IN THE INDUSTRIAL COURT OF MALAYSIA

CASE NO. : 19/4-643/18

BETWEEN

NAJAH BINTI AHMAD

AND

CONSIST COLLEGE SDN. BHD.

AWARD NO. : 1301 OF 2019

Before	:	Y.A. TUAN ANDERSEN ONG WAI LEONG - CHAIRMAN (Sitting Alone)
Venue	:	Industrial Court of Malaysia at Kuala Lumpur
Date of Reference	:	19.02.2018.
Date(s) of Mention	:	04.04.2018, 01.06.2018, 19.06.2018, 18.07.2018, 18.01.2019, 29.01.2019.
Date(s) of Hearing	:	04.09.2018, 05.09.2018, 14.09.2018, 12.10.2018, 07.11.2018, 19.12.2018.
Representation	:	Mr. Zi-Han Lim & Mr. Amirul Izzat Hasri Messrs Donovan & Ho. Counsel for the Claimant. Ms. Prema Kesavan Malaysian Employers Federation (MEF) Representative for the Company

A. REFERENCE:

[1] This is a reference from The Honourable Minister of Human Resources, Malaysia to the Industrial Court of Malaysia under *Section 20(3) of the Industrial Relations Act 1967 ("the IRA")* in respect of the dismissal of Najah Binti Ahmad ("the Claimant") by her employer, Consist College Sdn. Bhd. ("the Company") on 13.03.2017.

B. FACTS

[2] The Company is in the business of providing trainings and courses to students on health and safety, particularly in the areas of construction, industrial and environment.

[3] Pursuant to a letter of employment dated 27.04.2011, the Claimant commenced employment with the Company as a Lecturer, effective from 03.05.2011 with a monthly salary of RM2,300.00 ("1st Contract"). It was expressly stated in the aforesaid letter of employment that the Claimant was employed for a fixed term of three (3) years and the renewal of her contract was subject to her performance and commitment.

[4] By a letter entitled "Persetujuan Sebagai Tenaga Pengajar Bagi Program "NEBOSH International General Certificate" dated 01.07.2011, the Claimant was accepted as part of the lecturing force for NEBOSH International General Certificate program conducted by the Company. The

Claimant was confirmed in her position as OSH Lecturer with the Company effective 01.12.2011 *vide* the Company's letter dated 01.12.2011. The Company has also stated in the aforesaid letter of confirmation that the Claimant's employment status is permanent.

[5] By a letter dated 09.02.2012, the Claimant was appointed by the Company as an International HSE Programme Manager effective 01.02.2012. On 01.06.2012, the Company confirmed the Claimant's position as Lecturer with effect from 01.06.2012. Again, it was stated in the aforesaid letter that the Claimant's employment status is permanent.

[6] By a letter dated 15.04.2013 ("2nd Contract"), the Company informed the Claimant of the expiry of the 1st Contract in April 2014 and the Company's decision to renew her contract for another three (3) years, commencing from March 2013. The Claimant was also appointed as Manager of International HSE Programme, with a monthly salary of RM6,000.00.

[7] The Claimant was on maternity leave for two (2) months from 01.03.2016 to 02.05.2016. Upon the Claimant's return from the maternity leave, the Claimant was asked to relocate from Level 5 to a smaller room on Level 3 of the Company's office premises on 11.05.2016.

[8] By a letter dated 19.09.2016 ("the 3rd Contract"), the Claimant was re-designated from Manager of International HSE Programme to HSE

Counselor with the same monthly salary of RM6,000.00. The Company also informed the Claimant of the expiry of the 2nd Contract and the Company's decision to renew her contract for further three (3) years, commencing from September 2016.

[9] On 29.09.2016, the Company issued a memo to the Claimant, requesting her to submit weekly reports to Encik Mir Zafriz Hj Mior Zawari ("COW5") who was the Company's Director cum Deputy Chief Executive, on the activities, achievements expected from students and the following week's planning. The Claimant's access to resources and data was also revoked by the Company.

[10] Between December 2016 to January 2017, the Claimant was issued with numerous warning letters and memos, alleging various misconducts against her as follows:

(a)	27.12.2016	-	allegation of use of profanities in office;
(b)	19.01.2017	-	allegation of causing confusion among students on examinations;
(c)	24.01.2017	-	allegation of providing motivational oriented seminars;
(d)	31.01.2017	-	allegation of underperformance;
(e)	27.02.2017	-	allegation of failure to follow instructions;
(f)	28.02.2017	-	allegation of failure to discharge her duties;
(g)	04.03.2017	-	allegation of unsatisfactory attendance.

[11] In response to the Company's aforesaid letters and memos, the Claimant wrote several memos and emails to the Company to protest the allegations made against her by the Company and to explain herself as follows:

(a) memo dated 06.03.2017 stating her complaint and displeasure against the Company's action;
(b) email dated 06.03.2017, providing medical reports on her medical issues;
(c) letter dated 08.03.2017, responding to the cancellation of contract; and
(d) letter dated 08.03.2017, responding to the moving of office to the ground floor.

[12] By a letter dated 06.03.2017, the Company abolished the Claimant's position as HSE Counsellor and demoted the Claimant to the position of HSE Assistant. The Claimant was also informed of the pay cut or reduction of her salary from RM6000.00 to RM1,500.00.

[13] On 08.03.2017, the Company issued an Urgent Work Instruction, directing the Claimant to vacate her office and surrender all the keys to her office at Level 3 within two (2) hours. The Claimant's office was relocated and moved to the Ground Floor of the Company's premises.

[14] By a letter dated 09.03.2017, the Claimant informed the Company that she viewed the Company's aforesaid conduct as a breach of her employment with the Company. The Claimant requested the Company to rectify the alleged breach by 12.03.2017, failing which the Claimant will deem herself as constructively dismissed by the Company.

[15] Since no reply to the Claimant's letter dated 09.03.2017 was forthcoming from the Company, the Claimant *via* letter dated 13.03.2017 informed the Company that she considered herself constructively dismissed by the Company with immediate effect.

[16] The Company *via* letter dated 15.03.2017 attempted to retract its letter dated 06.03.2017 on the abolishment of the Claimant's HSE Consultant and reduction of salary. The Company informed the Claimant its decision to maintain the Claimant's position as HSE Consultant.

[17] The Claimant *via* letter dated 25.03.2017 informed the Company that she only received the Company's letter dated 15.03.2017 on 25.03.2017 and she had reported the matter to the Industrial Relations Department on 24.03.2017.

[18] The Company *via* its letter dated 30.03.2017 requested the Claimant to show cause as to why she was not present for work for three (3) consecutive days from 27.03.2017 until 30.03.2017, failing which

appropriate action would be taken against her. The Claimant did not respond to this.

C. EVALUATION AND FINDINGS OF THE COURT

[19] On the facts, there are two main issues in dispute. The Company's 4th Witness, Sharifah Rosnah Binti Syed Mahmud ("COW4") who was the Company's Ketua Jabatan Pentadbiran gave evidence that the Claimant was employed on a fixed term contract of three (3) years at the material time. Although this was not expressly pleaded by the Company, it was obvious from the Claimant's contract of employment with the Company that the Claimant was employed under a fixed term contract of three (3) years.

[20] The Claimant in her evidence has insisted that she was employed on a permanent basis. This was presumably due to the fact that the Company had informed the Claimant that her employment with the Company was on permanent basis upon completion of her probation period and confirmation of her employment. The Claimant has on 15.08.2013 written to the Company seeking clarification on the status of her employment with the Company. The Company had *via* letter dated 19.08.2013 explained to the Claimant that her employment with the Company was on a fixed term contract of three (3) years.

[21] The Claimant has in her letter to the Company dated 08.03.2017 which was subsequently retracted by her for reason best known to her only

admitted that her employment with the Company was pursuant to the Company's letter of appointment dated 19.09.2016 namely the 3rd Contract. As stated earlier, the Company's aforesaid letter of appointment is a fixed term contract for a period of three (3) years commencing from September 2016.

[22] The Claimant also said in her aforesaid letter that since the Company's actions have created issues with her contract dated 19.09.2016 by making allegations against her in its Memo for Underperformance dated 31.01.2017, the Claimant called for renegotiation of her contract of employment. Therefore, it is clear that the Claimant knew she was employed under a fixed term contract of three (3) years commencing September 2016 until August 2019.

[23] The crux of the matter in our present case is constructive dismissal. The Claimant contended that the Company's actions as a whole tantamount to the breach of her contract of employment with the Company which entitled her to repudiate the contract by claiming constructive dismissal. The Claimant alleged that she has been victimised by the Company after her return from the maternity leave for her 1st pregnancy and announcement of her 2nd pregnancy some time toward end of 2016.

The Doctrine Of Constructive Dismissal

[24] The doctrine of constructive dismissal is nowhere found in the *IRA* but it has been deeply entrenched in the Industrial Relations jurisprudence. This doctrine was dealt with extensively in *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd (1988) 1 MLJ 92* wherein *Salleh Abas LP* said as follows:

> *"Therefore, we must know and be clear precisely in our minds what a constructive dismissal is. In England, where this expression originated, there had been a great deal of unsettled opinion among industrial tribunals. According to the Court of Appeal in Western Excavating (ECC) Ltd v Sharp (1978) IRLR 27, it seems no more than the common law right of an employee to repudiate his contract of service where the conduct of his employer is such that the latter is guilty of a breach going to the root of the contract or where he has evinced an intention no longer to be bound by the contract. In such situation, the employee is entitled to regard himself as being dismissed."*

[25] In *Western Excavating (EEC) Ltd v Sharp (1978) IRLR 27*, the *English Court of Appeal* laid down the test for constructive dismissal as follows:

(a) the employee must show that the employer no longer intends to be bound by one or more of the essential terms of the agreement;

(b) the employee must leave the employment immediately for reason of the employer's breach and for no other cause;

(c) the employer's breach must be a significant one, going to the root of the contract, entitling the employee to terminate it without notice; and

(d) the employee had not terminated the contract before the employer's breach.

Burden Of Proof

[26] The burden of proof is on the Claimant here to prove on the balance of probabilities that she had been constructively dismissed by the Company. The Claimant has to prove that the Company has committed a fundamental breach of the contract of employment, entitling her to repudiate the contract. It is for this reason that in constructive dismissal case, trial will always begin with the claimant presenting his or her case. In *Selangor Medical Centre v Zainal Abidin Md Tamami (2002) 2 ILR 527*, the Court states as follows: -

> *"There is no convincing evidence offered by the claimant to prove that the company had failed the contract test or had repudiated the contract of employment. The claimant is not able to discharge the burden of proof which is on him to prove, on a balance of probabilities, that the Company as the*

employer, had been guilty of any fundamental breach which goes to root of the contract or that the Company had evinced any intention of no longer to be bound by it. As such, the claimant is not entitled to regard his contract of employment as being terminated or that he was constructively dismissed."

Relocation from Level 5 to Level 3

[27] In our present case, the Claimant's plight seems to have befallen her only after her return from the maternity leave in May 2016. The Claimant gave evidence that she was on maternity leave from 01.03.2016 to 02.05.2016. The Claimant said that on 11.05.2016, the Company directed her to relocate from Level 5 to a small room on Level 3 within the same day. The new office according to the Claimant was congested, with a diminished level of privacy, without a computer, and was inadequate to conduct counselling sessions in the discharge of her duties.

Change of position from Manager of International HSE Programme to HSE Counsellor

[28] On 19.09.2016, the Claimant's position was changed from Manager of International HSE Programme to HSE Counsellor of the Company. The change of position was a demotion in status from Tier 2 to Tier 3 of the Company's organizational chart. According to the Claimant, her job scope was completely changed and reduced from being directly responsible in

running and ensuring that the HSE International Program was up to standards to doing things like organizing workshop and providing information during meeting.

[29] The Claimant testified that she was asked to make a weekly report of the activities, achievements expected from students and the following week's planning. According to the Claimant, the contents of weekly reports were changed from time to time to include more contents by the Company and eventually the Claimant was asked to record her hourly activities in the time log sheet provided, to be submitted to COW5. This to my mind was mean and unreasonable.

Warning letters and memos

[30] The Claimant gave evidence that within three (3) months from late December 2016 to March 2017, she was issued with many warning letters and memos. The Claimant in her memo to the Company dated 06.03.2017 protested against the allegations levelled against her by the Company and contended that prior to her announcing her second pregnancy, she had never had any complaints against her from the Company. Indeed, the Company did not produce any evidence to show otherwise. The sudden surge in the complaints against the Claimant by the Company after she announced her second pregnancy is suspicious.

[31] On the Company's complaint that the Claimant used profanities in the office, the Company did not provide the details of the complaint. COW4 in her evidence said that she received a complaint from Juliana Binti Mat Rajab ("Juliana") who was the Company's librarian that the Claimant had uttered profanities at her. Juliana was never called as a witness to give evidence at the trial and she also did not specify the profanities uttered by the Claimant in her written complaint to the Company. Juliana merely said in her complaint that the Claimant had used inappropriate words in the office.

[32] With regard the Company's other warning letters and memos, they were mostly on the issue of failure to carry out the toolbox meeting as per the Company's instruction, conducting motivational talks and failure to adhere to the Company's instruction on the suspension of HSE workshops. The Company also alleged that the Claimant had confused the students on the college examination and the NEBOSH examination.

[33] On the facts, there is no evidence that the Claimant had caused any confusion among the students on the aforesaid examinations. The Claimant is an experience and qualified person in conducting NEBOSH courses. She had served the Company for six (6) years at the material time and there is no evidence such complaints previously from the Company.

[34] On the issue of motivational talks and not conducting the toolbox meeting in accordance with the Company's instruction, the Claimant contended that the information from her talks during the toolbox meeting

came directly NEBOSH, United Kingdom's case studies to encourage and empower students to be successful on their NEBOSH exams. The Company did not rebut this.

[35] As to the Company's instruction to suspend HSE workshop, the Claimant has explained that she only received the Company's Memo to suspend HSE workshop at the eleventh hours when the workshop was scheduled to start. In the circumstances, I do not think that the Claimant should be faulted for not adhering to the Company's instruction to suspend the HSE workshop.

[36] Save for the issue of poor attendance, the Company's other allegations against the Claimant were either unsubstantiated or unreasonable. The Claimant took twenty-two (22) days of medical leave between 30.01.2017 until 03.03.2017. According to the Company, the Claimant's poor attendance has disrupted the Company's operation. Whilst, it is not disputed that poor or unsatisfactory attendance of employees would disrupt the operation of the company, the Claimant did produce medical certificates to justify her absence.

Abolishment of the Claimant's position and pay cut.

[37] The Company *via* its letter dated 06.03.2017 has abolished the Claimant's position as HSE Counsellor and demoted her to the position of HSE Assistant. The Claimant's salary was also reduced substantially from

RM6,000.00 to RM1,500.00. Thereafter, on 08.03.2017, the Claimant was instructed to move her office from Level 3 to the Ground Floor beside the motorcycles parking area. The Claimant gave evidence her new office on the Ground Floor was exposed to noises and fumes emitted from the motorcycles which was a risk to her health and pregnancy.

[38] To my mind, these two events were the breaking points for the Claimant which led her to leave the Company and claimed constructive dismissal. It was "the last straw that broke the camel's back". The demotion to HSE Assistant and substantial pay cut were clearly a fundamental breach of the Claimant's contract of employment. The Company have acted or conducted in a manner which calculated or likely to destroy or seriously damages their relationship of trust and confidence by demoting the Claimant to HSE Assistant and reducing her salary substantially.

[39] The Company contended that they have *via* letter dated 15.03.2017 cancelled their earlier letter dated 06.03.2017 and agreed to allow the Claimant to continue as HSE Counsellor with no reduction in salary. Obviously, the Company at that juncture must have realised their mistake and attempted to salvage the situation. However, it was too late in the day for the Company to do so. The Claimant had left the Company and deemed herself constructively dismissed by the Company on 13.03.2017. In another word, the Claimant has accepted the Company's fundamental breach and repudiated the contract of employment before the Company attempted to retract / cancel its' letter dated 06.03.2017.

[40] The fact that the Company's letter dated 15.03.2017 was sent to the Claimant's old address and only reached her on 25.03.2017 is insignificant as the contract of employment had already been determined even before the Company's letter was sent. The damage was done when the Company demoted the Claimant and reduced her salary substantially. It could not be undone by the Company after the Claimant had deemed herself as constructively dismissed by the Company.

Findings

[41] Therefore, the Claimant has successfully discharged the burden of proof placed on her to prove, on a balance of probabilities, that the Company has committed fundamental breach which goes to the root of the contract or that the Company had evinced any intention of no longer to be bound by the Claimant's contract of employment.

[42] It is obvious from the Company's series of actions that the Company had wanted to get rid of the Claimant as she was not able to commit to her work, validly or otherwise. The Claimant was pregnant and had issues with her health at the material time which caused her to be absent from work frequently. These would have prompted the Company to endeavour to remove the Claimant. Notwithstanding the Claimant's inability to commit to her work, it was certainly not a valid reason for the Company to attempt to oust her from the Company.

D. RELIEF

[43] As for the relief sought, the Claimant at the time she was walked out of the Company on constructive dismissal on 13.03.2017, had about another 2 ½ years before her fixed term contract of three (3) years expired. However, the Claimant gave evidence during trial that she and her family had migrated to United States of America ("USA") in March 2018 which was about 1 year after she left the Company.

[44] The Court is mindful of the position of the law where the claimants in cases under s.20 of the IRA had refused reinstatement. In our present case, this issue was never canvassed or addressed by the parties. Be that as it may, the Claimant did and has pleaded reinstatement as one of the remedies sought by her in her Statement of Case dated 02.05.2018, Therefore, the Court gives the Claimant the benefit of the doubt as to whether the Claimant has abandoned the principal remedy of reinstatement.

[45] Nevertheless, the Court is minded to award only compensation for loss of employment for the period of one (1) year, from the time the Claimant left the Company on constructive dismissal in March 2017 until March 2018 when she migrated to USA instead of compensation *in lieu* of reinstatement and back wages. The assumption here is that the Claimant would have left the Company for USA in March 2018 together with her

family even if she was not constructively dismissed by the Company in March 2017.

[46] In *Hotel Jaya Puri v National Union of Hotel, Bar & Restaurant Workers & Anor. (1980) 1 MLJ, p. 109*, it was stated in Award No.115 of 1994:

> *"....if there is a legal basis for paying the compensation, the question of amount of course is very much a matter of discussion which the Industrial Court is fully empowered under s.30 of the Industrial Relations Act to fix..."*

[47] I am also mindful of paragraph 5 of the Second Schedule of the Industrial Relations Act 1967, which provides:

> *"Any relief given shall take into account contributory misconduct of the workman."*

[48] This is a clear case where reasonable deduction has to be made for contributory misconduct of the Claimant. As stated above, the Company had endeavored to get rid of the Claimant mainly because she was unable to commit to her work due to poor attendance. Therefore, the Court reduces the total compensation payable to the Claimant by 30%.

[49] Accordingly, this Court orders the Company to pay the Claimant as follows:

Loss of employment, RM6,000.00 x 12 months	-	RM72,000.00
Less contributory misconduct of 30%	-	(RM21,600.00)
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Total	=	RM50,400.00
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[50] The sum of **RM50,400.00** less any statutory deductions, if any, is to be paid by the Company to the Claimant *vide* her Solicitors, Messrs Donovan & Ho within 30 days from the date of service of this award.

HANDED DOWN AND DATED THIS 26th DAY OF APRIL, 2019

-signed-

(ANDERSEN ONG WAI LEONG)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
AT KUALA LUMPUR