

IN THE INDUSTRIAL COURT OF MALAYSIA

CASE NO: 4/4-17/21

BETWEEN

TUAN ROSHAMIDA BINTI TUAN YUSUF

AND

MASAMAS TRAVEL & TOURS SDN. BHD.

AWARD NO: 923 OF 2021

BEFORE : Y.A. TUAN AUGUSTINE ANTHONY
Chairman

VENUE : Industrial Court, Kuala Lumpur.

DATE OF REFERENCE : 08.12.2020.

**DATE OF RECEIPT OF
ORDER OF REFERENCE** : 04.01.2021.

DATES OF MENTION : 04.02.2021, 25.02.2021, 18.03.2021,
25.03.2021.

DATE OF HEARING : 27.04.2021.

REPRESENTATION : Mr. Alfred Iruthiarajoo, of Malaysian
Trades Union Congress (MTUC),
Representative for the Claimant.

Claimant – present.

Encik Abdul Muiz Bin Sulaiman
Company's Director.

THE REFERENCE

This is a reference dated 08.12.2020 by the Honourable Minister of Human Resources pursuant to section 20 (3) of the Industrial Relations Act 1967 (“The Act”) arising out of the dismissal of **Tuan Roshamida Binti Tuan Yusuf** (“Claimant”) by **Masamas Travel & Tours Sdn. Bhd.** (“Company”) on the 30.04.2020.

AWARD

[1] This case was fixed for hearing on the 27.04.2021. On this date, the Claimant was present with his Representative and the Company was represented by its Director. The Claimant’s Representative made his oral submissions on behalf of the Claimant at the conclusion of this case on the hearing date. This Court then informed all present that this Court will proceed to hand down its Award and notify the parties accordingly.

[2] This Court considered all the notes of proceedings in this matter, documents and the cause papers in handing down this Award namely:-

- (i) The Claimant’s Statement of Case dated 23.02.2021; and

(ii) Claimant's Witness Statement – CLW-WS (Tuan Roshamida Binti Tuan Yusuf).

INTRODUCTION

[3] The dispute before this Court is the claim by Tuan Roshamida Binti Tuan Yusuf (“Claimant”) that she had been dismissed from her employment without just cause or excuse by Masamas Travel & Tours Sdn. Bhd. (“Company”) on the 30.04.2020.

[4] The Claimant was employed by the Company as the Operation Assistant Manager on the 02.05.2011. The honourable Minister's reference states that the Claimant was dismissed from her employment with the Company on the 30.04.2020. At the time of the Claimant's dismissal from employment with the Company, the Claimant was paid a monthly salary of RM3,500.00 per month. It is the Claimant's version that on the 27.03.2020, the Claimant received a WhatsApp message from the Company informing her that due to financial losses suffered by the Company, the Claimant is now terminated from her employment with

the Company with 1 month notice which notice period will end at the end of April 2020 in line with the honourable Minister's reference on her dismissal date being 30.04.2020. The Company failed to file its Statement in Reply or any other documents in support of its case. The Claimant now claims that her dismissal from employment with the Company was without just cause or excuse.

[5] On the hearing date fixed by this Court, the Claimant gave evidence under oath and remained the sole witness for her case. The Company was represented by one Encik Abdul Muiz Bin Sulaiman who is the Director of the Company. The Company's Representative informed this Court that the Company is not desirous of calling any witnesses to state its case and limited his presence in Court to only ask questions on the Claimant's last drawn salary and allowances paid by the Company.

THE COMPANY'S CASE

[6] The Company's Representative gave unsworn statement and further submitted that the Claimant was terminated with a 1 month notice period due to the loss of business arising from the COVID 19 pandemic.

THE CLAIMANT'S CASE

[7] The Claimant's case can be summarised as follows:-

- (i) The Claimant was employed by the Company as the Operation Assistant Manager on the 02.05.2011.
- (ii) At the time of the Claimant's dismissal from employment with the Company, the Claimant was paid a monthly salary of RM3,500.00 per month.
- (iii) On the 27.03.2020, the Claimant received a WhatsApp message from the Company informing her that due to financial losses suffered by the Company, the Company will be terminating the Claimant from her employment with the Company.

- (iv) The Claimant was given 1 month notice of her termination from employment with the Company.
- (v) The Claimant states that the Company did not provide any reasonable grounds or sufficient reasons as to why she was dismissed from her employment with the Company.
- (vi) The Claimant states that her dismissal from employment with the Company was actuated by malice and an act of victimisation.
- (vii) The Claimant now claims that she had been dismissed without just cause or excuse and prays that she be reinstated to her former position without any loss of seniority or wages.

THE LAW

Role and function of the Industrial Court

[8] The role of the Industrial Court under section 20 of the Industrial Relations Act 1967 is succinctly explained in the case ***Milan Auto Sdn. Bhd. v. Wong Seh Yen [1995] 4 CLJ 449. His Lordship Justice Mohd***

Azmi bin Kamaruddin FCJ delivering the judgment of the Federal Court

had the occasion to state the following:-

“As pointed out by this Court recently in Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. & Another Appeal [1995] 3 CLJ 344; [1995] 2 MLJ 753, the function of the Industrial Court in dismissal cases on a reference under s. 20 is two-fold firstly, to determine whether the misconduct complained of by the employer has been established, and secondly whether the proven misconduct constitutes just cause or excuse for the dismissal. Failure to determine these issues on the merits would be a jurisdictional error ...”

[9] The above principle was further reiterated by the Court of Appeal in the case of ***K A Sanduran Nehru Ratnam v. I-Berhad [2007] 1 CLJ 347*** where ***his lordship Justice Mohd Ghazali Yusoff, JCA*** outlined the function of the Industrial Court:-

“[21] The learned judge of the High Court held that the Industrial Court had adopted and applied a wrong standard of proof in holding that the respondent has failed to prove dishonest intention and further stating that the respondent has not been able to discharge their evidential burden in failing to prove every

element of the charge. He went on to say that the function of the Industrial Court is best described by the Federal Court in Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd and Another Appeal [1995] 3 CLJ 344 where in delivering the judgment of the court Mohd Azmi FCJ said (at p. 352):

On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under s. 20 of the Act (unless otherwise lawfully provided by the terms of the reference), is to determine whether the misconduct or irregularities complained of by the management as the grounds of dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal”

[10] It will not be complete this if this Court fails to make reference to the decision of the Federal Court in the case of **Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 1 LNS 30** where **His Lordship Raja Azlan Shah, CJ (Malaya) (as HRH then was)** opined:

“Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that Court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If

it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the Court is the reason advanced by it and that Court or the High Court cannot go into another reason not relied on by the employer or find one for it.”

Burden Of Proof

[11] Whenever a Company had caused the dismissal of the workman, it is then incumbent on part of the Company to discharge the burden of proof that the dismissal was with just cause or excuse. This Court will now refer to the case ***of Ireka Construction Berhad v. Chantiravathan a/l Subramaniam James [1995] 2 ILR 11*** in which case it was stated that:-

“It is a basic principle of industrial jurisprudence that in a dismissal case the employer must produce convincing evidence that the workman committed the offence or offences the workman is alleged to have committed for which he has been dismissed. The burden of proof lies on the employer to prove that he has just cause and excuse for taking the decision to impose the disciplinary measure of dismissal upon the employee. The just cause must be,

either a misconduct, negligence or poor performance based on the facts of the case.”

Standard Of Proof

[12] In the case of ***Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314*** the Court of Appeal had laid down the principle that the standard of proof that is required to prove a case in the Industrial Court is one that is on the balance of probabilities wherein his lordship Justice Abdul Hamid Mohamad, JCA opined:-

“Thus, we can see that the preponderant view is that the Industrial Court, when hearing a claim of unjust dismissal, even where the ground is one of dishonest act, including "theft", is not required to be satisfied beyond reasonable doubt that the employee has "committed the offence", as in a criminal prosecution. On the other hand, we see that the courts and learned authors have used such terms as "solid and sensible grounds", "sufficient to measure up to a preponderance of the evidence," "whether a case... has been made out", "on the balance of probabilities" and "evidence of probative value". In our view the passage quoted from Administrative Law by H.W.R. Wade & C.F. Forsyth offers the clearest statement on the standard of proof required, that is the civil standard based on the balance of probabilities, which is flexible, so that the degree of probability required is proportionate to the

nature of gravity of the issue. But, again, if we may add, these are not "passwords" that the failure to use them or if some other words are used, the decision is automatically rendered bad in law."

EVALUATION OF EVIDENCE AND THE FINDINGS OF THIS COURT

[13] The Claimant gave unchallenged evidence before this Court that she was employed by the Company as the Operation Assistant Manager on the 02.05.2011. Further the Claimant gave cogent evidence that at the time of the Claimant's dismissal from employment with the Company, the Claimant was paid a monthly salary of RM3,200.00 per month with a further fixed allowance RM300.00 for which she was made to do the Company's accounting duties. There is no dispute that the Company through the Company's representative had sent a WhatsApp message to the Claimant on the 27.03.2020 informing the Claimant that the Company had decided to terminate the Claimant from her employment with the Company by giving 1 month notice period. Amongst other, in the WhatsApp message the Company informed the Claimant that the reason for the Claimant's dismissal from her employment with the

Company was due to the financial losses suffered by the Company. The reason the Company had suffered such financial losses were purportedly due to the COVID19 pandemic that had caused the tourism industry to suffer significantly. However the Company failed to file its Statement in Reply or any other documents in support of its case that the purported financial losses suffered were genuinely due to the COVID19 pandemic. In any event it is common knowledge that the Government of Malaysia imposed the Movement Control Order (MCO) nationwide on the 18.03.2020 and the Company's decision to terminate the Claimant within 9 days from the date of the imposition of the MCO does not reinforce the Company's unsworn statement that the MCO was the real and only cause for which the Claimant was terminated from employment with the Company. There is nothing before this Court that can support the Company or its case that the dismissal of the Claimant was done with just cause or excuse. The Company's Representative himself had informed this Court during the proceedings that the Company is not desirous of calling any witnesses to state its case and

limited his presence in Court to only ask questions on her last drawn salary and allowances paid by the Company.

[14] Pursuant to Section 30(5) of the Industrial Relations Act 1967 and guided by the principles of equity, good conscience and substantial merits of the case without regard to technicalities and legal forms and after having considered the totality of the facts of the case, the evidence adduced and by reasons of the established principles of industrial relations and disputes as stated above, this Court finds that the Company had failed to prove on the balance of probabilities that the dismissal of the Claimant from her employment with the Company was with just cause or excuse.

REMEDY

[15] This Court having ruled that the Claimant was dismissed without just cause or excuse, will now consider the appropriate remedy for the Claimant.

[16] The Claimant commenced employment with the Company on the 02.05.2011. The Claimant was dismissed from her employment with the Company on the 30.04.2020. The Claimant had thus served the Company for a period of 8 full years of service. There is no dispute that the Claimant was a confirmed employee of the Company.

[17] The Claimant, in stating that her dismissal from employment with the Company was without just cause or excuse, prays to this Court for reinstatement to her former position without any loss of wages and other benefits. In considering the facts of this case, it is this Court's view that reinstatement of the Claimant to her former position in the Company will not be a suitable remedy here.

[18] As such the appropriate remedy in the circumstances of this case must be compensation in lieu of reinstatement. The Claimant is also entitled for back wages in line with Section 30(6A) Industrial Relations

Act 1967 and the factors specified in the Second Schedule therein which states:-

“1. In the event that backwages are to be given, such backwages shall not exceed twenty-four months' backwages from the date of dismissal based on the last-drawn salary of the person who has been dismissed without just cause or excuse;”

[19] The Claimant's last drawn salary including the fixed monthly allowance per month was RM3,500.00.

[20] Equity, good conscience and substantial merits of the case without regard to technicalities and legal forms remains the central feature and focal point of this Court in arriving at its decision and these principles will be adhered by this Court at all times leading to the final order of this Court.

[21] This Court is further bound by the principle laid down in the case of ***Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah)***

& Anor [2001] 3 CLJ 541 where his Lordship Justice Tan Sri Steve Shim CJ (Sabah & Sarawak) in delivering the judgment of the Federal

Court opined:-

*“In our view, it is in line with equity and good conscience that the Industrial Court, in assessing quantum of backwages, should take into account the fact, if established by evidence or admitted, that the workman has been gainfully employed elsewhere after his dismissal. Failure to do so constitutes a jurisdictional error of law. Certiorari will therefore lie to rectify it. **Of course, taking into account of such employment after dismissal does not necessarily mean that the Industrial Court has to conduct a mathematical exercise in deduction.** What is important is that the Industrial Court, in the exercise of its discretion in assessing the quantum of backwages, should take into account all relevant matters including the fact, where it exists, that the workman has been gainfully employed elsewhere after his dismissal. This discretion is in the nature of a decision-making process”.*

(emphasis is this Court’s)

[22] This Court must take into account the post dismissal earnings of the Claimant in order to make an appropriate deduction from the back wages to be awarded. The Claimant had given unchallenged evidence

that she remained unemployed after her dismissal from employment with the Company.

[23] Having considered all the facts of case on the appropriate sum to be awarded and after taking into account that the Claimant had no post dismissal earnings or income as she remained unemployed after her dismissal from employment with the Company, this Court hereby orders that the Claimant be paid 1 month salary of the last drawn salary inclusive of the monthly fixed allowance totalling RM 3,500.00 for every year of service completed which totals 8 full years of service and back wages of the last drawn salary inclusive of the fixed monthly allowance of RM3,500.00 for 12 months. This will amount to:-

- (i) Backwages ordered:
RM3,500.00 x 12 months = RM 42,000.00

- (ii) Compensation in lieu of Reinstatement:
RM3,500.00 x 8 months = RM 28,000.00

Total amount ordered by this Court: RM 70,000.00

FINAL ORDER OF THIS COURT

[24] It is this Court's order that the Company pays the Claimant a sum of Ringgit Malaysia Seventy Thousand (RM 70,000.00) only less statutory deduction (if any) within 30 days from the date of this Award.

HANDED DOWN AND DATED THIS 3rd DAY OF MAY 2021

-signed-

**(AUGUSTINE ANTHONY)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR**