

**IN THE INDUSTRIAL COURT OF MALAYSIA**

**CASE NO.: 22/4-2510/20**

**BETWEEN**

**ONG PEI YUN**

**AND**

**BIO LUBRICANT INTERNATIONAL SDN BHD**

**AWARD NO. : 1247 OF 2021**

Before : **Y.A. TUAN PARAMALINGAM A/L J. DORAISAMY**  
- Chairman (Sitting Alone)

Venue : Industrial Court Malaysia, Kuala Lumpur

Date of Reference : 07.10.2020

Date of Mention : 14.12.2020; 24.02.2021; 31.03.2021; 28.05.2021; 11.06.2021

Date of Hearing : 23.04.2021 & 30.04.2021

Representation : Mr. Wayne Siang Chin Fong  
Messrs. Siang & Co.  
Counsel for the Claimant

Mr. Lim Chee Kong  
Sales Manager of the Company  
Representative from the Company

**REFERENCE :**

This is a reference made under Section 20 (3) of the Industrial Relations Act 1967 (Act 177), arising out of the dismissal of **Ong Pei Yun** (hereinafter referred to as "*the Claimant*") by **Bio Lubricant International Sdn. Bhd.** (hereinafter referred to as "*the Company*") on 11 June 2020.

## **AWARD**

[1] The Ministerial reference in this case required the Court to hear and determine the Claimant's complaint of dismissal by the Company on 11 June 2020.

### **I. Procedural History**

[2] The Court received the letter pertaining to the Ministerial reference under Section 20(3) of the Industrial Relations Act 1967 on 3 November 2020.

[3] The matter was thereafter fixed for mention on 14 December 2020, 24 February 2021, 31 March 2021, 28 May 2021 and 11 June 2021.

[4] The trial commenced on 23 April 2021 and concluded on 30 April 2021.

### **II. Parties' Position On The Merits**

#### **(a) The Claimant**

[5] The Claimant commenced employment with the Company on 21 July 2017 as a Sales Executive, reporting directly to the Managing Director of the Company or any other persons as assigned. Her remuneration at her initial appointment was RM2,500.00 together with allowance ranging from a minimum of RM620.00 to a maximum of RM1,070.00.

[6] The Claimant's employment was subsequently confirmed and her salary was revised to RM2,700.00. Her salary was again increased subsequently to RM2,900.00. Her last drawn salary was RM4,170.00 which comprised her basic pay and allowance.

[7] The Claimant's duty as Sales Executive required her to travel (including outstation) to service the Company's clients, including collection of payments.

[8] On 11 June 2020, the Claimant was issued with a Notice of Termination of Employment ("*Notice of Termination*") with immediate effect from the Company based on the following grounds:-

- i. The Claimant had allegedly submitted a fraudulent and untruthful daily sales report on 9 June 2020 to cheat the Company ("***Allegation No. 1***");
- ii. The Claimant had allegedly made an "*un-disciplinary statement*" against the Company ("impugned statement") on 4 June 2020, whereby the Claimant was asked to attend a sales representative meeting but the Claimant had informed the Company that she has to make an errand to Seremban to collect payment, otherwise she will not assume responsibility should there be any delay in collecting payments from the Seremban customer. The Seremban customer however had already made the payment on 3 June 2020 ("***Allegation No. 2***").

[9] The Claimant contends that she was not issued with any show cause letter and neither did the Company conduct any domestic inquiry on the alleged events or allegations.

[10] The Claimant denies the allegations contained in the Notice of Termination and contends that the Company did not conduct a domestic inquiry on the set of facts that had happened and did not afford the Claimant an opportunity to be heard.

[11] The Claimant contends that her termination from employment by the Company was done without just cause or excuse and seeks, *inter alia*, to be reinstated to her former employment without loss of seniority, salary, status, and benefits (monetary or otherwise), together with all statutory and contractual benefits due to the Claimant, as well as backwages.

**(b) The Company**

[12] The Company contends that the Claimant's misconduct pertains to a fraudulent and untruthful daily sales report submitted by the Claimant on 9 June 2020, which amounted to clear cut cheating, resulting in the termination of her service.

[13] The Claimant was not in good terms with the former Sales Manager, one Mr. Yap, leading to the Claimant submitting her resignation letter on 31 May 2019. However, the Company managed to persuade her to retract her resignation letter by

increasing her salary to RM2,900.00 on 21 June 2019 and it was not due to any excellent performance, as alleged by the Claimant.

**[14]** The Company contends that the Claimant's last drawn basic salary is RM2,900.00 with the following fixed monthly allowances:-

- i. Petrol – RM550.00
- ii. Car Maintenance – RM350.00
- iii. Toll & Parking – RM120
- iv. Handphone – RM150
- v. Entertainment – RM100

**[15]** The Company further contends that the Company did not allow her to be absent from an important sales meeting called by the Chairman of the Company, nor to travel long distance to collect payment from one customer only. She neither went to Seremban nor attended the meeting on that day. In fact, the particular customer had made a telegraphic transfer (TT) payment to the Company's bank account on 3 June 2020 before the Claimant's purported visit on 4 June 2020.

**[16]** The Company also contends that on 9 June 2020 the Claimant had submitted fraudulent and totally untrue daily sales report claiming that she visited customers in Seremban when in actual fact she never did so.

[17] The Claimant was instructed by the Sales Manager to attend the sales meeting on 4 June 2020 but she disobeyed the Sales Manager's instruction by threatening him that she needed to collect the payment from a particular customer, otherwise she would not be held responsible for the debt. However, that customer in fact had already made the payment online on 3 June 2020 before her purported visit to that customer's place on 4 June 2020.

[18] The Company contends that the Claimant had committed a serious offence of cheating the Company which warranted the immediate termination of her service.

### III. The Role Of The Industrial Court

[19] It is established law that the function of the Industrial Court in a Section 20(3) Industrial Relations Act 1967 case is two-fold, i.e. to determine:-

- (i) whether the misconduct of the employee alleged by the employer has been established; and
- (ii) whether the proven misconduct constitute just cause or excuse for the dismissal.

[20] In the case of **Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Anor Appeal [1995] CLJ 344** the Federal Court had held:-

*“On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under section 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.”*

**[21]** And in the case of **Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 2 MLJ 129** the Federal Court (*vide* the judgment of Raja Azlan Shah CJ) held:-

*“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”.*

**[22]** The burden of proof in an unfair dismissal claim lies on the employer to prove on a balance of probabilities that the employee had committed the misconduct

complained of. It was held by the Industrial Court in the case of **Ireka Construction Berhad v. Chantiravathan a/l Subramaniam James [1995] 2 ILR 11:-**

*“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 or 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 case”.*

**[23]** The standard of proof would be on a balance of probabilities that the dismissal was done with just cause or excuse. In the case of **Sarimah Lee v. Freescale Semiconductor (Malaysia) Sdn Bhd [2010] 1 ILR 103** the Industrial Court held:-

*“The burden of proof lies on the employer. He is obliged to prove his case on a balance of probabilities. It is for him to adduce evidence that the workman was dismissed for just cause or excuse”.*

#### **IV. Issues To Be Decided**

**[24]** The issues to be determined in this case are:-

- (i) whether the Claimant was guilty of the allegations of misconduct levelled against her by the Company; and

- (ii) whether the allegations of misconduct constitute just cause or excuse for the Claimant's dismissal.

## **V. The Court's Findings And Reasons**

### **(i) Whether the Claimant was guilty of the allegations of misconduct levelled against her by the Company**

**[25]** It was not disputed by the Company's representative and sole witness, i.e. Mr. Lim Chee Kong (COW-1), that there were only 2 grounds for termination stated in the Termination Letter dated 11 June 2020 (*at p. 29 of COB-1*):-

- i. wherein the Claimant did not actually visit the workshops on 9 June 2020;
- ii. the Claimant was alleged to have the following disciplinary issues:-
  - a. the Claimant had taken leave on 4 June 2020 and failed to attend an internal meeting;
  - b. the Claimant had insisted on visiting a workshop in Negeri Sembilan on 4 June 2020 after the client had made online payment on 3 June 2020.

- **Allegation No.1 – Submitting False Daily Reports**

**[26]** The first ground for the Claimant's termination from her employment is stated in the first paragraph of the Notice of Termination (*at p. 29 of COB-1*) and is worded as follows:-

*"We have found out that you have submitted a totally fraud and untrue daily sales report on 9<sup>th</sup> June 2020 to cheat the company. In view of your serious breach of company disciplinary and trust, your service is hereby terminated within 24 hours thereof".*

**[27]** This allegation revolves on the issue of whether the Claimant had visited the 4 workshops in Negeri Sembilan on 9 June 2020. The Claimant had reported to the Company that she had done so in her daily sales report for the day, but the Company denies these visits had ever happened.

**[28]** COW-1 testified that he had merely made 4 telephone calls to each of the 4 workshops that the Claimant had reported to have visited on 9 June 2020. Other than these 4 telephone calls, wherein each one lasted between 1 to 2 minutes, there were no other investigations carried out by COW-1 or anyone else in the Company for that matter before they terminated the Claimant from her employment on 11 June 2020. In the said 4 telephone calls made by COW-1 to the owners of the respective workshops, he had asked the owners whether the Claimant had visited their respective workshops on 9 June 2020, to which the answers were in the negative. COW-1 never clarified with the other workers nor were there any evidence that COW-1 had asked or given any opportunity for the owners to ask any of their employees whether the Claimant had seen any of them.

**[29]** The only other investigation purportedly carried out by COW-1 or the Company was approximately 6 months after the Claimant had been terminated from her employment, i.e. on 1 December 2020, wherein COW-1 had visited these 4 workshops with documents entitled “*Confirmation Of Sales Person Did Not Visit Workshop On 09<sup>th</sup> June, 2020*” pre-prepared by his boss, i.e. one Dr. Tor Lam Huat (Director of the Company) (“*Dr. Tor*”), to state that the Claimant never visited the workshops and asked the owners of the respective workshops to affix their signatures to the respective documents (*at pp. 17-20 of COB-1*). None of these 4 owners of the workshops were called to give evidence before this Court and to testify that they had signed the said documents having full knowledge of the contents therein. This is more so when COW-1 himself admitted that the contents of the documents were pre-prepared by the said Dr. Tor. COW-1 even admitted during cross-examination that the owners would have simply signed the documents as they would have wanted to preserve the business relationship with the company.

**[30]** In fact, with regards to one of the workshops, i.e. Jumash Auto Enterprise, the Claimant had made a phone call to its owner, i.e. one Muhammad Ashraf Bin Mokhtar (“*Ashraf*”), to verify the Claimant’s visit to his workshop on 9 June 2020, wherein Ashraf had apparently replied that she did not. This was stated in the document pre-prepared by Dr. Tor and purportedly signed by Ashraf (*at p. 18 of COB-1*). The Claimant countered the Company’s contention by producing an audio recording of her very own conversation with the said Ashraf (*exhibit CL-3, transcript of recording at pp. 5-6 of CLB-1*) wherein Ashraf stated that he did not tell COW-1 that the Claimant did not visit his workshop, and that in fact she did make the visit on 9 June 2020. COW-1 confirmed that the phone number that the Claimant had called

was indeed Ashraf's phone number. The Company failed to rebut this audio recording produced by the Claimant. Dr. Tor was also not produced by the Company as a witness before this Court.

[31] As it stands, the only purported investigation carried out by the Company with regards to this ground before they terminated the Claimant was the 4 phone calls made by COW-1 on 10 June 2020 wherein each call lasted 1 to 2 minutes. The Company could have easily made checks on the Claimant's Touch N Go statements which would have shown whether or not she had passed the toll plazas on the way to Seremban on 9 June 2020, but they did not do so. The country was under the Conditional Control Movement Order ("CMCO") at the material time due to the Covid-19 pandemic, thus the Company could have asked the Claimant to produce her MySejahtera check-in records which would have been more conclusive in determining whether the Claimant had visited the 4 workshops in Negeri Sembilan on 9 June 2020.

[32] The Court finds that the Company has failed to prove that the Claimant is guilty of Allegation No. 1.

- **Allegation No. 2 – Disciplinary Issues**

[33] The second ground for the Claimant's termination from her employment is stated in the second paragraph of the Notice of Termination (*at p. 29 of COB-1*) and is worded as follows:-

*“We also wish to mention your un-disciplinary statement on 4 June 2020, you were asked to attend sales representative meeting, but you said that you have an appointment with Seremban dealer to collect payment. When we request you to collect the following day, you make a threatened statement that if the payment cannot be collected, you are not be responsible. However, the customer has made online transfer on 3 June 2020 without you visiting him”.*

**[34]** The Claimant contends that she had arranged for the 4 June 2020 visit as she was unsure when Jumash Auto Enterprise will be making the payment. However, Jumash Auto Enterprise had in fact made the payment online on 3 June 2020 and it was not disputed by the Company that the Claimant was the one who handed over the online payment slip to the Company.

**[35]** The Company then alleges that the Claimant insisted on visiting Jumash Auto Enterprise on 4 June 2020 even though payment had been made on 3 June 2020. This however seems illogical as the Claimant herself had handed over the payment slip to the Company on 3 June 2020. COW-1 then testified that the Claimant had taken medical leave in order to avoid attending the Company’s sales meeting on 4 June 2020. However, he did not dispute that the Claimant had tendered her medical certificate.

**[36]** It would seem that COW-1 was constantly moving the goalpost to justify the Claimant’s termination when in fact what was obvious was that the Company’s

allegations against the Claimant was grounded on nothing more than conjectures and speculations, which the Court ought to be wary of.

[37] COW-1 also alleged that the Claimant had disciplinary issues, in that she had taken too many leaves. However, there is not an iota of evidence produced by the Company to show that they had deemed this a serious issue and issued warnings thereafter. Even though the Claimant may have taken many leaves, it would seem however that the Company had condoned the Claimant's behaviour.

[38] As such, the Court finds that the Company has failed to prove that the Claimant is guilty of Ground No. 2.

**(ii) Whether the dismissal of the Claimant was done with just cause and excuse**

[39] The Company has failed to prove both grounds/allegations stated in their Notice Of Termination dated 11 June 2020 against the Claimant.

[40] There had been no show cause letter issued to the Claimant nor were there any domestic inquiry carried out to provide an opportunity for the Claimant to answer the Company's allegations. COW-1's only response during the trial was that the Claimant can always prove her innocence after the termination letter was issued, but she did not do so. There clearly had been a breach of the principles of natural justice before the Claimant was terminated. Asking the Claimant to prove her innocence

after she had been terminated would surely be too little too late and reeks of arrogance and insensitivity on the Company's part. In fact, COW-1, in the same breath, testified that his boss, Dr. Tor, was not prepared to listen to the Claimant's explanations.

[41] The speed in which the Company went about conducting their so-called investigations also leaves much to be desired and calls into question their real motive in trying to get rid of the Claimant from her employment. COW-1 commenced his investigations on 10 June 2020 and by the very next day, i.e. 11 June 2020, the termination letter was already issued to the Claimant.

[42] In the absence of cogent reasons for the termination of the Claimant's employment, this Court accordingly finds that the dismissal of the Claimant was done without just cause and excuse.

## **VI. The Remedy**

[43] The Court finds that an order for reinstatement is inappropriate taking into account the circumstances of the case. The Company clearly does not wish to keep the Claimant in its employment.

[44] The Claimant's last drawn salary was RM4,170.00 per month, inclusive of fixed allowances. However, the Claimant's claim for her sales commission cannot be

allowed due to its fluctuating nature, wherein the commission would vary from month to month depending on successful sales completed.

**[45]** The Claimant is entitled to compensation *in lieu* of reinstatement, at the rate of one month's salary for each year of service. The Claimant commenced employment on 21 July 2017 and had worked for 2 years and 11 months. Thus, the Claimant has only 2 full years of completed service. The Claimant is thus entitled to compensation *in lieu* of reinstatement for a total sum of RM8,340.00, i.e. RM4,170.00 x 2 months.

**[46]** Para. 1 of the Second Schedule of the Industrial Relations Act 1967 provides that in the event that backwages are to be given, such backwages shall not exceed 24 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. The Claimant was terminated on 11 June 2020 and the hearing of this case was completed on 30 April 2021. Thus, the Court allows a total of 10 months backwages, amounting to RM41,700.00, i.e. RM4,170.00 x 10 months.

**[47]** The Claimant testified during trial that after she was terminated by the Company, she was unable to secure a new employment. Under the circumstances and taking into account the scarcity of job opportunities due to the Covid-19 pandemic that had ravaged the country's economy and business sector, the Court exercises its discretion not to impose any deduction for post-dismissal earnings.

**VII. Award**

**[48]** The Court awards and directs that the Company pay to the Claimant a total sum of **RM50,040.00**, which is derived from the following calculation:-

i.	Compensation <i>in lieu</i> of reinstatement		
	RM4,170.00 x 2 months	...RM	8,340.00
ii.	Back wages		
	RM4,170.00 x 10 months	...RM	41,700.00
			<hr/>
	<b>Total</b>	<b>... RM</b>	<b>50,040.00</b>
			<b>=====</b>

**[49]** The Company shall pay the said award sum of **RM50,040.00**, less any statutory deductions to the Claimant's solicitors, Messrs. Siang & Co., within 60 days from the date mentioned at the bottom of this Award.

**HANDED DOWN AND DATED THIS 19<sup>TH</sup> DAY OF AUGUST 2021**

***-Signed-***

**(PARAMALINGAM A/L J. DORAISAMY)**  
CHAIRMAN  
INDUSTRIAL COURT, MALAYSIA  
KUALA LUMPUR