

IN THE INDUSTRIAL COURT OF MALAYSIA

CASE NO. : 11/4-2307/20

BETWEEN

CHAN PEAK YEE

AND

TREAL TECH SDN. BHD.

AWARD NO. : 1317 OF 2021

Before : Y.A. TUAN ANDERSEN ONG WAI LEONG
- CHAIRMAN (Sitting Alone)

Venue : Industrial Court of Malaysia at Kuala Lumpur

Date of Reference : 07.10.2020

Date(s) of Mention : 16.11.2020, 23.02.2021.

Date(s) of Hearing : 14.04.2021, 15.04.2021.

Written Submission
(Claimant) : 17.05.2021, 27.5.2021.

Written Submission
(Company) : 20.05.2021, 14.06.2021.

Representation : Mr. K. Gunaseelan
Malaysian Trades Union Congress
Representative for the Claimant

Mr. A. Ravikumar
Messrs Ravi & Co
Counsel 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 Chan Peak Yee by her employer, Treal Tech Sdn. Bhd. (“the Company”) on 09.04.2020.

B. FACTS

[2] The Company is a fintech startup company principally engaged in technology-enabled, multi-tier customer trading and management solution for financial services industry including investment and forex trading.

[3] Pursuant to an offer of employment dated 15.10.2018, the Claimant commenced employment with the Company as Customer Service Executive effective 18.07.2018. The Claimant was subsequently confirmed in her employment as Customer Service Executive with the Company on 22.11.2018

[4] The Company conducted year end performance review for year 2019 on its employees including the Claimant. The Claimant was rated poor by her immediate superior, Ong Kee Eng who was the Customer Service Manager.

[5] By a letter dated 12.02.2020, the Company informed the Claimant its' decision to place the Claimant under Performance Improvement Plan ("PIP") for a period of six (6) weeks commencing on 12.02.2020 until 24.03.2020.

[6] The Claimant informed the Company on 18.02.2020 that she was pregnant and forwarded a certification letter from her doctor on her pregnancy.

[7] The PIP proceeded accordingly and at the conclusion of the PIP i.e. after the six (6) weeks duration, the Company was not happy with the outcome of the PIP for the Claimant as the Claimant had fared poorly in the PIP assessment.

[8] By a letter dated 26.03.2020, the Company informed the Claimant that the Company had decided to extend the PIP for another two (2) weeks until 08.04.2020.

[9] The Claimant again went through the PIP and at the end of the extended PIP period, the Claimant was found to have failed the PIP assessment.

[10] The Claimant was then issued with a letter of termination dated 09.04.2020, terminating the Claimant's employment with the Company. The relevant excerpts of the aforesaid letter of termination are reproduced herein below as follows:

"Dear Peggy,

**TERMINATION OF EMPLOYMENT – FAIL ON PERFORMANCE
IMPROVEMENT PLAN (PIP)**

As per our final review session conducted on 09th April 2020, you had failed the Performance Improvement Plan (PIP). As stated in the letter date 12th February 2020, failed the PIP shall lead to termination of employment. We regret to inform you that your employment is terminated from Treal Tech Sdn. Bhd. with immediate effect.

We provide enough timeline (eight weeks) and assistance from team member or manager to help you in make this PIP successful but we did not observe expected improvement in these weeks.

The performance improvement plan (PIP) you were participating in put five specific goals and targets that you agreed you meet by their due date. You were offered resources and additional support to fulfil your expectation in PIP. However, you still failed to meet the target in any of the areas specified within the plan that you and your manager wrote and agreed to together. Despite repeated feedback and performance coaching from your manager, your work performance has not improved.

The management decided to terminate your employment by immediate effect. Your physical and official last day with the organization shall be on 09th April 2020. According to the system, you have leave balance of three and half (3.5) days AL and one (1) day Replacement leave. The four and half (4.5) days leave shall be encashed. Company empathy on your losing of job during your pregnancy, the Management agreed to pay you extra of one month's payment notice in lieu. You shall receive your salary, from 1st April 2020 to 9th April 2020 together with the leave encashment and one month's payment of notice in lieu in April 2020's payroll.

You are required to return all the company's asset on 9th April 2020, company will arrange the dispatch service to collect the assets from you. The company shall reserve the rights to request for compensation if there is any damage on the assets. Upon the

termination of the employment, you should not disclose any confidential information regarding to the company.

We take this opportunity to thank you for all your past contribution and we wish you every success in your future endeavors.”

[11] The Claimant being unhappy with the dismissal, made a representation to the Director General for Industrial Relations for reinstatement and the matter was accordingly referred to the Industrial Court.

C. CLAIMANT’S CASE

[12] The Claimant put forward two main contentions in her case against the Company. The Claimant alleged that the Company had terminated her employment with the Company to avoid paying her the maternity benefits . Secondly, the Claimant contended that the Company did not provide her with the relevant trainings or guidance even when she was undergoing the PIP.

[13] The Claimant alleged that her dismissal was malicious and a form of gender discrimination, in that the Company should not have terminated her

during her pregnancy. As such, the Claimant alleged that the dismissal was unfair and unjust.

[14] The Claimant did not call any other witnesses to give evidence to support her case at the trial. Only the Claimant gave evidence at the trial for her case.

D. COMPANY'S CASE

[15] The Company denied that the dismissal of the Claimant was due or related to her pregnancy. The Company contended that the Claimant was dismissed from her employment because of poor performance and the Claimant failed the PIP assessment.

[16] At the trial, the Company called two (2) witnesses to give evidence in support of the Company's case. The first witness was Ong Kee Eng ("COW1") who was the Claimant's immediate superior at the material time. The second witness was one Lin Yuin Sam ("COW2") who was the Company's Chief of Human Resource.

E. EVALUATION AND FINDINGS OF THE COURT

[17] The role of the Industrial Court in deciding cases referred under *section 20(1) of the IRA 1967* was succinctly explained in the case of *Milan Auto Sdn. Bhd. v Wong She Yen (1995) 4 CLJ 449*, where the learned

judge, Mohd Azmi bin Kamaruddin, FCJ, in making reference to Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn. Bhd. & Anor (1995) 3 CLJ 344, held that 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.

[18] It is an established principle of the industrial jurisprudence that poor performance due to culpable incompetent and inefficiency are misconduct and can be cause for dismissal.

[19] The Oxford English Dictionary defines incompetent as not having or showing the necessary skills to do something successfully. On the other hand, inability to do one's work with the level of skill and speed which the employer requires for the position may be defined as inefficiency.

[20] Culpable incompetent and inefficiency may be attributable or due to negligence, carelessness, idleness, ineptitude efforts or breach of the duty imposed on the employee when he applies for the job.

[21] In cases of poor performance, applying the principles propounded in *Milan Auto's case* , the court has to first determine whether the culpable incompetent or inefficiency complained of by the employer has been

established, and secondly whether the proven culpable incompetent or inefficiency constitutes just cause or excuse for the dismissal.

[22] The Company bears the burden of proof to prove on a balance of probabilities the culpable incompetent or inefficiency and that the Claimant was dismissed for just cause or excuse. [See: *Telekom Malaysia Kawasan Utara v Krishnan a/l Kutty Sanguni Nair & Anor (2003) CLJ 314*]

Dismissal not due to the Claimant's pregnancy

[23] COW1 gave evidence that he had conducted the year end performance review for 2019 for all his staffs including the Claimant. According to COW1, the Claimant's overall scoring was poor and she only managed to secure twenty-nine (29%) per centum of the total marks allocated.

[24] COW1 also said in evidence that since the Claimant's year end performance review for 2019 was poor, he had suggested to the Company to put the Claimant under performance improvement plan. This piece of evidence was confirmed by COW2.

[25] COW1 and COW2 were merely employees of the Company. There is no real reason for them to deny the Claimant of her maternity benefits. The Claimant in her pleadings before the court certainly did not cast any

aspersion on COW1's intention in placing her under PIP or make any allegation of mala fide on the part of COW1 in doing so.

[26] COW2 gave evidence that the Claimant only informed the Company that she was pregnant after she was placed under the PIP. The Claimant was placed under the PIP on 12.02.2020 but she only informed the Company of her pregnancy on 18.02.2020 *vide* the doctor's certification letter. This was not disputed by the Claimant.

[27] COW2 had *via* her email dated 18.02.2020 informed the Claimant that based on the doctor's certification letter, she was deemed fit to undergo the PIP. However, COW2 did advise the Claimant that should the Claimant encounters any conditions during the PIP session due to her pregnancy, she could request a letter from the doctor to indicate clearly the situation. There is no evidence of the Claimant's complaining that she could not cope with the PIP due to her pregnancy.

[28] To further accommodate the Claimant's pregnancy, COW2 also asked the Claimant to inform the Company of her pregnancy check-up schedules to enable the Company to give priority to her check-up appointment over the PIP review session.

[29] In fact, the Company taking into consideration of the Claimant's pregnancy had also extended the PIP for another two (2) weeks when the Claimant failed the PIP assessment after the initial period of six (6) weeks.

[30] COW2 further testified that pursuant to the year-end performance review for 2019, all those rated poor were placed under performance improvement plan. Together with the Claimant, there were four (4) other employees placed under the PIP at that time.

[31] Therefore, I do not think that the Company had used the PIP as a ploy to get rid of the Claimant so as to avoid paying her the maternity benefits. There was clearly no ill intention on the part of the Company to place the Claimant under PIP and the Company did not act oppressively on her in regard to the PIP.

Incompetency or performance deficiencies

[32] It is the Company's case that the Claimant was placed under PIP because she fared poorly in the year end performance review for 2019. The Company produced and tendered into court the year end performance review form for 2019, for the Claimant.

[33] The Claimant in her evidence has never denied or challenge the outcome of the year end performance review for 2019. The Claimant's Representative, Mr. K. Gunaseelan when cross examining COW2 contended that since the year end performance review form for 2019 did not stipulate the year and the name of the Company, it was not conducted by the Company.

[34] COW1 in his evidence had expressly confirmed that the year-end performance review form was prepared by him and he did the performance review for 2019 for the Claimant. COW2 too confirmed that the year-end performance review form produced before the court was for year ending 2019 and it was prepared by COW1.

[35] Therefore, the Court accepts the Company's evidence that the year-end performance review form produced by the Company is the year-end performance review conducted by COW1 for the Claimant, for year 2019. Mr. Guna's contention that the year-end performance review was not conducted by the Company is merely a bare assertion.

[36] On the facts, there is also no evidence of the Claimant objecting to the PIP or denying that she was not performing to the Company's expectation when the Company informed her of its intention to place her under the PIP.

[37] In the circumstances, the Court believes that the Claimant was aware of her own shortcomings and she was not performing to the expectation of the Company when the Company wanted to place her under PIP.

[38] The main objective of the performance improvement plan or sometime also known as performance action plan is to assist the employee to overcome his shortcomings in his works performance. It is a tool to give

an employee with performance deficiencies the opportunity to succeed in his work achievement. Sometime, it is also used to address failures to meet specific job goals or to ameliorate behavior-related issues which an employee may have in his employment.

[39] Performance improvement plan should not be abused as a mean to get rid of employee on the pretext of poor performance. An employer is required to provide proof or justification for placing an employee under performance improvement plan. Failure to do so, may give rise a claim of constructive dismissal by the employee.

[40] The outcome of performance improvement plan can vary from improvement in the employee's work performance, the recognition of training gap, or possible employment actions such as a transfer, demotion or termination.

[41] On the facts, the Company was justified in placing the Claimant under PIP as the Claimant had fared poorly in her year-end performance review for 2019 which was never disputed by the Claimant and there were performance deficiencies on the part of the Claimant which required amelioration.

The Performance Improvement Plan

[42] The Claimant was placed under PIP for a total duration of eight (8) weeks. The Company produced and tendered into court the details of the PIP (“the PIP Form”). COW2 gave evidence that the PIP Form was given to the Claimant together with the Company’s letter dated 12.02.2020 when the Company informed the Claimant of its’ intention to place the Claimant under PIP.

[43] The Company in the PIP Form has set out the areas for improvement, the incidents and the Company’s expected outcome of the PIP. COW2 in her evidence confirmed that the Claimant was duly notified of the areas for improvement, the incidents and the Company’s expected outcome of the PIP as stated in the PIP Form.

[44] COW2 also said that the Claimant did not raise any issue on areas of improvement, the incidents and/or the Company’s expected outcome of the PIP when these were made known to her.

[45] Under the PIP, the Company identified five (5) key areas for improvement by the Claimant. There were as follows:

(a) Working Behaviours

- This is in relation to the Claimant’s tardiness, sick leaves, watching movie, playing hand phone and sleeping during working hours;

- (b) Analysis and Understanding.
 - Under this category, the Claimant was required to be able to analyse the customer's questions completely and accurately, and understand the core issues.

- (c) Service Attitude.
 - This is pertaining to the perfunctory response of the Claimant and her mistakes and omissions when responding to the customers' questions.

- (d) Product knowledge.
 - This is pertaining to incidents where the Claimant gave the wrong answers to the customers on the Company's products.

- (e) Treatment method.
 - This is in relation to the wrong treatment method employed by the Claimant when attempting to resolve problems.

[46] The Claimant in her evidence did not deny receiving the Company's letter dated 12.02.2020 and the PIP Form. The Claimant also admitted discussing the PIP with COW2 when she was notified of the PIP. However, the Claimant alleged COW2 had assured her that the PIP would not affect her employment.

[47] Under the PIP, the Claimant's performance was assessed and reviewed by the Company on a weekly basis. The Company produced and tendered into court, the outcome of the weekly reviews done with the Claimant throughout the entire PIP durations of eight (8) weeks.

[48] COW1 gave evidence that the initial four (4) reviews i.e. 19.02.2020, 27.02.2020, 07.03.2020, 12.03.2020 were done face to face with the Claimant in their office and the balance of four (4) reviews i.e. 19.03.2020, 26.03.2020, 02.04.2020 & 09.04.2020 were done online as the Claimant was working from home due to the Movement Control Order ("MCO") which kicked in on 15.03.2020.

[49] The Claimant did not deny that all the aforesaid reviews were done by the Company with her during the PIP period. In fact, the Claimant signed and confirmed on all the reviews done by the Company for the PIP. However, the Claimant contended that the Company, though identified her mistakes, did not teach or provide her with the answers to correct her mistakes. According to the Claimant, no guidance or training or coaching was provided to her during the PIP.

[50] COW2 gave evidence that every week he had meeting with the Customer Service Staffs including the Claimant either on Monday or Tuesday. According to COW1, during the meeting, they would discuss the mistakes committed by the Customers Service Staffs and the Quality Assurance personnel together with the Team Leaders would be there to

answer any question that the Customer Service Staffs may have pertaining to their work.

[51] COW2 also testified that every week before the MCO, he, COW2 and the Claimant would sit down together to discuss the PIP review. After the MCO, COW1 said the weekly meetings and the PIP reviews were done online *via* MS Team.

[52] I have perused all the PIP reviews done by the Company. I am satisfied that the Company did and had discussed the Claimant's mistakes and shortcomings with the Claimant during the PIP reviews. There were also remarks by COW1 on the "dos" and "don'ts" when he was commenting on the Claimant's mistakes in the PIP reviews.

[53] As stated above, five (5) Customer Service Staffs altogether including the Claimant were placed under the PIP at the same time. Two of them namely Au Mey Han ("AMH") and Khor Muar Hoong ("KMH") successfully completed the PIP and had continued working for the Company. Whilst, the Claimant and two others failed the PIP and were dismissed by the Company.

[54] The Company produced and tendered into court the letters from AMH and KMH, testifying on the PIP process which they went through. Both AMH and KMH confirmed that assistance and guidance were given by the Quality

Assurance personnel, COW1 and the Team Leaders to them including the Claimant during the weekly meetings when they were undergoing the PIP.

[55] Based on the foregoing, I find the PIP imposed on the Claimant, to be realistic and fair. The PIP had clearly specified the required goals and means for accomplishing them. The Claimant was also given reasonable assistance and guidance to achieve the goals set out in the PIP.

Dismissal with just cause or excuse

[56] On the facts, the Company was only informed by the Claimant of her pregnancy after she was placed under the PIP. The Company had expressly informed the Claimant that if she encounters any complication during the PIP sessions due her pregnancy, she could procure a letter from the doctor. There is no evidence of the Claimant's complaining that she could not go through the PIP due to her pregnancy.

[57] In any event, the areas for improvement required of the Claimant under the PIP were not pertaining to tasks which could not be performed during pregnancy. The Claimant's job was to assist and attend to the Company's customers' questions and queries.

[58] The Claimant's main weaknesses were in the areas of service attitude, product knowledge and treatment methods. From the weekly PIP reviews, it can be seen that the Claimant's performance in the aforesaid

areas did not improve markedly even toward the end of the PIP period. The Claimant's overall performance under the PIP leave much to be desired.

[59] Mr. Guna contended that since the Claimant was not given any warning during the PIP, she had performed well. From the onset of the PIP, the Claimant was already being warned of the repercussion of failing the PIP assessment *via* the Company's letter dated 12.02.2020. This was repeated again in the Company's letter dated 26.03.2020 where the Company warned the Claimant that if she failed to meet and fulfil the expectation under the PIP, her employment would be terminated.

[60] Therefore, I do not think there is a need for the Company to issue separate warning letters to the Claimant for each and every failure to meet the expectations under the PIP.

[61] Having considered the totality of the evidence and going by equity and good conscience and the substantial merits of the case, the Court finds that the Company has proven on the balance of probabilities the culpable incompetent and inefficiency of the Claimant.

[62] The Claimant had been accorded with reasonable opportunity and time to succeed in the PIP. However, the Claimant could not and did not make the cut and had failed the PIP assessment.

[63] In the circumstances, the Court holds that the Claimant's dismissal is warranted and justified. Accordingly, the Court finds that the Claimant was dismissed for just cause or excuse. The Claimant's case against the Company is hereby dismissed.

HANDED DOWN AND DATED THIS 6th DAY OF SEPTEMBER, 2021.

-signed-

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