

INDUSTRIAL COURT OF MALAYSIA

[CASE NO: 2/4-658/11]

BETWEEN

ROSLI IBRAHIM DAN 1 ORANG LAIN

AND

TIME dotCom BERHAD

AWARD NO. 1978 OF 2013

Before : **Y.A. PUAN ROSENANI BINTI ABD. RAHMAN**
- Chairman

Venue : Industrial Court Malaysia, Kuala Lumpur

Date Of Reference : 04.04.2011

Dates of Mention : 11.07.2011, 13.09.2011, 11.10.2011, 14.11.2011,
01.12.2011, 19.12.2011, 14.05.2012, 13.06.2012 &
02.04.2013

Dates of Hearing : 13.06.2012, 14.06.2012, 09.08.2012, 10.08.2012,
18.10.2012, 19.10.2012, 16.01.2013, 17.01.2013 &
18.01.2013

Representation : *For the claimant - Sivanesan Nadarajah; M/s
Vicknaraj, R D Ratnam, Rajesh Kumar & Associates*

*For the company - Edward KL Saw; M/s Josephine
LK Chow & Co*

Reference

This is a reference made under section 20(3) of the Industrial Relations Act 1967 arising out of the alleged dismissal of Encik Rosli Bin Ibrahim (CLW1) dan Encik Raimee bin Ahmad (CLW2) (hereinafter referred to as “The Claimants”) by TIME dotCom BERHAD (hereinafter referred to as “The Company”) on 31.12.2008.

AWARD

Brief Fact

The dispute in this case is concerning the alleged dismissal of 1st and 2nd Claimant *via* the force acceptance of a Voluntary Separation Scheme (VSS) by the Company with effect from 31.12.2008.

The 1st Claimant commenced employment as a Chief Operating Officer of a Customer Division on 01.08.2000 with a starting salary of RM15,000.00 per month. He was confirmed in his employment on 01.11.2000. On 01.08.2001 1st Claimant was appointed as the Senior General Manager and his last drawn salary was RM17,978.00.

The 2nd Claimant was employed by the Company as a General Manager on 03.11.2003 and confirmed on 03.05.2004. Subsequently on 01.01.2008 he was appointed as the Senior General Manager with monthly salary of RM14,000.00.

On 04.12.2008 the Company issued a VSS letter inviting all the Senior General Management and General Management level to submit their application for a VSS. This was the result of the losses that has been sustained by the

Company since 1999. The Company has decided to undergo a restructuring exercise which will result in redundancies for certain levels and function. Copy of the said letter which was separately address to the 1st and 2nd Claimants is produced for reference.

14

PRIVATE & CONFIDENTIAL



Our Reference: TDC/HCOD.TR/004/08 (032)

4 December 2008

EN. ROSLI IBRAHIM
Present

Dear *Rosli*,

VOLUNTARY SEPARATION SCHEME

As you are well aware, Time dotCom has been sustaining losses since 1999. A review of our operational structure is urgently and drastically required if we are going to move toward profitability. As a result, the company has decided to undergo a restructuring exercise which will unfortunately result in redundancies for certain levels and functions. Currently, the company has identified the Senior General Management and General Management positions as being surplus to requirements.

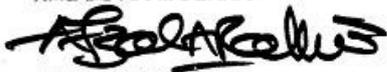
The company would therefore like to invite all the Senior General Management and General Management levels to submit their application for a Voluntary Separation Scheme (VSS). Employees who apply under this VSS will be eligible to receive 1.0 month compensation per year of service.

This offer of VSS is valid thru 12 December 2008. Please note that the company has the right to accept or reject your application as per our requirements.

Please acknowledge receipt and understanding of the contents of this letter by signing on the duplicate copy of this letter and return the same to us for record keeping purposes.

Thank you

Yours faithfully,
TIME DOTCOM BERHAD


AFZAL ABDUL RAHIM
Chief Executive Officer

c.c. : Personal File (TT2968)

I, *Rosli Ibrahim* (Emp. ID *2968*) hereby acknowledge the acceptance and understanding of the contents of this letter and I accept ~~the offer~~ ~~without prejudice~~ ~~the offer~~


Employee Signature

12/12/08
Date

**Please delete whichever is not applicable*

PRIVATE & CONFIDENTIAL



TIME

29

Reference: TDC/HCOD.TR/004/08 (024)

TIME dotCom Berhad (413292-P)
Level 1, Wisma TIME, 249 Jalan Tun Razak
50400 Kuala Lumpur, Malaysia
Tel. +60 3 2720 8000
Fax +60 3 2720 0199
www.time.com.my

4 December 2008

14

EN. RAIMEE AHMAD
Present

Dear *Raimee*,

VOLUNTARY SEPARATION SCHEME

As you are well aware, Time dotCom has been sustaining losses since 1999. A review of our operational structure is urgently and drastically required if we are going to move toward profitability. As a result, the company has decided to undergo a restructuring exercise which will unfortunately result in redundancies for certain levels and functions. Currently, the company has identified the Senior General Management and General Management positions as being surplus to requirements.

The company would therefore like to invite all the Senior General Management and General Management levels to submit their application for a Voluntary Separation Scheme (VSS). Employees who apply under this VSS will be eligible to receive 1.0 month compensation per year of service.

This offer of VSS is valid thru 12 December 2008. Please note that the company has the right to accept or reject your application as per our requirements.

Please acknowledge receipt and understanding of the contents of this letter by signing on the duplicate copy of this letter and return the same to us for record keeping purposes.

Thank you

Yours faithfully,
TIME DOTCOM BERHAD

AFZAL ABDUL RAHIM
Chief Executive Officer

c.c. : Personal File (TT3029)

acknowledge receipt

the Co. has agreed to pay salary until 31/12/08 + plus other final allowances and entitlements.

MUHD RAMIZU ABDUL WAHAB
Deputy General Manager
Human Capital & Organizational Development

I, Raimee bin Ahmad (Emp. ID TT 3029) hereby acknowledge the acceptance and understanding of the contents of this letter and I accept/reject* the offer.

Employee Signature

12/12/08

Date

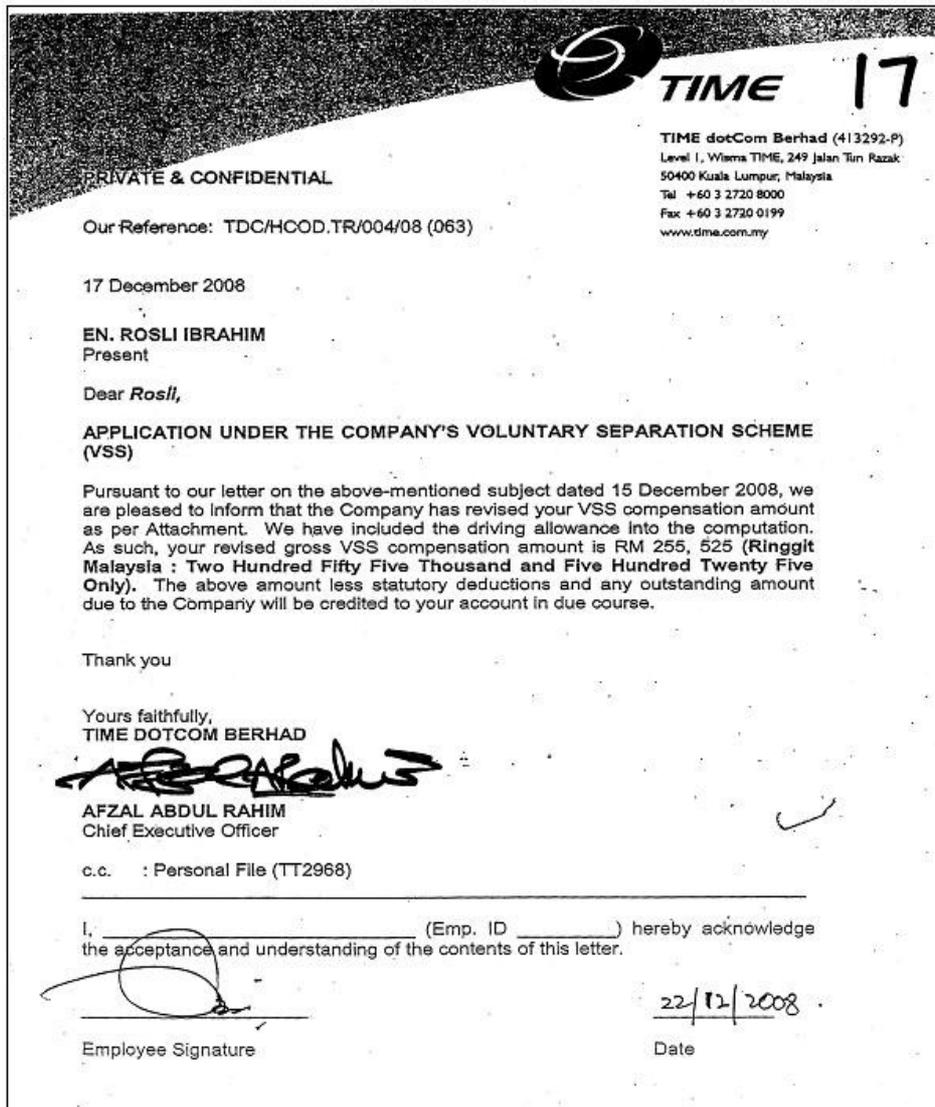
*Please delete whichever is not applicable

Both the Claimants contends that the purported restructuring exercise by the Company was not *bona fide* and implemented with an ulterior motive. They contended that the Company forced them to accept the VSS and they were

unlawfully dismissed from the Company.

The Company stated that the VSS has been accepted voluntarily by the 1st and 2nd Claimants and hence there is no dismissal within the meaning of section 20 Industrial Relation Act.

The 1st Claimant had accepted the VSS offer but had however requested for a higher VSS payment and the Company in good faith raised the VSS payment to RM255,525.00 and this has been accepted by 1st Claimant (refer to a letter dated 17.12.2008).



The 2nd Claimant also has accepted the VSS offer in which he was paid his salary together with fixed allowances and entitlement until 31.12.2008.

The Company reiterates that both Claimant has voluntarily offered themselves as participants in the VSS and had voluntarily accepted the VSS payment without any force and coercion.

The Law

It is settled law that the burden is upon the respondent to show by evidence that the excuse or reasons given to terminate the Claimant's employment has been made out and proven. If it fails to do so then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse (see: *Goon Kwee Phoy v. J&P Coats (M) Bhd* [1981] 1 LNS 30 *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344 and *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449).

The Court of Appeal had in the case of *William Jacks & Co. (M) Sdn Bhd v. S. Balasingam* [1997] 3 CLJ 235 stated as follows:

“Whether the retrenchment exercise in a particular case is *bona fide* or otherwise is a question of fact and of degree depending for its resolution upon the peculiar facts and circumstances of each case. It is well-settled that an employer is entitled to organise his business in the manner he considers best. So long as that managerial power is exercised *bona fide*, the decision is immune from examination even by the Industrial Court. However, the Industrial Court is empowered, and indeed duty-bound, to investigate the facts and circumstances of

a particular case to determine whether that exercise of power was in fact *bona fide*.”.

Redundancy does not necessarily mean that the job or work no longer exist. At page 21 of his book entitled “*Industrial Relations in Malaysia*” Dunston Ayadurai had defined redundancy as follows:

“Redundancy refers to a surplus of labour and is normally the result of a reorganisation of the business of an employer, and its usual consequence is retrenchment, ie, the termination by the employer of those employees found to be surplus to his requirements after the reorganisation. Thus, there must first be redundancy or surplus of labour before there can be retrenchment or termination of the surplus.”.

The right of the employer is limited by the rule that he must act *bona fide* and not for a collateral purpose (see: *Harris Solid State (M) Sdn Bhd*). What this mean is that he cannot act with motives of victimization or unfair labour practise nor could he use the cover of reorganisation to rid himself of employees who have incurred his displeasure @ promote some favoured employees to the detriment of others. See: *East Asiatic Company (M) Sdn Bhd v. Valen Noel Yap* [1987] 1 ILR 363a.

Issue

To ascertain whether the Claimant's dismissal was with just cause or excuse, the court has to consider the following:

1. Whether there was a genuine redundancy leading to the retrenchment exercise;
2. whether the Company had managed the consequential retrenchment exercise in compliance or in conformity with accepted standard of good practice;
3. Whether the claimant was forced to accept the VSS.

Burden of Proof

The burden on the Company is to prove its case on a balance of probabilities and the court in evaluating the evidence, must be mindful that it must have regard to the substantial merits of the case without regard to technicalities and legal form (see: *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sangurai Nair & Anor* [2002] 3 CLJ 314.

“... the Industrial Court should not be burdened with the technicalities regarding the standard of proof, the rules of evidence and procedure that are applied in a court of law. The Industrial Court should be allowed to conduct its proceedings as a “court of arbitration” and be more flexible in arriving at its decision, so long as it gives special regard to substantial merits and decides a case in accordance with equity and good conscience”.

It is trite that the burden of proof lies on this employer to prove redundancy. In *Bayer (M) Bhd v. Ng Hong Pau* [1999] 4 CLJ 155 Court of Appeal at page 160 that:

“On redundancy it cannot be gainsaid that the appellant must come to court with concrete proof. The burden is on the appellant to prove actual redundancy on which the dismissal was grounded (see: *Chapman & Ors v. Guonyean & Rastawvack China Clay Co. Ltd* [1983] 2 AER). It is our view that merely to show evidence of re organization in the appellant is certainly not sufficient.”.

Evidence, Evaluation and Finding

In the instance case there is no dispute that both the Claimants was dismissed on 31.12.2008 by the Company on the ground of redundancy. The court is duty bound to investigate the facts and circumstances of the case to determine whether the exercise of the managerial power was *bona fide*.

Perusing the evidence of the CEO of the Company (COW1) in Q&A no. 4 of COWS-1 which explained why and how the re organization was carried out.

“Q : Can you describe your immediate task as CEO of the Company?

A : Before I join the Company it was public knowledge that the Company was doing very badly financially. I was appointed with the specific objective of turning of Company around and hopefully to put it on the path of profitability. When I joined as CEO I believed that before we look at external factors we need to firstly do our own internal housekeeping. My plan was to restructure the whole company including the organizational structure, processes, systems and its people. As such I took steps to streamline its divisions so as to enable the company to capitalize on its strengths and to do away with redundant areas

of its business. As such some divisions were collapsed and merged while new business divisions such as Customer Intimacy, Network & Systems Planning, Projects & Operational Support., Service Management, Business IT and the Turnaround Team were created.

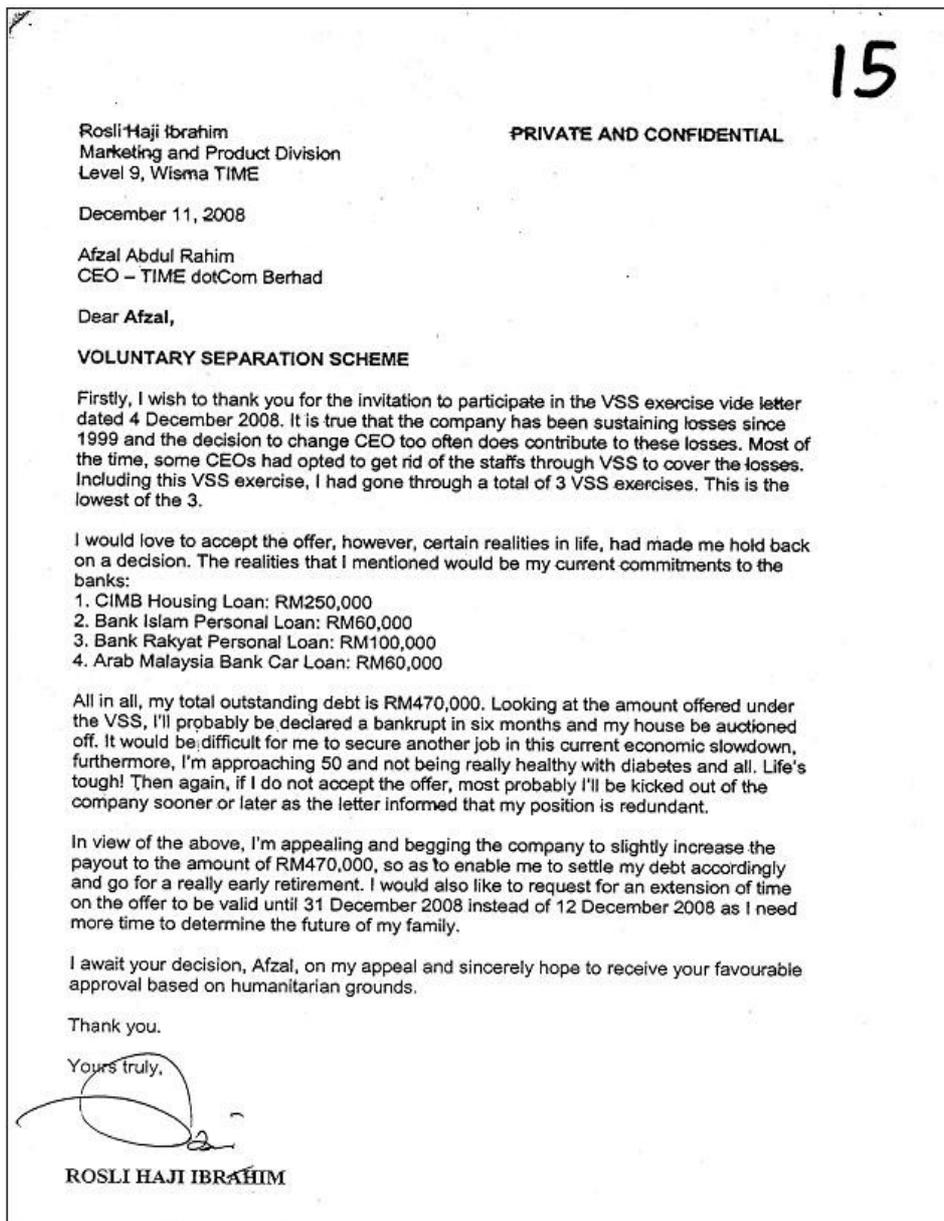
One of the very first things which I also noticed was that the company's top management was too “top heavy”. Its hierarchy had too many tiers and this was very inefficient. This needed to change. I wanted to reduce it to only 4 tiers ie, Head of Division, Head of Department, Head of Unit and then the staff.

Therefore I decided to conduct a VSS exercise for the top management first. In this exercise all 19 Senior General Managers and General Managers would be offered the opportunity to participate in the VSS. This included the 1st and 2nd Claimants.”.

COW1 has further testified as to how the VSS exercise was carried out in Q&A no. 5. According to COW1 he had a discussion with each and every Senior General Manager and General Manager where he personally explained the rationale for the need of VSS. There was series of meeting starting from 4th December 2008. Letters to that effect was issued and hand over personally to every Senior General Manager and General Manager concerned and each paragraph was explained to make sure they understand the contend of the letters. They were told that they had a choice to apply or not to apply and given sometime to think. The fact that COW1 had met the 1st Claimant on 05.12.2008 is not denied. According to COW1 he had gone through the said letter with 1st

Claimant and he understood the content. 1st Claimant was also shown the tabulation of the VSS payment which would be paid to him if he wanted to participate in the VSS scheme.

The 1st Claimant had replied to the said letter as at page 15 COB, dated 11 December 2008 asking for the amount to be increase to RM470,000.00. From the content of the letter shows that 1st Claimant was aware of the current economic slowdown then. He was also aware that his position in the Company has become redundant and he will be kick out from the Company.



In his evidence CLW1 testified in Q&A no. 4 that COW1 insisted that he leave and if he refused to leave he will be retrenched before Christmas of that year. COW1 further said that:

“He gave me no choice and forced me to accept the VSS scheme as retrenchment gave a lower compensation amount. In view of the threat by the CEO (COW1) I had no choice but to accept the VSS scheme on a without prejudice basis.”.

The evidence shows that there was a meeting with 1st Claimant on 12.12.2008. At this meeting 1st Claimant had asked for COW1 advice of whether he should take the VSS or not. COW1 told him that it was a good offer. COW1 denied that he had told 1st Claimant that if he did not accept the VSS, he will be retrench by Christmas. 1st Claimant had accepted the invitation. He signed the acceptance letter to participate in the VSS exercise with a notation “without prejudice”. By a letter dated 17.12.2008 the Company had revised the VSS compensation from RM247,105.00 to RM255,525.00 (page 17 COB).

During cross-examination CLW1 agree that after he signed the letter of acceptance dated 15.12.2008 at page 16 COB he did not write to CEO to complain that he was forced to accept it (copy of the said letter is produced). Subsequent to that CLW1 received and signed the VSS offer that has been revised to RM255,525.00 with no mention of without prejudice basis (refer to letter dated 17.12.2013). The 1st Claimant admitted that the amount RM255,525.00 was paid into his account and he did not returned the money.



TIME

16

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Our Reference: TDC/HCOD.TR/004/08 (055)

15 December 2008

EN. ROSLI IBRAHIM
Present

TIME dotCom Berhad (413292-P)
Level 1, Wisma TIME, 249 Jalan Tun Razak
50400 Kuala Lumpur, Malaysia
Tel +60 3 2720 8000
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www.time.com.my

Dear *Rosli*,

APPLICATION UNDER THE COMPANY'S VOLUNTARY SEPARATION SCHEME (VSS)

We refer to your recent VSS application dated 12 December 2008. The company is pleased to inform you that we have accepted your application under this scheme and in accordance with the terms proposed under the scheme, you will be paid a gross compensation amount totaling RM 247, 105. (**Ringgit Malaysia : Two Hundred Forty Seven Thousand and One Hundred and Five Only**) less statutory deductions and any outstanding amount due to the Company. The compensation amount comprises of basic salary plus fixed allowance multiplied by years of service, 3 months notice in lieu and unutilized annual leave of 15 days. Please refer to Attachment 1 for details.

Your last working date with the company shall be on **17 December 2008** and your last effective employment date shall be on **31 December 2008**. The Company has organized a career counseling session for you which date and time will be informed in due course. The VSS compensation amount will be credited to your account upon completion of the session and you have successfully handed over all company's related property.

Kindly return the completed Exit Interview Form and Exit Check List to Human Capital & Organizational Development Division prior to your departure date. Please refer to Attachment 2 and 3 respectively for the said forms. The Company is giving the Notebook currently assigned to you as token of appreciation for your service with the Company. You are also required to prepare handover notes to your immediate superior prior to your departure date. = 22, 815. *more*

The company would also like to take this opportunity to wish you the best in your future employment endeavours.

Please acknowledge receipt and understanding of the contents of this letter by signing on the duplicate copy of this letter and return the same to us for record purposes.

Thank you

Yours faithfully,
TIME DOTCOM BERHAD

AFZAL ABDUL RAHIM
Chief Executive Officer

c.c. : Personal File (TT2968)

I, *Rosli Ibrahim* (Emp. ID *2968*) hereby acknowledge the acceptance and understanding of the contents of this letter.

Employee Signature

15/12/08

Date

The 2nd Claimant was also invited to apply for VSS *vide* a letter dated 04.12.2008 and he accepted the invitation. The same goes with 2nd Claimant where he alleged that he was forced by COW1 on 12.12.2008 to accept the VSS or he will be retrenched by Christmas. COW1 denied the allegation and said that he never met the 2nd Claimant on 12.12.2008.

Referring to the evidence of CLW2 in CLW-WS2 which is almost similar to CLW1's evidence in CLW-WS1. Their evidence in Q&A no. 4 are exactly the same. In Q&A no. 6 the 2nd Claimant testified that:

“The company would retrenched me by or before Christmas of 2008 if did not accept VSS. Therefore due to short time period I had no option but to accept the VSS otherwise I will be terminated.”.

In cross examination CLW2 admitted that the content of the letter (page 25 COB) dated 04.12.2008 was explained to him. The calculation was shown but he disagree with the amount.

Referring to letter from CLW2 to CEO dated 09.12.2008 (page 26 COB) asking for extention of accepting VSS. Agree that in the letter he did not say that he is disagree with the calculation and also not mention that he refused to leave. Letter at page 26 did not challenged the reason given by the Company to conduct VSS. In a letter dated 04.12.2008 (page 25 COB) he signed acknowledged and accept and understand the content of the letter. CLW2 did not sign this letter under protest or without prejudice basis.

In a letter dated 15.12.2008 (page 27 COB) CLW2 signed and accepted the letter on 16.02.2008. He did not complain to CEO or Board of Director that he was force to accept the VSS and confirmed received the amount RM143,630.00.

 **27**

PRIVATE & CONFIDENTIAL

Our Reference: TDC/HCOD.TR/004/08 (058)
15 December 2008
EN. RAIMEE AHMAD
Present

TIME dotCom Berhad (413292-P)
Level 1, Wisma TIME, 249 Jalan Tun Razak
50400 Kuala Lumpur, Malaysia
Tel +60 3 2720 8000
Fax +60 3 2720 0199
www.time.com.my

Dear *Raimee*,

APPLICATION UNDER THE COMPANY'S VOLUNTARY SEPARATION SCHEME (VSS)

We refer to your recent VSS application dated 12 December 2008. The company is pleased to inform you that we have accepted your application under this scheme and in accordance with the terms proposed under the scheme, you will be paid a gross compensation amount totaling RM 143, 630 (Ringgit Malaysia : **One Hundred Forty Three Thousand and Six Hundred Thirty Only**) less statutory deductions and any outstanding amount due to the Company. The compensation amount comprises of basic salary plus fixed allowance multiplied by years of service, 3 months notice in lieu and unutilized annual leave of 7.5 days. Please refer to Attachment 1 for details.

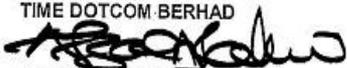
Your last working date with the company shall be on **17 December 2008** and your last effective employment date shall be on **31 December 2008**. The Company has organized a career counseling session for you which date and time will be informed in due course. The VSS compensation amount will be credited to your account upon completion of the session and you have successfully handed over all company's related property.

Kindly return the completed Exit Interview Form and Exit Check List to Human Capital & Organizational Development Division prior to your departure date. Please refer to Attachment 2 and 3 respectively for the said forms. The Company is giving the Notebook currently assigned to you as token of appreciation for your service with the Company. You are also required to prepare handover notes to your immediate superior prior to your departure date.

The company would also like to take this opportunity to wish you the best in your future employment endeavours.

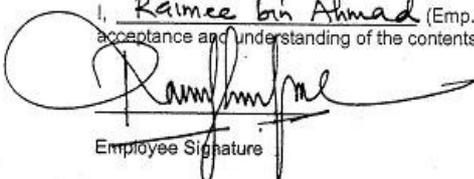
Please acknowledge receipt and understanding of the contents of this letter by signing on the duplicate copy of this letter and return the same to us for record purposes.

Thank you

Yours faithfully,
TIME DOTCOM BERHAD

AFZAL ABDUL RAHIM
Chief Executive Officer

c.c. : Personal File (TT3029)

I, *Raimee bin Ahmad* (Emp. ID *TT 3029*) hereby acknowledge the acceptance and understanding of the contents of this letter.


Employee Signature

16/12/08
Date

On the allegation, that the restructuring exercise was not genuine the court find that it is with no basis. The company has explained the situation as per the evidence explained of COW1. The Claimants also alleged that the Company has large liquid asset valued RM654 million arising out of its sale of the 3G license to Digi Telecommunication Bhd in November 2007. Referring to page 144 COB the Company has explained that Digi share of 22.5 million was sold and the proceed was used to pay the bank loan.

Refer to page 11 to 20 of CLB4 CLW1 agree that CLB4 is the circular issued to shareholders of Time Dot Com to explain the rational why the Company wanted to acquires the Company listed at page 14 CLW-WS1. These rational was table at the AGM (see: CL3 page 74 the last 3 paragraph).

Here the court finds that the Claimant's allegation has no basis. The Company has given their explanation and whether it is accepted by the Claimant is not an issue. Following the VSS exercise in 2008, there was a 2nd VSS exercise conducted for all the employees in August 2009, under this exercise 227 employer had opted for VSS. According to COW1 out of 19 Senior General Manager and General Manager, 7 rejected the invitation. Those who rejected were not retrenched where 4 out of 7 still with the company.

The Company admits that it hired new management employee after the VSS exercise in January to February 2009. This was done in light of the new business direction that was being charted from the organization that involved the creation of new business division, namely the Customer Intimacy, Network and System Planning Project and Operational Support Service Management, Business IT and turn around Team Division. COW1 further explain that the reorganization exercise involved the collapsing and merging of certain business division.

Based on the above explanation, the court is of the view that the reorganization of the Company which result in redundancies for certain level and division was *bona fide*. As can be seen from the evidence that COW1's appointment as CEO of the Company on 07.10.2008 was made with the specific objective of turning the Company around with the hope of profiling it on the path towards profitability.

It is also important to note that as a Senior Manager both the Claimants are aware of the Company's situation and the fact that their divisions was effected. They were given the opportunity to participate in the VSS exercise. The evidence shows that COW1 has met the Claimants individually to explain the content and the rationale of the letter dated 04.12.2008 issued to them. It is not in dispute that both the Claimant had accepted the VSS offer as well as the payment. However they alleged that they were forced by COW1 to accept the VSS offer, if not they will be retrench before Christmas.

It is trite law that the burden of proving that they were forced into accepting the VSS offer lie on the Claimants. Mere allegation or insinuation are not sufficient to discharge this burden of proof. If they fail to do so then there is no dismissal for the purpose of section 20 of Industrial Relation Act. When a workman submitted a VSS application he is said to make an offer to the Company. When it is accepted by the Company, there is said to be a mutual agreement to bring this their employment to and end which in effect is not a dismissal. See case of *Mariana bt Hassan v. British American Tobacco (M) Bhd* (Award No. 781 of 2008) and *Ahmad Fazran Aziz and 5 others v. Dynacraft* [2010] 2 LNS 0055.

In the instance case the court find that the Claimants has fail discharge the burden of proof that they were forced to accept the VSS. They have signed the

letter and accepted the VSS offer together with the payment without any complaint. It is the court's finding that the employment of the claimant was terminated by mutual agreement.

Conclusion

Having considered the evidence in totality, this court acting according to equity and good conscience on the substantial merit of the case finds that there was a genuine redundancy. This court is satisfied that the dismissal had been with just cause or excuse. The claim of both claimants are accordingly dismissed.

HANDED DOWN AND DATED THIS 18th DECEMBER 2013

(ROSENANI BINTI ABD RAHMAN)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
AT KUALA LUMPUR