

**IN THE INDUSTRIAL COURT OF MALAYSIA
[CASE NO: 5(20)/4-2727/21]**

BETWEEN

FIONA LIU ANAK JAPOK

AND

ROBINSON & CO. (MALAYA) SDN. BHD.

**(Heard together with Industrial Court Case Number : 5/4-1473/21,
5(20)/4-2726/21 and 5(20)/4-2728/21)**

AWARD NO: 325 OF 2024

Before : **Y.A. TUAN AHMAD ZAKHI BIN
MOHD DAUD- Chairman**

Venue : **Industrial Court, Kuala Lumpur.**

Dates of Reference : 15.04.2021,28.05.2021, 21.06.2021.

Dates of Mention : 28.07.2021, 03.09.2021, 05.10.2021,
02.11.2021, 01.12.2021, 21.01.2022,
23.02.2022, 31.05.2022, 26.07.2022,
30.08.2022, 20.09.2022, 17.10.2022,
23.05.2023, 11.07.2023

Dates of Hearing : 01.08.2023, 02.08.2023, 03.08.2023

Representation : *For the Claimants - Masura Mustafa;
M/s Nazri Aziz, Masura, Mak & Tan*

*For the Company - Simon CK Hong &
Daphne Ngo Jun Yan; M/s Josephine,
LK Chow & Co.*

Reference

These are references made under subsection 20 (3) of the Industrial Relations Act 1967 (“Act”) arising out of the dismissal of Mohd Ismadi bin Mohd Isa & 69 others, Azrulazlan bin Abdul Hamid, Fiona Liu anak Japok and Zaheerah Norzaisha binti Ruslan (“Claimants”) by Robinson & Co. (Malaya) Sdn. Bhd. (“Company”) on the 15.04.2021, 28.05.2021 and 21.06.2021 respectively.

AWARD

[1] The references in these cases required the Court to hear and determine the Claimants’ complaint of dismissal by the Company on 30.11.2020 and 31.12.2020 respectively.

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

- (a) Statements of Case dated 23.01.2023;
- (b) Statements in Reply dated 21.03.2023;
- (c) Claimants’ Bundle of Documents - CLB-1, CLB-2, CLB-3, CLB-4;
- (d) Company’s Bundle of Documents - COB-1, COB-2;
- (e) Claimants’ Witness Statement - CLWS-A & CLWS-B (Mohd Azri bin Amran)
- (f) Company’s Witness Statement - COWS-1 (Ting Ying Yi)
- (g) Claimants’ Written Submission and Reply
- (h) Company’s Written Submission and Reply

Background

[3] The disputes before this Court are the claims by the Claimants that they had been dismissed from their employment without just cause or

excuse by the Company on the said respective dates.

[4] On the said respective dates, the Company's Interim liquidator issued termination letters to the Claimants informing them that they are being terminated from their employment with immediate effect before or upon the voluntary winding up of the Company, which had gone out of business and closed its business operations during the Covid-19 pandemic period and its lockdowns.

[5] The Company was wound up on 24.11.2020 and a liquidator was appointed for the Company.

[6] The Claimants contended that the Company's termination exercise was done in bad faith and without just cause or excuse.

The Duty of the Industrial Court

[7] The Supreme Court in the case of *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 CLJ (Rep) 298 held that:

“When the Industrial Court is dealing with a reference under s. 20, the first thing that the court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse.”.

[8] The Federal Court in the case of *Goon Kwee Phoy v. J & P Coats (M) Bhd* [1981] 2 MLJ 129 held that:

“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 Burden of Proof

[9] The High Court in the case of *Weltex Knitwear Industries Sdn. Bhd. v. Law Kar Toy & Anor* (1998) 7 MLJ 359 held that:

“ The law is clear that if the fact of dismissal is not in dispute, the burden is on the company to satisfy the court that such dismissal was done with just cause or excuse. This is because, by the 1967 Act, all dismissal is prima facie done without just cause or excuse. Therefore, if an employer asserts otherwise the burden is on him to discharge ”

The Standard of Proof

[10] In the case of *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314, the court laid down the principle that the standard of proof that is required is one that is on the balance of probabilities.

“ Thus in hearing a claim of unjust dismissal, where the employee was dismissed on the basis of an alleged criminal offence such as theft of company property, the Industrial Court is not required to be satisfied beyond a reasonable doubt that such an offence was committed. The standard of proof applicable is the civil standard, ie, proof on a balance of probabilities which is flexible so that the degree of probability required is proportionate to the nature and gravity of the issue. ”

Claimant’s Case

- [11] (a) The Claimants dispute the contents of the termination letters.
- (b) The termination was carried out abruptly and summarily, without prior warning, notice or discussion.
- (c) The Company failed to comply with the “Code of Conduct for Industrial Harmony”.

- (d) The Company action was arbitrary, unconscionable, harsh and mala fide.
- (e) The Company never offered for any alternative or benefit prior to their termination.
- (f) The Company failed to make any attempt for deployment of the Claimants in any of the company under the same group of company.
- (g) The retrenchment was in violation of fair labour practices and carried out without just cause or excuse.
- (h) The Company's action had breached all rules of natural justice.
- (i) The Claimant's termination simpliciter is against the provisions of the Act.
- (j) The Claimants were victim of discrimination as the management had a hidden agenda.
- (k) The decision to dismiss the Claimants was against all notions of equity and good conscience.
- (l) The Claimants contend that the Company's conduct was an unfair labour practice.

Company's Case

[12] (a) The Claimants are the Company's former employees, whose employments were terminated immediately before or upon the voluntary winding up of the Company, which had gone out of business and closed its business operations during the Covid- 19 pandemic period as a result of the lockdowns.

(b) The Company was wound up on 24.11.2020 and a liquidator was appointed.

(c) The liquidator ceased the Company's business at its 2 premises of "Shoppes at Four Season Place Kuala Lumpur" and "The Gardens Mall" on 18.11.2020 and 30.11.2020 respectively.

(d) The Liquidator further extended the Company's business operations with minimal force until end of December 2020 for the purpose of liquidating the Company's remaining inventory.

(e) The Liquidator then issued letters of termination of employment to all Company's employees in November and December 2020 respectively.

(f) The Company had settled all salaries, approved claims, commissions, overtime payments, unutilised annual leave up until the date of termination due to the Claimants. The Company also advised that the Claimant's other entitlements and/or debts shall fall within the liquidation process as unsecured debts.

(g) Following the creditors' voluntary winding up of the Company due to its liabilities, all Company's business operations had ceased to exist.

(h) The global outbreak of the Covid-19 coronavirus coupled with the government's impositions of extended restrictions (Movement Control Orders (MCO) from 18.03.2020 to 30.04.2020 and the Control Movement Control Orders (CMCO) from 01.05.2020 to 09.06.2020 and 14.10.2020 to 14.01.2021) had paralyzed the Company's entire departmental store business and financial position.

(i) The Company was unable to reasonably foresee and prepare for the sudden business disruption. Despite the best efforts to weather the challenging circumstances, the Company no longer able to resolve the mounting liabilities owing to its numerous creditors. The termination of the Claimants' employment is in consequent of a genuine closure of its entire business, without any elements of bad faith or victimization.

(j) An interim Liquidator was appointed on 23.10.2020 and the Company held a virtual townhall session with all its employees on 30.10.2020, announcing that the Company will be placed in voluntary liquidation under the Interim liquidator. The Company also notified all employees, including the Claimants that the Interim liquidator would take control of the Company's affairs before proceeding to wind up the Company's administration. The Liquidator's representatives had also provided written notification to all employees of the Liquidator's appointment.

(k) On the requests of the employees, the Interim liquidator and/or his representatives held meetings with the employees on 07.11.2020 and 09.11.2020 at the Company's premises, with the assurances that the employees will be paid their respective salaries, allowances, claims, overtimes, commissions and statutory payments during the liquidation period.

(l) The termination of the Claimant's employment was due to the Company's genuine closure of business. Matters and principles pertaining to retrenchment or redundancy are immaterial to the instant case. Reinstatement of any of the Claimants also became impossible.

(m) It was impossible for the Company to offer any alternate employment, termination benefits or separation scheme, on the premise that its entire business ceased to exist after December 2020. Any payment of compensation or agreement for a separation scheme by the Liquidator on behalf of the Company would be in contravention of the provisions of the Companies Act 2016 relating to the preferential payments.

(n) It is not disputed that Alfuttaim Holdings Malaysia Sdn. Bhd. was the sole shareholder and remains as contributory of the Company. The Company contends that its shareholder/contributory is a separate legal entity, whereby it is under no duty to redeploy or seek new employment for the Claimants.

(o) The termination of the Claimants' employment was caused by the genuine closure of the Company's business and reasonable steps were taken by the Liquidator prior to the Company's winding up. The terminations of the employments were carried out with just cause or excuse and the Claimants' claims ought to be dismissed.

The Evidence - Company's case

[13] The sole witness for the Company is Mr Ting Ying Yi ("COW-1"), the Senior Manager at RSM Corporate Restructuring (Malaysia) Sdn Bhd. He testified among other thing that:

- (a) The Company was wound up in 2020.
- (b) In 2020, there was a global outbreak of the Covid-19 coronavirus. The government has imposed lengthy movement restrictions to curb the spread of virus that is the Movement Control Orders (MCO) from 18.03.2020 to 30.04.2020, the Controlled Movement Control Orders (CMCO) from 01.05.2020 to 09.06.2020 and 14.10.2020 to 14.01.2021.
- (c) The Company was unable to foresee and prepare for the sudden business disruption. The Company was no longer able to resolve the mounting liabilities from its creditors. This paralyzed the Company's entire retail business and its financial position.
- (d) The Company's directors then declared that the Company cannot continue its business on 30.10.2020 and an Interim Liquidator was appointed.
- (e) On 30.10.2020, the Company held a virtual townhall session with all employees. During the session, the Company announced that it had been placed in voluntarily liquidation and informed its employees that the Company's affairs will be managed by Interim liquidator.
- (f) During meetings between employees and liquidator on

07.11.2020 and 09.11.2020, the employees were given assurances that they would be paid their salaries, allowances, claims, overtimes, commissions and statutory payments owing to them.

- (g) On 24.11.2020, a meeting was held between the Company and its creditors. The majority of the Company's creditors voted in favour of appointing the Interim liquidator as the Company's liquidator.
- (h) At the same time, the Company was wound up by way of Creditors' Voluntary Winding-up in accordance with section 439(1)(b) of the Companies Act 2016 and the liquidator was appointed to wind up the affairs and distribute the Company's assets.
- (i) The liquidator ceased the Company's business operations namely "Shoppes at Four Season Place Kuala Lumpur" on 18.11.2020 and "The Gardens Mall" on 30.11.2020.
- (j) The liquidator extended a small part of the Company's business operations with a minimal workforce until the end of December 2020 in order to liquidate the Company's remaining inventory.
- (k) Between November and December 2020, all employees were terminated due to the closure of the business at the respective business premise. The closures were carried out in stages and the dates of termination are listed in Annexure "CL-2" of the Statement of Case.
- (l) The liquidator then had arranged for the Company to settle all salaries, approved claims, commissions, overtime payments, unutilised annual leave up until the Claimant's respective dates of termination.
- (m) The liquidator had taken reasonable steps in giving notice to

all employees at the earliest opportunity and meetings to provide explanations.

- (n) The terminations of the Claimant's employments was unavoidable in consequence of the closure of business and liquidation of the Company as a result of the unexpected circumstances. It is the duty and responsibility of the liquidator to prevent the Company from incurring additional debts and with the Company's dire financial situation, it was no longer feasible to carry on the business of the Company.
- (o) The terminations of the Claimant's employments were carried out with just cause and excuse. It remains impossible for the Company to reinstate any of the Claimants to their former employment since there is no longer a retail business or a Company to reinstate them into.

The Evidence - Claimants' case

[14] Only Claimant Mohd Azri bin Amran ("CLW-1") testified for the Claimants. He is one of the Claimants in the case of 5/4-1473/21, 5(20)/4-2726/21, 5(20)/4-2727/21 and 5(20)/4-2728/21. The parties and their counsels are agreeable to be bound by the testimony of CLW-1 during the cross-examination and re-examination in view of the same issues on terminations of employments.

He testified in "Bahasa Melayu" among other thing that:

- (a) "Beliau dan kesemua Yang Menuntut di dalam kes No.5/4-1473/21 telah memulakan perkhidmatan di Syarikat sepertimana di lampiran CL-3"
- (b) "Surat-surat penamatan perkhidmatan yang dikeluarkan oleh Syarikat kepada kesemua Yang Menuntut di dalam kes ini bertarikh 30.10.2020, 18.11.2020, 30.11.2020 dan 28.12.2020"
- (c) "Pihak Syarikat tidak pernah mengadakan sebarang

perbincangan atau memberi sebarang amaran untuk melaksanakan proses pemberhentian kerja dan ia dilakukan secara tiba-tiba. Surat tamat perkhidmatan yang dikeluarkan kepada kami adalah berkuatkuasa secara serta merta”

- (d) “Penamatan kerja oleh Syarikat kepada semua Yang Menuntut di dalam kes ini adalah tidak adil kerana gagal mematuhi “Code of conduct for industrial harmony” dan sebab-sebab berikut:
 - (i) Tidak merujuk kepada Kementerian Sumber Manusia;
 - (ii) Tiada Tindakan pengurangan kos sebelum menamatkan perkhidmatan Yang Menuntut;
 - (iii) Gagal memberi notis mengenai penamatan kerja;
 - (iv) Tiada perbincangan atau menawarkan pampasan atau tempoh notis;
 - (v) Gagal memberi peluang pekerjaan di syarikat yang dimiliki Alfuttaim Holdings Malaysia Sdn. Bhd. dan
 - (vi) Tidak mengambil sebarang tindakan/usaha membantu Yang Menuntut mendapatkan pekerjaan baru”
- (e) “Kami tidak menerima sebarang jemputan untuk menghadiri “townhall meeting” pada 30.10.2020 dan juga tidak hadir pada “townhall meeting” tersebut”
- (f) “Kami tidak dimaklumkan mengenai Mesyuarat Pemiutang pada 24.11.2020 dan keputusan undian serta tiada pengetahuan mengenai mesyuarat tersebut. Kami telah ditamatkan perkhidmatan sebelum mesyuarat tersebut iaitu seawal 30.10.2020 dan kemudian pada 18.11.2020”
- (g) “Tiada sebarang perjumpaan/ “engagement” di antara Syarikat dan Kami. Kami tidak pernah diberi nasihat untuk

mendapatkan pekerjaan baru dan tiada sebarang tawaran untuk surat rekomendasi. Kami ditamatkan perkhidmatan secara tiba-tiba dan telah diberikan surat penamatan perkhidmatan berkuatkuasa serta merta”

- (h) “Pihak Syarikat tidak pernah mengadakan sebarang perjumpaan secara lisan dan kami tidak pernah diberikan sebarang penjelasan”
- (i) “Kami tidak dibayar dengan gaji notis sepertimana di dalam terma pekerjaan”

Issues

[15] (a) Whether the termination or dismissal is with or without just cause or excuse.

(b) Whether that excuse or reason has or has not been made out.

The Findings

[16] In these cases, the facts of the Claimants’ termination are not disputed. Thus the only issue to be decided by this court is the claim by the Claimants that they had been terminated from their employment without just cause or excuse by the Company.

[17] The burden of proof lies on the Company that the Claimants had been terminated with just cause or excuse on the balance of probabilities.

[18] If the Company chooses to give a reason for the action taken by the Company, the duty of the Industrial Court will be to enquire whether that reason has or has not been made out.

[19] In the termination letters dated 18.11.2020, 30.11.2020 and 28.12.2020 respectively, (CLB1 pages 1-136), the Company gives reason that the Claimants were terminated because the Company had decided to cease its business operations due to its liabilities.

[20] In 2020, there was a global outbreak of the Covid-19 coronavirus.

The government has imposed lengthy movement restrictions to curb the spread of virus. The Company was unable to foresee and prepare for the sudden business disruption.

[21] The Company had adduced evidence to show that it had faced financial hardship namely losses (as stated in para 13 (c),(d),(g) and (h) above).

[22] The Company was no longer able to resolve the mounting liabilities from its creditors. This paralyzed the Company's entire retail business and its financial position.

[23] The Company's directors then declared that the Company cannot continue its business on 30.10.2020 and an Interim liquidator was appointed (COB1 pages 1-2).

[24] The newly appointed Interim liquidator then advised the Company's Trade Union of Employees of its appointment pursuant to a Company's Directors resolution and the inability of the Company to continue its business (COB1 pages 59-61).

[25] The Company's Union was also informed that the Company's Management had summoned a townhall session on 30.10.2020 via virtual meeting with all employees to inform them the Company's decision to be placed in voluntary liquidation and the appointment of an Interim liquidator to take control of the affairs and the winding up administration of the Company.

[26] The Interim liquidator had distributed to all employees of the Company, letters notifying of its appointment and advising them the business operation of the Company (COB2 pages 5-483).

[27] On 24.11.2020, a meeting was held between the Company and its creditors. At that time, the outstanding value of claims from its creditors was RM290,715,031. The majority of the Company's creditors voted in favour of appointing the Interim liquidator as the Company's liquidator (COB1 page 3 and COB 2 page 485).

[28] At the same time, the Company was wound up by way of Creditors' Voluntary Winding-up in accordance with section 439(1)(b) of the Companies Act 2016 and the liquidator was appointed to wind up the affairs and distribute the Company's assets (COB1 pages 4-5).

[29] The fact that the Company was wound up is not disputed by the Claimants. The Claimants had obtained leave from the Kuala Lumpur High Court on 09.09.2022 to litigate the Claimants' complaint of termination by the Company.

[30] It is the Company's case that the Claimants at all material times were an employees of the Company. Thus, when the Company decided to cease its business operations, the Claimants were given a termination letter.

[31] In *Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109, the court took the view that the closure of a restaurant within the Hotel was proper as it was facing financial losses. The court held that a termination resulted from a proper closure of business will not impose a legal obligation for the employee to be paid.

[32] In the case of *William Jacks & Co. (M) Sdn. Bhd. v. S Balasingam* [1997] 3 CLJ 235, the Court of Appeal held that:

“ 'Retrenchment' has been defined as the discharge of surplus labour or staff by an employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action”

[33] In the case of *Pipraich Sugar Mills Ltd. v. Pipraich Sugar Mills Mazdoor Union* AIR (SC) (1957) 95 the court observed that:

"Retrenchment connotes in its ordinary acceptance that the business itself is being continued but that a portion of the staff or the labour force is discharged as surplusage and the termination of services of all the workmen as a result of the closure of the business cannot therefore be properly described as retrenchment"

[34] In the case of *Unilever (M) Holdings Sdn Bhd v. So Lai & Anor* [2015] 3 CLJ 900 the court held that:

“From the phrase “compensation in lieu of reinstatement”, it is our judgment that the element of compensation will only arise when the employees is in a position or situation to be reinstated. It is a condition precedent to such compensation. Our view is fortified by the clear provision of s. 20(1) of the IRA 1967, where the primary remedy of such a presentation to the Director General is for the workman “to be reinstated in his former employment”... After all, reinstatement is a statutorily recognized form of specific performance can only be ordered in a situation where the legal basis for such performance does exist. One cannot substitute when the one to be substituted does not or cannot exist. This can be seen in the legal maxim: “lex non cogit ad impossibilia”, ie the law does not compel the impossible.”

[35] Thus, the Claimants were terminated as a result of the closure of the Company’s business and cannot be described as retrenchment where the business is being continued. The Claimants are in no position to be reinstated. The closure of the Company’s business was due to its inability to resolve the liabilities from its creditors amounting to RM 290,715,031. This had resulted the creditors petitioned for the Company to be wound up and a liquidator appointed to wind up the affairs and distribute the Company’s assets. The termination of the Claimants were carried out with just cause and it has been made out.

[36] Based on the whole evidence adduced and having regard to the written submissions and bearing in mind subsection 30(5) of the Act to act according to equity, good conscience and the substantial merits of the cases without regard to technicalities and legal form, the Court finds, the Company had discharged its burden of proving that the Claimants were terminated with just cause or excuse on a balance of probabilities. Thus, the Claimants’ cases are hereby dismissed.

HANDED DOWN AND DATED THIS 27 DAY OF FEBRUARY 2024

**(AHMAD ZAKHI MOHD DAUD)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR**