IN THE INDUSTRIAL COURTS OF MALAYSIA
[CASE NO: 13/4 – 627/22]

BETWEEN

LIM PEK CHOO

AND

SUNRISE TOURS & TRAVEL SDN. BHD.

AWARD NO. 1530 OF 2024

BEFORE	**:**	**Y.A. PUAN SELVA RANI THIYAGARAJAN - Chairman (Sitting Alone)**
VENUE	**:**	Industrial Court of Malaysia, Kuala Lumpur
DATE OF REFERENCE	**:**	02.03.2022
DATES OF MENTION	**:**	11.04.2022, 17.05.2022, 06.06.2022, 07.06.2022
DATES OF HEARING	**:**	20.02.2023, 21.02.2023, 15.03.2023, 16.03.2023 31.05.2023
REPRESENTATION	**:**	*For the claimant - Lim Pek Choo*
	:	*For the claimant - Teh Hong Jet; M/s Tan Kim Siong & Teh Hong Jet*
	:	*For the company - Edward San & Kevin Chin; M/s Josephine L K Chow & Co*

REFERENCE

This is a reference made under Section 20(3) of the Industrial Relations Act 1967 (Act 177), arising out of the dismissal of **LIM PEK CHOO** (hereinafter referred to as "the Claimant") by **SUNRISE TOURS & TRAVEL SDN. BHD.** (hereinafter referred to as the Company") on **02 March 2022.**

AWARD

[1] The Reference, in this case, required the Court to hear and determine the Claimant's complaint of dismissal by the Company on 31 July 2021.

I) PROCEDURAL HISTORY

[2] The matter was fixed for mention on 11 April 2022, 17 May 2022, 06 June 2022 and 07 June 2022.

[3] The case was fixed for hearing on 20 February 2023, 21 February 2023, 15 March 2023, 16 March 2023 and 31 May 2023.

II) CAUSE PAPERS, BUNDLE OF DOCUMENTS, WITNESS STATEMENTS, AND SUBMISSION

[4] This Court takes cognizance of the notes of proceedings and the following pleadings, evidence, documents, and submission while handing down this Award: -

a. Statement of Case dated 22 April 2022;

b. Statement in Reply dated 04 July 2022;

c. Rejoinder dated 17 August 2022;

d. Claimant's Bundle of Documents ("CLB-1");

e. Claimant's Bundle of Documents Volume 2 ("CLB-2");

f. Company's Bundle of Documents Volume 1 ("COB-1");

g. Company's Bundle of Documents Volume 2 ("COB-2");

h. Company's Bundle of Documents Volume 3 ("COB-3");

i. Company's Bundle of Documents Volume 4 ("COB-4");

j. Witness Statement of Claimant (Lim Pek Choo) ("CLWS – 1");

k. Witness Statement of Company (Naoki Baba) ("COWS – 1");

l. Additional Witness Statement of Company (Naoki Baba) ("COWS – 1A");

m. Claimant's Submission;

n. Company's Submission;

III) THE PARTIES POSITION ON THE MERITS OF THE CASE

A) THE CLAIMANT'S CASE

The Claimant in its Statement of Case and Rejoinder pleaded the following: -

[5] The Claimant began her employment with the Company as the General Manager of the Company effective of 01 August 2020 with a monthly salary of RM 7,500.00.

[6] The Claimant avers that in fact she and her team (comprising 4 Malaysians and 1 Japanese) had started working for the Company in July 2020.

[7] The Claimant was confirmed in her position as General Manager as of 01 October 2020.

[8] On 20 June 2021, Mr. Baba Naoki, the Managing Director of the Company, informed all the staff that the Company's business operations

had been greatly affected since late January 2020 in view of the Coronavirus (COVID-19) pandemic and there was no revenue generated until the present date.

[9] Hence the Company wished to implement the following two options namely Voluntary Separation Scheme (VSS) for 8 staff subject to management approval and management selection by following the rule of FWFO {foreigner worker first out) and LIFO (last in first out) or a 50% reduction of salary until further notice for staff willing to stay with the Company. The Claimant had agreed to accept the Voluntary Separation Scheme (VSS) jointly with her team.

[10] Vide a letter dated 01 July 2021, the Claimant was informed inter-alia that her last day of employment would be 31 July 2021 and she would be paid a compensation sum of RM 22,500.00 under the voluntary separation scheme.

[11] The Claimant's last drawn basic salary at the material time was still RM 7,500.00 per month.

B) THE COMPANY'S CASE

The Company in its Statement of Reply pleaded the following: -

[12] Due to the Covid-19 pandemic, the Movement Control Orders and the consequential halt on international travel, the Company was operating at a loss since January 2020.

[13] Despite the Company having been forced to implement cost-cutting measures since May 2020 including a 20% pay cut across the board in July 2020 and a VSS exercise in October 2020, the Company had continued to face financial constraints.

[14] As a result, the Company decided to venture into the Business Travel Management field with the hope that this would help the Company to generate more sales and to sustain its business. This led to the Company hiring the Claimant and her team to set up the JCKL Branch. Nonetheless,

the sales generated through the JCKL Branch was insufficient to cover the operating expenses and overhead of the Company itself. As a consequence, the Company had continued to suffer losses.

[15] Given the dire financial difficulties faced by the Company, the Company had no option but to consider carrying out a 2nd VSS exercise which was open to all its employees in June 2021 and to implement a further pay cut for the remaining employees.

[16] The letter that was eventually issued and announced to the employees was the letter dated 22 June 2021 ("the Letter dated 22 June 2021").

[17] As the then General Manager of the Company, the Claimant was involved in all the discussions pertaining to the 2nd VSS exercise and well aware of all the above.

[18] The Company's 2nd VSS exercise was offered to all 16 employees of the Company in its Headquarters and the JCKL Branch, and all the employees were given time to decide whether or not to voluntarily take up the VSS offer. For this 2nd VSS exercise, the Company's target was a reduction of headcount by 8 employees.

[19] The Company, whether by itself or through Mr. Naoki Baba, had never requested the Claimant and/or her team member to follow the LIFO principle and accept the VSS offer.

[20] As a matter of fact, the Company had informed the Claimant on numerous occasions that the Company had only intended for the rules to apply in the event that more than 8 employees applied whereupon it would become necessary for the Company to select the applications for approval.

[21] The Claimant and all her team members had volunteered and applied to take up the VSS offer of their own volition. Their applications were subsequently approved and all applicants, including the Claimant, had accepted their severance payments without protest.

[22] The Company states that the compensation sum of RM22,500.00 was paid to the Claimant together with her salary for July 2021 by way of

remittance to the Claimant's designated bank account on 09 September 2021.

[23] The Company further reiterates that the termination of the Claimant's employment was brought about by the Company's acceptance of her voluntary application to take up the Company's VSS offer. The Company strenuously denies the Claimant's allegation that the VSS exercise conducted was "non- genuine" and will put her to strict proof thereof.

IV) THE ROLE OF THE INDUSTRIAL COURT

[24] This Court refers to the case of *MILAN AUTO SDN BHD v. WONG SHE YEN* [1995] 3 MLJ 537 where his Lordship Justice Mohd Azmi bin Kamaruddin FCJ (as he was then) delivered the judgment that recapitulated the role of the Industrial Court as follows:

> " *The function of the Industrial Court in dismissal cases on a reference under s. 20 is two-fold. It must determine whether the misconduct complained of by the employer has been established, and secondly, whether the proven misconduct constitutes just cause or excuse for the dismissal. Failure to determine these issues on the merits is a jurisdictional error that merits interference by the High Court by way of certiorari. Further, the Industrial Court would be acting in excess of jurisdiction if it changed the scope of reference by substituting its own reason, that is to say a reason not relied upon by the employer for the dismissal."*

[25] His Lordship Raja Azlan Shah, CJ (as he was then) in the Federal Court case of *GOON KWEE PHOY v. J &P COATS (M) BHD* [1981] CLJU 30; [1981] 1 LNS 30 opined as follows: -

> *"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 inquiry 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."

V) THE BURDEN OF PROOF

[26] The Company disputes the claim by the Claimant regarding her dismissal, namely that she had left the job voluntarily after accepting the VSS, therefore there is no dismissal of the Claimant's employment.

[27] In the present case, the burden of proof will be borne by the Claimant and this is explained by the *Learned Chairman Ahmad Terrirudin Mohd Salleh* in the case of *NORTH SOUTH DEVELOPMENT SDN BHD v. ALOYSIES FATHIANATHAN* [2012] ILRU; [2012] 2 ILR referred to the Court of Appeal case of *WELTEX KNITWEAR INDUSTRIES SDN BHD v. LAW KOR TOY* [1998] 7 MLJ 359 where *His Lordship Abdul Kadir Sulaiman J e*xplained the burden of proof in a situation where the dismissal is disputed: -

"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 without 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. However, where the fact of dismissal is in dispute, it is for the workman to establish that he was dismissed by the employer. if he fails, there is no onus whatsoever on the employer to establish anything for in such situation no dismissal has taken place and the question of it being with just cause or excuse would not arise (see: Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ (Rep) 298.

In his judgment, His Lordship referred to the book entitled Cases and Materials on resignation Transfer and Suspension by Prof SB Rao that had quoted the following passage from the case of Tata Robinson Fraser Co Ltd v. Labour Court.

"To make out a case that his resignation was obtained under undue influence, misrepresentation, fraud or the like, the employee has to establish that he was not allowed time to think over the matter, not allowed to come out of the office but was physically restrained and he had signed under protest.".

[28] In the current case, the burden of proof is therefore placed on the Claimant to show that she was indeed dismissed from her employment.

[29] Once the Claimant successfully proves the elements of dismissal, the burden will shift to the Company to prove the just cause or excuse for the dismissal of the Claimant.

VI) STANDARD OF PROOF

[30] The Court of Appeal, in the case of *TELEKOM MALAYSIA KAWASAN UTARA v. KRISHNAN KUTTY SANGUNI NAIR & ANOR* [2002] 3 CLJ 314, laid down the principles that the standard of proof in the Industrial Court is on the balance of probabilities: -

"Thus, we can see that the preponderant view is that the Industrial Court, when hearing a claim of unjust dismissal, even where the ground is one of a dishonest act, including "theft," is not required to be satisfied beyond reasonable doubt that the employee has " committed the offense," as in criminal prosecution. On the other hand, we see that the courts and learned authors have used such terms as "solid and sensible grounds," "sufficient to measure up to a preponderance of the evidence," " whether a case has been made out", "on the balance of probabilities" and " evidence of probative value."

In our view, the passage quoted from Administrative Law by H.W.R Wade & C.F. Forsyth offers the clearest statement on the standard of proof required, that is, the civil standard based on the balance of probabilities which is flexible so that the degree of probability required is proportionate to the nature of gravity of the issue."

[emphasis added]

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

Since the parties have pleaded in their respective pleading of VSS, therefore this Court will examine the law of VSS.

VII) THE LAW ON VOLUNTARY SEPARATION OF SCHEME

[31] In the "*Law and Practice of Employment Law in Malaysia*" book written by *Mr. Sivabalah Nadarajah* at page 159, explained Voluntary Separation Scheme (hereafter referred to as VSS) concisely as: -

"***[6.111]*** *VSS is a scheme whereby an employer invites its employees to Voluntarily resign from their position. This would avoid the implications caused by retrenchment. In doing so, the employees would usually receive reasonable compensation. The VSS is a flexible scheme and there are no rigid rules that apply as to how the same is executed. It can be offered by the employer and any interested employees can take it up."*

[32] In the case of *AK BINDAL & ANOR v. UNION OF INDIA & ANOR* [2003] 2 LRI 837 page 609, the Supreme Court of India had succinctly laid down the governing principles for VSS as:

"The Voluntary Retirement Scheme (VRS) which is sometimes called Voluntary Separation Scheme (VSS) is introduced by companies and industrial establishments in order to reduce the surplus staff and to bring in financial efficiency….

The whole idea of implementing VRS is to save costs and improve our productivity. The main purpose of paying this amount is to bring about a complete cessation of the jural relationship between the employer and the employee. After the amount After the amount is paid and the employee ceases to be under the employment of the company or the undertaking, he leaves with all his rights and there is no question of him again agitating for any kind of his past rights, with his erstwhile employer including making any claim with regard to enhancement of pay scale for an earlier period..."

[33] Clause 22 of the Code of Conduct for Industrial Harmony (CCIH) (1975) encourages Companies to adopt VSS and can be seen as follows: -

"Clause 22

(a) If retrenchment becomes necessary, despite having taken appropriate measures, the employer should take the following: -

...

(i) Introducing schemes for voluntary retrenchment and retirement and for payment of redundancy and retirement;"

[INTENTIONALLY LEFT BLANK]

VIII) ISSUES TO BE DECIDED

33A. In the case of *MOHAMMAD ANDY TOH ABDULLAH v. MULIA PROPERTY DEVELOPMENT SDN BHD* [2024] 1 MELR 76**,** the *learned Chairman, Puan Rajeswari Karupiah* stated the following as the issues to be determined: -

(i) whether there was a dismissal as claimed by the Claimant; and

(ii) if so, whether the dismissal was with or without just cause or excuse. If the Court finds as a fact that there is no dismissal by the

Company, the Court need not go further to determine if the dismissal was with just cause or excuse.

IX) THE COURT'S FINDINGS

(i) whether there was a dismissal as claimed by the Claimant; and

[34] The Claimant has pleaded in paragraph 14 of her statement of case, that the VSS program she had entered was not a genuine VSS exercise.

[35] The Claimant has ceased her employment with the Company when she had received the compensation for enrolling in the VSS exercise with the Company.

[36] The invitation to participate in the VSS exercise can be seen from "CO-3" in the Statement of Reply. The invitation was to take the VSS exercise or take a 50% pay reduction if they chose to stay with the Company.

[37] The Claimant had on her own stated her acceptance to join the VSS exercise which can be seen on page 14 of CLB-1. Her acceptance of the VSS exercise was on behalf of the Japan team.

[38] As pleaded in the Statement in Reply, the Claimant had received the payment of RM 22,500.00 together with her July 2021 salary without protest or qualified acceptance.

[39] In the case of *AK BINDAL & ANOR v. UNION OF INDIA & ANOR* [2003] 2 LRI 837 (*SUPRA*) clearly expressed: -

> "*If the employee still permitted to raise a grievance regarding enhancement of pay scale from a retrospective date, even after he had opted for Voluntary Retirement Scheme and had accepted the amount paid to him, the whole purpose of introducing the scheme would be totally frustrated."*

[40] The Federal Court in the case of *ZAINON AHMAD & ORS v. PADIBERAS NASIONAL BHD* [2012] 8 CLJ 29 stated that: -

"... We are of the view that the VSS scheme is a separate and independent contract intended to mutually override and terminate an existing contract of employment. The two contracts do not co-exist. Otherwise the very objective of VSS as adumbrated in AK Bindal (supra) is defeated. A contract which is rescinded by agreement is completely discharged and cannot be revived. It is certainly not intended that after the employee leaves under the VSS, the employee can still return to ask for other benefits under the terms of his contract of employment."

[41] In her witness statement and to Question 24, the Claimant stated that the VSS exercise was not a genuine VSS due to the reasons that firstly, because her team had generated a high volume of sales, secondly, she stated her team, had taken a 30% to 50% percentage salary cut and was promised a higher salary by the Company. And lastly, she avers that the company had ulterior motives and did not employ the Claimant and her team for a long-term purpose.

[42] Regarding the high sales, generated by JCKL, from the pages in COB-1, pages 11 to 23, the earnings of the JCKL and the Company's headquarters are displayed. The Claimant alleges that the JCKL team has a high sales volume. The cost of operating and the deduction of expenses from the revenue were not considered. It can be perceived from said document that the Company had suffered a loss of RM 28,720.96 in January 2021 and this was confirmed by COW-1's testimonial.

[43] The Claimant herself had admitted that the Company at January 2021, was not profitable.

Q: Would you at least agree that at that time, January 2021, company was not profitable.

A: Yes.

[44] The offer from the Company in the letter dated 22 June 2021 involved two options: the VSS as the first, or a second option was for the employee to agree to take a pay reduction if they are willing to stay with the

Company. In utmost importance, it is noted in the letter dated 22 June 2021 from the Company, only 8 staff were requested to join the VSS from the entire Company.

[45] The Claimant had in her testimonial admitted that it was a joint decision from her entire JCKL team to take the VSS option jointly. It is noted that none of the other team members of JCKL have filed a case in the Industrial Court against the Company for the VSS.

[46] From her cross-examination, the Claimant confirmed that she took 8 days to consider the contents of the letter offering the VSS before accepting the offer.

Q: But you were agree with me that there's no evidence on record before the court now to show that the company actually rush you to sign. In fact, isn't it true between the 16th and the 26th, you have 8 days, roughly about 8 days, a week to consider the contents of the letter, right?

A: Yes, yes.

[47] The Claimant had ample time to change, decline, or qualify the acceptance of VSS but had made a conscious decision to accept the VSS offer.

[48] As can be seen in the case of *ABDUL AZIZ ISMAIL & ORS v. ROYAL SELANGOR CLUB* [2015] 2 MELR 325 held as follows: -

> *"**(2)** The club informed the claimants that their application upon the terms and conditions of the VSS had been accepted by the club together with the payments due to them. The acknowledgement of the claimants by their own signatures was proof of receipts. In the circumstances, there was in law a mutual termination of employment in accordance with the terms and conditions of the VSS. Consequently, there were no dismissals of the claimants by the club. (para 25)"*

[49] The Claimant also signed a voluntary acceptance of the VSS offer, without protesting, rejecting, or qualifying her reply to the offer. The Claimant has admitted to this fact in her cross-examination which can be seen below: -.

Q: And can you confirm when you signed the letter at page 8 of COB-1, can you confirm that there is no record of you protesting or rejecting or qualifying your acceptance of this letter, you agree?

A: The black and white show, yes.

[50] The most interesting factor here, in this case, is the fact that the premise where the Company had originally conducted its business was subsequently taken over by the Claimant's new company Asahi Travel to conduct a similar business as the Company. The registration of the Claimant's new Company was done at a time when she was still employed by the Company. This is evident by COB-1, see page 97.

[51] The Claimant as the General Manager should be able to appreciate the consequence of accepting a VSS on behalf of her team members without protest. She nevertheless chose to do it.

[52] In the case of *ABDUL AZIZ ISMAIL & ORS v. ROYAL SELANGOR CLUB* [2015] 2 MELR 325**,** the *learned Chairman* held: -

> *"**(1)** Based on the totality of the evidence adduced, it was held that the claimants had voluntarily applied to participate in the VSS initiated by the club. When the club accepted VSS applications, it resulted in the cessation of the claimants' employment. (para 24)"*

[INTENTIONALLY LEFT BLANK]

[53] For the above-stated reasons, the VSS on the present facts cannot be deemed forced. Since the Claimant asserts that the company has forced the VSS upon her, she will need to prove it as per ***SECTION 101 OF THE EVIDENCE ACT 1950***.

"(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist."

This Court deems the Claimant has failed to proof the VSS was forced upon her.

[54] After observing evidence and testimonials presented before this Court, it is the Court's finding that the Claimant has not proven that the VSS exercise was forced, but instead, she entered the VSS voluntarily. The VSS was a separate and mutually agreed contract that override and annihilated the Claimant's contract of employment with the Company.

[55] Since the Claimant had failed to prove on a balance of probability that her VSS was forced and that also a dismissal had occurred. Thus, the burden of proof did not shift to the Company to show that such a "dismissal" was done with just cause or reason.

[56] The Court hereby dismisses the Claimant's claim.

HANDED DOWN AND DATED THIS 2ND DAY OF OCTOBER 2024

(SELVA RANI THIYAGARAJAN)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR