INDUSTRIAL COURT OF MALAYSIA
CASE NO: 14/4-716/21

Between

SHOBA NAIR A/P KOCHU NARAYANAN

And

ROCA MALAYSIA SDN. BHD.

AWARD NO. : 2328 OF 2023

Before	:	**Y.A. Puan Eswary Maree - Chairman**
Venue	:	Industrial Court Malaysia, Kuala Lumpur
Date of Reference	:	17.03.2021
Dates of Mention	:	24.05.2021; 27.01.2022; 12.10.2022 & 07.09.2023
Dates of Hearing	:	10.02.2022; 28.09.2022; 16.03.2023 & 21.06.2023
Representation	:	Mr. Vijayaraj Edward (Counsel for the Claimant) Messrs Kumar Thangaraju & Co Mr. P Jayasingam (Counsel for the Company) Messrs Zul Rafique & Partners

REFERENCE

This is a reference under Section 20(3) of the Industrial Relations Act 1967 (1967 Act) by the Honourable Minister of Human Resources, emanates from the dismissal of **Shoba Nair a/p Kochu Narayanan** ("the Claimant") by **Roca Malaysia Sdn. Bhd.** ("the Company") on 13.07.2020.

AWARD

[1] This Court will determine the issues before it and make its findings based on the pleadings, the relevant oral and documentary evidences, the notes of proceedings and submissions. The following documents were filed before this Court:-

(i) Statement of Case dated 14.06.2021;
(ii) Amended Statement In Reply dated 23.07.2021;
(iii) Rejoinder dated 18.08.2021;
(iv) Company's Bundle of Documents : COB-1;
(v) Company's Supplementary Bundle of Documents : COB-2;
(vi) Travel Authorisation Form : COB-3;
(vii) Claimant's Consolidated Bundle of Documents : CLB-1;
(viii) Claimant's Post-Dismissal Documents : CLB-2;
(ix) Witness Statement of Diego Hernan Jolis : COWS-1;
(x) Witness Statement of Gaspe Mudiyanselage Anura Gamini Bandara Gaspe (Dr. Gaspe) : COWS-2;
(xi) Witness Statement of the Claimant, Shoba Nair a/p Kochu Narayanan : CLWS-1;
(xii) The Claimant's Additional Questions and Answers : CLWS-1A;
(xiii) The Claimant's Written Submissions dated 16.08.2023;
(xiv) The Company's Written Submission dated 16.08.2023;
(xv) The Claimant's Written Submissions In Reply dated 06.09.2023; and
(xvi) The Company's Written Submissions In Reply dated 06.09.2023

THE COMPANY'S CASE

[2] By a letter dated 23.03.2010, the Claimant was offered employment as QA Manager in the Company on 25.03.2010 subject to the terms and conditions stated therein. She was confirmed in her appointment as QA Manager on 25.06.2010.

[3] Between August 2018 and 13.07.2020, the Claimant reported to COW-1, the MD and she was based in the Company's factory at Bestari Jaya, Selangor ("Company's factory') and led the QA Department of the Company, which comprised of eight (8) employees as at July 2020.

[4] As a QA Manager, the Claimant's primary duties and responsibilities were amongst others, (i) to inspect the company's products and report the quality issues to ensure compliance to the company and quality standards; (ii) to identify misinspection and product non-conformity issues; and (iii) to facilitate proactive solutions by collecting and analyzing quality data.

[5] At the time of the Claimant's retrenchment on 13.07.2020, the Claimant's last drawn basic monthly salary was RM8,228.46.

[6] Prior to her retrenchment from service on 13.07.2020, the Claimant had seven (7) staff reporting to her.

[7] The Company's performance had been declining since 2016 due to global slowdown which affected the Malaysian economy, construction sector and oil prices, depreciation in the Malaysian Ringgit, increases in the price of natural gas which caused higher operating costs for the Company.

[8] In 2018 and 2019, the Company's performance fell below expectations despite improvement in the last quarter of 2019 where the Company made losses of approximately RM1.3 million.

[9] Consequent to the implementation of the Movement Control Order (MCO) by the Government of Malaysia on 18.03.2020, the Company's factory ceased operations with effect from 18.03.2020, which severely impacted their ability to generate revenue and caused cash flow problems for the Company.

[10] As a result of the MCO, all staff, including the Claimant, were asked to work from home between 18.3.2020 and 03.05.2020.

[11] As a result of the Company's factory having ceased operations due to MCO, the Company produced zero pieces in April and May 2020, respectively.

[12] In or about April 2020, the Company also noted that the business environment became increasingly more challenging, especially with the global outbreak of the COVID-19 pandemic as well as the imposition and enforcement of the MCO by the Government, which had contributed to a drastic decline in the Company's business to wit low sales, and low production volume.

[13] As a result of the reduction in production, loss in revenue and difficulties faced due to the COVID-19 pandemic, the Company had initiated several cost-cutting measures which includes massive reduction in investments and marketing expenditure, voluntary salary reductions for Senior Managers for three (3) months between April 2020 and June 2020, voluntary salary reductions for all other staff for two (2) months namely May 2020 and June 2020, and freeze of recruitment, to mitigate the effects of the prevailing circumstances of uncertainties in the business environment and the declining business environment.

[14] In addition to the voluntary reduction in salaries as highlighted above, which the Claimant duly accepted without any qualifications whatsoever, the Company also implemented several other cost cutting measures amongst others, non-renewal of fixed term contracts, non-replacement of workers that resigned, placement of workers on unpaid leave and reduction of workers in the Company's factory and in the Company.

[15] Upon obtaining MITI approval, the Company's factory began operating from June 2020, in stages and at a low capacity utilisation due to the drastic drop in sales orders and deliveries as well as surplus of stock in the Company warehouse.

[16] The Company also found that the demand for the Company's goods, along with the entire construction sector, had slowed down due to the COVID-19 pandemic and because of this, there was also a lot of unsold stock in the Company’s warehouse,

which meant that the Company was unable to resume production at a higher rate as the warehouse was nearly full.

[17] There was also a reduction in purchase of the Company's trade goods coupled with uncertainties in the business environment as well as a deterioration in the Company's business performance.

[18] Consequent to the MCO, there was reduced sales of approximately 56% compared to the previous year; the Company expected reduced production of approximately 63% compared to the previous year due to low sales as well as surplus of stock in the Company warehouse.

[19] The Company's production figures from February 2020 to July 2020 showed a substantial reduction if at all there was any production.

[20] Notwithstanding the Company's continued efforts to reduce costs during and after the MCO, there was no improvement in the Company's poor financial position as it still faced huge financial losses due to the drastic reduction in sales, demand and production coupled with the prevailing circumstances of uncertainties in the business environment and the Company's deteriorating business performance.

[21] As a last resort, the Company was compelled to initiate a reorganization and downsizing exercise involving specific departments with reduced or diminished workload following the drastic reduction in sales, demand and production coupled with the prevailing circumstances of uncertainties in the business environment as well as the Company's deteriorating business performance.

[22] Vide an Internal Memo dated 10.06.2020, COW-1 had informed Stephanie Murugasu (SM) that:-

(i) He had made the decision to reorganise and merge the QA Department and the Technical Department as a cost rationalization exercise as well as to improve efficiency and effectiveness based on the reduced workload in both departments following the massive reduction in production by the Company factory and reduction of purchase of trade goods coupled with the prevailing

circumstances of uncertainties in the business environment as well as the Company's deteriorating business performance ("restructuring exercise").

(ii) Both departments require a high level of product knowledge and to include the Claimant in the retrenchment plan as he had decided that Nabil would be responsible for both the Technical and QA Departments as he has all the required experience to manage both departments;

(iii) Based on the reduced workload in both departments, the Claimant would be in excess of Company requirements and therefore, the Claimant was to be retrenched from service.

[23] On 13.07.2020, the Claimant was called in for a meeting with SM, at the Company's Office at Bestari Jaya, where she was served with the letter dated 13.07.2020 titled "Retrenchment". SM asked the Claimant to read the letter and the Claimant then signed the duplicate copy of the letter. When SM asked the Claimant if she had any questions, the Claimant responded in the negative, and left the meeting room.

[24] By the said letter dated 13.07.2020 titled "Retrenchment", the Company had amongst others informed the Claimant that:-

(i) The economic situation in the country as a result of the COVID-19 pandemic has had a major impact on the financial performance of the Company;

(ii) The Company's factory had been inoperative from 18.3.2020 until 16.05.2020, and was now operating at an extremely low capacity utilization due to the lack of demand;

(iii) As a result of the sharp drop in sales orders as well as the surplus of stock in the Company warehouse, the factory would continue with very limited production for at least the rest of the year;

(iv) The Company's efforts to reduce operating costs have not yielded significant results, as the Company was still facing huge financial losses;

(v) As a last resort, the Company was forced to restructure and reduce headcount due to the drastic reduction in sales and demand;

(vi) Due to the massive reduction in production by the Company's factory and reduction of purchase of trade goods, her job functions as a full time QA Manager at the Company factory had become surplus to the Company's requirements consequent to the reorganization exercise undertaken by the Company coupled with the prevailing circumstances of uncertainties in the business environment as well as the Company's deteriorating business performance;

(vii) In the circumstances, the Company was left with no alternative but to retrench her from service with effect from 13.07.2020; and

(viii) She will be paid a total amount of RM91,905.55 subject to statutory deductions, which comprised of her salary up to 13.07.2020, three (3) months' salary in lieu of notice (notwithstanding her not being entitled to the same), payment in lieu of earned annual leave, arrears payment of voluntary salary reduction and retrenchment benefits.

[25] In addition to the said sum of RM91,905.55, the Claimant's retirement benefit was also subsequently paid to her in the amount of RM63,626.57 which payment the Claimant was not entitled to and despite this, the Company had decided to pay it to her.

THE CLAIMANT'S CASE

[26] The Company is a Spanish owned Company that produces sanitary ware under the brand names of Roca/Armani, Johnson Suisse and Econax, amongst others. The Company has its Malaysian head office in Petaling Jaya, Selangor whilst the production of their sanitary ware in Malaysia is at Bestari Jaya in which the Claimant was employed and stationed.

[27] The Claimant had excelled in her responsibilities and capabilities wherein the Company had rewarded the Claimant accordingly with the various bonuses and letters which emphasize the same.

[28] During the Claimant's employment history and her working career with the Company, the Claimant had never been issued with a warning letter or had there been any disciplinary action taken against the Claimant. This changed when the Company issued the Claimant with two (2) consecutive warning letters prior to the Claimant being served with the retrenchment letter dated 13.07.2020.

[29] The Claimant had eight (8) staff (subordinates) under her which included a Senior Quality Assurance Supervisor, five (5) Quality Assurance Technicians, a Quality Management Executive and a supervisor – Quality Management.

[30] Since August 2018 the Claimant reported directly to the new Managing Director, COW 1. The corporate Company's (i.e. Spain) policy has always been that the Quality Assurance Department should be independent of the Company's production department which is headed by the factory manager.

[31] The Claimant's function amongst others was to monitor closely the quality of all the products that is produced in the Company's factory at Bestari Jaya, Selangor where the Claimant is based, hence a KPI (product audit from BIW/month) which encourages more pieces to be audited, was an integral criteria for QA performance management, with a significant weightage since as far back as 2012.

[32] The Claimant had been unfairly victimised by the Company in relation to quality issues, the appointment and subsequent confirmation of an Assistant Quality Assurance Manager and disciplinary actions taken against her by the Company.

[33] The Claimant ha also outlined a series of actions by the Company, specifically the Human Resource Department, indicating a coordinated effort to terminate her employment as follows:-

(a) Management Reprimands and Audio Recording: The Managing Director and Human Resource Manager consistently reprimand the Claimant on trivial matters to pressure her into resignation. The Claimant records one such meeting, anticipating the Company's intent to terminate her.

(b) Unilateral Appointment of Assistant Manager: The Managing Director and Human Resource Manager confirm the appointment of an Assistant Manager without the Claimant's input. This decision alters the reporting structure within the Quality Assurance (QA) Department without the Claimant's consultation.

(c) Warning Letters and Show Cause Notice: The Claimant receives a warning letter and a notice to show cause for alleged rudeness. The Claimant responds, expressing discontent and providing explanations, but the Company rejects her response.

(d) Additional Warning Letter and Salary Issues: The Claimant receives another warning letter, to which she responds again. The Company delays responding, and the Claimant is denied a salary increase while the Assistant Manager receives one (1). The Claimant suggests this is part of a plan to undermine her.

(e) Office Changes and Retrenchment: The Human Resource Manager instructs the Claimant to alter the QA office layout. Despite no prior notice or voluntary separation scheme, the Claimant is served with a retrenchment letter, alleging it was due to her hindrance to plant productivity. The Claimant asserts unfair labor practices and violation of industrial relations principles.

(f) Objections to Retrenchment: The Claimant contends that her role as the head of the QA Department remained essential, and her functions were never redundant. She emphasizes the lack of adherence to established protocols regarding department

reorganization. The Claimant also raises concerns about potential losses in retirement benefits due to the timing of her dismissal and fund liquidation.

[34] To her knowledge, no Manager or management staff were issued with a Voluntary Separation Scheme (VSS) or even a notice of an impending retrenchment.

[35] The Company had utilised the guise of retrenchment to remove her from the Company as she had been an obstacle to the productivity numbers of the Company's factory.

[36] The Company had breached the code of conduct and failed to apply the Last in First out (LIFO) principle.

[37] Her position and job functions as QA Manager had at no material time become redundant.

[38] The Company had failed to consult her prior to implementing any reorganisation of the QA department.

[39] That the motive in retrenching the Claimant had also been to avoid paying her higher retirement benefits as the retirement benefit fund had been liquidated in December of 2020.

[40] Overall, the Claimant pleaded that the Company's actions were capricious, displaying mala fide intent through victimization and alleges breaches of industrial relations codes and fair labour practice and that her dismissal was without just cause and excuse.

THE LAW

[41] The Federal Court in **Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 344** at page 352 succinctly stated the function of the Industrial Court in dealing with dismissal cases as follows:-

> **On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under s.20 of the Act (unless otherwise lawfully provided by the terms of the reference) is to determine whether the misconduct or irregularities complained of by the management as the grounds of dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal.**

[42] The said principle was reiterated in **Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 4 CLJ 449** at pages 454 and 455 wherein in delivering the judgment of the Federal Court, His Lordship Mohamed Azmi FJ said:-

> **As pointed out by this Court recently in Hong Leong Assurance Sdn Bhd v. Wong Yuen Hock [1995] 3 CLJ 344; [1995] 2 MLJ 753, the function of the Industrial Court in dismissal cases on a reference under Section 20 is twofold: first to determine whether the misconduct complained of by the employer has been established and secondly to determine whether the proven misconduct constitute just cause or excuse for the dismissal of the employee.**

[43] As was opined by His Lordship Raja Azlan (CJ Malaya) (as HRH then was) in the Federal Court decision of **Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 1 LNS 30**, it is trite 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 proper enquiry of the Court is the reason advanced by it and that Court or the High Court cannot go into another reason not relied on by the employer or find one for it.

[44] The right to organize business or a Company's structure is a managerial prerogative as has been firstly established in **William Jacks & Co. (M) Sdn. Bhd v. S Balasingam [1997] 3 CLJ 235** wherein the Court of Appeal had defined "retrenchment" to be as follows:-

> **'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.**
>
> **Whether the retrenchment exercise in a particular case is bona fide or otherwise is a question of fact and of degree depending on the peculiar circumstances of the case. It is well-settled that the employer is entitled to organize his business in the manner he considers best. So long as the 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 the case to determine whether the exercise of power is in fact bona fide.**

[45] As regards burden of proof, it is trite that the burden lies on the employer to prove redundancy. In **Bayer (M) Sdn. Bhd. v. Ng Hong Pay [1999] 4 CLJ 155**, the Court of Appeal at page 160 states as follows:-

> **"On redundancy it cannot be gainsaid that the appellant must come to the court with concrete proof. The burden is on the appellant to prove actual redundancy on which the dismissal was grounded. (See Chapman & Others v. Goonvean & Rostawvack China Clay Co. Ltd. [1983] 2 All ER). It is our view that merely to show evidence of a re-organization in the appellant is certainly not sufficient."**

[46] The standard of proof needed is on a balance of probabilities (see **Telekom Malaysia Kawasan Utara v. Krishnan Kutty a/l Sanguni Nair & Anor [2002] 3 CLJ 314**).

[47] The issues for the Court's consideration in this case are:-

(i) Whether there was a genuine need for the reorganization exercise by the Company;

(ii) Whether a genuine redundancy situation had arisen which led to the retrenchment of the Claimant; and

(iii) Whether the Company had complied with the accepted standards and procedure when selecting and retrenching the Claimant.

EVALUATION AND FINDINGS OF THIS COURT

(i) Whether there was a genuine need for the reorganization exercise by the Company

[48] COW-1 presented unchallenged evidence that the Company's performance fell below expectation in 2018 and 2019 with losses of approximately RM1.3 million in the last quarter of 2019. The Company attributes the necessity of the reorganization to the compounding financial burden based by the COVID-10 pandemic, particularly in 2020.

[49] The Malaysian Government's implementation of the MCO in March 2020 severely impacted the Company revenue and resulted in cash flow problems. In the case of **PEPS-JV (Melaka) Sdn Bhd v. Industrial Court of Malaysia & Anor [2022] MLJU 2731**, the Learned Judge, Wan Ahmad Farid Wan Salleh J held as follows with regard to the Company's hardship and the MCO:-

> **[85] The MCO was followed by conditional movement control order ("CMCO"), which took effect from 4.5.2020 to 9.6.2020. According to the applicant, the long closure period had resulted**

> **in substantial mobilisation costs. In any event, the plant had to resume operation in stages with limited workers.**
>
> **[86] Relying on the judgment of the Federal Court in Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia [2021] 3 MLJ 466FC. The Federal Court observed that it would be impossible for this Court not to have noticed the pandemic or its effect on the industry as a whole.**

[50] The Company's audited accounts for 2020, found at pages 2 to 61 of COB-2, indicate a substantial increase in losses, a decrease of approximately 40% in revenue and a 630% increase in operating losses compared to 2019. On the issue of audited account, this Court in the case of **How Zheng Hong v. Airasia Berhad (Award No. 1099 of 2023)** followed the case of *Au Lai Chan v. Malaysian Mosaics Sdn Bhd & Another [2022] MLJU 875* and held as follows:-

> **[71] ... the audited accounts are a true indication of the Company's financial status.**

[51] It was apparent to the Court from the audited accounts for the year 2020, in 2019, prior to the MCO, the Company had only suffered losses before tax amounting to 1.456 million whilst in 2020, the Company had suffered a loss before tax of 14.622 million [COB-2, page 8] which represents a 904% increase in losses and the Claimant confirmed these facts in cross-examination.

[52] It cannot be gainsaid that the MCO had severely impacted the Company's financial position given the fact that from 2019 to 2020, the Company's losses had amplified by approximately 904%.

[53] The Claimant had attempted to rebut the Company's financial position by referring to the Company's retained earnings during COW-1's cross-examination, however this Court finds that it is an incorrect figure to rely on as retained earnings refer to the Company's accumulated earnings throughout the years whereas the

Company relied on the impact of the pandemic in the year of 2020 which, severely impacted the Company. In any event, the Company's retained earnings from the year 2019 to the year 2020 had decreased by approximately 27% further proving the impact the pandemic had on the Company [COB-2, page 7].

[54] Premised on the Company's unrebutted audited accounts for the year 2020, it is obvious to the Court that the pandemic had severely impacted the Company necessitating the reorganisation exercise. In the case of **Mary Anak Ahin and Besi Apac Sdn Bhd (Award No. 999 of 2023)**, this Court referring to the cases of **Mamut Copper Mining Sdn Bhd v. Chau Fook Kong @ Leonard & Ors [1997] 2 ILR 625** and **Kan Fui Chen v. Guocera Sdn Bhd [2020] ILJU 299** held as follows:-

> **[37] It is apparent to the Court that the steep decline in revenue from the years 2017 to 2019 due to low sales volume had significantly impacted the profitability of the Company's business resulting in a drastic reduction in production of the Company. It is the Company's case that as the Company was operating with a reduced output and production, and with the consolidation of units/ departments, the business required fewer employees. The Claimant also admitted that during cross-examination that she was aware that the positions of the retrenched employees were not replaced unless it was critical.**
>
> **[38] With regard to the issue of the Company still made a profit of RM16.9 million before taxation in Financial Year 2019 as raised by the Claimant, there were 16 employees retrenched, the Court finds that it is not the Company's case that it was making losses but the drop in sales, decline in its revenue and forecast necessitated the reorganisation and ensuing retrenchments.**
>
> **[39] In the infamous case of Mamut Copper Mining Sdn Bhd v. Chau Fook Kong @ Leonard & Ors [1997] 2 ILR 625, the Learned**

Chairman observed that the company was not a loss-making company faced with the imminent prospect of closure, and in fact noted that the company was "anything but a successful and viable entity". Notwithstanding that, the Court found that in view of the fail in revenue, the company was undertaking a genuine reorganisation and cost-cutting exercise necessitated by the reduction in profit. To this end, the Court recognised that cost control and staff reorganisation for better economy and efficiency is in itself a legitimate reason for retrenchment. In fact, the Court also observed that:-

"A discrete employer would be wise to act before falling profits and the red ink manifest in the profit and loss accounts which would result in the closure of the business."

[40] It is pertinent to note that the decision in the case of Mamut (supra) has been upheld by many other decisions. Recently, in the case Kan Fui Chen v Guocera Sdn Bhd [2020] ILJU 299, the Court held that due fo the continued deterioration of profits, the company's financial performance was unsustainable, as such, it was 15 justified for the company to review its operations and take drastic measures to improve efficiency in all its affairs. The Court opined that:-

> **" ...the Company has the prerogative to reorganize its business operations in any manner for the purpose of its economic viability and in the manner, the Company think best so long as that managerial power is exercised bona fide."**

[55] The Claimant alleged that losses outlined in the Company's audited accounts for the year 2020 specifically, the 2019 figures therein, are purportedly misleading if not untrue, as it also captures other losses such as depreciation of investments, depreciation of stocks in the warehouse, stocks write-off as well as expenses due to

events organised by the Company. However, this Court finds that it is without basis as the Company's specific reference is with regard to the 2020 figures. Not only did the Claimant herself confirm the impact of the pandemic on the Company but the figures speak for themselves in that such jarring losses and decrease in revenue cannot be equated to meagre depreciation. In any event, as evident from COB-2, page 10, the Company's unrebutted audited accounts for the year 2020 had in fact accounted for other losses such as depreciation of investments, depreciation of stocks in the warehouse and stocks write-offs.

[56] The Claimant had also attempted to allege that the Company's financial position was not in dire straits as the Company had held events in 2020. However, it was COW-1's unchallenged evidence that the events referred to by the Claimant was prior to her retrenchment which was done due to the impact of the COVID-19 pandemic and regardless, the Company had undertaken some investments, such as marketing events, in order to generate sales for the Company. This Court agrees with the Company that this is in line with what any Company worth its salt would do given the impact the pandemic had on sales of the Company and the Court finds that the Claimant's allegation holds no water.

[57] The Company's dire position is further supported by the unchallenged evidence of COW-1 and COW 2 that the Company also found that the demand for the Company's goods, along with the entire construction sector, had slowed down due to the COVID-19 pandemic and because of this, there was also a lot of unsold stock in the Company's warehouse, which meant that the Company was unable to resume production at a higher rate as the warehouse was nearly full.

[58] The Court also finds that the Claimant during cross-examination confirmed that there was a reduction in purchase of the Company's trade goods coupled with uncertainties in the business environment as well as a deterioration in the Company's business performance.

[59] The Company's production from February 2020 to December 2020 are as follows:-

February 2020	: 32, 822 pieces
March 2020	: 15,994 pieces
April 2020	: 0 pieces
May 2020	: 0 pieces
June 2020	: 4371 pieces
July 2020	: 3550 pieces
August 2020	: 5702 pieces
September 2020	: 6,314 pieces
October 2020	: 6,965 pieces
November 2020	: 8,761 pieces
December 2020	: 9,756 pieces

[60] The Court also finds that the Claimant herself had confirmed during cross-examination that as a result of this reduction in production, loss in revenue and difficulties faced due to the COVID-19 pandemic, the Company had firstly initiated several cost-cutting measures. It was unchallenged evidence of COW-1 that these cost-cutting measures included massive reduction in investments and marketing expenditure, voluntary salary reductions for Senior Managers for three (3) months between April 2020 and June 2020, voluntary salary reductions for all other staff for two (2) months namely May 2020 and June 2020, and freeze of recruitment, to mitigate the effects of the prevailing circumstances of uncertainties in the business environment and the declining business environment.

[61] The Claimant confirmed during cross-examination that by a letter dated 23.04.2020 and a letter dated 12.05.2020 she voluntarily accepted 20% salary reduction of her salary for the months of April, May and June 2020. Even though the Claimant alleged before this Court that the salary reduction was not voluntary in nature, the fact remains that she signed her acquiescence of the same without stating any qualifications whatsoever. The Claimant's allegation is without basis and purely an afterthought as she failed to show any documentary evidence to prove that the said voluntary salary reduction was otherwise.

[62] In fact, the Claimant had attempted to propose a 10% reduction in salary as opposed to the Company's proposal of 20%. It was the unchallenged evidence of COW-1 that in response to her proposal, COW-1 had stressed that the commitment to a 20% reduction in salary must be same for all (i.e. the Managers) and if she could not voluntarily accept a 20% reduction in salary, she need not. Therefore, the Claimant's allegation *to wit* she felt "obligated to accept" or that she "feared further persecution" due to COW-1's WhatsApp messages to her are without any basis.

[63] The Court also finds that the Company continued to implement the following cost-cutting measures:-

(a) The Claimant confirmed in cross-examination and it was COW-1's unchallenged evidence that forty-four (44) employees on fixed-term contracts were not renewed upon the expiry of their contracts;

(b) COW-1's unchallenged evidence that nineteen (19) workers of the Company resigned and were never replaced;

(c) The Claimant confirmed in cross-examination and it was COW-1's unchallenged evidence that nineteen (19) workers were placed on unpaid leave with their consent, and the Company paid them a small allowance and allowed them to remain in the Company's hostel. This was done so that, when production was able to resume at a higher level, these workers could be recalled; and

(d) COW-1's unchallenged evidence that these nineteen (19) workers who were placed on unpaid leave eventually resigned from service, or were forced to be retrenched by the Company.

[64] It was evidence before this Court that COW-1 had instructed COW-2 to review workload and propose efficiency measures to cut costs by 05.06.2020. The Company's reorganization included retrenching employees from the Production Department and implementing further cost cutting measures.

[65] The Claimant's attempt to challenge to the Company's decision to award increments to the employees in 2020 is untenable given the fact that the Company has the responsibility to continue to look into the best interest of the remaining employees as otherwise, it would lead to staff attrition - **Mary Anak Ahin and Besi Apac Sdn Bhd (Award No. 999 of 2023)**.

[66] In respect of the Claimant's allegations that the management meeting minutes dated 18.01.2019 and 17.02.2020 paint a different picture to the financial position of the Company, the Court finds that these evidence relied on by the Claimant is prior to the COVID-19 pandemic and despite these comments, the Company's evidence that it made losses amounting to 1.3 million in 2019 remains unrebutted.

[67] In addition, the Claimant alleged that the Company purportedly had RM95 million worth of orders pending. However, the Court finds that the Company's unrebutted audited accounts for 2020 shows the Claimant's allegation in this regard is simply a bare statement lacking any proof whatsoever.

[68] Further, the Claimant also allege that the salary reductions to Managers and all other staff of the Company were returned and that this was contrary to the dire straits of the Company. With this regard, the Court finds that it is a disingenuous attempt by the Claimant to discredit the Company despite the Company having acted in the best interests of its employees by returning the salary reductions to them, which included the Claimant.

(ii) Whether a genuine redundancy situation had arisen which led to the retrenchment of the Claimant

[69] The Company underwent reorganization exercises in the Customer Service Department and Sales team before restructuring the Claimant's department.

[70] It was the unchallenged evidence of COW-1 that vide an Internal Memo dated 20.04.2020, he informed the Head of HR and IT, SM that he had decided to re-organise and merge the Customer Service Department with the Sales team to enable the Customer Service staff to support the sales team in view of the current situation with COVID-19, the Company was experiencing very poor sales demand, receiving

very few sales orders and quotations, and that there was very limited work for the customer service team. As such, COW-1 decided that the full time Customer Service Manager will be in excess to the Company's requirements and he had decided to retrench her which would be implemented at the end of May 2020. However, before the Company could proceed to retrench the Customer Service Manager, she had decided to resign from service and the need to retrench the said Customer Service Manager does not arise. With this regard, it is apparent to the Court that the Claimant was not the first Head of Department deemed redundant by the Company due to its reorganization and the Claimant's allegation that she was the only Head of Department removed is untenable.

[71] COW-1 had given unchallenged evidence that vide an Internal Memo dated 10.06.2020, COW-1 had informed SM that he had made the decision to reorganise and merge the QA Department and the Technical Department as a cost rationalization exercise as well as to improve efficiency and effectiveness based on the reduced workload in both departments following the massive reduction in production by the Company's factory and reduction of purchase of trade goods coupled with the prevailing circumstances of uncertainties in the business environment as well as the Company's deteriorating business performance.

[72] It was also the unchallenged evidence of COW-1 that vide the same Internal Memo dated 10.06.2020, COW-1 had informed SM that both departments require a high level of product knowledge and to include the Claimant in the retrenchment plan as he had decided that Nabil would be responsible for both the Technical and QA Departments as he has all the required experience to manage both departments.

[73] Vide the same Internal Memo dated 10.6.2020, COW-1 had informed SM that based on the reduced workload in both departments, the Claimant would be in excess of Company requirements and therefore, the Claimant was to be retrenched from service.

[74] It is the unchallenged evidence of COW-1 that upon the restructuring exercise and given the drastically reduced workload for the QA Department as production had

decreased, the Claimant's position as full time QA Manager became surplus to the Company's requirements.

[75] It was the unchallenged evidence of COW-1 that the Claimant's role was tied to the production output of the Company and, with Production having stopped from 18.03.2020, and resuming at a limited quantity more than two months later, the Claimant's Job functions had diminished significantly. The Claimant had in fact confirmed in cross-examination that the production numbers post-MCO showed a substantial reduction in production numbers by the Company and although initially attempting to deny her reduced workload, she later admitted in cross-examination that there was in fact a substantial reduction in work for her.

[76] The Claimant confirmed during cross-examination that if there is no production by the Company, she will have no role to play, further confirming the relationship between the QA Department and production of the Company.

[77] During cross-examination, the Claimant had attempted to rebut the Company's assertion of her reduced workload by making reference to the fact that her duties involve regulatory compliance, certifications, permit applications and factory visits. However, it was the unchallenged evidence of COW-1 that the Claimant's allegation that there was continuing work in relation to the regulatory compliance applications is also not correct, as the majority of these had had their deadlines extended temporarily, during the MCO periods and at that time, travel was also banned and as such, the Claimant's allegations could not hold water. The Claimant had in fact confirmed in cross-examination that the deadlines for regulatory compliance were extended temporarily.

[78] It was COW-1's unchallenged evidence that consequent to the restructuring exercise, the QA & Technical Departments were merged and renamed as Technical & QA Department, and the Company found that there was duplication of roles and responsibilities between the Claimant and the Technical Manager, Nabil.

[79] It was the unchallenged evidence of COW-1 that the Claimant was selected for retrenchment over Nabil, as she was not experienced in some of the Technical functions (spare part management, technical product training management etc) with which Nabil was familiar, and Nabil had good overall experience in QA, having previously served as an Assistant QA Manager (which the Claimant confirmed in cross-examination), amongst other QA related roles. He was much more experienced in all the required Technical functions, he had more extensive technical product knowledge in the company's trade products and produced products compared to the Claimant, and he was more senior in years of service (i.e. twenty-four (24) years).

[80] In fact, the Claimant confirmed that she does not "repair parts and fix faucets" (i.e. the technical aspect of the new merged department) which further proves that she had become surplus to the Company's requirements.

[81] It was also the unchallenged evidence of COW-1 that the Technical & QA Department of the Company still exists till today and the position of full time QA Manager (which the Claimant had occupied) no longer exists in the Company.

[82] The Claimant submitted that the restructuring defied logic but the Company had explained that retaining some Production Staff was essential for a potential quick restart of production and that retrenching all Production staff made no business sense given the uncertainties of the pandemic and the need to maintain capacity for a potential increase in demand. The Sales Team was retained to focus on selling the surplus stock in the warehouse and generating revenue for the Company. The unchallenged evidence of COW-1 and COW-2 rebutted the Claimant's assertion that the Company was not in dire financial straits as they had appointed a Sales GM.

(iii) Whether the Company had complied with the accepted standards and procedure when selecting and retrenching the Claimant

[83] The Company had maintained that it adhered to acceptable standards and procedures during the retrenchment process. It submitted that the breach of the code of conduct is not fatal, as the code of conduct has no legal force - **Murali a/l Gunarajan v. Inter Touch (M) Sdn Bhd [2016] 4 ILJ 7.**

[84] The Claimant further alleged that the Company breached the LIFO principle by retaining another employee, Nabil, over her. The Company responds by asserting that Nabil was a Head of Department, similar to the Claimant, and therefore, the LIFO principle was not violated. The Company emphasized that reporting lines are not the decisive factor, and as Nabil headed the Technical Department, he is a Head of Department, just like the Claimant.

[85] The Court finds that the Claimant has not provided evidence to prove that Nabil's retention over her was unjustified. Additionally, the Company points out that LIFO is not a mandatory rule - **Malaysian Shipyard & Engineering Sdn Bhd Johor Bahru v. Mukhtiar Singh & 16 Ors [1991] 1 ILR 625** where it was held as follows:-

> **LIFO is not an absolutely mandatory rule which cannot be departed from by an employer when retrenching staff. That the employer Is not denied the freedom to depart from the LIFO procedure is made obvious by cl 22(b) of the Code of Conduct for industrial Harmony 1975.**

[86] As was held by this Court in **Mary Anak Ahin and Besi Apac Sdn Bhd (Award No. 999 of 2023)** the test is not *whether the decision of the management was wrong" but rather "whether the criteria was so wrong that no sensible or reasonable management could have relied on the decision which was arrived at in redundancy selection.*

[87] In **Vijian Paramasivan & Ors v. Sun Media Corporation Sdn Bhd [2009] 4 ILR 372** although being alleged to have been in breach of LIFO, the Chairman, however, was satisfied from the evidence that the employer had complied with the code of conduct when the employer conducted its selection of employees to be retrenched with due regard to:-

(a) The need for the efficient operation of the establishment or its undertaking; and

(b) The ability, experience, skill and occupational qualifications of individual workers required by the establishment or undertaking.

[88] As was held in the case of **Mary Anak Ahin and Besi Apac Sdn Bhd (Award No. 999 of 2023)**, those were objective criteria relevant to the employer's decision and the Court therefore held that there had been compliance with the Code. The decision in ***Vijian Paramasivan & Ors [supra]*** is affirmed by the High Court.

[89] Similar to the case before this Court, in the alternative that the selection criteria adopted by the Company, i.e. the experience and skills or Nabil as compared to the Claimant, are sound criteria for purposes of selection of Nabil over the Claimant. As per the evidence in ***Vijian Paramasivam & Ors [supra]*** *"he looked at what was necessary to operate the new model and he had to accept that the rest were surplus"*. The Company needed to fill the position of the merged department (i.e. the Technical & QA Department) and to do so, the Company needed someone who could do both. In this regard, this was not the Claimant, as she admitted during cross-examination that she does not have personally done the technical aspect of the job and that she does not "repair and fix" products.

[90] The Court concludes that the Claimant's reliance on LIFO is unfounded, and the selection of the Claimant was based on valid criteria.

[91] The Claimant also pleaded that the Company had never implemented a VSS. The Court finds that it is irrelevant as there is no legal requirement for the Company to do so - **Lim Trading Co v Tung Boon Hooi [2006] ILJU 49.**

[92] The Court finds that in this case the Company had gone above and beyond in ensuring the Claimant was fairly compensated when she was retrenched from service. The Company informed the Claimant that she will be paid a total amount of RM91,905.55 subject to statutory deductions, which comprised of the payments as stated in Appendix 1 of the letter of retrenchment dated 13.07.2020. In addition to the payment, the Claimant's retirement benefit was also subsequently paid to her in the amount of RM63,626.57 as confirmed by the Claimant during her cross-examination.

[93] The Claimant also alleges in her pleadings that the Company had retrenched her to avoid paying her a higher Retirement Benefit. However, the Court finds that this is nothing more than a bare assertion unsupported by documentary evidence by the Claimant.

[94] The Claimant had also further alleged that the Company had failed to discuss the restructuring exercise with her. With this regard, the Court agrees with the Company's submission that there is no such requirement in law for the Company to do so. This was the position taken in **Pook Li Ping v Mahkamah Perusahaan Malaysia & Anor [2012] 1 MLJ 536** where Aziah Ali J (as she then was) cited with approval the following Judgement of Abdul Kadir Sulaiman J (as he then was) in **Hashim bin Tuan Long v Esso Production Malaysia Inc [1998] 5 MLJ 535**:-

> **The company after all was not obliged to make any offer for any alternative employment on account of the exercise properly carried out. Further, it was not mala fide on the part of the respondent not to consult or discuss with the applicant its determination to reorganise its company.**

[95] The Court also finds that the Company had clearly adhered to the code of conduct given its objective application of Clause 20(b)(i) and 20(b)(ii) of the code of conduct before determining the Claimant to be redundant and surplus to the Company's requirements.

[96] On the issue of adverse inference to be drawn against the Company for the failure of the Company to produce SM, it is trite that adverse inference should not be drawn unless there is an intent to withhold or suppress evidence. In this case, the decision to retrench the Claimant was made by COW-1 and the Company supported its stance with unchallenged evidence, including internal memorandums, restructuring decisions and documentations of the Claimant's insubordination behavior. The Court finds that the warning letters and notice of show cause issued to the Claimant as legitimate disciplinary procedures taken against the Claimant by the Company. Hence, the issue of invoking adverse inference against the Company does not arise.

Other allegations made by the Claimant

[97] The Claimant made additional allegations, contending that the Company's decision to retrench her was a pretext to remove her from service. The Court finds that these allegations are irrelevant to the retrenchment, which resulted from a reorganization due to the pandemic.

[98] One of the Claimant's allegations concerns quality issues in the Company's products. The Company rebuts this and presented evidence that refutes the Claimant's claims, emphasizing that the quality control process was managed by the QA Department, which was under the Claimant's leadership. The Company submitted that the alleged quality issues were either beyond its control, non-existent, or adequately addressed.

[99] The Company challenged the Claimant's assertion that the quality matters raised by her were not taken seriously. It provides evidence, including email correspondence, to show that the Company responded to her concerns and took steps to address them. The Court finds that the Claimant's allegations are an attempt to create a false narrative regarding the Company's response to quality issues.

[100] Additionally, the Company had disputed the Claimant's characterization of interactions during a management meeting, presenting unchallenged evidence that contradicts her claims. It asserts that the Claimant's attempts to portray certain incidents as negative reactions from the management are unfounded.

[101] In summary, the Court finds that the Claimant's additional allegations lack substance. The Company maintained that the retrenchment was a result of a genuine reorganization due to the pandemic and as such, the Claimant's attempts to suggest otherwise are baseless.

[102] The Claimant alleges that the Company's issues coincided with the appointment of COW-2 as Factory Manager and his complimentary assistance upon the departure of the Spanish Production manager. The Claimant suggests a conflict of interest, as COW-2 was working with Mediceram, a supposed competitor. The Company rebuts these claims, asserting that the Factory's performance improved

during COW-2's assistance, there was no conflict of interest, and Mediceram was not a competitor based on the products they produced (ceramic gloves). The Court also finds that these allegations are baseless.

[103] The Claimant alleges that her bonus was reduced in 2019, and the KPIs assigned to her were unreasonable, specifically Audit Defectiveness and Non-Compliance to Malaysian Standards. The Claimant argues that these KPIs negatively impacted her bonus. The Company rebuts these claims, asserting that KPIs were reasonable and aligned with the QA Department's role in ensuring product quality and compliance. The Claimant's assertion that certain KPIs should belong to the Glost Inspection Department is countered by the Company, emphasizing the QA Department's responsibility for detecting defects and ensuring compliance before products reach the warehouse. It apparent to the Court that the Claimant's allegations lack factual basis.

[104] The Claimant alleges that the appointment of one Nanthinie was part of a scheme to remove her from service. However, the Company presents evidence suggesting that the decision to appoint Nanthinie was within the prerogative of COW-1, the Managing Director. The Claimant's objections regarding the appointment process lack substantial evidence, and it is evident that the company followed a reasonable process. Therefore, the Court finds no merit in the Claimant's allegations regarding the appointment and it has been raised as an afterthought.

[105] The Claimant further contests the confirmation of Nanthinie despite her recommendation to extend the probation period. However, the Company provides evidence suggesting that the Claimant's recommendation lacked sufficient supporting documents and periodic reviews. The Court finds that the Claimant's objections lack a substantial basis.

[106] The Claimant asserts that the decision to send Nanthinie to the SIRIM Audit in Barcelona, instead of her, was part of a scheme to remove her. The Company counters by presenting evidence of the Claimant's previous authorization of Nanthinie's trip for a similar audit in China. The Court finds that the decision to send

Nanthinie to the SIRIM Audit was within the prerogative of COW-1 and aligned with the Company's reorganization goals.

[107] The Company's actions, including the appointment, confirmation, and treatment of Nanthinie, as well as the disciplinary actions, were reasonable and within its managerial prerogative.

[108] The Claimant contests the warning letters and the notice to show cause, alleging victimization. However, the Company provides evidence of insubordinate behavior and failure to comply with instructions, justifying the disciplinary actions. The Court finds that the disciplinary actions were taken in response to the Claimant's conduct and were not acts of victimization.

[109] The Claimant alleges victimization due to the denial of a salary increment and claims for various benefits. The Company argues that such decisions are within its discretion and have been paid to the Claimant upon her retrenchment. The Court finds that the Company's decisions regarding salary and benefits are reasonable and justified.

[110] Whether the retrenchment of the Claimant by the Company was a *bona fide* exercise on part of the Company in its managerial powers and prerogative to organise its business in the manner it considers best must be supported by convincing evidence before this Court. Having considered all the evidence adduced before this Court, this Court is of the view that the reorganisation of the Company's business that led to the retrenchment of the Claimant is convincing. The selection of the Claimant for retrenchment cannot be viewed as showing any unfair labour practices intended to victimize the Claimant.

[111] Pursuant to **Section 30(5) of the 1967 Act** and guided by the principles of equity, good conscience and substantial merits of the case without regard to technicalities and legal forms and after having considered the totality of the facts of the case, the evidence adduced and by reasons of the established principles of industrial relations and disputes as stated above, this Court finds that the Company

had successfully proved on the balance of probabilities that the termination of the Claimant from her employment with the Company was with just cause and excuse.

[112] The Claimant's claim against the Company is hereby dismissed.

HANDED DOWN AND DATED THIS 06th DAY OF DECEMBER 2023

-signed-

(ESWARY MAREE)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR