INDUSTRIAL COURT MALAYSIA

CASE NO: 14/4-1512/19

BETWEEN

MOHD AZMIL BIN ABD SHUKOR

AND

PUTRAJAYA PROPERTIES SDN. BHD.

AWARD NO: 42 OF 2021

BEFORE	:	**Y.A. TUAN TEOH CHIN CHONG CHAIRMAN**
VENUE	:	Industrial Court Malaysia, Kuala Lumpur.
DATE OF REFERENCE	:	07.08.2019.
DATE OF RECEIVED	:	16.08.2019
DATES OF MENTION	:	10.09.2019, 11.09.2019, 16.10.2020, 14.10.2020.
DATES OF HEARING	:	26.02.2020, 12.03.2020, 22.07.2020, 13.08.2020, 14.08.2020, 09.09.2020.
REPRESENTATION	:	En. VK Raj and En Pong Loong Kean of Messrs A. Rajadurai P. Kuppusamy & Co, Counsel for the Claimant Cik Wong Keat Ching, Cik Teoh Alvare and Cik Loh Qiao Wen of Messrs Zul Rafique & Partners, Counsel for the Company.

REFERENCE:

[1] This is reference made under section 20 (3) of the Industrial Relation Act 1967 ('IRA") arising out of the dismissal of **Mohd Azmil Bin Abd Shukor** ("the Claimant") by **Putrajaya Properties Sdn. Bhd**. ("the Company") on 31 December 2018.

AWARD

Cause Papers

[2] The cause papers referred to at trial are marked as follows:-

2.1 Statement of Case dated 25 September 2019;

2.2 Statement in Reply dated 22 November 2019;

2.3 Rejoinder dated 17 December 2019;

2.4 The Company's Bundle of Documents – COB 1;

2.5 The Company's Bundle of Documents (Volume 2) - COB 2;

2.6 Balance Scorecard KPI Objective And Target Setting For FY 2018 - COB 3;

2.7 Minutes of the Second Special Board of Director's Meeting on 30 July 2018 - COB 4;

2.8 Limits of Authority Manual for Putrajaya Holdings Sdn. Bhd. dated 23 August 2010 - COB5;

2.9 Original copy of the Claimant's Balance Scorecard KPI Objectives And Target Setting For FY 2018 - COB 6;

2.10 The Claimant's Bundle of Documents - CLB 1;

2.11 The Claimant's Additional Bundle of Documents - CLB 2;

[3] Witnesses

The Company

3.1 Hassan Bin Ramadi - COW -1;

3.2 Nazlee Hadanee Awang - COW -2;

The Claimants testified on his own behalf.

Background Facts

[4] The Claimant commenced employment with the Company as Head of Division of Sepang Land Development on a Fixed Term Contract of two (2) year effective from 4 January 2016 to 3 January 2018.

[5] Subsequently, the Claimant entered into a second Fixed Term Contract for a further period of two (2) years effective from 4 January 2018 to 3 January 2020.

[6] The Claimant's last drawn bare remuneration per month was as follows and he was also entitled for car allowance of RM3,000 per months.

6.1 Basic salary of RM 38,127.00 per month

6.2 Pro-rated 13th month salary of RM 3,177.00

6.3 Pro-rated 14th month salary of RM 3,177.00

[7] The Company, a subsidiary of Putrajaya Holdings Sdn. Bhd. ("PJH") is a special purpose vehicle set up to overseas the development of approxiametely 1,600 acres of land in Sepang i.e. Sepang Land Development.

[8] The Claimants was to lead the team to come up with a Master Plan and concept for the Sepang Land Development and to lead the development thereafter.

[9] On 29 October 2018, the third Special Board of Director's Meeting of PJH on budget for Financial Year 2019 to 2023 was held. The Board had set future directions regarding amongst others, the development of the Company whereby the Company would remain as a land bank for PJH and that the management roles of the Company would be limited to providing minimum maintenance and security services as required to the land.

[10] The Board had approved the structure reorganisation inter alia, as follows:

10.1 The company would be placed under the Development Division of PJH; and

10.2 two (2) permanent employees of the company would be deployed to the Development Division of PJH and two (2) Fixed Terms Contract employees, including the Claimant, would be terminated.

[11] Due to the structure reorganisation, the Company was to cease its operations with effective from 31 December 2018 and only remained as a land bank with no activity in planning nor development. The minimum maintenance and security services to the land were provided by the Property Management Services Division of PJH.

[12] Vide letter dated 13 December 2018, the Claimant was informed about the termination of his Fixed Terms Contracts with effects from 31 December 2018 due to the structure reorganisation of all development within PJH and that the Company would cease its operations with effect from 31 December 2018. The Claimants was

paid a sum of RM114,318.00 being three (3) month's salary in lieu of notice of termination and RM8,775.43 being payment in lieu of his unutilised annual leave.

The Law

[13] In the case of ***Goon Kwee Phoy v. J&P Coats (M) Bhd*** **[1981] 1LNS 30** the Federal Court (vide the judgement of Raja Azlan Shah CJ) held:

> "*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. 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."*

[14] The burden of proof in an unfair dismissal claim lies on the employer to prove on a balance of probabilities that the employee is guilty of the allegation or the reason for the dismissal (see **Stamford Executive Centre v. Dharsini Ganeson [1986] 1 ILR 101.**)

[15] Issues

15.1 Whether there was a genuine Fixed Terms Contracts; and

15.2 Whether the claimant's position had become redundant thereby justifying the termination of his employment.

Evaluation And Findings

Whether there was a genuine Fixed Terms Contract

[16] The Claimant had on 28 December 2015 and 26 December 2017 entered into two Fixed Terms Contract with the Company for a total of four years without any form of breach in between.

[17] By acknowledging the above two Fixed Terms Contract, the Claimant had agreed and accepted the terms and conditions contained herein.

18.1 Clause 3.1 of the Claimant's first Fixed Terms Contract state as follow:

"you shall be employed in the above mentioned position for a period of two years commencing on 4 January 2016 and expiring on 3 January 2018."

18.2 Clause 3.1 of the Claimant's second Fixed Terms Contract state as follows:

"you shall be employed in the above mentioned position for a period of two years commencing on 4 January 2018 and expiring on 3 January 2020."

18.3 In both the Fixed Terms Contract, clause 3.2 expressly stipulated that:

"there is no agreement, expression or implied, between the company and you, for continuing or long terms employment beyond the Fixed Terms (or where applicable the Extended Terms) of this contract."

[18] The Federal Court in ***Ahmad Zahri Bin Mirza Abdul Hamid v AIMS Cyberjaya Sdn Bhd*** [2020] 6 CLJ 557 held that:

"[55]" The judicial treatments regarding the question of whether an employee had a genuine need for the service of an employee for a fixed duration may be divided into three consideration points:

(i) The intentions of the parties **(**see **Han Chiang High School/Penang Han Chiang Associated Chinese School Association v National Union of Teachers in Independent Schools, West Malaysia v Industrial Court of Malaysia [1990] 1 ILR 473, Hasni Hassan & Ors v Menteri Sumber Manusia & Anor [2013] 6 CLJ 74)**;

(ii) Employer's subsequent conduct during the course of employment (see **Innoprise Corporation Sdn. Bhd, Sabah v Rukumaran Vanugopal [1993] 1 ILR 373 B, Sime UEP Development Sdn. Bhd. V Chu Sh Poi**

[1996] 1 ILR 256, Malaysia Airlines Bhd v Micheal Ng Liang Kok [2000] 3 ILR 179, Holiday Villages of Malaysia Sdn Bhd v Mohd Zaizam Mustafa[2006] 2 LNS 0812); and

(i) Nature of the employer's business and the nature of work which an employee is engaged to perform (see **Audry Yeoh Peng Hoon v Financial Mediation Bureau [2015] 3 ILR, Charles Aseervatham Abdullah v The Zenith Hotel Sdn. Bhd. [2018] 2 LNS 2349)**"

[19] Therefore, whether or not the two Fixed Terms Contract was one for a fixed terms depends on the proper constructions of the contracts in question.

[20] The court find that by acknowledging the two Fixed Terms Contracts without any protest, the Claimant had agreed and accepted the terms and conditions of the first and second Fixed Terms Contract.

[21] In considering whether a fixed terms contracts is genuine, the court ought to determine whether the claimant was aware that the contract of employment was for a fixed-term, and understood, agreed and accepted the same. The Court in ***Ahmad Noor Majid v. TMR Urusharta (M) Sdn. Bhd. [2018] 2LNS 2253*** considered the above principle and found that the Claimant's employment contract was a genuine contract.

"The Claimant, when he entered into the employment contract dated 6th February 2014, was fully aware of the terms and conditions of the said contract and that it was a fixed terms contract for the period of three years.

The Claimant had acknowledge on 21st February 2014 at page 12 of exhibit CL-1 in the Statement of Case with the following words:-

> *"with reference to the above subject matter, I hereby understand, agree and accept the with my contract employment with TMR Urusharta (M) Sdn Bhd as the General Manager in Facility Management for central Region."*
>
> (emphasis added)

[22] The court should also consider whether the employee had raised any dispute or protest, objection or disagreement to the fixed-terms contract offered to her by her employer at the material time. In ***Ahmad Noor Majid v. TMR Urusharta (M) Sdn Bhd (supra)***, the court states as follows:

> "The claimant contends that the employment contract daged 6th February 2014 is termed as a promotion to the position of General Manager and that this necessarily implies that he was already holding a position in the company when the employment contract of 6th February 2014 was offered to him. However, this does not detract from the fact that the company has a policy of offering only fixed term contract to senior management staff. The claimant was aware of this and did admit to the same during cross-examination. Thus, knowing fully well of the said policy, the claimant nevertheless willingly entered into the fixed terms contract without any dispute or protest.

There was not a shred of evidence produced before this court by the claimant to show that he had disputed, challenged and/or protested against the fixed term contact that was offered to him by the company.

The court finds that the evidence before it clearly show that the claimant was fully aware that his employment contract dated 6th February 2014 was a fixed terms contract."

(emphasis added)

[23] On this issue the court is guided by the case of ***Sime Darby Auto Selection Sdn. Bhd. V. Lim Boon Leong & Anor [2019] 1 LNS 1312*** where Nordin Hassan J had stated the following:

"[11] The terms and conditions of the contract of employment are plain and unambiguous including the fixed term contract from 1 May 2013 until 30 April 2016.

[12] Having accepted the terms and conditions of the contract of employment, the 1st respondent is bound by it and this court must give effect to the said terms and conditions as explained by the Court of Appeal in the case of Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn. Bhd. [1997] 1 CLJ 23 in the following words:

"it is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied…. If the worlds are unambiguous, the court must give effect to them, notwithstanding that the results may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered invonvenient or unjust……"

He went on furher to say:

[13] Further, it is also instsructive to make reference to the Federal Court case of Affin Bank Berhad v. Mohd Kasim @ Kamal Bin Ibrahim [2013] 1 CLJ 465; (Civil Appeal No. 02-36-2011(W)) where it states the following:

> *"The parties are now bound by their new contract of employment. Once the Respondent accepted the new terms of the contract, he is deemed to have taken the benefit of the contract wholly, in other world he cannot now be seen to approbate and reprobate from the contract he has agreed to."*

[24] The fact that the contract was renewed without any break cannot by ifself convert a fixed term contract into a premenant one (see **Robert Henry Hawkins v. Rusch Sdn. Bhd. & Rusch Asia Pacific Sdn. Bhd [2010] 4 ILR 175**)

[25] There is no basic to impute any form of legitimate expectation for an extension of contract ad infinitum. For legitimate expectation to arise, there must be evidence of a promise or undertaking made by the respondent to that effect. (See Court of Appeal case of ***Zakiah bte Ishak v. Majlis Daerah Hulu Selangor [2005] 4 CLJ 77).***

[26] COW 2 in his testimony clarified that beside the Claimant's monthly basis salary, the Claimant's also received pro-rated 13th month's salary and pro-rated 13th months salary and 14th month's salary are only accorded for the fixed terms employees.

Annual Leave

[27] The Claimants was entitled to 14 days of leave for every one calendar year of employment, whereas as in the case of permanent employment, the annual leave is 20 days for every one calendar year of employment.

Sick Leave

[28] The Claimant was entitled to 14 days working days per calender year where no hospitalization is required. For permanent employment is 30 days for item (b) 30

working day per calender year whereas hospitalization is required for permanent employment is 60 days.

Medical Benefits

[29] The Claimant was entitled from RM2,000 per calendar year, for himself and dependents. In case of permanent employments, the outpatient entitlement is unlimited.

EPF, Socso and Income Tax

[30] Specifically in the case of EPC, fixed terms employees are, in terms of the employer's contribution, followed the statutory act, the EPF Act 1981. Whereas for permenant employees, followed the statutory act, plus a 3% additional employer's contributions.

[31] From the evidence of COW-1 and COW-2, the Company is a special purpose vehicle set up to oversea the Sepang Land Development. This was admitted by the Claimant during cross-examination that the Company only had one project, that is the Sepang Land Development project.

[32] The court finds that the intention of the Claimant's fixed terms contracts was for the purpose of the Sepang Land Development Project. It was a genuine project-based employment with no ulterior motive. There is no evidence to show that the Company intended to give any permanency of employment to the Claimant or vice versa.

[33] In this case, the Claimants was not promoted of his position in the Company. Either the Claimant's job scope and responsibilities in the Company had changed unlike as decided in the case of **Mohd Norhelmi Mohd Salleh v Malino Airways Sdn. Bhd [2016] 4 ILR 538**.

[34] The court is satisfied that the Company has proven in a balance of probabilities that the Claimant's employment with the Company via the Claimant's Fixed Term Contract dated 7 December 2015 and 7 December 2017 were genuine Fixed Term Contract and he was not employed as a permanent employed with the Company.

Redundancy

[35] The word 'redundant' has not been defined in our Act. In **Kesatuan Kakitangan Ladang-Ladang Seluruh Tanah Melayu v Vemaladawi a/p Namasivagam Ratnarajah [1991] 2 ILR 1234**, the Industrial Court made the following observations in relation to the term "redundancy" in Malaysian Industrial law which the court agree with Mr R Abraham, correctly represents the law:

Our Industrial Relations Act, 1967 does not define redundancy. However, s. 81 (2) of the Employment Protection (Consolidation) Act 1978, of England provides that:

For the purpose of this Act, an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to:

(a) *the fact that his employer has ceased, or intends to cease, to carry on the business for the purpose of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed, or*

(b) *the fact that the requirements of the business for employees to carry out of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease of diminish.*

A similar provision can be found in our Employment Act, 1955 that is ss. 12(3)(a), (b), (c) and (d). Further, this definition has been accepted and applied in our courts, in particular, the case of ***Food Specialities (M) Sdn. Bhd. v. Esa Bin Mohamed*** **[1989] 1 ILR 502 (Award No. 74/89).**

Whereas on 'retrenchment', YA Gopal Sri Ram JCA in ***William Jack & Co (M) Bhd. v. S Balasingam*** **[1997] 3 CLJ 235** at p. 241 said:

> 'Retrenchment' has been defined as the discharge of surplus labour or staff by the 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 organise 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.*

[36] The burden of proof is on the employer to prove redundancy which eventually leads to the retrenchment of the employee (see ***Bayer (M) Sdn. Bhd. v. Ng Hong Pau*** **[1994] 4 CLJ 155**). In ***Woo Vain Chan v Malayawata Steel Bhd (now known as Ann Joo Steel Bhd) [2013] 1 ILR 382***, learned Industrial Court Chairman referred to Soonavala's, "the learned author DS Chopra *laid down three issues to be decided by the court on whether a case of retrenchment had been made out and whether the company had acted bona fide,* which can be summarised as follows:

(a) whether the retrenchment was justified by the circumstances of the case;

(b) whether the grounds for the retrenchment given by the employer were true, namely that is whether there had in fact occurred reduction in the business of the company; and

(c) whether the order of retrenchment was motivated by bad faith and a desire to victimise or harass the workman or for some ulterior reasons the employer had wanted to discharge or dismiss the employee.

it is important to note that the Industrial Court's decision in **Woo Vain Chan** (supra) was upheld by the Court of Appeal. It was decided in at page 182 by the Court of Appeal as follows:

it is essential that it is the job functions and duties that are effected and not merely the job titile or designation. If the same or essentially same work is found to be carried out under a different name or manner, there is no redundancy…"
(See "the Law on Dismissal" by Nallini Pathmanathan, Siva Kumar Kanagasabi and Selvamalar Alagaratnam).

In this case, the respondent thereore had the burden to prove on the balance of probabilities that the case for redundancy was made out so as to justify the dismissal of appellant from its employment. Otherwise, it would tantamount to unfair labour practice, thereby rendering the dismissal invalid without lawful excuse.

The burden is on the employer to come to the court with *concrete proof to establish that the employee is actually redundant.*, that he is discharged as surplus age to the company's requirement. *There must be actual redundancy before a dismissal premised on the ground of redundancy could be grounded.* Merely b showing that the company was undergoing restructuring exercise will not suffice. *In order to bite it must be further exhibited through evidence that the exercise had impacted on the job function in such a manner that "it was reduced to such an extent that he was considered redundant".* In other worlds, the exercise had rendered the employee a surplus to the manpower requirement of the company. If such a situation is successfully borne out by the evidence as led before the court, then an employee so affected could be validly retrenched or his services terminated on that ground. (see the case of **Bayer**

(M) Sdn. Bhd. v. Ng Hong Pau [1999] 4 CLJ 155). In determining dismissal based on redundancy, the court is entitled to look at the bona fide of the said move by the company.

[37] COW 1 and COW 2's evidence in courts show that the decision of the PJH Board regarding the structure reorganization and that subsequently the Company ceased its operations with effected from 31 December 2018 whereby the Company only remained as a land bank with no activities in planning or development.

[38] COW 1 in his testimony stated that as at October/November 2018, there was not much work progress in the Sepang Land Development division and the team under the Claimant was still working on getting the Master Plan of the Sepang Land Development for the Board of Director's approval.

[39] Subsequently to the Special Board of Directors Meeting of PJH on 29 October 2018, the Board decided that for Sepang Land, the strategy was to retain the assets as a land bank, and to have maintenance and security services at the Sepang Land.

[40] The Board of PJH on 15 November 2018 approved amongst others that two permanent employees of the company would be deployed to the Development Division of PJH and two Fixed Terms Contract employees of the Company, including the Claimant would be terminated.

[41] Due to the structure re organization, the Company ceased its operations with effected from 31 December 2018 and only remained as a land bank with no activities in planning or development.

[42] COW 1's above evidence was supported by COW 2.

[43] COW 2 informed the courts that due to the structure re organization, two employees i.e. En Norazman bin Mahmood and Puan Hor Hafiza binti Fatahul Ariffin have been transferred to PJH whereas the Claimant and En. Abdul Azeem bin Jaafar as the fixed terms contract employees were terminated.

[44] The Director's Resolution dated 29 October 2018 and 15 November 2018 show that the PJH Board's approval for the Sepang Land to be retained as a land bank and to have maintenance and security services only, it also show that the structure reorganization of the Company and Putrajaya Venture Sdn. Bhd. and the Development Division of JPH and termination of the Claimant and other employee.

[45] The Claimant during cross-examination admitted that there was no work progress on the development stage of Sepang Land Development project and the project was still at the Master Plan stage without any approval by the Board of Directors of PJH.

[46] As stated by COW 1, the work done on the Sepang Land were only the preliminary works such as fencing and soil investigation.

[47] The management has the right and privilege to reorganize the company to achieve maximum efficiency and effectiveness (see **Mohd Rozi Othman v. Suria Strategic Energy Resources Sdn. Bhd. [2020] 3 ILR 97**).

[48] It is settled law now that redundancy does not mean the job or work no longer exists. A redundancy situation arises where the business requires fewer employees of whatever kind (***Stephen Bong v. FCB (M) Sdn. Bhd. & Anor.*** **[1991] 3 MLJ 411)**. One of the principles enunciated in ***Cycle & Carriage Bintang Bhd. v. Chiah Hian Lim*** **[1992] 2 ILR 400** is:

> *…… The retrenchment of an employee can be justified if carried out for the profitability, economy or convenience of the employer's business. The services of an employee may well become surplus if there was a reduction, diminution or cressation of the type of work the employee was performing (see also Award 384 of 1991).*

[49] In Soonavala's "*The Supreme Court On Industrial Law"* vol. II 2nd edn. at p. 424 it is discussed:

> *Retrenchment is a necessary incidence of running an industry, but retrenchment is justified only when due to shrinkage of work, whether permanently or for an indefinite or indeterminate period, there has arisen a surplus in the number of workmen in the employment of the company…..*
>
> *…..…..the only questions are –*

(a) whether the retrenchment was justified by the circumstances of the case;

(b) whether the grounds for the retrenchment given by the employer are true…..

[50] In the case of ***Harris Solid State (M) Sdn. Bhd. & Ors. v. Bruno Gentil Pereira & Ors.*** **[1996] 4 CLJ 747** the Court of Appeal stated likewise:

…. An employer may re-organise his commercial undertaking for any legitimate reason, such as promoting better economic viability. But he must not do so for a collateral purpose….

[51] In the case of ***Stephen Bong v. FCB (M) Sdn. Bhd & Anor [1991]*** **3 MLJ 411** it was held by the High Court that redundancy does not mean the job or work no longer exists but that redundancy situations arise where the business requires fewer employees of whatever kind.

[52] In the case of ***Boey Sow Foong v. Antah Drilling Sdn. Bhd***. [1998] 1 LNS 448 it was stated by Nik Hashim J:-

"*Likewise, in the present case, since there was a lower level of activity in the Respondent company at the material time following the completion of the contract and the position of the account manager had been eliminated and the Applicant's duties were absorbed by the remaining staff and not taken over by*

someone from outside. I think the Industrial Court is right in holding that the Applicant was lawfully retrenched. The mere fact that the remaining staff were paid for covering the applicant's duties does not mean that the retrenchment was not bona fide. The Industrial Court was satisfied that at the material time following the completion of the contract, the Applicant's service had diminished. Furthermore, there was no evidence of mala fide and victimization on the part of the Respondent to retrench the Applicant".

[53] In the case of ***Pengkalen Holdings Bhd v. James Lim Hee Meng*** [2000] 2 ILR 252 it was held by the Industrial Court:-

"The existence of surplus or supernumerary staff or a redundancy situation can arise due to a number of situations. A business entity facing a severe cutback in business volume or which is attempting to rationalize its business may have to reorganize and/or downsize. Where a whole production line or business unit is discontinued, the need for employees to work on that line or unit no longer exists. Both the job functions and the jobs of the employees in the said line or unit have ceased to exist. The business entity with such a problem of surplus workers would have to consider the painful option of retrenchment of its surplus staff who were previously holding posts which have since become redundant and are abolished accordingly.

Where organization arising from the reduction of work leads to a merger of work units or departments with consequential redistribution of work, there might be an abolishment of posts albeit the job functions assigned to other staff.

Similarly, where due to a reduction in the work of a department, there may be a need to reduce the staff strength therein with the workload of the abolished posts being re-assigned to the remaining staff, jobs might have to be abolished".

[54] COW 1 and COW 2 had testified that the Claimant's main key accountability is amongst others to manage the development project of the Sepang Land.

[55] The Claimant during cross-examination admitted that his main key accountabilities relate to the Sepang Land Development and his role no longer exist due to the cessation of the Company's operation.

[56] COW 1 and COW 2 had testified that the Claimant's functions were not taken over by the three other employees, namely En. Ishak Yahya, Puan Rozita Ramli and Puan Azlina Khairuddin as they were only managing the residual maintenance and security services that had to be provided to the Sepang Land which was kept as a land bank with no further development. They have not taken over any functions of the Claimant in the development of the Sepang Land.

[57] COW 1 had also clarified that the harvesting of oil palm fruit on the Sepang Land subsequent to its cessation of operations was residual in nature. This can be performed by a low level staff.

[58] COW 1 and COW 2 had testified that the Company had tried to look for alternative positions for the Claimant but there was no suitable position available.

[59] In this case, the Claimant's job functions has ceased that the Company requires fewer employees resulting from a reorganization exercise.

[60] Even though the Sepang Land Development was proposed to have six development phasing for over 15 years, the Company had the prerogative to reorganize or restructure the business to achieve maximum efficiency and effectiveness (See **Mohd Rozi Othman v Suria Strategic Energy Resources Sdn. Bhd. [2020] 3 ILR 97**). In this case, it was well within the Company's management prerogative to decide to cease the development of Sepang Land for bona fide business reasons.

[61] The Claimant alleged that his termination by the Company on the grounds of redundancy is nothing but a sham. It was merely an excuse to get rid of the Claimant's service. The Company had issued the Claimant a show cause letter alleging that the Claimant had committed a sexual misconduct. Subsequently the Company issued the Claimant a letter to inform the Claimant that his explanations had been accepted. Shortly after 22 days, the Company had terminated the Claimant on the purported grounds of redundancy.

[62] It is trite law that when it involves the issue of mala fide and victimization, the burden is on the Claimant to prove (see **Tokio Marina Insurans (Malaysia) Berhad v. Tan Kooi Luang & Anor [2014] 1 LNS 1839**).

[63] There is no evidence at all led by the Claimant to prove his contention.

[64] COW 2 in his testimony informed the court that the investigation on the allegations of the Claimant's misconduct and the structure reorganization of the Company were unrelated matters and handled separatly. COW 2's above evidence was not challenged in court by the Claimant.

[65] The Claimant had admitted during cross examination that the sexual harassment allegation was a separate matter from the termination of his Fixed Term Contract.

[66] The Claimant has failed to provide any evidence in court to proof his contentions that the termination was related to the sexual harassment allegation.

[67] Learnd counsel for the Claimant submitted that despite having already decided on 15 November 2018, the Company had failed to consult with the Claimant and/or either employees of its decision to retrench its employees. The Company has also failed to provide any form of notice of the retrenchment to its employees. (see **Equant Integration Services Sdn. Bhd. (In liquidation) v. Wong Wai Hung & Anor [2012] M LJU 582).**

[68] In circumstances where redundancy is likely an employer should, in consultation with the employers representatives or their trade union, as appropriate, and in consultation with the Ministry of Labour and Manpower, take positive steps to avert or minimize reduction of work force by the adoption of appropriate measures such as:

(i) limitation on recruitment :

(ii) restriction of overtime work;

(iii) restriction of work on weekly day of rest;

(iv) reduction in number of shifts or days worked a week;

(v) reduction in the number of hours of work;

(vi) re-training and/or transfer to other department/work.

The ultimate responsibility for deciding on the size of the workforce must rest with the employer, but, before any decision or reduction is taken there should be consultation with the workers or their trade union representative on the reduction.

The above code was made on 9 February 1975, pursuant to a joint agreement by the Malaysian Council of Employers' Organisation and the Malaysian Trade Union Congress with the approval of the Minister of Labour and Manpower (as it was then known). It is noteworthy that s.30(5A) of the Act, authorizes the Industrial Court, in making an award to take into consideration, the requirement of the code. The importance to observe the code was emphasized by the Federal Court in *Said Dharmalingam v. Malayan Breweries (M) Sdn. Bhd.* [1997] 1 CLJ 646; [1997] 1 MLJ 352 which observed:

> The reasonableness of the dismissal may well depend on the procedure…

Through the code has no legal force (see ***Penang & Seberang Prai Textile & Government Industry Employees Union v. Dragon & Phoenix*** **[1989] 1 MLJ 481**), it is a relevant factor for the purpose of considering the overall reasonableness of the employer's action (***Said Dharmalingam, supra***) in dismissal cases. In this regards, the learned chairman is correct when he took into consideration the fact that there was no consultation held with the 1st respondent before his dismissal as one of the grounds that the dismissal was without just cause or excuse. on the whole therefore, the award is not perverse, neither is it unreasonable.

[69] In the case of ***Equant Integration Services Sdn. Bhd. (In liquidation) v. Wong Wai Hung*** (supra), the Court of Appeal held as follows:-

"[12] As we have earlier stated, the failure to comply with the code per see cannot be fatal in a proper retrenchment excise. This is because the code does not have the force of law. The code is to be given due consideration by the Industrial Court's towards exercising its discretionary power under s.30(5A) of the Industrial Relations Act 1967, that is to make a decision in accordance with equity and good conscience. The code cannot be applied technically and mechanically instead it should be taken as mere guidance in a properly retrenched exercise as in the instant case. Failure to adhere to the requirement under the code per se cannot vitiate a genuine retrenchment. The proper question for the chairman to ask, is therefore how would the breach of the Code effects a redundant position in the company?."

[70] In this case, the Claimant was employed under Fixed Terms Contract and is not a permanent employee in the company. The retrenchment exercise of the Company only involved the Claimant and another employee. The Claimant was not a member of any trade union. The court finds that even if the Claimant was not consulted by the Company about the retrenchment exercise prior to his termination, based on the above authority, the Company has not vitiated a genuine retrenchment.

[71] Regarding the Claimant's contention that the Company had failed to produce the relevant document regarding "subject to the relevant comments in paragraph 3.0 (d) COB 1 page 31, COW1 had explained during re-examination that paragraph 3.0 (d) in fact referred to paragraph 2.0 (d) (xx) at COB 2 page 20.

[72] The courts accepts COW 1's explaination since he was present during the board meeting on 29 October 2018.

[73] Even though the Company had excluded multiple pages relating to the certified true copy of the Board minuets dated 29 October 2018, COW 1 had explained during re-examination that the Company had extracted all the parts that were relevant to the Sepang Land Development. COW 1 had explained that the exclusion of a few pages of the full Board minutes was necessary due to confidentiality purposes as it contained PJH's Proposed Business Plan and Budget for the 5 years from FY 2018 to FY 2023 which were not relevant to the Sepang Land Development issue.

[74] The court is satisfied that mere failure to produce the above full Board Minutes by the Company did not amount to with holding or suppressing of evidence in court.

[75] Premised on the totality of the evidence, written submission by both parties and bearing in mind Section 30(5) of the IRA to act accordingly to equity and good conscience and the substantial merits of the case without regards to technicalities and legal form, it is the court's finding that the Company has proved on a balance of probabilities that the Claimants Fixed Terms Contract was a genuine Fixed Terms Contract that had been terminated due to structure reorganization and cessation of operations of the Company. The court finds that the Claimant's dismissal was with just cause or excuse. Accordingly, the Claimant's claim is dismissed.

HANDED DOWN AND DATED THIS 07TH DAY OF JANUARY 2021

-signed-

(TEOH CHIN CHONG)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR