INDUSTRIAL COURT OF MALAYSIA

[CASE NO: 22/4-2423/18]

BETWEEN

MOHD HAFIZ MOKHTAR

AND

WIDURI BIDARI SDN BHD

AWARD NO: 2085 OF 2019

BEFORE	:	**Y.A. DATO' FREDRICK INDRAN X.A. NICHOLAS CHAIRMAN**
VENUE	:	Industrial Court Malaysia, Kuala Lumpur
DATE OF REFERENCE	:	03.08.2018
DATES OF MENTION	:	13.09.2018, 27.09.2018, 18.10.2018, 13.11.2018
DATE OF MEDIATION	:	18.01.2019
DATE OF HEARING	:	29.04.2019
REPRESENTATION	:	*For the claimant - Present In Person* *For the claimant - Varathan Panneer Selvam; Malaysian Trades Union Congress (MTUC)* *For the claimant - Ung Chirt Kye; M/s Phee, Chen & Ung*

AWARD

THE REFERENCE

[1] Before this Court is a reference pursuant to s. 20 (3) of the Industrial Relations Act, 1967 ('the Act'), by the Honourable Minister of Human Resources, dated 3.8.2018, concerning the dismissal from employment of one **Mohd Hafiz bin Mokhtar** ('the Claimant') by his erstwhile employer, **Widuri Bidari Sdn. Bhd.** ('the Company') on 3.4.2018.

THE FACTS

[2] The Claimant commenced employment with the Company as a Senior Mechanical & Electrical (M&E) Coordinator with a basic salary of RM6,000-00 per month with effect from 17.10.2017. His terms and conditions of employment were embodied in a letter to him from the Company dated 16.10.2017 and found in bundle of documents marked 'A' at pages 1 to 3.

[3] The Claimant was placed under probation for a period of 3 months. However, notwithstanding this, the Claimant was never officially confirmed in his employment. The Company then vide a letter dated 27.3.2018 [page 4 of bundle marked 'A'] issued a show cause notice to the Claimant, thus (exact copy follows):

(*1)

[illegible] SDN BHD
19-2A Gurney Tower,
18 Persiaran Gurney, 10250 Georgetown, Penang

[illegible] March 2018

Name: Mohd Hafiz Bin Mokhtar
Designation : M&E Coordinator
Project : [illegible] Suites

Ref: SHOW CAUSE NOTICE ON FREQUENT LATENESS, MEDICAL LEAVE, NOT LISTEN TO SUPERIOR INSTRUCTION AND STAY BACK LATE WITH NO REASON.

The management is not satisfy with your performance on your frequent lateness, Medical Leave, not listen to Superior Instruction and stay back late with no reason.

Your lateness to work record shows that you are in the habit and we have been verbally advised with regards to this matter but still repeating [illegible]. There is no significant improvement from you that can be observed. We have also noticed on Medical Leave and Emergency Leave that frequently taken.

Your frequent lateness, Medical Leave & Emergency Leave is totally unbecoming of being an employee of the company. You are therefore require to submit a written explanation on the above matter within 7 days of this letter. Please take note that if your explanation is not acceptable and found to be unsatisfactory, appropriate disciplinary action including dismissal shall be taken against you.

Yours faithfully,
[illegible] SDN BHD

Ong Chin Chye
M&E Project Manager

Acknowledged by Employee,

Name : Mohd Hafiz Bin Mokhtar
Date: [illegible]

cc: *Sr Project Manager - [illegible]*
HR Department - [illegible]

3

[4] The Claimant replied vide his handwriting at the bottom of the page, thus [page 6 of bundle marked 'B'] (exact copy follows):

(*2)

[5] The Company being dissatisfied with this response [*see Clause 7 of the Company's 'Statement of Reply'*] issued the following missive dated 3.4.2018 (exact copy follows):

(*3)

WIDURI BIDARI SDN. BHD. [illegible]
18-3A Gurney Tower,
18 Persiaran Gurney, 10250 Georgetown, Penang

3 April 2018

To : En Mohd Hafiz Bin Mokhtar
Position : Senior M&E Coordinator
Project : Sky Suites

Dear En Mohd Hafiz,

RE: NON CONFIRMATION OF EMPLOYMENT

We refer to the Clause 9 of our Letter of Appointment dated 18 October 2017.

The Management has reviewed your overall performance and also your attendance/punctuality records during your employment with us for the past five and a half (5 1/2) months and regret to inform that you have not performed up to the Management's expectation.

In view of the above, the Management would not be able to confirm your employment at this point of time. As such your employment will be terminated effective from **3 April 2018.**

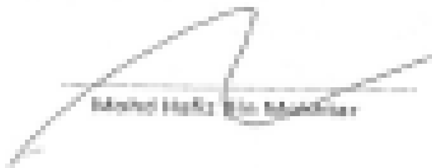
As per Clause 12.1b of your Contract, you are hereby given one month's salary in lieu of termination. In accordance to the above Clause, the final salary payment shall be calculated up to 3/5/18 inclusive of 5 days paid leaves and overtime claim for the month of March 18.

You are required to surrender all properties of the Company which may be in your possession to your immediate superior.

Kindly acknowledge receipt of this letter by signing and returning the duplicate of this letter.

Yours faithfully
WIDURI BIDARI SDN. BHD.

I, **Mohd Hafiz Bin Mokhtar**, NRIC No: **820620-11-5158** hereby acknowledge receipt of this letter and confirm that I fully understand and irrevocably agree to the above that I have no further claims whatsoever from the Company.



Mohd Hafiz Bin Mokhtar

3/4/2018
Date

[6] The Claimant now comes before this Court to aver that his dismissal from employment was without just cause or excuse and was contrary to the principles of equity, good conscience and the substantial merits of the case. He prayed to be reinstated to his former position without loss of seniority, wages or benefits, monetary or otherwise, together with arrears of salary; or in the alternative, to any relief that this Court deems just and fair in relation to the attendant facts.

[7] The Company, on the contrary, has denied the Claimant's allegations and contends instead that it was entirely justified in taking the action that it did in all the circumstances of this case.

THE LAW

[8] When dealing with a reference under section 20 of the Act, the first thing that the Industrial Court has to consider is the question of whether there was, in fact, a dismissal. If this question is answered in the affirmative, it must only then go on to consider if the said dismissal was with or without just cause or excuse. Reference is drawn to the case of *WONG CHEE HONG v. CATHAY ORGANISATION (M) Sdn. Bhd.* [1988] 1 MLJ 92 (***the then Supreme Court***) per Tun Salleh Abas LP.

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[9] In *COLGATE PALMOLIVE Sdn. Bhd. v. YAP KOK FOONG* (Award 368 of 1998) it was held as follows: -

"In a section 20 reference, a workman's complaint consists of two elements: *firstly*, that he has been dismissed, and *secondly* that such dismissal was without just cause or excuse. It is upon these two elements being established that the workman can claim his relief, to wit, an order for reinstatement, which may be granted or not at the discretion of the Industrial Court. As to the *first element,* industrial jurisprudence as developed in the course of industrial adjudication readily recognizes that *any act which has the effect of bringing the employment contract to an end is a 'dismissal' within the meaning of section 20.* The terminology

used and the means resorted to by an employer are of little significance; thus, **contractual terminations**, constructive dismissals, non-renewals of contract, forced resignations, retrenchments and retirements are all species of the same genus, which is **'dismissal'**." [emphasis added]

[10] The case of *GOON KWEE PHOY v. J & P COATS (M) Bhd.* [1981] 2 MLJ 129 is binding authority for the proposition that the court is restricted in its inquiry into the veracity of the reason chosen by an employer for the dismissal. Raja Azlan Shah CJ (Malaya) (as ***His Late Royal Highness the Sultan of Perak*** then was) speaking for the Federal Court ruled at page 136: -

"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."

[11] Thus, as the *factum of dismissal* is undisputed in the instant case, the sole issue before this Court is whether the dismissal of the Claimant by the Company was with or without just cause or excuse.

[12] The requirement of good faith or *bona fide* is a vital factor to be considered in any dismissal. If the dismissal is thought to be a colourable exercise of managerial authority to dismiss, or as a result of unfair labour practice or discrimination, the Industrial Court is free to interfere and set aside such a dismissal. [authority infra].

[13] It is however an entrenched rule of industrial jurisprudence that a ***probationer*** has no substantive right of tenure to hold the position nor does he hold a lien upon the post beyond the agreed contractual

probationary period. Authority for this can be found in the following cases; *EQUATORIAL TIMBER MOULDING Sdn. Bhd., KUCHING v. JOHN MICHAEL CROSSKEY, KUCHING* [1986] 2 ILR 1666 (Award No. 387 of 1986); *SOON SENG INDUSTRIAL PRODUCTS Sdn. Bhd. v. METAL INDUSRTY EMPLOYEES UNION* [1988] 2 ILR 219 (Award No. 227 of 1988); and *EDARAN OTOMOBIL NASIONAL Bhd. v. SAFRI JAUKARANI TIGUAT* [1994] 2 ILR 928 (Award No. 422 of 1994).

[14] This however, does not give the Company a right to terminate a contract of employment of a probationer at the Company's whims and fancies. C.P. Mills in the book *Industrial Disputes Law in Malaysia* at p.111 states as following: -

"The Industrial Court has held that employment of a person on probation does not give the employer a right to terminate the contract at his absolute discretion. Even in common law the employer's right to determine the contract during the probationary period depended on the employer being reasonably satisfied as to the suitability of the employee. This is to say, the employer's decision should be made *bona fide,* not arbitrarily or capriciously."

[15] In *KHALIAH bte ABBAS v. PESAKA CAPITAL Corp. Sdn. Bhd.* [1997] 1 MLJ 376 @ 379 Shaik Daud JCA speaking for the Court of Appeal held: -

"It is our view that an employee on probation enjoys the same rights as a permanent or confirmed employee and his or her services cannot be terminated without just cause or excuse. The requirement of bone fides is essential in the dismissal of an employee on probation, but if the dismissal or termination is found to be a colourable exercise of the power to dismiss or is a result of discrimination or unfair labour practice, the Industrial Court has the jurisdiction to interfere and to set aside such a dismissal."

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[16] See also the case of *SMART GLOVE CORPORATION Sdn. Bhd. v. INDUSTRIAL COURT, MALAYSIA & Anor.* [2006] 4 ILR 2697 @ 2705 where Raus Sharif J. (as His Lordship then was) held: -

"It is well established principle [sic] that a probationer enjoys the same rights as a permanent or confirmed employee and his service cannot be terminated without just cause or excuse. Like a confirmed officer, a probationer is also entitled to compensation when it is found that his service is terminated without just cause or excuse. By s. 30 of the Act, the amount of compensation to be awarded is within the discretion of the Industrial Court."

[17] In *DORSETT REGENCY HOTEL (M) Sdn. Bhd. v. ANDREW JAYADAS JAMES AMBROSE* [2003] 2 ILR 740 @ 751 (Award No. 421 of 2003), the learned Chairman John Louis O 'Hara (as His Lordship then was) reflected on the passage quoted above from the case of *KHALIAH bte ABBAS v. PESAKA CAPITAL Corp. Sdn. Bhd.* (*supra*) with regard to a reference under section 20 of the Act. This is what he had to say: -

"However *Kaliah's case* does not expound the substantive law pertaining to a probationer but relates to the specific question that if a probationer is to be terminated, it should be within the general purview of s. 20 (3) of the Act in that it should not be without just cause and excuse. Nevertheless, this court must be mindful that there is an intrinsic and material distinction between employees under probation and confirmed permanent employees. In the case of *Vikay Technology Sdn. Bhd. v. Ang Eng Sew* [1993] 1 ILR 90 at p. 95 the learned chairman referred to a passage in Malhotra's book *"The Law of Industrial Disputes"* (11th Edn.[sic] At p. 224) which reads as follows:

"It is well settled law that at the end of the probationary period, it is open to the employer to continue the employee in his service or not in his discretion, otherwise the distinction between probationary employment and permanent employment will be wiped out. Even if on the expiry of the probationary period the work of the employees is satisfactory, it does not confer any right on them to be confirmed."

[18] At the High Court, Wan Afrah JC in *HARTALEGA Sdn. Bhd. v. SHAMSUL HISHAM MOHD AINI* [2004] 3 CLJ 257 approved the interpretation of *KHALIAH bte ABBAS v. PESAKA CAPITAL Corp. Sdn. Bhd.* (*supra*) by the learned Chairman in *DORSETT REGENCY HOTEL (M) Sdn. Bhd. v. ANDREW JAYADAS JAMES AMBROSE* (*supra*). The Court in *Hartalega's case* further held that: -

> "**Held:**
>
> [1] .
>
> [2] There should be a distinction between a probationer and a confirmed employee. Merely bringing the probationer within the ambit of s. 20 of the Act does not automatically imply that the probationer is elevated to the status of a confirmed employee. This was not the intention of the legislature in enacting s. 20 (3) of the Act."

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[19] Thus, an employee on probation cannot expect to be accorded with the same status, rights or privileges as a permanent employee. So long as the employer is reasonably satisfied that the employee is not suitable for the job he may be removed. Suitability is not just based upon performance of the employee but also on his conduct, behaviour, aptitude and attitude in relation to the job for which he is employed. Efficiency and satisfactory work performance, inter alia, contribute towards suitability, and in cases of inefficiency and unsatisfactory work performance, the court has to be satisfied as to the manner the worker has failed to perform; whether he was pre-warned or notified of his shortcomings and whether in spite of the warnings he still failed to perform. See *GRAND BANKS YACHTS Sdn. Bhd. v. KOMANDER (B) TENG TIUNG SUE* [2002] 1 ILR 802.

[20] Whether a warning is required depends upon the peculiar facts and circumstances of each case. The issuance of warnings would be indicative of a proper appraisal being done in regard to the Claimant's performance.

In *RADIANT VISIONS Sdn. Bhd. v. DONALD WAYNE DICKMAN* [2003] 1 ILR 42 @ 46 the learned Chairman Lim Heng Seng stated: -

"It is clear that the court will not lightly interfere with the exercise of management prerogative which recognizes the principle that an employer who is genuinely satisfied that a probationer is not suitable for permanent employment as a confirmed employee may discharge the latter. However, such satisfaction must be arrived at pursuant to a fair process of assessment of the suitability of the probationer. While no rigid procedures will be imposed, the failure to make formal appraisals where the same is a part of the management practices of an employer will give the court cause for finding that there was some arbitrariness or unfair labour practice in the process."

[21] And in *Dr. A DUTT v. ASSUNTA HOSPITAL* [1981] 1 LNS 5, the Federal Court held, ***inter alia,*** that a ***termination simpliciter***, i.e. a termination by contractual notice and for no reason, if not grounded on any just cause or excuse would still be a dismissal *without just cause or excuse.*

FINDINGS

[22] This is a direct, straight forward and uncomplicated case. The Claimant was "contractually" terminated during the duration of his "extended" probation.

[23] However, notwithstanding allegations of non-performance, poor performance and/or misconduct in the show cause notice [*see* **(*1)** *above*]; as the Company chose not to lead any evidence before this Court (apart from having its bundle of documents marked) there was no cogency whatever advanced for his summary dismissal; nor was there any evidence of prior oral or written warnings given to the Claimant for his alleged employment misdemeanors.

[24] In short, there was not an iota of persuasive evidence before the Court that could have rendered the Company's action against the Claimant justifiable. This burden being indubitably upon the Company as per the

case of *STAMFORD EXECUTIVE CENTRE v. DHARSINI GANESON* (Award No. 263 of 1985).

[25] It is therefore the finding of this Court, based on the evidence as is before it and on a balance of probabilities; having duly considered the submissions of both learned Counsel for the Company and the erudite Representative of the Claimant; that the dismissal of the Claimant by the Company was arbitrary and/or capricious and/or actuated by bad labour practice.

[26] Consequently, it is the ruling of this Court that the Claimant was dismissed without just cause or excuse.

[27] The Company raised the issue that the Claimant, being an undischarged bankrupt, did not have the right to maintain this action. The short answer to that contention can be found in the case of *AKIRA SALES & SERVICE (M) Sdn. Bhd. v. NADIAH ZEE ABDULLAH & Anor. Appeal* [2018] 3 MLRA 589; where the Federal Court unambiguously held that a proceeding under s.20(3) of the Act did not require the previous sanction of the Director General of Insolvency under s. 38(1) (a) of the Insolvency Act 1967 to maintain such an action. The Claimant was thus quite competent to maintain this action in his own right.

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REMEDY

[28] In consonance with the authorities that a probationer has no substantive right of tenure to hold the position nor does he hold a lien upon the post, reinstatement of the Claimant in his former position is not ordered in this case.

[29] This Court is inclined towards ordering a fixed sum as compensation for the wrong which the Claimant as a probationer, has suffered. There must, of course, be some basis for this fixed sum. The criteria applied here is the approximate period that he would have required to secure appropriate

alternative employment, taking into account the personal peculiarities of the Claimant such as his age and the type of employment he held. No evidence was lead as to how long the Claimant remained unemployed after his termination by the Company. Nevertheless, some reasonable time must be allowed for the Claimant to have secured another job; and in the instant case it is the view of this Court that a realistic period would be 6 months.

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THE FINAL ORDER

[30] This Court therefore, for the reasons stated above, orders the Company to pay the sum of RM36,000.00 (RM6,000.00 X 6 Months) as compensation for its impugned action against the Claimant, within 30 days from the date of this Award; such sum being paid over to the Director General of Insolvency, or other relevant authority; to go towards the bankruptcy account of the Claimant; and where proof of payment of the same be handed over to the Claimant's Representative via the MTUC as soon as maybe thereafter.

Under my hand,

HANDED DOWN AND DATED THIS 18th DAY OF JULY 2019.

(FREDRICK INDRAN X A NICHOLAS)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
AT KUALA LUMPUR

Case(s) referred to:

Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd. [1988] 1 MLJ 92

Colgate Palmolive Sdn. Bhd. v. Yap Kok Foong (Award 368 of 1998)

Goon Kwee Phoy v. J & P COATS (M) Bhd. [1981] 2 MLJ 129

Equatorial Timber Moulding Sdn. Bhd., Kuching v. John Michael Crosskey, Kuching [1986] 2 ILR 1666 (Award No. 387 of 1986)

Soon Seng Industrial Products Sdn. Bhd. v. Metal Indusrty Employees Union [1988] 2 ILR 219 (Award No. 227 of 1988)

Edaran Otomobil Nasional Bhd. v. Safri Jaukarani Tiguat [1994] 2 ILR 928 (Award No. 422 of 1994)

Khaliah Bte Abbas v. Pesaka Capital Corp. Sdn. Bhd. [1997] 1 MLJ 376 @ 379

Smart Glove Corporation Sdn. Bhd. v. Industrial Court, Malaysia & Anor. [2006] 4 ILR 2697 @ 2705

Dorsett Regency Hotel (M) Sdn. Bhd. v. Andrew Jayadas James Ambrose [2003] 2 ILR 740 @ 751 (Award No. 421 of 2003)

Hartalega Sdn. Bhd. v. Shamsul Hisham Mohd Aini [2004] 3 CLJ 257

Grand Banks Yachts Sdn. Bhd. v. Komander (B) Teng Tiung Sue [2002] 1 ILR 802

Radiant Visions Sdn. Bhd. v. Donald Wayne Dickman [2003] 1 ILR 42 @ 46

Dr. A Dutt v. Assunta Hospital [1981] 1 LNS 5

Stamford Executive Centre v. Dharsini Ganeson (Award No. 263 of 1985)

Akira Sales & Service (M) Sdn. Bhd. v. Nadiah Zee Abdullah & Anor. Appeal [2018] 3 MLRA 589

Legislation referred to:

Industrial Relations Act 1967, s. 20 (3)

Insolvency Act 1967, s. 38(1) (a)