INDUSTRIAL COURT OF MALAYSIA
CASE NO: 14/4-891/20

Between

TAM SHEH MAY

And

TAYLOR'S UNIVERSITY SDN. BHD.

[Consolidated with Case No. 14(22)/4-1079/20 vide Court Order via Interim Award No. 1235 of 2020 dated 02.09.2020]

AWARD NO. : 944 OF 2024

Before	:	**Y.A. Puan Eswary Maree - Chairman**
Venue	:	Industrial Court Malaysia, Kuala Lumpur
Date of Reference	:	05.07.2020
Dates of Mention	:	18.08.2020; 07.10.2021; 14.04.2022; 07.06.2023 & 18.10.2023
Dates of Hearing	:	05.04.2021; 06.04.2021; 17.05.2021; 21.05.2021; 11.10.2022; 17.03.2023 & 22.03.2023
Representation	:	Mr. V.K. Raj (Counsels for the Claimants) Messrs A. Rajadurai P. Kuppusamy & Co. Mr. Dharmen Sivalingam & Ms. Leenalochana Malaipan (Counsels for the Company) Messrs Dharmen Sivalingam & 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 **Tam Sheh May** (hereinafter referred to as "**the 1st Claimant**") by **Taylor's University Sdn. Bhd.** ("the Company") on 31.12.2019

PREAMBLE

[1] Vide Award No. 1235 of 2020 dated 02.09.2020, Case No.: 14(22)/4-1079/20 between **Wong Ching Lee** (hereinafter referred to as "the **2nd Claimant**") and the Company was consolidated and heard together with this case.

[2] Both these cases were partly heard before the Learned Chairman Tuan Teoh Chin Chong and upon the exist of the said Learned Chairman from the Industrial Court in February 2022, the hearing was continued before me. **Section 23(6) of the Act** reads as follow:-

> **"During the absence or inability to act from illness or any other cause by the Chairman, the Yang Di-Petuan Agong may appoint another person to exercise the powers or perform the functions of the Chairman and, notwithstanding that the Chairman may have resumed the duties of his office, the person so appointed may continue to exercise the powers or perform the functions for the purpose of completing the hearing and determining any trade dispute or matter commenced before him."**

[3] Thus, it is clear that **Section 23 (6) of the Act** allows another Chairman to continue hearing and determine a part heard case. Reference is also made to the High Court decision in **Bax Global (Malaysia) Sdn Bhd v. Sukhder Singh Pritam Singh & Anor [2011] 2 ILR 251** wherein it was held that a Learned Chairman has the jurisdiction to hand down an Award in a matter heard by another Chairman.

AWARD

[4] 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) 1st Claimant's Statement of Case dated 04.09.2020;
(ii) 2nd Claimant's Statement of Case dated 04.09.2020;
(iii) Statement in Reply (1st Claimant) dated 12.10.2020;
(iv) Statement in Reply (2nd Claimant) dated 12.10.2020;
(v) 1st Claimant's Rejoinder dated 28.10.2020;
(vi) 2nd Claimant's Rejoinder dated 28.10.2020;
(vii) Company's Bundle of Documents (1st Claimant) : COB-1;
(viii) Company's Bundle of Documents (2nd Claimant) : COB-2;
(ix) Company's Additional Bundle of Documents (1st & 2nd Claimants) : COB-3;
(x) Company's Additional Bundle of Documents (2) (1st & 2nd Claimants): COB-4;
(xi) Company's Additional Bundle of Documents (3) (1st & 2nd Claimants) COB-5;
(xii) Documents marked as ID, CO-6 to CO-10;
(xiii) Claimant's Bundle of Documents (1st Claimant) : CLB-1;
(xiv) Claimant's Bundle of Documents (2nd Claimant) : CLB-2;
(xv) Claimants' Additional Bundle of Documents: CLB-3);
(xvi) Claimants' Supplementary Bundle of Documents : CLB-4;
(xvii) Company's Witness Statements of Chee Lye Yee, Cheryl : COWS-1;
(xviii) Company's Witness Statements of Emeritus Professor Dr. Paraidathathu Thomas a/l P.G. Thomas : COWS-2;
(xix) Company's Witness Statements of Dr. Phelim Yong Voon Chen :- COWS-3 & 3a;
(xx) Company's Witness Statements of Justina Prisca Ngui : COWS-4;
(xxi) Witness Statements of the 1st Claimant : CLWS-2;
(xxii) Witness Statements of the 2nd Claimant : CLWS-1;
(xxiii) The Claimant's Written Submissions dated 10.07.2023;
(xxiv) The Company's Written Submission dated 10.07.2023;
(xxv) The Claimant's Written Submission In Reply dated 16.10.2023; and
(xxvi) The Company's Written Submission In Reply dated 28.09.2023

THE COMPANY'S CASE

[5] The Company is a private educational institution.

[6] In determining whether the finance of the Company is at risk or financially well-managed, key indicators i.e. the operating margin and the Profit Before Tax (PBT) margin are analysed. From the analysis, it is identified that there had been a decrease in operating margin and PBT margin since the year 2014 as costs were escalating while revenue was relatively stagnant. This was largely driven by the stagnant and declining enrolment growth of the student population across various programmes in the Company, which resulted in a stagnant revenue trend over the years while costs were increasing.

[7] After recording a plunge in the operating margin in 2016 from 13.6 % to 6.7%, the Company was forced into implementing a voluntary separation scheme in 2017 to increase operational efficiency by reducing staff costs. Yet, the operating margin further reduced to an alarming percentage of 1.9% as of 2018. There was a very minor improvement in 2019 where the percentage was 2.8% but it was not a major upturn in the operating margins of the Company due to the increasing cost and at the same time, the faculties experienced a continued business slowdown. The Company continuously focused on boosting profit efficiency through the two-pronged approach of enhancing revenue and controlling costs.

[8] On 13.6.2019, the Senior Leadership Team of the Company convened a meeting to discuss numerous pressing issues that the Company was facing, including the Manpower Cost Rationalisation exercise to curb the low operating margin and PBT margin. The objective of the exercise is aimed to review and carry out any restructuring necessary in the various faculties and departments which will allow them to operate with a more efficient and lean structure while the second objective was to move the Company towards digital automation and information technology to improve the Company's operational effectiveness and efficiency.

[9] Following the Senior Leadership Team meeting, faculties that were making losses and divisions that are focused to steer toward digital automation and information technology were identified and subjected to a Manpower Cost Rationalisation exercise. As a result of this exercise, a total of 66 employees were identified to be redundant due to changes in the nature of operations.

[10] There were three Schools under FHMS that were identified to be suffering a financial loss. However, the Schools of Biosciences was suffering the most severe financial loss, mainly due to the rising cost and expenditure incurred by the School and lower number of intakes. All three Schools were subjected to this Manpower Costs Rationalisation Exercise, whereby the School of Biosciences embarked on a retrenchment process in order to achieve the objective of increasing operational efficiency of the Company.

[11] The School of Biosciences has been experiencing loss since 2014 and the loss had been increasing exponentially until 2019. Within the School of Biosciences, the Bachelor of Biotechnology programme was the least profitable as compared to the other two programmes mainly due to the stagnant student population and high-cost expenditure incurred. Thus, prompt action had to be taken as the performance of the Bachelor of Biotechnology programme affects the School of Biosciences and ultimately, the FHMS itself.

[12] It was observed that the Bachelor of Biotechnology programme was experiencing high 'staff-student ratio' and in comparison to all three programmes under the School of Biosciences, had a surplus of manpower. Following the Malaysian Qualification Agency (hereinafter referred to as "MQA") guidelines, the mandatory teacher-to-student ratio for each programme for the School of Biosciences is 1:20 i.e. one lecturer for every 20 students. The ratio for Bachelor of Biotechnology was 1:9 whereas the ratio for both Bachelor of Biomedical Science and Bachelor of Science (Food Science) were 1:18.

[13] There was an excess of academic staff teaching the Bachelor of Biotechnology programme and this would mean that the same output of work with a reduction in manpower could be achieved. The number of academic staff

would need to be reduced to maintain financial sustainability of the School of Biosciences and the Company itself.

[14] After referring to the accreditation requirements that are needed from MQA guidelines and also the pressing need to reduce manpower cost given that Bachelor of Biotechnology was the least profitable and in fact regarded as a loss-making programme, a decision was made where the FHMS decided that it could no longer sustain employees with a very high salary due to the financial position of the School and the programme itself. This also meant that a lesser total number of employees would be surplus to requirements as the cost savings from the higher earning academic staff would be able to reduce cost more significantly leading to less staff being released.

[15] All ten (10) academics employees within the Bachelor of Biotechnology programme were capable of carrying out similar roles and the difference in salary was due to each academic employee's ranking and experience. Two Associate Professors, including the 1st and 2nd Claimants, had the highest salary with a five-figure salary whilst the others had a four-figure basic salary. Therefore, these two Associate Professors were identified to be surplus to requirements. Based on the commercial reasons as explained above, these two Associate Professors were subjected to the manpower restructuring exercise.

[16] Thereafter, the 1st and 2nd Claimants were individually invited for a meeting with Dr. Phelim Yong Voon Chen (COW-3), Head of School of Biosciences, and Justina Prisca Ngui (COW-4) from Human Resources on 01.10.2020, whereby they were informed verbally that their roles had been made redundant together with an explanation of the reasons therefor. The 1st and 2nd Claimants were informed that their last day of employment with the Company would be 31.12.2019.

[17] Following that, the 1st and 2nd Claimants then wrote an appeal letter dated 21.10.2019 respectively, seeking clarification. The Company provided their explanation on 24.10.2019 on the financial and commercial reasons leading to their termination of employment. A second appeal letter was sent by the 1st and

2nd Claimants expressing their dissatisfaction on the reasons provided by the Company. A third appeal letter was subsequently sent by both Claimants. In response to both the second and third appeal letters from the Claimants, the Company invited the Claimants for a 2nd meeting on 28.11.2019 individually. During this meeting, the Company's representatives i.e. Emeritus Professor Dr. Paraidathathu Thomas a/l P. G. Thomas (COW-2), COW-3 and COW-4 and the respective Claimants were present. COW-3 had shown slides and explained about the financial difficulties faced by the Company as a whole as well as the position of the FHMS as well during this meeting. The Company had addressed all the grievances and queries by the Claimant. Upon the Claimants' verbal requests, COW-3 had written a testimonial letter in order to assist the Claimants in securing new employment.

[18] Initially, the Claimants were given retrenchment benefits according to the rates specified in the Employment (Termination & Lay-Off Benefits) Regulation 1980 but consequently the Company decided to revise the termination benefits uniformly to one month's salary per year of service for all impacted employees, amounting to RM104,970.20 for the 1st Claimant and RM127,296.00 for the 2nd Claimant.

THE CLAIMANTS CASE

1st Claimant

[19] The 1st Claimant commenced employment with the Company on 27.02.2012 as a Senior Lecturer I under Job Grade L5-T drawing a monthly basic salary of RM9,200.00.

[20] Vide letter dated 26.07.2012, the 1st Claimant was confirmed in her position effective 27.07.2012 even before the expiry of her probation period.

[21] The 1st Claimant contends that during her tenure of employment with the Company, she was given promotions and increments in salary as follows:-

No.	Date	Position	Grade	Salary
1.	27.02.2012	Senior Lecturer I	L5-T	RM9,200.00
2.	01.08.2017	Associate Professor II	L6TPR	RM12,630.00

[22] Vide letter dated 01.12.2012, the 1st Claimant was appointed as Associate Dean - Postgraduate Research & Innovation for the School of Biosciences effective 01.01.2013 to 31.12.2014. In line with the additional responsibility, the Claimant was paid responsibility allowance of RM1,000.00 per month.

[23] Vide letter dated 11.04.2013, the 1st Claimant was appointed as Acting Director, Research & Development for the period commencing from 15.04.2013 to 31.12.2013. The 1st Claimant was given additional allowance of RM1,500.00 per month for the above additional responsibility.

[24] Vide letter dated 25.09.2017, the 1st Claimant was appointed as Head of Research - Faculty of Health and Medical Sciences for the period commencing from 01.10.2017 to 30.09.2018. The 1st Claimant was given additional allowance of RM1,500.00 per month for the above additional responsibility.

[25] At the time of her dismissal, the 1st Claimant held the position of Associate Professor II, and her last drawn monthly basic salary was RM13,372.00.

[26] The 1st Claimant's job functions as Associate Professor II, inter alia were as follows:-

(i) Teaching & Learning

- To establish and maintain high standards of teaching and effective learning by supporting and complying with teaching quality assurances standards and procedures;
- Undertake teaching and teaching related duties such as design, prepare and develop teaching material, conduct classes/lectures, tutorials and practicals, consultations with students, invigilation, marking and assessment;

- Plan and implement teaching strategies to optimize student learning as well as to motivate them;
- Contribute significantly in high quality course and curriculum development.

(ii) Research

- Participate in scholarly activities, including undertaking research, conference presentation, journal publications and relevant community work;
- Seek and secure external grants to support research activities and scholarship

(iii) Administration & Other Activities

- Participate in administrative responsibilities such as attending departmental meetings, participate in committees and working groups within the Department and School;
- Engage in continuous professional development including participation in relevant professional activities;
- Build network, nationally and internationally, and establish linkages with external organisations/professional bodies in academic related matters.

[27] The events leading to the 1st Claimant's dismissal were as follows:-

(i) On 27.09.2019 the 1st Claimant received an e-mail invite from one Ms. Krishnaveni from the Human Resource Department, requesting the Claimant to attend a discussion on 01.10.2019 without specifying the details of the discussion. Vide e-mail dated 27.09.2019, the Claimant sought clarification on the discussion. However, the Company did not reply to the Claimant's e-mail.

(ii) The 1st Claimant duly complied with the request of Ms. Krishnaveni. During the meeting, the Head of School of

Biosciences, COW-3 and the Human Resource Manager, COW-4 were present.

(iii) During the said meeting, COW-3 told the 1st Claimant that for the past few years the Company was purportedly facing financial difficulties and as such the management had to embark on cost cutting measure. In line with the cost cutting measure, the Company had decided to issue notice of redundancy to the 1st Claimant. COW-3 then immediately handed the notice of redundancy dated 25.09.2020 to the 1st Claimant, without any prior warning.

(iv) The 1st Claimant was shocked and disappointed to receive the said notice of redundancy, as her job functions were still in existence. Vide the said notice of redundancy, the 1st Claimant was informed her last day of employment will be 31.12.2019, and the 1st Claimant was asked to sign the said notice and return the said notice to the Human Resource department later.

(v) During the said meeting, COW-4 also explained to the 1st Claimant that she was paid termination benefits pursuant to the prevailing law.

(vi) Vide emails dated 02.10.2019 and 07.10.2019 from Ms. Krishnaveni, the Company reminded the 1st Claimant to return the signed copy of the notice of redundancy. On 08.10.2019, the 1st Claimant submitted to the Human Resource department the signed copy of the Notice of Redundancy.

(vii) Vide letter dated 21.10.2019, the 1st Claimant appealed to the Company against the decision of termination of her service. Vide the said letter of appeal, the 1st Claimant inter alia placed on record the following:-

(a) That she was not redundant as the School of Biosciences and the Faculty of Health & Medical Sciences were still in operation.

(b) The 1st Claimant was given many promotions and held additional responsibilities from February 2012 to September 2019.

(c) The 1st Claimant also requested the Company to provide justification regarding her termination of service on the ground of redundancy.

(viii) Vide letter dated 24.10.2019, the Company replied to the 1st Claimant's appeal letter and stated that the Claimant's termination was due to financial and commercial reasons.

(ix) Vide letter dated 30.10.2019, the 1st Claimant placed on record her grievances pertaining to her termination of services and sought clarification for her termination. In addition, the 1st Claimant placed on record that the Company did not embark on cost cutting measures.

(x) Vide letter dated 01.11.2019, the Company revised the 1st Claimant's termination benefits. However, The Company did not reply to the 1st Claimant's letter dated 30.10.2019.

(xi) Since there was no reply from the Company, the 1st Claimant sent another letter dated 15.11.2019 and provided her justification as to why she was not redundant.

(i) On 28.11.2019, the Executive Dean of Faculty of Health and Medical Sciences, COW-2 invited the 1st Claimant for a meeting. During the said meeting, COW-3 and COW-4 were present. COW-3 showed the 1st Claimant certain slides to show that the School was facing financial difficulties. Some of the slides that were shown to the 1st Claimant were blur and she was not given a print out of

the slides. The 1st Claimant contends that she requested the Company to provide an official response to her letters dated 30.10.2019 and 15.11.2019. However, the 1st Claimant did not receive any response to her letters from the Company.

[28] In the circumstances, the 1st Claimant contends that her dismissal was without just cause or excuse as:-

(i) She was not redundant as her functions as the Associate Professor II continue to exist and had been taken over by other Academic Staff.

(ii) The retrenchment was effected in breach of the Code of Conduct for Industrial Harmony;

(iii) The decision to dismiss her was arbitrary, capricious, selective and contrary to all notions of equity and good conscience, and an unfair labour practice; and

(iv) The Company did not comply with the "LIFO" principle.

[29] The 1st Claimant further contends that she was not redundant as alleged by the Company as she was still teaching, doing research and carrying out her administrative/service functions as listed at paragraph 9 above when she was given her notice of redundancy.

[30] Vide e-mail dated 04.12.2019, the 1st Claimant was asked to transfer her FRGS project that she was heading to her colleague one Dr. Nallammai Singaram who was never part of the said project. The 1st Claimant contends that she was asked to be the co-researcher on the said project due to her expertise. In addition, the 1st Claimant contends that the said project was only granted to the Claimant on 01.09.2019 and for the duration of three (3) years.

[31] The 1st Claimant further contend that the Company's decision to dismiss her was motivated by *mala fide* intentions, and victimization of her in the circumstances of this case, and the Company is guilty of unfair labour practice, whereby her job functions were still in existence and was taken over by other Lecturers in the Company.

2nd Claimant

[32] The 2nd Claimant commenced employment with the Company on 01.03.2011 as a Senior Lecturer II under Job Grade L4-T drawing a monthly basic salary of RM8635.00.

[33] Vide letter dated 31.05.2011 the 2nd Claimant was appointed as a Programme Director-Biotechnology and Biomedical Science for the period commencing from 01.06.2011 to 31.12.2013. The 2nd Claimant was given additional allowance of RM800.00 per month for the above additional responsibility.

[34] Vide letter dated 30.06.2011, the 2nd Claimant was confirmed in her position effective 01.07.2011 even before the expiry of her probation period.

[35] The 2nd Claimant contends that during her tenure of employment with the Company she was given promotions and increments in salary as follows:-

No.	Date	Position	Grade	Salary
1.	01.08.2012	Senior Lecturer I	L5-T	RM9,520.00
2.	05.02.2015	Associate Professor II	L6TPR	RM11,572.00
3.	01.09.2018	Associate Professor I	L7TPR	RM14,118.00

[36] Vide letter dated 30.06.2013, the 2nd Claimant was appointed as Associate Dean Postgraduate Research & Innovation for the School of Biosciences effective 01.07.2013 to 30.06.2015. In line with the additional responsibility, the 2nd Claimant was paid responsibility allowance of RM1,000.00 per month.

[37] At the time of her dismissal, the 2nd Claimant held the position of Associate Professor I, and her last drawn monthly basic salary was RM14,400.00.

[38] The 2nd Claimant's job functions as Associate Professor I, inter alia were as follows:-

(i) Teaching & Learning

- To establish and maintain high standards of teaching and effective learning by supporting and complying with teaching quality assurances standards and procedures;
- Undertake teaching and teaching related duties such as design, prepare and develop teaching material, conduct classes/lectures, tutorials and practicals, consultations with students, invigilation, marking and assessment;
- Plan and implement teaching strategies to optimize student learning as well as to motivate them;
- Contribute significantly in high quality course and curriculum development

(ii) <u>Research</u>

- Participate in scholarly activities, including undertaking research, conference presentation, journal publications and relevant community work;
- Seek and secure external grants to support research activities and scholarship

(iii) <u>Administration & Other Activities</u>

- Participate in administrative responsibilities such as attending departmental meetings, participate in committees and working groups within the Department and School;
- Engage in continuous professional development including participation in relevant professional activities;

- Build network, nationally and internationally, and establish linkages with external organisations/professional bodies in academic related matters.

[39] The events leading to the 2nd Claimant's dismissal were as follows:-

(i) On 27.09.2019 the 2nd Claimant received an email invite from one Ms. Krishnaveni from the Human Resource Department;

(ii) Requesting the 2nd Claimant to attend a discussion on 01.10.2019 without specifying the details of the discussion;

(iii) The 2nd Claimant duly complied with the request of Ms. Krishnaveni. During the meeting, the Head of School of Biosciences, COW-3 and the Human Resource Manager, COW-4 were present.

(iv) During the said meeting, COW-3 told the 2nd Claimant that for the past few years the Company was purportedly facing financial difficulties and as such the management had to embark on cost cutting measure. In line with the cost cutting measure, the Company had decided to issue notice of redundancy to the 2nd Claimant. COW-3 then immediately handed the notice of redundancy dated 25.09.2020 to the 2nd Claimant, without any prior warning.

(v) 2nd The Claimant was shocked and disappointed to receive the said notice of redundancy, as her job functions were still in existence. Vide the said notice of redundancy, the 2nd Claimant was informed her last day of employment will be 31.12.2019, and the 2nd Claimant was asked to sign the said notice and return the said notice to the Human Resource department later.

(vi) During the said meeting, COW 4 also explained to the 2nd Claimant that she was paid termination benefits pursuant to the prevailing law.

(vii) Vide emails dated 02.10.2019 and 07.10.2019 from Ms. Krishnaveni, the Company reminded the 2nd Claimant to return the signed copy of the notice of redundancy. On 08.10.2019, the 2nd Claimant submitted to the Human Resource department the signed copy of the Notice of Redundancy.

(viii) Vide letter dated 21.10.2019, the 2nd Claimant appealed to the Company against the decision of termination of her service. Vide the said letter of appeal, the Claimant inter alia placed on record the following:-

(a) That she was not redundant as the School of Biosciences and the Faculty of Health & Medical Sciences were still in operation.
(b) She was just promoted to Associate Professor I on 01.09.2018.
(c) The 2nd Claimant was given many promotions and held additional responsibilities from June 2011 to March 2019;
(d) The 2nd Claimant also requested the Company to provide justification regarding her termination of service on the ground of redundancy.

(ix) Vide letter dated 24.10.2019, the Company replied to the 2nd Claimant's appeal letter and stated that the 2nd Claimant's termination was due to financial and commercial reasons.

(x) Vide letter dated 04.11.2019, the 2nd Claimant placed on record her grievances pertaining to her termination of services and sought clarification for her termination.

(xi) On 12.11.2019, the 2nd Claimant received a letter from the Company revising her termination benefits. However, The Company did not reply to the 2nd Claimant's letter dated 04.11.2019.

(xii) Since there was no reply from the Company, the 2nd Claimant sent another letter dated 14.11.2019 and provided her justification as to why she was not redundant.

(xiii) On 28.11.2019, the Executive Dean of Faculty of Health and Medical Sciences, COW-2 invited the 2nd Claimant for a meeting. During the said meeting, COW-3 and COW-4 were present. COW-3 showed the 2nd Claimant certain slides to show that the School was facing financial difficulties. Some of the slides that were shown to the 2nd Claimant were blur and she was not given a print out of the slides. The 2nd Claimant contends that she requested the Company to provide an official response to her letters dated 04.11.2019 and 14.11.2019. However, the 2nd Claimant did not receive any response to her letters from the Company.

[40] In the circumstances, the 2nd Claimant contends that she was dismissed without just cause or excuse as:-

(i) She was not redundant as her functions as the Associate Professor I continue to exist and had been taken over by other Academic Staff;

(ii) The retrenchment was effected in breach of the Code of Conduct for Industrial Harmony;

(iii) The decision to dismiss her was arbitrary, capricious, selective and contrary to all notions of equity and good conscience, and an unfair labour practice; and

(iv) The Company did not comply with the "LIFO" principle.

[41] The 2nd Claimant further contends that she was not redundant as alleged by the Company as she was still teaching, doing research and carrying out her administrative/service functions as listed at paragraph 9 above when she was given her notice of redundancy.

[42] Vide email dated 02.12.2019, the 2nd Claimant was asked to transfer her FRGS project that she was heading to her co-researcher Dr. Ng Jeck Fei. The Company attached a sample transfer letter together with the email.

[43] The 2nd Claimant also contends that the Company's decision to dismiss her was motivated by *mala fide* intentions, and victimization of her in the circumstances of this case, and the Company is guilty of unfair labour practice, whereby her job functions were still in existence and was taken over by other Lecturers in the Company.

THE LAW

[44] 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.**

[45] 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.**

[46] 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.

[47] In **William Jacks & Co. (M) Sdn. Bhd. v. S. Balasingam [1997] 3 CLJ 235,** the Court of Appeal explained the term "retrenchment" and enunciated as follows:-

> **"Retrenchment means: "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"**

(per SK Das J in Hariprasad v. Divelkar AIR [1957] SC 121 at p 132).".

"Whether the retrenchment exercise in a particular case is bona fide or otherwise, is a question of fact and of degree depending for its resolution upon the peculiar facts and circumstances of each case. It is well-settled that an employer is entitled to organize his business in the manner he considers best. So long as that 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 a particular case to determine whether that exercise of power was in fact bona fide.".

[48] The law recognizes that a Company has the right to organize its business in the manner it considers best. However, in doing so, the Company must act bona fide and not capriciously or with motives of victimization or unfair labour practice (see **East Asiatic Company (M) Bhd v. Valen Noel Yap [1987] 1 ILR 363a**).

[49] 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."

[50] 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**).

[51] In another case, i.e. **Gurbux Singh Prabha Singh v. J White & Co (M) Sdn Bhd [1981] 1 ILR 436** it was held that in the exercise of that power to terminate the services of redundant employees, the management must, when selecting employees to be retrenched not only act reasonably but also observe any customary arrangement or code of conduct. The code of conduct referred to in this case is the Code of Conduct for Industrial Harmony 1975. This code was endorsed in February 1975 by the Malayan Council for Employer Organisations (representing employers) and Malaysian Trades Union Congress representing employees and was witnessed by the Minister of Human Resources. The purpose of the Code is to promote sound industrial relations practice in Malaysia and to lay down principles and guidelines to employers and employees on the practice of industrial relations for achieving greater industrial harmony.

[52] The issues for this Court's consideration in this case is whether there was an actual and bona fide redundancy and if so, whether the proved redundancy constitutes just cause or excuse for dismissal under the circumstances. This Court is now duty bound to inquire whether the Company has come to Court with concrete proof to show actual and bona fide redundancy [see ***Bayer (supra)***].

EVALUATION AND FINDINGS OF THIS COURT

[53] At the outset, I would state that this Court is not bound by the decision in the case of **Wong Choy Peng & 3 Others v. Taylor's [Award No. 342 of 2022]** even though it involves the same retrenchment exercise. Furthermore, the issue of whether a retrenchment exercise is bona fide or otherwise is a question of fact and degree depending on the peculiar circumstances of each case. Hence, this Court will decide this case based on its own facts, evidence and testimonial presented before it.

[54] The actual reason for the Claimants' termination of employment as stated in the Notice of Redundancy is worded as follows: (pages 26 to 27 of CLB-2):-

> *"In view of the economic landscape in the education industry, the University is taking crucial steps to reorganize its operations for sustainability and cost efficiency. This involves a leaner structure, merging of certain roles, functions and services, consolidation of processes and automation, where applicable.*
>
> *As a result of this exercise, certain roles and functions in the schools and departments have become redundant.*
>
> *Accordingly, it is with deep regret that the University is no longer able to retain your services and this letter serves as a notice of termination of your contract of service with us.*

[55] Thus, the Company's reason for termination of the Claimants employment was due to economic landscape in the education industry, which resulted in the need for them to take crucial steps to reorganize their operations for sustainability which involves a leaner structure, merging of certain roles, functions and services, consolidation of processes and automation, where application. The Company's decision in selecting the Claimants for retrenchment were not even mentioned in Notice of Redundancy.

[56] In the case of **Maritime Intelligence Sdn Bhd v. Tan Ah Gek [2021] 10 CLJ 663** it was held by the Federal Court that the Industrial Court can only enquire into the reason for termination as premised on matters and events at the time of dismissal, and not subsequently raised in the pleadings. The Federal Court held (vide the judgment of Nallini Pathmanathan FCJ):-

> *"By virtue of the clear statutory content of s. 20(3), the function of the Industrial Court is tied inextricably to the representations of the workman of a dismissal without just cause or excuse. Those representations are made by the workman at the time of his dismissal, for reasons which he feels are without any reasoned basis*

or for reasons that are insufficient to warrant a dismissal. ***The focus of the enquiry of the industrial Court under*** *s. 20(3) of the Act,* ***is therefore premised on matters and events as they occurred at the time of the dismissal. The reasons operating in the mind of the employer, which preceded the decision to terminate, and resulted in the decision to terminate, comprise the matters to be considered and adjudicated upon by the industrial Court under s. 20(3).***

By way of elaboration of this point, specific factors, events or reasons would have operated on the employer's mind, prior to the employer deciding to terminate the workman's services. It is those reasons, factors or events which comprise the basis for the dismissal. And the workman makes his representation or complaint of dismissal without just cause or excuse based on those reasons, factors or events only under s. 20(1). *It therefore follows that the representations based on those limited reasons, factors or events only, can comprise the basis for assessment and adjudication by the Industrial Court under s. 20(3).*

The term "representations" therefore ties the jurisdiction of the Industrial Court down to the reasons, factors or events operating in the mind of the employer at the time of dismissal resulting in the representation.

In a situation where the employer gave no reasons whatsoever for dismissing the workman, the scope of the Industrial Court's adjudication is still tied to the representations and thereby to the factors operating in the mind of the employer at the time of the dismissal. The fact that those reasons have not been articulated does not alter the object and effect of s. 20(1) or 20(3). The Industrial Court is bound to restrict the inquiry to that extent. This issue is considered in further detail below.

There is no provision for the Industrial Court to consider matters outside of the representation by the workman, under s. 20(3). Matters outside of the representation would include matters which were not operative in the employer's mind when the decision to dismiss was taken, but which the employer chooses to put forward post-dismissal at a subsequent stage in the Industrial Court, to justify the decision to dismiss the workman, ex post facto. The very specific wording of s. 20 does not prescribe or allow an overarching survey by the Industrial Court of any and all matters both pre and post- dismissal, in an effort to ascertain whether the workman's representations are made out.

In summary, on this point, it is the statutorily prescribed function of the Industrial Court to examine, investigate the representations of the workman and then hand down an award under s. 20(3). It is not the function of the Industrial Court to decide otherwise than prescribed by the Act. The Act implicitly prescribes an investigation into facts and events and reasons at the point and/or time of dismissal. There is no provision in the Act for the industrial tribunal to embark on a far-ranging survey to ascertain whether given matters which the employer has discovered subsequently and not put to the workman, it is justified in dismissing the workman.

A further point which lends weight to the construction above is that the jurisdiction of the Industrial Court is to ascertain whether the dismissal was or without just cause or excuse. It follows that the "just cause or excuse" giving rise to the dismissal, circumscribes the precise area that the Industrial Court is jurisdictionally allowed to examine.

Any such "just cause or excuse" can only refer to the reason resonating in the employer's mind, prior to, or preceding the decision to dismiss. Those words do not envisage the investigation or

contemplation of matters or reasons that the employer discovers subsequently or which operate on the employer's mind post-dismissal.

These subsequent matters may well go to the issue of the moulding of the relevant relief such as contributory conduct, or comprise basis to refuse reinstatement and reduce or refuse compensation in lieu. But such subsequent and fresh evidence cannot be utilised retrospectively to justify a termination which was not effected for those reasons or on that basis. It is reiterated that this is because such "cause" did not operate on the employer's mind at the material time.

Therefore, both a literal and purposive statutory construction of s. 20 does not envisage the employer seeking to justify the termination utilising post-dismissal reasons.

Equally, it defies a proper construction of s. 20 of the Act, to conclude that an employer dismissing a workman for a particular reason or series of events, can then rely on a wholly different or additional matters, to justify the same dismissal at the Industrial Court, in an effort to bolster or put forward what the employer feels, or may be advised, is a "stronger" defence.

For these reasons, we are of the view that a literal and purposive statutory construction of the provisions of s. 20 clearly support the legal position that the Industrial Court is statutorily circumscribed in its jurisdiction to examine, adjudicate and hand down an award as to whether the dismissal was with or without just cause or excuse premised on matters operating in the mind of the employer at the time of the dismissal. As such the underlying matters relied upon as comprising "just cause or excuse" cannot and do not refer to matters discovered or chosen to be utilised post-dismissal, in order to justify the dismissal at the Industrial Court'.

[57] The Federal Court decision in ***Maritime Intelligence Sdn Bhd v. Tan Ah Gek [supra]*** echoes the most celebrated Federal Court decision in **Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] CLJU 30; [1981] 1 LNS 30; [1981] 2 MLJ 129** where it was held that the Industrial Court is to enquire only into the reason as advanced by the employer in the employee's termination and that the Court cannot go into another reason not relied on by the employer or find one for it.

[58] The reasons given by the Company for terminating the services of the Claimants were that*, in view of the economic landscape in the education industry, the University is taking crucial steps to reorganize its operations for sustainability and cost efficiency. This involves a leaner structure, merging of certain roles, functions and services, consolidation of processes and automation, where applicable*.

[59] It is apparent that the main reason cited by the Company in terminating the services of the Claimants was to achieve cost efficiency. In other words, the Company wanted to save costs.

[60] The Company submitted that based the Company's Audited Financial Statements, the financial performance of the Company had been deteriorating since 2014. The net sales revenue each year was generally stagnant whilst the cost incurred was increasing over the years. This caused the profit made by the Company to decrease over the years. Based on these key indicators, the Company recorded a plunge in the operating margin from 13.6% in 2014 and it drastically dropped to a single digit of 2.8% in 2019. The PBT margin in 2014 was 12.9% and it then dwindled to 2.3% in 2019. COW-1, the Chief Financial Officer had in her COWS-1 (Question & Answer No. 4) testified under oath that, *"the financial standing of the Company had been deteriorating since the year 2014 to 2019"* and during cross-examination, COW-1 admitted that this crucial reason was not stated in the notice of redundancy issued by the Company to the Claimants. Even though, the Company attempted to supplement their evidence of ensuring cost efficiency with deteriorating financial standing from 2014 to 2019, the Company had not stated and/or relied upon the said reason

in the in the notice of redundancy issued to the Claimants and/or in the Company's reply dated 24.10.2019 to the Claimants appeal against the termination. Hence, this reason was not operative in the Company's mind when the decision to terminate the services of the Claimants were taken, but which the Company chooses to put forward post-dismissal at a subsequent stage before this Court to justify the decision to terminate the Claimants, *ex post facto*.

[61] Further during COW-1's cross-examination, the following evidence emerged by reference to the Company's Audited Financial Statements:-

(i) That in 2014, the Company had paid management fees to the holding Company, Taylor's Education Sdn. Bhd RM15,627,259.00;

(ii) That the Company made various other payments to other related Companies;

(iii) That the Company paid to a related Company Taylor's Education Group RM29,476,674.00 as rental expense;

(iv) That the Company's cash and bank balance as at 31.122014 was RM31,968,483.00;

(v) That the Fixed Deposit amount as at that date was RM1,711,907.00;

(vi) That the Company's cash and bank balance as at 31.12.2015 was RM28,910,243.00;

(vii) That the Company had paid management fees to a related company, Taylor's Education Sdn. Bhd., an amount of RM9,955,315.00;

(viii) That the Company paid to a related Company Taylor's Education Group RM28,384,619.00 as rental expense;

(ix) That the Company paid RM7,437,536.00 to a director's (Datuk Loy Teik Ngan) related company, Maxwell Assets Sdn. Bhd .as rental expenses;

(x) That the Company paid RM7,190,663 to a Singapore related company, Taylor's International Alliance, as Agent's commission fees for recruitment of students;

(xi) That the Company's cash and bank balance as at 31.12.2016 was RM22,453,409.00;

(xii) That the Company had paid management fees to a related company, Taylor's Education Sdn. Bhd an amount of RM10,907,548.00 in 2016;

(xiii) That the Company paid to a related Company Taylor's Education Group Assets Sdn. Bhd RM29,561,735.00 as rental expense in 2016;

(xiv) That the Company had due payments from the holding company and other related companies, an amount of RM 34,136,205.00 as at 2017;

(xv) That COW-1 did not know what efforts the Company took to recover monies owed to the Company from other related Companies, but the Finance Department of the company will know (although no one else from the Finance Department was brought as a witness before this Court);

(xvi) That the Company's cash and bank balance as at 31.12.2017 was RM22,550,951.00;

(xvii) That the Company paid to a related Company Taylor's Education Group Assets Sdn. Bhd RM29,959,314.00 as rental expense in 2017;

(xviii) That the Company's cash and bank balance as at 31.122018 was an increased amount of RM35,789,008.00;

(xix) That the Company's cash and bank balance as at 31 .12.2019 was a further increased amount of RM56,432,266.00;

(xx) The Company had invested RM14,594,341.00 as short term investment in unit trusts between 31.12.2018 and 31.12.2019;

(xxi) That the evidence of when these units trust matured were not produced before this Court;

(xxii) No documentary evidence concerning the declining in enrolment growth of student population across various programmes for the years 2014 to 2019 were presented before this Court;

(xxiii) No analysis reflecting the co-relation of the operating margin of the Company to the enrolment growth of student population presented before this Court;

(xxiv) No record of how many students were enrolled by the Company from 2014 to 2019 including the School of Bioscience was presented before this Court.

[62] It is also pertinent to note that COW-1 who played a part as the team member of the Senior Leadership Team in the manpower rationalization exercise admitted before this Court that the meeting minutes, where the decision for the rationalization to reduce the headcount was not produced. COW-1 also testified that she was not aware who took the decision to retrench both the Claimants.

[63] It is also pertinent to note that during examination in chief, COWS-1 (Q & A No. 8 and 9), COW-1 testified that during the meeting on 13.06.2019 the Company had discussed about deteriorating operating margin. When we refer to pages 9 to 10 of COB-1, which is the minutes of said meeting, nowhere it

was mentioned about deteriorating operating margin and there was also no mention of the Claimants' name in the manpower costs rationalization exercise. As such, the Company has failed to prove what it says.

[64] This Court also finds that the Company had only produced the summary of the Profit and Loss Account but failed to produce the full set of the accounts. Hence, had deprived this Court to assess what was the income and what is taken as the expenses of the Company. In the case of **Mat Desa Saad & Anor v. Langkawi Ferry Services Sdn, Bhd. [2009] 1 ILR 15**, the learned Industrial Court Chairman held as follows:-

> *[30] In the instant case, after having perused and considered the evidence adduced this court finds on the totality of evidence the company has failed to discharge the burden of proving the existence of a redundancy situation to justify the retrenchment of the Claimants. This is because the company failed to produce its own profit and loss account which would clearly show its true financial position. The court is the view if the profit and loss account of the company had been tendered in this court it will show the true financial position of the company whether the financial difficulties was due to the business losses, cash flow problem or tight liquidity. The court notes here there was no explanation by the company for the failure to produce the said profit and loss account. Thus, in the absence of the said account this court has no alternative but to draw an adverse inference against the company under s. 114(g) of the Evidence Act 1950 (see: Arab Malaysian Management Services Sdn Bhd v. Shahruddin Ibrahim & Anor & Anor Case [2004] 3 ILR 563 (Award No. 910 of 2004)). Hence, it would appear the company was not in a real financial hardship when it decided to terminate the claimants. (emphasis added)*

[65] It is also pertinent to note that COW-1 admitted that there was no evidence before this Court to support her answer to Question No. 18 of COWS-1 that the School of Bioscience where the Claimants were employed was at a

loss as the full set of accounts was not produced before the Court. COW-1 testified as follows:-

> Q : Again, my last question to you with leave Yang Arif before I finish with this witness, there is no evidence today before the Court to support your answer that the School of Biosciences was at lost for 2018, correct? The full set of account we don't have today.
>
> A : Correct.

COW-2 also admitted the same, that there was no evidence to show that the Faculty that the Claimants were employed in were in the red, in 2018 wherein COW-2 testified as follows:-

> Q : So, I repeat my question for your benefits Sir. There is no detailed account before the Court today to show that these two faculties were in the red in 2018?
>
> A : That's right.
>
> Q : Agreed. You then say you probe into the profit and loss of all 3 Schools. My question to you, agree the full profit and loss account a detailed full for the profit and loss account of all 3 Schools that you probe is not before the Court today?'
>
> A : Agree is not before the Court.

[66] As a result of the Company's failure to produce full set of Profit and Loss Accounts, the Claimants' Counsel submitted that it would be appropriate to invoke the presumption of adverse inference under s. 114(g) of Evidence Act 1950 against the company, i.e., that this document, if called, would give evidence unfavourable to the Company with regards to the financial standing of the Company which brought about the termination. It is an established principle of law that the Courts will not automatically invoke s. 114(g) of the Evidence Act 1950 upon any party to a hearing merely on its failure to call a witness to give evidence before that hearing. The court must ascertain that the document that which was not tendered is an important document for the purposes of the

hearing concerned as was stated by His Lordship Mohamad Azmi FCJ in **Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492** at p. 494:-

> *It is essential to appreciate the scope of s. 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.*

[67] This Court agrees with the Claimants' Counsel that the full set of profit and loss accounts are important and material document based on the reasons given by the Company in the notice of redundancy terminating the services of the Claimants, and thus could certainly explain the true financial position of the Company. The onus is on the Company to produce the said full set of profit and loss accounts to prove its case against the Claimants and thereby justify that the Claimants dismissal was with just cause or excuse. It is trite that the Company must adduce cogent evidence as to the steps it had taken to secure the said document and/or provide the reasons as to why the said documents were not produce before this Court to avoid the court from drawing an adverse inference against it. However, the Company failed to do so. By the Company's failure to produce the said document which will show the true financial position of the Company, the Claimants were denied their rights to cross-examine the Company's witnesses on the same in the course of this hearing and this Court was also denied the opportunity to assess the said document. This Court thus draws an adverse inference against the Company under s. 114(g) of the Evidence Act 1950 upon its failure to produce the full set of the profit and loss accounts.

[68] COW-2 also admitted during cross-examination, that there was no evidence before this Court, that the School of Biosciences was suffering the most severe financial loss. COW-2 testified as follows:-

Q : That means Prof Thomas (COW-2) in respect to you but based on your answer that would mean there is no supporting evidence today to show that the school of Biosciences was suffering the most severe financial loss, correct? Today there is no such evidence although you say it under oath, I expect that but there is no supporting evidence to show that because that analysis is not before the Court?

A : I agree.

[69] The Company emphasizes that it must stay afloat in this tertiary education which is a highly competitive market. The Company tendered copious amounts of documentation as proof of its financial standing at that material time. COW-1 testified on the importance of a Company making a decent profit margin to remain profitable and it would have been reckless of the Company to ignore such a low level of profit as this is a Company that has an obligation to its shareholders to make sure that the Company is indeed making a reasonable margin.

[70] Even though the Company alleged that the financial standing of the Company had been deteriorating but admitted that the Company was not facing financial losses per se and that the profitability of the Company is not equivalent to its sustainability. The Company was not operating efficiently, and this must be arrested before the financial health of the Company worsens. It is established that it is not a requisite condition for a Company to undergo financial losses before undergoing a reorganization or retrenchment. In fact, at this juncture, this Court will call in aid the case of **Mohamad Sahrul bin Kahulan & Others v. Lourdes Medical Services Sdn Bhd [2021] 2 LNS 1295** wherein the Learned Chairman Tuan Augustine Anthony stated as follows:-

"A scrutiny of the Financial/Profit and Loss statement produced by the Company showing significant drop in the revenue of the Company cannot be taken as acceptable ground for the retrenchment of the Claimant."

…

"It does not mean that the moment there is some reduction in the revenue of any company/companies, the company must quickly and immediately retrench its employees. There are many significant and meaningful ways in which a company can initiate financial austerity measures whenever the company experiences some business downturn and revenue dip without resorting to retrenching its employees as an immediate and first step in costs cutting measures"

[Emphasis added]

[71] In fact, the alleged decision made during the meeting on 13.06.2019 to initiate a Manpower Cost Rationalisation exercise was also not stated in the notice of termination issued to the Claimants and/or in the Company's reply to the Claimants letters of appeal and it was belatedly raised. If there was such a rationalization made during the said meeting, the Company should have stated in the said termination letter and/or in the Company's reply dated 24.10.2019 to the Claimants' letters of appeal dated 21.10.2019. The Claimants were clueless as to their selection for redundancy and sought for justification. Furthermore, the Company chose not to reply to the Claimants subsequent letters of appeal dated 04.11.2019 and 14.11.2019 and in an attempt to shut the Claimants after receiving the said letters of appeal, the Company had increased the termination benefits. It is the Claimants' case that even though the Company had called them for a meeting on 28.11.2019 upon receiving their letters of appeal dated 04.11.2019 and 14.11.2019 and showed them certain slides that the School was facing financial difficulties, some of the slides that were shown to the Claimants were blur and they were not given a print out of the slides. Despite the Claimants request for the Company to provide an official response to the said letters of appeal, the Company chose not to reply to the same.

[72] Redundancy in employment can also arise where the business requires fewer employees due to reduced business or where the work had reduced significantly or diminished. I lean in support of the case of **Stephen Bong v.**

FCB (M) Sdn. Bhd. (1999) 3 MLJ 411, where the High Court held as follows:-

> *"It is not the law that redundancy means the job or work no longer exists. Redundancy situations arise where the business requires fewer employees of whatever kind ("Harvey on Industrial Disputes"). In the case before me, it is the Company's case that there was reduced work and reduced business, which made the applicant's position as an executive director in charge of one group redundant."*

[73] A distinction must be drawn between the redundancy of a specific position held by an employee and redundancy due to a surplus of manpower. When an employer alleges that a specific position is no longer required or has ceased to exist in the company, the employer must prove that not only has the position ceased to exist, but also that the associated functions, duties and responsibilities had ceased to exist.

[74] However, in the case of redundancy due to a surplus of manpower, it is unreasonable to require the employer to prove that the functions, duties and responsibilities of the position held by the retrenched employee have ceased to exist altogether, in order to justify his retrenchment.

[75] On the facts, the Claimants were not retrenched because their positions or the Claimants functions, duties and responsibilities had ceased but there were surplus of manpower.

Selection Criteria

[76] The Claimants contend that the Company had failed to adhere to the Code of Conduct For Industrial Harmony wherein prior notice, warning and/or consultation with the Claimant before the retrenchment. COW-2 testified during cross examination that he did not interview the Claimants before their retrenchment. COW-2 testified as follows:-

Q : My next question is now comes to the 2 Claimants, Dr. Wong and Dr. Tam. Agree that you never interviewed both Doctor Tam and Doctor Wong when you carried out this probe and came out with the action plans at that point in time you did not interview them?

A : Nope.

Q : By that you mean yes, I didn't interview them

A : Yes, I didn't interview them. We have not identified people at that point.

Q : Fair enough, we have not identified people at that time. So, before they were retrenched do you agree you also did not interview them?

A : No.

[77] The Code of Conduct for Industrial Harmony is a set of guidelines and principles for the employers and employers to follow on the practice of industrial relation for achieving greater industry harmony. The Code of Conduct of Industrial Harmony is the gold standard by which a Company's action may be measured against to see if the whole exercise of retrenchment had been carried out bona fide and that every attempt had been made to explore alternatives before the termination on account of retrenchment – Our Court of Appeal in **Ng Chang Seng v. Technip Geoproduction (M) Sdn Bhd & Anor [2021] 1 MLJ 447**.

[78] The Code of Conduct is not statute law it nevertheless has some legal sanction as a document that this Court should have regard to when making its award as clearly spelt out in Section 30(5A) of the 1967 Act as follows:-

"(5A) In making its award, the Court may take into consideration any agreement or code relating to employment practices between organizations representative of employers and workmen respectively where such agreement or code has been approved by the Minister."

[79] I would also refer to the case of **Kilby Jacob Atticus v. Halliburton Business Services Sdn. Bhd. (2022) 3 ILR 281** wherein it was stated that employer must provide strong and good reasons for not applying the procedures for retrenchment provided in the Code of Conduct for Industrial Harmony.

[80] In the case of **Ramesh Subramaniam v. Tan Chong Motor Assemblies Sdn. Bhd. (Award No 2434 of 2022),** which was upheld by the High Court recently, I have held that there are plethora of authorities whereby the Court has allowed the employee's claim after having regard of the Company's failure to comply with the Code of Conduct for Industrial Harmony, among others:-

(i) In the case of **Looi Tuck Keong v. New-Ell Stationery Products (M) Sdn Bhd [2010] 2 LNS 1527 413**, the Court held as follows:-

It is settled law that the Code of Industrial Harmony does not have any force of law. It has no legal sanction. No penalty can be imposed on the employers for their failure to follow its provisions. But it has been decided that a retrenchment is only justified if it is made in accordance with the accepted industrial relation standards, practices and procedures.

In the case of Mamut Copper Mining Sdn. Bhd. v. Chau Fook Kong referred to earlier, the Court held:-

".....the Court has generally adopted the principles contained in the Agreed Practices annexed to the Code. The basis for doing so is to be found in s. 30(5A) of the Industrial Relations Act 1967 which provides that the Industrial Court may, in making an award, "take into consideration any agreement or code relating to employment practices between organisations representative of employers and workmen respectively, where such agreement or code has been approved by the Minister."

The Court is mindful that the Code, ie, inclusive of the Agreed Practices attached thereto, has "no legal force or sanction" (see Penang & S. Prai Textile & Garment Industry Employees' Union v. Dragon & Phoenix Bhd. Penang & Anor. [1989] 2 CLJ 239). It is not the office of the Court to pronounce on the lawfulness or otherwise of a dismissal of a workman pursuant to a retrenchment exercise undertaken by an employer by reference to the issue whether or not the Agreed Practices have been complied with. Rather, it is the duty of the Court to consider whether or not the said dismissal is just or otherwise. In this regard, the Court's duty is to look at the entire facts and circumstances of the retrenchment exercise and the particular facts of the case of each of the retrenched workman to see whether the workman's retrenchment was done fairly and in accordance with the generally accepted norms of industrial relations practice as set out in the Agreed Practices."

[81] The Code of Conduct for Industrial Harmony provides, inter alia, the measures to be taken by the employers if retrenchment becomes necessary and the guidelines for selecting the employees to be retrenched. Clause 22(b) of the said Code reads:-

"The employers should select employees to be retrenched in accordance with an objective criteria. Such criteria, which should have been worked out in advance with the employees' representatives or trade union representatives or trade union, as appropriate, may include:-

(i) Need for the efficient operation of the establishment or undertaking;

(ii) Ability, experience, skill and occupational qualifications of individual workers required by the establishment or undertaking under (i);

(iii) Consideration for length of service and status (noncitizens, casual, temporary, permanent);

(iv) Age;

(v) Family situation;

(vi) Such other criteria as may be formulated in the context of national policies."

[82] With regard to the consideration of length of service, the common practice adopted and applied in redundancy exercises is the principle of "Last In, First Out" (LIFO). In the context of retrenchment, LIFO simply means that employees who were hired last would be the first to be let go. The Company contended that LIFO was not applicable. The Company relied on its own selection criteria.

[83] In **Ganda Oil Industries Sdn Bhd v. Monana Naidee [1984] 1 ILR 5,** it was stated that the LIFO principle is not a rigid principle, and a departure from the principle will be justified if it is omitted for sound and valid reasons. Therefore, there may be circumstances that would justify the departure from the LIFO principle.

[84] In **Firex Sdn Bhd v. Cik Ng Shoo Waa [1990] 1 ILR 226** the Industrial Court held: -

> *"When an employer claims to have dismissed a workman in accordance with seniority i.e. "last come, first go", he must show that he made the choice* ***from among workers doing like works****. If the evidence shows otherwise, the dismissal may be regarded as not being made bona fide."* ***[Emphasis Added]***

[85] In **BBC Brown Boveri (M) Sdn Bhd v. Yau Hock Heng [1990] 2 ILR 2** the Learned Chairman Steve L K Shim (as he then was) held:-

> "*Suffice it to state that when an employer claims to have dismissed a workman in accordance with this principle,* ***he must show that he made the choice from among workers doing like work****. If the*

evidence shows otherwise, the dismissal may be regarded as not being made bona fide." ***[Emphasis Added]***

[86] In the instant case, it is the Company's stand that LIFO principle is not applicable to the termination of the Claimants. The decision to terminate the Claimants were taken paying heed to a major consideration that their termination will result in a significant cost saving because of the high salary of both of the Claimants. It is the finding of tis Court that the Company failed to give sound and valid reasons for it to depart from the LIFO principle.

[87] As the Code has provided the procedures, it is the duty of the employer to follow them to ensure fairness to the employee. In this case it is clear from the evidence that the Code was not followed by the Company. The Claimants were not given any early warnings that their position was to be made redundant. They were only made known on the same day the notice of termination was served on them.

[88] Based the Company's case, it is not difficult to fathom why there was a surplus of manpower at the material time as the number of students had reduced. The Company confirmed that the Claimants were selected for retrenchment because of their high salaries and that is the selection criteria.

[89] The Company had noted that of the ten (10) academic employees of the Bachelor of Biotechnology programme, the 1st and 2nd Claimants, who are both Associate Professors, had the highest salary, consisting of a five-figure salary, whilst the other academic employees had a basic four-figure salary. Hence, the 1st and 2nd Claimants were identified as being surplus to the Company's requirement.

[90] Retrenchment based solely on high salary is unfair and discriminatory or biased against more experienced employees who have worked longer for the employer. The Claimants had worked for the Company for 7.85 years and 8.84 years respectively before being retrenched by the Company due to their high salary. The Company's action of targeting the Claimants for retrenchment, when

their high salaries was actually bestowed upon them by the employer's decision, to borrow the words of the Learned Chairman Tuan Andersen Ong Wai Leong, is akin to the saying "A tree that grows too fast is cut down first". Such action is grossly unjust and inequitable because the high salaries were granted by the Company's own decision.

[91] It also disproportionately affects employees who have dedicated more time and effort to the company. These individuals may have acquired valuable skills and experience over the years, contributing significantly to the employer's success.

[92] As such, targeting them based solely on salary overlooks their contributions and may undervalue their loyalty and dedication. Furthermore, it could perpetuate age discrimination, as older employees tend to have higher salaries due to their tenure and experience.

[93] On the facts, the Company not only did not follow the LIFO principle but also acted in contravention of the spirit and intent of the Code of Conduct For Industrial Harmony and LIFO principle by targeting the Claimants for retrenchment based on their high salaries. The said Code and LIFO principle are designed to avert the discrimination of employees and to maintain industrial harmony when retrenchment becomes necessary.

[94] The Company's main objective for conducting the retrenchment exercise was to retain a lean and efficient operations team to ensure the financial stability and sustainability of the Company.

[95] It is an established principle in the industrial jurisprudence that selection of staffs to do the work or the size of the workforce is a management prerogative, and the court will not interfere unless it was done unfairly or in bad faith.

[96] On the facts, the Company's decision to target the Claimants for retrenchment based on their higher salaries lacked good faith, improper and unfair.

[97] Despite the Company's financial misfortune and the necessity of retrenchment due to a surplus of manpower at the material time, the Company adopted and applied unjust and inequitable selection criteria for the Claimants retrenchment.

[98] Whilst there are no fixed selection criteria for retrenchment exercises, employers should always select employees to be retrenched in accordance with objective criteria that are fair and form part of the establishment's or undertaking's employment policy. Clause 24 of the Code of Conduct For Industrial Harmony provides as follows:-

> *"The appropriate measures and objective criteria should comprise part of the establishments or undertaking's employment policy.*

[99] The criteria used for selecting employees for retrenchment should be consistent with the employers existing employment policies and practices. These criteria should not be arbitrary but should align with the formal policies of the organization. Surely, the Company in our present case does not have policy that include targeting employees for retrenchment or victimizing them merely because of their higher salaries.

[100] It is undoubtedly unfair to someone who has dedicated themselves to build a career with an organization only to be arbitrarily terminated under the guise of redundancy because they were earning high salaries. Fairness would require at the very least, some kind of consultation or discussion for voluntary separation (which was carried out by the Company in 2017) or alternative employment. Under the provisions of Section 30(5A) of the 1967 Act, this Court is entitled to consider the provisions of the Code of Conduct for Industrial Harmony 1975 in determining whether the retrenchment of the Claimant was done in a fair and reasonable manner or otherwise.

[101] Whether the retrenchment of the Claimants 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 the totality of the evidence and going by equity, good conscience and the substantial merits of the case, the Court holds that the Company has failed to prove on a balance of probabilities that the Claimant's retrenchment was done in good faith. The selection of the Claimants for retrenchment due to redundancy cannot be viewed as showing fair labour practices.

[102] The Claimant's retrenchment was conducted unfairly and unjustly for the reasons explained above. Accordingly, the Court finds that the Claimant was dismissed without just cause or excuse.

REMEDY

[103] The Court will now proceed to consider the reliefs the Claimants are entitled to for the loss of their employment. The primary relief for an unjustified dismissal is reinstatement. Before the Court decides whether the Claimants should be reinstated to their former positions, this Court has to consider the industrial harmony of the parties and since that could not be maintained should this Court orders that the Claimants be reinstated, it is not in the best interest of industrial harmony to reinstate the Claimants to their former positions.

[104] The Court will now proceed to consider the compensation the Claimants are entitled to for the loss of their employments. The Federal Court in **Dr. A Dutt v. Assunta Hospital [1981] 1 LNS 5; [1981] 1 MLJ 304** held that the Industrial Court is authorised to award monetary compensation if it is of the view that reinstatement is not appropriate. The compensation constitutes two (2) elements namely that of (a) backwages and (b) compensation in lieu of reinstatement. Reference on the issue of relief (compensation) can also be made to the case of **Koperasi Serbaguna Sanya Bhd. (Sabah) v. Dr. James Alfred and Anor [2000] 3 CLJ 758** wherein the Court of Appeal at page 766 held as follows:-

> "**In industrial law, the usual remedy for unjustified dismissal is an order of reinstatement. It is only in rare cases that reinstatement is refused. For example, as here, where the**

relationship between the parties had broken down so badly that it would not be conducive to industrial harmony to return the workman to his place of work. In such a case, the Industrial Court may award monetary compensation. Such an award is usually in two parts. First, there is the usual award for the arrears of wages, or back wages, as it is sometimes called. It is to compensate the workman for the period that he has been unemployed because of the unjustified act of dismissal. Second, there is an award of compensation *in lieu* of reinstatement."

[105] The above decision was affirmed in the Federal Court and at page 544 of the reported case in **Koperasi Serbaguna Sanya Bhd. (Sabah) v. Dr. James Alfred and Anor [2001] 3 CLJ 541**, His Lordship Steve Shim CJ (Sabah and Sarawak) said:-

"...In our view, it is in line with equity and good conscience that the Industrial Court, in assessing quantum of backwages, should take into account the fact, if established by evidence or admitted, that the workman has been gainfully employed elsewhere after his dismissal. Failure to do so constitutes a jurisdictional error of law. *Certiorari* will therefore lie to rectify it. Of course, taking into account of such employment after dismissal does not necessarily mean that the Industrial Court has to conduct a mathematical exercise in deduction. What is important is that the Industrial Court, in the exercise of its discretion in assessing the quantum of backwages, should take into account all relevant matters including the fact, where it exists, that the workman has been gainfully employed elsewhere after his dismissal. This discretion is in the nature of a decision-making process.".

[106] A similar view has been echoed in paragraph 3 of the Second Schedule to the Industrial Relations Act, 1967 which provides:-

> *"Where there is post dismissal earnings, a percentage of such earnings, to be decided by the Court, shall be deducted from the backwages given."*

[107] As submitted by the Company, only one of the two Claimants who had been gainfully employed post-dismissal. The said Claimant, which is the 1st Claimant, successfully found gainful employment after earnestly looking for alternative jobs. The 1st Claimant had taken on jobs which were non-academic jobs because she was honestly and diligently attempting to mitigate for her loss of employment. Unlike the 2nd Claimant who just states that she had not been able to find employment. This Court agrees with the Company that the 2nd Claimant had not sought employment as diligently as the other. This Court duly consider the fact that there is no evidence that the 2nd Claimant had made attempts to look for a job even though she alleged that more than 40 job applications had been sent out. To avoid being seen to come to the aid and benefit of a Claimant who is seen to drag her own feet, even to her detriment, this Court will treat the 2nd Claimant similarly to the 1st Claimant who had found employment. Hence, the 2nd Claimant's backwages will also reflect a deduction similar to the 1st Claimant, who had been successful in seeking employment subsequent to the retrenchment.

[108] Since the Claimants in this case were paid one (1) month salary for each year of service at time of termination in the sum of RM104,970.20 and RM127,296.00 respectively, this Court will not award any compensation in lieu of reinstatement.

[109] In line with Sections 30(6) and (306A) of the 1967 Act and bearing in mind Section 30(5) of the Act to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form, this Court hereby orders as follows:-

1st Claimant

Backwages:-

RM13,372.00 x 24 months' salary - 20% (post dismissal earnings) = RM256,742.40

2nd Claimant

Backwages:

RM14,400.00 x 24 months' salary - 20% (post dismissal earnings) = RM276,480.00

[Total : RM533,222.40 (RM256,742.40 + RM276,480.00)]

[110] This Court now orders the Company to pay the total amount of **RM533,222.40** to the Claimants less any statutory deductions, if any, through their Messrs A. Rajadurai P. Kuppusamy & Co. within forty (40) days from the date of this Award.

HANDED DOWN AND DATED THIS 27th DAY OF JUNE 2024

-signed-

(ESWARY MAREE)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR