

INDUSTRIAL COURT MALAYSIA

[CASE NO: 4/4-826/11]

BETWEEN

ALIAH ANNAMMA ABDULLAH

AND

MANPOWEER STAFFING SERVICES (M) SDN BHD

AWARD NO. 1189 OF 2014

BEFORE : Y.A. TUAN P IRUTHAYARAJ A/L D PAPPUSAMY
Chairman (Sitting alone)

VENUE : Mahkamah Perusahaan Malaysia, Kuala Lumpur

DATE OF REFERENCE : 20.05.2011

DATES OF MENTION : 05.09.2011, 29.11.2011, 14.02.2012,
15.03.2012, 16.04.2012, 14.05.2012,
07.06.2012, 02.08.2012, 26.09.2012,
16.10.2012, 27.11.2012, 23.01.2013,
25.01.2013, 31.01.2013, 04.02.2014

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04.09.2014, 05.09.2014

DATES OF WRITTEN SUBMISSIONS : Written Submission by the Company filed on 14.10.2014;

REPRESENTATION : *For the claimant - M Eswary; M/s The Law Firm of M Eswary*

For the company - Dinesh Ratnarajah (Pavitra with her); M/s Richard Talalla & Harun

REFERENCE:

This is a reference by the Honourable Minister of Human Resources under Section 20(3) of the Industrial Relations Act 1967 for an award in respect of a dispute arising out of the dismissal of **PUAN ALIAH ANNAMMA BINTI ABDULLAH** (hereinafter referred to as “the Claimant”) by **MANPOWER STAFFING SERVICES (M) SDN. BHD** (hereinafter referred to as “the Respondent”).

AWARD

The parties to the dispute are Puan Aliah Annamma binti Abdullah (“**the Claimant**”) and Manpower Staffing Services (M) Sdn. Bhd (“**the Respondent**”). The dispute which has been referred to the Industrial Court by way of a Ministerial Reference under Section 20(3) of the Industrial Relations Act 1967 (“**the Act**”) is over dismissal of the Claimant by the Company on 02.11.2010.

Background Facts

The Company engaged the Claimant as its Human Resource Manager on contract basis (fixed term) with effect from 3rd May 2010 till 2nd August 2010.

The Claimant, *vide* a letter of employment dated 23rd July 2010 (“**the said employment letter**”) was offered the position of Human Resources

Manager by the Company, subject to the terms and conditions of the said employment letter.

The Claimant, as a Human Resource Manager, was reporting to the Human Resource Director, Ms. Anna Tan Lee Geng (**“COW-1”**).

Throughout the employment of the Claimant, there were six (6) performance reviews on the Claimant handled by COW-1. The 1st review was held on 20th September 2010 and the Claimant had a discussion with COW-1 and was informed of the tasks she needed to address.

The 2nd review was held on the 27th September 2010, where a copy of performance review was given to the Claimant so that the dates could be included in the “By When” column to ensure tracking and monitoring of progress. The Claimant was given various tasks and this was discussed at this review.

The 3rd review was held on 4th October 2010, where COW-1 followed up with an email to the Claimant on the review. However, the Claimant sent an email with no updates as regards her work in progress. The Claimant admitted that she did not attend this review without giving reasons.

On the 4th review session with the Claimant on 11th October 2010, COW-1 the HR Director of the Company at the material time, expressed *inter alia* her concern over the Claimant's performance in the Company, in particular the drafting of the Claimant's Job Description and objectives.

On the 5th review session by the Company with the Claimant on 18th October 2010, COW-1 at the material time, *inter alia* commented on the Claimant's requirement to develop her objectives and was asked to redraft her Job Descriptions. The Claimant was informed of other issues which required improvement and this has been adduced in evidence which will be addressed later on in this Award.

A final review session with the Claimant was rescheduled from 25th October 2010 to 28th October 2010, where COW-1 at the material time, *inter alia*, established the Claimant's inability in drafting her Job Descriptions, inability to complete the HR Audit and her inability to arrive at a final draft of the Grievance and Disciplinary Inquiry policies and procedures for her position.

The Claimant, as a Human Resource Manager, was expected to develop her own job description and was instructed and informed as such by her superior, COW-1.

In the premise, a Performance Review recording the minutes of the 6 Performance Reviews together with the Performance Expectations & Assessment were signed off by the COW-1 on 1st November 2010 and by the Claimant with remarks on 2nd November 2010. At all material times the Country Manager Mr. Sam Haggag (COW-2) was kept informed of the

Claimant's performance issues which arose and with her work in progress which was not completed until the date she was terminated.

On the 13th October 2010, COW-1 had sent a memo and/or email to the Claimant, which the Claimant had replied *vide* a memo or a letter dated 19th October 2010.

Vide an email dated 19th October 2010, Miss Anna Tan COW-1 had replied to the Claimant's memo/letter dated 19th October 2010. The Claimant then replied to COW-1's memo/letter dated 19th October 2010 *vide* email dated 21st October 2010.

Thereafter, COW-1 had sent an email and a show cause letter dated 21st October 2010 to the Claimant.

The Company had never authorized the Claimant to issue letters to employees without consultation and/or discussion with the Claimant's

superior and the Claimant was expected to consult and/or discuss issues with her superior before the issuance of any letters to the employee at all material time.

The show cause letter dated 21st October 2010 was issued to the Claimant in regard to her insubordinate behavior, misconduct and frequent tendency of making baseless allegations and the Claimant was required to give her explanation as to why disciplinary action should not be taken against her. *Vide* a letter dated 26th October 2010, the Claimant gave her explanation accordingly.

On 1st November 2010, a performance review was conducted by the Company for the period of 3rd August 2010 to 2nd November 2010.

The Company terminated the Claimant's employment and/or service *via* the letter dated 2nd November 2010 entitled "Non-Confirmation of Probation". The termination of the Claimant's service is justified by the

Claimant's poor performance and misconduct which is inconsistent with the expectation of that of an employee in a managerial position.

The Claimant's last drawn salary was RM5,000.00 per month as per the employment letter dated 23rd July 2010.

The Issues

The issues for determination are as follows:-

- (a) Whether the Claimant was dismissed by the Company;
- (b) If so, whether the dismissal of the Claimant by the Company was with just cause or excuse.

The Law

The function of the Industrial Court has been propounded by Mohd. Azmi FCJ in the Federal Court case of *Milan Auto Sdn. Bhd. v. Wong She Yen* [1995] 4 CLJ 449 ("*Milan case*") which is as follows:-

“As pointed out by this Court recently in Wong Yuen Hock v. Hong Leong Assurance [1995] 3 CLJ 344, the function of the Industrial Court in dismissal cases on a reference under s. 20 is twofold: first, to determine whether the misconduct complained of by the employer has been established and secondly whether the proven misconduct constitutes just cause or excuse for the dismissal.”

In the case of *Goon Kwee Phoy v. J & P Coats (M) Sdn. Bhd.* [1981] 2 MLJ 129 (“Goon’s case”) the Federal Court enunciated the following principle:-

“... 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 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.” [Emphasis added]

It is trite law that the Company bears the burden to prove that the Claimant had committed the alleged misconduct and that the misconduct warrants the Claimant's dismissal [see *Ireka Construction Berhad v. Chantiravathan a/l Subramaniam James* [1995] 2 ILR 11 (Award No. 245 of 1995)].

The Company need only to prove misconduct justifying the dismissal or termination on the balance of probabilities [see *Telekom Malaysia Kawasan Utara v. Krishnan Kutty a/l Sanguni Nair & Anor* [2002] 3 CLJ 314 (CA)].

In the case of *British Leyland UK Ltd v. SWIFT* [1981] IRLR 91, the Master of the Rolls Lord Denning at p 92 laid down the following test:

*"The first question that arises is whether the industrial tribunal applied the wrong test. We have had considerable argument about it. They said: "... a reasonable employer would, in our opinion, have considered that a lesser penalty was appropriate". I do not think that that is the right test. **The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably***

have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him.”

The Company had submitted that the Claimant was terminated due to her poor performance and misconduct. Despite having vast experience in the Human Resource field, the Claimant performed poorly and failed to improve herself. As such, the Claimant’s dismissal was fair. The Company has established this through written communication *vide* email to the Claimant, through various performance appraisals and by evidence extracted through cross-examination of the Claimant and company witnesses.

Let me now deal with the issues.

(A) Was the Claimant dismissed?

The answer to this question is in the affirmative as she was terminated *vide* letter dated 02.11.2010 entitled “Non-Confirmation of Probation”.

(B) Was the Claimant’s dismissal with just cause or excuse?

The Company’s reasons for terminating the Claimant based on non-confirmation of probation are as follows:-

There were broadly 2 main reasons and they are as follows:-

- A. The Claimant is incompetent; and
- B. The Claimant committed misconduct.

Let me now deal with such of those reasons:-

A. The Claimant is incompetent

The Company is of the view that the Claimant is incompetent based on the Claimant’s poor performance. The Claimant’s poor performance was noted on numerous occasions as follows:

- (i) Unable to come up with her own Job Description;
- (ii) Failed to complete Audit Findings;
- (iii) Unable to differentiate the policies and procedures with reference to grievance procedure; and
- (iv) Unilaterally changing the working hours.

Let me now deal with each of these reasons on incompetency of Claimant:-

(i) Unable to arrive at her own job description

The evidence is as follows:-

During Examination-in-Chief, COWS-1, testified as follows:

Q13: Please refer to page 19 of COB. Can you please refer to the email at the bottom of the page. Please explain this email.

A13: This is an email that was sent by the Claimant to me asking for some clarifications regarding the 2nd review. Subsequent to that I've replied to that email on the same day and it can be seen at the top part of page 19 of COB-I expressed my concerns to her and told her that despite the numerous discussions regarding her work progress, nothing has changed since then. I also told her to be more pro-active as a manager and told her that an experienced HR Manager like herself would have developed her objectives without having a Superior to instruct or develop a review plan.

Q14: Please refer to page 11 of COB. Can you please explain to Court what happened on the 4th review?

A14: During the 4th review, the Claimant had presented her Job Descriptions and objectives. She admitted that she was unable to complete and comprehend several matters such as the S.M.A.R.T objectives and besides, she didn't know what constituted the thresholds in the Manpower's TMP rating scaled despite the fact that I had given her the guidelines to develop her objectives. I expressed my concerns to her and told her that as a HR Manager she won't be able to contribute to the HR department to the fullest if she is incapable in coping with such basic human resource processes.

Q15: Please return to page 16 of the COB. Can you explain to the Court, what is this email about?

A15: This is the email that I have sent to Aliah on 9.9.2010. This is when I gave her the guidelines to develop her own objectives as I mentioned earlier. I've also expressed my concerns regarding her inability to develop her own objectives as a HR Manager, her inability to consider the S.M.A.R.T objectives and also the KPI Standards. I gave her examples or baselines for her to develop her objectives to arrive at better and more comprehensive objectives. My impression as her Manager at this point of time was that, she cannot and unable to work independently and that her work standard was not up to the managerial levels expected.

Q17: The Claimant in her Statement of Case Stated that while developing her own job description as requested, she had been performing her duties and responsibilities diligently. What are your observations?

A17: The Claimant was working as the HR Manager in the Company. The Company hired her based on her impressive CV which was qualified for the HR Manager position. However, the management realized her poor performance on numerous occasions. Besides, the reviews from other superiors also revealed that she was not able to grasp the basic human resource management concepts which are fundamental of human resource management. Further, she was unable to develop her own objectives and job descriptions and this was unacceptable because that was inconsistent with the experience needed to be appointed as a Human Resource Manager. Further, she was unable to meet deadlines that she was required to be committed to. For instance, she was unable to complete her task to conduct a HR Audit within the time limit despite her admission of having vast experience in the subject matter. Certainly these poor work performance incidents were unacceptable especially for the position of a Manager that requires high standards of work performance.

Q24: Please refer to paragraph 6 of the Statement of Case. What is the Company's response to this statement?

A24: As Human Resource Manager, the Claimant is expected to develop her own job description and was expected to adhere to the standards expected by the Company. The Company had no intention to hire a C&B Analyst and Employee Relations Manager to deal with an area in which the Claimant is not familiar, experienced and competent in. Further the Company did not remove the empowerment given to the Claimant for leave approval as a Human Resource Manager but had only requested for visibility and transparency of the leave approval process and the Company did not remove an/or intend to remove the Claimant's authority to approve leave.

COW-2 in COWS-2 testified as follows:

Q14: Please refer to page 11 of COB. Can you please explain to Court what happened on the 4th review?

A14: During the 4th review, the Claimant had presented her Job Descriptions and objectives. She admitted that she was unable to complete and comprehend several matters such as S.M.A.R.T objectives and besides, she didn't know what constituted the thresholds in the Manpower's TMP rating scales despite the fact that the HR Director had given her the guidelines to develop her objectives. The said Director expressed her concerns to her and told her that as a HR Manager she won't be able to contribute to the HR Department to the fullest is she is incapable in coping with such basic human resource processes.

Q15: Please turn to page 16 of the COB. Can you please explain to the Court, what is this email about?

A15: This email is the email that the HR Director has sent to the Claimant on 9.9.2010. This is when the said Director gave her the guidelines to develop her own objectives as mentioned earlier. The said Director also expressed her concerns regarding her inability to develop her own objectives as a HR Manager, her inability to consider the S.M.A.R.T objectives and also the KPI standards. The said Director gave her examples or baselines for her to develop her objectives to arrive at better and more comprehensive objectives. The said Director's impression as her Manager at this point of time was that, she cannot and unable to work independently and that her work standard was not up to the managerial levels expected.

Q13: Please also refer to page 19 of COB. Can you please refer to the email at the bottom of the page. Please explain this email.

A13: This is an email that was sent by the Claimant to the HR Director asking for some clarifications regarding the 2nd review. Subsequent to that, the said director applied to that email on the same day and it can be seen at the top part of page 19 COB. The HR Director expressed her concerns to the Claimant and told the Claimant that despite the numerous discussions regarding her work progress, nothing has changed since then. The said Director also told her to be more pro-active as a manager and told her that an experienced HR Manager like herself would have developed her objectives without having a Superior to instruct or develop a review plan.

Q17: The Claimant in her Statement of Case stated that while developing her own job description as requested, she had been performing her duties and responsibilities diligently. What are your observations?

A17: The Claimant was working as the HR Manager in the Company. The Company hired her based on her impressive CV which was qualified for the HR Manager position. However, the management realized her poor performance on numerous occasions. Besides, the reviews from other superiors also revealed that she was not able to grasp the basic human resource management concepts which are fundamental of human resource management. Further, she was unable to develop her own objectives and job descriptions and this was unacceptable because that was inconsistent with the experience needed to be appointed as a Human Resource Manager. Further, she was unable to meet deadlines that she was required to be committed to. For instance, she was unable to complete her task to conduct a HR Audit within the time limit despite her admission of having vast experience in the subject matter. Certainly these poor work performance incidents were unacceptable especially for the position of a Manager that requires high standard of work performance.

During cross-examination, the Claimant had stated as follows:

Q30: *This HR objectives for 2010 are these your objectives or that you are to achieve, found at page 16 of COB.*

A: *No.*

Q31: *What are these HR objectives at page 16?*

A: *Items 1-8, they are some examples given by Anna Tan for me to draft out the HR objectives.*

Q32: *So you were requested to draft a HR objective to be achieved by you.*

A: *Yes, but not all, items 4 & 6 were removed or given to another HR personal.*

Q33: *I refer you to page 16 of COB and page 17 COB do you agree with me that the supervisor sent you this email on HR objectives for 2010, because your draft objectives was not comprehensive and had only 2 objectives as per Ms. Anna Tan's email at page 17 COB.*

A. *Agree.*

Q34: *Refer to page 32 of CLB 2, do you agree that you were asked to develop your 2010 objectives since 8/9/2010, as per these email?*

A: *Yes.*

Q35: *Refer to page 16 of COB, on the 9/9/2010, Ms. Anna Tan had provided you with sample of HR objectives as per her statement in the 2nd last paragraph of page 16, agree?*

A: *Yes.*

Q35: *Refer to page 11 of COB, referring specifically to the 5th review "status and comments" column, last line "Alia still ... ensure". As at 5th review on 18/10/2010, you have still not developed the objectives as per performance review documents specifically there are "Alia ..." correct?*

A: *Incorrect.*

Q37: If, incorrect, could you produce the objectives accepted by the company if it is incorrect.

*A: The objectives that I drafted for my supervisor **was** not accepted by her.*

Q38: I put it to you, that the objectives you drafted were not satisfactory to your supervisor and therefore your tasks of completing your HR objectives remain incomplete until the date of your non - confirmation of employment.

A: I disagree.

Based on the evidence the Claimant failed to develop her own Job Description despite having more than 13 years experience in the field of Human Resources and the Claimant testified to this in her cross examination.

The Claimant had sent an email to COW 1 regarding clarification on the 2nd review. COW 1 replied to the Claimant's email and had highlighted to the Claimant that an experienced HR Manager would have developed her objectives without having a superior to instruct or develop a review plan. The Claimant is of a senior management position and is expected to judge for herself what is required of her.

However, the Claimant on the 4th review presented her incomplete Job Description and objectives and admitted that she was not able to complete and comprehend the S.M.A.R.T objectives and KPI Standards. The Claimant also admitted that she did not know what constituted the thresholds in the Company's rating scale, despite COW1 handing to the Claimant the guidelines to develop her objectives.

It is clear that the Claimant is unable to work independently and her work standard was not to that expected of a HR Manager or employer in a managerial position.

(ii) Failed to complete Audit Findings

The Claimant also failed to complete the Audit Findings.

During examination-in-chief through COWS-1, COW-1 testified as follows:

Q16: *Please refer to page 13-15 of the COB. Can you please explain what this document represents?*

A16: *Page 13-15 of the Company's Bundle of Documents shows the Performance Expectations and Assessment of each of her tasks which includes The Review and enhance HR Policies and System,*

Organisation and Self Development, Day to Day, Industrial Relation and Employee Relation and lastly, The Project. It is clear from this document that, there were several tasks that she failed to complete such as the Audit Findings that was supposed to be presented to the HRD and Country Manager. Whereas page 15 shows the outcome of the review in which I have reviewed that she did not meet the expectations.

COW-2 through COWS-2 testified as follows during the examination-in-chief:

Q16: *Please refer to page 13-15 of the COB. Can you please explain what this document represents?*

A16: *Page 13-15 of the Company's Bundle of Documents shows the Performance Expectations and Assessment of each of her tasks which includes The Review and Enhance HR Policies and System, Organisation and Self Development, Day to Day, Industrial Relation and Employee Relation and lastly, the Project. It is clear from This document that, there were several tasks that she failed to complete such as the Audit Findings that was supposed to be presented to the HRD and Country Manager. Whereas page 15 shows the outcome of the review in which the HR Director has reviewed that she did not meet the expectations.*

During the cross-Examination, the Claimant had stated as follows:

Q2: *Question 25 of cross examination, page 80 of CLB 2, earlier you were cross referred to page 80 in CLB2 with that of page 13 of COB, at page 80 CLB2, you have stated that the audit findings will*

be done by the 25th October 2010, and you agreed with my learned friend that as 1/11/2010, the audit findings were incomplete. Please explain to the Court why was this audit findings were incomplete as at 1/11/2010.

A: I've given my draft on the audit findings & review employment letter to my superior a number of times but was told to redraft and redraft.

The Claimant had failed to complete tasks assigned to her. Despite having vast experience in the field of Human Resource, the Claimant had failed to present the Audit findings to the HRD and Country Manager on time. This is undisputed and the task remained incomplete as at the date of the Claimant's termination.

(iii) Unable to differentiate between policies and procedures with reference to grievance procedures and was also not able to complete the task of drafting disciplinary policies

The Claimant was also not able to differentiate between policies and procedures with reference to grievance procedures, and had also failed to complete her task on time.

The Claimant during cross-examination had stated as follows:

39Q: *Did you attend the reviews on the 11/10/2010, 18/10/2010 and 25/10/2010 rescheduled to 28/10/2010 respectively?*

A: *I attended all.*

40Q: *I refer you to page 15 of CLB 1 the email dated 19/10/2010 specifically the 3rd paragraph "... grievance procedure...procedures". I cross refer you to page 17 of CLB 1, items no. 3, in relation to para 3 of "..." you agree that your supervisor have to explain to you that the differences between policies and procedures with reference to the grievance procedures, as you have stated in your email.*

A: *No. I disagree*

41Q: *Refer to page 17 of CLB 1, did you state in your reply on page 17 of CLB1 that your supervisor did not discuss the difference between policies and procedures.*

A. *I did not.*

42Q: *Page 15, 3rd para last line "it will ... completed". Do you agree that as a result of you not complying the agreement procedures, the same could not be implemented by the company as at the date of your non-confirmation.*

A. *It was drafted but not implemented.*

43Q: *Refer to page 80 CLB2, cross refer to page 13 of COB, refer to "by when" column and the '1st area' column for items no.8 - which is implement ... procedures". Do you agree that the decided date for completion and implementation of the grievances handling procedures was set at 18/10/2010 as per page 80 of CLB 2.*

A: *Agree.*

44Q: *Refer to page 15 of COB 1, the date of the email is 19/10/2010. Do you agree that this is past the dead line of 18/10/2010 given to you to complete and implement the grievances handling procedures and*

that is why your supervisor stated in para 3 last line, “ I will ... not completed.”.

A: Yes.

45Q: Refer to page 13 of COB 1. Do you agree that the dead line was pushed forward to 28/10/2010 to implement the grievance handling procedures as stated at page 13 COB?

A: Yes.

46Q: Refer to page 11 of COB specifically the 4th review on 11/10, the 2nd line of status and comments “ I refer her to” refer to page 16 of COB, is this the email referred to on 9/9.

A: Yes.

47Q: You had earlier testified that the words “not agree” refer to the smart objectives which you say were not discussed with you, refer to email at page 16 COB which you say “these objectives...” I put it to you that since you agree that your superior referred you to the email on page 16 COB, that the smart objectives were indeed discussed and hence reflected in the status and comments column, 4th review on page 11 of COB.

A: Disagree.

48Q: You had earlier stated that the review on 20/9/2010 was only a discussion have you in remarks at page 15 COB have stated that the review was only a discussion and not a performance review.

A: No.

49Q: Do you agree that your remarks at page 15, the 1st line of remarks have stated and identified it as a performance review by stating “do not agree with the performance review”.

A: Yes.

The Company submits that despite having vast experience, the Claimant is unable to differentiate policies and procedures with reference to grievance procedures and the Claimant's superior had to explain the differences to the Claimant. For the Claimant's position as HR Manager this is clearly unacceptable.

In fact the deadlines to implement the handling of the grievance procedures were pushed forward to 28/10/2010 due to the Claimant's inability to complete her task. Despite this the task remained incomplete.

This is a basic function of a person involved in Human Resources, let alone a HR Manager which the Claimant was engaged as. The Company found it unacceptable that the Claimant could not complete this simple task until the date she left employment.

(iv) Unilaterally changing the working hours.

The Company submitted that the Claimant had changed the working hours for the receptionist without the approval/consent from her superiors.

COW-1 through COWS-1 during examination-in-chief testified as follows:

Q18: Please refer to page 20 of COB. What is this document about?

A18: These are the emails exchanged between Aliah and me. Page 20 shows an email sent by Aliah on 29.10.2010 to our staff. She sent an email informing them that their working hours had been changed. However, Aliah did not consult me with regard to the changes. It is not a simple issue but rather a change in policy, and therefore it is an important issue. There's no one including the HR Manager who can unilaterally change the office hours without getting approval from the Country Manager as this may result in employees expressing their grievances in unilateral change in working hours. As her direct Manager I was expected to be consulted and informed. I've expressed my dissatisfaction through my email sent to her on 02.11.2010 at page 20.

COW-2 in COWS-2 testified as follows:

Q18: Please refer to page 20 of COB. What is this document about?

A18: These are the emails exchanged between the Claimant and the HR Director. Page 20 shows an email sent by the Claimant on

29.10.2010 to our staff. She sent an email informing them that their working hours had been changed. However, the Claimant did not seek my approval regarding the changes. It is not a simple issue but rather a change in policy, and therefore it is an important issue. There's no one including the HR Manager who can unilaterally change the office hours without getting approval from the Country Manager as this may result in employees expressing their grievances in unilateral changes in working hours. As the Country Manager, I was expected to be consulted and informed.

Based on the evidence from COWS-1 and COWS-2, it is clear that the Claimant had failed to adhere to the principles of the Company wherein she failed to obtain the approval of her superiors before changing the office hours.

In the case of *Terence M George v. Dhl Global Forwarding Penang (Dgf)* [2014] 3 ILR 269, the guidelines on whether the misconduct against the claimant has been established is set out as follows:

In order to justify a workman's (the Claimant) dismissal on the ground of poor or unsatisfactory performance, the employer (the respondent) has to establish as follows:

- (i) that the workman was warned about his poor performance;*
- (ii) that the workman was accorded sufficient opportunity to improve; and*
- (iii) that notwithstanding the above, the workman failed to sufficiently improve his performance*

The Company hired the Claimant based on her CV for which she was qualified for the post of HR Manager. However the Claimant had performed poorly on numerous occasions and areas of work. COW-1 and COW-2 testified that the Claimant had performed poorly despite having vast experience in the Human Resource field.

The Claimant had failed to perform her daily tasks diligently. During the 2nd review, COW-1 handed a copy of the performance review to the Claimant to include in dates for a deadline. However the Claimant failed to complete the form and submit it to COW-1 as instructed.

COW-1 had expressed her concerns to the Claimant that despite the numerous discussions regarding her work progress, there was no improvement in the performance of the Claimant's duty.

Applying the principle in *Terence M Gerige v. DHL Global Forwarding Penang*, COW-1 had in fact warned the Claimant regarding her poor performance and the Claimant was given sufficient opportunity to improve where she was given a sample job description and still was not able to draft a job description. The Claimant also failed to complete the Audit Findings and was not able to differentiate between policies and procedures with reference to grievance procedures and disciplinary policies. The Claimant also had failed to get the approval of her superiors before unilaterally changing the working hours and therefore the Court is of the considered view that the Claimant had failed to perform her tasks diligently.

Further, in the case of *James Hong Siong Eng v. Evergreen Paints Sdn Bhd* [2014] 1 ILR 369, it was clearly stated that:

“If the respondent finds that the claimant’s poor performance is due to the claimant’s own failure to exercise sufficiently in applying himself with commitment and diligence to the duties, then the respondent ought to inform the claimant of the shortcomings within a reasonable time frame.”

Applying the cases cited above and based on the evidence from **COWS-1, COWS-2 and the Claimant**, it is clear that the **Claimant is not competent and failed to perform up to the expectation of the Company** even after reminders were given to the Claimant and ample time was given for her to improve her performance.

(B) The Claimant Committed Misconduct

In the case of *Plaat Rubber Sdn Bhd v. Goh Chok Guan* [1995] 1 ILR 79, the court held that:

“Misconduct means such act or conduct as adversely affects an employee’s duties of the work entrusted to the employee by the employer”.

The Company had submitted that the Claimant had committed the following misconducts:

- (i) The Claimant's insubordinate behavior; and**
- (ii) The Claimant created a disharmony working environment.**

Let me deal with each of these factors:-

(i) The Claimant's insubordinate behavior

The company had submitted that the Claimant's insubordinate actions/behavior were as follows:

- a.** The Claimant failed to adhere to the instructions of her superiors.;
- b.** The Claimant acted on her own without the approval of her superiors.

(a) The Claimant failed to adhere to the instructions of her superiors.

During examination-in-chief, COW-1 in COWS-1 testified as follows:

Q19: *Can you please refer to page 10 of the COB? Can you please explain to Court this email?*

A19: *I have once again expressed my concerns and highlighted to her to stop making allegations that I was boycotting her. In this email I have again expressed my concerns about her work performance and this has been discussed through numerous discussions at different times. I urged her to focus on improving the quality of her work and deliver it to a standard befitting a professional and competent HR Professional. I've also pointed out to her about the incident where she had issued a 'show cause' letter to a staff without consulting me and that letter had triggered much unhappiness and upset the staffs in the Senior Leadership Team who had formed a view that the HR Department had taken such a 'strong hand' and a non-consultative approach with employees. This is not the intention, practice and culture of the Company, where there have been no discussions with the HR Director prior to arriving at any decisions.*

During Examination-in-Chief, COW-2 in COWS-2 testified as follows:

Q19: *Can you please refer to page 10 of the COB? Can you please explain to Court this email?*

A19: *The said Director has once again expressed her concerns and highlighted to the Claimant to stop making allegations that the HR Director was boycotting her. In this email the HR Director has again expressed her concerns about her work performance and this has been discussed through numerous discussions at different times. The said Director has urged her to focus on discussions at different times. The said Director has urged her to focus on improving the quality of her work and deliver it to a standard befitting a professional and competent HR Professional. The said Director also pointed out to her*

about the incident where she had issued a 'show cause letter to a staff without consulting the said Director and that letter had triggered much unhappiness and upset the staffs in the Senior Leadership Team who had formed a view that the HR Department had taken such a 'strong hand' and a non-consultative approach with employees. This is not the intention, practice and culture of the Company, where there have been no discussions with the HR Director prior to arriving at any decisions.

During cross-examination of the Claimant, the Claimant stated as follows:

55Q: Refer you to page 11 of COB, specifically the 3rd review, do you agree that instead of attending this review on the 4/10, you had sent an email to Anna Tan instead. Do you agree?

A: Yes.

56Q: Refer to page 30 of CLB 2, 8/10/10, the 2nd email "". Do you agree that Anna Tan has confirmed via this email that you did not attend the performance review and instead sent an email message on 4/10.

A: Agree.

The Company had submitted that the Claimant had failed to attend the 3rd performance review on 4th October 2010 and did not provide any reasons for failing to attend. The Claimant had also issued a 'show cause' letter to

staff without consulting her superiors and she was instructed not to do so unless approval was sought from her superior.

(b) The Claimant acted on her own without the approval of her superiors.

The Company had submitted that the Claimant had acted on her own without the approval of her superiors

COW-1 in COWS-1 during examination-in-chief testified as follows:

Q18: Please refer to page 20 of COB. What is this document about?

A18: These are the emails exchanged between Aliah and me. Page 20 shows an email sent by Aliah on 29.10.2010 to our staff. She sent an email informing them that their working hours had been changed. However, Aliah did not consult me with regard to the changes. It is not a simple issue but rather a change in policy, and therefore it is an important issue. There's no one including the HR Manager who can unilaterally change the office hours without getting approval from the Country Manager as this may result in employees expressing their grievances in unilateral change in working hours. As her direct Manager I was expected to be consulted and informed. I've expressed my dissatisfaction through my email sent to her on 02.11.2010 at page 20.

COW-2 in COWS-2 testified as follows:

Q18: Please refer to page 20 of COB. What is this document about?

A18: These are the emails exchanged between the Claimant and the HR Director. Page 20 shows an email sent by the Claimant on 29.10.2010 to our staff. She sent an email informing them that their working hours had been changed. However, the Claimant did not seek my approval regarding the changes. It is not a simple issue but rather a change in policy, and therefore it is an important issue. There's no one including the HR Manager who can unilaterally change the office hours without getting approval from the Country Manager as this may result in employees expressing their grievances in unilateral changes in working hours. As the Country Manager, I was expected to be consulted and informed.

During cross-examination, the Claimant had stated as follows:

57Q: Refer to page 31 of CLB1, email dated 7/10/2010 at the top of the page, refer to 2nd para, email from Anna Tan to you. **"I wanted...." on this issue, do u agree that Anna Tan has instructed you not to issue letters without her consent?**

A: Yes.

58Q: Can I refer you to the same bundle, page 15 & 16, specifically page 16. "on the same note ... Wednesday 10 am". I refer you to the 1st bullet point " you issued a letter to..." do u agree that despite AnnaTan's instruction to you on page 31 CLB1, not to issue letters to employees the consent, nevertheless issued a letter to Rajes dated 15/10/2010 without Anna Tan's agreement/consent as stated here. Agree?

A: I did not get Anna Tan's consent before I issued this letter.

The Claimant had failed to get the approval of the HR Director and the Country Manager before changing the working hours. Despite being instructed not to issue letters to employees by COW-1, the Claimant issued a letter to Rajes, one of the employees of the Company on 15.10.2010 without the consent of COW-1.

The Federal Court in the case of *Ngeow Voon Yean v. Sungei Wang Plaza Sdn. Bhd./Landmarks Holding Bhd* [2006] 3 CLJ 837 at page 847 decided *inter alia*:

“In Malaysia, the general rule governing the doctrine of superior orders is nothing more than the duty of obedience that is expected of an employee. The most fundamental duty of an employee is to obey his employer’s orders.

Therefore, the Claimant was insubordinate as she has failed to obey her employers orders/instructions. As such the Claimant had breached a fundamental duty as an employee which is to comply with her superior’s instructions.

(ii) The Claimant created a disharmony working environment.

The Company had submitted that the Claimant had made baseless accusations against her superior.

During examination-in-chief, COW-1 in COWS-1 testified as follows:

Q21: Please explain to the Court what are the documents at page 8 and 9 of the COB?

A21: Page 8 of COB is the email sent by me to the Claimant expressing my concerns regarding her baseless accusations against me. She had made some baseless statements about me after her review session on 11.10.2010. I wanted to put that in writing and hence the letter dated 13.10.2010 at page 9 of the COB. The letter is about the Claimant's attitude, behavior and inappropriate conduct as a HR Manager.

Q22: Can you please explain to the Court what were her allegations against you?

A22: On the performance review on 20.9.2010, the Claimant has accused me of victimizing her while as HR Director I was only highlighting to her the areas she should focus more and for to her improve her performance as a HR Manager. It is my role as her superior to review her work performance and take action that are needed to improve her work performance. This is because she has been making baseless statements about me regarding the result of her work performance review. I further stated that if she wanted to do so, she should do it through a proper channel and address the issues in accordance to the Company's policies and procedures.

COW-2 in COWS-2 testified as follows:

Q21. *Please explain to the Court what are the documents at page 8 and 9 of the COB?*

A21. *Page 8 of COB is the email sent by the HR Director to the Claimant expressing the said Director's concerns regarding her baseless accusations against the said Director. She had made some baseless statements about the said Director after her review session on 11.10.2010. I wanted to put that in writing and hence the letter dated 13.10.2010 at page 9 of the COB. The letter is about the Claimant's attitude, behavior and inappropriate conduct as a HR Manager.*

Q22. *Can you please explain to Court what were her allegations against the HR Director?*

A22. *On the performance review on 20.09.2010, the Claimant had accused the HR Director of victimizing her while the said Director was only highlighting to her the areas she should focus more and for her to improve her performance as a HR Manager. It is the said Director's role as her superior to review her work performance and take action that are needed to improve her work performance. This is because she has been making baseless statements about the said Director regarding the result of her work performance review. The said Director further stated that if she wanted to do so, she should do it through a proper channel and address the issues in accordance to the Company's policies and procedures.*

Q23. *Please refer to page 7 of Cob. Can you please explain to the Court what does the document represents?*

A23. *This is the show cause letter dated 21.10.2010 from the Company. The letter was issued after an incident whereby the Claimant has sent an email to one of the Senior Leadership Team members and she stated in her email that "Sometimes if I do without her permission, I get fired and If I do not also I get fired". The company viewed her comment*

as being insubordinate and an affront to the HR Director's position as her immediate Manager. The Company considers that she was attempting to sully the said Director's reputation and credibility as the HR Director of Manpower Malaysia. The Company in the said letter required the Claimant to provide a written explanation as to why disciplinary action should not be taken against her. The Company regarded her conduct as serious in nature.

The Claimant, during cross-examination had stated as follows:

Q59. I refer you to page 9 of COB specifically item 3, 2nd para "in the review section against you." In your reply to this, refer page 11 & 12 CLB1, specifically page 12 Item 3, para 2 "on 11/10 operation matters." Based on your reply, I put it to you that you have no evidence that Anna Tan had requested Helen Low to boycott you at anytime. Do you agree?

A. I disagree.

Q60. Could you show in your reply, where is the evidence that Anna Tan had requested Helen Low to boycott you?

A. In my reply at page 12 CLB1, where I used the phrase "not approaching me for leave matters" as well as other operational matters.

61Q. Did you hear Ms. Anna Tan tell Helen Low to boycott you?

A. No.

62Q. In your reply on page 12 CLB1, your reasons for stating that Anna Tan requested Helen Low to boycott you is an assumption based solely that Helen Low had not approach you for leave matters & for operational matters. Correct?

A: It is my conclusion based on the fact that Helen Low who is my subordinate did not obtain leave from me and went straight to Ms. Anna Tan as well as other operational matters such as covering for the reception when the receptionist is not there.

The Claimant had made baseless accusations against her superior during the performance review where her superior was simply highlighting the Claimant's poor performance with a view that the Claimant could improve. Further, the Claimant during cross-examination stated that her accusation was based on her assumption only.

The Claimant had also sent an email to one of the Senior Leadership Team member, where her statement in the email was an attempt to lower COW-1's reputation and credibility as the HR Director of the Company. As a result of the Claimant's gross misconduct, the Claimant was issued a Memo. The Claimant's reply to the Memo was unsatisfactory and the Company proceeded to issue her with a show cause letter.

Based on the cases cited above and the evidence from the witnesses, it is clear that the Claimant was certainly incompetent, actions were insubordinate and had made baseless accusations against her superior which is contrary to a master servant relationship.

Despite several reminders and having vast experience in the Human Resource field, the Claimant had failed to improve her work performance and continued to make baseless accusations against her superior. The Claimant also admitted that she had sent a show cause letter without the approval of her superiors which constitutes just cause for her dismissal. The Claimant had further unilaterally altered the working hours of the receptionist. The Claimant was unable to complete basic tasks expected of a junior HR Manager and despite the Claimant's vast experience the tasks relating to grievance procedures, HR Audit and to arrive at a job description was not completed and the Claimant did not understand and fully comprehend basic HR concepts and principles.

Conclusion

The Court is of the consider view that the rules of natural justice had been adhered to and the Company had established a *prima facie* case in that the Claimant's dismissal by way of non-confirmation was with just cause or excuse based on the above stated facts. Therefore the Claimant's claim is hereby dismissed.

HANDED DOWN AND DATED THIS DAY 24th OCTOBER 2014.

**(P IRUTHAYARAJ A/L D PAPPUSAMY)
PENGERTISI
MAHKAMAH PERUSAHAAN MALAYSIA
KUALA LUMPUR**