

LHAG Insights

Employment & Industrial Relations



ABOUT THE AUTHORS



Shariffullah Majeed
Partner

Employment & Industrial Relations
E: sha@lh-ag.com



Arissa Ahrom
Senior Associate

Employment & Industrial Relations
E: aa@lh-ag.com

17 JANUARY 2023

Breach of Fiduciary Duty: Non-Disclosure to Board of Directors

ZAINOL ZAKARIA v UEM BUILDERS BERHAD & MAHKAMAH PERUSAHAAN MALAYSIA (Kuala Lumpur High Court Application for Judicial Review No.: WA-25-61-01/2020)

The employer-employee relationship is fiduciary in nature. This means that whenever an employer engages an employee, he trusts that the employee will faithfully discharge his service and protect his interests. A greater level of trust and confidence is always reposed in employees holding senior positions of trust in senior management capacities of any organisation.

This is because they are expected to follow the best ethical working practices, as well as uphold all the policies and procedures of the organisation in setting an example for other employees. Accordingly, where a senior management employee's reporting line is directly to the Board of Directors, his or her duties to the board do not merely begin and end in board meetings.

Undoubtedly, senior management employees owe a duty to provide full and frank disclosure when reporting to the Board of Directors to ensure that issues confronting the organisation can be promptly addressed by the board. The instant matter proceeded for trial before the Industrial Court wherein the learned Chairlady dismissed the employee's claim for unfair dismissal via Award No.: 2695 of 2019 dated 9.10.2019 ("Award") and held, among others, as follows:

- (a) The employee was at all material times aware that his reporting line had always been to the Company's Board of Directors wherein he was under a duty to make full and

Head Office

Level 6, Menara 1 Dutamas
Solaris Dutamas
No. 1, Jalan Dutamas 1
50480 Kuala Lumpur
Malaysia
Tel: +603 6208 5888
Fax: +603 6201 0122

Johor Office

Suite 21.01
21st Floor, Public Bank Tower
No.19, Jalan Wong Ah Fook
80000 Johor Bahru, Johor
Tel: +607 278 3833
Fax: +607 278 2833

Penang Office

51-12-E, Menara BHL Bank,
Jalan Sultan Ahmad Shah,
10050 Penang
Pulau Pinang
Tel: +604 299 9668
Fax: +604 299 9628

Email

enquiry@lh-ag.com

Website

www.lh-ag.com

frank disclosures on the progress of the project under his care (“Project”) to the Board of Directors;

- (b) The employee had acted negligently in the performance of his duties and failed to act in the best interests of the Company when he failed to alert the Company’s Board of Directors of the complications and implications to the Project’s progress and costs despite being aware of the same at all times;
- (c) Although he was aware of the delays to the Project, he had misled the Board of Directors that the Project was ahead of schedule. His withholding of this critical piece of information had denied the Board of Directors the opportunity to undertake early assessments and mitigation steps that could have prevented significant delays and cost overruns; and
- (d) The employee had through his own actions laid to waste the implied duty of mutual trust and confidence wherein his dereliction of duties and failure to exercise the requisite duty of care, had caused a significant increase of about RM56.6 million in costs of the Project which resulted in reduction of the Company’s profit margin.

Dissatisfied with the Industrial Court’s decision, the employee then filed an application for judicial review to the High Court to quash the said Award. In dismissing the employee’s judicial review application, the High Court found that the employee’s complaints were mainly in relation to the findings of fact by the Industrial Court based on the evidence before it, which are immune from judicial review.

The High Court’s decision herein reaffirms that where an employee’s reporting line is to the organisation’s Board of Directors, his duty to make full and frank disclosures is not merely limited to board meetings. The importance of transparency and accountability to an organisation’s Board of Directors are necessary in the interests of an organisation and such non-disclosure amounts to a breach of fiduciary duty.

The employer was represented by partner Shariffullah Majeed, and senior associate Arissa Ahrom, of [Lee Hishammuddin Allen & Gledhill](#).

If you have any queries, please contact the author **Arissa Ahrom** (aa@lh-ag.com) or her team partner **Shariffullah Majeed** (sha@lh-ag.com).