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## ***Option To Resign In Lieu Of PIP***

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*PANNIRSELVAM VADIVELU PATHAR v  
EXXONMOBIL EXPLORATION AND PRODUCTION  
MALAYSIA INC.*

*(Kuala Lumpur High Court Application for Judicial  
Review No.: WA-25-432-07/2022)*

The oil & gas industry primarily operates around the clock with no downtime. Hence, employees are expected to be on top of their work 24/7. In the reality of general workplace dynamics, an employee may be informed that due to his failure to meet the standard of performance expected, it may be in his best interest to resign. Such an interaction does not mean that the employee was forced to resign.

The essence of the jurisprudence of forced resignation is where an employee is put into a position where he has no option but to resign, otherwise he would be terminated. Therefore, it is the threat of being sacked which causes the employee to resign. However, if the resignation is brought about by a consideration other than the threat of being terminated, then the resignation is deemed voluntary.

It is trite industrial relations jurisprudence that employers have the liberty to offer poor performing employees the option to resign as an alternative to being placed under a performance improvement plan ("**PIP**"). When being offered this option, the employee can choose either to:

- (a) proceed with the PIP, shape up and continue with employment; or
- (b) resign should he not wish to go through the PIP.

The above options cannot be construed as an ultimatum of either resign or be terminated as none of the options lead to any inevitable conclusion of termination. In the instant case, it was highlighted to the employee in February 2017 that the management intends to place him under a PIP for a period of 3 months in view of his unsatisfactory work performance since August 2015. At the same time, the employee was offered the option to resign as an alternative to being placed under PIP via a letter dated 28.2.2017 ("**Option Letter**"). He was further informed that should he opt to resign in lieu of PIP:

- (a) he will continue to receive his basic salary and contractual benefits for a period of 6 months from the date he elects this option;
- (b) he will be given outplacement services, for up to 3 months from the date he elects this option; and
- (c) he will be entitled to resignation benefits.

After selecting the option to resign in lieu of PIP and enjoying the benefits attached to the option for approximately **6** months, the employee suddenly lodged a complaint to the Industrial Relations Department wherein he alleged that he had been "**forced to resign**". The learned Chairman of the Industrial Court dismissed the employee's claim for unfair dismissal via Award.: 855 of 2022 dated 10.5.2022 and held among others as follows:

- (a) the employee admitted that he was given a period of **14** days to make a selection of the options given to him;
- (b) there was nothing in the Option Letter that can be construed as giving the employee an ultimatum that he would be terminated unless he resigns;
- (c) in fact, the **14**-days period given to the employee to consider his options is corroborative evidence that he was never under any force or pressure to resign and was never placed in a situation where he was forced to make a selection;
- (d) the employee was aware that should he choose not to be placed under the PIP, it does not necessarily mean that he would be terminated as the PIP does not inevitably lead to termination; and
- (e) no one can speculate the outcome of the PIP which can only be determined at the end, unless the employee brings upon himself unfavourable results by not improving his performance.

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. The High Court found no merits in the employee's application and dismissed the same.

The High Court's decision herein reaffirms that in the absence of the threat of being terminated, it has to be said that the employee has resigned voluntarily because it was beneficial to him to do so. The employer was represented

in the High Court by partner Shariffullah Majeed, and senior associate Arissa Ahrom, of Lee Hishammuddin Allen & Gledhill.

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