

IN THE INDUSTRIAL COURT OF MALAYSIA

CASE NO.: 22/4-874/20

BETWEEN

**WAN ZAINUDDIN BIN WAN MUDA**

AND

**SMALL MEDIUM ENTERPRISE DEVELOPMENT BANK MALAYSIA BERHAD**

AWARD NO.: 1130 OF 2021

Before : Y.A. Tuan Paramalingam A/L J. Doraisamy  
– Chairman (Sitting Alone)

Venue : Industrial Court Malaysia, Kuala Lumpur

Date of Reference : 05.07.2020

Dates of Mention : 18.08.2020

Dates of Hearing : 29.03.2021; 30.03.2021

Representation : En. Mahadi Bin Muhammad together with Cik Nur Zur'ain Binti  
Mat Ramlee  
Messrs. Mahadi Redzuan & Co.  
Counsel for the Claimant

En. Shariffullah Majeed together with Cik Nurul Aisyah Binti  
Hassan  
Messrs. Lee Hishammuddin Allen & Gledhill  
Counsel for the Bank

**REFERENCE :**

This is a reference made under Section 20 (3) of the Industrial Relations Act 1967 (Act 177), arising out of the dismissal of **Wan Zainuddin Bin Wan Muda** (hereinafter referred to as "*the Claimant*") by **Small Medium Enterprise Development Bank Malaysia Berhad** (hereinafter referred to as "*the Bank*") on 2 October 2019.

## **AWARD**

[1] The Ministerial reference in this case required the Court to hear and determine the Claimant's complaint of dismissal by the Bank on 2 October 2019.

### **I. Procedural History**

[2] The Court received the letter pertaining to the Ministerial reference under Section 20(3) of the Industrial Relations Act 1967 on 17 July 2020.

[3] The matter was fixed for mention on 18 August 2020.

[4] The hearing proceeded on 29 March 2021 and concluded on 30 March 2021.

### **II. Parties' Position On The Merits**

#### **(a) The Claimant**

[5] The Claimant commenced his employment with the Bank on 26 January 1995, which at that time was known as Bank Industri Malaysia Berhad ("*BIMB*"), as an Executive. He was then confirmed in his employment effective 6 March 1995. The Claimant served the Bank on a permanent basis until 30 September 2019 with excellent records.

[6] The Claimant contends that the Bank subsequently appointed him as a Director Group Human Capital Management Division on a contract basis for 3 years effective from 2 October 2017 until 1 October 2020. The Claimant had further signed an Employment Agreement as a Director Group Human Capital Management Division on 10 October 2017 where it had been expressly stated in Clause 3 of the Employment Agreement that the Claimant will be employed by the Bank as a Director Group Human Capital Division on a contract basis for 3 years from 2 October 2017 until 1 October 2020. The Claimant's last drawn monthly salary was RM34,300.00 including car and telephone allowances.

[7] The Bank *vide* its letter dated 14 August 2018 had confirmed the Claimant's position as a Director Group Human Capital Management Division and also acknowledged the Claimant's years of service with the Bank from 6 March 1995 until the date of the said letter, i.e. 14 August 2018.

[8] The Claimant had no performance issues throughout his employment with the Bank, which was for a period of 24 years. The Claimant had been consistently rated at 4 and 5 for his performance prior to his termination. He also had no issues of misconduct.

[9] *Vide* letter dated 30 January 2019, the Bank informed the Claimant that it had implemented a new group organisation structure effective 1 February 2019 and thus the Claimant's functions had changed from Director Group Human Capital Management Division to Acting Group Chief Human Capital Officer (EXCO). The

Claimant reported to the Group President/Chief Executive Officer under his new designation. His position in the organisation structure of the Bank for December 2018 until March 2019 had also automatically changed pursuant to the aforesaid implementation.

**[10]** Despite the above, the Bank *vide* its letter dated 29 April 2019 informed the Claimant that it had decided not to extend the Claimant's Employment Agreement after 1 October 2019. The Bank had then put the Claimant on a long garden leave with immediate effect from 29 April 2019 until 1 October 2019. It was expressly stated in the said letter that the Bank shall revoke all access, i.e. system, email and ELID card granted to the Claimant immediately and the Claimant was not allowed to enter the Bank's premises throughout his garden leave.

**[11]** The Claimant was shocked with the Bank's decision not to renew the Employment Agreement from 2 October 2019 until 1 October 2020 despite his excellent employment record. The Claimant replied to the Bank's letter on 27 May 2019 wherein he objected and/or disagreed with the Bank's decision as it had been expressly stated in the Employment Agreement that the conditions precedent for the renewal shall be the Claimant's performance and the Bank's need.

**[12]** The Bank only alleged in its letter dated 31 May 2019 that the Claimant's performance for year 2018 was at the rating of 2 which was categorised as "*Do not meet expectations*" despite no performance appraisal, formal or otherwise, conducted

on the Claimant for year 2018 and that that was the reason for the non-extension of the contract.

**[13]** The Bank had never conducted any genuine and/or complete performance appraisals on the Claimant in 2018 and 2019. The Claimant was also never informed by the Bank of the alleged unsatisfactory performance in 2018 and/or 2019.

**[14]** The Claimant channelled his objection and/or dissatisfaction *vide* his letter dated 28 June 2019 wherein he expressly stated that there had been no performance appraisals conducted on him for 2018 and that the Bank's allegation that he was aware his performance had been rated at "2.00" was untrue.

**[15]** Despite the Bank's allegation that the Claimant's performance was rated at "2.00" for the year 2018, it had issued a letter on 12 July 2019 expressly stating that the Claimant's overall performance for the past 5 years was at an average rating of "4.00" out of "5.00". The Bank had also acknowledged that the Claimant *"is a well-rounded and agile leader with extensive hands-on experience in full spectrum of HR. He has strong people management skills where he is able to work with people from diverse background and demographic especially in getting them to work together as a team"*.

**(b) The Bank**

[16] The Claimant was offered the position of Director, Group Human Capital Management Division under a fixed term contract of years effective 2 October 2017 to 1 October 2019 based on the Bank's operational needs.

[17] By accepting the Offer Letter, the Claimant's permanent employment with the Bank had ceased effective 30 September 2017. After a 1 day break of service, the Claimant was then on a fixed-term employment with the Bank effective 2 October 2017.

[18] It was amongst others the terms of the Claimant's appointment under the fixed-term contract that the Bank would have the discretion to renew the fixed-term contract for a period of 1 year from 2 October 2019 to 1 October 2020 subject to the Claimant's performance and recommendation by the Group Managing Director/Chief Executive Officer at the end of the fixed-term contract period to the Nomination Committee and subsequently the Board of Directors.

[19] Following the conversion of the Claimant's employment contract to the fixed-term contract, the Bank had granted the Claimant a one-off Sign On Compensation equivalent to 3 times of the Claimant's last-drawn salary which was RM60,903.00 (RM20,301.00 x3) and his balance of annual leave would be paid to him based on his last-drawn salary.

**[20]** The Bank subsequently entered into an Employment Agreement with the Claimant on 10 October 2017 to formalise the terms of the Claimant's fixed-term employment with the Bank. The terms of the Employment Agreement, *inter alia*, provided that:-

- i. the Claimant's employment with the Bank shall commence on 2 October 2017 until 1 October 2019 with an option for the Bank to offer 1 year extension effective from 2 October 2019 to 1 October 2020 based on the Claimant's performance and the Bank's needs;
- ii. the provision of the extension of the contract to be at the election of the Bank and not at the Claimant's election;
- iii. the assessment of the Claimant's performance will be conducted by the Group Managing Director/Chief Executive Officer for the purpose of determining the former's contract period; and
- iv. the Employment Agreement contains the entire understanding of the Claimant and the Bank and shall supersede all prior agreements and understandings, both written and oral between the parties in respect of the Employment Agreement.

**[21]** The Claimant had signed and accepted the terms of the Employment Agreement with no objections on 10 October 2017 and continued to carry out his duties under the Employment Agreement from 2 October 2017.

**[22]** At the Bank's Nomination and Compensation Committee ("NCC") Meeting on 6 December 2018, based on the Claimant's Psychometric Report as a potential candidate for the position of Group Chief Human Capital Officer, the NCC recommended that a new candidate be identified as the Group Chief Human Capital Officer.

**[23]** Subsequently, at the 149<sup>th</sup> Board of Directors' Meeting on 14 December 2018, the Board of Directors concurred with the NCC's recommendation that a new candidate be identified as Group Chief Human Capital Officer.

**[24]** *Vide* letter dated 30 January 2019, following the Bank's implementation of its new group organisation structure effective 1 February 2019, the Claimant's Job Designation was converted to "Acting Group Chief Human Capital Officer", which the Claimant accepted and never objected to.

**[25]** Upon an assessment of the Claimant's performance for the year 2018 by the Group President/Chief Executive Officer, En. Aria Putera Ismail (COW-2), the Claimant's overall performance was rated at the score of '2.00' after COW-2 had increased it from '1.00' following a moderation process. In response to this, the Claimant himself had placed a remark that he would "*strive to do better in 2019*".

**[26]** *Vide* letter dated 29 April 2019, the Bank informed the Claimant that based on its operational needs, the Employment Agreement would not be renewed upon its

expiry on 1 October 2019. The Claimant was also informed that he would be placed on garden leave effective immediately until his last day of service with the Bank, i.e. 1 October 2019. The Bank nevertheless had continued to pay the Claimant's monthly salary and the benefits he was entitled to until his last day of service. The Bank also paid the Claimant the balance of his unutilised annual leave.

**[27]** However, after nearly 1 month upon being informed that the Employment Agreement would not be renewed, *vide* letter dated 27 May 2019, the Claimant suddenly expressed his objection to the Bank's decision, claiming, *inter alia*, that:-

- i. there is a clause for the extension of his Employment Agreement for 1 year from 2 October 2019 to 1 October 2020 subject only to performance upon the expiry of the principal contract of 2 years;
- ii. there was no formal performance assessment/appraisal conducted on him for his performance in 2018 and 2019; and
- iii. he was a permanent employee of the Bank and the Employment Agreement was only used as a camouflage of his permanent employment.

**[28]** *Vide* letter dated 31 May 2019, the Bank expressed surprise over the Claimant's claim that he was a permanent employee, stating, *inter alia*, that:-

- i. the Claimant had agreed to convert his position from a permanent basis to fixed-term basis *vide* letter dated 2 October 2017;
- ii. with the conversion, the Claimant was granted a one-off Sign On Compensation equivalent to 3 times of the Claimant's last-drawn

salary which was RM60,903.00. (RM20,301.00 x 3) and his balance of annual leave would be paid to him based on his last-drawn salary; and

- iii. the Claimant was rated '2.00' (Does Not Meet Expectations) for the year 2018 and therefore did not meet one of the criteria for an extension of his Employment Agreement.

**[29]** *Vide* letter dated 28 June 2019 to the Bank, the Claimant, *inter alia*, reiterated his objections to the Bank's decision not to renew his Employment Agreement upon its expiry on 1 October 2019.

### **III. The Function Of The Industrial Court & The Burden Of Proof**

**[30]** In a case involving fixed term contracts, the Industrial Court has to determine:-

- (i) whether or not the employment contract is a genuine fixed term contract;
- (ii) if the employment contract is not a genuine fixed term contract, the Court would have to determine whether there was a dismissal or not and, if so, whether it was with just cause or excuse;
- (iii) if, however, the employment contract is a genuine fixed term contract, then there would be no issue of dismissal to begin with.

[31] In the High Court case of **M Vasagam Muthusamy v. Kesatuan Pekerja-Pekerja Resorts World, Pahang & Anor [2003] 5 CLJ 448** Faiza Tamby Chik J held:-

*“The applicant contended that the Industrial Court had not applied the correct test in making its decision by first asking itself whether there was a dismissal and secondly that if there was a dismissal, whether the dismissal was with just cause or excuse. I am of the opinion that the Industrial Court had correctly addressed the issue in this case by determining first whether or not the contract in question was a genuine fixed term contract (see pp. 3 and 4 of the said award). If the Industrial Court made a finding that it was not a genuine fixed term contract but was really a contract of employment, then only would the Industrial Court be required to ask whether there was a dismissal or not and that if so whether it was with just cause or excuse. In the instant case, since a finding was reached that the contract concerned was indeed a genuine fixed term contract, the question of there being a dismissal or not does not arise. Once it was established that there is a genuine fixed term contract, the dissolution of the contract upon reaching the expiry date of the fixed term would clearly spell the end of the worker's tenure with the relevant company”.*

[32] The fact of dismissal is in dispute in this case. The burden of proof thus lies with the Claimant to show that the employment contract is not a genuine fixed term contract. In the High Court case of **Weltex Knitwear Sdn. Bhd. v. Law Kar Toy [1997] 1 ILR 446** it was held by Abdul Kadir Sulaiman J:-

*“Next is the burden of proof on the issue of forced resignation raised by the first Respondent. The law is clear that if the fact of dismissal is not in dispute, the burden is on the company to satisfy the court that such dismissal was done with just cause or excuse. This is because, by the 1967 Act, all dismissal is prima facie done without just cause or excuse. Therefore, if an employer asserts otherwise the burden is on him to discharge. However, **where the fact of dismissal is in dispute, it is for the workman to establish that he was dismissed by his employer. If he fails, there is no onus whatsoever on the employer to establish anything for in such a situation no dismissal has taken place and the question of it being with just cause or excuse would not at all arise**: see Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd. [1988] 1 CLJ (Rep) 298; [1988] 1 CLJ 45. In the present case, it is the first Respondent who asserts that she was dismissed and the Applicant denies it. So, it is for the first Respondent to establish so by the evidence”.*

(Emphasis added)

#### **IV. Issues To Be Decided**

**[33]** The issues to be determined in this case are:-

- (i) whether the employment contract between the Claimant and the Bank is a genuine fixed term employment contract;
- (ii) if it was not a genuine fixed term contract, whether there was a dismissal and, if so, was it done with just cause and excuse;

## V. The Court's Findings And Reasons

### (i) Whether the employment contract between the Claimant and the Company is a genuine fixed term employment contract

[34] This case centres around the Employment Agreement dated 10 October 2017 (*at pp. 15 – 23 of COB-1*). Prior to entering into the said Employment Agreement, the Claimant had been a permanent employee of the Bank. Subsequently, the Bank had converted the Claimant's permanent employment to one of a fixed term in nature *vide* their offer letter dated 2 October 2017 (*at pp. 10 – 14 of COB-1*). The said offer letter stated in no uncertain terms that the Claimant's permanent employment will be terminated by 30 September 2017. The Claimant had no qualms in accepting the Bank's said offer when he acknowledged the offer letter (*at p. 12 of COB-1*) stating that he fully understood the contents of the same.

[35] The Claimant, despite pleading in his Statement of Case that his employment with the Bank was permanent in nature, admitted during the trial that his employment with the Bank was for all intents and purposes a fixed term contract when he signed the Employment Agreement.

[36] The crux of the Claimant's dispute in fact centred on only one issue, i.e. whether the Bank had acted unreasonably in refusing to exercise the option to renew his fixed term contract for one more year, i.e. from 2 October 2019 to 1 October 2020.

[37] To fully understand the Claimant's grouse, one has to look at Clause 3 of the Employment Agreement (at p. 17 of COB-1). Clause 3 provides:-

**"COMMENCEMENT OF EMPLOYMENT**

*The Employee's employment with the Bank shall commence on 2<sup>nd</sup> October 2017 until 1<sup>st</sup> October 2019 with an option for the Bank to offer one (1) year extension effective from 2<sup>nd</sup> October 2019 until 1<sup>st</sup> October 2020 based on the Employee's performance and Company's need (hereinafter called the 'Contract Period'). The provision for the extension of contract to be at the election of the Bank and not at employee's election".*

(Emphasis added)

[38] Thus, the duration of the Employment Agreement was for 2 years (i.e. 2 October 2017 until 1 October 2019) with an option to extend for one more year (i.e. 2 October 2019 until 1 October 2020). It is clear that the fixed term contract was only for 2 years. The discretion to elect for the option to extend the fixed term contract for one more year lay solely with the Bank, a fact admitted by the Claimant during cross-examination. The option to extend cannot be deemed to be a guarantee or a promise that the Bank will extend the fixed term contract beyond its expiry on 1 October 2019. The Claimant never disputed to any of these terms throughout the duration of the fixed term employment.

[39] The Bank in its letter entitled “Non-Renewal Of Employment Contract” dated 29 April 2019 (at pp. 40-41 of COB-1) stated:-

*“We wish to inform that after due consideration, Management had decided not to extend your employment contract with the Bank upon its expiry on 1<sup>st</sup> October 2019.*

*In view of the non-renewal and taking into consideration operational needs, Management has decided to grant you Garden Leave effective immediately from the date of this letter until your last day of service with the Bank, i.e. 1<sup>st</sup> October 2019. The Bank will continue to pay your monthly salary and you are eligible for all the benefits that you are currently entitled, until your last day of service. In addition, the Bank will compensate your unutilized annual leave balance”.*

[40] During cross-examination, the Claimant clearly admitted that his fixed term contract had come to an end on 1 October 2019. He was merely dissatisfied that the Bank refused to exercise its option to extend his contract for one more year. This could also be seen from the Claimant’s letter of 27 May 2019 (at pp. 42-43 of COB-1) where he stated in response to the Bank’s notice of non-renewal of employment contract:-

*“Based on the above explanation and justifications, I view that **SME Bank has not been fair in its decision and action to me and there was a colourable exercise in arriving to the arbitrary and unfair decision not to renew my employment contract when the principal two (2) year period expires on 1<sup>st</sup> October 2019.***

*This letter is served to record my objection and disagreement and dissatisfaction on the decision of SME Bank not to renew/extend my employment contract with SME Bank upon its expiry on 1<sup>st</sup> October 2019. I shall also reserve my rights accordingly”.*

(Emphasis added)

[41] The Claimant also admitted during cross-examination that he was not terminated from his employment with the Bank but rather that his fixed term employment contract was not extended.

[42] The Court agrees with the submission of the Bank’s Counsel that the terms of the Claimant’s fixed term contract, i.e. the Employment Agreement, are not in any way ambiguous, in that it would expire due to effluxion of time after 2 years, i.e. on 1 October 2019, unless the Bank decides to exercise its option to renew the fixed term contract. The Employment Agreement was for all intents and purposes a 2-year contract with an option to extend, and not a 3-year contract as alleged by the Claimant. It was held in the case of **Ahmad Noor Majid v. TMR Urusharta (M) Sdn Bhd (2018) 2 LNS 2253** that an option to renew a fixed term employment is at the sole discretion of the employer and does not in any way constitute a definite promise.

[43] In the case of **Elias Md Kadir Baba v. Keretapi Tanah Melayu Berhad [2018] 3 ILR 275** it was held:-

*“The claimant in his Witness Statement (CLWS-1) contended that there were 7 reasons or indications to show that this contract of employment was in reality a permanent contract (see answer to question 13 of CLWS-1 and pp. 10 to 12 of the claimant's written submission). It was submitted by the claimant's counsel that the first indication that the parties did not envision the contract for only a fixed- term was in reference to the clause entitled "Perlanjutan Kontrak" at p. 2 of CLB1. Therefore, according to the claimant's counsel, there was no evidence that the parties had understood that the contract will not be renewed on its expiry. However, counsel for the claimant had omitted to state the complete words used as the term for the extension of contract which are as follows:*

*Tempoh lanjutan perkhidmatan boleh di pertimbangkan sekiranya prestasi baik and perkhidmatan masih diperlukan oleh Kerajaan/MKD tertakluk kepada kelulusan Menteri Kewangan Diperbadankan.*

***It is therefore clear that the extension of the said contract may only be considered if the claimant's performance is good/ excellence and the service is still needed by the Government /MKD subject to the approval of Minister of Finance Incorporated. Based on the term, it is clear and understood by the parties that there will be no guarantee that the contract will be renewed on its expiry even if the claimant's performance in the company was excellent.*** No evidence however was adduced by the claimant pertaining to his performance during his tenure with the company and neither was there any evidence

*that the claimant's services was still needed by the Government/ MKD then.*

...

*The court must stick to the plain meaning of the words used as the language and the term for a specific period of the contract is clear and unambiguous. The claimant had also accepted and executed the contract voluntarily and had no complaint before the expiry of the said employment contract. **In my view based on the letter of appointment, both parties recognised that there was no understanding that the contract will be renewed on its expiry and it was the intention of the parties that there will be no guarantee of extension upon its expiry. The evidence showed that the claimant's contract was intended to be a fixed-term contract**.*

(Emphasis added)

**[44]** Thus, despite there being an option for extension of the fixed term contract, it cannot be denied that the parties clearly intended under the contract for the Bank to have the sole discretion on deciding whether to extend the said contract. It was not a given that the said fixed term contract will or must be renewed, rather it was more of a situation where the Bank may extend if there was a requirement. Should the Bank decide to extend the fixed term contract, then the 2 conditions precedent under Clause 3 of the Employment Agreement must be satisfied beforehand.

[45] We come now to the two conditions precedent for the exercise of the option to extend the Employment Agreement, as contained in Clause 3, i.e. that the decision to exercise the option to extend the fixed term contract would be based on “*the Employee’s performance and Company’s need*”.

[46] It is clear from the wordings of Clause 3 that the two pre-conditions has to be read conjunctively rather than disjunctively, due to the clear usage of the word “***and***” (instead of “***or***”) between the said pre-conditions, i.e. “*the Employee’s performance **and** Company’s need*”. As such, both pre-conditions must be satisfied should the Bank decide to exercise the said option to extend.

[47] With regards to the first condition precedent, i.e. the Claimant’s performance, it is the contention of the Claimant that the Bank had failed to conduct a performance appraisal, informal or otherwise, on him for the year 2018. However, despite the Claimant’s said contention, he agreed, during cross-examination, upon being shown the document at pages 28-36 of COB-1, i.e. the HR Avenue, that that constituted his performance appraisal for the year 2018.

[48] The Claimant also admitted during cross-examination that only he had access to his performance appraisal in the Bank’s HR Avenue system and that it was him who had made the comment “*I will strive to do better in 2019*” in his Performance Appraisal (at p. 36 of COB-1). He had also made the said comments subsequent to the ‘*Overall Rating Before Moderation*’ of “1.00” given by his former immediate supervisor, Dato’

Rezemem @ Razman Bin Mohd Noor (“Dato’ Razman”). He never raised any objections with regards to the rating given by Dato’ Razman.

[49] The Claimant also alleged that the reviewer’s column in the Performance Appraisal showed a rating of “0” as COW-2, i.e. the Supervisor’s Supervisor, failed to conduct any review. Further, no 360 degree assessment was done on the Claimant. All these factors have allegedly caused the Claimant’s rating to be at “1.00”. But yet the Claimant never raised any queries or objections to the alleged irregularities. As admitted by the Claimant, he would be informed of his performance appraisals by March of every year but yet he only raised these allegations pertaining to the 2018 Performance Appraisal in May 2019, i.e. after he received the Bank’s notice of non-renewal of the employment contract. COW-2 in fact testified that he subsequently moderated and raised the Claimant’s rating (given by Dato’ Razman) from “1.00” to “2.00”.

[50] In fact, it was held by Faiza Thamby Chik J in **M Vasagam Muthusamy v. Kesatuan Pekerja-Pekerja Resorts World, Pahang & Anor [2003] 5 CLJ 448** that even if there was an irregularity, it would have no bearing whatsoever on the ultimate issue of a genuine fixed term contract coming to an end through effluxion of time:-

*“The first respondent did not commit any procedural error in its decision to not renew the applicant’s contract of employment as alleged. This complaint was also raised by the applicant at the hearing before the Industrial Court and the Industrial Court reached the conclusion that even if there were such an irregularity, the ultimate issue remains*

*whether or not the contract was a genuine fixed term contract, and that since there was a genuine fixed term contract, whatever irregularities complained of has no bearing on the question of the claimant's contract coming to an end. As there was a valid and genuine fixed term contract, the facts remains that the said contract would expire once it comes to an end*'.

**[51]** The Claimant also based his contention that his performance was good for 2018 on the Bank's Confirmation of Employment letter of 12 July 2019 (*at p. 52 of CLB-1*) wherein it was stated that for the preceding 5 years the Claimant's average rating was "4.00" out of "5.00". However, this was merely an average rating over the span of 5 years. It does not erase the fact that his performance rating for the year 2018 stood at "2.00". COW-1 (En. Syed Md. Fithree Bin Syed Alwee), i.e. the signatory to the Bank's letter of 12 July 2019 testified that the Claimant had dictated to him what he wanted the said letter to contain, as is evident from their WhatsApp communication at pages 8 & 9 of COB-2. It is also pertinent to note that this Confirmation of Employment was issued after the Claimant's fixed term employment with the Bank had come to an end and was in fact given to assist the Claimant in finding new employment.

**[52]** It is also contended by the Claimant that the Bank had failed to re-evaluate his performance after 1 October 2019 subsequent to the decision taken at the Board of Directors Meeting on 31 January 2019. The said Meeting (*at p. 51 of CLB-1*) resolved as follows:-

- “i. That Encik Wan Zainuddin to remain as Senior Executive Vice President (SEVP), Group Human Capital Management Division (Job Grade 9), in the existing Contract of Employment until his contract expired on 1 October 2019.*
- ii. That the Group Chief Human Capital Officer to re-evaluate Encik Wan Zainuddin’s performance upon the expiry period of his contract and if he is deemed fit, to offer him a new Contract of Employment”*

**[53]** Thus, the resolution of the Board of Directors’ Meeting on 31 January 2019 was referring to a new contract of employment being offered to the Claimant. It was not referring to the current employment contract which the Board clearly stated will expire on 1 October 2019. Any evaluation with regards to the Employment Agreement dated 10 October 2017 and the option for extension contained thereunder would be dependent on the performance appraisal or assessment done for the year 2018. As admitted by the Claimant during cross-examination, there was no provision under Clause 3 of the Employment Agreement for an assessment to be done after 1 October 2019, i.e. after the expiry of the fixed term contract.

**[54]** In any event, the Claimant, being a Human Resource practitioner with 24 years of experience does not need to be told of any shortcomings in his performance or what needs to be done to improve his performance to achieve the targets set by the Bank. From the evidence, the Claimant knew very well that his performance was not up to mark when he made the remark in his 2018 Performance Appraisal that he will strive

to do better in 2019. In **United Oriental Assurance Sdn Bhd v. Kamala Rangithan Selladuray [1992] 2 ILR 280** it was held:-

*“The learned counsel for the Claimant urged the court to accept the doctrine of prior notice and cited a string of cases in support. The prior notice is that the attention of the Claimant should be drawn to his shortcomings and that he should be given time to improve his performance. **With respect the court feels that prior notice is not relevant in the case. The Claimant had 16 years of experience in insurance business before he joined the company, and I think that he needs no reminder from anyone, least of all from the company, to do his work. Maybe he was employed because of his past experience in insurance work. He knew very well what the target means and the reality of the insurance business. This is plain common sense with a man of his calibre and a man of his intellectual position.***

*Insurance is an intellectual property business. Only persons who come within the intellectual range and capability that is required of the business, may stay. Clearly no matter how long an experience in insurance business one may have, there is no guarantee that he can do well. **The reality of it all is the actual performance when one is in the saddle. If he cannot steer well it is quite inevitable that he must fall. Such is the fate of the Claimant.***

As Sir Donaldson's obiter dictum, in James v. Waltham Holy Cross [1973] JCR 378, well reflected that,

***Those employed in Senior Management maybe by the very nature of their jobs be fully aware of what is required of them and fully capable of judging themselves whether they are achieving that requirement. In such circumstances the need for warning and an opportunity for improvement are less apparent***.

[55] It is the Court's finding that the Bank had indeed conducted a performance appraisal or assessment on the Claimant for the year 2018 and found his performance not up to the mark.

[56] With regards to the second condition precedent, i.e. the Bank's needs, it is the Claimant's contention that at all material time the Bank still needed the Claimant's position and functions as a Group Chief Human Capital Officer for another 12 months, i.e. from 2 October 2019 until 1 October 2020. However, during cross-examination, the Claimant admitted that his position was not as a Group Chief Human Capital Officer, but rather as an Acting Group Chief Human Capital Officer.

[57] Counsel for the Bank submits that when an employee holds an Acting position, it means that he is holding that position for someone else for an interim period. Counsel referred to the case of **Baladevan Nadarajan v. PPG Performance Coating (M) Sdn Bhd [2019] 3 ILR 28:-**

*“The word ‘acting’ is an adjective which is ordinarily understood to mean temporarily doing the duties of another person. According to the Cambridge English Dictionary, the word ‘acting’ is a description of someone who does a job for a short time while the person who usually does that job is not there. Therefore, it is clear the position of ‘acting’ is temporary in nature and not meant to be permanent unless the person is subsequent made permanent”.*

[58] COW-2 testified that based on the Claimant’s Psychometric Report, the Bank’s NCC had recommended at the Board of Directors’ Meeting on 6 December 2018 and 14 December 2018 that a new candidate be identified as a Group Chief Human Capital Officer, and that the Board of Directors had concurred with the NCC’s recommendation. Pursuant thereto, one Puan Sainursalwa Sani was appointed as the Group Chief Human Capital Officer. The Claimant’s position as the Acting Group Chief Human Capital Officer had thus come to a natural end and ceased to exist altogether.

[59] Thus, the second condition precedent had equally not been satisfied for the Bank to exercise the option to extend the Claimant's fixed term contract under Clause 3 of the Employment Agreement.

[60] It is the Court's finding that the Employment Agreement dated 10 October 2017 between the Claimant and the Bank was a genuine fixed term contract and that it had come to a natural end upon the expiry of the two year term on 1 October 2019. The exercise of the option to extend the fixed term contract for one more year lay entirely at the Bank's discretion and it was not a mandatory requirement.

**(ii) If it was not a genuine fixed term contract, whether there was a dismissal and, if so, was it done with just cause and excuse**

[61] As stated above, the Court finds that the employment contract between the Claimant and the Bank was a genuine fixed term contract.

[62] Since the Court finds that the employment contract was genuine, therefore the question of there being a dismissal does not arise. The Claimant's employment contract period had clearly expired on 1 October 2019 and was not renewed thereafter. The Claimant's tenure of employment with the Company had simply come to an end due to effluxion of time. In the case of **M Vasagam Muthusamy v. Kesatuan Pekerja-Pekerja Resorts World, Pahang & Anor [2003] 5 CLJ 448** it was held by Faiza Tamby Chik J:-

*“It is noted that the first respondent's reason for not renewing the said contract was because it was able to carry on its functions without the services of the executive secretary, having had the benefit of the first respondent's expertise in union matters. The Industrial Court was of the view that this reason was good enough for not renewing the applicant's contract. It is also noted that the applicant's contention that the reason advanced by the first respondent for the non-renewal of the applicant's contract implied redundancy was rejected by the Industrial Court itself. I come to the conclusion that **the fact that a finding was reached and that there was a genuine fixed term contract between the first respondent and the applicant would make the whole issue of whether or not there were good reasons to not renew the said contract irrelevant**”.*

(Emphasis added)

[63] Further, in the High Court case of **Toko Inomoto & Ors v. Mahkamah Perusahaan Malaysia & Anor [2017] 1 LNS 201** it was held by Azizul Azmi Adnan JC (as His Lordship then was):-

***“If the Court comes to the conclusion that the fixed-term contracts are genuine, then the issue of dismissal would no longer arise. This is because their services with the Company would come to a natural end due to effluxion of time. In such situations, the Company just has to notify the Claimants of the fact that their employment***

*relationship will be coming to an end in accordance with their respective fixed-term contracts. There is no need to explain the non-renewal”.*

(Emphasis added)

**[64]** There is however one more issue that needs to be addressed. During the trial, the Claimant had admitted that he had been employed by a company known as Swiss Resources Sdn Bhd since July 2019. However, this new employment had taken effect whilst the Claimant was still on garden leave with the Bank at the material point in time and still being paid his salary by the Bank. The Claimant’s justification that he had to find new employment as he was put on a long garden leave and that he had to support his family does not hold water as he was still on the Bank’s payroll, and in fact was earning another salary on top of the salary being paid by the Company. There was a clear breach of fiduciary duty on the part of the Claimant when he accepted the new employment with Swiss Resources Sdn Bhd. whilst still being an employee of the Bank and not disclosing this fact to the Bank until the day of the trial.

**[65]** As the Court finds that the employment contract was a genuine fixed term contract and thus the issue of dismissal does not arise, likewise the issue of reinstatement becomes a non-issue.

**VI. Conclusion**

**[66]** The Claimant's fixed term employment contract had come to a natural end on 1 October 2019 due to effluxion of time. There is thus no issue of unfair dismissal in this case.

**[67]** The Claimant's case is hereby dismissed.

**HANDED DOWN AND DATED THIS 31<sup>ST</sup> DAY OF MAY 2021**

**-Signed-**

**(PARAMALINGAM A/L J. DORAISAMY)  
CHAIRMAN  
INDUSTRIAL COURT MALAYSIA  
KUALA LUMPUR**