IN THE INDUSTRIAL COURT OF MALAYSIA
AT IPOH, PERAK

CASE NO. 10/4-25/22

BETWEEN

RAJIVALOSANA A/P RAJINDRA KUMAR …The Claimant

AND

SYARIKAT V.K. KALYANASUNDRAM SDN. BHD. …The Company

(Consolidated with Case No. 10/4-101/22 and 10/4-102/22 by Order of Industrial Court via Interim Award No.1991/2022 dated 07th September 2022)

AWARD NO. 2009 OF 2023

Before:	**Y.A. TUAN ZULHELMY BIN HASAN – CHAIRMAN**
Venue:	Industrial Court of Malaysia – Perak Branch
Date of Reference:	04/01/2022
Dates of Mention:	10/02/2022, 08/04/2022, 09/05/2022, 03/06/2022 & 19/09/2022
Date of Hearing of Application:	29/07/2022
Dates of Hearing:	26/09/2022, 27/09/2022, 13/10/2022, 15/02/2023, 27/03/2023 & 28/03/2023
Representation:	For the Claimant: **Danial Rahman Bin Yang Razali** Messrs. Maxwell Kenion Cowdy & Jones For the Company: **Amardeep Singh Toor** with **Wong Lien Taa** Messrs. Lee Hishammuddin Allen & Gledhill

Reference(s):

This is a reference(s) dated 04/01/2022 & 13/01/2022 by the Director General of Department of Industrial Relations, Ministry of Human Resources pursuant to **Section 20(3) of the Industrial Relations Act 1967** ("The Act") to this division of the Industrial Court arising out of the dismissal of **Rajivalosana A/P Rajindra Kumar** (hereinafter referred to as "the 1st Claimant), **Barani Kumar A/L Balasubramaniam** (hereinafter referred to as "the 2nd Claimant) & **Vijay Anand A/L P Harivasagan** (hereinafter referred to as "the 3rd Claimant) by **Syarikat V.K. Kalyanasundram Sdn. Bhd.** (hereinafter referred to as "the Company") on 02/04/2021 & 12/04/2021 respectively.

AWARD

Factual Backgrounds:

1. The Company is a family owned business and the Company's nature of business involves the production and processing of rubber, oil palm industries and property investment. The Company's shareholders and directors are blood relatives in that they are either each other's siblings, cousins, aunties and uncles. The Company's estate was at Huntley Estate at Pantai Remis, Perak while the Company's Ipoh office was the head office. At the material time, **Barani Kumar A/L Balasubramaniam** (the Claimant in Case No. 10/4-101/22) and **Vijay Anand A/L P Harivasagan** (the Claimant in Case No. 10/4-102/22) were shareholders in the Company whereby another shareholder; **Kalyani A/P Balasubramaniam** (Ms. Kala) who is **Barani Kumar**'s sister and **Vijay Anand**'s cousin whom managed and operated the Company

2. Vide an Interim Award No. 1991 of 2022 dated 07/09/2022, this matter was consolidated with the claims filed by **Barani Kumar A/L Balasubramaniam** in Case No. 10/4-101/22, and by **Vijay Anand A/L P Harivasagan** in Case No. 10/4-102/22 against the same Company.

3. The 1st Claimant; **Rajivalosana A/P Rajindra Kumar** (Case No. 10/4-25/22) was appointed as the Head Office Clerk and commenced employment with the Company on 01/11/2018. At the time of her appointment, her basic salary was RM2,000.00. She was given the task to perform clerical work and to assist Madam **Kalyani A/P Balasubramaniam** (the Managing Director at that time) at the previous Company's Head Office at No. 70-72, Jalan Sultan Yusuff, 30000, Ipoh, Perak. Her service was terminated on the ground of redundancy after purported cost-cutting exercise via letter of termination dated 02/03/2021 (at page 4 of CLB-1) with her last drawn basic salary of RM2,200.00.

4. The 2nd Claimant; **Barani Kumar A/L Balasubramaniam** (Case No. 10/4-101/22) was appointed as the Assistant Manager at Huntley Estate, Pantai Remis and commenced employment with the Company on 01/05/2000. At the time of his appointment, his basic salary was RM2,000.00 plus RM500.00 for car allowance. The Claimant was later holding the position of General Manager, Director as well as shareholder of the Company. He is Ms. Kala's (**Kalyani A/P Balasubramaniam**) brother. Eventually, the Company had a change of shareholding and a change of management by the new management on or about 15/01/2021. The 2nd Claimant who was a Director previously was removed as a Director by the new management. In the circumstances, the Company issued a letter of termination dated 12/03/2021

with effect on 13/03/2021 purportedly on the basis of a cost cutting exercise. At the date of dismissal, his last drawn basic salary was RM7,500.00.

5. The 3rd Claimant; **Vijay Anand A/L P Harivasagan** (Case No. 10/4-102/22) was appointed as an Executive and commenced employment with the Company on 01/07/2014. He was also the Director and shareholder of the Company. At the time of his appointment, his basic salary was RM3,500.00 plus RM500.00 for car allowance. On the same event, the Company had a change of shareholding and a change of new management on or about 15/01/2021. The 3rd Claimant who was a Director previously was remove as a Director by the new management vide a letter of termination dated 12/03/2021 with effect from 13/03/2021 based on the same reason as of the 1st and 2nd Claimant.

6. **Kalyani A/P Balasubrmaniam (Ms. Kala)** was the Director and the shareholder of the Company. She was unofficially in control of the management of the Company for the past 20 years and was officially appointed as the Managing Director in 31/01/2013. She was also the owner of textile business *"V.K Kalyanasumdram Sdn. Bhd."* at the Company's Ipoh office which operates at the ground floor of the shop lot owned by her while the Company's head office located at the 3rd floor of the same building.

7. By way of extraordinary general meeting (EGM) held on 02/07/2020, the Company's shareholders had removed four (4) Directors including the 2nd and 3rd Claimants; **Barani Kumar A/L Balasubramaniam** and **Vijay Anand A/L P Harivagasan.** On 16/10/2020, the Company's Directors resolved to appoint **Kalyana Ganesh A/L Krishnamoorthy** (COW-1), **Santosh Murugan A/L S G Siva**

(COW-4) and **Kalyana Ganthinathan A/L Ramakrishnan** (COW-2) to review the Company's operations and finances to propose improvement due to poor management of the Company's business which resulted in cash flow issues.

8. On 20/09/2021, the Company's Board of Directors revoked **Ms. Kala**'s appointment as the Company's Managing Director instead of appointing a new managing director, it was decided that a management committee comprising of three (3) directors namely, **Kalyana Ganesh A/L Krishnamoorthy, Santosh Murugan A/L S G Siva** and **Kalyana Ganthinathan A/L Ramakrishnan** was formed to make decisions on behalf of the Company in regard to its banking and estate matters.

9. As a result of the review, the following cost cutting measures were implemented to reduce the Company's expenses and consequently the Company did not require full time employee for the Claimants' positions and there was no need to maintain their employment as their job functions were performed and absorbed by the new Company's Directors without been drawing additional salaries neither Director's fee been paid to them. The cost cutting measures resulted in the closure of the Company's Ipoh office and all employees of the Company based at Ipoh office were made redundant. Therefore, the Claimant's job functions and positions were made redundant and they were all retrenched by the Company.

10. The Claimants pray that this Court holds their dismissals by way of retrenchment as being capricious, manifestly unreasonable and in violation of fair labour practices and that the Company's action was arbitrary, unconscionable and without just cause or excuse. They pleaded that they were victimized and that the Company wanted to get rid of them. The Claimants pray that they be reinstated to

their former position with no loss of salary and all other benefits which the Court deems fit and proper to award.

The Company's Case:

11. The Company states that at all material times, the Claimants did not have any defined or specific duties and responsibilities as they were merely carried out routine and menial administrative tasks which did not require a full-time employee which is was work could be easily performed by anyone else. Thus, the Claimants' job scope at the Company which involved carrying out routine and menial administrative work did not require a full time staff and could be carried out by the Company's Directors themselves. Consequently, the Claimants' position was made redundant.

12. The Company further states that while earning a salary from the Company, the Claimant was also performing work at a textile shop under the business name; *"VK Kalyanasundram"* owned by **Kalyani A/P Balasubramaniam (Ms. Kala)** and **Barani Kumar A/L Balasubramaniam** while **Vijay Anand** was the Director of the said textile business. The Claimants was also assisting **Ms. Kala** with her personal matters as well as charity work.

13. At the material time, the Company was facing serious cash flow problems prior to the Claimant's dismissal led the Company taking loans from unlicensed money lender at extravagant interest rates up to 60% per annum which resulted the Company being unable to make payment of instalments in a timely basis. In addition, the Company also being unable to afford fertilizers for its plantation and

being unable to pay dividends to shareholders on timely basis as directed by Hong Leong Bank to cease payment of dividends to shareholders to ease the Company's cash flow as the Company no longer able to pay instalments to the banks.

14. The Company further states that the Company no longer able to sustain such serious cash flow problems let alone a family-owned business. The Company in order to ensure its sustainability undertook a cost-cutting exercise led to the closure of the Ipoh office, retrenchment of all employees based at the Ipoh office and disposal of its assets in order to reduce its unnecessary expenditures.

15. The Company reiterates that the Claimants' entire case is premised on a flawed understanding that a cost-cutting measure can never include making employees redundant and subsequently laying them off which ought to be disregarded by this Court. It is trite law that once a finding of a genuine and *bona fide* exercise is made, the decision to retrench an excess employee should no longer be the subject of examination by the Court as the finding of a proper retrenchment is incongruous with a dismissal without just cause.

16. The cost-cutting exercise was carried out for genuine reasons of better operation of its business and to promote economic viability in light of the serious cash flow issues which the Company was facing. The Company states that had acted in accordance with established principle on the law of retrenchment in industrial jurisprudence whereby retrenchment of an employee can be justified if carried out for profitability, economy or convenience of the employer's business. The Claimants was therefore aware at all times of the impending cost-cutting measures and their impending retrenchment.

17. The implementation of cost-cutting measures was with just cause or excuse that there was a genuine redundancy situation which led to the Claimants' retrenchment and it was bona fide without any ulterior purpose.

The 1st Claimant's Case (Rajivalosana A/P Rajindra Kumar):

18. The Company did not specify the reason for her termination in the letter of termination dated 02/03/2021 wherein the Company never had any consultation with her and did not give any reason for the termination. If at all, the Claimant was ready, willing and able to be transferred as directed by the Company.

19. The 1st Claimant alleges that she was simply terminated by giving one (1) month's notice without any just cause or excuse by the Company. As consequent to her dismissal, the 1st Claimant suffered losses and incurred expenses as a result thereof.

20. There is no convincing evidence produced by the Company that the Claimant's functions were reduced to such an extent that she is to be considered redundant due to the purported cost cutting exercise carried out by the Company that the Head Office had to be moved to Huntley Estate at Pantai Remis, Perak. The Company has not shown any genuine need for reorganization of the Company other than the fact that is motivated and/or initiated by the newly appointed Directors. After her dismissal, her functions were purportedly performed by the Directors themselves.

21. The 1st Claimant avers that her dismissal on the grounds of redundancy without just cause or excuse and/or in breach of the principles of natural justice and/or an unfair and unlawful of labour practice. In the circumstances, the 1st Claimant prays for an order that the Claimant be reinstated without any loss of wages, allowances, services, privileges or benefits of any kind and/or such other alternative relief and remedies as this Court deems fit and proper to grant.

The 2nd & 3rd Claimant's Case (Barani Kumar A/L Subramaniam & Vijay Anand A/L P Harivasagan):

22. The 2nd & 3rd Claimants state that prior to the termination, there were no indication that the Company's financial health was deteriorating. As there were no consultations whatsoever and no indication was made as to fact that their services will be terminated, the 2nd & 3rd Claimants further states that there were also no proper reasons, explanation and justification given to the 2nd & 3rd Claimants on the Company's purported financial difficulties as that there were no costs cutting measures adopted by the Company. The Company was not transparent and there were no full and frank disclosure of information given by the Company on the purported financial difficulties.

23. The Company failed to consider and take into account the Claimants' performance, skills, knowledge and achievements throughout their long service with the Company. There were no alternatives given to the Claimants be it changes in position and/or internal transfer and/or redeployment offered by the Company or within its Group.

24. Thus, the 2nd & 3rd Claimants further state that the termination is tainted with the elements of bad faiths and/or *mala fide* when the Claimants was only issued with one (1) month's notice of termination whereby they had worked with the Company for 20 years and was not given any compensation. The Company failed to adopt and practice the *Last In First Out* (LIFO) principle. The Company failed to consider and take into account the Claimants' performance, skills, knowledge and achievement throughout his long service with the Company.

25. The Claimants contend that the Company has not shown any genuine need for reorganization of the Company other than the fact that it was motivated and/or initiated by the newly appointed Directors. There is no convincing evidence produced by the Company that the Claimants' functions were reduced to such an extent that their positions were to be considered redundant. The Claimants contend that their duties and responsibilities are still in existence but are now being performed purportedly by the Directors themselves. The retrenchment exercise by the Company was not done in good faith and the termination was without just cause or excuse.

26. The Claimants pray that their dismissal as without just cause or excuse and/or breach of the principles of natural justice and/or an unfair and unlawful of labour practice. In the circumstances, the Claimants pray for an order be reinstated without any loss of wages, allowances, services, seniority, privileges or benefits of any kind and/or such other alternatives relief and remedies as this Court deems fit and proper to grant.

The Law:

27. The Federal Court in ***Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. & Another Appeal*** **[1995] 3 CLJ 344 at p. 352** succinctly stated the function of the Industrial Court in dealing with dismissal cases as follows:

> *"On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under* ***s. 20 of the Act*** *(unless otherwise lawfully provided by the terms of the reference) is to determine whether the misconduct or irregularities complained of by the management as the grounds of dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal."*

28. The said principle was reiterated in ***Milan Auto Sdn. Bhd. v. Wong Seh Yen*** **[1995] 4 CLJ 449 at pp. 454 and 455** wherein in delivering the judgment of the Federal Court, His Lordship *Mohamed Azmi* FJ said:

> *"As pointed out by this Court recently in* ***Hong Leong Assurance Sdn. Bhd. v. Wong Yuen Hock [1995] 3 CLJ 344; [1995] 2 MLJ 753,*** *the function of the Industrial Court in dismissal cases on a reference under* ***s. 20*** *is twofold: first to determine whether the misconduct complained of by the employer has been established and secondly to determine whether the proven misconduct constitute just cause or excuse for the dismissal of the employee."*

29. As was opined by His Lordship *Raja Azlan Shah* (CJ Malaya) (as HRH then was) in the Federal Court decision of ***Goon Kwee Phoy v. J & P Coats (M) Bhd.*** **[1981] 1 LNS 30,** it is trite that where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that Court to determine whether the

termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the Court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

30. The right to organize business or a company's structure is a managerial prerogative as has been firstly established in ***William Jacks & Co. (M) Sdn. Bhd. v. S Balasingam*** **[1997] 3 CLJ 235** wherein the Court of Appeal had defined "retrenchment" to be as follows:

> *"Retrenchment' has been defined as the discharge of surplus labour or staff by an employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action."*

31. Whether the retrenchment exercise in a particular case is *bona fide* or otherwise is a question of fact and of degree depending on the peculiar circumstances of the case. It is well-settled that the employer is entitled to organize his business in the manner he considers best. So long as the managerial power is exercised *bona fide*, the decision is immune from examination even by the Industrial Court. However, the Industrial Court is empowered, and indeed duty-bound, to investigate the facts and circumstances of the case to determine whether the exercise of power is in fact *bona fide*.

The Standard And The Burden Of Proof:

32. It is trite law that the burden of proof that the employee has committed the misconduct and that the dismissal was with just cause or excuse rests squarely on the employer as stated by the Industrial Court Chairman in ***Stamford Executive Centre v. Puan Dharsini Ganesan*** **[1986] 1 ILR 101** as follows:

> *"It may further be emphasised here that in a dismissal case the employer must produce convincing evidence that the workman committed the offence or offences the workman is alleged to have committed for which he has been dismissed. The burden of proof lies on the employer. He must prove the workman guilty, and it is not the workman who must prove himself not guilty. This is so basic a principle of industrial jurisprudence that no employer is expected to come to this court in ignorance of it".*

33. The standard of proof required in dismissal cases as decided by the Court of Appeal in ***Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor*** **[2002] 3 CLJ 314** is the civil standard of proof on a balance of probabilities.

34. As regards burden of proof, it is trite that the burden lies on the employer to prove redundancy. In ***Bayer (M) Sdn. Bhd. v. Ng Hong Pay*** **[1999] 4 CLJ 155,** the Court of Appeal at p. 160 states as follows:

> *"On redundancy it cannot be gainsaid that the appellant must come to the court with concrete proof. The burden is on the appellant to prove actual redundancy on which the dismissal was grounded. (See* ***Chapman & Others v. Goonvean & Rostawvack China Clay Co. Ltd. [1983] 2 All ER****). It is our view that merely to show evidence of a re-organisation in the appellant is certainly not sufficient."*

35. The issues for the Court's consideration in this case is whether there was an actual and *bona fide* redundancy and if so, whether the proved redundancy constitutes just cause or excuse for dismissal under the circumstances.

The Law On Redundancy:

36. Redundancy may arise in a situation where the business requires fewer employees of whatever kind. *Dunston Ayudurai* in his esteem book entitled *'Industrial Relations In Malaysia, Law & Practice' 3rd edition* at pp. 255 and 256 defined the term 'redundancy' as follows:

> *"Redundancy refers to a surplus of labour and is normally the result of a reorganisation of the business of an employer, and its usual consequences is retrenchment, i.e. the termination by the employer of those found to be surplus to his requirements after the reorganisations. Thus, there must first be redundancy or surplus of labour before there can be retrenchment or termination of the surplus".*

37. In ***William Jacks & Co. (M) Sdn. Bhd. v. S. Balasingam*** **[1997] 3 CLJ 235 at p. 241,** the Court of Appeal clearly set out the principles of retrenchment as follows:

> *"Retrenchment has been defined as the discharge of surplus labour or staff by the employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action. Whether the retrenchment exercise in a particular case is bona fide or otherwise, is a question of fact and degree depending for its resolution upon the peculiar facts and circumstances of each case. It is well settled that an employer is entitled to organise his business in the manner he considers best. So long as the managerial power is exercised bona*

fide, the decision is immune from examination even by the Industrial Court. However, the Industrial Court is empowered, and in deed duty bound, to investigate the facts and circumstances of a particulars case to determine whether that exercise of power was in fact bona fide...".

38. The Court of Appeal in ***Bayer (M) Sdn. Bhd. v. Ng Hong Pau*** **[1999] 4 CLJ 155; [1999] 1 MLRA 453; [1999] 4 MLJ 361; [1999] 4 AMR 3913** held:

"On redundancy, it cannot be gainsaid that the appellant must come to court with concrete proof. The burden is on the appellant to prove actual redundancy on which the dismissal was grounded...It is our view that merely to show evidence of a re-organisation in the appellant is certainly not sufficient. There was evidence before the court that although sales were reduced, the workload of the respondent remained the same. After his dismissal his workload was taken over by two of his former colleagues. Faced with the fact that there was no convincing evidence produced by the appellant that the respondent's function were reduced to such an extent that he was considered redundant."

39. Retrenchment in its ordinary acceptation connotes that the business itself is being continued but that a portion of the staff or the labour force is discharged as surplus.

40. In the Court of Appeal case of ***Harris Solid State (M) Sdn. Bhd. & Ors v. Bruno Gentil Pereira & Ors*** **[1996] 4 CLJ 747.** His Lordship *Gopal Sri Ram* JCA at p. 767 held that:

"... An employer may re-organise his commercial undertaking for any legitimate reason, such as promoting better economic viability. But he must not do so for collateral purpose..."

41. In the case of ***Stephen Bong v. FCB (M) Sdn. Bhd. & Anor*** **[1999] 1 LNS 131** the High Court had articulated as thus:

> *"It is not the law that redundancy means that the job or work no longer exists. Redundancy situation arise when the business required fewer employer of whatever kind."*

42. In ***Firex Sdn. Bhd. v. Ng Shoo Waa*** **[1990] 1 ILR 226 (Award No. 69 of 1990),** (the Learned Chairman *Steve LK Shim* (as he then was) after restating the principles as found in ***Ong Lean Phaik v. C.F. Sharp & Co. (M) Sdn. Bhd., Penang*** **[1980] 1 ILR 284 (Award No. 121 of 1980)** stated:

> *"... It is well established that it is for management to decide the strength of its staff which it considers necessary for efficiency in its undertaking. The court will not intervene unless it is shown that the decision was capricious or without reason or was mala fide or was actuated by victimisation or unfair labour practice. Those principles have been consistently applied by the Industrial Court in numerous cases."*

43. It is a settled principle that in selecting employees for retrenchment an employer should resort to the *"last in first out"* rule unless the employer can show sound reasons why they had to depart from it. Where it is necessary for some employees to be dismissed because of redundancy the Court will require the employee to show how, by whom and on what basis the selection was made. (See ***National Union of Cinema & Amusement Workers v. Shaw Management Services Sdn. Bhd.*** **(Award No. 27 of 1978**).

44. In determining whether the Claimant was dismissed with just cause or excuse by the retrenchment exercise undertaken by the Company, this Court will ask this pertinent questions:

(i) Whether there was a genuine need for a re organisation exercise by the Company;

(ii) Whether a genuine redundancy situation had arisen which led to the retrenchment of the Claimant; and

(iii) Whether the Company had complied with the accepted standards and procedure when selecting and retrenching the Claimant.

Cause Papers, Bundle of Documents, Witness Statement & Written Submissions Referred:

45. The Company had called upon four (4) witnesses to testify in support of the Company's case namely:

(i) **Kalyana Ganesh A/L Krishnamoorthy** (COW-1) – Director of the Company (Alternate Director to **Mr. Ramamoorthy**);

(ii) **Kalyana Ganthinathan A/L Ramakrishnan** (COW-2) – Director of the Company;

(iii) **Kalyana Prakash A/L Segaran** (COW-3) – Member Executive Customer Service; and

(iv) **Santosh Murugan A/L S G Siva** (COW-4) – Director/Shareholder of the Company

46. Meanwhile, each Claimant in their respective case testified on their own as the sole witness to support their own respective case. In the course of hearing, the Court had referred the following documents which were filed by the respective parties as the followings:

(i) Each Claimant's Statement of Case dated 10/03/2022;

(ii) Statement in Reply dated 21/04/2022;

(iii) Amended Statement in Reply dated 21/09/2022;

(iv) Rejoinder dated 13/05/2022;

(v) Claimant's Bundle of Documents **(Rajivalosana)** marked as CLB-1;

(vi) Claimant's Bundle of Documents **(Barani Kumar)** marked as CLB-2;

(vii) Claimant's Bundle of Documents **(Vijay Anand)** marked as CLB-3;

(viii) Claimant's Supplementary Bundle of Documents marked as CLB-4;

(ix) Company's Bundle of Documents marked as COB-1;

(x) Company's Supplementary Bundle of Documents marked as COB-2;

(xi) Company's Supplementary Bundle of Documents (2) marked as COB-3;

(xii) Company's Supplementary Bundle of Documents (3) marked as COB-4;

(xiii) Company's Supplementary Bundle of Documents (4) marked as COB-5;

(xiv) Company's Supplementary Bundle of Documents (5) marked as COB-6;

(xv) Company's Supplementary Bundle of Documents (6) marked as COB-7;

(xvi) Company's Written Submissions dated 04/07/2022;

(xvii) Claimant's Written Submissions dated 04/07/2022;

(xviii) Company's Written Submissions in Reply dated 15/08/2022; and

(xix) Claimant's Written Submissions in Reply dated 16/08/2022.

Evaluation of Evidence & Findings:

47. The Claimants alleged that their dismissal by the Company on the grounds of redundancy was without just cause or excuse. The Claimants submitted that there was no genuine need for reorganization and there was no indication that the Company's financial health was deteriorating, thus, there is no evidence shown that the Claimants' functions were reduced for they to be considered redundant.

48. On the other hand, the Company is entitled to organize its business in the manner the Company consider best and so long as the managerial power is exercised *bona fide*. The Company's submissions on its pleaded case and evidence adduced before this Court that the Claimants' dismissal on the grounds of redundancy was with just cause or excuse.

49. The two (2) pertinent questions which arises for the determination in redundancy whether the genuine redundancy situations arise leading to retrenchment in this case, and if there was a redundancy situation, whether the consequent retrenchment made in compliance or in conformity with accepted and good standards of procedure in industrial relations practice.

50. As in every dismissal case, the Court is tasked to strike a balance between the Company's prerogative to manage its business and the Claimant's right to livelihood. It is trite law that where an employer terminates the services of its employee, it is imperative for the employer to justify its reasons for doing so.

Review of Company's Operations:

51. The law recognises a Company's right to organise its business in a manner it considers best. However, in doing so, the Company must act *bona fide* and not capriciously. Hence, while the Court acknowledges the Company's right to reorganize, the exercise of that prerogative must be free from any *mala fide* or any inequitable elements. In this respect, the Court refers to ***Harris Solid State (M) Sdn. Bhd. & Ors v. Bruno Gentil Pereira & Ors*** **[1996] 4 CLJ 747** where the Court of Appeal held:

> *"An employer may reorganise his commercial undertaking for any legitimate reason, such as promoting better economic viability. But he must not do so for a collateral purpose, for example to victimise his workmen for their legitimate participation in union activities. Whether the particular exercise of managerial power was exercised bona fide or for collateral reasons is a question of fact that necessarily falls to be decided upon the peculiar circumstances of each case."*

52. This principle is reiterated in ***Tennarasu A/L S.M Shanmugam v. YB Menteri Sumber Manusia, Malaysia & Anor*** **[2017] 1 LNS 1737; [2017] MLJU 1718** where the High Court held as follows:

"[75] Our courts had fully the principle that an employer has the right and privilege to reorganize its business for the purpose of the economy or convenience so long as it is done bona fide. An employer too has the right to determine the number of his employee in line with the business needs and requirements. In the event the services of his employees are found by an employer to be in access of the needs and requirements of his business, the employer is entitled to discharge the access. (see ***Chang How Weng v. Yang Berhormat Menteri Sumber Manusia & Huang-DBS Vickers Research Sdn Bhd [2010] 1 LNS 555****.*

[76] The general principle in industrial law on retrenchment has been set out in the case of ***Cycle & Carriage Bintang Bhd. v. Cheah Hian Lim, Award No. 342 of 1992 2 ILR at page 400*** *where it was stated that the court will not disturb the decision of an employer in organizing his business for its efficacy. The management of a business has the right to decide on the strength of its workforce that is required for the efficacy of that particular business. Likewise, the same management is also entitled to decide if there are surplus to be discharged. In doing so, the employer must adhere to the accepted industrial principles and such act must not be tainted with victimization and mala fide.*

[77] In ***Minister of Labour, Malaysia v. Chan Meng Yuen [1992] 1 CLJ Rep 216,*** *the Supreme Court had recognized the fact that "retrenchment is an accepted eventuality in private sector".*

[78] At the time of retrenchment, the 2nd Respondent was suffering reduction in profits for over RM200 million, a drop of 50% in a single year. Reduction in profit had been recognized as a valid ground for retrenchment. In ***Mamut Copper Mining Sdn. Bhd. v. Chau Fook Kong @ Leonard & Ors [1997] 1 MELR 562*** *the court held:*

> *"... the Court finds that the company was undertaking a genuine reorganization and cost-cutting exercise necessitated by a sharp fall in throughout. Cost control and staff reorganization for better economy and efficiency is in itself a legitimate reason for*

retrenchment. There is no pre-condition that the same must be precede by losses suffered by the company. Indeed, a careful employer would be wise to act before falling profits and ultimately the red ink finally manifests itself in its profit and loss accounts."

53. On 16/10/2020, due to serious cash flow problems, the Company subsequently decided to appoint new Company's Directors in the management committee namely; **Kalyana Ganesh A/L Krishnamoorthy** (COW-1), **Kalyana Ganthinathan A/L Ramakrishnan** (COW-2) and **Santosh Murugan A/L SG Siva** (COW-4) who were tasked to review the Ipoh office and estate operations and the management of the Company and to propose improvements (at page 93 of COB-1) with references to the Company's financial accounts and Board of Directors' minutes of meetings over the past few years together carried out the Company's headcount and its operations. This review led to the following discoveries:

(a) The Claimants were employees of the Company accounted for approximately 50% of the Company's payroll, while they were also carrying out work for the textile business of *"VK Kalyanasundram"* during their working hours;

(b) The work performed by the Claimants did not require full-time employees and could be easily be performed by the Directors namely COW-1, COW-2 and COW-4 without the need to draw any salary from the Company (at pages 155, 163 and 164 of COB-2);

(c) There was a very high cost in maintaining **Barani Kumar**'s (the 2st Claimant) employment as his claims from September 2018 to April

2021 was RM130,000.00 which is equivalent to approximately RM3,000.00 per month (at page 231 of COB-2);

(d) From 2018 to 2020, there was a drastic increase in the Company's administrative and general expenses, as expenses in 2018 amounting to RM773,031.00 (at page 224 of COB-2), in 2019 amounting to RM537,828.00 (at page 224 of COB-2) and in 2020 amounting to RM1,329,061.00 (at page 226 of COB-2);

(e) The Ipoh office was being used to perform routine and menial administrative work only such as printing, photocopying and/or writing cheques which could be easily be done online or moved to the Company's Huntley Estate at Pantai Remis including that having and maintaining the Ipoh office just to hold meetings is redundant; and

(f) For year 2020 alone, the Ipoh office incurred total expenses of RM98,000.00 for electricity, upkeep of premises and office equipment, telephone and fax (at page 225 of COB-2). Approximately RM3,333.00 per month or RM40,000.00 per year was being forked out for electricity for years 2018 to 2020 (at pages 224-225 of COB-2). The Company was paying approximately RM1,111.00 for electricity for each employee based in the Ipoh office which is highly excessive for a small space which accommodated for less than three (3) employees at the material time.

54. It is clear and convincing evidence that the genuine restructuring exercise undertaken by the Company's Board of Directors is to ensure proper management of the Company by reviewing the Company's operations and finances from time to time

to promote efficiency wherever and whenever possible to reduce costs as much as possible by cost-cutting measures.

The Company's Serious Cash Flow Issue:

55. It is undisputed that there were serious cash flow problems effecting the Company since 2016 persisted until March 2021 at the time the Claimants were dismissed which they were aware of the financial difficulties faced by the Company led to immediate steps should be taken to overcome cash flow problems. The cash flow problems were so serious that it was affecting the Company's operations.

56. The Company's nature in business involves among others, the production and processing of rubber and oil palm fruits. In June 2018, it was decided that the application of fertilizers for a period of one year was to be withheld to ease the Company's cash flow (at page 122 of COB-1) and in October 2020, the Company's Directors during the material time informed the Board that the Company had not been able to apply full fertilizers to its crops over the past few years (2019 and 2020) to cut down on cost (at page 92 of COB-1). The Company was unable to purchase fertilizers and had not been applying full fertilizers for its crops. Inability to afford fertilizer from 2018 to 2020 is a serious concern.

57. In 2016, the Company took a friendly loan from **Mr. Jaganathan** who is not a licensed money lender (at page 40 of CPB-1) to ease the Company's cash flow problems at an interest of 5% per month which is equivalent to 60% per annum. However, the Company was unable to make payment of instalments on a timely

basis for the loan taken from **Mr. Jaganathan**; the unlicensed money lender that this was due to cash flow problems (at page 204 of COB-2).

58. In 2018, the Company took another loan from **Ms. Kalyani A/P Balasubramaniam (Miss Kala)** who is also not a licenced money lender for repayment of bank facilities/loan and operational expenses at an interest of 2% per month which is equivalent to 24% per annum (at page 40 of COB-1). As a result, the Company had to resort to taking loans from both unlicensed money lenders at extravagant interest rates up to 60% per annum. **Ms. Kala** as the Managing Director during the material time acknowledged that the Company was unable to meet all of its outstanding debts and to allocate sufficient funds for its essential expenditure (at page 147 of COB-1).

59. Extension of the term of the loan facilities taken from Hong Leong Bank was requested by **Ms. Kala** to reduce monthly instalments to be paid to the bank (at page 122 of COB-1) due to the Company was unable to make monthly bank instalments. The Company also had outstanding debts relating to a loan from Alliance Islamic Bank Berhad for the sum of approximately RM25,000.00 (at page 29 of COB-1). In addition, **Ms. Kala** personally agreed for the Company to temporarily use her personal credit line of RM800,000.00 in light of its cash flow problems (at page 122 of COB-1).

60. The cash flow problems led to delay in the payment of dividends to shareholders on a timely basis (at pages 207-211 of COB-2). The Company was directed by Hong Leong Bank to cease payment of dividends to shareholders to ease cash flow. As a result, the Company was unable to pay dividends to

shareholders on a timely basis wherein dividends payment for the month of May – August 2019 was only made in 22/01/2020, 13/02/2020, 28/02/2020 and 27/07/2020 respectively. It is clear and profound evidence from contemporaneous documents as abovementioned that the Company had serious cash flow problems which warranted immediate addressing.

61. In the case of ***Badariah Shahrudin v. Mudra Resources Sdn. Bhd.*** **[2022] 2 ILR 539 (Award No. 658 of 2022),** the Court in dismissing the Claimant's claim and upheld the redundancy as *bona fide*, the Court stated that:

> *"...there was a genuine need by the company to reorganize its business, the facts and evidence had shown that the company had been faced with a genuine situation that had required it to reorganise its business and it had taken a realistic approach on what had needed to be done, whilst experiencing the financial crisis...."*

62. In addition, in the said case in respect of what is redundancy, the Court had stated that:

> *"It has been well established that, in Industrial law, the employer has every right to reorganise its business in any manner for the purpose of economy or convenience provided he acts bona fide and no arbitrator should interfere with the bona fide exercise of that right. It is also well settled that it is for the management to decide the strength of its staff which it considers necessary for the efficiency in its undertakings. Where the management decides that the workmen are surplus and that there is, therefore a need for retrenchment, an arbitration tribunal will not intervene unless it can be shown that the decision was capricious."*

Cost-Cutting Measures:

63. Evidence of **Kalyana Ganthinathan A/L Ramakrishnan** (COW-2) testified and explained that on 06/01/2021, as the Company's Director had stressed on the need for cost-cutting measures to be implemented given the unsustainability of the Company's high debts in the future undertakings. COW-2 confirmed that in 01/03/2021, the Company decided to implement cost-cutting measures to reduce the Company's expenses to solve its cash flow problems which were as follows:

(a) The closure of the Ipoh office as it was unnecessary expense which did benefit the Company;

(b) Cost-cutting measures can include disposing off assets which are not required similarly in disposing assets such as Company owned vehicles namely Toyota *Fortuner* and *Mercedes Benz S-Class* (at pages 135, 136, 143 & 157 of COB-1) due to exorbitant amounts were being incurred by the Company for the highly maintenance, insurance, road tax of each vehicle (at pages 181-183, 165-166 & 184 of COB-1). For instances, high cost for the upkeep of Company's vehicles in year 2018 amounting to RM25,562.00, in year 2019 amounting to RM10,625 and in year 2020 amounting to RM51,164.00 notwithstanding that year 2020 was a pandemic year of Covid-19 where the Government had declared Movement Control Over (MCO) for prolonged periods throughout the nation; and

(c) In maintaining the employees who was employed through the Company's subsidiary of *"VK Kalyanasundram Plantations Sdn. Bhd."*

(Huntley Estate) as well as the overall positions of all employees in the Company who were based at the Ipoh office redundant including the positions of all three (3) Claimants in their respective case.

64. It is not unreasonable for the Company to take steps to reduce its cost through cost-cutting measures. The Board of Directors must from time to time relook its operations and finance to reduce cost as much as possible. For fact, a dismissal/retrenchment following the implementation of cost-cutting measures was with just cause or excuse.

65. In ***George C G George v. Bumi Armada Berhad*** **[2019] 2 LNS 2414,** the Industrial Court held that:

> ***"[23]*** *Furthermore, the Company had undertaken a series of cost cutting exercise since 2014. COW-1's evidence that the Company had carried out retrenchment exercises on 4th Quarter of 2014, 2nd Quarter of 2015 and 4th Quarter of 201 5 due to the depressed market sentiment, falling oil prices and widespread cost cutting by upstream oil and gas companies [COWS-1 pg.5 Q&A 7] was never challenged. As such it doesn't make sense for the Claimant not to know what was going on in the Company and why the Company need to embark again in the reorganization exercise.*
>
> ***[27]*** *This Court finds that the Company was consistent in taking steps to restructure its business and therefore the re-organization by merging both the International OSV and the SEA OSV to become one and concentrate on the SEA OSV was a genuine and bona fide decision."*

66. In ***Alam Arena Management Sdn. Bhd. v. Norfadzilah Surip & Anor*** **[2011] 1 ILR 590,** it was held that:

*"**(1)** Based on the evidence and authorities presented in this case, it had been clear that when the company had taken over, it had done so with an accumulated loss carried forward from the year ended 31 March 1998. Thus in terms of profit, the company's contention that they had been suffering a loss had been right. As such, the decision to retrench the claimants had been done with a view to achieve cost savings and not as a cloak to victimize them (paras 20 & 21).*

***(2)** The company had not embarked on other cost cutting measures before going on a retrenchment exercise but it had justified why cost cutting measures had not been suitable at the material time by stating that it would have affected the morale of the staff. As for overtime, the company's contention that it had been difficult to stop this facility as the company's functions had also involved football matches which had taken place at night and denying the staff this facility would have meant that the game would not have taken off which would have resulted in a loss of revenue, would be accepted. It was not that the company had not conducted cost cutting measures but it had done so in other forms such as retrenching more managerial level employees and withdrawing management allowances, not recruiting new staff, retaining staff who could multi task and having managers on secondment from Puncak Niaga Sdn. Bhd. It had been the prerogative of the company to organize or reorganize its business in a manner it thought fit (para 21)."*

67. Nevertheless, it is undisputed fact that with the closure of the Ipoh office effective from 01/04/2021, the Company was no longer required to incur operating cost in operating the said office resulted in a drastic reduction in the expenses incurred for the Ipoh office including upkeep of premises, office, equipment, fax, telephone and electricity for a total reduction from RM98,090.00 in year 2020 to RM1,047.00 in year 2022 (at page 226 of COB-2). In addition, the Company no longer incurred cost for the upkeep of vehicle which reduced from RM51,164.00 in year 2020 to none (RM0) in year 2021 (at page 226 of COB-2).

68. Notwithstanding that, the Company's headcount reduced from 26 employees in April 2021 (at pages 12-13 of COB-2) to 22 employees in May 2021 (at pages 14-15 of COB-2). The reduction in headcount led to the reduction of the Company's overall staff salaries including employer's contribution to EPF from RM41,800.40 in March 2021 (at page 155 of COB-2) to RM20,796.25 in August 2021 (at pages 163-164 of COB-2) which was nearly 50% of reduction.

69. As a result, the Company had drastically reduced its administrative and general expenses from RM1,329.061.00 in year 2020 to RM445,120.00 in year 2021 (at page 226 of COB-3) which is approximately 66% of reduction whereas the Company's profit from operations increased from RM3,092,655.00 to RM5,571,245.00 from year 2020 to 2021 (at page 119 of COB-3) which is approximately 80% increase of profit. By closing down the Ipoh office, the Company has reduced its overall cost.

70. There is overwhelming evidence demonstrates that there was a genuine cost-cutting measures carried out by the Company and it was *bona fide* that the steps taken by the Company had indeed reduced the operating costs. The cost-cutting exercise was for the genuine reasons for better operations of its business and to promote economic viability in light of the serious cash flow issues which the Company was facing prior to the retrenchment of the Claimants. Notably, these serious cash flow problems affected the Company since 2016 that the Claimants were aware of the financial difficulties faced by the Company and therefore the immediate steps should be taken to address these cash flow problems.

1) <u>Case No. 10/4-25/22: Rajivalosana A/P Rajindra Kumar</u>:

71. The Company's case is that the Claimants' services were terminated pursuant to purported cost cutting exercise due to poor management of the Company's business lead to insufficient cash flow to meet outstanding debts and to allocate sufficient funds for its essential expenditure. The Company also alleged that the 1st Claimant was pre-occupied with her work for **Kalyani A/P Balasubramaniam (Miss Kala)** and **Mr. Barani's** textile business to the extent that the 1st Claimant had to be constantly reminded to carry out routine and menial administrative tasks delegated to her.

72. The 1st Claimant had been consulted by COW-1 in the presence of COW-3 on 15/09/2020 before the new management of the Board of Directors deciding to embark on the cost-cutting measures. At this stage, she was informed that there was very little work for her to do for the Company at the Ipoh office, and at the same time most of her work was for the textile business operating at the ground floor of the premises.

73. In reference of **Ms. Kala**'s statement during the Board of Directors meeting held on 16/10/2020 in the presence of the 1st Claimant, **Ms. Kala** had admitted that the 1st Claimant had been working for her and that she was purportedly paid a salary by **Ms. Kala** (at page 233 of COB-2) for working at the textile business as COW-1 and COW-3 were also informed by **Ms. Kala** on 15/09/2020 that the 1st Claimant was paid RM1,500.00 by **Ms. Kala** for the said textile business. A photograph taken in the shop where the textile business operates (at page 69 of COB-2) shows that the 1st Claimant assisting with the operations of the textile business (the lady in the red

dress is the 1st Claimant; **Rajivalosana A/P Rajindra Kumar**) as she also admitted that the lady in the photograph was indeed herself in the textile shop.

74. The 1st Claimant (**Rajivalosana A/P Rajindra Kumar** – CLW-3) had admitted during cross examination that her role was no longer needed and was in fact redundant. The Claimant (CLW-3) also admitted that her role did not require a full time employee and it was reasonable for the Company to dismiss her:

"Question: Now, so therefore, if the Directors are able to do your work, you would agree that your job at that point did not require a full-time employee? Correct?

CLW-3: Yes.

Question: Yes. And therefore, you would agree with me your role was redundant at that point? Agree?

CLW-3: My role was no longer needed.

Question: Yes. Agree? It's very a long pause. Ms. Rajiva, for a very simple question. You want to agree, don't you? At that point, your role was redundant, right, Ms. Rajiva?

CLW-3: Yes.

Question: Yes. And now, if your role was redundant, Ms. Rajiva, you would agree with me, it was not reasonable for the Directors to dismiss you? Correct?

CLW-3: Which is right for the Directors to dismiss me?

Court: That your duty or your role was redundant?

Question: Yes. She agreed her role is redundant. So, now. I am asking her, so therefore, you would agree with me that since your role is redundant, it is reasonable for the Directors to dismiss you? Agree?

CLW-3: Yes, Sir."

75. The 1st Claimant's aforesaid admissions must be taken as conclusive evidence to warrant a finding of a genuine cost-cutting exercise which led to her retrenchment, with such being exercised *bona fide*.

76. The *Last In First Out* (LIFO) principles did not apply in this present case as the 1st Claimant's role, function and position was the sole position at the Ipoh office where no other employees were employed by the Company in the only position in that category except the 1st Claimant herself at the material time.

77. To what extent *"Last In First Out"* (LIFO) applies in redundancy? This Court is mindful of ***Gurbux Singh Prabha Singh v. J Whyte & Co (M) Sdn. Bhd.*** **[1981] 1 ILR 436** which held that in the exercise of that power to terminate the services of redundant employees, the management must, when selecting employees to be retrenched not only act reasonably but also observe any customary arrangement or code of conduct *i.e.*, the Code of Conduct for Industrial Harmony 1975.

78. Nevertheless, other school of thought is of the opinion that the Code of Conduct was; with the greatest of respect, a mere guidance and does not have the force of law. This Court found that this is a valid exception to the strict application of the Code of Conduct.

79. The Company had argued that the Code of Conduct does not have the force of law and non-compliance with it cannot be fatal. The case of ***Senjuang Sdn. Bhd. v. Munsiah Mad Nor*** **[2015] 1 ILR 471** was cited for the proposition that the Code of Conduct does not have any legal sanction. The Chairman in that case relied on the case of ***Penang & S Prai Textile & Garment Industry Employees' Union v.***

Dragon & Phoenix Bhd. Penang & Anor **[1990] 1 ILR 239; [1989] 1 MLRH 620** which stated this of the Code of Conduct:

> *"[32]...its acceptance is voluntary. This is so expressed by the Minister in his foreword to the code. There is no legal force or sanction for failing to accept such code of conduct..."*

80. Further, the Court of Appeal *in* ***Equant Integration Services Sdn. Bhd. (In Liquidation) v. Wong Wai Hung*** **[2006] 2 LNS 0151; [2012] MLRAU 591** held that:

> *"[12] The failure to comply with the code per se cannot be fatal in a proper retrenchment exercise. This is because the code does not have the force of law."*

81. While the Code of Conduct may not have the force of law, it is still the gold standard by which a Company's action may be measured against to see if the whole exercise of retrenchment had been carried out *bona fide* and that every attempt had been made to explore alternatives before the termination on account of retrenchment.

82. While the Code of Conduct is not statute law it nevertheless has some legal sanction as a document that the Industrial Court should have regard to when making its award as clearly spelt out on **s. 30(5A) of the IRA** as follows:

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

83. In ***Joseph Lourdesamy v. Measat Broadcast Network Systems Sdn. Bhd. & Anor*** **[2016] 1 LNS 1843,** it was held that:

> *"15. For ease of reference and to enable all parties concerned understand the reason behind the Award, the relevant portion of the Award is reproduced as follows:*
>
> *"…*
>
> *On the contention that LIFO was breached, the Court agree with the Company's submission that it does not apply as Claimant's position as 'Head' is the only position in that category. His subordinates did not take over his position as the Head and the Company merely de-layered the reporting structure. The Court observed that the job function was absorbed by people inside the Company and not taken by someone from outside.""*

84. Apparently, it is mindful to observe that the closure of the Ipoh office had resulted in the positions of all employees based there to be eliminated and made redundant including the 1st Claimant. It is the role of the Board of Directors to ensure proper management of the Company in reviewing the Company's operations and finance from time to time to promote efficiency where possible had showed the genuineness of the steps taken by the Company to review its operations and finances in the subsequent implementation of cost-cutting measures.

85. The 1st Claimant (**Rajivalosana A/P Rajindra Kumar**) as the Head Office Clerk was only carrying out routine and menial administrative works as such photocopying, scanning, issuing payment of cheques, etc., which are currently being performed by the Company's Directors and she was also not involved in any work related to the Company's estate operations which is the Company's primary

business and there was no available work for her at Huntley Estate. Her role did not require a full-time staff as it can be carried out by the Company's Directors themselves especially clerical works using online transactions (as example; online banking transactions) without salary being taken.

86. Further, it is undisputed that no replacement was hired to replace the 1st Claimant's position that her functions were absorbed by the Company's Directors. Therefore, cost-cutting measures would include reducing overheads where possible including closing Ipoh office which are not required. This includes closing the office that the 1st Claimant was working in as her position and functions were deemed redundant and there was no replacement hired for her role.

87. It is clear finding that the closure of the Ipoh office led to all employees based there being laid off as there was no longer any work available in the Ipoh office. Once a finding of a genuine and *bona fide* exercise is made, the decision to retrench an excess employee should no longer be the subject of examination as the finding of a proper retrenchment is incongruous with a dismissal without just cause. Thus, the Company cannot be faulted for taking steps to retrench the 1st Claimant and for taking steps to address the cash flow problems which plagued the Company. Based on the foregoing, there was a genuine redundancy situation which led to the 1st Claimant's retrenchment.

88. In ***Suhana Mat Din v. Sarawak Hidro Sdn. Bhd.*** **[2019] 2 LNS 2433,** the learned Chairlady of the Industrial Court had decided that:

> ***"[120]*** *In this case, the undisputed facts showed that the whole PJ Office had to be closed down and which affected all of its employees*

which numbered more than 40 employees. This was not a matter of who would go first and who would go last. The Court agrees that the LIFO principle does not apply in this case. The closure of the PJ Office was a business decision when MOF-PTP let go off their shares in the Company and those shares were bought by SEB. Then, SEB made a business decision to close the Company's operations because according to COW1, SEB is able to support the operations of the Bakun plant with its existing employees as it is also operating a few other hydroelectric plants. Then there is the evidence from the Claimants themselves that the compensation paid to them was not contractual in nature and that the total amount he received was higher than what the Company originally intended to give them. The Company had also encashed all their annual leave. Although they worked for 1.5 months only in 2018, the compensation had included for all annual leave balance for the whole of that year. In light of these facts, the Court can only conclude that the Company had conducted the termination of the Claimants' employment in accordance with accepted standards and procedures."

89. In ***Kelvin Wong Tuong Yong v. T T E Engineering (M) Sdn. Bhd.*** **[2021] 2 LNS 1861,** the Industrial Court decided that:

"The closure of the Kuching branch no doubt resulted in the Claimants to be without jobs. The Claimants were redundant and surplus to the requirements of the Company.

There is no evidence adduced to show that after the Claimants were retrenched, Company operated in Kuching afresh. This means that the closure of the Kuching office is genuine and it was not an attempt by the Company to drive the Claimants out of their job. The Claimants had opportunity to apply for the vacancies in the Company's branches in West Malaysia but the Claimants were not keen. It is a consolation that the Claimant did not walk away empty handed but were given compensation as required by the law.

On the facts and evidence adduced, there appears to be no unfair labour practice committed by the Company. Neither was the Court convinced that the Claimants were victimized when the Company took the decision to retrench them. The Company had been a good employer by any standard, giving the Claimants their annual increments, generous annual bonuses and the annual holiday trip incentives. Sadly, through no fault of the Claimants, whom the Company recognized as good employees, Kuching office was not doing well. The closure of Kuching office had nothing to do with the work performance of the Claimants but it was purely a business decision to close a branch which was not able to sustain itself for about 10 long years and so that the other branches need not subsidise its existence. With the closure of Kuching Branch, the need to resort to LIFO was not necessary in the instant case. The Court has considered the alleged short notice given by the Company as well as submission of PK FORM19 and the Court is of the considered opinion that they do not prove that the Company acted mala fide. Decided cases held that there is no legal obligation on the Company to consult or warn the employees before retrenchment.

On the totally of evidence adduced both oral and documentary, the facts of the case and the law and after reading the submissions of parties, the Court is of the considered opinion that the Company has, on the balance of probabilities established that the retrenchment exercise which resulted in the Claimants losing the jobs was bona fide and not capriciously or with motives of victimisation or unfair labour practice. The Claimants have not, on the evidence adduced, established that the Company acted mala fide when it undertook the retrenchment exercise which made their positions in the Company redundant."

90. In ***Chong Main Chung v. Kenso Marketing (M) Sdn. Bhd.*** **[2010] 3 ILR 301,** it was held that:

*"**1)** Eventhough the company had done better in the year 2000 as compared to the year 1999 except for the month of February 2000, it did not prevent it from reorganizing its business when the sales performance had not shown a positive sign of improvement in 2001. When the company had experiencing a slowdown in business for the year 2000 and for the months of January and February 2001 respectively, it had been at liberty to take appropriate steps to curtail its loss of revenue at its Sandakan branch even if it had performed well for the year 1999. If the company had decided that the most effective way of preventing further losses in its revenue was to close down its branch in Sandakan then it had been its own business decision to do so and the Court would not interfere in its plan provided that the company had not had any ulterior motive of victimization or unfair labour practice in making the decision (para 24).*

***(7)** Having considered the evidence as a whole, the respondent had on a balance of probabilities discharged its burden by showing that the slowdown in business during the year 2000 to February 2001 had resulted in losses to the company. Therefore, the company had to make a business decision to close down the Sandakan branch eventhough it had been a hard decision to take. The closure of the Sandakan branch had resulted in the retrenchment of the claimant. The company in law had been entitled to decide the strength of its staff which it had considered necessary in its undertaking. The retrenchment had been done bona fide and there had not been any evidence of victimization as claimed by the claimant. In fact, he had been paid his retrenchment benefits. Thus the claimant's dismissal had been with just cause and excuse (paras 39 & 40)."*

91. In ***Cycle & Carriage Bintang Bhd. v. Cheah Hian Lim*** **[1992] 2 ILR 400,** it was decided that:

*"**[1]** It is for the management to decide the strength of its staff which it considers necessary for efficiency in its undertaking. When the employer decides that the workmen are surplus to the requirement and*

there is a need for retrenchment, he has the right to re-organise his business in any manner for the purpose of economy or convenience provided he acts bona fide.

[2] *Services of the employee may well become surplus if there was reduction, diminution or cessation of the type of work the employee was performing.*

[3] *On the totality of the evidence the company had succeeded in proving that C's retrenchment was bona fide and untainted by any unfair labour practice."*

92. As such, it is undeniable that the Company had acted in accordance with established principles on the retrenchment of the employees can be justified if carried out for profitability, economic and convenience of the Company's business. The consequent retrenchment was done in compliance and/or in conformity with accepted standards of procedure as the Company had acted in accordance with good industrial relations practices. In the circumstances based on the considered grounds as abovementioned, it is of considered view and satisfied findings that the 1st Claimant's position in the Company was therefore redundant and the Company had exercised its lawful prerogative to retrench her was with just cause or excuse.

2) <u>Case No. 10/4-101/22 (Barani Kumar A/L Balasubramaniam)</u>:

93. **Barani Kumar A/L Balasubramaniam** (the 2nd Claimant) was appointed as Assistant Manager in a family-owned business by his sister; **Kalyani A/P Balasubramaniam (Ms. Kala)** on 31/05/2000 (at pages 6-8 of COB-1) and later on promoted by his sister to the position of General Manager on 27/01/2015. He also worked with her sister in their owned family textile business shop; *"VK*

Kalyanasundram". On 12/03/2021, the 2nd Claimant was provided three (3) months' notice of termination effectively immediately.

94. As a General Manager in the Company, the 2nd Claimant did not have any defined or specific duties and responsibilities and did not have fixed working hours. He was merely required to assist and manage operational matters as when he required as he would rarely visit the Company's Huntley Estate. Therefore, the Company did not require a fulltime staff for his position whereby it is unnecessary expense and could be carried out by the Company's Directors, consequentially his position in the Company was redundant. It is settled law that the redundancy does not means the job functions or work no longer exits. The fact that an employee's job or function was still in existence but was performed by other remaining employees does not necessarily means that there was no redundancy. A redundancy situation may arise where business requires fewer employees of whatever kind.

95. In ***Pengkalen Holdings Bhd. v. James Lim Hee Meng*** **[2000] 2 ILR 525 (Award No. 351 of 2000)** the Industrial Court held that:

> *"The existence of surplus or supernumerary staff or a redundancy situation can arise due to a number of situations. A business entity facing severe cutback in business volume or which is attempting to rationalise its business may have to reorganise and/or downsize. Where a whole production line or business unit is discontinued, the need for employees to work on that line or unit no longer exists. Both the job functions and the jobs of the employees in the said line or unit have ceased to exist. The business entity with such a problem of surplus workers would have to consider the painful option of retrenchment of its surplus staff who were previously holding posts which have since become redundant and are abolished accordingly.*

Where organisation arising from the reduction of work leads to merger of work units or departments with consequential redistribution of work, there might be an abolishment of posts albeit the job functions assigned to another staff. Similarly, where due to a reduction in the work of a department, there may be a need to reduce the staff strength therein with the workload of the abolished posts being re-assigned to the remaining staff, jobs might have to be abolished."

96. This Court also noted that the foregoing was also the view taken by the learned Chairman in the case of ***PBR Automotive (Malaysia) Sdn. Bhd. v. Subramaniam Andy & Ors*** **[2002] 1 ILR 825 (Award No. 237 of 2002),** where the Court held:

"It is settled law now that the redundancy does not mean the job or work no longer exists. In ***Kaolin (M) Sdn. Bhd. v Samba Sirvang Thanimalai [1998] 2 ILR 637*** *the Industrial Court stated that the fact that an employee's job or function was still in existence but was performed by other remaining employees does not necessarily mean there was no redundancy. If the retrenched worker's job can be performed by those who were not retrenched it means the retrenched worker is surplus to the needs of the employer. A redundancy situation may arise where the business requires fewer employees of whatever kind (See* ***Stephen Bong v. PCB (M) Sdn. Bhd. & Anor [1999] 1 LNS 131; [1999] 3 MLJ 411****).*

97. In ***Taiko Electronics (Malaysia) Sdn. Bhd. v. Ang Meng Chong & Mohd Suhaimi Arshad*** **[2008] 2 LNS 0611,** it was held that:

"In respect of the 2nd claimant the company requires less employees to carry out the job functions and the job function now is taken over and distributed between the other two production planners, his job function was also redundant. In ***Sutton v. Revlon overseas Corporation***

[1973] IRLR 173 *the chief Accountant was sacked and his work re allocated to three former colleagues. The firm still needed the same amount of accounting work but now needed only three employees instead of four to do it. It was held that there was a redundancy.*

In the present case evidence proved that after the 1st claimant and 2nd claimant were retrenched, the company did not appoint new employees to take over their job functions.

Regarding the LIFO principle, the company had proven that they had valid reason not to follow the principle. Among other reason was that the 1st claimant was the only staff being retrenched from his department. LC Malhotra in his book "Dismissal, Discharge, Termination of Service And Punishment" (7th Edn.) as cited by Hew Soon Kiong in his book "Dismissal" states: "in the case of retrenchment of the only employee in a particular category of workmen.... it is retrenchment of the post itself and therefore, if for reasons of economy and in a genuine interest of reorganization, the services of a single employee of a category have to be dismissed".

As for the 2nd claimant although the job function was still exist the company only required two employees instead of three to carry the job function. In ***Stephen Bong v. FCB (M) Sdn. Bhd. & anor [1999] 1 LNS 131; [1999] 3 MLJ 411*** *Nik Hashim (J) held..... it is not the law that redundancy means the job or work no longer exists. Redundancy situations arise where business requires few employees of whatever kind (Harvey on Industrial Disputes).*

On the totality of the evidence adduced the court is of the view that the termination of the claimants' services was due to the genuine redundancy and for reasons of economy and efficiency.
For the above reasons the court is of the view that the company had proven its case that the termination of the claimants was made with just cause or excuse. The claimants' case is hereby dismissed."

98. In ***Zaiton Baharuddin v. Cegelac (M) Sdn. Bhd.*** **[2004] 2 ILR 600,** the Industrial Court held that:

> *"COW2 stated that after the claimant was retrenched, the claimant's job function was taken over by another employee named Norshidah Jamaluddin who was employed before the claimant on 12 March 1990 vide CO6, Bundle A, p. 14.*
>
> *The court found that the work of the design and drafting department had decreased from 1997. When the claimant was retrenched, there was very much less work for that department compared to the previous two years in 1996 and 1997.*
>
> *The court found that the company suffered financial losses from 1997 until 1999 vide CO3 and CO4.*
>
> *The payment of bonus to the employees in 1997 and 1998 and the salary increments for 1997, 1998 and 1999 did not detract from the weight of evidence that the company had less work for the drafting and design department as at the material date and had suffered losses just before and after the material date. The company had proved that there was a redundancy of employees in the design and drafting department as at the material date. The company had followed the established industrial practice of retrenching the employees who had been employed later vide CO6.*
>
> *The company had the right to retrench its employees in order to remain viable. The company had proved that there was a genuine redundancy. The non-compliance of art. 22 (a) (i) of the Code did not render the retrenchment mala fide. The court held that the dismissal of the claimant was with just cause and excuse."*

99. It is undisputed evidence that during cross examination, the 2nd Claimant (CLW-1) agreed that the Company can exercise cost-cutting measures:

> *"Question: But I just want to hear your point, cost-cutting measures. Can the Company take it, it can, right?*
> *CLW-1: It can."*

100. The Company did not hire a replacement to perform the 2nd Claimant's role as General Manager, instead his position and functions were all being performed by the Company's Directors under new management.

101. It is undisputed that there were serious cash flow problems effecting the Company since 2016 and persisted until March 2021 at the time the 2nd Claimant were dismissed and he agreed to this evidence in his cross examination:

> *"Question: She says. "I further believe that the companies are unable to meet all outstanding debts and to allocate sufficient funds for essential expenditure".*
> *CLW-1: OK.*
>
> *Question: Correct? So you can confirm as the date of this letter the Company was having cash flow problems as confirmed and admitted by Madam Kala?*
> *CLW-1: Yes.*
>
> *Question: Correct?*
> *CLW-1: Yes.*
>
> *Question: Right. So as at 11th of March, the Company was having a cash flow problem?*
> *CLW-1: Yes.*

Question: *OK. I am going to take you now to page 17, you see that 12th March? This is the termination letter issue to you, correct?*

CLW-1: *Yes.*

Question: *Mr. Barani, it's one day after Madam Kala's email. So you would agree with me that just one day before, you just confirmed, the Company was having cash flow problems, agree?*

CLW-1: *Yes.*

Question: *So at the time of your dismissal, you would agree with me the Company was having cash flow problems, correct?*

CLW-1: *Yes.*

Question: *Agree?*

CLW-1: *Yes."*

102. The Company at the material time had faced a cash flow problem in the past whereby the Claimants were all aware of the financial situation and difficulties faced by the Company which need the Company to exercise immediate steps to be taken to address these cash flow problems. The evidence led by the Company demonstrates that there was a genuine cost-cutting measures and it was *bona fide* on the reasons of better operations of its business and to promote economic viability in light of the serious cash flow issues at the material time faced by the Company.

103. The 2nd Claimant did not dispute that there were serious cash flow issues effecting the Company since 2016 persisted at the time of his dismissal in March 2021 as he also aware due to the Company's financial difficulties that the Company should take immediate steps to address the cash flow problems and meet its outstanding debts and allocate sufficient funds for essential expenditure whereby the Board of Directors may exercise among others to dismiss employees identified as

redundant, disposed assets which were not economical required and to reduce overhead charges.

104. The 2nd Claimant is a shareholder of the Company at the material time. Under **Section 342 of the Companies Act 2016**, all Board of Directors' minutes is made available for inspection by any shareholders. He was therefore aware at all time of the impending cost-cutting measures and his impending retrenchment. In any event, it is trite law that failure to notify an employee of the impending retrenchment and/or there were no alternative positions offered to the Claimant does not render the retrenchment exercise unlawful, *mala fide* or done without just cause or excuse.

105. In ***N Vijayan K Nagarajan v. Siebel Systems (M) Sdn. Bhd.*** **[2006] 1 ILR 385,** it was held that:

> ***"(3)*** *The employer's failure to consult the claimant or to warn him of the impending retrenchment and its failure to offer the claimant an alternative job does not render the retrenchment of the claimant mala fide."*

106. In ***Lee Chan Keong v. MRCB Builders Sdn. Bhd.*** **[2023] 2 LNS 1588,** the Industrial Court decided that:

> *"On the issue of lack of prior notification or failure to notify the employees of the impending retrenchment exercise, this Court finds support in the case of* ***Kumaran Shanmuganathan v. Worleyparsons Business Services Sdn. Bhd. [2018] 2 LNS 3209*** *where it was stated by the Learned Chairman that:*

"It is an established principle that failure to notify the employees of the impending retrenchment exercise does not render the retrenchment exercise unlawful, mala fide or done without just cause or excuse. In ***Malaysia Shipyard & Engineering Sdn. Bhd. v. Mukhtiar Singh & Ors [1991] 1 ILR 626; [1991] 1 MELR 267*** *it was held: "There is no legal obligation on the part of the company to consult or warn its employees before retrenchment and in this case, there was also no contractual obligation for the company to do so. Furthermore, there was sufficient evidence to indicate that the claimants knew or must be deemed to know from the circumstances of the company and actions taken by it, real and imminent and therefore quite foreseeable".*

107. In ***Nirmala Devi N Letchumanan v. Informatics Training Technology Sdn. Bhd.*** **[2011] 1 ILR 121,** it was held that:

"(4) *On the claimant's claim that she had not been warned of her impending retrenchment, COW1 in evidence had stated that e-mails had been sent out to all employees of the company notifying them that there would be a restructuring and reorganization exercise taking place due to the company's financial situation and that the company would be implementing cost saving measures. The claimant claimed that she had not been aware that the company had been embarking on manpower cost saving measures but had agreed that the student intake had been much lower compared to previous years which had meant lower revenue for the company. The claimant had been working for the company for 14 years and she had been based at the Kuala Lumpur Centre where most decisions with regard to the downsizing and cost saving measures had been made. It thus could not be that she had not known or been aware of the cost cutting measures taken by the company. In any event, the failure to consult the claimant or to warn her of the impending retrenchment had not rendered her retrenchment mala fide. There had not been any obligation on the employer to consult or warn its employees before embarking upon retrenchment.*

To have expected the company to have done so would have been derogating from the recognized prerogative of an employer to close down, reorganize and restructure its business in the way it likes be it for the purposes of economy or convenience provided it had acted bona fide (paras 40, 42, 43 & 44)."

108. Logically, any cost-cutting measures that benefits the Company would also benefit the shareholders of the Company including the 2nd Claimant by receiving extra dividends of shares. The Claimant admitted that before the cost cutting measures, he received RM0.10 per share and on post cost-cutting measures exercised by the Company, he received RM0.33 per share. As such, cost-cutting measures was beneficial to the 2nd Claimant as a shareholder of the Company even though contrary to his claims against the Company for carrying the cost-cutting measures.

109. Evidence of COW-1 and COW-2 had testified that their review of the Company's operations disclosed that the 2nd Claimant role was in fact redundant when there was no existence of any management reports signed by the 2nd Claimant notwithstanding his role as General Manager. There are also no records of him approving or signing off any employees' leaves or attendance records. Monthly and/or Quarterly Directors Report were not checked nor signed by him, nor were there any evidence relating to the same.

110. The Company's staff or field workers did not take any orders or reported to him. In fact, the 2nd Claimant's name does not appear on the organization chart at the material time at the Company's Huntley Estate (at page 189 of COB-1). Instead the Company's Estate Manager reported directly to **Ms. Kala** and **Mr. Jeyaraman** as well.

111. Notwithstanding that, the role of 2nd Claimant as General Manager is not required for the Company's Huntley Estate which is around 500 hectares, compares it is only required for much larger estates. In such larger estate, there will be other departments for the General Manager to manage such as finance, human resources, information technology, environment, health, safety and security. The 2nd Claimant was in fact rarely visit the Company's Huntley Estate except at the time when he was required to visit.

112. The evidence of COW-1 and COW-2 had confirmed that the Company's Chief Clerk; **Mr. Thanabalan** during the material time had informed COW-1 and COW-2 on 12/03/2022 among others that the 2nd Claimant hardly visited Huntley Estate, only come in one (1) to three (3) times a month vide the transcript of his conversation (at page 15 of COB-6). It is corroborated with the evidence of COW-4 as the Company's former Administrative Assistant (form January 2017 until January 2019) who resided at the Company's Huntley Estate during the material time explained that the 2nd Claimant would only visit Huntley Estate once or twice a month, and he would sometimes visit the estate only attending temple prayers.

113. There is no convincing evidence produced by the 2nd Claimant that he was carrying out any specific duties and responsibilities in the Company at the material time except such emails. WhatsApp messages or even oral evidence, taking selfie by himself at Huntley Estate (at pages 1, 13-14 of CLB-4), pictures of him handling out ang pow and doing charity work (at pages 2-7 of CLB-4) and pictures of him celebrating workers' birthday at Huntley Estate (at pages 8-11 of CLB-4), surely cannot amount to cogent evidence that any work was carried by the 2nd Claimant at that material time.

114. In the foregoing, the Company in fact did not require a full-time staff for the 2nd Claimant's position whereby it can be carried out by the Company's Directors themselves which had made the 2nd Claimant's roles, functions and his position redundant whereby the Company had not hired a replacement to perform his role in the same category as a General Manager. His functions were absorbed by the Company's Directors notwithstanding that they were not drawing any salaries or Director's fees paid to them.

115. The Claimant was the only employee holding the position of General Manager during the material time. The *Last In First Out* (LIFO) principle did not apply in the present case when it is undisputed fact that all employees in the Ipoh office including the 2nd Claimant were made redundant whereby the Claimant's position as the General Manager is the only position in that category when nobody has taken over his position and job functions. The Court observed that the job functions was absorbed by the Board of Directors themselves and not taken by someone from outside. In the premises, there was a genuine redundancy situation which led to his retrenchment.

116. There is nothing wrong for the Company, under the new management of Board of Directors required a place to continue business other than the Huntley Estate and therefore rented an office in Hartamas, Kuala Lumpur due to the Ipoh office was incurring high administrative and general expenses. Only the menial works that was done in Ipoh office by the Claimants previously are being done by the Directors at the KL office without drawing any salaries or taking any Director's fee and no replacement employees are required.

117. It is clear evidence that by closing down the Ipoh office, the Company has reduced its overall operating cost and that the various other steps taken by the Company had indeed reduced the operating costs. Further, as a shareholder of the Company, the 2nd Claimant is privy to the fact that the Company had decided to implement cost-cutting measures to reduce the Company's expenses to solve its cash flow problems on 01/03/2021 (at page 150 of COB-1) pursuant to **Section 342 of the Companies Act 2016.** His blatant ignorance now is nothing more than an afterthought.

118. Evidence of COW-1 and COW-2 testified that the KL office was required as the Company was in the midst of carrying out a forensic audit into fraudulent transactions within the Company. Other reasons that the utilities and administrative costs and expenses is significantly less compared the expenses incurred at the Ipoh office and the Company's Directors were all based in KL as they had to constantly meet with suppliers and auditors were also based in KL, therefore reduced the need to incur unnecessary travelling expenses from KL to Huntley Estate at Pantai Remis, Perak.

119. The 2nd Claimant's years of service and purported performance, skills, knowledge and achievements throughout his tenure are irrelevant to the present dismissal claim which was on the grounds of redundancy, neither poor performance nor misconduct. He is also not statutorily entitled to any termination benefits.

3) <u>In Case No. 10/4-102/22 (Vijay Anand A/L P Harivasagan)</u>:

120. **Vijay Anand A/L P Harivasagan** (the 3rd Claimant) at the material time was a shareholder of the Company and commenced employment with the Company as an Executive on 08/07/2014. While earning a salary from the Company, he was also performing work at a textile shop owned by **Ms. Kala** and 2nd Claimant wherein the 3rd Claimant was a Director (at pages 33-34 of COB-1). The Company did not require a full-time staff for the 3rd Claimant's position as he did not have any defined or specific duties and responsibilities and his role was to assist **Ms. Kala** when required. His job was to perform menial work which the Company's Directors could easily perform themselves without drawing any Director's fee or salaries. Consequentially, his position in the Company was made redundant and on 12/03/2021 he was provided three (3) months' notice of termination effectively immediately.

121. Undoubtedly, the Company was facing serious cash flow issues prior to the 3rd Claimant's dismissal. Due to that, the closure of the Ipoh office resulted in the positions of all employees based there to be eliminated and made redundant including the 3rd Claimant. It is reasonable for the Company's Directors to review the Company's operations and finances and implemented cost-cutting measures when required whereby the 3rd Claimant (CLW-2) agreed the genuineness of the steps taken by the Company during cross examination:

> *"Question: You're not sure, alright, good. Now, Dr. Vijay, so therefore, having seen this, I just showed you the loans, having seen this, you would agree with me that it is reasonable for the Directors*

to review the Company's operations and finances to see whether there is any wastages, agree?

CLW-2: OK.

Question: I need you to say you agree to the mic.

CLW-2: Yes. I agree.

Question: You agree, right. Now in going so, you'd also agree with me then it is reasonable for the Company, for the Directors to review the Company's operations and implement cost-cutting measures where required, agree?

CLW-2: Cost cutting, yes.

Question: Yes, agree?

CLW-2: Agree."

122. The 3rd Claimant also agreed that any prudent and responsible Director should take steps including cost-cutting measures to ensure that the Company is able to meet its outstanding debts and the cash flow issues were genuine reasons and cause for the Company to review its operations and finance including cutting down on unnecessary expenditure:

"Question: You would agree with me that any prudent director and responsible director should take steps, including cost-cutting measures, to ensure that the Company is able to meet its outstanding debts, correct?

CLW-2: I agree.

Question: No, so because you are saying there is no cash flow problems, right? But let me phrase it the other way. Now, assuming there are cash flow problems, assuming Madam Kala is right, you would agree then the directors should take immediate steps to address these cash flow problems?

CLW-2: If there was, yes.

Question: If there was yes, correct? And in doing so, they should cut down on unnecessary expenditure, correct?

CLW-2: Maybe yes."

123. The 3rd Claimant does not dispute that there were serious cash flow issues effecting the Company since 2016 which was persisted at the time of his dismissal in March 2021. At all material time, the Claimant was aware of the Company's financial difficulties and recognized that immediate steps should be taken to address these cash flow problems. This included reviewing the Company's operations and finance to reduce cost as much as possible:

"Question: And this totaled up about RM98,090, right? Now you would agree that any prudent and responsible board of director must look at how he can reduce such cost from time to time, correct?

CLW-2: Yes.

Question: Agree, right? I mean, as a shareholder, I am assuming that is what you would expect from your directors, to reduce cost as much as they can? Now if we look at 2021, there is no expenditure for electricity, upkeep of premises and telephone and fax is reduced to just a total of RM1,047. Do you see that? Upkeep of premises is RM800, telephone and fax is RM247. Are you with me, Dr. Vijay?

CLW-2: Yes, I am.

Question: Yes, you see that, right?

CLW-2: Yes.

Question: So now, this, you would agree with me that the closure of the Ipoh office has greatly or indeed reduced the Company's overall operating cost, agree?

CLW-2: Yes, to a certain, yes."

124. The 3rd Claimant also agreed that his job was based in the Ipoh head office and all employees therein were redundant and dismissed:

"Question: Right. At that time there was also no suitable role for you in the estate, correct?
CLW-2: No, my job was in the head office.

Question: Your job was in head office?
CLW-2: Yes.

Question: And the entire head office was closed, correct?
CLW-2: Yes, it was.

Question: Everybody had been dismissed, correct?
CLW-2: Yes.

Question: Everyone in the head office was made redundant, correct?
CLW-2: Yes, they were terminated, yes."

125. According to the evidence of CWL-1 **(Barani Kumar** – 2nd Claimant**)** testified that the roles and functions of CLW-2 (**Vijay Anand** – 3rd Claimant) are now being performed by the Company's Directors where no replacement was hired to replace the 3rd Claimant and that his job functions were absorbed by the Company's Directors:

"Question: OK. Now, the functions that were being performed by you are now being performed by the current Directors?
CLW-1: Yes.

Question: Agree. The roles that were being performed Ms. Raji and Dr. Vijay are now being performed by the current Directors, agree?
CLW-1: Yes.

Question: The functions of you, Ms. Raji and Dr. Vijay are now being performed by the current Directors, correct?

CLW-1: Yes."

126. The foregoing plainly demonstrates the cost cutting measures taking effect, whereby there was no longer a need for the Company to incur unnecessary expenses in having a full time Executive and instead 3rd Claimant's job functions can be absorbed and performed by the Directors themselves with no salaries being drawn of Director's fees paid to them.

127. It is the 3rd Claimant's own evidence to the job functions carried out by him that he admitted did not have fixed duties and his role was to assist **Ms. Kala** when required:

"Question: Weekly. Now, you would agree with me that you did not have fixed duties and in fact your role was more to assist Madam Kala where required?

CLW-2: Yes, part of it, yes.

Question: Part of it was, yes. Alright. And this would include assisting Madam Kala in the textile business?

CLW-2: Not really. In my off time I used to help a little, yes."

128. Similarly, with the same findings of the 2nd Claimant, the 3rd Claimant was not doing any substantive amount of work for the Company and/or was not involved in the operation of the Company's Huntley Estate during the material time before his dismissal. He was instead preoccupied with **Ms. Kala**'s textile business and obviously that there was no position and/or work for the Claimant at the Company's estate.

129. In addition, the 3rd Claimant's job functions were to perform menial work which the Company's Directors could easily perform themselves without drawing any extra salaries neither director's fee. Further, he was not involved in day to day operations of the Company's Huntley Estate. His role of approving payments and writing cheques is now being performed by the Company's Directors and he was no longer liaising with the banks at the time of his dismissal. In other words, the roles and functions of the 3rd Claimant is now being performed by the Company's Directors.

130. Therefore, the Company did not require a full time staff for the 3rd Claimant's position and such be carried out by the Company's Directors, consequentially his position in the Company was redundant and there was a genuine redundancy situation which led to the 3rd Claimant's retrenchment. Further, it is undisputed that no replacement was hired to replace the Claimant's position and that his roles and job functions were absorbed by the Company's Directors.

131. Evidence of COW-1 testified that the 3rd Claimant was working for the textile business during working hours before his dismissal but drawing a salary from the Company. COW-1 has witnessed the 3rd Claimant on several occasions on the ground floor of the shop lot during working hours carrying out work the textile business when most of the time, he will be handling the cashier. Facebook photographs which show among others, that the 3rd Claimant was constantly present at the textile business (at pages 227-230 of COB-2) and documentary evidence in the form of a newspaper article showing the 3rd Claimant being involved in the textile business by selling sarees (at page 5 of COB-5).

132. It was reasonable for the Company's Directors to review the Company's operations and finances and implemented cost-cutting measures wherever and whenever required including cutting down on unnecessary expenditure as much as possible. As such, the closure of Ipoh office had resulted in a reduction in overall operating costs and that the various cost-cutting measures implemented had indeed reduced the Company's overall operating cost and all employees therein including the 3rd Claimant's job functions at Ipoh office were redundant and dismissed. He was therefore at all times of the impending cost cutting measures and his impending retrenchment.

133. The 3rd Claimant does not dispute that he was the only Executive in the Company during the material time. Should any other position be offered to him, it would be at a lower salary due to reorganization and cost cutting measures taken place by the new directorship. This would have been akin to a demotion of the 3rd Claimant which would have exposed the Company to the risk of constructive dismissal claim. Surely the Company cannot now be faulted for not doing so.

134. On final analysis, the 3rd Claimant failed to impugn the restructuring exercise and the consequent retrenchment on any ground and in particular that is was motivated by *mala fide* and/or unfair labour practice. The consequent retrenchment of **Vijay Anand** was made in compliance or in conformity with accepted standards of industrial relations procedure.

Conclusion:

135. The facts and materials presented before this Court plainly and indisputably show a genuine cost-cutting exercise being undertaken by the Company to address the long standing cash flow problems it was facing had been exercised *bona fide* without any ulterior purpose. The Company has shown genuine need for reorganization and there was clear indication that the Company's financial health was deteriorating. The Claimants' duties and responsibilities are still in existence but are now being performed by the Directors without drawing any extra salaries neither receiving any Director's fees.

136. The Company's cases were more probable than the Claimants' case on balance of probabilities to hold that the Company had substantially demonstrated on the facts and evidence before this Court that a genuine redundancy situation had arisen which led to the retrenchment of the Claimants. The Company, in exercising the retrenchment of the Claimants, had acted in accordance with good industrial relation practice, and the consequent retrenchment made in compliance or in conformity with accepted standards procedures.

137. There was also no evidence adduced by the Claimants to the contrary to show that the retrenchment was motivated by bad faith, and with a desire to victimize them by the Company. Given this facts, the Court is satisfied that the Company had just and proper reasons to terminate the employment of the Claimants and the justification for their cessation of employment have been clearly proven.

138. Based on the evaluation of evidence before this Court, the Court finds that the managerial power to retrench the Claimants by the Company was exercised in good faith. The Company had established on a balance of probabilities the reasons for the Claimants' dismissal was for redundancy.

139. Taking into consideration the totality of the evidence adduced by the Company and the Claimants and bearing in mind **Section 30(5) of the Industrial Relations Act 1967** to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form, this Court finds that the Claimants' dismissal was with just cause or excuse.

140. Accordingly, the 1st Claimant's claim in Case No. 10/4-25/22 which was heard consolidated with the 2nd Claimant's claim in Case No. 10/4-101/22 and the 3rd Claimant's claim in Case No. 10/4-102/22 are hereby dismissed.

THIS AWARD HANDED DOWN AND DATED 27TH SEPTEMBER 2023

Signed

(ZULHELMY BIN HASAN)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
PERAK BRANCH