DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN KUALA LUMPUR
(BAHAGIAN KUASA-KUASA KHAS)
PERMOHONAN BAGI SEMAKAN KEHAKIMAN NO: WA-25-432-07/2022

Dalam perkara Seksyen 20 Akta Perhubungan Perusahaan 1967;

Dan

Dalam perkara Aturan 15 Kaedah 16, Aturan 53 Kaedah 1(1), 2(1), (2), (3), (4), 3(1), (2), (3), (6), 4(1), (2) 5(1)(a), 5(1)(b) 5(2) Kaedah-Kaedah Mahkamah 2012;

Dan

Dalam perkara Seksyen 25(2) dan perenggan 1 Jadual kepada Akta Mahkamah Kehakiman 1964;

Dan

Dalam perkara Mahkamah Perusahaan di Kuala Lumpur dibawah nombor kes 4/4-668/20 Diantara Pannirselvam a/l Vadivelu Pathar dan Exxonmobile Exploration And Production Malaysia INC;

Dan

Dalam perkara rujukan oleh Yang Berhormat Menteri Sumber Manusia bertarikh 27/03/2018 kepada Mahkamah Perusahaan Kuala Lumpur ke atas pembuangan / pemberhentian pekerjaan Pannirselvam a/l Vadivelu Pathar secara paksaan dibawah Seksyen 20(3) Akta Perhubungan Perusahaan 1967;

Dan

Dalam perkara dibawah "Award" bernombor 855 Tahun 2022 bertarikh 10/05/2022 yang diberi dalam kes Mahkamah Perusahaan Kuala Lumpur bernombor 4/4-668/20;

Dan

Dalam perkara "Award" Mahkamah Perusahaan bernombor 855 Tahun 2022 bertarikh 10/05/2022 dalam kes 4/4-668/20 dikomunikasi kepada peguamcara dahulu bagi Pannirselvam a/l Vadivelu Pathar pada 13/05/2022 melalui surat Mahkamah Perusahaan Kuala Lumpur bertarikh 11/05/2022;

Dan

Dalam perkara kuasa-kuasa sedia ada Mahkamah di bawah Aturan 92 kaedah 4 Kaedah-Kaedah Mahkamah 2012;

Dan

Dalam perkara mengenai "Award" Bernombor 855 tahun 2022 yang diberi oleh Mahkamah Perusahaan Kuala Lumpur di bawah nombor kes Mahkamah Perusahaan 4/4-668/20 bertarikh 10/05/2022 yang memerintahkan untuk menolak tuntutan representasi dibawah Seksyen 20(3) Akta Perhubungan Perusahaan 1967 Pannirselvam a/l Vadivelu Pathar terhadap Exxonmobil Exploration And Production Malaysia Inc.

ANTARA

PANNIRSELVAM A/L VADIVELU PATHAR
(No K/P: 660907-05-5063) **...PEMOHON**

DAN

(1) MAHKAMAH PERUSAHAAN KUALA LUMPUR

(2) EXXONMOBIL EXPLORATION AND PRODUCTION MALAYSIA INC **...RESPONDEN-RESPONDEN**

Judgment

Introduction

1. The Applicant filed an application for a judicial review proceeding **(Enclosure 23)** under Order 53 of the Rules of Court 2012 **(ROC)**.

2. In essence, the Applicant was granted leave to apply for judicial review against the Respondents to seek the following reliefs: -

   2.1. suatu perintah deklarasi daripada Mahkamah Yang Mulia ini bahawa keseluruhan keputusan Responden Pertama dalam "Award" bernombor 855 Tahun 2022 bertarikh 10/05/2022 dalam kes Mahkamah Perusahaan bernombor 4/4-668/20 yang memerintahkan untuk menolak keseluruhan tuntutan representasi Pemohon dibawah Seksyen 20(3) Akta Perhubungan Perusahaan 1967 (Keputusan bertarikh 10/05/2022 tersebut) adalah tidak sah di sisi undang-undang;

   2.2. suatu perintah certiorari yang diarahkan kepada Responden Pertama supaya Keputusan Responden Pertama dalam "Award" bernombor 855 Tahun 2022 bertarikh 10/05/2022 dalam kes Mahkamah Perusahaan bernombor 4/4-668/20 tersebut dibatalkan;

   2.3. permohonan untuk apa-apa relif yang adil dan berpatutan daripada Mahkamah Yang Mulia ini terhadap Responden Pertama dan Responden Kedua termasuk gantirugi ke atas pembuangan pekerjaan Pemohon dengan Responden Kedua

secara salah dan/atau pemberhentian pekerjaan Pemohon dengan Responden Kedua secara paksaan menurut Aturan 53 Kaedah 5 Kaedah-Kaedah Mahkamah Tinggi 2012 serta Seksyen 25(2) Akta Mahkamah Kehakiman 1964 dibaca bersama-sama dengan perenggan 1 Jadual kepada Akta Kehakiman 1964;

2.4. Keputusan Responden Pertama dalam "Award" bernombor 855 Tahun 2022 bertarikh 10/05/2022 dalam kes Mahkamah Perusahaan bernombor 4/4-668/20 tersebut digantungkan secara sepenuhnya sehingga perlupusan penuh permohonan semakan kehakiman Pemohon; dan

2.5. Kos memperolehi kebenaran Mahkamah Yang Mulia ini dan segala kos susulan dibayar oleh Responden Pertama dan Responden Kedua kepada Pemohon; dan

2.6. Lain-Lain relif dan/atau perintah yang bersampingan bagi memberi efek ke atas perintah-perintah yang dipohon di sini.

3. In gist, the Applicant is seeking an Order of Declaration and Certiorari to quash the Industrial Court Award No 855 of 2022 dated 10.05.2022 pursuant to the claim by the Applicant for force dismissal of the Applicant from the employment of the 2nd Respondent.

4. After the hearing, I dismissed the Applicant's judicial review application (Enclosure 23). This judgment states the reasons for my decision.

Background Facts

5. I adopt the background facts in both parties' submissions with modifications.

6. The Applicant was the Claimant at the 1st Respondent **(Industrial Court)**. The Applicant had filed a claim with the Industrial Court against the 2nd Respondent pursuant to the Ministerial Reference dated 27.03.2018 under Section 20(3) of the Industrial Relations Act 1967 **(IRA)**.

7. The 2nd Respondent is incorporated in Delaware, United States of America and is registered with the Companies Commission of Malaysia as a foreign company having its registered address at No. 18, Menara ExxonMobil, Kuala Lumpur City Centre, 50088 Kuala Lumpur. The Company is one of the major crude oil producers and suppliers of natural gas in Malaysia.

8. The Applicant was first employed by Mobil Oil Malaysia Sdn Bhd on 26.04.1993 as a "Scheduling Assistant". The Applicant's position was confirmed on 26.10.1993.

9. Thereafter, Mobil Oil Malaysia Sdn Bhd was merged with Esson Production Malaysia Inc and the merger caused the registration of ExxonMobil Sdn Bhd (the 2nd Respondent) **(Company).**

10. After the merger, the Applicant was re-offered employment or his initial employment with Mobil Oil Malaysia Sdn Bhd was transferred to the Company as a "Maintenance Planning Clerk" commencing from 01.06.2005.

11. The Applicant's last drawn salary with the Company is RM 5, 151.00 per month together with a travelling allowance for RM 250.00 per month.

12. Apart from this, according to Article 18 of the Collective Agreement for the year 2016 – 2019, the Applicant was entitled to be paid a contractual bonus of 2.25 months for each year and in addition to this, the Applicant was entitled to vesting benefit in the amount of 1.9 months for each year of service, if the Applicant were to retire after having served 8 years with Mobil Oil Malaysia Sdn Bhd.

13. Further, Article 65 of the Collective Agreement for the year 2011 – 2013 provides that the Applicant was entitled to medical benefits until the Applicant reached the age of 65 years and the Applicant is entitled to E.P.F benefits as well.

14. Since 01.09.2012, the Applicant had medical issues and has taken unpaid leave and medical leave as follows: -

UNPAID LEAVE

Date	Period of Unpaid Leave
01.09.2012 – 31.01.2013	5 months
01.06.2013 – 31.08.2013	3 months
11.08.2014 – 10.02.2015	6 months
29.04.2016 – 06.11.2016	6 months

MEDICAL LEAVE

Date	Period of Medical Leave
21.01.2016 – 22.01.2016	2 days
29.01.2016	1 day
04.02.2016 – 05.02.2016	2 days
19.02.2016	1 day
29.02.2016 – 02.03.2016	3 days
07.03.2016 – 08.03.2016	2 days
18.03.2016 – 27.03.2016	10 days
01.04.2016	1 day
11.04.2016 – 14.04.2016	4 days
28.11.2016	1 day
23.01.2017 – 27.01.2017	5 days
13.02.2017 – 15.02.2017	3 days
16.02.2017 – 28.02.2017	13 days
06.03.2017 – 07.03.2017	2 days
15.03.2017 – 16.03.2017	2 days

15. Thereafter, on the Applicant's application, the Company through its letter dated 16.03.2015 had approved to place the Applicant under the "Flexi Working Hours", where the Applicant's working hours were reduced to 25 hours in a week from 15.03.2015 to 15.06.2015.

16. Despite, approving the Applicant's unpaid leave and flexible working hours, the Applicant was served with a letter from the Company dated 15.11.2015, which alleges that the Applicant's work performance was assessed to be unsatisfactory from 01.08.2014 to 31.07.2015.

17. Accordingly, vide a letter dated 25.11.2015, the Applicant was informed that he was not entitled to receive any annual increment to his base salary on 01.01.2016, in view of his poor work performance for the period of 01.08.2014 until 31.07.2015 following the 2015 Performance Assessment and Development Process Review **(PADP Review)**.

18. The Applicant was further informed that he had continued to perform below the normal requirements of his job from 01.08.2015 until 25.11.2015. The Applicant duly acknowledged receipt of the said letter dated 25.11.2015 and indicated his understanding of its contents by countersigning the same.

19. In view of the Applicant's continuous poor work performance, his superior, Anoop Kumar Chranji Lal Amarnath **(COW-1)**, the Onshore Repair Supervisor at the material time, together with the latter's superior, Ungku Hishamuddin Ungku Mohd Tahir **(COW-2)**, the Asset Manager – North Oil Fields had called the Applicant on 24.02.2017 and highlighted to the latter that: -

    19.1. He has continuously failed to meet the satisfactory level of performance required of his job since 01.08.2015.

    19.2. Consequently, the management intends to place him under a Performance Improvement Plan **(PIP)** for a period of 3 months which will include regular performance progress reviews with COW-1 **(Option 1)**.

20. He has the option to resign as an alternative to being placed under the PIP **(Option 2)** and should he opt for this: -

    (a) He will continue to receive his basic salary and contractual benefits for a period of 6 months from the date he elects this option;

    (b) He will be given outplacement services, for up to 3 months from the date he elects this option; and

    (c) He will be entitled to resignation benefits amounting to approximately RM16,484.00 as per Article 60B of the Collective Agreement between ExxonMobil Malaysia Sdn Bhd and the National Union of Petroleum & Chemical Industry Workers (2011 – 2013).

21. On 28.02.2017, COW-2 handed the Applicant a letter dated 28.02.2017 **(Option Letter)** which sets out the above matters highlighted to him in the call on 24.02.2017, in the presence of COW-1. It was further highlighted to the Applicant that he was required to make his selection within 14 days from 24.02.2017, i.e. by 10.03.2017.

22. As the Applicant did not respond with his selection within the stipulated time, COW-2 vide a WhatsApp message on 14.03.2017 at 9.57am had among others, reminded the former to respond with his selection of either Option 1 or Option 2, failing which the Company would proceed accordingly with placing him under the PIP.

23. Vide a letter of reminder dated 14.03.2017 **(Reminder Letter)**, it was highlighted to the Applicant that although the 14-days period for him to respond with his selection had expired on 10.03.2017, the Company had not received any response from him.

24. Further, on goodwill, the Company had agreed to extend the time for the Applicant to respond with his selection by 12.00 am on 15.03.2017. COW-1 also called the Applicant around 10.00pm on 14.03.2017 to remind him to respond with his selection of the options.

25. Subsequently, vide a WhatsApp message addressed to COW-2 on the same day, the Applicant stated that he had opted for Option 2, as follows: -

> "Dear ungku, thank you for your letter dated 14 march 2017. I am taking the 6 months salary offer plus mobil benefits (pls request h.r.dept. to recheck whether the amount quoted earlier is correct.) thank you."

26. Vide a letter dated 15.03.2017 **(Notice of Acceptance of Resignation)**, the Company had recorded among others, its acceptance of the Applicant's resignation as communicated by the latter's WhatsApp message on 14.03.2017 and reiterated that:

    26.1. The Company would continue to pay him his salary and contractual benefits for 6 months, until 15.09.2017;

26.2. He would be given outplacement services, for up to 3 months from 14.03.2017, to support his efforts to seek new employment;

26.3. The Company would pay him resignation benefits based on his former employment with ExxonMobil Malaysia Sdn Bhd amounting to approximately RM16,484.00 as per Article 60B of the Collective Agreement between ExxonMobil Malaysia Sdn Bhd and the National Union of Petroleum & Chemical Industry Workers (2011 – 2013); and

26.4. By electing to resign, the Applicant fully understands and acknowledges that his cessation of employment arising from his resignation will be construed as voluntary.

27. Pursuant to his voluntary resignation, the Applicant stopped reporting for work since 16.03.2017. On 20.03.2017, the Applicant duly acknowledged receipt of the said Notice of Acceptance of Resignation and indicated his understanding of its contents by countersigning the same. The Applicant continued to enjoy his salary and contractual benefits until 15.09.2017 under the terms of his voluntary resignation.

28. Subsequently to his resignation, the Applicant also requested to be medically boarded out in an attempt to obtain retirement benefits in addition to the resignation benefits which came with Option 2, as per Articles 56 & 57 of the Collective Agreement between Kesatuan Pekerja-Pekerja ExxonMobil Exploration and Production Malaysia Incorporated and the Company (2016 – 2019) which provides as follows: -

"ARTICLE 56 – AGE OF RETIREMENT

(a) The date of compulsory retirement of an employee shall be the date on which he fulfils any of the following conditions:

ii) Termination due to medical disability.

...

ARTICLE 57 – RETIREMENT BENEFITS

(f) .... For service after December 31, 1983, the Employment (Termination/Lay-Off Benefits) Regulations 1980 shall apply.

29. As requested, the Company proceeded to process the Applicant's application. However, after assessing the Applicant's application, the Medical Board determined that the former was not medically unfit for further service with the Company and therefore, not eligible for compulsory retirement based on medical disability.

30. Vide a letter dated 31.07.2017, the Applicant was accordingly informed of the above decision by the Company's Medical Board and that his resignation as per the terms of the Notice of Acceptance of Resignation remains applicable.

31. Subsequently, (approximately 6 months after his resignation and 1 ½ months after the decision by the Company's Medical Board), the Applicant suddenly lodged a complaint to the Industrial Relations Department wherein he alleged that he had been "forced to resign" from the Company's employment with effect from 15.09.2017.

32. According to the Applicant, his purported resignation was engineered and initiated by the Company and such purported resignation was in effect a dismissal without just cause and excuses since the Applicant was forced to resign either by deception or misrepresentation by the Company.

33. Further and in addition to the above, the choice to place the Applicant under a PIP itself was simply given by the Company to circumvent the terms of the Collective Agreement entered between the Trade Unions and the Company. As such, the purported choice which intended to circumvent the Collective Agreements is illegal and has no effect.

The grounds for judicial review

34. Based on the Statement, the Applicant seeks to challenge the Industrial Court's Award on the following grounds: -

    34.1. The following conclusions made by the Industrial Court were irrational and not proportionate to the circumstances of the case:

(a) The Option Letter did not have any elements of pressure or threat in view of the Applicant being given 14 days to decide on the options offered to him;

(b) The Company was entitled to call the Applicant late at night to remind him to respond with his selection of the options;

(c) The Applicant was never confined to a specific place to sign any documents; and

(d) The Applicant was never forced to resign simply because he never took any steps to challenge his resignation since 15.03.2017 (after sending his WhatsApp message to COW-1) until 20.03.2017.

34.2. The Industrial Court had failed to consider that the Applicant's forced resignation did not occur vide the Option Letter but on 14.03.2017 and 20.03.2017.

34.3. The Industrial Court had failed to consider that there was no need for the Applicant to make his selection since according to the Reminder Letter, he would automatically be placed under the PIP should he fail to respond.

34.4. The Industrial Court in coming to its decision had failed and/or refused to take into consideration the relevant facts listed in paragraphs 61 (a) to (rr) of Enclosure 2.

34.5. The Industrial Court in coming to its decision had also considered irrelevant facts and/or failed to consider relevant facts, particularly by overemphasizing that there was no ultimatum in the Option Letter in the absence of any phrase stating that the Applicant should resign or his employment would be terminated.

The Law

35. It is settled law that the High Court will not interfere with a decision of the Industrial Court unless it can be established that the decision is infected with errors of law.

36. In addition, a decision that involves an error of law is subject to judicial review as explained by the Federal Court in **Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor [1999] 1 MLRA 336; [1999] 3 CLJ 65; [1999] 3 AMR 3529; [1999] 3 MLJ 1**, where it states:

> "In our view, therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause, of the `not to be challenged, etc' kind, **judicial review will lie to impeach all errors of law made by an administrative body or tribunal and**, we would add, inferior courts. In the words of Lord Denning in Pearlman v. Harrow School (ibid) at p 70, `... **no court or tribunal has any jurisdiction to make an error of law on which the decision in the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it."**

(emphasis added)

37. The meaning of error of law has also been explained by the Court of Appeal in the case of **Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 1 MLRA 268; [1995] 2 CLJ 748; [1995] 2 AMR 1601; [1995] 2 MLJ 317** in the following words:

> **"It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law**, for the categories of such an error are not closed**. But it may be said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations** (what may be conveniently termed an Anisminic error) or **if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law."**

(emphasis added)

38. The above proposition is in line with the principle explained by the then Supreme Court in **Malayan Banking Bhd v. Association of Bank Officers, Peninsular Malaysia & Anor [1988] 1 MLRA 83; [1988] 1 CLJ Rep 183; [1988] 3 MLJ 204** where it was held as follows: -

> "The general principle would appear to be that it will usually be proper to treat a decision-maker's tasks of fact **finding and the drawing of factual inferences from established facts as falling within the decision-**

maker's jurisdiction, unless the decision-maker has reached absurd results or reached results absurdly."

(emphasis added)

39. Similarly, in the case of **Airspace Management Services Sdn Bhd v. Col (B) Harbans Singh Chingar Singh [2000] 3 MLJ 714; [2000] 3 AMR 3009; [2000] 1 MLRA 664; [2000] 4 CLJ 77**, the Court of Appeal held that an erroneous inference of facts is also an error of law which would warrant an order of certiorari: -

> "On the other hand, we accept, of course, that it is entirely competent for the High Court in certiorari proceedings to disagree with the Industrial Court on the conclusions or inferences drawn by the latter from the proved or admitted evidence on the ground that no reasonable tribunal similarly circumstanced would have arrived at such a conclusion or drawn such an inference. **An erroneous inference from proved or admitted facts is an error of law; not an error of fact."**

(emphasis added)

40. The Federal Court in **Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 5 MLRA 696; [2010] 8 CLJ 629; [2011] 3 AMR 38; [2010] 6 MLJ 1** had reaffirmed the position of **Airspace Management** (supra) where it held that the High Court may also interfere with a decision by way of the following: -

> "It is clear from the above authorities that the scope and ambit of Rama Chandran had been clearly explained and clarified. Decided cases cited above have also clearly established that **where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider relevant matters into consideration, such findings are always amendable to judicial review."**

(emphasis added)

41. Based on the foregoing passages, it is my view that to succeed in an application for judicial review, the Applicant must show that the Industrial Court had, among others: -

a. Asked itself the wrong questions;

b. Taken irrelevant matters into consideration;

c. Failed to take relevant matters into consideration;

d. Failed to apply the proper principle(s) of law; and/or

e. Reached a decision that was so perverse that no reasonable tribunal under similar circumstances would have reached it.

The decision of the Court

42. The Applicant claimed that he had been unfairly dismissed from the Company's employment vide the Notice of Acceptance of Resignation with effect from 16.03.2017.

43. Having perused the cause papers and the evidence produced before the Industrial Court, I am of the view that the Applicant's claim that he had been forced to resign by the Company cannot be sustained.

44. Vide the WhatsApp message addressed to COW-2 on 14.03.2017, the Applicant indicated that he had opted for Option 2 and even thanked the former for the Reminder Letter. This Court finds that never at any time did he state that his selection of the said option was under protest or was done involuntarily.

45. COW-2 in his evidence had stated that the Applicant had taken excessive unpaid leave since 01.09.2012 and his work performance for the succeeding years had been rated unsatisfactorily. The Applicant's work performance for the assessment period between 01.08.2015 until 31.07.2016 did not meet his job requirement.

46. The Company then decided to place the Applicant under a PIP to give him the opportunity to improve his work performance. The Company also gave the Applicant an option to resign with outplacement services in lieu of the PIP as reflected in the Option Letter as follows: -

(a) Option 1: The Applicant may opt to be placed in the PIP; or

(b) Option 2: The Applicant may opt to resign with outplacement services in lieu of PIP.

47. The Applicant claimed that he had been forced to resign by the Company vide his WhatsApp message dated 14.03.2017 with effect from 16.03.2017 following the Option Letter, Reminder Letter and COW-1's telephone call between 10.00pm to 11.00pm on 14.03.2017.

48. Upon perusal of the evidence presented before the Industrial Court, I find the Applicant's allegation is hard to believe based on the following reasons: -

a) There was no trace of any protest from the Applicant's WhatsApp message on 14.03.2017 addressed to COW-2 when he informed the latter of his selection of Option 2 and even thanked the latter for the Reminder Letter as follows: -

> "Dear Ungku, thank you for your letter dated 14 march 2017. I am taking the 6 months salary offer plus mobil benefits (pls request h.r.dept. to recheck whether the amount quoted earlier is correct.) thank you."

(See: **Page 42 of Enclosure 14**)

b) The Applicant testified that he was given a period of 14 days (until 10.03.2017) to make a selection of either Option 1 or Option 2 upon being given the Option Letter. Hence, he was never under any force or pressure nor was he ever threatened to resign;

c) After perusing the Option Letter, this Court finds that nothing in the said letter can be understood as giving the Applicant an ultimatum that he would be terminated unless he resigns.

d) The Company, on goodwill, even agreed to extend the time for the Applicant to respond with his selection by 12.00am on 15.03.2017 vide the Reminder Letter. COW-1 also called the Applicant around 10.00pm on 14.03.2017 to remind him to respond with his selection of the options;

e) The telephone conversation between COW-1 and the Applicant was cordial and the former never gave the latter any ultimatum for him to either resign or face being terminated from his employment. The Applicant admitted before the Industrial Court when cross-examined that COW-1 during the call on

14.03.2017 had never threatened him or given him any ultimatum to either resign or be terminated as follows: -

"Q: ...So, in that conversation, did Anoop say that you are to resign or you must resign? Did he say something like that?

A: No, he never say like that."

(See: **Page 68 of Enclosure 15**)

f) The Applicant was never placed in a situation where he was forced to make a selection. In fact, the Applicant could have simply informed COW-1 that he would not respond to the Option Letter, but this he did not do.

g) The Applicant was aware that should he choose to be placed under the PIP, it does not necessarily mean that he would be terminated as it is clear from the Option Letter that the PIP does not necessarily lead to his termination.

h) The Applicant was also never confined in any specific place or premises and insisted on giving an immediate answer on his selection of the options. His WhatsApp message on 14.03.2017 clearly demonstrated that he was in full control of his mental faculty despite his alleging that he was not well at that material time.

i) On 20.03.2017, the Applicant duly acknowledged receipt of the Notice of Acceptance of Resignation and signified his understanding of its contents by countersigning the same. He also ceased reporting for work since 16.03.2017 and continued to enjoy his salary and contractual benefits for 6 months until 15.09.2017 under the terms of his voluntary resignation;

j) The Applicant only suddenly lodged a complaint to the Industrial Relations Department and alleged that he had been "forced to resign" from the Company employment with effect from 15.09.2017, approximately 6 months after his resignation and 1 ½ months after the decision by the Company's Medical Board; and

k) The Applicant did not at any time throughout the 6 months, or at least within the 1 1/2 months after the decision by the

Company's Medical Board, did the Applicant indicate that he was enjoying his salary and contractual benefits without reporting for duty, under protest or involuntarily.

49. Based on the above, this court is of the view that the Applicant's claim that he had been "forced to resign" by the Company was premised on nothing more than an afterthought.

50. This court further takes the view that the voluntariness of the Applicant was reflected by the conduct of the Applicant after sending the WhatsApp message as follows:

(a) On 20.03.2017, COW-2 had personally handed the Notice of Acceptance of Resignation to the Applicant in the office and the Applicant duly acknowledged receipt of the said Notice of Acceptance of Resignation and indicated his understanding of its contents by countersigning the same;

(b) There is no indication or evidence between 15.03.2017 and 20.03.2017 of any steps taken by the Applicant to demonstrate that he was forced to resign vide the WhatsApp message dated 14.03.2017.

51. It is clear from the facts in the instant case that the Applicant's dismissal is in dispute. Therefore, the burden is on the Applicant to establish that he has been dismissed. Based on **Weltex Knitwear Industries Sdn Bhd v. Law Kar Toy & Anor [1989] 1 LNS 258; [1998] 4 MLRH 774; [1998] 7 MLJ 359**, Abdul Kadir Sulaiman J (as he then was) held as follows: -

> "Next is **the burden of proof on the issue of forced resignation** raised by the first Respondent. The law is clear that if the fact of dismissal is not in dispute, the burden is on the company to satisfy the court that such dismissal was done with just cause or excuse. This is because, by the 1967 Act, all dismissal is prima facie done without just cause or excuse. Therefore, if an employer asserts otherwise the burden is on him to discharge. However, **where the fact of dismissal is in dispute, it is for the workman to establish that he was dismissed by his employer. If he fails, there is no onus whatsoever on the employer to establish anything for in such a situation no dismissal has taken place and the question of it being with just cause or excuse would not at all arise**."

(emphasis added)

(See also: **The British School of Kuala Lumpur Sdn Bhd v. Menteri Sumber Manusia & Ors [2015] 9 CLJ 77; [2016] 1 MLRH 359; [2016] 8 MLJ 711; [2016] 1 ILR 289; [2016] 1 MELR 379**)

52. Looking at the totality of the evidence produced before the Industrial Court, I find that the Industrial Court had correctly applied the above trite industrial relations principle in respect of forced resignation in coming to its conclusion that the Applicant had failed to prove on a balance of probabilities that he had been forced to resign.

53. Based on the above, I am of the view that in dismissing the Applicant's claim the Industrial Court made a finding of fact based on the evidence produced before it and made a finding as follows: -

"[27] This Court having perused the document dated 28.02.2017, finds nothing in the said document which can be understood as giving the Claimant an ultimatum that unless he resigns, he will be terminated or sacked by the Company. This Court further finds that the conduct of the Company in giving the Claimant a good 14 days period to think over the options that he may choose is corroborative evidence that no force was applied on the Claimant neither was the Claimant put under any pressure to agree to the option to resign.

[28] When the Company had given the Claimant a good 14 days period to respond to the contents of the document dated 28.02.2017, it is natural for the Company to expect the Claimant to obey such instruction. It is not an overly burdensome expectation placed on the Claimant by the Company for a response within the 14 days period which the Claimant did not do. After a further extension period, COW1 had then called the Claimant on the 14.03.2017 between 10.00 pm to 11.00 pm to ask the Claimant to respond to the options given. This Court finds nothing wrong in the conduct of COW1 giving the Claimant a call reminding him to respond to the document dated 28.02.2017 regardless of what time the call was made. The Claimant did not find the call intrusive as the Claimant had responded to the call. The conversation between the Claimant and COW1 during the call was cordial. COW1 in the said conversation did not give the Claimant any ultimatum of resign or face termination or sack. It was amply clear from the evidence of the Claimant and COW1 that even after some 14 days had passed for the Claimant respond (sic) and even during the call on the 14.03.2017, there was no ultimatum given to the Claimant that if he refuses to resign or select the options given, he will then be terminated or sacked by the Company.

[29] It is pertinent to state here that the Claimant was comfortably away from the Company's premises and that COW1 had only called the Claimant to ask him to respond to the options. The Claimant was in no way under any circumstances that would give rise to a situation where he may or had been forced to make the choices that he is able to make at that time.

He could have simply said to COW1 during the call that he will not respond to the document dated 28.02.017 and could have asked COW1 to proceed to place the Claimant in the PIP which he did not do. The Claimant must be made aware that an option to place the Claimant in the PIP does not necessarily mean that it can be construed as an ultimatum of termination or a sack. A careful reading of the document dated 28.02.2017 clearly states that if the Claimant ought to undergo the PIP, that PIP would not necessarily lead to the Claimant's termination. During the PIP, the Claimant may still be able to improve his performance and retain his employment in the Company. The outcome of the PIP will only be known upon the completion of the PIP and no one can be sure of that outcome unless the Claimant himself brings upon himself an unfavourable end result by not improving his performance. If the Claimant had invited the thought that the PIP will conclusively lead to his termination upon completion, then no one can be faulted other than the Claimant himself for veering his state of mind to that unproductive contemplation.

[30] Further it is also important to state here that during the call with COW1, the Claimant could have also said that he wanted to consult a lawyer or even the Union or any other person that he chose and insist upon it which the Claimant did not do. The Company or any of its officers did not confine the Claimant in any specific place or premises and insist on an immediate answer failing which he will be retrained from his freedom of movement. The text message sent by the Claimant with such clarity of words itself is clear evidence that the Claimant was lucid and in full control of his mental faculty despite his evidence that he was not well at that time. This Court concludes that the Claimant was fully aware of his action in a voluntary manner when he sent the text message to COW2 of the choice that he had made to resign with outplacement services in lieu of PIP.

[31] The voluntariness of the Claimant in choosing to resign with outplacement services in lieu of PIP was further fortified by the subsequent conduct of the Claimant. It is clear from the evidence adduced in Court that upon the Claimant sending the text message to COW2 stating the choice that he had made to resign with outplacement services in lieu of PIP, the Company had then prepared a letter accepting his resignation on the very next day of 15.03.2017. The said letter dated 15.03.2017 was handed to the Claimant not immediately but some 5 days later on the 20.03.2017 by COW2 personally in the office. The Claimant acknowledged receipt of the said letter dated 15.03.2017 by placing his signature therein. There is no indication or evidence that between the 15.03.2017 to the 20.03.2017, the Claimant had taken any step to demonstrate that he was in effect forced to tender his resignation by the said text message on the 14.03.2017. Quite contrary to the allegation of forced resignation, the subsequent conduct of the Claimant after sending the text message on the 14.03.2017 only points to the voluntary resignation of the Claimant from his employment with the Company, a decision made by the Claimant as a result of a settlement

reached as stated in the option No:2 wherein the Claimant did enjoy certain benefits attached to the chosen option.

[32] It is undisputed evidence that the Claimant after acknowledging receipt of the letter dated 15.03.2017 without any protest, pursuant the settlement as stated in the option No:2 continued to receive the salary, prorated bonus and resignation benefits until 15.09.2017 despite subsequently alleging that he was forced to resign on the 14.03.2017. The Claimant also stopped reporting for work from the 16.03.2017 and proceeded to enjoy the benefits that came along with the chosen option No:2. The Claimant lodged a complaint that he was dismissed from employment on the 15.09.2017 despite agreeing and enjoying 6 months base pay and benefits until 15.09.2017. The Claimant's conduct of stating that he was dismissed without just cause or excuse was only made after it became apparent to the Claimant that his attempt for a medical board out failed wherein the outcome of the Medical Board Review was informed by the Company to the Claimant by way of a letter dated 31.07.2017. This further explains why the Claimant had made no protest at all material times and had taken the date of dismissal from employment with the Company as 15.09.2017 when in fact the alleged forced resignation took place on the 14.03.2017 and which formed the basis of the Claimant's allegation of forced resignation.

[33] This Court now makes a finding and conclude that pursuant to Section 30(5) of the Industrial Relations Act 1967 and guided by the principles of equity, good conscience and substantial merits of the case without regard to technicalities and legal form and after having considered the totality of the facts of the case, all the established principles of industrial relations and disputes as mentioned above, that the Claimant had failed to prove to the satisfaction of this Court on the balance of probabilities the claim of forced resignation. This Court further concludes that the Claimant had tendered his resignation voluntarily. As the Claimant is unable to prove that there was a forced resignation, the issue of the Company dismissing the Claimant without just cause or excuse does not arise and need not be determined herein as the dismissal of the Claimant from his employment with the Company itself remains unproven by the Claimant."

54. In essence, the Industrial Court's finding above can be summarized as follows: -

a. The Applicant had failed to prove forced resignation;

b. The Applicant's dismissal via the Company's letter dated 15.03.2017 took effect on 16.03.2017;

c. The Applicant's dismissal via the Company's letter dated 15.03.2017 emanated from the Applicant's text message to the representative of the Company on 14.03.2017;

d. The Applicant's text message on 14.03.2017 was indicative that the Applicant intends to resign;

e. The Applicant's job performance was not up to the Company's expectations;

f. As such, it was proper for the Company to place the Applicant under the said PIP;

g. The Company's letter dated 28.02.2017 did not give any ultimatum to the Applicant that either resign or be terminated. As such, there is no forced resignation;

h. No force or pressure was applied on the Applicant by the Company since the Applicant was given time to think over the option given in the letter dated 28.02.2017;

i. There is nothing wrong with the Company's representative calling the Applicant late at night on 14.03.2017 to get the Applicant's response to the letter dated 28.02.2017;

j. Based on the letter dated 28.02.2017, the option to place the Applicant under PIP is not indicative that the Applicant that he will be terminated and it is premature for the Applicant to conclude that the Applicant will be terminated upon the completion of PIP;

k. That the Applicant had voluntarily sent out the WhatsApp message to the Company's representative and had chosen to resign;

l. The Applicant signed the Company's letter dated 15.03.2017 to acknowledge receipt of the Company's letter dated 15.03.2017;

m. Between 15.03.2017 to 20.03.2017, there was no action taken by the Applicant to indicate that he was forced to resign by the text message sent on 14.03.2017; and

n. The Applicant's subsequent conduct shows that the Applicant was not forced to resign and the complaint for forced resignation was only alluded to after the Applicant's application to be medically boarded out failed.

55. Having perused the Award of the Industrial Court and the evidence produced before it, I am of the view that the Applicant had tendered his resignation voluntarily.

56. Based on the findings of the Industrial Court, it clearly shows that he had assessed all the facts and documents tendered before him before concluding that the Applicant had tendered his resignation voluntarily.

57. Further, I am of the view that the Industrial Court being faced with two conflicting versions of facts is entitled to ascertain which version was more probable and arrive at a specific finding of fact.

58. The Industrial Court has all the relevant and contemporaneous documents i.e. witnesses' statements etc. to draw a reasonable inference from them.

59. Therefore, I am of the opinion that the Industrial Court is entitled to affirm which of the two stories is the true version because the Industrial Court had the opportunity of seeing and hearing the witness and had the opportunity to see the demeanor of the witness and accepted the evidence adduced by the Company as credible.

60. The finding of facts of the Industrial Court will only be disturbed by this court when the Industrial Court was wrong in the evaluation of the evidence. It is for the Applicant to establish that there was a misdirection by the Industrial Court to warrant interference by this court. Unfortunately, the Applicant has not demonstrated any such errors in the facts of this case to warrant appellate interference.

61. I view the Industrial Court's findings as rational and cogent and there are no flaws in its reasoning or the conclusions therein. Based on the evidence before the Industrial Court, it cannot be said that the findings of the Industrial Court are irrational or perverse.

62. It is evident from the above, that the Applicant's complaints concerning the Award are largely premised on findings of fact by the Industrial Court. It is trite that this Court sitting in a supervisory capacity will not interfere with the findings of the Industrial Court, more so when these findings relate to findings of credibility and evaluation of documentary and oral testimony, which are matters which fall wholly within the purview of the functions of the Industrial Court.

63. The Court of Appeal in **William Jacks & Co (M) Sdn Bhd v. S Balasingam [1996] 1 MELR 312; [1997] 3 CLJ 235 at 241** held that a court cannot utilize certiorari proceedings as a cloak to entertain an appeal against findings of fact. The Court of Appeal in its judgment further held as follows: -

> "The question at the end of the day is whether a reasonable tribunal similarly circumstanced would have come to a like decision on the facts before it. However widely understood the proposition in Rama Chandran and Amanah Butler (supra) may be, it does not include the review, in certiorari proceedings, of **findings of fact** based on the credibility of witnesses."

(emphasis added)

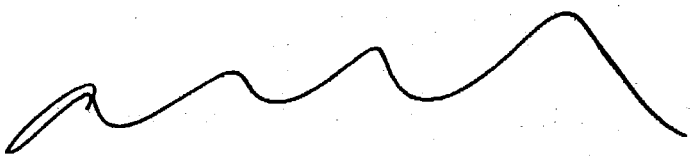
64. I am of the view that the finding of the Industrial Court is based on the totality of the evidence adduced before it. To me, the Industrial Court had scrutinized the evidence of both parties and applied the law to the facts and made a reasonable conclusion. It is not the task of this court to scrutinize every piece of evidence adduced before the Industrial Court and to make another finding of fact. That task of fact-finding falls within the jurisdiction of the Industrial Court.

Conclusion

65. Premised on the aforesaid reasons, I am of the view that the decision of the Industrial Court is not tainted with any errors of law, irrationality and/or unreasonableness that warrants the intervention of this court.

66. As such, the Applicant's application for judicial review (Enclosure 23) is dismissed with costs of RM5,000.00 subject to the allocator fee.

Dated: 05 September 2023



Ahmad Kamal Bin Md. Shahid
Judge
High Court Kuala Lumpur

Counsels

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