IN THE INDUSTRIAL COURT OF MALAYSIA

CASE NO: 4/4-1629/22

BETWEEN

AHMAD FAZDARUL BIN MISRAH

AND

BRAHIM'S SATS FOOD SERVICES SDN BHD

(Consolidated with cases No: 13/4-23/23, No: 14/4-82/23, No:14/4-83/23, No: 14/4-84/23 & No: 14/4-85/23 by way of Interim Award No: 1866/2023 dated 05.09.2013)

AWARD NO: 1708 OF 2024

BEFORE	:	**Y.A. TUAN AUGUSTINE ANTHONY CHAIRMAN**
VENUE	:	Industrial Court Of Malaysia, Kuala Lumpur.
DATE OF REFERENCE	:	05.12.2022, 19.12.2022 & 09.01.2023.
DATE OF RECEIPT OF REFERENCE	:	06.12.2022, 23.12.2022 & 12.01.2023.
DATES OF MENTION	:	13.01.2023, 10.03.2023, 17.08.2023, 26.09.2023 & 04.09.2024.
DATES OF HEARING	:	17.10.2023, 18.10.2023, 09.05.2024 & 24.06.2024

REPRESENTATION : Datuk Adnan Bin Sema @ Abdullah and Encik Haris Bin Md Nor of Messrs Adnan Sharida & Associates – Counsel for the Claimants

: Encik Shariffullah Majeed and Miss Arissa Ahrom of Messrs Lee Hishammuudin Allen & Gledhill - Counsel for the Company.

THE REFERENCE:

These are references dated 05.12.2022, 19.12.2022 and 09.01.2023 respectively 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") arising out of the alleged dismissals of **Ahmad Fazdarul Bin Misrah, Ahmad Zakir Bin Alimin**, **Rusmalizawati Binti Ismail**, **K Vathumayogam A/L Karuppiah**, **Razali Bin Yahya** and **Sivakumar A/L R Munusamy** (Claimants) by **Brahim's Sats Food Services Sdn. Bhd. (**Company) on the 25.03.2022, 15.02.2022, 25.03.2022, 01.03.2022, 03.02.2022 and 15.02.2022 respectively**.**

AWARD

[1] Pursuant to an Interim Award No: 1866/2023 dated 05.09.2013, the instant case No: 4/4-1629/22 (Ahmad Fazdarul Bin Misrah v.

Brahim's Sats Food Services Sdn. Bhd.) was consolidated with cases 4(13)/4-23/23 (Ahmad Zakir Bin Alimin v. Brahim's Sats Food Services Sdn Bhd), 4(14)/4-82/23 (Rusmalizawati Binti Ismail v. Brahim's Sats Food Services Sdn Bhd), 4(14)/4-83/23 (K Vathumayogam A/L Karuppiah v. Brahim's Sats Food Services Sdn Bhd), 4(14)/4-84/23 (Razali Bin Yahya v Brahim's Sats Food Services Sdn Bhd) and 4(14)/4-85/23 (Sivakumar A/L R Munusamy v Brahim's Sats Food Services Sdn Bhd). Upon consolidation of these cases, all cases were heard together by this Court.

[2] Pursuant to the directions of this Court, the parties in this matter filed their respective submissions dated 20.08.2024 (Company's Written Submissions), 22.08.2024 (The Claimants' Written Submissions), 18.09.2024 (Company's Written Rebuttal Submissions) and 18.09.2024 (Claimants' Written Submissions in Reply).

[3] This Court considered all the notes of proceedings in this matter, documents and cause papers in handing down this Award namely:

(i) The Claimant's Statement of Case dated 03.02.2023 (For Case No: 4/4-1629/22), the Claimant's Statement of Case dated 14.03.2023 (For Case No: 4(13)/4-23/23), the Claimant's

Statements of Case dated 20.03.2023 (For Cases No: 4(14)/4-82/23, 4(14)/4-83/23, 4(14)/4-84/23 & 4(14)/4-85/23);

(ii) The Company's Statement in Reply dated 10.03.2023 (For Case No: 4/4-1629/23); the Company's Statement in Reply dated 17.04.2023 (For Case No: 4(13)/4-23/23) and the Company's Statements in Reply dated 17.05.2023 (For Cases No: 4(14)/4-82/23, 4(14)/4-83/23, 4(14)/4-84/23 & 4(14)/4-85/23);

(iii) The Claimant's Rejoinder dated 28.03.2023 (For Case No: 4/4-1629/23), The Claimant's Rejoinder dated 17.05.2023 (For case No: 4(13)/4-23/23), The Claimants' Rejoinders dated 06.06.2023 (For cases No: 4(14)/4-82/23, 4(14)/4-83/23, No: 4(14)/4-84/23 & 4(14)/4-85/23);

(iv) The Claimants' Bundles of Documents – CLB1, CLB 2, CLB3, CLB4 ,CLB5 & CLB 6;

(v) The Company's Bundles of Documents – COB1, COB2 & COB 3;

(vi) The Claimant's Witness Statement – CLW1 – WS (Encik Ahmad Zakir Bin Alimin) for case No: 4(13)/4-23/23 ;

(vii) The Claimant's Witness Statement – CLW2 – WS (Puan Rusmalizawati Binti Ismail) for case No: 4(14)/4-82/23 ;

(viii) The Claimant's Witness Statement – CLW3 – WS (Mr. K.Vathumayogam a/l Karuppiah) for case No: 4(14)/4-83/23 ;

(ix) The Claimant's Witness Statement – CLW4 – WS (Encik Razali Bin Yahya) for case No: 4(14)/4-84/23 ;

(x) The Claimant's Witness Statement – CLW5 – WS (Mr. Sivakumar a/l Munusamy) for case No: 4(14)/4-85/23 ;

(xi) The Claimant's Witness Statement – CLW6 – WS (Encik Ahmad Fazdarul Bin Misrah) for case No: 4/4-1629/22 ;

(xii) Company's Witness Statement COW1- WS (Encik Mohd Fadhli Abdul Rahman) ;

(xiii) Company's Witness Statement COW2-WS (Puan Normalizawati Binti Mohd Razali);

[4] For convenience the Claimants in this consolidated cases will be referred to as follows :-

(i) Ahmad Zakir Bin Alimin – 1st Claimant (CLW1);

(ii) Rusmalizawati Binti Ismail – 2nd Claimant (CLW2);

(iii) K Vathumayogam A/L Karuppiah – 3rd Claimant (CLW3);

(iv) Razali Bin Yahya – 4th Claimant (CLW4);

(v) Sivakumar A/L R Munusamy – 5th Claimant (CLW5);

(vi) Ahmad Fazdrul Bin Misrah – 6th Claimant (CLW6);

INTRODUCTION

[5] The dispute before this Court relates to the claim by Ahmad Fazdarul Bin Misrah and the other 5 Claimants stated above ("Claimants") that they were dismissed from their employment without just cause or excuse by Brahim's Sats Food Services Sdn. Bhd. ("the Company") on the 25.03.2022, 15.02.2022, 25.03.2022, 01.03.2022, 03.02.2022 and 15.02.2022 respectively.

[6] The Company is involved in the business of providing in flight catering services at the Kuala Lumpur International Airport and Penang International Airport and the business of the Company is closely tied to the aviation industry. Any adverse economic impact on the aviation industry is certain to have equally adverse impact on the business of the Company.

[7] The Claimants are all long serving employees of the Company having commenced employment in the 1990s. 1st Claimant commenced employment on the 01.07.1996, 2nd Claimant commenced employment on the 15.01.1994, 3rd Claimant commenced employment on the 01.10.1990, 4th Claimant commenced employment on the 01.10.1990, 5th Claimant commenced employment on the15.11.1993 and the 6th Claimant commenced employment on the 01.06.1998.

[8] It is common knowledge that due to the COVID-19 pandemic, on the 18.03.2020 the Government of Malaysia imposed a movement control order (MCO) which MCO lasted for sometime through various stages of MCO. The aviation industry was devastated and this Court has dealt with the severity of the business decline due to this MCO on the

aviation industry in this Court's previous Award ***(please see Award No: 271 of 2023 – Mohd Suhaini Jaihan @Jainal v Air Asia X Berhad).***

[9] It is no surprise that the Company which is closely tied to the aviation industry due to its business nature could not escape the rage of the COVID-19 pandemic and the MCO that was imposed together with it. The Company's earnings and operating cash flow were severely affected leading the Company to undertake drastic cost cutting measures to stay afloat in this exceptionally challenging time.

[10] To avoid retrenching its employees the Company resorted to various measures including reduction of working hours and working days, stoppage of overtime and stoppage of payment of allowances, putting the employees on unpaid leaves, pay cuts and temporary layoffs which also affected the Claimants who were unionised employees of the Company. All of these measures were implemented by the Company after conducting town hall sessions with the employees and after reaching agreements with the Union.

[11] When the country transitioned into recovery period, all employees including the Claimants were instructed to report back for duty with some pay cuts implemented. The Company alleged that despite multiple instructions and opportunities for the Claimants to report back for duty the Claimants had failed to do so and the Company deemed that they had breached Section 15(2) of the Employment Act 1955 and had abandoned their respective employments.

[12] The Claimants however contend that they did not abandon their employment but were forced to return to work with downgraded contract of service with re designation of work, reduced salary and reduced and/ or no benefits which were breaches of their contract of employment after they were put on forced and unlawful lay off in breach of the provisions of the Employment Act 1955.

[13] In view of the above the Claimants contend that they did not abandon their employment but were instead dismissed without just cause or excuse and now pray that they be reinstated to their former position in the Company without any loss of wages and other benefits. The Company denies dismissing the Claimants and maintains that the

Claimants abandoned their employment. The Company now prays that the Claimants cases be dismissed.

[14] All the Claimants gave evidence under oath in support of their respective cases. Two witnesses gave evidence on behalf of the Company namely COW1 (Encik Mohd Fadhli Abdul Rahman who has served the Company as the General Manager for Accounts and Administration until September 2021, then as the Director of the Company effective 15.10.2021 and now serves as the Chief Executive Officer who gave evidence on the Company's business operations and cost cutting measures undertaken during the material time including holding town hall sessions to explain the Company's financial situation to the employees) and COW2 (Puan Normalizawati Binti Mohd Razali who had served the Company as the Head of the Human Resources department of the Company at the material time).

THE CLAIMANTS' CASE

[15] The Claimants' case can be summarised as follows:-

(i) The Claimants were long serving and confirmed employees of the Company having commenced employments in the

1990s and their date of commencement of employment are as follows :-

- 1st Claimant commenced employment on the 01.07.1996,
- 2nd Claimant commenced employment on the 15.01.1994,
- 3rd Claimant commenced employment on the 01.10.1990,
- 4th Claimant commenced employment on the 01.10.1990,
- 5th Claimant commenced employment on the15.11.1993,
- 6th Claimant commenced employment on the 01.06.1998.

(ii) In 2020, the Government imposed MCO due to the COVID-19 pandemic;

(iii) Due to the pandemic, the Company imposed various work related orders that affected the Claimants namely the Company implemented 10 to 15 days of work, pay cuts and forced the Claimants to go on unpaid leave;

(iv) The Company also implemented full layoffs of the Claimants with no salary payments;

(v) The Claimants’ pay cuts were implemented in April 2020 for all Claimants except for 1st Claimant whose paycut was implemented in July 2020;

(vi) The Claimants’ layoffs started on or about February and March 2021 and continued until 15.12.2021;

(vii) On the 15.12.2021 the Company instructed all the Claimants to return to work with a 15% pay cuts;

(viii) All the Claimants did not return to work when the Company instructed them to return to work;

(ix) The 3rd Claimant who returned to work but realised that the instruction for his return to work was in breach of his contract of employment and the collective agreement;

(x) On the 01.01.2022, the 3rd Claimant disagreed and deemed that he was on unpaid leave until he was paid the original salary;

(xi) All the Claimants then demanded that the Company restore the terms of their original contract of employment together with their original salary;

(xii) The Company failed to restore the terms of their original contract of employment together with their original salary;

(xiii) When the Claimants did not returned to work as demanded by the Company all the Claimants were terminated by the Company on the basis that the Claimants were in violation of Section 13 (2) and 15(2) of the Employment Act 1955;

(xiv) The Company had terminated the Claimants and claimed that the Claimants were not interested to work for the Company instead. However it was the Company that pressured the Claimants to resign from employment;

(xv) In view of the Company's act of terminating the Claimants , the Claimant had now made representations for dismissal to the Director General of the Department of Industrial Relations pursuant to "the Act";

(xvi) The Claimants now state that they were dismissed without just cause or excuse and pray that they be reinstated to their former positions in the Company without any loss of wages and other benefits.

THE COMPANY'S CASE

[16] The Company's case can be summarised as follows:-

(i) The Company does not dispute the Claimants' status as long serving and confirmed employees of the Company;

(ii) The Company states that the Company is involved in the business of providing in-flight catering services for Kuala Lumpur International Airport and Penang International Airport;

(iii) All the Claimants were unionised employees whose terms and conditions of employment were governed by the terms of the Collective Agreement;

(iv) The Company recognises the Union as the sole joint consultation body representing the employees;

(v) On the 18.03.2020, Malaysian government imposed MCO due to the COVID 19 pandemic;

(vi) As the Company's business was closely and intricately connected with the Aviation industry, the Company's earnings and cash flow was severely affected by the MCO resulting in Company resorting to cost cutting measures;

(vii) The Company held Town Hall sessions to notify the employees of the cost cutting measures taken with the objective of preserving all its employees' jobs;

(viii) The Company also notified the Labour Department of the proposed cost cutting measures and steps taken to prevent any employee retrenchments;

(ix) The Company entered into a total of 6 memorandums of understanding with the Union informing the Union of the various cost cutting measures all with the view to keeping the employees and the Claimants in employment without retrenching them;

(x) The Claimants were put under temporary layoffs with reduced working days as the Company continued to suffer losses and cash flow problem due to the MCO and COVID-19 pandemic;

(xi) The temporary layoffs had to be extended due to the continued loss of revenue and business slowdown due to the MCO and the pandemic;

(xii) The Claimants were also put on unpaid leaves due to the pandemic and the MCO;

(xiii) With the COVID-19 pandemic easing and the country on recovery mode, the Claimants were then instructed by the Company to report back to work as the Company through its initiatives were recalling the employees back to work again;

(xiv) The Company sent a letter dated 03.12.2021 to all the Claimants instructing them to report for work on the 15.12.2021 with a temporary pay cut of 15%;

(xv) All the Claimants did not report back to work with various reasons cited except for 3rd Claimant who after having reported for work later upon purportedly discovering that the Company breached his contract of employment did not turn up for work;

(xvi) As the Claimants have failed to report to work, the Company issued the Claimants reminder letters, warning letters and even show cause letters for them to report back for work;

(xvii) The 1st Claimant was issued with 2 show cause letters and 2 warning letters but despite these letters he failed to report for duty ;

(xviii) The 2nd Claimant was issued a show cause letter and a final reminder to report to work but despite these letters, the Claimant failed to report back for work;

(xix) The 3rd Claimant was issued a show cause letter and a warning letter but despite these letters, the Claimant failed to report back for work;

(xx) The 4th Claimant was issued a show cause letter and a warning letter but despite these letters, the Claimant failed to report back for work;

(xxi) The 5th Claimant was issued a show cause letter, two warning letters but despite these letters, the Claimant failed to report back for work;

(xxii) The 6th Claimant was issued a show cause letter and reminder letter but despite these letters, the Claimant failed to report back for work;

(xxiii) As all the Claimants failed to report back to work despite show cause letters, warning letters and reminder letters, the Company then issued all the Claimants a notice that all the Claimants had abandoned their employment with the Company pursuant to Section 15(2) of the Employment Act 1955;

(xxiv) The Company further states that it implemented all cost cutting measures with the agreement with the Union and as

such there were no complaints against the Company that it had breached any of the terms of the collective agreement;

(xxv) The Claimants or the Union did not raise any grievances in accordance with the terms of the collective agreement for any breaches of the collective agreements or in relations to any non compliance of the collective agreements;

(xxvi) All actions taken by the Company in implementing the austerity measures were in accordance with the law and in agreement with the Union;

(xxvii) The Company did not terminate the Claimants at anytime;

(xxviii) The Company also did not engage in any acts that can be deemed as forcing , pressuring, coercing or threatening the Claimants to resign;

(xxix) The Claimants have all abandoned their employment pursuant to section 15(2) of the Employment Act 1955;

(xxx) As such the Company prays that the Claimants case be dismissed as it is a baseless claim against the Company.

THE LAW

Role and function of the Industrial Court

[17] The role of the Industrial Court under section 20 of the Industrial Relations Act 1967 is succinctly explained in the case ***Milan Auto Sdn. Bhd. v. Wong Seh Yen [1995] 4 CLJ 449***. His lordship Justice Mohd Azmi bin Kamaruddin FCJ delivering the judgment of the Federal Court had the occasion to state the following:-

> *"As pointed out by this Court recently in **Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. & Another Appeal [1995] 3 CLJ 344;** [1995] 2 MLJ 753, the function of the Industrial Court in dismissal cases on a reference under s. 20 is two-fold firstly, to determine whether the misconduct complained of by the employer has been established, and secondly whether the proven misconduct constitutes just cause or excuse for the dismissal. Failure to determine these issues on the merits would be a jurisdictional error ..."*

[18] The above principle was further reiterated by the Court of Appeal in the case *of* ***K A Sanduran Nehru Ratnam v. I-Berhad [2007] 1 CLJ***

347 where his lordship Justice Mohd Ghazali Yusoff, JCA outlined the function of the Industrial Court:-

> *"**[21]** The learned judge of the High Court held that the Industrial Court had adopted and applied a wrong standard of proof in holding that the respondent has failed to prove dishonest intention and further stating that the respondent has not been able to discharge their evidential burden in failing to prove every element of the charge. He went on to say that the function of the Industrial Court is best described by the Federal Court in <u>Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhdand Another Appeal [1995] 3 CLJ 344</u> where in delivering the judgment of the court Mohd Azmi FCJ said (at p. 352):*
>
> > *On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under <u>s. 20 of the Act</u> (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"*

[19] It will not be complete this far if this Court fails to make reference to the decision of the Federal Court in the case of ***Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 1 LNS 30*** where His Lordship Raja Azlan Shah, CJ (Malaya) (as HRH then was) opined:

> *"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."*

Burden Of Proof

[20] Whenever a Company has caused the dismissal of the workman, it is then incumbent on part of the Company to discharge the burden of proof that the dismissal was with just cause or excuse. This Court will now refer to the case of ***Ireka Construction Berhad v. Chantiravathan a/l Subramaniam James [1995] 2 ILR 11*** in which case it was stated that:-

> *"It is a basic principle of industrial jurisprudence 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 to prove that he has just cause and excuse for taking the decision to impose the disciplinary measure of dismissal upon the employee. The just cause must be, either a misconduct, negligence or* ***poor performance*** *based on the facts of the case.*

Burden of proof in cases where dismissal is disputed.

[21] The case of ***Weltex Knitwear Industries Sdn. Bhd. v Law Kar Toy & Anor (1998) 1 LNS 258/ 91998) 7 MLJ 359*** is relevant on the role of this Court when the dismissal itself is disputed by the Company. In this case his lordship Haji Abdul Kadir Bin Sulaiman J opined :-

> *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 is this Court's).*

[22] The Company denies dismissing the Claimants' and contends that all the Claimants' abandoned their employment in the Company. In view of the above case and where in these cases the Company denies dismissing the Claimants' from their employment, it is now incumbent upon the Claimants to prove their case that they were dismissed from their respective employment with the Company. The burden of proof

thus had now shifted to the Claimants to prove that they were dismissed by the Company from their employments before this Court can proceed to determine whether that dismissal if proven amounts to dismissals without just cause or excuse.

Standard Of Proof

[23] In the case of ***Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314*** the Court of Appeal had laid down the principle that the standard of proof that is required to prove a case in the Industrial Court is one that is on the balance of probabilities wherein his lordship Justice Abdul Hamid Mohamad, JCA opined:-

> *"Thus, we can see that the preponderant view is that the Industrial Court, when hearing a claim of unjust dismissal, even where the ground is one of dishonest act, including "theft", is not required to be satisfied beyond reasonable doubt that the employee has "committed the offence", as in a criminal prosecution. On the other hand, we see that the courts and learned authors have used such terms as "solid and sensible grounds", "sufficient to measure up to a preponderance of the evidence," "whether a case... has been made out", "on the balance of probabilities" and "evidence of probative value".* ***In our view the passage quoted from Administrative Law by H.W.R. Wade & C.F. Forsyth offers the clearest statement on the standard of proof required, that is the civil standard based on the balance of***

probabilities, *which is flexible, so that the degree of probability required is proportionate to the nature of gravity of the issue. But, again, if we may add, these are not "passwords" that the failure to use them or if some other words are used, the decision is automatically rendered bad in law."*

EVALUATION OF EVIDENCE AND THE FINDINGS OF THIS COURT

[24] The Claimants were all long serving employees of the Company and had commenced employment with the Company in the 1990s. The exact dates of each of the Claimant's employment dates had already been stated in the Claimants' summary case above. The Claimants are not the exemplary employees of the Company and this can be seen from the various disciplinary issues that they were having with the Company whilst they were in employment. Despite the disciplinary issues that the Claimants had, they nevertheless continued to work for the Company since their commencement of employment dates in 1990. This in fact shows that the Company has practice a policy of being very slow or reluctant in terminating the employees and made every effort to preserve their employment with the Company.

[25] It is common knowledge that the Malaysian government imposed a MCO on the 18.03.2020 due to the COVID 19 pandemic. Much has been written by this Court in its previous awards on the impact of the

MCO on businesses. Any business that have big exposure to the aviation industry suffered as much as the aviation industry itself. The Company here being a in-flight catering service provider for the Kuala Lumpur and Penang International airport was severely affected by the MCO due to the COVID 19 pandemic.

[26] The evidence of COW1 and COW2 on the extent of the financial beating the Company suffered is not seriously challenged neither can this evidence can be disputed. The financial statements and the extent of more than RM100 million in losses suffered by the Company as testified by the Company's witnesses are proof the extent to which the COVID 19 pandemic and the ensuing MCO had cause tremendous hardship to the Company and its business operation. This Court is completely convinced that the Company due to the financial hardship placed upon it had to implement extreme austerity measures in order to continue surviving.

[27] Based on the evidence presented before this Court the Company did everything that was right and in compliance with the prevailing laws to stay afloat in its business and simultaneously ensure that its employees do not suffer retrenchment. As the evidence shows, the Company embarked on various cost cutting measures including putting

the employees on unpaid leave, temporary layoffs and pay cuts in furtherance of its austerity measures. This Court having analysed the evidence before this Court is of the view that the Company's decision to embark on these austerity measures in order to keep its business with a fighting chance of survival, a necessary action that cannot be faulted at all.

[28] The Company in as far as pursuing its austerity measures which affected the Claimants are concerned did not demonstrate any bad intention and was pursuing genuinely its plan of action in view of the sudden and drastic turn of events due to the unexpected and unprecedented COVID 19 pandemic and the ensuing MCO that took the businesses around the world by surprise and the worst affected businesses were the aviation and aviation related industries wherein the Company was one of them.

[29] In pursuing the cost cutting measures the Company kept the employees informed of the tremendous hardship the Company was facing due to the sudden business downturn and this was done through town hall sessions with the employees. Not only that, as all the Claimants in this case were unionized employees, the Company consulted the Union of the employees before implementing any of the

cost cutting measures that affected the employees. A total of 6 memorandums of understanding was signed between the Union and the Company that kept every union employee informed of the steps taken by the Company in its cost cutting measures. The Union also did not object or raised any complaints to the various departments under the Ministry of Human Resources.

[30] As all the terms of the employment, benefits and the rights of the employees were also covered under various collective agreements between the Union representing the employees and the Company, any issues relating to any breach of the employees' rights and benefits covered under the collective agreement would have becoming a trade dispute or at least a non compliance issue on the terms of the collective agreement. From the evidence there were no trade dispute registered or referred to the industrial court neither were there any issues raised on any purported non compliance of the collective agreement.

[31] The Company further notified the labour department its proposed cost cutting measures and various other matters implemented or proposed in order to avoid any retrenchment of its employees and all these actions taken by the Company were as a result of the unforeseen and extreme business and cash flow difficulties arising from the MCO.

As the Company was implementing all the cost cutting measures in line with the accepted standards and in consultation with the Union and after notifying the labour department, this Court does not find anything sinister or unreasonable about the Company's action. These implementations are indeed necessary for the survival and continuity of the Company's business. This Court has considered the evidence of COW2 in particular on these issues and finds there is hardly any evidence that can challenge her evidence on these issues as explained by this Court.

[32] Based on the evidence before this Court and as testified by COW2, when the country moved to a recovery phase with the announcement made by the government, the employees were told to be prepared to report back to work in stages. The Company by its letter dated 03.12.2021 notified all the Claimants that they must report back to work on the 15.12.2021 with a temporary reduced salary of 15%.

[33] The evidence before this Court is clear that despite the Company instructing the Claimants to report back to work, they nevertheless failed to report as instructed. Show cause letters were issued, warning letters were given and reminders sent to the Claimants to report back to work but they did not. For a brief two weeks the 3rd Claimant reported to work

only to then refuse to continue working and deemed himself to be on unpaid leave.

[34] All the Claimants failed to turn up for work on the basis of their objection to the Company reducing their salary temporarily by 15% which was an austerity measure implemented due to the financial difficulties arising from the loss of business and severe cash flow difficulties due to the COVID-19 pandemic and the ensuing MCO that followed.

[35] When the Claimants failed to report for work as instructed the Company issued letters to the Claimants to inform them that their failure to report for duty were in a breach of their employment contract pursuant to Section 15(2) of the Employment Act 1955 which states that :-

> *"An employee shall be deemed to have broken his contract of service with the employer if he has been continuously absent from work for more than two consecutive working days without prior leave from his employer, unless he has a reasonable excuse for such absence and has informed or attempted to inform his employer of such excuse prior to or at the earliest opportunity during such absence."*

[36] The Company issued letters informing of their breach based on the dates stated below:-

- 1st Claimant - letter issued on the 22.02.2022 stating that this Claimant abandoned his employment on the 15.02.2022;

- 2nd Claimant – letter issued on the 23.02.2022 stating that this Claimant abandoned her employment on the 03.01.2022;

- 3rd Claimant - letter issued on the 04.03.2022 stating that this Claimant abandoned his employment on the 01.03.2022;

- 4th Claimant - letter issued on the 09.02.2022 stating that this Claimant abandoned his employment on the 03.02.2022;

- 5th Claimant - letter issued on the 22.02.2022 stating that this Claimant abandoned his employment on the 15.02.2022 and

- 6th Claimant - letter issued on the 04.03.2022 stating that this Claimant abandoned his employment on the 17.01.2022.

[37] This Court having perused the documents before this Court and having considered all the evidence presented in this Court must agree with the Company's position taken that the Claimants have indeed abandoned their employment due to there being no plausible excuse or reasons for the Claimants to have stayed away from reporting back for duty upon the Company instructing them to report for work. Every steps taken by the Company in its austerity measures were in compliance with all acceptable standards and after consultation with the Union wherein the Union also did not raise any objection to the implementation of all the measures of the Company. There is no trade dispute or non compliance of any of the articles of the collective agreement referred to or filed in the Industrial Court on any alleged breaches of the collective agreement between the Company and the Union representing all the employees and as such the Claimants assertion that the Company was in breach of their employment contract was misplaced.

[38] Before this Court the Claimants have pleaded that they were forced to be on temporary lay off, forced to be on unpaid leave and were given new salary with a 15% reduction from the original salary. The Claimants have also stated that the Company has issued them termination letters.

[39] Upon this Court perusing all the documents filed in this Court, it is apparent that the Company did not issue any termination letter against any Claimants and this fact was also conceded by the Claimants upon cross examination. All that is clear is that the Company had informed the Claimants that if they continued to be absent from work without proper reasons they were deemed as having abandoned their respective employments.

[40] Having heard the Claimants' testimonies in this Court, this Court must also state here that the Claimants allegations that they were forced and or pressured to resign from their respective employment is unsupported by any evidence. Further in addition to the complete lack of evidence, the Claimants' pleading also have not particularised the circumstances leading to the forced resignation as claimed by the Claimants.

[41] This Court has also carefully studied the pleadings of the Claimants and the evidence led in this Court and upon analysing the submissions of the Claimants have noticed that the Claimants were now raising matters of breaches of termination and lay off benefits under ***Employment (Termination and Lay Off Benefits) Regulations 1980*** and attempting to introduce constructive dismissal as a basis for their

cases against the Company. This Court must add that the pleaded cases of the Claimants are flagrantly deficient on the particulars needed to prove a case in constructive dismissal. Even for argument sake if this Court now considers the Claimants cases against the Company on the basis of the existence of elements of constructive dismissal, the Claimants cases are certain to fail as there are various test the Claimants must fulfill before succeeding in a constructive dismissal case all of which are lacking in the cases of the Claimants chief amongst them is the Claimants' prompt action on their rights as soon as they have knowledge of the breach of the fundamental terms of the contract of employment [please see this Court's previous Awards ***Soo Poi Chi v Camel Power Trading Sdn. Bhd. (Award No: 1614 of 2024)*** and ***Sui Ng Ching @ Ng Ching v Houses Lightings Sdn. Bhd. (Award No: 1555 of 2024)***]

[42] From the evidence it is amply clear that the Claimants have all refused to turn up or report for work despite being instructed to do so and the Claimants have all failed to turn up without any reasonable excuse for more than 2 days. Their objection to the 15% reduction is not a reasonable excuse for them to fail to report for work. The Claimants have all acted in breach of Section 15(2) of the Employment Act 1955 and had clearly abandoned their employment with the Company.

[43] In abandoning the employment in the Company various Claimants offered various excuses which are not acceptable at all. The 1st Claimant had requested to extend his unpaid leave period for the purposes of dealing with his personal and family matters, 2nd Claimant wanted to be on unpaid leave for a further 12 months because she wanted to continue her online and direct selling business and also gave further reasons of her health being another factor , the 4th Claimant requested unpaid leave to operate his newly opened bicycle shop. The others simply disobeyed the lawful orders of the Company in contravention of Section 15(2) of the Employment Act 1955.

[44] Having considered all the evidence before this Court, this Court finds that the Claimants have all failed to prove that they were dismissed from their employment with the Company and this Court finds no hesitation in concluding that all the Claimants have abandoned their respective employment in the Company. The Claimants' pleadings that touched on matters raised during the proceedings in the Industrial Relations Department and any evidence adduced of the same in this Court are inadmissible and excluded by this Court pursuant to Section 54 of the "The Act" when considering all the evidence before this Court. ***Section 54(2) of "the Act"*** states :-

(2) In a proceeding before the Court on a reference to the Court under subsection 20(3), no evidence shall be given of any proceeding before the Director General under subsection 20(2) other than a written statement in relation thereto agreed to and signed by the parties to the reference.

[45] Pursuant to Section 30(5) of "The Act" 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 evidence adduced in this Court and by reasons of the established principles of industrial relations and disputes as mentioned above, this Court finds that the Claimants have failed to prove to the satisfaction of this Court on the balance of probabilities that they were dismissed from their employment with the Company. As the Claimants are unable to prove that they were dismissed by the Company from their respective employment with the Company, the issue of the dismissal of the Claimants without just cause or excuse is no longer an issue that this Court needs to consider and determine in the circumstances of these cases.

[46] Accordingly, the Claimants' claims against the Company hereby dismissed.

HANDED DOWN AND DATED THIS 5th DAY OF NOVEMBER 2024

-Signed-

(AUGUSTINE ANTHONY)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR