

**NURUL NAJMI RADZUAN & ORS v.
T-SYSTEMS MALAYSIA SDN BHD**

INDUSTRIAL COURT, KUALA LUMPUR
BERNARD JOHN KANNY

AWARD NO. 3001 OF 2018 [CASE NO: 29(19)/4-1783/16]
CONSOLIDATED WITH CASES NOS: 19/4-1784/16, 19/4-1785/16,
19/4-1786/16, 19/4-1787/16, 19/4-1788/16, 19/4-1789/16,
19/4-1791/16, 19/4-1792, 19/4-1793] by Award No. 1042 of 2018
22 NOVEMBER 2018

***DISMISSAL:** Retrenchment – Redundancy – Whether the claimants’ positions had become redundant – Factors to consider – Evidence adduced – Effect of – Evaluation of the evidence – Whether an actual redundancy situation had existed – Company’s actions towards them – Whether it had been hasty – Whether the company’s failure to retrain the claimants and follow the LIFO principle had breached the provisions of the Code of Conduct for Industrial Harmony – Effect of – Whether dismissals without just cause and excuse*

***DISMISSAL:** Retrenchment – Reorganisation – Whether the company had carried out a reorganisation exercise – Whether it had given any reason and proof for the so-called reorganisation exercise – Evidence adduced – Effect of – Claimants not warned of their redundancy – Effect of – Whether the company had exercised its managerial powers bona fide – Whether its actions towards the claimants had deprived the latter of their fundamental right to earn a livelihood and had constituted an unfair labour practice*

***INDUSTRIAL COURT:** Remedies – Compensation – Determination of – Whether claimants must take reasonable steps to mitigate their losses post-dismissal – Spirit and intent of para 3 of the Second Schedule of the Industrial Relations Act 1967 – Industrial Relations Act 1967, para. 3 of the Second Schedule*

The claimants had been employed by the company in various positions with various salary packages. Sometime in 2016, based on the company’s global strategy of Best Price, Best People, Best Quality and Best Product (‘Global Strategy’), it decided to review its business needs. Due to this review, the claimants were served letters informing them that their roles in the company had become redundant and paid severance packages accordingly. The claimants now contend that their dismissals had been carried out without just cause and excuse as a redundancy situation had not existed and that the retrenchment carried out had not been in accordance with the Code of Conduct for Industrial Harmony (‘Code’). There were three main issues that arose for determination before this court. The first was whether there had been a reorganisation carried out by the company and if it had been justified, the second was whether the company had succeeded in proving that a redundancy situation had arisen in it that had necessitated the claimants’ retrenchments and, in the event

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A the first and the second issues were answered in the affirmative, whether the selection and retrenchment of the claimants had been done fairly and in compliance with acceptable standards and procedures.

Held for the claimants:

- B (1) On the issue of whether there had been a reorganisation carried out by the company and if it had been justified, although the company had undertaken a detailed study of what had been required and contrasted that against the skillsets of its existing employees, a copy of that review had not been submitted into evidence and no reasons had been forthcoming from it as to why that had been so. Thus, an adverse inference would be drawn against it for the non-availability of the review in evidence. Further, the court will not rely on pp 12-14 of COB4 as firstly, the source document had not been available, secondly, it had been created after the claimants had been terminated and lastly because its authenticity had been in question. The company had also failed to prove that new skillsets had been required and that the claimants had lacked them. In short, the company had not given any reason and proof for the so-called reorganisation. As such, its exercise of managerial power had not been carried out *bona fide* and had reflected it as being with a collateral purpose aimed at depriving the claimants their fundamental right to earn a livelihood, which constituted an unfair labour practice. There was, in effect, no redundancy (paras 51, 52, 60, 66, 67, 69 & 70).
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- F (2) On the question of whether the company had warned the claimants of their redundancy, COW3 had confirmed that the answer had been in the negative. The company had known that they had been required to give early notice to the claimants but had chosen not to do so. In fact, the claimants had been terminated in haste, *ie.*, they had been handed the separation letter and immediately sent off. This had not been reflective of a termination arising from a normal redundancy (paras 75 - 77).
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- H (3) On the question of whether the company had provided retraining for the claimants, again it had to be answered in the negative. The company could have retrained the claimants to do other matters handled by others who were junior to them in service or train them with newer skillsets, but it had failed to do so (para 82).
- I (4) The company, in choosing to dismiss the claimants without following the LIFO principle and in failing to offer retraining, had breached the provisions of the Code (para 84).
- (5) The company had failed to adduce documentary evidence to show that it had lost business volume or suffered a reduction in business volume, thus justifying the claimants' positions becoming redundant. As such, the company had neither provided any evidence to show its

consideration for reorganisation, nor produced any evidence to show that there had indeed been a review undertaken on the future of its business. It had failed to produce evidence to show what its business requirements had been for the future, what skillsets had been needed for the future and what skillsets had been lacking in the claimants which had resulted in them being selected for retrenchment. In the absence of all this, the retrenchment exercise that had been carried out by it had been carried out *mala fide* (paras 94 - 96).

- (6) When considering compensation, it is necessary to consider what steps a person has taken to mitigate his loss. The claimant must take reasonable steps to mitigate his loss. The duty to mitigate loss is the justice systems' way of making sure that the dismissed workmen play their part by actively looking for work post-dismissal, especially in a court of equity, good conscience and the substantial merits of the case. In the Court's opinion, it would not be just and equitable, even logical, that a claimant who diligently seeks alternative employment is awarded a sum less than one who does not, as the result would be that the Court would be punishing employees who have found employment post-dismissal by scaling down monetary compensation whilst employees who resist looking for employment, get off with no deductions made. This would surely be against the spirit and intent of para 3 of the Second Schedule of the Industrial Relations Act 1967 (paras 112, 114, 118 & 119).

[Dismissals without just cause or excuse - Claimants awarded backwages and compensation in lieu of reinstatement accordingly.]

Award(s) referred to:

- Crest Ultrasonics (M) Sdn Bhd v. Liew Siew Kim [2003] 1 ILR 564 (Award No. 1033 of 2002)*
- DTS Trading Sdn Bhd v. Wong Weng Kit [2008] 1 ILR 548 (Award No. 222 of 2008)*
- Firex Sdn Bhd v. Cik Ng Shoo Waa [1990] 1 ILR 226 (Award No. 69 of 1990)*
- Gold Coins Feedmills (Malaysia) Sdn Bhd v. Ibrahim Mohd Shah & Ors [2001] 3 ILR 167 (Award No. 657 of 2001)*
- International Planned Parenthood Federation v. Tuan Syed Adam Al-Jafri [1982] 2 ILR 116b (Award No. 183 of 1982)*
- Inti IABS Sdn Bhd (Inti College Sarawak) v. Frank Samuel Agong [2001] 2 ILR 267 (Award No. 391 of 2001)*
- Lee Seong Fatt lwn. Joint Management Body of Pearl Point Condominium [2016] 2 LNS 0704 (Award No. 704 tahun 2016)*
- Mohd Irwan Arifin v. Aluminium Company of Malaysia Berhad [2017] 1 ILR 397 (Award No. 168 of 2017)*
- Nestle Food Storage (Sabah) Sdn Bhd v. Terrence Tan Nyang Yin [2002] 1 ILR 280 (Award No. 1017 of 2001)*
- Ong Lean Phaik v. CF Sharp & Co (M) Sdn Bhd, Penang [1980] 1 ILR 284 (Award No. 121 of 1980)*
- Pelangi Enterprises Sdn Bhd v. Oh Swee Choo [2001] 1 ILR 492 (Award No. 115 of 2001)*
- Penang Port Stevedoring Corporation Sdn Bhd v. Kesatuan Pekerja-Pekerja Pelabuhan Pulau Pinang (Award No. 18 of 1970)*

- A *Syarikat Eastern Smelting Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Perusahaan Pelaburan Logam Sa Malaya (Award No. 16 of 1968)*
Syarikat Ppes Edar Sdn Bhd Kuching v. Cik Maudreen Agnes Yap Mui Lim Kuching [1988] 2 ILR 636 (Award No. 312 of 1988)
Transport Workers' Union v. Selangor Omnibus Co Ltd [1981] 1 ILR 179 (Award No. 62 of 1981)

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Case(s) referred to:

- Bayer (M) Sdn Bhd v. Ng Hong Pau [1999] 4 CLJ 155*
Credit Corporation (M) Bhd v. Choo Kam Sing & Anor [1999] 8 CLJ 86
Dr A Dutt v. Assunta Hospital [1981] 1 LNS 5
Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor [2001] 3 CLJ 541

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- Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 1 LNS 30*
Hotel Jayapuri v. National Union of Hotel Bar & Restaurant Workers [1980] 1 MLJ 109
Kaolin (M) Sdn Bhd v. Samba Sirvang Thanimalai [2001] 1 CLJ 491
Koperasi Serbaguna Sanya Bhd (Sabah) v. Dr James Alfred (Sabah) & Anor [2000] 3 CLJ 758

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- Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam [2006] 2 CLJ 501*
Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629
Stephen Bong v. FCB (M) Sdn Bhd & Anor [1999] 1 LNS 131
Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314

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- Tuan Syed Hashim Bin Tuan Long v. Esso Production Malaysia Inc [1997] 1 LNS 99*
William Jacks & Co (M) Sdn Bhd v. S Balasingam [1997] 3 CLJ 235

Legislation referred to:

Industrial Relations Act 1967, ss. 20, 30(5), (5A), (6A)

Other source(s) referred to:

- F Ashgar Ali Ali Mohamed & Dr Farheen Baig Sardar Baig, "Procedure for Unfair Dismissal Claims in Malaysia", p. 55
Ashgar Ali Ali Mohamed, "Dismissal from Employment and the Remedies", p. 103
Dunyston Ayudurai, "Industrial Relations in Malaysia" at p. 255

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- For the claimant - Harikannan Ragavan (Samantha (PDK) with him); M/s Jayadeep, Hari & Jamil*
For the company - Pavalakodi Nadarajah (Sujatha Selliah with her); M/s Dharmen Sivalingam & Partners
Reported by Sharmini Pillai

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**AWARD
(NO. 3001 of 2018)**

Bernard John Kanny:

- I [1] The Ministerial Reference in this case required the court to hear and determine the claimants' dismissal by the company on 2 March 2016. The reference was dated 5 December 2016 and was received by the Industrial Court on 19 December 2016.

[2] On the 2 May 2018, counsel for the claimant applied for case No. 19/4-1783/16 to be consolidated and heard together with case Nos 19/4-1784/16, 19/4-1785/16, 19/4-1786/16, 19/4-1787/16, 19/4-1788/16, 19/4-1789/16, 19/4-1791/16, 19/4-1792/16 and 19/4-1793/16. The court allowed the claimant's application *vide* Interim Award No. 1042 of 2018. A

[3] All the matters were transferred from Court 19 to this court on 4 July 2018 pursuant to instructions from Yang DiPertua Mahkamah Perusahaan Malaysia dated 3 July 2018, in order that the Final Award be handed down. B

[4] The company's Solicitors filed their written submissions on 15 October 2018 and reply on 8 November 2018 while claimants Solicitors filed their written submission on 12 October 2018 and reply on 26 October 2018. C

Proceedings In The Industrial Court

[5] The matters were heard on 30 July 2018, 6 August 2018, 9 August 2018, 10 August 2018, 4 September 2018, 5 September 2018, and 21 September 2018 during which the following witnesses were called by the company to testify in court: D

i) Mr Vaclav Koranda who is the Vice President of Human Resource ("COW1"); E

ii) Mr Mark Harinck who is the Head of Department of Global Customer Unit Shell and Head of Service Department Customer Shell ("COW2");

iii) Ms Marijana Bekavac who is a member of the Board of Directors and Vice President of Finance and Controlling ("COW3"); F

iv) Mr Senthil Perumal who is Head of DPS Department ("COW4");

v) Mr Zaki Shuhaimi who is Head of SAP Department ("COW5"); and

vi) Mr James Jeyaraj Nayagam who is Head of CCS Department ("COW6"). G

[6] The 10 claimants in the order of their testimonies are:

1. Ahmad Faros Bin Othman ("CLW1");

2. Ramas A/L Kindnasamy ("CLW2"); H

3. Ravinder Singh A/L Mohinder Singh ("CLW3");

4. Yusniza Binti Yahaya ("CLW4");

5. Nurul Najmi Binti Radzuan ("CLW5");

6. Khairil Arief Bin Muhamud ("CLW6"); I

7. Ang Yen Chen ("CLW7");

8. Poh Chek Kiang ("CLW8");

- A 9. Narendran A/L Krishnasamy (“CLW9”); and
10. Ragu A/L Munisamy (“CLW10”)
- [7] The documents filed and marked before this court are as follows:
- B i) Company’s Bundle of Documents (claimant no 1-4) (“COB1”);
ii) Company’s Bundle of Documents (claimant no 5-7) (“COB2”);
iii) Company’s Bundle of Documents (claimant no 8-10) (“COB3”);
iv) Company’s Additional Bundle of Documents (“COB4”);
- C v) Company’s Bundle of Documents (III) (“COB5”);
vi) Witness Statement of Vaclav Koranda (“COWS-1”);
vii) Witness Statement of Mark Harinck (“COWS-2”);
viii) Witness Statement of Marijana Bekavac (“COWS-3”);
- D ix) Witness Statement of Senthil Perumal (“COWS-4”);
x) Witness Statement of Zaki Suhaimi (“COWS-5”);
xi) Witness Statement of James Jeyaraj Nayagam (“COWS-6”);
- E xii) Claimant’s Bundle of Documents (“CLB1”);
xiii) Claimant’s Additional Bundle of Documents (“CLB2”);
xiv) Witness Statement of Ahmad Faros Bin Othman (“CLW1”);
xv) Witness Statement of Ramas A/L Kindnasamy (“CLW2”);
- F xvi) Witness Statement of Ravinder Singh A/L Mohinder Singh
 (“CLW3”);
xvii) Witness Statement of Yusniza Binti Yahaya (“CLW4”);
xviii) Witness Statement of Nurul Najmi Binti Radzuan (“CLW5”);
- G xix) Witness Statement of Khairil Arief Bin Muhammad (“CLW6”);
xx) Witness Statement of Ang Yen Chen (“CLW7”);
xxi) Witness Statement of Poh Chek Kiang (“CLW8”);
- H xxii) Witness Statement of Narendran A/L Krishnasamy (“CLW9”);
and
xxiii) Witness Statement of Ragu A/L Munisamy (“CLW10”)
- [8] After the conclusion of the trial, the parties submitted their written closing submission-in-chief and followed by their written closing submission-in-reply.
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Factual Background

Background Facts

[9] Below is a summary of the relevant facts and allegations based on the parties' written submission, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the parties' written submission, pleadings and evidence may be set out, where relevant in connection with the legal discussion that follows.

[10] While the court has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, the court refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

[11] Briefly, all the claimants were employees of the company. Below are details of the claimants' positions before dismissal, Basic Salary, Fixed Allowances, Supplementary Pay and Commencement Date of Employment.

No	Name of Claimant	Position Before Dismissal	Basic RM Salary	Fixed Allowance	Commencement date of Employment
1.	Nurul Najmi Binti Radzuan	Livelihood Analyst	4,083.00	650.00	02.07.2012
2.	Ramas A/L Kindnasamy	IT Operations Manager CCS	7,692.00	1,465.00 + 1,303.02	01.07.2008
3.	Ravinder Singh A/L Mohinder Singh	Database Administrator	8,780.00	1,615.00 + 1,487.32	01.07.2008
4.	Khairil Arief Bin Muhammad	Solution Architect	6,637.00	1,465.00 + 1,124.30	01.07.2008
5.	Ahmad Faros Bin Othman	Manager Business Operations DPS	9,164.00	1,465.00 + 1,552.37	12.04.2001
6.	Ang Yen Chen	Health, Safety Manager	8,502.00	500.00	22.08.2012
7.	Ragu A/L Munisamy	SR SAD Basic Engineer	7,800.00	1,050.00	20.12.2009
8.	Poh Chek Kiang	Head Service OP Center Kone	31,509.00	3,000.00	10.05.2010
9.	Yusniza Binti Yahaya	Process Analyst	5,421.00	650.00	04.11.2009
10.	Narendran A/L Krishnasamy	Disaster Recovery Expert	6,855.00	1,465.23 + 1,161.23	01.05.2009

[12] The company provides Information and Communication Technology (ICT) services such as Data Center, application of operations and storage to various clients.

[13] The company had a global strategy which was based on Best Price,

A Best People, Best Quality and Best Product. Pursuant to the Global Strategy, the company reviewed its business needs to face what it believed was the best way to serve the business undertaken.

[14] The company's global strategy was that the changing business needs required people with the right skills sets to deliver the best product with the best quality at the best price hence the company reviewed the company's organization structure and aligned some of the functions.

B [15] The company had to adapt and restructure its business hence the claimants' job functions became redundant and surplus to the requirement of the company.

C [16] Subsequently, the company issued a separation letter dated 2 March 2016 to the claimants. The contents of all the letters to the various claimants are identical hence this court will refer to the Letter of Separation issued to the 1st claimant for reference in respect of all the claimants found at pp. 8 to 9 of COB1.

D [17] For ease of reference the Letter of Separation dated 2 March 2016 is reproduced below:

■T...Systems■

E Strictly Private & Confidential

2 March 2016

Nurul Najmi Binti Radzuan

Personnel No. 330223

F Collaboration and Communication Services

Dear Nurul Najmi,

Separation Letter

G The management has recently reviewed the company's organization structure and aligned some of the functions. This is a business decision which will have an impact on a number of employees whose jobs have been affected.

H Arising from this restructuring exercise, your role in the company has also been impacted and made redundant effective 2 April 2016. However, you are not required to report to work from 2 March 2016.

We are providing you a separation package and details of the severance compensation are as follows:

Severance Compensation

I To ease the transition, your March 2016 salary will be processed as usual *via* payroll, and will be credited into your bank account by 20 March 2016. For March salary details, please refer to the attached Annex A.

The payment of your notice *in lieu* and the severance package minus all statutory deductions will be remitted into your payroll bank account **once you have performed your tax clearance with IRB, and to provide us with the Tax Clearance Letter.** For details, please refer to the attached Annex B.

A

You will be provided with a checklist on all Company's assets and belongings i.e. access card, drawer keys, etc, which you are required to return on 2 March 2016. All benefits (including dental and optical coverage) shall cease on 2 March 2016, with the exception of the medical coverage, which shall cease on 2 April 2016.

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We have engaged The Ayers Group. Career Transition Services provider (Ms. Mastura Jaffar, tel: 03-21196900 to assist you with a career transition program).

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Kindly be reminded of your agreement regarding confidentiality of Employer's Information and that your obligation of confidentiality continues subsequent to your employment with the company.

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For any clarification, you may contact us for assistance at FMB-TSMY-HR2U@t-systems.com We appreciate the contributions you made while employed with the company.

Yours sincerely,
for T-Systems Malaysia Sdn Bhd

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Sharmila A/P Santharasagaran
Manging Director

Vaclav Koranda
Vice President, Human Resources

I hereby acknowledge receipt of this letter.

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Signature
Name: Nurul Najmi Bt Radzuan
I/C No/Passport No. (Country) : 781215-10-5032
Date : 2/3/16

G

T-Systems Malaysia Sdn Bhd (B031168-W)

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[18] *Vide* the letter dated 2 March 2016 the claimants were informed that their roles in the company were made redundant effective 2 April 2016. Further, the claimants were informed that they were not required to report for work from 2 March 2016.

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A [19] The claimants were paid Severance Payments, Notice *in lieu*, Unutilised Annual Leave and Prorated Various Bonus as follows:

	Claimants	Retrenchment Package	Variable Bonus	Leave Encashment	Salary for March 2016	Salary in Lieu of Notice (3.4.2016-2.6.2016)	Salary for 1 & 2 April 2016	TOTAL
B	Nurul Najmi Binti Radzuan	RM23,004.63	RM4,377.00	RM476.35	RM4,762.03	RM8,166.00	RM315.53	RM41,101.54
	Ramas A/L Kindnasamy	RM102,830.45	RM 20,590.00	RM5,640.80	RM 10,460.02	RM 17,948.01	RM694.54	RM158,169.82
C	Ravinder Singh A/L Mohinder Singh	RM129,535.07	RM23,756.00	RM3,219.33	RM11,930.70	RM20,486.69	RM788.96	RM189,716.75
	Khairil Arief Bin Muhammad	RM87,253.82	RM16,828.00	RM774.32	RM9,226.30	RM15,486.36	RM612.68	RM130,181.48
D	Ahmad Faros Bin Othman	RM196,737.27	RM23,235.00	RM2,749.20	RM12,181.37	RM21,382.70	RM808.75	RM257,094.29
	Ang Yen Chen	RM 46,120.44	RM 15,827.00	RM2,267.20	RM9,002.00	RM17,004.00	RM600.13	RM90,820.77
	Ragu A/L Munisamy	RM73,565.75	RM14,040.00	RM6,500.00	RM8,335.48	RM15,600.00	RM553.33	RM118,594.56
E	Poh Chek Kiang	RM279,048.88	RM97,417.00	RM12,603.60	RM34,509.00	RM63,018.00	RM2,300.60	RM488,897.08
	Yusniza Binti Yahya	RM52,175.27	RM5,419.00	RM1,084.20	RM6,071.00	RM10,842.00	RM404.73	RM759,965.20
F	Narendran A/L Krishnasamy	RM71,245.05	RM17,034.00	RM1,028.25	RM9,481.23	RM15,995.01	RM629.56	RM115,413.13

[20] The above compensation package for the claimants were calculated and paid based on the following formula:

G	Retrenchment Package	Length of service x base salary per month x 1.5 month retrenchment rate
	Salary <i>in lieu</i> of Notice (3.4.2016-2.6.2016)	No of work days/no calendar days in a month x base salary per month
H	Leave Encashment (Pro rate annual leave, special leave, leave bank)	No of leave balance as 2.4.2016 x 30 x basic salary per month
	Salaries for 1 & 2 April 2016	Base Salary: No of work days/no of calendar days in a month x base salary per month
I		Allowance: No of work days/no of calendar days in a month x fixed allowance per month

[21] Having accepted the severance package, the claimants now challenge the redundancy notice dated 2 March 2016 as being *mala fide* thus claiming wrongful dismissal.

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[22] The claimants alleged that the termination was without just cause and excuse because:

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- a) There was no redundancy; and
- b) The retrenchment was not done in accordance with the Code of Conduct for Industrial Harmony

Issues

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[23] The issue for determination are as follows:

- (i) Was there a reorganisation by the company and if so was it justified?
- (ii) Did a redundancy situation arise in the various departments of the company leading to the retrenchment of the claimants?
- (iii) If the answers to (i) and (ii) are affirmative, whether the selection and retrenchment of the claimants were done fairly in compliance with the accepted standards or procedure?

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The Law

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[24] The function of the Industrial Court in a reference under s. 20 of the Act has clearly been spelt out in the Federal Court in the case of *Goon Kwee Phoy v. J & P Coats (M) Bhd* [1981] 1 LNS 30; [1981] 2 MLJ 129, where his Lordship Raja Azlan Shah, CJ (Malaya) (as he then was) stated at p. 136:

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where representation 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.

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[25] Again, in *Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam* [2006] 2 CLJ 501 at 527, the Court of Appeal stated:

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the function of the Industrial Court in dealing with reference under s. 20 of the Act is to determine whether the misconduct or irregularities complained of by the management and forming 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.

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A [26] The term “redundancy” has been defined by Dunston Ayudurai in his book *“Industrial Relations in Malaysia”* at p. 255 in the following terms:

B Redundancy refers to a surplus of labour and is normally the result of a reorganisation of the business of an employer; and its usual consequence is retrenchment, *ie*, termination by the employer of those employees found to be surplus to his requirements after the reorganization. Thus, there must first be redundancy or surplus of labour before there can be retrenchment or termination of the surplus.

C [27] In the case of *William Jacks & Co (M) Sdn Bhd v. S Balasingam* [1997] 3 CLJ 235, the Court of Appeal held as follows:

D It is the right of every employer to reorganize his business in any manner for the purpose of economy or convenience provided he acts bona fide ... The employer has the right to determine the volume of his labour force consistent with his business and organization and if by the implementation of a reorganization scheme adopted for reasons of economy and better management of the business the services of some of the employees become excess of the requirement of the business the employer is entitled to discharge such excess.

E [28] In *Firex Sdn Bhd v. Cik Ng Shoo Waa* [1990] 1 ILR 226 (Award No. 69 of 1990) the learned Chairman Steve LK Shim (as he then was) after restating principles as found in *Ong Lean Phaik v. CF Sharp & Co (M) Sdn Bhd, Penang* [1980] 1 ILR 284 (Award No. 121 of 1980) stated as follows:

F ... 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 victimization or unfair labour practice. These principles have been consistently applied by the Industrial Court in numerous cases...the employer has a right to determine the volume of his labour force consistent with his business and organisation and if the implementation of a reorganising scheme adopted for reasons of economy and better management of the business, the services of some of the employees become excess of the requirement of the business, the employer is entitled to discharge such excess.

H [29] In the High Court case of *Kaolin (M) Sdn Bhd v. Samba Sirvang Thanimalai* [2001] 1 CLJ 491, it was held that it was the duty of the Industrial Court to investigate the facts and circumstances of a particular case to determine whether the exercise of the company’s power was done *bona fide*.

I [30] In *Tuan Syed Hashim Bin Tuan Long v. Esso Production Malaysia Inc* [1997] 1 LNS 99, where it was stated that the right to reorganize the company is the prerogative of the management to achieve maximum

efficiency and effectiveness. This prerogative belongs to the company provided it is done *bona fide*. If in the process of doing that some workmen had to be laid off, there is ample provision in the law to provide them with retrenchment benefits

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[31] In *Credit Corporation (M) Bhd v. Choo Kam Sing & Anor* [1999] 8 CLJ 86, it was held that:

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In examining the reason for reorganization of the company and the resulting termination of the claimant by reason of redundancy the court does not conduct a detailed examination of the propriety of the scheme or reorganization. The court is only concerned that such scheme is carried out *bona fide*.

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[32] In *Stephen Bong v. FCB (M) Sdn Bhd & Anor* [1999] 1 LNS 131; [1999] 3 MLJ 411, wherein it was stated at p. 416 as follows:

that it is not the law that redundancy means the job or work no longer exists. Redundancy situations arise where the business requires fewer employees of whatever kind.

D

[33] It has also been the practice of the Industrial Court to look at the Code of Conduct for Industrial Harmony in determining the issue of fairness. Though the code has no legal force and its acceptance voluntary, it is still relevant for the purpose of considering the overall reasonableness of the employer's action.

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[34] Pursuant to s. 30(5A) Industrial Relations Act, the Industrial Court in making its award, may take into consideration any agreement or code relating to employment practices where such code or agreement has been approved by the Minister.

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[35] In *Gold Coins Feedmills (Malaysia) Sdn Bhd v. Ibrahim Mohd Shah & Ors* [2001] 3 ILR 167 (Award No. 657 of 2001), the Industrial Court observed as follows:

It has been held that the code had 'no legal force or sanction'. The Court has however, received into its jurisprudence some of the Agreed Practices. The incremental adoption of other practices will go a long way towards creatively establishing more binding and effective norms and standards in the interest of industrial peace and harmony. In doing so, the Court had to carefully develop principles for their application, the permitted departure therefrom and the consequences for any breach of the said practices.

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[36] Finally it is settled law that the burden of proof lies on the employer to prove that the decision to reorganise and the subsequent redundancy of the claimants are *bona fide*. (see: *Bayer (M) Sdn Bhd v. Ng Hong Pau* [1999] 4 CLJ 155). The standard of proof needed is on a balance of probabilities (see *Telekom Malaysia Kawasan Utara v. Krishnan Kuttu Sanguni Nair & Anor* [2002] 3 CLJ 314).

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A [37] The issue before the court bearing in mind the aforestated principles of law is whether there was a genuine retrenchment *vis a vis* the claimants.

Evaluation Of Evidence And Findings Of Court

B (1) *Was There A Reorganisation/Restructuring At The Company And If So Was It Justified?*

[38] The company in its Statement of Reply pleaded that the company had a Global Strategy which is based on Best Price, Best People, Best Quality and Best Product.

C [39] Based on the Global Strategy the business needs of the company was reorganized. The company's changing business needs required people with the right skill sets to deliver the best product with the best quality at the best price. This was the global requirement of the company.

D [40] The concept behind the restructuring was to ensure the best person was placed for the right job.

E [41] COW1 Vaclav Koranda the Vice President of Human Resource of the company testified in Court. He stated that the company undertook the restructuring exercise because the company had a Global Strategy which is based on Best Price, Best People, Best Quality and Best Product hence the business needs of the company had to be reorganized.

F [42] He stated the company realized that the skills that employees possessed were based on what was necessary for its business needs some years ago hence the company realized that the employees' skills were not relevant for its future needs because of the rapidly changing technology.

[43] COW1 further stated the company's business needs required people with the right skill sets to deliver the best product with the best quality at the best price. This was the global requirement of the company.

G [44] Consequently the company undertook a detailed study of what is required and contrasted that against the skillsets of its existing employees. According to COW1 the concept behind the restructuring was to ensure the best person was placed for the right job.

H [45] This exercise was conducted by The Ayers Group. Having conducted a detailed study by the Ayers Group, the company carried out its reorganization which led to the retrenchment exercise.

[46] COW1 stated the company needed to ensure that its people were "fit for the future."

[47] COW1 was cross examined as follows:

I Q : Refer to Question 10 and Question 11 of your Witness Statement, would you agree reorganization was for the future of T Systems?

- A : Yes A
- Q : Essentially T Systems did in the future things will be changing so need to reorganize Company to meet future needs. Right?
- A : Yes
- Q : Part of reorganization was to see which employee can fit future needs of the Company? B
- A : Yes
- Q : Reorganisation and subsequent termination was a forward looking exercise?
- A : Yes C
- Q : Refer to Question 13 of your Witness Statement. In your answer reorganisation was not due to financial issues means termination was nothing to do with Company's financial position?
- A : Yes
- Q : Then termination and reorganization has nothing to do with business loss. Only the future? D
- A : Yes
- Q : Business loss was not the reason for termination and reorganisation?
- A : Yes E
- Q : What was the business model you foresaw which was different from current?
- A : We didn't change the business model. Just change the internal way.
- Q : Foreseeing the future direction came from HQ?
- A : Yes F
- Q : Directions came from where?
- A : Germany
- Q : Global initiative from Germany and communicated to T Systems Malaysia? G
- A : Yes
- Q : When Germany comes out with initiative there will be documents?
- A : Didn't do it by document
- Q : When was global initiative started? H
- A : End of 2015 or beginning of 2016
- Q : The review of T Systems was undertaken at HQ level?
- A : No was done in Malaysia
- Q : Did T Systems HQ have the same initiative like Malaysia?
- A : I don't know if HQ did reorganization I

- A Q : After Malaysia did review, Malaysia would send outcome of review to Germany?
A : Yes I believe so
Q : You agree that review which was sent to Germany is not in your Bundle of Documents?
- B A : Not here
Q : Was there a requirement for HQ to reduce headcount?
A : No
Q : Refer to Question 7 of your Witness Statement, if the business model is the same how is it employees skills were irrelevant for the future?
- C A : It was not all employee skills which were irrelevant for the future. Only some. Identified 40 employees not for the future. We did our best to redeploy if possible.
- D **[48]** COW3 was cross examined as follows:
Q : Refer Question 6 of your Witness Statement detail study no report?
A : I do not know
Q : This was done by the Ayers Group?
- E A : Correct
Q : Did Ayers Group decide future skillsets?
A : Ayers only the methodology of matching skillsets to demand and comparing future and current skillsets
Q : Future demands who determined?
- F A : T-Systems International
Q : T-Systems International identify future business model?
A : Correct
Q : They communicate it to Malaysia?
- G A : Correct
Q : In written form?
A : There was a workshop in Budapest it was discussed
Q : Was there a slide given to Ayers Group?
- H A : We had flipcharts and presentation
Q : The future business model what was Ayers role?
A : To bring their expertise and ensure fair and transparent approach of selection
- I Q : Ayers participated on who should be retrench?
A : They came up with recommendation of skillsets. Ayers was consulted by us how to use methodology.

[49] COW2 testified and stated that he provided a report to Human Resource to justify the retrenchment of the 3rd, 9th and 10th claimants. According to COW2 the report identified the future skillsets which the 3rd, 9th and 10th claimants did not have. A

[50] COW2 agreed during cross examination that the power point slides which showed the future skillsets required were all removed and not found in company's Bundle of Documents. B

[51] From the examination in chief and cross examination of COW1, COW2 and COW3 the court finds that the company undertook a detailed study of what is required and contrasted that against the skillsets of its existing employees. This review was conducted by the Ayers Group. C

[52] A copy of this review by the Ayers Group was sent to the HQ of T Systems in Germany. However a copy of this review was not enclosed in company's Bundle of Documents before this court.

[53] In this regard COW3 was cross examined as follows: D

Q : Refer to Question 11 of your Witness statement the reorganisation was not due to financial issues.Nothing to do with loss of revenue/ business?

A : No simply forward looking E

Q : Did you have a report before reorganisation?

A : We had regular workshop and discussion

Q : Did Company come out with a report?

A : We came out with new organisation chart and new skills needed F

Q : The skillsets needed documented?

A : Future skillsets based on customer demands based on order entry collected by mother Company

Q : Company has documents to show new skill sets? G

A : We would have

[54] COW3 during her cross examination had confirmed that the company had carried out workshops to determine the skillsets required.

[55] In this regard COW3 was cross examined as follows: H

Q : Each department submitted their own assessment of employees?

A : Correct

Q : For your department you submitted your list?

A : Correct I

- A Q : That assessment in writing?
A : Correct
Q : That assessment not in Company Bundle of Documents?
A : We had one on one sessions
- B Q : On your assessment you assessed skillsets?
A : I assessed skill which was not needed for future
Q : That document not produced because will damage Company's case?
A : I disagree
- C [56] From the above it would appear that the claimants' skillsets were contrasted against the future skills required by the company. However the company chose not to produce this evidence before this court.
[57] This review by the Ayers Group would be important as the court would be able to see what was required and contrasted that against the skillsets of the claimants. In the absence of the Ayers report the court will also not be able to identify the future skillsets which the company required and contrast that against the skillsets of the claimants to determine if the exercise was carried out *bona fide*.
- E [58] COW3 has testified that the company would have documents to show the new skillsets required. This was corroborated by COW2.
[59] Both COW2 and COW3 testified there were flipcharts and presentation at their workshop in Budapest identifying the future skillsets. However these were not produced before this court.
- F [60] The company had not given any reasons for the non-inclusion of the Ayers report, flipcharts and slide presentations in the company's Bundle of Documents, hence the court will draw an adverse inference against the company for the non-availability of the documents.
- G [61] It is a cardinal principle of the law of evidence that a court may presume that evidence which could be and is not produced would, if produced would be unfavourable to the person withholding it.
[62] COW1 stated in evidence that the specific reasons for redundancy and reasons for selection are at pp. 12 to 14 of COB4. This was a result of the review undertaken by the Ayers Group.
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[63] The reasons put forward by the company at pp. 12 to 14 of COB4 are as follows:

No	Claimants	Reason For Redundancy	Reason For Selection
1.	Nurul Najmi Binti Radzuan	Business loss. The LiveLink Business Service Desk (BSD) service was cancelled by the customer due to LiveLink being migrated to SharePoint as part of the customer's strategic direction.	There were 3 in this team and there were given 6 months advanced notice to search for a job within the Company before LiveLink BSD was officially cancelled. 1 eventually found a job outside the Company, 1 found a job internally within the Company. Nurul Najmi Binti Radzuan was the only one in the team who has not found anything within or outside the Company.
2.	Ramas A/L Kindnasamy	The Application Operation Service for customer KONE is transitioned from Malaysia to Cognizant India due to cost saving reason. Another service called Core Media Service for customer EPCOS was moved to Germany due to change in contract with customer.	Ramas A/L Kindnasamy was the only person delivering these services and there was no other suitable OPM role available during that time.
3.	Ravinder Singh A/L Mohinder	Reduction of Senior DBA's due to volume loss of business for Shell account. Number of databases in support declining significantly (Reduction of >27% supported assets within a year). Current trends show more databases being decommissioned on regular basis. Fewer resources needed to support this service. Reduction is required.	With the decline of supported database volume, the number of customer requests and project activities was also reducing. Ravinder was primarily involved in request and project work (not incident management) and both areas were declining in volume as well.
4.	Khairil Arief Bin Muhammad	This is about Solution Architect position/role for customer KONE, provided out of Technical Expert Center within Global Delivery Unit, Communication & Collaboration Service (CCS) T-Systems Malaysia to T-Systems International Architecture & Innovation group for global customer KONE.	Khairil Arief is the only Solution Architect we have in Technical Expert Center.

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A	No	Claimants	Reason For Redundancy	Reason For Selection
B			<p>The Solutions Architect resource/skills are ordered by Lead Solutions Architect for a fixed period of time, usually for a year and renewed on a yearly basis.</p>	
C			<p>The Solution Architect resources/skills are provided based on Time and Material (T&M) model of agreement on a fixed rate from TSMY towards T-Systems International Architecture & Innovation group for global customer KONE.</p>	
D			<p>Muhammud, Khairil Arief was assigned as a Solution Architect from Technical Expert Center to fill this position.</p>	
E			<p>The requirement for this position/role was revoked effective 31st Dec 2015 with agreement to complete the handover by 29th Feb 2016. Hence this position was no longer available within T-Systems Malaysia under GDU CCS Technical Expert Center effective 1st March 2016.</p>	
F	5.	Ahmad Faros Bin Othman	<p>The team has no longer required a manager after an internal re-organisation as the same role can be performed by a team lead. After the said re-organisation, the team size has been reduced from 23 to 11 people. With this, the BO Manager role was deemed redundant.</p>	Ahmad Faros was the only manager in the team.
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H	6.	Ang Yen Chen	<p>Based on the restructuring and refining of the organisation structure, the management has decided that we do not need a manager to lead such a small team of 2 people; thus, all staff should be reporting directly to the VP of Finance.</p>	Ang Yen Chen was the only manager in the team.
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No	Claimants	Reason For Redundancy	Reason For Selection
7.	Ragu A/L Munisamy	Business loss due to the exit of Philips Global Account. As a result, the Company had merged 2 different teams into 1 (Merged of LA and APAC, then led by one Team Leader instead of 2)	Among all affected staff, Ragu doesn't possess other skills as compared to his peers to be redeployed to other roles.
8.	Poh Chek Kiang	The 2 SOC teams in the business unit were merged and the Company only required one SOC Head after the re-organisation. Besides, all other staff in the team was reporting to a Team Lead. So, the role which was held by Poh Chek Kiang was redundant.	Poh Chek Kiang was the only SOC Head in KONE and there is a Team Lead who has been managing the other staff in the team. The Company doesn't need another senior SOC in the same team after the merger of the SOCs.
9.	Yusniza Binti Yahaya	Due to overall reduction of volumes of the Shell Global Account also supporting functions have to reduce to deal with the decline. This position obsolete and workload not there anymore.	<p>Apart from volume reduction, the work on reporting is largely under consolidation and automation. Therefore, it was significant less people are needed to generate and validate reports.</p> <p>The specific role which Yusniza worked on became obsolete due to this. Volumes went down and so does the number of reports and work on reporting. Yusniza's skill was mainly running basic reports and the Company could not easily re-deploy Yusniza like her peers.</p>
10.	Narendran A/L Krishnasamy	Work of this team highly dependent on the volumes and assets we support for this customer. Since Volumes go down, less people needed in the DR team. As fewer assets need to be tested during the (annual) DR tests and less DR services onboarded.	The number of services Shell buys from T-Systems is reducing significantly as most confidential systems have been onboarded. Occasionally, we do onboard new applications into DR service. However, we do not need a dedicated person for this function anymore and since Narendran was mainly acted on such tests, he was the one we had to let go. The other staffs are, more multi-skills and can be redeployed in a wider range of tasks.

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[64] Proceeding now, to apply these principles to the instant case of the dismissal of the claimants.

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- A **[65]** As regards the documents at pp. 12 to 14 of COB4, COW1 was cross examined as follows:
- Q : The details at pp. 12 to 14 of COB-4 were the outcome of your detail study by Ayers Group?
- B A : Yes
- Q : T-Systems being a multinational wouldn't the report be more formal?
- A : That's how we did it
- C Q : There were a lot of meetings to do the review. Was meetings minuted?
- A : I can't remember
- Q : Some of the meetings any exchange of emails?
- A : Most probably
- D Q : Those emails are not in the Company Bundle of Documents?
- A : No
- Q : In the review you were looking at current business, business needs, skillsets of future employees and see where IT industry moving?
- E A : Yes
- Q : There would be methods to follow when you did this review?
- A : We followed methodology provided by the Ayers Group
- F Q : The methodology is not produced in any of the Company documents filed in Court?
- A : Yes
- Q : There was a document?
- A : We had several workshops with Ayers Group
- G Q : There must be a report cannot be just pp. 12-14 of COB4?
- A : The only report are at pp. 12-14 of COB4
- Q : Would Ayers Group have the report?
- A : I don't know
- H Q : Details of the study you say are at pp. 12 to 14 of COB4. This was prepared in 2016. Are you aware Solicitors for the Claimants had requested for documents in March 2018 to show study details. Are you aware?
- I A : I can't remember
- Q : Documents at pp. 12 to 14 of COB4 we only got in June 2018. Are you aware?
- A : I am not aware

- Q : If pp. 12 to 14 of COB4 was created in January/February 2016. Why did it take so long for Company to file these documents? A
- A : I don't know
- Q : Put it to you these documents were created?
- A : I don't agree B
- Q : Pages 12 to 14 of COB4 is not original document?
- A : Yes
- Q : **This document at pp. 12 to 14 was created after they were terminated?** C
- A : **Yes**
- Q : **The source of document is not here?**
- A : **Correct**
- [Emphasis Added] D
- [66]** The court will not rely on documents at pp. 12 to 14 of COB4 as being details of the review report in the absence of the source document. These documents at pp. 12 to 14 were merely an extract of a comprehensive document and created after the termination of the claimants. E
- [67]** Further, the authenticity of this document at pp. 12 to 14 of COB4 is in doubt especially when COW1 had confirmed during cross examination that business loss was not a reason for reorganisation. Further there were no documents filed in this court to prove the company suffered a loss in business. The reason for redundancy in the Letter of Separation was not business loss. The company did not plead business loss as a reason for redundancy in their Statement of Reply. It is trite law that parties are bound by their pleadings (see *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629). F
- [68]** COW1 during cross examination could not confirm if this Global Transformation was implemented in Germany. G
- [69]** In the instant case the company has failed to prove to this court what were the new skillsets required in this Transformation Programme and what were the skillsets which the claimants lacked. The company has failed to show the court the detailed study had been undertaken to show what is required and contrasted against the skillsets of its existing employees. Basically the company had not given any reason and proof for the so-called reorganisation. H
- [70]** In the circumstances the court is constrained to make a finding that the exercise of the managerial powers was not *bona fide* and therefore was with collateral purpose aimed at depriving the claimants of their fundamental right to earn a livelihood and therefore an unfair labour practice and there was no redundancy. I

A Did The Company Warn And Consult The Claimants Of Their Redundancy?

[71] COW1 stated in evidence that it was just not possible to inform impacted employees, including the claimants, about the decision to retrench.

B [72] COW1 explained it was unfortunate that the company could not provide any notification and it was a considered decision for the notification to be as sudden as it was.

C [73] The claimants stated in evidence that on the 1 March 2016 they were notified to attend a meeting on the 2 March 2016. At the meeting the claimants were served their Letter of Separation wherein they were informed that due to a restructuring exercise, their roles in the company were made redundant effectively 2 April 2016. Further they were told to return all company properties in their possession immediately. They were then escorted to their car at the car park and were told to leave the company immediately.

D [74] In this regard COW1 was cross examined as follows:

E Q : When you called for a meeting on the 2 March 2016 with the Claimants you did not tell them they were being retrenched?

A : Yes

Q : The Claimants were not told before the meetings?

A : Correct

F Q : You only told them at the meeting they were terminated?

A : Yes

Q : Is this how the Company treat an employee with dignity and care?

A : I believe so

G Q : Retrenchment was done pursuant to Malaysian laws. Are you aware of the Code of Industrial Harmony which requires early warning?

A : I think yes

[75] COW3 had also confirmed that there was no warning prior to termination.

H [76] Clearly from the above cross examination of COW1 and COW3, the company knew they were required to give early notice to the claimants. However, the company chose not to give notice to the claimants. In fact in the instant case the claimants' services were terminated in haste, as can be seen from the Letter of Separation dated 2 March 2016 which stated: "Arising from this restructuring exercise, your role in the company has also been impacted and made redundant effective 2 April 2016. However, you are not required to report to work from 2 March 2016.

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[77] The said letters were handed to the claimants on the 2 March 2016 and almost immediately the claimants were sent off. Thus in my opinion, the action taken by the company is not reflective of a termination arising from a normal redundancy. A

[78] In *Syarikat Ppes Edar Sdn Bhd Kuching v. Cik Maudreen Agnes Yap Mui Lim Kuching* [1988] 2 ILR 636 (Award No. 312 of 1988), the learned Industrial Court Chairman had this to say: B

The claimant was dismissed in the same manner as a workman guilty of misconduct, and the court cannot accept the show of haste and the manner of the dismissal to be in accord with redundancy as the genuine reason for dismissal. The evidence points inescapably to a dismissal without just cause or excuse. C

Did The Company Provide Retraining To The Claimants?

[79] COW1 was cross examined on the issue of retraining as follows:

Q : All the 10 Claimants you did not send them for retraining for the future? D

A : No

Q : Why this 10 people were not sent for retraining?

A : They don't have the skillsets to meet future. E

[80] COW1 further stated it was difficult to retrain the claimants hence they were not sent for retraining.

[81] COW3 was cross examined on the issue of retraining as follows:

Q : Termination of the 6th Claimant Ang Yen Chen you are here to speak? F

A : Yes

Q : You did not send her for retraining?

A : Correct G

Q : You determine Ms Ang skills were not fit for the future?

A : Correct

Q : You determine that without giving her opportunity for retraining?

A : Correct because no time H

[82] The company could have trained the claimants to do other matters handled by others who were junior in service and or train the claimants with the newer skillsets. This the company failed to do.

Did The Company Follow LIFO? I

[83] COW1 agreed that the company did not evaluate on the basis of LIFO.

- A [84] In choosing to dismiss the claimants without following LIFO principles and not offering retraining the company had breached the provisions of the Code of Conduct for Industrial Harmony. All these requirements are stipulated in the Code of Conduct for Industrial Harmony which this court is called upon to take into consideration, pursuant to s. 30(5A) of the Industrial Relations Act 1967.
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What Evidence Led By The Company In Order To Prove The Claimants' Job Functions Have Become Redundant?

- C [85] It is trite law, the burden of proof to justify a dismissal lies on the company. All that the claimants need to prove is that they were dismissed from employment. Once this is done, the burden shifts to the company to establish that the dismissal was with just cause or excuse.

- D [86] COW2 who was Head of Department of Global Customer Unit Shell and Service Department Customer Shell testified that the 3rd, 9th and 10th claimant became redundant due to loss of business of the Shell account. Due to the loss of business volume, the said claimants' position became redundant due to less work.

- E [87] COW5 who was Head of SAP Department testified that the 7th claimant's position was made redundant due to the significant business volume reduction in the KONE account. As a result the company merged 2 different teams.

- F [88] COW6 who was leading the CCS Department testified that the 4th claimant's position was made redundant because his position was revoked by the customer effective 31 December 2015. In respect of the 8th claimant, his position was made redundant due to the loss of business volume from KONE account. As regards the 2nd claimant his position was made redundant because the Application Operation Service for KONE was transferred to India while EPCOS was moved to Germany.

- G [89] This reason put forward by COW2, COW5 and COW6 was never addressed in the letter of separation nor the town hall meetings. Both COW1 and COW3 had confirmed that loss of business was not a reason for reorganisation. In addition it was not pleaded in the company's Statement of Reply.

- H [90] Since the burden of proof in a retrenchment exercise lies with the company, it is vital that the company produce supporting documentation.

- I [91] The court is in agreement with claimant's submissions that the company has failed to introduce documentary evidence that the company has lost business volume to justify the claimants' positions being redundant. There was no document to show that the business volume reduced.

[92] COW3 the VP of Finance and Controlling gave evidence that due to the restructuring the 6th claimant position became redundant. A

[93] CLW6 testified that there was no redundancy because there was no reduction, diminution nor cessation of her duties and responsibilities. Her duties were handed to other members to perform.

[94] Here again the company failed to adduce evidence demonstrating its consideration for reorganisation. The company has not provided evidence to show that there was indeed a review undertaken on the future business of the company. B

[95] The company in the exercise has not produced evidence to prove what were the business requirements needed for the future, what were the skillsets needed for the future and what were the skillsets which the claimants did not have which resulted in them being selected for retrenchment. C

[96] In the absence of proof this court finds that the retrenchment exercise was not carried out *bona fide*. D

Conclusion

[97] Based on the totality of evidence adduced by parties as well as submissions made and also having regards to equity and good conscience as well as substantial merits of the case without regard to technicalities and legal form as stated in s. 30(5) Industrial Relations Act 1967, this court finds that the claimants' dismissal was without just cause or excuse. E

[98] Accordingly, the claimants' claims are hereby allowed. Hence I shall now examine the remedy. F

Remedy

[99] The claimants have sought the intervention of this court to order their reinstatement of employment with the company without loss of wages, allowance, service, seniority, privileges or benefits of any kind as this court deems fit and proper. G

[100] The Court of Appeal in *Koperasi Serbaguna Sanya Bhd (Sabah) v. Dr James Alfred (Sabah) & Anor* [2000] 3 CLJ 758 @ p. 766 held the following:

In Industrial law, the usual remedy for unjustified dismissal is an order of reinstatement. It is only in rare cases that reinstatement is refused. For example, as here, where the relationship between the parties had broken down so badly that it would not be conducive to industrial harmony to return the workman to his place of work. In such a case, the Industrial Court may award monetary compensation. Such an award is usually in two parts. First, there is the usual award for the arrears of wages, or backwages, as it is sometimes called. It is to compensate the workman for the period H
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- A that he has been unemployed because of the unjustified act of dismissal. Second, there is an award of compensation *in lieu* of reinstatement.
- B [101] Given the fact and reality of this case; and recognising that the employer-employee relationship between the company and the claimants has no doubt been irreversibly damaged through the events that leading to their termination of employment and thereafter, it is held by this court that reinstatement is not proper remedy in this case. Thus compensation *in lieu* of reinstatement and backwages shall be the alternative remedy ordered here. (See *Dr A. Dutt v. Assunta Hospital* [1981] 1 LNS 5).
- C [102] In *Hotel Jayapuri v. National Union of Hotel Bar & Restaurant Workers* [1980] 1 MLJ 109 the Federal Court held that if there was a legal basis for paying compensation, the question of amount is very much at the discretion of the court to fix under s. 30 of the Act.
- D [103] Further to this are the requirements of s. 30(5) of the Act to act in accordance to equity, good conscience and the substantial merits of the case. In addition s. 30(6A) and the second schedule of the Act are relevant in considering the appropriate compensation that should be paid to the claimants since they have found employment after dismissal.
- E [104] This court is constrained to act on the broad principle that a monetary award must clearly consist of a sum which is just and equitable (see *International Planned Parenthood Federation v. Tuan Syed Adam Al-Jafri* [1982] 2 ILR 116b (Award No. 183 of 1982)). It must be an award which is fair and reasonable seeking always a right balance between the interests and expectations of both parties pursuant to s. 30(5) of the Act. In this regard, the monetary award of the workman be a sum which is adequate (see *Penang Port Stevedoring Corporation Sdn Bhd v. Kesatuan Pekerja-Pekerja Pelabuhan Pulau Pinang* (Award No. 18 of 1970)) whilst from the point of view of the employer it must not be excessive. (see *Inti IABS Sdn Bhd (Inti College Sarawak) v. Frank Samuel Agong* [2001] 2 ILR 267 (Award No. 391 of 2001)).
- F
- G [105] It is the practice of the Industrial Court to base compensation *in lieu* of reinstatement on one month's wages for each completed year of service.
- H [106] This court is mindful of the second schedule to the Act which provides that back pay may be ordered from the date of dismissal based on the last drawn salary but is subject to a maximum of 24 months.
- I [107] As the principle of equity and good conscience have to be applied in the exercise of discretion in granting financial relief, consideration ought to be had to the possibility of rescaling the monetary award ordered for backwages. It is the view of this court that the factor to be taken into consideration in rescaling compensation is the fact of post dismissal gainful employment in this case.

[108] The Industrial Court in *Pelangi Enterprises Sdn Bhd v. Oh Swee Choo* [2001] 1 ILR 492 (Award No. 115 of 2001), the learned Chairman stated:-

This Court is required to make an adjustment where the workman has found other employment. In making the adjustment this Court has to be fair to both parties.

[109] The Federal Court in *Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor* [2001] 3 CLJ 541 held that when taking into account that the workman has been gainfully employed elsewhere after his dismissal it “does not necessarily mean that the Industrial Court has to conduct a mathematical exercise in deduction.”

[110] Dr Ashgar Ali Ali Mohamed and Dr Farheen Baig Sardar Baig in their book “Procedure for Unfair Dismissal Claims in Malaysia” at p. 55 stated:

The common law principle that a wrongfully dismissed workman is bound to make reasonable exertion and show diligence in endeavouring to procure alternative employment, equally applies in the sphere of industrial jurisprudence in Malaysia. Paragraph 3 of the Second Schedule to the IRA provides: “Where there is post dismissal earnings, a percentage of such earnings, to be decided by the Court, shall be deducted from the backwages given.”

Thus, the failure to accept suitable alternate employment **or take reasonable steps to procure the same would result in a deduction from the total amount recoverable** calculated on a sum representing the amount the workman might have earned during the period.

[Emphasis added]

[111] It is noted that by virtue of para. 3 of the Second Schedule, the court is now obliged by statute to make the necessary deductions by percentage basis from the backwages where there is evidence of post dismissal income.

[112] This court is of the view that when considering compensation, it is necessary to consider what steps a person has taken to mitigate his/her loss. This means that a person must provide evidence that they have taken reasonable steps to minimise the impact of the dismissal. What is required is that the claimant take reasonable steps.

[113] It is indeed rare if workmen do not mitigate their damages. Most workmen want to work. It would be normal to do everything possible for a dismissed workman to try to get life back on track quickly.

[114] The duty to mitigate loss is the justice system’s way of making sure dismissed workmen play their part by actively looking for work especially when this court is required to act in accordance to equity, good conscience and the substantial merits of the case. This spirit of fairness must be applied to both the employer and the employee.

- A [115] In *Syarikat Eastern Smelting Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Perusahaan Pelaburan Logam Sa Malaya* (Award No. 16 of 1968), the Industrial Court held that an employee who seeks reinstatement is under a duty to make all reasonable efforts to search for and obtain gainful employment during the interim period, and that upon reinstatement, there should be deducted from his backwages his actual earnings while in such employment. If the employee has not made such a search for employment or has unreasonably refused employment offered, then it will be assumed that other reasonable employment would have yielded earnings equal to the earning of the employee in the job from which he was dismissed.
- B
- C [116] In *Transport Workers' Union v. Selangor Omnibus Co Ltd* [1981] 1 ILR 179 (Award No. 62 of 1981); Harun J held "the sum awarded, however, may be reduced on the ground that the dismissed employee is expected to mitigate his loss."
- D [117] In *Nestle Food Storage (Sabah) Sdn Bhd v. Terrence Tan Nyang Yin* [2002] 1 ILR 280 (Award No. 1017 of 2001), the Learned Chairman of the Industrial Court Mr Lim Heng Seng, noted that the duty of mitigation of loss has the "**basis in equity, good conscience and certainly in justice and common sense.**"
- E [Emphasis added]
- [118] The question this court asks itself is : Is it just and equitable, even logical, that a claimant who diligently sought alternative employment is awarded a sum of backwages reduced by the amount he had earned in the interim while the less diligent workman who refuses to work is ordered to be paid his/her backwages in full?
- F [119] Further to this, this court is of the view that the court would be punishing employees who have found employment post dismissal by scaling down monetary compensation (by virtue of para. 3 of the Second Schedule) while the employees who resist looking for employment get off with no deductions made. Surely this was not the spirit and intention of para. 3 of the Second Schedule.
- G [120] In *Nestle Food Storage (Sabah) Sdn Bhd v. Terrence Tan Nyang Yin* [2002] 1 ILR 280 (Award No. 1017 of 2001), the Industrial Court held:
- H It cannot be just and equitable; it certainly offends good conscience, common sense and simple logic, that the indolent workman or the different employee who can afford not to work but prefer to remain unemployed or does not exert himself sufficiently to get employment elsewhere is awarded backwages in full while the conscientious Claimant who had diligently sought alternative employment is not awarded backwages at all or has the award reduced by the earnings he had received from his gainful employment elsewhere.
- I

[121] Thus, this court finds it necessary for the claimants to show to the court that the claimants took reasonable steps to secure alternative employment by making applications for employment and or attending interviews.

A

[122] In *DTS Trading v. Wong Weng Kit* [2008] 1 ILR 548 (Award No. 222 of 2008) the Learned Industrial Court Chairman held:

B

In a society such as ours where a person would invariably have to work in order to sustain day to day living, the Court is of the view that even if no evidence is adduced as regards post dismissal earnings, the Court is entitled nevertheless to make a deduction for post dismissal earnings. "As such, a Claimant who has not been gainfully employed since his dismissal, or who has been gainfully employed but on a woefully small salary, should clearly say so to the Court. To remain silent is to risk the Court making a deduction deemed reasonable by the Court."

C

[123] In *Lee Seong Fatt Iwn. Joint Management Body of Pearl Point Condominium* [2016] 2 LNS 0704 (Award No. 704 tahun 2016), the Industrial Court found that there was no evidence that the claimant had obtained employment elsewhere or whether he remained unemployed from the date of dismissal until the date of hearing. Nonetheless, the court made a deduction of 30% on the backwages for post-dismissal earnings.

D

E

[124] Similarly, in the case of *Mohd Irwan Arifin v. Aluminium Company of Malaysia Berhad* [2017] 1 ILR 397 (Award No. 168 of 2017), although the Industrial Court found that there was "no or very little evidence being adduced on post dismissal earnings by the claimant," the court was prepared to infer that the claimant was gainfully employed or earning some form of income during the post-dismissal period.

F

[125] In *Crest Ultrasonics (M) Sdn Bhd v. Liew Siew Kim* [2003] 1 ILR 564 (Award No. 1033 of 2002), the Industrial Court deducted 35% of the back wages which the claimant was entitled because the claimant did not make any effort to find any alternative employment despite her qualifications.

G

[126] Dr Ashgar Ali Ali Mohamed in his book "Dismissal from Employment and the Remedies" at p. 103 stated:

if the employee failed to make reasonable efforts to find other employment pending settlement of the grievance, the Court may reduce the size of the award. For example, in England, in ascertaining the losses of an unfairly dismissed employee, the Tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applied to damages recoverable under the common law of England and Wales, or Scotland, as the case may be.

H

I

The rule on mitigation of damages by seeking alternative employment applies equally in Malaysia.

[Emphasis Added]

- A Therefore, failure to mitigate damage by seeking alternative employment implies that damages, which might otherwise be recoverable, will be reduced. In *Gardiner Hill v. Roland Berger Technics Ltd* [1982] 1 ILR 498, Brown Wilkinson J stated:
- B In fixing the amount to be deducted for failure to mitigate, it is necessary for the Tribunal to identify what steps should have been taken; the date on which that step would have produced an alternative income and, thereafter to reduce the amount of compensation by the amount of the alternative income which would have been earned.
- C **[127]** Even in the United Kingdom in *Wilding v. British Telecommunications Plc* [2002] EWCA/ 2002 1 ILR 524; the Court of Appeal England and Wales upheld a decision by an Employment Tribunal that, by refusing an offer of part time employment, an employee who had been unfairly dismissed had thereby failed to mitigate his loss.
- D **[128]** Having considered all the above, the court hereby orders as follows:
1st Claimant Nurul Najmi Binti Radzuan
- E **[129]** The 1st claimant commenced employment with the company since 2 July 2012. Her last position with the company was Livelink Analyst. The 1st claimant was terminated by the company on 2 April 2016.
- [130]** Her last drawn basic salary was RM4,083 and fixed allowances RM650 per month.
- F **[131]** The 1st claimant claimed she remained unemployed after her termination. There is no evidence before this court to reflect that the claimant had even made any attempts to secure any form of employment.
- G **[132]** Thus, I find it was necessary for the claimant to show to the court that she took reasonable steps to secure alternative employment by making applications for employment and/or attending interviews. This the claimant failed to do.
- H **[133]** In this court's opinion the failure to accept suitable alternative employment or take reasonable steps to procure the same would result in a deduction from the total amount of backwages recoverable by the claimant.
- [134]** Therefore, the amount of backwages and compensation *in lieu* of reinstatement are as follows:
- I a) Backwages
- | | | |
|----------------------------------|---|--------------|
| RM4,733 x 24 months | = | RM113,592.00 |
| Less 30% post dismissal earnings | = | RM34,077.60 |

TOTAL	= RM79,514.40	A
b) Compensation <i>in lieu</i> of reinstatement		
RM4,733 x 3 months	= + RM 14,199	
TOTAL	= RM93,713.40	B
Less severance package	= RM 31,170.63	
TOTAL	= RM62,542.77	

[135] This court now orders that the company shall pay the total amount of RM62,542.77 to the 1st claimant (Nurul Najmi Binti Radzuan) less statutory deductions, if any.

2nd Claimant Ramas A/L Kindnasamy

[136] The 2nd claimant commenced employment with the company since 1 July 2008. However in his letter of employment dated 18 June 2008, the company took into account his years of service with Shell which commenced on 5 August 2007. The claimant was informed that his service with the company was deemed continuous. His last position with the company was IT Operations Manager CSS. The 2nd claimant was terminated by the company on 2 April 2016.

[137] His last drawn basic salary was RM7,692, fixed allowances RM1,465 and supplementary pay RM1,303.02 per month.

[138] The 2nd claimant claimed he remained unemployed until June 2018. Since June 2018 the 2nd claimant started working as a Grab driver. However the 2nd claimant did not provide any proof of earnings in the form of documentation from LHDN. The claimant failed to show that he took reasonable steps to secure alternative employment immediately after dismissal. The failure to take reasonable steps would result in a deduction from the total amount of backwages recoverable by the 2nd claimant.

[139] Therefore, the amount of backwages and compensation *in lieu* of reinstatement are as follows:

a) Backwages		
RM10,460.02 x 24 months	= RM251,040.48	
Less 30% post dismissal earnings	= RM75,312.14	H
TOTAL	= RM175,728.34	
b) Compensation <i>in lieu</i> of reinstatement		
RM10,460.02 x 8 months	= +RM 83,680.16	
TOTAL	= RM259,408.50	I
Less severance package	= RM 120,778.46	
TOTAL	= RM138,630.04	

A [140] This court now orders that the company shall pay the total amount of RM138,630.04 to the claimant, (Ramas A/L Kindnasamy) less statutory deductions, if any.

3rd Claimant Ravinder Singh A/L Mohinder Singh

B [141] The 3rd claimant commenced employment with the company since 1 July 2008. However the company took into account his years of service with Shell which commenced on 6 May 2006. The company deemed his service continuous. His last position with the company was Database Administrator. The 3rd claimant was terminated by the company on 2 April 2016.

C [142] His last drawn basic salary was RM8,780, fixed allowances RM1,615 and supplementary pay RM1,487.32 per month.

D [143] The 3rd claimant claimed he started working from end of June 2016. His e-filing LHDN for 'Tahun Taksiran 2017' is found at p. 7 of CLB2. In July 2018 the 3rd claimant joined Osiris Support Services Sdn Bhd as Senior Oracle Database Administrator with a salary of RM12,500 per month. A copy of his letter of employment is found at pp. 8 to 12 of CLB2.

E [144] Therefore, the amount of backwages and compensation *in lieu* of reinstatement are as follows:

a) Backwages

RM11,882.32 x 24 months = RM285,175.68

F Less 50% post dismissal earnings = RM142,587.84

TOTAL = RM142,587.84

b) Compensation *in lieu* of reinstatement

RM11,882.32 x 9 months = +RM 106,940.88

G TOTAL = RM249,528.72

Less severance package = RM 150,021.76

TOTAL = RM99,506.96

H [145] This court now orders that the company shall pay the total amount of RM99,506.96 to the claimant, (Ravinder Singh A/L Mohinder Singh) less statutory deductions, if any.

4th Claimant Khairil Arief Bin Muhammad

I [146] The 4th claimant commenced employment with the company since 1 July 2008. However the company took into account his years of service with Shell which commenced on 7 January 2007. The company deemed his service continuous. His last position with the company was Solution Architect. The 4th claimant was terminated by the company on 2 April 2016.

[147] His last drawn basic salary was RM6,637, fixed allowances RM1,465 and supplementary pay RM1,124.30 per month.

A

[148] The 4th claimant was not cross examined on post dismissal earnings by Solicitors for the company. However this court is of the view that it was necessary for the claimant to show to the court that he took reasonable steps to secure alternative employment. The failure to take reasonable steps would result in a deduction from the total amount of backwages recoverable by the claimant.

B

[149] Therefore, the amount of backwages and compensation *in lieu* of reinstatement are as follows:

C

a) Backwages

RM9,226.30 x 24 months = RM221,431.20

Less 30% post dismissal earnings = RM66,429.36

TOTAL = RM155,001.84

D

b) Compensation *in lieu* of reinstatement

RM9,226.30 x 9 months = +RM 83,036.70

TOTAL = RM238,038.54

E

Less severance package = RM 102,740.18

TOTAL = RM135,298.36

[150] This court now orders that the company shall pay the total amount of RM135,298.36 to the claimant, (Khairil Arief Bin Muhammad) less statutory deductions, if any.

F

5th Claimant Ahmad Faros Bin Othman

[151] The 5th claimant commenced employment with the company since 1 July 2008. His last position with the company was Manager Business Operations DPS. The 5th claimant was terminated by the company on 2 April 2016.

G

[152] The 5th claimant was initially employed by Shell Information Technology International Sdn Bhd since 12 April 2001. *Vide* Letter of Employment dated 18 June 2008 the company informed the 5th claimant that his years of service with Shell will be taken into account and that his service with the company be deemed continuous.

H

[153] His last drawn basic salary was RM9,164, fixed allowances RM1,465 and supplementary pay RM1,552.37 per month.

[154] The 5th claimant stated in evidence that he commenced employment in 2017. Copies of his EA Forms for 2017 can be found at pp. 14 and 15 of CLB2. He further agreed that he was earning RM13,000 per month since January 2018.

I

A **[155]** Therefore, the amount of backwages and compensation *in lieu* of reinstatement are as follows:

a) Backwages

RM12,181.37 x 24 months = RM292,352.88

B Less 50% post dismissal earnings = RM146,176.44

TOTAL = RM146,176.44

b) Compensation *in lieu* of reinstatement

C RM12,181.37 x 15 months = +RM 182,720.55

TOTAL = RM328,896.99

Less severance package = RM 218,119.97

TOTAL = RM110,777.02

D **[156]** This court now orders that the company shall pay the total amount of RM110,777.02 to the claimant, (Ahmad Faros Bin Othman) less statutory deductions, if any.

6th Claimant Ang Yen Chen

E **[157]** The 6th claimant commenced employment with the company since 22 August 2012. Her last position with the company was Health, Safety & Environment and Facilities Management Manager. The 6th claimant was terminated by the company on 2 April 2016.

F **[158]** Her last drawn basic salary was RM8,502 and Transport Allowance RM500 per month.

G **[159]** The 6th claimant was not cross examined on post dismissal earnings by Solicitors for the company. However this court is of the view that it was necessary for the claimant to show to the court that she took reasonable steps to secure alternative employment. The failure to take reasonable steps would result in a deduction from the total amount of backwages recoverable by the claimant. Her 'tahun taksiran' 2017 returns confirmed she was employed. The claimant commenced employment with Teledirect Pte Ltd in Singapore on the 2 July 2018.

H **[160]** Therefore, the amount of backwages and compensation *in lieu* of reinstatement are as follows:

a) Backwages

RM9,002 x 24 months = RM216,048

I Less 30% post dismissal earnings = RM64,814.40

TOTAL = RM151,233.60

b) Compensation <i>in lieu</i> of reinstatement		A
RM9,002 x 3 months	= +RM 27,006	
TOTAL	= RM178,239.60	
Less severance package	= RM 63,124.44	
TOTAL	= RM115,115.16	B

[161] This court now orders that the company shall pay the total amount of RM115,115.16 to the claimant, (Ang Yen Chen) less statutory deductions, if any.

7th Claimant Ragu A/L Munisamy

[162] The 7th claimant commenced employment with the company since 20 December 2009. His last position with the company was Senior SAP Basic Engineer. The 7th claimant was terminated by the company on 2 April 2016.

[163] His last drawn basic salary was RM7,800 and allowances RM1,050 per month.

[164] The 7th claimant was not cross examined on post dismissal earnings by Solicitors for the company. This court takes the view that it was necessary for the claimant to find alternative employment. The failure to take reasonable steps would result in a deduction from the total amount of backwages recoverable by the claimant. The 7th claimant has submitted his BE Year of Assessment Form for 2017 at pp. 28 to 29 of CLB2.

[165] The claimant commenced his own consultancy services since 1 October 2017. He remained unemployed for 17 months. Subsequently there is evidence that he was in gainful employment.

[166] Therefore, the amount of backwages and compensation *in lieu* of reinstatement are as follows:

a) Backwages		G
RM8,850 x 24 months	= RM212,400.	
Less 25% post dismissal earnings	= RM53,100.	
TOTAL	= RM159,300.	H
b) Compensation <i>in lieu</i> of reinstatement		
RM8,850 x 6 months	= +RM 53,100.	
TOTAL	= RM212,400.	
Less severance package	= RM 89,265.75	I
TOTAL	= RM123,134.25	

A [167] This court now orders that the company shall pay the total amount of RM123,134.25 to the claimant, (Ragu A/L Munisamy) less statutory deductions, if any.

8th Claimant Poh Chek Kiang

B [168] The 8th claimant commenced employment with the company since 10 May 2010. His last position with the company was Head Service Operations Center Kone. The 8th claimant was terminated by the company on 2 April 2016.

C [169] His last drawn basic salary was RM31,509 and allowances RM3,000 per month.

D [170] The 8th claimant has submitted his BE Year of Assessment Form for 2017 at p. 33 of CLB2. The claimant joined Infineon on the 15 November 2016 as Senior Manager earning an average of RM9,066.67. On the 1 August 2018 claimant joined Carsem (M) Sdn Bhd with a monthly salary of RM22,400 per month.

[171] Therefore, the amount of backwages and compensation *in lieu* of reinstatement are as follows:

	a) Backwages	
E	RM34,509 x 24 months	= RM828,216.
	Less 50% post dismissal earnings	= RM414,108.
	TOTAL	= RM414,108
F	b) Compensation <i>in lieu</i> of reinstatement	
	RM34,509 x 5 months	= +RM172,545.
	TOTAL	= RM586,653.
	Less severance package	= RM342,066.88
G	TOTAL	= RM244,586.12

[172] This court now orders that the company shall pay the total amount of RM244,586.12 to the claimant, (Poh Chek Kiang) less statutory deductions, if any.

H 9th Claimant Yusniza Binti Yahaya

[173] The 9th claimant commenced employment with the company since 4 November 2009. Her last position with the company was Process Analyst II. The claimant was terminated by the company on 2 April 2016.

I [174] Her last drawn basic salary was RM5,421 and allowances RM650 per month.

[175] The claimant claimed she remained unemployed until today. However the claimant failed to show to the court that she took reasonable steps to secure alternative employment. The failure to take reasonable steps would result in a deduction from the total amount of backwages recoverable by the claimant. A

[176] Therefore, the amount of backwages and compensation *in lieu* of reinstatement are as follows: B

a) Backwages

RM6,071 x 24 months	=	RM145,704.	
Less 30% post dismissal earnings	=	RM43,711.20	C
TOTAL	=	RM101,992.80	

b) Compensation *in lieu* of reinstatement

RM6,071 x 6 months	=	+RM 36,426.	
TOTAL	=	RM138,418.80	D
Less severance package	=	RM 63,017.27	
TOTAL	=	RM75,401.53	

[177] This court now orders that the company shall pay the total amount of RM75,401.53 to the claimant, (Yusniza Binti Yahaya) less statutory deductions, if any. E

10th Claimant Narendran A/L Krishnasamy

[178] The 10th claimant commenced employment with the company since 1 May 2009. His last position with the company was Discovery Recovery Expert. The claimant was terminated by the company on 2 April 2016. F

[179] His last drawn basic salary was RM6,855, allowances RM1,465.23 and supplementary pay RM1,161.23 per month. G

[180] The claimant enclosed his 'Tahun Taksiran' 2017 LHDN returns at p. 48 of CLB2. The claimant provided consultancy business since 23 August 2017. He remained unemployed for 15 months. Claimant failed to show that he took reasonable steps to seek alternative employment at the soonest. The failure to take reasonable steps early would result in a deduction from the total amount of backwages recoverable by the claimant. H

[181] Therefore, the amount of backwages and compensation *in lieu* of reinstatement are as follows: I

a) Backwages

RM9,481.23 x 24 months	=	RM227,549.52	
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A Less 25% post dismissal earnings = RM56,887.38
 TOTAL = RM170,662.14

b) Compensation *in lieu* of reinstatement

 RM9,481.23 x 6 months = +RM 56,887.38
B TOTAL = RM227,549.52
 Less severance package = RM 87,240.06
 TOTAL = RM140,309.46

C **[182]** This court now orders that the company shall pay the total amount of RM140,309.46 to the claimant, (Narendran A/L Krishnasamy) less statutory deductions, if any.

Final Order

D **[183]** This court now orders that the company shall pay the total amount due above to the claimants, through the claimants' Solicitors Messrs Jayadeep Hari & Jamil within 45 days from the date of this Award.

E _____

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