MELIPOLY ENTERPRISE SDN BHD

v.

ONG HONG YEOK & ANOR

Court of Appeal, Putrajaya
Hanipah Farikullah, Che Mohd Ruzima Ghazali, See Mee Chun JJCA
[Civil Appeal No: W-01(A)-736-12-2021]
18 March 2024

Administrative Law: *Judicial review — Award of Industrial Court — Dismissal of 1st respondent by appellant found to be unjust by Industrial Court — Whether 1st respondent's termination without just cause and excuse — Jurisdiction of Industrial Court to inquire into reference and award any damages or relief when 1st respondent had testified that he did not wish to be reinstated*

Labour Law: *Industrial Court — Award — Judicial review — Dismissal of 1st respondent by appellant found to be unjust by Industrial Court — Whether 1st respondent's termination without just cause and excuse — Jurisdiction of Industrial Court to inquire into reference and award any damages or relief when 1st respondent had testified that he did not wish to be reinstated*

The Industrial Court ("IC") had found the dismissal of the 1st respondent, Marketing Manager of the appellant company, to be without just cause and excuse and awarded a sum of RM47,000.00 which was derived from compensation in lieu of reinstatement, back wages and less a deduction of 20%. The appellant then sought to challenge the IC's award by way of judicial review, but this was dismissed by the High Court. Hence, the appellant's present appeal in which the following issues were raised: (i) whether the 1st respondent's termination was without just cause and excuse; and (ii) the jurisdiction of the IC to inquire into the reference and award any damages or relief when the 1st respondent had testified that he did not wish to be reinstated.

Held (dismissing the appeal with costs):

(1) The reasons given in the letter of termination were "current economic recession" and "prolonged period of poor sales revenue". It was trite that the appellant could only rely on the reasons as stated in the letter of termination and no other. With regard to the stated grounds as given in the letter of termination, the statement of comprehensive income was evidence that the appellant was suffering financial losses occasioned by the current economic recession and prolonged period of poor sales revenue. However, the appellant had failed to prove redundancy. Essentially, the retrenchment must be *bona fide* for which this Court confined itself to the four corners of the letter of termination where the grounds were stated. The management prerogative of reorganisation was recognised, but subject always to it being exercised *bona fide*. The evidence was

that the appellant's Managing Director, one Almond Siah was transferred back to Malaysia to take over the 1st respondent's function as Marketing Manager for a few outlets. This would mean that the 1st respondent's function and work as Marketing Manager was reduced but never eliminated. Hence, the termination was without just cause and excuse, and the retrenchment was not *bona fide*. (paras 30-31, 35-36, 39-42)

(2) Even if the 1st respondent stated that he did not wish to be "put back into employment", the IC nevertheless continued to have jurisdiction as the IC was seized with such jurisdiction pursuant to the Ministerial reference under s 20(3) of the Industrial Relations Act 1967. It was not disputed that the 1st respondent, along with a few others, had set up a company known as Bee & Joy Enterprise ("Bee & Joy"), which was registered on 14 May 2019. It was submitted that even if the 1st respondent wanted reinstatement, this was not possible as he had to manage the operations of Bee & Joy. However, the facts showed that the 1st respondent had withdrawn from Bee & Joy as at 24 July 2019. Under the circumstances, since the function and scope of Marketing Manager was reduced but never eliminated and the 1st respondent had withdrawn from Bee & Joy, it could not be said that the legal basis for such performance, namely, the 1st respondent to be reinstated, did not exist. (paras 54-55, 58-59)

Case(s) referred to:

Airspace Management Services Sdn Bhd v. Col (B) Harbans Singh Chingar Singh [2000] 1 MLRA 664 (refd)

Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 1 MLRA 415 (refd)

Holiday Inn Kuching v. Elizabeth Lee Chai Siok [1991] 2 MELR 246; *[1991] 3 MLRH 455 (overd)*

Maritime Intelligence Sdn Bhd v. Tan Ah Gek [2022] 1 MELR 200; *[2022] 1 MLRA 56 (refd)*

Ng Chang Seng v. Technip Geoproduction (M) Sdn Bhd [2020] 3 MELR 311; *[2021] 1 MLRA 261 (refd)*

Sanbos (M) S/B v. Gan Soon Huat [2021] 3 MELR 375; *[2021] 5 MLRA 133 (folld)*

Stephen Bong v. FCB (M) Sdn Bhd & Anor [1999] 5 MLRH 107 (refd)

The Borneo Post Sdn Bhd v. Margaret Wong [1995] 2 MELR 533; *[1995] 4 MLRH 399 (refd)*

Unilever (M) Holdings Sdn Bhd v. So Lai @ Soo Boon Lai & Anor [2015] 2 MELR 511; *[2015] 3 MLRA 507 (distd)*

William Jacks & Co (M) Sdn Bhd v. S Balasingam [1996] 1 MELR 312; *[1996] 2 MLRA 678 (refd)*

Woo Vain Chan v. Malayawata Steel Berhad [2016] 3 MELR 531; *[2016] 4 MLRA 79 (refd)*

Legislation referred to:

Industrial Relations Act 1967, s 20(1), (3)

Counsel:

For the appellant: Tay Shieh Chin (Eugene Khoo Yean Shern with her); M/s Yeoh Shim Siow & Lay Kuan

For the respondents: Koong Yu Qian (Jess); M/s Aziz & Co

JUDGMENT

See Mee Chun JCA:

Introduction

[1] On 1 June 2020, the Industrial Court (IC) found the 1st respondent's dismissal to be without just cause and excuse and awarded a sum of RM47,000.00 which was derived from compensation in lieu of reinstatement, back wages and less a deduction of 20%.

[2] The appellant then sought to challenge the award of the IC by way of judicial review. This was dismissed by the High Court (HC) on 17 November 2021.

[3] The appeal to this Court was also dismissed for which we now give our reasons.

Parties And Background Facts

[4] The appellant is a company with the business activity of selling and distributing honey products. The 1st respondent commenced employment on 26 February 2016 with the appellant as Marketing Manager with a probationary period of 3 months. By letter of appointment dated 1 April 2016, he was appointed Marketing Manager from that date.

[5] The monthly salary of the 1st respondent then was RM5,000.00 and increased to RM6,000.00 from March 2018. Due to the appellant's financial situation, it was subsequently agreed that the 1st respondent's salary would be reduced by RM1,000.00 per month until the situation improved.

[6] The appellant's financial position did not improve. The 1st respondent was then issued a letter of termination dated 6 May 2019, "that we have no choice but to terminate your employment as per terms in your contract. This letter shall serve as a formal notice of termination pursuant to cl 4 of your employment contract".

[7] The 1st respondent was dissatisfied with the termination and sought advice from the Department of Industrial Relations, Bentong Branch. The reconciliation sessions did not materialise. The 1st respondent's representation was then referred to the IC.

At The HC

[8] As alluded to earlier, the IC found the 1st respondent to have been dismissed without just cause and excuse.

[9] The HC Judge (HCJ) dismissed the judicial review application of the appellant. The grounds of judgment (GOJ) can be found in encl 10/4-22.

[10] In para 22, the HCJ found there were only 2 issues to be decided:

> "i. what was the actual reason for the termination of the 1st respondent's employment and has it been made out by the Applicant; and
>
> ii. whether the 1st respondent's termination from his employment was done with or without just cause or excuse."

[11] The HCJ noted that the letter of termination stated that the reason for termination was due to the prevailing economic recession and prolonged period of poor sales revenue (para 23).

[12] The HCJ found that the appellant had relied on other grounds of termination not stated in the letter of termination. These other grounds were unsatisfactory performance, conflict of interest where there was a failure to disclose a personal interest in a company known as Bee & Joy Enterprise and sexual harassment. The HCJ agreed with the IC that the Court is only to inquire on the reasons advanced by the appellant for the dismissal and not go into another reason not relied upon or to find one for it. The cases of *Goon Kwee Phoy v. J & P Coats (M) Bhd* [1981] 1 MLRA 415, *Airspace Management Services Sdn Bhd v. Col (B) Harbans Singh Chingar Singh* [2000] 1 MLRA 664 and *Maritime Intelligence Sdn Bhd v. Tan Ah Gek* [2022] 1 MELR 200; [2022] 1 MLRA 56, were cited to support this proposition. Refer to paras 24 to 27, GOJ. The HC concluded in paras 28 and 29 that the IC was right in not inquiring into reasons subsequently put up to justify the dismissal.

[13] On the issue of without just cause and excuse, the HCJ dealt firstly with whether the IC had jurisdiction to hear the 1st respondent's claim considering the allegation that the 1st respondent was not claiming for reinstatement. Relying on *Sanbos (M) S/B v. Gan Soon Huat* [2021] 3 MELR 375; [2021] 5 MLRA 133, the HCJ stated the following in paras 34 and 35:

> "34. Based on the above, it is clear that the Industrial Court was right in ruling that it has jurisdiction to hear the 1st respondent's case notwithstanding that the 1st respondent no longer wanted reinstatement by the time of the hearing as he was gainfully employed in another company.
>
> 35. It is my view that the Industrial Court was seized with jurisdiction to hear the dispute between the Applicant and the 1st respondent once the Minister had duly made a reference under s 20(3) of the IRA."

[14] On redundancy, it was said in para 42 GOJ that even if financial losses had been proved, the appellant had failed to prove there was redundancy in the company. It was further stated in para 43 GOJ that the appellant's reorganising exercise was not *bona fide* as the appellant had on numerous occasions stated the decision to terminate was due to unsatisfactory and/or poor performance based on the company's sales reports. There was no evidence that the 1st respondent had been informed there was to be a retrenchment exercise and the HCJ found the 1st respondent was the only employee who was dismissed under the retrenchment (para 44 GOJ).

Submissions Of The Appellant

[15] It was submitted by the appellant that the HCJ decision was founded on 2 main issues namely:

> "17. The appellant's present appeal against the learned High Court Judge's decision which affirmed the Industrial Court award is founded on two main issues:
>
> (a) Whether there was a genuine redundancy leading to the retrenchment of the Respondent?
>
> (b) Whether the Industrial Court has the jurisdiction to inquire into the reference or make any award of damages or other form of relief when the Respondent had testified that he did not wish to be reinstated to his former job/claim for unlawful dismissal?"

[16] The appellant submitted that the HCJ had failed to appreciate that sufficient evidence had been adduced that it faced financial hardship, which the 1st respondent was aware of. There was also no appreciation that under the restructuring exercise the appellant had consolidated the 1st respondent's job functions to be taken over by the appellant's CEO.

[17] It was further submitted that "redundancy situation may arise where the business requires fewer employees of whatever kind", *Stephen Bong v. FCB (M) Sdn Bhd & Anor* [1999] 5 MLRH 107.

[18] Even though the misconduct committed by the 1st respondent was not mentioned in the letter of termination, the selection of employees for retrenchment were done based on selected criteria, namely misconduct, poor performance and salary consideration due to poor financial position.

[19] As recognised in *William Jacks & Co (M) Sdn Bhd v. S Balasingam* [1996] 1 MELR 312; [1996] 2 MLRA 678, it is the right and management prerogative of the company to reorganise the business as long as the decision is exercised *bona fide*.

[20] The other main point of contention was the jurisdiction of the IC to inquire into the reference or award any damages when the 1st respondent had testified he did not wish to be reinstated. Reference was made to *Holiday Inn Kuching*

v. Elizabeth Lee Chai Siok [1991] 2 MELR 246; [1991] 3 MLRH 455 [HC] and *Unilever (M) Holdings Sdn Bhd v. So Lai @ Soo Boon Lai & Anor* [2015] 2 MELR 511; [2015] 3 MLRA 507.

Submissions Of The 1st Respondent

[21] The 1st respondent took the position that the appellant could not submit on grounds of dismissal not stated in the letter of termination. It would also not be submitting on those grounds.

[22] It was contended there had been no actual redundancy and no proof of financial losses. Even if the appellant had suffered losses during the relevant period, there was no actual and genuine redundancy. Reference was made to *William Jacks*, *Woo Vain Chan v. Malayawata Steel Berhad* [2016] 3 MELR 531; [2016] 4 MLRA 79 and *Ng Chang Seng v. Technip Geoproduction (M) Sdn Bhd* [2020] 3 MELR 311; [2021] 1 MLRA 261.

[23] On reinstatement and jurisdiction, the 1st respondent submitted that *Sanbos* applied and that *Holiday Inn* is no longer good law. *Unilever* was wrongly relied on in the facts of the instant appeal, as the employee there had exceeded the retirement age at the time the award was handed down.

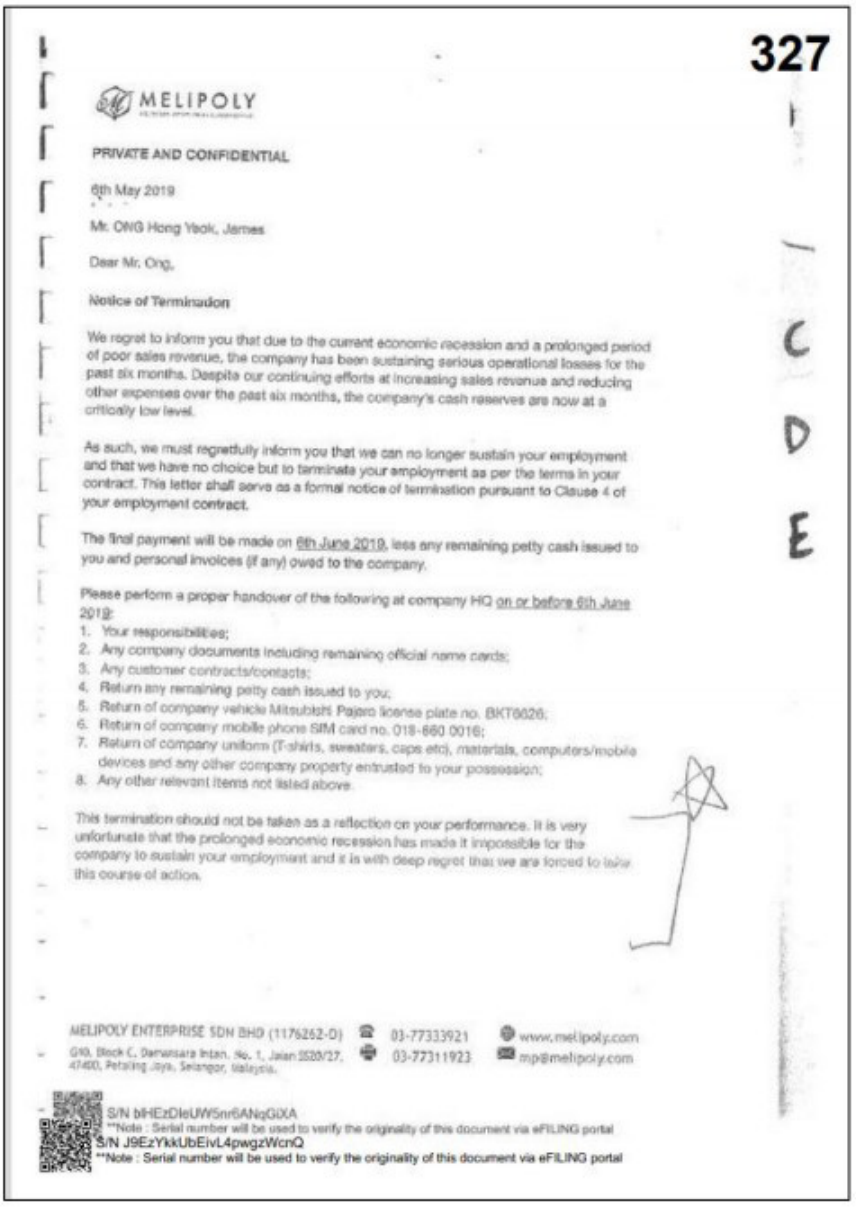
Our Decision

[24] The issues raised in this appeal relate to whether the termination was without just cause and excuse; and the jurisdiction of the IC to inquire into the reference and award any damages or relief when the 1st respondent had testified he did not wish to be reinstated.

Termination

[25] By letter of appointment dated 1 April 2016 (encl 5/138-141), the 1st respondent was appointed Marketing Manager as from that date. By then, he had served his probation period of 3 months.

[26] The 1st respondent was terminated by the letter of termination dated 6 May 2019 (encl 6/132-133) as below:



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MELIPOLY

PRIVATE AND CONFIDENTIAL

6th May 2019

Mr. ONG Hong Yeok, James

Dear Mr. Ong,

Notice of Termination

We regret to inform you that due to the current economic recession and a prolonged period of poor sales revenue, the company has been sustaining serious operational losses for the past six months. Despite our continuing efforts at increasing sales revenue and reducing other expenses over the past six months, the company's cash reserves are now at a critically low level.

As such, we must regretfully inform you that we can no longer sustain your employment and that we have no choice but to terminate your employment as per the terms in your contract. This letter shall serve as a formal notice of termination pursuant to Clause 4 of your employment contract.

The final payment will be made on 8th June 2019, less any remaining petty cash issued to you and personal invoices (if any) owed to the company.

Please perform a proper handover of the following at company HQ on or before 6th June 2019:

1. Your responsibilities;
2. Any company documents including remaining official name cards;
3. Any customer contracts/contacts;
4. Return any remaining petty cash issued to you;
5. Return of company vehicle Mitsubishi Pajero license plate no. BKT6626;
6. Return of company mobile phone SIM card no. 018-660 0016;
7. Return of company uniform (T-shirts, sweaters, caps etc), materials, computers/mobile devices and any other company property entrusted to your possession;
8. Any other relevant items not listed above.

This termination should not be taken as a reflection on your performance. It is very unfortunate that the prolonged economic recession has made it impossible for the company to sustain your employment and it is with deep regret that we are forced to take this course of action.

MELIPOLY ENTERPRISE SDN BHD (1176262-D)
G10, Block C, Damansara Intan, No. 1, Jalan SS20/27, 47400, Petaling Jaya, Selangor, Malaysia.
03-77333921
03-77311923
www.melipoly.com
mp@melipoly.com

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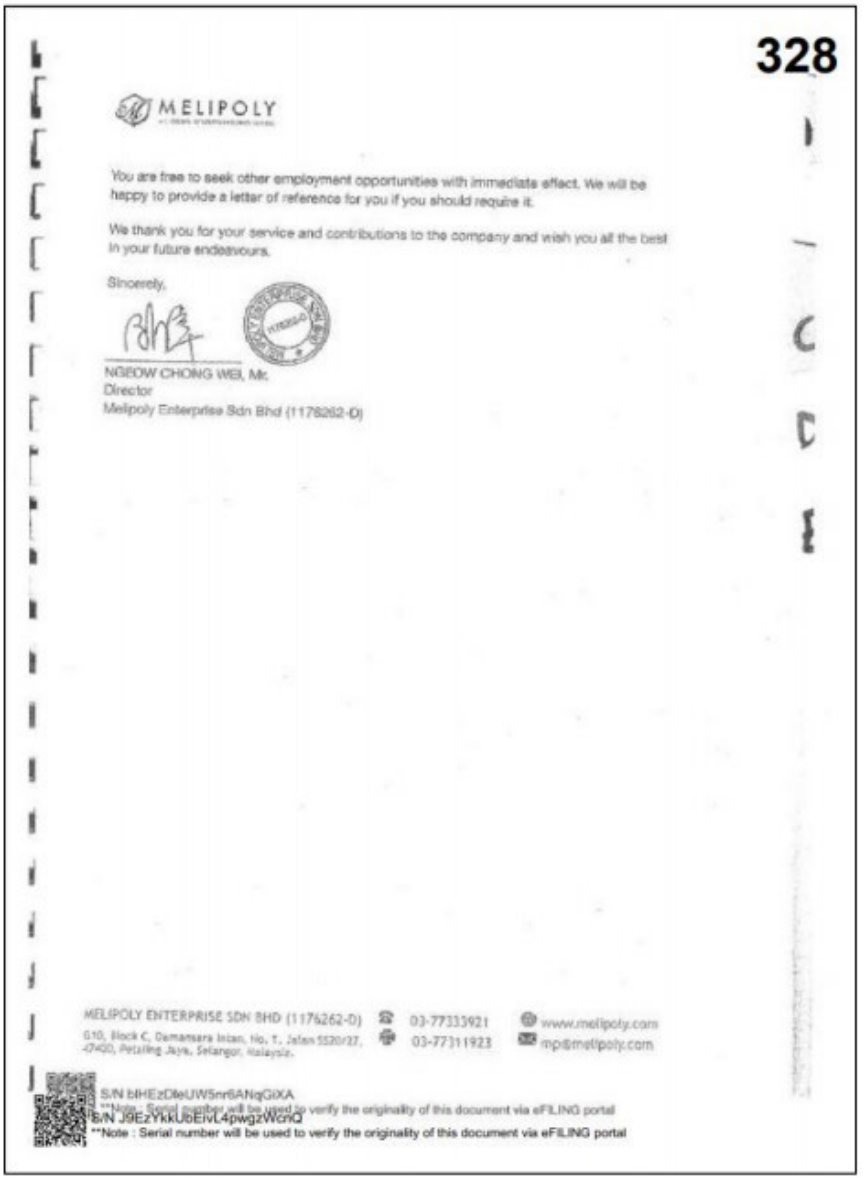

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MELIPOLY

You are free to seek other employment opportunities with immediate effect. We will be happy to provide a letter of reference for you if you should require it.

We thank you for your service and contributions to the company and wish you all the best in your future endeavours.

Sincerely,

NGEOW CHONG WEI, Mr.
Director
Melipoly Enterprise Sdn Bhd (1176262-D)

MELIPOLY ENTERPRISE SDN BHD (1176262-D)
G10, Block C, Damansara Intan, No. 1, Jalan SS20/27, 47400, Petaling Jaya, Selangor, Malaysia.
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[27] Although the letter was dated 6 May 2019, it was the 1st respondent's evidence he received it by courier on 24 May 2019. He was informed verbally on 6 May 2019 and he had no objection. His evidence in re-examination at encl 8/24 was as follows:

> "WSM: Mr Ong, my question is did you have any objection to the notice of termination when notice was given to you verbally on 6th of May and then on 24th of May only you received it by courier. Did you have any objection?

> ONG: I didn't have any (04:03:43PM) objection because I already go to the IR department."

The acknowledgment of receipt can be seen in encl 6/135.

[28] Thus, for all intents and purposes, there is a letter of termination dated 6 May 2019 of which the 1st respondent had notice.

[29] Paragraph 1 of the letter of termination spelt out the reasons for termination followed by para 2 that "we have no choice but to terminate your employment". The aforesaid paragraphs are reproduced below:

> "We regret to inform you that due to the current economic recession and a prolonged period of poor sales revenue, the company has been sustaining serious operational losses for the past six months. Despite our continuing efforts at increasing sales revenue and reducing other expenses over the past six months, the company's cash reserves are now at a critically low level.
>
> As such, we must regretfully inform you that we can no longer sustain your employment and that we have no choice but to terminate your employment as per the terms in your contract. This letter shall serve as a formal notice of termination pursuant to cl 4 of your employment contract."

[30] A perusal of the letter of termination shows that the reasons given were "current economic recession" and "prolonged period of poor sales revenue".

[31] It is trite that the appellant can only rely on the reasons as stated in the letter of termination and no other reason. We therefore agree with the HCJ that the appellant could not rely on other grounds such as unsatisfactory performance, conflict of interest and sexual harassment.

[32] To drive home this point, we refer to *Goon Kwee Phoy* where the Federal Court stated at p 429:

> "We do not see any material difference between a termination of the contract of employment by due notice and a unilateral dismissal of a summary nature. The effect is the same and the result must be the same. 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.**"
>
> [Emphasis Added]

[33] In *Maritime Intelligence*, the same too was said by the Federal Court at pp 213-214:

> "[51] In summary, on this point, it is the statutorily prescribed function of the Industrial Court to examine, investigate the representations of the workman and then hand down an award under s 20(3). It is not the function of the Industrial Court to decide otherwise than prescribed by the Act. The Act implicitly prescribes an investigation into facts and events and reasons at the point and/or time of dismissal. **There is no provision in the Act for the industrial tribunal to embark on a far-ranging survey to ascertain whether given matters which the employer has discovered subsequently and not put to the workman, it is justified in dismissing the workman**."
>
> [Emphasis Added]

[34] The Federal Court dwelt at length with *Goon Kwee Phoy* and cited the same passage as we did earlier and went on as follows at p 216:

> "[69] This portion of the passage restricts the enquiry of the Industrial Court to the reasons given for the action taken by the employer. **That can only mean the reasons operating on the mind of the employer preceding his decision to terminate the workman's services, which are usually specified in the letter of dismissal**. This court in *Goon Kwee Phoy* (above) arrived at the same point as we did, in the earlier paragraphs of this judgment, far more pithily, but utilising the same rationale."
>
> [Emphasis Added]

[35] With regard to the stated grounds as given in the letter of termination, we are of the considered opinion that the statement of comprehensive income was evidence that the appellant was suffering financial losses occasioned by the current economic recession and prolonged period of poor sales revenue. We refer to encl 6/123-124 which is the appellant's statement of comprehensive income for the period 1 October 2018 to 31 March 2019, which shows a net loss of RM582,546.72. The 1st Appellant was aware of the financial situation as per his witness statement Q&A 3 (encl 5/66) where he agreed to waive RM1,000.00 per month for 3 months believing that the Company will repay the sum when the Company's financials are stabilised.

[36] However, we found that the appellant had failed to prove redundancy. We say so for the following reasons.

[37] In *William Jacks*, it has been said at p 679:

> ..The issue before that Court was whether there was a genuine retrenchment exercise *vis-à-vis* the respondent. **Retrenchment means: "the discharge of surplus labour or staff by the employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action**" (per S.K. Das J in *Hariprasad v. Divelkar* AIR [1957] SC 121 at p 132).

> **Whether the retrenchment exercise in a particular case is *bona fide* or otherwise, is a question of fact and of degree depending for its resolution upon the peculiar facts and circumstances of each case. It is well-settled that an employer is entitled to organise his business in the manner he considers best. So long as that managerial power is exercised *bona fide*, the decision is immune from examination even by the Industrial Court. However, the Industrial Court is empowered, and indeed duty-bound, to investigate the facts and circumstances of a particular case to determine whether that exercise of power was in fact *bona fide*.**"
>
> [Emphasis Added]

[38] Reference is further made to *Ng Chang Seng*:

> "[63] As stated the burden of proof is always on the company to show before the Industrial Court that the termination on ground of retrenchment arising out of redundancy is for a just cause or excuse and that it is lawful and not actuated by irrelevant considerations like poor performance or perceived insubordination or that it was not done *mala fide* and did not reek of unfair labour practice. The Industrial Court found as a matter of fact that the company had failed to discharge its burden of proof."

[39] Essentially the retrenchment must be *bona fide* for which we confine ourselves to the 4 corners of the letter of termination where the grounds are stated. We recognise the management prerogative of reorganisation but subject always to it being exercised *bona fide.*

[40] The evidence was that the appellant's Managing Director Almond Siah was transferred back to Malaysia to take over the 1st respondent's function as Marketing Manager for a few outlets. Prior to 1 March 2018, the 1st respondent was managing 5 outlets. After March 2018, the 1st respondent was managing 3 outlets which were Village Agro Park, Cameron Highlands and Kampar Free Park. Refer to the 1st respondent's cross-examination in encl 7/162.

[41] This would mean that the 1st respondent's function and work as Marketing Manager was reduced but never eliminated. As was said in *Woo Vain Chan* at p 85:

> "[17] Another essential feature that needed to be considered in determining whether redundancy existed in an organisation, would be to see **whether 'the work continues to exist or whether the work although continuing to exist requires fewer employees to carry it out. The restructuring or reorganisation that is carried out must result in redundancy, that is, it must result in a situation of cessation of work carried out by the employee(s) or a surplus of employees to carry out the particular job function. The issue is whether the work continues to exist or whether the work although continuing to exist requires fewer employees to carry it out. It is essential that it is the job functions and duties that are affected and not merely the job title or designation. If the same or essentially same work is found to be carried out under a different name or manner, there is**

> **no redundancy**...' (see *The Law on Dismissal* by Nallini Pathmanathan, Siva Kumar Kanagasabai and Selvamalar Alagaratnam)
>
> [Emphasis Added]

[42] We conclude on this point that the termination was without just cause and excuse and the retrenchment was not *bona fide.*

Jurisdiction Of The IC

[43] The thrust of the appellant's submission was that the IC had no jurisdiction to inquire into the reference or make any award of damages or other form of relief when the 1st respondent had testified that he did not wish to be reinstated. It was also submitted that subsequent to the letter of termination, the 1st respondent had almost immediately set up a company known as Bee & Joy Enterprise (Bee & Joy).

[44] Reference was made to the evidence of the 1st respondent as follows in encl 8/13 and 16:

> "ONG: You know why I'm in Court today?
>
> TSC: Yes.
>
> ONG: Because the Labour Department will ask me to come today.
>
> TSC: So you actually don't want to come to Court? The Labour Department ask you to come to Court, that's why you are here.
>
> ONG: Can consider like that.
>
> ...
>
> CHM: So, you want to be put back into employment in this Company?
>
> ONG: Last time yes, but now no more.
>
> CHM: Last time means when?
>
> ONG: When the IR ask them come to discussion. But three time also they didn't come to meet up."

[45] To support its contention of no jurisdiction, the appellant referred us to *Holiday Inn* and *Unilever*.

[46] In *Holiday Inn*, the High Court had held at p 460:

> "...It is essentially on the issue of reinstatement. As stated by me earlier the respondent in her representations initially wanted reinstatement which is in accordance with s 20(1) of IRA but subsequently in the hearing before the Industrial Court she changed her stand and instead asked for damages *in*

lieu of reinstatement. In such a situation can the Industrial Court consider this aspect of her claim? In my view the respondent clearly could not come within the provisions of s 20(1) and (3) of IRA as the legislature intended that recourse to the Industrial Court is only in respect of reinstatement and once reinstatement is no longer applied for the Industrial Court ceases to have any more jurisdiction. According to the case of Dr A. Dutt:

> the right to compensation must be an issue in representations for reinstatement and necessarily arises where the Court would not order reinstatement.

In the case here the issue in representations for reinstatement no longer arises as the respondent clearly abandoned reinstatement in the course of the hearing before the Industrial Court. According to Chang Min Tat FJ in *Dr A. Dutt's* case:

> **If a workman complains he has been dismissed without just cause or excuse**, it does mean that he is dissatisfied with his dismissal or termination of services and **he wants his job back**. However there may exist circumstances and reasons why reinstatement should not be ordered.
>
> [Emphasis Added]

In other words, for compensation for reinstatement to arise:

(i) the workman must "want his job back"; and

(ii) although the workman wants his job back, the Industrial Court would not order reinstatement."

[47] At the outset, we note that *Holiday Inn* has been found to be not good law by this Court in *Sanbos*.

[48] In *Sanbos*, this Court had referred to *Holiday Inn* at paras 11-12 (pp 138-139). At para 14, reference was also made to *The Borneo Post Sdn Bhd v. Margaret Wong* [1995] 2 MELR 533; [1995] 4 MLRH 399 at p 400 as follows:

> "[14]... In that case as well, the employee did not pray for reinstatement in the statement of case filed at the Industrial Court. Denis Ong J held that the omission to pray for reinstatement is a point of procedure and does not affect the jurisdiction of the court. His Lordship said as follows:
>
> > The omission in the statement of the case to state it as a specific relief does not affect the jurisdiction of the Industrial Court to hear and determine the case on the merits: see s 29(d) of Act 177. **The Industrial Court derives its jurisdiction from the order of reference by the Minister made under s 20(3) of Act 177 and which such court must exercise, so it was held in** *Assunta Hospital v. Dr A Dutt* [1980] 1 MLRA 66."
> >
> > [Emphasis Added]

[49] At p 140 of *Sanbos*, this was next said:

> "[18] **On our part, we wholly agree with the decision of the learned High Court Judge that the Industrial Court was seized with jurisdiction to hear the dispute between the employer and employee in this case once the Minister had duly made a reference under s 20(3) of the Industrial Relations Act 1967 (Revised 1976)**. As stated by Denis Ong J in *The Borneo Post Sdn Bhd v. Margaret Wong* and Chang Min Tat FJ in *Assunta Hospital v. Dr A Dutt*, the Industrial Court is invested with jurisdiction because of the Ministerial reference."
>
> [Emphasis Added]

[50] Finally, at p 144, *Sanbos* held:

> "[31] **Therefore, it is not the function of the Industrial Court to question its own jurisdiction simply because the remedy of reinstatement is not pleaded or sought**. In the light of the occasional conflict of views in the Industrial Courts on the issue of jurisdiction if reinstatement is not pleaded or claimed, we state here that the decision in *The Borneo Post Sdn Bhd v. Margaret Wong* on this point is correct. **The Industrial Court does not cease to have jurisdiction once a reference is duly made under s 20(1) of the Industrial Relations Act 1967 (Revised 1976) even if the remedy of reinstatement is not pleaded or pursued at the hearing**."
>
> [Emphasis Added]

[51] As *Sanbos* stated that on the issue of jurisdiction the decision of *The Borneo Post* is correct, it follows that *Holiday Inn* which took the contrary view, is no longer good law.

[52] We agree with *Sanbos* that the IC is seized with jurisdiction once the Minister had made a reference under s 20(3) of the Industrial Relations Act 1967 (IRA) and that the IC has such jurisdiction because of the Ministerial reference.

[53] Section 20(1) and (3) IRA provides as follows:

> "20(1) Where a workman irrespective of whether he is a member of a trade union or otherwise considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.
>
> ...
>
> (3) Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the Court for an award."

[54] Here, even if the 1st respondent stated that he did not wish to be "put back into employment", the IC nevertheless continued to have jurisdiction as the IC is seized with such jurisdiction pursuant to the Ministerial reference.

[55] It is not disputed that the 1st respondent along with a few others had set up Bee & Joy which was registered on 14 May 2019. Refer to the company search in encl 6/146. It was submitted that even if the 1st respondent wanted reinstatement, this was not possible as he had to manage the operation of Bee & Joy. However, a perusal of the same company search at encl 6/149 under the heading "Information of previous owner" would reveal that the 1st respondent had withdrawn from Bee & Joy as at 24 July 2019. That information showed as follows:

INFORMATION OF PREVIOUS OWNER

NAME	:	ONG HONG YEOK
DATE ON ENTRY	:	14-05-2019
DATE OF WITHDRAWAL	:	24-07-2019
REASON OF WITHDRAWAL	:	PULL-OUT

[56] As for the reliance on *Unilever*, we note that the question of law before the Federal Court was on a narrow scope, namely:

> "Whether compensation *in lieu* of reinstatement can be awarded to a person who cannot be reinstated and/or whether the issue of reinstatement even arises as he had already attained the age of retirement at the time of the filing of his claim (under s 20 of the Industrial Relations Act 1967)."

[57] At paras 19 and 20, the following were said:

> "[19] The leave question also speaks of "compensation in lieu of reinstatement". The key words "compensation", "in lieu of and "reinstatement" are not defined in the IRA 1967. The Law Lexicon defines "in lieu of" as signifying "instead of" and "in place of". Therefore reading the words "compensation in

> lieu of reinstatement" in plain English it means that such compensation was meant to be a replacement or a substitute or an alternative to reinstatement.
>
> [20] From the phrase "compensation *in lieu* of reinstatement", it is our judgment that the element of compensation will only arise when the employee is in a position or situation to be reinstated. It is a condition precedent to such compensation. Our view is fortified by the clear provision of s 20(1) of the IRA 1967, where the primary remedy of such a representation to the Director General is for the workman "to be reinstated in his former employment". If a workman cannot be reinstated because his age has exceeded his retirement age, the issue of compensation cannot arise. Corollary to that logic, it cannot be in lieu of his reinstatement. After all, reinstatement is a statutorily recognized form of specific performance. On that premise, such specific performance can only be ordered in a situation where the legal basis for such performance does exist. One cannot substitute when the one to be substituted does not or cannot exist. This can be seen in the legal maxim: "*lex non cogit ad impossibilia*", ie the law does not compel the impossible."

[58] The facts in *Unilever* are such that by the time the award was made, the workman in question had reached his retirement age where reinstatement was not possible. In this appeal, we had earlier found that the function and scope of Marketing Manager was reduced but the post was never eliminated. Further the 1st respondent had withdrawn from Bee & Joy on 24 July 2019.

[59] Under the circumstances, it cannot be said that the legal basis for such performance, namely the 1st respondent to be reinstated, does not exist.

Conclusion

[60] For the above reasons, we find that there is no merit in the appeal and the appeal is dismissed with costs of RM10,000.00 subject to allocatur.

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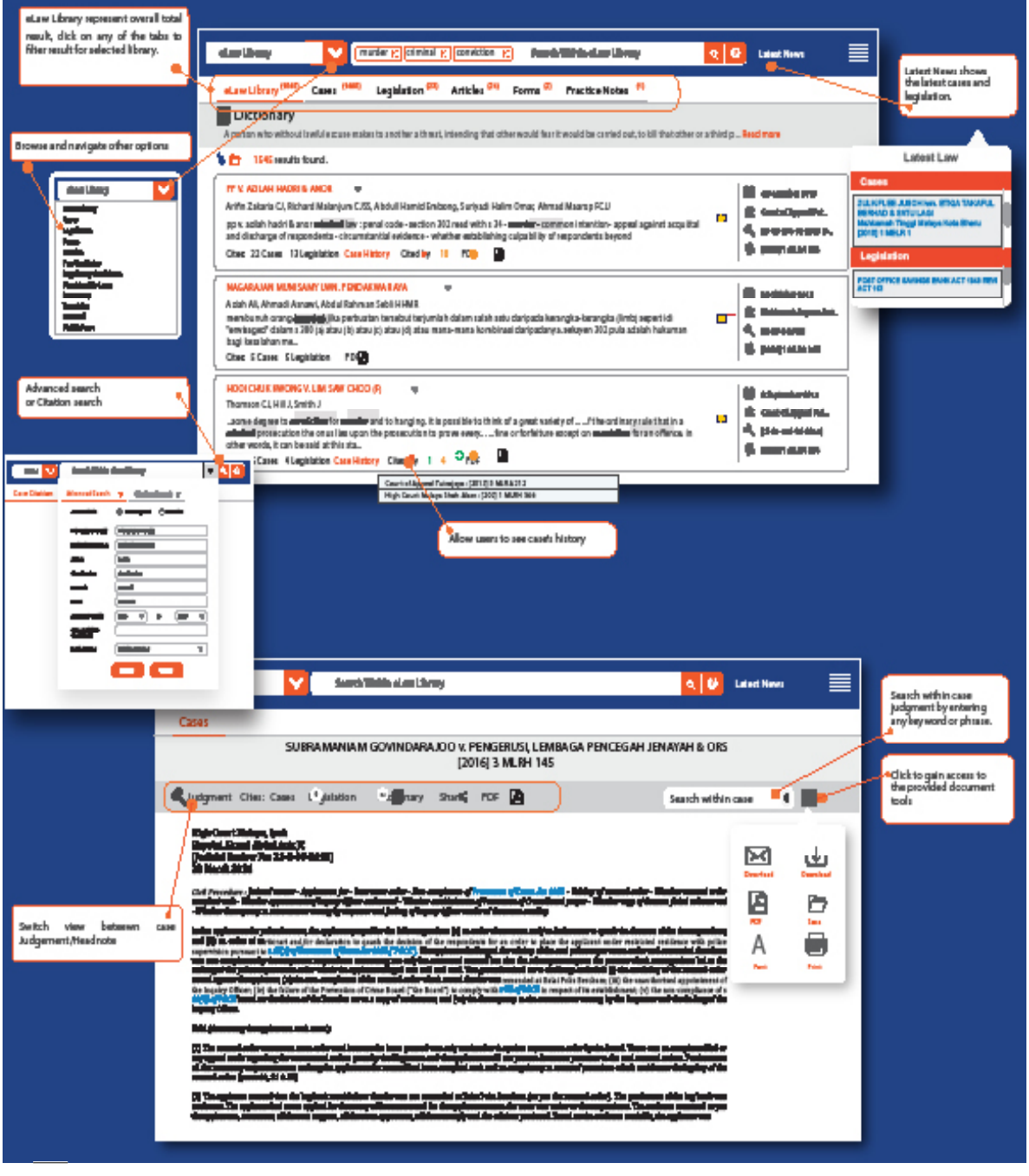

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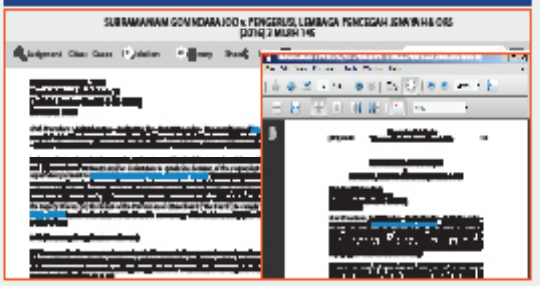

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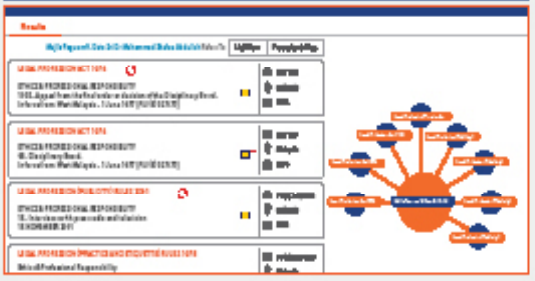

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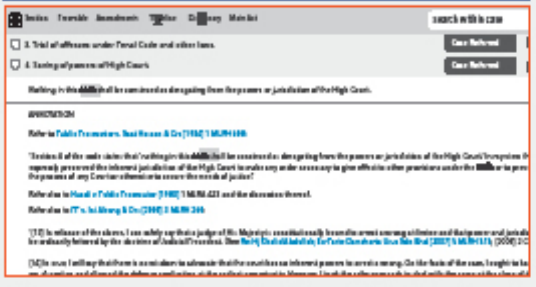

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