IN THE INDUSTRIAL COURT AT KUALA LUMPUR

CASE NO.: 22(30)(20)/4-1802/18

BETWEEN

MURALI THARAN NAIR A/L G. NARAYANA NAIR

AND

HLMG MANAGEMENT CO. SDN. BHD.

AWARD NO. 276 OF 2020

BEFORE	**:**	**Y.A. TUAN PARAMALINGAM A/L J. DORAISAMY - Chairman (Sitting Alone)**
VENUE	**:**	**Industrial Court of Malaysia, Kuala Lumpur**
DATE OF REFERENCE	**:**	**16.07.2018**
DATES OF MENTION	**:**	**27.08.2018; 18.09.2018; 25.02.2019; 10.07.2019**
DATE OF HEARING	**:**	**21.10.2019; 25.10.2019; 14.11.2019; 18.11.2019**
REPRESENTATION	**:**	**Mr. Muhendaran Suppiah together with Ms. Chong Wan Loo Messrs. Muhendaran Sri Counsel for the Claimant**
		Mr. Vijayan Venugopal Messrs. Shearn Delamore & Co. Counsel for the Company

REFERENCE :

This is a reference made under Section 20 (3) of the Industrial Relations Act 1967 (Act 177), arising out of the dismissal of **Murali Tharan Nair a/l G. Narayana Nair** (hereinafter referred to as "*the Claimant*") by **HLMG Management Co. Sdn. Bhd.** (hereinafter referred to as "*the Company*") on 15th March 2018.

AWARD

[1] The Ministerial reference in this case required the Court to hear and determine the Claimant's complaint of dismissal by the Company on 15th March 2018.

I. PROCEDURAL HISTORY

[2] The Court received the letter pertaining to the Ministerial reference under Section 20(3) of the Industrial Relations Act 1967 on 24th July 2018.

[3] The matter was fixed for mention on 27th August 2018, 18th September 2018, 25th February 2019 and 10th July 2019.

[4] The case was then transferred from Court No. 20 to Court No. 30 on 11th October 2019 pursuant to the directions of the learned President of the Industrial Court.

[5] The trial proceeded before me in Court No. 30 on 21st October 2019, 25th October 2019, 14th November 2019 and 18th November 2019.

[6] The case was thereafter transferred from Court No. 30 to this Court, i.e. Court No. 22, upon the directions of the learned President of the Industrial Court, on 7th January 2020, due to my appointment as Chairman of Court No. 22, for the purposes of handing down the Award.

II. THE PARTIES' POSITION THE MERITS

(a) The Claimant

[7] The Claimant commenced his employment with the Company as a Senior Manager in Industrial Relations effective 12th May 2014.

[8] On 6th December 2017, the Head of Human Resources of the Company, i.e. one Ms. Lalita Abdullah (COW-1) informed the Claimant that the Group Human Resources would be undergoing restructuring and that the Claimant's position would not exist, rendering him redundant. COW-1 offered the Claimant a Mutual Separation Package ("*MSP*") of 5 months of the Claimant's last drawn salary. The Claimant *vide* email dated 28th December 2017 to COW-1 and the Director of Human Resources of Hong Leong Group, i.e. one Ms. Tricia Especkerman (COW-2) recorded the conversation that he had with COW-1 on 6th December 2017.

[9] COW-1 thereafter sent the Claimant 2 emails on 28th December 2017 denying the fact that she had made the Claimant an offer of a MSP. The Claimant however replied to the said emails vide his email dated 1st January 2018 addressed to both COW-1 and COW-2 narrating what had actually transpired on 6th December 2017.

[10] On 5th January 2018, a meeting was held between COW-2 and the Claimant, where the following transpired:-

i. COW-2 informed the Claimant that the entire Group would undergo a restructuring exercise. As a result of which, the Claimant's position would be abolished and the Claimant would be made redundant;

ii. The Claimant expressed his disappointment to COW-2 on the Company's decision to retrench the Claimant;

iii. The Claimant further enquired whether he was the only employee being retrenched by the Company, to which COW-2 informed him that there would be others affected by the restructuring exercise including employees from the Finance Department, Audit Department, Legal Department and Company Secretariat Department;

iv. COW-2 also informed the Claimant that this was the beginning and that there would be further restructuring where other employees would also be retrenched. She further informed that the Group had 446 Human

Resource employees and that the Claimant had been selected to be the first one to be retrenched. All positions and the structures in the Company would be undergoing restructuring;

v. COW-2 then requested that the Claimant tender his resignation. She also informed the Claimant that his outstanding bonus would be paid as part of the MSP;

vi. However, the Claimant refused to resign.

[11] On 22nd January 2018, a further meeting was held between COW-2 and the Claimant, where the following transpired:-

i. COW-2 informed the Claimant that a Mutual Separation Agreement ("*MSA*") would be prepared for the Claimant to sign and repeatedly asked the Claimant to tender his resignation; and

ii. The Claimant requested for an alternative job or an industrial relation role within the Group to which COW-2 replied that there were none available at that point in time. COW-2 further confirmed that the Company was undergoing a massive restructuring in every function within the Group and that all the details of the restructuring would also be documented, which she claimed to have not seen yet. She also informed the Claimant that he needed to prepare the handover list.

[12] The Claimant wrote an email on 26th January 2018 recording what had transpired during the said meetings on 5th January 2018 and 22nd January 2018. The Claimant in his email expressed that he had been unfairly treated and that he was being forced or pushed to accept the MSP.

[13] On 29th January 2018, COW-2 sent 2 copies of the MSA dated 24th January 2018 to the Claimant. The said copies of the MSA were pre-signed by COW-2 and witnessed by COW-1. The Claimant did not sign the MSA dated 24th January 2018.

[14] On 5th February 2018, the Claimant met COW-2 about the MSA dated 24th January 2018 and queried why a resignation clause had been inserted therein instead of a clause stating that the redundancy was due to the Company's restructuring exercise. COW-2 had replied that this was a standard template used by the Company. The Claimant then refused to sign the MSA dated 24th January 2018. COW-2 then took back both copies of the MSA dated 24th January 2018 and informed the Claimant that she would revise the clause on resignation since the Claimant refused to sign the MSA.

[15] On 6th February 2018, COW-2 gave the Claimant an amended copy of the MSA which was now dated 5th February 2018. COW-2 however insisted that the Claimant still needed to submit a written resignation. The Claimant again refused to sign the MSA.

[16] The Claimant had queried why the amended MSA dated 5th February 2018 failed to contain any reason as to why the Claimant was asked to leave employment and failed to stipulate his last date of service. COW-2 then informed the Claimant that the Legal Department of the Company had drafted the MSA and that it was drafted in such a manner to protect the Company in order to avoid the Claimant pursuing legal action against the Company.

[17] COW-2 met the Claimant on 9th February 2018 and insisted that the Claimant should sign the MSA dated 5th February 2018. The Claimant enquired again as to why the reasons for the group restructuring, redundancy and the last date of employment were not stated in the MSA. COW-2 replied that the management was not going to state the reasons and the last day of his employment in the MSA and reiterated that this was the Company's final decision and that the Company would not amend the MSA any further. COW-2 again insisted that the Claimant sign the MSA.

[18] Left with no other alternative, the Claimant signed the first copy of the MSA dated 5th February 2018 but only after he made a note "*Accepted due to restructuring and redundancy*" underneath his signature on the MSA. Upon reading the Claimant's note, COW-2 reacted by stating she was not going to accept the MSA since it was signed with a condition. She therefore insisted that the Claimant should sign the second copy of the MSA without any condition. The Claimant had no other choice but to sign the second copy of the MSA without stating any condition. COW-2 then took both copies of the MSA dated 5th February 2018 from the Claimant.

[19] On 13th February 2018, the Claimant received a letter from COW-2 stating his last date of employment shall be on 15th March 2018.

[20] The Claimant *via* an email dated 12th April 2018 to COW-2 recorded what had transpired which led him to sign the MSA dated 5th February 2018. In the email he expressed that he was forced to accept the MSA and there was no valid reason for his dismissal.

[21] The Claimant contends that he was forced and/or coerced and/or put under duress to accept or to sign the MSA dated 5th February 2018. He also contends that he was misled by the Company or the Company had misrepresented to him that he was redundant due to the restructuring exercise.

[22] The Claimant contends that his dismissal is, *inter alia*, without just cause or excuse, a breach of the principles of natural justice, an unfair labour practice and an act of mala fide by the Company.

(b) The Company

[23] The Company avers that it did not dismiss the Claimant from his employment. Since the Claimant's services had ceased by mutual agreement which the Claimant had voluntarily accepted, there was no dismissal of the Claimant within the context of Section 20 of the Industrial Relations Act 1967 as alleged by the Claimant. As such,

the Company contends that on this ground alone, the Claimant's claim should be dismissed by the Court.

[24] In the alternative, should the Court decide that there was a dismissal of the Claimant, then such a dismissal was done with just cause and excuse. It is the Company's contention that the Claimant never indicated that his acceptance and signing of the MSA was made under duress or that he was coerced into entering into the MSA. At all material times, the Claimant was given the opportunity and was at liberty to accept or reject the offer of the mutual separation. The Claimant, as a Senior Manager of Industrial Relations was fully aware of his legal rights and had signed the MSA voluntarily.

[25] It had come to the Company's attention that the Claimant displayed unsatisfactory performance in executing his tasks and responsibilities, which thereafter had to be undertaken by other employees. Hence there was no longer any need to have a dedicated individual performing such functions. During the discussion between the Claimant and COW-2, the Claimant was informed that a fit for role review was being undertaken for the Human Resources functions across the Group. He was also informed that his role was ineffective as the plants and operating companies had decided to take charge of their own industrial relations matters given that it was difficult to get hold of the Claimant. Feedback was given by COW-1 to the Claimant regarding his lack of support and his unavailability.

[26] The Company contends that as the Claimant's services were surplus to the business requirements of the Company, he was accordingly redundant. As such, the dismissal of the Claimant was as a result of a *bona fide* exercise of the Company's prerogative rights to restructure its business in a manner that it deems best.

III. THE FUNCTION OF THE INDUSTRIAL COURT & THE BURDEN OF PROOF

[27] The role of the Industrial Court pertaining to a reference under section 20 (3) of the Industrial Relations Act 1967 is to ask itself a question whether there was a dismissal; and, if so, whether it was with or without just cause or excuse (**WONG CHEE HONG v. CATHAY ORGANISATION (M) SDN. BHD. [1988] 1 MLJ 92; [1987] 1 MLRA 346**).

[28] The Company's stand is that there had been no dismissal of the Claimant's employment by the Company as the Claimant's services had ceased by mutual agreement. As such, the fact of dismissal is in dispute. In such a case, the burden of proof lies on the Claimant to establish that he had in fact been dismissed by the Company. It was held by Abdul Kadir Sulaiman J in the High Court case of **WELTEX KNITWEAR INDUSTRIES SDN. BHD. v. LAW KAR TOY & ANOR [1998] 4 MLRH 774; [1998] 1 LNS 258**:-

> "*The law is clear that if the fact of dismissal is not in dispute, the burden is on the company to satisfy the court that such dismissal was done with just cause or excuse. This is because, by the 1967 Act, all dismissal is*

prima facie done without just cause or excuse. Therefore, if an employer asserts otherwise the burden is on him to discharge. However, where the fact of dismissal is in dispute, it is for the workman to establish that he was dismissed by his employer. If he fails, there is no onus whatsoever on the employer to establish anything for in such a situation no dismissal has taken place and the question of it being with just cause or excuse would not at all arise".

IV. ISSUES TO BE DECIDED

[29] The issues to be determined in this case are:-

(i) whether there is a dismissal on the facts; and

(ii) if so, whether the dismissal was with or without just cause or excuse.

V. THE COURT'S FINDINGS AND REASONS

(i) Whether there is a dismissal on the facts

[30] The Claimant's stand is that the Company's representatives, i.e. COW-1 and COW-2 had represented to him that the MSA was brought about due to the restructuring exercise that was being undertaken in the Group Human Resources in the Company and that the Claimant's services had been identified as redundant.

[31] The Company on the other hand contends that there is no issue of redundancy and that both parties had entered into the MSA voluntarily. In such a case, there is in fact no dismissal to begin with.

[32] Thus, the Court has to now look at whether the Claimant had voluntarily entered into the MSA and accepted the terms contained therein.

[33] In the case of **SUSEELA DEVI BALAKRISHNAN v. INTI INTERNATIONAL COLLEGE KUALA LUMPUR SDN. BHD. [2019] 1 ILR 421; [2019] 3 MELR 224** it was held by the learned Industrial Court Chairman, P. Iruthayaraj D. Pappusamy:-

> "*The issue in this case is whether there was: (a) justification for the implementation of VSS by the company, and if so (b) whether the VSS was carried out voluntarily or involuntarily. If the VSS was carried out voluntarily then the claimant's separation from the company was proper and in order. If the VSS was applied involuntarily that is to say it was carried out by use of force subtle or otherwise or by coercion or duress in any form or by any unfair labour practice, then it may amount to dismissal without just or excuse*".

[34] And in the case of **TIMBER MASTER TRADING (M) SDN. BHD. v. JANE WANG SING FANG [1994] 2 ILR 1293; [1994] 1 MELR 693** it was held by the learned Industrial Court Chairman, Lim Heng Seng:-

"*In the present case, the Court is not dealing with a case founded upon constructive dismissal or "forced resignation". The Claimant alleges that she had been dismissed. The Company on the other hand contends that there had been a mutual termination of the contract of employment. The Court has found that there was an understanding between the Claimant and the Company that the relationship of employer-employee existing between them is to come to an end. The issue before the Court is whether the contending parties had indeed come to mutual agreement to terminate the Claimant's contract of employment which the Court should give effect to.*

It is the Court's considered opinion that the correct approach in dealing with the case of an alleged mutual termination of a contract of service should be the same as the approach adopted by the Court in dealing with the analogous case of a "forced resignation" by an employee.

The duty of the Court is to determine whether there had been a termination which had been mutually and freely agreed upon between the parties. The Court cannot in equity and good conscience give effect to a purported mutual agreement which had not been genuinely consensual. It cannot be seriously argued that there was a mutual termination where there is no genuine consensus between the parties; and in particular where the employee's volitional capacity had been impaired at the time he was purported to have agreed to the mutual termination.

However, where the employee does not plead harassment, compulsion, undue advantage, oppression, unfair labour practice or any other matter which the Court would in equity and good conscience consider to be vitiating circumstances in the process of arriving at, and/or in the substance of the agreement. The Court would be slow to go behind the same. An agreement mutually and freely arrived at between the parties to dissolve the relationship of an employee and his employer must be given effect to".

(Emphasis added)

[35] Counsel for the Claimant submits that the Company had indeed stated to the Claimant that the offer of mutual separation was due to redundancy as a result of restructuring of the Human Resources Department across the Group. In order to substantiate this contention, Counsel had referred to the following evidence:-

i. COW-1 in her Witness Statement (COWS-1; Q & A No. 7) stated the following:-

"*Q7. Please refer to paragraph 4 of the Claimant's Statement of Case, wherein the Claimant alleges as follows:*

"On 06.12.2017, the Head of Human Resources of the Company, one Ms. Lalita Abdullah (hereinafter referred to as "Ms. Lalita") had informed the Claimant that the Group Human Resources would be undergoing restructuring and

that the Claimant's position would not exist and that the Claimant would be redundant. Pursuant to the same, Ms. Lalita had offered the claimant a Mutual Separation package with the payment of five (5) months of the Claimant's last drawn salary".

What is your response to this?

A7. On 6th December 2017 I met with the Claimant to inform him about the HR restructuring that was taking place across the Group. I informed him that the Industrial Relations position would no longer exist in the IG office and as such his position would be redundant. I did mention a Mutual Separation Package with the payment of five (5) months of his last drawn salary, and I told him to take some time to think about it and that I was available to speak to him at any time".

(Emphasis added)

ii. COW-2 in her Witness Statement (COWS-2; Q & A No. 6) stated as follows:-

"*Q6. What transpired during the meeting on 5 January 2018?*

A6. I informed the Claimant that a fit for role review was being undertaken for the Human Resources functions across the Group. I also informed the Claimant that his role was ineffective and that the plants and operating

companies will take charge of their own Industrial Relations matters given that it was difficult to get hold of the Claimant. In essence, the Claimant's tasks and responsibilities had to be undertaken by other employees hence it was no longer needed to have a dedicated individual performing such functions".

(Emphasis added)

iii. COW-2 in her email to the Claimant dated 16th April 2018 (*at p. 15 of COB-1*) stated *inter alia*:-

"*The contents of your email are inaccurate and a misrepresentation of the facts leading to your cessation.* ***You had agreed to a separation on mutual terms after you were informed of your redundancy as a result of the abolishment of your role in the Company due to the restructure of the IR operations within the Group.*** *You had accepted this and agreed to proceed on mutual separation with a package extended to you*".

[36] From the documentary evidence as well as the oral testimonies of COW-1 and COW-2, it is evident that the offer of the MSP by the Company was on the basis of redundancy as a result of the restructuring that was being carried out in the Group Human Resources.

[37] The Claimant contends that the Company had failed to adduce any evidence before the Court that there had been a restructuring exercise and that the Claimant's role was identified as being redundant.

[38] Counsel for the Company on the other hand submits that the Claimant in fact was not terminated on the ground of redundancy, hence there is no requirement to prove redundancy in cases involving mutual separation schemes. Counsel referred to the case of **SURESH A/L K VELAUTHAN v. PETRONAS ICT SDN. BHD. [2019] 2 ILR 345; [2019] MELRU 900** wherein the learned Industrial Court Chairman, Rajeswari Karupiah, had held that there is no requirement that the position of redundancy must be proven to exist before a mutual separation package is offered to an employee. However Counsel failed to highlight that the learned Industrial Court Chairman had went on to state that even in cases involving mutual separation schemes the basic principle underlying any formation of contract, i.e. *consensus ad idem* or a meeting of the minds must exist in the first place:-

> "*As pointed out by the Learned Chairman in the aforementioned case,* ***the Industrial Court in equity and good conscience will not give effect to a purported mutual separation agreement that has been obtained via compulsion, oppression or unfair labour practice that can vitiate the genuine mutuality of the separation agreement.*** *In the absence of evidence that compulsion had been employed, the Court must and will give effect to the agreement between the parties to mutually dissolve the relationship of employer and employee.*

In arriving to its conclusion, the Court will take into consideration factors such as the conduct of the parties as a whole including that of the employer, the seniority of the employee, the nature of employment, the salary grade of the employee and the monetary compensation being offered to the employee. This list is however not exhaustive. Ultimately, the decision on whether the acceptance of the mutual separation was voluntary or otherwise will be determined by the facts of each individual case.

….

Mutual Separation Package or Mutual Separation Scheme belongs to the genus of mutual termination of the employer and employee relationship. It is distinguishable from a retrenchment or even a Voluntary Separation Scheme in the sense that there is no pre-requirement on the part of the employer to make a similar offer to other employees in the category of the employee in question. Neither is there a requirement that the position of redundancy must be proven to exist before such MSP is offered to an employee. ***The main feature of MSP is that there is mutuality of intention or*** **consensus-ad-idem** ***that the employer will commit itself to a financial pay-out scheme and the employee will in return agree to give up his security of tenure and consent to leave his employer voluntarily.*** *MSP is availed by an employer to bring an employment relationship to an end vide mutual consensus. It is often used to secure the separation of senior level personnel in an organisation. In order to do so, the employer will be prepared to provide monetary consideration at a rate that could be well*

above the statutory rate as prescribed in the Employment Act 1955 or even the norms used in the Industrial Court to award an employee who is dismissed unjustly".

(Emphasis added)

[39] The importance of general consensus or a meeting of the minds in mutual separation agreements was stressed by the learned Industrial Court Chairman, Rajendran Nayagam, in the case of **JAMIL ARSHAD & ORS v. CNA MANUFACTURING SDN. BHD. [2010] 8 MELR 409; [2010] 2 LNS 1305**:-

"*When an employer is facing declining business, he may be forced to make a substantial reduction in his workforce, this he may do either by way of retrenchment or through the introduction of a voluntary separation scheme. Unlike in the case of retrenchment, in the case of voluntary separation scheme, the employer issues a circular inviting its employees to take advantage of an early retirement scheme. Under the scheme, the employer normally offers an attractive retirement package, which is better than the statutory minimum for retrenchment. When an employee makes an application, he is said to make an offer of early retirement to the company, which is subject to the acceptance by the company.* ***When the company accepts the application of the employee, the contract of employment is said to be terminated by mutual consent and it is not considered as a dismissal****, (see* Birch & Another v. Liverpool University [1985] I CR 470*).*

What is important to note in this type of scheme calling on the employees to apply for early retirement is that by its very nature, it is done on a voluntary basis, without the employee being forced into retirement. The court cannot in equity and good conscience give effect to a purported mutual agreement which is not genuinely consensual, in particular where the employee's volitional capacity had been impaired at the time he was purported to have agreed to the mutual termination*. On the other hand, an agreement mutually and freely arrived at between the parties must be given effect to.* (see Timber Master Trading Sdn Bhd v. Jane Wang [1994] 1 MELR 693; [1994] 2 ILR 1293 (Award 553 of 1994)).

The onus is on the employee to establish by cogent evidence that he was forced into signing the mutual separation agreement".

(Emphasis added)

[40] Since the MSA is an agreement that brings an end to the Claimant's employment, the relevant provisions of the Contracts Act 1950 would be applicable.

Section 10 of the Contracts Act provides:-

"*What agreements are contracts*

10(1) All agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and

with a lawful object, and are not hereby expressly declared to be void"

Section 13 of the Contracts Act 1950 provides:-

"*Consent*

13(1) Two or more persons are said to consent when they agree upon the same thing in the same sense"

Section 14 of the Contracts Act 1950 provides:-

"*Free consent*

14. Consent is said to be free when it is not caused by-

(a) coercion, as defined in section 15;

(b) undue influence, as defined in section 16;

(c) fraud, as defined in section 17;

(d) misrepresentation, as defined in section. 18; or

(e) mistake, subject to sections 21, 22 and 23.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation, or mistake".

[41] Thus, the principles applicable to a termination of an employment contract *via* mutual separation scheme are:-

i. there must be a genuine consensus or *consensus ad idem* (a meeting of the minds) between the parties when entering into the mutual separation agreement; and

ii. there must be no harassment, compulsion, undue advantage, oppression, unfair labour practice, misrepresentation, duress, coercion or any other matter, which the Court may consider to be vitiating factors in the process of reaching the said agreement.

[42] The evidence before the Court that both COW-1 and COW-2 had represented to the Claimant that the MSP was being offered pursuant to a restructuring exercise within the Group Human Resources and that the Claimant's role had become redundant is wholly inconsistent with the stand now taken by the Counsel for the Company (during the trial and in his written submissions) that the Claimant was not dismissed on the grounds of redundancy. Counsel stressed that the only issue before the Court is whether the MSA was entered into voluntarily by the parties. No doubt one does not have to prove redundancy in cases involving mutual separation schemes, but what is pertinent is the effect that the representations of both COW-1 and COW-2 had on the Claimant's state of mind, i.e. that the MSP was being offered pursuant to the restructuring exercise and as a result of which the Claimant's services were deemed redundant. Since Counsel for the Company states the Company's stand

that redundancy is not an issue, then the statements made by COW-1 and COW-2 to the Claimant in the process of preparation of the MSP amounted to misrepresentations. The misrepresentations are evident from COWS-1 (Q & A No.7), COWS-2 (Q & A No.6) and COW-2's email dated 16th April 2018 as set out in paragraph 35 above. The misrepresentations of COW-1 and COW-2 affected the Claimant's judgment and induced him into entering the MSA, thus negating the element of voluntariness.

[43] The Claimant, being a Senior Manager in Industrial Relations, was well aware that the Company could terminate his services for redundancy, if he declined to accept the MSP.

[44] The case of **AHMAD FAUZAN AZIZ & OTHERS v. DYNACRAFT INDUSTRIES SDN. BHD. [2010] 3 MELR 381; [2010] 2 LNS 0055** centred around VSS being offered to the claimants but the issue on voluntariness is very much relevant to the case at hand. In the **DYNACRAFT** case, the company invited its employees to participate in a VSS as it had undertaken a restructuring exercise and was in the midst of downsizing its staff. The claimants accepted the VSS, received their severance packages and their employment was mutually brought to an end. But the matter did not end there. The claimants then filed a representation for unfair dismissal claiming that they were put in fear of a future retrenchment as the company was considering closing down the LMS Department. As such, the company had put fear into the claimants' mind that if they did not accept the VSS, then they would

ultimately be retrenched with lower benefits. The learned Industrial Court Chairman, Rajendran Nayagam held:-

> "*Hence, in the light of these facts, when the claimant had to make a decision to apply for VSS, it is clear that he had no job waiting for him.* ***The question then is why did he make the VSS application to opt out of his employment. The 1st claimant had stated that this is because he was told by COW2 that the LMS Department will be closed in the near future and that his name was on the VSS list. In this regard, COW2 did admit informing the claimants that the Company was considering closing the LMS Department but that no date had been fixed. Although, COW2 denied telling the claimants that their services would be retrenched in the future, the question that needs to be asked is why then tell the claimants about the prospects of the department being closed in the future. What was the need to give this information to the claimants. By doing so, COW2 had planted the fear of retrenchment in the mind of the claimants. Now they were compelled to consider whether they should apply for VSS or face the prospect of being retrenched in the future with lower benefits****. This seems to be the only probable explanation as to why the 11th claimant opted for VSS at the age of 45, when he did not have any employment waiting for him.*
>
> *As regards the 13th claimant, he too was jobless for about 1 1/2 years after receiving the VSS. He merely received a sum of RM18,370 as*

severance payment. His last drawn salary was RM2,875 a month and had a long way to go before retiring at the age of 55 years. Hence, in the light of the above circumstances, the only probable reason for the 13th claimant to opt out of employment was the fear of being retrenched in the near future, with lower compensation.

In conclusion, ***COW2 made a grave error in informing the claimants that the LMS Department will be closed in the near future. In my opinion, this had put the fear of future retrenchment in the mind of the claimants and as such their volitional capacity had been impaired. As such, the court acting in accordance with equity and good conscience, cannot give effect to their purported VSS agreement and it must be struck down***".

(Emphasis added)

[45] The Claimant, on his part, had consistently protested and refused to sign the MSA during his meetings with COW-2 on the ground that he was being pressured to accept the mutual separation offer. He even had raised his disagreement to the said mutual separation offer in his emails dated 28th December 2017 (*at p. 4 of COB-1*) and 1st January 2018 (*at p. 6 of COB-1*) to COW-1 and also an email dated 26th January 2018 to COW-2 (*exhibit "CL-3" of the Statement of Case*).

[46] Hence, there is substance to the Claimant's allegation that he was being forced or placed under duress to accept the MSP based on COW-1's and COW-2's misrepresentations. Counsel for the Company submits that the Claimant was always

slow in responding to COW-1's and COW-2's emails. He also had apparently taken his time to consider the MSA that was sent to him. Counsel further submits that if the Claimant truly felt forced, coerced or pressured by the Company, it is inconceivable that he will delay in showing signs of protest about his impending separation. However, from the WhatsApp message by COW-1 at page 2 of COB-3, it is evident that the staff of the Company were well aware and acknowledged even way back in May 2017 that the Claimant was always slow in responding to emails etc. That may very well be his nature. But it could not be denied that the Claimant did in fact register his protests to COW-1 and COW-2.

[47] The Claimant's clouded state of mind pursuant to the misrepresentations of COW-1 and COW-2 is also evident when the Claimant accepted the MSA on 9th February 2018 by making a specific notation underneath his signature "*Accepted due to restructuring and redundancy*" (*p. 6 of CLB-2*). COW-2 in response had purportedly raised her voice upon seeing the notation and thereafter insisted on a second fresh copy of the MSA being signed without any such notation being affixed thereto. Counsel for the Company submits that that is not the case and in fact could not be the case as COW-2 is much smaller in physical size, height and weight than the Claimant. In fact during the trial, Counsel for the Company did ask COW-2 to stand side by side with the Claimant to show the difference in size, height and weight between the two individuals and now submits that the Court ought to take judicial notice of this fact. But lest it be forgotten, COW-2 is the Claimant's superior, in that she is the Director of Human Resources of the Hong Leong Group. The Court is unable to agree with the submissions of the Company's Counsel that it was impossible for the Claimant to be intimidated by COW-2. Power and conduct of a management staff is not related to the

size of the person but rather from the power they wield by virtue of the position held in the Company.

[48] Further, the fact that a second fresh copy of the MSA was signed (*at pp. 8-13 of COB-1, and in particular page 13*) lends credence to the Claimant's contention that COW-2 was indeed dissatisfied with the notation "*Accepted due to restructuring and redundancy*" at page *6 of CLB-2* and had made the Claimant sign a fresh copy of the MSA. The only conclusion that can be derived from COW-2's conduct is that the Company wanted a clean break with regards to the Claimant's employment in that they wanted the MSA to be signed without any conditions being attached thereto, thereby giving the false impression that it was voluntarily entered into by the Claimant.

[49] It is the Court's finding that the Claimant was indeed forced or pressured into signing the MSA dated 5th February 2018 as a result of the misrepresentations made to him by COW-1 and COW-2 that he was deemed redundant pursuant to the restructuring exercise taking place at the Group Human Resource. From the evidence before the Court, the incontrovertible conclusion is that the MSA was not voluntarily entered into by the Claimant. The Claimant has succeeded in proving, on a balance of probabilities, that he had been dismissed by the Company in the guise of a mutual separation scheme.

(ii) Whether the dismissal was with or without just cause or excuse

[50] It is trite law that the sanctity of a contract should always be upheld. However, there are vitiating factors that could upend that sanctity if it could be proved that the contract was not entered into in a free state of mind or genuine consensus.

[51] Such is the case here that the evidence wholly points to the fact that the Company's senior officers, i.e. COW-1 and COW-2, had misrepresented to the Claimant that he had been found redundant during the restructuring exercise within the Group Human Resource, and thus an MSP was being offered to him so he could walk away from the Company without the stigma of retrenchment being attached to him.

[52] The Claimant was clearly led into believing the misrepresentations of COW-1 and COW-2 and did indeed act to his detriment when he signed the MSA relying on the said misrepresentations.

[53] The Court agrees with the submission of the Claimant's counsel that the MSA was signed by the Claimant due to consistent and persistent misrepresentation of redundancy made by COW-1 and COW-2 and the intense pressure exerted by both COW-1 and COW-2 on the Claimant to accept the MSA.

[54] The Company's contention that the Claimant had displayed unsatisfactory performance also does not hold water in that its own appraisal documents and the

testimony of COW-1 during cross-examination shows that the Claimant was a good performer and that the mutual separation scheme had nothing to do with performance issues, as admitted by COW-1.

[55] Under the circumstances, the Court finds that the MSA dated 5th February 2018 was not entered into by the Claimant on his own free volition. The Claimant had indeed been dismissed by the Company and such a dismissal was made without just cause and excuse.

VI. The Remedy

[56] The Court finds that an order for reinstatement is inappropriate taking into account the circumstances of the case. The Company clearly does not wish to keep the Claimant in its employment.

[57] The Claimant had pleaded in his Statement of Case that his last drawn salary was RM11,500.00.

[58] The Claimant is entitled to compensation *in lieu* of reinstatement, at the rate of one month's salary for each year of service. The Claimant commenced his employment in May 2014 and was dismissed in March 2018. Thus, the Claimant's completed years of service is 3 years. The Claimant is entitled to compensation *in lieu* of reinstatement for a total sum of RM34,500.00, i.e. RM11,500.00 x 3 months.

[59] Para. 1 of the Second Schedule of the Industrial Relations Act 1967 provides that in the event that back wages are to be given, such back wages shall not exceed 24 months' back wages from the date of dismissal based on the last-drawn salary of the person who has been dismissed without just cause or excuse. Claimant was terminated on 15th March 2018 and the hearing of this case was completed on 18th November 2019. Thus, the Court allows a total of 20 months back wages, amounting to RM230,000.00, i.e. RM11,500.00 x 20 months.

[60] The Claimant testified during trial that after he was terminated by the Company, he joined Hup Seng as an IR Manager on a 1-year contract and was employed for 1 ½ months from June to July 2018. He has been unemployed ever since despite sending out applications to obtain employment elsewhere. Under the circumstances, the Court exercises its discretion to impose a deduction of 10% to be made on the back wages awarded to the Claimant.

[61] The Claimant however had already been paid his severance pay-out package under the MSP amounting to RM57,500.00 by the Company. Therefore, a sum of RM57,500.00 shall be deducted from the total compensation awarded herein.

VII. Award

[62] The Court awards and directs that the Company pay to the Claimant a total sum of **RM184,000.00**, which is derived from the following calculation:-

(i)	Compensation *in lieu* of reinstatement	
	RM11,500.00 x 3 months	…RM 34,500.00
(ii)	Back wages	
	RM11,500.00 x 20 months	…RM 230,000.00
(iii)	Less deduction of 10%	…RM (23,000.00)
(iv)	Less severance pay-out	…RM (57,500.00)
	Total	**… RM 184,000.00**

[63] The Company shall pay the said award sum of RM184,000.00, less statutory deductions (including but not limited to EPF and SOCSO contributions) to the Claimant's solicitors, Messrs. Muhendaran Sri, within 30 days from the date mentioned at the bottom of this Award.

[64] The Court also hereby orders that the Company shall pay the statutory contributions deducted from the award sum as well as its own share towards the contributions to the relevant statutory bodies, including all interests and/or dividends

payable on such statutory contributions from the date of the Claimant's dismissal, within 30 days from the date mentioned at the bottom of this Award.

HANDED DOWN AND DATED THIS 28TH DAY OF JANUARY 2020.

-Signed-

(PARAMALINGAM A/L J. DORAISAMY)

CHAIRMAN

INDUSTRIAL COURT, MALAYSIA

KUALA LUMPUR