YAP SZE LEONG

v.

HWEE SENG (ELECTRONICS) SDN BHD

INDUSTRIAL COURT, KUALA LUMPUR
MARY SHAKILA G AZARIAH
AWARD NO. 389 OF 2011 [CASE NO: 27/4-172/09]
21 MARCH 2011

DISMISSAL: *Absenteeism - Claimant absent from work - Whether he had reasonable excuse for being absent from work - Whether the company had been aware of his reasons for being absent from work - Effect of - Evidence adduced - Whether it had constituted just cause to dismiss the claimant - Effect of - Whether dismissal without just cause or excuse - Industrial Relations Act 1967, s. 20(3)*

DISMISSAL: *Absenteeism - Claimant absent from work - Whether proven by the company - Evidence adduced by the company - Effect of - Claimant transferred numerous times by the company - Whether the claimant's transfer had been exercised in good faith - Claimant refusing to go on transfer - Whether the claimant's refusal had been reasonable - Whether the transfers had been a form of punishment imposed by the company on the claimant - Claimant querying new terms and conditions of service - Company failing to address the claimant's concerns - Whether that had been good industrial relations practice on the part of the company - Effect of - Past service record of the claimant - Effect of - Whether dismissal without just cause or excuse - Industrial Relations Act 1967, ss. 20(3) & 30(5)*

The company had employed the claimant as a Manager for Sales and later made a Director. The company contended that the claimant had admitted to some misconduct and was initially offered a fresh appointment by the company which he refused to take up. The company's latest offer to the claimant had been a job assignment in Butterworth as its Branch Manager but owing to the claimant's failure to report for work for a continuous period of 6 days, the company considered that the claimant had dismissed himself. The claimant contended that he had been dismissed without just cause and excuse. The sole issue that arose for determination before this court was whether the claimant's dismissal had been with just cause or excuse.

Held for the claimant: Dismissal had been without just cause or excuse

(1) The company had removed the claimant as its director but had allowed him to continue to serve the company as its Sales Manager warning him that if he repeated his acts again, his employment would be put in jeopardy. The evidence had also shown that the company had not been happy with the claimant for what he had allegedly done. It appeared that the company had decided to reduce in writing the terms and conditions of the claimant's service. The management thought that this had been fair and it had been done to punish him for his misdoings. The claimant had not agreed to this and he had continued to reject the company's 2nd, 3rd, 4th and subsequent job assignments that had been issued to him. Then the claimant's salary was once again reduced and his sales territory once again changed. The company's witnesses had stressed that this had been done to punish the claimant. The subsequent reduction in salary and the taking away of his original scope, benefits and allowances had also been done to punish him. The company had attempted to justify their action in changing his sales territory by stating that they had thought that he had lost the respect of his sales staff but evidence to that effect had not been led in court. In essence the company had demoted the claimant after COW2 had come to know of the incidents and that too a year later. The company had issued a warning to the claimant that if he were found guilty of misconduct once again or displayed behaviour detrimental to the welfare and interests of the company, his employment would be put in jeopardy. Hence it had been completely unfair for the company to have continued in the course they had embarked on to inflict further punishment on the claimant (paras 30 & 31).

(2) The company had attempted to build its case on the claimant's refusal to accept the job assignments that he had been offered but the claimant's evidence as to why he had not been able to accept the terms and conditions of the new assignments had been acceptable. At the hearing, the company had not disputed that it had been "punishing" the claimant every step of the way, nor had it denied that the other sales managers had not been subject to the same terms and conditions of service that had been imposed on the claimant. This had smacked of unfair labour practice which would not be upheld or tolerated (para 32).

(3) The claimant had not been unreasonable or difficult when he had disagreed to his salary being cut without his consent, or his sales territory being changed at the company's whims or the failure of the company to address the issue of his allowance or benefits or the imposition of the new sales targets by the company, which in his opinion, could not be achieved at all (para 33).

(4) As the company had not issued a letter to the effect that the claimant's suspension had been lifted, he could not be faulted in thinking that his suspension had continued until the date of his dismissal from the company (para 33).

(5) The non-reporting to work by the claimant had stemmed from the 1st job assignment that had been given to him by the company wherein he had sought clarification from the company and intimated that he had disagreed to some of the terms. The company's haste in wanting to transfer the claimant around and not deeming it proper to sit down and discuss the matters that had been in contention in relation to his employment had been hard to understand. If the company had been sincere in wanting to keep the claimant in employment, it should have spoken to him and sorted out the issues in connection with his employment. It would be good industrial relations practice for an employer to investigate and discuss matters raised by the employee before transferring him or her. The claimant had served the company for 36 years. He had an unblemished record for many years until 2003. A transfer, notwithstanding that it is a management prerogative, is not absolute and untrammeled. Where a transfer is tainted by ulterior motive, arbitrariness or capriciousness, unfair labour practices or *mala fide*, there will be intervention in the process of industrial adjudication (para 34).

(6) Applying all the facts and evidence in this case and applying the legal principles, the claimant's transfer by the company had been actuated by improper motive and had not been exercised in good faith. The company's prolonged treatment of the claimant for his acts had been unfair. The claimant's transfer to Malacca and Johore, then Penang and lastly to Butterworth had not been made for the interest or exigencies of the company's business. It had been meant as a punishment to the claimant for his misconducts and had not been done in good faith. Thus his dismissal for not reporting to work had been done high-handedly and had been without just cause and excuse. For the periods in question, the claimant had been

reporting to the branch at Petaling Jaya and this had been within the company's knowledge. The onus of proving vitiating circumstances or factors that had undermined the proper exercise of the employers exercise of its prerogative to transfer had laid with the employee and had been discharged by the claimant in this case (paras 36 & 37).

[Dismissal without just cause or excuse - Claimant awarded backwages and compensation in lieu of reinstatement in the sum of RM278,400.]

Award(s) referred to:
Antioni Sdn Bhd v. Maria Lawrence [2001] 2 ILR 364 (Award No. 437 of 2001)

Case(s) referred to:
Ladang Holyrood v. Ayasamy Manikam & Ors [2004] 2 CLJ 697
Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 4 CLJ 449
Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9
Wong Chee Hong v. Cathay Organisation (Malaysia) Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298
Woods v. WM Car Services [1981] ICR 666

Legislation referred to:
Employment Act 1955, s. 15(2)
Industrial Relations Act 1967, s. 20

For the claimant - Adi Hazlan (Adlan Hadi); M/s Nik Saghir & Ismail
For the company - Umi Kalsom; M/s David Gurupatham & Koay

Reported by Sharmini Pillai

AWARD
(NO. 389 of 2011)

Mary Shakila G Azariah:

[1] This reference stems from the dismissal of Encik Yap Sze Leong ("the claimant") by Hwee Seng (Electronics) Sdn. Bhd. ("the company") on 31 May 2004.

Brief Facts

[2] Reading his pleaded case the claimant commenced employment with company in the year 1968 as an office boy. The claimant was made a manager of sales in 2000 and was later made a director of the company by its management. The company contended that the claimant admitted to some misconduct and was initially offered fresh appointments by the company which the

claimant refused to take up. The company latest offer to the claimant was a job assignment in Butterworth as its Branch Manager which was intimated to him by the company on 29 April 2004 *vide* its letter. Owing to the claimant's failure to report for work at Butterworth for a continuous period of 6 days the company considered the claimant to have dismissed himself.

Issues And Law

[3] At the onset of the proceedings the company's solicitor informed the court that the claimant was dismissed by the company with just cause. This then is the issue that the court would have to determine. The function of the Industrial Court following the case of *Wong Chee Hong v. Cathay Organisation (Malaysia) Sdn. Bhd.* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 the foremost question to be asked is whether there was a dismissal. In *Milan Auto Sdn. Bhd. v. Wong Seh Yen* [1995] 4 CLJ 449 the function of the Industrial Court in a reference under s. 20 of the Industrial Relations Act 1967 was stated as follows:

> … the function of the Industrial Court in dismissal cases on a reference under s. 20 is two-fold. It has to determine whether the misconduct complained of by the employer has been established, and, secondly, whether the proven misconduct constitute just cause or excuse for the dismissal.

[4] It is trite where the workman has made representations that he had been dismissed without just cause or excuse the burden of proof is on the employer and not claimant. The employer is required to prove on a balance of probabilities that he had just cause or excuse to dismiss the claimant. Evidence must therefore be adduced by the employer be it oral or documentary to establish that the facts and circumstances that he contends constitute just cause or excuse for dismissing the claimant.

Evidence

[5] The company evidence was given by first, its director (CW1). He testified that the claimant was issued with a warning letter dated 11 June 2003 for his actions and omissions. He explained that the warning letter was issued because the claimant had in the heat of anger pulled out the flower and plants and had stomped on them with his feet using foul language at the same time in front of his staff and the company's dealers. He further testified that the claimant slapped one of the company's directors, Mr. Kong Thiong Ching for calling him "childish" during an annual dinner in January 2003. It was his testimony that the claimant also borrowed

monies from one of the company's dealers, Musical Image though he knew that it was against the company's policies to do so and that the claimant sold the falcon products even though the company had given him firm instructions to discontinue selling the products because they were poor in quality. CW1 said that the claimant was issued with the warning letter because he had further failed to inform the company that one of its staff was in the process of setting up his own business which was in conflict of his interest with the company.

[6] It was CW1's evidence that the claimant was told to refrain, rectify and cease his actions and omissions by the company *vide* the said warning letter. He said that the claimant was required to explain himself and to return the company's car, credit card and handphone. CW1 testified that the claimant in his reply apologized for losing his temper and damaging the plants. He said that the claimant admitted hitting Mr. Kong and borrowing monies from Musical image and as a result had compromised his position to act in the interest of the company. He said that the claimant requested the company to give him an opportunity to provide his service.

[7] CW1 further testified that the company required further explanation from the company. He said the claimant wrote back informing the company that he had apologized to Mr. Tan How Kim, the company's Managing Director, and that Mr. Tan had agreed that a written statement was not required from him. CW1 said that this was not true. He testified that the claimant also *vide* his letter apologized to Mr. Kong for having slapped him.

[8] CW1 also said that the company thereafter decided to remove the claimant as a director of the company with effect from 3 July 2003 and not 3 June 2003. He said that due to the service with the company the management decided to give the claimant another chance to continue as Sales Manager setting new terms and conditions of service for him *vide* the company's letter of 15 July 2003. He said that the claimant rejected the terms and conditions of service which imposed a personal guarantee to be executed by him for the bad debts of the company. According to CW1 another letter of appointment was issued to the claimant dated 8 August 2003 but the claimant *vide* his letter dated 18 August 2003 replied rejecting paras. 3, 4 and 5 of the company's said letter. He said that the company *vide* its reply accepted the counter offer of the claimant *vide* its letter dated 3 September 2003 and stating that the claimant was required to report for work at the branch office at Penang where he would be transferred to *vide* the second letter of

appointment. CW1 testified that the claimant replied that he did not accept the job assignment but the company responded saying *vide* its letter dated 15 September 2003 that the contract had already been concluded.

[9] It was his testimony that the claimant refused to take up the job assignments given to him by the company. He said that the company made another assignment transferring the claimant to Butterworth as its Branch Manager *vide* its letter dated 29 April 2004. He said that the claimant was asked to report for work there on 10 May 2004. CW1 explained that the letter stipulated that the salary was reduced to RM4,000 because there was a salary cut imposed by the company at the material time on all staff. He said that owing to the claimant's failure to report for work at Butterworth for a period of 6 days the company deemed that the claimant had dismissed himself from service. He testified that prior to terminating his services the company *vide* its letter dated 11 May 2004 informed the claimant that the company had viewed his actions of not reporting for work at the newly assigned territory seriously and will not tolerate his actions and attempts to avoid undertaking work in the company. He said that the company gave him a final warning. CW1 testified that the claimant was paid his salary even when he was not doing his work during the interim period. He said that the company had specially created a job opportunity in Butterworth for the claimant. He said that at that time positions were hard to come by and the management had exhausted all possible vacancy of a managerial position for the claimant. He said that all staff in the company were transferable.

[10] When he was cross-examined CW1 said that he knew about the incident that took place after the annual dinner involving the claimant in June 2002. He agreed that he did nothing about it. He testified that he did not personally witness it however. He agreed that the company did not hold a Domestic Inquiry against the claimant. He agreed that when the 1st job assignment was given to the claimant his salary was reduced, the company required him to sign a personal guarantee for the past debts of the company arising from the sales clinched by the claimant and the company imposed for the first time sales targets for the claimant to achieve. He said that this was done as the claimant was not working in the interest of the company and was guilty of the acts of misconduct.

[11] CW1 testified that the claimant *vide* the company's letter dated 11 July 2003 had his directorship removed as a result of his misdoings but that he could continue as Sales Manager of the company. He agreed that *vide* the said letter also the claimant's

A salary was reduced from RM5,800 to RM5,000. It was his testimony that though the claimant rejected the job offers of the company to him the company nevertheless regarded him as an employee and continued to pay him the reduced salary. He testified that the last job offer to the claimant was a position in
B Butterworth which the claimant also refused to accept. He agreed with the court that during the period the claimant did not report for work at Butterworth branch as he was asked to do so he was at the warehouse of the company situated at Petaling Jaya. He said that he was aware as to why the claimant kept on rejecting the
C offers of new job assignments by the company.

[12] CW1 when asked by the claimant's counsel agreed that the company had asked the claimant to write a letter of apology to Mr. Kong which he did. When asked when was the claimant released from the initial suspension that was leveled against him by the
D company CW1 said that was done on 11 July 2003. CW1 relied on the company's letter dated 11 July 2003 as prove that the suspension was lifted by the company in 11 July 2003 by the company. He added that even though the claimant did not sign accepting the new terms and conditions of service that was given
E to him by the company he was released from his suspension. When asked what was done to the claimant between the period 3 July 2003 to 31 May 2004 CW1 said that the claimant was removed as a director by the company and his salary was deducted. CW1 said that there was pay-cut imposed on all staff and the claimant too
F was subject to it. When asked whether the company dismissed the claimant he said "Yes".

[13] In re-examination CW1 told the court the claimant's acceptance was not required when the company gave him the new job assignments. He said that the claimant being an employee was
G required to carry out the instructions of the company perform his duties. He said that the employees were transferable.

[14] The company's second witness was CW2 the Managing Director of the company. His evidence was that he did go through
H with the claimant with regards to his acts of misconduct. He said that the claimant pleaded with him to be given a second chance to retain his job. He said that he asked the claimant to apologize to Mr. Kong. He said that *vide* the company's letter dated 11 July 2003 the company did give the claimant another chance to continue his duties as Sales Manager. He said that details of the
I new assignment was given to him CW2 said that he was not allowed to continue in his current employment as Sales Manager then because his sales staff had by then lost respect for him. CW2

said that the claimant rejected all the job assignments that was given to him by the company. CW2 testified that the company offered to accommodate him as Sales Manager of Penang, Kedah and Perlis Branch and when this was also rejected the company offered him another job assignment as Sales Manager at Butterworth as the company filled up that vacancy at Penang. He said that re-assignment kept on going because the company wanted to retain the claimant in his employment as the company recognized his long service with the company. He said that was why the company still kept paying the claimant his salary despite him turning down then previous job assignments. It was his testimony that after giving him so many offers and chances the company decided to terminate his services when he failed to report for work for a continuous period of 6 days.

[15] It was his evidence when cross-examined by the claimant's counsel that the claimant's directorship was removed by the company because of his misconduct. CW2 agreed with the claimant's counsel when it was suggested to him that the company punished the claimant by removing him as a director of the company. CW2 when asked also testified that the imposition of a personal guarantee on the claimant was not effected for the other managers. He said that he was offered the salary of RM5,000 again to discipline him for his misconduct.

[16] CW2 explained that as a result of the claimant's admission to the 5 allegations the company raised he was asked to manage the sales at Malacca and Johore whilst stationed at Petaling Jaya. He said that this was done because the company felt that the claimant could no longer have the respect of his sales staff who knew about his acts of misconduct.

[17] CW2 testified that he knew that the claimant did not accept *inter alia*, the first job assignment because of the requirement of the personal guarantee that he would be required to sign. He said that the 2nd job assignment that the company offered to him was as Sales Manager covering Penang, Kedah and Perlis. He said that he was transferred to Penang with a reduction in salary "to punish him". When the claimant's counsel asked him that the claimant was punished twice for his alleged acts of misconduct by the company in that he was removed as a director of the company and transferred to Penang with a salary cut he replied "yes, correct". CW2 also agreed that the company took away all the claimant's allowances that he was enjoying up until that time. He said that he thought it was reasonable for the company to transfer the claimant to Penang as Sales Manager with a salary reduction and

without any credit card and other allowances. He agreed with the claimant's counsel suggestion that the "new job assignments" were in fact new job offers to the claimant.

[18] The claimant testified that he was the Sales Director and also the director of the company. He said that he commenced work for the company on 1 April 1968 as an office and rose in the company rank and file because of his discipline and ability. The claimant did not agree with the 1st and 2nd allegation contained in the warning letter dated 11 June 2003 from the company. As regards the 3rd allegation he said that he did not agree to the same as well as he did not borrow the monies from Musical Image but from Michael Lim as a friendly loan. He testified that he had settled the amount borrowed since. It was also his testimony that the goods from Falcon which was the basis of the 4th allegation of the company the said goods were given on a consignment basis and he had told Optison to take them back which they delayed doing. He said that by 11 June 2003 the said goods were taken back by Optison. In regards to the position of Edwin the claimant testified that he had already asked him about his personal business and he denied that he was doing his own business. He said that he had warned Edwin of the consequences of doing his own business whilst being an employee of the company.

[19] It was the claimant's testimony that he had apologized in his letter dated 12 June 2003 to the company with regards to the 1st and 2nd allegations notwithstanding his denial of them as he was afraid that if he did not do so he might lose his job. He explained that by apologizing to the company he was not admitting that he was guilty of the same. The claimant testified that the company wrote to him on 11 July 2003 informing him that he was found guilty of misconduct. He said that he was removed as a director of the company and that together with their letter finding him guilty and removing him as director the company had enclosed another letter for a new job assignment as sales manager requiring him to sign (referred to as the "1st job assignment"). The claimant said that he did not sign the said letter as the company *vide* the 1st job assignment had deducted his salary from RM5,800 to RM5,000, asking him to become a guarantor for the bad debts of the company and imposing unreasonable sales targets for him to meet. The claimant testified that he wrote to the company stating that he was not agreeable to the execution of the personal guarantee and to the 1st job assignment.

[20] The claimant testified that *vide* its letter dated 8 August 2003 the company gave him a 2nd job assignment as Sales Manager. He said that this 2nd job assignment changed his sales territory and removed the requirement for his personal guarantee. He said that the 2nd job assignment also imposed sales targets which were unreasonable and quite impossible to achieve. It was his evidence that the other Sales Managers in the company were not required to sign a personal guarantee that will by its terms, *inter alia*, bind even his personal representatives, heirs and assigns. He said that he was not agreeable to this 2nd job assignment as he thought the terms were unreasonable and ridiculous. He said that *vide* his letter dated 18 August 2003 he informed the company that he was not agreeable to paras. 3, 4 and 5 of the 2nd job assignment.

[21] It was his testimony that even if paras. 3, 4 and 5 were deleted from the said 2nd job assignment he would still not accept the 2nd job assignment as there were still several other unclear issues with the company. He said that before this he received a hand phone, car and credit cards allowances from the company. He said that the company was silence in their job assignments offered on the restoration of these benefits he enjoyed. He said that he had to discuss the issue of housing and outstation allowances and the reduction of his salary with the company.

[22] The claimant testified that *vide* their letter dated 3 September 2003 the company accepted his counter-offer and enclosed a 3rd job assignment for him. He said that in the 3rd job assignment the company omitted paras. 3, 4 and 5 and requested him to sign the same. He said that he however did not sign the same as he did not make a counter-offer in his letter dated 18 August 2003 and had never agreed to the 2nd job assignment. He said that he wrote to the company on 5 May 2003 stating that he had not accepted the 2nd job assignment and asked as to why his salary was reduced. It was his evidence that the company replied *vide* their letter dated 15 September 2003 saying that the contract between him and the company had been concluded upon receipt of the company's letter dated 3 September 2003. He said *vide* his letter dated 19 September 2003 he wrote to say that the contract had not been concluded.

[23] The claimant further testified that *vide* the letter dated 29 April 2004 the company informed him that the post of Sales Manager at Penang branch had been filled up and asked him to go to Butterworth as its Branch Manager. He said that he received from the company a 4th job assignment wherein the company

A reduced his salary to RM4,000. He said that he did not accept this as well. The claimant testified that from his first letter to the company dated 1 December 2003 he came to work in KL Branch and the company kept accusing him of failing to take up his job assignments at Penang as its Branch Manager. He said that he
B never accepted the job assignment at Penang. He said that *vide* the letter dated 31 May 2004 the company terminated his services with them as he had allegedly failed to report for work for 6 days. He said that it is not true that he did not report for work as he had all along been working in the Kuala Lumpur Branch. It was his
C testimony that the 4 job assignments were not "new assignments" but new offers as his salary was always reduced and all his benefits were taken away from him by the company. He said that the company had bad intentions in giving him the job assignments and had perhaps wanted him to leave the company.

D **[24]** It was his evidence during his cross-examination that from 11 June 2003 to 24 May 2004 he was at the Sales Section, at the Petaling Jaya office at Sunway Damansara. He said he was looking at the products and was sitting at the warehouse. He said during this period he reported to CW1. He said however he did not
E inform him that he was at the warehouse during this period but had punched his time-in and out card. He said that this will show that he was at the warehouse. He agreed that CW1 had testified he was speaking on the telephone but with the dealers. He said that early in the morning and at lunchtime he would read the
F newspaper. He said that he was still under suspension of his duties and the company did not let him to do any work. It was his evidence that until 31 May 2004 the company paid him his salary.

[25] When cross-examined on his admission to the company's allegations against him he said that everything during Yvonne's
G dinner was in the open and he did not damage any potted plants belonging to the company or use foul language. He explained that owing to his mother's ill-health he had borrowed monies from Michael who was his friend. He maintained that he returned it later. He said that he explained to the company that he did not
H damage any flower pots or slap anyone but the company did not accept his explanation so he apologized. He said that he had explained this to CW2. When asked about the Falcon products he said that he was not aware that the company had asked to stop selling them.

I **[26]** In regards to the 1st job assignment he testified that he only informed the company about his non-acceptance of paras. 3, 4 and 5 because they were very important to him. He testified that as a

Sales Director there were no sales targets imposed on him by the company. He maintained when asked by the company's counsel that from 11 June 2003 to 31 May 2004 he was suspended by the company. He said that he had been working in the company for 36 years and was thrown here and there by COW2. It was his testimony that the company was forcing him to resign treating him like "rubbish". On a question posed by the court the claimant said that he agreed that the company had a right to transfer him but that the transfer must be reasonable. He said that the company should not impose so many conditions, cut his pay, take away his handphone and credit cards. He said this is unreasonable altogether and is like demoting him.

Evaluation

[27] There is only one reason advanced by the company for dismissing the claimant and that is as the facts suggest, that he had absented himself from work for a continuous period of 6 days. To be more precise the company took note of the fact that the claimant did not report for work at their Butterworth Branch as he was directed to do vide its letter dated 11 June 2003. The company presumably thought this merited dismissal. Quite rightly so if we look at s. 15(2) of the Employment Act 1955. But the facts of the case suggest that it is not so straight forward a case as that that meets the eye. This last job assignment was the 4th that the company assigned to the claimant after the 1st, 2nd and 3rd were not adhered to by the claimant. This fact was undisputed by the company's witnesses and claimant as well. It has been said that it is the court's duty to examine the evidence and facts and determine whether the company's allegations against the claimant were in fact established or to consider whether such misconduct if established constitute just cause or excuse for his dismissal and that it was sufficient for the employer to dispose of the dispute at hand purely on account of the company's failure to adhere to the principles of natural justice but also with the requirement of a Domestic Inquiry dismissing the claimant.

[28] It was not denied by the company's witnesses that the claimant was not accorded a due inquiry before he was dismissed by the company. The company I reiterate relied solely and heavily on s. 15(2) of the Employment Act. But this defect if at all is curable as the Hearing before this court is heard *de novo* and the company is given an opportunity to satisfy the court on a balance of probability that the claimant's dismissal was without just cause or excuse.

[29] On the evidence and facts it was clear that the acts complained of against the claimant, to which he confessed in writing, the question I pose is whether they warranted the company acting in the manner they did *vide* their letter of 31 May 2004. Taking the matters that the company thought were unsatisfactory, matters 1 and 2 happened a year before the company issued their letter of warning to the claimant requesting him to explain. The matter of the borrowings from Musical Image it is not told to the court exactly when this happened but the evidence suggest and it was undisputed by the company, that when the letter of warning was issued to the claimant he had returned the monies borrowed to Mr. Michael of Musical Image from whom the claimant said he took a personal loan. It is trite that the company has the prerogative and a managerial right having come to know of what had happened to require the claimant to explain himself. The company may have its reasons as to why it forbids the borrowing of monies from its dealers by its employees. Such orders and directions should be adhered to by the employees. However having said that, when the said letter of warning and the subsequent letter of 26 June 2003 requesting for further explanation and directing the claimant to do certain acts and to make amends was issued to the claimant, the court opines that the matters complained off against the claimant were put to rest. More so because the evidence shows that the claimant complied with the directions contained in the said letter of 26 June 2003. The claimant apologized to the director he allegedly slapped and to CW2 for not fulfilling his duties.

[30] Sadly, as the evidence shows the company removed the claimant as its director but allowed him to continue to serve the company as its Sales Manager warning him that if he repeats his acts again he would put his employment in jeopardy. But the evidence also shows that the company was not happy with that treatment of the claimant for what he allegedly had done. On the evidence it appears that the company decided to reduce in writing the terms and conditions of service of the claimant. The letter of 11 July 2003 was issued to the claimant and by which terms the company reduced the claimant's salary without his consent, imposed the requirement that he was to execute a personal guarantee for the debts arising from goods sold and delivered as per his instructions and changed his sales territory to Malacca and Johore with new sales targets to achieve. According to the company's witnesses the management thought that this was fair and that it was done to punish the claimant for his misdoings. It was only to be expected that the claimant would not agree to this

and which he did. This led to the 2nd, 3rd and 4th job assignments being issued by the company one after another as the claimant continued to reject the terms and conditions of each new job assignment that the company issued to the claimant. It is noted that the claimant's salary was again reduced and the sales territory changed. The company's witnesses said that this was because there was a salary cut during that period for all staff and that claimant's too was not spared. They said that because of the claimant's rejection the sales territory was necessarily changed as the company had to fill up the vacancy at Penang. However no explanation was heard for the company changing the claimant's territory from Malacca and Johore to Penang (see the terms of the 1st and 2nd job assignments).

[31] What is worrying is that the company's witnesses stressed that this was done so as to punish the claimant. So removal of him as director was to punish him. The subsequent reduction in salary and taking away of his original scope and benefits and allowances was also to punish the claimant. The company attempted to justify their action in changing his sales territory by saying that they thought that claimant had lost the respect of his sales staff. But evidence to that effect was not led in court. The company did not adduce witnesses from the company who could allude to this fact or corroborate the evidence of the company's witnesses on this. CW1 testified that he knew about the incidents earlier but chose to do nothing about it. After that the claimant it is noted continued in his job as Director of Sales until his suspension *vide* the company's letter dated 11 June 2003. Both CW1 and CW2 did not testify that the claimant's sale staff complained about him or expressed their reluctance to work under him. There was no evidence to that effect adduced by the company. In essence the company on the facts and evidence before the court were demoting the claimant after the math of the incidents CW2 came to know about and that too a year later. The company *vide* its letter of 11 July 2003 had issued a warning to the claimant that if he were found guilty of misconduct once again and/or further acts or behavior which are detrimental to the welfare and interest of the company his employment would be put to jeopardy. Hence it was totally unfair for the company to continue in their course they had already embarked upon that is to inflict further punishment on the claimant. The court opines on the evidence the claimant had already been dealt with for his actions by the company *vide* the company's letter dated 11 June 2003 and/or 11 July 2003.

[32] The company attempted to build its case on the claimant's refusal to accept the job assignments that the company had offered him. The court accepts the claimant's evidence as to why he could not accept the terms and conditions of the new job assignments from the company. Reiterating the company's stand on the matters that had happened, the company had already removed all his benefits and allowances and had removed him as a director of the company. It was not disputed by the company at the hearing that every step of the way the company was "punishing" the claimant. The company also did not deny that other sales managers were not subject to the same terms and conditions of service that they were imposing on the claimant. This smacks of unfair labour practice which the court will not uphold and tolerate.

[33] The claimant gave a reasonable explanation as to why he could not accept the company's job assignments. The court could not on the facts and evidence find anything wrong with what the claimant did or how the claimant responded to each job assignment that was given to him by the company. The court opines that the claimant was not being unreasonable or difficult if he was disagreeing to his salary being cut without his consent or discussion between him and the company or his sales territory being changed seemingly at the whims of the company or no talk about his allowances or benefits that were taken away being restored to him or the imposition on him alone of sales targets that he said could not be achieved at all. The company did not lift the suspension that was imposed on the claimant *vide* their letter dated 11 June 2003. There was no letter to that effect. So the claimant cannot be faulted to have thought that his suspension continued until his day of dismissal from the company.

[34] Having said all this it must be noted that the company terminated the claimant's services as he had failed to show up for work at the Butterworth branch as he was directed to do so for a continuous period of 6 days. The company's counsel submitted that it was the company's prerogative to transfer the claimant to Butterworth and the company was therefore justified in dismissing the claimant who failed to report for work as ordered. However in the light of the prevailing facts that transpired before this it would appear that the non-reporting for work by the claimant stems from the 1st job assignment that was given to him by the company. The claimant had sought clarifications and intimated that he disagreed with some of the terms. Even in regards to the last job assignment the claimant had said that he could not accept it as there were terms and conditions that was agreed upon. The court could not

understand the company's haste in wanting to transfer the claimant around and not deeming it proper to sit down and discuss the matters that were in contention as to his employment. If the company was sincere in wanting to keep the claimant in employment this is what the company should have done that is to speak to him and sought out the issues in contention over his employment. This would be good industrial relations practice for an employer to investigate and discuss the matters raised with the employee before they transferred him. As stated by the learned chairman in the case of *Antioni Sdn. Bhd. v. Maria Lawrence* [2001] 2 ILR 364 (Award No. 437 of 2001) it behoves the employer to give due attention and considerations to the such expressed misgivings of an employee. The claimant had served the company for 36 years. He had a unblemished record for many years until the 2003. It is trite that a transfer notwithstanding that it is a management prerogative, is not absolute and untrammeled. It has been stated that where a transfer is tainted by ulterior motive, arbitrariness or capriciousness, unfair labour practise or *mala fide* the court will intervene in the process of industrial adjudication. I stress the court will of necessity intervene in the exercise of the company's right to transfer an employee if the transfer is actuated with improper motive.

[35] Guidance can be sought from the case of *Ladang Holyrood v. Ayasamy Manikam & Ors* [2004] 2 CLJ 697 at p. 703 where it was held that:

> It is well established in industrial law ...
>
> (a) there is nothing to the contrary in the terms of the employment;
>
> (b) the management has acted *bona fide* and in the interest of its business;
>
> (c) the management is not actuated by any indirect motive or any kind of *mala fide*; and
>
> (d) the transfer is not made for the purpose of harassing and victimising the (e) the transfer does not involve a change in the conditions of service.

[36] Applying these principles enunciated it is evident that the company's transfer of the claimant was actuated with improper motive and was not exercised in good faith. The company's evidence through its 2nd witness was that it was done to punish the claimant for his acts of misconduct a matter that the company had dealt with *vide* its letter dated 11 June 2003 and/or 11 July 2003. On the evidence terms of transfer were less favourable to the

claimant. In *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9 the learned judge referred to an English case *Woods v. W.M. Car Services* [1981] ICR 666 and quoted Brown-Wilkinson J as stating:

> ... the tribunal's function is to look at the employer's conduct as a whole and determine whether it is that its effect, judged reasonably and sensibly is such that the employee cannot be expected to put up with it. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed.

[37] On the totality of the facts and evidence before it the court holds that the company's prolonged treatment of the claimant for his acts was unfair. The court is not satisfied that the transfer of him to Malacca and Johore, then to Penang and lastly to Butterworth was made for the interest or exigencies of the employer's business. It would appear that it was meant as the company's witnesses testified to deal with the claimant for his alleged admissions to the acts alleged against him by the company. The court is not convinced that it was done in good faith at all. Accordingly the court finds that the company's dismissal of the claimant for not reporting for work at Butterworth for highhandedly done. The court accepts that the claimant for the periods in question was reporting to the branch at Petaling Jaya and this on the evidence was within the knowledge of the company. Hence the claimant's dismissal was without just cause or excuse in the light of the facts and evidence and submissions heard and read. The court is well aware that the onus of showing such vitiating circumstances or factors that undermine the proper exercise of the employer's exercise of its prerogative to transfer lies with the employee and which the court states has been discharged by him. It is for the reasons discussed in the paragraphs hitherto that the court finds that the transfer orders were all invalid.

Relief

[38] In the final analysis of things it is the court's findings for the claimant that he had been dismissed without just cause or excuse. Though the claimant seeks reinstatement the court is of the view based on the facts that it would not be desirable that he should be reinstated and makes that following orders as such:

(1) Compensation *in lieu* of reinstatement

The court orders the company to pay the claimant the sum of RM208,800 derived as follows:

RM5,800 x 36 months = RM208,800

(2) Backwages

RM5,800 x 24 months = RM139,200

Rescaling

[39] The backwages of RM139,200 otherwise payable to the claimant by the company is reduced by 50% by the court taking into account his post dismissal earnings and the fact the claimant did contribute to the company acting in the manner they did against the claimant thus leaving the sum of RM69,600 derived as follows:

RM139,200 x 50% = RM69,600

Final Order

[40] The company is ordered to pay the claimant the sum of RM278,400 only less any statutory deductions to the claimant *via* his Solicitors within 30 days from the date hereof.