

**INDUSTRIAL COURT OF MALAYSIA
[CASE NO: 3/4-479/19]**

BETWEEN

SITI HAJAR JAMALUDIN

AND

CELCOM AXIATA (M) BERHAD

AWARD NO. 452 OF 2020

Before : **PUAN ANNA NG FUI CHOO - Chairman
(Sitting Alone)**

Venue : Industrial Court Malaysia, Kuala Lumpur

Date of Reference : 2.4.2019

Dates of Mention : 15.5.2019, 31.5.2019, 19.6.2019, 3.7.2019, 27.8.2019,
10.9.2019

Date of Hearing : 14.10.2019

**Company's Written
Submission** : 11.11.2019

**Claimant's Written
Submission** : 11.11.2019

**Company's Written
Submission in Reply** : 22.11.2019

Representation : *For the claimant- Ethayakumar Muniandy; Malaysian
Trades Union Congress*

*For the company- Louis Liaw Vern Xien; Ram Caroline
Sha & Syah; (formerly known as Ram Rais & Partner)*

Reference

This is a reference made under section 20(3) of the Industrial Relations Act 1967 (the Act) arising out of the dismissal of **Siti Hajar binti Jamaludin** (hereinafter referred to as “the Claimant”) by **Celcom Axiata (M) Berhad** (hereinafter referred to as “the Company”) on 29 November 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 29 November 2018.

Facts

[2] The Claimant started her employment with the Company as an International Operator on 1 May 2000 (on a contractual basis). Her first employment contract can be seen from page 1 to 4 of the Company’s Bundle of Documents (COB1). The Claimant was subsequently offered permanent employment by the Company and this is reflected in the second contract of employment in the position of international operator as found at pages 5 and 6 of COB1. Over the years, the Claimant was promoted and transferred. The Claimant held the position of Process Analyst prior to the termination of her employment.

[3] *Vide* a termination letter dated 22 November 2018 (page 91 of COB1), the Claimant was released from her duties with one week notice and she was paid three months in salary *in lieu* of notice. It was stated that the reason for the termination of her service was that she had failed to improve to the required standards of the Company despite having been put in the Performance Improvement Plan (PIP) for five (5) months and having received guidance from the Company.

The Duty of the Industrial Court

[4] The duty of the Industrial Court when dealing with ministerial references under section 20 of the Act was stated by his Lordship Salleh Abbas LP in the case of *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd* [1988] 1 CLJ (Rep) 298 at page 302 that:

“When the Industrial Court is dealing with a reference under section 20, the first thing that the Court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse.”.

[5] In the case of *Goon Kwee Phoy v. J & P (M) Bhd* [1981] 2 MLJ 129, his Lordship Raja Azlan Shah CJ Malaya (as he then was) at page 136 impressed upon the court its duty and said:

“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 the 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 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.”

The Company’s Case

[6] The Company called two witnesses to prove a case of poor performance against the Claimant which had led to her dismissal. The Company’s first witness Mr. Samuel Saravanan a/l Danker (COW1) is the Company’s Human Capital Business Partner. COW1 testified that the Company’s employees were registered on an online management software named Sapphire, a system used for various purposes and all employees are able to access it. COW1 also explained in detail the document called the Performance Goal Management & Performance Improvement Plan (PGM PIP) exhibited from pages 70 to 83 of COB1.

[7] COW1 further elaborated on the calibration process and how it was conducted in the Company. He testified that "calibration" means to apply a consistent set of standards

in deciding the performance rating of each individual employee, taking into consideration the variation of delivery targets, challenges, methods, result and feedback received from peers, line managers, stakeholders and leaders. It is conducted in a closed group forum attended by the Chief of Customer Service & Experience, Head of respective CSE Divisions and facilitated by Human Capital Business Partner. The attendees go through the list of each individual employee and calibrate based on feedback received across all stakeholders. In the case of the Claimant, as far as COW1 was aware, the manager's proposed Performance Rating was 2, and upon calibration, it was confirmed as 2.

[8] COW2 was the Claimant's immediate superior/supervisor and her evidence on the Company's monitoring process of an employee's work performance is almost similar to COW1's evidence. COW2 gave testimony about the PIP in general. She said the PIP in the first stage was for a period of three months. Throughout the three months, the employee would be reviewed from month to month. Depending on the results, COW2 explained that the Company would then make a decision whether to withdraw the employee from the PIP, for example when one has improved, or extends the time in the PIP, if one fails to improve in the performance. In the case of the Claimant, the PIP was extended for an additional two months at the end of her three months in the PIP. After the extension period had ended, the Company found that the Claimant had failed to hit her targets set in the PIP so it decided to terminate her employment.

[9] COW2 said the Claimant's performance in 2017 was unsatisfactory as the Claimant had obtained a rating of 2.67 for her Individual KPI score, which was below the minimum satisfactory rating of 3.0 and her overall Performance Rating was 2. The Performance Rating of 2 meant that she had obtained a rating of 2 that was below the minimum rating of 3 needed to qualify her for a performance bonus. It was also due to this rating that the Company enrolled her into the PIP program. The Performance Rating of 2 was first proposed by COW2 as the Claimant's manager and it was then calibrated by the management and affirmed to be 2. Thereafter, by way of a letter (email) to the Claimant dated 15 May 2018 (page 84 of COB1), the Company enrolled her into the PIP program.

[10] COW2 explained further on the issue of setting the Claimant's KPIs. At the beginning of the year, targets known as KPIs were set with the Claimant. For the year

2017, the individual KPI for the Claimant are found at page 1 of the Company's Additional Bundle of Documents (COB2). The projects assigned to the Claimant can be seen at pages 3 to 5 of COB2 which is actually the printed version of an online document operated using the Sapphire software. Sapphire was accessible to COW2 and the Claimant and it was used to track the status of the projects assigned to the Claimant.

[11] COW2 further elaborated that in the rating column, there is a grade to the performance of the Claimant in relation to a specific project. The highest grade is 5 while the lowest is 0. As could be seen in the document, for projects 4, 6, 7, 8, 9, 10, 11, 14, the rating that the Claimant obtained was 2, which was the grade below average. With these targets set at the beginning of the year, and the way they were measured (pages 3 to 5 of COB2), made known to the Claimant, COW2 said the Claimant would know clearly what she needed to achieve by the end of the year to achieve a high-performance rating.

[12] COW2 also referred to the document at page 56 to 68 of COB1 which was the 2017 Year End Review report of the Claimant. COW2 explained that the Year End Review included the review of two main components. Firstly, it was in terms of the achievement of KPIs and secondly, in terms of the compliance to the culture of the Company. In addition, in respect of the former, it contained three components namely the Company's KPIs, the cross functional team's KPIs (CFT KPI), and the employee's individual KPIs. For the latter, a "culture score" would be given. This was also explained by COW1.

[13] Consequently, two results were given namely for Performance Rating and Performance Bonus Index. COW2 said the Claimant would be aware of the review process not only because there were briefings held by the Human Resource department from time-to-time but also because the Claimant had been an employee with the Company for close to 20 years. Additionally, the policies relating to employees were made accessible to the Claimant at all times.

[14] The Claimant's Performance Bonus Index was 3.7/5.0 as could be seen at page 68 of COB1. Her Performance Rating as a result of automation using the grid box was 3 and that is seen in the "bubble" in the grid box. The automated result was only a guide. It is stated at page 68 of COB1 that "A bubble comprising KPI score & Culture score is

available on the KPI vs Culture grid box (25 boxes) to guide you”. Using the guide, COW2’s proposed Performance Rating for the Claimant was 2 and she “Needs Development”. COW2 gave her comments that the Claimant had to be more focused and to deliver her tasks on time. After calibration, the Claimant’s final Performance Rating was confirmed 2.

[15] COW2 did not deny that the Claimant’s Performance Rating was 3 based on the grid box but her proposed Performance Rating for the Claimant was 2. After calibration, it also became 2. COW2 explained that when the year-end-review was done, based on the grid box which had taken into account the “KPI score” and “Culture score”, the Claimant’s rating as automated was indeed 3. COW2 who had managed and observed the Claimant throughout the year, and the fact that the Claimant only scored 2.67 for the individual KPI and 2.0 for culture score, believed the Claimant’s rating should be 2 instead of 3. COW2 explained the reason she had given the Claimant a rating of 2 was based on an objective observation of the Claimant’s performance and also because she believed the Claimant needed development to improve.

[16] More importantly, COW2 said the Claimant was also aware that for the purpose of fairness, the Performance Rating was subject to calibration. The process of calibration had also been explained by COW1. Upon calibration, the Company had agreed with COW2’s proposed rating and it was affirmed at 2. The final Performance Rating was provided and displayed on the Sapphire system, accessible online by the Claimant. COW2 said the Claimant was aware that she was calibrated at rating 2 as there was an email sent to her by the Human Capital (page 61 of COB2).

[17] The Claimant was also informed via the email that she was not eligible for the 2017 Performance bonus. COW2 further confirmed that there was no objection or appeal by the Claimant after the Claimant had been notified about her final Performance Rating being graded 2. COW2 said the Claimant could raise her objections by submitting a performance rating appeal to the Performance Rating Appeal panel (Performance & Goal Management policy at page 75 of COB1) but the Claimant did not.

[18] COW2 also stated that the Claimant was rated 2.67 for individual KPI because of

the average score from three subjects, namely:

- (a) processes / guidelines for CS Touchpoints developed and completed within SLA which she had scored 2.0;
- (b) top 5 Priorities on Project deliverable, which she had scored 2.0, and
- (c) stakeholders satisfaction rate which she had scored 4.0.

COW2' also said the Claimant was not able to deliver all her tasks based on the timeline given earlier.

[19] COW2 also emphasized that the Claimant was involved in the year-end-review because firstly, prior to the face-to-face meeting with COW2, the Claimant had to rate herself using the Sapphire system. The Claimant had to give a rating for her own performance and her comments in relation to her achievement of the KPIs. This could be seen in the report under "employee rating" and "employee comments". After that, the employee (the Claimant) had to set a meeting with COW2 to go through the review together whereby comments and feedback were given to the Claimant and she had the opportunity to discuss with COW2 on her views and what help she needed.

[20] In relation to the Claimant's enrolment into the PIP, COW2 referred to page 84 of COB1 in the letter dated 15 May 2018. The Claimant was informed that her performance did not meet the minimum acceptable performance required and it was stated that the PIP KPIs would be discussed and agreed upon between her and her line manager (COW2). In addition, there was to be a monthly review on the Claimant's performance in the PIP so there were three monthly reviews.

[21] COW2 noted that in the letter dated 15 May 2018, there was a space for the Claimant to sign and acknowledge receipt of the letter. The Claimant was also to sign to indicate that she had received a copy of the Performance Goal Management & Performance Improvement Plan (PGM PIP) policy and that she understood the contents. However, those spaces were not signed because the letter was issued *via* email and employees were supposed to print out and sign on their own initiative. Nevertheless,

COW2 advised the Claimant to acknowledge receipt and to submit the document to the Company. COW2 clarified that the fact that the Claimant enrolled into the PIP and undertook the three months PIP without objection or appeal, indicated clearly the Claimant's acceptance of the contents of the said letter. Moreover, COW2 highlighted that the PGM PIP policy was available on the servers of the Company and was accessible to all employees including the Claimant at all times, even if an employee has not been enrolled into a PIP.

[22] The Company's PGM PIP Policy is exhibited from page 70 to page 83 of COB1. COW2 was also the line manager in charge of supervising the Claimant's performance during her PIP. COW2 testified that at the beginning of the PIP, she had sat down with the Claimant and set the KPIs for the Claimant. COW2 told the court that there were three main KPIs set for the Claimant for her PIP. Firstly, it was titled "to improvement on project to deliverable on time & how to write the process (short & compress), second was "project deliverable-availability on Customer Request at Centouch Portal" and third was "project deliverable- FLOA rebate & waiver at Centouch Portal".

[23] In relation to the first KPI, COW2 said the Claimant's performance was on target. For the other two KPIs, the Claimant's performance were behind schedule. For KPI#2, her task was to verify and recommend proposals to have transactions which were not available in Centouch portal (which was used by Blue Cube). She did not deliver the business requirement document (BRD) and change request (CR) until the end of the PIP. For KPI#3, this was also not delivered. The task was to propose on what were the enhancement/improvement process that Blue Cube agents could do in executing their performance. At the end of the PIP first month review, the Claimant's performance was "on track", meaning her performance in achieving the targets set for her PIP was on track. However, at the end of the second and third month, her performances were both "off track", which meant that she had not been achieving the targets set for her PIP. This triggered the proposal for her extension.

[24] COW2 claimed that the Claimant was aware that COW2 would propose to the human capital department that her time in the PIP be extended. Thereafter, the Company agreed with COW2's proposal to extend her time in the PIP and the Claimant was duly

informed. The Claimant again didn't raise any objection or filed any appeal against COW2's proposal or the Company's decision. The Claimant then proceeded to undertake the extension of two months of the PIP, without any evidence that she had done so under protest.

[25] However, after the end of the five months, the final review of the Claimant found that the Claimant had failed yet again to obtain a "pass" grade. COW2 also referred to another document which recorded the Claimant's performance during the PIP - it was an Excel sheet that can be seen at page 54 of the COB2. It captured the overall performance of the Claimant in the entire PIP. It could be seen that there were five projects assigned to the Claimant which she had failed to deliver. Although extension of the target dates had been given, the Claimant could not even deliver them by 28 September 2018.

[26] COW2 also referred to pages 86 to 90 of COB1 which was the printed report at the end of the PIP of the Claimant. The PIP was also done with the assistance of the Sapphire software. COW2 said the Company, upon exhausting the "extension" option, had to resort to the "exit" option, which meant that the Claimant was to be terminated of her employment. Therefore, as can be seen at page 89 of COB1, the recommendation at the end of the extension was for the Claimant's termination. The Claimant was handed the termination letter on 22 November 2018.

[27] Based on the Company's records, COW2 related to the court on the Claimant's work performance prior to the year 2016. COW2 referred to page 23 of COB1 which was a letter dated 2 July 2007 sent to the Claimant from the Company. In that letter, the Claimant was informed that the Company had enrolled her into the Employee Productivity Enhancement (EPE) program, which is the former name of the PIP. The reason she was enrolled in the program was that her performance in the year before, that was in 2006, was not satisfactory. The EPE was to improve the Claimant's performance. For the same reason, the Claimant was also not entitled to a performance bonus for the year 2006, as per the letter at page 21 of COB1. The Claimant managed to improve her performance and hit her KPIs under the EPE program. Consequently, as can be seen in the letter dated 1 October 2007 at page 33 of COB1, the Claimant was withdrawn from the EPE program. The Claimant then resumed her normal employment.

[28] In the year 2014, the Claimant's performance was again found not satisfactory. COW2 said the Company then put the Claimant under a watchlist as can be seen in a letter to the Claimant dated 22 April 2015 at page 51 of COB1. She was later enrolled into the PIP program. As per the Company's letter to the Claimant dated 1 July 2015 at page 52 of COB1, she was informed that the final overall rating of her performance for 2014 was at level 3-. Thus, she was placed in the "watch list" and enrolled into the rehabilitation 'FAME' ("Facilitating achievement and motivating employee") program. Thereafter, as could be seen in a letter to her dated 6 January 2016 (page 53 of COB1), after the three months of the FAME program, the Company found that she had improved and she was withdrawn from the performance improvement program. She was also given a small increment upon her successful exit from the FAME program.

The Claimant's Case

[29] The Claimant was the only witness in the Claimant's case and she testified for her own case. She told the court she was in the Company's employment for about 18 years and her last drawn salary was RM3,700.00 a month. Her daily duties were handling customer services and preparing weekly and monthly reports.

[30] The Claimant testified that the Company conducted the End Review in December 2017. She alleged that her supervisor COW2 had given her a rating of 3. To her knowledge, only those employees who got rated below 2 would be placed under a PIP. The Claimant also denied that a review had been done before she was issued the letter dated 15 May 2018 enrolling her into the PIP. The Claimant further confirmed that she was put under the PIP for three months but alleged that the extension of her PIP for another two months was conveyed to her verbally. She further alleged that the Company had not informed her the results of her PIP.

[31] With reference to paragraph 10 of her Statement of Case, the Claimant said her dismissal was unfair because she had obtained a rating of 3 and any employee who had obtained a rating of 3 should not have been put under the PIP. Furthermore, for the five months she was placed under PIP, she claimed that there was no assessment of her work performance.

Evaluation of Evidence and Findings

[32] The burden of proof is on the Company to prove the Claimant's poor performance and the standard of proof that is required is merely on a balance of probabilities. The case of *I.E. Project Sdn Bhd. v. Tan Lee Seng* [1987] 1 ILR 165 explains what an employer should do in handling employees with poor work performance prior to taking the drastic action of termination. The learned Chairman in that case stated:

“Dismissal for unsatisfactory work or incompetency should almost invariably have been preceded by warnings.

In the event of poor performance being the reason for the dismissal one should always endeavour to show that the work complained of was performed subsequent to the warnings.

If an employee is not measuring up to his job, it may be because he is not exercising himself sufficiently or it may be because he really lacks the capacity to do so. An employer should be very slow to dismiss upon the ground that the employee is found to be unsatisfactory in his performance or incapable of performing the work which he is employed to do without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground and giving him an opportunity of improving his performance.

It is for the employer to find out from the employee why he is performing unsatisfactorily and to warn him that if he persists in doing so he may have to go.”.

[33] The court has perused the documentary evidence adduced and the oral testimony of all the witnesses. The Claimant was in the employment of the Company close to 18 years and she was placed under the Company's PIP three times. She was also not new to the Sapphire system which tracked her KPIs' achievement and other work progress. It is clear to the court that the Claimant knew what was expected out of her by the Company. COW2

was her line manager and immediate supervisor so COW2 was the best person to monitor her work performance and to give evidence in court on the Claimant's work performance.

[34] The court notes that the Claimant did not dispute how she was assessed save for the fact that she was actually rated 3 and should not have been put under the PIP. The court accepts the Company witnesses' evidence, especially that of COW2 who had explained that when the year-end-review was done, based on the grid box which had taken into account the "KPI score" and "Culture score", the Claimant's rating as automated was indeed 3. However, COW2 who had managed and observed the Claimant for the year and taking into consideration that the Claimant only scored 2.67 for the individual KPI and 2.0 for culture score, asserted that the Claimant deserved a rating of 2 instead of 3. The court accepts COW2's explanation that the reason she had given the Claimant a rating of 2 was based on an objective observation of the Claimant's performance and also because she believed the Claimant needed development to improve. At no point of time was there any evidence led that COW2 was prejudiced against the Claimant for giving her the rating of 2 or that COW2 had meant to victimise her.

[35] The court has also found that the Claimant had not protested about the rating at any point of time after the review was done and even after she was informed that she was put under the PIP. The Company had put in a system of appeal but the Claimant failed to show she was in disagreement with her review. The fact that she was objecting to the rating of 2 now (which the Claimant had alleged was 3 as per the automated rating and before calibration) in the hearing seems to be an after thought of the Claimant to justify her claim before the court.

[36] The Claimant was warned about her poor performance when she was put under the last PIP and if she failed at the conclusion of the PIP, that could trigger the termination of her service (page 84 of COB1). The Company had given her many opportunities to improve before that as she had undergone two PIP before the final one. The Company even extended the final PIP for two months. Hence, the court is satisfied that the Claimant had been warned, guided by her supervisor in her work and given opportunities to improve. Unfortunately, she was unable to perform to the expectations of the Company.

Decision

[37] The Company/employer has a business to run and it needs employees who can contribute and work effectively and efficiently. Performance by its very nature is subjective and the best person to judge an employee's performance should and must be the employer. This was stated by *Lord Denning MR in Alidair Ltd v. Taylor* [1978] ICR 445 at page 451:

“Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable and incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent.”.

[38] In this case, from the totality of the evidence adduced, the court is satisfied that the Company has proved a case of poor performance against the Claimant. The Company had identified the Claimant as a poor performer and she was put under a PIP. However, she still failed to improve on the tasks assigned.

[39] Having considered all the above, the court agrees with the Company's decision for terminating the Claimant's services due to her poor performance after it had exhausted the avenues in dealing with her poor performance. The Claimant's dismissal was therefore for a just cause or excuse.

[40] Accordingly, the Claimant's claim is dismissed. In arriving at this decision, the court has acted with equity and good conscience and the substantial merits of the case without regard to technicalities and legal form as stated under section 30 (5) of the Act.

HANDED DOWN AND DATED THIS 21 DAY OF FEBRUARY 2020

(ANNA NG FUI CHOO)
CHAIRMAN
INDUSTRIAL COURT, MALAYSIA
KUALA LUMPUR