

**INDUSTRIAL COURT OF MALAYSIA**

**CASE NO. : 3/4-415/16**

**BETWEEN**

**NAZREEN BEGUM BINTI MOHAMED YAACOB**

**AND**

**PETRONAS / PETRONAS CHEMICALS GROUP BERHAD**

**AWARD NO. : 1614 OF 2018**

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

**Venue : Industrial Court Malaysia, Kuala Lumpur**

**Date of Reference : 6.1.2016**

**Dates of Mention : 14.3.2016, 8.4.2016, 22.4.2016, 27.5.2016,  
16.6.2016, 14.7.2016, 28.7.2016, 11.8.2016,  
20.2.2017, 2.3.2017,**

**Dates of Hearing : 7.3.2017, 17.5.2017, 6.7.2017, 7.9.2017,  
8.9.2017, 8.12.2017**

**Claimant's Written Submission : 2.2.2018**

**Company's Written Submission : 2.2.2018**

**Written Submission in Reply by Claimant : 7.3.2018**

**Written Submission** : 16.3.2018  
**in Reply by Company**

**Representation** : Mr. Harshaan bin Muhammad Zamani  
From Messrs Karpal Singh & Company  
Counsel for the Claimant

Ms Wong Keat Ching together with Ms Teoh  
Alvare  
From Messrs Zul Rafique & Partners  
Counsels for the Company

### **Reference**

This is a reference made under section 20 (3) of the Industrial Relations Act 1967 (the Act) arising out of the dismissal of **Nazreen Begum Binti Mohamed Yaacob** (hereinafter referred to as “the Claimant”) by **Petronas / Petronas Chemicals Group Berhad** (hereinafter referred to as “the Company”) on 16 March 2015.

## **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 16 March 2015.

### **Facts**

**[2]** The Company offered employment to the Claimant *vide* a letter dated 2 August 1999 as an Executive (Chemical Engineer) with effect from 16 August 1999 (pages 1 to 4 of the Company's Bundle of Documents 1 (COB1)). The Claimant was assigned to ASEAN Bintulu Fertilizer Sdn. Bhd. (ABF) at Bintulu, Sarawak, which is a subsidiary of PETRONAS. At the time of the Claimant's dismissal from service, she

held the position of Executive (Service Performance Analyst) in PCG (the Company). Her last drawn basic salary was RM9,236.00 a month.

**[3]** The Claimant was rated '4' (Below Expectation) in her Overall Final Rating (OFR) for FY2013 (Financial Year 2013). By a letter dated 18 February 2014 (pages 9 to 11 of COB1), the Company informed the Claimant that her OFR was '4' for FY2013. She was then instructed to undergo a Performance Improvement Plan (PIP) for six (6) months.

**[4]** Subsequently by a letter dated 14 October 2014 (pages 63 and 64 of COB1), the Claimant was put on notice, amongst others that:

- (a) throughout the PIP for FY2014, there was no significant improvement in her overall performance that had met the Company's requirement;
- (b) the Company had decided to extend her PIP for a further period and she would be subject to the final PIP review during the Year End Review (YER) for FY2014; and
- (c) should she be rated '4' again in OFR at the YER FY2014, the Company shall have the right to take necessary actions against her which might include the termination of her employment with the Company.

**[5]** The Claimant was informed by the Company in a letter dated 11 February 2015 (pages 93 and 94 of COB1) that the PDC (People Development Committee) had deliberated on her performance

throughout the PIP for FY2014. It stated that it was found that there was no significant improvement in her overall performance that met the Company's requirement and the next course of action was going to be duly communicated to her.

**[6]** The Company averred that it had considered the Claimant's performance during the PIP period including the three (3) months extension from 1 September 2014 until 30 November 2014 and her overall performance for FY2014. However, the Company did not envisage that giving the Claimant further opportunities would produce the sustained result that was required. Therefore, the Company concluded that she was unsuitable for continued employment with the Company. Consequently, by a letter dated 12 March 2015 (pages 95 to 97 of COB1) titled "Termination Due to Performance for Financial Year 2014", the Company informed the Claimant that:

- (a) PDC had deliberated on her performance and found that she had failed to make significant improvement that met the Company's requirement throughout the PIP for FY2014; and
- (b) The Company had decided to terminate her employment with effect from 16 March 2015 and she would receive payment of three (3) months' salary in lieu of notice and the remaining unutilized earned annual leave for FY2015, if any.

## The Duty of the Industrial Court

[7] 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.”.

[8] 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

**[9]** It is for the Company to prove that the Claimant's dismissal was for a just cause or excuse, there being no dispute on the first issue that the Claimant had been dismissed. The Company called two witnesses and they were Mr. Shaifuldin bin Amir (COW1) and Ms Hanim binti Hussin (COW2). COW1 is the Manager, Service & Performance Management for Centralised Services Department under the Manufacturing Division of PCG (PETRONAS Chemical Group) while COW2 was the Manager, Leadership & Performance Management (PMS), Human Resource Management Department of PCG in 2013 and 2014.

**[10]** The Company led evidence that *vide* a letter dated 7 March 2012, ABF informed the Claimant that her OFR for FY2011 was "4" (Below Expectation) and therefore the Claimant was required to undertake a Performance Improvement Plan (PIP) for a period of six (6) months from March 2012. The Company deliberated on her performance throughout the PIP for FY2012 and found that there was no significant improvement in the Claimant's overall performance that could meet the Company's requirement. The Company then extended the PIP with a view to further assist the Claimant to show significant improvement in her overall performance. As the Claimant had shown improvement during the extension of the PIP in 2012, she had completed her PIP successfully and was rated 3L (met most Base Targets) in her OFR in year 2012.

**[11]** COW2 alleged that in the beginning of FY2013, the Claimant who was then holding the position of Executive (Reliability & Integrity

Management) at ABF had refused to fill up and failed to submit her Individual Performance Contract (IPC) for her superior's approval despite receiving reminders and guidance from the Human Resource Management Department (HRMD) and her immediate superior (page 10 of COB2). By a letter dated 10 July 2013, the Claimant was re-assigned to her previous position as Executive (Reliability & Integrity Management) in Asset Management Section, Operational Excellence Department, ABF. However, the Claimant refused to report for duty. In view of the Claimant's refusal to report for duty, by a letter dated 14 August 2013, the Company seconded the Claimant to the position of Executive (Special Projects - ELMS), Technical Services Department of ABF at Bintulu, Sarawak.

**[12]** Sometime in August 2013, the Claimant applied and attended an interview for a position in Centralised Services Department of PCG. The Claimant's application for the position in Centralised Services Division of PCG was then approved. By a letter dated 13 September 2013 (pages 5 and 6 of COB1), ABF informed the Claimant that she was assigned to perform the roles and responsibilities of Executive (Service Performance Analyst), Service & Performance Management Section, Centralised Services Division of PCG effective from 13 September 2013 until 31 December 2013. Subsequently, by a letter dated 2 January 2014, ABF informed the Claimant that her assignment as Executive (Service Performance Analyst), Service & Performance Management Section, Centralised Services Division was extended further effective 1 January 2014 until further notice (pages 7 and 8 of COB1). By a letter dated 25 February 2014, the Company informed the Claimant that she was seconded to the Company to assume the position of Executive (Service

Performance Analyst), Centralised Services Department of PCG effective from 16 February 2014 (pages 12 and 13 of COB1).

**[13]** In relation to the Claimant's assessment of her work performance, she was rated '4' (Below Expectation) in her OFR for FY2013. Consequently, the Company informed the Claimant *vide* a letter dated 18 February 2014 that since her OFR was '4' for FY2013, she was to undergo a PIP for six months starting from 1 March 2014. COW1 who was then the Claimant's immediate superior testified that the Claimant was placed on a PIP to facilitate improvement in her overall work performance within a stipulated time period by discussions and a documented performance action plan. This was necessary to ensure that the Claimant brought her overall performance in line with the Company's expected standards. In the process, the Claimant's performance could be assessed and the areas in which she was required to improve could be highlighted. However, the Claimant refused to acknowledge receipt of the letter (pages 9 to 11 of COB1).

**[14]** On 27 February 2014, COW1 held a meeting with the Claimant to explain and discuss the process, objectives and requirements of the PIP. However, the Claimant refused and/or failed to accept the PIP. This led to a second meeting being held and attended by COW2 from the Human Resources Management Department (HRMD) and the Claimant on 13 March 2014 to discuss the performance rating of the Claimant in FY2013 and the requirement to undergo the PIP for six months. During the meeting, the Claimant acknowledged the fact that she had received the rating of '4' in FY2013. COW2 also explained to the Claimant again that the process and purpose of the PIP was to ensure improvement of her



performance through coaching on a monthly basis with her superior. It was alleged that the Claimant had informed COW2 that she had completed the discussion of her IPC 2014 with her superior. It was also said that the Claimant would give full cooperation to her superior and to discuss her IPC on a monthly basis (page 14 of COB1).

**[15]** Subsequently, the Claimant together with her immediate superior, COW1 and Mr. Kamarul Ariffin Bin Tajul A'mar who was the Head of Centralised Services Manufacturing Division of the Company (COW1's superior) had several discussions. They agreed on five (5) specific objectives/Key Performance Indicators (KPIs) and the time frame to be met by the Claimant within the PIP period together with development plan/strategies to ensure the achievement of the objectives set. The contents of the discussions were recorded in a Monthly Record of Coaching and Counselling form (RCC) for the month of March 2014. The Claimant then signed the RCC form for the month of March 2014 on 10 April 2014 and allegedly agreed with the PIP as contained therein. It also appeared to be her agreement to the objectives, KPIs, development plans and time frames that were discussed, set and documented therein (pages 15 to 18 of COB1).

**[16]** COW1 testified that he had provided coaching and counselling through discussions and meetings with the Claimant. During the discussions and meetings, the Claimant's improvement and performance gaps were identified in the RCC forms. The dates of those discussions and meetings were documented and recorded in the RCC forms at page 18 of COB1 (27 February 2014, 13 March 2014 and 9 April 2014) and

page 22 of COB1 (16 April 2014, 30 April 2014 and 7 May 2014). These RCC forms were signed by the Claimant at pages 18 and 22 of COB1.

**[17]** In the discussions and meetings with the Claimant on 20 May 2014 and 4 June 2014, it was agreed among the Claimant, COW1 and COW1's superior that the Claimant should only be assigned with four (4) objectives instead of five objectives effective from 21 May 2014 onwards until the end of August 2014. COW1's superior recorded in his handwritten notes on the RCC form which stated *inter alia*:

- (a) To review KPI to be more specific and granulated action;  
and
- (b) Focus on key department deliverables and come out with specific area for Nazreen.

The Claimant signed on this RCC form found at page 22 of COB1. Based on the revised objectives, COW1 said he continued to provide coaching and counselling through discussions and meetings with the Claimant for the months of June, July and August 2014.

**[18]** During the discussions and meetings, the Claimant's performance gaps were identified in the RCC forms for the respective months (pages 15 to 49, 54 to 62 and 66 to 77 of COB1). At the end of the six months of PIP, the Company's witnesses said the Claimant had failed to demonstrate that she had achieved significant improvement in her overall performance as required during the PIP. Out of the four objectives and KPIs assigned to the Claimant, she only achieved "meet

requirement” for one objective and had not met requirements for the other three objectives. COW1 testified that the Claimant was briefed and warned on the lack of improvement in her performance. Consequently, COW1 proposed that the Claimant's PIP be extended for another three months starting from 1 September 2014 to 30 November 2014.

**[19]** For the extension period of the PIP as stated, COW1 continued to provide coaching and counselling to the Claimant through discussions and meetings for the months of September, October and November 2014. During the discussions and meetings, the Claimant's performance gaps were identified in the RCC forms for the respective months. The RCC forms during the three (3) months' extension of the PIP were signed by the Claimant at pages 58, 70 and 77 of of COB1.

**[20]** Nevertheless, COW1 realised that the Claimant continuously failed and neglected to show any significant improvement in her overall work performance, especially her failure to fulfil all agreed objectives and KPIs. By a letter dated 11 February 2015, the Company informed the Claimant that the PDC had deliberated on her performance throughout the PIP for FY2014 and found that there was no significant improvement in her overall performance that could meet the Company's requirement. Hence, the next course of action to be taken by the Company would be communicated to her in due course (pages 93 and 94 of COB1).

**[21]** Having considered the Claimant's performance during the PIP period including the three months' extension from 1 September 2014 until 30 November 2014 and her overall performance for FY2014, the

Company did not see that giving the Claimant further opportunities would produce the sustained result that was required by the Company. The Company concluded that the Claimant was unsuitable for continued employment with the Company and a termination letter then ensued on 12 March 2015 to terminate the Claimant's employment with effect from 16 March 2015.

### **The Claimant's Case**

**[22]** The Claimant testified for her own case and was the only witness in the Claimant's case. The Claimant alleged that her performance evaluation for FY2013, which was the basis for the PIP in year 2014, was improper and was not done in a fair manner. She claimed that for FY2013, she was only evaluated for three months i.e. from the month of July 2013 to September 2013. The Claimant's evidence in this regard can be summarized in the following paragraphs.

**[23]** The Claimant said she was informed that the evaluation for FY2013 was supposed to be from January to September 2013 (pages 25 and 26 of the Claimant's Bundle of Documents (CLB)). The Claimant alleged that for the period from January 2013 to March 2013, she was not given any specific task and her job scope at that material point of time was on an ad hoc request basis. Further, her position in the Maintenance Department at that time was only temporary and not permanent.

**[24]** For the period from April 2013 to June 2013, the Claimant said she was on medical leave as she had to undergo treatment for her back

problems. She claimed that the Company was well informed regarding this (pages 28, 40 to 42 of CLB). Subsequently, the Claimant returned to work in July 2013 and continued with her duties until September 2013. On 13 September 2013, the Claimant said she was assigned to perform the roles and responsibilities as Executive (Service Performance Analyst), Service & Performance Management Section, Centralised Services Division of the Company.

**[25]** Hence, the Claimant contended that her evaluation was highly improper and unreasonable as she was only evaluated for the period of July 2013 to September 2013 when she was supposed to be evaluated for the entire nine months. The Claimant insinuated that the Company was not acting in good faith in evaluating her performance for FY2013 as she was subsequently required to undergo PIP in year 2014 for her alleged poor performance in the year 2013.

**[26]** The Claimant further alleged that the Company had failed to adopt a fair procedure when it made its decision to terminate her employment. The Claimant testified that the Company had failed to identify her weaknesses and informed her of the same prior to the setting the objectives of the PIP. Further, it was alleged that the Company had failed in its duty in assisting the Claimant to improve on her alleged weaknesses for FY2013.

**[27]** The Claimant also stressed that the Company had failed to take into consideration the change of her position or job scope prior to placing her under the PIP. The Claimant testified that she was only placed in her new position for a very short period before she was directed to

undergo the PIP. In such circumstances, the Claimant contended that it was unreasonable to expect her to perform according to the standards set by COW1 before she could even adapt to her new position, more so when she was not specifically told of her job scope in her new position.

**[28]** In addition, the Claimant said the Company had failed to provide her sufficient support and coaching in assisting her to improve on her alleged weak performance. In relation to this allegation, the Claimant accused her superior (COW1) for not providing her sufficient training and guidance during the PIP period. Further, the Claimant argued that COW1 had failed to provide any evidence of him coaching her on executing the development plans but that he was merely giving her instructions as per the development plans.

**[29]** The Claimant also accused the Company for failing to provide her an opportunity to explain or rebut the findings made against her by COW1. She said COW1 had prepared all the RCC forms for her entire PIP which had lasted nine months. COW1 was also the one to prepare the PIP Summary at pages 50 to 53 and pages 78 to 92 of COB1. Specifically, the Claimant alleged that COW1 never allowed her to explain or rebut the findings made against her which are stated at page 53 of COB1.

### **Evaluation of Evidence and Findings**

**[30]** 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 poor performers prior to taking the drastic action of dismissal. The learned Chairman in that case stressed:

“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.”.

**[31]** The learned Claimant's counsel has submitted that a domestic inquiry was not conducted by the Company before the Claimant's dismissal. It is not disputed that the Claimant was dismissed due to her alleged poor performance and not for committing any acts of

misconduct. Thus, there was no necessity for the Company to hold a domestic inquiry before she could be dismissed.

**[32]** The Claimant's main contention that she should not have been put under the PIP was that her performance for FY2013 was not properly evaluated and that had been made the basis for her PIP in 2014. The Company had adduced evidence that the performance appraisal began with the preparation of the Individual Performance Contract (IPC). The IPC consisted of the targets that were agreed by the Claimant and her superior. The Claimant confirmed under cross-examination that the IPC was an important document for the purposes of assessing her performance. However, it was the Company's contention that it was the Claimant who had failed and refused to submit her IPC for FY2013 because she was more interested in getting her transfer out of ABF.

**[33]** The Company had adduced evidence that arising from the Claimant's failure to prepare her IPC for FY2013, her superior at ABF, one Mr. Fauzam Shaari had taken the effort to assist the Claimant in preparing her KPIs and tasks for her to submit in her IPC online. Nevertheless, the Claimant had failed and was not interested in submitting her IPC for FY2013. This was despite the fact that she was reminded numerous times to do so (page 10 of COB2 and page 25 of CLB) by her colleagues in ABF. The Company has emphasized that resulting from the Claimant's failure to submit her IPC online for FY2013 and based on the Claimant's performance review at ABF and later in the Company, the Claimant's year-end Performance Review for FY2013 received a rating of '4' (Below Expectation). This is also evident from the



testimony of COW2 (Q&A No.14 of COW2's witness statement). COW2 told the court that the Claimant's performance in FY2013 had been evaluated since January 2013, rebutting the Claimant's allegation that she had not been fairly evaluated.

**[34]** The evaluation was done by Mr. Fauzam Shaari Bin Geran as he was the Claimant's superior at ABF. He was not called as a Company witness and the Claimant submitted that an adverse inference should be held against the Company. The court is of the view that he was not an important and material witness and that his evidence was crucial to the Company's case. Thus, the failure to call him as a witness does not warrant an adverse inference to be held against the Company as the court thinks there was really no evidence that the Company wanted to suppress. COW2 in her capacity as the Manager of the HRMD could testify on the Claimant's performance evaluation for FY 2013 and the Claimant's employment history. Further, the Claimant was dismissed due to her poor performance during her PIP in FY2014 which had been satisfactorily explained by COW1.

**[35]** COW2 confirmed under cross-examination that the Claimant was not evaluated on her performance when the Claimant was on medical leave and unpaid leave in 2013. However, the Claimant was evaluated a while when she was in employment from January to September in ABF. COW2 further stressed that the Claimant was evaluated for the entire year from the performance period which was from January to December 2013. The Claimant's performance from September to December was deliberated during the PDC (People Development

Committee) in ABF. Therefore, the Claimant's medical leave had not affected the Company's evaluation on her performance.

**[36]** The Claimant contended in court that she never agreed or accepted the OFR rating of 4 for FY2013 and she had never agreed that her performance required improvement. It was alleged that the Claimant did protest the Company's decision to put her under PIP. However, she claimed she wanted to maintain a harmonious working relationship with the Company. She said she did not want to go against her superior's orders so she had taken the PIP path upon her superiors' instructions. The Claimant argued that going to see COW2 was her sign of protest against being put under the PIP. She admitted that she had raised this issue to COW2 in the meeting on 13 March 2014. The issues of that meeting were subsequently reproduced by COW2 in the letter/email found at page 14 of COB1. The said letter stated that the Claimant still refused to sign the PIP acknowledgement letter but the Claimant would give full cooperation in the meeting with her superior to discuss the IPC on a monthly basis. The court has observed that there was nothing on record to show that the Claimant had protested against the contents of the letter dated 25 March 2014 (page 14 of COB1). Had the Claimant disputed the contents on what had been discussed, she would have sent a reply to dispute what COW2 had written.

**[37]** The Claimant had raised the allegation that the tasks and KPIs set out for her in the PIP were not suitable for her. The Company highlighted the fact that the Company had taken into account the Claimant's role, skills and position when determining the tasks and KPIs during the PIP and the Claimant herself was aware of all the tasks and

KPIs that had been set. This stems from the fact that the Claimant had the opportunity to discuss all the KPIs and tasks during every monthly PIP discussion with COW1. The tasks and KPIs set for the Claimant throughout the whole PIP were carefully decided by her superiors based on the Claimant's roles, skills and position. Therefore, the court is of the opinion that the Claimant's allegation that the Company had not identified her weaknesses prior to the setting of her tasks and KPIs in the PIP is without basis.

**[38]** COW1 did explain during re-examination that the objectives were set for the Claimant during her PIP period to assist her to achieve the tasks. Referring to pages 15 to 18 of COB1 for the RCC form for March 2014, COW1 said they had discussed the gaps in the 3<sup>rd</sup> column and the development plans in the 4<sup>th</sup> column. The development plans on the 4<sup>th</sup> column is a step-by-step method to assist the Claimant on how to achieve each of her objective and tasks. The court opines that the Claimant's allegation is definitely an afterthought as she had not objected to the tasks when they were first revealed to her and she had signed on the said RCC form.

**[39]** The Claimant further raised the allegation that the Company had failed to take into account her change in position or job scope prior to the PIP. The Company submitted that the Claimant was well-suited to hold the position as the Executive (Service Performance Analyst) as she had held the position as an Executive for 14 years prior to the said change in her position. It is an undisputed fact that the Claimant had served Petronas for 14 years. In those long 14 years of experience of serving Petronas as an Executive, the Claimant would have acquired the skills of

an Executive. Hence, the Claimant would have been compatible to hold any position as an Executive within the Company.

**[40]** COW1 also testified that when he and his superior drew up the PIP's objectives for the Claimant, they had carefully decided on the KPIs that the Claimant could deliver. The Company had taken into consideration her past experience as a chemical engineer and her understanding in the position of service performance analyst, which was the position the Claimant was assigned to since September 2013. COW1 then proceeded to clarify that the Claimant wasn't totally new in her position when she started her PIP in March 2014.

**[41]** The Claimant had contended that page 5 of COB1 dated 13 September 2013 ("Assignment of Staff") did not explain the roles and responsibilities of her tasks in her new position. COW1 told the court that the Claimant had requested and applied for the position of Executive (Service Performance Analyst), Service and Performance Management Section, Centralised Services Division in the Company. COW1 clarified that the Claimant had met with his superior Mr. Kamarul Ariffin in his office in the Petronas Twin Towers in KLCC and they had a discussion on the position as per page 5 of COB1. During the discussion, COW1 explained that the Claimant had been briefed on the roles and responsibilities for the position of Executive (Service Performance Analyst).

**[42]** COW1 was the person responsible for evaluating the Claimant's performance and had explained to the court the steps that he had taken in dealing with the Claimant's performance when she was put under the

PIP. He told the court that he had called the Claimant to brief her on the roles and responsibilities for the position of Executive, Service and Performance Analyst when she first started on the job. Then, he had discussed with the Claimant on the deliverables, or tasks that had been agreed upon by the Claimant when she was placed under the PIP.

**[43]** The court is also satisfied that there was sufficient evidence of coaching and counselling given to the Claimant by COW1 and his superior before and during the PIP. Therefore, the Claimant's allegation that the Company had failed to assist her to improve her performance is without basis. It is evident from the tasks and KPIs that were set for the Claimant and the Claimant's performance that had been documented and signed by the Claimant and her superiors in the RCC forms. The Claimant's allegation that the RCC forms cannot be regarded as evidence of coaching and counselling is clearly an afterthought as those were documentary evidence which she sought to dispute through her oral testimony. The Claimant's performance during the PIP was documented in the RCC forms wherein all the objectives, gaps and development plans were clearly stated. The Claimant had signed on all the RCC forms after discussions between the Claimant and COW1. In court, the Claimant repeatedly said she had no choice but to sign the RCC forms and she had not protested because COW1 was her superior. Moreover, the Claimant said under cross-examination that she had signed the forms to acknowledge receipt of the RCC forms but not the results.

**[44]** The court had the advantage of observing the Claimant giving her testimony in court and the court finds it hard to believe that the Claimant

would not speak up had she disputed the RCC results. Going back to the history of her employment in 2013, the Claimant had refused to submit her IPC despite reminders from her superiors. The Claimant had also refused to sign acknowledgement of the PIP letter in February 2014, claiming that she should not be placed under PIP. In 2012, the Claimant was also put under PIP so she had knowledge how a PIP process was going to be done. The Claimant had shown she was not the type of employee who would submit easily to her superiors through her past actions. Therefore, it is incredible for the court to believe the Claimant that she had no choice but to sign the RCC forms without protest when she had disagreed with the contents. The court has no hesitation concluding that her denial in court about the contents in the RCC forms are afterthoughts.

**[45]** The court is satisfied with the evidence adduced by the Company that it had provided all opportunities to the Claimant to explain and/or rebut the findings made against her. Further, the Claimant's allegation that she was denied the opportunity to rebut the findings of the PIP appears unfounded. As explained earlier, COW1 had testified that the Claimant had signed the RCC forms after the contents of the RCC forms were reviewed and discussed and the Claimant had given her comments. COW1 had reiterated that the RCC session was conducted on a monthly basis. He said he and the Claimant had discussions, coaching and counselling sessions. After the discussion, COW1 said he prepared a draft of the RCC form or a report and had sent it to the Claimant for review and comment if any. Had it deviated from the discussion in the RCC session, it would be corrected or if there was a discrepancy from the one they had discussed during the RCC session.

If there was no discrepancy, COW1 had it printed and got it signed by the Claimant, COW1's superior Mr. Kamarul Ariffin and himself.

**[46]** From the evidence adduced by the Company, the court opines that the Claimant was given sufficient opportunity to improve her performance through specific KPIs with guidance, coaching and counselling by her superior in the PIP of six months and the extension of three months (total PIP period was nine months). Although the learned Claimant's counsel submitted that the nine months of PIP were insufficient as the Claimant had served the Company for 14 years and required a longer PIP evaluation period, the court thinks otherwise. The Claimant had been put under PIP in 2012 and successfully undergone the process. She also testified in court that due to her long experience in the Company, she knows many senior people in the Company and she was an asset to the Company. On this point, the court finds that she had clearly contradicted herself. In view of her 14 years' experience in the Company and her own admission that she knows many people, she did not require more time to execute the tasks assigned to her during the PIP.

**[47]** The court must also add that the Company had also reduced one of the Claimant's tasks in the PIP and her KPIs were revised to be more detailed and granulated in order to assist the Claimant to achieve the KPIs that were set for her. Unfortunately, the Claimant failed to show significant improvement in her work performance despite the Company's effort to assist her to improve on her performance.

## Decision

**[48]** 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.”.

**[49]** 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. The Claimant was also told and warned that if she did not improve on her performance, she would be dealt with appropriately by the Company. During the PIP, the Claimant was guided and coached by COW1. The Claimant had been given the opportunity to improve on her performance when she was placed under the PIP but she had failed to perform up to the level expected of her by the Company.


**[50]** 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.

**[51]** 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 13 DAY OF JULY 2018**

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