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LHAG Insights

Employment & Industrial Relations

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Higher Standard of Performance Expected of Senior-Level Employees Not Unreasonable

Julie Marzliffa binti Mohd Razaki v UEM Group Berhad
(Industrial Court Award No 1561 of 2021)

It is trite law that an employer is not bound to retain an employee who has demonstrated poor work performance. Nevertheless, it is an established principle of industrial law that an employer cannot dismiss a worker who is not performing satisfactorily without first informing him of the mistakes he is alleged to have made. The worker must be given an opportunity to correct himself within a reasonable period and he must be warned of the risk of dismissal if the errors are not corrected.

The claimant last held the position of Senior Executive in the company's Group Tax Department and had served the company in the same position since 2015. In May 2018, the claimant was placed under a Performance Improvement Plan (**PIP**) due to her "Bronze" rating for her performance in 2017. The PIP was conducted over six months (May-October 2018) with a total of four review sessions held with the claimant's superior (**COW-2**), the Head of Group Tax Department, in order to address her issues of poor performance and to provide her with the opportunity to meet the company's satisfactory level. During the final review session, it was highlighted to the claimant that she had shown no improvement and was recommended for termination of employment.

In January 2019, the claimant was dismissed on the grounds of her consistent failure to achieve the company's required standard of performance and her continuous poor work performance despite being given ample time, opportunity and

guidance to improve throughout the period of the PIP.

The claimant contended that the PIP was unfairly conducted as she was instructed to complete an unreasonable number of tasks and the company had a malicious intent to terminate her employment despite her having served the company and its subsidiaries for a total of 15 years. The claimant also went on to allege that she was never warned of the possibility of termination and that the company had failed to comply with proper procedures before terminating her. This was because she did not receive any coaching, training and guidance from the company throughout the PIP and she was never informed about the results of the PIP from October 2018 to January 2019.

Interestingly, in the claimant's evidence before the court, her final review session PIP form was incomplete and did not indicate that termination was recommended even though the form was signed by her, COW-2 and a HR representative. However, in the company's evidence, the final review session PIP form did indicate a recommendation for the claimant's termination and was also accordingly signed by the same parties. In this regard, the court found that the claimant's document was her own copy whereas the document in the company's record was the one used as the basis for the discussion with the claimant. Thus, the claimant was in fact aware of her recommendation for termination. In dismissing the claim for unfair dismissal, the Industrial Court held, *inter alia*, that:

(a) In providing the claimant with the opportunity to improve her performance, the company had reduced her scope of work and this had already been highlighted to the claimant during the target-setting session before the commencement of the PIP. The target-setting form was also agreed and mutually acknowledged by the claimant;

(b) The claimant's complaint of breaches of natural justice by the company due to its failure to convene a domestic inquiry for her to defend herself against the allegation of her poor performance was unsubstantiated as this matter was heard before the court *de novo*;

(c) Contrary to the claimant's averment that only a domestic inquiry would be the proper forum for the issue of poor performance to be addressed, the company had not breached any terms of her employment contract by placing her under a PIP to address issues of her poor performance;

(d) Despite the claimant's claim that she was never warned of the possibility of termination, the company's evidence showed that there had been sufficient communications to the claimant in regard to the possibility of termination since even before she was placed under the PIP as she

had been warned of her poor performance in 2014 when she fell under the Bottom 5% Category;

(e) It was not unreasonable for the company to expect a high standard of performance from the claimant given that she held the degree of Bachelor of Accountancy (Hons), had served the company and its subsidiaries for 15 years and was entrusted to assist COW-2 in important taxation matters; and

(f) On the overall evidence adduced by both parties, no reasonable employer would, in this case, have retained the claimant in its employment and the company had exercised its management prerogative in terminating the claimant's employment.

The company was represented by partner Shariffullah Majeed, and associate Arissa Ahrom, of **Lee Hishammuddin Allen & Gledhill**.

The Industrial Court award may be viewed here.

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