



**Malai Nuridah Sheikh Mohammad ..... Plaintiff/Appellant**

**AND**

**Brunei Shell Petroleum Company Sdn Bhd ..... 1<sup>st</sup> Defendant/Respondent**  
**Ken Marnoch ..... 2<sup>nd</sup> Defendant/Respondent**

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**(High Court of Brunei Darussalam)**  
**(Civil Suit No. 8 of 2015)**

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**Steven Chong, J.**  
**2 November 2015**

Striking out claim – Constructive dismissal – Dismissal without just cause – Enforced early retirement – Summary dismissal – Termination by notice – Defamation.

Mr. Mohd Shazale bin Haji Mat Salleh (M/S Mohd Shazale Salleh Advocates and Solicitors) for the Plaintiff/Appellant.

Ms. Linda Lee, Mr. Tang Weng Leong and Mr. Andrew Wong (M/S CCW and Partnership) for the Defendants/Respondents.

**Cases cited:**

*Adams (appellant) v GKN Sankey Ltd (respondents)* [1980] 1RLR 416.  
*AH-Gen of Duchy of Lancaster v L& N.W. Ry.* [1892] 3 Ch. 274 at 277.  
*Blue Town Investments v Higgs & Hill* [1990] 1WLR 696.  
*“Bunga Melati 5”* [2012] 4 SLR 546.  
*Cheung Chi Keung v Hospital Authority* [2006] 2 HKC 399.  
*Collins v Jones* [1955] 1 Q.B. 564.  
*Dr. A. Dutt v Assunta Hospital* [1981] 2 MLJ 304.  
*Drummond-Jackson v British Medical Association* [1970] 1 ALL ER 1094.  
*Hubbuck & Sons v Wilkinson, Heywood and Clark* [1899] 1QB86.  
*R. B. Diwan Badri Dass & Ors. v Industrial Tribunal, Patiala & Ors*, A. I. R. 1963 S. C. 630 at 633.  
*Reda and another (appellants) v Flag Ltd (respondents)* [2002] UKPC 38.  
*Slim v Daily Telegraph Ltd* [1968] 2 QB 157.  
*Sun Zhongquo v BOC Group Ltd* [2003] 2HKC 239.  
*U.N. Dutt & Company Private Limited v Its Workmen*, A. I. R. 1963 S.C. 411.  
*Vincent v South China Morning Post Publishers Ltd* [2002] 2 HKC 353.  
*Walker v Zurich Australian Insurance Ltd & Anor* [2001] QCA 296.  
*Western Excavating (E. G. C.) Ltd. V Sharp* [1978] QB 761 at 769.



**Steven Chong, J.:**

This is an appeal by the Plaintiff from the order of the Senior Registrar Ramzidah Binti PDKD Haji Abdul Rahman striking out her claim against the Defendants.

### **The claim**

The Plaintiff (“*Hjh Malai Nuridah*”) was an employee of the 1<sup>st</sup> Defendant (“*BSP*”) from 1981 until the termination of her employment in 2014. The 2<sup>d</sup> Defendant (“*Mr. Marnoch*”) was the Managing Director of BSP.

Broadly, *Hjh Malai Nuridah*’s claim is for:

- (i) constructive dismissal;
- (ii) dismissal without just cause;
- (iii) enforced early retirement; and
- (iv) defamation.

She seeks special damages of \$863,360 for loss of salary and allowances; further or in the alternative, special damages of \$272,000 for enforced early retirement; and general damages for defamation.

### **RSC o.18 r.18**

The application to strike out the claim is made under all four limbs of RSC o.18 r.18:

- a) it disclose no reasonable cause of action;
- b) it is scandalous, frivolous and vexatious;
- c) it may prejudice, embarrass or delay the fair trial of the action; and/or
- d) it is otherwise an abuse of the process of the court.

In general it is only in plain and obvious cases that the power to strike out should be invoked: *Hubbuck & Sons v Wilkinson, Heywood and Clark* [1899] 1QB86. The court will let the plaintiff proceed with the action unless his case is wholly and clearly unarguable: *Blue Town Investments v Higgs & Hill* [1990] 1WLR 696.

A “*reasonable cause of action*” has been defined as a cause of action which has some chance of success when only the allegations in the pleading are considered: *Drummond-Jackson v British Medical Association* [1970] 1 ALL ER 1094.

A proceeding is frivolous or vexatious if it is “*obviously unsustainable*”: per Lindley, L.J. in *AH-Gen of Duchy of Lancaster v L& N.W. Ry.* [1892] 3 Ch. 274 at 277; and the “*Bunga Melati 5*” [2012] 4 SLR 546.

## Constructive dismissal

Hjh Malai Nuridah began her career in BSP on 1 October 1981 as a “Jr. Water Chemist”. She progressed to various positions in human resources culminating in her appointment as Human Resources Director (“HD”) on 1 May 2011.

She claims that on or about 1 May 2012, she was removed from the HD role, where she headed a team of some 200 staff, and appointed as “Special Projects Lead” which was “*basically a one-woman show*” and this was tantamount to constructive dismissal (para 14 of the Statement of Claim).

The law on constructive dismissal was succinctly explained by Lord Denning M. R. in *Western Excavating (E. G. C.) Ltd. V Sharp* [1978] QB 761 at 769:

*“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”*

Thus, an employee to succeed in a claim for constructive dismissal must plead and prove:

- (i) the employer committed a repudiatory breach of the contract of employment by a breach of an express or implied term of the contract;
- (ii) the repudiatory breach caused the employee to leave the employment of the employer; and
- (iii) the employee suffered loss.

Hjh Malai Nuridah has not pleaded that BSP committed a breach of any express or implied term of the contract of employment in removing her from the HD position and appointing her to the role of Special Projects Lead. The reason why she omitted to do so is plain to see.



There is no express term in the contract of employment providing that BSP required the consent of Hjh Malai Nuridah in appointing her to a new position. On the contrary, clause 3 of the contract employment provides:

*"You will work for us as Jr. Water Chemist or in such other positions as we may from time to time direct and in whichever part of the State of Brunei we may require."*

BSP was therefore entitled to remove Hjh Malai Nuridah from the HD position and appoint her to the role of Special Projects Lead.

Nor has Hjh Malai Nuridah pleaded that she accepted a repudiatory breach by BSP which caused her to leave the employment of BSP. Again, it is obvious why she did not.

The fact of the matter is that Hjh Malai Nuridah did not leave the employment of BSP when she was removed from the HD position. She accepted her appointment as Special Projects Lead and was employed in that capacity for over 2 years until her termination from employment.

On a consideration of the pleadings alone, the claim for constructive dismissal is patently unarguable. Upon an analysis of the undisputed facts, the claim for constructive dismissal is obviously unsustainable.

Mr. Shazale, who now represents Hjh Malai Nuridah, having taken over from Mr. Rozaiman, rightly concedes that this part of the claim is untenable.

### **Dismissal without just cause**

There are three letters of termination from BSP to Hjh Malai Nuridah and there was confusion as to which one BSP relied on to terminate her employment.

Hj Kamaludin bin Haji Bungsu ("*Hj Kamaludin*") is the present HD of BSP. He was appointed on 1 May 2012 upon the removal of Hjh Malai Nuridah. He deposed in his first affidavit that:

- (i) By a letter dated 1 July 2014 (signed by Mr. Marnoch) (HK4), BSP purported to terminate Hjh Malai Nuridah's employment by giving 3 months' notice. The letter was withdrawn after Hjh Malai Nuridah refused to accept service of it.
- (ii) By a subsequent letter dated 10 July 2014 (which was unsigned) (HK5), BSP terminated Hjh Malai Nuridah's employment on payment of 3 months' salary in lieu of notice.



(iii) Hjh Malai Nuridah's last day in the office was 18 July 2014.

However, Hj Kamaludin in his second affidavit says that:

- (a) He had mistakenly relied on the unsigned letter dated 10 July 2014 (HK5) as the letter of termination.
- (b) The correct letter of termination was the one also dated 10 July 2014 (which was signed by Mr. Marnoch) (MN1) and it was served on Hjh Malai Nuridah. By this letter BSP terminated Hjh Malai Nuridah's employment with 3 months' notice which expired on 10 October 2014.
- (c) Hjh Malai Nuridah received the full amount of 3 months' salary.

Insofar as it is material, BSP's letter of termination of Hjh Malai Nuridah's employment (MN1) is in these terms:

*"As per your discussion on July 1<sup>st</sup> 2014 with Hj Salleh Bostaman Hj Zainal Abidin and Hj Kamaludin Hj Bungsu this letter is to formalize Brunei Shell Petroleum Company Sendirian Berhad's ("BSP") decision to end your employment with BSP and to release you from service.*

*Your contract of employment states that you are entitled to three months' notice or payment in lieu of salary for the notice period of three months. This letter services as a three months' notice in accordance with your contract of employment. Your formal notice period commences running 1<sup>st</sup> July 2014 and you will remain on our payroll until 10<sup>th</sup> October 2014.*

*Whilst we have no legal obligation to do so, we would like to make an ex gratia payment to you in the amount of Brunei Dollars forty two thousand six hundred and five (B\$42,605.00) in recognition of your services to the Brunei Shell Joint Ventures. This ex gratia payment will be paid as a lump sum payment in your last payroll and subject to you signing a Settlement Agreement with BSP on the terms provided by BSP. The Settlement Agreement will be provided to you shortly."*

Hjh Malai Nuridah's case is that behind the letter of termination by notice, BSP had an ulterior motive for dismissing her. She makes a host of allegations against BSP and Mr. Murnoch (paras. 8, 9, 10, 11, 12, 13, 15 and 16 of the Statement of Claim) which she relies on as the reasons for her dismissal. She contends that BSP "disguised" a dismissal without just cause as a termination by notice.



Mr. Shazale places heavy reliance on two cases: *Dr. A. Dutt v Assunta Hospital* [1981] 2 MLJ 304; and *U.N. Dutt & Company Private Limited v Its Workmen*, A. I. R. 1963 S.C. 411.

In *Dr. A. Dutt v Assunta Hospital*, the Federal Court of Malaysia had to consider the effect of section 20(1) of the Industrial Relations Act, 1967 which provides:

*“Where a workman who is not a member of a trade union of workmen considers that he has been dismissed without just cause or excuse by his employer he may, within one month of the dismissal, make representations in writing to the Director General to be reinstated in his former employment.....”*

The Federal Court (Raja Azlan Shah C. J., Wan Suleiman & Chang Min Tat F. J. J.) decided that notwithstanding the exercise of the contractual provision of termination by notice by an employer, where an employee considers he has been dismissed without just cause or excuse, he may sue for reinstatement or compensation.

Chang Min Tat F. J. J. (delivering the judgment of the court) cited with favour the following extract from the judgment of Gajendragadkar J. in *R. B. Diwan Badri Dass & Ors. v Industrial Tribunal, Patiala & Ors*, A. I. R. 1963 S. C. 630 at 633:

*“The broad and general question raised.....on the basis of the employer’s freedom of contract has been frequently raised in industrial adjudications; and it has consistently been held that the said right is now subject to certain principles which have been evolved by industrial adjudication in advancing the cause of social justice.....*

*The doctrine of the absolute freedom of contract has thus to yield to the higher claims for social justice”*

Reference was made by Mr. Shazale to the following passage of the judgment in *U.N. Dutt & Company Private Limited v Its Workmen*:

*“.....an employer cannot any longer base his right to discharge an employee purely on contract and he cannot be allowed to say that under contract he has an unfettered right to hire and fire his employees. That right is now subject to industrial adjudication and even a power given under the provision of a standing order to termination the service of an employee without assigning any reason and merely giving notice or on paying wages in lieu of such notice, is now subject to the scrutiny of the Industrial Court in the manner indicated above.”*



Mr. Shazale then refers to section 26 of the Employment Order, 2009, which provides:

- “(1) An employer may after due inquiry dismiss without notice an employee employed by him on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service except that instead of dismissing an employee an employer may –*
- (a) Instantly down-grade the employee; or*
  - (b) Instantly suspend him from work without payment of salary for a period not exceeding one week.*
- (2) Notwithstanding subsection (1), where an employee considers that he has been dismissed without just cause or excuse by his employer, he may, within one month of the dismissal, make representations in writing to the Minister to be reinstated in his former employment.”*

In my opinion those two cases do not assist Hjh Malai Nuridah’s claim. First, there is no provision in the Employment Order, 2009 equivalent to section 20(1) of the Industrial Relations Act, 1967 of Malaysia.

Secondly, I do not agree that the doctrine of the absolute freedom of contract must “yield to the higher claims for social justice”.

The Employment Order, 2009 also does not support Hjh Malai Nuridah’s claim. The Employment Order, 2009 does not apply to an employee of Hjh Malai Nuridah’s position. Section 2 provides that the definition of “employee” does not include “any person employed in a “managerial, executive or confidential position”.

Mr. Marnoch in BSP’s Web Bulletin of 13 April 2012 describes Hjh Malai Nuridah’s position of Special Projects Lead as “an important role of leading these critical path People Projects” in which she would “spearhead a number of essential initiatives and changes, ensuring that we maintain momentum, deliver the desired impact and operate in line with the Aligned Stand.” Hjh Malai Nuridah received a salary of \$14,862.75 – no less than that of her previous position as HD.

Surely, in my opinion, Hjh Malai Nuridah’s role as Special Projects Lead was either “managerial” or “executive” and therefore she was not an “employee” under the Employment Order, 2009.

But even if Hjh Malai Nuridah was an “employee” under the Employment Order, 2009, section 26 does not apply to her situation. Section 26 governs the dismissal of

an employee without notice on the ground of misconduct. Hjh Malai Nuridah was not dismissed without notice due to misconduct.

In truth, the Employment Order, 2009, if it applies, supports BSP's contention that Hjh Malai Nuridah's employment was lawfully terminated by notice because section 22 provides:

- "(1) Either party to a contract of service may at any time give to the other party notice of his intention to terminate the contract of service.*
- (2) The length of such notice shall be determined by the contract of service....."*

I now turn to clause 7 of the contract of employment which is germane to the issue of termination and it provides:

*"After the expiration of the probationary period, either you or we may terminate your employment at any time by giving not less than three months' notice in writing or alternatively we may terminate your employment at any time without notice upon paying you three months' salary in lieu. The foregoing is without prejudice to our right summarily to dismiss you for any cause which justifies such dismissal, in which event you will not be entitled either to any notice or to any salary in lieu of notice."*

In *Reda and another (appellants) v Flag Ltd (respondents)* [2002] UKPC 38, the Privy Council (Lord Nicholls, Lord Mackay, Lord Hope, Lord Hutton, Lord Millet) held that:

*"The Court of Appeal of Bermuda had correctly held that the appellants' employment was lawfully terminated in accordance with a contractual provision giving the employers an express and unrestricted power to terminate the employment without cause at any time during the contract period. The Court of Appeal had rightly observed that the very nature of such a power is that its exercise does not have to be justified. A power to dismiss without cause is a power to dismiss for any cause or for none."*

And in *Walker v Zurich Australian Insurance Ltd & Anor* [2001] QCA 296, the Queensland Court of Appeal (de Jersey CJ, Davies and Thomas JJA) recognized an employer's unfettered contractual right to terminate the employment of an employee by notice.

So too, the courts in Hong Kong: *Vincent v South China Morning Post Publishers Ltd* [2002] 2 HKC 353; and *Cheung Chi Keung v Hospital Authority* [2006] 2 HKC 399.

In my opinion those cases support Ms. Lee's submission on behalf of the Defendants that this is a simple case of an employer lawfully terminating an employee's employment by notice.

Clause 7 of the contract of employment is an express provision giving either party unrestricted power to terminate employment by notice. Neither party is obliged to give a reason for termination. BSP chose to exercise that power by giving Hjh Malai Nuridah 3 months' notice and cannot be faulted for doing so. Her claim of dismissal without just cause is unarguable and is obviously unsustainable.

### **Summary dismissal**

Hjh Malai Nuridah's last day in BSP's office was on 18 July 2014. This is not in dispute. Mr. Marnoch's letter to Hjh Malai Nuridah dated 23 July 2014 explains why she was not required to work out her notice:

*"In a meeting with Hj Salleh Bostaman, Hj Zainal Abidin and Hj Kamaludin Hj Bungsu at our offices on Friday 18 July 2014, you were informed that, given the nature of the complaints raised in your recent email, it was no longer appropriate that you remain at the office and that your last day in the office would be Friday, 18 July 2014."*

Mr. Shazale argues that the purported termination by notice was in effect a summary dismissal since Hjh Malai Nuridah's last day in office was on 18 July 2014 when she should have worked until 10 October 2014 which was the expiry of the 3 months' notice.

I do not agree. The fact that Hjh Malai Nuridah was requested to stop work on 18 July 2014 did not vitiate the 3 months' notice of termination: *Adams (appellant) v GKN Sankey Ltd (respondents)* [1980] 1RLR 416. She remained on BSP's payroll until the expiry of the 3 months' notice and not on the date she was asked to stop work. This was not a summary dismissal but a termination by 3 months' notice.

There is no express provision in the contract of employment entitling Hjh Malai Nuridah to continue working in the office until the expiration of the 3 months' notice. Nor could there be an implied term to that effect: *Sun Zhongquo v BOC Group Ltd* [2003] 2HKC 239.

Hjh Malai Nuridah received the salary due to her in full. No loss was suffered.

## Enforced early retirement

Section 4 of the Retirement Age Order, 2010 provides:

- “(1) Notwithstanding anything in any written law, contract of service or collective agreement, the retirement age of an employee shall be not less than 60 years.*
- (2) No employer shall dismiss on the ground of age any employee who is below the age of 60 years.”*

Hjh Malai Nuridah claims that when BSP decided to remove her from the HD position, Mr. Marnoch initially suggested early retirement but this was not possible as she had not reached the age of 55 and he then proposed she took over the role of “*Head of Resourcing and Bruneianisation*” (para 13 of the Statement of Claim). She then claims that the 3 months’ notice of termination of employment was tantamount to enforced retirement (para 20.1 of the Statement of Claim).

The contention of Hjh Malai Nuridah is that “*given the 1<sup>st</sup> Defendant’s professed desire in 2011 to get me to retire early before the mandatory retirement age of 60*” she was “*entitled to hold the view and/or suspicion*” that her dismissal was on the ground of her age (para 14 of the Supplementary Affidavit).

This claim of wrongful dismissal on the ground of age is misconceived. Assume for the moment Hjh Malai Nuridah’s allegation that Mr. Marnoch had suggested early retirement to her in 2011 is proven, on the pleadings the proposal to retire early was made not on the ground of her age but as a possible option in light of the decision to remove her as HD.

Hjh Malai Nuridah’s “*suspicion*” that her dismissal was on the ground of her age is ill-founded. BSP’s letter of termination (MN1) to her plainly shows a termination of employment by 3 months’ notice and not on the ground of her age.

The claim for enforced early retirement is clearly unarguable and obviously unsustainable.

## Periphery issues

Before turning to the claim for defamation I will briefly deal with a number of periphery issues raised by Hjh Malai Nuridah: financial package offered for enforced early retirement not in line with the financial package “*which in principle had been agreed*” by BSP during the Panaga Health Centre Outsourcing Exercise in 2011 (para 20.2 of the Statement of Claim); financial package offered well below that given to

*“other male staff issued with a similar release from service notice”* amounted to *“sexual discrimination”* (para 20.3 of the Statement of Claim); and *“grievance procedure”* not followed by BSP (para 23 of the Statement of Claim).

The question is whether Hjh Malai Nuridah’s employment was lawfully terminated. Suffice to say that those periphery issues are irrelevant to BSP’s lawful termination by 3 months’ notice of Hjh Malai Nuridah’s employment pursuant to clause 7 of the contract of employment.

## **Defamation**

In respect of BSP, the claim of Hjh Malai Nuridah is that her *“sudden departure”* from the office had raised speculation amongst BSP’s employees, contractor workforce and the public that she had committed *“some wrongdoing”* (paras 29 and 30 of the Statement of Claim). She says that the *“abrupt and sudden nature”* of her dismissal had damaged her reputation as there was a common perception within BSP that *“sudden dismissals would only be applied where employees had been guilty of serious misconduct”* (para 15 of the Supplementary Affidavit).

The short answer to the claim is that Hjh Malai Nuridah’s *“sudden departure”* from the office on 18 July 2014, in itself, discloses no reasonable cause of action for defamation against BSP.

As to Mr. Marnoch, the claim of Hjh Malai Nuridah is that he made *“derogatory remarks about the HR leadership team to different groups of staff”* within and outside BSP (para 19 of the Statement of Claim).

Hjh Malai Nuridah should have but did not:

- (i) set out with reasonable certainty in the pleadings the actual words complained of: *Collins v Jones* [1955] 1 Q.B. 564, per Denning, L.J. at 571, 572; and
- (ii) plead the meaning of the alleged defamatory words so that the court can decide whether the words are capable of bearing the meaning attributed: *Slim v Daily Telegraph Ltd* [1968] 2 QB 157.

Therefore, the pleadings do not disclose a reasonable cause of action for defamation against Mr. Marnoch.



## **Conclusion**

For the foregoing reasons the Senior Registrar's order striking out Hjh Malai Nuridah's claim against BSP and Mr. Marnoch is unassailable.

The appeal is dismissed with costs to be paid by Hjh Malai Nuridah to BSP and Mr. Marnoch to be taxed if not agreed.

**DATO PADUKA STEVEN CHONG**  
Judge, High Court