# Dispute Resolution

## Threshold to Commence Winding Up Proceedings Raised

By the Federal Government Gazette Notification No. 4159 dated 22 March 2021, the amount of indebtedness required to commence winding up proceedings under section 466(1)(a) has been fixed at RM50,000.00 with effect from 1 April 2021.

This means that a creditor may only commence winding-up proceedings against a debtor company where the debtor company has failed to satisfy a debt owed to the creditor exceeding RM50,000.00 within 21 days after a notice of demand has been served upon the debtor company. The initial prescribed amount of indebtedness under the Act was RM10,000.00. By the Federal Government Gazette Notification No. 21841 dated 30 December 2020, the threshold was raised to RM50,000.00 for a limited period from 1 January 2021 to 31 March 2021. Therefore, Gazette Notification No. 4159 effectively makes permanent the increased threshold of RM50,000.00 from 1 April 2021.

**CONTACT US FOR FURTHER INFORMATION REGARDING DISPUTE RESOLUTION MATTERS.**

# Legal Updates

APRIL 2021

**Shearn Delamore & Co**
**7th Floor**
**Wisma Hamzah Kwong-Hing,**
**No 1, Leboh Ampang**
**50100, Kuala Lumpur, Malaysia**
**T: 603 2027 2727**
**F: 603 2078 5625**
**info@shearndelamore.com**
**www.shearndelamore.com**
**www.linkedin.com/company/94702**

# Employment & Administrative Law

## Importance of Getting Your Employees to Acknowledge Receipt of Any Notice on Changes to the Company's Policies

It is inevitable that throughout the operations of businesses, policies and rules within the established businesses would go through changes, either to implement a change in the applicable laws and regulations, or to improve the company's internal policies in order to enhance its operations. For changes concerning the employees of a company, it is important that prior to the implementation of any new policy, the employees of the company are made aware of the impending change(s) and accept the same. Failure of the company to do so may result in the employees successfully arguing that unilateral changes were made to the terms and conditions of their employment, or refusing to acknowledge that changes have been made to their terms of employment.

This is illustrated in the recent Industrial Court Case of **Philomina a/p F F Silvari v Daito Asia Development (M) Sdn Bhd** (Award No.: 455 of 2021). The Claimant of this case was a Personal Assistant to the General Manager at Le Meridien Hotel Kuala Lumpur, which is operated by the company. The claimant had been employed by the company for 16 years.

### Facts

On 15 July 2019, when the claimant reported to work as usual, she was informed that she was no longer an employee of the company. The claimant claimed that she had been unfairly dismissed by the company.

The company, however, argued that in view of the implementation of the law on Minimum Retirement Age in 2012, the claimant had attained her retirement age of 60 years on 14 July 2019. Therefore, the claimant's employment had

come to an end on 14 July 2019. As such, the company contended that the claimant was never dismissed in this case. Instead, she had simply retired from her employment upon attaining the age of 60 years.

## Issues

The issue before the Industrial Court was whether the claimant had been dismissed by the company, or whether she had simply attained her retirement age and her employment contract had rightly come to an end.

In this regard, the claimant argued that there was no clause for retirement age in her appointment letter, which was signed before the implementation of the **Minimum Retirement Age Act 2012**. She further argued that the **Minimum Retirement Age Act 2012** merely ensures that employers do not terminate the services of employees before the age of 60, it does not mean that employees must retire when they attain the age of 60.

The company, on the other hand, adduced evidence that in view of the implementation of the **Minimum Retirement Age Act 2012**, the company had issued a letter dated 1 August 2013 to the claimant to inform her that her retirement age would be 60 years of age. The claimant had accepted the letter by signing the same. Further, when the claimant disputed her retirement some two months before her last day of service, the company had also written to the claimant vide a letter dated 7 June 2019 that the official retirement age of the company is also provided for in the Association Handbook.

## Decision of the Industrial Court

In coming to its decision, the Court took specific note of the letter dated 1 August 2013 which was not just of a general application, but addressed specifically to the claimant. In that letter, the company expressly informed the claimant, among others, that her existing retirement age (if any) provided in her appointment letter is now substituted by the age of 60 years.

Pursuant thereto, the claimant had signed that letter and acknowledging it under the wordings, *"I confirm my understanding and acceptance of the above terms and*

*conditions by signing and returning to you the duplicate of this letter".* The claimant, during cross-examination, admitted that she understood the terms of the letter of 1 August 2013.

There was no evidence before the Industrial Court that the claimant had objectedto the contents of that letter and/or sought any clarification from the company's human resources department on its content.

The Claimant claimed that she was unaware of the existence of the Association Handbook, and that in any event they were not applicable to her, since they were only introduced after her appointment letter. The company's witness testified that the Association Handbooks are available in the hotel's intranet, which was accessible to all employees of the company. The claimant herself admitted that she was aware of the intranet. Further, the Court was of the view that since the claimant had admitted that she had enjoyed the benefits provided for under the handbook, she cannot now plead the non-applicability of the retirement clause just because it did not suit her.

In view of the foregoing, the Court found that the claimant's employment had come to a natural end due to her attaining the retirement age of 60 years on 14 july 2019, thus the claimant's claim was dismissed by the Industrial Court.

## Comments

This case demonstrates the importance of notifying the employees of a company of any changes to the company's internal policies, especially when such changes affect the terms and conditions of the employees' employment. It is also important to get the employees' consent prior to implementing such changes, as any unilateral changes to the policies may even result in the employees pleading constructive dismissal.

The company in this matter was represented by Vijayan Venugopal and Benedict Ngoh, both of the Employment and Administrative Practice Group of Shearn Delamore & Co.

**CONTACT US FOR FURTHER INFORMATION REGARDING EMPLOYMENT & ADMINISTRATIVE LAW MATTERS.**

# Intellectual Property

## Aggrieved Person under the Trademarks Act 2019 — Qi Sheng Sdn Bhd v Foong Yit Meng [2021] MLJU 269

The **Trademarks Act 2019** ("TMA") came into force on 27 December 2019 and to date many provisions of the Act remain untested in court. One of the important provisions is section 47 of the TMA which provides for the invalidation of a registered trademark. Notably, section 47 of the TMA retains the requirement of "*aggrieved person*" of its precursor ( section 45 of the repealed Trade Marks Act 1976).

The High Court recently shed some light on the requirement of "*aggrieved persons*" in its decision in **Qi Sheng Sdn Bhd v Foong Yit Meng**. In this case, the plaintiffs applied to invalidate the first defendant's trademark registrations under Registration Nos. 05000826 and 2016007852 under section 47 of the TMA.

The High Court held that the question of whether the plaintiffs are "*aggrieved persons*" under section 47 of the TMA must be answered in the affirmative before the Court can consider the substantive grounds for invalidation. If the answer to the question is in the negative, the Court will dismiss the application for invalidation in *limine* without evaluating the merits.

His Lordship went on to refer to the case of **Re Arnold D Palmer** [1987] 2 MLJ 681, and the decisions of the Federal Court in **McLaren International Ltd v Lim Yat Meen** [2009] 4 CLJ 749 and **Mesuma Sports Sdn Bhd v Majlis Sukan Negara (Pendaftar Cap Dagangan Malaysia, interested party)** [2015] 6 MLJ 46. Based on these authorities, the High Court noted that one must have a genuine and present intention to use his mark as a trademark in the course of a trade which is the same as or similar to the registered trademark in question, in order to be an "*aggrieved person*". Further, the High Court held that the person seeking to invalidate a registered trademark must not fall within the category of busy-bodies.

Applying the legal principles to the facts therein, the Court found that the plaintiffs were not aggrieved persons under section 47 of the TMA. Hence, there was no necessity for the Court to consider the substantive grounds raised by the plaintiffs.

**CONTACT US FOR FURTHER INFORMATION REGARDING INTELLECTUAL PROPERTY LAW MATTERS.**