INDUSTRIAL COURT OF MALAYSIA

CASE NO. : 3/4-2921/18

BETWEEN

NG SEOK MAY @ ANGIE SABRINA

AND

MAXIS BROADBAND SDN. BHD.

AWARD NO. : 122 OF 2020

Before	:	**PUAN ANNA NG FUI CHOO - Chairman** (Sitting Alone)
Venue	:	Industrial Court Malaysia, Kuala Lumpur
Date of Reference	:	22.10.2018
Dates of Mention	:	22.11.2018, 20.12.2018, 18.1.2019, 14.2.2019, 9.5.2019, 15.5.2019, 23.5.2019, 10.6.2019, 13.6.2019, 19.6.2019
Dates of Hearing	:	25.7.2019, 6.8.2019
Claimant's Written Submission	:	4.9.2019
Company's Written Submission	:	17.9.2019
Company's Written Submission in Reply	:	3.10.2019
Claimant's Written Submission in Reply	:	15.10.2019

Representation : Mr. Pathma Raj Ramasamy
From Messrs Pathma Raj Ramasamy & Co.
Counsel for the Claimant

Ms Teoh Alvare and Ms Teh Jovaynne
From Messrs Zulrafique & 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 **Ng Seok May @ Angie Sabrina** (hereinafter referred to as "the Claimant") by **Maxis Broadband Sdn. Bhd.** (hereinafter referred to as "the Company") on 18 July 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 18 July 2018.

Facts

[2] The Claimant was employed by the Company as a Contract Strategy and Management Specialist on 14 November 2016 as per the Letter of Offer of Employment dated 3 November 2016 (pages 1 to 10 of the Company's Bundle of Documents 1 (COB1)). Holding that position, the Claimant had to report directly to one Ms Joanne Lai, the Head of Vendor, Contract & Sourcing Management. A copy of the Claimant's Job Description can be found at page 11 of COB1. At the time of the Claimant's dismissal on 18 July 2018, the Claimant held the same position, drawing a basic salary of RM11,000.00 per month.

[3] On or about December 2017, the Company was made aware of reports of certain allegations of misconduct which were traced back to the Claimant. By a Show Cause email dated 22 December 2017 (pages 12 to 14 of COB1), the Claimant was required to provide her written explanation in respect of two (2) allegations of misconduct which included four (4) Facebook postings by the Claimant. By an email dated 28 December 2017 (pages 9 to 14 of COB2), the Claimant submitted her explanation to the allegations of misconduct.

[4] The Company was not satisfied with the Claimant's explanations so by a letter dated 23 January 2018 (pages 15 to 23 of COB1), the Company notified the Claimant that she was required to attend a Domestic Inquiry (DI) on 30 January 2018 to answer three (3) charges of misconduct which are reproduced as follows:

> "**Charge 1**
>
> That you, between the periods of 26 November to 20 December 2017 had posted negative comments about your superiors on your personal Facebook account. Details of the postings are as below:
>
> i) On 26 November 2017 at approximately 9.03 P.M.;
>
> "Another weekend gone, salary in and last week wif bxxxxxx then long leaves not seeing...looking fwd to it... wonder when will I forever don't c these bxxxxxx..."

ii) On 4 December 2017 at approximately 6.10 A.M.;

> "A Bitch missing me by continue to email and want me to work during on leaves..even me also they expect me to work.."

iii) On 20 December 2017 at approximately 9.52 P.M; and

> "Back to see bitches..nx wk no need to see them since they r on holiday.. wish do no need to see them.. hope my wish will come true ...yet so near and yet so far.. the waiting time is killing"

iv) On 20 December 2017 at approximately 9.59 P.M

> "As each day passing, treating each day as the last day..grow bolder without consideration to respect and considerate their feelings since they never consider your feelings...1 don't owe any of u bitches a living...no hesitation to let the whole world know include high ranking position..i have nothing to loose...am fully prepared all the way!!!bring it on bitches!!!"

By so doing, you have acted contrary to the express and/or implied terms and conditions of service and have conducted yourself in a manner that is disrespectful and insubordinate. Quote apart from that it is also incompatible with the proper discharge of your duties to the Company in that you had failed to comply with the Company's policy and/or had failed

to exercise due care and diligence to safeguard the Company's reputation and have thereby committed a serious misconduct.

Charge 2

That you, on 20 December 2017, at approximately 3:00 P.M, had made a comment to an external vendor from Huawei that:

a) Your leave was not approved by the management even though you have applied for it in advance;

b) The above happened due to managements poor planning;

c) The Company is prejudice towards you; and

d) You are currently placed on Performance Improvement Plan (PIP).

This took place at the common area in your office at Level 14, Menara Maxis.

By so doing, you have conducted yourself in a manner that is incompatible with the proper discharge of your duties to the Company and/or have been acting unprofessionally when engaging with the Company's external vendor. Your words and conduct were aimed at portraying the Company in a negative light. In so doing you had failed to comply with the

Company's policy and/or failed to exercise due care and diligence to safeguard the Company's reputation and have thereby committed a serious misconduct.

Charge 3

That you, have been disrespectful towards your manager, Joanne Lai as per your email correspondences. Details are as below.

a) **Via an email "Working in PS" dated 28 December 2017 sent by:**

i) **at approximately 2:49 P.M.**

Explained provided.

Appreciate that you make it clear that even you are on leave, do I need to report my whereabouts?

Since you brought up this topic, there are colleague that were in PS whole day last Friday and there is no meeting scheduled.

Can you also share me that the team notified you that they are in PS?

ii) **at approximately 3:14 P.M.**

I had already replied. Please reply to my question.

iii) **at approximately 3:47 P.M.**

As I had replied, I could not remember which date but I informed you. Definitely not Thursday and Friday.

One of the days Monday, Tuesday or Wednesday.

Prior to further reply, I am still waiting for answer to my concern address below:

Is there double practice here even they are doing the same action but only conduct applies to me and not them?

iv) **at approximately XXXD P.M.**

I had answered so many of your question. You have not address my concern.

Please address my concern to further continue your question. If not, I will be unable to further answer your question.

Is there double practice here even they are doing the same action but only conduct applies to me and not them?

v) **at approximately 3:30 P.M.**

Please address my concern to further continue your question. If not, 1 will be unable to further answer your question.

Is there double practice here even they are doing the same action but only conduct applies to me and not them?

vi) **at approximately XXX P.M.**

Proceed what?

vii) **at approximately XXX P.M.**

Hi joanne,

This should be practiced long ago for all staff in Maxis not just only because of this incident from me which is practice to only me

Please provide me the correct iso standard form.
Thanks

b) **Via an email "Discussion in PS 10/1/2018-digitalisation" dated 9 January 2018 sent by you at approximately 4:32 P.M.**

Address this in the correct email which was send out earlier.

Will reply in the email accordingly for ease of understand the conversation.

c) **Via an email "VPE - Training" dated 3 January 2018 sent by you:**

i) **at approximately 4:23 P.M.**

Hi Joanne,

The missing communication gaps from top down unaligned.

ii) **at approximately 4:34 P.M.**

Joanne,

This is why I seek your support to solution this gap.

It is not within my level.

iii) **at approximately 5:43 P.M.**

Hi Joanne,

Noted below is your solution to the communication gap I had mentioned from top to down and seek your help.

iv) **at approximately 6:19 P.M.**

Joanne,

Noted below is your help and solution to the communication gap I had mentioned from top to down.

v) **on 4 January 2018 at approximately 5:23 P.M.**

Below link to assist you to understand the meaning.

Http://www.google.com/search?ei= MZNWuRkov0vATky7e4Dfl&g=**meaning+solution&oq**= meaning +solution&gsl=psy-ab.3..0j0i221l30k119.8412.14495.0.14818.14.13.1.0.0.0.320.1553.0j2j4j1.7.0....0...1c.1.64.psy-ab..6.8.1594...0i67k1j0i131k1.0.Cy0VBrHoXk4

https://vvww.google.com/search?ei=98dNWuvGFMrrvqTqwJT4BQ&q=**meaning+help**&og= meaning+help&gs1=psy-ab.3...3665.4555.0.4810.8.7.0.0.0.0.240.240.2-.1.0....0...1c.1.64.psy-ab..8.0.0....0. CeW8iSTL1V0

d) **Via an email "Leaves" dated 24 October 2017 at approximately 5:34 P.M.**

Hi Joanne,

Please clarify that am I reporting under Opdesh directly now? If not, you as the direct supervisor to approve.

Thanks.

e) **Via an email "Ivalua Solution - Walkthrough of Revised Design Document Supplier Management Module" dated 22 November 2017 at approximately 2:42 P.M**

From my side, I have included in. You may want to review if you have further concern you want to address and not address during the meeting.

You can provide the correct flow by describing what is missing at which flow and to add in. Since you are the head, the process will be practice by the team, therefore your input is critical.

f) **Via an email Via an email "Final Review of Design Documents - Contract Management and Supplier Management modules" dated 20 December 2017:**

i) **at approximately 9:18 A.M.**

You are in the email of the attachment, you will see the comment if you open the attachment.

In a simple summary from the email response to IValua, the flow is not updated, therefore the comment in the descriptions are not updated as well.

ii) **at approximately 9:31 AM.**

Based on my response below, it is well clearly mentioned the status on the supplier design. What more confirmation you need?

By so doing, you have conducted yourself in a disrespectful and insubordinate fashion apart from being evasive and obstructive when presented with elementary queries for which a courteous and professional response would have sufficed. Instead you have chosen to respond and to further correspond in a manner that is incompatible with the proper discharge of

your duties to the Company and/or have been disrespectful towards your Team Leader and/or failed to comply with the Company's policy and have thereby committed a serious misconduct.”.

[5] The DI against the Claimant proceeded on 30 January 2018 and the Claimant pleaded not guilty to the three charges of misconduct. Subsequently, the DI Panel found the Claimant guilty of all the charges. By a letter dated 8 February 2018 (pages 1 and 2 of COB2) while the Company was deliberating on the decision of the DI Panel, the Claimant was informed that her services were suspended with effect from 8 February 2018 on half pay for two (2) weeks. By an email dated 22 February 2018 (page 1 of COB3), the Claimant was informed that her suspension from work was further extended until further notice with effect from 22 February 2018, on full pay.

[6] The Claimant was informed of the findings of the DI panel by a letter dated 18 July 2018 (the Letter of Dismissal). The Company stated that it could no longer put the necessary trust and confidence in the Claimant to perform her duties and responsibilities as an employee of the Company so her services were terminated with immediate effect on 18 July 2018 (pages 24 to 32 of COB1).

The Function of the Industrial Court

[7] The Industrial Court's function 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:

"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] It was also stated in the Federal Court case of *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449:

"As pointed out by the Court recently in *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd* [1995] 2 MLJ 753, the function of the Industrial Court in dismissal cases on a reference under s. 20 is twofold, first, to determine whether the misconduct complained of by the employer has been established, and secondly, whether the proven misconduct constitutes just cause or excuse for the dismissal.".

[9] 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

[10] The Company called three (3) witnesses to testify in court and to prove its case against the Claimant and they were:

(a) Muhammad Afif bin Hamzah (COW1) – the Company's Industrial Relations Specialist;

(b) Keong Ghee Choong (COW2) – Chairman of the DI; and

(c) Joanne Lai Sia Ling (COW3) – the Head of Vendor Management, the Claimant's immediate superior.

[11] The Company adduced documentary and oral evidence to prove that the Claimant had in fact committed the misconduct in the 1st Charge:

(a) The oral evidence directly relevant to proving the 1st Charge were adduced through COW2 and by the Claimant's admission.

(b) The documentary evidence directly relevant to proving the 1st Charge are as follows:

(i) the Claimant's Letter of Offer of Employment with Maxis dated 3 November 2016 (pages 1 to 10 of COB1);

(ii) the Claimant's Facebook postings with her face icon on it (pages 15 to 17 of COB2);

(iii) calendar record which shows the date of salary release, the Claimant's leave, Ms Chua Ai Chin and COW3's leave (pages 2 and 3 of COB3);

(iv) the Claimant's leave record for November and December 2017 (page 4 of COB3);

(v) Ms Chua Ai Chin's leave record for December 2017 (page 6 of COB3);

(vi) COW3's leave record in December 2017 (page 5 of COB3);

(vii) email from COW3 to the Claimant dated 1 December 2017 (page 7 of COB3);

(viii) email from the Claimant to COW3 dated 4 December 2017 (page 7 of COB3);

(ix) the Claimant's Facebook postings in relation to the “Boring Xmas lunch” dated 20 December 2017 (page 17 of COB2);

(x) the three different versions of explanation in relation to the Claimant's Facebook postings – her Facebook

account was hacked (page 11 of COB2); her phone was used by relatives (pages 9 and 10 of COB2); and finally, she suspected her husband had used her phone to post the postings (Q&A No.12 of the Claimant's witness statement - CLWS1);

(xi) the "I KNOW - Code of Business Practice" on My Social Media (page 5 of COB2); and

(xii) the Claimant's acknowledgement of the Code of Business Practice (page 8 of COB2).

[12] Relating to the 2nd Charge, the Company also adduced direct oral evidence from COW3 to prove the said charge and also *vide* the admission by the Claimant. The documentary evidence directly relevant on the proof of the 2nd Charge are as follows:

(a) the Claimant's further reply to the Show Cause email dated 28 December 2017 (pages 10 and 11 of COB2);

(b) the email from COW3 to Ms Karen Lim Chin Chin, Mr. Saeed Khalil and Ms Laity Shaarani dated 21 December 2017 in relation to the incident (page 18 of COB2);

(c) Whatsapp screenshot of the message from Yao Ming (Huawei vendor) in relation to the incident (page 19 of COB2); and

(d) the minutes of the DI where two of the Claimant's colleagues namely Ms Chua Ai Chin and COW3 were called to testify in the DI on this incident (pages 65 to 68 of COB3).

[13] In the 3rd Charge, the Company adduced oral evidence through COW3 and the Claimant. The documentary evidence directly relevant to proving the 3rd Charge are the following:

(a) Email titled "Working in PS" (pages 20 to 25 of COB2);

(b) Email titled "Discussion in PS – 10 January 2018" (pages 26 to 28 of COB2);

(c) Email titled "VPE-training" (pages 29 to 33 of COB2);

(d) Email titled "Leaves" (pages 34 and 35 of COB2);

(e) Email titled "Ivalua Solution - Walkthrough of Revised Design Document for Supplier Management Module" (pages 36 to 40 of COB2); and

(f) Email titled "Final Review of Design Documents - Contract Management and Supplier Management modules" (pages 41 to 43 of COB2).

The Claimant's Case

[14] The Claimant gave testimony in her own case and was the only

witness in the Claimant's case. She told the court that she was subjected to two charges in the Show Cause email dated 22 December 2017 but for the DI conducted on 30 January 2017, she had to answer to three charges. She testified that she was only made known of the 3rd Charge on the day of the Notice of DI which was 23 January 2018.

[15] The Claimant's response to the Company's 1st Charge during the DI was that the statements written were very general and had not mentioned specifically Maxis or employees of Maxis. The Claimant reiterated that she had already explained this in her show cause letter. Further, in the DI the Claimant said she had informed the panel that it was her husband who had posted the Facebook postings. As for the Claimant's response to the 2nd Charge, the Claimant claimed that her words had been twisted by the Company. The Claimant alleged that she was not given a fair DI. As for the 3rd Charge, the Claimant said she was only made known about it on the day of the Notice of DI.

Evaluation of Evidence and Findings

[16] It is settled law that the burden is on the Company to prove the misconduct of the Claimant and the standard required is merely on a balance of probabilities, even if the ground complained of is one of a dishonest act. In the Court of Appeal's case of *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314, his Lordship Abdul Hamid Mohamad JCA (as his Lordship then was) at page 327 said,

> "Thus, we can see that the preponderant view is that the Industrial Court, when hearing a claim of unjust dismissal,

> even where the ground is one of dishonest act, including "theft", is not required to be satisfied beyond reasonable doubt that the employee has "committed the offence", as in a criminal prosecution. On the other hand, we see that the courts and learned authors have used such terms as "solid and sensible grounds", "sufficient to measure up to a preponderance of the evidence", "whether a case … has been made out", "on the balance of probabilities" and "evidence of probative value". In our view the passage quoted from *Administrative Law* by H.W.R. Wade & C.F. Forsyth offers the clearest statement on the standard of proof required, that is the civil standard based on the balance of probabilities, which is flexible, so that the degree of probability required is proportionate to the nature of gravity of the issue.".

The Claimant's Submission

[17] The Claimant's arguments in the written submission for the three charges are as follows:

1st Charge

[18] The 1st charge against the Claimant was based on the Code of Conduct. It was contended that firstly, there was no evidence before the court to show that the Claimant was the one who had posted the postings. It was highlighted that the 1st charge related to a breach of the Code in relation to social media post which may affect the reputation of Maxis. However, even COW2 had agreed during cross-examination that there was no mention of the word "Maxis" in any of the Facebook posting.

[19] In addition, there was nothing that was shown in the Facebook profile of the Claimant that the Claimant was employed by Maxis. Based on the above, it was further submitted that the Company in their findings (pages 11 to 13 of COB3) failed to conclusively make an evaluation on the existence of Maxis' name in the Facebook postings. It was contended that the purported findings by the Company was only premised on the four postings (pages 10 and 11 of COB3). It was submitted that there was no further evaluation conducted by the panel on the Facebook profile belonging to the Claimant and this had been confirmed by COW2.

[20] The court must state that the Claimant had admitted during cross-examination that she had a Facebook account under her own name, Angie Ng in 2017. It was the Facebook account 'Angie Ng' that had posted the Facebook postings in Charges 1(a) to 1(d) (pages 16 to 18 of COB1, pages 15 and 16 of COB2). However, her initial response was that the account had been hacked.

The 2nd Charge

[21] The court was urged to invoke an adverse inference for not calling the witness stated in the 2nd Charge (the Huawei external vendor). In his absence to confirm the said message, it was submitted that the Whatsapp message remains hearsay evidence. It was also the Claimant's contention that the Claimant had been further denied an opportunity to adduce audio evidence during the DI as she was only told during the DI that she was required to obtain clearance to adduce the said audio recording evidence. As such, it was submitted that the Claimant was never given a fair hearing from the outset.

[22] The court has perused the evidence adduced by the Company and found that there was sufficient evidence to prove Charge 2 on a balance of probabilities. On 20 December 2017 at approximately 3:00 pm, COW3 had heard the Claimant commenting to the external vendor that her leave was not approved by the management even though she had applied for it well in advance; it had happened due to the management's poor planning; the Company was prejudiced against her and that she was placed on Performance Improvement Plan (PIP). COW3 and another colleague were sitting very near to the Claimant and the Huawei vendor so they could hear the Claimant complaining to him about her grouses. The Claimant's conduct by making those comments to the external vendor was most unprofessional when engaging with the Company's external vendor and/or conducted herself in a manner that was incompatible with the proper discharge of her duties to the Company. Moreover, the Claimant's conduct of complaining to the external vendor had portrayed the Company in a negative light. Hence, the Claimant had failed to comply with the Company's policy and/or safeguard the Company's reputation and thereby committed a serious misconduct.

3rd Charge

[23] The Claimant submitted that this charge was mainly premised on alleged insubordination. It was argued that the Claimant was never given an opportunity to explain herself regarding this charge prior to the DI. COW1 admitted to this during cross-examination and reference was made to the case of *Chandra A/L Thuraisamy v. Sanko Plastics (Malaysia) Sdn. Bhd* (Award No. 1863 of 2019). The Claimant submitted that although the purported events leading to the 3rd Charge had taken place after the show cause letter had been issued, the Company could

have sent the Claimant a second show cause letter prior to the DI. This was not done by the Company.

[24] It was further contended by the Claimant that from the email conversations, the Claimant was at all material times seeking for guidance and help from COW3. However, the Claimant alleged that she was not given adequate support and guidance from COW3. The Claimant further lamented that she was at all material times subject to a forced PIP. The Claimant also submitted that it was clear from the chain of emails between the Claimant and COW3 that the Claimant had often used words such as “guidance” and “help”. Consequently, it was alleged that the charge of insubordination was clearly baseless. Nevertheless, it was contended that based on the foregoing, it appeared that the Company had pre-determined their course of action to dismiss the Claimant where this certainly rendered the Claimant's dismissal as unfair.

The Domestic Inquiry (DI)

[25] COW2, the Chairman of the DI confirmed that the Claimant attended the DI (Q & A No. 8 of COWS2) and she had pleaded not guilty to all the three charges at the DI. Two witnesses were called by the Company, including COW3. The court has observed that the authenticity and accuracy of the typewritten Minutes of DI (pages 22 to 129 of COB3) were never challenged nor put to COW2 during cross-examination. Therefore, the minutes of DI must be deemed admitted and/or accepted by the Claimant (refer to *Sudipto Sarkar v. R Manohar)* in *Sarkar on Evidence*, Volume 2, 15th Edition at pages 2178 and 2179).

[26] The court is mindful of its duty since a DI had been conducted by the Company prior to the Claimant's dismissal. His Lordship Raus Sharif J (as he then was) had expressed in the case of *Bumiputra Commerce Bank Bhd v. Mahkamah Perusahaan & Anor* [2004] 7 MLJ 441 at pages 447 and 448:

> "...Thus, I am of the view that the principle laid down in both cases cannot be said to extend to instances where a domestic inquiry has been held. As such, I am in agreement with the submissions of learned Counsel for the applicant that, where due inquiry has been held, the Industrial Court's jurisdiction is limited to considering whether there was a *prima facie* case against the employee ....
>
> … Thus, I am of the view that in cases of this nature, the Industrial Court should first consider whether or not the domestic inquiry was valid and whether the inquiry notes are accurate. In the absence of such consideration and a finding on the validity of the domestic inquiry and accuracy of the inquiry notes, the Industrial Court's action in proceeding to decide the matter without any regard to the notes of inquiry cannot be described as anything more than an error of law.".

[27] His Lordship who had decided on the case above had clarified his decision in the subsequent case of *Plaintree Wood Products Sdn. Bhd. v. Mahkamah Perusahaan Malaysia & Muhammad Safarudin Chew bin Abdullah* [2005] 1 LNS 283 (Application for Judicial Review, High Court Kuala Lumpur, No. R1-25-42 of 2005) (unreported) where his Lordship said as follows:

"*Di dalam kes Bumiputra Commerce Sdn. Bhd., apa yang saya putuskan adalah mengenai kegagalan Mahkamah Perusahaan untuk mengambilkira nota keterangan domestic inquiry yang telah dikemukakan sebagai keterangan. Mahkamah Perusahaan di dalam kes ini tidak langsung merujuk kepada nota keterangan domestic inquiry dalam membuat penilaian fakta dan kegagalan ini telah saya putuskan sebagai suatu kesilapan undang-undang. Di dalam kes pemohon ini, keadaan adalah berbeza. Kes pemohonan di Mahkamah Perusahaan adalah masih di peringkat pembicaraan. Pada saya, responden kedua adalah bebas untuk membentangkan kesnya ini dan untuk menyokong dakwaan bahawa beliau telah dibuang kerja tanpa alasan yang munasabah. Di pihak pemohon pula, jika terdapat keterangan mengenai domestik inquiry, terpulanglah kepada pemohon untuk mengemukakannya. Tugas Mahkamah Perusahaan ialah untuk membuat keputusan berpandukan keseluruhan keterangan yang dikemukakan melalui keterangan-keterangan saksi yang dikemukakan oleh kedua-dua pihak. Sudah tentu Mahkamah Perusahaan tidak semata-mata terikat kepada nota prosiding di dalam domestik inquiry. Jadi Mahkamah Perusahaan adalah tidak silap untuk mengarahkan pembicaraan penuh dijalankan di dalam kes ini*.".

[28] In reference to the Claimant's allegation that she was not allowed to adduce her audio evidence during the DI, the Company submitted that it had operated within the limits of its management prerogative in disciplinary matters and acted in accordance with established principles of industrial relations practice/jurisprudence. COW2 during cross-

examination testified that the DI panel was informed that the recording was taken without the knowledge of the said person in the recording and the person concerned was still an employee of the Company at the material time. The Claimant was told that she was allowed to produce the audio recording provided she met one of the two requirements below (page 75 of COB3):

(a) The Claimant was given time to obtain written consent or approval from the person in the recording; or

(b) To produce the said person as a witness in the DI;

[29] The DI panel then adjourned the DI for a break to enable and allow the Claimant to carry out the above. Following the break when the DI resumed, the Claimant was unable to fulfil the choice given by the DI panel. Hence, the audio recording was not allowed to be adduced as evidence in the DI.

[30] In relation to the Claimant's allegation that the 3rd Charge preferred against the Claimant was not part of the show cause email dated 22 December 2017 issued, therefore she was not given the opportunity to explain the 3rd Charge, the court must reiterate that it was never disputed that it was contained in the Notice of DI dated 23 January 2018. At all material times during the DI on 30 January, the Claimant was given reasonable time and every opportunity to explain, defend and/or exculpate herself from the charges of misconduct (including the 3rd Charge) as specified in the Notice of DI, including to cross-examine the witnesses (pages 15 to 23 of COB1).

[31] The Claimant during cross-examination had admitted that she had received the Notice of DI dated 23 January 2018 and she was aware that the DI would be held on 30 January 2018, thus giving her a week to prepare for the 3rd Charge and the DI. The Claimant was also informed in the Notice of DI at page 23 of COB1, first paragraph:

> "At the notice of DI, you will be given full opportunity to conduct your defense by not only cross examining such witnesses as may be produced against you but also by examining your own witnesses (if any). You may bring along with you any documentary or other evidences that may help you in your defense".

[32] The Claimant was given an opportunity to cross-examine witnesses during the DI. She also admitted that she did not call any witnesses. The court has perused the DI notes and found that all the formalities of a proper DI had been adhered to by COW2, the Chairman and the panel members and the relevant evidence had been brought forth before the DI panel to be considered. The Claimant was also given time to call the witness for whom she had done a secret recording. It is the court's findings that the Claimant had been given a fair hearing and she was given ample time and opportunity to defend herself in the DI, including for the 3rd Charge.

[33] Nevertheless, the proceedings in this case were conducted *de novo* before this court. Hence, whatever decision or conclusion that the DI panel might have made, ultimately it is still the Industrial Court's decision that will take precedence and importance to see through the finality of the fate of the Claimant's dismissal. This is trite law as it was

clearly decided and expressed in the Court of Appeal in the case of *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665 that a defective inquiry or the failure to hold a domestic inquiry is not a fatality but only an irregularity which is curable by *de novo* proceedings before the Industrial Court.

[34] In *Dreamland (M) Sdn. Bhd. v. Choong Chin Sooi & Anor* [1998] 1 CLJ 1; [1988] 1 CLJ (Rep) 39; [1988] 1 MLJ 111, His Lordship Wan Suleiman FJ said,

> "(i) The absence of DI or the presence of a defective inquiry is not a fatality but merely an irregularity, it is open to the employer to justify his action before the Industrial Court by leading all relevant evidence before it and having the entire matter referred before the Court.".

The Audio Recording

[35] The authenticity of the audio recording (page 2 of the Claimant's Bundle of Documents (CLB)) which was recorded without the permission/ consent of the Claimant's former colleague, is an issue as to its admissibility. The recording was done without 'Nurul's' consent and was clearly an invasion of her privacy. It was equally unethical of the Claimant who had recorded the conversation secretly and then attempt to use it for her benefit, all without obtaining the permission of the alleged 'Nurul' to record their conversation. The Claimant during cross-examination admitted the following:

(a) the audio recording was taken without the knowledge and/or consent of the alleged person named 'Nurul';

(b) 'Nurul' was not called to court to verify the contents of the recording produced in CLB;

(c) transcribing of the audio recording was done by the Claimant herself; and

(d) there were no details produced i.e. name, designation, time, date, place in which the said audio recording was made.

[36] In these circumstances, it would not be proper for the court to accept the audio recording as the Claimant's evidence. The court therefore rejects the contents of CLB as being inadmissible.

[37] The court will now proceed to decide if the Company has adduced sufficient evidence to prove the three charges against the Claimant on a balance of probabilities. The Company had produced every detail including the calendar of the staff concerned, details of their leave, trail of emails and all that were necessary to prove the Claimant's misconduct.

[38] In the 1st Charge, the evidence adduced by the Company were:

(a) that the Claimant had posted negative comments about her superior and/or team members at Maxis on her personal Facebook account;

(b) the comments and/or terms used in the Claimant's Facebook postings referred to her place of employment i.e. Maxis;

(c) that the Claimant was the author of the Facebook postings whilst she was an employee of the Company;

(d) that the Claimant's Facebook's postings with negative comments about her superior (COW3) and/or her team members were disrespectful and insubordinate in nature;

(e) that the Facebook comments made by the Claimant had the potential to cause damage to the Company's reputation and/or its employee (COW3) and that posting negative comments about her superior and/or team member on social media that could be seen by or shared with an uncontrollable number of people would amount to public comments; and

(f) that the Claimant had committed an act of serious misconduct that breached the Code of Business Practice provision on 'Non-Discriminatory and Safe Work Environment', 'My Social Media' and 'My Conduct with Internal Parties' and her implied and/or express conditions of service (pages 3, 5 and 6 of COB2).

[39] It is the court's considered opinion that the Company has proven this charge. It was very clear to any of the Claimant's Facebook friends

who she was referring to – without even stating the Company or the Claimant's superior/colleagues' names. The comments posted were not only negative but with the very unsavoury words used, were blatantly disrespectful and insubordinate in nature. Calling one's superior 'bitch' repeatedly and colleagues 'bitches' is most unacceptable in any institution.

[40] The Company had adduced evidence to prove the 2nd Charge that on 20 December 2017, at approximately 3:00 pm, the Claimant had commented to the external vendor that her leave was not approved by the management even though she had applied in advance; it happened due to the management's poor planning; the Company's prejudice against her; and that she was placed on PIP. COW3 together with another colleague were within earshot when the Claimant made those comments. Subsequently, the said external vendor had also texted what the Claimant had complained about to him and the screenshot was produced as part of the Company's evidence, corroborating what COW3 had testified in court. Although the said external vendor was not called as a witness for this hearing, the court does not hold him as an important and material witness so as to raise an adverse inference against the Company for not calling him. COW3 had given direct evidence in this hearing and in the DI and the court opines that is sufficient proof of the 2nd Charge against the Claimant.

[41] Considering the circumstances and the Claimant's comments to the external vendor, the Claimant had acted unprofessionally when engaging with him and/or conducted herself in a manner that was incompatible with the proper discharge of her duties to the Company.

Moreover, the Claimant's conduct of complaining to the external vendor had portrayed the Company in a negative light. Hence, the Claimant had failed to comply with the Company's policy and/or safeguard the Company's reputation and had thereby committed a serious misconduct. The Claimant is hereby found guilty of the 2nd Charge.

[42] The 3rd Charge hinged on the Claimant's disrespect towards her manager (COW3) as per the Claimant's emails and the court also finds the Claimant guilty of this charge. The Company adduced evidence *vide* all the emails' trail to prove the charge that the Claimant had demonstrated a consistent pattern of being disrespectful, evasive, obstructive and insubordinate to COW3 in her email correspondence:

(a) that in reference to emails titled “Working in PS”, the Claimant's emails dated 28.12.2017 at 14:49, 15:14, 15:47, 14:51, 15:30, 15:56 and email dated 4 January 2018 at 8:10 in response to COW3's basic instruction which was a request for the Claimant to provide an explanation as to why she was working in Plaza Sentral (not her base location) without informing her or obtaining her approval, the Claimant had deliberately evaded COW3's repeated instruction to explain, was argumentative and challenged COW3's authority (pages 20 to 25 of COB2). The Claimant's response (email dated 4 January 2018 at 8:10) was crystal clear in proving that her manner in communicating with COW3 was ill-mannered and also showed her persistent argumentative behaviour and inability to understand that her conduct was improper;

(b) that in relation to email titled “Discussion in PS 101112018-digitalisation”, instead of following COW3's instructions in providing the necessary details for COW3's consideration for approval to attend the Internal Training - Category Management, the Claimant had sent an email reply dated 9 January 2018 at 16:32 (page 26 of COB2). The Claimant's response had shown the Claimant's unprofessional behaviour; demonstrated the same tone and/or pattern of behaviour in evading COW3's instructions; disrespectful and uncooperative when asked questions by COW3;

(c) that in relation to emails titled “VPE - Training”, the Claimant's emails dated 3 January 2018 at 16:23, 16:34, 17:43, 18:19 shows the Claimant's continuous failure and/or refusal to follow COW3's repeated instruction to work through issues with Ms Opdesh. In the end, COW3 received responses from the Claimant (email dated 4 January 2018 at 17:23) that were evasive and not responding to what was requested, which were disrespectful up to the extent of asking COW3 to get definitions from Google to understand the meaning (pages 30 and 31; page 29 of COB2);

(d) that in relation to emails titled “Leaves”, COW3 had requested the Claimant to obtain clearance for her leave from Ms Opdesh as the Claimant was part of Ms Opdesh' team to do the Procurement Digitalisation. By an email dated 24 October 2017 at 17:34, the Claimant questioned

COW3 if she was reporting directly to Ms Opdesh and if not, directed COW3 to approve her leave (page 34 of COB2). The Claimant's response proves that instead of following COW3's instruction, she had questioned COW3's authority; disrespectful towards COW3 and was most uncooperative;

(e) that in relation to emails titled “Ivalua Solution - Walkthrough of Revised Design Document for Supplier Management Module”, the Claimant's email dated 22 November 2017 at 14:42 in response to COW3's email shows that the Claimant's response was unconnected to what COW3 had requested her to do. On top of that, the Claimant had instructed COW3 to do her work. This shows a consistent pattern of the Claimant in her evasive, argumentative and confrontational attitude in not addressing the question or instruction requested (page 37 of COB2); and

(f) that in relation to emails titled “Final Review of Design Documents - Contract Management and Supplier Management modules”, the Claimant's email dated 20 December 2017 at 09:18 and 09:31 in response shows her confrontational and argumentative behaviour. The Claimant's continuous evasive behaviour in not confirming what COW3 had requested from her showed the Claimant was disrespectful and deliberate in defying COW3's orders and authority (page 41 of COB2).

Decision

[43] On the totality of the evidence before the court, it is found that the Company has proved the misconduct of the Claimant in the three charges, on a balance of probabilities. The Claimant had given three different versions of her defence on the Facebook postings and that in itself showed that she was not a reliable and credible witness and was inconsistent in her evidence. She was merely pushing the blame to others and not able to substantiate her allegations. The court is satisfied with the evidence adduced by the Company that it was the Claimant who was responsible for those postings and it was not her Facebook account that had been hacked, or that her relatives or her husband had used her phone and posted the nasty remarks. The conclusion that can be drawn is that only those familiar with the Company's happenings and the Claimant's colleagues would know when they went on leave, when was salary paid, all that had been posted by the Claimant.

[44] The court will now decide if the Claimant's dismissal was for a just cause or excuse. In this respect, the Federal Court case of *Norizan bin Bakar v. Panzana Enterprise Sdn. Bhd.* [2013] 6 MLJ 605 has confirmed that the Industrial Court has the jurisdiction to decide if the dismissal of an employee was without just cause or excuse by using the doctrine of proportionality. As reiterated by the Company in the Claimant's dismissal letter at page 31 of COB1,

> "As an employee, the Company expects a certain level of commitment and discipline from you in the discharge of your duties and responsibilities. However, you were found to have continuously conducted yourself in a disruptive manner towards

your manager, Joanne Lai. You were uncooperative, lacking in teamwork, abrasive, tactless and unable to communicate respectfully and/or effectively with your manager.

Despite being verbally advised and warned on the same matter, especially during your Performance Improvement Plan (PIP) review sessions in the present of your project team leader Opdesh Kaur and People & Organisation personnel, Saeed, Karen Lim and Laily, wherein you were sufficiently advised to be more careful in the manner you communicate with your superiors, team members and also the Company's vendors, you continued to communicate with those parties in an argumentative, disrespectful, aggressive and/or abrasive manner.

Your continuous abrasive and uncooperative attitude does not only have a disruptive influence to your job performance, but also hinders Company's growth, especially when the Company's success relies heavily on efficiency, teamwork and cooperation of its employees to ensure productivity and the overall performance of the Company.

After careful deliberation of the matter in totality, looking into the facts and evidences, we regret to inform you that the Company can no longer put the necessary trust and confidence in you to perform your duties and responsibilities as an employee of the Company.".

[45] Based on the findings of the DI and in the face of the gravity of the Claimant's misconduct and what had been stated above, the

Company decided to terminate the Claimant's service. The court could not have agreed more with the observations of the Company and its decision to dismiss the Claimant. The Claimant's conduct and her choice of language were clearly unbecoming of a subordinate's treatment of her superior. Not only was she indignant and rude, she had also made unnecessary comments against her superior and colleagues. The Claimant was also disruptive in the conduct of her office affairs and that would have made it almost impossible to get things moving and working in the office.

[46] In *Pearce v. Foster* [1886] (71) QBD 536 Lord Esher, MP said of the following duty of a servant to his master:

> "The rule of law is that where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss. The relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faithfully, and if by his own act he prevents himself from doing so, the master may dismiss him. ...".

[47] Having considered all the above, the court opines that the Claimant's misconduct was very serious and any employer, similarly circumstanced, would have dismissed the Claimant. The Company's decision to dismiss the Claimant with immediate effect was therefore warranted. This court finds that the Claimant's dismissal was for a just cause or excuse. Accordingly, the Claimant's claim is dismissed.

[48] 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 JANUARY 2020

Signed

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