

INDUSTRIAL COURT OF MALAYSIA

CASE NO.: 22(29)(22)/4-406/19

BETWEEN

OTHMAN BIN ABDUL MANAN

AND

CIMB BANK BERHAD

AWARD NO : 751 OF 2020

Before : **Y.A. TUAN PARAMALINGAM A/L J. DORAISAMY**
- Chairman (Sitting Alone)

Venue : Industrial Court Malaysia, Kuala Lumpur

Date of Reference : 08.03.2019

Date of Mention : 22.04.2019; 27.05.2019; 15.07.2019 & 04.10.2019

Date of Hearing : 21.08.2019; 10.12.2019 & 13.12.2019

Representation : Pn. Rohani Ibrahim together with En. Khairul Amin Abdullah
Messrs. Amin, Nizam & Rohani
Counsel for the Claimant

Ms. Teoh Alvare together with En. Muhammad Sharulnizam
bin Mohamad Roni
Messrs. Zul Rafique & Partners
Counsel for the Bank

REFERENCE :

This is a reference made under Section 20(3) of the Industrial Relations Act 1967 (Act 177), arising out of the dismissal of **Othman Bin Abdul Manan** (hereinafter referred to as "*the Claimant*") by **CIMB Bank Berhad** (hereinafter referred to as "*the Bank*") on 6 September 2018.

AWARD

[1] The Ministerial reference in this case required the Court to hear and determine the Claimant's complaint of dismissal by the Bank on 6 September 2018.

I. Procedural History

[2] The Court received the letter pertaining to the Ministerial reference under Section 20(3) of the Industrial Relations Act 1967 on 12 March 2019.

[3] The case came up for mention on 22 April 2019, 27 May 2019 and 15 July 2019.

[4] The trial proceeded before the then learned Chairman of Court No. 22, Dato' Frederick Indran X.A. Nicholas on 21 August 2019.

[5] Due to the learned Chairman Dato' Frederick Indran X.A. Nicholas' elevation to the High Court of Malaya as a Judicial Commissioner on 25 November 2019, the matter was thereafter transferred upon the instructions of the learned President of the Industrial Court to Court No. 29 for it to be heard before the learned Chairman, Tuan Bernard John Kanny. The hearing continued on 10 December 2019 and concluded on 13 December 2019.

[6] Due to the non-extension of the Task Force Courts, and in this case Court No. 29, the learned President of the Industrial Court on 11 March 2020 instructed the matter to be transferred from Court No. 29 to this Court, i.e. Court No. 22, for the purposes of handing down an Award for this case.

[7] This Court, after perusing the pleadings, the documents, the witness statements, the notes of proceedings as well as the written submissions (together with the bundles of authorities) filed by the parties to this matter, herein hands down the Award as per the instructions of the learned President of the Industrial Court.

II. Factual Background

[8] The Claimant was first employed by the Bank *vide* letter of appointment dated 10 June 1982 as Clerical/Cashier effective 1 July 1982. The Bank was then known as Bank Bumiputra Malaysia Berhad.

[9] Sometime in January 2018, the Bank had reviewed the Preferred Customers Accounts (“PCA”) of several staff in Taman Nilam Dengkil Branch after several transactions in the accounts had triggered the Anti-Money Laundering Act (“AMLA”) Alert. The Claimant was the Branch Manager of the Taman Nilam Dengkil Branch at that material point in time.

[10] The investigation carried out by the Company revealed that the Claimant had performed fund transfers between his current account and the current accounts of 3

staff in the same branch, i.e. Cheah Pui Mun (Staff No. 0068720), Seri Rohayu Binti Md Yusof (Staff No. 0007516) and Syarmiza Binti Anis Shaidi (Staff No. 0060944).

[11] The Company contends that the purpose of the Claimant performing the said fund transfers into the current account of the 3 staff was to assist them to qualify for the PCA customer status and in the process to achieve his Branch Key Performance Index (KPI) target for “Number of Successful Acquisition – New Preferred Customer” for his yearly performance assessment.

[12] On 30 July 2018, the Bank issued a Notice To Show Cause to the Claimant requiring the Claimant to provide his written explanation in respect of 2 allegations of misconduct. The Claimant replied to the Notice to Show Cause on 7 August 2018 but the Bank however found it to be unsatisfactory and unacceptable.

[13] It is the Claimant’s sole contention that the fund transfers to the accounts of the Taman Nilam Dengkil Branch staff was as an appreciation and motivation by the Claimant as the Branch Manager so that the staff will work harder to achieve the sales target.

[14] The Claimant was informed *vide* the Bank’s letter dated 6 September 2018 that the Bank could no longer repose the necessary trust and confidence in him to effectively discharge his duties as an employee of the Bank. Due to the seriousness

of the misconduct committed, the Claimant was dismissed from the services of the Bank with immediate effect.

[15] The Claimant appealed against the decision of the Bank on 26 September 2018 but the Bank decided that the decision to dismiss the Claimant from service remains unchanged.

[16] The Claimant contends that his dismissal was done without just cause or excuse and thus prays for reinstatement to his former position without any loss of benefits.

III. The Function of the Industrial Court & The Burden Of Proof

[17] It is established law that the function of the Industrial Court in a Section 20(3) Industrial Relations Act 1967 reference is two-fold, i.e. to determine:-

- (i) whether the misconduct of the employee alleged by the employer has been established; and
- (ii) whether the proven misconduct constitute just cause or excuse for the dismissal.

[18] In the case of **WONG YUEN HOCK v. SYARIKAT HONG LEONG ASSURANCE SDN BHD & ANOR APPEAL [1995] CLJ 344; [1995] 1 MLRA 412** the Federal Court had held:-

“On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under section 20 of the Act (unless otherwise lawfully provided by the terms of the reference), is to determine whether the misconduct or irregularities complained of by the Management as the grounds of dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal.”

[19] And in the case of **GOON KWEE PHOY v. J & P COATS (M) BHD [1981] 2 MLJ 129; [1981] 1 MLRA 415** the Federal Court (*vide* the judgment of Raja Azlan Shah CJ) held:-

“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 that 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 that 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”.

[20] The burden of proof in an unfair dismissal claim lies on the employer to prove on a balance of probabilities that the employee had committed the misconduct complained of (**STAMFORD EXECUTIVE CENTRE v. DHARSINI GANESON [1986] ILR 101; [1985] 2 MELR 245**).

IV. Issues To Be Decided

[21] The issues to be determined in this case are:-

- (i) whether the Claimant was guilty of the charges of misconduct levelled against him by the Company; and
- (ii) whether the charges of misconduct constitute just cause or excuse for the Claimant's dismissal.

V. The Court's Findings And Reasons

(i) Whether the Claimant was guilty of the charges of misconduct

(a) Charge No. 1 – Misrepresenting to the Bank on the qualification of 3 staff for the Preferred customer status

[22] Charge No. 1 contained in the Notice To Show Cause dated 30 July 2018 (at pp. 4 - 5 of Bundle A) is worded as follows:-

“That you, as the then Branch Manager of Taman Nilam Dengkil Branch, had between 5 October 2017 and 9 January 2018, misrepresented the Bank on the qualification of three (3) staff in Taman Nilam Dengkil Branch for Preferred customer status by performing

various fund transfers from your current account no. 8008545166 into the current account of the three (3) staff as stated in paragraphs (a) and (b) above for purpose of meeting the criteria of having Asset Under Management (AUM) of at least RM250,000.00 (with the Bank).

By your above conduct, you have therefore been dishonest and/or breached your express and/or implied terms of service as an employee of the Bank”.

[23] It is not disputed that in order for a customer to qualify as a Preferred Customer and open a Preferred Customer Account (PCA), the customer must meet the criteria of having an Asset Under Management (AUM) of at least RM250,000.00. In short, the 3 staff only attained the Preferred Customer status after the Claimant transferred his own funds into the current accounts of the 3 staff.

[24] The Claimant had then set about enabling his said 3 staff, i.e. Cheah Pui Mun (COW-5), Seri Rohayu Binti Md Yusof (COW-2) and Syarmiza Binti Anis Shaidi (COW-3) to attain the Preferred Customer status by transferring his own funds in his current account into the current account of these 3 staff so that they can meet the AUM criteria of RM250,000.00.

[25] The Claimant did not deny that he had instructed the transfer of his own funds into the accounts of the said 3 staff (*at pp. 68-74 of Bundle B*). However, his

contention that the said transfers were to reward the said 3 staff does not hold water in light of the fact that each and every transfer that was made by the Claimant to the said 3 staff were later transferred back from the current accounts of the 3 staff to the Claimant's account.

[26] The 3 staff, i.e. COW-5, COW-2 and COW-3, testified in Court that they were not qualified to attain the Preferred Customer status as they did not have RM250,000.00 to achieve the AUM criteria. They also testified that they opened the current account upon the Claimant's instructions, who was their superior, i.e. Branch Manager, at that point in time. The said funds that was transferred by the Claimant into the accounts of the 3 staff were then transferred back in January 2018 after the Branch KPI for 2017 was completed.

[27] It is also pertinent to note COW-5's testimony that there was an earlier transaction in October 2017 prior to the 27 December 2017 transactions wherein the Claimant had transferred a sum of RM80,000.00 in total to COW-5's account in order for the Claimant to achieve his Branch KPI for October 2017 target for "Number of Successful Acquisition – New Preferred Customer". However, since COW-5 returned the said sum back to the Claimant within the month of October 2017 itself, she was unable to attain her Preferred Customer Status for October 2017 for it to be taken into account for the Claimant's October 2017 Branch KPI target. This explains the Claimant's second attempt in December 2017 to transfer his funds to not only COW-5, but also to COW-2 and COW-3, for them to attain their Preferred Customer status for December 2017. Only after the status was attained and the KPI achieved were

the monies returned by COW-5 (on 8 January 2018), COW-2 (on 9 January 2018) and COW-3 (on 9 January 2018) to the Claimant.

[28] The Claimant testified during cross-examination:-

“Q : *Setuju dengan saya Puan Cheah telah memulangkan tunai kepada anda pada 8 Januari 2018, iaitu...*

A : *Setuju.*

Q : *Saya belum habis lagi, ya. **Puan Cheah telah memulangkan tunai kepada anda pada 8 Januari 2018, iaitu selepas markah KPI cawangan bulan Disember atau bagi tahun 2017 telah disahkan?***

A : ***Setuju.***

Q : *Setuju bahawa pada 9 Januari 2018 Puan Rohayu telah membuat pindahan tunai untuk memulangkan kembali kepada anda RM250,000 berserta RM65.00 yang merupakan keuntungan hibah?*

A : *Setuju...*

Q : *Setuju Encik Othman bahawa Puan Rohayu juga telah memulangkan tunai kepada anda lebih kurang 13 hari dari tarikh 20 Disember 2017 di mana anda telah membuat pindahan tunai ke akaun Puan Rohayu...*

A : *Ulang semula.*

Q : *Anda...*

A : *Maaf.*

Q : *Setuju bahawa Puan Seri Rohayu juga telah memulangkan tunai kepada anda lebih kurang 13 hari dari tarikh 20...27 Disember 2017 di mana anda telah membuat pindahan tunai ke akaun Puan Rohayu?*

A : *Setuju.*

Q : ***Setuju anda juga Puan Rohayu juga telah memulangkan tunai kepada anda iaitu pada 9 Januari 2018 iaitu selepas markah KPI cawangan bulan Disember atau tahun 2017 Disember, Yang Arif, telah disahkan?***

A : ***Setuju.***

Q : *Begitu juga Puan Syarmiza pada 9 Januari 2018 telah membuat pindahan tunai untuk memulangkan kembali kepada anda RM250,000 berserta RM65.00 yang merupakan keuntungan atau hibah?*

A : *Setuju.*

Q : *Puan Syarmiza juga telah memulang...memulangkan tunai kepada anda lebih kurang 13 hari dari tarikh 27 Disember 2017 di mana anda telah membuat pindahan tunai ke akaun Cik Syarmiza.*

A : *Setuju.*

Q : Cik Syarmiza juga telah memulangkan tunai kepada anda pada 9 Januari 2018 selepas markah KPI cawangan bagi bulan Disember tahun 2017 telah disahkan?

A : Setuju, Yang Arif'.

[Transcript Notes, 13.12.2019; 09:58:28 – 10:05:10]

(Emphasis added)

[29] From the evidence that was produced before this Court, it could not be denied that there was never any intention to maintain the PCAs of COW-2, COW-3 and COW-5 at the AUM of RM250,000.00. The entire exercise was perpetrated by the Claimant in order to serve his own self-interest in achieving his year 2017 Branch KPI target for “Number of Successful Acquisition – New Preferred Customer”. This is more than evident when the Claimant instructed COW-2, COW-3 and COW-5 to return his monies after the 2017 KPI was already confirmed. The Claimant’s monies resided in the accounts of COW-2, COW-3 and COW-5 for a mere 12 to 15 days. It cannot be said by any stretch of imagination that the transfers were rewards by the Claimant to COW-2, COW-3 and COW-5. They did not receive any benefits from the said transfers. In fact, even the interest earned, i.e. RM65.00, had to be returned by them to the Claimant.

[30] It is this Court’s finding that the Claimant had misrepresented to the Bank on the qualification of COW-2, COW-3 and COW-5 as Preferred Customers when he performed the various fund transfers from his account to the 3 staff’s current

accounts to enable them to meet the AUM criteria of having a minimum RM250,000 with the Bank.

[31] As such, the Bank has succeeded in proving Charge No. 1 against the Claimant.

(b) Charge No. 2 – Misrepresenting to the Bank on the attainment of the Branch’s 2017 KPI Target

[32] Charge No. 2 in the Notice To Show Cause dated 30 July 2018 (*at pp. 4-5 of Bundle A*) is worded as follows:-

“That you, by your conduct as stated in Charge 1 above had misrepresented the Bank on the attainment of Taman Nilam Dengkil Branch’s 2017 KPI target for ‘Number of Successful Acquisition – New Preferred Customer’.

By your above conduct, you have therefore been dishonest and/or have breached your express and/or implied terms of service as an employee of the Bank”.

[33] The Claimant during cross-examination had clearly admitted that he had assisted COW-2, COW-3 and COW-5 to attain the Preferred Customer status in order to achieve his year 2017 Branch KPI target for “Number of Successful Acquisition – New Preferred Customer”.

[34] The Claimant had also admitted during cross-examination:-

- i. The Branch's KPI for September 2017 at Item No. 11 "Number of Successful Acquisition – New Preferred Customer" showed that the target to be achieved was 26.59 but the Claimant had only achieved 20 New Preferred Customer. Thus, for September 2017, the Branch rating for item No. 11 was 2 (Below Expectations) (*at p. 13 of Bundle B*);
- ii. The Branch's KPI for October 2017 at Item No. 11 "Number of Successful Acquisition – New Preferred Customer" showed that the target to be achieved was 29.55 but the Claimant had only achieved 24 New Preferred Customer. Thus, for October 2017, the Branch rating for Item No. 11 was 2 (Below Expectations) (*at p. 14 of Bundle B*);
- iii. The Branch's KPI for December 2017 at Item No. 11 "Number of Successful Acquisition – New Preferred Customer" showed that the target to be achieved was 35.45 and the Claimant achieved 40 (including the 3 staff) New Preferred Customer. Thus, for December 2017, the Branch rating for Item No. 11 was 5 (Far Exceed Expectations) (*at p. 12 of Bundle B*).

[35] COW-4 (Mr. Chua Kim Lin; Senior Managing Director) testified in his Witness Statement (*Q & A No. 9 of COWS-4*) that without the additional 3 PCAs from COW-

2, COW-3 and COW-5, the Branch would only achieve the rating of 3 (Meet Expectations) instead of 5 (Far Exceed Expectations) for New Preferred Customer and the overall score for KPI would have been 2.60 instead of 2.70. Q & A No. 9 of COWS-4 is as follows:-

“Q : Please refer to page 12 of the Bank’s Bundle of Documents (Volume 2) [Bundle B]. What is this document?”

A : (a) This is the Claimant’s Branch KPI for year 2017. Please refer Item No. 11 “Number of Successful Acquisition – New Preferred Customer” which shows that the Branch had achieved the rating of 5.

(b) The following were the Branch KPI Achievement for 2017 with and without 3 Preferred Current Account (“PCA”) of the 3 staff:

(i) Target Range for “Number of Successful Acquisition – New Preferred Customer”

Far Below Expectations	Below Expectations	Meet Expectations	Exceed Expectations	Far Exceed Expectations
(1)	(2)	(3)	(4)	(5)
0.00 – 21.26	21.27 – 35.44	35.45 – 37.22	37.23-38.99	39.00-39,000.00

(ii) Branch Achievement for “Number of Successful Acquisition – New Preferred Customer”

KPI	Weight (%)	Achievement		Rating		Weighted Score	
		With 3 PCA	Without 3 PCA	With 3 PCA	Without 3 PCA	With 3 PCA	Without 3 PCA
Number of Successful Acquisition – New Preferred Customer	56	40	37	5	3	0.25	0.15
Total						3.85	3.75
Total KPI Score at 70% #						2.695	2.625
Total KPI Score at 70% (Rounding) #						2.70	2.60

Calculation for the Branch Manager's (the Claimant) personal KPI

- (c) Without the additional 3 PCAs from the 3 staff, the Branch would only achieve the rating of 3 (Meet Expectations) instead of 5 (Far Exceed Expectations) for New Preferred Customer and the overall score for KPI would be 2.60 instead of 2.70.
- (d) The Claimant had led the Bank to believe that the Branch had obtained 3 New Preferred Customers although there was no intention to maintain the funds in the accounts. Therefore, the Claimant had misrepresented to the Bank on the attainment of the Taman Nilam Dengkil Branch's

2017 KPI target for the “Number of Successful Acquisition – New Preferred Customer”.

[36] The Claimant himself admitted that if the calculation for the KPI had not taken into account his 3 staff, i.e. COW-2, COW-3 and COW-5, his Branch would have just obtained 37 customers with the Preferred Status and attaining a rating of 3 (Meet Expectations):-

“Q : Setuju sekiranya pengiraan KPI tersebut tidak mengambil kira akaun tiga staf, iaitu Puan Cheah, Puan Seri Rohayu dan Syarmiza, cawangan anda hanya akan mencapai 37 pelanggan berstatus “Preferred” dan mendapat rating 3 (Meet Expectations)?

A : Setuju.”

[Transcript Notes, 13.12.2019; 10:34:27 – 10:35:10]

[37] It is this Court’s finding that the opening of the 3 PCAs for COW-2, COW-3 and COW-5 and the subsequent transfer by the Claimant of his own funds into the 3 PCAs was done by the Claimant for the sole purpose of achieving the Branch KPI for 2017 New Preferred Customer. The Branch’s KPI was also the Claimant’s KPI. The Claimant had clearly led the Bank to believe that the Branch had obtained the 3 PCAs although there was no intention all along to maintain the funds in the said accounts. Thus, the Claimant had misrepresented to the Bank on the achievement of

the Taman Nilam Dengkil Branch's 2017 KPI target for the "Number of Successful Acquisition – New Preferred Customer".

[38] The Bank had succeeded in proving on a balance of probabilities that the Claimant was guilty of Charge No. 2.

(ii) Whether the charges of misconduct constitute just cause or excuse for the Claimant's dismissal

[39] As can be seen from the findings above, the Bank has succeeded to prove on a balance of probabilities that the Claimant is guilty of the two charges levelled against him.

[40] As an employee of the Bank, and more so as a Branch Manager, the Claimant was expected to discharge his duties with full trustworthiness and probity. This is more so where the Bank is a custodian of public funds and thus places its employees on strict standards of trust, honesty and integrity. Any form of misconduct which challenges the ability of its employees to carry out its duties with honesty and integrity is one that warrants dismissal.

[41] In the case of **PERWIRA HABIB BANK (M) BHD v. TAN TENG SENG @ LIM TENG HO [1997] 2 ILR 839; [1995] 2 MELR 499** it was held by the learned Industrial Court Chairman, Tan Kim Siong:-

“The banking industry belongs to a special kind of business and services rendered to the public. It is entrusted with other people's money. Therefore a high quality of discipline and conduct of the highest order is expected of its staff to win public confidence. The bank demands from its employees absolute honesty and impeccability. The claimant, as a bank manager, occupied a position of trust. He should not only be honest but be seen to be honest. Like Caesar's wife, the claimant must be above all suspicion”.

[42] The Court agrees with the submission of the Banks' counsel that the fact that there was no monetary loss matters not one jot. His conduct in misrepresenting facts to the Bank for his own self-serving needs damaged the trust and confidence reposed in him by the Bank, justifying the Bank in dismissing him from his employment. The act of lying connotes a serious lack of integrity on the Claimant's part and constitutes a serious misconduct on his part just as much as stealing and cheating would.

[43] Upon analysing the evidence and facts of the case in its entirety, the Court is satisfied and do hereby find that the Claimant's dismissal by the Bank was done with just cause and excuse.

VI. Conclusion

[44] The Bank's action in terminating the Claimant's services was done with just cause and excuse.

[45] The Claimant's case is hereby dismissed.

HANDED DOWN AND DATED THIS 4TH DAY OF JUNE 2020.

-Signed-

(PARAMALINGAM A/L J. DORAISAMY)
CHAIRMAN
INDUSTRIAL COURT, MALAYSIA
KUALA LUMPUR