IN THE INDUSTRIAL COURT OF MALAYSIA

CASE NO: 18/4-759/18

BETWEEN

KHAW YAO SHUN

AND

PETROLIAM NASIONAL BERHAD (PETRONAS)

AWARD NO: 2141 OF 2019

Before	:	**Y.A. PUAN MARIANI BINTI GHANI** **CHAIRMAN**
Venue	:	**INDUSTRIAL COURT OF MALAYSIA,** **PENANG BRANCH**
Date of Reference	:	19.2.2018
Dates of Mention	:	2.4.2018, 4.5.2018, 8.6.2018, 2.7.2018, 6.8.2018, 12.2.2019, 9.5.2019, 31.5.2019.
Dates of Hearing	:	6.3.2019, 9.4.2019.
Written Submission of Claimant	:	9.5.2019
Written Sumission of Respondent	:	9.5.2019
Submission in Reply by Claimant	:	31.5.2019
Submission in Reply by Respondent	:	31.5.2019
Representation	:	**Mr. John Khoo Boo Lai** **Mr. Syed Alfiq Syed Amran** Messrs Ismail, Khoo & Assoc (Counsels for the Claimant) **Miss Wong Keat Ching** **Mr. Muhammad Shahrul Nizam** Messrs Zul Rafique & Partners (Counsels for the Respondents) Claimant present

Reference

This is a reference made under section 20(3) of the Industrial Relations Act 1967 (the Act) arising out of the dismissal of **KHAW YAO SHUN** ("the Claimant") by **PETROLIAM NASIONAL BERHAD (PETRONAS)** ("the Respondent") on 5th April 2017.

AWARD

[1] The Ministerial reference in this case required the court to hear and determine the Claimant's complaint of dismissal by the Respondent on 5th April 2017.

Facts

[2] By a letter of offer for PETRONAS Education Sponsorship Programme dated 12.5.2008, the Claimant was offered sponsorship for completion of the course in Mechanical Engineering in the United States of America but was later re-routed to University Technology PETRONAS in May 2012 to complete his study.

[3] The Claimant accepted the letter of offer by executing the PETRONAS Education Sponsorship Agreement dated 1.8.2008 between the Company, the Claimant as well as the guarantors, Tan Lay Lee and Tan Lay Pin (1st Guarantor and 2nd Guarantor, respectively) ("the Study Loan / Sponsorship Agreement") [**CLB-1, pages 7 – 19**].

[4] It is a term of the Study Loan / Sponsorship Agreement that after completion of the Claimant's course of study, he would have to serve the Company for a period of 10 years. Clause 1(f) of the Study Loan / Sponsorship Agreement [**CLB-1, page 10**] provides as follows:

> *"(f) bahawa beliau, setelah menyempurnakan Kursus Pengajian, jika dikehendaki oleh PETRONAS dalam tempoh enam (6) bulan daripada*

tarikh beliau melaporkan diri di PETRONAS di bawah perenggan (e) di atas, menerima apa-apa jawatan yang ditawarkan dalam PETRONAS atau anak syarikatnya atau mana-mana badan atau syarikat lain yang diluluskan oleh PETRONAS (kemudian daripada ini disebut sebagai "Syarikat Tersebut") sebagaimana yang diarah atau dipersetujui oleh PETRONAS dalam apa-apa jawatan yang pada pendapat PETRONAS sesuai dengan kelayakan yang diperolehi oleh Pelajar dan Pelajar hendaklah berkhidmat selama sepuluh (10) tahun jika mengikuti dan tamat Kursus Pengajian dalam bidang Perubatan dan Kejuruteraan atau tujuh (7) tahun bagi lain-lain Kursus Pengajian.

Pelajar dengan ini bersetuju bahawa sekiranya Pelajar diambil berkhidmat dengan Syarikat Tersebut di bawah perenggan ini, maka pinjaman Pelajar bertukar secara serta merta kepada biasiswa tertakluk selanjutnya kepada perenggan 12(d), (e) dan (f) Perjanjian ini;"

[5] Upon completion of the Claimant's course of study, by letter dated 11.1.2016, the Claimant was offered employment with the Company in the position of **Executive (Mechanical Engineering)**. By the same letter, the Claimant was informed that he was seconded to PETRONAS Penapisan (Terengganu) Sdn Bhd (a subsidiary of the Company) under Maintenance Department with effect from 1.2.2016 [**COB-1, pages 1 – 4**].

[6] The Claimant had duly read the terms and conditions stated in the letter dated 11.1.2016 and he had accepted the said terms and conditions by signing acceptance on 14.1.2016 [**COB-1, page 4**].

[7] Subsequently, the Claimant executed the Employee's Service Agreement on 14.1.2016 [**COB-1, page 5**].

[8] The Claimant was confirmed in his position with effect from 1.8.2016.

[9] The events leading to the dismissal of the Claimant are as follows:

a. Sometime in October 2016, the Company had conducted an investigation into certain acts of misconduct alleged to have been committed by the Claimant.

b. Consequently, by the Notice of Suspension to Work dated 1.11.2016, the Claimant was informed that he was suspended from employment with effect from 2.11.2016 until further notice [**COB-1, pages 6 - 7**].

c. By the Notice to Show Cause dated 21.12.2016 which was sent by email dated 22.12.2016, the Claimant was required to provide his written explanation in respect of the 5 allegations of misconduct as stated therein [**COB-1, pages 8 - 12**].

d. By an email dated 26.12.2016, the Claimant attached his reply to the Notice to Show Cause.

e. As the Claimant's explanations were unsatisfactory, by a Notice of Domestic Inquiry (DI) dated 8.2.2017, the Company required the Claimant to attend a DI on 20.2.2017 and 21.2.2017 to answer 5 charges of misconduct as specified therein [**COB-1, pages 13 – 17**].

f. The Inquiry against the Claimant commenced as scheduled on 20.2.2017 and 21.2.2017 [**COB-1, pages 13 – 17**].

g. After the charges were read out to the Claimant and understood by him, the Claimant pleaded not guilty to the 5 charges of misconduct. The DI against the Claimant proceeded on 20.2.2017 and concluded on 21.2.2017 [**COB-1, pages 18 - 21**].

h. After having deliberated on the facts and evidence adduced at the Domestic Inquiry, including the testimonies of all the witnesses and

considering all material documentary evidence that were produced during the Domestic Inquiry, the DI Panel unanimously found the Claimant:

(i) Guilty of Charge 2, Charge 3 and Charge 4; and

(ii) Not guilty of Charge 1 and Charge 5.

i. Consequently, by a letter dated 5.4.2017, the Claimant was informed of the findings of the DI. As the Company viewed the offences seriously, the Company decided to dismiss the Claimant from service with immediate effect [**COB-1, pages 18 - 21**].

j. By a letter dated 18.4.2017, the Claimant appealed against the decision of the Company.

k. The Company took into account the Claimant's grounds of appeal as per his letter dated 18.4.2017. However, by a letter dated 19.5.2017, the Company informed the Claimant that his appeal was rejected [**COB-1, page 22**].

The Function of the Industrial Court

[10] The function of the Industrial Court under s. 20 of the Act was succinctly expressed in the Federal Court case of ***Milan Auto Sdn. Bhd v. Wong Seh Yen*** [1995] 4 CLJ 449, as follows:

> *"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 constitute just cause or excuse for the dismissal."

[11] In the case of ***Goon Kwee Phoy v. J & P Coats (M) Bhd*** [1981] 1 LNS 30. Raja Azlan Shah, CJ Malaya (as his HRH then was) at p, 136 impressed upon the court its duty and said:

"Where representations are made and are referred to Industrial Court for enquiry, it is the duty of the 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 not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion is 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".

[12] The Federal Court in the case of ***Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd. & Another Appeal*** [1995] 3 CLJ 344 held, inter alia, as follows:

"On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under s. 20 of the Act … 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 it so, whether such grounds constitute just cause or excuse for the dismissal."

Issues for Determination

[13] In this case, it is an undisputed fact from the evidence that the Claimant's employment with the Respondent was terminated vide letter dated 5th April 2017 [**COB1, p.18-21]**. Based on ***Colgate Palmolive (M) Sdn. Bhd. v. Yap Kok Foong***

& Another Appeal [2001] 3 CLJ 9, It now remains to be considered whether the misconduct complaint of by the Respondent has been established and if so whether the said misconduct constitutes just cause or excuse for the dismissal.

Evidence, Evaluation and Findings

[14] Based on the facts enumerated above and by reference to the Claimant's Statement of Case dated 15.5.2018, the issues which fall to be determined by this Honourable Court may be summarized as follows:

(a) Whether the 3 charges of misconduct proffered against the Claimant are proved on a balance of probabilities;

(b) Whether the punishment of dismissal that was based on the 3 charges of misconduct was proportionate.

Whether the 3 charges of misconduct proffered against the Claimant are proved on a balance of probabilities

[15] It is a well-established principle of industrial jurisprudence that in a dismissal case such as this instant one, the burden of proof lies on the Company, as an employer, **to prove on a balance of probabilities** that the Claimant's dismissals were with just cause and excuse. (***Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor*** [2002] 3 CLJ 314

[16] As stated in paragraph [10] (h), the Claimant was found guilty by the DI panel for charge 2, 3 and 4. This Court will now evaluate all the evidence adduce by both parties and do the findings whether there is misconduct and the dismissal of the Claimant is with just cause or excuse.

[17] The Respondent called three (3) witnesses to prove their case. They were Lee Kian Seng (LKS) (COW1), the Executive (Mechanical Engineer), Encik Mohd Hafidz bin Zakaria, the Executive East Coast Regional Office (COW2) and Encik

Noor Azlan bin Ariffin, the Head (Industrial Relations) Downstream Business (COW3). The Claimant only called one (1) witness, himself.

Charge No. 2

[18] Charge No. 2 against the Claimant reads as follows [**COB-1, page 14**]:

> *"That you, Khaw Yao Shun (SN: 1032446) during your capacity as Executive (Mechanical Engineer), Mechanical Engineering, Maintenance Department, PETRONAS Penapisan (Terengganu) Sdn. Bhd. had committed an act of misconduct when you, on **16 September 2016** at the workstation of Lee Kian Seng ("LKS") (SN:1032421) located at ORTC Cabin, PETRONAS Penapisan (Terengganu) Sdn. Bhd. **caused damage to the company's laptop assigned to LKS by pouring MILO drinks** into the right side of LKS' laptop*
>
> *By the aforesaid act, you have violated:*
>
> *i. PETRONAS Code of Conduct and Business Ethics (CoBE), Part II D: Assets of PETRONAS, Section 16, Responsibility for Assets, Facilities, Resources and Records; and/or*
>
> *ii. The generality of PETRONAS Code of Conduct and Business Ethics (CoBE), Part IV: Discipline, Disciplinary Process and Sanctions, Section 1, Importance of Good Conduct and Discipline; and/or*
>
> *iii. Other express and/ or implied terms of your employment.*
>
> *In the event you are found guilty of the said misconduct, you will be liable for punishment as provided under Section 2 of Part IV: Disciplinary Process & Sanctions, Country Supplement: Malaysia of CoBE."*

[19] COW1 who was the Claimant's colleague and the victim in this case had testified in his examination-in-chief that before he took leave on 15.9.2016, he had installed video surveillance software on his laptop. According to COW1, since the

previous incidents, he did not have any proof in order to lodge a report to HR against the Claimant. As such, he installed the surveillance software because it would record whenever there was motion captured by the webcam. If there was a moving object in front of his laptop webcam, the application would automatically record videos in his laptop [**Q&A No. 8 & 9 COWS-1**].

[20] COW1 also testified in examination-in-chief that when he came back to the office on 20.9.2016, he found that his laptop had a bad smell, the rubber cover of the pointing stick / mouse went missing, the battery indicator was blinking in red and a lot of tiny pieces of tissues were found at his workplace [**Q&A No. 11 COWS-1**].

[21] COW1 testified in examination-in-chief that when he watched all the video recordings, he found that the Claimant came to his workplace suspiciously for a few times on 16.9.2016 in the morning [**Q&A No. 12 COWS-1**]:

Examination-in-chief of COW1

Q12	*What have you found out from the video recordings?*
A	*I found out that the Claimant came to my workplace suspiciously for a few times on 16.9.2016 in the morning. His actions at my workplace were as follows:* *i. He took away multiple documents from my workplace. ("COB-2 p.5" The recording time of the video was between 09:58:31 hours to 09:59:33 hours on 16.9.2016);* *ii. He bent down and looked like doing something under my table. Under my table, I kept packet drinks of Milo, Dutch lady milk and an empty biscuit box. (COB-2 p.6. The recording time of the video was between 10:21:46 hours to 10:22:10 hours on 16.9.2016);* *iii. He took a packet of Milo and did something with my laptop as the video showed the laptop being lifted and turned and then put back on the table. (COB-2 p.7. The recording time of the video was between 10:31:55 hours to 10:32:22 hours on 16.9.2016); and* *iv. He did something like wiping action on the laptop. (COB-2 p.8 The recording time of the video was between 10:33:05 hours to 10:33:50 hours on 16.9.2016)."*

[22] During examination-in-chief (supplementary questions) in Court, COW1 confirmed that the videos in **COB5** were the video recordings referred in **Q&A No. 12 of COWS1** as follows:

(a) Video No. 1 in COB-5 is the video referred in Answer No.12 (i) of COWS-1 and page 5, COB-2 are the screenshots from Video No. 1;

(b) Video No. 2 in COB-5 is the video referred in Answer No.12 (ii) of COWS-1 and page 6, COB-2 are the screenshots from Video No. 2;

(c) Video No. 3 in COB-5 is the video referred in Answer No.12 (iii) of COWS-1 and page 7, COB-2 are the screenshots from Video No. 3; and

(d) Video No. 4 in COB-5 is the video referred in Answer No.12 (iv) of COWS-1 and pages 8, COB-2 are the screenshots from Video No. 4.

[23] COW1 testified that from the four (4) video as in paragraph [22], COW1 could recognized the nametag (in video No.1 and Video No.4) as well as the face (in video No.2) was the claimant.

[24] COW1 further testified that when he came back to the office on 29.9.2016, he found several damages on his laptop. COW1 refers to ICT PETRONAS for inspection on 30.11.2016. COW1 then was informed by the ICT that they found sticky chocolate liquid smell like MILO had been poured into his laptop.

[25] From the evidence of COW2, the person who did the inspection on the COW1 laptop testified that he was unable to turn on the laptop. Since the laptop is still under the warranty of DELL, COW2 had asked the DELL Supportive Engineer to look into the problem. COW2 was informed by the DELL supportive Engineer that the laptop was damaged because a large quantity of liquid had been poured into the laptop and these not in cases where you spill your drink on your laptop. COW2 also was informed that the liquid found in the COW1 laptop was a sticky liquid smell liked MILO. COW2 also confirmed that the laptop belongs to COW1 (**COB2 p.1-2**). COW2 also testified what the damage was caused by the liquid to the COW1 laptop:

Examination-in-chief of COW2

S	*Sila terangkan apakah kerosakan di dalam computer riba tersebut*
J	*Cecair tersebut telah merosakkan beberapa bahagian seperti motherboard, hard drive, bateri, skrin dan casing computer riba tersebut. Ini telah mengakibatkan computer riba tersebut tidak dapat berfungsi dengan baik.*

[26] During the cross-examination, before the Respondent proceeds with the questions regarding the five (5) videos, the Claimant was asked whether he want to see the video first before answering the questions. The Claimant confirmed that he does not need to see the five (5) videos.

[27] From the Claimant testimony, the Claimant simply disagrees to most of the question put to him by the Respondent's counsel. When the screen shot of video No.2 (**COB2 p.6**) was shown to the Claimant, he disagrees that the person who was at the COW1 workstation was him.

[28] This Court opines that the Claimant was not a truthful witness. From the screen shot of the Video No.2 (**COB2 p.6**) it was clearly shown, it was the Claimant. This Court also has the opportunity to watch the video No.2 more than once during the proceeding; it clearly shows it was the Claimant in the video.

[29] The Claimant also agreed, when crossed by the Respondent's counsel that he was expected to demonstrate good behavior that befits his qualification and profession. The Claimant also agreed that he was bound by the terms and conditions contained in his letter of offer and also subject to (a) PETRONAS Executive Handbook, (b) PETRONAS CoBE and (c) PETRONAS circulars, directives, policies, processes, procedures, guidelines, internal rules and regulations enforced by PETRONAS from time to time during his employment:

Cross-examination of the Claimant

Q	*Refer Clause 16.3 at p. 9 COB3* *You understand as an employee of PETRONAS, you were required to take all necessary steps to prevent damage to assets belonging to PETRONAS?*
A	*Agree*
Q	*Refer Clause 16.4. You understand that as an employee of Petronas, if you*

	commit misconduct of damaging the Company's property, you can be reported to the authorities?
A	*Agree*
Q	*After finding you guilty of Charge 2 relating to pouring Milo into the Company's laptop, agree that the Company could have reported you to the police but didn't?*
A	*Agree*

[30] This Court agrees with the Submission of the Respondent's Counsel that the Claimant had conducted himself in a manner inconsistent with the express and/or implied terms and conditions of his contract of service, in particular CoBE. The Claimant had breached the Respondent's core values and culture by deliberately causing damage to the laptop of a fellow employee which the laptop was the property of the Respondent. As such, the Claimant destroyed the confidence and trust in the employer/employee relationship.

Charge No.3

[31] Charge No. 3 reads as follows [**COB-1, pages 14 - 15**]:

> "That you, Khaw Yao Shun (SN: 1032446) during your capacity as Executive (Mechanical Engineer), Mechanical Engineering, Maintenance Department, PETRONAS Penapisan (Terengganu) Sdn. Bhd. had committed an act of misconduct when you, on 16 September 2016 at the workstation of Lee Kian Seng ("LKS") (SN: l032421) located at ORTC Cabin, PETRONAS Penapisan (Terengganu) Sdn. Bhd. by taking multiple documents belong to LKS without his consent that obstructed him from performing the task efficiently.
>
> By the aforesaid act, you have violated:
>
> i. The generality of PETRONAS Code of Conduct and Business Ethics (CoBE), Part IV: Discipline, Disciplinary Process and Sanctions, Section 1, Importance of Good Conduct and Discipline; and/or
>
> ii. Other express and/ or implied terms of your employment.

In the event you are found guilty of the said misconduct, you will be liable for punishment as provided under Section 2 of Part IV: Disciplinary Process & Sanctions, Country Supplement: Malaysia of CoBE."

[32] COW1 testified that the Claimant took away multiple documents from his workplace [**Q&A No. 18 COWS-1 & Video 1 of COB-5**]. Among the missing documents were COW1 study notes, highlight on codes and standards, audit findings records, draft of the departmental tasks, IT forms and Bid waiver form approved by Head of Department (HOD)."

[33] COW3 testified that the Claimant took the documents belonging to COW1 at his workstation and thus had obstructed him from performing his work tasks efficiently. During the re-examination COW3 testified that referring to **COB2 p. 5** Video No.1, webcam recording from laptop of COW1 between 9:58:31 am to 9:59:33 am showing the Claimant taking documents from COW1's workstation. In (a) of same video, clearly shows the Claimant in his coverall uniform with nametag "Y.S.Khaw". In (b) shows the Claimant taking some documents from COW1's workstation."

[34] The Claimant's counsel attempted to suggest in cross-examination of COW1 that the coverall uniform bearing the Claimant's name "Y.S.Khaw" (as seen in Video No. 1 and Video No. 4) was borrowed by someone else. On the contrary, COW1 had testified that Executive-level staffs like himself and the Claimant never share their coveralls:

Re-examination of COW1

Q	*Refer COB2 p.6 Video 2. Can you identify who is seen in the Video 2*
A	*It's clear to me that it is the Claimant*
Q	*Can you explain why you disagree that coverall cannot be shared?*
A	*People working with PETRONAS plant, we wear coverall from home. There's no swapping and borrowing coverall amongst staff. And the sharing of coverall only happens to the non-Executives. The Claimant and I are in Executives level so we never share coveralls.*

[35] COW1 testified that after he realized that the Claimant was at his workplace (**COB2 p. 5**); COW1 found out that the Claimant had taken his documents without permission, COW1 then texted the Claimant via SMS (**COB2 p.10-11**). The Claimant denies taking any documents from COW1 workstation.

Cross-Examination in chief of the Claimant

Q	*Refer COB-2, p. 10. Confirm that this SMS was sent by LKS to you*
A	*Yes.*
Q	*Refer COB-2, p. 11. Confirm that this is your SMS in reply to LKS's SMS on p. 10?*
A	*Yes, I think so.*
Q	*Agree that on p.10, COB2. LKS did not mention documents?*
A	*Yes*
Q	*Agree that on p. 11, COB2, you stated that "I don't even take any of your documents"?*
A	*Correct.*

The texted SMS

COW1 text to Clamant	*You do know that taking without permission is steal right?*
Rely text from the Clamant	*What the fuck you are talking about??!! I don't even take any of your **documents!***

[36] This Court agreed with the Respondent's submission that the Claimant had taken some documents from the COW1 workplace without COW1 permission - that obstructed COW1 from performing his work.

Charge No.4

[37] Charge No. 4 reads as follows [**COB-1, pages 15 - 16**]:

> "That you, Khaw Yao Shun (SN: 1032446) during your capacity as Executive (Mechanical Engineer), Mechanical Engineering, Maintenance Department,

PETRONAS Penapisan (Terengganu) Sdn. Bhd. had committed an act of workplace harassment that caused unconducive workplace environment against Lee Kian Seng ("LKS") (SN: 1032421) when you, on 21 September 2016 at the workstation of LKS located at ORTC Cabin, PETRONAS Penapisan (Terengganu) Sdn. Bhd. erased the written notes on his whiteboard without permission that obstructed him from performing the task efficiently.

By the aforesaid act, you have violated:

i. PETRONAS Code of Conduct and Business Ethics (CoBE), Part Ill: Workplace Culture and Environment of the Code, Section 1, Significance of Safe Secure and Conducive Workplace Environment; and/or

ii. The generality of PETRONAS Code of Conduct and Business Ethics (CoBE), Part IV: Discipline, Disciplinary Process and Sanctions, Section 1, Importance of Good Conduct and Discipline; and/or

iii. Other express and/ or implied terms of your employment.

In the event you are found guilty of the said misconduct, you will be liable for punishment as provided under Section 2 of Part IV: Disciplinary Process & Sanctions, Country Supplement: Malaysia of CoBE."

[38] COW1 testified that the Claimant had erased the written notes on his whiteboard without his permission. The Claimant's act had obstructed COW1 from performing his work tasks efficiently [**Q&A No. 21 COWS-1 & Video 5 of COB-5**]. During re-examination, COW1 testified that the written notes erased by the Claimant were his "To-Do-List" which contains information of which he needed to do his work.

[39] Then screen shot of video No.5 (**COB2 p.9**) was shown to the Claimant, whether that person in the screen shot was him. The Claimant testified that the person in the screen shot was most likely similar like him. Again when being asked by this Court, the Claimant answer it is not him but similar like him:

Cross-examination of the Claimant

Q	*Video 5 – COB2 p.9* *Can you confirm that the person in this video is you?*
A	*Most likely similar*
	…
Court	*Are you saying that is not you?*
A	*I cannot say it's not me but it is similar*

[40] Later, from the Claimant testimony, the Claimant agrees when it was put to him by the Respondent's counsel that he was the person seen in the screen shot at COB2 p.9 showing him wiping out something on the white board of COW1 at COW1 workstation.

Q	***Put: Based on Video 5 COB2 p.9 – you are the person in the video seen to be wiping out something on the white board of COW1 workstation?***
A	***Yes, correct.***
Q	*Put: COW1 had testified that the thing you wiped out from his white board were important note to his to do list*
A	*Disagree*
Q	*Put: Agree that whatever you wiped out as seen in Video 5, you had done it without COW1 permission*
A	*Disagree*

[41] Evidence from the Claimant's own admission admitted that he had erased the important notes on COW1's whiteboard without permission that obstructed him from performing his tasks efficiently.

[42] The Court finds that the Respondent has proved on a balance of probabilities the 3 Charges preferred against the Claimant.

Whether the punishment of dismissal that was based on the 3 charges of misconduct was proportionate.

[43] This Court agree with the submission of the Respondent's counsel that the issue of proportionality of punishment in this case must be viewed in the context of the seriousness of the acts of misconduct committed by the Claimant. The

Claimant's acts of misconduct amounted to workplace bullying or harassment towards a colleague as well as deliberate damage of the Company's property (laptop) which had breached the CoBE.

[44] The Claimant in this present case, held a position as an Executive (Mechanical Engineering) in the Company. In cross-examination, the Claimant himself agreed that as an Engineer in the Respondent's company, he must demonstrate behavior that befits his qualification and profession.

[45] In the case of ***Chew Chor Eng v. Golden Palm Tree Resort & Spa Sdn Bhd*** [2017] 1 ILR 140, the Industrial Court upheld the Company's decision of dismissing the claimant, who was found guilty of having acted unprofessionally, i.e. bullying and intimidation, by using inappropriate and vulgar profanities on his subordinates during the morning briefings. The Industrial Court further held that:

> *"Use of abusive and threatening words is clearly an act subversive of discipline which warrant nothing less than the punishment of dismissal"*

[46] In the case of ***Malaysia Airline System Berhad v. Wan Sa'adi Wan Mustafa*** [2008] 4 ILR 72, the Industrial Court upheld the definition of harassment by Rohan Price in his book entitled, *"Employment Law in Principle*", as follows:

> *"[60] In Employment Law in Principle by Rohan Price on pp. 295 and 296*
>
> *Harassment means:*
>
> > *Napoli (Napoli, J Understanding Equal Employment Opportunity, Prentice Hall, 1998, p 109) has described harassment as:*
> >
> > *Unwelcome behaviour which has the effect of offending, humiliating or intimidating the person at which the behaviour is directed. It may include behaviour by a person, or a group of people, which involves them using power inappropriately over subordinate(s) or colleague(s) at work. It can also include the distribution or publication of racist or*

sexist materials, verbal abuse, racist or sexist jokes or other comments that negatively stereotype, threats or physical assaults."

[47] This Court also agree that, in this present case, the Claimant's total denial of his action and lack of remorse had caused the Respondent to lose all trust and confidence in him. The acts of misconduct of the Claimant were very serious because there was a victim involved and the Company could not condone such acts of misconduct committed by the Claimant against another employee within the workplace. The Claimant's acts of misconduct had caused an unconducive workplace environment and breached PETRONAS values of mutual and reciprocal respect, which are stated clearly in CoBE.

[48] Harassment, be it workplace harassment or sexual harassment, both are very serious misconduct which warrant nothing less than the punishment of dismissal. In the case of ***Shaun Khee Tuck Keat v. Carigali Hess Operting Company Sdn Bhd*** [2016] 4 ILR 112, the Industrial Court held as follows:

"Harassment is a very serious misconduct and it cannot be tolerated by the employer in any form. The employer bears an obligation to protect its employees from being harassed by their co-workers. Harassment in any form lowers the dignity and respect of the ones who get harassed and disrupts or destroys the harmonious and conducive environment of the workplace. The perpetrators who go unpunished will only intimidate, humiliate and traumatize the victims resulting in an unhealthy working environment……"

[49] In the case of ***Jacob Along v. M.I. Drilling Fluids (Malaysia) Sdn Bhd*** [2015] 2 LNS 0315 (Award No. 315 of 2015), the Industrial Court held:

"[51] B.R. Ghaiye in Misconduct in Employment; Chapter XIX at pages 650 and 651 states;

"1. The servant stands in a fiduciary relation

The relation between an employer and an employee is of fiduciary character. The word "fiduciary" means belonging to trust or trusteeship. It means that

whenever an employer engages a worker he puts trust that the worker will faithfully discharge the service and protect and further the interest of the employer. A fiduciary relationship exists between employer and employed; (a) whenever the former entrusts the latter with property, tangible or intangible, e.g., confidential information and relies upon the other to deal with such property for the benefit of the employer, or for purposes authorized by him, and not otherwise, (b) whenever the employer entrusts the employee with a task to be performed, e.g., the negotiation of a contract, and relies on the servant or agent to procure the best terms available. If the employee does an act which is inconsistent with the fiduciary relationship, then that will be an act of bad faith for which his services can be terminated. The said obligation is an implied obligation, i.e. an obligation attached to every contract of service even when there is no express mention in the contract. The obligation to serve his master with good faith and fidelity arises out of necessary implication which is deemed to be engrafted on each and every contract of service. This implied condition is recognized on account of realization of the need of full confidence between the employee and the employer and this implied condition continues even after an employee has left the service. If an employee continues in service, then one of the obvious remedies for breach of faith is to dismiss him."

…

"[59] In the case of ***Pearce v. Foster*** *[1886] (17) QBD 536, Lord Isher M.R. enunciated as follows:*

> *"The rule of law is that where a person has entered into the position of servant, if he does anything incompatible with due or faithful discharge of his duty to his master, the latter has a right to dismiss."*

(Emphasis added)

[50] In the case of ***Azahari Shahrom & Anor v. Associated Pan Malaysia Cement Sdn Bhd*** [2010] 1 ILR 423, the Industrial Court was of the view that:

"[46] It is trite that the association between employer and employee out of necessity is fiduciary in nature. There has to be mutual trust and confidence that one would deal with the other in all fairness and rectitude over the rights and obligations flowing between the parties under the employment agreement. If one does an act or commits an omission which is inconsistent with that fiduciary relationship, then that act or omission will be mala fides. This principle has equal application as against the employer and the employee in their respective positions viz. the employment relationship between them."

[51] In the case of ***Noh Mohamed Yacob lwn. F & N Beverages Manufacturing Sdn Bhd*** [2014] 2 LNS 1156, the Claimant had caused damage to the company's property and the Industrial Court upheld the punishment of dismissal. The court held as follows:

"31. Mahkamah bersetuju dengan hujahan Responden bahawa perbuatan Yang Menuntut dalam Tuduhan 1 iaitu mengoyakkan kad kedatangan (punch card) milik Pengadu (Latifah Binti Yusof) tanpa kebenaran daripada Pengadu adalah salah laku serius iaitu merosakkan harta benda Syarikat. Dalam buku "Misconduct in Employment (in Public and Private Sector)" oleh B. R. Ghaiye di muka surat 664 yang menghuraikan prinsip seorang pekerja yang tidak sepatutnya melakukan apa-apa perbuatan yang mendatangkan kerosakan kepada majikan seperti berikut:

> *"13. An employee should not do any act which is damaging to the employer*
>
> *The employees should be loyal to their employers and, therefore, it is one of the primary obligations that they should not do any act which damages the interests of the employer. Some of the forms of damage are discussed below:*

(a) An employee should not damage the property of the employee - When a worker is charged with damaging the machine then it cannot be said that the charge is not established if the company fails to prove the motive. The damage should, however, be deliberate.""

[52] This was clearly a serious breach of fiduciary relationship between the employer and employee that would render the Claimant unfit for continuance in employment. Furthermore, the Claimant had served the Respondent for about 5 years, the Respondent entrusted him, and he owed his duty to the Respondent to maintain integrity, honesty and loyalty as well as uphold the trust and confidence reposed upon him at all times during the course of his employment. The Claimant had not only breached the Company policy but he had also been untruthful to his employer. Workplace harassment and causing damage to the Company's property is a serious offence and that such betrayal of trust could not be condoned by a punishment lesser than dismissal as it would set a dangerous precedent to other employees. The punishment of dismissal was justifiable.

[53] It is a trite law that the burden of proof in the Industrial Court is on the ***balance of probabilities***. Also as illustrated in paragraph 29 of the Respondent's submission, the industrial Court in ***Sivam Atanmalingam's case*** held:

"What is essential to note is that the test is not whether the employee did it; but rather whether the employer acted reasonably in thinking the employee did it; and whether the employer acted reasonably in subsequently dismissing him. What this means is that there is no burden on the employer to prove that the employee had committed the misconduct with malicious intent; or even establish for certain that the alleged misconduct caused the Company financial loss or a dent in its reputation and prestige. What there is, is a burden to establish that the employer had cogent and rational grounds upon which to reasonably infer that the employee had committed the misconduct. In order to discharge this burden all, the employer has to show is that an investigation into the matter had been carried out as was reasonable in all the circumstances of the case.

(Emphasis added)

[54] The Respondent in this present case had taken all the reasonable steps in discharging the burden.

[55] The Industrial Court should not be burdened with the technicalities concerning the different standards of proof or the rules of evidence or procedure that are applied in a court of law. The Industrial Court are allowed to conduct its proceedings as a 'court of arbitration' with the necessary flexibility to arrive at a decision so long as it has given special regard to the substantial merits of the case and decided it according to equity and good conscience. Furthermore, as stated in the case of ***Santokh Singh Visaka Singh v. Cashflow Horison Sdn. Bhd.*** [2012] 3 ILR 59 following the principle in the case of ***T.A. Miller Ltd. V. Minister of Housing and Local Government and Another*** [1968] 2 All E.R. p. 634 by Lord Denning M.R. which said as follows:

> *"A tribunal of this kind is master of its own procedure, provided that the rules of natural justice are applied.*
>
> (Emphasis added)

[56] Therefore, this Court agrees that, **discipline at the workplace** is the *sine qua non* for the efficient working of the Company. Given that the Respondent has a huge work force, discipline and civility amongst its employees must be maintained to ensure a **conducive, safe and harmonious work environment**. The 3 charges proved against the Claimant were sufficiently serious to justify the punishment of dismissal against the Claimant. As such, the dismissal was proportionate to the nature and gravity of the misconduct committed by him. The Claimant's dismissal was with just cause and excuse.

Conclusion

[57] By a careful assessment of the evidence taken as a whole, grounded upon equity, good conscience and the substantial merits of this case pursuant to s. 30(5) of the Industrial Relations Act 1967, it is the finding of this Court that the Respondent

has established, on a balance of probabilities, the appropriateness of the Respondent's action against the Claimant. In the circumstances of this case, it is the considered view of this court that is unreasonable to expect the Respondent to have continued the Claimant's employment. The Claimant's claim is hereby dismissed.

HANDED DOWN AND DATED THIS 25th DAY OF JULY 2019.

~ signed ~

(MARIANI GHANI)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
PENANG BRANCH