

IN THE INDUSTRIAL COURT OF MALAYSIA

CASE NO.: 22/4-1427/18

BETWEEN

NORFADILAH BINTI ABDUL HALIM

AND

CIMB BANK BERHAD

AWARD NO. 383 OF 2020

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

VENUE : Industrial Court of Malaysia, Kuala Lumpur

DATE OF REFERENCE : 25.06.2018

DATES OF MENTION : 21.08.2018; 25.09.2018; 02.11.2018; 11.02.2019;
13.06.2019

DATES OF HEARING : 05.03.2019; 01.04.2019; 02.04.2019; 17.04.2019;
08.05.2019; 10.06.2019; 23.08.2019

REPRESENTATION : Mr. Bernard Scott
together with En. Zolazrai Zolkapli
Messrs. Sault Scott & Co.
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 **Norfadilah Binti Abdul Halim** (hereinafter referred to as "*the Claimant*") by **CIMB Bank Berhad** (hereinafter referred to as "*the Bank*") on 25 January 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 25 January 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 6 July 2018.

[3] The case came up for mention on 21 August 2018, 25 September 2018, 2 November 2018 and 11 February 2019.

[4] The trial proceeded before the then learned Chairman of Court No. 22, Dato' Frederick Indran X.A. Nicholas, on 5 March 2019, 1 April 2019, 2 April 2019, 17 April 2019, 8 May 2019, 10 June 2019 and concluded on 23 August 2019.

[5] At the submission stage in particular on 7 January 2020, a new firm of Solicitors i.e. Messrs Seira & Shairzad, took over conduct from Messrs. Sault Scoot & Co. to act as Solicitors for the Claimant

[6] 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, and my appointment as the Chairman of Court No. 22 on 2 January 2020, I shall now proceed to hand down the Award for this matter after having thoroughly perused 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.

II. Factual Background

[7] The Claimant was first employed by the Bank *vide* letter of appointment dated 30 May 2006 as Clerical (Grade 33) at BCB Bahau Branch, 21 Jalan Mahligai, 72100 Bahau, Negeri Sembilan effective 15th June 2006. Her starting basic gross salary was RM995.00 per month.

[8] The Claimant's job functions as a Customer Service Representative – Teller was to perform Branch operation transactions and provide efficient service to achieve optimal customer satisfaction.

[9] Sometime in July 2017, through the Bank's investigation, it was found that:-

- i. On 13 July 2017, the Claimant had bought cash of RM10,000.00 from her fellow Teller, i.e. Nasron Bin Shaari (COW-4). The Claimant however failed to raise and validate cash transfer voucher into the Branch Delivery System (“BDS”) before buying/receiving the said cash of RM10,000.00 from COW-4;
- ii. At the day end cash balancing on 13 July 2017, the Claimant had a cash excess of RM10,000.00 but she had failed to declare the same;
- iii. The Claimant only declared that she had an excess of RM10,000.00 on the following day, i.e. 14 July 2017 at 1.26pm.

[10] By a Notice of Domestic Inquiry dated 14 November 2017, the Claimant was informed by the Bank that she was suspended from work with immediate effect with full pay until the outcome of the Domestic Inquiry. The Claimant was required to attend an Inquiry on 23 November 2017, 24 November 2017 and 27 November 2017 to answer 3 charges of misconduct levelled against her by the Bank.

[11] The Claimant requested for the Inquiry to be rescheduled, which the Bank duly granted. The Domestic Inquiry commenced on 20 December 2017, 21 December 2017 and 22 December 2017. The Claimant pleaded not guilty to the 3 charges. After having deliberated on the facts and evidence adduced at the Inquiry, the Inquiry Panel unanimously found the Claimant guilty of all 3 charges.

[12] By a letter dated 25 January 2018, the Claimant was informed of the findings of the Inquiry Panel. In view of the seriousness of the misconduct committed, the Bank felt it could no longer repose the necessary trust and confidence in the Claimant to effectively discharge her duties as an employee of the Bank. And thus the Bank dismissed her from service with immediate effect.

[13] By a letter dated 12 February 2018, the Claimant appealed against the Bank's decision. The Bank however decided that the decision to dismiss the Claimant from service would remain unchanged.

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

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

[15] 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.

[16] 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.”

[17] 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".

[18] 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

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

- (i) whether the Claimant was guilty of the charges of misconduct levelled against her 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 – Failure to raise and validate the cash transfer voucher in the BDS**

[20] Charge No. 1 contained in the Domestic Inquiry notice dated 14 November 2017 (at p. 5 of Bundle A) is worded as follows:-

“That you had on 13 July 2017, at about 2.52 p.m., bought cash of RM10,000.00 from the teller, Nasron bin Shaari (Nasron) but failed to raise and validate the cash transfer voucher in the Branch Delivery System (BDS) before receiving the cash of RM10,000.00 from Nasron.

By your above act, you have conducted yourself in an insubordinate manner, wherein you have acted in disregard and/or in breach of CSR Buy Cash to CSR/Custodian (Branch Management) of the Business Process Publisher and/or breached your express and/or implied terms of service as an employee of the Bank”.

[21] On 13 July 2017 at 2.52 p.m., the Claimant who was stationed as a teller at BCB Bahau Branch, had bought cash of RM10,000.00 from her fellow teller who was seated next to her, i.e. COW-4. The said cash of RM10,000.00 comprised of 2 bundles of RM50 notes equivalent to the total amount of RM10,000.00, i.e. each bundle containing 100 pieces of RM50 notes.

[22] Further, the CCTV recording on 13 July 2017 at 14:53:30 shows COW-4, who was seated next to the Claimant, placing 2 bundles of RM50 notes equivalent to

RM10,000 in front of the printer near the Claimant's workstation. The Claimant is seen taking both the bundles of cash.

[23] COW-4 in his Witness Statement (Q & A Nos. 15 & 16) stated that the Claimant had bought cash of RM10,000.00 from him on the said date of 13 July 2017. The Claimant during cross-examination did not dispute receiving the said 2 bundles of cash amounting to RM10,000.00 from COW-4.

[24] The next question that arises is whether the Claimant followed the procedure as provided under the CSR Buy Cash from CSR/Custodian (Branch Management) of the Business Process Publisher dated 1 February 2014 (*"the CSR Buy Cash from CSR/Custodian Procedure"*) (at p. 93 of Bundle B). The CSR Buy Cash from CSR/Custodian Procedure states:-

"To initiate CSR Buy Cash from CSR/Custodian, determine Seller have sufficient amount and denomination to meet the request;

Complete Cash Transfer Voucher (CS 02);

Proceed to key in the information details in BDS i.e. Trans Type, Amount, Description and denomination;

Once process is completed, insert Cash Transfer Voucher (CS 02) for printing;

Check, validate, tick and sign the validated Cash Transfer Voucher (CS02) to ensure the transaction details e.g. Trans Type, Amount, Description and denomination is correctly printed;

If in order, hand over the signed & validated Cash Transfer Voucher (CS 02) to Seller (Teller/CSRO/Cash Custodian)”

[25] Thus, it is incumbent upon the Claimant, who was ‘the Buyer’ of the cash of RM10,000.00 from COW-4 (‘the Seller’), to raise and validate the cash transfer voucher in the BDS before receiving the said cash of RM10,000.00 from ‘the Seller’, i.e. COW-4. From the Interview Notes (*at p. 86 of Bundle B*) it is evident that the Claimant was fully aware of this procedure:-

“Q13 : Sila nyatakan prosedur untuk membeli wang dari teller lain?

A : Pertama, saya akan pastikan teller berkenaan mempunyai denominasi dan jumlah yang saya inginkan. Kedua, saya ingin melengkapkan butir-butir seperti denominasi, jumlah dan di ruangan diskripsi saya akan nyatakan nama teller tersebut. Setelah itu saya akan mencetak butiran tersebut di atas baucer pindahan tunai untuk tujuan validasi. Saya akan memastikan semua butiran tersebut adalah sama dengan komputer validasi. Seterusnya, saya akan tandatangan baucer pindahan kredit tersebut di ruangan penerima wang. Saya akan menyerahkan satu salinan baucer pindahan tunai tersebut kepada teller yang berkenaan sebagai bukti pembelian wang tersebut.

Q14 : *Siapakah yang sepatutnya memulakan ('initiate') transaksi tersebut, teller yang ingin membeli wang atau pun teller yang ingin menjual wang?*

: Teller yang hendak membeli wang.

Q15 : *Sekiranya salah seorang dari teller tidak membuat transaksi tersebut, apakah yang akan terjadi?*

A : *Buyer – teller tersebut akan ada lebihan wang (physical cash excess)*

Seller – Teller tersebut akan kekurangan wang (physical cash shortage)

Q16 : ***Apakah yang sepatutnya kamu lakukan ketika menerima wang tersebut dari Nasron?***

A : ***Saya perlu melengkapkan dan mencetak baucer pindahan tunai untuk transaksi buy CSR.***

Q17 : ***Mengapa kamu tidak melakukan transaksi tersebut?***

A : ***Saya tidak ingat kenapa saya tidak melakukan transaksi tersebut".***

(Emphasis added)

[26] The Claimant during cross-examination admitted that on the said date of 13 July 2017 she did not raise and validate the cash transfer voucher into the BDS when she bought the cash of RM10,000.00 from COW-4. As a result of which, at the day

end cash balancing on 13 July 2017, COW-4 had a cash shortage of RM10,000.00 and the Claimant would have had a cash excess of RM10,000.00.

[27] Despite not raising and validating a cash transfer voucher into the BDS after buying the cash of RM10,000.00 from COW-4, the Claimant failed to declare or report the cash excess of RM10,000.00 at the day end cash balancing on 13 July 2017. Instead, she declared that she had a balanced cash on 13 July 2017.

[28] Counsel for the Claimant submits that the failure to raise and validate the cash transfer voucher was due to the Claimant not feeling well on 13 July 2017 due to influenza and that she had visited the panel clinic and was prescribed some medicine which caused her to lose focus whilst at her job. However, this fact was never pleaded in any of the Claimant's pleadings, be it in the Statement of Case or the Rejoinder. It is trite law that a party is bound by the four corners of his or her pleading (**RANJIT KAUR S. GOPAL SINGH v. HOTEL EXCELSIOR (M) SDN BHD [2010] 3 CLJ 310; [2010] 5 MLRA 696**). Counsel then submits further that since the Claimant was not well, and if she had failed to raise and validate the cash transfer voucher, then COW-4 could have easily validated the said voucher since he was not having any customers at that time. This however would be against the CSR Buy Cash from CSR/Custodian Procedure where it is the Buyer's (i.e. the Claimant) duty to raise and validate the voucher before receiving the cash of RM10,000.00. As admitted by the Claimant herself that quite apart from the procedure, this had been the practice at the Bank all the while. So why did she depart from this practice? The procedure exists to indicate each and every teller's specific duty pertaining to the selling and buying of cash from

each other, otherwise uncertainty would creep in and a guessing-game ensues as to who had actually raised the necessary vouchers.

[29] As the Claimant herself had admitted that she failed to raise and validate the cash transfer voucher for the purchase of the cash of RM10,000.00 from COW-4, she had clearly breached the CSR Buy Cash from CSR/Custodian Procedure set by the Bank.

[30] The Court thus finds that the Bank has succeeded in proving on a balance of probabilities that the Claimant is guilty of Charge No.1.

(b) ***Charge No. 2 – Failure to declare excess cash of RM10,000.00 at the day end balancing on 13 July 2017***

[31] Charge No. 2 in the Domestic Inquiry notice dated 14 November 2017 (*at p. 5 of Bundle A*) is worded as follows:-

“That you had at the day end balancing on 13 July 2017, failed to declare the excess cash of RM10,000.00 in your possession.

By your above act, you had breached Section 3.5.1 of the Cash Management Policy and/or breached your express and/or implied terms of service as an employee of the Bank”.

[32] Following on from Charge No. 1 where the Claimant failed to raise and validate the Cash Transfer Voucher in the BDS when she bought the cash of RM10,000.00 from COW-4, at the day end cash balancing on 13 July 2017 the Claimant (as the Buyer) would have had a cash excess of RM10,000.00 whilst COW-4 (as the Seller) would have had a cash shortage of RM10,000.00.

[33] The Claimant however failed to declare the cash excess of RM10,000.00 in her possession on 13 July 2017, as is strictly required under the Bank's Cash Management Policy (*at p. 92 of Bundle B*). Clause 3.5.1(a) of the said Policy provides:-

“Any cash shortages or surplus have to be declared and the necessary vouchers are to be passed. In no circumstances that the excess is to be kept aside pending claim from the customer”.

[34] The Claimant during cross-examination admitted that she had failed to raise and validate the cash transfer voucher in the BDS before receiving the RM10,000.00 cash from COW-4, and consequently she had an excess cash of RM10,000.00. She also admitted that she had failed to declare this cash excess of RM10,000.00 to the Bank on 13 July 2017. In fact, it was COW-4 who had reported at the day end cash balancing on 13 July 2017 that he was experiencing a cash shortage of RM10,000.00. The Claimant instead merely declared that her cash was balanced at the day end cash balancing on 13 July 2017, i.e. that she was not experiencing any cash excess on that day.

[35] At the day end cash balancing on 13 July 2017, the Claimant's CSR/Custodian Cash Total and CSR Cash Balancing (*at pp. 8-9 of Bundle B*) showed her to have an ending cash of RM20,006.63, when in fact she should have been having a cash excess of RM10,000.00. If the Claimant had raised and validated the cash transfer voucher when she bought the RM10,000.00 cash from COW-4, then her total ending cash on 13 July 2017 would have shown RM30,006.63, instead of RM20,006.63. COW-4's ending cash on 13 July 2017 (as depicted on the CSR Cash Balancing and CSR/Custodian Cash Total) on the other hand showed his day end cash as RM5,431.67 with a declared 'Physical Short' of RM10,000.00 (*at p. 12 of Bundle B*).

[36] The Claimant only declared the cash excess of RM10,000.00 on the following day, i.e. 14 July 2017, at 1.26 p.m. The Court agrees with the submission of the Bank's Counsel that the fact of the Claimant failing to declare the cash excess of RM10,000.00 by the day end cash balancing on 13 July 2017, but somehow declaring it only on the following day at 1.26pm raises suspicion and doubts on the Claimant's actions and intentions.

[37] The Court finds that the Bank has succeeded in proving on a balance of probabilities that the Claimant is guilty of Charge No. 2. There has clearly been a breach of Clause 3.5.1(a) of the Cash Management Policy on the Claimant's part when she failed to declare the cash excess of RM10,000.00 by the day end cash balancing on 13 July 2017.

(c) Charge No. 3 – Temporarily misappropriating a sum of RM10,000.00

[38] Charge No. 3 in the Domestic Inquiry notice dated 14 November 2017 (*at p. 5 of Bundle A*) is worded as follows:-

“That you had between 13 July 2017 and 14 July 2017 (both dates inclusive), temporarily misappropriated a sum of RM10,000.00.

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

[39] The CCTV recording on 13 July 2017 at 14:53:30 shows that COW-4 had placed 2 bundles of RM50 notes equivalent to RM10,000 in front of the printer near the Claimant’s workstation. The Claimant then took the first bundle of RM50 notes and kept it in her first drawer. She proceeded to count the second bundle of RM50 notes.

[40] The CCTV recording then shows at 16:58:54 on 13 July 2017, the Claimant is seen to be opening her first drawer where her cash box is kept, seemingly checking into the said drawer. The Claimant then takes out her handbag from her second drawer (where she kept her personal belongings) and placed it on her lap. At first, she seemed to be checking something inside her handbag, then she placed something inside the said handbag. She turns her body to her right whilst continuing to check inside her handbag. At 17:05:27, the Claimant went to the Cash Custodian, i.e. COW-3, for the physical cash (denomination and amount) in her cash box to be calculated, balanced

and verified to ensure that the cash position (denomination and amount) in the CSR Cash Balancing Report balanced with the physical cash (denomination and amount) in the cash box.

[41] The CCTV recording for 14 July 2017 at 12:06:42 shows that the Claimant's second drawer was open. She then takes out something from the second drawer (containing her personal belongings), proceeds to open the first drawer (containing the cash box) and appears to place something in that first drawer.

[42] Taking into account the Claimant's admission in failing to raise and validate the cash transfer voucher into the BDS for the purchase of RM10,000.00 cash from COW-4 and then failing to declare the resulting excess cash of RM10,000.00 to the Bank by the day end cash balancing on 13 July 2017, there is strong circumstantial evidence establishing the Claimant's culpability in temporarily misappropriating the said sum of RM10,000.00.

[43] If the said RM10,000.00 was in the cash box, as seems to have been suggested by the Claimant, then surely it would have been detected either by the Claimant or COW-3 during the end day cash balancing on 13 July 2017. The Claimant testified during cross-examination:-

“Q : *Setuju selepas itu anda telah meletak balik physical cash ke dalam peti tunai anda, mengunci peti tunai tersebut dan kunci disimpan oleh anda?*

A : **Setuju.**

Q : *Rujuk Bundle B, m/s 8.*

Setuju selepas anda mengesahkan bahawa physical cash adalah seimbang dengan cash position di CSR Cash Balancing Report, En. Azman telah menandatangani CSR Cash Balancing Report bertarikh 13.7.2017 di hadapan anda?

A : *Setuju dengan penjelasan.*

Q : *Rujuk Bundle B, m/s 9.*

Setuju ini adalah CSR/Custodian Cash Total anda bertarikh 13.7.2017?

A : *Setuju.*

Q : *Setuju jumlah 'ending cash' yang anda laporkan adalah RM20,006.63?*

A : *Setuju dengan penjelasan.*

Q : *Setuju pada 13.7.2017, anda telah membuat semakan pertama dan kedua untuk physical cash dalam peti tunai anda tetapi tidak terdapat cash excess RM10,000.00 di dalam peti tunai anda pada 13.7.2017 seperti yang didakwa oleh anda?*

A : *Setuju dengan penjelasan.*

Q : ***Sekiranya terdapat cash excess RM10,000.00 di dalam peti tunai setuju bahawa anda sebagai Teller yang berpengalaman pasti akan melaporkan kepada Bank?***

A : **Setuju.**

Q : **Sekiranya terdapat cash excess RM10,000.00 di dalam peti tunai setuju bahawa Cash Custodian pasti akan melaporkan kepada Bank?**

A : **Setuju”.**

(Emphasis added)

Based on the Claimant’s testimony above, it is obvious that the said RM10,000.00 was not in the cash box.

[44] Counsel for the Claimant seems to suggest in their submission (I say this because the written submissions contained copious wholesale reproduction of the notes of evidence without any explanation or argument being put forth with regards to the said excerpts of the notes) that at the end of her working day on 13 July 2017, the Branch Manager had checked the Claimant’s handbag when the Claimant was leaving the bank premises and the RM10,000.00 was not found in the said handbag (as confirmed by COW-2 during cross-examination) and this shows that the Claimant had not misappropriated the said money. With due respect, this Court is unable to agree with this suggestion. Just the mere fact that the said RM10,000.00 was not found in her bag does not totally absolve the Claimant from any culpability. It could very well have been placed in some other place to which only the Claimant had access, in particular the second drawer at her workstation where she kept all her personal belongings. What is pertinent is that the Claimant did not account for the said

RM10,000.00 to the Bank at the day end cash balancing on 13 July 2017, thereby giving rise to the presumption that she had temporarily misappropriated the said cash until she declared it on the following day (i.e. 14 July 2017) at 1.26 p.m.

[45] The Court finds that the Bank has succeeded to prove on a balance of probabilities that the Claimant is guilty of Charge No. 3.

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

[46] 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 charges levelled against her.

[47] As an employee of the Bank, the Claimant was expected to discharge her 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.

[48] 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”.

[49] In NORHAYATI IBRAHIM v. MALAYAN BANKING BERHAD [2018] 2 LNS

0138 the learned Industrial Court Chairman, Ani AK Solep, held:-

*“In my opinion, the Claimant had been dishonest in her conduct on the handling the cash excess/cash discrepancy on the evening of 28.09.2015. I address myself this question, had COW1 not discovered the cash shortage on 28.09.2015, what would happen to the cash kept by the Claimant in the pigeon hole? Had the Claimant been honest, I would expect her to declare the cash excess to COW1 before COW1 discovered the cash discrepancy and confronted the Claimant on the same. As a bank officer the Claimant would handle public money on daily basis. The cash discrepancies, whether in the form of cash shortage or excess are bound to occur and it is expected of a bank officer to declare the same immediately to his superior. Hence, the need to strictly observe rules like the Bank's SPI PP/CB/Cash/0052. **The fact that the Claimant did not declare her cash discrepancy immediately in violation of the***

Bank's SPI PP/CB/Cash/0052 under 6.7.4 and declaring the same only upon the discrepancy being discovered and upon being questioned by COW1, is in my considered opinion a dishonest act committed against the Company which is a serious misconduct. By her dishonesty, she had breached the trust and confidence reposed on her by the Company. The Company is justified in losing trust and confidence in her and I find her dismissal by the Company to be with just cause and excuse”.

(Emphasis added)

[50] B.R. Ghaiye in **Misconduct In Employment** (3rd Ed.) at p. 816 states:-

“When an employee uses employer’s money for his personal need without making any entry of the account and never refunds it back, it is misappropriation or ‘embezzlement’. However, if he refunds the money so used and then makes the entries, or offers to refund the same, it is temporary misappropriation or ‘temporary embezzlement’”.

(Emphasis added)

The author goes on to state that misappropriation can be inferred from circumstantial evidence.

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[51] **O.P. Malhotra in The Law Of Industrial Disputes (6th Ed.), Vol. 2**, at p. 1168 states:

“Intentional retention of the money of an employer by a workman which does not belong to him even for a temporary period will tantamount to misappropriation of such money”.

[52] **Russell On Crime (Vol. 2) (12th Ed.)** at p. 1062-1063 states:-

“The old distinction however has been steadily maintained, namely, that if the servant first reduces the property (money, chattel, or valuable security) into his master’s possession as, for example, by putting goods into his master’s cart or building, and then takes out that property dishonestly, he commits larceny. Whereas if he misappropriates the money for his own dishonest use after it has come into his hands but before it gets to the master’s possession he commits embezzlement. Again, a servant who receives money or goods from his master for the purpose of paying the money or transferring the goods to a third person on his master’s account, and wrongfully appropriates the same, is not guilty of embezzlement but of larceny, and the same applies where he has received the money from any one of the master’s clerks. But where money received by one clerk on account of his master is handed over by that clerk to another clerk to be handed to the master in the ordinary

course of business and the latter clerk appropriates the money, he is guilty of embezzlement”.

[53] In **AMINUDDIN BAKI @ SABTU ESA v. SCAN ASSOCIATES BERHAD**
[2016] 2 LNS 0801 it was held by the learned Industrial Court Chairman, Hapipah Monel:-

“According to Sathiada v. PP [1970] 2 MLJ at page 243, the gist of the crime is entrustment and dishonest misappropriation. Loss as a consequence of the act is not a factor, it is the act itself which amounts in law to this offence.

Section 504 Penal Code describes the person who may be guilty as one being in any manner entrusted with property or dominion over it. And if that person dishonestly misappropriates (that property), he or she commits; criminal breach of trust’.

As soon as the accused certified, approved or paid out the loan, or any part of it notwithstanding whether to an outside body or to another account within his organisation and such payment was either outside the ambit of his responsibilities or unlawful, he committed the crime of criminal breach of trust. It does not matter whether the pay-out was for a split second or the amount was paid back within a few days. To hold otherwise will be to encourage officials who have dominion over money or property misuse their positions and gamble or play the stock and shares. Such person can then promise that they will settle the sum when

the value of the shares goes up or make up for the shortfall when the price goes down. That cannot represent the law.

Further, at page 244 the relevant portion of the judgment read as follows:

"For the purpose of establishing dishonest intention, it is not the law in this country (any more than it is the law in India) that the prosecution should go further and also prove the actual mode of misappropriation or conversion. **Once the prosecution has proved that the appellant was entrusted with money for a specific purpose. And that he has failed to account for it, or has done something which is clearly indicative of his dishonest intention, the charge of dishonest misappropriation must be held to have been established unless the appellant shows the existence of some fact or circumstance within his own knowledge which is consistent with his innocence.** It is must be stated here that for the purpose of establishing dishonest intention, the persecution is not required to eliminate all possible defences and circumstances which might exonerate the appellant or that, apart from proving the appellant's possession of the money and his inability to account for it, it has also to prove the exact manner of his disposal of the money in a manner contrary to the purpose for which he received it."

In JM Desai v. State of Bombay AIR 1960 SC 889, the relevant portion of the Judgment reads as follows:

"To establish a charge of criminal breach of trust, the prosecution is not obliged to prove the precise mode of conversation, misappropriation, or misappropriation by the accused of the property entrusted to him or over which he has dominion. **The principal ingredient of the offence being dishonest misappropriation or conversion, which may not ordinarily be a matter of direct proof, entrustment of property and failure, in breach of an obligation, to account for the property entrusted, if proved, may in the light of other circumstances justifiably lead to an inference of dishonest misappropriation or conversion**".

(Emphasis added)

[54] The Claimant's contention that COW-4 was not equally dealt with *via* disciplinary proceedings and that he was given a mere warning letter also does not hold water. The duty was on the Claimant to ensure that she raised and validated the cash transfer voucher into the BDS. That was not the responsibility of COW-4. The warning letter was issued to COW-4 for failing to ensure that he received the validated cash transfer voucher from the Claimant. In fact, COW-4 immediately reported on the cash shortage at the end day cash balancing on 13 July 2017 to the Bank and the Bank deemed there was no integrity issue on COW-4's part. This contrasted with the Claimant's actions in failing to raise and validate the cash transfer voucher into the BDS on 13 July 2017 when she received the RM10,000.00 from COW-4, failed to declare on her cash excess at the end day cash balancing on 13 July 2017 and failed

to account for the missing RM10,000.00 until the following day at 1.26 p.m. The Bank was justified under the circumstances in losing all trust and confidence that they had reposed in the Claimant as it involved public funds.

[55] Counsel for the Claimant submits that there were several shortcomings in the Domestic Inquiry and that the Industrial Court is not bound to accept the Domestic Inquiry Notes since the hearing before the Industrial Court is by way of *de novo*. Whilst Counsel fails to highlight what are these particular “shortcomings”, nevertheless the Court agrees that the hearing before it was by way of *de novo*. And after hearing the testimonies of the witnesses and perusing the documentary evidence, the Court is satisfied that the Company has succeeded in proving that the Claimant is guilty of all three charges.

[56] 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.

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VI. Conclusion

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

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

HANDED DOWN AND DATED THIS 12TH DAY OF FEBRUARY 2020.

-Signed-

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