

INDUSTRIAL COURT OF MALAYSIA

CASE NO. : 22(28)(22)/4-1405/19

BETWEEN

RAMDAN BIN SHARIFF

AND

HENGYUAN REFINING COMPANY BERHAD

AWARD NO : 693 OF 2020

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

Venue : Industrial Court Malaysia, Kuala Lumpur

Date of Reference : 23.07.2019

Date of Mention : 26.08.2019; 18.10.2019; 01.11.2019; 08.11.2019;
13.01.2020; 13.02.2020; 21.02.2020 & 24.02.2020

Date of Hearing : 11.12.2019 & 12.12.2019

Representation : Ms. Subahsini Kandasamy
Messrs. Hakem Arabi & Associates
Counsel for the Claimant

Ms. Elizabeth Goh Huay Ling
Messrs. Raslan Loong, Shen & Eow
Counsel for the Company

REFERENCE :

This is a reference made under Section 20 (3) of the Industrial Relations Act 1967 (Act 177), arising out of the dismissal of **Ramdan Bin Shariff** (hereinafter referred to as "*the Claimant*") by **Hengyuan Refining Company Berhad** (hereinafter referred to as "*the Company*") on 26 March 2019.

AWARD

[1] The Ministerial reference in this case required the Court to hear and determine the Claimant's complaint of dismissal by the Company on 26 March 2019.

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 29 July 2019.

[3] The case came up for mention on 26 August 2019, 18 October 2019, 1 November 2019 and 8 November 2019.

[4] The trial proceeded before the learned Chairman of Court No. 28, Tuan Franklin Goonting on 11 December 2019 and 12 December 2019.

[5] Due to the non-extension of the Task Force Courts, and in this case Court No. 28, the learned President of the Industrial Court on 7 January 2020 instructed the matter to be transferred from Court No. 28 to this Court, i.e. Court No. 22, for the purposes of handing down an Award for this case.

[6] 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

[7] The Claimant commenced employment with the Company which was previously known as Shell Refining Company (Federation of Malaysia) Berhad on 1 September 1983 as a Refinery Auxiliary Police. He was continuously employed with the Company for a period of approximately 36 years prior to his dismissal. The Claimant's last held position with the Company was as an Integrated Facility Coordinator with a last drawn salary of RM7,745.00 per month with transport allowance of RM350.00.

[8] On 9 January 2019, the Company's Human Resource Manager, i.e. Ms. Islamiah Idris, served a Show Cause letter dated 9 January 2019 (*"the Show Cause letter"*) and further stated that the Claimant will be suspended immediately until further notice. The Show Cause letter contained the following allegations:-

"...that you have instructed UEMS staffs to perform works which are not part of the job requirement at places other than the designated work place during their working hours.

The details of occurrence as below:

1. *You have instructed UEMS staff named Bharat Ghimire and Junior Technician named Thiban a/l Murugiah to clean cat cages at a location with the address of Impian Kasih, Lot 1370, Kampung Arab, 71000 Port Dickson on 2nd November, 2018 at around 4.30 pm and on 3rd November 2018 around 8.15 am.*
2. *On 28th November, 2018, you have instructed UEMS staff named Bharat Ghimire to go to a location with the address of: 99, Rumah Rakyat Pekan Lukut, 71010 Port Dickson, to transport 7 (Seven) units of 20 liters mineral water bottles to another location with the address Impian Kasih, Lot 1370, Kampung Arab, 71000 Port Dickson.*
3. *On 1st December, 2018 at about 9.00 a.m., you have instructed UEMS supervisor, Mohd Latip Bin Suleiman to gather UEMS staff, Bharat Ghimire and Mohamed Nafiz Uddin to perform cleaning works at a location stated as Impian Kasih, Lot 1370, Kampung Arab, 71000 Port Dickson.*
4. *On 14th December 2018 UEMS supervisor, Mohd Latip Bin Suleiman instructed Bharat Ghimire to stop his working duties and to proceed to a location with the address 99, Rumah Rakyat Pekan Lukut, 71010 Port Dickson to pick up some carpets and transport it to a location near Batu 4, Port Dickson.*

The Company views the above conducts as misappropriation of company's resources and these are serious allegations..."

[9] The Claimant replied to the Show Cause letter on 15 January 2019 (at pp. 71-75 of COB-1) stating *inter alia* as follows:-

- d) Referring to para 1 of the said letter, I agree to the fact that I have requested a favour from Bharat Ghimire and Thiban a/l Murugiah to feed my cats at my residence after working hours (and they agreed for pocket money), as I was on leave with my family on 2nd November 2018 and 3rd November 2018 in Johor. So they agreed to assist me as a favour. I have no knowledge that Bharat Ghimire and Thiban a/l Murugiah was at my residence during working hours;
- e) Referring to para 2 of the said letter, Bharat Ghimire has assisted me in carrying the mineral water from my old house at No. 99, Blok K, Rumah Rakyat Pekan Lukut Port Dickson to my new house as a favour and this was done after working hours and as a token of appreciation, my wife gave Bharat Ghimire RM20.00;
- f) Referring to para 3, I deny to the fact that this incident occurred on 1st December 2018 and reiterate that they were at work on that day. Bharat Ghimire and Mohammad Nafiz Uddin have frequently asked me for extra pocket money and were willing to work outside on Sundays. They have also pleaded with me to introduce them to other people for cleaning jobs so that they can make some extra income. Since they were very helpful previously, to return their favour I offered them a job to clean my

residence. They were happy and satisfied as they made a little income for their effort; and I even gave them breakfast and lunch in house as appreciation. My wife and daughter who lives with me decided to pay them a small token;

- g) Referring to para 4 on the other hand, the contents of the letter is wrong and the event accused on the 14.12.2018 did not occur nor did I inform Mohd Latip Bin Suleiman to instruct Bharat Ghimire to stop work. It is not within my knowledge on Bharat's picking up any carpets from my home on 14.12.2018. This allegation towards me is baseless and put the company on strict proof.*

The Company has now stated that the above conducts are misappropriation of the company's. I state that, I did not misappropriate any resources of the company as the favors that Bharat Ghimire and Thiban a/l Murugiah has done were during after working hours and I did not pay anything directly to them. I further state that, by Bharat Ghimire and Thiban a/l Murugiah performing the favour towards me, their office job were not interrupted and no complaints were made against them for non-performance of work..."

[10] The Claimant was subsequently issued with a Notice of Domestic Inquiry and Charge Letter dated 1 February 2019 (at pp. 89-92 of COB-1) ("the DI Notice") by the Company wherein the Company withdrew 3 charges and maintained 1 charge

from the Show Cause. However, another 7 charges were added, which added up to a total of 8 charges levelled against the Company. The Charges are:-

- “1) You have instructed Bharat Ghimire “Bharat” & Thiban A/L Murugiah “Thiban” to go to your house bearing the address of Impian Kasih, Lot 1370, Kampung Arab, 71000 Port Dickson to clean up the cat cages.*

 - a. On **2nd Nov 2018 (Friday)**, Bharat had gone to the above address around **4.00 pm to 6.00 pm** together with Thiban (‘the driver’) using UEMS’s lorry to do the cat cage cleaning & cats feeding. After finishing the jobs, both Bharat & Thiban went back to HRC on the same day.*
 - b. On **3rd Nov 2018 (Saturday)**, Bharat had gone to the above address around **8.00 am to 10.00 am** together with Thiban (‘the driver’) using UEMS’s lorry to do the cat cage cleaning, cats feeding and floor cleanings. After finishing the jobs, both Bharat & Thiban went back to HRC on the same day.*
- 2) On **24th Nov 2018 (Saturday)**, after received an instruction from you, Mohd Latip Bin Suleiman “Latip” have gathered Bharat & Muhammad Nafiz Uddin “Nafiz” to bring them to your house at Impian Kasih, Lot 1370, Kampung Arab, 71000 Port Dickson around **10.00 am to 7.00 pm** to perform the cleaning jobs. After*

finishing the jobs, both Bharat & Nafiz go back to HRC on the same day.

- 3) *On **26th Nov 2018 (Monday)** Bharat together with Nafiz has performed cleaning work at you (sic) house addressed Impian Kasih, Lot 1370, Kampung Arab, 71000 Port Dickson, around **9.00 am to 5.00 pm.***
- 4) *On **28th Nov 2018 (Wednesday)** upon receiving an instruction from you, Latip have asked Bharat to stop doing his routine jobs in HRC and brought him together with Thiban to your house at Unit 99, Rumah Rakyat Pekan Lukut, 71010 Port Dickson around **9.00 am to 1.00 pm** to transfer various items to the different locations. After finishing the jobs, both of them were sent back to HRC on the same day.*
- 5) *On **8th Dec 2018 (Saturday)**, you have brought UEMS's worker namely Nafiz, Mohammad Shohel Miah "Shohel" and Md Bahadur Ali "Ali" to your house at Unit 99, Rumah Rakyat Pekan Lukut, 71010 Port Dickson around **10.00 am to 7.00 pm** to perform the cleaning jobs. After finishing the jobs, both of them were sent back to HRC on the same day.*
- 6) *On **9th Dec 2018 (Sunday)**, you have brought UEMS's worker namely Nafiz, Shohel and Ali to your house at Unit 99, Rumah Rakyat Pekan Lukut, 71010 Port Dickson approximately around **10.00 am to 7.30 pm** perform the cleaning jobs. The floor cleaning has also been performed using vacuum & floor scraper*

machines. Both machines belong to UEMS which has been brought together for cleaning jobs. After finishing the jobs, they have been sent back to HRC on the same day.

- 7) *On **10th Dec 2018 (Monday)**, only Nafiz was involved in the cleaning jobs. You have brought Nafiz to your house at Unit 99, Rumah Rakyat Pekan Lukut, 71010 Port Dickson approximately around **3.00 pm** to **7.00 pm** to clean the glass walls. After finishing the jobs, he has been sent back to HRC on the same day.*

- 8) *That you have received favour from Excel Pest Control Services (Reg No: 9805539H) in the form of pest control services at your house at Impian Kasih, Lot 1370, Kampung Arab, 71000 Port Dickson on the following dates:*
 - a. *13th December 2018*

 - b. *18th November 2018*

 - c. *24th October 2018*

All the services above done for free of charge.”

[11] The Domestic Inquiry was held on 19 February 2019. *Vide* letter dated 26 March 2019, the Claimant was informed that the Domestic Inquiry Panel had found him guilty of 5 of the 8 charges in the DI Notice, i.e. Charges No. 1, 4, 5, 6 and 7. It is to be noted that the Domestic Inquiry Panel had renumbered the Charges in the DI Notice. For purposes of this Award, the Court will refer to the original numbering of

the Charges in the DI Notice. Thus, in the Domestic Inquiry Panel's findings (*at pp. 191-192 of COB-1*), para (1) refers to Charge No. 1, para. 2 refers to Charge No. 4, para. 3 refers to Charge No. 5, para. 4 refers to Charge No. 6 and para. 5 refers to Charge No, 7.

[12] It is the Claimant's contention that the Domestic Inquiry is defective as, *inter alia*, he was not given an opportunity to defend himself or given an opportunity to be heard.

[13] 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.

[14] The Company on the other hand contends that the misconducts in question revolved around the Claimant having instructed UEMS contractors, who were engaged by the Company to provide cleaning and maintenance services to the Company's infrastructure and facility, instead to perform personal works at his personal residences on numerous occasions. This was in breach of the Company's Code of Conduct and its Anti-Bribery & Corruption and Anti-Money Laundering Manual, as the Claimant had, in breach of his position as Technical Executive Infrastructure, got the Company's contractors to perform personal services at his personal residences. The Company further contends that the Claimant had in his reply to the Show Cause letter admitted having the UEMS' contractors to perform personal works at his residences on numerous occasions in return for pocket money.

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 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

[20] With regards to Charge No. 1 contained in the DI Notice, the Domestic Inquiry Panel had reached the following conclusion (*at p. 191 of COB-1*):-

"You have instructed Bharat Ghimire "Bharat" & Thiban A/L Murugiah "Thiban" to go to your house bearing the address of Impian Kasih, Lot 1370, Kampung Arab, 71000 Port Dickson to clean up the cat cages. You have admitted that you have given the house key to Thiban for this task and you have also rewarded them RM80.00 each".

[21] The Claimant admits instructing Bharat and Thiban (COW-7) to clean the cat cages at his personal residence, but that he had asked them to do so on 2 November 2018 (Friday) and 3 November 2018 (Saturday) after working hours. It was also impossible for the Claimant to have monitored what time Bharat and COW-7 came to his house to do the cat cage cleaning jobs as he was outstation in Johor Bharu on both those dates. The fact that the Claimant was outstation on 2 November 2018 and 3 November 2018 was also confirmed by COW-7 during the trial. The Claimant would therefore have had no control or even knowledge what time both Bharat and COW-7 would be turning up at his house on 2 November 2018 and 3 November 2018, if they decided to turn up early.

[22] The Company had produced Bharat's clock in-clock out punch card (*at pp. 87-88 of COB-1*) to prove that he had gone to the Claimant's premises to do the cleaning job. However, this punch card in itself does not point to the exact whereabouts of Bharat during the time he had clocked out, and this was admitted to by the Company's witness, i.e. Mohd. Azran Adam (COW-5; Human Resource Executive of the Company), during cross-examination:-

“Q : But do you agree with me this only shows that the times he clock in and clock, it doesn't exactly show where he would have gone at this material time when he clock out?”

A : Basically this record is located at our main building and main gate, so it will record everything within this area.

Q : So do you agree with me Mr. Azran when he clock out from this main building you wouldn't know where he went?”

A : Yes”

[23] A pertinent point to note is that Bharat, despite being a central figure in this event, was not called by the Company as a witness during the trial of this matter. Instead the Company relied on the Investigation Record (*at pp. 76-88 of COB-1*) wherein the said Bharat was interviewed pertaining to the incident. Bharat was not called as a witness to confirm his statements in this Investigation Record.

[24] The Claimant handed over his house keys to COW-7 since he was going outstation during the time the cleaning works were to be done. Thus, he would have

had no control as to what time COW-7 and Bharat would turn up at his house on 2 November 2018 and 3 November 2018. In fact, there is no evidence, be it oral or documentary, that shows that the Claimant instructed COW-7 and Bharat to do the cat cage cleaning job during working hours on 2 November 2018 and 3 November 2018. COW-7 testified during cross-examination:-

“Q : Kamu cakap kamu datang waktu bekerja lah?”

A : Yes.

Q : Okay. Di mana Encik Ramdan pada 2 dan 3 November? Encik Thiban tahu tak?

A : Saya ingat dia bagi tahu saya dia pergi ke JB, Johor Bahru.

Q : Oh JB. So, masa 2 dan 3 tu dia tak ada dekat rumah lah?

A : Tak ada.

Q : Setuju dengan saya tak kalau saya katakan Encik Ramdan tak boleh pastikan pukul berapa Encik Thiban datang ke rumahnya pada hari incident?

A : Tak boleh pastikan Encik Ramdan.

*Q : **Tak boleh sahkan kalau lah Encik Thiban boleh datang pukul 7, pagi 7 malam, 3 petang, Encik Ramdan memang tak boleh sahkan melainkan Encik Thiban bagitahu dia, setuju dengan saya?***

*A : **Ya, setuju**”.*

[25] COW-7 had also testified that he had been helping the Claimant on multiple occasions. However, there was no documentary evidence adduced by the Company to prove this fact.

[26] COW-7 also testified that he had agreed to go to the Claimant's house on 2 November 2018 and 3 November 2018 with the intention to take pictures as proof in order to lodge a complaint against the Claimant. COW-6 (Jayaraj a/l Devarajan; Facility Manager of Edgenta UEMS Sdn. Bhd.) testified that Bharat had seen him on 2 November 2018 to complain and that it was COW-6 who had suggested for the photos to be taken. Thus, it would seem that COW-7 and Bharat was sent to the Claimant's house during working hours for the sole purpose of pressing charges of misconduct against the Claimant.

[27] The Company contends that the Claimant had breached the Company's Code of Conduct and the Anti-Bribery Corruption and Anti-Money Laundering Manual. However, it is pertinent to note from the email at pages 40-41 of COB-1 that the Anti-Bribery & Corruption and Anti-Money Laundering Manual was only approved by the Board of Directors of the Company on 23 November 2018 and circulated to all the Company's staff on 3 December 2018, which was after the incidents spelt out in Charge No. 1 against the Claimant.

[28] Based on the evidence before it, this Court finds that the Company has failed to prove Charge No. 1 against the Claimant.

(b) **Charge No. 4**

[29] With regards to Charge No. 4 contained in the DI Notice, the Domestic Inquiry Panel had reached the following conclusion (*at p. 191 of COB-1*):-

“On 28th Nov 2018 (Wednesday) upon receiving instruction from you, Mohd. Latip Bin Suleiman “Latip” have brought Bharat & Thiban to your house at Unit 99, Rumah Rakyat Pekan Lukut, 71010 Port Dickson to transfer various items to the different locations by using UEMS’s lorry during working hours”

[30] COW-8 (Mohd Latip Bin Suleiman; Environment Supervisor at Edgenta UEMS Sdn. Bhd.) testified that 99.9% of instructions given by the Claimant to him are work-related. He also confirmed that if any of UEMS’ vehicles are to be used, permission had to be obtained beforehand and such usage have to be recorded in the log book. However, no such log book was ever tendered by the Company before the Court to show usage of UEMS’ lorry on 28 November 2018 as per the Domestic Inquiry Panel’s finding.

[31] COW-8 in fact agreed during cross-examination that since there was no record or log book of usage of the lorry, then it can be concluded that the alleged incident on 28 November 2018 never took place:-

“Q : Kalau saya katakan memang tak ada bukti bahawa Encik Latip ada buat kerja-kerja macam ini, Encik Latip setuju dengan saya tak? Tak ada bukti dokumentari lah. Hanya ada bukti yang Encik

Latip sahkan cakap hari ini sahaja. Kalau nak cakap dalam buku log memang tiada lah

A : *Memang tiada rekod.*

Q : *Memang tiada rekod lah. Memandangkan kalau tiada rekod boleh ke saya cakap, setuju dengan saya tak, saya kena tanya Encik Latip soalan ini, ok. **Setuju dengan saya memandangkan kalau tiada rekod, setuju dengan saya tak bahawa cerita ini tidak pernah berlaku?***

A : ***Kalau tiada rekod, memang tak ada lah. Boleh dikatakan tak pernah berlaku lah.***

Q : ***Setuju dengan saya?***

A : ***Setuju***".

(Emphasis added)

[32] In fact, there was also no evidence tendered before the Court to prove that COW-8 had indeed brought COW-7 and Bharat to the Claimant's personal residence on 28 November 2018. COW-5 further confirmed during cross-examination that he did not discover anywhere during his investigations that the Claimant had instructed the UEMS' contractors to use their company vehicle:-

"Q : *So are you saying that Mr. Ramdan have knowledge of what time the workers came to his house?*

A : *I wouldn't know.*

Q : *You wouldn't know, that's why I'm asking. So you agree with me or disagree? So if at all the workers would have come to his house, would Mr. Ramdan by any chance know that he would abuse his office vehicle?*

A : *Through the investigation yes, I understand I agree on that.*

Q : *You agree what?*

A : *The witness using the company vehicle.*

Q : ***Witness use the company vehicle, but did the investigation, did anywhere did you discover that Mr. Ramdan is the one who told them to use the company vehicle?***

A : ***No.***

Q : ***Or Mr. Ramdan would told them to come during office hours?***

A : ***No.***"

(Emphasis added)

[33] Another critical point to note is that the original Charge No. 4 contained in the DI Notice never mentioned anything about the usage of UEMS' lorry. However, the Domestic Inquiry Panel had seen it fit to enlarge the scope of Charge No. 4 to include the unauthorised usage of UEMS' lorry for the Claimant's personal errands. It is imperative that an employee is informed in detail the exact charges that is being levelled against him by the Company.

[34] This Court finds that the Company has failed to prove Charge No. 4 against the Claimant.

(c) Charge No. 5

[35] With regards to Charge No. 5 contained in the DI Notice, the Domestic Inquiry Panel had reached the following conclusion (*at p. 191 of COB-1*):-

“On 8th Dec 2018 (Saturday), you have brought UEMS’s worker namely Mohammad Nafiz Uddin “Nafiz”, Mohammad Shohel Miah “Shohel” and Md Bahadur Ali “Ali” to your house at Unit 99, Rumah Rakyat Pekan Lukut, 71010 Port Dickson to perform the cleaning jobs. All of them were instructed to pack old clothes and carried them outside the compound to be burnt and these jobs was done during working hours”.

[36] Counsel for the Claimant submits that both Nafiz and Ali were not called as witnesses by the Company during trial. However, Shohel (COW-9) was called as a witness and gave his oral testimony. COW-9’s Investigation Record (*at pp. 133-138 of COB-1*) was also tendered to Court by the Company.

[37] Despite the suggestion by the Counsel for the Claimant that COW-9 was not well-versed in Malay or English, he nevertheless managed to give his oral evidence to the best of his ability in simple Malay language. He also testified that he knew what were his statements in the Investigation Record and knew what he was signing

as he had the help of someone who knew the Hindi language during the investigation, possibly referring to either Nafiz or Ali.

[38] COW-9 testified during cross-examination that it was the Claimant who had picked him up together with Nafiz and Ali to the Claimant's house for "housekeeping" work:-

“Q : *Ini bos punya rumah you ada pergi?*

A : *Pergi.*

Q : ***Pergilah? You ada buat mop?***

A : ***Ya, buat kerja housekeeping buat juga.***

Q : *Buatlah. Buat guna apa? Mesin?*

A : *Sikit-sikit mesin.*

Q : *Apa?*

A : *Itu Saturday kerja itu mesin, housekeeping*

Q : ***Housekeeping juga lah. Tapi macam mana mahu guna, apa you buat sana? Apa housekeeping you buat?***

A : ***Housekeeping dua hari***

Q : *Rumah dia besar mana? Tahu?*

A : *Besar? Besar mana itu mana saya tahu.*

Q : *You pergi dengan siapa?*

A : *Dia cakap, Latip bos cakap, saya tunggu office dia angkat.*

Q : *Oh pergilah.*

A : *Saya mahu duit pergilah.*

Q : *...You ada tanya bos, bos kalau ada kerja lebih you mahu pergi? Macam mana you tanya bos?*

A : *Jayaraj, saya kerja.*

Q : *Ha? Macam mana you pergi?*

A : *Macam mana apa?*

Q : ***Siapa bawa you?***

A : ***Bos bawa.***

Q : ***Bos bawa lah. Kenapa you pergi?***

A : ***Saya duit mahu***".

(Emphasis added)

[39] COW-9 confirmed that he did the cleaning work at the Claimant's house for 2 days, i.e. 8 December 2018 (which was a Saturday) and 9 December 2019 (which was a Sunday). It is COW-9's testimony that 8 December 2018, being a Saturday, was a working day. Thus, the Claimant had brought the UEMS workers during working hours to do cleaning works at his personal residence. And in return, he had paid them money.

[40] At this point in time, the Anti-Bribery & Corruption and Anti-Money Laundering Manual had already been circulated to all the Company's staff. The Claimant is deemed to have known about this Manual on 8 December 2018 when he brought the UEMS workers to his personal residence to do cleaning works.

[41] Under Clause 5.1 of the Code of Conduct (*at p. 25 of COB-1*) it is provided:-

“5.1 ANTI-BRIBERY AND CORRUPTION

...

YOUR RESPONSIBILITIES

- *You must not offer, pay, make, seek or accept a personal payment, gift or favour in return for favourable treatment or to gain a business advantage. You must not allow anybody else to do so on your behalf.”*

[42] And under Clause 5.2 of the Code of Conduct (*at p. 26 of COB-1*) it is provided:-

“5.2 GIFTS AND HOSPITALITY

...

YOUR RESPONSIBILITIES

- ***You must not, either directly or indirectly, offer, give, seek or accept:***

- *Illegal or inappropriate G & H, cash or cash equivalents (including per diems unless contractually agreed), vehicles, **personal services**, or loans in connection with HRC business...*

(Emphasis added)

[43] Such payments as outlined in Clauses 5.1 and 5.2 of the Code of Conduct can only be done with the Line Manager's approval and submitting the declaration form to the Risk & Integrity Officer. There is however no evidence before this Court that the Claimant had complied with this requirement.

[44] This Court finds that the Company has succeeded in proving Charge No. 5 against the Claimant.

(d) Charge No. 6

[45] With regards to Charge No. 6 contained in the DI Notice, the Domestic Inquiry Panel had reached the following conclusion (*at p. 191 of COB-1*):-

"On 9th Dec 2018 (Sunday), you have brought UEMS's worker namely Nafiz, Shohel and Ali to your house at Unit 99, Rumah Rakyat Pekan Lukut, 71010 Port Dickson to perform the cleaning jobs. The floor cleaning has also been performed using vacuum & floor scraper machines belong to UEMS which has been brought together for cleaning jobs during working hours".

[46] This incident happened on the following day after that alleged in Charge No. 5. However, this second day of cleaning works at the Claimant's personal residence occurred on a Sunday, which was not a working day. COW-1 (Lim Yong Joo; Risk and Integrity Officer of the Company) confirmed that the Code of Conduct as well as the Anti-Bribery & Corruption and Anti-Money Laundering Manual is silent as to whether it applies to employees during their time of work or otherwise as well. The sum paid by the Claimant to Nafiz, Shohel and Ali was for works done outside working hours and as such would not fall under the purview of the Code of Conduct as well as the Anti-Bribery & Corruption and Anti-Money Laundering Manual.

[47] There was also no record or log book produced by the Company to show that the Claimant had used vacuum and floor scraper machines belonging to UEMS for his personal use at his personal residence. No evidence had been led by the Company to show how the Claimant, whilst not being an employee of UEMS, would have had access into UEMS' premises and taken the said items, and that too on a Sunday.

[48] This Court finds that the Company has failed to prove Charge No. 6 against the Claimant.

(e) Charge No. 7

[49] With regards to Charge No. 7 contained in the DI Notice, the Domestic Inquiry Panel had reached the following conclusion (*at p. 192 of COB-1*):-

“On 10th Dec 2018 (Monday), only Nafiz was involved in the cleaning jobs. You have brought him to your house at Unit 99, Rumah Rakyat Pekan Lukut, 71010 Port Dickson to clean the house windows. Nafiz was given RM80.00 as the reward for the 3 days of work (8th, 9th & 10th Dec 2018) while Sohell & Ali was given RM60.00 each as the reward for the 2 days of work (8th & 9th Dec 2018)”.

[50] This charge pertains to the house cleaning job purportedly done by only Nafiz on 10 December 2018, which was a Monday and a working day.

[51] The Claimant however has denied this incident ever took place. The Company also had failed to produce Nafiz as a witness during the trial and neither was his punch card tendered to the Court.

[52] Under the circumstances, the Court finds that the Company has failed to prove Charge No. 7 against the Claimant.

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

[53] As can be seen from the findings above, the Company has succeeded to prove on a balance of probabilities that the Claimant is guilty of only one charge levelled against him, i.e. Charge No. 5. The Claimant is not guilty of Charges No. 1, 4, 6 and 7.

[54] The misconduct committed by the Claimant in taking UEMS workers out from their working hours to do personal cleaning job at his personal residence is a serious offence which no reasonable employer would tolerate. On top of that, the Claimant had breached anti-bribery and corruption guidelines set by the Company when the UEMS workers were rewarded with money by the Claimant for the said personal cleaning job done by them at the Claimant's residence during working hours. It had been made clear through the Anti-Bribery & Corruption and Anti-Money Laundering Manual that the Company would not tolerate any of its staff offering or taking gifts or bribes. In the event the Claimant required the services of the UEMS workers, all he had to do was to comply with the Manual and get his Line Manager's approval and submit the declaration form to the Risk & Integrity Officer. This the Claimant clearly failed to do so, evincing an intention to hide the fact that he was obtaining personal services from the UEMS workers.

[55] The Claimant's conduct was against the Company's best interest and faithful discharge of his duty to the Company. In the oft-quoted case of **PEARCE v. FOSTER [1886] QBD 536** it was held by Lord Esher MR:-

"The rule of law is, that where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him. The relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faithfully, and if by his own act he prevents himself from doing so, the master may dismiss him. It is not that the servant warrants that he will duly and faithfully

perform his duty; because, if that were so, upon breach of his duty his master might bring an action against him on the warranty. But the question is, whether the breach of duty is a good ground of dismissal’.

[56] The Claimant contends that the Domestic Inquiry is defective as, *inter alia*, he was not given an opportunity to defend himself or given an opportunity to be heard. However, it is trite law that the absence of a domestic inquiry is not fatal as any procedural breach of natural justice could be cured at the hearing before the Industrial Court. This principle was laid down by the Federal Court in the case of **WONG YUEN HOCK v. SYARIKAT HONG LEONG ASSURANCE SDN BHD AND ANOTHER APPEAL [1995] 2 MLJ 753** wherein Mohd Azmi FCJ held:-

“It was therefore the function of the Industrial Court in this particular case to determine on the available evidence whether Wong had misconducted himself by his involvement in the sales of the two motor car wrecks against the unwritten rules of Hong Leong which prohibited its staff from such activity. Since the answer was in the positive, the next question for the Court to ask itself was whether such misconduct constituted a just cause or just excuse for the dismissal? It was not within the ambit of the reference for the Industrial Court to determine whether Hong Leong ought to be punished for failing to hold a domestic inquiry. The Industrial Court was not competent to declare the dismissal void for failure to comply with the rule of natural justice. The very purpose of the inquiry before the Industrial Court was to give both parties to the dispute an opportunity to be heard irrespective of whether

there was a need for the employer to hold a contractual or statutory inquiry. We were confident that the Industrial Court as constituted at present was capable of arriving at a fair result by fair means on all matters referred to it. If therefore there had been a procedural breach of natural justice committed by the employer at the initial stage, there was no reason why it could not be cured at the rehearing by the Industrial Court”.

[57] 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 Company was done with just cause and excuse.

VI. Conclusion

[58] The Company’s action in terminating the Claimant’s services was done with just cause and excuse.

[59] The Claimant’s case is hereby dismissed.

HANDED DOWN AND DATED THIS 1ST DAY OF JUNE 2020.

-Signed-

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