

**DALAM MAHKAMAH TINGGI MALAYA PULAU PINANG****PERMOHONAN BAGI SEMAKAN KEHAKIMAN NO. PA-25-80-10/2023**

Dalam perkara mengenai permohonan untuk memohon kebenaran bagi satu perintah Certiorari berkenaan dengan Awad No. 1810 pada 2023 bertarikh 22.08.2023 di dalam kes Mahkamah Perusahaan No:9/4-1622/21 yang diterima pada 28.08.2023;

Dan

Dalam perkara Seksyen 20 Akta Hubungan Perusahaan 1967;

Dan

Dalam perkara Jadual Akta Mahkamah Kehakiman 1964;

Dan

Dalam perkara Aturan 53 Kaedah-Kaedah Mahkamah 2012

Antara

Ahmad Khushairi Bin Mohamed Nasser

[No. K/P: 841006-07-5617]

... Pemohon



Dan

1. Mahkamah Perusahaan Malaysia
2. Bank Kerjasama Rakyat Malaysia Berhad

... Responden-Responden

## **GROUND OF JUDGMENT**

### **Introduction**

- [1] This is a judicial review application for an Order for Certiorari to quash Industrial Court Award No. 1810 of 2023. I will hereinafter set out the background facts and my analysis of the rival contentions raised by the Applicant and the 2<sup>nd</sup> Respondent.

### **Background Facts**

- [2] The Applicant joined the bank in 2010 and was subsequently promoted several times and was the Head of the Bank's Auto Finance Centre of Seberang Jaya Branch effective 1<sup>st</sup> July 2019. Pursuant to a Domestic Inquiry (hereinafter referred to as "DI") conducted in the first half of 2020, the Applicant was found guilty on charges of abuse of powers and the punishment meted on 1<sup>st</sup> June 2020 was a denial of salary increment.



- [3] Pursuant to a separate and further investigations thereafter by the Bank's Fraud Department, a report was prepared on 9<sup>th</sup> September 2020 wherein it was concluded that the Applicant and two others had inter alia committed offences of fabricating documents and breaching the Bank's Code of Business Conduct & Ethics and Disciplinary Policy & Procedures.
- [4] However, prior to the report dated 9<sup>th</sup> September 2020, a show cause letter dated 26<sup>th</sup> August 2020 was issued setting out extensively three allegations. The said show cause letter was reproduced in the Award and it reads as follows:





4/INRU/20/2011219/SULIT  
26 Ogos 2020 / 7 Muharam 1442H

Encik Ahmad Khushairi Bin Mohamed Nasser  
Pengurus *Auto Finance Centre*, Seberang Jaya,  
Bank Rakyat

Tuan,

**SURAT TUNJUK SEBAB**

Perkara di atas dirujuk.

Tuan dilaporkan telah melakukan salah laku berat di bawah peruntukan Garis Panduan Am (GPA) Dasar Perkhidmatan Bil. 10, *Code of Business Conduct & Ethics, Disciplinary Policy & Procedures*, 20.2 Salah Laku Berat (yang telah dipinda dan berkuatkuasa pada 26 Mac 2018) :

- i. Bil. 27 "Terlibat dengan apa-apa perkara berkaitan frod dalam urusan pemiagaan Bank atau semasa menjalankan tugas".
- ii. Bil. 30 "Memalsukan, mengubah atau meminda apa-apa rekod atau dokumen Bank untuk kepentingan peribadi atau tujuan lain"; dan
- iii. Bil.21 "Gagal mematuhi peruntukan berkenaan Sifat Profesionalisma Dan Akauntabiliti seperti yang telah ditetapkan dalam Kod Tatajaku Dan Etika Pemiagaan)

Tuduhan salah laku adalah seperti berikut :

1. Tuan diantara 21 Ogos 2019 hingga 8 November 2019, semasa bertugas sebagai Ketua, *Auto Finance Centre (AFC)* Seberang Jaya, dikatakan telah terlibat dengan perkara berkaitan frod apabila telah meluluskan permohonan pembiayaan kenderaan pelanggan (An Naqlu 1) seperti di Jadual A di bawah dengan cara mengarahkan Encik Syamsul Amri Bin Ahmad Tajuddin Bukhari, Eksekutif Pembiayaan, AFC Seberang Jaya dan Encik Azrulzaimi Bin Azmi, mantan Eksekutif Kanan, AFC Seberang Jaya untuk melakukan pemalsuan terhadap dokumen *Vehicle Sales Invoice (VSI)* yang dikeluarkan oleh Syarikat Duaria Sdn. Bhd seperti berikut :
  - i. Meminda Harga Jualan Diluluskan Kerajaan (*Government Approved Selling Price*) dengan memasukkan Harga Fakej Aksesori (*accessory packages*), Harga Aksesori Tambahan Perodua (*Additional Perodua Accessories (APA)*), dan Kos Pemasangan (*Installation Cost*) untuk dijadikan sebagai Harga Jualan Diluluskan Kerajaan;

Perhubungan Perusahaan  
Tingkat 22, Menara 1, Menara Kembar Bank Rakyat, No. 33 Jalan Rakyat, KL Sentral 50470 Kuala Lumpur  
Tel: 03 26126503 Fax: 03 22722259



4//NRL/20/2011219/SULIT  
26 Ogos 2020 / 7 Muharam 1442H  
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- ii. Menggunakan cop (*rubber stamp*) palsu di atas nama Syarikat Duaria Sdn. Bhd;
- iii. Menggunakan template *Vehicle Sales Invoice* palsu di atas nama Syarikat Duaria Sdn. Bhd;

JADUAL A

No.	Nama Pelanggan / No. Akaun (S1-298-)	Tarikh Kelulusan Pembiayaan	Jumlah Pembiayaan Diluluskan (RM)	Jumlah kos yang tidak sepatutnya dibiayai oleh Bank	VSI (palsu) disediakan oleh	Pembiayaan Diluluskan oleh
1.	Nurul Izatul Azan Binti Ariffan / 003234-0	21.08.2019	43,000.00	Other Accessories : RM 5,017.95	Syamsul Amri Ahmad Tajuddin Bukhari	Ahmad Khushari Mohamed Nasser
2.	Mohamed Shahul Fardeen Bin Mohamed Ashari / 003804-8	24.09.2019	35,000.00	Additional Accessories : RM 128.00 Kos Pemasangan : RM 21.20	Syamsul Amri Ahmad Tajuddin Bukhari	Ahmad Khushari Mohamed Nasser
3.	Raziah Binti Mohd Pauzi / 004150-1	10.10.2019	35,000.00	Additional Accessories : RM 281.40 Kos Pemasangan : RM 10.50	Syamsul Amri Ahmad Tajuddin Bukhari	Ahmad Khushari Mohamed Nasser
4.	Arieen Duangia A/P Arkhom / 004231-1	14.10.2019	63,700.00	Other Accessories : RM 3,287.97	Azirulzaimi Azmi	Azirulzaimi Azmi
5.	Mohd Kamal Bin Mohd Napiah / 004256-1	15.10.2018	40,000.00	Other Accessories : RM 4,180.08 Additional Accessories : RM 140.00	Azirulzaimi Azmi	Azirulzaimi Azmi
6.	Martinus Paulus / 004303-4	16.10.2019	35,600.00	Other Accessories : RM 7,787.59	Syamsul Amri Ahmad Tajuddin Bukhari	Ahmad Khushari Mohamed Nasser

Pertubuhan Perumahan  
Tingkat 22, Menara 1, Menara Kembar Bank Rakyat, No. 33 Jalan Rakyat, KL Sentral 50470 Kuala Lumpur  
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No.	Nama Pelanggan / No. Akaun (S1- 298-)	Tarikh Kelulusan Pembinaan	Jumlah Pembayaran Diluluskan (RM)	Jumlah kos yang tidak sepatutnya dibiayai oleh Bank	VSI (pa/su) disediakan oleh	Pembiayaan Diluluskan oleh
7.	Danny Goh Kau En / 004391-2	23.10.2019	41,900.00	<i>Additional Accessories :</i> RM 338.80  <i>Kos Pemasangan :</i> RM 21.20	Azirulzalmi Azmi	Ahmad Khushari Mohamed Nasser
8.	Nur Falehah Binti Azmi	08.11.2019	46,000.00	<i>Additional Accessories :</i> RM 1,485.20  <i>Kos Pemasangan :</i> RM 84.80	Azirulzalmi Azmi	Ahmad Khushari Mohamed Nasser
Jumlah			332,400.00	22,784.78		

2. Tuan juga di antara 21 Ogos 2019 hingga 8 November 2019, Tuan juga diantara 21 Ogos 2019 hingga 8 November 2019, semasa bertugas sebagai Ketua, *Auto Finance Centre (AFC)* Seberang Jaya, dikatakan gagal mematuhi peruntukan berkenaan *Sifat Profesionalisma Dan Akauntabiliti* apabila telah meluluskan permohonan pembiayaan kenderaan pelanggan (An Naqu 1) seperti di Jadual B di bawah termasuk dengan perkara-perkara yang tidak dikira sebagai harga kenderaan seperti *Additional Accessories, Other Accessories* dan Kos Pemasangan.

Perkara ini telah menyebabkan pihak Bank telah mengalami kerugian sebanyak RM15,176.75 (Ringgit Malaysia: Lima Belas Ribu, Satu Ratus Tujuh Puluh Enam dan Sen Tujuh Puluh Lima) selepas terlebih biaya perkara-perkara yang tidak dikira sebagai harga kenderaan seperti *Additional Accessories, Other Accessories* dan Kos Pemasangan.

Perkara ini juga adalah bertentangan dengan :

Garis Panduan Operasi (GPO), Pembiayaan, Bil. 206 Sewa Beli Kenderaan-i An Naqu 1, Perkara 2.8.2, Margin Pembiayaan, Para b. Harga Kenderaan Meliputi (antaranya) ix. Pakej Aksesori, Nota : *Melibatkan pakej aksesori standard atau pakej edisi khas yang dikeluarkan oleh pembuat/pengeluar kenderaan.*

Pertubuhan Penasihat  
Tingkat 22, Menara 1, Menara Kembar Sanki Rakyat, No. 33 Jalan Rakyat, KL Sentral 50470 Kuala Lumpur  
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JADUAL B

No.	Nama Pelanggan / No. Akaun (61- 298-)	Tarikh Ketulusan Pembiayaan	Jumlah Pembiayaan Diluluskan (RM)	Jumlah kos yang tidak sapatutnya dibayar oleh Bank	VSI (palsu) disediakan oleh	Pembayaran Diluluskan oleh
1.	Nurul Izatul Adzan Binti Arifan / 003234-0	21.09.2019	43,000.00	Other Accessories : RM 5,017.96	Syamsul Amri Ahmad Tajuddin Bukhari	Ahmad Khushari Mohamed Nasser
2.	Mohamad Shahrul Fardeen Bin Mohamed Ashari / 003604-8	24.09.2019	35,000.00	Additional Accessories : RM 128.00  Kos Pemasangan : RM 21.20	Syamsul Amri Ahmad Tajuddin Bukhari	Ahmad Khushari Mohamed Nasser
3.	Reziah Binti Mohd Pauzi / 004150-1	10.10.2019	36,000.00	Additional Accessories : RM 281.40  Kos Pemasangan : RM 10.60	Syamsul Amri Ahmad Tajuddin Bukhari	Ahmad Khushari Mohamed Nasser
4.	Marinus Paulus / 004303-4	18.10.2019	35,800.00	Other Accessories : RM 7,787.59	Syamsul Amri Ahmad Tajuddin Bukhari	Ahmad Khushari Mohamed Nasser
5.	Danny Goh Kau En / 004391-2	23.10.2019	41,900.00	Additional Accessories : RM 338.80  Kos Pemasangan : RM 21.20	Azirulzalmi Azmi	Ahmad Khushari Mohamed Nasser
6.	Nur Falehah Binti Azmi	08.11.2019	48,000.00	Additional Accessories : RM 1,485.20  Kos Pemasangan : RM 84.80	Azirulzalmi Azmi	Ahmad Khushari Mohamed Nasser
Jumlah			<b>238,700.00</b>	<b>15,176.75</b>		

Perubong Persehasan  
Tingkat 22, Menara 1, Menara Kembar Bank Rakyat, No. 22 Jalan Rakyat, KL Sentral 50470 Kuala Lumpur  
Tel: 03 25128600 Fax: 03 22723250



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3. Tuan juga diantara 21 Ogos 2019 hingga 8 November 2019, semasa bertugas sebagai Ketua, *Auto Finance Centre (AFC)* Seberang Jaya, dikatakan gagal mematuhi peruntukan berkenaan dengan integriti apabila mengetahui dan membenarkan penggunaan cop palsu dan *template Vehicle Sales Invoice* palsu Syarikat Duaria Sdn. Bhd oleh Encik Syamsul Amri Bin Ahmad Tajuddin Bukhari, Eksekutif Pembiayaan, AFC Seberang Jaya dan Encik Aziruzaimi Bin Azmi bagi pelanggan-pelanggan seperti di Jadual A di atas.

Perkara di atas adalah bertentangan dengan *Code of Business Conduct & Ethics*, Seksyen 1.0 Integriti -Kita mengambil tindakan yang wajar, Perkara 1.1 Sifat Profesional dan Beratnggungjawab, iaitu :

*"Warga kerja hendaklah berkelakuan dan mengendalikan urusan sehariannya dengan penuh sikap profesional dan beretika dan tidak boleh bertolak ansur dari segi integriti, kebertanggungjawaban dan moraliti dalam menjalankan tugas mereka sebagai warga kerja Bank."*

Sehubungan itu, tuan dikehendaki memberi penjelasan bertulis dalam tempoh 7 hari dari tarikh surat ini berhubung perkara di atas. Sekiranya tuan gagal memberikan penjelasan di dalam tempoh yang ditetapkan, tuan akan dianggap sebagai tidak mempunyai sebab yang munasabah dan tindakan tata tertib yang sewajarnya akan diambil terhadap tuan.

Sila akui penerimaan surat ini dengan menandatangani akuan penerimaan yang disertakan.

Yang benar,



MOHAMAD KAMAL HANAFIAH ABDUL KARIM  
Ketua, Perhubungan Perusahaan

S.k : Ketua Wilayah Kedah / Perlis / Pulau Pinang  
Ketua, Sisatan Prod  
Unit HRIT



NOORZILAH ABDULLAH  
Ketua, Operasi-Modal Insan

Perhubungan Perusahaan  
Tingkat 22, Menara 1, Menara Kembar Saph, Rakyat, No. 33 Jalan Rakyat, KL Sentral 50470 Kuala Lumpur  
Tel: 03 20120000 Fax: 03 22722268



- [5] The Applicant in response sent his reply dated 1<sup>st</sup> September 2020 denying the allegations. It is to be noted that in such reply, he did not seek any further particulars or evidence relating to the three allegations.





- [6] A DI was then convened/conducted on 24<sup>th</sup> September 2020 whereby the charges were amended on the said date and time/opportunity given to the Applicant to defend himself fully at the same. The DI panel subsequently found the Applicant guilty of the allegations and a letter of dismissal dated 4<sup>th</sup> November 2020 was then issued terminating his services with immediate effect.
- [7] Being dissatisfied with the dismissal and having considered that it was without just cause or excuse, the Applicant filed a representation pursuant to **Section 20(3) of the Industrial Relations Act 1967** (hereinafter referred to as “**IRA 1967**”) for reinstatement and such representation was subsequently referred to the Industrial Court by the Honorable Minister for an Award.
- [8] A trial was conducted over several days in 2022 and 2023 before the learned Chairman Puan Suraiya binti Mustafa Kamal. However, Puan Suraiya thereafter left the Industrial Court bench and was transferred to another agency.
- [9] A new Chairman, namely Puan Rusita Binti Md Lazim, then relying on **Section 23(6) IRA 1967** handed down Award No. 1810 of 2023 dated 22<sup>nd</sup> August 2023 wherein she dismissed the Applicant’s claim upon an evaluation of the facts and evidence of the matter and concluded that the Applicant’s dismissal was with just cause and excuse.



### **The Charges and the Award**

- [10] As indicated earlier, it is not disputed that the dismissal was predicated on three charges that were levelled against the Applicant and these relate to inter alia the allegation that as Head of the Respondent's Auto Finance Centre, he had between 21<sup>st</sup> August 2019 to 8<sup>th</sup> November 2019 been involved in fraud when he approved the loan for certain vehicles as specified in the charge sheet in Schedule A.
- [11] Through their pleadings in the Industrial Court, the Applicant maintained that he was not guilty of the allegations while the Bank pleaded that he was and that the punishment of dismissal was warranted under all the circumstances.
- [12] At this stage, with reference to the main Charge 1, it is to be noted that it made express reference to an allegation that the Applicant had instructed his subordinates namely Encik Syamsul Amri Bin Ahmad Tajuddin Bukhari and Encik Azirulzaimi Bin Azmi to falsify documents i.e. Vehicle Sales Invoices (VSIs).
- [13] At the Industrial Court, the Applicant testified for himself and the Bank produced six witnesses including the said Encik Syamsul Amri Bin Ahmad Tajuddin as COW-4. A perusal of the Award will reflect the following train of thought and conclusions/findings made by the learned Chairman which were as follows:



- a. the learned Chairman at the outset sets out the facts of the case and then sets out the respective parties' cases at paragraphs 18 and 19 of the Award;
- b. at paragraphs 20-23 of the Award, the learned Chairman correctly sets out the role of the Industrial Court as well as the burden and standard of proof i.e. that the burden is on the employer to prove on a balance of probabilities the misconduct of the employee;
- c. the learned Chairman then identifies the issues to be determined at paragraph 24 of the Award; and
- d. at paragraphs 25-53 of the Award, the learned Chairman undertakes the evaluation of evidence both documentary as well as that of oral testimony of the witnesses. Upon such evaluation, the learned Chairman at paragraphs 54 and 55 of the Award finds that the Bank has proven the alleged misconduct and concludes that the Applicant's dismissal was warranted on the ground of serious misconduct and that the Bank's trust and confidence in the Applicant was destroyed.

### **The Grounds of the Application and Analysis**

[14] The Applicant in their affidavit and submissions raised several grounds in support of this application with a view of persuading me that the



learned Chairman has committed various errors of law which warranted an Order of Certiorari to quash the same. I also note that in their submissions, the Applicant seeks a consequential Order that the dispute be remitted to the Industrial Court to be heard *de novo* by another learned Chairman.

- [15] I will now proceed to consider the various grounds advanced by the Applicant and consider the responses on each by the Respondent Bank with a view to deciding if this application is with merits.

**Issue No.1: Whether the new learned Chairman has the jurisdiction to decide the matter under Section 23(6) IRA 1967?**

- [16] There is no dispute that at paragraph 3 of the Award, the learned Chairman had expressly stated that she had read, perused and evaluated the facts and evidence contained in the notes of proceedings and had considered all cause papers and various bundles of documents and lists them all out extensively at paragraph 4 of the Award.
- [17] Further, at paragraph 2 of the Award, the learned Chairman acknowledges that the case was heard by Puan Suraiya but then relies on **Section 23(6) IRA 1967** as well as refers to the decision of the High Court in the case of **Bax Global (Malaysia) Sdn Bhd v. Sukhdev Singh Pritam Singh & Anor [2010] 9 MLRH 421** as the basis for her handing down the Award.



[18] **Section 23(6) IRA 1967** reads as follows:

***“Divisions of the Court***

23. (1) ...

...

(6) *During the absence of or inability to act from illness or any other cause by the Chairman, the Yang di-Pertuan Agong may appoint another person to exercise the powers or perform the functions of the Chairman and, notwithstanding that the Chairman may have resumed the duties of his office, the person so appointed may continue to exercise the powers or perform the functions for the purpose of **completing the hearing of and determining** any trade dispute or matter commenced before him.” [Emphasis mine]*

[19] In this application, the Applicant contends and submits that the Award ought to be quashed in *limine* as the learned Chairman had no jurisdiction to hand down the Award when the dispute was heard by another learned Chairman. In this regard, learned Counsel for the Applicant contends that **Section 23(6) IRA 1967** above uses the word “*and*” which he submits connotes a conjunctive reading i.e. the learned Chairman must complete the hearing **and** determine the dispute. As such, it is submitted by the Applicant that the new learned Chairman had erred by merely determining the dispute without completing the hearing.



[20] With respect, I do not agree with the Applicant's contention as the High Court in the case of **Bax Global (supra)** as referred to and relied upon by the learned Chairman has previously decided that a new Chairman may utilize and rely on **Section 23(6) IRA 1967** to hand down an Award in cases where the previous Chairman is unable to complete the hearing for any reason. I adopt and wholeheartedly agree with the reasoning in **Bax Global (supra)** that **Section 23(6) IRA 1967** given a purposive interpretation and with a view of speedy resolution, a new Chairman appointed may continue to exercise the powers or perform the functions for the purpose of completing the hearing of and determining any trade dispute or matter commenced before her.

[21] Secondly, even if the Applicant's contention is correct that there must be an element of completing the hearing, in my view, the reading of all the cause papers and the written submissions amount to completing the hearing and to thereafter handing down the decision/Award would be in compliance with **Section 23(6) IRA 1967**. In my opinion, the word "complete the hearing", does not connote that the new Chairman must hear a witness as suggested by learned Counsel for the Applicant.

[22] Learned Counsel for the Applicant has in his submissions in reply relied on several decisions of the Courts in India to support his contention that it is incumbent for the determining Chairman to personally hear witnesses to determine their demeanour etc. I find those cases not helpful or relevant as they do not deal with an express provision similar to **Section 23(6) IRA 1967**.



[23] Further, if I were to accede to the Applicant's contention that the Award was severely flawed on account of this, that would essentially mean that a matter would have to be heard *de novo* every time a Chairman could not complete a hearing and/or hand down an Award for any reason and this in my view would deviate from the purpose of **Section 23(6) IRA 1967** which is to enable speedy resolution of disputes.

[24] During oral submissions before me, upon my informing Counsel that in my view, **Section 23(6) IRA 1967** quite clearly conferred jurisdiction on the new learned Chairman to hand down the Award, learned Counsel for the Applicant then whilst conceding that the new Chairman has a discretion whether to hand down the Award or hear the matter *de novo* etc., then contended as follows:

- a. that a new Industrial Court Chairman need not automatically hand down the Award for a matter heard by a different Chairman in every situation. In this regard, it is contended that depending on the peculiar facts of the case and especially in cases concerning serious misconduct where the demeanour of witnesses is crucial, then, the learned Chairman should either hear the matter *de novo* or at the very least give an opportunity to learned Counsel to submit orally and/or to refer to the video evidence to observe the oral testimony of witnesses especially under cross-examination;
- b. that on the facts of this case, Counsel submits that the learned Chairman ought to have invited Counsel to submit orally prior to



handing down the Award. As this was not done, it is submitted that there was a breach of natural justice to the Applicant and/or alternatively, there was procedural impropriety in handing down the Award and therefore should be quashed;

[25] Despite his persuasive/impassioned submission which caused me to adjourn this matter to consider such arguments/contentions, having given due weight to such submission, I am with the greatest of respect unable to agree with his contentions for the following reasons.

[26] First and foremost, I am of the view that in situations where a new learned Chairman takes over a matter as occurred in this case, it may indeed be prudent for the new learned Chairman to invite learned Counsel for their views as to whether they wish to highlight their submissions before him or her. This was clearly not done in this case. However, I do note that there is nothing in the **IRA 1967** that mandates the learned Chairman to make such an offer to parties. In fact, in this case, I note from the Award that there was a mention on 26<sup>th</sup> May 2023 post the completion of the trial whereby parties were informed and aware that a new learned Chairman would be handing down the Award. In my view, it would thus have been incumbent on the Applicant at that stage to inform the Court/ new learned Chairman that they intend to orally submit and highlight the particular nuances of the case. This they did not do. Had they done so and such request denied, that would have been a different matter altogether.





[27] On the issue of an alleged breach of natural justice, a perusal of the said Award gives no indication whatsoever by the learned Chairman that she did not understand the case. As such, in my opinion, there is no prejudice caused to the Applicant or any breach of natural justice occasioned merely on account of the matter not being heard *de novo* or Counsel not being given an opportunity to submit further orally before the new learned Chairman.

[28] Learned Counsel for the Applicant, Encik Reza also contended that the Applicant has been severely prejudiced as the learned Chairman had no opportunity to observe the demeanour of the witnesses while testifying which he says would have been critical and desirable in this case. This was the exact argument taken by Counsel in the case of **Bax Global (supra)**. However, such argument found no favour with the learned High Court Judge there who had followed the decision in the case of **Merita Merchant Bank Singapore Ltd v. Benatulin Timur Sdn Bhd & Anor [2002] 4 MLRH 365; [2004] 3 CLJ 44; [2004] 4 AMR 410** and concluded that since the learned Chairman did not state anywhere in the Award that she did not understand the case, there was no prejudice to the Applicant. Further and in any event, we are unable to ascertain whether the learned Chairman, Puan Rusita had undertaken the exercise of reviewing the video recording of the evidence led at trial and she may have very well have done so.

[29] As for me, I gratefully adopt the rationale/reasoning in the abovementioned cases in that unless there is an indication that the new learned Chairman could not follow nor understand the case, no



prejudice is caused to the Applicant on account of the new learned Chairman handing down the Award. In fact, having perused the Award in its totality, it is quite clear to me that the learned Chairman fully understood the background facts, the evidence adduced, and the rival contentions and was able to reach conclusions upon evaluation of the same.

[30] As such, on this issue, I hold that no error of law was committed by the learned Chairman.

**Issue No.2: Whether the internal investigation as well as the DI was flawed?**

[31] The Applicant complains amongst others that he was not shown the details of the 8 incriminating accounts and also points to the fact that the show cause letter dated 26<sup>th</sup> August 2020 was issued even before the Bank's Fraud Department's investigation report of 9<sup>th</sup> September 2020.

[32] Further, the Applicant at paragraph 53 of their submission sets out various reasons why it contends that the DI was flawed or failed to follow rules of basic fairness.

[33] In this regard, I note that at paragraph 29 of the Award, the learned Chairman has remarked that the Claimant had attended the DI and was given the opportunity to defend himself.



[34] In fact, at paragraphs 45 and 47 of the Award, the learned Chairman referred to the DI minutes and concluded that the correct procedure was applied whereby the Applicant had been given the right to be informed of the misconduct alleged as well as the opportunity to present his case i.e. procedural fairness was given. In my view, without going too much into the details of the complaints advanced by the Applicant, suffice for me to say, I find no merits in this complaint because even assuming for a moment that there was a breach of natural justice at the DI, it is trite law that the case is essentially heard *de novo* in the Industrial Court and that any breach of natural justice is cured by the inquiry by the Industrial Court itself. [See the Federal Court cases of **Milan Auto Sdn Bhd v Wong Seh Yen [1995] 4 CLJ 449** and **Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd And Another Appeal [1995] 2 MLJ 753**].

[35] I therefore find no merits on this ground advanced.

**Issue No.3: Whether the alleged misconduct has been proven?**

[36] I have perused the Applicant's submissions carefully and the crux of the Applicant's contentions can be summarised as follows:

a. that the charges were not proven;



- b. that there was no documentary evidence that the Applicant had directed his juniors to falsify the Vehicle Sales Invoice (VSIs) to enable loans to be disbursed to 8 customers and such evidence was only verbal;
- c. that despite the company calling several witnesses, there were gaps in their version of testimonies and, in particular, a major complaint was that COW-4 and COW-5 contradicted each other's testimony in relation to when such instructions were given by the Applicant i.e. at the morning briefings as testified by COW-4 or on a case-to-case basis privately as testified by COW-5. In furtherance of this, the Applicant contends that the evidence of COW-4 and that of COW-5 has to be treated with caution as they were the actual perpetrators and had concocted their evidence to save themselves and making the Applicant the scapegoat;
- d. that although Encik Syamsul Amri Bin Ahmad Tajuddin Bukhari had testified as COW-4, the other employee who was instructed namely Encik Azirulzaimi Bin Azmi did not testify and that an adverse inference ought to have been drawn;
- e. that the learned Chairman failed to take into account the exchange of a WhatsApp conversation between COW-4's wife and the Applicant which they contend reveals that COW-4 sought to place the blame on the Applicant;



- f. that the evidence pointing to the Applicant's guilt was all merely circumstantial and insufficient; and
- g. lastly, that there was no basis for the Bank to lose confidence in the Applicant as other employees who had committed the forgery were not dismissed and are still retained as employees today.

[37] In so far as the charges are concerned, a perusal of the Award will reveal that the learned Chairman has commencing at paragraph 25 of the Award undertaken the exercise of considering the charges and the evidence both documentary and oral by the witnesses. Having done so, the learned Chairman found as a fact that it was proven that the Applicant had approved the VSIs as fabricated and as a Head/higher ranking officer, the Applicant was responsible for overseeing the duty of his subordinates and complying with the Bank's guidelines and procedures.

[38] I further find that the learned Chairman had evaluated the evidence of COW-2 and was satisfied that the Applicant had approved various financing which included the costs of accessories which was not allowed to be financed. The learned Chairman concludes that the Applicant was fully aware of what was going on and should not be allowed to point fingers at his subordinates.

[39] In so far as the evidence of COW-4 and COW-5 being contradictory, the learned Chairman expressly deals with this contention at paragraphs 39 to 44 of the Award and finds that there was no



contradiction as the instructions to both could have been given separately.

[40] Of critical importance to me is that the learned Chairman accepts the evidence of COW-4 and COW-5 as being credible in that they were consistent and corroborated by the documentary evidence.

[41] On the contention of the WhatsApp conversation between the Applicant and COW-4's wife, it would appear that the learned Chairman has not made reference to the same in the Award. However, from the notes of evidence as well as the submissions, it can be seen that such messages were hearsay as COW-4's wife did not testify and that COW-4 had agreed that whilst such words were exchanged between COW-4's wife and the Applicant, the truth of them cannot be ascertained. As such, any weight to be given to the WhatsApp messages in isolation would have to be weighed against the other available evidence before the Court that instructions were given by the Applicant to falsify the VSIs.

[42] In so far as the allegation on disparity of punishment by virtue of the fact that action was only taken against the Applicant, I again find that the learned Chairman had dealt with this issue at paragraphs 49 to 53 of the Award and that it is inaccurate to contend that no action was taken against COW-4 and COW-6. In this regard, disciplinary action was in fact taken against COW-4 and COW-6 for fabricating the VSIs on the Applicant's instructions. While COW-4 and Encik Azirulzaimi Bin Azmi were found not guilty of the charges, COW-6 was meted the



punishment of no salary increment. As such, it cannot be contended that the Bank took no action against other employees. In my view, the Bank has no control over the conclusions reached by a DI panel against those employees.

[43] In any event, the Federal Court in the case of **Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1** has held that an employer's action or inaction against another employee for similar misconduct is irrelevant.

[44] It is trite law that the High Court as a reviewing Court is now entitled to look beyond the mere process of a Tribunal and to also consider if the Award is tainted by illegality, irrationality or procedural impropriety. Considering the Award as a whole, I am unable to conclude that the said Award is so tainted.

[45] As highlighted earlier, the learned Chairman accepted the evidence of COW-4 and COW-5 and concluded that the Applicant had indeed instructed them to falsify the said VSIs. In any event, apart from the evidence given under oath by COW-4 and COW-5 as well as the documentary evidence, Puan Nurul of Counsel for the 2<sup>nd</sup> Respondent has helpfully in her submission highlighted the ample evidence in the form of statements taken from the Applicant's subordinates by the FRIV which corroborated that it was the Applicant who directed the falsification of the VSIs.



[46] It is trite law that a reviewing Court is not entitled to interfere with the finding of facts based on the credibility of witnesses. [See the case of **William Jacks & Co (M) Sdn Bhd v S Balasingam [2000] 7 MLJ 1**].

[47] Finally, on the issue of whether the punishment of dismissal was proportionate under all circumstances, it cannot be said that it was not. There is a plethora of authority and decided cases which have held that in the banking industry, the element of trust and honesty is intrinsic and in my view, bearing the facts of this case and the nature of the charges, I share the view of the learned Chairman that the misconduct was of a nature that destroyed the trust and confidence that was required and that any other employer similarly circumstanced would have terminated the Applicant's services.

[48] In my view, the charges levelled against the Applicant were indeed serious. The Applicant at all material times was fully aware of the allegations against him and had defended himself at a DI. Having then progressed to the Industrial Court, it is open to the employer to justify its decision in the Industrial Court whereby the Industrial Court is mandated by **Section 30(5) of the Industrial Relations Act 1967** to act in accordance with equity and good conscience without regard to legal technicalities. The duty of the Industrial Court is to adjudicate on the justification for such dismissal and such enquiry does not have to be with the full trappings of a criminal court trial. [See the decision of the High Court in **Malayawata Steel Bhd v Mohd Yusof Bin Abu Bakar & Anor [1994] 2 MLJ 16**].





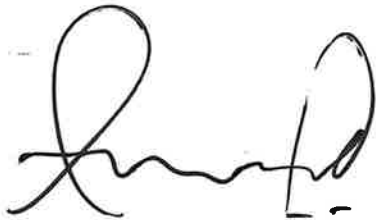
## Conclusion

- [49] There is no dispute that judicial review has progressed much over the years and moved away from the traditional position from only being able to review process but to now also considering the substance to decide if an error of law has been committed. [See the Federal Court case of **R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145**]. Notwithstanding, there is still remains a fundamental juristic difference between an appeal and a judicial review and the Court should therefore be mindful not to transgress the line between the two delineated by the test of illegality, irrationality, procedural impropriety and proportionality. [See the cases of **Sam Maak Verak v. Dato' Zainal Abidin Ahmad & Ors [2022] 3 CLJ 661** and **Balaguru a/l Ramiah v Malayan Banking Bhd & Anor [2023] MLJU 2710**].
- [50] In conclusion, having considered all facts and circumstances in this case, I am constrained to the view that the handing down of the Award by the new learned Chairman was with jurisdiction and that the conclusions and findings made therein were not without basis but were conclusions that could reasonably be reached by another learned Chairman similarly circumstanced. I am also unable to conclude that the said Award is tainted with procedural impropriety, illegality or irrationality warranting intervention by this Court.



[51] In the upshot, this application is dismissed with costs of RM3000.00 subject to allocator.

Dated 18<sup>th</sup> April 2024



**YA Anand Ponnudurai**

Judge

Georgetown High Court

Penang.

**Counsel(s):**

Mr. Mohamed Reza Abdul Rahim from Messrs. Reza Rahim & Rajivan (Georgetown) for the Applicant.

Ms. Nurul Aisyah Binti Hassan from Messrs. Lee Hishammuddin Allen & Gledhill (Kuala Lumpur) for the 2<sup>nd</sup> Respondent.



**Cases Referred to:**

*Balaguru a/l Ramiah v Malayan Banking Bhd & Anor [2023] MLJU 2710*

*Bax Global (Malaysia) Sdn Bhd v. Sukhdev Singh Pritam Singh & Anor [2010] 9 MLRH 421*

*Merita Merchant Bank Singapore Ltd v. Benatulin Timur Sdn Bhd & Anor [2002] 4 MLRH 365; [2004] 3 CLJ 44; [2004] 4 AMR 410*

*Milan Auto Sdn Bhd v Wong Seh Yen [1995] 4 CLJ 449*

*Muhamad Athif Izuddin Rosle v. Malaysia Airport Sdn Bhd & Anor [2023] CLJU 504*

*Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2011] 6 MLJ 1*

*R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145*

*Sam Maark Verak v. Dato' Zainal Abidin Ahmad & Ors [2022] 3 CLJ 661*

*William Jacks & Co (M) Sdn Bhd v S Balasingam [2000] 7 MLJ 1*

*Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd And Another Appeal [1995] 2 MLJ 753*

**Legislation referred to:**

*Industrial Relations Act 1967, Section 20(3); 23(6)*

