

IN THE INDUSTRIAL COURT OF MALAYSIA

CASE NO: 5/4-1076/21

BETWEEN

MOHD SAHARUDIN BIN SAAD

AND

PUBLIC BANK BERHAD

AWARD NO: 2374 OF 2023

Before : Y.A. TUAN AHMAD ZAKHI BIN MOHD DAUD
Chairman

Venue : Industrial Court, Kuala Lumpur.

Date of Reference : 17.03.2021

Dates of Mention : 19.05.2021, 19.01.2022, 09.02.2022

Dates of Hearing : 26.08.2022, 01.11.2022, 02.11.2022,
13.03.2023, 22.05.2023

Representation : Fatima Zulaikha bt. Ahmad Bashri & Arif Firdaus
Messrs Faizal Rahman & Co.
Counsels for the Claimant

P.Thavaselvi & Sandeep Sidhu
Messrs Zul Rafique & Partners
Counsels for the Company

Reference

This is a reference made under section 20 (3) of the Industrial Relations Act 1967 ("The Act") arising out of the dismissal of Mohd Saharudin bin Saad ("Claimant") by Public Bank Berhad ("Company") on the 11.07.2020.

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 11.07.2020.
- [2] This Court considered the notes of proceedings, documents and cause papers in handing down this Award namely:-
- (i) Statement of Case dated 12.07.2021
 - (ii) Statement in Reply dated 23.08.2021
 - (iii) Rejoinder dated 13.09.2021
 - (iv) Claimant's Bundle of Documents - CLB-1, CLB-2, CLB-3
 - (v) Company's Bundle of Documents - COB-1, COB-2, COB-3
 - (vi) Claimant's Witness Statement - CLW-1S (Mohd Saharudin bin Saad), CLW-2S (Mardiana binti Alias), CLW-3S (Mohamad Hariff bin Abdul Haiyi)
 - (vii) Company's Witness Statement - COW-1S (Rosemawarni bt Abdul Rahman), COW-2S (Sam Lai Ying), COW-3S (Tan Quat Ngo), COW-4S (Ganesh Raj A/L Annamalay)
 - (viii) Claimant's Written Submission and Reply
 - (ix) Company's Written Submission and Reply
 - (x) Claimant's and Company's Bundle of Authorities

Background

- [3] The dispute before this Court is the claim by the Claimant that he had been dismissed from his employment without just cause or excuse by the Company on the 11.07.2020.
- [4] By a letter of offer dated 18.06.1996, the Claimant was offered employment with the Company as a Messenger. The Claimant's last drawn salary was RM4,817.00.
- [5] On 28.02.2020, the Company issued a show cause letter to the Claimant pertaining to an alleged misconduct by the Claimant namely failed to declare the excess cash incurred during day-end balancing and had temporarily misappropriated the said cash.
- [6] On 10.02.2020, the Company convened a Domestic Inquiry (DI) against the Claimant. At the DI, 2 charges were preferred against the Claimant. The substance of the 2 charges are as follows:
- (a) that you have committed the following act of misconduct namely on 13.09.2019, you as the Clerk/Typist/Cashier of the said Branch had failed to declare the excess cash of RM 40.00 incurred by you on the same day during your day-end balancing. The said excess cash arose from the

erroneous posting of RM 20.00 being the revenue stamp favouring the customer, Ng Kim Yen whereby the transaction was posted as "Misc Cash In" on the said day at 1.00 p.m. and;

- (b) that on 13.09.2019, you as the Clerk/Typist/Cashier of the said Branch had temporarily misappropriated the sum of RM 40.00 being the excess cash incurred by you on the said day arising from the erroneous posting of RM 20.00 being the revenue stamp favouring the customer, Ng Kim Yen.

- [7] On 06.07.2020, the Panel came to the conclusion that all the charges against the Claimant have been proved.
- [8] On 09.07.2020, the Company informed the Claimant of the result of the DI and his termination of service with effect from 11.07.2020.

The Duty of the Industrial Court

- [9] The Supreme Court in the case of *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 CLJ (Rep) 298 held that:

“When the Industrial Court is dealing with a reference under s. 20, the first thing that the court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse”

[10] The Federal Court in the case of *Goon Kwee Phoy v J & P Coats (M) Bhd [1981] 2 MLJ 129* held that:

“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 Burden of Proof

[11] The High Court in the case of *Weltex Knitwear Industries Sdn. Bhd. v. Law Kar Toy & Anor (1998) 7 MLJ 359* held that:

“The law is clear that if the fact of dismissal is not in dispute, the burden is on the company to satisfy the court that such dismissal was done with just cause or excuse. This is because, by the 1967 Act, all dismissal is prima facie done without just cause or excuse. Therefore, if an employer asserts otherwise the burden is on him to discharge”

The Standard of Proof

[12] In the case of *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314*, the court laid down the principle that the standard of proof that is required is one that is on the balance of probabilities.

“Thus in hearing a claim of unjust dismissal, where the employee was dismissed on the basis of an alleged criminal offence such as theft of company property, the Industrial Court is not required to be satisfied beyond a reasonable doubt that such an offence was committed. The standard of proof applicable is the civil standard, ie, proof on a balance of probabilities which is flexible so that the degree of probability required is proportionate to the nature and gravity of the issue.”

Evaluation of Evidence and Findings

[13] The issues before this Court are:

- (a) Whether the misconduct complained of by the employer has been established; and
- (b) Whether the proven misconduct constitutes just cause or excuse for the dismissal/termination.

[14] In this case, the Company has conducted a DI prior to the Claimant being dismissed/terminated. Thus the Court has to determine whether or not the DI was valid and the inquiry notes accurate.

[15] In the case of *Bumiputra Commerce Bank Bhd v Mahkamah Malaysia Perusahaan Malaysia & Anor* [2004] 7 MLJ 441, the High Court held as follows:

“Where due inquiry has been held, the Industrial Court’s jurisdiction is limited to considering whether there was a prima facie case against the employee. Thus, in the present case, the Industrial Court should have first considered whether or not the domestic inquiry was valid and the inquiry notes accurate. In the absent of such considerations, the Industrial Court’s action in proceeding to decide the matter

without any regard to the notes of inquiry could be described as anything more than an error of law.”

[16] The Court of Appeal in the case of *Lini Feinita binti Muhammad Feisol v Indah Water Konsortium Sdn Bhd* [2021] 3 AMR 375, considered the question as to whether the Industrial Court is duty bound to consider the findings made by the DI panel when deciding whether the employee’s dismissal was with just cause or excuse. The court first set out the law in relation to the duty of the Industrial Court in cases where a DI is held and not held:

(a) In a case where no DI is held by the employer prior to the employee’s dismissal, the Industrial Court is entitled to take the position that such absence of a DI will not be fatal to the employer’s case since the Industrial Court has jurisdiction to rehear the matter de novo, i.e., hear the matter afresh.

(b) However, in the case where a DI is held, the Industrial Court is duty bound to consider the findings made by the DI panel in deciding whether the employee’s dismissal was with just cause or excuse and that the

Industrial Court should not proceed to hear the matter de novo.

[17] In order for the Court to determine the validity of the DI, regards must be had to the decision making process whether it comply with the basic rules of natural justice generally mean the right to be heard, the rule against bias and the duty to act fairly.

[18] In the case of *Malaysia Airline System Bhd v Wan Sa'adi Wan Mustafa* [2015] 1 CLJ 295, the Federal Court held:

- (i) The basic rules of natural justice generally mean the right to be heard, the rule against bias and the duty to act fairly. However, the scope of the 'duty to act fairly' should be considered on a case to case basis depending on the facts and circumstances governing the relationship of those involved prior to the decision being made. "Procedural fairness", on the other hand, encompasses the procedure used by a decision maker and not so much the actual decision itself. Ordinarily, procedural fairness requires a hearing that is appropriate to the facts and

circumstances of the matter, the absence of bias, the availability of evidence and an inquiry into the issue before a decision is made.

- (ii) The principles of natural justice should not be "unreasonably and unnaturally extended so as to frustrate the process of law". It would suffice to a large extent if the essential elements of the principles are followed, namely that there must be absence of bias, that there must be scope for a fair hearing and that irrelevant materials must not be taken into account.

[19] Before and during the DI,

- (a) The Claimant had been given a show cause letter which contains the allegations of misconduct.
- (b) After the Company had found the Claimant's explanation unacceptable, it proceeded to issue a Notice of Domestic Inquiry (NODI) which contain the charges.
- (c) The Company had informed the Claimant that during the DI, he may be accompanied by union representative, be allowed to conduct his defence by cross-examining

witnesses against him, examining his own witnesses, to produce any documentary evidence and the Company will make arrangements for the Claimant's witnesses to attend the DI.

- (d) The Claimant and his representative had cross-examined the Company's witnesses.
- (e) The Claimant had the right to be heard of his defence when the prosecuting officer cross-examined him.
- (f) The DI panel consists of members from other departments and not involved in the case. Their rank was higher than the Claimant. The Claimant did not object to the composition of the panel.

[20] In the Claimant's case, it can be seen from the DI notes of proceedings on pages 13-58 of the COB-1, the correct procedure was applied. The Claimant had been given the right to be informed in writing of the misconduct alleged, an opportunity to call his witnesses and present his case. Thus the rules of natural justice have been complied with. The DI notes has been verified by the Claimant, panel members and the prosecuting officer. Therefore

this Court considered the DI was valid and the DI notes are accurate.

[21] Having considered that the inquiry was valid and the notes are accurate, the Court will now consider whether there was a prima facie case of misconduct against the Claimant.

[22] In *Mozley and Whiteley's Law Dictionary (5th Ed)* it states: "A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called to answer it. A prima facie case, then, is one which established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side."

Thus, this court is bound to consider the findings made by the DI panel that all the charges against the Claimant have been proved. The charges against the Claimant involved failure to declare the excess cash incurred during day-end balancing and had temporarily misappropriated the said cash. The DI panel in its findings stated that for Charge 1, the Claimant had agreed that he was aware that he had incurred an excess cash of RM 40.00 during pre-lunch

balancing on 13.09.2020. However, he had failed to declare the excess cash by day-end balancing despite having knowledge of it since pre-lunch balancing (pages 39 and 40 of of the COB-1). Moreover, he should be aware of the Company's rules and regulations on reporting of excess cash coupled with the fact that he is an experienced teller (pages 50 of the COB-1).

For Charge 2, based on the CCTV recordings on 13.09.2020, the Claimant was seen moving cash from the cash drawer to his petty cash box on the floor, there were a series of suspicious movements made by him. After the Claimant performed his day-end balancing at around 5.50 p.m., the Claimant took a transparent plastic bag from the right side drawer and placed it into his baju Melayu pocket. Subsequently, the Claimant was instructed to perform an error correction for the wrongly posted transaction. The Claimant still did not declare the excess cash incurred by him even after he had performed the error correction. Instead the Claimant took out the cash of RM 40.00 from his pocket and discreetly replaced them into his petty cash box outside the Chief Cashier's room without anyone's knowledge in order to avoid detection of his temporary misappropriation. The panel also made a finding that for both charges, the Claimant could not furnish plausible explanation as to why he did not declare the said excess cash at day end and as to

why he had to use his own money to replace the excess cash if his claim that the excess cash was all the while in his cash drawer is true.

The panel findings were based on reasonable grounds that the Claimant had committed the offence as per the charges against him. All Company witnesses during the DI (W1, W2 and W3) testified that the Claimant never informed of the excess cash he had on 13.09.2020. This can be seen from the DI notes on pages 24, 33 and 37 of the COB-1. The Claimant also admitted that he had failed to declare the said excess cash he had on 13.09.2020.

[23] Thus this court considered that the evidence adduced at the DI was sufficient to establish the charges preferred against the Claimant and a prima facie case has been made out. The proven misconduct constitutes just cause or excuse for the dismissal as provided under Article 17(1)(b)(vi) MCBA/NUBE Collective Agreement whereby it provides that the Company has the right to terminate the contract of employment of an employee without notice on ground of serious misconduct. (pages 23-24 of the COB-2)

[24] Based on the whole evidence adduced and having regard to the written submissions and bearing in mind sub-s. 30(5) of the Act to

act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form, the Court finds, the Company had discharged its burden of proving that the Claimant was dismissed/terminated with just cause or excuse on a balance of probabilities. Thus, the Claimant's case is hereby dismissed.

HANDED DOWN AND DATED THIS 14 DAY OF DECEMBER 2023



(AHMAD ZAKHI BIN MOHD DAUD)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR