

INDUSTRIAL COURT OF MALAYSIA

CASE NO: 29(4)(13)(25)/4-1271/15

BETWEEN

THAVIAMBHAI A/P SUBRAMANIAM

AND

IOI BUILDING SERVICES SDN. BHD.

AWARD NO: 947 OF 2019

Before : Y.A. TUAN BERNARD JOHN KANNY
CHAIRMAN (Sitting Alone)

Venue : Industrial Court of Malaysia, Kuala Lumpur

Date of Reference : 24.11.2015

Dates of Mention : 22.01.2016, 25.02.2016, 28.03.2016, 11.04.2016, 11.05.2016,
20.06.2016, 14.12.2016, 10.01.2017, 29.05.2017

Dates of Hearing : 10.01.2017, 11.01.2017, 14.03.2018, 15.03.2018, 09.04.2018,
10.04.2018, 23.04.2018, 26.04.2018, 27.04.2018, 02.05.2018,
10.10.2018, 19.10.2018, 17.02.2018, 18.12.2018

**Written Submission
by Company** : 11.02.2019

**Written Submission in
Reply by Company** : 19.02.2019

**Written Submission
by Claimant** : 18.01.2019

**Written Submission in
Reply by Claimant** : 21.02.2019

Representation : Mr. S Mariappen & Ms. Shanti
From Messrs The Chambers of Shanti
Counsels for the Claimant

: Ms. P. Thavaselvi & Mr. Tan Hao Wei
From Messrs Zul Rafique & Partners
Counsels for the Company

REFERENCE

This is a reference made under section 20 (3) of the Industrial Relations Act 1967, arising out of the dismissal of **Thaviambhai A/P Subramaniam** (hereinafter referred to as "the claimant") by **IOI Building Services Sdn Bhd** (hereinafter referred to as "the company") on 08.04.2015.

AWARD

[1] The Ministerial Reference in this case required the court to hear and determine the claimant's dismissal by the company on 08.04.2015. The reference was dated 24.11.2015 and received by the Industrial Court on 23.12.2015.

[2] This matter was heard before Dato' Tan Ghee Phaik who has since gone on transfer to the Attorney General Chambers.

[3] The matter was transferred from Court 13 to this court on 04.10.2018 pursuant to instructions from the Yang Di-Pertua Mahkamah Perusahaan Malaysia dated 01.10.2018, in order that the final Award be handed down.

[4] On the 10.10.2018 both parties informed the Court that they had no objections to the Court continuing and hearing the matter.

[5] The Court relies on S 23 (6) IRA which reads:

"During the absence or inability to act from illness or any other cause by the Chairman, the Yang Di-Petuan 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 and determining any trade dispute or matter commenced before him."

[6] Thus it is clear that S 26(3) IRA allows another Chairman to continue hearing a part heard case. Please refer to **Bax Global (Malaysia) Sdn Bhd V Sukhder Singh Pritam Singh & Anor [2011] 2 ILR 251**.

[7] On that basis the Court proceeded to continue and hear the evidence of the Claimant till completion.

[8] The matter was fixed for hearing on 10.01.2017, 14.03.2018, 15.03.2018, 10.04.2018, 12.04.2018, 23.04.2018, 26.04.2018, 18.06.2018, and 17.12.2018.

[9] The Company's solicitors filed their written submissions on 11.02.2019 and reply on 19.02.2019 while the Claimant's solicitors filed their written submissions on 18.01.2019 and reply on 21.02.2019.

(A) Proceedings in the Industrial Court

[10] When the matter was heard the following witnesses were called by the Company to testify in Court:

- (i) Madam Kokilawanee A/P Dharmaraj who is the Senior Admin Executive ("COW-1");
- (ii) Mr Azhar Bin Abdul Rahman who is the Senior Car Park Executive ("COW-2");
- (iii) Mr Ramanaidu A/L Dovodu who is Manager EDP ("COW-3");
- (iv) Madam Wong Fay Choo who is Senior Leasing Manager of Dynamic Management Sdn Bhd ("COW-4");
- (v) Mr Ling Kea Ang who is Head Group Internal Audit ("COW-5");
- (vi) Mr Mohd Noorafizam Bin Ismail who was the Building Manager ("COW-6");
- (vii) Mr Chew Joo Gim who is Operations Manager ("COW-7"); and
- (viii) Mr Cheah Wing Choong who is Chief Operating Officer of Dynamic Management Sdn Bhd ("COW-8")

[11] The Claimant gave evidence herself. ("CLW-1")

[12] The documents filed and marked before this Court are as follows:

- (i) Claimant's Bundle of Documents ("CLB");
- (ii) Company's Bundle of Documents ("COB");
- (iii) Company's Supplemental Bundle of Documents ("COB-1");

- (iv) Company's Supplemental Bundle of Documents V2 ("COB-2");
- (v) Company's Supplemental Bundle of Documents V3 ("COB-3");
- (vi) Company's Supplemental Bundle of Documents V4 ("COB-4");
- (vii) Company's Supplemental Bundle of Documents V5 ("COB-5");
- (viii) Email dated 17.02.2015 from How Ting Hiang ("COB-6");
- (ix) AR Registered Letter to Mohd Noorafizam Bin Ismail ("COB-7");
- (x) IOI Group Diary ("COB-8");
- (xi) Witness Statement Kokilawanee A/P Dharmaraj ("COWS-1");
- (xii) Witness Statement Azhar Bin Abdul Rahman ("COWS-2");
- (xiii) Witness Statement Ramanaidu A/L Dovodu ("COWS-3");
- (xiv) Witness Statement Wong Fay Choo ("COWS-4");
- (xv) Witness Statement Ling Kea Ang ("COWS-5");
- (xvi) Witness Statement Chew Joo Gim ("COWS-7");
- (xvii) Witness Statement Cheah Wing Choong ("COWS-8"); and
- (xviii) Witness Statement Thaviambhai A/P Subramaniam ("CLWS-1")

(B) Brief Background Facts

[13] The Claimant commenced employment on 01.12.2003 as Cashier (CS 11) and was confirmed in her position with effect from 01.09.2004.

[14] By a letter dated 28.04.2010, the Claimant was transferred to Maintenance Accounts Department under the employment of IOI Building Services Sdn Bhd with effect from 01.05.2010. Her designation as Cashier (CS 11) and all other terms and conditions of employment remain unchanged.

[15] A Job Description was attached to the transfer letter dated 28.04.2010. (Refer page 8 of COB). The Claimant duly confirmed acceptance of the transfer to the Company.

[16] IOI Building Services Sdn Bhd is a wholly owned subsidiary of IOI Properties Berhad and operates, amongst others, the car park facilities management of the buildings and/or structures owned and/or managed by IOI Properties Bhd.

[17] By a letter dated 27.09.2010, the Claimant was informed that her Job Grade had been upgraded to CSI with effect from 01.07.2010.

[18] By a letter dated 23.09.2011, the Claimant was informed that she would be Re-designated to Cashier Cum Admin Assistant.

[19] By an email dated 13.09.2011 found at page 13 of COB-1, the Claimant was informed of the Banking In Process of Company's Collections. The Claimant was required to bank in all collections the following scheduled and banking day.

[20] For ease of reference the email dated 13.09.2011 is reproduced below:

From: Elice Tye Lea See
Sent: Tuesday, 13 September, 2011 5:40 PM
To: Property Account; Property Cashier (Level ML); Thaviambhai A/P Subramaniam; Sharon Yee Hai Jing; Ng Lim Yong
Subject: Bank in slips for the collections

Dear All,

Refer to the above.

Kindly ensure that all the bank in slips for the official receipts issued are collected from the respective collections centres in a week time in view of alternate banking day @ different collections centres. All the collections shall be banked in the following scheduled banking day.

Besides, if there is any delay in the clearance of the collections, especially cash collections, kindly inform Azlan or myself.

Your immediate attention and action are much appreciated.

* Happy to Serve *

Regards,
Elice Tye
Property Accounts
IOI Properties Berhad
Two IOI Square, IOI Resort
62502 Putrajaya
Tel: 603-8947 8888 (GL)
603-8947 8826 (DL)
Fax: 603-8947 8600

IOI Branded Customer Service Experiences
Our Brand Promise
Reliability, Quality and Community Development


IOI PROPERTIES

[21] By a letter dated 06.12.2011, the Claimant was transferred to IOI Boulevard Office with effect from 15.12.2011. Whilst employed as Cashier Cum Admin Assistant at IOI

Boulevard, the Claimant was required to report to Mohd Noorafizam Bin Ismail (COW-6) the Building Manager.

[22] In terms of submission of the Puchong Financial Corporate Centre (PFCC) Car Park Operation, Daily Cash Deposit at Bank Weekly Reports, the Claimant was required to report to the Admin Executive, Ms Kokilawanee A/P Dharmaraj ("COW-1").

[23] By an email dated 21.02.2014 from COW-6 found at page 15 of COB-1, the Claimant was informed of the Revised bank-in process for Puchong Financial Corporate Centre which was managed by the Company.

[24] For ease of reference the email dated 21.02.2014 is reproduced below:



[25] The Revised bank-in process was as follows:

- (i) "To bank in every Tuesday and Thursday;
- (ii) To notify Kokila and Mohyuddin by 10 am, when you are ready to go to the Bank;
- (iii) To ensure amount, transaction slip, cheque no etc. are correct; and
- (iv) Arrange immediate add hoc bank-in process if we receive total day payment RM3,000.00 and above."

[26] By an email dated 16.08.2014 found at pages 16-20 of COB-1, Elice Tye Lea See informed the Claimant the policies pertaining to banking matters in particular, the requirements for;

- (i) Timely reporting and recording of collections;
- (ii) Timely depositing of funds into the Company's bank account, and attached the processes which were required to be followed; and
- (iii) Daily Collections Verification Policy.

[27] On the 16.02.2015, the Group Internal Audit was alerted of alleged irregularities relating to PFCC's car park collections and had carried out an investigation.

[28] The Company in the course of their investigations instructed the Claimant to explain the shortfall between the PFCC's car park collections from the Automated Payment System and the amount banked in.

[29] The Claimant in her reply dated 24.02.2015 found at page 16 of COB informed the Company that the delay was due to increase work load.

[30] For ease of reference the Claimant's reply dated 24.02.2015 is reproduced below:

To : IOI Management (IOI PFCC)

Name : Thairambhai a/p Subramaniam

Job Title : Cashier Cum Admin Assistant

Date : 24/2/2015

To Whom It May Concern

Ref : Cause of delaying my job.

The reason I delayed my job is because of too much of work load. In mid November 2014, I didn't receive any report from our autopay collection which the report need to be submitted to me on every Friday by Miss Wawa . This is due to our work load which we are doing now. For example season parking for 129 people and registration in IFCA System. I also need to do inspection on cleaning for tower 2 daily, which was instructed by Ms.Kokila.

My work load has increased too much which I cannot cope up against my actual work, which keep on pending until end of December. Therefore I requested Ms.Kokila some manpower to assist me on counting the cash. For coins, I cleared daily but for RM 1.00 notes and RM 5.00 notes, I need to arrange in order before putting in the counting machine to count.

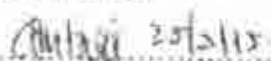
When I receive the cash, I never do the counting on the spot because I have no sufficient time due to I need to attend to the walk in customers. Around 4.45pm, I open up the note box (RM) and put them into the plastic bag and keep it in the safe box. (this is done on Monday, Wednesday & Fridays only)

Hence I have to wait for the report from Ms.Wawa and I cannot bank in the cash without the report. I couldn't detect the missing amount is because of no report to match the actual cash which I have. I started to do the counting of my balance money on 16th February 2015 and found out some amount is missing. I then immediately inform Ms.Kokila.

Mr.Zack also will change cash float with me for RM 1000 in RM1 note almost every month From Jan 2014 – Dec 2014. He will return after 1 / 2 months later.

The above statement which I have given is absolute truth nothing but the whole truth.

Yours Sincerely,


.....
(Thairambhai a/p Subramaniam)

[31] The Company reviewed the Claimant's response and found it to be unsatisfactory. Thus the Claimant was suspended for two weeks on half pay pending further investigations by the Company.

[32] On the 17.03.2015, the Claimant was served a Notice of Domestic Inquiry and was informed that a domestic inquiry would be held on the 25.03.2015. A copy of the notice of Domestic Inquiry dated 17.03.2015 is found at pages 18-19 of COB.

[33] For ease of reference the notice of Domestic Inquiry dated 17.03.2015 is reproduced below:



IOI Building Services Sdn Bhd (127254-J)
 Two IOI Square, IOI Resort,
 62502 Putrajaya, Malaysia
 T: +603-8947 8888
 F: +603-8947 8910

17 March 2015

Thariambhal A/P. Subramaniam
 No.04, Jalan 11
 Taman Bukit Kuchai
 Batu 8, Jalan Puchong
 47100 Selangor

Dear Mdm Thariambhal,

NOTICE OF DOMESTIC INQUIRY

Reference is made to your explanation letter dated 24 February 2015 and our suspension letter to you of 3 March 2015.

Following our investigations and in view of the severity of the misconduct, the Management has deemed it necessary to hold an inquiry to determine the following charges against you:

- a) That you have failed to bank-in the total of RM33,603.40 for collection of Automated Payment System, motorcycle collection, clamping, perimeter parking, loss ticket and loss contractor pass ("Collection") of Puchong Financial Corporate Centre ("PFCC") being the shortage between amounts banked-in (RM36,151.60) against the Collection (RM69,755) as recorded in the Car Park Operation PFCC Daily Cash Deposit Bank Report covering the period of November 2014, December 2014 and 1-13 January 2015.
- b) That you have failed your duty as a Cashier to bank-in the Collection for November 2014, December 2014 and 1-13 January 2015 of PFCC intact on a timely manner as tabulated below:

Bank-In Date	Amount	For Collection Month
04/12/2014	434.30	November 2014
29/12/2014	734.00	
11/02/2015	3,663.00	December 2014
13/02/2015	4,901.00	
12/02/2015	1,219.30	January 2015
16/02/2015	25,280.00	November 2014, December 2014 & January 2015
Total	36,151.60	

- c) That you have on 17 October 2014 and 19 December 2014 taken RM2,000 of the Collection and handed the money to En Mohd Noorafizam (Zack) without proper records and prior written approval.

d) That you have violated the good conduct and integrity of a Cashier as mentioned in the charges above has destroyed the relationship of trust and confidence existing between employer and employee.

You are hereby required to present personally a Domestic Inquiry at

Date: 25 March 2015 (Wednesday)

Time: 9.30am

Venue: Level 10 Conference Room, Two IOI Square, IOI Resort, 62502 Putrajaya

Please be informed that if you fail to present the Domestic Inquiry at the stipulated date, time and venue, the Domestic Inquiry shall proceed ex-parte (i.e. in your absence) and appropriate disciplinary action shall be taken.

You will be given full opportunity to defend yourself by bringing in your witness(es), documents or any other evidence(s) to support your defenses during the session. Should you require an employee to be your witness, please inform us latest by 20 March 2015 for us to arrange their release.

Kindly be informed that pending the inquiry, you will continue to be on suspension with full pay until further notice. During the period of suspension, you are not permitted to enter the Company's premises unless duly required to do so with the prior written consent of the Company. You are however required to be contactable by the Company during office hours for us to communicate with you. If the result of the inquiry does not establish a case against you, the Company shall restore forthwith the salary so withheld.


Please acknowledge receipt of this letter by signing the enclosed duplicate copy and return to the undersigned immediately.

Yours sincerely,
IOI BUILDING SERVICES SDN BHD



HOW TING HIANG
Human Resource Manager
(Corporate and Property Division)

We acknowledge receipt of the above charges / documents in order.


.....
Company Clerk and Signatory
Date: 17/3/15

Cc: Mr Cheah Wing Choong - Chief Operating Officer
Ms Stefanie Lau - Senior Manager, Group HR

[34] The Claimant duly attended the domestic inquiry as scheduled. At the Inquiry the Claimant pleaded not guilty to the charges (a) to (c) and pleaded guilty to charge (d) as specified in the notice of Domestic Inquiry. The handwritten and typewritten notes of the Domestic Inquiry is found at pages 46 to 90 of COB-2.

[35] The Claimant was informed vide a letter dated 08.04.2015 that the Company had decided to terminate the Claimant's services with immediate effect from 08.04.2015 as the Company had found the Claimant guilty of charges (a) and (b) as specified in the Domestic Inquiry dated 17.03.2015. The Claimant had pleaded guilty to charge (d) in the notice of Domestic Inquiry. The panel of Inquiry found the Claimant not guilty of charge (c) in the notice of Domestic Inquiry.

[36] The Claimant seeks the primary relief of an order of reinstatement to her former position of Cashier Cum Admin Assistant as she considered that her dismissal was without just cause or excuse.

(C) Issue

[37] The issue before this Honourable Court is whether the Claimant's dismissal was with just cause or excuse, or in other words, whether the Claimant was guilty of the charges preferred against her which would constitute just cause or excuse for the Company to dismiss her.

[38] In considering the above issue, the Court has to deliberate on the following:

- (a) Whether the charge preferred against the Claimant was proven by the Company based on the evidence produced before this Court;
- (b) Should the Court find that the Claimant is guilty of the charge preferred against the Claimant, whether the punishment of dismissal meted out by the Company is too harsh in the circumstances.

(D) The Law

[39] The law on dismissal is now well settled, the function of the Industrial Court in a reference under s. 20 of the Act has clearly been spelt out in the Federal Court in the case of **Goon Kwee Phoy V J & P Coats (M) Bhd [1981] 2 MLJ 129**, where his Lordship Raja Azlan Shah, CJ (Malaya) (as he then was) stated at p 136:

"where representation 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."

[40] In the case of **Wong Yuen Hock V Syarikat Hong Leong Assurance Sdn Bhd and Another [1995] 3 CLJ 344** at p. 352 Mohd Azmi FCJ stated as follows:

"On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under s. 20 of the Act is to determine whether the misconduct or irregularities complained of by the management as the grounds of a dismissal were in fact committed by the workman, and if so, whether such grounds of dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal. In our opinion, there was no jurisdiction by the Industrial Court to change the scope of reference by substituting its own reason."

[41] In **Colgate Palmolive (M) Sdn Bhd V Yap Kok Foong [1998] 3 ILR 843 (Award no 368 of 1998)**, the Industrial Court held as follows:

"In a section 20 reference, a workman's complaint of two elements: firstly, that he had been dismissed, and secondly, that such dismissal was without just cause or excuse. It is upon these two elements being established that the workman can claim his relief, to wit, an order of reinstatement, which may be granted or not at the discretion of the Industrial Court. As to the first element; Industrial Jurisprudence as developed in the course of Industrial adjudication readily recognizes that any act which has the effect of bringing the employment contract to an end is a 'dismissal' within the meaning of Section 20".

[42] In a reference under s. 20 (3) of the Industrial Relations Act 1976, it is trite law that the burden of proof is on the employer to prove that the Claimant is guilty of the alleged misconduct thereby justifying the dismissal

[43] In **Stamford Executive Center V Dharsini Ganeson [1986] 1 ILR 101**, the Industrial Court held as follows:

"It may further be emphasised here that in a dismissal case the employer must produce convincing evidence that the workman committed the offence or offences, the workman is alleged to have committed for which he has been dismissed. The burden of proof lies on the employer. He must prove the workman guilty, and it is not the workman who must prove himself not guilty. This is so basic a principle of industrial jurisprudence that no

employer is expected to come to this Court in ignorance it."

[44] In **Telekom Malaysia Kawasan Utara V Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314**, a court of Appeal case, Abdul Hamid JCA (as he then was) stated in no uncertain terms that the standard of proof required in a case is on a balance of probabilities.

[45] O.P Malhotra in his book, the Law of Industrial Disputes, Sixth Edition at page 1119 defined "misconduct" as follows;

"Any conduct on the part of an employee inconsistent with the faithful discharge of his duties towards his employer would be a misconduct. Any breach of the express or implied duties of an employee towards his employer, therefore, unless it be of trifling nature, would constitute an act of misconduct. In Industrial Law, the word 'misconduct' has acquired a specified connotation. It cannot mean inefficiency or slackness. It is something far more positive and certainly deliberate. The charge of 'misconduct' therefore is the charge of some positive act or of conduct which would be quite incompatible with the express or implied terms of relationship of the employee to the employer".

[46] As defined above, where there is a breach of the terms of employment by an employee, the employee would be deemed to have committed the misconduct. This principle was adopted and followed by the Industrial Court in **Holiday Inn V Elizabeth Lee [1990]2 ILR 262**, where it was held:

"Any conduct inconsistent with the faithful discharge of his duties, or any breach of the express or implied duties of an employee towards his employer, unless it be of a trifling nature, would constitute an act of misconduct".

(E) The Domestic Inquiry

[47] Where, as in the instant case, a Domestic Inquiry has been conducted, the Industrial Court is required at the onset to examine the inquiry notes and verify whether the inquiry was valid, whether the notes were accurate and whether a prima facie case has been made out against the Claimant (see **Bumiputra Commerce Bank Bhd V Mahkamah Perusahaan Malaysia & Anor [2004] ICLJ 77**).

[48] The minutes of the Domestic Inquiry appear at pages 46 to 64 of COB-2 (Handwritten notes) and pages 65 to 90 (Typewritten notes). The Notice of the Domestic Inquiry is found at pages 18 to 19 of COB.

[49] COW-7 the Chairman of the Domestic Inquiry Panel testified that the Claimant at the DI indicated she understood the charges against her and was accorded sufficient opportunity to present her own case.

[50] COW-7 was not cross examined nor challenged on the veracity or accuracy of the Notes of Domestic Inquiry.

[51] A perusal of the Domestic Inquiry notes will show that whilst perhaps the inquiry did not have the turn of phrase or the flow of a formal trial, it nevertheless appeared to have been conducted overall in practical compliance to the rules of natural justice.

[52] In **Hj Ali Hj Othman V Telekom Malaysia Bhd [2003] 3 CLJ 310** it was held, inter alia, that the law does not expect a Domestic Inquiry to have all the trappings of a formal trial in a Court of law. The Honourable Court in that case adopted with approval the view expressed by her Ladyship L'Heureux-Dube J in **Board of Education of the Indian Head School Division no 19 of Saskatchewan, The V Ronald Gray Knight [1990] 1 SCR 653**; which was as follows:

"It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a Court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a Court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair."

[53] Upon perusal of the domestic inquiry notes found at pages 46 to 90 of COB-2, the Court is satisfied that the domestic inquiry did not suffer from any procedural infirmities or that the Claimant was denied a fair hearing. The Claimant was given the opportunity to cross examine Company's witnesses and put forward her case during the inquiry. The Claimant was allowed to call her witnesses to testify. Claimant had admitted during cross examination that she had signed the handwritten notes of the DI without condition or qualification.

[54] The Court has also read and considered the findings made by the panel of inquiry found at pages 26 to 28 of COB-1 which concluded that the Claimant was guilty of charges (a) and (b) in the notice of Domestic Inquiry. The Claimant had voluntarily pleaded guilty to charge (d) in the notice of Domestic Inquiry. The Court finds that the findings of the domestic inquiry panel was not perverse. Therefore, the Court holds that the domestic inquiry was valid and the domestic inquiry notes accurate.

[55] Upon perusal of the notes of DI and the testimony of COW-7, it is the Court's finding that the DI was valid and that the transcript of the proceedings substantively accurate. Having said that, I will keep in mind the prima facie evidence against the Claimant tendered at the DI, such as it was, giving what weight to it, that it may deserve in all the circumstances of this case; while strictly observing **Hong Leong Equipment Sdn Bhd V Liew Fook Chuan & Other Appeals [1997] 1CLJ 665**; where it was held that the findings of the DI are not binding on the Industrial Court, which in fact rehears the matter afresh; and where, by implication the fact that a DI was held, would lend to the reasonable belief that procedural propriety was indeed exercised by the Company, prior to the dismissal.

(F) Evaluation of Evidence and Court Findings

Whether the Company has established the Claimant's misconduct?

The First Allegation

[56] The Company's first charge is as follows:

"That you have failed to bank in the total RM33,603.40 for collection of Automated Payment System, Motorcycle Collection, Clamping, Perimeter Parking, Loss Ticket and Loss Contractor Pass of Puchong Financial Corporate Centre being the shortage between amount banked in (RM36,151.60) against the collection (RM69,755) as recorded in the Car Park Operation PFCC Daily Cash Deposit Bank Report covering the period of November 2014, December 2014 and 1-13 January 2015."

[57] Thus, the Company alleged that the Claimant failed to bank in RM33,755.00 from the total collection of RM69,755.00 for the period November and December 2014 and 1st to 13th January of 2015.

[58] Mr. Ling Kea Ang (COW-5) who was Head of Group Internal Audit testified that on the 16.02.2015, Group Internal Audit (GIA) was alerted by the Chief Operating Officer (Property Investments) (COW-8) about the impropriety in the car park collections of Puchong Financial Corporate Center (PFCC).

[59] Having received the complaint, GIA commenced investigations into the alleged impropriety.

[60] GIA carried out investigations between 17.02.2015 to 27.02.2015. GIA completed their investigations on 10.03.2015 upon finalising the Investigation Report. A copy of GIA Investigation Report dated 10.03.2015 is found at pages 36 to 40 of COB-2.

[61] GIA concluded that the Claimant had failed to bank in RM33,603.40 comprising of November to December 2014 and 1st January to 13th January 2015 car park collections. The GIA found that the Claimant failed in her duty to bank in all the car park collections in a timely manner.

[62] According to COW-5, Mr Cheah Wing Choong (COW-8) had alerted GIA on the alleged impropriety when COW-1 had informed Elice Tye the delay in receiving car park collection reports, bank in slips and official receipts from CLW-1.

[63] COW-5 stated that the Claimant as Cashier Cum Admin Assistant of the Company was primarily responsible for:

- (i) Counting the car park collections and reconciling the said collections with the car park collections reports;
- (ii) Banking-in the car park collections on a timely manner, and
- (iii) Preparing the daily collection reports and bank in reports for all collections received at the cashier counter.

[64] However the Claimant in her submissions argued that the Company failed to issue written instructions regarding her functions in respect of car park collections.

[65] The Claimant had agreed that it was her basic duty as Cashier to count the collections received and to bank in the collections received.

[66] In this regard the Claimant was cross examined as follows:

"Q : Refer to answer 1 CLWS-1. I put it to you that your basic duty as a Cashier until 16.02.2015 were (1) to count collections received and (2) to bank in collections received in a timely manner as per Company's policy and procedures?

A : Agreed."

[67] Based on the above evidence, the Claimant has agreed that it was her duty to count any collections received by the Company and bank it in into the Company account.

[68] COW-5 testified that the process the Claimant was required to adhere to in relation to banking in car park collections was found in the following documents:

- (i) Claimant's Job Description found at page 12 of COB-1;
- (ii) Email dated 13.09.2011 from Elice Tye to the Claimant at page 13 of COB-1; and
- (iii) Email dated 21.02.2014 from COW-6 to the Claimant at page 15 of COB-1.

[69] Based on the above emails dated 13.09.2011 and 21.02.2014 the Claimant was required to (i) to bank in the collections the following scheduled banking day, (ii) in the event of delay in the clearance of collections she was required to inform Elice or Azlan, (iii) to bank in every Tuesday and Thursday; (iv) to arrange immediate ad-hoc bank in process if the total day payment of RM3,000 and above was received.

[70] The email dated 13.09.2011 at page 13 of COB-1 referred to "all collections".

[71] The Claimant acknowledge receipt of the emails dated 13.09.2011 and 21.02.2014 and instructions there to.

[72] In this regard the Claimant admitted during cross examination as follows:

Q : Do you agree that as an employee you are required to strictly comply with all rules and regulations including policies, processes and SOP of the Company and the Group?

A : Yes I agree.

Q : Isn't it true that from 2004 until your dismissal from service on 08.04.2015 you performed Cashier duties?

A : Yes I agree.

Q : As a Cashier you also reported to the Former Assistant Account Manager Elice Tye of the Finance Department based in IOI Putrajaya regarding all financial matters. Do you agree?

A : Yes.

Q : Refer COB-1 page 12 as well as COB pages 7 & 8. Do you agree that your basic duties are reflected in these job description?

A : Yes.

Q : Refer COB-1 page 13. Do you agree that this is an email instruction from Elice dated 13.09.2011 in particular on the requirement for collections to be banked-in the following scheduled banking day?

A : Yes.

Q : This email instruction is addressed to you amongst others?

A : Yes.

Q : Is there reference to "all collections" in COB-1 page 13?

A : Yes.

Q : Refer to COB-1 page 13. Do you agree based on these email instructions if there was going to be delay in banking in collections especially cash collections Cashiers including you must inform Azlan or Elice?

A : Yes.

Q : You in fact acknowledged this duty to inform Elice where there is delay in banking in as per COB-1 page 13?

A : Yes.

Q : In light of COB-1 page 13 do you agree that you continued to receive instructions from Elice on all financial matters after 2010?

A : Yes.

Q : Refer to page 15 COB-1. Can you confirm that this email was issued by your immediate superior on 21.02.2014 and addressed to the parking team including you?

A : Yes."

[73] It is clear from the above cross examination of the Claimant, that the Claimant had received emails dated 13.09.2011 (page 13 COB-1) and 21.02.2014 (page 15 COB-1) and was privy to the Company's SOP on banking in process of collections. In addition the Claimant agreed that the email dated 13.09.2011 referred to "all collections".

[74] At the material time COW-6 was the Building Manager and Claimant's superior. The Claimant was required to report to him.

[75] COW-6 stated in evidence that the Claimant as Cashier was "responsible to collect payment such as rental and various service charges i.e. water charges, season car park payment, building service charges, prepare car park collection report and to bank in all the collections."

[76] COW-6 confirmed that the Claimant was required to bank in all collections received including car park collections.

[77] Further, COW-6 confirmed that the instructions of the banking in process was communicated to the Claimant vide the emails found at pages 13 to 15 of COB-1.

[78] In this regard COW-6 gave evidence during examination in chief as follows:

" Q : Based on your e-mail, what was the Claimant's duty?

A : The Claimant supposed to bank in every Tuesday and Thursday by notifying Kokila, Admin Officer and Mohyuddin who was the Security Manager by 10 am on Tuesday and Thursday when Ambiga is ready to bank in the collections. Also to ensure amount transaction slip, cheque no etc. are correct. Apart from Tuesday and Thursday Ambiga need to arrange for ad-hoc bank in process if amount of collections RM3,000 and above."

Q : Refer to pages 16-20 of COB-1 this email was addressed to you and the Claimant amongst others?

A: Yes.

Q: Please explain what is this email regarding. Briefly?

A: Policies given by Elice from Finance Department on process flow for collection reporting and daily collection verification policy.

Q: At page 16 COB, can you confirm that there is a requirement to strictly adhere to the group banking and collections policy?

A: Yes."

[79] According to COW-6, Elice Tye of the Accounts Department vide her email dated 16.08.2014 (at page 16-20 COB-1) informed among others the Claimant, about timely reporting and recording of collections and timely depositing of funds into the Company's bank account.

[80] COW-6's evidence was not challenged during cross examination by the Claimant hence it is deemed to be admitted.

[81] COW-5 stated in evidence the total car park collections as reported in the Daily Cash Deposit Bank between 01.11.2014 to 13.01.2015 was RM69,755.00. However, the amount banked in was RM36,151.60. This is reflected in the Bank-In-Slips/Maybank Cash Deposit slips found at pages 3-9 of COB-2. RM36,151.60 was banked in on 04.12.2014, 29.12.2014, 11.02.2015, 13.02.2015 and 16.02.2015. The bulk of the bank in amount totalling RM25,200.00 for said the period was only banked in on 16.02.2015. This evidence was corroborated by COW-1.

[82] COW-1 in her evidence had confirmed there was a shortage of RM33,603.40 between the amounts banked into FDSB's account against PFCC's car park collections between November 2014 to 13.01.2015.

[83] Thus, according to COW-5 and COW-1 there was shortage of RM33,603.40 i.e. the amount banked-in against PFCC's car park collections.

[84] The evidence of COW-5 and COW-1 was neither challenged nor rebutted during cross examination hence COW-5's and COW-1's evidence is deemed to have been admitted,

[85] In **Aik Ming (M) Sdn Bhd V Chang Ching Chuen & ORS [1995] 3 CLJ 639** Gopal Sri Ram JCA stated:

"It is essential that a party's case be expressly put to his opponent's material witness when they are under cross examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument."

[86] The Industrial Court in **Advantest (M) Sdn Bhd V Ganesh A Rengasamy [2005] 2 ILR 651 at page 656** referred to the High Court case of **Malaysian Airline System Berhad V Ritzeraynn Bin Rashid & 4 ORS, OM NO R 2. 25-9-1999** wherein in reviewing an Industrial Court Award, the High Court ruled as follows:

"It is trite law that failure to cross examine is taken as an acceptance of the truth of that part of the witness's evidence. This principle is not merely a technical rule of evidence but it is a rule of essential justice."

[87] The Claimant does not dispute that there was a shortage of RM33,603.40 i.e. the amount banked-in against PFCC's car park collections.

[88] In this regard the Claimant during cross examination stated as follows:

" Q : Isn't it true that you do not dispute that there was a shortfall of RM33,603.40 for **car park collections** between November 2014 and 13.01.2015?

A : Yes.

Q : Refer to Q & A 14 and 19 CLWS-1 and page 47 COB-2. Is it true that you did not dispute that the daily **car park collections** between November 2014 and 13.01.2015 were not banked in a timely manner?

A : Yes.

Q : You did not bank in a timely manner as this is evident in your answer to question 19 CLWS-1 and your statement dated 24.02.2015 page 16 COB?

A : Yes."

[Emphasis Added]

[89] The Claimant during cross-examination agreed that (i) she was responsible for the car park collections for the periods November 2014, December 2014 and 01.01.2015 to

13.01.2015, (ii) the shortfall of RM33,603.40 was her responsibility and (iii) she could not blame anybody.

[90] In this regard the Claimant was cross examined as follows:

Q : I put it to you, any shortfall in the Auto pay car park collections between November 2014 to 13.01.2015 was your responsibility?

A : Disagree.

Q : Why? You have 4 days of control. Who else are we supposed to blame?

A : I cannot blame anybody, I'm not the only person doing Auto pay car park collections.

Q : The Auto pay car park collections which is the subject matter of your charge, you were responsible for it namely between November 2014 and 13.01.2015. Agree?

A : Yes.

Q : The Shortfall of RM33,603.40 was therefore your responsibility?

A : Yes.

Q : So, you failed to bank in this RM33,603.40 of collection for Auto Pay System covering the period November 2014, December 2014, and 01.01.2015 to 13.01.2015?

A : Yes. I failed to bank in because I don't have any Auto pay car park collection report from Wawa, November 2014 until 13.01.2015.

Q : So, even in October 2014, you didn't bank in Auto Pay Car Park collections for the 4th week of October 2014 in a timely manner?

A : Yes."

[91] Based on the above evidence, the Claimant has once again agreed that the shortfall was RM33,603.40 and that she was responsible for the **car park collections** to be banked in a timely manner. She admits that she failed to bank in the sum of RM33,603.40. **[Emphasis Added]**

[92] Further, the Claimant has admitted that she was aware of Company's SOP's vide emails found at pages 13 and 15 of COB-1 hence the Claimant is aware of Company's requirements and SOP regarding banking in collections.

[93] In this regard the Claimant was cross examined as follows:

“ Q : I put it to you that, it is a requirement that all collections that you receive as a Cashier must be banked in on the following scheduled banking day?

A : Yes, but not for the auto pay collections. Without the report I cannot bank in the cash.

Q : Can you produce any document in Court which makes an exception in relation to the banking in of auto pay collections as alleged by you?

A : No.

Q : Refer to COB-1 page 15, email dated 21.02.2014 titled "Bank In Process". I put it to you that based on the email you or your placement were required:

1. Bank in all collections every Tuesday and Thursday.
2. Notify Kokila and the Security Manager Mohyuddin by 10 am when ready to go to Bank.
3. Ensure amount, transaction slip, cheque number etc. are correct.
4. Arrange immediate ad hoc bank in process if the total day payment of RM3,000 and above was received.

A : Yes, I follow the instruction given by Mr. Zack for all collection **including auto pay car park collection** which was in February 2014. But the incident happens where auto pay collections cannot be bank in because I never receive report from Wawa. For other collections I banked in, in a timely manner on Tuesday and Thursday. January until February I don't have this kind of problem because Wawa give me the auto pay collection report.

Q : Refer to COB-1 page 15. I put it to you that your basic duty as a Cashier was to bank in collections on Tuesday and Thursday and make arrangements for immediate ad hoc bank in when you had RM3,000 and above?

A : Yes. But that one for not auto pay car park collections.

Q : Refer to COB-1 page 15. Do you agree that the email instruction does not make any qualification in relation to item on total day payment of RM3,000 and above or for the scheduled bank in days?

A : Yes.

Q : And according to you prior to November 2014 you complied with the email instruction (COB-1, page 15) for auto pay car park collections?

A : Yes.”

[Emphasis Added]

[94] Based on the above evidence, it is clear that the Claimant was privy to rules, regulations and SOP of the Company governing banking and collections. In addition, the Claimant has admitted that it was her responsibility to bank in collections including auto pay car park collection.

[95] Clearly from the evidence, the Claimant's argument that she had no written instructions regarding her functions in respect of car park collections is without basis and misconceived.

[96] Despite knowing the policy governing Company's Banking and Collections, the Claimant had admitted that she had failed to bank in RM33,603.40 in a timely manner as required for the periods November 2014, December 2014 and 1-13 January 2015.

[97] Therefore, based on the evidence and admitted facts the Company has on a balance of probabilities proven the charge against the Claimant.

The Claimant's Defence/Mitigating Factor On Why She Did Not Bank In RM33,603.40 In A Timely Manner

Failure To Receive PPM Task Sheet From Wawa

[98] The Claimant's defence merely fortifies the Company's case that she failed to bank in RM33,603.40 of collections against the collection of RM69,755.00 recorded in the Car Park Operation PFCC Daily Cash Deposit Bank Report covering the period November 2014 to 13th January 2015 as per charge (a) in the notice of Domestic Inquiry.

[99] The Claimant claimed that her predecessor (Rozita) had told her that she required the PPM task sheet/reports before proceeding to bank in the cash.

[100] The Claimant's reason for not banking in RM33,602.40 was that Wawa (Norfarhana Diana Binti Ahmad Fauzi) the Administration Assistant delayed in submitting to her the PPM task sheet together with the Auto Pay Cash Containers Content Print.

[101] Thus, the Claimant could not tally the car park collections for banking in without the auto pay collections reports.

[102] COW-6 the Claimant's manager stated in evidence that the Claimant is able to bank in the collections even in the absence of the PPM task sheet.

[103] In this regard COW-6 stated during examination in chief to a question from the Court:

" Q Court : Is she able to bank in the money if there is no PPM task sheet?

A : Yes."

[104] The Claimant during cross examination stated as follows:

" Q : I put it to you that based on your knowledge, regarding the average auto pay collection per week, from the time you received the auto pay car park collections for the 1st week of November 2014, you were aware that you had in your possession RM3,000 or more?

A : Yes, I am aware. But no report I cannot bank in the money.

Q Court : Every time you count the money, it tallies with the report or not?

A : Yes it tallies exactly every time I count the money.

Q Court : In that case, there is nothing to stop you from counting the money and banking in the money that you have in your possession?

A : Yes.

Q : Do you know that you have to bank in the collections received on the next schedule bank in day?

A : Yes."

[105] Further, COW-6 stated in evidence that COW-1 had reported to him that the Claimant had delayed in forwarding the weekly car park collections report to her.

[106] According to COW-6 he spoke to the Claimant who informed him that the car park collections from November 2014 to 13.01.2015 had been banked in. The Claimant had not prepared the report as she was awaiting the report from Wawa and the deposit slips from Maybank.

[107] In this regard COW-6's evidence is as follows:

" Q : Did the Claimant confirm that she banked in the car park collections between November 2014 and 13.01.2015 regardless of the car park machine report pending from Wawa?

A : The Claimant confirmed that she had banked in the car park collections between November 2014 and 13.01.2015 but she did not receive any bank in slips from the Bank Officer was too busy to issue any bank in slips."

[108] The Claimant had also informed COW-1 that she had banked in PFCC's daily car park collections into FDSB's account.

[109] COW-1 had stated in examination in chief as follows:

" Q : When was the first time that you discovered that the Claimant failed to submit to you the weekly car park collection reports in 2014?

A : The first time was in early November 2014, when the Claimant delayed in submitting to me the weekly car park collection reports for the 4th week of October 2014 for my checking.

When I followed up with the Claimant for the weekly car park collection reports for the 4th week of October 2014, she informed me that although PFCC daily car park collections had been duly banked in into FDSB's account, she could not submit to me the said weekly car park collection reports as she could not print the official receipt from the IFCA system through her personal computer."

" Q : Did you have personal knowledge if the Claimant had in fact banked-in the daily car park collections for November 2014 into FDSB's bank account?

A : No, but the Claimant verbally confirmed to me that the daily car park collections for November 2014 had been duly banked in into FDSB's bank account."

[110] As sure as night follows day it is obvious that the Claimant was lying as there was a shortage of RM33,603.40 in the Company's car park collections.

[111] According to COW-6, together with COW-1 and the Claimant he went to Maybank and was informed by the Officer at the Bank that there was no policy of banking in and not issuing or giving a bank in slip to the customer.

[112] Further COW-1 vide emails dated 09.02.2015 (COB-2 page 1 and 2), and 12.02.2015 (page 14 and 15 COB) to the Claimant requested the Claimant for documents. The Claimant did not respond to the emails.

[113] COW-5 had also stated in evidence that the counting of the money and reconciling the collection report are separate matters. It was not necessary for the Claimant to await the reports before banking in the money.

[114] The Claimant herself agreed that reconciling the car park collections and banking in the car park collections received in compliance with Company SOP are two separate matters.

[115] This is illustrated by the Claimant when she banked-in the car park collections received for November 2014 until 31.01.2015 on 5 occasions (page 1 of COB-1) prior to receipt of any reports from Wawa.

[116] In this regard the Claimant was cross examined as follows:

Q : Please refer to COB-1, page 1. I put it to you that prior to reconciling the car park collection received for November 2014 until 13.01.2015 with the PPM Task Sheet and Auto Pay Cash Print Out you banked in:

1. RM434.30 on 04.12.2014 being collection for 1-8 November 2014.
2. RM734.00 on 29.12.2014 being collection for 9-16 November 2014.
3. RM3663.00 on 11.02.2015 being collection for 17-21 November 2014.
4. RM4901.00 on 13.02.2015 being collection for December 2014.
5. RM1219.30 on 12.02.2015 being collection for 1-13 January 2015.

A : Yes, I agree. I banked in the money.

Q : I put it to you that reconciling of the car park collections and banking in the car park collections received in compliance with the email instructions at COB-1, pages 13-20 are two separate matters?

A : Yes, I banked in without reconciling reports to the bank. The PPM Task

Sheet is important to me to count the money to bank in. The bank no need PPM Task Sheet from me to bank in the money. The bank only need the cash and the bank in slip for me in the money."

[117] Thus, the Claimant's allegation that she was not able to perform banking-in of car park collections until she received the PPM task sheet and Auto pay print out is untrue.

Access To Small/Big Safe

[118] COW-2 had testified that on or about the 12.01.2015 he had assisted in the shifting of the small safe from "Kaunter Juruwang, Menara 2, Tingkat 2, PFCC" to "Jabatan Parkir, Menara 1, Tingkat 1 PFCC."

[119] COW-2 in his examination in chief had stated:

"Setelah sampai di Kaunter Juruwang, Menara 2 Tingkat 2, PFCC saya telah menyaksikan Yang Menuntut membuka peti besi kecil yang terletak di bawah Kaunter Juruwang di tempat kerja Yang Menuntut dan Yang Menuntut mengeluarkan kesemua bungkusan dari dalam peti besi kecil.

Kemudian En. Zack telah memasukkan nombor gandingan untuk peti besar dan pintu peti besar dibuka dengan kunci oleh Yang Menuntut. Sejurusnya, Yang Menuntut telah memasukan kesemua bungkusan yang dikeluarkan dari peti besi kecil ke dalam peti besi besar. Setelah memastikan bahawa peti besi kecil telah dikosongkan, saya telah memindahkan ke Jabatan Parkir".

[120] Thus, COW-2 had confirmed that there was no money in the small safe after they transferred the same to the big safe.

[121] Further, COW-2 confirmed that the Claimant had the key to the big safe whilst COW-6 and COW-1 had the combination to the big safe. COW-2 during cross examination confirmed COW-6 did not have the key and combination together. This was corroborated by COW-1. Thus no one person had both the key and combination password for the big safe.

[122] The Claimant had cross examined COW-1 as follows:

" Q : Before Claimant went on leave on 13.01.2015 the cash in the small safe was shifted to the big safe in the presence of Mr Zack, the Building Manager and En Azhar the Parking Executive and the Claimant?

A : I am aware of it."

[123] Clearly the money was transferred from the small safe to the big safe on the 12.01.2015.

Did COW-6 Have The Key To The Big Safe?

[124] COW-2 had testified that COW-6 only had the combination password to the big safe while the Claimant had the key.

[125] COW-1 had also testified that COW-6 did not have the key to the big safe.

[126] In this regard COW-1 was cross examined as follows:

" Q : In regard to the big safe, do you agree the key to it was kept by the Claimant who handed over to Mr Zack before going on leave on 13 & 14 January 2015?

A : No.

Q : Upon transferring the money to the big safe the Claimant handed over the key to the big safe to Mr Zack?

A : I don't agree.

Q : Apart from Zack, the key to the big safe is also kept by Nana who is the Admin staff?

A : Mr Zack did not keep the key. The Claimant and Nana did."

[127] COW-6 had testified that it was the Claimant who had the key to the big safe. Further he stated that nobody had the key and combination password for the big safe. One person had the key while the other had the password.

[128] COW-6 was cross examined on the issue of the big safe as follows:

Q : In regard to the safe where the Claimant kept the money, do you agree you had the combination password for the big safe?

A : Agreed.

Q : Also Kokila had the combination password for the big safe. Do you agree?

A : I can't remember.

Q : Do you agree that apart from the Claimant, Nana has the key to the big safe?

A : I can't remember."

[129] Based on the cross examination of COW-6 by the Claimant, the Claimant has failed to put to COW-6 that he had both the key and combination to the big safe. Thus, the Claimant's failure in this regard is deemed to be an abandonment of the same and the Claimant's evidence disregarded.

[130] Thus it is the finding of this Court that COW-6 did not have the key to the big safe.

[131] The Claimant was aware of the shortfall in the car park collections when she received the November and December reports from Wawa in December as she had only banked in RM4,831.30 car park collections for November against the total collection of RM27,790.20 and RM4,901.00 being car park collections for December against the total collection of RM29,345.10.

[132] Despite being aware of the shortfall, the Claimant failed to report the shortages to COW-1, COW-6 and Elice (Accounts Department).

[133] This Court finds on a balance of probabilities that there is no reason for the Claimant's failure to bank-in the shortage of RM33,603.40 between the amounts banked in against PFCC's car park collections between 01.11.2014 to 13.01.2015. In addition, it was the responsibility of the Claimant to bank in the collection.

The Second Allegation

"That you have failed your duty as a Cashier to bank-in the Collection for November 2014, December 2014, and 1-13 January 2015 of PFCC intact on a timely manner as tabulated below."

Bank-In Date	Amount	For Collection Month
04/12/2014	434.30	November 2014
29/12/2014	734.00	
11/02/2015	3,663.00	December 2014
13/02/2015	4,901.00	
12/02/2015	1,219.30	January 2015
16/02/2015	25,200.00	November 2014, December 2014 & January 2015
Total	36,151.60	

[134] COW-5 testified that the Claimant had failed in her duty to bank-in all car park collections intact and on a timely manner. COW-5 relied on the cash deposit slips found at pages 3 to 9 of COB-2 as proof that the Claimant failed to bank in the collections for November and December 2014 and 1-13 January 2015 in a timely manner.

[135] This evidence from COW-5 was not challenged nor rebutted during cross examination. Following the principle in **Aik Ming (M) Sdn Bhd V Chang Ching Chuen & ORS [1995] 3 CLJ 639** this part of COW-5's evidence is deemed to have been admitted.

[136] COW-6 testified that the instructions of the banking in process was communicated to the Claimant vide emails found at pages 13 to 15 of COB-1. In addition COW-6 confirmed that the Claimant was required to strictly adhere to the group banking and collections policy.

[137] The Claimant during cross examination admits that the collection was not banked in a timely manner.

[138] In this regard the Claimant was cross examined as follows:

" Q : Refer to Q & A 14 and 19 CLWS-1 and page 47 COB-2. It is true that you did not dispute that the daily car park collections between November 2014 and 13.01.2015 were not banked in a timely manner?

A : Yes.

Q : You did not bank in a timely manner as this is evident in your answer to question 19 CLWS-1 and your statement dated 24.02.2015 page 16 COB?

A : Yes."

[139] Based on the above evidence the Claimant has admitted that she failed to bank in the collections in a timely manner.

[140] In addition, the Claimant had admitted during cross examination that she had received emails dated 13.09.2011 at page 13 of COB-1 and 21.02.2014 at page 15 of COB-1 and was therefore privy to the Company's SOP on banking in process of collections.

[141] Therefore, based on the admission of the Claimant herself and on the evidence and admitted facts, the Company has on a balance of probabilities proven the charge against the Claimant.

The Fourth Allegation

"That you have violated the good conduct and integrity of a Cashier as mentioned in the charges above has destroyed the relationship of trust and confidence existing between employer and employee."

[142] The Claimant had pleaded guilty to the above charge at the Domestic Inquiry. (Refer page 47 of COB-2)

[143] The Claimant during cross examination confirmed that she understood the charges preferred against her and agreed she pleaded guilty to charge (d).

[144] In this regard the Claimant was cross examined as follows:

Q : So were the charges read to you?

A : No. I read it myself and gave my plea to the DI panel.

Q : So you understood the charges?

A : Yes.

Q : I put it to you after understanding the charge, you pleaded guilty to charge (d) at page 19 COB without any conditions?

A : Yes.

Q : Refer answer 13 CLWS-1 and page 47 of COB-2 with reference to your plea to charge 4 and there was no condition?

A: Yes I admitted charge 4 and there was no condition.”

[145] Therefore, based on the admission of the Claimant that she understood the charge and pleaded guilty to the said charge, the Company has on a balance of a probabilities proven the charge against the Claimant.

[146] Based on the above grounds and on the balance of probability there is no reason to doubt that the Claimant’s misconduct complaint of by the Company has been established herein. This Court holds that the Company has proven the misconduct against the Claimant.

Whether The Proven Misconduct Warranted The Punishment of Dismissal From Service?

[147] Having established the Claimant’s misconduct, the next question the Court has to consider is whether the dismissal of the Claimant was with just cause or excuse.

[148] In **Norizan Bakar V Panzana Enterprise Sdn. Bhd. [2013] 4 ILR 477** the Federal Court held:

“the Industrial Court has the jurisdiction to decide that the dismissal of the appellant was without just cause or excuse by using the doctrine of proportionality of punishment and also to decide whether the punishment of dismissal was too harsh in the circumstances when ascertaining the award under s.20(3) of the IRA.”

[149] Following **Norizan Bakar V Panzana Enerprise Sdn. Bhd.**, it is the duty of this Court to decide whether the Claimant’s act of misconduct is sufficient to justify the dismissal.

[150] In **Mohd Yusof Bin Jaafar V Nibong Tebal Paper Mill Sdn Bhd [2012] 2 ILR Pg 45**, the Industrial Court had referred to the case of **Taylor V Persons Peebles Ltd [1981] IRLR 119** where the Court held:

“In determining the reasonableness of an employer’s decision to dismiss, the proper test is

not what the policy of the employer was, but what the reaction of a reasonable employer would be in the circumstances."

[151] In **Dahaman Huri Bin Azidin V MISC Integrated Logistic Sdn Bhd**, Award No **129 of 2014**, the Industrial Court following "**Pearce V Foster [1889] 17 QBD 536**, Lord Esher MR observed:

"The rule of law is that where a person has entered into the position of servant, if he does anything incompatible with the due and faithful discharge of his duty to his master, the latter has the right to dismiss. The relation of master and servant shall be in a position to perform his duty and faithfully, and if by his own act he prevents himself from doing so, the master may dismiss him."

[152] And Lopes LJ in the same case held:

"If a servant conducts himself in a way inconsistent with the faithful discharge of his duty in the service it is misconduct which justified immediate dismissal."

[153] In **HK Ananda Travel (Malaysia) Sdn Bhd V Khor Seng Kear [2003] 3 ILR 1280** the Industrial Court held:

"Hence he should at all times be trustworthy and always mindful of the need to maintain the relationship of mutual trust and confidence reposed upon him by the Company. He also needs to be reliable."

[154] The Court considered the plea of the Claimant to act according to equity and good conscience and the substantial merits of the case based on s.30(5) of the Industrial Relations Act 1967.

[155] The Claimant in this case had contended that the Company had imposed maximum penalty against her hence Company's action was unreasonable and unconscionable. Further, the Claimant claimed that she had an unblemished record with the Company.

[156] The Company in its Statement in Reply at paragraph 22.2 and 22.6 submitted that the Company no longer reposed the necessary trust and confidence in the Claimant to carry out her duties and responsibilities in a faithful and diligent manner.

[157] COW-8 the Chief Operating Officer testified that the Claimant had a duty to ensure compliance of the Company's Policies and Procedures. However, she failed to discharge the duty entrusted on her.

[158] Further COW-8 had confirmed that due to the Claimant's gross misconduct the Company had suffered losses. Thus the Claimant betrayed the trust and confidence placed in her.

[159] At the time of dismissal the Claimant was a Cashier Cum Admin Assistant. Her job functions were as follows:

- i) To collect daily collection and issue official receipts;
- ii) Attend to walk in purchasers in regard to any queries on payment/balance inquiry;
- iii) Monitor on banking in of daily collections;
- iv) Submit Daily Cashier's Report to Executive; and
- v) To bank in collections.

[160] Clearly, from the evidence the Claimant was actively involved in financial transactions involving the Company. The Claimant was required to collect money collections and bank in the collections on behalf of the Company. Therefore, it is reasonable for the Company to expect a high standard of care and conduct from the Claimant.

[161] This Court is of the considered view that good faith and loyalty towards the employer are essential qualities of a workman.

[162] It is apparent that the company has loss trust in the Claimant following the discovery of the Claimant's gross misconduct.

[163] The very fact that the Claimant had served the Company since December 2003 shows that the Claimant has to be aware of Company's policies and its need for strict compliance and adherence thereto.

[164] In **I Bhd V KA Sandurannehru Ratnam & Anor [2004] 5 CLJ 460**, the Court held:

"In deciding whether the dismissal was without just cause what the Industrial Court had to consider was merely whether the evidence produced before it the applicant had reasonable grounds in dismissing the employee. The test to be applied in **Ferodo LTd V Barnes [1976] ICR 39** stated that:

"It must be remembered that in dismissing an employee including a dismissal where the reason is criminal conduct, the employer need only satisfy himself at the time of the dismissal, there were reasonable grounds for believing that the offence put against the employee was committed. **The test is not whether the employee did it but whether the employer acted reasonably in thinking the employee did it and whether the employer acted reasonably in subsequently dismissing him.**" **[Emphasis Added]**

[165] The Claimant was a Cashier Cum Admin Assistant, she was actively involved in daily collections of cash transactions on behalf of the Company, therefore it was reasonable for the Company to doubt the Claimant's integrity and honesty hence losing trust and confidence in the Claimant.

[166] The Claimant had no past record of misconduct. However, it was not unreasonable to dismiss an employee with an unblemished record for a single act of insolence when the misconduct is grave.

[167] In **Kartar & Sundra Singh Omnibus Co V Transport Workers Union (Award No 7 of 1970)** the Industrial Court held:

"A single act of misconduct may justify dismissal only where the misconduct is such that it goes to the root of the contractual relationship of master and servant so as to indicate an unwillingness on the part of the servant to be bound by the terms of his contract."

[168] Based on the facts and circumstances of this case the dismissal of the Claimant by the Company was fair and proportionate to the misconduct committed by her.

(G) Conclusion

[169] This Court is satisfied that on a balance of probabilities, the decision of the Company's management to dismiss the Claimant should not be disturbed. Since there is just cause or excuse for the Company's dismissal of the Claimant, this Court has decided not to interfere with the Company's decision in any way.

[170] Accordingly, the Claimant's claim is dismissed.

HANDED DOWN AND DATED THIS DAY OF 14th MARCH 2019


(BERNARD JOHN KENNY)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR