

IN THE INDUSTRIAL COURT OF MALAYSIA

CASE NO: 4/4-2991/18

BETWEEN

SHAHARUDDIN BIN ZAINUDDIN

AND

BANK PEMBANGUNAN MALAYSIA BERHAD

AWARD NO: 1249 OF 2020

BEFORE : Y.A. TUAN AUGUSTINE ANTHONY
Chairman

VENUE : Industrial Court of Malaysia, Kuala Lumpur

DATE OF REFERENCE : 29.10.2018.

**DATE OF RECEIPT OF
ORDER OF REFERENCE** : 01.11.2018.

DATES OF MENTION : 29.11.2018, 24.01.2019, 11.03.2019,
07.05.2019, 26.07.2019, 09.08.2019.

**DATES OF HEARING &
DATES OF HEARING OF
APPLICATION (HOA)** : 03.06.2019(HOA),12.06.2019(HOA),
13.06.2019(HOA),12.09.2019,13.09.2019,
25.09.2019, 26.09.2019, 27.09.2019,
02.12.2019, 04.12.2019, 23.01.2020,
04.02.2020, 12.02.2020, 20.02.2020,
25.02.2020.

REPRESENTATION

: Mr. Deepak Mahadevan & Miss Jasneeta Kaur Bhullar of Messrs Azmi Fadzly Maha & Sim, Counsel for the Claimant

Mr. Siva Kumar Kanagasabai & Miss Sara Lau Der Yin of Messrs Skrine, Counsel for the Company

THE REFERENCE

This is an order of reference dated 29.10.2018 by the Honorable Minister of Human Resources pursuant to section 20(3) of the Industrial Relations Act 1967 arising out of the alleged dismissal of **Shaharuddin Bin Zainuddin** (“Claimant”) by **Bank Pembangunan Malaysia Berhad** (“Company/Bank”) on the 30.07.2018.

AWARD

[1] The parties in this matter filed their respective written submissions dated 02.06.2020 (Bank’s Written Submissions), 02.06.2020 (Claimant’s Written Submissions & Executive Summary), 02.07.2020 (Bank’s Submissions in Reply) and 30.06.2020 (Claimant’s Reply Submissions and Executive Summary).

[2] This Court considered all the notes of proceedings in this matter, documents and the cause papers in handing down this Award namely:-

- (i) The Claimant's Statement of Case dated 20.12.2018;
- (ii) The Bank's Statement in Reply dated 10.01.2019;
- (iii) The Claimant's Rejoinder dated 24.01.2019;
- (iv) The Bank's Bundle of Documents – COB1;
- (v) The Bank's Bundle of Documents – COB2;
- (vi) The Bank's Bundle of Documents – COB3;
- (vii) The Bank's Bundle of Documents – COB4;
- (viii) The Bank's Bundle of Documents – COB5;
- (ix) The Bank's Bundle of Documents – COB6;
- (x) The Bank's Bundle of Documents – COB7;
- (xi) The Bank's Bundle of Documents – COB8;

- (xii) The Claimant's Bundle of Documents – CLB1;
- (xiii) The Claimant's Bundle of Documents – CLB2;
- (xiv) The Claimant's Bundle of Documents – CLB3;
- (xv) The Claimant's Bundle of Documents – CLB4;
- (xvi) The Claimant's Bundle of Documents – CLB5;
- (xvii) The Claimant's Bundle of Documents – CLB6;
- (xviii) The Claimant's Bundle of Documents – CLB7;
- (xix) Interim Award No. 1940/2019 dated 05.07.2019
(enclosure no 36);
- (xx) The Bank's Witness Statement – COW1 - WS;
(Mohd Nordin Che Omar)
- (xxi) The Bank's Witness Statement – COW 2 - WS;
(Suffian Bin Baharuddin)
- (xxii) The Bank's Witness Statement – COW 3 - WS;
(Nur Sabrina Binti Ahmad Nor Azam)
- (xxiii) The Bank's Witness Statement – COW 4 - WS;
(Amellia Nabila Binti Nurehsan Wambeck)

- (xxiv) The Bank's Witness Statement – COW 5 - WS;
(Norhayati Binti Yusof)

- (xxv) The Bank's Witness Statement – COW 6 - WS;
(Aider Bin Mohd)

- (xxvi) The Bank's Witness Statement – COW 7 - WS;
(Mohd Zaki Bin Abdullah)

- (xxvii) The Bank's Witness Statement – COW 8 - WS;
(Mohamad Fadzli Bin Mohamad Noor)

- (xxviii) The Claimant's Witness Statement - CLW1- WS (1) & (2);
(Shaharuddin Bin Zainuddin)

- (xxix) The Claimant's Witness Statement - CLW2 - WS (2) & (2);
(Rizal Bin Ishak)

- (xxx) The Claimant's Witness Statement – CLW 3 - WS;
(Muhammad Azraini Bin Abdul Hamid)

- (xxxi) The Claimant's Witness Statement – CLW 4 – WS;
(Marina Binti Mohd Ibrahim)

- (xxxii) The Claimant's Witness Statement – CLW 5 - WS;
(Zarina Binti Nadzimuddin)

INTRODUCTION

[3] The dispute before this Court is the claim by Shaharuddin Bin Zainuddin (“Claimant”) that he had been dismissed from his employment without just cause or excuse by Bank Pembangunan Malaysia Berhad (“Bank/Company”) on the 30.07.2018.

[4] The Bank is a development financial institution and is governed by the Development Financial Institutions Act 2002 (DFIA) and is wholly owned by the Government of Malaysia. The Claimant qualified as a Certified Chartered Accountant in 1995 and is a person with extensive work experience in the financial industry which includes Risk Management, Islamic Finance, Compliance and Financial Security and had worked in London, Middle East and had also headed compliance and financial security for Middle Eastern and African branches in more than 10 countries whilst working for Credit Agricole Corporate and Investment Bank which is a large banking group in the world. The Claimant was appointed as a member of the Bank’s Board of Directors (BOD) in February 2017 as an independent Non-Executive Director for a term of 2 years. As an independent Non-Executive Director of the BOD, the Claimant held important positions in various committees of the BOD. Amongst other, the Claimant was a

member of Credit Committee of the Board, Chairman of the Group Audit and Examination Committee, a member of the Group Risks Management Committee and a member of the Executive Committee. Around the period of June 2017, the position of the President/ Group Chief Executive Officer (P/GCEO), the highest executive position of the Bank fell vacant. By virtue of Section 6 of DFIA, the appointment of P/GCEO requires the approval of the Minister of Finance and further verification for being a fit and proper person by Bank Negara Malaysia (BNM). The Claimant satisfied both the requirement in that his appointment was approved by the Minister of Finance and he was verified a fit and proper person for the job of P/GCEO of the Bank by BNM. On the 07.09.2017, the Claimant was appointed the P/GCEO of the Bank for a fixed term contract of 3 years effective 11.09.2017 and expiring on the 10.09.2020.

[5] On the 26.04.2018, two members of the Bank's BOD that included the Chairman of the BOD, were summoned to attend a meeting with the members of BNM's Bank Supervision Department wherein during this meeting the representatives of BNM highlighted several allegations of breaches of integrity and governance by the Claimant. These allegations arose out of 3 unsigned and undated anonymous letters forwarded to Tan

Sri Muhammad Ibrahim, the Governor of BNM which alleged various issues of integrity and governance against the Claimant. These allegations were noted in a document that was provided by BNM to the members of the Bank's BOD who attended the meeting.

[6] As a consequence of the concerns raised by BNM, the Bank's BOD convened a special meeting on the 02.05.2018 in which meeting the BOD was informed of the matters of concerns raised by BNM during the meeting held between BNM and members of the BOD in attendance on the 26.04.2018. The BOD then resolved to issue a letter to the Claimant giving him an opportunity to reply to the allegations and issues raised against him. On the 08.05.2018, the Chairman of the BOD met the Claimant personally and delivered a letter dated 08.05.2018 requesting the Claimant's written response and clarification on all matters raised in the letter. Thereafter the Claimant provided his detailed written responses on the 23.05.2018 and 28.05.2018. The Claimant also provided further oral explanations and responses to the BOD on the 04.06.2018 wherein the BOD had the opportunity to put questions to the Claimant.

[7] The Bank had concerns on all the explanations given by the Claimant and ventured further by conducting its own further investigations by interviewing other officers/employees of the Bank on the 07.06.2018. On the 24.06.2018 the BOD held a meeting which resolved that the written and oral explanations by the Claimant were unacceptable and further resolved that the Claimant be issued with a show cause letter and a suspension letter. The Claimant was then issued with a show cause letter dated 25.06.2018 setting out 3 charges of misconduct involving issues relating to political donation, van sponsorship to FELDA and permitting an individual not being an employee of the Bank to participate and involve himself in the affairs of the Bank.

[8] The Claimant responded to the show cause letter of the Bank by his letter dated 02.07.2018. The BOD deliberated on the Claimant's reply to the show cause letter and took the position that the Claimant's response in his reply letter to the show cause letter was unacceptable wherein the BOD was of the view that the alleged misconducts of the Claimant had materially compromised the Claimant's fitness and propriety to hold the position of the P/GCEO which necessitated the Group Nomination & Remuneration Committee (GNRC) to conduct a Fit and Proper Assessment of the

Claimant as required under DFIA and the BNM's Fit and Proper criteria guidelines. GNRC then resolved that the Claimant had breached the Fit and Proper requirements to be the P/GCEO of the Bank and recommended to the BOD amongst other that the Claimant be removed immediately from the office of the P/GCEO pursuant to the provisions of the DFIA. The Bank by a letter dated 30.07.2018 terminated the Claimant's employment as the P/GCEO of the Bank with immediate effect. By the many explanations provided by the Claimant in this Court, the Claimant claims that he had been dismissed from his position as the P/GCEO without proper inquiry or investigations and was dismissed in haste, in bad faith without just cause or excuse. The Claimant further claims that he had by the said dismissal from employment suffered victimization and prays for reinstatement to his former position without any loss of wages, allowances, seniority, privileges and benefits. The Claimant also prays for exemplary compensation. The Bank on the other hand contends that the dismissal of the Claimant as the P/GCEO of the Bank was carried out with just cause or excuse.

[9] The Claimant gave evidence under oath and his case was further supported by the evidence of 4 other witnesses namely CLW2 (Rizal Bin Ishak, who gave evidence relating to the third allegation of misconduct

levelled against the Claimant), CLW 3 (Muhammad Azraini Bin Abdul Hamid, who is the current Group Head, Group Operations of the Bank), CLW 4 (Marina Binti Mohd Ibrahim who is the current Head of Business & Credit Audit Unit under the Group Internal Audit of the Bank) and CLW 5 (Zarina Binti Nadzimuddin who is the current General Counsel & Group Company Secretary of the Bank).

[10] The Bank's evidence was led through COW1(Mohd Nordin Che Omar who is the Head of Property & Administration function of the Bank), COW 2 (Suffian Bin Baharuddin who was a member of the BOD of the Bank at all material times and who was one of the BOD member who attended the meeting with BNM on the 26.04.2018 where the Claimant's conduct which raised matters of integrity and governance was discussed), COW 3 (Nur Sabrina Binti Ahmad Nor Azam who is an Executive in the Group Strategic Planning Department whose job scope includes assisting in the formulating and coordinating strategic projects within the Bank), COW 4 (Amellia Nabila Binti Nurehsan Wambeck who served the Bank amongst other in the capacity as an Executive in the P/GCEO's office and reported to one Puan Nashua Binti Fauzun by assisting her with government liaison duties), COW 5 (Norhayati Binti Yusof who serves the

Bank in her capacity as the Secretary to the Chief Executive Officer and had also served in the same capacity for the Claimant whilst the Claimant was the P/GCEO), COW 6 (Aider Bin Mohd who is a clerk in the Corporate Communications Department of the Bank and whose duties amongst other is the vetting and checking of all application for sponsorships and donations), COW 7 (Mohd Zaki Bin Abdullah who is the Head of the Group Information Technology (IT) Department of the Bank whose job responsibilities is to ensure the Bank's IT strategy remains relevant according to the current standards and support the Bank's mission and vision) and COW 8 (Mohamad Fadzli Bin Mohamad Noor who worked as the personal driver for the Claimant whilst the Claimant served the Bank as the P/GCEO).

THE BANK'S CASE

[11] The Bank's case can be summarised as follows: -

- (i) The Bank is a development financial institution and is governed by the DFIA.

- (ii) To be appointed as the P/GCEO of the Bank, the Claimant must obtain the approval from the BOD of the Bank and by virtue of Section 6 of DFIA requires the approval of the Minister of Finance and verification of being fit and proper by BNM.

- (iii) The Claimant was appointed as the P/GCEO being the highest executive position of the Bank for a fixed term contract of 3 years effective 11.09.2017 until 10.09.2020.

- (iv) One of the Bank's statutory obligations is its secrecy obligations as set out in Section 119 of DFIA in relation to keeping information relating to the accounts and affairs of its customers confidential.

- (v) On the 26.04.2018, BNM summoned and held a meeting with two members of the Bank's BOD which included the Chairman of the Bank's BOD to highlight several allegations of breach of integrity and governance by the Claimant which required investigation. The allegations against the Claimant were noted in a document which was provided by BNM to the Bank's members of BOD during the meeting.

- (vi) Following the meeting with the representatives of BNM, the Bank's BOD convened a special meeting on the 02.05.2018 where the Bank's BOD was informed of the matters raised by BNM during the meeting on the 26.04.2018. The BOD then resolved as a first step to issue a letter to the Claimant to provide him with all the opportunity to reply to the allegations and issues raised against him.
- (vii) On the 08.05.2018, the Chairman of the Bank's BOD met the Claimant and delivered a letter dated 08.05.2018 personally and requested the Claimant to provide written response and clarification to the queries raised in the letter.
- (viii) By the letter dated 08.05.2018, the Claimant was requested to respond to 7 specific questions posed namely: -
- a. Donation of two vans to FELDA (FELDA Van Donation),
 - b. The alleged donation of RM80,000.00 to a "Back to School" programme organized by the Barisan Nasional

Backbenchers Club (BNBBC) now known as the BNBBC
Donation,

c. The alleged donation of bicycles to Gerakan Wawasan
Malaysia,

d. The alleged participation of non-Bank staff during the
Bank's Senior Management Retreat at Tanah Aina,

e. The alleged involvement of one En. Rizal bin Ishak (CLW-
2) in the Bank's affairs,

f. The qualifications of Puan Nashua Binti Fauzun , who was
the Claimant's Special Officer,

g. The Claimant's alleged usage of the Bank's pool cars and
pool drivers.

(ix) Based on the Claimant's written responses dated 23.05.2018 and
28.05.2018 together with the supporting documents and further
oral explanation to the BOD on the 04.06.2018, the BOD of the

Bank decided to conduct further investigation on the allegations and issues pertaining to the Claimant's conduct.

- (x) The investigations of the BOD of the Bank included the interviews it carried out with key personnel of the Bank on the 07.06.2018 which included En. Yasir Abdul Rahman (the Chief Human Resources Officer of the Bank), En. Razali Hassan (Chief of Legal and Governance), Puan Afidah Mogh Ghazali (Chief Financial Officer), Encik Zulkeefli Mad Karim (Head of Finance), Encik Azrul Azwar (Head of Strategic Planning and Puan Anita Ramly (Vice President II, Corporate Communication).

- (xi) The BOD then held a meeting on the 24.06.2018 and resolved that the written and oral responses by the Claimant were unacceptable and further resolved that a Show Cause Letter and a suspension letter be sent to the Claimant. Thereafter a Show Cause Letter dated 25.06.2018 was sent to the Claimant setting out 3 charges of misconduct relating to the Political Donation, Van Sponsorship and Rizal Bin Ishak's involvement in the Bank's affairs.

- (xii) The Claimant responded to the Show Cause Letter by his reply dated 02.07.2018.

- (xiii) The BOD members had informal meetings on the 09.07.2018 to deliberate the Claimant's response and to decide on the next step. The consensus after deliberation was that the Claimant's response as contained in the Reply to the Show Cause Letter in relation to all the 3 charges of misconduct was unacceptable because of several information and allegation/misconduct which may materially compromise the Claimant's fitness and propriety to hold the position of P/GCEO.

- (xiv) Thereafter the Bank's GNRC held a meeting on the 19.07.2018 to deliberate whether the Claimant was still fit and proper to hold the position of P/GCEO of the Bank as required under DFIA and the relevant BNM Fit and Proper criteria guidelines.

- (xv) After deliberations the GNRC resolved that the Claimant had breached the Fit and Proper requirements under DFIA and BNM Fit and Proper criteria guidelines as required of the Claimant.

(xvi) In view of the GNRC's position that it had taken against the Claimant, the GNRC recommended to the BOD, the followings: -

a. The Claimant no longer fulfils the "fit and proper" requirement for the P/GCEO's position due to his non-compliance of the fit and proper requirements under the First Schedule of DFIA resulting in a breach of Section 6A of DFIA.

b. That the Claimant shall immediately cease to hold the position of P/GCEO and cease to act in such capacity in view of his non-compliance in line with Section 8(1)(b) of DFIA.

c. That the Claimant be removed immediately from the office of P/GCEO in line with Section 8(1A)(b) of DFIA.

(xvii) On the 28.07.2018 the BOD reviewed the GNRC's recommendation and deliberated on whether the Claimant was still fit and proper to hold the position of P/GCEO and found that the Claimant no longer satisfied the fit and proper criteria under the First Schedule of DFIA and the relevant BNM Fit and Proper criteria guidelines.

(xviii) In view of the findings of the Bank's BOD, the Bank then terminated the Claimant from his employment as the P/GCEO of the Bank with immediate effect by sending a letter of termination dated 30.07.2018.

(xix) It is critical for the Bank that the Claimant holding the highest executive position of P/GCEO of the Bank must demonstrate personal qualities such as honesty, integrity, trustworthiness, diligence, independence of mind and fairness and must further show a disciplined and on-going commitment to high ethical standards and corporate standards of governance which the Claimant failed to show and this had severely compromised the integrity and corporate governance standards of the Bank.

(xx) The Claimant fail to comply with the Bank's rules, policies and procedures at a very basic level.

(xxi) As a consequence, the dismissal of the Claimant from his position as the P/GCEO of the Bank was done with just cause or excuse.

THE CLAIMANT'S CASE

[12] The Claimant's case can be summarised as follows: -

- (i) The Claimant has over 20 years of global experience specialising in risk management, governance and control arising out of his role in the areas of banking, finance and private equity industries in London, Middle East, Africa and Malaysia. The Claimant qualified as a Certified Chartered Accountant sometime in 1995.

- (ii) In the year 2012, the Claimant returned to Malaysia under the Talent Corp programme organised by the Government of Malaysia and here in Malaysia he co-founded a business venture that involved corporate finance advisory and private equity which was licensed by Securities Commission.

- (iii) The Claimant was then, in September 2016 appointed as the director and member of the Board of Directors at Alliance Islamic Bank.

- (iv) Arising out of an interview conducted on or about November 2016 by the GNRC of the Bank and after being confirmed fit and proper to hold the position of Director of the Bank by BNM, on the 13.02.2017, the Claimant was appointed as a member of the Board of Directors (BOD) of the Bank as an Independent Non-Executive director for a term of 2 years. In the capacity as the Director of the Bank and member of the BOD, the Claimant was also appointed to sit in various committees of the Board which included the Credit Committee of the Board, as Chairman of the Group Audit and Examination Committee, Group Risks Management Committee and Executive Committee.
- (v) While serving as the Director of the Bank, on or about June and July 2017, the Chairman of the Board approached the Claimant to accept the appointment for the position of the CEO of the Bank. BNM too confirmed that the Claimant had fulfilled the fit and proper person criteria to take up the appointment of the CEO of the Bank.
- (vi) Though the Claimant was not keen to take on the position of the CEO of the Bank, nevertheless decided to only accept the position after securing the commitment of the BOD to undertake major

transformation exercise in the Bank having realised the need for the same in the Bank.

- (vii) By a letter dated 07.09.2017, the Claimant was officially appointed as the President/Group Chief Executive Officer (P/GCEO) of the Bank for a fixed term of 3 years commencing from the 11.09.2017 to 10.09.2020 with a monthly salary of RM80,000.00 and other allowances.

- (viii) The Claimant realized that at the outset of his appointment as the P/GCEO of the Bank, there were resistance from some members of the BOD who were resisting his efforts to transform the Bank. Nevertheless, the Claimant proceeded with the transformation exercise by introducing the needed changes.

- (ix) Not even a year into his duties and responsibilities as the P/GCEO of the Bank and whilst actively proceeding with the transformation plan, it came as an absolute surprise to the Claimant that on or about 08.05.2018 the Claimant was to be handed a letter of “request for response” from the Chairman of the BOD, detailing 7

allegations against the Claimant originating from anonymous sources which required clarification from the Claimant (please see para viii of the Company's case on the 7 allegations).

- (x) The Claimant thereafter realised that the BOD was treating this request for response in a hostile manner what more when the BOD/Bank was willing to ignore its own Whistle Blowing Policy and Procedure which had made it clear that all anonymous letters and complaints should not be entertained by the Bank. The Claimant claims that the Bank had made an exception in his case by commencing investigations based on anonymous letters and complaints.

- (xi) The Claimant responded to the request for response with supporting documents and detailed responses and by further oral clarification to the BOD on the 04.06.2018, however the Claimant observed that the members of BOD were hostile towards him and was not prepared to accept the explanations given by the Claimant.

- (xii) The BOD was particularly displeased with the issue of CLW2's (Rizal Bin Ishak) involvement with the Bank although the Claimant had given sufficient explanations that CLW2 was engaged in discussions and meetings for networking purposes for the benefit of the Bank.

- (xiii) It had become apparent to the Claimant that the Bank had every intention of removing him from the position of the P/GCEO and this was evident from the Show Cause Letter that was issued on the 25.06.2018 as one of the measures to remove him from the position of the P/GCEO of the Bank and the immediate humiliating treatment that he was made to endure soon after the handing of the Show Cause Letter.

- (xiv) By the letter dated 02.07.2018, the Claimant responded to the Show Cause Letter issued by the Bank. However not long after the said reply, on the 30.07.2018 the Claimant received a termination letter from the Bank informing the Claimant that he is now terminated from his position as the P/GCEO of the Bank with immediate effect.

- (xv) The Claimant claims that the Bank took no steps at all to follow and comply with any of its own procedures before deciding to terminate his services.
- (xvi) The Claimant further claims that his dismissal was done swiftly as the Bank was gaining attention from the new government that was formed after Malaysia's 14th General Elections, which new government was targeting government linked companies, mainly their boards and the past transactions that were undertaken by them.
- (xvii) The Claimant too claims that he had no knowledge of the Bank's Fit and Proper Assessment which was purportedly carried out on him and denies that he was not Fit and Proper for the position of the P/GCEO. The Claimant maintains that the Bank's Fit and Proper Assessment carried out on him was fundamentally flawed and the entire process leading to the termination of the Claimant was tainted with mala fide.

(xviii) The Claimant now states that he had been victimized by the Bank and that his dismissal was carried without just cause or excuse and prays for reinstatement to his former position without any loss of wages, allowances, benefits and privileges.

THE LAW

THE ROLE AND FUNCTION OF THIS COURT IN DETERMINING THE DISPUTE BETWEEN THE PARTIES.

[13] The role of the Industrial Court under section 20 of the Industrial Relations Act 1967 is succinctly explained in the case ***Milan Auto Sdn. Bhd. v. Wong Seh Yen*** [1995] 4 CLJ 449, his Lordship Justice Tan Sri Haji Mohd Azmi bin Kamaruddin FCJ delivering the judgment of the Federal Court had the occasion to state the following:-

“As pointed out by this Court recently in Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. & Another Appeal [1995] 3 CLJ 344; [1995] 2 MLJ 753, the function of the Industrial Court in dismissal cases on a reference under s. 20 is two-fold firstly, to determine whether the misconduct complained of by the employer has been established, and secondly whether the proven misconduct constitutes just cause or

excuse for the dismissal. Failure to determine these issues on the merits would be a jurisdictional error ...”

[14] Also in the case of **K A Sanduran Nehru Ratnam v. I-Berhad [2007] 1 CLJ 347** where the Federal Court again reiterated the function of the Industrial Court:-

*“The main and only function of the Industrial Court in dealing with a reference under s. 20 of the Industrial Relations Act 1967 is to determine whether the misconduct or **irregularities** complained of by the management as to the grounds of dismissal were in fact committed by the workman. If so, whether such grounds constitute just cause and excuse for the dismissal.”*

The Burden of Proof

[15] The law is settled in cases where the dismissal is caused by the Company. It follows that whenever the Company caused the dismissal of the workman, it is the Company that must now discharge the burden of proof that the dismissal is with just cause or excuse.

[16] This long settled principle was demonstrated in the case of **Ireka Construction Berhad v. Chantiravathana/ISubramaniam James [1995] 2 ILR 11** where the Court opined that :-

*“It is a basic principle of industrial jurisprudence 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 to prove that he has just cause and excuse for taking the decision to impose the disciplinary measure of dismissal upon the employee. The just cause must be, either a misconduct, negligence or **poor performance** based on the facts of the case.”*

The Standard of Proof

[17] In the case of **Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314** the court made it clear 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.”

The Bank’s request for response and clarifications from the Claimant.

[18] It is the Bank’s case that on the 26.04.2018, BNM summoned and held a meeting with two members of the Bank’s BOD that included the Chairman of the BOD to highlight several allegations of breach of integrity and governance against the Claimant which required investigation. Following the meeting with BNM on the 26.04.2018 and arising out of the Bank’s BOD’s specially convened meeting on the 02.05.2018 wherein the BOD then resolved as a first step to issue a letter to the Claimant to provide him with all the opportunity to reply to the allegations and issues raise against him, the Chairman of the Bank’s BOD met the Claimant and

delivered a letter dated 08.05.2018 personally and requested the Claimant to provide written response and clarification to 7 questions raised namely :-

- a. Donation of two vans to FELDA (FELDA Van Donation),
- b. The alleged donation of RM80,000.00 to a “Back to School” programme organized by the Barisan Nasional Backbenchers Club (BNBBC) no known as the BNBBC Donation,
- c. The alleged donation of bicycles to Gerakan Wawasan Malaysia,
- d. The alleged participation of non-Bank staff during the Bank’s Senior Management Retreat at Tanah Aina,
- f. The alleged involvement of one En. Rizal bin Ishak (CLW-2) in the Bank’s affairs,
- g. The qualifications of Puan Nashua Binti Fauzun , who was the Claimant’s Special Officer,

h. The Claimant's alleged usage of the Bank's pool cars and pool drivers.

[19] Based on the written response provided by the Claimant, the Bank's BOD was of the view that the responses were unacceptable and thereafter resolved to issue a Show Cause Letter with 3 specific charges of misconduct for the Claimant to answer.

Show Cause Letter and charges of misconducts against the Claimant

[20] It is the evidence of the Bank that as a consequence of the Claimant's alleged misconducts, the Claimant was issued with a Show Cause Letter detailing the alleged misconducts and calling for the Claimant to offer sufficient explanation. Excerpts of the Show Cause Letter dated 25.06.2018 containing the 3 alleged misconducts is produced herein for convenience:-

"Following investigations and inquiry, it has been alleged that you have committed the following misconduct in breach of your express and/or implied conditions of employment as President/Group Chief Executive Officer of Bank Pembangunan Malaysia Berhad ("Bank"):-

1. POLITICAL DONATION

1.1. That in breach of paragraphs 5.6 & 5.7 of the Bank's Anti-Bribery and Corruption Policy & Guidelines, you approved the following donations, which were political donations, from the Bank's funds to be paid into the following accounts which are influenced by political officials:-

	<i>Account</i>	<i>Political Official</i>	<i>Amount</i>
(a)	<i>Pusat Khidmat Ahli Parlimen P179 Ranau</i>	<i>YB Datuk Ewon Ebin YB Tan Sri Shahrir Samad</i>	<i>RM40,000</i>
(b)	<i>Tabung Pusat Khidmat Parlimen Saratok</i>	<i>YB William Mawan Anak Ikom</i>	<i>RM40,000</i>

You had knowledge that these Donations were intended to be used in 2 Barisan Nasional Parliamentary constituencies in respect of a program entitled " Back to School" organized by the Barisan Nasional Backbenchers Council ("BNBBC") to foster a closer relationship between BNBBC Members of Parliament and their constituents ("Donation").

1.2 That in breach of paragraph 5.7.3 of the Bank's Anti-Bribery and Corruption Policy & Guidelines, prior to approving the Donation and handing over the cheques to Tan Sri Shahrir Samad (Chairman of BNBBC), you failed to:-

(a) take reasonable steps to identify the specific intended recipients of the Donation; and/or

(b) ensure that a proper due diligence was carried out in relation to the Donation which you informed the Board of Directors was purposed at providing assistance to the 200 students form underprivileged families (per constituency).

Your actions above may amount to a breach of Section 41(5) of the Development Financial Institution Act 2002 (“DFIA”) and may further expose the Bank to action by Bank Negara Malaysia.

2. VAN SPONSORSHIP

2.1. That you abused your position and acted without authority form the Bank by effectively committing the Bank to agree to sponsor 2 vans to Lembaga Kemajuan Tanah Persekutuan’s (FELDA) 2.0 program at Lembah Bilut (“Van Sponsorship”) by publicly committing the Bank to the Van Sponsorship when you presented a mock key for the vans to the Prime Minister at the launching of the FELDA 2.0 event which was televised live on TV1 on 4 February 2018 before receiving approval from the Group Management Committee.

2.2 That following your actions described in paragraph 2.1 above, you abused your position at the Bank by presenting to the Group Management Committee, which you chaired and which comprised of your subordinates, with a fait accompli decision regarding the Van Sponsorship, giving them

no real option but to ratify the commitment you had given in relation to the Van Sponsorship.

3. RIVAL BIN ISHAK

3.1 *That in breach of your duty to the Bank and in abusing your position, you permitted one Rizal bin Ishak, who was not an employee of the Bank or otherwise properly engaged by the Bank, to participate and/or be involved in the affairs of the Bank around November 2017 and April 2018, including no limited to meeting the Bank's staff to discuss Bank related matters and being involved in discussions between the Bank in its dealings with certain third parties. Your actions, amongst others, exposed the Bank to:-*

(a) the risk of a potential leak of the Bank's confidential information; and/or

(b) the risk of the Bank breaching its secrecy obligations under Section 119 DFIA."

The Claimant's response to the Show Cause Letter & The Termination of the Claimant's employment

[21] The Claimant responded to the Show Cause Letter by his reply dated 02.07.2018. It is the Bank's contention that the Claimant's explanation

received were unsatisfactory as several information and allegation/misconducts of the Claimant had materially compromised the Claimant's fitness and propriety to hold the position of P/GCEO of the Bank and as such the Claimant was thereafter dismissed from his employment with the Bank. The termination letter dated 30.07.2018 issued to the Claimant is hereby reproduced in part for convenience.

TERMINATION FROM THE EMPLOYMENT

"We refer to our show cause letter dated 25 June 2018 and your reply dated 2 July 2018.

Having duly considered, investigated and deliberated over the allegations of misconduct set out in our show cause letter, we found your explanation to be unacceptable.

The Board of Directors has become aware of information which may materially compromise your fitness and propriety to hold the position of President/Group Chief Executive Officer. Therefore, the Group Nomination and Remuneration Committee ("GNRC") has undertaken a Fit and Proper assessment on you as required under Bank Negara Malaysia's Fit and Proper Criteria guidelines ("BNM Guidelines") and the Development Financial Institutions Act 2002 ("DFIA"). GNRC's assessment was presented to the Board of Directors. After due

consideration, deliberation and an assessment in accordance with the law, the Board of Directors has determined that you have not complied with the Fit and Proper criteria under DFIA, the BNM Guidelines and the Bank's internal policies.

In the circumstances, the Board of Directors has decided to remove you from the position of President/Group Chief Executive Officer of the Bank and to terminate your services with immediate effect. You will be paid all your contractual entitlements up to 30 July 2018.

You are required to return all BPMB property currently in your possession to the Chief Human Resource Officer as soon as possible. You are also reminded of your continuing obligations under your contract of employment.”

Evaluation of evidence and the findings of this court

Charge no:1 - Political Donation

[22] On the alleged misconduct under Charge No:1 as set out in the Show Cause letter relating to the approval of political donation i.e. the purported Barisan Nasional Backbenchers Club (BNBBC) donation in breach of the Bank's Anti-Bribery and Corruption Policy & Guidelines (ABC Policy & Guidelines) it is the Company's contention that the Claimant had approved a political donation and further had not identified the specific recipients of

the purported BNBBC donation and had not ensured that a proper due diligence was carried out before approval.

[23] It is not disputed that the Claimant in his capacity as the P/GCEO of the Bank had received a letter entitled “Program Back To School Di Peringkat Kawasan Parlimen” dated 30.11.2017 from the Ministry of Finance (MOF) which letter was signed by the then Minister of Finance II, Datuk Seri Johari Bin Abdul Ghani. The fact that this request for donation came from the Ministry of Finance is further strengthened by the evidence of COW6 who testified that the Claimant had said to COW6 ***that “MOF ini bapa kita, kenapa kalau bapa kita minta , kita tak beri”***. This letter from the Ministry of Finance laid bare the purpose and the intended beneficiaries of the donations. The Ministry of Finance’s request was to enable some 200 under privileged children to start the opening of the schooling session with adequate basic schooling necessities. Amongst other, one of the main objective envisaged in this letter is the involvement and support of the Government Linked Companies (GLC) in the corporate social responsibilities (CSR) to help and assist the communities needing financial assistance namely the people belonging to B40 group. This letter made it clear that the assistance sort was not only for the Barisan Nasional

controlled constituencies but for all parliamentary constituencies in Malaysia. After the Claimant received the letter, the Claimant wrote on the letter “diluluskan. CEO to deliver the cheque” on the 13.12.2017. This letter was then handed over to the Bank’s Group Corporate Communications (GCC) department on the 14.12.2017. Despite the words appearing in the said letter “diluluskan. CEO to deliver the cheque”, this particular request for donation had to go through the normal process of Anti Money Laundering/Counter Financing Terrorism (AML/CFT) due diligence by GCC. Thereafter the Group Compliance Verification was verified by AML/CFT Compliance, Regulatory Compliance and Legal and Governance Department of the Bank for the sponsorship for the “Back To School for Kawasan Parlimen Ranau and Kawasan Parlimen Saratok” initiative. The Group Compliance in verifying these sponsorship had this to say:-

For Kawasan Parlimen Saratok :-

“Sponsorship to a political entity contravenes with paragraph 5.6 and 5.7.2 of the Bank’s Anti Bribery and Corruption Policy which states that :.....

Given that there maybe instances where an individual holds two different positions at the same time (example : public official and political official), request made under the political capacity shall not be entertained.

However it may be allowed if the sponsorship is given to a non-political identified beneficiary. Hence after due checking and further information we found that the sponsorship is paid to the account of Tabung Khidmat Parlimen Saratok , Sarawak and not directly to account linked to a political organisation.”

For Kawasan Parlimen Ranau:-

“Sponsorship to a political entity contravenes with paragraph 5.6 and 5.7.2 of the Bank’s Anti Bribery and Corruption Policy which states that :.....

Given that there maybe instances where an individual holds two different positions at the same time (example : public official and political official), request made under the political capacity shall not be entertained.

However it may be allowed if the sponsorship is given to a non-political identified beneficiary. Hence after due checking and further information we found that the sponsorship is paid to the account of Pusat Khidmat Ahli Parlimen P179 Ranau , Sarawak and not directly to account linked to a political organisation.”

[24] The Claimant then after having satisfied that all the departments had conducted a verification process and had stated their views that the donation to Tabung Khidmat Parlimen Saratok , Sarawak and Pusat

Khidmat Ahli Parlimen P179 Ranau Sarawak were in compliance with the Bank's procedure relating to CSR, gave the final approval for the donations on the 09.01.2018. These cheques were subsequently handed over by the Claimant to Tan Sri Shahrir Bin Abdul Samad, the then BNBBBC Chairman upon the request of the then Finance Minister.

[25] It is this Court's finding that despite the words appearing that says "Diluluskan". CEO to deliver cheque", in light of the evidence adduced in Court, this notation of the Claimant nevertheless had to go through the process of Group Compliance Verification that was carried out by the various department and the outcome of the verification had been one that this donation or sponsorship was not directly linked to a political organisation thereby it will be a safe sponsorship/donation without breaching the Bank's ABC Policy and Guidelines. The word "Diluluskan". CEO to deliver cheque" did not in any way prevent or outflank the proper verification process that were carried out by the various department put in place for the verification purposes before the final approval and disbursement of the donation was made. In fact it is observed by this Court that there is no evidence in Court that had made any suggestion that the conduct of the Bank in making these donations had violated the provisions

of Section 41(5) of DFIA. The complaint against the Claimant that his action in approving the donation may amount to a breach of Section 41(5) of DFIA was also not proven by the Bank. There was not even a suggestion by BNM at any time that the conduct of the Claimant or the Bank would lead to a breach of Section 41(5) due to the purported political donation made by the Bank.

[26] This Court also makes a further finding that there is not single piece of evidence in Court that would suggest that the donation made out to Tabung Khidmat Parlimen Saratok , Sarawak and Pusat Khidmat Ahli Parlimen P179 Ranau , Sarawak for the purposes of assisting the poor children in the constituencies to start the schooling sessions were diverted to any entities or made out for any other purposes other than the original intended purposes of helping the poor school going children which had all times remained the sole objective of the donation. As such it will be an unacceptable burden to be placed on the Claimant to identify individually each and every one intended recipients of the Donation.

[27] This Court also makes a further finding that the allegation that the Claimant failed to ensure that a proper due diligence was carried out in

relation to the donation for the purposes of providing assistance to the 200 students from under privileged families is an unfounded allegation simply because the Group Compliance Verification which was done and verified by AML/CFT Compliance, Regulatory Compliance and Legal and Governance Department for the sponsorship for the “Back To School” programme had in no uncertain term stated that they have done due checking and had considered further information that had made the donation complying with the Bank’s ABC Policy and Guidelines. The Claimant’s detailed explanation in his reply dated 02.07.2018 to the show cause letter with the supporting documents clearly shows that the Claimant did not fail to take or ensure that a proper due diligence was carried out by the various department of the Bank. 5 senior officers of the Bank had reviewed the request for the donation which led to the approval of the donation in compliance with the policies and procedure of the Bank and to suggest that the Claimant had failed to ensure that a proper due diligence was carried out in relation to the donation is to this Court not an accurate and acceptable riposte on part of the Bank.

[28] This Court also finds that the steps taken by the Bank’s various department to verify the donation leading to the approval is sufficient to

show that the Claimant had not acted contrary to the interest of the Bank. There is no need for the Claimant to inform the BOD of the assessment made by COW6 that the donation is one of political donation and as such that donation must be rejected simply because COW6's assessment was overtaken by events and opinions of other more senior officers in view of the Group Compliance Verification that were carried out by other departments. Even if this Court is to believe that the Claimant had reprimanded or scolded COW6 for his assessment that purportedly went against the Claimant's wishes who was intent on making the donation, the subsequent assessment and verification done by 5 senior officers of the Bank leading to the approval of the donation did not show that any of the officers involved in the subsequent verification and approval process were at any time put under any pressure or directed by the Claimant to provide a favourable assessment and verification leading to the approval of the donation. The evidence in cross examination of COW2 confirms that the 5 senior officers namely Siti Mazlinda Sheikh Othman, Afidah Binti Ghazali, Ali Ab. Hamid, Razali Hassan and Zharif Shafiq Onn were not at any anytime under any form of pressure or unwarranted interference from the Claimant to verify and approve the donation.

[29] It is this Court's finding that the Claimant had not acted in breach of paragraph 5.7.3 of the Bank's Anti-Bribery and Corruption Policy & Guidelines prior to approving the donation and handing over the cheques to Tan Sri Shahrir Bin Abdul Samad and as a consequence this Court finds that the charge of misconduct levelled against Claimant on this charge of political donation remains unproven.

CHARGE NO:2 - VAN SPONSORSHIP

[30] By this Charge of misconduct, in essence the Bank now alleges that the Claimant had abused his position as the P/GCEO of the Bank and acted without authority when he committed the Bank to agree to sponsor 2 vans to FELDA on the 04.02.2018 for a program to assist the rural communities of Lurah Bilut and by his commitment to sponsor the said vans to FELDA, the Claimant had presented the Group Management Committee (GMC) , a fait accompli decision on the Van sponsorship which left the Bank no option but to ratify and approve the Claimant's commitment given on the 04.02.2018 to FELDA.

[31] The contemporaneous documents produced in Court makes it abundantly clear that the Claimant had an approving limit of up to

RM100,000.00. The approving authority for Group Corporate Communication (GCC) for matters relating to marketing and public relations activities inclusive of sponsorship and souvenir makes it clear that the Claimant had the approving authority of up to RM100,000.00.

[32] It is the evidence of the Claimant in Court that by a letter dated 19.01.2018, FELDA wrote to the Claimant in his capacity as the P/GCEO of the Bank for corporate sponsorship of van to be used by the rural communities of FELDA Lurah Bilut. The Claimant having the authority to approve sponsorship of the said van, gave approval for the donation of 2 vans and this approval by the Claimant was recorded on the 22.01.2018. By the letter dated 19.01.2018 for van sponsorship, FELDA did not impose that the sponsorship of the van must be of a certain value. The Claimant in approving the sponsorship of the vans too did not impose any amount to be allocated for the purchase of the vans by the Bank.

[33] The Claimant gave consistent evidence, that by the memo dated 24.01.2018, the Bank's GCC confirmed that they were in support of the van sponsorship programme and listed down the options available for the Bank's sponsorship. The GCC was in support of this sponsorship as it was

in line with this country's development with emphasis on the importance of corporate social responsibility (CSR) since this sponsorship of van will provide the needed assistance to the Orang Asli community in the FELDA Lurah Bilut area. It is common knowledge that the Orang Asli community in this country is one of the most marginalised community needing special attention and help so much so the Federal Constitution of Malaysia by Article 8(5) (c) makes special provision for the protection, wellbeing and advancement of this community. There is nothing wrong in the Claimant or the Bank's GCC in showing its enthusiasm in helping the Orang Ali community of this country in line with its CSR. In fact, it will be the right direction for the Bank in its CSR to help the Orang Asli community enthusiastically. The delight in the GCC seeking the Claimant's approval as the P/GCEO for the van contribution for the FELDA's Lurah Bilut community is manifest from the memorandum of the Bank dated 24.01.2018 itself. For convenience the excerpts of the memorandum is produced herein:-

“As an entity that emphasize on the country's development as well as the importance of corporate social responsibility, GCC would like to propose for the Bank to allocate two vans for the usage of the indigenous community in FELDA Lurah Bilut.....”

[34] The GCC by its memorandum dated 24.01.2018 further proposed 2 options for the approval of the Claimant as the P/GCEO. The Claimant granted approval for the recommendation made by GCC and chose Option 2 recommended by the GCC. The notation by the Claimant is crystal clear in that despite choosing option 2 with the high quality vans with the value of an amount of more than RM100,000.00 for the use of the Orang Asli community, the Claimant nevertheless instructed GCC to obtain the GMC's approval which had the authority to approve any sponsorship worth more than RM100,000.00. On the 15.02.2018 the Claimant signed a letter of intent dated 02.02.2018 to sponsor 2 units of vehicle to FELDA subject to the terms and conditions to be agreed upon by FELDA and the Bank. In this letter the cost of the 2 vehicles was not mentioned at all as it remained a matter that is to be agreed upon later. The letter makes it abundantly clear that it was signed subject to the terms and conditions to be agreed upon by FELDA and the Bank. Nevertheless, it must be understood at all times that the Claimant had the authority to approve the cost of vehicles up to the amount of RM100,000.00 without the need for the Claimant to obtain the GMC's approval as confirmed by COW2 in cross examination.

[35] It is the finding of this Court that it will be wholly inaccurate for the Bank to allege that the Claimant abused his position and acted without authority by publicly committing the Bank to the Van Sponsorship when the Claimant presented a mock key in the event “Majlis Pelancaran FELDA 2.0: Transformasi Rancangan FELDA” dated 04.02.2018 for which the Claimant was invited, which event was officiated by the then Prime Minister Dato’ Sri Mohd. Najib Tun Abdul Razak.

[36] The Claimant at the material time of the launching of the event “Majlis Pelancaran FELDA 2.0: Transformasi Rancangan FELDA” dated 04.02.2018 had the authority to approve any sponsorship worth not more than RM100,000.00 for which he need not seek the approval of the GMC. Further before attending the event on the 04.02.2018, the Claimant did not at any time commit to any sponsorship in the form of donation of 2 vans for an amount of more than RM100,000.00 as the letter dated 02.02.2018 signed by the Claimant on 15.02.2018 clearly shows. On the 04.02.2018 when the mock key was presented to the then Prime Minister in the event, there were no details presented or shown that the Claimant is donating on behalf of the Bank any van/vans where a known or specific value attached to the vans particularly the value amounting to more than RM100,000.00.

Thus to suggest that by presenting the mock key to the then Prime Minister, the Claimant presented the GMC with a fait accompli decision regarding the Van sponsorship amounting to more than RM100,000.00 does reflect the accurate account of the conduct of the Claimant. The value of the sponsorship was not determined in finality on the 04.02.2018. The Bank relying on the evidence of COW6 and COW4 submits that at the time of the FELDA 2.0 launch event, the Claimant had intended only to donate 2 high quality vans outside his limits of authority. With respect this Court is unable to agree with the submissions of the Bank as there is no evidence pointing irresistibly that the Claimant had such intention as at the date of the launching of the event. Further the value of the vans was not determined at all at that time. An intention to donate high quality vans does not necessarily mean that it must be above the RM100,000.00 limits of authority. Further the GMC could have always taken a stand to do what is appropriate in the circumstances if it is of the opinion that it will not commit to any van sponsorship of more than RM100,000.00. It is not too late in the day for the GMC to make that decision if it was intent on pursuing that matter in that manner. When the GMC meeting was called on the 06.02.2018 it was attended by more than 10 senior officers of the Bank. The members present during the meeting could have at least raised the

issues of concern or caution on the van sponsorship of more than RM100,000.00 if there were any such concerns but that was not the case at all as the meeting was more concerned about the role of the Bank in this CSR participation. To a question by a member of the GMC one Encik Ahmad Mochtar who is the Chief Credit Officer and Acting Chief Risk Officer, whether GCC has any policy or guidelines with regard to the CSR activities and if there is, whether the proposed purchase of the 2 units of the vans for donation is allowed under the said policy, Puan Siti Maslinda who attended the meeting by invitation confirmed that GCC do have a policy with regard to CSR and there are no provisions in the policy or guidelines prohibiting the Bank from purchasing the vans for the purposes of donation. Thus questions coming from the Acting Chief Risk Officer did raise issues of concerns and risk merely on the purchase of the vans without touching on the value of the vans and which question was adequately explained in the meeting. Having extensively deliberated on all matters regarding the donation of the vans, the GMC resolved without any objection from any attending members that the 2 units of vans costing more than RM100,000.00 to be contributed to the FELDA Lurah Bilut Community. It is clear to this Court that this is a collective decision of the GMC and to now

allege that the Claimant presented a *fait accompli* decision to this GMC will be an allegation unsubstantiated by the evidence led in Court.

[37] The Claimant, as it was clear from the evidence in this Court chose to make a remark that if a donation is to be made than such donation must be vans of high quality befitting a noble and commendable CSR intention on part of the Bank without stating that the value of the vans to be more than RM100,000.00. All the Claimant intended by his remarks was for the vans to be of high quality vans without more. It would have been wrong if the Claimant who chaired the GMC meeting was pushing or was insisting for high quality vans for an amount of more than RM100,000.00 as donation if he had some personal gain, interest or benefits accruing from it. It is clear from the evidence in Court that there was no personal gain for the Claimant in this van donation exercise as the beneficiaries who received the best that the Bank could offer in its CSR initiative were one of the most marginalised community in this country i.e. the Orang Asli. This Court can find nothing wrong in the manner in which the Claimant had conducted himself in the events leading to the Bank's van sponsorship for the FELDA 2.0 programme at Lurah Bilut in Bentong Pahang, comprising the Orang Asli community. This Court having analysed all the evidence presented, finds

that the charge of misconduct levelled against Claimant on this charge of van sponsorship is unproven to the satisfaction of this Court. Far from being a misconduct on part of the Claimant, this van sponsorship by the Bank in which the Claimant had an important role to play as the P/GCEO of the Bank without abusing his position or authority is the embodiment of genuine CSR drive beyond photo opportunities sometimes ridiculed by the public as means to promote and publicise oneself in the presence of important people.

CHARGE NO:3 - RIZAL BIN ISHAK

[38] The charge of misconduct against the Claimant in relation to Rizal Bin Ishak is one where the Claimant had allegedly involved Rizal Bin Ishak in the affairs of the Bank which posed the risk of potential leak of the Bank's confidential information and/or the risk of the Bank breaching its secrecy obligations under Section 119 of DFIA in particular Section 119 (3), (5) and (6) which states that :-

“(3) No person, who has access to any document or information relating to the affairs or account of any customer of a prescribed institution, including-

(a) the prescribed institution; or

(b) any person who is or has been a director, officer or agent of the prescribed institution,

shall disclose to another person any document or information relating to the affairs or account of any customer of the prescribed institution.

(5) No person who has any document or information which to his knowledge has been disclosed in contravention of subsection (3) shall disclose the same to any other person.

(6) Any person who contravenes subsection (3) or (5) commits an offence and shall on conviction be liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million ringgit or to both.”

[39] It is not disputed that the Claimant and Rizal Bin Ishak (CLW2) had previously worked together in an entity known as Iris Corporation Berhad. When the Claimant was appointed as the P/GCEO of the Bank, CLW2 was recommended by the Claimant to the position of Chief Transformation Officer (CTO) of the Bank. It is the evidence of the Claimant that he accepted the position of the P/GCEO of the Bank upon the Bank giving the Claimant the commitment that a major transformation of the Bank was needed. The Claimant’s extensive experience leading to his appointment as the P/GCEO was also as a result of his involvement with people like CLW2.

[40] As the Claimant had secured the commitment of the Bank to carry out a major transformation of the Bank, it will be natural to conclude that the Claimant would engage people who are known in the industry to have vast experience in the area of banking transformation. CLW2 neatly fitted into this role for the transformation of the Bank. This urgent need for the transformation of the Bank resulted in the Claimant networking with CLW2 for the purposes of harnessing CLW2's extensive networking contacts as well as the knowledge which to the Claimant's mind would be highly beneficial to the Bank. In a way, this Court can conclude that the involvement of CLW2 in the Bank was to extract as much knowledge and information from CLW2 that can be useful to the Bank as opposed to an engagement with this individual for the purposes of divulging confidential information of the Bank to CLW2 to the detriment of the Bank. The Claimant's involvement with CLW2 was never intended for the purposes of the Claimant sharing, leaking or divulging any information of the Bank with intent to compromise information relating to the affairs or account of any customer of the Bank (***Refer to the case of Robert Ti v ECM Libra Avenue Securities Sdn. Bhd. (2013) 1 ILR 112, referred in para 47 below.***).

[41] This Court had perused the minutes of the BOD's meeting dated 31.10.2017. Upon the perusal of this minutes it is clear that the BOD is fully aware that a Transformation Office under the P/GCEO office including additional manpower was needed and the BOD had as early as 24.10.2017 approved the establishment of this Transformation Office. The function of this transformation office is to formulate and implement a wide ranging and comprehensive organisational transformation and turnaround plans to set the strategy and improve the business and financial strength of the Bank. This exercise involves a comprehensive internal and external transformation programme.

[42] The need to appoint a CTO to head the Transformation Office must have been a very urgent need of the Bank to the extent that the BOD on the 31.10.2017 deliberated extensively on the suitability and other issues including any impediment against CLW2 to be appointed as the CTO. After due deliberation, within 17 minutes, the BOD resolved that CLW2's proposed appointment as the CTO is accordingly approved with the condition that prior to joining the Bank, CLW2 is required to regularise all issues in order to satisfy the financial integrity requirement for that appointment.

[43] The Claimant gave evidence that since the BOD had already approved CLW2's appointment as the CTO of the Bank which is consistent with the minutes of the BOD's meeting dated 31.10.2017, CLW2 was only then included in various meetings and discussions in preparation of his impending employment with the Bank. The Claimant gave further evidence that throughout all the meetings and discussions between the Claimant and CLW2, there were no disclosures or revelation of any information that would risk the Bank to be in breach of its secrecy obligation under Section 119 of the DFIA. The discussions and meetings with CLW2 only involved with the strategic formulation, business plans and organizational changes, proposed transactions or collaborations with third parties, the planned and proposed activities for the management or the BOD and corporate communication which were at all times never defined as confidential information by any policy or guidelines of the Bank.

[44] It is the evidence of COW2 during cross examination that the Bank had no known policy to define what are deemed as information that are confidential in nature which cannot be shared with persons other than the Bank employees. In any event if there were any such policy and guidelines, this Court would expect the Bank to itemise or list down what were the

purported confidential information of the Bank that were at risk of potential leak in the Show Cause letter itself to offer the Claimant an opportunity to respond adequately with his explanation. The Show Cause letter simply states without more that the Claimant breached his duty and abused his position by permitting CLW2 who was not an employee of the Bank to participate and or be involved in the affairs of the Bank including meeting the staff of the Bank and dealing with certain third parties that risked a potential leak of these information.

[45] Consistent with the evidence of the Claimant, CLW2 also gave evidence that the Claimant never revealed any specific confidential information of the Bank. All that was shared by the Claimant were ideas on development, trainings, networking contacts and general history of the Bank which were publicly available. COW3, another Bank's witness also confirmed during cross examination that the Claimant had not directed her to deal with CLW2 neither was there any direction to her to disclose any information of the Bank's customers to CLW2.

[46] The evidence of the Claimant is also consistent with the Bank's own document produced in this Court. The Claimant's evidence that there were

no disclosures or revelation of any information that would risk the Bank to be in breach of its secrecy obligation under Section 119 of the DFIA must be looked at and compared with the content of Show Cause letter of the Bank too. There is nothing in the Show Cause letter particularly under part 3.1 that can show to this Court that the Claimant had acted in a way that had posed the risk of the Bank breaching its secrecy obligations under Section 119 DFIA. The Bank was unable to show to this Court that the Claimant had access and in possession of documents or information relating to the affairs or account of any of its customer and had further disclosed this document or information to CLW2 or other person in breach of Section 119 of the DFIA.

[47] The only document that came close to the culpability of the Claimant which likely posed the risk of the Bank breaching its secrecy obligations under Section 119 DFIA was a document sent by the Bank's witness, COW5 to CLW2. The said document entitled "Memo on New Org Chart" contained an unsigned memorandum with two appendices which among others set out information regarding the names and status of the Bank's customers. During cross examination, COW5 confirmed that the Claimant had never instructed her to send any information of the Bank's customers to

CLW2 or other persons who are not the employees of the Bank. COW5 further confirmed during cross examination that the Claimant had only directed her to send a draft "Org Chart" that was prepared by the HR department to CLW2 and one Alvin and whatever documents which was sent out by COW5 could not be ascertained with accuracy simply because when COW5 sent out these documents she did not care to read the document that was sent out.

[48] The evidence in Court also reveals that this document "Memo on New Org Chart" was never disclosed or made known to the Claimant prior to his termination from his employment. The Claimant had no knowledge that this document was also a subject matter of the allegations of misconduct against him. If indeed the Bank was of the view that the Claimant was responsible for disclosing this information to CLW2, the Bank could have easily brought this document to the attention of the Claimant before or even after the show cause letter was issued to offer the Claimant sufficient opportunity to explain his version in his reply to the show cause letter as the Claimant remained an officer of the Bank until his dismissal but that was not the case here. The witness for the Bank, COW7's evidence will show that the Bank was only searching and/or attempting to compile evidence against

the Claimant after his termination from employment as the request for extraction of the historical activities of the email pertaining to the email exchanges between CLW2 and the Bank employees was only made after the Claimant was terminated from his employment as testified by COW7. This Court had also considered the issues relating to Banking secrecy which is a very important component of financial transaction and banking matters and to this extent had also considered the case of **Robert Ti v ECM Libra Avenue Securities Sdn. Bhd. (2013) 1 ILR 112**, referred to by the Bank. The facts of **Robert TI's** case are clearly very different from the case before this Court. The charge of misconduct in **Robert Ti's** case shows clear and precise particulars of misconduct as oppose to the case before this Court. Excerpts of Robert Ti's case facts are produced herein below for convenience:-

[11] Charge 1 (as amended before the D.I.)

That you, while employed under the company of ECM Libra Avenue Securities Sdn Bhd, admitted to Mr T. Jeyaratnam and Ms Wong Seong Cho in the morning of 21 September 2007 that you had confirmed to Ms Sharen Kaur, a reporter from the News Straits Times Press that ECM Libra Avenue Securities Sdn Bhd ("company") is the advisor for Tamco Corporate Holdings Berhad and when asked for information on a certain corporate exercise, referred her to past articles,

particularly The Edge Malaysia, June 25, 2007 ("The Edge Article") for details of a corporate exercise carried out by Tamco Corporate Holdings Berhad, later had subsequently retracted your admissions via your letter dated 5 October 2007 when you knew or ought to have known that such conduct is contrary to the express and/or implied terms of your contract of employment when you knew or ought to have known that such conduct is contrary to the express and/or implied terms of your contract of employment.

In **Robert Ti's** case the Claimant intentionally leaked information to a reporter knowing full well that such information was meant to be confidential. Similarly in the case of **Aziz Bin Ya v Malayan Banking Bhd (2019) 2 LNS 1384** , the Claimant a bank officer was asked by a friend to check on whether there were sufficient funds in the bank account of a customer of the Bank to clear a cheque that had been issued to the said friend. The Claimant in that case checked the account of the said customer and had intentionally leaked the customer details to his friend, a conduct unbecoming of a bank officer. The facts of the case in **Aziz Bin Ya** with clear particulars of the misconduct is produced herein:-

“[28] Briefly it was alleged the serious acts of misconduct was committed by the Claimant when he had on 6 occasions from 02.03.2016 to 10.03.2016 performed unauthorized inquiries on the current account belonging to M/s KI2B Niaga NS

Sdn Bhd in the CBS system as detailed in said letter using his CBS system ID No. M0302Q0 and subsequently disclosed the account's status to Encik Lim Yit Kion for the purpose of clearing a cheque favouring him, thus violating section 133(1) of Act 758.

[29] *The Claimant admitted that he had on 6 occasions made inquiries into the account of M/s K12B Niaga NS Sdn Bhd, wherein Pn. Nurizzaty is the proprietor of the said company [COB-1 p. 9]. Based on evidence Pn. Nurizzaty was a customer at the Bank's Seremban branch. She was not a customer at the Bank's Kuala Krai branch where the Claimant was working.”*

[49] The case before this Court is different since there is no evidence that the Claimant leaked any information of the Bank knowing all too well that such information is to be kept confidential at all times. The charge of misconduct itself lacks particulars of any specific information which are deemed confidential that was leaked by the Claimant to CLW2 or third parties. This Court having analysed all the evidence presented in this Court on the allegation contained in Charge No:3 relating to Rizal Bin Ishak (CLW2), finds that this charge of misconduct levelled against Claimant is not proven to the satisfaction of this Court.

[50] Now this Court will deal with the other issues that were instrumental leading to the dismissal of the Claimant as the P/GCEO of the Bank. According to COW2, the BOD agreed that there were several information, allegations and/or misconducts of the Claimant which may materially compromise the Claimant's fitness and propriety to hold the position of P/GCEO of the Bank. Hence it was necessary for GNRC (consisting of the same members of the BOD) to conduct a fit and proper assessment of the Claimant which then resolved that the Claimant had breached the Fit and Proper Assessment requirement under the DFIA and BNM Fit and Proper Criteria. After the GNRC's deliberations and recommendation, the BOD (consisting the same members from GNRC) undertook a fit and proper assessment of the Claimant. The Claimant's dismissal from his employment was as a result of a fit and proper assessment conducted by BOD which found that the Claimant no longer satisfied the fit and proper criteria under the First Schedule of the DFIA and the relevant BNM fit and proper criteria guidelines.

[51] The BOD's fit and proper assessment conducted on the Claimant involved the 3 charges of misconducts stated in the Show Cause letter which this Court had now made a finding that the Bank was unable to prove

to the satisfaction of this Court that the Claimant was guilty of the said misconducts. Apart from these 3 major alleged misconducts of the Claimant as contained in the Show Cause letter, the BOD's fit and proper assessment also delved on other matters that were not stated in the Show Cause letter neither was the Claimant required to respond to any of these allegations at any material times after the show cause letter was issued and before the BOD's fit and proper assessment carried out on the Claimant.

[52] The new allegations considered by the BOD in the fit and proper assessment are: -

- (i) The Claimant's conduct of creating a "Fear Culture at Work".
- (ii) The Claimant characteristics of "Not Recognising Authority of the BOD".
- (iii) The Claimant Not Being Free from Political Relationship which could interfere with Exercise of Judgment.
- (iv) The Claimant Misusing Pool Cars and Pool Drivers.

[53] This Court finds it puzzling that the Bank was able to list down 3 misconducts namely the political donation, van donation and matters

involving CLW2 for the Claimant to respond but fail to call upon the Claimant to respond to the above 4 new allegations raised for the first time in Court which allegation were deliberated and considered by the BOD as grounds for the dismissal of the Claimant from his employment without even calling the Claimant to respond to these allegations. This Court will now make reference to the proper course of conduct that the BOD ought to have pursued before passing judgment on the Claimant that led to his termination from employment by referring to the case of **Skypak International (M) Sdn. Bhd. v Foong Kah Tin (1987) 1 ILR 495** which also involves the dismissal of the Claimant there due to the Company being in receipt of anonymous letter also known in that case as poison pen letter and which states that :-

“In gist, the principles of natural justice in the context of an industrial disciplinary inquiry may be stated to be as follows:

(a) That the workman whose conduct or misconduct is being inquired into must have a reasonable notice of the case he has to meet.

(b) That he must have reasonable opportunity of being heard in his own defence according to the maxim 'audi partem alteram', and this includes, inter alia, the opportunity to face and challenge his accusers, witnesses, and whatever evidence there is against him.

(c) That the hearing must be by an impartial tribunal, i.e. a person who is neither directly nor indirectly the party to the case: 'nemo debet esse judex in propria causa', that is to say, no man shall sit in judgment in his own cause or that in which he has an interest.

Applying the principles to the facts and circumstances of the case, it is obvious that the Claimant was not accorded natural justice in his dismissal.

The Company submitted that it had to act in the way it did, and in the haste it did, because of the sensitivity of its business. This the Court considers to be a poor excuse and unacceptable. The Company could have suspended the Claimant first and then carried out an inquiry conforming to the methods of natural justice which are impartiality, fairness, sense of responsibility, honesty and comprehensiveness. And in the Court's view, had the Company adhered to the appropriate procedure and had Booth not acted as judge, witness and prosecutor, after having been the investigator as well, and in such haste, the result would inevitably have been that the Claimant had not committed misconduct that justified dismissal. The Court finds that the dismissal was in breach of the rules of natural justice.”

[54] The 4 new allegations against the Claimant were very serious in nature and could even be said to be more serious than the 3 charges stated in the show cause letter and it is truly perplexing as to why the Bank did not

even see it fit to list them down as alleged misconducts in the show cause letter to offer the Claimant sufficient opportunity to respond to these allegations thereby observing the basic tenets of the rules of natural justice which demands that no man shall be judged or condemned until he is sufficiently heard. Why is this Court of the view that the 4 new allegations are serious in nature? This Court observes that if the Claimant being the highest ranking executive of the Bank had allegedly committed the misconduct by creating a fear culture at work, then the resultant effect will be one where this culture will destroy camaraderie and comradeship within the Bank which is an essential component necessary for an institution to be productive. Further the alleged misconduct of the Claimant not recognising the authority of the BOD must naturally be construed as a very serious misconduct which amounts to insubordination at the highest level of the Bank. Also the purported misconduct of the Claimant not being free from political interference which could interfere in the exercise of judgment will render the Bank's role under DFIA seriously compromised even leading to criminal prosecution. The Claimant's alleged misconduct of misusing pool cars and pool drivers where the Claimant would enjoy personal benefits which he is not entitled to clearly suggest abuse of power and authority. Thus all these new allegations of misconducts are indeed very serious in

nature. And yet despite the seriousness of these allegations, the Bank did not see it fit to state or list them all in the show cause letter to offer an opportunity for the Claimant to respond to these allegations and proceeded to consider these allegations as ground for the dismissal of the Claimant. The conduct of the Bank in raising these allegations in Court now for the first time raises serious questions as to the bona fide nature of the Bank in the undertaking and conduct of the fit and proper assessment carried out against the Claimant that has led to his dismissal from his employment as the P/GCEO of the Bank wherein the same individuals/Directors of the BOD from the Bank were involved at every level of the investigation, questioning of the Claimant, deliberation and decision making process leading to the conclusion that the Claimant is not fit and proper to be the P/GCEO of the Bank. This Court will now make further reference to the recent decision in the case of ***Toh May Fook v Menang Development (M) Sdn. Bhd. (2019) 1 ILR 449*** to drive home the point that there is something seriously amiss in the manner in which the Bank had conducted itself in dismissing the Claimant from his employment. The Industrial Court in the case of ***Toh May Fook (supra)*** had the occasion to state that :-

“[33] The two essential elements of natural justice are:

(i) The rule against bias, and

(ii) That of hearing both sides.

[34] The rule against bias simply means that a CEO cannot be judge, jury and executioner and the second rule means that the employee must be given an opportunity to be heard.

[36] As said earlier, although non-compliance with the Rules of Natural Justice is not fatal, but if Companies want the Industrial Court to support their decisions then they must show that they have complied with the fundamental Rules of Natural Justice, which ensures fairness, which is the basis of the adjudication conducted by the Industrial Court under the Industrial Relations Act 1967.”

[55] In any event the Claimant gave cogent evidence in Court that he is not guilty of the 4 new allegations which were levelled against him which this Court had no hesitation in believing and accepting.

[56] On the allegation of fear culture created by the Claimant, the Claimant gave evidence that Puan Siti Maslinda and Encik Masri did not even report to the Claimant. Though Puan Siti Maslinda reported to the Claimant initially however after her re-designation she then reported to the Group Strategic

Planning Head. Encik Masri who was working in the HR department had also left the Bank. These former employees of the Bank were not called as witnesses to be cross examined on the truthfulness and veracity their allegation for this Court to make a proper finding relating to this allegation. The fit and proper assessment document presented in this Court on this allegation presents vague details which were not convincing at all. This document states that **“following investigations , information has been received from ex employees of BPMB who alleged oppressive and improper conduct”** by the Claimant by narrating very vague and unconvincing details of alleged fear culture at work shown by the Claimant. The document itself concludes by saying that these allegations ought to be considered with caution. The BOD seemed to have a distorted understanding of the meaning of fear culture. It must be emphasised that one or two isolated allegations do not create a culture. Culture in its ordinary and natural meaning denotes a pattern of entrenched behaviour which will be difficult to demolish or destroy easily and it takes time for its development. Fear Culture must be sustained acts for a prolong period of time that strikes fear in the hearts and minds of employees. There is no evidence from any of the Bank’s witnesses that the Claimant is a person demonstrative of such destructive behaviour neither did this Court having

the advantage of seeing and hearing the Claimant through the prolonged cross examination convinced that he is one who is capable of such conduct.

[57] On the allegation of not recognising the authority of the BOD, it is this Court's finding that the Claimant did not behave in a manner that can be construed as not recognising the authority of the BOD. The Claimant's evidence on the issue involving the CEP was very clear in that the BOD had informed the Claimant that in the event the Claimant did not want to disclose what transpired in the discussion and queries made by the Council of Eminent Persons (CEP), the Claimant could disclose the same to the Chairman of the BOD who was the spokesperson of the BOD. This instruction of the BOD was in fact complied with by the Claimant. Thus the issue of the Claimant not recognising the authority of the BOD is wholly inaccurate.

[58] The allegation of the Claimant not being free from political relationship which could interfere with his exercise of judgment in his duties by purely linking the Claimant to Tan Sri Shahrir Bin Abdul Samad who was the then Chairman of BNBBBC and FELDA simply because of the Van donation and the alleged political donation forming one of the charges in the show cause

letter is far-fetched argument put forth by the Bank. There is no evidence that the Claimant was at any time clouded in his judgment as the P/GCEO on account of any purported political relationship. It cannot be said with certainty that the recommendation by the Claimant for the appointment of one Puan Nashua Binti Fauzun who had worked as a special officer to Tan Sri Shahrir Bin Abdul Samad, to work in the Bank had any political involvement or interference. The recommendation was purely on ground that Puan Nashua Binti Fauzun is a valuable person for the Bank who can greatly assist the Bank in its function. The Claimant's evidence clearly show that the intention of the Claimant in recommending Puan Nashua Binti Fauzun for a job function in the Bank was to serve the best interest of the Bank and not to further any of the Claimant's personal purpose as alleged by the Bank. There is simply no evidence to support the contention by the Bank that the Claimant is not free from political relationship which could interfere with the exercise of his judgment. Further COW4's mere evidence that she had accompanied Puan Nashua Binti Fauzun and the Claimant to Parliament to meet Tan Sri Shahrir Bin Abdul Samad does not in any way suggest that the Claimant is unable to exercise his professional judgment in his duties as the P/GCEO of the Bank. Further the Claimant had not denied meeting Tan Sri Shahrir Bin Abdul Samad who was at that time the

Chairman of FELDA which is another development institution for the purposes of cooperation between the Bank and FELDA for development project within Malaysia. This Court finds that there is nothing wrong in the Claimant meeting the Chairman of FELDA to discuss development projects.

[59] On the allegation of the misuse of pool cars and pool drivers, this Court finds that the first time the Bank raised this allegation was when the Claimant was asked for clarification in the request for Response and Clarification letter dated 08.05.2018. The Claimant thereafter provided his explanation to justify that there were no misuse of the pool cars and pool drivers. The Claimant's evidence clearly shows that the use of the pool cars and pool drivers were not in breach of any of the Bank's policy and this is not disputed by the Bank. Despite there being no prohibition for the use of these pool cars and pool drivers, the Claimant nevertheless went further to seek clarification from the HR Department, Administration Department and the Legal Department who have all said that there is no bar to the use of the pool cars and pool drivers. The Claimant also received written confirmation that there is no restriction and prohibition to the use of the Bank's pool cars. The Bank's emails to the Claimant through one Mohd Nordin Che Omar (COW1) dated 23.05.2018 and one Razali Hassan

dated 24.05.2018 is ample proof that the Claimant had no intention of misusing the pool cars and pool drivers neither did the Claimant misuse the pool cars and pool drivers.

[60] The Show Cause letter that came after the explanation given by the Claimant revealed allegations of misconducts wherein this allegation of misuse of pool cars and pool driver was conspicuously missing. If the explanation of the Claimant was unacceptable to the Bank, then it would have been incumbent on part of the Bank to have also included the purported misuse of Bank's assets as one of the charge of misconduct against the Claimant in the show cause letter. That was not the case here. Thus to reconsider this alleged misconduct of misuse of the pool cars and pool drivers in the fit and proper assessment was not a wise act on part of the BOD. It would seem to this Court that it was not the Claimant who had exhibited poor judgment but on the contrary that blame of demonstrating lack of good judgment ought to fall on the shoulders of the framers of the allegations of misconduct in the fit and proper assessment document produced in Court by the Bank.

[61] The Claimant was dismissed from his employment as the P/GCEO of the Bank based on the fit and proper assessment carried out on him by the BOD. The fit and proper assessment purportedly carried out on the Claimant by the BOD had in addition to the 3 charges of misconduct spelt out in the Show Cause letter also contained other allegations including the 4 new allegations and further allegations of Breach of DFIA and failure to comply with Internal Procedure. The Claimant was totally unaware of the fit and proper assessment that was carried out on him which included many allegations that the Claimant was unaware of and was not even given a chance to explain. Even at the time of being in receipt of his termination letter dated 30.07.2018, the Claimant was kept in the dark of the real reason for his dismissal from the Bank apart from the general comments that the Board of Directors had become aware of information which may materially compromise the Claimant's fitness and propriety to hold the position of P/GCEO ostensibly arising out of the 3 charges of misconduct stated in the Show Cause letter. The perusal of the termination letter makes it abundantly clear that even on the day of termination from employment, the Claimant was kept in the dark on all the real reasons for his termination from employment which is now known to contain more than the allegations contained in the Show Cause letter. It is only during the course of the

conduct of this case in Court, the Claimant became aware of the whole list of reasons for his termination from employment with the Bank. For convenience relevant excerpts of the termination letter is produced herein again:-

“ Having duly considered , investigated and deliberated over the allegations of misconduct set out in our show cause letter, we found your explanation to be unacceptable.....

The Board of Directors has become aware of information which may materially compromise your fitness and propriety to hold the position of President/ Group Chief Executive Officer..... Therefore the Group Nomination and Remuneration Committee (GNRC) has undertaken a Fit and Proper assessment on you..... GNRC’s assessment was presented to the Board of Directors. After due consideration, deliberation and assessment in accordance with the law, the Board of Directors has determined that you have not complied with the Fit and Proper criteria under DFIA, the BNM Guidelines and the Bank’s internal policies.”

[62] It is the view of this Court that a workman who is being dismissed from employment ought to be duly informed of the reason for the dismissal with sufficient particulars so as to offer him an opportunity to understand the nature and seriousness of the charges of misconduct committed by him

thereby in appropriate circumstances the workman may even decide to give the matter a rest without going further if he is convinced that the decision to dismiss him was not actuated by malice. If the workman is not given adequate particulars and reasons for the dismissal, then it may burden him to take the matter to a different forum and this may cause the enquiry of the reasons for the dismissal and in unique circumstances like in the present case, the workman may even be shocked to discover that the reasons for his dismissal were for matters that he is totally unaware of and was not even offered an opportunity to defend himself. It will be a sorry state of affair for a man to be condemned for reasons not known to him.

[63] The Bank's action against the Claimant smacks victimisation and this is manifestly clear by looking at the combined weight of the evidence before this Court wherein the contentious pleaded grounds of the Bank remains unproven. This Court will now make reference to the pleaded case of the Bank in the Statement In Reply (SIR) produced in verbatim here. Part of paragraph 20 reads as follows: -

“.....The Bank will submit that having breached the Bank's internal policies and his authority limit before the general elections to gain favour with the then Chairman of the Barisan Nasional Backbencers Council (BNBBC) and the

then Prime Minister, the Claimant appears keen, based on his allegations in the Statement of Case, after the general elections outcome on 8.5.2018, to then use his position as P/GCEO to gain favour with the new Government by pretending to show his utmost cooperation to the CEP while disregarding his duties and obligations to the Bank.”

[64] This Court having analysed all the evidence presented before this Court, is unable to see how the Claimant breached the Bank’s policies and his authority limit before the 14th general elections of Malaysia to gain favour with Tan Sri Sharir Bin Abdul Samad (who was also the then Chairman of Felda apart from his position as the then Chairman of BNBBBC) and the then Prime Minister of Malaysia. What favour did the Claimant intended or attempted to gain from the then Prime Minister of Malaysia and the then Chairman of Felda is not proven at all by the Bank. The Claimant who reluctantly accepted the position of P/GCEO of the Bank on the 11.09.2017 had a very comfortable security of a 3 years fixed term contract of employment until 10.09.2020 as the highest ranking and most senior executive of the Bank. What more that the Claimant could ask for other than this position that this Court is not made aware of by the evidence tendered in Court. Even when the new Government took over from the previous Government after the 14th general elections, the Claimant still had a very

comfortable remaining period of his fixed term contract for a period of more than 2 years. So how was the Claimant pretending to show his utmost cooperation to the CEP while disregarding his duties and obligations to the Bank to gain favour with the new Government? Clearly the Claimant is a victim of these serious yet unfounded allegations.

[65] This Court also finds that the Claimant had been given exceedingly unfair treatment by the Bank at every given time ever since the emergence of the anonymous letters that listed a whole range of allegations against the Claimant emanating from the work of unknown author/authors. There is no dispute that when COW2 and the Chairman of BOD met BNM officers on the 26.04.2018, it was brought to their attention that there were 3 unsigned and undated allegation letters against the Claimant. The allegations that the Claimant had to respond after receiving the letter for clarifications and show cause letter from the Bank in this case originated from these 3 unsigned and undated anonymous letters. The Bank's representatives attending the meeting with BNM officers instead of informing BNM of the Bank's internal policy namely the Whistle Blowing Policy which was already in force at that time that ensures that Bank will not entertain any anonymous complaints and allegations unless the whistle-blower discloses his or her identity when

making the complaint proceeded to entertain the contents of the anonymous letters.

[66] The contents of the 3 undated and unsigned anonymous letters were very detailed. The information revealed by BNM that were from these anonymous letters were ostensibly high level information, matters, deliberations and decision making process of the Bank. Surely some individual/s from within the Bank were disseminating these information and affairs of the Bank to third parties (though the accuracy and veracity of it is yet to be determined) as no one can be sure how far and wide these letters had been or can be circulated. Such unverified and unauthorised dissemination of the Bank's information to third parties by improper means ought to have been a great concern for the Bank necessitating the Bank to thereafter to enquire, investigate and deliberate on such leakage of the Bank's internal information to third parties and take these individuals to task as was done in the case of **Robert Ti's Case (supra)** but the Bank did not show its concern on this porous information finding its way to third parties but instead was more interested in going after the Claimant who was a victim of smear activities arising out of the Bank employee/s itself (**see BNM's comments at paragraph 67 below**).

[67] It is undisputed that the Bank has a very strict and comprehensive Anti-Bribery and Corruption Policy and Guideline. The policy statement of this Policy and Guideline makes it very clear in that the Bank shall be committed to the highest standards of ethical and legal conduct. That being so, the Bank must strictly adhere to the scope and applicability of this Policy and Guideline without picking and choosing whatever provisions of the Policy and Guideline which suits them whilst ignoring or disregarding other equally important provisions of the Policy and Guideline which are reduced in writing and articulated to achieve a fair and just outcome. One of the provision (paragraph 3.4) in this Policy and Guideline in line with upholding the highest standards of ethical and legal conduct of the Bank is for the Bank to read this Policy and Guideline together with the amongst other the Whistle Blowing Policy and Guideline of the Bank which had been painstakingly prepared and put in place to achieve its overall objective. The Bank's Policy on Whistle Blowing is yet another policy that starts with a policy statement for the Bank to be committed to the highest standards of ethical and legal conduct. One of the fundamental ethical and legal standards of the Bank by its own Policy on Whistle Blowing under paragraph 6.1 is to ensure that the Bank adopts a 'non anonymous' reporting whereby a whistle-blower needs to disclose his identity and

contact details in making disclosure. Any anonymous disclosure will not be entertained.

[68] It is glaring in this case that while the Bank was very swift in its action to deal with the Claimant against his rights and interest by making available all laws and provisions in the Bank's Guideline and Policy, the Bank was nevertheless less interested to deal with those responsible for sending out the anonymous letters to third parties apart from a remark by a member of the BOD that allegation letters were sent to BNM and that the staff do not have sufficient trust in the whistleblowing framework and process of the Bank. Had the Bank aggressively and forcefully pursued the parties and employees responsible for disseminating the Bank's internal information and affairs to third parties in view of the whistle blowing policy of the Bank, then there will be reasons to believe that the Bank was acting fairly against all its employees and in particular the Claimant. The treatment accorded to the Claimant by the Bank only suggest that the Bank was acting less than fairly against the Claimant. Further, and with respect this Court is also unable to agree with the submissions of the Bank that there is no anonymity to the allegations as the purported source of the information was BNM. This Court finds that the information contained in the 3 unsigned and undated

letters were matters relating to the affairs of the Bank and BNM was only a recipient of these information through anonymous letters. One cannot be sure to whom else these anonymous letters were disseminated to.

[69] It must be stated here that during the meeting with the BNM officers, BNM also made certain observation and remarked on the 3 anonymous letters touching on the Claimant. Some of the remarks of BNM reduced in writing by the Bank as the minutes of the meeting dated 26.04.2018 and signed by COW2 is reproduced here in verbatim:-

“BNM Comments

P/GCEO may show high commitment to transform and improve BPMB and is seen to be a man in a hurry.....

BNM felt that the various allegation letters were a concerted effort by staff of BPMB who may be unhappy with the P/GCEO's strict and non-nonsense management style, demand for urgency and accountability. Unhappy staff may attempt to seek for any weaknesses and alleged wrong doing by P/GCEO in retaliation.....”

[70] Further this Court upon analysing the evidence presented in this Court is also of the view that the hostility of the BOD towards the Claimant was apparent judging from the documented minutes of the Bank's BOD meeting dated 04.06.2018 and the **“Attachment 1 – Verbatim transcript of conversation between BOD and P/GCEO at BOD meeting on 4 June 2018”** wherein in this meeting there were suggestions that the BOD was even prepared to disregard its own rules and procedures when dealing with issues arising in the Bank that touched on the Claimant. In this document it was recorded a member of the BOD saying ***“I mean, forget about the procedure, you yourself, when you are caught in that situation, don't you think it was a political donation?”*** The Claimant of course is guided by the internal procedures and rules. If the BOD is of the view that there are rules and procedures that are lacking in clarity, punishing the Claimant for following the rules and procedure should necessarily be viewed as unfair, unjust and unacceptable acts on part of the Bank against the Claimant.

[71] It is not disputed that the Claimant is a person with more than 20 years' global working experience in the area of banking, finance and private equity industries with no known tainted reputation relating to his professional integrity. Upon his return to Malaysia, in September 2016, the

Claimant was appointed as a Director and a member of the Board of Directors of Alliance Islamic Bank after undergoing a fit and proper assessment by Alliance Islamic Bank and Bank Negara Malaysia and found to be fit and proper for the role since 01.09.2016. Thereafter before the Claimant joined the Bank as a non-executive independent director on the 13.02.2017, again the Claimant had to undergo the fit and proper assessment by the Bank and Bank Negara Malaysia and found to be fit and proper for the role. Some 7 months later, to be appointed as the P/GCEO of the Bank, the Claimant was found to be fit and proper by the Bank and Bank Negara Malaysia again. With 3 fit and proper assessment in about 2 years all pointing to the Claimant being fit and proper for the senior role in the Banking industry, surely the Claimant would have expected out of all person or persons, the members of the BOD to be the first to come in defence of his unblemished reputation painstakingly build over more than 2 decades against the onslaught on his reputation by anonymous letters immediately after his appointment as the P/GCEO of the Bank what more when the Claimant had worked tirelessly to bring significant improvement in the Bank's performance . Regrettably for the Claimant, hostility from the BOD is what the Claimant had to endure when the Claimant attempted to clear his name against the allegations made against him.

[72] Apart from what this Court had already found in the forgoing paragraphs, the Claimant being the highest ranking executive of the Bank is responsible for the dealings of the Bank which involves vast sums of monies to the tune of billions of Malaysian Ringgit, yet all the unproven charges and allegations against the Claimant could not pinpoint a single ringgit of abuse what more where the Bank is unable to show that the Claimant had any personal gain or interest in whatever decision making process that he was involved in. None of the Claimant's actions relating to all the unproven allegations against him benefited the Claimant personally or benefited any person in close relationship with him. To this extent the facts of case submitted by the Bank namely **Stanley Savuriyar v Digi Telecommunications Sdn. Bhd (2013) 2 LNS 0856** are markedly different in nature and not useful to point to the culpability of the Claimant. In **Stanley Savuriyar's case** the Court made a fact finding in the following manner :-

"The claimant occupied a senior post in the company's Procurement Department, which handled contracts and tenders involving the company's vendors and other suppliers. This is the reason COE2 called it a high risk department. As such, the staff from the department had to attend courses on integrity, where the company's code of conduct was explained to them. In the present case, the

company was alerted to claimant's corrupt activities by an anonymous e-mail. This led the company to check on the claimant's overseas trips. The company discovered that the claimant had in June 2008 attended the Communication Asia Conference at the invitation of one of the company's vendors namely Emerson Network Power [Malaysia] Sdn. Bhd. When the claimant was questioned as who paid for the trip, he initially claimed that he paid for it. But subsequent investigation by the company established that Emerson had paid for the flight ticket, hotel accommodation and meals as stated in the charge. The company took exception to the claimant accepting the sponsored trip without first obtaining clearance from the company. The reason is obvious in that the company did not want any employee to be beholden to any vendor, as it may affect the business interests of the company.

The company's case is that the claimant had gone on a trip sponsored by Emerson and that he had not obtained the express permission of his Head of Department. This has been proved.....'

[73] The evidence in Court shows that the unproven charges against the Claimant and the manner in which the Bank treated the Claimant had caused the Claimant to lose more than his job as the P/GCEO of the Bank. There is ample evidence of the act of victimization against the Claimant by the Bank and this act of victimization must be corrected by this Court now.

[74] Pursuant to Section 30(5) of the Industrial Relations Act 1967 and guided by the principles of equity, good conscience and substantial merits of the case without regard to technicalities and legal forms and after having considered the totality of the facts of the case, the evidence adduced and by reasons of the established principles of industrial relations and disputes as stated above, this Court finds that the Bank had failed to prove on the balance of probabilities that the dismissal of the Claimant was with just cause or excuse.

REMEDY

[75] This Court having ruled that the Claimant was dismissed without just cause or excuse, will now consider the appropriate remedy for the Claimant. This Court had taken into account the submissions of the Bank that reinstatement of the Claimant to his former position as the P/GCEO of the Bank is not an appropriate remedy in the circumstances of this case as the Bank is governed by DFIA and the appointment of the P/GCEO is subject to the prior written approval of the Minister of Finance and further verification by BNM for being fit and proper. The combined facts of this case suggests that this case is not one that is suitable for the reinstatement of

the Claimant to his former position in the Bank. The Claimant's fixed term contract will also end on the 10.09.2020. As such the suitable remedy must be compensation in the form of back wages in the circumstances of this case.

[76] In the case of **Malayan Banking Bhd v. Mahkamah Perusahaan Malaysia & Anor [2017] 2 CLJ 70**, the High Court had opportunity to deal with the question of an employee on probation and employed on a fixed term contract wherein the court opined that :-

“[48] The issue for determination now is whether the second respondent should be treated as a probationer or one employed upon a fixed term contract for the purpose of back wages. If the former, then she would, in line with the Second Schedule to the IRA be entitled to a maximum of 12 months back wages which was what she had been awarded, but if the latter, then she would only be entitled to back wages for the remaining balance contract period of five months and two weeks.....

[54] Therefore although the second respondent was also placed on probation, her entitlement to back wages upon being unfairly dismissed has to be limited to the unexpired term of her fixed term contract. Any other construction would render the whole intent and purpose of having a fixed term contract meaningless. In light

of this, I find that the case of Thangasamy Brown is still relevant in determining the issue of back wages due to an employee employed on a fixed term contract who has been unfairly dismissed before the expiration of the said fixed term.”

[77] In the case of **Thangasamy Brown DN Gnanayutham v Pelabuhan Tanjung Pelepas Sdn. Bhd. & Anor (2009) 6CLJ 144** , the Court of Appeal had the occasion to state the following : -

“[12]..... The Industrial Court's decision on the issue of fix term contract is consistent with established principles of law. Having found that the appellant was engaged for a fixed term period of six months (commencing 1 July 2000-31 December 2000) and the contract terminating by effluxion of time on 31 December 2000, there is no question of reinstatement, but only compensation to be considered by the Industrial Court for the premature termination arising from the constructive dismissal which occurred on 25 September 2000. In the circumstances, we are unanimous that the Industrial Court correctly awarded compensation consisting of the remuneration the appellant would have earned for the balance sum of the contract.....”

[78] This Court had also considered the case of **Toh May Fook v Menang Development (M) Sdn. Bhd. (2019) 1 ILR 449 :-**

“The claimant was on a fixed term contract for 3 years from 22 April 2016 until 21 April 2019 and his contract was terminated on 18 July 2016, leaving a balance of 33 months. But it will be capped at 24 months. [See Second Schedule, s. (1) of the Act]”

[79] The Claimant’s entitlement for compensation in the form of back wages must also be in line with the statutory limits under Section 30(6A) Industrial Relations Act 1967 and the factors specified in the Second Schedule therein which states:-

“1. In the event that backwages are to be given, such backwages shall not exceed twenty-four months’ backwages from the date of dismissal based on the last-drawn salary of the person who has been dismissed without just cause or excuse;

3. Where there is post-dismissal earnings, a percentage of such earnings, to be decided by the Court, shall be deducted from the backwages given;”

[80] Based on the above cases referred, this Court holds that the computation of compensation in the form of back wages that can be awarded to the Claimant be limited to the remainder unexpired period of the

fixed term contract but that must be capped to a maximum of 24 months pursuant to the Second Schedule of the Industrial Relations Act 1967 with the necessary scaling down of the compensation if necessary for any post dismissal earnings of the Claimant and other necessary deduction if any.

[81] The remainder unexpired period of the fixed term contract in this case is 25 months and 10 days. The Claimant is entitled to back wages upon being dismissed without just cause or excuse which has to be limited to the unexpired term of his fixed term contract subject to the Second Schedule.

[82] In assessing the quantum of back wages, this Court is bound by the principle laid down in the case of ***Dr James Alfred (Sabah) V. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor*** [2001] 3 CLJ 541 where his Lordship Justice Tan Sri Steve Shim CJ (Sabah & Sarawak) in delivering the judgment of the Federal Court opined:-

“In our view, it is in line with equity and good conscience that the Industrial Court, in assessing quantum of backwages, should take into account the fact, if

*established by evidence or admitted, that the workman has been gainfully employed elsewhere after his dismissal. Failure to do so constitutes a jurisdictional error of law. Certiorari will therefore lie to rectify it. **Of course, taking into account of such employment after dismissal does not necessarily mean that the Industrial Court has to conduct a mathematical exercise in deduction.** What is important is that the Industrial Court, in the exercise of its discretion in assessing the quantum of backwages, should take into account all relevant matters including the fact, where it exists, that the workman has been gainfully employed elsewhere after his dismissal. This discretion is in the nature of a decision-making process".(emphasize is this Court's)."*

[83] The Claimant had given evidence that he was not able to apply for any positions in any Bank in Malaysia. The moment the Claimant was dismissed, he was blacklisted by Bank Negara Malaysia. The dismissal from the Bank had affected the ability of the Claimant of the secure any full time employment within the Banking Industry or in any other industry in Malaysia. The evidence in Court shows that the Claimant had no income or earning after he was dismissed from his employment with the Bank. Having considered all the facts of case on the appropriate sum to be awarded and after taking into account that there were no post dismissal earnings of the Claimant, this Court acting in accordance with the principles of equity, good

conscience and substantial merits of the case without regard to the technicalities and legal forms will now make an order that the Claimant is to be paid the sum of RM80,000.00 per month salary being the last drawn salary limited to a maximum of 24 months as compensation in the form of back wages calculated from the date of dismissal on 30.07.2018.

[84] This Court will also allow the Claimant's fixed allowance of RM5,300.00 per month paid by the Bank according to the terms and conditions of service in Appendix 3 of the letter of appointment dated 07.09.2017 and to be capped for a maximum of 24 months. The amount ordered by this Court will be: -

(i) 24 months x RM80,000.00 = RM1,920,000.00.

(ii) 24 months x RM5,300.00 = RM127,200.00.

Total sum Awarded = RM2,047,200.00

[85] From the above awarded sum this Court will make a deduction of an amount totalling **RM240,000.00** being the 3 months' salary paid to the Claimant in lieu of notice.

[86] Thus after making the deduction the final amount due and payable to the Claimant is RM 1,807,200.00 only.

[87] Before the final order of this Court, this Court would like to thank both the Counsel for the Bank and the Claimant for the detailed and thorough research and presentation of the case.

FINAL ORDER OF THIS COURT

[88] It is this Court's order that the Bank pays the Claimant a sum of **Ringgit Malaysia One Million Eight Hundred Seven Thousand Two Hundred (RM 1,807,200.00)** only less statutory deduction (if any) within 30 days from the date of this Award.

HANDED DOWN AND DATED THIS 3rd DAY OF SEPTEMBER 2020

-signed-

**(AUGUSTINE ANTHONY)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR**