

**INDUSTRIAL COURT OF MALAYSIA**

**CASE NO: 16/4-2044/18**

**BETWEEN**

**UMAR BIN ABDULLAH**

**AND**

**TENAGA NASIONAL BERHAD**

**AWARD NO: 2363 OF YEAR 2019**

**Before** : **Y. A. PUAN SUMATHI MURUGIAH**  
- **CHAIRMAN (sitting alone)**

**Venue** : Industrial Court of Malaysia  
Johor Branch

**Date of Reference** : 26.07.2018.

**Dates of Mention** : 10.09.2018; 08.10.2018; 17.12.2018;  
11.04.2019; 29.04.2019.

**Dates of Hearing** : 27.02.2019; 28.02.2019.

**Representation** : Mr. Mohd Ashri bin Rais and  
Mr. Mohd Yamin bin Ismail  
From Messrs Mohd Ashri Rais & Co.  
Counsels for the Claimant

Ms. Nur Elissa binti Baharudin and  
Ms. Syazwani binti Suhaimy  
From Messrs Zul Rafique & Partners  
Counsels for the Respondent

## **Reference:**

The reference under Section 20(3) of the Industrial Relations Act 1967 by the Honourable Minister of Human Resources Malaysia, is regarding the dismissal of **Umar bin Abdullah** (“the Claimant”) by **Tenaga Nasional Berhad** (“the Company”) on 07.02.2018.

## **AWARD**

### **Brief Facts**

1. The Claimant was initially employed by the Company (previously known as “*Lembaga Letrik Negara*”) as a “*Buruh Am*” with effect from 27.10.1981.
2. The Claimant’s last held position was “*Penolong Juruteknik Tingkatan Kanan “A”* (Gred TT08)”.
3. By a Notice of Inquiry dated 05.06.2017, the Claimant was required to attend a Domestic Inquiry (hereinafter referred to as “**the DI**”) on 18.07.2017 until 20.07.2017 to answer the charges of misconduct preferred against him, as stated therein. The Notice of Inquiry is as shown below:

Dasar: EN 673 3my  
Tarikh: 6/6/2017



Tenaga Nasional Berhad 000366-01  
No 129, Jalan Bangsar, 59200 Kuala Lumpur.

Tel: +6 03 2296 5566  
Fax: +6 03 2283 3686  
www.tnb.com.my

Memorandum



Ruj. Kami : TNB/JPU/P.10046166 (P)

Tarikh : 06 Jun 2017

Kepada : Umar bin Abdullah  
No. Pekerja: 10046166  
Penolong Juruteknik Tingkatan Kanan (TT08)  
Pejabat Pengurus Kawasan (Batu Pahat)  
Bahagian Pembahagian, TNB

Melalui : Pengurus Kawasan (Batu Pahat)  
Bahagian Pembahagian, TNB

Tuan,

#### SURAT PERTUDUHAN

Laporan telah diterima yang menyatakan bahawa tuan, Umar bin Abdullah, No. Pekerja: 10046166, Penolong Juruteknik Tingkatan Kanan (TT08) di Pejabat Pengurus Kawasan (Batu Pahat), Bahagian Pembahagian, TNB telah didapati melakukan salahlaku-salahlaku berikut:-

#### SALAHLAHU PERTAMA

Pada 04.09.2016 jam lebih kurang diantara 5.00 petang hingga 6.00 petang tuan telah mengambil wang tunai RM 2,500.00 daripada Encik Koh Kim Gan, Nombor Kad Pengenalan 671008-01-5133 dipremis Tokong Nin Kuan Fu Pu Chi Miao beralamat TL PM 70/4 Lot 1244 Kg, No.15, PT Besar, Jalan Keluang, Batu Pahat, Johor bagi tujuan menguruskan permohonan bekalan baru tanpa kebenaran Syarikat.

Perbuatan tuan ini adalah merupakan satu Salahlaku Berat. Mengikut Prosedur Tatatertib Tenaga Nasional Berhad Edisi Keenam 2013, tuan telah melanggar:-

#### Perkara 38, Senarai Salahlaku Berat, Lampiran "J" di muka surat 44

"Menipu atau cuba menipu, bersubahat untuk menipu atau bersubahat untuk cuba menipu harta benda Syarikat atau harta benda orang lain didalam atau di luar kawasan Syarikat"; dan/atau

#### Perkara 25, Senarai Salahlaku Berat, Lampiran 'J' di mukasurat 43

"Berkelakukan dengan sedemikian cara hingga menjatuhkan reputasi perkhidmatan atau menghilangkan kepercayaan terhadap perkhidmatan Syarikat dan/atau jawatannya sendiri"; dan/atau

#### Perkara 21, Senarai Salahlaku Berat, Lampiran 'J' di mukasurat 43

"Melakukan sesuatu kerja atau tugas di luar bidang kuasa atau tanggungjawabnya tanpa kebenaran."; dan/atau

#### Perkara 73, Senarai Salahlaku Berat, Lampiran 'J' di mukasurat 47

"Melanggar atau tidak mematuhi atau gagal mematuhi mana-mana terma dan/atau syarat perkhidmatan (tersurat dan/atau tersirat) Peraturan atau arahan atau Pekeliling Syarikat atau sebahagian daripada Peraturan atau Arahan atau Pekeliling berkenaan.

#### SALAHLAHU KEDUA

Pada 11.09.2016 jam lebih kurang diantara 9.00 pagi hingga 10.00 pagi, tuan telah mengambil wang tunai RM 2,000.00 daripada Encik Koh Kim Gan, Nombor Kad Pengenalan 671008-01-5133 dipremis Tokong Nin Kuan Fu Pu Chi Miao beralamat TL PM 70/4 Lot 1244 Kg, No.15, PT Besar, Jalan Keluang, Batu Pahat, Johor bagi tujuan menguruskan permohonan bekalan baru tanpa kebenaran Syarikat.

Perbuatan tuan ini adalah merupakan satu Salahlaku Berat. Mengikut Prosedur Tatatertib Tenaga Nasional Berhad Edisi Keenam 2013, tuan telah melanggar:-

#### Perkara 38, Senarai Salahlaku Berat, Lampiran "J" di muka surat 44

"Menipu atau cuba menipu, bersubahat untuk menipu atau bersubahat untuk cuba menipu harta benda Syarikat atau harta benda orang lain didalam atau di luar kawasan Syarikat"; dan/atau

#### Perkara 25, Senarai Salahlaku Berat, Lampiran 'J' di mukasurat 43

"Berkelakukan dengan sedemikian cara hingga menjatuhkan reputasi perkhidmatan atau menghilangkan kepercayaan terhadap perkhidmatan Syarikat dan/atau jawatannya sendiri"; dan/atau

#### Perkara 21, Senarai Salahlaku Berat, Lampiran 'J' di mukasurat 43

"Melakukan sesuatu kerja atau tugas di luar bidang kuasa atau tanggungjawabnya tanpa kebenaran."; dan/atau

#### Perkara 73, Senarai Salahlaku Berat, Lampiran 'J' di mukasurat 47

"Melanggar atau tidak mematuhi atau gagal mematuhi mana-mana terma dan/atau syarat perkhidmatan (tersurat dan/atau tersirat) Peraturan atau arahan atau Pekeliling Syarikat atau sebahagian daripada Peraturan atau Arahan atau Pekeliling berkenaan.

#### SALAHLAHU KETIGA

Pada 20.10.2016 jam lebih kurang diantara 2.00 petang hingga 5.00 petang, tuan telah didapati membuat sambungan elektrik secara terus tanpa menggunakan meter TNB dipremis Tokong Nin Kuan Fu Pu Chi Miao beralamat TL PM 70/4 Lot 1244 Kg, No.15, PT Besar, Jalan Keluang, Batu Pahat, Johor tanpa kebenaran Syarikat.

Perbuatan tuan ini adalah merupakan satu Salahlaku Berat. Mengikut Prosedur Tatatertib Tenaga Nasional Berhad Edisi Keenam 2013, tuan telah melanggar:-

#### Perkara 64, Senarai Salahlaku Berat, Lampiran 'J' di mukasurat 46

"Memberi Bekalan elektrik secara haram atau membuat sambungan elektrik secara haram atau membuat pemintasan haram atau mengganggu perjalanan jangka elektrik" dan/atau;

**Perkara 65, Senarai Salahlaku Berat, Lampiran 'J' di mukasurat 48**

"Mencuri atau cuba mencuri arus elektrik di rumah sendiri atau membantu atau cuba membantu orang lain mencuri arus elektrik di rumah atau premis pengguna lain." dan/atau;

**Perkara 25, Senarai Salahlaku Berat, Lampiran 'J' di mukasurat 43**

"Berkelakuan dengan sedemikian cara hingga menjatuhkan reputasi perkhidmatan atau menghilangkan kepercayaan terhadap perkhidmatan Syarikat dan/atau jawatannya sendiri.

Dengan ini, tuan adalah dikehendaki supaya menghadirkan diri ke satu Sesi Siasatan yang akan diadakan pada:

Tarikh : 18, 19 dan 20 Julai 2017 (Selasa, Rabu & Khamis)  
Masa : 9.00 pagi  
Tempat : Bilik Mesyuarat aras 2,  
Pejabat Pengurus Kawasan (Batu Pahat)  
Bahagian Pembahagian, TNB.

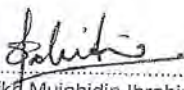
Tuan adalah dibenarkan membawa apa-apa bukti, saksi, seorang rakan sekerja (sekiranya tuan tidak menjadi mana-mana ahli kesatuan) atau seorang wakil kesatuan (sekiranya tuan adalah ahli kesatuan) untuk membantu tuan di dalam sesi ini.

Ingin ditegaskan bahawa salahlaku di atas adalah merupakan suatu salahlaku berat, dan jika disabitkan kesalahan, tuan boleh dikenakan hukuman sehingga Buang Kerja. Oleh itu, tuan adalah dinasihatkan supaya hadir ke sesi Siasatan Dalaman pada tarikh, masa dan tempat yang ditetapkan di atas.

Sekiranya tuan gagal menghadiri sesi Siasatan Dalaman yang telah ditetapkan di atas tanpa sebab dan/atau alasan yang munasabah, sesi Siasatan Dalaman tersebut akan diteruskan tanpa kehadiran tuan dan keputusan akan dibuat berdasarkan maklumat-maklumat dan/atau fakta yang akan dikemukakan oleh pihak Pegawai Pendakwa Tatatertib sahaja.

Kos kehadiran saksi tuan akan ditanggung oleh Syarikat manakala kos kehadiran Pembela/wakil tuan tidak akan ditanggung oleh Syarikat.

Sekian.

  
(Sheikh Mujahidin Ibrahim)  
PEGAWAI PENDAKWA TATATERTIB  
JABATAN PERKHIDMATAN UNDANG-UNDANG  
TENAGA NASIONAL BERHAD

4. The DI against the Claimant did not commence as scheduled on 18.07.2017 and was postponed to 28.08.2017 due to the Claimant being admitted to the hospital. The DI was then postponed the second time to 26.09.2017 because the Claimant was on medical leave.

5. The DI against the Claimant commenced on 27.09.2017 wherein the Claimant pleaded not guilty to the charges of misconduct preferred against him. The DI proceeded on 28.09.2017, 28.11.2017, 29.11.2017, 09.01.2018, 10.01.2018, 06.02.2018 and was completed on 07.02.2018.

6. The “*Jawatankuasa Tata tertib Bagi Kumpulan Bukan Eksekutif, TNB*” (Disciplinary Committee for Non-Executive Staff) (hereinafter referred to as “**the Disciplinary Committee**”) unanimously found the Claimant guilty of the charges of misconduct preferred against him.

7. Thereafter on 07.02.2018, having considered the mitigating factors submitted by the Claimant, the aggravating factors submitted by the “*Pegawai Pendakwa Tata tertib*” and all other matters, including the nature and seriousness of the Claimant’s misconduct, the Disciplinary Committee informed the Claimant of the punishment of dismissal imposed upon him.

8. By a letter dated 07.02.2018 as shown below, the Company confirmed in writing the outcome of the DI and the punishment of dismissal that was imposed upon the Claimant with effect from 07.02.2018. By the same letter, the Claimant was also informed of his right to appeal to the “*Jawatankuasa Rayuan Tata tertib Bagi Kumpulan Bukan Eksekutif TNB*” (Disciplinary Appeals Committee for Non-



Executive Staff) (hereinafter referred to as “the Disciplinary Appeals Committee”) against the punishment imposed on him within fifteen (15) days from the date of receipt of the letter.



Tenaga Nasional Berhad (200966-01)  
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Memorandum

Ruj. Kami : TNB/JI 15/11/7 (Bhg. 3)  
Tarikh : 7 Februari 2018  
Kepada : En. Umar bin Abdullah  
(No. Pekerja: 10046166)  
Penolong Juruteknik Tingkatan Kanan 'A' (TT08)  
Pejabat Pengurus Kawasan (Batu Pahat)  
Bahagian Pembahagian, TNB  
Melalui : Pengurus Kawasan (Batu Pahat)  
Bahagian Pembahagian  
Tenaga Nasional Berhad



*R.Tin  
- R.Tin  
b.  
M/n*

**SURAT KEPUTUSAN/HUKUMAN TINDAKAN TATATERTIB**

Kami merujuk kepada Surat Pertuduhan bertarikh 5 Jun 2017 yang telah dikemukakan kepada Tuan dan sesi Siasatan Dalaman yang telah diadakan pada 18 Julai 2017, 28-29 Ogos 2017, 26-28 September 2017, 31 Oktober - 1 November 2017, 28-30 November 2017, 9-11 Januari 2018 dan 6-7 Februari 2018 di Pejabat Pengurus Kawasan (Batu Pahat), Bahagian Pembahagian TNB, Batu Pahat Johor.

Setelah mendengar pertuduhan yang dibacakan, meneliti eksibit-eksibit yang dikemukakan oleh Pegawai Pendakwa dan juga setelah mendengar keterangan saksi-saksi Pegawai Pendakwa dan Pembela semasa sesi Siasatan Dalaman pada tarikh-tarikh yang disebutkan di atas dengan hujahan pengguguran Pegawai Pendakwa dan Pembela maka berdasarkan kepada beban pembuktian diatasimbangan kebarangkalian, Jawatankuasa Tatatertib TNB memutuskan Tuan bersalah terhadap kesemua pertuduhan yang dikenakan.

Setelah mendengar faktor-faktor mitigasi pihak Pembela dan agravasi pihak Pendakwa pada 7 Februari 2018, maka Jawatankuasa Tatatertib TNB, sebulat suara memutuskan Tuan dikenakan hukuman **Buang Kerja** berkuatkuasa mulai **7 Februari 2018**.

Sekiranya Tuan tidak berpuas hati dengan hukuman yang dikenakan, Tuan bolehlah membuat rayuan kepada Pengerusi Jawatankuasa Rayuan Tatatertib Bagi Kumpulan Bukan Eksekutif TNB di alamat Ketua Pegawai Pembangunan Integriti, Jabatan Integriti, Tenaga Nasional Berhad, Aras 3A, Lobi 2, Bangunan Crystal Plaza, Jalan 51A/223, 48100 Petaling Jaya di dalam tempoh lima belas (15) hari dari tarikh penerimaan surat keputusan/hukuman ini.

Sekian.

(AZIZI HABIBULLAH)  
PENGURUSI  
JAWATANKUASA TATATERTIB  
TENAGA NASIONAL BERHAD

Jabatan Perkhidmatan Undang-Undang		Tenaga Nasional Berhad	
Misles Jawatan (??)	Tarikh		
PEK (SUU)			
PD (SSC)		13/2	
PD (PBN)			
PD (CCS)			
PD (KMDP)			
RELIM			
LFT			
Transmission			
DN			
CCS			
EV			
PLAP			
Subsidiary			

**Surat Keputusan/Hukuman Tindakan Tatatertib**

En. Umar bin Abdullah  
(No. Pekerja: 10046166)  
...sambungan

AKUAN PENERIMAAN

Saya UMAR BIN ABDULLAH No. Pekerja 10046166  
mengaku telah menerima surat diatas dan faham isi kandungannya.

Tarikh: 7-2-18

Tandatangan:

s.k. Pengurus Besar  
(HR Shared Service Centre)  
Bahagian Sumber Manusia Kumpulan, TNB

s.k. Pengurus Besar Kanan  
Jabatan Perkhidmatan Undang-Undang, TNB

s.k. Ketua Pegawai Pembangunan Integriti  
Tenaga Nasional Berhad

s.k. Pengurus Besar  
(HR Business Partner - Distribution Network)  
Bahagian Sumber Manusia Kumpulan, TNB

SULTIS

9. By a letter dated 21.02.2018, the Claimant appealed to the Disciplinary Appeals Committee against the punishment of dismissal imposed on him by the Disciplinary Committee.

10. By a letter dated 23.04.2018, the Claimant was informed that his appeal was rejected and that the punishment of dismissal from service was maintained.

### **The Company's case**

11. On 20.10.2016, Special Engagement Against Losses ("**SEAL**") Team ("*Pasukan Seksyen Jaminan Hasil*"), Southern Zone made an inspection at the premise of a Chinese Temple bearing the address TL PM 70/4 Lot 1244, Kg. No. 15, PT Besar, Jalan Keluang, Batu Pahat, Johor (hereinafter referred to as "**said premise**").

12. During the said inspection on 20.10.2016, the SEAL Team, South Zone found a meter installed at the said premise with illegal electricity supply connection as the said premise was not registered in the Company's system. The SEAL Team then removed the meter from the said premise and disconnected the electricity supply.

13. The owner of the said premise, one Mr. Koh Kim Gan informed the Claimant about the inspection and removal of meter conducted by the SEAL Team. Then, on the same day which was on 20.10.2016, the Claimant had visited the said premise and fixed direct electricity connection without a meter. The electricity connection was fixed without the Company's permission or its authorisation.

14. On 07.02.2017, the SEAL Team visited the said premise for another inspection and again found illegal electricity connected without a meter. Mr. Koh Kim Gan informed the Company that he had tried to apply for user registration with the Company, however he was approached by the Claimant who promised him that he would assist in the user application with the Company and asked for a payment of RM4,500.00 to do so.

15. Having reviewed the findings of investigations conducted by the Company, specific charges of misconduct against the Claimant were drafted and an inquiry was carried out to determine whether the Claimant was guilty on all the charges preferred against him.

16. The Claimant was given the opportunity to exculpate and or defend himself against all the charges preferred against him throughout the inquiry



including adducing relevant evidence or documents to support his defence on the alleged lack of investigation by the Company.

17. Based on the findings of the DI held against the Claimant, the Company decided to dismiss the Claimant from his employment as the Company felt that the misconduct by the Claimant warranted a dismissal.

18. The Company had called five (5) witnesses to give evidence in support of its case. The witnesses are as follows:

- (i) Azizi bin Habibullah (COW-1) – “Ketua Unit Judiciary” in the Company
- (ii) Mohd Zulhairry bin Mohd Zulkipli (COW-2) – “Juruteknik Tingkatan Biasa, Seksyen Jaminan Hasil, Zon Selatan” in the Company
- (iii) Nuur ‘Aisyah binti Khairuddin (COW-3) – “Pengurus Unit Pengurusan Disiplin, Jabatan Integriti” in the Company
- (iv) Nor Halim bin Hayon (COW-4) – “Pengurus LPC Billing” in the Company
- (v) Muhamad Adam bin Ahamaddariri (COW-5) – “Jurutera Kendalian dan Senggaraan” in the Company

## The Claimant's case

19. In the Claimant's written submission, the Claimant had raised his objections to the inquiry proceedings conducted by the Company where the Company was said to have breached the principle of natural justice for the following reasons:

- (i) The Company failed to give the Claimant the opportunity and fail to remind him to call for witnesses for the inquiry;
- (ii) The Claimant was denied the right to be present and present his case before the Appeal Committee; and
- (iii) The Company failed to produce the qualification of the members in the Appeal Committee.

20. Whether the Company had succeeded in establishing all the charges drafted against the Claimant. As such, the Claimant in this case had declared and submitted that he has no case to answer and in his submission to the court had quoted the case of **UN Pandey v Hotel Marco Polo [1980] 1 MLJ 4** which states:

“On the subject of no case to answer, a summary of the practice of Court of England is to be found in the White Book at 35/7/2. The last time the practice was judicially considered is in the Court of Appeal decision in *Storey v Storey*.

There are however, two sets of circumstances under a defendant may submit that he has no case to answer. In the one case, there may be a submission that, accepting the plaintiff’s evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.

In my judgment, it would be a desirable practice in courts to allow a submission of no case to answer at the end of the plaintiff’s case, without putting the defendant to his election, whether to call evidence or not, if his submission fails. It is trite to say that we have a young legal profession and a fused one. Most are small practitioners and engage in many fields of law. The time and effort put in litigation matters are diffused. Such a practice therefore will ensure not only that there is a thorough preparation of the case before trial, but also careful presentation of it at the

hearing. Altogether, the practice will bring about a saving of costs for the parties.”

21. Since the Claimant had declared that he has no case to answer, he did not produce any witnesses to substantiate his case. The Claimant himself chose not to give any evidence. The Claimant’s written submission also made no mention of and had not addressed all the explanations, defences and statements made in his pleadings prior to the written submission. As such, the court is of the opinion that the Claimant in the light of his stand of no case to answer had chosen to abandon the issues raised in his pleadings.

### **The Domestic Inquiry (DI)**

22. The Company had conducted a DI against the Claimant on 27.09.2017, 28.09.2017, 28.11.2017, 29.11.2017, 09.01.2018, 10.01.2018, 06.02.2018 and 07.02.2018.

23. The Industrial Court is required at the onset to examine the notes of the DI and verify whether the DI was valid, whether the notes were accurate and whether a *prima facie* case has been made out against the Claimant **(Bumiputra Commerce Bank Bhd v. Mahkamah Perusahaan Malaysia & Anor [2004] 7 CLJ 77)**.

“ The Industrial Court's jurisdiction, in instances where a domestic inquiry has been held, was limited to considering whether there was a prima facie case against an employee. Thus, in the present case, the Industrial Court should have first considered whether or not the domestic inquiry was valid and the notes accurate. In the absence of such considerations, the Industrial Court's action in proceeding to decide the matter without any regard to the notes of inquiry could not be described as anything more than an error of law.”

24. The Claimant had contended that the DI was conducted in breach of the rules of Natural Justice. This court refers to the case of **Kahan Singh v. Air Asia Berhad [2015] 2 LNS 1303 (Award No. 1303 of 2015)** where the followings were stated:

“ In evaluating the process of the DI, I am minded that the decision making process must comply with the basic principle of Natural Justice. The principle of Natural Justice composed 2 pillars which has been explained by the Privy Council in **B Surinder Singh Kanda v. Government of Federation of Malaya [1962] MLJ 169** as:

- 1) The rule of hearing or **principle of audi alteram partem meaning that no one is to be condemned unheard.**



- 2) The **rule against** bias; or *nemo iudex in causa sua* meaning no one should be a judge in his own cause...”

25. The concept stated in the case of **Skypak International (M) Sdn Bhd v. Foong Kah Tin [1987] 1 ILR 495 (Award No. 161 of 1987)** is also being referred to by this court, where the followings were stated;

“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 iudex 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.”

26. The Claimant's contention that the DI was in breach of natural justice because the Company failed to give the Claimant the opportunity and fail to remind him to call for witnesses for the inquiry.

27. In **Maimunah Aminuddin's Termination of Employment, Understanding The Process at page 207**, the author had stated the following:

"When preparing for a domestic inquiry, one of the most important tasks, other than informing the accused employee of the charges and issuing a notice of inquiry, is the appointment of a panel of inquiry. Any experienced employee can be appointment as a panel member for the purpose of a domestic inquiry. The criteria for selection are that the members must be:

<sup>35</sup><sub>17</sub> Unbiased and neutral;

<sup>35</sup><sub>17</sub> Not directly involved in the case, whether as witness, complainant or in any other capacity;

<sup>35</sup><sub>17</sub> Unaware of the details of the case;

<sup>35</sup><sub>17</sub> More senior in rank than the accused employee, or if necessary, when there is no other suitable person available, of the same rank."

28. Similar requirements pertaining to the criteria to be applied when selecting DI panel members as shown above can also be found in the book, **Law of**

**Dismissal by Nalini Pathmanathan, Siva Kumar Kanagasabai and Selvamalar Alagaratnam at page 232.**

29. In this case, based on the “Surat Tuduhan” dated 05.06.2017, the contents of the letter shows that the Claimant had been informed that he was allowed to produce *inter alia* witnesses in order to assist him in establishing his case. The paragraph referred to in this letter is as below:

“Tuan adalah dibenarkan membawa apa-apa bukti, saksi, seorang rakan sekerja (sekiranya tuan tidak menjadi mana-mana ahli kesatuan) atau seorang wakil kesatuan (sekiranya tuan adalah ahli kesatuan) untuk membantu tuan di dalam sesi ini.”

30. The Company had called the Chairman of the DI (COW-1) to testify at the hearing and according to him, the Claimant was represented at the DI as stated in COW-1’s witness statement:

“9. S: Adakah Yang Menuntut diwakili oleh mana-mana pihak dalam Sesi Siasatan Dalaman?”

J: Ya, Yang Menuntut telah diwakili oleh Naib Presiden Kesatuan Percantuman Pekerja-Pekerja (“KPPP”) TNB, Encil Ahmad Bin

Abdullah dan Setiausaha Kewangan/Pengerusi Tatatertib KPPP

TNB, Encik Abdul Mutalib Gultom Bin Mohamed Salleh”

Based on the evidence given by COW-1 as stated above, the court is of the view that since the Claimant was indeed represented at the DI, his claim that he was not informed and reminded to call witnesses for the DI has very little weight to it. The Claimant has also not produced any evidence to substantiate this allegation. Therefore, it is the court’s view that the DI proceeding is valid and not against the principles of Natural Justice.

31. Nevertheless, be as it may, the evaluation and findings on this matter will thus be premised upon the evidence adduced and admitted during the course of the hearing before the court as guided by the case of **Dreamland Corp (M) Sdn Bhd v. Choong Chin Sooi & Industrial Court Of Malaysia [1988] 1 CLJ 1; [1988] 1 CLJ (Rep) 39** where the following was said:

“India, we were told, has statutory provisions similar to those in our Act. The following passage from a Supreme Court decision in *Workmen of the Motipur Sugar Factory Private Limited v. The Motipur Sugar Factory Private Limited* AIR [1965] SC 1803 is relevant:

Where an employer has failed to make an inquiry before

dismissing or discharging a workman it is open to him to justify his action before the Tribunal by leading all relevant evidence before it. The entire matter would be open before the Tribunal. It will have jurisdiction not only to go into the limited questions open to a Tribunal where domestic enquiry has been properly held, but also to satisfy itself on the facts adduced before it by the employer whether the dismissal or discharge was justified. The important effect of omission to hold an enquiry is merely that the Tribunal would not have to consider only whether there was a *prima facie* case but would decide for itself on the evidence adduced whether the charges have really been made out.”

32. The court is also guided by the principles enunciated in the case of **Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan & Other Appeals** [1997] 1 CLJ 665; where Gopal Sri Ram JCA as he then was said the following:

“The fact that an employer has conducted a domestic inquiry against his workman is, in my judgment, an entirely irrelevant consideration to the issue whether the latter had been dismissed without just cause or excuse. The findings of a domestic inquiry are not binding upon the Industrial Court which rehears the matter afresh. ”



## **The Issues**

33. Based on both the parties' case as stated above, it is apparent that the two questions which the court has to ask itself are:

- (i) was there a dismissal; and
- (ii) if the answer to (i) is in the affirmative, was the dismissal with or without just cause or excuse.

34. As stated in the case of **Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd. [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298** by the then Supreme Court as follows:

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

35. In this case, the fact of dismissal is not disputed. Therefore, the only issue which is left to be deliberated before this court is whether the dismissal of the Claimant by the Respondent was with just cause or excuse.

36. Having established that there is a dismissal, the principals in the Federal Court case of **Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn.**

**Bhd. & Anor [1995] CLJ 344** is now being referred. In this case it was held that :-

“On the authorities, we were of the view that the main and only function of the Industrial Court is dealing with a reference under section 20 of the Act (unless otherwise lawfully provided by the terms of the reference), is to determine whether the misconduct or irregularities complained of by the Management as the grounds of dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal.”

37. Based on the foregoing para 33 - 36 herein above, this court has a duty to consider the followings:-

- i. Whether the Claimant is guilty of the allegations of misconduct levelled against her by the Company; and
- ii. If the allegations of misconduct had been proven by the Company against the Claimant, whether that misconduct is serious enough to warrant a dismissal of the Claimant by the Company.

### **The Law**

38. In the case of **Shell Malaysia Trading Co. Sdn Bhd v. National Union of Petroleum & Chemical Industry Workers [1986] 1 ILR 677**, the Industrial

Court stated that:

"The company cited various authorities from Soonavala's The Supreme Court on Industrial Law (1979 Edition).... But one authority relied on by the company goes on to add:

It is for the management to determine whether the act of the workman constitutes misconduct and whether it merits an order of dismissal. However, in determining whether there has been such misconduct, it must have facts upon which to base its conclusions and it must act in good faith without caprice or discrimination and without motive of victimization or intimidation or resorting to unfair labour practice and there must be no infraction of the accepted rules of natural justice. When management does have facts from, which it can conclude misconduct, its judgement cannot be questioned provided the above mentioned principles are not violated."

39. In the case of **Ireka Construction Berhad v. Chantiravathan Subramaniam James [1995] 2 ILR 11 (Award No. 245 of 1995)** the following was stated:

"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.”

40. Having the burden of proving, the standard in which the employer has to prove that the act of terminating the employee was carried out with just cause or excuse is on a balance of probabilities. The principals of setting the standard of proof can be seen in the case of **Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314**, wherein it was stated as follows:-

“... it is quite clear to us that the Industrial Court should not be burdened with the technicalities regarding the standard of proof, the rules of evidence and procedure that are applied in a court of law. The Industrial Court should be allowed to conduct its proceedings as a "court of arbitration", and be more flexible in arriving at its decision, so long as it gives special regard to substantial merits and decide a case in accordance with equity and good conscience.

Thus, we can see that the preponderant view is that the Industrial Court, when hearing a claim of unjust dismissal, even where the ground is one of dishonest act, including "theft", is not required to be satisfied beyond reasonable doubt that the employee has "committed the offence", as in a criminal prosecution... The standard of proof required, that is the civil standard based on the

balance of probabilities, which is flexible, so that the degree of probability required is proportionate to the nature of gravity of the issue.

As such, there is no question of the employer proving that the employee had committed the offence beyond reasonable doubt. There is ample authority for saying that the test is not whether the employee did it but whether the employer acted reasonably in thinking the employee did it (see: *Ferado Ltd. v. Barnes* [1976] 439 ICR). In order for the employer to establish reasonable grounds, they must show that they had made reasonable enquiries and did not form their belief hastily and that they had given employee a fair opportunity to explain himself (see: *W. Weddel & Co. Ltd. v. Tepper*[1980] IRLR 76).”

41. As a Court of arbitration, Section 30(5) of the Industrial Relations Act 1967 (Act 1977) requires the Court to decide a case in accordance with equity and good conscience. Gopal Sri Ram JCA's decision in **Harris Solid States (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors (1996) 4 CLJ 747 CA** had stated that it is incumbent upon the court to have regard to substantial merits of the case rather than to technicalities.

### **Evaluation and Findings**

42. Since the court heard the case afresh, whether the Claimant has committed any misconduct has to be proven by the Company by way of



pleadings and evidence produced in court. It is trite that the Claimant is not the one who must prove that he was not guilty of misconduct [see the case of **Stamford Executive Centre v. Dharsini Ganesan [1986] 1 ILR 101 (Award No. 263 of 1985)**]. That burden is cast squarely upon the Company.

43. On the first and second charges drafted against the Claimant, the first paragraphs of both the charges bears the alleged conduct whilst the rest of the paragraphs of the charges are the breaches due to the conduct which tantamount to a misconduct. Since the Claimant had declared that he has no case to answer at the hearing in this court, the evidence given by the Company through its pleadings, documents and witnesses will be referred to and evaluated by the court.

44. On both these charges, the Claimant had himself admitted that he did take the monies as per stated in the charges from one Koh Kim Gan in both the Claimant's "*Percakapan Dalam Pemeriksaan*" and during the DI as shown below:

**"The Claimant's "*Percakapan Dalam Pemeriksaan*" (statements during investigation)**

“S.5: Seorang pengguna bernama Encik Koh Kim Gan, pemilik Tokong Nin Kuan Fu Pu Chi Miao di alamat TL PM 70/4, Lot 1244 Kg, No. 15, Parit Besar, Jalan Kluang, Batu Pahat, Johor mengatakan Encik telah berjumpa dengan beliau pada 4 September 2016 di tokong beliau itu serta meminta wang sebanyak RM4500.00 dengan alasan untuk membantu beliau membuat permohonan masuk bekalan elektrik ke tokong beliau itu... Apakah penerangan Encik tentang perkara tersebut?

J.5: ... **Saya telah meminta wang sebanyak RM4500.00 daripada Encik Koh Kim Gan tetapi beliau hanya memberikan kepada saya wang sebanyak RM2500.00 sahaja** dengan mengatakan kepada saya bahawa saya perlu membawa dan menunjukkan borang permohonan masuk bekalan elektrik yang berkaitan kepada beliau terlebih dahulu untuk tandatangani barulah wang bakinya sebanyak RM2000.00 itu beliau berikan kepada saya. Pada 11 September 2016, jam lebih kurang 9.30 pagi, saya telah pergi ke tokong Encik Koh Kim Gan... dan **meminta wang baki sebanyak RM2000.00 itu daripada Encik Koh Kim Gan dan menyimpannya.**

### **Domestic Inquiry Notes of Proceeding (Examination-in-chief )**

13. PB: Dari dokumen atau ekshibit yang dibentangkan, Encik Umar ada menerima wang sebanyak RM4500.00 dari pemilik tokong.

Untuk apakah kegunaan wang tersebut?

ST1: ... Saya nak membantu pengguna atasi masalah yang sebelum ini, tetapi pengguna ini Encik Koh, saya rasa dia tak faham yang dia ingat benda ini untuk urusan permohonan bekalan. Saya cuba terangkan kepada Encik Koh macam mana boleh jadi begini. Duit itu untuk permohonan bekalan baru yang Encik Ismail tetapkan dan disaksikan oleh Encik Koh, rakannya dan saya.

### **Domestic Inquiry Notes of Proceeding (Cross examination)**

4. P: **Setuju atau tidak saya katakan Encik Umar menerima wang dari Encik Koh, pemilik tokong sebanyak RM4,500.00**

**STI: Setuju.**

5. P: **Dimanakah wang yang Encik Umar terima daripada Encik Koh?**

**STI: Pada saya.**

.

- 6. P: Setuju atau tidak saya katakan video rakaman iaitu PO4, Encik Umar terima wang dari rakan Encik Koh di tokong.**

**STI: Setuju.**

.

- 11. P: Setuju saya katakan wang RM4,500 masih lagi di tangan Encik Umar?**

**STI: Setuju.”**

45. The Company also produced a video recording of the Claimant receiving and counting the monies given to him by Koh Kim Gan. COW-2 had given evidence as follows pertaining to the video recording:

**“ Examination-in-chief of COW-2**

**“Q:** Sila rujuk jawapan anda di soalan nombor 12 pada Penyata Saksi anda. Sila sahkan adakah video yang akan dimainkan adalah video yang ditunjukkan kepada anda oleh penghuni premis tersebut, Encik Koh Kim Gan pada 20.10.2016?

**A:** Ya, saya sahkan.

Q: Sila rujuk jawapan anda di soalan nombor 8 pada Penyata Saksi anda dan video yang telah dimainkan. Kenapa anda mengatakan bahawa Encik Koh Kim Gan menyerahkan wang kepada Yang Menuntut tetapi video tersebut hanya menunjukkan Yang Menuntut sedang mengira duit?

A: Ini kerana penghuni premis tersebut iaitu Encik Koh Kim Gan yang memaklumkan kepada saya bahawa beliau telah menyerahkan wang kepada Yang Menuntut dan beliau telah merakam Yang Menuntut sedang mengira wang selepas menerima wang tersebut.”

### **Re-examination of COW-2**

“Q: Sila jelaskan kenapa anda tidak bersetuju bahawa video itu tidak menunjukkan/ menceritakan apa-apa. Apakah sebenarnya yang video itu ceritakan?

A: Yang Arif, dalam video tersebut menunjukkan penyerahan wang yang sedang dikira oleh si penuntut dan pemilik tokong menceritakan dia ada menyerahkan sejumlah wang kepada penuntut. Wang tersebut dikatakan untuk kos pemasangan meter di premis tokong tersebut.”

46. Based on the video recording and the Claimant's own admission of receiving the monies as per stated in both the first and second charges, the conduct of the Claimant has been established. Since the Claimant had not produced any evidence to show that he had the authority to receive the monies from Koh Kim Gan, by his conduct the Company has established the breaches he had committed via his conduct which tantamount to a misconduct as per the allegation made against him. As such, the court is of the view that the Company has successfully established the allegations made against the Claimant for both the first and second charges.

47. As for the third charge, the Claimant had admitted to the conduct as stated in the third charge. His admission is seen as stated below:

**“ Domestic Inquiry Notes of Proceeding (Cross examination)**

**“8. P: Setuju atau tidak Encik Umar telah membuat penyambungan terus di tokong tersebut.**

**ST1: Setuju.**

P: Setuju atau tidak Encik Umar telah membuat pengakuan penyambungan elektrik secara terus di

tokong Encik Koh semasa lawatan Encik Nor Halim serta pegawai penyiasat di tokong tersebut pada 7 Feb 2017.

ST1: Setuju.”

48. Since the Claimant had admitted to carrying out this conduct which tantamount to a misconduct, as per specified in the third charge. Now, having established the misconduct, the issue which needs to be determined is whether the misconduct by the Claimant warrants a dismissal.

49. In this case, the Company had not only drafted all three (3) charges against the Claimant describing the alleged conduct of the Claimant but had also listed down for each charge the breaches committed by such a conduct which tantamount to a misconduct in accordance to the “Prosedur Tatatertib Tenaga Nasional Berhad (Edisi Keenam, 2013) as listed in all the three (3) charges respectively. In the case of **Arkema Pte. Ltd [Formerly Known As Elf Atochem SA Representative Office, Malaysia] & Anor v Tang Swee Nien [2009] 2 LNS 0738**, wherein the Claimant was found guilty of demanding and receiving monies from the Company’s agent, the Industrial Court held that the misconduct was serious and warranted the punishment of dismissal:

“**27.** Here, in this case **the Claimant had received money from the agent and had received the said money for his personal interest.** The Claimant's contention that Seca Dyme Sdn. Bhd. had given the Claimant interest or a gratuitous payment for taking a loan from **the Claimant clearly showed that the Claimant had acted in contravention of his implied term of contract.**”

**28.** Having evaluated the evidence of the Company's witnesses and in the Claimant's evidence, this Court finds that there is a prima facie case of misconduct. In equity, good conscience and based on the substantial merits of the case, this Court finds that the dismissal of the Claimant by the Company was with just cause and excuse.”

50. With regards to the Third Charge i.e causing direct electrical connections without a meter amounted to theft of electricity which caused the Company losses in terms of revenue, the case of **Tenaga Nasional Bhd v. Asharuddin Hanifullah [2003] 3 ILR 743** is being referred to as the Industrial Court in this case held that:



“[3] **The illegal connection of electricity without installation of a meter amounted to theft of electricity which resulted in loss to the company;** this was theft of the company's property, the company being a provider of electricity. The claimant's misconduct, a breach of items (67) and (68) of TNB "D", was a serious misconduct in the company's "disciplinary procedure". The claimant had previously committed a similar misconduct in 1987. These factors were **sufficient reasons to justify the dismissal of the claimant.**

51. As such, the court concurs with the Company's submission that the Claimant's action of taking and receiving monies from the Customer (the **First Charge** and the **Second Charge**) and causing direct electrical connections without a meter without the Company's permission (the **Third Charge**) are acts of dishonesty towards the Company amounting to gross misconduct which had broken the trust and confidence of the Company towards the Claimant as one of the Company's technician.

52. As stated in B.R. Ghaiye in **Misconduct in Employment Chapter XIX at page 650** states:

"The relation between an employer and an employee is of a fiduciary character. The word "fiduciary" means belonging to trust or trusteeship. It means that whenever an employer engages a worker he puts trust that the worker will faithfully discharge the service and protect and further the interest of the employer."

53. In **Pearce v. Foster [1886] (vol XV11) QBD 536 the Queen's Bench Division** it was held as follows:

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

And Lopes LJ in the same case at page 542 stated as follows:

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

54. Therefore, by a careful assessment of the evidence taken as a whole, grounded upon equity, good conscience and the substantial merits of this case pursuant to Section 30(5) of the Industrial Relations Act 1967, it is the finding of the court that the Company has established, on a balance of probabilities, the appropriateness of the Company's action against the Claimant. In the circumstances of this case, it is the considered view of the court that it is unreasonable to expect the Company to have continued the Claimant's employment.

55. The Claimant's claim is hereby dismissed.

**Cases referred to :**

1. UN Pandey v Hotel Marco Polo [1980] 1 MLJ 4
2. (Bumiputra Commerce Bank Bhd v. Mahkamah Perusahaan Malaysia & Anor [2004] 7 CLJ 77)
3. Kahan Singh v. Air Asia Berhad [2015] 2 LNS 1303 (Award No. 1303 of 2015)
4. B Surinder Singh Kanda v. Government of Federation of Malaya [1962] MLJ 169
5. Skypak International (M) Sdn Bhd v. Foong Kah Tin [1987] 1 ILR 495 (Award No. 161 of 1987)

6. Maimunah Aminuddin's Termination of Employment, Understanding The Process at page 207
7. Law of Dismissal by Nalini Pathmanathan, Siva Kumar Kanagasabai and Selvamalar Alagaratnam at page 232
8. Dreamland Corp (M) Sdn Bhd v. Choong Chin Sooi & Industrial Court Of Malaysia [1988] 1 CLJ 1; [1988] 1 CLJ (Rep) 39
9. Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665
10. Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd. [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298
11. Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn. Bhd. & Anor [1995] CLJ 344
12. Shell Malaysia Trading Co. Sdn Bhd v. National Union of Petroleum & Chemical Industry Workers [1986] 1 ILR 677
13. Ireka Construction Berhad v. Chantiravathan Subramaniam James [1995] 2 ILR 11 (Award No. 245 of 1995)
14. Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 31
15. Harris Solid States (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors (1996) 4 CLJ 747 CA
16. Stamford Executive Centre v. Dharsini Ganesan [1986] 1 ILR 101 (Award No. 263 of 1985)

17. Arkema Pte. Ltd [Formerly Known As Elf Atochem SA Representative Office, Malaysia] & Anor v Tang Swee Nien [2009] 2 LNS 0738
18. Tenaga Nasional Bhd v. Asharuddin Hanifullah [2003] 3 ILR 743
19. Misconduct in Employment Chapter XIX at page 650
20. Pearce v. Foster [1886] (vol XV11) QBD 536 the Queen's Bench Division

**HANDED DOWN AND DATED THIS 27<sup>th</sup> DAY OF AUGUST 2019.**

**signed**

**( SUMATHI MURUGIAH )  
CHAIRMAN  
INDUSTRIAL COURT OF MALAYSIA  
JOHOR**