INDUSTRIAL COURT OF MALAYSIA

CASE NO. : 12/4-41/18

BETWEEN

DEWALAXHMANA A/L A.S PARAM

AND

WESTSTAR AVIATION SERVICES SDN. BHD.

AWARD NO.: 692 OF 2020

Before	:	**YA PUAN NOOR RUWENA BINTI DATO' MOHD NURDIN - CHAIRMAN (Sitting Alone)**
Venue	:	Industrial Court Malaysia, Kuala Lumpur
Date of Reference	:	10.11.2017
Dates of Mention	:	07.02.2018; 16.04.2018; 26.07.2018; 30.08.2018; 14.09.2018; 30.01.2019; 11.02.2019; 16.12.2019; 30.12.2019; 06.01.2020; 04.02.2020; 18.02.2020; 26.02.2020; 04.03.2020
Dates of Hearing	:	26.09.2018; 27.09.2018; 28.11.2018; 29.11.2018; 14.05.2019; 15.05.2019; 24.07.2019; 25.07.2019; 27.08.2019; 31.10.2019
Hearing of Application	:	22.10.2018
Representation	:	Mr. Anthony Gomez From Messrs Gomez & Associates Counsel for the Claimant Mr. Vijayan Venugopal with From Messrs Shearn Delamore & Co. Counsel for the Company

Reference :

This is a reference made under subsection 20(3) of the Industrial Relations Act 1967 [*Act 177*] arising out of the dismissal of **Dewalaxhmana A/L A. S Param** ("the Claimant") by **Weststar Aviation Services Sdn. Bhd.** ("the Company") on 28 February 2017.

AWARD

[1] The Ministerial reference in this case required the Court to hear and determine the Claimant's complaint of dismissal by the Company on 28 February 2017 and was received by the Industrial Court on 8 January 2018.

Factual matrix

[2] The Claimant commenced employment with the Company as Human Resources and Administration Director (HRAD) on 14 August 2015 with a base salary of RM33,500 and a monthly transport allowance of RM1,000. He was provided with a company car and a driver. The Claimant was put under probation for six months. He reported directly to the Company's Chief Executive Officer (CEO), General Tan Sri Muhammad Ismail Bin Jamaluddin (Retired). Upon completion of his probation, the Claimant was confirmed by the Company and he remained in that position until his dismissal from the Company.

[3] The Claimant carried out his duties without fear nor favour during his time there. He set about streamlining the work culture in the Company and set KPIs for all staff under his supervision. He also introduced the elements of core values and leadership attributes to be embedded in the Company to motivate and encourage better performance and accountability. However, he claimed that certain members of the Company's senior management were uncomfortable with the new initiatives and were unprepared for change. The Claimant claimed that he managed to review some of the operational costs structure of the Company which resulted in savings of several million ringgit. He had never been warned about his work performance until 16 January 2017.

[4] On that day, the Claimant was suddenly issued with a show cause letter from the CEO containing a number of allegations. He was suspended from work for 14 days with full pay, prohibited from entering the Company's premises and required to reply to the letter within seven days. He claimed that the charges were unsubstantiated and with an ulterior motive to tarnish his professional reputation as the charges were based on stale issues which had already been settled and "condoned". He alleged that the

Company wanted to humiliate him and get him out of the Company but despite that, he replied to the show cause letter on 23 January 2017. However, he was only able to refute the allegations against him from memory.

[5] The Company replied to the Claimant's reply *vide* letter dated 26 January 2017 acknowledging it and extended his suspension for a further period of 14 days from 30 January 2017 until 13 February 2017. In light of the gravity of the charges against the Claimant, the Company claimed that it was necessary to carry out further investigations into the alleged misconducts and his reply to the show cause letter. The Claimant's suspension was again extended on 13 February 2017 until further notice as the Company had not completed its investigations. On 28 February 2017, the Company terminated the Claimant's employment with immediate *vide* letter dated the same after considering the Claimant's reply to the show cause letter. He claimed that the Company had summarily dismissed him, denied him a proper inquiry and it had violated industrial relations practice in the manner of its handling of his dismissal.

[6] The Company denied the Claimant's allegations on the various initiatives which he brought to the Company. It alleged that the work culture was introduced by a consultant engaged by it, whereas the initiatives was brought into the Company by the Claimant's predecessor. The Company further claimed that the KPIs introduced by the Claimant were unclear and not discussed with his subordinates on their outcomes.

[7] Meanwhile, the Company alleged that it received many complaints from its employees relating to the Claimant's alleged misconducts which were in breach of his express and implied duties as HRAD. It conducted an internal investigations and even the CEO had discussions with the Claimant regarding his alleged behavioural attitude prior to the issuance of the show cause letter. Later, the show cause letter was issued and the Claimant suspended with full pay until completion of its investigations. Subsequently, after considering the Claimant's reply to the show cause letter, on 28 February 2017, the Company dismissed him with immediate effect. The Company stated in the dismissal letter that it was unable to repose the necessary trust and confidence in the Claimant due to the severity of the misconducts charged against him. The Company refuted the Claimant's claim of unfair dismissal as it had conducted the termination in accordance with due process.

Fact of dismissal and the law

[8] The Claimant prays that this Court holds his dismissal as being without any just cause or excuse and the appropriate remedy be given to him including reinstatement to his former position without any abatement to his salary, increment, bonus and all other monetary benefits to which he is entitled to. The has remained unemployed since his dismissal.

[9] The Claimant has made his representation under subsection 20(3) of the 1967 Act and where such representations have been made and are referred to the Industrial Court for inquiry, it is the duty of the Court as stated by the Federal Court in the case of **Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. and another appeal [1995] 2 MLJ 753** to determine whether the termination or dismissal is with or without just cause or excuse. Hence, the role of the Court is to determine whether the Claimant was indeed dismissed on 28 February 2017 and if so, whether the dismissal was without just cause or excuse. Although it is incumbent upon the Court to inquire into the issue of justness or the excuse on its merits, the Court must first be satisfied that the Claimant was dismissed.

[10] Based on the evidence and documents presented in this case, the Court has only to consider on a balance of probabilities whether the dismissal was with just cause or excuse because the fact of dismissal was not disputed. The burden of proof is on the Company to discharge as stated in the case of **Stamford Executive Centre v. Dharsini Ganesan [1986] 1 ILR 101**:

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

[11] Further, in order to successfully defend an unfair dismissal claim, the burden of proof is on the employer to show that the reason for dismissing the employee falls into one of the two categories set out in subsection 20(3) of the 1967 Act. The termination of the employee will be deemed to have been unjust unless an employer can prove that the employee was dismissed for a just cause or excuse. Even if an employer succeeds in proving that there was a reason for the dismissal of the employee, it is for the Industrial Court to decide whether the dismissal was warranted or not in accordance with, *inter alia,* the principles of equity, good conscience and the substantial merits of the case.

Evaluation and Findings by the Court

[12] The Company called five witnesses to prove its case against the Claimant as follows:

(i) Adliza Binti Abdullah (COW1), General Counsel and Company Secretary Director;

(ii) Eizel Arizan Bin Salleh (COW2), Manager, Compensation and Benefits;

(iii) Cecily A/P Arokiam (COW3), Assistant Manager, Human Resources and Administration Department;

(iv) Azman Bin Muhamad (COW4), Manager, Payroll; and

(v) General Tan Sri Muhammad Ismail Bin Jamaluddin (Retired), (COW5), Chief Executive Officer.

[13] The Company had issued to the Claimant the nine-pages show cause letter dated 16 January 2017 containing seven main misconducts and each had a few sub-charges; even the chronology of events were included in the charges. The seven main misconducts were:

(i) that the Claimant had deliberately and intentionally misled the Management to making decisions, which otherwise might not have been forthcoming;

(ii) unauthorised amendment/manipulation of documentation to secure results which otherwise might not be achieved;

(iii) abuse of power and manipulation of authority;

(iv) non-compliance with processes and procedures:

(v) derogatory/racist reference;

(vi) multiple and frequent behavioural issues; and

(vii) lack of HR skills, incompetency, poor leadership and mentoring.

[14] It would not be feasible to reproduce all the lengthy (and some repetitive) charges here but the Court will highlight seven of the more serious alleged misconducts. There was a total of 28 charges as stated by the Company but even in its submissions the Company relied on seven charges, which were the more serious ones; Charges 1(A), 1(B), 2(A), 2(B), 3(D), 3(E) and 6(B). The seven charges were as follows:

"**Charges 1(A) and 1(B):**

1. That you had deliberately and intentionally misled Management to making decisions, which otherwise might not have been forthcoming.

   A. Deliberately misled the Management as to the quantum/deductions for the distribution of duit raya for 2016:

      (i) It has been the practice of WASSB to pay the duit raya token to its employees and the usual preparatory steps as per the previous years and consistent with this instruction were taken. The approval clearly denoted a sum of RM1,000.00 with no indication/instruction as to deduction for EPF or tax.

      (ii) When the final list of recipients was presented to you, you had verbally instructed to make the duit raya token as taxable, a clear deviation of practice. Despite the request for you to issue a written directive or provide sufficient documentation to support that the amount of RM1,000.00 was required to be taxed in order that the deviation in practice was properly documented, you had refused to do so.

      (iii) You had advised the CEO that this payment was tax deductible but that this was not done in past practice – which could result in issues with the IRB. Based on your advice, the CEO agreed to the tax deduction of the duit raya.

      (iv) On subsequent discussion with the Group Managing Director, the directive for the duit raya to be taxable was rescinded.

   B. Deliberately misled the Management as to the list of members of the Management Team who were eligible for the Annual Increment in 2016:

(i) HRAD Department had prepared a tabulation of direct reports to the Chief Executive Officer who are identified to be eligible for increment.

(ii) It is within your knowledge that all contract and unconfirmed permanent staff were not eligible for increment, including you good self, who had not been confirmed in service at that time.

(iii) Although it was within your knowledge that you were not eligible for the increment, you had failed/neglected and/or refused to highlight your own ineligibility as an unconfirmed permanent staff and surreptitiously, the list of recipients were approved to include you.

Charges 2(A) and 2(B):

2. Unauthorised amendment/manipulation of documentation to secure results which otherwise might not be achieved.

A. Annual Increment 2016 Eligibility:

(i) A draft Memo on the increment eligibility was prepared by the HRAD Department which contains the criteria for the increment eligibility. The draft listed certain eligibility criteria (e.e. permanent staff only, those who were confirmed as at 31 December 2015, those who had no disciplinary action etc.)

(ii) By virtue of these criteria, you would not have been eligible for increment as you were not a confirmed employee as at 31 December 2015.

(iii) Although the draft memo had been approved by the CEO, you had amended the memo to move the eligibility date to 10 March 2016 to enable you to be eligible for the increment exercise.

B. Deliberately misleading the Remuneration Committee:

(i) A candidate for the HRMS Executive post which was to replace one Shahida Yaacob was processed at your direction. On 23rd September 2016, you had met with the HRMS candidate. The appointment of the HRMS was to replace Shahida Yaacob and did not follow due process. You had conducted the interview alone, with the candidate, in contravention of the SOP which required two panel of interviewers.

(ii) You also did not interview other candidates for this position. The candidate that you have interviewed appeared to have only experience in HR2000 (payroll system only), not HRMS.

(iii) When presenting to the Remuneration Committee, you lied to the Remuneration Committee that you had interviewed 2 other candidates for the HRMS Executive post. Although the interviews were conducted with 2 candidates, these candidates were in fact interviewed for a completely different post i.e. HRAM post.

(iv) During the presentation made to the Remuneration Committee, you had proposed the appointment of the new HRMS Executive to replace Shahida with a basic salary approximately 20% higher than Shahida's last drawn salary. You had also lied to the Remuneration Committee that you had made a counter offer to Shahida, which you had not.

Charges 3(D) and 3(E):

3. Abuse of power and manipulation of authority.

D. Early confirmation of Shahida Yaacob

(i) Shahida was appointed in Nov 2015 with her confirmation due after 6 months (April 2016).

(ii) Notwithstanding that the employee had yet to be confirmed, you presented a paper to the Remuneration Committee recommending a salary revision. The Committee's decision/recommendation was that the increment be effective only after 6 months i.e. upon confirmation.

(iii) In defiance of the decision of the Remuneration Committee, you had given effect to the increment/adjustment effective March 2016, approximately 2 months prior to Shahida's confirmation.

E. Deliberately misleading the Remuneration Committee:

(i) The appointment of the HRMS Executive was to replace Shahida Yaacob and did not follow due process. The candidate's basic salary was approximately 20% higher than Shahida's last drawn salary.

(ii) You lied to the Remuneration Committee that you had made a counter offer to Shahida when you had not.

(iii) It is the practice of the Company to source for 2 or 3 candidates to fill a vacancy and each interview is usually conducted by 2 to 3 interviews.

(iv) For this appointment, you had sourced only for one candidate and you were the sole interviewer. Your conduct in doing so is in contravention with the Company's SOP and was not on an arm's length basis.

Charge 6B:

6. Multiple and Frequent Behavioural Issues

B. In respect of the distribution of the Duit Raya 2016:

It was highlighted to you that the intention of GMD was to give duit raya for the sum of RM1,000 to each employee. If the amount was made taxable, the nett amount of the duit raya would be reduced. In your response to your staff, you mentioned that the employees would not know how much tax is imposed on the Duit Raya because the payslip does not state such details. During the conversation, you had raised your voice and made your staff felt like they have failed to understand the issue.".

[15] COW1 testified that the Claimant's scope of duties includes, among others, the following:

(i) Strategically lead and drive HR initiatives and other strategic activities in order to ensure the implementation of integrated and holistic HR management practices;

(ii) Translate and communicate implementations of corporate vision to the team so as to align the departmental strategy to the corporate objectives;

(iii) Act as the Department's Point of Reference by providing direction and leadership, establishing cultural and behavioural norms, developing competent staff and inspiring confidence in and commitment to the goals of the Company.

Charges 1(A) and 1(B)

[16] The first two allegations were that the Claimant had deliberately and intentionally misled the Company's Management to make decision on two separate occasions, which it would not have done so if not for his advice. The first occasion was in regard to the payment of the *Duit Raya* for 2016 ("*duit raya*") whereby the Claimant had allegedly misled the Company by claiming that the payment was subject to tax deductions. The second occasion was in respect of the list of members of the Management Team who qualified for the Annual Increment payment for 2016 wherein the Claimant had included his name in the list of qualified personnel. The Company had related Charge 6(B) to Charge 1(A) as it arose from the same misconduct. The Court agrees with this approach and will consider the charges under the same head as well as the charges which arose from the same misconduct(s) together.

[17] Sometime in September or October 2016, the Company received complaints from its employees relating to the Claimant's alleged misconducts which were in breach of his express and implied duties as an employee of the Company. The foregoing led to an initial investigation conducted by the Safety & Quality Assurance Director, Md. Moghni Bin Rahmat, involving interviews with several employees. COW1 said COW5 also had discussions with the Claimant regarding his behavioural attitude. After the conclusion of the initial investigation, another investigation was conducted by her own department.

[18] COW1 stated it had been the practice of the Company to pay *duit raya* token to all its employees and that the payment for *duit raya* token was treated as non-taxable and no EPF deduction would be made for the payment. For 2016, the Company agreed to pay RM1,000.00 to each staff and RM500.00 to the internship students. The proposal for the payment of *duit raya* token was prepared by COW4 (page 1 of the Company's Additional Bundle of Documents, COB2).

[19] The proposal was signed by the Claimant as the proposer on 16 June 2016, verified by COW5 on the same day and approved by the Group Managing Director (GMD). According to the approved proposal, there was no indication or instruction on

the deduction towards EPF or tax. Based on the Company's investigation, the Claimant had instructed COW4 to make the *duit raya* token taxable and not EPF attractable. COW4 confirmed that he requested the Claimant for the instruction to be in writing so as to document the deviation from the approved proposal. He said the Claimant had refused to do so.

[20] COW5 testified that the Company was concerned by the Claimant's instruction to make the *duit raya* liable for income tax because it may raise issues with the Inland Revenue Board (IRB) on the Company's previous practice of not paying tax on the *duit raya* token. When the matter was brought to the GMD by COW5, it was resolved that no tax was to be paid by the employees for the *duit raya* token.

[21] Charge No. 1(A) against the Claimant was that he misled the Company's Management about this issue i.e. that the *duit raya* token was liable to be taxed. When the word "misled" is used in the charge, there must be some form of intention by the employee concerned to mislead the employer. In his cross-examination, the Claimant agreed that he told COW4 to make the *duit raya* token to be liable for income tax payment. The Company in its submission claimed it was an issue of afterthought by the Claimant when he raised for the time during the cross-examination that he was actually agreeable to confirm making the instruction in writing but he could not do it as he saw an e-mail that there was no tax deduction on the *duit raya*; the Claimant claimed that he could not recall when the incident took place. The Company submitted that this point was also never raised in the Claimant's reply to the show cause letter dated 23 January 2017.

[22] The Claimant's witness statement did not elaborate about this issue. Hence the Court looked at the said reply to the show cause letter at page 16 of COB1. Therein, the Claimant then had explained that he gave that advice in good faith when he relied on subsection 13(1)(a) of the Income Tax Act 1967 whereby he was of the view that *duit raya* could be considered as "perquisite" which is a taxable item. However, he acknowledged that he was not a tax expert. He claimed that he was not even informed that the decision (to make the *duit raya* liable for taxation) had already been rescinded by the GMD. He only knew about this when he saw the e-mail exchange between one

Nik Mohd. Nasir and COW5 on this matter. Therefore, he made no further attempt to question the decision.

[23] From the evidence before me, I am of the view that the Claimant had raised the issue about the e-mail at the first instance in the show cause letter, although he did not have a copy of that e-mail. He had also explained why he gave the advice and that he was not a tax expert. The Court views that a *duit raya* token is a one-off payment which is considered as a windfall for employees and it does not attract income tax. Hence, the Court opines that the element of "misled" in Charge 1(A) is not proved by the Company. This is not a criminal trial and the burden of proof on the Company to prove its case is only on a balance of probabilities. Nevertheless, as the charges involved the underlying issue of the Claimant's integrity, the element of "misled" must be proved by the Company because it was the basis of the Company in dismissing the Claimant. The Court opines that on that standard of proof, the Claimant's explanation and the Company's own evidence showed that his version was more probable than the Company's and therefore, the issue of "misleading" the Company does not arise. **The Court finds that Charge 1(A) has not been proved by the Company.**

[24] In regard to Charge 1(B), COW1 stated that the Company also discovered that when the list of the direct reports of COW5 who were eligible for annual increment was prepared, the Claimant's name was also included in the list (page 2 of the COB2). This list was subsequently approved by the Management. COW1 said since the Claimant was yet to be confirmed at that time, he would not have been entitled to the annual increment. But she said the Claimant did not highlight this issue with the Management despite knowing that his ineligibility to the annual increment.

[25] COW2 in his witness statement evidence stated that he prepared the list on page 2 of COB2 under the Claimant's instructions. The original list which he prepared did not include the Claimant's name. He stated that employees who were not eligible for annual increments were contract employees and unconfirmed employees. At the time when the list was prepared, the Claimant was yet to be confirmed as an employee of the Company. Therefore, the Claimant would not be eligible for the annual increment. He said that the Claimant did not highlight his own ineligibility for the annual increment and the list was approved to include his name. Later in cross-

examination he said that he did not prepare the list at page 2 of COB2 but clarified in re-examination that the document which he prepared did not include the Claimant's name because at that time the latter was still a probationer and would not have qualified for the payment. He said the contents of the document which he prepared was similar to the list at page 2 of COB2. He did not know who prepared the final list.

[26] COW5 confirmed in his testimony that he had approved the list at page 2 of COB2. The list consisted of his direct reports who were eligible for the annual increment in 2016. The Claimant's name was included in this list. At the time of approving this list, he said it was not highlighted to him that the Claimant was not eligible for the annual increment as he was yet to be confirmed at that time. COW5 stated that the Claimant should have highlighted his ineligibility and he would not have approved the list to include the Claimant's name.

[27] The Court has looked at the name list of the Management Team at page 2 of COB2 where the Claimant's name was listed therein. His signature appeared towards the bottom of the page. In his cross-examination, the Claimant confirmed that his signature appeared on that page. The list had been verified by COW5 as stated in that page on 3 March 2016. This is the date when COW5 approved the list.

[28] The Claimant's explanation on this matter is found at page 17 of COB1 in his reply to the show cause letter as follows:

> **"B. Deliberately misled the Management as to the list of members of the CEO who are identified to be eligible for the Annual Increment 2016.**
>
> I dismissed that this was done deliberately. We debated on the increment qualification for confirmed staff with the 31st December cut-off whereas our increment (and bonus) are being paid in March of the following year. I reasoned out to CEO in a hypothetical situation, where an employee joined us in mid-July with a 6 months' probation period, chances are his confirmation will be in January, and with this ruling he will only get the increment in the following year (January) leaves the employee without a

salary increment for about 18 months before since he joined the Company. I explained that most companies I worked in practices a much *humane* increment policies for employees who performed well and where we would like to retain. In this case I have suggested that we give increment to those who were confirmed on or before the increment month of March. CEO agreed to this during our meeting. (I believe for the same reason Abg Ashraf (GCCS Manager) was confirmed early to effective the 1st March 2016 to meet this requirement). I convey this new policy to my C&B team and the spreadsheet were prepared by them, for all Departments Heads including for the CEO. I did not realised they did not fully understood or followed my instructions, but I recalled Abg Ashraf was confirm early and got an increment. I was disappointed that my C&B team were still following the old rule until CEO informed me of this and I went back to check with my C&B Manager (Eizel). I was quite embarrassed by this oversight by my team but took the mistake in stride and gave instruction to my Payroll team to make salary deductions to refund the company of the increment paid to me, which was subsequently done. Since this happened almost a year ago and I clarified the situation with the CEO, and which he accepted my explanation, I take it that this case is close. I am appalled that I have to explain this issue over again and suspect a mala-fide intent by certain parties."

[29] Charge 1(B) was that the Claimant misled the Management about the list of qualified employees for the annual increment to be paid in 2016 for the previous year. He would have only been confirmed the earliest on 14 February 2016. He stated in the reply to the show cause letter that he had reasoned out to COW5 about the hypothetical situation of an employee who joined the Company in mid-July 2015 would not be getting an annual increment for that year but would only qualify for it in the next year and which payment would be paid out in 2017. This would appear to apply to the Claimant's own situation. The Court would not speculate why he did not tell COW5 then that he was also caught in that situation.

[30] COW5 in his cross-examination said that referring to page 7 of CLB, which was the letter regarding the Claimant's salary increment in March 2016, he stated that his

understanding of the matter would be that the Claimant's increment was only to be paid once he was confirmed, which was in 2016, and that it should be paid in 2017. By his statement, it is clear what COW5 thought about the Company's policy in not giving the annual increment until an employee, including the Claimant, was confirmed. Again, as this involved the issue of the Claimant's integrity, the Court opines that the element of "misled" in Charge 1(B) needs to be proved by the Company. COW2 testified that the Claimant's name was not included in the list when it was prepared as at that time he was still a probationer. COW5 testified he would not have included the Claimant's name if it was highlighted by the latter that he had yet to be confirmed. The Claimant's defence was that it was not done deliberately (to mislead the Management). The Court opines that on a balance of probabilities, the Company's evidence on this charge is more probable than the Claimant's. **Therefore, the Court finds that Charge 1(B) has been proved by the Company.**

Charge 6B

[31] The Company's investigation also revealed that the Claimant had raised his voice at COW4 when they were having a discussion over this issue. COW4 highlighted to the Claimant that the intention of the GMD was to give RM1,000.00 to each employee and if the amount was made taxable, the nett amount that the employee would receive would be reduced. The Claimant mentioned that the employees would not know the tax amount as the payslip did not state the details of the same. During the conversation on 16 June 2016, the Claimant made COW4 feel like he had failed to understand what the Claimant was trying to tell and the Claimant started to raise his voice. COW4's evidence was when he asked for the instruction to be given in writing, the Claimant stated something to the effect "Why should I? I am doing the right thing.". He told his superior by the name of Nik Mohd. Nasir, the General Manager for Human Resources, about the incident. He also complained about the incident verbally to Md. Moghni and COW1 about a few months later after it happened but he could not remember the exact date of the complaint. The Court assumes that this happened when the investigation against the Claimant commenced.

[32] In cross-examination, COW4 stated that he did not have proof of his complaint about the Claimant's behaviour in writing as he made it verbally to his superiors. The

only eye witness to the incident was himself and the Claimant. He also said that he could demand the Claimant to give the instruction in writing because the Claimant's instructions deviated from past practices. Therefore, he would need to have it in writing to support his next course of action on the matter. He confirmed that he received an e-mail from Nik Mohd. Nasir to make the *duit raya* payment without subjecting it to tax.

[33] COW5 in his cross-examination was asked whether he had issued any letter of advice, warning or reprimand to the Claimant during his time in the Company. He replied "Not formally'. He explained that there was no letter of warning or that kind issued to the Claimant. However, from time to time, he would ask the Claimant to his room to discuss on "people engagement" because what he heard was that there was some kind of "disharmony in the HR Department". COW5's advice to the Claimant was that as HR Director he should engage his people in a more harmonious way. He agreed that he did not put anything of the discussions in writing. He also agreed that there were complaints against the Claimant from his subordinates but none in writing. He asked Md. Moghni to investigate the complaints and based on the outcome, COW5 viewed that a more thorough and detailed investigation was warranted. That was when he instructed COW1's department to investigate the complaints.

[34] On the evidence available before me, the Court finds that Charge 6(B) has been proved on a balance of probabilities by the Company against the Claimant. The Court does not condone offensive remarks in the workplace or anywhere else as it only creates animosity among people. But these things happen from time to time, in the heat of the moment, when people fail to see eye to eye even at the workplace. The Court is of the view that although the charge has been proved, the Claimant should have just been given a warning by the Company.

Charge 2(A)

[35] In regard to Charge 2(A), the facts were similar to Charge 1(B) as it is in relation to the unauthorised amendment to the date or manipulation of documentation to secure results which otherwise might not be achieved. In short, this charge is about the Claimant amending the draft memo on increment eligibility which is at page 3 of COB2. The results which otherwise might not be achieved was in respect of the Claimant

getting the annual increment for 2015 to be paid to him although he did not qualify for it by virtue of the cut off date which was 31 December 2015. The Claimant in his reply to the show cause letter stated that he had explained about this charge in the explanation for Charge 1(B). This was also raised in his submissions. However, the documents at pages 2 and 3 of COB2 are two separate issues altogether. It is noted that the document at page 2 is the list of names of the Management team members who qualified for the annual increment to be paid in 2016 (for 2015). Whereas the document at page 3 is the draft memo about the eligibility criteria for bonus pay-out for 2015. The Company's policy on bonus pay-out can be seen at page 3 of COB2. It was only after the amendments to the draft memo that the final version (page 4 of COB2) was circulated. The eligibility criteria in that final memo had changed considerably.

[36] COW2 told the Court that he prepared the draft memo at page 3 of COB2 in respect of the entitlement criteria for the bonus pay-out in 2015. He also stated that employees who were confirmed as at 31 December 2015 would be eligible for the pay-out. This draft memo had been approved by COW5 but he alleged that the Claimant amended the memo to move the eligibility date to 10 March 2016. He said that the handwritten amendments were made by the Claimant. The Claimant was not straightforward in his answer at first on this issue when he was cross-examined by the Company's Counsel.

[37] The draft internal memo titled "Bonus 2015" at page 3 of COB2 showed that there were some amendments made in handwriting where two types of pen had been used. It appeared that one was written using a bigger font pen than the other. COW2 was familiar with the Claimant's handwriting. COW2 explained that he believed the handwriting belonged to the Claimant but using two types of pen. The Claimant did not challenge his evidence on this issue. COW2 confirmed that the final version of that memo was on page 4 of COB2 and he received it in his capacity as an employee. It can be seen that the memo listed down the Entitlement Criteria. The first criterion, that is, "The cut off date is 31 December 2015" was struck off. The draft memo dated 3 March 2016 is as follows:

PAGE 3 COB2

A2-1

WESTSTAR AVIATION SERVICES

MEMORANDUM

From:	Human Resource
To:	All Weststarians
Copy to:	
Date:	03 March 2016
Subject:	Bonus 2015

Dear ~~Weststarians~~, Colleagues

Following the announcement by the CEO on the bonus 2015, please be notified that the bonus payment 2015 shall be based on the following criteria:-

ENTITLEMENT CRITERIA

1 ~~The cut-off date is 31/12/2015.~~ who did not complete a full year of svc in 2015,
2 Bonus rate is equal to one ~~(1)~~ month basic pay as of December 2015.
3 *Employees with ~~length of service less than 1 year as of December 2015~~, the bonus calculation will be on pro-rated ~~basis.~~ accordingly.
4 ~~Confirmed~~ employees. as at the time of payroll cut off on 10 March 2016.
5 Eligibility exclusion:-
   a) Those tendered notice of resignation up to the date of payment.
   b) Those presently on long unpaid leave.
   c) Those with disciplinary record in 2015.

On behalf of the management I thank all of you for your performance in 2015
~~I would like to take this opportunity to thank the management and hope all Weststarians~~ will continually improve the quality of ~~the~~ your performance in order to realize our Corporate aspirations to be a Global ~~Champion~~. Company

Thank you.

.....
Devalaxhmana Param
Human Resource & Administration Director
Weststar Aviation Services Sdn. Bhd.

[38] However, the final version of the memo dated 8 March 2016 at page 4 of COB2 showed only four criteria after the first one was struck off from the draft. The memo approved and signed by the Claimant was as follows:

PAGE 4 COB2

4

A2-2

WESTSTAR AVIATION SERVICES

MEMORANDUM

From:	Human Resource
To:	All Weststarlans
Copy to:	
Date:	08 March 2016
Subject:	Bonus 2015

Dear Colleagues,

Following the announcement by the CEO on the bonus 2015, please be notified that the bonus payment 2015 shall be based on the following criteria:-

ENTITLEMENT CRITERIA

1 Bonus rate is equal to one (1) month basic pay as of December 2015.
2 Employees who did not complete a full year of service in 2015, the bonus calculation will be pro-rated accordingly.
3 Confirmed employees as at the time of payroll cut off or 10 March 2016.
4 Eligibility exclusion:-
   a) Those tendered notice of resignation up to the date of payment.
   b) Those presently on long unpaid leave.
   c) Those with disciplinary record in 2015.

On behalf of the management I thank all of you for your performance in 2015 and we will continue to improve the level of our performance to realize the Corporate aspirations of being a Global Company.

Thank you.

.....

Devalaxhmana Param
Human Resource & Administration Director
Weststar Aviation Services Sdn. Bhd.

Bonus 2015

[39] Now, the undisputed fact is that the Claimant was confirmed in his position sometime around 14 February 2016 about six months after he joined the Company on 14 August 2015. The confirmation letter is at page 36 of CLB. The Claimant was notified *vide* letter dated 22 March 2016 (page 7 of CLB) he received a salary increment of 3% of his base salary and also a prorated bonus as he had not complete a full year of service then. This was the disputed letter which the Company claimed that the Claimant was not entitled as he had not completed a full year service, according to COW1 and COW5. It is pertinent to note though that COW2 confirmed the handwriting on page 3 of COB2 was the Claimant's as he was familiar with it. The Claimant meanwhile, at first did not directly answer to the Company's question that it was his handwriting at page 3 of COB2 when he said it was probably his. Then he confirmed that it was his handwriting. He also agreed that he would not have been eligible for the payment of the annual increment because the cut off date was 31 December 2015 and he was not yet confirmed at that material time.

[40] There is an element of intention in Charge 2(A) when it talked about amendment or manipulation of documentation. Based on the oral evidence from both sides and documentary evidence before the Court, the inevitable conclusion is that the Claimant knew of the financial implications from the Company's policy regarding the cut-off date of 31 December 2015 for those who joined the Company after 30 June 2015, including himself. He even brought up the issue of one Abg Ashraf, GCCS Manager, who was caught in the same situation and whose confirmation was made effective 1 March 2016 in order to meet the Company's requirement. Although Charge 2(A) mentioned Annual Increment 2016 Eligibility, the Court finds that two documents had been amended in Charge 2(A). One was the list of qualified Management team members for the annual increment 2016 and the other was the memo regarding the Bonus pay-out for 2015 eligibility criteria. The Claimant's explanation in his reply to the show cause letter was that he was not informed of any errors at that time or if the Management were not happy with that new criterion. He said he was appalled that an old issue like this which had been resolved by him returning the money to the Company was dug up by the Company. The Court views the Claimant's explanation on this charge confirms the earlier findings of the Court in respect of Charge 1(B). On a balance of probabilities, the Court finds, similarly to Charge 1(B), that the Company's evidence on this charge is

more probable than the Claimant's. **Therefore, the Court finds that Charge 2(A) has been proved by the Company.**

Charges 2(B) and 3(E)

[41] For charge 2(B) which was the unauthorised amendment to the date or manipulation of documentation to secure results which otherwise might not be achieved, it related to the Claimant's alleged action pertaining to the recruitment of a candidate to replace one Shahida Yaacob ("Shahida") as an HRMS Executive whereby he did not follow due process. It was alleged that the Claimant did not interview other candidates for that position. The charge stated that when he presented to the Remuneration Committee, the Claimant had lied to the Remuneration Committee that he had interviewed two other candidates for the HRMS Executive post. The Company alleged that although the interviews were conducted with two candidates, these candidates were in fact interviewed for a completely different post i.e. HRAM post.

[42] In regard to Charge 3(E), this was about abusing his power as HRAD and manipulation of authority. It stated that during the presentation made to the Remuneration Committee, the Claimant also had proposed the appointment of the new HRMS Executive to replace Shahida with a basic salary which was approximately 20% higher than Shahida's last drawn salary. It said that the Claimant had also lied to the Remuneration Committee that he had made a counter offer to Shahida, which he had not

[43] The evidence in respect of the two charges was from COW1 and COW3. COW5 also confirmed that an interview must be carried out by two panel members, and not the Claimant alone. COW1's evidence was as follows:

> "Following the resignation of Cik Shahida binti Yaacob, who held the HRMS Executive post, the Company had to look for her replacement. To this end, Cecily a/p Arokiam was asked to process a candidate for the said post. The Company's Standard Operating Procedure provides that there must be 2 panel of interviewers and normally, there would be 2 or 3 candidates to be interviewed for one position. For this candidate, the Claimant had

> conducted the interview on his own and he did not interview other candidates for the HRMS post. The candidate's CV shows that she only has experience in HR2000 (payroll system only). When the Claimant presented to the Remuneration Committee, he informed the Remuneration Committee that he had interviewed 2 candidates for the HRMS post. Although there were interviews with 2 candidates, the interviews were for a completely different post, i.e. HRAM post. I refer to pages 10 - 30 of the Company's Additional Bundle of Documents for a copy of the resume. Further, the Claimant informed the Remuneration Committee that he had made a counter offer to Shahida Yaacob, which he did not. The Claimant also proposed the appointment of the new HRMS Executive to replace Shahida Yaacob with a basic salary approximately 20% higher than Shahida Yaacob's last drawn salary."

[44] COW3 who was the Assistant Manager in the HRAD with the job title of Human Resources Account Manager gave evidence that HRMS was a management system that has many modules of HR. The particular candidate in the interview, Jude Lee Kwee Wah (pages 6-8 of COB2) did not have such qualification for the position. She stated that she was asked by the Claimant to process a candidate whereby the appointment of that candidate was to replace another employee. On 23 September 2016, the Claimant met up with this candidate for an interview where he had conducted it alone. This was not in compliance with the Company's HR Manual which requires two panel of interviewers. In normal circumstances there would be two or three candidates for one position. But for this position, the Claimant only interviewed one candidate and he was the sole interviewer. Page 5 of COB2 showed the Claimant as the sole interviewer for the candidate above. The resume of the candidate also reflected that the person only had experience in HR2000, which was in payroll system only and not HRMS, which she said was relevant for the position (pages 6-8 of COB2). The Court noted that the Claimant did not dispute that he was the sole panel member who conducted the interview with that candidate.

[45] COW3 in her cross-examination said that she did try to get more candidates for the interview, about four or five persons. All of them met the minimum requirements

and all were from the Job Street portal. However, when she gave the names to the Claimant, he only said “Later”. In the end, she said they did not call any of them for the interview. As HRAD, she said the Claimant was competent to decide on any candidate applying for a vacancy in the Company. However, according to COW3 it has been the Company’s practice that her department gives the assessment particularly for this position, HRMS/Analytics Executive, because the portal and the system is new.

[46] She said that for technical reasons due to the system, she would be more competent to assess or make the selection of candidate as she and COW4 took lead of the project and they became the project managers. She viewed that Jude Lee Kwee Wah was not a suitable candidate for the position based on his different field of qualification. However, at that time she did not raise it to the Company. Eventually, the candidate was given a fixed-term contract of two years as decided by the Claimant. His contract was later converted to a permanent employment after the two years ended and at the time of the hearing, COW3 stated that he was still with the Company. Meanwhile, she said she has worked with the Claimant for about four years before his dismissal. She stated that as the HRAD, the Claimant still had to follow the Company’s recruitment procedures and he simply could not hire anyone by himself.

[47] The Claimant in his reply to the show cause letter stated that when Shahida tendered her resignation and gave short notice desperately looking at a replacement as there were HRMS projects on-going, and operational issues that he had to manage. He asked COW3 to contact one Siti Shazwanie (a former People Quest employee) to ask if she is keen for the role and at the same time he asked one Mr Yew (People Quest MD) if he knew of any HRMS available on short notice. The former too gave him Siti Shazwanie's contact. Unfortunately, the person did not want to join the Company. He got Jude Lee Kwee Wah’s contact and after interviewing him, he said he got COW5 to meet the candidate. He stated that COW5 met the candidate before “we gave him on the offer”. So the question of him interviewing the candidate all by himself was not true as he claimed that he had the candidates presented to COW5 to meet the candidate as well.

[48] He said in the reply to the show cause letter that he did not explain how many candidates he interviewed for the HRMS role to the Remuneration Committee as it

was clear it was not really necessary. On the lone interview, he said peer to peer interview would not be effective (all of them were Direct-Reports to him) but presented his shortlisted candidates to COW5 for the second round interview. When he was invited for the interviews for the HRAM roles (who reported to him), he sat in the interviews with COW3 and Paula Tamura (the Talent Manager), instead of wasting the candidate's time to come in twice (if they pass the first stage). He questioned in that reply, why did no one complain when he interviewed Shahida alone for the same role.

[49] On the counter-offer to Shahida (Charge 2(B)(iv) and 3(E)(ii)), he said he did not lie to the Remuneration Committee. Her resignation was not her first but second in six months. At the first resignation, he convinced her to stay and asked for a salary adjustment which he successfully got and she stayed on. When she again came with her intention to leave the second time, she told him she received a better offer from an MNC. He noted in one conversation with COW5 when an employee from another Department requested an increase with an excuse of a better offer elsewhere, the latter remarked that the Company should not be in the habit of counter-offering an employee if he/she was only interested in more money with threat of resignation. The Claimant said he shared the same views and principles as it would create more salary inequity amongst the loyal employees.

[50] In respect of the allegation in Charge 3(E)(i), he stated that he had the Remuneration Committee and COW5's approvals on the package before the Company hired the candidate. Whether it is 20% or more, he had justified this with the committee, debated and got their approval. There had been salary adjustments for employees which exceed 20%. Therefore, he stated that one needed to know why the inconsistencies when it comes to a HR candidate. He also said it was quite common that the committee gets a request for higher salary by candidates replacing the current incumbent. Therefore, he denied that he did not follow the Company's policy and asked which policy that he was alleged to not have followed.

[51] COW5 in his cross-examination stated that the Claimant would update him of new positions in the Company. On the matter of approval for the positions, the Company had set procedures. The Claimant and other directors would discuss with him on future hirings within the Company. A decision may not be made there and then

but once a decision was made, new hires would then be brought to the Remuneration Committee. Once the Remuneration Committee endorsed the hires, the Claimant would bring it up to COW5 for his approval. It is noted that none of the set procedures were exhibited in the Company's bundles of documents.

[52] Based on the evidence that the Court has seen and heard, the Court opines that the evidence is not very clear for it to be satisfied on a balance of probabilities that the Company has proved all the charges under these two heads. Looking at COW5's evidence, although he said there were set procedures and he narrated to the Court how a recruitment process is carried out, the Court views it as neither here nor there. The Claimant said he got COW5 to meet the candidate and which he did. Then "we gave him on the offer". COW5 did not deny that he met the candidate. The Court finds that the Claimant's explanation in the reply to the show cause letter in regard to Charges 2(B) and 3(E) was the more probable version of events. Due to Shahida leaving the Company on short notice, which the Company did not dispute, he had to find a replacement fast. COW3 was asked to help him find a replacement which she did through Job Street. But they did not interview any of those candidates, and the rest is history. Jude Lee Kwee Wah whom had been appointed to replace Shahida is still with the Company and is now a permanent employee.

[53] However, in regard to Charge 2(B)(i) of conducting the interview alone, there is clear evidence that the Claimant had conducted the interview by himself as can be seen in the interview rating sheet (page 5 of COB2) and which the Claimant himself admitted. On a balance of probabilities, the Court views that the Company's evidence on this charge only in respect of Charge 2(B)(i) is more probable than the Claimant's. **Therefore, the Court finds that Charge 2(B)(i) has been proved by the Company.**

[54] In regard to Charge 2(B)(ii), the Court accepts the Claimant's evidence about the urgent necessity to recruit Shahida's replacement and that he brought the candidate to meet with COW5. COW5 did not deny that he met the candidate. **He may have breached the Company's policy on the recruitment process but the Company did not challenge the Claimant's evidence in respect of the urgent necessity to get a replacement for the position that Shahida vacated.** The question is by conducting the interview alone, did he cause a loss to the Company

when he recruited Jude Lee Kwee Wah? COW3 may have been miffed that her efforts of getting a few candidates from Job Street was not followed through with an interview for each of them. But even she admitted that as HRAD, the Claimant was competent to decide on any candidate applying for a vacancy in the Company. For Charges 2(B)(iii) and (iv), the Court does not find the Company's evidence to be more probable than the Claimant's in respect of the element of lying to the Remuneration Committee. **The Court finds that the Company has not proved on a balance of probabilities Charges 2(B)(ii), (iii) and (iv).**

[55] In regard to Charge 3(E)(ii), he has explained his reason on the counter-offer issue to Shahida in page 21 of COB1 as follows:

> "On para (ii) why should I lie when there were no reason to? It's not a SOP to counter offer a resigning employee and I have counter-offer her once, and not in a habit of counteroffering my staff every few months they come with a resignation letter. Bringing up an issue which has been overtaken by time and have no bearing in company policies and procedures suggest a mala-fide intent from certain parties.
>
> For para (iii) and (iv) I have explained this in my earlier explanations that the candidates were floated to the CEO before I interview them and subsequently met CEO before we gave them the offer.".

[56] I am of the view that the Claimant has been consistent on this issue about whether or not he had made a counter-offer to Shahida and his evidence is believable. His response to this issue was at page 21 of COB1 in relation to paragraph (ii) of Charge 3(E). This charge is related to Charge 2(B)(iv). I have elaborated on that charge above and do not wish to add further to it. The Court also does not find the Company's evidence to be more probable than the Claimant's. **Accordingly, the Company has also not proved Charge 3(E) on a balance of probabilities.**

Charge 3(D)

[57] In regard to Charge 3(D), this was also about abusing his power as HRAD and manipulation of authority. It was on the issue of the early confirmation of Shahida Yaacob. Why did this become an issue for the Company? Shahida was appointed in Nov 2015 with her confirmation due after six months (April 2016). Notwithstanding that the employee had yet to be confirmed, the Claimant allegedly presented a paper to the Remuneration Committee recommending a salary revision. The Committee's decision/recommendation was that the increment be effective only after six months i.e. upon confirmation. In defiance of the decision of the Remuneration Committee, the Claimant had given effect to the increment/adjustment effective March 2016, approximately two months prior to Shahida's confirmation. It is noted that eventually, Shahida left the Company and that was why a replacement had to be found to take her position as HRMS Executive. It related to Charge 3(E) which has been decided above.

[58] The Claimant's response in his reply to the show cause letter on Charge 3(D) was the following (page 20 of COB1):

> "Again this incident has been overtaken by time, and I wish whoever the complainant, brought this up in March of 2016 rather than 10 months later. I now find it difficult to recall without able to sight proper documentation, but I believe this has got something to do with her (first) resignation, I justified to the RC, and can't recall what the decision was but later got to CEO for his approval, as the CEO has the final authority. I believe, Payroll nor the other HR team members will not on this increment or confirmation without CEO's signature on the proposal. am confident that the documents were proper but not able to request this now since I am on suspension. Again bringing up something which happens more than 6 months ago now, indicates a mala-fide intention towards me.".

[59] The Company's evidence at page 33 of COB2, which was the recommendation presented to the Remuneration Committee, showed Shahida's name and the notation "Early confirmation. To confirm employment with 14% salary adjustment as she showed great attitude towards her work.". COW5 had approved and signed the recommendation and prior to that the paperwork had gone through the Chief Operating

Officer, Wan Hasmar Azim Wan Hassan, Md. Moghni and the Claimant. COW5 stated that the increment was valid but it must be paid after six months. Shadida received her increment on 1 March 2016 as stated in page 34 of COB2, well before the end of her probation period.

[60] The Claimant stated that he could not recall what was the decision of the Remuneration Committee but he obtained COW5's approval which can be seen on that document. I have scrutinised the document at page 33 of COB2 which was quite difficult to read without the aid of a magnifying glass. The Company claimed that the Remuneration Committee had recommended that "Adjustment & confirmation after 6 months of Date of Employment". This notation was made in the last box on that page and signed by someone. The Claimant had put to COW5 that when he got the latter to approve and sign on the document, that notation was not there. It was put to COW5 also that the Claimant did not know whose signature it belonged to. COW5 replied that he could not recognise the signature as well. There were no dates written in the document. COW5 stated that looking at the document, the Remuneration Committee had approved of Shahida's salary adjustment. But COW5 said it is to be paid after her confirmation.

[61] The letter dated 2 March 2016 to Shahida only stated that her basic salary had been revised effective 1 March 2016. It did not state when it was to be paid. The Company did not exhibit Shahida's salary slips from March 2016 onwards to show whether the adjustment was indeed paid in March 2016 or after her confirmation in April 2016. Charge 3(D) in paragraph (ii) stated that:

(i) Notwithstanding that the employee had yet to be confirmed, you presented a paper to the Remuneration Committee recommending a salary revision. The Committee's decision/recommendation was that the increment be effective only after 6 months i.e. upon confirmation.

(ii) In defiance of the decision of the Remuneration Committee, you had given effect to the increment/adjustment effective March 2016, approximately 2 months prior to Shahida's confirmation.

[62] The crux of the charge was that the Claimant had given effect to the increment effective 1 March 2016 whereas her date of confirmation was after 15 April 2016. I believe it was not wrong for the Claimant to present a salary revision for Shahida although her confirmation date was not due yet. The whole purpose of it was him trying to get an early confirmation date for Shahida. He said he thought it was because of her first resignation letter, and he was trying to get Shahida to stay on with the Company by getting an early confirmation date for her, as well as an increase in her salary. However, no one was able to confirm who made the notation "Adjustment & confirmation after 6 months of Date of Employment" and whether it was there already when COW5 approved the recommendation. The signature accompanying that notation did not look like it belonged to any of the four persons, including the Claimant, who had signed on the document.

[63] Nevertheless, the undisputed evidence was that COW5 stated that the increment was valid, only that it must be paid after her confirmation. The Court therefore assumes from his evidence that the notation must have already been there when he approved and signed the document. Based on these evidence, the Court opines it is unsafe to find the Claimant guilty of this charge because it is probable that COW5 had approved Shahida's early confirmation, but that the salary increment could only be paid after 15 April 2016, which was six months after her date of employment. Therefore, the Court finds that the Claimant's evidence is supported by COW5's evidence in that regard. **Accordingly, the Court finds that Charge 3(D) Company has not been proved.**

<u>Absence of Domestic Inquiry Process</u>

[64] The Court will address the issue of the absence of a Domestic Inquiry (DI) because the Claimant claimed that his dismissal was unfair as he was not given the opportunity to present his case before a DI panel. In **Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan & Other Appeal [1997] 1 CLJ 665 at page 716** it was held that:

> "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. However it may take into account the fact that a domestic inquiry had been held when determining whether the particular workman was justly dismissed".

[65] In **Bharat Forge Co. Ltd. v. A.B. Zodge and Another (1996-11-LLJ-643) (SC)** the court held that a DI may be vitiated by either for non-compliance of the rules of natural justice or for perversity. Any disciplinary action thus taken on the basis of a vitiated inquiry does not stand on a better footing than a disciplinary action with no inquiry. Two principles emerge from this, i) that the principles of natural justice must have been adhered to at the domestic inquiry stage and ii) where the domestic inquiry has been vitiated for some reason, the Court can hear the case *de novo*.

[66] In the case of **BZ Holdings Sdn Bhd. v. Krishnan A/L Rengasamy [1993] 1 ILR26** the Industrial Court ruled that dismissing an employee without a show cause letter being served or a DI being held was alone sufficient to decide that the dismissal was procedurally unfair. The Court refers to the case of **Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. & Another Appeal [1995] 3 CLJ 344** where the Federal Court held that the Industrial Court, in inquiring into the question of whether there was a failure to hold a DI, had gone into a reason not relied upon by the employer, and into a matter quite outside the reference by the Minister. The Industrial Court has thus changed the scope of the Minister's reference, committing thereby a jurisdictional error. The defect in natural justice by the respondent could and ought to be cured by the inquiry by the Industrial Court. At page 354, Mohd. Azmi Bin Haji Kamaruddin FCJ stated:

> "In any event, we held the view that once a case of wrongful dismissal had been properly referred by the Minister under s. 20(3), the Industrial Court was seised with jurisdiction and was obliged under the Act to determine the dispute on its merits. … Invariably, the hearing before the Industrial Court itself which indeed provides a better and impartial forum for the employee than most domestic tribunals, should be taken as sufficient opportunity for the employee to being heard to satisfy natural justice and thereby rectify any omission to hold any domestic inquiry. Indeed, the Minister's reference should be viewed as a hearing *de novo* by an independant statutory tribunal."

Further at page 356, the Federal Court held:

> "It was not within the ambit of the reference for the Industrial Court to determine whether Hong Leong ought to be punished for failing to hold a domestic inquiry. The Industrial Court was not competent to declare the dismissal void for failure to comply with the rule of natural justice. The very purpose of the inquiry before the Industrial Court was to give both parties to the dispute an opportunity to be heard irrespective of whether there was a need for the employer to hold a contractual or statutory inquiry. We were confident that the Industrial Court as constituted at present was capable of arriving at fair result by fair means on all matters referred to it. If therefore there had been a procedural breach on natural justice committed by the employer at the initial stage, there was no reason why it could not be cured at the re-hearing by the Industrial Court."

Finally at page 358, the Federal Court held:

> "For reasons already stated, we were of the view that the High Court ought to conclude that the Industrial Court had omitted to consider all relevant matters and committed jurisdictional error in its award when it held that Wong was dismissed without just cause or excuse purely on the basis of failure to hold a domestic inquiry. The omission to consider on the merits whether Wong's dismissal was with or without just cause or, regardless of the initial breach to hold a domestic inquiry, was fatal. Hong Leong's appeal was accordingly allowed but limited only to quashing that part of the award which held that the failure of Hong Leong to hold an inquiry *ipso facto* rendered Wong's dismissal without just cause or excuse...".

[67] Based on the case laws above, it is not fatal to the Company's case for not conducting a domestic inquiry because the Court can hear the case *de novo,* and which it has done accordingly. The relevant witnesses were produced by the Company and documents have been exhibited for the Court to consider. For reasons best known to the Company, it did not proceed to call evidence on or some of the people whose names were mentioned in the 21 other charges against the Claimant. Nevertheless, in evaluating all the evidence before it, **the Court finds that only four charges have been proved; Charges 1(B), 2(A), 2(B)(i) and 6(B).**

[68] On the issue of production of documents, I would just state briefly here that the Claimant had, during the course of the hearing, applied for the investigation report on the Claimant to be exhibited in Court. The Company objected to the application and a date was set for the parties to submit on this matter. COW1 was still under cross-examination at that time and hearing proper continued on 28 November 2018. On 22 October 2018, the Court heard the application and reserved its decision. The Court

has now come to a decision on the Claimant's application to produce essentially the reports of investigations carried out against him which led to the Company's decision to dismiss him without a domestic inquiry being held. During the hearing of the application, the Counsel for the Claimant submitted that his application was not a fishing expedition for evidence and elaborated on the reasons for this application that is, the said documents were relevant to prove the averments that the Claimant was not given an opportunity to state his case in a proper DI. Instead he was summarily dismissed despite him giving his reply to the show cause letter on 23 January 2017. It was submitted that if a domestic inquiry was held, there was no necessity for the Claimant to apply for the investigations reports to be produced. However, the Court dismissed the application on the grounds that the investigation reports were irrelevant.

[69] Another issue that I will deal with briefly is the Claimant's assertion that the Company's witnesses were all lying in Court. Particularly, he said that COW5 lied in Court because he had to defend the show cause letter. This is despite the Claimant testifying that he worked with COW5 closely in the past and found him to be one who was not prone to lying. The Claimant also claimed that the Company had victimised him by digging up all those issues that formed the basis for his charges when it had condoned the "mistakes" then. A point that I would address here in this regard is that the Company had confirmed him in his position in February 2016, about six months after he joined the Company. The main Charges 1(B), 2(A), 2(B) and 6(D) which the Court finds the Claimant guilty of had occurred after he was confirmed. If the Company had wanted to get rid of him, it is the Court's view that the Company would not have confirmed him immediately after his probation period ended.

[70] Having heard the Company's witnesses, I am of the view that the Company's witnesses have no reason to lie on the documentary evidence that are available for the Court's scrutiny or the reason for the dismissal. There was no evidence to show what they stood to gain by his dismissal. Nevertheless, some of the evidence I found to be less probable than the Claimant's as they were unclear, and which I have elaborated earlier in this Award. The charges were preferred based on the Company's investigations after it received complaints from its employees, namely the Claimant's subordinates. It proceeded to dismiss the Claimant after it received his reply to the show cause letter and conducted further investigations against him. It is normal for a

company to verify the employee's (who was suspended) version of events in his reply to the show cause letter, hence the extension of the period of suspension with full pay. This is already trite law.

[71] I find that the Company had acted reasonably in issuing the show cause letter to the Claimant which was an opportunity for him to explain himself against the allegations by his subordinates. Despite not holding a domestic inquiry, it was proper for the Company to take the next course of action when it considered the Claimant's explanation in the reply to the show cause letter and was not satisfied with it. It reasonably believed that the Claimant was guilty of the misconducts he was charged with. The Court applies the case of **Mohd Saufi Ahmad Rozali & Anor v. Puspakom Sdn. Bhd. [2013] 2 ILR 144** as follows:

> "[7] Hence, even the standard of proof on the balance of probabilities may be too rigid a standard and the standard now is of reasonable belief. This standard has been reaffirmed by the Court of Appeal in the case of K A Sanduran Nehru v I-Berhad [2007] 1 CLJ 347. This case established that the test is not whether the employee did it but whether the employer acted reasonably in thinking the employee did it…".

[72] It is then the duty of the Court to examine the evidence in the dismissed employee's case to determine if the dismissal was with just cause or excuse. Earlier, the Court has found on a balance of probabilities that the Company has proved four of the charges he faced and that the Claimant was guilty of the charges, that is, there is just cause or excuse for his dismissal. It now boils down to whether the punishment of dismissal by the Company was proportionate in light of the evidence available before the Court.

<u>Proportionality of the punishment of dismissal</u>

[73] The Court has found the Company has proved its case against the Claimant on Charges 1(B), 2(A), 2(B)(i) and 6(B). At the submissions stage, the Company stated that it would be relying on the said seven charges only. Hence, it is deemed that it has "abandoned" the remainder 21 charges against the Claimant. Nevertheless, it is the Court's duty to analyse all the other evidence which were not

mentioned in the preceding paragraphs of this Award. Having said that, I am of the view that the Company's evidence on the remainder charges were rather sparse and I have no wish to comment further on that. It is not surprising then that it chose to concentrate on the seven main charges above.

[74] In **Holiday Inn Kuching, Sarawak v. Puan Elizabeth Lee Chai Siok, Sarawak [1990] 2 ILR 262**, the word "misconduct" was defined as any conduct inconsistent with the faithful discharge of his duties or any breach of the express or implied duties of an employee towards his employer. In **Syarikat Kenderaan Melayu Kelantan Sdn. Bhd. v. Transport Workers Union [1995] 1 ILR 79**, the term was defined as "conduct so seriously in breach of the accepted practice that by standard of fairness and justice the employer should not be bound to continue the employment". The misconducts that the Claimant was alleged to have committed, were in respect of breaches of his express and implied duties as HRAD; some of the breaches involved the issue of the Claimant's integrity and honesty.

[75] The Company's Counsel submitted that **OP Malhotra** in his book ***The Law of Industrial Disputes, 6th Edition*** at page 1116 defined "misconduct" as follows:

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

[Emphasis added]

[76] In **Pearce v. Foster & Others [1886] 17 QBD 536**, the Court of Appeal held the following:

> "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…".

[77] The principle in the above case has been applied in the case of **Mohd. Azizi Bin Sohan v. Asian Kitchen (M) Sdn. Bhd. (Award No. 1407 of 2017)** where the learned Chairman had stated:

"In this context, courts have consistently held that the followings are acts of misconduct:

(a) Where the act or conduct of the employee is prejudicial or likely to be prejudicial to the interests of the employer or to the reputation of the employer;
(b) **Where the act or conduct of the employee is inconsistent or incompatible with the due or peaceful discharge of his duty to his employer**;

…".

[Emphasis added]

[78] In the case of **Tan Poh Thiam v. Nestle Products Sdn. Bhd. [2009] 9 CLJ 504** the High Court held that:

"[29] It cannot be denied that apart from competence and industry, honesty and integrity are amongst the key characteristics that any employee should possess, no matter what form of employment the employee is engaged in. However, such characteristics assumed significant importance especially for someone holding the position held by the applicant who was a senior employee of the company….".

[79] The Court agrees with the principles as stated above and find that it has been consistently applied by the Industrial Court; where the employee's conduct is incompatible with the due or peaceful discharge of his or her duties, the employer has a right to dismiss the employee. Further, this Court in the case of **Viswanathan B Narayanan v. Malaysian Airline System Berhad [2019] 2 ILR 319** had stated:

"[61] In discharging its duty in a case under a reference in a section 20 of the 1967 Act, what is important for the Court is to determine whether the dismissal was with just cause or excuse. The Company must produce convincing evidence that the Claimant had committed the offences he was alleged to have committed and for which he was dismissed: **Stamford Executive Centre v. Dharsini Ganesan [1986] 1 ILR 101**. The Industrial Court is a court of equity and not a criminal court. The Court needs only to be satisfied that at the time of the dismissal, there were reasonable grounds for believing the offence put against the employee was committed; and there were such reasonable grounds indeed. The test is not whether the employee did it but whether the employer acted reasonably in subsequently dismissing him: **Utusan Melayu (M) Bhd. National Union of Journalists Malaysia [1991] 2 ILR 840.**".

[80] In respect of Charge 6(B), the Company submitted that from case laws, it had been decided that such misconducts of raising one's voice to a subordinate cannot be condoned as it would be detrimental to the morale and discipline of the company; **Kian Joo Can Factory Berhad v. Ng Kok Hooi [2010] 2 ILR 258.** Although the Court views that the Claimant could have been given a written warning instead for that misconduct, the Court will not disturb the Company's decision on this charge, bearing in mind that there are more serious misconducts which it has found against the Claimant.

[81] I have considered the Claimant's submissions but unfortunately, I am unable to agree with him on some of the issues raised. Notably one point which the Court wishes to briefly address therein is in regard to the issue of the defective charges, that is, absence of material particulars. The Court is of the view that as the Claimant was able to give his detailed response in his reply to the show cause letter dated 23 January 2017, his assertion on this issue is unsustainable.

[82] I will now go on to consider the proportionality of the punishment of dismissal on the Claimant. Reference is made to the case of **British Leyland UK Ltd v. Swift [1981] IRLR 91** which had been applied in the case of **Norizan Bakar v. Panzana Enterprise Sdn. Bhd. [2013] 4 ILR 477** which is a Federal Court decision and **Said Dharmalingam Abdullah v. Malayan Breweries (Malaysia) Sdn. Bhd. [1997] 1 CLJ 646**, where the court had made the following observation:

> "There is a band of reasonableness within which one employer may reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him then the dismissal must be upheld as fair; even though some other employers may not have dismissed him.".

[83] Applying the case of ***Norizan Bakar*** above, the issue of whether it was reasonable for the Company to dismiss the Claimant would depend on the seriousness of the allegation of misconduct. The principle in that case is if the Court is of the view that it was fair for the company to dismiss a claimant, then the dismissal must be upheld as fair. Would a reasonable company have retained the Claimant in the circumstances of the case? It is noted that on the facts of that case too, the

claimant's dismissal was upheld by the Federal Court due to the gravity of the misconduct committed which had destroyed the trust and confidence that the company in that case would have placed on him. In the present case, it is evident from the facts that the Claimant had committed multiple acts of misconducts and the Court has found that two out of the four those misconducts were serious in nature.

[84] In **Ngiam Geok Mooi v. Pacific World Destination East Sdn. Bhd.** (Civil Appeal No.P-02(IM)-974-06/2015) the claimant had committed a single act of misconduct. The Court of Appeal had referred to the case of ***Norizan Bakar*** and stated:

> "Learned counsel further submitted that the learned High Court judge fell into serious error in holding that the Industrial Court failed to direct its mind to the cumulative acts of insubordination. **As can readily be seen from the Award, the Industrial Court had indeed directed its mind to the alleged cumulative acts of subordination adverted to by the learned High Court judge...**
>
> [Emphasis added]

[85] The Industrial Court in the case of **BSN Commercial Bank & Anor v. Arumugam Ramasamy [2006] 4 ILR 2569** referred to several other cases that re-state the same point of law, that is, that an employee owes a fiduciary duty to the employer and cannot act in any way that destroy that relationship, and concluded as follows:

> "The Claimant's conduct in the entire circumstances of this case was inconsistent with the trust and responsibility reposed in him by the Company in the relationship of employer-employee between them. The Claimant had acted in conflict of interest with the rudimentary responsibilities and fiduciary duties that he owed to the Company as his employer; … ."

[86] In this regard, the Claimant held a trusted position in the Company by virtue of him being a very senior official with the Company as the HRAD. The Court views that the Claimant did not inform the Company of his situation as an unconfirmed employee when he spoke to COW5 about the Annual Increment 2016 and the Bonus 2015 pay-out and when he amended the draft memo. It appears that the Claimant had not been candid with the Company and allowed his personal interest to be in conflict with his duties towards the Company when he amended the draft memo as per page 3 of

COB2 and got his name included in the list of qualified employees as per page 2 of COB2.

[87] The misconducts involving the first two charges that the Court found him guilty were serious in nature. The Claimant had breached the fundamental terms of mutual trust and confidence between employer and employee by his actions. The Court opines that no reasonable employer would in this case have retained the Claimant in its employment on the two serious charges as above. The Company had lost its trust and confidence in him due to the cumulative misconducts of the Claimant who was its Director of Human Resources and Administration. It was not a suitable case for letting the Claimant off lightly with just a warning, particularly in respect of Charges 1(B) and 2(A). Therefore, given the seriousness of the misconducts by the Claimant in Charges No. 1(A) and 2(B) and all relevant facts of the present case, the dismissal was with just cause or excuse. The Court finds the dismissal was warranted because the Company could no longer repose the necessary trust and confidence in the Claimant.

Conclusion

[88] In this case, it is a finding of fact by the Court on the facts and evidence made available to it that the Company had proved its case on a balance of probabilities in respect of Charges 1(B), 2(A), 2(B)(ii) and 6(B) as stated above.

[89] In conclusion, the Court finds that, having considered all evidence available before it and bearing in mind subsection 30(5) of the 1967 Act to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form, the dismissal was with just cause or excuse. Accordingly, the Claimant's claim is hereby dismissed.

HANDED DOWN AND DATED 1 JUNE 2020

-signed-

(NOOR RUWENA BINTI DATO' MOHD NURDIN)
CHAIRMAN
INDUSTRIAL COURT, MALAYSIA
KUALA LUMPUR