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**MUHAMMAD HANIFF AZZAHARI v.  
TELEKOM MALAYSIA BERHAD**

INDUSTRIAL COURT, PENANG  
DOMNIC SELVAM GNANAPRAGASAM  
AWARD NO. 851 OF 2017 [CASE NO: 9/4-1022/13]  
14 JUNE 2017

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**DISMISSAL:** *Misconduct – Claimant uploading the respondent company's Letter of Censure on his Facebook page and posting various insulting comments and his personal opinion on it – Whether the misconduct had been proven by the respondent company against him – Factors to consider – Evidence adduced – Effect of – Whether it had justified the respondent company dismissing him – Claimant's explanations – Whether acceptable – Whether his conduct had been inconsistent and incompatible with the due and faithful discharge of his duties to his employer – Whether the decision to dismiss him had been justified under the circumstances – Whether dismissal without just cause and excuse*

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The claimant had been employed by the respondent company as a Technician. Approximately one year nine months into his employment with it, he was issued a show cause letter for, *inter alia*, uploading the respondent company's Letter of Censure on his Facebook page and posting his personal opinion on it. A Domestic Inquiry was convened against him, at the conclusion of which he was found guilty of the charges preferred against him and dismissed from service. The claimant now claims that his dismissal had been carried out without just cause and excuse. There were two main issues which arose for consideration before the Court. The first was whether the claimant, by his actions, had committed a misconduct and if answered in the affirmative, whether his dismissal had been with just cause and excuse.

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**Held in favour of the respondent company: Dismissal with just cause and excuse**

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It was undisputed that the claimant had uploaded the Letter of Censure issued by the respondent company on his Facebook page. The letter had contained the respondent company's logo and the posting had consisted of various insulting comments, remarks and defamatory statements against his superior, who had issued the letter. Thus, the respondent company had succeeded in proving this charge against him and it had warranted his dismissal as it had been a grave misconduct. His actions had been one that had obviously been inconsistent and incompatible with the due and faithful discharge of his duties to his employer (paras 30, 31, 34 & 36).

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*[Dismissal with just cause and excuse.]*

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**Award(s) referred to:**

*Stamford Executive Center v. Puan Dharsini Ganesan [1986] 1 ILR 101 (Award No. 263 of 1985)*

**Case(s) referred to:**

*Bax Global (Malaysia) Sdn Bhd v. Sukhdev Singh Pritam Singh & Anor* [2011] 2 CLJ 534

*Bumiputra Commerce Bank Bhd v. Mahkamah Perusahaan Malaysia & Anor* [2004] 7 CLJ 77

*Goon Kwee Phoy v. J & P Coats (M) Bhd* [1981] 1 LNS 30

*Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors* [1996] 4 CLJ 747

*Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665

*Pearce v. Foster* (1886) All ER Rep ExT 1752

*Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314

*Union Construction & Allied Trades Technicians v. Brain* [1981] IRLR 225

*Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344

**Legislation referred to:**

Industrial Relations Act 1967, ss. 20(3), 23(6) & 30(5)

*For the claimant - K Veeriah; Malaysian Trades Union Congress*

*For the respondent - Arumugam Ganapathy; M/s Ghazi & Lim*

*Reported by Sharmini Pillai*

**AWARD**  
**(NO. 851 of 2017)**

**Domnic Selvam Gnanapragasam:**

[1] The reference under s. 20(3) of the Industrial Relations Act 1967 by the Honourable Minister of Human Resources is regarding the dismissal of Muhammad Haniff bin Azzahari (“the claimant”) by Telekom Malaysia Berhad (“respondent”) on the 28 December 2012.

[2] The hearing of this case commenced on 14 September 2015 and was duly completed on 28 September 2015 before the then Chairman; Dato’ Hj. Sulaiman bin Ismail. The claimant’s representative from MTUC filed the Written Submissions on 15 December 2015 and Submissions In Reply on 11 April 2016 respectively. The respondent’s solicitors Messrs Ghazi & Lim filed their written submissions on 16 February 2016. This matter has been pending since then as the tenure of Dato’ Hj. Sulaiman Bin Ismail had ended on 31 August 2016. The current Chairman has been directed by the President to hand down this Award in the interest of justice. Both parties had on 6 January 2017 consented for the Award to be handed down by the current Chairman.

[3] Notwithstanding the consent, the court relies on the authority of *Bax Global (Malaysia) Sdn Bhd* (now known as *Schenker Logistic (Malaysia) Sdn Bhd*) *v. Sukhdev Singh Pritam Singh and Anor* [2011] 2 CLJ 534 where reference was made, *inter alia* to s. 23(6) of the Industrial Relations Act 1967. It was held in the said case that in order to obviate grave hardship being caused the case need not be heard *de novo*, the award can be handed down by another Chairman and the Award written by another Chairman in similar circumstances was upheld by the Appeal Court. In addition to

- A this, the parties to this matter do not have any objections towards the current Chairman handing down the award. This award is therefore written in total reliance on the evidence, documents and facts contained in the notes and records of proceedings as well as the written submissions made available to the original court and before me. The court shall now
- B hand down this award.

### **Brief Facts**

- [4] The claimant commenced employment with the respondent as Technician on a fixed term contract for one year and his contract was made permanent with effect from the 1 March 2011.

- C [5] The claimant was dismissed by the respondent company on 28 December 2012 after he was found guilty on 3 charges of misconduct. The claimant then appealed to company's Disciplinary Appeal Committee and the appeal was dismissed.

- D [6] His last drawn salary was RM1,305 per month.

- [7] The claimant contends that save for having uploaded the respondent's Letter of Censure on his Facebook website and having posted his personal opinion with regards to the said advisory letter, it was devoid of any intention either to insult his superior Encik Shahrnizar bin
- E Mohamad or to defile the respondent's reputation. Therefore the claimant takes the stand that the grounds of his dismissal was without just cause or excuse or extremely harsh and unfair.

- [8] The respondent contended that the act of the claimant by uploading the Letter of Censure (Surat Teguran) issued by the respondent against him on Facebook on 14 August 2012 amounted to gross misconduct. The letter which was posted by the claimant on his Facebook contained the respondent's logo as well as various insulting comments, remarks and defamatory statement was made against his superior.
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- [9] A Domestic Inquiry was held on 31 October 2012 and 1 November 2012 where the claimant was present and took part in the inquiry.
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[10] At the conclusion of the Domestic Inquiry, the Domestic Inquiry Panel unanimously found that all the 3 charges preferred against the claimant were proven.

- H [11] The respondent's Disciplinary committee which met on 28 December 2012 decided to dismiss the claimant immediately with effect from 28 December 2012. The respondent company submitted that the claimant's dismissal was with just cause and excuse as the misconduct committed by the claimant is such that most reasonable employer would have dismissed the claimant.

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### **The Law**

[12] It is trite law that where an employer gives reasons for terminating the employment of his employee, it is incumbent upon the employer to justify the reasons. If these reasons are not proved, then the inevitable conclusion must

be that the termination was without just cause or excuse. This principle of Industrial Law is laid down by his Lordship. Mr. Justice Raja Azlan Shah, CJ (Malaya) in the case of *Goon Kwee Phoy v. J & P Coats (M) Bhd* [1981] 1 LNS 30; [1981] 2 MLJ 129 at p. 136 which reads as follows:

Where representations are made and are referred to the Industrial Court of enquiry, it is the duty of that Court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that Court or the High Court cannot go into another reason not relied on by the employer or find one for it.

[13] The onus of proving that the dismissal is with just cause or excuse lies with the employer. It is the employer who must prove that the employee is guilty and it is not the employee who must prove himself innocent. To discharge the onus of proof the employer must adduce cogent and concrete evidence, whether oral or documentary, to prove the facts and circumstances which he contends constitute just cause or excuse for terminating employment of the employee. The standard of proof is on a balance of probabilities (See *Union Construction & Allied Trades Technicians v. Brain* [1981] IRLR 225, *Stamford Executive Center v. Puan Dharsini Ganesan* [1986] 1 ILR 101 (Award No. 263 of 1985) and *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314).

[14] Further, the Federal Court in decision of *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344; [1995] 2 MLJ 753 had this to say with regards to the function of the Industrial Court:

On the authorities, we were of the view that the main and only function of the Industrial Court in 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.

[15] Where a domestic inquiry has convened, it is the duty of the Industrial Court to inquire if the domestic inquiry was valid and the inquiry notes accurate. In *Bumiputra Commerce Bank Bhd v. Mahkamah Perusahaan Malaysia & Anor* [2004] 7 CLJ 77, the High Court held as follows:

Held (allowing the application):

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

- A Industrial Court should have first considered whether or not the domestic inquiry was valid and the inquiry 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. Accordingly, the conclusion of the Industrial Court that all charges preferred against the second respondent were not proven could not be supported and was, in fact, contrary to the clear evidence of the case. Since it was apparent from the records that the Industrial Court had misconstrued and misapplied the principles of law pertaining to the relevance of a valid domestic inquiry, this court was compelled to exercise its powers of judicial review to issue an order of *certiorari* to quash the award.
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[16] As a court of arbitration I am reminded that s. 30(5) of the Industrial Relations Act 1967 (Act 177) requires the court to decide a case in accordance with equity and good conscience. In doing so I am guided by Gopal Sri Ram JCA's decision in *Harris Solid States (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors* [1996] 4 CLJ 747 CA that it is incumbent upon the court to have regard to substantial merits of the case rather than to technicalities.

#### Standard Of Proof

- E [17] It is a principle of Industrial Relations jurisprudence that in a dismissal case, the employer must produce convincing and cogent evidence that the workman committed the misconduct for which he has been dismissed. The burden of proof lies on the employer, the respondent's company in the instant case. Thus it is incumbent on respondent to prove their case on a balance of probabilities and adduce evidence that the claimant's dismissal was for just cause and excuse. See *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314.
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#### Domestic Inquiry

- G [18] It is common ground that the Domestic Inquiry was conducted on 31 October 2012, 1 November 2012 and from 22 to 23 November 2012 by the respondent.
- [19] The records of proceeding of the inquiry during which notes were taken are found at pp. 86 - 617 of COB1.
- H [20] The claimant was given opportunity to defend himself during the Domestic Inquiry. He was in fact represented by representatives from the National Union of Telecoms Employees (NUTE) in the persons of Encik Zulkifli Bin Yahya and Encik Ahmad Rushdan bin Mohd. Salleh ("the said Defence Counsels").
- I [21] Since the Domestic Inquiry had been conducted by the respondent prior to the dismissal, the Industrial Court is limited to considering whether there was *prima facie* case against the employee has been made out.

[22] The Industrial Court's duty to consider whether the Domestic Inquiry was valid and whether the inquiry notes are accurate. The court finds it as a matter of fact that the claimant did not plead of any infirmities in either the Domestic Inquiry nor to the notes of the proceedings thereof. Neither did the claimant challenge the veracity of the notes of proceedings of the Domestic Inquiry during the trial.

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[23] After perusing the Domestic Inquiry notes, this court as of the opinion that the Domestic Inquiry notes was valid and the inquiry notes are accurate. The claimant was duly represented by the said Defence Counsels who had cross-examined the witnesses for the respondent.

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[24] In the case of *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665 at p. 716. The Court of Appeal had decided that the fact that the employer has conducted the Domestic Inquiry against his workman is an entirely irrelevant consideration to the issue whether the latter has been dismissed without just cause and excuse.

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[25] The findings of the Domestic inquiry are not binding upon the Industrial Court which rehears the matter afresh.

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#### Evaluation And Findings

[26] The evaluation and findings of this court is based on the evidence adduced by the claimant and the nine witnesses for the respondent.

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[27] This court has to make finding of facts premised on the evidence available as to whether the three charges of misconduct had been established against the claimant by the respondent on a balance of probabilities.

[28] There must exist clear evidence to support those charges of misconduct in order for this court to uphold the decision of the respondent to terminate the claimant's employment.

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[29] The claimant's services with the respondent was terminated *vide* the respondent's letter dated on 28 December 2012 after he was found guilty on all 3 charges levelled against him during the Domestic Inquiry.

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[30] The respondent called nine (9) witnesses to prove its case. It was not disputed that on or around 14 August 2012 the claimant uploaded a Letter of Censure issued by the respondent against him on Facebook. In fact this is the pleaded case of the claimant. The claimant never pleaded nor adduced evidence that the remarks were innocuous. His only evidence was that they were unintentional. The respondent through its witnesses gave evidence that the letter which was posted by the claimant contained the respondent's logo as well as various insulting comments, remarks and defamatory statement which was directed against his superior Mr. Sharunizar bin Mohamad who issued the Letter of Censure (Surat Teguran).

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- A [31] From the evidence adduced by the witnesses for the respondent, it is the finding of this court that the respondent's company had succeeded in proving on a balance of probabilities that the claimant had committed the act of grave misconduct which warranted dismissal and this was reflected in the letter of dismissal dated on 28 December 2012.
- B [32] The claimant had pleaded that the respondent had condoned to his actions by electing not to institute disciplinary action against him for a period of three (3) weeks. The claimant however abandoned this line of defence as evidence was not led during the trial to prove the same.
- C Notwithstanding the lack of evidence, the court would not be persuaded in any way by such defence (had it been adduced) as the period of time is negligible as well as the gravity of the misconduct complained of.

### Conclusion

- D [33] Based on the totality of evidence, written submissions by both parties and bearing in mind s. 30(5), the Industrial Relations Act 1967 to act according to equity and good conscience and substantial merit of the case without regard the legal forms, it is court's finding that the claimant's dismissal was with just cause and excuse.

- E [34] The court finds that the claimant's conduct is one that is obviously inconsistent or incompatible with the due or faithful discharge of his duty to the employer.

[35] In the case of *Pearce v. Foster* (1886) All ER Rep ExT 1752, Lord Esher MR enunciated as follows:

- F The rule of law is that where a person has entered into relationship of servant to a master, if he does anything incompatible with the faithful performance of his duty, the master, may dismiss him without notice

- G [36] For the reason adumbrated and having regards to the evidence on its totality this court is of the considered view that the respondent has proven on a balance of probabilities that the claimant's termination was reasonable and justified. The court finds that the claimant's termination was carried out with just cause or excuse.

[37] The claim is hereby dismissed.

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