LIM CHEE KEONG v. MDC PRECAST INDUSTRIES SDN BHD

INDUSTRIAL COURT, PENANG
RUSITA MD LAZIM
AWARD NO. 624 OF 2026 [CASE NO: 9-4-309-24]
21 APRIL 2026

Abstract – *When an employer becomes aware of an employee's misconduct but continues their employment without taking disciplinary action, the misconduct is legally considered condoned. This election not to punish acts as a permanent waiver, preventing the employer from later using that same incident as a basis for punishment.*

LABOUR LAW: *Employment – Dismissal – Misconduct – Allegations of failure to update stock cards – Absence of formal job scope revision or training – Whether stock card duties specifically assigned to employee – Whether misconduct proven – Whether dismissal with just cause or excuse – Industrial Relations Act 1967, s. 20(3)*

LABOUR LAW: *Employment – Dismissal – Misconduct – Condonation – Allegations of habitual lateness – Employer's knowledge of claimant's attendance patterns for substantial period of time – Failure to take disciplinary action despite knowledge – Whether employer's inaction amounted to condonation – Whether alleged misconduct could be subsequently used as basis for dismissal – Whether dismissal with just cause or excuse – Industrial Relations Act 1967, s. 20(3)*

The claimant joined the respondent ('company') in 2007. Over a tenure of approximately 16 years, he was promoted to Assistant Production Manager and eventually served as Assistant Inventory Manager. At the time of his dismissal in 2023, his last drawn salary was RM7,800. The company initiated disciplinary action *via* a show cause letter, levelling two primary charges against the claimant, namely for his: (i) failure to update stock cards, specifically regarding two U-Drain product sizes, where a discrepancy of 97 units existed between the recorded stock and physical inventory; and (ii) habitual lateness, alleging that the claimant was late for work on numerous dates between May 2023 and August 2023, based on a purported 8am start time. A domestic inquiry was held and the claimant was found guilty. Following the domestic inquiry recommendation, the company dismissed the claimant with immediate effect. Hence, the present claim. The claimant contended that: (i) his working hours had been understood as 8.30am to 5.30pm since 2021 and his superiors were aware of his attendance patterns; and (ii) the stock card responsibilities were historically managed by a different employee ('Mr Yeoh') and he had not received specific training or a formal job scope revision following that employee's departure.

Held (allowing claim; awarding claimant RM218,400):

(1)(a) The company submitted that the claimant's admission that he headed three divisions was important because he confirmed that the failure to update the stock card, raised in the charge, was within the scope of his duties in the inventory division, not another party. Nevertheless, the company did not provide any evidence indicating that, after Mr Yeoh left the company, the task was specifically assigned to the claimant. There was no modification to the claimant's job scope as Assistant Production Manager and Assistant Inventory Manager since 2021. The company also failed to show the court that the claimant's job scope was revised after Mr Yeoh left the company in 2023. (paras 20-22)

(1)(b) Based on paras. 5 and 6 of the claimant's contract in 2007, no evidence was tendered that the claimant's job scope was briefed every time there were reshuffles, promotions, and restructuring by the company from 2015 to 2023. (para 23)

(2)(a) The initial permission given by the claimant's former superior was neither challenged nor rebutted until the show cause letter was issued to the claimant. This clearly showed that there was condonation in his attendance trend since 2021, with a few instances of lateness after 8.30am. Considering the claimant's tardiness, a condonation occurred when the employee committed misconduct with the employer's full knowledge, and no disciplinary measures were implemented, resulting in the inference that the employer had acquiesced to the employee's misconduct. The company also chose not to impose any deductions from his monthly salary and other benefits. (paras 30, 31 & 36)

(2)(b) Once a master has condoned any misconduct which would have justified dismissal, he cannot, after such condonation, go back upon his election to condone and claim a right to dismiss the servant or impose any other punishment in respect of the offence which he has condoned. (para 34)

(3) The company failed to discharge its burden of proving, on a balance of probabilities, that the dismissal was with just cause or excuse. The claimant was awarded RM218,400. (paras 45 & 57)

Award(s) referred to:

Ireka Construction Bhd v. Chantiravathan Subramaniam James [1995] 2 ILR 11 (Award No. 245 of 1995)

Len Chee Omnibus Co v. Transport Workers Union (Award No. 12 of 1970)

Stamford Executive Centre v. Paun Dharsini Ganesan [1986] 1 ILR 101 (Award No. 263 of 1985)

Case(s) referred to:

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

Dr A Dutt v. Assunta Hospital [1981] CLJU 5; [1981] 1 LNS 5
Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] CLJU 30; [1981] 1 LNS 30
Hotel Jaya Puri Bhd v. National Union of Hotel Bar & Restaurant Workers & Anor [1979] CLJU 32; [1979] 1 LNS 32
Koperasi Serbaguna Sanya Bhd (Sabah) v. Dr James Alfred & Anor [2000] 3 CLJ 758
Lee Gee Pheng v. RHB Bank Bhd [2003] 4 CLJ 639
Mak Sik Kwong v. Minister Of Home Affairs, Malaysia (No. 2) [1975] CLJU 97; [1975] 1 LNS 97
Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 4 CLJ 449
Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor [1996] 2 CLJ 586; [1981] CLJ (Rep) 74
Pahang South Union Omnibus Co Bhd v. The Minister Of Labour & Manpower & Anor [1981] CLJ 83
Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314

Legislation referred to:
Industrial Relations Act 1967, ss. 20(3), 30(5), (6A), Second Schedule

For the claimant - Vijayan Veeriah; Malaysian Trade Union Congress
For the respondent - Siti Rafidah Abdul Raof & Darirah Irwani; M/s Aswandi Hashim & Co

Reported by Lina E

AWARD
(No. 624 of 2026)

Rusita Md Lazim:

[1] This court has considered the following cause papers and documents in handing down this award, namely:

(i) the claimant's statement of case dated 27 June 2024;

(ii) the company's statement in reply dated 24 July 2024;

(iii) the claimant's witness statement (Lim Chee Keong) is marked as "CLWS-1";

(iv) the company's witness statement (Chan Huan Phan) is marked as "COWS-1";

(v) the company's witness statement (Izzatul Hazwani binti Che Man) is marked as "COWS-2";

(vi) the claimant's bundle of documents marked as "CLB1";

(vii) the company's bundle of documents marked as "COB1";

(viii) the company's bundle of documents marked as "COB2"; and

(ix) the company's bundle of documents marked as "COB3".

Brief Facts Of The Case

[2] The claimant commenced his employment as QC Executive with MDC Precast Industries Sdn Bhd on 16 July 2007.

[3] The claimant, then *via* a letter of appointment dated 1 September 2012, was transferred to MDCon 15 Sdn Bhd effective 1 September 2012.

[4] The claimant was then, *via* a transfer of company letter dated 1 January 2013, transferred back to the company (MDC Precast Industries Sdn Bhd effective 1 January 2013.

[5] At the time of the termination, the claimant's last drawn salary was RM7,800 per month.

The Claimant's Contentions

[6] The claimant avers as follows:

(i) the company, *via* a letter dated 12 September 2023, issued a "show cause letter" against the claimant for three allegations;

(ii) the claimant was directed to provide a written explanation to the company within three days from the date of receipt of the said show cause letter;

(iii) the claimant replied to the company's show cause letter on 15 September 2023;

(iv) the inventory department starts work at 8.30am. If the claimant was late, he worked overtime without pay;

(v) the company did not notify the claimant immediately on 26 June 2023 regarding all allegations by the company and only issued a show cause letter on 12 September 2023;

(vi) the allegation dated 1 March 2023 until 29 May 2023 only issued a show cause letter on 12 September 2023, which, after four to six months, was condoned by the company for disciplinary action against the claimant;

(vii) starting 1 January 2021, the claimant's working hours were changed from 8am to 5pm to 8.30am to 5.30pm;

(viii) the claimant's superior was notified of the claimant's late attendance with a valid reason, and thereafter, no action was taken by the company until 12 September 2023;

(ix) by way of a letter dated 19 September 2023, the claimant was issued a notice of domestic inquiry and that he was notified that a domestic inquiry ("DI") will be held on 25 September 2023, *via* online Zoom meeting;

(x) the claimant attended ("joined") the DI session *via* Google Meet on 25 September 2023 and he was found guilty;

(xi) the domestic inquiry, held on 25 September 2023 via online Zoom meeting that was conducted in breach of the fundamental principles of natural justice;

(xii) the claimant *via* a letter dated 29 September 2023, was notified of his dismissal with effect from 29 September 2023; and

(xiii) the claimant's dismissal was in breach of the fundamental principle of natural justice and an abuse of management's prerogative to institute disciplinary action.

The Company's Contentions

[7] The company avers as follows:

(i) based on the report received by the company, there was a shortage of two U-Drain product stocks for sizes 1200 x 1200 and 1200 x 1200/SB on 16 June 2023;

(ii) the claimant also failed to update the stock card for both products, where the company found that 151 units had been recorded in the stock card, of which there are only 54 physical stock units;

(iii) the claimant was repeatedly informed by his superior officer to ensure that the stock information is updated;

(iv) on June 26, 2023, the company's Human Resources Department received one complaint form from Mr Chan Huan Phan, who holds the position of "Factory Manager", which contains a complaint regarding misconduct committed by the claimant;

(v) the claimant attended ("joined") the internal investigation session dated 25 September 2023 and the DI was conducted accordingly;

(vi) the claimant was given a reasonable opportunity to give evidence and present all evidence in his defence during the internal investigation. The claimant was also allowed to present witnesses in the internal investigation proceedings;

(vii) show cause letter dated 12 September 2023 was an opportunity to defend oneself in writing, which has been given;

(viii) during the DI, the claimant did not adduce any evidence or any witnesses on his behalf to support his evidence in the DI;

(ix) the claimant was also allowed to call his witnesses in the DI. However, the claimant did not present any evidence or present any witnesses on his behalf to support his evidence in the internal investigation proceedings;

(x) the DI was perfect as there were no gaps that affected the process of justice during its proceedings. The examination of witnesses and the witnesses' answers were recorded in an orderly manner without any "fabrication"; and

(xi) the claimant had also signed each page of the DI minutes. Thus, the claim that the DI proceedings conducted against the claimant violated the basic principles of natural justice is completely unfounded.

The Law, Role, And Function Of The Industrial Court

[8] Reference is made to the decision of the Federal Court in *Goon Kwee Phoy v. J & P Coats (M) Bhd* [1981] CLJU 30; [1981] 1 LNS 30; [1981] 2 MLJ 129 on p. 136 where His Lordship Raja Azlan Shah, CJ (Malaya) (as His Royal Highness then was) opined:

> *Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that Court to determine whether the termination or dismissal is with or without just cause or excuse.* If the employer chooses to give 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 is found 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.*
>
> (emphasis added)

[9] In *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449, His Lordship Mohd Azmi Kamaruddin, FCJ explained the role of the Industrial Court under s. 20 of the IRA as follows:

> As pointed out by this court recently in *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344; [1995] 2 MLJ 753, the function of the Industrial Court is dismissal cases on a reference under s. 20 is two-fold firstly, *to determine whether the misconduct complained of by the employer has been established*, and secondly whether *the proven misconduct constitutes just cause or excuse for the dismissal.* Failure to determine these issues on the merits would be a jurisdictional error.
>
> (emphasis added)

Burden Of Proof

[10] It has been settled law that in cases where the dismissal was caused by the employer, it is the employer that must discharge the burden of proof that the dismissal is with just cause and excuse. This long-settled principle was demonstrated in the case of *Ireka Construction Bhd v. Chantiravathan Subramaniam James* [1995] 2 ILR 11 (Award No. 245 of 1995), wherein the learned Chairman opined that:

> It is a basic principle of industrial jurisprudence that in a dismissal case the employer must produce convincing evidence that the workman committed the offence or offences the workman is alleged to have committed for which he has been dismissed. **The burden of proof lies on the employer** to prove that he has just cause and excuse for taking the decision to impose the disciplinary measure of dismissal upon the employee. The just cause must be either a misconduct, negligence or poor performance based on the facts of the case.
>
> (emphasis added)

Standard Of Proof

[11] The onus or burden of proof is based on a standard of proof on the balance of probabilities as laid down by the Court of Appeal in *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314 wherein His Lordship Abdul Hamid Mohamad, JCA opined:

> Thus, we can see that the preponderant view is that the Industrial Court, when hearing a claim of unjust dismissal, even where the ground is one of dishonest act, including "theft", is not required to be satisfied beyond reasonable doubt that the employee has "committed the offence", as in a criminal prosecution. On the other hand, we see that the courts and learned authors have used such terms as "solid and sensible grounds", "sufficient to measure up to a preponderance of the evidence", "whether a case … has been made out", "on the balance of probabilities" and "evidence of probative value". In our view the passage quoted from *Administrative Law* by H.W.R. Wade & C.F. Forsyth offers the clearest statement on the standard of proof required, *that is civil standard based on the balance of probabilities, which is flexible, so that the degree of probability required is proportionate to the nature of gravity of the issue.* But again, if we may add, these are not "passwords" that the failure to use them or if some other words are used, the decision is automatically rendered bad in law.
>
> (emphasis added)

Issue

[12] The issues to be determined in this case are as follows:

(i) whether the claimant had committed the acts of misconduct alleged against him as stated in the charge; and

(ii) whether such misconduct is so serious that it constitutes just cause or excuse for the company to dismiss the claimant.

Evaluation Of Evidence And Findings Of The Court

[13] In the present case, the claimant had called one witness to testify. The respondent company had called two witnesses to testify on its behalf. The witnesses were as follows:

(i) Lim Chee Keong (CLW1);

(ii) Chan Huan Phan (COW2); and

(iii) Izzatul Hazwani binti Che Man (COW2).

[14] The following is a chronology of the claimant's employment and disciplinary actions, which ultimately led to the claimant's dismissal:

Date	Occasions
16.7.2007	The claimant commenced his employment at the company.
1.01.2015	The claimant was promoted to Assistant Production Manager.
Mei 2023-August 2023	The claimant was alleged to be late to the company after 8am.
16.06.2023	Failure to update the stock card.
26.06.2023	The company received a complaint from Mr Chan Huan Phan, Factory Manager, regarding the claimant's misconduct
1.08.2023	The statements of five witnesses were recorded by the company
2.09.2023	The "Rakaman Kenyataan" submitted to the Independent Chairman of Pihak Berkuasa Disiplin, Dato' Dr Aswandi Mohamed Hashim from Messrs. Aswandi Hashim & Co
7.09.2023	The Independent Chairman, Dato' Dr Aswandi, that based on the "Rakaman Kenyataan", ruled out: (i) *prima facie* misconduct has been made out (charges 1 and 2) and recommended that the company (ii) The show cause letter is to be issued.
12.09.2023	The company issued the show cause letter.
15.09.2023	The claimant responded to the show cause letter.
19.09.2023	The company issued a notice of "Domestic Inquiry" and Charge Sheet to the claimant for two charges
25.09.2023	The company conducted a DI chaired by a lawyer, Dini Abdullah from Messrs. Aswandi Hashim & Co
29.09.2023	The company found the claimant guilty of the two charges and dismissed the claimant with immediate effect.

Whether There Was A Termination Of The Claimant By The Company Due To Tardiness And Failure To Perform His Task

[15] In this case, the fact of the claimant's termination is not disputed. Thus, the next issue for this court to decide is whether the claimant's dismissal from his employment by the company on 25 September 2023 was proven.

[16] The company's main terms of reference in determining the claimant's duties and responsibilities towards the company are the letter of appointment dated 25 July 2007. The letter of appointment dated 25 July 2007 is attached as follows:

[17] During the claimant's service period from 2007 until September 2023, the claimant has held several positions in the company. After serving for almost 16 years, the claimant was charged with two counts of tardiness and failure to perform his duty satisfactorily. The claimant was charged and found guilty by the DI panel under the following charges:

> First Charge
>
> Berdasarkan kepada laporan yang telah diterima oleh pihak Syarikat, bahawa pada tarikh 16 Jun 2023 telah berlaku kekurangan ke atas Dua (2) stok produk U-Drain bagi saiz 1200 x 1200 dan 1200 x 1200/SB yang mana produk tersebut perlu dibuat penghantaran kepada pihak Pelanggan.
>
> Rentetan itu, pihak Syarikat telah mendapati bahawa pihak Encik telah gagal untuk mengemaskini stock card bagi kedua-dua produk tersebut di mana pihak Syarikat mendapati sebanyak 151 unit telah direkodkan di dalam stock card, yang mana stok fizikal hanya terdapat sebanyak 54 unit sahaja.
>
> Anda telah diberi makluman berulang kali oleh Pegawai Atasan untuk memastikan maklumat stok dikemaskini, produk walaubagaimanapun, anda masih gagal/enggan ingkar mematuhi arahan yang diberikan tersebut sepertimana yang anda tahu dan sepatutnya tahu.
>
> Perbuatan salahlaku anda telah dirujuk kepada Kontrak Perkhidmatan bertarikh 25 Julai 2007, Klausa 5, iaitu "Your appointment is subject to your compliance with any conditions of service or Company rules and practices, either express or implied for the time being in force. For ease of reference, some of the main terms and conditions of employment are shown in the attachment to this letter. The company however, reserves the right to alter or amend any of the terms and conditions from time to tie as it deems necessary" dan dibaca bersama kl. 6 iaitu "You will be required to carry out such duties and jobs functions".

[18] The company's counsel submits that the claimant had breached clauses 5 and 6 (paras. 5 and 6) of the employment contract dated 25 July 2007 as per the charges.

[19] Mr Vijay, the claimant's representative, submits that the company did not produce evidence that the claimant failed to update the stock card. During cross-examination, COW1 and COW2, it collectively admitted that the company did not provide training in relation to the stock card. Further, the company witness admitted that the said work was new to the claimant since the person in charge (Mr Yeoh) left the company in 2023.

[20] The respondent's counsel submits that the claimant's admission that he headed three divisions was important because he confirmed that the failure to update the stock card, raised in the charge, was within the scope of his duties in the Inventory Division, not another party.

[21] Nevertheless, the company did not provide any evidence indicating that, after Mr. Yeoh left the company, the task was specifically assigned to the claimant. The claimant, during cross-examination, told the court as follows:

Soalan	:	Setuju sebagai Assistant Inventory Manager, Encik bertanggungjawab terhadap rekod dan pemantauan stok?
Jawapan	:	Tak setuju, kerja itu bahagian saya hanya 'title'.
Soalan	:	Untuk tugas merekod dan kemaskini stok, siapa yang bertanggungjawab?
Jawapan	:	Yeoh Kooi Chuan.
Soalan	:	Untuk tugas merekod dan kemaskini stok, Encik bertugas seorang diri atau ada pembantu?
Jawapan	:	Ada pembantu.
Soalan	:	Berapa orang pembantu?
Jawapan	:	Masa saya handle, ada 4 orang pembantu.

[22] There was no modification to the claimant's job scope as Assistant Production Manager and Assistant Inventory Manager since 2021. The company also failed to show the court that the claimant's job scope was revised after Mr Yeoh left the company in 2023. The failure to update the stock card occurred only in June 2023.

[23] Having read paras. 5 and 6 of the contract dated 25 July 2007, no evidence was tendered that the claimant's job scope was briefed every time there were reshuffles, promotions, and restructuring by the company from 2015 to 2023:

Second Charge

Bahawa anda didapati telah lewat hadir bekerja bagi tarikh- tarikh sepertimana berikut di mana waktu kerja sebenar anda adalah bermula pada pukul 8am sepertimana yang anda tahu dan sepatutnya tahu.

[24] The respondent's counsel submits that the notice of change of working hours document dated 26 July 2022 clearly shows that the claimant's working hours begin at 8am, and not 8.30am as confirmed by the respondent's witnesses. The claimant, however, refuted the receipt of the Notice and denied acknowledging the receipt of the notice dated 26 July 2022, which the claimant purportedly acknowledged on 13 September 2023, after the issuance of the show cause notice. The issue at hand is whether the notification regarding the changes to 10-hour working hours, which has been backdated, can be regarded as sufficient service. A copy of the notice dated 26 July 2022 is reproduced as follows:

[25] Following "rakaman kenyataan" done and submitted by the company to the Independent Chairman of the Disciplinary Authority and the Legal Adviser of the company, Dato' Dr Aswandi Mohamed Hashim, a show cause letter stating all the misconduct between May and August 2023 was issued and served on the claimant. A copy of the show cause letter dated 12 September 2023 is attached below:

[26] Learned counsel for the respondent submits that the claimant pleaded guilty without any inducement from any party. Despite the claimant's plea of guilt to the charges, the DI panel has continued with the question-and-answer session to allow the claimant to provide his explanation regarding the charges.

[27] The issue that arose was whether there is any requirement for the panel to be satisfied with the claimant's plea of guilt by asking the claimant to elaborate on the charges. Furthermore, the opportunity granted online, with some technical issues, was found to be an abuse of the justice process and unfair to the claimant.

[28] The respondent also contends that the DI Chairman found that the claimant "was not sensitive to his own working hours and automatically assumed that his working hours were the same as those of his other subordinates in the Inventory Department". The matter at hand for the court is to determine if the company, upon concluding the inquiry, was persuaded that the clock-in times of the personnel in the Inventory Department were later than those of the claimant, who held the position of Assistant Inventory Manager.

[29] The court refers to the case of *Stamford Executive Centre v. Paun Dharsini Ganesan* [1986] 1 ILR 101 (Award No. 263 of 1985), the court states:

> It may further be emphasized here that the employer must produce convincing evidence that the workman committed the offence or offences the workman is alleged to have committed and 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.

Condonation

[30] Based on the attendance record, the court finds that the claimant's monthly lateness to work was condoned because neither the initial permission given by the claimant's former superior was challenged nor rebutted until the show cause letter was issued against the claimant. This clearly shows that there was condonation in his attendance trend since 2021, with a few instances of lateness after 8.30am as follows:

(i) 3 May 2023 - 8.35 am;

(ii) 9 May 2023 - 8.39 am;

(iii) 10 May 2023 - 8.35 am;

(iv) 16 May 2023 - 8.47 am;

(v) 24 May 2023 - 8.34 am;

(vi) 26 May 2023 - 8.33 am; and

(vii) 27 Julai 2023 - 8.56 am.

[31] Considering the claimant's tardiness, a condonation occurred when the employee committed misconduct with the employer's full knowledge, and no disciplinary measures were implemented, resulting in the inference that the employer has acquiesced to the employee's misconduct.

[32] In *Len Chee Omnibus Co v. Transport Workers Union* (Award No. 12 of 1970), the Industrial Court held that:

> It is well established that if any employer on discovering that an employee has been guilty of misconduct which would justify his dismissal, nevertheless elects to continue to employ him, he condones such misconduct and cannot subsequently dismiss him/her on account of the same offence.

[33] In *United Traction Co Sdn Bhd, Butterworth v. Transport Workers Union* [1986] 2 ILR 1233 (Award No. 282 of 1986), the principle laid down that an employer who continues to keep an employee in employment with full knowledge that the latter has committed a breach, condones the breach, and such waiver or retroactive permission prevents the employer from later punishing the employee for it. In short, misconduct is deemed as condoned where an election is made not to punish or discipline an employee guilty of misconduct.

[34] It is also a settled principle that once a master has condoned any misconduct which would have justified dismissal, he cannot, after such condonation, go back upon his election to condone and claim a right to

A dismiss the servant or impose any other punishment in respect of the offence which he has condoned. During cross-examination, COW1 testified that the claimant was only reprimanded for failing to update the stock card on 16 June 2023. COW1's evidence is reproduced as follows:

Soalan	:	Kamu tidak pernah menegur mengenai kelewatan kerja dan isu stockcard?
Jawapan	:	Tidak setuju.
Soalan	:	Bila kamu menegur yang menuntut mengenai isu kelewatan dan juga isu kemaskini stockcard?
Jawapan	:	Sebelum kejadian ini 16 June 2023.

[35] From the average attendance record showing that the claimant's attendance so far has been between 8am and 9am, it is highly likely that his working hours are the same as the inventory division and are no longer tied to his working hours when he joined the company in 2007, which were from 8am to 5pm.

[36] The issue of the claimant being late to the office does not arise when the respondent cannot prove that the verbal confirmation, when joining the Inventory Division, was that his working hours were changed from 8.30am to 8am. The company's counsel alleged that the claimant was late to the company on several occasions since 2018. Nevertheless, the company condoned the misconduct despite knowing and acknowledging it as serious misconduct. The company also chose not to impose any deductions from his monthly salary and other benefits.

[37] Having read the submissions, consistently arriving late on several occasions, specifically after 8.30am, and compensating for this by working extra hours beyond the regular working hours in 2026, does not represent a substantial breach that warrants termination. Nevertheless, the claimant was dismissed from his position *vide* a letter dated 29 September 2023, with immediate effect. The decision of the DI was reiterated as follows:

Whether Such Misconduct Is So Serious That It Constitutes Just Cause Or Excuse For The Company To Dismiss The Claimant

[38] In this case, the fact of the claimant's termination is not disputed. Thus, the next issue for this court to decide is the claimant's claim that he was dismissed/terminated from his employment by the company on 29 September 2023 due to alleged misconduct, and that the dismissal was without cause or excuse.

[39] The disciplinary action by the company was initiated with the inquiry before the independent Chairman ruled that a *prima facie* case was made out. Therefore, he recommended that the company issue a show cause letter. "Laporan Penilaian Salah Laku kes di Tahap *Prima Facie* ke Atas Pekerja

Lim Chee Keong" ("misconduct report") of the independent Chairman was supported by several decided case laws for the company to consider. The "misconduct report" dated 7 September 2023 is reproduced as follows:

[40] The Industrial Court's jurisdiction, in instances where a domestic inquiry had been held, was limited to considering whether there was a *prima facie* case against an employee. Thus, in the present case, the Industrial Court should have also first considered whether the domestic inquiry was valid and the inquiry notes accurate. (See *Bumiputera Commerce Bank Bhd v. Mahkamah Perusahaan Malaysia & Anor* [2004] 7 CLJ 77; [2004] 7 MLJ 441).

[41] In response to the company's submission that there was no breach of fundamental principles of natural justice, the claimant hereby points out that the company's proceeding of DI was conducted unfairly because the claimant was dismissed after the company received the "Laporan Pengerusi Siasatan Dalaman". The DI was chaired by Dini Amalina Mohamad, who practices in the legal firm by the name Messrs Aswandi Hashim & Co. During the trial, it was proven that panel 2 and the Secretariat are also lawyers and staff from Messrs Aswandi Hashim & Co. Later all the related documents to the disciplinary action were copied to Dato' Dr Aswandi Hashim, Legal Adviser of the company and the partner in Messrs. Aswandi Hashim & Co.

[42] The gaps and deficiencies of the DI proceedings become increasingly pronounced when the DI is conducted "online" and coordinated by the Secretariat from the same firm. Instead of this dual role, Messrs. Aswandi Hashim & Co also represent the respondent company in this court proceeding. Since the claimant did not raise any issue of "*locus*" during the initial proceedings, the court continued with the case until this issue of likely bias was brought to attention at a later stage.

[43] In *Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor* [1996] 2 CLJ 586; [1996] 1 MLRA 171; [1996] 1 MLJ 374; [1996] 1 AMR 908, the High Court held that where an order has been obtained in breach of natural justice, the affected party is entitled to have it set aside as of right. The case of *Mak Sik Kwong v. Minister Of Home Affairs, Malaysia (No. 2)* [1975] CLJU 97; [1975] 1 LNS 97; [1975] 1 MLRH 655; [1975] 2 MLJ 175, decided by Justice Eusoffee Abdoolcader J (as he then was) and approved by the Federal Court in *Pahang South Union Omnibus Co Bhd v. The Minister Of Labour & Manpower & Anor* [1981] CLJ 83; [1981] CLJ (Rep) 74; [1981] 1 MELR 4; [1981] 1 MLRA 88; [1981] 2 MLJ 199, held that:

> … the rules of natural justice are not rigid or universally fixed but are flexible and must be applied according to the circumstances of each case, including the nature of the inquiry, the governing framework, and the subject matter involved. *In the present case, the*

> *circumstances overwhelmingly demand the application of the audi alteram partem principle, given that the proceedings directly affected the proprietary rights of parties who were deliberately excluded.*
>
> (emphasis added)

[44] In *Lee Gee Pheng v. RHB Bank Bhd* [2003] 4 CLJ 639; [2003] 2 MLRA 122; [2004] 1 MLJ 618, the High Court held that:

> "A final order may be set aside or amended without the need to appeal in the following cases: ... (iii) where the order has been obtained in breach of natural justice ... (v) where the justice of the case requires the court to correct a serious defect in the order". [154] The court held that where proceedings have been conducted in breach of the rules of natural justice, the resulting order is a nullity which may be set aside in the exercise of the court's inherent jurisdiction. This principle was affirmed by the Court of Appeal in *Ng King Chong & Anor v. Ooi Kim Geik & Ors* [2019] 1 MLRA 221; [2019] 2 MLJ 398; [2019] 2 CLJ 246; [2018] 8 AMR 568, where the court reiterated that:
>
> It is settled law, as we had earlier accepted, that any person affected by an order obtained in breach of natural justice is entitled to have it set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside such orders. In short, **an order made in breach of the rules of natural justice was a nullity and could be challenged in collateral proceedings.**
>
> (emphasis added)

[45] Having considered the totality of the evidence, this court finds that the company had failed to discharge its burden of proving, on a balance of probabilities, that the dismissal was with cause or excuse on the grounds stated in the letter of termination dated 29 September 2023.

Remedies

[46] In his statement of case, the claimant pleads for reinstatement to his former position in the company without any loss in service and/or seniority. Alternatively, the claimant prays for compensation *in lieu* of reinstatement if the courts find reinstatement not suitable. The claimant also prays for back wages in respect of basic pay and fixed monthly allowance, together with all other benefits which he would otherwise be entitled to if he had been in continued employment with the company.

Reinstatement

[47] This court is of the view that it would be inappropriate in the circumstances to order a reinstatement as the working relationship between the claimant, and the company had no longer been harmonious since 29 September 2023.

[48] The court is guided by the principles laid down in the case of *Koperasi Serbaguna Sanya Bhd (Sabah) v. Dr James Alfred & Anor* [2000] 3 CLJ 758; [2000] 1 MLRA 483; [2000] 4 MLJ 87; [2000] 3 AMR 3493, the Court of Appeal held at p. 766 to guide this court:

> In industrial law, the usual remedy for unjustified dismissal is an order of reinstatement. It is only in rare cases that reinstatement is refused. For example, as here, *where the relationship between the parties had broken down so badly that it would not be conducive to industrial harmony to return the workman to his place of work.* In such a case, the Industrial Court may award monetary compensation. Such an award is usually in two parts. First, there is the usual award for arrears of wages, or backwages, as it is sometimes called. It is to compensate the workman for the period that he has been unemployed because of the unjustified act of dismissal. Second, there is an award of compensation *in lieu* of reinstatement.
>
> (emphasis added)

[49] Having read the submission, the court is of the view that the best remedy is to award monetary compensation *in lieu* of reinstatement, as decided by the Federal Court in the case of *Dr A Dutt v. Assunta Hospital* [1981] CLJU 5; [1981] 1 LNS 5; [1981] 1 MLRA 472; [1981] 1 MLJ 304 as follows:

> The Industrial Court is authorized to **award monetary compensation if it is of the view that reinstatement is not appropriate.** We are of the opinion that upon a true interpretation, the Industrial Court may properly award compensation where the dismissal is without just cause or excuse, if, in its considered view, it does not think reinstatement should be ordered.
>
> (emphasis added)

[50] In the case of *Hotel Jaya Puri Bhd v. National Union of Hotel Bar & Restaurant Workers & Anor* [1979] CLJU 32; [1979] 1 LNS 32; 32[1979] 1 MLRH 197; [1980] 1 MLJ 109. The Federal Court held that:

> "if there was a legal basis for paying compensation, the question of the amount is very much at the discretion of the court to fix under s. 30 of the Act." if there is a legal basis for paying the compensation, the question of amount of course is very much a matter of discussion which **the Industrial Court is fully empowered under s 30 of the Industrial Relations Act to fix.**
>
> (emphasis added)

Backwages

[51] Having considered the fact that the reinstatement of the claimant to his former position in the company is not suitable and not appropriate. As such, the most suitable and appropriate remedy may be compensation in the form of loss of wages from the effective date of the claimant's dismissal until the date of the hearing.

A **[52]** The court also refers to sub-s. 30(6A) of the Industrial Relations Act 1967 which provides: Notwithstanding sub-s. (6), the court in making an award concerning sub-s. 20(3), shall take into consideration the factors specified in the Second Schedule. Paragraph 1 of the Second Schedule of the Act provides that if backwages are to be given, such backwages shall not B exceed 24 months' backwages from the date of dismissal based on the last-drawn salary of the person who has been dismissed without just cause or excuse.

[53] The claimant's last withdrawn basic salary was RM7,800 per month. Regarding backwages, deductions must be made for any contributory C conduct. The claimant, as head of his inventory unit, failed to carry out due diligence to ensure that Mr Yeoh's successor was appointed to manage the stock card update. The claimant also contributed to the misconduct by failing to minimise delays after 8.30am and failing to obtain permission to clock in late after 8.30am on several occasions in the month stated in the second D charge. The court believes that a 30% deduction from the back wages is an appropriate and justifiable figure considering the claimant's contributory misconduct.

[54] The claimant told the court that, after his dismissal, he began working with a new company in 2024. This court must consider the claimant's E post-dismissal earnings to make an appropriate deduction from the backwages. Having considered the EPF statement, some deduction shall be made from this backwages. The EPF statement for 2024 is reproduced as follows:

[55] Taking into consideration all the aforesaid factors and the claimant's F post-dismissal earnings, the court reduces the backwages to be awarded to the claimant by 20%.

Compensation In Lieu Of Reinstatement

[56] It is a trite principle that compensation *in lieu* of reinstatement is one G month's salary per year of service. The claimant had been employed with the company from 16 July 2007 until 29 September 2023. After considering the evidence adduced before this Court and the submission by both parties, the claimant is entitled to compensation *in lieu* of reinstatement at a rate of one month's salary for 16 years of service.

H **Final Award**

[57] Having considered all the above, including all pleadings, evidence and submissions available before the court and bearing in mind s. 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 total I amount payable to the claimant by the company is as follows:

(i) backwages, based on his last drawn monthly basic salary, calculated from the date of dismissal, 29 September 2023, to the last date of hearing, 8 October 2025 (subject to a maximum of 24 months):

RM7,800 x 24 months	=	RM187,200.
(less 30% for contributory misconduct)	=	(RM56,160)
(less 20% for post-dismissal earnings)	=	(RM37,440)
	=	RM93,600

(ii) compensation *in lieu* of reinstatement, based on the formula of one month's salary for every completed year of service, calculated from 16 July 2007 until the date of dismissal, 29 September 2023 (approximately 23 years and two months), as follows:

RM7,800 x 16 months	=	RM124,800
Total Amount	=	RM124,800
	+	RM93,600
		RM218,400

[58] Hence, the court hereby orders that the sum of RM218,400, less any statutory deductions, if any, is to be paid by the company to the claimant *via* his representative, Malaysian Trades Union Congress (MTUC), within 30 days from the date of service of this award.