

INDUSTRIAL COURT OF MALAYSIA

NO. KES : 25(21)/4-14/17

BETWEEN

VIGNESWARAN THEVAR A/L ANNANTHAN

AND

MALAYSIAN AIRLINES BERHAD

AWARD NO. : 679 OF 2019

Before	:	DATO' JALALDIN BIN HAJI HUSSAIN - CHAIRMAN
Venue	:	Industrial Court Malaysia, Kuala Lumpur
Date of Reference	:	13.12.2016
Date of Receipt of Order of Reference	:	03.01.2017
Dates of Mention	:	15.02.2017; 01.06.2017; 05.07.2017; 21.08.2017; 26.09.2017; 25.10.2017; 14.11.2017; 21.11.2017.
Dates of Hearing		29.10.2017; 30.10.2018; 17.12.2018.
Date of Claimant's Submission	:	18.01.2018 (Claimant's Submission) (Claimant's Reply) Extension given and to be filed by 16.02.2019
Date of Company's Submission	:	18.01.2018 (Company's Submission) 12.02.2019 (Company's Reply)
Representation	:	Mr Vijayan Venugopal Messrs Shearn Delamore & Co. Counsel for the Company
	:	Ms Subitra Dali Messrs Surend Mokhzani & Partners Counsel for the Claimant

Reference:

This is an order of reference dated 13.12.2016 by the Honourable Minister of Human Resources pursuant to section 20(3) of the Industrial Relations Act 1967 arising out of the alleged dismissal of **Vigneswaran a/l Annanthan** (hereinafter called "the Claimant") by **Malaysian Airlines Berhad** (hereinafter called "the Company") on 12.07.2016.

The case was first mentioned in Court 21 of the Industrial Court Kuala Lumpur and transferred to this court vide a direction of the Learned President of the Industrial Court dated 10.10.2018.

Hearing commenced on 29.10.2018 and was completed on 17.12.2018. thereafter the parties filed their submissions and reply.

AWARD**Factual Matrix**

The Claimant was employed by the Company as of 01.09.2015 as an Officer Special Product Handling at MAS Animal Hotel.

By letter dated 9.12.2015 the Claimant was transferred to MAB Kargo Sdn Bhd with effect from 1.1.2016. MAB Kargo Sdn Bhd is a fully owned subsidiary of the Company.

The Claimant's duties and responsibilities were as per his statement of case **(SOC) tag 2.**

By letter dated 30.05.2016 vide **SOC tag 3** the Company informed the Claimant that he was under investigation for an alleged act of misconduct with regards to manipulation and false declaration of Cardo AWV-232-62842253 sector SBW/KUL dated 16.05.2016 for MH 2713. The Company contends that since the allegations were serious in nature the Claimant was suspended with full pay immediately until further notice.

The Claimant then replied to the suspension letter vide email **as per SOC tag 4.** Encik Ahmad Luqman Mohd Azmi, the Chief Executive Officer of MAB Kargo Sdn Bhd thereafter replied to the Claimant's email informing him that his suspension was to facilitate investigation (see letter attached to SOC tag 4).

The Company thereafter issued the Claimant with a Show Cause letter dated 15.06.2016 **as per SOC tag 5.** The Claimant was required to provide explanation to 3 issues stated therein.

The Claimant replied to the said Show Cause letter vide **SOC tag 6** dated 29.06.2016.

The Company reviewed the Claimants reply to the show cause letter and also the facts of the case. It found his explanation to be unacceptable. The Company

then informed the Claimant of its decision vide their letter dated 12.07.2016 **as per SOC tag 7.**

The Company too in view of the seriousness of the said misconduct decided that the Claimant be dismissed from the services of the Company with effect from 12.07.2016.

The Claimant was also informed that he has a right to appeal against the said dismissal. The Claimant contends that his dismissal was based on frivolous allegation without any valid basis and made mala fide. He said he was victimised by an unsubstantiated and frivolous allegation with no Domestic Inquiry held which is contrary to fair labour practice and in breach of the principles of natural justice.

He contends that he was never accorded appearance to defend himself fairly and justly against the said allegation. He also contends that the punishment of dismissal was excessive and harsh.

The Claimant in short is claiming that his dismissal is without just cause and excuse.

The Role and Function of this Court in Determining the Dispute between the Parties

The role of the Industrial Court under section 20 of the Industrial Relations Act 1967 is succinctly explained in *the case Milan Auto Sdn. Bhd. V Wong She*

Yen [1995] 4 CLJ 449, his Lordship Justice Tan Sri Haji Mohd Azmi bin Kamaruddin FCJ delivering the judgement of the Federal Court had the occasion to state the following: -

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

In recent times the above often quoted principle of the Federal Court on the role and function of this Court saw further reference to it by the Federal Court in the case of **K A Sanduran Nehru Ratnam v. I-Berhad [2007] 1 CLJ 347** where the Court again reiterated the function of the Industrial Court: -

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

Thus this Court in examining the facts of the case and in arriving at its decision must deal with two issues namely: -

- (i) Whether there exist any irregularities or misconduct by the Claimant that lead to the dismissal.
- (ii) Whether that irregularities or misconduct constitute just cause or excuse for the dismissal.

The Burden of Proof

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

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

"it is basic principle of industrial jurisprudence that in a dismissal case the employer must produce convincing evidence that the workman committed the offence or offences the workman is alleged to have committed for which he has been dismissed. The burden of proof lies on the employer to prove that he has just cause and excuse for taking the decision to impose the disciplinary measure of dismissal upon the employee. The just cause

must be, either a **misconduct**, negligence or poor performance based on the facts of the case."

The Standard of Proof

In the case of *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314* the Court made it clear that the standard of proof that is required is one that is on the balance or probabilities.

"Thus in hearing claim of unjust dismissal, where the employee was dismissed on the basis of an alleged criminal offence such as theft of company property, the Industrial Court is not required to be satisfied beyond a reasonable doubt that such an offence was committed. The standard of proof applicable is the civil standard, ie, proof on a balance of probabilities which is flexible so that the degree of probability required is proportionate to the nature and gravity of the issue."

The Evidence

The Company

The company call 4 witnesses.

COW 1

COW 1 testified that he was working on 16.05.2016 at the MAS Kargo AVI counter between 8.00 am to 6.00 pm. When he started work, he saw the Claimant

who was off duty on that day at the AVI counter talking to his colleague. He went to his work station at the counter to log in his ID on his computer after which he went to sign his timesheet and meet his supervisor at the back of the AVI.

Upon his return he saw the Claimant sitting at his work station at the counter and had used his computer to print out an Airway Bill (AWB). AWB is a document containing details of payment that needs to be made before a shipment can be released. The particulars of the courier and consignee are all in the AWB.

COW 1 said the Claimant had access to his computer as he had logged in his ID. He too testified that once his ID had been logged in, anyone including the Claimant can have access to his computer.

The Claimant then gave him the AWB which the Claimant had printed from COW 1's computer together with RM300.00 as handling charges to process the tax invoice and issue Delivery Order in order to release the goods.

COW 1 then made (entered) the said payment and issued a tax invoice **as per page 12 CLB 2** together with a Delivery Order (D.O.). He gave the AWB and the two said documents to the Claimant for the Claimant to give it to the Operation Officer for clearance of the said item from the Animal Hotel.

Under cross examination COW 1 maintained that it was the Claimant who printed the AWB and gave it to him. It was also the Claimant and not Suresh (the Claimant's brother in law) who gave him RM 300.00. He agreed that it was wrong

for the Claimant to print out the AWB from his computer as the Claimant was on leave but did not report the matter as he did not suspect anything wrong.

COW 1 said the Claimant asked him to receive the payment because the Claimant could not do so as he was not on duty. The received payment and issuance of the tax invoice and D.O according to COW 1 can only be made by the officer on duty i.e. COW 1. COW 1 said he accepted the RM 300.00 and process the AWB because he was on duty and duty bound to do it. He was not rendering assistance to the Claimant. He reiterated that he did not report the said incident as he did not suspect anything wrong. The Claimant was his senior and that he had just been transferred to the said AVI as of 01.09.2015. He was new to the whole process. The Claimant as his senior ought to be more familiar with the process. COW 1 said had he suspected any wrong doing he would have reported the matter. COW 1 too said that it was not a requirement to get approval from his superior to accept any payment, to issue tax invoice and D.O. The release of the item will be made by the relevant officer. His job was to accept payment and issue tax invoice together with D.O. He said the Claimant out not to do it as the payment and production of AWB was normally by the handling agent for the shipment which was the Claimant's brother in law, Suresh. He knew Suresh as Suresh had handled shipment for the handling agent MT Speed and had done so for other shipments with him.

COW 1 said he was sure Suresh was not around when payment was made by the Claimant. Under re-examination, COW 1 reiterated that it was the Claimant who printed the AWB and handed him the RM 300.00 for payment.

COW 2

COW 2 testified that he and Senior Executive, Mohd Zain (MZ) handled the investigation of this case. He said he instructed MZ to record COW 1's statement **as per pages 9 to 14 COB**. COW 2 said at page 12 there was mention of Exhibit A which was provided and tendered as COB 1. He also instructed MZ to record the statement of Shamsul Emry **as per COB page 15 to 17**, a statement from Mat Razali **as per COB page 18 to 20**. A statement from Mohd Zuhaidi **as per COB page 21 to 26**. He himself recorded a statement from the Claimant witnessed by Zamzuri bin Abu Bakar **as per pages 31 to 39 COB** on 20.05.2016. He said he recorded a further statement from the Claimant on 26.05.2016 **as per COB page 27 to 30**.

COW 2 subsequently prepared an investigation report **as per COB 2**. The investigation report states that COW 1 had stated that it was the Claimant who printed the AWB and gave RM 300.00 to COW 1 as payment. COW 3 (A3 Mat Razali) too said he noticed the Claimant printing the AWB from COW 1's computer. COW 3 further said that the Claimant then signed the AWB and asked COW 1 to charge the terminal charges (TC) which will be produced in the tax invoice.

With regards to COB 1 (Exhibit "A"), COW 2 testified that it is an Airway bill to indicate who was the shipper and who was the consignee. From COB 1, the consignee is Boon That Food Trading based in Macau while the shipper was MS Cold Storage Sibu, Sarawak. The final destination is Macau while the shipment was from Sibu to Kuala Lumpur.

COW 2 said a shipper can move the goods from Sibü to Kuala Lumpur and then move it to its final destination Macau using AWB on multiple flights. COB 1 also states that the goods were declared as "frozen fish" transit shipment via Kuala Lumpur. The shipment was supposed to be released in Kuala Lumpur and resubmit to KLASS to be re-documented. The shipment will then have a new AWB. This according to COW 2 was a manipulation of the current process.

COW 2 said A3 (COW 3) confirmed that it was the Claimant who printed the AWB and gave RM300.00 to COW 1 and that COW 1 issued the tax invoice and D.O to the Claimant. The D.O will then be given to the staff in charge of releasing the said shipment. Both the customer and the releasing officer will sign the release document. According to A3 (COW 3), he did not receive any D.O from the Claimant or Suresh.

Based on the report from KLASS, it was confirmed that Suresh was the Claimant's brother in law.

In this case according to COW 2, they cannot establish who released the shipment from the Animal Hotel (AV1) as the original D.O cannot be located.

With regards to charge 2 and based on COW 1 and A3 (COW 3) testimony they Company contends that the Claimant had abetted his brother in law by printing the AWB making payment and getting the Tax invoice and Delivery Order. The Claimant too had requested COW 1 to print the tax invoice and D.O. The Claimant's above conduct was without authorization or justification because he was not on duty

(hid off day) and was not allowed to access any company's document or information without approval by his superior. There was no evidence that the Claimant did get approval from his superior. There was also no justification for the Claimant when on off duty to access COW 1's computer, at the AV1 counter, to sit at COW 1's place and to print a copy of the AWB. This is more so when COW 1 had already log into the system.

COW 1's statement is supported by COW 3 (A3).

With regards to charge 3, COW 2 said they reviewed information from their counterpart at KLASS Security Manager whereby Perhilitan Officers had confiscated a shipment containing anteater meat in KLASS Cold room (freezer). The report from KLASS is **as per COB 3**. The report states that on 16.5.2016 Jabatan Perhilitan conducted a spot check and detained 40 boxes of frozen anteaters. From the master Airway bill (MAWB) no 232-6284-2253 when cross refer with the AWB Bill **as per COB 1** printed by the Claimant the number is the same. It can thus be concluded that COB 1 does not contain frozen fish but anteater's meat. This is stated in the KLASS report page 2 cross referring to confiscation item 2 and 5 and 1st page of report. The falsification is at item 3.

Under cross examination, COW 2 said he had no personal knowledge with regards to the statement taken by Mohd Zain. He recorded the Claimants statement at page 27 to 39 and the Claimant requested that Zamzuri be present. He said the Claimant gave him CLB 3 in support of his statement to say that he went to the animal hospital to collect his car which had broken down.

COW 2 reiterated that COW 1 and Mat Razali saw the Claimant at the counter and that the Claimant printed the AWB. He agreed that the code MH2102954 on the Tax invoice is COW 1's employee number. He said this shows that COW 1 was the one who received the said payment of RM 300.00.

COW 2 said he prepared COB 2 and Mohd Zin typed it. He said D3 was the original AWB with a stamp on it. He was not involved in the decision making to terminate the Claimant. COW 2 said he did not see CLB tab 4 Page 11 to 13 and tab 6 page 15 to 16. COW 2 however said he had personal knowledge of the wrong declaration of anteater's meat **as per COB 3**. He was sure that there was a wrong declaration.

Under reexamination, COW 2 said at page 15 COB Shamsul Emry as an independent witness stated in his recorded statement that he saw the Claimant at the AVI counter and then at COW 1's place on the said date of 16.05.2016. Similarly, COW 1, A3 and Zuhaidi (A4) too stated the same.

COW 3

COW 3, Mat Razali (A3) testified that he gave a statement as per pages 18 to 20 COB. He was sure that he saw the Claimant printing the AWB from COW 1's P.C. He said on that day 16.5.2016 the Claimant was off duty. He saw the Claimant printing the AWB from Afiq's (COW 1's) P.C. At that time COW 1 was not present at COW 1's work station. The Claimant then gave the AWB to COW 1 and ask COW 1 to charge (T.C Charges) and issue the D.O as per the payment receipt. COW 1 then

issued the tax invoice and D.O and gave it to the Claimant. The Claimant was supposed to bring and submit the said documents to COW 3 at the "gudang" for clearance of the said item. The Claimant did not see him but he later realized that the said item (goods) later went missing. He said COB 4 (Appendix C) was shown to him when En Mohd Zain recorded his statement.

Under cross examination COW 3 said his duty was to wait for agents to collect items from the AVI. He said he was working from 8.00 am to 6.00 pm. He said the picture at Exhibit C was the counter where COW 1 receive documents and payments.

COW 3 said even though his place of work was not at Exhibit C he went there to collect the flight schedule for the day which he had sent for printing at the printer next to where COW 1 was working as there was no printer at the place where he was working. COW 3 said to get out he had to pass through COW 1's work station at Exhibit C while passing he said he could see what the Claimant had printed from COW 1's P.C. It was the AWB.

COW 3 said if COW 1 had opened his computer and keyed in his password anyone sitting at COW 1's P.C can have access, use and print from the said P.C. He said "Afiq (COW 1) di bahagian sebelah printer saya. Masa kejadian itu YM (the Claimant) ada duduk di tempat COW 1 dan print guna printer ini. Saya tidak ada dalam gambar (Exhibit C) tapi saya lalu di belakang printer. Itu sebab saya nampak apa yang YM cetak".

Under reexamination, COW 3 reiterated that he was sure he saw the Claimant printing the AWB. He further said "AWB yang keluar sebab printer COW 1 boleh print AWB, D.O dan T.C. Yang keluar ialah AWB. The Tax invoice and D.O was printed by COW 1.

COW 4

COW 4 was the Senior Manager Industrial Relations, Human Capital Division of the Company. **COB 1 page 3 to 6** was an offer letter of employment from the Company dated 27.5.2015 issued to the Claimant. The Claimant was appointed as an officer special Product Handling (Experts Handling Unit/Animal Hotel) with effect 01.09.2015.

By a letter dated 09.12.2015 the Claimant was transferred to MAB Kargo a full subsidiary of the Company with effect from 01.01.2016 as special product Kargo Handling Grade G.E 3.

In May 2016 the Company was informed that the Claimant had committed a serious misconduct on 16.05.2016. Investigation were conducted and the Claimant was suspended as per the suspension letter dated 30.05.2016. The Claimant then wrote a letter to the CEO of MAB Kargo who replied stating that his suspension was to facilitate investigations.

The Claimant was later issued a Show Cause letter dated 15.06.2016 wherein 3 charges of misconduct was levelled against him. The Claimant responded vide a

letter dated 29.06.2016. The Company reviewed the Claimants response and found it unacceptable. The Company then dismiss the Claimant and informed him vide letter dated 12.07.2016. The Company did not conduct a domestic inquiry (DI) as the Claimant had an opportunity to put forward his case. He said the Company had taken statements from COW 1, Shamsul Emry, COW 3 and Muhamad Zuhaidi (A4).

COW 4 said it was the CEO of MAB Kargo who made the final decision to terminate upon his recommendation. It was he who signed the letter of termination. He confirms that the 3 chargers against the Claimants were serious misconduct and any one of them is serious enough to warrant a dismissal in this case.

Under cross examination, COW 4 said he framed the charges based on internal investigation by MAB Kargo (COB 2 & COB 3). He did not make any written recommendation.

Under reexamination COW 4 said MAB Cargo is a full subsidiary of MAB therefore the letter referred to at CLB 1 were issued under MAB letterhead. That is why final decision on dismissal was made by CEO of MAB Cargo.

The Claimant

The Claimant said he joined in September 2015 and was dismissed on 12.07.2016. He said he had maintained a clean record.

He first received a Letter of Suspension dated 30.05.2016 and 01.06.2016, he replied to Encik Ahmad Lughman, the CEO via email. On 20.06.2016 he received a show cause letter with 3 charges which he replied via letter dated 29.06.2016. He then received a punishment order dated 12.7.2017 terminating his services.

With regards to the incident on 16.05.2016 he said that he was on night shift on 13.05.2016 which ended at 9.00 am 14.05.2016. He had some problems with his car and unable to drive smoothly. He had to park his car at MAS parking bay. He then requested his friend's help to drive him back to his house. As the next day was a Sunday and Public Holiday he could not drive his car out or get any mechanics to repair it.

On 16.05.2016, he requested his brother in law Mr Suresh to send him to MAS parking bay to collect his car. His brother in law was an agent for MAS Animal Hotel. His brother in law, Suresh wanted to pay tax and sign the D.O for a consignment. As there was a delay at MAS Animal Hotel he decided to request COW 1 to drive him to MAS parking bay.

At the parking bay he called the mechanic who could not come in as he had no pass. He drove slowly out of the parking bay for the mechanic to examine the car and they later went to the mechanic's workshop. Once his car was fixed he drove to Johor to visit his wife. On his way back he received a call from his brother in law saying that his brother in law was suspected by Wild Life Organisation for illegally exporting shipment. He then asked his brother in law to settle the issue as he was not involved in it. He later received a call from COW 1 stating that the Wild Life

Organisation and MAB has inspected MAS Cargo. He asked COW 1 to liaise with the agents or other MAS Cargo Officers as he was not the Officer on duty that day.

On 19.05.2016 he was informed by Puan Siti and COW 2 that his immediate boss wanted to meet him to enquire about an illegal transshipment AWB 232-62842253 sector SBW/KUL dated 16/5/2016 for MH 2713. He was requested by COW 2 to produce the receipt from the mechanic and also bring his witnesses. He did produce to COW 2 the repair receipt and brought his brother in law as his witness.

As for the tax invoice he said it was COW 1 who printed it as the Tax invoice carried COW 1's I.D Number. He said it was his brother in law, Suresh who paid RM 300.00 to COW 1 for the release of the Cargo.

He said he had never committed any misconduct. He admitted to writing to the CEO of MAB Cargo after he was issued with a letter of suspension. The Claimant said that he was victimised as the decision to dismiss him is based on unsubstantiated and frivolous allegation and that there was no D.I. He said he was never accorded any opportunity to defend himself fairly and justly. The dismissal was thus without just cause and / or excuse.

Under cross examination the Claimant said his only document on the repair to his car was CLB 3. He agreed that there is nothing in CLB 3 to show that the car belongs to him. He agreed that Suresh was his brother in law and that he was off duty on 16.05.2016.

He denied printing AWB from COW 1's computer and said that COW 1 was lying. When asked what reason was there for COW 1 to lie, the Claimant said "I don't know". He disagrees that he cannot be at the counter on his off duty. When asked whether he was at the counter he said "Yes". When asked, you never returned the signed D.O to COW 3 the Claimant said "I disagree". When asked "You are saying you did return the signed D.O to COW 3 he said "No return to COW 3. He disagreed paying COW 1 RM 300.00 but said it was Suresh who "Make Payment" for Terminal Charges (TC). He was not at the counter but at the lobby.

The Claimant said from 8.15 am to 10.30 am he was "not at counter but at lobby". He also disagrees with Q5, Q7 and Q8 of COW 3 written statement **at COB Page 18 to 20**. He said COW 3 was lying but did not know why COW 3 was doing so. He was then shown COW 1's written statement **at Page 9 to 14 COB**. He said he disagreed with Q2, Q5, Q8, Q9 and Q14. He denied with Q4 of Shamsul Emry's written statement **as per COB Pages 15 to 17**. He said Shamsul also was not telling the truth. He said Shamsul was lying but did not know why he was doing so. He also disagreed with Q4, Q5 and Q20 of Mohd Zuhaidi statement. He said Zuhaidi was also lying but do not know why Mohd Zuhaidi was doing so.

Claimant however agreed with what COW 2 testified. The Claimant however maintains his answer to Q10, Q12, Q13 and Q15 of his witness statement. He agreed that he replied to the suspension letter even when there were no charges preferred against him **as per CLB 1 Tab 3**. His reply to the Show Cause letter is **as per CLB 1 Tab 5**.

Evaluation and Findings

The Claimant was dismissed due to the commission of three serious offences **as per SOC Tab 7.**

First Charge

"That you as an Officer of the Company on 16.05.2016 between 0800 hours to 1200 hours during your off day at the MAB AVI Counter had printed a copy of the airway bill for cargo AWB 232-62842253 sector SBW/KUL arriving on MH 2713, 16.05.2016 without proper authorization or justification".

The Company through COB Page 3 had establish that the Claimant was offered and accepted employment with the Company. His acceptance is **as per COB Page 6 dated 08.06.2015.**

By letter dated 09.12.2015 the Claimant was transferred to MAB Kargo a full subsidiary of the Company pursuant to the transfer clause contained in the Claimant's Letter of Employment **as per COB Page 7.** The term and condition of his transfer is stipulated in the said letter. The Claimant accepted the transfer as Page 8 COB. The Claimant is thus an Officer of the Company. **According to S.O.C Tab 2,** the Claimant's job description, he is as an officer at the AVI (Animal Hotel) having responsibilities as stated therein.

The next issue is where was the Claimant on his off day on 16.05.2016. The fact that 16.05.2016 was the Claimant off day was not disputed as the Claimant himself had admitted to be on off day on 16.05.2016. Both COW 1 and COW 3 too testified to the same. The subsequent issue was whether he was at the MAB Kargo AVI Counter during the said period.

The company called COW 1 and COW 3 to testify, it also produced through COB the statements from Shamsul Emry (A2) **at COB Pages 15 to 20** and Muhammad Zuhaidi A4 **at Pages 21 to 26 COB**. The Court is mindful that both Shamsul Emry and Mohammad Zuhaidi were not called as witnesses by the Company. Their existence and statements however were provided to the Claimant's Counsel. It is trite law that it is the discretion of the Company as who they wish to call and not to call. A case is not decided on the mere calling of a number of witnesses but whether there is credible evidence to support their case. The Court is mindful that the statements of both A2 and A4 were not put through the acid test of cross examination but the fact remains that they were made during the course of investigations by COW 2.

Both COW 1 and COW 3 confirm that the Claimant was at COW 1's working station at the AVI Counter at around 8.15 am. A2 confirm the same in his statement.

From the totality of COW 1 and COW 3 and statement of A2 taken at face value the Company argues that it was possible on the balance of probabilities that the Claimant was at the counter where COW 1 was working on 16.05.2016. A2, Shamsul Emry's statement too is consistent with that of COW 1 and COW 3 and even

if not to be taken as to the truth of the matter lends credence to the evidence of COW 1 and COW 3. The Court finds that the Company had on a balance of probabilities proved that the Claimant was at the AVI Counter on 16.05.2016 on his off day between 8.15 am to 9.00 am.

The most critical part of the 1st charge is that of the printing of the AWB bill by the Claimant.

COW 1 said when he went to his workplace at about 8.15 am he saw the Claimant at the counter talking to his colleagues, Shamsul Emry (A2). He then went to his computer to log in his I.D after which he went to sign his timesheet and attendance and meet his supervisor at the back of the counter.

Upon his return he saw the Claimant sitting at his workstation and had printed out the AWB bill as per charge.

COW 1 said the Claimant had access to his computer as he had logged in his ID.

COW 3 was more specific and detail in his recollection of events. COW 3 after clocking in said he went to the counter next to Exhibit C to collect the flight schedule for the day. When he reached the counter he saw the Claimant sitting at COW 1's work station printing a document which he later saw and confirm as the AWB as per charge.

COW 3 was sure as he said only three documents can be printed from COW 1's computer which was the AWB bill, the tax invoice and the D.O. This was because COW 1 was in charge of collecting documents and payments for T.C and printing out the D.O. He was sitting next to the printer used by the Claimant to print the AWB bill and had to pass by the back of the Claimant to go back to his working place. He too testified the same as COW 1 in that once COW 1 had login his I.D in his computer anyone can access COW 1's computer to download information i.e AWB bill from COW 1's computer and print it through the printer at Exhibit C. Both COW 1's and COW 3's evidence as to what can be done after COW 1 had log in his I.D in his computer is not disputed and thus accepted by the Court.

A4, in his statement too saw the Claimant using COW 1's computer. COW 1 subsequently upon his return saw the Claimant at his work station. The Claimant then gave him the AWB bill which the Claimant had printed from COW 1's printer.

From the totality of the above evidence the Court finds on a balance of probabilities that the Claimant had printed the airway bill as per charged.

The Claimant did not dispute that he was off duty. This was also confirmed by COW 1, COW 2, COW 3, A2 and A4. The Claimant too knew **as per Page 29 COB** that when on off duty he was not supposed to be within or inside the Company's premises without approval. There was thus no authorization or justification for the Claimant so to do.

The Claimant's answer was that he was not at the counter but at the lobby as such he could not have printed the said Airway bill. He too said that he cannot use or print the Airway bill because every employee had his own I.D and he does not know COW 1's ID to have access to it.

The Court had the opportunity to see the demeanor of both COW 1 and COW 3 when giving evidence. It was not even put to them that they were creating stories or were lying. Their evidence was consistent with their statements taken during investigations. The Claimant too could not produce any reason as to why COW 1 or COW 3 were lying.

COW 3 was firm and sure of what he saw was printed by the Claimant. He was close and from his working experience knew that it was an airway bill. COW 1 too testified receiving the same from the Claimant almost a few minutes later upon his return to his work station. The Court finds both COW 1 and COW 3's evidence credible and accepts them. The company had thus on a balance of probabilities proven the misconduct as per the first charge.

The court finds the Claimant's version a mere denial of being there. The Court finds on a balance of probabilities the Claimant's version vis a vis that of the Company not probable. The Company had thus proven on a balance of probabilities that the Claimant had committed the misconduct as per the first charge. COW 4 had testified that this misconduct is serious in nature and in itself warrant the Claimants dismissal.

Second Charge

"That you as an officer of the Company on 16 May 2016 at MAB Kargo AVI Counter had abetted and / or cause to abet Mr Suresh (IC N.O 850406-10-5859) from MT Speed Enterprise in the release of Cargo AWB 232-62842253 sector SBW/KUL X MH 2713 16.05.2016 by printing a copy of the airway bill and made the payment of the said cargo to officer Mohd Nor Afiq (SN: 2102954) in order to proceed with the cargo release."

The chronology of events with regards to the second charge based on the evidence of COW 1 and COW 3 and cross referring to their statement in COB 1 and also that of Shamsul Emry **at Page 15 to 17 COB 1**, and Muhammad Zuhaidi **at COB Page 21 to 26** is as follows: -

COW 1 and COW 3 started work from 0800 hours on 16.05.2016. At about 8.15 am COW 1 saw the Claimant at the Counter talking to Shamsul Emry (A2). This is consistent with A2'S statement (Page 15 to 17 COB 1). COW 1 login his I.D in his computer and then went to the back to sign his time sheet attendance and meet with his supervisor.

COW 3 was on that day on duty at the cargo claims counter (gudang) of the Animal Hotel (AVI). At about 8.30 am he went to the Document and Payment Counter which was COW 1's work station to print the flight schedule for the day as there was no printer at the cargo claim counter (gudang). At the point of time COW

3 saw the Claimant sitting in front of COW 1's computer. According to COW 3, COW 1 was not at his place then.

COW 3 testified that he saw the Claimant printing the airway bill. He was certain that it was the Claimant who had printed the airway bill similar to COB 1. A2 too confirm seeing the Claimant at COW 1's computer but did not know what the Claimant printed. COW 3 further testified that he had sight of the Airway bill and confirm it was similar to COB 1. He explains that he was certain that it was Airway bill because it was COW 1's job to collect document ie. airway bill and payment before issuing the tax invoice (upon payment of the Tax Charges) and Delivery Order.

COW 3 said he was familiar with the airway bill as all the three documents ie. AWB, tax invoice & D.O will be subsequently given to him before the goods can be cleared and taken out from the "gudang". COW 3 was certain that there was only one document which the claimant printed and it was the Airway bill which he was familiar with.

Subsequently, COW 1 came back and he testified that the Claimant gave him the airway bill which the Claimant had printed from his computer with a cash amounting to RM 300.00 as handling charges and requested him to process the tax invoice and Delivery Order. He testified that at that time COW 3 and A2 was present at the AVI counter.

COW 3 too testified that he saw the Claimant handing over the airway bill which the Claimant printed and RM 300.00 to COW 1 to enable COW 1 to process the tax invoice and the delivery order.

COW 1 then processed the tax invoice **as per CLB 2 Tab 2.**

Both COW 1 and COW 3 was sure that it was the Claimant who gave RM 300.00 to COW 1 and not Suresh the Claimant's brother in law. See also the statements of COW 1 at Page 9 to 14 COB 1 and COW 3 at Pages 18 to 20 COB 1.

Both COW 1 and COW 3 too testified that the RM 300.00 was paid by the Claimant to COW 1 to process the tax invoice and Delivery order which is needed for the Cargo to be released.

COW 1 was sure and firm that he did not receive the payment from Suresh. Suresh was not there then and that he knows Suresh who had on other occasions been to the counter to pay the tax charges for other shipments.

COW 3 said the AWB, tax invoice and delivery order was supposed to be given to him in order for him to release the said goods.

COW 1 explained that the Claimant had asked him to clear the tax charges and print the Tax invoice and Delivery Order because the Claimant cannot do so as the Claimant was off duty. He referred to the Tax invoice and identified the member of the employee processing it as MH2102954 as that of his. COW 1 was sure and

said 2 other employees ie. COW 3 and Shamsul Emry were at the counter. COW 3 confirm that he was present. A1 Shamsul Emry too, confirm the presence of COW 1, COW 3 and the Claimant. COW 1 and COW 3 was sure Suresh was not present then. Suresh only came later at 10.00 am.

COW 1 said after accepting the payment and printing the said tax invoice he gave it to the Claimant together with the Delivery Order to enable it to be given to the relevant officer at the back for it to be signed before the item can be released.

With regards to the contents of the AWB (COB 1), COW 1 said the particulars were given by the original sender in Sibu. According to the updated system it was declared as 41 pieces of "frozen fish". The charge stated was system generated. He said he process the payment "You (Claimant) bukan ketua saya dan saya buat kerja tersebut kerana dia (Claimant) tidak boleh buat bayaran kerana saya orang on duty pada masa tersebut jadi sebagai rakan sekerja tidak mengesyaki apa-apa yang mencurigakan. Saya tidak tolong dia. Saya buat pembayaran sebab saya seorang pada hari itu."

COW 1 further said "Saya tidak report apa-apa sebab saya tidak mengesyaki apa-apa walaupun dia (Claimant) tidak arah dia adalah senior saya di tempat kerja tersebut dan lebih tahu tata kerja di tempat tersebut, kalau saya mensyaki sesuatu, saya akan lapor". Under re-examination, COW 1 said "Saya pasti Yang Menuntut yang membayar bukan Suresh". "Saya pasti Yang Menuntut yang print airway bill daripada computer saya dan selang 5 minit setelah Yang Menuntut print beliau telah memberi airway bill dan wang RM 300.00 untuk membuat pembayaran".

COW 1 withstood the acid test of cross examination and was steadfast as to the events and persons involved. He confirms that he gave the documents (AWB, tax invoice and D.O) to the Claimant.

Both COW 1 and COW 3 were eyewitness and had direct first-hand information about what transpired between them and the Claimant. Their evidence was consistent with each other. The Court accepts their evidence and finds it sufficient on a balance of probabilities even in the absence of CCTV footage to establish that it was the Claimant who made the payment as stated in charge 2 to COW 1.

It is also noted that the Claimant himself had stated that he did not know why COW 1, COW 3, Shamrul Emry and Zuhaidi would lie. There was no evidence of bad blood nor was COW 1 and COW 3 challenged that they were lying in Court. The only challenge put to COW 3 was that COW 3 was not present at the AVI counter. This however is untenable having regard to COW 1's evidence and Shamsul Emry's statement.

It is also COW 1's evidence that the Claimant was on leave and was not supposed to make the payment. According to COW 1, the Claimant too was not the forwarding agent for the said consignment. The forwarding agent was the Claimant's brother in law, Mr. Suresh.

From COW 1 and COW 3's evidence on the Claimant's action as stated above ie printing of the AWB making payment of RM 300.00 to COW 1 and receiving the

tax invoice and delivery order from COW 1 was on a balance of probabilities done to assist his brother in law in getting approval which finally led to the release of the said consignment as per charge. The Court finds on a balance of probabilities the Claimants acts of assisting his brother in law in printing the AWB, making payment of RM 300.00 and getting the tax invoice and D.O tantamount to abetting his brother in law.

It is also not disputed that subsequently the Claimant was seen to be with his brother in law at the AVI to clear a shipment at 10.00 am. This evidence was given by COW 1, COW 3 and the Claimant's statement **at Page 34 COB.**

If we were to look at the chronology of events and time stated from 8.30 am to 9.00 am, the irresistible inference would have seen that the Claimant did print the AWB, make payments and got the Tax invoice and Delivery Order. He did not give COW 3 the said document but remain at the AVI counter. He was still waiting for his brother in law. It is probable on a balance of probabilities that he was waiting for his brother in law to give the said documents. It was also not disputed that the Claimant later followed his brother in law to KLASS. It is also probable on a balance of probabilities that he Claimant was not there only to collect his car at the parking bay as he could have done so by asking his brother in law to send him straight to the parking bay.

The Claimant's explanation that he was not at the AVI Counter (COW 1's workstation) and that it was Suresh who made the payment and receive the documents is on a balance of probabilities untenable.

The Courts finds that the Company had on a balance of probabilities proven the said misconduct by the Claimant as per the 2nd charge.

Third Charge

The Charge reads as follows: -

"That you as a n officer of the Company on 16.05.2016 had corroborated in the release of Cargo AWB 232-62842253 sector SBW/KUL arriving MH 2713 16.05.2016 where it was wrongly declared as "frozen fish" instead of "anteaters" meat. Subsequently, the cargo was confiscated by Jabatan Perhilitan KLIA due to falsification of document and smuggling of prohibited animal".

For the above charge the fact that the Claimant was an officer of the Company is not disputed. From COB 2 and COB 3 it shows that subsequently there was a check and confiscation of the cargo by Jabatan Perhilitan in which the Claimant was alleged to have abetted to clear. COB 3 also stated that the confiscation was due to falsification of document and smuggling of prohibited animal.

COW 4 testified with regard to the Claimant's position in the Company and COW 2 testified with reference to COB 3 regarding the confiscation by the Jabatan Perhilitan.

The main issue left is whether the Claimant had corroborated in the release of the shipment which it was wrongly declared as frozen food.

From COW 1's evidences the AWB number as per COB 1 was 232-62842253 which is stated in COB 1. The nature and quality was "frozen fish", Perishable. The shipment was via KUL to MFM by Air Asia handling by MT Speed Enterprise. It is also stated "notify packing MT Speed Enterprise, original document attached in the box".

It is also not disputed that Suresh, the Claimant's brother in law was the handling agent for MT Speed. The Claimant too does not dispute his brother in law's position as he stated in his statement that he had seen his brother in law's Airport pass stating MT Speed Enterprise. COW 1 too had testified that Suresh had been handling shipments for MT Speed Enterprise with him on previous occasions.

As for the first and second charge the Court had on a balance of probabilities found that the Claimant had printed the AWB, gave COW 1 the said AWB and RM 300.00 as payment upon which COW 1 issued the tax invoice and D.O to the Claimant. It is also probable on a balance of probabilities that the Claimant had sight of what he printed and knew what was declared. By giving the AWB to COW 1 he had knowledge of what was declared.

It is also COW 1 and COW 3's evidence that with the AWB, tax invoice and D.O the said consignment 232-62842253 which had been declared as "frozen fish" can be cleared.

It is also from the Claimant's own statement that he met with his brother in law at the AVI and subsequently followed his brother in law to KLASS.

At page 28 COB 1 the Claimant agreed that he was at the AVI beside the in-house container. The Court noted A1's is recorded statement and COW 1 in his witness statement at page 10 Q3 where COW 1 stated as follows: -

Q : Adakah beliau (Claimant) maklum pada kamu apa jenis barang yang beliau nak ambil / keluarkan.

A : Ada "frozen fish".

It is noted that Q3 of COW 1's statement was not one of those which the Claimant disagreed. The Claimant only disagreed with questions and answers 2, 5, 8, 9 and 14 of COW 1's statement. The Claimant had thus agreed with COW Q3 of COW 1's statement that he had told COW 1 that the goods were "frozen fish". This lends weight to the probable inference that the Claimant had knowledge of the contents of the AWB he printed.

Further **at page 32 of COB** the Claimant too said his brother in law was waiting for "frozen fish" shipment from MH flight and to clear the said shipment.

At page 34 COB the Claimant when asked about the type of shipment said: -

"Yes I know that is frozen fish coming from Sibu MH 2713". He also knew the amount of handling charges and that the AWB COB 1 was a duplicate (page 33). From the above said evidence the Court finds that the Claimant had knowledge and

had declared to Afiq that the said consignment was "frozen fish". He also knows that Suresh had the duplicate AWB and what was printed was a 'copy'.

It is also noted that at page 35 the Claimant said that his brother in law collected the cargo. He said as follows: -

"Before payment collect cargo after that Suresh come and pay payment".

At page 29, when asked whether the MAB Kargo Officer was present at the counter to release the cargo, the Claimant said: -

"A7 – No MAB Kargo Officer at that time".

It is in evidence that the MAB Officer in charge of releasing the cargo was COW 3 and at that time COW 3 was printing the daily schedule at the counter. It lends weight to COW 3 testimony that he did not receive any D.O, did not release the cargo nor sign any document. He said that neither the Claimant nor Suresh did give him the D.O.

The Claimant's evidence that his brother in law collected the cargo (when COW 3 not at the MAB Kargo) in itself shows the Claimant knew something is wrong. The Claimant in his evidence said he knew the procedure which was to make payment and collect the D.O first before getting the release of the cargo. The Claimant in fact detailed the procedure which had to be followed if he was the releasing officer. He clearly mentions the need of making payment and handing over the D.O prior to releasing the goods.

As stated earlier the Claimant himself knows the procedure that the goods cannot be cleared without the AWB, tax invoice and D.O. The Claimant too stated that Suresh clear the goods before making payment thus there was no tax invoice and D.O at the material time as these items cannot be issued prior to payment. It is also noted that COW 3 said the Claimant after making the payment and getting the tax invoice and D.O did not give him the said document which were needed for clearance. COW 1 too was sure that the said payment was made by and documents given to the Claimant. The original D.O was given to the Claimant and subsequently surrendered by his brother in law as admitted by the Claimant in his statement because Puan Siti requested for them.

From the chronology of events as stated above, it is probable on a balance of probabilities that there was no necessity to give the said documents to COW 3 due to the fact that Suresh had already cleared the shipment. It is also the evidence of COW 3 that when he came back to his workplace the goods were subsequently missing. He recalled that he only asked the driver of the truck who took the good, whether the goods were "cukup" (sufficient) and the answer was "cukup". The Claimant also in his statement recorded by COW 2 and shown the CCTV footage of the truck picking up the shipment (see page 35) which was driven by Suresh, said at page 36 "Suresh truck Izuzu 2359". The above evidence on a balance of probabilities support the Claimants version that Suresh cleared the item before payment. It lends weight to COW 1 and COW 3's evidence that it was the Claimant who made the payment then. It too supports COW 1 and COW 3's evidence that Suresh was not at the AVI counter when payment was made by the Claimant. It also makes their

version that Suresh was only seen at the AVI counter meeting the Claimant at 10.00 am after the Claimant had make payment.

The above evidence shows on a balance of probabilities that there was corroboration between the Claimant and his brother in law. The brother in law clearing the consignment while the Claimant printed the AWB, make payment and receive the tax invoice and D.O.

The Claimant himself also admitted to subsequently following Suresh in the said truck to KLASS where Suresh then checked in the said shipment of 41 boxes which were declared as frozen fish to its final destination in Macau.

This piece of evidence of waiting and following Suresh to KLASS on a balance of probabilities shows further collaboration between the Claimant and his brother in law, Suresh.

The Claimant from the totality of the evidence adumbrated earlier knew and had declared the said shipment as "frozen fish".

It is not disputed that the said shipment vide COB 2 and COB 3 was bound to have been wrongly declared as "frozen fish" when they were actually "frozen anteaters".

The Company had on a balance of probabilities produced credible evidence to prove that the Claimant had corroborated in the release of the cargo which was wrongly declared as per the third charge.

The Court has considered the Claimant's evidence and his witness statements. The Claimant stated from the onset that he went to the MAB Kargo to collect his car which had broken down. If that was the case, why did he go to the AVI which he knew he should not go to. He could have asked his brother in law to proceeded straight to the parking bay to take his car and go off to repair it.

The Claimant's document CLB does not state that the said car was the Claimants Car nor did the Claimant produce the registration card to prove that it was his car. At no time did the Claimant state as to the time the car was picked up at the parking bay or when it was repaired. In this case time is of the essence due to the processes that was being carried out. The repair of the car ipso facto does not on a balance of probabilities show that the Claimant had not committed the said misconduct prior to sending the car. The misconduct changed were even if we take COW 1, COW 2, COW 3, and the Claimants evidence committed before the Claimant fetch his car at the parking bay. The Claimant did state that he followed his brother in law to KLASS. The Claimant stated that when his brother in law say that the brother in law will take some time at KLASS he called COW 1 to pick him up at KLASS and to send him to the parking bay. This support's the contention on a balance of probabilities that the picking up of his car at the parking bay was after the 3 said misconducts were committed.

The Claimant did not even put his calling of COW 1 to send him from KLASS to the parking bay to COW 1 when COW 1 gave evidence. The Claimant's subsequently version was that he was in front of the counter (page 27) inside the office at the back of COW 1 (page 28), near the in-house container (page 28), at the "toilet" (page 38) at KLASS (page 37) and at the lobby shows that he was all over the places he should not be on his off day. He was on a balance of probabilities at the AVI.

It also shows on a balance of probabilities that he was with his brother in law throughout the process of clearing the shipment as per charged and subsequently at KLASS with his brother in law to send the said shipment to Macau. From COW 1 and COW 3's evidence the Claimant assisted in the printing of the AWB, payment of the tax charges and given the said tax invoice and D.O. The Claimant also admitted that Mr Suhaimi told him that the original D.O was with his brother in law as per COB Page 29. It was not disputed that the Claimant after making payment and receiving the tax invoice was given the original D.O by COW 1. He did not give to nor did COW 3 receive from the Claimant the original D.O. It is thus probable on a balance of probabilities from the fact that COW 1 gave the original to the Claimant at 8.30 am to 9.00 am, the Claimant was later seen with his brother in law at the AVI at 10.00 am and later the original D.O was received from his brother in law according to En Suhaimi were all circumstantial evidence. The circumstantial evidence on a balance of probabilities lead to an irresistible conclusion that the Claimant would have given the original D.O to his brother in law. This probable inference on a balance of probabilities will further add to support his corroboration with his brother

in law in the release at the AVI and MAB Kargo and subsequent declaration of frozen fish at the KLASS.

The Claimant further argued that the video recording was not produced. The non-production on a balance of probabilities does not in anyway weaken the Company's case as COW 1 and COW 3 had given credible testimony on what transpired which were direct evidence. The Court finds on a balance of probabilities that COW 1 and COW 3's evidence sufficient to prove the Company's case.

The Claimant's own statement lends support to the Company's case. The Court thus on a balance of probabilities finds that the Company had proven the said misconduct as per third charge. The Company proven all 3 charges and had just cause and excuse to terminate the Claimant's employment.

With regards to the failure of the Company to hold a DI suffice to say that the hearing before the Industrial Court is a rehearing of the matter (***See Milan Auto Sdn Bhd v Wong Seh Yen [1995] 4 CLJ 449***). The Court too is not bound by the DI's decision. It is duty bound but will have to evaluate evidence before coming to a finding (***Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd & Anor Appeal [1995] 3 CLJ 344***). The Claimant had been represented by the Counsel and been given the opportunity to be heard and present his case before this Court. Failure to hold a pre-dismissal domestic inquiry could be cured by the hearing before the Industrial Court (***Penang Mutiara Beach Resort & Anor v Mohd Amin Mahmud Haider [2003] 3 ILR 1358***).

The Court notes that the Claimant did not dispute COW 4's evidence that each of the misconduct is a serious misconduct which in itself warrants dismissal. COW 4 said that the said misconduct singularly and severally had caused in the Company to lose trust and confidence in the Claimant and as such dismissal was a fair punishment.

The Court stands guided and thankful to both parties on the authorities cited on the question of punishment. The Court too is guided the principles of proportionality of punishment enunciated in the Federal Court cases of ***Norizan Bakar v Panzana Enterprise Sdn Bhd [2013] 9 CLJ 409*** and ***Hariato Effendy Zakaria v Mahkamah Perusahaan Malaysia & Anor [2014] 8 CLJ 821***.

The Court looking at the nature of the offence, manner in which it was committed and the circumstances of its commission finds on a balance of probabilities the said punishment was befitting. Trust and confidence which forms the essence of employment and basis of relationship between employer and employee is of utmost importance. Once lost it is difficult to retain the said employee in the services of the Company. The punishment on a balance of probabilities is fit and proper.

Conclusion

In conclusion, the Court finds, having concluded all evidence available before it and bearing in mind subsection 30(5) of Act 177 to act according to equity, good

conscience and the substantial merits of the case without regard to technicalities and legal form, that the Company had proven on a balance of probabilities that the dismissal of the Claimant is with just cause or excuse. Accordingly, the Claimant's case is hereby dismissed.

HANDED DOWN AND DATED THIS 25 FEBRUARY 2019.



**(DATO' JALALDIN BIN HAJI HUSSAIN)
CHAIRMAN
INDUSTRIAL COURT, MALAYSIA
KUALA LUMPUR**