

INDUSTRIAL COURT OF MALAYSIA

CASE NO: 25/4-517/07

BETWEEN

ENCIK LIM SHEN HEN

AND

CHAO YUAN INDUSTRIAL SDN. BHD.

AWARD NO : 969 OF 2010

BEFORE : **DATO' JALALDIN HJ. HUSSAIN
CHAIRMAN (Sitting Alone)**

VENUE : Industrial Court, Kuala Lumpur.

DATE OF REFERENCE : 28 August 2006.

DATES OF MENTION : 16 February 2007, 8 March 2007, 17 April
2007, 22 May 2007, 28 June 2007, 24 July
2007, 5 October 2007, 23 October 2007, 31
October 2007, 11 March 2008, 11 April
2008, 22 October 2008, 13 November 2008
and 20 November 2008.

DATES OF HEARING : 27 November 2008, 13 April 2009, 26 May
2009, 27 August 2009, 3 November 2009
and 24 November 2009.

**DATES OF RECEIPT OF
SUBMISSION** : By Claimant – 28 December 2009.

By Company – 4 May 2010.

Reply by Claimant – 14 May 2010.

REPRESENTATION : Miss Shalini a/p Sugumaran and Cik Fadiyah
Nadwa Fikri of Messrs. Kesavan, counsel
for the Claimant.

Mr. P. Vishnuvathan of Messrs. Alvinthiren
& Partners, counsel for the Company.

REFERENCES

This is a reference under Section 20(3) of the Industrial Relations Act 1967 arising out the dismissal of **Encik Lim Shen Hen** (hereinafter referred to as “the Claimant”) by **Chao Yuan Industrial Sdn. Bhd.** (hereinafter referred to as “the Company”) on 15 February 2005.

AWARD

This is a reference made under Section 20(3) of the IRA arising out of the alleged dismissal of the Claimant by the Company. The matter was referred to the Industrial Court through a reference by the Honourable Minister of Human Resources dated 28 August 2006 and received by this Court on 10 January 2007.

The Law:

His Lordship Mohd. Azmi FCJ, in the case of *Milan Auto Sdn. Bhd. v. Wong Seh Yen* [1995] 4 CLJ 449, had stated that the functions of the Industrial Court in dismissal cases on a reference under Section 20 of the Industrial Relations Act 1967 are twofold, namely:-

“... first 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”.

Thus, the two questions that the court has to ask itself are:-

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

It is now settled law that a forced resignation is no resignation at all but is a dismissal in fact. In the case of *Stanley Ng Peng Hon v. AAF Pte. Ltd.* [1978] 1 LNS 186, Choor Singh J had held as follows:-

“It will be clear that the underlying basis of the doctrine of "forced resignation" is the existence of facts showing that an employee was put under compulsion to resign and that if he declined to do so, the employer would proceed to dismiss him in any event”.

In the case of *Bata (M) Bhd. v. Normadiah Abu Suood* [1991] 2 ILR 1106, Steve LK Shim, Chairman of the Industrial Court (as he was then) had observed as follows:-

“Now, industrial tribunals have consistently held that a "forced resignation" is a dismissal: See *Scott v. Formica Ltd* [1975] IRLR 105; *Spencer Jones v. Timmens Freeman* [1974] IRLR 325. It has also been held that the use of persuasion by an employer to obtain an employee's resignation may be a dismissal: see *Pascoe v Hallen & Medway* [1975] IRLR 116. Again that a resignation will be treated as a dismissal if the employee is invited to resign and it is made clear to him that, unless he does so, he will be dismissed: see *East Sussex Country Council v Walker* [1972] 7 I.T.R.280”.

In the case of *Harpers Trading (M) Sdn. Bhd. Butterworth v. Kesatuan Kebangsaan Pekerja-pekerja Perdagangan* [1988] 2 ILR 314, (Award No. 251 of 1988), the Industrial Court in considering the issue of forced resignation had this to say:-

“It is a well established principle of industrial law that if it is proved that an employer offered the employee the alternatives of "resign or be sacked" and, without anything more, the employee resigned, that would constitute a

dismissal. The principle is said to be one of causation - the causation being the threat of the sack. It is the existence of the threat of being sacked which causes the employee to be willing to resign. But where that willingness is brought about by some other consideration, and the actual causation is not so much the sacking but other accepted considerations in the state of mind in the resigning employee, then it has to be said that he resigned voluntarily because it was beneficial to him to do so, that then there has therefore been no dismissal”.

Burden Of Proof:

It is a well-established principle of industrial jurisprudence that where the fact of dismissal is disputed, the burden is on the workman to establish that the employer dismissed him. This is seen in the often-quoted case of *Weltex Knitwear Industries Sdn. Bhd. v. Law Kar Toy & Anor* [1998] 1 LNS 258 which decision has been upheld by the Court of Appeal. There his Lordship Abdul Kadir Sulaiman J had held as follows:-

“The law is clear that if the fact of dismissal is not in dispute, the burden is on the company to satisfy the court that such dismissal was done with just cause or excuse. This is because, by the 1976 Act, all dismissal is *prima facie* done without just cause or excuse. Therefore, if an employer asserts otherwise, the burden is on him to discharge. However, where the fact of dismissal is in dispute, it is for the workman to establish that he was dismissed by his employer. If he fails, there is no onus whatsoever on the employer to establish anything for in such a situation no dismissal has taken place and the question of it being with just cause or excuse would not arise (see *Wong Chee Hong v. Cathay Organization (M) Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298)”.

Issue:

Based on the law as outlined above, the issues before the court are as follows:-

- (1) Whether the claimant had been dismissed by the company; and
- (2) If the Claimant had been dismissed, whether the dismissal was with just cause or excuse.

In determining whether the claimant had been dismissed, the court would have to consider whether the claimant had established on a balance of probabilities that he was forced to resign.

Evidence, Evaluation And Findings:

Evidence

Claimant

The Claimant called two witnesses, himself and one MR. Yap Wee Ming. The Claimant in his Witness Statement , CLWS1 stated that he was employed in 2002 as Supervisor and his terms and conditions of service is as per CLB pages 1 to 9. He further said in answer to Question 4 to 11 as follows:-

Q4 : Sila beritahu Mahkamah apa yang berlaku pada 15hb Februari 2005?

A : Saya telah dipanggil oleh Encik Lin Chin Ming, iaitu Pengarah Syarikat dan diberitahu bahawa saya diberhentikan kerja dengan gaji ganti notis satu bulan. Dia tidak memberikan apa-apa sebab untuk pemberhentian kerja saya. Saya telah diminta menandatangani surat yang mengakui saya terima gaji ganti notis tersebut. Saya enggan untuk menerima gaji tersebut dan

tidak menandatangani surat tersebut kerana saya tidak diberitahu sebab saya diberhentikan.

Q5 : Apa berlaku selepas itu?

A : Selepas itu saya diminta keluar daripada premis Syarikat dengan serta-merta.

Q6 : Apakah tindakan anda selepas itu?

A : Saya telah menulis surat kepada Syarikat bertarikh 16 Februari 2005 dan saya menyatakan bahawa saya telah diberhentikan tanpa sebab dan saya meminta supaya Syarikat mengambil saya untuk bekerja semula di jawatan asal saya. Saya telah hantar surat tersebut secara tangan dan telah mendapat satu salinan akui terima.

Q7 : Sila lihat mukasurat 13, 'Claimant 's bundle of document'. Adakah ini surat yang anda maksudkan?

A : Ini adalah surat tersebut.

Q8 : Adakah anda terima apa-apa jawapan daripada Syarikat?

A : Tidak, Syarikat tidak menghubungi saya atau menjawab surat saya. Saya tidak menerima apa-apa pengesahan bertulis daripada Syarikat yang saya telah diberhentikan ataupun sebab untuk pemberhentian saya.

Q9 : Apakah tindakan anda selepas itu?

A : Oleh kerana saya tidak terima apa-apa jawapan atau surat daripada Syarikat, saya pergi ke Jabatan Perusahaan untuk membuat laporan.

- Q10 : Sila lihat perenggan 2 Pernyataan Jawapan Syarikat Terpinda bertarikh 31hb Mac 2008. Pihak Syarikat menyatakan bahawa anda telah ditangkap berjudi dan anda telah mengakui perkara ini kepada Encik Lin Chih Ming pada 15hb Februari 2005. Adakah ini benar?
- A : Pernyataan Syarikat adalah tidak benar sama sekali. Saya tidak pernah berjudi di kawasan Syarikat. Pernyataan Syarikat ini adalah untuk mengelirukan situasi sebenar dan untuk memperdayakan Mahkamah Mulia ini. Saya menafikan dengan sekeras-kerasnya pernyataan Syarikat.
- Q11 : Seterusnya Syarikat menyatakan di perenggan 3 Pernyataan Jawapan Terpinda bahawa Syarikat tidak memberhentikan anda tetapi hanya memberikan amaran kepada anda kerana kegiatan berjudi dan anda telah enggan menandatangani surat amaran tersebut. Seterusnya Syarikat menyatakan yang anda secara sendiri telah meninggalkan premis Syarikat dan bukan atas arahan Syarikat. Adakah pernyataan ini benar?
- A : Allegasi Syarikat adalah tidak benar sama sekali. Saya telah diberhentikan tanpa sebab dan bukan sebaliknya. Jika adalah benar saya hanya diberikan amaran, kenapa saya perlu tinggalkan Syarikat? Adalah tidak munasabah sama sekali untuk saya meninggalkan pekerjaan saya apabila hanya telah diberi amaran. Saya menyatakan bahawa saya tidak pernah berjudi dan tidak diberikan amaran oleh Syarikat. Syarikat tidak

pernah mengemukakan apa-apa surat amaran kepada saya atau dalam Mahkamah ini sehingga sekarang.

Under cross examination as per Notes of Proceeding dated 13 April 2009, Claimant said that COW2 was his boss and that COW2 went back to Taiwan for about five to six days to celebrate Chinese New Year (see page 3). He said his salary was paid every 2nd of the next month (page 4) and bonuses were given before Chinese New Year. For 2005, bonus was given on 2 February 2005 and credited into Claimant's bank account, Public Bank. He said COW2 only saw him on 15 February 2005 after coming back from Taiwan (page 5). At pages 5 to 6, the Claimant said:-

Q : Sebelum dia pergi, dia ada marah awak?

A : Tak ada.

Q : Selepas balik dari Taiwan, hari pertama dia jumpa awak?

A : Ya.

Q : Dia jumpa dan suruh you berhenti kerja?

A : Ya.

Q : Jadi dia jumpa pada 15 Februari 2005?

A : Ya.

Q : Awak kata sebelum balik ke Taiwan, Encik Lin tak ada marah atau ada pasal dengan you dan balik sahaja, dia terus buang you?

A : Ya.

Q : Ada logik ke tak ada apa-apa pasal, you pekerja yang baik dan tiada gaduh, dia terus buang you?

A : Tak logik.

- Q : Saya kata semasa ketiadaan Encik Lin, ada perkara yang berlaku di Syarikat?
- A : Tiada apa-apa terjadi.
- Q : Jadi Lin saja mahu kasi you berhenti kerja?
- A : Ya.
- Q : Saya kata kalau dia nak buang you kerja, tidak perlu bayar bonus dan tunggu sehingga pergi ke Taiwan dan balik baru berhentikan you. Lin boleh berhentikan you tanpa bayar bonus dan buang lebih awal?
- A : Ya.
- Q : You kenal Encik Lim Ching Huat?
- A : Kenal.
- Q : Dia siapa?
- A : Dia kerja dekat kilang.
- Q : Masa you kerja, dia pun ada kerja?
- A : Ya.
- Q : Saya katakan kepada awak, masa Encik Lin tak ada, satu perkara terjadi iaitu kamu main judi di premis Syarikat, setuju atau tidak?
- A : Tidak.
- Q : Saya cadangkan masa kamu keluar Syarikat pada 15 Februari 2005, kamu jumpa Encik Lim dan bagi tahu dia, bos buang kerja sebab you main judi di Syarikat?
- A : Tidak.

At pages 7 to 9, the Claimant said:-

- Q : Saya cadangkan bahawa pada 15 Februari 2005, Encik Lin masuk office dan panggil you jumpa dia?
- A : Ya.
- Q : Dia cakap sama you ada orang bagi tahu dia you main judi dalam Company?
- A : Tidak.
- Q : Kamu cakap, “tiap-tiap tahun saya selalu main judi, ini tahun apa hal dia orang bikin?”
- A : Tidak.
- Q : Saya katakan pada hari itu, 15 Februari 2005, Encik Lin mahu kasi you warning letter sahaja?
- A : Tidak.
- Q : You sahaja keluar Company and tidak balik selepas itu?
- A : Tidak.
- Q : Lihat mukasurat 13 CLB, ini surat kamu kepada Syarikat?
- A : Ya.
- Q : You kasi sama siapa?
- A : Lim Ching Huat.
- Q : Ini masa Lim kerja sebagai apa?
- A : Technician, dia kerja department lain, bukan bawah saya.
- Q : Patut kasi surat kepada siapa?
- A : Biasa kami kasi Lim.
- Q : Banyak orang kasi sama dia ka?
- A : Ya.

- Q : Ini kilang ada office di tingkat atas.
- A : Ya.
- Q : Tingkat atas ada Mr. Lin, secretary dan pejabat pentadbiran di tingkat atas. Mereka duduk di sana bukan?
- A : Ya.
- Q : Tapi kasi sama Lim Ching Huat?
- A : Ya.
- Q : Cop siapa taruh?
- A : Lim letak dia terus cop dan kasi saya.
- Q : You kata hantar surat tarikh 16 Februari 2005, bila kasi?
- A : Itu hari saya kasi.
- Q : Lepas kasi itu surat, ada jumpa Lim Ching Huat tanya ada apa-apa jawapan?
- A : Ya, ada saya telefon.
- Q : Apa Lim kata?
- A : Dia kata tak ada jawapan.
- Q : Ini Company tahu tak di mana awak tinggal?
- A : Ya, Syarikat tahu alamat saya.
- Q : You tahu nombor telefon Syarikat?
- A : Tahu.
- Q : Ada telefon Company tanya?
- A : Ada, saya cakap sama "Kelly" orang panggil dia Kelly.
- Q : Kelly siapa?
- A : Dia kerja sana office?
- Q : You tahu dia kerja office sebelum awak keluar?

- A : Ya.
- Q : Tapi tak hantar surat kepada dia?
- A : Dia tak ada.
- Q : Macam mana tahu dia tak ada?
- A : Saya ada call.
- Q : Tapi tak masuk office?
- A : Tak ada masuk office.
- Q : Saya cadangkan cerita awak bagi surat kepada Lim dan telefon Kelly semua tipu sebab awak tak buat?
- A : Saya tidak setuju.

The Claimant agreed that he had received the full salary for February on 4 March 2005 though he claimed to have been dismissed as of 15 February 2005. The Claimant too did not enquire why he was paid the full salary.

The Claimant said he only called Kelly and Lim on 16 February 2005 and was told there was still no answer to his letter as per CLB page 13 dated 16 February 2005. He did not call thereafter.

Under re examination, the Claimant said he met COW2 on 15 February 2005 and COW2 told him that he had been dismissed but did not tell him why. The Claimant further said COW2 told him the following as per pages 11 of the Notes of Proceeding dated 13 April 2009:-

- Q : Ada Lin suruh sign surat?
- A : Ya, surat kata saya sendiri mahu berhenti kerja.

- Q : Ada Lin cakap mahu bayar gaji?
- A : Ada untuk bulan Februari.
- Q : Apa dia cakap?
- A : Saya kata tak mahu terima gaji bulan Februari sebab dia kata dia kasi bulan Februari punya gaji, sign itu surat dan berhenti kerja.
- Court : Dia kata itu jam dia bagi you gaji?
- A : Ya.
- Q : Selalunya gaji masuk dalam akaun bank dan perlu sign slip gaji?
- A : Ya.
- Q : Bila? Gaji sudah masuk baru sign? Lihat Annex A page 2. Gaji sudah masuk tapi Company tak panggil you sign itu voucher?
- A : Tak ada panggil.
- Q : Ada Company panggil you sign ini voucher?
- A : Tak ada.
- Q : Tadi you setuju you kata you sudah di sack oleh boss?
- A : Ya.
- Q : Ada cakap you kena sack sebab main judi?
- A : Tidak.

He denied that COW2 wanted to give him a warning letter. The Claimant said there was no warning letter and he did not receive any from the Company. With regard to CLB page 13, the Claimant at page 12 of the same Notes said:-

- Q : Rujuk kepada mukasurat 13 CLB, kenapa hantar kepada Encik Lim?
- A : Pasal office tak ada orang.
- Q : Macam mana tahu office tak ada orang?
- A : Saya tanya Lim Ching Huat.
- Q : Syarikat punya cop, siapa ada?
- A : Office, Lim, saya dan Lim share itu cop.
- Court : Siapa boleh pakai cop?
- A : Lim, supervisor boleh pakai, packing pun boleh pakai kalau tak ada orang, QC pun boleh pakai.
- Court : Kalau Lim tak ada, siapa-siapa boleh pakai?
- A : Boleh.
- Q : Selepas 15 Februari 2005, ada balik kerja?
- A : Saya tak balik kerja sampai sekarang.

The second witness for the Claimant was one Mr. Yap Wee Ming. In his Witness Statement, CLWS-2, which was served on the Company's counsel on 25 May 2009 and produced in Court on 26 May 2009, CLWS2 said:-

- Q8 : Adakah anda tahu apakah yang terjadi kepada Lim Shen Hen selepas pertengahan bulan Februari 2005?
- A : Lim Shen Hen tidak lagi bekerja di Syarikat selepas pertengahan bulan Februari kerana dia telah dibuang kerja pada 15 Februari 2005.
- Q9 : Bagaimana anda tahu bahawa Lim Shen Hen telah dibuang kerja pada 15 Februari 2005?

- A : Pada 15 Februari, sejurus selepas Lim Shen Hen keluar dari bilik mesyuarat dengan Lin Chih Ming, dia ada memberitahu saya bahawa dia telah dibuang kerja.
- Q10 : Adakah anda tahu sebab Lim Shen Hen diberhentikan kerja?
- A : Saya ada bertanya Lim Shen Hen apakah sebab diberhentikan kerja, tetapi dia memberitahu saya bahawa dia tidak tahu sebab tersebut kerana dia tidak dimaklumkan oleh pihak Syarikat tentang sebab pembuangan kerja.
- Q11 : Apakah yang terjadi selepas itu?
- A : Lim Shen Hen pergi meninggalkan Syarikat selepas itu.
- Q12 : Apakah reaksi anda mengenai kejadian ini?
- A : Saya berasa sangat terkejut dan cuba bertanya kepada pekerja-pekerja di Syarikat apakah sebenarnya punca Lim Shen Hen dibuang kerja.
- Q13 : Apakah yang anda ketahui kemudiannya?
- A : Beberapa hari selepas itu saya terdengar daripada rakan-rakan sekerja yang lain bahawa Lim Shen Hen dituduh bermain judi di Syarikat semasa.
- Q14 : Adakah anda tahu butir-butir tuduhan Lim Shen Hen bermain judi di Syarikat seperti tarikh, tempat dan dengan siapa dia bermain judi?
- A : Tidak tahu.
- Q15 : Adakah rakan-rakan sekerja anda tahu atau melihat sendiri kejadian sebenar berkenaan dengan tuduhan bahawa Lim Shen Hen berjudi semasa bekerja?

A : Tidak. Rakan-rakan sekerja saya hanya tahu tentang tuduhan Lim Shen Hen bermain judi semasa bekerja apabila terdengar melalui cakap-cakap antara satu sama lain setelah semua terkejut mendapat tahu bahawa Lim Shen Hen telah meninggalkan Syarikat pada 15 Februari 2005. Tiada sesiapa pun antara mereka yang benar-benar melihat atau menjadi saksi kejadian yang kononnya Lim Shen Hen telah bermain judi semasa bekerja.

Q16 : Adakah anda tahu dengan siapakah Lim Shen Hen bermain judi semasa bekerja?

A : Tidak tahu.

Under cross examination, CLW2 said he worked for three years with the Company. He admitted to have resigned from the Company when he got a better offer. CLW2 too admitted that he was given two warning letters by the Company because, "saya buat salah, kerja tak baik i.e. mengurus kerja dengan tidak lancar. Warning letters sebut saya tidak kerja dengan lancar". He said COW1 was from Taiwan and usually went back for Chinese New Year. At page 3 of the Notes of Proceeding dated 27 August 2009, CLW2 said:-

Q : Company ada masalah dengan Claimant?

A : Tiada masalah.

Q : 15 Februari 2005 Claimant datang, kata dia kena buang kerja?

A : Ya.

Court : Awak ada tanya dia apa pasal dia kena buang kerja?

A : Ya, saya ada tanya, Claimant kata dia pun tak tahu apa hal dia kena buang kerja.

Q : Apa yang terjadi?

A : Claimant datang jumpa saya, Claimant kata dia kena "sack". Saya tanya apa sebab kena "sack". Claimant kata dia pun tak tahu apa sebab Syarikat mahu "sack" dia, lepas itu Claimant pun balik.

CLW2 admitted that he was a close friend of the Claimant and said the Claimant contacted him (phone him) two weeks before he gave evidence. He said it was Miss Mei Ling who told him that the Claimant, "kena buang kerana berjudi". At page 5 of the same Notes, CLW2 said:-

Q : Dalam statement you kata Mei Ling keluar bilik mesyuarat dengan Lin Chih Ming?

A : Ya, saya ada nampak Mei Ling keluar bersama bos pada 15 Februari 2005.

Q : Di mana bilik mesyuarat?

A : Tingkat bawah Syarikat.

Q : Kamu kata tidak tahu butiran tuduhan Claimant main judi di Syarikat?

A : Ya, saya tidak tahu.

Q : Tidak tahu, maksud apa?

A : Saya tidak ada nampak Claimant berjudi.

Q : You tak tahu?

- A : Saya di department lain, saya tak tahu Claimant main judi atau tidak.
- Q : Awak ada kata rakan-rakan kerja tiada siapa lihat Claimant berjudi. Siapa dia?
- A : Lim Ching Huat, Sham dan Mei Ling.

At page 6, CLW2 said:-

- Q : You ada tanya siapa-siapa lain?
- A : Saya tak tanya sebab lain worker adalah foreign worker. Saya tak tanya, saya tanya tiga orang ini apa hal dan mereka kata tak nampak Claimant berjudi.
- Q : Selain foreign worker, ada lagi?
- A : Ada orang bekerja di office. Office punya orang di tingkat atas. Saya kurang bercampur dengan mereka dan tak tanya mereka.
- Q : Kalau saya kata Claimant berjudi dengan foreign worker, you pun tak tahu?
- A : Saya tak tahu.

At pages 7 and 8, CLW2 said:-

- Q : Awak kata Claimant jalankan kerja dengan baik?
- A : Ya, sepanjang pengetahuan saya Claimant tak pernah kena marah. Dalam meeting pun Claimant tak pernah kena marah, dalam mesyuarat yang saya hadiri. Mesyuarat tak tentu, bila bos nak meeting, dia panggil.

- Q : Bos Encik Lin, ada pernah nampak bos marah dengan Claimant?
- A : Tidak pernah.
- Q : Masa 15 Februari 2005, bos baru balik dari Taiwan?
- A : Ya, lepas beberapa hari bos balik dari Taiwan.
- Q : Setuju tak Company tak buang kerja tanpa sebab?
- A : Ya, kalau ada sebab baru "sack".
- Q : Ada tanya office punya orang apa pasal Claimant kena "sack"?
- A : Tidak, kerana kurang rapat dengan mereka.
- Q : Ada bos atau office orang cakap apa pasal dia "sack" Lim (Claimant)?
- A : Tidak ada.
- Court : Dalam mesyuarat ada bos bagi tahu apa pasal "sack" Claimant?
- A : Tidak ada.
- Court : Ada bos bagi tahu meeting, Claimant telah dibuang?
- A : Tak ada, apa pun tak ada.
- Q : Setakat you sendiri, you tahu tak dia balik atau dia kena "sack"?
- A : Yang saya tahu ialah apa yang Claimant cakap iaitu dia kena "sack" apa yang berlaku antara Claimant dengan bos, saya tak tahu.
- Court : You percaya apa Claimant cakap?
- A : Saya percaya sebab Claimant banyak ajar saya. Mula-mula saya ingat dia cuma bergurau tapi apabila saya nampak dia balik, saya percaya dia kena "sack".
- Court : Apa pasal awak ingat Claimant bergurau?

A : Sebab saya tak faham kerana kalau “sack” satu orang, mesti ada sebab. Itulah sebab saya tanya Claimant, apa sebab dia kena “sack”.

Re:

Q : Ada tahu dari kawan-kawan, mereka ada tahu butir-butir kejadian berjudi, siapa main dengan Claimant?

A : Mereka pun kata dengar cakap sahaja. Mereka pun cakap tak tahu dan kata dengar orang cakap sahaja.

Q : Awak tahu Claimant kena buang kerja sebab berjudi melalui cakap-cakap orang sahaja?

A : Ya, saya tahu selepas dua tiga hari sahaja.

Q : Selepas Lim keluar dari bilik pejabat, ada dia kata yang dia kena marah ke kena warning ke?

A : Tak ada, cuma kata kena “sack” sahaja.

The Company

The Company called two witnesses. COW1 was Mr. Lim Ching Huat. In his Witness Statement, COWS-1, he said:-

Q8 : What position did Mr. Lim Shen Hen held in Chao Yuan Industrial Sdn. Bhd.?

A : He was the Company Production Supervisor.

Q9 : Do you work at the same work place as Mr. Lim Shen Hen?

A : Yes, he was my Supervisor.

Q10 : Do the working hours of yours and Mr. Lim Shen Hen the same?

A : Yes.

- Q11 : How would you describe your relationship with Mr. Lim Shen Hen?
- A : We were friends. Working mates.
- Q12 : Is Mr. Lim Shen Hen still working for Chao Yuan Industrial Sdn. Bhd.?
- A : No.
- Q13 : When was the last time you saw Mr. Lim Shen Hen at Chao Yuan Industrial Sdn. Bhd.?
- A : The exact date I could not remember but it was just after Chinese New Year holidays in 2005 when I came back to work.
- Q14 : Are you aware why Mr. Lim Shen Hen no longer is employed with Chao Yuan Industrial Sdn. Bhd.?
- A : Yes.
- Q15 : How did you came to know it?
- A : I was at the ground floor of the Company when I saw Mr. Lim Shen Hen came down from the office. Mr. Lim then approached me and told me that he has been sacked by the boss. He then further told me that the reason given by the boss was that an employee of the Company had told the boss that Mr. Lim was gambling at the Company's premise.
- Q16 : After that what did Mr. Lim Shen Hen say or do?
- A : Mr. Lim Shen Hen just left the Company without saying anything.
- Q17 : Are you sure?
- A : Yes, I am.

- Q18 : Did you see or hear of Mr. Lim Shen Hen after that day?
- A : No.
- Q19 : Did you hear anything about the reasons why Mr. Lim Shen Hen was no longer working with the Company?
- A : A few days later I heard from the other staff of the Company that Mr. Lim Shen Hen was gambling in the Company and the boss found out about it.
- Q20 : Who are these other staff?
- A : Other employees of the Company, who were no longer working there.

In answer to Supplementary Questions as per page 10 of the Notes of Proceeding dated 27 August 2009, COW1 said:-

- Q : Rujuk kepada Statement of Case – Annexure C – termination letter. Mr. Lim, have you seen this letter before?
- A : No.
- Q : Claimant said he gave this letter to you?
- A : No, I did not receive this letter from Claimant. Lim did not give it to me.
- Q : Who put the chop here?
- A : I don't know.
- Q : Did you put the chop here?
- A : No.
- Q : After Claimant left Company on 15th February 2005, did you see or hear from him after that?

A : No.

Under cross examination at pages 10 to 12 of the same Notes, COW1 said:-

Q : Are you still working with Company?

A : Yes.

Q : In your Statement said at Question 15, Claimant approached you and said he was “sacked”?

A : Yes, he said he was “sacked” by the boss.

Q : Any reason given by Claimant?

A : He said he was sacked by the boss. Claimant said the boss gave the reason, Claimant gambling in the Company.

Q : Claimant said the boss gave him the reason?

A : Yes.

Q : Did you hear from any other source?

A : Yes, I am not sure when I heard but it was from the staff.

Q : Who was the staff?

A : I also forget because the staff was no longer working there. I cannot remember.

Court : Are you sure you hear?

A : I heard but not sure.

Q : What did you hear?

A : I heard other staff talking about Claimant's case and they said they heard the reason was gambling in the Company.

Q : Did any of them say they witnessed the incident?

A : No.

Q : Did anyone know the details of the incident?

A : No.

Q : You have authority to chop any letter of Company?

A : No.

Q : Who can chop?

A : Staff of the office.

Q : Have you ever chopped?

A : I never chopped.

Court : Who kept the "chop"?

A : I don't know.

Court : You are the supervisor?

A : In 2005 I was not supervisor. After 2005, I became supervisor.
I was supervisor at that time.

In answer to question by Court, COW1 said:-

Court : After Claimant came and saw you and told you he was sacked, do you know whether Claimant was sacked or he left the Company?

A : Yes, he was sacked.

Court : Are you sure he was sacked or he left the Company?

A : I am sure he was sacked by the Company.

Court : Do you have any meetings in the Company?

A : Yes.

Court : Did boss at any of the meetings said Claimant was sacked or Claimant left Company and reason?

A : Boss never said anything.

Court : Who appointed you as supervisor?

A : Boss, Mr. Lin (Taiwan).

Court : What did he tell you?

A : Boss said he was not sacked. Boss said Claimant left, he never said he sacked Claimant.

Court : What is your view of the version? Which one you believe?

A : I don't know.

The final Company's witness was COW2, Mr. Lin Chih Ming. In his Witness Statement, COWS-2, COW2 said:-

Q2 : What 's your relationship with Chao Yuan Industrial Sdn. Bhd. at No. 23 & 25, Jalan Selat Selatan 25, Sobena Jaya, Pandamaran, Pelabuhan Klang?

A : I'm one of the Directors in Chao Yuan Industrial Sdn. Bhd.

Q4 : What is the post you now hold in Chao Yuan Industrial Sdn. Bhd.?

A : Now I am the Director and also the Factory Manager. I was appointed the Factory Manager in 2003 after Mr. Wong Yung Chiang left for Taiwan.

Q5 : As the Factory Manager of Chao Yuan Industrial Sdn. Bhd. what are your functions?

A : The position of Factory Manager is the highest rank in the company here in Malaysia. The General Manager is in Taiwan.

Therefore, I'm in charge of the entire operation's of the company and all matters relating to the Company come directly to me.

Q8 : Does your duties comprises handling the conduct and action of the employees of Chao Yuan Industrial Sdn. Bhd.?

A : Yes.

Q9 : Does that also mean that you are the one that keeps the discipline of the employees of Chao Yuan Industrial Sdn. Bhd.?

A : Yes.

Q13 : How would describe your relationship with Mr. Lim Shen Hen?

A : Normal employer employee relationship.

Q14 : Is Mr. Lim Shen Hen still working for Chao Yuan Industrial Sdn. Bhd.?

A : No.

Q15 : When was the last time you saw Mr. Lim Shen Hen at Chao Yuan Industrial Sdn. Bhd.?

A : The last time I saw him was on 15.2.2005 around 10.30 am at my office in the Company's premise.

Q16 : Were you the one that meet Mr. Lim Shen Hen last before he left Chao Yuan Industrial Sdn. Bhd.?

A : Yes.

Q17 : Can you inform the Court as what transpired on 15.2.2005?

A : It was after the Chinese New Year holidays and I had just arrived from Taiwan after my Chinese New Year holidays. When I went to the Company in the morning on 15.2.2005, one of my employees informed me that when I was not around

during the Chinese New Year holidays, Mr. Lim Shen Hen had been gambling in the Company's premise.

Q18 : Who was the employee who informed you?

A : I could not recall his name and furthermore he was no longer working with the Company.

Q19 : What did you do once the employee informed you?

A : I immediately called Mr. Lim Shen Hen to come to my office to see me.

Q20 : What time did Mr. Lim Shen Hen came to see you?

A : It was around 10.00 am.

Q21 : How many of you were there at the meeting that time?

A : The meeting was only between me and Mr. Lim Shen Hen.

Q22 : What happen there in meeting?

A : When Mr. Lim Shen Hen came into my office, I asked him whether he was gambling at the Company's premise during the time I was away in Taiwan for the Chinese New Year break. Mr. Lim Shen Hen then informed me that "yes", he did gamble at the the Company's pemise.

Q23 : What did you then say to him?

A : I informed him that what he did was wrong and that the Company would issue him a warning letter. I then instructed my secretary to prepare a warning letter which she did. Upon receiving the warning letter, I instructed Mr. Lim Shen Hen to acknowledge the said letter which he refused to do.

Q24 : Did Mr. Lim Shen Hen tell why he refused to sign the said letter?

A : He said that he have been gambling at the Company's premise every year during Chinese New Year and why only now that I am giving him a warning letter. After that he just left my office without saying anything.

Q25 : Can you explain the reason why the Company issued the warning letter?

A : I was not aware that Mr. Lim Shen Hen had been gambling every year during the Chinese New Year holidays. This is because every year one week to ten days before the Chinese New Year, I will go back to my country to spent my holidays with my family. It was only in 2005 that I became aware that Mr. Lim Shen Hen was gambling in the Company's premise. If I had known this earlier, I would have warned him earlier.

Q26 : Where did Mr. Lim Shen Hen go after leaving your office?

A : I was informed that he left the Company's premise straight away.

Q27 : After that what did you see or hear from Mr. Lim Shen Hen?

A : No.

Q28 : Can you describe Mr. Lim Shen Hen's conduct at Chao Yuan Industrial Sdn. Bhd.?

A : Mr. Lim Shen Hen has on at least two occasions been reprimanded and warned of his conduct in the Company's premises. Prior to 15.2.2005, Mr. Lim Shen Hen have been issued two letters of warning both I believe in relation to work performance and attendance. As can be seen in the exhibits in

the Company's Statement in Reply "Annexure B". Mr. Lim Shen Hen had been taking medical leave and annual leave on regular basis.

Q29 : When were the earlier two letters of warning issued to him?

A : Both letters were issued in the year 2004.

Q30 : Are you sure that you only asked Mr. Lim Shen Hen to sign the warning letter on the 15.2.2005 at your office?

A : Yes.

Q31 : Did you at any point of time inform him that the Company is terminating his services?

A : No.

Q32 : After Mr. Lim Shen Hen left the Company's premises, did you see or hear from him?

A : No.

Q33 : After Mr. Lim Shen Hen left the Company, he said he sent a letter dated 16.2.2005 to your Company seeking reply and reinstatement. What is your reply?

A : With regard to the letter 16.2.2005, the Company denied that we have received the said letter from Mr. Lim Shen Hen. The letter did not have the signature of the person who received the said letter and also the date and time the letter was received. The Company have no knowledge of the letter whatsoever. The Company have not heard or seen the Claimant after 15.2.2005.

Q34 : After that, what the Company do?

A : The Company waited for Mr. Lim Shen Hen to return for work and when we failed to hear from him, the Company decided to stop paying his salary.

Q35 : Did the Company still pay his salary for the month of February 2005?

A : Yes the Company did make salary payment for the Claimant for the month of February 2005 via depositing his pay into his account on the 4.3.2005. The Company had also made payment to the EPF for the Claimant. All these have been exhibited as "Annexure A" in the Company's Statement in Reply.

Q36 : Can you inform the Court as to when the Company terminated the employment of Mr. Lim Shen Hen?

A : The Company decided to stop paying his salary after February 2005 as Mr. Lim Shen Hen had been absent from work since 16.2.2005 without prior notice. Although the Company paid his February 2005 salary, since he had not worked or even contacted the Company after 16.2.2005, the Company had no other choice but to terminate his services.

Under cross examination, COW2 at pages 3 to 6 of the Notes of Proceeding dated 3 November 2009, COW2 said:-

Q : Refer to Question 24. Claimant said he have been gambling every Chinese New Year, why now only gave him a warning letter?

- A : My answer is as per Question 25. I only knew Claimant was gambling in 2005 because he admitted. I was only aware of Claimant gambling in 2005 but because was Claimant who admitted that he had been gambling every Chinese New Year.
- Q : Did you call those who gambled with him?
- A : The Claimant did not give me the opportunity to call person who gambled with Claimant.
- Court : What do you mean?
- A : Before I could finish the conversation, Claimant had already left.
- Court : Do you know the people who gamble or not?
- A : Only one person, we called him by the name Ta Shiong – the nickname. The full name, I have to get from my office. This Ta Shiong was no longer working in Company.
- Q : Did you ask Ta Shiong?
- A : I did not ask.
- Court : Why?
- A : I did not want to embarrass the Claimant, therefore, I did not look for Ta Shiong.
- Q : Do you agree with me, gambling was a serious offence?
- A : Yes.
- Q : Do you agree that as an employer, you should investigate the allegation of gambling?
- A : Yes, I agree.
- Q : Refer to Question 37. If Claimant was only warned, why did you not write to him for being absent from work?

A : My duty as an employer, if the employee is absent, he should write in, why he absent.

Q : If being absent without any ground, is a misconduct. Agree?

A : Yes.

Q : Claimant was absent, why did you not write a show cause letter to Claimant for being absent without leave?

A : In the year 2005, I don't know all the procedure that I have to send a show cause letter. All I know is employee should send letter to Company for being absent.

At pages 5 and 6, COW2 said:-

Q : Do you have Claimant's previous two warning letters?

A : Yes, I have but did not bring.

Q : Is it an offence to take leave and medical leave?

A : Not an offence.

Q : Refer to Question 32, after Claimant left, you did not see him. Why you did not communicate to him and tell him consequence of his absence?

A : I called Claimant's handset but could not get through, maybe handset not in service I did not write to him officially.

Q : Do you agree that by issuing letters was part of good management to inform Claimant of his status of employment?

A : I do not agree. My Company has so many employees and anyone or everyone behave like Claimant, the Company has to

issue letter everyday to employees. There was no conversation with Claimant because he already left the Company.

Q : Do you agree that you are saying you have no duty to enquire as you have so many employees?

A : Yes, I didn't have duty to enquire but Claimant also had no duty to inform me.

Q : Question 34, you said first pay, then on 4th March 2005 pay?

A : I did not say, I did not want to pay. Company decided to stop paying his salary after paying the Claimant's February salary i.e. after 4th March 2005.

Court : Claimant did not come but you still paid his salary for whole of February?

A : Yes.

Court : Claimant did not work from 16th February i.e. half month but you still paid?

A : Yes.

Q : Annexure A, second page?

A : Payment voucher and bank in slip. Page 3 salary slip. Page 1 – bonus. I paid for the whole month of February.

Q : You paid full salary to Claimant, did you send letter to ask why Claimant absent or that you terminate him?

A : No letter.

Under re examination, COW2 said at pages 6 and 7 of the same Notes the following:

Q : Why did you pay Claimant's salary even though Claimant did not come to work?

A : I hope Claimant can come back to work.

Q : When you met Claimant on 15th February 2005, what did Claimant say about gambling incident?

A : Claimant told me that every Chinese New Year, he used to gamble in the Company. Why only this year in 2005, Company issued me a warning letter. That was all the Claimant said. Later I told Claimant that I celebrated my Chinese New Year in Taiwan, therefore, I do not know he had been gambling in Company every year. In year 2005, someone complained to me that Claimant was gambling in Company. Then I issued a warning letter.

Q : Claimant admitted that he gambled?

A : Yes.

Q : Since he admitted to you, do you feel that it is still necessary to investigate?

A : Not necessary to investigate.

Q : After Mr. Lim left the Company, did he make any attempt to explain what happened?

A : No.

COW2 was later recalled to produce the warning letters as per COB-1, COB-2 and COB-3 as the Company was unable to locate the said letters as it had shifted. The

case was adjourned at 12.00 and resumed at 12.15, the same day .e. 3 November 2009.

At page 8 of the Notes of Proceeding of the same date, COW2 tendered the three letters, COB-1, COB-2 and COB-3. At pages 8 to 11, COW2 said:-

Q : COB-1, please explain. Letter dated 27th July 2004 – to whom?

A : To Claimant sent on 27th July 2004.

Court : Look Claimant's acknowledgement – 27th July 2003.

A : I can't remember whether 03 or 04, my letter dated 2004.

Subject Matter – Product of Company – Car Radiator Part – for water to pass through.

Para 1: Company product No. LR1587, the hole should be even but when produced it is uneven, there was a leakage. There was thus delay in production because of defective product. Company cannot deliver the product on time.

Para 2: Claimant was given first warning and penalty of RM25.00 – imposed on Claimant. Claimant paid, Claimant signed at bottom – COB-1.

Q : COB-2, explain.

A : Letter sent to Claimant on 28th July 2004 by me. Subject Matter – Claimant on MC without informing me or Claimant's subordinate i.e. Claimant on MC on 28th July 2004, did not inform COW2 or his subordinate.

Para 1: That you being a supervisor did not turn up for work and did not inform the Company and did not inform your subordinate or give directions on what to do, thereby causing a delay in production.

Para 2: Claimant was given first warning as it was different from the earlier one dated 27th April 2004.

Penalty – also RM25.00, Claimant paid, Claimant signed on 31st July 2004.

Q : COB-3 – third letter, please explain.

A : Third letter by me to Claimant dated 15th February 2005, signed by me on 15th February 2005. Subject matter – Tidak mematuhi masa kerja (surat amaran kedua).

Warning to Claimant for coming late – reasons given to Company not acceptable. Claimant was given second warning and if repeated, stern action will be taken.

Q : Who prepared COB-3?

A : My secretary.

Q : What instruction you give to secretary?

A : I told my secretary to issue a warning letter.

Q : Can you read or write in Bahasa Malaysia?

A : No.

Q : Do you know what were the contents of COB-3?

A : I was not aware of contents of letter, I was only aware when the letter was interpreted to me today in Court.

Q : Can you explain the delay in getting the three letters?

A : I have been keeping these three letters and have forgotten after so many years. Last week when I was clearing my room, then only discovered these three letters.

Q : On 15th February 2005 did you give and show COB-3 to Claimant?

A : Yes.

Q : What did Claimant do?

A : Claimant refused to sign.

Q : You said only when letter interpreted to you only you realised the contents. Was this your intended content then what was your intention then?

A : I wanted to give him a warning letter on the gambling matter.

The cross examination of COW2 was deferred on 3 November 2009 to 24 November 2009 as the Claimant was absent and his counsel wanted to get instructions. On 24 November 2009, the Claimant was absent but the Claimant's counsel informed Court that he had referred COB-1 to 3 to the Claimant and got his instruction.

Under cross examination on 24 November 2009, COW2 said at pages 1 to 3 of the Notes of Proceeding on the same date the following:-

Q : Refer to COB-1. This letter was issued to Claimant because of some defective products?

A : Yes.

Q : There was a penalty at para 2?

A : Yes, RM25.00.

Q : Is this penalty paid by deduction from salary?

A : Yes.

Q : Deduction from July salary?

A : Yes.

Q : Refer to COB-2, this is MC without informing his subordinates to carry out their function?

A : Yes.

Q : Penalty at para 2?

A : Yes, RM25.00.

Q : This is deducted by way of Claimant's salary?

A : Yes.

Q : From July salary?

A : Yes.

Q : Both warnings issued in July 2004?

A : Yes, I confirmed.

Court : (To Claimant's counsel) Have you clarified with Claimant his signature and date in COB-1?

Claimant's counsel : Yes and Claimant said he did not sign both warning letters but both were in July 2004.

Q : Refer to pay slip of Claimant for July 2004 of Claimant. Can you confirm this is salary slip for July 2004 of Claimant?

A : Yes.

Q : Is there any deduction of RM25.00 + RM25.00 in the pay slip?

A : No deduction.

Claimant's counsel : I wish to tender the Claimant's pay slip as CLB page 14.

Company's counsel : No objection.

Court : Payslip for July 2004, admitted and marked CLB page 14.

Q : Refer to COB-3, can you confirm this is warning letter issued to Claimant before he left the Company?

A : Yes.

Q : Is it a gambling matter?

A : Yes, as per my instruction to the secretary.

Q : After letter written by secretary, was it given to you?

A : Yes and I signed the letter.

Q : You acknowledged contents of the letter?

A : Yes, I acknowledged it but I don't understand Bahasa Malaysia. My instruction was to issue warning letter on the gambling matter.

Q : Do you agree act of gambling is very different from coming late to work?

A : Yes, certainly so.

Q : Do you agree that the implication is also different for this two acts?

A : Yes.

Under re examination, COW2 at page 4 of the same Notes said:

Q : Refer to COB-1 and COB-2. Whose signatures on the right?

A : Claimant's signatures.

- Q : How can you confirm?
- A : Because Claimant signed in front of me.
- Q : Refer to CLB page 14, why was there no deduction in Claimant's salary of the fines RM25.00 + RM25.00 (COB-1 and COB-2)?
- A : I can't remember whether it was deducted from August or September salary.
- Court : Just now under cross you said you agree deducted from July salary?
- A : Yes, that was what I said.
- Court : So why change now, after looking at CLB page 14?
- A : According to Company's procedure, it should be deducted from July salary but I can't remember whether it was deducted and can't answer why it was not deducted. I do not have the proof now.
- Q : Is Company still at the address as per COB-1 and COB-2?
- A : No, we have shifted.
- Q : When shifted?
- A : October 2008.

Evaluation And Findings:

When dealing with a reference under Section 20 of the Act, the first thing that the Industrial Court has to consider is the question of whether there was, in fact, a dismissal. If this question is answered in the affirmative, it must only then go on to consider if the said dismissal was with or without just cause or excuse. Reference is drawn to the case of *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd. [1988]*

1 CLJ 45; [1988] 1 CLJ (Rep) 298 (Federal Court) per Salleh Abas LP. (emphasis added).

In *General Containers Sdn. Bhd. v. Yip Siew Ling* [1994] 2 ILR 912 (Award No. 418 of 1994) it was stated:-

“It is a trite principle of industrial law that only a workman who has been dismissed by his employer may seek the remedies available under Section 20 of the IRA 1967. This is a jurisdictional fact which is more often than not a matter which is not disputed. Where, however, the employer denies that he had dismissed the workman and alleges that it was the workman who had resigned, then the Industrial Court has the duty to decide first of all the preliminary issue whether there was a dismissal. Once it is established that there was a dismissal, the issue that is left for the court to decide is whether or not the employer had just cause or excuse for dismissing the workman”.

In a case such as this where there are two conflicting versions of what really happened and where there is a state of unresolved conflict of oral evidence with regard to the facts, the court must turn to the averments made by the parties in their respective pleadings and contrast that to the evidence adduced.

To this end, I turn to the following cases for guidance.

The Federal Court in the case of *R. Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 has pronounced that the Industrial Court must attend to matters that it is bound to consider and that pleadings in that respect

should not be treated as mere pedantry; and in *Joey Kanniah v. Poliklinik & Hospital Veterina Sdn. Bhd. & Ors* [1997] 5 CLJ 237, the High Court held that parties to an action are bound by their pleadings and this includes proceedings before the Industrial Court.

The Federal Court in Rayuan Sivil No-04-1-2009 (W) 2009 between *Ranjit Kaur A/P S. Gopal Singh v. Hotel Excelsior (M) Sdn. Bhd.* in answer to Question 2 in relation to pleadings held in para 28 and 29 as follows:-

“There is no doubt that the underlying objectives and purposes of the Act is to ensure social justice to both employers and employees and to advance the progress of industry by bringing harmony and cordial relationship between the parties and to eradicate unfair labour practices, to protect workmen against victimisation by employers and to ensure termination of industrial dispute is a peaceful manner (see *Tanjug Jara Beach Hotel Sdn. Bhd. v. National Union of Hotel & Bar Restaurant Workers* [2004] 4 CLJ 657). However, as rightly pointed out by learned counsel for the respondents, Section 30(5) of the Act cannot be used to override or circumvent the basic rules of pleading. The Industrial Court, like the Civil Courts must confine itself to the four corners of the pleading. This had been held to be so by this Court in *Rama Chandran* which are as follows:-

“It is trite law that a party is bound by its pleadings. The Industrial Court must scrutinise the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having strict regards to the issues”.

There is no reason to depart from the view. Pleadings in the Industrial Court are as important as in the Civil Courts. The appellant must plead its case and the Industrial Court must decide on the appellant's pleaded case. This is important in order to prevent element of surprise and provide room for the other party to adduce evidence once the fact or an issue is pleaded. Thus, the Industrial Court's duty, to act according to equity, good conscience and substantial merits of the case without regard to technicalities and legal form under Section 30(5), does not give the Industrial Court the right to ignore the Industrial Court Rules 1967 made under the principle Act”.

In conclusion at para 32 (ii) of the said judgment held:-

“As to the second question, our answer is that pleadings in the Industrial Court are as important as in the Civil Courts. Section 30(5) of the Act could not be used to override or circumvent the basic rules of pleading”.

In this case, the Claimant had at para 3 to 5 of his Statement of Case stated the following:-

“On February 2005, the Claimant was verbally informed that dismissed from service with one month salary. No reason was given to the Claimant for his dismissal. The Claimant was asked to acknowledge receipt of the one month salary. The Claimant did not accept the one month salary and refuse to acknowledge the said letter. The Company then dismissed the Claimant from his employment on 15 February 2005 with immediate effect.

The Claimant by a letter dated 16 February 2005 to the Company stated that he did not know why he was dismissed as there was no reason given for his dismissal and sought to be reinstated to his former position. There was no reply from the Company.

The Claimant contended that he had been unlawfully dismissed by the Company as:-

- (i) he was not given a reason for his dismissal nor sufficient notice before the dismissal;
- (ii) the Claimant was not given a show cause letter or letter of termination when he was dismissed; and
- (iii) the Company had unlawfully without just cause or excuse dismissed the Claimant for no proper reason despite the Claimant being an employee of the Company since 2002.

Para 3 contains the following assertions:-

- (i) that the Claimant was verbally dismissed on 15 February 2005;
- (ii) no reason was given for his dismissal;
- (iii) the Claimant was asked to acknowledge the receipt of one month's salary;
- (iv) the Claimant did not accept the one month's salary and refuse to acknowledge the letter; and
- (v) the Company then dismissed the Claimant from his employment on 15 February 2005 with immediate effect.

The Court will examine the above vis a vis the Claimant's and the Company's evidence. If there is dismissal then the Court will look further if not, there is nothing for the Company to answer.

Was The Claimant Dismissed On 15 February 2005?

The Claimant in answer to Question 4 CLWS-1 had stated that on 15 February 2005 he was called by COW2 and told that he “diberhentikan kerja dengan gaji ganti notis satu bulan”. COW2 did not give any reason why he was dismissed and he was asked to “menandatangani yang saya menerima gaji ganti notis tersebut”. He testified that he did not sign the said letter (surat mengakui saya terima gaji ganti notis).

Under cross examination, the Claimant said 15 February 2005 was the first time he saw COW2 after COW2 came back from COW2's leave in Taiwan for the Chinese New Year. The Claimant agreed that prior to COW2 going on leave, he had never, “marah atau ada pasal” with him. The Claimant too agreed that if COW2 wanted to dismiss him, COW2 would have done so earlier and needed not pay the Claimant his annual bonus which the Claimant received on 2 February 2005. He too agreed that it would be illogical for COW2 to dismiss him for no reason as the Claimant was a good worker and there was no issues between him and COW2.

The Claimant's version in short would mean that he was called by COW2 and straight away verbally told that he was dismissed.

The Claimant too said that he was then given a notice to sign which was an acknowledgment of a receipt of salary in lieu of notice of termination. The Claimant at para 3.5 of his written submission filed on 28 December 2009 referred the said notice as Annexure "A" page 2 of the Statement in Reply. A perusal of Annexure "A" page 2 would show that it was dated 4 March 2005. 4 March 2005 was also the same day as the bank in slip that was at the bottom of Annexure "A" page 2. The Claimant did not dispute that the Claimant's February salary was banked into his account at Public Bank as per Annexure "A" page 2. Annexure "A" page 2 did not state that it was "a notice ganti gaji" but stated that it was for February salary 2005. It included food allowance, overtime, EPF and SOCSO. The Claimant had earlier testified with regard to Annexure "A" page 1 that he received his bonus on 2 February 2005 and that it was credited into his Public Bank account on 2 February 2005. From the Claimant's evidence with regard to Annexure "A" page 1, it is on a balance of probabilities probable that Annexure "A" page 2 would have been prepared and banked in as per Annexure "A" page 1 i.e. prepared on 4 March 2005 and banked into the Claimant's account at Public Bank on 4 March 2005.

Based on the above evidence, the Court finds that Annexure "A" page 2 would not have been the "notis ganti gaji" as alleged by the Claimant. To lend support to the said conclusion, the Claimant too did not bring the issue of "notis ganti gaji", when COW2 was cross examined nor Annexure "A" page 2 put to him as "notis ganti gaji". With regard to the reason, COW2 called the Claimant to see him, it was not disputed by the Claimant that it was COW2 who called the Claimant to COW2's office. COW2's testimony that he was the one who called for the Claimant to meet him in his office, remains intact. What then was the reason underlying the said call?

COW2 testified that 15 February 2005 was COW2's first day at work after he came back from Taiwan. On 15 February 2005, COW2 was informed by his employee that the Claimant had been gambling when COW2 was not around. From COW2's evidence, would it not be on a balance of probability reasonable for COW2 to call for the Claimant to ask him about the said allegation. It was noted that the version about gambling was denied by the Claimant and was said to be an afterthought by the Company. CLW1, however, said that he heard about it two or three days after 15 February 2005 from Mei Lin, COW2 and Suhaimi. COW1, however, testified that it was the Claimant who told COW1 that he was dismissed (sacked) for being involved in gambling. From the evidence of COW1, CLW1 and COW2 as against that of the Claimant, the Court finds on a balance of probabilities that gambling was an issue which caused COW2 to have called the Claimant to COW2's office.

The Claimant, CLW1 and COW1 testified that it was not logical to terminate (sack) the Claimant for no reason. If the Claimant and CLWS-1 who was the Claimant's own witness said that COW2 had no quarrel with the Claimant, i.e. "Claimant tak pernah kena marah" and "tak pernah nampak boss (COW2) marah Claimant", would it then be probable on a balance of probabilities for COW2 to call the Claimant in and straight away sacked him? The Court finds COW2's evidence that he called the Claimant to enquire about gambling on a balance of probabilities more probable.

COW1's evidence too lends weight to COW2's testimony that the reason COW2 called the Claimant was "because an employee had informed the boss (COW2) that the Claimant was gambling". The Court also noted that the Company had filed COW1's Witness Statement on 27 November 2008, the date of hearing before the

Claimant gave evidence. COW1 as early as 27 November 2008 stated in answer to Question 15, COWS-1 that the Claimant told him, “that the reason given by the boss was that an employee of the Company had told the boss that (the Claimant) Mr. Lim, was gambling at the Company's premise”. COW1 was cross examined on this and he stood firm to say that it was the Claimant who told him so. COW1's testimony lent weight to COW2's evidence that an employee of the Company had told COW2 that the Claimant had been gambling in the Company's premise.

The Court thus finds on a balance of probabilities that COW2 did call the Claimant to COW2's office on 15 February 2005 because “an employee had informed COW2 that the Claimant was gambling”. It is then probable for COW2 to have confronted the Claimant.

COW2 testified that he did confront the Claimant about the gambling and the Claimant not only admitted that the Claimant had gambled but also said that he had done so “every year during Chinese New Year. The Claimant also said why only now COW2 giving him a warning letter”.

Both COW1 and CLW2 said they did not know what transpired on 15 February 2005 between COW2 and the Claimant. With regard to CLW2, it was noted that the Claimant did not in his Witness Statement, in cross examination or in re examination said that he met CLW2 and told him that he was sacked. CLW2 was never mentioned by the Claimant prior to CLW2 giving evidence on 26 May 2009. In fact, it is noted that after the Claimant had been re examined on 13 April 2009, the Claimant's counsel told the Court that the next witness was Encik Suhaimi. Counsel

further said, "Suhaimi could not be present on 13 April 2009 but is available on 26 May 2009 as he is in Terengganu". Counsel for the Claimant too had undertaken to file Suhaimi's Witness Statement one week before 26 May 2009. However, on 26 May 2009 there was neither Suhaimi nor his Witness Statement. Instead the Claimant called CLW2. CLW2 testified that the Claimant contacted him about two weeks before 26 May 2009 to testify in Court. CLW2 too testified that the Claimant, "banyak ajar saya". The Court also notes that CLWS-2, CLW2's Witness Statement was only produced in Court after the Claimant had given evidence, being cross examined and re examined. It was also after counsel had sight of COWS1 and COWS-2 which had been filed on 27 November 2008. CLW2's evidence would have to be considered in the light of the above circumstances.

Both CLW2 and COW1 had said that the Claimant told them that he was "sacked". CLW2 said the Claimant said the Company did not give any reason. COW1, however, said the Claimant told him that it was because an employee had informed COW2 that the Claimant had been gambling. CLW2 said he saw Mei Lin coming out of the office with COW2 on 15 February 2005 and Mei Lin was one of those who informed him about the Claimant being involved in gambling. From COW1 and CLW2's evidence, the Claimant's involvement in gambling is thus on a balance of probabilities not an afterthought by the Company. Both COW1 and CLW2 agreed that the Company did not sack employees without any reason. The Claimant too agreed that it was not logical to do so. If such was the case, it would on a balance of probabilities be not probable for COW2 to have straight away dismissed the Claimant. From COW1, COW2 and CLW2's evidence, the Court finds on a balance of probability that COW2 did call the Claimant to COW2's office on 15 February 2005

due to the Claimant's involvement in gambling. The Court too finds that COW2's evidence that he called the Claimant to find out about the said allegation from the Claimant on a balance of probabilities also probable. The Court too as stated earlier had found that the Claimant's assertion that he was asked to sign a notice "ganti gaji" as per Annexure "A" page 2, not probable.

With regard to whether the Claimant was sacked by COW2, both CLW2 and COW1 said that the Company had not sacked anyone without reason. CLW2 testified that he thought the Claimant was joking (bergurau) when the Claimant had told him that the Claimant was sacked thus he asked for the reason. Even COW1 testified that he asked for the reason. From COW1 and COW2's evidence in total, the Court finds the Claimant's contention that no reason was given on a balance of probabilities, not probable.

It is noted that both COW1 and CLW2 agreed that they did not know what transpired between COW2 and the Claimant. CLW2 and COW1, however, said the issue of the Claimant being sacked due to gambling was never brought up by COW2 nor discussed at any meeting after 15 February 2005. COW1 testified that COW2 told him that COW2 never sacked the Claimant but it was the Claimant who left the Company. COW2 said he never intended to sack the Claimant. He testified that he did ask the Claimant whether the Claimant did gamble at the Company's premises and the Claimant said "yes". COW2 said he informed the Claimant that the Company would issue him a warning letter. He asked his secretary to issue the letter and asked the Claimant to acknowledge the said letter which the Claimant refused to do. The reason for the refusal, according to COW2 was that the Claimant

said that the Claimant had been gambling at the Company's premise every year during Chinese New Year and why only now COW2 was giving him a warning letter. The Court noted that the Claimant in examination in chief and under cross did not adduce any evidence that COW2 had given him a letter to sign and he refused to do so. The Claimant only testified of the "notis ganti gaji" as Annexure "A" page 2. However, under re examination as per page 11 Notes of Proceeding dated 13 April 2009, the Claimant said:-

"Q : Ada Lin suruh sign surat?"

A : Ya, surat kata saya sendiri mahu berhenti kerja."

The Claimant's above evidence in itself on a balance of probabilities supports COW2's story that he did give the Claimant a letter which the Claimant refused to sign.

The said letter was produced as COB-3. COW2 explained that the letter was misplaced and could not be located earlier as the Company had shifted in October 2008 and he only found them "last week when he was cleaning his room". The Court accepts his explanation. COW2 testified that he did not understand Bahasa Malaysia. This was made apparent when the Court asked him about the Company's address and he could not read the Company's card as per COB-4 as the address was in Bahasa Malaysia. COW2 said the letter he indented to give the Claimant was a warning letter due to the gambling. The Claimant understood Bahasa Malaysia and gave evidence in Bahasa Malaysia. His Witness Statement, cross examination and re examination was in Bahasa Malaysia. The Court had been and heard the Claimant and finds that he understood and was conversant in Bahasa Malaysia. The

Claimant's evidence was that the letter COW2 gave him, "kata saya sendiri mahu berhenti kerja". A perusal of COB-3 showed otherwise. COW2 on the other hand said it was a warning letter signed by him. COB-3 bears COW2's signature and the date was 15 February 2005. COB-3 was in fact a warning letter.

The Claimant argued that the contents had nothing to do with gambling. To this COW2 explained that he wanted to issue a warning letter and never had the intention to sack the Claimant. The letter was prepared by his secretary, he did not understand Bahasa Malaysia. All that COW2 told his secretary was to issue a warning letter. He himself was not aware of the contents till interpreted to him in Court on 3 November 2009.

The Court finds on a balance of probabilities from both COW2 and the Claimant's evidence, COW2 did give to the Claimant a letter and the letter was COB-3. The letter supports COW2's version that it was a warning letter and not as claimed by the Claimant that it was "surat kata saya sendiri mahu berhenti kerja".

The Court too finds from COW2 and the Claimant's own evidence of COW2 giving him the said letter, COW2's evidence of the said matter is on a balance of probabilities more probable. In the circumstances, COW2's evidence that he did not sack or dismiss, the Claimant is on a balance of probabilities probable. The Claimant had thus not proven on a balance of probabilities the factum of dismissal.

The Court is mindful of the persuasive authority of *Rhesa Shipping Co. Sa v. Edmunds and Anor, (The Popi M)* [1985] 2 All E R 712 House of Lords where it was held:-

“ ... The judge is not bound to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid to do so. There are cases, however, in which owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only course for him to take”.

It is trite industrial jurisprudence that the burden of proof to show the factum of dismissal is squarely upon the claimant; and he has the duty to discharge this burden on a balance of probabilities.

Based on the totality of evidence, bearing in mind the substantial merits as a whole; and pursuant to the definite and unequivocal jurisprudential position on the issue at hand with regard to the burden of proof, this Court finds the Claimant's evidence does not bear out and indeed runs somewhat counter to his pleadings. He has not discharged his burden of proof, i.e. shown with clarity, on a balance of probabilities, the actual factum of dismissal.

Conclusion:

As the factum of dismissal is not proved on a balance of probabilities by the Claimant there is no onus whatsoever on the employer to establish anything for in such a situation no dismissal had taken place and the question of it being with just cause or excuse would not arise.

In the circumstances, here and having regard to Section 30(5) of the IRA 1967 bearing in mind equity and good conscience, the Court hereby dismisses the Claimant's claim.

HANDED DOWN AND DATED 22 JULY 2010

sgd

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