

INDUSTRIAL COURT OF MALAYSIA

CASE NO : 21(31)(20)/4-956/18

BETWEEN

WAN AMRAN BIN WAN BULAT

AND

MALAYSIA AIRLINES BERHAD

AWARD NO : 430 OF 2020

Before : SYED NOH BIN SAID NAZIR @ SYED NADZIR
Chairman

Venue : Industrial Court Malaysia, Kuala Lumpur

Date of Reference : 05.04.2018

Dates of Mention : 28.05.2018, 13.08.2018, 28.02.2019 &
06.09.2019

Dates of Hearing : 25.06.2019, 26.06.2019, 15.11.2019 &
29.11.2019

Claimant's Written Submission : 08.01.2020

Company's Written Submission : 21.01.2020

Claimant's Written Submission In Reply : 11.02.2020

Company's Written Submission In Reply : 28.01.2020

Representation : Encik Najib Bin Zakaria
Messrs Najib Zakaria, Hisham & Co.
Counsel for the Claimant

Mr. Sebastian Tay &
Ms. Shivani Sothirachagan
Messrs Lee Hishamuddin Allen & Gledhill
Counsel for the Company

Reference:

This is a reference made under Section 20(3) of the Industrial Relations Act 1967 (the Act) arising out of the dismissal of **Wan Amran Bin Wan Bulat** (hereinafter referred to as "the Claimant") by **Malaysia Airlines Berhad** (hereinafter referred to as "the Company") on 14.09.2017.

AWARD

[1] The Ministerial reference in this case required the Court to hear and determine the Claimant's complaint of dismissal by the Company on 14.09.2017. This case was partly heard by Y.A. Cik Nor Afizah Hanum Mokhtar, Chairmain of Court 20 and was transferred from Court 20 to Court 31 on 24.10.2019 for continued hearing before Chairman of Court 31, Syed Noh Bin Said Nazir@Syed Nadzir and was thereafter transferred to this division of the Court on 15.01.2020 pursuant to the instructions from Y.A. Tuan Yang Dipertua, Mahkamah Perusahaan Malaysia in order for the completion of the hearing and a final award be handed down.

[1A] This reference before the Court was heard together with another reference, case number of which is 21(31)(20)/4-957/18 arising out of dismissal of Ina Meliesa Binti Hassim by the same Company as in the present action.

FACTUAL MATRIX

[2] The Claimant joined Malaysia Airlines System (“MAS”) as Airline Steward on 06.08.1990. Prior to his termination on 14.09.2017 he held the position as “Leading Airline Steward”.

[3] The Claimant’s last drawn basic salary was RM 3,303.00 and he had served both MAS and as well as Malaysia Airlines Berhad (“MAB”) from 1990 to 2017 for relatively 27 years. His service with MAS was for 25 years and with MAB was for approximately 2 years.

[4] In June 2015, the Claimant’s weight was found to be in excess of his Body Mass Index (“BMI”). He was then subjected to management weight program and his flying duties were altered to allow him to undergo diet and exercise training in gymnasium provided by the Company. Subsequently based on the failure to reach the minimum BMI weight by MAB, the Claimant was grounded and not allowed to perform his primary duties of flying as Flight Supervisor.

[5] During the Claimant’s weight management program, the Company had arranged for the Claimant to be given the opportunity to undergo an interview with another Company, i.e. Aerodarat Services Sdn. Bhd. for executive role for ground work. He attended the first interview, however when he was informed

that he will be disabled from performing his primary skill in leading flying crew, that discouraged him to pursue a career in Aerodarat Services Sdn. Bhd.

[6] The Claimant did not get through his weight management program which eventually led to his dismissal.

FACTS LEADING TO CLAIMANT'S DISMISSAL

[7] By an email dated 20.10.2015, an announcement was made for the 1st Weigh-In Exercise for 2016 wherein the Company had informed **all Cabin Crew ("Crew")** that as part of the Company's continuous efforts to maintain its image as a premium airline, the Company would embark on a weight management program. The importance of weight management was stipulated in the Cabin Crew Grooming Manual ("**Company Manual**") which was distributed to all the Crew. The email further highlighted as follows:

"As cabin crew, apart from maintaining the appearance as set by the Company, you are also responsible to ensure the safety of our passengers while in flights. Being front liners in uniform, Cabin Crew cast unforgettable image in the minds of our valued guests. It is for this reason that the Company considers the feedback received from our customer on the image of Crew and inevitably even the appearance of Cabin Crew has been included as one of the attributes in the passenger Flight Experience Survey (FES) and which is being tracked monthly.

Beginning 04 January 2016, all Cabin Crew are required to present themselves at Cabin Operations Department at FMB for

the next wave of weigh-in. Those of you who exceed our weight range, you will be subjected to a weight management process which many involve grounding. This circular is issued as a preliminary notice with the intention of creating awareness to reduce official weight in anticipation of the official weigh in process commencing from 04 January 2016 as mentioned above. You will be monitored and if no progress has been made to reduce weight, then appropriate action will be taken accordingly. With this policy in place, the airline will see healthier Cabin Crew who will project an image befitting that of the World's Best Cabin Staff as well as for ensuring the passengers' safety when needs arise."

[8] The Company Manual further stipulated as follows:

"6.1.2 WEIGHT MANAGEMENT PROGRAM

a) Cabin Crew who do not achieve their weight range by the end for the bi-annual weigh-in exercise, shall be rostered for 4(four) months daily flights or single nightspot pairing flights.

b) While on the 4(four) months daily or single night stop pairing flights, Cabin Crew will have to present themselves for a weight check before the 7th of each month.

c) If no improvement is evident after 4(four) months, Cabin Crew will be referred to the Weight Management Action Committee (WMAC) for further action.

d) Cabin Crew who meet their weight range within the four(4) months shall be required to come in for their follow up weight check for the next 3(three) consecutive months, i.e. a total of 4 (four) months within their weight range. If Cabin Crew maintain their weight range within this period, Cabin Crew shall be removed from the weight management program.

e) No repeat of the above processes for Cabin Crew who have been on the weight management program and do not meet their weight range again. Cabin Crew shall be referred to Industrial Relation (IR) for re-categorisation or any other action deemed fit by IR.”

[9] Further, by an email dated 9.11.2015, the Company sent its Crew the 1st Update for the 1st Weigh-In Exercise for 2016 scheduled for 4.1.2016 to 10.3.2016 wherein the Crew were informed, inter alia, as follows:

“[...] We have deliberated extensively on this program and we are confident that with your support on the implementation of this program, the airline will see healthier Cabin Crew who will project an image befitting that of the World’s Best Cabin Staff as well as for ensuring the passengers’ safety when the needs arise.

8. The 1st wave for weigh-in shall commence on the 4 Jan 2016 to 10 March 2016.

9. Crew who do not meet their ideal weight, shall be granted No Pay Leave (NPL) for 01 month.

10. If Crew reaches ideal weight midway during grounding (NPL), crew will be reinstated to roster.

11. After 01 month on NPL and crew do not meet their ideal weight, they shall be rostered for 03 months on daily flights/single night pairing where applicable.

12. Crew who are on the 03 months daily flights/single night pairing shall need to come in for their weigh-in before the 7th of the month.

13. Crew who still do not achieve their ideal weight after the 03 months daily flights/single night pairing shall be referred to HR referral committee for their action.”

[10] The Company then sent out updates with regards to the 1st Weigh-In Exercise as follows:

- i) **On 08.12.2015, the Company had sent its Crew the 2nd Update** for the 1st Weigh In Exercise for 2016 scheduled for 4.1.2016 to 10.3.2016;

- ii) **On 17.02.2016, the Company had sent its Crew the 3rd Update for 2016** scheduled for 4.1.2016 to 10.3.2016;

As the Company had been flooded with requests from the members of the Cabin Crew to revisit the initiative, the Company had revised the terms of the initiative to remove the clause of No Pay Leave.

- iii) **On 02.03.2016, the Company had sent its Crew the 4th update** for 2016 scheduled for 4.1.2016 to 10.3.2016. The update served as a reminder for all Cabin Crew to attend the weigh in exercise;

- iv) **On 07.03.2016, the Company had sent its Crew the 5th update** for 2016 scheduled for 4.1.20 16 to 10.3.2016;

- v) **On 14.03.2016, the Company had sent its Crew the 6th update** for 2016 scheduled for 4.1.2016 to 10.3.2016 (this served as a reminder of the date of closure of the weigh in exercise and served as a warning to those who had failed to attend the weigh in). The update further stated that the appropriate disciplinary action would be taken against the Cabin Crew members who had failed to adhere to the Company's Manual;

- vi) **On 07.04.2016, the Company had sent its Crew the 7th Update** for 2016 scheduled for 4.1.2016 to 10.3.2016. This

update served as a reminder to those who were still overweight to take remedial actions to ensure that their weight was as per the recommended weight in the Company Manual;

- vii) **On 18.04.2016, the Company had sent its Crew the 8th Update** for 2016 scheduled for 4.1.2016 to 10.3.2016 (which served as reminder to the Cabin Crew to attend the 1st monthly weigh-in on 7.5.2016). The update informed all the Cabin Crew members of the success of most of the members and further served as a reminder to those who had not yet achieved the ideal weight as per the Company Manual;
- viii) **On 23.06.2016, the Company had sent its Crew the 9th Update** for 2016 scheduled for 4.1.2016 to 10.3.2016. This update serves as a congratulatory note to all Crew members who had achieved their ideal weight as per the Company Manual and served as a further reminder to those who had failed to achieve their ideal weight to attend the 3rd and final weigh-in on 7.7.2016; and
- ix) **On 05.07.2016, the Company had sent its Crew the 10th update** on the Weight Management Program wherein the update served as a summary of the weigh-in exercise as well as to inform the Crew members who had failed to achieve their ideal weight that a show cause letter would be issued by the Human Resource department.

[11] As the Claimant's height was 1.75 m (175 cm), the maximum permissible weight under the Company's Grooming and Uniform Guidelines Manual was 79.0 kg. (COB-1, Page 8)

[12] In this regard, the Claimant, despite the numerous chances provided by the Company, failed to achieve his ideal weight. The Claimant's weight as per the Weight Management Program (WMP) was as follows:

Date of Weigh-in	Weight (kg)	BMI Status
March 2016	84.8	Overweight
May 2016	84.4	Overweight
June 2016	83.6	Overweight
October 2016	84.5	Overweight
November 2016	83.5	Overweight
December 2016	84.8	Overweight

April 2017	86.5	Overweight
May 2017	84.3	Overweight
June 2017	86.8	Overweight

[13] On 7.10.2017, the Company had issued the Claimant a Show Cause Letter (1st Show Cause Letter) which informed the Claimant that despite most of the other Crew members having reached their ideal weight as per the Company manual, the Claimant had consistently failed to attend the weigh-in sessions and achieve his ideal weight. As such the Company required the Claimant to provide his explanation for the same within seven (7) days of the letter failing which the Company would assume that he had none to proffer.

[14] By an email dated 17.10.2016, the Claimant had provided the Company with his explanation.

[15] The Company was unsatisfied with the explanation and as such had issued the Claimant a Punishment Order dated 18.11.2016 wherein the Claimant was informed inter alia, that the Company had, out of good will and support, granted the Claimant with a final extension till 31.12.2016 to achieve his ideal weight as per the Company Manual.

[16] The Claimant however, had failed to reach his ideal weight and as such was placed on Annual Leave till 8.2.2017 and on No Pay Leave indefinitely. On 25.4.2017, the Company issued the Claimant with a Letter of

Grounding wherein the Claimant was informed that he was grounded from 1.2.2017 till 31.5.2017 so as to enable him to focus in reaching his ideal weight.

[17] Despite the Claimant's consistent failure to achieve his ideal weight as per the Company Manual, the Company, had a Weight Management Briefing on 5.6.2017 with the Claimant at the Human Resource (Industrial Relations), Cabin Operations Department.

[18] However, despite the numerous chances given by the Claimant to achieved his ideal weight, the Claimant failed to achieve the same and as such, the Company had issued the Claimant with a Redeployment Letter dated 16.6.2017 wherein the Company had endeavoured to find the Claimant an alternative position with Aerodarat Serivces Sdn Bhd ("ADS"). The Claimant was further informed that his placement at ADS would be contingent upon his success at the interview stage.

[19] By a letter dated 16.6.2017, the Company had informed the Claimant that out of good will and support, the Company was according the Claimant one final chance to achieve his ideal weight, and that the Company was arranging for a final weigh-in on 30.6.2017. Nonetheless, the Claimant had once again failed to achieve his ideal weight.

[20] The Claimant's interview for the position at ADS on 16.6.2017 was rescheduled for 21.6.2017 as the Claimant was not able to attend the same. The Claimant however, failed the interview.

[21] The Company, taking into consideration the Claimant's position and his failure at the interview stage at ADS, out of good will and support for the Claimant, provided the Claimant with final chance to achieve his ideal weight vide letter 6.7.2017, but the Claimant had once again failed to achieve his ideal weight.

[22] As such, the Company had no choice but to terminate the Claimant's services vide letter dated 14.9.2017.

COMPANY'S SUBMISSION

[23] The submission of learned counsel for the Company was generally as follows:

23.1 That the Company is **not** the successor, assignee or transferee or a successor employer of Malaysian Airline System Berhad;

23.2 The Company had **no other alternatives** following the Claimant's repeated failure to achieve his optimal weight;

23.3 The weight management rules/policies of **other airline companies** are **irrelevant**; and

23.4 In totality, the Claimant's dismissal was **with just cause**

and excuse.

[24] The Court's attention was drawn to Section 25 of the **Malaysian Airline System Berhad (Administration) 2015 (Act 755) (the Act)** which states as follows:

“25. (1) Notwithstanding anything to the contrary in this Act of under any law, where the Administrator assumes control of the Administered Companies or where the Malaysia Airlines Berhad makes an offer of employment to a person in the employment or service of Administered Companies, or where the Malaysia Airlines Berhad enters into a transition service agreement with the Administered Companies, the Administrator, appointer or the Malaysia Airlines Berhad shall not –

(a) Be regarded as the successor, assignee or transferee or a successor employer to the Administered Companies;

(b) Be liable for any sum which is calculated by to a period of time prior the Malaysia Airlines Berhad becoming the employer of the person in question.

(2) The Malaysia Airlines Berhad, the appointer and the Administrator shall not be named as a party in any claim or application made or joined as a party in any proceeding commenced or continue by or on behalf of any employees or

former employees of the Administered Companies pursuant to the Industrial Relations Act 1967 [Act 177], Employment Act 1955 [Act 265], Sabah Labor Ordinance 1950 [Sabah Cap. 67], Sarawak Labour Ordinance 1952 [Sarawak Cap. 76] or the Trade Unions Act 1959 [Act 262].

[25] It was submitted by the Company that in view of the above statutory provision, the Claimant had begun his employment with the Company on 1.9.2015 on fresh terms of employment; when the Company had officially taken over the business of national aviation from MAS which is a separate legal entity and distinct of the Company.

[26] It was further submitted that Company had, in its attempt to aid him to achieve his optimal weight, emplaced him on a weight-management program within a period of 18 months during which, he was consistently monitored, given ample amount of time and opportunities to meet the same and had even been provided with an aviation doctor. Despite the initiatives of the Company to assist the Claimant however, the Claimant had failed to achieve his optimal weight.

[27] It was undisputed that the Company had even arranged for an interview with ADS for the Claimant. In this respect, the Company submitted that it had no hidden agendas, other than to identify an alternative employment for the Claimant which in no way estopped the Claimant from filing his representation for unfair dismissal.

[28] The Company reiterated that, the Claimant had failed to achieve the optimal weight, throughout the duration of 18 months that he was emplaced

under the WMP as admitted by the Claimant during his cross-examination.

[29] The Company argued that the Claimant's failure to achieve his optimal weight was despite him being grounded and emplaced on annual leave and subsequently no pay leave. It was argued that it is unreasonable for the Company to keep the Claimant in employment but grounded indefinitely, when the Claimant's records clearly show that he had not met the Company's expectations despite the period of 18 months.

[30] The Company highlighted the fact that the Claimant has continuously failed to even attend his scheduled weigh-ins let alone achieve his optimal weight despite the numerous chances and extensions provided for by the Company and as such, it would be unreasonable for the Claimant to achieve his optimal weight should him be grounded for an extended period of time.

[31] The Company went on to argue that it is not duty bound to transfer or reassign the Claimant to the role of a part time Cabin Crew or chartered Cabin Crew for pilgrimage on the ground that the right to transfer an employee is the prerogative of the employer and cited **Govindasamy Munusamy v. Litang Plantations Sdn. Bhd. [2006] 3 ILR 1830** in support of its contention.

[32] The Claimant at paragraph 22 of the Claimant's Submissions submits that the excess weight being a safety risk is frivolous as other continental airlines such as British Airways, Luftansa, KLM and Qantas are known for not having a minimum BMI weight for their cabin crews and have not yet encountered such safety risks.

[33] In this regard, it was the Company's submission that the Claimant has failed to satisfy Section 103 of the Evidence Act 1950 wherein his assertion of other airlines such as British Airways, Lufthansa, Qantas and KLM not implementing minimum BMI weight for Cabin Crews had not been substantiated. It was further submitted that the Company is a separate entity from the other airlines and that the right to decide on the policies in line with the Company's business strategy i.e. to portray itself as a premier airline, is the prerogative of the management of the Company.

[34] It was argued that the Claimant's termination was with just cause and excuse for reasons, to wit:

34.1 The Claimant had been given sufficient time and opportunity to comply with the weight management program; and

34.2 That the Company had attempted to find alternative employment for the Claimant following his failure to comply with the Company's policy.

[35] Finally, the Company concluded that the Claimant were not subjected to unreasonable timelines to reduce his weight overnight. Instead, the Claimant had a total of 18 months to meet the expected weight range. Unfortunately, the Claimant failed to do so after being accorded with many opportunities within such a lengthy period.

[36] As such, the Company prays that the Claimant's claim be dismissed.

CLAIMANT'S SUBMISSIONS

[37] The Claimant disputed the basis of the termination in particular clause 6.1.2 of paragraph (e) under **WEIGHT MANAGEMENT PROGRAM** under Grooming and Uniform Guidelines Manual which the Company had relied on which reads as follows:

*“(e) No repeat of the above processes for Cabin Crew who have been on the weight management program and do not meet their weight range again. Cabin Crew shall then be referred to Industrial Relations (IR) for re-categorization **or any other action deemed fit by IR**”*

[38] It was argued by the Claimant that the said paragraph (e) in its plain meaning allows discretion to the Company to take appropriate action to cabin crew who fails to maintain his or his BMI weight. The phrase “any other action deemed fit” denotes that there are various forms of consequences for non-adherence of BMI weight by any cabin crew, in that termination is not the sole option. Options includes, cabin crew being grounded from flying until they reach the BMI weight, wage reduction until they reach the BMI weight, etc.

[39] Basically the Claimant submitted that the pertinent question is whether the decision of termination were appropriate especially in the case where the Claimant's excess weights were well below 1 kg, i.e. Wan Amran was around 800 gram and Ina Meliesa was very much lesser than Wan Amran.

[40] The Claimant contended that a mere excess of weight below 1 kg

cannot disable him to perform his primary duties effectively. Any suggestion that it can be prejudicial to safety is frivolous because continental airlines such as British Airways, Lufthansa, KLM or Qantas are known of not applying minimum BMI weight to cabin crews and have yet to encounter any safety issue, as it was suggested during trial by the President of NUFAM (National Union of Flight Attendants of Malaysia).

[41] It was contended further that the Company did not procure any evidence from the Regulator, the Civil Aviation Department prior to issuing any circular that support their contention to that effect.

CAUSE PAPERS, WITNESS STATEMENTS, BUNDLES OF DOCUMENTS AND WRITTEN SUBMISSIONS

[42] The following documents had been filed by the parties to the proceeding for the purpose of trial:

Cause Papers

- (i) Statement of Case dated 28.06.2018
- (ii) Statement in Reply dated 03.09.2018

Witness Statements

- (iii) The Company's Witness Statement of Khatijah Marianne Abdullah, (COW-1) marked as "COWS-1A"

(iv) The Company's Witness Statement of COW-1 marked as "COWS-1B"

(v) The Company's Witness Statement of Muhammad Fauzi Mahayuddin, (COW-2) marked as "COWS-2A"

(vi) The Company's Witness Statement of COW-2 marked as "COWS-2B"

(vii) Witness Statement of the Claimant, Ina Meliesa Binti Hassim (CLW-1) marked as "CLWS-1"

(viii) Witness Statement of the Claimant, Wan Amran Bin Wan Bulat (CLW-2) marked as "CLWS-2"

(ix) Witness Statement of Ismail Nasaruddin Bin Abdul Wahab, the President of NUFAM (CLW-3) marked as "CLWS-3A"

(x) Witness Statement of CLW-3 marked as "CLWS-3B"

Bundles of Documents

(xi) The Company's Bundle of Documents dated 25.02.2019 marked as "COB-1"

(xii) The Company's Bundle of Documents dated 25.02.2019 marked as "COB-2"

(xiii) The Claimant's Bundle of Documents dated 13.02.2019 marked as "CLB-1"

(xiv) The Claimant's Bundle of Documents dated 13.02.2019 marked as "CLB-2"

(xv) The Claimant's Show Cause Letter marked as "CLB-3"

(xvi) The Claimant's Body Composition Analyzer marked as "CLB-4"

(xvii) The Claimant's Progress Record marked as "CLB-5"

Written Submissions

(xviii) The Company's Written Submission dated 21.01.2020

(xix) The Company's Written Submission In Reply dated 28.01.2020

(xx) The Claimant's Written Submissions dated 08.01.2020

(xxi) The Claimant's Written Submissions In Reply dated 11.02.2020

ROLE OF INDUSTRIAL COURT

[43] The role of the Industrial Court was lucidly explained by His Lordship Raja Azlan Shah CJ (Malaya) (as His Royal Highness then was) in **Goon Kwee Phoy v. J & P Coats (M) Bhd. [1981] 1 LNS 30; [1981] 1 MLJ 129** at page 136 (Federal Court) as follows:

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

[44] In cases where an employee is dismissed on the grounds of misconduct, it is trite in Malaysian industrial jurisprudence that the test to be adopted in respect of cases involving **s.20 of the Industrial Relations Act 1967**, is two-fold:

- a. Whether the Claimants had committed the **misconduct** complained of by the employer;
- b. and If the misconduct is proven, whether the employer had **just cause and excuse** for the dismissal.

[45] The Federal Court in the case of **Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 344** held, *inter alia*, as follows:

“On the authorities, we were of the view that the main and only function at the Industrial Court in dealing with a reference under s. 20 of the Act...is to determine whether the misconduct or irregularities complained of by the management as the grounds of dismissal were in fact committed by the work man, and if so, whether such grounds constitute just cause or excuse for the dismissal”

BURDEN OF PROOF

[46] The burden of proving that the employee is guilty of the allegation – as the case may be – and establishing the reasons for dismissal rests squarely upon the employer. This was aptly stated by the Learned Industrial Court Chairman in **Stamford Executive Centre v. Puan Dharsini Ganesan [1986] 1 ILR 101** as follows:

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

[47] The standard of proof applicable to dismissal cases is the civil standard of proof on a balance of probabilities as decided by the Court of Appeal in ***Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314*** as follows:

“Thus, we can see that the preponderant view is that the Industrial Court, when hearing a claim of unjust dismissal, even where the ground is one of dishonest act, including “theft”, is not required to be satisfied beyond reasonable doubt that the employee has “committed the offence”, as in a criminal prosecution... In our view the passage quoted from Administrative

Law by H. W. R. Wade & C. F. Forsyth offers the clearest statement on the standard of proof required, that is the civil standard based on balance of probabilities, which is flexible, so that the degree of probability required is proportionate to the nature and gravity of the issue.”

ISSUES

[48] The issues for the Court's consideration is whether there was a dismissal and if so, whether the proved misconduct constitutes just cause excuse for dismissal under the circumstances.

COURT'S EVALUATION OF EVIDENCE

[49] It was the Company's bone of contention that the Claimant had been terminated on the basis that he had continuously failed to achieve the weight range in accordance with the Company's Grooming and Uniform Guidelines Manual ("Company Manual"). The grounds for which the Claimant was terminated were reflected in the Claimant's Letter of Termination wherein it reads as follows:

"[...] The Company regrets to note that despite genuine efforts in providing you ample time and opportunities to achieve the required weight range, you have continuously failed to achieve the weight range in accordance with the Company's Grooming and Uniform Guidelines Manual"

[50] In his evidence, the Claimant had admitted to material facts pertaining to him continuous failure to be within his weight limit. He had admitted during cross examination as follows :

Q: Do you agree that based on this letter, your services

with the Company were terminated on the basis that you had continuously failed to achieve the weight range in accordance with the Company's Grooming and Uniform Guidelines Manual ("Company's Manual")?

A: Agree.

Q: Please refer to p. 1 - 12 of COB-2.

Do you agree that this is the Company's grooming and Uniform Guidelines Manual referred to in the aforementioned circular?

A: Agree.

Q: Please refer to paragraph 6.1 of the Company's Manual at p.6 of COB-1. Do you agree that it states as follows:

"Based on the approved weight charts, Cabin Crew are required to be within their weight range at all times?"

A: Agree.

Q: Please refer to p.9 of COB-2. Do you agree that this is the weight chart which was applicable to you?

A: Agree.

Q: Do you agree that according to this weight chart, your weight limit is 79kg as your height is in fact 1.7m?

A: Agree.

Q: Please refer to p.108 of COB-2. Do you agree that in March 2016, you weighed in at 84.8 kg?

A: Agree.

Q: Do you agree that according to the Company's records, you had exceeded the Company's weight limit for every month which you had attended the monthly weigh-in from March 2016 until June 2017?

A: Agree.

Q: Please refer to p.37 of COB-1. Do you agree that according to this Punishment Order letter dated 18.11.2016, the Company had given you until 31.12.2016 to meet the Company's weight limit?

A: Agree

Q: Please refer to p.108 of COB-2. Do you agree that in December 2016, you had not attained your weight limit because your weight was recorded at 84.8kg?

A: Agree

Q: Please refer to p.52 of COB-1. Do you agree that according to this Grounding Letter dated 25.4.2017, you

were given additional time of 4 months from 1.2.2017 until 31.5.2017 to meet the Company's weight limit?

A: Agree

Q: *Please refer to p.108 of COB-2. Do you agree that in May 2017, you still had not attained your weight limit because your weight was recorded at 84.3 kg?*

A: Agree

Q: *I put it to you that in spite of a protracted period of time commencing from April 2015 until 30.6.2017, equivalent to 15 months, you had failed to meet the Company's weight limit. Agree?*

A: Agree

[51] It is pertinent to note that as early as October 2015 the Claimant was notified of the Weight Management Program that was to begin in January of 2016. The Company's circular dated 20.10.2015 reads as follows:

"[...] As part of the Company's continuous effort to maintain its image as a premium airline, the Company will embark on a weight management program.

[...] Beginning 04 January 2016 all Cabin Crew are required to present themselves at Cabin Operations Department at FMB, for the next wave of weigh -in. For those of you who exceed your weight range, you will be subjected to a weight

*management process which may involve grounding... **You will be monitored and if no progress has been made to reduce weight, then appropriate action will be taken accordingly.***

[52] Subsequent to the circular dated 20.10.2015, the Company followed up the same with details of the weight management program. By a circular dated 9.11.2015, the Company had informed its Crew as follows:

“the program will be as below:

8. The 1st wave for weigh-in shah commence on the 4 Jan 2016 to 10 March 2016.

9. Crew who do not meet their ideal weight, shall be granted No Pay Leave (NPL) for 01 month.

10. If Crew reaches ideal weight midway during grounding (NPT), crew will be reinstated/to roster.

11. At 01 month on NPL and crew do not meet their ideal weight, they shall be rostered for 03 months on daily flights/single night pairing where applicable.

12. Crew who are on the 03 months daily flights/single night pairing shall be referral to HR referral committee for their action.

13. Crew who still do not achieve their ideal weight after the 03

months daily flight/single night pairing shall be referred to HR referral committee for their action.

14. Crew who have been cleared after going through above process 2,3,4 & 5 shall be required to come in for their follow-up weigh-in for the next 03 consecutive months. If ideal weight is maintained, the Crew's name shall be removed from the weight check program.

15. No repeat of the above process for those Crew who have been on this weight-management program and become overweight again. Crew shall be referred to HR Referral Committee for re-categorization or any other action deemed fit by HR referral committee."

The Company's initiatives in assisting the Claimant achieving the ideal weight

[53] It must also be observed that the Company had provided its entire Crew, including the Claimant with assistance to achieve their optimal weight. COW-1 in his examination-in-chief testified as follows:

"Q: Did the Company aid the cabin crew in achieving their optimum weight?

A: Yes. the Company was well aware of the sensitivity of the nature of the task at hand. Everyone is conscious of their weight at one time or another. Ensuring that one is within one's weight range translates into a great deal of time and energy dedicated

to one's appearance and health.

*As such, beginning 4.1.2016, all cabin crew were required to present themselves at the Cabin Crew Department at FMB and at the MH Crew Centre, Level 4, Main Terminal Building, KLIA for the weigh-in. **The cabin crew who had exceeded their weight range would be emplaced on a weight-management process which may involve grounding to assist them in achieving their optimum weight. The Cabin crew were regularly monitored and provided with nutritionists as well as gym memberships to assist them in achieving the optimal weight**".*

[54] The testimony of COW-1 was supported by the evidence of COW-2 when it was testified that :

"Q: Kindly explain to this Honourable Court what happened thereafter?"

A: Despite the punishment order, the Claimant failed to achieve his optimum weight as per the Company Manual. As such, the Claimant was issued a 2nd Show Cause Letter which once again requested the Claimant to provide an explanation as to his failure to achieve his optimum weight as per the Company's Manual. The 2nd Show Cause Letter further set out the numerous ways that the Company had attempted to aid the claimant in achieving his optimum weight,

which were, amongst others, as follows.

i) A special list had been drawn up to support the schedule of all cabin crew who had yet to achieve their optimum weight;

ii) A group discussion session with a dietician was arranged for all the cabin crew who were part of the Weight Management Program to create awareness in relation to their daily meal intake;

iii) Appointments with the fitness centre was arranged and sponsored by the Company to ensure that the cabin crew who were part of the Weight Management Program carried out the right exercise to achieve their optimum weight;

iv) Special rates were provided to the cabin crew should they have wanted to enrol with the Company's panel; and

v) A discussion with the aviation medical doctor was arranged for all cabin crew who were part of the Weight Management Program to ensure that they were healthy and were achieving their optimal weight in a safe and healthy manner."

[55] In relation to the evidence in paragraph (v) above, the Claimant had agreed during cross examination that he had in fact attended a medical check up with an aviation doctor on 1.02.2017 as arranged by the Company.

[56] The Court further observed that the Company had accorded the Claimant with ample time to achieve his optimal weight. This was conceded by the Claimant himself during cross-examination that the Company had indeed taken several initiatives over an extensive period of time to assist the Claimant to achieve his optimal weight. He admitted as follows:

“Q: Do you agree that as you had exceeded the stipulated weight limit 79kg, during the first weight-in exercise which ended in March 2016 you were required to attend a monthly weigh in no later than the 7th of every month?”

A: Agree

Q: Do you agree that this monthly weight in was necessary for the Company to monitor your weight progress?

A: Agree

Q: Please refer to p.31 of COB-2. Do you agree that according to this circular dated 7.4.2016, crew members who did not meet their ideal weight would be emplaced on the 1st phase of the weight management program for 3 months only?

A: Agree.

Q: Please refer to p.48 of COB-2. Do you agree however, that this phase was eventually extended until January 2017?

A: Agree

Q: Please refer to p.48 of COB-2. Do you agree that the final phase of the weight management program was initially due to conclude on 31.5.2017?

A: Agree.

Q: Do you agree that even after 31.5.2017, the Company still gave you the opportunity until 30.6.2016 to meet your weight limit?

A: Agree.

[57] In the aforesaid, the Company had established that it had, at all material times, taken initiatives to assist the Claimant in complying with the Company policy and achieving his optimal weight.

Was the implementation of the policy justifiable?

[58] The rationale behind implementing the weight policy was sufficiently explained by the Company vide circular dated 20.01.2015. The circular stated, inter alia, as follows:

“As part of the Company’s continued effort to maintain its image as a premium airline, the Company will embark on a weight management program. It is the Company’s hope that cabin crew will join the Company in a concerted effort to ensure the success of this program. The importance of weight management and matters related thereto is stipulated in the forthcoming Cabin Crew Manual which will be distributed to each and everyone of you in due course of time.

Admittedly, nearly everybody is conscious of their weight at one time or another. For some, it is a daily struggle that is dealt with for weeks, months, years and even decades. This translates into a great deal of time and energy dedicated to one’s appearance and health.

As cabin crew, apart from maintaining the appearance as set by the Company, you are also responsible to ensure the safety of our passengers while in flights. Being front liners in uniform, Cabin Crew cast an unforgettable image in the minds of our valued guests. It is for this reason that the Company considers the feedback received from our customers on the image of Crew and inevitably even the appearance of Cabin Crew has been included as one of the attributes in the passenger Flight Experience Survey (FES) and which is being tracked monthly.

[---] With this policy in place, the airline will see healthier Cabin Crew who will project an image befitting that of the World’s Best Cabin Staff as well as for ensuring the Passengers’ safety when

the necessity arise.”

[59] COW-1 in his capacity as In-Flight Services Team Lead had further explained the rationale of the implementation of the weight –in exercise in his examination-in-chief wherein he had testified as follows:

“Q: Could you explain to the Company’s rationale behind implementing the weigh-in exercise?”

A: As part of the Company’s continuous effort to maintain its image as a premium airline, the Company embarked on a weight management program. It was the Company’s hope that the cabin crew would join and work together with the Company to ensure the success of the program. The importance of weight management and matters related hereto is stipulated clearly in the Company’s Grooming and Uniform Manual (please refer to pages 1-12 of the Company’s Bundle of Documents) which had been distributed to each and every one of the cabin crew including the Claimant. As cabin crew, apart from maintaining the appearance as set by the Company, the cabin crew were responsible to ensure the safety of the passengers while on flights. Being front-liners in uniform, cabin crew cast an unforgettable image in the minds of our valued guests. It is for this reason that the Company considers feedback received from our customers on the image of the Crew inevitably the appearance of the Company’s cabin crew had been included as one of the attributes in the passenger Flight Experience Survey (“FES”) and which was tracked monthly.”

[60] CLW-3 further confirmed the foregoing rationale of the Company in his cross-examination. It was agreed by CLW3 that :

- i) *According to this circular, one of the reasons for the Company's weight management program was to "maintain its image of a premium airline".*
- ii) *The image of the cabin crew is an important aspect to maintain the Company's premium status.*
- iii) *According to this Circular, the other reason for the weight management program was to ensure safety of our passengers while in flights.*
- iv) *The ideal weight range of a cabin crew is required to ensure mobility with ease between the aisles of a plane should an emergency arise.*

[61] The Claimant himself had agreed during his cross-examination that the according to the circular, one of the reasons for the Company's weight management program was to maintain its image of a premium airline. In other words, it was agreed that the image of the Crew is in fact an important aspect to maintain the Company's premium status. It was also evident, that the Claimant had agreed during cross-examination that the other reason for the

weight management program was to ensure the safety of the passengers while in flights.

[62] In the aforesaid evidence, the Court is satisfied that the weight management policy and subsequent program was introduced by the Company with a justified and warranted rationale i.e. to maintain the premium image of the brand.

Whether the Company's policy discriminatory

[63] It has been the Company's case that the entire Crew of the Company had been placed on the weight management program and that almost 1200 members of the crew who had gone in for the weight check had succeeded to be within their weight range. The Claimant had been notified of this vide the circulars that stated as follows:

"We are pleased to announce that till date we have about 1200 crew who have come in for their weight check and all are within their weight range. The department would also like to heap praise and congratulate the crew who were previously placed on "weight check" but are not well within their weight range"

"[...] It has been encouraging through this exercise to see so many crew lose weight, looking trim and fighting fit. Most importantly, many have expressed their support for this program which has ultimately made them look good and beaming with health. Most have complied to meeting the initial dateline of 10 March 2016 except for a handful of crews who were required to

come in before the 31 March 2016”

[64] It was also agreed by the President of NUFAM i.e. CLW-3 that it was the Company's discretion to determine its policy with regards to weight management, independent from other local or international airlines. At no point in time did the Claimant object to the introduction of the weight management program nor had he raised any grievances during the same.

[65] Hence, to object to the weight management policy and subsequent program at this juncture is an after thought. The weight management program was in no way discriminatory as it applies among all crew and the Company had at all times ensured that the Claimant and all its Crew were accorded every opportunity possible to achieve their optimum weight.

[66] COW-2 in his examination-in-chief elaborated on the Claimant being provided with sufficient time and opportunity to comply with the Company's weight management policy wherein he had testified as follows:

“Q: What was the Company's response to his reply to the Show Cause letter?

A: [...]As such, the Company had issued a Punishment Order dated 18.11.2016 informing him that despite the Company's continuous efforts to support him and provide him with ample opportunities during the Weight Management Program as well as the fact that many of the other Cabin Crew members had achieved their optimum prescribed weight, the Claimant had

continuously failed to achieve his ideal weight. The Company nevertheless informed the Claimant that it would provide the Claimant with a last chance to achieve his ideal prescribed BMI as per the Company's Manual.

Q2: Kindly explain to this Honourable Court what happened thereafter.

A: As the Claimant had failed to achieve his optimum weight, the Company made the executive decision to ground the Claimant from flight duty and placed the Claimant on Annual Leave and No-Pay Leave (as was stated and informed in the 1st Circular) from 2.2.2017 till 8.2.2017 (Annual Leave). This emplacement on leave was to provide the Claimant with time and the opportunity to achieve his optimum weight as per the Company Manual.

Q: Kindly explain to this Honourable Court what happened thereafter.

A: [...]However, despite the Claimant's consistent failure to achieve his optimum weight, the Company look into consideration the Claimant's seniority as well as the Claimant's long standing service with the Company and as such organised a briefing session with the Human Resource (Industrial Relations) Cabin Operations Department on 5.6.2017.

[...]Further to the above, the Company also informed

the Claimant via letter dated 16.6.2017 that as a gesture of goodwill and support, the Company was according the Claimant with a final chance to achieve his optimum weight as set out in the Company Manual. As such, the Claimant was required to attend one final weigh-in on 30.6.2017 at the Company's cabin Operations Department. Despite the final chance accorded to him, the Claimant once again failed to achieve his optimum weight."

[67] In his testimony, the Claimant further agreed during cross-examination regarding the numerous opportunities provided to him by the Company to achieve his optimum weight, wherein he admitted to same as follows:

Q: *Please refer to p.108 of COB-2. Do you agree that in March 2016, you weighed in at 84.8 kg?*

A: *Agree.*

Q: *Do you agree that according to the Company's records, you had exceeded the Company's weight limit for every month which you had attended the monthly weigh-in, from March 2016 until June 2017?*

A: *Yes.*

Q: *Please refer to p.37 of COB-2. Do you agree that according to this punishment order letter dated 18.11.2016, the Company had given you until*

31.12.2016 to meet the Company's weight limit?

A: Agree.

Q: *Please refer to p.108 of COB-2. Do you agree that in December 2016, you had not attained your weight limit because your weight was recorded at 84.8kg?*

A: Agree

Q: *Please refer to p.52 of COB -1. Do you agree that according to this Grounding Letter dated 25.4.2017, you were given additional time of 4 months from 1.2.2017 until 31.5.2017 to meet the Company's weight*

A: Agree

Q: *Please refer to p.108 of COB-2. Do you agree that in May 2017, you still had not attained your weight limit because your weight was recorded at 84.3kg?*

A: Agree

Q: *Please refer to p.61 of COB-1. Do you agree that according to this Redeployment letter dated 16.6.2017 you were, yet again, given more time until 30.6.2017 to meet the Company's weight limit?*

A: Agree”

[68] It was also evident that despite the Claimant's repeated failure to meet his weight limit as at 30.6.2017, the Company did not terminate his employment immediately.

[69] In the circumstances, the Court is convinced that the Company had provided the Claimant with ample opportunities and chances to comply with the Company's policy and that despite the many opportunities however, the Claimant had consistently failed to achieve his optimal weight.

[70] The dismissal action taken by the Company against the Claimant was appropriate in the circumstances. The Company has a duty to enforce its policy regarding ideal weight amongst 1200 flying crew without fear or favour and in all consistencies. It follows that the Company was right when it did not take into consideration the fact that the Claimant had a mere less than one kilogramme in excess of the optimal weight as per the Company Manual, when terminating the Claimant.

[71] The Court is also of the considered opinion that it would be unnecessary for the Company to produce any evidence from the Civil Aviation Department prior to issuing any circular in respect of safety issue as it is the Company's prerogative to enforce its own policy for compliance by its employees so long as the policy is not tainted with male fide or discriminatory in nature.

[72] Based on the materials made available before the Court, and upon perusal of evidence produced before it the Court found that the Claimant had

not conducted himself in a manner expected of a senior personnel with long standing service. Despite the numerous initiatives provided by the Company as well as the protracted time period accorded to him, the Claimant had failed to achieve his optimal weight as per the Company Manual. To allow the Claimant's claim would tantamount to doing injustice to the 1200 cabin crew who have made necessary efforts in complying in the Company's weight management policy and were thereby able to keep their flying duties.

[73] In the upshot, in light of the legal position and factual matrix highlighted above, it is the finding of this Court that the Company has established on the balance of the probabilities just cause or excuse in dismissing the Claimant. The Court answers the question in paragraph [48] *Supra*, in the affirmative.

DECISION

[74] In conclusion, based on the facts and circumstances in the present case in its entirety and the evidence adduced by both parties in the proceedings and upon hearing the testimonies of the witnesses, the Court is of the considered view that the Company had successfully proved on the balance of probabilities that the Claimant was terminated with just cause or excuse. In any event, the Claimant failed to show satisfactory evidence that the termination was tainted with mala fide or that the termination was a form of victimization.

[75] Having considered the evidence as produced by both parties in its totality, and bearing in mind the provision in Section 30(5) of the Industrial Relation Act 1967 by which virtue the Court shall act according to equity, good

conscience and the substantial merit of the case without regard to technicalities and legal form, the Court has no hesitation in holding that the Company has proved on the balance of probabilities that the termination of the Claimant was with just cause or excuse. The Claimant's case is hereby dismissed.

HANDED DOWN AND DATED THIS 19th FEBRUARY 2020

~signed~

**(SYED NOH BIN SAID NAZIR @ SYED NADZIR)
CHAIRMAN
INDUSTRIAL COURT, MALAYSIA
KUALA LUMPUR**