IN THE INDUSTRIAL COURT OF MALAYSIA

CASE NO.: 22/4-145/18

BETWEEN

DATO' BERNARD FRANCIS A/L G. FRANCIS

AND

MALINDO AIRWAYS SDN BHD

AWARD NO : 952 OF 2020

Before	:	**Y.A. Tuan Paramalingam A/L J. Doraisamy** - Chairman
Venue	:	Industrial Court Malaysia, Kuala Lumpur
Date of Reference	:	10.11.2017
Date of Mention	:	08.02.2018; 12.03.2018; 19.03.2018; 22.03.2018; 16.04.2018; 25.04.2018 & 04.06.2018
Date of Hearing	:	03.09.2018; 10.10.2018; 04.12.2018; 05.12.2018; 28.01.2019; 29.01.2019; 27.02.2019; 28.02.2019; 22.04.2019; 23.04.2019; 27.05.2019; 28.05.2019; 28.08.2019; 29.08.2019; 30.09.2019; 03.10.2019; 15.10.2019; & 16.10.2019
Representation	:	Mr. Dinesh Ratnarajah together with Ms. Rathi Jebaratnam Messrs. Richard Talalla & Harun Counsel for the Claimant Mr. Jeyendran Ramachandran Messrs. Deva & Jeyen Counsel for the Company

REFERENCE :

This is a reference made under Section 20 (3) of the Industrial Relations Act 1967 (Act 177), arising out of the dismissal of **Dato' Bernard Francis a/l G Francis** (hereinafter referred to as "*the Claimant*") by **Malindo Airways Sdn. Bhd.** (hereinafter referred to as "*the Company*") on 5 June 2017.

AWARD

[1] The Ministerial reference in this case required the Court to hear and determine the Claimants' complaint of dismissal by the Company on 5 June 2017.

I. Procedural History

[2] The Industrial Court received the letter pertaining to the Ministerial reference under Section 20(3) of the Industrial Relations Act 1967 on 8 January 2018.

[3] The matter was fixed for mention on 8 February 2018, 12 March 2018, 19 March 2018, 22 March 2018, 16 April 2018, 25 April 2018 and 4 June 2018.

[4] The trial of the matter proceeded on 3 September 2018, 10 October 2018, 4 December 2018, 5 December 2018, 28 January 2019, 29 January 2019, 27 February 2019, 28 February 2019, 22 April 2019, 23 April 2019, 27 May 2019, 28 May 2019, 28 August 2019, 29 August 2019, 30 September 2019, 3 October 2019, 15 October

2019 and 16 October 2019 before the learned Chairman, Dato' Frederick Indran X.A. Nicholas.

[5] Due to the learned Chairman Dato' Frederick Indran X.A. Nicholas' elevation to the High Court of Malaya as a Judicial Commissioner on 25 November 2019, and my appointment as the Chairman of Court No. 22 on 2 January 2020, I shall now proceed to hand down the Award for this matter after having thoroughly perused the pleadings, the documents, the witness statements, the notes of proceedings as well as the written submissions (together with the bundles of authorities) filed by the parties to this matter.

II. The Parties' Position On The Merits

(a) The Claimant's Case

[6] The Claimant was offered a job in the Company by the then Chief Executive Officer ("*CEO*"), Mr. Chandran Rama Murthy. He accepted the position of Chief Commercial Officer ("*CCO*") *vide* an Offer of Employment dated 11 April 2016 with a basic salary of RM94,000.00 per month (exclusive of benefits).

[7] The Claimant's probationary period was for 6 months. The Claimant contends that he was verbally informed by the CEO in January 2017 that he was a confirmed staff of the Company. The Claimant was also issued a medical health benefit card pursuant to the Company's Employee Handbook, Part 5, Clause 26, which are issued to all confirmed employees.

[8] The Claimant contends that he had hired and built a substantial team which were experienced, highly skilled and specialised in the respective commercial areas in the airline business. From June 2016 to March 2017, his team had launched 18 aircrafts into commercial operations, grew passengers and capacity simultaneously at 80% and generated substantial cash flow to support the growth of the Company's business. For the month of March 2017 alone, the Claimant forecasted that the Company generated more than RM200 million in sales revenue.

[9] However, from December 2016 onwards the CEO had begun discriminating against the Claimant by resorting to 'divide and rule' the commercial team by overly interfering into the day-to-day commercial activities of the Company and also removing the Claimant's Network and Scheduling Department from reporting to the Claimant.

[10] The CEO had also brought in one Mr. Ramdas as the General Manager of Sales and Business Development in January 2017 and one Mr. Jonas Bereketab as the new Head of Revenue Management in February 2017. It was the intention of the CEO in recruiting these two individuals to side-line and bypass the Claimant on daily commercial activities with the respective departments.

[11] On 6 March 2017, the Claimant approached the CEO to address his discontentment and frustration in working, in particular with the Company's disregard to the organisational structure, rampant irrational change of strategy, directions and change of organisational reporting structure without any due consideration and

consultation with the management and team and most significantly derogatory statements and/or remarks and intimidation by the CEO towards the employees. The Claimant informed the CEO that he will resign from his position if the Claimant's services and expertise were no longer required. However, the CEO refused to accept the Claimant's resignation.

[12] On 13 March 2017, the Claimant submitted his leave application form to the CEO for the period of 22 March 2017 until 24 March 2017, which was approved by the CEO.

[13] On 19 March 2017, the CEO sent the Claimant a WhatsApp message informing him that one of the shareholders in the Company, i.e. Bapak Rusdi Kirana, found that the Company's yield management was the problem in managing. The CEO instructed the Claimant to handover the Revenue Management Department to the CEO and that he wanted the Claimant to focus on Sales and Marketing.

[14] On 20 March 2017, the Claimant met with the CEO at the CEO's office to discuss the CEO's instructions to handover the Route Department to the CEO. After explaining to the CEO that the Route Revenue should be managed by the Claimant and should it be removed it would disrupt the Claimant's functions as CCO, the CEO accepted the Claimant's justification and allowed the Route Revenue Department to continue reporting to the Claimant.

[15] From 22 March 2017 until 24 March 2017, the Claimant was on annual leave (which was approved by the CEO) and he was due to resume work on 27 March 2017, which was on a Monday.

[16] On 26 March 2017 at 12.53pm the Claimant received a WhatsApp message from the CEO stating that in view of recent developments, the CEO had instructed the Claimant to go on leave on 27 March 2017 and the Claimant was required to see the CEO on the following day, i.e. 28 March 2017. The Claimant was unaware of any developments but replied to the said message acknowledging the CEO's instructions and abide by the said instructions accordingly as the Claimant had been on leave from 22 March 2017.

[17] On 28 March 2017, the Claimant was informed by the General Manager Human Resources and Department General Affairs, i.e. Mr. Gurdeep Singh ("*GMHR*") that the CEO had received instructions from Bapak Rusdi Kirana to 'remove' the Claimant from the Company and this was acknowledged by the CEO. The GMHR emphasised that it was not a termination and they would want to resolve the Claimant's departure amicably. The CEO further stated that the reason for ordering the Claimant's removal was because the Company was losing money and the Company was opening up too many seats of low level fares.

[18] The GMHR then informed the Claimant that it would be best to discuss a Mutual Separation Scheme ("*MSS*"). Due to this, the Claimant was compelled to accept the Company's decision on the MSS. However, at that point of time, the

Company informed the Claimant that it was unable to provide any offer of MSS and instead requested the Claimant to propose the offer. The Claimant disagreed to this and insisted that the Company should propose the offer as the MSS was initiated by them. The GMHR then informed the Claimant that the Company requested some time to prepare the offer and assured the Claimant that the offer will be ready by the end of the day on 28 March 2017 or latest by the following day on 29 March 2017.

[19] However, immediately after the Claimant left the Company's premises on 28 March 2017 around 10.30am, the CEO had called for a meeting of the staff of the Company at Level 1 of the building and announced that the Claimant had resigned from the Company and that the entire commercial department shall report to the CEO effective from 28 March 2017. Later that evening, the Claimant had spoken to Bapak Rusdi Kirana who denied instructing the CEO to 'remove' the Claimant from the Company. Bapak Rusdi Kirana told the Claimant to discuss the matter with the CEO and that he will thereafter speak to both the CEO and the Claimant on how they could collaborate and cooperate in order to improve the overall financial position of the Company.

[20] On 29 March 2017 at approximately 11.43am, the GMHR informed the Claimant *via* WhatsApp that he was preparing his letter to be sent out on the same day and will forward a copy to the Claimant later. The Claimant then informed the GMHR that Bapak Rusdi Kirana had spoken to the Claimant the day before and had requested the Claimant to speak to the CEO. The Claimant also informed the GMHR that he had sent a message to the CEO regarding this but the CEO had not responded to the said message., The GMHR however did not reply to the Claimant's

said message. At 3.27pm on the same day, the GMHR had sent a message *via* WhatsApp to the Claimant informing that he had emailed a letter to the Claimant. The Claimant thereafter proceeded to check his email expecting to study the MSS Proposal. Instead, what was emailed by the GMHR to the Claimant was a letter entitled 'Suspension and Show Cause Letter' dated 29 March 2017 ("*the Show Cause Letter*") (*at pp. 17-18 of Bundle A*).

[21] The Show Cause Letter contained, *inter alia*, the following charges of misconduct against the Claimant:-

> "*1. Conflict of interest in allowing and/or causing a Travel Agent and his family to obtain Free of Charge (FOC) tickets during peak season (school holiday) offered during Malindo Air Travel Fair 2016 incentive which expired on 31.12.2016.*
>
> *2. Conflict of interest involving purchase of Business Class tickets for yourself and your family for travel to Hong Kong at promo rate during peak season (school holidays).*
>
> *3. Conflict of interest involving you and your family travelling together with the Travel Agent and his family mentioned in No. 1."*

[22] The Claimant replied to the allegations in the Show Cause Letter *vide* his letter dated 3 April 2017.

[23] The Claimant further contends that to his detriment, the Company had caused to be published a defamatory article titled “Francis quits Malindo” in a newspaper/news media named Focus Malaysia on 8 April 2017.

[24] The Company then issued a Notice of Domestic Inquiry dated 17 April 2017 (“*Domestic Inquiry Notice*”) where the Company had stated *inter alia* that it did not accept the Claimant’s explanation in his letter dated 3 April 2017. The Company had withdrawn Charge No. 2 as contained in the Show Cause Letter. The expanded Charges No. 1 & 3 contained in the Domestic Inquiry Notice are as follows:-

> **Charge No. 1**
>
> “*On 23.2.2017, you had instructed Mogan R. Narayanasamy to proceed to book three (3) Free of Charge Business Ticket to Hong Kong for (Roger) Hia Lim Koaa, Hia Mee Yeng and Yong May Choo for the travel period during school holidays (date of departure on 22.3.2017 and date of return on 26.3.2017). Your instructions were based on an email dated 22.3.2017, which was sent by Cecilia Foo from Air Link Travel and Tour Sdn Bhd together with attached documents of three (3) Malindo Air Travel Fair 2016 Incentive Vouchers. The validity of the said three (3) incentive vouchers was from 1.7.2016 until 31.12.2016. You had approved to extend the validity of the said three (3) Free of Charge Business Class tickets for (Roger) Hia Lim Koaa, Hia Mee Yeng and Yong May Choo to travel on school holidays (date of departure on 22.3.2017 and date of return on 26.3.2017) without proper approval or authorisation of the Chief Executive Officer.*

Your work related decision in relation to approval to extend the validity of the abovementioned three (3) incentive vouches [sic] *and your instruction to book and finalise the abovementioned three (3) Free of Charge Business Class tickets to (Roger) Hia Lim Koaa, Hia Mee Yeng and Yong May Choo was for your personal interest or gain (related to Charge 3 as below) and not for the best interest of the Company.*

The aforesaid action on your part, if proved amounts to a serious/major misconduct on your part as per the Code of Conduct and Disciplinary Procedure Appendix I clause 45 stating Committing or cause to commit any act which shall be directly/indirectly a conflict of interest to the company".

Charge No. 2

"*Withdrawn*"

Charge No. 3

"*On 22.3.2017, you and your family travelled together with (Roger) Hia Lim Koaa and his family (Travel Agent Air Link Travel and Tours Sdn Bhd) from Kuala Lumpur to Hong Kong. On 26.3.2017, you and your family travelled together with (Roger) Hia Lim Koaa and his family (Travel agent Air Link Travel and Tours Sdn Bhd) from Hong Kong to Kuala Lumpur. For the trip to Hong Kong from 22.3.2017 to 26.3.2017, you had accepted or received tour package, favors and other benefits from (Roger) Hia Lim Kaoo of (Travel agent Air Link Travel and Tours*

Sdn Bhd) for your personal benefit/gain (related to Charge 1 as above) and not for the best interest of the company.

The aforesaid action on your part, if proved amounts to a serious/major misconduct on your part as per 6.4 of Code of Ethics and the Code of Conduct and Disciplinary Procedure Appendix 1 clause 45 stating Committing or cause to commit any act which shall be directly/indirectly a conflict of interest to the company".

[25] The Domestic Inquiry was held on 9 May 2017 and the Inquiry Panel found the Claimant guilty of only Charge No. 3. He was found not guilty of Charge No. 1. The Company thereafter issued a letter of dismissal dated 5 June 2017 ("*Letter of Dismissal*") to the Claimant. In the said Letter of Dismissal, the Company stated that the Claimant was allegedly still a probationer, which is denied by the Claimant as he was already treated as a confirmed staff as verbally informed by the CEO to the Claimant in January 2017 and further that he was issued with a medical health benefit card, which only confirmed staff are entitled to as per the Company's Employee Handbook Part 5 Clause 26. The Claimant also contends that the Company did not adhere to the mandatory provision of Part 2, Clause 6.2 of the Company' Employee Handbook by not informing the Claimant of the extension of the Claimant's probationary period in writing.

[26] The Claimant contends that he had been treated unfairly and unjustly as well as being victimised by the Company to drive him out of his employment. The Company by its conduct had breached the express and/or implied terms of the

Claimant's contract of employment with the Company. His dismissal by the Company is contrary to the principles of natural justice, good conscience, equity and fair labour practice. The Claimant thus prays for a reinstatement to his former position in the Company.

(b) The Company's Case

[27] On 26 March 2017, the CEO reported to the GMHR that the Claimant had travelled together with the travel agent Dato' Roger Hia Lim Koa ("*Dato' Roger Hia*") and Datin Vicky Yong May Choo ("*Datin Vicky Yong*") of Airlink Travel and Tours Sdn. Bhd. to Hong Kong. The Claimant, being the CCO of the Company, did not disclose about his travel with the said travel agent (whose company, i.e. Airlink Travel and Tours Sdn. Bhd., was doing business with the Company at the material time) to the CEO or to the Company.

[28] The CEO instructed the Human Resource Department to investigate further. The Company conducted its preliminary investigation, and at the conclusion of the said investigation had issued the Show Cause Letter to the Claimant on 29 March 2017.

[29] The Claimant had replied to the Show Cause Letter but the Company was not satisfied with the explanation given. A Domestic Inquiry was held wherein the Claimant was found not guilty of Charge No. 1 but was guilty of Charge No. 3.

[30] The reason and conclusion of the Panel in finding the Claimant guilty of Charge No. 3 are as follows:-

i. Both the Claimant's and Dato' Roger Hia's families had a good relationship. The Claimant's excuse that he had no knowledge of their travel together to Hong Kong is hard to believe and created elements of doubt and trustworthy issues;

ii. The Claimant was not able to provide explanation on some of the discrepancies in the travel package:-

   a. 3 Adults (Triple sharing) fare is different from the travel itinerary;

   b. The Panda Hotel room rate was paid by the Claimant but there was evidence to prove that the room was given on a complimentary basis;

   c. The Panda Hotel was booked as complimentary under the Claimant's name.

iii. Both the Claimant and Dato' Roger Hia failed to submit relevant genuine documents to support their story;

iv. The Claimant's witness, i.e. Dato' Roger Hia, was also unable to provide explanation and give details of the tour package. The reason for charging the Claimant for Panda Hotel when the room was given as complimentary and the explanation why the Panda Hotel Room was booked a day before the Claimant purchased the tour package was unacceptable. It was concluded that the so-called package tour with all the

discrepancies created doubts as to the authenticity of the travel voucher prepared by Airlink Travel and Tours Sdn. Bhd.;

v. The Claimant holds a very important position as the CCO which requires the highest order of integrity and credibility and to be an exemplary person. His work generally involves interaction with travel agents, but he is expected to draw the line between work and leisure. Being together on official duties is acceptable but not on a planned holiday trip. The Claimant and his family travelled together with the travel agent and his family to Hong Kong and return. They all stayed in the same hotel and also spent a day in the cruise ship. All the events could not be labelled as a coincidence but a planned activity;

vi. The Invoice and Tax Invoice provided by the Claimant failed to be a relevant genuine document due to the numerous inconsistencies.

[31] The Company's decision to dismiss the Claimant from his employment was based on the findings of the Inquiry Panel with regards to Charge No. 3. Due to the serious nature of Charge No. 3, it was inconceivable for the Company to continue with the Claimant's employment when its trust and confidence with the Claimant had been broken. The Claimant had breached his fiduciary duties and acted against the best interests of the Company, acted dishonestly and committed breach of trust.

III. The Role of the Industrial Court & The Burden of Proof

[32] It is established law that the function of the Industrial Court in a Section 20(3) Industrial Relations Act 1967 reference is two-fold, i.e. to determine:-

(i) whether the misconduct of the employee alleged by the employer has been established; and

(ii) whether the proven misconduct constitute just cause or excuse for the dismissal.

[33] In the case of **WONG YUEN HOCK v. SYARIKAT HONG LEONG ASSURANCE SDN BHD & ANOR APPEAL [1995] CLJ 344; [1995] 1 MLRA 412** the Federal Court had held:-

> "*On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under section 20 of the Act (unless otherwise lawfully provided by the terms of the reference), is to determine whether the misconduct or irregularities complained of by the Management as the grounds of dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal*."

[34] And in the case of **GOON KWEE PHOY v. J & P COATS (M) BHD [1981] 2 MLJ 129; [1981] 1 MLRA 415** the Federal Court (*vide* the judgment of Raja Azlan Shah CJ) held:-

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

[35] The burden of proof in an unfair dismissal claim lies on the employer to prove on a balance of probabilities that the employee had committed the misconduct complained of. It was held by the Industrial Court in the case of **IREKA CONSTRUCTION BERHAD v. CHANTIRAVATHAN A/L SUBRAMANIAM JAMES [1995] 2 ILR 11; [1995] 1 MELR 373**:-

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

[36] The standard of proof would be on a balance of probabilities that the dismissal was done with just cause or excuse. In the case of **SARIMAH LEE v. FREESCALE SEMICONDUCTOR (MALAYSIA) SDN BHD [2010] 1 ILR 103; [2009] 2 MELR 783** the Industrial Court held:-

> "*The burden of proof lies on the employer. He is obliged to prove his case on a balance of probabilities. It is for him to adduce evidence that the workman was dismissed for just cause or excuse*".

IV. Issues To Be Decided

[37] The issues to be determined in this case are:-

(i) whether the Claimant was guilty of the allegation of misconduct levelled against him by the Company; and

(ii) whether the allegation of misconduct constitutes just cause or excuse for the Claimant's dismissal.

V. The Court's Findings And Reasons

(i) Whether the Claimant was guilty of the allegation of misconduct

a. Claimant's status of employment in the Company

[38] When the Claimant joined the Company on 1 June 2016, he was placed under probation for a period of 6 months pursuant to Clause 2 and Annexure A of the Contract of Employment dated 11 April 2016 (*at pp. 5 and 9 of Bundle A*). Clause 2.3 of the contract states that upon completion of the probation period, the Company has

the discretion whether to confirm the Claimant, extend the probationary period or terminate his services.

[39] It is not disputed that the Company had not issued any confirmation letter to the Claimant. However, it is the Claimant's contention that he was verbally informed by the CEO of the Company, i.e. Mr. Chandran a/l Rama Murthy (COW-7), that the Claimant has been confirmed in his employment. The Claimant testified during cross-examination that he was verbally informed by COW-7 in COW-7's office sometime in January 2017 that the Claimant was a confirmed staff and COW-7 had then instructed the GMHR, i.e. Mr. Gurdeep Singh a/l Charan Singh (COW-1), to issue the confirmation letter to the Claimant. The Claimant also received his medical cards for him to enjoy medical benefits which the Claimant contends was done pursuant to the Company's policy of issuing such medical cards only to confirmed staffs. COW-7 however denied ever stating to the Claimant that he had been confirmed in his employment with the Company.

[40] However, the fact of the matter is that no confirmation letter was ever issued to the Claimant. The Claimant relied solely on the fact that he was issued medical cards sometime in early 2017 to justify his contention that he was already being treated as a confirmed staff. The medical cards produced by the Claimant (*at pp. 1-2 of Bundle K*) on the other hand shows that the Claimant had been covered since 1 June 2016, i.e. the date he commenced employment with the Company. This would tally with Item No. 13 of Annexure A in the Contract of Employment (*at p. 9 of Bundle A*) which states "Hospitalization (Inpatient only) : as per Cover accorded by Insurer for the employee only". Furthermore, when the Claimant was shown the documents

at page 241 of Bundle R, he confirmed that his name, identity card number, employment number and more crucially the commencement date of the medical card (i.e. 1 June 2016) were correct. Therefore, nothing turns on this issue of medical cards that were given to him being an indication that he was already a confirmed employee of the Company. Furthermore, the said medical cards were given to the Claimant due to his position in senior management of the Company as a Chief Commercial Officer.

[41] In fact, Clause 26.1 (Part 5: Employee Benefits) provides:-

> "***26. Medical Coverage, Hospitalization and Surgical Benefits***
>
> *26.1 Only confirmed Employees are entitled to medical and hospitalization benefits.* ***Should an unconfirmed Employee require medical coverage, the company will evaluate on a case-to-case basis.***
>
> *…*"
>
> (Emphasis added)

Thus, there was nothing in the Employee Handbook (which the Claimant steadfastly relies on to substantiate the fact that he had been confirmed in his employment) which says that an unconfirmed employee will be denied medical coverage or benefits.

[42] The Claimant also relies on the testimony of his witness, i.e. Mr. Saravanan a/l Ramasamy (CLW-6), who said that he received his medical cards together with others sometime at the end of January 2017 or early February 2017. More importantly, CLW-6 also testified that he was only issued with a confirmation letter in April 2017 (exhibit 'CLE-1') when in fact he commenced employment in June 2016, i.e. 9 months after he joined the Company. Thus, it is the practice of the Company to issue confirmation letters to their staff who had been put under probationary period.

[43] The Claimant also contends that the fact that he applied for annual leave as per the Leave Application Form dated 15 March 2017 (*at p. 195 of Bundle B*) for the period of 22 March 2017 to 24 March 2017 and the said leave application was approved would necessarily mean that he was already a confirmed staff as only confirmed staff are given annual leave. COW-7 testified that the Leave Application Form was filled up by the Claimant himself and in the process ticked the box entitled "ANNUAL" himself. This was further confirmed by the Company's witness, i.e. En. Muzaffar Bin Mazlan (COW-3; Senior Manager of Human Resources) who testified that the leave application submitted by the Claimant was not an annual leave but rather from the Claimant's entitlement of 18 days of paid leave as per his Contract of Employment at Item No. 12 Annexure A (*at p. 9 of Bundle A*) even though he was under probation. The Claimant admitted during cross-examination that he was indeed entitled to the said 18 days paid leave as per his employment contract.

[44] The decision to confirm their employees lies solely at the discretion of the Company. It is trite law that in situations where at the expiry of the probationary period the probationer is neither confirmed nor terminated from his employment,

such a probationer continues as a probationer. In both the Federal Court decisions in **KC MATHEWS v. KUMPULAN GUTHRIE SDN BHD [1981] 2 MLJ 320; [1981] 1 MLRA 77** and **V. SUBRAMANIAM & ORS. v. CRAIGIELEA ESTATE [1982] 1 MLJ 317; [1982] 1 MLRA 542** the decision of the Indian Supreme Court in ***Express Newspapers (P) Ltd. v. Labour Court AIR 1964 SC 806*** was referred to and adopted:

> *"There can, in our opinion, be no doubt about the position in law that an employee appointed on probation for six months continues as a probationer even after the period of six months if at the end of the period his services had either not been terminated or he is confirmed. It appears clear to us that without anything more an appointment on probation for six months gives the employer no right to terminate the service of an employee before six months had expired – except on the ground of misconduct or other sufficient reasons, in which case even the services of a permanent employee could be terminated. At the end of the six months period the employer can either confirm him or terminate his services, because his service is found unsatisfactory. If no action is taken by the employer either by way of confirmation or by way of termination, the employee continues to be in service as a probationer".*

[45] This Court finds that the Claimant was still under probation when he was terminated for misconduct on 25 June 2017. And the Company had the right to terminate the Claimant for misconduct even though he was still under probation. In

the High Court case of **SULNAYAH MOHD ISA v. SEKOLAH KANAK-KANAK PEKAK SELANGOR & ANOR [1999] 6 CLJ 234; [1999] 2 MLRH 566** it was held by Azmel Maamor J:-

> "*The main issue that arose from this application concerned with the right of an employer to dismiss its employee during the period of probation. It was not disputed that the applicant was dismissed by respondent No. 1 during the currency of her probationary period. At p. 3 of the award the Industrial Court had quite rightly stated the legal principle concerning this issue i.e.:*
>
> > *In other words the employer has no right to terminate the service of an employee before the period of probation has expired, except on the ground of misconduct or other sufficient reasons in which case even the service of a permanent employee could be terminated.*
>
> ***This principle means that an employee cannot be terminated by the employer during the currency of his probationary period. However there is an exception to the rule, i.e. the employee can be terminated if he commits an act of misconduct for which reason even the services of a confirmed employee can be terminated***".
>
> (Emphasis added)

b. Charge No. 1

[46] Charge No. 1 as per the Domestic Inquiry Notice pertains to the Claimant's approval of the extension of time for the Malindo Air Travel Fare 2016 Incentive

vouchers ("*Travel Incentive Vouchers*") to allow the travel agent, Dato' Roger Hia (of Airlink Travel & Tour Sdn. Bhd.) and his family to obtain free of charge tickets to travel during peak season and that this had raised a conflict of interest.

[47] The Domestic Inquiry Panel had found the Claimant not guilty of Charge No. 1. However, the Claimant submits that Charge No. 1 was inserted into the Domestic Inquiry Notice by the Company as part of its fault-finding mission to terminate the Claimant from his employment.

[48] It is not disputed by the Claimant that any extension of the validity period of the Travel Incentive Vouchers was subject to the approval of the CEO, i.e. COW-7. In the first place, the Claimant should not have extended the validity period of the said Travel Incentive Vouchers to 31 March 2017 (i.e. beyond its initial expiry date of 31 December 2016) without prior approval of the CEO, as the discretion to extend the same lies solely with the CEO. But the Claimant contends that the Company with *mala fide* intention had submitted the Travel Incentive Vouchers that did not contain the signature of approval by the CEO (*at pp. 72-74 of Bundle D*) to the Domestic Inquiry Panel and that the Company had intentionally withheld the copy of Travel Incentive Vouchers that contained the CEO's approval (*at p. 75 of Bundle D*) with a view to mislead the Domestic Inquiry Panel.

[49] Counsel for the Claimant then submits that after the Company discovered that the Claimant had in his possession a copy of the Travel Incentive Vouchers with the CEO's approval, it had apparently no option but to find the Claimant not guilty of

Charge No. 1. This Court however is unable to agree with the conjecture of the Claimant's Counsel. The Travel Incentive Vouchers at pages 72-74 of Bundle D was in fact an attachment to an email from one Cecilia Foo (*at p. 69 of Bundle D*), i.e. a staff of Airlink Travel & Tour Sdn. Bhd., to Mogan R. Narayanasamy (COW-5; Senior Regional Manager of Sales of Malindo Airways) wherein the said Cecilia Foo had instructed COW-5 to book the flight tickets for Dato' Roger Hia and his family using the attached Travel Incentive Vouchers that contained only the Claimant's signature of approval. This was confirmed during trial by COW-1, COW-5 and COW-7. In fact, even Charge No. 1 in the Domestic Inquiry Notice clearly referred to the 3 Travel Incentive Vouchers that were **attached** to Cecilia Foo's email. In any event, the Travel Incentive Vouchers with the CEO's signature of approval was tendered during the Domestic Inquiry by the Claimant and the Company did not object thereto.

[50] COW-5 could not book the flight tickets for Dato' Roger Hia and his family using the attachments contained in Cecilia Foo's email as it did not have the CEO's approval. At the same time, the Claimant had started to enquire COW-5 on the status of the bookings of the flight tickets, evidencing the fact that he was interested in the developments of the purchase of the FOC flight tickets for Dato' Roger Hia and his family using the Travel Incentive Vouchers. COW-5 brought the Travel Incentive Vouchers to COW-7 who had then approved the same but on condition that there shall be no travel during school holidays. That was how the document at page 75 of Bundle D came about.

[51] COW-5 had then on his own frolic liaised with another staff, i.e. Cik Harlina Harun, and instructed her to proceed with the bookings for the flight tickets for Dato'

Roger Hia and his family. This is where the Domestic Inquiry Panel found that there had been "*a gap in the process*". COW-5 did not return the Travel Incentive Vouchers with the CEO's approval back to the Claimant to resolve the issue of the CEO laying down a condition that there shall be no travel during school holidays as far as any bookings under the Travel Incentive Vouchers is concerned. Instead, COW-5 instructed Cik Harlina Harun to proceed with the bookings, without even copying his email containing his instructions to the Claimant. It was because of this that the Domestic Inquiry Panel found the Claimant not guilty of Charge No. 1. Based on the evidence before them, the Inquiry Panel found that the Claimant was unaware that the tickets were being booked when in fact it was running counter to the conditions laid down by COW-7 on the Travel Incentive Vouchers. COW-5's only excuse as to why he had asked Cik Harlina Harun to go ahead and book the FOC flight tickets for Dato' Roger Hia and his family was because the Claimant was his boss who had already given him the instructions beforehand to get the tickets.

[52] The Domestic Inquiry Panel's findings pertaining to Charge No. 1, *inter alia* states as follows (*at p. 84 of Bundle A*):-

> "*6) Mr. Morgan (CW2) handed over the Travel Voucher with the restriction to travel during the school holidays to Miss Harlina (CW3) to proceed with the booking for Dato' Roger Chia and his family despite the restriction imposed by CEO.* ***There is no clear explanation from CW2 as to why he choose to go through CW3. CW2 should have returned the voucher to his superior (the Accused) to resolve the issue****. CW2 said he did*

it because the Accused was his Boss. Reason for CW3 to issue FOC tickets was contradictory to company procedure.

7) ***Both CW2 and CW3 were issued a letter of reminder of compliance by HR for not following company procedure in issuing FOC tickets. This indicates that there is a gap in the process.***

…

8) ***The Board finds no evidence from the Accused on his involvement on the issuance of tickets for the travel agents except for the reminders given by him to his subordinate CW2***".

(Emphasis added)

[53] This Court is satisfied that the Domestic Inquiry Panel had arrived at the correct conclusion when they did not find the Claimant guilty of Charge No. 1 due to the lack of incriminating evidence against the Claimant pertaining to the act of booking the FOC flight tickets for Dato' Roger Hia and his family despite the CEO's condition that there shall be no travel during school holidays with regards to the Travel Incentive Vouchers. There was certainly no element of victimisation on the part of the Domestic Inquiry Panel or the Company against the Claimant when the Inquiry Panel reached such a conclusion.

[54] To add further, the reason for the Claimant's dismissal as stated in the Company's Letter of Dismissal (*at p. 90 of Bundle A*) was not even premised on Charge No. 1, but on Charge No. 3.

c. Charge No. 2

[55] Charge No. 2 as originally contained in the Show Cause Letter pertained to the Claimant's conflict of interest in purchasing Business Class tickets for himself and his family for travel to Hong Kong at promo rate during peak season, i.e. school holidays.

[56] It is as clear as day from the Domestic Inquiry Notice (*at p. 38 of Bundle A*) that the Company had withdrawn this Charge No. 2, after it had accepted the Claimant's explanation in his response to the Show Cause Letter.

[57] The said Charge No. 2 was not even considered or deliberated upon by the Domestic Inquiry Panel. But yet the Claimant saw it fit to resurrect this non-existent Charge No. 2 in order to level against the Company yet another allegation of victimisation.

[58] Counsel for the Claimant submits that it has been established in evidence that prior to accusing the Claimant for Charge No. 2, the Company had forced the Company's Route Analyst from the Revenue Management, i.e. Nurul Fatenah Binti Mohammad (CLW-3), to go on leave for 10 days to place her under distress and that

COW-1 had thereafter harassed her to give false statement that the Claimant requested her to manipulate the pricing of the flight seats for the trip on 22 March 2017 until 26 March 2017 that the Claimant had purchased. And it seems that it was because of that, Charge No. 2 was withdrawn. CLW-3, on the other hand, when cross-examined testified that she does not even know what Charge No. 2 was. Thus, the Claimant's allegation that CLW-3 informed him that the Company inserted Charge No. 2 to victimise him is highly circumspect when CLW-3 did not even know what the charge was in the first place.

[59] In any event, Charge No. 2 was already withdrawn before the Domestic Inquiry commenced and it was certainly not a reason for the Claimant's dismissal as contained in the Letter of Dismissal. It is obvious that in order to absolve himself from any misconduct, the Claimant had attempted to throw everything but the kitchen sink at the Company hoping to get a reprieve, in particular from Charge No. 3.

[60] As such, Charge No. 2 was a non-starter from the outset of the Domestic Inquiry and also the trial before the Industrial Court. This Court will refrain from making any decision pertaining to Charge No. 2 as it never formed any part of the Company's reason or decision to dismiss the Claimant from his employment in the first place (see **GOON KWEE PHOY v. J & P COATS (M) BHD [*supra*]**).

d. Charge No. 3

[61] Charge No. 3 as contained in the Domestic Inquiry Notice pertains to the Claimant and his family having travelled with the travel agent (Dato' Roger Hia) and

his family and received gifts and benefits from the travel agent which tantamount to a conflict of interest and runs contrary to Clause 6.4 of the Code of Ethics and Code of Conduct and Disciplinary Procedure, Appendix 1, Clause 45.

[62] Counsel for the Claimant submits that the Claimant is not guilty of Charge No. 3 as the Claimant did not accept or receive any tour package, favours and other benefits from Dato' Roger Hia for his personal benefit or gain. It is also the Claimant's contention that there is nothing in Clause 6.4 of the Code of Ethics or Appendix 1 of the Code of Conduct & Disciplinary Procedure or anywhere in the Company's Employee Handbook which provides that employees of the Company are not allowed to travel with travel agents and that it would amount to a misconduct if they do so.

[63] Clause 6.4 of the Code of Ethics (*at p. 55 of Bundle D*) provides:-

> "***Payment, Gifts, Gratuities and Entertainment***
>
> *The general principle that applies to the offer and acceptance of gifts and entertainment is that no staff and any member of his family should solicit or accept or receive gifts, entertainment, trips, discounts, loans, commissions, or other favors from outside companies or individuals. This is especially important if the outside companies or individuals concerned are soliciting business relationship or information from MALINDO AIR.*
>
> *Work related decisions must at all times be made in an objective manner, based upon the best interests of the Company and not be*

influenced or affected in any way by consideration of personal gain, or of obligation resulting from the acceptance of a gift, commission, entertainment or other benefits. From time to time especially during the festive season, gift may be sent to staff. In the event that all efforts to decline these gifts fail, they may be accepted only if the following conditions are met:-

- *The gift is not in the form of cash;*
- *The gift must be of limited value only, so as not to be perceived as a bribe or pay-off;*
- *The gift should be declared and contribute as a prize for the Company's activities;*
- *In the case of perishable products, they should be shared with the others in the department*".

[64] Whereas Appendix 1 of the Code of Conduct & Disciplinary Procedure (*at pp. 29-34 of Bundle D*) lists out the types of unacceptable behaviours which are deemed misconducts that will be a cause for disciplinary action to be taken (including termination) and in particular Clause 45 states "*Committing or cause to commit any act which shall be directly/indirectly a conflict of the interest to the Company*" as a misconduct.

[65] The Claimant in his Reply to the Show Cause Letter (*at pp. 19-34 of Bundle A*) produced supporting documents consisting of a tax invoice and receipt from Airlink Travel and Tours Sdn. Bhd. (*at pp. 32-34 of Bundle A*).

[66] Counsel for the Company however submits that the position of the Company is that the information contained in the said invoices and receipt at pages 32-34 of Bundle A contained various inconsistent, incorrect and contradictory information:-

i. The trips, cruise and the hotel details for the tour code: GD0504-DC-HKG on the tax invoice (*at p. 32 of Bundle A*) does not correspond or tally with the itinerary information at pages 201-202 of Bundle B for tour code: GD0504-DC-HKG;

ii. The tax invoice at page 32 of Bundle A states that the price for the Panda Hotel was RM450.00. However, the document at page 225 of Bundle C (i.e. a screenshot of the Panda Hotel Reservations Confirmation No. 4014543) which the Company had received from the staff of Panda Hotel shows that the room in Panda Hotel was complimentary and it was recorded in the hotel database system as complimentary for the Claimant;

iii. There was a difference in calculation on the Tax Invoice (*at p. 32 of Bundle A*) and receipt. At the left hand side column is stated the room rate for Hong Kong Disney Hotel is RM1310.00 but on the right hand side for the same hotel it is stated as RM1840.00;

iv. On the tax invoice (*at p. 32 of Bundle A*), it is stated as a 3 Adults rate x RM1727 for the Genting Dream cruise but only 2 adults and a child's name was stated at page 32 of Bundle A.

[67] It is not in dispute that Airlink Travel and Tours Sdn. Bhd. was doing business with the Company and was the top-selling travel agent for the Company at the material point in time. At the same time, the Claimant was the Chief Commercial Officer of Malindo Air in charge of the whole commercial department of the Company. The main principals of Airlink Travel and Tours Sdn. Bhd. at the material point in time was Dato' Roger Hia and Datin Vicky Yong. The Claimant's family and Dato' Roger Hia's family were close and had known each other for quite some time. And this is where the Company's suspicions were aroused that the Hong Kong tour that the Claimant's family and Dato' Roger Hia's family were on was actually part of a special arrangement between themselves and this had interfered with the Claimant's fiduciary duties owed to the Company.

[68] Dato' Roger Hia had insisted during the Domestic Inquiry that although his family and the Claimant's family travelled to Hong Kong, they were in fact on a separate destination. However, during the trial both the Claimant (CLW-5) and his wife, Datin Vijaya Latha a/p Sinniah (CLW-4) confirmed during cross-examination that both the families had checked in at the same time and stayed at the Panda Hotel on 22 March 2017. Both families had then checked out at the same time on 23 March 2017 and proceeded to travel together to the Disneyland Hotel and stayed in the said hotel. And then on 24 March 2017, both families travelled together from the Disneyland Hotel to the Hong Kong Cruise pier, after which they went on the cruise together and returned to the airport on 26 March 2017 to board their flight back to Kuala Lumpur. In other words, hardly a 'separate destination'.

[69] Upon making a random check, the CEO, i.e. COW-7, stumbled upon data that the Claimant and his family were due to board the Malindo flight back to Kuala Lumpur on 26 March 2017 together with Dato' Roger and his family, whereupon COW-7 instructed his ground staff at the Hong Kong airport, i.e. one Ms. Lillian Cheah Cheng Yuin (COW-4), to take photographs of both the Claimant and Dato' Roger Hia together with their respective families at the check-in counter at the Hong Kong airport. The photographs taken by COW-4 was produced before the Court at pages 13-16 of Bundle A.

[70] Coming back to the tax invoices and receipts at pages 32-34 of Bundle A, the Claimant maintained that the information contained therein were true and correct. The Claimant even testified during cross-examination that he had checked with Dato' Roger Hia who confirmed that there were no mistakes on the said documents. However, upon a careful analysis, it does seem apparent that there were some discrepancies on the said documents.

[71] Firstly, the said tax invoice at page 32 of Bundle referred to the GD0504-DC-HKG. The only travel itinerary pertaining to this tour GD0504-DC-HKG on Airlink Travel and Tour's website points to the itinerary entitled "*5 Days Genting Dream * Hong Kong*". The Claimant's first witness, Hia Siew Hoong (CLW-1), who is Dato' Roger Hia's daughter and a current director of Airlink Travel and Tours Sdn. Bhd., confirmed that the tour code GD0504-DC-HKG stated in pages 32-34 of Bundle A is the same as the tour code stated in the travel itinerary at pages 201-202 of Bundle B. CLW-1 also further confirmed when cross-examined that the tour stated in pages 201 and 202 of Bundle B were also available to other customers. However, the travel

description and dates contained in pages 201-202 of Bundle B differs from that on page 32 of Bundle A, wherein the tour package duration at pages 201-202 of Bundle B (and which is available to all of Airlink's customers) states 5 days 4 nights whereas the tour duration at page 32 of Bundle A (which was given to the Claimant) states 3 days 2 nights. It then becomes obvious from this that the travel itinerary or tour package which is referred to at pages 32-34 of Bundle A was in fact tailor-made for the Claimant's family by Airlink Travel and Tours Sdn. Bhd. and had clearly departed from the actual travel itinerary at pages 201-202 of Bundle B. The Claimant's Hong Kong trip was in actual fact a special arrangement trip given by Dato' Roger Hia and his company, i.e. Airlink Travel and Tours Sdn. Bhd., to the Claimant and his family.

[72] Secondly, the entry of 3 Adults (Triple Sharing) is also called into question by the Company as the Claimant and his wife had travelled with their child and thus it ought to have reflected as 2 Adults and 1 Child. CLW-1 explained in her witness statement (*CLWS-1; Q & A No. 10*):-

> "*Q10: Refer to the tax invoice page 32 of Bundle A, the third row. Since there were 2 adults and 1 child going for the cruise, why did Airlink Travel & Tours Sdn. Bhd. charge the Claimant the amount for 3 adults?*
>
> *A : When we key in the customer's date of birth into the system, the system will automatically capture the age of the customers and label them as either adults or children. This cannot be manually changed. Further, the Claimant's son Elijah Devin was about 4 years old at the time of travel and therefore children above the*

age of 2 and above are charged the adult's rate and labelled as adults in charge".

[73] The Claimant's second witness, i.e. Ms. Choong Siew Fung (CLW-2; Finance Manager of Airlink Travel and Tours Sdn. Bhd.) testified when cross-examined that all the information on the tax invoice at page 32 of Bundle A was manually entered by her and that it was not automated. CLW-2's testimony thus materially contradicts with the testimony of CLW-1 who had testified that the system will automatically capture the age of the customers and it cannot be manually changed. The error becomes even more glaring when the travel itinerary at pages 201-202 of Bundle B is looked at where it shows that the rate of the 3rd & 4th pax will be lesser than the 1st & 2nd pax. More crucially, under Note at No. 1 (*at page 202 of Bundle B*) it is stated "*Child and Infant fare have to be either 3rd/4th pax after 2 full paying accompanying passengers*", to which even CLW-1 admitted to when cross-examined. This further fortifies the Company's contention that the information contained in the documents at pages 32-34 of Bundle were fictitious and manufactured to suit the Claimant's case.

[74] Thirdly, the charges for Panda Hotel Chuen Wan at Item No. 3 on the tax invoice at page 32 of Bundle A is equally highly circumspect. The tax invoice at page 32 of Bundle A states that the Claimant was charged RM450 per night for the stay at Panda Hotel. The Company however produced the reservation documents from the Hong Kong travel agent, i.e. Carry On Travel Services Ltd., which shows that the Panda Hotel room was recorded as complimentary for the Claimant, and not only to Dato' Roger Hia. And the screenshot of the Reservations-Confirmation No. 4014543

states the rate as '0.00', signifying that the Claimant was not charged at all for the room.

[75] Dato' Roger Hia had given his testimony during the Domestic Inquiry (*at p. 116 of Bundle I*) that the Panda Hotel rooms were given as complimentary to his company and that it was entirely up to him whether he wanted to charge the Claimant for the said complimentary rooms:-

> "*GS: Now as far as the records are concerned, it was a complementary. So, for you to charge Dato' Bernard for $450, can you explain how this happen? How this could happen when the room is booked complementary and the charge for Panda Hotel is 450?*
>
> *W4: We use to practice that.*
>
> *GS: This is a practice?*
>
> *W4: We charge on client eventhough it's complementary.*
>
> *GS: This is a practice.*
>
> *W4: Kita dapat free, kita punya pasal*".

[76] CLW-1 and CLW-2, who admitted that they never dealt with the Claimant with regards to this tour package, nevertheless testified during the trial that the Panda Hotel rooms were given free for Airlink Travel and Tours Sdn. Bhd. by Carry On Travel Services Ltd. And the Claimant never at any point in time complained about the conduct of Airlink in misusing his name to obtain complimentary rooms from

Carry On Travel Services Ltd. and thereafter charging him for the same. Instead the Claimant defended Airlink by testifying that it was Airlink's prerogative of obtaining complimentary rooms and thereafter charging him for the same. But it still does not make any sense for someone to allow his name to be misused by a third party for the purposes of obtaining complimentary rooms and thereafter to be charged for the same by the said perpetrator.

[77] The testimonies of Dato' Roger Hia (at the Domestic Inquiry), CLW-1, CLW-2 as well as the Claimant flies out of the window when one looks carefully at the Reservation Order form at page 223 of Bundle C. The Reservation Order form clearly states that the complimentary rooms were not only for Dato' Roger Hia and Datin Vicky Yong but also for the Claimant and his family. And what is more pertinent is the 'Remark' on the said document which states "*2 Rooms Complimentary for Airlink Boss & Chief commercial of Malindo Air*". The Chief Commercial of Malindo Air referred to in the said Reservation Order form is none other than the Claimant. Thus, it is evident from the said Reservation Order form that the Panda Hotel rooms were given as complimentary not only to Dato' Roger Hia but also to the Claimant right from the outset.

[78] Fourthly, the tax invoice at page 32 of Bundle A states that the Claimant was charged RM1,840.00 per night for his stay at Disney Hotel Hong Kong. The Claimant during cross-examination disagreed with the Company's counsel's suggestion that there was no such hotel as Disney Hotel Hong Kong. This clearly contradicted with CLW-2's testimony during cross-examination who admitted that there was no such hotel called Disney Hotel Hong Kong. Glaringly, CLW-1 and CLW-2 testified that

once the name of Disney Hotel Hong Kong is keyed into the system, the price for the hotel will automatically appear. But how could the price for the hotel automatically appear if Disney Hotel Hong Kong does not even exist in the first place, as subsequently admitted by CLW-2?

[79] There was also a material discrepancy on the hotel room rate for the 'Disney Hotel Hong Kong' on the tax invoice at page 32 of Bundle A wherein the hotel room rate quoted is RM1,310.00 per night but the Claimant was purportedly charged RM1,840.00 per night. CLW-1 testified that the rate charged, i.e. RM1,840.00 for one night, is only for standard room and was not inclusive of the entrance to the Disneyland theme park. (*At this juncture, the Court cannot help but note how at ease the Claimant was in trying to explain the intricacies of Airlink's tax invoices and receipts when he was not even a personnel in Airlink*). This was contrary to Dato' Roger Hia's testimony during the Domestic Inquiry wherein he had admitted that the tour package includes meals, transport and entry to the theme park (*at p. 107 of Bundle I*). CLW-1 however gave a different answer during the trial wherein she testified during cross-examination that the hotel room rate of RM1,840.00 was only for standard room and did not cover the entrance fee to the Disneyland theme park. When the Claimant (CLW-5) took the stand during the trial, he agreed to the question posed by the Company's Counsel that the difference between RM1,310.00 and RM1,840.00 was because it's inclusive of entrance to the Disneyland. The inconsistencies in the testimonies of the Claimant and his witnesses raises more questions than answers on the tax invoice and receipt at pages 32-34 of Bundle A.

[80] It is the Claimant's contention throughout the case that he had instructed his wife (CLW-4) to make the payment of RM7471.00 (as stated in the tax invoice at p. 33 of Bundle A) to Datin Vicky Yong of Airlink Travel & Tour Sdn. Bhd. CLW-4 testified that she had paid the amount of RM7,471.00 in cash to Datin Vicky Yong at Dato' Roger Hia's house, upon the instructions of the Claimant. When asked by the Company's counsel whether she knew what was the breakdown of the cash sum of RM7,471.00 that she had paid to Datin Vicky Yong, CLW-4 answered that she did not know. CLW-4 also admitted that there was no tax invoice or receipt given to her for the alleged payment of RM7,471.00. In fact, it is the Claimant's testimony during the trial that the tax invoices/receipt was given to him by Dato' Roger Hia when they checked in at the Malindo check-in counter for their flight from Kuala Lumpur to Hong Kong on 22 March 2017. CLW-1 meanwhile testified that she received the sum of RM7,471.00 from Dato' Roger Hia, and not Datin Vicky Yong. CLW-1 produced a bank-in slip of Airlink's collection for the day (*at p. 1 of Bundle Q*). But this bank-in slip shows a total amount of RM14,946.40 that was banked in and not to the specific amount of the alleged sum of RM7471.00 that was paid by CLW-4 to Datin Vicky Yong. The notation at the side of the bank-in slip on page 1 of Bundle Q was made by CLW-2 who received the monies from CLW-1. CLW-2 notated the sum of RM7471.00 but she is unable to ascertain how the said sum of RM7471.00 had changed hands and eventually reached her, or if it did at all. Therefore, the testimonies of CLW-1 and CLW-2 pertaining to this alleged payment of RM7471.00 together with the bank-in slip and notation on page 1 of Bundle Q must be treated with caution. There is a missing link in the chain of evidence and that would be the evidence of Datin Vicky Yong.

[81] The testimony of Datin Vicky Yong is of utmost importance in this case. Dato' Roger Hia has since passed away, and his evidence during the Domestic Inquiry was rather sketchy and vague. Datin Vicky Yong on the other hand was not produced as a witness before the Court. The excuse given by the Claimant in July 2019 for Datin Vicky Yong's non-attendance in Court was that she was ill and could not sit or stand for a long time. No medical records were however tendered to the Court. CLW-1 on the other hand stated in October 2019 that Datin Vicky Yong had travelled to Melbourne for a holiday in July 2019 and also travelled to Japan in September 2019. CLW-1 also testified that Datin Vicky Yong often travels to overseas for events and exhibition. Thus, the excuse given by the Claimant that Datin Vicky Yong was unable to attend Court due to her medical condition is highly suspect and implausible. Datin Vicky Yong is a crucial witness because she was the one who allegedly received the payment of RM7471.00 from CLW-4 and could shed light on how the said monies were transmitted (if at all) and eventually came to CLW-1's hands. An adverse inference is raised against the Claimant under Section 114(g) of the Evidence Act 1950 on the non-production of Datin Vicky Yong as a witness before the Court that if she were to take the witness stand, her testimony would have been prejudicial or detrimental to the Claimant's case.

[82] CLW-1 also does not know what time on 9 March 2017 that she received the said sum of RM7471.00 from Dato' Roger Hia, let alone the breakdown of the said monies. She also testified that she does not know when the booking confirmation was done for the Claimant's tour package. On the other hand, the Claimant states that the booking confirmation was done upon the payment of the said sum of RM7471.00. Once again, the situation surrounding the payment of RM7471.00 by

CLW-4 to Datin Vicky Yong and the booking confirmation for the tour package becomes murky. The inference that can be drawn is that the payment of RM7471.00 in fact was never made in the first place.

[83] Looking at the tax invoice at page 32 of Bundle A and the testimonies of the witnesses, it is evident that the Claimant had colluded with the travel agent, i.e. Airlink Travel and Tours Sdn. Bhd., to manufacture the said tax invoice to paint a picture to the Domestic Inquiry Panel and also to the Court that the Claimant had paid for the tour package arranged by Airlink and that the said tour package was not a special arrangement or a gift from Airlink to the Claimant and his family.

[84] After analysing the documentary evidence and the oral testimonies of the witnesses before the Court, it is this Court's finding that the Company has succeeded in proving, on a balance of probabilities, that the Claimant is guilty of Charge No. 3. There had been a clear breach of Clause 6.4 of the Company's Code of Ethics and Clause 45 of Appendix 1 of the Code of Conduct & Disciplinary Procedure. The Claimant had put his self-interests before that of his fiduciary duties owed to the Company when he received the complimentary tour package from the travel agent that was doing business with the Company, i.e. Airlink Travel and Tours Sdn. Bhd., without any payments being accounted for it. Clause 6.4 of the Code of Ethics has clearly spelt out that no staff or any member of his family can solicit or accept or receive gifts, entertainment, trips, etc., from outside companies or individuals.

(ii) Whether the allegations of misconduct constitute just cause or excuse for the Claimant's dismissal.

[85] As can be seen from the findings above, the Company has succeeded to prove on a balance of probabilities that the Claimant is guilty of Charge No.3.

[86] The Domestic Inquiry had also found the Claimant guilty of Charge No. 3 but he was not however found guilty of Charge No.1. The Court has analysed the Domestic Inquiry Notes and the findings of the Inquiry Panel (*at pp. 81-88 of Bundle A*) and agrees with the findings made by the Domestic Inquiry Panel and there is thus no reason for this Court to depart from the same. The conclusion reached by the Inquiry Panel was correct based on the evidence adduced before it.

[87] The Claimant contends that the principles of natural justice was not adhered to at the Domestic Inquiry when the Inquiry Panel allegedly refused to let the Claimant present his case and interfered with his testimony as well as that of his witness, Dato' Roger Hia. It is trite law that any procedural breach of natural justice could be cured at the hearing before the Industrial Court as the Industrial Court hears the matter *de novo*. This principle was laid down by the Federal Court in the case of **WONG YUEN HOCK v. SYARIKAT HONG LEONG ASSURANCE SDN BHD AND ANOTHER APPEAL [1995] 2 MLJ 753** wherein Mohd Azmi FCJ held:-

> "*It was therefore the function of the Industrial Court in this particular case to determine on the available evidence whether Wong had misconducted himself by his involvement in the sales of the two motor car wrecks against the unwritten rules of Hong Leong which prohibited*

its staff from such activity. Since the answer was in the positive, the next question for the Court to ask itself was whether such misconduct constituted a just cause or just excuse for the dismissal? It was not within the ambit of the reference for the Industrial Court to determine whether Hong Leong ought to be punished for failing to hold a domestic inquiry. The Industrial Court was not competent to declare the dismissal void for failure to comply with the rule of natural justice. The very purpose of the inquiry before the Industrial Court was to give both parties to the dispute an opportunity to be heard irrespective of whether there was a need for the employer to hold a contractual or statutory inquiry. We were confident that the Industrial Court as constituted at present was capable of arriving at a fair result by fair means on all matters referred to it. If therefore there had been a procedural breach of natural justice committed by the employer at the initial stage, there was no reason why it could not be cured at the rehearing by the Industrial Court".

[88] The Claimant's misconduct is very serious in nature involving an employee at a leadership position, company values and corporate governance. He should be setting an example to his subordinates especially on the core values and integrity instilled by the Company upon its staff. LC Malhotra in his book **Dismissal, Discharge, Termination of Service and Punishment (13th Edn.)** had this to say about integrity (*at p. 5*):-

"*Integrity according to Oxford dictionary is '*moral uprightness; honesty*'. It takes in its sweep, probity, innocence, trustfulness, openness,*

sincerity, blamelessness, immaculacy, rectitude, uprightness, virtuousness, righteousness, goodness, cleanness, decency, honour, reputation, nobility, irreproachability, purity, respectability, genuineness, moral excellence etc. In short, it depicts sterling character with firm adherence to a core of moral values".

[89] The Claimant had committed a gross misconduct by breaching the express and/or implied terms of his employment contract by placing himself in a position of conflict of interest when he accepted without any qualms the complimentary tour package from Dato' Roger Hia, who was the then principal of Airlink Travel and Tour Sdn. Bhd., i.e. a company who at the material time was doing business with the Company. Indeed, it speaks volumes that the Company immediately severed all ties with Airlink Travel and Tours Sdn. Bhd. after this incident involving the Claimant and Dato' Roger Hia.

[90] In the case of **PANTAS CERAH SDN BHD v. LAU BOON SENG [1999] 3 ILR 216** it was held by the learned Industrial Court Chairman, Tan Kim Siong:-

"*When an employer employs an employee, it is implied the employee will faithfully with loyalty and honesty further the interest of the employer. There is a fiduciary relationship between the employer and the employee. An employee, under the payroll of the employer should not do any act which causes detriment to the interest of the employer. The claimant had committed wrongdoings inconsistent with the employer-employee relationship. He had engaged in activities which*

had conflict of interest with his duties and loyalty to his employer. He had bitten the hand that had fed him".

[91] B.R. Ghaiye in his book **Misconduct In Employment (3rd Edn.)** said (*at pp. 634-635*):-

"*The relation between an employer and an employee is of fiduciary character. The word 'fiduciary' means belonging to trust or trusteeship. It means that whenever an employer engages a worker he puts trust that the worker will faithfully discharge the service and protect and further the interest of the employer. A fiduciary relation exists between employer and employed: (a) whenever the former entrusts the latter with property, tangible or intangible, e.g., confidential information and relies upon the other to deal with such property for the benefit of the employer, or for purposes authorised by him, and not otherwise, (b) whenever the employer entrusts the employee with a task to be performed, e.g. the negotiation of a contract, and relies on the servant of agent to procure the best terms available. If the employee does an act which is inconsistent with the fiduciary relationship, then that will be an act of bad faith for which his services can be terminated. The said obligation is an implied obligation, i.e., an obligation attached to every contract of service even when there is no express mention in the contract. The obligation to serve his master with good faith and fidelity arises out of necessary implication which is deemed to be engrafted on each and every contract of service. This implied condition is recognised on account of realisation of the need of full confidence between the*

employee and the employer and this implied condition continues even after an employee has left the service. If an employee continues in service, then one of the obvious remedies for breach of faith is to dismiss him".

[92] The Claimant also alleged that the Company had victimised him with regards to Charge No. 1 and Charge No. 2. The burden of proving victimisation lies upon the Claimant. As it is a serious allegation, it has to be properly and adequately pleaded. OP Malhotra in **The Law Of Industrial Disputes (7th Edn.)** said (*at p. 1746*):-

"*'Victimisation' is a serious charge by an employee against an employer which reflects to a degree, upon subjective attitude of the employer evidenced by certain acts and conduct. The onus of establishing 'victimisation' will be upon the person who alleges it. The charge of 'victimisation' being a serious one, it must be properly and adequately pleaded giving all particulars upon which the charge is based to enable the employer to fully meet them. In other words, the charge must not be vague and indefinite. The act of 'victimisation' being an amalgam of facts relating to acts and conduct, inferences and attitudes, these have to be established by safe and sure evidence. Mere allegations, vague suggestions and insinuations are not enough*".

[93] The Claimant however had failed to plead particulars of the victimisation other than making a general allegation that Charges No. 1 and 2 were inserted in the Show Cause Letter and later in the Domestic Inquiry Notice with the sole purpose to victimise him. However, the Court does not find any element of victimisation by the Company in the conduct of the investigation, inquiry and his subsequent dismissal. The Domestic Inquiry Panel in fact found the Claimant not guilty of Charge No. 1 after it found that there was a gap in the evidence culminating in the eventual purchase of the FOC flight tickets using the Travel Incentive Vouchers for Dato' Roger Hia and his family. Charge No. 2 was altogether withdrawn and it is stated as such in the Domestic Inquiry Notice after the Company accepted his explanation in his Reply to the Show Cause Letter.

[94] Upon analysing the evidence and facts of the case in its entirety, the Court is satisfied and do hereby find that the Claimant's dismissal by the Company was done with just cause and excuse.

VI. Conclusion

[95] The Company's action in terminating the Claimant's employment was done with just cause and excuse.

[96] The Claimant's case is hereby dismissed.

HANDED DOWN AND DATED THIS 10TH DAY OF JULY 2020.

-Signed-

(PARAMALINGAM A/L J. DORAISAMY)
CHAIRMAN
INDUSTRIAL COURT, MALAYSIA
KUALA LUMPUR