**INDUSTRIAL COURT OF MALAYSIA**

**CASE NO: 20/4-91/20**

Between

**ANDREW KEN SEAN LEE**

And

**JETSPREE SDN. BHD.**

**AWARD NO.: 1770 OF 2022**

| | | |
|---|---|---|
| **Before** | : | Y.A. PUAN RAJESWARI KARUPIAH |
| **Venue** | : | Industrial Court Malaysia,<br>Kuala Lumpur |
| **Date of Reference** | : | 17.12.2019 |
| **Date(s) of Mention** | : | 07.02.2020, 05.03.2021, 07.07.2021, 08.11.2021, 09.02.2022 & 11.05.2022 |
| **Date(s) of Hearing** | : | 26.04.2021, 27.04.2021 & 16.03.2022 |
| **Representation** | : | Mr. Adam Thye Yong Wei & Ms. Corrinne Chin May Suet<br>Messrs Skrine<br>Counsel for the Claimant<br><br>Mr. Alwin Rajasurya & Ms. Suzanne Arockiaraj<br>Messrs Ramesh Dipendra Jeremiah Law<br>Counsel for the Company |

## REFERENCE

This is an order of reference dated 17.12.2019 by the Honourable Minister of Human Resources, Malaysia pursuant to **Section 20(3)** of the Industrial Relations Act 1967 ("the Act") for an award in respect of a dispute arising out of the claim of unjust dismissal by **Andrew Ken Sean Lee** ("the Claimant") against his employer, **Jetspree Sdn. Bhd.** ("the Company) on 31.05.2019.

## BRIEF FACTS

**[1]** By a contract of employment dated 14.02.2018, the Claimant commenced his employment at Tropicana Technology Sdn. Bhd. as Deputy General Manager, Internet Business effective from 02.04.2018.

**[2]** Vide another contract of employment dated 21.05.2018, the Claimant accepted continuous employment with the Company in the same role.

**[3]** The Claimant was confirmed as Deputy General Manager, Internet Business effective from 01.09.2018.

**[4]** On 27.05.2019, the Claimant was required to attend a meeting on by Alexander Le, the Executive Director of the Company, who is his immediate superior. During the meeting, the Claimant was requested to tender his resignation from the Company in order to part in an amicable way or if not, a formal inquiry will be conducted against him on allegation of misconduct.

**[5]** The Claimant requested for time to consider the options he had including a planned handover of his responsibilities.

**[6]** On 29.05.2019 the Claimant met again with the Alex Le wherein he was told that Dato Dickson Tan (a member of the Company's top management) wanted the Claimant to resign immediately. Following this meeting, the Claimant tendered his resignation from the Company vide an email (page 27 CLB). Through his e-mail, the Claimant informed the Company that he is leaving with one month notice on 29.06.2019.

**[7]** On 30.05.2019, vide a WhatsApp message (page 30-32 CLB), the Claimant's superior requested the Claimant to provide either a backdated resignation letter reflecting 31.05.2018 as his last date of service or seek an early release with no claims for payment in lieu of notice. The Claimant did not agree to either of these options which were presented to him by his superior.

**[8]** By a letter dated 31.05.2019, the Company proceeded to terminate the Claimant's employment with immediate effect, setting out 5 allegations of misconduct against the Claimant.

**[9]** Being dissatisfied with the Company's decision, the Claimant filed a representation under Section 20 of the Industrial Relations Act 1967 ("the Act") for unfair dismissal.

**[10]** At the time of his dismissal, the Claimant's last drawn salary was RM30,000.00 per month which included a fixed monthly car petrol allowance of RM2,000.00 per month.

**THE FUNCTION OF THE INDUSTRIAL COURT**

**[11]** In the Federal Court decision of ***WONG YUEN HOCK V. SYARIKAT HONG LEONG ASSURANCE SDN. BHD. & ANOTHER APPEAL [1995] 1 MLRA 412*** it was held that:

> *"On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under s. 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."*

**[12]** Thus, the function of the Industrial Court in a Section 20(3) Industrial Relations Act 1967 reference is twofold, which is to determine: -

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

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

**[13]** In the case of ***GOON KWEE PHOY V. J.P. COATS [1981] 2 MLJ***, his Lordship Justice Raja Azlan Shah C.J. speaking for the Federal Court held: -

> *"We do not see any material difference between a termination of the contract of employment by the notice and a unilateral dismissal of a*

*summary nature. The effect is the same and the result must be the same. 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."*

*[emphasis ours]*

**[14]** The burden of proof in an unfair dismissal claim lies on the employer who has to prove on a balance of probabilities that the employee had committed the acts of misconduct that he is accused of; (***STAMFORD EXECUTIVE CENTRE V. DHARSINI GANESON [1986] ILR 101*****; [1985] 2 MELR 245**).

**THE ALLEGATIONS**

**[15] Five allegations of misconduct were stated by the Company in its termination letter dated 31.05.2019: -**

*i. Being guilty of any conduct prejudicial to the interest and reputation of the Company (Clause 26 In-house rules & regulations) and Acting in manner which may have subversive effect on the department in which*

*one is posted, or towards the Company (Clause 36 of the In-house rules & regulations).*

*Upon investigations, it has been found that you have explicitly provoked a member of your staff to resign. As the tech team leader, you are accountable to ensure the morale as well as stability or the harmony of the team is maintained upon the recent resignation of an employee in order to ensure the continued success of the Company. Instead, you have opted to provoke the only engineering employee left into resigning.*

ii. *Acting or behaving in a manner which may be detrimental to the interest of the Company or which may bring discredit to the good name of the Company (Clause 37 of the In-house rules & regulations).*

*Upon investigations, it has been found that you have wilfully disobeyed the rules and regulations of the Company as well as refusing to engage in the team culture. As an employee of the Company, you are to behave in a professional manner in line with the interest of the Company. Instead, you have opted to incite to the other employees that the Head of Company is incapable of leading the Company. Your actions to impair your superior's authority, position or dignity tantamount to a serious misconduct on your part.*

iii. *Failing to observe hours of duty (Clause 3 of the In-house rules & regulations) and Failing to report for duty without reasonable cause or excuse (Clause 6 of the In-house rules & regulations).*

*You have been found to have failed to observe your hours of duty in breach of your contract of employment dated 14 February 2018 21 COB-1, p. 21. 22 COB-1, p. 22. 22 with the Company which contains a clause*

*on your working hours, namely under the First Schedule, Section 1 which states as follows:-*

*"Your working hours shall be as follows: - Monday – Friday: 9:00AM to 6:00PM". You have acceded to the contents of the said schedule which requires you to be on duty according to the aforementioned hours. However, it is well documented that you have consistently failed to arrive on time either for work or for meetings without providing any valid reasons for your lateness.*

*Furthermore, you have consistently failed to inform your immediate superior promptly and provide proof for your absence. You are in breach of the Company's policy which requires proof or documentation to substantiate your absence without leave. Your misconducts has led to an official email sent to all employees of the Company on adhering to the agreed working hours.*

iv. *Wilful insubordination or disobedience of the lawful or reasonable order of any superior officer of the Company (Clause 25 of the In-house rules & regulations) and Acting or interfering with the work allocated to any of the employees (Clause 22 of the In-house rules & regulations). You have been found to have wilfully insubordinate the lawful and reasonable order of a superior officer in the company whom has explicitly instructed you to complete a messaging feature for the Company by citing unreasonable technical reasons and delay tactics. Your actions interfered with the work allocated to the employees of the Company and impaired relationships with the main investors. Furthermore, it was reported through witness statements that your inability to manage and cooperate with the members of your team has*

*resulted in resignations which is detrimental to the interest of the Company.*

*v. Laziness and shirking of duties (Clause 1 of the in-house rules & regulations).*

*You have been found to have failed to attend countless team meetings despite multiple reminders and a company-wide email on working hours.*

**[16]** Even though 5 allegations were mentioned in the letter of termination, in the proceedings before us, the Company had in its Statement in Reply as well as Witnesses Statements relied on three broad accusations against the Claimant, as testified by the company's 3rd witness, Philip Yaw Chuek Hoe (COW-3), who is the Deputy General Manager of the Human Resources Department of Palmgold Corporation Sdn.Bhd, who represented the Company's management:

a) Acting or behaving in a manner which is detrimental to the interest of the Company and reputation of the Company;
b) Failing to report for duty without reasonable cause and excuse; and
c) Wilful insubordination or disobedience of the lawful or reasonable order of a superior officer of the Company.

**[17]** Thus it appears that the Company was departing from adherence to its charge sheet which it formulated to dismiss the Claimant. It is trite law that the charge sheet forms the basis or charter of disciplinary action instituted by an employer and the importance of the same cannot be over-emphasized. Being an employer who is part of a conglomerate, the Court believes that the

Company has sufficient resources and capacity to conduct proper investigations and prefer clear charges against an employee before it decides to exercise the power of discipline against that employee. This approach would have ensured that the Company adhered to the allegations stated in the termination letter that was issued to the Claimant.

**[18]** In **MARITIME INTELLIGENCE SDN BHD V TAN AH GEK [2021] 10 CLJ 663,** the Federal Court has given the following interpretation of section 20 of the IRA 1967 which is binding on this Court:-

> *"[46] By virtue of the clear statutory content of section 20(3), the function of the Industrial Court is tied inextricably to the representations of the workman of a dismissal without just cause or excuse. Those representations are made by the workman at the time of his dismissal, for reasons which he feels are without any reasoned basis or for reasons that are insufficient to warrant a dismissal. The focus of the enquiry of the Industrial Court under section 20(3) of the Act, is therefore premised on matters and events as they occurred at the time of the dismissal. The reasons operating in the mind of the employer, which preceded the decision to terminate, and resulted in the decision to terminate, comprise the matters to be considered and adjudicated upon by the Industrial Court under section 20(3).*
>
> *…*
>
> *[48] The term 'representations' therefore ties the jurisdiction of the Industrial Court down to the reasons, factors or events operating in the mind of the employer at the time of dismissal resulting in the representation."*
>
> *(Emphasis ours)*

**[19]** According to the pronouncement made by the Federal Court, this Court will focus its enquiry on matters and events as they occurred at the time of dismissal and the factors operating in the mind of the employer at the time of the Claimant's dismissal. Consequently, the Court will scrutinize each of the allegations set out in the termination letter dated 31.05.2019, as these formed the reason(s) for the Claimant's termination from the Company.

**[20]** It is also observed that the Company did not issue the Claimant with a show cause letter or convene a domestic inquiry before his dismissal. Although, this action of the Company could be deemed as a prima facie breach of the rules of natural justice, the same is however curable. For the hearing before this Court shall be deemed as a denovo hearing. This is based on the principles enunciated by the Federal Court in ***Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd.*** *(supra)* where it was held as follows:

> *"The Supreme Court of Malaysia in the Dreamland case said: In the Motipur case Wanchoo J said:*
>
> > *If the inquiry is defective or if no inquiry had been held as required... **the entire case would be open before the tribunal and the employer would have to justify on facts as well as that its order of dismissal or discharge was proper"***
> >
> > *(emphasis ours)*

**[21]** According to the principles set out above, we will now look at each of the allegations that led to the Claimant's dismissal and evaluate the evidence that was presented in the Court by both parties.

**FIRST ALLEGATION**

**[22]** *Being guilty of any conduct prejudicial to the interest and reputation of the Company (Clause 26 In-house rules & regulations) and Acting in manner which may have subversive effect on the department in which one is posted, or towards the Company (Clause 36 of the In-house rules & regulations).*

*Upon investigations, it has been found that you have explicitly provoked a member of your staff to resign. As the tech team leader, you are accountable to ensure the morale as well as stability or the harmony of the team is maintained upon the recent resignation of an employee in order to ensure the continued success of the Company. Instead,* ***you have opted to provoke the only engineering employee left into resigning****.*

**[23]** The accusation in this allegation simply put is that the Claimant had provoked a member (engineering employee) of his staff into resigning from the Company. It is not stated in the charge who that member of staff is and how the Claimant had 'provoked' the said staff into resigning from the Company.

**[24]** In its Statement in Reply, the Company alleged that the Claimant has explicitly encouraged, provoked or threatened 2 members of his staff namely, Lim Mei Wei ("COW-1") and Samuel Lee Chee Hao ("COW-2") to resign.

**[25]** COW-1 testified that the Claimant had a conversation with her on 17.05.2019 wherein the Claimant had asked her to make up her mind regarding her resignation from the Company and prior to then the Claimant had a conversation with COW-1 in the car on 26.04.2019, when she was given a ride by the Claimant to KL Sentral. According to COW-1's written statement dated 24.05.2019 (pages 23-26 COB-1), she was feeling upset on that day over something and when the Claimant questioned her as to what was upsetting her, she had responded that she felt like she did not learn much in the past 1 year and 4 months. From what she understood from the Claimant's reply is that she should move to another company for her personal growth.

**[26]** In her written statement (page 24 COB-1), COW-1 further stated that she had tendered her resignation on 14.05.2019 as she wanted ownership of Product at Jetspree and the Claimant agreed to let COW-1 have the Product ownership with conditions, but she could not agree to those conditions. Subsequently, on 17.05.2019, COW-1 and the Claimant had a conversation as follows:-

> Andrew: Have you decided?
>
> Mei Wei: Not yet
>
> Andrew: When are you going to decide? Because it's going to affect the sprint
>
> Mei Wei: Next week
>
> Andrew: No, you have 30 seconds to decide now. Make up your mind now.
>
> Andrew: I'll decide for you. No, you are not staying. Pack up and leave.

In her statement COW-1 had further remarked; ***"I didn't take him seriously because I cant't tell whether he is serious or not. I wasn't even sure of his intention…"***

**[27]** The Court noted the casualness of the conversation and the fact that COW-1 could not tell if the Claimant uttered those words seriously. In Court too COW-1 testified that she did not take the Claimant seriously over his utterances to her on 17.05.2019. The Court noted that COW-1 did not resign from the Company as a result of what the Claimant has said or did. COW-1 confirmed too that her eventual resignation from the Company (5 months after the Claimant was terminated from his employment) was not caused by the Claimant.

**[28]** COW-1 testified that she left the Company approximately 5 months after the Claimant's dismissal, for her own reasons. COW-1 stated under cross-examination that the Claimant did not force her to resign from the Company at any time. In fact, COW-1 had agreed during her cross-examination that she had in the past resigned multiple times and had retracted her resignation letters amongst others on the Claimant's persuasion.

**[29]** The Company also relied on COW-2's testimony to prove the first allegation. Samuel Lee had joined the Company as a Senior Developer on 04.04.2016 and is still employed by the Company. It was COW-2's testimony that the Claimant had on an occasion that they were lunching at Rakuzen talked about how much engineers can make and hinted that there are better opportunities available in the market. According to COW-2, the Claimant had

said to him that he was waiting for his bonus before he leaves the Company and that he was worried for his team. On 16.05.2019, the Claimant had a chat with COW-2 wherein he asked COW-2, "I have dropped you a lot of hints and why haven't you left yet?" Further, according to COW-2, the Claimant had emphasized that COW-2 should look out for his family and himself.

**[30]** The Claimant meanwhile testified that COW-1 was one of his subordinates in the Company and she had attempted to resign multiple times before May 2019. However, COW-1 always retracted her resignation notices due to the Claimant's efforts in convincing her to stay on in the Company. In May 2019, COW-1 again tried to resign from the Company and he once more discussed the possible retraction of her resignation but she did not agree to the Claimant's proposed terms. Thus, the Claimant had responded to COW-1 in a manner where he attempted to use reverse psychology on COW-1.

**[31]** With regards to COW-2, Claimant testified that COW-2 was a subordinate of his. He had general conversations with COW-2 regarding career growth but he did not force or provoke or threaten COW-2 to resign from the Company. According to the Claimant, the conversation which took place on 16.05.2019 was a casual chat with COW-2 touching on various topics. The conversation took place in the presence of another subordinate of the Claimant named Kodjo Desire Afewou. The Claimant denied that he provoked or threatened COW-2 to resign. Although, he spoke to COW-2 about career growth and COW-2's well-being, the Claimant did not ask COW-2 to resign from the Company. According to the Claimant, COW-2 had never decided to resign from the Company.

**[32]** The Court observes that COW-2 remains employed by the Company whilst COW-1 did not leave the Company for almost half-year after the Claimant's termination from the Company. Thus, it is unclear to the Court as who is the mysterious engineering employee who had been provoked by the Claimant who was at the material time the "only engineering employee left, into resigning" as stated in the Company's termination letter. Additionally, the Court notes that the allegation refers to a single member of staff whereas the Company's case before the Court is that the Claimant had provoked or threatened two of his staff namely COW-1 and COW-2.

**[33]** Based on the evidence presented in Court we do not find that the Claimant had explicitly provoked any member of his staff to resign as alleged. The Claimant had not threatened either COW-1 or COW-2 into resigning from the Company. The Court therefore holds that the Company has failed to establish this allegation in a cogent and concrete manner.

**[34]** It is noteworthy that both COW-1 and COW-2 had purportedly given written statements to the Company even prior to the Claimant's termination. If the Company believed that these allegations to be true and if the matter was deemed serious, the Company would have named COW-1 and COW-2 in its letter of dismissal. The Company would have unhesitatingly issued the Claimant with a show cause letter to explain himself. This would have been consistent with the Company's in-house disciplinary rules which expressly provide that an employee will be given the opportunity to state his own case before any disciplinary action is taken against him (page 57 COB-3). However, that was not what happened in this case.

**[35]** The fact that the Company chose not to name the employee(s) in question in its termination letter raises doubt in our mind whether COW-1 and COW-2 were the employee in question. It is notable that not only the names of COW-1 and COW-2 but also the occasions or dates when the Claimant had provoked his staff member to resign are not stated in the termination letter. The least that the Company could do in the circumstances is to act as a reasonable employer would, that is to set out the grounds for the Claimant's dismissal in a plain and transparent fashion, so that the Claimant is not left guessing about the misdeed that he is alleged to have committed. The Court can only conclude that the statements of COW-1 and COW-2 and their evidence is an afterthought on the Company's part. For these stated reasons, the Court concludes that the Company has not proven the First Allegation set out in the Claimant's dismissal letter.

**SECOND ALLEGATION**

**[36]** *Acting or behaving in a manner which may be detrimental to the interest of the Company or which may bring discredit to the good name of the Company (Clause 37 of the In-house rules & regulations).*

*Upon investigations, it has been found that you have willfully disobeyed the rules and regulations of the Company as well as refusing to engage in the team culture. As an employee of the Company, you are to behave in a professional manner in line with the interest of the Company. Instead, you have opted to incite to the other employees that the Head of Company is incapable of leading the Company. Your actions to impair your superior's authority, position or dignity tantamount to a serious misconduct on your part.*

**[37]** In this charge the Company has alleged that the Claimant has disobeyed the rules and regulations of the Company and refused to engage in the team culture, failed to act in a professional manner and that he has opted to incite the other employees that the Head of the Company is incapable of leading the Company.

**[38]** Again, the Court is perplexed by the lack of material particulars in the termination letter. Although, the allegation is pleaded in Paragraph 16 and 17 of the Company's Statement in Reply, the Company did not produce any direct evidence of the Claimant's misconduct. Instead, COW-3 in his Witness Statement (Exhibit COWS-3) made some vague references as to how the Claimant had failed to demonstrate his leadership qualities. The evidence of COW-3 was found to be unreliable as he only started to manage the Company's Human Resources from June 2020. There was lack of cogent evidence adduced by the Company in support of COW-3's statement. The alleged feedback forms pleaded in the Company's Statement in Reply remains as hearsay evidence since none of the employees (who is said to have given the feedback) were called to testify before the Court. Additionally, COW-3 did not even know who had completed these feedback forms as he was not responsible for the Human Resource Management of the Company at that time. The feedback forms too shed no light as to how the Claimant had impaired his superior's authority, position or dignity which tantamount to serious misconduct as alleged by the Company.

**[39]** As a result of the Company's failure to adduce evidence on the second charge, the Court is left with no choice but to conclude that the Company's second allegation against the Claimant is without basis.

**THIRD ALLEGATION**

**[40]** *Failing to observe hours of duty (Clause 3 of the In-house rules & regulations) and Failing to report for duty without reasonable cause or excuse (Clause 6 of the In-house rules & regulations).*

*You have been found to have failed to observe your hours of duty in breach of your contract of employment dated 14 February 2018 21 COB-1, p. 21. 22 COB-1, p. 22. 22 with the Company which contains a clause on your working hours, namely under the First Schedule, Section 1 which states as follows: -*

*"Your working hours shall be as follows: - Monday – Friday: 9:00AM to 6:00PM". You have acceded to the contents of the said schedule which requires you to be on duty according to the aforementioned hours. However, it is well documented that you have consistently failed to arrive on time either for work or for meetings without providing any valid reasons for your lateness. Furthermore, you have consistently failed to inform your immediate superior promptly and provide proof for your absence. You are in breach of the Company's policy which requires proof or documentation to substantiate your absence without leave. Your misconducts has led to an official email sent to all employees of the Company on adhering to the agreed working hours.*

**[41]** The accusation in this charge is that the Claimant was a habitual late comer who failed to observe the Company's working hours and had failed to report for duty or meetings punctually and had not informed his immediate superior promptly or provided proof for his absence.

**[42]** The Claimant's immediate superior at the material time is Alexander Le. Alex Le was not called as a witness by the Company. Therefore, the Court

cannot ascertain if the allegations made against the Claimant is true. The Court took note that the incidences of the alleged late coming by the Claimant were not listed in the Company's termination letter dated 31.05.2019. If there is evidence that the Claimant was a late comer, then the said incidences could have been simply set out in a show cause letter to the Claimant to provide him with an opportunity to explain his late-coming in order for the Company to consider whether the Claimant's explanations are acceptable or not. The said incidences could have been included in the termination letter as well. However, in this case, the Company chose to narrate the alleged incidences in its Statement in Reply that was filed in Court on 20.03.2020.

**[43]** The Court notes that in the absence of the Claimant's superior at the material time and in the absence of any concrete evidence such as attendance records, reprimands or other formal communication that was issued by either Alex Le or the Company's Human Resources to the Claimant, the Court is unable to draw a conclusion that the Claimant was a habitual late comer as accused by the Company. The Court further noted that the Company had given a salary increment to the Claimant on 19.10.2018 and he was then confirmed in his position on 27.11.2018. In his confirmation letter, the Company had commended about the Claimant's level of commitment towards his job and the Company. The Claimant was thereafter paid a performance bonus that was equivalent to 2 months of his salary on 16.01.2019 and again the Company commended the Claimant for his commitment and dedication towards the growth of the Company.

**[44]** The Claimant on the other hand has stated that the Company had given him flexible hours and he did work both from home and the office. It is the

Claimant's testimony that he was free to plan his workday schedule and he was not constrained by the Company's fixed hours. According to the Claimant, this flexibility was given to him by Alex Le after a discussion.

**[45]** Evidence of COW-1 and COW-2 as regards this allegation is not convincing to the Court first and foremost because the Claimant was their superior and he did not report to them. They are in no position to attest to the Claimant's working hours in the Company including any flexible arrangement that he may have had with his superior. Given COW-3's testimony that he only started to manage the Human Resources of the Company in June 2020, the Court cannot place emphasis on COW-3's testimony that the Claimant was either constantly absent or late for work. It appears to be a conclusion made by COW-3 based entirely on phone chats between Alex Le and the Claimant. As can be seen the screenshot of the conversation at page 54 COB-2 on 01.06.2018, and the conversation on 12.07.2018 at page 38 COB-1 do not prove the Company's accusation. Alex Le did not reprimand the Claimant in these chats. The fact remains that the Claimant was in the Company's good books until January 2019 as demonstrated by his salary adjustment on 19.10.2018, confirmation of employment on 27.11.2018 and bonus on 16.01.2019. Surely, this is not how a Company would treat a habitual absentee. Moving on to the screenshot of conversations which appears on pages 44 to 48, there is no tangible proof as to who is the maker or with who Andrew Le was in communication with. In the absence of reliable proof or direct evidence from witnesses, the Court is hesitant to place weight on the same.

**[46]** In addition, there is ample evidence before this Court that the relationship between Alex Le and the Claimant had soured by April 2019 and

the working relationship between them became unhealthy. Therefore, the Court has to apply abundance of precaution to the purported chat messages tendered in evidence by the Company at pages 44 to 48.

**[47]** According to COW-3, the Company had issued an official e-mail to all employees of the Company on 17.04.2019 on adherence to the agreed working hours. The Court finds that the e-mail did not support COW-3's testimony since the e-mail in question stated that; ***"Alex highlighted that our team should be at least be in the office to work from 10am to 7pm or 9am to 6pm, or it would great if you can stay and work for longer hours"***. The evidence given by COW-3 in COWS-3 is that the Claimant was to strictly adhere to the working hours of 9.00am to 6.00pm as stated out in his contract of employment, which again is in direct contradiction with the contents of the e-mail that was issued by the Company on 17.04.2019.

**[48]** The Court therefore finds that the Company has failed to produce cogent or convincing evidence that the Claimant was a late comer or had missed meetings as alleged in charge 3 of the termination letter.

**FOURTH ALLEGATION**

**[49]** *Wilful insubordination or disobedience of the lawful or reasonable order of any superior officer of the Company (Clause 25 of the In-house rules & regulations) and Acting or interfering with the work allocated to any of the employees (Clause 22 of the In-house rules & regulations).*

*You have been found to have wilfully insubordinate the lawful and reasonable order of a superior officer in the company whom has explicitly instructed you*

*to complete a messaging feature for the Company by citing unreasonable technical reasons and delay tactics. Your actions interfered with the work allocated to the employees of the Company and impaired relationships with the main investors. Furthermore, it was reported through witness statements that your inability to manage and cooperate with the members of your team has resulted in resignations which is detrimental to the interest of the Company.*

**[50]** The Company vide this charge had alleged that the Claimant had been wilfully insubordinate towards the reasonable order of a superior officer. Even though the superior officer was not named in the letter of termination, the Company has in its Statement in Reply at page 10 paragraphs 25 and 26 stated that the Claimant has wilfully disobeyed the directives from Dato' Dickson Tan to complete a messaging feature for the Company. The said instructions were allegedly given to the Claimant in December 2018. According to the termination letter that was issued by the Company, the Claimant had disobeyed the instructions of Dato' Dickson Tan citing "unreasonable technical reasons" and "delay tactics".

**[51]** Even though Dato' Dickson Tan would be the person who has personal knowledge about the allegation, the Company chose not to produce him as a witness to prove this allegation. Meanwhile, COW-3 in his under cross-examination stated that he could not provide an answer as to what *"unreasonable technical reasons"* or *"delay tactics"* the Claimant had cited to the Company. When pressed to explain his answer to question 14 in COWS-3, COW-3 could only state that his witness statement (Exhibit COWS-3) was drafted by his predecessor. When asked what instructions Dato' Dickson had given to the Claimant, COW-3 was unsure about it. At the same time, COW-3

agreed that there was no mention made about the messaging feature in the allegation contained in the Company's termination letter. COW-3 was also unaware that the deadline for completion of the messaging feature was on 01.04.2019 and that the Claimant had completed the said task.

**[52]** On this allegation, the Claimant testified that he was never wilfully insubordinate towards the instructions of Dato' Dickson Tan or Alex Le. According to the Claimant, the decision to implement the messaging feature was made in or around March 2019 and he was informed by Alex Le that the messaging feature had to be completed around 01.04.2019, on Dato Dickson's instructions. The Claimant did complete the messaging feature as instructed. Even though COW-3 attempted to raise page 50 of COB-1 as proof of the Claimant's purported insubordination, under cross-examination he admitted that the said conversation between Alex Le and the Claimant made no reference to the messaging feature and the said conversation does not state anything about the instructions given by Dato' Dickson to the Claimant.

**[53]** Based on the evidence adduced before this Court, the Court finds that the Charge 4 is not substantiated at all and the Court thus finds the Claimant not guilty of this allegation.

**FIFTH ALLEGATION**

**[54]** *Laziness and shirking of duties (Clause 1 of the in-house rules & regulations).*

*You have been found to have failed to attend countless team meetings despite multiple reminders and a company-wide email on working hours.*

**[55]** Pertaining to this charge, the Court noted that the Company did not per se lead evidence on this charge. Furthermore, COW-3 had under cross-examination agreed that the Company has abandoned this allegation.

**[56]** The Court thus concludes that the Company has no proof whatsoever as to the fifth allegation levelled against the Claimant.

**CONCLUSION**

**[57]** Based on the totality of the evidence before the Court, the Court finds that the misconduct which the Claimant has been accused of by the Company has not been proven. The Court therefore finds that the Claimant is not guilty of these alleged acts of misconduct. Accordingly, the Court holds that the Claimant's dismissal by the Company on 31.05.2019 is without just cause or excuse.

**THE REMEDY**

**[58]** The Claimant has served the Company from 02.04.2018 until his termination on 31.05.2019. In his final months in the Company, the Claimant's relationship with his superiors appears to have deteriorated. It is also in evidence that the Claimant has started his own business from January 2022. As such, the Court does not think that reinstatement would be an appropriate remedy in this case. The Court will therefore award the Claimant salary of 1

month in lieu of his completed year's of service. As the Claimant's last drawn salary is RM28,000.00 per month with fixed petrol allowance of RM2,000.00 per month, this sum will be equivalent to RM30,000.00.

**[59]** It is the norm of the Industrial Court to award backwages to the unjustly dismissed workman. Such backwages is intended to compensate the Claimant for loss of income as a result of the unjust dismissal and this is subject to a maximum of 24 months prescribed in the second Schedule to the IRA 1967. Such backwages are however determined by the Court and may vary from case to case depending on the pleaded facts, the evidence and the circumstances of each case. The Court in this case takes note of the fact that due to the deterioration in his relationship with his immediate superiors, the Claimant had tendered his resignation from the Company on 29.05.2019 and his last date of service would have been on 29.06.2019. The Company however intercepted the Claimant's notice period with its decision to terminate the Claimant with effect from 31.05.2019. In its letter of termination, the Company made no reference to the Claimant's resignation. The Claimant too has said that his resignation was involuntary due to the pressure that was exerted on him by Alex Le and Dato' Dickson Tan, which is evidenced via the WhatsApp chats at pages 30 to 31 of CLB. The Claimant's testimony as regards the events that led to his resignation and termination from the Company was uncontroverted.

**[60]** Although, the Claimant's resignation may have been caused by his deteriorating relationship, the Court considers that due to the Claimant's level of seniority, he would have had taken the decision to resign only after giving the same adequate thought and upon weighing out his options vis-à-vis his

future career opportunities. This is also probably why the Claimant had not alluded to the pressure from his superiors in the resignation notice.

**[61]** At the same time, the Court is also mindful of the fact that the Company had subjected the Claimant to a summary dismissal on five allegations without giving him a chance to defend himself. The decision of the Company appears to have been brought about by the Claimant's refusal to backdate his notice of resignation or seek an early release thereby waiving his notice period of 1 month. The reaction of the Company in this manner has brought about the claim before this Court and the Court will have to consider the impact of the Company's decision on the Claimant's career record and his future employment, if any. Based on these considerations, the Court is of the considered view that the backwages in this case should not be limited to the period of the Claimant's resignation notice as submitted by the Company. The Court agrees with the Claimant's Counsel in this respect that the Company's position is inconsistent. The Company cannot dismiss the Claimant and yet take the position that the Claimant is at the same time bound by his resignation notice. The Court finds that the Company's conduct effectively supervened the notice of resignation that was tendered by the Claimant and he is no longer bound by his resignation notice, as the said notice was clearly rejected by the Company when the Company chose to override the resignation notice by summarily dismissing the Claimant.

**[62]** Having regard to the above stated factors, the Court finds that backwages of 6 months is an appropriate remedy in this case. The total backwages payable by the Company shall be 6 x RM30,000.00 = RM180,000.00.

**[63]** The Court therefore orders the Company to pay the following to the Claimant:-

Backwages

| | | |
|---|---|---|
| (i) | RM30,000.00 × 6 months | RM 180,000.00 |

Compensation *In Lieu* Of Reinstatement

| | | |
|---|---|---|
| (i) | RM30,000.00 × 1 month | RM 30,000.00 |
| | **Total** | **RM 210,000.00** |

**[64]** The Court orders that the Company pays the Claimant through his solicitors Messrs Skrine, the sum of **Ringgit Malaysia Two Hundred Ten Thousand Only** subject to statutory deductions that are applicable, within 30 days from the date of this Award.

**HANDED DOWN AND DATED THIS 10th DAY OF AUGUST 2022**

*-signed-*

**RAJESWARI KARUPIAH**
**CHAIRMAN**
**INDUSTRIAL COURT MALAYSIA**
**KUALA LUMPUR**