INDUSTRIAL COURT OF MALAYSIA

CASE NO: 4/4-540/18

BETWEEN

RAJARATNAM A/L MARIMUTHU @ NURUTHU

AND

UMW TOYOTA MOTOR SDN. BHD.

AWARD NO: 451 OF 2019

BEFORE	:	**Y.A. TUAN AUGUSTINE ANTHONY Chairman**
VENUE	:	Industrial Court, Kuala Lumpur
DATE OF REFERENCE	:	27.12.2017.
DATE OF RECEIPT OF ORDER OF REFERENCE	:	15.01.2018.
DATES OF MENTION	:	28.02.2018, 12.03.2018, 26.03.2018, 19.04.2018, 04.05.2018, 16.05.2018, 25.05.2018, 13.06.2018, 13.07.2018, 27.07.2018.
DATES OF HEARING	:	06.08.2018 & 17.08.2018.
REPRESENTATION	:	Mr. Balasubramaniam and Cik Siti Nurdiyana binti Mohd Sharif of National Union of Commercial Workers (NUCW), representative for the Claimant. Ms. S. Sivagami and Ms. Vinhothinii Rajoo of Messrs Zaid Ibrahim, Counsel for the Company.

THE REFERENCE

This is an order of reference dated 27.12.2017 by the Honourable Minister of Human Resources pursuant to section 20(3) of the Industrial Relations Act 1967 arising out of the alleged dismissal of **Rajaratnam a/l Marimuthu @ Nuruthu** ("Claimant") by **UMW Toyota Motor Sdn. Bhd.** ("Company") on 28.07.2017.

AWARD

[1] The parties in this matter filed their respective written submissions on the 01.10.2018 (Claimant's Submissions), 05.10.2018 (Company's Submissions), and 29.10.2018 (Company's Written Submissions in Reply).

[2] This Court considered all the notes of proceedings in this matter, documents and the cause papers in handing down this Award namely:-

(i) The Claimant's Statement of Case dated 26.03.2018;

(ii) The Company's Statement in Reply dated 04.06.2018;

(iii) The Claimant's Rejoinder dated 13.06.2018;

(iv) The Claimant's Bundle of Documents – CLB1;

(v) The Company's Bundle of Documents – COB1 & COB2;

(vi) Claimant's Witness Statement – CLW1-WS;

(vii) Company's Witness Statement – COW1-WS(1) & COW1-WS(2) (Ammar Affandi bin Khalid Sham); and

(viii) Company's Witness Statement – COW2-WS (Lee Yong Yew).

INTRODUCTION

[3] Rajaratnam a/l Marimuthu @ Nuruthu, the Claimant in this case commenced employment with the Company, UMW Toyota Motor Sdn. Bhd. on the 01.03.1997 as a technician with the monthly salary of RM600.00 and has served the Company for more than 20 years as a technician before he was dismissed on grounds that he had committed misconducts deemed serious by the Company. The Claimant's last drawn salary was RM3,200.00.

[4] On the 03.04.2017, based on a random spot check conducted by the Company representative it was discovered that nine employees including the Claimant had stored what was purported to be Company's property in their lockers which the Company claims to be contrary to the Company's policy. The Company is of the view that this is a serious misconduct.

[5] Upon the instruction of the Company, the Claimant provided written explanation on the 11.04.2017 with regard to the findings of the spot check. Dissatisfied with the explanation of the Claimant, the Company issued the Claimant a show cause letter dated 25.04.2017. The Claimant denied the allegation contained in the show cause letter by letter dated 02.05.2017. Subsequently a Domestic Inquiry (DI) was held against the Claimant on the 08.06.2017 and 09.06.2017 and the Claimant pleaded not guilty to the charges levelled against him. However the Company by letter dated 24.07.2017 acting on the purported findings of the DI Panel found the Claimant guilty and dismissed him from his employment with the Company effective 28.07.2017.

[6] The Claimant now claims that the Company blatantly disregarded the explanation given by the Claimant on all the charges levelled against

him and had victimised the Claimant and now claims that the dismissal from his employment with the Company is without just cause or excuse.

[7] The Claimant gave evidence under oath and remained the sole witness for his case. The Company's evidence on the other hand were led by COW1 (Ammar Affandi bin Khalid Sham, the Industrial Relations Executive assigned to conduct the preliminary investigation) and COW2 (Lee Yong Yew – Customer Services Operation Executive in charge of assisting the manager in the operations of the service centre).

THE COMPANY'S CASE

[8] The Company's case can be summarised as follows:-

(i) The Claimant had kept a gasket and a hose in his locker when he knew or ought to know that keeping used part from customer's vehicle inside the locker without his superior's approval is prohibited according to the Company policy.

(ii) That all these items were kept in the locker for some time without any knowledge of his superiors until this was discovered during the spot check.

(iii) That in the event there are any used parts, these parts should have been returned to the customers unless specific instructions given by the customers to dispose them or if these parts are needed for diagnostic purposes it should have been made known to his superiors.

(iv) That the Claimant had failed to prove that the gasket is his, since no supporting documents or witness presented during the inquiry.

(v) By keeping the parts, the Claimant could have unfairly profited using the Company's properties which will set a bad example to other employees.

THE CLAIMANT'S CASE

[9] The Claimant's case can be summarised as follows:-

(i) The hose found in the locker is the Claimant's which he had bought for his brother who had not claimed it because his brother had gone overseas for employment matters.

(ii) The receipt cannot be produced because it is misplaced.

(iii) The hose found in the locker is meant for diagnostic purposes and for other work related matters and this hose had been kept in the locker with the permission of his superior who knew of this practice.

(iv) There are no written or precise policies of the Company about keeping these items in the locker and the Claimant is unaware of what Company policy that has been breached.

(v) That he was dismissed despite the fact that 7 others who were dismissed together were later reinstated wherein some of those dismissed had kept items which are far greater in value than what the Claimant had kept. This is deemed grossly unfair to the Claimant and amounts to victimisation.

THE ROLE AND FUNCTION OF THIS COURT IN DETERMINING THE DISPUTE BETWEEN THE PARTIES

[10] The role of the Industrial Court under section 20 of the Industrial Relations Act 1967 is succinctly explained in the case ***Milan Auto Sdn.***

Bhd. v. Wong Seh Yen **[1995] 4 CLJ 449**, his Lordship Justice Tan Sri Dato' Haji Mohd Azmi bin Dato' Haji Kamaruddin FCJ delivering the judgment of the Federal Court had the occasion to state the following:-

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

[11] Also in the case of **K A Sanduran Nehru Ratnam v. I-Berhad [2007] 1 CLJ 347** where the Federal Court again reiterated the function of the Industrial Court:-

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

THE BURDEN OF PROOF

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

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

> *"It is 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 and excuse for taking the decision to impose the disciplinary measure of dismissal upon the employee. The just cause must be, either a misconduct, negligence or* ***poor performance*** *based on the facts of the case."*

THE STANDARD OF PROOF

[14] In the case of **Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314** the Court made it clear

that the standard of proof that is required is one that is on the balance of probabilities.

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

THE SHOW CAUSE LETTER

[15] The Company issued a show cause letter dated 25.04.2017 on the following allegations and it was then preferred as the 2 charges during the DI proceedings for the Claimant to answer:-

> *"1. You are alleged to have kept the following items in Attachment A in your locker No. 23 as the items were found when a checking was conducted on 3 April 2017 from 4.45 pm to 5.30 pm whereby you knew or ought to have known that keeping used parts from customer's vehicle inside the locker is prohibited as it is the policy of the Company.*

2. You are alleged to have kept the following items in Attachment A in your locker No. 23 without prior approval from your superior whereby you knew or ought to have known that keeping used parts from customer's vehicle inside the locker is prohibited as per the Company's policy."

THE CLAIMANT'S REPLY TO THE 2 CHARGES BY LETTER DATED 02.05.2017:-

[16] The Claimant maintained the explanation given in the letter dated 02.05.2017 even during the DI proceedings and the explanations are as follows:-

"(i) The item (spare part- gasket worth RM13.70) found in his locker is an item that he had bought for his brother around the period of 2005 and it is not meant to be sold for any reason to anyone. It was not handed over to his brother and it remained in the locker since his brother had gone to a foreign land for employment purposes.

(ii) The used hose (valued approximately RM87.30) was kept for the purposes diagnostic of cars belonging to the Company's customers and it is not for sale."

THE DOMESTIC INQUIRY AND ITS FINDNG

[17] It is the Company's contention that the Claimant was dismissed pursuant to the findings of the DI Panel on the preferred charges against the Claimant.

[18] It is this Court's view that whenever a domestic inquiry is conducted by the Company, it must adhere to certain duties imposed upon it to follow the correct procedure and to reach the correct conclusion. The case **Metroplex Administration Sdn. Bhd. v. Mohamed Elias [1998] 5 CLJ 467** is a guide that one must constantly have in contemplation where his lordship Justice Hop Bing J opined:-

"Where a domestic inquiry is held and the rules of natural justice have been applied, the Industrial Court should first consider the adequacy or otherwise of the procedure adopted in the proceedings for the domestic inquiry in order to determine whether the domestic inquiry has applied the correct procedure and reached the correct conclusion having regard

to all the evidence, documentary and oral, adduced at the domestic inquiry. If at the domestic inquiry, the rules of natural justice were properly applied; the employee being given the opportunity to be heard and to present his case; and should a finding be made against the employee based on the evidence which was presented to the domestic inquiry, the Industrial Court ought to consider the finding of the domestic inquiry in order to conclude whether the employee has been dismissed without just cause or excuse".

[19] This Court had taken cognizance that the Company in its best endeavour to accord the Claimant an opportunity to be heard and defend himself against the charges levelled against him, had conducted the domestic inquiry. However this Court is also mindful of the decision of the Court of Appeal that this Court is not bound by the finding of the DI panel whenever this Court is called upon to decide whether the Claimant is dismissed from his employment with just cause or excuse. This Court finds support from the decision of the Court of Appeal in **Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan & Other [1997] 1 CLJ 665** where his Lordship Justice Gopal Sri Ram had the occasion to state the following:-

"The fact that an employer has conducted a domestic inquiry against his workman is, in my judgement, an entirely irrelevant consideration to the

issue whether the latter had been dismissed without just cause or excuse. The findings of a domestic inquiry are not binding upon the Industrial Court which rehears the matter afresh. However, it may take into account the fact that a domestic inquiry had been held when determining whether the particular workman was justly dismissed".

[20] Be that as it may, this Court is guided by the cases stated above namely case **Milan Auto Sdn. Bhd. v. Wong Seh Yen (supra) and Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan & Other (supra)** and will proceed to determine this case and make the appropriate findings based on all the evidence produced in this Court.

THE FINDINGS OF THIS COURT

[21] The two charges levelled against the Claimant state that the Claimant had acted contrary to the policy of the Company. This Court views such an assertion as a clear and direct accusation against the Claimant who must have breached certain defined Company policy based on the ingredients of the charges. One cannot breach or act in violation of a policy which is non-existent in the first place. **(see Adiladha bin Sulaiman v. Mahkamah Perusahaan Malaysia & Anor [2016] 7 MLJ 333.**

[22] COW1 and COW2 in all the evidence adduced before this Court is unable to produce any written Company policy for which the Claimant is said to have acted in breach of. During cross examination of COW1 all he could say is that there is an implied policy that the technicians are told during every morning briefing by the outlet management executive or manager not to keep any parts in the personal locker. The evidence of COW1 is supported by COW2 when COW2 testified that technicians are told that any item that has been paid for by the customers belongs to them and must be returned to them and not kept by the technicians.

[23] It is the Company's case that keeping any items regardless of the reason for which it is kept is a serious misconduct which is in breach of the Company policy. If that is the case this Court would expect the Company to produce some materials before this Court to substantiate that it was indeed a Company policy of that nature. It would not be enough for the witness to come to Court and say that there is an implied policy as it will not give the technicians/employee the exact nature of the offence or breach that they ought to avoid at all times. Company policies must be clear for every employee to obey and follow and this is necessary to prevent a loose and flimsy policy creation at the whims and fancies of the management that will likely lead to abuse. Based on the evidence of the Company's witnesses all that can be discerned by this

Court is that there is an advice or guidance given to the technicians to avoid keeping the customers' parts in the lockers. It may as well be an important advice or guidance given to the technicians to prevent any accusation of the technicians being accused of misappropriating the Company's or customers' motor vehicle parts and further unfairly profiting from the Company or from the customers of the Company that can have serious ramification on the Company's reputation.

[24] The reasoning of the purported implied policy which is the basis for the 2 charges against the Claimant can be seen from the letter of dismissal dated 24.07.2017 at item (iv) which states that:-

> *"By keeping the parts,* ***you could have*** *unfairly profited using the Company's properties which will set a bad example to other employees as the parts are easily kept somewhere else other than parts store"*

[25] If the Company's accusation against the Claimant is keeping the Company's property and unfairly profiting out of the said property, then it will be good for the Company to formulate a charge to state this in clear and unequivocal manner to allow the Claimant to answer them appropriately. But the reason in item (iv) of the letter dated 24.07.2017 is

nothing but dabbling in guess work and conjecture to dismiss the Claimant without more.

[26] It is for this reason the Company is unwilling and unprepared to accept any of the explanation given by the Claimant why these two items were kept in the locker.

THE FIRST CHARGE

[27] This Court proposes to touch on the reason given by the Claimant to answer the first charge wherein the gasket found in the locker of the Claimant.

[28] The Claimant had given evidence that this gasket belongs to him which he bought for his brother who had not claimed it because he is overseas on employment related matter. There is nothing that was adduced by the Company to show that the Claimant is not telling the truth. The only reason given by the Company is that he is unable to show to the DI Panel or to this Court the receipt for the purchase of this item some 10 years ago. No evidence was produced by the Company that this item is stolen, misappropriated either from the Company or the customers or that it does not belong to the Claimant. It is such a tall

order to expect the Claimant to produce receipts of things purchased more than 10 years ago especially of an item that cost a mere RM13.70. It is not common for a layman to always keep record of every item purchased or acquired.

[29] In the Case of **Overseas Investment Pte. Ltd. v. Anthony William O'Brien & Anor [1988] 2 CLJ (Rep) 82**, His Lordship Justice Mahadev Shankar had this to say:-

> *"The claimant's unchallenged evidence was that she came from a wealthy family. She was a person of independent means before she married the defendant in 1966. Thereafter she had a printing company with an income of about RM1,500 per month. The goods attached had been acquired over a period of 18 years. The only material the plaintiff elicited in cross-examination was, that during the marriage the defendant was also employed but his actual earnings were not known. The point is, that the plaintiff produced no evidence whatsoever of title to the goods in the defendant.*
>
> ***At this juncture I would observe that it must be self-evident that it would be no easy matter for a housewife to produce at the drop of the Sheriff's hat, individual receipts for each item of household furniture acquired over a lifetime of wedlock. If the Registrar's approach is correct, then it behoves every Malaysian housewife to***

beware and immediately start a special file of receipts for household goods".

(emphasis is this Court's)

[30] Thus it can be said here that where one party gives un-contradicted sworn testimony to prove a fact, that evidence must be accepted if there is nothing at the other end to disprove it. This Court rules that based on the available evidence in Court there is no reason for this Court to disbelieve the Claimant that the gasket belongs to him.

THE SECOND CHARGE

[31] On the second charge of keeping the hose, the Claimant had given very satisfactory answers at all time. It must be borne in mind that the Claimant is not just a simple technician who had just started work with the Company. He has to his credit 20 years of experience dealing with car repairs and diagnostic work. To cross examine this Claimant on his capacity to make use of used spare parts/items which are no longer required by customers require great knowledge in automobile repairs and diagnostics work.

[32] Almost all car owners would have encountered at one point, the abilities of mechanics and vehicle technicians in demonstrating or showing their skills in using used spare parts and sometimes even old, second hand unused parts for various diagnostic experience and experiments. This is a common feature that can be seen even in car workshops.

[33] The Claimant was put under intense cross examination on the need to use the hose for various diagnostics purposes and other related car repair works and he was unshaken during the cross examination demonstrating his deep knowledge in matters related to his work. After carefully listening to this Claimant's testimony and scrutinising the same, this Court arrives at an irresistible conclusion that the Claimant had kept this hose for a variety of his work related matters as a technician which was only for the benefit of the Company. The Company cannot on the one hand benefit from the creative and skilful work of the Claimant and at the same time find fault in him for taking the extra effort to satisfy the Company's customers.

[34] The Claimant also gave evidence that the hose was kept by him only after obtaining the permission of his superior who is the service advisor. There is nothing to suggest in the evidence of the Company that

the Claimant cannot act on the advice and permission of the service advisor. And the Claimant was never admonished or reprimanded for keeping the hose in the locker. This Court finds the evidence of COW2 in this regard not very convincing in that the Claimant must report to only those mentioned by this witness when he gave evidence especially when it is the norm for the Claimant's superiors to keep changing by the introduction of new superiors.

[35] Having considered the evidence of all the witnesses on the second charge, this Court is satisfied with the evidence the Claimant had adduced in Court and now makes a finding that the second charge against the Claimant was not proven to the satisfaction of this Court.

[36] There are other unsatisfactory features in the manner the Company had dealt with the Claimant. There were 9 employees of the Company who were initially dismissed for the same perceived misconducts of keeping or storing the Company's property in their locker arising out of the spot check. Some of these employees had even stored items which were far more expensive than what the Claimant's stored parts were, reaching values of up to RM1,000.00. However 7 out of the 9 employees were reinstated based on reasons which were totally unclear and flimsy. And if this is the reason for the reinstatement of the 7

employees and disregarding the Claimant's, then this Court will conclude that this is a case of clear victimization of the Claimant by the Company

[37] COW1 had this to state in in his evidence during cross examination:-

> *"A : 7 reinstated, 2 dismissed.*
>
> *Q : Ignition Coil, RM1,000.00, second hand part value, if you combine both it is only RM100.00 for the Claimant, why reinstate with the value higher?*
>
> *A : Company reinstated based on acceptable reason……..*
>
> *A : **Because of position and reason**."*

[38] Further, this Court is unable to accept the submissions of the learned Counsel for the Company that the dismissal of the Claimant in the circumstances of this case is a justified act. The facts of the case show that the Company had undertaken a course of action in the most unjustified manner in dismissing the Claimant on allegation of misconducts which are vague and unsubstantiated and were venturing into guesswork and conjectures.

[39] It is also the view of this Court based on the evidence before this Court, the Claimant had done no wrong in view of the fact that

the Company itself is not clear about its policy, amongst others and as such the issue of proportionality of punishment is not a matter that this Court needs to deal with even if it means that the Claimant had on occasion had stated that such matters as outline in the 2 charges will not be repeated.

[40] Having considered the totality of the facts of the case, the evidence adduced and by reasons of the established principles of industrial relations and disputes as stated above, this Court finds that the Company had failed to prove on the balance of probabilities the alleged misconducts of the Claimant. And it follows that the Company had failed to prove on the balance of probabilities that the dismissal of the Claimant is with just cause or excuse.

REMEDY

[41] This Court will now deal with the remedy that is suitable for the Claimant in this case.

[42] The Claimant's had served the Company for slightly more than 20 years until his dismissal from employment effective 28.07.2017. The Claimant is a confirmed employee of the Company.

[43] The Claimant, in stating that the dismissal from the employment with the Company is without just cause or excuse, prays to this Court for reinstatement to his former position without any loss of wages, allowance, seniority and privileges. This Court had considered the factual matrix of this case and had further considered all other factors including the time that had lapsed from the date of his dismissal to the date of this Award and the submissions of the Company's counsel with whom this Court is in agreement on the issue of reinstatement. This Court is of the view that reinstatement of the Claimant to the position from which he was dismissed by the Company is not a suitable remedy in this case.

[44] As such the appropriate remedy in the circumstances of this case must be compensation in lieu of reinstatement. The Claimant is also entitled for back wages in line with Section 30(6A) Industrial Relations Act 1967 and the factors specified in the Second Schedule therein which states:-

> *"1. In the event that backwages are to be given, such backwages shall not exceed twenty-four months' backwages from the date of dismissal based on the last-drawn salary of the person who has been dismissed without just cause or excuse;"*

[45] The Claimant's last drawn salary was RM3,200.00.

[46] Equity, good conscience and substantial merits without regard to technicalities and forms remains the central feature and focal point of this Court in arriving at its decision and final order and this principle will be adhered by this Court at all times leading to the final order of this Court.

[47] This Court is further bound by the principle laid down in the case of ***Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor*** **[2001] 3 CLJ 541** where his Lordship Justice Tan Sri Steve Shim CJ (Sabah & Sarawak) in delivering the judgment of the Federal Court opined:-

> *"In our view, it is in line with equity and good conscience that the Industrial Court, in assessing quantum of backwages, should take into account the fact, if established by evidence or admitted, that the workman has been gainfully employed elsewhere after his dismissal. Failure to do so constitutes a jurisdictional error of law. Certiorari will therefore lie to rectify it.* ***Of course, taking into account of such employment after dismissal does not necessarily mean that the Industrial Court has to conduct a mathematical exercise in deduction.*** *What is important is that the Industrial Court, in the exercise*

of its discretion in assessing the quantum of backwages, should take into account all relevant matters including the fact, where it exists, that the workman has been gainfully employed elsewhere after his dismissal. This discretion is in the nature of a decision-making process".

(emphasis is this Court's)

[48] This Court must take into account the post dismissal earnings of the Claimant in order to make an appropriate deduction from the back wages to be awarded. The Claimant had given unchallenged evidence that since the dismissal from employment with the Company, the Claimant is unable to find any suitable job and he is without any post dismissal earnings.

[49] Having considered all the facts of case on the appropriate sum to be awarded and after taking into account that the Claimant had no post dismissal earnings, this Court now orders that the Claimant be paid 1 month salary of the last drawn salary of RM3,200.00 for every year of service completed totalling 20 years and back wages of the last drawn salary of RM3,200.00 for 24 months. This will amount to:-

(i) Backwages ordered:

RM3,200.00 x 24 months = RM76,800.00

(ii) Compensation in lieu of Reinstatement:

RM3,200.00 x 20 months = RM64,000.00

Total amount ordered by this Court: RM140,800.00

FINAL ORDER OF THIS COURT

[50] It is this Court's order that the Company pays the Claimant a sum of **Ringgit Malaysia One Hundred Forty Thousand Eight Hundred (RM140,800.00)** only less statutory deduction (if any) within 30 days from the date of this Award.

HANDED DOWN AND DATED THIS 31ST DAY OF JANUARY 2019

-signed-

(AUGUSTINE ANTHONY)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR