IN THE INDUSTRIAL COURT OF MALAYSIA
CASE NO. 21/4-326/20

BETWEEN

SEE YEAP SENG

AND

BERJAYA SOMPO INSURANCE BERHAD

AWARD NO. 1327 OF 2021

Before	**:**	**Y.A. SYED NOH BIN SAID NAZIR @ SYED NADZIR** Chairman
Venue	**:**	Industrial Court of Malaysia, Kuala Lumpur
Date of Reference	**:**	06.01.2020
Dates of Mention	**:**	12.08.2020
Dates of Hearing	**:**	28.04.2021 & 19.05.2021
Representation	**:**	Mr. Ravi Nekoo together with him Ms. Pamynder Kaur Messrs. Hakem Arabi & Associates Counsel for The Claimant Mr. Mohd Suharin bin Sulaiman Siew Messrs. Aimi Farhana & Partners Counsel for the Company

Reference:

This is a reference made under Section 20(3) of the IRA 1967 ("the Act") arising out of the dismissal of **See Yeap Seng** (hereinafter referred to as "the Claimant") by **Berjaya Sompo Insurance Berhad** (hereinafter referred to as "the Company") on 27.02.2019.

AWARD

FACTUAL MATRIX

[1] The Company is a general insurance service provider having branches all over the country including one in Kota Bahru, Kelantan at which the Claimant was employed as a Branch Manager with a last drawn monthly salary of RM12,659.35 inclusive of fixed allowance (CLWS-1, QA4) (CLB-1, Pages 1-5).

[2] The Claimant was a permanent and confirmed employee and had been employed with the Company since 2002. At all material times the Claimant was also holding 5% shares in another company by the name of Mentari Automobil dealing with pre-owned vehicles as well as car insurance.

[3] Throughout his service with the Company, the Claimant rose from the position of Marketing Executive and held various positions such as Assistant Manager, Branch Manager and Senior Manager of Business Development and Marketing. Nevertheless, the Claimant's main responsibility, since 2004 was as the Company's Branch Manager in Kota Bahru.

Events Leading to the Claimant's Termination

[4] On 16.8.2018, the Claimant was called for a meeting with the Company's Chief Executive Officer, by the name of Mr Tan Sek Kee and Deputy Chief Executive Officer by the name of Mr Futoshi Hanahara, and in the presence of the Company's Head of Human Resource by the name of Mr Wong Wai Kit.

[5] The meeting was to inquire and to give the Claimant the opportunity to explain about a situation of conflict of interest involving his position in the

Company (as the Senior Manager Marketing, Kota Baru Branch) and his position and/or involvement in Mentari Automobile.

[6] Pursuant to the meeting, the Company issued a letter dated 30.8.2018 to require the Claimant to provide his further explanation in writing.

[7] On 02.09.2018, the Claimant responded to the Company's letter dated 30.08.2018, by email stating that Mentari Automobil is managed by a shop manager known as Chan Siek Hong and thereafter replaced by Ms. Liam.

[8] Subsequent to the response from the Claimant, on 03.01.2019, the Claimant was given a letter entitled "Notice Of Inquiry" from the Company where the following charge was levelled against him:-

> ***Charge***
>
> *It is alleged that you, as a Senior Manager, Marketing, for Kota Bahru branch, had created a conflict of interest situation between yourself and the Company (BSIB) by carrying out business activities for another business entity i.e. Mentari Automobil situated at Lot 355-357, Jalan Pasir Puteh, 15200 Kota Bahru during Berjaya Sompo Insurance Berhad (BSIB) office hours between 10 December 2018 to 12 December 2018 when you knew or ought to have known that such activities are clearly prohibited under the BSIB Human Resources Policy and your signed Contract of Employment thus constituting acts of misconduct.*

[9] The Claimant was further informed that he was required to attend a Domestic Inquiry on the above charge and that, in the meantime his services in the Company would be suspended.

[10] The Company held a Domestic Inquiry against the Claimant on 24.01.2019.

The private investigators report

[11] In order to adduce material evidence before the DI, the Company had appointed private investigators to track the movements of the Claimant from 10.12.2018 to 12.12.2018. The private investigators had provided a report on their surveillance of the Claimant during the said period. (COB-1, Pages 30-36)

[12] The report formed the basis of the charge levelled against the Claimant and was relied upon by the Company during the domestic inquiry to establish that the Claimant had gone to Mentari Automobil during office hours to conduct personal business.

[13] The summary of the private investigator's report on the movements of the Claimant on 11.12.2018 is as follows:

The Claimant's Whereabout/Movements on 11.12.2018

Date	Time	Claimant's whereabouts	Reference
11.12.2018	2.52pm	Claimant was at Mentari Automobil	COB1 page 31 CD-6(b)
	3.53pm	Claimant left Mentari Automobil with a Chinese man driving a black Grand Vitara	COB1 page 32 CD-6 (c)
	3.57pm	Claimant went to a Shell Petrol Station and was seen re-fueling the tank	

	4.06pm	Claimant dropped off the chinese man at Lai Spray	COB1 page 32 CD-6 (d)
	4.28pm	Claimant was at Pusat Solek Kereta Auto Technic and was seen installing accessories for the Grand Vitara	
	4.30pm	Roshazlan, who was then an employee of BSIB at the Kota Bahru branch met up with the Claimant at Pusat Solek Kereta Auto Technic	COB1 page 34 CD-6(e)
	05.03pm	Claimant left the accessory shop in Roshazlan's car	
	05.36pm	Roshazlan dropped Claimant at Mentari Automobil	
	06.07pm	Claimant left Mentari Automobil	

[14] The Claimant's Whereabout/Movements on 12.12.2018.

Date	**Time**	**Claimant's whereabouts**	**Reference**
12.12.2018	11.03am	Claimant was at Mentari Automobil	COB1 page 35 CD-6(f)
	11.23am	Claimant left Mentari Automobil and went to the Chinese Food Court for breakfast	
	3.57pm	Claimant was at Pusat Solek Auto Technic	
	4.06pm	Claimant left Pusat Solek Auto Technic	

	4.28pm	Claimant reached Mentari Automobil	
	4.30pm	Claimant went back to BSIB	
	05.03pm	Claimant was seen leaving BSIB office	

[15] By a letter dated 26.2.2019, the Claimant was informed of the decision of the DI that the Claimant was found guilty as charged and he was informed that his last date of employment was 27.2.2019.

COMPANY'S CASE

[16] The Company avers that the prohibition for employees (including the Claimant) from performing and/or involving in any business activities (other than the Company's) during working hours is within the Claimant's full knowledge. The said prohibition has been clearly stated in the Claimant's Employment Contract and in the Human Resource Policies & Procedures Manual (Version 1.0-16).

16.1 Under Clause 33(a) and (d) of the Claimant's Employment Contract it was agreed as follows:-

> *"It shall be deemed breach of the terms of employment should you… (a) fail to faithfully and diligently perform such duties and such responsibilities as may from time to time assigned to you by the Company and at all times to endeavour to the utmost of your ability to promote and advance the interest of the Company"*

> *"It shall be deemed breach of the terms of employment should you… (d) carry on a private trade or business of your own by sharing with other person or persons in any type of business unless with the express written approval of the Company. This is a full time job requiring total commitment and utmost efforts from you and as such, there should be no involvement in other business or part-time work elsewhere."*

16.2 Under Item 1.12.9 (1) of the Human Resource Policies & Procedures Manual (Version 1.0-16) it was stated as follows:-

> *"During the employment with the Company, an employee shall not engage directly or indirectly in any other business or occupation whether as principal, agent, servant or broker. An employee shall also not engage in any activities that may be detrimental to or damage the Company, whether directly or indirectly."*

[17] The Company avers that based on the available evidence, on the balance of probabilities there are reasonable grounds and/or suspicion to believe and to conclude that the Claimant indeed had performed business activities (other than the Company's) during working hours, hence the issue of conflict of interest by the Claimant. The followings are the amongst others, evidence leading to the Claimant's guilt:-

17.1 There are pictures (marked as Exhibit CD-6 (b) during the said DI) showing the Claimant on 11.12.2018 was seen at Mentari Automobile premises despite it was during the working hours of the Company which at about 2:52 p.m. (without the Company's consent and/or knowledge);

17.2 There are pictures (marked as Exhibit CD-6 (b) during the said DI) showing the Claimant was driving out from Mentari

Automobile in a vehicle bearing a registration number DBF 9270 (hereinafter referred to as "the said Vehicle") to a Shell Petrol Station for refuelling at about 3:57 p.m. which was clearly within the Company's working hours (without the Company's consent and/or knowledge);

17.3 There are pictures (marked as Exhibit CD-6(d) during the said DI) showing the Claimant made a stop at Pusat Solek Kereta Auto Technic and installing some accessories for the said Vehicle at about 4:28 p.m. again which was still within the Company's working hours (without the Company's consent and/or knowledge);

17.4 There are pictures (marked as Exhibit CD-6(f) and (g) during the said DI) showing the Claimant on 12.12.2018 was seen at Mentari Automobile premises despite it was during the working hours of the Company which at about 11:03 a.m. (without the Company's consent and/or knowledge) and later was seen at the Pusat Solek Kereta Auto Technic at 12:26 p.m. and drove off in the said Vehicle again;

17.5 The Claimant had never denied and/or challenged the authenticity of the aforesaid pictures marked as Exhibit CD-6 (b) – (g) during the said DI. In fact, the Claimant had admitted that indeed he drove the said Vehicle from Mentari Automobile and made few stops as in the pictures.

[18] Further, the Claimant had actually been warned earlier back in 2012 regarding his involvement with Mentari Automobile at the material time. The Company vide its letter dated 4.10.2012 had expressly stated that in order for the Claimant to retain his position with the Company, he may only hold 5%

shares in Mentari Automobile but subject to a condition that he must be free from any personal relationship, activities or financial affairs of Mentari Automobile and the Claimant is expected to perform his duties conscientiously, honestly and for the best interest of the Company.

[19] Based on the aforesaid evidence the Claimant had failed and/or deliberately refused to adhere to the aforesaid condition set by the Company in the said letter dated 4.10.2012 and also to the terms and/or clauses in the Claimant's Employment Contract and the Company's Human Resource Policies & Procedures Manual.

[20] As such, due to the issue of conflict of interest by the Claimant the Company can no longer hold any trust and confidence towards the Claimant as its employee. The Claimant who was in a managerial level had shown a bad example to other employees especially to his subordinates. The Claimant had committed a serious misconduct which warrants his termination of employment.

[21] The Company prays for the case or claim by the Claimant to be dismissed by this Court.

CLAIMANT'S SUBMISSIONS

[22] The Claimant submitted that the Company had failed to prove dismissal with just cause or excuse as there is no evidence adduced by BSIB that the Claimant was engaged in carrying out any business activities on behalf of Mentari Automobil at all material times and that the mere presence of the Claimant at Mentari Automobil on 11 and 12 December 2018 is no proof that the Claimant was doing personal business at Mentari Automobil.

[23] The Claimant submitted that the reason why he goes to Mentari Automobil was to fulfil his responsibility to ensure that the Kota Bahru branch is a profitable branch. It was averred that in order to do so, the Claimant cannot be sitting in the office from 8.30am to 5.00pm but to go out of his office to market the Company insurance policies. This was agreed to by COW-2 and COW-3 during cross-examination.

[24] The Claimant submitted that his commitment to the Company's business can be seen by a placard placed at Mentari Automobil that Mentari Automobil is the insurance agent for the Company. It was averred that the Claimant is only committed to sell the motor insurance policies of Berjaya Sompo and not those of other insurance undertakers.

[25] The Claimant submitted that the Claimant's agents/potential customers do meet at Mentari Automobil as there is a spacious car park at Mentari Automobil whereas the parking space at the Company is limited. The Claimant pointed out that COW-1 agreed in cross-examination that the parking space at BSIB office lot is limited.

[26] The Claimant went on to dispute the procedure adopted at the Domestic Inquiry wherein the Company had called the Claimant first to defend himself against the charge, after which only had the Company tendered witness statements of the Company witnesses namely by:

a. Norasikin binti Mohd Taib – (COB1 page 51-52)
b. Chua Kim Leng – (COB1 page 53-54)
c. Sherabiya binti Md Rashid – (COB1 page 55-56)
d. Loo Su Fei – (COB1 page 57-58)

[27] The Claimant averred that the Domestic Inquiry was wrong in admitting hearsay evidence and decided on hearsay evidence notwithstanding

the Claimant's failure to object during the DI. In support of his contention the Claimant referred to the case of **Alcantara a/l Ambrose Anthony v PP [1996] 1 MLJ 209** at page 211 where the Federal Court held that hearsay evidence being inadmissible evidence, does not become admissible by reason of failure to object.

[28] The Claimant further submitted that he was not given an opportunity to cross examine these witnesses at the domestic inquiry which had occasioned a breach of natural justice. The Claimant cited the case of **Sithradevi a/p Nagalingam v Masdar bin Hj Darman & Anor (Majlis Peguam Malaysia, Intervener) [2021] 2 MLJ 399** at page 414 para [42]. The Claimant took issue that leading questions were asked to the Claimant and that the Claimant was asked to prove his innocence. The Claimant went on to challenge the said DI's findings in that they held that "no proof of evidence was presented by the accused that he was not conducting his personal business at Mentari Automobiles or at other entity i.e. Pusat Salek Kereta Auto Technic". The following cases were relied on by the Claimant:

(i) **Automotive Manufacturers (Malaysia) Sdn Bhd v Ahmad Mohd Som [2009] 2 ILR 290**, wherein the court held as follows:

> "The panel members had committed an error of law by placing wrongly the burden of proof on the claimant to tender concrete proof to rebut the prosecution's contentions. In fact the panel members should be aware that in cases of this nature, the burden is always on the company to prove the case against the claimant on a balance of probabilities."

(ii) **Jamaludin Mohamad v. Dutch Lady Milk Industries Berhad [2008] 2 LNS 2054** in which the court held as follows:

> The court found that the panel of domestic inquiry had erred when it put the evidential burden of proof to prove that that he had received the payment from the wife of the supplier for unit trusts. The evidential burden of proof in a domestic inquiry is on the employer to prove that the employee received a bribe from a supplier.

Claimant's Pleaded Remedies

[29] In the circumstances, the Claimant submitted that the dismissal of his employment was without just cause or excuse.

[30] Having emphasized that this case is not one which is suitable for reinstatement the Claimant prayed for compensation by backwages of his last drawn salary (including allowances) from the date of his dismissal i.e. 28.02.2019 in accordance with Section 30 and the Second Schedule of the Industrial Relations Act 1967. The Claimant denied any post dismissal earning despite admittedly operating a kopitiam shop in view of the Covid 19 pandemic.

CAUSE PAPERS, WITNESS STATEMENTS (together with a brief introduction of the witness) AND OTHER DOCUMENTS

[31] This Court had considered the following documents that had been filed for the purpose of hearing in the proceeding before this Court as follow :

a) Cause Papers

(i) Statement of Case dated 30.07.2020.
(ii) Amended Statement of Case dated 14.04.2021.
(iii) Statement in Reply dated 24.08.2020.
(iv) Rejoinder dated 25.08.2020.

(b) Witness Statements and brief description of Witnesses Produced during Trial

(v) Company's Witness Statement of **Norasikin Binti**

Mohamad Taib, the Senior Executive, non Motor Underwriting at Berjaya Sompo Insurance Berhad (COW-1) marked as "COWS-1"

(vi) Company's Witness Statement of **Phang Yin Peng**, the Chief Commercial Business Officer at Berjaya Sompo Insurance Berhad (COW-2) marked as "COWS-2"

(vii) Company's Witness Statement of **Wong Wai Kit**, the Head of Human Resource at Berjaya Sompo Insurance Berhad (COW-3) marked as "COWS-3"

(viii) Witness Statement of **See Yeap Seng** i.e. the Claimant marked as "CLWS-1" and in this award referred to as CLW-1.

(ix) Witness Statement of **Lai See Pheng**, the Insurance Agent as "CLWS-2", who gave evidence for the Claimant and for the purpose of this award, referred to as CLW-2.

(c) Bundles of Documents

(x) Company's Bundle of Documents dated 30.10.2020 marked as "COB-1"

(xi) Company's Bundle of Documents (Volume 2) marked as "COB-2"

(xii) Claimant's Bundle of Documents dated 10.11.2020 marked as "CLB-1".

(xiii) Claimant's Bundle of Documents – Web-print Head of Branch, Kota Kinabalu marked as "CLB-2A".

(xiv) Claimant's Bundle of Documents - Web-print Head of Branch, Seremban marked as "CLB-2B".

(xv) Claimant's Bundle of Documents – *Borang E (Kaedah 13) Lai See Pheng* marked as "CLB-3".

(xvi) Claimant's Bundle of Documents – *Borang E (Kaedah 13)* LSP Agency marked as "CLB-4".

(d) Written Submissions

(xvii) Company's Written Submissions dated 16.06.2021
(xviii) Claimant's Written Submissions dated 16.06.2021
(xix) Claimant's Written Submissions In Reply dated 23.06.21

CLAIMANT'S INTERLOCUTORY APPLICATIONS

[32] At the outset, the Claimant had filed a Notice of Application dated 25.09.2020 (Enclosure 15A) for discovery seeking for the Company's sales turnover record for Kota Bahru branch from 2015 to 2021 (the said application). Both parties had filed their respective written submissions wherein the Company had contended, inter alia that the documents sought by the Claimant is irrelevant insofar as the reason for termination of the Claimant i.e. misconduct is concerned. The said application was heard on 14.04.2021 whereupon this Court had dismissed the said application in Enclosure 15A.

[33] Having considered the written submissions filed by both parties, this Court found that the Claimant's sales performance is not relevant for this Court to determine whether or not the Claimant had indeed committed the misconduct of conflict of interest.

[34] In arriving at the above decision, this Court has benefited from and was guided by the following cases involving the issue of conflict of interest:-

Asahi Industries (M) Sdn Bhd V Lim Mui Lin [2000) 1MELR
wherein it was held as follows:

> *"The learned counsel for the claimant has submitted that* ***even though the claimant had another business besides acting as the senior administration manager in the company, her work in the company had not been affected at all*** *by this and that she even received an increment.* ***I do not consider this as***

> ***relevant to the issue before the court which is an act of misconduct*** *on the part of the claimant. An employee is paid to do work for the employer for the period specified and for an employee to be seen gainfully doing some other work not connected to the work for which the employee is engaged to do as in this case is certainly an act of misconduct on the part of the employee. "*

Tan Mong Hock V Kong Brothers Enterprise Sdn Bhd [2019) 2 MELR 482 in which it was held as such:

> *"As the termination was not based on poor performance,* ***not much weight is to be given to the evidence on whether or not his performance was good.****"*

[35] This Court's attention was also drawn to the Industrial Court case of **Aziz Yaakob V Bank Muamalat Malaysia Bhd [2005) 3 MELR 64** in an extended view where it was decided that 'work performance' is not relevant to be considered since it is not part of the charge (of misconduct) which the employee was found guilty, where in the learned Chairman held as follows:-

> *"On the facts of the instant case the claimant's* ***work performance is not a factor to be considered*** *by this court for the following reasons:-*
>
> > *(i) the claimant's work performance* ***is not part of the charge for which he was found guilty;****"*

[36] The above decided cases are ostensibly persuasive enough for this Court to adopt. It is absolutely unnecessary for this Court to consider irrelevant factors such as the Claimant's sales performance which is totally not related to the reason for the termination as relied by the Company (i.e. misconduct - conflict of interest).

[37] It follows that the documents sought by the Claimant in this Application

i.e. the sales turnover for Kota Bahru Branch is also irrelevant and need not be considered by this Court in adjudicating the Claimant's case.

[38] It is pertinent to note that during the hearing of this application **the Company had admitted to the fact that the Claimant's sales performance was not an issue at the material time during his employment.** That being so, this Application before this Court is deemed academic. Based on the aforesaid grounds, the said application was thereby dismissed.

[39] Concurrently heard with the said application was the Claimant's another Application in Enclosure 22 by way of a Letter dated 09.11.2020 for leave to file an Amended Statement of Case enclosing therein a Proposed Amended Statement of Case. Counsel for the Company had no objection to the Claimant's application in Enclosure 22 and as such leave was granted for the Claimant to file the Amended Statement of Case which he did on 14.04.2021.

ROLE OF INDUSTRIAL COURT

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

> "Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of the Court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason or excuse for the action taken by him, the duty of the Industrial Court will be to enquire whether that reason or excuse has or has not been made out. If it finds as a fact that it has not been proven, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the

> Court is the reason advanced by the employer, and that court or the High Court cannot go into another reason not relied on by the employer, or find one for him."

BURDEN OF PROOF

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

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

STANDARD OF PROOF

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

> "Thus, we can see that the preponderant view is that the Industrial Court, when hearing a claim of unjust dismissal, even where the ground is one of dishonest act, including "theft", is not required to be satisfied beyond reasonable doubt that the employee has "committed the offence", as in a criminal prosecution… In our view the passage quoted from Administrative Law by H. W. R. Wade & C.F. Forsyth offers the clearest statement on the standard of proof required, that is the civil standard based on balance of probabilities, which

> is flexible, so that the degree of probability required is proportionate to the nature and gravity of the issue."

[43] On the other hand, in the Industrial Court case of **MOHD SAUFI AHMAD ROZALI & ANOR V PUSPAKOM SDN BHD [2013] MELRU 074** learned Chairman YA Tuan Rajendran Nayagam had succinctly deliberated on the said standard and/or test as follows:-

> "[6] When an employer makes an accusation of misconduct against an employee and dismisses him on that ground, it is trite law that the employer bears the burden of proving the misconduct against the employee. However, it is my humble view that the standard of proof has seen some significant changes in the recent past….The standard that is required of the employer is that of a reasonable employer and whether there were "solid and sensible grounds" on which the employer could reasonably suspect the employee guilty of the misconduct. The other important point is that the Industrial Court cannot demand proof to its satisfaction and the Industrial Court has only to be satisfied that company was justified in coming to its conclusion. What is vital to note is that the employer has only to show that he had reasonable grounds to believe and did honestly believe that the employee was guilty of misconduct.
>
> [7] Hence, even the standard of proof on the balance of probabilities may be too rigid a standard and the standard now is of reasonable belief. This standard has been reaffirmed by the Court of Appeal in the case of K A Sanduran Nehru Ratnam v. I- Berhad [2007]1 CLJ 347. This case established that the test is not whether the employee did it but whether the employer acted reasonably in thinking the employee did it."

[44] The same standard and/or proper test was also echoed in a leading authoritative book. This Court has benefited from the passage in **HALSBURY'S LAW OF ENGLAND VOL. 40 (EMPLOYMENT), 5TH EDITION** at para 733 as follows:

> "It is well established that in a case of suspected misconduct the test of fairness is not whether the employer has proved the employee's guilty, and still less whether he has done so beyond reasonable doubt, but rather whether the employer genuinely believed on reasonable grounds in the employee's guilt. This involves a threefold test:-
>
> (1) the employer must establish that he genuinely did believe the employee guilty of the misconduct;
> (2) that belief must have been formed on reasonable grounds; and
> (3) the employer must have investigated the matter reasonably"

[45] In **MOHD AZRIZAL MYDIN PITCHAY V NORTHPORT (MALAYSIA) BERHAD [2019] MELRU 2479** learned Chairman YA Dato Fredrick Indran XA Nicholas (as he then was) held the followings, on the said test as laid down in the authorities earlier on as follows:

> "…the test is not whether the employee did it but rather whether the employer acted reasonably in thinking the employee did it and whether the employer acted reasonably in subsequently dismissing him. What this means is that there is no burden on the employer to prove that the employee had committed the offence; but there is a burden to establish that the employer had cogent and rational grounds upon which to reasonably infer that the employee had committed the misconduct. In order to discharge this burden all the employer has to show, is that an investigation into the matter had been carried out as was reasonable in all the circumstances of the case and that the employee was given a fair opportunity of explaining his position before the dismissal."

LAW ON DOMESTIC INQUIRY

[46] It is trite that in adjudicating a claim of unfair dismissal, this Court is not bound to apply the findings of a domestic inquiry or other internal, fact-finding tribunal. The Court hears the matter de novo; infact the Court is the better forum to hear the merits of the employees contention in challenging the employers allegations against the employees. Procedural improprities that

may occur during a domestic inquiry is merely an irregularity and not a nullity. It was held in **Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Anor her Appeal [1995] 3 CLJ 344,** that hearing before the Industrial Court renders any defect in the inquiry process; curable.

[47] As such, a Domestic Inquiry validly held is a relevant consideration in determining whether the Company complied with procedural fairness and natural justice, and the minutes of the inquiry and findings of the panel form part of the body of evidence upon which this Court can rely in making its findings.

[48] In Bumiputra Commerce Bank Berhad v. Mahkamah Perusahaan Malaysia & Anor [2004] 7 CLJ 77, Raus Sharif J (as he then was), observed as follows:

> *"Thus, I am of the view that in cases of this nature,* ***the Industrial Court should first consider whether or not the domestic inquiry was valid and whether the inquiry notes are accurate. In the absence of such consideration and a finding on the validity of the domestic inquiry and accuracy of the inquiry notes, the Industrial Court's action in proceeding to decide the matter without any regard to the notes of inquiry cannot be described as anything more than an error of law.*** *Accordingly, the conclusion of the Industrial Court that all charges preferred against the second respondent were not proven could not be supported and in fact, contrary to evidence."*

ISSUES

[49] The issues for this Court's consideration is thus whether the Company had sufficiently proved the charge preferred against the Claimant and if so; whether the said grounds constitute just cause or excuse for dismissal.

COURT'S EVALUATION AND DECISION

[50] It is well embedded that in dealing with dismissal cases such as before this Court, the burden of proof shall be on the employer to establish the reason for the termination.

[51] The test to determine whether the employer has fulfilled such burden was expounded inter-alia in the case of **I-BERHAD V KA SANDURAN NEHRU RATNAM & ANOR [2004] 1 MLRH 543.** In the said case, the High Court had applied "the reasonable suspicion" test and in so applying, had stated the followings:

> "8] In deciding whether the dismissal was without just cause what the Industrial Court had to consider was merely whether on the evidence produced before it the applicant had reasonable grounds in dismissing the first respondent. The test applied in Ferodo Ltd v. Barnes [1976] ICR 39 states that:-
>
> > It must be remembered that in dismissing an employee including a dismissal where the reason is criminal conduct, the employer need only satisfy himself at the time of the dismissal, there were reasonable grounds for believing that the offence put against the employee was committed. The test is not whether the employee did it but whether the employer acted reasonably in thinking the employee did it and whether the employer acted reasonably in subsequently dismissing him.
>
> [9] And similarly in British Home Stores Ltd v. Burchell [1978] ILR 378 it was again emphasized that:-
>
> > In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair an Industrial Tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time."

[52] The aforesaid case was affirmed by the Court of Appeal in **I-BERHAD V K A SANDURAN NEHRU RATNAM & ANOR [2007] 1 CLJ 347.** Prior to the aforesaid High Court case of I Bhd (2004), the Court of Appeal in the landmark case of **TELEKOM MALAYSIA KAWASAN UTARA V KRISHNAN KUTTY SANGUNI NAIR & ANOR [2002] 1 MLRA 188** was tasked to deliberate on the same issue regarding the standard and/or the proper test to be applied in misconduct cases. In arriving at its decision, the Court of Appeal had amongst others, quoted and applied in the affirmative the principle held by the Supreme Court of India in the case of Management of Balipara Tea Estate v. Its Workmen AIR 1960, as follows:-

> "In making an award in an industrial dispute referred to it, the Tribunal has not to decide for itself whether the charge framed against the workman concerned (in this case falsification of accounts and misappropriation of funds) has been established to its satisfaction; it has only to be satisfied that the management of a business concern was justified in coming to the conclusion that the charge against its workman was well founded. If there is finding by the Tribunal that the management has been actuated by any sinister motives, or has indulged in unfair labour practice, or that the workman has been victimized for any activities of his in connection with the trade unions, it may have reasons to be critical of the enquiry held by the management.
>
> The Tribunal misdirects itself in so far as it insists upon conclusive proof of guilt to be adduced by the management in the inquiry before it. It is well settled that a Tribunal has to find only whether there is justification for the management to dismiss an employee and whether a case of misconduct has been made out at the inquiry held by it."

[53] It is worth a repetition to state that in **MOHD SAUFI AHMAD ROZALI & ANOR V PUSPAKOM SDN BHD (Supra) Paragraph [43]** the said standard and/or test was deliberated by the learned Chairman as follows:

> "[6] When an employer makes an accusation of misconduct

against an employee and dismisses him on that ground, it is trite law that the employer bears the burden of proving the misconduct against the employee. However, it is my humble view that the standard of proof has seen some significant changes in the recent past…**The standard that is required of the employer is that of a reasonable employer and whether there were "solid and sensible grounds" on which the employer could reasonably suspect the employee guilty of the misconduct.** The other important point is that the Industrial Court cannot demand proof to its satisfaction and the Industrial Court has only to be satisfied that company was justified in coming to its conclusion. What is vital to note is that the employer has only to show that he had reasonable grounds to believe and did honestly believe that the employee was guilty of misconduct.

[7] Hence, even the standard of proof on the balance of probabilities may be too rigid a standard and the standard now is of reasonable belief. This standard has been reaffirmed by the Court of Appeal in the case of K A Sandman Nehru Ratnam v. I-Berhad [2007]1 CLJ 347. This case established that the test is not whether the employee did it but whether the employer acted reasonably in thinking the employee did it."

[54] Similar standard or test was also echoed in the leading authoritative book of HALSBURY'S LAW OF ENGLAND VOL. 40 (EMPLOYMENT), 5TH EDITION at para 733 as follows:

"It is well established that in a case of suspected misconduct the test of fairness is not whether the employer has proved the employee's guilty, and still less whether he has done so beyond reasonable doubt, but rather whether the employer genuinely believed on reasonable grounds in the employee's guilt. This involves a threefold test:-

(1) the employer must establish that he genuinely did believe the employee guilty of the misconduct;
(2) that belief must have been formed on reasonable grounds; and
(3) the employer must have investigated the matter reasonably"

[55] It is also beneficial to quote a recent Industrial Court case of **MOHD**

AZRIZAL MYDIN PITCHAY V NORTHPORT (MALAYSIA) BERHAD [2019] MELRU 2479 presided by the learned Chairman YA Dato Fredrick Indran XA Nicholas (as he then was) wherein he held on the said test as discussed in the earlier authorities hereinabove as follows:

> "…the test is not whether the employee did it but rather whether the employer acted reasonably in thinking the employee did it and whether the employer acted reasonably in subsequently dismissing him. What this means is that there is no burden on the employer to prove that the employee had committed the offence; but there is a burden to establish that the employer had cogent and rational grounds upon which to reasonably infer that the employee had committed the misconduct. **In order to discharge this burden all the employer has to show, is that an investigation into the matter had been carried out as was reasonable in all the circumstances of the case and that the employee was given a fair opportunity of explaining his position before the dismissal."**

[56] As such, having borne in mind the above legal principles and in applying the same doctrine to the facts and circumstances of the case at hand, it is the duty of this Court to address the issues by applying the proper test in order to determine whether the Company had acted reasonably and had entertained genuine suspicion on reasonable grounds of the Claimant's guilt when terminating the Claimant. If the answer was in the negative, the inevitable conclusion is the Claimant was terminated without just cause or excuse.

[57] On the evidence it is undisputed that investigations had been carried out by private investigator appointed by the Company in respect of suspicion of the Claimant's misconduct. The investigations conducted by the Company were in the following forms:

> **<u>Investigation 1: The Appointment of an external investigator</u>**

a) COW-3 testified that the Company at the material time decided to appoint an external investigator after receiving information that the Claimant was conducting his own private business during office hours.

b) COW-3 also testified that the appointment of the said external investigator was to ensure a fair investigation process being carried out.

Investigation 2: The Interviews of several employees in Kota Bahru Branch

a) Some of the employees from the Kota Bahru Branch were interviewed by the Company. These employees were the Claimant's subordinates at the material time.

b) During trial, COW- I being one of the interviewee had confirmed the contents of the interview record that she had at the material time. She testified that she had seen the Claimant doing works for Mentari Automobil during working hours such as by bringing in Mentari Automobil files to the Company's office and having phone conversation about selling cars. It is noteworthy that this evidence by COW-I was never challenged during the trial.

Investigation 3: The Domestic Inquiry

a) After obtaining the photos from the external investigator and after interviewing the Claimant's subordinates, the Company proceeded to inquire into the Claimant's allegation of misconduct by calling

the Claimant in to defend himself during a domestic inquiry. Being a reasonable process, it is perfectly valid to consider it as part of the Company's effort to conduct further investigation before making any decision pertaining to the Claimant's guilt or otherwise.

[58] It was also on the evidence that the Claimant was given a fair opportunity to explain prior to his termination. The opportunities provided by the Company to the Claimant to explain himself consisted of the events which can be seen as follows:

(i) The Claimant was issued with a show cause letter

a) Acting on information that there are reasons to believe that a misconduct of conducting his own private business during office hours, the Company had issued a show cause letter to the Claimant dated 30.8.2018. Hence, upon being given the opportunity to explain his defence to the allegation the Claimant had provided his explanation vide his email dated 2.9.2018.

b) By virtue of the said show cause letter, the Company had accorded the Claimant with his right to be heard and provided him with the earliest opportunity to explain and defend himself. The Claimant’s explanatory email in reply to the said show cause letter suffice and may not in the form of an oral representation. In this respect, reference is made to the Privy Council case of **NAJAR SINGH V GOVERNMENT OF MALAYSIA & ANOR [1976] 1 MLRA 633** which had quoted in the affirmative the obiter by Sankey J in the case of The King V. Housing Appeal

Tribunal [1920] 3 KB 334 on the 'right to be heard', as follows:-

> "Now a hearing in my view need not be an oral one, it may be on written representations."

ii) The Claimant was called to be present in a domestic inquiry

a) Dissatisfied with the Claimant's reply, the Company then proceeded to provide further opportunity for the Claimant to explain his defence by conducting a domestic inquiry against the Claimant. He was duly informed about the said domestic inquiry vide the Notice of Domestic Inquiry dated 3.1.20198 which contained the full particulars of the charge preferred against him.

b) Sufficiency of time to prepare for the domestic inquiry was never an issue which goes to prove that the Claimant was given ample opportunity to answer the charge against him. The Claimant was allowed to call his witnesses or to produce any evidence to support his defence.

[59] It can be observed by the minutes of the said domestic inquiry that the Claimant had fully participated in the proceeding. He had adequate opportunity to explain, to ask questions, to view documents and to agree or otherwise to the composition of the domestic inquiry panels. As such this Court is inclined to favour the fact that the domestic inquiry held by the Company, is genuine and functional one as oppose to a mere formality.

[60] Nevertheless during trial, the Claimant contended that the domestic inquiry was flawed in technicality in applying the wrong standard of proof when

the Company had asked the Claimant to prove his innocence, failing to produce the Company's witnesses before questioning the Claimant, and that the DI had allowed leading questions. It was also contended that the panels relied on hearsay evidence.

[61] This Court shall now analyse whether there is merit in the Claimant's aforesaid allegations. On the evidence, the issue of irregularity the DI proceedings was never raised by the Claimant during the said DI. Objections against the procedural defects in the DI was only raised by the Claimant during trial before this Court.

[62] It is to be observed that the Company had in substance, complied with and adhered to the basic principle of Audi Alteram Partem during the DI in that, the Claimant during the domestic inquiry had been provided with the sufficient opportunity to explain and to defend himself against the charge. It must be stated that the domestic inquiry should not be burdened with the procedural trappings or technicalities applied in a formal trial as insisted by the Claimant during trial. Support to this contention is found in the Court of Appeal case, of **HJ ALI HJ OTHMAN V TELEKOM MALAYSIA BHD [2003] 1 MELR 7**, which had decided as follows:-

> "We find the steps taken by the respondent prior to the inquiry and the proceedings at the inquiry to be consonant to the duty to act fairly imposed on the respondent by law and art 5(1) read with art 8(1) of the Constitution. Where **the appellant has, with respect, misled himself is, we think, in equating a domestic inquiry with a formal trial in a court. This is not the law.** In this regard, we agree and gratefully adopt the view expressed by L'Heureux-Dubé J speaking on behalf of the majority of the Supreme Court of Canada in The Board of Education of the Indian Head School v. Knight:
>
> It must not be forgotten that every administrative body is the master of its own procedure and need not assume

> the trappings of a court. The object is not to import into ad ministrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair."

[63] In addition, it is a settled law that the proceeding before this Court will rectify any irregularities in the domestic inquiry even if it is found that the domestic inquiry was improperly carried out by the Company. It was so decided in the landmark case of **WONG YUEN HOCK V SYARIKAT HONG LEONG ASSURANCE SDN BHD & ANOTHER APPEAL [1995] 1 MLRA 412** in the following passage:

> "Invariably, the hearing before the Industrial Court itself which indeed provides a better and impartial forum for the employee than most domestic tribunals, should be taken as sufficient opportunity for the employee to being heard to satisfy natural justice and thereby rectify any omission to hold any domestic inquiry."
>
> "…If therefore there had been a procedural breach on 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."

[64] In the aforesaid this Court is of the views that the procedure adopted by the DI was not utterly defective so as to render the DI invalid. The minutes of the DI were correctly taken and agreed to by the Claimant which is evident by the Claimant's signature found on every page of the minutes of the DI. The finding of the DI shall serve as a material consideration for this Court in arriving at its decision. With the initial information on the investigation at hand, the important question that follows would be whether the Company's reason to believe that the Claimant had committed the misconduct pursuant to the aforesaid investigations is tenable; and if so whether the Company had acted reasonably when it entertained such belief that the Company eventually dismissed the Claimant.

[65] To answer the above questions, it must be borne in mind that Claimant is charged with having carried out business activity for Mentari Automobil between the dates 10th - 12th December 2018 during his working hours with the Company.

[66] It was admitted by the Claimant during cross examination that his working hours is from 9.00 a.m. until 5.00 p.m. and that on the 10th - 12th of December 20I8, he was not on any leave. However the Claimant was not working in his office during the aforesaid dates.

[67] Upon being instructed by the Company to conduct an investigation into the alleged external business activities, the external investigator had managed to track the Claimant's movements on 10th - 12th December, 20I8 wherein several photos of the Claimant during the said period were taken by the external investigator. These photos were tendered during domestic inquiry and marked as Exhibit CD6(a) - (g) without objection by the Claimant. During cross examination before this Court, the Claimant entirely admitted and acknowledged the veracity of the photos and admitted that he is the man in the photos on the given date and time. COW-I i.e. the Senior Executive – Non Motor Writing, had identified the man in the photos as the Claimant. (COWS-1, QA 3-5)

[68] It was sufficiently established that based on the aforesaid photos on the 11th December 2018 the Claimant was seen at Mentari Automobil at 2.52 p.m. and he left Mentari Automobil at 3.53 p.m. by driving out a vehicle with registration number DBF 9270 (‘the said Vehicle'). At 3.57 p.m., the Claimant was seen refueling the said Vehicle before reaching Lai Spray (car spraying shop) at 4.06 p.m. Subsequently, the Claimant with the said Vehicle was captured to be at Pusat Solek Kereta Auto Technic (car accessories shop) at 4.28 p.m. These sequence of events on 11.12.2018 were never disputed by

the Claimant.

[69] It would be undeniable that based on the above uncontested circumstantial evidence, any reasonable employer would reasonably believe that the Claimant was carrying out business activity for Mentari Automobil. Any business dealing with pre-owned vehicles (such as Mentari Automobil), would normally and subsequently deals with car spraying shop (such as Lai Spray) and car accessories shop (Such as Pusat Solek Kereta Auto Technic). This Court is inclined to believe that the Company's suspicion that the Claimant had put his personal interest in conflict with the Company's interest is fair and reasonable in the circumstances.

[70] The Claimant's contention that he was purportedly recruiting a potential insurances agent for the Company named, Ms Lai See Pheng (CLW-2) who is the owner of the said vehicle must be taken with caution. Merely CLW-2 runs her own insurance agency, there was no corroborative envidence that the Claimant was recruiting CLW-2 as a potential insurance agent for the Company. To believe that the Claimant was in the midst of recruiting CLW-2 as an agent would open the Claimant's role and function as a Branch Manager to abuse.

[71] CLW-2's evidence purportedly in support of the Claimant's case did not in any way disparage the Company's reasonable suspicion that the Claimant would in all probabilities involve in business activities of Mentari Auto that is his own personal interest during his working hours.

[72] During her testimony, CLW-2 alleged that she was in lack of knowledge about installing car tint and painting car. For this reason, the Claimant purportedly offered his assistance to get CLW2's car tinted and painted at the respective car accessories and spraying shops in order to persuade CLW-2 to become the Company' insurance agent. This Court is

unable to believe as there is no nexus in the evidence of CLW-2 to that effect. Her evidence defies logic. It does not make sense when under cross examination CLW-2 admitted that being an insurance agent, she has the contacts with car workshops to assist her insurance customers to repair their cars but strangely enough she was incapable of getting her own car tinted and painted.

[73] The Claimant further contended that he would visit Mentari Automobil during working hours and held meetings with the Company's insurance agent and/or potential agent and/or customer and/or potential customer. The only excuse given by the Claimant was that, there is an ample parking spaces at Mentari Automobil compared to that of the Company's office. There is absolute no merit in this contention. Apart from the Claimant conducting himself in a manner inconsistent with his subserviency in line with his master-servant relationship with the Company, his act is merely desperate act to justify his frequency in the vicinity of Mentari Auto. In the case of **NG EE KANG V TY DISTRIBUTION NETWORK SDN BHD [2009] 4 MELR 23** a similar excuse of 'meeting prospect client' was raised. In rejecting the Claimant's contention, the Industrial Court held as follows:-

> "The Court has carefully considered the Claimant's evidence in connection with his claim of prospecting and surveying the market along the Cheras-Kajang Highway. The unreliability of the Claimant's evidence in respect of his alleged customers in the Bangi Industrial Estate is apparent and the Court has no hesitation in finding that the Claimant has been far from truthful on this score. From the retraction of his earlier claim that Standard Plastics Sdn Bhd and Kenplas Sdn Bhd were his customers along the Cheras Kajang Highway, the Court is of the view that the Claimant was only attempting to justify the frequency of his presence along the said Highway and his innumerable toll claims."

[74] The Claimant went on to argue that his involvement in Mentari

Automobil was allegedly consented to by the Company pursuant to the Company's letter dated 4.10.2012 ('the consent Letter'). It was submitted by Company that the Claimant had misconceived the contents of the said Letter. This Court entirely agrees. Upon scrutinizing the consent Letter, this Court is satisfied that the Company had only allowed the Claimant to hold 5% shares in Mentari Automobil with the condition that he must be free from any personal relationship, activities, etc for Mentari Automobil. This was confirmed by COW-3 during trial. The activities of the Claimant at the material time did not appear to be consonent with the prerequisite condition to the Company's consent to the Claimant's holding of 5% shares in Mentari Auto - that he must be free from any personal activities or relationship for Mentari Auto.

[75] The Consent Letter did not authorize the Claimant to carry out activities for Mentari Automobil which is the basis for the charge proffered against the Claimant. The charge was not related to the holding of 5% shares by the Claimant in Mentari Automobil. As such, the Claimant had abused the consent letter to his personal monetary advantage which remained a reasonable suspicion by the Company against the Claimant.

[76] In the above circumstances, this Court is satisfied that the Company had discharged its burden to prove its reasonable belief, that on the balance of probabilities the Claimant had indeed committed the misconduct.

Whether the Punishment of Termination Proportionate

[77] In dealing with the issues of whether or not the punishment of dismissal proportionate in the circumstances, it would be beneficial to refer to decided cases underlying the legal principles. In **FEDERAL AUTO CARS SDN BHD V ROSLAN ZAHARI EFFENDI [2000] 1 MELR 437** the learned Chairman held as follows:

> '…I am unable to accept the contention just because the

claimant's outside business activities do not directly or indirectly compete with the company's business in selling new and used Volvo cars, there is no conflict of interest. Other than the provisions in the company's human resources policies and procedures I am of the view what the claimant did while in the employ of the company is simply unacceptable as an employee. There is conflict in other form, such as using the time an employee is paid for to carry out his own business activities or using the facilities paid for by the employer to further his business activities. The Industrial Court cannot be seen to sanction such behaviour of employee in the workplace...

It is the finding of this court what the claimant did is wrong and it is reasonable for the company to dismiss him on those grounds.'

[78] In case of **ASAHI INDUSTRIES (M) SDN BHD V LIM MUI LIN [2000] 1MELR 726** the Court had this to say:

"The learned counsel for the claimant has submitted that even though the claimant had another business besides acting as the senior administration manager in the company, her work in the company had not been affected at all by this and that she even received an increment. I do not consider this as relevant to the issue before the court which is an act of misconduct on the part of the claimant. An employee is paid to do work for the employer for the period specified and for an employee to be seen gainfully doing some other work not connected to the work for which the employee is engaged to do as in this case is certainly an act of misconduct on the part of the employee."

[79] In another case **MBF MANAGEMENT SDN. BHD. V HOUNG HAI KONG [1995] 1MELR 897** it was held that:

"It is settled law that the employee is required at all times to act in a faithful manner and not to place himself in a position where his interest conflicts with his duties. If the employee does an act which is inconsistent with the fiduciary relationship then it will be an act of bad faith for which his services can be terminated."

[80] The eloquent author in Industrial Law, **HL KUMAR in his book EMPLOYER'S RIGHTS UNDER LABOUR LAWS (7th Ed)** opined as follows:

> "An employee is not expected to waste his duty hours by doing any private work during duty hours. A worker is expected to give his whole hearted time and attention to his work and therefore, he cannot utilize the management's time for his private needs"

[81] Echoing similar sentiments, another distinguished author in Industrial Law **BR GHAIYE in his book MISCONDUCT IN EMPLOYMENT (3rd Ed)** had the following observations:

> "An employee is expected to give his whole-hearted time and attention to his work and not to waste his duty hours by doing any private or personal work of his own…This may amount to work subversive of discipline"

[82] Meanwhile, the renowned author **DR ASHGAR ALI ALI MOHAMED in his book, DISMISSAL FROM EMPLOYMENT AND THE REMEDIES (2nd Ed)** had stated as follows:-

> "The obligation of the employee is to serve the best interests of the employer. He should not place himself in a position where his interest had conflicted with his duties. It would be a clear violation of duty of fidelity when an employee acted in conflict with the best interest of the employer for example, conducting private businesses during working hours…Many organizations view conflict of interest as a gross misconduct that warrant dismissal from employment. Lord Esher in Pearce v Forster, stated as follows:
>
> The rule of law is that where a person had entered into the position of servant, if he does anything incompatible with the due of faithful discharge of his duty to his master, the later has a right to dismiss…"

[83] It must be acknowledged that this Court has greatly benefited by the above stated authorities and in applying the said principles this Court observed that the Claimant's misconduct of doing outside and/or private works during the Company's official working hours had brought about a bad precedent in the Company. This was testified by COW-3. The Claimant had frustrated, upset and destroyed the discipline in the Company when he committed the misconduct.

[84] On the Claimant’s contention that Mentari Automobil's business was different from that of the Company, this Court is of the considered opinion that this is irrelevant as decided in Federal Auto Cars (Supra). A situation of conflict of interest may still happened despite of the different business nature such as in this case where the Claimant had utilized his working hours to conduct activities for Mentari Automobil. Suffice to say that no reasonable employer would be able to tolerate the misconduct committed by the Claimant and no reasonable employer would allow its employee to do private business at the expense of the employer. Such act of misconduct destroys the trust and confidence the employer had towards the employee. As such the punishment of termination meted out against the Claimant is fair, reasonable and proportionate.

CONCLUSION

[85] In conclusion, based on the facts and circumstances of the present case in its entirety and the evidence adduced by both parties in the proceedings and upon reading respective written submissions and hearing the testimonies of the witnesses, the Court is of the considered view that the Company had successfully proved on the balance of probabilities that the Company had reasonable suspicion that the Claimant had committed the misconduct as charged and that the Company had acted reasonably when terminating the Claimant which is proportionate in the circumstances.

Therefore the Company had proved on the balance of probabilities that the Claimant's termination was with just cause or excuse. The Court answers the question at paragraph [49] supra, in the affirmative.

[86] Having considered the evidence as produced by both parties in totality, and bearing in mind the provision in Section 30(5) of the Industrial Relation Act 1967 by which virtue the Court shall act according to equity, good conscience and the substantial merit of the case without regard to technicalities and legal form, the Court has no hesitation to dismiss the Claimant's case.

HANDED DOWN AND DATED THIS 08 SEPTEMBER 2021

~Signed~

(SYED NOH BIN SAID NAZIR @ SYED NADZIR)

CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR