INDUSTRIAL COURT OF MALAYSIA

CASE NO : 15/4-169/02

BETWEEN

NETWORK FOODS INDUSTRIES SDN. BHD.

AND

CHOO SOOK HENG

AWARD NO : 734 OF 2006

Before	:	**N. RAJASEGARAN - Chairman** (Sitting Alone)
Venue:	:	Industrial Court Malaysia, Kuala Lumpur.
Date of Reference	:	21.2.2002.
Dates of Mention	:	3.5.2002, 17.6.2002, 17.7.2002, 26.2.2003, 17.11.2003, 10.8.2004, 20.8.2004, 13.1.2005 and 12.4.2005.
Dates of Hearing	:	23.8.2004, 25.7.2005.
Company written submission received	:	7.11.2005.
Claimant's written submission received	:	24.11.2005.
Representation	:	Mr. H.C. Yong of Messrs Zaid Ibrahim & Co. of counsel for the Company. Cik Haniza bt. Abd. Rani of Messrs Chan Tse Yuen & Co. of counsel for the Claimant.

Reference :

This is a reference made under Section 20(3) of the Industrial Relations Act, 1967 arising out of the dismissal of **Choo Sook Heng** by **Network Foods Industries Sdn. Bhd.**

AWARD

The Reference

1. The Claimant before me is Choo Sook Heng. She is a lady. She once held employment with the Company, Network Foods Industries Sdn. Bhd. The Claimant was dismissed by the Company for misconduct. That was on 4.8.1999. Considering the dismissal to be without just cause or excuse, she made representations under section 20. That action of hers culminated in the Minister of Human Resources making an order on 21.2.2002 to refer the dismissal for adjudication. The reference was received by this Court on 10.3.2002. All reference to sections in this decision, unless otherwise stated, refers to the Industrial Relations Act, 1967.

The Narrative

2. The Claimant commenced employment with the Company on 3.4.1989. She was employed initially as a typist-general clerk and later rose to be accounts officer. Recall, she was dismissed on 4.8.1999. At that material time she reported to the Company's accounts executive, one Thandapani a/l Tirugananasanbandam. It will be convenient to refer to him as Thandapani in this decision. In the Court, Thandapani testified as the Claimant's witness. Thandapani in turn reported to the Company's finance manager, Thirunavukarasu a/l Karthikeya. It will ease burden on my typist to just call him Arasu, as was done during the trial. The Claimant had an assistant, Shanmugavadiwoo, another of her own sex. During the trial she was referred to as Shanmu and I will do so too. According to Arasu, Shanmu's designation was either account assistant or account clerk. And these, are the three main players to the charge of misconduct that led to the Claimant's dismissal.

3. The Company received an invoice numbered 4740 bearing the date 19.3.1999 from Percetakan Kelang Indah Sdn. Bhd., from now called Kelang Indah. According to this invoice the Company had to pay Kelang Indah the sum of RM5,200.00 being payment for the supply of goods described therein. This invoice is found at page 17 of exhibit AB1 which initially constituted the Company's bundle of documents but by consent of parties, became to be treated as an agreed bundle. I find it suitable to call this the Kelang Indah invoice. Connected with this is a Goods Received Note, GRN for short. This document is raised by the Company's stores upon receipt of the goods described in the invoice. The GRN found at page 70 of AB1, I will call the Kelang Indah GRN. It is tied to the Kelang Indah invoice. And then, there is page 13 of AB1. That page contains two documents; the bottom being a copy of a cheque and the top being a remittance advice from the Company to the drawee of the cheque, breaking down invoices to which the amount stated in the cheque related. The drawee is Kelang Indah and one of the invoices detailed in the remittance advice is the Kelang Indah invoice. All those exhibits I have referred to now bear direct connection with the first charge of misconduct that the Company took against the Claimant.

4. There was a second charge of misconduct that the Claimant had to answer. This involved a company called IPE Industries Sdn. Bhd., now onwards referred to as IPE. IPE dispatched an invoice of the number and date 1196 and 31.3.1999 respectively. It excited me to note that the invoice involved the supply of packaging bearing the name 'Van Houten'. I have always in the past and continue now to enjoy a drink made out of Van Houten cocoa-powder. Back from my momentary distraction. This invoice was for supply of goods to the Company for a value of RM7,000.00. It stands to reason for me to call this the IPE invoice. It is found at page 53 of AB1. To this invoice was connected a GRN, the IPE

GRN, displayed at page 77 of AB1. And at page 38 of AB1 is, at the bottom a copy of a cheque made payable to IPE by the Company and at the top the remittance advice in respect of the invoices to which the payment related. One amongst them is the IPE invoice. All these documents are tied with the second charge of misconduct directed at the Claimant.

5. Both the cheques relating to the Kelang Indah and IPE transactions were presented to Arasu for his signature. Arasu's own words in his witness statement, aptly described the stage upon which the drama of the Claimant's dismissal unfolded - *"I am one of 2 cheque signatories for the Company. As I was about to sign the cheques, I noticed some particulars that were suspicious and this led me to investigate the payments. During the course of my investigations, I realised that we almost paid for goods we never received."*

6. *Ex facie,* the exhibits show that the RM5,200.00 and RM7,000.00 stated in the Kelang Indah and the IPE invoices respectively were paid by the Company. In reality this was not so, for the Company stopped payment upon finding certain irregularities in the processing of the payment. And it was these irregularities that led to the three charges of misconduct which the Claimant had to answer.

7. Timely now, to introduce those three charges of misconduct that the Company put upon the Claimant subsequent to the investigation spear-headed by Arasu. They are, in verbatim :

> " <u>*Charge No. 1:*</u>
> *"That you had committed an act of gross negligence in the discharge of your duties by wrongfully issuing payment for the sum RM5,200.00 for GRN PM No. 27241 dated*

19/3/1999 as part of cheque No.BHLBB 056614 which was for the amount of RM39,646.49 and made out to one Percetakan Kelang Indah Sdn. Bhd. without checking the said GRN PM number against the Purchase Receipt Report for March 1999 as per established work procedure".

Charge No. 2:

"That you had committed an act of gross negligence in the discharge of your duties by wrongfully issuing payment for the sum of RM7,000.00 for GRN PM No. 27378 dated 31/3/1999 as part of cheque No.BHLBB 056630 was for the amount of RM47,392.50, and made out to one IPE Industries Sdn. Bhd., without checking the said GRN PM number against the Purchase Receipt Report for March 1999 as per established work procedure".

Charge No. 3:

"That you had in committing the acts specified in Charges No 1 and 2, failed to discharge your fiduciary obligations to the Company as An Accounts Officer, causing the Company to be exposed to financial losses". "

8. Appropriate at this stage, to remind myself of that deeply entrenched proposition of law enunciated by Raja Azlan Shah CJ (as His Royal Highness then was) in ***Goon Kwee Phoy v. J & P Coats (M) Bhd. (1981) 2 MLJ 129*** that if an employer chose to give a reason for the dismissal, the enquiry of the Court should be restricted to the reason given by the employer and the Court cannot go into any other reason not relied upon by the employer.

9. That makes relevant now, the reason given by the Company for the Claimant's dismissal. This is described in the Claimant's dismissal letter of 4.8.1999. The reason there is stated as - *"The charges levelled against you and proven against you at the enquiry being grave and serious, the punishment warranted is that of dismissal."* What these three charges were, have been outlined earlier. In real terms there were two charges, the first relating to the Kelang Indah and the other to the IPE transaction respectively. Charge 3 is consequential to charges 1 and 2. I have captured the intrinsic content of the two main charges to be the Claimant's failure to verify the GRNs against the purchase receipt report or purchase receipts summary as it was also known, before making out cheques for payment.

10. Convenient at this stage, to dispose of one particular aspect which kept cropping up during the course of the trial. Mr. H.C.Yong, learned Counsel for the Company, led Arasu through a track which cast aspersions on the integrity of the Claimant. This involved the authenticity of the Kelang Indah and IPE GRNs. Cik Haniza bt. Abd. Rani, learned Counsel representing the Claimant, who for short I will call Cik Haniza, willing obliged by rushing down that same beaten track by enthusiastic cross-examination of both Arasu and Joseph Norbert Gomez, another Company witness, whom I will call Norbert. I am unable to be enticed to stray down this track in as far as it being made to constitute a reason towards the dismissal of the Claimant. And the reason for this I have discoursed earlier, that is, the proposition of law found in ***Goon Kwee Phoy (supra)***. The Company had not raised the purported forgery of the two GRNs either in its pleadings nor in its submission. Neither did the Company ever accuse the Claimant of having committed or having been involved in the forgery of any GRNs. Notwithstanding, I will find at the rump of my decision, reason to wonder

at the Company's penchant for repeatedly making reference to this purported forgery.

11. Veering back to the mainstream of the narrative, the Claimant was through service of a letter dated 23.7.1999 suspended from employment pending a domestic inquiry into the three charges. The domestic inquiry scheduled to be held on 29.7.1999 was duly held on that date. There was a panel of three with Norbert as the chief inquiry officer or chairman of the domestic inquiry. Notes were taken down during the course of the domestic inquiry by Moy Saw Chan who testified in the Court as the Company's third witness. A typed transcript of the proceedings was prepared by her and this was exhibited as COE1. It is the Claimant's position that the conduct of the domestic inquiry was improper and that COE1 is not a correct representation of what had occurred during the domestic inquiry. Both these I find unable to accept. I have scrutinized COE1 first for procedure and I found nothing to default the panel of inquiry in the conduct of the domestic inquiry. As for the notes of the inquiry itself, I found it to be very detailed. Save for one short passage in reported speech, found at the bottom of page 81 of COE1, all evidence was recorded verbatim, in question-and-answer-form. The Claimant's evidence in her witness statement that the notes were a modification, exaggeration and fabrication were but bare statements. I had cause in the case of ***Expressway Lingkaran Tengah Sdn. Bhd. v. Susheela Saminathan, Award No. 352 of 2006*** to say that an employee cannot without more simply challenge the veracity of an employer's notes of domestic inquiry on a bare assertion. For support, I had leaned on a decision of learned Chairman Steve L.K. Shim (now Chief Judge, Sabah and Sarawak) made in the case of ***Syarikat Kenderaan Melayu Kelantan Sdn. Bhd. v. Transport Workers Union (1990) 1 ILR 213.*** It is further the Claimant's evidence under cross-examination that she

had nothing to show in support of her contention that the domestic inquiry notes were improper. And so, I reject that contention of hers.

12. Umbrage was taken by the Claimant during the domestic inquiry over the fact that no show cause letter preceded the domestic inquiry. Cik Haniza pursued the same line in her submission. Mr. H.C. Yong allocated no space to this area in his written submission. That does not absolve me from addressing the same. It is my judgment that a show cause letter need not necessarily precede a domestic inquiry unless the disciplinary procedures put into place by the employer makes such a letter a prerequisite. In the instant case no such evidence was placed before me. I also find that no prejudice had been caused to the Claimant through the non adherence of a show-cause letter procedure. In the upshot, the attempt to default the domestic inquiry on this ground fails.

13. The domestic inquiry panel made a report of its findings. This report was exhibited as COE2. I will have cause to later refer to a part of this report. I will link this part to that penchant of the Company to stray down the path of forged GRNs. In COE2 the panel decided to dismiss the Claimant and this was carried out by the Company through service upon her, the dismissal letter of 4.8.1999. At the time of her dismissal, the Company paid the Claimant a salary of RM1,750.00 per month. So much for the narrative.

The Issues

14. I now turn to the issues for determination. I find only two. The first involves a finding of fact. Stripped of all trappings, it boils down to one question – Was the Claimant negligent in the processing and preparation of cheques towards payment of the Kelang Indah and IPE invoices?

15. The second issue pertains to a point of law. It involves the domestic inquiry conducted by the Company. It arises in the face of my finding that the manner in which the domestic inquiry was conducted and the records of the same could not be defaulted. The issue before the Court concerns what should be the effect of the domestic inquiry upon the deliberations of the Court.

First Issue

16. To begin, on the burden of proof and the standard upon which it is to be based. Suffice it for me to say that the onus is upon the Company to adduce cogent and convincing evidence to show that the Claimant committed the misconduct that she is alleged to have done so. It is not for her to prove otherwise. The Company's burden here in on a balance of probabilities and nothing more. So firmly have these two principles been established in our jurisprudence that it will be superfluous to quote authority.

17. In order to be found negligent, there must first be a duty to perform. It is the omission to perform this duty that gives birth to the misconduct of negligence. In the content of the instant case, what this duty that the Claimant was required to perform but failed to do, has been specifically identified by Arasu on two occasions in his witness statement. This is found in his answers to questions 14 and 41. In both he narrowed down that duty to be the duty of the Claimant to check the Kelang Indah GRN and the IPE GRN against a document called 'purchase receipts summary'. This is the duty that the Claimant failed to perform. And this constituted the gross negligence that she committed.

18. A good starting point to determine whether it was indeed the duty of the Claimant to countercheck the Kelang Indah and IPE GRNs against

the purchase receipts summary, would be to examine the Claimant's job function. On pages 11 and 12 of AB1 is found a document called job scope. It details the Claimant's job description. It was prepared by the Claimant herself upon instructions from Arasu. On the job scope, Arasu had this to say under cross-examination:

> *" Q: (Refers to pages 11 and 12 of AB1). Do you confirm you agree with the contents. Because she knows her job function well?*
>
> A: Yes. "

Later,

> *Q: (Refers to same). Is it stated anywhere here it is the Claimant's duty to check the purchase receipts or to refer to purchase receipts summary when making payments?*
>
> *A: It is understood. It is not stated specifically. Neither is all the job she does is stated there.*

His explanation to that,

> *Q: Did you question her on that part of her job which is missing from page 12 of AB1?*
>
> *A: In a job scope you don't write details of all the work that you do. "*

The official job description of the Claimant made no mention of a duty imposed upon the Claimant to verify GRNs against the purchase receipts summary before writing out cheques for payment of goods received by the Company.

19. The Claimant included in her bundle of documents, from pages 26 to 31 a document entitled 'Procedure/Flow Chart of Documents', which I will for short call flow chart. All pages, save for pages 26 to 31 of the Claimant's bundle of documents became an agreed bundle and was

marked as exhibit AB2. The flow chart, it will be observed, did not form part of the agreed bundle in AB2. The parties were on common ground that the flow chart was prepared by Thandapani. Thandapani had been the subject of a domestic inquiry himself and had submitted the flow chart during the same. Recall, Thandapani was the Claimant's immediate superior. The flow chart threw important light on whether it was the duty of the Claimant to perform that duty of which she is accused by the Company to have failed to perform. That flow chart did not show that there was such a duty. The flow chart presented two posers to the Court. First, whether the Court should refer to the flow chart and include it in its deliberations. If so, it led to the second poser which concerned the accuracy of the flow chart.

20. The first poser came about this way. The Claimant testified last, just before close of trial. During cross-examination of the Claimant, Mr. H.C. Yong sought the Claimant's confirmation that the flow chart was not a Company document. This the Claimant confirmed. At that point, Mr. H.C. Yong observed that the flow chart had yet to be marked as an exhibit. Having said that, he said no more. Cik Haniza failed to respond. Till then, the flow chart had been the subject of examination both by Mr. H.C. Yong and Cik Haniza of several witnesses. The first time the flow chart came to light was when Mr. H.C. Yong led Arasu, the Company's first witness, in examination in chief. Through him Mr. H.C. Yong laid before the Court, the information that I had related earlier, that is that the flow chart was prepared by Thandapani for usage at his domestic inquiry. Cik Haniza brought into focus the flow chart during cross-examination of Arasu. He was examined quite a bit on its accuracy. Mr. H.C. Yong was heard not to object. Thandapani gave evidence in the Court for the Claimant. He was however not made to utter any sound on the flow chart by either learned Counsel. The Claimant gave evidence after Thandapani. In her witness statement she brought back into play

the flow chart. How Mr. H.C. Yong responded to the flow chart during cross-examination of the Claimant, I had mentioned earlier. After having had my attention directed to the flow chart on so many occasions and having been made to record evidence on the same, I am now asked to pretend that it did not exist. Why? - because Cik Haniza did not apply and have it marked as an exhibit. Section 30(5) behoves me not to be bound by technicalities. I find the flow chart to shed light on the issue before me. Both learned Counsel had ventilated the flow chart. That the author of the flow chart was Thandapani had never been the subject of discord. Evidence on it was recorded from the witnesses of either party. In ***Lim Heng Soon & Anor v. Public Prosecutor (1970) 1 MLJ 166*** it was held by the High Court that there was no substantial miscarriage of justice when an exhibit produced in court but not taken into custody by the court and marked as an exhibit was used as evidence. Including the flow chart in my deliberations will not cause prejudice to either party. In the event, I do so. I must however add that evidence abound on the nature of the Claimant's duties in relation to the issue at hand. My decision on the issue would have been no different if I had not included the flow chart in my deliberations.

21. That leads me to the second poser which involves the veracity of the flow chart. Arasu, the only Company witness who gave material evidence to the fact of gross negligence committed by the Claimant, agreed with all aspects of the flow chart except for two. He also could not understand para (e) of page 29. What he could not understand, is not relevant to the issue surrounding this case. What he could not agree, related to the process flow tabularized at page 27. According to him the duty of checking the GRN against the purchase receipts summary to appear immediately after the function described under the title 'purchase order' is missing. His second disagreement, found at page 27, relates to the purpose of the purchase receipts summary. Two purposes are stated

there. Arasu's contention is that it should include a third and that is, it is to be used for payment of goods actually received. Remember, both his points of disagreement relate to the specific duty of the Claimant *vis-a-vis* the purchase receipts summary around which circulates the alleged misconduct of the Claimant.

22. At this point, I find it relevant to move aside to examine yet another document. It is found at page 4 of AB2, recall, an agreed bundle. It is a memorandum written by Arasu, addressed to four employees in the accounts department. Amongst these four employees are the Claimant, Thandapani and Shanmu. Under skilled cross-examination by Cik Haniza, Arasu agreed that the memorandum instructed the four employees on what had to be done before the issuance of any cheques and that the steps stated therein were mandatory. Yet no where could be found reference to the purchase receipts summary. His answers as to why, I found to be rather weak and defensive.

23. It impresses me not a little that the Company's job scope of the Claimant makes no mention of counter-checking GRN's against the purchase receipts summary. So does not the express written instructions given by Arasu. Correspondingly the flow chart, prepared by the Claimant's own superior, Thandapani, is silent on the same matter. I am left wondering why, if that is indeed the duty of the Claimant and one crucial enough to bring forth an accusation of gross negligence, this duty did not find importance enough to be mentioned in all these three documents. Arasu's explanation on this, with respect, I found to be lame.

24. Now, to superimpose these documents upon the evidence adduced through the various witnesses. I will first examine Thandapani's

testimony. In so doing I exercise caution for the reason that Thandapani himself had been dismissed by the Company following a domestic inquiry at which two of the charges preferred against him were connected with the misconduct with which the Claimant was accused. But I found the caution not to bite. First, in the direct manner in which he gave evidence. Next, in that his evidence was consistent with the earlier documents on GRNs *vis-a-vis* the purchase receipts summary and, finally on account of the workability displayed in the procedures that he described. For effect, I will quote part of his evidence in cross-examination :

> *" Q:* ***Put.*** *Claimant failed to do her job because she did not check the purchase receipt report before she issued the cheque?*
>
> *A: I do not agree.*
>
> *Q: All goods received by the Company are supposed to be reflected in the purchase receipt report?*
>
> *A: Yes.*
>
> *Q: If goods do not feature in the purchase receipt report, then it means Company never received goods?*
>
> *A: I do not agree.*
>
> *Q: If GRN is generated. Then goods received under the GRN should appear in the purchase receipt report?*
>
> *A: It will appear provided the data is entered by the store clerk.*
>
> *Q: Is it the Claimant duty to make sure everything is updated?*
>
> *A: Yes, provided the documents are provided to the Accounts Department at the point of checking. "*

In the circumstances, his single affirmative *"No"* in answer to the question in re-examination – *"Is this purchase receipt report a necessary document for the Accounts Department to refer to when making payments?*", I find tempted to accept.

25. One other answer that Thandapani gave in re-examination brings into sharp focus what Arasu had earlier said under cross-examination. The question posed to Thandapani and his answer to it was :

> *" Q: Can there be any goods which the Company received but not reflected in the purchase receipt report?*
>
> *A: There are incidences when this has happened. "*

Compare this with that stated earlier by Arasu :

> *" Q: When making payments for imported goods, the purchase receipts summary does not arise?*
>
> *A: Yes. Does not apply.*
>
> *Q: Are these imported goods also stock items?*
>
> *A: Yes.*
>
> *Q: Do you confirm that in this case the requirement for purchase receipts summary does not arise?*
>
> *A: Yes. "*

Arasu also said :

> *Q: Do you agree there are other items e.g. stationary whose receipt does not appear in the purchase receipts summary, yet payment is made out?*
>
> *A: Yes. They are non-stock items. In our Company 'non-stock items' means those items that are not used in the manufacturing process. "*

There can therefore be occasions when the GRN cannot or need not be verified against the purchase receipts summary to effect payment. That

being so, such verification surely cannot be a mandatory prerequisite before the preparation of a cheque for payment. This may well be the reason why this process is left unstated in those three documents earlier referred to.

26. Now, for a review of Arasu's evidence. Particularly what he said under cross-examination. His evidence was reflective of his role in the sequence of events which culminated in the Claimant's dismissal. He discovered the purported negligence, he did the preliminary investigations, he was the main witness at the domestic inquiry and so too was he in the Court. Even to state that he was an interested witness would under the circumstances be an understatement.

27. On Shanmu's role. Recall, she was the accounts clerk who assisted the Claimant. Examininig Arasu's evidence, it was Shanmu's responsibility to check and confirm to the Claimant that all documentation in relation to any payment are in order. The invoices and the cheque distribution summary relating to Kelang Indah and PIE found at pages 17, 53, 13 and 38 of AB1 bear testimony in the form of her writing or signature in verification, on this crucial role that she played. I depart Shanmu with two series of questions posed by Cik Haniza and Arasu' s responses thereto :

First,

"Q: Do you agree Ms. Shanmu had done her job properly?

A: She has not done her job properly. That is why we are here.

Q: Was Ms. Shanmu involved in this irregularity?

A: Yes she was involved.

Q:: Are the irregularities connected with the allegation against the Claimant here?

A: Yes."

Second,

"Q: ***Put.*** *Ms. Shanmu even if involved in this irregularity and checking with the documents, she was not subject to domestic inquiry, but instead was promoted?*

A: Yes."

28. Finally, the general tenor of Arasu's evidence. With respect, I cannot but describe it in one word – disingenuous. For a full effect as to why, it would be necessary to scrutinize his evidence at various stages of his cross-examination. I resist the temptation to repeat all and will attempt at prose wherever possible without risk to clouding the perspective. On how he had reacted to the various questions on why had been left out the requirement for the Claimant to verify the GRNs against the purchase receipts summary in the Claimant's official job scope and his memorandum of 14.6.1999 on payment procedure, I had mentioned earlier.

29. Yielding to temptation, I relate under some of Arasu's testimony. They are not contiguous. I must add that this does not rob it of the true intent of his answers.

"Q: If there were no goods received, there will not be any GRN raised by the store?

A: Yes.

Q: If you receive a GRN from the stores, will you think that the goods were not received at all?

A: I will not under normal circumstances."

Later, speaking on the reliability of the GRN *vis-a-vis* the purchase receipts summary to confirm receipt of goods from suppliers, Arasu's version :

"Q: Are you saying that only when data is entered into the system, then only you can confirm the goods have been received?

A: Yes.

Q: Although you have trustworthy stores personnel, who have confirmed and verified the GRN that the goods have been received by the Company, yet you cannot take the GRN at face value?

A: Yes.

Q: Are you saying that it is only on sight of the purchase receipts summary that it is confirmed that the goods have been received by the Company?

A: It is accounted for only when it is entered into the system."

Not relevant to the issue at hand, but to show that Arasu was capable of answers difficult to digest :

"Q: The Purchasing Department negotiates and determines the price of goods to be purchased?

A: Yes.

Q: After the purchasing order were issued and goods were received, supplier also issues delivery order and invoice, you are saying Claimant can still question the price?

A: Yes. Definitely.

Q: Even though 2 Managers, i.e. Factory Manager and Purchasing Manager have checked, you say Claimant can still question the price?

A: Yes."

30. Now, for some comments on the purchase receipts summary. The stores upon receipt of goods from suppliers will raise a GRN. Copies of

the GRN and other supporting documents are then sent by the stores to the accounts department for issuance of payment. The purchase receipts summary is however not sent to be accounts department at that point of time. Completion of that summary is the sole responsibility of one Pakiyam, employed in the stores. Pages 64 to 74 of AB1 is the purchase receipts summary for the month of March 1999. The two charges of negligence against the Claimant relate to transaction during the month of March 1999. It is both the Claimant's and Thandapani's evidence that the purpose of the purchase receipts summary is not related to cheque preparations but for accounting purposes. Against the bare assertion of Arasu on one side, I have to weigh the absence of mention of the purchase receipts summary in the three documents stated earlier and the evidence of both the Claimant and Thandapani on the other. I further cannot help but take notice that the entries in the purchase receipts summary for March 1999 is not in any proper running sequence but entered at random involving not less than 178 GRNs and purchase orders thus making checking a tedious affair. And not to be disregarded too is the fact that the March 1999 summary is dated 5.4.1999. In the event, I find the Claimant's version on the purpose of the purchase receipts summary to be more probable.

31. For the reasons adumbrated, I find the Company not to have made out the charge of gross negligence for which it had dismissed the Claimant. The contagion is that the dismissal is without just cause or excuse. But it is not so easily to be. For I have yet to apply my mind to the second issue confronting me. And this relates to the effect of the company's domestic inquiry upon the proceedings in the Court.

Second Issue

32. On this second issue relating to domestic inquiry, Mr. H.C. Yong first referred the Court to the High Court's decision in the case of ***Bumiputra Commerce Bank Bhd. v. Mahkamah Perusahaan & Anor (2004) 7 CLJ 77***. Mr. H.C. Yong quoted that part of the decision where Raus Sharif J. read the apex Court's decisions in the case of ***Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. & Another Appeal (1995) 3 CLJ 344*** and in the case of ***Milan Auto Sdn. Bhd. v. Wong Seh Yen (1995) 4 CLJ 449*** that the Industrial Court upon receiving a reference of a dismissal under section 20(3) is duty bound to hear the merit of the case to conclusion and determine whether the dismissal is with just cause or excuse, not to apply to cases where a domestic inquiry precedes the dismissal. In such cases, the need for the Industrial Court to conduct a *de novo* hearing into the merits of the dismissal did not arise and the Industrial Court is instead limited to considering whether there was a *prima facie* case against the workman, said the learned Judge. Unfortunately the learned Judge stopped short, offering no insight as to whether the Industrial Court had to determine the *prima facie* case based on its own investigation or from the investigations of the employer at the domestic inquiry stage. Cik Haniza offered no reply to all this. On my part, the route that I have taken on the issue pertaining to the domestic inquiry makes it unnecessary to discuss the proposition of law propounded by the learned Judge in the Bumiputra Commerce Bank Bhd. case.

33. Continuing his submission, Mr. H.C. Yong referred to the decision of the High Court in ***Metroplex Administration Sdn. Bhd. v. Mohamed Elias (1998) 5 CLJ 467*** where Low Hop Bing J. propounded a view which amounted to that, where an employer had conformed to the principles of natural justice in conducting the domestic inquiry, the

Industrial Court ought to consider the findings of that domestic inquiry. Relying on this decision, Mr. H.C. Yong submitted that when a domestic inquiry was held and the notes thereto were accurate, the Industrial Court is duty bound to consider the inquiry's findings and it is only where the findings are perverse that the findings of the inquiry may be set aside. Cik Haniza perpetuated her state of blissful silence. Here, I too will partake in blissfulness. But for the moment only.

34. My scrutiny of the Bumiputra Commerce Bank Bhd. decision had my attention drawn to one complaint made by the learned Judge which is - *"In the instance case, the Industrial Court did not address the issue whether a proper domestic inquiry had been held and whether the conclusion reached by the inquiry panel was perverse."* I think that the complaint is in keeping with common sense justice. And it is also not distant from the view expressed in the Metroplex Administration Sdn. Bhd. case. I will therefore proceed to address the issue regarding the conclusion of the domestic inquiry. To do so I must first apply my mind on what constitutes a perverse decision.

35. A perverse decision circulates the findings of the enquiry officer. The findings has to be weighed against the background of the evidence that had been collated during the domestic inquiry. Basically the enquiry officer should ensure there is adequate evidence to support his findings. The conclusions should be based on such evidence and the conclusions arrived at by him should be such, that any reasonable person going through the evidence on record would come to the conclusion that the delinquent is guilty. Otherwise, the findings will be held to be perverse. If the findings are based on no evidence or evidence which is inadequate to bring home the charge – it will be held to be perverse. On this subject I was particularly attracted by the writings at

page 308 of the text ***K.P. Chakravarti's Domestic Inquiry & Punishment by M.R. Mallick, 3rd edn.*** where the learned author wrote :

> *" In* ***Benaras Electric Light and Power Co. Ltd. v. Labour Court II, Lucknow AIR 1972 SC 2182 (2184) : (1972) 25 FLR 469 (SC),*** *the Supreme Court has laid down the law in this regard thus –*
> *'A finding recorded in a domestic inquiry cannot be characterised as 'perverse' by the Labour Court unless it can be shown that such finding is not supported by any evidence or is entirely opposed to the whole body of the evidence adduced. In a domestic inquiry once a conclusion is deduced from the evidence it is not permissible to assail that conclusion, even though it is possible for some other authority to arrive at a different conclusion.' "*

The caution appearing at the ultimate of this passage is not lost on me in evaluating the decision of the Company's domestic inquiry panel.

36. Recall, that I had earlier found the conduct and the notes of the domestic inquiry to be fair. Now, to turn to the domestic inquiry's findings or decision. It is found at exhibit COE2. I must say it was well written. It reflected in clear terms the matters that influenced the mind of the panel in arriving at the decision of the Claimant's guilt. I however find the manner in which the panel arrived at its findings and the decision it took to be cause for concern. Arasu was a company-witness at the inquiry. His evidence there was not dissimilar to that given in the Court. There were no documents that were produced during the domestic inquiry that were not seen as exhibits in the Court. The domestic inquiry heard the evidence of three other witnesses. The first two did not testify in the Court, but the last, Thandapani, did.

Thandapani maintained at the domestic inquiry what he subsequently said in the Court, that is, that the purchase receipts summary was not tied up with payment. Now, for the other two witnesses at the domestic inquiry. One was Pakkiyam the store clerk. She merely testified on the GRNs. The other was Nigel Chieng, assistant manager from audit department. He spoke more on his investigations with particular reference to the Kelang Indah and PIE GRNs. Nor surprisingly therefore, Norbert, the chairman of the inquiry panel, testified in the Court that he treated Arasu as the key witness. He also said that most of his findings were based on the evidence of Arasu. The evidence of both Arasu and Thandapani as well as the exhibits produced during the domestic inquiry, as I had observed earlier, are no different from that which were submitted in the Court. And I had evaluated these to be unable to support the two acts of gross negligence which the Company found the Claimant guilty of.

37. There is one other matter that appeared to be so glaring in both the notes of domestic inquiry as well as the findings report of the enquiry. This matter by itself, vitiates the findings and decision of the domestic inquiry. This involved the alleged forgery of the two GRNs. Remember, the subject matter of the charges was narrowed down to the failure of the Claimant to verify the two GRNs against the good receipts summary prior to the preparation of the cheques. But the domestic inquiry went on a tangent, more to investigate into the authenticity of the two GRNs – whether they were genuine or forgeries. And this was not an offence for which the Claimant was accused of. In discussing the evidence in the findings report, the panel took special note of Arasu's evidence that the Claimant had removed questionable invoices from Arasu's room and replaced them with other invoices; that the GRNs and the rubber stamp used on the said GRNs were forged and; that the Claimant's conduct showed forgery and an intention to cheat. They also

assessed Nigel Chieng's evidence to show that the Claimant's act went beyond gross negligence and pointed towards criminal intent. Unfortunately these observations by the panel were based on bare assertions of the witnesses and in the absence of cogent evidence. That the enquiry panel was influenced by these irrelevant or unsupported considerations in arriving at its decision is obvious from its opinion stated at paragraph (g) at page 97 of COE2. For best effect, I repeat it :

> *"g) It is the opinion of the Panel that should this employee be allowed to continue her job, it would tantamount to the Company condoning acts of Gross Negligence and criminal intent. "*

38. The findings and decision of the domestic inquiry was indeed perverse and should not be allowed to stand. The only path left to me is to reassert my earlier finding that the Claimant's dismissal by the Company was wrong. That means it was without just cause or excuse.

Remedy

Reinstatement

39. A finding of dismissal without just cause or excuse should in the norm result in an order of reinstatement. (See para 39 of ***Steel Recon Industries Marketing Sdn. Bhd. v. Yap Cheng Hong, Award No. 140 of 2006*****).** But I do not consider it appropriate in the instant case. The circumstances surrounding the Company's decision to terminate the services of the Claimant has raised doubts on the feasibility of the Claimant and Company to be able to work together in complete confidence. That the separation between the parties has been for more than six years further accentuates the undesirability of reinstatement. I

therefore find it more suitable to order compensation in lieu of reinstatement. Such compensation is calculated by multiplying the last drawn salary by the length of period commencing from the date the Claimant commenced employment up to the last date of hearing (see Federal Court in ***R. Ramachandran v. The Industrial Court of Malaysia (1997) 1 CLJ 147*** and a host of Industrial Court awards). The multiplier being RM1,750.00 and the multiplicand being 16.25 years, the compensation in lieu of reinstatement works out to RM28,437.50.

Backwages

40. The Claimant is also due backwages. Backwages is due from the date of dismissal up to the last date of hearing (per Gopal Sri Ram JCA at para 10, page 3029 in ***Airspace Management Services Sdn. Bhd. v. Col.(B) Harbans Singh a/l Chingar Singh (2000) 3 AMR 3009***). Similar view was expressed by Abdul Kadir Suleiman J. (later FCJ) in ***Thilagavathy Alagan Muthiah v. Meng Sing Glass Sdn. Bhd. & Anor (1997) 4 CLJ Supp 368 at p. 372*** :

> *" Once it is determined that a workman has been dismissed without just cause or excuse, generally for his absence from the place of employment from the time of dismissal to the time of reinstatement or the time of the order for compensation in lieu thereof, he must be paid wages in full as though he was working for the employer during the period. It was not through his fault for being away from work during the period. It was through the wrongful act of the employer dismissing him without just cause or excuse. "*

41. Backwages however may be scaled down for definite reasons. The heads under which such scaling down may be effected are contributory

misconduct, gainful employment and delays attributable to the dismissed workman (see Nik Hashim J [now FCJ] in ***Ter Ah Chai v. The Times packaging Co. Sdn. Bhd. & Anor. (1998) 4 CLJ 923 at p. 927 para h & i)***. I too had occasion in the case of ***Ike Video Distributor Sdn. Bhd. (2004) 2 ILR 687*** to discourse extensively on this same subject of scaling down. The need to regurgitate here the same analysis is unnecessary. I now proceed to apply the various principles on backwages and scaling down thereon.

Contributory Conduct

42. First, the head of contributory conduct by the Claimant. There being no evidence of any such conduct by the Claimant, no scaling down can be invited under this head.

Gainful Employment

43. Second, scaling down for the reason of gainful employment of the Claimant during the interregnum between dismissal and the date of completion of hearing. I find scaling down appropriate under this head. In so doing, I have applied my mind to the apex Court's decision in ***Dr. James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd. (Sabah) & Anor (2001) 3 CLJ 54.*** As to its import, my explanation can be found in ***Ike Video Distribution Sdn. Bhd. (supra).***

44. Relevant it becomes now, to examine what the Claimant did since her dismissal from the Company. It was her evidence that she was not in constant employment during the period relevant to backwages. She was unemployment immediately after her dismissal up to the year 2000 when she obtained employment with Golden Cambridge Elite Sdn. Bhd. in the capacity of accounts and administration assistant at a salary of

RM1,900.00 per month. She remained in that employment up to August 2001. It was for her to show when she started employment there, but she did not. In the circumstances, I take it that she began in January 2000. She said she next worked with Alliance Harvest Sdn. Bhd. in the year 2002 and remained there till 31.12.2002. There she worked again as accounts and administration assistant, but this time at a salary of RM2,200.00 per month. As in earlier circumstances, I again take it that she commenced work with the second employer in January 2002. Since 1.1.2003 up to the date of completion of hearing she held no regular employment. Instead she worked part-time in an accounting firm at a salary of RM400.00 per month plus commission. In the year 2004 she earned a total commission of RM4,700.00 giving an average of RM391.00 per month. If this commission be used as a yardstick, her remuneration averaged RM791.00 per month since 1.1.2003 to date.

45. Given this state of affairs, I decide first, to award her full backwages for the period of initial unemployment from August 1999 to December 1999, a period of five months. The next period of unemployment from September to December of the year 2001, a period of four months, I treat the same. For the periods during which she worked as accounts & administration assistant, earning comparatively comfortable salary, I award no backwages. For the period 1.1.2003 up to the last date of hearing, a period of thirty months, I order full backwages. The reason is that the sum she earned during this period was minuscule and of subsistence level if compared to what her salary would have reasonably progressed had she remained in the Company's employ. In that I have not erred in such a reasoning, I find reassurance from the words spoken by Abdul Kadir Suleiman J. (Later FCJ) repeated under, in the unreported case of ***Kris Safety Footware Sdn. Bhd. v. Lee Teck Meng & Anor, KL-High Court O.M. No. R-1-25-107 of 1996*** in relation to an exception on scaling down for gainful employment.

> *"As for the deduction in respect of post dismissal income, my view is, to allow the 1st Respondent (workman) to keep that income and at the same time to be paid again backwages by the Applicant (employer) for the same period, the 1st Respondent would benefit twice over an account of his wrongful dismissal. Equity and good conscience would not permit this.* ***I would exercise my discretion in favour of the 1st Respondent if the income he received was of sufficient amount just to keep him and his family subsist. "*** (emphasis added)

Backwages therefore works out at RM68,250.00.

Delay Factor

46. To explain, delay contributes to the size of the total sum of money that a Claimant will receive upon victory in the Court. When such delay is occasioned by the Claimant or when such delay had not been caused by the Company's recalcitrance, injustice would be caused if there be no scaling down. Scaling down if necessary should be on the total sum, that is compensation in lieu of reinstatement and backwages. I found neither the Claimant nor the Company to have occasioned any delays in the events leading to and during the conduct of the trial. It took two and a half years for the Claimant's dismissal to be referred to the Industrial Court. The case languished for a further one year in the year 2003 for the reason that there was no substantive Chairman in this Division of the Court. Considering those facts and the fact that I have not applied Industrial Court Practice Note 1 of 1987 in maximizing backwages to twenty-four months, I find scaling down of 12.5% to be fair. This percentage I arrived at after discounting a one year period as being a

reasonable lapse of time for a dismissal to be referred to the Industrial Court and having pegged, as in past decisions, scaling down at the rate of 5% per year delayed.

47. Applying the arguments given, the compensation in lieu of reinstatement and backwages totalling RM96,687.50 is scaled down under the head of delay factor to RM84,601.56.

Claimant's Other Prayers

48. In her pleadings, the Claimant complained that she was not paid salary for the period 1st to 4th August 1999 and salary in lieu of balance of annual leave for the years 1998 and 1999. Her prayer, at the end of pleadings, was wide enough to encompass these two complaints. But I am unable to give life to either for at no time during the trial were these matters raised.

Order

49. The Court orders the Company to pay the Claimant the sum of RM84,601.56, less statutory deductions if any, through her solicitors on record, not later than forty-five days from the date of this award.

HANDED DOWN AND DATED THIS 2ND MAY 2006

(N. RAJASEGARAN)
CHAIRMAN
INDUSTRIAL COURT