

ADRINE VERGHEESE JACOB

v.

MALAYSIAN AIRLINES SYSTEMS BERHAD

Industrial Court, Kuala Lumpur
Gulam Muhiaddeen Abdul Aziz
Award No: 69 of 2015 [Case No: 12/4-84/12]
20 January 2015

Dismissal: Misconduct — Theft — Claimant convicted of misconduct and dismissed — Whether company acted in bad faith in terminating claimant — Whether company failed to investigate and convene board of enquiry — Whether claimant committed act of misconduct — Whether claimant breached fiduciary relationship with company — Whether company failed to observe rules of natural justice in dismissing claimant — Whether dismissal with just cause or excuse

The claimant, a Chief Steward with the company was returning from official duty in Dubai when he was detained for theft of a mobile phone at the Dubai Airport. He was detained by the authorities in Dubai and later released on bail and asked to be present in court at a future date. When the claimant's case was called he was absent as he alleged he was not notified of the hearing date. The Dubai court found him guilty and he was sentenced to a year's jail *in absentia*. The claimant appealed against the conviction and sentence but in the meantime the company issued a termination letter against the claimant citing a breach of cl 4.1 Appendix A of the 'MAS Disciplinary Procedures' ('the disciplinary procedures'). It was the company's case that as the claimant had been charged for theft of a mobile phone and been found guilty of the offence by a criminal court in Dubai, it had no choice but to terminate the claimant from employment. The claimant alleged that the company had acted in bad faith and that the initial sentence of imprisonment was given in a foreign jurisdiction which obviously did not take into account rules of natural justice. It was the claimant's contention that he was dismissed without just cause or excuse as the company had failed to follow its own specific procedure for dismissal, namely the disciplinary procedures by its failure to investigate and convene a board of enquiry.

Held (dismissing the claimant's claim):

(1) From the relevant clauses in the the disciplinary procedures, it was obvious that the company had to take necessary steps before a punishment was imposed for misconduct, whether it was a minor or major misconduct. Although there were no provisions in the the disciplinary procedures, which allowed a summary dismissal, it would appear that the company chose to ignore its own procedures when terminating the claimant from his employment. However, it is settled law that it is the duty of this court to scrutinise the evidence adduced to determine whether the claimant had committed the act of misconduct. The



burden of proof was still on the company to prove, on a balance of probabilities, that the claimant had been dismissed with just cause or excuse. (paras 32, 42 & 45)

(2) Based on the evidence, when the claimant appealed against his conviction and sentence, he was granted a suspended sentence, whereby the judge suspended the implementation of the sentence with the condition that if the claimant were to commit another crime during this suspension period of three years, his suspension would be revoked and the claimant would have to serve the three months in prison. Therefore, the misconduct complained of by the company had been established. The Dubai Correctional Court, the Review Court and lastly the Dubai Court of Appeal had found him guilty of the theft of the mobile phone and had convicted the claimant of the charge. (paras 50-51)

(3) The claimant's submission that the initial sentence of imprisonment was given in a foreign jurisdiction which obviously did not take into account rules of natural justice was without any basis and ought to be rejected. The Dubai Court of Appeal had considered all the relevant facts and submissions by the claimant before making its decision. Further, the claimant had contradicted himself when explaining why he took the mobile phone in the first place. (paras 52, 53, 56 & 58)

(4) The claimant's act had breached the fiduciary relationship with the company which was one of trust. In an employment relationship, when the employer engages the services of an employee, there is an expectation that the employee would discharge his duties faithfully, as well as protect and further the interest of the employer. On the present facts, the claimant had breached his fiduciary duty when he committed the misconduct. Therefore, the company was justified in dismissing the claimant from service as he had committed a serious act of misconduct. In the circumstances, the company had proved on a balance of probabilities that the claimant's termination was reasonable and justified. (paras 62-63)

Case(s) referred to:

Asahi Industries (M) Sdn Bhd v. Lim Mui Lin [2000] 1 MELR 726 (refd)

Goon Kwee Phoy v. J&P Coats (M) Bhd [1981] 1 MLRA 415 (refd)

Management of Balipara Tea Estate v. Its Workmen [1960] AIR 191 (refd)

Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 2 MLRA 23 (refd)

Stamford College Petaling Jaya v. Lai Fook Seng [1994] 2 MELR 520 (refd)

Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 1 MELR 4; [2002] 1 MLRA 188 (refd)

Utusan Melayu (M) Berhad v. National Union of Journalists, Malaysia [1971] 2 ILR 840 (refd)

Wong Chee Hong v. Cathay Organisation Malaysia Sdn Bhd [1987] 1 MELR 32; [1987] 1 MLRA 346 (refd)



Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 1 MLRA 412 (refd)

Legislation referred to:

Industrial Relations Act 1967, s 20(3)

Other(s) referred to:

OP Malhotra, *Law of Industrial Disputes*, 4th edn, vol II, p 59

Counsel:

For the claimant: Darshan Singh Akhlakh (Jaswant Kaur with him); M/s Darshan & Jaswant

For the company: Shalini; M/s Lee Hishammuddin Allen & Gledhill

AWARD

Gulam Muhiaddeen Abdul Aziz:

[1] This is a reference made under s 20(3) of the Industrial Relations Act 1967 arising out of the dismissal of Adrine Verghese Jacob (“the claimant”) by Malaysian Airlines Systems Berhad (“the company”) on 25 May 2011. The reference was dated on 27 January 2012 and received by the court on 8 February 2012.

Background Facts

[2] The claimant joined the company on 12 January 1990 as a Trainee Air Steward with a monthly allowance of RM400.00.

[3] The claimant’s last position before his dismissal was as Chief Steward and his last drawn salary was RM3,469.89 together with a fixed allowance for laundry amounting to RM80.00 and RM470.00 for “Elaun Pesawat” per month.

[4] On 8 February 2011, the claimant was returning from official duty in Dubai when he was detained for theft of an Iphone at the Dubai Airport. He was detained by the authorities in Dubai and later was released on bail and asked to be present in court on a future date.

[5] The claimant’s case was called on 3 March 2011. The claimant was not present as he alleged that he was not notified of the date and was not aware of the hearing date. The court found him guilty and he was sentenced to a year’s jail *in absentia*.

[6] The claimant later appointed a lawyer to represent him and instructed him to file a review on the basis that he had been sentenced *in absentia*. The claimant remained on bail pending the review.



[7] The review was heard on 28 April 2011 and the judge maintained the sentence of one year imprisonment term.

[8] The claimant then proceeded to file an appeal in the Court of Appeal. The appeal was set for hearing on 7 June 2011.

[9] The company issued a termination letter to the claimant on 25 May 2011 dismissing the claimant from his employment in the company on the ground of his conviction and sentence of a one year jail sentence by the Dubai Court. The letter further states that the basis for the termination was that the claimant has breached cl 4.1, Appendix A of the MAS Disciplinary Procedure; namely, "Conviction or found guilty of any registrable criminal offence".

[10] The claimant alleged that the company had acted in bad faith and was wrong in not following proper procedures and was in total disregard of the principles of natural justice in dismissing him. The claimant prays that he be reinstated in his former position and all backwages and allowance be paid to him.

The Function Of The Court

[11] The function of the Industrial Court in a reference under s 20(3) of the Act has been explicitly stated by the Supreme Court in the case of *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 2 MLRA 23 as follows:

"As pointed out by this court recently in *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 1 MLRA 412, the function of the Industrial Court in dismissal cases on a reference under s 20 is two-fold; firstly, to determine whether the misconduct complained of by the employer has been established and secondly whether the proven misconduct constitutes just cause or excuse for the dismissal."

[12] In the case of *Wong Chee Hong v. Cathay Organisation Malaysia Sdn Bhd* [1987] 1 MELR 32; [1987] 1 MLRA 346, the Supreme Court at p 36 states as follows:

"When the Industrial Court is dealing with a reference under s 20, the first thing that the court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse ..."

[13] In the present case, it is not disputed that the claimant was dismissed from the employment of the company on 25 May 2011 via its letter of termination dated 25 May 2011. The only issue is whether the termination was with or without just cause or excuse.

Burden Of Proof

[14] This issue has been sufficiently dealt with in the case of *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair* [2002] 4 MELR 30; [2002] 1 MLRA 188 wherein the Court of Appeal made a preliminary observation that



the Industrial Court should not be burdened with technicalities regarding the standard of proof, the rules of evidence and the procedure that are applied in a court of law. The Industrial Court should be given sufficient flexibility to arrive at its decision so long as it gives special regard to the substantive merits of the case and decides the case in accordance with equity and good conscience.

[15] In the *Telekom Malaysia* case, Abdul Hamid Mohamad JCA made reference to the Indian Supreme Court decision in *Management of Balipara Tea Estate v. Its Workmen* [1960] AIR 191 in which the court held:

“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 the workman was well founded.**

The tribunal misdirects itself in so far as it insist upon conclusive proof that 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.”

[Emphasis Added]

[16] In *Utusan Melayu (M) Berhad v. National Union of Journalists, Malaysia* [1971] 2 ILR 840, the Industrial Court observed:

“It must be remembered that in dismissing an employee including the dismissal where the reason is criminal conduct, the employer need only satisfy himself that at the time of the dismissal, there was reasonable grounds for believing the offence put against the employee was committed. **The test is not whether the employee did it but whether the employer had acted reasonably in thinking the employee did it and whether the employer acted reasonably in subsequently dismissing him.**”

[Emphasis Added]

The Company’s Case

[17] The only witness for the company was Ahmad Sukri Bin Abdullah (COW1) who was the company’s Senior Manager Human Resources Services. He testified that as the claimant had been charged for theft of a phone and been found guilty of an offence by a criminal court in Dubai, the company had no choice but to terminate the claimant from employment. He confirmed that the company had issued the termination letter more than three months after the claimant had been charged and detained in Dubai on 8 February 2011.

[18] In his witness statement, COW1 explained that cl 4.1 Appendix A of “MAS Disciplinary Procedures”, was referred to in the termination letter. It explicitly states that misconduct includes “Conviction or found guilty of any



registrable criminal offence. He had also stated that the company had only dismissed the claimant after his appeal had been dismissed on 28 April 2011.

[19] During cross-examination, COWI reiterated that the claimant's dismissal had been premised on the criminal conviction in Dubai and as a summary dismissal case, there was no need for show cause or domestic inquiry procedures.

Q46: Refer to Q&A 11, was there any domestic inquiry or show cause implemented in this case?

A: It was summary dismissal based on conviction in the Court of Law. There was no domestic inquiry or show cause procedures.

Q47: Refer p 38 of COB, you based the dismissal on the fact that the claimant has committed registrable criminal offence?

A: Yes.

Q48: By that you meant the one year jail sentence that you refer to in the dismissal letter?

A: He was convicted in Court of Dubai under criminal case.

Q49: Is the one year jail sentence is a registrable criminal offence?

A: The decision to dismissal doesn't matter whether it is one year or one day jail as long as the person is convicted by the Court of Law.

The Claimant's Case

[20] The claimant gave evidence that on 8 February 2011 when he was returning back from Dubai Airport, after the security screening, he saw a hand phone in the tray which he believed belonged to Kuganesh S Govindramohon, a member of his flight crew who had just gone ahead. The claimant picked it up to give it to him.

[21] As soon as he boarded the plane, two Airport Police Officers came to the plane and asked him if he had taken a handphone. He replied that he did and told them why he took the handphone. They asked the claimant to follow them out of the plane to give a statement because, according to the officers, the phone belonged to a Russian crew member. The claimant was asked to sign a statement which was in Arabic saying it was a mere formality. After he signed the statement, the Police Officers did not let him board the plane. Instead they took him away and charged him for theft.

[22] The claimant informed his wife in Malaysia about what happened and she with the help of her employer's friend's lawyer in Dubai managed to get him released on bail pending trial. Upon his release, he was told by the lawyer that he had actually signed a confession that he had stolen the phone. The statement was in Arabic.



[23] The claimant further testified that when he was released on bail, he had given the company's office address in Dubai to the police for communication but the company had failed to inform him of the date of the trial. As a result he did not attend court and was sentenced *in absentia* based on the so-called confession.

[24] The claimant's learned counsel submits that the company had failed to follow its own specific procedure for dismissal namely the Malaysian Airlines Systems Berhad Disciplinary Procedure. Clause 9.1 which states as follows:

9. Major Misconduct:

- 9.1. If the investigation discloses that the employee has committed a serious misconduct which warrants severe punishment such as suspension without pay for a maximum period of one week, demotion or dismissal, etc, proper enquiry must be held. In such an event the Director of Personnel should be furnished with details of the misconduct and report of investigations carried out and he shall convene a Board of Enquiry.

[25] Therefore, the company had failed to comply with the above procedure when it failed to investigate and convene a Board of Enquiry.

[26] The claimant further submits that sending the letter of dismissal a few days before the final appeal reflects a clear case of *mala fide* on the part of the company.

[27] In conclusion, the claimant submitted that he was dismissed without just cause or excuse and prays that he be reinstated.

Evaluation Of Evidence And Decision

[28] It is established law that the main and only function of the Industrial Court in dealing with a reference under s 20 of Industrial Relations Act 1967 is to determine whether the misconduct complained of by the employer as the grounds of dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal.

[29] The case of *Goon Kwee Phoy v. J&P Coats (M) Bhd* [1981] 1 MLRA 415, is binding authority for the proposition that the court is restricted in its inquiry into the veracity of the reason chosen by an employer for the dismissal. Raja Azlan Shah CJM speaking for the Federal Court stated as follows:

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



[30] In the present case the claimant was dismissed as a result of his conviction and the sentence of a one year jail by the Dubai Court on 3 March 2011 and thereby the claimant has breached cl 4.1 “Conviction or found guilty of any registrable criminal offence”, Appendix A of the MAS Disciplinary Procedures.

[31] COW1 had testified that the claimant’s dismissal had been premised on the criminal conviction in Dubai and as a summary dismissal case, there was no need for show cause or domestic inquiry procedures.

MAS Disciplinary Procedure

[32] The company has its own Disciplinary Procedures which are exhaustive and cover all aspects of misconduct. The procedures were made effective from 1 August 1981 and all the staff are required to be conversant with the procedures. The procedures laid down the steps to be taken when a misconduct is alleged against an employee of the company.

[33] The following are some of the pertinent clauses in the MAS Disciplinary Procedures.

[34] Under cl 2.2.1, misconduct has been defined as follows:

“Misconduct refers to acts of commission or omission by an employee which contravene or conflict with established rules and regulations of the company or implied or expressed terms and conditions of his employment, which if proven, would warrant disciplinary action. Please see Appendix A for a list of acts which constitute misconduct, but which are by no means exhaustive.”

[35] Appendix A list out the acts of misconduct and ends the list with the statement that; “The above are examples of misconduct and the list is not exhaustive”.

[36] Item 4 of Appendix which is the misconduct alleged against the claimant states as follows:

“Conviction or found guilty of any registrable criminal offence.”

[37] The court notes that Appendix A did not classify any misconduct as minor or major misconduct. However, under cl 4 of the procedure states as follows:

4. Responsibility;

4.1. Maintenance of discipline is the responsibility of all executives and supervisors. The executives shall have powers to impose minor punishments such as verbal warning and written warning. Major punishments such as suspension without pay, downgrading, dismissal, etc, shall be awarded by the Director of Personnel or his representative after due enquiry. The Director of Personnel will also provide necessary advice and guidance in the implementation of the disciplinary procedure.



[38] The procedure for investigation has been laid down in cl 6 as follows:

6. Investigation (Criminal And Civil Cases)

6.1. When a Section Head or Departmental Head or Divisional Head receives a complaint or suspects that a member of his staff has committed a misconduct, he must immediately carry out an investigation. This is to establish whether there is a *prima facie* case against the employee concerned. This is a fact finding enquiry. The investigation should be along these lines.

- (a) Interview the complainant if there is one and record his statements.
- (b) Interview other employees who may be involved in the incident eg if a complaint is received that a fight took place among staff all those involved in the fight should be interviewed.
- (c) Interview also the employee against whom the complaint is made and record explanation if he gives it voluntarily. No duress or promise of material benefit should be made, as confession obtained under duress will not be accepted as evidence.
- (d) After investigating the complaint as thoroughly as time permits, Section Head or Departmental Head or Divisional Head concerned should then consider whether the complaint is justified. He should be clear what the misconduct is, ie whether the misconduct is minor or major or criminal in nature.

[39] Under cl 9 of the procedure states as follows:

9. Major Misconduct;

9.1. If the investigation discloses that the employee has committed a serious misconduct which warrants severe punishment such as suspension without pay for a maximum period of one week, demotion or dismissal, etc, a proper enquiry must be held. In such an event the Director of Personnel should be furnished with details of the misconduct and report of investigations carried out and he shall convene a Board of Enquiry.

[40] Further, under cl 11 states as follows:

11.1. After receiving the advice from the Head of Department concerned, the Director of Personnel or his authorised representatives will issue a letter of allegation against the employee concerned calling for an explanation why disciplinary action should not be taken against him in respect of the charges contained therein.

11.2. The Letter of Allegation:

- (a) should be specific, clear, precise and accurate;



- (b) should state the date, time and place of commission of the offence(s);
- (c) should cite the company or departmental regulation(s) where the offence is in breach of some regulation(s);
- (d) should contain a statement calling upon the employee against whom the allegation is made to submit his explanation in writing within fourteen days;
- (e) should state where necessary that the employee against whom the allegation is made is suspended pending inquiry.

11.3. An example of the letter of allegation is at Appendix C.

[41] The example of the letter of allegation at Appendix C is a sample letter for serious misconduct.

[42] From the above clauses in the MAS Procedures, it is obvious that the company must take the necessary steps before a punishment is imposed for misconduct whether it is, a minor or major misconduct. COW1 testified that no such procedures were taken in the present case as he considers that it was a major misconduct and summary dismissal is justified. However, there are no provisions in the MAS Procedures which allows a summary dismissal. The company chose to ignore its own procedures.

Implication On Not Following The MAS Procedures

[43] In the case of *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 1 MLRA 412 the Federal Court held that even when there was a breach of contractual or statutory duty to hold an inquiry, the Industrial Court should proceed and determine, firstly, whether the misconduct complained of was in fact committed and if so, whether it constitutes just cause or excuse for the dismissal.

[44] Mohd Azmi FCJ further states at p 422 as follows:

“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. Indeed, the Minister’s reference should be viewed as a hearing *de novo* by an independent statutory inquiry ...”.

[Emphasis Added]

[45] In the light of the above case, it is the duty of this court to scrutinise the evidence adduced in this court and to determine whether the claimant has committed the act of misconduct. The burden of proof is still on the company to prove, on a balance of probabilities, that the claimant has been dismissed with just cause or excuse.



The Misconduct

[46] The company's sole witness testified that he relied on p 16 of COB as the evidence that the claimant was convicted for theft.

[47] Page 16 is the Bahasa Malaysia translation by the Malaysian National Institute of Translation of the Court Proceedings in Dubai on 28 April 2011 which states as follows:

“Keputusan Mahkamah;

Mahkamah telah memutuskan untuk menerima bantahan secara formalnya dan secara objektifnya menolak bantahan dan mensabitkan hukuman *in absentia* yang dibantah.”

[48] Earlier, on 3 March 2011 the claimant was found guilty and was sentenced to one year jail sentence *in absentia* as the claimant was not present in court.

[49] The claimant then filed an appeal in the Dubai Court of Appeal. The appeal was heard on 7 June 2011 and its decision was delivered on 14 June 2011. The Appeal Court decides as follows:

“The court ruled in his presence: to accept the appeal in form, and in fact, to amend sentence against the accused person, where the court cancelled deportation, and reduced the imprisonment punishment to three months, but implementation of the punishment will take place only if the accused person commits any crime in three years from now.”

[50] Based on the above decision which has been translated from Arabic to English by the Malaysian National Institute of Translation, it is obvious that the claimant had not been acquitted of the charge but merely that his sentence had been reduced. Further, the judgment states that his punishment would be implemented if the claimant committed any crime during the next three years. This is known as a suspended sentence whereby the judge convicts the accused and pronounces the sentence and then suspends the implementation of the sentence. If, however the accused were to commit another crime during this suspension period of three years, then the judge is entitled to revoke the suspension and have the accused serve the three months in prison.

[51] Therefore, the misconduct complained of by the company has been established. The Dubai Correctional Court, the Review Court and lastly the Dubai Court of Appeal had found him guilty of the theft of the mobile phone and had convicted the claimant of the charge.

Rules Of Natural Justice

[52] The claimant's learned counsel submits that the initial sentence of imprisonment was given in a foreign jurisdiction “which obviously does not take into account Rules of Natural Justice, ie the claimant was made to sign a statement in Arabic (which turned out to be a confession) and was sentenced



to a year in jail without trial and *in absentia*, and the court never gave him a chance to address these issues. This reflects the kind of judicial system the claimant was up against.”

[53] This court views the above submission is without any basis and ought to be rejected. The Dubai Court of Appeal has considered all the above submission by the claimant and has rejected it. The Court of Appeal in its judgment clearly states as follows:

“And at a hearing session set for the appeal, the accused person appeared and denied the charges on him and he brought his lawyer who submit a memorandum to defend him and to refute the charges against him and to prove the invalidity of the investigations facts collected by the public prosecutor as they have not provide an interpreter, and also the unavailability of criminal intention in the act of stealing, and asked for the acquittal of all charges against the accused person, and commutation of penalty if convicted.”

[54] The Court of Appeal further set out the facts of the case as follows:

“And as the facts of the charge and the evidence of proof was previously accepted by the accused person which details were the basis for appealed sentence and which the court referred to and which was considered as an integral part of the reasons as reported by the victim Nazurava Elina that saying; while she was on her journey through Dubai Airport to Russia she put her belongings and her mobile phone number: 000979055091843 and placed them on the baggage screening machine and then went to finish her check-in matter and when she was at the departure check-in counter she realised that she had left her mobile phone and when she went to get it, she did not find it, because the accused person has taken the phone as he passed through the machine and took the phone.

And as the incident has pre-imaging evidence as the proof of the validity of the charge against the accused person in addition to his confession during investigations by prosecutors where he confessed that he took the mobile phone with intention to possess.”

[55] Lastly the Court of Appeal made the following findings:

“As the claim raised by the accused person about not providing an interpreter is inadmissible claim because the court relied on the confession of the accused person during investigation by public prosecutor, as he admitted the details of the incident charged against him after they assigned to him an interpreter who was fluent in english as the accused person. And he had taken oath as proved by the investigator in their investigation on 9 February 2011 which was attached in the case file and therefore the objection is not relevant and should be rejected. And as for the unavailability of criminal intention, the accused person admitted that he committed the crime charged against him and he knew that he was committing crime by taking other belonging and his will was bound to the materialism sides of the crime and therefore the elements of crime charged against him are available.



Therefore, the court was reassured to prove the charge against the accused person and that the denial is not more than a mere defence which intended to refute the charges, and it does not effect the court in its decision, **even though the court is satisfied with the evidence and the sentence mentioned above, but the court considers to take a part compassion and that the accused will not return to commit the crime in the future**, therefore, and pursuant to articles No 83 & 84, **decided to suspend the imprisonment punishment and to cancel deportation punishment.**”

[Emphasis Added]

[56] Therefore, the submission by the claimant’s counsel in questioning the judicial system in Dubai is unjustified and without any merits. The Dubai Court has considered all the relevant facts before making a decision.

[57] The claimant’s explanation for taking the handphone is that he thought the phone belongs to Kuganesh S Govindramohan, a member of his flight crew who had just gone ahead of him. He picked up the phone to give it to Kuganesh. However, there seems to be a contradiction in the claimant’s testimony when he states that he did not know if Kuganesh was in the plane. He testified as follows:

Q: How long did it take you to reach the plane from the security check?

A: I cannot remember but it was about 15-20 minutes.

Q: After that the airport security arrived at the plane immediately?

A: Yes.

Q: From the 15-20 minutes approximately, you did not attempt to give back the phone to your colleague, Kuganesh?

A: After the custom check, we walked our own way to the aircraft, some went to the duty free shop.

Q: When you reached the aircraft, did you attempt to give the phone back to him?

A: I do not know if Kuganesh was in the plane.

[58] From the above evidence, the claimant seems to have contradicted himself when he first states that he attempted to return the phone and then stated that he did not know if Kuganesh was on board. If the claimant had wanted to return the phone to Kuganesh, he would have tried to do so expediently and swiftly. He would not have delayed the matter as he was not sure at that stage when he took the handphone whether Kuganesh was the actual owner of the handphone. The court is of the view that the fact that there had been a lapse of time seems to suggest otherwise.



Whether Such Proven Misconduct Constitutes Just Cause Or Excuse For The Dismissal?

[59] In the case of *Stamford College Petaling Jaya v. Lai Fook Seng* [1994] 2 MELR 520, the Industrial Court held as follows:

“It is well established that a contract of employment is a contract of confidence and trust. Sometimes it is also called a contract of fidelity. What it means is that the employee must not place himself in a position where his interest conflicts with the interest of his employer. However, it is equally established in law that such term is implied in a contract of employment.”

[60] In *Asahi Industries (M) Sdn Bhd v. Lim Mui Lin* [2000] 1 MELR 726 it was held that:

“In any establishment be it public or private, trust and confidence are of utmost importance, if any of the two lacking then it becomes very difficult for the employer to continue keeping the employee in its employment.”

[61] In *OP Malhotra on the Law of Industrial Disputes*, 4th edn, vol II, p 59 states as follows:

“The act of theft, fraud and dishonesty committed toward utter strangers may not make a workman guilty of industrial misconduct unless he is convicted by a criminal court in which case the employer will have the jurisdiction to dismiss him on the basis of the conviction itself.”

[62] In the present case, the claimant’s act had clearly breached the fiduciary relationship with the company which is one of trust. In an employment relationship, when the employer engages the services of an employee, there is an expectation that the employee would discharge his duties faithfully, as well as protect and further the interest of the employer. On the present facts, the claimant had breached his fiduciary duty when he committed the misconduct. Therefore, the company was justified in dismissing the claimant from service as he had committed a serious act of misconduct.

Conclusion

[63] For reasons adumbrated and having regards to the evidence in its totality, the court is of the considered view that the company has proved on a balance of probability that the claimant’s termination was reasonable and justified. Based on equity and good conscience and the substantial merit of the case without regard to technicality and legal form, the court finds that the claimant’s termination was carried out with just cause or excuse. The claim is hereby dismissed.

