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MUHAMMAD ZAILANI MAT ZIN v. NATIONAL UNION OF HOTEL, BAR AND RESTAURANT WORKERS, PENINSULAR MALAYSIA

INDUSTRIAL COURT, KUALA LUMPUR
AUGUSTINE ANTHONY
B AWARD NO. 760 OF 2020 [CASE NO: 4/4-2857/18]
4 JUNE 2020

DISMISSAL: *Misconduct – Whether the claimant had advised Rafidah, from the Holiday Inn Glenmarie, to inform the management that if they could not settle the*
C *Collective Agreement, the union would picket – Factors to consider – Evidence adduced – Evaluation of – Effect of – Union's actions – What it had shown – Contents of the union's show cause letter to the claimant – Whether it had been satisfactory – Purpose of show cause letters – Whether the union had followed the rules of natural justice in dealing with the matter – Whether the claimant's*
D *dismissal had been carried out with just cause and excuse*

DISMISSAL: *Misconduct – Whether the claimant had misappropriated the union's funds – Factors to consider – Evidence adduced – Effect of – Whether proven by the union on a balance of probabilities – Union's actions in the matter – What it had shown – Effect of – Whether the claimant's dismissal had been carried out*
E *with just cause and excuse*

EVIDENCE: *Documentary evidence – Whether the claimant had been a workman under the Industrial Relations Act 1967 – Factors to consider – Evidence adduced – Effect of – Perusal and evaluation of the union's Constitution – What it had*
F *shown – Claimant no longer an employee in the Hotel, Bar and Restaurant industry – Effect of – Whether he could hold a position in the union – Whether he had obtained the necessary exemptions under the Trade Unions Act 1959 – Effect of – Union's actions towards him – What it had shown – Industrial Relations Act 1967, s. 2 and Trade Unions Act 1959, ss. 29 & 30*

G ***INDUSTRIAL COURT:*** *Jurisdiction – Whether the IC had been seized with jurisdiction to hear this matter – Factors to consider – Evidence adduced – Effect of*

The claimant had been employed by Holiday Inn On The Park, Kuala Lumpur ('Hotel') before being retrenched and thereafter, he had continued
H to serve as the Branch Officer of the union on a full time basis wherein he had drawn a salary and bonus and whereby the union had also contributed to his Employees Provident Fund ('EPF'). Approximately 19 years later, the union had issued him a show cause letter dated 14 May 2018 ('SCL') for allegedly instigating its member in Holiday Inn Glenmarie ('HIG') to picket.
I The union also alleged that the claimant had misappropriated its funds, together with two other persons and caused the approval of unreasonable and unsubstantiated claims by the Selangor Branch Chairman and Secretary. The

claimant responded to the SCL but he was terminated from employment. He now claims that he had been a workman by virtue of the definition under the Industrial Relations Act 1967 ('The Act') and that his dismissal had been without just cause or excuse. The union on the other hand claims that the claimant had not been a workman, as defined under The Act and that the Industrial Court ('IC') had not been seized with jurisdiction to hear this reference by the Minister. Alternatively, it claims that his dismissal had been carried out with just cause or excuse. There were two main issues that arose for determination. The first was whether the claimant had been a workman within the definition under The Act and in the event the first issue is answered in the affirmative, whether his dismissal had been carried out with just cause and excuse.

Held in favour of the claimant: Dismissal without just cause and excuse

(1) On the issue of whether the claimant had been a workman under s. 2 of The Act, the section had defined a "contract of employment" to mean any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as a workman and that other agrees to serve his employer as a workman and "workman" means any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute, includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute. The evidence had shown that the claimant had been an employee of the Hotel when he had become a member of the Union and that when the Hotel had ceased operations, he had been retrenched on the same date. Whether or not he had been employed by any Hotel, Bar and Restaurant thereafter had been unclear. Rule 3 of the union's constitution ('Constitution') had stated that membership to the union had only been open to all employees in the Hotel, Bar and Restaurant industry, other than managerial staff, confidential staff and security guards and r. 11 had stated that no person shall be elected or act as an officer of the union if he is not a member of the union, subject to an exemption under s. 30 of the Trade Unions Act 1959 ('TUA'), which exemption had not been obtained in this case. As the claimant had no longer been an employee of the Hotel, Bar and Restaurant industry, by virtue of r. 3(1) and (6) of the Constitution, he had ceased to be its member automatically and by virtue of r. 11 thereof, he could not be elected or act as its officer since he had no longer been its member. He had also not fulfilled the provision of s. 29 of TUA as he had not been elected to hold the office of the Branch Treasurer in accordance with the rules of the union. Further, by virtue of r. 3, particularly r. 3(1) and (6), and r. 11 of the Constitution and in view of his retrenchment from employment with no

known employment within the Hotel, Bar and Restaurant industry, he had also ceased to be a member of the union and as such could not be elected to any position within it. His irregular or improper appointment as the Branch Treasurer of Selangor had been further highlighted by the DGTU but the union had not responded to the matters of concern raised by it. The legality of the claimant's appointment as a Branch Treasurer for Selangor had been a matter for the consideration of the DGTU, more so, when he had not been granted an exemption under s. 30 of TUA to allow him to be an officer of the union. Thus, the claimant's contention that he had sought employment with the union and that it had employed him, had been consistent with the conduct of the union. Further, the union had paid his EPF contributions which had shown that at all times, it had known that the claimant had been in its employment. Thus, the claimant had been a workman pursuant to s. 2 of The Act and had been employed by the union under a contract of employment/service and the issue of his expulsion as its member had not arisen. Thus, the claimant's termination of employment had been one of a dismissal of a workman and the IC had been seized with the jurisdiction to hear and determine the matter on whether his dismissal had been with just cause or excuse. (paras 11, 12, 14, 15, 16, 17, 18 & 19)

(2) The union had issued the claimant a SCL, for the misconduct of advising Rafidah, from the Holiday Inn Glenmarie, to inform the management that if they could not settle the Collective Agreement, the union would picket. An analysis of the SCL had shown some highly unsatisfactory features, for example, the union had claimed that the claimant's alleged act had been a serious misconduct but had been unable to state the exact date of its commission. It had also failed to inform the claimant who the complainant had been or who had brought the matter up to its attention for investigation and action. The union could not simply act on any rumours and unsubstantiated statements from unknown persons. Further, it had carbon copied the SCL to its various officers around the country, instead of just sending it to the claimant for his explanation. Its actions had been akin to "lynching" an employee before giving the employee a fair chance of offering his explanation. Show cause letters ought to be confidential and only sent to the intended recipient, as the allegation contained therein remains unproven until a full investigation is concluded on the matter, which had not been the case here. The conduct of the union in sending out this SCL had sealed the fate of the claimant with an almost certain outcome that the final decision would be against him, no matter what his explanations. A further scrutiny of the SCL had shown that although the allegation of misconduct against the claimant had been one of advising Rafidah on the union's intention to picket, the union, in the SCL, had taken it upon itself to interpret the alleged advice as instigating its members to picket. Obviously, it had

used the words "advise" and "instigate", in the context of its allegation against the claimant, to mean the same thing or of importing the same meaning which had not been accurate, as these two words had carried a markedly different meaning. In addition, the claimant had been suspended even before he had had a chance to explain himself. The evidence had shown that there had been a consistent pattern in this case where the union had failed to observe the rules of natural justice, had failed to accord the claimant a fair chance to explain his version of events and had failed to deliberate on the matter in a fair and just manner. Its conduct aforesaid had resulted in an unjust decision against the claimant. The lightning speed in which the SCL had been issued, *ie*, on the same day that the EXCO meeting had been held, with little regard to precise particulars in the SCL, had demonstrated the haste in which the union had acted to the claimant's detriment. The union had embarked on a course of conduct in dismissing the claimant from his employment without any acceptable proof of misconduct on his part. The WhatsApp message between Rafidah and the claimant that had been produced in evidence, had been an incoherent conversation between them and had not in any way suggested that the claimant had instigated any picketing and Rafidah's attempts to explain it had been ignored. She had also not been produced in Court for such a purpose (paras 26, 27, 28, 29 & 30).

(3) On the union's charge against the claimant for misappropriating its funds, it had clearly been an afterthought designed by it to bolster its case. The union's pleadings had lacked the particulars of the misappropriation and this allegation had referred to matters that had transpired in 2016, whilst the police report that had only been lodged in 2017, had not implicated the claimant in any wrongdoing. The claimant had been issued a warning letter on it for his purported failure to do his duties to the satisfaction of the union and the matter had ended there without any further action being taken against him. The union's attempt to now regurgitate this matter to bolster its case had been unwise and had revealed its desperation in defeating the claimant's case against it as his employer. The union had failed to prove, on a balance of probabilities, that the claimant's dismissal had been with just cause or excuse (paras 31 & 32).

[Dismissal without just cause and excuse - Claimant awarded backwages and compensation in lieu of reinstatement in the sum of RM140,010.]

Award(s) referred to:

Ireka Construction Berhad v. Chantiravathan Subramaniam James [1995] 2 ILR 11 (Award No. 245 of 1995)

Case(s) referred to:

Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor [2001] 3 CLJ 541

K A Sanduran Nehru Ratnam v. I-Berhad [2007] 1 CLJ 347

Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 4 CLJ 449

Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314

Legislation referred to:

Industrial Relations Act 1967, ss. 2, 20(1), (3), 30(5), (6A)

Trade Unions Act 1959, ss. 2(1), 29(1)(b), (2)(c), 30

For the claimant - Anthony Gomez; M/s Gomez & Assocs

For the company - Norsuhaila Mat Nudin (Surekaa Santhiran with her); M/s Ten & Colin

Reported by Sharmini Pillai

AWARD
(NO. 760 of 2020)

Augustine Anthony:

[1] The parties in this matter filed their respective written submissions dated 3 October 2019 (Union's Written Submissions), 12 September 2019 (claimant's Written Submissions), 18 December 2019 (Union's Written Submissions in Reply).

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

(i) The claimant's Amended Statement of Case dated 23 May 2019;

(ii) The union's Statement in Reply dated 18 February 2019;

(iii) The claimant's Rejoinder dated 23 May 2019;

(iv) The union's Bundle of Documents - COB1;

(v) The union's Bundle of Documents - COB2;

(vi) The claimant's Bundle of Documents - CLB1;

(vii) The claimant's Bundle of Documents - CLB2;

(viii) The claimant's Bundle of Documents - CLB3;

(ix) Claimant's Witness Statement - CLW1-WS;

(x) Company's Witness Statement - COW1-WS (1) & COW1 - WS (2) (Rusli Bin Affandi);

Introduction

[3] The dispute before this court is the claim by Muhammad Zailani Bin Mat Zin ("claimant") that he had been dismissed from his employment without just cause or excuse by National Union Of Hotel, Bar And Restaurant Workers, Peninsular Malaysia (Union) on the 20 July 2018.

[4] The claimant was formerly an employee of Holiday Inn On The Park, Kuala Lumpur (Hotel). Whilst being an employee of the Hotel, the claimant was elected as the Branch Committee Member and subsequently became the Branch Treasurer of the Selangor Branch of the union. The claimant was retrenched by the Hotel on the 13 July 1999. Nevertheless, by virtue of the provisions of the Trade Unions Act 1959 the claimant continued being a member of the union and remained the full time Branch Officer of the union. The claimant's position as a full time officer of the Branch was endorsed by the Executive Council of the union on the 15 May 1999 and the said endorsement was forwarded with Borang L(1) to "Jabatan Hal Ehwal Kesatuan Sekerja, Selangor on 16 August 1999 after the claimant's retrenchment from the hotel. The claimant then continued to serve as the Branch Officer of the union on a full time basis. In the course of the employment of the claimant, the claimant drew a salary, bonus and the union also contributed to the claimant's Employee's Provident Fund (EPF).

[5] At about the time in May 2018, the union alleged that it had come to the knowledge of the union that the claimant had committed acts of serious misconduct. The union further alleged that in view of the seriousness of the claimant's misconduct the union had carried out an investigation on the alleged misconduct of the claimant. It was then during the EXCO meeting held on the 14 May 2018, the union made a unanimous decision to issue the claimant with a show cause letter requiring the claimant to explain why disciplinary action against the claimant should not be taken for allegedly instigating the union's member in Holiday Inn Glenmarie to go on picketing when there was no dispute as both the Holiday Inn Glenmarie and union were still negotiating on the collective agreement. The claimant replied to the show cause on the 25 May 2018. However, the union through the General Secretary on the same day of the receipt of the letter of explanation alleged that the claimant's explanation was unacceptable. Further the union also found the claimant's explanation unacceptable and unreasonable. The Union also alleged that the claimant had also misappropriated the Union's fund together with two other persons and caused the approval of unreasonable and unsubstantiated claims by the Selangor Branch Chairman and Secretary. It is the union's stance that as a consequence of the misconduct, the union made a decision and on the 20 July 2018 expelled the claimant from the union's membership with immediate effect and when the claimant lost his union membership by expulsion, along with it the claimant also lost his employment status with the union. The claimant now claims that he is

workman by virtue of the definition under the Industrial Relations Act 1967 (The Act) and that the dismissal from his employment with the union is without just cause or excuse and prays for reinstatement to his former position. The union on the other hand contends that the claimant is not a workman as defined under The Act and that the claimant had chosen the wrong forum wherein this court is not seized with the jurisdiction to hear this reference by the Minister. In the alternative the union states that the claimant's dismissal is with just cause or excuse.

[6] The claimant gave evidence under oath and remained the sole witness for his case. The union's evidence was adduced through COW1 (Rusli Bin Affandi) who is the General Secretary of the union. This witness had on behalf of the union, signed and issued to the claimant the show cause letter dated 14 May 2018, the suspension letter dated 25 May 2018 and the expulsion letter dated 20 July 2018.

The Union's Case

[7] The union's case can be summarised as follows:

(i) The union is a trade union registered under the Trade Unions Act 1959.

(ii) The claimant was employed by Holiday Inn On The Park Kuala Lumpur (The Hotel).

(iii) Whilst the claimant was employed by The Hotel, he was elected as the Branch Committee Member and later exchanged his position as the Branch Treasurer of the Selangor Branch Union on the 1 February 1998.

(iv) The claimant was subsequently retrenched by the hotel on the 13 July 1999 when the hotel ceased operations.

(v) Despite the claimant's retrenchment by the hotel, the claimant continued to be elected as the Treasurer of the Selangor Branch of the union.

(vi) The claimant continued to serve as an executive of the union by virtue of him winning in repeated elections by virtue of the provisions of s. 29(1) (b) of the Trade Unions Act 1959 and Rule 11(2)(d) of the Rules and Constitution of the union.

(vii) That at no time the union had employed the claimant as fulltime office bearer of the union with a monthly salary, allowances and contractual bonus.

(viii) The union admits contributing for the EPF and gave the claimant allowances but it was a matter of reimbursement to the claimant as he was retrenched and not having any job in other establishments and the same was discussed and agreed by the EXCO of the union.

(ix) In May 2018, it came to the knowledge of the union that the claimant had committed serious misconduct and the union conducted an investigation into this alleged misconduct.

(x) During the EXCO meeting on the 14 May 2018, the EXCO made a unanimous decision to issue a show cause letter to the claimant.

(xi) The claimant's explanation dated 25 May 2018 to the show cause letter wherein the claimant was alleged to have instigated the union members in Holiday Inn Glenmarie to go on picketing, was unreasonable and unacceptable to the union.

(xii) Further the claimant was found to have misappropriated the union's fund together with two others and had also caused the approval of unreasonable and unsubstantiated claims by the Selangor Chairman and Secretary.

(xiii) In view of the above misconduct of the claimant, the union during the EXCO meeting on the 20 May 2018 decided to expel the claimant from the union's membership with immediate effect.

(xiv) On the 20 July 2018, the claimant was expelled from the union.

(xv) The claimant is also not a workman falling within the definition of s. 2(1) of The Act as he was elected under s. 29(1) and 29(2)(c) of the Trade Unions Act 1959 and r. 11(2)(d) of the Rules and Constitution of the union.

(xvi) This court is not seized with the jurisdiction to hear and determine this matter.

(xvii) Further and in the alternative as the claimant was guilty of the charge of misconduct, the Union's action in terminating the employment of the claimant was with just cause or excuse.

The Claimant's Case

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

(i) The claimant had been a member of the union for a long time.

(ii) From the period of 1997, he was an officer of the union.

(iii) On 1 February 1998, the Selangor Branch of the union appointed the claimant as its Branch Treasurer without a formal election. At this time the claimant was still in the employment with Holiday Inn On The Park, Kuala Lumpur.

(iv) The claimant's employer (Holiday Inn On The Park, Kuala Lumpur) ceased operation on the 13 July 1999 and the claimant was also retrenched on that date.

(v) By virtue of the r. 3 of the Union's Constitution, the claimant ceased to be member of the Union as there were no known employment of the claimant with any Hotel, Bar and Restaurant.

(vi) By virtue of r. 11 of the Union's Constitution, no person shall be elected or act as an officer of the union if he is not a member of the union.

(vii) Despite r. 3 and r. 11 of the Union's Constitution and the closure of the claimant's employer (Holiday Inn On The Park, Kuala Lumpur), the union employed the claimant and engage the claimant as a full time employee. By a circular letter dated 3 July 1999 to the Delegates of the union, the union requested the approval of the Delegates for the claimant's appointment and remuneration as its Branch Treasurer for Selangor. The union also sent a letter to the Department of Trade Union for Selangor, Federal Territory and Pahang on the 26 August 1999.

(viii) By a letter to the local office of the Registrar of the Trade Union on the 23 August 1999, the union notified the appointment of the claimant as its employee under s. 29 of the Trade Unions Act 1959.

(ix) The claimant in the instant case did not fulfil the requirement of s. 29 of the Trade Unions Act 1959 as the claimant at the material time was not elected to hold the office of the Branch Treasurer in accordance with the rules of the union since the claimant's position as an officer of the union came to an end when he ceased to be an employee in the Hotel, Bar and Restaurant industry on the 13 July 1999 following the closure of the claimant's employer (Holiday Inn On The Park, Kuala Lumpur) where the claimant worked.

(x) The claimant's appointment as full time Branch Treasurer was done without obtaining the Ministers exemption as provided for under s. 30 of the Trade Unions Act 1959 and the claimant's irregular appointment as Branch Treasurer was highlighted by the Director General of Trade Unions (DGTU) by a letter dated 16 November 2001. The union did not respond to the DGTU neither did the union obtained any exemption under s. 30 of the Trade Unions Act 1959 from the Minister and there was no exemption granted to allow the claimant to be an officer of the union.

(xi) As a consequence of the above the claimant was for all intent and purposes a full time employee of the union.

(xii) The issue relating to the legality or the illegality of the appointment of the claimant as the Union's Branch Treasurer for Selangor lies within jurisdiction and authority the of the DGTU which is a separate matter from the lawfulness of the dismissal of the claimant from his employment with the union being its employer.

(xiii) That this court is now seized with the power to hear and determine the matter in view of the Minister's reference of this matter under s. 20(3) of The Act.

(xiv) On the event that transpired sometime in May 2018 that is the subject matter of the allegation of the misconduct against the claimant, there is no evidence tendered in court other than some incoherent WhatsApp conversation between the claimant and one Rafidah who is the assistant branch manager of Holiday Inn Glenmarie suggesting the claimant had instigated or incited the said Rafidah or any employee to picket.

(xv) The union's conduct starting from the time the show cause letter was issued to the claimant seeking explanation for the alleged misconduct was nothing short of a course of conduct which was an unfair labour practice intended to victimize the claimant.

(xvi) The claimant was denied not only procedural fairness but also substantive justice by the conduct of the union in embarking on the purported expulsion of the claimant from the union's membership which by such expulsion causes the claimant to suffer the loss of employment. This exercise was carried out by the union in order to outflank the union improper conduct in the dismissal of the claimant from his employment with the union since at the time of the purported expulsion/dismissal of the claimant, he was neither a member nor an officer of the union in accordance with the Trade Unions Act 1959.

(xvii) The claimant now claims that the union's decision to dismiss the claimant was without just cause or excuse and prays for reinstatement.

Preliminary Issue: Whether The Claimant A Workman As Defined By Section 2 Of The Industrial Relations Act 1967.

[9] Before this court proceeds to deal with the issue and make a finding whether the claimant was dismissed with or without just cause or excuse, it is incumbent upon this court to first determine whether the argument put forth by the union on the preliminary issue that the claimant is not a workman within the definition of s. 2 of the Industrial Relations Act 1967 (The Act) has any merits considering the peculiar facts of this case.

[10] In the event this court finds that the claimant is not a workman as defined under s. 2 of the Act , then it will be incumbent upon this court to conclude that the claimant do not possess the right to make representation under s. 20(1) of The Act.

[11] Section 2 of The Act defines a "contract of employment" to mean any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as a workman and that other agrees to serve his employer as a workman.

[12] Section 2 of The Act further states that a "workman" means any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute.

[13] The preliminary issue in this matter giving rise to the question of whether the claimant is a workman within the definition of s. 2 of The Act can be resolved if this court is able to determine whether the claimant at the time of the purported expulsion as a member of the union on the 20 July 2018 was in fact a member of the union in light of the facts of the case. In the event this court concludes that the claimant's membership in the union is not proven, then the issue of expulsion of the claimant will not arise. In the event the issue of expulsion of the claimant does not arise, then the question of the termination of the claimant from his full time employment with the union must be dealt with by this court by making a finding whether the claimant is a workman pursuant to the definition under s. 2 of The Act and whether a contract of employment exist between the claimant and the union pursuant to the definition of the contract of employment as defined in s. 2 of The Act.

[14] The claimant was an employee of Holiday Inn On The Park, Kuala Lumpur (hotel) when he became a member of the union. This Hotel ceased operation on the 13 July 1999 and the claimant was retrenched on the same date. There is no evidence before this court whether the claimant subsequent to his retrenchment was gainfully employed in any Hotel, Bar and Restaurant. By virtue of r. 3 of the Union's Constitution, membership to the union is only open to all employees in the Hotel, Bar and Restaurant other than Managerial Staff, Confidential Staff and Security Guards. Further by virtue of r. 11 of the Union's Constitution, no person shall be elected or act as an officer of the union if he is not a member of the union subject to a certain exemption under s. 30 of the Trade Unions Act 1959 which exemption was not obtained in this matter by the union. Section 30 of the Trade Unions Act 1959 states that:

> The Minister may by order
>
> (a) declare that section 28 or 29 shall not apply to any registered trade union or class of registered trade unions specified in the order; or
>
> (b) grant, either absolutely or subject to such conditions as he may consider reasonably necessary, exemption from all or any of the provisions of section 28 or 29 in respect of officers or employees or such proportion or class of officers or employees of any registered trade union or class of registered trade unions as may be specified in the order.

[15] As the claimant was no longer an employee of the Hotel, Bar and Restaurant Industry, by virtue of r. 3(1) and (6) of the Union's Constitution, the claimant ceased to be a member of the union automatically and therefore by virtue of r. 11 of the Union's Constitution he cannot be elected or act as an officer of the union since the claimant is no longer a member of the union. The claimant also did not fulfil the provision of s. 29 of the Trade Unions Act 1959 which states that:

> (1) A registered trade union may, subject to subsection (2) and of the rules of such union, employ and pay a secretary, treasurer and such other persons as may be necessary for the purposes of such union or of any federation of trade unions to which the union belongs:
>
> Provided that no employee of such union other than:
>
> (a) the holder of a full-time office as secretary, assistant secretary, treasurer or assistant treasurer who is elected in accordance with the rules of such union; or
>
> (b) a secretary, assistant secretary, treasurer or assistant treasurer who is employed as such immediately before the commencement of this paragraph and possessing no power of voting in respect of the affairs of such union or of any of its committees,
>
> shall be a member of the executive of such union.
>
> (2) A person shall not be employed by a registered trade union under subsection (1) -
>
> (a) if he is not a citizen of the Federation resident in Peninsular Malaysia, in the case of a trade union in Peninsular Malaysia, or resident in Sabah, in the case of a trade union in Sabah, or resident in Sarawak, in the case of a trade union in Sarawak;
>
> (b) if he has been convicted by any court of a criminal offence and has not received a free pardon in respect thereof, and such conviction in the opinion of the Director General renders him unfit to be employed by a trade union;
>
> (c) if he is an officer or employee of any other trade union;
>
> (c1) if he is an office-bearer or employee of a political party:
>
> Provided that paragraph (a) shall not apply in the case of union which, in the opinion of the Minister, is required by its objects to represent persons or the interests of persons who are not resident in Peninsular Malaysia, Sabah or Sarawak as the case may be, and that paragraph (c) shall not apply to a federation of trade unions registered under Part XII.

[16] It is clear to this court that the claimant did not fulfil the provisions of s. 29 of the Trade Unions Act 1959 as the claimant was not elected to hold the office of the Branch Treasurer in accordance with the rules of the union.

Further by virtue of r. 3 particularly r. 3 (1) and (6) and r. 11 of the union's constitution and in view of the claimant's retrenchment of employment with no known employment within the Hotel, Bar and Restaurant Industry, the claimant had also ceased to be a member of the union and as such cannot be elected to any position within the union. The claimant's irregular or improper appointment as the Branch Treasurer of Selangor was further highlighted by the DGTU by letter dated 16 November 2001 but the union did not respond to the matters of concern raised by the DGTU. It is therefore the findings of this court that the legality of the appointment of the claimant as a Branch Treasurer for Selangor is a matter for the consideration of the DGTU what more when the Union failed to respond to the DGTU's letter dated 16 November 2006. There is also no evidence in court to show that the claimant was granted exemption by virtue of s. 30 of the Trade Unions Act 1959 to allow the claimant to be an officer of the union. The fact remains that the claimant was employed by the union as the Selangor Branch Treasurer with effect from 13 July 1999 with a fixed basic salary and other allowance and this is clearly stated in the union's circular letter to delegates dated 3 July 1999 and despite the retrenchment of the claimant from Holiday Inn On The Park on the 13 July 1999 that signals that the claimant was no longer a member of the union (as he was not employed by any other Hotel, Bar and Restaurant), the union employed the claimant on the 13 July 1999 and continued to keep the claimant in employment until his termination on the 20 July 2018. The claimant's evidence that he sought employment with the union and that the union employed him as an employee of the union is consistent with the conduct of the union as stated above.

[17] This court had also considered the fact that the union had contributed to the claimant's EPF whilst the claimant was in the union's employment. This court is unable to accept the arguments of the union that the said EPF contribution was made as a matter of reimbursement to the claimant as he was retrenched. It is noteworthy to state here that the date of his employment with the union commenced the very date that he was retrenched from employment with Holiday Inn On The Park. Thereafter the claimant was not employed in any job of any other establishments. As such the explanation of the union is totally unacceptable to this court. The union contributed to the claimant's EPF simply because at all times the union knew that the claimant was in employment with the union as any other employee would be. The union's witness Rusli Bin Affandi (COW1) had also given evidence that he serves the union in the position of the union's General Secretary on a full time basis but is not the employee of the union. This witness' position is different from that of the claimant wherein there is no evidence that this witness also enjoys the EPF contribution. Further this witness draws service charge as an employee of Ramada Plaza Hotel, Melaka as opposed to the claimant who is not proven to enjoy this service charge from any Hotel, Bar and Restaurant. Thus while it can be accepted that this union's witness can

be said to be someone who is not the employee of the union and serving the union as an officer and being a member of the union by virtue of his employment in the Hotel, Bar and Restaurant Industry, the same cannot be said of the claimant.

[18] Accordingly, this court now makes a finding that the claimant is a workman pursuant to s. 2 of The Act and was employed by the union under a contract of employment/service. The issue of the expulsion of the claimant as a member of the union does not arise henceforth. The claimant's termination of employment is one of dismissal of a workman.

[19] It is therefore the finding of this court that this court is seized with the jurisdiction to hear and determine matter and make a finding whether this dismissal is with just cause or excuse.

[20] Now this court will proceed to deal with the dispute between the parties on the issue of termination of the claimant from employment with the union and whether this termination amounts to a dismissal without just cause or excuse.

The Law

The Role And Function Of This Court In Determining The Dispute Between The Parties

[21] The role of the Industrial Court under s. 20 of the Industrial Relations Act 1967 is succinctly explained in the case of *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449, his Lordship Justice Tan Sri Haji Mohd Azmi bin Kamaruddin FCJ delivering the judgment of the Federal Court had the occasion to state the following:

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

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

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

A

The Burden Of Proof

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

B

[24] This long settled principle was demonstrated in the case of *Ireka Construction Berhad v. Chantiravathan Subramaniam James* [1995] 2 ILR 11 (Award No. 245 of 1995) where the court opined that:

> It is a basic principle of industrial jurisprudence that in a dismissal
C case the employer must produce convincing evidence that the workman committed the offence or offences the workman is alleged to have committed for which he has been dismissed. The burden of proof lies on the employer to prove that he has just cause and excuse for taking the decision to impose the disciplinary measure of dismissal upon the employee. The just cause must be,
D either a misconduct, negligence or **poor performance** based on the facts of the case.

The Standard Of Proof

[25] In the case of *Telekom Malaysia Kawasan Utara v. Krishnan Kutty*
E *Sanguni Nair & Anor* [2002] 3 CLJ 314 the court made it clear that the standard of proof that is required is one that is on the balance of probabilities.

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

Show Cause Letter And Charges Of Misconducts Against The Claimant

G

[26] The union issued a show cause letter dated 14 May 2018 to the claimant as a consequence of the claimant's misconduct. The misconduct that is levelled against the claimant is that the claimant had advised one Puan Rafidah from the Holiday Inn Glenmarie to inform the management that if they cannot settled the Collective Agreement, the union will do picketing.

H

[27] Having analysed the letter dated 14 May 2018 (the show cause letter), this court finds a notable and highly unsatisfactory features in the said letter which the union could have paid attention to before issuing the letter to the claimant. The union claims that the alleged act of the claimant is serious
I misconduct but was unable to even state the exact date of the said serious misconduct. The union also failed to inform the claimant who the complainant was or who had brought up the matter to the union for its

investigation and action. The union cannot simply act on any rumours and unsubstantiated statement from unknown persons. The union further carbon copied the show cause letter to various officers of the union from around the Country instead of just sending the said show cause letter to the claimant for his explanation. The action of the union is akin to "lynching" an employee before the employee is even given a fair chance to offer his explanation. Show cause letters ought to be confidential and only sent to the intended recipient as the allegation contained therein remains unproven until full investigation and conclusion of the matter which was not the case here. By the conduct of the union in sending out this show cause letter, it can be easily concluded that the fate of the claimant at the conclusion of the investigation is almost sealed with certainty that it will be an outcome against the claimant no matter what explanation that can be given by the claimant.

[28] Further scrutiny of the show cause letter shows to this court that although the allegation of misconduct of the claimant was one of advising Puan Rafidah on the union's intention to do picketing, the union in its show cause letter took it upon itself to give an interpretation that that alleged advise is now viewed as instigating the members of the union to go on picketing. Obviously the union is now using the words "advise" and "instigate" in the context of its allegation against the claimant to mean the same thing or importing the same meaning which are not as these two words carry a markedly different meaning.

[29] Further even before the claimant could give his explanation, he was informed in the same letter that the EXCO had decided to suspend him and he was directed to return all keys and other belongings of the union. When did the EXCO meet and decide on this harsh course of action against the claimant? There is nothing in the said letter as to when the EXCO had met and decided on this matter of the suspension of the claimant. The union produced a minutes of meeting held on the 14 May 2018 and referred to Agenda 6: "To decide on the Selangor Branch Treasurer" as proof that the EXCO met and decided on the suspension of the claimant from his employment. Having perused the minutes of the meeting held on the 14 May 2018 and after analysing the manner in which the COW1 (Rusli Bin Affandi) being the General Secretary passed around a WhatsApp conversation between the claimant and Puan Rafidah and further refusing to listen to Puan Rafidah on her explanation about the contents of the WhatsApp conversation, this court is of the view that there exists a consistent pattern in which the union had failed to observe every rules of natural justice and accord the claimant a fair chance to have his version explained and further deliberated in a fair and just manner. The conduct of the union in dealing with the claimant in this manner had in fact resulted in an unjust decision against the claimant. The lightning speed in which the show cause letter was issued on the same day that the EXCO meeting held on the 14 May 2018

with little regard to precise particulars in the show cause letter demonstrates to this court the haste in which the Union acted to the detriment of the claimant.

[30] The claimant offered his explanation on the 25 May 2018 in which he denied that he had advised or instigated Puan Rafidah to picket and went on to give further details in his explanation, however on the same day in lightning speed COW1 (Rusli Affandi) being the General Secretary of the union quickly dismissed the claimant's explanation as unacceptable. There were no deliberations by the union on the explanation given by the claimant. No reason whatsoever was given by the union why his explanation was unacceptable neither did any enquiries undertaken by the union after the explanation given by the claimant. COW1 simply dismissed all explanation given by the claimant and also refused to listen to the explanation of Puan Rafidah. The combine evidence in court shows that the union had embarked on a course of conduct in dismissing the claimant from his employment without any acceptable proof of misconduct on part of the claimant. This court is in agreement with counsel for the claimant that the WhatsApp message produced in court by the union is an incoherent conversation between the claimant and Puan Rafidah which does not in any way suggest that the claimant instigated any picketing and that this WhatsApp message required further explanation which explanation Puan Rafidah was volunteering but the union chose to ignore her despite her presence on the 14 May 2018 when the EXCO held its meeting. The union also did not produce Puan Rafidah in Court to explain the WhatsApp message produced in court by the union.

[31] As to the charges of misappropriation of the fund of the union which was levelled against the claimant as stated in the Statement in Reply para. 6, this court is of the view that this allegation is clearly an afterthought designed by the Union to bolster its case in this court. This court is in total agreement with the pleading of the claimant as contained in para. 1(3)(g) of the Rejoinder filed by the claimant that the claimant was not dismissed on the grounds of misappropriation of the union's fund. Further the Statement in Reply of the union at para. 6 also lacks particulars of the act of misappropriation and it must be further stated here that this allegation refers to matters that transpired around the period of 2016 and the police report was only lodged on the 23 January 2017. The police report also does not implicate the claimant in any wrongdoing as this report refers to other officer of the Selangor Branch of the union. The claimant was also issued a warning letter on the 14 November 2017 arising out of his purported failure to do his duties to the satisfaction of the union on matter raised in this police report and the matter ended there without any further action against the claimant. For the union to now regurgitate this matter to bolster its case is an unwise move that only reveals the union's desperation in wanting to defeat the

claimant's case against the union as his employer. The claimant was dismissed on grounds that he instigated Puan Rafidah to picket as the Agenda No: 4 of the Executive Council Meeting dated 20 July 2018 clearly states. The union's decision to dismiss the claimant on that ground of instigating Puan Rafidah to picket must be proven to the satisfaction of this court based on the standard of proof required as set out in the preceding paragraph which the union had failed to do.

[32] Pursuant to s. 30(5) of the Industrial Relations Act 1967 and guided by the principles of equity, good conscience and substantial merits of the case without regard to technicalities and legal forms and after having considered the totality of the facts of the case, all the evidence adduced in this court and by reasons of the established principles of industrial relations and disputes as mentioned above, it is this court's finding that the union had failed to prove to the satisfaction of this court on the balance of probabilities that dismissal of the claimant from his employment was with just cause or excuse. Accordingly, this court holds that the claimant was dismissed without just cause or excuse.

Remedy

[33] This court having ruled that the claimant was dismissed without just cause or excuse, will now consider the appropriate remedy for the claimant. The claimant's years of service in the union must start from the commencement date of his employment with the union on the 13 July 1999 which falls on the same date he was retrenched and ceased to be a member of the union and thereafter became a full time employee of the union. The claimant was dismissed from his employment on the 20 July 2018. Therefore, the claimant had served the union as an employee for a period of 19 full years.

[34] The claimant, in stating that the dismissal from his employment with the union was without just cause or excuse, prays to this court for reinstatement to his former position without any loss of wages and other benefits. This court had considered all factors including the time that had lapsed from the date of the claimant's dismissal to the date of this Award. In view of the factual matrix of this case, reinstatement of the claimant to his former position in the union is not a suitable remedy in the circumstanced of this case.

[35] As such the appropriate remedy in the circumstances of this case must be compensation *in lieu* of reinstatement. The claimant is also entitled for backwages in line with s. 30(6A) Industrial Relations Act 1967 and the factors specified in the Second Schedule therein which states:

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

A 3. Where there is post-dismissal earnings, a percentage of such earnings, to be decided by the court, shall be deducted from the backwages given;

[36] It is not disputed that the claimant is a fulltime employee of the union and having worked as an employee for a period of 19 full years, would B certainly enjoy the status of a confirmed employee. The claimant gave evidence that his last drawn salary was RM3,590 per month and that he was also paid officers allowance and bonus.

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

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

> In our view, it is in line with equity and good conscience that the Industrial Court, in assessing quantum of backwages, should take E into account the fact, if established by evidence or admitted, that the workman has been gainfully employed elsewhere after his dismissal. Failure to do so constitutes a jurisdictional error of law. *Certiorari* will therefore lie to rectify it. **Of course, taking into account of such employment after dismissal does not necessarily mean that the Industrial Court has to conduct a mathematical** F **exercise in deduction.** What is important is that the Industrial Court, in the exercise of its discretion in assessing the quantum of backwages, should take into account all relevant matters including the fact, where it exists, that the workman has been gainfully employed elsewhere after his dismissal. This discretion is in the nature of a decision-making process.
>
> G (emphasis is this Courts')

[39] This court must take into account the post dismissal earnings of the claimant in order to make an appropriate deduction from the backwages to be awarded. The claimant had given evidence that he was unable to find any new employment and that he remains unemployed until the date of the H hearing of this matter. There is nothing to suggest to this court that the claimant was gainfully employed after his dismissal from employment with the union and as such this court concludes that there is no post dismissal earnings of the claimant to be considered when assessing the quantum of back wages to be awarded to the claimant.

I

[40] Having considered all the facts of case on the appropriate sum to be awarded and after taking into account that the claimant had no post dismissal earnings, this court now orders that the claimant be paid 1-month salary of the last drawn salary of RM3,590 for every year of service completed totalling 19 years and backwages of the last drawn salary of RM3,590 for 20 months. This will amount to:

(i) Backwages ordered:

RM3,590 x 20 months = RM71,800.

(ii) Compensation *in lieu* of Reinstatement: RM3,590 x 19 months

= RM68,210.

Total amount ordered by this court: RM140,010.

Final Order Of This Court

[41] It is this court's order that the union pays the claimant a sum of Ringgit Malaysia One Hundred Forty Thousand and Ten (RM140,010) Only less statutory deduction (if any) within 30 days from the date of this Award.