INDUSTRIAL COURT OF MALAYSIA

CASE NO : 3(24)/4-463/12

BETWEEN

CHEW KOK KUAN

AND

WING TUNG DRINKS (M) SDN. BHD.

AWARD NO : 471 OF 2016

Before	:	**PUAN YAMUNA MENON - Chairman** (Sitting Alone)
Venue	:	Industrial Court Malaysia, Kuala Lumpur
Date of Reference	:	14.3.2012
Dates of Mention	:	13.6.2012, 13.7.2012, 15.8.2012, 18.9.2012, 22.10.2012, 21.1.2013, 11.3.2013, 20.3.2013, 18.6.2013, 3.7.2013, 12.7.2013, 16.10.2013, 30.10.2013, 24.1.2014, 21.2.2014, 26.3.2014, 24.4.2014, 22.5.2015
Dates of Hearing	:	23.7.2013, 24.7.2013, 25.7.2013, 10.10.2013, 12.12.2013, 13.12.2013
Written Submission of Claimant	:	21.2.2014
Written Submission of Company	:	26.3.2014

Submission in Reply by Claimant : 24.4.2014

Representation : Mr. Ng Tee Fung
From Messrs Benjamin Ng & Partners
Counsel for the Claimant

Mr. Tan Kim Soon and Ms. Tan Ling Shean
From Messrs Tan Kim Soon & Co.
Counsels for the Company

Reference :

This is a reference made under section 20 (3) of the Industrial Relations Act 1967 (the Act) arising out of the alleged dismissal of **Mr. Chew Kok Kuan** (hereinafter referred to as "the Claimant") by **Wing Tung Drinks (M) Sdn. Bhd.** (hereinafter referred to as "the Company") on 24 April 2009.

AWARD

[1] The Ministerial reference in this case required the Court to hear and determine the Claimant's complaint over his alleged dismissal by the Company on 24 April 2009.

Background

[2] This case was heard by, and the evidence of all the witnesses taken before former learned Chairman Ms Yamuna Menon. Written submissions and the Claimant's reply were filed by 24 April 2014 in her court. Upon Ms Yamuna's official retirement from the public service on 18 April 2015, the award of this case had not been handed down.

[3] This case was called up for mention before the Assistant Registrar on 22 May 2015 and the learned counsels of both the Claimant and the Company said they had no objections for the award to be handed down by another Chairman, to be decided by the learned President. Consequently, the former learned President gave instructions for me to hand down this award and the case was then transferred to this court on 3 June 2015. This award is penned and decided based on the pleadings filed, bundles of documents' filed, witnesses' statements, notes of proceedings and the written submissions of both learned counsels of the Claimant and the Company. The notes of proceedings taken by the former Chairman were typed by her former secretary and sent to this court on 8 October 2015 and I have read them thoroughly before making this decision. Due to my busy work commitments and having to hand down Court 3's awards, I was unable to hand down this award promptly.

Facts

[4] The Claimant was first employed by Wong Lo Kat (Malaysia) Sdn. Bhd. by a letter dated 13 June 2008 (page 3 of the Claimant's Bundle of Documents 1 (CLB1)) at a fixed salary of RM6,700.00 per month as Admin/Accounting Manager (Sub-contract basis). Shortly thereafter, Wong Lo Kat (Malaysia) Sdn. Bhd. in a letter dated 30 June 2008 offered the Claimant an appointment as a permanent staff. On or about 16 January 2009, Wing Tung Drinks (Malaysia) Sdn. Bhd. (the Company) was incorporated and all operations' business and staff of the company Wong Lo Kat (Malaysia) Sdn. Bhd. was taken over by the Company.

[5] The Claimant alleged that without just cause or excuse, the Company issued him a letter of "Termination of Employment" dated 24

April 2009, thereby summarily dismissing him on 24 April 2009. However, it was the Company's case that during an internal audit inspection held on 23 April 2009, the Company discovered that the Claimant as the Admin and Account Manager had misappropriated the Company's petty cash amounting to RM7,317.60. When the Claimant was confronted, he admitted to the above and returned the Company's petty cash amounting to RM7,317.60 *vide* a letter dated 24 April 2009. Therefore, the position taken by the Company was that the Company and the Claimant had mutually agreed to the termination of his employment with immediate effect *vide* a letter dated 24 April 2009 from the Company to the Claimant.

[6] The Company's letter found at pages 2 and 3 of the Company's Bundle of Documents 1 (COB1) titled "Termination of Employment" states:

> "We regret to inform that your employment with the company shall be terminated on ***24th April 2009***, for the reasons:
>
> *Unsatisfactory Performance
>
> - Referring to the earlier warning letter of unsatisfactory performance attended to you dated 7th August 2008, the management finds reasonably that you performance is not up to expectation during the entire extended probation period.
>
> *Breach of professional practice
>
> - Referring to the Internal Auditing Inspection held

> on 23rd April 2009, we regret to inform that your miscarriage of the company petty cash worth ***RM 7,317.60*** by depositing into own personal severely against the company policy and professional practice as Finance Manager.
>
> It is mutually agreed that your employment shall be terminated as per the date mentioned above. Henceforth, Mr. Chew Kok Kuan, I/C no: 580606-08-6325 reserves no legal rights to challenge the company regarding any legal disputes.
>
> Severance payment shall be made to you according to company policy, which is ONE (1) month remuneration for month April 2009 and additional ONE (1) month remuneration. The additional ONE (1) month remuneration (after deduction of EPF + Socso + Income tax = **RM 5,389.55**) shall be paid upon completion of all related handovers. Please arrange for return of any company property in your possession includes the following but shall not limit to:...".

[7] The above letter was signed off with a signature in Chinese characters followed by the words "The Management of Wing Tung Drinks (Malaysia) Sdn. Bhd." There was another signature on the right side of the letter and under "Accepted by" was a signature which was identified as the Claimant's.

The Duty of the Industrial Court

[8] The duty of the Industrial Court was stated by his Lordship Salleh Abbas LP in the case of *Wong Chee Hong v. Cathay Organisation (M)*

Sdn. Bhd [1988] 1 CLJ (Rep) 298 at page 302 that:

> "When the Industrial Court is dealing with a reference under section 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.".

[9] The function of the Industrial Court under section 20 of the Act was succinctly expressed in the Federal Court case of *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449, as follows:

> "As pointed out by the Court recently in *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd* [1995] 2 MLJ 753, the function of the Industrial Court in dismissal cases on a reference under s. 20 is twofold, first, 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.".

[10] In the case of *Goon Kwee Phoy v. J & P (M) Bhd* [1981] 2 MLJ 129, his Lordship Raja Azlan Shah CJ Malaya (as his HRH then was) at page 136 impressed upon the court its duty and said:

> "Where representations are made and are referred to the Industrial Court for enquiry, 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 enquire whether the 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 the termination

or dismissal was without just cause or excuse. The proper enquiry 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.".

The Company's Case

[11] The Company called four (4) witnesses in the hearing and they were:

(a) Ms Leung Kin (COW1) – Director of the Company;

(b) Ms Chan Lo May Mei Kwan (COW2) – Group General Manager – Finance of Jiaduobao Group;

(c) Ms Lee Shuk Yee (COW3) – Assistant Accountant; and

(d) Mr. Ke Huijun (COW4) – Group Vice-General Manager - Finance of Jiaduobao Group.

[12] COW1, COW2 and COW3 were based in Hong Kong and testified in the language they were conversant in, which is Cantonese. COW4 who was based in China gave his testimony in the language he is conversant in, which is Mandarin. The interpretation and translation in court was handled by one Ms Lee Lai Ngo, a certified interpreter.

[13] It was the evidence of the Company that on the instructions of COW1, who is a Director of the Company and based in Hong Kong, an internal audit of the Company was carried out by COW2, COW3 and COW4. They were the representatives of COW1 and the audit was done in the Company's office in Malaysia on 23 April 2009. COW1 testified

that during the internal audit, it was discovered that the Claimant had misappropriated the Company's petty cash. When the Claimant was confronted, it was alleged that he had admitted that the Company's petty cash was not in the petty cash box. Thereafter, he had offered to return the Company's petty cash to the Company as soon as possible. It was said that the Claimant had also agreed to mutually terminate his employment contract accordingly. It was also the understanding of the parties that an additional one (1) month's salary would be paid to the Claimant when he returned the Company's petty cash, documents and files of the Company (page 2 of COB1).

[14] COW1 also told the court that the Company's petty cash must be kept in a locked petty cash box in the Company's premises. Hence, she said she was utterly shocked when she was told that the Company's petty cash was not in the petty cash box and that the Claimant could only return the Company's petty cash of RM7,317.60 the next day. COW1 denied that the termination of the Claimant was orchestrated by the Company's management to victimize him. She said the Claimant had misappropriated the Company's petty cash by not keeping it locked in the petty cash box in the Company's premises. Moreover, the Claimant had understood and agreed with the seriousness of such misappropriation as an Administrative and Accounting Manager and thereupon, agreed to the mutual termination of his employment contract with the Company.

[15] COW1 also explained why HKD78,213.50 (RM35,582.14) had been banked into the Claimant's bank account on 21 January 2009. It had been done when the Company had just been incorporated and it did not have its own bank account. It was out of necessity that COW1 said she had deposited the salary of the Company's staff into the Claimant's

bank account in order to pay the salaries of the staff on time. Subsequently, the Company opened its own bank account in HSBC on 13 March 2009 (page 4 of COB2).

[16] COW2 was the head of the internal audit team and she was assisted by COW3 and COW4. On the afternoon of 23 April 2009, COW3 and COW4 conducted a petty cash surprise cash count and it was discovered that the petty cash summary for April 2009 showed a figure of RM7,317.60. However, there was no physical petty cash amounting to RM7,317.60 available for sighting and to be verified (see page 12 of CLB1). COW4 had written in Chinese characters on the bottom left of the petty cash summary for April 2009 (page 12 of CLB1) that the actual audit amount was "zero" whereby there was no physical cash for the amount, available for verification at the time of the petty cash surprise cash count.

[17] Thereafter, COW2 spoke to the Claimant regarding the Company's petty cash and it was alleged that the Claimant had admitted that the Company's petty cash was not in the petty cash box. During the discussion, the audit team alleged that the Claimant had offered to return the Company's petty cash to the Company as soon as possible. He also requested the Company not to lodge a police report against him. It appeared that the Claimant had agreed to leave his employment and that his employment contract could be mutually terminated.

[18] On the next day in the morning of 24 April 2009 after the Claimant had made some calculations relating to the Company's petty cash, the Claimant gave the Company's petty cash amounting to RM7,317.60 to COW3. Thereafter, the Claimant wrote a letter and passed the letter to

COW3 (page 1 of COB1). COW3 testified that she had kept the cash in a locked petty cash box in the Company's premises after that. On the afternoon of 24 April 2009, the contents of the letter of mutual termination which is in the English language, was explained to COW4 by COW2. COW4 signed the said letter in Chinese characters and the letter was handed to the Claimant. The witnesses said that the Claimant, after perusing the letter, signed the letter after the words "Accepted by" (page 3 of COB1).

The Claimant's Case

[19] The Claimant was the sole witness for the Claimant's case and testified for his own case. He denied the allegations of the Company and said he was never issued a show cause letter or charged by the Company and found guilty before the termination. He alleged that the Company's practice for petty cash was for it to be kept by him since he was the Administration and Accounting Manager. He explained that the petty cash was used to pay for stationery, utility bills, phone bills, office cleaning and the like. He testified that every month, the petty cash usage was summarised and updated and given to the management and forwarded to Hong Kong.

[20] On the day of the internal audit on 23 April 2009, the Claimant alleged that the petty cash held by him in his role as Admin and Accounting Manager was summarised and certified correct in the amount of RM7,317.60 (page 12 of CLB1). He claimed that prior to his joining the Company and handling of the petty cash account, the former Marketing Manager Mr. Lee Jen Lun (Mr. Lee) was the person in charge of petty cash. The Claimant alleged that the petty cash was kept by Mr.

Lee in his bank account. The petty cash was handed to the Claimant after Mr. Lee left the office and the Claimant then took over the petty cash matters.

[21] The Claimant's explanation for the financial arrangements of the Company with regard to the petty cash was that the bank signatories comprised of Hong Kong management and directors who were all based in Hong Kong. Hence, the Company's bank signatories signed cheques once a month in favour of suppliers, individual employees and the petty cash. Suppliers and individual employees would then be handed those cheques. Likewise, the petty cash was banked into Mr. Lee's personal account. The Claimant further told the court that before his appointment, there was no Admin and Accounting manager. After his appointment, the Business Development Director of the Company, Ms. Kathleen Wong had instructed Mr. Lee to pass the petty cash to him. The Company thereafter issued petty cash cheques which monies the Claimant banked into his account for use as the Company's petty cash monies. At the end of each month, the Claimant said a petty cash summary was prepared as part of the Company's accounting.

[22] That was the Claimant's explanation as to why petty cash was banked into his personal account which he attributed to the Company's past practice and was continued by him. In addition, the Company had also issued cheques' payment and petty cash only once a month. As such, the Claimant said the sums were reasonably large and he claimed that it was unsafe to leave the money lying around in the office. The Claimant alleged that there was no safe in the Company's premises for the cash to be kept which he was required by the Company to hold. Hence, petty cash was withdrawn as needed and utilized during the

entire time for the Company that he was handling petty cash and replenished by the Company's monthly petty cash remittance. He reiterated that every *ringgit* and *sen* was summarized monthly as petty cash summary in the Company's books. Reference was made to page 11 of CLB1 which was the statement for June 2008.

[23] With regard to the 23 April 2009 incident, the Claimant testified that the Company's management had concurrently certified on the day itself the petty cash April 2009 summary. On the next day, the Claimant said he was asked to pass the petty cash to Ms Lee Shuk Yee (COW3). Hence, the Claimant said he had done so on the same day in the forenoon to withdraw RM7,317.60, which was the Company's petty cash and passed the petty cash sum, fully accounted for, to COW3. This was evident from the Claimant's handwritten letter which confirmed that the petty cash was indeed passed to COW3 (page 1 of COB1). The Claimant testified that he had written the letter as a record that he had properly handed the petty cash money and passed the responsibility to COW3.

[24] The Claimant made reference to a 20 April 2009 CIMB bank statement which was dated 13 April 2009 bearing description 2D local cheque, ref. no. 200543955818, deposit : RM6,992.46 (page 13 of CLB2). The Claimant explained that this RM6,992.46 was the sum he deposited in April 2009 into his bank account *vide* a bank cheque. He claimed that the cheque was meant for the petty cash and it had been safely deposited into the Claimant's CIMB personal account.

[25] The Claimant also made reference to his 20 May 2009 CIMB bank statement (page 14 of CLB2) which showed his April salary payment of RM6,300.05, ref. cheque no. 200508336522. The 24 April 2009 date (when the salary cheque was given to him) was the same day as the Claimant's dismissal. Thus, the Claimant argued that the signatories of the cheques were not in Malaysia at that time and had been overseas. The Claimant therefore alleged that his salary cheque on 24 April 2009 would have been pre-signed by the signatories in Hong Kong and brought over by the three (3) people (audit team) who came to the Company on 23 April 2009. The Claimant alleged that the inference was that they had came with an agenda to terminate his employment.

Evaluation of Evidence and Findings

[26] This court has observed that it was not pleaded by the Claimant in his Statement of Case that he was forced to leave the employment of the Company though he had pleaded that he was terminated summarily. The Company did plead that the Claimant had agreed to leave his employment based on a mutual agreement and arrangement. The Company had given two (2) reasons why the Claimant's employment with the Company was terminated in its letter dated 24 April 2009. The Company had also started the case which would mean that it did not dispute that it had dismissed the Claimant.

[27] It is perhaps timely to remind parties the point highlighted in the case of *Weltex Knitwear Industries Sdn Bhd v. Law Kar Toy & Anor* [1998] 1 LNS 258, the decision of his Lordship Dato' Haji Abdul Kadir Bin Sulaiman J (as he then was) when he stated:

> "The law is clear that if the fact of dismissal is not in dispute, the burden is on the company to satisfy the Court that such dismissal was done with just cause or excuse. This is because, by the 1967 Act, all dismissal is *prima facie* done without just cause or excuse. Therefore, if an employer asserts otherwise the burden is on him to discharge. However, where the fact of dismissal is in dispute, it is for the workman to establish that he was dismissed by his employer. If he fails, there is no onus whatsoever on the employer to establish anything for in such a situation no dismissal has taken place and the question of it being with just cause or excuse would not at all arise. ...".

[28] The fact that parties are bound by their pleadings is trite law. Serving as a reminder is the case of *R Ramachandran v. Industrial Court of Malaysia & Anor.* [1997] 1 CLJ 147. In the Federal Court decision in *Ranjit Kaur a/p S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1 at page 10, it was stated:

> "... s 30(5) of the Act cannot be used to override or circumvent the basic rules of pleading. The Industrial Court, like the civil courts must confine itself to the four corners of the pleading. This had been held to be so by this court in Rama Chandran ...
>
> ... Pleadings in the Industrial Court are as important as in the civil courts. The appellant must plead its case and the Industrial Court must decide on the appellant's pleaded case. This is important in order to prevent element of surprise and provide room for the other party to adduce evidence once the fact or an issue is pleaded. Thus, the Industrial Court's duty, to act

according to equity, good conscience and substantial merits of the case without regard to technicalities and legal form under s. 30(5), does not give the Industrial Court the right to ignore the Industrial Court Rules 1967 made under the principal Act.".

[29] It is settled law that the burden is on the Company to prove the misconduct of the Claimant as alleged in the termination letter. The standard that is required is merely on a balance of probabilities. In the Court of Appeal's case of *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314, his Lordship Abdul Hamid Mohamad JCA (as his Lordship then was) at page 327 said,

> "Thus, we can see that the preponderant view is that the Industrial Court, when hearing a claim of unjust dismissal, even where the ground is one of dishonest act, including "theft", is not required to be satisfied beyond reasonable doubt that the employee has "committed the offence", as in a criminal prosecution. On the other hand, we see that the courts and learned authors have used such terms as "solid and sensible grounds", "sufficient to measure up to a preponderance of the evidence", "whether a case ... has been made out", "on the balance of probabilities" and "evidence of probative value". In our view the passage quoted from *Administrative Law* by H.W.R. Wade & C.F. Forsyth offers the clearest statement on the standard of proof required, that is the civil standard based on the balance of probabilities, which is flexible, so that the degree of probability required is proportionate to the nature of gravity of the issue.".

[30] The only evidence led by the Company for the first reason in the termination of the Claimant's employment was a letter dated 7 August 2008 exhibited on page 4 of COB1. It was a letter signed by the Management of Wong Lo Kat (M) Sdn. Bhd titled "Miscalculation of Amount Payable to Co-packer (Pokka Ace (M) Sdn Bhd)". It is this court's view that there was no evidence who had signed that letter and that the Claimant had indeed been given a notice of unsatisfactory performance, which appeared to be from the former management. The court is unable to find that the Company has proved the first allegation against the Claimant when there was no evidence led on his unsatisfactory performance except for that letter.

[31] In relation to the second reason given on the Claimant's "Breach of professional practice", COW1 had explained it was the misappropriation of the Company's petty cash. A perusal of the evidence before the court indicate that the Company's petty cash amounting to RM7,317.60 had been deposited by the Claimant into his personal bank account. The Claimant had testified during cross-examination that the cash cheque for the sum of RM6,992.46 to top up the petty cash:

(a) was drawn out as cash from the Company's HSBC bank account;

(b) the cash was then deposited into the Claimant's RHB bank account;

(c) the Claimant then issued a cheque from his RHB bank account; and

(d) the Claimant then deposited it into his CIMB Bank Account.

[32] The Claimant had also testified that he did not keep a separate bank account for the Company's petty cash as against other funds held by him in his personal bank accounts in both RHB Bank and CIMB. The Claimant had contended that he had kept the Company's petty cash in his personal bank account for safe-keeping since it was a large amount. This has led the Company to submit that the Claimant was holding the Company's petty cash on trust for the Company, if indeed it was true that was the purpose served. Therefore, the Claimant being a trustee had deposited the Company's petty cash into his personal bank accounts, which inter-mingled with his own money, and he had earned interest on the Company's petty cash (pages 5 to 15 of CLB2).

[33] COW1 had testified during examination-in-chief that the Company's petty cash must be kept in a locked petty cash box in the Company's premises. The Claimant had alleged that there was no such petty cash box to keep the petty cash. Both COW1 and COW3 were cross-examined on the existence of a petty cash box and both had replied that there was one in the Company. COW3 further testified that the petty cash box and its key were not listed in CLID1 because the Claimant had handed the petty cash to her in the morning of 24 April 2009 together with the petty cash box, whereas CLID1 was only prepared in the afternoon and passed to her.

[34] At all material time, the Claimant was aware that the Company had issued a cash cheque for the petty cash to be cashed out and not to be deposited into his personal bank account. Exhibits CO-1 and CO-1A showed that the Company's cheque for RM6,992.46 was a cash cheque

dated 27 March 2009 and the "Payment Requisition Form" for the petty cash had been checked by the Claimant.

[35] COW1 did not deny that the Company had deposited RM35,582.14 into the Claimant's CIMB bank account on 21 January 2009 because the Company had just been incorporated and it did not have its own bank account. COW1 further testified that it was out of necessity to pay the salaries of the staff on time and it was done on one isolated occasion. Had the Company intended for the Company's money to be deposited into the Claimant's personal bank account (as claimed by the Claimant), the Company would have done so by depositing the petty cash directly into the Claimant's bank account or issued a cheque in the Claimant's name. Hence, the Claimant's contention that the Company had trusted him enough to bank in the staff's salaries into his bank account must be seen as one isolated incident when the Company did not have its bank account then.

[36] The Company submitted that COW4 had signed the letter of mutual termination of employment in his capacity as a representative of COW1. COW1 had testified that she was at all material times kept informed and had been updated on the events of 23 and 24 April 2009 and the decision had been made by her. Therefore, what COW4 did was an act which was authorised by the Company. It must also be noted that on those two days, the Claimant did not protest or object to the authority of COW2, COW3 and COW4. It was clear that when the Claimant was confronted on 23 April 2009 on the 'zero petty cash' by them, he had 'produced' the petty cash the next day and passed the money to COW4.

[37] It is evident from the Letter of Termination that the Claimant had not expressed any objection on the letter itself by writing something on it to that effect but he had signed the letter after the words "Accepted by". He claimed that those words meant that he had acknowledged the receipt of the letter and not that he had agreed to the mutual termination. The Claimant also alleged that he had not protested because the Company had threatened to withhold his April 2009 salary. The court finds that difficult to believe, coming from a senior and experienced manager who would get overly anxious over a month's salary. It seems to be an afterthought of the Claimant because in July 2009, the Company had to send him a letter to remind him to collect his May salary *vide* a cheque dated 18 May 2009 (page 5 of COB1). The Claimant who claimed to have been worried about his April pay not been paid, did not seem to be interested in the one month's pay just a few weeks later. He had not collected it then or any time after. In light of all these, the court can infer that the Claimant had not objected to the mutual termination as proposed by the Company.

[38] The Claimant had also contended that the termination letter was signed by COW4 who could not read and understand English, which was another matter not raised in the pleadings. COW4 had testified in cross-examination that COW2 had explained to him the contents of the letter of termination. Further, in re-examination, COW4 had testified that he knew and understood what the letter of termination meant when he handed it to the Claimant. The court opines that it was more important that the Claimant had understood the letter of mutual termination of employment which was in a language he is conversant with i.e. the English language. It appeared that the Company's witnesses had taken pains to put it in the English language which was something they were not fluent in.

[39] This leads to another point in contention. COW1 had testified in cross-examination that the second reason provided in the letter of mutual termination of employment was that the Claimant had failed to put the Company's petty cash in the petty cash box in the Company's premises. COW1 was asked why the words "...your miscarriage of the company petty cash" were used in the termination letter. During re-examination, COW1 explained that "miscarriage" also meant "misappropriate". Therefore, what the Company had meant in using the word "miscarriage" was that the Company had wanted the Claimant to keep the Company's petty cash to be kept in the Company's designated place i.e. the petty cash box in the Company's premises and not in the Claimant's personal account. It was not disputed that the Claimant was unable to produce the petty cash on 23 April when the audit team requested to check it. It was only on the next day that he could give the money to them.

[40] It is this court's considered opinion that the Company's termination letter which had used the words "miscarriage of the company petty cash" cannot be given a literal meaning to the word 'miscarriage'. The Company's witnesses are foreigners and they had used Mandarin and Cantonese dialect when they testified in court. The court has read the letter of termination which contains grammatical and other mistakes. In all likelihood, the witnesses had endeavoured their best in drafting the termination letter, which could be the result of translation from the languages they were conversant in. The court accepts COW1's evidence that what the Company meant was 'misappropriation' rather than 'miscarriage'. What the court is more concerned about is the substantial merits of this case rather than the exact word to describe the misconduct. Nevertheless, the second reason cited in the termination letter was actually "Breach of professional practice" which COW1 had explained

was for the Claimant's failure to keep the petty cash in a petty cash box in the Company's premises. Instead, the Claimant had kept the money in his own personal account.

[41] The Claimant had also raised the issue of victimisation and that the audit team had brought the Claimant's signed cheque with them so it must have been with the view of terminating his employment. The Claimant had failed to give any reasons why the Company would want to single him out and victimise him. Furthermore, it was not true that the Claimant's salary cheque was the only cheque issued by the Company. It could be seen in exhibit CO-6 that the salary cheque for Mr. Lee Jen Jun was also dated 20 April 2009. Thus, the court is unable to find any evidence that the Company was out to victimise him.

[42] It is appropriate to decide if the Company was justified in dismissing the Claimant without conducting a proper inquiry as the Claimant has alleged. In John Bowers QC's book, *A Practical Approach to Employment Law, Eighth Edition,* it is stated at page 351 :

> "Tribunals have steered a middle course in relation to dismissal for offences, both at work and outside, between demanding such proof of guilt as would be necessary in a criminal court and allowing dismissal on suspicion. The crucial question (which applies to all misconduct cases) was formulated by Arnold J in *British Home Stores Ltd (BHS Ltd) v. Burchell* [1978] IRLR 379, as whether the employer:
>
> > Entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time... First of all, there must be established by the

> employer that fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think that the employer at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.".

[43] The English position with regard to "reasonable suspicion" could be found in an earlier case of *Ferodo Ltd v. Barnes* [1976] ICR 39 where the Employment Appeal Tribunal stated:

> " ... the question before the Industrial Tribunal should be 'Are we satisfied that the employers had, at the time of dismissal, reasonable grounds for believing that the offence put against the applicant was committed?' rather than "Are we satisfied that the offence was committed?".

[44] From the evidence given by all the witnesses, there was no dispute that an internal audit was carried out and the Claimant was not able to produce the petty cash immediately. It was handed to the Company the next day. It was further made known that the Claimant had banked in the petty cash cheque into his personal account. The Claimant had known that what he had done was wrong and he had told the audit team that he would produce the money and agreed to have a mutual termination of his employment if the matter was not reported to the police. In the court's view, the Company had reasonable grounds for believing that the Claimant had committed the offence when the petty

cash which should have been in the Company's petty cash box, was not and he could only produce the money the next day.

[45] The Claimant had contended that the Company did not have a petty cash box and he had followed the alleged Company's previous practice of keeping petty cash in his bank account. Common sense would dictate that petty cash is required for use in the office for the expenses spent for smaller amount and had to be kept in the office in a safe place. If indeed it was true as alleged that when the Claimant took over the petty cash and there was no petty cash box or safe to keep the money, then, as COW1 reasoned, the Claimant as the Admin and Finance manager would have been duty bound to buy one. Notwithstanding, the court opines that this is a lame excuse given by the Claimant for not keeping the petty cash in the Company's premises.

[46] The Claimant had also raised the issue that he had been terminated without a domestic inquiry being conducted. It is settled law on the authority of the case in *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344 which followed the decision of the Supreme Court in *Dreamland Corporation (M) Sdn Bhd v. Choong Chin Sooi & Industrial Court of Malaysia* [1988] 1 CLJ 1 that a defective inquiry or failure to hold a domestic inquiry is not a fatality but only an irregularity curable by *de novo* proceedings before the Industrial Court. This transpired in this case whereby the parties had called their witnesses and adduced evidence in support of their case.

[47] In the case of *Hong Leong Equipment Sdn. Bhd. V Liew Fook Chuan & Another supra* the Court of Appeal decided:

"[10] The fact that an employer has conducted a domestic inquiry against his workman is, in my judgment, an entirely irrelevant consideration to the issue whether the latter had been dismissed without just cause or excuse. The findings of a domestic inquiry are not binding upon the Industrial Court which rehears the matter afresh. However it may take into account the fact that a domestic inquiry had been held when determining whether the particular workman and justified dismissed.".

[48] On the totality of the evidence before the court, the court is satisfied that the Company has proved the second reason for the termination of the Claimant's employment, on a balance of probabilities.

Decision

[49] The court will now proceed to decide if the Claimant's dismissal by the Company was warranted and if it was for a just cause or excuse. In this respect, the Federal Court case of *Norizan bin Bakar v. Panzana Enterprise Sdn. Bhd.* [2013] 6 MLJ 605 has confirmed that the Industrial Court has the jurisdiction to decide if the dismissal of an employee was without just cause or excuse by using the doctrine of proportionality.

[50] It cannot be denied that what the Claimant had done was a serious misconduct which involved the Company's money but the Claimant had treated it as his own by putting it in his personal account together with his own money. Although the Claimant had returned the money to the Company, it was only after it was revealed that the petty cash had been in his personal account. It could not exculpate him from

the liability that had arisen for keeping the Company's petty cash in his personal account. The Claimant's conduct was clearly a breach of professional practice and integrity and the breach of the confidential relationship between the employer and employee is viewed as a grave misconduct by the court.

[51] In the case of *Taylor v. Parsons Peebles Nei Bruce Peebles Ltd* [1981] IRLR 119 it was held that:

> "In determining the reasonableness of an employer's decision to dismiss, the proper test is not what the policy of the employer was but what the reaction of a reasonable employer would be in the circumstances.".

[52] In *Pearce v. Foster* [1886] (71) QBD 536 Lord Esher, MP said of the following duty of a servant to his master:

> "The rule of law is that where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss. The relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faithfully, and if by his own act he prevents himself from doing so, the master may dismiss him. ...".

[53] After considering all the above, the court holds that the company's decision to mutually terminate the Claimant's employment was fair and the dismissal was therefore for a just cause or excuse. Accordingly, the Claimant's claim is dismissed.

[54] In arriving at this decision, the court has acted with equity and good conscience and the substantial merits of the case without regard to technicalities and legal form as stated under section 30 (5) of the IRA.

HANDED DOWN AND DATED THIS 20 DAY OF APRIL 2016

(ANNA NG FUI CHOO)
CHAIRMAN
INDUSTRIAL COURT, MALAYSIA
KUALA LUMPUR