

**INDUSTRIAL COURT MALAYSIA
CASE NO. 4(2)(4)/4-241/15**

BETWEEN

MOHAMAD AZHAR BIN ABDUL HALIM

AND

NAZA MOTOR TRADING SDN. BHD.

AWARD NO : 101 OF 2017

BEFORE : Y.A. PUAN SAROJINI A/P KANDASAMY
Chairman (Sitting alone)

VENUE : Industrial Court Malaysia, Kuala Lumpur

DATE OF REFERENCE : 26.03.2015

**DATE OF RECEIPT OF
ORDER OF REFERENCE : 13.05.2015**

**DATES OF MENTION : 08.05.2015, 11.06.2015, 29.07.2015,
25.08.2015**

**DATES OF EARLY
EVALUATION : 29.09.2015, 23.10.2015, 29.10.2015**

DATES OF HEARING : 28.03.2016, 18.04.2016

**REPRESENTATION : Mr. Muhammad Radhi bin Azizan of
Messrs. Farid & Radhi - Counsel for
Claimant**

Mdm. Prema Kesavan of Malaysian
Employers Federation (MEF) for
Company

REFERENCE

This is a reference by the Honourable Minister of Human Resources under section 20(3) of the Industrial Relations Act 1967 for an award in respect of a dispute arising out of the dismissal of **MOHAMAD AZHAR BIN ABDUL HALIM** (“Claimant”) and **NAZA MOTOR TRADING SDN. BHD.** (“Company”).

AWARD

The Reference

1. The parties to the dispute are **Mohamad Azhar bin Abdul Halim** (“Claimant”) and **Naza Motor Trading Sdn. Bhd.** (“Company”). The dispute which was referred to the Industrial Court by way of a Ministerial Reference under section 20(3) of the Industrial Relations Act 1967 made on 26.03.2015 is over the dismissal of the Claimant by the Company on 11.11.2014.

Documents

2. The relevant cause papers before this Court are as follows:
- a) The Claimant’s Statement of Case (SOC) dated 06.05.2015;
 - b) The Company’s Statement in Reply (SIR) dated 13.07.2015;
 - c) The Claimant’s Rejoinder dated 29.07.2015;
 - d) The Claimant’s Bundle of Documents (CLB);
 - e) The Company’s Bundle of Documents (COB);
 - f) The Claimant’s Witness Statement (CLWS-1); and
 - g) The Company’s Witness Statement by Tuan Syed Kamal Syed Ali (COWS-2).

The Company's Case

3. The Company called the following witnesses to give evidence before this Court:

- (a) COW-1: Mdm. Azlin binti Zainal Abidin, the previous Senior Accounts Executive, Naza Mekar Sdn Bhd; and
- (b) COW-2: Tuan Syed Kamal Syed Ali, Senior Vice President II Corporate Human Capital Division, Naza World Corporate Services.

4. COW-2 explained that Naza World Corporate Services is the holding Company and the Company is its subsidiary. The Company's nature of business includes distribution and motor-trading of vehicles.

5. On 03.10.2014, the Company received an e-mail dated 03.10.2014 from one of its female employees (COW-1) [COB p. 10-11]. In the e-mail COW-1 had informed the Company that the Claimant had threatened her and that she was afraid and has since resigned and left the Company.

6. Pursuant to the e-mail, the Company issued a Show Cause and Suspension Letter dated 28.10.2014 [COB p. 14-15] to the Claimant as he had threatened COW-1 and subsequently COW-1 tendered her resignation as she was not comfortable to work whilst the Claimant was around.

7. The Company found that the Claimant's reply to the Show Cause and Suspension Letter dated 03.11.2014 was not acceptable [COB p. 16-17]. The Company then issued a Letter of Dismissal dated 10.11.2014 [COB p.18] to the Claimant as it viewed the act of threatening and harassing COW-1 as a major misconduct. The Claimant was dismissed on 11.11.2014.

8. During the Claimant's tenure with the Company, the Claimant was appraised and was also issued a warning letter dated 16.08.2013 [COB p.23]. The Company asserted that the Claimant's dismissal was with just cause and excuse.

The Claimant's Case

9. The Claimant gave evidence on his own behalf before this Court on 18.04.2016. The Claimant was employed in the Company as a Manager at the Joint Group Executive Chairman's ("JGEC") office with effect from 17.06.2013 pursuant to a Letter of Appointment dated 14.06.2013 [COB p. 1-5]. According to the Letter of Appointment, the Claimant was required to undergo a probationary period of 6 months.

10. The Claimant stated that at the material time the Company was a Group Company and Naza Mekar Sdn Bhd was a sister Company. The Human Resources Department, Audit Department and Accounts Department were under the Company. The staff in the Company was assigned to be in charge of Naza Mekar Sdn Bhd. After the Claimant left Naza World Corporate Services was formed.

11. During the probationary period, the Claimant was transferred from JGEC's office to the Group Internal Audit Department to head the Risk Management Unit vide letter dated 26.11.2013 [COB p.6] which took effect from 17.10.2013. The Claimant was confirmed to the position of Manager with effect from 01.04.2014 vide letter dated 19.03.2014 [CLB Tab 8A] after his probationary period was extended for a further 3 months [COB p.8].

12. The Claimant's commencement salary was RM7,000.00 per month. Throughout his employment with the Company, the Claimant was conferred a reward in terms of bonus payment amounting to RM5,806.00 which was credited into his April 2014 salary for his excellent individual performance vide Company's letter dated 25.04.2014 [CLB Tab 9]. The Claimant last drawn salary was RM8,000.00 per month.

13. On 28.10.2014, the Claimant received a Show Cause and Suspension Letter signed by COW-2 intimating that the Claimant during working hours as a Manager was involved in a serious major misconduct by sending via WhatsApp messages threatening and harassing words to one of the Company's employees in March 2014, and purportedly based on a police report lodged 7 months after that (i.e. on 20.10.2014) by one of the Company's employee [COB p.13]. Further, the Company also alleged that the Claimant's act of misconduct had caused *"unconducive safe working environment with threatening words or bodily harm perception as safety and security is compromised."*

14. The Claimant was suspended for a period of 14 days pending further investigation with immediate effect and was disallowed to represent the Company in any business related matters. On the same day, the Claimant was escorted out from the Company's premises and was ordered to surrender all properties belonging to the Company (pass card, cell phone, laptop, etc). The Claimant was given 7 days to reply to the Show Cause and Suspension Letter as to why disciplinary action should not be taken against him.

15. The Claimant vide letter dated 03.11.2104 replied to the Company stating that the Company had made a serious allegation against him and he requested the Company to furnish him with more information regarding the police report lodged, name of complainant and the allegation of purportedly *"threatening and harassing words"* and *"causing unconducive working environment with threatening words or bodily harm perception as safety and security is compromised"*. The Claimant demanded the details and grounds of the allegation made against him from the Company as he was unable to provide his explanation to the Show Cause and Suspension Letter. The Claimant contended that his letter to the Company dated 03.11.2014 clearly amounted to a sufficient request/notice for further information/documents from the Company, in exercise of his meaningful right to be heard to which the Company had blatantly denied.

16. On 30.10.2014, the Claimant lodged a police report pursuant to his suspension [CLB Tab 2]. On 10.11.2014, the Claimant received a Letter of Dismissal from COW-2 stating that in lieu of the seriousness of the acts of misconduct, the Claimant was dismissed from his employment

after due deliberation and consideration. The dismissal was to take effect on 11.11.2014.

17. The Claimant once again lodged a police report on 24.11.2014 [CLB Tab 7] stating that the dismissal was unjust as his right to be heard and to give meaningful explanation to all allegations mentioned were unjustly denied. The Claimant strongly believed that the Company had intended to remove him from the organization based on the Company's unilateral finding of a purported "*misconduct*" and therefore he considered himself as unfairly dismissed/wrongful terminated. The Claimant contended that the whole dismissal process was wrong and unjust in law as it was against the principles of natural justice. The dismissal was perpetuated with malice and was *mala fide*.

18. The Claimant contended that the purported content of the threat/harassment was baseless and/or was a blatant lie and/or fabrication of facts by the Company and/or COW-1, whether by way of conspiracy or otherwise, to injure/damage the reputation, career and livelihood of the Claimant. In any event, purportedly upon receiving such complaint against the Claimant, the Company had *inter-alia*:

- (a) failed to properly verify the accuracy and veracity of such complaint made against the Claimant by COW-1;
- (b) failed to give meaningful opportunity to the Claimant to explain and defend himself against such allegation by providing the Claimant with relevant documents, in particular

the entire Co-Exhibit 2 in SIR, despite requesting the same vide his letter dated 03.11.2014;

- (c) failed to properly carry out any inquiry, fairly to the Claimant's interest, to investigate such complaint made against him by COW-1; and/or
- (d) failed to conduct and administer proper procedures to come to a decision and/or deliberation, in accordance with the rules of natural justice, to terminate the employment of the Claimant with the Company.

19. The Claimant further contended that his working and even personal relationship between himself and COW-1 during the entire material time was good. COW-1 did not at any point in time express that she was "*scared*" and/or "*afraid*" and/or "*depressed*" and/or had "*threatening*" feelings towards the Claimant.

20. Upon receiving the SIR from the Claimant's solicitors and in view of the false and malicious allegations thereto, the Claimant had filed a police report in relation to the same on 27.07.2015 [CLB Tab 10]. This police report is independent from the two earlier police reports lodged by the Claimant pertaining to the same matter on 31.10.2014 and 24.11.2014.

21. The Claimant asserted that the Company had upon receiving such complaint against him by COW-1 purportedly acted without justification and reasonable care towards his interest by acting upon unverified and unproven information, acted arbitrarily and unreasonably by denying him

meaningful opportunity to be heard and unreasonably without proper/valid grounds dismissed him.

22. The Claimant prays that this Court holds his dismissal as without just cause or excuse and to order that he be reinstated without any loss of seniority, wages, allowances and other benefits and emoluments from the date of dismissal, be paid all backwages and benefits due to him from the date of dismissal until the date of this Award and any other or alternative relief as this Court deems fit and proper.

The Law and Burden of Proof

23. The function of the Industrial Court under section 20 of the Industrial Relations Act 1967 was clearly stated 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. & Anor Appeal* [1995] 3 MLJ 344, 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."

24. It is trite law that the Company bears the burden to prove that the Claimant had committed the alleged misconduct and that the misconduct warrants the Claimant's dismissal. In *Ireka Construction Berhad v*

Chantiravathan Subramaniam James [1995] 2 ILR 11 (Award No. 245 of 1995) it was stated as follows:

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

25. In the Court of Appeal's case of *Telekom Malaysia Kawasan Utara v. Krishnan Kutty a/l Sanguni Nair & Anor* [2002] 3 CLJ 314, His Lordship Abdul Hamid Mohamad JCA (as he then was) ruled that the standard of proof required for criminal misconduct of workmen is not beyond reasonable doubt even in those cases of misconduct which are related to dishonest acts. At p. 327 the following was stated:

"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."

Issues

26. It is the unchallenged evidence of the Claimant that no Domestic Inquiry (DI) was conducted against the Claimant in regards to the allegations of misconduct made against him. On the authority of *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; [1988] 1 CLJ (Rep) 39, a defective inquiry or failure to hold a DI is not a fatality but only an irregularity curable by *de novo* proceedings before the Industrial Court.

27. In *Dreamland Corp. Sdn. Bhd. v. Choong Chin Sooi & Industrial Court of Malaysia (supra)*, SCJ Wan Suleiman (as he then was) stated as follows:

“(i) The absence of DI or the presence of a defective inquiry is not a fatality but merely an irregularity, it is open to the employer to justify his action before the Industrial Court by leading all relevant evidence before it and by having the entire matter referred before the Court.

(ii) Unless the Industrial Court has found that the dismissal is without just cause or excuse, the Court has no jurisdiction to offer any relief whatsoever.”.

28. Invariably, the hearing before the Industrial Court itself which indeed provides a better and impartial forum for the Claimant should be taken as sufficient opportunity for the Claimant to being heard to satisfy

natural justice. Indeed, the Minister's reference should be viewed as a hearing *de novo* by the Court and it therefore rehears the matter afresh.

29. The Claimant's dismissal by the Company vide Letter of Dismissal dated 10.11.2014 is not disputed. This Court will now look at the evidence adduced at the hearing to determine whether the Company has on a balance of probabilities proven the alleged misconduct against the Claimant. If the Court makes a finding that the alleged misconduct against the Claimant has been proven, then the Court must determine whether the Claimant's dismissal was with just cause or excuse.

Evaluation of Evidence and Findings of Court

30. It is not disputed that the Company had dismissed the Claimant vide its letter dated 10.11.2014 as he had been found to have committed an act of major misconduct of threatening and harassing one of the Company's employees and thereby breaching the Company's policies and procedures. In the Show Cause and Suspension Letter dated 28.10.2014 the Claimant's alleged misconduct was set out in detail, namely:

- a) You have been found to have sent via WhatsApp threatening and harassing words in nature to one of the Company's employee, in March 2014.

- b) Further to the above also, a police report dated 20th October 2014 has been lodged whereby the employee concerned felt her safety is threatened and also felt uncomfortable in the office area during working hours.
- c) The above act by you during working hours as a Manager is a serious major misconduct whereby it is construed by the Company as causing unconducive safe working environment with threatening words or bodily harm perception as safety and security is compromised.

31. At the outset the Court finds the allegations (b) and (c) above are inextricably linked to allegation (a) and the nexus between the allegations (a), (b) and (c) are so closely linked that they form part of the one and same transaction. Thus this Court will deal with the above 3 allegations as one main allegation against the Claimant.

32. The case of *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 1 LNS 30; [1981] 2 MLJ 129 is 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 CJ (as His Highness then was) speaking for the Federal Court ruled:

“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 that excuse 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 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.”.

[Emphasis added]

Claimant was not provided with any material particulars of allegation made against him

33. The Claimant stated in evidence that after the Show Cause and Suspension Letter dated 28.10.2014 was issued to him by the Company, he was never called or given any opportunity by the Company to give any explanation. In fact, the Claimant in his attempt to offer an explanation to the Company, was not given the requisite documents or details by the Company to enable him to answer the allegation made against him as contained in the Show Cause and Suspension Letter dated 28.10.2014. The Company admitted in evidence through COW-2 that the Company received the Claimant's request for further explanation/details vide his letter dated 03.11.2014 [COB p. 16]. However it decided or rather deemed it fit not to provide those details to the Claimant as per his request as it was of the opinion that if the identity of the complainant (COW-1 being a woman) was revealed to the Claimant, he would go after her and she would be in danger.

34. The Claimant's learned counsel submitted that to compound the injustice done by the Company, instead of asking the Claimant to come forward and give his explanation against the allegation made or provide

the Claimant with details of the allegation as requested by him, the Company without any inquiries whatsoever, decided to terminate the Claimant's employment by the issuance of the Letter of Dismissal dated 10.11.2014.

35. The allegation made against the Claimant is vague and lacks any sort of particulars to give him a reasonable and fair opportunity to defend himself adequately. The allegation is serious as it is criminal or quasi-criminal in nature. The Court of Appeal in *Esso Production Malaysia Inc v Maimunah Ahmad & Anor* [2001] 1 MELR 53 held that the time, date and place of offences ought to be put into the charge as they were material particulars, failing which the charge would be defective and *void ab initio*.

“...Needless to say these charges are criminal or semi-criminal in nature. **It is a basic requirement that in a criminal or semi-criminal charge it must contain the date, time and place the offence was alleged to have taken place. These are material particulars to be contained in the charge in order to enable the accused person to prepare his Defence adequately.** Without stating the particulars of date, time and place the accused person is put in a prejudicial position to prepare his Defence and answer the charge properly...”.

[Emphasis added]

36. The judgment of *Esso Production (M) Inc v. Maimunah bte Ahmad & Anor (supra)* was followed in the recent High Court case of *Intrakota Consolidated Bhd v. Mohamad Roslin Md Shah & Anor* [2008] 8 CLJ 81 where the High Court held that the material particulars as to time, place and identity of persons referred to in the charge were essential to enable

the employee to know with certainty the charge leveled against him and to allow him to prepare and conduct his defence. For such reasons, the Respondent's substantive application for judicial review was dismissed. Justice Lau Bee Lan in particular strongly emphasized the following at p. 92 and 93 of her judgment which is as follows:-

"What is of particular importance is the validity of the charge preferred against the 1st respondent and therefore material particulars as to time, place and identity of persons referred to in the charge are essential to enable the 1st respondent to know with certainty the charge levelled against him and to allow him to prepare and conduct his defence; as the learned Chairman stated at p.8 of the impugned award, **"It may well be that it is also within the personal knowledge of the claimant, but it is not for the claimant to fill in the gaps... It is for the Respondent to lay all the bare facts as the burden is always upon the Respondent to show by evidence that the excuse or reasons given to terminate the claimant's employment has been made out or proven"**. This approach is in accordance with the legal principles enunciated in the off-cited cases of *Goon Kwee Phoy (supra)*, *Hong Leong Assurance (supra)* and *Milan Auto Sdn Bhd (supra)*. In addition it is interesting to note the following note at p. 460 G in *Esso Production (M) Inc. (supra)* "[Editorial Note: The appellant's application for leave to appeal to the Federal Court (before Ahmad Fairuz Chief Judge (Malaya), Siti Normah Yaakob and Mokhtar Abdullah FCJ) was dismissed with costs on 22 April 2002]. What can be inferred is that the principles enunciated in *Esso Production (M) Inc. (supra)* is still good law."

[Emphasis added]

37. The case of *Esso Production (M) Inc v. Maimunah bte Ahmad & Anor (supra)* was cited with approval in the case of *K. Kavitha a/p Krishnan v Aetins Sdn Bhd* [2016] 1 MELR 476 where allegations of misconduct were leveled against the claimant. It was held as follows:

“This Court would like to stress on the importance of material information to be given to accused employees to enable them to prepare their defence adequately and to answer to the charges... the failure of employers to provide such material particulars would impinge on the basic principles of natural justice. Employees must be able to know what are the particulars in the case and given sufficient time so that they know the allegations they have to face and to enable them to answer the charges adequately.”.

[Emphasis added]

38. The Court concludes that the allegation against the Claimant was bad and defective as it lacked material particulars such as name of complainant, date of complaint, particulars of the WhatsApp message that allegedly contained threatening and harassing words to enable the Claimant to prepare an adequate and reasonable defence. COW-2 in evidence stated that the Company did not provide the particulars requested by the Claimant as it feared he would endanger COW-1 if he knew her identity. The reason put forth by the Company is baseless and hypothetical as there was no proof that the Claimant had ever threatened COW-1 even after he found out her identity during the course of these proceedings. In fact, he had lodged a police report dated 27.07.2015 after he was given a copy of the police report lodged by COW-1 dated 20.10.2014. In his police report the Claimant stated that the report made by COW-1 *“adalah laporan palsu tujuan untuk menganiayai serta mengaibkan kehormatan saya”*. In fact COW-2 admitted in evidence that as a result of being denied any material particulars of the allegation made against him, the Claimant has been denied his right to natural justice/right to be heard. The consequence of the Claimant’s dismissal is to deprive him of his right to livelihood as indeed had happened to him by being dismissed from his employment

with the Company (see *Hong Leong Equipment Sdn. Bhd. v Liew Fook Chuan and Another Appeal* [1995] 1 MLJ 481.

Allegation against Claimant

39. COW-2 testified that when he signed the Show Cause and Suspension Letter dated 28.10.2014 he was relatively new in the Company as he had just joined the Company on 13.10.2014. COW-2 admitted that prior to joining the Company, he had never met or knew the Claimant or COW-1 nor their backgrounds. COW-2 also further admitted that he never called COW-1 to give an explanation pertaining to her allegation against the Claimant at any point in time. Neither had he called the Claimant in respect of the allegation made against him.

40. However within the span of 15 days since joining the Company, COW-2 decided to sign-off the Show Cause and Suspension Letter. Subsequently within less than 1 month from COW-2's joining the Company he deemed it fit to terminate the Claimant by signing the Letter of Dismissal. COW-2 in evidence stated that it was the Exco's decision to terminate the Claimant. However COW-2 could not produce the minutes of the Exco meeting where the decision was made to terminate the Claimant.

41. The Exco comprised Mr. David Cheang Chin Lim (Chief Financial Officer (CFO), Company), Mr. David Ting Lieng Yu (Head of Group Internal Audit, Risk Management & Credit Control, Company), Mr. Praba (Legal), Mr. David Hector (Senior Vice-President Operations) and

COW-2. Incidentally Mr. David Cheang Chin Lim is COW-1's boss who ordered COW-1 to file a police report on 20.10.2014. Mr. David Ting Lieng Yu is the Claimant's boss.

42. COW-2 explained how the Exco came to the decision to terminate the Claimant:

“Q: How does the Exco come to the decision?”

*A: David Cheang mentioned that Azlin (COW-1) wants to resign and **reason for resigning is because she is being harassed by Claimant.** Further discussion done.*

...

Q: Did you brief Exco about complaint?

A: No.

Q: Did Azlin (COW-1) brief Exco about complaint?

A: No.

Q: So everything based on what David Cheang said?

A: Yes.”

43. However contrary to what Mr. David Cheang Chin Lim said, COW-1 in evidence stated that she resigned from Nazar Mekar Sdn Bhd for the purposes of her career development:

“Q: Kenapa anda tinggalkan Nazar Mekar Sdn Bhd ?

*A: **Saya berhentikan di Nazar Mekar Sdn Bhd atas faktor career saya** di mana di Nazar Mekar Sdn Bhd setakat Senior Sales Executive sahaja.”*

44. COW-2 also failed to produce the so called “Company policy and procedure” which the Company alleged that the Claimant had breached and instead kept on referring to paragraph 14(a) of the terms and conditions of the Claimant’s Letter of Appointment as the purported document to evidence the Company’s policies and procedures. Paragraph 14(a) is a term on “Dismissal for Misconduct” which provides that the Claimant may be terminated if he is found guilty of misconduct inconsistent with the fulfillment of expressed and implied conditions of service. The Court concludes that this provision does not sufficiently state clearly what is the Company’s policy or procedure that has been breached by the Claimant, namely the expressed and implied conditions of service.

45. Clearly from the demeanor of COW-2 when giving evidence in Court, it is apparent that he has no direct knowledge of the events leading to the Claimant’s dismissal. He seemed confused of the facts in relation to COW-1’s complaint and had no personal knowledge in relation to any material events leading to the Claimant’s termination. COW-2 agreed that when he wrote the Show Cause and Suspension Letter to the Claimant he did not have personal knowledge of the allegation made against the Claimant. However COW-2 asserted that he had personal knowledge of the allegation against the Claimant when he signed the Letter of Dismissal. Further COW-1 stated that he drafted the allegation against the Claimant based on the police report lodged by COW-1 [COB p. 13] and a WhatsApp snapshot message/image [COB p. 12]. When he drafted the allegation against the Claimant and signed the Show Cause and Suspension Letter he relied solely on information from

investigations conducted by Mr. Khairul Nizam bin Tajudin, Senior Executive Corporate Human Capital Division, Naza World Corporate Services Sdn Bhd, and the purported interview of COW-1 by Mr. Khairul Nizam bin Tajudin. Mr. Khairul Nizam bin Tajudin was not called as a witness during this hearing although he had been present at all mentions before this Court and was also present during the conduct of this hearing as the Company's observer/representative.

46. Thus the Court finds that the major portion of COW-2's evidence in regards to the allegation against the Claimant and matters pertaining to the issuance of the Show Cause and Suspension Letter is hearsay evidence and its reliability is suspect and as such not much weight will be given to it. Under section 60 of the Evidence Act 1950, oral evidence shall be direct evidence of the person who saw, heard or perceived the fact. In this case COW-2 relied upon information produced by Mr. Khairul Nizam bin Tajudin who had personal knowledge in regards to COW-1's allegation against the Claimant and matters pertaining thereto.

47. COW-1 stated in evidence that she only lodged the police report against the Claimant after Mr. David Cheang Chin Lim, CFO of Company had asked/instructed her to do so. This was pursuant to an e-mail dated 03.10.2014 that COW-1 sent to Mr. David Cheang Chin Lim (COW-1's boss), Mr. John Ong Beng Cheng (General Manager, Accounts Department) and Puan Azlin Adura Md Ismail (Head of Naza Mekar Sdn Bhd) informing them of the alleged "*threat*" made to her. This sequence of events explained the fact that although the police report was lodged on 20.10.2014, it is a complaint for the purported occurrence

of “harassment” in March 2014 i.e. 7 months prior to lodging of the police report. In other words, COW-1 was not steadfast in lodging or taking any action after purportedly being threatened by the Claimant, but rather waited it out for another 7 months to lodge a police report upon the instructions of the higher management of the Company. An excerpt of the e-mail dated 03.10.2014 is as follows:

“....Before I leave from Naza Mekar (10th Oct 2014 is my last day), I should tell both of you the true story.

En Azhar threatened me once, thru WhatsApp. It happen few months back when John wanted to resign. I didn't know from whom En. Azhar found out about this. So he WhatsApp me to know whether it is true or not.

*I replied, I didn't know. I refused to let him know because he should ask John personally. Not thru me. Then he replied **“Puan Azlin z.a dah banyak berubah skrg. Hutang darah akan dibalas dengan darah...ho ho ho”**.*

The way he replied like he have grudged to me. To be frank I'm scared. I just keep quiet and he started to call me few times. 3x if I'm not mistaken. My husband was beside me when En Azhar called. My husband advise don't answer his call.

1st person knew about this is Rosmaliza. I print screen the WhatsApp to her. And she was shocked.

To be honest, I am scared and I feel depressed. After the incident, I refused to talk with En Azhar. Even when I met him in front of surau or in café, I'm pretended I didn't noticed him and keep busy with my hp.

It took long time for me to recover back.

I should tell this earlier but I am scared. I am scared if he will do something bad to me or my family. For your info, WhatsApp image of our conversation still with me. For proof that I'm not making story about this.”

[Emphasis added]

48. From this e-mail dated 03.10.2014, COW-1 asserted that after receiving the alleged WhatsApp message, she was scared and avoided the Claimant. However during the hearing she testified that after the purported March 2014 “*threat and harassment*” by the Claimant, she still received and attended to the Claimant’s phone calls, assisting and working together closely with Claimant on a matter in respect of “Naza Mekar Sdn Bhd internal fraud case”. Whilst working with the Claimant during this time **she did not feel threatened by him**. She also admitted that she did not try to avoid the Claimant nor change her handphone number. Her evidence is as follows:

“Q: *Did you continue to work with Claimant after 22.03.2014 on the fraud case?*

A: *After incident, I still continue to work with Claimant on fraud case. While I was working with Claimant after incident I was not threatened by him.*

...

Q: *Did Claimant threaten you in any other way apart from the WhatsApp message?*

A: *Besides WhatsApp message, I was not threatened by Claimant.*

Q: *Did Claimant threaten you after you left Company?*

A: *No.*

Q: *Did you change your handphone after the incident/after you left company?*

A: *No as I had used the handphone for a long time.”.*

49. At the same time the Claimant in evidence stated that after the incident he was not confronted by COW-1's husband who worked in Naza Mekar Sdn Bhd based on evidence submitted during the hearing.

50. In fact COW-1 stated in evidence that her relationship with the Claimant prior to this alleged incident was good and she admitted that she handed over to the Claimant a copy of her resume [CLB Tab 13] for the Claimant to assist her in finding an alternative employment outside the Company. An original copy of this resume was produced in Court for the inspection of all parties. COW-1 had also orally informed the Claimant that she will be attending an interview at Lembaga Hasil Dalam Negeri (LHDN) and she asked the Claimant to be a referee to confirm her designation in the Company if any reference was required by LHDN. COW-1 was looking for a new job because she could not stand the pressure she had in the Accounts Department after the incident of Mark Lim's (ex-Manager of Naza Mekar Sdn Bhd and COW-1's ex-boss) fraud case and she was afraid to become a witness in the case. COW-1 was the main witness for that case. The Claimant eventually resigned from the Company in June 2015 and not on 10.10.2014 as alleged in her e-mail dated 03.10.2014. In fact COW-1 resigned after the Claimant's termination on 11.11.2014.

51. It is useful to pause here for a moment to say a few words regarding the approach which should be adopted in evaluating the

evidence adduced during this hearing. In the case of *Noorianti Binti Zainol Abidin & Ors v Tang Lei Nge* [1990] 2 MLJ 242 it was held:

“...a trial judge should not approach the case upon the basis of deciding which of the two conflicting stories he should believe but rather on considering which version is inherently probable or improbable...”.

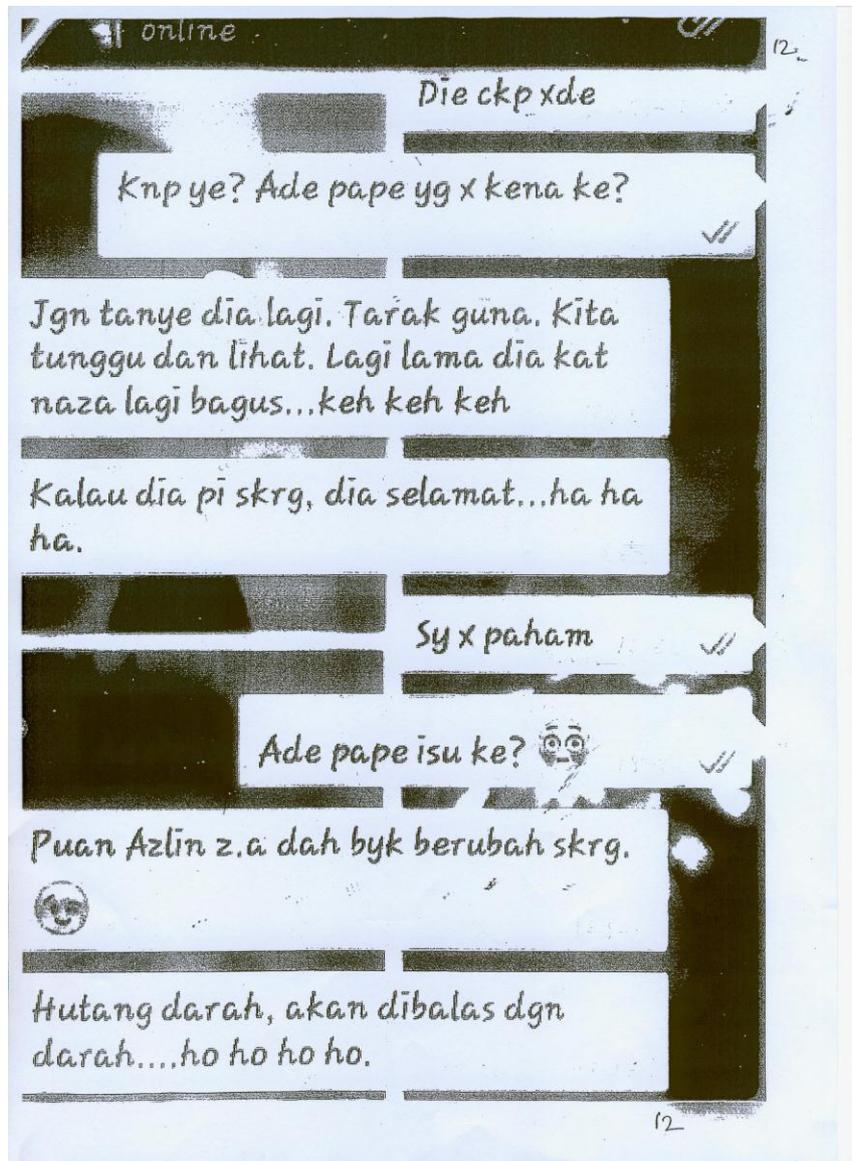
With this principle in mind this Court shall now assess the evidence in the present case.

52. The Court concludes that based on COW-1's evidence it is more probable that after she received the alleged WhatsApp message she did not feel threatened, uncomfortable in the office area during working hours nor had the perception of bodily harm where her safety and security was compromised. This is in direct contradiction to what she had stated in the e-mail dated 03.10.2014. In fact prior to the alleged incident the relationship between the Claimant and COW-1 was good.

53. Moving on the Court will now look at the 2 pieces of documents upon which COW-2 relied for the purpose of drawing up the allegation against the Claimant. From the chronology of events one would conclude that the WhatsApp snapshot image took place first which resulted in the police report being lodged by COW-1. In other words, the police report is purportedly made in consequence to the WhatsApp snapshot image.

54. The WhatsApp snapshot image is found at COB p. 12. From the evidence, it is undisputed that no where in the WhatsApp snapshot image was it mentioned the Claimant's name, date of WhatsApp message, Claimant's hand phone number or Claimant's profile picture nor any other evidence to prove that it was indeed the Claimant who was purportedly having such conversation with COW-1. COW-1 in evidence could not state the exact date of the WhatsApp message and stated that it was made between 20.03.2014 and 22.03.2014. To prove the veracity of the WhatsApp message, COW-1 did bring along her handphone to the Court to be inspected by all parties. However, COW-1 admitted in evidence that the "WhatsApp message" in her handphone is a mere screen snapshot/an image and not the original WhatsApp messages. She stated in evidence that she has changed her handphone size and hence she does not have the original WhatsApp messages in its original form/format. In evidence COW-1 admitted that the WhatsApp messages at COB p.12 were carried out from 18.49pm to 18.53pm. She admitted that there were related WhatsApp messages before 18.49pm but she does not have a record or screen snapshot/image of the messages. After 18.53pm the alleged conversation between her and the Claimant continued but she again does not have a record or screen snapshot/image of those messages. However this Court opines that if the alleged "*threat and harrasment*" by the Claimant is the subject of a police report for which she has made a serious allegation against the Claimant, it would have been prudent and sensible for COW-1 to have downloaded the original WhatsApp messages and not merely rely on a screen shot of a part of the message that seems to be a stand alone.

55. This Court will now look at the content of the WhatsApp snapshot image at COB p. 12. The WhatsApp snapshot image consists of 8 chat boxes as follows:



56. These chat boxes are referring to a person as in the use of the word “**dia**” for as many as 4 times. The Claimant in evidence stated that the word “**dia**” refers to Mr. John Ong Beng Cheng (who allegedly wanted to resign). However in regards to the last chat box that contained

the words “**Hutang darah akan dibalas dengan darah**” she asserted that the words referred to her. The Court ponders why would the said words refer to COW-1 when all the way the conversation was about Mr. John Ong Beng Cheng.

“Q: *Adakah anda tahu maksud apabila Claimant menyatakan “Puan Azlin z.a dah banyak berubah skrg. Hutang darah akan dibalas dengan darah”?*”

A: *Saya tidak tahu tentang maksud beliau tetapi mesej itu suatu ugutan buat saya.*

...

Q: *Why do you say “Hutang darah akan dibalas dengan darah” is in reference to you?*

A: *Because darah boleh jadi macam-macam.*

Q: *Do you agree words “Hutang darah akan dibalas dengan darah” is not specifically directed to you?*

A: *Disagree, perbualan ini antara saya dengan Claimant. Beliau mengharapkan saya untuk memberi jawapan tetapi saya cuba untuk mengelak untuk memanjangkan perbualan ini.*

...

Q: *Dalam WhatsApp message at p.12 of COB, 4 times word “dia” is referred to. To whom is made reference “dia”?*

A: *John.*

Q: *Is last sentence at p.12 of COB referring to you?*

A: *Yes.*

Q: *Why did last sentence at p.12 of COB refer to you when message prior to it sent by Claimant has a smiley face?*

A: *[No answer].”.*

57. Is the WhatsApp snapshot image authentic or can it be manipulated? This was a question posed by the Claimant's learned counsel during the hearing. In the course of the proceedings, the Claimant had demonstrated to the Court how easy it was to fabricate a WhatsApp conversation that can be done within minutes. The demonstration was witnessed by all parties, including the Company's learned counsel, who did not cross-examine the Claimant on this matter. Thus the Court is satisfied that based on the demonstration before it a WhatsApp conversation can be fabricated and thus questions arise as to its credibility and authenticity, a point this Court considers manifestly important as the entire subject of the allegation against the Claimant is based on this alleged WhatsApp snapshot image of a conversation allegedly between COW-1 and the Claimant. Thus if the alleged conversation between COW-1 and the Claimant was fabricated, then the authenticity of the alleged WhatsApp snapshot image of that conversation is suspect and deemed unreliable.

58. The Company's learned counsel alleged that in the WhatsApp snapshot image (7th chat box COB p. 12), COW-1 was addressed as "Puan Azlin z.a". This was a similar form of reference in the Claimant's witness statement (CLWS-1) where he addressed COW-1 as "Azlin ZA". The Company's learned counsel submitted that this raised an inference that it was the Claimant who was one of the parties to the WhatsApp conversation. In evidence the Claimant denied that he was the only person in the Company who called COW-1 as "Azlin ZA" as she was generally referred to as "Azlin ZA" in the Company. In fact this allegation amounts to submissions from the Bar since no evidence was ever led by the Company that only the Claimant referred to COW-1 as "Azlin ZA".

This matter was also not put to COW-1 during the examination before this Court. The inference is drawn by the Company's learned counsel and is tantamount to an inference from the Bar. In ***Ng Hee Thoong & Anor v Public Bank Bhd*** [1995] 1 MLJ 281, the Court of Appeal made it crystal clear about its position on evidence from the Bar:

“The only reference to the delay point is to be found in the address of counsel for the respondent in the court below and **the explanation is in reality that of counsel and not of his client under oath**. It is a principle fundamental to our system of adversarial litigation that evidence upon a matter must be given on oath. The practice of counsel giving evidence from the Bar, as was done in this case, is to be deprecated.”.

[Emphasis added]

Thus the Court concludes that this inference as drawn by the Company's learned counsel is unsubstantiated and appears to be an afterthought and therefore bears no weight in this Court's evaluation.

59. The Claimant in evidence denied emphatically that he had sent the WhatsApp message to COW-1. In fact in the Claimant's view the reason for his dismissal is as stated in his unchallenged testimony as follows:

“Q: *Jika kamu tidak melakukan kesalahan, mengapakah pihak syarikat menamatkan perkhidmatan kamu?*

A: *Sesetengah pihak dalam syarikat adalah bermain politik. Kedudukan jawatan saya sebagai Pengurus Audit Dalaman, Pegawai Penyiasat dan Pengurusan Risiko sebelum ini telah membongkarkan banyak kesalahan dalaman seperti pecah amanah pekerja. Kesalahan berlaku apabila ada kecuai*

daripada pegawai atasan mereka. Antara risiko yang dihadapi oleh syarikat responden adalah jenayah kolar putih.”

60. On the credibility of COW-1, the Court has observed her demeanour and evidence during the hearing. The Court finds COW-1 to be an unreliable witness as her evidence was inconsistent, contradictory and conflicting. Needless to say that she is the complainant in this case and her integrity and truthfulness is very much in question. It would be highly prejudicial and erroneous to give much weight or credence to her evidence as adduced during the course of this hearing. The Court finds that her testimony when being compared against the totality of evidence in this Court is highly improbable.

61. The Court concludes that the WhatsApp snapshot image does not conclusively prove that it was indeed the Claimant who was purportedly having a conversation with COW-1 because it is undisputed/unchallenged that no where in the WhatsApp snapshot image was it mentioned the Claimant's name, date of WhatsApp message, Claimant's hand phone number or Claimant's profile picture nor any other evidence to prove that there in fact was such a conversation. Furthermore the WhatsApp snapshot image was not proven to be authentic because as demonstrated in Court the WhatsApp message can be fabricated resulting in a fabricated WhatsApp snapshot image of that message. Thus in this regards there is doubt as to whether the Claimant had a conversation with COW-1 at the material time and had stated the words "*Hutang darah akan dibalas dengan darah*" in the purported WhatsApp message. Furthermore the contents of the WhatsApp snapshot image at COB p.12 does not conclusively prove

that the threatening words “*Hutang darah akan dibalas dengan darah*” were addressed to COW-1. To add further to the awkwardness of the situation, COW-1 admitted that she continued to prolong her conversation with the Claimant after she alleged that the Claimant made threatening and harassing words to her at approximately 18.53pm. Why she did this she could not explain to the Court, but it seems odd that she would continue her conversation with the Claimant when the Claimant allegedly frightened her with threatening and harassing words at the material time. The normal response in such a situation would be to end the conversation abruptly and seek the necessary assistance to address the impact and consequences of the threatening and harassing words. However after receiving the WhatsApp message that allegedly threatened and harassed her, COW-1 did nothing although she asserted that she was scared and frightened for her life. She just went about her life as if nothing had happened and did not report the matter immediately to her head of department. She continued to have a good working relationship with the Claimant after the alleged incident. This is totally incredulous for someone who feared for her life and that of her family! The police report lodged by COW-1 was merely a lip service done on the instructions of her boss since the whole police report hinged on 1 event, purportedly the WhatsApp snapshot image that allegedly contained words threatening and harassing her.

62. On the totality of evidence, the Court concludes that the allegation made against the Claimant is defective for want of material particulars as stated in the foregoing. Furthermore the Company did not produce any compelling and cogent evidence to prove the allegation that it was the

Claimant who had sent vide WhatsApp threatening and harassing words to COW-1. Accordingly in the circumstances after taking into account the totality of the evidence adduced by both parties and bearing in mind s. 30(5) of the Industrial Relations Act 1967 to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form, it is the finding of this Court that on a balance of probabilities the Claimant was not guilty of the allegation made against him and that he was dismissed without just cause or excuse. The Claimant's case is hereby allowed.

Remedy

63. As for the remedy sought the Court is of the view that reinstatement is no longer the appropriate remedy in the interest of industrial harmony as the relationship between the Company and the Claimant has become strained and irreparable. The Court will proceed to award compensation in lieu of reinstatement instead.

64. The Court finds that backwages shall be the alternative remedy ordered here (See *Dr. A. Dutt v Assunta Hospital* [1981] 1 LNS 5). On the facts of this case, the Claimant's last drawn basic salary is RM8,000.00.

65. As the principles of equity and good conscience have to be applied in the exercise of discretion in granting financial relief, consideration ought to be had to the possibility of rescaling the monetary award ordered for backwages. The Court finds that the appropriate head under

which such scaling down is appropriate is the Claimant’s post-dismissal gainful employment. After his dismissal he stated that it was difficult for him to find a permanent job as he had been terminated by the Company. At the same time job offers were limited due to the country’s weak economy. He only managed to find some part time jobs, some of which paid on an hourly basis. The Federal Court in the case of *Dr. James Alfred v Koperasi Serbaguna Sanya Bhd. Sabah* [2001] 3 CLJ 541 said that when taking into account that the workman has been gainfully employed elsewhere after his dismissal it “*does not necessarily mean that the Industrial Court has to conduct a mathematical exercise in deduction*”. Thus in the circumstances it is reasonable and fair to make a deduction of 10% for post-dismissal earnings.

66. The Court therefore orders as follows:

(a) Backwages from the date of dismissal (10.11.2014) to the last date of hearing (18.04.2016) but limited to 24 months:

RM8,000.00 x 24	=	RM192,000.00
Less 10% (<i>post-dismissal earnings</i>)	=	RM 19,200.00

		RM172,800.00

- (b) Compensation *in lieu* of reinstatement of one month's salary for each completed year of service (17.06.2013 to 11.11.2014)

RM 8,000.00 x 1	=	RM 8,000.00

TOTAL	=	RM180,800.00
		=====

FINAL ORDER

67. The Court now orders that the Company shall pay the total amount of **RM180,800.00 (Ringgit Malaysia : One Hundred Eighty Thousand and Eight Hundred Only)** to the Claimant less statutory deductions, if any, through the Claimant's Solicitor's firm Messrs. Farid & Radhi within 30 days from the date of this Award.

HANDED DOWN AND DATED 10 JANUARY 2017

-signed-

**(SAROJINI A/P KANDASAMY)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR**