

INDUSTRIAL COURT OF MALAYSIA

[CASE NO: 26(12)/4-582/17]

BETWEEN

SYED NAHARUDIN BIN SYED HASHIM

AND

ETIQA TAKAFUL BERHAD

AWARD NO : 3143 OF 2018

Before : Y.A. Tuan Yong Soon Ching – Chairman.
(Sitting alone)

Venue : Industrial Court Malaysia, Kuala Lumpur.

Date Of Reference : 19.06.2017

Dates Of Mention : 09.08.2017; 13.09.2017; 30.10.2017; 03.01.2018;
26.01.2018; 23.02.2018; 02.03.2018; 28.06.2018;
26.07.2018.

Dates Of Hearing : 28.08.2018; 24.09.2018.

Representation : Mejar (B) Ibrahim Hashim and Ms Norazira Azhar
From Messrs Ibrahim Hashim & Associates
Counsel for the Claimant

Ms Janice Anne Leo and Ms Priyanka
From Messrs Steven Thiru & Sudhar Partnership
Counsel for the Company

Reference:

This is a reference dated 19 June 2017 by the Honourable Minister of Human Resources under Section 20(3) of the Industrial Relations Act 1967 arising out of the dismissal of **Syed Naharudin bin Syed Hashim** (hereinafter called "the Claimant") by **Etiqa Takaful Berhad** (hereinafter called "the Company") on 21.10.2016.

AWARD

[1] This is a Ministerial reference to the Industrial Court under section 20 (3) of the Industrial Relations Act 1967 (Act 177) for an award in respect of the dismissal of Syed Naharudin bin Syed Hashim ("the Claimant") by Etiqa Takaful Berhad on 21.10.2016.

[2] The hearing of the case commenced on 28 August 2018 and was duly completed on 24 September 2018. The Company's Solicitors filed their Written Submissions on 14 November 2018. The Claimant's Solicitors has yet to file any submissions as of the date of this Award.

BRIEF FACTS

[3] The Claimant first joined the Company as an Assistant Manager in 1995, at the Head Office for Human Capital Division in Kuala Lumpur for MNI Insurance.

[4] He has held different positions in the Company and his last position when dismissed was as Head, Agency Management, (Family Takaful Agency), ETIQA. His last drawn salary was RM 10,667.00 per month. He is currently 50 years of age.

[5] On 2 July 2016, the Company received an anonymous email alleging that two officers of the Company had been operating as sexual predators and targetting girls as young as thirteen years old.

[6] The anonymous author also alleged that the Claimant, using the pseudonym, "K-Boy", carried out his meetings with girls at Seri Pacific Hotel in Kuala Lumpur. It was also alleged that the Claimant's conversations had been recorded and featured in an undercover exposé by the Star newspaper team of journalists known as STAR R.AGE Team.

[7] An investigation by the Company revealed that there were two video recordings featuring K-Boy which had been uploaded onto the STAR R.AGE online website and the videos had gone viral on YouTube.

[8] The Claimant was interviewed by the Company on 14 July 2016 where the Claimant was said to have admitted, voluntarily, the following:

- 8.1 He was the individual named K-Boy in the two STAR R.AGE video recordings;
- 8.2 He met with a lady journalist named Nadia /Yaya through WeChat and had been in communication with her for two weeks before asking her to meet in person;
- 8.3 He was told that Nadia/Yaya was only 15 years old before the meeting;
- 8.4 He met with Nadia/Yaya on 3 June 2016 at around 9.15 p.m. at a café near Seri Pacific Hotel, Kuala Lumpur;
- 8.5 During the meeting he had tried to persuade her to follow him to his room at Seri Pacific Hotel, "just to talk". He also had a conversation

with her at the hotel lobby where he spoke about his sexual exploits with girls as young as 13 years old;

- 8.6 On 9 June 2016, at about 10.30 p.m. he met with Nadia/Yaya for the second time at Seri Pacific Hotel and he took the girl to his hotel room, where they talked for about 30 minutes. He allegedly admitted that he talked with her regarding his sexual exploits and that the substance of the conversation was sexually explicit.

[9] On 19 July 2016 the Company suspended the Claimant with immediate effect.

A copy of the Notice of Suspension is as follows:-

Encik Syed Naharudin

SUSPENSION OF SERVICE

We have received a report alleging that you had committed serious acts of misconduct.

In view of the seriousness of the allegations leveled against you, the Bank has decided to suspend you from service with effect from 19/7/2016.

Whilst under suspension, you will be given half-pay for the initial two (2) weeks and thereafter on full pay.

Upon receipt of this letter, you are required to provide your correspondence address and contact number (if any) to the Head, Family Takaful Agency ETIQA to facilitate communication with you.

Please acknowledge receipt of this letter by signing on the duplicate and return the same to us.

Yours faithfully
for Maybank



LOOI HEONG MENG
HEAD, GROUP INDUSTRIAL RELATIONS GOVERNANCE & OSH

[10] The Company issued a Notice of Show Cause dated 16 August 2016 to the Claimant.

A copy of the Notice of Show Cause is as follows:-

Confidential

Our Ref : GHC/GIRGO/CIR/LHM/PPR/CHY/PF 75444
Date : 16/8/2016

Encik Syed Naharudin bin Syed Hashim
No 2A Jalan Bukit Mewah 9/13
Taman Bukit Mewah Fasa 9
43000 Kajang

Encik Syed Naharudin

LETTER OF SHOWCAUSE

We had been informed via an anonymous email whereby you have been alleged of being involved in acts of sexually grooming young girls, some as young as 13 years, and sexually abusing them. In the said email, you had been alleged as the sexual predator known as 'K-Boy' and appeared in an undercover video filmed by STAR R.AGE journalists in their investigations and expose' on this recent issues of sexual offenders.

During our investigative interview with you on 14/7/2016, you had admitted to the following:

- You were the individual named K-Boy as filmed in the said videos posted on the STAR R.AGE website (<http://rage.com.my/catching-sex-predators/>) and you had met the 'girl' online via Wechat and claimed to have 'known' her for 2 weeks.
- On 3/6/2016, you had met with the said female journalist (named Nadia @ Yaya) at around 9:15pm at a nearby café within the vicinity of Seri Pacific Hotel, KL. You also admitted that you had booked a room in Seri Pacific Hotel and throughout the meeting with her on 3/6/2016, you made several attempts to persuade her to follow you to the room. Also after she agreed to follow you to the hotel lobby, you attempted to persuade the girl for sexual favors by talking about your 'past sexual exploits with other young and under aged girls. The following are extracted from your recorded conversation with the journalist in the café and in the hotel lobby.

Syed Naharuddin (SN): "Sebab bila abang nak kenal nadia abang akan focus 100%. Nak kenal. Sini semua gangguan."

Journalist (N): "Ni org takde benda nak cerita."

SN : "Takpe, bila kita masuk bilik tu banyaklah nak cerita, banyak nak sembang. Abang nak Nadia percaya kata abang.. bagus memang masih wes-was.. sebab abang bukan kenal Nadia seorang, dah ramai."

N : "Dia orang semua, mude macam orang ke?"

SN : " Ada. Nanti abang cerita.. Form 3 ada, Form 2 ada, Form 1 pun ada. Apa yang abang buat dengan dia orang , nanti abang cerita.. sini tak sesuai. Cuma kejap lagi untuk elakkan dari masalah ok.. kita jangan jalan sebelah.. jalan belakang. Tak nak orang nampak apa...itu jer.. Abang kena jaga, abang akan jaga Yaya."

N : "Orang nak buat apa dalam bilik?"

SN : " Sembang. Nanti abang ceritakan...takut ape? Kalau orang fikir abang jenis macam ini,.. (Illegible)... Yaya pun kenal abang, kawan abang pun Yaya dah nampak.. Muka abang pun dah ada... kalau abang buat apa-apa, tunjuk jer."

SN : " Ada yang abang jumpa.. sorî nak cakap lah.. tapi ok,.. buat.. Tapi ade yang jumpa kawan saja. Ade yang kita tak buat ape-ape. Seperti itu i minta benda benda ni, Yaya fikirkan seks tapi abang dah takde ape-ape."

N : "Tapi kalau abang jumpa umur macam Yaya?"

SN : "Abang buat."

N : "Kepala otak .."

SN : " Abang pernah buat dengan Form 1, Form 2, Form 3, Form 4, Form 4 Form 5 Form 6.. Abang buat semata-mata sebab orang nak, dan nak bagi orang suka saja."

N : " Tapi Form 1 dah biasa buat?"

SN : " Yang abang buat tu, sekarang mungkin dah Form 4. Jumpa lagi.. masih jumpa lagi...kalau free pagi esok, boleh datang lah."

- Having met with the girl again at around 10:30pm on 9/6/2016 in Seri Pacific Hotel, KL during which, you admitted that you had brought her to your hotel room, which had been booked by Etiqa in conjunction with intervention program for its agency members. You claimed you only had a conversation with her but at the same time, also admitted that your conversation topics were of a sexually explicit nature as recorded in the said videos. The following are extracted from your recorded conversation with the journalist in the hotel.

N : Macam hari itu abang cakap, abang pernah dengan 13 tahun kan?

SN : Ya, dia sebabkan bila dia nak, dia seronok, dia lupa benda lain... dia lupa seketika , itu orang kota, syurga dunia. Kalau abang bawa laptop, abang boleh tunjuk. Kecil orang dia, tapi sebab dia selalu buat.. Tu pun dia sakit sikit...

Y : Tapi mudanya..

SN : Dia sakit sikit sebab Abang punya agak besar jugak lah. Kotekan Nadia nak belajar, nak tengok, bagitahu abang je. Abang tak kisah. Serious, kita tak buat. Kalau Nadia nak tengok macam mana lelaki punya naik ke macam tu, bagitau jer.

In view of the above, it is hereby alleged that you, as the Head of Agency Management, Etiqa Takaful Berhad had committed serious acts of misconduct in that you had :-

- On 3/6/2016, you had met with a young female, at a café nearby the vicinity of Seri Pacific Hotel at around 9:15pm and made attempts to persuade her to follow you to a hotel room which you had booked in Seri Pacific Hotel, KL. On the same date, you had admitted to having a sexually explicit conversation with her in the lobby of Seri Pacific Hotel, KL, pertaining your past sexual exploits with other young and under aged girls as highlighted above.
- On 9/6/2016, you had met with the same female at around 10:30pm inside the lobby of Seri Pacific Hotel, KL during an ongoing intervention program for agency members, and brought her to your hotel room which had been booked by Etiqa, whereby you admitted that you had again, conversed with her on sexually explicit topics and descriptions your past sexual exploits, as highlighted above.

Please note that your above actions has also tarnished the image and reputation of the Bank. As such, you are hereby required to explain as to why disciplinary action, including dismissal should not be taken against you for your conduct highlighted above. Your reply should reach us latest by 22/8/2016 failing which it will be presumed that you have no explanation to offer. The Bank thereupon shall be at liberty to proceed further on the matter on such presumption without further communication with you.

Meanwhile, please acknowledge receipt of this letter by signing on the duplicate and return same to us.

Yours faithfully
for Maybank



LOOI HEONG MENG
HEAD, GROUP INDUSTRIAL RELATIONS, GOVERNANCE & OSH

[11] The Claimant replied to the Notice to Show Cause on 22 August 2016.

The reply is as follows:-

CONFIDENTIAL
WITHOUT PREJUDICE

Syed Naharudin bin Syed Haslim,
No 2A, Jalan Bukit Mewah 9/13,
Taman Bukit Mewah Fasa 9,
43000 Kajang,
Selangor Darul Ehsan

22 August 2016

To :

Mr Looi Heong Meng,
Head, Group Industrial Relations, Governance & OSH,
Malayan Banking Berhad,
Kuala Lumpur.

Dear Mr Looi,

REPLY TO LETTER OF SHOWCAUSE

With reference to your letter dated 16 August, 2016 with ref: GHC/GIRGO/CIR/LHM/PPR/CHY/PF75444 which was sent to me via email, I wish to state my reply to the said allegations as follows:-

- a) On 3/6/2016, you had met with a young female, at a café nearby the vicinity of Seri Pacific Hotel at around 9.15pm and made attempts to persuade her to follow you to a hotel room which you had booked in Seri Pacific Hotel, KL. On the same date, you had admitted to having a sexually explicit conversation with her in the lobby of Seri Pacific Hotel, KL, pertaining your past sexual exploits with other young and under aged girls as highlighted above.
- b) On 9/6/2016, you had met with the same female at around 10.30pm inside the lobby of Seri Pacific Hotel, KL during an ongoing intervention program for agency members and brought her to your hotel room which had been booked by ETIQA, whereby you admitted that you had again conversed with her on sexually explicit topics and descriptions your past sexual exploits, as highlighted above.

2. The said website as mentioned in your letter, <http://rage.com.my/> is managed by a team of young journalists in Malaysia producing in-depth stories and videos on stuff that according to them people need to know about. The lady appeared in the video is a 26 years old *RAGE* undercover journalist/video editor whose real name is Maryam bt Zainol (please refer to Appendix 1 attached). She identified herself as "Nadia @ Yaya" to me. She acted as an "agent provocateur" who elicited prepared questions which answers are well expected as what she wanted it to be as young "investigative journalist". As she is also a video editor, the posted video was deliberately edited and shown only parts that benefited her organization and purposes only. This is prejudicial on my part. Besides the recording were done illegally and without my permission, knowledge and consent, the video only shown for about 4-5 minutes out of the entire more than 60 minutes conversation which were intervened here and there. As I said earlier this is detrimental to me as far as this process is concerned and had breached my privacy and confidentiality.

3. The lady (Nadia @ Yaya) was brought to the hotel room as a guest. When she was in the room, there was no physical contact and neither any kind of harassment took place. The room door was not locked and even I could see from the video, her colleagues were all over the places and outside the room. If at all I have done anything wrong, her colleagues would have stormed into the room. There is no report against me by this lady. I believed that bringing a guest to a room after a completed event is not against the Bank's policy or a misconduct. There is no untoward incident on the specified dates.

4. The complaint as stated in your letter received via an anonymous email which certainly cannot be substantiated nor verified. Even if there are any acts of previous sexual acts as in the conversations between "K-Boy" and the lady, they are all fantasies with no cogent proof of the actual engagements.

5. As you are also aware, the figure/person of "K-Boy" in the video clip was distorted and it was a very blur recordings. Nobody including you and officers of the Bank could identify "K-Boy" as myself. It is the intention of the RAGE to do so. Nothing in my conversations that I have mentioned about my real name, occupation and the organization that I work with or anything related thereto. Nothing. I did not wear any clothing or marking or uniform whatsoever as to be recognized as a person working with the Bank or the organization itself.

6. There is no contravention of any law what more the misconduct that has taken place, which tarnished the image and the reputation of the Bank. There is no damage at all to the Bank. There is nothing to relate me or my acts to the Bank that easily recognizable by anyone who view the recording. There is no adverse publicity against the Bank could rise whatsoever.

7. Summarily I dispute the fact that I have tarnished the image and reputation of the Bank by the actions shown in the video clips as stated. There is no misconduct on my part and these allegations are done with malice in order to jeopardize my good name and services to the Bank for more than 21 years as you can see from my personal records. I struggled hard with this pleasant organization which I enjoyed doing until today. I have no slight intention to bring down the image and reputation of the Bank and I will not allowed anyone to do so.

Please fairly consider my explanations and clarifications on the incident so as to bring justice to my family as well as my colleagues and me.

Thank you.

Yours faithfully,


SYED NAEEMUDDIN BIN SYED HASHIM

[12] On 2 September 2016, the Claimant was interviewed a second time and the Company alleged that he admitted as follows:-

- 12.1 He did meet up with Nadia/Yaya on two separate occasions;
- 12.2 He was not aware of Nadia's actual profession or age;
- 12.3 He had no malicious intention in respect of the events that had transpired and only wanted to know her on a personal level;
- 12.4 He admitted that the statements as listed in the Notice to Show Cause were made by him but he did not have any malicious intent towards her;
- 12.5 He was guilty of all charges preferred against him but he contended that his action did not cause any reputational damage to the Company or tarnish the image of the Company.

[13] The Claimant was terminated on 21 October 2016, via a Letter of Dismissal as follows:-

LETTER OF DISMISSAL

We refer to our interview session with you which were conducted on 14/7/2016 and 2/9/2016, our Letter of Showcause dated 16/8/2016 and your reply to the same dated 22/8/2016.

In view of the seriousness of the allegations levelled against you and after considering all the relevant facts, circumstances and admissions made by you during the interviews, the Management has decided to dismiss you with effect from 21 October 2016.

The Management has concluded that your actions and statements in the undercover video expose by the STAR RAGE are extremely prejudicial to the interests and reputation of Etiqa Takaful Berhad ("the Company") and the Maybank Group generally, particularly in light of your senior position. As such, the Company is unable to repose the necessary trust and confidence in you to continue in employment.

You are required to return all properties belonging to the Company that are currently in your possession to Encik Muhammad bin Abdulkah, HC Director Etiqa & Group Islamic Banking.

Yours faithfully
for MAYBANK


LOOI HEONG MENG
Head, Group Industrial Relations, Governance & OSH
GROUP HUMAN CAPITAL

THE CLAIMANT'S CASE

[14] The Claimant contends that he had been trapped by someone in the Company who was acting out of professional jealousy. He claims that there was a plot to drive him out of the Company.

[15] The Claimant contends that the Company's action was based on a ghost writer or an anonymous author of an email.

[16] It is the Claimant's case that he had served the Company for 21 years and was even awarded a Long Service Award in 2016 for 20 years of service.

[17] A domestic inquiry was not held for him to defend himself.

[18] Although the Claimant did not explicitly contest the Company's take on the two interviews with the Company, his contention was that the Company had used the Claimant's honest confession against him when he admitted he was the individual in the videos.

[19] The Claimant is of the opinion that the videos did not reveal the Claimant's name, his occupation and his position in the Company. Thus, he could not have tarnished the image of the Company.

[20] He further claims that the whole incident was an entrapment by Nadia, who was actually a 27 year-old journalist.

[21] No offence had actually taken place or had been committed.

The Company's Case

[22] The Company contends that the dismissal was based on the Claimant's admission of the veracity of the contents of the anonymous email.

[23] There is no issue about the identity of the person in the videos, and the face was purposely blurred by the STAR R.AGE Team.

[24] The intention of the Claimant towards the girl as shown in the videos was very clear. It was captured in video and the voice recorded to show the intent and the direction of the conversations.

[25] The Company contends that the Claimant's senior management position as Head, Agency Management ETIQA, was incumbent on him to safeguard the image and reputation of the Company at all times.

EVALUATION AND FINDINGS

[26] This is a case involving a phenomenon known as sexual grooming and not a sexual harassment case per se.

Sexual Grooming

[27] The Penal Code has some limited protection for minors such as section 375 (rape of a minor) and section 377E, which prevents a person from causing a child under 14 to commit indecent acts.

[28] However, there are other aspects of sexual crimes such as grooming, molestation and child pornography.

'Grooming is the term used to describe the process by which paedophiles build trust with a child from a non-sexual relationship to a sexual relationship in a manner that seems natural and non-threatening either to the child himself or even to an adult supervising the child. It is through this 'process' paedophiles seek out, befriends and manipulate a targeted child for production of child pornography. In other words 'grooming' is the 'gradual process a skilled paedophile takes in laying a foundation of trust, love and friendship before escalating the relationship to that of a sexual nature' Ultimately, the seemingly healthy relationship is used to take sexual advantage of a vulnerable child. See *The Need for 'Anti-Grooming' Laws to Regulate Child Pornography on The Internet and The Penal Code of Malaysia: A time for Review [2016] 6 MLJ cxxv* by Dr. Manique Cooray.

[29] The new Sexual Offences Against Children Act 2017 (SOAC 2017) has expanded the category of protection for children. In part III (Offences Relating to Child Grooming), it is provided in s 11

- (1) Subject to subsection (3), any person who-
 - (a) sexually communicate with a child; or
 - (b) encourages a child to sexually communicate, by any means, commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding three years.
- (2) For the purposes of this section, a person is said to sexually communicate if-
 - (a) the communication or any part of the communication relates to an activity that is sexual in nature, or
 - (b) any reasonable person would consider any part of the communication to be sexual.
- (3) No person shall be convicted of an offence under this section if the communication is for education, scientific or medical purposes.

[30] "Child Grooming" is defined, in SOAC 2017 as follows:

- 12. (1) Any person who communicates by any means with a child with the intention to commit or to facilitate the commission of any offence under section 5, 6, 7, 8, 14 or 15 or any offence specified in the Schedule against the child commits an offence and shall, on conviction be punished with imprisonment for a term not exceeding five years and shall also be liable to whipping

[31] The Company asserts that the Claimant was dismissed due to a serious misconduct that tarnished the image and reputation of the Company. The misconduct was that the Claimant met with someone whom he thought was a minor on two separate occasions (3 June and 9 June 2016). During the first meeting he attempted to persuade her to follow him into his hotel room and had sexually explicit

conversations pertaining to his past sexual exploits with young underaged girls, some as young as 13 years old.

[32] During the second encounter, he brought the young lady (or so he thought) to his hotel room (which was booked in conjunction with his work obligations) and the conversation revolved around his previous sexual exploits as well.

[33] Although there is no evidence that the police had ever taken a case against the Claimant although he did have an interview with them, it is the opinion of this court that any police action, is a separate matter and is of no relevance to the dismissal case before this Court.

[34] The Company does not have to show that the actions of the Claimant are criminal in nature or that the charges against him are proven on a standard that befits a criminal case.

[35] The court shall take cognizance of the definition of sexual grooming as provided under SOAC 2017 and the seriousness of the punishment provided thereunder.

[36] The actions of the Claimant can amount to a sexual communication. The facts of the case which are largely admitted to by the Claimant, are that he communicated

with the intended "victim" in social media and then met up with the person (who informed him that she was a young girl of 15). The setting, the time and the locale were such that a person of his standing in society and representing an insurance company should have been wary of. Further, the conversations were explicitly related to sex and sexual exploits which a man of his age has no business to discuss with a young lady, notwithstanding her real age.

[37] The Company had played the relevant portions of the video recordings in court and there was no challenge as to the authenticity and faithfulness of the recordings, except the length and those parts edited out. This court accepts that for reason of brevity, relevance and substance, there was no need to play the entire undercover surveillance recordings. What comes across was sufficient to paint a picture of an older man who was trying to impress, and to use his past exploits as a bait to attract a young girl to his hotel room. These conversations among strangers at best were not meant as an avuncular chat or an innocent gesture of friendliness and certainly devoid of any wish to simply befriend a person.

[38] It is incumbent on the Claimant to show that his meetings and his conversations were benign and devoid of any "malicious" intent as he has claimed. The second meeting even extended to his hotel room and the whole conversation revolved around his attempt to show that sex and sexual relations (even with much younger partners) were par for the course and not something sinister and manipulative.

[39] Sexual grooming can sometimes take a long time and requires patience and care on the part of the perpetrator. It may not result in a sexual act immediately or even within weeks or months. It's more of a process of getting the intended victim to be calm, collected and accepting of the perpetrator. It could be a long drawn-out affair to gain the trust of the victim. In this context, the actions of the Claimant speak of a conduct that can amount to sexual grooming of a child.

[40] The Claimant's testimony failed to show that he was framed by anyone or that someone was jealous of him. The Claimant was his own witness. There was no sufficient or active challenge to his claim of a plot to drive him out of the Company.

[41] When asked by his Counsel why he confessed, he replied:-

A : If I did something wrong, I will confess. In this case, in interviews 1, 2, in replies to show cause letter and the one on appeal, that I only admitted my presence in the video as a K-Boy but never admitted that I tarnished the Company's image. I confessed in order to save the Company's time, these are after-hours stuff. I only admitted my presence in the video.

[42] In his cross-examination he was asked:-

Q : You were the K-Boy?

A : Yes

Q : Statements were made by you?

A : Yes

Q : You also admitted to your Superior, Muhd Sani Ayub, that you were K-Boy?

A : Yes

Q : You met Nadia on WeChat and communicated for two weeks. You believed she was a 15 years old girl?

A : Yes.

Q : Looking at the conversation, would you agree that the conversation was sexual in nature?

A : Yes

Q : Your conversations with Nadia both on 3 and 9 June were also about previous sexual exploits?

A : Yes

Q : If you look at p66 and answer to Question 24, why did you admit or agree that you were ethically or morally wrong, if you were just chatting?

A : I admit it was ethically and morally wrong.

Q : During these conversations with Nadia, you chatted with her for 2 weeks before she trusted you enough? How did you introduce yourself?

A : I am 38 years old and I'm an independent motivator.

[43] The anonymous email sent to the Company was plainly an attempt to get the Company to live up to its name as "Etika Takaful Berhad" and as a member of a large banking group, Maybank. The allegation was about grooming children as

young as 13 years old and raping them. The Claimant was explicitly named and the viral presence of the videos made known to the Company. The author pleaded with the Company to do the right thing as young lives were at stake.

[44] It would have been remiss of the Company had no investigation been launched, whatever the motive of the sender might be. COWS-1 as Head, Group IR and Governance, gave evidence about the investigation and the interviews with the Company. He gave evidence on the discovery of two video recordings featuring K-Boy (the Claimant) which had been uploaded onto the STAR R.AGE online website and he also gave the online links. The videos were played in the courtroom and COWS-1 explained that they showed the following:-

- 44.1 The Claimant met with a young girl known as "Nadia" at a café opposite the Seri Pacific Hotel, Kuala Lumpur at about 9 pm on 3.6.2016;
- 44.2 The Claimant asked Nadia to continue the conversation in his hotel room;
- 44.3 That the Claimant claimed to have met and had sex with many young girls before; including girls in Forms 1-6;
- 44.4 That the Claimant was willing to show or teach Nadia how to have sex;
- 44.5 That the Claimant said that if Nadia wished to see how a male can erect, all she needed to do was to ask him; and
- 44.6 That the Claimant had taken Nadia into his room and had conversations that were sexually explicit in nature.

[45] In both the interviews that the Claimant had with the Company, he admitted to the facts of the allegation against him. In his reply to the Notice to Show Cause, he proffered an explanation about his action. He said that the girl, Nadia/Yaya, was actually a 26 years old girl who was an undercover journalist with the R.AGE team. He said she was an ***agent provocateur*** and that the videos were edited to show only parts that benefited her organisation. He further contended that the videos were recorded illegally and without his consent or knowledge. He admitted taking Nadia into his room but said there was no physical contact or any kind of harassment.

[46] The Claimant had asserted in his reply to the Notice to Show Cause that the anonymous email could not be verified. He further claimed that the person K-Boy in the videos was distorted and in his conversation with Nadia, he did not mention his real name, occupation or the organisation he worked for. There was nothing in his attire that could identify him as personnel of the bank (Maybank) or the Company. He denied having tarnished the reputation of the Company and denied that what he did was a contravention of the law.

[47] It must be noted that s 22 of SOAC 2017 explicitly mentioned that the evidence of ***agent provocateur*** is admissible. S 22 (1) states:

Notwithstanding any law or rule of law to the contrary, in any proceedings against any person relating to any offence under this Act, or any offence specified in the Schedule where the victim is a child, no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to commit or abet, or having been engaged in a criminal conspiracy to commit, such offence if the main

purpose of such attempt, abetment or engagement was to secure evidence against such person.

[48] The Claimant was lured by a person who claimed to be much younger than she actually was. The Claimant contacted the person and met up with the person with the expectation of meeting with a minor. The person was an undercover journalist and she was surely attempting to secure evidence against the Claimant about his predatorial inclination towards underaged girls. Although Nadia nor the R.AGE team members were called as a witness(es), there was no necessity as the evidence gathered was both cogent and sufficient to show the Claimant's tendency and inclination.

[49] The Claimant may have boasted about past exploits but this cannot be taken into account. What the court can take into account is his admission as to the basic facts of the allegations although his explanation that no harm was done nor any criminal act committed could not stand.

Is Sexual Grooming a Serious Misconduct?

[50] There is little doubt to hold that the action of the Claimant could tantamount to an act of sexual grooming. The fact that the whole episode was recorded and uploaded and easily available made it a socially embarrassing fact for the Company. Although the author of the anonymous email is not known, the email specifically

mentioned the Claimant and the investigation thereafter showed that the Claimant himself confessed that he was the K-Boy mentioned.

[51] The power of social media is such that there is a presumption that the public knows or would have known that the Claimant worked for the Company. In fact the Company was also alerted to that fact by the STAR R.AGE team when it was contacted by the Company. In view of the fact that the Claimant was in a senior management position, it could be successfully argued that he had tarnished the image and reputation of the Company. As a person in senior management, it was incumbent on the Claimant to safeguard the reputation of the Company at all material times.

[52] From the perspective of ethics and good conduct, it can be seen that the entire episode reeks of an immoral and unethical activity unbefitting that of a senior manager of the Company. It's also against the core values of the organisation he worked for.

Investigation and Domestic Inquiry

[53] A parallel must be drawn between sexual grooming and sexual harassment in the workplace, although this case does not fall under sexual harassment per se. There must be no delay in investigating a claim on sexual harassment cases. The Company upon being emailed the anonymous email, had immediately undertaken an

investigation. The Claimant was interviewed and the contents of the email made known to him. The investigation could be concluded quickly as the Claimant was co-operative and had acknowledged that he was the person featured in the videos.

[54] During the trial, the Company failed to show that there were policy statements regarding sexual grooming or acts related to sexual offences or even sexual harassment and the procedures in dealing with such allegations. It would have been prudent for this and other companies to include such statements in their policies or posted in appropriate places in the Company's premises.

[55] The absence of a domestic inquiry does not nullify the Company's findings nor make the Company's action to dismiss either inappropriate or unjustified. The Company has explained that the investigation was such that the allegations were admitted by the Claimant. Although this is a case of misconduct, the absence of a domestic inquiry is not a fatality. At worst, it is merely an irregularity, see ***Dreamland Corp Sdn Bhd v Chong Chin Sool*** [1998] 1 CLJ 1. Whether the Claimant was dismissed with just cause and excuse is a matter for this Court to determine.

THE LAW

[56] In ***Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & Other Appeals*** [1997] 1 CLJ 665, the Court of Appeal opined that the findings of a

domestic inquiry are not binding upon the Industrial Court which rehears the matter afresh. The Industrial Court may take into account the fact that a domestic inquiry has been held when determining whether the particular workman was dismissed.

[57] Failure to conduct a domestic inquiry is not fatal as no additional information could or would be gathered in any domestic inquiry since the misconduct of the Claimant was clear and unambiguous, see *Pan Global Textiles Bhd Pulau Pinang v Ang BengTeik* [2002] 1 CLJ 181. In p 199, the Federal Court held:-

The learned High Court judge had on the other hand formed the view that the appellant's failure to conduct an inquiry into the misconduct of the respondent in not reporting for work is not fatal. At pp. 29 and 30 of his judgment, the learned High Court judge said:

..there would be no additional information which would be gathered from the inquiry and the decision would have been the same, as the misconduct of the Respondent is clear and not unambiguous. Furthermore, had an enquiry been held the Respondent would have raised the issue of demotion, and this would not be the proper forum for the Respondent to do so, considering that the proper forum under the law to raise such issue and to lodge his complaint, would be to the Director-General pursuant to Section 20(1) of the Industrial Relations Act, 1967. The Respondent had adopted an attitude of indifference. Would not the action of the Employer in such circumstances be justified? Yes, it would, as otherwise all employees will stay away from work to win their demand whether valid or invalid, and yet tie the hands of the Employer from taking any action without being accused of having dismissed the employee from his employment.

We agree with the learned High Court judge; more so when considered in the light of the authorities referred to in Para. 8 above. There is nothing in its award that can indicate its awareness of those authorities – in particular the excerpts from B.R. Ghaiye's "Misconduct in Employment" and O.P. Malhotra's "The Law of Industrial

Disputes". In this sense, the IC had committed an error of law. It is also obvious that, in the circumstances, the findings of IC enlisted above fly against law, logic and reason. Mohamed Azmi SCJ, in ***Enesty Sdn Bhd v. Transport Workers Union & Anor.*** [1986] 1 MLJ 18.

[58] In ***Sebastian Matthias Boehme v Siemens Malaysia Sdn Bhd*** [2017] 3 ILR 50, the Industrial Court had to consider whether the claimant's actions were in violation of its business Conduct Guidelines and whether his misconduct was serious and grave. The claimant in that case was accused of sexual harassment, being drunk, misbehaving with and assaulting the hotel staff and guests. The court held that the claimant's acts potentially could have harmed the reputation of the company and expose the company to potential legal risks.

[59] This Court is of the opinion that the Claimant's actions amounted to a serious misconduct and the dismissal was within the range of reasonable responses. Any argument that the Claimant is entitled to do whatever he likes after office hours does not hold water. Although the Claimant's activities were generally carried out in his own time and personal in nature, this court holds that such actions are not disconnected with his employment and any personal action that may pose legal risks to the Company and cast aspersions on the Company's ethics and morals are a reflection of the Company. As a Takaful company, the Company cannot be burdened with an employee who does not reflect the Company's social ethos and social standing.

[60] The burden of proof is upon the Company which must produce cogent and convincing evidence that the Claimant committed any misconduct and whether such misconduct amounts to a misconduct that justifies a summary dismissal.

[61] The Claimant was promoted to Grade Band F in 2010, and was given a document that lists down the terms and conditions of employment for "Band F". In Article 28 clause 3, it reads, "Before any disciplinary action is taken, the executive concerned shall have an opportunity to be heard orally or in writing." The Claimant was interviewed twice and he was given an opportunity to reply to the Notice to Show Cause, which he did.

[62] In Article 28, entitled "Discipline", the Company may take disciplinary action in the event of misconduct, indiscipline, or inefficiency. Depending on the seriousness of the misconduct, the Company may take one or more of the following:-

- g) Terminate the service of the executive by giving the appropriate notice or payment in lieu of the notice period; or
- h) Dismiss the executive summarily.

It can be seen that the Company had acted within its purview and within the terms and conditions of employment.

A Case of Constructive Dismissal?

[63] For completeness sake, it is important to consider whether the Claimant could consider himself as being constructively dismissed. In cases of constructive dismissal, the correct test to use is the “contract test” as laid out in the case of ***Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988]*** 1 CLJ (Rep) 298. The then Supreme Court finds that the concept of constructive dismissal has application to the interpretation of s 20 Industrial Relations Act 1967. Since the Claimant was able to show that he was dismissed, it was for the Company to show that the dismissal was with just cause or excuse. In ***Wong Chee Hong***, the court held: “When the Industrial Court is dealing with a reference under s 20, the first thing that the Court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse”. It went on to state that, “...it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it. In such a situation the employee is entitled to regard the contract as terminated and himself as being dismissed.” (p 302). The Supreme Court adopts the passage in the Industrial Court award, as follows: “Past cases of constructive dismissal dealt with by this Court...are agreed that whether or not there has been constructive dismissal is to be determined by the contract test: that is, did the employer’s conduct amount to a breach of contract which entitled the employee to resign? And did the employee make up his mind and act at the appropriate point in time soon after the conduct of which he complained has taken place.” (p 304).

[64] Considering all the evidence and the evidence adduced by the Claimant himself, the Claimant had failed to prove, on a balance of probabilities, that he has been constructively dismissed.

[65] It is incumbent on the Company to prove its case on a balance of probabilities (see *Telekom Malaysia Kawasan Utara v Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314 that the dismissal was for just cause or excuse. The standard applies even where the alleged misconduct is criminal in nature, see *Blue Apparels (M) Sdn Bhd v Vickneswaran Ramanathan* [1997] 3 ILR 803.

[66] The function of the Industrial Court in dismissal cases on a reference under s 20 of the Industrial Relations Act 1967 is two-fold:

1. To determine whether the misconduct complained of by the Company has been established;
2. Whether the proven misconduct constitutes just cause or excuse for the dismissal. See *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 4 CLJ 449 and *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129

[67] In *British Homes Stores Ltd v Burchell* [1978] IRLR 379, it was held that there are three elements to decide whether the employer who discharged the employee on the ground of misconduct entertained a reasonable suspicion amounting to a belief in the guilt of the employee. There are:

- 67.1 there must be established by the employer the fact of that belief, that the employer did believe it;
- 67.2 it must be shown that the employer had in his mind reasonable grounds upon which to sustain the belief; and
- 67.3 the employer, at the state at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

CONCLUSION

[68] in conclusion, taking into account the totality of the evidence adduced by both parties and bearing in mind section 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, this Court finds that the termination was with just cause or excuse and the Claimant's case is therefore dismissed.

HANDED DOWN AND DATED 7 DECEMBER 2018


(TUAN YONG SOON CHING)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR