INDUSTRIAL COURT OF MALAYSIA

CASE NO: 29(7)/4-224/16

BETWEEN

THILAGAVATHY A/P ARUNASALAM

AND

MAXIS MOBILE SERVICE SDN.BHD.

AWARD NO: 1050 OF 2019

Before	:	**Y.A. TUAN BERNARD JOHN KANNY** **CHAIRMAN (Sitting Alone)**
Venue	:	Industrial Court of Malaysia, Kuala Lumpur.
Date of reference	:	06.01.2016
Dates of mention	:	14.03.2016, 27.04.2016, 04.08.2016, 24.10.2016, 08.11.2016, 10.01.2017, 08.02.2017, 27.02.2017, 10.07.2017, 14.08.2017, 15.08.2017, 11.10.2017, 14.08.2018, 22.02.2019
Dates of Hearing	:	26.09.2018, 27.09.2018, 15.11.2018, 14.01.2019
Company's Written Submission	:	06.03.2019
Claimant's Written Submission	:	15.02.2019
Written Submission in Reply by Claimant	:	25.03.2019
Representation	:	Ms. Thilagavathy Arunasalam Claimant in person Ms. Teoh Alvare From Messrs Zul Rafique & Partners Counsel for the Company

REFERENCE

This is a reference by the Honourable Minister of Human Resources made under subsection 20 (3) of the Industrial Relations Act 1967 (Act 177) arising out of the dismissal of **Thilagavathy A/P Arunasalam** (hereinafter referred to as "the Claimant") by **Maxis Mobile Service Sdn. Bhd.** (hereinafter referred to as "the Company") on 1st April 2015.

AWARD

[1] The Ministerial Reference in this case required the Court to hear and determine the Claimant's dismissal by the Company on 1st April 2015. The reference was dated 06th January 2016 and received by the Industrial Court on 11th February 2016.

[2] The matter was transferred from Court 7 to this Court on 14th September 2018 pursuant to instructions from the Yang Di-Pertua, Mahkamah Perusahaan Malaysia dated 28th August 2018, in order for the case to be heard and that a final Award be handed down.

[3] The Company's solicitors filed their written submissions and reply on 06th March 2019 while the Claimant filed her written submissions on 15th February 2019 and reply on 25th March 2019.

(A) Proceedings in The Industrial Court

[4] The matter was heard on 26th September 2018, 27th September 2018, 15th November 2018 and 14th January 2019 during which the following witnesses were called by the Company to testify in court: -

i. Cik Zaharatul Laily Shazi Binti Shaarani who is the Company Employee/Labour Relations Specialist ("COW-1"); and
ii. Encik Manoj Kumar Vallabhai Patel who is Head of Maxis Centre Low Yat ("COW-2").

[5] The Claimant gave oral evidence and did not call any witness ("CLW-1").

[6] The documents filed and marked before this court are as follows :

I. Claimant's Bundle of Documents ("CLB-1");
II. Claimant's Bundle of Documents ("CLB-2");
III. Pantai Hospital Bills ("CLB-3");
IV. Company's Bundle of Documents ("COB");
V. Company's Witness Statement of Zaharatul Laily Shazi Binti Shaarani ("COWS-1"); and
VI. Company's Witness Statement of Manoj Kumar Vallabhai Patel ("COWS-2").

(B) Background Facts

[7] The Claimant commenced employment on 13.08.2012 as Executive (Grade 10) Sales & Services, Customer Service, at Maxis 1-Center KLCC. A copy of her letter of appointment dated 01.08.2012 is found at pages 3 to 7 of COB.

[8] The Claimant was on probation for 3 months. Subsequently the Claimant was confirmed in employment vide letter dated 28.03.2014.

[9] At the time of her dismissal, the Claimant's last drawn basic salary was RM3,690.00 per month.

[10] The Claimant was transferred to Maxis Centre E-Curve with effect from 11.03.2013. The Claimant reported to the Head of Maxis Centre E-Curve, Mr Manoj Kumar (COW-2).

[11] The Claimant's duties and responsibilities as an Executive Sales & Services included among others, customer services, sales of products, management of retail stores, preparation of 'Day End Sales and Service Report' and perform 'day end branch closing' and overall management of the store in the absence of the Head.

[12] Sometime end February 2015, the Claimant and all other employees of Maxis Centre E-Curve were informed by Mr Manoj Kumar (COW-2) to be present and stationed at the Maxis Centre E-Curve on 01.03.2015 for a visit by the Management of Retail

Operations. Employees were informed that their attendance on the 01.03.2015 was compulsory.

[13] Accordingly, Mr. Manoj Kumar, Head of Maxis Centre E-Curve (COW-2) instructed all employees that their annual leave, off day/rest day on the 01.03.2015 was frozen.

[14] Despite COW-2's instructions, the Claimant informed COW-2 that she had a "planned holiday" from 27.02.2015 to 05.03.2015 overseas during that period and will not be present on 01.03.2015.

[15] COW-2 then requested the Claimant to furnish proof of her travel plans to enable her to justify to the management as to why the Claimant would not be present during the management visit on 01.03.2016.

[16] For purpose of communicating with employees it was common practice at Maxis Retail Centres to create WhatsApp Groups among its employees for ease of communication, fast updates and responses for business operations.

[17] Two WhatsApp Groups were created for employees at Maxis Centre E-Curve, namely "Maxis e @ Curve" and "MSSC e @ Curve Home & EOMC".

[18] COW-2 stated that he had informed all employees (including the Claimant) stationed at Maxis Centre E-Curve that they had to inform him in advance if they wish to exit from the WhatsApp Group. It required his approval before they could exit the group.

[19] Sometime in December 2014 the Claimant had exited from the WhatsApp Group without permission. COW-2 vide his email dated 31.12.2014 (at page 51 of CLB-2) reminded the Claimant that she must obtain his approval before exiting the WhatsApp Group. The Claimant was warned not to repeat the incident.

[20] Despite being aware of the requirement "not to exit" the WhatsApp Groups without approval, the Claimant on the 28.02.2015 sent a message to the "Maxis e @ Curve" group chat stating that she would exit from the chat group during her holiday.

[21] Immediately on the 28.02.2015, the Claimant exited from both the WhatsApp

Group namely, "Maxis e @ Curve" and "MSC e @ Curve Home & EOMC" without obtaining approval from COW-2.

[22] Subsequently, COW-2 had written an email dated 03.03.2015 to the Claimant requesting the Claimant for an explanation as to why she had exited from the WhatsApp Group on 28.02.2015 without his approval.

[23] For ease of reference the email dated 03.03.2015 is reproduced below:

From: Manoj Kumar Vallabhbhai Patel
Sent: 03 March 2015 11:59 AM
To: Thilagavathy Arunasalam
Cc: M Zulkhairi M Zulkifli; Manoj Kumar Vallabhbhai Patel
Subject: Exit from watsapp group
Importance: High

Thila,

I need an explanation on the below matter.

Why did your exit from both our watsapp from HoMC/EoMC and MSC Ecurve grp on 28th Feb 2015. You must seek my approval before you exit this group. Before you exited Msc Ecurve grp, you informed: "Team, I will add back into both watsapp group next week.Anything important sms me. This is completely not acceptable excuse from you as a EoMC.

Kindly revert by 4pm on 5th March 2015.

Regards
Manoj
HoMC Ecurve

[24] The Claimant in her reply vide email dated 05.03.2015 informed COW-2 that she was not aware that she required his approval before exiting the WhatsApp Groups and that her exit from the WhatsApp Groups was not a breach of Company policy.

[25] For ease of reference the email dated 05.03.2015 is reproduce below:

From: Thilagavathy Arunasalam
Sent: Thursday, March 05, 2015 4:00 PM
To: Manoj Kumar Vallabhbhai Patel
Cc: M Zulkhairi M Zulkifli
Subject: RE: Exit from watsapp group

Manoj,

I was not aware that I need to seek approval for this as previously all of us did changed mobile numbers few times As instructed by my husband, he wanted a phone/watsapp free holiday as we were planning for a second baby.

Also I believe this is not a breach of a policy.

Kindly add me back into Ecurve group

Thanks
Thila EOMC ECURVE

[26] On the 06.03.2015 the Claimant had a meeting with Mr. Agnelraj Muthuthamby the sales and services HR Business Partner and COW-1 the Industrial Relations Officer of the Company.

[27] At the meeting the Claimant was advised and counselled to be more tactful and diplomatic in her communication both written and oral to her superior COW-2. In addition, the Claimant was also advised to be vigilant in her Facebook postings so as not to post any materials that give or be construed as giving negative impressions about the Company and its officers.

[28] Consequently, on the 06.03.2015 and 08.03.2015, the Claimant failed to submit the 'Day End Sales and Service Report' of the Maxis Centre E-Curve to COW-2.

[29] As such, by an email dated 09.03.2015 from COW-2 to the Claimant, the Claimant was required to explain on why she failed to submit her 'Day End Sales and Service Report' for 06.03.2015 and 08.03.2015.

[30] For ease of reference the email dated 09.03.2015 is reproduced below:

From: Manoj Kumar Vallabhbhai Patel
Sent: 09 March 2015 01:56 PM
To: Thilagavathy Arunasalam
Cc: Zaharatul Laily Shazi Bt Shaarani; M Zulkhairi M Zulkifli; Manoj Kumar Vallabhbhai Patel
Subject: Explanation- Failure to send Day End Sales & Service Report
Importance: High

Thila,

I need an explanation on the below matter.

Why have you fail to send our "Day End Sales and Service Report to me dated 6th & 8th March 2015? . It's not an excuse if you have left our Homc/Eomc grp and also Ecurve team grp. As a EoMC, it's your responsibility to send the report to me.

6th March 2015- I watsapp your personally to inform you that I need the Day End report and your reply was "im on the way back home". I also replied to you" As A EOMC, its your responsibility to send the report to me. Even though you are not in my watsapp group. You should think out of the box". You did not respond.

08th March 2015- You failed to send me the report despite me informing you via watsapp on the 6th March 2015.

Kindly revert by 4pm today.

Regards,

Manoj
HoMC Ecurve

[31] The Claimant responded on the same day vide her email dated 09.03.2015 to COW-2.

[32] For ease of reference the email dated 09.03.2015 is reproduced below:

From:	Thilagavathy Arunasalam
Sent:	Monday, March 9, 2015 8:45 PM
To:	Manoj Kumar Vallabhbhai Patel
Cc:	Zaharatul Laily Shazi Bt Shaarani; M Zulkhairi M Zulkifli; Agnelraj S I Muthuthamby
Subject:	RE: Explanation- Failure to send Day End Sales & Service Report
Attachments:	FW: Exit from watsapp group

Manoj, while investigating Shasha's phone stolen incident, you personally mentioned to me that you think as a fraudster hence it enable you to handle the situation.
Due to that I do not feel comfortable to deal personally on any work related matters as you might turn the table against me. As such I am uncomfortable to send any message to your personal number. Further explanation is in the email attached for you.

Hence this email justifies that I would need to be in Ecurve management watsapp group purely for business needs.

Thanks
Thila EOMC ECURVE

[33] Thereafter, the Claimant failed and/or neglected to submit the 'Day End Sales and Service Report' to COW-2 for 09.03.2015, 11.03.2015, 12.03.2015, 14.03.2015 and 15.03.2015.

[34] In view thereof, by a show cause email dated 16.03.2015, the Company required the Claimant to submit her written explanation in respect of the allegations of misconduct stated therein.

[35] For ease of reference the show cause email dated 16.03.2015 is reproduced below:

From: Zaharatul Laily Shazi Bt Shaarani
Sent: Monday, March 16, 2015 5:44 PM
To: Thilagavathy Arunasalam
Cc: Tan Cheong Tatt; M Zulkhairi M Zulkifli; Manoj Kumar Vallabhbhai Patel
Subject: Show Cause _ Thilagavathy A/P Arunasalam

Dear Thilagavathy,

We make reference to:

1) your supervisor's email dated 3 March 2015 and your subsequent reply dated 5 March 2015 pertaining to your failure to seek his approval prior to exiting the Maxis Centre E-Curve's HoMC/EoMC and Maxis Center E-Curve *WhatsApp* groups;
2) your supervisor's email dated 9 March 2015 and your subsequent reply on the same date pertaining to your failure to send out the "Day End Sales and Service Report" on 6 and 8 March 2015;
3) your meeting with the Sales & Services HR Business Partner, Mr. Agnelraj Muthuthamby and the undersigned on 6 March 2015 at Level 19, Menara Maxis; and
4) your email to Mr. Agnelraj dated 8 March 2015.

We have duly reviewed the abovementioned correspondences. At this juncture, the Company is of the view that your responses to your supervisor via the two emails can be construed as disrespectful. Your failure to send the "Day End Sales and Service Report" to your supervisor when you were asked to do so may also be seen as an act of you willfully disobeying a reasonable instruction. The Company also would like to place on record that you have continuously failed to send the abovementioned report to your supervisor on 9, 11, 12, 14 and 15 March 2015.

In the circumstances, you are hereby required to show cause on why disciplinary action, including dismissal should not be taken against you. Your written reply is to reach the undersigned not later than **20 March 2015**, failing which it shall be deemed that you have no explanation to offer and the Company shall proceed with its next course of action without further reference to you.

Regards
Laily Shaarani
Industrial Relations

[36] In response, the Claimant provided her explanation through an email dated 23.03.2015 found at pages 11 to 12 of COB.

[37] The Company reviewed the Claimant's response and found it to be unacceptable. The Company found the Claimant to continuously conduct herself in a disruptive manner towards her superior COW-2. In addition, the Claimant's conduct lacked teamwork and she was found to be abrasive, tactless and disrespectful. Hence, the Company was of the view that it could no longer repose the necessary trust and confidence in the Claimant.

[38] Accordingly, by a letter dated 01.04.2015, the Company informed the Claimant that it had decided to terminate the Claimant's services with immediate effect from 01.04.2015.

[39] For ease of reference the letter of termination dated 01.04.2015 is reproduced below:

maxis

Maxis Mobile Services Sdn Bhd
(73315-V)

Level 21, Menara Maxis
Kuala Lumpur City Centre
50088 Kuala Lumpur
Malaysia

P.O. Box 13447
50810 Kuala Lumpur
Malaysia

1 April 2015

STRICTLY PRIVATE & CONFIDENTIAL

Thilagavathy A/P Arunasalam (Staff ID: 08506)
Present

By hand

Dear Thilagavathy,

Dismissal from Services

We refer to our Show Cause Letter dated 16 March 2015, and your reply dated 23 March 2015.

We write to inform you that the Company finds the explanation to the allegations of misconduct preferred against you as set out in your reply to be unacceptable.

As an employee, the Company expects a certain level of commitment and discipline from you, in the discharge of your duties and responsibilities. However, you were found to have continuously conducted yourself in a disruptive manner towards your supervisor, Mr. Manoj Kumar Vallabhbhai Patel. You were uncooperative, lacking in teamwork, abrasive, tactless and unable to communicate respectfully and/or effectively with your supervisor.

Despite being warned on similar misconduct by a letter dated 31 December 2014 and attending several meetings held on 6 and 30 December 2014 and 6 March 2015, wherein you were sufficiently advised to be more conscientious in the manner you communicate with your supervisor, you continued to communicate with your supervisor in an argumentative, disrespectful, aggressive and abrasive manner, thereby failing to give effect to the implied term of mutual respect.

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Your continuous abrasive and uncooperative attitude does not only have a disruptive influence to your job performance, but also inhibits the Company's growth, especially when the Company's success relies heavily on efficiency, teamwork and cooperation of its employees to ensure productivity and the overall performance of the Company.

Given the circumstances, the Company regrets to inform you that it can no longer repose in you the trust and confidence necessary to discharge your duties and responsibilities as an Executive of the Company. Accordingly, your services are hereby terminated with effect from **1 April 2015**. Your salary and other contractual dues (if any) will be paid on or before your last date of service.

Notwithstanding the Company's decision to terminate your services from the Company, the Company reserves all its rights to take whatever necessary action against you to recover any lose or damages suffered and/or may be suffered by the Company arising from any acts and/or omissions attributable to you, during your tenure of employment with Company.

Kindly also be reminded of your on-going confidentiality obligations in respect of the business of the Company or its associate or related companies, which you may have received or obtained whilst in service of the Company. Kindly also be reminded that any documents or work produced or obtained by you during the duration of your contract, vests in and belong absolutely to the Company.

Finally, please ensure that all Company property in your possession, is returned to the People & Organisation personnel or your supervisor on or before you last date of service.

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Kindly acknowledge receipt of this letter on the duplicate copy and return the same to the undersigned for the Company's records.

Yours faithfully,

Zaharatul Laily Shazi Binti Shaarani
People & Organisation Division

CC: Tan Cheong Tatt, M Zulkhairi B M Zulkifli

Acknowledgement of Receipt

I, Thilagavathy A/P Arunasalam (NRIC No._____) hereby acknowledge receipt of this original letter dated 1 April 2015.

_____ _____

Signature Date

[40] Not being satisfied with the Company's decision, the Claimant appealed to be reinstated to her former position of Executive Sales & Services as she considered her dismissal was without just cause and excuse.

(C) Issue

[41] The issue before this Honourable Court is whether the Claimant's dismissal was with just cause or excuse, or in other words, whether the Claimant was guilty of the charges preferred against her which would constitute just cause or excuse for the Company to dismiss her.

[42] In considering the above issue, the Court has to deliberate on the following:

(a) Whether the charge preferred against the Claimant was proven by the Company based on the evidence produced before this Court;

(b) Should the Court find that the Claimant is guilty of the charge preferred against the Claimant, whether the punishment of dismissal meted out by the Company is too harsh in the circumstances.

(D) The Law

[43] The law on dismissal in now well settled, the function of the Industrial Court in a reference under s. 20 of the Act has clearly been spelt out in the Federal Court in the case of **Goon Kwee Phoy V J & P Coats (M) Bhd [1981] 2 MLJ 129,** where his Lordship Raja Azlan Shah, CJ (Malaya) (as he then was) stated at p 136:

> "where representation 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 or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper 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."

[44] In the case of **Wong Yuen Hock V Syarikat Hong Leong Assurance Sdn Bhd and Another [1995] 3 CLJ 344** at p. 352 Mohd Azmi FCJ stated as follows:

> "On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under s. 20 of the Act is to determine whether the misconduct or irregularities complained of by the management as the grounds of a dismissal were in fact committed by the workman, and if so, whether such grounds of dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal. In our opinion, there was no jurisdiction by the Industrial Court to change the scope of reference by substituting its own reason."

[45] In **Colgate Palmolive (M) Sdn Bhd V Yap Kok Foong [1998] 3 ILR 843 (Award no 368 of 1998),** the Industrial Court held as follows:

> "In a section 20 reference, a workman's complaint of two elements: firstly, that he had been dismissed, and secondly, that such dismissal was without just cause or excuse. It is upon these two elements being established that the workman can claim his relief, to wit, an order of reinstatement, which may be granted or not at the discretion of the Industrial Court. As to the first element; Industrial Jurisprudence as developed in the course of Industrial adjudication readily recognizes that any act which has the effect of bringing the employment contract to an end is a 'dismissal' within the meaning of Section 20".

[46] In a reference under s. 20 (3) of the Industrial Relations Act 1976, it is trite law that the burden of proof is on the employer to prove that the Claimant is guilty of the alleged misconduct thereby justifying the dismissal

[47] In **Stamford Executive Center V Dharsini Ganeson [1986] 1 ILR 101, the** Industrial Court held as follows:

> "It may further be emphasised here that in a dismissal case the employer must produce convincing evidence that the workman committed the offence or offences, the workman is alleged to have committed for which he has been dismissed. The burden of proof lies on the employer. He must prove the workman guilty, and it is not the workman who must prove himself not guilty. This is so basic a principle of industrial jurisprudence that no employer is expected to come to this Court in ignorance it."

[48] In **Telekom Malaysia Kawasan Utara V Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314**, a Court of Appeal case, Abdul Hamid JCA (as he then was) stated in no uncertain terms that the standard of proof required in a case is on a balance of probabilities.

[49] O.P Malhotra in his book, the Law of Industrial Disputes, Sixth Edition at page 1119 defined "misconduct" as follows;

> "Any conduct on the part of an employee inconsistent with the faithful discharge of his duties towards his employer would be a misconduct. Any breach of the express or implied duties of an employee towards his employer, therefore, unless it be of trifling nature, would constitute an act of misconduct. In Industrial Law, the word 'misconduct' has acquired a specified connotation. It cannot mean inefficiency or slackness. It is something far more positive and certainly deliberate. The charge of 'misconduct' therefore is the charge of some positive act or of conduct which would be quite incompatible with the express or implied terms of relationship of the employee to the employer".

[50] As defined above, where there is a breach of the terms of employment by an employee, the employee would be deemed to have committed the misconduct. This principle was adopted and followed by the Industrial Court in **Holiday Inn V Elizabeth Lee [1990]2 ILR 262**, where it was held:

> "Any conduct inconsistent with the faithful discharge of his duties, or any breach of the express or implied duties of an employee towards his employer, unless it be of a trifling nature, would constitute an act of misconduct".

(E) <u>There Was No Domestic Inquiry</u>

[51] On the facts, the Company dismissed the Claimant on 01.04.2015 [CLB-2, pages 35-37], after the Show Cause email and the Reply to the Show Cause letter [COB, pages 11-14]. **There was no domestic inquiry held against the Claimant. [Emphasis Added]**

[52] It is trite law that the absence of a Domestic Inquiry does not ipso facto render the Claimant's dismissal from the service without just cause or excuse because this Honourable Court can proceed to hear the case de novo.

[53] In **Wong Yuen Hock V Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 344** the Federal Court held that the defect in natural justice by the respondent in that case could and ought to be cured by the inquiry before the Industrial Court. Mohd Azmi bin Hj. Kamaruddin, FCJ said at p. 356:

> "The very purpose of the inquiry before the Industrial Court was to give both parties to the dispute an opportunity to be heard **irrespective of whether there was a need for the employer to hold a contractual or statutory inquiry**. We were confident that the Industrial Court as constituted at present was capable of arriving at fair result by fair means on all matters referred to it. **If therefore there had been a procedural breach on natural justice committed by the employer at the initial stage, there was no reason why it could not be cured at the rehearing by the Industrial Court**."

[54] Thus, this Court will proceed to evaluate the evidence submitted by the Company and determine if the allegations of the Claimant's misconduct have been established by the Company.

(F) WHETHER THE ALLEGATIONS OF MISCONDUCT ARE PROVEN?

1st Allegation

"The Claimant's failure to seek approval from COW-2 prior to exiting the "Maxis Centre E-Curve" and "Maxis Centre E-Curve Home/EOMC" WhatsApp Group".

[55] The Claimant' reply to the allegation is found in her email dated 05.03.2015 found at page 8 of COB.

[56] The Claimant's reasons for not seeking approval prior to exiting the WhatsApp Groups of Maxis Centre E-Curve are as follows:

(i) She was not aware that she was required to seek approval from COW-2;
(ii) Her Husband wanted a phone/WhatsApp free holiday; and
(iii) There was no breach of Company policy.

[57] The Claimant has agreed that when she was working at Maxis Centre E-Curve, there were 2 WhatsApp Groups namely:

(i) "Maxis e @ Curve" which included all employees stationed at Maxis Centre E-Curve; and
(ii) "MSC e @ Curve HOMC & EOMC" which included Managers and Supervisors of Maxis Centre E-Curve.

[58] In this regard the Claimant was cross examined as follows:

" Q : Agree that when you were working at Maxis Centre E-Curve, there were 2 WhatsApp groups?
A : Yes.
Q : One is "Maxis e @ Curve" which included all employees stationed at Maxis Centre E-Curve?
A : Yes.
Q : The second is "MSC e @ Curve HOMC & EOMC" which included Managers and Supervisors of Maxis Centre E-Curve?
A : Yes.
Q : Agree that you were also in the 2 WhatsApp Groups?
A : Yes. "

[59] The Claimant during cross examination has agreed that she was in both the WhatsApp groups at Maxis Centre E-Curve.

Was the Claimant Aware That She Was Required To Seek Approval from COW-2 Prior to Exiting the WhatsApp Groups?

[60] The Claimant in her reply dated 05.03.2015 to the show cause has clearly stated that she was not aware she required approval from COW-2.

[61] Both COW-1 and COW-2 testified that it was common practice in all Maxis Retail Centres to form WhatsApp Groups and include all employees in that particular Maxis Retail Centre for purposes of communicating with the employees for latest updates, communication and responses for business operations.

[62] The Claimant in her email dated 09.03.2015 to COW-2 admits that she would need "**to be in the E-Curve management WhatsApp Groups for Company's business needs**". **[Emphasis Added]**

[63] COW-2 had testified during examination in chief that any employee who wish to exit the WhatsApp group had to obtain approval from him. **This was an instruction from the Head of Maxis Centre E-Curve to his subordinates. [Emphasis Added]**

[64] In this regard his evidence during examination in chief was as follows:

> " Q : Was there a requirement to obtain approval before exiting the WhatsApp Group?
>
> A : Yes, as the Head of Maxis Centre E-Curve, I had informed all employees stationed at Maxis Centre E-Curve that all of them need to be in the WhatsApp Group for ease of communication and that if they wish to exit from the WhatsApp Group, they must inform me in advance and get my approval or permission. "

[65] The Claimant did not challenge COW-2's evidence that (i) it was an instruction from COW-2 to all employees at Maxis Centre E-Curve and (ii) exiting the WhatsApp group required his approval.

[66] In **Aik Ming (M) Sdn Bhd V Chang Ching Chuen & Ors [1995] 3 CLJ 639** Gopal Sri Ram JCA stated:

> "It is essential that a party's case be expressly put to his opponent's material witness when they are under cross examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument."

[67] Thus, the failure to cross examine COW-2 is taken as an acceptance of the truth of COW-2's evidence.

[68] The Claimant had cross examined COW-1 and put to her that exiting the WhatsApp

group was not a breach of Company policy.

[69] COW-1 had replied during cross examination that exiting the WhatsApp group was a breach of Company practice.

[70] Both COW-1 and COW-2 testified that the Claimant was aware of COW-2's instructions that employees at Maxis Centre E-Curve should not leave the WhatsApp Group without COW-2's approval.

[71] COW-2 had informed the Claimant in December 2014 vide his email dated 31.12.2014 that communication via WhatsApp was official form of communication and that she cannot leave the WhatsApp Group on her own accord without COW-2's approval. This was expressly told to the Claimant when the Claimant left the WhatsApp Groups of Maxis Centre E-Curve in December 2014.

[72] For ease of reference the email dated 31.12.2014 is reproduced below:

From:	Manoj Kumar Vallabhbhai Patel
Sent:	Wednesday, December 31, 2014 12:00 PM
To:	Thilagavathy Arunasalam
Cc:	M Zulkhairi M Zulkifli; Tan Cheong Tatt; Kelum Udaya Kumara Weliwattage; Zaharatul Laily Shazi Bt Shaarani; Siti Aminah Bt Ismail; Siti Nor Asyikin Bt M Sharifudin
Subject:	Re: Explanation

Thila,

You left the Whatsapp group were at your own privilege and only you know the reason behind the action. As I mentioned numerous times, the action & decision to approve or decline any requests are on discretional basis and depending on our operation's needs. Moving forward, I do not wish to see recurrence of such.

I appreciate your view in terms of communication, nevertheless being in a telco business there is no barrier to this. Hence effective immediately, any form of communication channel use regardless via email / Whatsapp it is an official direction/instruction/request. We do practice this among the Management team as well.

Gradually there will be more changes in terms of operational guidelines that I will put in place moving forward to avoid violation and misuse. This applies to all staffs and I will communicate separately to the team in our upcoming meeting that I will schedule soon as my prime focus will be the team's achievement in 2015.

Regards
Manoj
HoMC Ecurve

[73] The Claimant during cross examination has admitted that instructions sent through Maxis email is official hence COW-2's instructions by an email dated 31.12.2014 in relation to WhatsApp was official and the Claimant was duly notified to obtain COW-2's approval prior to exiting the WhatsApp Groups.

[74] In this regard the Claimant was cross examined in respect of email dated 31.12.2014 as follows:

> " Q : Refer to page 51 of CLB-2. Email dated 31.12.2014 from COW-2. Please read para 2
> "I appreciate your view in terms of communication, nevertheless being in the telecom business there is no barrier to this. Hence effective immediately, any form of communication channel uses regardless via email/WhatsApp it is an official direction/instruction/request. We do practice this among the management team as well."
> Agreed that instructions send through Maxis email is official?
> A : I do agree. "

[75] The Claimant agreed during cross examination that she had exited the WhatsApp group in December 2014. Following her exit, COW-2 had warned the Claimant in his email dated 31.12.2014 at page 51 of CLB-2 that "**I do not wish to see recurrence of such**". **[Emphasis Added]**

[76] Clearly from the statement made by COW-2 in the email dated 31.12.2014, the Claimant knew that in the future she would require the approval of COW-2 prior to exiting from the Maxis Centre E-Curve WhatsApp Group.

[77] In an email dated 08.03.2015 from the Claimant to Agnelraj Muthuthamby the Sales & Services HR Business Partner at page 76-77 of CLB-2, the Claimant acknowledged that she required the approval of COW-2 prior to exit from the WhatsApp Group.

[78] The Claimant wrote in the said email to Angelraj Muthuthamby "**Of course in future if I were to exit the groups, I would seek his approval first.**" **[Emphasis Added]**

[79] Agnelraj Muthuthamby had replied vide his email dated 18.03.2015 at page 76 of CLB-2 and stated:

> **"Thank you for acknowledging that exiting from business communication tools require the approval and the consent of your leaders." [Emphasis Added]**

[80] The evidence shows that the Claimant had deliberately exited from the WhatsApp Group in December 2014 and for the second time on 28.02.2015.

[81] On the balance of probabilities the Company has adduced sufficient evidence to show that the Claimant was aware that she required the approval of COW-2 prior to exiting the Maxis Centre E-Curve WhatsApp group. The Claimant failed to get the approval of COW-2 when she exited the WhatsApp Groups of Maxis Centre E-Curve on 28.02.2015.

[82] The Court is therefore of the conclusion that the Claimant is guilty of the misconduct alleged by the Company.

Was the Requirement of Obtaining Approval Prior to Exiting the WhatsApp Group a Breach of Company Policy?

[83] COW-1 had testified that it is a breach of Company practice.

[84] COW-2 had issued written instructions that the Claimant required his approval before exiting the WhatsApp Groups vide email dated 31.12.2014 after the Claimant had first exited the group in December 2014.

[85] Company used emails and WhatsApp as official communication tools of the Company. COW-2 testified that other employees of Maxis Centre E Curve had followed his instructions.

[86] Despite being told the first time in December 2014 that she required approval prior to exit the WhatsApp Group, the Claimant had for the second time deliberately exited the WhatsApp Group on 28.02.02.2015 without seeking COW-2's approval.

[87] The Court is of the considered view that the Claimant was in breach of her terms of employment with the Company when she failed to follow the reasonable oral and written instructions of COW-2.

2nd Allegation

"Failure to send the "Day End Sales and Service Report" on 6th, 8th, 9th, 11th, 12th, 14th and 15th March 2015, to her Superior, COW-2 amounted to wilful disobedience of a reasonable instruction".

Was it the Claimant's Duty to Submit the "Day End Sales and Service Report"?

[88] Both COW-1 and COW-2 testified that it was the Claimant's duty to submit the Day End Sales and Service Report.

[89] The Claimant did not challenge the evidence of both COW-1 and COW-2. Following **Aik Ming (M) Sdn Bhd V Chang Ching Chuen & Ors [1995] 3 CLJ 639** the failure to cross examine is taken as an acceptance of the truth of that part of the witness evidence.

[90] The Claimant during her evidence at examination in chief admitted "As an EOMC my main job description will be sending out the "Day End Sales and Services Report" which is generated by the System.

[91] In this regard the Claimant was cross examined as follows:

" Q : Agree that as an Executive Maxis E Curve you were also responsible to send the "Day End Sales and Services Report at the end of branch closing to your Supervisor?

A : Yes. "

[92] Based on the admission, it was the duty of the Claimant to send out the "Day End Sales and Service Report" to COW-2.

Did the Claimant send out the "Day End Sales and Services Report" to COW-2 on 6th , 8th , 9th , 11th , 12th , 14th and 15th March 2015?

[93] COW-2 had sent an email dated 09.03.2015 to the Claimant requesting the Claimant to provide an explanation as to why she failed to submit the "Day End Sales and Service Report" for 06.03.2015 and 08.03.2015. A copy of the email dated 09.03.2015 is found at page 9 of COB.

[94] Thereafter, the Claimant failed to deliver the "Day End Sales and Service Report" for 9th, 11th, 12th, 14th and 15th March 2015.

[95] The Claimant admitted that she failed to send the "Day End Sales and Service Report" on 6th, 8th, 9th, 11th, 12th, 14th and 15th March 2015 to COW-2.

[96] In this regard the Claimant was cross examined as follows:

" Q : Refer to page 9 COB, email from COW-2 dated 09.03.2015. Agree that you had failed to send "Day End Sales and Service Report" on 06.03.2015 and 08.03.2015?

A : Yes.

Q : Agree that you had also continuously failed to send "Day End Sales and Service Report" on 9th, 11th, 12th, 14th and 15th March 2015 to COW-2?

A : Yes.

Q : Agree that you would be able to obtain details from the Maxis Center System to prepare the "Day End Sales and Service Report"?

A : Yes. "

[97] Based on the above evidence, the Company has adduced cogent and convincing evidence to prove that the Claimant had failed to submit the "Day End Sales and Service Report" on 6th, 8th, 9th, 11th, 12th, 14th and 15th March 2015 to COW-2. Further, the Claimant had admitted that she did not send the said "Day End Sales and Service Reports".

[98] It was the Claimant's contention that she was unable to send the Maxis Centre E-Curve "Day End Sales and Service Report" on the 6th, 8th, 9th, 11th, 12th, 14th and 15th March 2015 as she was not added back into the WhatsApp Group after she exited on the 28.02.2015.

[99] COW-2 had explained that he did not add back the Claimant into the WhatsApp Group because his complaint regarding the Claimant that for the second time she had exited the WhatsApp Group was pending a decision from HR.

[100] Clearly there were other means to communicate with COW-2 such as the Company email. The Claimant had received a query from COW-2 regarding the non-submission of the "Day End Sales and Service Report" via email on the 09.03.2015. The Claimant replied by writing an email on the 09.03.2015. This email is found at page 9 of COB.

[101] Thus, the Claimant could have used the email to send the "Day End Sales and Service Report" to COW-2. The email was an accepted tool of communication in the Company.

[102] It was the Claimant's duty as employee / an EOMC to obey COW-2, her Supervisor's instructions to obtain approval before exiting the WhatsApp Groups and to submit the "Day Sales and Service Report" to COW-2. In the case of **Ngeow Voon Yean V Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd [2006] 3 CLJ 837** the Federal Court held:

> "**In Malaysia, the general rule governing the doctrine of superior orders is nothing more that the duty of obedience that is expected of an employee. The most fundamental implied duty of an employee is to obey his employer's orders**. The classic modern statement of that duty is found in the judgement of Lord Eversherd M.R. in Laws V London C Human Resourcesonicle (Indicator Newspaper) Ltd [1959] 2 ALL ER 285 to be as follows:
>
> It is, no doubt, therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard – a complete disregard – of a condition essential to the contract of service namely the condition that the servant must obey the proper orders of the master and that,

unless he does so, the relationship is, so to speak, struck at fundamental."

[103] The Court finds that the Claimant's conduct in totality clearly shows wilful defiance to the lawful orders of the Company. Her persistent refusal to obey instructions or to cooperate with COW-2 amounted to an act of indiscipline and insubordination.

[104] Further, the Claimant's conduct in totality challenged and rejected the whole fabric of the relationship of employer and employee and effectively destroyed the trust, which must subsist in any such relationship where the employee holds a responsible position.

[105] Therefore, based on the evidence and admitted facts the Company has on a balance of probabilities proven the charges against the Claimant.

Whether the Proven Misconduct Warranted the Punishment of Dismissal From Service?

[106] Having established the Claimant's misconduct, the next question the Court has to consider is whether the dismissal of the Claimant was with just cause or excuse.

[107] In **Norizan Bakar V Panzana Enterprise Sdn. Bhd. [2013] 4 ILR 477** the Federal Court held:

> "the Industrial Court has the jurisdiction to decide that the dismissal of the appellant was without just cause or excuse by using the doctrine of proportionality of punishment and also to decide whether the punishment of dismissal was too harsh in the circumstances when ascertaining the award under s.20(3) of the IRA."

[108] Following **Norizan Bakar V Panzana Enerprise Sdn. Bhd.**, it is the duty of this Court to decide whether the Claimant's act of misconduct is sufficient to justify the dismissal.

[109] In **Mohd Yusof Bin Jaafar V Nibong Tebal Paper Mill Sdn Bhd [2012] 2 ILR pg 45**, the Industrial Court had referred to the case of **Taylor V Persons Peebles Ltd [1981] IRLR 119** where the Court held:

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

[110] Thus, if it is shown that the punishment selected is disproportionate to the alleged misconduct, then the Court will not hesitate to intervene in the employer's decision in accordance to the principles of equity and good conscience as provided in the IRA 1967.

[111] In **Dahaman Huri Bin Azidin V MISC Integrated Logistic Sdn Bhd, Award No 129 of 2014**, the Industrial Court following **"Pearce V Foster [1889] 17 QBD 536**, Lord Esher MR observed:

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

[112] And Lopes LJ in the same case held:

"If a servant conducts himself in a way inconsistent with the faithful discharge of his duty in the service it is misconduct which justified immediate dismissal."

[113] In **HK Ananda Travel (Malaysia) Sdn Bhd V Khor Seng Kear [2003] 3 ILR 1280** the Industrial Court held:

"Hence he should at all times be trustworthy and always mindful of the need to maintain the relationship of mutual trust and confidence reposed upon him by the Company. He also needs to be reliable."

[114] In **Asani Industries (M) Sdn Bhd V Lim Mui Lin [2007] 2 ILR 29** the Industrial Court held:

"In any establishment be it public or private trust and confidence are of utmost importance. If any of the two is lacking, then it becomes very difficult for the employer to continue

keeping the employee in its employment."

[115] The Claimant in paragraph 13 of her statement of case contended that the Company had taken unreasonable and unconscionable decision hence the dismissal of the Claimant is unwarranted under the circumstances.

[116] In rebutting the Claimant's contention, the Company had adduced evidence of the Claimant's past misconduct.

[117] COW-1 had referred to the past misconduct of the Claimant. COW-1 testified that the Company had issued a warning letter to the Claimant on 31.12.2014 in respect of her disrespectful attitude towards COW-2. In the said letter the Claimant was warned not to repeat the incident of exiting the WhatsApp Group without approval in the future. A copy of the warning letter is found at page 50 of COB.

[118] The Claimant had sent abrasive messages to COW-2 in the WhatsApp Group which includes personal attacks towards COW-2 as well as his education background. Copies of the text messages is found at pages 43-45 of COB. The Claimant was issued a show cause email dated 19.12.2014 pertaining to her disrespectful behaviour towards COW-2.

[119] The Claimant admitted that she sent the abrasive messages to COW-2. This messages is found at pages 51 to 53 of COB. Making of accusations against her superior officer (COW-2) and abusing him by allegations and insinuations against his character is considered a serious misconduct.

[120] The language used by the Claimant was disrespectful towards her superior. It is also insolent, impertinent, and derogatory in nature, as it is offensively contumacious and tends to lower the dignity and position of her superior.

[121] The Claimant is COW-2's subordinate and by using such language at him she has committed an act which is inconsistent with her fundamental assumption at which the employer-employee relationship is based.

[122] In the case of **Kamala Loshanee Amabalavanar V Jaffnese Co-Operative**

Society [1998] 1 LNS 339, Nik Hashim J held:

> "In my judgment, past misconduct is a relevant factor to be taken into consideration. If there is a repetition of similar acts of misconduct the cumulative effect may justify dismissal... Thus the learned Chairman of the Industrial Court was right to take the past misconduct as a relevant consideration for the purpose of determining the appropriate punishment for the subsequent misconduct."

[123] Thus the Court must consider the past record as a relevant consideration for the purpose of determining the appropriate punishment for the subsequent misconduct.

[124] Despite being issued a warning letter on the 31.12.2014 by the Company, the Claimant sometime in January 2015 continued to make detrimental posting on her Facebook, casting aspersions on COW-2. The posting on Facebook is found at page 73-75 of COB. In addition, the Claimant had exited the WhatsApp Group once again without approval.

[125] In the book titled "Misconduct in Employment" the author BR Ghaiye (2nd Edn.) stated (p.520), as follows:

> "The right to control employees is a distinguishing feature of the contract of employment... When the employee does certain act which is contrary to his position of a subordinate, then he is guilty of insubordination...
>
> At p. 571 the author states further:
>
> The use of derogatory, insolent and impertinent language towards the superior officers is also treated as a misconduct. The derogatory language means the language which lessens or impairs the authority, position or dignity of a person. Insolent language means the language which is offensively contumacious. The test in such cases is to see if whether the use of such language tends to lower the dignity or position of the superior officers. The employee is supposed to be in a subordinate position. If he acts or behaves in a manner or uses such expression which is inconsistent with this fundamental assumption on which the employer-employee relationship is based then that would be impertinent or derogatory language."

[126] In the case of **Zainuddin Kassim V Johan Ceramic Berhad [2008] 2 LNS 1447 (Award No. 1447 of 2008)**, the Industrial Court had held as follows:

> "The right to control employees is a distinguishing feature of a contract of employment. The right to control implies the right to ask the employee what work to do. It is a dominant characteristic in the relationship of employer and employee, which marks off the employee form an independent character. As such, **the employee must subject himself to the said control and behave accordingly**. (See *Misconduct in Employment by B.R. Ghaiye at p. 42*)."

[127] In **Guna Ratnam S Subramaniam V Shin-Etsu Polymer (Malaysia) Sdn Bhd [2011] 3 ILR 578 at page 644** the learned Industrial Court Chairman observed:

> "The learned author, Alfred Arins in his book, "Employees Misconduct", stated as follows: While an employee is required to respect the authority of a superior, rather than the superior himself, a vituperative exhibition of contempt of a person must necessarily be contempt of his position as well, since a respect for a position necessarily requires restraint in attacking his holder, lest the attack spill over onto him in respect to his position."

[128] The Company and its officers namely COW-2 are entitled to give all reasonable and legal directions regarding the manner in which the work of the establishment should be conducted and if their directions are flouted and workers such as the Claimant behave in an insubordinate manner then the proper functioning of the establishment becomes impossible, and, therefore such disobedience or insubordinate behaviour is a serious misconduct.

[129] Clearly based on the evidence, it is the considered view of the Court that the Claimant's continuous argumentative, disrespectful, abrasive, tactless and uncooperative attitude not only breached the implied duty of mutual respect but also disruptive to teamwork and cooperation at the workplace. In short, she has committed misconduct which warrants none other than dismissal.

[130] In addition, the Claimant's conduct shows wilful defiance to the lawful orders of the Company. Her persistent refusal to obey the instructions of her superior (COW-2) or to respect his authority amounted to an act of indiscipline and insubordination. Thus, there was a wilful repudiation of the essential contractual condition that the servant shall admit

the authority of the master and obey his reasonable orders.

[131] Thus it is the considered view of this Court that no reasonable employer would in this case have retained the Claimant in its employment. The Claimant deserves the punishment of termination of service.

(G) Conclusion

[132] The Claimant's misconduct had marred the trust and confidence of the Company had in the Claimant, the Court finds that the punishment meted to the Claimant is appropriate in the circumstances of the case.

[133] This Court satisfied that the decision of the Company's management to dismiss the Claimant should not be disturbed. Since there is just cause or excuse for the Company's dismissal of the Claimant, this Court has decided not to interfere with Company's decision in any way.

[134] Accordingly, the claimant's claim is hereby dismissed.

HANDED DOWN AND DATED THIS DAY OF 27th MARCH 2019

(BERNARD JOHN KANNY)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR