

**INDUSTRIAL COURT OF MALAYSIA
[CASE NO: 3/4-825/20]**

BETWEEN

KALAI ARASI SIVABALAN

AND

GARDENIA BAKERIES (KL) SDN BHD

AWARD NO. 648 OF 2023

BEFORE : **YA PUAN NOOR AZZAH BINTI ABDUL AZIZ - CHAIRMAN**

VENUE : Industrial Court Malaysia, Kuala Lumpur

DATE OF REFERENCE : 05.07.2020

DATE OF RECEIPT OF ORDER OF REFERENCE : 14.07.2020

DATES OF MENTION : 25.08.2020, 01.10.2020, 24.02.2021

DATES OF HEARING : 08.08.2022, 11.08.2022

REPRESENTATION : *For the claimant - Thanakumaran Magasvaran; M/s M Thanakumaran & Shan*

For the company - Edward Andrew Saw Keat Leong & Megan Choo Wen Shin; M/s Josephine, L K Chow & Co

REFERENCE:

This is a reference made under Section 20(3) of the Industrial Relations Act 1967 [Act 177] arising out of the dismissal of **Kalai Arasi a/p Sivabalan** (hereinafter referred to as “the Claimant”) by **Gardenia Bakeries (KL) Sdn. Bhd.** (hereinafter referred to as “the Company”) on 6 August 2019.

AWARD

[1] The Ministerial reference in this case required the Court to hear and determine the

Claimant's complaint of dismissal by the Company on 6 August 2019 and was received by the Industrial Court on 14 July 2020.

[2] Hearing of this case commenced on 8 August 2022 and concluded on 11 August 2022. In this trial, the following witnesses have been called by the parties:

(a) The Claimant's witness:

CLW-1 : Ms. Kalai Arasi a/p Sivabalan, the Claimant, former General Worker of the Company.

CLW-2 : Dr. Madihah binti Ahmad Puad.

(b) The Company's witnesses:

COW-1 : Datin Dr. Rofina binti Abdul Rahim.

COW-2 : Ms. Shamini C. Maganderalingam, the Industrial Relations Manager of the Company.

[3] This Court had considered all the notes of proceedings in this matter, and the following documents in handing down this Award:

(a) Pleadings

(i) Statement of Case dated 8 September 2020;

(ii) Amended Statement in Reply dated 28 September 2020;

(iii) Rejoinder dated 8 October 2021.

(b) Bundles of Documents

(i) Claimant's Bundle of Documents marked as "CLB-1";

(ii) Company's Bundle of Documents marked as "COB-1";

(iii) Company's Supplementary Bundle of Documents marked as "COB-2".

(c) Witness Statements

(i) Claimant's Witness Statement of Kalai Arasi a/p Sivabalan marked as "CLWS-1";

(ii) Claimant's Witness Statement of Dr. Madihah binti Ahmad Puad marked as "CLWS-2";

(iii) Company's Witness Statement of Datin Dr. Rofina binti Abdul Rahim

marked as “COWS-1;

(iv) Company’s Witness Statement of Shamini C. Maganderalingam marked as “COWS-2”.

(d) Written Submissions

(i) Claimant’s Written Submission dated 11 October 2022;

(ii) Company’s Written Submission dated 12 October 2022;

(iii) Claimant’s Submission in Reply dated 5 December 2022;

(iv) Company’s Reply Submission dated 5 December 2022.

A. THE CLAIMANT’S CASE

[4] The Claimant pleads that she joined the Company on 26 February 2018 as a General Worker.

[5] The Claimant states that she was sick on 30 May 2019 and she went to the Klinik Kesihatan Seksyen 19, Shah Alam. She was given medical leave for the next day which is on 31 May 2019. However, the date “31” did not appear clear on the medical certificate and the Claimant informed the Medical Officer on that. Then the Medical Officer has written on top of the number 1 to make it appear clear as 31 May 2019.

[6] The Claimant then served the said medical certificate dated 30 May 2019 to the Company.

[7] However, the Claimant received a suspension and domestic inquiry notice on 26 July 2019 due to the medical certificate dated 30 May 2019. The Company alleged that the Claimant has amended the date on the medical certificate from 30 May 2019 to 31 May 2019.

[8] In the domestic inquiry the Claimant informed the Company that she did not amend the medical certificate and the Claimant was asked to prove that by the Company.

[9] The Claimant then took a copy of the medical certificate which she served to the Company and met with the Medical Officer who issued the medical certificate and explain to the Medical Officer the action taken by the Company on her caused by the medical certificate. Subsequently the Medical Officer attested at the place where it is written as 31 May 19 on the copy of the medical certificate brought by the Claimant and the Medical Officer also wrote a Memo dated 5 August 2019 to be produced to the Company.

[10] The Claimant then produced both the attested on the copy of medical certificate and the memo to the Company but the Company failed to consider that. Even the Medical Officer has called Ms. Shamini of the Company to inform her that the medical certificate was genuine.

[11] Nevertheless, the Company failed to consider all proof submitted by the Claimant and subsequently terminate the Claimant on 6 August 2019 and did not accept the Claimant's appeal via a letter dated 9 August 2019, against the termination.

[12] The Claimant contends that throughout the Claimant's employment with the Company, there was never any disciplinary action against her or any record of bad performance.

[13] The Claimant further contends that her dismissal from the Company was with mala fide intention and was an unfair dismissal.

[14] The Claimant's last drawn basic salary was RM1,100.00 per month and an average overtime income of RM1,000.00 per month.

[15] Therefore, the Claimant prays for the remedy of reinstatement to her former position.

B. THE COMPANY'S CASE

[16] The Company in its Amended Statement in Reply avers as follows:

- (i) On 11 June 2019, the Claimant submitted to the Company a Medical Certificate ("MC"), No. AJ939205 from Klinik Kesihatan Seksyen 19 at Jalan Gelora 19/ 46, Seksyen 19, 40300 Shah Alam for one (1) day medical leave on 31 May 2019.
- (ii) An obvious alteration on the medical leave date on the MC and a different medical leave date that is recorded at the back of the MC raised the Company suspicions on the authenticity of the MC, which led to a Show Cause Session conducted by the Company with the Claimant on 20 June 2019.
- (iii) On 3 July 2019, the Company had written a letter to the Clinic to verify the authenticity of the MC.

- (iv) On 25 July 2019, the Company received a letter from the Clinic confirming that the MC has been falsified. The Clinic confirmed that medical leave was given by the medical officer who attended to the Claimant (Dr. Madihah binti Ahmad Puaad, UD 48) for 30 May 2019 and not 31 May 2019.

[17] Flowing therefrom, the Company had suspended the Claimant *vide* its letter dated 26 July 2019 pending a Domestic Inquiry to be held on 1 August 2019 to inquire into the following charge levelled against the Claimant:

“Mengemukakan sijil cuti sakit (No. AJ 939205) dari Klinik Kesihatan Seksyen 19 di Jalan Gelora 19/46, Seksyen 19, 40300 Shah Alam yang telah dipinda tarikhnya secara tidak sah daripada ‘30/05/2019’ kepada ‘31/05/2019’.”

[18] A Domestic Inquiry was held on 1 August 2019 and the Claimant was given the opportunity to answer the charge levelled against her. The Company states that at the conclusion of the Domestic Inquiry the Panel of Inquiry had found the Claimant guilty of the charge.

[19] The Company’s management, after deliberating on the findings of the Domestic Inquiry Panel, took the decision to dismiss the Claimant with effect from 6 June 2019 and the said decision was communicated to the Claimant *vide* the Company’s letter dated 6 June 2019. In the Company’s letter, the Claimant was accorded the right to appeal against the Company’s decision to dismiss her.

[20] On 6 June 2019, after the dismissal, the Claimant submitted an appeal against her dismissal. In support of her appeal, the Claimant produced a handwritten memo from Dr. Madihah explaining that the date on the MC was allegedly altered by her (Dr. Madihah) from 30 May 2019 to 31 May 2019.

[21] The same was communicated by Dr. Madihah to the Company’s Industrial Relations Manager, Ms. Shamini C. Maganderalingam via a telephone conversation on the next day, 7 August 2019. However, upon being notified that the Company had in fact received a letter from the Clinic signed off by her superior, Dr. Rofina binti Abdul Rahim, UD 56, confirming that the MC had been falsified and that the medical leave given was for 30 May 2019, Dr. Madihah said that she would need to check with Dr. Rofina on the contents of the Clinic’s letter dated 25 July 2019.

[22] Shortly after that telephone conversation, Ms. Shamini received another call from one Puan Kalsum binti Saidin from the administration department of the Clinic. In this

subsequent telephone conversation, Puan Kalsum had affirmed once again that the contents of the Clinic's letter dated 25 July 2019 that the MC had been falsified, and according to the Clinic's record, the medical leave given was 30 May 2019 and not 31 May 2019.

[23] After considering the confirmation of the Clinic that the MC was indeed falsified, the Company decided to reject the Claimant's appeal and the said decision was communicated to the Claimant *vide* the Company's letter dated 9 August 2019.

[24] The Company contends that the Claimant's contention therein is irrelevant in view of the gravity and/or seriousness of the misconduct committed by the Claimant which not only was a clear and obvious breach of Rule 40 of the Company's "Syarat, Peraturan dan Faedah Pekerjaan", but also an act of dishonesty which destroys the relationship of trust and confidence implicit in any employment relationship.

[25] The Company further contends that it had just cause and excuse for dismissing the Claimant and had observed all the rules of natural justice and had acted fairly in doing so.

[26] The Company avers that the Claimant is not entitled to the relief sought therein and therefore prays that the Claimant's claim be dismissed.

C. THE LAW ON DISMISSAL ON GROUNDS OF MISCONDUCT

[27] It is established law that the function of the Industrial Court pertaining to a reference under Section 20(3) of Act 177 is to determine -

- (i) whether the misconduct of the employee alleged by the employer has been established; and
- (ii) whether the proven misconduct constitute just cause or excuse for the dismissal.

[28] In the case of *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Anor Appeal* [1995] 3 CLJ 344; [1995] 1 MLRA 412 the Federal Court held:

"On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under section 20 of the Act (unless otherwise lawfully provided by the terms of the reference), is to determine whether the misconduct or irregularities complained of by the Management as the grounds of dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal."

[29] His Lordship Raja Azlan Shah CJ (Malaya) (as His Royal Highness then was) in a Federal Court Case of *Goon Kwee Phoy v. J&P Coats (M) Bhd.* [1981] 1 LNS 30; [1981] 2 MLJ 129 at page 136 held as follows:

“Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether the excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.”

[30] In *Plaat Rubber Sdn. Bhd. v. Goh Chok Guan* [1995] 1 ILR 79, the Industrial Court defined misconduct as -

- (a) Such act or conduct as adversely affects employees’ duties toward the employer.
- (b) The misconduct complained of must have the same relations with the employees’ duties or the work entrusted to him by the employer or his competency to perform the same.
- (c) Any breach of an express or implied duty on the part of the employee, unless it be of a trifling nature, would amount to misconduct.

D. BURDEN OF PROOF AND STANDARD OF PROOF

[31] In the case of *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314 the Court of Appeal had laid down the principle that the standard of proof that is required to prove a case in the Industrial Court is one that is on the balance of probabilities:

“The Industrial Court should not be burdened with the technicalities regarding the standard of proof, the rules of evidence and procedures that are applied in the court of law. The Industrial Court should be allowed to discharge its functions as it was intended to by statute and to conduct its proceeding as a ‘court of arbitration’. It should be more flexible in arriving at its decision, so long as it gives special regard to substantial merits and decide a case in accordance with equity and good conscience.”

[32] As the fact of dismissal was not disputed, the Court has to consider on a balance of probabilities whether the dismissal was with just cause or excuse. The burden of proof is on the Company to discharge as stated in the case of *Stamford Executive Centre v. Dharsini Ganesan* [1986] 1 ILR 101:

“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 of it.”

[33] In order to successfully defend an unfair dismissal claim, the burden of proof is on the employer to show that the reason for dismissing the employee falls into one of the two categories set out in Section 20(3) of Act 177. The termination of the employee will be deemed to have been unjust unless an employer can prove that the employee was dismissed for a just cause or excuse.

[34] Even if the employer succeeded in proving that there was a reason for the dismissal of the employee, it is for the Industrial Court to decide whether the dismissal was warranted or not in accordance with, inter alia, the principles of equity, good conscience and the substantial merits of the case.

E. ISSUES TO BE DECIDED

[35] The issues to be determined in this case are -

- (i) whether the Company had sufficiently proved the charges preferred against the Claimant; and
- (ii) if so, whether the said grounds constitute just cause or excuse for the Claimant’s dismissal.

F. EVALUATION OF EVIDENCE AND FINDINGS OF THE COURT

[36] The Company’s grounds for the Claimant’s dismissal was based on the allegation of misconduct, namely -

“Mengemukakan sijil cuti sakit (No. AJ 939205) dari Klinik Kesihatan Seksyen 19 di Jalan Gelora 19/46, Seksyen 19, 40300 Shah Alam yang telah dipinda tarikhnya

secara tidak sah daripada '30/05/2019' kepada '31/05/2019'."

[37] This charge was levelled against the Claimant in a Notis Penggantungan Kerja dan Sesi Soal Selidik Dalaman dated 26 July 2019 as follows:



15

26 Julai 2019

Cik Kaláí Arasi Sivabalan (15745 – *General Worker*)

HADIR

Cik Kalai

NOTIS PENGGANTUNGAN KERJA DAN SESI SOAL SELIDIK DALAMAN

Menurut laporan yang kami terima dan siasatan yang kami lakukan, anda dengan ini dituduh:

1. Mengemukakan sijil cuti sakit (No. AJ'939205) dari Klinik Kesihatan Seksyen 19 di Jalan Gelora 19/46, Seksyen 19, 40300 Shah Alam yang telah dipinda tarikhnya secara tidak sah daripada '30/05/2019' kepada '31/05/2019'.

Perkhidmatan anda dengan ini digantung mulai 26/07/2019 hingga ke tarikh yang akan dimaklumkan kepada anda secara bertulis kelak.


Sehubungan dengan itu anda dikehendaki menghadiri sesi soal selidik bagi menjawab tuduhan di atas yang dijadualkan seperti berikut:

Tarikh : 01/08/2019
Masa & Tempat : 10.00 pagl, Kilang Gardenia Seksyen 23, Shah Alam

Anda boleh membawa sebarang saksi atau bukti jika ianya dapat membantu kes anda. Jika saksi anda adalah dari kalangan kakitangan syarikat, sila maklumkan dengan notis yang munasabah kepada Cik Shamini atau Cik Mary Madeleine di Jabatan Sumber Manusia untuk dibuat pengaturannya. Anda juga akan diberi peluang menyoal selidik saksi syarikat (jika ada).

Anda diingatkan bahawa sesi tersebut tetap akan dijalankan tanpa kehadiran anda (*ex-parte*) jika anda gagal hadir seperti dijadualkan tanpa memberi notis dan alasan yang munasabah, walaupun ia mungkin akan menjejaskan kepentingan/pekerjaan anda (termasuk kemungkinan diberhentikan kerja).

Yang benar
GARDENIA BAKERIES (KL) SDN BHD


FARIZAL MOHAMAD
Pengurus Kanan
Sumber Manusia

s.k. En. Jonathan Irutheeyanathan

/sm

Lot 3, Jalan Polabur 23/1, 40300 Shah Alam, Selangor Darul Ehsan, Malaysia. Tel: (603) 5542 3228 (12 Lines) (603) 5542 3213

Saya / Kami mengesahkan
penerimaan surat ini


Tandatangan / Tarikh



[38] The Company after conducting a Domestic Inquiry on 1 August 2019 concluded that the Claimant was guilty of the charge preferred in the Notis Penggantungan Kerja dan Sesi Soal Selidik Dalaman. Therefore, the Claimant was dismissed from her employment with the Company effective from 6 August 2019.

The letter of Pemberhentian Kerja dated 6 August 2019 is as follows:



16

6 Ogos 2019

Cik Kalai Arasi Sivabalan (15745)
No. 16 Jalan Serdang Dua 18/15B
Seksyen 18
40200 Shah Alam
Selangor Darul Ehsan

Cik Kalai

PEMBERHENTIAN KERJA

Surat kami bertarikh 26/07/2019 dan sesi soal selidik yang anda hadiri pada 01/08/2019 adalah dirujuk.

2. Panel sesi soal selidik berkenaan telah mendapati anda bersalah atas tuduhan yang dihadapkan seperti dalam surat bertarikh 26/07/2019 tersebut.

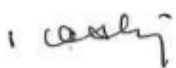
3. Sehubungan itu, setelah mengambil kira semua faktor-faktor yang berkaitan termasuk rekod dan tempoh perkhidmatan anda, kami dengan ini menamatkan pekerjaan anda sebagai *General Worker* tanpa notis berkuatkuasa mulai 06/08/2019.

4. Bagaimanapun, anda boleh merayu (secara bertulis) terhadap keputusan tersebut dalam tempoh seminggu daripada tarikh surat ini.

5. Baki gaji anda (jika ada) akan dikreditkan ke dalam akaun bank anda yang sedia ada.

Sekian, harap maklum.

Yang benar
GARDENIA BAKERIES (KL) SDN BHD


ROS LI MOHD NOR
Pengurus Besar
Sumber Manusia & Hal Ehwal Am
s.k. En. Jonathan Irutheeyanathan
/sm

Saya / Kami mengesahkan
penerimaan surat ini


Tandatangan / Tarikh 6/8/2019



Allegation of submitting a medical certificate which has been illegally altered

[39] The Company's conclusion that the Claimant was guilty of the charge levelled against her was based on the following:

- (i) The Company's witness, Ms. Shamini C. Maganderalingam, the Industrial Relations Manager (COW-2) in her Witness Statement (COWS-2) states that the Claimant submitted to the Company a Medical Certificate (No. AJ 939205) issued by Klinik Kesihatan Seksyen 19 Shah Alam dated 30 May 2019. COW-2 noticed that there was an obvious alteration on the medical leave date of 31.5.2019 at the front page of the medical certificate. When she looked at the back of the same medical certificate, she noticed that a different date recorded on the back ie. 30.5.2019. This raised suspicions to COW-2 that the date on the front of the medical certificate had been altered.
- (ii) On 20 June 2019, the Company held a Show-Cause Session with the Claimant. During this session, the Claimant claimed it was the doctor that had attended to her at that time who had altered the date from 30.5.2019 to 31.5.2019.
- (iii) The Company then wrote a letter to the Clinic dated 3 July 2019 requesting the Clinic's verification on the authenticity of the medical certificate.
- (iv) The Clinic responded *via* a letter dated 22 July 2019 to the Company confirmed that the medical officer who had attended to the Claimant ie. Dr. Madihah binti Ahmad Puaad, had given the Claimant, medical leave for one (1) day which was for the same day that she had attended at the Clinic ie. 30 May 2019 and not 31 May 2019.
- (v) A Domestic Inquiry was conducted on 1 August 2019 whereby the Panel of Inquiry had found the Claimant guilty of the charge and the Company's management took the decision to dismiss the Claimant with effect from 6 August 2019.

[40] Meanwhile, the Claimant (CLW-1) in her Witness Statement (CLWS-1) testifies that-

- (i) The day, 30 May 2019 was the Claimant's working day off.
- (ii) The Claimant was sick on that day and she went to Klinik Kesihatan Seksyen 19, Jalan Gelora 19/46, Seksyen 19, 40300 Shah Alam, Selangor

Darul Ehsan to get treatment. She was being attended by Dr. Madihah binti Ahmad Puaad.

- (iii) The Claimant was given a medical leave for the next following day, ie. 31 May 2019.
- (iv) The Claimant took the medical certificate and left the doctor's room. She found that the date 31 was not clear on the medical certificate and went back to the doctor's room and asked the doctor to correct it. The doctor then wrote clearly above the number "1" on the date "31" so that it is clear.
- (v) The Claimant then submitted the medical certificate to the Company when she returned to work.

[41] The Claimant's evidence that the alteration on the date on the medical certificate from 30 May 2019 to 31 May 2019 was made by Dr. Madihah binti Ahmad Puaad, the medical officer who attended her, was corroborated by Dr. Madihah binti Ahmad Puaad (CLW-2) herself when she gave evidence in Court.

[42] Dr. Madihah binti Ahmad Puaad (CLW-2) in her Witness Statement (CLWS-2) testifies as follows:

"Q.5: Dr.Madiah, did the claimant really feel ill and need MC for the next day?"

A: Yes. She was initially issued an MC for the day of the encounter itself (30th May 2019).

Q.6: Did you issue the MC to the claimant for the next day, which is 31st May, 2019?

A: Yes. It was requested after the initial MC was written.

Q.7: What happens after you issued the MC to the claimant?

A: I had written the MC for the original date and given it to the patient. The patient left the room to collect her medication after our session has ended. I continued to see the subsequent patient. Several patients later, the claimant entered the room unexpectedly and requested for the MC to be for the next day instead. As I was mid-session with another patient, and her card had likely been collected to be filed, I just did what I could without much thought - which was to overwrite the date on the MC."

[43] This was also corroborated by the Company's witness, Ms. Shamini (COW-2) in

cross-examination by the learned Counsel for the Claimant, whereby COW-2 admits that CLW-2 told her that she was the one who altered the date on the medical certificate:

“Q: Miss Shamini during your conversation with Dr. Madihah she clearly told that she was the one who altered the MC?”

A: Yes.”

“Q: What was told by Dr. Madihah?”

A: She claimed that she was the one who changed the date and during that time I mentioned to her that we received a letter from the hospital claiming that the MC forged. The dates were falsified. Then she said she will speak to her superior, Dr. Rofina.”

[44] From the evidence by the witnesses, it is evident that the changes made on the date on the medical certificate was not made by the Claimant, but the changes was made by Dr. Madihah binti Ahmad Puaad (CLW-2), the medical officer who treated the Claimant when the Claimant went to Klinik Kesihatan Seksyen 19 Jalan Gelora 19/46, Seksyen 19, 40300 Shah Alam, Selangor Darul Ehsan to get treatment on 30 May 2019.

[45] Therefore, referring to the Company’s charge against the Claimant, that is *“Mengemukakan sijil cuti sakit (No. AJ 939205) ... yang telah dipinda tarikhnya secara tidak sah daripada ‘30/05/2019’ kepada ‘31/05/2019’.”* This Court is of the opinion that the Claimant has proved that the date on the medical certificate was not illegally altered, as the changes was made by Dr. Madihah binti Ahmad Puaad (CLW-2) herself.

[46] The Company in its Written Submission submits that the Claimant had committed the act of misconduct as alleged, which is in breach of paragraph 40 of the *Syarat, Peraturan dan Faedah Pekerjaan* of the Company. Paragraph 40 provides:

“40) Salah laku yang boleh dikenakan tindakan tatatertib (termasuk pemberhentian kerja)

- Memalsukan atau mengubah sijil cuti sakit atau sebarang dokumen yang dikemukakan kepada syarikat dengan tujuan untuk menipu atau mengelirukan syarikat.”

[47] Hence, based on the evidence adduced, the Claimant has proved that she did not falsify or alter the date on the medical certificate (from 30 May 2019 to 31 May 2019) which was submitted to the Company with the intention of deceiving or misleading the Company.

Memo dated 5 August 2019

[48] This Court views that the Company had failed to consider the appeal made by the Claimant after she was dismissed from the Company. In her appeal, the Claimant had attached a Memo dated 5 August 2019 (page 5 of CLB-1) issued by Dr. Madihah binti Ahmad Puaad (CLW-2) to confirm that the medical certificate was given for the following day ie. 31 May 2019.

[49] CLW-2 in her Witness Statement (CLWS-2) testifies that she issued the Memo to explain that she had indeed issued the medical certificate:

“Q8: After that, did the claimant meet you again?”

A: Yes on 05-08-2019, the patient came as a walk-in to see me. She told me what had happened, and was understandably rather distraught. I felt personally responsible and asked her how to convey the truth of the situation. She asked for the memo. I also inquired how to communicate with the person in charge, so that I may explain to them that I had indeed issued the MC.”

[50] The Company had also failed to consider the Memo dated 5 August 2019 issued by CLW-2 to explain on the alteration she made on the date on the medical certificate and confirmation by CLW-2 that the medical certificate was not falsified. CLW-2 in her Witness Statement (CLWS-2) states -

“Q14: Did you call the Company and talked to Ms. Shamini regarding the MC and Memo?”

A: Yes, as the patient had met with me and informed me of her situation. I felt obliged to correct the situation.

Q15: Dr. Madihah did you gave your confirmation to Ms. Shamini from the Company that the MC is not falsified?

A: I did.”

[51] Further, from the evidence adduce, this Court finds that there is a conflict between the Clinic’s letter dated 22 July 2019 (pages 13 - 14 of COB- 1) and the Memo dated 5 August 2019 issued by CLW-2 (page 5 of CLB-1). The Company, however, even though admits that there was a conflict, failed to refer to the higher authority to find the truth, and merely believed on the telephone conversation with one Puan Kalsum binti Saidin, from the Clinic. Moreover, Puan Kalsum binti Saidin was never called as a witness by the Company to testify the same.

[52] COW-2 when cross examined by the learned Counsel for the Claimant testifies as follows:

“Q: There is conflict between the Clinic’s letter and Dr. Madihah’s memo. Do you agree?”

A: There is conflict, I agree.

Q: Since you agree there is a conflict between the Clinic’s letter and Dr. Madihah’s memo and also by taking into account the submission, did the Company decided to write to the higher authority than the Clinic to find out the truth?”

A: No, because Puan Kalsum had already confirmed.”

[53] The Company’s first witness, Datin Dr. Rofina binti Abdul Rahim, Head of Klinik Kesihatan Seksyen 19, Shah Alam (COW-1) testifies that the Clinic’s letter dated 22 July 2019 (pages 13 - 14 of COB-1) was issued as a reply to the Company’s query, confirming that the medical certificate had been falsified. COW-1 further testifies that they had reviewed the existing record especially the carbon copy of the medical certificate in the book of *“Sijil Cuti Sakit”* of Dr. Madihah binti Ahmad Puaad (pages 1 - 2 of COB-2) and found that the Claimant was given medical leave on the date the Claimant came to the Clinic, ie. 30 May 2019 and not 31 May 2019.

[54] Further, COW-1 when cross examined by the learned Counsel for the Claimant admits that Dr. Madihah did issued a Memo to the Claimant stating she did the alteration in the medical certificate:

“Q: Dr. Madihah keluarkan memo untuk kata pindaan dia yang buat dengan chop?”

A: Betul.

Q: Ada tanya bagaimana memo boleh dikeluarkan?”

A: Ada. Dia kata dia tak semak rekod pesakit dan tak semak MC salinan.”

[55] COW-1’s evidence is consistent with the evidence of Dr. Madihah binti Ahmad Puaad (CLW-2) when she was cross examined by the learned Counsel for the Company, whereby CLW-2 admits that she did not check the record and just made the alteration in the medical certificate which had been issued to the Claimant. CLW-2 further testifies during cross examination, that the purpose of issuing the Memo in page 5 of CLB-1 was *“I want to help her. MC was under my name. I thought she is not to be blamed.”*

[56] From the evidence adduced, this Court finds that CLW-2 did not at any time mention that she did not make the alteration in the original medical certificate. In her Witness Statement (CLWS-2), cross-examination and re-examination, CLW-2 clearly indicates that she was the one who altered the date on the medical certificate.

[57] Hence, after perusing the evidence and document submitted, this Court finds that the Company had failed to prove the allegation of misconduct levelled against the Claimant that is, submitting the Medical Certificate which has been illegally altered. This Court further finds that it is unfair for the Claimant to be penalised when evidence shows that the alteration on the medical certificate was not made by the Claimant, but it was made by Dr. Madihah binti Ahmad Puaad (CLW-2), the medical officer who treated the Claimant when the Claimant went to Klinik Kesihatan Seksyen 19, Shah Alam to get treatment on 30 May 2019.

[58] Therefore, having regard to the totality of the facts and evidence before it and to Section 30(5) of Act 177, and guided by the principles of equity, good conscience and substantial merits of the case without regard to technicalities and legal forms, the Court is of the considered view that the Company had failed to prove on a balance of probabilities that the dismissal of the Claimant from her employment with the Company was with just cause or excuse. Accordingly, the Claimant's claim is hereby allowed.

G. REMEDY

(i) Compensation *in lieu* of reinstatement

[59] The Claimant was a confirmed employee and has been employed by the Company since 26 February 2018 and her last day of employment was on 6 August 2019. The Claimant had thus served the Company for a period of 1 year 5 months.

[60] The Claimant prays that she be reinstated to her former position.

[61] Based on the facts of this case, this Court views that reinstatement of the Claimant to her former position is not a suitable remedy and not in the interest of industrial harmony. Hence, the Court will not order reinstatement of the Claimant.

[62] As such the appropriate remedy in the circumstances of this case will be compensation in lieu of reinstatement. Based on the number of years in service, the Court will order **compensation *in lieu* of reinstatement at a multiplier of 1 month**, that is, one month for each completed year of service.

[63] The Claimant's last drawn basic salary was RM1,100.00 per month.

(ii) Backwages

[64] The Claimant is also entitled for backwages in line with Section 30(6A) Act 177 and the factors specified in the Second Schedule which states:

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

[65] Therefore, this Court will order backwages **for 22 months only** from the date of last employment of 6 August 2019.

[66] In exercising discretion assessing the quantum of backwages, this Court will consider all relevant matters, including that the Claimant has been gainfully employed elsewhere after her dismissal. The Claimant testifies in Court that she is currently working as a Quality Controller in a factory since September 2019 with a salary of RM1,650.00 per month.

[67] The Claimant has also furnished her EPF Statements for the year 2019 until July 2022 which shows contributions being made by the employer and employee every month since January 2019 until July 2022.

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

"In our view, it is in line with equity and good conscience that the Industrial Court, in assessing quantum of backwages, should take into account the fact, if established by evidence or admitted, that the workman has been gainfully employed elsewhere after his dismissal. Failure to do so constitutes a jurisdictional error of law. Certiorari will therefore lie to rectify it. Of course, taking into account of such employment after dismissal does not necessarily mean that the Industrial Court has to conduct a mathematical exercise in deduction. What is important is that the Industrial Court, in the exercise of its discretion in assessing the quantum of backwages, should take into account all relevant matters including the fact,

where it exists, that the workman has been gainfully employed elsewhere after his dismissal. This discretion is in the nature of a decision-making process.”

[69] Based on the circumstances of his case, this Court rules that there will be a deduction of 20% from the backwages of 22 months awarded in regard to the post-dismissal income.

[70] Therefore, the total amount of backwages and compensation in lieu of reinstatement payable to the Claimant is -

(i) Backwages		
RM 1,100.00 x 22 months	=	RM 24,200.00
Less 20%	=	RM 4,840.00
TOTAL	=	<u>RM 19,360.00</u>
Add		
(ii) Compensation <i>in lieu</i> of reinstatement		
RM 1,100.00 x 1 month	=	RM 1,100.00
TOTAL	=	<u>RM 20,460.00</u>

H. FINAL AWARD

[71] The Court hereby orders that the Company pays the Claimant the total sum of **Ringgit Malaysia Twenty Thousand Four Hundred Sixty (RM20,460.00)** only less any statutory deductions, if any, through the Claimant’s Solicitors, Messrs M. Thanakumaran & Shan, within 30 days from the date of this Award.

HANDED DOWN AND DATED 21 MARCH 2023

(NOOR AZZAH ABDUL AZIZ)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR