INDUSTRIAL COURT OF MALAYSIA

CASE NO : 15/4-773/02

BETWEEN

EXPRESSWAY LINGKARAN TENGAH SDN. BHD.

AND

SUSHEELA SAMINATHAN

AWARD NO : 352 OF 2006

Before	**:**	**N. RAJASEGARAN - Chairman** (Sitting Alone)
Venue	**:**	Industrial Court Malaysia, Kuala Lumpur.
Date of Reference	**:**	29.7.2002.
Dates of Mention	**:**	17.10.2002, 6.8.2003, 13.12.2004 and 13.4.2005.
Dates of Hearing	**:**	8.4.2004, 16.8.2004, 17.8.2004, 1.8.2005 2.8.2005 and 30.9.2005.

Company's written submission received: 8.11.2005

Claimant's written submission received : 22.12.2005.

Representation	**:**	Mr. T.M. Varughese of Messrs T.M. Varughese & Co. Counsel for the Company. Encik Fadzil bin Abdullah (Mr. S. Mariappen with him) of Messrs J. Azmi & Associates, Counsel for the Claimant.

Reference :

This is a reference made under Section 20(3) of the Industrial Relations Act, 1967 arising out of the dismissal of **Susheela Saminathan** by **Expressway Lingkaran Tengah Sdn. Bhd.**.

AWARD

The Reference

1. In the Industrial Court ('the Court'), before me is a reference made by the Honourable Minister of Human Resources pursuant to section 20(3) of the Industrial Relations Act, 1967 ('the Act'). The reference dated 29.7.2002 involves the dismissal from employment of Susheela Saminathan ('the Claimant') by Expressway Lingkaran Tengah Sdn. Bhd. ('the Company'), commonly known as ELITE.

The *Factual Matrix*

2. I begin with the *factual matrix* against which the reference rests. On 13.11.2000 the Claimant wrote a letter to the Company. Through that letter she informed the Company that she considered herself to have been constructively dismissed by the Company on the same date. Her reason stated verbatim is: *"I refer to your letter dated 8th November 2000 on the finding of the domestic inquiry and wish to express that I do not agree to the charges against me. I have also expressed this during the inquiry."* Consequent to that letter the Claimant ceased employment. What made her write this letter forms the deciding point in this award.

3. I find it relevant at this stage to set out a brief history of the Claimant's employment in the Company. She was appointed for employment on 16.9.1981 as a confidential general clerk in the Company's secretarial division. Then she was redesignated as confidential personnel clerk on 20.6.1990. This involved a movement up in salary grade from 3 to 2. 1st January 1993 saw her promoted in grade to 1 but in that same position. Later came a promotion to the position of human resources executive, made effective on 11.4.1994. From there she moved as senior executive, human resources put on the salary grade

of 6 with effect from 1.9.1997. Finally she attained the position of Assistant Manager, Human Resources and Administration in which position she took responsibility as head of that department on 1.1.2000 at a salary of RM4,142.00 in a grade called E5. In that position, she reported to the General Manager Finance, one Ahmad Mahir Isa ('GM Finance'). She remained as Assistant Manager until the cessation of her employment. A conclusion, based on the Claimant's employment history, that she would have been knowledgeable and experienced in the human resources function is not far-fetched.

4. In the year 2000, the Company participated in a promotion involving every department in the Company. It was called promotion of Time Access 183. The Claimant was allocated RM23,000.00 for use by the Human Resources and Administration Department inconnection with the promotion.

5. By a memo dated 30.5.2000 the GM Finance sought approval from the Managing Director, one Suhaimi Halim ('Managing Director'), to purchase six sets of mobile phones for use by staff whose names were listed in an attachment to that memo. The Court saw the memo but not the list. On that same memo the Managing Director approved the purchase. That the Claimant was assigned the responsibility of purchase by the GM Finance is common ground between parties. And this the Claimant did on 7.6.2000.

6. But the Claimant purchased eight sets of mobile phones of a brand called Nokia. She did this at a cost of RM6,848.00. There is a cash sale receipt to this effect issued by the vendor, Touch Line Enterprise, situated in a shop–lot in Pertama Complex, Jalan Tunku Abdul Rahman, Kuala Lumpur. The money for this, she utilized from the RM23,000.00

allocated for the Time Access 183 promotion. And thus began her troubles with the Company.

7. It is the Claimant's version that she was instructed to do both by the GM Finance that is, the number of mobile phones to purchase and the source of funding. It is further the Claimant's contention that she distributed all eight sets of the mobile phone to the respective users. In support thereof she enclosed from pages 9 to 13 in her bundle of documents, later marked exhibit AB1, an agreed bundle of documents, memos which she had written to the recipients. The recipients acknowledged receipt of the phones by signing in an appropriate space in the respective memo. The memos are dated 7.6.2000 and the phones were received by the users on the same date. These memos account for five of the mobile phones. Of these five, one was received by the Managing Director and another by the GM Finance. At page 15 of AB1 is a memo written by the GM Finance addressed to the Claimant, dated 7.6.2000, through which memo the Claimant was also given one of the mobile phones. She acknowledged having received the mobile phone on 9.6.2000. That accounted for six mobile phones. At page 14 of AB1 is a memo written by the Claimant, dated 7.6.2000, addressed to one Lourdes Dass, handing over one mobile phone. That part of the memo where Lourdes Dass is required to acknowledge receipt by signing, writing his name and stating the date of receipt, is blank. In effect, the Claimant did not produce anything to show that more than six sets of mobile phones had been assigned out. I hasten to add that this fact, I found to have no impact on my decision making process.

8. Then the Claimant prepared a document called 'Request For Approval' which she addressed to the Managing Director. It is dated 20.6.2000. Through this document she sought approval for the purchase of eight sets of mobile phones of Nokia brand at a cost of

RM6,848.00. The Managing Director approved the requisition. It is the Managing Director's version that he commenced work with the Company in May 2000. He had approved a request for purchase of six sets of mobile phones on 30.5.2000. This was through the memo, earlier referred to, written to him by the GM Finance. The Request For Approval from the Claimant, he approved on trust thinking that it referred to the earlier consent given by him in response to the application by the GM Finance. He complained that his attention was not drawn to the fact that the Request For Approval was for eight sets of mobile phones and that these had already been purchased on 7.6.2000. To this the Claimant retorts that she had enclosed to the Request For Approval, a copy of the cash sales receipt. And this receipt clearly indicated eight sets of mobile phones purchased on 7.6.2000. Unfortunately, *ex facie* the Request For Approval, there is no indication that she had indeed enclosed a copy of the relevant cash sales receipt. Against the backdrop of the circumstances that the Managing Director had only recently commenced employment in the organization, that the sum of money involved in the purchase was comparatively small and, that the request for approval was made by the Claimant who was then responsible for the Company's human resources and administration function, the Managing Director's version that he approved the Request For Approval on trust, I find not to be implausible.

9. The next thing that occurred in the Company was an audit conducted by the Company's Group head office, that is United Engineers (Malaysia) Berhad. It was a routine operational audit involving a team of five. One in that team was Shahinaz Binti Abdul Rahim ('Shahinaz'). During the audit Shahinaz interviewed the Claimant. What started off as a simple query on the mode of payment for the purchase of the mobile phones ended up into a full blown investigation into every facet of the purchase. Much time was spent by both parties in extracting evidence

on the mode of payment - the Company claiming that the Claimant had during investigations informed both Shahinaz and Makhdzir bin Ghazali ('Makhdzir') then the Group's Coordinator of Human Resources, that she initially used her personal credit card to effect the purchase and later reimbursed herself the total sum of RM6,848.00 from the Time Access 183 account. The Claimant before the Court, denied using her credit card for the purchase. The path that I have embarked in my decision making process does not make it incumbent upon me to take a stand on this issue of whether the Claimant did use her credit card.

10. The audit investigations resulted in an audit report where a query was raised on the purchase of the mobile phones. The audit report was followed by a meeting between the Claimant and the Managing Director on 8.8.2000. At this meeting the Managing Director requested the Claimant to reply the audit-query. Then came a memo dated 12.8.2000 from the Managing Director to the Claimant. This memo referred to the audit report which had made reference to the Claimant's purchase of eight mobile phones allegedly without compliance to existing procedure, the discussion of 8.8.2000 between the two, sought an explanation from the Claimant on the purchase of the mobile phones and, stated that failure to do so within a week would result in appropriate proceedings being instituted against her. To this memo the Claimant, by another memo dated 12.8.2000, replied. In that reply she spoke of the Managing Director's approval granted to the GM Finance on the purchase of mobile phones and enclosed a copy of that approval. That approval on recapitulation, was for the purchase of six mobile phones. She also spoke of quotations having been obtained from three sources. And she wrote that on the approval of the GM Finance she proceeded to purchase the mobile phone at a cost of RM890.00 each on 7.6.2000 *"as per copy of invoice attached."* She further stated that the purchase was made with cash taken from the T.T.dot com advance and that *"past practice any*

items purchased cash there was no purchase order or quotations done." Lastly she referred to that approval granted by the Managing Director in the Request For Approval dated 20.6.2000. That was for the purchase of eight mobile phones. A point to note are those facts raised by Mr. T.M.Varughese, learned counsel for the Company, in cross-examination of the Claimant that nowhere in this memo did the Claimant specifically refer to the number of mobile phones that the Managing Director approved for purchase in response to the GM Finance's request. Nor did she specifically state the number of mobile phones that she actually purchased and the date on which she purchased the same. Neither did she state the number of mobile phones that the Managing Director subsequently approved in that Request For Approval. Do I detect evasion here? Or is it that the copy of the cash sales receipt that she attached spoke for itself? Either way, the route I have pursued makes it unnecessary to disclose my views.

11. The Company's response to the Claimant's reply was to suspend her from employment from 7.10.2000 pending a domestic inquiry. This was done through service upon her of a letter dated 6.10.2000. And this letter was followed by a notice of domestic inquiry dated 17.10.2000. I cannot avoid quoting this notice of domestic inquiry *in extenso* and state under, its contents shorn of formalities :

> " *NOTICE OF DOMESTIC INQUIRY*
>
> ---
>
> *It was reported that on 30th May 2000, En. Ahmad Mahir Isa, ex-General Manager Finance, submitted a memorandum to the Managing Director, En Suhaimi Halim to seek for his approval to purchase 6 units of mobile telephone.*
>
> *On 7th June 2000, you purchased 8 units of mobile telephone from Touch Link Enterprise which amounted to RM6,848.00*

On 20th June 2000 you submitted a "Request For Approval" to the Managing Director to purchase 8 units of mobile telephone.

In view of the above, it is hereby alleged that :

1. *You, on 7th June 2000 acted beyond your authority by purchasing 2 additional units of mobile telephone without obtaining prior approval from the Managing Director.*
2. *You had committed an act of non-compliance to the company's procedure and policy in that you did not submit the "Request for Approval" to the Managing Director, prior to the purchase of the 8 units of mobile telephone.*
3. *You had committed a serious act of misconduct in that you had misled the Managing Director by not declaring the fact that you had purchased 8 units of mobile telephone on 7th June 2000 in the "Request For Approval" dated 20th June 2000.*
4. *You had committed a serious act of misconduct in that you had utilised a sum of RM6,848.00, from the cash advance that was taken on 28 March 2000 which was meant specifically for the promotion of Time Access 183, without obtaining prior approval from the Managing Director.*
5. *You had committed a serious act of misconduct in that you had utilised a sum of RM7,120.40, from the cash advance that was taken on 28 March 2000 which was meant specifically for the promotion of Time Access 183, without obtaining prior approval from the Managing Director.*

As such, the Management had decided that a domestic inquiry be held against you. The details are as follows :-

Date : 23.10.2000 (Monday)
Time : 9.00 a.m.
Venue : ELITE, Operational Office
Shah Alam, Selangor.

You are required to be present at the said inquiry failing which it shall be proceeded ex-parte.

At the inquiry you are allowed to be accompanied by any staff of ELITE Bhd. You may also bring along documentary evidence and/or witness/witnesses to testify at the inquiry.

Please note that your suspension of service will continue until 4th November 2000. "

12. The Claimant had a discussion with Makhdzir prior to the domestic inquiry. When exactly, it is not know to the Court. From evidence, the discussion centred on the mode of payment for the purchase of the mobile phones. Also before the domestic inquiry, the GM Finance had ceased employment with the Company. As to when precisely, is another date not known to the Court.

13. Come 23.10.2000, the Company held a domestic inquiry on the charges preferred against the Claimant as elaborated in the notice of domestic inquiry. The notes of the domestic inquiry are exhibited as COE1. Nowhere during the trial did En. Fadzil bin Abdullah, learned Counsel appearing for the Claimant, challenge the veracity of the notes of the domestic inquiry through any of the Company's witnesses.

14. Now, for that part which I found central to my deliberations and which primarily shaped the nature of the decision I have taken in this case before me. It is what occurred during the domestic inquiry. But before that, I depart momentarily to deal with the Claimant's various quarrels on the conduct of the domestic inquiry. The complaints that the

Claimant had against the domestic inquiry in her evidence were that two of the prosecuting officers were senior to the chairman of the domestic inquiry and that the domestic inquiry notes were inaccurate. I disregard these as afterthoughts for three reasons. Firstly, at not time during the domestic inquiry had she complained on the choice of prosecutors; secondly, Mohd Zin Bin Abd Rahman, a member of the domestic inquiry panel, confronted with the standard rhetoric questions usually pursued by enterprising lawyers in their effort to invalidate a domestic inquiry, said nothing in the Court to incriminate the domestic inquiry and, thirdly an employee cannot without more simply challenge the veracity of an employer's notes of domestic inquiry on a bare assertion. [see p.217 in the decision of learned Chairman, Steve L.K. Shim (now Chief Judge, Sabah & Sarawak) in ***Syarikat Kenderaan Melayu Kelantan Sdn. Bhd. v. Transport Workers Union (1990) 1 ILR 213***]. Another complaint on the conduct of the domestic inquiry can be found at paragraph 8.10 of the document called 'Claimant's Written Submission' . It reads :

> *"8.10 The point we are highlighting is that the evidence obtained during the inquiry is hardly sufficient to warrant the finding of guilt. We humbly submit that the finding of guilt is unjust and perverse and accordingly the demotion (AB-1 page 22) is grossly unfair. "*

I will deal with this complaint in due course at the appropriate stage.

15. Coming back to the mainstream on the domestic inquiry. The only person who gave evidence on behalf of the Company during the domestic inquiry was Shahinaz. She testified on the results of the audit investigations, commencing from the Claimant's purchase of the mobile

phone, the source from which the purchase was funded, the procedure adopted in the purchase in contrast with what she alleged was the proper procedure, the approval for purchase given subsequent to actual purchase and, on the usage of the Time Access 183 funds on two occasions by the Claimant both to reimburse the cost of the purchase of the mobile phones at RM6,848.00 and the purchase of sports attire to the cost of RM7,120.00. The domestic inquiry notes show that she produced a total of thirteen exhibits to support her testimony. Her testimony and exhibits covered all the five charges preferred against the Claimant at the domestic inquiry. The Claimant had no question to ask Shahinaz in cross-examination. Thereafter the prosecution closed its case. Based on the evidence before it, the domestic inquiry panel found that the Claimant had a case to answer in respect of all five charges and informed her accordingly. And as to the response of the Claimant, that part of the notes of the domestic inquiry repeated under, speaks for itself :

> *" Note : SS (Claimant) refused to defence (sic) herself after given a chance by HA (Panel Chairman).*
>
> *: HA repeatedly explained to SS the consequences will be faced by SS due to her decision.*
>
> *: SS still refused.*
>
> *: HA thanks to everybody.*
>
> *Stop at 12.09 noon. "*

That the Claimant refused to and failed to offer a defence at the domestic inquiry is not in dispute. As to why she did so, will be dealt with further down in this award.

16. The domestic inquiry found the Claimant to be guilty of the five charges preferred against her. I think it would have been inconsistent for the domestic inquiry to have found otherwise, particularly after

having called for the Claimant to defend herself. In the result, the Company decided to punish the Claimant by demotion. This the Company did by serving upon the Claimant a letter dated 8.11.2000. By this letter she was demoted in salary grade from E5 to E6. This entailed a reduction in salary to RM3,665.00 per month. The effective date was 13.11.2000. The letter makes no mention of there being a demotion in her substantive position as Assistant Manager. That she was to continue to hold that position is not a subject of dispute.

17. To this demotion, the Claimant responded with her letter of 13.11.2000, referred to at the initial stages of this award, which brought about her cessation of employment by way of constructive dismissal. So much for the facts.

The Law

18. Now to the law. There is nothing new to the law on constructive dismissal. It stands very much in that same position as when it was restated by Salleh Abas LP in ***Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd. (1988) 1 MLJ 92*** in the following words :

> *" ... interpretation of the word "dismissal" in our section 20. We think that the word 'dismissed' in this section should be interpreted with reference to the common law principle. Thus it would be a dismissal if an employer is found 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 situation, the employee is entitled to regard the contract as terminated and himself as dismissed. "*

19. That unfair or unreasonable conduct of the employer has no place in a claim of constructive dismissal has been firmly entrenched in a galaxy of cases, the shining star amongst which is the decision of Mahadev Shankar JCA speaking for the Court of Appeal in ***Anwar bin Abdul Rahim v. Bayer (M) Sdn. Bhd. (1998) 2 MLJ 599.*** The first and basic requirement of an allegation of constructive dismissal is that the employer had breached a fundamental term of the contract of employment. And it is this issue of whether the Company had breached a fundamental term of the Claimant's contract of employment that I find pivotal in my deliberations in the instant case.

Application of Law to *Factual Matrix*

20. Stripped naked of its trappings, it is the Claimant's position that the fundamental breach of contract committed by the Company was the demotion in her salary grade. Whereas the Company took the position that subsequent to a domestic inquiry, it had good grounds to punish the Claimant and this it did through demoting her in salary grade and as such its action did not constitute a breach of her contract of employment.

21. Intricately woven to the platform of the demotion being a breach of contract is that plank adopted by the Claimant that the domestic inquiry was defective. My earlier discussion has dispelled this argument on a defective inquiry. I found nothing wrong with the conduct of the inquiry. That brings me to examine the conduct of the Claimant, the contribution of her conduct if any, towards the decision of the domestic inquiry and whether the panlel's decision was wrong or perverse.

22. A domestic inquiry is not an empty formality. It is a mechanism by which the employer puts into effect the principles of natural justice. It's

purpose is two-fold. On the part of the workman, to enable him to face his accuser, challenge the evidence against him and thereafter to offer his own explanations supported by evidence, if any. For the employer, it affords the opportunity to find out the truth of the allegation made against his workman. A workman's refusal, without cogent and acceptable reasons, to participate in a domestic inquiry will result in paralysing the administrative process and defeating the end of justice.

23. And as to what happens on such refusal by a workman, ***B.R. Ghaiye's Law and Procedure of Department Enquiries, Vol 1, 3rd edn at page 714*** reads :

> *" If a workman intentionally refuses to participate in the enquiry he cannot complain that the dismissal is against the principles of natural justice (Lakshmi Devi Sugar Mills v. Ram Swarup [1957] 1 LLJ 17:AIR 1957 SC 82; Assam Oil Co v. Appalswami [1954] 2 LLJ 328; Escorts Ltd. v. Workmen (Del Gaz. dtd 17-12-1961 p. 344). "*

And further down in that same page :

> *" When in early stages workers refused to co-operate and later on withdrew completely from enquiry on grounds which were not at all justifiable then the management could take decision on the material available to it (Lotsatta Karyalaya v. Nirabhai Naraindas 1958 ICR 859 [IT]). "*

24. In ***Legal Aspects of Managing Employee Relations by A.B. Chowdhury, Edn. 2005***, the learned author at page 433 has this to say :

> *" The delinquent employee cannot refuse to participate in the enquiry for no reason and for an oblique purpose of frustrating or sabotaging the enquiry and then complain violation of principles of natural justice (Swati Gangulu v. State of West Bengal 1995 Lab IC 235 [244] [Cal]. "*

25. The Claimant was present throughout the proceedings of the domestic inquiry. She failed to cross-examine the prosecution's main witness when granted the opportunity to do so. And when told to enter her defence to the charges preferred against her, she refused. She maintained her refusal notwithstanding being warned of the consequences. I find it compelling to view the Claimant's conduct against the background of the Claimant's experience in and her position as the Company's head of human resources. She was no ordinary employee to be accorded the benefit of inability to appreciate or evaluate the consequences of her conduct in refusing to defend herself. The domestic inquiry had heard the prosecution and based on this held that she had a case to answer. They did not find her guilty at that stage. They merely wanted her to rebut the evidence tabled by the prosecution. She refused. And as to why, can be best gleaned from her answers in cross-examination :

> *"Q. At the end of the Company's case, do you agree there was a break. And the inquiry resumed. And you were asked to present your case?*
>
> *A: I cannot recall.*
>
> *Q: Were you asked to present your case at the end of the Company's case?*
>
> *A: I cannot recall.*
>
> *Q: Did the panel repeatedly tell you that whatever case you have you must present it, otherwise the consequences will be serious?*

A: I cannot recall.

Q: Did you present your case at the end of the Company's case?

A: I stated my reason for not giving the evidence because I have already given an explanation letter to the MD and verbal explanation to Makhdzir Ghazali, the Human Resource Coordinator. While these two are pending, no reply has come from both of them. I can't defend myself at the Domestic Inquiry.

Q: Do you agree that your decision not to defend yourself at the Domestic Inquiry was by your own choice?

A: Yes.

Q: Did the Company give you reasonable time to prepare and come for the Domestic Inquiry?

A: No.

Q: Why do you say "No"?

A: I was only given page 19 of AB1 on 17.10.2000. I was called on the 23.10.2000 for Domestic Inquiry. Its about one week. Not sufficient for me to prepare my defence. Too short a notice.

Q: Did you write to Company to extend the date of the Domestic Inquiry?

A: No I did not.

Q: Why?

A: There is no reason why. When they said come on 23/10/2000 , I just went.

*Q: **Put.** Your answer that too short notice is given is an afterthought?*

A: I do not agree. "

26. Her reason for refusing to participate in the domestic inquiry, I find to be unacceptable. Her presumption that the Company had accepted her explanations on the subject matter of the charges preferred against her for the reasons that the Company failed to reply to her memo of explanation dated 12.8.2000 and because she had been given that impression by Makhdzir, I find to be foolhardy and against the weight of evidence. On Makhdzir, what she said in cross-examination is this - *"After, I was called to his office to give explanation. After a lengthy explanation he said 'ok'. But I do not know what does the 'ok' mean."* And Makhdzir's response is that it is not true that he accepted the Claimant's explanation though he did say after the meeting – *"Ok, you can leave."* And as for her reason of awaiting the Company's reply to her explanatory memo of 12.8.2000, the Company's response, through the letter of suspension and notice of domestic inquiry dated 6.10.2000 and 17.10.2000 respectively, cannot be any clearer that her explanations were not accepted.

27. The Claimant's conduct in refusing *ex animo* to defend herself at the domestic inquiry was to her own peril. It enabled the domestic inquiry to proceed with arriving at a decision on her guilt or otherwise based on the evidence before it. Bias prevented the domestic inquiry panel of having sight of the Claimant's written explanation before commencement of the domestic inquiry. Neither were they shown the same during the inquiry. It was left to the prosecution whether to or when to produce the same. The domestic inquiry was therefore forced to arrive at a decision on the guilt or otherwise of the Claimant without benefit of a rebuttal from her. Now, to examine the decision of the domestic inquiry panel – to evaluate whether that decision was wrong, perverse or tainted with *mala fides*.

28. At the outset I remind myself that it is not my role to substitute my view with that of a reasonable decision taken by the domestic inquiry panel. And in analysing the decision I first inquire what where the facts and circumstances known to the panel on the day the decision was taken to find the Claimant guilty of the charges. Next, was the panel acting reasonably and, with those facts before it, was it entitled to take the view that it did.

29. In circumstances not dissimilar in principle to such as these, Vice-Chancellor Sir Nicholas Browne-Wilkinson speaking for the Court of Appeal in the case of ***British Gas plc (respondents) v. McCarrick (appellant) (1991) IRLR 305*** opined :

> *" The decision for the Industrial Tribunal was whether, on the facts which were known or should have been known to the employers, they genuinely believed, on reasonable grounds, that the employee was guilty of the conduct he was charged. "*

30. The headnotes to the law report on ***Dick and another (appellants) v. Glasgow University (respondents) (1993) IRLR 581,*** a decision by Lord Justice Clerk (Lord Ross) sitting in the Court of Session reads :

> *" In determining whether an employer had carried out reasonable investigations in the circumstances, an Industrial Tribunal should consider the nature of the material which was before the employer when the decision to dismiss was taken. A Tribunal is not entitled to conclude that a reasonable investigation had not been carried out because during the disciplinary procedure, the employer had failed to have regard to material, when that material was never placed before him*

and emerged for the first time as evidence during the Tribunal hearing. "

31. I have elaborated earlier on the evidence placed by Shahinaz before the domestic inquiry panel. Based on the entire evidence confronting the panel I do not find the panel's decision to be capricious, fanciful or prejudiced. In fact at the close of the prosecution case, the panel broke for deliberation for half hour and upon return declared that the Claimant had a case to answer. She refused. The panel's decision of finding the Claimant guilty is but an inevitable conclusion arising from the Claimant's refusal to rebut the evidence before the panel and to offer her version of what transpired. The panels' decision was far from wrong, perverse or moved by *mala fides.* I find the maxim *nullus commodum capere potest de injuria sua propria* that is, no one can gain advantage by his own wrong, to be most appropriate in the circumstances.

32. Next, on the punishment meted out to the Claimant by the Company, that is demotion in salary grade accompanied by a reduction in salary. Though not pleaded nor submitted, the Claimant testified twice that the Company did not have the contractual right to impose the punishment of demotion. To me that set alarum bells. For in the unreported decision of ***Sharikat Permodalan Kebangsaan Berhad v. Mohamed Johari bin Abdul Rahman, Award No. 921 of 2004***, I had examined exhaustively on an employer's right to impose the punishment of demotion and ruled that the power to punish by demotion should be expressly provided contractually or through legislation. It is not a right inherent within management prerogative. I was spared the reason to pursue this path, for the Claimant in cross-examination stated that it was her responsibility to enforce *"procedures set by the HQ under the UEM human resources policy"* and when questioned - *"Do you agree that the Company's HR policy includes that if misconduct committed by an*

employee (he) can be punished with dismissal, downgrading or any lesser punishment?," she replied – "*Yes*." Downgrading means demotion. And the right to downgrade as a punishment, the Company had, under its human resources policy. And what is stated in the human resources policy becomes contractual provided it has been made known to the workman.

33. I find a need to explore at this point whether the action initiated by the Company against the Claimant was actuated by *mala fides*. I have to do this in view of the Claimant's pleadings and evidence led in the Court. It is the Claimant's position that the Company *"wanted to bring in their own people to replace me"* and that one Latifah Mohd Noor ('Latifah') had been appointed as Assistant Manager, Human Resources and Administration even before the Claimant's demotion. The Company, on the other hand, denied the same and took the position in cross-examination of the Claimant that Latifah was assigned to perform the duties of the Claimant after she was suspended from work by the letter dated 6.10.2000. I find the Company's position to be more probable for the reasons that Latifah took over the duties associated with the Claimant's position on the day of the Claimant's suspension from work that is, 7.10.2000 and also because the punishment of demotion subsequently imposed by the Company did not remove the Claimant from her substantive position as Assistant Manager, Human Resources and Administration.

34. Finally, I proceed to that part on whether the punishment imposed upon the Claimant was disproportionate to the guilt of the Claimant. I examine this against the backdrop of the details of the demotion itself. It involved no demotion in status nor position. It was restricted to a reduction in salary grade and consequential reduction in salary. I do not

find the punishment, based on the *factual matrix* of this case to be so disproportionate as to disturb the conscience of the Court. I leave it undisturbed.

Conclusion

35. For the reasons adumbrated, I find that the Company not to have breached any fundamental term of the contract of employment as averred by the Claimant. Instead there was a fundamental flaw upon which the Claimant based her reasoning to cease employment. It was a misadventure. It was not a dismissal. And so she loses.

Order

36. The Claimant's prayer that her dismissal is without just cause or excuse is unfounded and is therefore dismissed.

HANDED DOWN AND DATED THIS 6TH MARCH, 2006.

(N. RAJASEGARAN)
CHAIRMAN
INDUSTRIAL COURT.