

THE INDUSTRIAL COURT OF MALAYSIA

CASE NO. 5(1)/3 – 702/03

BETWEEN

MAYBANK BERHAD

AND

ASSOCIATION OF MAYBANK CLASS ONE OFFICERS (AMCO)

AWARD NO. 788 OF 2007

Before:

TUAN CHEW SOO HO	- CHAIRMAN
YM. RAJA ALIZA BT RAJA AZIDDIN	- PANEL MEMBER FOR EMPLOYERS
MR. S. RAJENDRA PARSHAD	- PANEL MEMBER FOR EMPLOYEES

Venue : The Industrial Court of Malaysia, Kuala Lumpur

Date of Reference : 1.9.2003

Date of Hearing : 29.11.2006
: 19.1.2007 – Written Submission of the Bank
: 31.1.2007 – Written Submission of the Union

Representation : Mr. S. Muhendaran from Messrs Muhendaran Sri
together with Miss G.S. Kavitha
Solicitor for the Union

: Mr. T.M. Varughese from Messrs T.M. Varughese &Co.
Solicitor for the Bank

Reference :

This is a dispute under Section 26(2) of the Industrial Relation Act, 1967 between **Maybank Berhad** (hereinafter referred to as “the Bank”) and **Association of Maybank Class One Officers (AMCO)** (hereinafter referred to as “the Union”).

AWARD

Facts of the Case

The dispute of this case is between the Association of Maybank Class One Officers (AMCO) (hereinafter referred to as the "Union") and Maybank Berhad (hereinafter referred to as "the Bank") with regards to the disciplinary action taken by the Bank against one of the Union members named Yap Siew Chooi who is also known as Cerina Yap (hereinafter referred to as "the Claimant").

The Claimant commenced employment with the Bank as a Class 2 Officer on 2 May 1984 and on 1 July 1991, she was promoted as Class 1 Officer. The Claimant received a letter dated 14 January 1999 from the Bank informing her that a domestic inquiry (D.I.) would be held against her on 25 January 1999 in respect of 3 allegations or charges as follows:

- (i) On 10/3/98 committed a serious act of misconduct by requesting someone else to write your name and forge your signature in the "out" column on the attendance register.
- (ii) On 16/2/98 acted inconsistent with the expectation of the Bank by requesting someone else to write your name in the "out" column on the attendance and only signed out on the next working day.

- (iii) Committed a serious breach of duty by failing to exercise supervision which enabled the above misconducts to be committed by your subordinates.

The D.I. was subsequently postponed from 25 January 1999 to 4 February 1999 by the Bank. Claimant accordingly attended the D.I. which commenced on 4 February 1999 and proceeded for a duration of 9 days until 11 March 1999. Claimant pleaded not guilty to all the charges against her in the D.I. Vide a letter dated 13 July 1999, the Bank wrote to inform the Claimant that the Panel of Inquiry had found the Claimant guilty of the 1st Charge but not guilty of the 2nd and 3rd Charges and that the Staff Committee at its meeting on 30 June 1999 had resolved that the Claimant's increment be stopped for a period of 2 years with effect from 1 July 1999. On 23 August 1999, Claimant wrote her letter of appeal to the Bank asserting that she was not guilty of the 1st Charge and requested the Staff Committee to reconsider the punishment meted out to her. The Bank vide its letter dated 23 October 1999 informed the Claimant that the Staff Committee in its meeting held on 14 September 1999 had rejected her appeal. Consequently, Claimant referred the matter to the Union which made the representation to the Honourable Minister of Human Resources.

The Issues

In so far as the charges leveled against the Claimant are concerned, the Inquiry Panel had found the Claimant guilty on the 1st Charge and not guilty on the 2nd and 3rd Charges and the Staff Committee had meted out the punishment basing

on the decision of the finding of guilt of the 1st Charge against the Claimant vide the Bank's letter to the Claimant dated 13 July 1999 (CLB p.6), therefore, the issue to be determined is whether the Bank had proved the misconduct of the 1st Charge against the Claimant to warrant her punishment.

If it is established that the Bank had proved the 1st Charge against the Claimant, only then will this Court consider the next issue of whether the punishment meted out against the Claimant commensurate with the misconduct committed by her.

This Court will not be able to make a finding from the inquiry notes whether a *prima facie* case had been made out against the Claimant on the 1st Charge as the Bank had not requested for the inquiry notes to be marked as a part of the Bank's bundle of documents nor was it produced through any witness. No evidence had been led by the Bank to establish the validity of the D.I. that had been held and the accuracy of the inquiry notes that had been recorded. Further, from a perusal of the D.I. notes, it is apparent that there was no record to show that the Claimant was called or given the opportunity to give evidence to defend the allegations against her; hence there is a fundamental breach of the principle of natural justice which would vitiate the validity of the said D.I. Nevertheless, a defective D.I. or even the absence of one is not fatal to the proceedings before this Court: see *Ngeow Voon Yean v. Sungei Wang Plaza Sdn Bhd. & Anor* [2004] 1 CLJ 8 C.A. Consequently, this Court will determine this dispute on the facts and evidence produced before this Court

The Law

The powers granted to the Industrial Court to determine the real dispute between the parties on a reference under Section 26 of the Industrial Relations Act 1967 is very wide. This is so stated by the Supreme Court in *Malayan Agricultural Producers Association v. National Union of Plantation Workers* [1992] 1 ILR 287 where His Lordship Harun M. Hashim SCJ said at page 290:

“....., a reference of a trade dispute under s. 26 where the Minister need only identify the parties to the dispute and state a dispute exists between them with regard to the conclusion of a collective agreement, or the dismissal of certain employees, without going into details. In such cases, the Industrial Court is granted very wide powers to determine the real dispute between the parties and may even include matters not specifically claimed by the parties: s. 30(7).”

It is trite law that the Bank bears the burden of proving the misconduct that it charged the Claimant with by producing cogent and convincing evidence; it is not the Claimant who must prove herself not guilty: *Stamford Executive v. Puan Dharsini Ganesan* [1986] ILR February 101. Although the *Stamford Executive's* case is in relation to dismissal cases, nevertheless the basic principle of industrial jurisprudence of an employer having to show why he so punishes his employee is amply clear. The standard of proof is one of a balance of probability: *Telekom Malaysia Kawasan Utara v. Krishnan Kutty a/l Sanguni Nair & Anor* [2002] 3 CLJ 314.

Evaluation & Findings

The only relevant charge for this Court to consider in the instant case against the Claimant is the 1st Charge which states:

“On 10/3/98 committed a serious act of misconduct by requesting someone else to write your name and forge your signature in the “out” column on the attendance register.”

The main and sole ingredient of this charge is that the Claimant had made request to someone to write her/Claimant’s name and to forge her signature in the “out” column in the attendance register. The relevant attendance register for the relevant date of 10 March 1998 is produced as CLB p.4 in the Union’s bundle of documents. This particular attendance register is not in dispute so is the particular entry No. 13 in the “out” column which is the subject of the charge. Was there a request made by the Claimant to someone to do the acts as alleged in this charge? It is clear from the evidence adduced that no evidence was ever produced by the Bank as to show that a request was made by the Claimant to someone; who that “someone” was is in fact not known. In short there is absolutely no direct evidence from the Bank to prove the ingredient of the Claimant having made such a request to someone as in this 1st Charge against the Claimant. The evidence for which the Bank had solely relied on is basically circumstantial from the handwriting expert, Mr. Siow Kwen Sia (COW2), who on 16 November 1998 was requested by the Bank to determine the authorship of the written entries of not only the Claimant but also

of Intan/Asmah on some H.O. Building Management attendance register forms. In his evidence vide Witness Statement COW2-S, COW2 testified that he is a Forensic Document Analyst; his qualifications and experience are as stated in COB p.8-9. Upon the request by the Bank, he had conducted study and examination with regard to the handwriting and signature in line No. 13 in the "Out" column in the attendance register dated 10 March 1998 (CLB p.4); his findings and conclusions are as stated in his report enclosed in COB p.10-18 (the original copy is tendered as COB1-A but for ease of reference, this Court will use COB p.10-18 in the Bank's bundle of documents) with specific reference to Cerina Yap, the Claimant at pages 12 and 13. At COB p.13, on the "questioned signature of Cerina Yap", COW2 concluded that it "was of different authorship from the specimen signatures" and on the writing of the "questioned name of Cerina Yap on Maybank HOBM attendance register form dated 10.3.98 (D)", he concluded that it "was very likely to be written by Asmathwati".

The Union has submitted extensively on the law pertaining to the evidence of a handwriting expert. The Bank, on the other hand, submitted that the law and authorities cited refer to criminal cases where the standard of proof is beyond reasonable doubt and hence are not applicable to the instant case and are thus distinguishable. On this point, this Court will depart from the view as expressed by the Bank in its submission. Principles of law in criminal cases are not *per se* inapplicable to industrial cases by virtue of the criminal standard of proof of beyond reasonable doubt being different from the applicable standard of a balance of probability for industrial cases especially when the standard of proof

is not an issue for determination. Principles of law relating to the nature of the handwriting expert's evidence or the evaluation of the evidence of the handwriting expert in a case be it criminal or civil, will be applicable with equal force in industrial cases as long as they are relevant to the issue in question and the assessment of it is in accordance with the respective standard of proof of that particular case.

Is COW2 an expert witness?

Claimant has submitted that the failure of the Bank to lead evidence from this witness to affirm that his evidence given in Court in his past experience had been accepted by the courts renders COW2's credibility as an expert witness doubtful. Claimant's submission is based on the salutary advice of how to lead the basic evidence of an expert witness as propounded in the case of *Wong Chop Saow v. P.P.* [1965] 1 MLJ 247 as quoted in *P.P. v. Lin Lian Chen* [1991] 1 MLJ 316 as follows:

“the expert witness should give his evidence as follows. He should first state his qualifications as an expert. He should then state that he has given evidence as an expert in such cases and that his evidence has been accepted by the courts.”

It must be appreciated that the intent and/or purpose of the above quoted procedure is to establish the expertise of the witness as an expert in the field he is called in. In other words, if the said procedure to lead evidence to establish

the expertise of a witness is not followed, that witness will not be construed as or is not proved to be an expert witness. In our instant case, this is indeed a non issue as counsel for the Union had categorically informed this Court and this Court has so recorded that the Union was not disputing the fact that COW2 is an expert after COW2 had tendered his qualifications and experience vide COB p.8-9 while giving evidence. There is also no cross-examination as to his qualification and his previous evidence in courts being accepted by the courts or otherwise. Therefore this submission by the Union as to the doubt in the status of COW2 as an expert witness ought therefore to be rejected. This Court accepts that COW2 is an expert witness in this case.

Can COW2's evidence be accepted independently and without corroboration?

In *P.P. v. Mohamed Kassim bin Yatim* [1977] 1 MLJ 64, His Lordship Hashim Yeop A. Sani J (as he then was) said at page 67 of the following:

“Evidence of experts can never go beyond an opinion and can never therefore be of absolute certainty. It has always been accepted that expert evidence especially of handwriting can never be conclusive. But the proper way to assess the evidence in this case would be to see whether the court could act on such evidence if there was corroboration either by direct evidence or circumstantial evidence. It is only with such approach that a proper decision can be arrived at.”

The above approach to handwriting expert's evidence was endorsed by the Supreme Court in *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1.

In *The Law of Evidence* by Ratanlal & Dhirajlal 18th Edition 1992 page 165 on the topic of handwriting, the learned author said,

“Though the opinion of a handwriting expert on the question of the handwriting of a person is relevant it is not conclusive and the handwriting of the person can be proved by other means also.

Mere variation in the appearance of the signatures or handwriting does not disprove the authenticity of the signature or handwriting, because a fine or a stub pen, haste or deliberation, good or bad health, sitting or standing position, drunken or sober state of a person may radically change the appearance or quality of writing. Dissimilarity between the admitted impression of the accused and that on the document due to difference in ink and angle of the impression was held to be superfluous and not of positive impact. The expert opinion on handwriting can raise a suspicion as to the genuineness of a document but it is of no moment unless confirmed by other evidence. The expert must, in addition to lapse of time, take all the above factors into consideration before expressing his final opinion with regard to the signature on a disputed document. ...”

This Court is of the view that the above principles of law expressed in *Mohamed Kassim bin Yatim's* case and *The Law of Evidence* by Ratanlal & Dhirajlal are general principles of law governing the evidential value of an expert witness under section 45 of the Evidence Act 1950. Such principle is equally applicable to civil cases. This can be seen in *Dr. K. Shanmuganathan (Suing by his Attorney D. A. Puraviappan) v. Periasamy s/o Sithambaram Pillai* [1994] 2 CLJ 225 where His Lordship Dato' Peh Swee Chin SCJ had held, *inter alia*, as follows:

“[4] A handwriting expert seems more like an art or music expert rather than a medical expert or chemical expert. The difference between science and art is that science is associated with demonstrable truths while art is associated with a great deal of imagination. The evidential value of such an art is very questionable and can never be conclusive.”

From the principle of law recapitulated above, what is expressed of a handwriting expert's evidence is that such evidence being opinion evidence can never be conclusive by itself and that corroboration, be it by direct evidence or circumstantial evidence, is needed before such evidence is to be accepted. This Court holds that such principles are applicable to industrial cases as in civil cases.

The Bank has submitted 3 authorities of *United Malayan Banking Corp. Bhd. v. Poon Fook Soo* Kuala Lumpur High Court Civil Suit No. D5-22-1265-1992, *Malayan Banking Bhd. v. Shanker Kanavel* [1997] 1 ILR 992 and *Elizabeth*

Chew Yee Fung v. Leong Fook Ngen [2001] 6 MLJ 403 where COW2's evidence as a handwriting expert had been accepted by the courts. It must be noted that in *United Malayan Banking Corp. Bhd's case*, COW2's expert evidence was accepted basically because his evidence was not credibly challenged; the learned JC Dato' Kamalanathan Ratnam (as His Lordship then was) said:

“His clear, didactic exposition of his analysis as contained in his 22-page report has not been credibly challenged. Even when an opportunity was given to take the challenge, the plaintiff declined.”

If the plaintiff declined to challenge the report of the handwriting expert, it is trite law that such a failure would amount to an acceptance of the evidence. In the *Malayan Banking Bhd's case*, the handwriting expert's evidence was “accepted by the Court to substantiate the evidence of other witnesses of the bank”; in other words, there is a need for mutual corroboration. And in *Elizabeth Chew Yee Fung's case*, the Court accepted the handwriting expert's evidence “in view of the total absence of any form of challenge against the evidence of PW1 as to his expertise and method adopted to examine the disputed signature” (referred p.410 in the same cited case).

In our instant case, the Claimant has challenged the evidence of COW2 extensively. This Court is urged to reject COW2's evidence on numerous flaws and doubts in his evidence. Having considered the evidence of COW2 vide his Witness Statement and oral evidence in Court together with his report COB p.

10-18 (COB1-A inclusive) and all evidence before this Court as a whole, this Court agrees that there were doubts created in the evidence of COW2 giving rise to grave doubts in his findings and conclusion in respect of the signature and writing in Entry No. 13 in the “Out” column in the Attendance Register dated 10 March 1998 (CLB p.4) which implicated the Claimant.

The handwriting expert’s (COW2’s) conclusion on signature

Referring to COW2’s conclusion at COB p. 13 (hereinafter referred to as “the 1st conclusion”) on the “questioned signature” of Cerina Yap (the Claimant), COW2 after making the comparison, concluded as follows:

“CONCLUSION: The questioned signature of Cerina Yap D was of different authorship from the specimen signatures.”

The specimen signature of the Claimant was of paramount importance as they formed the basis of COW2’s 1st conclusion. In short, without these specimen signatures of the Claimant, COW2 would not have been able to conduct the necessary analysis or comparison in order to arrive at his 1st conclusion whether the questioned signature in CLB p.4 Entry No. 13 “Out” column was that of the Claimant or someone else. These specimen signatures were referred to as “S1” to “S6” in COW2’s report at COB p.10 which included not only the specimen handwritings/signatures of the Claimant but also those of one called Asmah. COW2 said in cross-examination that the Claimant did not

tell him that the specimen marked “S1” to “S6” were her signatures. COW2 said that he had no personal knowledge as to whose signatures “S1” to “S6” were as he was only told by the Bank that they were Claimant’s specimen signatures. In spite of this challenge by the Union, the Bank did not call any witness nor produce any evidence at all to prove that the specimen signatures for which COW2 made the comparison with CLB p.4 were the specimen signatures of the Claimant, Cerina Yap. Further, the Bank also failed to cross-examine the Claimant by showing her “S1” to “S6” and seeking her to confirm that these were her specimen signatures. By the failure of the Bank to lead any evidence to establish whose specimen signatures “S1” to “S6” were, it has created a gap in the Bank’s case and it gave rise to a clear doubt whether COW2 was comparing the questioned attendance register CLB p.4 with the specimen signatures of the Claimant or Asmah or someone else. On this grave doubt as to whose specimen signatures that COW2 was making the comparison with CLB p.4, the conclusion arrived at by COW2 to implicate the Claimant may not be correct at all.

In addition, in relation to “S1” to “S6”, COB p.10 said as follows:

“A.1 Specimens Submitted

Six 1997 Maybank HOBM attendance register forms dated

11.6.97, 16.6.97, 17.6.97 S1 to S3

18.6.97, 21.6.97 and 8.7.97 S4 to S6

(specimen handwritings/signatures of Asmah and Cerina).”

Since "S1" to "S6" were said to be the specimen handwritings/signatures of Asmah and Cerina, which were those of Asmah and which were those of Cerina were unexplained and not known. "S1" to "S6" were exhibited in COB p.18 and it was stated by COW2 as well as the type-written words at the top of COB p.18 that these were Cerina Yap's signatures. Are they also Asmah's specimen signatures from the above record in COB p.10 since Asmah's specimen handwritings/signatures were also contained in "S1" to "S6"? If not, where are Asmah's specimen signatures in "S1" to "S6" in COB p.18? Was there a separate document of "S1" to "S6" for Asmah? If there was, where were those separate specimen signatures of Asmah? The original specimen signatures annexed to COB1-A did not include any other specimen marked "S1" to "S6" apart from the same one as exhibited in COB p.18. Anyway, COW2 had no personal knowledge of the specimen signatures of the Claimant. Similarly, there is no evidence that he had personal knowledge of Asmah's specimen signatures. That being the case, how would COW2 be able to distinguish which specimen signatures in "S1" to "S6" which purportedly consisted of both the specimen signatures, belonged to the Claimant and which belonged to Asmah? With all these lingering doubts which the Bank had failed to clear, this Court holds that the 1st conclusion arrived at by COW2 basing on these specimen is fundamentally flawed on the fact that COW2 had conducted his analysis or comparison on specimen which are not proved to be those of the Claimant.

Referring to COB p.10 paragraph A.1 of COW2's report, Claimant submitted that COW2 testified that he had obtained the specimen handwritings and signatures of the Claimant marked C5 to C7 which was taken from the March

1998 attendance register. However, COW2 testified that he did not use this specimen marked C5 to C7 which were contemporaneous to the date of the charge of misconduct on 10 March 1998 for analysis or comparison with the Entry No. 13 in the “Out” column in CLB p.4 but instead he used the specimen S1 to S6 which were supposedly to have been written or signed in 1997, that is, one year before the alleged misconduct. COW2 did not offer any explanation as to why he chose to compare specimen of one year old than to compare with contemporaneous specimen of the same month of the alleged misconduct. What would be COW2’s conclusion if he were to conduct his analysis by comparing the contemporaneous specimen handwritings/signatures with Entry No. 13 in the “Out” column in CLB p.4? Would he have come to the same conclusion or otherwise? In such a case, this Court would like to echo what had been said by His Lordship Winslow J of the evidence of an expert called by one party as against the opposing party in *Ong Chan Tow v. Regina* (1963) 29 MLJ 160 @ 162 as follows:

“The expert called for the appellant would naturally tend to give evidence in favour of the appellant’s version – otherwise he would not have been called as a witness – and to that extent, every such witness can be said to be biased against the version of the other side.”

See also *Sarkar on Evidence* 15 Edition 1999 at page 915. This Court tends to agree with the submission of the Claimant that the failure of COW2, without any explanation, in comparing contemporaneous handwritings/signatures specimen with the questioned handwritings/signatures in CLB p.4 but instead choosing to

compare it with specimen of one year ago, gives rise to a doubt as to his unbiasedness in reaching his 1st conclusion. It is also undoubted that there is absolutely no evidence from the Bank to support or corroborate the 1st conclusion of COW2. On the Entry No. 13 CLB p.4 at the “Out” column, Claimant had testified that she wrote her name, the time and signed her signature therein refuting the 1st conclusion of COW2 that it was not her signature. In *Sarkar on Evidence (supra)* at page 916, it was expressed that:

“The unsupported evidence of experts in hand-writing will not avail against the denial on oath of the alleged writer himself [*Paquin v. Turcotte*, QR 35 SC 266; *Ethier v. Labelle*, QR 33 SC 39; *Deschenes v. Langlois*, QR 15 KB 388; Canadian cases cited in Best, on Ev 11th Ed p 240]”

Claimant had virtually denied on oath of the allegation that it was not her writings and/or signature in CLB p.4, hence the unsupported evidence of COW2 will not avail.

COW2’s conclusion on the handwriting

At COB p.13 of COW2’s report, COW2 had arrived at the following conclusion on the handwriting of the questioned name of Cerina Yap (the Claimant) (hereinafter referred to as “the 2nd conclusion”) as follows:

“CONCLUSION: Therefore, from these similarities, I concluded that the questioned name of Cerina Yap on Maybank HOBM attendance register form dated 10.3.98 (D) was very likely to be written by Asmahwati.”

COW2 had made comparison of the entries of Cerina Yap as shown in paragraph D.1 in COB p.12 where specimen handwritten names of Cerina Yap Siew Chooi were used. By looking back at COB p.10, these specimen handwritings referred to were the same “S1” to “S6” which also comprised of the alleged Claimant’s specimen signatures. As there was no evidence from the Bank to prove that these specimen handwritings or any other specimen referred to were the handwritings of the Claimant and the evidence of COW2 to say that he did not know whose handwritings “S1” to “S6” actually were, this Court will adopt the above-stated findings in respect of COW2’s 1st conclusion that there were grave doubts on the findings and conclusion of COW2 in relation to the handwritings of the Claimant as he had found in paragraph D.1 in COB p.12. In addition, this Court notes that COW2 had made comparison of what were not found in the questioned name in CLB p.4, that is, the dissimilarities of the handwritings but had never looked into its similarities. This Court is certainly not an expert in handwriting but this Court is of the view that it is only natural to perceive in all fairness that if we want to ascertain whether the particular person is the writer, the first thing to look at is to see if he is the writer of the writings by which all the similarities of the writings and the specimen are to be looked into before winnowing the dissimilarities to conclude that he is not the writer. This Court is of the opinion that COW2 in failing to look into the similarities in the handwritings but only the dissimilarities had virtually ruled out

the possibility of the Claimant being the writer of the questioned writings in advance and in the circumstances, COW2 did not act with impartiality.

On the 2nd conclusion, the Bank did not call Asmahwati to corroborate the finding and conclusion of COW2 that she was likely to be the one who wrote the name of Cerina Yap on Entry No. 13 in the “Out” column in CLB p.4 nor did the Bank call any other evidence in support. On the contrary, Claimant had produced Asmahwati bt Jaafar’s declaration CLB p.17 which she signed on 19 August 1999 in the presence of a witness asserting emphatically that the handwritten name and signature of Cerina Yap on the attendance register dated 10 March 1998 was not written and signed by her. By this material documentary evidence CLB p.17 which the Bank had never objected or even attempted to challenge, it had totally refuted the 2nd conclusion of COW2 that the questioned name of Cerina Yap was very likely to be written by Asmahwati. The 2nd conclusion of COW2 is thus not only uncorroborated but contradicted directly. Apart from CLB p.17, this Court is of the view that COW2 had not made a fair comparison of the handwritings for reason that COW2 only made comparison of the similarities without looking into dissimilarities of Asmah’s handwriting before concluding as he did. In *Sarkar on Evidence (supra)* at page 920 and 921, the learned author said of the true test to be applied as follows:

“In examining a disputed document the true test is not the extent of the similarities observed when compared with genuine documents, as forged documents usually are good imitations, but the nature and extent of the

dissimilarities noticed. It is these differences which expose the true character of the document in question [*Raviappa v. Nilkanta*, A 1962 Mys 53] ...The opinion of handwriting expert on glaring similarities would not be of much value. In any serious attempt the forgers achieve some similarities and may even bring about glaring similarities. [*Mrs. Maria Piedade D'Souza v. M. Narayanaswamy*, A 1984 NOC 139 (Kant) : (1983) 2 Kant LJ 135]”

Had COW2 looked into the dissimilarities of Asmahwati's writings when comparing the questioned handwritings but rejected them with reasons before accepting the similarities to arrive at his conclusion, this Court is prepared to accept the fact that COW2 had indeed conducted a fair analysis which may lend credence to his conclusion. However, COW2 had chosen to base his findings and conclusions in respect of the Claimant, on dissimilarities alone and in respect of Asmahwati, on similarities alone. For the above reasons, this Court finds doubts in the findings and 2nd conclusion of COW2.

Corroboration

Evidence before this Court is amply clear that there is no direct evidence from the Bank to corroborate the findings and conclusions of the handwriting expert. Circumstantial evidence in this case too did not support an inference that the Claimant had requested someone else to write her name and sign for her on 10 March 1998. The undenied and undisputed fact is that Claimant was working on 10 March 1998 and the Document Tract Record as appeared in CLB p.14-16

showed that these 3 documents were received by the Claimant's department on 10 March 1998 and Claimant had attended to these documents at 6.05 p.m. where she filled in item 2 the name of her Manager, "Y.P. Seng", the date "10/3" and the time "6.05" after she had initialed on the last column in item 1 which was filled up by the clerk of the department who received the mail and stamped with the round date and time stamp on the top of CLB p.14-16. CLB p.13, an extract from the in-coming mail register of the Claimant's department, also showed that on 10 March 1998, mails were received and Claimant had initialed with the time of 6.05 p.m. The signing out time in the attendance register CLB p.4 at Entry No. 13 was 6.15 p.m. In term of time, if the Claimant was still working at 6.05 p.m., it would be consistent if she were to sign out at 6.15 p.m. Unless evidence or facts were to show that Claimant was no longer working and was elsewhere before the signing out time of 6.15 p.m., it would then be reasonable for this Court to draw an inference that Claimant could not have signed out at 6.15 p.m. as she was not in her office by that time and hence she must have requested someone else to write her name and sign for her in the attendance register. In the absence of any such evidence or facts that the Claimant was longer in her office when the attendance was allegedly written and signed in her name, this Court finds no apparent reason and no basis for the Claimant to have done as per the 1st Charge against her. On account of this, this Court holds that circumstantial evidence of the case does not corroborate or support the findings and conclusions of COW2 in paragraph D.1 to D.3 in COB p.12-13 of his report.

The Bank has submitted that the Claimant had admitted that she had on 16 February 1998 failed to write her name in the attendance register at the sign out column. This to this Court, has no bearing on the 1st Charge against her as she did not admit to not writing her name on 10 March 1998 on the attendance register.

Conclusion

For all the reasons and findings of this Court as adumbrated above, this Court holds that no weight is to be given to the evidence of COW2 especially on his findings and conclusions and his report COB p.10-18 (COB1-A). The Bank's case which relied solely on the evidence of COW2, must perforce fail. Consequently, this Court holds that the Bank had failed to prove the 1st Charge against the Claimant on a balance of probability and that the Bank had not acted reasonably in concluding that the Claimant had committed the misconduct as in the 1st Charge thereby punishing her forthwith in line with *Ferodo Ltd. v. Barnes* [1976] ICR 39 and *British Home Stores Ltd. v. Burchell* [1980] ICR 303 as submitted by the Bank. In equity, good conscience and the substantial merits of the case, the finding of guilt and the punishment meted out against the Claimant was therefore unjustified.

The Union's claim is therefore allowed.

Award

The Bank is hereby ordered to withdraw the finding of guilt of the 1st Charge against the Claimant and to withdraw the punishment meted out against the Claimant of stoppage of increment for two years effective from 1 July 1999 till 30 June 2001 (CLB p.6).

It is further ordered that the Bank do pay to the Claimant all the salary increments from 1 July 1999 to 30 June 2001, the difference in bonus, salary adjustment and Employment Provident Fund from 1 July 1999, less any statutory deduction if any, within 30 Days from the date of this Award hereunder.

HANDED DOWN AND DATED THIS 10 OF APRIL 2007

**(CHEW SOO HO)
CHAIRMAN
INDUSTRIAL COURT MALAYSIA
KUALA LUMPUR**