

**IN THE INDUSTRIAL COURT OF MALAYSIA
CASE NO. 21(31)(21)/4-2760/18**

BETWEEN

MOHD NIZAM BIN BAHAROM

AND

TENAGA NASIONAL BERHAD

AWARD NO. 305 OF 2021

(to consolidate with Case No. 21(31)(21)/4-2761/18 and 21(31)(21)/4-2762/18
via Interim Award No. 1701 of 2019 dated 12.06.2019)

Before : **Y.A. SYED NOH BIN SAID NAZIR @
SYED NADZIR**
Chairman

Venue : Industrial Court of Malaysia, Kuala Lumpur

Date of Reference : 25.09.2018

Dates of Mention : 13.11.2018, 24.01.2019, 04.03.2019 &
13.03.2019

Dates of Hearing : 25.06.2019, 28.06.2019, 16.08.2019,
26.08.2019, 27.08.2019, 13.11.2019,
19.11.2019, 14.02.2020, 19.02.2020,
24.08.2020, 25.08.2020 & 09.10.2020

Representation : Mr. V.K. Raj
together with him, Mr. L K Pong
Messrs A. Rajadurai P. Kuppusamy & Co
Counsel for the Claimant

Ms. Wong Keat Ching
together with her, Ms. Syazwani Binti Suhaimy
Messrs Zul Rafique & Partners
Counsel for the Company

Reference:

This is a Ministerial reference made under Section 20(3) of the Industrial Relations Act 1967 (“the Act”) arising out of the dismissal of **1. Mohd Nizam Bin Baharom 2. Shariman Bin Shammim 3. Mohd Zul Husni Bin Che Mail** (hereinafter referred to as “the Claimant”) by **Tenaga Nasional Berhad** (hereinafter referred to as “the Company”) on 26.04.2018.

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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 26.04.2018. This case was transferred from Court 21 to Court 31 on 27.05.2019 with the instruction to proceed with the hearing before the Task Force Chairman of Court 31 and was further transferred back to this division of Court 21 on 06.01.2020 before the current Chairman pursuant to the instructions from the Chamber of the learned President of the Industrial Court of Malaysia in order to complete the Hearing and for a final award be handed down.

FACTUAL MATRIX

[2] The dispute before this Court is over the dismissals of Mohd Nizam Bin Baharom ("The First Claimant"), Shariman Bin Shammim ("the Second Claimant"), Mohd Zul Husni Bin Che Mail ("The Third Claimant") from the services of the national utility Company i.e. Tenaga Nasional Berhad ("the Company"). The First Claimant testified as "CLW-1", the Third Claimant testified as "CLW-2" and the Second Claimant testified as "CLW-3". For the purpose of this Award, the First Claimant, the Second Claimant and the Third Claimant, shall be referred to as CLW-1, CLW-3 and CLW-2 respectively.

[3] Pursuant to Section 29 (g) of the Industrial Relations Act 1967 the case of CLW-3 registered under Case No. 21(31)(21)/4-2761/18 and CLW-2's case registered under Case No. 21(31)(21)/4-2762/18 were consolidated with the case of the First Claimant as registered hereunder pursuant to the Interim Award No. 1701 of 2019 dated 12.6.2019.

The Claimants Employment History

[4] The First Claimant was initially employed by the Company as a “Juruteknik Tingkatan Biasa” with effect from 15.6.1995. During the First Claimant's tenure in employment, he was transferred or re-designated to various positions. The Claimant's last held position in the Company was “Juruteknik Tingkatan Biasa ‘A’ (Gred TT12)” and his last drawn salary was RM4,830.00 per month.

[5] The Second Claimant was initially employed by the Company as a “Juruteknik Tingkatan Biasa” with effect from 15.7.2003. During the Second Claimant's tenure in employment, he was transferred or re-designated to various positions. The Claimant's last held position in the Company was "Juruteknik Tingkatan Kanan ‘B’ (Gred TT11)” and his last drawn salary was RM3,551.00 per month.

[6] The Third Claimant was initially employed by the Company as a “Juruteknik Tingkatan Biasa” with effect from 1.1.2009. During the Third Claimant's tenure in employment, he was transferred or re-designated to various positions. The Claimant's last held position in the Company was “Juruteknik Tingkatan Biasa ‘A’ (Gred TT10)” and his last drawn salary was RM2,656.00 per month.

Events Leading To the Claimants' Dismissal

[7] The events leading to the Claimants' dismissal from the services of the Company are as follows:

- 7.1 On 13.7.2014 at about 8.00 pm, the First Claimant as a "Orang Berkebenaran" or Authorised Person ("AP") had applied for authorisation from Regional Control Centre ("RCC") and was given the Authorisation Serial No. 605948 (COB-3, page 9) to carry out work to repair the fault between "Pencawang Elektrik Padat Sek. Keb. Kg. Melayu Subang" to "Pencawang Elektrik Subang Low Cost".

- 7.2 On 13.7.2014 between 9.00 pm to 10.00 pm., the First Claimant instructed and handed over the abovesaid task of cable phasing test at "Pencawang Elektrik Padat Sek. Keb. Kg. Melayu Subang" to "Joint Pit" to "Pencawang Elektrik Subang Low Cost" (the Site) to another "Orang Berkebenaran" or Authorised Person ("AP"), which is the Second Claimant without revoking the Authorisation Serial No. 605948 and without informing Regional Control Centre ("RCC"). These actions were in breach of the Company's procedure in "Atucara Keselamatan Elektrik 1996 ("AKE")" and "Prosedur Pensuisan (Bil. 11/2002)".

- 7.3 The First Claimant then left the Site to another work site at Anshin, Shah Alam. Hence, the first Claimant was not at the Site to conduct or supervise the cable phasing test.
- 7.4 The First Claimant as the AP who had received the official Authorisation Serial No. 605948 was not present at the Site to conduct and/or monitor the cable phasing test which was in breach of the Company's procedure in "Aturan Keselamatan Elektrik 1996 ("AKE")".
- 7.5 The Second Claimant then took over the task of the First Claimant without informing the Regional Control Centre ("RCC") to apply for a new authorisation to continue the task of cable phasing test at the Site.
- 7.6 Then, the Second Claimant instructed and handed over the task of cable phasing test without any official work order or documents to "Orang Berkecekapan" or Competent Persons ("CP") who were the Third Claimant and Sabri Bin Nek Mat (Sabri). Such actions were in breach of the Company's procedure "Aturan Keselamatan Elektrik 1996 ("AKE")".
- 7.7 The Second Claimant also handed over two (2) units Master Key type Abloy and Garrey for "Pencawang Elektrik Padat Sek. Keb Kg Melayu Subang" to the Third

Claimant and Sabri who were only Competent Persons (“CP”) without the Company's permission.

7.8 The Second Claimant then left the Site to another work site in Anshin, Shah Alam. He too was not at the Site on the night of 13.07.2014.

7.9 The cable phasing test conducted by Third Claimant and Sabri was unsuccessful.

7.10 Consequently, at about 11.50 pm (on 13.7.2014), an accident occurred at the Site in particular at the Joint Pit as a result of a flashover which later caused the death of the Company's employee, Hairuinizam Bin Abu Hasan (Hairulnizam) and also caused serious injuries to two other Company's employees, Mold Yatim Bin Hamzah (Yatim) and Syamsul Hadi Bin Sanusi (Syamsul).

7.11 The accident occurred when the late Hairuinizam was in the Joint Pit to assist the cable phasing test between "Pencawang Elektrik Padat Sek. Keb. Kg. Melayu Subang" to "Joint Pit" to "Pencawang Elektrik Subang Low Cost".

COMPANY'S CASE

[8] It was averred that based on the Company's investigation, the cause of the accident which resulted in the death of Hairulnizam was due to the Earth Switch human error in particular the Feeder of the Ring Main Unit ("RMU") was switched from "OFF" to "ON" at "Pencawang Elektrik Padat Sek. Keb. Kg. Melayu Subang"; which was not a mechanical error.

[9] The Company averred that the Claimants' failures and/or blatant disregard of the Company's safety procedures and policies namely "Aturan Keselamatan Elektrik 1996 ("AKE")" had led to the fatal accident involving Hairulnizam.

[10] The Company further averred that as the Company was conducting its investigation, CLW-3 and CLW-2 gave false statements to Puan Noor Sa'edah Binti Selamat (Jurutera Keselamatan) when stated that CLW-3 as an Authorised Person ("AP") was present at the site and had carried out the cable phasing test at the Site assisted by CLW-2 and Sabri, when it later turned out that CLW-3 was not present.

[11] The Company decided to inquire further into the incident whereby Notices of Domestic inquiry dated 30.9.2015 were issued by the Company requiring all three Claimants to attend a Domestic Inquiry to answer the charges of misconduct as specified therein (the DI) (COB-1, page 26 — 38),

to which the Claimant pleaded not guilty when the domestic inquiry commenced on 08.03.2016.

[12] Upon the conclusion of the DI on 23.04.2018 and after having deliberated on the facts and evidence adduced at the Inquiry, including the testimonies of all the witnesses and considering all material documentary evidence that were produced during the Inquiry including that of the Claimants and after deliberating the respective submissions of parties, the “Jawantakuasa Tata tertib Bagi Kumpulan Bukan Eksekutif, TNB” (Disciplinary Committee for Non-Executives) (Disciplinary Committee) unanimously found CLW-1 guilty of Charges 1 and 2 and not guilty of Charge 3 while CLW-3 and CLW-2 were guilty of all the charges preferred against them.

[13] As the Company considers that the misconduct were utterly serious the Company had no alternative but to dismiss them from service with effect from 26.4.2018.

CLAIMANT’S SUBMISSION

[14] It was undisputed that authorization was not cancelled. However, the Claimant submitted that the non cancellation by CLW-1 of the authorization was not the cause of the death of Hairulnizam bin Abu Hassan (the deceased). Whether the authorization was cancelled and obtained again by CLW-3 (AP2), would not have made any difference as the death was not caused by CLW-1. Moreover, the deceased was never supposed to be at site in the first place as he was not on the standby list that week, as admitted even by the Company's witnesses.

[15] It was submitted that CLW-3 did not in fact perform the phasing work, but was performed by CLW-2 along with En. Sabri. On this ground it was submitted that the charge must fail for the sole reason that it was never the case in the first place. Even if CLW-1 had instructed CLW-3 (which is denied), the phasing work was not performed by CLW-3. Furthermore, the Company had failed to prove the actual cause of the flashover incident but had merely made attempts to establish that the said incident was caused by "human error". No evidence was given as to who in particular made that error. It is submitted that this "human error" cannot be attributed to the Claimants in this present case.

[16] The Claimants further submitted that the Company failed to rebut the fact that the jointer team had started work before the PTW was issued. It was testified in examination in chief (CLWS-1) by CLW-1 that the jointer team had begun working prior to the issuance of the PTW. CLW-1's evidence was corroborated by the testimony of Abdul Mutalib during DI that PTW was not issued prior to the cable jointer works by the jointer teams but the PTW was issued after the incident on the instruction / discussion between the whole team and En. Faiz (COW-4) on 13.07.2014.

[17] The Claimants emphasised that CLW-1 had not cancelled the authorization as he intended to return to the work site at Kg. Melayu Subang in view of his testimony that he held four (4) authorizations on that particular night which was not challenged by the Company.

[18] As such, it is submitted that CLW-1 is not required to cancel the authorization as he had intended to return to the work site at Kg. Melayu

Subang. CLW-3 had also testified during trial that he had never requested for an authorization throughout his service with the Company and had always been assisting CLW-1. The Claimant argued that the practice of the Company had always been the same, and the cancellation of the authorization is only necessary if and when CLW-1 does not intend to return to the site.

[19] It is further submitted that at that material time, the Claimants had been on standby the entire week (last page of CLW-1's Rejoinder) and there were 12 breakdowns in total within the said week. In this regard, the Claimants and the rest of their team members were exhausted. The issues of lack of manpower, in particular, the number of APs available were raised by the Claimants as it can be seen in the report made by COW-4 (CLB-4, Page 18) wherein it was reported that there were issues of continued work pressure that had caused exhaustion and lack of focus. It was also reported that one of the accident was the shortage of Authorized Persons (AP).

[20] The Claimants further submitted that the Claimants had been on standby that week. The deceased on the other hand, was not in the standby list for the week in question. The Claimants disputed the blame on them when the deceased was not supposed to be on site in the first place. Furthermore, since the PTW (permit to work) was never issued before commencement of work, no work should have been done until the PTW was issued.

[21] It was argued in the submission that the authorization is merely a formality the cancellation of which has no bearing to the accident that happened on the night of 13.07.2014 and in the circumstances urged this Court to find that CLW-1 not guilty of the first charge.

[22] The essence of the second charge preferred against CLW-1 is that he was not present at the work site to carry out the phasing work which had caused a death and in breach of the "Aturan Keselamatan Elektrik 1996" (AKE) and "Prosedur Pensuisan (Bil. 11/2002)".

[23] In this regard, the Claimants submitted that there is nothing in the AKE or the "Prosedur Pensuisan" which requires CLW-1 to be present at the site at all times. On the contrary, it was submitted that the AKE provides the authority and power to an AP to give permission to the rest of his team to do further work (AKE, Paragraph 3.4.2). More importantly, paragraph 3.4.2 of the AKE does not state that the AP is required to be on site throughout the entire process. This only serves logic and common sense because there were 12 breakdowns in the week concerned, and the Company was understaffed. Hence, the need for the APs and CPs to be mobile and be present in several locations on the same night to handle power breakdown.

[24] On the Company's contention that high voltage work must be done by the AP, the Claimants submitted that the certificate issued by the Company itself (CLB-3, Page 15) certifies that CLW-3 (CP) himself has the qualification of handling works, which include "menguji" of up to 33kv. The Claimant referred to paragraph 3.4.1 of the AKE (COB-3, Page 28) where it is clearly stated that "Penyuisan Volta Tinggi hanya boleh dijalankan oleh Orang Berkebenaran atau **Orang Berkecekapan** yang dibenarkan khusus untuk penyuisan..."

[25] The Claimants drew this court's attention to the report produced by COW-2, whereby it was recommended to ensure that all APs and CPs understand their scope of work (CLB-4, Page 19). In this respect, the

Claimants submitted that the Company has full knowledge that CPs have been doing phasing work and that to now contend that it is wrong for a CP to do phasing work sounds hollow and must be rejected. As the issue of lack of manpower (AP & CP) was duly reported, it shows that the Company had knowledge that CPs have been performing phasing work. It would have been impossible to otherwise complete the work required when there are insufficient APs to carry out these works.

[26] As such, the Claimants submitted that CLW-1 is not guilty for both the charges based on the aforesaid. CLW-1 was found not guilty on the third charge, and as such, this Court shall not deliberate on the third charge that was levelled against CLW-1.

[27] The main essence of the first charge preferred against CLW-2 is that he had acted out of his qualifications/authority by performing phasing work.

[28] The Claimants contended that the Sijil Kecekapan issued by the Company (CLB-5, Page 15) is evidence that CLW-2 has the authority to perform high voltage work of up to 33kv. The Sijil Kecekapan clearly provides CLW-2 the qualification and authority to perform "ujian perfasaan". The Claimant submitted that on this basis alone, CLW-2 cannot be said to be guilty of the first charge.

[29] The Claimants reiterated that, nothing in the AKE shows that a CP is not allowed to perform phasing work. Instead, it is clearly stated that an AP "boleh memberi keizinan am untuk kendalian suis-suis, pengasing-pengasing, suis-suis pbumian, atau pemasangan atau penanggalan cantuman pbumian, dan penyambungan bekalan ujian ke bahagian yang telah

diasingkan." (COB-3, Page 29 – Paragraph 3.4.2 Supra). Based on this, it was argued that CLW-2 is fully qualified to perform phasing work (CLB-3, Page 15).

[30] The Claimants went on to submit that CLW-2 cannot be blamed for carrying out the phasing work when taking instruction from En. Faiz (COW-4) who was a superior officer to CLW-1 being an engineer on stand by. It would only be reasonable for CLW-2 to have followed COW-4's instructions at that material time. It is submitted that, on a balance of probabilities, CLW-2 cannot be found guilty of the first charge.

[31] The second and third charges preferred against CLW-3 revolves around CLW-3 allegedly giving false statements during investigations. The Claimants reiterated that the Statements given during investigation were pursuant to the discussions and as planned by En. Faiz (COW-4) purportedly to protect the good name of TNB (Shah Alam) and that of the interest of the deceased.

[32] The main essence of the fourth charge preferred against CLW-3 is that he had allegedly given two (2) Master Keys "Abloy & Gere" to CLW-2 and En. Sabri without the Company's authorization. CLW-3 disputed Sabri's evidence during DI that CLW-3 had given two master keys "Abloy & Gere" to CLW-2 and Sabri and thereby enabling CLW-2 and Sabri to enter Pencawang Elektrik Padat Kg. Melayu Subang without authorization.

[33] It was submitted that the master keys can be easily obtained by any CP at the PBBB Office without the involvement of an AP. It was further submitted that since the Company had failed to prove that the master keys

were in fact from CLW-3, this charge against CLW-3 must fail, and sought to rely on the case of *Soh Tong Hwa V Malaysian Oxygen Berhad* (Award No. 469/2008) wherein it was held that as the Company had failed to prove every element of the first charge, the Claimant cannot be said guilty of the same.

[34] The Claimants summarized their submission by noting that the **deceased was never on the standby list** and should never have been on site and should never have performed any work, especially since no PTW was issued by CLW-1. Although it is a misfortune for the deceased to have suffered injuries from the flashover incident, nevertheless the Claimants cannot be blamed for this.

[35] The Claimants further submitted that even if the Claimants are guilty of any of the alleged misconducts the Company should not have dismissed the Claimants. It was argued that the Company had failed to take into account the Claimants unblemished record of employment and that the punishment of dismissal is too harsh and disproportionate to the misconduct alleged. The Claimants averred that they had performed their duties to the best of their abilities, taking into account that the Company was understaffed and there were 12 breakdowns during the week that the Claimants were on standby. It was reiterated that the Claimants had agreed to follow a script or plan made by COW-4 and COW-5 in order to save the deceased interest and that of TNB Shah Alam. The Claimants had cited authorities i.e. R.M. Parmar v. Gujarat Electricity Board [1983] 1 LLJ 261 decided by His Lordship Mr. Justice M.P. Thakkar and the case of *Sunmugam Subramaniam v. JG Containers (M) Sdn. Bhd. & Anor [2001] 6 CLJ 521* presided by His Lordship Faiza Thamby Chik as well as *Ngiam Geok Mooi v. Pacific World Destination East Sdn. Bhd. [2016] MLJU 85* presided by His Lordship Mohd Zawawi Salleh and in the Federal Court case of Norizan Bin Bakar v Panzana Enterprise Sdn. Bhd

[2013] 4 ILR 47.

[36] By way of a letter dated 26.06.18 the Claimants appealed to the Jawatankuasa Rayuan Tata tertib Bagi Kumpulan Bukan Eksekutif, TNB (the Disciplinary Appeals Committee) against the punishment. The said appeal was dismissed by the Disciplinary Appeal Committee. Before this Court, the Claimants plead reinstatement or in the alternative damages in lieu thereof, backwages and other reliefs this Court deems fit and proper.

CAUSE PAPERS, WITNESSES PRODUCED, WITNESS STATEMENTS, BUNDLES OF DOCUMENTS AND WRITTEN SUBMISSIONS

[37] The following documents had been filed by the parties for the purpose of trial:

Cause Papers

- (i) First Claimant's Statement of Case dated 17.12.2018
- (ii) Second Claimant's Statement of Case dated 14.12.2018
- (iii) Third Claimant's Statement of Case dated 17.12.2018
- (iv) Company's Amended Statement in Reply for the First Claimant dated 02.05.2019
- (v) Company's Amended Statement in Reply for the Second Claimant dated 02.05.2019
- (vi) Company's Amended Statement in Reply for the Second Claimant dated 02.05.2019
- (vii) First Claimant's Rejoinder dated 13.03.2019

- (viii) Second Claimant's Rejoinder dated 13.03.2019
- (ix) Third Claimant's Rejoinder dated 13.03.2019

Witness Statements and Witnesses Produced during Trial

(x) Witness Statement of **Suid Bin Othman**, the Company's Chief Engineer, Asset Development Utara at Pulau Pinang. (COW-1) marked as "COWS-1"

(xi) Witness Statement of **Hafizzudin Bin Kasim**, the Company's Section Leader, Forensic Engineering Group (COW-2) marked as "COWS-2"

(xii) Witness Statement of **Sivaraman a/l R. Jaganathan**, the Company's Project Leader, Organisational Development Department, Distribution Network Division (COW-3) marked as "COWS-3"

(xiii) Additional Witness Statement of **Sivaraman a/l R. Jaganathan**, the Company's Project Leader, Organisational Development Department, Distribution Network Division (COW-3) marked as "COWS-3A"

(xiv) Witness Statement of **Mohd Faiz Bin Abu Bakar**, the Company's Manager HRBP – Distribution Network Services, Group Human Resource (Sumber Manusia Kumpulan) (COW-4) marked as "COWS-4"

(xv) Additional Witness Statement of **Mohd Faiz Bin Abu Bakar**, the Company's Manager HRBP – Distribution Network Services, Group Human Resource (Sumber Manusia Kumpulan) (COW-4) marked as "COWS-4B"

(xvi) Witness Statement of **Noor Sae'Dah Binti Selamat**, the Company's Senior Engineer, Service Implementation, Asset

Development, Selangor and Putrajaya (COW-5) marked as "COWS-5"

(xvii) Additional Witness Statement of **Noor Sae'Dah Binti Selamat**, the Company's Senior Engineer, Service Implementation, Asset Development, Selangor and Putrajaya (COW-5) marked as "COWS-5A"

(xviii) Witness Statement of **Dato' Muhammad Razif Bin Abdul Rahman**, the Company's Chief People Officer, Human Resources (COW-6) marked as "COWS-6"

(xix) Witness Statement of the Claimant, **Mohd Nizam Bin Baharom** (CLW-1) marked as "CLWS-1"

(xx) Additional Witness Statement of the Claimant, **Mohd Nizam Bin Baharom** (CLW-1) marked as "CLWS-1B"

(xxi) Witness Statement of the Claimant, **Mohd Zul Husni Bin Che Mail** (CLW-2) marked as "CLWS-2"

(xxii) Witness Statement of the Claimant, **Shariman Bin Shammin** (CLW-3) marked as "CLWS-3"

Bundles of Documents

(xxiii) Company's Bundle of Documents (Volume 1) dated 13.06.2019 marked as "COB-1"

(xxiv) Company's Bundle of Documents (Volume 2) dated 13.06.2019 marked as "COB-2"

(xxv) Company's Bundle of Documents (Volume 3) dated 13.06.2019 marked as "COB-3"

(xxvi) Company's Bundle of Documents (Volume 4) dated 25.06.2019 marked as "COB-4"

(xxvii) Company's Bundle of Documents (Volume 5) dated 26.08.2019 marked as "COB-5"

(xxviii) Company's Bundle of Documents (Volume 6) dated 19.11.2019 marked as "COB-6"

(xxix) First Claimant's Bundle of Documents dated 17.12.2018 marked as "CLB-1"

(xxx) Second Claimant's Bundle of Documents dated 17.12.2018 marked as "CLB-2"

(xxxi) Third Claimant's Bundle of Documents dated 17.12.2018 marked as "CLB-3"

(xxxii) Claimant's Additional Bundle of Documents dated 24.06.2019 marked as "CLB-4"

(xxxiii) Claimant's Supplementary Bundle of Documents dated 24.06.2019 marked as "CLB-5"

(xxxv) Claimant's Supplementary Bundle of Documents "Perakuan Kekompetenan Sebagai Penjaya Jentera" dated 24.06.2019 marked as "CLB-5A"

(xxxvi) Third Claimant's Bundle of Documents "GRAB Annual Partner Statement for Mohd Zul Husni Bin Che Mail for January 1

to December 31.2019” marked as “CLB-6”

(xxxvii) Third Claimant’s Bundle of Documents “GRAB Annual Partner Statement for Mohd Zul Husni Bin Che Mail for 11 Jun 2020 to 19 July 2020” marked as “CLB-6A”

Written Submissions

(xxxviii) Company’s Written Submission dated 15.12.2020

(xxxix) Company’s Written Submission In Reply dated 20.01.2021.

(xxxx) Claimant’s Written Submissions dated 04.12.2020.

(xxxxi) Claimant’s Written Submission In Reply dated 18.01.2020.

ROLE OF THE INDUSTRIAL COURT

[38] The role and function of the Industrial Court in a reference under Section 20 of the Industrial Relations Act 1967 which requires the Court to first determine whether there is a dismissal on the facts is abundantly clear. In the present case before the Court, it is undisputed that the Claimant was dismissed via the Company’s Letter of Dismissal dated 06.06.2018 which took effect on 14.06.2018.

[39] The Court of Appeal in *Raja Abdul Rahman Raja Abdul Aziz v. Exxonmobil Exploration and Production Malaysia Inc [2012] 4 ILR 4* opined as follows:

“[17] The function of the Industrial Court is twofold: first, to determine whether the alleged misconduct has been established and secondly, whether the proven misconduct constitutes just cause or excuse for dismissal. Failure to determine these issues would be a jurisdictional error which would merit interference by certiorari by the High Court (see Milan Auto Sdn Bhd v. Wong She Yen [1995] 4 CLJ 449, Federal Court).”

[40] Similarly, it is a principle well embedded that in deciding whether the workman is guilty of an alleged misconduct, the Industrial Court must confine its investigation to the reasons given by the employer for the dismissal and shall not go on to consider other reasons or factors that did not form the reason for dismissal at the material time. His Lordship Raja Tun Azlan Shah (as he then was) in ***Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 2 MLJ 129*** had this to say:

“We do not see any material difference between a termination of the contract of employment by due notice and a unilateral dismissal of a summary nature. The effect is the same and the result must be the same. 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 that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The

proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.”

BURDEN OF PROOF

Whether the charges of misconduct preferred against the Claimants are proved on a balance of probabilities

[41] It is a well-established principle of industrial jurisprudence that in a dismissal case such as this instant one, the burden of proof lies on the Company, as an employer, to prove on a balance of probabilities that the Claimants' dismissal were with just cause and excuse. In the case of **Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314 [please see pages 17 & 29, Tab 3 of the CBOA]** the High Court held as follows:

“[21] This in hearing a claim of unjust dismissal, where the employee was dismissed on the basis of an alleged criminal offence such as theft of company property, the Industrial Court is not required to be satisfied beyond a reasonable doubt that such an offence was committed. The standard of proof applicable is the civil standard, ie, proof on a balance of probabilities which is flexible so that the degree of probability required is proportionate to the nature and gravity of the issue.”

ISSUES

[42] The issues for the Court's consideration is whether the irregularities or the misconduct complained of by the Company as the ground for dismissal was in fact committed by the Claimant and whether such ground constitute just cause or excuse for the dismissal.

COURT'S EVALUATION OF EVIDENCE

The First Claimant (CLW-1)

The First Charge

[43] The First Charge against the First Claimant reads as follows:

"SAL AHLAKU PERTAMA

Pada 13 Julai 2014 diantara jam 9:00 malam hingga 10:00 malam, tuan telah melanggar Aturan Keselamatan Elektrik 1996 dan Prosedur Pensuisan (Bil 11/2002) apabila mengarahkan Encik Shariman Bin Shammim, No Pekerja 10077138, Juruteknik Tingkatan Kanan "B"(TT11) untuk melakukan kerja-kerja pengujian perfasaan kabel diantara Pencawang Elektrik Padat Sek. Keb Kg Melaya Subang ke Joint Pit ke Pencawang Elektrik Subang Low Cost tanpa membuat pembatalan Authorisation Serial No. 605948 sehingga menyebabkan kemalangan elektrik maut.

Perbuatan tuan ini adalah merupakan Salahlaku Berat. Mengikut Prosedur Tatatertib TNB Edisi Keenam 2013, tuan telah melanggar:-

Perkara 23, Senarai Salahlaku Berat, Lampiran "J", di muka surat 43,

"Mengabaikan tugas dan tanggungjawab yang diamanahkan oleh Syarikat" dan/atau

Perkara 31, Senarai Salahlaku Berat, Lampiran "J", di muka surat 44,

"Cuai dalam menjalankan tugas sehingga berlaku kemalangan maut atau kemalangan tidak maut dan/atau kecederaan dan/atau kerosakan dan/atau kerugian kepada Syarikat atau pekerja lain atau orang lain", dan/atau

Perkara 34 Senarai Salahlaku Berat Lampiran "J", di muka surat 44,

"Tidak mematuhi atau gagal mematuhi Arahan atau Peraturan berhubung dengan keselamatan di tempat kerja atau tidak memakai atau gagal memakai pakaian/peralatan keselamatan yang dibekalkan oleh Syarikat sewaktu bertugas".

[44] The Company has adduced documentary and oral evidence to prove that CLW-1 had committed the misconduct in the First Charge:-

44.1 The oral evidence adduced by Encik Hafizzudin Bin

Kasim ("COW-2"), Encik Sivararrian AL R. Jaganathan ("COW-3"), Enck Mohd Faiz Bin Abu Bakar ("COW-4") and Puan Noor Sae'dah Binti Selamat ("COW-5").

44.2 The documentary evidence are as follows:

No.	Documents	Reference
a)	The Authorisation Serial No. 605948	COB-3, pages 9
b)	Aturan Keselamatan Elektrik ("AKE")	COB-3, pages 20-49
c)	Panduan Kejuruteraan Bil 11/2002 Prosedur Pensuisan Voltan Tinggi	COB-6, pages 1-14
d)	Percakapan Dalam Pemeriksaan (state- ments during investigation) of the First Claimant	COB-3, pages 76-80
e)	The First Claimant's written statement	COB-3, pages 66 – 69
f)	Permit To Work ('PTW")	COB-3, pages 7-8
g)	Technical Report by Forensic Engineering Group	COB-3, pages 102- 140
h)	Laporan Eksekutif Kemalangan Elektrik Maut Anggota Kerja di Peparit Kabel, Jalan 4, Taman Melayu Baru, Kg Melayu Subang, Shah Alam, Selangor pada 13 Julai 2014 Jam 23:50 pm	COB-4, pages 1 – 10
i)	Presentation slide Kes Kemalangan El- ektrik Maut di Jln 4 Tmn Melayu Baru, Kg Melayu Subang, Selangor	COB-4, pages 11-59
j)	Site Investigation Report on Merlin Gerin RM6 RMU on PE Compact Sek. Keb. Kg. Melayu Subang.	COB-5, pages 1-9

Whether The First Claimant (CLW-1) did not cancel the Authorisation Serial No.605948 which he had received from the Regional Control Centre (“RCC”)

[45] The fact that the First Claimant had received the Authorisation Serial No. 605948 (COB-3, Page 9) from the Pegawai Yang Mengawal or Officer in Control, one Encik Saw from Regional Control Centre (RCC) on 13.7.2014 at 2030 hours or 8:30 pm for the work to repair fault between Sek. Keb Kg. Melayu toward Low Cost Subang PKNS (COB-3, page 9) was not in dispute.

[46] It was also undisputed that the Authorisation Serial No. 605948 (the said Authorization) also includes work to repair fault at Pencawang Elektrik Padat Sek. Keb. Kg. Melayu Subang to Joint Pit to Pencawang Elektrik Subang Low Cost (the Site), as admitted by CLW-1 during cross-examination although he testified that the said Authorisation received by him as an Authorised Person (AP) was for the work “to repair fault between Sek. Keb Kg Melayu Subang toward Low Cost Subang PKNS” which involves work connecting the cable and cable phasing test.

[47] CLW-1 also admitted that on the night of the accident on 13.7.2014, he went to another work site at Anshin, Shah Alam and left the Site in Subang [CLWS-1, Q&A No. (v)] and CLW-1 did not cancel the said Authorisation that he received from the RCC. CLW-1 did not inform the RCC when he left the Site and the he did not prepare handing over documents (“*dokumen serah tugas*”) to be handed over to CLW-3.

Cross-examination of CLW-1:

“Q: Pada malam kejadian anda tidak membatalkan Authorisation, tidak memberi dokumen serah tugas dan tidak memaklumkan RCC apabila anda beredar dari Tapak Kg Melayu Subang ke Tapak Anshin?”

A: Betul,”

[48] COW-3 who was the Engineer on standby in charge of the site on 13.7.2014 testified that he or the RCC, were not being informed of any change in AP on the night of the accident on 13.07.2014. (COWS-3, Q&A No. 15)

[49] Further, it was on evidence that as the AP who had received the Authorisation from the RCC, CLW-1 was fully responsible and in control of all the work carried out at the Site. COW-5 who was the Company’s Senior Safety Engineer testified during re-examination as such:

“Q: Sila jelaskan kenapa AP bertanggungjawab terhadap kerja-kerja ujian pernafasan sebelum dan selepas PTW dikeluarkan?”

A: Kebenaran menjalankan kerja ada dua. Yang pertama ialah Authorisation daripada RCC. Bila AP diberi Authorisation bermakna dibertanggungjawab sepenuhnya ke atas Authorisation yang diberi. Apa jua yang berlaku ke atas pemasangan yang diberi authorisation iaitu kerja yang hendak dijalankan dan pembaikan yang hendak

dibuat adalah di bawah tanggungjawab orang yang diberi Authorisation iaitu AP. Yang kedua ialah PTW atau SKMK adalah arahan AP bertanggungjawab menjaga butiran pemasangan kerja-kerja yang terlibat”.

Whether the First Claimant (CLW-1) had instructed the Second Claimant (CLW-3) to carry out cable phasing test at the Site

What is Phasing Test

[50] Phasing test is a test carried out to determine the colour of the cable (i.e red, yellow or blue) as the cable are not coloured. The phasing test is carried out before any cables are connected to ensure that the cables with the same colour are connected, (COWS-3, Q&A No. 7). On the night of the accident on 13.7.2014, the cable to be connected are located in the joint pit where the part of the cables which was faulty was cut and removed and to be replaced with new cable. The phasing test was required to connect the new cable in the joint pit. (COWS-4,Q&A No. 14)

CLW-1’s instruction to CLW-3 to do Phasing Test

[51] During the Domestic Inquiry, CLW-1 had admitted when questioned by his representative that despite the said Authorization issued to him, he had instructed CLW-3 to carry out the phasing test because CLW-3 was also an Authorised Person.

CLW-1’s statement during Domestic Inquiry

“WP S37: Saya merujuk P017 soalan 9 jawapan 9 di mana tuan ada menyatakan bahawa tuan ada mengarahkan AP2 Encik Shariman untuk membuat ujian perfasaan kabel tersebut

sebab tuan hendak menyiapkan kerja kerosakan kabel Anshin sedangkan tuan yang mengambil authorisation dari RCC. Mengapa tuan mengeluarkan arahan tersebut.

ST1: Saya dengan Shariman telah bersama dengan pasukan tunggu sedia lebih kurang 5 tahun iaitu dari tahun 2009. Sepanjang tunggu sedia itu selama 5 tahun hanya saya yang mengambil authorisation dan ini bukan menjadi rahsia maknanya semua orang di Shah Alam yang terlibat dengan tunggu sedia tahu tentang perkara tersebut. Saya meminta AP2 membuat phasing sebab bagi saya ia seorang Authorise Person layak untuk membuat phasing dan perkara itu memang menjadi kebiasaan di Shah Alam di mana API dan AP2 membantu. Saya ke Anshin untuk menguji kabel di sana sebab bagi saya kerosakan Anshin ini adalah lebih utama untuk disiapkan sebab pertama kerosakan ini tertanggung terlalu lama.

[52] CLW-1's aforesaid admission during the DI appears to have been repeated in his two other admissions i.e. "Percakapan Dalam Pemeriksaan" (statement during investigation) (COB-3, pages 78-79) duly signed by him, wherein CLW-1 admitted that at about 9.00 pm to 10.00 pm, he had instructed CLW-3 to carry out the phasing test at the Site in Subang. This was confirmed in admission during cross-examination as follows:

"Q: Rujuk mukasurat 78 COB-3. Di dalam urutan kejadian. Anda kata anda menyerahkan kerja-kerja ujian perfasaan kepada shariman.

A: Setuju."

[53] CLW-1's admission that he had instructed CLW-3 to carry out the phasing test at the site at Kg. Melayu Subang can also be found in his own handwritten statement (**COB-3, pages 66-69**) which he had written for the investigator, COW-5 whereby he wrote that:

“..setelah kelihatan keadaan terkawal, saya arahkan AP Shariman utk kawal kerja, b/down di Subang sementara saya dan mate pergi ke Anshin sek. 15 utk test kabel b/down yg lain.”

[54] In the aforesaid evidence, the fact that CLW-1 had instructed CLW-3 to carry out the work at the Site in Subang including the cable phasing test on the night of 13.07.2014 has been adequately established although there was no change in the Authorization issued to CLW-1.

Whether there was a breach of “Aturan Keselamatan Elektrik” (“AKE”)

[55] The investigator of the fatal accident (COW-5) testified in his Witness Statement i.e. COWS-5 that CLW-1 had breached paragraph 3.4.2 of the “Aturan Keselamatan Elektrik” (“AKE”) (COB-3, page 29) as CLW-1 being the Authorised Person (“AP”) who received the Authorisation from the Pegawai Yang Mengawal or Regional Control Centre (“RCC”) was not at the Site to carry out the phasing test

[56] **Paragraph 3.4.2 of the AKE** laid down the safety procedure for switching for the purpose of testing as follows:

Penyuisan Untuk Tujuan Pengujian

a) *Apabila sebahagian radas telah diasingkan dari semua punca bekalan untuk tujuan pengujian, **dan keizinan dari Pegawai Yang Mengawal telah diperolehi.** Orang Berkebenaran yang menjaga pengujian tersebut boleh memberi keizinan untuk kendalian suis-suis, pengasing-pengasing, pengasingan-pengasingan, suis-suis pbumian, atau pemasangan atau penanggalan cantum pbumian dan penyambungan bekalan ujian ke bahagian yang telah diasingkan.*

b) **Orang Berkebenaran yang menjaga pengujian akan bertanggungjawab sepenuhnya memerhatikan sebarang kerja di bahagian yang diasingkan, dijalankan dengan langkah-langkah keselamatan yang mencukupi mengikut aturan ini dengan tegas”.**

[57] In his evidence in chief, COW-4 explained that “Pegawai Yang Mengawal” or Officer in Control as mentioned in Paragraphs 2.27 and 2.29 of the AKE (**COB-3, pages 24 - 25**) is the Engineer or Controller at the Regional Control Centre (“RCC”).

[58] Paragraph 3.4.2 (a) of the AKE provides that the Authorised Person must first receive an Authorisation from the Pegawai Yang Mengawal or in this case Regional Control Centre (“RCC”) before carrying out the phasing test or "pengujian".

[59] As such, the act of CLW-1 in handing over the phasing work to the CLW-3 who did not have the Authorisation to perform the phasing test from the RCC was in breach of Paragraph 3.4.2 of the AKE.

[60] It is to be understood that if CLW-1 as an AP was desirous of handing over the phasing test to the another AP who is CLW-3, CLW-3 must first obtain fresh Authorisation from the RCC. As there can only be one Authorisation at the worksite, the Authorisation to CLW-1 must be cancelled before CLW-3 can get the Authorisation from the RCC. The evidence of the standby Engineer (COW-3) is testament to this position. During re-examination, COW-3 testified that if an AP decides to hand over his duties to another AP, the Authorization is to be cancelled. However, COW-3 also testified that if an AP merely seeks for assistance, he need not to cancel the Authorisation.

[61] The abovesaid procedure is perfectly understood and well accepted by in particular CLW-1. CLW-1 admitted during cross-examination as follows:

“Q: Setuju bahawa penyerahan tugas kepada AP lain memerlukan pembatalan Authorisation sebelum penyerahan tugas kepada AP lain?”

A: Setuju.”

[62] During cross-examination, CLW-3 also admitted that only CLW-1 was given the authority and responsibility to carry out the phasing test at the Site. CLW-3 testified as follows:

“Q: *Rujuk COB-3, mukasurat 9. Berdasarkan Authorisation ini, AP Nizam sahaja yang diberi kuasa dan tanggungjawab menjalankan perfasaan atau menyelia ujian perfasaan di Tapak?*

A: *Setuju.”*

[63] CLW-3 further confirmed during cross-examination, that for the second Authorised Person (“AP”) to take over the first AP’s tasks, the first AP must cancel the Authorisation first only then the second AP may take over the work. CLW-3 even went on to admit that if everyone complies with the permit to work, which understandably the safety procedure, accident shall not happen. CLW-3 further testified as such:

“Q: *Berdasarkan Authorisation di mukasurat 9, COB-3 hanya AP Nizam yang berkuasa dan bertanggungjawab untuk mengeluarkan PTW, untuk kerja-kerja dilakukan di Tapak Kg Melayu Subang?*

A: *Ya betul. Untuk satu breakdown perlu satu Authorisation. API perlu membatalkan Authorisation baru AP2 boleh mengambil alih.*

PTW perlulah menulis nombor Authorisation oleh RCC. Ini bermaksud apa-apa sahaja kerja yang dilakukan perlulah di sign dahulu PTW. Orang yang bertanggungjawab adalah orang yang mengambil

Authorisation kerana di PTW tersebut ada ditulis cara-cara untuk keselamatan seperti tertera di PTW.

*Setelah dipatuhi semua langkah-langkah tersebut barulah orang yang bekerja itu menandatangani dan barulah boleh mula kerja. **Jika semua orang mematuhi permit kerja ini maka tiadalah kemalangan akan berlaku.***

[64] This Court is convinced that by virtue of Paragraph 3.4.2 (b) of the Aturan Keselamatan Elektrik CLW-1 being the Authorised Person who is in charge of the phasing test at the site of Kg. Melayu Subang on the night of 13.07.14 was responsible to monitor the work at the Site and to ensure strict compliance of the safety procedures. Nevertheless CLW-1 had left the Site and therefore was not able to monitor the work at the Site and to ensure that the safety procedures were being strictly followed at the Site in breach of Paragraph 3.4.2 (a) of the AKE as he had handed over the phasing test at the Site to an AP who did not have the Authorisation from the RCC.

Whether there was a breach of “Prosedur Pensuisan (Bil. 11/2020)”

[65] Paragraph 2.2 (5) of the Panduan Kejuruteraan Bil 11/2002 Prosedur Pensuisan Voltan Tinggi (COB-3, page 64 & COB-6, page 6) is as follows:

"2.2 Kerja Pemulihan Gangguan Bekalan (Breakdown)

*(5) **Jika bahagian sistem yang rosak (yang telah ditinggalkan) perlu diserahkan kepada AP lain untuk kerja-kerja pembaikan, satu dokumen serah tugas (gunakan format penyerahan kerja antara SAP/AP kepada AP pembaikan seperti di***

LAMPIRAN C) perlu diberikan selepas perbincangan di antara dua AP yang berkaitan dan seterusnya SAP memaklumkan kepada Pegawai Yang Mengawal”.

[66] During cross-examination, CLW-1 admitted that when an AP cancelled his Authorisation with the RCC and handed over the work to another AP, the “dokumen serah tugas” at Lampiran C of Panduan Kejuruteraan Bil 11/2002 Prosedur Pensuisan Voltan Tinggi (COB-6, page 12) must be used. Notwithstanding his admission, CLW-1 caveated that he had never used the “dokumen serah tugas”.

[67] It was on evidence that CLW-1 handed over the work of phasing test at the Site to CLW-3 without handing over the "dokumen serah tugas" as at Lampiran C of Panduan Kejuruteraan Bil 11/2002 Prosedur Pensuisan Voltan Tinggi nor had CLW-1 informed the Pegawai Yang Mengawal or RCC.

[68] As such, it is clear that CLW-1 had breached the Panduan Kejuruteraan Bil 11/2002 Prosedur Pensuisan Voltan Tinggi when he failed to prepare the “dokumen serah tugas” when he handed over the phasing test work to CLW-3. CLW-1 also failed to inform the RCC that he will be handing over the phasing test at the Site to CLW-3.

The Alleged Plot by COW-4 for the First Claimant (CLW-1) to give false statement to the Investigators

[69] CLW-1’s averment that his admission in the "Percakapan Dalam Pemeriksaan" (statement during investigation) (COB-3, pages 76-80) that he

had instructed CLW-3 to carry out the phasing test was based on the answers he had discussed together with and as instructed by COW-4 in order to protect the image of TNB of Shah Alam and the interest of the deceased is devoid of merit as it was not corroborated by any evidence. CP Abdul Mutalib whom the Claimant cited as having objected to what was alleged as COW-4's script or instruction to CLW-1 to admit that CLW-1 instructed CLW-3 to perform the phasing test at the site on 13.07.2014, was never produced by the Claimant to testify before this Court. CLW-1's allegation that he did not instruct CLW-3 to continue his work at the Site in Subang including carrying out the phasing test but for COW-4's instruction was merely a bare denial.

The First Claimant's reason for failing to cancel the Authorization - to return to the Site after handing over the work to the Second Claimant (CLW-3) – whether valid

[70] In his submission, CLW-1 argued that he did not need to cancel the Authorisation Serial No. 605948 when he handed over the phasing test work at the Site in Subang to CLW-3 as he intended to come back to the Site.

[71] This is unlikely to be the case. CLW-1 as the Authorised Person who had received the Authorisation Serial No. 605948 must issue PTW to the jointer team and substation (pencawang) team in accordance with paragraph 3.6.1 of the Aturan Keselamatan Elektrik ("AKE") for the teams to carry out their work at the Site. (COWS-3, Q&A No. 10)

[72] The importance of PTW was emphasized in evidence by COW-3 and COW-4 in that 7 safety principles are stated therein that the AP must adhere to, to which CLW-1 admittedly agree during cross-examination The seven principles are as follows (COWS-3, Q&A No. 12 and COWS-4, Q&A No. 11):

- (a) The apparatus is off (dimatikan);
- (b) The apparatus is alienated (from any source of supply);
- (c) The apparatus has to be proven off (dibuktikan mati);
- (d) The apparatus is earthed;
- (e) The apparatus is locked with Non-Standard Lock ("NSL");
- (f) The danger notice and caution is placed at the apparatus;
- (g) The apparatus is obstructed (dihadang).

[73] CLW-1 further admitted in cross-examination that he did not issue any PTW for the work to be carried out at the site before the work was carried out, although he fully aware that it was his responsibility as the AP to do so; thereby ensuring that the seven safety principles were complied with at the site.

[74] As CLW-1 cannot disregard the safety procedure by leaving the Site without ensuring that the Site is safe for work to be carried out and without issuing the PTW to the jointer team, CLW-1's contention that he did not cancel the Authorization when he left the worksite as he wanted to return to the site cannot be valid as he had not issued the PTW to ensure compliance of the seven safety rules.

Whether Safety Procedure in Phasing Test was complied with

[75] COW-3 testified in his Witness Statement (COWS-3) that before an Authorised Person ("AP") can carry out phasing test at the joint pit, the AP

must temporarily cancel the PTW to ensure that the cable team evacuate the joint pit, in order to ensure that the site is safe. This is because the RMU at PE Padat Sek. Keb. Kg. Melayu Subang will be in position FEEDER "OFF" and EARTH "ON". (COWS-3, Q&A No. 7 – 8). The abovesaid safety procedure is prescribed in the PTW (COB-3, page 8), that the PTW must be temporarily cancelled where all work must stop if the AP needed to carry out testing works including phasing test as seen in the section "PEMBATALAN SEMENTARA PERMIT - TUJUAN PENGUJIAN". In the instant case, CLW-1 did not dispute that there was a need to carry out phasing test. Hence, the temporary cancellation of the PTW is required. The PTW clearly stated the following to be fulfilled by the Authorised Person:

"Perakuan daripada Orang Berkecekapan mesti diperolehi sekiranya Orang Berkebenaran mahu melakukan kerja pengujian semasa Permit ini masih berkuatkuasa di mana kerja

- 1) Semua orang di bawah jagaan telah berundur dari skop kerjanya*
- 2) Tiada apa-apa alat tertinggal*
- 3) Pembumian tambahan telah ditanggalkan."*

[76] It is pertinent to note that CLW-1 admitted during cross-examination that he did not carry out the safety procedures as stated in the section of the **"PEMBATALAN SEMENTARA PERMIT"** in the Permit to Work. CLW-1 also admitted that he is unable to confirm that the three safety rules abovesaid were duly complied with as he had left the work side to carry out work at another site at Anshin.

[77] CLW-1 being the AP who had received the Authorisation from the RCC tasked with the duties in carrying out the phasing test must be held responsible for having left the Site and thereby compromising the Company's safety procedures as stated in the PTW when carrying out the phasing test.

Cause of the accident

[78] COW-2 who was the Investigating Engineer (Jurutera Penyiasatan) under Forensic Engineering Group testified that he and his colleague Norul Rafiq Namas Khan had prepared the Technical Report on Investigation into the Fatal Electrical Accident during Cable Jointing Work at PE Compact Sek Keb Kg Melayu Subang, Selangor dated 13.7.2015 (Technical Report) (COB-3, pages 102 – 140) (COWS-2, Q&A No. 5). The Technical Report was prepared for the purpose of identifying the root cause of the incident at Kg. Melayu Subang work site on 13.02.2014.

[79] COW-2 testified during examination-in-chief that he had carried out physical investigation and inspection on the Ring Main Unit ("RMU") at the PE Padat Sek Keb Kg Melayu Subang by way of tearing down the RMU (COWS-2, Q&A No. 5 – 6) to investigate switching possibilities or abnormalities within the compartment [COB-3, Page 104-Technical Report-P.1(C)].

[80] Upon conducting investigation and inspection of the RMU the forensic engineering team found no mechanical defect of the RMU, the RMU was still in good condition, there were no abnormalities or manufacturing defects or intrusion of foreign objects in the RMU. Having found as such, the forensic engineering team concluded as reported by COW-2 that the most probable root cause of the incident was due to human error.

[81] COW-2 further explained that the human error that had caused the accident during the cable work at PE Sekolah Kebangsaan Melayu Subang was because the RMU was on "ON" position (COB- 3, page 104) (COWS-2, Q&A No. 10). The fact that the evidence of COW-2 corroborates with that of COW-5 in her evidence in chief (COWS-5, QA 6) (COWS-5A, QA 12) is of significant importance. The Site Investigation Report on the post mortem carried out on the RMU in the site in question together with Suruhanjaya Tenaga and Asset Management Division on 18.07.2014 also attended by COW5 (COB, Pages 1 – 9) also concluded that the cause of the accident was due to human error and not mechanical error.

[82] COW-2 testified that the possibilities of the switching to "ON" position of the RMU was due to 2 possible scenarios as stated in the Technical Report at paragraph 8.4.3. [see COB-3, pages 111 - 112] as follows:

- (a) The first scenario - that there is a possibility that the RMU was on "OFF" position initially and the CP might have tried to attempt switching activity from "OFF" position to "EARTH ON" position, but instead, he switched to "ON" position.
- (b) The second scenario - that there is a possibility that the RMU was in "ON" position before the phasing test was carried out. (COB-3, pages 111 – 112)

[83] At this juncture, it must be pointed out that it is not the duty of this Court to analyse which of the two scenarios presented above would probably be the case on the fateful night of 13.07.2014. Suffice to say that the Technical Report presented by COW-2 clearly stated that there was no

mechanical defects on the RMU and the Technical Report concluded that the possible root cause of the accident is due to human error. This human error points to the failure of AP in charge to ensure the RMU was in "OFF" position.

[84] In examination-in-chief, COW-5 who was the Senior Safety Engineer of Selangor testified that she carried out initial investigation on the accident that occurred at the Joint Pit Kg Melayu Subang on 13.7.2014 (COWS-5, Q&A No. 4) during which COW-5 interviewed all of the Claimants in this case (QA No. 14), visiting the site and carry out post mortem on the RMU at PE Padat Sek. Keb. Kampung Melayu Subang, and had prepared an executive Report on the fateful incident.

[85] This Court has no reason to depart from the finding of the Technical Report, Executive Report and the Site Investigation Report in the respective conclusion that the cause of the accident was not due to any mechanical error but due to human error. It follows that the human error causing the accident on 13.7.2014 at the Site in Subang could have been avoided if the safety procedures at the Site was strictly complied with by all the Claimants. This includes the CLW-1 as an AP who was given Authorisation from RCC to carry out the work at the Site and unfortunately had left the site despite his unequivocal admission during cross-examination that the phasing test must be carried out in the presence of the Authorised Person who had sought Authorisation from the Regional Control Centre and to ensure safety at the site. CLW-1 testified as such:

"Q: Tetapi anda setuju menurut Authorisation mukasurat 9, COB-31 adalah AP yang diberikan kuasa melakukan kerja-kerja dan memastikan keselamatan di Tapak

menurut Authorisation?

A: *Betul."*

[86] In this case CLW-1 had breached the Company's safety procedures when he left the work site and instructed CLW-3 to do the phasing test at the Site without cancelling his Authorisation and without ensuring that he handed over the work to CLW-3 in accordance to the safety procedures. The punishment of dismissal is with just cause and excuse.

The Second Charge

[87] The Second Charge against CLW-1 reads as follows (COB-1, page 22):

SAL AHLAKU KEDUA

Pada 13 Julai 2014 diantara jam 9:00 ma/am hingga 14 Julai 2014 jam 12:30 malam, tuan sebagai Orang Berkebenaran (Authorised Person) telah melanggar Aturan Keselamatan Elektrik 1996 dan Prosedur Pensuisan (Bil. 11/2002) apabila tidak berada di tapak kerja untuk melakukan pengujian perfasaan diantara Pencawang Elektrik Padat Sek. Keb. Kg. Melayu Subang ke Joint Pit ke Pencawang Elektrik Subang Low Cost sehingga menyebabkan kemalangan elektrik maut.

Perbuatan tuan ini adalah merupakan satu Salahlaku Berat. Mengikut Prosedur Tatatertib TNB Edisi Keenam 2013, tuan telah melanggar:

Perkara 23, Senarai Salahlaku Berat, Lampiran "J", di muka surat 43,

"Mengabaikan tugas dan tanggungjawab yang diamanahkan oleh Syarikat" dan/atau

Perkara 31, Senarai Salahlaku Berat, Lampiran "J" di muka surat 44

"Cuai dalam menjalankan tugas sehingga berlaku kemalangan maut atau kemalangan tidak maut dan/atau kecederaan dan/atau kerosakan dan/atau kerugian kepada Syarikat atau pekerja atau orang lain"; dan/atau

Perkara 34, Senarai Salahlaku Berat. Lampiran "J" di muka surat 44

"Tidak mematuhi atau gagal mematuhi Arahan atau Peraturan berhubung dengan keselamatan di tempat kerja atau tidak memakai atau gaga/ memakai pakaian/ peralatan keselamatan yang dibekalkan oleh Syarikat sewaktu bertugas".

[88] The elements of the First and Second charges are similar but for the Second Charge the focus is CLW1's failure to be at the Site to carry out the phasing test.

[89] The Company has adduced documentary and oral evidence to prove that CLW-1 had committed the misconduct in the Second Charge:-

89.1 The oral evidence adduced by Encik Hafizzudin Bin Kasim ("COW-2") 1 Encik Sivaraman A/L R. Jaganathan ("COW-3"), Encik Mohd Faiz Bin Abu Bakar ("COW-4") and Puan Noor Sae'dah Binti Selamat ("COW-5").

89.2 The documentary evidence are as follows:

No.	Documents	Reference
a)	The Authorisation Serial No. 605948	COB-3, pages 9
b)	Aturan Keselamatan Elektrik ("AKE")	COB-3, pages 20-49
c)	Panduan Kejuruteraan Bil 11/2002 Prosedur Pensuisan Voltan Tinggi	COB-6, pages 1-14
d)	Percakapan Dalam Pemeriksaan (statements during investigation) of the First Claimant	COB-3, pages 76-80
e)	The First Claimant's written statement	COB-3, pages 66 – 69
f)	Permit To Work ("PTW")	COB-3, pages 7-8
g)	Technical Report by Forensic Engineer- ing Group	COB-3, pages 102- 140
h)	Laporan Eksekutif Kemalangan Elektrik Maut Anggota Kerja di Peparit Kabel, Jalan 4, Taman Melayu Baru, Kg Mela- yu Subang, Shah Alam, Selangor pada 13 Julai 2014 Jam 23:50 pm	COB-4, pages 1 – 10
i)	Presentation slide Kes Kemalangan El- ektrik Maut di Jln 4 Tmn Melayu Baru, Kg Melayu Subang, Selangor	COB-4, pages 11-59
j)	Site Investigation Report on Merlin Gerin RM6 RMU on PE Compact Sek. Keb. Kg. Melayu Subang.	COB-5, pages 1-9

Whether on 13.7.2014 between 9.00 pm to 14.7.2016 at 12.30 am the First Claimant was at the Site to carry out the cable phasing test

[90] During cross-examination the Claimant admitted that he was not at the Site during the phasing test and when the accident occurred.

Cross-examination of the Claimant

“Q: *Sahkan anda tidak berada di Tapak Semasa kemalangan berlaku semasa ujian perfasaan?*

A: *Setuju.”*

[91] CLW-1 administered similar admission during the Domestic Inquiry that he was not at the Site when the accident happened. (COB-2, Page 226)

“PO S24: *Setuju atau tidak saya katakan bahawa tuan tidak berada di tapak Kerja Kg. Melayu Subang semasa kejadian flashover pada 14/7/2014 kerana tuan berada di tapak kerja Anshin Seksyen 15 Shah Alam?*

ST1: *Setuju.”*

[92] In cross-examination, CLW-2 testified that he had carried out the phasing tests at the Site without the presence of any Authorised Person (AP) namely CLW-1 nor CLW-3 as follows:

“Q: *Anda melakukan ujian perfasaan tanpa*

kehadiran AP Nizam dan tanpa kehadiran AP Shariman?

A: Ya.”

[93] As it was not challenged that the accident occurred during the phasing test at about 11.50 pm on 13.07.2014 it was clear that CLW-1 was not at the Site carrying out the phasing test or supervising the phasing test on 13.07.2014 between 9.00 pm to 14.07.2016 at 12.30 pm.

Panduan Kejuruteraan Bil. 11/2002 dan Prosedur pensuisan Voltan Tinggi

[94] During examination-in chief, the investigator, COW-5 testified that CLW-1 had breached paragraph 2.2 (5) of the Panduan Kejuruteraan Bil 11/2002 Prosedur Pensuisan Voltan Tinggi (COB-3, page 64 and COB-6, page 6) which provide as follows:

"2.2 Kerja Pemulihan Gangguan Bekalan (Breakdown)

(5) Jika bahagian sistem yang rosak (yang telah diasingkan) perlu diserahkan kepada AP lain untuk kerja-kerja pembaikan, satu dokumen serah tugas (gunakan format penyerahan kerja antara SAP/AP kepada AP pembaikan seperti di LAMPIRAN C) perlu diberikan selepas perbincangan di antara dua AP yang berkaitan dan seterusnya SAP memaklumkan kepada Pegawai Yang Mengawal."

[95] During cross-examination, CLW-1 admitted that when an AP cancelled his Authorisation with the RCC and hand over the work to another AP, the "dokumen serah tugas" as at Lampiran C (COB-6, page 12) must be used, albeit his reservation that he had never used the said document.

[96] In the above circumstances, CLW-1 had breaced the Panduan Kejuruteraan Bil 11/2002 Prosedur Pensuisan Voltan Tinggi when he had left the Site and failed to prepare and handed over to CLW-3 the "dokumen serah tugas".

[97] CLW-1 was also in breach of paragpragh 3.4.2 (b) of the AKE as he was not at the Site to monitor the work at the Site.

[98] CLW-1 also failed to inform the RCC that he had left the Site and he will be handing over the phasing test at the Site to CLW-3. As such, without following the above Panduan Kejuruteraan Bil 11/2002 Prosedur Pensuisan Vo/tan Tinggi, CLW-1 cannot leave the Site to CLW-3 and neglect his duty in carrying out the phasing test.

Cause of the accident

[99] This Court's findings on the cause of the accident is similar to that of in the first charge. There is absolutely no reason for this Court to depart from the finding .of the Technical Report, Executive Report and the Site Investigation Report in the respective conclusion that the cause of the accident was not due to any mechanical error but due to human error. It follows that the human error causing the accident on 13.7.2014 at the Site in Subang could have been avoided if the safety procedures at the Site was

strictly complied with by all the Claimants.

The Deceased was Not Rostered on the night of the Incident - Whether Relevant

[100] CLW-1 had relied on the contention that the victim, Hairulnizam was not rostered in the Standby Duty Roster (CLWS-1, Q&A No. 10) although he admitted that he was responsible for the workers at the Site as an AP with Authorisation from the RCC and he did not ask the workers to stop their work or leave the Site.

[101] CLW-1 further admitted that he failed to adhere to the procedures under “**PEMBATALAN SEMENTARA PERMIT**” in the Permit To Work (“PTW”) (COB-3, page 8] including ensuring that the workers such as Hairulnizam had retreated from the phasing test area at the Site. CLW-1’s admission during cross-examination was as follows:

Q: *Setuju, oleh kerana beredar ke Anshin pada masa kemalangan berlaku, anda tidak boleh mengesahkan bahawa perkara-perkara keselamatan yang 3 dibawah pembatalan sementara permit telah dipatuhi. Betul?*

A: *Betul.*

Q: *Arwah Hairulnizam di dalam joint pit semasa kemalangan berlaku?*

A: *Setuju.*

Q: **Sepatutnya Arwah Hairulnizam dan pekerja-pekerja lain berundur di tapak pengujian dilakukan?**

A: *Setuju.*”

[102] Based on the aforesaid evidence by CLW-1 during cross-examination, this Court is of the view that the undisputed fact that the deceased Hairulnizam was not rostered to be on duty on the night of the accident was immaterial as to his guilt under the charge. In any event CLW-1 who had total control of the workers at the Site failed to ask the deceased to leave the Site. The incident which took the life of the deceased would not have happened had CLW-1 instructed the jointer team as well as the deceased who was not listed on the standby list on duty, to leave the work site prior to him leaving the same for another site at Anshin.

Whether the First and the Second Charge against the First Claimant Proven

[103] Based on the evidence adduced, this Court is of the conclusion that the material ingredients of both the first and the second charge had been proven against CLW-1 in that CLW-1:

- (a) as the AP who had received the Authorisation from the Regional Control Centre was not at the Site on the night of 13.7.2014 to carry out and monitor the phasing tests;
- (b) had wrongfully instructed CLW-3 to carry out the phasing test at the Site;

- (c) had not cancelled the Authorisation when he had left the Site in Subang to go to the work site in Anshin, Shah Alam;
- (d) was in breach of the Aturan Keselamatan Elektrik ("AKE") and Prosedur Pensuisan (Bil. 1112002); and
- (e) had utterly disregard the Company's safety procedure that had led to the accident to occur.

[104] It is safe to conclude further that CLW-1 was indeed the AP in charge for the phasing test at the Site but he had failed to carry out his responsibility by leaving the Site without following the Company's safety procedures. Such failure justify the finding of guilt as to the charges that warrant a dismissal.

[105] The misconduct complained of by the Company in both Charges is a serious and gross misconduct. The Claimant was a Senior Technician holding the post of a technical function at all material times. He owes responsibilities in ensuring the safety of his staff as well as the deceased who was his colleague on the work site on the fateful night. By exposing his Jointer Team to such a serious risk, the Claimant was placing the lives of the staff in danger which was evident in the death of Hairulnizam as result of the flashover that occurred.

[106] This Court also inevitably conclude that CLW-1 had not merely put the safety of the workers at Site at risk when he failed to follow the Company's safety procedures, but due to his failure, he had caused the fatal accident of his fellow colleague. The punishment of dismissal is justified given the blatant disregard to ensure the safety procedures at the Site where he was fully responsible for.

Whether Finding of Guilt with the Charges Warrants a Dismissal

[107] Based on the overwhelming evidence before this Court, there shall be no doubt that the misconduct in the First and the Second Charges proved against CLW-1 is one that warrants dismissal from the Company. The Company had successfully established that COW-1 had breached the Company's Disciplinary Procedure (Perkara 23, 31, 34 and 73 of the Prosedur Tatatertib TNB, Edisi Keenam) (COB-1, pages 74 – 78) and the breach was serious enough as the Claimant as an employee failed to exercise due care and compliance with the relevant Rules in the performance of his job.

[108] The Industrial Court in the case of Clearways Offshore Development Drilling Sdn Bhd Terengganu v. Johnson Pa Anthony [2002] 1 ILR 609 held that safety procedures must be strictly followed and no short cut is to be taken. The Industrial Court held that the punishment of dismissal is justified and held as follows:

“However the claimant thought he knew better. He claimed it was not necessary to take all the steps described by the company’s witness. His reason is that at the time he attended to the pump drilling was not in progress and the pumps would not be started up. The procedure described by the company’s

witnesses was admitted by the claimant and his witness. He admitted breaching the procedure but contended it would not cause accident. To the court in a high risk work place such as the rig it is not for any employee to question such procedure. A breach may or may not cause accident. The procedure must be strictly followed. No short cut is to be taken. In the circumstances the court would hold that the second charge has been proved as well.

As for the punishment of dismissal the court agrees that it is justified. The claimant has breached safety procedures not because he was ignorant or negligent but chose to disagree with the procedure. In high risk work place this cannot be tolerated. It may cause loss of life and property. committing one breach is bad enough but the claimant committed two within a short period of time. No employer could tolerate that. No authority or opinion of learned author is required to support the company's action.”

The Second Claimant (CLW-3)

The First Charge

[109] The First Charge against CLW-3 reads as follows (COB-1, pages 30 – 31) :

SALAH LAKU PERTAMA

Pada 13.7.2014 diantara jam 9 malam hingga 14.7.2014 12.30 malam, tuan telah melanggar Aturan Keselamatan Elektrik 1996 dengan mengarahkan Encik Zul Husni Bin Che Mail, No. Pekerja: 10082844, seorang Juruteknik Tingkatan Biasa 'A'

(TT10), Orang Berkecekapan (Competent Person) dan Encik Sabri Bin Nekmat, No. Pekerja: 10026992, Seorang Tukang Tingkatan Kanan (TT08), Orang Berkecekapan (Competent Person) untuk menjalankan kerja-kerja pengujian perfasaan kabel diantara Pencawang Elektrik Padat Sek. Keb Kg. Melayu Subang ke Joint Pit ke Pencawang Elektrik Subang Low Cost.

Perbuatan tuan ini adalah merupakan satu Salahlaku Berat. Mengikut Prosedur Tatatertib TNB Edisi Keenam 2013, tuan telah melanggar:-

Perkara 23, Senarai Salahlaku Berat. Lampiran "J" di muka surat 43

"Mengabaikan tugas dan tanggungjawab yang diamanahkan oleh Syarikat" dan/atau;

Perkara 31, Senarai Salahlaku Berat, Lampiran "J" di muka surat 44

"Cuai dalam menjalankan tugas sehingga berlaku kemalangan maut atau kemalangan tidak maut dan/atau kecederaan dan/atau kerosakan dan/atau kerugian kepada Syarikat atau pekerja atau orang lain" dan/atau;

Perkara 34, Senarai Salahlaku Berat, Lampiran "J" di muka surat 44

"Tidak mematuhi atau gagal mematuhi Arahan atau Peraturan

berhubung dengan keselamatan di tempat kerja atau tidak memakai atau gaga/ memakai pakaian/peralatan keselamatan yang dibekalkan oleh Syarikat sewaktu bertugas" dan/atau;

Perkara 73, Senarai Salahlaku Berat, Lampiran "J" di muka surat

"Melanggar atau tidak mematuhi atau gagal mematuhi mana-mana terma dan atau syarat perkhidmatan (tersurat dan/atau tersirat), Peraturan atau Arahan atau Pekeliling Syarikat atau sebahagian daripada Peraturan atau Arahan atau Pekeliling berkenaan".

[110] The documentary adduced by the company in relation to the First Charge are as follows:

No.	Documents	Reference
a)	Notes of Proceeding of Domestic Inquiry	COB-2, pages 22-301
b)	<i>"Percakapan Dalam Pemeriksaan"</i> (statements during investigation) of the Second Claimant	COB-3, pages 81-85
c)	<i>"Percakapan Dalam Pemeriksaan"</i> (statements during investigation) of the Third Claimant	COB-3, pages 86-89
d)	Aturan Keselamatan Elektrik ("AKE")	COB-3, pages 20-49
e)	Letter dated 26.09.2014 to the Second Claimant from the Suruhjaya Tenaga	COB-3, pages 147-148

Whether the cable phasing test at the Site was carried out by the Second Claimant CLW-2

[111] In cross-examination CLW-2 testified that he had admitted during DI that he had carried out the phasing test on the night of the accident with another Competent Person ("CP"), Sabri without the supervision of CLW-3.

[112] It was undisputed that on the night of the accident on 13.7.2014, CLW-3 and CLW-1 had left the work site to go to another work site in Anshin, Shah Alam. (CLWS-3, Q&A No. 6 (iv))

[113] CLW-3 also admitted during the Domestic Inquiry that on the night of 13.7.2014, the phasing at the Site was carried out by CLW-2 and Sabri. CLW-3's statement during the Domestic Inquiry is as in COB-2, page 265 – DI Report.

[114] The evidence that CLW-3 was not at the Site to carry out the phasing test on the night of the accident on 13.7.2014 is therefore well established.

Whether The Second Claimant (CLW-3) instructed the Third Claimant (CLW-2) and Sabri to carry out the cable phasing test at the Site

[115] CLW-3 gave evidence during the Domestic Inquiry that he had handed over his tasks to CLW-2 and Sabri. (COB-2, page 265 – DI Report) This was consistent with CLW-2's admission during Domestic Inquiry that CLW-3 had instructed CLW-2 to carry out the phasing test at the Site. (COB-2, page 294 – DI Report)

[116] The testimonies by CLW-2 and CLW-3 during the Domestic Inquiry as above where similarly consistent with the statement of Sabri also during the Domestic Inquiry. Sabri's statement during the Domestic Inquiry is as follows (COB-2, page 52 – DI Report) :

“PO S9: Sila sahkan siapakah yang mengarahkan anda dan Encik Zul Husni untuk membuat pengujian di PE Compact Sekolah Kebangsaan Kg. Melayu Subang pada 13/7/2014.

*SP2: **AP Encik Shariman.**”*

[117] CLW-3 also stated in his "Percakapan Dalam Pemeriksaan" (statements during investigation) recorded by investigator, Encik Adnan Bin Haji Ishak on 2.12.2014, that he had instructed and passed the equipment to CLW-2 for him to carry out the phasing test between PE Low Cost to Joint Pit to PE Compact Sek. Keb. Kg Melayu Subang (COB-3, Page 83).

[118] CLW-2's statement in his "Percakapan Dalam Pemeriksaan" (statements during investigation) recorded by the investigator, Encik Adnan Bin Haji Ishak on 9.12.2014 confirmed that he had received instruction from CLW-3 to continue the phasing test between PE Low Cost to Joint Pit and to PE Compact Sek. Keb. Kg Melayu Subang to Joint Pit which was the Site. (COB-3, Page 88)

[119] As such, it is also established that on the night of 13.7.2014, CLW-3 had indeed given the instruction to CLW-2 to carry out the phasing test at the Site.

Whether there was a breach of the Aturan Keselamatan Elektrik (“AKE”)

[120] It was the evidence of the investigator during examination-in-chief that CLW-3’s action of instructing CLW-2 and Sabri to carry out phasing test at the Site was in breach of paragraph 3.4.2 of the Aturan Keselamatan Elektrik (“AKE”) (COB-3, page 29) as CLW-3 did not receive the Authorisation from Regional Control Centre to carry out phasing test at the Site. (COWS-5, Q&A No. 12]

[121] Paragraph 3.4.2 of the Aturan Keselamatan Elektrik ("AKE") (COB-3, page 29) reads as follows:

“3.4.2 Penyuisan Untuk Tujuan Pengujian

- e) *Apabila sebahagian radas telah diasingkan dari semua punca bekalan untuk tujuan pengujian, **dan keizinan dari Pengawal Yang Mengawal telah diperolehi**, Orang Berkebenaran yang menjaga pengujian tersebut boleh memberi keizinan am untuk kendalian suis-suis, pengasing-pengasing, suis-suis pbumian, atau pemasangan atau penanggalan cantuman pbumian dan penyambungan bekalan ujian ke bahagian yang telah diasingkan.*
- f) **Orang Berkebenaran yang menjaga pengujian akan bertanggungjawab sepenuhnya memerhatikan sebarang kerja di bahagian yang**

diasingkan, dijalankan dengan langkah-langkah keselamatan yang mencukupi mengikut aturan ini dengan tegas.”

[122] CLW-3 agreed during cross-examination that only CLW-1 was given the authority and responsibility to carry out the phasing test or supervise the phasing test at the Site. CLW-3 also aware that there can only be one Authorised Person ("AP") with Authorisation for each breakdown and there was no call to cancel or seek new Authorisation from the Regional Control Centre ("RCC").

[123] CLW-3 conceded and was well aware that he did not have the Authorisation from the Regional Control Centre for him to carry out the phasing test at the Site. Not having the Authority from the Regional Control Centre himself, it is apparent that CLW-3 is incapable of instructing a **Competent Person (CP) who were CLW-2 and Sabri to carry out the phasing test at the Site.**

[124] In this connection reference must be made to **paragraph 3.14.1 of the Aturan Keselamatan Elektrik ("AKE") (COB-3, page 42)** which provides that the phasing test can only be carried out by an Authorised Person. **Paragraph 3.14.1 of the Aturan Keselamatan Elektrik ("AKE")** is as follows:

“3.14 Arahan Lanjut Untuk Pengujian

3.14.1 Kebenaran Bagi Orang Yang Berkeanaan

*Dalam semua kes dimana pengetahuan teknik atau pengalaman yang mencukupi diperlukan untuk menghindar bahaya, **pengujian hanya boleh dijalankan oleh atau di bawah penyeliaan terus Orang Berkebenaran. TIDAK SEORANG PUN MENJALANKAN KERJA TERSEBUT TANPA DITEMANI.***

[125] Therefore, not only CLW-3 did not have the authority to carry out the phasing test, he had left the Site and instructed a mere Competent Person to carry out the phasing test which was clearly not allowed in the Aturan Keselamatan Elektrik ("AKE").

[126] In his testimony before this Court CLW-3 contended that he did not instruct CLW-2 to carry out the phasing test at the Site but that the instruction came from COW-4, an allegation which was denied by COW-4. COW-4 disagreed that CLW-3 was qualified to carry out the phasing test according to Sijil TNB.

[127] COW-4 also stated that he was not aware that CLW-3 had instructed CLW-2 and Sabri to carry out phasing test before CLW-3 left to the work site at Anshin, Shah Alam.

[128] Additionally, Sabri gave the statement that COW-4 was not aware that CLW-2 and him was carrying out the phasing test at the PE Compact Sekolah Kebangsaan Kg. Melayu Subang. Sabri's statement during the Domestic

Inquiry is as in COB-2, page 54 - DI Report.

[129] This Court has also considered that vide the letter dated 26.9.2014 to CLW-3 from the Suruhanjaya Tenaga, (the said Commission) it was stated that the said commission found that CLW-3 had given access to a non-competent person to the site PE Sek. Keb. Kg Melayu Subang to carry out testing works. (COB-3, page 147). Having found so, the said commission had suspended CLW-3's Competency Certificate (Perakuan Kekompetenan) issued by the Suruhanjaya Tenaga. (COB-3, page 148).

[130] Based on the abovesaid abundant evidence which clearly point to the fact that COW-4 was unaware that CLW-3 had instructed CLW-2 and Sabri to carry out the phasing test, allegation that the instruction came from COW-4 cannot be sustained.

Whether the First Charge against the Second Claimant (CLW-3) Proven

[131] In the above circumstances this Court is of the considered conclusion that CLW-3 had breached AKE 1996 when he gave instruction to CLW-2 and Sabri to carry out the phasing test at the Site in defiance of the Company's safety procedure. Such misconduct is one that warrants a dismissal by the Company.

[132] CLW-3 had clearly misconducted himself by breaching the Company's safety procedure when he, without the Authorisation from the RCC to carry out the phasing test at the Site had simply instructed a Competent Person who was not allowed to carry out the phasing test to do the job.

The Second Charge and Third Charge against the Second Claimant (CLW-3)

[133] The Second Charge and Third Charge against CLW-3 reads as follows (COB-1, pages 31 – 32) :

SAL AHLAKU KEDUA

Pada 14.7.2014, tuan telah memberi keterangan yang tidak benar kepada Puan Noor Sae'dah Binti Selamat, No. Pekerja: 10027695, Jurutera Kanan Keselamatan, Kesihatan, Pekerjaan dan Alam Sekitar Negeri Selangor, Bahagian Pembahagian, TNB pada masa itu apabila **tuan mengaku bahawa tuan yang menjalankan kerja-kerja pengujian perfasaan kabel diantara Pencawang Elektrik Padat Sek. Keb. Kg Melayu Subang ke Joint pit ke Pencawang Elektrik Subang Low Cost dengan dibantu oleh Encik Mohd Zul Husni bin Che Mail**, No. Pekerja: 10082844, Orang Berkecekapan (Competent Person) dan Encik Sabri Bin Nekmat, No. Pekerja: 10026992, Orang Berkecekapan (Competent Person).

Perbuatan tuan ini adalah merupakan satu Salahlaku Berat. Mengikut Prosedur Tatatertib TNB Edisi Keenam 2013, tuan telah melanggar:-

Perkara 23, Senarai Salahlaku Berat, Lampiran "J" di muka surat 43

“Mengabaikan tugas dan tanggungjawab yang

diamanahkan oleh Syarikat" dan/atau;

Perkara 61, Senarai Salahlaku Berat, Lampiran "J", di muka surat 45.

"Memberi keterangan/pengakuan/jawapan tidak benar kepada pegawai yang mewakili Syarikat" dan/atau;

Perkara 34, Senarai Salahlaku Berat, Lampiran "J" di muka surat 44

"Tidak mematuhi atau gagal mematuhi Arahan atau Peraturan berhubung dengan keselamatan di tempat kerja atau tidak memakai atau gagal memakai pakaian/peralatan keselamatan yang dibekalkan oleh Syarikat sewaktu bertugas" dan/atau;

Perkara 25, Senarai Salahlaku Berat, Lampiran "J", di muka surat 43.

"Berkelakuan dengan sedemikian cara hingga menjatuhkan reputasi perkhidmatan atau menghilangkan kepercayaan terhadap perkhidmatan Syarikat dan/atau jawatannya sendiri."

SAL AHLAKU KETIGA

Pada 17.7.2014, tuan telah memberi keterangan yang tidak benar kepada Pasukan Penyiasat Kes Kemalangan Elektrik di Jln 4 Taman Melayu Baru, Kg Melayu Subang pada 13 Julai

2014, apabila tuan mengaku bahawa tuan yang menjalankan kerja-kerja pengujian perfasaan kabel diantara Pencawang Elektrik Padat Sek. Keb Kg Melayu Subang ke Joint Pit ke Pencawang Elektrik Subang Low Cost dengan dibantu oleh Encik Zul Husni bin Che Mail, No Pekerja: 10082844, Orang Berkecekapan (Competent Person) dan Encik Sabri Bin Nekmat, No. Pekerja: 10026992, Orang Berkecekapan (Competent Person).

Perbuatan tuan ini adalah merupakan satu Salahlaku Berat. Mengikut Prosedur Tatatertib Edisi Keenam, 2013, tuan telah melanggar:-

Perkara 23, Senarai Salahlaku Berat, Lampiran "J", di muka surat 43.

"Mengabaikan tugas dan tanggungjawab yang diamanahkan oleh Syarikat" dan/atau

Perkara 61, Senarai Salahlaku Berat, Lampiran "J", di muka surat 45.

"Memberi keterangan/ pengakuan/ jawapan tidak benar kepada pegawai yang mewakili Syarikat", dan/atau

Perkara 25, Senarai Salahlaku Berat, Lampiran "J", di muka surat 43.

"Berkelakuan dengan sedemikian cara hingga menjatuhkan reputasi perkhidmatan atau menghilangkan kepercayaan terhadap perkhidmatan Syarikat dan/atau jawatannya sendiri."

[134] In the course of establishing the second and the third charges against CLW-3, the Company has adduced documentary and oral evidence that CLW-3 had committed the misconduct in the Second Charge:-

134.1 *The oral evidence directly relevant to proving the Second Charge are adduced by COW-4 and COW-5.*

134.2 *The documentary evidence directly relevant to proving the Second Charge are the written statement by CLW-2 on 17.7.2014 (COB-3, pages 70-72) and percakapan dalam pemeriksaan (statements during investigation) of COW-5 (COB-3, pages 57 – 62).*

Whether the Second Claimant (CLW-3) admitted to COW-5 on that he performed the cable phasing test when in fact that was not true

[135] In examination-in-chief, COW-5 who was the investigator (Jurutera Keselamatan Kanan, Negeri Selangor) testified that she arrived at the accident site which is the joint pit at the Site at about 1.45 am and CLW-1 had explained to her that CLW-1 had asked CLW-3 to carry out the phasing test as CLW-1 had to leave the Site to go to Anshin, Shah Alam. (COWS-5, Q&A No. 14)

[136] It was testified by COW-5 in examination-in-chief that at about 2.30 am, COW-5 went to the PE Padat Sekolah Kebangsaan Kg Melayu Subang and there CLW-3 had explained to her how CLW-3 was carrying out the phasing test. CLW-3 showed to COW-5 that he was knocking on the switching gear when he was unable to get the reading while Sabri was on the phone communicating with the victim, Hairulnizam. Suddenly, he heard a loud noise before the area blackout. (COWS-5, Q&A No. 14)

[137] COW-5 had given consistent evidence during the Domestic Inquiry that on 14.7.2014 at around 2.30 am, COW-5 went to investigate at the Pencawang Padat Sekolah Kebangsaan Kg Melayu Subang and CLW-3 was explaining to COW-5 how he carried out the phasing test. COW-5's statements before the DI Panel were as follows (COB-2, Page 114) :

“POS11: Sila rujuk sambungan jawapan nombor 11 dan terangkan kepada ahli panel apa yang sebenarnya berlaku semasa puan menjalankan siasatan bagi kes ini bermula dari 14/7/2014 sehingga 22/7/2014.

SP6: Pada 14/7/2014 saya telah pergi ke tapak sekitar 1.45 pagi dan mendapati telah ada pomen saya Hj. Ruslani, Encik Siva dan beberapa anggota kerja yang lain. Encik Siva menerangkan sedikit maklumat tentang kerja-kerja dijalankan iaitu Orang Yang Berkebenaran yang terlibat, Orang Yang Berkecekapan yang terlibat dan juga pencawang yang terlibat.

Saya juga diterangkan oleh Encik Nizam (yang saya panggil AP1) pada malam tu meminta Encik Shariman (yang saya panggil AP2) pada malam itu membuat ujian perfasaan kerana beliau perlu pergi ke PE Anshin untuk membaiki breakdown yang lain. AP2 dibantu oleh Encik Zul Husni dan Encik Sabri. Kemudian sekitar 2.30 pagi kami telah pergi ke Pencawang Padat Sekolah Kebangsaan Kg. Melayu Subang dengan menaiki kereta Encik Nizam bersama Hj. Ruslani.

*Sampai di pencawang pada tersebut saya mendapati feeder di switchgear tersebut dalam posisi OFF dan berkunci dengan NSL can digantung notis. Earth switch dalam posisi ON dan tidak berkunci. AP2 menerangkan bagaimana beliau membuat pengujian perfasaan. Saya juga bertanya kedudukan di mana AP2, kedudukan Encik Zul Husni sebagai GP dan Encik Sabri sebagai GP juga. **AP2 memaklumkan komunikasi semasa pengujian menggunakan handphone Encik Sabri dalam keadaan loud speaker kerana bateri handphone beliau telah habis. AP2 menerangkan setelah beliau tidak mendapat bacaan dalam ujian perfasaan beliau telah mengetuk-ngetuk bahagian atas switch gear dan beliau mendengar bunyi kuat dan kawasan tiba-tiba menjadi gelap. Beliau dimaklumkan mangsa terkena flashover melalui handphone Encik Sabri..."***

[138] Apart from that COW-5 also gave a consistent statement in her percakapan dalam pemeriksaan (statements during investigation) whereby COW-5 stated that CLW-3 had explained to COW-5 that he had carried out the phasing test and what he did when he failed to get the reading. (COB-3, page 59).

[139] In the circumstance, there is no reason to disbelieve that on 14.7.2014, after the accident, CLW-3 had admitted to COW-5 who was the Jurutera Kanan Keselamatan, Kesihatan Pekerjaan dan Alam Sekitar, Negeri Selangor that he had carried out the phasing test at the Site assisted by CLW-2 and Sabri. COW-3 gave false statement to COW-5 and in doing so, COW-3 was not being truthful to COW-5 because the truth of the matter was that the phasing test was done by CLW-2 and Sabri. This Court found CLW-3 guilty of the Second Charge.

Whether the Second Claimant (CLW-3) falsely admitted that he did the cable phasing test to the Pasukan Penyiasat on 17.7.2014

[140] The Investigation Team on 17.7.2014 consisted of Foo Yong Tan, Faisal Mohammad, Shahida Azizan, Yuhaimi Yaacob, Anwar Muhammad and COW-5 himself.

[141] It was the evidence of COW-5 that on 17.7.2014 she had called the workers involved including CLW-3 and asked them to give their hand written statement. COW-5 further testified that in CLW-3's hand written statement (COB-3, pages 70-72), CLW-3 admitted that he had carried out the phasing test at the Site and he was assisted by CLW-2 and Sabri. (COWS-5, Q&A 15). The Written Statement by CLW-3 is as follows (COB-3, Page 71):

“saya, Sabri, Zul Husni telah membuat phasing.

- 1) *H-pole ke joint pit*
- 2) *Dari pencawang ke joint pit 2 kable*
- 3) *Sek. Keb. ke joint pit.”*

[142] It is interesting to note that in cross-examination, CLW-3 admitted that he and CLW-1 had left to Anshin, Shah Alam when CLW-2 and Sabri was carrying out the phasing test. CLW-2 went on to state that he had explanation as to why he had given false statement to COW-5 and/or the investigation team. During Re-Examination, COW-3 explained that he had given false statement to COW-5 and/or the investigation team as according to the advice or instruction given by COW-4 purportedly to protect the good name of TNB of Shah Alam and that of and in the interest of the deceased. This Court is unable to agree with the explanation given by CLW-3. No evidence was adduced as to how by giving false statement to the Investigation Team led by COW-5, the good name of TNB of Shah Alam and the interest of the deceased would be protected. The Court found this contention is without merit and must therefore be rejected. In any event, an employee is bound to follow a formally written SOP/Safety Rules and not to take as a shield a wrongful order of his or her Superior against a damaging misconduct. In *Mustafa Kamal V Maybank Finance Bhd [2011] 2 LNS 1671* it was held that:

"[1] Kepatuhan kepada peraturan dan garis panduan yang dikeluarkan oleh bank pusat adalah teras utama kepada bank dan syarikat kewangan yang beroperasi di negara ini. Arahan dan peraturan dikeluarkan bagi memastikan urus tadbir sistem kewangan oleh bank dan institusi kewangan dijalankan dengan penuh tanggungjawab dan berintegriti. Ia juga bertujuan bagi

memastikan pelanggan bank adalah terjamin serta dapat mengelakkan dari berlaku keruntuhan sistem kewangan dengan hilangnya kepercayaan masyarakat kepada sistem kewangan oleh institusi kewangan di negara ini. Ia adalah malapetaka yang perlu dielakkan bagi menjamin kesihatan ekonomi negara.

...

[31] Episod yang berlaku di dalam kes ini adalah persimpangan di antara arahan yang diberikan oleh pegawai atasan kepada pegawai bawahan untuk menjalankan suatu tindakan yang melanggar peraturan dan undang-undang. Dalam keadaan persimpangan sebegini, sudah pasti pada masa yang matang, pegawai bawahan akan melakukan arahan pegawai atasan atas alasan pegawai bawahan dikehendaki mematuhi arahan pegawai atasan. Adalah tidak dapat dinafikan di dalam keadaan tertentu pegawai atasan mungkin akan berlepas tangan sekiranya pelanggaran peraturan dan undang-undang itu dapat dikesan oleh majikan. Pada masa ini, berkemungkinan pegawai bawahan yang mengikut arahan tersebut akan menanggung kesan tindakan beliau yang dikategorikan sebagai salah laku. Pegawai atasan yang memberi arahan tersebut tidak akan dikaitkan dengan salah laku ekoran daripada pelanggaran peraturan dan undang-undang tersebut. Walau bagaimanapun, dalam menangani isu ini pegawai bawahan harus sentiasa memastikan bahawa pematuhan arahan kepada pegawai atasan itu tertakluk kepada arahan tersebut sama ada bercanggah dengan peraturan dan undang-undang serta adakah arahan tersebut memberikan bahaya kepada beliau? Seseorang pekerja tidak boleh menjadikan pematuhan arahan pegawai atasan yang bercanggah dengan undang-undang sebagai perisai untuk dikatakan tidak melakukan salah laku.

Apa yang lebih penting di dalam kes ini sebagai seorang pekerja di institusi kewangan adalah menjadi tugas dan tanggungjawab kakitangan untuk memastikan integriti sistem perbankan tidak dicabuli. Semua pekerja harus sedar tanggungjawab mengendalikan dana pendeposit dan harta syarikat adalah besar tanggungjawabnya. Para pendokong sistem perbankan dan kewangan tidak boleh berkompromi sebarang bentuk penyelewengan, pemalsuan, penyembunyian maklumat dan tindakan yang tidak beretika dalam memberikan perkhidmatan kewangan atau nasihat kewangan kepada para pelanggan. Sama ada ia merugikan Pihak Responden secara langsung atau menguntungkan Pihak Responden, apa yang penting ialah para pekerja di sektor kewangan dan perbankan harus mempunyai tahap etika yang tinggi dalam pengurusan kewangan. Ia adalah penting bagi membolehkan sistem perbankan negara ini dapat bersaing dengan institusi kewangan antarabangsa dan dapat menagih kepercayaan yang tinggi di kalangan para pelanggan. Peraturan yang dikeluarkan oleh bank pusat adalah bertujuan untuk memastikan para pengamal instusi kewangan dapat menjalankan urusan dengan mempunyai tahap piawaian yang tinggi serta memenuhi piawaian antarabangsa. Oleh itu, sebarang ketidakpatuhan kepada BAFIA dan peraturan-peraturan bank pusat dan peraturan- peraturan dalaman bank dan syarikat kewangan perlu diberikan perhatian yang serius. Dalam erti kata lain, gabungan yang mantap di antara peranan kakitangan institusi kewangan, institusi kewangan dan bank serta bank pusat adalah penting bagi menjamin kelangsungan sistem kewangan yang berwibawa serta dapat menjadi mercu tanda kepada institusi kewangan luar negara bagi mencontohi dan meneladani kecekapan, integriti dan keberkesanan sistem

kewangan dan perbankan negara ini."

[143] In the case of Subramaniam Paidiah v. Proton Edar Sdn Bhd [2018] 2 LNS 3125, the Industrial Court upheld the dismissal against the claimant and held that a clear contravention of the SOP, even when such an instruction emanates from the Claimant's superior, is unlawful. The Chairman of Industrial Court held [please see page 40, Tab 2 of the CBOA], that:

"[39] A clear contravention of the SOP, even when such an instruction emanates from the Claimant's superior, is unlawful. The Claimant clearly knew that the instructions of his superior was wrong but yet instead of reporting or seeking clarification from the higher authority in the Company, the Claimant persisted to follow the unlawful instructions."

[144] As such, this Court is satisfied that on 17.7.2014, CLW-3 had given the statement to the investigation team that the phasing test at the Site was carried out by him and assisted by CLW-2 and Sabri. This was a false statement by CLW-3. This Court found CLW-3 guilty of the Third Charge.

Whether the Second Charge and Third Charge against the Third Claimant (CLW-3) Proven

[145] It is abundantly clear that based on the overwhelming evidence adduced, the Company has successfully proved the Second Charge and Third Charge on a balance of probabilities. CLW-3's explanations that it was COW-4 and COW-5 who instructed him to make the false statements were not founded on any credible evidence.

[146] This Court is of the considered conclusion that the misconduct in the Second Charge and Third Charge proved against CLW-3 warrants dismissal by the Company. Giving untruthful statement to the Investigation Team formed by the Company to investigate into the causes of the fatal accident occurred on 13.07.2014 had the effect of misleading the finding of the investigation team and as such it is a serious offence.

[147] In this regard, this Court found support in the case of *Thamil Chelvan a/l Kalithasan dan Seorang Perayu Lain v Seri Pacific Cooperation Sdn. Bhd* [2017] ILJU 155 the Industrial Court held the following:

“The 2nd Claimant had not only breached the Hotel's policy in the Hotel's Employee Handbook, but he had also been untruthful to his employer. That amounted to serious acts of misconduct for which punishment of dismissal was justifiable.”

Fourth Charge

[148] The Fourth Charge against CLW-3 reads as follows (COB-1, page 32):

SAL AHLAKU KEEMPAT

Pada 13.7.2014 lebih kurang diantara jam 9 malam hingga 10 malam, tuan memberikan dua (2) Master key jenis Ablov & Gere untuk Pencawang Elektrik Padat Sek. Keb Kg Melayu Subang kepada Encik Mohd Zul Husni Bin Che Mail, No Pekerja: 10082844, Orang Berkecekapan (Competent Person) dan Encik Sabri Bin Nekmat, No Pekerja 10026992, Orang

Berkecekapan (Competent Person) tanpa kebenaran Syarikat.

Perbuatan tuan ini adalah merupakan satu Salahlaku Berat. Mengikut Prosedur Tatatertib Edisi Keenam, 2013, tuan telah melanggar:-

Perkara 23, Senarai Salahlaku Berat, Lampiran "J", di muka surat 431

"Mengabaikan tugas dan tanggungjawab yang diamanahkan oleh Syarikat" dan/atau

Perkara 34, Senarai Salahlaku Berat, Lampiran "J" di muka surat 44,

"Tidak mematuhi atau gagal mematuhi Arahan atau Peraturan berhubung dengan keselamatan di tempat kerja atau tidak memakai atau gagal memakai pakaian/ peralatan keselamatan yang dibekalkan oleh Syarikat sewaktu bertugas"

Panduan Kejuruteraan Bil. A4/2007, Guideline On New Master Key Locking System and Key Control for TNB Distribution Division (COB-3, Pages 145 – 146)

[149] It was evidenced by COW-3 and COW-4 that based on the company's safety procedure as stated in Paragraph 8 of the Panduan Kejuruteraan Bil A4/2007 and Guideline on New Master Key Locking System and Key Control for TNB Distribution Division (COB-3, pages 145-46) that master keys cannot be issued to another person who is not authorized to hold Master Keys.

(COWS-3, Q&A No. 16) and (COWS-4, Q&A No. 18).

[150] Paragraph 8 of Panduan Kejuruteraan Bil A4/2007 and Guideline on New Master Key Locking System and Key Control for TNB Distribution Division read as follows:

“8. *Management of Master Keys*

*TNB Distribution Division Sites are locked to protect the network from unauthorize access and to protect the public from hazards associated with the operation of the network. **Master keys are issued to an AP who is responsible for the safekeeping of the Master Keys. No person entrusted with keys to TNB-Distribution Division Sites shall give the keys to another person who is not authorized to hold Master Keys.** Failure to comply with this requirement may result in Master Keys being withdrawan and Certificate of Authorisation or Special Permit suspended.”*

[151] As such, it must be understood that the Master Key to PE Padat Sek. Keb Kg Melayu Subang can only be kept by Authorised Person who are CLW-1 and CLW-3, as testified by COW-3 (COWS-3, Q&A No. 16)

[152] COW-3 went on to testify that the Master Key are keys to all the substations in the area where the Authorised Person is in charge of and CLW-3 as an AP cannot pass the Master Keys of PE Padat Sek. Keb Kg Melayu Subang to CLW-2 who was only a Competent Person ("CP"). (COWS-3, Q&A No. 17 & 18).

Whether The Second Claimant (CLW-3) gave the Master keys to the Third Claimant (CLW-2) and Sabri

[153] CLW-2's statement in his "percakapan dalam pemeriksaan" (statement during investigation) with the Encik Adnan Bin Haji Ishak dated 9.12.2014, is pertinent in this issue. CLW-2 clearly stated that CLW-3 had passed the key to him and Sabri had opened the door to the pencawang. CLW-2's Statement was as follows (COB-3, Pages 88):

"S17: Semasa kamu pergi ke P/e S.K Kg. Melayu Subang, Bagaimana kah kamu memasuki pencawang tersebut?"

J17: En. Shariman bin Shammin ada memberikan dua jenis Master key (Abloy & Garrey) dan En. Sabri bin Nekmat yang membuka pintu pagar serta pintu pencawang tersebut."

[154] Sabri's statement during the Domestic Inquiry ultimately confirmed CLW-2's statement that CLW-3 had given the key to CLW-2 and Sabri had used the key given to open the pencawang. Sabri gave evidence during DI as follows (COB-2, Page 51) :

"PO S6: Sila rujuk muka surat 3, P04 soalan nombor 7 hingga jawapan nombor 10. Sila terangkan secara ringkas apa yang telah berlaku pada 13/7/2014.

SP2: Saya bersama Encik Zul Husni dapat arahan

daripada Encik Shariman untuk tolong buat ujian kerana Encik Shariman ada dapat call dari Encik Nizam minta tolong ke PE Anshin. **Sebelum dia pergi dia serahkan kunci pencawang kepada Encik Zul Husni. Selepas itu kita pergi ke PE Compact Sekolah sampai di sana Encik Zul bawa kereta. Saya ambil kunci dan membuka pintu pencawang.**

Whether the Fourth Charge against the Second Claimant (CLW-3) Proven

[155] From the evidence adduced, this Court is satisfied that the Company had adduced sufficient evidence in support of the charges that CLW-3 had given CLW-2 the Master Key to the PE Padat Sek. Keb. Kg Melayu Subang and Sabri without the Company's approval and in breach of the Company's safety procedure. This Court is of the considered opinion that CLW-3's denial devoid of any merit and failed to stand the consistent evidence given by Sabri and CLW-2 during the Domestic Inquiry, that CLW-3 had given the master keys to the pencawang elektrik to CLW-2. Sabri had used the master keys to open the pencawang elektrik at Sek. Keb. Kg. Melayu Subang which needs no repetition that is of serious nature.

[156] In the case of *Shamshulbaharil Omar v Petronas Penapisan (Melaka) Sdn Bhd* [2010] 2 LNS 1333 the Industrial Court held the following:

“40. *Sebenarnya Syarikat tidak perlu mengenakan tuduhan yang banyak kepada Yang Menuntut untuk menunjukkan Yang Menuntut telah melakukan perbuatan salahlaku. Mahkamah berpendapat satu atau dua pertuduhan*

adalah memadai sekiranya kesalahan yang dilakukan oleh Yang Menuntut adalah merupakan kesalahan serius yang menyalahi peraturan Syarikat dan menjadi asas kepada pelanggaran syarat perkhidmatan dan dapat dibuktikan atas pertimbangan kebarangkalian. Dr. Ashgar Ali di dalam bukunya "Dismissal from Employment and the Remedies" di muka surat 135 menyatakan:-

"What is certain is that an act of gross misconduct in the workplace or outside the workplace during the working hours and in certain situations even outside working hours, if established against the employee, may entitle the employer to dismiss the employee. Misconduct of a serious nature such as insubordination, moral turpitude, fighting, falsifying company documents, theft of the employer's property, violating the company's security or safety regulations or any substantive violation, may result in dismissal from employment."

Third Claimant (CLW-2)

First Charge

[157] The First Charge against CLW-2 reads as follows (COB-1, pages 35-36):

"SAL AHLAKU PERTAMA

Pada 13.7.2014 di antara jam 9:00 malam hingga 14.7.2014 jam 12.30 pagi, tuan telah melakukan kerja di luar bidang kuasa

apabila tuan menjalankan kerja-kerja pengujian perfasaan kabel diantara Pencawang Elektrik Padat Sek. Keb. Kg Melavu Subang ke Joint Pit ke Pencawang Elektrik Subang Low Cost sehingga menyebabkan Kemalangan Elektrik Maut kepada Encik Hairulnizam Bin Abu Hassan, No. Pekerja: 10077357, seorang Tukang Tingkatan Kanan (TTOB).

Perbuatan tuan ini adalah merupakan satu Salahlaku Berat. Mengikut Prosedur Tatatertib Edisi Keenam, 2013, tuan telah melanggar:-

Perkara 21, Senarai Salahlaku Berat, Lampiran "J", di muka surat 43,

"Melakukan sesuatu kerja atau tugas di luar bidang kuasa atau tanggungjawab tanpa kebenaran" dan/atau

Perkara 23, Senarai Salahlaku Berat. Lampiran "J", di muka surat 43,

"Mengabaikan tugas dan tanggungjawab yang diamanahkan oleh Syarikat" dan/atau

Perkara 31, Senarai Salahlaku Berat, Lampiran "J", di muka surat 44,

"Cuai dalam menjalankan tugas sehingga berlaku kemalangan maut atau kemalangan tidak maut dan/atau kecederaan dan/atau kerosakan dan/atau kerugian kepada Syarikat atau

pekerja lain atau orang lain”, dan/atau

Perkara 34, Senarai Salahlaku Berat, Lampiran "J", di muka surat 44,

“Tidak mematuhi atau gagal mematuhi Arahan atau Peraturan berhubung dengan keselamatan di tempat kerja atau tidak memakai atau gagal memakai pakaian/ peralatan keselamatan yang dibekalkan oleh Syarikat sewaktu bertugas”: dan/atau

Perkara 73, Senarai Salahlaku Berat, Lampiran 'J' di muka surat 47

"Melanggar atau tidak mematuhi atau gaga! mematuhi mana-mana terma dan/atau syarat perkhidmatan (tersurat dan/atau tersirat), Peraturan atau Arahan atau Pekeliling Syarikat atau sebahagian daripada Peraturan atau Arahan atau Pekeliling berkenaan".

[158] The Company has adduced documents relevant to the first charge against CLW-2 as follows:

No.	Documents	Reference
a)	<i>Aturan Keselamatan Elektrik ("AKE")</i>	COB-3, pages 20-49
b)	<i>Surat Pekeliling Pengurus Besar Kanan (Pengurus Aset) Perkhidmatan Dan Amalan Kejuruteraan Bil. A33/2012</i>	COB-3, pages 119-121
c)	<i>"Percakapan Dalam Pemeriksaan (statement during investigation) of Sabri Bin Nekmat</i>	COB-3, pages 10-15

The Third Claimant's (CLW-2's) admission that he carried out the cable phasing test

[159] CLW-2 admitted in his examination-in-chief that he had together with Sabri, carried out the phasing test at the Site on the night of the accident. (CLWS2, Q&A No. 14). It is to be noted that, CLW-2 also stated that he and Sabri had done so on the purported instruction of COW-4 who was the Senior Maintenance Engineer and the OIC. CLW-2 also thought that he was qualified to carry out the phasing test as he possessed certificate of competency issued by TNB.

[160] During cross-examination, CLW-2 admitted that when he had carried out the phasing test at the Site, CLW-3 was not present to supervise his work. CLW-2 further admitted that he had testified the same evidence during the DI that the phasing test was carried out by him and Sabri in the absence of CLW-3.

Whether the Third Claimant (CLW-2) has exceeded his job scope

[161] In examination-in-chief, COW-5 testified that CLW-2 who was only Orang Berkecekapan or Competent Person ("CP") cannot carry out the phasing test at the Site as he will be in breach of paragraphs 3.4.2 and 3.14.1 of the Aturan Keselamatan Elektrik ("AKE") (COB-3, pages 29 & 42). (COWS-5, Q&A No. 12)

[162] Paragraph 3.4.2 (b) of the AKE (COB-3, pages 29) clearly provides that the Authorized Person ("AP") who was responsible for testing including phasing test will be fully responsible to supervise the work carried out to

ensure that the safety procedures are strictly followed. It reads as follows:

"3.4.2 *Penyuisan Untuk Tujuan Pengujian*

b) Orang Berkebenaran yang menjaga pengujian akan bertanggungjawab sepenuhnya memerhatikan sebarang kerja di bahagian yang diasingkan, dija/ankan dengan langkah-langkah keselamatan yang mencukupi mengikut aturan ini dengan tegas."

[163] Further more, paragraph 3.14.1 of the AKE (COB-3, page 42) prescribed that any test must be carried out or under the supervision of Authorized Person ("AP") and no person can carry out the testing without being accompanied by an AP. Paragraph 3.14.1 of AKE provides:

"3.14 *Arahan Lanjut Untuk Pengujian*

3.14.1 *Kebenaran Bagi Orang Yang Berkeajaan*

*Dalam semua kes dimana pengetahuan teknik atau pengalaman yang mencukupi diperlukan untuk menghindar bahaya, **pengujian hanya boleh dijalankan oleh atau di bawah penyeliaan terus dari Orang Berkebenaran. TIDAK SEORANG PUN BOLEH MENJALANKAN KERJA TERSEBUT TANPA DITEMANI.***

[164] It was also clear, in the Company's Surat Pekeliling Pengurus Besar Kanan (Pengurusan Aset) Perkhidmatan Dan Amalan Kejuruteraan Bil. A33/2012 (COB-3, pages 119 – 121) (COB-3, page 120 Paragraph 3.1) that any switching and testing work at any of the Company's apparatus MUST be carried out by Authorised Person. It was worded as such:

*"3.0 LANGKAH PENGUJIAN KABEL DI PERKAKASUIS
PADA SISTEM TNB PEMBAHAGIAN*

3. *Kerja-kerja **PENSUISAN dan PENGUJIAN**
peralatan/pepasangan elektrik TNB
MESTILAH dilakukan oleh Orang
Berkebenaran TNB dengan menggunakan
*penuh Peralatan Perlindungan Diri (PPD)."**

[165] It would thus be apparent that based on the Company's safety procedure above in the Aturan Keselamatan Elektrik and Surat Pekeliling Pengurus Besar Kanan (Pengurusan Aset) Perkhidmatan Dan Amalan Kejuruteraan Bil. A33/2012 only Authorised Person can carry out tests including phasing test. Other employees, including Competent Person are beyond the reach of Authorisation pursuant to paragraph 3.4.2 and 3.14.1 of the AKE and circular from the Senior GM as aforesaid.

[166] In cross-examination, CLW-2 admitted that he was well aware that only Authorised Person can carry out the phasing test and he was supposed to carry out the phasing test under the supervision of an AP, and no one else,

including COW-4 whom CLW-2 referred to as a Senior Engineer of higher authority. CLW-2 testified during cross-examination as follows :

“Q: Sepatutnya AP yang membuat phasing?”

A: Ya, betul.

Q: Jadi setuju, sepatutnya anda membuat ujian phasing di bawah seliaan AP dan bukannya Encik Faiz?

A: Sepatutnya memang setuju.”

[167] During cross-examination CLW-2 was referred to Aturan 3.14.1 of AKE and COW-2 confirmed that he understood the said Aturan and further agreed according to the Aturan that his carrying out of the phasing without CLW-1 or CLW-3 who were Authorised Person ("AP") was in breach of paragraph 3.14.1 of the AKE.

[168] CLW-2's contention that he was authorized to carry out the phasing test at the Site because of his certificate of competency and he was purportedly instructed by COW-4 to carry out the phasing test at the Site, flies in the teeth of the Safety Procedure laid down for strict compliance itself and cannot be accepted.

[169] This Court is drawn to the testimony of COW-5, who was the Senior Safety Engineer in TNB Selangor during cross-examination that even with the Certificate of Competency that allowed CLW-2 to handle operates until 33 KV, CLW-3 is still not allowed to carry out the phasing test as the critereon

dictated in the Aturan Keselamatan Elektrik and Surat Pekeliling are not met. This is despite the capacity of the joint pit at Kg. Melayu Subang in question is merely 11 KV. In the words of COW-5 during cross-examination:

"Jadi batasan CP perlu merujuk AKE dan peraturan pekeliling TNB."

[170] As technical employees of the Company having the charge or conduct of the apparatus, the Claimants are perpetually bound by the Aturan Keselamatan Elektrik Paragraph 1.3 of AKE which provides :

"1.3 Tugas-tugas

Adalah menjadi tugas dan tanggungjawab semua yang berkaitan dengan kendalian dan bekerja pada sistem dan radas TNB, untuk mengetahui dengan mendalam Peruntukan Kanun dan Aturan Keselamatan Elektrik yang menguasai sebarang kerja yang mereka lakukan.

Kejahilan terhadap Peruntukan Kanun dan Aturan Keselamatan Elektrik, Arahan Tekni, Arahan Kejuruteraan TNB tidak boleh diterima sebagai alasan untuk mengabaikan tugas."

[171] CLW-2 during cross examination admitted that he understood and agreed with Paragraph 1.3 of the Aturan Keselamatan Elektrik. CLW-2 was well aware of his limits in that he was not authorized to carry out the phasing

test as he was only a Competent Person and not an Authorised Person. Unfortunately, CLW-2 choosed to flout the clear provisions of the AKE.

[172] Even if assuming that instructions were given by COW-4 to CLW-2 to carry out the phasing test at the joint pit at Kg. Melayu Subang on the fateful night, CLW-2 would not be bound by, on the contrary, wrongful of CLW-3 to follow invalid instructions from even an Engineer as senior in rank as COW-4.

[173] This Court agrees that CLW-2 could have objected if at all he received wrongful instructions from COW-4 and this mechanism is prescribed under paragraph 1.6 of the Aturan Keselamatan Elektrik (COB-3, page 21) whereby it is stated that when the employee receives any instruction in regards to work or operating of high voltage and low voltage apparatus, the employee can report any objection from carrying out the instruction. Paragraph 1.6 of the Aturan Keselamatan Elektrik is as follows:

"1.6 Bantahan

Apabila seseorang menerima arahan berkenaan dengan kerja atau kendalian pada perkakas Voltan Tinggi atau Voltan Rendah, beliau boleh melaporkan apa jua bantahan jika ada, dari menjalankan arahan tersebut kepada orang yang memberi arahan itu. Orang yang memberi arahan akan menyiasat bantahan tersebut dan jika perlu dirujuk kepada pihak atasan."

[174] It was agreed by CLW-2 during cross-examination that he should have objected should there were instructions from COW-4 as he knew that the

instructions ought to have come from CLW-1 who held the authorization to carry out phasing test at Kg. Melayu Subang on the night of 13.07.2014.

[175] In view of the above admission by CLW-2, this Court is satisfied that CLW-2 as Competent Person was not authorized to carry out the phasing test at the Site as the phasing test must be carried out by an AP or under direct supervision of an AP. It was undisputed that there was no Authorised Person present when the phasing test was carried out at the Site.

Cause of the Accident

[176] This Court has elaborated and dealt with on this point earlier on and repeats the content of the same and reiterate the Court's finding herein, that the cause of the accident was due to human error and not mechanical error.

[177] As the cause of the accident was not due to any mechanical error but due to human error, this Court agrees that the human error causing the accident on 13.7.2014 at the Site could have been avoided if the safety procedures at the Site was duly followed by all the Claimants including CLW-2.

Whether the First Charge against the Third Claimant (CLW-2) proved

[178] Based on the evidence adduced, this Court found on the balance of probabilities, that CLW-2 had carried out work beyond his job scope when he had done the phasing test at the Site on the night of the accident which resulted in the death of Hairulnizam.

[179] CLW-2 was well aware of the Company's safety procedures that he cannot carry out the phasing test at the Site as he was merely a Competent Person (CP) and not an Authorised Person (AP). It was evidenced by COW-5 that an AP is more qualified and knowledgeable than a CP. (COWS-5, QA 11). CLW-2's disregard to the Company's safety procedure had led to the accident.

Second Charge and Third Charge against the Third Claimant (CLW-2)

[180] The Second Charge and Third Charge against CLW-2 reads as (COB-1, pages 36-37) :

"SAL AHLAKU KEDUA

Pada 14.7.2014, tuan telah memberi keterangan yang tidak benar kepada Puan Noor Saedah Binti Selamat, No. Pekerja: 10027695, Jurutera Kanan Keselamatan, Kesihatan Pekerjaan Dan Alam Sekitar Negeri Selangor, Bahagian Pembahagian, TNB pada masa itu, apabila tuan mengatakan bahawa Encik Shariman Bin Shammim, No. Pekerja: 10071738, Juruteknik Tingkatan Kanan "B" (TT11), Orang Berkebenaran (Authorised Person) yang menjalankan kerja-kerja pengujian perfasaan kabel diantara Pencawang Elektrik Padat Sek. Keb. Kg Melayu Subang ke Joint Pit Ke Pencawang Elektrik Subang Low Cost.

Perbuatan tuan ini adalah merupakan satu Salahlaku Berat. Mengikut Prosedur Tatatertib Edisi Keenam, 2013, tuan telah melanggar:-

Perkara 23, Senarai Salahlaku Berat, Lampiran "J", di

muka surat 43.

"Mengabaikan tugas dan tanggungjawab yang diamanahkan oleh Syarikat" dan/atau

Perkara 24, Senarai Salahlaku Berat, Lampiran "J", di muka surat 43.

"Membelakangkan kewajipan dan/atau berkelakuan dengan sedemikian cara yang boleh menyebabkan kepentingan persendirianya bercanggah dengan kewajipannya terhadap Syarikat": dan/atau;

Perkara 61, Senarai Salahlaku Berat, Lampiran "J", di muka surat 45.

"Memberi keterangan/pengakuan/jawapan tidak benar kepada pegawai yang mewakili Syarikat".

SAL AHLAKU KETIGA

Pada 17.7.2014, tuan telah memberi keterangan yang tidak benar kepada Pasukan Penyiasat Kes Kemalangan Elektrik di Jin 4 Taman Melayu Baru, Kg. Melayu Subang pada 13 Julai 2014, apabila tuan mengatakan bahawa Encik Shariman Bin Shammim, No Pekerja: 10071738, Juruteknik Tingkatan Kanan "B" (TT11), Orang Berkebenaran (Authorised Person) yang menjalankan kerja-kerja pengujian perfasaan kabel diantara Pencawang Elektrik Padat Sek. Keb. Kg Melayu Subang ke Joint Pit ke Pencawang Elektrik Low Cost.

Perbuatan tuan ini adalah merupakan satu Salahlaku Berat. Mengikut Prosedur Tatatertib Edisi Keenam, 2013, tuan telah melanggar:-

Perkara 23, Senarai Salahlaku Berat, Lampiran "J", di muka surat 43,

"Mengabaikan tugas dan tanggungjawab yang diamanahkan oleh Syarikat" dan/atau

Perkara 24, Senarai Salahlaku Berat, Lampiran "J", di muka surat 43,

"Membelakangkan kewajipan dan/atau berkelakuan dengan sedemikian cara yang boleh menyebabkan kepentingan persendirianya bercanggah dengan kewajipannya terhadap Syarikat", dan/atau;

Perkara 61, Senarai Salahlaku Berat, Lampiran "J", di muka surat 45,

"Memberi keterangan/ pengakuan/ jawapan tidak benar kepada pegawai yang mewakili Syarikat".

Whether The Third Claimant (CLW-2) falsely admitted to COW-5 on 14.7.2014 that the Second Claimant (CLW-3) did the cable phasing test

[181] As the first and the second charges against CLW-2 are similar to the

second and the third charge against CLW-3, this Court hereby, to the extent of its relevancy adopts the findings and elaborations that had been dealt with at Paragraph [140] until Paragraph [144] (Supra).

[182] In her evidence, COW-5 (Jurutera Kanan Keselamatan, Negeri Selangor) who was the investigator testified that she arrived at the accident site which is the joint pit at the Site at about 1.45 am and CLW-1 had explained to her that CLW-1 had asked CLW-3 to carry out the phasing test as CLW-1 wanted to leave the Site for Ashin, Shah Alam. (COWS-5, Q&A No. 14). CLW-2 was present during this explanation.

[183] COW-5 went on to testify that at about 2.30 am, she went to the PE Padat Sekolah Kebangsaan Kg Melayu Subang and there CLW-3 had explained to her how CLW-3 was carrying out the phasing test. CLW-2 showed to COW-5 that he was knocking on the switching gear when he was unable to get the reading while Sabri was on the phone communicating with the victim, Hairulnizam. Suddenly, CLW-3 heard a loud noise before the area blackout. CLW-2 was present during this explanation. (COWS-5, Q&A No. 14).

[184] In her *percakapan dalam pemeriksaan* (statements during investigation) COW-5 consistently stated that the CLW-2 informed her that he was outside when CLW-3 was carrying out the phasing test. CLW-2 was present when CLW-3 had explained to COW-5 that CLW-3 had carried out the phasing test and what CLW-3 did when he failed to get the reading.

[185] Clearly CLW-2 never did admit to COW-5 that he was the one who carried out the phasing test. He was also silent when CLW-3 falsely admitted to COW-5 that he was the one who carried out the phasing test at the Site;

whereas it was CLW-2 who was a mere CP who had carried out the phasing test.

Whether The Third Claimant (CLW-2) falsely admitted to Pasukan Penyiasat on 17.7.2014 that the Second Claimant (CLW-3) did the cable phasing test

[186] COW-5 testified that on 17.7.2014 she had called the workers involved including CLW-2 and asked them to give hand written statements. In CLW-2's written statement (COB-3, page 73), CLW-2 admitted that the phasing test at the Site was carried out by CLW-3 assisted by CLW-2 and Sabri (COWS-5, Q&A No. 15). During cross-examination CLW-2 confirmed the abovesaid admission in his written statement. CLW-3's evidence was as follows:

Cross-examination of the Third Claimant

"Q: *Saya katakan, semasa siasatan pada 17.7.2014, anda memberitahu, AP Shariman yang buat ujian perfasaan dibantu oleh anda dan Sabri?*

A: ***Semasa siasatan ada saya bagi tahu tetapi itu mengikut skrip.***"

[187] It can be seen from the abovesaid that the evidence is convincing enough to conclude that on 17.7.2014, CLW-2 had given the false statement to the investigation team that the phasing test at the Site was carried out by CLW-3.

Whether The Third Claimant (CLW-2) gave false statement to COW-5 and Pasukan Penyiasat

[188] It is on the evidence that CLW-3 was not with CLW-2 when CLW-2 had carried out the phasing test at the Site. CLW-2 fully understood that only an AP is authorized – with Authorization from RCC- to carry out phasing test and if CLW-2 was to assist, it must be done under the supervision of an AP. CLW-2's testimonies during cross-examination were as follows :

"Q: Sila mukasurat 87, COB-3. Rujuk soalan 7 hingga 15. Shariman tidak ada bersama anda semasa penentuan fasa atau ujian perfasaan di P/E low cost ke kotak joint (P/E SK Kg Melayu Subang)?

A: Ya, memang Shariman tidak ada."

"Q: Sebagai CP anda memang tahu seorang AP mempunyai tanggungjawab yang penting dan berat seperti dinyatakan di dalam AKE?

A: Betul.

Q: Sepatutnya AP yang membuat phasing?

A: Ya, betul."

[189] As such, it is established that CLW-2 had given the false statement that the phasing test was carried out in the presence of CLW-3 as he knew that the phasing test cannot be carried out by him who was only a Competent Person (CP).

Whether by the Third Claimant's (CLW-2's) explanation valid

[190] It was contended by CLW-2 that he was instructed by COW-4 to give the statement that CLW-3 was the one who carried out the phasing test at the Site and accompanied by CLW-2 and Sabri. (CLWS-2, Q&A No. 17 & 18)

[191] This was denied by COW-4. In his evidence, COW-4 who was the Officer in Charge scheduled on the night of 13.7.2014, testified that on the early morning of 14.7.2014 after the accident, when he met up with the Claimants, he had only instructed the Authorised Person (AP) in charge to regularise or update the Permit To Work (PTW). (COWS-4, Q&A No. 6)

[192] COW-4's denial was also contained in the Notes of Evidence in the DI whereby COW-4 stated that he did not discuss any other matter on the morning of 14.7.2014 when he met the Claimants. COW-4 gave statement before the DI Panel as follows (COB-2, Page 78).

"WP S23: Sila tuan perjelaskan jam berapa pertemuan-pertemuan tersebut?"

SP4: Perjumpaan pertama dalam lingkungan 3 hingga 4 pagi. Perjumpaan kedua sebelum pukul 8 pagi. Itu adalah anggaran sahaja.

WP S24: Adakah kedua-dua perjumpaan semata-mata berkenaan untuk memperkemaskan PMK selari dengan kerja-kerja di tapak.

SP4: Ya.

WPS25: *Adakah tuan pasti tiada isu lain yang dibincangkan selain isu perkemaskan PMK.*

SP4: Ya.”

[193] The allegation that COW-4 and/or COW-5 gave instruction to CLW-2 to give the statement that the phasing test was carried out by CLW-3 and accompanied by CLW-2 was unsupported by any evidence. It was not adequately explained why CLW-2 had obeyed the alleged instruction by COW-4 who was the OIC on standby to give untrue statements to COW-5 and/or the Investigation Team that CLW-3 had carried out the phasing test at the site. Again it was not evidenced how would this protect the image of TNB of Shah Alam or the deceased interest.

[194] CLW-2 knew he was not authorised to carry out the phasing test and on that basis he made a false statement that it was CLW-3 who did the phasing test. The untrue statement was all but an attempt to cover-up for all three Claimants who knew they had breached the safety policies that is meant for strict compliance.

Q: *Sila jelaskan apakah keterangan yang menyokong ulasan dan penemuan ke atas Pihak Yang Menuntut Ketiga (Zul Husni) bagi salahlaku ketiga?*

A: *Saya merujuk kepada mukasurat 324 hingga 325, COB (Volume 2) iaitu ulasan dan penemuan ke atas Zul Husni bagi salahlaku ketiga adalah seperti berikut:*

- (a) *Didapati P015 (Salinan Rakaman Percakapan kepada Jawatankuasa Siasatan oleh Mohd Zul Husni Bin Che Mail), Zul Husni telah memberi keterangan yang tidak benar secara bertulis kepada pasukan penyiasat kes kemalangan pada 17.7.2014. (sila rujuk mukasurat 73, COB (Volume 3))*

- (b) *Pengakuan Shariman semasa sesi Pemeriksaan Utama, soalan WP 534 dan petikan jawapan ST2. (sila rujuk mukasurat 257, COB (Volume 2))*

- (c) *Pengakuan Shariman mengarahkan Zul Husni dan Encik Mohd Sabri Bin Nekmat berdasarkan PDP Shariman (sila rujuk soalan dan jawapan no. 15 dan 18 di mukasurat 146, COB (Volume 2))*

- (d) *Pengakuan Zul Husni bahawa beliau menjalankan pengujian tanpa diawasi oleh Shariman dalam PDP Zul Husni (sila rujuk soalan dan jawapan no. 12 dan 13 di mukasurat 150, COB [Volume 2])*

- (e) *Pihak pembela Pihak-pihak Yang Menuntut*

tidak dapat mengemukakan bukti seperti saksi-saksi lain selain dari Pihak-pihak Yang Menuntut sendiri untuk mengesahkan Encik Mohd Faiz dan Puan Noor Sa'edah yang mendorong Pihak-pihak Yang Menuntut memberi keterangan tidak benar."

Whether the Second Charge and Third Charge against the Third Claimant (CLW-2) Proven

[195] In the aforesaid this Court is satisfied that the Company had adduced sufficient evidence to prove the Second Charge and Third Charge against CLW-2.

[196] The truth of the matter is that the phasing test at the Site was carried out by CLW-2 and Sabri on 13.7.2014 and not by CLW-3. CLW-2's act on the other hand, of giving untrue statement to COW-5 and the Investigation Team that it was CLW-3 who had carried out the cable phasing test between PE Padat Sek. Keb. Kg. Melayu Subang to Joint Pit to PE; points to only one conclusion; that the material ingredients formulating the two charges had been proved on the balance of the probabilities.

[197] CLW-2's effort to reason out the giving of false statements to COW-5 and the Investigation Team that it was based on the instructions of COW-4 and COW-5, lacks credibilities and devoid of merit.

[198] Y.A. Tuan Franklin Goonting speaking from his Award of the Industrial Court in the case of **Siti Dzahirah binti Harun v Malayan Banking Berhad**

[2018] 2 LNS 2141 held that the punishment of dismissal for being untruthful during the investigative interview commensurate with the Claimant's misconduct. The learned Chairman of the Industrial Court held the following:

*“[19] The Claimant held a very senior position in the Bank. More than just holding a position of trust, she was the enforcer of the Banks' policies. **She had breached this trust that the Bank had reposed in her and she had aggravated such breach by being untruthful at the investigative interview. In the circumstances the Court cannot fault the Bank for deciding that it could no longer keep the Claimant in its employment. The dismissal was with just cause and excuse.**”*

[199] The above decision was affirmed by the High Court on Judicial Review. Guided by the decision in the above case, this Court is of the opinion that CLW-2's proven misconduct as per the second and third charges in the instant case warrants the punishment of dismissal.

Whether Domestic Inquiry Proceedings had Complied with Natural Justice

[200] From the evidence, this Court found nothing in the DI Proceedings of any breach of the fundamental rules of natural justice, i.e. the maxim of audi alteram partem (the right to be heard) and the maxim of nemo debet esse iudex in propria sua causa (no man shall sit in judgment in his own cause).

[201] On the contrary, the Company had held a valid Domestic Inquiry to

accord all 3 Claimants an opportunity to exculpate themselves from the charges leveled against them.

[202] COW-1 who was the Chairman of the Disciplinary Committee confirmed that the Claimants attended the Domestic Inquiry and they were represented by Union representatives. (COWS-1, Q&A 10 & 11). COW-1 also testified that the Disciplinary Committee had found the Claimants guilty and the reasons for such findings were stated in COB-2, pages 305-325 (COWS-1, Q&A No. 18 – 28).

[203] It was contended by the Claimants that there had been multiple postponements of the DI proceedings and the DI took a long time to complete. This Court found that the Claimant had contributed to 16 postponements due to health reasons either by the Claimant themselves, CLW-3's wife or child and due to CLW-2 had just returned from fishing in Thailand, all of which for a period spanning from 01.12.2016 until 06.12.2017. COW-1 testified on the details of the postponements of DI Proceedings in evidence in chief (COWS-1, QA 11). As such there is no merit in the Claimant's contention on this point. The DI proceedings and the findings arrived at the conclusion of the proceedings were intact, with which this Court is in agreement.

[204] In the case of *Malayan Banking Bhd. v. Mohd. Bashah Bin Babji* [1995] 1 ILR 643 (Award No. 180 of 1995) the Industrial Court held :-

"...this Court finds that there is no defect in the DI and was in fact just and fair. This Court will not interfere in the findings of the panel members even on beyond reasonable doubt where the claimant was guilty on the charges preferred against him.

The claimant's dismissal by the bank was with just cause and his claim is therefore dismissed."

[205] Where the domestic inquiry is held in accordance with the principles of natural justice, the Industrial Court ought to consider the adequacy of the findings of the domestic inquiry in order to conclude whether the domestic inquiry has reached the correct conclusion and whether the employee has been dismissed with just cause or excuse. In the High Court case of *Bumiputra Commerce Bank Bhd v. Mahkamah Perusahaan Malaysia & Anor* [2004] 7 CLJ 77 his Lordship Raus Sharif J (as he then was) held as follows:-

"In Metroplex Administration Sdn Bhd v. Mohamed Elias [1998] 5 CLJ 467, Low Hop Bing J in considering a certiorari application to quash an Industrial Court's Award held as follows:

Where a domestic inquiry is held and the rules of natural justice have been applied, the Industrial Court should first consider the adequacy or otherwise of the procedure adopted in the proceedings for the domestic inquiry in order to determine whether the domestic inquiry has applied the correct procedure and reached the correct conclusion having regard to all the evidence, documentary and oral, adduced at the domestic inquiry. If at the domestic inquiry, the rule of natural justice were properly applied, the employee being given the opportunity to be heard and to present his case, and should a finding be made against the employee based on the evidence which was presented to the domestic inquiry, the Industrial Court ought to consider the finding of the domestic inquiry in order to conclude

whether the employee has been dismissed without just cause or excuse. The rule that a domestic inquiry should be held is after all a rule of the court's own devising."

[206] In the instant case, this Court found that the Company had carried out a comprehensive Domestic Inquiry by calling 9 witnesses (COWS-1, Q&A No. 14). The Claimants were accorded with the opportunity to defend themselves during the Domestic Inquiry (COWS-1, Q&A No. 15). In addition, the Disciplinary Committee had reached the correct conclusion that the Claimants were guilty of the charges having regard to all the evidence adduced at the Domestic Inquiry (COB-2, pages 305-325).

Whether punishment of dismissal proportionate

First Claimant (CLW-1)

[207] This Court regards that CLW-1's failing to carry out his responsibilities as an Authorised Person ("AP") with Authorisation given to him by the Regional Control Centre in that he failed to be at the Site to carry out and supervise the phasing test as a serious misconduct. CLW-1 had left the Site in total disregard of the strict safety procedure and he did not cancel his Authorisation Serial No. 90548 with the Regional Control Centre before he handed over his work at the Site to CLW-3.

[208] CLW-1's failure to adhere to the Company's safety procedure, amount to serious misconduct in breach of the Company's "Prosedur Tatatertib Tenaga Nasional Berhad (Edisi Keenam, 2013)". The accident that occurred on 13.07.2014 which took the life of the Claimant's fellow technician was due to human error and not mechanical error. This Court is satisfied that human error was contributed by CLW-1's negligence in complying the safety rules in

a strict manner. In the case of Mohd Razali Sisam v. Duraton Engineering Sdn Bhd [2014] 2 LNS 1112 the claimant was dismissed due to his negligence namely, that he failed to exercise supervision of his subordinates. The Industrial Court held as follows:

*"[23] It is an implied term in a contract of employment that the employee would take reasonable care in the performance of his or her duties under the contract - Ngeow Voon Yean v. Sungei Wang Plaza Sdn. Bhd. & Anor [2004] 1 CLJ 8. It is clear that the Claimant owed a duty to the Company to exercise reasonable skill in the performance of his duty. From the totality of the evidence adduced by the Company and the Claimant's testimony, the court finds that the Claimant was guilty of the misconduct in the charge levelled against him when he failed to exercise reasonable supervision of his subordinates' work and had led to the huge losses suffered by the Company. **His excuses that he did not realise he had been cheated by his technicians and that he was also busy with other projects are not acceptable by the court.**"*

(emphasis is mine)

[209] CLW-1 in the instant case had failed to take reasonable care under his contract as he owed a duty to the Company to exercise reasonable skills in the performance of his job as the Authorised Person at the Site with Authorization issued by the RCC. The punishment of dismissal is therefore proportionate.

The Second Claimant (CLW-3) and Third Claimant (CLW-2)

[210] The fact that CLW-2 and CLW-3 had clearly given false statements to the investigator ("COW-5") and the Pasukan Penyiasat during the course of the investigation on the accident was well established. Their false statements were acts of dishonesty towards the Company, even on the Claimant's belief that it was done with the intention of protecting the name of Shah Alam TNB and the deceased's interest; as allegedly scripted by COW-4. It is the act and not the intention of the act that must be regarded by the Court.

[211] Their actions were a clear misconduct of Perkara 61, Senarai Salahlaku Berat Prosedur Tatatertib TNB Edisi Keenam, 2013 (COB-1, page 77) which states the following:

"61. Memberi keterangan pengakuan/jawapan yang tidak benar kepada pegawai yang mewakili Syarikat."

[212] In a Judicial Review in the case of Siti Dzahirah binti Harun v Mahkamah Perusahaan Malaysia & Anor [2019] MLJU 1421, the High Court upheld the decision of the Industrial Court which found that the Claimant's dismissal was with just cause and excuse. The Claimant was dismissed due to her misconduct which included that she had been untruthful in the investigative interview conducted on 18.10.2016. (Supra, Paragraph 198)

[213] CLW-3's action of instructing CLW-2 to carry out the phasing test at the Site and giving the Master Keys of the PE Padat Sek. Keb. Kg Melayu Subang to CLW-2 were serious breaches of the Company's strict safety procedures. CLW-3 had failed to adduce any supportive evidence that the

master keys can be taken by a CP at the PBBB office where 15 sets of the master keys were available. There is no credibility in such a contention.

[214] CLW-2's utter disregard to the Company's safety procedure by carrying out the phasing test at the Site without the Company's approval and Authorisation was a serious misconduct as he had failed to safeguard the trust and confidence entrusted upon him by the Company.

[215] In the case of Chan Siew Choo v. Manulife Insurance (Malaysia) Berhad [2010] 2 LNS 0074 the Industrial Court had quoted Lord Esher MR wherein his Lordship has this to say in Pearce V Foster [1886] (17) QBD 536 :

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

And Lopes LJ in the same case stated:-

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

[216] It is thus clear that misconduct involving breach of Company's policy including safety procedures amount to a serious offence. Such breaches of trust and confidence between employer and employee relationship cannot be condoned by a punishment lesser than dismissal as it would set a dangerous precedent to other employees. This Court views the Claimant's misconduct in the context that their breaches against various safety rules and regulations of the Company resulted in the death of a fellow colleague at the work site.

[217] In the case of *Zainol Zakaria v. UEM Builders Berhad* [2019] 2 LNS 2695 the Industrial Court considered the importance of the due carrying out duties and responsibilities and behaving contrary to the terms of employment as follows :

*“[113] It is the considered view of this Court that the Claimant had conducted himself in a manner that was contrary to the express and/or implied terms and conditions of employment and/or which was repugnant to the continuation of the same. He unfortunately had abused the responsibility bestowed upon him to undertake his duties with care, prudence and diligence, and Claimant's actions had completely eroded and shattered the trust and confidence reposed upon him by the Company. In the circumstances no reasonable employer, in a similar situation, would want to keep such an employee in its continued employment. (See the cases of *Pantas Cerah Sdn Bhd v. Lau Boon Seng* [1999] 3 /LR 216 (Award No. 596 of 1999); *SGS-Thomson Microelectronics Sdn Bhd, Muar v. Ibrahim Ahmad* [1997] 3 ILR 1123 (Award No.*

606 of 1997); and HK Ananda Travel (Malaysia) Sdn Bhd v. Khor Seng Kear [2003] 3 /LR 1280 (Award No. 761 of 2003)). Accordingly, the Court is of the considered view that the Claimant's misconducts were serious enough to warrant his dismissal."

[218] In the aforesaid, this Court is of the considered view that the punishment of dismissal against the Claimants were proportionate to the nature and gravity of the misconduct committed by them. As such, the Claimants' dismissals were with just cause and excuse and proportionate with the gravity of the misconducts.

Other Issues Raised by the Claimants

The First Claimant

The deceased employee, was not supposed to be at Site as he was not rostered in the standby list

[219] CLW-1 contended that the deceased employee, Hairulnizam was not supposed to be at the Site as Hairulnizam was not rostered on the standby list that week and as such CLW-1 cannot be held responsible when the deceased was not in the standby list for the week in question.

[220] It is clear that CLW-1 as an Authorised Person who had received the Authorisation from the Regional Control Centre was fully responsible for the work and the workers at Site, whether it was his team or the deceased working at the Site. This Court is of the view that it matters not of the fact that the deceased was not rostered on the standby list that week. His safety on the site came under the purview of CLW-1 as the AP holding the Authorization,

notwithstanding that the deceased was not rostered to be on the list on standby on the fateful night.

[221] On the part of CLW-1 neither did he ask the workers nor the deceased to stop their work or leave the Site. The fact that he had not issued the PTW to enable the team to commence work in compliance of the safety procedure ought to have triggered CLW-1 to instruct the team at the first available opportunity; to stop their work and retreat; which he failed to do.

During the week when the accident occurred, there were many breakdowns and the teams were clearly understaffed

[222] CLW-1 contended that at the material time of the accident, the Claimant had been on standby the entire week and there were 12 breakdowns in total within the said week. The Claimants and the rest of their team were exhausted and there was also issue of lack of manpower, in particular the number of the Authorised Persons ("AP") available.

[223] The issue raised by CLW-1 had been addressed to by the Company. During examination-in-chief, COW3 who was the Engineer on standby during the week of the accident testified that the Authorised Person ("AP") on duty at the Site was given the flexibility to get assistance from workers who are not rostered in the standby schedule to help with work to be carried out at the Site to ensure that the work at the Site were carried out smoothly. (COWS-3, Q&A No. 21)

[224] Besides, it was evidenced by COW-5, who was the engineer in charge of investigating the accident that had occurred on 13.7.2014, that the

Authorised Person ("AP") in charge can report to the Engineer in charge or Officer in Charge ("OIC") if the AP needed any help from other APs who are not on duty in the standby list or request for extra workers at the Site. (COWS-SA, Q&A No. 4). In the Court's view, the company's explanation is reasonably acceptable. All it takes upon securing approvals from the OIC would be the issuance of the PTW to enable the team to conduct the work on site in compliance with the safety procedure.

[225] As such, the contention that the teams were understaffed as there were many breakdowns during the week of the accident is hereby rejected. There was no issue for CLW-1 to report the deficiency of staff to the OIC or Engineers On Standby to get extra assistance from other workers or other AP to assist him at the Site but he did not do so but simply left the Site without following the strict safety procedure of the Company.

The Aturan Keselamatan Elektrik ("AKE") and Prosedur Pensuisan (Bil. 11/2002) did not require First Claimant (CLW-1) is to be on Site throughout the entire process

[226] Reading the charges levelled against CLW-1 in its proper context, it must be understood that the charges against CLW-1 was not concerning him not being at the Site throughout the process, but the charges, in particular the Second Charge concerning CLW-1 not being present at the Site to carry out the phasing test.

[227] Aturan Keselamatan Elektrik at Paragraph 3.4.2 (b) clearly provided that the Authorised Person who had the Authorisation to carry out testing must fully supervise the work in accordance with safety procedures.

“3.4.2 **Penyuisan Untuk Tujuan Pengujian**

(a) *Apabila sebahagian radas telah diasingkan dari semua punca bekalan untuk tujuan pengujian, **dan keizinan dari Pengawal Yang Mengawal telah diperolehi,** Orang Berkebenaran yang menjaga pengujian tersebut boleh memberi keizinan am untuk kendalian suis-suis, pengasing-pengasing, suis-suis pbumian, atau pemasangan atau penanggalan cantuman pbumian dan penyambungan bekalan ujian ke bahagian yang telah diasingkan.*

(b) **Orang Berkebenaran yang menjaga pengujian akan bertanggungjawab sepenuhnya memerhatikan sebarang kerja dibahagian yang diasingkan, dijalankan dengan langkah-langkah keselamatan yang mencukupi mengikut aturan ini dengan tegas.**”

[228] Paragraph 3.4.2 (a) of the AKE must be read together with Paragraph 3.4.2 (b) of the AKE. Thus, by Paragraph 3.4.2 (b) of AKE, CLW-1 must be present at the site carrying out or supervise in the carrying out of the phasing test in order to be able to take full responsibilities in ensuring the phasing works were done in strict compliance pursuant to Paragraph 3.4.2(b) of AKE.

[229] It was also testified by COW-5 in examination-in-chief that that CLW-1 had left the Site and handed over the work of phasing test to CLW-3 without

handing over the "dokumen serah tugas' as at Lampiran C of Panduan Kejuruteraan Bil 11/2002 Prosedur Pensuisan Voltan Tinggi (COB-6, page 12) and without informing the Pegawai Yang Mengawal or RCC. (COWS-5, Q&A No. 13)

[230] On another note, that the checklist that must be followed by the AP at Paragraph 3.0 Senarai Semak Pengawasan Sebelum dan Selepas Pensuisan of the Panduan Kejuruteraan Bil 1112002 Prosedur Pensuisan Voltan Tinggi (COB-6, pages 8 – 9) does indicate that the AP must be at the Site at all time to ensure all the steps as prescribed in the checklist are adhered to when the AP is carrying out switching including for phasing test.

[231] In the circumstances, CLW-1 had breached paragraph 3.4.2 (b) of the AKE as he was not at the Site to monitor the work at the Site.

The Second Claimant (CLW-3) and Third Claimant (CLW-2)

[232] It was contended that CLW-2 had the qualification to carry out the phasing test at the Site as he possessed the certificate or Sijil Kecekapan (CLB-3, page 15) issued by the Company. The certificate showed that CLW-2 had the authority to perform high voltage work of up to 33 kV and had the authority to perform "ujian perfasaan".

[233] This Court is satisfied with the explanation given by the Company with regard to this issue. During cross-examination, COW-5, who was the Senior Safety Engineer in TNB Selangor testified that even with the certificate, **the Third Claimant cannot carry out the phasing test as it is against the Aturan Keselamatan Elektrik ("AKE") and Surat Pekeliling Pengurus**

Besar Kanan (Pengurusan Aset) Perkhidmatan Dan Amalan Kejuruteraan

Bil. A33/2012. COW-5 went on to clarify in evidence as follows:

*"Saya ada menyemak sijil GP Encik Zul Husni. **Batas dan tanggungjawab yang terdapat dalam sijil tersebut perlu merujuk kepada AKE 1996.** Kejahilan untuk mengetahui batas dan tanggungjawab tidak boleh diterima sebagai alasan untuk mengabaikan tugas seperti termaktub dalam Seksyen 1 Peruntukkan Am 1.3 Tugas-tugas."*

Dan juga merujuk COB-3, mukasurat 119 iaitu Surat Pekeliling Pengurus Besar Kanan (Pengurusan Aset) Perkhidmatan Dan Amalan Kejuruteraan Bil. A33/2012. Di mukasurat 120, COB-3 Perkara 3. 1 Langkah Pengujian.

"Kerja-kerja PENSUISAN dan PENGUJIAN peralatan/pepasangan elektrik TNB MESTILAH dilakukan oleh Orang Berkebenaran TNB dengan menggunakan penuh peralatan perlindungan diri."

Jadi batasan CP perlu merujuk AKE dan peraturan pekeling TNB."

[234] The rule as to the limitation to only AP in the performing of phasing test can also be found at **Paragraph 3.14.1 of the AKE** which prescribed that any test must be carried out by or be done under the supervision of Authorised

Person ("AP") and no person can carry out the testing without being accompanied by an Authorised Person ("AP").

"3.14 Arahan Lanjut Untuk Pengujian

3.14.1 Kebenaran Bagi Orang Yang Berkenaan

*Dalam semua kes dimana pengetahuan teknik atau pengalaman yang mencukupi diperlukan untuk menghindar bahaya, **pengujian hanya boleh diialankan oleh atau di bawah penyeliaan terus dari Orang Berkebenaran. TIDAK SEORANG PUN BOLEH MENJALANKAN KERJA TERSEBUT TANPA DITEMANI.***

[235] Furthermore, Surat Pekeliling Pengurus Besar Kanan (Pengurusan Aset) Perkhidmatan Dan Amalan Kejuruteraan Bil. A33/2012 (COB-3, pages 119 – 121) clearly stated at paragraph 3.1 that any switching and testing work at any of the Company's apparatus MUST be carried out by Authorised Person ("AP"). The abovesaid Paragraph reads as follows :

"3.0 LANGKAH PENGUJIAN KABEL DI PERKAKASUIS PADA SISTEM TNB PEMBAHAGIAN

*3.1 Kerja-kerja **PENSUISAN dan PENGUJIAN peralatan/pepasangan elektrik TNB MESTILAH dilakukan oleh Orang Berkebenaran TNB** dengan menggunakan penuh Peralatan Perlindungan Diri (PPD)."*

[236] It is clear that based on the Company's safety procedure above in the Aturan Keselamatan Elektrik ("AKE") and Surat Pekeliling Pengurus Besar Kanan (Pengurusan Aset) Perkhidmatan Dan Amalan Kejuruteraan Bil. A33/2012 it is clearly stated that **only Authorised Person ("AP") can carry out tests including phasing test.** A CP-as in this case, CLW-3 is not empowered to carry out the phasing test on his own as it would tantamount to a breach of the clear safety guidelines stated in the aforesaid sources of rules. The applicability of CLW-2's Sijil Kecekapan authorizing him to perform high voltage work of up to 33KV must be subject to the safety rules and procedure under the AKE and Surat Pekeliling Pengurus Besar Kanan (Pengurusan Aset) Perkhidmatan Dan Amalan Kejuruteraan Bil. A33/2012. To understand otherwise would be a failure in heeding valid and necessary SOP or rules set down by the Company for strict compliance

CONCLUSION

[237] This Court had reached the conclusion that all three Claimant had clearly breached the safety procedures of the Company and their utter disregard of the Company's safety procedures had caused the loss of life of their fellow employee. Such a serious misconduct attracts punishment none other than a dismissal which commensurate with the gravity of the offence. In the case of *Pragash Subramaniam v. Diethelm Logistics Services Sdn Bhd* [2008] 2 LNS 0327, the Industrial Court upheld the dismissal of the claimant who had failed to adhere to the safety procedures and guidelines and cause the injury of another employee. The Industrial Court held that:

"It now remains to be considered whether this proven

misconduct merited the extreme penalty of dismissal. The claimant had attended briefings on safety measures conducted by the respondent so he knew what duties and standard of care was required of him in operating the respondent's reach trucks...

....It will be a sad day for industrial relations when an employee, after accepting blame for a misconduct, can, by way of mitigation if you will, deflect and throw back to his employer the blame for the consequences brought about by that very misconduct. Equity and good conscience militate against this sort of thinking. No credit is given to the claimant's union representative for apparently encouraging the claimant with this perverse notion.

In the unmitigated circumstances of the case the Court is hard put to find reasons to interfere with the respondent's decision to dismiss the claimant. The dismissal was with just cause and excuse."

[238] In the upshot, based on the facts and circumstances of the present case in its entirety and the evidence adduced by both parties in the proceedings and upon hearing the testimonies of the witnesses and also upon reading respective written submissions, the Court is in the agreement with the findings of the DI and is of the considered view that the Company had successfully proved on the balance of probabilities that all of the three Claimant's were dismissed with just cause or excuse. The Court answers the question at paragraph [42] supra, in the affirmative.

DECISION

[239] Having considered the evidence as produced by both parties in its totality, and bearing in mind the provision in Section 30(5) of the Industrial Relations Act 1967 by which virtue the Court shall act according to equity, good conscience and the substantial merit of the case without regard to technicalities and legal form, this Court hereby dismiss the Claimants' case.

HANDED DOWN AND DATED THIS 25 FEBRUARY 2021

~Signed~

**(SYED NOH BIN SAID NAZIR @ SYED NADZIR)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR**