

INDUSTRIAL COURT OF MALAYSIA

CASE NO : 15/4-166/02

BETWEEN

BINA GOODYEAR BERHAD

AND

SUBRAMANIAM A/L KANAIAPPAN

AWARD NO : 773 OF 2004

Before : **N. RAJASEGARAN** - **Chairman**
(Sitting Alone)

Venue: : Industrial Court Malaysia, Kuala Lumpur.

Date of Reference : 21.2.2002.

Dates of Mention : 3.5.2002, 27.1.2003, 6.10.2003 and
3.6.2004

Dates of Hearing : 9.6.2004 and 10.6.2004.

Representation : Encik Mohd. Nizam bin Esa
from M/s. Wee Choo Keong & Faaiz,
Counsel for the Company.

Mr. R. Ravindran
from M/s. Sithra & Partners,
Counsel for the Claimant, absent on
dates of hearing.

Reference :

This is a reference made under Section 20(3) of the Industrial Relations Act, 1967 arising out of the dismissal of **Subramaniam a/l Kanaiappan** (hereinafter referred to as "the Claimant") by **Bina Goodyear Berhad** (hereinafter referred to as "the Company").

AWARD

BACKGROUND

1. Subramaniam a/l Kanaiappan ('the Claimant') *via* an undated letter served on 1.6.2000 upon his employer, Bina Goodyear Berhad ('the Company') ceased employment on that very day and thereafter on 30.6.2000 appealed under section 20 of the Industrial Relations Act, 1967 ('the Act') which appeal prompted the Minister of Human Resources acting under that same section of the Act to refer on 21.2.2002 the Claimant's cessation of employment as a dismissal to the Industrial Court which reference was received by Industrial Court 15 ('the Court') on 27.3.2002.

2. The Court mentioned the case on four occasions with on the third occasion on 6.10.2003, hearing earlier fixed for 6 and 7.10.2003 being vacated and hearing being rescheduled for 9 and 10.6.2004. By that occasion, pleadings as directed by the Court had been filed by both parties through their solicitors on record. The Company in addition complied with the Court's instruction to file its bundle of documents and witness' statements. The Claimant's counsel did not. Nor did he attend the fourth mention for case management scheduled and held on 3.6.2004 notwithstanding effectively served notice. In the circumstances, the Court directed that a second notice be served both upon the Claimant's counsel and the Claimant himself in connection with the hearing dates earlier fixed for 9 and 10.6.2004.

3. Come 9.6.2004, Company's counsel was present but not so the Claimant nor Claimant's counsel. Company's counsel produced a sick leave certificate in respect of his main witness and requested adjournment to the second day set for hearing i.e. 10.6.2004. The Court

consented. The Court took this opportunity to instruct the Registry to serve yet another copy of the notice of hearing by hand on the Claimant's counsel. And this was subsequently done on that same day at 10.00 a.m. as seen from enclosure 21 of the Court's file.

EX PARTE APPLICATION

4. On the second date of hearing on 10.6.2004 Company's counsel and witnesses were present in Court but not so the Claimant's counsel nor the Claimant. Thereupon Company's counsel applied to the Court to proceed *ex-parte* and in response the Court formed the opinion that in accordance to equity, good conscience and the substantial merits of what had transpired thus far, it would be in the interest of justice that the application for an *ex-parte* hearing should be granted and so ordered accordingly pursuant to the powers vested under section 29(d) of the Act.

5. An *ex-parte* hearing entails a fiction which enables the Court to presume that the absent party is present before it and proceed with a full hearing to its logical conclusion ensuring always that the attending party discharges its evidential burden where applicable [see ***Ike Video Distributor Sdn. Bhd. v. Chan Chee Bin Award No: 636 of 2004.***]

CONSTRUCTIVE DISMISSAL

6. The Claimant in his pleadings contents that his cessation of employment amounts to constructive dismissal, yet another fiction where an employee ceases work of his own accord and thereafter claims that he had been dismissed. As with all legal fictions it is subject to strict prerequisites failing which the dismissal loses its fictional status to convert into a resignation.

7. The principle of constructive dismissal was enunciated in **Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd. (1988) 1 MLJ 92**, based on by the contract test expounded by Lord Denning in **Western Excavating (EEC) Ltd. v. Sharp (1978) IRLR 27 CA**, when Salleh Abas L.P. speaking for the Supreme Court said:

“ The word ‘dismissal’ in section 20 of the Act should be interpreted with reference to the common law principle. Thus it would be a dismissal if an employer is guilty of breach which goes to the root of the contract or if he evinced an intention no longer to be bound by it. In such situations, the employee is entitled to regard the contract as terminated and himself as being dismissed. ”

8. In **Lifelong Stainless Exhaust (M) Sdn. Bhd. v. Tan Dee Mei, Award No. 103 of 2004**, the Learned Chairman, Yeoh Wee Siam referring to **Bryn Perrins’ Industrial Relations and Employment**, ruled that the conditions a workman should satisfy before succeeding on a claim of constructive dismissal are as follows:

- “ 1. There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach;*
- 2. That breach must be sufficiently important to justify the employee resigning or else it must be the last in a series of incidence, albeit erroneous interpretation of the contract by the employer, will not be capable of constituting a repudiation in law;*
- 3. He must leave in response to the breach and not for some other, unconnected reason; and*

4. *He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract*

If the employee leaves in circumstances where these conditions are not met, she will be held to have resigned and there will be no dismissal within the meaning of the legislation at all.”.

And on the evidential burden, Yang Arif continued:

“ To determine whether there had been grounds for constructive dismissal, the burden of proof is on the Claimant to establish the above conditions precedent.

If any of the above conditions are not established, then the Claimant's claim must, in law, fail. ”

9. Speaking on the burden of proof in ***Moo Ng v. Kiwi Products Sdn. Bhd. Johor & Anor, (1998) 3 CLJ 475*** the High Court held:

“ If any employee asserts that he has been constructively dismissed, he must establish that there has been conduct on the part of the employer which breaches an express or implied term of the contract of employment going to the very root of the contract.”.

EVIDENCE, EVALUATION AND FINDINGS

10. It is the Claimant's case as seen from his pleadings that he commenced employment with the Company on 3.5.99 as a mobile crane operator. At the material time, the Claimant earning a monthly salary of RM1800.00, stationed at the Company's Puchong construction site, was under the direct supervision of one Ng Tian Sow ('COW1'), then a site supervisor. The Claimant avers that on 1.6.2000 upon request, the Claimant proceeded to COW1's office, where in the presence of other employees including one "Mr. Raju (Mechanic)", COW1 for no reason whatsoever and without justification started swearing at the Claimant both in Chinese and Malay using intemperate language. The Claimant further avers that this caused him humiliation, embarrassment and mental distress, thus causing him to immediately giving a letter of resignation to COW1.

11. Industrial jurisprudence has developed so as to recognise an employment contract as engaging obligations in connection with the self-esteem and dignity of the employee. This obligation is an off-shoot of the term of mutual trust and confidence implied in every contract of employment.

12. In England the usage of intemperate or abusive language by a superior towards a junior has been held to constitute sufficient cause to breach the term of mutual trust and confidence thus enabling the employee to terminate the contract of employment and claim to have been constructively dismissed. See High Court in ***Horkulak v. Cantor Fitzgerald International (2003) IRLR 756***, and Employment Appeal Tribunal in ***Palmanor Ltd v. Cedron (1978) IRLR 303; Isle of Wight Tourist Board v. Coombes (1976) IRLR 413*** and ***Moore v. Bude-Stratton Town Council (2000) IRLR 676***.

13. Though not related to the use of intemperate language, the stand of the Industrial Court in Malaysia is not dissimilar to the position adapted in England in relation to the consequence of a breach by the employer of the implied term of mutual trust and confidence. See **Hong Leong Management Co. Sdn. Bhd. & Anor v. Lai Teck Yaing (2004) 1 ILR 210**; **Cerah Damai Sdn. Bhd. v. Heng Cheng Eng (2004) 1 ILR 346**, and **Rimex Sdn. Bhd. v. Mering Ak Madang (1997) 3 ILR 34**.

14. The Court of Appeal in **Quah Swee Khoon v. Sime Darby Bhd. (2000) 2 AMR 2265** endorsed that part of the decision of the Employment Appeal Tribunal in **Woods v. W.M. Car Services (Peterborough) Ltd. (1981) IRLR 347** where it was held that destruction or serious damage to the relationship of confidence and trust between an employer and employee is a fundamental breach amounting to a repudiation of the contract of employment.

15. Whilst the Court succumbs to the above authorities on that the usage of intemperate language can amount to a breach of the implied term of mutual trust and confidence thus enabling the Claimant to cease employment and claim constructive dismissal, the Court is also persuaded by the English High Court decision in **Bank of Credit And Commerce International SA v. Ali and others (No. 3) (1999) IRLR 508** where Lightman J. referring to the House of Lords case of **Malik Mahmud v. BCCI (1997) IRLR 462** stated:

“ The principles stated by the House of Lords may, I think, be expanded as follows:

(1) the misconduct on the part of the employer amounting to a breach must be serious indeed, since it must amount to constructive dismissal and as such entitles the employee to leave immediately without any notice on

*discovering it. **The test is whether the employer's conduct is such that the employee cannot reasonably be expected to tolerate it a moment longer after he has discovered it and walk out of his job without prior notice.** ” (Emphasis added).*

16. And in **Woods v. WM Car Services (Peterborough) Ltd. (supra)** it was held:

*“ To constitute a breach of this implied term (mutual trust and confidence) it is not necessary to show that the employer intended any repudiation of the contract: **the tribunal's function is to look at the employer's conduct as a whole and determine whether it's effect, judged reasonably and sensibly is such that the employee cannot be expected to put up with it:** see **British Aircraft Corporation Ltd. v. Austin (1978) IRLR 347. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed: Post Office v. Roberts.** ” (Emphasis added).*

17. And one last guidance on evidential burden in cases of loss of mutual trust and confidence, obtained from **BCCI SA v. Ali (supra)**:

*“ **Proof of subjective loss of confidence is not an essential element of the breach.** The employee need not even know of the conduct amounting to the breach during the period of his employment: see **Lord Nichollas at 464, 20 and Lord Steyn at 469.61 [Malik & Mahmud v. BCCI (supra)].** ” (Emphasis added).*

18. Armed with the guidance of the aforesaid authorities and precedences I now examine the Company's case to determine whether there was indeed a breach of the implied term of mutual trust and confidence arising from COW1 having humiliated, embarrassed and causing mental stress to the Claimant through the usage of intemperate language during the incident of 1.6.2000 and as to whether the nature of the breach was such that in all the circumstances of the case the Claimant could not be expected to put up with it, thus enabling him to cease employment forthwith.

19. It is the evidence of COW1 that he had summoned the Claimant to his office on 1.6.2000 to discuss and reprimand the Claimant on poor work performance and absence from employment for three consecutive days. COW1 further testified that upon being questioned, the Claimant became angry and in his words "he say in very loud and say very bad words. He also never explain why he didn't work for 3 days." COW1 had earlier through his witness statement averred:

" the Claimant become so angry about the verbal complaints and/or reprimand and/or reproaches make against the Claimant and the Claimant start shouting at me and answering in loud voice in front of other staff which are also under my supervision, which result both of us exchange a vulgar words and the Claimant's using foul and/or coarse and/or offensive and/or abusive language (four-letter word) against me and the Claimant also said that "*saya tak mahu kerja lagi*". Further, the Claimant never explain about his absent from work for 3 consecutive days without leave. "

COW1 continued in evidence that subsequent to this altercation, the Claimant submitted to him on that same day his resignation letter,

reproduced below, and failed to report for work thereafter. In the circumstances he treats the Claimant's cessation of work as a sudden resignation.

“ MR. SUBRAMANIAM S/O KANIAPPAN
NO. 30, LOT 1596, BATU 3 ½,
JALAN KAMPUNG JAWA,
41000 KLANG,
SELANGOR.

M/S. BINA GOODYEAR BERHAD.

Dear Sirs,

LETTER OF RESIGNATION

I, SUBRAMANIAM S/O KANIAPPAN (NRIC NO: 460731-10-5031 hereby give my resignation letter effective from 1.6.2000 to 15.6.2000 being two weeks notice.

I take this opportunity to thank you and the management and staff for the guidelines during my service here.

Thank you.

Yours faithfully,

Sgd.

SUBRAMANIAM S/O KANIAPPAN ”

20. Selva Raju a/l Suppiah, COW2, a mechanic, testified that he witnessed the incident between COW1 and the Claimant on that fateful

day. He testified that there was a discussion between COW1 and the Claimant and that it was the Claimant who first raised his voice and, in his words: “menggunakan perkataan lucah yang melampau, ‘Fuck you’ terhadap Encik Ng. Kemudian, mereka berdua berbalas-balas perkataan lucah semasa mereka ” Of further relevance is the following evidence by him:

“Q: Siapa bermula percakapan lucah?

A: Yang Menuntut bermula cakap lucah. ”

COW2 further testified that the Claimant thereupon left the office and returned with his resignation letter.

21. The inevitable consequence of the Claimant’s non-representation and absence at the trial is that he has not only failed to overcome the various evidential hurdles that is required in a claim of constructive dismissal but he has also left unrebutted the evidence of the Company.

22. In arriving at a conclusion I finally submit to the authority of Gopal Sri Ram JCA in ***Quah Swee Khoon v. Sime Darby Bhd. (2002) 2 AMR 2265*** where His Lordship took the stand:

“ Whether one would describe the conduct complained of as amounting to constructive dismissal or the breach of the implied term governing mutual trust and confidence is really a matter of semantics. Nothing turn upon it. At the end of the day, the question simply is whether the appellant was driven out of employment or left it voluntarily. ”

CONCLUSION

23. After having carefully examined the evidence available in relation to the Company's conduct as a whole *viz-a-viz* the Claimant's conduct, bearing in mind what the evidential burden is upon each party and having assessed the cumulative impact of the sequence of events that had transpired, it is my judgement that the Company's conduct had not contributed nor resulted in a breach of the implied term of mutual trust and confidence between the parties. Nor do I find the Company guilty of breach of any other contractual term. In the upshot I am unable to find for the Claimant in his claim of constructive dismissal. Instead I find that the Claimant was not driven out of employment but had left it voluntarily, true to the contents of his resignation letter, worded simple, straight forward and purposeful.

24. The Claimant's claim is therefore dismissed.

HANDED DOWN AND DATED THIS 5TH JULY, 2004.

**(N. RAJASEGARAN)
CHAIRMAN
INDUSTRIAL COURT.**