

INDUSTRIAL COURT OF MALAYSIA

CASE NO : 15/4-966/01

BETWEEN

GUOY CONSULTANCY SDN. BHD.

AND

LEO ALBERT ESPECKERMAN

AWARD NO : 1070 OF 2004

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

Venue: : Industrial Court Malaysia, Kuala Lumpur.

Date of Reference : 11.9.2001.

Dates of Mention : 29.10.2001, 9.9.2002, 9.6.2003,
23.6.2003, 18.8.2003 and 18.3.2004.

Dates of Hearing : 26.3.2004, 12.5.2004 and 9.7.2004.

Claimant's Written Submission received: 24.6.2004

Company's Written Submission received: 9.7.2004

Representation : Mr. Chai Yow San
of M/s Chai Yow San & Co.,
Counsel for the Company.

Mr. Terrance Kanagaratnam
of M/s Kassim Tadin Wai & Co.,
Counsel for the Claimant.

Reference:

This is a reference made under Section 20(3) of the Industrial Relations Act, 1967 arising out of the dismissal of **Leo Albert Especkerman** (hereinafter referred to as "the Claimant") by **Guoy Consultancy Sdn. Bhd.** (hereinafter referred to as the "the Company").

AWARD

REFERENCE

1. Before me is a reference by the Honourable Minister of Human Resources made on 11.9.2001 pursuant to his powers under section 20(3) of the Industrial Relations Act, 1967. It involves the cessation of employment of Leo Albert Especkerman (“the Claimant”) with his employer, Guoy Consultancy Sdn. Bhd. (“the Company”). In the reference the cessation of employment arose through a dismissal and the effective date of dismissal is 31.3.1998.

FACTS OF CASE

Facts In Agreement

2. The Claimant commenced as an employee of the Company on 1.11.1997 in the capacity of Technical Services Manager, the terms of his contract of employment being embodied in the letter of offer dated 29.10.1997 found from pages 1 to 3 in agreed bundle of documents no. 1, marked as ‘AB1’. He was paid a salary of RM3,100.00 per month.

3. The Company was awarded a contract by Jabatan Pengairan Dan Saliran Malaysia (JPDSM) to collect rainfall data at stations in the states of Selangor and Negeri Sembilan. The Claimant was assigned to perform this function. One amongst the Claimant’s duties was to collect recorded paper charts from the rainfall recording equipment at the stations and submit the same to the respective Pengarah Pengairan dan Saliran in Shah Alam or Seremban dependent on the location of the station. The submission is accompanied by covering letters similar to those exhibited at COE4. This covering letter is prepared by the Claimant.

4. By a letter dated 28.2.98, exhibited at pages 17 and 18 of AB1, JPDSM indicated to the Company that the contract to collect rainfall data will continue until March 1998 and terminated thereafter.

5. A meeting was held between the Claimant and Guoy Tong Kiat, Managing Director of the Company (“COW1”) at the end of February 1998 at which meeting the Claimant was informed of the termination of contract by JPDSM.

6. Another meeting was held between the Claimant and COW1 at the end of March 1998 in connection with the termination of contract by JPDSM.

7. The Claimant was paid salary up to 31.3.1998 and was not paid any salary thereafter.

8. The Claimant attended to the handing over of the stations to the respective JPDSM in Negeri Sembilan and Selangor and this he did so through the check list exhibited from pages 7 to 49 of agreed bundle of documents no. 2 marked as ‘AB2’. The Claimant’s and the receiving authorities’ signatures are affixed to each of these check-lists.

Facts In Dispute

9. It is the Company’s version that during the meeting held at the end of February 1998 the Claimant was informed by COW1 that due to the cessation of the JPDSM contract, no work was available for him and for this reason it would be better for the Claimant to resign in March, 1998, to which suggestion the Claimant consented. And it was agreed mutually that the Claimant leaves on 31.3.1998. COW1 further states

that the Claimant had discussed working with the Company thereafter on a joint venture basis in connection with a contract which the Claimant was confident in securing from Tenaga Nasional Berhad.

Save for the fact that he was shown the letter of cessation of contract from JPDSM and told that the contract would cease at the end of March 1998, the Claimant denies all else that is said by COW1 to have happened.

10. The Company contents that at a meeting of 31.3.1998 between COW1 and the Claimant, COW1 on the request of the Claimant prepared a resignation letter which letter is exhibited at page 1 of AB2. It is germane to produce the letter here.

“ 452 Taman Desa Rasah
70300 Seremban
Negeri Sembilan.

Date: 31.3.1998

The Managing Director
Guoy Consultancy Sdn Bhd
14-2B, Jalan 3/7
Pandan Jaya
55100 Kuala Lumpur.

RESIGNATION FROM THE POST OF
TECHNICAL SERVICE MANAGER

I hereby tender my resignation as Technical Services (Electrical) Manager of the Company with immediate effect.

Yours faithfully,

(sgd)

.....

LEO ALBERT ESPECKERMAN ”

11. The Claimant in his submission contents that he never met COW1 on 31.3.1998. And as for the resignation letter, the Claimant contents *non est factum*. His pleading is that he never executed the letter of resignation and that the said letter of resignation is a forgery.

12. It is the Company’s stand that the Claimant’s employment ceased on 31.3.1998 through the resignation letter. There was therefore no dismissal. It is the pleading, testimony and submission of the Claimant that his employment was verbally terminated by COW1. He however does not identify the date of termination of employment anywhere.

13. The Company contents that the Claimant completed the handing over of the relevant reports and the stations to the JPDSM on 1.4.1998 and on 2.4.1998. The Claimant’s evidence and submission is that the complete hand over of the stations was done on 23.4.1998.

THE LAW AND ISSUES VIS-A-VIS THE PARTIES SUBMISSION

14. Both parties directed the flow of their respective evidence and submission towards the issue of whether the Claimant had indeed resigned through service of the resignation letter as contented by the Company or whether he had been dismissed verbally as per the Claimant’s contention. Both learned counsels’ submission was in the form of drawing attention to evidence that supported their respective

stand. There was no submission on law and consequently no authorities were referred to by either.

15. The Industrial Court's *mandatum* on receiving a reference under section 20(3) of the Act is to proceed on the twofold process of (a) to determine whether the misconduct complained of by the employer has been established and (b) whether the proven misconduct constitutes just cause or excuse for the dismissal. This requirement by authority of ***Milan Auto Sdn. Bhd. v. Wong Seh Yen (1995) 3 MLJ 537*** would not be appropriate under the circumstances of the instant case.

16. Of more relevance would be the utterance of Salleh Abas LP in ***Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd. (1988) 1 MLJ 92*** where his Lordship said:

*“ When the Industrial Court is dealing with a reference under section 20, the **first thing that the Court will have to do is to ask itself a question whether there was a dismissal and if so whether it was with or without just cause or excuse.** ” (emphasis added).*

17. In the instant case the Company, having based its case on its averment that the Claimant had resigned, would have been incongruous to have attempted justification for the termination of employment. Neither had the Company pleaded nor submitted any other reason in the alternative. In the circumstances the Company's case will stand or fall on the issue of whether there was indeed a resignation by the Claimant. And in support thereof the Company relies *ex facie* the resignation letter. A finding that there was indeed a dismissal would spell adversity to the Company for the Company had not pleaded, led evidence nor submitted

on any just cause and excuse for the termination of the Claimant's employment.

18. On the reverse, the Claimant's case is that he was dismissed verbally by the Company. In ***Weltex Knitwear Industries Sdn. Bhd. v. Law Kar Toy & Anor (1998) 1 LNS 258*** Abdul Kadir Suleiman J. sitting in the High Court held that in the event of a dispute, the burden is upon the workman to prove that he was dismissed. And it is this principle that was adopted by the Industrial Court in the cases of ***Tai Leong Industries Trading v. Michael Choo Khin Fatt (2004) 1 ILR 1099***; and ***Poh Yep Service Centre v. Yap Kau, (2004) 1 ILR 1063***.

19. In view of the position adopted by the Company, the Claimant should succeed in his claim in this Court if he overcomes the evidential hurdle of proving that he was verbally dismissed by the Company. By the evidence led in Court and in his submission, the Claimant attempts to discharge this evidential burden not through direct evidence but by way of circumstantial evidence.

20. Commingled with this is the Claimant's rebuttal based on the veracity of the resignation letter. Here again he relies on circumstantial evidence. And what is circumstantial evidence in the instant context can be gleaned from page 63 of ***Sarkar On Evidence, Vol. 1, 15th Edn.*** where the learned author wrote :

“ Evidence which proves or tends to prove the factum probandum indirectly by means of certain inferences of deduction to be drawn from its existence or its connection with other facts probantia it is called circumstantial evidence [Chakuna Orang v. State of Assam 1981 Cri LJ 1661, 1662]. ”

That the chain of circumstantial evidence should irresistibly lead to the conclusion that which the Claimant seeks is accepted law (see ***Mui Bank Bhd. Johor v. Tee Puat Kuay, (1993) MLJ 239***).

On how to assess circumstantial evidence I obtain guidance from Thomson C.J. in ***Chang Chwen Kong v. Public Prosecutor (1962) MLJ 307 C.A.*** where his Lordship spoke :

“ It must, however, be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is the rope strong enough to hang the prisoner? ”

21. And in all this the standard of proof required of both the Company and the Claimant is that of on a balance of probabilities. [See ***Tai Leong Industries Tranding (supra)***].

22. In the circumstances the only issue for the Court to decide is whether there was indeed a dismissal or inversely there was a resignation. And in arriving at a decision on this issue the Court will be guided by the authorities and precedences hereinbefore stated.

EVIDENCE, EVALUATION AND FINDINGS

23. Was there a dismissal? No says the Company. Yes, a verbal dismissal, maintains the Claimant. It is the Claimant's evidence that he was informed by COW1 towards the end of March 1998 that he would be terminated after March 1998 and that he would not be paid salary after 31.3.1998. Notwithstanding this he had continued working since he

“had not received any notice of termination in writing” and that he ceased work after 23.4.1998 when upon his request for his April 1998 salary, COW1 refused to pay him stating that his services had already been terminated. The Claimant failed to submit any cogent evidence in support of this testimony of his, thus being unable to surmount the evidential burden upon him to prove dismissal. However the circumstances of the instant case are such that I have formed the opinion that if the Claimant succeeds in his rebuttal based on the authenticity of the resignation letter, he should succeed in his claim that he was dismissed. And I arrive at this decision for the reason that it is the Company’s position that the cessation of employment had arisen through voluntary resignation. As such if there be no voluntary resignation there can be no other conceivable reason for the termination of employment save for an involuntary cessation by the Claimant caused by the Company; the end result of which would be a dismissal.

24. And now for that all important resignation letter upon which both parties’ case hinges upon.

25. *Non est factum* is the resignation letter, says the Claimant. And in support of this the Claimant states that he did not prepare the resignation letter, he is unsure whether the signature affixed thereon is his, that he did not meet COW1 on 31.3.1998 which is the date of the letter, that if he had indeed resigned on 31.3.1998, he would not have represented the Company in work related matters on 1st, 2nd and 23rd April 1998.

26. The Company builds its case by first stating that the Claimant was specifically employed to perform the work associated with the JPDSM contract which was terminated on 31.3.1998. That there was a JPDSM contract and it terminated on 31.3.1998, both parties agree. But that

the Claimant was employed only in respect of this project, the Claimant disagrees. Whether this is so or not, it is germane to note that both parties are on common ground that throughout his tenure of employment with the Company, the Claimant only performed duties associated with this contract and nothing else.

27. It is common ground too that upon receipt of the letter terminating the JPDSM contract sometime in February 1998, COW1 had a meeting with the Claimant at which meeting the Claimant was informed of the termination of the JPDSM contract effective from the end of March 1998. There agreement ends. COW1 says that during that meeting he suggested to the Claimant that in view of there being no further employment, the Claimant resigns from his employment. And to this suggestion the Claimant agreed. COW1 further states that the Claimant proposed that thereafter he works with the Company on a joint venture basis in connection with contracts that the Claimant was confident of securing from Tenaga Nasional Berhad. The Claimant denies the whole of this part. In this connection, though no evidence was led on it, I take notice of a letter dated 10.9.1997 from Tenaga Nasional Berhad addressed to the Company, exhibited at page 16 of AB1 which is an agreed bundle, approving the registration of the Company with the number V501100 to render services to Tenaga Nasional Berhad.

28. It is also common ground that COW1 and the Claimant met at the end of March 1998 and discussed the Claimant's continued employment. The Company contents that this meeting was on 31.3.1998. The Claimant denies this date but offers no alternative date. The Company contents that COW1 on the request of the Claimant typed the resignation letter and the Claimant dated and signed the same. This of course the Claimant denies. The Company further contents that the Claimant had not submitted the necessary data and records to JPDSM and as such the

Claimant could not be paid his March 1998 salary and all other expenses. Though the Claimant does not deny and by inference from evidence which will be discussed later admits that the March data to JPDSM had yet to be submitted, he maintains that he was paid his March 1998 salary on 28.3.1998 as can be seen from the salary voucher exhibited at page 2 of AB2. To this COW1 states in cross-examination that the date on the salary voucher refers to the date of preparation of the voucher and not the date of payment. This explanation the Court finds difficult to accept since the date appears in a column entitled "Pay Day". The Court however by virtue of page 5 of AB2 which is a payment voucher dated 3.4.1998 to pay the Claimant a sum of RM2,000.00 as 'travelling expenses – rainfall station maintenance project' accepts the Company's submission that other expenses were paid on 3.4.1998. In this connection, in cross-examination the Claimant stated that he submitted pages 6 to 28 of AB2 which are the records and data for the month of March 1998 in respect of Selangor on 1.4.1998 and that he submitted pages 29 to 49 of AB2, records for that same month in respect of Negeri Sembilan, on 2.4.1998.

29. Both parties are in agreement that the Claimant had on 1.4.1998 and 2.4.1998 submitted records on data in connection with the month of March 1998 to JPDSM. The Claimant submits that if he had indeed resigned with effect from 31.3.1998, the Company would not have allowed the Claimant to represent the Company after that date. In this connection the Court notes that under cross-examination, COW1 when questioned why he allowed the Claimant to represent the Company after he resigned, replied "I instructed him to complete all work by end of March 1998. I have no control. He was keeping all the documents. He chose to hand over the documents after 31.3.1998." The overall evidence of the Claimant, COW1 and the relevant exhibits is that the Claimant worked independently in the collection and submission of data to

JPDSM. After considering all the relevant circumstances I am unable to question the veracity and vitiate the Claimant's resignation letter on the grounds that the Claimant had submitted the aforesaid records on data on 1.4.1998 and 2.4.1998.

30. The cover letter dated 30.3.1998 accompanying the March 1998 data in respect of the Selangor stations was the subject of much evidence. The Claimant produced that letter as exhibit CLE3. CLE3 is a photocopy of the original which original the Claimant stated under cross-examination he had handed over to one Johari Mahmud. Johari Mahmud's signature and official stamp as Juruteknik, Jabatan Pengairan Dan Saliran Negeri Selangor Darul Ehsan are found on this copy. Next to Johari Mahmud's signature is written the date '1.4.98' which the Claimant under cross-examination stated was written by Johari Mahmud. There also is found another date of '1.4.98' written below the official stamp and this writing the Claimant testified is by himself. In that same copy is an original hand written note stating "Telah terima semua data-data (catav and SRAM CARD dan juga long term carts dari Leo Albert Especkerman (Guoy Consultancy) untuk bulan Feb & March '98 serta kunci-kunci berkenaan stesen-stesen hujan." Below this note is a signature below which is written "EN. RAJAN" and below which is written the date 23.4.98.

The Company produced a photocopy of that same cover letter dated 30.3.98, exhibited as COE3. It is identical to CLE3 save for that handwritten note, signature, the name EN. RAJAN and the date 23.4.98.

The issue before the Court is which exhibit, CLE3 or COE3, should be accepted on a balance of probabilities. For if CLE3 is accepted, then the Claimant's contention that he completed the handing over only on 23.4.1998 would be true. And the Claimant submits that if he had

indeed resigned on 31.3.1998, why had the Company allowed him to represent the Company up to 23.4.1998. Should COE3 be accepted, then the Claimant's contention of completion of handing over on 23.4.1998 will have to be rejected.

31. The Claimant relies on CLE3, his own testimony and that of Rajendran a/l Kolandan, ("CLW2") who is the author of the handwritten note, signature and date of 23.4.98 referred to earlier in CLE3, in support of his contention that the handing over was completed only on 23.4.1998.

In CLW2's handwritten note, signature and date lie the difference between CLE3 and COE3. In arriving at a decision on which exhibit to accept, I take into consideration the following:

- (a) The original of both was handed over to Johari Mahmud on 1.4.1998. And he in signing the document declares "Saya bagi pihak JPS Negeri Selangor mengesahkan penerimaan data-data hujan serta rekod-rekod dan borang berkaitan seperti senarai di atas."
- (b) The Claimant testified that pages 7 to 28 of AB2 which are report forms in respect of each of the stations relevant to the said cover letter, was submitted to Johari Mahmud on 1.4.98. The report from of each station is entitled "BORANG SERAHAN STESEN UNTUK KONTRAK KERJA-KERJA MENGUTIP DAN MENGUMPUL DATA-DATA HUJAN SERTA KERJA-KERJA MENYELENGGARA STESEN-STESEN HUJAN" and at the bottom of the form is typed "Merujuk surat

tuan bertarikh 28/2/98, (67) dlm. PPS 11/4/3/2. Pihak kami (GUOY CONSULTANCY) menyerah semula kerja-kerja yang terlibat didalam kontrak perkhidmatan (JPS/IP/II/3A/97 kepada JPS Negeri masing-masing". Each form is signed and dated 1.4.98 by Johari Mahmud. It is also signed by the Claimant.

- (c) The handwritten note by CLW2 is on a photocopy which I find irregular under the circumstances.
- (d) CLW2 being an officer of JPDSM could have produced the original cover letter in the possession of JPDSM or any other evidence to show that the text of his writing in CLW2 is indeed true. I find this an appropriate instance for the application of the presumption in section 114(g) of the Evidence Act, 1950.

For the reasons stated above the Court accepts COE3 and rejects CLE3. It follows therefore that the Claimant's submission that if the Claimant had indeed resigned on 31.3.1998, the Company would not have allowed the Claimant to represent the Company on 23.4.1998, should fail.

32. And now for the resignation letter which the Claimant pleads *non est factum*. On arriving at a decision on this issue I first note that the Claimant does not plead that the resignation letter was obtained *per vi*, *per clam* or *per precario*. For if it was, then it would not have been a resignation [See **Stanley Ng Peng Hon v. AAF Pte. Ltd (1979) 1 MLJ 57**; and **Bata (M) Bhd. v. Normadiah bt. Abu Suood (1991) 2 ILR 1106**]. In the instant case the Claimant in his pleading denies execution

of the resignation letter and says that it is a forgery. And learned counsel for the Claimant submits that the letter is a creation of the Company and the Claimant's signature on the same differs from that of the Claimant as it appears in other exhibits.

I next take into consideration all of the following:

- (a). For the duration of the Claimant's employment the duties that he actually performed involved the JPDSM contract and nothing else. This JPDSM contract terminated on 31.3.1998.
- (b). The Honourable Minister of Human Resources in his reference of the instant case to the Court states *inter alia* that the reference is a consequence of **an appeal by the Claimant that he was dismissed by the Company on 31.3.1998**. This date coincides with the Company's version of the date of the meeting between COW1 and the Claimant when the resignation letter of even date was effected.
- (c). It is the submission of the Claimant that he had given specimen signature to the Company as he would be executing documents on behalf of the Company. Save for stating this, the Claimant's submission draws no conclusion based on this allegation. Further, the Claimant made no mention of this in his pleadings nor in his testimony. COW1 was cross-examined on whether the Company took the Claimant's specimen signature and whether this specimen signature was used in the resignation letter. Both were denied by COW1. The burden being on the Claimant to

prove this and having failed, the Court disregards this submission of the Claimant.

- (d). It is the Claimant's evidence that the first occasion that he had sight of the resignation letter was on 13.3.2001 when he received the same by post, mailed to him with a cover letter by the Company. Upon request, during cross-examination, the Claimant produced the original of the cover-letter, the envelope in which it was mailed to him and a photocopy of the resignation letter which he said was enclosed to the cover-letter. These were marked as CLE1 (a), (b) and (c) respectively. As correctly submitted by learned counsel for the Company, on a physical examination, the cover-letter bears the necessary creases to show that it was inserted into the envelope. But not so with the copy of the resignation letter that was purported to have been enclosed with the cover letter. It is a clean sheet of paper, smooth with absolutely no trace of even a single fold. The evidence before the Court is contrary to the Claimant's contention that the first time he lay sight of the resignation letter was when CLE 1(c) was sent to him by mail.
- (e). Learned counsel for the Company in his submission invites the Court to exercise its powers under section 73 of the Evidence Act, 1950 to compare the signature in the resignation letter to that of the signature of the Claimant appearing in a vast number of exhibits. And on the application of that section, Augustine Paul (as how his Lordship is referred to in the text) in his book ***Evidence Practice and Procedure, 3rd Edn., at page 596*** writes :

“ There are two methods of comparison of handwriting in the section. They are :

*(a) by the comparison of any signature, writing or seal, admitted or proved to the satisfaction of the court with the one which is to be proved. This was the method adopted by the court to compare signatures in **Ng Yik Seng & Anor v. Perwira Habib Bank Malaysia Bhd (1980) 2 MLJ 83 (FC)**. See also **Goh Cheng Teik & Anor v. Syarikat Goh Guan Ho & Ors (1997) 4 MLJ 403 (HC)**; **Re Estate of Chong Swee Lin (1997) 4 MLJ 464 (HC)**. ”*

I find great similarity between the signatures of the Claimant appearing in the exhibits and that appearing in the resignation letter. If I harboured any doubts on the correctness of this finding, I am supported by the Claimant himself when in cross-examination he states twice and in re-examination once that the signature on the resignation letter looks like his own.

- (f). The most damning conduct of the Claimant in the witness box was that under repeated cross-examination the Claimant made no effort to deny that the signature on the resignation letter is his. In cross-examination he is able to identify the signature in all other exhibits as his. But when it came to the resignation letter, in cross-examination he stops with saying that the signature looks like his. And in re-examination on being questioned whether it is his signature, he took the same stance.

After anxiously considering the totality of the evidence before me, I hold that the facts and circumstances are against the resignation letter being *non est factum* the Claimant. On a balance of probabilities I find the letter to be a resignation by the Claimant. *A fortiori* there is therefore no dismissal of the Claimant by the Company.

DECISION

33. For the reasons adumbrated above, the Court cannot but dismiss the Claimant's claim that he was dismissed and was so dismissed without just cause or excuse.

34. Claimant's claim dismissed.

HANDED DOWN AND DATED THIS 1ST SEPTEMBER, 2004.

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