INDUSTRIAL COURT OF MALAYSIA

CASE NO : 15/4-548/01

BETWEEN

(1) KONSORTIUM PERKAPALAN BERHAD
(2) MALAYSIAN SHIPPING AGENCIES SDN. BHD.

AND

AZIAH BT. ANIS

AWARD NO : 1536 OF 2004

Before	:	**N. RAJASEGARAN - Chairman** (Sitting Alone)
Venue	:	Industrial Court Malaysia, Kuala Lumpur.
Date of Reference	:	24.4.2004.
Dates of Mention	:	12.7.2001, 1.11.2002, 2.9.2003, 26.3.2004 and 12.4.2004.
Dates of Hearing	:	4.2.2002, 29.4.2004 and 30.4.2004.
Company's written submission received on	:	5.7.2004
Claimant's written submission received on	:	10.8.2004
Company's rejoinder received on	:	23.8.2004
Representation	:	Encik Ahmad Humaizi b. Mat Noor from Malaysian Employer's Federation representing the Company. Encik Abdul Shukor Ahmad from Messrs Shukor Baljit & Partners, 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 **Aziah bt. Anis** (hereinafter referred to as "the Claimant") by **Konsortium Perkapalan Berhad** (hereinafter referred to as "the Company").

AWARD

1. Before me is the reference of the dismissal of Aziah bt. Anis ('the Claimant'). The reference was made by the Honourable Minister of Human Resources acting pursuant to section 20(3) of the Industrial Relations Act, 1967 ('the Act'), which reference was received by Industrial Court 15 ('the Court') on 11.6.2001. In the reference the employer was stated as Konsortium Perkapalan Berhad ('the Company').

JOINDER OF PARTY

2. The Claimant on 4.2.2002 moved the Court to join Malaysian Shipping Agencies Sdn. Bhd. as a party to this reference. The then learned Chairman, Lim Heng Seng, pursuant to section 29(a) of the Act, in a verbal decision made on that same day, acceded to the application and joined Malaysian Shipping Agencies Sdn. Bhd. as a party to the dispute.

BACKGROUND

3. The factual matrix that form the background to this case may be shortly stated.

4. The Claimant commenced employment on 1.10.1993 as a Secretary. Her employer was then Malaysian Shipping Agencies Sdn. Bhd. ('MSASB'), which is a subsidiary of Konsortium Perkapalan Berhad

('the Company') which later came to be called Konsortium Logistik Berhad. Her letter of appointment is seen at pages 1 and 2 of AB1, a bundle of documents agreed to mutually by the parties. Her place of employment was Subang Jaya in Selangor Darul Ehsan. By a letter dated 17.7.1998, exhibited at page 3 of AB1, the Claimant was transferred to the Bulk Petroleum Distribution Division ('BPDD') of the Company. BPDD is situated in Port Klang, Selangor Darul Ehsan. In response to a written query by the Claimant, the Company informed her by letter dated 24.7.1998, found at page 9 of AB1, that upon transfer her designation would be 'Executive' and her job function would be to assist the department's Manager on all administrative and personnel matters. To this letter her job description was enclosed. The Claimant reported on transfer at BPDD on 27.7.1998. The department's Manager was Captain Hassan Ariffin ('COW2'). Thereafter the Claimant applied to the Company for the vacant position of Executive (Government) in MSASB situated in Subang Jaya. In this application she failed. The relevant application and reply thereto are exhibited at pages 13 and 14 of AB1. Next, by a letter dated 1.9.1998 addressed to COW2, the Claimant served three months notice of her intention to resign from employment. And this resignation was accepted by the Company by letter dated 3.10.1998 which letter also fixed the Claimant's last date of service as 14.11.1998. At pages 15 and 16 of AB1 are found these two letters. Then, following a discussion with COW2, the Claimant wrote a letter bearing the caption 'Retraction of Resignation', carrying the date 30.10.1998, directed to COW2. To this letter the Company replied, disagreeing to the Claimant retracting her resignation and declaring the Claimant's last date of employment as 14.11.1998. These letters have been included in AB1 at pages 17 and 19. Finally, the Claimant by a handwritten letter dated 14.11.1998, exhibited as CLE1(a), sent by facsimile on that same day at 12.08 after noon, claimed constructive dismissal by the Company.

5. Other correspondences there were. These form part of AB1. Referred to them, I have yet to. Refer to them I will, as my discussion progresses and the need arises.

CONSTRUCTIVE DISMISSAL

The Law

6. Constructive dismissal is a fiction of law. It allows a workman to cease employment of his own volition on account of his employer's conduct and thereafter claim that he has been dismissed. As with all legal fiction it is subject to strict prerequisites failing which the dismissal loses its fictional status to convert into resignation.

7. The principle of constructive dismissal was affirmatively restated in ***Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd. (1988) 1 MLJ 92,*** when Salleh Abas L.P. speaking for the Supreme Court said :

> *" The common law has always recognized the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as effects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer. "*

8. That constructive dismissal is within the ambit of a reference under section 20(3) of the Act was reaffirmed by Salleh Abas L.P. in that same landmark decision when he said:

> *"... interpretation of the word 'dismissal' in our section 20. We think that the word 'dismissal' in this section should be interpreted with reference to the common law principle. Thus*

it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it. In such situations, the employee is entitled to regard the contract as terminated and himself as dismissed. "

9. The prerequisites to found a claim of constructive dismissal as written in ***Bryn Perrins' Industrial Relations and Employment*** has been repeated so often both in the Industrial Court as well as higher courts that it has come to be a rule unto itself. I repeat that part of the text.

" *In order for the employee to be able to claim constructive dismissal, four conditions must be met:*

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, he will be held to have resigned and there will be no dismissal within the meaning of the legislation at all. "

The Court's Function

10. What the Court's function is in a constructive dismissal reference is elucidated in Salleh Abas LP's decision in ***Wong Chee Hong (Supra)*** when his Lordship said :

" When the Industrial Court is dealing with a reference under s. 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. "

And what Salleh Abas LP said was reaffirmed by Gopal Sri Ram JCA at page 2283 of ***Quah Swee Khoon v. Sime Darby Berhad, (2000) 2 AMR 2265*** when his Lordship said:

" The task is no different where a case of constructive dismissal is alleged. The Industrial Court must in such a case also determine firstly whether there was a dismissal. And secondly, whether that dismissal was with just cause and excuse. "

Evidential Burden

11. I next broach the subject of evidential burden. The law is old but firm. Cases abound that the burden lies upon the workman to prove all the necessary ingredients of constructive dismissal. This is no different from the position that when in dispute, the burden is upon the workman to prove that he had been dismissed. Azmel J reconfirmed the law when in ***Chua Yeow Cher v. Tel Dynamic Sdn. Bhd, (2000) 1 MLJ 168*** his Lordship said :

> *" It is now trite law that in a reference before the Industrial Court by an employee complaining that he had been constructively dismissed by his employer the burden is on the employee to prove that he had been dismissed unlawfully. "*

12. The submission of both Encik Ahmad Humaizi, learned representative of the Company and Encik Abdul Shukor, learned counsel for the Claimant are consistent with the law as stated here.

EVIDENCE, EVALUATION AND FINDINGS

Was There A Breach Of Contract

13. It would be an appropriate starting point to set out the letter with which the Claimant claimed constructive dismissal ('the constructive dismissal notice').

" 14th November 1998

By Fax:

En. Farid Z Hamid
GSVP – Organizational Development
Konsortium Perkaplan Berhad
14th Floor, Wisma Integrated
Subang Jaya.

Dear Sir,

I refer to my letter dated 11th November 1998, on my reasons for the retraction of my resignation whereby until to date 14.11.98, there has been no reply.

I hereby retract my resignation and go for constructive dismissal against the Company.

Yours sincerely

signed
.....
AZIAH BT. ANIS

cc: En. Mirzan Mahathir – Group Exec. Chairman
Capt. Hassan Ariffin – Manager, Bulk Petroleum "

14. That the constructive dismissal notice is not included in AB1 but is found in a disputed bundle of documents worries me not for the Company not only failed to challenge the Claimant on its existence but had in its written submission at paragraph 4.16, in substance admitted to this letter.

15. ***Goon Kwee Phoy v. J & P Coats (M) Bhd. (1981) 2 MLJ 129*** is binding authority for the proposition that the Court is restricted in its inquiry into the veracity of the reason chosen by an employer for the dismissal. Raja Azlan Shah CJ (Malaya) (as HRH then was) speaking for the Federal Court ruled at page 136:

> *" 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. "*

16. For all purposes a workman's letter claiming constructive dismissal is akin to an employer's dismissal letter. In both cases it is this letter that effects the dismissal. I see therefore no reason why a workman's letter claiming constructive dismissal should be treated any different from an employer's dismissal letter and be exempted from the principle laid in ***Goon Kwee Phoy (supra).***

17. The only reason declared by the Claimant in her constructive dismissal notice is that she had not been given a reply to a letter dated 11.11.1998 that she had written to the Company. Being germane, this letter is repeated.

" 11th November 1998.

En. Farid Z. Hamid
Group Senior Vice President
Organisational Development
Konsortium Perkapalan Bhd.
14th Floor, Wisma Intergrated
Subang Jaya.

Dear Sir,

Re: Retraction of Resignation

I refer to your letter dated 10th November, 1998 under the above heading and with to place on record that my retraction was done after consultation with my present superior who had strongly recommended that I should stay on in this Company.

Kindly refer to his memorandum to you dated 30th October, 1998.

Regards,

Signed
.....
(AZIAH BT. ANIS)

cc: En. Mirzan Mahathir – Group Exec. Chairman
Capt. Hassan Ariffin – Manager BPD "

18. The Claimant had in an earlier letter dated 30.10.1998 retracted her resignation. This letter being relevant in this and other discussions to follow is reproduced ('the retraction letter') below.

"30th October 1998.

Aziah Anis
29, Jalan PJS 9/4
Bandar Sunway
46150 P.J.

Capt. Hassan Ariffin
Manager
Bulk Petroleum Distribution Division
Port Kelang.

Dear Sir,

Re: Retraction of Resignation

I refer to my letter of resignation dated 1st September, 1998 and the conversation with your goodself. I wish to retract my resignation due to the following :

a. that I am compensated on the petrol/ maintenance allowance or alternatively
b. with a car loan.

As you are aware, the above has been my main grievance and a distraction to my concentration of work.

I look forward to work with the Company again and be rest assured of my continued performance and responsibility

as I personally feel this Division needs all the support available at every level in these critical time.

Thank you.

Yours sincerely,

Signed

.....

cc: 1) En. Mirzan Mahathir – Group Exec. Chairman
2) En. Farid Z. Hamid – Group SUP-Organisational Div. "

19. To this retraction letter the Company replied and this letter for similar reasons is reproduced. ('Company's reply to the retraction letter') :

" 10 November 1998

Puan Aziah Anis

Dear Aziah

RETRACTION OF RESIGNATION

We refer to your letter dated 30th October 1998 with regards to your request to retract your resignation.

After due consideration we regret to inform you that we are not able to agree to your request and your last day of service will be 14th November 1998.

KONSORTIUM PERKAPALAN BERHAD

Signed

.....

FARID Z. HAMID

GROUP SENIOR VICE PRESIDENT –

ORGANISATIONAL DEVELOPMENT

Cc : 1) En. Mizan Mahathir, Group Executive Chairman

2) Capt. Hassan Ariffin, Manager, BPD "

20. And it is this Company's reply to the retraction letter that led to her letter of 11.11.1998. That the Company did not reply to the Claimant's letter under reference is a fact. And this failure by the Company, the Claimant maintains in the constructive dismissal notice, is the ground for her claiming dismissal. The notice carries no other grounds. Did this failure on the part of the Company result in a breach of a fundamental term of the Claimant's contract of employment with the Company? That question describes aptly the issue before me.

21. In answering this poser, I take cognisance of the fact that the principle of constructive dismissal in Malaysia is based on the contract test and not on the unreasonable conduct test. That this is so has been firmly entrenched by a plethora of cases. Suffice it for me to quote Mahadev Shankar JCA speaking at page 605 in the Court of Appeal

decision of ***Anwar bin Abdul Rahim v. Bayer (M) Sdn. Bhd; (1998) 2 MLJ 599*** :

> " *It has been repeatedly held by our courts that the proper approach in deciding whether constructive dismissal has taken place is not to ask oneself whether the employer's conduct was unfair or unreasonable (the unreasonableness test) but whether 'the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer to be bound by the contract.'* [See ***Holiday Inn, Kuching v. Elizabeth Lee Chai Siok (1992) 1 CLJ 141*** and ***Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd. (1988) 1 MLJ 92 at p. 94***]. "

And as to why this is so, Salleh Abas L.P. in ***Wong Chee Hong (supra)*** explains:

> " *... 'constructive dismissal' does not mean that an employee can automatically terminate the contract when his employer acts or behaves unreasonably towards him. Indeed if it were so, it is dangerous and can lead to abuse and unsettled industrial relations.* "

22. Granted that the Company was unreasonable in not replying her letter of 11.11.1998. But not in issue is the unreasonable conduct of the employer. In issue is whether there has been a breach of a fundamental term of her contract of employment, such breach being born of the Company's failure to reply the said letter. It is the Company's submission that this failure does not constitute a breach of any

fundamental term of the Claimant's contract of employment. With this submission I have to agree.

23. To this is tied the view I had earlier expressed that the principle enunciated in ***Goon Kwee Phoy (supra)*** should apply equally to a workman who ceases employment and claims constructive dismissal. This view behoves the Court to enquire whether the reasons given by the workman for the action taken has or has not been made out. The proper enquiry of the Court should be limited to the reasons advanced by the workman and the Court should not go into any other reason not relied on by the workman or find one for him. If the Court finds as a fact that the reasons advanced by the workman have not been proved, then perforce, the principle would lead to the inevitable conclusion that there has been no dismissal of the workman. In this connection it cannot be the law that the workman should necessarily express his reasons in writing. What is essential is that the reason or reasons should have been made known clearly and unequivocally to the employer around the time the workman had resorted to his action of cessation of employment. Equity too will demand this for unless the workman puts the employer to notice of the breach complained of, the employer would not have had the opportunity, if he chose to, to remedy the breach of contract.

24. I have carefully examined the evidence before me and save for the reason extended by the Claimant in her constructive dismissal notice, she had not made known to the employer clearly and unequivocally any other reason for her action. And the reason the Claimant has advanced relies on a flawed assumption for its correctness, namely the mistaken assumption that the failure of the Company to give a reply to her letter of 11.11.1998 constituted a breach of a fundamental term of her employment. The necessary corollary to this is that there was no dismissal of the Claimant by the Company. And that is my finding.

25. Though not required of me, for purposes of completeness I now turn to examine the reasons proffered by the Claimant in her pleadings and in her testimony in support of her claim of constructive dismissal. These reasons she states in answer to question 72 in her witness statement which in substance is in *pari materia* to her pleadings at paragraph 20. Her reasons are :

> *"a. I considered that the transfer has the effect of a demotion whereby I was given a job description fitting a job of an executive of human resources, instead of a secretary;*
> *b. I was transferred to a new designation and the job description differs materially with that I was initially doing;*
> *c. The transfer was done without consultation with me and without taking into consideration the difficulties that I had to encounter as a result thereof.*
> *d. That the transfer was done not in good faith and not in proper labour practice;*
> *e. I felt victimized and humiliated;*
> *f. I had lost the estimation to work "*

These reasons, Encik Ahmad Humaizi submits, are an afterthought for the reason that the same has not been stated in the constructive dismissal notice. To this Encik Abdul shukor makes no mention in his submission in reply.

26. The Claimant, designated as Secretary, was transferred to BPDD as Executive. A comparison of the duties that the Claimant had performed as Secretary as against that made known to her in the job description of Executive does not support the Claimant's contention of

the transfer being a demotion and in the circumstances this ground and that relating to her being humiliated cannot stand.

27. *Ex-facie* there was indeed some difference in her job function. But an employee should reasonably expect to see some changes to her job content upon a transfer or re-designation. No two jobs can be alike. That this difference was a bone of contention at the material time is not evident from the Claimant's response, in the form of a letter dated 25.7.98, exhibited at page 11 of AB1, on being made known of her job description as Executive. In that letter though commenting on the additional responsibilities that the job would entail, she made no protest and instead sought guidance and training to enable her to carry out her duties. In the upshot I find this ground too unsustainable.

28. And as to the ground of the transfer being effected without consultation, particularly on possible difficulties caused to her, the Court cannot help but note that notwithstanding her handwritten letter dated 18.7.1998, seen at page 5 of AB1, seeking the reasons for her transfer at short notice, the events that followed, that is, the contents of the various correspondences that ensued, her reporting for duty at BPDD albeit at a slightly delayed date, her discussion with her immediate superior, COW2, all lead the Court to conclude that this lack of consultation was not at the material time perceived as *mala fide* by the Claimant. Nor is there any uncontroverted evidence before the Court that the Claimant had clearly objected to the said transfer.

29. On the transfer being actuated *mala fide* or being an unfair labour practice or an act of victimisation against the Claimant, there lie no cogent and tangible evidence before the Court. And in this I am in consonance with Encik Ahmad Humaizi's reference to ***Intra Marine (PK) Sdn. Bhd. v. Thomas a/l Pappu, (1995) 1 ILR 654*** where the learned

Chairman Yussof bin Ahmad (as Yang Arif then was) adopted the writing of ***B.R. Ghaiye*** in his text ***Law and Procedure of Departmental Enquiries (In Private and Public Sectors) at page 1461 :***

> *" 10. Procedure in case of victimization or mala fide.*
>
> *(a) The burden of showing mala fides and victimization is on the employee – The onus of proving victimization is on employees on the accepted rule that a person has to prove the affirmative and it is not for the other person to prove the negative. The allegations of mala fide conduct is easy to make but not always easy to prove. When allegations are made on one side and denied by the other the mala fides are not proved. Victimization is a serious charge and must be properly and adequately pleaded giving all particulars upon which the charge is based to enable the employer to fully meet the same. Onus of establishing the charge is upon the person pleading it and he has to establish the same by safe and sure evidence.*
>
> ***It is now well-established that a finding of mala fide should be reached by Industrial Adjudication only if there is sufficient and proper evidence in support of the finding.*** *Such finding should not be made either in a casual manner or light-heartedly." (Emphasis added).*

30. Finally, useful reference may be made to from an authority quoted by Encik Abdul Shukor in his submission. This is the case of ***Kontena National Bhd. v. Hashim Abd. Razak, (2000) 8 CLJ 274.*** In this case Faiza Thamby Chik J. at page 290 said :

> *" Conversely where an employee treats himself as having been constructively dismissed pursuant to a transfer order, the only issue for determination of the Industrial Court is whether the applicant was acting within the parameters of the respondent's contract of employment. In examining the motives behind the transfer and concluding that the actions of the company amounted to a punishment in the form of a transfer and was a humiliation, the Industrial Court had overstepped the boundaries curtailing its role in a constructive dismissal situation arising from a transfer order. "*

Clause 4 of the Claimant's appointment letter enables her to be transferred or seconded to the Holding Company or any of its subsidiaries or associates. That the Claimant's transfer fell within the parameters of her contract of employment is undeniable. That this transfer was effected by the Holding Company cannot, as submitted by the Claimant, constitute a breach of contract. More so since the Claimant by conduct complied with, acknowledged, corresponded and accepted the authority of the Holding Company at all times.

And in as far as the Claimant's losing the estimation to work, the enthusiasm conveyed in her letter of 25.7.98, earlier referred to, speaks otherwise. The grounds involving the transfer and the Claimant's loss of estimation to work cannot in the circumstances take off to support her case.

Time Taken To Affirm Breach

31. Minus the necessary conditions enumerated in ***Bryn Perrins' Industrial Relations and Employment (supra)*** there can be no

constructive dismissal. These conditions are cumulative and not in the alternative and it is for the Claimant to satisfy the Court that they have all been fulfilled.

One condition precedent is that the Claimant should not have delayed too long in terminating the contract of employment, otherwise she will be treated as having affirmed and adopted the breach. On this Encik Ahmad Humaizi submits that if the Claimant's case of constructive dismissal is founded on her transfer to BPPD which occured on 27.7.1998, her reaction on 14.11.1998, after a delay of 3½ months, amounts to waiver of the alleged breach. In support he relies on the case of ***CCM Fertilizers v. Peter Shanta Arthur Sukumar, (2003) 3 ILR 944*** where the learned Chairman held that a delay of 2½ months before proceeding on constructive dismissal arising from a disputed transfer, resulted in the workman waiving his right to do so.

The general principles applicable to waiver of a breach of contract may be shortly stated. If one party commits a repudiatory breach of the contract, the other party can choose one of two courses: he can either affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract comes at an end. Merely delay by itself does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation.

To all this Encik Abdul Shukor replies that the Claimant acceded to the transfer and reported at BPDD for she was under the impression that the transfer order was lawful and she feared that refusal would lead to disciplinary action against her; that the Claimant was confused; and that she had written to the Company a letter dated 18.7.1998 seeking the reason for her transfer which letter was never replied.

32. With respect, I am unable to find in support of the Claimant. That she reported for work at BPDD is not the issue. What is, is the fact that she walked out of her employment 111 days after the transfer which she complains constitutes the breach of contract. Is this period of 111 days before which the Claimant reacted reasonable under the circumstances? If it is, it will negative waiver. Otherwise she is deemed to have affirmed and adopted the alleged breach. I am unable to accept the reason of awaiting a reply to the Claimant's letter of 18.7.1998 being a justifiable cause for the delay. The Claimant's conduct as revealed in the various correspondences that she entered into, particularly her letter of 25.7.1998 earlier referred to, and the perceptions relayed therein is not conduct that made a reply to her letter of 18.7.1998 crucial.

33. Examining this period of 111 days as closely as possible in the overall context, there is in my judgement insufficient evidence from which to draw the inference that the Claimant had not waived her rights to challenge the transfer. Minus this essential ingredient of prompt reaction to a purported breach of contract, the Claimant's case in support of constructive dismissal is insustainable.

34. The Claimant's case for constructive dismissal founded on the reasons expounded by her in answer to question 72 in her witness statement collapses under the various heads discussed thus far. And a dismissal on these grounds I cannot find.

DIRECT DISMISSAL

35. My decision hitherto is that the Claimant was not dismissed by the Company by way of constructive dismissal. I now turn to another glaring series of events which appear to have escaped both learned counsels' attention. These events when conjoined together lead the instant case in

an entirely different direction to the extent of bringing about a role reversal where dismissal is concerned. I now proceeded to consider this.

Claimant Resigns

36. The Claimant reported for duty on transfer at BPDD on 27.7.1998. The overall Manager of BPDD was COW2 and to him the Claimant was subordinate. The Claimant submitted her resignation by a letter dated 1.9.1998 addressed to COW2 with copies, one of which was sent to Farid Z. Hamid, the Group Senior Vice President of the Company. The letter, short and up to the point, is set out below.

> " 1st September, 1998.
>
> To:
> Capt. Hassan Ariffin
> Manager
> Bulk Petroleum Distribution Division
> Port Klang.
>
> Re: Resignation
>
> In compliance with KPB's Terms and Conditions of Service, I am tendering my resignation effective 3 months from today.
>
> Yours sincerely,
>
> Signed
> .....
> AZIAH BT. ANIS

cc: Mr. Andy Goh – VP Finance
En. Farid Z. Hamid – SUP – Corp. Human Resource,
KPB. ”

That copy of the letter which was tendered as evidence, bears at the top a received stamp from the Senior V.P. Group HR and at the bottom has a note which reads “JA- Pls. check with Hassan when is her last day”. I will refer to the import of this later in my discussion.

Company Accepts Resignation

37. To this resignation letter, Farid Z. Hamid replied on 3.10.1998 accepting the Claimant’s resignation and fixing her last date of employment on 14.11.1998. This letter was copied to Captain Hassan Ariffin who is COW2. It is the position in industrial jurisprudence that once the resignation of a workman is accepted by the employer, the workman cannot thereafter unilaterally withdraw his resignation and the contract of employment terminates on the designated date.

Claimant Retracts Resignation

38. What next happened is best described by repeating testimony and correspondence that transpired. This relates to the events leading to the retraction of her resignation letter by the Claimant.

The Claimant in her witness statement stated :

“*60. Q: What were your reasons for retraction of your resignation?*

A: After I have sent my letter of resignation, I had a discussion with my superior, Kpt. Hassan Ariffin. He

indicated to me that my main grievance, namely transportation, can be solved at his level. He indicated that it is within his jurisdiction to approve compensation for travelling by way of petrol/maintenance allowance. In the alternative he also suggested that I apply for a loan from the company for the purchase of a new car and that he will strongly support my application. As my grievance may be solved by the two alternatives, I was willing to continue working for the Company.

63. Q: Was the letter written to the Manager Bulk Petroleum Distribution after consultation/conversation with the Manager Kpt Hassan Ariffin?

A: Yes as I have stated earlier, the letter was issued after the indications given by Kpt Hassan Ariffin.

64. Q: The conditions were agreed to by the Manager?

A: Yes, they were agreed to by the Manager, Kpt. Hassan Ariffin.

65. Q: Can you tell the Court to whom you addressed the letter to?

A: I addressed the letter retracting my resignation to my immediate superior, Kpt Hassan Ariffin. "

The Claimant was not challenged by the Company in cross-examination on the veracity of that which she stated. And what is not challenged is accepted by the opposing party. That is the law.

COW2 under cross-examination stated:

> *" Q: When the Claimant requested for retraction of resignation did you not agree with the request?*
>
> *A: Yes I agreed.*
>
> *Q: Do you agree you had discussion with Claimant on car loan and travel allowance?*
>
> *A: It was not a discussion. It was an advice from me. I recall Claimant came and saw me, cannot remember date. When she submitted her resignation. My advice to her was why you want to resign after serving the Company 4 to 5 years. I think she told me her problem of staying in Subang Jaya. Quite difficult to come to Port Klang to work. Public Transport not reliable. Has only one car used by her husband. Husband unable to send her to office everyday. I think I advice her and it is within my power and jurisdiction to recommend for an employee to be given petrol and maintenance allowance if she posses a car. And if she required to travel. And in this job sometimes she needs to travel. I am not sure I advised her she can apply for Company loan. "*

39. The Claimant then wrote her retraction of resignation letter dated 30.10.1998 addressed to COW2 with copies, one of which she sent to Farid Z. Hamid. This letter has been reproduced earlier in this Award.

Company's Response To Retraction Letter

40. To this letter of the Claimant, the Company through the hand of Farid Z. Hamid responded with a letter dated 10.11.1998 which letter too has been earlier reproduced.

Puzzled am I by the contents of this letter, particularly on that part where the Claimant's letter of 30.10.1998 is referred to as a request to retract her resignation. *Ex facie* the Claimant's retraction of resignation letter read in the light of that which preceded between the Claimant and COW2, leads me to determine that the said letter is not a request for retraction of her resignation. The letter is in substance a confirmation of her retraction of the resignation which retraction had earlier been agreed to by the Company through COW2, her superior.

Can Claimant Withdraw Her Resignation

41. This leads me now to examine the status of a workman whose resignation has been accepted by the employer. Can such a workman withdraw his resignation?

On this I turn to ***Riordan v. The War Office (1959) 3 All ER 552*** where Diplock J. spoke at page 557 :

> *" I think that the regulations relating to the termination of employment must be regarded if not as the terms of contract of employment at least as analogous to the terms of such a contract and that the* ***giving of a notice terminating the employment, whether by employee or employer, is the exercise of the right under the contract of employment to bring the contract to an end, either immediately or in the future.*** *It is unilateral act, requiring no acceptance by the other party, and, like a notice to quit tenancy,* ***once given it cannot in my view be withdrawn save by mutual consent.*** *" (Emphasis added)*

And closer at home, in a case circulating the right of an employer to withdraw a termination notice, Hasan J. in ***Kerisna a/l Govindasamy lwn. Highlands & Lowlands, Ladang Bukit Selarong, (2003) 6 MLJ 739*** referred with approval to a passage from ***Harris & Russle Ltd. v. Slingsby (1973) 3 All ER 31*** which being relevant to the instant issue before me, is repeated :

> *" Although it appears that there is no direct authority on the point in the case of a master and servant relationship, the court is satisfied that where one party to the contract gives a notice determining that contract he cannot thereafter unilaterally withdraw the notice.* ***It will of course always be open to the other party to agree to his withdrawing the notice****, but in the absence of agreement the notice must stand and the contract will be terminated on the effluxion of the period of notice. " (Emphasis added)*

And in the Industrial Court, learned Chairman, Tan Kim Siong speaking in ***MST Industrial System Sdn. Bhd. v. Foo Chee Lek, (1993) 1 ILR 202*** held :

> *" This Court will now briefly examine whether the Claimant whose resignation has been accepted by the Company can withdraw it subsequently. There are numerous authorities and awards which held that once a party to a contract gave notice determining that contract he could not thereafter unilaterally withdraw his notice. This Court is further persuaded to take the view of the award, Fairview Schools Bhd. and Cik Brigitta Bhawani d/o Masilamani Azariah and Cik Sarita Shalini d/o Masilamani Azariah which held :*

1. ***Once notice has been given by either the employer or the employee, it can only be withdrawn with the agreement of the other.*** *(See Riordan v. War Office, 1959 3 All E.R. 552 and Bryan v. Wimpey 1968 3 ITR 28). " (Emphasis added)*

And again in ***Percetakan Keselamatan Nasional Sdn. Bhd. v. Jamaliah Md. Yussof, (2001) 2 ILR 536,*** learned Chairman, Zura Yahya said :

> *" In view of the decisions in Syed Aman Syed Hassan v. Mara Institute of Technology (supra) and Riordan v. The War Office (supra) which are more authoritative than the authorities cited by counsel by the claimant, this court takes the stand that there is no legal obligation on the part of a company to communicate its acceptance of resignation and that* ***a resignation once tendered cannot be withdrawn except with the consent of the employer.*** *"(Emphasis added)*

The principle that emerges from the aforesaid cases is that a workman whose resignation has been accepted by his employer cannot thereafter unilaterally revoke such resignation save by mutual consent with the employer. Common sense demands this principle to be correct and with this I go along.

42. In the instant case the Claimant's revocation of her resignation was effected through her retraction of resignation letter of 30.10.1998 with the consent of her employer, in this case, COW2. That COW2 represents the employer in as far as the Claimant is concerned cannot be denied, particularly so since at no time did the Company maintain that COW2 acted out of authority in his agreement with the Claimant on the

revocation. I further take notice of that note at the bottom of the Company's copy of the Claimant's letter of resignation. I had earlier referred to this note where the author had instructed a certain 'JA' to check with 'Hassan', presumably COW2, on the Claimant's last date of employment. Following this, Farid Z. Hamid wrote to the Claimant accepting the resignation and fixing her last date of employment. This letter was copied to COW2. COW2 had therefore participated in and had full knowledge of the Company's decision *vis-a-vis* the Claimant's resignation. Notwithstanding, he had chosen to agree to the withdrawal of the Claimant's resignation.

Can Company Retract Acceptance Of Revocation

43. Can this revocation of the resignation by the Claimant, obtained with the consent of the Company, be subsequently overturned unilaterally by the Company? My response is in the negative. Once the withdrawal of the workman's resignation is accepted by the employer, the revocation may only be reversed by mutual consent between the workman and the employer. Otherwise it leads to a dismissal. And this is what happened in the instant case. The Company through its letter of 10.11.1998, rejected her purported request to retract her resignation and informed her that her last date of employment would be 14.11.1998. This letter brought about the dismissal of employment of the Claimant on 14.11.1998.

44. What of the Claimant's constructive dismissal letter of 14.11.1998? Did this letter negative the dismissal of the Claimant effected by the Company's letter of 10.11.1998? I now turn to examine this. A workman who has been dismissed by an employer remains so dismissed. A workman cannot thereafter terminate that same employment contract which has already been terminated. A contract of employment has only

but one life at any given time. Once extinguished, it remains so and cannot be extinguished again. For that to be done the contract will first have to be rekindled into life by mutual consent between the workman and the employer. The Claimant's letter of constructive dismissal produced no effect whatsoever on her contract of employment, already torn asunder by the Company's earlier letter.

45. Approaching the issue in this way and looking at the circumstances as a whole, I find dismissal of the Claimant at the behest of the Company, effected on 14.11.1998. Having decided this, I now proceed, as is required of me, to move to the second limb of the Court's function, that is, to examine whether the Company had just cause and excuse to dismiss the Claimant. The Company's action being *mala in se* and there being no evidence to the contrary, I find the Company not to have just cause and excuse for its action.

Pleadings

46. Before departing from this finding, there is need for me to make mention of the fact that I had in the course of arriving at my decision directed my mind to the all important subject of pleadings. In this connection I had hearken to the oft quoted passage of Eusoff Chin CJ in ***R. Ramachandran v. Industrial Court of Malaysia & Anor, (1997) 1 CLJ 147*** where his Lordship held that though the Industrial Court is not bound by all the technicalities of a civil court by virtue of section 30 of the Act, pleadings cannot be ignored and treated as pedantry. I also took heed of that part of the passage where his Lordship said that "*the Industrial Court must at all times keep itself alert to the issues and attend to matters it is bound to consider.*".

47. The facts pertaining to the retraction of the resignation by the Claimant and the response to the same by the Company was pleaded by both parties. The relevant correspondences were exhibited in a bundle of documents agreed mutually by the parties. Related facts were not only included in the Claimant's and COW2's witness statements but both of them were also subject to cross-examination on the same. The object of pleadings is to prevent surprises. I cannot for one moment think that the Company can be said to have been taken by surprise because the facts material to my decision had been laid bare for all to see through the numerous media referred to. That either party did not recognize the legal issues which surfaced as a result of these facts and failed to submit on the same does not absolve the Court from doing what is incumbent upon it to do. Upon me lies the duty to keep alert to possible issues that arise and to attend to all matters that I am bound to consider. And in this quest I take the position that material facts may be pleaded without the need to plead the legal consequences that follow (see Gopal Sri Ram JCA in ***Quah Swee Khoon v. Sime Darby Bhd., (2000) 2 AMR 2265)***.

48. I verily believe that I have not offended any rule of pleadings in taking into consideration the relevant facts and arriving at my decision that the Claimant was dismissed by the Company. And if I have, I take confidence from that salutary charge of Gopal Sri Ram JCA found at page 320 of ***Ng Kim Moi (P) & Ors v. Pentadbir Tanah Daerah, Seremban, Negri Sembilan, (2004) 3 MLJ 301*** :

> *" The law is not so impotent that it will let an injustice pass by while having its limbs bound by procedural technicalities. "*

REMEDY

REINSTATEMENT

49. The Claimant has sought reinstatement in her former position both in her pleadings and in her testimony. The Court not having found her transfer to BPPD being wrong, will treat the former position referred to by her as that position she held at BPPD at the time of her dismissal. The Court is mindful of the nature of the work that was assigned to the Claimant; that she holds a Diploma from the Mara Institute of Technology; that she had worked with a subsidiary of the Company for a period of 5 years; that her cessation of employment was carried out not under circumstances that were tumultuous or disharmonious; that there is no evidence before the Court that the position previously held by her has been filled; and that she is now 46 years old, an awkward age, which though it allows a substantial remaining working life, has the effect of impeding her chances of securing employment with a new employer. After weighing these considerations the Court finds it fit to reinstate the Claimant in her former employment.

BACKWAGES

50. The Court had in the case of ***Ike Video Distributors Sdn. Bhd. v. Chan Chee Bin (2004) 2 ILR 687*** analysed in detail relevant factors and had set out the principles by which the Court will be governed in the award of remedies including backwages. The Court held that backwages should be for the period between the date of dismissal and the date of conclusion of hearing. From this sum the Court will scale down, if appropriate, based on the circumstances of the case, under the three heads of (a) gainful employment, (b) contributory conduct and (c) delay factor. The arguments and rationale of the Court in having arrived at

this mode of computation is discussed in detail in ***Ike Video Distributor Sdn. Bhd. (supra)*** and will not be repeated here.

51. The Claimant was dismissed on 14.11.1998. Hearing of the case in the Court ended on 30.4.2004, a period of 65 months. This figure becomes the multiplier in computing backwages.

52. The evidence before the Court is that the Claimant earned a salary of RM2,700.00 per month at the time of her dismissal. And this becomes the multiplicand.

53. The multiplicand of RM2,700.00 with the multiplier of 65 leads to a sum of RM175,500.00 as backwages.

SCALE DOWN

Gainful Employment

54. This principle of law, set by the Court of Appeal in ***Koperasi Serbaguna Sanya Bhd. Sabah v. James Alfred, Sabah & Anor, (2000) 3 AMR 3493***, was further clarified by the Federal Court on appeal in ***Dr. James Alfred v. Koperasi Serbaguna Sanya Bhd. Sabah & Anor, (2001) 3 MLJ 529.***

55. The Court had analysed the application of this principle in ***Ike Video Distributor Sdn. Bhd. (supra)*** and will adhere to the same here.

56. No evidence was adduced by either party on the Claimant's employment or income status during the interregnum between her dismissal and the last date of hearing. In the circumstances the Court has to presume that she was not gainfully employed during the

interregnum and for this reason no scaling down is effected under this head.

Contributory Conduct

57. The Court finds the Claimant not to have contributed in any way towards her dismissal and for this reason no scaling down is effected under this head.

Delay Factor

58. The Court is amenable to scale down on the total compensation under two sub-heads in connection with delay factor *viz* (a) delays occasioned by the Claimant subject to a maximum scaling down of 30% and (b) delays attributable to the Ministry of Human Resources or the Industrial Court subject to a further maximum scaling down of 30%. The Court adds that scaling down if any under this head should equitably be done as the last exercise after having determined the final sum payable to a Claimant.

59. In the instant case the Claimant was represented without absence at every one of the mentions and hearing dates set by the Court. She further complied with all directions on the filing of pleadings, documents and witness statement. She therefore made no contribution towards delay and the Court accordingly effects no scaling under this sub-head.

60. The Claimant's appeal under section 20 of the Act was received by the Minister of Human Resources on 17.11.1998. On 24.2.2001 the Minister decided to exercise his discretion to refer the matter to the Industrial Court and the matter was assigned to the Court on 11.6.2001 more than 2.4 years later. And on being assigned to the Court, hearing

of the matter was further delayed for the reason that the Court was without a substantive Chairman from 1.2.2003 to 15.1.2004, a period of almost one year. There was therefore a delay of a total of 3.4 years under this sub-head.

61. Although such delays are not the doing of a claimant it is inequitable and against good conscience to shoulder the total penalty of full compensation under both heads upon the employer for he contributes no blame too. In the circumstances the Court scales down the backwages at the rate of 5% per year of delay. Scaling down under this sub-head will therefore be 17%, thus giving a figure of RM145,655.00 from the original sum of RM175,500.00.

ORDERS

62. The Company is ordered to reinstate the Claimant as Executive in BPPD with effect from 1st December 2004 on terms and conditions of service accruing to that position in the Company at the time of her reporting for duty but not less than the terms and conditions of service which applied to her at the time of her dismissal. Should the Claimant fail to report for duty at BPPD on or before 15th December 2004, this reinstatement order will lapse and she will thereafter lose this benefit of reinstatement.

63. The Court orders that the Company further pays the Claimant through her solicitors, the sum of RM145,665.00 less statutory deductions if any, not later than 45 days from the date of this Award.

HANDED DOWN AND DATED THIS 1ST NOVEMBER, 2004.

(N. RAJASEGARAN)
CHAIRMAN
INDUSTRIAL COURT