INDUSTRIAL COURT OF MALAYSIA

CASE NO : 15/4-676/01

BETWEEN

TECOMAS (M) SDN. BHD.

AND

LEE CHOON KEONG

AWARD NO : 1687 OF 2005

Before	:	**N. RAJASEGARAN - Chairman** (Sitting Alone)
Venue	:	Industrial Court Malaysia, Kuala Lumpur.
Date of Reference	:	5.6.2001.
Dates of Mention	:	2.8.2001, 29.10.2001, 12.12.2001, 26.2.2002, 24.9.2002, 6.1.2003, 23.9.2003, 26.2.2004, 22.11.2004, 13.12.2004, 11.4.2005 and 9.5.2005.
Date of Hearing	:	6.6.2005.
Date of Submission	:	15.7.2005.
Representations	:	Mr. T. Gunaseelan from M/s Gunaseelan & Associates, Counsel for the Company. Mr. Teh Hong Jet from M/s Tan Kim Siong & Teh Hong Jet 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 **Lee Choon Keong** (hereinafter referred to as "the Claimant") by **Tecomas (M) Sdn. Bhd.** (hereinafter referred to as "the Company").

AWARD

Reference

1. Before me is a reference by the Honourable Minister of Human Resources made on 5.6.2001 pursuant to his powers under section 20(3) of the Industrial Relations Act, 1967. It refers to the dismissal of Lee Choon Keong ('the Claimant') by his employer, Tecomas (M) Sdn. Bhd. ('the Company') on 14.7.1999. The reference was received by the Industrial Court ('the Court') on 28.6.2001.

Facts In Agreement

2. Effort and words may be economised by repeating here the Court's records on that which transpired during case management on 9.5.2005. This is what it reads :

> *" In discussing with both parties the following are recorded as agreed facts in respect of which no further evidence need be led :*
>
> *1. The first party, Tecomas (M) Sdn. Bhd. ('the Company') is the employer of the Claimant.*
>
> *2. The Claimant commenced employment in July 1984 as a Salesman.*
>
> *3. The Claimant was promoted as a Sales Manager on October 1992.*
>
> *4. The Claimant's last drawn basic salary was RM6050.00 per month. Claimant also received a Telephone Allowance of RM200.00 per month. Confirmed that the Telephone Allowance is a fixed allowance and not a reimbursement.*

5. *The Claimant gave the Company a resignation letter dated 14.7.1999 as found at CL1 received by the Company on 14.7.1999. CL1 was given by the Claimant by hand to the Company.*

6. *The Company served a letter as per CL2 upon the Claimant in response. The Claimant received the letter dated 14.7.1999 on even date by hand.*

7. *The Claimant was paid RM50,000.00 by the Company after he tendered his resignation letter.*

8. *There was a meeting on 14.7.1999 between the Claimant, the MD Mok Swee Sang and the GM Bernard Lim Beng Chye. The resignation letter i.e. CL1, followed the said meeting. "*

Issues To Be Tried

3. On that same day of case management the parties agreed and had it recorded that the issues in dispute were :

" 1. Claimant maintains that he was forced to resign i.e. CL1 was obtained under duress. Company's stand is that CL1 was not obtained under duress. It was a negotiated settlement.

2. Claimant maintains that the last date of employment was 14.7.1999. Company maintains the last date of employment as 13.7.1999. "

4. During trial as well as in submission neither proceeded on that issue relating to the Claimant's last date of employment. The flow of evidence before the Court, consistent by both parties, was that the Claimant did work on 14.7.1999 and that he ceased employment on that

same day sometime after lunch. Put in issue were two dates appearing in the Claimant's resignation letter. The Claimant signed the letter on 14.7.1999. But the letter states that he resigns with effect from 13.7.1999. Evidence was led and submission was devoted to this fact but I find no reason to dwell upon this for no attempt was made in submission by either to link this confusion on dates to the issue at hand. And that is, was the resignation letter prompted *per vi, per clam* or *per precario.*

5. At the risk of repeating but finding it necessary to do so, the issue before me is to determine whether the letter of resignation was a voluntary act of the Claimant or whether it was involuntary, that is it was forced upon him. And in arriving at a finding of fact on this issue I evaluate the evidence before me in relation to the circumstances preceding, during and after the authorship of the resignation letter. The fact that the resignation letter was authored, typed and signed by the Claimant is not in dispute.

The Law

6. The *factual matrix* and primary issue for determination in the instant case enables me to dispose of the Court's *mandatum* by simply repeating Salleh Abas LP in ***Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd. (1988) 1 MLJ 92*** where his Lordship spoke thus :

> *" 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)

7. First, does a resignation letter *per se* negative dismissal? Authority and precedence say otherwise. In this I am particularly attracted to that decision of Choor Singh J reported in ***Stanley Ng Peng Hon v AAF Pte Ltd (1979) 1 MLJ*** 57 where his Lordship in one simple sentence covered the law by saying: *"A resignation obtained under compulsion is no resignation in law."* Such a proposition of law has been adopted in a plethora of cases in the Industrial Court. So numerous are they that to name any would be superfluous.

8. Next, on the burden of proof. I find the reference of Mr. T. Gunaseelan, learned Counsel for the Company, to the decision of Abdul Kadir Sulaiman J (as his Lordship then was) in ***Weltex Knitwear Industries Sdn. Bhd. v. Law Kar Toy & Anor (1998) 7 MLJ 359*** to be on point. His Lordship in that decision held :

> *" However, where the fact of dismissal is in dispute, it is for the workman to establish that he was dismissed by his employer. "*

Later in his judgement his Lordship opined that section 101 of the Evidence Act, 1950 imposes a similar burden upon the workman.

Evidence, Evaluation and Findings

9. Before I move to discuss the main issue, I find the need to dispose of one area that was canvassed by both Counsel with vigour. This related to the alleged unsatisfactory work performance and conduct of the Claimant. The Company clothed the Claimant as a declining performer and of poor rapport with other staff. The Claimant demurred. Time was spent on submission by both Counsel on whether these allegations stood substantiated. I do not consider it necessary to subject

them to critical scrutiny. For what is in issue is not the Claimant's work performance and conduct. On issue is the voluntariness of the resignation letter. And in determining this and this alone, I find the fact of an allegation *per se* against the Claimant by the Company to be of relevance. For it showed that the Company had reason, whether well-grounded or not, to seek the Claimant's departure from employment. And this the Company does not deny for it is the Company's evidence that the Company sought the Claimant's resignation. The resignation was a negotiated settlement says the Company. The resignation was forced says the Claimant.

10. This conflicting position adopted by the parties forms the *factum probandum.* I now examine the law relevant to this area. Having received no assistance I had to embark on my own research. A good summary of law on the issue can be found in the Employment Appeal Tribunal's ('EAT') decision in ***Sheffield v. Oxford Controls Ltd. (1979) IRLR 133***. In that case the employee under threat of dismissal entered into and signed an agreement with the employer to resign in consideration of a financial settlement. The Industrial Tribunal found a resignation as opposed to a dismissal. The dicta there of Arnold J in upholding the Tribunal's finding, being appropriate to the circumstances of the instant case, I repeat at length :

> *" It is plain, we think, that there must exist a principle, exemplified by the four cases to which we have referred, that where an employee resigns and that resignation is determined upon by him because he prefers to resign rather than to be dismissed (the alternative having been expressed to him by the employer in the terms of the threat that if he does not resign he will be dismissed), the mechanics of the resignation do not cause that to be other than a dismissal. The cases do*

not in terms go further than that. We find the principle to be one of causation. In cases such as that which we have just hypothesised, and those reported, the causation is the threat. It is the existence of the threat which causes the employee to be willing to sign, and to sign, a resignation letter or to be willing to give, and to give, the oral resignation. ***But where that willingness is brought about by other considerations and the actual causation of the resignation is no longer a threat which has been made but is the state of mind of the resigning employee, that he is willing and content to resign on the terms which he has negotiated and which are satisfactory to him, then we think there is no room for the principle to be derived from the decided cases. In such case he resigns because he is willing to resign as the result of being offered terms which are to him satisfactory terms on which to resign****. He is no longer impelled or compelled by the threat of dismissal to resign, but a new matter has come into the history, namely, that he has been brought into a condition of mind in which the threat is no longer the operative factor of his decision; it has been replaced by the emergence of terms which are satisfactory. Therefore, we think that the finding that Mr Sheffield [the employee] had agreed to terms upon which he was prepared to agree to terminate his employment with the company – terms which were satisfactory to him – means that there is no room for the principle and that it is impossible to upset the conclusion of the Tribunal that he was not dismissed. "* (emphasis added)

11. I next came across the decision of the EAT in the case of ***Logan Salton v. Durham County Council (1989) IRLR 99,*** the facts of which are not particularly material, but where the same problem arose. In that case an employee when under notice of disciplinary hearing, negotiated a settlement of resignation and resigned thereafter. The Industrial Tribunal's decision to treat the termination of employment as a resignation was upheld. In so doing, the EAT referred to those same words of Arnold J in ***Sheffield v. Oxford Controls Ltd. (supra).***

12. Helpful too I found an earlier decision of the Court of Appeal in England in the case of ***Birch and Humber v. The University of Liverpool (1985) IRLR 105,*** the headnotes of which read :

> *" The definition of dismissal in [s.95(1)(a)] is directed only to a case where the contract of employment is terminated by the employer alone. Dismissal, as it is defined in that section, is not consistent with a case where the contract has been terminated by the mutual, freely-given consent of the employer and the employee. In a case where the contract has been terminated by such mutual agreement, it may properly be said that the contract has been terminated by both the employer and the employee jointly, but it cannot be said that it has been terminated by the employer alone. "*

13. The proposition of law that may be distilled from the cases referred to is that an employer who does not wish to continue the services of a workman for any reason whatsoever may secure that workman's departure from employment through a negotiated settlement obtained by mutual consent and of free will between both. Then *cadit quaestio,* it is not a dismissal.

14. Now to the factual narrative. Confined in the most to facts on that which the principal issue hinges upon. Nothing else. Some earlier stated, forced to be repeated to enable a more comprehensible flow of events.

15. The Claimant was employed by the Company as a Sales Representative in July 1984. He was promoted to the position of Sales Manager in October 1992 and remained in that position until his cessation of employment on 14.7.1999. At that time in 1999 the Claimant's immediate superior was Bernard Lim, the General Manager situated in that same premises where the Claimant had his place of employment. Before this Court, Bernard Lim was the sole witness leading evidence for the Company. Another character in this play was Mok Swee Sang, the Managing Director of the Company based in Singapore. The elusive one. Whom the Court never saw or heard.

16. First, the events leading to the resignation letter. The Company purporting to be dissatisfied with the Claimant states that it held several discussions through Bernard Lim to seek the resignation of the Claimant. The Claimant agreed to resign for a consideration which Bernard Lim did not have the authority to decide. The Claimant's response to all this is a flat denial. Mok Swee Seng flew in from Singapore on 14.7.1999. Both agree to this flight of his. It is the Company's contention that the reason for his flight was to discuss and agree with the Claimant on the quantum of consideration to secure his resignation. Both agree that the Claimant, Bernard Lim and Mok Swee Seng had lunch which the Claimant states that he paid for; a fact unchallenged. It is common ground that the lunch proceeded in an amiable and cordial atmosphere.

17. To depart a little to the sideline. Relevant for what it imports on the relationship between the Claimant and his superior. The Claimant testified that up to 14.7.1999, he enjoyed with Bernard Lim, in his own words, a *"cordial relationship." "All the while after office hours I used to go out with Bernard for happy hours drink. No quarrels with him. Right up to July 1999 I used to go out with Bernard for happy hours"* he testified. The Court cannot but find them to have been a happy pair. But they became estranged on 14.7.1999 by words uttered by Bernard Lim which I will soon refer to.

18. Returning to the mainstream. After that lunch on 14.7.1999 all three returned to the Company's premises. Bernard Lim and Mok Swee Seng went to Bernard Lim's office situated on a top floor. The Claimant went to his office on the lower floor. The three then met again in Bernard Lim's office. There was a discussion. All this is common ground. As to what transpired during that meeting, the parties are in conflict on certain essential facts leading to the root of the issue in dispute.

19. Then came those words of estrangement. They were uttered by Bernard Lim to the Claimant. I have to repeat them here for the reason that it formed part of the transaction that went on in Bernard Lim's office and more so because those words were repeated by Mr. Teh Hong Jet, learned Counsel appearing for the Claimant, so often; in the Claimant's pleadings, testimony, submission and even in cross-examination of Bernard Lim. Bernard Lim did not deny those words. His response as to whether he said those words was – *"I don't remember the exact words."* And the words according to the Claimant were :

> *" I have to go. I have to go. When a husband and wife are not in good terms. They divorce. Just like you and me. Not in good terms and I must resign. "*

And those words set the stage for the ultimate divorce of the Claimant and the Company, or so the Claimant states. That spelt the end of happy hours, or so I presume.

20. How do I fit these words into the determination of the primary issue. Do these words by itself denote that the Claimant was forced into resignation? I do not find them so. In the circumstances that prevailed, I find them to be part of the negotiation between the Claimant and Bernard Lim. What is important is what can be perceived to be the effects of these words upon the Claimant. It is not in evidence that the Claimant felt threatened by these words. I myself am unable to find those words threat enough to secure a resignation *per minas*. And on this I depart again to another collateral circumstance, outside the discussions which went on in Bernard Lim's office, but which prevailed then. Known to the Claimant but not to the Company as the evidence shows.

21. To put it briefly, the Claimant was a director in a company called Elvo Sdn. Bhd. ('Elvo') with effect from 24.8.1998. Elvo's business is similar to that of the Company. I found the Claimant to be evasive and not forthcoming in his evidence when cross-examined on Elvo. It was Mr. T. Gunaseelan's skill that brought out in cross-examination what the Claimant's true involvement with Elvo was at the material time. I find that I cannot avoid correlating the Claimant's involvement with Elvo at the material time on that issue relating to whether the agreement on the resignation was as a result of coercion upon the Claimant. And in this connection I cannot disregard the Claimant's testimony that he commenced employment in Elvo with effect from 1.8.99 as a Sales Manager immediately after his cessation of employment with the Company. He was also director and a shareholder of Elvo. And an

extract of one particular question and its answer during cross-examination of the Claimant reads :

> " *Q:* ***Put*** *You already had a business with Elvo, that is why you were more than happy to resign?*
>
> *A: (long pause) No.*

It is that *'long pause'* that I find relevant.

22. Now back to the factual narrative. It is the Company's position that a settlement was mutually reached that the Claimant would be paid RM50,000.00 in consideration of his resigning from the Company. The Claimant agrees that there was a settlement except that it is his position that it was forced upon him. He then left Bernard Lim's office. Went downstairs to his own office. Drafted and typed the resignation letter himself. Came back upstairs to Bernard Lim's office and handed over the same to the Company. The Company accepted the resignation by a letter dated 14.7.1999. The Claimant acknowledged receipt of a cheque for the sum of RM44,456.00 being RM50,000.00 less EPF contributions. The acknowledgment is dated 14.7.1999. And the resignation letter was signed and delivered on 14.7.1999. Much ado was made about the contents of the resignation letter. I find it of no interest, for all that ado was not indicative of a forced letter of resignation. I find the case of ***Davotek Sdn. Bhd. & Ors. v. Key Yoke Beow (2004) 2 ILR 1949*** relied upon by Mr. Teh Hong Jet not to be a good comparable for in that case the employer not only prepared but also pre prepared the resignation letter.

23. In fashioning my decision I also receive timely assistance from that very learned judge, Abdul Kadir Sulaiman speaking in ***Weltex Knitwear Industries Sdn. Bhd. (supra)*** where his Lordship quoted the following

passage from the Indian case of ***Tata Robinson Frazer Co Ltd. v. Labour Court 1989- II – LLJ 443*** :

> *" To make out a case that his resignation was not voluntary and his resignation was obtained under undue influence, misrepresentation, fraud or the like, the employee has to establish that he was not allowed time to think over the matter, not allowed to come out of the office but was physically restrained and he had signed under protest. "*

Further down in that same page of the judgment his Lordship reiterated his earlier position of law that the burden was upon the employee to establish forced resignation. And it is my finding of fact that the Claimant has failed in this quest.

24. There is one disturbing element in the Company's case that I find unable to refrain comment on. That is the absence of Mok Swee Seng's testimony. He witnessed the ongoings in Bernard Lim's office. He could have put the truth or lie on either party's version of what transpired. But the Company chose not to call him. Authority has it that adverse presumption under section 114(g), Evidence Act, 1950 cannot in the circumstances apply to the Company. In the text **Evidence : Practice and Procedure, 3rd Edn.** at pg 840 the learned author, Augustine Paul (now Federal Court Judge) wrote of that sub-section :

> *" Where the burden of proof in a civil case is not on the defendant, his failure to call a material witness, would not raise the presumption. "*

And the burden is not on the Company to show that the resignation letter arose out of duress.

25. The upshot of my discussion thus far is that the resignation of the Claimant was secured by the Company through mutual agreement and this based on authority does not lead to a dismissal. It is as what the resignation letter states *ex-facie*; a resignation and not a dismissal.

26. The Claimant's claim is dismissed forthwith.

HANDED DOWN AND DATED THIS 1ST SEPTEMBER, 2005.

(N. RAJASEGARAN)
CHAIRMAN
INDUSTRIAL COURT.