INDUSTRIAL COURT OF MALAYSIA

CASE NO : 15/4-733/05

BETWEEN

MEC FORWARDING SYSTEM SDN. BHD.

AND

RAMACHANDRAN A/L G. KRISHNAN

AWARD NO : 1544 OF 2006

Before	**:**	**N. RAJASEGARAN - Chairman** (Sitting Alone)
Venue:	**:**	Industrial Court Malaysia, Kuala Lumpur.
Date of Reference	**:**	10.5.2005.
Dates of Mention	**:**	26.7.2005, 26.9.2005, 23.1.2006, 24.3.2006 and 10.4.2006.
Dates of Hearing	**:**	8.5.2006 and 9.6.2006.
Claimant's submission received	**:**	9.6.2006.
Company's submission received	**:**	21.7.2006.
Representation	**:**	Tuan Haji Zaikon Jaafar of the Malaysian Employers Federation (MEF) representing the Company. Mr. A.G. Dass of Messrs K. Nadarajah & Partners representing the Claimant.

Reference :

This is a reference made under Section 20(3) of the Industrial Relations Act, 1967 arising out of the dismissal of **Ramachandran a/l G. Krishnan** by **MEC Forwarding System Sdn. Bhd.**

AWARD

The Reference

1. Ramachandran a/l G. Krishnan, the Claimant, ceased from his employment with the Company, carrying the name MEC Forwarding System Sdn. Bhd. The Claimant considering himself to be dismissed by the Company without just cause or excuse, made representations under section 20 of the Industrial Relations Act, 1967. The Claimant's representations became an action before me through a reference ordered by the Honourable Minister of Human Resources. The reference was ordered on 10.5.2005.

The Narrative

2. The Company is involved in the business of international freight forwarding. The Company operates from the Kuala Lumpur International Airport, more popularly known as the KLIA. The Claimant was stationed at the Company's office at the KLIA. The Company is a subsidiary of Morrison Express (M) Sdn. Bhd., easier referred to as Morrison Express.

3. The Claimant commenced employment with the Company on 1.3.1995 in the capacity of customer service co-ordinator. Upon confirmation in employment on 1.7.1995, he was promoted as customer service supervisor and remained so until his next promotion on 1.4.1996 as operations supervisor. It was from this position that he ceased employment on 14.6.2003. He did this through serving upon the Company a letter of even date which shorn of its formalities reads :

> *"I refer to the aforesaid letter which I received on the 11th day of June 2003.*

In respect of paragraph 1 of the said letter, I state that I have never breached my duties and responsibilities to the Company and as such I am of the view that the Company's act of demoting me from the position of Operation Supervisor to Operation Clerk with a reduction of salary in the sum of RM500.00 is unlawful and totally unjustified.

I am advised that the Company's act of demoting me and reducing my salary amounts to a repudiation of my contract of employment with the Company.

In the circumstances, I am compelled to treat myself as constructively dismissed without just cause by the Company with immediate effect.

I shall be seeking the appropriate remedies available to me under the law. "

As this letter brought about the termination of the Claimant's employment, I will call it the dismissal letter.

4. The Company's letter, which the Claimant referred to in the dismissal letter, is dated 31.5.2003. For reasons which soon will become obvious, I will call it the demotion letter. The first paragraph which the Claimant alluded to states :

" The management regrets to note that you have accepted external duties that have not been specified as your standard duties and responsibilities by the Company. By reason of the above action or conduct, you have breached your duties and responsibilities to the Company. "

This breach, the Company considered to be a serious misconduct. For this, it punished the Claimant by demoting him to the position of operations clerk with reduction in salary to RM2,474.00. In his earlier position, he earned a salary of RM2,974.00 per month.

5. The demotion letter also referred to a Company's memorandum dated 3.4.2003 which prohibited the Company's employees 'to take over other external or unrelated duties except duties specified by the Company during working hours' and which gave last warning that failure to comply with the prohibition would lead to termination of employment. This memorandum, I will call the prohibition memorandum.

6. From October 1992 up to 15.3.2003, one Lau Hua Hing, commonly called by both parties as Marvin Lau, held the position of district manager to Morrison Express. Marvin Lau was the Claimant's immediate superior and he too was based at the KLIA. On 5.3.1998, a company named Premier SA Logistics Sdn. Bhd. came into being. I will henceforth call this company as Premier. The business of Premier also included freight forwarding - a business similar to that of the Company. Corporate information on Premier, supplied by the Companies Commission of Malaysia, show Marvin Lau to be one of three directors. It is relevant to add here that the Claimant was not a director of Premier. Marvin Lau, who testified in the Court as the Claimant's witness, said that upon his own instructions, given in his capacity as district manager, the Claimant and one Azman bin Abdul Rahman, amongst other Company employees, performed work for Premier. The issues arising in the instant case does not make it incumbent upon me to examine the propriety of Marvin Lau's conduct in the on-goings *vis-a- vis* Premier and the Company.

7. At or about the time Marvin Lau resigned from the Company, one Fan Chia Jun @ Paul Fan was transferred from the Company's operations in Penang to Kuala Lumpur. Paul Fan's designation at the material time was district manager. Ostensibly he replaced Marvin Lau. Paul Fan, now a General Manager of the Company, appeared as the chief witness for the Company. It was upon his evidence that the Company

mainly relied on, to support its case concerning the Claimant's demotion. Paul Fan chose to give evidence in the English language and did so. A pre-prepared witness statement in the English language constituted his examination-in-chief. However mid-way during his cross-examination, noting the obvious difficulty that both he and Mr. A. G. Dass, learned counsel appearing for the Claimant, were having in employing the English language as a tool of communication, I offered to Paul Fan the services of an interpreter which offer he accepted. Further evidence elicited from him were through the services of the Court's interpreter, certified to translate from Mandarin to English and *vice-versa*.

8. Paul Fan said that sometime in February 2003, following a search, the Company learnt of Marvin Lau and Azman being company directors of Premier. At this point it is relevant to note that the Company had business dealing with Premier during the tenure of Marvin Lau and these business connections continued after the appearance of Paul Fan as district manager. Such business dealings continued till 2004 but as to what month exactly, Paul Fan was unsure.

9. The Company, then caused to be released the prohibition memorandum. Recall, this was signed by Paul Fan and dated 3.4.2003. Amongst others, the Claimant and Azman signed and acknowledged having seen the memorandum. The purpose and import of the memorandum is best described by Paul Fan's own words, which is :

> *" As I have stated earlier, some of the staff were assisting or working for the Company's competitors. I decided to issue the memo to remind all staff that they are prohibited from doing outside work which is not connected with the Company while they are on duty such as engaging in customs clearance for other companies. In the said memo I warned all staff who*

breached the rule would be subjected to disciplinary action which includes termination of service if necessary. "

10. Following the prohibition memorandum, Paul Fan served upon the Claimant the demotion letter of 31.3.2005. It is Paul Fan's evidence that the letter was not preceded by any discussion with the Claimant. Neither was the Claimant faced with the allegation stated therein nor given an opportunity to rebut or explain the allegation. What that allegation was, I had reproduced earlier. Read together with the evidence given by Paul Fan, the specific complaint of the Company against the Claimant was that the Claimant had performed work for Premier which company he said, was a competitor to the Company.

11. I find it appropriate at this juncture, to identify the period in time when the Claimant is said to have committed the misconduct that he is alleged to have done. The identification of this period I find, to be an important component in my decision making procedure. The demarcation here is the date of the prohibition memorandum. The vital question is whether the allegation against the Claimant involved work for Premier during the period preceding this date or succeeding this date or a time span spread over both periods. In cross-examination, Paul Fan took the position that the disciplinary letter was issued to the Claimant for work associated with Premier done before and after the prohibition memorandum. I however find the weight of evidence before me to support more a proposition that the disciplinary letter was the result of work allegedly performed by the Claimant for Premier after the prohibition memorandum was issued. I will explain why. First, it is the unchallenged evidence before the Court that the Claimant performed work for Premier prior to the prohibition memorandum on the instructions of his superior, Marvin Lau. Not only the Claimant, but Azman and other employees as well. Secondly, the Company took no

disciplinary action against any one of the employees including Azman for work done before the date of the prohibition memorandum. The third reason involves the contents of the prohibition memorandum issued by Paul Fan when he took over Marvin Lau's position. That memorandum clearly gives a final warning to all employees to cease doing 'outside work'. Such a warning would effectively put behind it, any breaches committed by the Company's employees during the period before the final warning. Any such breach before the final warning I construe the Company to have waived the right of disciplinary action other than in the form of the final warning already given in the prohibition memorandum. This effect of the prohibition memorandum also applied to the Claimant. Fourthly, the Company's demotion letter, which specifically made reference to the prohibition memorandum, is in its overall context, consistent with punishment being meted out for breach committed after the said memorandum. Finally, I refer to the pleadings found at paragraphs 9 and 10 of the Company's statement in reply. Paragraph 9 devotes itself to the prohibition memorandum. Paragraph 10 goes on in substance to plead that the Claimant continued to be involved with Premier and for this reason was downgraded. *Cadit quaestio.*

12. The Claimant responded to the demotion letter with his own dismissal letter. In that letter he claimed to have been constructively dismissed by the Company.

Juxtaposition of the Law and Evidence

13. Mr. A.G. Dass, quoted at great lengths from the cases of ***Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd. (1998) 1 MLJ 92 SC*** and ***Western Excavating (ECC) Ltd. v. Sharp (1978) IRLR 27 CA*** regarding the concept of constructive dismissal. Tuan Haji Zaikon Jaafar, learned representative appearing for the Company, killed several

birds with a singular stone when he referred to my earlier decision in ***Syarikat Permodalan Kebangsaan Bhd. v. Mohamed Johari Abdul Rahman (2004) 2 ILR 803*** where I had discoursed, in addition to those two same cases referred to by Mr. A.G. Dass, the cases of ***Anwar Abdul Rahim v. Bayer (M) Sdn. Bhd. (1998) 2 CLJ 197 CA*** and ***Chua Yeow Cher v. Tele Dynamics Sdn. Bhd. (2000) 1 MLJ 168 HC*** and the text of ***Bryn Perrins' Industrial Relations and Employment Law***. Paraphrased, what I there said was that constructive dismissal (i) falls within the ambit of a reference under section 20(3) of the Industrial Relations Act, 1967; (ii) is based on the contract test and not on the unreasonable conduct test; (iii) the four conditions precedent to found a claim of constructive dismissal are (a) the existence of a breach of the contract of employment by the employer and, (b) such breach should be sufficiently important enough to justify the employee leaving his employment and, (c) the employee should leave on account of the breach and for no other reason and, (d) the employee should not have waived his right to leave; and (iv) the employee shoulders the burden of proving the ingredients necessary to found a claim of constructive dismissal.

14. On another aspect of the law revolving the instant case, Haji Zaikon in his submission referred to chunks of material from ***B.R. Ghaiye's Misconduct In Employment (in Public and Private Sector) 3rd edn***. I will again attempt a précis. He first referred to the part where the learned author wrote that the relationship between an employer and an employee is fiduciary in character and as such requires the employee to faithfully discharge his duties and protect the interest of the employer. Next, Haji Zaikon referred to that part on there being an implied condition of fidelity in all employment contracts to the effect that an employee should not emplace himself in a position where his interest conflicts with his duties or do anything which may harm his employer's business. With these submission, I cannot but agree totally. If the

Claimant had indeed been doing work for Premier after the issuance of the prohibition memorandum, he would have committed misconduct which was actionable at its severest form by the Company.

15. Then, Mr. A.G. Dass shocked me into disbelief. He did this by purporting to quote Mohamed Azmi FCJ in ***Milan Auto Sdn. Bhd. v. Wong Seh Yen (1995) 3 MLJ 537***. This concerned the fact that the Company had demoted the Claimant without prior due inquiry. Mr. A.G Dass quoted his Lordship as having spoken words to the effect that an employee can only be dismissed summarily after due inquiry and in the case of an employee within the meaning of the Employment Act, 1955 such an inquiry is mandatory. Thankfully, my faith in my memory was restored when upon a hurried reading of the Federal Court's decision I found that what Mr. A.G. Dass claimed was indeed not spoken by Mohamed Azmi FCJ but was instead said by the learned Chairman of the Industrial Court in his impugned award. And having repeated all that was said by the learned Industrial Court Chairman, his Lordship in his own terse language pronounced "*In the context of a s.20 reference, we disagreed with the above argument.*" I will not here indulge in unnecessary castigation. But I cannot help but comment, of course with the customary utmost of respect, that learned counsel appearing before the Court, should endeavour to exercise care when quoting authorities, lest they appear to be misleading.

16. On the converse, the Milan Auto Sdn. Bhd. case is authority for the proposition that failure by an employer to conduct a pre-dismissal enquiry is not fatal to the case of the employer and such failure could be cured by the proceedings conducted before the Industrial Court. As correctly submitted by Haji Zaikon, such a proposition of law can also be found in the apex Court's decisions in the cases of ***Dreamland Corp (M) Sdn. Bhd. v. Choong Chin Sooi & Anor (1988) 1 MLJ 111*** and in

Wong Yuen Hock v. Hong Leong Assurance Sdn. Bhd. (1995) 2 MLJ 753.

17. For the reason that the Company raised it in submission and lest I be accused of incompleteness, I cannot avoid making mention of the Supreme Court's decision in ***Said Dharmalingham Abdullah v. Malayan Breweries (M) Sdn. Bhd. (1997) 1 MLJ 352*** which involved an employee within the purview of the Employment Act, 1955. I find the decision to be irrelevant to the current scheme of facts. The short reason is, the evidence before the Court is that the Claimant's monthly wage put him outside the ambit of that Act. Neither was there any material nor oral evidence brought before the Court to contain the Claimant within the rest of the First Schedule to that same Act so as to clothe him with the status of being an 'employee' as defined there.

18. To proceed now, to examine whether the Claimant satisfied all of the prerequisites needed to bring about in law, constructive dismissal. I remind myself that all four conditions must be present and the absence of any one will be fatal to the Claimant. I begin with whether the Company breached a fundamental term of the Claimant's contract of employment. It is trite law that such a term may be express or implied. It would be on point now to reveal that neither party brought into the custody of the Court and mark as an exhibit, the Claimant's contract of employment. Save for all that stated earlier, nothing more is known of his express terms and conditions of employment.

19. On the subject of breach of a term of the Claimant's contract, I find it a good starting point to repeat under what I had said at page 816 of ***Syarikat Permodalan Kebangsaan Bhd. (supra)***.

> *" Industrial jurisprudence has developed so as to recognise an employment contract as engaging obligations in connection*

with the legitimate expectation of an employee to be treated fairly by his employer. This obligation is an off-shoot of the term of mutual trust and confidence implied in every contract of employment. And this legitimate expectation of being treated fairly by the employer may be negated by conduct of the employer amounting to, unfair labour practice, victimisation or mala fide. "

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

21. A workman against whom an employer imposes punishment or takes disciplinary action without just cause or excuse or for that matter wrongfully, may treat such action as having destroyed or seriously damaged the relationship of confidence and trust between him and the employer. The issue which arises in the instant case is, on the facts which were known to the Company at the material time, was its finding that the Claimant performed work for Premier in contravention of the prohibition memorandum, reasonable under the circumstances. In determining this issue, the seriousness of the Company's complaint against the Claimant has not escaped me. If true and allowed to continue, it would have undermined the business of the Company. To be on track, I first hearken to the words of Lord Justice Mummery, speaking for the Court of Appeal in ***Post Office v. Foley; HSBC Bank (formerly Midland Bank plc) v. Madden (2000) IRLR 827***, as copied under :

> *" This case illustrates the dangers of encouraging an approach to unfair dismissal cases which leads an employment tribunal to substitute itself for the employer or to act as if it were conducting a rehearing of, or an appeal against, the merits of the employer's decision to dismiss. The employer, not the tribunal, is the proper person to conduct the investigation into the alleged misconduct. The function of the tribunal is to decide whether that investigation is reasonable in the circumstances and whether the decision to dismiss, in the light of the results of that investigation, is a reasonable response. "*

The principle enunciated will apply equally to any other kind of punishment including a demotion.

22. In Haji Zaikon's words, the evidence before the Court is stacked against the Claimant. On closer scrutiny, it revealed that the evidence before the Court more related to work done by the Claimant for Premier before the date of the prohibition memorandum. Indeed, I find the need to rely on all those evidence unnecessary for the reason that the Claimant admitted having worked for Premier at that point in time. What is in question is the period after the prohibition memorandum. With respect, I found no stacks of evidence on this score. Instead, I found only a twig of evidence, relied upon by the Company through Paul Fan, to take the decision to find the Claimant guilty and to mete out the punishment of demotion upon him. Sadly for the Company, that twig snapped under the weight of evidence before me. To explain, this twig was a copy of a cheque exhibited as COE3. This cheque, dated 9.4.2003 was issued by Premier to the benefit of Morrison Express. It contains the signature of Marvin Lau and the Claimant. That it was this piece of evidence alone that made Paul Fan decide that the Claimant was guilty

can be seen from his various responses during cross-examination. For best effect I repeat them verbatim :

> *" Q: After you gave the memo, do you have any proof, Claimant was doing outside work?*
>
> *A: The memo is on 3.4.2003 (COE2). The cheque signature (COE3) is 9.4.2003. Claimant signed the cheque on behalf of Premier. "*

Later onn,

> *" Q: (Refers to Q.20 of his Witness Statement). Did you personally see Claimant assisting Marvin Lau in customs clearance after COE2?*
>
> *A: No. I didn't. But the cheque, COE3 is the proof. "*

And finally,

> *" Q: Except for the cheque at COE3 did you personally have any evidence that the Claimant did external work after your memo COE2 was issued?*
>
> *A: No, I didn't have any other evidence to show that the Claimant did external work for Premier after the memo at COE2 was issued.*
>
> *(I ask Ms. Lim to read out this answer again in Mandarin to the witness to confirm it to be correct. He confirms it is correct.) "*

23. It is my opinion that the Company's contention that the Claimant's signing of the cheque was proof of him doing work for Premier even after the prohibition memorandum, is unsustainable. I conclude this in two ways. Firstly, it was the evidence of the Claimant that prior to the prohibition memorandum he had already, upon Marvin Lau's instructions, signed several blank cheques for Premier. These cheques were handed over to Marvin Lau. This evidence was corroborated by the unchallenged testimony of Marvin Lau that he had

asked the Claimant to pre-sign several blank cheques before Marvin Lau's departure from the Company on 15.3.2003. And secondly, Paul Fan testified that the cheque constituted payment by Premier to Morrison Express for three shipments on three different dates which shipments were all made prior to the date of the prohibition memorandum. On another point, I must add that being a cheque signatory though showing involvement with Premier, is not conclusive of showing the performance of work, specifically customs clearance as alleged by Paul Fan, for Premier.

24. The Company's attempt to show that the Claimant had indeed worked for Premier by producing his itemized phone bills showing telephone calls made between the Claimant and Marvin Lau after Marvin Lau's resignation did not make much impact on me. This is because the Company was unable to tie up conclusively the telephone calls to work performed by the Claimant for Premier. So too was I left unimpressed by exhibit COE6 which is a copy of a facsimile from one PLK Cargo dated 22.8.2003 and which is addressed to Premier, to the attention of Mr. Chandran, ostensibly the Claimant. The Claimant was not examined on COE6 by either party. It was marked as an exhibit on the application of the Company, through Marvin Lau who testified after the Claimant. The Company elicited no information from Marvin Lau save for identifying Chandran as the Claimant and that on the day on which COE6 is dated, the Claimant was not employed by Premier. And as far as Paul Fan is concerned, he knew nothing of the exhibit. Even more, the facsimile carries a date which is two months after the date on which the Claimant ceased employment with the Company. Added to all this, the evidence thus far is that both the telephone records and facsimile from PLK Cargo were not brought to the attention of Paul Fan and thus made incapable of forming a consideration for him to take a decision on the guilt or otherwise of the Claimant. Paul Fan surely did not have reasonable

grounds upon which to sustain his belief of guilt of the Claimant for the reason that he did not conduct as much investigation into the matter as was reasonable in the circumstances. He did not even question the Claimant on the cheque, which he found so damning against the Claimant.

25. In conclusion, I find the Company not to have proved the charge that it found the Claimant guilty of. When the very foundation of the punishment, which is the charge of misconduct directed against the Claimant, is knocked off, the punishment cannot stand. It attains the status of being without just cause or excuse. In the event, there was a breach of the term of mutual trust and confidence implied in the contract of employment of the Claimant, by the Company.

26. Having made this finding, I find not the need to explore further on whether *per se* the punishment of demotion imposed by the Company was wrongful. Suffice for me to say that there exists no evidence before me to show that the Company either had the contractual right or the force of legislature to impose such a punishment upon the Claimant. On this subject, I have found no reason to depart from the view I had earlier espoused in the case of ***Syarikat Permodalan Kebangsaan Bhd. (supra)***.

27. Now, to examine the second prerequisite. I begin with asking whether the term that was breached was fundamental? It was. Not only was the Claimant substantially reduced in rank from supervisor to clerk, but his salary was reduced by RM500.00 or 17%. That it was Paul Fan's intention that the reduction in rank and salary would be temporary in nature is inconsequential. Being fundamental, it was sufficiently serious enough to justify the Claimant leaving his employment.

28. On the next two conditions of the Claimant leaving for no other reason but for the breach and him not having waived his rights, the dismissal letter speaks for itself. I consequently, find these two conditions to be satisfied.

29. In the upshot, I find the Claimant's cessation of employment to be a dismissal and one without just cause or excuse.

30. Before departing my finding, I must say that this case contains certain arresting facts which need mention but not necessarily conclusion. First of these facts is that Azman who was a director of Premier to the knowledge of the Company, had no disciplinary action taken against him by the Company up to the date of his resignation from the employment of the Company in April 2006. Secondly, the Company continued to do business with Premier even after the advent of Paul Fan and up to the year 2004, the year in which Premier ceased to operate. Finally, the evidence before the Court is that Premier was more a client of the Company.

Remedy

Reinstatement

31. I do not consider reinstatement to be an appropriate remedy based on the position which the Claimant held, the length of time he had been out of employment with the Company and the circumstances leading to his dismissal. I find it more suitable to order compensation in lieu of reinstatement. Such compensation is calculated by multiplying the last drawn salary by the length of period commencing from the date the Claimant started employment in the Company up to the last date of hearing (see Federal Court in ***R. Ramachandran v. The Industrial***

Court of Malaysia (1997) 1 CLJ 147). Parties are on common ground that the Claimant's basic monthly salary before his demotion was RM2,974.00. In addition to this, he was also paid a fixed transport allowance of RM300.00 per month. The allowance was not a reimbursement. The multiplier being RM3,274.00 and the multiplicand being 11.1 years, the compensation in lieu of reinstatement works out to RM36,341.40.

Backwages

32. The Claimant is also due backwages. I find this an appropriate case to apply Industrial Court Practice Note 1 of 1987 and maximise backwages to twenty-four months. Backwages however may be subject to scaling down for definite reasons. The heads under which such scaling down may be effected are contributory misconduct, gainful employment after dismissal and delays in the hearing of the trial (see ***Network Food Industries Sdn. Bhd. v. Choo Sook Heng, Award No. 374 of 2006***).

33. I find no evidence of there being any contributory misconduct by the Claimant. Neither party led any evidence on the employment or on the income status of the Claimant after his dismissal. I also conclude that neither party occasioned any delays in connection with the hearing of this reference. Nor were there any unwarranted delays by the Court nor the Ministry of Human Resources. In the upshot no scaling down can be invited under these various heads.

34. The backwages payable to the Claimant is therefore RM78,576.00.

Order

35. The Court orders the Company to pay the Claimant the sum of RM114,917.40, less statutory deductions if any, through his solicitors on record, not later than forty-five days from the date of this Award.

HANDED DOWN AND DATED THIS 1ST SEPTEMBER 2006.

(N. RAJASEGARAN)
CHAIRMAN
INDUSTRIAL COURT.