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1. *Tharmanandan a/l Thangamuthu v Alam Etikaa Resources (M) Sdn Bhd [2017] 3 ILJ 8*

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Tharmanandan a/l Thangamuthu v Alam Etikaa Resources (M) Sdn Bhd [2017] 3 ILJ 8

Industrial Law Journal (ILJ)

INDUSTRIAL COURT (KUALA LUMPUR)

JAMIL ARIPIN CHAIRMAN

CASE NO 14/4-1152 OF 2015

20 April 2017

Case Summary

Labour law — Constructive dismissal — Claimant claimed company for failing to pay his wages — Whether company conducts amounted to repudiatory breach — Whether claimant to treat himself as being constructively dismissed — Industrial Relations Act 1967 s 20(3)

The claimant who are the Service Manager at the company claimed the company failed to pay his wages and reimburse his telephone and petrol allowances. Neither the company pay his Employee Provident Fund (EPF) nor his Social Security Organisation (SOCSO) contributions. The claimant considered himself as constructively dismissed because the company failed to pay his ***salary*** for six months amounting to RM39,000. He further contends that his constructive dismissal is baseless, against the principal of substantial justice and without just cause or excuse. Issue to determine, (a) whether company conducts amounted to repudiatory breach; and (b) whether claimant to treat himself as being constructively dismissed.

Held, allowing the claim and awarding the claimant RM106,122.59 in backwages and compensation in lieu of reinstatement:

(1) It is known that the company was having problem to pay the ***salary*** of its employees. The undisputed fact was that the company had failed to pay the claimant's ***salary*** totaling six months. It is the court finding that there was an actual breach that goes to the root and foundation of the contract of employment between the claimant and the company. The conduct of not paying the claimant's ***salary*** for six months alone was sufficiently important to justify the claimant to treat himself as constructively dismissed by the company (see paras 48 & 51).

(2) The company had breached a fundamental contract of the claimant's employment by not paying him ***salary*** for six months and the company had evinced an intention of no longer wanted to be bound by the claimant's contract of employment and thus entitling the claimant to walk out of his employment. The non-payment of ***salary*** alone is sufficient to prove on the balance of probabilities that the said conducts of the company amounted to repudiatory branches of the claimant's contract of employment and thus entitling the claimant to treat himself as being constructively dismissed. Therefore, the court ordered the company to pay the total amount of RM106,122.59 as total sum on backwages and compensation in lieu to the claimant (see paras 53 & 60).

Pihak menuntut yang merupakan Pengurus Perkhidmatan di syarikat responden mendakwa syarikat gagal membayar upahnya dan membayar balik elaun telefon dan petrolnya. Syarikat juga tidak membayar Tabung Simpanan Pekerja (KWSP) atau sumbangan Pertubuhan Keselamatan Sosial (PERKESO). Pihak penuntut menganggap dirinya dibuang kerja secara konstruktif kerana beliau tidak dibayar gaji selama enam bulan berjumlah RM39,000. Penuntut selanjutnya menegaskan bahawa pemecatannya tidak berasas, terhadap prinsipal keadilan yang ketat dan tanpa sebab atau alasan. Isu untuk menentukan, (a) sama ada syarikat menjalankan amaun pelanggaran undang-undang; Dan (b) sama ada pihak yang menuntut menganggap dirinya dibuang secara konstruktif.

Diputuskan, membenarkan tuntutan dan memberi pihak menuntut RM106,122.59 dalam gaji kebelakang dan ganti rugi kembali sebagai ganti pengembalian semula:

(1) Adalah diketahui bahawa pihak syarikat mempunyai masalah untuk membayar gaji pekerjanya. Fakta yang tidak dipertikaikan adalah bahawa syarikat itu gagal membayar gaji penuntut yang berjumlah enam bulan. Ia adalah keputusan mahkamah bahawa terdapat pelanggaran sebenar yang berlaku kepada asas kontrak pekerjaan antara pihak menuntut dan syarikat. Tuntutan tidak membayar gaji pihak menuntut selama enam bulan cukup untuk membenarkan pihak menuntut menyatakan bahawa beliau dibuang kerja secara konstruktif oleh pihak syarikat (lihat perenggan 48 & 51).

(2) Pihak syarikat telah melanggar kontrak asas pekerjaan penuntut dengan tidak membayar gaji selama enam bulan dan syarikat telah berniat ingin tidak lagi ingin terikat oleh kontrak kerja penuntut dan dengan demikian melepaskan pihak menuntut untuk keluar dari pekerjaannya . Tidak membayar gaji sahaja adalah mencukupi untuk membuktikan baki kebarangkalian bahawa kelakuan syarikat itu berjumlah cawangan penolakan kontrak kerja penuntut dan dengan itu melayakkan pihak menuntut untuk merawat dirinya sebagai dibina secara membina. Oleh itu, mahkamah mengarahkan syarikat untuk membayar jumlah keseluruhan sebanyak RM106,122.59 jumlah pampasan gaji kebelakang dan ganti pengembalian semula kepada pihak menuntut (lihat perenggan 53 & 60).

Notes

For cases on constructive dismissal, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1057–1058

Cases referred to

Anwar Bin Abdul Rahim v Bayer (M) Sdn Bhd [1998] 2 MLJ 599; [1988] 2 CLJ, CA (refd)

BSN Commercial Bank & Anor v Arumugam Ramasamy [2006] 4 ILR 2569-2587, IC (refd)

Dr James Alfred (Sabah) v Koperasi Serbaguna Sanya Bhd (Sabah) & Anor [2001] 3 MLJ 529; [2001] 3 CLJ 5419 , FC (refd)

Giraffe World (M) Sdn Bhd v Hasri Ahmad [2001] 1 ILR 567 , IC (refd)

Heng Kiah Woo v Consolidated Farms Bhd [2007] 2 LNS 2454 (refd)

Lewis v Motorworld Garages Ltd [1986] ICR 157 (refd)

Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600; [2001] 1 CLJ 9, CA (refd)

Rajamohan Maniam v GPA Plastic Industries Sdn Bhd [2012] MLJU 211; [2012] 5 CLJ 900 , CA (refd)

Seah Ann Yee v John Hancock Life Insurance (Malaysia) Bhd [2010] 2 ILR 302 , IC (refd)

Tan Cheng Hing v Federal Metal Printing Sb & Anor [1999] MLJU 319; [1999] 1 LNS 130 (refd)

Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor [2002] 3 MLJ 129; [2002] 3 CLJ 314 , CA (refd)

Weltex Knitwear Industries Sdn Bhd v Law Kar Toy & Anor [1998] 7 MLJ 359; [1998] 1 LNS 258

Western Excavating (ECC) Ltd v Sharp [1978] I All ER 713

Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92; [1998] 1 CLJ 45;; [1988] 1 CLJ (Rep)

298 , SC (refd)

Legislation referred to

Industrial Relations Act 1967 s 20(3)

V Kumar (Hasif Kumar & Co) for the claimant
Sunther Tulasi (Ahmad Amir together with him) (Affendi Zahari) for the company

Jamil Aripin Ch

AWARD

[1]This matter was referred to Court by way of Ministerial reference under *s 20(3)* of the *Industrial Relations Act 1967* on 2 December 2016 and was received by the Court on 9 December 2016, arising out of the alleged constructive dismissal of Tharmanandan a/l Thangamuthu (hereinafter called "the Claimant") by Alam Etikaa Resources (M) Sdn Bhd (hereinafter called "the Company") on 25 March 2015.

[2]The Court's record showed that there was an earlier reference by the Honourable Minister dated 8 October 2015 in respect of the same matter and same Claimant except the name of the employer is Alam Etikaa Sdn Bhd. This award however will only be confined to the second reference dated 2 December 2016. Any reference made to Alam Etikaa Sdn Bhd in the pleadings is substituted with Alam Etikaa Resources (M) Sdn Bhd.

Claimant's Case

[3]The Claimant commenced employment with the Company as a Service Manager on 18 May 2012 with the ***salary*** of RM6,000 per month plus and at the time he treated himself as constructively dismissed, his ***salary*** was RM6,500 per month plus RM1,000 as an allowance. It was the Claimant's case that the Company had failed to pay his wages since October 2014 and failed to reimburse his telephone and petrol allowances. Neither did the Company pay his Employee Provident Fund (EPF) nor his Social Security Organization (SOCSO) contributions. The Claimant further contends that his constructive dismissal is baseless, against the principal of substantial justice and without just cause or excuse.

[4]Before he was constructively dismissed, the Claimant had served the Company approximately 2 years and 10 months. According to the Claimant, the reason why he considered himself as constructively dismissed was because the Company failed to pay his ***salary*** from October 2014 to 31 March 2015 (6 months) totaling RM39,000.

[5]In his evidence in Court, the Claimant (CLW1) admitted that he was called to a meeting on the proposed ***salary*** restructuring but he disagreed to such reduction. He also testified that he never signs any document pertaining to the said ***salary*** restructuring and no memo or any letter issued stating the reduction of his ***salary***. Claimant however admitted that he did borrow money from his employer during the period where his ***salaries*** were not paid but he was unable to recall the amount.

[6]As regards to SOCSO's contribution, the Claimant testified that no contribution payments were made for the month of January and March 2015 while EPF contributions that were paid only until November 2014. Claimant also admitted that he was reemployed by Thiviya Resources Bhd on 1 June 2015 with a ***salary*** of RM7,000.

[7]During Cross-Examination, the Claimant however admitted receiving the Internal Memo (p 68 of COB) on the ***salary*** reduction of 20% which contradicted his earlier evidence during Examination In-chief. The Claimant further testified that even though he did not object in writing on the ***salary*** reduction, he did verbally raise his objection to Pn Rozita who was then the Human Resources Manager. The Claimant also contends that if two months' ***salary*** were unpaid, it is considered breach of contract. It was also admitted by the Claimant that after he was constructively dismissed, he was unemployed for only two months. The Claimant agreed that based on the documents at p 98–110 COB, payment of the SOCSO's contributions were made until March 2015. In respect of EPF contributions, the documents at p 49 of CLB on the Claimant's EPF statement is not clear as to the months where the EPF contributions remain unpaid. The document that were referred by counsel for the Company during Cross-Examination at p 51 CLB was in respect of SOCSO's contributions.

[8]The Claimant also admitted of borrowing or taking advance from the Company but unable to recall as to the total amount. However, when documents in the COB were shown to him, he admitted that he had borrowed a total of RM10,000 from the Company for a period from January 2015 until April 2016 but denied borrowing RM1,000 on 17 March 2016 on the ground that the signature on the cash voucher at p 131 COB is not his signature. When asked by the Court whether the payment was an advance or payment for outstanding ***salary***, the Claimant answered "No, it was an advance. For the first two payments was ***salary*** advancement".

[9]Having scrutinised the bank transaction slip, cash and payment vouchers in the COB, the following payments were paid and admitted by the Claimant amounting to RM10,000:-

a) Cash Voucher dated 30 January 2015 amounting to RM2,500 at p 89 of COB, it is clearly stated "First Payment December 2014 ***salary***".

b) Bank slip for cash deposit of RM3,000 to the Claimant's account on 18 March 2015.

c) Payment voucher dated 3 March 2016 amounting to RM1,000 at p 130 COB was paid as advance ***salary***.

d) Payment voucher dated 30 March 2016 of RM2,000 together with a slip deposit cheque at p 1 of COB 1 stated that the amount paid as being part of pending ***salary*** for the month of November and December 2014.

e) Transaction slip of cash deposit of RM1,500 to the Claimant's account on 29 April 2016.

[10]It was also the evidence of the Claimant that during the ***salary*** restructuring, the Company business of renting heavy machineries was still ongoing as usual and was not affected at all and the income from the renting was not less than RM100,000 a month.

Company's case

[11]The Company, however denied that the Claimant was earning RM6,500 a month plus other allowances at the time of the alleged constructive dismissal and it is the contention of the Company that due to the collapse of the world price for iron ore, a restructuring exercise was conducted by the Company which includes ***salary*** deduction of all the staff including the Claimant. The employees of the Company were informed of the intended restructuring exercise during a meeting held on 30 October 2014.

[12]By way of internal memorandum dated 28 November 2014, the Company notified all employees including the Claimant that the Company shall be implementing the reduction of 20% of their monthly ***salary*** commencing 1 January 2014. The Company further contends that the decision to reduce the staff monthly ***salary*** was not disputed or objected by the Claimant and the Claimant continued to work with the Company without any complaint until he

tendered his constructive dismissal's letter on 25 March 2015.

[13]In regards to EPF contribution, the Company pleaded that for July 2014 to October 2014, the contributions had been fully paid by the Company to EPF and for the employer's contribution for the month of November 2014 to March 2015 amounting to RM3,887 after deducting the sum of RM2,392 being the deduction for failure to give two months' notice as stated in the letter of employment dated 24 April 2012. As to SOCSO's contribution, it is the contention of the Company that they had never defaulted any contribution and had paid the SOCSO's contribution for Claimant until March 2015.

[14]The Company further denied that the Claimant's constructive dismissal is baseless, against the principal of substantial justice and without just cause or excuse.

[15]According to COW1 (Managing Director of the Company, Dato Seri Rajagopal a/l Ramasamy), the Claimant was employed as Service Manager of the Company on 24 April 2012 and commenced works on 18 May 2012. COW1 denied that the Claimant was earning a basic ***salary*** of RM6,500 and other allowances at the time of the alleged termination. It was the contention of COW1 that during a meeting held by the Company on 30 October 2014 and attended by the Claimant, the Company did inform all its employee that following the collapse of the world for iron ore price, a restructuring exercise will be conducted by the Company which includes ***salary*** deduction for all staff including the Claimant. Claimant was also notified at the same meeting that ***salaries*** will be delayed as the Company is unable to pay ***salaries*** because there was no business and income to the Company and whoever is unable to stay could tender resignation.

[16]In furtherance of the meeting, the Company issued an internal memorandum dated 28 November 2014 notified all employees including Claimant that the Company shall be implementing the reduction of 20% of their monthly ***salary*** commencing from 1 December 2015. The said decision was not disputed or objected by the Claimant and in fact the Claimant continues to work with the Company without any complaint until he tendered his letter dated 25 March 2015 claiming that he was constructively dismissed.

[17]COW1 in his Witness Statement contends that the actual amount due to the Claimant as per the table below:

No.	**Month**	Amount (RM)
1	October 2014	5, 560.57
2	November 2014	6, 138.58
	Restructured ***Salary***	
3	December 2014	5, 185.25
4	January 2015	4, 157.79
5	February 2015	4, 999.54
6	March 2015	3, 417.51
	TOTAL	29, 459.24

Less Termination in lieu of Notice RM5, 200.00 x 2 Months	RM10,400.00
TOTAL	19,059.24
Less	
Advance Taken	
January 2015	2,500.00
March 2015	3,000.00
3rd March 2016	1,000.00
17th March 2016	1,000

	.00
29th April 2016	1,500.00
Balance Payable	10,059.24

[18]Based on the 20% reduction from RM6,500, the last drawn ***salary*** of the Claimant was supposed to be RM5,200 without taking into account the statutory deduction of EPF and SOCSO contributions and income tax if any. No evidence adduced on how the Company came up with the above figures and why there were ***salary*** differences for each month before and after the restructuring of ***salary***.

[19]It was the evidence of COW1 in his Witness Statement that the Claimant is only entitled to claim the sum of RM1,922.59 after deducting the sum of RM400 being the telephone allowance because the Claimant failed to produce the monthly telephone bill statements to support his claim. According to Letter of Employment (at p 4 para 9(b), the Claimant shall be entitled to claim telephone usages maximum RM100 per month. It is not clear and no explanation given on how COW1 came to such figure of RM1,922.59.

[20]Further, COW1 contends that the Claimant is not entitled to claim the sum of RM1,204.90 being the costs of material purportedly purchased for the Company with his own money because there was no request made and no approval was obtained from the Company's management prior to the alleged purchase. There is procedure requirement before a purchase can be made and it must be approved by the managing director. It is also not the practice of the Company's management to request the staff to purchase any materials for the Company by using their own money or using personal credit card as the same is against the Company policy.

[21]As regards to the employer's EPF contribution for July 2014 to October 2014, COW1 claimed that it has been fully paid by the Company. However, the actual amount due for employer's contributions are for the months of November 2014 until March 2015 which is only RM3,887 after deducting the sum of RM2,392 being the deduction for failure to give two months' notice as stated in the letter of employment dated 24 April 2012. Again, there is no evidence on how the Company came up with the figure of RM3,887 and the deduction figure of RM2,392 and no explanation why the deduction of RM2,392 was made to the employer's EPF contribution when it is its statutory obligation. As regard to SOCSO's contribution, there is no more issue as during Cross-Examination of CLW1, he

admitted that based on the documents at pp 98 to 110 COB, payment of the SOCSO's contribution were made until March 2015, the month he treated himself as constructively dismissed.

[22]It is the evidence of COW1 in Court that the Claimant did ask for an advance of RM1,000 on 17 March 2016 and he acknowledged it by signing on the envelope which he used to carry petty cash. There were two other employees' signature on the same envelope apart from the Claimant as shown at p 132, COB.

[23]On the issue of machineries rented to Alam Etikaa Sdn Bhd as testified by CLW1, COW1 said, that Alam Etikaa Resources Sdn Bhd has no business with Alam Etikaa Sdn Bhd Alam Etikaa Resources Sdn Bhd rent machineries to Alam Etikaa Mining Sdn Bhd and the income from the renting was about RM50,000 to RM70,000. During the peak time before the iron ore market collapse, the turn over for renting the machineries are estimated between RM200,000 to RM450,000 a month. While the payment of instalments of the machineries is estimated between RM200,000 to RM300,00 a month.

[24]COW1 further testified that there was no objection in writing by any of the staff on the ***salary*** reduction including the Claimant. According to the last paragraph of the Internal Memorandum at p 68 of COB any staffs who wish to object can discuss with Human Resources Manager and according to Pn Rozita no one came forward to object. According to COW1 further, there was official announcement made during the official meeting on the ***salary*** reduction and it was followed by Internal Memorandum.

[25]During Cross-Examination, COW1 admitted that there was a binding contract between Alam Etikaa Resources and the Claimant. However, COW1 denied that the ***salary*** of the Claimant was not paid from October 2014 to March 2015 as the Company had advanced a total of RM11,000 to the Claimant.

[26]Pn Rozita bt Jusoh when called by the Court, testified that there was no objection either verbally or in writing by any of the staff in respect of the Internal Memorandum issued on ***salary*** reduction. She also denied that the Claimant did verbally inform her of his objection.

The Law on Constructive Dismissal

[27]The law relating to constructive dismissal is settled and has been confirmed in the Supreme Court case *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* *[1988] 1 MLJ 92*; [1998] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 . There, Salleh Abas LP enunciated as follows:

> *"The common law has always recognised the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligation if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer. It was an attempt to enlarge the right of the employee of unilateral termination of his contract beyond the perimeter of the common law by an unreasonable conduct of his employer that the expression "constructive dismissal" was used"*

[28]In *Western Excavating (ECC) Ltd v Sharp* [1978] 2 WLR 344*, Lord Denning* enunciated the contract test as follows:

"... If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complaints, for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract".

[29]In the case of *Anwar Bin Abdul Rahim v Bayer (M) Sdn Bhd* [1998] 2 MLJ 599; [1988] 2 CLJ the Court of Appeal held at p 205 that:

"It has been repeatedly held by our Courts that the proper approach in deciding whether constructive dismissal 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".

[30]The Industrial Court in the case of *Giraffe World (M) Sdn Bhd v Hasri Ahmad* [2001] 1 ILR 567, stated thus:

"In determining whether the workman is entitled to treat himself as having been constructively dismissed, this Court will follow the test of reviewing the conduct of employer to ascertain if the employer has either committed a fundamental breach going to the root of the contract or has evinced an intention not to be bound by the term of the contract".

[31]While the Court of Appeal in *Rajamohan Maniam v GPA Plastic Industries Sdn Bhd* [2012] MLJU 211; [2012] 5 CLJ 900, had reiterated that the correct test for constructive dismissal is that of the contract test and not that of unreasonableness test. According to Lord Denning MR in *Western Excavating (ECC) Ltd v Sharp* [1978] I All ER 713 that the correct test to apply is the contract test as follows:

(i) did the employer's conduct amount to a breach of contract which entitled the employee to resign; and

(ii) did the employee make up his mind and act at the appropriate point in time soon after the conduct of which he complained had taken place.

(iii) Otherwise he would be regarded as having elected to affirm the contract and would lose the right to repudiate the contract ie. to treat himself as discharged.

[32]It has been well accepted that the repudiatory conduct of the employer, which entitled the employee to treat himself as discharged from further performance, may consist of a series of acts or incidents. This principle is clearly stated in the case of *Lewis v Motorworld Garages Ltd* [1986] ICR 157 as follows:

"It is now well established that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of the contract of employment, that the

employer will not without reasonable and proper cause conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".

[33]In the Court of Appeal case of *Quah Swee Khoon v Sime Darby Bhd* *[2000] 2 MLJ 600*; [2001] 1 CLJ 9**,** his Lordship Gopal Sri Ram JCA observed as follows:

"Constructive dismissal can take place, as we have attempted to demonstrate, in a number of cases. Since human ingenuity is boundless, the categories in which constructive dismissal can occur are not closed. Accordingly, a single act or a series of acts may, according to the particular and peculiar circumstances of the given case, amount to a constructive dismissal."

Burden Of Proof

[34]In the case *Tan Cheng Hing v Federal Metal Printing Sb & Anor* *[1999] MLJU 319*; [1999] 1 LNS it was affirmed that the onus of proving that there was constructive dismissal lies on the Claimant. As such and in line with the authority as cited above, the Claimant seeking to establish a case for constructive dismissal must prove that:

(i) the Company, by its conduct, had breached a term of his contract of employment or has evinced an intention no longer to be bound by it,

(ii) the breach is a fundamental one going to the root and foundation of the contract,

(iii) he left the company in response to that breach and not for some unconnected and ancillary reasons, and

(iv) he did not delay too long in terminating the contract in response to the Company's breach, otherwise he may be deemed to have waived the breach

[35]In the often-quoted case of *Weltex Knitwear Industries Sdn Bhd v Law Kar Toy & Anor* *[1998] 7 MLJ 359*; [1998] 1 LNS 258 which decision has been upheld by the Court of Appeal. There his Lordship Abdul Kadir Sulaiman J had held as follows:

"The law is clear that if the fact of dismissal is not in dispute, the burden is on the Company to satisfy the Court that such dismissal was done with just cause or excuse. This is because, by the 1976 Act, all dismissal is prima facie done without just cause or excuse. Therefore, if an employer asserts otherwise, the burden is on him to discharge. However, where the fact of dismissal is in dispute, it is for the workman to establish that he was dismissed by his employer. If he fails, there is no onus whatsoever on the employer to establish anything for in such a situation no dismissal has taken place and the question of it being with just cause or excuse would not arise see*Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* *[1988] 1 MLJ 92*; [1998] 1 CLJ 45;; [1988] 1 CLJ (Rep) 298)".

Standard Of Proof

[36]The Court of Appeal in the case of *Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor* *[2002] 3 MLJ 129*; [2002] 3 CLJ 314 ("Telekom case") clearly stated the standard of proof required to be met even where criminal related misconducts are concerned as follows:-

"In our view the passage quoted from Administrative Law by H.W.R. Wade & C.F. Forsyth offers the clearest statement on the standard of proof required, that is the civil standard based on a balance of probabilities, which is flexible, so that the degree or probability required is proportionate to the nature of gravity of the issue. But, again, if we may add, these are not

"password" that the failure to use them or if some other words are used, the decision is automatically rendered bad in law."

The issue

[37]In view of the facts pleaded, the evidences as adduced and the cases cited above, the issues before the court are:

a) whether the said conducts of the Company of not paying ***salary*** for six months amounted to repudiatory breaches of the Claimant's contract of employment and if so proven,

b) whether the said repudiatory breaches of the Claimant's contract of employment with the Company entitled the Claimant to treat himself as being constructively dismissed

Evaluation and Finding

[38]Before I proceed to discuss the above issues, I shall at the outset determine whether unilateral reduction of employee's ***salary*** is valid as was raised by the learned counsel for the Claimant in his written submission. According to the evidence adduced, the reason for the reduction in ***salary*** was due to the collapse of iron ore market. This issue and the proposed ***salary*** restructuring were made known to all the staff including the Claimant during a meeting held on 30 October 2014 and followed by an Internal Memorandum, where all the staff were informed of the ***salary*** reduction of 20%.

[39]Despite the Claimant's evidence that he did raise his objection verbally to Pn Rozita bt Jusoh, the Human Resources Manager, the evidence of Pn Rozita bt Jusoh confirmed the evidence of COW1 that there was no objection either verbally or in writing in respect of the ***salary*** reduction after the Internal Memorandum was issued. In other words, the Claimant did not expressly object the said ***salary*** reduction and continue working for another four months after the reduction's exercised was carried out. The minutes of the meeting at pp 51 to 60 of COB clearly showed that the explanation on the status of the Company's performance and finance was given in details including the proposed ***salary*** restructuring. Furthermore, it was also clearly stated in the Internal Memorandum that if any of the staff do not understand or is not satisfied with the ***salary*** reduction, they can contact Pn Rozita Jusoh for discussion. It was the testimony of Pn Rozita that no staff of the Company had come forward to raise objection on the ***salary*** reduction or writing to her raising his or her objection. In view of the evidence adduced, it is my considered view that the ***salary*** reduction was not carried out unilaterally as the reason was explained to all the staff and there was no objection either verbally or in writing made by any of them including the Claimant. However, I am mindful of the fact that in reality, no employee will agree with any ***salary*** reduction, but such disapproval should be expressly shown or raised which was none in this case. Therefore, under the circumstances as explained by the Managing Director (COW1) during the meeting, I find the restructuring of ***salary*** was justified and valid as the staff were properly notified and explained.

[40]It is also important to determine first how much the Company had advanced the Claimant. Again, it was not disputed by the Claimant that he had taken advance of RM10,000 from COW1. However, he disputed taking an advance of RM1,000 on 17 March 2016. Despite of the Claimant's denial that the signature on cash voucher at p 131, COB is his signature, the signature on the envelope dated 17 March 2016 appeared similar to his signature at pp 48, 83, 90 and 130 of COB. It was the Claimant's evidence that he could not recall the total amount of advance taken by him. Having heard COW1 and having seen the signature on the envelope and comparing with the Claimant's signature on other undisputed documents in COB, I am more inclined to believed that the Claimant did take an advance of RM1,000 on 17 March 2016. I see no reason for COW1 to lie and the fact that the Claimant himself admitted in his testimony that he was unable to recall the total amount.

[41]It was not refuted that the Company did not pay the Claimant's ***salaries*** for six months based on para 4 of Statement in Reply and the Witness Statement of COW1 at question and answer no 9 where the actual amount of ***salary*** which is due to the Claimant stated by the Company. COW1 however in his testimony during Cross-Examination denied that ***salaries*** were not paid from October 2014 to March 2015 as there was an advancement. I

am unable to agree that an advancement can be regarded as ***salary*** even if it is recorded in the voucher as part payment of ***salary***. In my view an advancement could not in any way be regarded as ***salary***. There is no provision on advancement in the contract of employment. It is the obligation of the Company to pay the ***salary*** of its employee but not an advancement which is discretionary in nature. Therefore, based on the Company's Statement in Reply and based COW1 Witness Statement, I find that there is no denial that the Company failed to pay ***salary*** of the Claimant for the month of October 2014 until March 2017 (six months).

[42]The only dispute was as to the amount of ***salary*** due to the Claimant. The Company disputed the amount of ***salary*** which was due to the Claimant, taken into account the restructured ***salary*** which took effect in December 2014 and the deduction of two-month ***salary*** in lieu of notice. However, there was no explanation from COW1 how did the Company came up with the figure as stated in the above said table. Why the Claimant's ***salary*** before the ***salary*** restructuring for October 2014 was RM5,560.57 and November 2014 was RM6,138.58? Why was the ***salary*** not consistent after EPF, SOCSO and Income tax deductions if any? Based on the letter of employment and the documents in COB, it is clear that the deduction of SOCSO was RM66.40 a month while EPF was RM715 a month before the ***salary*** reduction (see pp 49 and 51 of CLB). Based on the letter of employment, EPF monthly contribution will be 11% of the Claimant's ***salary*** and 12% of the Claimant's ***salary*** will be contributed by the Company. Therefore, before the ***salary*** reduction, the Claimant's EPF contribution was RM715 a month while the employer contributed RM780 a month. After the ***salary*** reduction, the Claimant was earning RM5,200 a month and therefore the Claimant's EPF contribution should be RM572 a month while the employer contributed RM624 a month.

[43]As regards to SOCSO's contribution, the letter of employment stated that the monthly deduction towards SOCSO scheme will be based on the schedule rate which was not been produced in Court. However, as was said earlier, the amount that was deducted was RM66.40 a month (see pp 94, 98, 101,104,107 110 of COB). There was no change in term of the rate even after the ***salary*** reduction exercise effective December 2014.

[44]On the deduction of income tax, the letter of employment stated that the income tax deduction will be made as per the Income Tax schedule as specified by the authorities. There is no evidence adduced on how much was the income tax deduction as specified by authorities. In the absence of any evidence on the income tax deduction or any other deduction if any, I am unable to do determine whether the amount of ***salary*** due as stated in the table was correct and justified. No evidence adduced as to other deduction. Therefore, this Court will only rely on the letter of employment and the Internal Memorandum issued as to the ***salary*** of the Claimant less the statutory deductions.

[45]Notwithstanding the inclusion of the table of the ***salaries*** due to the Claimant from the month of October 2014 until March 2015 in the Company's Statement in Reply and in COW1 Witness Statement, nothing was mention on this in the Claimant's Rejoinder. Neither could I find any evidence in respect of the actual ***salaries*** due after deductions from October 2014 until March 2015 in the Claimant's testimony. According to the Claimant's testimony, prior to his alleged dismissal on 25 March 2015, he was earning a basic ***salary*** of RM6,500 plus RM1,000 as an allowance. However, there was no evidence adduced to support allowance claim and no mention of the such allowance in the letter of employment.

[46]According to the Claimant's letter of constructive dismissal dated 25 March 2015 (pp 82 and 83 COB), he was asking the Company to reimburse the phone bill and diesel for the month of November 2013 (as stated in the letter) until February 2015 amounting to RM6,398.67 and personal claim amounting to RM1,873. Despite the fact that telephone and petrol allowance reimbursement were pleaded, no mention of these issues were made in witness statement and no evidence adduced on the reimbursement by the Claimant when he was called to testify. Even the Claimant's written submission did not no mention any of these claims. It was the evidence of COW1 in his Witness

Statement question and answer 10 and 11 as follows:

Question 10: Did the Company fail to reimburse the Claimant for all his telephone and petrol allowances as alleged by the Claimant?

Answer: No, that the Claimant is only entitled to claim the sum of RM1,922.59 after deducting the sum of RM400.00 being the telephone allowance becausethe Claimant failed to produce the monthly telephone bill statement to support his claim.

Question 11: Is the Claimant entitled to claim for the purchase of material for the Company?

Answer: No, The Claimant is not entitled to claim the sum of RM1,204.90 being the costs of material purportedly purchased for the Company with his own money because there was no request made and no approval was obtained from the Company's management prior to the alleged purchase.

[47]The above said evidence of COW1 was not challenged during Cross- Examination and therefore the Court will accept the evidence of COW1 that the Claimant is only entitled to claim the sum of RM1,922.59 for the reimbursement of telephone and petrol allowance. As regards to the claim on the costs of material purportedly purchased for the Company, no evidence that there was a request made and approval was obtained from the Company's management prior to the alleged purchase. Since this evidence was again not challenged and the fact that nothing was mentioned on this by the Claimant in his testimony and in the written submission, this Court will not consider such claim.

[48]Next issue is whether the said conduct of the Company of not paying ***salary*** for six months amounted to repudiatory breaches of the Claimant's contract of employment. Based on the minutes of the meeting held on 30 October 2014 (pp 52 to 60 of COB) which was also attended by the Claimant, it is a known fact that the Company was having problem to pay the ***salary*** of its employees. The Company had also borrowed between three to four million ringgit from the Managing Director's personal Company to pay the ***salary*** of its managers and employees. Whether or not this is a case of deferred ***salary*** payment or a non-payment of ***salary***, the undisputed fact was that the Company had failed to pay the Claimant's ***salary*** from the October 2014 until March 2015 totaling 6 months ***salary***.

[48]The consequence of not paying an employee ***salary*** promptly was discussed in the case of *Heng Kiah Woo v Consolidated Farms Bhd* [2007] 2 LNS 2454, wherein the learned Chairman stated as follows:

"It is abundantly clear from various authorities that the employer's obligation to pay remuneration to the employee is one of the fundamental terms of a contract in Dr Rayanold Pereira v Menteri Sumber Manusia & Anor [1997] 3 CLJ Supp 116 *the High Court enunciated as follows:*

... the allegation of breach of contract of employment through the ***salary*** cut and non-payment of March 1993 ***salary*** are not without basis. There is no provision for loan in the contract enabling the ***salary*** cut. Reference may be made to the case

quoted in the applicant's statement of facts in the case of *Hanlan v Allied Breweries (UK) Ltd* [1975] 1 RLR 321 *quoted in 'Unfair Dismissal Handbook' by Malcom Mead, 2nd edition (at page 66 and 69) which lays down the provision that it is alongrecognizedimplied term that there is an obligation to pay agreed wages promptly... Where the employee was not paid according to the contract, the industrial tribunal held that this entitled the employee to resign and to have her resignation treated as a constructive dismissal because the employer had repudiated a term of the contract. "*

[49]In *BSN Commercial Bank & Anor v Arumugam Ramasamy* [2006] 4 ILR 2569-2587 *(Award No 1756 of 2006) Issue 11/2016 at p 3571* the learned Chairman held as follows:

*"the Claimant was only informed that his **salary** for March 1999 was being with held, two (2) weeks after he had treated himself as being constructively dismissed. The evidence of COW1 who admitted to unilaterally making the decision to withhold the **salary**, which according to COW1 had only entailed a delay of 9 days and the bank not having evinced any intention not to pay him his **salary**, this court found unacceptable. Such belated and highhanded utterances would have afforded the Claimant cold comfort at a time when he was agonising over the non-payment of his March **salary** (para 51). Failure to pay wages or **salary** when it falls due would constitute a fundamental breach of the claimant's contract of employment and by failing to pay the claimant his March **salary**, the bank had by its conduct, breached a fundamental term of the claimant's contract of employment or had evinced an intention no longer to be bound by it thus entitling the claimant to walk out of his employment. If they had no such intention, they certainly did not inform the claimant of it before the date he claimed constructive dismissal (para 52)."*

[50]Even paying August 2002 ***salary late*** by one month and one day alone, can be regarded as breach of a fundamental contract of employment and had also evinced an intention of no longer wanted to be bound by the Claimant's contract of employment was decided in the case of *Seah Ann Yee v John Hancock Life Insurance (Malaysia) Bhd* [2010] 2 ILR 302 **.**

[51]In the instant case, it is my finding that there was an actual breach that goes to the root and foundation of the contract of employment between the Claimant and the Company. The conduct of not paying the Claimant's ***salary*** for six months alone was sufficiently important to justify the Claimant to treat himself as constructively dismissed by the Company.

[52]Despite the fact that there was delay in terminating the contract in response to the employer's breach, the Claimant could not be said as having waived or accepted the breach for six month as the financial situation of the Company was explained to the staff including the Claimant (see meeting minute dated 30 October 2014 pp 52 to 60 COB) the Company was having financial hardship to the extent that it has to borrow money to pay the ***salaries*** of its employee and the delay in ***salary*** payment was expected by the Claimant. Further the act of the COW1 who give advancement of the total amount of RM11,000 is another factor that may had delayed the Claimant in terminating the contract. There was also promise made by the Managing Director when the performance of the Company improved and the financial situation restored, the ***salary*** will be paid. It is my view that in this case where constructive dismissal was caused by non-payment of ***salary***, the delay was because the Claimant continue with the employment with the hope that the financial situation of the Company will be restored and he will be paid his ***salary***. Unfortunately, after six month of patiently waiting, there was no sign that the Company's financial situation will improve. Under such circumstances, it is my view that there was no inordinate delay on part of the Claimant in terminating his employment and the Claimant had never waived the breach and agreed to vary the contract. Alternatively, it is my considered view that the law on constructive dismissal which requires that the claimant should have acted fast in the face of the employer's conduct does not apply in the instant case where the issue involved was the deferment of ***salary*** payment. Sometimes the continuity of employment was more important and given the priority than a prompt ***salary*** payment unless and until the circumstances or the situation of the employee is as

such that will not afford them to continue further with the employment.

[53]Therefore, applying the principle of law of the above cited cases on the undisputed facts that the Company had not paid the ***salary*** of the Claimant for six months, it is therefore clear that the Company had breached a fundamental contract of the Claimant's employment. By not paying the Claimant's ***salary*** for six month, the Company had evinced an intention of no longer wanted to be bound by the Claimant's contract of employment and thus entitling the Claimant to walk out of his employment. The non-payment of ***salary*** alone is sufficient to prove on the balance of probabilities that the said conducts of the Company amounted to repudiatory breaches of the Claimant's contract of employment and thus entitling the Claimant to treat himself as being constructively dismissed.

Conclusion

[54]On the totality of the evidence, the Court finds on a balance of probabilities that the Claimant had successfully satisfy this Court that the Company had breached one of the fundamental terms which would entitle the Claimant to walk off and considered himself as constructively dismissed from the Company. The mere act of not paying the ***salary*** of the employee in my view is sufficient to show the intention of the Company that it no longer wished to be bound by the said contract of employment.

Remedy

[55]The Claimant had served the Company for about 2 years and 10 months and was unemployed for only two months after he treated himself as constructively dismissed by the Company. His last drawn ***salary*** was RM5,200 (after the ***salary*** restructuring) effective December 2014 and prior to that his ***salary*** was RM6,500. No evidence that the Claimant was entitled to an allowance of RM1,000 a month. However, the contract of employment provided that the Claimant shall be entitled to claim telephone usages maximum RM100. Again, this is also not submitted in the written submission and no monthly telephone bill statements produced. In my view reinstatement may not be appropriate since the Claimant was reemployed two months after the said dismissal. In the circumstances, the alternative remedy would be compensation in term of back wages and in lieu of reinstatement.

[56]The total amount of ***salary*** due for the month of October and November 2014 should be RM13,000 (RM6,500 x 2) and after the ***salary*** restructuring exercise, the total amount due for the month of December 2014, January, February and March 2015 should be RM20,800 (RM5,200 x 4). Therefore, the total amount of ***salary*** due to the Claimant is RM33,800 before statutory reductions.

[57]As regard to backwages, I am mindful of the fact that the Claimant was unemployed for only 2 months. According to the second schedule of *Industrial Relation Act 1967*, the Court may award backwages but it shall not exceed 24 months from the date of dismissal based on last ***salary*** drawn. In the case of *Dr James Alfred (Sabah) v Koperasi Serbaguna Sanya Bhd (Sabah) & Anor* *[2001] 3 MLJ 529*; [2001] 3 CLJ 5419 , it was held that:

> "*It is in line with equity and good conscience that the Industrial Court, in assessing quantum of backwages, should take into account the fact, if established by evidence or admitted, that the workman has been gainfully employed elsewhere after his dismissal. Failure to do so constitutes a jurisdictional error of law. Certiorari will therefore lie to rectify it. What is important is that the Industrial Court, in the exercise of its discretion in assessing the quantum of backwages, should take into account all relevant matters including the fact, where it exists, that the workman has been gainfully employed elsewhere after his dismissal. This discretion is in the nature of a decision making process. As such, it was subject to judicial review*"

In the same case, it was also held that said that when taking into account that the workman has been gainfully employed elsewhere after his dismissal:

"it does not necessarily mean that the Industrial Court has to conduct a mathematical exercise in deduction".

Taken into consideration the hardship faced by the Claimant for not being paid ***salary*** for six months (see NOP during Examination In-Chief) and the ***salary*** restructuring exercise where his ***salary*** was 20% reduced and without ignoring the fact that the Claimant had only worked less than three years with the company, it is my view that it is fair and reasonable to award 12 months backwages.

[58]Since the termination was caused by the employer's conduct, there would be no deduction in lieu of two months notice.

[59]Taking into consideration all the above factors and as no evidence adduced as to any other deduction apart from statutory deductions, this Court in exercising its discretion based on equity, good conscience and substantial merits of the case, make award as follows:

a) Compensation in lieu of reinstatement: RM6,500 x 3 = RM9,500 (less RM500 as only worked for 2 years and 10 months = RM 19,000)

b) Backwages from the date of dismissal (25 March 2015) to the last date of hearing RM5,200 x 12 = RM 62,400

c) Unpaid ***salary***: RM 33,800

d) Reimbursement of Petrol and Telephone: RM1,922.59

e) Total amount = RM117,122.59

f) Less the amount of advance taken (RM11,000) = RM106,122.59

[60]The Courts orders that the total sum of RM106,122.59 less statutory deductions (SOCSO and EPF contributions and income tax) shall be paid by the company to the Claimant's within 30 days from the date of this Award.

Claim allowed and awarded the claimant RM106,122.59 in backwages and compensation in lieu of reinstatement.

Reported by Mukesh Nair Balakrishnan