

**INDUSTRIAL COURT OF MALAYSIA**

**CASE NO: 16/4-1004/20**

**BETWEEN**

**MOHD FAIZUL BIN TAHAR**

**AND**

**COSCO SHIPPING LINES (MALAYSIA) SDN. BHD.**

**AWARD NO: 1350 OF YEAR 2021**

**CORAM** : Y.A PUAN NOOR HAYATI BINTI HAJI MAT  
- Chairman

**VENUE** : Industrial Court of Malaysia, Johor Branch.

**DATE OF REFERENCE** : 05.07.2020

**DATES OF MENTION** : 25.08.2020; 20.12.2020; 25.05.2021; 22.06.2021 &  
27.06.2020

**DATES OF HEARING** : 04.04.2021 & 05.04.2021

**REPRESENTATION** : Mr A. Sivananthan from Malaysian Trades Union  
Congress, MTUC  
(Representative for the Claimant)

En Mahadi Bin Muhammad from Messrs Mahadi  
Redzuan & Co  
(Counsel for the Company)

## THE REFERENCE

This case is a reference under Section 20(3) of the Industrial Relation Act 1967 (Act), made on 5 July 2020 by the Honorable Minister of Human Resource arising from the dismissal of **MOHD FAIZUL BIN TAHAR** (Claimant) by **COSCO SHIPPING LINES (MALAYSIA) SDN. BHD.** (the Company) on 10 December 2019.

## AWARD

### Introduction

1. This case was heard together with 13 other cases whereby both parties agreed that evidence of the Company will applies to all Claimants. The Claimants had also agreed for one witness i.e Lee Eng Chuan (case no 16/4-1008/20) to give evidence on their behalf and adopted his testimony on the general facts of the case. Evidence specifically related to individual claimants on the post dismissal earnings will be as per documents tendered agreed by both parties. Since these cases are heard together and not consolidated, this award is now handled down separately referring to each and every claimant individually.

2. All pleadings, documents and witness statements were considered as filed by both parties and tendered in court. Written submissions were filed by both parties on 18 May 2021 and 24 June 2021.

### Brief Facts

3. The Claimant in this case, Mohd Faizul Bin Tahar commenced employment with Cosco Shipping Lines (Malaysia) Sdn. Bhd., the Company, as *Operations Executives*, at Johor Branch with effect from 1 Mac 2013. The Claimant last drawn basic monthly salary before his dismissal was RM4,650.00.

**4.** The Company headquarter is in Singapore (New Golden SEA Shipping Pte. Ltd.) (the HQ) and the Company's main office in Malaysia is located in Sunway, Selangor with one of its branches in Johor Bahru, Johor.

**5.** On 17 September 2019, employees of the Company at Johor Branch were briefed by the Branch Manager, that the Company will be implementing centralization of its department. By letter dated 4 October 2019, the Claimant, being one of the employees of the branch was notified of a transfer order to the Sunway Office with effect from 1 December 2019 in line with clause 4 in the appointment letter.

**6.** By letter dated 18 October 2019, the Claimant requested for the Company to reconsider the transfer, but the Company replied on 30 October 2019 stating unable to accede to the request and maintained that the Claimant is required to report for duty on 2 December 2019.

**7.** By email dated 29 November 2019, the Claimant declined the transfer and did not report to work on 2 December 2019 at Sunway Office and urge the Company to allow him to continue working in Johor Branch.

**8.** Subsequently, on 5 December 2019, a show-cause letter was issued to the Claimant for failure to report duty in Sunway Office without the approval of the Company.

**9.** The Claimant responded to the show-cause letter stating that since there is no response from the Company with regards his request to allow him to stay working in Johor Branch, the Claimant regards himself as being terminated from his service from 10 December 2019 and avers that the requirement to reply to the show-cause letter does not arise.

**10.** The Company views the Claimant's refusal to obey the transfer order and continuous absence at Sunway Office as serious misconduct and a breach of the employment contract. The Company reaffirmed its position that there was no

termination or dismissal of the Claimant and states that the Claimant had left the employment on his own accord on 10 December 2019.

11. The Claimant now claims for constructive dismissal which tantamount to termination of service under the Act and states that the transfer was done with *mala fide* intention and the termination was unjustified and without basis. The Claimant prays for an order of reinstatement without loss of wages, seniority and other benefits or relief this court deems fit and proper to grant.

### **The Law on Constructive Dismissal**

12. To succeed on a plea of constructive dismissal it was discussed at length and well explained by the Court of Appeal in the case of ***Southern Investment Bank Bhd & Anor v Yap Fat and Mahkamah Perusahaan Malaysia (Civil Appeal W-01(A)-96-04/2016)*** at page 8:

*[11] Constructive dismissal occurs where an employee resigns because of his employer's behaviour. In constructive dismissal, the issue is primarily the **conduct of the employer** and not the conduct of employee – unless waiver, estoppel or acquiescence is in issue.*

*[12] The notion of constructive dismissal comes from the concept that (as it is phrased in United Kingdom): “An employer must not, without reasonable or proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee”. (See **Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84, EAT**).*

*[13] In **Wong Chee Hong v Cathay Organisation (M) Sdn. Bhd. [1989] 1 CLJ 298 (Rep)** at p. 301, Salleh Abas L P explained the meaning of “constructive dismissal” as follows: “We think that the word “dismissal” in this section should be interpreted with reference to the common law principle. Thus it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention*

no longer to be bound by it. In such situation the employee is entitled to regard the contract as terminated and himself as being dismissed. (See **Bouzourou v. The Ottoman Bank [1930] AC 271** and **Donovan v. Invicta Airways Ltd. [1970] Lloyd's LR 486**). In Bouzourou's case an employee would have been entitled, according to the Privy Council, to regard himself as being dismissed if his transfer from one province to another province rendered him exposed to an immediately threatening danger of violence or disease to his person. And in Donovan's case the Court of Appeal held that when the conduct of the employer was such that it rendered the continuance of the employee's service impossible, the latter was entitled to treat the contract as at end and to obtain damages for wrongful dismissal.”.

[14] Gopal Sri Ram, JCA (as he then was) in **Quah Swee Khoon v Sime Darby Bhd [2001] 1 CLJ 9 at 19** described “constructive dismissal” as follows – “A reading of the pleaded case for the parties resolved the issue that fell for adjudication before the Industrial Court into what the profession has come to call as a “constructive dismissal”. There is no magic in the phrase. It simply means this. An employer does not like a workman. He does not want to dismiss him and face the consequences. He wants to ease the workman out of his organization. He wants to make the process as painless as possible for himself. He usually employs the subtlest of means. He may, under the guise of exercising the management power of transfer, demote the workman. That is what happened in **Wong Chee Hong** (ibid). Alternatively, he may take steps to reduce the workman in rank by giving him fewer or less prestigious responsibilities than previously held. Generally speaking, he will make life so unbearable for the workman so as to drive the latter out of employment. In the normal case, the workman being unable to tolerate the acts of oppression and victimization will tender his resignation and leave the employer's services. The question will then arise whether such departure is a voluntary resignation or a dismissal in truth and fact.”.

[15] There are **four conditions which have to be met by an employee** to be able to successfully claim for constructive dismissal. The High Court in **Buyer (M) Sdn. Bhd v Anwar Bin Abdul Rahim [1996] 2 CLJ 49** set out the four conditions as follows –

“(1) there must be a **breach of contract** by the employer;  
(2) the breach must be **sufficiently important to justify** the employee resigning;  
(3) the employee **must leave in response to the breach** and not for any other unconnected reason; and  
(4) he must not occasion any **undue delay** in terminating the contract, otherwise he will be deemed to have waived the breach and agreed to vary the contract. (See **Wong Chee Hong v Cathay Organization**, *supra*) Where the employee leaves in circumstances where these conditions are not met, he will be held to have resigned and there will be no dismissal within the meaning of the Act.” (our emphasis)

[16] The above decision was endorsed by the Court of Appeal in **Anwar Bin Abdul Rahim v Bayer (M) Sdn. Bhd.** (*supra*). The appeal against the decision of the Court of Appeal was dismissed by the Federal Court.

[17] It is interesting to note that the Court of Appeal of South Africa formulated the test for constructive dismissal under the common law in **Murray v Minister of Defence** [2008] 29 1369 (CA) as follows –

“The employee must prove that the resignation was not voluntary, and that it was not intended to terminate the employment relationship. Once this is established, the inquiry is whether the employer (irrespective of any intention to repudiate the contract of employment) had without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with the employee. Looking at the employer’s conduct as a whole and in its cumulative impact, the courts have asked in such cases whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it.”

[18] We agreed with the submission of learned counsel for the appellants that in the overall conspectus of evidence adduced in this instant appeal, the constructive dismissal contended for by the 1st respondent was devoid of substance, and he failed to discharge the onus on him to prove that there was any breach of the employment

*contract by the appellant, let alone one which goes to the root of the contract justifying the resignation of the 1st respondent.*

*[19] It is trite that the employee must prove that the employer's action amounted to a fundamental breach of contract or the law. In **Moo Ng v Kiwi Products Sdn. Bhd., Johor & Anor [1998] 1 CLJ 475**, the Court stated: "In a broad sense constructive dismissal occurs when an employer repudiates a contract of employment. The repudiation may take the form of a breach, anticipatory breach or notice of intention. It may be express or implied and it must go to the substance of the contract. If an employee asserts that he has been constructively dismissed, he must establish that there has been conduct on the part of the employer which breaches an express or implied term of the contract of employment going to the very root of the contract."*

*[20] It is important, therefore, to be cautious in adopting a wide interpretation of what conduct by an employer that would constitute constructive dismissal because of the danger of inviting a flood of employees who resign and then resile and claim to be constructively dismissed. **The paramount consideration is the requirement that the breach must be so serious which goes to the root of the contract and the employee cannot be expected to continue with the contractual arrangement.**"*

*- emphasis added*

## **The Law on Transfer**

**13.** It is trite law that the Company has the implied and express right to transfer its employees. This principle of law is recognized in several cases. In the case of **Ladang Holyrood v Ayasamy Manikam & Ors [2004] 2 CLJ 697**, the Court of Appeal held that:

*"We now turn to the next issue, that is, whether the appellant has any right under the contract of service to transfer the respondents to the main Division. In **Soon Seng Cement Products Sdn. Bhd. & Anor v. Non-Metallic Mineral Products Manufacturing Employees's Union [1996] 1 ILR 414** Award No. 107 of 1997 the same*

*issue came to be considered by the Industrial Court. There the court made the following observation which we think is highly pertinent to the issue before us:*

*It is well established in Industrial Law that the right to transfer an employee from one department to another or from one post of an establishment to another or from one branch to another or from one company to another within the organization is **the prerogative of the management** and the Industrial Court will ordinarily not interfere. **But if the transfer is actuated with improper motive**, it will attract the jurisdiction of the Court. The power to transfer is, therefore, subject to, according to **Ghaiye's Misconduct in Employment** (at pages 254 and 255), the following well recognized restrictions:*

- “(a) There is nothing to the contrary in the terms of employment;*
- (b) The management has acted bona fide and in the interests of its business;*
- (c) The management is not actuated by any indirect motive or any kind of mala fide;*
- (d) The transfer is not made for the purpose of harassing and victimizing the workmen; and*
- (e) The transfer does not involve a change in the conditions of service.*

*And this right of transfer is also embodied in the Industrial Relations Act 1967, where it states that the company has the right to transfer its employees within the organization so long as such transfer **“does not entail a change to the detriment of an employee in regard to the terms of employment.”** - Section 13 of the Industrial Relations Act 1967.”*

*-emphasis added*

## **Evaluation of Evidence**

**14.** The onus of proving constructive dismissal lies with the Claimant where he must establish his case, on the balance of probabilities, that he had been dismissed unlawfully (***Chua Yeow Cher v Tel Dynamics Sdn Bhd (2000) 1 MLJ 168*** - "It is trite law that in a reference before the Industrial Court by an employee complaining that he

*had been constructively dismissed by his employer the burden is on the employee to prove that he had been dismissed unlawfully").*

**15.** As stated in the case above mentioned (***Southern Investment Bank***, supra) the conduct/behaviour of the Company, if unreasonable, without proper cause and likely to destroy the relationship of trust and confidence between the employer and the employee would entitle the Claimant to regard the contract as terminated and **himself** as being dismissed.

**16.** The four conditions stated in the case of ***Buyer (M) Sdn. Bhd v Anwar Bin Abdul Rahim [1996] 2 CLJ 49*** which must be met by the Claimant to successfully claimed for constructive dismissal are as follows:

- 1. There **must be a breach of contract** by the Company;*
- 2. The breach must be **sufficiently important to justify the Claimant resigning**;*
- 3. The Claimant **must leave** in response to the breach and not for any other unconnected reason; and*
- 4. He must **not occasion any undue delay** in terminating the contract, otherwise, he will be deemed to have waived the breach and agreed to vary the contract.*

**17.** In this case, it was pleaded by the Claimant that the issue which triggers the dissatisfaction between the Company and the Claimant was the decision of the Company to transfer the Claimant to the Sunway office in Selangor without giving reasons on the need of its operational business undertaking, not clearly stating the Claimant new position in Sunway Office and failure to consider the option to pay compensation due to the downsizing operation. Thus, this transfer, thought provided in the contract, according to the Claimant, was done with *mala fide* intention and to frustrate the Claimant to terminate his service enabling him to claim for constructive dismissal.

**18.** The transfer, as submitted by the Company was to centralize the Company's Documentation Centre, Booking Centre and Equipment Control Centre to one hub in the Company's main office in Sunway. It was pleaded that the Company had decided to transfer 29 of its employees including the Claimant from its Johor Bahru Branch to the main office in Sunway. 11 of them accepted the transfer.

**19.** The transfer order was made with additional and new benefits, that is:

- a. One-off transfer allowance of RM1,000.00 (single) / RM2,000 (including family);
- b. RM300 increment on the Claimant's basic salary; and
- c. Fully paid round trip flight between Kuala Lumpur and Johor Bahru on a quarterly basis for all the transferred employees until 30.11.2020.

**20.** It was also pleaded that the transfer was in line with the Claimant's employment contract and thus the Company had not acted in breach of any express and/or implied terms of the Claimant's contract of employment. It was also carried out in good faith due to the need to centralize its business. The Company denied any termination of the Claimant's services and avers that they had legitimately exercised its prerogative power to transfer the Claimant and his refusal to abide entitled the Company to issue a show-cause letter for the Claimant to explain his rejection or refusal to obey the Company's order to report for duty on 2 December 2019.

**21.** In short, the transfer order, was according to the Company, made as a genuine business decision of the Company and lawful exercise of the prerogative of the management following directions from the HQ. It was not actuated with any improper motives.

**22.** The Company avers that they were not duty-bound to provide detailed reasons on the needs of its business and operations to any of the employees. The transfer was also due to a reorganization exercise which resulted in the downsizing of the employees at Johor Bahru's office and thus not duty-bound to pay compensation to the affected employees.

23. The Claimant, however, contends that the employees at Johor Branch were informed by the Branch Manager verbally that they will be offered an option whether to accept the transfer and whoever accepted it, will be paid compensation.

24. But then, by letter dated 4 October 2019 the Claimant with 29 other employees received a transfer order to the Sunway Office with effect from 1 December 2019. He responded to the letter on 18 October 2019 and states his reasons for not accepting the transfer. The Claimant further contends that he did not reject the transfer but merely asking for the Company to consider 7 months salary as compensation and a deferment until 30 April 2020 for him to find a new job.

25. Since the Company refused to reconsider the Claimant's request and maintained the transfer order, the Claimant declined the transfer and state that it was with reasonable grounds.

26. The Claimant received a show-cause letter to explain his act of not adhering to the transfer order by 12 December 2019. He did not reply to it as he had written to the Company on 10 December 2019 giving notice that he was constructively dismissed by the Company instead.

### **Analysis and Findings**

27. The term of the employment allowing transfer of employee at the discretion of the Company was not disputed by the Claimant. It was the Company's alleged refusal to accept the Claimant's reasons that causes him to claim that the transfer was done in bad faith and subsequently consider himself to be constructively dismissed by the Company.

28. Before that, a question arises, was the reason for the transfer by the Company unreasonable or without proper cause which can be construed as a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee? (See ***Courtaulds Northern***

***Textiles Ltd v Andrew [1979] IRLR 84, EAT*** referred to in the case of ***Southern Investment***).

29. From the evidence given, this court finds that the Claimant had *declined* (as worded in his letter) the transfer for reasons listed in his letter which was rather personal in nature. Reproduced below his reasons as stated in his letter dated 18 October 2019:

*“I appreciate management’s effort for the arrangement, but I’am not able to work at Sunway as I have commitments in Johor Bahru, such as housing loan, car loan and study loans. My parents are helping to take care of my two children, so if I move to Sunway, I need to find a reliable child care centre. However, this will increase my expenses in addition to the accommodation expenses and other living cost at Sunway”*

30. It was clear from his letter that the Claimant had requested for the Company to reconsider the transfer or withdraw it but if not possible, he had requested for the transfer date to be deferred to 30 April 2020. He also requested for an payment of compensation equivalent to his 7 months salary.

31. The Company was unable to accede to the request and subsequently issued a show-cause letter. The Claimant did not respond to the show cause because had earlier claimed being constructively dismissed. After receiving the notice of constructive dismissal, the Company, by letter dated 16 December 2019 maintained its stance that the Claimant was never dismissed and states that his act of not obeying the transfer was serious misconduct or willful insubordination. But yet again, subsequently, by letter dated 7 January 2020, the Company still offers a final opportunity to the Claimant to report for duty at Sunway Office on 23 January 2020. The Claimant, however, maintained his claim *via* letter 10 December 2019 that he was constructively dismissed.

32. From the above scenario, this court finds that the reasons pleaded by the Company, that is to centralize its *centres* (Documentation, Booking and Equipment Control) to one hub was genuine business consideration or a reasonable management decision in any organization. As submitted, the purpose of the centralization *is to ensure that the Company adopt a standard SOP throughout its branches and/or strengthen the administration and management of the business units whilst coping with the new systems and/or ease the training processes to its employees.*

33. Next question would be whether the Company in exercising its managerial prerogative had done it with *mala fide* intention or having ulterior motives to victimize the Claimant? To show these circumstances, the burden would be on the Claimant to satisfy this court (*see Yong Yoke Sing & Ors v Sungei Way Estate (1965) 2 MLJ*).

34. Unfortunately, there is nothing in the evidence of the Claimant who had given *via* the testimony of Lee Eng Chuan which only referred to the tendered exchange of letters with regards to the order of transfer but nothing else to prove the adverse malicious intention of the Company to arbitrarily exit all the effected employees by transferring them to Sunway Office. The Claimant attempted to rely on the evidence of Chan Chee Chung, COW2, the Branch Manager to show that the transfer was never the intention of the Company because they were only briefed on the alleged centralization and downsizing of employees and the issue of compensation was raised. However, this was not admitted conclusively by COW2 as he could not remember specifically whether it was mentioned by him at the briefing on the issue of compensation.

35. However, this court referred to the testimony of Lee Eng Chuan, though deny knowing about the impending transfer, but he had inadvertently stated that:

*“Mr Chan pada 17.9.2019, dia berjumpa kami dan dia hanya menyatakan kepada kami bahawa Company akan downsize. Maka diberi pilihan kepada*

*sesiapa yang ingin menawarkan diri **dipindahkan ke ibu pejabat Sunway** atau cawangan di Penang. Jika tidak terima **pemindahan**, bayaran pampasan akan dibayar.”*

- *Emphasis added*

**36.** Was the issue of transfer not make known or disclosed to the Claimant? Undoubtedly, as they (all the employees who attended the briefing) knew about the possibility of transfer. It was conveyed to them, and they had responded to it, and they foresee it forthcoming.

**37.** Be that as it may, the decision to transfer was within the Company's legitimate right provided in the contract of employment for as long as it does not initiate with *mala fide* intention (see the case of ***Ladang Holyrood v Ayasamy Manikam & Ors (2004) 1 MELR 19***).

**38.** Clearly the Claimant unwillingness to adhere to the transfer was on personal reasons. However, this court was at the considered view that the Company had offered additional benefits of a one-off payment, increment of salary and round-trip flights to its affected employees as an initiative to assist them to cope with their new life. These facts show that the Company's decision was carried out in good faith and was made within the parameters of the prerogative of the Company in making a pure business decision without intention to victimize the Claimant in any way. The Company had eventually agreed to defer the transfer up until January 2020. Whilst allowing the Claimant to report for duty, the Claimant still refused to obey and this, to this court was a clear act of insubordination to a reasonable direction of the Company.

**39.** As such, there is no proof of fundamental breach of contract as the Claimant's status remains the same and in fact with increased monthly salary to support his accommodation at the new workplace. The transfer order does not in any manner detrimental to the Claimant's employment status, income or any other terms and conditions of the Claimant's letter of appointment but merely affected him with

discomfort to leave his children at child care centre and possibility of increase in daily expenses.

**40.** No improper motive was neither shown nor proved by the Claimant. The Claimant was given the privilege to accept the transfer with reasonable increment but choose to claim being constructively dismissed.

**41.** From the totality of the evidence, based on equity, good conscience and the substantial merits of the case, it is the finding of this court that the Claimant has failed to establish, on a balance of probabilities, the Claimant's plea of constructive dismissal against the Company and thus there was no termination of the Claimant's employment by the Company. For the reasons given, the claim is hereby dismissed.

**HANDED DOWN AND DATED THIS 14<sup>TH</sup> DAY OF SEPTEMBER 2021**

**-SIGNED-**

**(NOOR HAYATI BINTI HAJI MAT)  
CHAIRMAN  
INDUSTRIAL COURT OF MALAYSIA  
JOHOR**