INDUSTRIAL COURT OF MALAYSIA

CASE NO : 15/4-730/02

BETWEEN

KENYIR OUTDOOR LEADERSHIP ACADEMY (KOLA)

AND

MOHD SHAHARUDDIN BIN WAN MUHAMAD

AWARD NO : 1885 OF 2005

Before	:	**N. RAJASEGARAN - Chairman** (Sitting Alone)
Venue:	:	Industrial Court Malaysia, Kuala Lumpur.
Date of Reference	:	10.07.2002.
Dates of Mention	:	18.9.2002, 18.10.2002, 3.7.2003, 1.3.2004, 11.1.2005 and 13.4.2005.
Dates of Hearing	:	11.7.2005 and 13.7.2005.
Date of Oral Submissions:		9.9.2005
Representations	:	Mr. Zulfahmi bin Abu Bakar from M/s Abd. Ghani Che Man & Co., Counsel for the Company. Ms. G. S. Kavitha from M/s Muhendaran Sri, Counsel for the Claimant.

Reference :

This is a reference made under Section 20(3) of the Industrial Relations Act, 1967 arising out of the dismissal of **Mohd Shaharuddin bin Wan Muhammad** (hereinafter referred to as "the Claimant") by **Kenyir Outdoor Leadership Academy (KOLA)** (hereinafter referred to as "the Company").

AWARD

Reference

1. The Honourable Minister of Human Resources made a decision dated 10.2.2002 pursuant to section 20(3) of the Industrial Relations Act, 1967 ('the Act'). That decision was to refer an appeal made under the Act by Mohd Shahaharuddin bin Wan Muhamad ('the Claimant') to the effect that he had been dismissed from his employment by his erstwhile employer, Kenyir Outdoor Leadership Academy (KOLA) ('the Company') on 3.5.2005.

The Events

2. I begin with the narrative. This is as can be discerned from the statement of agreed facts and the evidence before the Court. There are in principle four stages which generate from the set of facts. I find it convenient to relate to the facts in this manner.

3. The first stage opens with the offer by the Company dated 3.11.2000 and acceptance by the Claimant on 14.12.2000 of a contract of employment ('First Contract'). That First Contract was for the position of Resort Director with terms amongst others that the basic salary payable would be RM4,500.00 per month and that a sales commission at the rate of 2.5% of total monthly sales would also be paid. Of particular relevance is that the contract stated that it was for a fixed duration of six months commencing from 8.9.2000. It further contained a clause providing that the contract "*shall be reviewed for further extension. Upon expiry of this contract, either party has the right to decline any extension proposal.*"

4. Still on that first stage. Prior to the signing of the First Contract a director of the Company by the name of Wan Azmi bin Wan Abd. Rahman ('Wan Azmi') was authorized by the Company's Board of Directors to discuss with the Claimant his employment on the basis of "*secara kontrak*". That is on a literal translation – on a contract-basis. This is in common parlance - a temporary contract or as known in industrial jurisprudence - a fixed term contract.

5. It is the Claimant's position that Wan Azmi promised him during the pre-employment negotiations that upon completion of the First Contract, the Claimant would be offered a contract of employment for a further period of two years at a salary of RM5,000.00 per month plus a sales commission at the rate of 5% of total monthly sales. This purported promise of Wan Azmi is denied by the Company.

6. Continuing that first stage, the Claimant commenced employment on 8.9.2000. But before that, the Company submitted to the Claimant a draft dated 6.9.2000 on terms of a contract of employment ('Draft Contract'). The Claimant did not accept this Draft Contract. Instead he wrote a letter dated 27.9.2000 addressed to the Group Corporate Affairs Manager of Permodalan Terengganu Berhad (PTB) of which the Company is a wholly owned subsidiary. This letter for ease of reference I will call the 'Claimant's response to the Draft Contract.' The salient part of this letter is that the Claimant referred to his discussion with Wan Azmi and outlined additional clauses to be added to the Draft Contract.

7. Still on the first stage. Then on 3.10.2000 the Claimant completed and signed a form belonging to PTB entitled "Personal Particulars Form." Next came the First Contract on 3.11.2000. That letter constituting the First Contract opens with a reference to the Draft Contract and the Claimant's response to the Draft Contract and called its contents as

revised terms and conditions of employment. As stated earlier, this First Contract the Claimant signed in acceptance.

8. Now onn to the second stage – the Claimant's employment during the First Contract. Nothing interesting was raised in evidence save for the health of the Claimant. The Claimant was hospitalised from 14.12.2000 to 23.12.2000 and resumed work on 2.1.2001. On his return the Company requested him to undergo the pre-employment medical examination upon which the First Contract was subject to. A little late in the day, I cannot help but comment. But the Claimant complied for what the instruction was worth. He was examined at the UM Specialist Centre Sdn. Bhd. or the Universiti Hospital as it is more commonly called. Then followed two reports by a non-medical person, *to wit*, that same Group Corporate Affairs Manager of PTB, who declared in one of her reports that "*Memandangkan penyakit yang dihadapi oleh Encik Shaharuddin ('the Claimant') adalah penyakit yang berpanjangan maka dijangka Syarikat ('the Company') perlu membuat peruntukan kos perubatan yang berlarutan. Sehubungan dengan perkara di atas, Syarikat juga perlu prihatin akan risiko yang akan dihadapi jikalau meneruskan perkhidmatan Encik Shaharuddin."* And this report was tabled at the Company's Board of Directors meeting on 10.2.2001 which Board decided not to extend the contract of employment of the Claimant. After this decision came the medical report from the UM Specialist Centre Sdn. Bhd. The Hospital's consultant physician and endocrinologist, truly a medical person, gave the Company a medical report dated 28.2.2001 which in brief listed the health deficiencies of the Claimant but which concluded in so many words that the Claimant was able to perform his occupation.

9. Now for the third and penultimate stage which takes us up to the day following the last date of the Claimant's First Contract. The

Company served upon the Claimant a letter dated 8.3.2001 which letter in substance offered the Claimant an extension of the First Contract for another one month commencing from 9.3.2001 ('Extension Contract'). True to the terms of the First Contract, the Claimant was offered an option to accept this Extension Contract. The Claimant failed to sign acceptance in the space provided in the Extension Contract. Instead he wrote a letter dated 15.3.2001 to Wan Azmi which letter shorn of its formalities reads :

> *"I refer to your letter dated 8 March 2001 received on 9 March 2001.*
>
> *I am surprised that I am only give one (1) month extension of service. As you know at the interviews and subsequent Board of Directors meeting, I was promised two and half (2½) year period of contract to turn the company around.*
>
> *I hope the company will honour the promise made.*
>
> *Thank you."*

In action the Claimant rejected the Extension Contract.

10. The Claimant contends that he continued working in the Company from 8.3.2001 and thereafter until he ceased employment. The Company's response will be the subject of further discussion at the appropriate time.

11. The final and fourth stage. It begins with the Company sending to the Claimant what it called an appointment letter but in actual fact a contract of employment dated 20.4.2001 ('Second Contract'). It was

received by the Claimant on 30.4.2001. It is relevant to mention that the Second Contract offered the position of Resort Manager, for a duration of twenty-four months commencing from 2.5.2001, at similar basic salary and sales commission as stated in the First Contract but with reduced medical benefits and without the benefit of reimbursement of the purchase of a mobile phone subject to a maximum price of RM1,000.00.

12. The Claimant did not sign and return the Second Contract to indicate acceptance of the same. But he avers that he continued working for the Company.

13. It is then the Claimant's version that on 24.4.2001 the Company informed his subordinates not to report to him anymore. He further complained that on 28.4.2001 he was denied entry into his office through the deactivation by the Company of his access card. The Company did not deny both. But more on this later.

14. Meanwhile the Company by a letter dated 15.5.2001 ("Revocation Letter") informed the Claimant that since he had not accepted the Second Contract by 14.5.2001 and because he had on 14.5.2001 returned the access card and petrol card belonging to the Company, it deemed that the Claimant did not intend to accept the Second Contract and that the offer of the same was revoked. What else was said in that letter will be referred to as and when appropriate.

15. The curtain is drawn on this fourth stage with the cessation of employment of the Claimant. The Claimant wrote to the Company a letter dated 16.5.2001 ('Cessation Letter'). The issues to be determined being part dependant on the contents of this letter, the body of it is reproduced :

" I refer to my letter dated of 15 March 2001. I also refer to your letter dated 20 April 2001 together with the cover letter dated 23 April 2001 both of which was received by me on 30 April 2001 when I return to Kuala Lumpur.

As you are aware, I had refused to sign the letter dated 20 April 2001 for the following reasons:

a) On 24 April 2001 my officers in KL office and resort were informed by yourself that they are not to report to me anymore but directly to yourself with immediate effect;

b) On 28 April 2001 my access card to office was blocked and I was denied entry, and

c) The letter dated 20 April 2001 shows that the company has varied the important terms of my contract relating to place of work. Furthermore the company has not kept the promise made in October 2000 that my salary will be increased to RM5,000.00 and my sales commission will also be increased to 5.0%.

In view of the above, I was forced to consider myself dismissed by the company with effect from 3rd May 2001.

Thank you. "

16. As an encore the Claimant wrote to the Company a letter dated 29.5.2001. Replying to the Company's Revocation Letter stating that his position taken in his Cessation Letter remained and amongst other matters that he had returned his access and petrol cards on 3.5.2001 and not on 14.5.2001.

17. So much for the narrative.

The Fixed Term Contract Begins

18. The parties took a contending stance on the nature of the First Contract under which the Claimant was employed. Ms. S. Kavitha, learned counsel for the Claimant took the posture that the Company's labelling of the First Contract as a fixed term contract did not by itself make it so. She relied for support on the Industrial Court's decision in ***Malaysian Airlines Bhd v. Michael Ng Liang Kok (2000) 3 ILR 179***. On this matter she invited the Court to examine the intention of the parties when they entered into the contract which is that the Claimant was to be given a contract of employment lasting for a period of two and half years commencing from 8.3.2000. Encik Zulfahmi bin Abu Bakar, learned counsel appearing for the Company ('En. Zulfahmi') urged the Court to treat the First Contract as per its contents, which is that of a fixed-term of six months. He offered no backup authority.

19. To go along the position adopted by the Company, I find it easy. The case of ***Malaysian Airlines Bhd (supra)*** relied on by Ms. S. Kavitha is, with respect, not an appropriate comparable. In that case the workman was employed on a succession of two three-years fixed duration contracts in a position which the Court found to be on-going. In those circumstances coupled with other factors all not appearing in the instant case, the Court there found the workman's contract of employment not to be a fixed-term contract.

The *locus classicus* on fixed-term contract, ***Han Chiang High School v. National Union of Teachers in Independent Schools, West Malaysia (1988) 2 ILR 611*** distinguished between a genuine fixed-term contract and one which is a sham. In that case the Court found the employer to have perpetrated a sham, the details of which I find unnecessary to

repeat here for the reason that the same does not arise in the instant case. But that case is relevant in that the Court recognised the concept of a fixed-term contract and even propounded the protection of such contracts provided they are genuine.

20. I find it pertinent to repeat here a decision of Justice Lindsay given in the Employment Appeal Tribunal in deciding the case of ***British Broadcasting Corporation (appellants) v. Kelly-Phillips (respondent) (1997) IRLR 57.*** That decision not only lays down in simple terms on what a fixed-term contract involved, but also covers another area in connection with termination clauses which aspect Ms. S. Kavitha raised and which will be discussed by me later. This is what Justice Lindsay had to say :

> *" First, fixed-term contracts are not defined by the legislature; the meaning of the phrase has been left to the courts. Leaving aside cases of sham, to which we will return later, there is binding authority that for present purposes contracts with fixed beginning-dates and fixed end-dates are contracts for fixed terms and are to be regarded as such regardless, for example, of their terminating by notice:* ***Dixon and another v. BBC (1979) IRLR 114 CA; Wiltshire County Council v. NATFHE and Guy (1980) IRLR 198 CA.*** *"*

Closer at home our superior courts have similarly recognised fixed-term contracts. To name but a few : ***M. Vasagam Muthusamy v. Kesatuan Pekerja-Pekerja Resorts World, Pahang & Anor (2003) 5 CLJ; Lt. Col (B) Abdul Rahman Mohd Tahir v. Menteri Sumber Manusia, Malaysia & Anor (1997) 4 CLJ Supp 37.***

21. The sequence of events earlier described show the Claimant not to be one who could be coerced into signing and accepting that which he is not inclined to. On being cross-examined in relation to the First Contract, this is what the Claimant responded :

> *" Q: (Refers to page 22 of AB1). Is this your signature under the acceptance column?*
>
> *A: Yes it is.*
>
> *Q: **Put** When you signed page 22 you agreed to be bound by all the terms in this letter?*
>
> *A: Yes I agree.*
>
> *Q: **Put** You agree to all the effects of the terms in this letter?*
>
> *A: Yes I agree. "*

22. In the circumstances I am unable to voyage out of the four corners of the First Contract as prevailed upon me by Ms. S. Kavitha. The Court finds that the Claimant's First Contract was indeed as clearly stipulated therein, that is, a fixed-term contract determinable six months from the date of commencement on 8.9.2000.

23. Now for the true position the Claimant held under the First Contract. That the position which the Claimant held was Resort Director, I harbour no doubts. The Company's very own letters in the form of Draft Contract, First Contract and the Extension Contract, all referring to the Claimant's appointment as Resort Director puts in question the Company's contention that the Claimant's position was in reality that of Resort Manager. The Company's further contention that there exist no position of Resort Director within its organisational set-up is again doubtful for the reason that Lt. Col. Cheng Jiew Koon, the Claimant's predecessor in the Company, was designated Resident Director and it is

the evidence of the Company's sole witness that the title 'Resort Director' is the new name to replace 'Resident Director'. That part in evidence where the Claimant had completed the Personal Particulars Form, well after he had commenced employment under the First Contract, in which form he had completed the column on position applied for as 'Resort Manager', did not even find mention in En. Zulfahmi's submission. I too find it of little significance. The Company's sole witness is Md. Som bin Mangy ('COW1') a Director sitting in the Board of Directors of the Company. That the Claimant was not a member of the Company's Board of Directors does not in any way negative his designation as Resort Director as maintained by the Company. The designation of Director is a management position which could be appointed by a company under a contract of employment. A member of the Board of Directors of a company is an appointment by and on behalf of the shareholders of a company and does not *ipso facto* entail a contract of employment. An employee holding the designation of Director need not necessarily therefore be appointed to the Board of Directors of a company.

The Fixed Term Contract Ends

24. On 7.3.2001 the First Contract was to terminate. Parties are divided on this. Ms. S. Kavitha submitting that the First contract existed after 7.3.2001 for the reason that it was not terminated by the Company through serving notice of termination and the Company submitting that the First Contract expired on 8.3.2001 and did not exist thereafter.

25. I am of the view that unless specifically provided for, the need to terminate by notice a fixed-term contract of employment does not arise if such termination is on the date of determination of the contract. In law, notice of termination of a fixed-term contract is given at the time of making the contract when parties mutually agree on the date or the

event which will bring about the end of the contract. And this notice began at the time the contract was made and will end on the date of the termination of the fixed-term contract if the contract is based on time or upon completion of the work if the contract is based on the performance of a specific job. Whilst on the subject of notice I agree with En. Zulfahmi's submission that the notice of one month stated in paragraph 5 of the First Contract applied only to instances where the contract is terminated before time. Thus part of my reason for earlier quoting Justice Lindsay in ***British Broadcasting Corporation (supra)***.

26. It is therefore my finding that the First Contract, a fixed-term contract of employment, terminated on 7.3.2001 upon expiry of six months from the date of commencement.

Claimant's Status After Fixed-Term Contract Ends

27. What happened next? It is the Claimant's evidence that he continued working non-stop from 8.4.2001 until he claimed to have been constructively dismissed by the Company with effect from 3.5.2001. To this the Company's reply is that the First Contract terminated on 8.3.2001 and the Claimant did not accept the Extension Contract of one month. Save for maintaining this, the Company unfortunately avoided the issue of whether the Claimant actually worked from 8.3.2001 onwards. At no time did the Company specifically plead nor lead direct evidence to support a fact that the Claimant did not work in the Company after 7.3.2001. Further, the Company took a perilous course in not cross-examining the Claimant's testimony in regard to his continued working after 7.3.2001. His evidence remained unchallenged. And what is not challenged is deemed accepted. That is the law (per Gopal Sri Ram JCA in ***Aik Ming (M) Sdn. Bhd. & Ors v. Chong Chin Chuen & Ors***

and another appeal (1995) 2 MLJ 770; per Augustine Paul JCA (now FCJ) in ***Ayoromi Helen v. Public Prosecutor (2005) 1 MLJ 699***).

28. Three other inescapable evidence before the Court lend further weight to the Claimant's claim of having worked in the Company after 7.3.2001. First, the evidence of Badrul Hisham bin Mohammad Zawazi, a subordinate of the Claimant, that at a meeting held on 24.4.2001 he and two other subordinates of the Claimant were instructed by Wan Azmi not to report to the Claimant but instead to himself. That such a meeting was held and an instruction of like was given is admitted by COW1. Secondly, the evidence before me is that it was only on 15.5.2001 through the Company's Revocation Letter that the Company took steps to require the Claimant to complete the Company's handover note to facilitate handing over of official items and documents. Thirdly, the various responses of COW1 when cross-examined on the fact of the Claimant having worked in the Company after 7.3.2001. For its full effect I repeat them :

> *" Q: Agree after 8.3.2001, Claimant was still reporting to work?*
>
> *A: I am not too sure. "*

Later,

> *" Q:* ***Put*** *Since you are based in the KL office you do not have knowledge whether the Claimant did turn up to work after 8.3.2001?*
>
> *A: I am not a full-time Director of the Company and I don't oversee the day to day operations of the Company. As such I am not in a position to say whether the Claimant turned up to work after 8.3.2001. "*

Yet later, on Wan Azmi's purported instructions to the Claimant's subordinates :

" Q: You do agree that such instruction was given to the staff not to report to the Claimant?

A: Yes. I agree.

Q: Agree that since Claimant no longer an employee as alleged by you from 8.3.2001 therefore there was no necessity to give the staff such instructions unless the Claimant was still working with the Company?

A: There is a necessity to inform the staff. If the employees are not informed then they might take instructions from the Claimant in the capacity of his employment. "

Lastly,

" Q: You said Claimant was no longer an employee since 8.3.2001. Did the Company take any action to request from the Claimant to return his access card or any other property belonging to the Company?

A: Personally I am not too sure whether the Company requested the Claimant to return back the access card. But after the expiry of the 14 days after he received the offer letter on page 35 to 37 of AB1, the Company through the letter dated 15.5.2001 (at page 41 of AB1) requested the Claimant to hand over official items and documents belonging to the Company. "

29. I find the contention of the Claimant that he worked in the Company from 8.3.2001 onwards to remain uncontroverted by COW1's testimony. And I find that he worked not without the knowledge of the Company. I now examine the status of the Claimant *vis-a-vis* the Company from 8.3.2001 to 3.5.2001, the purported date of dismissal. Neither the Claimant nor the Company directed the Court's attention to

this question which I find pivotal to the route that I am embarking upon to resolve this matter of the Claimant's dismissal.

30. Admitted the route that I now embark upon in my decision making has not been specifically pleaded nor submitted by either party. I have directed my thoughts to the Federal Court's decision in the case of ***R. Ramachandran v. Industrial Court of Malaysia & Anor (1997) 1 CLJ 147*** where it was held that though the Industrial Court is not bound by all the technicalities of a civil court by reason of s.30 of the Act, pleadings cannot be ignored and treated as pedantry. But this ruling I find not to be at odds with the proposition of law enunciated by Gopal Sri Ram JCA in ***Quah Swee Khoon v. Sime Darby Bhd. (2001) 1 CLJ 9*** that material facts may be pleaded without the need to plead the legal consequences that follow. Facts which support the route that I now take have been pleaded by one or the other of the parties. High authority has it that it is incumbent upon me to identify issues and deal with all matters that arise. And this is what I do now.

31. Defining a contract of employment, section 2 of the Act says -

> *" 'contract of employment' means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as a workman and that other agrees to serve his employer as a workman. "*

32. ***OP Malhotra's The Law of Industrial Dispute, 6th edn., vol. 1 at page 684*** reads :

> *" The terms of the contract creating such relationship of employment may be expressed or implied, i.e. a contract of employment may be inferred by conduct which goes to show*

*that such a contract was intended although never expressed [**Thorn v. London Corp (1875) LR 10 Exch 112, 123, per Brett J – on appeal (1876) 1 AC 120 (HL); Fitzpatrick v. Evans & Co (1901) 1 KB 576 affirmed in appeal in (1902) 1 KB 505]**, as when there has, in fact, been employment of the kind usually performed by employees. In other words, creation of relation need not be, by written or verbal consent [**Thacker Coal and Coke Co v. Bruke 5 LRA (NS) 1091-98**]; it may, very often rest, on the implication of circumstances [**Pugmire v. Oregon Short Line R Co 13 LRA (NS) 565**]. "*

33. And in ***Kilang Gula Felda Perlis Sdn. Bhd. v. Aman Shah bin Abdul Khalid (1998) 5 MLJ 700*** Nik Hashim JC (now FCJ) on that same subject has this to say :

*" A contract of service under the Act need not be in writing. It can be implied. Technicalities and legal forms have no place in industrial adjudication [s.30(5)]. A liberal and not a restricted or rigid interpretation is to be adopted and applied in determining whether the claimant was a workman and whether there was a contract of service between the company and the claimant [**Hoh Kiang Ngan**]. "*

34. Applying the above principles to the instant case, I find the Claimant to have commenced under a fresh contract of employment with the Company from 8.3.2001 onwards and worked up to the date of his cessation of employment. If this not be the true position, thousands of employees in Malaysia employed in the plantations, agricultural undertakings, fishing, small businesses and retail outlets whose

employment are generally not supported by written contracts of employment would cease to be working under a contract of employment and thus lose the protection afforded by the Employment Act, 1955 and whatever recourse available under the Industrial Relations Act, 1967.

35. That in turn brings me to examine the nature of this contract of employment that existed between the Claimant and the Company. All contracts of employment are presumed to be contracts perdurable. That is, regular contracts for an uncertain period of time capable of termination for good cause and excuse; say upon the workman's resignation or retirement or medical incapacitation and many other reasons. Any such inference, is however, open to rebuttal as by showing that the contract of employment was casual in nature or for a fixed-term. The burden would lie on the one who rebuts the existence of a regular contract to lay cogent evidence before the Court in support thereof (see ***sections 101 and 103 of the Evidence Act, 1950***).

36. On 8.3.2001 the Company offered to the Claimant the Extension Contract offering him on terms stated therein, a contract of employment for one month commencing on even date. The Claimant was given the option to confirm acceptance of that contract by signing it in the appropriate space and returning it to the Company. The Claimant failed to sign. He refused to accept the Extension Contract. He went so far as to write to the Company the letter of 15.3.2001 in reply. The substance of that letter has been laid out earlier in this award. The letter made clear the Claimant's rejection of the terms of the Extension Contract. Notwithstanding, the Claimant continued to work in the Company.

37. The *précis* of all this is that the Claimant having continued to work in the Company after the termination of his fixed-term contract of employment and having refused to accept the Extension Contract of one

month and there being no evidence of any sort that the Claimant's continued employment was under a fixed-term or casual or any other type of contract of employment, I find the Claimant to have been employed afresh by the Company under a regular contract of employment with effect from 8.3.2001. There being no evidence of him having accepted any changes to his terms and conditions of employment, the terms stated in his First Contract became implied terms of his contract of employment. All save for that part on the duration of contract which through effluence of time became ineffective and thus void.

38. And am I within jurisdiction to arrive at such a finding? Going back in history, but evergreen in its wisdom, is the decision of Chang Ming Tat FC in the case of ***Dr. A. Dutt v. Assunta Hospital (1981) 1 MLJ 304*** where, in speaking of the powers of the Industrial Court, his Lordship quoted with approval Mukherjea J in ***Bharat Bank Ltd Delhi v. Employees of the Bharat Bank Ltd Delhi AIR 1950 SC 188 at p. 209*** :

> *" In settling disputes between the employers and the workman, the function of the tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or to give effect to the contractual rights and obligation of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace. "*

Company's Offer of A Second Contract

39. The Claimant's employment in the Company was interrupted by a letter from the Company dated 23.4.2001 which he received on 30.4.2001. To this letter was attached the Second Contract. The Claimant did not accept the Second Contract and the terms offered therein. He effectively carried on working under the regular contract of employment which was then subsisting.

Company Terminates Employment of Claimant

40. The Company reacted to the Claimant's failure to accept their offer of the Second Contract through serving upon the Claimant the Revocation Letter dated 15.5.2001. This letter has been referred to earlier in the narration but not reproduced. My discussion that follows makes it incumbent to reproduce this letter which shorn of its formalities reads :

> *" We refer to out letter of offer to you dated 20 April 2001 for the above position ("the offer").*
>
> *We note that the time period for the acceptance of the offer had expired yesterday, 14 May 2001. We regret to note that you have not accepted the offer todate. We also note that you had on 14 May 2001 returned the office access card and the petrol card to the company. By your conduct it shall be deemed you have no intention of accepting the offer and as such we hereby give notice that the letter of offer dated 20 April 2001 is now revoked.*

To facilitate the handing over of official items and documents, we enclose a copy of the hand over note for your completion.

We wish you every success in your future endeavour and record our sincere appreciation for your services rendered to the company. "

41. This letter, I find to not just revoke the offer of the Second Contract but also one which instructed the Claimant to hand over all official items and documents thereby effectively telling the Claimant that his services was no more required. If I had any doubts on this, that last sentence of appreciation of the services rendered by the Claimant to the Company and wishing him success in his future endeavours seals this finding of mine. No particular terms of art is required to indicate notice of termination of employment [per Lord Justice Clerk in ***Walmsley (apellant) v. C & R Ferguson Ltd (respondents) (1989) IRLR 122 CS***]. The construction to be put on the Revocation Letter should not be a technical one, but should reflect what an ordinary, reasonable workman would understand by the words used. This letter by the Company I find to translate into a dismissal of the Claimant by the Company. The date of that letter is 15.5.2001. The date of postage of the letter is not known to the Court.

Claimant Claims Constructive Dismissal

42. Even before the Claimant received the Company's Revocation Letter, the Claimant sent his Cessation Letter. The letter though dated 16.5.2001 was sent by him *via* registered mail on 17.5.2001. By this letter the Claimant claimed to have been constructively dismissed by the Company.

Which Letter Effected The Termination of Employment

43. That the Claimant's employment with the Company was terminated is a fact. The dilemma before the Court is who terminated the contract of employment between the Claimant and the Company. The former or the latter? The answer is a question of law and fact. The facts have been narrated. Now to apply the law as I understand it to be.

44. First, I am of the opinion that different rules are applicable where an employer dismisses in the sense that he 'sends away' as opposed to cases where a repudiation is alleged. The express sending away of an employee is a dismissal within the meaning of section 20 of the Act whether or not it is accepted by the workman. The workman cannot refuse to be sent away. The employer can unilaterally determine the contract of employment and no acceptance of that determination is required to effect it, nor does the workman have the right to say 'no'.

45. Secondly, a dismissal order has to be communicated to be effective. Otherwise an employer may effect a termination of employment merely by writing or even thinking of a termination and without doing more. To hold that a dismissal is effective only when a workman receives the communiqué, would again be unrealistic. For a workman can effectively avoid receipt by one method or another and claim to be a salaried employee until actual service. I therefore contribute to the belief that communication is done when the employer puts the letter in transmission through the mail or whatever other recognised means.

46. Thirdly, a dismissal as envisaged under the Act can be either with or without notice (see ***Goon Kwee Phoy v. J & P Coats (M) Bhd. (1981) 2 MLJ 129***). If it is without notice it must constitute an immediate termination of the contract, that is, a summary dismissal. If it is with

notice, it will terminate upon expiry of that notice. To say that notwithstanding such summary dismissal, the employment in fact lasted until the workman physically received the instrument of dismissal would be to say that the dismissal is not summary but on notice until such time that the workman received that instrument. That this constitute the law, I find difficult to accept.

47. Finally, whether a dismissal had taken effect does not, in my view, turn on whether the Claimant understood or knew what had happened. It turns, in my view, on what their relationship actually was on 15.5.2001. This is the date of the Revocation Letter. At the end of the day, the question is – would the Company have allowed the Claimant to work after that letter of 15.5.2001. Could the Claimant have claimed a salary after that date? I cannot imagine either question to be answered in the affirmative. In my analysis the contract of employment between the Company and the Claimant ended on the day the letter of 15.5.2001 was put into transmission. And in the absence of any evidence to the contrary, I presume that in the common course of business a letter is sent into transmission on the date that it is dated and signed. (See **section 114(f) Evidence Act, 1950**). The Claimant's Cessation Letter mailed on 17.5.2001 was superseded by the Company's Revocation Letter which brought about the end of the contract of employment between the two. And on the effect of the Cessation Letter, suffice it for me to say that when the services of a workman is terminated by two successive orders, then the second order is a mere surplusage [see the Court's decision in ***Konsortium Perkapalan Bhd. & Anor. v. Aziah Anis (2005) 1 ILR 273 at p. 292 f & g***].

48. The conclusion that is forced upon me is that the Company terminated the employment of the Claimant even before he claimed that he was constructively dismissed. Having found a dismissal effected by

the Company, my next quest as made incumbent upon me by the authority of ***Milan Auto Sdn. Bhd. v. Wong Sen Yen (1995) 4 CLJ 449***, is to determine whether that dismissal was for good cause and excuse. The only reason that can be attributed to the Company's action is what can be gleamed from the Revocation Letter. And this is that the Claimant had failed to accept the Company's Second Contract. And this reason I find, unable to translate the dismissal of the Claimant to be for good cause and excuse. I am therefore compelled to find the case in favour of the Claimant.

Claimant's Case of Constructive Dismissal

49. Be that as it may, in deference to the very full arguments which were advanced by counsel on both sides and perchance that my earlier decision is subject to question, I now proceed to examine whether the Claimant's claim of constructive dismissal can be substantiated.

50. There is of course no new point of law on the subject of constructive dismissal. It is merely a matter of applying settled principles to the particular facts of this case. And those facts in so far as relevant to these principles, if not stated earlier in this award, will be shortly stated as and when appropriate.

51. Before dealing with the merits, it is opportune at this point to restate the principles governing constructive dismissal. They are beyond argument. It is this. Constructive dismissal arises through the application of the common law right of an employee to terminate his contract of employment and consequently consider himself to be dismissed if the employer is guilty of a breach that goes to the root of the contract of employment or if the employer has evinced or shown an intention not to be bound by it any longer [per Salleh Abas LP in ***Wong***

Chee Hong v. Cathay Organisation (M) Sdn Bhd (1988) 1 CLJ 45; [1988] 1 CLJ (Rep) 298]. The test to be applied in determining constructive dismissal is the contract test and not whether the conduct of the employer was unreasonable [per Mahadev Shankar JCA in ***Anwar bin Abdul Rahim v. Bayer (M) Sdn. Bhd. (1998) 2 CLJ 197***]. And the conditions precedent to bring the termination within the ambit of constructive dismissal are that (a) there is a breach of contract committed by the employer and; (b) the breach is sufficiently important to justify the employee leaving and; (c) the employee left in response to the breach and not for other cause and; (d) the employee is not seen to have waived or agreed to the breach through delay in leaving (see ***Bryn Perrin's Industrial Relations and Employment Law***). The burden is upon the employee to prove the conditions precedent [per Azmel J in ***Chua Yeow Che v Tel Dynamics Sdn. Bhd. (2000) 1 MLJ 168***]. And when faced with a claim of constructive dismissal, the Industrial Court is charged with first determining whether there was indeed a dismissal and next to decide whether the dismissal was for just cause and excuse [per Gopal Sri Ram JCA in ***Quah Swee Khoon v. Sime Darby Berhad (2001) 1 CLJ 9***].

52. The reason which the Claimant gave in his Cessation Letter, I take to be that which operated in his mind at the material time. There are three in all. Any one of those six reasons given by the Claimant in his witness statement and relied upon by Ms. S. Kavitha in her submission in support of the claim of constructive dismissal which I found inconsistent with the three reasons stated in the Claimant's Cessation Letter, I treat to be as an afterthought.

53. Applying the principles of law earlier said I now proceed to examine the facts peculiar to this case. But before that, I must declare that in determining the issue of whether the Claimant was indeed constructively

dismissed by the Company, I have found the words of Gopal Sri Ram JCA in ***Quah Swee Khoon (supra)*** at page 21 to be most appropriate. His Lordship put his finger on the pulse of the matter when he said: "*At the end of the day, the question simply is whether the appellant (workman) was driven out of employment or he left it voluntarily*." And in the application of this test, I found two acts of the Company pivotal to the issue at hand.

54. First, it is the Claimant's testimony, in tandem with that given by Badrul Hisham bin Mohamad Zawazi ('Badrul'), a subordinate of the Claimant at the material time, that on 24.4.2001 at a meeting, Wan Azmi had instructed three subordinates of the Claimant to cease reporting to the Claimant and to report directly to Wan Azmi instead. COW1's testimony did not contradict this.

55. Next came the inactivation of the Claimant's access card used by him to gain entry into the Company's premises in Kuala Lumpur which was one of the Claimant's work place. The Claimant found this to have occurred on 28.4.2001. COW1 confirmed the inactivation of the Claimant's access card though he was unable to specify the date on which this was done.

56. It is my finding that the Company through its act of directing the Claimant's subordinates not to report to him and further by denying the Claimant access to the very place of his employment through deactivating his access card, the Company had effectively driven the Claimant out of his employment. The Company's Revocation Letter of 15.5.2001 wherein the Company had directed the Claimant to hand-over official items and documents through the completion of the Company's hand-over note, and where the Company had bid the Claimant farewell through wishing him success in his future as well as thanking him for

his services rendered to the Company, clearly evinces the Company's intention in not wanting to be bound by the contract of employment that prevailed then between the Company and the Claimant. And this in law enabled the Claimant to walk out of his employment and claim to have been constructively dismissed by the Company.

57. For reason of completeness I feel a need to address the third reason given by the Claimant in his Cessation Letter. My decision here does not negative my earlier finding that the Claimant had substantiated his claim of constructive dismissal.

58. On the promise being the Claimant's third reason. It is the Claimant's testimony that Wan Azmi had promised him that his monthly salary would be increased from RM4,500.00 to RM5,000.00 and that his sales commission would be increased from 2.5% to 5% upon completion of the First Contract. Ms. S. Kavitha sought to corroborate the Claimant's testimony through his own letter dated 15.3.2001 in response to the Company's Extension Later in which response the Claimant stated: "*I was promised two and half (2½) year period of contract to turn the Company around*" and the fact that the Company did not reply to the same. With respect, I do not find that letter of the Claimant to be supportive of the alleged promise on salary and sales commission for nowhere does it refer to these subjects. Next Ms. S. Kavitha submitted that the adverse presumption in s. 114(g) of the Evidence Act, 1950 should be arrested upon the Company for having failed to call Wan Azmi as a witness in challenge of the Claimant's testimony. En. Zulfahmi turned the boat on Ms. S. Kavitha by maintaining the position that s. 103 of the Evidence Act, 1950 put the burden of proof regarding the promise upon the Claimant and that it is upon the Claimant against whom the Court should apply adverse presumption for having failed to secure the presence of Wan Azmi. And in support thereof he relied on

the *dicta* of Siti Norma Yaakob JCA (as her Lordship then was) in ***Juahir bin Sadikon v Perbadanan Kemajuan Eknomi Negri Johor (1996) 3 MLJ 627.*** It goes like this :

> *" He who alleges must prove such allegation and the onus is on the appellant to do so. See s.103 of the Act. Thus, it is incumbent upon the appellant to produce Tan Sri Basir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Basir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered, as firstly, the respondent never raised such an allegation and, secondly, had denied even making one. For this reason the adverse inference under s.114(g) of the Act relied upon by the appellant cannot be accepted as establishing that if the witness had been produced, his evidence would work against the respondent. There is no obligation in law for the respondent to produce the witness as that obligation rests with the appellant, the party who alleges, and the fact that the appellant was unable to do so is fatal to his case. For this reason too, the adverse inference under s. 114(g) is invoked against the appellant. "*

59. Strangely all that needs to be said of the arguments canvassed by Ms. S. Kavitha is adequately covered by her Lordship Siti Norma Yaakob. All it leaves me to do is to find the Claimant's third reason of a promise being made to him by the Company unsubstantiated.

Other Issues

60. In the cause of proceedings much ado was made by both parties on the health reports pertaining to the Claimant and the terms of the Second Contract. I do not find the need to subject these to any scrutiny in view of the direction of my decision making process.

In Obiter

61. One point that caused me concern but which was not addressed by either party, I now discuss. I consider it desirable for me to express my views on this very important point. Even though it would be obiter it is relevant on that question determining which letter terminated the Claimant's contract of employment *viz* the Revocation Letter or the Cessation Letter. The enigma arose from a most undesirable and unsatisfactory facet of the Claimant's Cessation Letter. This involves the Claimant's purported date on which he considered himself dismissed. He fixed this date as 3.5.2001. That letter was dated 16.5.2001. Through that letter the Claimant purported to bring about the termination of his employment. It should therefore be treated not dissimilar from a notice of termination of employment issued by an employer. Can an employer dismiss an employee with retrospective effect? As what the Claimant sought to do. On this, ***B.R. Ghaiye's Law And Procedure Of Departmental Enquiries, vol. 2, 3rd edn. at page 1219*** reads :

> *" The dismissal or removal from service with retrospective effect is bad and beyond the powers of employer. It is now settled law that there can be no dismissal or discharge made with retrospective effect. "*

In support of this proposition of law, the learned author quotes no less than seventeen Indian Supreme and High Court decisions. Suffice for me to say this without having to repeat the case names.

62. If I should not support this proposition, a workman who decides to claim constructive dismissal after a considerable lapse of time from the date of breach of a term of contract by an employer may escape waiver or acquiescence of the breach by stating a retrospective date of dismissal. On a not dissimilar application, in ***Ang Beng Teik v. Pan Global Textile Bhd. Penang (1996) 3 MLJ 137,*** a matter concerning constructive dismissal, one of the issues that the Court of Appeal had to decide was the date on which the workman considered himself to be dismissed so as to determine whether the time limitation of sixty days imposed by s.20(1A) of the Act had been satisfied. I find the test postulated by Gopal Sri Ram JCA there helpful. This is what his Lordship said :

> *" When, therefore does the time limited by sub-s (1A) begin to run? The answer to that question must surely be : from the moment that the workman considers himself to have been dismissed without just cause or excuse. Not a moment sooner. An objective assessment of the facts of a particular case will disclose the point of time at which the workman had, by words or by conduct, considered himself as dismissed. One may then be able to say when the sixty day period fixed by sub-s (1A) began. "*

Applying this test, I find the point at which the Claimant considered himself to be dismissed to be when he wrote the Cessation Letter and mailed it on 17.5.2001.

63. But before that, my research shows that there is precedence to support a position in law that the effective date of a dismissal can be brought forward or put back. But this can only be done by mutual agreement [see ***Mowlem Northern Ltd. v. Watson (1990) IRLR 500 EAT***].

64. On the effect of a purported retrospective termination, the learned author, B.R. Ghaiye writes that there is a difference in opinion whether retrospective dismissal is wholly inoperative or it operates with prospective effect. Some Indian High Courts have held that the whole retrospective dismissal order being unseverable, is invalid. He then continues at page 1220 :

> *" As against this is a number of High Courts have held that retrospective dismissal will be deemed to operate from the date on which such a dismissal order is passed and will not be wholly invalid [see* ***Surendra Nath Shukla v. Indian Airlines (1965) 2 FLR 263: (1966) 1 LLJ 201 (Cal HC)****]. The reason is that such a retrospective portion is severable on account of which the entire order is not bad [****Satkari Chaterji v. Commr. of Police, (1966) 1 LLJ 654 (Cal HC); Nepal Chandra Guchait v. Distt. Magistrate, (1967) 2 LLJ 71 (Cal HC); Manohar Laxman Balal v. Nagpur Nagrik Sahkari Bank Limited, Mah Gaz dt. 21-1-1970 p. 467; Hanley v Pease & Partners Ltd. (1915) 1 KB 698, 715]. "***

I find myself associating with that second view that a retrospective dismissal should not be wholly invalid. It will not serve any good purpose to forcibly invalidate a clearly indicated intention to terminate a

contract of employment. *ut res magis valeat quam pereat.* This is in consonant with what is enjoined upon the Court by s.30(5) of the Act to act accordingly to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

65. The breath of the powers conferred upon the Industrial Court under s.30 subsection (4) to (6) of the Act is considerable though it goes without saying that power should be exercised reasonably and not arbitrarily [per Edgar Joseph Jr. J (later FCJ) in ***Viking Askim Sdn. Bhd. v. National Union of Employees in Companies Manufacturing Rubber Products, (1991) 2 MLJ 115 at p. 122***]. And in exercise of these powers I hold that the Claimant's dismissal cannot be retrospective from 3.5.2001 but prospective from the date the Cessation Letter was mailed, that is 17.5.2001. And in arriving at this decision I am fortified by those words appearing at page 1220 of B.R. Ghaiye's text earlier referred to :

> *" In case of Industrial Tribunal and Labour Court, the error in dismissing with retrospective effort can be rectified by giving effect to the dismissal as from the date of the order* [see ***Madhavnagar Cotton Mills Ltd v. Shri Krishna Dattatraya Patsule, 1969 ICR 566 (IC Bom)***]. The observations made by Calcutta High Court in case of Sudhir Ranjan Haldar v. State of West Bengal, that the court has no power to make a proper order on behalf of the executive authority are not applicable to a case before the Labour Court under the Bombay Industrial Relations Act because the Labour Court's powers are different than the powers of High Court [see ***Ganesh Sahakari Sakhar Karkhana Ltd. v. Bhikaba Dagadu Panthare, 1962 ICR 754, 755 (IC)***]. In view of this in industrial cases also a retrospective order

of dismissal would be deemed to be effective prospectively [see ***Bombay Pencils (P) Ltd v. Workmen, 1965 ICR 771, 774 (IT)***]. "

Remedy

66. Basing upon the circumstances revolving the employment of the Claimant and the grounds employed by the Court in arriving at its decision on unfair dismissal, reinstatement of the Claimant in his former position will not be an appropriate remedy. Instead the Court orders compensation in lieu of reinstatement. And upon the same consideration, I fix that compensation to be one month's salary.

67. Now for backwages. For the reasons stated earlier, I limit backwages to twenty four months (see Industrial Court Practice Note 1 of 1987). Next, on the scaling down of backwages. The Court having limited backwages to the Practice Note referred to, scaling down for delay is inappropriate. There being no evidence of contributory conduct by the Claimant, scaling down under this head too does not arise. And as for the application of the principle enunciated in ***Dr. James Alfred v. Koperasi Serbaguna Sanya Bhd, Sabah & Anor (2001) 3 CLJ 541,*** on scaling down arising from post-dismissal employment, there lie no evidence before me of any such employment.

68. A total of twenty-five months salary is therefore to be paid by the Company to the Claimant as compensation in lieu of reinstatement and as backwages. The remuneration of the Claimant at the time of dismissal was similar to that found in the First Contract. This is what was due to him in monetary terms – basic salary of RM4,500.00, sales commission of 2.5% on monthly sales, petrol allowance of RM350.00 and telephone subscription and bills up to RM150.00. What sales

commission was earned by the Claimant is not known to the Court. Telephone subscription and bills are reimbursement of actual expenses. Petrol allowance *ex facie* the contract appears to be a fixed allowance and not a reimbursement. In the circumstances I total this fixed allowance and the basic salary to arrive at the monthly salary due to the Claimant which adds to RM4,850.00.

Order

69. The Court orders the Company to pay the Claimant the sum of RM121,250.00, less statutory deductions, not later than 45 days from the date of this Award.

HANDED DOWN AND DATED THIS 3RD OCTOBER 2005.

(N. RAJASEGARAN)
CHAIRMAN
INDUSTRIAL COURT.