INDUSTRIAL COURT OF MALAYSIA

CASE NO:15/4-998/01

BETWEEN

BANK PEMBANGUNAN & INFRASTRUKTUR MALAYSIA BERHAD

AND

DR. ZAINUL BAHRIN BIN DATUK HJ. MOHD ZAIN

AWARD NO: 539 OF 2006

Before	**:**	**N. RAJASEGARAN - Chairman (Sitting Alone)**
Venue	**:**	Industrial Court Malaysia, Kuala Lumpur
Date of Reference	**:**	9.10.2001.
Dates of Mention	**:**	10.12.2001, 25.1.2002, 5.8.2002. 14.4.2003, 16.6.2003, 15.7.2003, 15.9.2003, 13.10.2003, 2.7.2004, 4.2.2005 and 11.4.2005.
Dates of Hearing	**:**	5.7.2004, 6.7.2004, 14.10.2004, 3.5.2005, 5.7.2005, 6.7.2005, 4.8.2005, 16.8.2005 and 22.8.2005.

Claimant's Written Submission received : 30.12.2005.

Bank's Written Submission received : 10.2.2006.

Representation	**:**	Mr. T. Thavalingam (Ms Natalia Navin with him) of M/s Zaid Ibrahim & Co., Counsel for the Bank.
		Mr. Balbir Singh (Cik Siti Fatimah bte Talib with him) of M/s Wan Balbir & Associates, 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 **Dr. Zainul Bahrin bin Datuk Hj. Mohd. Zain** by **Bank Pembangunan & Infrastruktur Malaysia Berhad.**

AWARD

The Reference

1. There is Dr. Zainul Bahrin bin Datuk Hj. Mohd Zain ('the Claimant'). There is also Bank Pembangunan & Infrastruktur Malaysia Berhad ('the Bank'). The Bank was the Claimant's erstwhile employer. The Bank moved the Claimant to a company called Pembangunan Leasing Corporation Sdn. Bhd. ('PLC'). The Claimant found reason to be unhappy with this move. He ceased employment on 18.7.2000 and considered himself to have been dismissed. The Minister of Human Resources acting under section 20(3) of the Industrial Relations Act, 1967 ('the Act') referred the dismissal to the Industrial Court ('the Court') on 9.10.2001.

Case Flow

2. The case moved sluggishly, meandering through mentions and hearing dates subsequently vacated. As to why, it cannot be discerned from the records. On 5.7.2004 it came before me. Hearing commenced on 6.7.2004. It spread over seven days, ending on 22.8.2005. Not included are two dates of hearing fixed for 5.7.2004 and 3.5.2005 which were vacated impromptu at the Claimant's insistence. The Claimant's written submission arrived on 30.12.2005 followed by the Bank's on 10.2.2006. I must record my appreciation to Mr. Balbir Singh and Mr. T. Thavalingam, learned counsel for the Claimant and the Bank respectively for their detailed submissions. I found both most helpful. I do not think it necessary to reproduce the arguments of learned counsel before me. I shall refer to it as I go along. Now, for the authorities presented by both. Mr. Balbir Singh referred to Wong Chee Hong v. Cathay Organisation [1998] 1 MLJ 92; Western Excavating (E.C.C.) Ltd v. Sharp [1978] ICR 221; Lewis v. Motorworld Garages Ltd. [1986] ICR 157; Leong Shin Hyun

v. Rekapacific Bhd & Ors [2001] 2 CLJ 288; Primason Sdn Bhd v. Chin Ooi Leng [1996] 2 ILR 1708; Barat Estates Sdn Bhd & Anor v. Parawakan Subramaniam & Others [2000] 3 CLJ 265; MCSB Software Development Sdn Bhd v. Leong Mun Kam [2004] 3 ILR 186; Jawaharlal Nehru University v. Dr. K.S. Jawatkar [1989] (59) F.L.R. 190; Jasbir Singh & Other v. Food Corporation of India 1991 (62) F.L.R. 489; AGK Sdn Bhd v. Han Keow Keow [1997] 2 I.L.R. 505, Hong Leong Bank Bhd v. Lee Sang Huat [2005] 2 ILR 172; Kelab Golf Sarawak v. Masni Mos [2005] 3 ILR 1; Dr A Dutt v. Assunta Hospital [1981] 1 MLJ 304; Telekom Malaysia Berhad v. Ramli Akim [2005] 6 CLJ 487 and Dunston Ayadurai's, Industrial Relations In Malaysia, Law and Practice, Second Edition, pg 158. As against those, Mr. Thavalingam referred the Court to Wong Chee Hong v. Cathay Organisation [1988] 1 MLJ 92; Moo Ng v. Kiwi Products Sdn Bhd Johor & Anor [1998] 3 CLJ 475; Kelang Container Terminal Sdn Bhd v. Tguan Syed Khadzail Bin Syed Salim [1993] 1 ILR 1; Bina Goodyear Bhd v. Subramaniam Kanaiappan [2004] 3 ILR 148; Konsortium Perkapalan Bhd & Anor v. Aziah Anis [2005] 1 ILR 273; Syarikat Permodalan Kebangsaan Bhd v. Mohamed Johari Abdul Rahman [2004] 2 ILR 803 and Visu Sinnadurai's Law of Contract (3rd Edition). If I do not refer to any one of these authorities, I beg to be excused; the reason being that I had found another, more on point to the issue that arose.

The *Factual Matrix*

3. On 18.7.2000 the Claimant wrote a letter to the Bank. Through that letter he informed the Bank that he believed himself to have been constructively dismissed by the Bank. Shorn of its formalities, the letter read :

"Re My Constructive Dismissal

I refer to the above matter and to my transfer to Pembangunan Leasing Corporation Sdn. Bhd.

My transfer to Pembangunan Leasing Corporation Bhd. the circumstances surrounding it and my subsequent victimisation amounts to constructive dismissal. I was denied the opportunity to be heard and was denied fair terms and conditions relating to secondment.

Further, the actual reduction of my benefits and the constant harassment forcing me to resign from several Boards is not only a reduction in remuneration and benefits but has also caused me humiliation and anxiety. This gives me reasonable cause to believe that I have been constructively dismissed.

I therefore have no option but to leave against my wishes with effect from today.

Lastly, I reserve my strict legal rights to take appropriate action for redress for all the wrongdoings against me. "

Consequent to the letter, the Claimant ceased employment on 18.7.2000. There being no other letter leading to the cessation of employment of the Claimant, I call this letter of the Claimant as 'the dismissal letter'.

4. To the dismissal letter the Bank replied. It replied by a letter dated 29.7.2000 carrying the title 'Termination of Service'. I repeat under, two full paragraphs and part of the last paragraph of that letter. Not repeating other parts of that letter does not impar the message contained therein on what is relevant to discussion that follow. I repeat the

paragraphs for the reason that it at once puts into perspective the Bank's position on this dismissal. The paragraphs are :

> *" Please take notice that we do not agree with the allegations you have made. We refer to your contract of employment dated 23 June 1989 wherein it is clearly stated that 'selama di dalam perkhidmatan Bank ini tuan boleh ditukarkan ke mana-mana bahagian Bank ini atau diarah menjalani tugas gantian sekiranya diperlukan.'*
>
> *Your secondment to PLC was in accordance with the abovesaid term and it was based on the same terms with no reduction in remuneration and benefits whatsoever.*
>
> *We have been made to understand that you are now in the employment of another organization. We deem you have thereby terminated your contract of service with the Bank. "*

5. It is appropriate now, to traverse backwards in time to trace the events leading to the dismissal letter. The seeds were sown when the Claimant commenced employment with the Bank on 1.7.1989. His appointment was to the position of Pengurus Besar, Perkhidmatan Korporat, translated to read, General Manager, Corporate Services. The appointment came in the form of an offer letter dated 14.6.1989 which stipulated the terms associated with the same. One term required the Claimant to serve a probationary period of six months, capable of being extended further if considered necessary by the Bank. That offer letter also had a performance clause relating to transfer of location and duties. It also contained a clause on terms not stated in the offer letter but elsewhere. I will have occasion towards the rump of this decision to elaborate on this performance clause and on the other-terms-of-service clause.

6. The Claimant saw confirmation in his initial appointment on 1.1.1990 effected by a letter from the Bank addressed to him dated 20.1.1990. It was signed by the then Chief Executive of the Bank, Datuk Nik Ibrahim b. Abdullah ('Datuk Nik Ibrahim').

7. Come September 1st 1999, the Claimant was promoted to the scale of 'Pengurus Besar Kanan (Sekil 1)' or Senior General Manager (Scale 1). This was done by a letter dated 3.8.1999, signed by the Bank's Executive Chairman at that time, Tan Sri Datuk Dr. Aris bin Othman ('Tan Sri Dr. Aris'). That same letter referred to a restructuring of the Bank and appointed the Claimant as Senior General Manager, Corporate Management Sector. In that same letter also was written the scheme of benefits applicable to the promoted position. I will have reason to refer in greater detail to this part of the letter at a later time. Though cannot be found in that letter, both parties are on common ground that the Claimant was required to serve a probationary period of six months in that promoted position. The parties are also in tandem on that the Claimant was not confirmed at the end of the six months of probationary period. By a letter dated 31.3.2000, that is seven months from the date of promotion, the Claimant's probationary period was extended for a further three months commencing from 1.3.2000. As to why, the reasons were stated therein. The letter was signed by Tan Sri Dr. Aris. To this letter the Claimant responded with his own letter dated 3.4.2000 in which letter he expressed generally his unhappiness over the extension of his probationary period and offered explanations to the causes stated in the Bank's letter of extension of his probation. Nowhere in that letter did he either challenge or specifically dispute the extension. I find both the Bank's and the Claimant's letters not to be a determinant in the issues before me, more so since this particular non-confirmation had not been raised by the Claimant as a breach that led to the dismissal.

8. Sometime in April 2000 the Claimant first had a discussion with Datuk Nik Ibrahim, by then designated as Managing Director and next on 19.4.2000 with Tan Sri Dr. Aris. The Claimant in a memorandum dated 20.4.2000, addressed to both Tan Sri Dr. Aris and Datuk Nik Ibrahim referred to these meetings. The meetings involved the pending movement of the Claimant to PLC. In that memorandum he spoke of his positive response to the movement or transfer as he called it. He also put forward certain requests, seven in all, in order, as he put it, to facilitate his work at PLC and also to ensure that the transfer would not make him suffer any diminution in terms of benefits, perquisites and seniority.

9. The Claimant followed with another memorandum soon after, dated 26.4.2000 addressed again to both Tan Sri Dr. Aris and Datuk Nik Ibrahim where after referring to an announcement on his transfer to PLC at the senior management committee meeting held on 20.4.2000, he reiterated two of his seven requests contained in his earlier memorandum of 20.4.2000. This was in relation to his appointment as executive or managing director of PLC and his appointment to the board of directors of PLC.

10. By a letter dated 2.5.2000, signed by Tan Sri Dr. Aris, the Bank informed the Claimant of his move to PLC with effect from 1.6.2000. The move was called 'dipinjamkan berkhidmat', literally translated as 'service on loan' or in common parlance - secondment. The period of secondment was stated to be for two years. And the position to which he was seconded to PLC was as Chief Executive. To that letter was attached an annexure listing out the terms of secondment. It was there stated that there would be no changes to his current terms and conditions of service and that his salary and benefits would be as per the Bank's service conditions, then in force and as per changes effected from time to time. It is relevant to make special reference to the entertainment allowance

that the Claimant was to receive as a term of the secondment. What this was, was stated in an annexure to a letter dated 9.5.2000 written by Wan Sulaiman Hj. Abdul Kadir, the Bank's Senior Manager, Human Resources and Administration addressed to PLC's chairman enumerating the terms of the Claimant's secondment. It was there stated that the entertainment allowance would be 'sebenar mengikut resit' or actual as per receipts. I draw attention to this because a change in quantum of entertainment allowance was subsequently treated by the Claimant to be one of the breaches of contract that led to his dismissal. Later, on 27.5.2000 another letter was written by Tan Sri Dr. Aris. This time to the Claimant direct. One annexure to this letter listed in detail the remuneration and benefits accruing to him. On entertainment allowance it now stated 'kos sebenar mengikut resit dengan had RM1,000.00 sebulan', thus limiting entertainment allowance to a maximum of RM1,000.00 per month.

11. On 31.5.2000 the Bank received a letter of even date from Messrs Harun Idris, Yeoh & Partners, a firm of advocates and solicitors. They acted for the Claimant. I will for the purpose of this decision call them the Claimant's lawyer. That letter, to the attention of Tan Sri Dr. Aris spoke of the impending 'transfer' of the Claimant to PLC and continued that 'our client accepts this unilateral instruction. However, our client does so under protest and without prejudice to his legal rights.' It spoke no further on specifics. The Bank's Senior Manager, Legal Department, Narayanan Nair replied the Claimant's lawyer by way of a letter dated 30.6.2000. In that letter he informed them that the Claimant was not transferred to PLC but was instead seconded for a period of two years, that the secondment was in accordance to the terms and conditions of service for officers and existing policies of the Bank and, that the Claimant will continue to receive remuneration and benefits accruing to his status and to be an officer of the Bank.

12. Then came a letter dated 4.7.2000 from Tan Sri Dr. Aris, as Executive Chairman of the Bank, to the Claimant. I will call this letter as the 'extension of probation letter'. The name served the intend. By that letter the Bank extended the Claimant's probationary period in relation to his promotion to the position of Senior General Manager. The extension was for a further three months of probation commencing from 1.6.2000. This amounted to a second extension of his probationary period. The reasons were stated therein and this related to the Claimant's performance. To be specific it said, "Keputusan ini dibuat setelah mengambilkira tuan masih belum menunjukkan peningkatan yang ketara dari segi keperibadian tuan sebagai pemimpin kanan Bank sejak dinaikkan pangkat berbanding dengan prestasi yang lalu." The letter continued that his performance would be assessed in his new assignment at PLC. The very next day on 5.7.2000 the Claimant's lawyer responded. In that letter the Claimant's lawyer referred both to the Bank's earlier reply to them as well as the extension of probation letter. That letter being more specific of the complaints raised by the Claimant, I cannot avoid reproducing. Shorn of its formalities it read :

> " *Re :* ***Transfer of Dr. Zainul bin Datuk Haji Mohd Zain to Pembangunan Leasing Corporation Sdn Bhd***
>
> ---
>
> *We refer to your letter dated 30.6.2000.*
>
> *Our client instruct us that your aforesaid letter does not address the specific issues raised in our letters dated 31.5.2000 and 13.6.2000 to you, in particular, on the issue of reinstatement.*
>
> *Our client, being a Board Member of Pembangunan Leasing Corporation Sdn. Bhd. is not given the appropriate title of*

Managing Director but instead, is only being given the title of Chief Executive Officer.

Our client had been promised confirmation on Senior General Manager scale by the Managing Director himself on 27.5.2000 but to date, out client has not received any such confirmation.

Further, with reference to your letter dated 4.7.2000, we are of the opinion that the contents therein are frivolous, baseless and made as an afterthought to our client's complaints against you.

Thank you. "

The Claimant's lawyer had the subject matter by its horns when they referred to confirmation of the Claimant on senior general manager scale. For that was what the original promotion was all about as can be seen from the Bank's letter of 3.8.1999 to the Claimant on that score.

13. Following this, on 18.7.2000 the Claimant wrote to the Bank the dismissal letter and summarily ceased employment. Based on the substratum of these facts I now proceed to state the law, identify the issues and apply the law to those issues.

The Law

14. Beginning with the substantive law on constructive dismissal, both Messrs Balbir Singh and T. Thavalingam have stated the law with precision. They are not at variance here. The law on constructive dismissal is however fairly settled. There is no new point. It stands very much frozen in that same position as when Salleh Abas LP left it in

Wong Chee Hong v. Cathay Organization (M) Sdn. Bhd. (1988) 1 MLJ 92. It is this :

> *"... interpretation of the word "dismissal" in our section 20. We think that the word 'dismissed' in this section should be interpreted with reference to the common law principle. Thus it would be a dismissal if an employer is found guilty of a breach which goes to the root of the contract or is 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 dismissed. "*

15. An attempt to thaw the law was begun in ***Ang Beng Teik v. Pan Global Textiles (M) Bhd. (1996) 3 MLJ 137*** where the Court of Appeal's decision was read to mean that the proper approach in deciding whether constructive dismissal had taken place was to ask whether the employer's conduct was unfair or unreasonable (the unreasonableness test). A commendable exposition of the true import of the Ang Beng Teik case can be found in the decision of KC Vohrah J. in ***Mak Weng Kit v. Reed Exhibitions Sdn. Bhd. (2000) 1 MLJ 715.*** Subsequent decisions of the Court of Appeal, notably in ***Anwar bin Abdul Rahim v. Bayer (M) Sdn. Bhd. (1998) 2 MLJ 599; Shahbudin Abdul Rashid v. Talasco Insurance Sdn. Bhd. (2004) CLJ 514*** and ***Quah Swee Khoon v. Sime Darby Berhad (2000) 2 AMR 2265*** reverted the law to its original state of freeze in that it was the contract test and not the unreasonableness test that applied to constructive dismissal. And that is the test I am behoved to apply in the instant case.

16. Continuing, to that part of the law on the burden of proof. That the burden is firmly upon the workman to show that he had the necessary prerequisites to found an action for constructive dismissal has been unshakeably put in place in our jurisprudence. The oft quoted

decision of Abdul Kadir Sulaiman J. (later FCJ) in ***Weltex Knitwear Industries Sdn. Bhd. v. Lau Kar Toy & Anor (1998) 7 MLJ 359*** is on point. Equally on point is that decision by Raus Sharif J. in ***Ling Ngong Tick (Johnny) v. Industrial Court of Malaysia & Anor (2005) 5 MLJ 119***.

17. Ending, on the prerequisites essential to turn a cessation of employment into a dismissal by way of constructive dismissal. Faiza Thamby Chik J. speaking in the unreported decision of ***Balakrishnan a/l Krishnasamy v. Western Digital (M) Sdn. Bhd. & Anor, KL-High Court-Originating Motion No. R3-25-38 of 1998*** said :

> *" The basic principles involved in determining the issue of constructive dismissal are summarised in **Bryn Perrins' Industrial Relations and Employment Law** as :*
>
> *In order for the employee to be able to claim constructive dismissal, four conditions must be met.*
>
> 1. *There must be a breach of contract which may either be an actual or anticipatory breach;*
> 2. *That breach must be sufficiently important to justify the employee resigning;*
> 3. *He must leave in response to the employer's breach; and*
> 4. *He must not delay too much in terminating the contract in response to the employer's breach.*
>
> *If 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 legislation at all. "*

That his Lordship should quote with favour Bryn Perrins is no surprise for long before that and up to the present time the Industrial Court has

consistently adhered to the preconditions enunciated in that text. Perhaps it is for this reason too that the learned author, Dunston Ayadurai in his text **Industrial Relations In Malaysia, Butterworths 1998 edn at p 134 and 135** makes reference to that same passage in Bryn Perrins' work. Mr. Balbir Singh's submission that the Claimant has to establish these same four prerequisites to establish a claim for constructive dismissal I find therefore to hold much merit.

18. The relevant point here is that the four conditions precedent to frame a case of constructive dismissal are cumulative and conjunctive and are not disjunctive. All four conditions must be fulfilled in order for constructive dismissal to occur. A workman's failure to establish any one of the conditions will render his cessation of employment not to fall within the ambit of constructive dismissal.

Why the Claimant Left Employment

19. Several issues concerning all four preconditions necessary to found a claim for constructive dismissal were attended to in great depth by both Messrs Balbir Singh and T. Thavalingam. But, I truly find it unnecessary to deal in any great depth with all of these conditions save for one. That has to do with the third condition. Recall, that this is that the workman should leave his employment for the reason of the employer committing a contractual breach. His departure from employment cannot be for any other reason. To succeed in his claim, it is incumbent upon the workman to demonstrate this condition. Failure to adduce cogent evidence to substantiate this condition will turn his departure to something other than dismissal.

20. Any concerns that I felt over such a proposition being novel, were put to rest when my legwork in the Court's library unearthed the case of ***KYM Industries (M) Sdn. Bhd. v. Cheek Hong Leong @ Cheek Han***

Leong (1994) 2 ILR 83. Learned Chairman, Yussof bin Ahmad (later to be President, Industrial Court) had cause to address this same issue with the following words :

> *" Be that as it may the court is of the opinion that the third condition stated by Byrn Perrin supra is good law. That condition is that the Claimant must leave in response to the breach and not for some other unconnected reason. In other words even if the Claimant left immediately after discovering the breach by the company but if the reasons for his leaving the company is not the breach then he will fail in his claim that he was constructively dismissed. "*

21. In the context of this proposition of law I found myself first wanting to unravel the poser of whether it is not the inherent right of a workman who is made unhappy with his employer for commission of a breach of his contract of employment, to seek employment elsewhere. I found Mr. T. Thavalingam's reference to my words in the case of ***Bina Goodyear v. Subramaniam Kanaiappan (2004) 3 ILR 148***, to be a good starting point in my analysis of this vexing question. In that case I had said that constructive dismissal is a fiction of law where an employee ceases work of his own accord and thereafter claims that he had been dismissed. And, as with all legal fictions it is subject to strict prerequisites failing which the dismissal loses its fictional status to convert into a resignation. To this statement I now find need to elaborate that there is no dismissal in the true sense of that word in a claim of constructive dismissal. The workman takes advantage and latches on to a, for want of a better word I say, technicality, to claim dismissal. That, the law says is his right. But the law also says that he has to tread with care or he will slip into the realm of resignation. This is because a legal fiction is always consistent with equity – *in fictione juris semper aequitas existit*. What is important is the *causa causans* for the Claimant's leaving. Was it to accept another

employment or was it that he could not tolerate the breach any further and left on account of it? If it was for the former, then it is a resignation and not a dismissal. And this, can only be the common sense view of justice.

22. Is this too simplistic an approach to take? My preoccupation with this question saw satiety when I came across ***Jones (appellant) v. F Sirl & Son (Furnishers) Ltd. (respondent) (1997) IRLR 493***, a decision of the Employment Appeal Tribunal. Mrs. Jones was employed as a manageress in a furnishing company. Between July and October 1993, the employer made several unilateral changes to her terms of employment. On 17th November, Mrs Jones was offered and decided to accept employment with another furnishing company. She left her employer on 24th November and claimed constructive dismissal. The industrial tribunal though finding the employer to have committed breaches of contract, found that Mrs. Jones had not proved that she had resigned in consequence of these breaches and on that account dismissed her complaint. She appealed to the Employment Appeal Tribunal and from thence, this decision. In allowing the appeal, Judge Colin Smith QC said :

> *" We turn therefore to the main issue on the appeal, namely whether the finding of the industrial tribunal that the appellant had not established that she had left in consequence of the breach was erroneous, in that they had applied the wrong test in law. In our judgement, it is clear from case law to which we were referred, namely Norwest Holst Group Administration Ltd v. Harrison [1984] IRLR 419, Walker v Josiah Wedgwood & Sons Ltd [1978] IRLR 105 and an unreported decision of His Honour Judge Peter Clark in the Employment Appeal Tribunal, namely O'Grady v Financial Management Group Services Ltd EAT/1161/94, of which we*

> *were helpfully provided with a transcript, that* ***in order to decide whether an employee has left in consequence of fundamental breach, the industrial tribunal must look to see whether the employer's repudiatory breach was the effective cause of the resignation.*** *It is important, in our judgment, to appreciate that in such a situation of potentially constructive dismissal, particularly in today's labour market,* ***there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of his contract of employment entitling him to put an end to it. Thus an employee may leave both because of the fundamental and repudiatory breaches, and also because of the fact that he has found another job. In such a situation, which will not be uncommon, the industrial tribunal must find out what the effective cause of the resignation was, depending on the individual circumstances of any given case***. " (emphasis added).

23. I find the views expressed by Judge Colin Smith QC to somewhat lessen the rigorous which appeared at first brush in relation to the third condition on identifying the reason for the Claimant's departure. It serves my sense of justice to adopt it and, I will. But I must not lose sight that, at the axis of my deliberation should lie the primary question of the effective or immediate cause of the Claimant's leaving. All other considerations can be but merely incidental to this primary question. The approach that I take will be first to determine the immediate cause of the Claimant's departure from the Bank. Next, I will briefly examine all those complaints that he had against the Bank. In the process I will evaluate whether the Bank committed fundamental breaches of his contract or if the Bank had evinced an intention not to be bound by its contract with the Claimant. And the result I will allow to temper my

decision on the third condition which I have found pivotal in determining this case.

24. Starting with the reason why the Claimant left the Bank. Mr. T. Thavalingam went into great detail on this score in the cross-examination of the Claimant. Unhelpfully he only made a fleeting reference to this area in his written submission. As for Mr. Balbir Singh he did not devote any space to the same in his submission. He stayed clear of it. Understandably so.

25. I will pronounce my decision first. After anxiously considering the entire evidence adduced, I hold that the facts and circumstances are more consistent with a finding that the *causa causans* of the Claimant leaving the Bank was to accept employment as Managing Director of Bank Kerjasama Rakyat Malaysia Berhad or Bank Rakyat as it is more commonly known. I will now proceed to give my reasons.

26. The Claimant, it will be recalled, served upon the Bank the dismissal letter on 18.7.2000 and ceased employment on that same day. In evidence at page 75 of AB1, an agreed bundle, is a page off the annual report of Bank Rakyat for the year 2000. It is entitled 'calendar of events 2000'. For the month of July, on the date of the 18th, it depicts a photograph with the caption under it - "A reception was held to welcome Bank Rakyat new Managing Director, Dato' Dr. Zainal Bahrin Datuk Haji Mohd Zain." It referred to the Claimant. Exhibit COE1 is an appointment letter given by Bank Rakyat to the Claimant, dated 28.7.2000, confirming his appointment as Managing Director of Bank Rakyat with effect from 21.7.2000 at a basic salary of RM16,000.00 per month. Benefits, monetary and otherwise, were also stated. Exhibit CLE2 is service circular no. 1 of year 2000 issued by Tuan Haji Yidris bin Abdullah of Bank Rakyat that he, pursuant to 'Fasal 46(iii) Undang-Undang Kecil Bank Rakyat', appoints the Claimant as Managing Director

of Bank Rakyat with effect from 21.7.2000. The Claimant does not deny all this. So in a nutshell, he started work at Bank Rakyat on 21.7.2000.

27. I found it of interest to the issue at hand to compare the terms offered to the Claimant by Bank Rakyat as opposed to what he was to receive on secondment to PLC. Unfortunately both learned Counsel did not pursue this path. I was left to discern the details from the exhibits before me, namely exhibit COE1 which I had introduced earlier and which contained the terms of employment, offered by Bank Rakyat to the Claimant and, pages 46, 50 and 51 of AB1 which I had referred to even earlier, detailing the benefits to be received by the Claimant on his secondment to PLC. Tabularized, the essentials only, show :

Item	**Bank's terms**	**Bank Rakyat's terms**
Basic Salary	RM14,770.00	RM16,000.00
Elaun Khidmat Perbankan	Nil	RM 2,500.00
Contractual Bonus	Nil	One month's salary
Bonus	As declared	As declared
Utiliti Kediaman	RM300.00	Nil
Gratuiti	Nil	Basic salary x 15% x months of service
Company Car	Provided	Provided
Driver	Allowance M400.00	Provided by Employer
Entertainment	Actual subject to maximum RM1,000.00	Actual subject to Garis Panduan Am
Telephone	Maximum M250.00	Not mentioned

There were other benefits both monetary and non-monetary but I find them incapable of veining any substantive discord. They crossed out

each other in many respects. On the whole, I found the terms offered by Bank Rakyat to be more attractive than that he had with the Bank. In this, I have not lost sight of directorship potentials and remuneration arising therefrom. That directorship and consequential benefits was not an impossibility at Bank Rakyat can be seen from that term which read - "Bayaran Pengarah Subsidiari : Akan ditetapkan oleh Lembaga Pengarah." But here I must add that I will have occasion later to say that directorship of other companies can only be determined by the shareholders of those companies and not by the employer.

28. I find it most relevant to apply my mind to the time when the Claimant learnt of his offer of new employment as well as the manner in which he departed the Bank. Besides throwing light on the issue of the reason for his departure, I will have reason later to refer to these facts in another context. I find to be most suitable to approach the subject by examining the Claimant's answers in cross-examination at various stages.

29. On the date of his appointment as director of Bank Rakyat he said: *"Logically speaking, of course that would have been done before 21.7.200."* Although the Claimant undertook to get a copy of the relevant resolution appointing him as a director of Bank Rakyat, he did not do so subsequently. He only produced CLE2 which is an announcement and that does not show when the resolution to appoint him as a director was tabled and approved.

30. On as to when and how the offer of employment at Bank Rakyat came to him, he said :

> *"Q: How did you come about getting this job?*
>
> *A: I did not apply for the job. It was a job entrusted upon me by the Government of Malaysia.*

Q: Entrusted upon you by Tan Sri Kasitah Gadam, the Honourable Minister of Land & Cooperative Development?

A: Yes.

Q: How was this entrustment made, by fax, telephone, etc.?

A: I do not know the process prior to my selection. But I received a letter of appointment as a Board Director of Bank Rakyat from the Minister himself.

Q: When did this letter reach you?

A: Sometime in 2nd week of July 2000.

Q: Can you produce this letter in Court?

A: I will try to retrieve it from my file.

Q: Is the letter dated sometime of June 2000?

A: Yes.

A: I now say the letter was dated in July, the 2nd week of July. "

It was indeed unfortunate that the Claimant did not eventually produce the Minister's letter to him. It would have laid to rest the search for that date on which he had confirmation of his appointment as a director of Bank Rakyat. That appointment was tied with his employment. He later continued in cross-examination :

" Q: Was the Minister's letter an offer of appointment or an appointment itself?

A: I cannot recall.

Q: Do you recall accepting the appointment?

A: Yes, I accepted whatever was stated in the letter from the Minister.

Q: When did you make this acceptance?

A: I cannot recall the exact date.

Q: Was this acceptance before 18.7.2000? (date of dismissal letter).

A: Yes. "

The position to which the Claimant was offered appointment was a high position. The appointment was made by the Government of Malaysia. And the appointment was conveyed to the Claimant through no less than by a letter signed by the relevant Minister himself. It also involved the appointment of the Claimant to the board of directors of Bank Rakyat. It is conceivable that such appointments are not hatched within a spate of days but over many weeks, if not months. It is also not improbable that the Claimant was in the know of the pending appointment well before the arrival of the instrument of appointment.

31. The Claimant had himself chosen the date on which he was to commence work :

" Q: Did they give you a choice when to start work in Bank Rakyat?

A: I cannot recall.

Q: Do you recall you chose Friday?

A: I specifically chose Friday since it is a Muslim day. It is a very good day. "

Curiously, although he was required to serve three months notice of termination of employment to the Bank, he had chosen the date of 21.7.2000. Did this mean that he knew of the job offer at Bank Rakyat, three months in advance of that date? Added to this was the Claimant's presence at a welcoming reception held on 18.7.2000, hosted by Bank Rakyat. All these irresistibly lead to a conclusion that the Claimant knew well before his dismissal letter and departure from the Bank of the offer pending from Bank Rakyat. And as to when exactly he knew, in an adversarial system, I was made slavishly dependent on the skill of learned Counsel in revealing or concealing the same.

32. The Claimant's physical departure from the Bank was not under an acrimonious cloud. Instead I found it to be under nostalgic circumstances. He had even before the dismissal letter informed PLC's company secretary that he was accepting employment as managing director of Bank Rakyat. That resulted in PLC hosting a farewell for the Claimant on the evening of 17.7.2000, that is, the eve of his departure. He accepted the invitation. There were more than ten staff present at the function. The Claimant gave a farewell speech and when questioned on that speech said: *"I cannot recall. Some of the things was for them to continue to work hard for the organization irrespective whether I was there or not."* Hardly the action and words of a man disillusioned or driven away from the Bank. The Claimant had one of two choices to effect his departure from the Bank. He could have served upon the Bank the contractual three months notice of termination. He chose not to embark upon this choice. Instead he chose to serve on the Bank the dismissal letter and walk out without notice of termination.

33. For all the reasons adumbrated, my finding of fact is that the reason why the Claimant left the Bank was to take up employment with Bank Rakyat.

34. Now then, to proceed to the second part of my inquiry, that is, to evaluate whether the various complaints which the Claimant had against the Bank amounted to fundamental breaches of contract or whether the conduct of the Bank evinced an intention not to be bound by the Claimant's contract of employment.

35. The complaints of the Claimant against the Bank stem from his move to PLC. He had seven complaints which he listed out under cross-examination. I am indeed appreciative of the systematic manner in which Mr. T. Thavalingam approached each one of these complaints under separate sub-headings in his written submission. As against this,

Mr. Balbir Singh in his written submission had what he called four chief complaints. I will not be drawn into numbers where the complaints are concerned. I found the Claimant's complaints juxtaposed and intermingled. I will therefore extract the substance from these seven and four complaints and deal with them under headings that I find appropriate.

36. I first dispose of one complaint of the Claimant which correctly goes to the root of the issue. This involved the legality of the Bank's action in moving the Claimant to PLC. This matter was not specifically raised in the Claimant's pleading nor did it by name constitute one of the seven complaints that he listed under cross-examination. Notwithstanding, both sides went to great extends in leading evidence in relation to this matter. Mr. Balbir Singh submitted extensively, quoting several authorities which he said supported the position he took. Of course it was Mr. Balbir Singh's position that the move was unlawful. He based this on the performance clause appearing in the Claimant's original offer letter from the Bank dated 14.6.1989. I had earlier said that there was a performance clause and an other-terms-of-service clause in that letter which I will refer to at the appropriate time. Now is the time. Both, appearing under the heading of 'Hal-Hal Umum' or general matters, read :

> *"Selama di dalam perkhidmatan Bank ini tuan boleh ditukarkan ke mana-man bahagian Bank ini atau diarah menjalani tugas gantian sekiranya diperlukan.*
>
> *Selain daripada peraturan dan syarat-syarat yang tersebut di atas tuan adalah juga tertakluk di bawah Peraturan dan Syarat-Syarat Perkhidmatan Bank yang berkuatkuasa dan yang akan dipinda dari masa ke masa termasuk Perjanjian Perkhidmatan dan Surat-Surat Pekeling. "*

In substance, the performance clause provided that the Claimant could be transferred to any section of the Bank and could be directed to perform alternative duties. The clause on other terms made as part of the Claimant's contract of service, service contract and service circulars. The clause further provided for changes to these from time to time. At page 6 of AB1 can be found the Claimant's signed acceptance of these terms and conditions governing his employment with the Bank.

37. Mr. T. Thavalingam made no submission on this area presumably in line with ***R. Rama Chandran v. The Industrial Court of Malaysia & Anor (1997) 1 MLJ 145*** that pleadings are not pedantry and parties are bound by the same. I am prevented from side-stepping this issue on the legality of the Claimant's secondment to PLC. I find it to be pivotal, because of evidence having been exhaustively led on it and also because of the law propounded in ***Quah Swee Khoon (supra)*** that if the facts relevant to the point at issue had been pleaded, it is unnecessary to plead the legal result flowing therefrom. Failure to direct my mind to this complaint may raise the spectre of irrationality on my part.

38. The law on the transfer of employees within a group of companies is fairly settled. I am grateful to Mr. Balbir Singh for those authorities that he referred the Court to. If I make no mention to any, it is because I have, as stated before, found others which are more in point to the issue at hand. Raus Sharif J. summarized the law on transfer most adequately when he spoke in ***Chong Lee Fah v. The New Straits Times Press (M) Bhd. (2006) 1 MLJ 289*** :

> *" It is an acceptable principle that the right to transfer an employee from one department to another and 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. In fact this right of transfer is*

embodied in the Industrial Relations Act 1967, where s13 provides that a company has the right to transfer its employees within the organization so long as such transfer does not entail a change to the detrimental of an employee in regard to the terms of employment. "

His Lordship then continued with the following *caveat* on an employer's right to transfer :

" Clearly, the right to transfer is not without restriction. In Ladang Holyrood v. Ayasamy a/l Manikam & Ors [2004] 3 MLJ 339, Arifin Zakaria JCA (now Federal Court judge) endorsed the right of the company to transfer its employees from one company to another within its organization but subject to well recognized restrictions as set out in Ghaiye's Misconduct in Employment which are as follows :

(i) there is nothing to the contrary in the terms of employment;

(ii) *the management has acted bona fide and in the interest of its business;*

(iii) *the management is not actuated by any indirect motive or any kind of mala fide;*

(iv) *the transfer is not made for the purpose of harassing and victimizing the workmen; and*

(v) *the transfer does not involve a change in the condition of service.*

His Lordship further went on to state that whether a transfer entails a change to the detriment of an employee in regard to the terms of employment; or whether the transfer was bona fide is a question of fact for the court to determine. "

39. Wan Suleiman bin Hj. Ab Kadir, the Bank's Senior Manager from the Human Resources and Administration department produced that part relevant to transfers contained in the Bank's regulations and conditions of service which as had been stated earlier, been made contractual to the Claimant. I admitted and marked the document exhibit COE4 in the face of objection by Mr. Balbir Singh which I had overruled. Article 20.1 of COE4 reads :

> *" All officers are subject to transfer, at the absolute discretion of the Bank to any branch or department of the Bank or seconded to any subsidiary of the Bank, or any company where the Bank has an interest or any other institution as directed by the Bank. "*

That part of the ambiguity appearing in the performance clause on what "ke mana-mana bahagian Bank" meant, I found to be resolved by the specific words contained in that article 20.1. The impact of all those cases which Mr. Balbir Singh referred to inconnection with prohibition of a move to a separate legal entity faded in view of this term. In the circumstances I found nothing in the Claimant's contract which prevented his move to PLC which is a subsidiary of the Bank. In the event, the general principles on transfer as advocated by Raus Sharif J. in the Chong Lee Fah case applied.

40. My familiarity with the decision of Arifin Zakaria J. (now FCJ) in ***Rosneli Kundor v. Kelantan State Economic Development Corporation (1997) 3 CLJ Supp 470***, caused me some concern. In that decision, his Lordship dealt with the legality of the employee's secondment from her employer to the holding company of the employer. In that case, the employee was governed by a transfer clause which said that she could be transferred 'di mana-mana tempat'. The learned Judge in interpreting this phrase held that the employee could be posted

anywhere but confined within her own organisation. He held that the employer could not second the employee to the holding company for the reason that it was a different legal entity. But his Lordship imposed a *caveat*. The employee could be seconded to a different legal entity but with her prior consent. The decision was upheld by the Court of Appeal, reported under the same title at ***(2004) 4 CLJ 492***. My concern at first brush, evaporated under the factual matrix of the instant case. Here the Claimant had consented to secondment to any of the Bank's subsidiaries or associates. He did this in two ways. First, when he agreed to that term in his contract as detailed in the earlier described article 20.1 and next, in his very conduct preceding and immediately succeeding his secondment. This relates to the correspondences that he entered into with Tan Sri Dr. Aris whilst discussing his secondment to PLC and to those actions that he took at PLC upon reporting there. I will have cause to refer to these actions later.

41. Having resolved that part on the legality of the secondment, I next move to examine whether in real terms, the Claimant lost out as a result of his secondment to PLC. Monetarily there is only one complaint that he makes. This involved the entertainment allowance payable to him. He was originally paid on allowance of RM500.00 per month. Then on 1.3.1991 came a change. This change was effected by a letter dated 6.3.1991 addressed to the Claimant, written by Datuk Nik Ibrahim. The change was that the Claimant could now "dilayakkan menuntut Elaun Keraian berdasarkan kos sebenar mengikut resit." The effect of this change in law was that the fixed entertainment allowance of RM500.00 per month now became a claim of reimbursement for entertainment based on actual spent as per receipts produced. The Claimant did not object to this change and accepted the same. There was no change to this situation at the time of the Claimant being informed of his secondment to PLC. Then came the Bank's board meeting of 22.5.2000. At that meeting, the Bank's board of directors decided to revise the

entertainment allowance. The revision affected all salary grades and ranks including Senior General Manager, the rank which the Claimant held. All employees had caps imposed on the reimbursement which they could now claim. Employees of the rank to which the Claimant belonged had their reimbursement capped at RM1,000.00 per month. The effective date of this was 1.6.2000. A memorandum to this effect dated 27.5.2000, signed by Tan Sri Dr. Aris was sent to all employees affected by the change. Consequently the letter which Tan Sri Dr. Aris wrote to the Claimant on 27.5.2000 detailing the benefits that he would receive upon his secondment to PLC reflected this change. This change, the Claimant relates to his move to PLC and avers is to his disadvantage. What seems to have escaped the Claimant is that the change involving the so-called entertainment allowance would have applied to him irrespective of his secondment to PLC. The term 'entertainment allowance' was a misnomer. It was reimbursement of actual spent on entertainment. In the absence of any evidence to the contrary, I take it that this involved entertainment correlated with the Claimant's official duties. It carried no monetary benefit of any sort to the Claimant. He just could claim what he spent. And this, he spent ostensibly on people in relation to the Bank's business. Surely not on himself or his family or friends, for if it was, it would have amounted to a tax scam. The Bank in its wisdom had decided to spend less in this area. All the Claimant had to do was to spend less. He would not have been put out of pocket. I therefore find the Claimant's complaint on the so-called entertainment allowance to be misconceived. So sure of this I am, that I find no need to discuss the Bank's contractual right to change the terms of service from time to time.

42. Another of the Claimant's complaint was that he was asked to resign as a board member of a company called BESTA. And the Claimant did. That the Claimant was asked upon his secondment to PLC to resign from the board of BESTA is common ground between the

parties. How this can convert into a fundamental breach of the Claimant's contract of employment is puzzling. It is not a term of his contract of employment that he was to be made a director of any company. Nor can it be. For the decision to be appointed to the board of any company is a decision of the shareholders of the company (see ***Life Insurance Corporation v. Escorts Ltd & Ors AIR 1986 SC 1370***). Tan Sri Dr. Aris' evidence that *"Directorship for subsidiaries and associates of the Bank is not in the contract of all executives. It is a privilege rather than a right"* echoed what I have just said. That part of the Claimant's stand that he was harassed to resign from the board of directors of BESTA I disregard, for the reason that it is common practice and politeness to seek a director's resignation rather than to pass a resolution to remove him unceremoniously. In any event, in the final count, the Claimant, after resignation from the board of BESTA was appointed as a director of PLC, the very company where he was working. And there is no evidence before me that a director in BESTA is better off than a director in PLC. And on the granting of directorship to the employees of the Bank, Tan Sri Dr. Aris said : *"But as indicated earlier, I have to ensure a fair distribution. By being a director of PLC there need to be a relinquishment of one directorship which happens to be at BESTA."* Given this state of affairs I am not easily moved to behold that the Claimant had suffered any fundamental breach of his contract in connection with the matter of directorship.

43. I now turn to address those pot-pourri of complaints with which the Claimant sought to show that various actions of the Bank had damaged the relationship of confidence and trust between them. His litany of complaints, I found to be largely a mixture of exaggeration, triviality, afterthoughts and in some cases with respect, bordering on absurdity. Stepping aside for a moment for the law on the subject of damaged relationship of confidence and trust. The Court of Appeal in ***Quah Swee Khoon (supra)*** endorsed that part of the decision of the

Employment Appeal Tribunal in ***Woods v. WM Car Services (Peterborough) Ltd. (1981) IRLR 347*** where it was held that destruction or serious damage to the relationship of confidence and trust between an employer and employee is a fundamental breach amounting to a repudiation of the contract of employment. And on how to determine such a breach, I find timely assistance from the passage repeated under, from ***Woods v. WM Car Services (Peterborough) Ltd (supra)*** :

> *"To constitute a breach of this implied term (mutual trust and confidence) it is not necessary to show that the employer intended any repudiation of the contract :* ***the tribunal's function is to look at the employer's conduct as a whole and determine whether it's effect, judged reasonably and sensibly is such that the employee cannot be expected to put up with it*** : *see British Aircraft Corporation Ltd. v. Austin (1978) IRLR 347.* ***The conduct of the parties has to be looked at as a whole and its cumulative impact assessed*** *: Post Office v. Roberts. "* (emphasis added).

Also on point is that part of the decision in ***Bank of Credit And Commerce International SA v. Ali and others (No. 3) (1999) IRLR 508*** where Lightman J. referring to the House of Lords case of ***Malik Mahmud v. BCCI (1997) IRLR 462*** stated :

> *" The principle stated by the House of Lords may, I think, be expanded as follows :*
>
> *(1) the misconduct on the part of the employer amounting to a breach must be serious indeed, since it must amount to constructive dismissal and as such entitles the employee to leave immediately without any notice on discovering it.* ***The test is whether the employer's conduct is such that the employee cannot reasonably be expected to***

tolerate it a moment longer after he has discovered it and walk out of his job without proper notice." (emphasis added)

Above all, that one-liner, employing language unrivalled in its trenchant lucidity, perfectly encapsulates the law on that which I am required to ultimately determine. And that is : *"At the end of the day, the question simply is whether the appellant (workman) was driven out of employment or left it voluntarily."* It was said by Gopal Sri Ram JCA. He said it in ***Quah Swee Khoon (supra).***

44. Evidence was led by both parties on that part relating to the confirmation of the Claimant. To put in proper perspective, this involved the confirmation of the Claimant in the rank and salary grade of Senior General Manager, Scale 1. It will be recalled that the Bank decided to extend the extended probationary period of the Claimant for a further period. Facts pertinent are that the decision to extend was based on his work performance at the Bank and not PLC, he continued to draw the salary in the promoted grade and, that it was not the Claimant's case that the Bank did not have such a right of extension. The assessment of suitability for confirmation after probation has been long held to be the prerogative of management. I found the Bank not to be capricious nor arbitrary in extending the Claimant's probation. It was preceded by performance evaluation and the reason for the extension was clearly stated in the letter informing the Claimant of the extension of his probationary period. The correct course of action was to discuss the issue with the Bank. But he chose not to, and to cease employment. And that, I find to be premature and hasty.

45. On that part of Mr. Balbir Singh's submission on humiliation, embarrassment and demotion suffered by the Claimant. With respect, I do not find the evidence supportive of such contention. From being a

head of department, the Claimant was seconded as the chief executive of a subsidiary. Chief executive or managing director, he was still at the helm of PLC. He was not dragged unwillingly to PLC. His secondment was the subject of discussion and even negotiation of terms initiated by the Claimant. This is evidenced by the contents of his memorandum dated 20.4.2000 addressed to Tan Sri Dr. Aris on his secondment to PLC. I had referred to this memorandum earlier. In this memorandum, the Claimant enumerated the reason behind his transfer to PLC which was to enhance the performance of that company and declared that he took this move to be an honour as well as a challenge. The general tone of the letter was that of a man inspired to move to PLC. Not only that, the Claimant even made several requests regarding his position inconnection with the move. Notable amongst these were his requests to be designated as managing director or executive director; to be made a director of PLC; to postpone his date of secondment by one month and; to even change the composition of PLC's board of directors. He also sought reassurances on maintaining his seniority status and his monetary benefits. Some amongst his requests were subsequently implemented by the Bank. Save for maintaining on par his terms and conditions of service, the Bank really did not have to concede to any of his other requests.

46. Moving forward in time to examine the Claimant's conduct in PLC after his move there. Did he paint a picture of reluctance? Far from it. He displayed great enthusiasm in carrying out his new role. He went to the extent of making changes not only to the existing organizational set-up, but also to the physical structure of PLC, expending substantial sums of money. All this I find to be acts of a person settling down into his job and not with a little gusto. And this leads me to the crucial finding of fact that the Claimant would have remained in his position at PLC if not for the offer of employment with Bank Rakyat. The contagion effect will be that the effective cause of the Claimant's departure from his

employment with the Bank was to accept employment in Bank Rakyat. Driven out of employment from the Bank, he surely was not.

47. The picture that emerged of the Claimant, as seen from his various correspondences with the Bank starting from his very first letter of 15.4.1989 written even before he commenced employment, is one of a person who was quick in seeking and offering clarification and who had no qualms in expressing his views. He was no push-over. In Court, the Claimant gave intelligent evidence, though with respect, prone at times to verbosity. He tried hard to weave a picture of unjust treatment, seeking advantage of all instances however remote. I found Tan Sri Dr. Aris to be non-partisan, objective, clear in his action involving the Claimant's move to PLC and his general responses to the Claimant's requests made in the memorandum which the Claimant wrote to him. He was an impressive witness, straightforward and direct in his evidence. He has since retired from his position in the Bank. That the Claimant's dismissal letter came as a surprise to him was indicative of the impressions given to him by the Claimant and to his state of mind in his dealings with the Claimant. I found no evidence of the Bank being actuated by *mala fide*s in its dealings with the Claimant.

48. The Claimant, who had hitherto been amenable if not enthusiastic, about his secondment to PLC as can be gauged from his memoranda of 20.4.2000 and 26.4.2000 written to both Tan Sri Dr. Aris and Datuk Nik Ibrahim, uttered his first growl with that letter dated 31.5.2000 which he had his lawyer serve on the Bank. In that letter he made his first challenge to his move to PLC and put on notice the Bank that he was accepting the move under protest and without prejudice to his legal rights. The growl became a roar with the second letter dated 13.6.2000 sent to the Bank by his lawyer, listing out an array of complaints and giving the Bank thirty days to remedy the same failing which the Claimant would consider himself dismissed. Then came the pounce, in

the form of the dismissal letter of 18.7.2000. From the growl to the pounce took just six weeks. Considering the nature of the job offer from Bank Rakyat, the institution to which the offer related and, the mechanism preceding the making of such an offer, it is not inconceivable that the Claimant knew of the impending offer well before the dismissal letter of 18.7.2000.

49. Lest I be blamed for incompleteness, I make mention of two letters, both dated 29.6.2000 tendered by the Claimant as exhibits CLE1(a) and (b). They are purported to be written by the Claimant to both Tan Sri Dr. Aris and Datuk Nik Ibrahim. One is a complaint regarding directorship in BESTA and the other on his confirmation in the Senior General Manager scale. I only make mention but take no regard of these two letters. The reason is that both were unsigned and the Bank denied having received both.

50. Mr. T. Thavalingam closed his written submission by quoting the case of ***Bina Goodyear v. Subramaniam Kanaiappan (supra)*** on the concept of constructive dismissal. I had earlier referred to the same in calling constructive dismissal as a fiction of law. I find it timely to be reminded of this now. *Fictio cedit veritati*, *fictio juris non est ubi veritas* that is, fiction yields to truth; where the truth appears there is no fiction of law.

51. It is the purpose and role of the Industrial Court to dispense justice equally to both workmen and employers alike. The Court should be vigilant to safeguard the true intent behind the concept of constructive dismissal. It will not tolerate deception by a workman desirous of resigning from his employment to decorate a case for constructive dismissal. The truth has shattered the fiction which the Claimant would have the Court believe. There was no dismissal. The Claimant resigned. And so the Bank wins.

Order

52. The Claimant's prayer that his dismissal was without just cause or excuse is unfounded and is therefore dismissed.

HANDED DOWN AND DATED THIS 3RD APRIL 2006.

(N. RAJASEGARAN)
CHAIRMAN
INDUSTRIAL COURT.