INDUSTRIAL COURT OF MALAYSIA

CASE NO : 15/4-629/01

BETWEEN

SHARIKAT PERMODALAN KEBANGSAAN BERHAD

AND

MOHAMED JOHARI BIN ABDUL RAHMAN

AWARD NO : 921 OF 2004

Before	:	**N. RAJASEGARAN - Chairman** (Sitting Alone)
Venue:	:	Industrial Court Malaysia, Kuala Lumpur.
Date of Reference	:	15.5.2001.
Dates of Mention	:	27.7.2001, 30.1.2002, 7.8.2002, 4.8.2003, 10.2.2004 and 19.4.2004.
Dates of Hearing	:	20.4.2004 and 26.4.2004.
Company's Written Submission received	:	12.5.2004.
Claimant's Written Submission received	:	26.6.2004.
Company's rejoinder received	:	30.6.2004.
Representation	:	Mr. T. Thavalingam (Mr. Teofilus Ponniah with him) from Messrs. Zaid Ibrahim & Co., Counsel for the Company. Encik Nazri bin Hussin from Messrs. Yazli Zain Megat & Murad 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 **Mohamed Johari bin Abdul Rahman** (hereinafter referred to as "the Claimant") by **Sharikat Permodalan Kebangsaan Berhad** (hereinafter referred to as "the Company").

AWARD

1. Mohamed Johari bin Abdul Rahman ('the Claimant') *vide* a letter dated 29.9.1998 served on his employer, Syarikat Permodalan Kebangsaan Berhad ('the Company') ceased employment on that very day and thereafter on 25.11.1998 appealed under section 20 of the Industrial Relations Act, 1967 ('the Act') which appeal prompted the Honourable Minister of Human Resources acting under that same section of the Act to refer on 15.5.2001 the Claimant's cessation of employment as a dismissal to the Industrial Court which reference was received by Industrial Court 15 ('the Court') on 13.6.2001.

THE FACTS

2. The parties are on common ground on the facts that unfold.

3. The Claimant commenced his career with the Company on 15.9.1981 in the position of Accounts Executive at a salary of RM700.00 per month. After several promotions, at the time of his cessation of employment on 29.9.1998 he held the position of Assistant Group Financial Controller earning a salary of RM7,500.00 per month.

4. The Claimant's contract of employment is embodied in his original appointment letter dated 14.9.1981 exhibited at pages 1 and 2 of CLB.

5. The Company had caused to write to the Claimant a memorandum dated 3.8.1998 through the hand of one Jamal Sh Hassan Sulaiman Damanhoori, entitled 'Akaun SPKB Dan Anak-Anak Syarikat' on work related matters and giving him one week to complete the five assignments mentioned therein.

6. The Claimant applied to the Company for leave of absence of 14 days commencing from 6.8.1998 to 21.8.1998 through completing the Company's leave application form, dated 20.7.1998, stating the reason as "compulsory residential visit to RMIT Univeristy, Melbourne, Australia (MIM/RMIT course)." That leave application form exhibited at page 5 of CLB has an approval column where the words "adalah diluluskan/tidak diluluskan" have been left undisturbed and that space for the signature of the approving authority and date thereof is blank.

7. On failing to receive a response from the Company on his leave application, the Claimant wrote a letter dated 4.8.1998 to the Company in this connection, exhibited at page 6 of CLB.

8. The Claimant then proceeded on leave for the period stated in his leave application form.

9. On the Claimant's return to work, the Company served him a letter dated 21.8.1998 entitled "Bergantung Kerja", exhibited at page 8 of CLB, which letter caused him to be suspended from employment from 22.8.1998 to 6.9.1998 to facilitate investigations into the various allegations stated therein.

10. The Claimant next received a letter dated 22.8.1998 entitled 'salary reduction', exhibited at page 10 of CLB, the contents of which in brief informed him that due to financial difficulties the Company in a cost

cutting exercise was revising his monthly basic salary to RM6,000.00, representing a 20% reduction, with effect from 1.9.1998.

11. By a letter dated 5.9.1998, found at page 13 of CLB, the Company requested the Claimant to attend a domestic enquiry scheduled to be held on 10.9.1998, informed him of an extension of his suspension from work for a further 14 days from 7.9.1998 to 20.9.1998 and that the charges preferred against him were :

> " (1) Pada 6 Ogos 1998 hingga 21 Ogos 1998 tuan telah pergi bercuti tanpa kelulusan daripada Pihak Majikan terlebih dahulu hingga menyulitkan pihak Pengurusan di dalam pengendalian kerja harian.
>
> (2) Tuan telah gagal melaksanakan kerja-kerja yang telah diarahkan kepada pihak tuan oleh Encik Jamal Damanhoori (surat arahan bertarikh 3 Ogos 1998 dilampirkan). "

12. A domestic inquiry was held as scheduled on 10.9.1998, the notes of evidence of which are exhibited as COE4.

13. The Company notified the Claimant of its decision on the outcome of the domestic inquiry *vide* a letter dated 21.9.1998, exhibited at page 15 of CLB.

14. Thereafter the Claimant by a letter dated 29.9.1998 addressed to the Company and exhibited at page 16 of CLB, ceased employment by way of constructive dismissal ('Termination Letter').

CONSTRUCTIVE DISMISSAL

The Law

15. Constructive dismissal – a fiction where a workman ceases employment of his own volition on account of his employer's conduct and thereafter claims that he has been dismissed. As with all legal fictions it is subject to strict prerequisites failing which the dismissal loses its fictional status to convert into resignation.

16. The principle of constructive dismissal not previously unknown to the Industrial Court saw its affirmative rebirth in Malaysian industrial jurisprudence through ***Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd., (1988) 1 MLJ 92,*** fathered by the contract test spawned in the intellect of Lord Denning M.R. in ***Western Excavating (Ecc) Ltd. v. Sharp. (1978) 1 RLR 27 CA***, when Salleh Abas, L.P. speaking for the Supreme Court said at page 95:

> " *The common law has always recognized the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as effects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer.* "

17. That the principle of constructive dismissal in Malaysia is based on the contract test and not on the unreasonable conduct test has been firmly entrenched by a host of authorities. Suffice for me to quote Mahadev Shankar JCA speaking at page 605 in the Court of Appeal decision of ***Anwar bin Abdul Rahim v. Bayer (M) Sdn. Bhd; (1998) 2 MLJ 599*** :

> " *It has been repeatedly held by our courts that the proper approach in deciding whether constructive dismissal has taken place is not to ask oneself whether the employer's conduct was unfair or unreasonable (the unreasonableness test) but whether 'the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer to be bound by the contract.'* [See ***Holiday Inn, Kuching v. Elizabeth Lee Chai Siok (1992) 1 CLJ 141*** and ***Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd. (1988) 1 MLJ 92 at p. 94***]. "

And as to why this is so, Salleh Abas L.P. in ***Wong Chee Hong (supra)*** explains:

> " *... 'constructive dismissal' does not mean that an employee can automatically terminate the contract when his employer acts or behaves unreasonably towards him. Indeed if it were so, it is dangerous and can lead to abuse and unsettled industrial relations.* "

18. That constructive dismissal is within the ambit of a reference under section 20(3) of the Act was reaffirmed by Salleh Abas L.P. in that same landmark decision when he said:

> *"... interpretation of the word 'dismissal' in our section 20. We think that the word 'dismissal' in this section should be interpreted with reference to the common law principle. Thus it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it. In such situations, the*

employee is entitled to regard the contract as terminated and himself as dismissed. "

19. The prerequisites to found a claim of constructive dismissal as written in ***Bryn Perrins' Industrial Relations and Employment*** has been repeated so often both in the Industrial Court as well as higher courts that it has come to be a rule unto itself. I repeat that part of the text.

" *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 by the employer. This may be either an actual breach or an anticipatory breach;*

2. *That breach must be sufficiently important to justify the employee resigning or else it must be the last in a series of incidence, albeit erroneous interpretation of the contract by the employer, will not be capable of constituting a repudiation in law;*

3. *He must leave in response to the breach and not for some other, unconnected reason; and*

4. *He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract....*

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. "

The Court's Function

20. The Court upon receiving a reference from the Minister under section 20(3) of the Act is compelled by the enunciation of Mohamed Azmi FCJ in ***Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. & anor (1995) 2 MLJ 753*** and ***Milan Auto Sdn. Bhd. v. Wong Seh Yen (1995) 3 MLJ 537,*** to carry out a twofold process *viz* (a) first, to determine whether the misconduct complained of by the employer has been established, and (b) secondly, whether the proven misconduct constitute just cause or excuse for the dismissal.

21. That the Industrial Court should in a case of constructive dismissal act no different is confirmed by Gopal Sri Ram JCA at page 2283 of ***Quah Swee Khoon v. Sime Darby Berhad, (2000) 2 AMR 2265*** where his Lordship said:

" The task is no different where a case of constructive dismissal is alleged. The Industrial Court must in such a case also determine firstly whether there was a dismissal. And secondly, whether that dismissal was with just cause and excuse. "

Evidential Burden

22. I next broach the subject of evidential burden. There is no new law. Cases abound that the burden lies upon the workman to prove all

the necessary ingredients of constructive dismissal. This is no different from the position that when in dispute, the burden is upon the workman to prove that he had been dismissed. Azmel J (as his Lordship then was) reconfirmed the law when in ***Chua Yeow Cher v. Tel Dynamic Sdn. Bhd, (2000) 1 MLJ 168*** his Lordship said :

> *" It is now trite law that in a reference before the Industrial Court by an employee complaining that he had been constructively dismissed by his employer the burden is on the employee to prove that he had been dismissed unlawfully. "*

23. Does the evidential burden lie on the workman throughout in a litigation involving constructive dismissal? The weight of authority is that it does not. That burden upon him ceases with the establishment of dismissal, albeit effected by way of constructive dismissal. And in a reference under section 20(3) of the Act, once the dismissal is established, the Industrial Court moves into the second limb of inquiry to determine whether the employer had just cause and excuse for the dismissal. And here the burden shifts upon the employer. Raus Sharif J. in ***Pelangi Enterprises Sdn. Bhd. v. Oh Swee Choo & Anor, (2004) 6 CLJ 157*** refers to this shifting of burden calling that upon the workman as "the first burden of proof" at page 165 and that upon the employer as the "second burden of proof" at page 166.

Pleadings

24. Before I depart the law on constructive dismissal, there is one further aspect, made crucial by binding authority, though not restricted to constructive dismissal alone, to be mentioned. This is that parties are bound by their pleadings. Mr. T. Thavalingam correctly submits this,

quoting Eusoff Chin CJ in ***R. Rama Chandran v. Industrial Court of Malaya & Anor (1997) 1 CLJ 147*** as follows:

> *" It is trite law that a party is bound by its pleadings. The Industrial Court must scrutinise the pleadings and identify the issues, take evidence, hear parties' arguments and finally pronounce its judgment having strict regard to the issue. It is true that Industrial Court is not bound by all the technicalities of a civil court (section 30 of the Industrial Relations Act 1967) but it must follow the same general pattern. The object of pleadings is to determine what are the issues and to narrow the area of conflict. The Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant of the issues and come to the wrong conclusion. "*

25. What submissions both Mr. T. Thavalingam and Encik Nazri bin Hussin have made are not at odds with the law hereinbefore stated.

EVIDENCE, EVALUATIONS AND FINDINGS

26. Armed with that which is required of me from the aforesaid authorities in my decision making process, I now assault the evidence, scrutinizing that which has been laid before me, to determine the direction my judgement should flow.

27. ***Goon Kwee Phoy v. J & P Coats (M) Bhd. (1981) 2 MLJ 129*** is binding authority for the proposition that the Court is restricted in its inquiry into the veracity of the reason chosen by an employer for the

dismissal. Raja Azlan Shah CJ (Malaya) (as HRH then was) speaking for the Federal Court ruled at page 136:

> *" Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it. "*

28. For all purposes a workman's letter claiming constructive dismissal is akin to an employer's dismissal letter. In both cases it is this letter that effects the dismissal. I see therefore no reason why a workman's letter claiming constructive dismissal should be treated any different from an employer's dismissal letter and be exempted from the principle laid in ***Goon Kwee Phoy (supra).***

29. The Claimant's Termination Letter claiming constructive dismissal being crucial, it is now germane to reproduce the body of the same.

> **"BERHENTI SECARA KONSTRUKTIF (CONSTRUCTIVE DISMISSAL)**
>
> Saya ingin merujuk kepada perkara-perkara seperti berikut:-

- Pada bulan September sahaja gaji bulanan saya telah dipotong sebanyak tiga (3) kali, sila rujuk surat tuan bertarikh 21/8, 22/8 dan 21/9/98. Ini adalah satu amalan yang bertentangan dengan peraturan biasa dan perlaksanaan potongan gaji untuk kakitangan bergaji RM5,000.00 keatas tidak konsisten dimana dua atau tiga kakitangan sahaja yang terlibat (termasuk saya) didalam Kumpulan SPK. Kenapa Capital Insurance Bhd (CIB) dan Pengarah Kerja Bersama dikecualikan? Ini adalah satu ketidakadilan dan berat sebelah.

- Saya telah memohon cuti selama 14 hari dari 7/8/1998 hingga 21/8/1998 untuk 'Residential Visit' ke RMIT University, Melbourne, Australia yang mana ianya satu keperluan didalam pengajian kursus Ijazah Pentadbiran Perniagaan yang dianjurkan oleh MIM/RMIT. Permohonan telah dibuat lebih awal iaitu 20 atau 21 Julai 1998, tetapi sehingga 4/7/1998 selepas 13 hari, pihak pengurusan masih belum memberi jawapan dan saya terpaksa menulis surat (bertarikh 4/8/1998) untuk bertanyakan halnya, tetapi masih tiada jawapan resmi (hingga kini). Memandangkan hal sedemikian saya terus bercuti dengan beranggapan cuti saya telah diluluskan.

  Walaubagaimana pun sekembalinya saya pada 22/8/98 di pejabat, atas sebab-sebab yang tuan sahaja tahu, dua surat bertarikh 21/8 dan 22/8 telah saya terima yang mana telah memeranjatkan saya. Ianya berniat untuk menganiayai (victimised) saya.

- Saya telah dipanggil untuk sessi Siasatan Dalaman (Domestic Inquiry) pada 10.9.98 yang mana ianya sengaja diadakan untuk menjestifikasikan tuduhan-tuduhan kepada saya seperti surat bertarikh 5/9/1998. Tuduhan-tuduhan yang dilemparkan hanya merupakan satu latihan untuk mencari kesalahan saya (fault finding exercise).

- Keputusan dari siasatan dalaman tersebut adalah sangat tidak adil dan tidak wajar dengan kononnya 'kesalahan' yang telah dilakukan. (Sila rujuk surat bertarikh 21/9/98.).

- Dalam beberapa komunikasi saya dengan tuan saya telah disyorkan untuk mendapatkan pekerjaan lain dan ini menjelaskan niat sebenarnya.

Memandangkan kepada senario di atas, satu bentuk penganiayaan telah berlaku untuk menyingkir saya dari untuk terus berkhidmat dengan syarikat ini. Maka dengan perbuatan sebegitu saya tidak mempunyai pilihan lain kecuali mengambil tindakan berhenti secara konstruktif (Constructive Dismissal). "

30. Mr. T. Thavalingam submits and correctly so, that the Claimant had under cross-examination testified that save for five grounds supporting his claim of constructive dismissal, he had no other. His testimony repeated below is in *pari materia* to his Termination Letter.

" 1. Salary was reduced by 20% and it was not done consistently to all officers earning RM5,000.00 and above.

2. When I applied for leave, I expected leave to be approved. Non-approval of leave was victimization.

3. I was called for a Domestic Inquiry on 10 September 1998. It was done as a fault-finding exercise.

4. Finding of the Domestic Inquiry was not fair.

5. In my interaction with the Joint Managing Director, on many occasions, he proposed that I should get a job somewhere else. By doing so, it is clear that his intention to make me leave the Company.

I confirm no other grounds to claim constructive dismissal. "

31. I now approach each of the reasons offered by the Claimant, not particularly in the order that he has stated, proceed to sieve the evidence before me, at all times keeping alert to the issues and attend to matters that I am bound to consider. My approach is bilateral, the second arising only upon satisfaction of the first.

First, to determine based on the reason proffered by the Claimant, that there is indeed a dismissal. For there to be one the Claimant has to satisfy all the necessary prerequisites and overcome the evidential hurdles. Second, whether the Company has just cause or excuse for the dismissal.

Leave Application And Domestic Inquiry

32. Having carefully examined the pleadings and the evidence before the Court, I find it convenient and relevant to handle together the

Claimant's complaints regarding his leave application and the holding of the domestic inquiry against him. In cross-examination these constitute his 2nd and 3rd grounds. In substance, the same appear in his Termination Letter and pleadings.

33. Negative of the breach of a fundamental term of the contract of employment, there can be no constructive dismissal. A contract of employment, capable of existence through being either expressed or implied (see section 2 of the Act), will therefore consist of terms which are similarly expressed or implied.

34. In ***Malik v. Bank of Credit and Commerce International (1997) IRLR 462,*** the House of Lords recognised the existence of a term to be implied in all contracts of employment to the effect that an employer would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and mutual trust between employer and employee (see the speech of Lord Nicholas of Birkenhead at pp 463-464; per Lord Steyn at p. 468).

35. The stand of the Industrial Court in Malaysia is not dissimilar to the position adopted in England in relation to the consequence of a breach by the employer of the implied term of mutual trust and confidence. See ***Hong Leong Management Co. Sdn. Bhd. & Anor v. Lai Teck Yaing (2004) 1 ILR 210; Cerah Damai Sdn. Bhd. v. Heng Cheng Eng (2004) 1 ILR 346,*** and ***Rimex Sdn. Bhd. v. Mering Ak Madang (1997) 3 ILR 34.***

36. The Court of Appeal in ***Quah Swee Khoon v. Sime Darby Bhd. (2000) 2 AMR 2265*** endorsed that part of the decision of the Employment Appeal Tribunal in ***Woods v. W.M. Car Services***

(Peterborough) Ltd. (1981) IRLR 347 where it was held that destruction or serious damage to the relationship of confidence and trust between an employer and employee is a fundamental breach amounting to a repudiation of the contract of employment.

37. Industrial jurisprudence has developed so as to recognise an employment contract as engaging obligations in connection with the legitimate expectation of an employee to be treated fairly by his employer. This obligation is an off-shoot of the term of mutual trust and confidence implied in every contract of employment. And this legitimate expectation of being treated fairly by the employer may be negated by conduct of the employer amounting to, unfair labour practice, victimisation or *mala fide.*

38. The breath as well as the consequences of the application of this principle is analysed by the Employment Appeal Tribunal in ***BG v. O'Brien, (2001) IRLR 496 at page 499:***

> *" Thus far, the authorities establish that:*
>
> *(a) a term to the effect that an employer will behave reasonably towards his employee cannot be implied in a contract of employment; but*
>
> *(b) this is because of the width of any such term, and not because it is open to an employer to behave in a totally unreasonable manner whilst remaining within the four corners of the contract; and*
>
> (c) *if an employer behaves in an arbitrary or capricious or totally unreasonable manner towards an employee, in*

the exercise of his (the employer's) discretion under the contract, he will be in breach of the contract. "

39. It is the Claimant's case that he had applied for 14 days leave commencing from 7.8.1998 to 21.8.1998 for the purpose of a 'residential visit' to RMIT University in Melbourne, Australia through completing the Company's leave application form. His complaint is that the Company failed to respond to his application thus forcing him to write to the Company a letter dated 4.8.1998 (the 'Appeal Letter'). The Appeal Letter too failed to move the Company to respond. Thereafter the Claimant proceeded on leave and his reasons are enumerated in his answer to question 18 in his witness statement. Paraphrased, his reasons are that he had given ample notice to the Company of his intention to go on leave; there was no proof that his application for leave was not approved since his application for leave was not rejected by the Company; and he "deemed approved" his leave application for the reason that that part of his leave application form consisting of a box entitled "Pentadbir Rekod Dan Butir-Butir Cuti" shows that the 14 days leave applied had been deducted from his balance of leave available at that point of time.

40. It is the Company's response that the Claimant had proceeded on leave without prior approval or permission, the reason being that the leave application of the Claimant was not approved as can be seen *ex facie* the leave application form. The Company further states that that part of the form within the box referred to earlier is for completion by the leave-clerk for purposes of processing the leave application. It is Mr. T. Thavalingam's submission that processing does not amount to approval. Going on leave without approval tantamount to gross insubordination. In support thereof he refers to the Federal Court decision in ***Pan Global Textiles Bhd. v. Ang Beng Teik (2002) 1 CLJ 181*** where the Federal Court quoted ***B.R. Ghaiye in Misconduct In Employment,*** where the

learned author wrote that no employee can claim as a matter of right leave of absence without permission, and ***OP Malhotra in The Law of Industrial Disputes*** where the learned author wrote that no employee can claim leave of absence as a matter of right, and remaining absent without leave will itself constitute gross violation of discipline.

41. That an application for leave by itself does not entitle a workman to proceed on leave is trite. Suffice it for me to refer to the learned Chairman Tuan Haji Syed Ahmad Radzi bin Syed Omar who in ***(1) Kuala Lumpur International Hotel Sdn. Bhd. (2) Kuala Lumpur International Management Sdn. Bhd. v. Encik Roslee Bin Idris, Award No. 700 of 2004*** said:

> *" The law on the issue of absenteeism is found in various cases. In the case of* ***Etonic Garment Mfg Sdn. Bhd. v. Kalainagal Muthusamy [1998] 3 ILR 698*** *the Industrial Court held that :*
>
> > *It is a misconception to suggest that an employee can go away whenever he submits his leave application without regard to the employer's convenience. The right of an employee to go on leave must be balanced equitably to the exigencies of the employer's business. The discretion to grant or not to grant the employees' leave is a discretion of the employer. An employee is not at liberty to absent himself from work unless and until his leave is formally and properly approved by his employer. The Claimant's contention that her leave was approved automatically is untenable and unacceptable as it would deprive the employer's vested right to refuse or grant the leave. "*

42. Encik Nazri bin Hussin in his submission referred to ***Enmark (M) Sdn. Bhd. v. Hoh Ee Li [2004] 1 ILR 101,*** a case involving an application for maternity leave. With respect, I find nothing in this case to further the cause of the Claimant.

43. It is the Court's finding that the Claimant proceeded on leave without prior approval or permission for the reason that the leave application form was not approved in the appropriate column. In this connection the Court rejects the Claimant's contention that what is not rejected is approved. The Court is further unable to accept the Claimant's reading of the completion of the box referred to in the leave application form as a "deemed approval" because it is obvious from the face of the document that this box merely reflects an administrative record of his leave status and the Court accepts the Company's version that it is completed for purposes of processing the leave application. It is further the Court's finding that the Claimant had proceeded on leave knowing that his leave had not been approved. This finding is supported by the Claimant's Appeal Letter where he wrote " ... saya telah menghantar borang cuti untuk bercuti selama empat belas (14) hari bermula 6.8.1998 hingga 21.8.1998 (tidak termasuk hari Ahad) hingga ke tarikh surat ini saya tidak menerima apa-apa jawapan" and he continued "Dengan ini, saya merayu (jika permohonan cuti saya ditolak atas sebab apa pun) agar Syarikat meluluskan permohonan cuti saya ..." His writings in the said letter are cemented in cast when the Claimant under cross-examination testified that "I agree that I went without approval."

44. So much for the leave application. And now for the initiation of disciplinary proceedings in the form of a domestic inquiry against the Claimant.

45. The Claimant takes umbrage to the domestic inquiry conducted by the Company, calling it a "fault finding exercise" done for the purpose of eliminating him from the Company.

46. ***OP Malhotra's The Law of Industrial Disputes, Vol. 2, 6th Edn. at page 1294*** reads:

> *" It is unmistakably clear from the judicial dicta in the area of disciplinary action that if the action is commenced male fide, or is a measure of victimisation or unfair labour practice, it will be liable to be interfered with by industrial adjudication. Violation of the rules of natural justice in conducting the inquiry proceedings and perversity in recording the findings are other variants of mala fides. "*

And the learned author continues ***at pages 1296 and 1297*** :

> *" Thus, the initiation of the disciplinary action, inquiry proceedings, report of the inquiry officer and the order of punishment, can all be challenged on the grounds of perversity, mala fides, victimisation and unfair labour practice. However, these are all questions of fact.* ***The burden of establishing them is on the workman who makes the allegations, by adducing relevant evidence before the tribunal*** *as it may not always be possible to decide these questions by merely looking into the records of the inquiry [see* ***Orissa Cement Ltd. v. Their Workmen (1960) 2 LLJ 91, 94 (SC); Ideal Jawa (India) Pvt Ltd v. C. Madan Mohan (1972) 1 LLJ 316, 324 (Mys); Bharat Iron Works v. Bhagubhai Balubhai Patel 1976 Lab IC 4 (SC)****]. An allegation of mala fide, such as unfair labour*

practice, victimisation or discrimination etc have, therefore to be specifically pleaded and proved. *[see* ***Firestone Tyre and Rubber Co. of India Pvt Ltd. v. The Workmen (1981) 2 LLJ 218, 225 (SC); Shankar Chakravarti v. Britannia Biscuit Co. Ltd. 1979 Lab IC 1192, 1205 (SC)****]. "*

47. Plead, the Claimant did. Prove he did not, that the domestic inquiry was an act of victimization.

48. The Claimant's allegation in his Termination Letter, repeated in his pleadings that the domestic inquiry was a "fault finding exercise" remained bare, naked of any evidence in support thereof.

49 The Court has scrutinized the inquiry notes and can find no fault in the conduct of the inquiry. The rules of natural justice had been adhered to. And the fact that the Claimant had not only signed at the end of the inquiry notes but had also initialled each page of the same leads the Court to presume that the notes are a true and correct representation of what had transpired during the inquiry.

50. The Court is mindful of its earlier decision that the Claimant had misconducted himself in having proceeded on leave without prior approval. This by itself necessitated an inquiry by the Company.

51. The second of the two charges preferred at the domestic inquiry is that the Claimant had failed to carry out certain work instructions. Both the Claimant's Termination Letter and his pleadings are silent on the matter of the second charge. Neither does he make mention of it in his witness statement. In the absence of any challenge and having perused all related documentary evidence exhibited, the Court is unable to find

any *mala fide* in the Company preferring this second charge against the Claimant.

52. In the above circumstances the Court finds the contention of the Claimant that the domestic inquiry was a fault finding exercise to be unsustainable.

53. In the upshot the Court finds that the Company has not breached any term of the contract of employment, expressed or implied, in as far as the Claimant's 2nd and 3rd grounds are concerned. No dismissal therefore can arise out of these causes.

Intention To Chase

54. The 5th ground propagated by the Claimant was that the joint Managing Director on many occasions proposed that the Claimant seeks employment elsewhere and this according to the Claimant is clear indication of the Company's intention to make him leave. That the burden towards proving this averment lay upon the Claimant is trite. The Claimant led no evidence towards establishing this fact and his allegation remains bare, devoid of any support. The Court notes that the Claimant had in his witness statement referred to a letter dated 3.9.1998 from the Company to the current account department of Perwira Affin Bank Bhd. instructing them on a change of signatories in connection with the Company's account. Save for saying that he had been removed as one of the signatories, the Claimant has not made any attempts either in his testimony or in submission to link this action of the Company to any breach of contract or *mala fide*. The Claimant under cross-examination had testified that his complaint on the letter is not one of the five grounds stated in his Termination Letter and that the same was not a ground at that time of his leaving employment since he had only

discovered of the letter a month after leaving. Finally the Court is mindful that the Claimant had been suspended with effect from 21.8.1998 and the change in signatories is from 3.9.1998. Whether it is the intention of the Claimant to link the letter on change of signatories to his 5th ground or not the Court finds that both the 5th ground canvassed by the Claimant and the letter on change of signatory as a cause for constructive dismissal cannot take off in the circumstances stated above.

Finding of Domestic Inquiry Not Fair

55. The Claimant elaborates on his 4th ground in his Termination Letter when he writes that the decision of the domestic inquiry is unfair and not commensurate with the misconduct committed. He is obviously referring to the punishment meted out which is contained in the Company's letter to him dated 21.9.1998, the relevant portion of which reads :

> " This is to inform that the Panel of Inquiry found you guilty as charged for both charges. In view of the seriousness of the misconducts committed the management has decided the following:
>
> 1. Downgrade to position of Accountant (from the present position of Assistant Financial Controller).
> 2. Reduction of salary effective from the month of September 1998 as such you will be paid a salary of RM5,418.75 per month.
> 3. Withdrawal of company car provided to you with immediate effect. "

56. Nowhere does the Claimant complain against the finding of the inquiry in as far as his guilt is concerned. His complaint as seen from his termination letter, pleadings and testimony is against the punishment imposed upon him. This is reaffirmed by the Claimant's evidence under cross-examination that a warning letter would have sufficed as punishment.

57. The issue circulates the gravamen of the two misconducts *vis-a-vis* the proportionality of the three punishment meted out.

58. Whilst Encik Nazri bin Hussin made no submission on this behalf, Mr. T. Thavalingam at page 4 of his written submission writes – "Although the misconduct committed by the Claimant was serious enough to warrant the punishment of instant dismissal, the management in recognising that all important right to livelihood decided to impose the following punishment on the Claimant as contained in the letter dated 21 September 1998." That this indeed was the position and intention of the Company, stands bare unsupported by any evidence and for this reason I give no weight to it. Mr. T. Thavalingam then referred the Court to ***Super Coffemix Marketing Sdn. Bhd. v. Loke Siew Mann (2003) 1 ILR 549*** where the Learned Chairman ruled that absence without leave is a serious misconduct which merits dismissal. Of course this ruling has to be read in conjunction with the circumstances of each case. That absenteeism *per se* should lead to dismissal cannot reflect true industrial jurisprudence. Whilst absenteeism is an actionable misconduct, punishment will depend on the circumstances of each case. The *factual matrix* in ***Super Coffeemix*** varies from the instant case. Amongst others, there it was an employee with about three years service applying for unpaid leave after having exhausted his annual leave whilst here in the instant case the Claimant had served 17 years and was applying for eligible paid leave. I therefore find ***Super Coffeemix*** unhelpful on that

issue relating to the appropriateness of the punishment meted out to the Claimant.

59. Disciplining a delinquent workman is an employer's prerogative though not without fetters, imposed by statute, contract or common law. In this connection ***Smith & Wood's Industrial Law, 7th Edn. Butterworths at page 437*** reads :

> " *Although certain forms of disciplinary action may still lie entirely within the managerial prerogative (e.g. transferring a general labourer to a different job or refusing to give a discretionary bonus), many other forms will impinge upon the rights and expectations of the disciplined employee (e.g. fines, suspension, demotion) and so* ***the crucial point about lawful disciplinary measures is that the employer must have the power to impose them****, and normally this will involve having the contractual authority (express or implied) to do so.* ***If the employer goes outside this authority the employee may in theory maintain a common law action*** *(e.g. to recover the amount of a fine unlawfully deducted); of much greater significance* ***in modern employment law is the possibility that the wrongly disciplined employee may walk out and claim to have been constructive dismissed****, for the purpose of bringing an unfair dismissal action. " (emphasis added*).

60. ***Selwyn's Law of Employment, 7th Edn., Butterwoths, at paragraph 7.57 entitled 'Demotion'*** reads :

> *" If there is an express power to do this in the contract or rules, then provided the sanction has been fairly exercised, there should not be any legal problem.* ***In the absence of such a power, it could be a breach of contract by the employer, and hence amount to constructive dismissal."*** *(emphasis added).*

61. In the instant case the designation of the Claimant which enlightens his job function and his salary puts him outside the scope of the Employment Act 1955 in which event the statutory punishment of downgrading or demotion provided in section 14(1) *ibid* is not available to the Company. The Claimant's appointment letter found at pages 1 and 2 of CLB, in the absence of any other evidence, wills the Court to treat as his contract of employment. And this letter makes no mention of the forms of disciplinary action that may be resorted to by the Company. In the circumstances the Company will have to rely on the common law form of punishment made available as management prerogative. And demotion is not one of them.

62. That demotion has serious consequences upon a workman cannot be denied. And more serious is a demotion with a reduction in salary as in the instant case. The Claimant's salary was reduced by about 28% from RM7,500.00 to RM5,418.75. There was a drastic change to his earning capacity through his contract of employment upon which his livelihood depended. And to a right of livelihood the Claimant is entitled to, if not directly by art 5(1) of the Federal Constitution, definitely by way of the authority of Gopal Sri Ram JCA speaking in ***Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan and another appeal (1996) 1 MLJ 481.***

63. The Court therefore holds that the Company having no right to exercise demotion as a punishment upon the Claimant had not merely breached a term of the Claimant's contract of employment but had essentially offered him a new revised contract of employment which he had a choice to accept or reject. If I cherished any doubts on the correctness of this, I am comforted by the words of Gopal Sri Ram JCA at pp. 148 of ***Ang Beng Teik v. Pan Global Textile Bhd. Penang (1996) 3 MLJ 137*** :

> *" Take the case of demotion. A workman in a particular case who suffers a demotion may consider himself to have been dismissed without just cause or excuse. He may treat the demotion as a dismissal. "*

64. In this demotion with a salary reduction, unlawfully done, I find the Company to have breached a fundamental term of the Claimant's contract of employment. This leads to a dismissal. And the dismissal springing from an unlawful act cannot succeed in the second limb of being for just cause and excuse.

65. I next approach the argument of the Claimant that the punishments meted but to him were disproportionate to the gravity of the offence.

66. ***OP Malhotra*** in ***The Law of Industrial Dispute (supra)*** at pages 1294 writes :

> *" In order to avoid the change of vindictiveness, justice, equity and fair play demand that the punishment must always be commensurate with the gravity of the offence charged. " [* see

Rama Kant Misra v. State of Uttar Pradesh 1982 Lab IC 1790, 1792 (SC)].

67. ***Selwyn's Law of Employment (supra) at paragraph 7.58*** reads :

> *" But if a demotion on disciplinary grounds is out of all proportion to the offence, the employee may regard the employer as having repudiated the contract, and claim constructive dismissal. "*

68. In ***British Broadcasting Corporation v. Beckett (1983) IRLR 43 EAT*** it was held :

> *" Downgrading following disciplinary offence amounted to a repudiation of contract where the punishment was grossly out of proportion to the offence notwithstanding that the disciplinary procedure expressly gave the contractual right to demote as a penalty for misconduct. "*

69. The weight of authority is therefore that punishment excessively heavy and disproportionate to the misconduct committed will lead to a breach of a fundamental term of the contract of employment. The Court in the instant case approaches the issue of disproportionate punishment under the first limb, that is, whether there has been a fundamental breach of the contract resulting in a dismissal. However ***Shanmugam Subramaniam v. JG Containers (M) Sdn. Bhd. & Anor (2000) 6 CLJ 521***, treats this same issue as falling under the second limb of determining just cause and excuse. For in the words of Faiza Thamby Chik J. at page 535 :

> *" A perusal of the award would reveal that the Industrial Court in this instant case had totally failed to perform its main duty in the second limb of its twofold function as set out in* ***Milan Auto.*** *In other words, the Industrial Court failed to address its mind as regards the harshness or severity of punishment. The Industrial Court had committed a jurisdictional error of law. "*

Whichever the limb, the result is the same.

70. The Claimant, having commenced employment as an Accounts Executive at a salary of RM700.00 and during his eighteen year career being promoted on several occasions until he held the position of Assistant Group Financial Controller at a salary of RM7,500.00, with no evidence of any past misconduct or disciplinary action, for having been found guilty of the two charges of absenteeism and non-completion of duties was punished by :

1. Demotion to the position of Accountant; and
2. Reduction of salary; and
3. Withdrawal of the benefit of the usage of the Company car assigned to him.

Three distinct severe punishments. In assessing degree of retaliation, the axiom applicable is 'one cannot stab another for being pricked with a pin'. In the instant case 'to kill a mosquito with a sledge hammer' would be more appropriate. The punishment belies the crime. *Mala fide* reigned supreme in the act of the Company. Yet another breach of a fundamental term of the Claimant's contract of employment resulting in dismissal. And there lie before me no evidence of just cause and excuse for the Company's action.

71. That the Claimant's conduct contributed towards his predicament through committing the misconducts cannot be denied. But here, for this decision, that is not a relevant consideration.

72. After having arrived at this decision, the Court for completeness will quote ***B.R. Ghaiye's Law And Procedure of Department Inquiries in Private And Public Sectors, 3rd Edn.*** where at page 1123 the learned author writes :

> *" When two penalties were imposed not by reviewing the order but by the initial order itself, then the validity of imposition of two penalties depends upon the relevant Service Rules or Standing Orders. When the Kerala Civil Services (Classification, Control and Appeal) Rules 1960, provides that Government may impose any of the penalties then it cannot be construed to mean that two penalties cannot be imposed.* ***Ordinarily in the absence of rules the punishing authority has no right to impose two punishments simultaneously or in quick succession. The subsequent punishment in that case becomes illegal. "*** [see ***Swami Saran v. State of U.P. 1969 SLR 787 (All HC)***]. *(emphasis added).*

Yet another nail on the box encasing the Company's action in this respect, which box I had, with my earlier decision, already closed.

Reduction In Salary

73. The Claimant in his Termination Letter complains of three salary deductions. So does he in his pleadings. The three are (1) half salary for the period of suspension pending inquiry from 22.8.1998 to 6.9.1998

effected through a letter dated 21.8.1998; (2) reduction by way of letter dated 22.8.1998 as a cost reduction device by the Company; and (3) the salary reduction imposed as a punishment.

74. I have dealt with the third complaint of salary deduction as a punishment. I now deal with the other two, starting with the second reduction or rather deduction arising from the two weeks of suspension pending inquiry. And on this issue both parties made no submission. In fact neither side bothered much about it.

75. ***O.P. Malhotra's The Law of Industrial Disputes (supra) at page 1182*** reads :

> *" The legal position as regards the master's right to place his servant under suspension is now well settled by judicial dicta. In* ***Hotel Imperial, New Delhi & Hotel Workers' Union,*** *the Supreme Court considered the question whether a master could suspend his servant during the pendency of the inquiry. The proposition, that under ordinary law of master and servant ,* ***the power to suspend the servant without pay could not be implied as a term in any ordinary contract of service between the master and the servant must arise either from an express term in the contract itself or a statutory provision governing such contract, was taken as settled law.*** *"* [see ***Babu Nandan Gir v. Sub-divisional officer, Salempur (1966) 2 LLJ 81 (All); P. Doraikannu v. Hotel Savoy (1966) 1 LLJ 701 (Mad) (DB); Dukhrooram Gupta v. Cooperative Agricultural Assn Ltd. (1962) 1 LLJ 353 (M) (DB)***]. *(emphasis added).*

76. ***Cisco (M) Sdn. Bhd. v. Narayanasamy A/L Manickam (1995) 1 ILR 283 at pp. 287,*** a case where the workman claimed constructive dismissal, amongst others, for the reason that he was suspended on half-pay, the learned Chairman, Haji Sabarudin bin Haji Othman (as Yang Arif then was), ruled :

> *" I am therefore of the view that in this particular case the suspension and the deprivation of the Claimant's half-month salary for July 1990 is a fundamental breach that goes to the root of the contract which entitled the Claimant to regard the contract as terminated and himself being dismissed without reasonable cause or excuse. "*

77. Statutory right to suspend the Claimant on half pay, the Company did not have. Contractual right to do so, the Company did not prove. That the Company had breached a fundamental term of contract by what it did is an inescapable conclusion. Dismissal proved under the first limb of ***Milan Auto***. And under the second limb that it was for just cause and excuse, the Company failed to discharge its evidential burden.

78. What finally left to be determined is that third salary deduction effected as a cost reduction device by the Company. Need I continue more? It needs but one bullet which if penetrated to sufficient depth to be fatal. Likewise it needs but a single breach which penetrates to the root of the contract of employment to cause the contract's demise. Caused to expire several times over, had been the contract of employment between the Claimant and the Company.

79. For me not to determine this issue of the third salary deduction would do injustice not only to both learned counsels' toil but also to expound the law as I believe it should be.

80. The Company's letter addressed to the Claimant on this salary reduction, being material has its body reproduced below :

> " SALARY DEDUCTION
>
> As you very well know, the Company is currently facing a very difficult financial situation. Various measures have been taken to address this issue to ensure the survival of our business. Among other, we have already executed a retrenchment programme involving 30 staff which had taken place in May this year. At the same time, the Company has also began disposing its assets to meet its day to day financial obligations.
>
> In view of the above, the Management has decided to take another step towards cost reduction by administering a 20% cut in salaries of executive staff earning RM5,000.00 or more. Savings to the Company as a result of this exercise would help a great deal for the Company to survive in these difficult times.
>
> We therefore wish to inform you that with effect 1st September 1998, your gross basic salary will be revised to RM6,000.00 representing a 20% reduction from your previous pay. "

81. First, I am required to determine if there had been a dismissal occasioned by the Company having breached a term which goes to the root of the contract of employment. And in doing so, foremost in my thoughts is that in the instant case, the act of salary reduction is unilateral, not by mutual consent.

82. It is the Company's pleading that facing a "difficult financial situation" the Company retrenched thirty staff in May 1998, begun disposing of assets and as a step towards cost reduction effected a salary cut of 20% affecting those executive staff earning RM5,000.00 per month or more. The Claimant was one such executive staff.

83. ***Industrial Rubber Products v. Gillon, (1977) IRLR 389*** a decision of the Employment Appeal Tribunal, Scotland involved a workman who claimed constructive dismissal on account of his employer effecting a minimal salary reduction, forced to do so in order to comply with official government pay policy. And this is what the court had to say :

> *" We would prefer to apply the perhaps more general test of whether or not in the whole circumstances the employer was in material breach of his contract of employment. If he was then the employee was no longer under an obligation to continue working with him. Applying that test we find that in the present case what has happened is that albeit for good reasons the employer felt it necessary to unilaterally to reduce the employees' basic rate of remuneration.* ***The basic rate of pay is a fundamental element in any contract of employment and in our opinion it cannot be said that there is no material breach on the part of an employer who proposes to reduce the basic rate even for good reasons and to a relatively small extent. We are therefore driven to the conclusion that the respondent was constructively dismissed in terms of para 5(2) of the First Schedule.*** *" (emphasis added).*

84. In ***Kejuteraan Samudra Timur Sdn. Bhd. v. Seli Mandoh & Anor (2004) 1 CLJ 393,*** Raus Shariff J. held :

> ***"*** *The first respondent pleaded that the unilateral reduction of his salary amounted to a repudiation of his contract of employment. Thus the question for the Industrial Court to determine was whether the contract itself provided for such a reduction. The Industrial Court made a finding that there was no such provision in the contract and the first respondent did not consent to the massive reduction of 30% of his salary. To me the Learned Chairman was right to conclude the unilateral reduction of an employees pay constitute a fundamental and repudiatory breach of the contract of employment. "*

Here in the instant case no different. There is no evidence of contractual right to reduce salary for any reason whatsoever.

85. And in ***Encik See Teow Hock v. (1) Pustaka Delta Pelajaran Sdn. (2) Gedung Ilmu Sdn. Bhd., Award No. 650 of 2004,*** the learned Chairman, Susila Sithamparam faced with an employer who for economic reasons had unilaterally reduced the workman's salary thus resulting in the workman claiming constructive dismissal, found the employer to have breached a fundamental term of the contract of employment and hence the occurrence of a dismissal.

86. With the above authorities I associate and in the result find the Company, by having unilaterally reduced the salary of the Claimant, to have breached a term going to the very root of the contract.

87. Mr. Thavalingam first submitted that the borang PK4/98 exhibited as COE2, which is a mandatory report on salary reduction of workers to

be made to the Jabatan Buruh, expressly allows for salary reduction. This submission I find to be baseless. His next submission is that the Claimant though being informed by letter dated 22.8.1998 of the salary reduction, had not objected to the same till the Termination Letter of 29.9.1998. He however draws no conclusion on this state of affairs, thus absolving the Court's need to comment on the same. And he also made reference to ***Pexxon Sdn. Bhd. v. Sia Qui Yau, Johore (1989) I ILR 235*** where the Court having said that the length of time by which the workman repudiates his contract in response to the breach is crucial, the learned Chairman held that the period of one month taken for the workman to act was considered unreasonable. To this submission I now direct my deliberation.

88. That it is a prerequisite that the Claimant should not delay in terminating the contract in response to the breach is the law and has been mentioned earlier. Time here is to be determined on all the circumstances of the particular case. In the instant case the Claimant was served a letter on 21.8.1998 suspending him from employment with effect from that same date up to 6.9.1998 and denied permission to enter the office during that same period. Thereafter by another letter dated 5.9.1998 the Claimant's suspension was further extended up to 20.9.1998. He was also told to attend a domestic inquiry during the suspension period on 10.9.1998. Whilst this was in progress, the Company caused to serve the Claimant a letter dated 22.8.1998 informing him of a pending reduction in salary with effect from 1.9.1998. This the Court understands to relate to the salary for the month of September 1998. By letter dated 21.9.1998 the Claimant was informed of the outcome of the domestic inquiry. In view of the above sequence of events and the tumultuous position that the Company had led the Claimant into, I find that the Claimant's response in accepting the

repudiation of his contract by his letter of 29.9.1998 not offending this prerequisite against delay in response.

89. And whilst on this subject, the Court has not lost sight of the *factum probandum,* which is the breach occasioned by the salary reduction. The breach arose not when the Claimant was informed by the letter dated 22.8.1998 of the pending reduction, but when the reduction was effected. The testimony of COW1 is that the salary of September 1998 would have been paid in the third week. And it is upon payment of this September salary at a reduced rate, that *actus* of breach is completed. And this date is not far from the date of the Claimant walking out of his employment.

90. The third salary reduction did truly bring about a dismissal. Any decision otherwise will make nonsense of the discussion thus far.

91. A constructive dismissal does not *ipso facto* result in a dismissal being without just cause or excuse. Support for this I find from ***Logabax Ltd. v. R.H. Titherley (1977) IRLR 97*** where the Employment Appeal Tribunal observed :

> *" Thirdly, if there is conduct* ***entitling an employee to treat it as constructive dismissal, is such dismissal automatically an unfair dismissal? To this question we would give a negative answer.*** *We have in mind that in considering whether or not a dismissal is unfair para 6(8) of the First Schedule requires an overall assessment of circumstances in the light of what is fair and equitable. In other words, there my be a situation where the employer has properly followed the code of practice and, although his*

conduct otherwise has forced a constructive dismissal, yet looked at overall he might be able to say it was nevertheless fair. " (emphasis added).

That which expressed in ***Logabax Ltd.*** is not dissimilar to that which is required of me under the second limb enunciated in ***Milan Auto (supra)*** and reaffirmed in ***Quah Swee Khoon (supra).***

92. In ***Award No. 650 of 2004 (supra)*** the learned Chairman, satisfied that the Company had indeed suffered financial losses found on these grounds that the constructive dismissal was for just cause and excuse. This decision though not binding should weigh persuasion upon me. With respect, after anxious self-debate, I am not so persuaded. *Judicium parium,* far from me be any such intention.

93. Gopal Sri Ram JCA in ***Ang Beng Teik v. Pan Global Textile Bhd. Penang (supra)*** said that *"Employment – that is to say, the right to one's livelihood – is also a fundamental liberty guaranteed by the Federal Constitution."* That this is so, the Federal Court agrees in ***Rama Chandran v. The Industrial Court of Malaysia & Anor (1997) 1 AMR 433.*** And in pursuit of this livelihood the servant seeks employment from his master. For it is this employment that delivers him the means to purchase that required for his living. That salary constitutes the first impetus to seek employment cannot be denied. Salary is the nub of the relationship between the servant and master. Any change to this, whatever the reason may be, totally destroys the relationship. The master cannot be allowed to justify reducing the salary of his servant for the reason that he has insufficient means. A change in salary augurs a new relationship. One which the servant may accept or reject freely.

94. Section 30(5) of the Act behoves the Court to act according to equity and good conscience amongst others. A workman's expenditure towards his commitments would have been preset by him based on his monthly emolument. A sudden reduction in the same would cause hardship to him and his dependants. That an employer suffers financial hardship is no reason to force the same upon his workman. Perhaps it is for this reason that the ***Code of Conduct for Industrial Harmony*** signed on 9.2.1975 does not include reduction of salary as one of the listed appropriate measures before the employer embarks upon retrenchment.

95. In the upshot the Court rules that save by mutual consent, the reduction of salary for the reason of the employer's financial hardship cannot be accepted as just cause and excuse to justify a dismissal by way of constructive dismissal occasioned though a breach of the contract of employment arising from a unilateral reduction in a workman's remuneration.

96. In the circumstances the Court dispenses with the need to arrive at a finding on the Company's true financial position.

REMEDY

97. The Claimant in his pleadings seeks reinstatement to his former post without loss in any benefits, monetary or otherwise and arrears of salary from date of dismissal to the date of reinstatement.

98. The Claimant at the time of the dismissal on 29.9.1998 held the position of Assistant Group Financial Controller. Judging from the designation, the fact that he received three promotions before attaining this position coupled with the fact that he was a cheque signatory, the

Court assumes that this is a senior position. Come September 2004, the Claimant would have been away from the working environment and work practices of the Company for six years. By his own admission the Claimant had not been performing any work similar to that which he performed at the time of his dismissal. It is unlikely under the circumstances that the Claimant will readily fit into the slot which he had left behind. The Court is also mindful of its equitable obligation to not place impediments upon the efficient management of the Company upon which depends the livelihood of other workmen. Having viewed the substantial merits of the case and the circumstances, equity and good conscience will not be served if the Claimant is reinstated.

99. The Federal Court in ***Dr. A. Dutt v. Assunta Hospital (1981) 1 MLJ 304*** held that the Industrial Court is authorised to award monetary compensation if of the view that reinstatement is not appropriate. Compensation constitutes two elements *viz* (a) backwages and (b) compensation in lieu of reinstatement. [See also the Court of Appeal in ***Koperasi Serbaguna Bhd. Sabah v. James Alfred, Sabah & Anor, (2000) 3 AMR 3493***].

100. And in ***Hotel Jaya Puri v. National Union of Hotel Bar & Restaurant Workers, (1980) 1 MLJ 105*** the Federal Court held that if there was a legal basis for paying compensation, the question of amout is very much at the discretion of the Court to fix under section 30 of the Act.

101. In exercising the Court's discretion I bear in mind the cautionary words of the learned author, O.M. Malhotra in his work***, Law of Industrial Disputes, Vol. 2, 4th Ed. at page 961***:

> *" The tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular. "*

So too I bear in mind the requirements of section 30(5) of the Act to act according to equity, good conscience and the substantial merits of the case.

Scire feci the exercise of the Court's discretion I now approach the two heads of compensation, decide on the quantum and state my reasons therefore.

PRINCIPLES APPLICABLE

102. The Court had in the case of ***Ike Video Distributor Sdn. Bhd. v. Chan Chee Bin, Award No. 636 of 2004*** analysed in detail relevant factors and has set out the principles by which the Court will be governed in the award of remedies. The Court's decision was that remedy in cases where no reinstatement is ordered, will be under two heads *viz* (a) compensation in lieu of reinstatement and (b) backwages.

103. Thereafter from this total sum the Court will scale down, if appropriate based on the circumstances of the case, under the three heads of (a) delay factor, (b) gainful employment and (c) contributory conduct.

104. The arguments and rationale of the Court in having arrived upon the above mentioned decisions on remedy is discussed in detail in the ***Ike Video Distributor Sdn. Bhd. case*** and will not be repeated here.

COMPENSATION IN LIEU OF REINSTATEMENT

105. Compensation in lieu of reinstatement is one month's salary per year of service; the multiplicand being the salary and the multiplier being the period from the date of commencement of employment up to the last date of hearing.

106. It is the evidence before the Court that the Claimant, at the time of his dismissal, earned a monthly salary of RM7,500.00. No evidence was led on the receipt of other benefits, monetary or otherwise. The multiplicand in the instant case is therefore RM7,500.00.

107. With the Claimant having commenced work on 15.9.1981 and the last date of hearing being 26.4.2004, the multiplier in the instant case is 22.6.

108. In the result, a sum of RM169,500.00 is due as compensation in lieu of reinstatement which sum is obtained through multiplying RM7,500.00 by 22.6.

BACKWAGES

109. Backwages is for the period between the date of dismissal and the date of conclusion of hearing which in the instant case is from 29.9.1998 to 26.4.2004, a period of 66 completed months.

110. The multiplicand being RM7,500.00 with a multiplier of 66, backwages amounts to RM495,000.00.

SCALE DOWN

Delay Factor

111. The Court is amenable to scale down on the total compensation under two sub-heads in connection with delay factor *viz* (a) delays occasioned by the Claimant subject to a maximum scaling down of 30% and (b) delays attributable to the Ministry of Human Resources or the Industrial Court subject to a further maximum scaling down of 30%.

112. In the instant case the Claimant was represented without absence at every one of the mentions and hearing dates set by the Court. He further complied with all directions on the filing of pleadings, documents and witness statement. He therefore made no contribution towards delay and the Court accordingly effects no scaling under this sub-head.

113. The Claimant's appeal under section 20 of the Act was received by the Minister of Human Resources on 25.11.1998. On 15.5.2001 the Minister decided to exercise his discretion to refer the matter to the Industrial Court and the matter was assigned to the Court on 13.6.2001 more than 2.5 years later. And on being assigned to the Court, hearing of the matter was further delayed for the reason that the Court was without a substantive Chairman from 1.2.2003 to 15.1.2004, a period of almost one year.

114. Although such delays are not the doing of a claimant it is inequitable and against good conscience to shoulder the total penalty of full compensation under both heads upon the employer for he

contributes no blame too. In the circumstances the Court scales down the total compensation by 30% under this sub-head, giving a figure of RM465,150.00 from the original total of RM664,500.00 (RM169,500 plus RM495,000).

Gainful Employment

115. This principle of law, set by the Court of Appeal in ***Koperasi Serbaguna Sanya Bhd. Sabah (supra),*** was further clarified by the Federal Court on appeal in ***Dr. James Alfred v. Koperasi Serbaguna Sanya Bhd. Sabah & Anor, (2001) 3 MLJ 529.***

116. The Court had analysed the application of this principle in the ***Ike Video Distributor Sdn. Bhd. case*** and will adhere to the same here.

117. Cross-examined, the Claimant testified that he has since January 2002 been employed as a part-time assistant remiser with RHB Securities Sdn. Bhd. Exhibit CLE1 shows no contribution was made to KWSP during the year 2002 and the commission that the Claimant earned was RM61.97 and RM72.31 for the years 2002 and 2003 respectively. Hardly any earnings at all. The Claimant was not examined by either counsel on attempts to secure gainful employment. Nor did the Claimant volunteer any such information. And in this both counsel cannot be defaulted for authority and prevailing precedence has it that the need for a dismissed workman to mitigate his loss by diligently seeking employment elsewhere does not arise anymore [see High Court in ***Thilagavathy Alagan Muthiah (supra)*** and in ***Great Eastern Mills Bhd. v. Ng Yuen Ching (1998) 6 MLJ 214*** and Industrial Court in ***Boots Co. (Far East) Pte Bhd., Singapore v. Kenneth Toh Lee Soo Teong (1981) MLLR 681***].

118. The learned Chairman, John Louis O'Hara in ***Pelangi Enterprises Sdn. Bhd. v. Oh Swee Choo, Award No. 155/01 (2001) 1 ILR, at page 492*** remarked of the claimant in that case who had diligently sought employment and worked during the interregnum, thus :

> *" This Court is required to make an adjustment where the workman has found other employment. In making the adjustment this Court has to be fair to both parties.* ***If the Claimant had done nothing i.e. just sat at home and waited, she would be entitled to full backwages.*** *But a person has to live and to live he/she has to earn a living by working. " (emphasis added).*

119. That *lex et consuetudo* Industrial Court of the past was the application of the common law principle of mitigation of damages, is reported at ***page 133 of the 2nd End. of Industrial Dispute Law in Malaysia by C.P. Mills*** :

> *"* ***Both the Industrial Arbitration Tribunal and the present Court have applied the common law principle of mitigation of damages,*** *but with some modification of the onus of proof. "Ordinarily upon reinstatement, an employee is entitled to all back pay, allowances and privileges from the date of dismissal. This Court has however followed the principle that there is a duty upon the employee who seeks reinstatement to make all reasonable efforts to search for and obtain gainful employment during the interim period, and that upon reinstatement, there should be deducted from his back pay his actual earnings while in such employment.* ***If the employee has not made such a search for employment***

or has unreasonably refused employment offered, then it will be assumed that other reasonable employment would have yielded earnings equal to the earnings of the employee in the job from which he was dismissed": Sharikat Eastern Smelting Bhd. v. Kesatuan Kebangsaan Pekerja2 Perusahaan Peleboran Logam S-Malaya (Award No. 16/68, 26 April 1968) [1968-69] Mal. L.L.R 127; National Union of Cinema & Amusement Park Workers v. Gopeng Theater (Award No. 160/78, 13 November 1978). " *(emphasis added).*

120. My research into the pronouncements of both the Court of Appeal and the Federal Court in the ***Dr. James Alfred case*** has failed to resurrect the principle of mitigation of damages through diligently seeking alternative employment. Though I find this as in Dworkin's words, "a hard case", bound by prevailing authority, *a fortiori* I effect no scaling down of the Claimant's wages under the head of 'gainful employment'.

Contributory Conduct

121. The second of the two-fold function of the Industrial Court upon receiving a reference from the Minister is to determine whether the proven misconduct constitute just cause or excuse for the punishment of dismissal. [see ***Wong Yuen Hock (supra)*** and ***Milan Auto Sdn. Bhd. (supra)***].

122. In cases where the Industrial Court determines that the punishment of dismissal is too grievous for the proven misconduct or in cases where the Industrial Court finds the workman to have contributed by his conduct to his predicament, the Industrial Court has scaled down

the total compensation awarded for the reason of contributory conduct. In this connection ***Halsbury's Laws of Malaysia, Vol. 7, 2000 Edn. at paragraph 120.103 entitled 'Reinstatement and Compensation'*** reads :

> " *In awarding compensation, the Industrial Court may consider the contributory conduct of the employee in reducing the compensatory award [see* ***Standard Chartered Bank v. Wong Foot Kin (1994) 2 ILR 591; George Kent (M) Bhd. v. Steven Koh Hon Seng, Award No. 368 of 1995****] but any reduction must be based on facts which have been found. [see* ***M. Natonasabapathy v. United Asian Bank Bhd. (1994) 2 CLJ 534****]. It may also take into account subsequently discovered misconduct by an employee to justify a reduction in compensation. [see* ***W. Devis & Sons Ltd. v. Atkins (1977) ICR 662; George Kent (M) Bhd. v. Steven Koh Hon Seng (supra)****]. "*

123. The Industrial Court had effected scaling down the total compensation for contributory conduct by the Claimant in ***Kuala Selangor Omnibus Company Bhd. v. Mohd Isnin Saleh, (2003) 3 ILR 1267*** by 30%; in ***Fatty Chemical (M) Sdn. Bhd. v. Muniandy Muthusamy; (2004) 1 ILR 363*** by 30%; in ***Johor Port Bhd. v. Zainal Mohd. Nahu, (2003) 3 ILR 721*** by 40%; and in ***Unilever (M) Holdings Sdn. Bhd. v. Yang Kang Loong, (2003) 3 ILR 639*** by 50%.

124. The various fundamental breaches committed by the Company may be divided into two. First, those arising in connection with the domestic inquiry and second, the reduction of salary as a cost saving device. The reduction of salary effective upon payment in the third week

of September was the last of the breaches. The act of repudiation of the contract of employment by the Company occurred with the first set of breaches. And when the Claimant accepted the repudiation and walked out of his employment, in law this first set of breaches become *causa proxima*.

125. It is the Claimant's act of proceeding on leave without prior approval and failure to carry out work assigned that led to the domestic inquiry. The Claimant's conduct therefore contributed to his predicament and for this reason, the Court scales down 30% under the head of contributory conduct. The final sum payable to the Claimant is therefore RM325,605.00 (RM465,150.00 less 30%).

ORDER

126. The Court orders that the Company pays the Claimant through his solicitors, the sum of RM325,605.00 less statutory deductions if any, not later than 45 days from the date of this Award.

HANDED DOWN AND DATED THIS 4TH AUGUST, 2004.

(N. RAJASEGARAN)
CHAIRMAN
INDUSTRIAL COURT.