

IN THE INDUSTRIAL COURT OF MALAYSIA

CASE NO: 9(20)(10)/4-2284/07

BETWEEN

FAIZAL BIN ABD RAHMAN

AND

BASF PETRONAS CHEMICALS SDN. BHD.

AWARD NO. : 975 OF 2010

Before : DATO' HAJI SULAIMAN BIN ISMAIL
CHAIRMAN

Venue : INDUSTRIAL COURT OF MALAYSIA
TERENGGANU BRANCH

Date of Reference : 29th OF OCTOBER 2007

Dates of Mention : 22.1.2008, 6.5.2008, 20.5.2008 & 9.7.2008

Dates of Hearing : 19.10.2008, 20.10.2008 & 15.12.2008.

Representation : Mr. Dzulkarnain Bin Mohamad, the learned
Counsel from Messrs Hafidz Zulkarnain for the
Claimant.

Miss Rajeswari Karupiah and Miss Syarifah
Shahirah Albar, the learned Counsels from
Messrs Zul Rafique & Partners.

Reference:

This is a Ministerial reference to the Industrial Court under Section 20(3) of the Industrial Relations Act 1967 (Act 177) made on 29th October 2007 for an award in respect of dismissal of Encik Faizal Bin Abd. Rahman ("the Claimant") by BASF Petronas Chemicals Sdn. Bhd. ("the Company") on 26th of April 2004.

AWARD

This matter was heard on 19th of October 2008 and was duly completed on 15th of December 2008. The Company's Counsel filed the Written Submission on 28th of January 2009 and received by the Court on 15th of February 2009 and Submission In Reply on 6th of May 2009.

The Claimant's counsel filed the Written Submission on 28th of February 2009 and received by the Court on 29th of March 2009.

Brief Facts:

At the commencement of hearing of this case on 19th of October 2008 both parties had agreed the following facts:

The parties to the matter before the Court are BASF Petronas Chemicals Sdn. Bhd. hereinafter referred to as the Company and Faizal Bin Abdul Rahman hereinafter referred to as the Claimant who is the former employee of the Company.

The issue before the Court is the Constructive Dismissal of the Claimant by the Company which forced the Claimant to tender his resignation via letter dated 25th of April 2004.

The Claimant was employed by the Company on 1st of September 1998 as a Shift Supervisor with the basic salary of RM5,500.00 permonth.

The Claimant then received several increment in line with his position as Senior Executive in which his last drawn salary before being demoted is RM6946.00.

The Claimant was then issued with show cause letter dated 19th of February 2004 for failing to comply with the Management's Instruction to attend a meeting on 14th of February 2004 to discuss on the objective setting for year 2004 and was required to submit a written explanation not later than 12.00 noon on 24th of February 2004.

The Claimant received a letter dated 5th April 2004 in reply to his appeal which states that the disciplinary action taken against him by the Company stand.

Subsequently, the Claimant filed his resignation letter dated 25th of April 2004 claiming victimization by the Company.

The Company via letter dated 30th of April 2004 accepted the resignation.

The resignation letter dated 25th of April 2004 is hereby reproduced as below:

Faizal Bin Abd. Rahman
Executive (Production)
Acrylic Ester Complex,
BASF Chemicals Sdn. Bhd.

25th of April 2004

The Director,
Human Resource Management & Administration Division,
Puan Suhaila Abdullah
BASF Petronas Chemicals Sdn. Bhd.

Re: Resignation

Dear Madam,

With reference to my letter of appeal dated 17th March 2004 and the reply letter dated 5th April 2004 which was duly served to me on 16th April 2004 refers.

Therefore I, FAIZAL BIN ABD RAHMAN (NRIC:620907-08-5987) after much deliberation and consideration, believe that i've been victimised by the Company since all the actions taken against me are not in accordance to the Contract Of Employment and the Terms and Conditions of the same.

As such, i hereby submit my resignation from my current position with immediate effect.

Thank you.

Sincerely,

.....sgd.....

Faizal Bin Abd. Rahman

c.c.

En. Jumahdi Ramli, Manager (Production) OAE.

In the Statement Of Case the Claimant inter alia contends that he was Constructively Dismissed based on the following events; the Claimant received year end 2003 Appraisal which suggested that his performance is deemed to be poor. He contended that the appraisal is null & void because the Company did not follow its own guidelines in assessing the competencies of the Claimant.

The Company failed to follow the managing performance improvement procedures and failed to conduct a coaching program due to the bad appraisal.

The Claimant also contends that the Company failed to take an action in resolving the grievance to adhere to the guidelines as being provided under the HRM policies and guideline manual for managing grivience.

The Claimant further contends that the disciplinary action taken against him is unfair and / or in breach of the principles of natural justice and is unlawful since the Company had failed to conduct a domestic inquiry in order to give the Claimant the opportunity to defend himself against all the charges against him.

The Claimant prays for an order that he be reinstated in his former job as Senior Executive without any loss of wages, allowances, service, seniority and or alternate relief as this Court deems fit and proper.

The Respondent in the Statement In Reply denies that the Claimant was Constructively Dismissed. The Company avers that the Claimant had since 22nd of March 2004 accepted and performed the position of Executive (production) in the Company until 25th of April 2004 and is therefore deemed to have affirmed the punishment that was meted out by the Company to him.

The Company avers that it had fairly assessed the Claimant's demonstrated behavior in relation to the competencies as for Company's HRM policies and guidelines.

The Company categorically denies that the disciplinary action taken against the Claimant was unfair and / or in breach of the principles of natural justice and / or was mala fide or that the Claimant had been victimized by the Company in any manner whatsoever.

Therefore, the Company prays that the Claimant's case be dismissed.

Issues to be tried

Both parties had agreed the issues to be tried for the determination of this Court. The following are the relevant issues:

- i) Whether the failure on the part of the Company to resolve the grievance of the Claimant tantamount to victimization and constructive dismissal.

- ii) Whether the disciplinary action taken by the Company in accordance with the principles of natural justice and lawful.

- iii) Whether the failure of the Company to follow all the HRM manual and procedural tantamount to unfair practice.

- iv) Whether the Claimant's resignation on 25th of April 2004 was on his own accord and not in view of having Constructively Dismissed by the Company.

- v) The Claimant willfully defience to the order of his superior and to his disobediance and follow the instruction from Company to attend the meeting on 4th of February 2004, 5th of April 2004 and 14th Of April 2004 tantamount to gross insubordination which resulted the Company to meet out the punishment of demotion.

vi) The Claimant's performance is the demoted position from 22nd of March 2004 until 25th of April 2004 deemed to an affirmation of the punishment meted out by the Company and the Claimant's subsequent resignation is an abandonment of the employment without lawful excuse and without giving the Company a proper notice.

The Law on Constructive Dismissal

The onus of proof is on the Claimant to prove that he was Constructively Dismissed. Once the Claimant had proved that he was Constructively Dismissed, the onus of proof shifts to the Respondent to prove that the dismissal was with just cause or excuse.

In Constructive Dismissal the focus is in the employer's conduct with respect to the particular employee concerned against the backdrop of the employee's employment contract.

The test for Constructive Dismissal was whether the Respondent had breached a fundamental term of the contract of employment which went to the root of the contract or had evinced an intention not to be bound by the contract.

In the case of ***WONG CHEE HONG V CATHAY ORGANISATION (M) SDN. BHD. [1988] 1 CLJ 45 (1988) 1 CLJ (Rep) 298 at pp 302 and 303*** the Supreme Court decided as follows:

“When the Industrial Court is dealing with a reference under Section 20, the first thing that the Court will have to do is to ask itself a question whether there was a dismissal and if so, whether it was with or without just cause or excuse.”

Thus it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it. In such situation the employee is entitled to regard the Contract as terminated and himself as being dismissed.

The next question is this. Is the dismissal with just cause or excuse? Since the appellant has succeeded in showing that he was dismissed, it is for the Respondent Company to show that the dismissal was with a just cause or excuse.

The principles of law enunciated in **Wong Chee Hong (Supra)** is once Constructive Dismissal is proven by the employee the burden of showing whether the dismissal is with just cause or excuse lies on the Respondent.

The term “Constructive Dismissal” was clearly defined in the case of **Western Excavation (E.C.C) Ltd v Sharp (1978) a All En 713 at page 717** where Lord Denning MR decided that the correct test to apply is the contract test as follows:

“If the employer is guilty of conduct which is a significance breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential

terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is Constructively Dismissed."

The crux issues that arose before this Court for deliberation and determination are as follows:

- i) Whether the Claimant has been Constructively dismissed by the Respondent Company
and
- ii) If the Claimant had been dismissed, whether the dismissal was with just cause or excuse.

The Claimant's Case

The Claimant adduced evidence in Court on 19th of October 2008. The Claimant is 46 years old and working as Senior Executive in BASF Petronas Chemicals Sdn. Bhd.

The relevant evidence-in-chief of the Claimant as produced in CLWS 1 are as follows:

Q6: What triggered your problem with the Company?

A6: I believe the problem started when i raised my concern about my career development to my superior i.e. Senior Plant Manager.

Q7: Who?

A7: Mr. Selva Kumaran Chelliah.

Q8: Why did you raise the concern?

A8: I fail to see any positive career development prospects for “non-Engineer” like me although i have been with the Company from the

start up and i have reached the ceiling in my salary group. I believe that i am qualified if not better than the newly appointed Production Manager due to my broad experience qualifications and all the skills that i got.

The Claimant further testified that he is better qualified because he has been with the Company for more than 5 year as shift superior and other experience compared to Mr. Albert Su and Mr. Marzuki who are fresh graduates. Mr. Albert Su even used to be his deputy before been taken out of shift since he was incapable to handle the shift and contractors and not familiar with work permit system.

He further testified that he had met Mr. Selva Kumaran Chelliah to discuss the matter but he was informed that there was no career development for him.

The Claimant further testified that he had received an Appraisal 2003 in which his performance is deemed to be safety and security awareness leadership and communication. He did not agree with

the said appraisal and he believe that the Plan Management had malicious intend to discredit him so justify for their own failure to promote him.

The Claimant filed his grievances to Mr. Nadzrin Rijaludin who is the HR Planning, Recruitment & Employee Relations Department on 2nd of December 2003. He had not received his increment for the last 3 years and his relationship with the Superior which he considered to be deteriorated. He also requested to be transferred to another complex or department.

Subsequently he was asked to forward his grievance to the Division Director on 3rd of February 2004 and 4th of February 2004, the Claimant stated that he received E-mail from Production Manager to meet and discuss about the objectives setting for the year 2004 but he refused to meet and discuss the objective setting because Production Manager was the one who he had filed grievance against on 11th of February 2004, he received another E-mail giving him the instruction to attend the

meeting schedule on 14th of February 2004 to discuss about the objectives setting but he did not attend.

As the result the Claimant received the show cause letter dated 19th of February 2004 for his refusal to abide the final instruction.

The Claimant replied vide his letter dated 20th of February 2004 but the Company decided to take a disciplinary action against him and he was demoted to the post of Executive with salary reduction vide the Company's letter dated 1st of March 2004.

The Claimant further testified that he had filed an appeal on 17th of March 2004, but he reported for duty as an Executive on 22nd of March 2004.

He was given a new assignment and objectives by Mr. Jumahdi Ramli and was told that he got no chain of command to Subordinate, Operation Technician, Mechanical Technicians and Contractors.

The Claimant had filed an appeal against the said instruction vide his letter dated 5th of April 2004 and the Company had replied vide the letter dated 16th of April 2001 where the action taken by the Company stands.

On 25th of April 2004, the Claimant submitted his resignation letter because he believe that he had been victimised by the Company and Constructively Dismissed without just cause or excuse.

He seeked to be reinstated to his former job as Senior Executive without any loss of wages, allowance, service seniority, privilege or benefits of any kind and / or any other relief as this Court deems fit and proper.

The Company's Case

The Respondent Company called the following witnesses to testify

- 1) Suhaila bt Abdullah (COW 1)

Heads of Special Project, HRM Division Petronas, Kuala Lumpur.

- 2) Nadzrin bin Rijeldin (COW 2)
Senior Manager, HR, BASF Petronas Chemicals Sdn. Bhd.

- 3) Selvakumar Chelliah (COW 3)
Senior Olant Manager, Acrylics Esther Department.

- 4) Jumahdi bin Ramli (COW 4)
Production Manager of the Acrylics Esther Department.

The Company did not dispute that the Claimant commenced employment with the Company as Shift Supervisors based in Subang Jaya, Selangor on 1st of September 1998. The Claimant held the position of Senior Executive (production) before he was demoted to the position of Executive (Production). His last drawn salary was RM6669.00 permonth.

The Claimant's demotion was a subsequence of disciplinary action that was initiated against him following his acts of insubordination

and the charge of misconduct levelled by the Company against him as per letter dated 19th of February 2004.

It was the practice of the Company to conduct performance review on its employees at least twice a year on completion of the performance cycle the employees immediate superior would measure and provide appropriate rating and comments as of objectives and competencies on the Performance Management form.

Upon concurrence by the Head of Department, the form will be forwarded to a Management Committee. These rating would then be further reviewed and calibrated by the Management Committee to ensure consistence throughout the Company. The immediate superior of the employee is responsible to fill up the training and development plan for the employee as well as the employee's career development plan on an annual basis.

The Claimant's performance reviews from 2001 and 2003 consistency rated as "meet requirement" both for the assesment of objective as well as competencies.

COW 2 testified that on 3rd of December 2003, the Claimant met him over the performance review for 2003. He seeked to change the remarks made by his superior vide the Claimant's Performance Management form 2003.

COW 3 had informed him that the Claimant's superior was not willing to make any changes to the comment he has made in the Claimant's Performance Management form 2003.

The COW 2 further testified that the Claimant reinterated his dissatisfaction with his superior in his department and the Company's Director of Human Resources. Claimant made further request to be transferred out of the Production Department or be paid severance package comprising of one year salary including all statutory contribution

to be made to him by the Company in exchange for his voluntary resignation.

The Claimant had forwarded his grievance to Director of the Operation Division but with no response.

COW 4 testified that he requested the Claimant to attend a meeting with him on 4th of February 2004 with him to discuss and set the Claimant's objective for the year 2004, however the Claimant failed to present himself at the said meeting and as a result the meeting on 4th of February 2004 could not proceed. The meeting was rescheduled to 5th of February 2004 but the Claimant had informed his superior that he finds it impossible to work with his department managers as these managers had demonstrated that they were not sincere towards him and therefore the Claimant wished to limit the meeting with any of his Department Manager.

On 14th of February 2004 the Company instructed the Claimant to meet his immediate superior that should he fail to comply with

the Company's express instruction the Company would not hesitate to take appropriate disciplinary action against him.

The Claimant action in defiance, refused to accept or acknowledge the said letter from the Company. The Claimant also failed to attend the said meeting which was scheduled on 14th of February 2004 at 11.00 a.m.

Vide letter dated 19th of february 2004 the Company issued a show cause letter against the Claimant, asking him to provide his written explanation in respect of the Claimant defiance of authority or express instruction of the Company.

The Claimant replied by his letter dated 20th of February 2004. The Company was not satisfied with the Claimant's explanation held the meeting on 1st of March 2003. Following this meeting, the Disciplinary committee decided to demote the Claimant due to his clear acts of insubordination.

By letter dated 17th of March 2003 the Claimant appealed against the Company decision to demote him. The Claimant went on leave from 3rd of March 2004 until 12th of March 2004 and absent for work from 13th of March until 14th of March 2004.

The Claimant reported to work in the demoted position on 22nd of March 2004.

The Company vide the letter dated 5th of April 2004 notified the Claimant that after due consideration of the facts of the action taken against him by the Company is maintained further he was advised to pursue the grievance which he had filed against his superior through the Company's established channel as provided under the grievance policy.

On 11th of April 2004, the Director of Division invited the Claimant for formal meeting and to discuss the grievance filed by him but the Claimant refused.

By letter dated 25th of April 2004, the Claimant had tendered his resignation from the Company with immediate effect.

He had claimed that he had been victimized by the Company and the Company's action against him was not in accordance to his contract or terms and conditions of employment.

The Company informed the Claimant of his accepted of the Claimant's resignation and the Company categorically denied the Claimant's claim of victimization vide the letter dated 30th of April 2004.

The learned counsel for the respondent submitted that the Claimant failed to discharge the burden of proving fundamental breach of contract of the employment.

The Claimant has no cogent evidence that the Company's conduct was calculated to damage or seriously destroy the relationship of trust and confidence between the Company and the Claimant.

There is no repudiation of a fundamental term (express or implied) of the Claimant contracts of employment which entitled the

Claimant to consider himself Constructively Dismissed with effect from 26th of April 2004.

Finally the Company submitted that it had acted with bona fide in meeting out punishment of demotion as a result of the Claimant being found guilty of serious act of misconduct and was not actuated with mala fide to victimise or harass the Claimant. Further it was submitted that the burden of proof lies on the Claimant who complains of Constructive Dismissal to prove that the punishment order of demotion meted out by the Company was unlawful or unreasonable.

The Claimant had failed to prove the same would lend him in misconduct and voluntary abandonment of service.

The Company submitted there is no basis for the Claimant to claim Constructive Dismissal as the Company had not breached any of the term of contract of employment.

The Company prays the Claimant's case to be dismissed.

Evaluation and Findings

The proper approach in deciding whether Constructive Dismissal has taken place is for the Court to determine 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 the employer has evinced an intention no longer to be bound by the contract.

This principle has been succinctly explained in the Court of Appeal of ***Anwar Abdul Rahim v Bayer (M) Sdn. Bhd. (1998) 2 CLJ 197 at page 205*** and ***Shahabudin Abdul Rashid v Talasco Insurance Sdn. Bhd. (2004) 4 CLJ 514 at page 518***.

The burden of proving Constructive Dismissal is on the employee i.e. The Claimant in the instant case.

It was incumbent on the Claimant to establish on a balance of probabilities that the Respondent's conduct amounted to a fundamental breach that went to the root of his employment contract.

On the totality of the evidence adduced to all having regard to all the Written Submission of both parties, it is the finding of this Court that the Respondent had not committed any act whatsoever to have breached a fundamental term of the Claimant's term of employment which goes to the root of the contract.

In the instant case it was the Claimant's undesired behaviour to disregard lawful instruction of their superior. Since the Claimant had admitted to the act of insubordination levelled against him in the Show Cause Letter the Company's Disciplinary Committee had lawfully decided the punishment demotion against the Claimant.

The Claimant in fact accepted and performed in the demoted position as Executive (Production) without protest until 25th of April 2004.

On the balance of probabilities and having considered the factual matrix and circumstances of the case, this Court finds that the Claimant failed to prove that he was Constructively Dismissed by the Respondent Company's.

There is not an iota of evidence adduced by the Claimant to show that the Respondent's conduct amounted to a breach of contract or had the Respondent evinced an intention no longer to be bound by the Contract.

It was crystal clear that the Claimant in the instant case continues in the employment of the Company in demoted position.

On the basis of the totality of evidence adduced the Conduct of the Respondent did not amount to a fundamental breach of the Claimant's Contract of employment going to the root of the contract nor did the Respondent evince an intention no longer to be bound by it. (See ***Rudy Darius Ogon v Ming Court Hotel Kuala Lumpur (2000) ILNS 147***).

The Respondent Company by its conduct has not breached a term or terms of the Claimant's contract of employment or has evinced an intention no longer to bound by it.

Conclusion

In conclusion, taking into account the totality of the evidence adduced by both parties and bearing in mind Section 30(5) of the Industrial Relations Act 1967 to act according to equity, good conscience and the substantial merit of the case without regard to the technicalities and legal forms, this Court finds that the Claimant failed to prove that he was Constructively Dismissed by the Respondent Company's. Accordingly, the Claimant's case is hereby dismissed.

HANDED DOWN AND DATED THIS 23rd DAY OF JULY 2010.

**(DATO' HAJI SULAIMAN BIN ISMAIL)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
PENANG BRANCH.**

