

INDUSTRIAL COURT MALAYSIA

CASE NO: 12/4-129/20

BETWEEN

KUHAN A/L ANANTHAVADIVEL

AND

FLYGLOBAL CHARTER SDN. BHD.

AWARD NO: 1702 OF 2021

BEFORE : **Y.A. TUAN TEOH CHIN CHONG**
CHAIRMAN

VENUE : Industrial Court Malaysia, Kuala Lumpur.

DATE OF REFERENCE : 17.12.2019.

DATE OF RECEIVED : 02.01.2020.

DATES OF MENTION : 04.02.2020, 25.02.2020, 17.03.2020.

DATES OF HEARING : 08.11.2021.

REPRESENTATION : Ms. Velvashini Vembarasan of Messrs Ramesh K.
Supramaniam, Counsel for the Claimant

Company - absent.

Claimant present.

Reference

This is a reference made under section 20 (3) of the Industrial Relations Act 1967 (IRA 1967) arising out of the dismissal of **Kuhan a/l Ananthavadivel** ("the Claimant") by **Flyglobal Charter Sdn. Bhd.** ("the Company") on 24.07.2019.

AWARD

Procedural History

[1] The court received the letter pertaining to the Ministerial reference under sec 20(3) of the IRA 1967 on 02.01.2020.

[2] The case was fixed for mention on 04.02.2020, 25.02.2020 and 17.03.2020.

[3] The last date of hearing was fixed on 08 & 09.11.2021 at 9.00 am.

[4] The Company's counsel attended court on the first mention date fixed on 04.02.2021. Thereafter, they did not appear in court. The solicitor for the Company discharged themselves as the solicitors for the Company vide their letter dated 01.10.2020 addressed to court and copied to the Claimant's solicitors. No representatives for the Company were present during any other case management after their solicitors discharge themselves and/or for the trial on 08 & 09.11.2021 despite being notified by the court via email dated 08.04.2021.

[5] Despite the instructions for the Company to file its pleadings and documents, the Company did not comply with the court's instructions.

[6] On the date of hearing on 08.11.2021 at 10.10 am, the Company's representative was still absent. Upon the request of the Claimant's counsel, the court

in exercising its power under section 29 (d) of the IRA 1967 decided to have the case heard by way of ex-parte.

Section 29(d) of the IRA 1967 provides for an ex-parte hearing without the presence of one of the parties to the dispute.

Sec. 29 (d) of the IRA 1967 provides that:

“the court may in any proceedings before it...

(d) hear and determine the matter before it notwithstanding the failure of any party to submit any written statement whether of case or reply to the court within such time as may be prescribed by the President or in the absence of any party to the proceedings who have been served with a notice or summons to appear..”

[7] OP Malhotra, The Law of Industrial Disputes Volume 1: 6th Edition, at page 1062 states:

“If, however, a party wilfully absents himself in such a way that the adjudication is likely to be impede, or wilfully tries to delay or avoid the proceedings, the tribunal may fix a preemptory hearing on a particular day. After reasonable notice of hearing has been given to the defaulting party, if he still neglects or refuses to attend, the tribunal may and ought to hear in his absence. Prompt discharge of business is of particular importance before a tribunal adjudicating an industrial dispute...”

[8] Therefore, the court was of the view that in the circumstances of the case, an ex-parte hearing was warranted due to the Company's failure to attend court despite the court's instructions in respect of the filing of pleadings, documents, and witness statements and for the Company representative to attend the hearing.

Factual Background

[9] The Claimant commenced employment with the Company on 02.04.2018 as Captain on a basic salary of RM27,000 per month. The Claimant reports to the Chief Pilot Operations of the Company. The Claimant was required to undergo a probation of 6 months. The Claimant also received allowances as follows:

- (a) Flying – MGH is 25 hours per month;
 - (i) 0-95 hours – RM360 per hour;
 - (ii) Above 95 hours – RM400 per hour; and
- (b) Overseas allowances – RM4,000 per month

[10] On 13.08.2018, The Claimant was appointed as Head of Safety, Security & Quality for the Company with the following benefits:-

- (a) Basic Salary - RM35,000.00
- (b) Management Pilot Allowance - RM5,000.00; and

(c) Flying Allowance - RM400.00 per hour with no guaranteed/MPH

[11] The Claimant's employment with the Company was confirmed by letter dated 16.04.2019. All the other terms and conditions as stated in the Letter of Employment dated 28.03.2018 and letter dated 13.08.2018 remained unchanged.

[12] By letter dated 25.04.2019, the Claimant was further offered Nominated Postholder (NPH) Allowance for a sum of RM20,000.00 per month with effect 01.05.2019. All the other terms and conditions as stated in the Letter of Employment dated 28.03.2018 and letter dated 13.08.2018 remained unchanged.

[13] From January 2019 until June 2019, the Company failed to pay and/or delayed paying the Claimant's monthly salary and allowances. The Company further failed to make statutory payments for EPF and PCB deductions since October 2018 even though the said deductions were deducted from the Claimant's salary and allowances.

[14] After numerous reminder via emails were sent by the Claimant to the Company and queries made for the non-payment of salaries, allowances and statutory payments mainly with the Company's Head of Administration (Vanisha Roghnini), Company's Senior Manager HR, Admin and Legal (Kim G Somasundaram) and Company's Head of Administration-HR, IT and Legal (Izudin Merican). The Company thereafter only made payment for salaries and management pilot allowances for the month of January 2019 sometime in March 2019 and April 2019 sometime in June 2019 leaving the outstanding salaries and management pilot allowances for the months of February

2019, March 2019, May 2019 and June 2019; and statutory payments since October 2018. There are further outstanding allowances for the months of January 2019, February 2019, March 2019, April 2019, May 2019 and June 2019 which was left unpaid by the Company.

[15] The Claimant had approached mainly the Company's Chief Executive Officer (Shamini Law), Company's Director of Flight Operation (Captain Mustapha Kamal Bin Halim) and Company's Head of Administration-HR, IT and Legal (Izudin Merican) on numerous occasions to seek their assistance on the non-payment of the Claimant's salaries, allowances and statutory payment, but to no avail.

[16] By Claimant's letter dated 19.07.2019, the Claimant gave a notice of constructive dismissal. The Claimant informed the Company that he could no longer condone the non-payment of his salaries, allowances and statutory payments. The Claimant thereafter gave the Company 3 days to rectify their breach for non-payment of salaries, allowances and statutory payments.

[17] However, the Company did not adhere to the request of the Claimant. The Claimant by way of letter dated 24.07.2019, duly considered himself as being constructively dismissed from the Company with immediate effect.

[18] The Claimant avers that the Company had resorted to the aforementioned measures to drive him out of employment, which amount to a breach of social justice and unfair labor practice. Such conduct by the Company further amounts to

victimization of the Claimant leaving him no alternative than to consider himself as constructively dismissed.

Issue

Whether the Claimant was constructively dismissed

The Law

[19] The Claimant has claimed his dismissal as constructive dismissal, therefore it is appropriate for the court to refer to the law relating to constructive dismissal.

[20] The principle underlying the concept of “constructive dismissal”, a doctrine that has been firmly established in industrial jurisprudence, was expressed by Supreme Court in ***Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.*** [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 28 where Salleh Abas LP at page 95 held as follows:

“The common law has always recognized the right of an employee to terminate his contract of service and therefore to consider himself discharged from further obligations if the employer is guilty of such a breach as affects the foundation of the contract, or if the employer has evinced or shown an intention not to be bound by it any longer. It was an attempt to enlarge the right of the employee if unilateral termination of his contract beyond the perimeter of the common law by an unreasonable conduct of his employer that the expression ‘constructive dismissal’ was used.....”

“...We think that the word ‘dismissal’ in this sections 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 being dismissal. (See *Bouzourou v The Ottoman Bank* [3] and *Donovan Invicta Airways Ltd* [4])

[21] In ***Bayer (M) Sdn. Bhd. v. Anwar Bin Abdul Rahim*** [1996] 2 CLJ 49 on the contract test application, it was held as follows:

“Thus it is settled law that the test applicable in a constructive dismissal case is ‘the contract test’ and not the ‘test of reasonableness’. The claim constructive dismissal, four conditions must be fulfilled. These conditions are:

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

(See Wong Chee Hong v. Cathay Organisation, supra)

If the employee leaves in circumstances where the conditions have not been met, he will be held to have resigned and there will be no dismissal within the meaning of the Act.”

[22] The case of **Suechi Industries Sdn. Bhd. v. Umah Jeralene Louis Adailalasani** [2005] 1 ILR 54 endorsed this view where it stated that it is well established whether or not there has been constructive dismissal, is to be determined by the ‘contract test’; the aforesaid conditions being established by the Claimant at the hearing. If the Claimant succeeds in satisfying the ‘contract test’ then the burden will shift to the Company to prove that the dismissal was with just cause and excuse.

Evaluation and Findings

[23] As the Claimant had considered himself constructively dismissed, the Claimant has to prove that the Company’s conduct amounted to a fundamental breach going to the root of the contract which entitled the Claimant to resign. Further whether the Claimant had left the Company at the appropriate point in time soon after the Company’s conduct of which the complained had occurred. If the Claimant left in circumstances where these conditions are not met, there would be no dismissal within the meaning of the IRA 1967 as he would be deemed to have resigned on his own form the job.

[24] The court finds that from the evidence adduced, the Company had evinced an intention that it no longer intended to be bound by one or more of the essential terms of the employment contract. The Company had breaches the fundamental terms of the employment contracts for not paying the Claimant's salaries, allowances and statutory payments. The breach was sufficiently important for the Claimant to walk out of his employment.

[25] The first breach by the Company for not paying the Claimant's salary, management pilot allowances and statutory payment occurred in January 2019. The Company rectified the situation in March 2019 by paying only the January 2019 salary and management pilot allowances.

[26] The Claimant via email dated 13.02.2019, 29.05.2019, 04.06.2019 and 06.07.2019 demanding for the Company for the payment of his salaries, allowances and statutory payments. The Claimant also approached the Company's Chief Executive Office (Shamini Law also known as Shamini a/p Muthusamy) the Company's Director of Flight Operations (Captain Mustapha Kamal Bin Halim) and the Company's Head of Administration – HR, IT and Legal (Izudin Merican) on many occasions to seek their assistance on the non-payment of his salary, allowances and statutory payment.

[27] The Claimant continued to work with the Company because the Company kept on giving assurances and promises that the Company will make payments for all the outstanding payments due to him in due time. Since the Company's representative was absent and no witnesses were called to rebut the Claimant's above averment, the

court finds that there was no undue delay on the Claimant's part in leaving the job immediately. The Claimant continued to work based on the assurances and promises given by the Company. The Claimant has been able to explain the delay in leaving his employment and claiming for construction dismissal.

Conclusion

[28] Premised on the totality of facts and evidence and after taking into consideration sec 30 (s) of the IRA 1967 to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form, the court finds that the Claimant has proven the contract test on a balance of probabilities that his dismissal was without just cause or excuse. Accordingly, the Claimants claim is hereby allowed.

Remedy

[29] The Claimant was employed with Ethiopian Airlines until February 2021. The Claimant came back to Malaysia because of the instability caused by the unrest in Ethiopia. The Claimant's last drawn salary was 10,000 USD. Since April 2021, the Claimant is under the employment of Z9 Elite Sdn. Bhd.

[30] In ***Mazlin Desa v Malaysia Airline System Berhad*** [2013] 3 ILR 646, the court took the Claimant's post-dismissal earnings into account when deciding on the quantum of backwages in the following manner. The court held as follow:

"[45] Since the claimant found employment within two weeks after the date of dismissal on 5 August 2012, the court orders the respondent company to pay the claimant backwages of 3 months which is fair in the circumstances of this case based on the claimant's last drawn salary (including the fleet and laundry allowances) or RM4,146.80 per month and 20% to be deducted from the bacwages for post dismissal earnings to be calculated as follows:

RM4,146.80 x 3 months – 20% = RM9,952.32"

[31] In ***Dr. James Alfred (Sabah) & Anor v Koperasi Serbaguna Sanya Bhd (Sabah)*** [2001] 3 CLJ 541, the Federal Court held that:

"In dealing with different types of cases, the tribunal in each case has to see that relief should be given in a particular case to a particular workman in the matter of compensation by balancing the conflicting claims and the variations that exist in human conduct and the requirements of social justice. On the parity of reasoning, the adjudicators has to counter-balance the claim of the employer that the workman was gainfully employed elsewhere during the period of unemployment with him, with the claim of the workman that he was not employed anywhere at all. The quantum of backwages is, therefore, a matter in the discretion of the tribunal dependent on the facts of the case. The tribunal

will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercise in a judicial and judicious manner.”

[32] The Claimant prays for reinstatement to his former position. The court opines this as unsuitable and not in the interest of industrial harmony. The court will order compensation in lieu of reinstatement of one month’s salary per each year of completed service.

Backwages

Date of dismissal	:	24.07.2019
Last date of hearing	:	08.11.2021
RM35,000 x 24 months	=	RM840,000.00
Deduction of 30% (post-dismissal earnings)	=	RM252,000.00

		RM588,000.00
		=====

Compensation in lieu of reinstatement

Date of employment	:	02.04.2018
Date of Dismissal	:	24.07.2019
RM35,000 x 1 month	=	RM35,000.00

Total	=	RM623,000.00
		=====

[33] The award sum of **RM623,000.00** less any statutory deductions, if any, is to be paid to the Claimant's solicitor Messrs Ramesh K. Supramaniam of Suite 17-12 Level 17 Centro, No. 8 Jalan Batu Tiga Lama, 41300 Klang, Selangor on behalf of the Claimant within 30 days from the date of the Award.

HANDED DOWN AND DATED THIS 23RD DAY OF NOVEMBER 2021

**-signed-
(TEOH CHIN CHONG)
CHAIRMAN
INDUSTRIAL COURT, MALAYSIA
KUALA LUMPUR**