A

KUMPULAN SF POWERTECH SDN BHD

v.

M MARNOKARRUN D MARUTHAMUTHU

B

INDUSTRIAL COURT, KUALA LUMPUR
P IRUTHAYARAJ D PAPPUSAMY
AWARD NO. 230 OF 2013 [CASE NO: 4(22)(20)/4-1741/04]
31 JANUARY 2013

C

DISMISSAL: *Constructive dismissal - Benefits - Claimant unable to use the company car - Whether it had been a contractual entitlement - Contents of the claimant's contract of employment - Whether the company's failure to renew the road tax had amounted to a fundamental breach going to the root of the contract of employment - Evidence adduced - Effect of - Whether dismissal without just cause or excuse - Industrial Relations Act 1967, ss. 20(3) & 30(5)*

D

DISMISSAL: *Constructive dismissal - Benefits - EPF and income tax deductions - Company failing to remit despite claimant paying - Whether it had amounted to a breach of a fundamental term of the claimant's contract of employment - Effect of - Whether dismissal without just cause or excuse - Industrial Relations Act 1967, ss. 20(3) & 30(5)*

E

DISMISSAL: *Constructive dismissal - Benefits - Reimbursement of hospital bills - Whether the company had failed to fulfil - Evidence adduced - Whether sufficient to prove the allegation - Effect of - Whether dismissal without just cause or excuse - Industrial Relations Act 1967, ss. 20(3) & 30(5)*

F

DISMISSAL: *Constructive dismissal - Hours of work - Whether the log-in and log-out books had been falsified - Evidence adduced - Whether sufficient to prove the allegation - Effect of - Whether dismissal without just cause or excuse - Industrial Relations Act 1967, ss. 20(3) & 30(5)*

G

DISMISSAL: *Constructive dismissal - Salary - Deductions made - Claimant not notified beforehand - Whether a fundamental breach going to the root of the contract of employment - Effect of - What the company should have done - Whether dismissal without just cause or excuse*

H

DISMISSAL: *Constructive dismissal - Salary - Delay in the payment of the claimant's salaries - Reasons for the same - Whether the claimant had been singled out and victimised - Whether the claimant had been aware of the financial difficulties faced by the company - Evidence adduced - Evaluation of - Effect of - Whether dismissal without just cause or excuse*

I

DISMISSAL: *Constructive dismissal - Status - Change to the claimant's reporting line - Whether it had amounted to a demotion - Reasons for the change - Whether the claimant had been aware of the reasons - Evidence adduced - Evaluation of - Effect of - Whether dismissal without just cause or excuse - Industrial Relations Act 1967, ss. 20(3) & 30(5)*

The claimant commenced employment with the company as the Head of Marketing and Operations and he simultaneously held the position of General Manager for Astral Ground Handling Services Sdn Bhd. The claimant claimed constructive dismissal due to, amongst other things, several acts and omissions on the part of the company, inconsistent with the terms of his contract of employment. The company on the other hand, denied that they had done any acts to enable the claimant to consider himself constructively dismissed. There were 2 main issues that arose for determination before this court. The first was whether the claimant had been constructively dismissed and if answered in the affirmative, whether his dismissal had been with just cause and excuse.

Held for the claimant: dismissal without just cause and excuse

(1) On the issue of the company deducting the claimant's salaries for the months of November and December respectively, it had failed to notify him of his annual medical leave entitlement and the reasons the said deductions had been made. It should have done so. Its failure aforesaid had amounted to a repudiation and a breach of a fundamental term of the claimant's contract of employment, which had entitled the claimant to claim constructive dismissal. There had been contributory misconduct on the part of the claimant *ie* his unilateral decision not to report for work, just because his company car road tax had not been renewed. He should have reported for work and taken the issue up separately (para 16).

(2) On the issue of the company's falsification of the log-in and log-out book, which according to the claimant had amounted to a breach of a fundamental term of his contract of employment, there had not been any concrete evidence adduced to show that the company had falsified the log-in and log-out book for the purpose of building up a case to get rid of him from his employment. Hence there had not been any merit to this allegation by the claimant (paras 20 & 21).

(3) On the company's late payment of the claimant's salaries for the months of November and December respectively, it had not occurred every month and the evidence had shown that

other employees' salaries had also been paid late, due to the fact that the company had been facing cash flow problems. The claimant had been fully aware that the company's delay in paying his salary had been due to these financial problems. If the company had intended to victimise him, it wouldn't have given him an advance payment of his salary in previous months. From the evidence, it had been obvious that even with the financial difficulties being faced by the company, it had not intended to breach the terms of the claimant's contract of employment (para 24).

(4) On the company's alleged failure to pay the claimant's hospitalisation bills, no documents had been produced to support this allegation. Based on the evidence adduced by the claimant, the dates 1 November 1998 and 26 September 1998 as stated by him in the Statement of Case, had been wrong and it should have read 17 November 1998, for which the company had paid the bills on 21 November 1998. Thus the company had fulfilled its obligations and the issue of constructive dismissal had not arisen in respect thereof (paras 27 & 29).

(5) On the company's failure to renew the road tax for the company car, its actions had prevented the claimant from performing his official duties and had definitely been a breach of a fundamental term of his contract of employment. Based on the specific wording in the 2nd paragraph of his contract of employment, the provision of the company car had been a contractual entitlement as opposed to a discretionary benefit and it could not be removed unilaterally by the employer. Thus the claimant had been justified in claiming constructive dismissal on this basis (paras 32 & 33).

(6) On the claimant's contention that the change in his reporting line had justified him claiming constructive dismissal, Mahesh's appointment as a consultant had been to advise the company on how to turn around the operations of Astral in KLIA from one of loss to profit. Since the claimant's position as GM of Astral had remained intact, it had not amounted to a demotion when he had been told to report to Mahesh, as he had to work together with Mahesh to turn around the financial position of Astral. Thus his claim for constructive dismissal on this ground had not arisen (para 37).

(7) On the company's failure to remit his EPF and Income Tax deductions, it had been a breach of a fundamental term going to the root of the contract of employment and had been good

grounds for claiming constructive dismissal. It had been a term of the claimant's contract of employment that both the claimant and the company had to make statutory deductions for both EPF and income tax. The fact that all of the claimant's EPF and income tax payments had been duly paid could not absolve the company from his claim for constructive dismissal (paras 40, 41 & 43).

(8) The conduct of the company when cumulatively considered, had amounted to a repudiatory breach of the fundamental terms of the claimant's contract of employment, which had justified him walking out and claiming constructive dismissal (para 44).

[Dismissal without just cause or excuse - claimant awarded compensation in lieu of reinstatement and backwages in the sum of RM215,250.]

Award(s) referred to:
Equitylink Consultants (M) Sdn Bhd v. Dr Jayaprakash Mohan Rao [1992] 1 ILR 492 (Award No. 168 of 1992)
Lee Cheong Co Sdn Bhd v. Lim Suw Koong [2003] 2 ILR 135 (Award No. 291 of 2003)

Case(s) referred to:
Anwar Abdul Rahim v. Bayer (M) Sdn Bhd [1998] 2 CLJ 197
Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor [2001] 3 CLJ 541
Pan Global Textiles Bhd, Pulau Pinang v. Ang Beng Teik [2002] 1 CLJ 181
Western Excavating (ECC) Ltd v. Sharp [1978] QB 761
Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298

Legislation referred to:
Industrial Relations Act 1967, ss. 20(3) & 30(5)

Other source(s) referred to:
BR Ghaiye, "*Misconduct in Employment*", 2nd edn, pp. 306 & 712

For the claimant - David Gurupatham (Satwant Kaur with him); M/s David Gurupatham & Koay
For the respondent - Suresh Thanabalasingam; M/s Suresh Thanabalasingam

Reported by Sharmini Pillai

A

AWARD
(NO. 230 of 2013)

P Iruthayaraj D Pappusamy:

B **[1]** The parties to the dispute are Encik M Marnokarrun a/l D Maruthamuthu ("the claimant") and Kumpulan SF Powertech Sdn Bhd ("the respondent")(the company). The dispute between the claimant and the company arose out of the alleged constructive dismissal of the claimant by the company on 9 January 2001.

C **Introduction**

[2] This case was initially handled by Y.A. Tuan Hj Zaini b. Hj Abdul Rahman who was then the former chairman of the Industrial Court at the first date of mention on 30 September 2004. Subsequently, Y.A. Tuan Hariraman a/l Palaya took over this D matter on 29 March 2005. Thereafter this matter was then handled by Y.A. Puan Amelia Tee Hong Geok binti Abdullah on 30 April 2008. Y.A. Tuan Teo Song Eng then heard the matter on 22 September 2008, 2 December 2008, 26 March 2009, 11 July 2009.

E **[3]** Upon my transfer to the Industrial Court Kuala Lumpur in May 2010, I took charge of this file and fixed a mention date on 10 May 2010. At that point in time the solicitors acting for the company was Messrs Suresh Thanabalasingam. The solicitors acting for the claimant was Messrs David Gurupatham & Koay. At the stage of continued hearing of this matter before me the claimant F was under cross-examination.

Brief Background Facts

[4] The claimant had commenced employment with the company G on 1 March 1997 as Head of Marketing and Operations. Upon his appointment he held the position as the General Manager of Astral Ground Handling Services Sdn Bhd ("the subsidiary company"). The parent company was Kumpulan SF Powertech Sdn Bhd. There was no dispute as to his position since 1997 and his last drawn salary was RM8,000 per month. He was also paid entertainment H allowance of RM500 per month and petrol allowance of RM250 per month. By letter dated 9 December 2000 the claimant had claimed constructive dismissal against the company.

Claimants' Case

I **[5]** The claimant *inter alia* contended as follows:

(i) that due to several acts and omissions of the company, it had acted inconsistently within the terms of claimant's employment

contract and therefore he contends that he was dismissed constructively.

(ii) company had acted in bad faith and had breached the terms of the claimant's letter of employment *inter alia*:

(a) that on two occasions failed to provide medical insurance as claimed in the company's letter of employment;

(b) that the company had failed to pay the claimant his salary on time and/or reimburse his claims;

(c) that the company had wilfully refused to renew the company's car road tax and this had prevented the claimant from performing his duties;

(d) that the company had failed to contribute/pay the claimant's EPF and his income tax eventhough the said sum was deducted from the claimant's salary;

(e) that the company had falsified the log-in and log-out book in an attempt to build a case in order to terminate the claimant from employment;

(f) that the company has without just cause or reason deducted the sum of RM3,200 from the claimant's salary and further in the month of December 2000 the company had further deducted a sum of RM2000 from the claimant's salary.

Company's Case

[6] The company's contention *inter alia* is as follows:

(a) the company denies that the claimant was constructively dismissed on 9 January 2001;

(b) the company denies that it had acted in a way that it had breached the contract of employment nor had the company evinced or had shown an intention as not to be bound by the contract of employment;

(c) the company had notified the claimant who was the General Manager of the subsidiary company that the subsidiary company was facing financial problems;

(d) in view of the financial problems faced by the subsidiary company the company had to take some drastic remedial action to fix the financial problems;

(e) the claimant refused to comply with the rules and regulations introduced by the new recruited CEO;

(f) that the reasons on why the EPF contributions and income tax payments had not been credited were well within the knowledge of the claimant;

(g) the claimant had not been victimized;

(h) the company states that the claimant's medical bills at Assunta Hospital and Subang Jaya Medical Centre were borne by the company's insurers, SEA Insurance Bhd;

(i) the company states that till the day the claimant was with the company it had paid his salaries and allowances eventhough there were occasions when the claimant's salaries was paid after the 7th of the said month but this was due to the poor financial position of the company;

(j) in any event the company had paid all his claims.

Issues

[7] The issues in this case for the court's determination are as follows:

(a) Whether the claimant had been constructively dismissed by the company; and

(b) If the claimant had been so dismissed, whether the dismissal is with just cause or excuse.

The Law

[8] The law relating to constructive dismissal has been clearly set out by the Supreme Court in the case of *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 where Salleh Abas, LP, has stated:

> 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 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 is an attempt to enlarge the right of the employee of 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.

[9] The above doctrine was adopted from Lord Denning's judgment in the case of *Western Excavating (ECC) Ltd v. Sharp* [1978] QB 761 wherein, His Lordship stated as follows: A

> … if the employer is guilty of conduct which is a significant breach going to the root of 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 his contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances, at the instant without giving notice at all or, alternatively, may give notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for if he continues for any length of time, without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract. B C D

[10] Hence, the test formulated is one of 'contract test' and no longer the 'unreasonableness test'. In *Anwar Abdul Rahim v. Bayer (M) Sdn Bhd* [1998] 2 CLJ 197 the Court of Appeal restated the above test in clear terms as follows: E

> 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 CLJ (Rep) 298) F G

[11] It is trite law that in a case where the employee contends that he was constructively dismissed the onus of proof falls on the employee to prove on the balance of probabilities that he was constructively dismissed. Once the claimant satisfies the test of constructive dismissal then the burden shifts to the company to establish that the dismissal was with just cause. The test for constructive dismissal was whether the company 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 **(the contract test)**. H I

[12] Let me now examine if the following grounds as stated by the claimant amount to a claim for constructive dismissal:

Ground 1

(a) Whether The Company's Deduction Of RM3,200 (November 2000) And RM2000 (December 2000) From The Claimant's November And December Salaries Respectively Give Rise To The Claimant's Claim For Constructive Dismissal?

[13] It is the claimants' contention that by the company deducting the claimant's salary without giving any reasons whatsoever, it can be said that it amounts to a breach of a fundamental term and the company had evinced an intention not to be bound by the terms of the contract.

[14] The company on the other hand had contended that a sum of RM3,200 was deducted from the claimant's salary in the month of November 2000 due to the fact that he had taken excessive medical leave of 25 days which is beyond the 14 days prescribed under the labour law. A sum of RM2,000 was also deducted from his December 2000 salary as the claimant was absent from work for 8 days without permission (see *Pan Global Textiles Bhd, Pulau Pinang v. Ang Beng Teik* [2002] 1 CLJ 181; [2002] 2 MLJ 27) ("*Pan Global Textiles*").

[15] The principle of law is that it is an employer's duty to pay an employee his agreed remuneration which is a basic obligation under the contract of employment. The employer is not entitled to deduct part of an employee's salary for whatsoever reason without prior notification. If the employer deducts part of his salary without notifying the claimant for any other reason for doing so (besides statutory deductions), and also without the claimant's knowledge and agreement then such unilateral reduction of salary could be a sufficiently serious breach to amount to repudiation of the employee's contract of employment. (see *Equitylink Consultants (M) Sdn Bhd v. Dr Jayaprakash Mohan Rao* [1992] 1 ILR 492 (Award No. 168 of 1992)).

[16] I have examined the claimant's and company's contentions in this regard and the court is in agreement with the claimants' contention that failure to notify the claimant with reason(s) prior to deducting of his salary can amount to a breach of a fundamental term. This is applicable on the facts of the instant case for the following reasons:

The Deduction Of RM3,200 From The Claimant's November 2000 Salary

(i) In cross-examination COW1 admitted that the company's document does not state that an employee is entitled to only 14 days of medical leave per annum, but that there is a provision in the labour law that provides for that;

(ii) How does an ordinary lay person like the claimant knows or even expected to know where in the labour law does the maximum entitlement of 14 days of medical leave is allowed if the company had not notified him of that law at the commencement of employment;

(iii) The company's terms and conditions of employment does not contain the claimant's 14 days medical leave entitlement per annum. Even it there is a provision in the labour law that provides for 14 days medical leave per annum entitlement, the company failed to lead evidence as to which specific provision in the labour law legislation does it provide for the said entitlement.

(iv) The company had failed to notify the claimant of his medical leave entitlement per annum and also the reason for deduction of RM3,200 from his November 2000 salary prior to the said deduction. Even the letter at p. 152 of COBD-1 was not carbon copied to the claimant to notify him of that. The said letter at p. 152 of COBD-1 states "As per company rules an employee of the company is entitled to 14 days medical leave per annum and any excess will be deducted from the salary". The company however failed to adduce an iota of evidence on the existence of such an express provision in the company's rules.

The Deduction Of RM2000 From The Claimant's December 2000 Salary

(i) This is with regard to the deduction of RM2,000 from claimant's December 2000 salary is due to the fact that the claimant was absent for 8 days without company's permission. In my view the company ought to have informed the claimant the reason prior to the said deduction from his salary. Failure to provide and notify the claimant prior to the said deduction is a breach of a fundamental term the claimant's contract of employment and based on such a conduct on the part of the company amounts to a repudiation of the claimants' contract of employment. This entitles the claimant to claim constructive dismissal.

(ii) On the claimant's part the court also finds **contributory misconduct** for unilaterally deciding not to report for work just because the company car road tax was not renewed. The claimant should have reported for work and should have taken up this issue separately. In *Pan Global Textiles* at p. 39 the Federal Court made reference to BR Ghaiye, in his book entitled '*Misconduct in Employment*' (2nd edn, at p. 306, said:

> 22. Whether an employee is required to obey orders if it is doubtful whether the orders are legal or not.
>
> *It is generally held that the proper course for an employee is to obey the orders when it is given and protest about its illegality in separate proceedings*. The distinction is made on the basis that if it is allowed to a worker to judge about the legality of every order and to disobey it, if he thinks it is not legal, it would be impossible for the management to get work done. (*Rashtriya Girni Kamgar Sangh v. Genda Lal Mills Co* [1951] ICR 603 (IC); *Kalyanbhai Millji Bhai v. New National Mills Co Ltd, Ahmedabad* [1957] ICR 1052 (IC); *BM Kastura v. Swadeshi Mills Co Ltd* [1973] ICR (IC) ...

And as to absence of employee without permission, BR Ghaiye, at p. 712 of the same book, said:

> No employee can claim as matter of right leave of absence without permission and when there might not be any permission for the same. Remaining absent without any permission is, therefore, grouse violation of discipline... (emphasis added).

[17] In the instant, there is no doubt that the conduct of the claimant in remaining absent from work without permission (even though he may have a reason for his absence) is certainly a contributory misconduct on his part (**"first contributory misconduct"**).

Ground 2

(b) Whether The Alleged Falsification Of The Log-in And Log-out Book By The Company Can Give Rise To A Claim Of Constructive Dismissal By The Claimant?

[18] The claimant had submitted that the company had breached the terms of the claimant's contract of employment by falsifying the log-in and log-out book in an attempt to build a case in order to terminate the claimant's employment. This amounts to making unfounded allegations by falsifying the log-in and logout book. According to the claimant constructive dismissal includes making unfounded allegation such as this.

[19] The company on the other hand had submitted that based on the evidence of the claimant he had not informed the company (a) of the alleged offence allegedly committed by the company of falsifying the log-in and log-out book (b) that a previous report (p. 57 of CLBD) had been lodged by the claimant on this matter on 23 December 2000. It is the evidence of COW1 that he is unaware of this and there is no evidence that it was falsified. Therefore the company is of the view that this cannot be a basis for constructive dismissal.

[20] In my view there is no concrete evidence that the company had falsified the log-in and log-out book for the purpose of building up a case to get rid of the claimant from his employment. The following testimony of the claimant will reveal this unfounded allegation of the claimant's complaint in this regard:

Q180 : Another issue you have raised in your SOC at p. 4 para (f) "the company has further falsified … employment, is that true?

A : Yes.

Q181 : And during your cross-examination you referred to p. 37 of CLBD where you testified that this is the original page of the log in and log out book and at p. 38 is the falsified one (Ref to W.S. CLWS1 Q34).

A : Yes.

Q182 : Who keeps the log in and log out report?

A : Normally it is left on the table in the office.

Q183 : In your evidence in examination in chief you had stated that you had photocopied p. 37 on 27 November 2000. Is that true?

A : Yes.

Q184 : Do you agree that at the time which you claimed you had photocopies this page this p. 37 was in the log in and log out record?

A : Yes.

Q185 : That would mean p. 38 was not there in the log in and log out record?

A : I am not saying that there are 2 pages of the same dates in the log in and log out record.

Q186 : Where did you get p. 38 from?

A : Page 38 was photostated before p. 37. It was from the log in and log out book.

Q187 : Who photostated p. 38 of COBD1?

A : I did it.

Q188 : You photostated p. 37 on 27 November 2000 and p. 38 was prior to p. 37. Is this true?

A : Not true.

Q189 : When was pg 37 photostated?

A : On 30 November 2000.

Q190 : Did you go to work on 29 & 30 November 2000?

A : Yes.

Q191 : And you agree that from p. 37 it shows that you have gone to work on 29 & 30 November 2000?

A : Yes.

Q192 : In p. 37 of COBD-1 a copy of the original log in and log out record?

A : No.

Q193 : When was p. 38 of COBD-1 photocopied?

A : On 28 November 2000.

Q194 : I put it to you that if you had photostated p. 38 on 28 November 2000 it would obviously show contents only up to 28 November 2000. Agree?

A : Yes.

Q195 : Based on your evidence you said that you photocopied p. 38 on 28 November 2000 and p. 37 on 30 November 2000 and you are claiming that there was falsifying of records. Did you write to the company to seek clarification?

A : No.

Q196 : You lodged a police report on 23 December 2000 (found at p. 57 of CLBD). Where was this police report lodged at?

A : Petaling Jaya Police Station.

Q197 : You will also agree with me that based on this police report the basis for you to have lodged this police report is because you received a letter from CEO Mr. Mahesh on 18 December 2000?

A : Yes.

Q198 : Refer to p. 18 - 20 of COBD1. Do you agree that the police report is based on this letter?

A : Yes.

Q199 : You also agree that from this letter dated 18 December 2000 the Co has shown their dissatisfaction towards your work attitude as per the reference in the said letter?

A : Yes.

Q200 : You also agree that in the said letter reference to p. 19 of COBD1 the Co was dissatisfied as to the manner you have been logging in and logging out?

A : I do not agree.

Q201 : I put it to you that the reason this police report was lodged and your claim that the record book (log in & log out) were falsified is actually an afterthought?

A : I disagree.

Q202 : I put it to you that based on p. 37 and 38 of CLBD there is no falsification on the said 2 pages?

A : I disagree.

[21] Based on the evidence of the claimant there is no merit to conclude that the company had falsified the log-in and log-out book. Hence, the claimant has failed to establish that the company had breached a fundamental term of the claimant's contract of employment in respect of the falsification of the log-in and log-out book.

Ground 3

(c) Whether The Late Payment Of Salary By The Company To The Claimant Particularly For The Month Of December 2000 Gives Rise To The Claimant's Claim Of Constructive Dismissal?

[22] The claimant's case is that failure to pay the claimant his salary within the period specified amounts to a breach of the terms of the claimant's letter of employment.

[23] The company's case is that there is no doubt that the claimant had been paid his salary till December 2000. However, the only month that his salary was paid late was for December 2000 (p. 149 and 150 of COBD-1). His December 2000 salary was credited into his account on 19 December 2000. This is due to the financial difficulties faced by the company.

[24] In my view the very late payment of the claimant's salary did not occur every month but that the December 2000 salary was paid very late, ie, on 19 December 2000. It is in evidence by COW1 that it is not only the claimant's salary that was paid late but also other employees' salary too was paid late due to the fact that the company was facing financial cash flow problems. I believe the claimant was fully aware that the company's delay in paying his salary late was due to the fact that the company was facing some financial problems. In any event if the company had intended to victimize the claimant it would not have paid an advance payment of his salary in previous months. As a matter of fact the claimant was not forthright in answering questions relating to the fact the company had paid advance salary to him in the past. The advance payments are exhibited in pp. 116 - 132 of COBD1. Hence, it is obvious than even with the financial difficulties faced by the company, the company had no intention to breach the terms of the claimant's letter of employment. Based on the circumstances of the case there is no merit in the claimant's claim that the late payment of the December 2000 salary is a breach of a fundamental term of the claimant's contract of employment. Hence, his claim that this has given rise to a claim for constructive dismissal is without basis.

Ground 4

(d) Whether The Alleged Failure By The Company To Pay The Claimant's Hospitalization Bills Amounts To Constructive Dismissal?

[25] On this matter the claimant had submitted that on 1 November 1998 the claimant was admitted to Assunta Hospital and on 26 September 1998 the claimant was admitted to Subang Jaya Medical Centre. It is also the claimant's contention that on both these occasions the claimant had to bear his own medical bills as the company refused to bear these hospital expenses incurred by the claimant. This is contrary to cl. 10 of the terms and conditions of the employment contract which states that "an employee is also covered by Group Hospitalization Plan". According to the claimant this is in fact a breach of a fundamental term of the claimant's contract of employment and as such the claimant is entitled to claim constructive dismissal.

[26] The company's case on the other hand is that the claimant's claim in his statement of case that 1 November 1998 and 26 September 1998 the company had refused to pay his bills is incorrect and in fact the two said dates mentioned by the claimant is also wrong.

[27] In my view the claimant had not produced any documents to the effect that the company had refused to pay the claimant's hospitalization bills on 1 November 1998 and 26 September 1998 respectively.

[28] The evidence of the claimant in cross-examination in this regard is as follows:

Q116 : The other complaint you had is that your medical bills were not paid by the Co? Is that right?

A : Yes a few.

Q117 : In your Statement of Case at p. 3 para 7 item a. There were the 2 dates where you say that the medical bills were not paid?

A : Yes.

Q118 : The other complaint you had was that the company had no medical insurance as stated in their letter of appointment? Is that right?

A : Yes it is true to the best of my knowledge. There is only 1 year coverage.

Q119 : Ref to p. 29 of COBD-1. Do you agree that based on this letter which states that from the date of your confirmation 1 September 1997 you are covered by the Group Health Insurance Scheme? Agree?

A : For the year 1997 yes (only that year).

Q120 : Do you have any documents to say that in the year 1998, 1999, 2000 that you were not covered by the said Insurance Scheme?

A : No, I do not have.

Q121 : In 1999 were you admitted to Subang Medical Centre for a prolapse disc?

A : Yes.

Q121 : Do you agree with me that your medical bill was paid for your treatment for at Subang Medical Centre by SEA Insurance?

A : This happened long ago so I cannot remember.

Q122 : Ref to p. 39 of COBD-1. Do you confirm that based on this document you were admitted to Subang Jaya Medical Centre on 21 September 1999 for prolapse discs and your medical bill was paid by SEA Insurance?

A : Yes.

Q123 : Now you would agree with me that when you were questioned earlier when you said that you were only covered for the year 1997 you were wrong?

A : Yes.

Q124 : In 1998 you were admitted to Assunta Hospital?

A : I can't remember.

Q125 : Refer to p. 35 and 36 of COBD-1. Pages 35 shows the seal of Assunta Hospital which will mean that you were admitted to Assunta Hospital at that time?

A : Yes.

Q126 : Do you agree also that the sum of RM3000 was also paid by the Co?

A : Yes paid by the Co not the Insurance.

Q127 : In CLBD and also in CLWS-1. Refer to CLWS-1 at Q12, 13 & 14 you referred to pp. 7 - 11 of CLBD you were asked. These are the documents which you are saying that the Co did not reimburse you?

A : To the best of my knowledge they were not reimbursed to me.

Q128 : Refer to pg 8 of CLBD. Can you read date "Registered at 23 February 1999 and discharged at 26 February 1999. Read from 7 - 11 that you have earlier referred in examination-chief. These are all with regard to your hospitalization at Subang Jaya Medical Centre in the year 1999. Do you agree that the bill you have produced in CLBD are with regard to your hospitalization in the month of February 1999?

A : Yes.

Q129 : Is there any documents that you have produced with regard to your hospitalization on 26 September 1998?

A : I can't remember.

Q130 : Is there any documents that you have produced to show that you were admitted on 1 November 1998 at Assunta Hospital?

A : I can't remember.

Q131 : I put it to you there is no evidence on record to show that you were admitted at the said Hospital as per your SOC on those 2 occasions? A

A : I can't remember.

[29] Based on the evidence adduced by the claimant the dates of 1 November 1998 and 26 September 1998 as stated by him in the statement of case are wrong. It should have been 17 November 1998 for which the company had paid the bills on the 21 November 1998 (p. 33-35 of COBD-1). On 21 September 1999, the claimant was admitted at Subang Jaya Medical Centre and the bill was paid by the Group Insurance Policy (p. 39 of COBD-1). This was the evidence through cross-examination. Therefore in my view based on the evidence the company had fulfilled its obligation and the issue of constructive dismissal does not arise in respect of this matter. B C D

Ground 5

(e) Whether The Failure By The Company To Renew The Road Tax Of The Company Car Vehicle WFT 429 Entitles The Claimant To Claim Constructive Dismissal? E

[30] The claimant's contention is that the company's deliberate and willful non renewal of the road tax for the said company car (which is the claimant's contractual entitlement under his contract of employment) which prevented him from performing his official duties is a breach of a fundamental term of his contract of employment. The said breach entitles him to claim constructive dismissal. F

[31] The company on the other hand contended that based on cl. 11 at p. 3 of COBD-1 the company car is a benefit given to the claimant. Hence the company has a discretion to withdraw such benefit from him. Therefore the withdrawal of this benefit from the claimant does not give rise to a claim of constructive dismissal. G

[32] I am in agreement with the claimant's contention in the instant case that the non-renewal of road tax of the company's car WFT 429 which prevented him from performing his official duties is definitely a breach of a fundamental term of the claimant's contract of employment. At p. 1 of CLBD the 2nd paragraph of the claimant's letter of employment stipulates "In addition, **a company car will be provided** and the following allowances will be paid: H I

Entertainment Allowance	RM500 per month
Petrol Allowance	**RM250 per month**

(emphasis added)

[33] Based on the specific, clear wordings of the above mentioned said 2nd paragraph of the claimant's letter of employment the provision of a company car to the claimant is contractual entitlement to him and not a discretionary benefit that the company can withdraw at its whims and fancy. Hence this contractual entitlement cannot be removed unilaterally by the employer. Therefore, in the instant case the non-renewal of the company car road tax and the withdrawal of the company car is a breach of a fundamental term of his contract of employment and as such the claimant is entitled to claim constructive dismissal.

Ground 6

(f) Whether The Change In The Reporting Line From The Claimant Initially Reporting To COW-1 To That Of Mr Mahesh The CEO Of Astral Can Give Rise To A Claim Of Constructive Dismissal By The Claimant?

[34] In the first place the claimant had not raised this issue in his letter of constructive dismissal. Hence, this court is not duty bound to deal with this issue at this stage. In any event for the sake of completeness I shall nevertheless deal with it.

[35] It is the claimant's contention that the company's unilateral changing of reporting structure from the claimant initially reporting to COW-1 the Senior Vice President to that of Mahesh the CEO of Astral amounts to a demotion and therefore it amounts constructive dismissal.

[36] The company on the other hand contends that Mahesh was appointed as a consultant to Astral as it was running at a financial loss and needed to be turned around financially. It is not a demotion for the claimant as his chain of command as a General Manager remained intact. Hence, the issue of constructive dismissal does not arise.

[37] I am in agreement with the said company's contention. In this regard COW-1 testified in his re-examination regarding the appointment of Mr Mahesh that "the claimant remains as GM of Astral and Mahesh was specifically assigned to look into the loses and financial aspect of the company. In this regard the claimant reported to Mr Mahesh". In my view the appointment of Mr Mahesh as a consultant was to advise on how to turn around

the operation of Astral in KLIA to a profitable level from that of suffering loses. Since the claimant's position as GM of Astral remained intact it did not amount to demotion when he was told to report to Mahesh since the claimant had to work together with the consultant in any event to turn around the financial position of Astral. In the circumstances the issue of constructive dismissal did not arise.

Ground 7

(g) Whether The Non-Remittance Of The Claimant's EPF And Income Tax Deductions To The Relevant Authorities Entitles The Claimant To Claim Constructive Dismissal.

[38] The claimant's contention is that non-payment of claimant's EPF and income tax contributions amounted a material breach of his contract of employment and therefore his claim for constructive dismissal is justified.

[39] On the other hand the company's contention is that due to the company's financial constraint it is not only the claimant's portion of EPF contribution and income tax portion were not remitted but the other employees as well. Furthermore the claimant had never made a complaint to management pertaining to this since 1998. Hence this could not be a basis for constructive dismissal.

[40] This court is of the view that non-remittance of statutory deductions for EPF and income tax deduction of an employee is a breach of a fundamental term of the claimant's contract of employment and hence it is a ground for a claim of constructive dismissal. Item 5 of the claimants' term and conditions of employment (p. 2 of CLBD) states:

> 5 Statutory Contributions
>
> Both you and the company shall make the required statutory contributions at the prevailing rates. This shall include contribution to the EPF, Inland Revenue (Under the PAYE system)

[41] It is a term of the claimant's contract of employment that both the claimant and the company have to make a statutory deduction in so for as EPF and income tax contributions are concerned. COW1's evidence in cross-examination reveals as follows:

> Q102 : At the point when the company was deducting his portion of the EPF from his salary and not paying the EPF from his

salary and not paying the EPF did the company inform the claimant that it was not paying EPF?

A : No, we did not tell.

Q103 : Refer to p. 48 of CLBD. Do you agree that as of 20-1-2001 at paragraph 5 "Kindly also take note that you have not reverted to me on my EPF and Income Tax deductions." Did you tell the claimant that his portion has been deducted but not paid to EPF?

A : No, we did not.

Q109 : During that period of time it was mandatory for the company to deduct the portion of claimants' income tax. Do you agree that when you made those deductions you represented to the claimant that portion of the claimant was going to be paid as part of his statutory obligation to the Inland Revenue Department?

A : Yes.

Q110 : In actual fact you did not on those months January 2000 onwards until December 2000. When did you make this payment of Income Tax to the IRD?

A : In 2004.

Q116 : Where was the money deducted from the claimants' salary for the months?

A : It was used by the company because of the shortfall.

Q117 : You agree that the total amount owed to the claimant for his EPF contributions between the years 1998 to 2001 is RM66,240 as per your answer to Q42 of W.S.?

A : Yes.

[42] In the case of *Lee Cheong Co Sdn Bhd v. Lim Suw Koong* [2003] 2 ILR 135 (Award No. 291 of 2003) at p. 140 the court held:

> Further, EPF and Income Tax deductions were made for the whole of 1996 (exh. CLB 15) and 1997 (exh. CLB 16). However the EPF deductions were not remitted to the EPF department as is evident from the EPF statements which showed zero contributions from the employee and employer for (i) 1996 (February to November); (ii) 1997 (November to December) and (iii) 1998 (January to March) (exhs. CLB14, CLB12 and CLB13 respectively). There is also no evidence that the income tax deductions were not remitted to the relevant

> department ... Since the company was guilty of conduct which was a significant breach going to the root of the contract of employment, the claimant was justified in considering himself as being constructively dismissed.

[43] The fact that all of the claimant's EPF and Income Tax in the instant case had been duly paid and that by itself did not absolve the company from the claimant's claim of constructive dismissal.

[44] In my view the conduct of the company cumulatively considered did amount to a repudiatory breach of the fundamental term of the expressed terms and conditions of the claimant's employment contract and therefore his claim for constructive dismissal is justified.

Conclusion

[45] In conclusion, after having taken into account the totality of the evidence adduced by both parties and bearing in mind s. 30(5) of the Industrial Relations Act 1967 to act according to equity, good conscience and substantial merits of the case without regard to technicalities and legal form, this court finds that the claimant has proved on the balance of probabilities that he was constructively dismissed by the company in so far as grounds (1), (5) and (7) are concerned as the company is guilty of conduct which are significant breaches going to the root of the claimant's contract of employment.

[46] I shall now examine the remedy.

Remedy

[47] The claimant prayed for reinstatement in this case. Based on the court's assessment of the industrial relations climate between the parties as displayed by the various witnesses at the trial it is certainly not conducive to reinstate the claimant. In these circumstances it is inappropriate to order the remedy of reinstatement. In the circumstances, the claimant instead will be awarded compensation under two heads, namely, backwages and compensation in lieu of reinstatement.

Backwages

[48] I find this an appropriate case to apply the Industrial Court Practice Note 1 of 1987 and maximize backwages to 24 months. The payment of backwages may be subject to scaling down for

definite reasons. The heads under which such scaling down may be effected are contributory conduct of the part of the claimant, gainful employment after dismissal and delay in the hearing of the trial.

(a) Contributory Factor

[49] I have carefully examined the facts and evidence of the instant case and I made a finding that in so far as ground (a) is concerned there is a contributory misconduct on the part of the claimant and accordingly it is reasonable and fair to make a deduction of 20% from the backwages under this head.

(b) Delay Factor

[50] In my view neither party occasioned any delay in connection with the hearing of this reference nor were there any unwarranted delays by the court or the Ministry of Human Resources. Hence, there is no scaling down under this head.

(c) Gainful Employment

[51] In considering the amount of backwages to be awarded in this case, the court takes note of the decision of *Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor* [2001] 3 CLJ 541 ("*Dr James Alfred*'s case") where the Federal Court held that the Industrial Court "should take into account all relevant matters including the fact, where it exist, that the workman has been gainfully employed elsewhere after his dismissal." The Federal Court in the said case also clarified that to take into account does not *"not necessarily mean that the Industrial Court has to conduct a mathematical exercise in deduction."*

[52] On the facts of the instant case there is no evidence that the claimant was gainfully employed after his constructive dismissal claim. Hence, there is no deduction under this head.

[53] The claimant's last drawn salary was RM8,000 per month. He was also entitled to allowances, namely (i) Entertainment allowance of RM500 per month and (ii) Petrol allowance of RM250 per month. Hence, his gross salary per month is RM8000 + RM500 + RM250 = RM8750 per month.

[54] The court therefore orders as follows:

(i) Backwages from the date of dismissal (9 January 2001) to the last date of hearing (14 May 2012) but limited to 24 months:

RM8,750 x 24 = RM210,000

Less 10% for a contributory misconduct under ground (1) on the part of the claimant = RM21,000

= RM189,000

Add

(ii) Compensation of one month's salary for each completed year of service (1 June 1997 till 9 January 2001)

RM8,750 x 3 months = RM26,250

Total RM215,250

[55] It is further ordered that the company shall pay the total amount of RM215,250 (Ringgit Malaysia: Two Hundred Fifteen Thousand Two Hundred and Fifty) to the claimant less income tax, if any through the claimant's solicitor's firm Messrs David Gurupatham & Koay within 30 days from the date of this award.