INDUSTRIAL COURT OF MALAYSIA

[CASE NO: 27/4-430/11]

BETWEEN

TAN PIK YEE

AND

GYPCEIL (M) SDN BHD

AWARD NO. 740 OF 2012

BEFORE	: **Y .A. DATO' MARY SHAKILA G. AZARIAH - CHAIRMAN (Sitting Alone)**
VENUE	: Industrial Court, Kuala Lumpur
DATE OF REFERENCE	: 29 December 2010
DATE OF MENTION	: 30 May 2011, 13 July 2011, 12 August 2011, 26 September 2011, 2 November 2011 and 23 February 2012
DATE OF HEARING	: 26 April 2012 and 22 May 2012
DATE OF ORAL SUBMISSIONS	: -
REPRESENTATION	: *For the claimant - KS Tan & LJ Fong; M/s Tan Kim Soon & Co* *For the company - Absent* *For the company - Wan Zaharina Wan Zawawi, Official Receiver of Liquidator*

REFERENCES:

This case is a reference under Section 20(3) of the Industrial Relations Act 1967, arising from the dismissal of **Puan Tan Pik Yee** (hereinafter referred to as "the Claimant") by **Gypceil (M) Sdn. Bhd.** (hereinafter referred to as "the Company") on 18 July 2008.

AWARD

This reference stems from the dismissal of Puan Tan Pik Yee ("the Claimant") by Gypceil (M) Sdn. Bhd. ("the Company") on 18 July 2008.

Brief Facts

The Claimant was employed by the Company initially as their Senior Business Development Executive with effect from 20 September 2004. The Claimant deemed herself constructively dismissed *vide* her letter dated 4 August 2008. She contends that she has been driven out of her employment by the Company. She contends that she was asked to resign by the Group Managing Director of the LCL Corporation Berhad Group of Companies which included the Company on 16 June 2008. She avers that on 15 July 2008 the Executive Director of the same Group had asked her to vacate her office and on 19 July 2008 she was shut out of her office which she had been occupying. The Claimant wrote to the Board of Directors on 28 July 2008 listing the events that took place and gave notice to the Company that unless the Company gave her the new keys to her office she shall take the position that the Company was attempting to force

her out of her employment with them. The Claimant contends that on 4 August 2008 when she arrived at the office she found that her office had new locks. She avers that she was requested to meet with the Company's legal adviser which she did and was told by him to go home.

The Company though initially was represented by Solicitors did not file its Statement in Reply to the pleaded case of the Claimant. Its said Solicitors discharged themselves as the case progressed in Court.

On the day fixed for Hearing though served with the Court's notice informing it of the said Hearing date the Company nor its officers did not attend Court. The Court was informed that the Company had on 5 January 2012 been wound up. The representative from the Official Receiver's office attending the said Hearing informed the Court that they had no objections to the Hearing continuing *ex-parte*. The Court proceeded to hear the case *ex-parte*. This the Court felt it was empowered to do by virtue of **Section 29(d)** and **29(g)** of the **Industrial Relations Act 1967.**

To succeed on a plea of constructive dismissal it was held in the case of *Wong Chee Hong v. Cathay Organization (M) Sdn. Bhd.* [1998] 1 MLJ that:

> "*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 was 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*".

A workman is given recourse to Section 20 of the Industrial Relations Act 1967 (the said "Act 1967") in the absence of a formal dismissal or termination. As long as the workmen considers "that he has been dismissed" whether through some conduct on his employer's part or an order of demotion or a transfer, Section 20 of the said Act 1967 can be relied on. Such conduct has been referred to as "constructive dismissal" which categories are not closed.

The onus of proving constructive dismissal lies with the Claimant where he has to establish his case on a balance of probabilities.

The case of *Suechi Industries Sdn. Bhd. v. Umah Jeralene Louis Adailalasani* [2005] 1 ILR 54 the endorsed this view and stated that it was well established that whether or not there has been constructive dismissal is to be determined by the contract test which is basically the aforesaid conditions being established by the Claimant at the Hearing. Should the Claimant succeed in satisfying the "contract test" the burden then shift to the Company to prove that the dismissal was with just cause and excuse.

Reverting again to the case of *Wong Chee Hong v. Cathay Organization (M) Sdn. Bhd.* (*supra*) the learned judge had this to say:

> "*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 being dismissed. (See ***Bouzourou v. The Ottoman Bank (3) and Donovan Invicta Airways Ltd. (4)).***

In ***Bouzourou's*** *case an employee would have been entitled according to the Privy Council, to regard himself as being dismissed if his transfer from one province to another province rendered him exposed to an immediately threatening danger of violence or disease to his person.*

And in ***Donovan's*** *case the Court of Appeal held that when the conduct of an employer was such that it rendered the continuance of the employee's service impossible, the later was entitled to treat the contract as at an end and to obtain damages for wrongful dismissal".*

Having said this the Court is however mindfull that this case was heard *ex-parte* and of the principles. To quote from the book "*The Law of Industrial Disputes*" by O.P. Malhotra, Vol. 3rd Edn. at page 716:

> "*A rule empowering the tribunal to proceed ex-parte if a party is absent and sufficient cause is not shown for his absence, would not enable it either to do away with the enquiry or straightaway pass an award without giving a finding on the merits of the disputes. In other words, the absence of a party does not entail the consequence that an award will straightaway be made against him*".

In the case of *Dawood Khan v. Labour Court* [1969] 11 ILJ 611 (AP) it was held by Chinnappa Redd J:

> "'*Ex-parte' only means in the absence of the other party. It creates a friction which enables a tribunal to presume that all parties are present before it. A fortiori, an adjudicator may imagine that the absentee is present and having done so, it may give full effect to its imagination and carry it to its logical conclusions*".

Ensuing therefrom it is incumbent upon the Court to consider whether a *prima facie* case had been made out and in arriving at this conclusion as whether a *prima facie* case has been made out the Court has to consider the evidence before it and as narrated by the Claimant oath in the afore said paragraphs.

The Claimant testified that she had been working for the Company for nearly 4 years, that is, since 20 September 2004. She said that she was promoted to the position of General Manager by the Company effective 1 June 2007. It was her evidence that in June 2008 she was asked by the Group Managing Director to resign. She said that subsequently she was told by the Group's Executive Director to vacate her office that she was occupying and to surrender the Company's corporate credit card that was given to her. She testified that they did not give her any reasons as to why they requested her to tender her resignation and to vacate her room.

The Claimant further testified that on 19 July 2008 she discovered that the door to her room was locked and her personal items from within were left outside. She said that she lodged a police report and wrote a letter to the Board of Directors on 28 July 2008 informing them of the events that had transpired and requesting that the keys to her office be returned to her or else she will take the position that she has been forced out of the Company by them. It was her testimony that the Company did not respond to her letter and she later *viz* on 4 August 2008 discovered that the Company had changed the lock to her said office. She said that she was requested to meet the legal adviser of the Group to settle all relevant issues which she did. The Claimant testified that the said legal adviser had told her to go home. She said that she was asked by the Company to resign and resolve the matter amicably with her *vide* their letter dated 4 August 2008.

The Claimant *vide* her letter dated 7 August 2008 deemed herself constructively dismissed and informed the Board of Directors of her decision. She testified further that she received a call from the said Group legal adviser threatening her to accept

the settlement offered by the Company. She said that she lodged a police report with regards to the same. It was her evidence that during her tenure the Company she did not receive any warning letters from the Company and that the Company had no issues with her regarding her performance and employment.

Since the Company or its witnesses were absent in Court for the Hearing the important aspects of the Claimant's evidence remains incontrovertible and thus unchallenged by any sworn evidence by the Company. The absence of the Company or its witnesses at the said Hearing and the failure on its part to file its Statement In Reply hinders the Court in making a decision that might favour the Company in this case or justify their actions if at all. The Court on the evidence that is before it is satisfied that the Claimant has established a *prima facie* case against the Company in respect of her termination of service by the Company constructively. The Court finds that the Company's actions are on fundamental breach of the in contract of employment and erodes the mutual trust and confidence that each party reposes in the other. This trust once undermined may cause either party

to treat contract at an end. This is what the Claimant has done. The Company's failure to file its Statement In Reply or to attend any of the mentions and the Hearing though being in receipt of the Court's letters and notices simply shows that the Company is not interested in defending the Claimant's claim that she has been constructively dismissed by the Company. The Claimant's evidence is not challenged and remains incontrovertible. On the facts the Court is satisfied in the absence of evidence to the contrary that the Company by its actions had breached the Claimant's contract of employment. In the absence of evidence oral or documentary the Court is unable to ascertain whether the Company is innocent of that that has been testified against it by the Claimant. This is the Court's findings in the absence of evidence to the contrary that the Claimant's plea of constructive dismissal must succeed against the Company. There is no evidence before the Court to say that the Company is not guilty of what the Claimant pleads its officers had done to her during her tenure with them. There is no evidence to the contrary that shown that the Company was at least justified in what they did.

On the pleadings the Court is satisfied that the Statement of Case in compliance with Rule 9(3) of the Industrial Court Rules 1967 discloses relevant facts and arguments that indicates that there is a breach of the contract of employment. The Claimant's plea for constructive dismissal is justified.

Relief

The Company has constructively dismissed the Claimant without just cause or excuse. The Court does not think that reinstatement would be a suitable remedy given the facts of this case as the Company has been wound up. As such the Court makes the following orders:

(1) Compensation *in lieu* of Reinstatement

RM7,000 x 36 months = **RM252,000.00**

(2) Backwages

The Claimant is entitled to the following sum as backwages guided by the principles of **Section 30(5) of the Industrial Relations Act 1967 (the said "Act").**

In *Nadar Pakar Sdn. Bhd. v. Radja Aritonang* [2000] 3 ILR it was held that it was incumbent upon the Court vested with wide discretionary powers to make an award to the workman dismissed without just cause or excuse on a sound and cogent basis. It was further stated in the said case that in the judicious exercise of its judicial discretion based on sound principles the Court shall generally act with careful regard to the direction in subsection (5) to section 30 of the said Act 1967. The Claimant has testified that her gross salary per month was RM7,000.00.

RM7,000 x 24 months = **RM168,000.00**

The Court is aware that it is required to rescale and reduce the backwages by the post-dismissal earnings of the Claimant. It is her evidence that after her dismissal she was not able to secure an employment for herself for 2 years. Hence no deductions shall be made.

Final Order

The Company is ordered to pay the Claimant the sum of **RM420,000.00** to the Claimant less any statutory deductions if any, within 30 days from the date hereof.

HANDED DOWN AND DATED THIS 6 DAY OF JUNE 2012

(DATO' MARY SHAKILA G. AZARIAH)
CHAIRMAN
INDUSTRIAL COURT, MALAYSIA
KUALA LUMPUR