IN THE INDUSTRIAL COURT OF MALAYSIA
[CASE NO: 6(15)/4-480/20]

BETWEEN

SYLVAIN MARCEL JACQUES PERRET

AND

1) NEARBUY SOUTH EAST ASIA SDN BHD
2) DARAYUS HAPPY MINWALLA

AWARD NO. 1495 OF 2023

Before	:	**Y.A. Tuan Amrik Singh - Chairman**
Venue	:	Industrial Court Malaysia, Kuala Lumpur
Date of Reference	:	21.02.2020
Dates of Mention	:	23.07.2020, 06.08.2020, 18.02.2021, 09.03.2021, 15.03.2021, 22.03.2021, 07.04.2021, 07.05.2021, 05.08.2021, 26.08.2021, 26.11.2021, 20.12.2021, 04.03.2022, 28.04.2022, 02.06.2022, 05.07.2022, 08.07.2022, 19.10.2022 & 17.11.2022
Dates of Hearing	:	12.05.2023
Date of Hearing of Application	:	21.01.2022 & 07.02.2023
Representation	:	*For the claimant - Danielle Dickman; M/s Lavania & Balan Chambers* *For the company - Absent*

REFERENCE:

This is a reference by The Honourable Minister of Human Resources, Malaysia to the Industrial Court of Malaysia pursuant to section 20(3) of the Industrial Relations Act 1967 ('the Act') in respect of the dismissal of **Sylvain Marcel Jacques Perret** (hereinafter referred to as "*the Claimant*") by his employer **Nearbuy South East Asia Sdn. Bhd.** (hereinafter referred to as "*the Company*") on 3 October 2019.

AWARD

Preliminary

[1] The Claimant filed an Application (encl 43A) for an Order that Darayus Happy Minwalla (DHM) who is the Chairman of Nearbuy Group of Companies be joined as a party to the proceedings and the Application was supported by the Claimant's Affidavit In Support. The Court having heard the Application had *vide* Award No. 627 of 2023 ordered that the Chairman of Nearbuy Group of Companies, the proposed joinee be joined as a party in this proceedings, Hereinafter, the Company and the Joinee are, for convenience jointly referred to as "the Respondents".

[2] The Claimant who is a Frenchman, had resided in Malaysia under a working visa during his employment with another company known as Nearbuy Group Ltd which is part of the Nearbuy Group of Companies *vide* an Employment Agreement dated 01.04.2018, in which the Claimant held the position of General Manager Asia.

[3] Approximately three (3) months later, the Claimant was offered the position of General Manager Asia in the Company which is a Malaysian subsidiary in the group of companies *vide* Employment Agreement dated 01.07.2019.

[4] On 03.10.2019, the Claimant via an email dated 03.10.2019 to the Company, tendered his resignation letter claiming constructive dismissal on reasons that the Company had failed to pay his outstanding salaries for the months of January 2019 and May to September 2019 which total up to AED 212, 243.51.

[5] On the date of the hearing, the Claimant's counsel had informed the Court that the Claimant would wish to proceed the case for trial despite the absence of any representative from the Company. By an Interim Award No. 2457 of 2022

handed down by the previous Chairman of Court 6, the Claimant's counsel had informed the Court that the relevant cause papers had been served to the Company in accordance with the required mode of service that is by advertisement in the paper and posting to the last known address of the Company. Having satisfied that the prescribed mode of service had been complied with the Court note that the Respondents were not present to defend the constructive dismissal claim and neither did they file any document to that effect. In fact, despite issuing the relevant Court Forms, the Respondents did not make any effort to be present before this Court.

[6] On the application by the Claimant's counsel that the case be proceeded by way of *ex parte* hearing in the absence of the Respondents, it is necessary to understand the role of the Court in adjudicating in an *ex parte* hearing and the accompanying principles.

The Law On *Ex Parte* Hearing

[7] The role of the Industrial Court in an *ex parte* hearing was lucidly explained by OP Malhotra in the Law of Industrial Disputes, Volume 1, 6th Edition at page 1062 where the learned author stated as follows:

"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 pre emptory hearing on a particular day. After reasonable notice of hearing has been given to the defaulting party, if he still neglect 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…"

And at 1063, the learned author further stated that:

"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 inquiry or to straight away pass an award without giving a finding on the merits of the dispute. In other words, the absence of a party does not entail consequences that an award will straight away be made against him".

[8] The relevant provision that empowers an Industrial Court to hear a matter ex-parte is section 29(d) of the Act that provides:

> "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…"

[9] This Court is satisfied that the instant case is a case fit to be proceeded by *ex-parte* hearing. That said, the Court allowed the Claimant to proceed to testify for the purpose of adducing evidence for his case to which he was the only witness for his case.

Claimant's evidence

[10] The Claimant was until his dismissal on 03.10.2019 the General Manager Asia of the Company and had claimed to be constructively dismissed by the Company.

[11] The Claimant in his evidence gave evidence as follows:

The Claimant was employed by the Company from 01.04.2018 until his dismissal on 03.10.2019. On 01.04.2019 the Claimant had sent an email to the Chief Financial Officer of the Company to enquire on the status of his outstanding salaries for the months of January and February 2019 which amounted to AED35,373.92 and RM9,631.65 respectively. However, except for a brief acknowledgment of the email received from the Claimant, it met with no response.

[12] The Claimant then sent a follow up email on 03.05.2019 on the status of the salaries which were owed to him and again received no immediate response from the Company until on 24.05.2019 when the Finance Manager sent an email asking the Claimant to be prepared to spend some time in "survival mode".

[13] Due to the excuses given by the Company in its email receipt on 24.05.2019, the Claimant responded by another email notifying the Company of the unpaid salaries in the month of January, February and May 2019 and the other expenses which he incurred and not yet been paid to him by the Company.

[14] By an email dated 28.05.2019 from the Company, the Claimant was informed that financial situation of the Company may not materialise in the short term. Except for assuring him that settling the Claimant's overdue salaries will be the top priority as soon as the Company managed to collect a material amount, no time line was given to the Claimant on when the payment of his salaries will be settled.

[15] On 20.06.2019, the Claimant sent an email to the Company highlighting upcoming payments and expenses claims and again reminded the Company of his unsettled salaries.

[16] On 25.06.2019, the Claimant by email to DHM enquired on the update of the proposal to allot a percentage of the Company's equity to the Claimant but received no reply. This was followed up with subsequent emails on 17.07.2019 and 28.07.2019.

[17] On 29.07.2019, DHM wrote back to the Claimant and among others informed the Claimant that he hope that the Company can pay the outstanding salaries or part thereof before his visit to Malaysia in mid August.

[18] Until 04.09.2019, the Company had yet to settle the Claimant's salary and this was reminded by the Claimant to DHM vide his email dated 04.09.2019 of the large amount of salary owed by the Company to him.

[19] On 03.10.2019, the Claimant then sent an email to the Company and to DHM to inform them of his resignation by claiming constructive dismissal.

The Law On Constructive Dismissal

[20] The starting point on the law of constructive dismissal is the seminal case of *Western Escavating (ECC) Ltd v. Sharp* [1978] 1 ALL ER 713 where Lord Denning established the correct test for constructive dismissal and explained lucidly as follows:

"... if the employer is guilty of conduct which is the significant 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 contracts , then the employee is entitled to treat himself as discharged from any further performance, if he does so, then he terminated the contract by reason of the employer's conduct. He is constructively dismissed.

The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficienty 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 without any length of time without leaving, he will loose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract".

[21] The same principle was enunciated in *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ (Rep) 298; [1988] 1 CLJ 45 where it was held:

"Constructive dismissal it has been said is likened to "a double edged sword". The reason for resigning it is said should be such that at it effects the important fundamentals of his terms and conditions of service, or the employer's action was such that no reasonable employee could tolerate such an action. It is important that there is no condonation on the part of the employee. This is because any failure on the part of employee to ensure these two conditions are fulfilled may result in his resignation not meeting the criteria for constructive dismissal and result in his claim being dismissed by the Court".

At page 95 of the judgment in Wong Chee Hong (*supra*) it was held:

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

[22] In *Bayer (M) Sdn Bhd v. Anwar Abdul Rahim* [1996] 2 CLJ 49, it was settled that the test that was applied was the 'contract test' and not the 'test of reasonableness'. For an employer to claim constructive dismissal, four conditions must be met. 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.

Evaluation And The Findings

[23] From the cases above, it is the Claimant who has the burden of proving that he has been constructively dismissed on a balance of probabilities.

[24] From the evidence adduced by the Claimant, as at 28 July 2019, the Company had failed to pay the Claimant his salaries for the months of January, February, May, June and July 2019. The Claimant also claimed that there were other expenses he incurred which were not paid by the Company.

[25] In the Claimant's resignation letter, the outstanding salaries that were still not paid to the Claimant till October 2019 are the salaries for the months of January, May, June, July, August and September 2019.

[26] The Court note that the salary for January, June and July month were still not paid by the Company by October 2019 and in addition, the Company had repeated its breach for the months of August and September 2019.

[27] In the case of *Ooi Boon Khim v. Spottorder Sdn Bhd* [2021] 2 LNS 1223 the learned Chairman asked the following questions:

"Going back to the facts of the case, did the employer's conduct amount to a fundamental breach going to the root of the contract which entitled the employee to resign ? Further, did the employee leave at the appropriate point in time soon after the employer's conduct of which he complained had occurred if the employee leaves in circumstances where these conditions are not met, there will be no dismissal within the meaning of th 1967 Act as he will be held to have resigned. In deciding to leave because of the constructive dismissal, the employee must not delay too long in determining the contract. Otherwise, he may be deemed to have "condoned" the employer's conduct or waived the breach and agreed to vary the contract".

[28] In Ooi Boon Kim's case, the Company was owing the Claimant his two month salary and the Claimant after giving the notice via dated 05.03.2019 for a notice of termination to be issued to him or otherwise would deem himself to be constructively dismissed walked out about a week after giving the notice , the learned Chairman held that no delay occurred on his part as he was waiting for the Company to respond to his notice.

[29] In this present case, evidently, the failure of the Company to pay the Claimant's salary when its due tantamount to a fundamental breach of the express and integral term of his Employment Agreement. There is no doubt that such a breach goes to the root of the contract. This entitles the Claimant to treat the contract as terminated and himself as being dismissed.

[30] In the case of *Noor Hazlina Kamarudin v. Nusapetro Sdn Bhd* [2019] MELRU 2846 the learned Industrial Court Chairman held that:

"The issue regarding the said non-payment of salaries for the said period was stated in evidence. It goes without saying that payment of the claimant's salary is obviously an integral term of a contract of employment and therefore it is the company's obligation to pay the claimant her salaries for the said period as well as the said statutory deductions to the relevant authorities".

[31] The Court further finds that the Claimant had left the Company due to the Company's failure to pay his outstanding salaries and not for any other

reasons. This is clearly stated in the Claimant's resignation letter as reproduced in part below :

> *"4. No actions have been taken to settle my outstanding salaries and expenses despite the fact that I have been promised many times that this will be addressed. Please make payment of the outstanding sum.*
>
> *.....*
>
> *8. The company's actions have been wholly inconsistent with the terms of my employment and the company has placed me in an extremely difficult financial position. Therefore, I have no choice but to deem myself to be constructively dismissed."*

[32] The Claimant's reason for leaving his employment relates directly to the breach of the terms of his Employment Agreement caused by the Company by not making good the salaries owed to the Claimant which fortified his claim for constructive dismissal.

[33] On the issue of delay, the Court finds that no delay had occasioned by the Claimant. The Claimant had only waited due to the promises made by the Company and DHM that the Company will settle his outstanding salaries and the assurances that a percentage of the Company equity will be given to the Claimant to reflect his commitment and participation to the success of the business.

[34] The promises made to the Claimant did not materialize when it should have been materialized when the Claimant brought in a substantial amount of funds for the Company which could have been used to pay his salaries. DHM had intentionally reneged on his assurances given to the Claimant. On full reliance of the promises and assurances made to the Claimant, the Claimant decided to continue working and to wait until the end of September 2019 before leaving the Company.

[35] The Court does not have any evidence from DHM who did not appear before this Court to rebut the evidence given by the Claimant though he had been joined as a party to this proceedings. As the Company has been wound up and in the event this Award favours the Claimant he will be deprived of claiming on the monetary amount awarded to him. By joining DHM in the proceedings,

DHM can be made liable to compensate the Claimant should an Award be handed down in the Claimant's favour.

[36] From the evidence adduced by the Claimant which was unrebutted, I am of the view of the view that the Respondents had evinced an intention that it no longer intended to be bound by one or more of the essential terms of the Employment Agreement when it failed to pay the monthly salaries of the Claimant. Based on the criteria required of constructive dismissal claim that have been satisfied by the Claimant on a balance of probabilities, the Company is found to have dismissed the Claimant on a without just cause or excuse.

Remedy

[37] The only suitable remedy for the Claimant in this case is monetary claims that is Compensation *in lieu* reinstatement. The Claimant last drawn salary was RM11,000.00 a month as stipulated in the Employment Agreement (CBOD p.16). Any other amount submitted by the Claimant will not be taken into account as there is no convincing evidence to support any additional income of the Claimant.

[38] With regard to the back wages, this Court scales down to 20 months from 24 months as no evidence was adduced to show that the Claimant had tried to look for other gainful employment. However, since the Claimant has been unemployed since his dismissal, the Court finds 20 months for back wages to be reasonable.

Back wages :

RM11,000.00 x 20 months = RM220,000.00

Compensation *In Lieu* of Reinstatement :

Based on one month's salary for each year of completed service, the multiplication will be for 1 month (from 01.04.2018 till 03.10.2019)

RM11,000 x 1 month = RM11,000.00

Unpaid salaries for the months of January, May, June, July, August and September 2019 (6 months)

RM11,000.00 x 6 months = RM66,000.00

Total Amount = RM297,000.00

[39] In arriving at the above conclusion, the Court has taken into account the entire evidence bearing in mind section 30(5) of the Act by which the Court shall act according to equity, good conscience and the substantial merit of the case without regard to technicalities and legal form.

Final Award

[40] This Court hereby orders that the total sum of **RM297,000.00** (Two Hundred and Ninety Seven Thousand Only) less any statutory deductions (if any) is to be paid by Darayus Happy Minwalla to the Claimant through his solicitors Messrs Lavania & Balan Chambers within thirty (30) days from the date of this Award.

HANDED DOWN AND DATED THIS 6TH DAY OF JULY 2023

(AMRIK SINGH)
CHAIRMAN
INDUSTRIAL COURT MALAYSIA
KUALA LUMPUR

Case(s) referred to:

Western Escavating (ECC) Ltd v. Sharp [1978] 1 ALL ER 713

Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ (Rep) 298; [1988] 1 CLJ 45

Bayer (M) Sdn Bhd v. Anwar Abdul Rahim [1996] 2 CLJ 49

Ooi Boon Khim v. Spottorder Sdn Bhd [2021] 2 LNS 1223

Noor Hazlina Kamarudin v. Nusapetro Sdn Bhd [2019] MELRU 2846

Legislation referred to:

Industrial Relations Act 1967, ss. 20(3), 29(d), 30(5)