GEORGE SOH THIAN BOON v. HOEPHARMA HOLDINGS SDN BHD

INDUSTRIAL COURT, KUALA LUMPUR
SAROJINI KANDASAMY
AWARD NO. 1696 OF 2018 [CASE NO: 27(2)/4-616/16]
20 JULY 2018

DISMISSAL: *Constructive dismissal – Change in status – Whether the new organisational chart introduced by the company had culminated in a change of status to the claimant's position – Factors to consider – Whether proven by him – Evidence adduced – Evaluation of – Effect of – Company's explanations – Whether acceptable – Whether the company's actions had amounted to a fundamental breach going to the root of the contract of employment – Whether the claimant had been constructively dismissed – Whether dismissal without just cause or excuse – Industrial Relations Act 1967, ss. 20(3) & 30(5)*

EVIDENCE: *Documentary evidence – Findings of DI – Whether perverse – Factors to consider – Claimant not challenging the DI proceedings – Effect of*

The claimant commenced employment with the company in January 1997. Approximately 18 years into his employment with it, he was issued a show cause and suspension letter with five charges preferred against him. The claimant responded to the show cause letter denying the charges and he avers that he was told to resign by the COO and CEO of the company. He was subsequently found guilty of two charges and issued a stern warning. He was also asked to reimburse the company a certain sum of monies. The claimant also contends that *vide* an Organizational Announcement, his line of reporting had been changed and that the responsibilities that had previously been handled by him had been reduced. This culminated in him walking out of his employment claiming constructive dismissal. There were two 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 company: claimant's claim dismissed

(1) The company had reasonable and proper cause to commence disciplinary action against the claimant. The charges preferred against him had not been baseless and the company had had the management prerogative to investigate and conduct itself in the manner in which it had done. Further, the claimant had never denied the charges and had in fact agreed that the management had had the right to investigate the matter further. He had also not challenged the DI proceedings. Thus, the DI had been conducted in a fair and just manner and its decision had not been perverse. The claimant had also impliedly accepted the punishment of the stern warning that had been imposed upon him and had thereby waived his right to challenge the company's decision pursuant to the DI (paras 38 - 40).

(2) On the issue of the alleged reduction of his status due to the reorganisation of the company, the evidence had shown that apart from the fact that he had been required to report directly to COW2 and not the COO, there had not been any changes to his position, salary or other terms and conditions of his service. His job functions had remained intact and nothing had changed in terms of the day to day operations carried out by him. A change in the reporting line alone cannot amount to a fundamental breach of the contract of employment. Further, a change in the organisational chart had been a managerial prerogative and the evidence had shown that the company had acted *bona fide* in introducing and implementing it (paras 44, 67, 70 & 73).

(3) On the issue of the company's "strange reply" to him, a perusal of the letter had shown nothing strange in its contents and it could not amount to a fundamental breach which had gone to the root of his contract of employment as the company had made it clear that an "amicable solution" had no longer been possible after he had been issued a stern warning. By returning to work, the claimant had impliedly accepted the company's decision and had been deemed to have waived his right to claim constructive dismissal on this ground (para 84).

(4) The company had exercised its management prerogative by introducing and implementing a new organisational chart and the claimant had failed to prove that it had culminated in a reduction to his status. His second reason for constructive dismissal had been a weak and meagre attempt to justify his claim. He had repeatedly sought a severance package as an "amicable solution" despite being given a stern warning pursuant to the findings of the DI. He had failed to prove that the company had committed any act that had breached the fundamental terms of his contract of employment or that it had evinced an intention to no longer be bound by it (paras 87 & 88).

[Constructive dismissal claim dismissed.]

Award(s) referred to:

EON Bank Berhad v. Goh Lee Miang [2003] 1 ILR 226 (Award No. 1083 of 2002)
Ireka Construction Berhad v. Chantiravathan Subramaniam James [1995] 2 ILR 11 (Award No. 245 of 1995)

Case(s) referred to:

Anwar Abdul Rahim v. Bayer (M) Sdn Bhd [1998] 2 CLJ 197
Bayer (M) Sdn Bhd v. Anwar Abd Rahim [1996] 2 CLJ 49
Chong Mee Hup Kee Sdn Bhd v. Mahkamah Perusahaan Malaysia & Anor [2008] 6 CLJ 790
Christoph Hoelzl v. Langkawi Island Resort Sdn Bhd [1998] 1 LNS 87
Govindasamy Munusamy v. Industrial Court Malaysia & Anor [2007] 1 LNS 527
Kontena Nasional Bhd v. Hashim Abd Razak [2000] 8 CLJ 274

Lewis v. Motorworld Garages Ltd [1986] 1 ICR 157
Pelangi Enterprises Sdn Bhd v. Oh Swee Choo & Anor [2004] 6 CLJ 157
R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147
Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629
Talasco Insurance Sdn Bhd v. Industrial Court of Malaysia & Anor [1997] 4 CLJ 97
Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314
Western Excavating (ECC) Ltd v. Sharp [1978] 1 All ER 713
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)

For the claimant - S Shanker (Juanita Chua with him); M/s Shanker & Arjunan
For the company - Edward Saw (K K Low with him); M/s Josephine, L K Chow & Co

Reported by Sharmini Pillai

AWARD
(NO. 1696 of 2018)

Sarojini Kandasamy:

The Reference

[1] The parties to the dispute are George Soh Thian Boon ('claimant') and Hoepharma Holdings Sdn. Bhd. ('company'). The dispute which was referred to the Industrial Court by way of a Ministerial Reference under s. 20(3) of the Industrial Relations Act 1967 made on 14 April 2016 is over the dismissal of the claimant by the company on 25 June 2015.

[2] The relevant cause papers before this court are as follows:

a) The Statement of Case dated 1 August 2016 (SOC);

b) The Statement in Reply dated 14 September 2016 (SIR);

c) The claimants' Bundle of Documents (CLB1, CLB2, CLB3 and CLB4);

d) The company's Bundle of Documents (COB1 and COB2);

e) The claimant's Witness Statement (CLWS-1);

f) The company's Witness Statement by Mr. Maki Kamijo (COWS-1); and

g) The company's Witness Statement by Mr. Tan Keng Aun (COWS-2).

The Claimant's Case

[3] The claimant gave evidence on his own behalf on 26 March 2018. The claimant commenced employment with the company on 1 January 1997. The company at that time was named Diversified Healthcare

A Services, and was subsequently renamed Hoepharma Holdings Sdn. Bhd. The claimant was a shareholder of the company until the year 2011, when his shares were bought over by Taisho Pharmaceuticals Co Japan.

[4] The claimant averred that on 6 February 2015 he was given a Notice of Suspension and Show Cause letter [CLB1 pp. 5-7] by the B company, wherein five charges were preferred against him. The claimant was told that a Domestic Inquiry (DI) would be held on 12 February 2015. The claimant *vide* letter dated 12 February 2015 [CLB1 pp. 8-11] provided a written response, wherein he made it clear that he was not guilty of the charges as contained in the said Notice of Suspension and C Show Cause letter.

[5] The claimant averred that he met Mr. Maki Kamijo (Chief Operating Officer (COO)) on 10 March 2015, and was supposedly told that he was found guilty and was told to resign. The claimant refused to resign and stressed that he was not guilty of the charges preferred against D him. Subsequently the claimant met Mr. Jun Kuroda (Chief Executive Officer (CEO)) on 12 March 2015, wherein Mr. Jun Kuroda allegedly offered him 6 month's salary as compensation to resign from the company. The claimant refused this offer.

E **[6]** The company *vide* letter dated 20 March 2015 [CLB1 pp. 30-31] informed the claimant that he had been found guilty of two charges preferred against him and he was issued a stern warning. The claimant was also told to pay to the company a sum of RM3,171.58 which was subsequently deducted from the claimant's claims for the period April to June 2015.

F **[7]** The claimant responded *vide* letter dated 3 April 2015 [CLB1 pp. 32-33], wherein he strongly disagreed with the findings of the DI. He placed on record the fact that he had two meetings with the company's officials and that he had been offered a settlement to leave the company G amicably at those meetings. The company responded *vide* letter dated 8 April 2015 [CLB1 pp. 34-35] and denied the claimant's statements. Subsequently the claimant responded *vide* letter dated 15 May 2015 [CLB1 p. 36], wherein thereafter the company responded *vide* letter dated 21 May 2015 [COB1 p. 35].

H **[8]** Further the claimant contended that *vide* an Organizational Announcement which came into effect from 1 June 2015 [CLB1 p. 37], the company announced that the claimant would now have to report to the newly appointed Commercial Director. Thereafter *vide* letter dated 15 June 2015 [COB1 p. 40] the company informed its clients that the new I Commercial Director would take over responsibility in respect of confirming all Purchase Orders, shipments, and all trade terms to the company's distributors. The claimant alleged that these responsibilities were previously under him and his status and responsibility in the company had therefore been reduced.

[9] The claimant averred that the company had fundamentally breached the claimant's contract of employment. The claimant further averred that he was left with no choice but to consider himself constructively dismissed *vide* letter dated 25 June 2015 [CLB1 p. 42], and that the said dismissal was without just cause or excuse. The claimant's last held position in the company was General Manager for Export and his last drawn salary was RM26,265 and fixed travel allowance of RM15,407.

[10] The claimant prays that he be reinstated to his former position without any loss of seniority, wages or benefits, whether monetary or otherwise, including EPF contributions.

The Company's Case

[11] The company called the following witnesses to give evidence during the hearings on 25 April 2018 and 27 April 2018:

(a) COW1: Mr. Maki Kamijo, who at the material time was the Chief Operating Officer (COO) of the company; and

(b) COW2: Mr. Tan Keng Aun, who at the material time was the Commercial Director in the company.

[12] The company contended that following an audit on the company from 17 November 2014 to 21 November 2014 carried out by its parent company, Taisho Pharmaceuticals Co. Japan, it was discovered that there were several questionable expense claims made by the claimant which were in breach of the company's Standard Operating Procedures (SOP). Upon further investigation it was suspected that these expense claims were made by the claimant dishonestly and as such the company thought that it was best to give the claimant the fullest opportunity to explain himself before a DI scheduled for 12 February 2015. The claimant was issued a Notice of Suspension and Show Cause Letter dated 6 February 2015 wherein five charges were preferred against him. In the meantime, the claimant was suspended from work commencing 7 February 2015 until further notice on full pay.

[13] A DI was held on 12 February 2015, wherein the claimant participated fully at the DI. At the end of the DI, the DI Panel found the claimant guilty of 2 out of the 5 charges preferred against him. The company further contended that its management was made aware of the findings made by the DI Panel and was compelled to decide on the punishment to be meted out to the claimant. It was therefore decided that attempts be made to resolve the matter amicably by negotiating a separation between the company and the claimant on terms to be agreed upon.

[14] On 10 March 2015, COW1 met with the claimant for the purposes of exploring a quick and amicable resolution to the disciplinary proceedings. It was proposed that a package be paid to the claimant in

consideration for his exit from the company. Subsequently the claimant met with Mr. Jun Kuroda on 12 March 2015 in regards an amicable resolution, but at the end of the meeting no agreement was reached.

[15] On 20 March 2015, the company informed the claimant that he had been found guilty of two charges preferred against him. The claimant was let off with a stern warning, and he was reinstated and instructed to return to work on 24 March 2015. The claimant was also requested to refund the company RM3,171.58, being the amount he wrongfully claimed. The claimant returned to work on 24 March 2015 and continued in his position as General Manager for Export.

[16] On 3 April 2015, the claimant responded to the company's letter dated 20 March 2015 stating, *inter alia*, that he disagreed with the findings of guilt and reminded the company about his meetings with COW1 and Mr. Jun Kuroda and stated that he was still open to an amicable solution. Further correspondences pursued in regards this matter between the claimant and the company *vide* letters dated 8 April 2015, 15 May 2015 and 21 May 2015.

[17] A month later, on 15 May 2015, the company made an organizational announcement, wherein it was announced that COW1 would be returning to Japan, Mr. Tito Tolentino would take on the temporary role as interim COO, and COW2 was recruited to take up the position as Commercial Director. It was also announced that the claimant as General Manager for Export was to report to the new Commercial Director with effect from 1 June 2015.

[18] On 17 June 2015, the claimant circulated the announcement of COW2's appointment as Commercial Director by e-mail to the company's Business Partners [COB1 p. 43]. On 25 June 2015, the claimant suddenly and without any notice claimed that he had been constructively dismissed.

[19] The company averred that at all times it acted within its managerial prerogatives and in the best interests of the company and prays that the claimant's claim be dismissed.

The Law And Burden Of Proof

[20] The principle underlying the concept of "constructive dismissal", a doctrine that has been firmly established in industrial jurisprudence, was expressed by Salleh Abas LP in the case of *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298:

> The common law has always recognised the right of an employee to terminate his contract and therefore to consider himself as 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 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.
>
> [Emphasis added]

[21] Furthermore, that constructive dismissal is within the ambit of a reference under s. 20(3) of the Industrial Relations Act 1967 was reaffirmed by Salleh Abbas LP in *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* (*supra*) when he said:

> ... interpretation of the word 'dismissal' in our s. 20. 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 dismissed. (See *Bouzourou v. The Ottoman Bank* [1930] AC 271 and *Donovan v. Invicta Airways Ltd* [1970] 1 Llyod's Rep 486).

[22] In *Western Excavating (ECC) Ltd v. Sharp* [1978] 1 All ER 713 at p. 717 Lord Denning M.R. decided that the correct test to apply in the instance of constructive dismissal is the "contract test" as follows:

> If the employer is guilty of conduct which is a significant breach going to the root of the contract, 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 the employee terminates 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 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 (varied) contract.

[23] In *Anwar Abdul Rahim v. Bayer (M) Sdn Bhd* [1998] 2 CLJ 197 His Lordship Mahadev Shanker J decreed as follows:

> 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).

[24] The High Court in *Bayer (M) Sdn Bhd v. Anwar Abd Rahim* [1996] 2 CLJ 49 summarized what needs to be established by the employee in order to discharge his burden of proof:

> To 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.

[25] This decision was upheld by the Court of Appeal in *Anwar Abdul Rahim v. Bayer (M) Sdn Bhd* (*supra*).

[26] The High Court in the case of *Govindasamy Munusamy v. Industrial Court Malaysia & Anor* [2007] 10 CLJ 266 set out the following principles governing the pre-requisites to found a claim of constructive dismissal:

> To succeed in a case of constructive dismissal, it is sufficient for the claimant to establish that:
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> (i) the company has by its conduct breached the contract of employment in respect of one or more of the essential terms of the contract;
>
> (ii) the breach is a fundamental one going to the root or foundation of the contract;
>
> (iii) the claimant had placed the company on sufficient notice period giving time for the company to remedy the defect;
>
> (iv) if the company, despite being given sufficient notice period, does not remedy the defect then the claimant is entitled to terminate the contract by reason of the company's conduct and the conduct is sufficiently serious to entitle the claimant to leave at once; and
>
> (v) the claimant, in order to assert his right to treat himself as discharged, left soon after the breach.
>
> The test for constructive dismissal as it stands is a test on **contractual breach** rather than unreasonableness. Further, where the workman's claim for reinstatement is based on constructive and not actual dismissal, **the onus of proving that he has been constructively dismissed lies on the workman himself.**
>
> [Emphasis added]

[27] The question whether there was constructive dismissal as complained by the claimant is one that must eminently be determined in the light of its own particular set of facts and there cannot be a definite or

inflexible interpretation of law. This principle was enunciated by the High Court in the case of *Chong Mee Hup Kee Sdn Bhd v. Mahkamah Perusahaan Malaysia & Anor* [2008] 6 CLJ 790.

[28] Once these prerequisites for constructive dismissal have been established by the claimant in reference to a dismissal under s. 20 of the Industrial Relations Act 1967, the Industrial Court then moves into the next limb of the inquiry; and that is to determine whether the employer had just cause or excuse for the dismissal. Here the burden shifts upon the employer. Raus Sharif J (as His Lordship then was) in *Pelangi Enterprises Sdn Bhd v. Oh Swee Choo & Anor* [2004] 6 CLJ 157 refers to this 'shift of the burden', calling that upon the workman as 'the first burden of proof' at p.165 and that upon the employer as the 'second burden of proof' at p. 166.

[29] Where this onus or burden of proof is upon any party, it is to be proved by that party to a standard of a balance of probabilities. (See *Ireka Construction Berhad v. Chantiravanathan Subramaniam James* [1995] 2 ILR 11 (Award No. 245 of 1995) and *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314).

Evaluation Of Evidence And Findings Of Court

Domestic Inquiry

[30] It is undisputed that a DI was conducted by the company in respect of the five charges preferred against the claimant. The DI found the claimant guilty of two of the preferred charges, namely:

(a) "that you had made a claim for yourself and allowed and approved your Executive's claim for a personal tour in Tanzania which was not a business related expense therefore you had acted in breach of the company's SOP and policies"; and

(b) "that you had been negligent in submitting a duplicate claim for accommodation at the Eden Saigon Hotel when you had approved your Executive's claim for the same accommodation for the same period".

[31] It is undisputed that the company conducted its audit between 17 November 2014 to 21 November 2014 and as a result of that audit several issues arose with regards to claims that were made by the claimant. The particulars of the claims raised by the audit team are as in COB1 pp. 7-22. Subsequent to the audit, the company preferred five charges against the claimant.

[32] The two charges of which the claimant was found guilty by the DI concern a claim for a safari trip at the Mikumi National Park, Tanzania as a business expense without the approval of the company [COB1 pp. 8-14,

18-22], and a double claim by the claimant at the Eden Saigon Hotel when he had previously approved his subordinate's claim for the same stay at the same hotel [COB1 pp. 15-17].

[33] In regards the claim for the safari trip at the Mikumi National Park, Tanzania from 31 August 2013 to 1 September 2013, the claimant does not deny making the claim but explained that there was nothing unusual about the claim because it was an accepted practice under the old management of the company (Goldis). He admitted in evidence that he had assumed that if the practice was accepted by Goldis then it was also accepted by the current management of the company. The claimant admitted under cross-examination that he did not obtain approval from the company to take the safari trip at the Mikumi National Park, Tanzania and did not have approval to charge the said expenses to the company. Furthermore in his claim form at CLB1 pp. 14 and 15, the particulars given for this claim make no mention of particulars of the stay at the Mikumi National Park, Tanzania. It merely stated "Hotel Expenses and food consumed from 31 August 2013 to 1 September 2013: USD 457 x 3.48 = RM1,590.36". COW1 admitted in evidence that when he approved the claimant's said claim he was not aware that it was pertaining to a safari trip at the Mikumi National Park, Tanzania.

[34] In regards the double claim at the Eden Saigon Hotel from 7 April 2014 - 10 April 2014, the claimant agreed that duplicate claims were made on the same hotel receipt. The claimant had on 5 May 2014 submitted his claim based on the hotel receipt to COW1 for his approval. However 3 days later, on 8 May 2014, the claimant approved his subordinate's (Mr. David Wong) claim based on the same hotel receipt. The claimant confirmed in cross-examination that the hotel bill was paid by his subordinate Mr. David Ong. This issue had been picked up by the company's Finance Department *vide* an e-mail dated 12 June 2014 [CLB1 p. 17], that was not copied to COW1. The claimant gave his explanation in response to the said e-mail in June 2014. COW1 confirmed in evidence that he would have had no reason to doubt the claimant's claim because he would not have been aware of Mr. David Ong's claim which had been approved earlier by the claimant and not COW1.

[35] Pursuant to the audit findings, COW1 had asked the claimant to clarify on the above issues, to which he did so *vide* his e-mail dated 31 December 2014 [CLB1 pp. 12-13]. According to COW1, the claimant's explanation was then forwarded to the company's Headquarters in Japan and the subsequent instruction was to carry out a DI. Accordingly a Notice of Suspension and Show Cause Letter dated 6 February 2015 was issued to the claimant.

[36] Pursuant to the DI the company *vide* its letter dated 20 March 2015 informed the claimant that he was found guilty of the two charges preferred against him. Notwithstanding this, the company decided to give

the claimant the benefit of the doubt as to whether there was any dishonesty and/or dishonest intentions on the claimant's part in making the said claims. The company thereafter issued a stern warning to the claimant that he is to abide by and follow all of the company's Standard Operating Procedures (SOP's) and policies whether they are related to making of claims or otherwise at all times during his tenure of employment with the company. The claimant was also directed to refund the company a sum of RM3,171.58, which was the amount he had wrongfully claimed from the company. The company thereafter lifted the claimant's suspension and reinstated him on 24 March 2015.

[37] The claimant in his pleadings asserted that the company had raised baseless allegations against him in the DI. The claimant had also pleaded that a party at the DI was a Human Resource Consultant, and therefore stated that the DI was not independent. The company replied *vide* its pleadings that the claimant had stated unequivocally at the commencement of the DI that he had no objections to the constitution of the DI Panel which included an external and independent Human Resource Consultant. During the hearing this matter was not further deliberated upon and no evidence was produced by the claimant in respect thereto. Furthermore during the hearing no reliance was placed on the Notes of DI which were not put forth before this court for its perusal.

[38] The court concludes that the company had reasonable and proper cause to commence the disciplinary proceedings against the claimant. The charges preferred against the claimant were far from being baseless and the company had the managerial prerogative to investigate them and to conduct itself in the manner in which it did pursuant to the audit between 17 November 2014 to 21 November 2014. The claimant had in fact never denied the charges. Furthermore the claimant in evidence agreed that the company is entitled to investigate if there is a breach of any its rules, policies or regulations.

[39] Further the court also finds that no evidence was put forth before it to challenge the proceedings of the DI, namely that there was procedural impropriety, or to hold that the findings of the DI were perverse. In the light of these circumstances, the court finds the DI proceedings were conducted in a fair and just manner and the decision of the DI was not perverse.

[40] The claimant returned to work as the General Manager for Export on 24 March 2015 in compliance with the company's instructions. By so doing he had impliedly accepted the punishment of a stern warning imposed upon him by the company pursuant to the findings of guilt by the DI Panel. Therefore upon his acceptance of reinstatement the claimant has waived his right to challenge the decision of the company pursuant to the DI as a ground for his claim of constructive dismissal. As the age old

adage pronounces "You can't have your cake and eat it too". Furthermore if he in fact intended to construe the decision of the company pursuant to the DI as a ground for constructive dismissal, then he should have walked out immediately upon knowing of the company's decision that found him guilty of two charges and imposed upon him a stern warning. This is as enunciated in *Bayer (M) Sdn Bhd v. Anwar Abd Rahim (supra)* and *Govindasamy Munusamy v. Industrial Court Malaysia & Anor (supra)*. In fact at this point of time the claimant did not walk out on constructive dismissal but returned to work as the General Manager for Export on 24 March 2015. Thus the court concludes that the events prior to the claimant's reinstatement on 24 March 2015 did not contribute in any direct or indirect manner to his alleged claim of constructive dismissal. Consequently the court finds that the claimant's assertion that the alleged baseless allegations preferred against him in the DI was directly linked to the issues that he had raised in his letter of constructive dismissal dated 25 June 2015 is merely an afterthought and an unsubstantiated and bare assertion.

[41] The court will now look at the events following the claimant's reinstatement on 24 March 2015, and more specifically the claimant's reasons for claiming constructive dismissal as set out in his letter of constructive dismissal dated 25 June 2015. In *Bayer (M) Sdn Bhd v. Anwar Abd Rahim (supra)*, Low Hop Bing J stated that:

> If the employee leaves in circumstances where these conditions are not met, he will be held to have resigned and there will be no dismissal within the meaning of the Act. **The crucial document that I must critically examine is the said letter and the reasons given therein for him to walk away from his job claiming constructive dismissal.**
>
> [Emphasis added]

[42] The claimant's letter dated 25 June 2015 sets out the following reasons for claiming constructive dismissal.

(a) "I also refer to the new organizational chart that came out early this month. I noticed from the chart, I am now required to report to a new commercial director. I also noticed my status is reduced"; and

(b) "In view of the company's strange reply to my letter mentioned above, I feel that the company is driving me out of my job".

[43] The court will now accordingly address each reason advanced by the claimant in turn.

Alleged Reduction In Status

[44] The claimant's first reason for constructive dismissal is his alleged reduction of status due to the reorganization of the company. Based on company's unchallenged evidence, the company was in the process of reinforcing its structure in order to promote growth and operational

effectiveness in line with its plans to transform the company from a generic derma company into a multi-national one. It was stated in evidence that the company's transformation plans were in the pipelines since 2012 and was ongoing even after the organizational announcement on 1 June 2015 and hence has no links or any connection with the charges preferred against the claimant.

[45] Further it is also the company's unchallenged evidence that the organisational change in the company was also due to the company's dismal performance in 2014. This is supported by COW1's e-mail dated 9 January 2015 [CLB4] wherein he informed the management team including the claimant that the Head Office in Japan had noted that the company had failed to achieve its sales target for almost every month in the year 2014 and there were concerns pertaining to the company's management capability to achieve its sales targets in the year 2015. In this regards, COW1 explained during re-examination that there was a genuine possibility that the company's management members including himself would also be changed or transferred, but this did not involve any demotion. COW1 also confirmed that between 9 January 2015 to 15 June 2015 there was no change in management members of the company.

[46] The claimant confirmed in cross-examination that he was not the only one who was affected by the organizational announcement and the changes in the company therein. In fact COW1, who was the COO to whom the claimant was previously reporting to, was due to return to Japan. COW1 was replaced by Mr. Tito Tolentino who was at that material time the Regional Commercial Director SEA and was assigned to take on the temporary role of interim COO in the company. During cross-examination the claimant agreed that Mr. Tito Tolentino was only an interim COO but said that he was not aware, when it was suggested to him, that Mr. Tito Tolentino was not able to be in Malaysia because at that time he was travelling extensively to both Hong Kong and Taiwan. As a Senior Manager of the company, the court finds it quite astounding that the claimant is not aware of such important issues that concern the top management of the company.

[47] Upon perusing the evidence the court finds that the organizational change in the company was *bona fide* and genuine. In the case of *Talasco Insurance Sdn Bhd v. Industrial Court of Malaysia & Anor* [1997] 4 CLJ 97, Abdul Kadir Sulaiman J stated as follows:

> Hence the restructuring of the applicant company as stated above. If this is the genuine intention of the applicant, the employees cannot complain for in *Woods v. WM Car Services (Peterborough) Ltd* [1982] ICR 693, Watkins LJ in the Court of Appeal at p. 702 said:
>
> > Employers must not, in my opinion, be put in a position where, through the wrongful refusal of their employees to accept change, they are prevented from introducing improved business methods in furtherance of seeking success for their enterprise.

[48] The claimant in evidence confirmed that he did not object to the appointment of COW2 as commercial Director for the company. The claimant also did not object to the announcement by Mr. Tito Tolentino (COO) dated 15 June 2015 [COB1 p. 40] to all the company's distributors regarding the appointment of COW2 as the Commercial Director for the company and its subsidiaries, and COW2's role as Officer In Charge (OIC) who was responsible in confirming all Purchase Orders, shipments (with regards to shipment of commercial and bonus goods) and all trade terms (such as discounts, rebates, tender and/or extra bonus *etc.*). The claimant was in fact the author and source of the e-mail announcement dated 17 June 2015 [COB1 p. 43] to all the company's business partners, wherein the changes to the Management Group of the company and its subsidiaries was announced, including the appointment of COW2 as the Commercial Director. I am of the view that as a Senior Manager of the company who had served the company for over 18 years, the claimant could have raised his concerns to the company if he had any, more particularly as he alleged that COW2 had taken over all or a major portion of his job functions and duties. If the claimant found the said e-mail announcement objectionable and false he could have again raised his concerns with the company, but he chose to remain silent and distributed the e-mail announcement to all the company's business partners.

[49] In regards the claimant's contention that he had been reduced in status pursuant to the organizational change on 1 June 2015, the claimant stated that prior to 1 June 2015, he reported directly to the COO (that is COW1). However after 1 June 2015, the claimant was to report to a new Commercial Director, Mr. Tan Keng Aun (COW2), instead of directly to the COO (Interim) at that material time, namely Mr. Tito Tolentino. The claimant alleged that this constituted a demotion to a rung from where he was previously before 1 June 2015, that is, the insertion of the position of Commercial Director (COW2) in between the claimant's line of reporting to the COO.

[50] Further the claimant in his evidence stated that after the organizational change in the company on 1 June 2015 COW2 had taken away all or a major portion of his job functions and duties. At the outset the claimant unfortunately could not produce a job scope that lists out his functions, duties and responsibilities as General Manager for Export. In evidence he summarised the list of job functions and duties as General Manager of Export as follows:

> To look after the export markets I was assigned to. The people in export market (whether based in this country or business partners including distributors and Ministry of Health) report directly or liaise with me. My functions include sales, ensuring that expenses budgeted every year is within the set budget, at the same time delivering profit expected by Company of me.

> One of my major functions is to get Purchase Orders from distributors or even our own people in these countries. Includes sales activities such as promotion, tender, rebates and all other sales functions in these countries.

[51] On the matter of the claimant's contention that all or a major portion of his job functions and duties had been taken over by COW2, the claimant relied on the Organizational Announcement dated 15 May 2015 [CLB1 p. 37] by Mr. Jun Kuroda (CEO) wherein it was stated that COW2 "will have overall responsibility for all strategic and tactical elements of the commercial functions to ensure the execution of our business objectives". Further Mr. Tito Tolentino (COO) *vide* the announcement dated 15 June 2015 announced that COW2 in his new role as Commercial Director would be "the OIC (Officer in Charge) and responsible in confirming all Purchase Orders (PO), shipments (with regards to shipment of commercial and bonus goods) and all trade terms (such as discounts, rebates, tenders and/or extra bonus, tender *etc*) to our distributors".

[52] The claimant explained further why he considered his status reduced:

> I was not involved in meeting that I used to be involved in all my years in company. The company made announcement on 15 May 2015 (COB1 p. 40) that Mr. Tan Keng Aun (COW2) was taking over some of my responsibilities/functions under my purview. That is why my status in Company has been reduced.

[53] The claimant further elaborated on his alleged reduction in status:

> "The e-mail on 15 May 2015 [COB1 p. 40] was addressed to all business partners which has an attachment about announcement of new Commercial Director (Mr. Tan Keng Aun). This announcement was to all business partners in particular distributors. It stated clearly that new Commercial Director is Officer in Charge for confirming all Purchase Orders, shipments (commercial and bonus goods) and trade terms such as discounts, rebates, tenders and/or extra bonus *etc*. This was function I was involved in with all the distributors.

[54] During the hearing COW2 explained that his functions were to oversee the company's commercial operations for both its local (Malaysia operations) and export businesses. In this regards he was the head of the newly created Sales & Marketing RA & BD (Business Development) Department. As head of this Department, both the claimant (General Manager for Export) and the General Manager Malaysia reported directly to him. Further COW2 stated that the most important commercial responsibilities of his position are the strategic direction of company and the operational aspect of the organisation.

[55] In the Organizational Announcement by Mr. Jun Kuroda dated 15 May 2015, it was stated that COW2 "will have overall responsibility for all **strategic** and **tactical** elements of the commercial functions to

ensure execution of the company's business objectives". COW2 in evidence affirmed that he was hired to drive the strategic direction of the entire organisation that includes Malaysia operations and export businesses. COW2 further explained that "strategic elements" is the long term direction of company (normally 3-5 years), while "tactical elements" set in after the strategic direction of the company was developed and formalised on how the company intends to execute its strategies/direction. COW2 reiterated that he specifically looked into the strategic direction of the company in terms of all its products and assets both in respect of Malaysia operations and export businesses, namely where it wants to go, how to resource for it, where to get the resources, what it must keep doing and what it must stop doing and how to carry out the plan (that is, tactical part). It is in essence the transformation of the organisation.

[56] The strategic planning exercise was an on-going one and would have taken COW2 a year to complete. The development of the strategy for the company is done at the COO level with input from Divisional heads. COW2 clarified that the development and direction of strategies must come from the top management of the company as it requires resources and allocation of company's assets and resources. In formulating the strategies, COW2 would need to get input from the claimant who was a Divisional head, namely General Manager for Export. However the claimant left the company within 20 days after COW2 joined the company. It was thus too short a time for COW2 to ask the claimant for input in regards to the strategies for the Export Division. COW2 also stated that the claimant was a useful resource for strategic planning given his long tenure with the company and would have been involved eventually in the strategic planning of the company *vide* his input had he stayed on with the company.

[57] During the course of the hearing the claimant's learned counsel put it to the company's witnesses that the claimant was responsible for the strategic planning decisions for the Export Division. In fact this was never pleaded in the Statement of Case nor in the claimant's witness statement (CLWS-1). It is without doubt that the court is mindful that it is trite law that a party is bound by its pleadings (See *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 and *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629). The court finds that this is an afterthought and the court is not bound to take cognisance of it.

[58] Further COW2 confirmed that based on the announcement by the Mr. Tito Tolentino dated 15 June 2015, he was the OIC for confirming all Purchase Orders, shipments (with regard to shipment of commercial and bonus goods) and all trade terms (such as discount, rebates, tender and / or extra bonus) to the company's distributors. COW2 reiterated that he was overall in charge of these functions. Nonetheless he confirmed that all

the day to day operations of all these functions were carried out by the claimant as had been done by him prior to 1 June 2015. COW2 affirmed that the duties of the claimant remained the same throughout the claimant's tenure in the company.

[59] During the course of the hearing the court finds that the claimant had mislead the court by stating that he was responsible for confirming all Purchase Orders. In fact I have observed that the claimant's evidence during the course of this hearing has been tainted with contradictions and inconsistencies, and the reliability of his evidence before this court is very much in doubt. Based on the documents at COB1 pp. 48-63, it clearly showed that the claimant was involved in confirming Sale Order Forms together with COW2 from 9 June 2015 right up to 25 June 2015, which is the date he claimed to have been constructively dismissed. The claimant did not at any time confirm Purchase Orders as indicated by the document at COB1 p. 64. The claimant was also aware that the e-mail dated 15 June 2015 [COB1 p. 40] erroneously mentioned Purchase Order and not Sales Order Form, and this fact was earlier highlighted to him by COW2 *vide* e-mail dated 5 June 2015 [COB1 p. 39]. The court is thus cautious of the reliability of the claimant's evidence during this hearing as he had blatantly mislead this court with erroneous and conflicting evidence, wherein he asserted that he was responsible to confirm Purchase Orders and not Sales Orders.

[60] The discrepancy over the terms "Purchase Order" and "Sales Order" was explained by COW2 when he admitted that there was some confusion over the term "Purchase Order (PO)" contained in the e-mail dated 15 June 2015. COW2 explained that it was unfortunate that the said e-mail referred to Purchase Orders when it should have been Sales Orders for the simple reason that Purchase Orders are not raised by the company but rather its customers. In fact COW2 raised this issue in his e-mail dated 5 June 2015 to a list of recipients including the claimant wherein he stated "Please note that the selected document I was referring to is **"New Sale Order Form"** and not the PO (Purchase Order)/PI where Maki-san endorsement is not required."

[61] COW2 further explained in re-examination that the Purchase Order is initiated and raised by the company's customer and sent to the claimant's department. Upon receipt of the Purchase Order by the claimant's department, the personnel concerned will discuss trade terms (discounts, rebates *etc.*) with the customer and decide whether bonus goods will be shipped together with the order. Once these issues have been resolved, a Sales Order Form and/or New Sales Order Form is raised by the personnel in the claimant's department. Once the said form is raised it is sent, firstly, to the claimant for confirmation and then sent to COO to be counter-signed. It is only the claimant that can approve/confirm the type of shipment and type of trade terms including bonus goods to be

given. The above procedure represents the day to day operation in regards "confirming all Purchase Order (PO), shipments (with regards to shipment of commercial and bonus goods) and all trade terms (such as discounts, rebates, tenders and/or extra bonus, tender *etc*) to our distributors". These day to day operations were carried out by the claimant prior to 1 June 2015 and he continued to do so after 1 June 2015. These day to day operations were never carried out by COW2 after 1 June 2015.

[62] As mentioned above, the Sales Order Form that is confirmed by the claimant is then counter-signed by the COO. COW2 confirmed that there has been no change to this procedure at all except that previously the Sales Order Form is counter-signed by the COO, that is COW1. COW2 was instructed by the present COO (Mr. Tito Tolentino) to counter-sign or sign off the Sales Order Forms on his behalf in the interim because at that time COW1 was about to return to Japan, and Mr. Tito Tolentino as the interim COO was busy travelling for business in Hong Kong and Taiwan, and not able to be in Malaysia. COW2 explained this in Q/A 10 COWS-2 as well as in e-mails dated 5 June 2015 at COB1 p. 39. I concur with the company's learned counsel that this makes a good business efficacy decision.

[63] The above evidence of COW2 had enlightened the court on the actual operations in the company. His evidence was reliable, consistent, credible, truthful and transparent, and speaks volumes of his credibility and reliability as a witness before this court.

[64] The claimant had also, in his witness statement, alleged that he had all along been included in the company's strategic meetings. However after the organizational change on 1 June 2015 he was excluded from what he described to be a strategic meeting known as "Strategic Direction of HOE Pharmaceuticals based on mid and long term perspectives" which was held on 11 June 2015. It is pertinent to note that this alleged exclusion was not pleaded in the claimant's Statement of Case, but was raised in his witness statements CLWS-1 at Q/A 10.

[65] The company produced COB2 to answer the claimant's assertions in regards the said matter. COW2 explained the purpose of the strategic meeting known as "Strategic Direction of HOE Pharmaceuticals based on mid and long term perspectives" in Q/A12 of COWS-2:

> On 11 June 2015 there were several meetings scheduled to coincide with Mr. Jun Kuroda's visit to Malaysia. Mr. Maki (COW1) sent out this meeting schedule (COB2). The meeting "Discussion on strategic direction of HOE Pharmaceuticals based on mid and long term perspectives" was for Mr. Tito, myself, Mr. Hattori and Mr. Kamijo to discuss our presentation which we had to make to Japan HQ on our then upcoming trip to Japan for a Strategic Meeting to be held at Japan HQ in early July 2015. *The Claimant was not part of the team going to Japan. Hence he was not part of that meeting which was scheduled from 10am to 12 pm on 11 June 2015.*

[66] The claimant in evidence stated that he was not aware that the said meeting was for Mr. Tito Tolentino (COO), Mr. Hattori, Mr. Tan Keng Aun (COW2) and Mr. Maki Kamijo (COW1) to discuss their presentation to Japan Headquarters during their upcoming trip to Japan. The claimant admitted that he did not make any attempts to ask what the said meeting was for. I concur with the company's learned counsel's submission that if the claimant did not know what the meeting was for and if he did not even to bother to ask or clarify its purpose then it would have been rather presumptuous for him to conclude that he was excluded from the said meeting. Thus his allegations of not being included in the company's strategic meetings is unsupported and baseless.

[67] Pursuant to the evidence adduced thus far, the court finds that apart from the fact that he was required to report directly to COW2 and not the COO, there were no changes in the claimant's position, salary or any other terms and conditions of service following the organizational change in the company on 1 June 2015. The claimant continued to hold the position of General Manager for Export and he still had the same regions R1, R2, R3 and R4 reporting to him. Based on evidence the court finds that the claimant's job functions and duties remained intact and he continued to perform the same job functions and duties both prior and after 1 June 2015. Nothing changed in terms of the day to day operations carried out by the claimant who continued to confirm and sign the Sales Order Forms.

[68] The claimant asserted that the company had breached the implied term of mutual trust and confidence as his status and responsibility in the company had been reduced after the reorganisation on 1 June 2015 wherein he was required to report directly to COW2 and not the COO. The company's learned counsel submitted that in *Lewis v. Motorworld Garages Ltd* [1986] 1 ICR 157, the English Court of Appeal described the implied term of mutual trust and confidence as follows:

> On the other hand it is now established that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of the contract of employment *that the employer will not, without reasonable and proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee.*
>
> [Emphasis added]

[69] It was further submitted by the company's learned counsel that in *Hilton v. Shiner* [EAT Appeal No. EAT/9/00], the Employment Appeal Tribunal explained the implied term of mutual trust and confidence as follows:

> Thus, in order to determine whether there has been a breach of the implied term two matters have to be determined. *The first is whether, ignoring their cause, there have been acts which are likely on the face of them seriously to damage or destroy the relationship of trust and confidence*

A *between employer and employee. The second is, whether that act has no reasonable and proper cause.* There is an element of artificiality which must be recognised in dividing the test in this way, because it may be that the act is seen by the employee and employer as so bound up with legitimate reasons for doing it that it is unlikely to damage the relationship of trust and confidence between them, or that, B conversely, it is certain to do so. It is not, therefore, a test to be applied to any set of facts by rote. Nonetheless, in circumstances such as the present, it is helpful.

To take an example, any employer who proposes to suspend or discipline an employee for lack of capability or misconduct is doing C an act which is capable of seriously damaging or destroying the relationship of trust and confidence between employer and employee, whatever the result of the disciplinary process. *Yet it could never be argued that an employer was in breach of the term of trust and confidence if he had reasonable and proper cause for the suspension, or for taking the disciplinary action.*

D [Emphasis added]

[70] It has been held in a plethora of cases that a change in reporting line on its own cannot amount to a fundamental breach of contract on the part of the company. In the case of *Talasco Insurance Sdn Bhd v. Industrial Court of Malaysia & Anor* [1997] 4 CLJ 97 the High Court was confronted with E a case, whose facts are similar to the present case, where the employee had claimed constructive dismissal because, on account of a reorganization, he was to report to a new recruit. Abdul Kadir Sulaiman J said:

F With respect, the 1st respondent had gone too far in the purported exercise of his jurisdiction to determine whether the 2nd respondent was dismissed by the applicant on account of the reorganisation. It is not for the 1st respondent to decide for the applicant who is best to perform what function in its organisation. More so in this case it is not denied that Abu Bakar bin Man in relation to the 2nd G respondent possessed a higher qualification. **It is the applicant's prerogative to decide who is more suitable for a particular job for so long as in the making of the decision, it acted in good faith** and that the 2nd respondent's responsibilities, salary and all other terms and conditions of service with the applicant remained unchanged. It may result in the loss of pride for the 2nd respondent to be the H subordinate of the newly appointed immediate superior. But this loss of pride alone would not constitute a dismissal of the 2nd respondent by the applicant. In the circumstances, the fact that the 2nd respondent was asked to report to this newly appointed senior manager, finance and administration, who is his immediate superior on account of the reorganisation and his change of designation to I accountant (corporate) could not in substance or in fact or in law, be considered a demotion of the 2nd respondent. Therefore, the 1st respondent had acted outside its jurisdiction in taking into consideration irrelevant matters.

[Emphasis added]

[71] In *Christoph Hoelzl v. Langkawi Island Resort Sdn Bhd* [1998] 1 LNS 87, the High Court said:

> In my view, the new arrangement merely had the effect of bringing down the control by the management from Kuala Lumpur to Langkawi through the overseer (the owner's representative). **The only change is only in the line of reporting. It does not in any way erode the functions of the plaintiff as the general manager as originally envisaged. His functions remained intact.** It is rather unfortunate that there was no written job description as such at the inception of his employment. Be that as it may, on the documentary evidence gathered from Ikatan B, I am satisfied that the functions given to the owner's representative as spelt out in the job description are mainly concerned with the powers of management control which were originally vested in the defendant and that the new job description for the plaintiff in reality merely spells out in details the functions and the responsibilities of the general manager which ought to have been done or could have been done at the inception of the plaintiff's employment. With regard to the impugned clause in the new job descriptions, I am of the view that it does not detract from the original terms of employment which could have been spelt out at the inception of the employment had there been a written job description as the amendments are within the ambit of the functions and duties of the general manager.
>
> Therefore, the defendant cannot be said to be guilty of a breach which goes to the root of the contract or had evinced an intention no longer to be bound by it. No doubt that the plaintiff might have felt slighted by the new arrangement because it affected the plaintiff's esteem amongst his fellow employees but that alone is not enough to frustrate a reasonable man or to make it impossible for a reasonable man to carry on being employed under the organization. Hence, the plaintiff is not entitled to consider himself dismissed.
>
> [Emphasis added]

[72] Further in the case of *Kontena Nasional Bhd v. Hashim Abd Razak* [2000] 8 CLJ 274, Faiza Tamby Chik J stated that there was no contractual provision in regards an employee's line of reporting:

> In the instant case, one of the reasons on which the respondent had relied upon in considering his transfer to be a demotion was due to the fact that other assistant managers reported to the senior manager to whom he was also required to report to. The mere fact that the respondent had been required to report to the Chief Executive Officer previously, was not reflective of his status and position. **There was no contractual provision for the respondent's line of reporting.** In any event the applicant's witness had given evidence that as the Senior Manager of Business Development was the head of that unit, the respondent would be required to report to him.
>
> [Emphasis added]

[73] The court concludes that the organisational change implemented by the company after 1 June 2015 is a managerial prerogative and the company had acted *bona fide* and substantiated the organizational change with cogent and substantive evidence. Pursuant to the organisational change COW2 as the Commercial Director was made the head of the newly created Sales & Marketing RA & BD (Business Development) Department, to whom the claimant as the General Manager for Export was required to report to. The court finds that the claimant's alleged reduction in status due to the change of his reporting line from COO to a new Commercial Director (COW2) is insufficient to constitute a fundamental breach of the claimant's contract of employment, namely that the company would not *inter alia* without reasonable cause conduct itself in a manner likely to destroy or damage the relationship of trust and confidence between the parties as employer and employee. In furtherance, the company has not evinced an intention no longer to be bound by the said contract of employment.

The "Strange Reply" From The Company

[74] In his letter dated 25 June 2015, the claimant put forth his second reason for constructive dismissal:

> In view of the Company's strange reply to my letter mentioned above, I feel that the Company is driving me out of my job.

[75] In cross-examination, the claimant was asked why he says he found the company's response "strange" and his answer was:

> It is strange because they never replied to the issues I raised on 15 May 2015.

[76] Based on evidence adduced during the hearing, the company admitted that there was a meeting between the claimant and COW1 on 10 March 2015 and between the claimant and Mr. Jun Kuroda on 12 March 2015. It is the company's unchallenged evidence that between 12 February 2015 and 12 March 2015 the company's management was made aware of the findings made by the DI Panel and thereafter the company was compelled to decide on the punishment to be meted out to the claimant. The company decided that attempts be made to resolve the matter amicably by negotiating a separation between the company and the claimant on terms to be agreed upon to avoid having to make a decision on whether to punish the claimant or not. It was the intention of Taisho Pharmaceuticals Co. Japan not to embarrass the claimant in view of his long service and contribution to the company. It was towards this aim that the two meetings were held between the claimant, COW1 and Mr. Jun Kuroda. However pursuant to the said meetings there was no amicable resolution pertaining to the severance package to be paid to the claimant.

[77] The claimant produced before the court the transcripts of the conversation during the said meetings [CLB2 and CLB3], which were agreed to by the company's learned counsel. It was apparent that the thrust of these meetings was on attaining an amicable resolution through a consensual severance package. However COW1 in evidence refuted that he had asked the claimant to resign during the said meetings. In any event the Industrial Court has held that offering an employee facing disciplinary proceedings an option to resign is not something unusual. In *EON Bank Berhad v. Goh Lee Miang* [2003] 1 ILR 226 (Award No. 1083 of 2002) the Industrial Court held:

> The court finds that objectively viewed in the context of the facts and circumstances of this case, what can be reasonably construed from the evidence before the court is that the bank's human resource manager took what is the **altogether not unusual course of action** of proffering an employee who is the subject of serious complaints and facing the prospect of disciplinary action the option of resigning.

[78] The company admitted that the two meetings between the claimant, COW1 and Mr. Jun Kuroda had taken place on a "Without Prejudice" basis. The company's learned counsel submitted that since the claimant had failed to accept the severance package discussed between him and Mr. Jun Kuroda, the company was not bound to continue negotiations with the claimant. The company had no choice but to proceed to make a decision on what further action it will take against the claimant with regards to the outcome of the findings of the DI. Subsequently the company issued a stern warning to the claimant *vide* its letter dated 20 March 2015.

[79] On 3 April 2015, the claimant responded to the company's letter dated 20 March 2015 stating, *inter alia*, that he disagreed with the findings of guilt and reminded the company about his meetings with COW1 and Mr. Jun Kuroda and stated that he was still open to an "amicable solution". Further correspondences pursued in regards this matter between the claimant and the company *vide* letters dated 8 April 2015, 15 May 2015 and 21 May 2015.

[80] The claimant *vide* his letter dated 15 May 2015 continued to hold out that he was still awaiting an "amicable solution" from the company. In this regards it is apparent that he was referring to the severance package based on his prior meetings with COW1 and Mr. Jun Kuroda.

[81] The company's learned counsel submitted that the issues raised by the claimant in his letter dated 15 May 2016 had already been responded to by the company *vide* its letter dated 8 April 2015, namely that the findings of guilt by the DI against the claimant were reviewed by management of the company and it had decided to issue the claimant with a stern warning, and that the meetings between the claimant, COW1 and

Mr. Jun Kuroda to find an "amicable solution" was conducted on a "Without Prejudice" basis. The company reiterated that no amicable resolution or agreement was ever reached between the claimant and the company as the company could not agree to the terms as proposed by the claimant. The company in fact made it crystal clear that the matter pertaining to the allegations against the claimant was treated as closed when it stated the following:

> As the matter regarding the allegations against you has come to a close you are strongly advised to observe the terms and conditions of your employment and to carry out your duties and responsibilities in your position as General Manager for Export.

[82] Despite this response the claimant kept harping on the "amicable solution" that he wanted as if he was not prepared to accept that negotiations were off the table although he had returned to work to his position as General Manager for Export following the disciplinary proceedings on 24 March 2015. This is in essence the spirit of his letter dated 15 May 2015 wherein he admitted in cross-examination that he was still at this point referring to the "amicable solution".

[83] On 21 May 2015, the company responded to the claimant's letter dated 15 May 2015 and reminded him once again that the company had closed his case and as such would not be entertaining any more future correspondences in relation to the said matter. In fact the company had twice *vide* its letters dated 8 April 2015 and 21 May 2015 repeatedly told the claimant that the company had closed his case.

[84] The court finds that there is therefore nothing "strange" in the company's reply on 21 May 2015, and the said letter does not and cannot amount to a fundamental breach of the claimant's contract of employment because the company made it clear that an "amicable solution" was no longer possible as the company considered the claimant's case closed after it issued him a stern warning. The company basically was reinforcing what it had already conveyed to the claimant *vide* its earlier letter dated 8 April 2015. The claimant had impliedly accepted the company's position when he returned back to work as instructed by the company on 24 March 2015 *vide* its letter dated 20 March 2015. The claimant continued to work in the company after 24 March 2015 and did not walk out on constructive dismissal at this point of time. Thus he is deemed to have waived his right to claim constructive dismissal on the grounds stated in the second reason of his letter of constructive dismissal.

[85] The company's learned counsel submitted that the High Court decision in *Govindasamy Munusamy v. Industrial Court Malaysia & Anor* [2007] 1 LNS 527 at subparagraph 5(iii) and (iv) held that in satisfying the two limbed contract test, it is also a requirement for the claimant to show that he had put the company on notice regarding the alleged breach and

allowed the company sufficient time to remedy the alleged breach (if any) before he can assert his right to treat himself as being constructively dismissed. It was further submitted that in this case the claimant had not fulfilled the requirement of notifying the company of the fundamental breach on which he relied on and did not give the company an opportunity to rectify the breach. The court finds that in the landmark case of *Western Excavating (ECC) Ltd v. Sharp (supra)*, His Lordship Lord Denning, M.R. held as follows:

> If the employer is guilty of conduct which is a 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 contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. **The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice saying he is leaving at the end of the 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.
>
> [Emphasis added]

[86] The court is of the view that *Western Excavating (ECC) Ltd v. Sharp (supra)* enunciated that the requirement for notice is not mandatory as the employee may or may not give notice, but what is of importance is that the conduct that he complained of must be sufficiently serious to entitle him to leave at once or at the end of the period of notice. Furthermore that the requirement for notice is not mandatory is further fortified in the decision of *Bayer (M) Sdn Bhd v. Anwar Abd Rahim (supra)*.

Conclusion

[87] The court concludes that the company had exercised its management prerogative in carrying out a *bona fide* organizational change of its management. The claimant failed to prove that the said organizational change had resulted in a reduction in his status. The organizational change had merely caused a change in the claimant's reporting line which on its own cannot amount to a fundamental breach of contract on the part of the company. The claimant's second reason of the company's strange reply *vide* its letter dated 21 May 2015 was a meagre and weak attempt to justify his claim of constructive dismissal. The claimant repeatedly sought for a severance package as an "amicable solution" despite the fact that he had been reinstated as General Manager for Export after being given a stern warning pursuant to the findings of the DI.

[88] On the totality of the evidence adduced and having regard to all the written submissions of both parties, it is the finding of this court that the company had not committed any act whatsoever to have breached a fundamental term of the terms of employment which goes to the root of the claimant's contract of employment, or that the company evinced an intention to no longer be bound by the contract of employment.

[89] On the balance of probabilities and having considered the factual matrix and circumstances of the case, this court finds that the claimant has failed to discharge the burden of proof to establish that he was constructively dismissed by the company. The company deemed that the claimant had decided to leave his employment with the company when he submitted his letter of constructive dismissal on 25 June 2015. Consequently, the next question of whether the dismissal was with just cause or excuse need not be answered since the claimant has not succeeded in discharging his burden to prove that he was constructively dismissed. In fact the claimant had walked out of the employment.

Decision

[90] In conclusion, taking 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 the substantial merits of the case without regard to technicalities and legal form, this court finds that the claimant failed to prove that he was constructively dismissed by the company. Accordingly, the claimant's case is dismissed.