

INDUSTRIAL COURT OF MALAYSIA

29(12)/4-981/16

BETWEEN

SHANKAR A/L RAMIAH @ RAMAYA

AND

CIMB BANK BERHAD

AWARD NO: 624 OF 2019

Before	: Y.A. TUAN BERNARD JOHN KANNY CHAIRMAN (Sitting Alone)
Venue	: Industrial Court of Malaysia, Kuala Lumpur.
Date of reference	: 28.07.2016
Dates of mention	: 11.10.2016, 17.11.2016, 19.12.2016, 07.02.2017, 07.03.2017, 10.04.2017, 23.10.2017, 13.12.2017, 24.04.2018, 04.07.2018, 18.09.2018
Dates of Hearing	: 28.06.2018, 21.08.2018, 16.10.2018, 05.11.2018, 03.12.2018
Written Submission by Bank	: 23.01.2019
Written Submission by Claimant	: 18.01.2019
Reply Submission by Bank	: 12.02.2019
Reply Submission by Claimant	: 04.02.2019
Representation	: Mr. Sandosh Anandan & Ms. Parasakthi Rajaretnam From Messrs Sandosh Anandan Counsels for the Claimant Ms. Wong Keat Ching & Ms Nur Elissa Baharudin From Messrs Zul Rafique & Partners Counsels for the Company

REFERENCE

This is a reference by the Honourable Minister of Human Resources made under section 20 of the Industrial Relations Act 1967 (Act 177) arising out of the dismissal of **Shankar A/L Ramiah @ Ramaya** (hereinafter referred to as "the claimant") by **CIMB Bank Berhad** (hereinafter referred to as "the bank") on 30th June 2015.

AWARD

[1] The Ministerial reference in this case required the court to hear and determine the claimant's dismissal by the bank on 30th June 2015. The reference was dated 28th July 2016 and received by the Industrial Court on 26th August 2016.

[2] The matter was transferred from Court 12 to this court on 27th June 2018 pursuant to instructions from the Yang DiPertua, Mahkamah Perusahaan Malaysia dated 5th June 2018, in order that the Final Award be handed down.

[3] The matter was fixed for hearing on 28th June 2018, 21st August 2018, 16th October 2018, 5th November 2018 and 3rd December 2018.

[4] The Bank solicitors filed their written submission on 23rd January 2019 and reply on 12th February 2019 while the claimant solicitors filed their written submissions on 18th January 2019 and reply on 4th February 2019.

(A) Proceedings in The Industrial Court

[5] When the matter was heard the following witnesses were called by the bank to testify in Court:

- (i) Madam Lim Swee Meng who is the Head of Office Audit Department ("COW-1");
- (ii) Mr Lim Tiang Siew who was Group Chief Internal Auditor CIMB Group ("COW-2");
- (iii) Mr Chua Kim Lin who is Managing Director, Regional HR Services/Regional Industrial Relations, Group Human Resource ("COW-3"); and

(iv) Mr Thangamani Rajagopal who is Head of Credit Audit, Group Internal Audit Division ("COW-4").

[6] The claimant gave evidence himself ("CLW-1").

[7] The documents filed and marked before this Court are as follows:

- i. The Bank's Bundle of Documents ("COB-1");
- ii. The Bank's Bundle of Documents (Volume 2) ("COB-2");
- iii. Claimant's Bundle of Documents ("CLB-1");
- iv. Claimant's Supplementary Bundle of Documents ("CLB-2");
- v. Witness statement of Lim Swee Meng ("COWS-1");
- vi. Witness statement of Lim Tiang Siew ("COWS-2") ;
- vii. Witness statement of Chua Kim Lin ("COWS-3");
- viii. Witness statement of Thangamani Rajagopal ("COWS-4A"); and ("COWS-4B");
- ix. Witness statement of Shankar a/l Ramiah @ Ramaya ("CLWS-1");

(B) Brief Backgrounds Facts

[8] By a letter of appointment dated 05.05.2005, the claimant commenced employment on 15.06.2005 as Assistant Manager (Grade 36) in the Group Internal Audit Division. A copy of the letter of appointment is found at page 3 of COB-1

[9] The claimant was required to serve a probationary period of six (6) months. Subsequently the claimant was confirmed in employment.

[10] At the request of the claimant vide a letter dated 23.01.2013, the Bank transferred the claimant to the Group Internal Audit Division – Credit Audit effective 01.03.2013. A copy of the transfer letter is found at page 4 of COB-1.

[11] By a letter dated 21.03.2014, the claimant was promoted to the position of Manager, Credit Audit effective 01.04.2014. A copy of the letter dated 21.03.2014 is found at page 5 of COB-1.

[12] Subsequently, the claimant voluntarily tendered his resignation vide his letter dated 30.03.2015. A copy of his letter of Resignation is found at page 6 of COB-1.

[13] For ease of reference the resignation letter dated 30.03.2015 is reproduced below:

Head of Credit Audit,
Thangamani Rajagopal,
Group Internal Audit Division,
CIMB BANK BERHAD.

Date: 30.03.2015

Resignation from Group Internal Audit - Credit Audit with effect from 30.03.2015

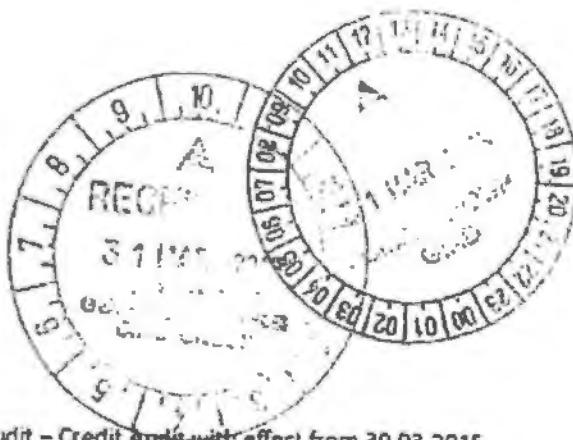
I, Shankar Ramiah (IC:741002-14-5157) would like to serve a 3 month notice of resignation from my current duties with effect from 30.03.2015.

Thank you.

Regards

Shankar Ramiah

Cc: Group Human Resource



30/3/15
Spotted b Shankar -
joining another bank
for 25%, where is
going

Management
Planning Director

[14] On the 31.03.2015 an exit interview was conducted by the claimant's superior, COW-4. During the exit interview, the claimant had informed COW-4 that he had secured a new job in another Bank with a 25% salary increase, which COW-4 wrote on the claimant's resignation letter.

[15] Subsequently, the claimant filled up an Exit Interview Form dated 02.04.2015 which is found at pages 7 to 8 of COB-1, whilst the claimant's superior COW-4 filled another Exit Interview Form found at page 9 of COB-1.

[16] The Bank accepted the claimant's resignation vide its letter dated 03.04.2015 and in doing so fixed his last date of service on 30.06.2015. A copy of the acceptance letter dated 03.04.2015 from the Bank is found at page 10 of COB-1.

[17] For ease of reference the acceptance letter from the Bank dated 03.04.2015 is reproduced below:



PRIVATE & CONFIDENTIAL

3 April 2015

Mr. Shankar a/l Ramiah @ Ramaya - 0017909 (U6)
CIMB Bank Berhad
GIAD - Credit Audit
Level 22, Menara Bumiputra-Commerce

Dear Mr. Shankar,

Resignation

We refer to your letter of resignation dated 30 March 2015 which we received on 31 March 2015 and wish to inform you that your resignation has been accepted by the Bank. Pursuant to this, your employment with the Bank will cease with effect from 1 July 2015 and your last day of service with the Bank will be 30 June 2015.

Your proportionate leave entitlement up to 30 June 2015 is 13 days, which has to be taken prior to your last day of service. Any unutilised pro-rated annual leave will be paid to you together with your last drawn salary less any monies owing, if any.

Kindly return the staff access card, parking access card or sticker, keys or any other Bank's properties in your possession to your immediate supervisor on or before your last working day.

We trust that you will continue to preserve strict confidence on all matters relating to the Bank and its customers after leaving service as provided under Section 133 (Secrecy) of the Financial Services Act 2013.

On behalf of the Bank, I would like to take this opportunity to thank you for the services rendered to the Bank and wish you every success in your future undertakings.

Yours faithfully,
for CIMB Bank Berhad

A handwritten signature in black ink that appears to read "Lall".

Chua Kim Lin
Head, HR Services
Group Human Resource

[Handwritten mark]

cc Mr Lim Tiang Siew
Group Chief Internal Auditor

[18] In the said letter the Bank informed the claimant that his last day of service with the Bank will be 30.06.2015.

[19] The claimant claimed that he tendered his resignation to the Bank, as a result of verbal abuse and harassment by his superior officer COW-4.

[20] As a result of the alleged verbal abuse and harassment by COW-4 the claimant was demoralised and demotivated thus seeking medical assistance.

[21] Thereafter, the claimant went on sick and annual leave from 31.03.2015 until his last date of service on 30.06.2015.

[22] The claimant returned to work from sick leave in mid-April 2015 and was required to meet COW -2 who was the Group Chief Internal Auditor.

[23] COW-2 who was Group Chief Internal Auditor CIMB Group had a meeting with the claimant to find out the reason for his resignation. Claimant informed COW-2 that he had problems working with COW-4.

[24] After listening to the claimant, COW-2 advised the claimant that he could apply for vacancies within the division or the Bank subject to the claimant retracting his resignation and it being allowed by the Bank and/or for him to serve his notice of period and leave the Bank in accordance to his letter of resignation.

[25] Subsequently, on the 22.04.2015 the claimant had a meeting with COW-1 Mdm Lim Swee Meng who was head of Head Office Audit Department. After the meeting the claimant was informed by COW-1 to report to Head Office Audit Department on the 27.04.2015.

[26] The claimant never reported for work on the 27.04.2015 at Head Office Audit Department. The claimant informed COW-1 that he was on medical leave from the 27.04.2015 to 28.04.2015.

[27] While the claimant was serving his notice period the Claimant on the 28.05.2015 had submitted to the Bank his application for a Mutual Separation Scheme (MSS) through the Bank's e-HR System. A copy of his application form is found at page 11 of COB-1.

[28] Vide letter dated 11.06.2015 the Bank informed the claimant that his MSS application had been rejected. A copy of the Bank's letter dated 11.06.2015 is found at page 12 of COB-1.

- [29] For ease of reference the Bank's letter dated 11.06.2015 is reproduced below:



Ref no: 0017809

PRIVATE AND CONFIDENTIAL

11 June 2015

Shankar a/f Ramiah @ Ramaya
CIMB Bank Berhad
GIAD - Corporate Credit, Credit Risk Management, GSAM & Special Projects
Group Internal Audit

Dear Shankar a/f Ramiah @ Ramaya

Application for Mutual Separation Scheme (MSS)

Your application for MSS received by us on 28/05/2015 refers.

We regret to inform that after due consideration, CIMB is unable to accede to your application to leave CIMB under the MSS.

The Management looks forward to your continued support and commitment for mutually rewarding aspirations.

Yours faithfully
for CIMB Bank Berhad

A handwritten signature in black ink, appearing to read "L...llie".

Chua Kim Lin
Head, HR Services
Group Human Resource

- [30] On the 25.06.2015 the claimant tendered his "notice of actual reason leaving the Bank" informing the Bank that he was resigning with immediate effect vide his letter dated 25.06.2015. In the letter the claimant claimed himself constructively dismissed by the bank. The claimant stated that the letter should be accepted as his supplementary letter of resignation. A copy of the claimant's letter dated 25.06.2015 is found at pages 63 to 65 of CLB-1.

- [31] For ease of reference the claimant's letter of "notice of actual reason leaving the

Bank" dated 25.06.2015 is reproduced below:

Date : 25/6/2015

PRIVATE AND CONFIDENTIAL.

Shankar Ramiyah
No. 659, Jalan Sri Pulai 34,
Taman Sri Pulai 3, Sikamai,
70400 Seremban, Negeri Sembilan.

By Hand

Mr. Chua Kim Lin
Head Human Resource Services
Group Human Resource
CIMB Bank Berhad (13491-P),
19th Floor, Menara Bumiputra-Commerce,
11, Jalan Raja Laut,
50350 Kuala Lumpur.

We hereby acknowledge receipt of the
above document(s)/payment(s) are in order
dated _____



Dear Sir,

Re : Notice of Actual Reason Leaving the Company

My name is Shankar Ramiyah (staff ID: 0017909) and I was attached with Group Internal Audit Division- Credit Audit. However, recently I was transferred to Group Internal Audit Division – Head Office Audit (please refer to ehris system for details).

I am writing to inform you that I am resigning from my post with immediate effect. Please accept this as my supplementary letter of resignation and a termination of our contract.

I feel that I am left with no choice but to resign in light of the following :-

Mr. Thangamani started to harass and abuse me aggressively with among others the following words:-

- "I will finish you off"
- "I am your taukeh – don't make me – make you vomit blood"
- "I just kicked out one person don't make me do that to you"
- "You are incompetent", "You don't know what you are doing"
- "I will slap you"
- He even asked my junior executive "hey, that Shankar fellow is really working huh"
- "If I was Shanthini, I would not have promoted you", "I don't know how you could be promoted", "Why were you not promoted before this, if your performance was good"?

For the last couple of months (early 2015) - he used to call me in his office frequently and scold me so much so that my morale and self-confidence became so low and the fact that I became fear of working that I decided to resign giving 3 months notice (effective 31.03.2015) with not even having a job in hand.

I did not state the above reasons in the earlier resignation letter and exit form because of :-

- (i) I was afraid the bank can give a negative feedback to my prospective employer and fearing the possibility of Mr. Thanga passing untruthful remarks about me to the management circle of banking industry at large taking into account Mr. Thanga is a very senior employee with the bank for almost 35 years and has wide contacts in banking industry.
- (ii) At that particular crucial time, I was suffering from severe depression due to the above stated harassment and abuse by Mr. Thanga. I was also seeking treatment and under heavy dose of medicine and this condition had affected or influenced my decision by omitting these details in my earlier resignation letter.

However on or about second week of April 2015 after I came back from my medical leave due to depression, my higher boss the Group Chief Internal Audit Mr. Lim Tiang Siew (GCA) spoke to me in his office and I did explain and put him on notice of all the particulars of harassment and abuse by Mr. Thanga against me as above.

I also told the Mr. Lim that I did not write anything of what I mentioned here in the resignation letter and HR Exit form because I wanted a smooth exit/didn't want to have any "problem". I just wanted to leave the bank due to the fear inflicted in me by Mr. Thanga. However, even after my resignation, Mr. Thanga kept on harassing me and at one point where I had to tell him that my resignation was due to his abusive words and harassment towards me.

Mr. Lim then, asked me to consider to re-tract my resignation, to which I said "yes" verbally at his room.

Mr. Lim was willing to transfer me to another department (within group internal audit division) so as to avoid me from reporting to Mr. Thanga, for which I said – I love doing credit audit and credit was my passion for the last 11 years in this bank. I would prefer to go somewhere within the bank that has to do with credit job scope.

Mr. Lim told me that, he was unable to transfer me out of the division as he had no powers to do so but only had powers to transfer me within group internal audit.

As soon as I came out from his room, later in the evening I had a meeting with Ms. Lim Swee Meng, Head for Head Office Audit Department.

She told me that Mr. Lim wanted her to talk to me and see if I can fit in to her place.

On 24/4/2015 I received an email from Ms. Lim Swee Meng to report to her on the 27/4/2015 – stating my desk number and assigned tasks.

Upon being transferred this new department, I tried my best to carry on with the job but I was unable due to :-

- i) The skill sets, method, and job scope required to perform the jobs in my new department is vastly different compared to the previous department.
- ii) I still had the fear over Mr. Thanga and frustration of going through this job adjustment during this difficult time which Mr. Thanga was the main cause.
- iii) This transfer which requires me to settle down and acclimatise to the new job requirement puts me under further pressure and aggravates my work related depression which leads into hospitalization and medical leave.

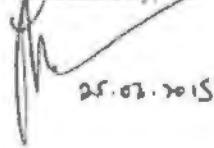
I tried hard to get back to work but the element of fear was always there. I just couldn't concentrate despite me trying to work. This I have informed my new boss - Ms Lim Swee Meng, Head, Head Office Audit via an email.

I consider this to be a fundamental/unreasonable breach of the contract on your part and I have no other choice rather than leaving the company now due to constructive dismissal.

I appreciate the time and energy which you have invested in training me.

I would be grateful if you could acknowledge this letter at the earliest available opportunity.

Yours sincerely,



25.03.2015

[32] The Bank vide its letter dated 30.06.2015 refuted the claimant's unfounded allegations and stated that the claimant's employment ceased with effect from 01.07.2015. Further the Bank reiterated the fact that the claimant had resigned on his own accord vide his letter dated 30.03.2015. A copy of the Bank's letter dated 30.06.2015 is found at page 13 of COB-1.

[33] For ease of reference the Bank's letter dated 30.06.2015 is reproduced below:



PRIVATE AND CONFIDENTIAL

30 June 2015

Mr. Shankar Ramiah - Staff No 0017909 (U6)
No. 659 Jalan Sri Putai 34
Taman Sri Putai 3
Sikamat
70400 Seremban
Negeri Sembilan

By Normal Mail

Dear Shankar,

Re: Notice of Actual Reason Leaving the Company

We refer to your resignation letter dated 30 March 2015, our reply dated 3 April 2015 and your recent letter dated 25 June 2015.

The Bank strictly refutes the unfounded allegations contained in your letter dated 25 June 2015.

Your resignation letter dated 30 March 2015 was received on 31 March 2015 and this was accepted by the Bank vide our letter dated 3 April 2015 where your employment will cease effective 1 July 2015.

As such, the Bank wishes to state that you had resigned on your own accord vide your letter dated 30 March 2015 and that the Bank had not breached any of the terms and conditions of your service.

Yours faithfully
for CIMB Bank Berhad

A handwritten signature in black ink, appearing to read "Chua Kim Lin".

Chua Kim Lin
Head
HR Services
Group Human Resource

[34] The claimant seeks the primary relief of an order of reinstatement to his former position as his dismissal was without just cause or excuse.

[35] The Bank, conversely, has denied the claimant's allegations and contends instead that there was no dismissal, in fact and/or in law, in respect of the claimant's employment with the Bank. The claimant had resigned voluntarily.

[36] Further the Bank submits that the dispute is over the claimant's voluntary resignation from service on 30.03.2015 with 3 months' notice and his last day of

employment was on 30.06.2015.

(C) Issues

[37] The issue before this Honourable Court is whether the claimant effectively resigned from the service of the Bank. This is a question of fact. It is also a question of fact whether that resignation was at the instance of the Bank to fall within the definition of constructive dismissal and whether the claimant's dismissal was without just cause or excuse.

[38] In considering the above issue the court has to deliberate on the following:

- (a) Whether the claimant's resignation from service dated 30.03.2015 was voluntary?;
- (b) If it was voluntary whether there was acceptance of the claimant's resignation letter by the bank?;
- (c) Whether there was a retraction of the resignation by the claimant?;
- (d) If there was a retraction, whether the claimant was constructively dismissed?; and
- (e) If the claimant had been so dismissed, whether such dismissal was with just cause or excuse?

(D) The Law

[39] Since the Claimant has claimed constructive dismissal, it is only appropriate to study the law relating to constructive dismissal and whether the Claimant's claim falls into a fitting case for him to walk out of his employment.

[40] In respect of constructive dismissals, the case of **Ravi Chanthran S Sithambaram v Pelita Akademi Sdn.Bhd. [2007] 1 ILR 475 (Award No. 13 of 2007)** held at p.483 that:

"Constructive dismissal is a creation of the law, where a workman ceases employment on his own volition as a result of the conduct of his employment and thereupon claims that he has been dismissed.

As with all legal fictions it is subject to strict requirements being proved for it to

sustain itself as a dismissal *de facto* and *de jure*; and not convert into a (voluntary) resignation where those prerequisites are wanting."

[41] 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 in the following manner:

"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 envinced an intention not to be bound by it any longer."

[42] In **Western Excavating (E.C.C) Ltd. V Sharp** [1978] 1 All E.R. 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".

[Emphasis added]

[43] In the case of **Quah Swee Khoon v Sime Darby Bhd** [2000] 1 CLJ 9 at page 20 his Lordship Gopal Sri Ram JCA explained the duty of the Industrial Court in considering

constructive dismissal cases:

"In the normal case, an employer either dismisses the servant for cause or terminates the employment under a contractual provision that provides for notice of termination. As a matter of law, the Industrial Court is unconcerned with labels. It does not matter that the parties refer to the particular severance of the relationship as a termination or a dismissal. It is for the Industrial Court to make the determination. Having found that there was in fact a dismissal or the *bona fide* exercise of the contractual power to terminate, the Industrial Court must, in the former case, decide whether the dismissal was for just cause or excuse. If, on the other hand, it comes to the conclusion that there was a *bona fide* termination, then *cadit quaestio...*

The task is no different where a case of constructive dismissal is alleged. The Industrial Court must in such a case also determine firstly whether there was a dismissal. And secondly, whether that dismissal was with just cause or excuse. That is a statutory formula employed by S.20 (1) of the Act...

Constructive dismissal can take place, as we have attempted to demonstrate, in a number of cases. Since human ingenuity is boundless, the categories in which constructive dismissal can occur are not closed. Accordingly, a single act or acts may, according to particular and peculiar circumstances of the given case, amount to a constructive dismissal. There are cases which fall as illustrations at either end of the spectrum...

Whether one would describe the conduct complained of as amounting to constructive dismissal or the breach of the implied term governing mutual trust and confidence is really a matter of semantics. Nothing turns upon it. At the end of the day. The question simply is whether the appellant was driven out of employment or left it voluntarily."

[44] It is therefore trite law that in constructive dismissal cases, the burden is on the Claimant, on the standard that is on a balance of probabilities, to prove that he had been constructively dismissed.

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

“...interpretation of the word ‘dismissal’ in our section 20. We think 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 was convinced an intention no longer be bound by it.”

[46] In the case of **Govindasamy Munusamy v Industrial Court Malaysia & Anor (2007) 10 CLJ 266** the Court illustrated the following principles governing the prerequisites to found a claim of constructive dismissal:

“To succeed in a case of constructive dismissal, it is sufficient for the Claimant to establish that:

- (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]

[47] The Industrial Court in Ahmad Alkaf Mohd Yacob v Bluescope Steel (M) Sdn Bhd [2014] 2 LNS 0591 had stated:

"the burden of proof is on the claimant to establish the above conditions precedent and if any of the above conditions are not established, then the claimant's claim must, in law fail."

[48] Once the perquisites for constructive dismissal have been established by the Claimant in a reference to a dismissal under s 20 of the Act the Court moves into the second limb of inquiry to determine whether the Company had just cause or excuse for the dismissal. Here the burden shifts upon the employer to do so. (See **Pelangi Enterprises Sdn Bhd v Oh Swee Choo & Anor [2004] 6 CLJ 157**).

[49] The law on resignation is clear. Once it is accepted, the matter becomes final and unless agreed to be withdrawn by the employer, there cannot be a unilateral retraction of resignation by the employee. Thus, in order for the resignation to be withdrawn, there must be mutual consent.

[50] In Syed Aman Syed Hassan v MARA Institute of Technology [1993] 1 CLJ 228, the Honourable Justice Lim Beng Choon had stated as follows:

"Turning to the law, it is clear that the relationship of master and servant is essentially contractual. It is a created and continued with mutual consent. Just as the master cannot force the servant to continue to serve him, so also the servant cannot force his service upon the master. By the same token if a letter of resignation is submitted the contract of employment loses the bilateral relationship needed and as such may be said to dissolve the relationship created."

(E) Evaluation of Evidence and Findings of Court

Was the claimant's resignation dated 30.03.2015 made voluntary?

[51] The claimant stated in evidence that vide a letter dated 23.01.2013 from the Bank the claimant was transferred to Group External Audit Division – Credit Audit effective 01.03.2013.

[52] The claimant reported to Ms Shantini a/p Subramaniam who was Assistant General Manager of Group Internal Audit.

[53] Subsequently, in July 2014 the claimant reported to his new immediate supervisor Mr Thangamani a/l Rajagopal (COW-4).

[54] The claimant alleged in evidence that during the 3rd quarter of 2014 he was victimized, verbally abused and harassed by COW-4.

[55] According to the claimant as a result of the constant verbal abuse and harassment by COW-4, the claimant tendered his resignation by a letter dated 30.03.2015. A copy of his resignation letter is found at page 6 of COB-1.

[56] Following the claimant's resignation and the exit interview, the Bank by a letter dated 03.04.2015 from the Bank's Human Resources Department informed the claimant of the Bank's acceptance of his resignation. A copy of the Bank's letter dated 03.04.2015 is found at page 10 of COB-1.

[57] The claimant in evidence alleged that the words uttered by COW-4 at him which deemed as "constant harassment and verbal abuse" were as follows:

- "a) I was incompetent;
- b) Did not deserve to be promoted;
- c) Threatened to place me under the performance improvement plan;
- d) I am your taukeh;
- e) Don't make me, make you vomit blood; and
- f) I just kicked a fellow out, don't make me do that to you"

Found at paragraph 12 of the Statement of Case and Q28 of CLWS-1.

[58] According to the claimant in his examination in chief at Q28 of CLWS-1, all the

above words were uttered by COW-4 towards the claimant in the presence of his colleagues. This caused him to feel fear, down and demotivated. The claimant did not name the colleagues nor produce them as witnesses.

[59] Further the claimant claimed in his evidence during examination in chief at Q29 of CLWS-1, that he informed a personnel in the Human Resource Department regarding the harassment and verbal abuse but once again the claimant did not name nor produce any witness from the HR Department to give evidence on his behalf.

[60] Despite the factual allegations raised in his evidence and statement of case (paragraph 12) the claimant did not give evidence in support of the said allegations. The claimant did not produce any witness to give evidence on his behalf. He who asserts must prove as provided for under section 103 Evidence Act 1950.

[61] Thus this court is unable to accept the allegations made by the claimant, on the ground that it was not substantiated by evidence. It must be proven by cogent evidence and not by bare assertions. Bare and unsubstantiated allegations do not constitute evidence and has no probative value.

[62] In addition the claimant's failure to call his colleagues and/or the HR personnel as a witness would warrant the Court to draw an adverse inference under section 114 (g) Evidence Act 1950.

[63] In cross examination, the claimant agreed that he met COW-4 on 31.03.2015 to tender his resignation and during the meeting, the claimant agreed that he did not mention any verbal and/or harassment by COW-4. Moreover, the claimant had informed COW-4 that his resignation was due to him joining another company.

[64] In this regard the claimant was cross examined as follows:

"Q : Agree with me when COW-4 spoke to you on 31.03.2015, you did not inform him that your reason for resignation was harassment?

A : Agreed.

Q : At the meeting, did you give a reason to COW-4 for your resignation?

A : Yes.

Q : What was the reason for resignation told to COW-4?

A : I said I am going to join another company."

[65] This evidence is corroborated by COW-4's remarks written on the resignation letter at page 6 of COB-1 "spoken to Shankar joining another Bank for 25% increase in pay".

[66] On the oral testimony above and before the court there is no evidence of harassment and verbal abuse by COW-4 towards the claimant thus this court is of the opinion that the claimant has failed to substantiate the contention that his resignation was involuntary.

[67] The documentary evidence vide the claimant's resignation letter dated 30.03.2015 is succinctly clear to indicate the intention of the claimant. The contents of the letter of resignation is simple, straightforward and purposeful.

[68] The claimant has clearly and unequivocally terminated his contract of employment by his own resignation and the resignation has been accepted by the Bank vide its letter dated 03.04.2015.

(F) **Did the claimant alleged harassment and verbal abuse by COW-4 in the claimant's Exit Interview Form?**

[69] The claimant filled up an Exit Interview Form dated 02.04.2015. This was filled up 2 days after his resignation letter dated 30.03.2015. This Exit Interview Form is found at pages 7 to 8 of COB-1. COW-4 filled up his part of the Exit Interview Form which is found at page 9 of COB-1.

[70] The claimant in his Exit Interview Form did not mention of any harassment and verbal abuse by COW-4. The Claimant listed "others" as his reason for resignation, although there was a column in the Exit Interview Form which listed "Dissatisfied – Relationship with superior". Further, the Claimant had listed that he received fair treatment by his superior. In addition the Claimant did not site "Health" as a reason for his resignation. This is evident from the Exit Interview Form found at page 7 of COB-1.

[71] In this regard the claimant was cross examined as follows:

"Q : Refer Exit Interview Form at page 7 and 8 COB-1. Agree that there is nothing in this form which mention any harassment or verbal abuse by Mr Thanga?

A : Yes.

Q : Under the subject "Employee Development" for guidance and direction given by your superior you have given a rating of 3 which means "satisfactory"?

A : Yes.

Q : Under the subject "superiors and colleagues" for level of fair treatment as demonstrated by your superior you have given a rating 2 which was "fair"?

A : Correct.

Q : From your Exit Interview Form you have only rated items as 1 which is "poor" that is for "compensation package and job expectation"?

A : Yes.

Q : At page 8, COB-1 the first question – "Is there anything in the Bank could have done to prevent you from learning? You wrote "better compensation packages"?

A : Yes."

[72] Once again there was no evidence to prove that the claimant was harassed and verbally abused by COW-4 from the claimant's Exit Interview Form hence the claimant has failed to substantiate the contention that his resignation was involuntary.

(G) Was the conduct of the claimant that of a victim who suffered harassment and verbal abuse by COW-4?

[73] The claimant in his resignation letter dated 30.03.2015 agreed to serve the 3 months' notice period after resignation.

[74] The claimant was fully aware that he would still have to work under COW-4's supervision during the notice period.

[75] In this regard the claimant was cross examined as follows:

"Q : By this resignation letter, you stated that you would like to serve 3 months'

notice. Confirm?

A : Yes.

Q : You agree that in this resignation letter, you had not stated any reasons for your resignation?

A : Yes.

Q : You agree that in this resignation letter, you did not request to leave early or request waiver of your notice of period?

A : Yes."

[76] The court is in agreement with the submissions by the learned counsel for the Bank that the claimant had a choice but yet choose to serve out his 3 months' notice under the supervision of COW-4.

[77] Clearly this action by the claimant did not reflect the behaviour of a victim who naturally would not want to work for another 3 months with COW-4 who allegedly had been verbally abusing and harassing the claimant. Hence the Claimant has failed to substantiate the contention that his resignation was involuntary.

[78] The Court is in agreement with learned counsel for the Bank that the claimant's actions are totally inconsistent with his claim of being verbally abused and harassed.

(H) **Was the claimant suffering from depression as a result of the verbal abuse and harassment caused by COW-4?**

[79] The claimant reported to COW-4 in July 2014. Since July 2014 the claimant claimed that he was harassed and verbally abused by COW-4 resulting in him tendering his resignation on the 30.03.2015.

[80] The claimant alleged that he was suffering from work stress which eventually led to depression as a result of the constant harassment and verbal abuse by COW-4.

[81] The claimant stated in evidence during examination in chief at Q32 of CLWS-1 that he started developing work stress on or about the 3rd quarter 2014. (From the time he reported to COW-4 i.e. July 2014). The claimant stated as a result of the work stress due to verbal abuse and harassment by COW-4 he tendered his resignation on the

30.03.2015.

[82] The claimant relied on the following Medical Reports to prove that he was suffering from work stress depression due to verbal abuse and harassment by COW-4:-

- (i) ASP Medical Clinic Sdn Bhd Medical at page 48 of CLB-1;
- (ii) Mawar Medical Centre Medical Report at page 49 of CLB-1;
- (iii) Klinik Unimed Plaza Damansara Medical Report at page 52 of CLB-1;
- (iv) KPJ Specialist Hospital Medical Report at page 53 of CLB-1;
- (v) KPJ Specialist Hospital Inpatient Discharge Summary at page 57 of CLB-1;
- (vi) KPJ Specialist Hospital Medical Report at page 58 of CLB-1;
- (vii) KPJ Specialist Hospital Medical Report at page 83 of CLB-1;
- (viii) Poliklinik Pride Letter of Referral at page 1 of CLB-2; and
- (ix) ASP Medical Clinic Sdn Bhd Medical Report at page 2 of CLB-2.

[83] It was the claimant's contention that he suffered harassment and verbal abuse from COW-4 since July 2014. This resulted in the claimant suffering from work stress which resulted in him tendering his resignation on the 30.03.2015.

[84] I have perused all the medical reports and/or referral letters above and find that the said documents were post resignation i.e. given after the claimant tendered his resignation on 30.03.2015.

[85] The claimant did not provide any medical evidence in the form of medical reports from the time he was harassed i.e. July 2014 until the 30.03.2015 when he tendered his resignation. Further the claimant did not list down "health" as a reason for his resignation in the Exit Interview Form. Thus, there is no medical evidence before this court to support the claimant's contention that he suffered depression/work stress from July 2014 leading to his resignation letter dated 30.03.2015.

[86] It was evident from the testimonies of CLW-2 and CLW-3 the two doctors who testified on the claimant's behalf that they were not able to make a proper diagnosis. They merely stated in their medical reports/referral letter what was told to them by the claimant himself. Both these doctors saw the claimant after he tendered his resignation.

[87] In this regard DR Emma Sharmila Bte Hasbullah (CLW-2) was cross examined as follows:

" Q : Refer to page 2 CLB-2. Please confirm the diagnosis?

A : This is an impression. It is not a diagnosis. I am not a psychiatrist.

Q : In what circumstances do you write a referral letter?

A : The claimant requested me to write a medical report about his stress and anxiety at work. To that I replied, I am not a certified psychiatrist so I cannot help him to write the report. This is why I wrote this referral letter.

Q : The notes under the section chief complaint is actually what the claimant informed you?

A : Yes.

Q : Agree that the second para is based on your observation?

A : The second para is told to me by the claimant not my observation.

Q : Confirm that the last note on page 2 at CLB-2 "Anxiety disorder with mild depression" is not a diagnosis?

A : Not a diagnosis, only an impression. It takes specific tools to diagnose any psychiatric problems."

[88] DR M. N. Rajaselvi (CLW-3) was cross examined as follows:

" Q : You saw the claimant for the first time on 11.04.2015?

A : Yes.

Q : You confirm you don't know the claimant's condition on 30.03.2015 or prior to that?

A : I don't know.

Q : Agree your medical report at page 83 of CLB-1 does not state the date or month when the claimant's medical condition had started?

A : Yes, I didn't mention.

Q : The second sentence "patient complained that he was feeling very sad and is not able to work as he is feeling very disturbed emotionally and feels he is being abused and treated badly at workplace". This is what the claimant told to you?

A : Yes.

Q : "After taking a good history and examining him, I made a diagnosis of major

depression". This taking of history and examining him was done on 11.04.2015 or was it over 4 months?

A : I made the diagnosis on 11.04.2015 itself. It takes about 2 weeks to make a diagnosis."

[89] To a question from the court CLW-3 testified as follows:

" Q : Any lab test done?

A : I didn't do anything. No lab test. I confirm this letter was written upon the claimant's request."

[90] The claimant's own medical report at page 49 of CLB-1 contradicts the claimant's contention that he was suffering from depression as a result of the harassment and verbal abuse by COW-4.

[91] The claimant had gone to see DR Parameswaran of Mawar Medical Center on 04.04.2015. This was 5 days after the claimant's resignation letter dated 30.03.2015. This means, the claimant had seen DR Parameswaran at Mawar Medical Center one week before he went to see DR M. N. Rajaselvi CLW-3 on the 11.04.2015.

[92] DR Parameswaran Ramasamy had prepared a medical report dated 11.04.2015. This report is found at page 49 of CLB-1.

[93] DR Parameswaran Ramasamy stated as follows in his medical report dated 11.04.2015:

"The above mention gentleman was seen in my clinic on the 4th April 2015. He was recently promoted and posted away from current place of stay. During the earlier part, he was coping very well but over period of time develop adjustment disorder secondary to workload and logistic issue. At one point of the time he was very distress that he made a decision to resign but it was an impulsive act."

[Emphasis Added]

[94] Based on the medical report from DR Parameswaran the claimant tendered his resignation because he was promoted away from his current place of stay. DR Parameswaran referred to it as "adjustment disorder secondary to work load and logistic issue."

[95] DR Parameswaran's conclusion was based on what the claimant told him. This court finds that on the 04.04.2015 when the claimant saw DR Parameswaran the claimant did not complain that he was harassed and verbally abused by COW-4 at the work place. Instead the claimant informed the good Doctor that he had workload and logistic issue as he had to travel to work from his place of stay in Seremban.

[96] In addition DR Parameswaran had confirmed in his report that the claimant's current condition was "**much calmer and stable**".

[97] The claimant was on sick leave from the 06.04.2015 to 10.04.2015. On the 11.04.2015 he visited DR Parameswaran of Mawar Medical Center wherein he obtained a referral to a panel psychiatrist for further evaluation and treatment.

[98] On the 11.04.2015 the claimant visited DR Rajaselvi (CLW-3) at KPJ Seremban. CLW-3 confirmed that it takes 2 weeks to make a diagnosis. CLW-3 first saw the claimant on the 11.04.2015. She confirmed that she did not see the claimant prior to 11.04.2015.

[99] CLW-3 confirmed she made her diagnosis on the 11.04.2015 (during cross examination). She diagnosed the claimant suffered major depression. A copy of CLW-3's medical report dated 22.08.2015 is found at page 83 of CLB-1.

[100] The Court finds that CLW-3's diagnosis is unclear especially when it takes 2 weeks to make a diagnosis. CLW-3 did not see the claimant prior to 11.04.2015. She only saw the claimant on the 11.04.2015 hence following her own evidence that it required 2 weeks to confirm a diagnosis it was not possible for her to make a diagnosis on the 11.04.2015.

[101] Further DR Parameswaran had stated in his medical report dated 11.04.2015 that when he saw the claimant on 04.04.2015 the claimant was much calmer and stable and it is now unclear how the claimant is then diagnosed with major depression one week later.

[102] In a week the claimant had changed his version of work stress due from workload and logistic issue (in DR Param's report dated 11.04.2015) to being abused and treated badly at work place (in DR Selvi's report dated 11.04.2015).

[103] Based on the inconsistencies the evidence led by the claimant is inconsistent and unacceptable.

[104] After considering the totality of the evidence adduced during the hearing I find it is proven that the claimant tendered his resignation voluntarily and the claimant's claim of constructive dismissal was not due to verbal abuse or harassment by COW-4.

(I) **Did the Bank accept the Claimant's Resignation?**

[105] The Bank accepted the Claimant's letter of resignation vide its letter dated 03.04.2015. A copy of the letter dated 03.04.2015 is found at page 10 of COB-1.

(J) **Whether the claimant can withdraw his resignation after acceptance by the Bank and whether there was a retraction of the resignation by the claimant?**

(a) **Can the claimant withdraw his resignation?**

[106] It is the position in industrial jurisprudence that once the resignation of a workman is accepted by the employer, the workman cannot thereafter unilaterally withdraw his resignation and the contract of employment terminates on the designated date. (Refer **Interfurn (M) Sdn Bhd v Corstjen Jacques [1998] 2 ILR 315**)

[107] In the instant case the Bank replied vide its letter dated 03.04.2015 accepting the claimant's resignation vide his letter dated 30.03.2015 and fixing his last date of employment on 30.06.2015.

[108] In **Riordan v The War Office [1959] 3 AER 552** where Diplock J. spoke at page 557:

"I think that the regulations relating to the termination of employment must be regarded if not as the terms of contract of employment at least as analogous to the terms of such a

contract and that the giving of a notice terminating the employment, whether by employee or employer, is the exercise of the right under the contract of employment to bring the contract to an end, either immediate or in the future. "It is a unilateral act, requiring no acceptance by the other party, and, like a notice to quit tenancy, once given it cannot in my view be withdrawn save by mutual consent."

[Emphasis added]

- [109] In **Kerisna a/l Govindasamy v Highlands & Lowlands, Ladang Bukit Selarong [2003] 6 MLJ 739** referred with approval to a passage from **Harris & Russle Ltd v Slingsby [1973] 3 AER 31** Hasan J. held:

"Where one party to the contract gives a notice determining that contract he cannot thereafter unilaterally withdraw the notice. It will of course always be open to the other party to agree to his withdrawing the notice, but in the absence of agreement the notice must stand and the contract will be terminated on the effluxion of the period of notice."

[Emphasis Added]

- [110] The Learned Chairman Mr. Tan Kim Siong in the Industrial Court speaking in **MST Industrial System Sdn Bhd v Foo Chee Lek [1993] 1 ILR 202** held:

"Once notice has been given by either the employer or the employee, it can only be withdrawn with the agreement of the other."

[Emphasis Added]

- [111] And again in **Percetakan Keselamatan Nasional Sdn Bhd v Jamaliah Md Yussof [2001] 2 ILR 536**, the Learned Chairman Puan Zura Yahya said:

"A resignation once tendered cannot be withdrawn except with the consent of the employer."

[Emphasis Added]

[112] Based on the above cases it is clear that a workman whose resignation has been accepted by his employer cannot thereafter unilaterally revoke such resignation save by mutual consent with the employer.

[113] In the instant case it is clear that the Bank has accepted the claimant's resignation thus the claimant cannot unilaterally revoke the resignation save by mutual consent of the Bank. The resignation letter submitted by the claimant had the legal effect of causing the employment contract to lose the bilateral relation as it dissolved the employment relationship between the two.

(b) **Whether there was a retraction of the resignation by the claimant**

[114] The claimant in evidence stated upon returning from 2 weeks' medical leave he was asked to meet COW-2 (refer Q38 of CLWS-1).

[115] COW-2 was the Group Chief Internal Auditor of the Bank. According to COW-2 he had called to meet the claimant upon learning that the claimant had resigned. COW-2 wanted to know the reason for his resignation.

[116] According to COW-2 after listening to the claimant and having found out that he had not secured new employment, he had asked the claimant to consider getting a transfer to another department within Internal Audit or another department within the Bank.

[117] COW-2 informed the claimant that he had 3 possible options, the options being:

- (i) Claimant could apply for vacancies within the Internal Audit Division of the Bank; or
- (ii) The claimant could apply for any vacancies within the Bank; or
- (iii) The claimant could continue to serve his notice period and leave the Bank in accordance to his resignation letter.

On both the options no (i) and (ii) COW-2 had informed the claimant that he needed to retract his resignation and the retraction must be accepted by the Bank.

[118] COW-2 informed the court that at the meeting, the claimant expressed to explore

the 1st option and said he would contact COW-1 who was Head of Head Office Audit Department to ascertain if there were any vacancies available.

Did COW-2 have the powers to accept the claimant's retraction of his resignation

[119] It is the Bank's submission that the claimant did not withdraw and/or retract his resignation at any time after he tendered his resignation.

[120] There is no documentary evidence from the claimant to proof that the claimant withdrew and/or retracted his resignation.

[121] However the claimant contends that by the action of COW-2 asking him to consider a transfer to another department within Internal Audit or the Bank meant that the Bank allowed him to retract his resignation.

[122] COW-2 had testified that he had no powers to accept the claimant's retraction of his resignation.

[123] In this regard COW-2 was cross examined as follows:

" Q : Did the claimant indicate he was interested?

A : Yes, claimant indicated he would explore. The claimant indicated first option.

Q : You had the powers to make proposal to the claimant?

A : I can make proposal but subject to HR.

Q : My instructions are that once a department is identified you will arrange for claimant to meet COW-1?

A : Not correct.

Q : What was the correct procedure?

A : For claimant to make withdrawal of resignation and then claimant to talk to the HOD.

Q : Claimant would have to retract the resignation letter for option to be exercised?

A : That's correct.

Q : So he needed to retract the resignation letter form the bank?

A : Yes."

[124] COW-2 was then re-examined as follows:

" Q : Who has the authority to decide whether claimant can retract resignation?

A : HR Department.

Q : You have no authority to retract resignation?

A : No.

Q : At the time you spoke to claimant and gave him the 3 options did you know whether the Bank will allow the retraction of the resignation?

A : No."

[125] Based on the above evidence it is clear that COW-2 did not have the powers to accept the claimant's retraction of his resignation. It was the evidence of COW-2 that it was paramount for the claimant to obtain approval from the HR department prior to exercising his option to apply for a vacancy in the Internal Audit Division.

[126] The claimant's resignation dated 30.03.2015 was accepted by COW-3 who was Head, HR Services, Group Human Resource hence it follows that any retraction of the resignation must be agreed to by the HR department.

[127] COW-3 who was Senior Managing Director, Regional HR Services/Regional Industrial Relations, Group Human Resource testified that the claimant did not retract his resignation.

[128] In this regard COW-3 was re-examined as follows:

" Q : Was HR aware of the transfer of the claimant from COW-4's department to COW-1's department?

A : No.

Q : Is it normal for HR to be unaware?

A : Yes.

Q : Please explain?

A : For case like this where staff resign. Department may convince staff to stay on and do internal movement in the division if all parties are agreeable. Staff would have to retract resignation and inform HR. The department also have

to inform. Only then a formal letter will be issued by HR about movement to formalize the movement. **In this case we never receive a retraction letter and formal notification from department."**

[Emphasis Added]

[129] Based on the evidence above it is the finding of the Court that the claimant never made an application to retract his letter of resignation. Thus the claimant's letter of resignation dated 30.03.2015 remains valid.

(c) Did COW-1 accept the claimant's retraction of his resignation/was there a retraction by the claimant

[130] The claimant contends that the act of the Bank enabling him to internally rotate to the Head Office Audit Division under the supervision of COW-1 meant that the Bank allowed him to retract his resignation.

[131] COW-1 testified that she was unaware that the claimant had tendered his resignation.

[132] In this regard COW-1 was cross examined as follows:

"Q : Were you notified by LTS (COW-2) that the claimant had tendered his resignation?

A : No I did not know he tendered his resignation.

Q : Did LTS inform you that the claimant choose option 1 to remain in the Bank?

A : I am not aware of the options.

Q : Refer to your answer to Q7 of your witness statement. Is this internal rotation applicable to staff who tendered resignation?

A : No.

Q : You agree that it would be illogical for Bank to consider internal rotation if the claimant is considered to be serving notice period?

A : I didn't know that claimant tendered resignation.

Q : Refer to your answer to Q12 of your witness statement "no harm in trying to apply for the MSS". Put it to you the claimant was fully eligible for MSS?

A : I disagree because I was not aware the claimant tendered his resignation."

[133] Based on the above, this court finds that the claimant had failed to submit his retraction of his resignation to HR and failed to inform COW-1 that he had resigned prior to his application to join her department. As the Bank had already issued the letter of acceptance of resignation, the claimant's status at the time of rotation was that he was serving his notice period of resignation from 30.03.2015 to 30.6.2015.

[134] After considering the totality of the evidence adduced during the hearing I find that the claimant had not withdrawn and/or retracted his resignation dated 30.03.2015. In addition, the Bank also did not give its consent to the claimant's purported withdrawal of resignation. Hence the purported withdrawal (as claimed by the claimant) of his resignation is therefore ineffective.

[135] Based on the evidence, this court comes to the conclusion that the claimant tendered his resignation voluntarily due to his personal reasons and not because the Bank forced him to do so.

(d) **Did the Bank affirm that the claimant was still a permanent employee when the claimant submitted his application for MSS**

[136] The claimant submitted his online application for MSS on the 28.05.2015 vide the Bank's HR portal. A copy of his application can be found at page 11 of COB-1.

[137] The claimant claimed that the fact the claimant was able to submit the application for MSS showed that the Bank had agreed to the retraction of his resignation by accepting his application.

[138] I do not agree with the claimant's contention that the application for MSS was evidence of his retraction of his resignation as the application was made online via the Bank's HR portal. The claimant was able to access the HR portal without obstruction as he was still an employee of the bank on the 28.05.2015 albeit serving his notice period of resignation.

[139] In addition the Bank had the absolute right to accept or reject any MSS application

made by an employee. In the case of the claimant the Bank had duly rejected the claimant's MSS claim vide its letter dated 11.06.2015. A copy of the letter is found at page 12 of COB-1.

[140] Based on the evidence the claimant did not retract his resignation dated 30.03.2015 and neither did the Bank give its consent to the claimant's purported withdrawal of resignation.

(K) **What of the claimant's constructive dismissal letter of 25.06.2015?**

[141] The claimant had only claimed constructive dismissal on the 25.06.2015. This was done 3 months after the claimant tendered his resignation dated 30.03.2015.

[142] Constructive dismissal occurs where an employee resigns because of his employer's behaviour ie in constructive dismissal, the issue is primarily the conduct of the employer.

[143] There are four conditions which have to be met by an employee to be able to successfully claim for constructive dismissal. (see **Bayer (M) Sdn Bhd v Anwar Abd Rahim [1996] 2 CLJ 49** and **Govindasamy Munusamy v Industrial Court Malaysia & Anor [2007] 10 CLJ 266**)

[144] These conditions are cumulative and not in the alternative and it is for the claimant to satisfy the court that they have all been fulfilled.

[145] One condition precedent is that the claimant should not have delayed too long in terminating the contract of employment, otherwise he will be treated as having affirmed and adopted the breach.

[146] The claimant claimed that as a result of the harassment and verbal abuse by COW-4 his morale and self-confidence became so low that he feared working in the Bank under the supervision of COW-4. The first time these allegations were raised was in the claimant's letter dated 25.06.2015 claiming constructive dismissal. It was in this letter that the claimant first raised his "notice of actual reason leaving the company." This was 3 months after he tendered his resignation dated 30.03.2015.

[147] I find that if the claimant's case of constructive dismissal is founded on the alleged harassment and verbal abuse by COW-4 which occurred on or about July 2014 (3rd quarter 2014), the claimant's reaction on 25.06.2015, after a delay of 11 months, amount to waiver of the alleged breach. The prolonged delay is evidence of an implied affirmation.

[148] It is trite that in a claim for constructive dismissal, it is imperative for the claimant to take immediate steps in walking out of his employment within a reasonable time after the alleged breach of contract, failing which the claimant will be deemed to have waived the breach.

[149] In **Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761**, Lord Denning said:

"That an employee must make up his mind soon after the conduct which he complains: for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged."

[150] As the claimant did not act promptly, the claimant's case in support of constructive dismissal is unsustainable.

[151] Further, the court agrees with the submissions of the learned counsel for the Bank that the claimant's alleged grievances against COW-4 were mere afterthoughts undertaken after his MSS application was rejected.

[152] In **Mukunda Kumar Ms Nair v Asia Pharmaceutical Products Sdn Bhd [2012] 2 LNS 1549** the Industrial Court rejected the employee's claim for constructive dismissal based on an afterthought.

[153] In addition the claimant had submitted in his letter dated 25.06.2015 that he was not able to carry out his job in the new department because "the skill sets, method and job scope required to perform the job scope is vastly different compared to the previous department". Clearly the claimant did not leave in response to any alleged breach by the Bank. The claimant left for reasons unconnected to the alleged breach. In addition the claimant failed to prove that the Bank had at any time breached the terms of employment.

[154] Thus I find based on the evidence adduced, the constructive dismissal contended by the claimant was devoid of substance, and he failed to discharge the onus on him to prove that there was any breach of the employment contract, let alone one which goes to the root of the contract justifying the resignation of the claimant.

(L) **Conclusion**

[155] For the reasons and findings above, the court holds having taking into account the totality of the evidence adduced by both parties and bearing in mind section 30 (5) of the Industrial Court Act 1967 to act accordingly to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form, that the claimant had voluntarily resigned from his employment and his claim for constructive dismissal had not been proven hence he has no justification to claim that he has been dismissed without just cause or excuse.

[156] Accordingly, the claimant's case is hereby dismissed.

HANDED DOWN AND DATED THIS 20th DAY OF FEBRUARY 2019



(BERNARD JOHN KADNY)

CHAIRMAN

INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR