

**LUNAR VENTURE SDN.BHD v ENCIK MOHD NOOR KHAN BIN  
MOHAMMAD KHAN [2005] ILJU 29**

Industrial Law Journal Unreported (ILJU)

INDUSTRIAL COURT (KUALA LUMPUR)

Y. A.RAJENDRAN NAYAGAM

CASE NO 26(11)/4-3151/04 2172 OF 2005

25 November 2005

Ms.Alexis Diana(Messrs A.Diana & Co);Mr.D.Paramalingam(Messrs Krish Maniam  
& Co)



Reference:

This is a reference made under Section 20(3) of the Industrial Relations Act, 1967 arising out of the dismissal of Mr. Mohd. Noor Khan bin Mohammad Khan (“the Claimant”) by Lunar Venture Sdn. Bhd (“the Company”).

AWARDThe Facts

The Claimant was employed as a Safety cum General Supervisor by the Company on 23rd September 2002, with a starting salary of RM1,100.00. After a 3 month probationary period, he was confirmed on 14th February 2003 and given a revised salary of RM1,200.00.

The Claimant was working at no. 1-3 & 1-5,3/137B Bedford Business Park, 4 1/2 Miles Jalan Klang Lama, Kuala Lumpur. He was responsible for the safety of the site and its general supervision.

As soon as the Claimant started work, he faced many difficulties. He found that he was not getting any cooperation from the site staff and sub contractors on safety matters. This caused him to write a letter dated 6th November 2002 to the Company. Further, on 30th November 2002, he also wrote another letter to the Company complaining about the interference by the chief security officer, one Mr. Damoder.

The Claimant found that the Company was not responsive to his complaints. In point of fact, he was ticked off by the senior site project manager, one Mr. Tan Ben Yong. In the circumstances, the Claimant tendered his resignation letter on 2nd May 2003. to take effect after 3 months on 2nd August 2003. When this happened, the Claimant stated that the Company requested him to withdraw the letter. On 16th July 2003, he wrote a letter (exhibit CLE 8) withdrawing his letter of resignation, which was received by one Mr. Patrick, on behalf of the Company. After this episode, the Claimant stated that he received greater cooperation from the Company. However after awhile, the situation again deteriorated.

This time, the Claimant was having problems with the site manager, one Mr. Lee, who apparently was having a drink problem. He lodged a written complaint on 3rd August 2003 with the Company. On 22<sup>nd</sup> August 2003, the Claimant was summoned to the office of Mr. Choy a director of the Company, who was not too happy with the Claimant for lodging the complaint. Unfortunately at this meeting, things got out of hand for the Claimant and he was assaulted by Mr. Choy. On the same day, the Claimant lodged a police report against Mr. Choy.

Pursuant to the police report, on 2nd September 2003 the Company hand delivered a letter to the Claimant, rejecting his withdrawal of the resignation letter and stating that he was discharged from duty.

#### Failure of the Company to call witnesses

On the day of hearing the Company's counsel was present without any witnesses. He applied for an adjournment on the grounds that Encik Shahrizal Hisham, who was handling the matter was away in Mecca. The court informed learned counsel that the court had not granted any adjournment in the matter and that the case will proceed as scheduled.

On the second day of hearing, the Company's counsel informed Court that he wished to call one witness by the name of Teh Beng Yong. He stated that he had obtained a subpoena on the first day of hearing but unfortunately could not serve it on him, as the witness was not at home.

The counsel for the Claimant strongly objected to any adjournment stating that the Company's solicitors had ample time from 15th September 2005 to call the witness and not do it at the 11th hour.

In the circumstances the court found that the Company's solicitors were given ample time to locate the witness but they put themselves in a fix by doing it at the 11th hour. As such,

the application for an adjournment to locate the witness was refused.

Did the Claimant resign or was he dismissed by the Company

The Company in their statement of reply averred that the Claimant resigned on his own free will and denied that he was dismissed. The Claimant, on the other hand, stated that his services was terminated vide Company's letter dated 2nd September 2003 (exhibit CLE 11).

As regards the issue of resignation, the Industrial Court in the case of *MST Industrial System Sdn. Bhd v Foo Chee Lek* (Award 87 of 1993) staffed:

“ Under the common law, the impact of resignation on the employer- employee relationship is settled. Just as an employer had the right to terminate the service of an employee, an employee has the right to put an end to the contract by intimating to his employer his intention to quit. If an employee makes known his intention to resign, and the employer accepts his resignation, the contract comes to an end, ending the employer-employee relationship. The resignation is not complete until it is accepted by the employer, and before such acceptance the employee can change his mind and withdraw his resignation. ”

In the instant case, the Claimant tendered his resignation letter on 2nd May 2003. Subsequently, one Mr. Patrick from Syarikat Mampu Jaya (the parent Company) called him and had a discussion of the matter. He then requested the Claimant to withdraw the letter. Mr. Choy, the Director of Company also requested him to withdraw the letter. These facts have not been rebutted by the Company, as no witnesses were called to testify. The burden of proof lies on the Company to prove that the Claimant had voluntarily resigned.

Hence, although the Claimant had made known of his intention to resign, the Company did not accept his resignation. This had the effect of keeping the employer-employee relationship in existence and in these circumstances the Claimant withdrew his letter of resignation on 16th July 2003. He continued to work at the site until things started to go wrong again. The time as stated above, he had a problem with Mr. Lee, the site manager. When he lodged a complaint against Mr. Lee, this brought him in direct confrontation with Mr. Choy, the Company Director, which resulted in the lodging of the police report by the Claimant. The Company on 2nd September 2003 responded by sending Exhibit CLE II which is set out as follows:

“ 2nd September 2003

Enclik Mohd. Noor Khan

By Hand

Dear Encik Mohd

**RE REJECTION OF WITHDRAWAL OF RESIGNATION LETTER**

We refer to your withdrawal of resignation letter to us and after due consideration, the Management has decided not to accept your letter and hereby inform you are discharge from duties with immediate effect.

Please list down all the outstanding work currently handle by you and make a clean exist and if you don't, the Management reserve the right to take action against you. Thank you.

Yours faithfully

**LUNAR VENTURE SON BHD**

**PARTRICK LIM**

**Finance & Admin Manager ”**

The Company was not in a position to send the rejection letter on 2nd September 2003 because the Claimant had on 16th July 2003 withdrawn his resignation letter. As stated above, resignation not wilt be complete until accepted by the Company. Hence, the Claimant could change his mind and withdraw his resignation on 16th July 2003 because at that point in time there was no acceptance of the resignation by Company, It follows therefore that in September 2003, the Claimant was still in the employ of the Company and the question of rejecting his resignation did not arise. The effect of sending the rejection letter is that it amounted to a dismissal of the Claimant.

Was the Claimant's dismissal by the Company for just cause or excuse

In view of the court's finding that it is a dismissal, the answer to this question is in the negative.

Remedy

The Claimant was a confirmed employee at the time of the unlawful dismissal, earning a salary of RM1,200.00 a month. After his dismissal, the Claimant found work as a part-time taxi-driver earning about RM200.00 a month. In view of the bad blood between the employees of the Company and Claimant, reinstatement is certainly not an appropriate remedy. Since, the Claimant was in the employ of the Company for less than a year, it only equitable that he be awarded compensation in the form of backwages from date of dismissal (2nd September 2003) to date of conclusion of hearing (10th November 2005), subject to a maximum of 24 months. The counsel for the Claimant submitted a quantum of RM2,403.00 a month, which was not proven by evidence.

Order

(i) It is ordered that the Company do pay the Claimant compensation as follows:

RM1,200.00 & 24 months = RM28,800.00 (less any statutory deductions)

(ii) The said sum to be paid not later than (30) days from the date of this Award.

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