INDUSTRIAL COURT OF MALAYSIA
[CASE NO: 14/4-32/22]

BETWEEN

SHEIKH AMER BIN HUSSEIN

AND

PENGURUSAN AIR SELANGOR SDN. BHD.

AWARD NO. 425 OF 2024

Before	**:**	**Y.A. Puan Eswary Maree - Chairman**
Venue	**:**	Industrial Court Malaysia, Kuala Lumpur
Date of Reference	**:**	04.01.2022
Dates of Mention	**:**	14.02.2022; 20.04.2022; 05.07.2022; 28.07.2022 & 20.12.2023
Dates of Hearing	**:**	06.06.2023; 27.06.2023 & 27.09.2023
Representation	**:**	*For the claimant - Kaharuddin Harun; M/s Sulaimi, Sharmini & Partners* *For the company - Amardeep Singh Toor & Ashreyna Kaur Bhatia; M/s Lee Hishammuddin Allen & Gledhill*

REFERENCE

This is a reference under Section 20(3) of the Industrial Relations Act 1967 (1967 Act) by the Director General of Industrial Relations emanates from the dismissal of **Sheikh Amer bin Hussein** ("the Claimant") by **Pengurusan Air Selangor Sdn. Bhd.** ("the Company") on 01.05.2021.

AWARD

PREAMBLE

[1] This Court considered all the notes of proceedings, pleadings, the relevant oral and documentary evidences and the cause papers in handing down this Award. The following documents were filed before this Court:-

(i) The Claimant's Statement of Case dated 08.03.2022;

(ii) The Company's Statement in Reply dated 20.04.2022;

(iii) The Claimant's Rejoinder dated 26.07.2022;

(iv) The Claimant's Bundle of Documents (Part 1) : CLB-1;

(v) The Claimant's Bundle of Documents (Part 2) : CLB-2;

(vi) The Company's Bundle of Documents : COB-1;

(vii) The Company's Supplementary Bundle of Documents : COB-2

(viii) The Claimant's Witness Statement : CLWS-1;

(ix) The Witness Statements of Abd Latif bin Ismail : COWS-1A;

(x) Supplementary Witness Statements of Abd Latif bin Ismail : COWS-1B;

(xi) The Claimant’s Written Submission dated 22.11.2022;

(xii) The Company’s Written Submission dated 17.11.2023;

(xiii) The Claimant’s Written Submission in Reply dated 18.12.2023; and

(xiv) The Company’s Written Submission in Reply dated 18.12.2023

[2] The dispute before this Court is the claim by the Claimant that he had been dismissed from his employment without just cause or excuse by the Company on 01.05.2021. In this case the Claimant tendered letter of resignation dated 02.02.2021 and before this Court alleges that he was constructively dismissed by the Company.

THE CLAIMANT’S CASE

[3] The Claimant was employed by the Company as a Senior Manager on 23.04.2012.

[4] The Claimant contended that he was a loyal and hardworking employee who has at all material time carried his work dutifully and faithfully. He had met the Company’s expectations and was one of the most productive staff of the Company.

[5] The Claimant’s last drawn salary was RM15,173.00. On top of the Claimant’s salary, he was promised and was paid commissions and allowances namely transportation allowances, fuel allowances and phone allowances. The Claimant was also paid bonus equivalent to his four (4) months salaries in year 2020.

[6] On or about 08.09.2013, whilst on duty at Pulau Ketam Jetty, Klang as instructed by the Company, the Claimant met with an accident where water pallets fell onto his right shoulder. As a result,

the Claimant suffered severe pain and injury at his right shoulder and neck. The Board of SOCSO doctors informed and confirmed that he is suffering from "slip disc" and categorized him as a permanent disability patient.

[7] On 23.01.2015, the Claimant was transferred to Wilayah Hulu Langat effective 01.02.2015 by the Company pursuant to the provisions of the Claimant's contract of employment. Based on his medical condition and the distance he need to travel from his home to work place at Wilayah Hulu Langat which is about 54km, the Claimant appealed to the Company to be transferred somewhere else. The Company agreed and transferred him to Wilayah Sepang.

[8] On 01.07.2018, the Claimant was promoted to Assistant Vice President I and transferred back to Klang.

[9] On or about 03.07.2020, the Company had transferred the Claimant to the Headquarters at Wisma Goshen, Lembah Pantai effective 20.07.2020. The Claimant appealed to the Company to be maintained at Klang. However, he eventually reported at Headquarters on 03.08.2020.

[10] As a result of this transfer to Headquarters and travel activities which were against the doctor's advice, the Claimant suffered pain, was hospitalized and his health deteriorated.

[11] On 30.11.2020, the Claimant filled up a transfer form to be transferred to Customer Billing Services at Klang Region. The Claimant's Head of Section supported his application. Upon the suggestion given by the Company, on 04.12.2020, the Claimant wrote a letter of transfer to Customer Billing Services Section at Wilayah Kuala Langat. However, to the Claimant's disappointment, it turned out that it was only on 3rd or 4th day of January 2021 that the Company's Head of Department elevated his application for transfer to the Company's Board of Directors.

[12] On or about 25.01.2021, the Claimant received a memo from one Cik Hayati by way of WhatsApp message indicating that his application for transfer was rejected. The said rejection was due to the unavailability of a suitable position for the Claimant at that point in time.

[13] In late 2020, the Claimant was put on stern warning by his doctor that if the Claimant continued to travel in such a manner, the probability and/or the chance for the Claimant to get paralysed will be even greater.

[14] Eventually, on or about 02.02.2021, the Claimant submitted his letter of resignation with the required three (3) months' notice. This letter of resignation was acceptance by the Company by issuing a letter of acceptance and stating that his last day of service will be on 01.05.2021.

[15] On 01.04.2021, to exhaust the balance notice period with the Company, the Claimant applied to be transferred to Wilayah Kuala Langat. This application was allowed by the Company.

[16] Considering his seniority, tendering of resignation and application to transfer to Wilayah Kuala Langat at the end of his service, the Claimant contends that the Company has practiced double-standard in its practice and in making out guideline for transfer to the Company's workers like the Claimant. The Claimant avers that his "slip disc" condition is exceptionally precarious and not arbitrary and should receive due deliberation and consideration whenever instruction to transfer is given to the Claimant.

[17] The Claimant contends that all circumstances and events exercised by the Company which led to his resignation were simply without just cause and good reasons. The Company has breached the very fundamental terms of contract with the Claimant.

[18] Further and in the alternative, the Claimant averred that his resignation occurred as a result of the Company's practice which is

contrary to natural justice, equity, good conscience as well as unfair practice to a worker like him.

[19] The Claimant contended that the Company by its conduct has breached both express and implied term of the contract namely to safeguard and provide the safety for a worker like the Claimant. This safety is a foundational expectation of every workers including the Claimant and the Company's refusal to allow the Claimant's request is entirely intolerable as the medical reports/memo were fully submitted.

[20] Further the Claimant averred that as a result of the Company's conduct by refusing to appreciate the severity of his travel as against his health condition and rejects his meaningful transfer, the Company has clearly shown their intention that the Claimant was to continue working in such a bad health condition, be unable to commit himself to the fullest number of days per month, leading to his performance shamble down, impairing his chance of promotion, making the Claimant opt to resign.

THE COMPANY'S CASE

[21] The Claimant commenced employment at the Company's Klang Office effective 23.4.2012. The Claimant's history of transfers within the various branches of the Company is set out below:-

Date	Reporting Office
23.04.2012 (Commencement of employment)	Klang
02.03.2015	Sepang
01.07.2018	Klang

[22] On 13.09.2019, Syarikat Bekalan Air Selangor Sdn Bhd (Syabas), and several other private concessionaires were acquired and merged under one entity named Pengurusan Air Selangor Sdn Bhd, the Company.

[23] On 03.07.2020, the Claimant was informed that he would be transferred to the Company's Customer Billing Services Department, Billing & Recovery Section, Region & Bulk Account Management Unit, Customer Billing Services, Regions Sub-Unit at its headquarters effective 20.7.2020. The headquarters is located at Wisma Goshen, Kuala Lumpur.

[24] The reason for the transfer was that the Claimant's experience and expertise were required at the Company's headquarters to enhance business operations, particularly in view of the restructuring exercise. His expertise and experience were needed in the Company's Headquarters as it was beneficial to the Company's branches/offices in the other regions. The transfer would also be beneficial to his career development as he would gain more exposure in his designation as Assistant Vice President I.

[25] On 14.07.2020, the Claimant sent an e-mail enclosing a letter addressed to the Chief Executive Officer and to several random heads of department. The letter was an appeal against the transfer order. Firstly, the Chief Executive Officer was not copied in the email and therefore did not receive the appeal letter. Secondly, his method of

appeal was contrary to the correct process/practice on appeals against transfer orders.

[26] On 03.08.2020, the Claimant had duly reported for duty at the Company’s Headquarters, and he continued to serve without any complaints or grievances.

[27] In mid-August, the Claimant followed up on his appeal. He was advised to resubmit his appeal in accordance with the correct procedure. He did not do so and instead continued to work without any complaints or grievances.

[28] On 04.12.2020, the Claimant filled up a transfer request form. He requested to be transferred from the Headquarters to the Company’s office at Kuala Langat. His reason was his pre-existing back injury i.e., ‘slip disc’, which purportedly limited his ability to travel.

[29] On 25.01.2021, the Claimant was informed that his request to be transferred from the Headquarters to the Kuala Langat Office was rejected. There were no vacancies for a lower job grade position or any suitable position in the Kuala Langat Office.

[30] On 02.02.2021, the Claimant voluntarily resigned from his employment by providing three (3) months’ notice. In his resignation letter, he had expressly apologized to the Company for being unable to provide good service due to his back injury. He had also expressly thanked the Company for their cooperation throughout his employment with the Company.

[31] His reasons for resigning were as follows:-

(i) His back injury was deteriorating;

(ii) His back injury had caused him to frequently be on hospitalisation leave; and

(iii) The distance between his house and the Headquarters had caused his health to deteriorate and disrupt his work performance.

[32] On 19.03.2021, the Company duly accepted his resignation and informed him that his last working day would be on 01.05.2021.

[33] On 30.04.2021, an exit interview was conducted with the Claimant. During the interview, the Claimant indicated the reason for resigning was his health condition and the travel distance to work. The Claimant did not indicate that he was constructively dismissed in his resignation letter, during his exit interview and/or at any time while serving his notice period with the Company.

[34] Before this Court, the Claimant had alleged that he was constructively dismissed by the Company.

THE LAW

ROLE AND FUNCTION OF THE INDUSTRIAL COURT

[35] The role of the Industrial Court under Section 20 of the Industrial Relations Act 1967 is succinctly explained in the case *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449. His lordship Justice Mohd Azmi bin Kamaruddin FCJ delivering the judgment of the Federal Court had the occasion to state the following:-

> **As pointed out by this Court recently in** *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344; [1995] 2 MLJ 753**, the function of the Industrial Court in dismissal cases on a reference under s.20 is two-fold firstly, to determine whether the misconduct complained of by the employer has been established, and secondly whether the proven misconduct constitutes just cause or excuse for the dismissal. Failure to determine these issues on the merits would be a jurisdictional error...**

LAW ON CONSTRUCTIVE DISMISSAL

[36] With regard to the test to be applied for the Claimant in this Court to prove constructive dismissal, we need only to turn to the *locus classicus* in the Supreme Court case of *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 at pp. 301 to 302:-

> **The common law has always recognised the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer. It was an attempt to enlarge the right of the employee of unilateral termination of his contract beyond the perimeter of the common law by an unreasonable conduct of his employer that the expression "constructive dismissal" was used. It must be observed that para. (c) never used the words "constructive dismissal". This paragraph simply says that an employee is entitled to terminate the contract in circumstances entitling him to do so by reason of his employer's conduct. But many thought, and a few decisions were made, that an employee in addition to his common law right could terminate the contract if his employer acted unreasonably. Lord Denning MR, with whom the other two Lord Justices in the case of** *Western Excavation* (*supra*) **reiterating an earlier decision of the Court of Appeal presided by him (see** *Marriott v. Oxford and District Co-operative Society Ltd* [1969] 3 All ER 1126) **rejected this test of unreasonableness...**
>
> **Thus, it is clear that even in England, "constructive dismissal" does not mean that an employee can automatically terminate the contract when his employer acts or behaves**

unreasonably towards him. Indeed, if it were so, it is dangerous and can lead to abuse and unsettled industrial relation. Such proposition was rejected by the Court of Appeal. What is left of the expression is now no more than the employee's right under the common law, which we have stated earlier and goes no further. Alternative expression with the same meaning, such as "implied dismissal" or even "circumstantial dismissal" may well be coined and used. But all these could not go beyond the common law test.

...

When the Industrial Court is dealing with a reference under s. 20, the first thing that the Court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse. Dismissal without just cause or excuse may well be similar in concepts to the UK legislation on unfair dismissal, but these two are not exactly identical. Section 20 of our Industrial Relations Act is entirely different from para. (c) of s. 55(2) of the UK Protection of Employment Act 1978. Therefore, we cannot see how the test of unreasonableness which is the basis of the much advocated concept of constructive dismissal by a certain school of thought in UK should be introduced as an aid to the 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 situation the employee is entitled to regard the contract as terminated and himself as being dismissed*****. (See** *Bouzourou v. The Ottoman Bank* [1930] AC 271 **and** *Donovan v. Invicta Airways Ltd.* [1970] Lloyd's LR 486)**.**

[emphasis added]

[37] In a constructive dismissal case it must be shown by the employee that the employer:-

(i) By his conduct had significantly breached the very essence or root of the contract of employment; or

(ii) That the employer no longer intends to be bound by one or more the essential terms of the contract.

[38] And if the employer demonstrates the above, then the employee is entitled to treat himself as discharged from further performance of the contract. The termination of the contract is then for reason of the employer's conduct thereby allowing the employee to claim constructive dismissal.

[39] In the case of *Anwar Abdul Rahim v. Bayer (M) Sdn Bhd* [1998] 2 CLJ 197, the Court of Appeal further explained the ingredients of the constructive dismissal where His Lordship Justice Mahadev Shanker, JCA opined:-

> **It has been repeatedly held by our courts that the proper approach <u>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</u>.** *(Also see Holiday Inn Kuching v. Elizabeh Lee Chai Siok* [1992] 1 CLJ 141 ***(cit)*** *and Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ 298 *at p. 94)* **[Emphasis added]**

[40] It must be further stated here that the Claimant's case being one of constructive dismissal, the Claimant must give sufficient notice to his employer of his complaints that the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether the employer has evinced an intention no longer

to be bound by the contract as stated in the case of *Anwar Abdul Rahim [supra]*. The sufficient notice is to enable the Company to remedy the defect if any.

[41] As for the burden of proof of constructive dismissal, guidance may be had from the *dicta* in *Moo Ng v. Kiwi Products Sdn Bhd Johor & Anor* [1998] 3 CLJ 475 **at** p. 498 where the High Court observed as follows:-

> ***If an employee asserts that he has been constructively dismissed, he must establish that there has been conduct on the part of the employer which breaches an express or implied term of the contract of employment going to the very root of the contract. It can safely be said that one term which, if not express, may be implied in a contract of employment and it is that the employer will not make such a substantial change in the duties and status of the employee as to constitute a fundamental breach of the contract. What has to be ascertained is whether in all the circumstances of the case the responsibilities and duties of the employee have been so altered by the employer as to constitute a breach of a fundamental term of the contract of employment.***

[42] The burden in a constructive dismissal case is on the Claimant to prove, on a balance of probabilities that he had been constructive dismissed by the Company. The test for constructive dismissal as it stands is a test on contractual breach rather than unreasonableness.

[43] The prerequisites that had to be established by the Claimant in order to constitute constructive dismissal was set out in the case of *Govindasamy Munusamy v. Industrial Court Malaysia & Anor* [2007] 10 CLJ 266 (cited with approval by the Court of Appeal in *Keretapi Tanah Melayu Bhd v. Mohan Vythialingam & Anor And Another Appeal* [2023] ILRU 264; [2023] 2 ILR 264):-

(a) That the company, by its conduct, had breached one or more of the terms of the employment contract;

(b) That the terms which had been breached goes to the root or foundation of the Employment Contract;

(c) That the claimant, had placed the Company on sufficient notice period giving time for the Company to remedy the defect;

(d) If the Company, despite being given the sufficient notice period, does not remedy the defect then the Claimant is entitled to terminate the Employment Contract by reason of the Company's conduct and the conduct is sufficiently serious to entitle the Claimant to leave at once; and

(e) The Claimant, in order to assert his right to treat himself as discharged, left soon after the breach.

[44] If any of the above conditions are not established, then the Claimant's claim must, in law, fail.

[45] Once the prerequisites for constructive dismissal have been established by the Claimant in a reference to a dismissal under Section 20 of the 1967 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).

[46] Having taken cognizance of the law as it is set out above, this Court will now move to the facts of this case for its determination. In doing so, this Court will now move to the conduct of the Claimant, Company and the events that had led the Claimant to tender his letter of resignation dated 02.02.2021 and now consider that he has been constructively dismissed by the Company.

EVALUATION OF EVIDENCE AND THE FINDINGS OF THIS COURT

[47] The Company states that the reason for the transfer was that the Claimant's experience and expertise were required at the Company's Headquarters to enhance business operations, particularly in view of the restructuring exercise. His expertise and experience were needed in the Company's Headquarters as it was beneficial to the Company's branches/offices in the other regions. The transfer would also be beneficial to his career development as he would gain more exposure in his designation as Assistant Vice President I. The Company states that the resignation was made voluntarily and the Claimant has exercised his resignation pursuant to his contract of employment with the Company. The Company also denies any breach of employment terms express or implied and that the back injury/slip-disc condition and distance are the main factors causing the Claimant's own voluntary resignation. Further the Claimant's letter of resignation is redolent of grace, respect and thanks. The Claimant was also said to consistently took hospitalization leave due to his back injury/slip-disc condition even before he was transferred to Headquarters.

[48] The Claimant had tendered his resignation vide a letter of resignation dated 02.02.2021 with three (3) months' notice wherein his last day of employment will be on 01.05.2021.

[49] At the outset, this Court will refer to the case of *Sanbos (Malaysia) Sdn Bhd v. Gan Soon Huat* [2021] 6 CLJ 700; [2021] ILRU 11; [2021] 3 ILR 11 wherein the Court of Appeal explained that in determining a claim of constructive dismissal, the Industrial Court need to only consider the reasons stated in the letter of resignation and/or constructive dismissal and any reasons not stated in the letter are irrelevant as follows:-

> **[38] We are of the considered view that the learned High Court Judge erred in reversing the decision of the Industrial Court on the issue of constructive dismissal. Our reasons are**

as follows. As stated in the authorities we cited earlier, an employee is only entitled to regard himself as dismissed if there is a breach of the fundamental terms of the contract of employment. In the letter of resignation, the respondent only gave two reasons for leaving employment, ie, the revision of sales commission rate and the change in his area of sales coverage which would reduce his monthly earnings. Therefore, the only question that arises is whether these two complaints amounted to a breach of the fundamental terms of the employment contract. The other reasons he advanced at the Industrial Court hearing are not relevant as an employee cannot rely on reasons not given for considering himself constructively dismissed.

[50] The Claimant's letter of resignation with the reasons stated therein is reproduced herein below for ease of reference:-

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Sheikh Amer Bin Hussein,

AVP 1 (Staff No AIS 02874),

Customer Billing Services HQ,

Pengurusan Air Selangor Sdn Bhd.

02hb Feb 2021

Cik Hayati Ab Wahab

Ketua Jabatan,

Customer Billing Services HQ,

Pengurusan Air Selangor Sdn Bhd

Perkara : Perletakkan Jawatan

Saya seperti nama di atas, ingin meletak jawatan sebagai AVP 1 yang berkuat kuasa 3 bulan dari tarikh surat ini . Peletakkan jawatan saya adalah di atas sebab berikut :

1. Saya tidak sihat disebabkan mengalami sakit 'SLIP DISC' yang semakin serius (C3,C4,C5,C6,C7,L4,L5 dan S1) yang mana pihak syarikat sedia maklum.
2. Kesakitan yang berpanjangan menyebabkan saya selalu mengambil "Hospitalisation leave".
3. Jarak perjalanan saya dari rumah ke tempat kerja yang agak jauh menyebabkan tahap kesihatan saya semakin menurun dan prestasi kerja saya terganggu.

Saya memohon maaf kerana tidak dapat memberi perkhidmatan yg baik di sebabkan masalah kesihatan saya kepada syarikat. Saya juga ingin mengucapkan ribuan terima kasih di atas kerjasama sepanjang saya berkhidmat dengan syarikat ini.

Yang Benar,

Sheikh Amer Hussein.

Cc En Shahruddin B Ab Rahman – Ketua Seksyen Customer Billing Services
HR

[51] Even though the Claimant had tendered his letter of resignation dated 02.02.2021 with three (3) months' notice which ends on 01.05.2021, before this Court the Claimant, an Assistant Vice President I of the Company, asserted that he had been constructively dismissed without just cause and excuse by the Company.

[52] Before this Court, the Company argued that there was no constructive dismissal and that the Claimant had resigned as evidenced from the letter of resignation dated 02.02.2021 from the Claimant to the Company.

[53] The Claimant was employed as the Senior Manager for the Billing & Credit Control Section and subsequently evaluated by the Company and offered a new designation as Assistance Vice President I. As is not uncommon, the Claimant was subject to being transferred to any of the Company's subsidiaries, holding company or any related/associated Company between departments/divisions and between jobs at any time.

[54] It was the Claimant's testimony that he is from Accounting profession background and his main scope of duties in the Company is to oversee customer billing service at all regions of day-to-day operation to ensure adherence to policy and procedure.

[55] On 03.07.2020, the Company instructed the Claimant to be transfer to Headquarters at Wisma Goshen Lembah Pantai and to report for duty on 20.07.2020. The Claimant appealed against the said transfer and in the meantime reported for duty at Headquarters on 03.08.2020. Initially the Claimant requested to be transferred to Customer Billing Services at Klang Region and subsequently on 04.12.2020, the Claimant also wrote a letter of transfer to Customer Billing Services Section at Wilayah Kuala Langat. However, on or about 25.01.2021, the Claimant received a memo via WhatsApp from one Cik Hayati of the Company stating that his application for transfer has been rejected.

[56] Alas, on 02.02.2021, the Claimant submitted his letter of resignation with the required three (3) months' notice.

[57] The Claimant tendered his resignation as Assistance Vice President I of the Company and in language both warm and cordial, he also further thanked the Company for the opportunity to work with

them. It was what one would reasonably expect in a voluntary parting of ways where courtesy and commendation would be the sweet aroma of separation.

[58] The Company by its letter of 19.03.2021 accepted the Claimant's resignation and informed him that his last date of employment will be on 01.05.2021.

[59] Before this Court, the Claimant however took the position that he was constructively dismissed by the Company on 01.05.2021.

[60] As held by the Court of Appeal in the case of *Sanbos (Malaysia) Sdn Bhd [supra]* in determining a claim of constructive dismissal, this Court need to only consider the reasons stated in the letter of resignation, and any reasons not stated in the letter are irrelevant.

[61] Likewise, conversely, the Federal Court in *Maritime Intelligence Sdn Bhd v. Tan Ah Gek* [2021] 10 CLJ 663; [2021] ILRU 417; [2021] 4 ILR 417 ruled that employers are only able to rely on the reasons stated in the letter of dismissal to justify the dismissal:-

> **[56] Equally, it defies a proper construction of s. 20 of the Act, to conclude that an employer dismissing a workman for a particular reason or series of events, can then rely on a wholly different or additional matters, to justify the same dismissal at the Industrial Court, in an effort to bolster or put forward what the employer feels, or may be advised, is a "stronger" defence.**

[62] A similar proposition should also be applied for the inverse instance where employees claim constructive dismissal, consistent with the principle of *Sanbos (Malaysia) Sdn Bhd [supra]*. To enable an employee to add additional grounds in justifying his claim of constructive dismissal before this Court would be inherently unjust and/or unfair. After all the principle of constructive dismissal is premised on an employee considering that the employer had

committed an act or a series of acts that were so serious to enable the employee to claim constructive dismissal.

[63] It is the finding of this Court that if at all, the series of actions of the Company were as serious as alleged, surely the Claimant would have seen fit to place the said actions in his letter of resignation. The Claimant was an Assistant Vice President I and not a rank-and-file employee. It would have been ordinarily incumbent upon him to state the exact reasons for his claim of constructive dismissal. This was not forthcoming in his letter of resignation dated 02.02.2021.

[64] It is apparent to the Court that the Claimant had cited his poor health as the reason for his resignation in his letter of resignation and the Exit Interview. Further, during cross-examination, the Claimant conceded that his decision to resign was motivated by other reasons including to take care of his wife, who was unwell, as seen below:-

> *"Q: So, my first question was just to confirm that this was, when he submitted his resignation letter, a screenshot of when he submitted his resignation on the Company's HR system, he said yes. En. Amer, just to confirm, agree that the reasons you have listed here for your resignation is "personal reasons." Correct?*
>
> *A: Yes.*
>
> *Q: Ok. And this personal reasons, En. Amer, can we also look at page 33 of CLB-2?*
>
> *A: CLB. Page?*
>
> *Q : 33 of CLB-2.*
>
> *A: Ok.*
>
> *Q: Paragraph 5. These reasons also include that your wife at that time was also unwell and one of the personal reasons was that you needed to take care of her. Correct?*

A: Yes."

[65] It is apparent to this Court that the Claimant's attempt to add the new reasons to justify his claim of constructive dismissal and as these factors were not stated in his letter of resignation whatsoever, they should be relegated to the realm of an afterthought.

[66] This Court appreciate that the Claimant is at liberty to narrate the facts prior to his resignation but the pertinent question to be asked is when is the defining moment when he claimed himself to have been constructively dismissed. As none was forthcoming in his letter of resignation and that by itself, renders his claim fatal.

[67] In his Statement of Case, the Claimant pleaded that the Company had failed to consider their obligation to "safeguard and provide safety to the Claimant", the Company had failed to take the Claimant's health condition into account, failure to consider the Claimant's appeal against the transfer to Headquarters. Basically, the Claimant is relying on entirely different angle and allege that the series of events that occurred prior to the Claimant's letter of resignation was part of his reasons to claim constructive dismissal.

[68] If the Claimant is so certain that those actions of the Company are so connected with one another as to culminate in a repudiation of the employment contract, then he must show and be seen to have dissociated and distanced himself from the actions of the Company and to forthwith walk out of the employment and treat himself as being constructively dismissed.

[69] Mere contentions/averments are not conclusive of constructive dismissal. The higher one is in the employment ladder and here we are talking about Assistant Vice President I, the higher the test that one has been constructively dismissed.

[70] The Claimant did not plead that the transfer is not *bona fide* and in fact submitted that it is not the transfer that the Claimant is unhappy about. In fact, the Claimant's transfer to headquarters was

within the scope of the contract of employment which clearly provides that he was subject to be transferred. During his tenure of employment, he had accepted transfers and the Company had also allowed his appeal against transfer order in the past.

[71] This Court finds no merits in the Claimant's argument that the Company's decision, namely the alleged safeguard and provide safety to the Claimant and rejection of his appeal, was a breach of contract. The Company, as an employer, was empowered to transfer. A mere decision to transfer the Claimant cannot amount to a constructive dismissal unless it was not *bona fide* but that is not the Claimant's case. To accept the Claimant's argument of constructive dismissal in the circumstances of the case would effectively curtail the Company's prerogative to manage its operations.

[72] Furthermore, if there was a fundamental breach as alleged the Claimant must not have delayed in treating himself as being constructively dismissed. He should have put in his letter treating himself as being constructively dismissed on ground that the company had breached the fundamental terms of its contract of employment with him or a breach going to the root of the contract or that the company had evinced no intention to be bound by the said contract. See the cases of *Ang Beng Teik v. Pan Global Textile Bhd, Penang* [1996] 4 CLJ 313; [1996] 3 MLJ 137, *Bouzourou v. The Ottoman Bank* [1930] AC 271 and *Donovan v. Invicta Airways Ltd* [1970] 1 Lloyds Rep 486.

[73] In *Bouzourou's case [supra]*, the Privy Council held that an employee would have been entitled to regard himself as being dismissed if his transfer from one province to another province rendered him exposed to an immediately threatening danger of violence or disease to his person. In *Donovan* 's case *[supra]*, the Court of Appeal held that when the conduct of the employer was such that it rendered the continuance of the employee's service impossible, the latter was entitled to treat the contract as at end and to obtain damages for wrongful dismissal.

[74] The Court of Appeal in *Southern Investment Bank Bhd/Southern Bank & Anor v. Yap Fat & Anor* [2017] 8 CLJ 159; [2017] 3 MLJ 327, reaffirmed the position that an employee ought to take immediate steps to walk out of employment for a claim of constructive dismissal as follows:-

> **[29] That, however, is not the end of the matter. In our view, the First Respondent's delay of approximately five months in leaving employment goes to show that there was never any conduct by the appellants which rendered continued employment impossible, unreasonable and unbearable as alleged by the first respondent.**
>
> **[30] It is trite that in a claim for constructive dismissal, it is imperative for the employee to take immediate steps in walking out of his employment within a reasonable time after the alleged breach of contract. Failing which, the employee will be deemed to have waived the breach and agreed to vary the contract.**

[75] In the present case, the following facts and evidence cannot be disputed:-

(i) The Claimant did not dispute the transfer but merely appealed to be maintained at Klang or to be transferred to Wilayah Hulu Langat

(ii) Upon the appeal being rejected, the Claimant tendered his letter of resignation with the required three (3) months' notice and served his notice period accordingly.

[76] In the case of *Kontena Nasional Bhd v. Hashim Abd Razak* [2000] 8 CLJ 274 at p. 290, the High Court opined that the employee's delay of two weeks in claiming constructive dismissal pursuant to a transfer order amounted to an affirmation of the transfer order.

[77] In the case of *Anwar Abdul Rahim* [*supra*], the Court of Appeal held that where an employee is relying on cumulative conduct to justify his claim of constructive dismissal, the evidence must show that each conduct was connected that it forms part of the same transaction as follows:-

> **He [the Chairman of the Industrial Court] also took into account irrelevant considerations by going into previous acts of alleged victimisation which were not pleaded but brought out for the first time at the hearing in the Industrial Court. Contrary to Anwar's statement of claim there was no evidence whatsoever that he had been "relieved of his administrative functions" on 17 or 19 October 1989. The doctrine of waiver or condonation applies equally to employees. *Therefore, if cumulative misconduct is being urged it must be pleaded and evidence has to be given to show that each misconduct was so connected with the culminating act of misconduct as to form part of the same transaction. That is not what was pleaded here.***

[78] In the present case not only is the Claimant holding the position of Assistant Vice President I, but he had himself written his own letter of resignation with three (3) months' notice in measured and mellowed language of maturity - marking a memorable departure from service with the company as "*saya juga ingin mengucapkan ribuan terima kasih di atas kerjasama sepanjang saya berkhidmat degan Syarikat ini.*"

[79] The letter of resignation with the required notice period coupled with thanking the Company are all the language of conciliation and closure with no trace of resentment or recrimination. It is said that out of the abundance of the heart, the mouth speaks and words are written down and it is to those words written that we look for any sign of constructive dismissal. I find no trace of it for the very words employed negated it. On the contrary the words used have all the elements of a voluntary resignation.

[80] One can often sense and discern the very mood of a writer from the words used in his writing and here the words chosen by the Claimant in his letter of resignation were redolent of respect and best regards. It cannot be interpreted as that coming from an Assistant Vice President I who is treating himself as constructively dismissed by the Company.

[81] The Company in its' letter of 19.03.2021 "*Re: Acceptance of Resignation*", had in fact accepted the Claimant's resignation with the three (3) months' notice, informed him of his last day of employment being 01.05.2021 and subsequently agreed for the Claimant to serve the balance notice period at Klang.

[82] It is both important and imperative to note that if at all the Company's actions were fundamental breaches, which were so serious for the Claimant to claim constructive dismissal, he would not have tendered a letter of resignation with redolent of respect and continue working with the Company serving the three (3) months' notice.

[83] This Court finds that the Company did not commit any actions which were fundamental breaches to justify the Claimant's claim of constructive dismissal and even if there were (though there is no evidence for that), the Claimant's delay had affirmed the said breaches.

[84] Having analysed all the evidence in this Court, this Court is unable to find anything that can show that the Company had conducted itself in a manner that amounted to a severe breach of both express and implied terms of the Claimant's employment contract. In this whole episode, this Court having analysed all the facts and evidence only found facts and evidence that had shown that the Company had attempted to ensure that the Claimant continued in the service of the Company. There is no evidence before this Court that the Company had breached any of the essential or fundamental terms of employment of the Claimant or had evinced an intention no longer to be bound by the essential terms of the Claimant's contract of

employment with the Company. This Court cannot allow the Claimant to seize any minor shortcomings or failings of the Company (if there is) and turn it into or interpret it as though they form the breach of essential or fundamental terms of the contract of employment of the Claimant with the Company.

[85] This Court is mindful that the circumstances giving rise to a constructive dismissal depends on the facts and circumstances of each case. However, this Court would also ask questions regarding the conduct of the Company and whether such conduct of the Company was a deliberate design to drive the employee out of the Company by making the employee's continued presence in the Company unbearable or intolerable. In this regard, this Court finds the judgment of the Court of Appeal in the case of *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9 instructive wherein the Court of Appeal opined as follows:-

> **A reading of the pleaded case for the parties resolved the issue that fell for adjudication before the Industrial Court into what the profession has come to call as a 'constructive dismissal'. There is no magic in the phrase. It simply means this.**
>
> **An employer does not like a workman. He does not want to dismiss him and face the consequences. He wants to ease the workman out of his organisation. He wants to make the process as painless as possible for himself. He usually employs the subtlest of means. He may, under the guise of exercising the management power of transfer, demote the workman. That is what happened in *Wong Chee Hong (ibid)*. Alternatively, he may take steps to reduce the workman in rank by giving him fewer or less prestigious responsibilities than previously held. Generally speaking, he will make life so unbearable for the workman so as to drive the latter out of employment. In the normal case, the workman being unable to tolerate the acts of oppression and victimisation will**

tender his resignation and leave the employer's services. The question will then arise whether such departure is a voluntary resignation or a dismissal in truth and fact.

[86] The complete analysis of the facts and evidence in this case does not show that the Company had engaged in any acts or conducts that is designed to make the Claimant's working experience in the Company unbearable that had the likely result of driving the Claimant out of employment from the Company. This Court finds that the Claimant's allegations of that the Company had breached the express and/or implied terms of her employment contract with the Company are unproven. There are overwhelming evidence that the Claimant had tendered his resignation voluntarily.

CONCLUSION

[87] Pursuant to Section 30(5) of the 1967 Act and guided by the principles of equity, good conscience and substantial merits of the case without regard to technicalities and legal form and after having considered the totality of the facts of the case, all the evidence adduced in this Court and by reasons of the established principles of Industrial Relations and disputes as stated above, this Court finds that the Claimant had failed to prove to the satisfaction of this Court on the balance of probabilities that he was dismissed from her employment by the Company. Since the Court finds that the Claimant has failed to prove that he had been constructively dismissed by the Company and that he had voluntarily tendered his resignation, thus the issue of whether the dismissal was done with or without just cause or excuse does not arise as there was no dismissal to begin with in the first place.

[88] Accordingly the Claimant's claims hereby dismissed.

HANDED DOWN AND DATED THIS 19TH DAY OF MARCH 2024

(ESWARY MAREE)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR

Case(s) referred to:

Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 4 CLJ 449

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

Anwar Abdul Rahim v. Bayer (M) Sdn Bhd [1998] 2 CLJ 197

Moo Ng v. Kiwi Products Sdn Bhd Johor & Anor [1998] 3 CLJ 475

Govindasamy Munusamy v. Industrial Court Malaysia & Anor [2007] 10 CLJ 266

Keretapi Tanah Melayu Bhd v. Mohan Vythialingam & Anor And Another Appeal [2023] ILRU 264; [2023] 2 ILR 264

Pelangi Enterprises Sdn Bhd v. Oh Swee Choo & Anor [2004] 6 CLJ 157

Sanbos (Malaysia) Sdn Bhd v. Gan Soon Huat [2021] 6 CLJ 700; [2021] ILRU 11; [2021] 3 ILR 11

Maritime Intelligence Sdn Bhd v. Tan Ah Gek [2021] 10 CLJ 663; [2021] ILRU 417; [2021] 4 ILR 417

Ang Beng Teik v. Pan Global Textile Bhd, Penang [1996] 4 CLJ 313; [1996] 3 MLJ 137

Bouzourou v. The Ottoman Bank [1930] AC 271

Donovan v. Invicta Airways Ltd [1970] 1 Lloyds Rep 486

Southern Investment Bank Bhd/Southern Bank & Anor v. Yap Fat & Anor [2017] 8 CLJ 159; [2017] 3 MLJ 327

Kontena Nasional Bhd v. Hashim Abd Razak [2000] 8 CLJ 274

Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9

Legislation referred to:

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