CHOONG SIEW FONG v. BRU-HAAS SDN BHD

INDUSTRIAL COURT, KUALA LUMPUR
AUGUSTINE ANTHONY
AWARD NO. 216 OF 2024 [CASE NO: 4-4-1211-22]
6 FEBRUARY 2024

Abstract – *Employers may design certain tactics to force an employee out of employment through pressures and certain conducts. If an employee yields to the heat by the employer, the employer would then succeed in causing the employee to end the contract of employment with the company, without even directly terminating the employee. Such indirect tactics would give rise to a claim of constructive dismissal as the employer's conduct: (i) is a breach of mutual trust and confidence between the employer and the employee; (ii) evinces an intention to no longer be bound by the essential terms of the contract of employment; and (iii) is clearly a fundamental breach which goes to the root of the employment contract.*

LABOUR LAW: *Employment – Dismissal – Constructive dismissal – Employee began pregnancy during COVID-19 pandemic – Employee unvaccinated due to pregnancy – Employee advised by consultant obstetrician and gynaecologist to work from home for remaining period of pregnancy to minimise exposure and risk of contracting COVID-19 infection – Medical advice reduced to writing and communicated to employer – Employee immediately pressured to tender resignation through series of acts and conducts orchestrated by employer – Whether there was constructive dismissal – Whether employer's conduct significantly breached essence of employment contract – Whether employer no longer intended to be bound terms of employment contract – Whether reinstatement proper remedy – Industrial Relations Act 1967, ss. 20(3), 30(5) & 30(6A)*

CONTRACT: *Employment contract – Breach – Employee began pregnancy during COVID-19 pandemic – Employee unvaccinated due to pregnancy – Employee advised by consultant obstetrician and gynaecologist to work from home for remaining period of pregnancy to minimise exposure and risk of contracting COVID-19 infection – Medical advice reduced to writing and communicated to employer – Employee immediately pressured to tender resignation through series of acts and conducts orchestrated by employer – Whether there was fundamental breach of terms of employment contract*

The claimant served with the respondent ('company') as an Assistant Office Administrator of the Admin Division, earning RM6,000 per month. The claimant began her pregnancy around March 2021, during which period the COVID-19 pandemic surged, and the number of positive cases increased, resulting in the company's employees, including the claimant, working from

home. Around May-June 2021, the company's employees, including the claimant, had to work in the office on a rotation basis which the claimant complied with. Due to the claimant's pregnancy, in July 2021, the claimant's doctor, a consultant obstetrician and gynaecologist, advised her to work from home for the remaining period of her pregnancy to minimise the exposure and risk of contracting COVID-19 as the claimant was unable to get her vaccination owing to her pregnancy. The doctor had also issued a letter to that effect. During this period, there were employees in the company who were exposed to COVID-19 infection. According to the claimant, the company, (i) initially agreed to the claimant working from home during the duration of her pregnancy but later changed its mind as it needed someone to work in the office; (ii) requested for the claimant to tender her resignation and hand over all her list of work and for this, the company would compensate her with three months' salary; (iii) immediately blocked the claimant's access to her work email and office internet; (iv) through the claimant's immediate superior ('Miss Tina'), informed her that everything was ready for her to sign and the claimant was to pick up her personal belongings and surrender all the company's properties. A copy of an unsigned letter of termination of employment contract was also sent to the claimant, purportedly being on a mutual understanding and agreement between the claimant and the company which the claimant vehemently denied ever agreeing to; and (v) removed the claimant from the company's WhatsApp group. When the claimant queried Miss Tina about the company's conduct, the claimant was informed that the decision was final and the letter of termination stood as it was. Dissatisfied, the claimant wrote to the company enquiring the status of her employment, *ie*, whether the company had terminated her. The company's solicitors responded that the claimant remained the company's employee. The response, however, came with many directives to the claimant, which the claimant found oppressive and in breach of the essential terms of her contract of employment with the company. The claimant claimed constructive dismissal in view of the company's conduct in failing to address the claimant's concerns. Hence, the present claim for reinstatement to her former position. The company, on the other hand, denied that the claimant was dismissed, arguing that: (i) upon being aware of the claimant's pregnancy and her unvaccinated status, the company had given her a certain amount of latitude purely on a goodwill basis for her to work from home until September 2021 but this was not a permanent right; (ii) to ensure the smooth operation of the company, it had requested the claimant to report back to work physically at the office premises; (iii) the claimant's work could not be performed without her physical attendance in the office as there was a need for two administrative staff to be present in the office to assist one another; (iv) the doctor's letter did not prohibit the claimant from resuming her job in the office by physical attendance; (v) due to the claimant's refusal to attend and work in the office,

there was a verbal understanding between the claimant and Miss Tina that her employment would cease; (vi) while there was a termination letter, this was prepared by the company at the claimant's request. As the letter was not finalised, the termination of the claimant by mutual understanding did not materialise and, therefore, the claimant remained the company's employee; (vii) the blocking of access to the company's email and internet was done for all employees, including the claimant, who were working remotely, for security and integrity reasons to prevent any hacking from outside and misuse of data; (viii) the removal of the claimant from the WhatsApp group was due to the fact that the group was only used to facilitate and assist the employees working physically at the company's office; (ix) the company's solicitors had adequately responded to the claimant but the claimant still claimed constructive dismissal; (x) the company did not do or commit any act resulting in any material breach of any of the fundamental terms of the employment contract between the claimant and the company; and (xi) it was the claimant who, by her own conduct, had abandoned her employment with the company without any due notice.

Held (allowing claim; awarding claimant RM66,000):

(1) The claimant went for further check up with her doctor and, since she had not been vaccinated, enquired on whether it would be safe for her to return to work normally in the office. It was the claimant's doctor's advice that the claimant should remain at home. The tone of the doctor's letter was such that it would be dangerous for the claimant to work in the office during the duration of her pregnancy. It was an advice of a consultant obstetrician and gynaecologist to a pregnant mother/patient; not from a lay person or fear-mongering individuals. (paras 28 & 29)

(2) The claimant was unwilling to lose her job as she was, at all times, an obedient employee who followed the company's order to work from the office even during her pregnancy. She was only unable or fearful to work at the office due to her doctor's advice. Considering the mental and emotional well-being of the claimant at that time where her pregnancy was at stake, the least that the company could have done was to be considerate and sensitive to the claimant's well-being. That was not the case here. Not only was the company totally unsympathetic, to make matters worse, the company saw it fit to renege on its previous assurance to the claimant that enabled her to work from home for the duration of her pregnancy. So, profit-driven was the mindset of the company that it was prepared to disregard the claimant's welfare at the critical time of the claimant's pregnancy. (paras 29 & 30)

(3) The doctor's advice, which was reduced to writing to the claimant, was conveyed to Miss Tina on the same day. Despite the claimant informing Miss Tina of the doctor's advice, what followed, on the same day, was that the claimant was immediately asked to tender her resignation letter.

Within 15 minutes after her conversation with Miss Tina, all the claimant's access to her work email and other IT resources were blocked. The next day, the claimant was cut off from all communications with the company's personnel and this could be seen from the removal of the claimant from the WhatsApp group, which was created for communications purposes for all the company's employees. Around the same time, the company, through Miss Tina, continued to pressure the claimant to tender her resignation and had even prepared a letter of termination of employment, purportedly on the mutual understanding and agreement with the claimant, with a cheque for three months' salary. The claimant denied this alleged mutual understanding and agreement for her to be terminated from her employment in this manner and her evidence remained unchallenged. Miss Tina was never called as a witness to rebut the claimant's evidence and the company's evidence in defence remained unconvincing. (para 31)

(4) It was obvious that the company had designed certain tactics and methods to force the claimant out of her employment with the company and, regrettably so, against an employee who was grappling with the fear of the risk of the COVID-19 infection and how that infection, if it ever happened, would affect her unborn child. If the claimant yielded to the company's pressure, the company would have then succeeded in causing the claimant to end her contract of employment with the company, without even participating directly by terminating her. It is this type of indirect tactic, used by companies to drive the employees out of employment, that gives rise to a claim of constructive dismissal. The company had conducted itself in a manner that could only be construed as a breach of mutual trust and confidence between the claimant and the company. The company, by its conduct or series of conducts, had evinced an intention to no longer be bound by the essential terms of the contract of employment entered into between the claimant and the company. The company's conduct was clearly a fundamental breach of the terms which went to the root of the employment contract. (para 33 & 35)

(5) The claimant had succeeded in proving that she was dismissed by the company from her employment by way of constructive dismissal. The claimant had been dismissed without just cause or excuse. Considering the factual matrix of the case, where the claimant claimed constructive dismissal under a very undesirable condition and the claimant had found a new employment with a salary of the same amount which was paid by the company, reinstatement of the claimant to her former position was not a suitable remedy. The appropriate remedy must be compensation *in lieu* of reinstatement and the claimant were also entitled to backwages. Therefore, the claimant was awarded RM66,000 (RM54,000 in backwages + RM12,000 being compensation *in lieu* reinstatement). (paras 35, 36, 38, 40, 41 & 48)

Award(s) referred to:
Ireka Construction Berhad v. Chantiravathan Subramaniam James [1995] 2 ILR 11 (Award No. 245 of 1995)

Case(s) referred to:
Anwar Abdul Rahim v. Bayer (M) Sdn Bhd [1998] 2 CLJ 197
Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor [2001] 3 CLJ 541
Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] CLJU 30; [1981] 1 LNS 30
Govindasamy Munusamy v. Industrial Court Malaysia & Anor [2007] 10 CLJ 266
K A Sanduran Nehru Ratnam v. I-Berhad [2007] 1 CLJ 347
Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 4 CLJ 449
Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9
Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314
Weltex Knitwear Industries Sdn Bhd v. Law Kar Toy & Anor [1998] CLJU 258; [1998] 1 LNS 258
Wong Chee Hong v. Cathay Organisation Malaysia Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298

Legislation referred to:
Industrial Relations Act 1967, ss. 20, 30(5), (6A)

For the claimant - Iris Lim Xin Yi & Chang Carrie; M/s Justin Voon Chooi & Wing
For the company - Sarita Ashok Khandar & Vimalan Ramanathan; M/s Edorra Arfah Khandhar

Reported by Najib Tamby

AWARD
(No. 216 of 2024)

Augustine Anthony:

[1] Pursuant to the directions of this court, the parties in this matter filed their respective submissions dated 23 October 2023 (claimant's written submissions), 23 October 2023 (company's written submissions), 1 December 2023 (claimant's written submissions in reply) and 4 December 2023 (company's written submissions in reply).

[2] This court considered all the notes of proceedings in this matter, documents and cause papers in handing down this award namely:

(i) the claimant's statement of case dated 24 August 2022;

(ii) the company's statement in reply dated 26 September 2022;

(iii) the claimant's rejoinder dated 4 October 2022;

(iv) the claimant's bundle of documents - CLB1, CLB2 & CLB3;

(v) the company's bundles of documents - COB1 & COB2;

(vi) the claimant's witness statement - CLW-WS(1) & CLW-WS(2) (Miss Choong Siew Fong);

A (vii) the company's witness statement - COW1-WS (Muhaini binti Mohmad Omar);

(viii) the company's witness statement - COW2-WS(1) & COW2-WS(2) (Mr Song Dai).

B **Introduction**

[3] The dispute before this court relates to the claim by Choong Siew Fong ("claimant") that she was constructively dismissed from her employment without just cause or excuse by Bru-Haas Sdn Bhd ("the company") on 1 October 2021.

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[4] The company is involved in the business of sales of electrical, electronic and telecommunications products. The claimant commenced employment with the company as an Assistant Office Administrator of the Admin Division on 1 July 2019. There is no dispute that the claimant was a confirmed employee of the company. The claimant's last drawn salary a
D month was RM6,000 prior to the claimant claiming constructive dismissal.

[5] The claimant began her pregnancy around the period of March 2021, during which period the COVID-19 pandemic surged and the number of positive cases increased, resulting in the company's employees including the
E claimant, working from home. Around the period of May to June 2021, the employees of the company, including the claimant, had to work in the office on a rotation basis which the claimant complied with. Due to the claimant's pregnancy, around the period of July 2021, the claimant's doctor has advised her to work from home for the remaining period of her pregnancy to minimise the exposure and risk of contracting COVID-19 as the claimant was
F unable to get her vaccination due to her pregnancy. Around this time, there were employees in the company who were exposed to COVID-19 infection. The claimant alleged that despite the company initially agreeing for the claimant to work from home during the duration of her pregnancy, the company had then changed its mind as it needed someone to work in the
G office and thereafter requested the claimant to tender her resignation and handover all her list of work. Immediately thereafter, the company blocked the claimant's access to her work email and office internet. The company then further pressured the claimant to resign from her employment which the claimant refused.

H **[6]** The claimant, dissatisfied with the company's conduct, wrote to the company through her solicitors on 24 September 2021 enquiring the status of her employment as to whether the company has terminated her. The company's solicitors responded to the claimant's solicitors on 28 September 2021, confirming that the claimant remained the employee of
I the company, but the response came with many directives to the claimant which the claimant considered oppressive and in breach of the essential terms

of the contract of employment of the claimant. On 1 October 2021, the claimant claimed constructive dismissal in view of the company's conduct in failing to address the claimant's concerns. The claimant now claims that she was constructively dismissed by the company from her employment and that the said dismissal was without just cause or excuse and prays that she be reinstated to her former position in the company without any loss of wages and other benefits. The company denies that the claimant was dismissed and states that the claimant had in fact abandoned her employment with the company without any notice and prays that the claimant's case against the company be dismissed.

[7] The claimant gave evidence under oath and remained the sole witness for her case. Two witnesses gave evidence on behalf of the company and they are COW1 (Muhaini binti Mohmad Omar, who is an Assistant Office Administrator of the company and who gave evidence that the claimant was needed in the office to carry out her duties so as to assist the other administrative staff in the company) and COW2 (Mr Song Dai , the Director of the company who gave evidence on the claimant's scope of duties and the need for the claimant to be physically present in the company's office to discharge her duties).

The Claimant's Case

[8] The claimant's case can be summarised as follows:

(i) the claimant commenced employment with the company as an Assistant Office Administrator of the Admin Division on 1 July 2019;

(ii) the claimant was a confirmed employee of the company and her last drawn salary per month was RM6,000;

(iii) the claimant began her pregnancy around the period of March 2021;

(iv) when the claimant was still in her pregnancy, it was also a period when the COVID-19 pandemic surged and the number of positive cases increased;

(v) as a consequence of the increase in the COVID-19 cases and as there was no approval from the Ministry of International Trade and Industry (MITI), the company's employees, including the claimant, were directed to work from home;

(vi) after obtaining permission from MITI, around the period of May to June 2021, the employees of the company, including the claimant, had to work in the office on a rotation basis which the claimant complied;

(vii) at that time, between June 2021 and end of July 2021, the claimant was unable to receive any vaccination due to her pregnancy but despite being unvaccinated, the claimant had still performed her work in the office physically based on the rotation schedule;

A (viii) due to the claimant's pregnancy, around the period of July 2021, the claimant's doctor has advised her to work from home for the remaining period of her pregnancy to minimise the exposure and risk of contracting COVID-19 as the claimant was unable to get her vaccination due to her pregnancy;

B (ix) the company agreed to the claimant working from home based on the advice of the claimant's doctor as the claimant's work can be performed from home too;

(x) thereafter, the doctor has also issued a letter dated 14 September 2021 in written form of her advice to the claimant to work from home for C the remainder of her pregnancy;

(xi) the claimant alleged that despite the company initially agreeing for the claimant to work from home during the duration of her pregnancy, the company had then changed its mind as it needed someone to work in D the office;

(xii) on 14 September 2021, one Miss Tina Lai Hui Yin (Miss Tina), who is the claimant's immediate superior, informed the claimant that the company requires someone who can work in the office despite the claimant's doctor's advice to the claimant;

E (xiii) Miss Tina then requested the claimant to tender her resignation and handover all her list of work and for this, the company will compensate her with three months' salary;

(xiv) immediately thereafter, the company blocked the claimant's access to her work email and office internet and all the credentials have been F changed and or blocked on the instruction of Miss Tina and one Mr Ganesha, who is the Director of IT and Technical Department;

(xv) on 15 September 2021, Miss Tina further pressured the claimant to resign from her employment by informing the claimant that everything G was ready for her to sign on 16 September 2021, wherein the claimant was to pick up her personal belongings and surrender all company's properties;

(xvi) the claimant was also informed that her payment cheque was also ready for the claimant to pick up and the company was awaiting the H claimant's appearance at the company premises on 16 September 2021;

(xvii) a copy of an unsigned letter of termination of the employment contract was also sent to the claimant purportedly being on a "mutual understanding and agreement" between the claimant and the company which the claimant vehemently denies ever agreeing to; I

(xviii) the claimant was also removed from the company's WhatsApp group chat titled "BRU-HAAS MGT";

(xix) when the claimant queried Miss Tina about the conduct of the company doing all the above pressuring the claimant to resign, Miss Tina informed the claimant that the decision was final and the letter of termination stands as it is;

(xx) the claimant dissatisfied with the company's conduct wrote to the company through her solicitors on 24 September 2021 enquiring the status of her employment as to whether the company has terminated her and how the company wish to repair the breach of trust and confidence between the claimant and the company;

(xxi) the company's solicitors responded to the claimant's solicitors on 28 September 2021, confirming that the claimant remained the employee of the company but the response came with many directives to the claimant which the claimant considered oppressive and in breach of the essential or fundamental terms of the contract of employment of the claimant;

(xxii) on 1 October 2021, the claimant claimed constructive dismissal in view of the company's conduct in failing to address the claimant's concerns;

(xxiii) the claimant now claims that she was constructively dismissed by the company from her employment and that the said dismissal was without just cause or excuse; and

(xxiv) the claimant now prays that she be reinstated to her former position in the company without any loss of wages and other benefits.

The Company's Case

[9] The company's case can be summarised as follows:

(i) the company does not dispute the claimant's employment history, her status as a confirmed employee of the company and her last drawn salary before her claim of constructive dismissal;

(ii) the company denies that the claimant was dismissed from her employment in the company;

(iii) the company admits having knowledge of the claimant's pregnancy in around the period of July 2021;

(iv) the company upon being aware of the claimant's pregnancy and her unvaccinated status, had given her a certain amount of latitude purely on a goodwill basis for her to work from home until September 2021 but this was not a permanent right;

(v) however, the company in order to ensure the smooth operation of the company had requested the claimant to report back to work physically at the office premises;

(vi) the company disagrees that the claimant's work can be performed without physical attendance in the office as there is a need for two office administrative staff to be present in the office to assist one another;

(vii) the company states that the claimant's doctor's letter does not prohibit the claimant from resuming her job in the office by physical attendance;

(viii) the company states that due to the claimant's refusal to attend work in the office, there was a verbal understanding between the claimant and her immediate superior that the claimant's employment will be ceased;

(ix) the company admits there was a termination letter prepared by the company but states that it was done at the claimant's request but as the letter was not finalised, the termination of the claimant by mutual understanding did not materialise;

(x) as the termination of the claimant could not materialise, the claimant remained the employee of the company;

(xi) on the issue of blocking the claimant's access to the company's email and internet, the company admits doing so but it was done for all employees who were working remotely to prevent any hacking from outside and misuse of data. The blocking exercise was done with the security and integrity of the company's documentation/information in mind;

(xii) on the issue of the removal of the claimant from the WhatsApp group "BRU-HAAS MGT", the company states that it was done due to the fact that this group was only used to facilitate and assist the employees currently working physically at the company's office;

(xiii) despite the claimant's allegations through her solicitors which the company denies, the company had adequately responded to the claimant's solicitors through the company's solicitors' letter dated 28 September 2021 and maintained that the claimant remained an employee of the company;

(xiv) despite the company's adequate explanations, the claimant nevertheless claimed constructive dismissal on 1 October 2021;

(xv) the company states that the company did not do or commit any act resulting in any material breach of any of the fundamental terms of the contract of employment between the claimant and the company;

(xvi) the company further states that the company has not evinced any intention not to be bound by any of the essential terms of the contract of employment with the claimant and as such the claimant's claim of constructive dismissal is without basis;

(xvii) the company states that the claimant by her conduct has abandoned her employment with the company without any due notice;

(xviii) the company states that it did not dismiss the claimant;

(xix) the company now prays that the claimant's case be dismissed.

The Law

Role And Function Of The Industrial Court

[10] The role of the Industrial Court under s. 20 of the Industrial Relations Act 1967 is succinctly explained in the case of *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 ...

[11] The above principle was further reiterated by the Court of Appeal in the case of *K A Sanduran Nehru Ratnam v. I-Berhad* [2007] 1 CLJ 347, where His Lordship Justice Mohd Ghazali Yusoff JCA outlined the function of the Industrial Court:

> [21] The learned judge of the High Court held that the Industrial Court had adopted and applied a wrong standard of proof in holding that the respondent has failed to prove dishonest intention and further stating that the respondent has not been able to discharge their evidential burden in failing to prove every element of the charge. He went on to say that the function of the Industrial Court is best described by the Federal Court in *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd and Another Appeal* [1995] 3 CLJ 344 where in delivering the judgment of the court Mohd Azmi FCJ said (at p. 352):
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> > On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under s. 20 of the Act (unless otherwise lawfully provided by the terms of the reference), is to determine whether the misconduct or irregularities complained of by the management as the grounds of dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal.

[12] It will not be complete this far if this court fails to make reference to the decision of the Federal Court in the case of *Goon Kwee Phoy v. J & P Coats (M) Bhd* [1981] CLJU 30; [1981] 1 LNS 30 where His Lordship Raja Azlan Shah, CJ (Malaya) (as HRH then was) opined:

> Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. *If the employer chooses to give a reason for the action taken by him the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out.* If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.
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> (emphasis added)

Burden Of Proof

[13] Whenever a company has caused the dismissal of the workman, it is then incumbent on the part of the company to discharge the burden of proof that the dismissal was with just cause or excuse. This court will now refer to the case of *Ireka Construction Berhad v. Chantiravathan Subramaniam James* [1995] 2 ILR 11 (Award No. 245 of 1995) in which case it was stated that:

> It is a basic principle of industrial jurisprudence that in a dismissal case the employer must produce convincing evidence that the workman committed the offence or offences the workman is alleged to have committed for which he has been dismissed. The burden of proof lies on the employer to prove that he has just cause and excuse for taking the decision to impose the disciplinary measure of dismissal upon the employee. The just cause must be, either a misconduct, negligence or **poor performance** based on the facts of the case.
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> (emphasis added)

Burden Of Proof In Cases Of Constructive Dismissal

[14] The case of *Weltex Knitwear Industries Sdn Bhd v. Law Kar Toy & Anor* [1998] CLJU 258; [1998] 1 LNS 258; [1998] 7 MLJ 359 is relevant on the role of this court when the dismissal itself is disputed by the company. In this case, His Lordship Haji Abdul Kadir bin Sulaiman J opined:

> Next is the burden of proof on the issue of forced resignation raised by the first respondent. The law is clear that if the fact of dismissal is not in dispute, the burden is on the company to satisfy the court that such dismissal was done with just cause or excuse. This is because, by the 1967 Act, all dismissal is *prima facie* done without just cause or excuse. Therefore, if an employer asserts otherwise the burden is on him to discharge. *However, where the fact*

> *of dismissal is in dispute, it is for the workman to establish that he was dismissed by his employer. If he fails, there is no onus whatsoever on the employer to establish anything for in such a situation no dismissal has taken place and the question of it being with just cause or excuse would not at all arise:*
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> (emphasis added)

[15] In view of the above case and anchored on a claim of constructive dismissal where the company denies dismissing the claimant from her employment, it is now incumbent upon the claimant to prove her case that she has been dismissed in line with the claim of constructive dismissal. The burden of proof thus had now shifted to the claimant to prove that she was dismissed by the company from her employment before this court can proceed to determine whether that dismissal, if proven, amounts to a dismissal without just cause or excuse.

Standard Of Proof

[16] In the case of *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314, the Court of Appeal had laid down the principle that the standard of proof that is required to prove a case in the Industrial Court is one that is on the balance of probabilities wherein His Lordship Justice Abdul Hamid Mohamad JCA opined:

> Thus, we can see that the preponderant view is that the Industrial Court, when hearing a claim of unjust dismissal, even where the ground is one of dishonest act, including "theft", is not required to be satisfied beyond reasonable doubt that the employee has "committed the offence", as in a criminal prosecution. On the other hand, we see that the courts and learned authors have used such terms as "solid and sensible grounds", "sufficient to measure up to a preponderance of the evidence," "whether a case ... has been made out", "on the balance of probabilities" and "evidence of probative value". *In our view the passage quoted from Administrative Law by H.W.R. Wade & C.F. Forsyth offers the clearest statement on the standard of proof required, that is the civil standard based on the balance of probabilities*, which is flexible, so that the degree of probability required is proportionate to the nature of gravity of the issue. But, again, if we may add, these are not "passwords" that the failure to use them or if some other words are used, the decision is automatically rendered bad in law.
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> (emphasis added)

Law On Constructive Dismissal

[17] In *Wong Chee Hong v. Cathay Organisation Malaysia Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298, His Lordship Salleh Abas LP, delivering the judgment of the court had this to say:

> The common law has always recognized 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 ...
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> ... 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.

[18] 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; and

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

[19] And if the employer demonstrates the above, then the employee is entitled to treat herself/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.

[20] In the case of *Anwar Abdul Rahim v. Bayer (M) Sdn Bhd* [1998] 2 CLJ 197, the Court of Appeal expounded the requirements to prove constructive dismissal wherein His Lordship Justice Mahadev Shankar JCA, delivering the judgment of the court had the occasion to state the following:

> It has been repeatedly held by our courts that the proper approach in deciding whether constructive dismissal has taken place is not to ask oneself whether the employer's conduct was unfair or unreasonable (the unreasonableness test) but whether "the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer to be bound by the contract". (See *Holiday Inn Kuching v. 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.

[21] It must be further stated here that the claimant's case being one of constructive dismissal, the claimant must give sufficient notice to her employer of her 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 notice to the employer will be necessary in order for the employer to remedy the breach (if any) before the claimant can treat herself as constructively dismissed if there was a failure on the part of the company to remedy the breaches complained of.

[22] In the case of *Govindasamy Munusamy v. Industrial Court Malaysia & Anor* [2007] 10 CLJ 266, His Lordship Justice Hamid Sultan Abu Backer JC (as he then was) had succinctly stated what a claimant has to prove in order to succeed in a case of constructive dismissal:

> [5] 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.

[23] Having stated the law as above, this court will now move to the facts and evidence of this case for its consideration. In doing so, this court will now take into account the conduct of the claimant, company and the series of events that led to the claimant now claiming constructive dismissal.

Evaluation Of Evidence And The Findings Of This Court

[24] In evaluating all the evidence before this court in order to determine whether the claim of the claimant that she was constructively dismissed by the company has any merit, this court proposes first to deal with the undisputed facts of the case based on the evidence before this court.

[25] It is undisputed that the claimant began her pregnancy around the period of March 2021 and subsequently delivered her baby on 15 December 2021. Before May or June 2021, the company's employees worked from home as the company did not have MITI's approval to commence work from its office. However, when the company was allowed to operate from office around May and June 2021, the company directed the employees to work in the office physically on a rotation basis and the claimant complied with

this directive of the company without protest despite being pregnant and unvaccinated. It is also undisputed that during her pregnancy until the period of August 2021, Malaysia was still experiencing the spread of COVID-19 pandemic and during this period, the claimant remained unvaccinated. The claimant was only fully vaccinated between 1 August 2021 and 22 August 2021.

[26] However, before the claimant was vaccinated, on or about 15 July 2021, the claimant was advised by her doctor, who is a consultant obstetrician and gynaecologist to continue working from home for the remaining period of her pregnancy to minimise the exposure and risk of contracting COVID-19 and the same was immediately communicated by the claimant to Miss Tina (who was not called as a witness for the company). Based on the claimant's evidence and the WhatsApp conversation between the claimant and Miss Tina, it is clear that the company has agreed to allow the claimant to work from home for the duration of her pregnancy and in the same WhatsApp conversation it was also made clear that the claimant need not produce any doctor's letter on the advice given by the doctor. The claimant's evidence in this regard was not convincingly challenged by the company what more when the company failed to make available Miss Tina to state otherwise or challenge the claimant's testimony.

[27] This court has considered the evidence of COW2 that the claimant was given a certain amount of latitude purely on a goodwill basis to work from home however finds that COW2's evidence without specifying the extent of this alleged "latitude" as evidence that is not able to challenge the claimant's convincing evidence that she was allowed to work from home for the duration of her pregnancy. As the claimant's evidence that she was allowed to work from home for the duration of the claimant's pregnancy was convincing, this court finds that the evidence of COW2 that the claimant was required to work in the office physically after September 2021 is not convincing at all. COW2's evidence that the claimant must report back to the office in September 2021 as the company needs two administrative employees to be present in the office to attend to the company's daily affairs can only be seen as the company reneging its earlier promise or agreement with the claimant that would allow her to work from home for the duration of her pregnancy.

[28] The claimant thereafter went for her further check up with her doctor on 14 September 2021 and enquired that since she has been vaccinated, whether it will be safe for her to return to work normally in the office. It was the claimant's doctor's advice that the claimant should remain at home as far as possible. The tone of the doctor's letter was such that it would be dangerous for the claimant to work in the office during the duration of her pregnancy and this can be seen from the doctor's letter dated 14 September 2021:

> Ms Choong has been under my care for the duration of her pregnancy and is now at 24 weeks gestation.
>
> In view of the dire situation with COVID numbers in the Klang Valley, I have advised Ms Choong remain at home as far as possible to minimize the likelihood of possible COVID infection since if she were to test positive during pregnancy , it would have serious and far reaching consequences.
>
> **As such, I have advised her to work from home for the remainder of her pregnancy in order to limit exposure to others.**
>
> (emphasis added)

[29] The above is a consultant obstetrician and gynaecologist's advice to a pregnant mother/patient. It is not an advice from a lay person or fear-mongering individuals spreading unsubstantiated information or fake dissemination of news on the risk of COVID-19 infection to the pregnant mother and more so the risk it poses to an unborn child, the extent of the risk was not fully known or understood at that time. It is obvious, the claimant was unwilling to lose her job as the claimant was at all times an obedient employee who followed the company's order to work from the office even during her pregnancy but was only unable or fearful to work from the office due to her doctor's advice. The conduct of the claimant and the emotional upheaval that she was enduring at that time was evident from her evidence in court what more a mother desperate to ensure the safety and well-being of her unborn child.

[30] Considering the mental and emotional well-being of the claimant at that time of pregnancy was at stake, the least the company could have done was to be considerate and sensitive to the claimant's well-being but that was not the case here. Not only the company was totally unsympathetic but even worse when the company could see it fit to renege on its previous assurance to the claimant that enabled her to work from home for the duration of her pregnancy. So profit driven was the mindset of the company that it was prepared to disregard the claimant's welfare at the critical time of the claimant's pregnancy as the evidence in this court reveals, which this court will elaborate below.

[31] The doctor's advice reduced into writing to the claimant was on 14 September 2021 and the doctor's advice to the claimant was conveyed to Miss Tina on the same day. Despite the claimant informing Miss Tina of the doctor's advice, what followed was that immediately on the same day, the claimant was asked to tender her resignation letter. The claimant gave convincing evidence that within 15 minutes after her conversation with Miss Tina, all her access to her work email and other IT resources were blocked on the advice of Miss Tina and one Mr Ganesha, the Director of IT and Technical Department. By the next day being the 15 September 2021,

A the claimant was cut off from all communication with the company's personnel and this can be seen from the removal of the claimant from the WhatsApp group "BRU-HAAS MGT" created for communication purpose by all the company employees. Around the same time, the company through Miss Tina, continued to pressure the claimant to tender her resignation and
B had even prepared a letter of termination of employment contract purportedly on the mutual understanding and agreement of the claimant with a cheque for salary of three months. The claimant had denied this alleged mutual understanding and agreement for her to be terminated from her employment in this manner and her evidence remains unchallenged. Miss
C Tina was never called as a witness to rebut the claimant's evidence at all and much of COW2's evidence in defence of the company's conduct remains unconvincing.

[32] Further, this court has considered the evidence of COW2 justifying the blocking of the claimant from using the email and other company IT
D resources and the removal of the claimant from the WhatsApp group "BRU-HAAS MGT" and found this witness' evidence hardly convicting. The best person who could answer the questions relating to the conduct of the company in this regard would be Miss Tina who was not called at all by the company to challenge the claimant's evidence as Miss Tina was the person
E on behalf of the company who had almost all the dealings with the claimant. The company's attempts to explain itself through COW2 giving reasons why the company blocked the claimant's email and IT resources were so unconvincing that the company resorted to an unexpected conduct by attempting to introduce one Mr Ganesha, the Director of IT and Technical
F Department during the testimony of COW2, who was at all times present in this court and following all the testimonies of witnesses including the claimant who has completed giving evidence. The company throughout Mr Ganesha's presence in court and who was following the proceedings, gave everyone present in this court the impression that he will not be called as a witness but only seated in court as an observer following the case for
G the company but this court and the claimant's counsel were taken by surprise when suddenly this witness was called to give evidence on behalf of the company out of a sudden when there was ample opportunity for this witness to be made available and called as a witness from the beginning of the hearing of this matter. Needless to say that this court upon the objection by learned
H claimant's counsel, disallowed this one Mr Ganesha to give any evidence in this court for this matter. The company's conduct of a trial by ambush is something that this court will not tolerate or allow (for submissions on this objection by the claimant's counsel please see notes of Evidence). Further, this court had also considered the evidence of the company's witness COW1
I whose testimony was not at all helpful in challenging the evidence of the claimant in matters relating to the manner in which the company has treated the claimant.

[33] To this court's mind, it is obvious that the company has designed certain tactics and methods to force the claimant out of her employment with the company and regrettably so against an employee who was grappling with the fear of the risk of COVID-19 infection and how that infection, if it ever happened, would affect her unborn child. If the claimant yielded to the company's pressure, the company would have then succeeded in causing the claimant to end her contract of employment with the company without even participating directly by terminating her. It is this type of indirect tactics used by the companies to drive the employees out of employment that gives rise to a claim of constructive dismissal.

[34] What the claimant suffered here is nothing short of what was described in the case of *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9 by the Court of Appeal wherein His Lordship Justice Gopal Sri Ram JCA 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.
>
> (emphasis added)

[35] Based on the evidence before this court, it is clear that the company has conducted itself in a manner that can only be construed as a breach of mutual trust and confidence between the claimant and the company. The company, by its conduct or series of conducts, has evinced an intention to no longer be bound by the essential terms of the contract of employment between the claimant and the company and clearly the company's conduct is a fundamental breach of the terms of employment contract with the claimant which goes to the root of the employment contract. The claimant's solicitors' letter dated 24 September 2021 giving notice to the company of its breaches of the essential terms of the contract was however not remedied

by the company nor adequately responded to by the company despite the company's solicitors' letter dated 28 September 2021 to the claimant's solicitors. The obvious followed wherein the claimant, having knowledge that the company was not prepared to remedy the breaches, left soon after on 1 October 2021 by claiming constructive dismissal on the same date.

[36] The company's conduct which amounted to a fundamental breach going to the root of the contract of employment with the claimant in this case, resulted in a successful claim of constructive dismissal and as such, the claimant has succeeded in proving that she was dismissed by the company from her employment by way of constructive dismissal.

[37] It is now upon this court to make a further finding as to whether the dismissal of the claimant from her employment amounted to one without just cause or excuse. This court finds that the company's conducts in reneging its earlier assurance that the claimant can work from home for the duration of her pregnancy and the company's conduct in forcing the claimant to work physically in the office despite the claimant's doctor's advice was calculated to seriously damage the relationship of confidence and trust between the claimant and the company. The company's subsequent conduct of pressuring the claimant to tender her resignation to the extent of even preparing the termination letter and the pay cheque without even properly discussing and communicating with the claimant especially even after knowing that the claimant was pregnant at that time are exceedingly undesirable conduct of the company. The company's conduct also reveals unfair labour practice that should have been wholly avoided. In view of all the findings of this court herein, the company's contention be it through the company's solicitors' letter or through the evidence of its witnesses that the claimant had abandoned her employment in the company however must necessarily fail and far from it, the company's conduct has resulted in the dismissal of the claimant from her employment in the company in an unjust and unfair manner.

[38] Pursuant to s. 30(5) of "the Act" and guided by the principles of equity, good conscience and substantial merits of the case without regard to technicalities and legal forms and after having considered the totality of the facts of the case, the evidence adduced and by reasons of the established principles of industrial relations and disputes as stated above, this court finds that the company had failed to prove on the balance of probabilities that the dismissal of the claimant was with just cause or excuse. This court now finds that the claimant has been dismissed without just cause or excuse.

Remedy

[39] This court having ruled that the claimant was dismissed without just cause or excuse, will now consider the appropriate remedy for the claimant.

[40] According to the letter of appointment dated 1 April 2019, the claimant's effective date of employment with the company commenced on 1 July 2019. The claimant was dismissed from her employment with the company on 1 October 2021. Thus, the claimant has served the company for a period of two full years of service. There is no dispute that the claimant was a confirmed employee of the company.

[41] The claimant, in stating that her dismissal from employment with the company was without just cause or excuse, prays to this court for reinstatement to her former position in the company without any loss of wages and other benefits. Considering the factual matrix of this case, amongst other where the claimant claimed constructive dismissal under a very undesirable condition and thereafter the claimant has found a new employment in June 2022 with a salary of RM6,000 per month which salary is the same amount the claimant was paid by the company being her last drawn salary, it is this court's view that reinstatement of the claimant to her former position in the company is not a suitable remedy in the circumstances of this case.

[42] As such, the appropriate remedy in the circumstances of this case must be compensation *in lieu* of reinstatement. The claimant is also entitled for backwages in line with s. 30(6A) of "the Act" and the factors specified in the Second Schedule therein which states:

> 1. In the event that backwages are to be given, such backwages shall not exceed twenty-four months' backwages from the date of dismissal based on the last-drawn salary of the person who has been dismissed without just cause or excuse;

[43] The claimant's last drawn salary was RM6,000 per month.

[44] Equity, good conscience and substantial merits of the case without regard to technicalities and legal forms remains the central feature and focal point of this court in arriving at its decision and these principles will be adhered to by this court at all times leading to the final order of this court.

[45] This court is further bound by the principle laid down in the case of *Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor* [2001] 3 CLJ 541 where His Lordship Justice Steve Shim CJ (Sabah & Sarawak) in delivering the judgment of the Federal Court opined:

> In our view, it is in line with equity and good conscience that the Industrial Court, in assessing quantum of backwages, should take into account the fact, if established by evidence or admitted, that the workman has been gainfully employed elsewhere after his dismissal. Failure to do so constitutes a jurisdictional error of law. *Certiorari* will therefore lie to rectify it. **Of course, taking into account of such employment after dismissal does not necessarily mean that the Industrial Court has to conduct a mathematical**

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> **exercise in deduction.** What is important is that the Industrial Court, in the exercise of its discretion in assessing the quantum of backwages, should take into account all relevant matters including the fact, where it exists, that the workman has been gainfully employed elsewhere after his dismissal. This discretion is in the nature of a decision-making process.

B

(emphasis added)

[46] This court must take into account the post-dismissal earnings of the claimant in order to make an appropriate deduction from the backwages to be awarded. As stated earlier, the claimant had given evidence that in June C 2022, the claimant had found new employment with a salary of RM6,000 and this post-dismissal earnings will be taken into account by this court when making the order for the appropriate sum of money to be paid by the company to the claimant.

[47] Having considered all the facts of case on the appropriate sum to be D awarded and after taking into account of the post-dismissal earnings or income of the claimant, this court hereby orders that the claimant be paid one month's salary of the last drawn salary of RM6,000 for every year of service completed totalling two years and backwages of the last drawn salary of RM6,000 for nine months. This will amount to:

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(i) backwages ordered:

RM6,000 x 9 months = RM54,000.

(ii) compensation *in lieu* of reinstatement:

RM6,000 x 2 months = RM12,000.

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[48] Total amount ordered by this court: RM66,000.

Final Order Of This Court

[49] It is this court's order that the company pays the claimant a sum of G Ringgit Malaysia Sixty-Six Thousand (RM66,000) only less statutory deduction (if any) within 30 days from the date of this award.

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