IN THE INDUSTRIAL COURT OF MALAYSIA

CASE NO: 7/4-1435/22

BETWEEN

KRISHNAVEENI A/P K SELVAM

AND

MALAYSIAN GERMAN CHAMBER OF COMMERCE AND INDUSTRY

AWARD NO: 856 OF 2025

BEFORE : **Y.A. PUAN VANITHAMANY SIVALINGAM** - **Chairman**

VENUE : Industrial Court of Malaysia, Kuala Lumpur.

DATE OF REFERENCE : 11.10.2022.

DATE OF MENTION : 07.11.2022.

DATES OF HEARING : 12.09.2023 (P.H), 01.12.2023 (P.H), 08.12.2023 (P.H), 20.05.2024 (P.H.), 05.06.2024 (P.H), 06.06.2024 (P.H), 01.10.2024 (P.H) & 02.10.2024.

REPRESENTATION :

Mr. Balasubrameniam Selvam together with
Ms. Kanimoli Ammaal Subramaniam and
Ms. J. Pavitra
Messrs. Sothi Bala & Associates
(Counsel's for the Claimant)

Ms. Gene Tan together with Ms. El Cheah
Messrs. GM Tan & Co
(Counsel for the Company)

REFERENCE

This is a reference by the Director General of Industrial Relations to this Industrial Court under Section 20(3) of the Industrial Relations Act ("The Act") for an award in respect of the dispute arising out of the alleged constructive dismissal of **KRISHNAVEENI A/P K SELVAM** ("the Claimant") by her employer, **MALAYSIAN GERMAN CHAMBERS OF COMMERCE AND INDUSTRY** ("Company").

This Court takes cognizance of the following bundles, statements, submission and cause papers filed;

DOCUMENTS IN COURT FILES

I. Statement of case dated - 06.12.2022

II. Statement of reply dated - 09.01.2023

III. Rejoinder dated - 14.02.2023

IV. Claimant's Bundle of Document - (CLB1, CLB2, CLB3)

V. Company's Bundle of Document - (COB1, COB2, COB3)

VI. Witness Statement of the Claimant - KRISHNAVEENI A/P K SELVAM (CLWS1A, CLWS1B)

VII. Witness Statement of the Company - DANIEL BERNBECK (COWS1)

VIII. Witness Statement of the Company - SUSAN LI (COWS2)

IX. Witness Statement of the Company - DR EVA LANGERBACK (COWS3)

X. Witness Statement of the Company - SHARIFUDIN SIDEK (COWS4)

XI. Company's Written Submission dated - 09.12.2024

XII. Claimant's Written Submission dated - 09.12.2024

XIII. Company's Written Submission in Reply dated - 09.01.2025

XIV. Claimant's Written Submission in Reply dated - 09.01.2025

XV. Company's Bundle of Authorities

XVI. Claimant's Bundle of Authorities

The Claimant alleged that her employment was brought to end by way of constructive dismissal by the Company on 25.1.2022.

THE CLAIMANT'S CASE

[1] The Claimant entered into a contract of service ("contract') with the Company commencing from 1.9.2005 as a Receptionist with the starting salary of RM1,150.00. At the time of dismissal, the Claimant's position was Administrative Assistant, and her last drawn salary was RM2,317.50. The Claimant averred that the alleged dismissal took place due to the conduct of the Company placing the Claimant under Personal Improvement Plan ("PIP") and series of displeasure and unfair treatment by the Head of Human Resource of the Company, Ms. Susan Li ("COW2"). The Claimant averred that she had an untainted record of service with the Company for 17 years. During the Movement Control Order ("MCO"), the Claimant had been working from home since 18.3.2020. The Claimant also received an increment of RM130.00 for the year assessment 2020/2021.

[2] COW2 joined the Company in 2019 and since then COW2 had some displeasure with the Claimant. The Claimant alleged that COW2 had humiliated the

Claimant in a private meeting. COW2 also had made some hurtful and insulting racial slur statement towards the Claimant.

[3] The incidents that led to the alleged resignation of the Claimant were;

i) The Claimant was not subjected to any physical supervision for assessment of work performance during the MCO, all works were monitored by remote technology methods and any query of works are made once in every Two(2) Weeks;

ii) The Work From Home ended in April 2021, and the Claimant requested to work from 9am till 4pm from Monday till Friday. The Claimant requested the Company to allow her child to be presented in the office with her as the Claimant was unable to secure any babysitter. The Company approved her request. However, COW2 was unsatisfied with the Claimant bringing her child to office quoting that the staffs were not happy to see her child in the office during Covid-19;

iii) COW2 had made unwarranted remark and racial slur stating to the Claimant *'why Indians are so fat'.* COW2 also raised her voice at the Claimant;

iv) In September 2021, COW2 oppressed the Claimant without anyone noticing it;

v) In December 2021, the Claimant had knee problem and sought medical treatment with modern and traditional medical practitioners. COW2 starts finding fault in the work that does not fall within the Claimant's job scope and framed the Claimant for the delay in processing a contract at document;

vi) In 2021, the Claimant was instructed to arrange books to purposely humiliate the Claimant. COW2 did not warn the Claimant about the poor performance of the Claimant, however placed the Claimant in the PIP;

vii) On 12.1.2022, COW2 informed the Claimant that she was placed in PIP which frustrated the Claimant and finally the Claimant resigned on 25.1.2022.

[4] The Company made demands from the Claimant vide letters 26.1.2022, 28.1.2022 and 31.1.2022. The Claimant alleged that the Company showed the '*white supremacy'.* The Claimant alleged that the Claimant was targeted, harassed, bullied and oppressed for without a legitimate reason to get rid of her from employment.

THE COMPANY'S CASE

[5] The Company averred that the objective of placing the Claimant under the PIP was to afford the Claimant with reasonable opportunities to enhance her work performance, attain work goal and overcome her work obstacle and to give the Claimant a platform to do so under the guidance and supervision of COW2. The

Company further averred that the allegation of displeasures and bad treatment by COW2 is baseless, untrue and a twist of positive environment under the Company.

[6] The Claimant is undergrounded in alleging malafide, frivolous and vexatious against the Company when she participated in all the Company's past performance plans and evaluations about her work performance. Throughout the tenure, the Claimant never raised any complaints or objections against COW2 with regards to how she handled and assessed the Claimant's work performance. The Company states that the Claimant has been giving her guidance and has closely worked with the Claimant to meet her deadlines and duty requirements with the team and the Company's members.

[7] Before the Claimant was placed in PIP, she was served with warning letters with regards to extreme high record of utilization of emergency leaves for year 2015 and first quarter of 2016 without evidence. There were meetings held between the Claimant and former Acting Deputy Head of Administration, Ravannia K, for the Claimant's poor performance of her daily tasks. The Claimant failed to attend the renewal license with Dewan Bandaraya Kuala Lumpur ("DBKL") for year 2021. The Claimant also poorly performed in year 2018.

[8] The Company averred that the PIP was given to the Claimant in year 2022 and not during the recovery period of 2021. The Company disputes all the allegations that the Claimant leveled against COW2. COW2 is a professional and did not show any displeasure towards the Claimant at any material times. Placing the Claimant under PIP was the Company direction and were professional based. It was COW2 who

proposed a salary adjustment for the Claimant effective from 2019. Furthermore, COW2 had arranged for the Claimant for virtual training in Office Administration to assist the Claimant with the improvement of her performance. COW2 entrusted the Claimant with access of petty cash to ease the Claimant's management in purchasing fruits and groceries for the Company. It was the first time the Company entrusted the Claimant with any cash. The Company never received any complaint from the Claimant with regards to these allegations.

[9] The Company's Employment Handbook Article 15(3), (4) & (5) acknowledged receipt by the Claimant which states that racism would not tolerate to any extent by the Company. It is illogical for the Claimant to state that COW2 had jeopardized the Claimant's career by engaging into some sort of racist statement, conduct and practice. There were no complaints about humiliations, hurtful treatment and insulting racial slurs thus far. The Company averred that there was no breach of by the Company.

[10] Prior to the PIP, the Claimant received yearly physical work performance assessment in 2018 and 2019. Around 2020, the Company issued a Remote Work Policy to all employees due to the MCO. The Claimant accepted that she was also required to evidence responsible behavior when she was working from home. During the MCO and RMCO, the Claimant together with her colleague Mashitah Mat Yasin ("Mashitah") to work from office but in a shared rotation basis each week. On 22.12.2021, COW2 emailed the Claimant to update the Claimant that she could work fully in the office from January 2022. The Company resumed its review of the Claimant's work performance assessment by conducting the PIP for the period of

12.1.2022 to 11.4.2022 and there was no friction between the Claimant and COW2 during the assessment period.

[11] The Company recorded issues regarding the Claimant's work performance from March 2020 until October 2021;

i) Inability to meet work expectations in SOP standards, supplier's management and cost management;
ii) Failure to attend the renewal license with DBKL;
iii) Delay in submitting time sheet. The Claimant submitted the time sheet on 2.2.2021 when re deadline was on 29.1.2021;
iv) Failure to adhere to the leave application for Admin Team;
v) Delay in submitting weekly reports.

[12] No employees brought their children to work except the Claimant. There was no dissatisfaction with COW2 when the Claimant brought her child to work, in fact it was COW2 who obtained necessary approval for the Company to allow the Claimant to bring her child to work. COW2 had proposed that Room 1 to be used to place the Claimant's child as it was the nearest room to the Claimant's workstation. The Company avers that the Claimant's entire case against the Company was based on her personal bias as well as subjective reactions against COW2 despite her supervision and guidance of her work throughout 2019 to 2022.

[13] The Claimant's knee problem is irrelevant to the case as it is not employment related injury. However, COW2 had advised the Claimant to apply for leave so that the

Company could make the necessary arrangements on the Claimant's work. The Claimant was reminded to be diligent in her work. The Claimant has been disloyal to the Company by engaging in another second business where she ran catering kitchen business called "Veenilicious Kitchen" sharing photos of her orders and cooking which caused delay and turn over a late submission of her weekly report.

[14] Dr. Eva oversees the legal assignments and duties of the Company, she served mainly as the Deputy Director of the Company. The contract referred to by the Claimant was all under the Claimant's duty to extend and attend the renewal of the maintenance service contract and coordinate with the supplier on software and hardware of the telephone systems. Further handling the Company's books was part of the Claimant's job description which was stated in the Job Description of 'Handling MGCC Library Books'.

[15] The Company sent a legal letter of demand as a legal resource to remedy and recover from the Claimant's willful and deliberate abandonment of her employment and the demands are based on the offences and Claimant's breach of confidentiality and privacy. The Company demanded the Claimant to return the Company's petty cash amounting to RM 300 and the racing Surge Chair and a keyboard with a mouse. The Company avers that the Claimant breached Section 8 of the Contract of Employment, the Employee and Trainee Privacy Declaration, Article 17 of the Employment Handbook and Article 4.5 (Prohibited Usage) and 4.7.2 (Email Confidentiality) of the Company's Employment Handbook. The Company disputes vehemently the allegation of 'white supremacy' within its organization.

[16] The Company avers that as the employer of the Claimant, it has the right to ask the Claimant to enter any training, monitoring and guidance review so long as it does not breach the fundamental term of the employment contract. Although the Claimant was within her right to resign, she still committed breach of the employment contract when she refused to return to work to serve her contractual notice period.

THE ISSUES

[17] The burden of proof is on the Claimant to establish whether the Company had breached a fundamental term or terms of the contract of employment or whether there was a repudiation of an express or implied term of the contract entitling her to consider herself constructively dismissed.

[18] The issue for the Court to consider now is whether the Claimant was forced to resign and whether the said dismissal was with or without just cause and excuse.

THE LAW

[19] ***WONG CHEE HONG v. CATHAY ORGANISATION (M) SDN BHD [1987] 1 MELR 32***, where it was held:

> *"Constructive dismissal it has been said is likened to "a double-edged sword". The reason for resigning it is said should be such that at it affects the important fundamentals of his terms and conditions of service, or the employer's action was such that no reasonable employee could tolerate such an action. It is*

important that there is no condonation on the part of the employee. This is because any failure on the part of the employee to ensure these two conditions are fulfilled may result in his resignation not meeting the criteria for constructive dismissal and result in his claim being dismissed by the Court".

[20] The burden of proof is on the Claimant to establish that she had been dismissed as held in the case of ***WELTEX KNITWEAR INDUSTRIES SDN BHD v. LAW KAR TOY & ANOR [1998] 4 MLRH 774; [1998] 7 MLJ*** 359 it was held that:

"Next is the burden of proof on the issue of forced resignation raised by the 1st 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 and excuse. Therefore, if the 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".

[21] In the case of ***TELEKOM MALAYSIA KAWASAN UTARA v. KRISHNAN KUTTY SANGUNI NAIR & ANOR (2002) 1 MELR 4*****,** it was held that the standard of proof that is required to prove a case in Industrial Courts is that of balance of probabilities where his Lordship went on to say that;

*" 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 HWR Wade & CF Forsyth offers the clearest statement on the standard of proof required, that is 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 decisio*n *is automatically rendered bad in law."*

[22] Reference is made to the case of ***WELTEX KNITWEAR INDUSTRIES SDN BHD v. LAW KAR TOY & ANOR [1998] 4 MLRH 774; [1998] 1 LNS 258,*** where the High Court held that if the dismissal is disputed, the burden of proof rests on the Claimant to show on balance of probabilities that he had been dismissed by her employer. See also ***TUNG SHIN HOSPITAL v. LEW CHEE HONG (1998) 2 MELR 309,*** where it was held that;

"As the Claimant pleaded that she was forced to resign, the onus of proof rests on her."

[23] The Court's task is to decide whether the Claimant's resignation was procured by an alleged threat or any other circumstances whereby the Claimant's own volition had been compromised. The Court is mindful that the burden of proof is upon the Claimant to establish on balance of probabilities, that the resignation letter which was sent by the Claimant was tainted with coercion in nature.

[24] The principle of forced resignation was distinctly established in the case ***HARPERS TRADING (M) SDN BHD BUTTERWORTH v. KESATUAN KEBANGSAAN PEKERJA - PEKERJA PERDAGANGAN (1988) 2 MELR 167*****,** where it was held that;

> *"It is a well-established principle of industrial law that if it is proved that an employer offered the employee the alternative of "resign or be sacked" and, without anything more, the employee resigned, that would constitute a dismissal. The principle is said to be one of causation - the causation being the threat of the sack. It is the existence of the threat of being sacked which causes the employee to be willing to resign. But where that willingness is brought about by some other consideration, and the actual causation is not so much the sacking but other accepted considerations in the state of mind of the resigning employee, then it has to be said that he resigned voluntarily because it was beneficial to him to do so, that then there has therefore been no dismissal."*

[25] In the case of ***KUALA LUMPUR GLASS MANUFACTURERS CO. SDN BHD v. LEE POH KENG (1995) 1 MELR 921*****,** it was held that;

"It will be clear that the underlying basis of the doctrine of 'forced resignation' is the existence of facts showing that an employee was put under compulsion to resign, and that if he declined to do so, the employer would proceed to dismiss him in any event. There might be disclosed in the evidence elements of persuasion; for example, that it would be better for the plaintiff to resign with a record unblemished by a dismissal, or even the provision of a favorable, or at least neutral, letter of reference to prospective employers.

"It appears that the set of circumstances in which an employee leaves his employment which would constitute a 'forced resignation' might equally be held to constitute, and has been described as, an 'indirect dismissal' by industrial tribunals. In ***BBC Brown Boveri Sdn Bhd v. Yan Hock Heng [1990] 2 MELR 92; [1990] 2 ILR 2*** *the Court, in holding that there had been an 'indirect dismissal' of the claimant, cited with approval a passage from* ***'The Law of Redundancy' by Cyril Grunfeld (3rd Edn) at p 110*** *as follows:*

> *"Indirect dismissal is not a special term of art. I am using the phrase to distinguish cases of termination by the employer in which, while he has not dismissed directly, he has also not broken the contract (or otherwise behaved) so as to justify constructive dismissal. Some important kinds of dismissal for redundancy take this form and it is useful to emphasis their character as dismissals by the employer. The most obvious kind of indirect dismissal is where the employer invites the employee to resign in circumstances in which it is clear that, otherwise, the employee will in any case be dismissed. The precise formulation by the employer is*

immaterial whether it be invitation, request or dictation so long as the substance of it is that the employer places his employee in a position in which the employee really had no option but to tender his notice. In such a situation the reality is... that the employee is dismissed".

[26] The test to be applied for a Claimant in the Industrial Court to prove constructive dismissal has been set out by the Supreme Court in ***WONG CHEE HONG v. CATHAY ORGANIZATION (M) SDN BHD [1987] 1 MELR 32*** where the Court held that:

"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 to 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) 55(2) of the UK Protection of Employment Act 1978 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 relations. Such a proposition was rejected by the Court of Appeal. What is left of the expression is now no more than the employee's right under common law, which we have stated earlier and goes no further. Alternative expressions 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."

[27] Further, in determining the issue of constructive dismissal, the contract test is applicable rather than the test of reasonableness. In the case of ***ANWAR ABDUL RAHIM v. BAYERN (M) SDN BHD [1997] 1 MELR 50*****,** the Court reaffirmed the contract test in constructive dismissal case and stated as follows:

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

[28] Further, refer to the case of ***HOMD ISA SA'UDE v. AFFIN-ACF FINANCE BERHAD [2010] 5 MELR 221*****,** which held that:

"From the chain of events as stated in the above background facts and based on the evidence of the Claimant's witnesses and the Company's witnesses, it is clear that the Court has to determine the following prerequisites in order to decide whether the Claimant was constructively dismissed".

[29] The test to determine whether the Claimant was constructively dismissed or not is whether:

i) whether there was a breach of the term of the contract by the Company or the Company had evinced its intention not to be bound by the contract,

ii) whether the breach is a fundamental one which goes to the root of the contract;

iii) whether the Claimant left the employment pursuant to the said breach;

iv) whether the Claimant left the employment at an appropriate time soon after the breach.

COURT'S EVALUATION AND FINDING

[30] Where there is no formal dismissal, but there was a conduct on part of the employer which makes a workman consider that she has been dismissed without just cause or excuse, such conduct is termed as 'constructive dismissal'. Just because a workman decided one day to leave the Company or her employment, it does not mean she was forced to leave the employment. The employer's conduct, although not the legal test for constructive dismissal, the Courts can take into account to determine if there was any fundamental breach of the contract of employment. See the case of ***TAN LAY PENG v. RHB BANK BERHAD & ANOR (2024) 5 MLRA 171*.**

[31] In the case of ***KERETAPI TANAH MELAYU BERHAD v. VYTHIALINGAM & ANOR AND ANOTHER APPEAL (2023) 3 MLRA 722*,** the Court of Appeal affirmed ***Wong's case*** and stated that;

"the test for constructive dismissal as it stands is a test on contractual breach rather than unreasonableness. Further, where the workman's claim for

reinstatement is based on constructive and not actual dismissal, the onus of proving that he has been constructively dismissed lies on the workmen himself."

[32] Based on the aforesaid principle, in order to establish a case of constructive dismissal, the Claimant must prove the test reiterated in the case of **VYTHIALINGAM***.* The case of ***WONG CHEE HONG v. CATHAY ORGANIZATION (M) SDN BHD [1987] 1 MELR 32*** had stated that

"Constructive dismissal it has been said is likened to "a double-edged sword". The reason for resigning it is said should be such that at it affects the important fundamentals of his terms and conditions of service, or the employer's action was such that no reasonable employee could tolerate such an action. It is important that there is no condonation on the part of the employee. This is because any failure on the part of the employee to ensure these two conditions are fulfilled may result in his resignation not meeting the criteria for constructive dismissal and result in his claim being dismissed by the

[32] In the case of ***QUAH SWEE KHOON v. SIME DARBY BHD (2000) 2 AMR 2265***, the Court of Appeal ruled that a claim for constructive dismissal may also succeed in a situation where if it's proven that the employer's cumulative conduct, viewed collectively, they had breached the implied terms governing mutual trust and confidence between the employer and employee.

[33] In the case of ***PETROLIAM NASIONAL BERHAD v. NORAIN RADZKIAH OSMAN SALLEH & ANOR (2023) 1 LNS 1071*****,** it was held by the Court that the

Company need to establish the test in order to prove poor performance on part of the Claimant.

[34] The Company claimed that it was not reasonable for the Claimant to allege that she did not have knowledge of her non-performance and her placement in PIP. The Company submitted that the Claimant should have had the knowledge that she would be placed in PIP as she was performing poorly. The Company impliedly stated that the Company was not obligated to warn the Claimant that she will be placed in PIP if the poor performance continues. The Company submitted that there was no evidence adduced by the Claimant to prove that the PIP was unjustified and malafide. The Company contend that the PIP was done professionally as guidance to the Claimant to improve her performance.

[35] The first allegation was that there had been numerous reminders with regard to the Claimant's work performance and failing to submit the report by the deadlines. However, none of the reminders constitutes as warning to the Claimant. There were merely reminders, and it is unreasonable for an employee who served the Company for 16 years to expect to be placed under PIP in the absence of a warning. The Claimant claimed that she was employed in the Company for 16 years and 4 month and had no issues of poor performance until COW2 joined the Company in 2019. According to the Claimant, it was COW2 who nitpicked on the Claimant. The Company on the other hand, submitted that the Company had warned the Claimant of her poor performance, refer to ***page 40 & 41 of COB1.*** The evidence led by the Company at ***page 40 of COB1,*** was with regards to the Claimant's attendance and not performances, furthermore this letter was dated 5.4.2016 which has nothing to do with

the PIP placement in 2022. The Claimant's signature was found on **page 40 and not on 41 of the COB1**. The Performance Evaluation for the year 2018 was rated as 'Meet Expectation'. As the COW1 stated, the issue of the Claimant's poor performance started after COW2 joined the Company. The Company never led any evidence that it has conducted PIP for any of its employees thus far. So, it is unreasonable for the Company to argue that the Claimant was expected to be placed under PIP since only reminders were sent to her.

[36] The second allegation was that the Claimant could not focus on her work because of her catering business. During the cross examination, it was asked to COW2 if she knew that the Claimant was doing the catering business and had delivered food to the Company functions. COW2 answered affirmatively. COW2 stated that the catering business had affected the performance which caused the Claimant failed to focus on the work completely. The Claimant was alleged to have been cooking for her catering business during office hours, however, COW2 failed to mention the exact time the incident took place. COW2 was aware that the Claimant had cooked food for the Company's Deepavali lunch on 1.11.2019 and COW2 admitted that she was aware of the fact that the Claimant was doing catering. The Company never raised this as a complaint to the Claimant until she was constructively dismissed. From the COW2's testimony, it is obvious that the Company was aware of the Claimant's catering business and had no objection to it. The Company raised this as a complaint after the Claimant had resigned. The Company never brough to the Claimant's attention nor did they complained that the issue of poor performance was caused by the Claimant running her catering business until the Claimant left the employment.

[37] The third allegation was that the Claimant left the office to the stationery shop without informing COW2. A WhatsApp message was submitted in Court as evidence to prove that the Claimant left the office without informing COW2. However, this Court noticed that COW2 did not raise this as a complaint to the Company. There were hiccups between COW2 and the Claimant ever since COW2 joined the Company, it is clear from the evidence. COW2 had on another occasion admitted that purchasing stationeries was part of the Claimant's duty. In the cross examination, the Claimant's counsel asked if COW2 had complained to the other staff about the same, COW2 stated that it was the other staff's duty to go to the stationery shop and not the Claimant's. The Company did not adduce evidence to prove their version of the story. The Court cannot accept the Company's argument that the relationship between Claimant and COW2 was smooth all these while as the Claimant had raised her concerns about COW2 to the Company prior to her resignation.

[38] There are times when a particular upper ordinate steps in as the employee's superior and it can be said that the monitoring /supervision goes out of hand or a bit too much until the employee feels that she/he has been targeted to get rid of the employment. It may be the case sometimes, however most of the time, it is genuine supervision. The Court can only decide this on a case-to-case basis from the conduct of the Company.

[39] This Court noticed that the allegations that the Company raised against the Claimant were never brought to the Claimant's attention nor was the Claimant warned of the poor performance. There was no performance review for the year 2021 done. Furthermore, COW2 admitted that the Claimant had complained about COW2 in the

Company's Feedback box. The PIP was drafted by COW2, the very person that the Claimant had complained about. The act of the Company giving authority to COW2 be in charge the PIP program does not seem to be fair and reasonable for the Claimant. COW1 agreed that the issue of poor performance arose after COW2 joined the Company although COW1 made it clear that COW2 was not responsible for Claimant's constructive dismissal.

[40] Prior to COW2's arrival in the Company, there was no warning letter served to the Claimant, no complaints about her work performance except a reminder that was served on the Claimant in year 2016 with regard to her attendance and not performance. To this Court, placing the Claimant to the extent of placing the Claimant in PIP, without a proper warning served on the Claimant with regards to the allegation of poor performance and without a proper Performance review for 2021 is malafide.

[41] The Company averred that the Claimant did not protest to the PIP. COW1 agreed that the issue of performance arose during COW2's tenure, however no suggestion that COW2 was the reason for the Claimant's constructive dismissal. COW1 further stated that the principle of SMART was introduced by COW2 in the Company which was supposed to be used for the performance review, however, there was no performance review done for the Claimant prior to the Claimant being placed under PIP. According to the Claimant, if the SMART was not met, it would lead to PIP however, the SMART was not mentioned in the PIP. COW1 also stated that PIP was not the final warning.

[42] Although the Company alleged that there was an unauthorized transfer of confidential customer's date to the Claimant's personal email, there was no police report made by the Company to protect the datas from falling into the third party's hand. Further, no warning letters were sent to the Claimant with regard to this misconduct until after the Claimant tendered her resignation letter. There was no proof that the datas were shared with third party or that the Company had suffered any loss due to the Claimant's action. On the other hand, the Claimant did not show that she had obtained the Company's approval before sharing the private and confidential datas to her private email. Whether the Company suffered any losses or not is irrelevant. When the employees signed the confidential agreement, they are bound by the terms throughout the employment. However, the Company's conduct of not lodging any police report shows that transfer of the date was not a serious offence as the Company alleged.

[43] An increment was given to the Claimant for the year 2019. COW1 and COW2 had testified that an increment was given to the Claimant to cope with the inflation rate however ***page 56 of CPOB1,*** the salary increment letter did not state anything about the inflation rate. The letter goes *'We are pleased to inform you that effective for 1 December 2019, your monthly gross basic salary will be adjusted to MYR2,250.00. Thank you for your loyalty, contribution and dedication to the Chambers success. We look forward to your continuous efforts and commitment'.* The Claimant's counsel suggested that there was nothing in the letter which stated about the inflation rate and further stated that the increment was given to the Claimant for her performance. There was nothing written in the contract of employment which suggests that the increment

was automatic or contractual. In the absence of these terms, this Court could not agree more with the Claimant counsel's suggestion.

[44] In the case of ***THOMAS KURUVILLA v. MALAYSIAN DIGITAL ECONOMY CORPORATION SDN BHD*** **(Industrial Court award No 51 of 2021)** , the Industrial Court held that;

> *'Performance managers have a duty to ensure that an employee coming under their supervision is given adequate support and supervision in order for the employee to achieve the deliverables and KPIs. However, placing a very performing employee and in this case the Claimant, in a new setting within the Company without adequate support and assistance and thereafter suggesting that the Claimant is not performing well and needs improvement does not reflect that the Company had treated the Claimant well and fairly…'*

[45] According to COW2 there were other grievance procedures and mediums whereby the Claimant could have addressed her grievance. However, the Claimant chose to complain about COW2 in the feedback box which was not proper medium. This Court is of the view that, despite of the choice of medium chosen by the Claimant to address her grievance, it is obvious that the Claimant managed to bring to the Company's attention COW2's behavior towards the Claimant.

[46] The Company submitted that the only time the Claimant complained about the PIP was vide her letter of resignation. This Court views the Claimant allegation of '*white supremacy'* as a bare assertion as there was no evidence ever produced to

show that COW1 or COW3 had unfairly treated the Claimant. The Claimant was unhappy with COW2 particularly as her supervisor. This Court perceives that the allegation of '*white supremacy'* as an afterthought. This was not even mentioned in her resignation letter too. The Claimant had worked with the Company for 17 years and never raised this allegation except in her Statement of Case. COW2 also raised the issue of the Claimant working with the Company's competitor after she left the Company. This Court opines that the Claimant's post dismissal employment is not an issue to be raised unless the Company could prove there is malice in the conduct of the Claimant prior she leaving her employment, which is not the case.

[47] There have been complaints by the Company that the Claimant failed to return the game chair, keyboards, mouse and the cash of RM300 to the Company. However, the Company agreed that all these items were eventually returned to the Company by the Claimant. With regards to the claim of contractual notice period and payment in lieu, the Claimant had walked out from the employment due to constructive dismissal therefore there is no requirement for the Claimant has to serve the notice period.

[48] A claim for constructive dismissal may also succeed in a situation where if it's proven that the employer's cumulative conduct, viewed collectively, they had breached the implied terms governing mutual trust and confidence between the employer and employee ***(QUAH SWEE KHOON supra).*** There appear to be no warning been given to the Claimant except some reminders. Referring to the Claimant's resignation letter at ***page 14 of the CLB1,*** this Court is convinced that the employer has evinced or shown intention not to be bound by the contract of employment any longer. The Claimant had brought to the notice of the Company her grievance, her resignation was

because of COW2 placing her in PIP without a proper performance review and she left the employment at an appropriate time soon after the breach.

[49] The Federal Court had clarified and confirmed that the test for constructive dismissal is the "contract test" and not the "reasonableness test" in its most recent pronouncement in ***TAN LAY PENG v. RHB BANK BERHAD & ANOR [2024] 5 MLRA 171***, in answer to the leave question posed which was "*Is there a difference in the contract test or reasonable test in light of major developments in industrial jurisprudence?*" In answering the question posed the Federal Court declared as follows

> *" It is a trite principle of law in Malaysia that the applicable test in constructive dismissal cases is the contract test and not the reasonableness test. The contract test is whether the conduct of the employer, in its action or series of actions, constitutes a fundamental or repudiatory breach that goes to the root of the employment contract or where the employer has evinced an intention no longer to be bound by the express or implied terms of the contract. Constructive dismissal is where the employee claims that he has been dismissed due to the employer's conduct. This can be said as "deeming dismissal" by the employer. The burden is on the employee to prove, on the balance of probabilities, that he has been constructively dismissed."*

[50] In the case of ***SAHARUNZAMAN BARUN v. PERODUA SALES SDN BHD & ANOR AND OTHER APPEALS (2025] 2 MLRA 184*****,** it was held that;

“There is a difference between the contract test and the reasonableness test. The appropriate test for determining a constructive dismissal case is the contract test. The reasonableness of the employer's conduct is a factor that may be taken into consideration in determining whether there is any fundamental breach of the contract of employment or an intention no longer to be bound by the contract. When the Company's conduct is being challenged on grounds of unreasonableness, mala fide and for a collateral, colourable or oblique purpose, then the Company's action is open for scrutiny by the Court”.

[51] The ***Saharunzaman supra*** , it was also held that in analyzing and assessing if the conduct of the Company and the circumstances of the case justifying the transfer as being reasonable or otherwise, the context that triggers the transfer must be examined as a whole. That examination does not convert the "contract test" into the "reasonableness test". It is very much a "contract test" with the requirement of "reasonableness" built into it as part of the contractual term.”

[52] Further the Court of Appeal also held that;

“As to whether a breach of the agreed contractual requirement of "reasonableness" is one going to the root of the contract or one where the Company had evinced its intention not to be bound by the terms of the contract, that would very much be a finding of fact that ordinarily the Industrial Court would be best positioned to decide by taking into consideration all relevant factors and not taking into consideration irrelevant factors and asking the right questions and giving reasonable answers to the questions posed. One would

have to look at the proximate cause of the transfer and discern if it is proper or perverse in the context and circumstances of the case and the conduct of the parties."

[53] The Claimant was placed under PIP without proper performance evaluation and proper warning. Although the Company adduced the letter sent to the Claimant in 2016 as evidence to prove poor performance. This Court is of the view that it is irrelevant as it is related to attendance and it was in year 2016. This Court is convinced that the Claimant left the employment due to the conduct of COW2. The Company's conduct of placing the Claimant under the PIP was found to be malafide without proper evaluation and warnings. Therefore the Company was proven to have evinced its intention not to be bound by the contract.

DECISION

[54] Being 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 Claimant had proved on the balance of probabilities that the dismissal of the Claimant was without just cause or excuse. This Court now finds that the Claimant has been dismissed without just cause or excuse, therefore the Claimant's claim is hereby allowed by this Court.

REMEDY

[55] This Court having ruled that the Claimant was dismissed without just cause or excuse, will now consider the appropriate remedy for the Claimant. Therefore, the monetary award of compensation in lieu of reinstatement would be more suitable ***(KOPERASI SERBAGUNA SANYA BHD (SABAH) v. DR. JAMES ALFRED (SABAH) & ANOR [2000] 3 CLJ 758.*** This Court will thereby order compensation in lieu of reinstatement of one month salary for each year of completed service to the Claimant. For the calculation of the compensation this Court will take into account the salary of the Claimant being RM2,317.50.

[56] Therefore, this Court in computing the back wages for the Claimant will make post dismissal earning deductions as the Claimant had been gainfully employed after the dismissal.

Back wages of 12 month:

RM2,317.50 x 24 months	=	RM55,620.00
Post dismissal deductions of 30%	=	RM16,686.00

Compensation in lieu of reinstatement of one month pay for each year of service:

RM2,317.50 X 16 month	=	RM37,080.00
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TOTAL AMOUNT PAYABLE TO THE CLAIMANT	**=**	**RM76,014.00**
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[57] It is hereby ordered that the total sum of **RM76,014.00 (Ringgit Malaysia Seventy Six Thousand And Fourteen Only)** after statutory deductions if any, is to be paid by the Company to Claimant's solicitor Messrs Sothi Bala & Associates within 30 days from the date of this Award.

HANDED DOWN AND DATED THIS 03rd DAY OF JUNE, 2025.

-signed-

(VANITHAMANY SIVALINGAM)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR