

IN THE INDUSTRIAL COURT OF MALAYSIA

CASE NO: 4/4-2052/19

BETWEEN

CHAN YEONG SEN

AND

GAMUDA LAND (T12) SDN. BHD.

AWARD NO: 1622 OF 2020

BEFORE : Y.A. TUAN AUGUSTINE ANTHONY
Chairman

VENUE : Industrial Court, Kuala Lumpur.

DATE OF REFERENCE : 11.10.2019.

**DATE OF RECEIPT OF
ORDER OF REFERENCE** : 16.10.2019.

DATES OF MENTION : 12.11.2019, 19.12.2019, 16.01.2020,
27.02.2020, 17.08.2020, 01.09.2020,
08.09.2020.

DATES OF HEARING : 29.06.2020, 30.06.2020.

REPRESENTATION : Ms. Tan Yang Qian of Messrs Bodipalar
Ponnudurai De Silva, Counsel for the
Claimant

Ms. Syazwani Binti Suhaimy and Ms.
Teh Jovaynne of Messrs Zul Rafique &
Partners, Counsel for the Company

THE REFERENCE

This is an order of reference dated 11.10.2019 by the Honourable Minister of Human Resources pursuant to section 20 (3) of the Industrial Relations Act 1967 (“The Act”) arising out of the alleged dismissal of **Chan Yeong Sen** (“Claimant”) by **Gamuda Land (T12) Sdn. Bhd.** (“Company”) on the 16.04.2019.

AWARD

[1] The parties in this matter filed their respective written submissions dated 10.08.2020 (Claimant’s Written Submissions), 10.08.2020 (Company’s Written Submissions), 28.08.2020 (Claimant’s Submissions in Reply), and 02.09.2020 (Company’s Written Submissions in Reply).

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

- (i) The Claimant’s Statement of Case dated 26.11.2019;
- (ii) The Company’s Statement in Reply dated 06.01.2020;
- (iii) The Claimant’s Rejoinder dated 30.01.2020;
- (iv) The Claimant’s Bundle of Documents – CLB1;

- (v) The Claimant's Bundle of Documents (2) – CLB2;
- (vi) The Company's Bundle of Documents – COB1;
- (vii) The Company's Bundle of Documents (Volume 2) – COB2;
- (viii) Claimant's Witness Statement – CLW1-WS (Chan Yeong Sen);
- (ix) Company's Witness Statement – COW1-WS (Zazawati Binti Mat Zin); and
- (x) Company's Witness Statement – COW2-WS (Raja Nahdatul Sima Binti Raja Mohd Nor).

INTRODUCTION

[3] The dispute before this Court is the claim by Chan Yeong Sen ("Claimant") that she had been constructively dismissed from her employment by Gamuda Land (T12) Sdn. Bhd. ("Company") on the 16.04.2019 and that the dismissal was without just cause or excuse.

[4] The Claimant commenced employment as a Secretary with Valencia Development Sdn. Bhd. on the 03.12.2012. It is the Claimant's claim that Valencia Development Sdn. Bhd. is a subsidiary of Gamuda

Berhad and is under the same Gamuda group of companies as the Company herein. The Claimant claims that whenever a new project is undertaken by Gamuda Berhad, a new company will be set up to undertake such new project. The Company was set up by Gamuda Berhad for its new Gamuda Cove project in Dengkil. The Claimant reported to one Ngan Chee Meng who was at that time the Chief Operating Officer of the property group of companies under Gamuda Berhad. Sometime in January 2018, Ngan Chee Meng was promoted as the Chief Executive Officer (CEO) of the Company. The Claimant was then transferred to the CEO's office and she continued to report to Ngan Chee Meng. Around the period of April 2018, Ngan Chee Meng enquired as to whether the Claimant's workload was too demanding for her and the Claimant answered in the affirmative. Sometime in July 2018, Ngan Chee Meng informed the Claimant that he had arranged for the Claimant to be transferred to the Company's site office, the Gamuda Cove based in Dengkil and that pursuant to the transfer, the Claimant would now be reporting to one Wong Yik Fong who is the Company's General Manager. At that time when the Claimant was informed of this impending transfer, the site office in Dengkil was not ready and operational and thus the Claimant was based in Menara Gamuda , Damansara Perdana. The Claimant claims to have objected to this transfer as this transfer would cause the Claimant untold hardship and burden due to the long

travel distance from her new office in Gamuda Cove to her residence in Rawang which entails a travel distance of 60 – 70 Kilometers every day and will take between an hour to 90 minutes to commute. The Claimant also claims that in light of the transfer, her job nature, duties and functions had changed significantly and views this as the Company's attempt in undermining her position and effectively demoting her and humiliating her, which resulted in the Claimant tendering her resignation on the 16.04.2019. By this the Claimant claims that the actions and conduct of the Company had therefore breached the fundamental terms which include express and implied terms of the Claimant's contract of employment with the Company entitling the Claimant to claim constructive dismissal. The Claimant now claims that her dismissal from employment with the Company was without just cause or excuse and prays for reinstatement to her former position without any loss of wages and benefits.

[5] The Company on the other hand denies the claim of constructive dismissal by the Claimant and contends that when the Claimant joined Valencia Development Sdn. Bhd. she was duly informed that she will be subjected to transfer from one post to another or from one station to another within the said company or to any of the associate or subsidiary companies of the Gamuda group of companies whether in or outside of

Malaysia. Further in view of the Claimant's own reply that the workload was heavy, the Company made attempts to accommodate her by exploring other suitable roles in the Company. The Claimant however was not keen on the recommendation made by the Company. The Company was also prepared to accommodate the Claimant's concern on the travel distance by making adjustment to her salary to account for the increased travel distance. In view of the above the Company now contends that the Company had not engaged in any unfair labour practice, acts of victimisation or shown any mala fide intention in dealing with the Claimant. The Company further contends that the Claimant resigned from the Company on her own volition. It is also the Company's version that the Claimant had informed Ngan Chee Meng sometime in January 2019 after being informed of the transfer in July 2018 that she had the intention to look for another job near her house and had asked for Ngan Chee Meng's recommendation letter which the Claimant herself prepared for him to sign which he did so in good faith. The Company contends that the Claimant's claim of constructive dismissal on the basis that the Company had acted in breach of the express or implied terms of her contract of employment is without basis or merit.

[6] The Claimant gave evidence under oath and remained the sole witness for her case. The Company's evidence was led COW1

(Zazawati Binti Mat Zin who was the HR Business Partner of the Company at the material time and was responsible for providing back-end support and handling of all matters relating to HR operations) and COW2 (Raja Nahdatul Sima Binti Raja Mohd Nor who joined the Company on the 01.04.2019 and worked as the HR Senior Executive and responsible for providing back-end support and handling of all matters relating to HR operations).

THE CLAIMANT'S CASE

[7] The Claimant's case can be summarised as follows: -

- (i) The Claimant first commenced employment as a Secretary with Valencia Development Sdn. Bhd. on the 03.12.2012. She was then transferred Harum Intisari Sdn. Bhd.
- (ii) There is no dispute that the Claimant was a confirmed employee of the Company.
- (iii) The Claimant initially reported to one Ngan Chee Meng who was formerly the Chief Operating Officer of the property group of companies under Gamuda Berhad and the General Manager under the HQ centralized Finance Department. Subsequently

Ngan Chee Meng was promoted as the CEO of the Company and the Claimant continued to report to him.

- (iv) The Claimant's role was to provide secretarial and administrative assistance at all times. The Company raised no issues on the Claimant's performance at any time.
- (v) On or about 03.04.2018, Ngan Chee Meng enquired as to whether the Claimant's workload was too demanding for her which the Claimant answered in the affirmative.
- (vi) As Ngan Chee Meng had been promoted to the position of CEO, he had then informed the Claimant that his job scope had changed and thus had the intention of getting another secretary to assist him which the Claimant welcomed. However, there were no additional secretary who joined the CEO's office soon after the conversation between the Claimant and Ngan Chee Meng.
- (vii) On or about 26.07.2018, the Claimant was informed by Ngan Chee Meng that he had arranged for the Claimant to be transferred to the Company's site office known as Gamuda

Cove which is based in Dengkil and by the said transfer, the Claimant would now report to the Company's General Manager, Wong Yik Fong.

- (viii) Immediately the Claimant objected to the transfer as the transfer would cause untold hardship to the Claimant due to the long travel distance from the Claimant's residence in Rawang to the site office in Dengkil.
- (ix) The Claimant was transferred to the Company's General Manager's office effective 01.08.2018, however the Claimant continued working in the Company's office in Menara Gamuda, Damansara Perdana until such time that she needed to report for work in Dengkil.
- (x) In the General Manager's office, the Claimant had to undertake the responsibilities of coordinating the sales and marketing for the Company, personnel requisition and also be a Fixed Asset Representative for the Company. The Claimant was not required to perform these functions when working as the Secretary to the CEO.

- (xi) The Claimant's job functions drastically changed in the General Manager's office and it was difficult and overwhelming for the Claimant to adapt to these changes and familiarize with her new position without a proper hand over of the job.
- (xii) The Claimant was unhappy with this change in her job and function in the Company but nevertheless had to put up with it thinking it was only a temporary measure that could be resolved.
- (xiii) On 11.04.2019, the Claimant was officially notified by the Wong Yik Fong of her physical relocation to Gamuda Cove in Dengkil which was done in total disregard to the Claimant's objection raised previously.
- (xiv) The Company's conduct from the period of July 2018 to 11.04.2019 was a breach of the fundamental terms of the Claimant's employment contract and as such the Claimant could no longer put up with the Company's conduct and as such the Claimant with no other choice left tendered her resignation letter on the 16.04.2019.

- (xv) During the Claimant's feedback session with the HR on the 17.04.2019, the Claimant had to fill up the exit interview form wherein the Claimant recorded the reason being "**depressed job change**". The Claimant also wanted to add "**forced transfer**" but was advised against it.
- (xvi) The Claimant then claimed constructive dismissal on the 16.04.2019 and there was no delay in the Claimant doing so as the physical relocation of the Claimant to Gamuda Cove was only confirmed to take effect on the 11.04.2019.
- (xvii) The Claimant now claims that she had been dismissed without just cause or excuse and prays for reinstatement to her former position without any loss of wages or all benefits.

THE COMPANY'S CASE

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

- (i) The Company denies the claim of constructive dismissal by the Claimant.

- (ii) The Company contends that when the Claimant joined the Valencia Development Sdn. Bhd. she was duly informed that she will be subjected to transfer from one post to another or from one station to another within the said company or to any of the associate or subsidiary companies of the Gamuda group of companies whether in or outside of Malaysia.
- (iii) The Claimant reported to Ngan Chee Meng at all times until August 2018.
- (iv) Between 2013 to 2017 the Claimant had received bonuses and salary increment throughout her tenure as Secretary with the Company / Gamuda group of companies.
- (v) The Claimant had informed the Company through Ngan Chee Meng of her workload being heavy.
- (vi) By a letter dated 26.07.2018, the Claimant was informed of her transfer from the CEO's office of Gamuda Land (Botanic) Sdn. Bhd. to the General Manager's office of the Company located at Menara Gamuda , Damansara Perdana.

- (vii) By an email dated 27.07.2018, the Claimant was informed that she was to be transferred from the CEO's office to the General Manager's office of Gamuda Cove with effect from 01.08.2018. The Claimant was also notified that an amount of RM200.00 will be allocated to her as an adjustment to her salary due to the transfer.

- (viii) By a letter dated 31.07.2018, the Claimant raised her objections to the transfer from Menara Gamuda , Damansara Perdana to Gamuda Cove in Dengkil due to the travel distance and the RM200.00 salary adjustment not being sufficient to cover her daily travelling expenses. The Claimant claimed that the travelling expenses with Toll charges would amount to RM 600.00 a month. The Claimant gave the Company until 01.08.2018 to respond to her letter of objection.

- (ix) The Company promptly responded to the Claimant's letter dated 31.07.2018 with the Company's email dated 01.08.2018 giving reasons why the transfer to Gamuda Cove needed to proceed as planned.

- (x) Thereafter the Claimant reported to work in the General Manager's office at Menara Gamuda, Damansara Perdana effective 01.08.2018. At the time of the Claimant's resignation from the Company, the Claimant had not yet been physically relocated to the site office in Gamuda Cove.
- (xi) By a letter dated 19.12.2018 on salary review and bonus for year ending 2018 the Claimant received salary adjustment and bonus.
- (xii) The Company further states that the Company made attempts to accommodate the Claimant by exploring other suitable roles in the Company however the Claimant was not keen on the recommendation made by the Company.
- (xiii) The Company was also prepared to accommodate the Claimant's concern on the travel distance by making adjustment to her salary to account for the increased travel distance.
- (xiv) In view of the above the Company now contends that the Company had not engaged in any unfair labour practice, acts of victimisation or shown any mala fide intention in dealing with the Claimant.

- (xv) The Company further states that the Claimant resigned from her employment with the Company on her own volition.
- (xvi) The Company states that the Claimant had informed Ngan Chee Meng sometime in January 2019 after being informed of the transfer in July 2018 that she had the intention to look for another job near her house and had asked for Ngan Chee Meng's recommendation letter which the Claimant herself prepared for him to sign which he signed in good faith.
- (xvii) The Company now contends that the Claimant's claim of constructive dismissal on the basis that the Company had acted in breach of the express or implied terms of her contract of employment is without basis or merit.
- (xviii) The Company now prays that the Claimant's case be dismissed.

THE LAW

Role and function of the Industrial Court

[9] The role of the Industrial Court under section 20 of the Industrial Relations Act 1967 is succinctly explained in the case *Milan Auto Sdn.*

Bhd. v. Wong Seh Yen [1995] 4 CLJ 449. His Lordship Justice Tan Sri Haji 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 ...”

[10] The above principle was further reiterated by the Federal Court in the case of ***K A Sanduran Nehru Ratnam v. I-Berhad [2007] 1 CLJ 347*** where the Court outlined the function of the Industrial Court:-

*“The main and only function of the Industrial Court in dealing with a reference under s. 20 of the Industrial Relations Act 1967 is to determine whether the misconduct or **irregularities** complained of by the management as to the grounds of dismissal were in fact committed by the workman. If so, whether such grounds constitute just cause and excuse for the dismissal.”*

The Burden of Proof

[11] When a Company had caused the dismissal of the workman, it follows that the Company must discharge the burden of proof that the dismissal is with just cause or excuse. This Court refers to the case of ***Ireka Construction Berhad v. Chantiravathan a/l Subramaniam James*** [1995] 2 ILR 11 to drive home this point:-

*“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.”*

The Burden of Proof in Cases of Constructive Dismissal

[12] The case of ***Weltex Knitwear Industries Sdn. Bhd. v Law Kar Toy & Anor*** [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 Dato' 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:** (emphasis is this Court's).*

[13] In view of the above case and anchored on the ground of constructive dismissal, it is now upon the Claimant to prove her case that she had been dismissed by way of constructive dismissal. The burden of proof thus had now shifted to the Claimant.

The Standard of Proof

[14] In the case of *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314* the Court laid down the principle that the standard of proof that is required is one that is on the balance of probabilities.

*“Thus in hearing a claim of unjust dismissal, where the employee was dismissed on the basis of an alleged criminal offence such as theft of company property, the Industrial Court is **not** required to be satisfied beyond a reasonable doubt that such an offence was committed. The standard of proof applicable is the civil standard, ie, proof on a **balance of probabilities** which is flexible so that the degree of probability required is proportionate to the nature and gravity of the issue.”*

The Law on Constructive Dismissal

[15] In *Wong Chee Hong v Cathay Organization Malaysia Sdn. Bhd.* [1998] 1 CLJ Rep 298/ [1988] 1 CLJ 45 his Lordship Tun Salleh Abas 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.....

.....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.”

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

- (i) by his conduct had significantly breached the very essence or root of the contract of employment or,
- (ii) that the employer no longer intends to be bound by one or more of the essential terms of the contract,

And if the employer demonstrates the above, then the employee is entitled to treat him/her 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.

[17] In the case of **Anwar Abdul Rahim v. Bayer (M) Sdn. Bhd.** [1998] 2 CLJ 197, the Court of Appeal further explained the ingredients of the constructive dismissal:-

*“To constitute a breach of implied term it is **not necessary to show that the employer intended any repudiation of the contract.** The tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, **judged reasonably and sensibly,** is such that the employee cannot be expected to put up with it. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed.*

Therefore the company's argument that there was a delay from 3 July 1989 to 23 October 1989 on the part of the claimant and therefore he now cannot raise those issues does not hold water.

*It is the court's view that the company will not, **without reasonable and proper cause,** conduct itself in a manner likely to damage the relationship of confidence and trust between the company and the claimant. (Emphasis added).*

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. Elizabeth 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."

[18] It must be further stated here that the Claimant's case being one of constructive dismissal, the Claimant must give sufficient notice to his/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)**.

[19] In the case of **Govindasamy Munusamy v. Industrial Court Malaysia & Anor [2007] 10 CLJ 266**, his lordship Justice Hamid Sultan Abu Backer had succinctly stated what a Claimant had 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.”*

[20] Having stated the law above, this Court will now move to the facts of this case for this Court’s 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

[21] It not disputed that the Claimant first commenced employment within the Gamuda Berhad group of companies known as Valencia Development Sdn. Bhd. The Claimant gave evidence that it has been the practice in Gamuda Berhad that a new company will be set up for

Gamuda Berhad's new projects. The Claimant's employment in Valencia Development Sdn. Bhd. took effect on the 03.12.2012. In the offer letter of employment dated 09.11.2012 which was accepted unconditionally by the Claimant on the 21.11.2012, one of the terms of employment relates to the transfer of the Claimant from within the Company, any associate or subsidiary companies of Gamuda Group of companies in Malaysia or outside of Malaysia. For convenience the transfer clause in the offer letter of employment is produced herein for convenience:-

"h) TRANSFER

At the discretion of the management, you are liable to be transferred from one post to another or from one station to another either within the Company or to any of the associate or subsidiary companies of the Gamuda Group of Companies in Malaysia or outside of Malaysia."

[22] By the above terms of the employment offer from Valencia Development Sdn. Bhd. the Claimant at the time of accepting the offer was even prepared to be transferred out of Malaysia if the Company wishes to exercise its discretion in doing so.

[23] Subsequent to the Claimant's employment in Valencia Development Sdn. Bhd. on 10.01.2013 , the Claimant was notified that

she will be transferred to another entity within the Gamuda Berhad group known as Harum Intisari Sdn. Bhd. The Claimant recorded no protest to this transfer. By another letter dated 26.07.2018, again the Claimant was notified that the Claimant will now be transferred from Gamuda Land (Botanic) Sdn. Bhd. to the Company (Gamuda Land T12 Sdn. Bhd.) based at Menara Gamuda in Damansara Perdana. The Claimant continued working for the Company until her resignation from the Company on the 16.04.2019.

[24] Subsequent to the letter dated 26.07.2018 relating to the transfer of the Claimant from Gamuda Land (Botanic) Sdn. Bhd. to the Company, the Claimant was notified by another email dated 27.07.2018 informing the Claimant that the Claimant will now be transferred to the Company's site office known as Gamuda Cove which is located in Dengkil effective 01.08.2018.

[25] The Claimant was very displeased with the notification from the Company on her transfer and relocation from the Company's office in Menara Gamuda, Damansara Perdana to Gamuda Cove in Dengkil. The Claimant was disappointed with the decision of the Company to transfer her to Gamuda Cove as the Claimant claims that the transfer was made unilaterally without the Claimant's consent or agreement. The

Claimant further gave reasons that the transfer would cause hardship to her. An inquisitive mind will become curious when a contemporaneous document being the Claimant's letter dated 31.07.2018 describing hardship is now amplified as untold hardship in the Statement of Case and the Claimant's Witness Statement filed herein in this Court.

[26] The untold hardship that will be suffered by the Claimant can be described by this Court in a nutshell after having analysed the Claimant's letter dated 31.07.2018. By this transfer to Gamuda Cove in Dengkil, it is the Claimant's version that the Claimant will now have to endure a daily commuting distance from her residence in Rawang to Dengkil that will be an additional 50 Kilometres away. The Claimant had to start the journey early in the day and travel home late at night which would be unsafe. The additional amount of RM200.00 allocated by the Company will not be enough to cover the Claimant's daily travelling expenses. The Claimant further states that the daily job location is a very important part of her employment and any drastic change should not be made without her consent.

[27] The evidence before this Court clearly points to the fact that the Claimant acknowledges the Company's discretion and prerogative in the transfer of its employees as the Claimant herself had been subjected to

transfers previously. The Claimant admitted and acknowledged the Company's prerogative to effect transfers during the cross examination of the Claimant. The evidence of the Claimant is also consistent with the transfer clause in her contract of employment. What the Claimant objected to was the transfer that will cause hardship to her in terms of travel distance and the likely additional travelling expenses that entails as a result of this transfer. The Claimant also fears for her safety due to the daily commuting from her residence in Rawang to the Company's site office in Dengkil.

[28] In the case of *Ladang Holyrood V. Ayasamy Manikam & Ors [2004] 2 CLJ 697*, his Lordship Justice Ariffin Zakaria JCA (as he then was) had the occasion to opine the right of an employer to transfer an employee from one department to another or from one post of establishment to another or from one branch to another or even from one company to another within the organisation in the following manner:-

“We now turn to the next issue, that is, whether the appellant has any right under the contract of service to transfer the respondents to the main Division. In *Soon Seng Cement Products Sdn Bhd & Anor v. Non-Metallic Mineral Products Manufacturing Employees's Union [1996] 1 ILR 414* award no. 107 of 1997 the same issue came to be considered by the Industrial Court. There

the court made the following observation which we think is highly pertinent to the issue before us:

It is well established in Industrial Law that the right to transfer an employee from one department to another or from one post of an establishment to another or from one branch to another or from one company to another within the organisation is the prerogative of the management and the Industrial Court will ordinarily not interfere. But if the transfer is actuated with improper motive, it will attract the jurisdiction of the Court. The power to transfer is, therefore, subject to, according to Ghaiye's *Misconduct in Employment* (at pages 254 and 255), the following well recognised restrictions:

- (a) there is nothing to the contrary in the terms of employment;
- (b) the management has acted bona fide and in the interests of its business;
- (c) the management is not actuated by any indirect motive or any kind of *mala fide*;
- (d) the transfer is not made for the purpose of harassing and victimising the workmen; and
- (e) the transfer does not involve a change in the conditions of service.

And this right of transfer is also embodied in the Industrial Relations Act 1967, where it states that the company has the right to transfer its employees within the organisation so long as such transfer "does not entail a change to the detriment of an employee in regard to the terms of employment." - Section 13 of the Industrial Relations Act 1967."

[29] COW1 also gave evidence that it is common practice within the Gamuda Berhad group of companies for employees to have job transfer based on different projects handled and managed by the companies within this group of companies. The Claimant was needed to support the General Manager for the Gamuda Cove projects in Dengkil. The Claimant was fully aware being an employee of the Company, Gamuda Land is a project based company and the company has many projects within and outside Malaysia and as such all the employees employed are subjected to transfer and must be prepared for such transfers. It is for this reason the Claimant's offer of employment letter dated 09.11.2012 even mentions that a transfer outside Malaysia is also possible which the Claimant accepted unconditionally without any protest.

[30] This Court having analysed the evidence must now come to a finding that the Company had not acted in any way that can be construed as having any improper ulterior motive that was actuated by malice or bad faith to harass or victimise the Claimant in the exercise of its discretion in transferring the Claimant to Gamuda Cove. What this Court can find is that the Company was doing nothing more than harnessing the abilities and capabilities of the Claimant in furtherance of the Company's business interest consistent with its past practice within

the Group of companies. And in so doing the Company was at all times acting within the scope and parameters of its managerial power as agreed between the Company and the Claimant pursuant to the contract of employment of the Claimant with the Company.

[31] It is also observed by this Court based on the evidence adduced in Court, the Company was not at any time acting in an arbitrary and improper manner calculated to embarrass and humiliate the Claimant, what more, to conduct itself in a manner to give the impression that the Company was, by the said transfer of the Claimant to Gamuda Cove was in effect demoting the Claimant as stated by the Claimant in her letter dated 16.04.2016 which amongst other alleged forced transfer and demotion. When the Claimant expressed her unhappiness by her letter dated 31.07.2018, the Company did not ignore her concerns raised in the letter. The Company proceeded to engage with the Claimant immediately the very next day offering option for the Claimant to explore other roles in the Company but the Claimant was not keen on the option offered.

[32] On the Claimant's claim that the travel distance and the travelling allowance allocated by the Company would cause her hardship in that

the travel distance is much further from her previous place of employment in Damansara Perdana and the amount allocated is not sufficient to cover her travelling cost, this Court finds some truth in her claim of this hardship. It is unfortunate that the Claimant had to undergo this hardship however as it is commonly understood many employees in employment all over who are subjected to transfer orders would normally undergo this form of inconvenience and hardship too. These form of inconvenience or hardship is part and parcel of the employer, employee relationship so long as it is not actuated by bad faith by the employer. This Court must rule that this hardship caused does not in any way significantly breached the very essence or root of the contract of employment between the Claimant and the Company or that the Company had evinced an intention no longer to be bound by the contract of employment between the Claimant and the Company.

[33] This Court must also add here that it is not always the case that when a company exercises its prerogative to effect a transfer on its employees, this Court's position will be one of non-interference. There had been occasions where transfers had been ordered against employees which had attracted this Court's jurisdiction to interfere as the facts of these cases support this Court interference and to rule that such transfer entitles the employee to claim constructive dismissal. (please

see cases : ***Saharunzaman Barun V. Perodua Sales Sdn Bhd [2019] 2 LNS 1838 , Mohd Razif Zainal Abidin V. Perodua Sales Sdn Bhd [2019] 2 LNS 1840, Noramidah Othman @ Anuar V. Perodua Sales Sdn Bhd [2019] 2 LNS 1839)***

[34] On the claim by the Claimant that, the journey from Rawang to Dengkil will be unsafe since the Claimant had to start her journey from home to work early in the morning and return home late at night, this Court must say that the Claimant's fear is simply unfounded. In fact, the Claimant did not offer any cogent evidence as to how the journey will be perilous. The Claimant can find some comfort in this Court's general observation that there are a multitude of employees who travel on a daily basis to every part, every nook and corners of this country, sometimes in the ungodly hours of the day in furtherance of their search for livelihood but who cannot be absolutely sure or could totally guarantee that every single journey that they take will always be safe and secure but nevertheless take on this unavoidable and uncertain daily routine in their stride.

[35] The Claimant also submitted that the transfer from the CEO's office to the General Manager's office resulted in drastic changes to her job nature, duties and functions and from the very date of the transfer

effective 01.08.2018 to the date she claimed constructive dismissal on the 16.04.2019 her job functions and role was marked with difficulties. The Claimant claims that the transfer was done in haste without regard to the Claimant's role as the Secretary. It is the finding of this Court that the evidence before this Court shows that despite these complaints by the Claimant, the Claimant nevertheless continued working in the General Manager's office until 16.04.2019. Certainly there is a long delay from the time of the Claimant's alleged circumstances giving rise to the fundamental breach of the terms of the contract of employment to the date when the Claimant claimed constructive dismissal.

[36] The Claimant raised her objection on the 31.07.2018 and yet despite her objection to the transfer, the Claimant nevertheless accepted the transfer and continued working in the General Manager office until 16.04.2019. The Claimant claims that despite her unhappiness, she had put up with the change of job scope and hardship which came along with it because she was apparently told that this would be a temporary measure and there had been no physical transfer to Gamuda Cove at that point of time. This Court finds that it is an unacceptable explanation on part of the Claimant to say that she had to put up for a period of 8 months on ground that she was told that the transfer was temporary measure. What this Court is able to glean from the entire circumstance

surrounding this case is that the Claimant was unhappy with the transfer and had every intention of leaving the Company for a better job whenever one comes by and it was for this reason the Claimant had requested for a letter of recommendation from Ngan Chee Meng on or about January 2019. Almost immediately after the Claimant tendered her alleged forced resignation letter on the 16.04.2019, the Claimant was able to secure a better paying job in the month of May 2019.

[37] Having examined the facts of this case and the evidence adduced, this Court is unconvinced by the claims made by the Claimant that the Company had caused the Claimant's alleged forced resignation. The Claimant is also unable to satisfy this Court that there had been a fundamental breach of the terms of the employment contract of the Claimant with the Company which was caused by the Company thereby giving rise to a successful claim of constructive dismissal by the Claimant. This Court must conclude that the Claimant tendered her resignation letter on her own volition for which the Company cannot be faulted.

[38] Pursuant to Section 30(5) of the Industrial Relations Act 1967 and guided by the principles of equity, good conscience and substantial merits of the case without regard to technicalities and legal form and

after having considered the totality of the facts of the case, all the evidence adduced in this Court and by reasons of the established principles of industrial relations and disputes as mentioned above, this Court finds that the Claimant had failed to prove to the satisfaction of this Court on the balance of probabilities that she was dismissed from her employment with the Company. As the Claimant is unable to prove that she was dismissed by the Company from her employment with the Company, the issue of the dismissal of the Claimant being without just cause or excuse is no longer an issue that this Court need to consider and determine in the circumstances of this case.

[39] Accordingly, the Claimant's claim of constructive dismissal against the Company is hereby dismissed.

HANDED DOWN AND DATED THIS 2nd DAY OF NOVEMBER 2020

-signed-

**(AUGUSTINE ANTHONY)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR**