IN THE INDUSTRIAL COURT OF MALAYSIA

CASE NO: 4/4 - 477/22

BETWEEN

CHAN LAI HAN

AND

GURKHAS GROUP (G3S) FACILITY MANAGEMENT (MALAYSIA) SDN. BHD.

AWARD NO: 1760 OF 2022

BEFORE	:	**Y.A. TUAN AUGUSTINE ANTHONY Chairman**
VENUE	:	Industrial Court of Malaysia, Kuala Lumpur.
DATE OF REFERENCE	:	18.02.2022.
DATE OF RECEIPT OF REFERENCE	:	24.02.2022.
DATES OF MENTION	:	05.04.2022, 27.04.2022, 19.05.2022, 08.06.2022 & 28.07.2022.
DATE OF HEARING	:	13.07.2022.
REPRESENTATION	:	Claimant - Present (Self Representation)
	:	Company - Absent

THE REFERENCE

This is a reference dated 18.02.2022 by the Director General of Department of Industrial Relations, Ministry of Human Resources pursuant to section 20(3) of the Industrial Relations Act 1967 ("The Act") arising out of the alleged dismissal of **CHAN LAI HAN** ("Claimant") by **GURKHAS GROUP (G3S) FACILITY MANAGEMENT (MALAYSIA) SDN. BHD.** ("Company") on the 03.09.2021.

AWARD

[1] The Claimant in this matter had filed her written submissions dated 27.07.2022 as directed by this Court. The Company had failed to attend the full hearing of this matter and had also failed to file any documents as directed by this Court.

[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 24.04.2022

(ii) The Claimant's Bundle of Documents – CLB;

(iii) Claimant's Witness Statement – CLW-WS;

INTRODUCTION

[3] The dispute before this Court is the claim by Chan Lai Han ("Claimant") that she had been dismissed by way of a constructive dismissal from her employment without just cause or excuse by Gurkhas Group (G3S) Facility Management (Malaysia) Sdn. Bhd. ("Company") on the 03.09.2022 as reflected in the reference dated 18.02.2022 by the Director General of Department of Industrial Relations.

[4] It is the Claimant's contention and pleaded case that she was appointed as the managing director of the Company effective 02.01.2019. However the Claimant did not exhibit any such letter of appointment with all the terms and conditions of appointment. The Claimant exhibited a letter of appointment as the Executive Director of the Company effective 01.01.2019 with little or no terms and conditions of employment. It is also

the pleaded case of the Claimant that she is a shareholder of the Company and as the shareholder she has all the rights in the management of the Company's account. The Claimant also testified that she was the person who was solely responsible for the setting up of the Company. According to the Claimant her commencement salary was RM3,000.00 per month and later the remuneration was revised wherein the Claimant was also paid a further RM2,000.00 per month as travel and entertainment allowance. The Claimant now states that due to the Company's chairman's constant harassment, abuse and unjust treatment the Claimant had to resign from her employment in the Company and claim constructive dismissal. The Claimant now states that she had been dismissed without just cause or excuse and prays that she be reinstated to her former position without any loss of wages, other benefits and seniority.

[5] The Claimant gave evidence under oath and remained the sole witness for her case. The Company or its representative failed to attend the hearing of this matter and had also failed to file any documents in this Court despite the direction given by this Court.

THE LAW

Role and function of the Industrial Court

[6] The role of the Industrial Court under section 20 of the "The Act" was 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 ..."*

[7] 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 Bhdand Another Appeal [1995] 3 CLJ 344 where in delivering the judgment of the court Mohd Azmi FCJ said (at p. 352):*
>
> *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"*

[8] 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] 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."*

Burden Of Proof

[9] Whenever a Company had caused the dismissal of the workman, it is then incumbent on 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 a/l Subramaniam James [1995] 2 ILR 11*** 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.*

Burden of proof in cases of constructive dismissal.

[10] The case of ***Weltex Knitwear Industries Sdn. Bhd. v Law Kar Toy & Anor (1998) 1 LNS 258/ 91998) 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 Justice 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).*

[11] In view of the above case and anchored on a claim of constructive dismissal as alleged by the Claimant even in the absence of any statement or averment from the Company, it is now incumbent upon the Claimant to prove her case that she had 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 had been 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

[12] 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."*

The law on Constructive Dismissal

[13] In ***Wong Chee Hong v Cathay Organization Malaysia Sdn. Bhd. [1998] 1 CLJ Rep 298/ [1988] 1 CLJ 45*** his lordship Justice Salleh Abas, LP delivering the judgment of the Supreme 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."

[14] 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,

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

[16] In the case of ***Anwar Abdul Rahim v. Bayer (M) Sdn. Bhd. [1998] 2 CLJ 197***, the Court of Appeal explained the proper test to be applied in cases of constructive dismissal:-

> *"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."*

[17] 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 / breaches going to the root of the contract or whether the employer had evinced an intention no longer to be bound by the contract as stated in the case of ***Anwar Abdul Rahim (supra)*** and offer an opportunity for the employer to remedy the said breach / breaches. And despite the opportunity given, if the employer fails to remedy the said breaches, the employee can then in order to assert his/her rights treat himself/herself as discharged and leave soon thereafter.

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

[19] Having stated the law above, this Court will now move to the facts and evidence of this case for this Court's consideration. In so doing, 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.

[20] Before this Court proceeds to evaluate the facts and evidence in this matter , this Court must first deal with preliminary matters in view of the absence of the Company or its representative during the full hearing of this matter on the 13.07.2022.

The proceedings before this Court

[21] This Court will now deal with the proceedings before this Court and in so doing, will first remind itself of the provision of Section 29 of "The Act" which states:

> *"The Court may, in any proceedings before it-*
>
> *(g) generally direct and do all such things as are necessary or expedient for the expeditious determination of the matter before it."*

[22] This Court is duty bound to do all things necessary for the expeditious determination of the matter before it and in so doing expect the parties in this matter to comply with all directions given in order to ensure that this matter can be speedily and promptly disposed of. In this regard this Court observed that the Company despite being given all the opportunities to file

all the relevant documents in preparation of its case had nevertheless failed to comply with the directions given by this Court.

[23] This matter was called for mentions on several occasions and the parties were given directions for the filing of the documents in preparation of the hearing of this matter fixed on the 13.07.2022. Despite the directions of this Court, the Company failed to file any documents in Court and had also failed to attend the hearing of this matter on the 13.07.2022. The Claimant was present and was ready to proceed with the case.

[24] Thus in view of the Company's or its representatives non-appearance for the hearing of this matter and non-compliance of the directions given by this Court during the mention dates, this Court proceeded to hear the matter in the absence of the Company or its representative in order to ensure the expeditious determination of the matter before it. This Court is empowered to do so by the **Industrial Court Rules 1967**.

Rule 8 of the Industrial Court Rules 1967 *states that:-*

"(1) Upon a case being brought before the Court, the Secretary shall immediately serve notice in Form F of the place, date and time for mention of the case before the President.

(2) Notwithstanding the absence of any party at the place, date and time prescribed by paragraph (1), the President may fix dates for hearing of the case and no application for any alteration of the dates will be entertained except under very exceptional circumstances.

(3) Upon the dates for hearing being fixed, the Secretary shall serve notice thereof in Form G."

[25] This Court is of the view that in giving effect to the statutory provision of "The Act" and in the interest of justice, this Court ought to proceed to hear this matter even in the absence of the Company. "The Act" empowers this Court to hear and determine the matter in the absence of any party to the proceedings who has been served with a notice or summons to appear.

Section 29 of The Act states:-

"The Court may, in any proceedings before it-

(d) hear and determine the matter before it notwithstanding the failure of any party to submit any written statement whether of case or reply to the Court within

such time as may be prescribed by the President or in the absence of any party to the proceedings who has been served with a notice or summons to appear."

[26] After the conclusion of the full hearing of this matter, this Court ordered the filing of the submissions for this Court's consideration. This Court had then set a further mention date on the 28.07.2022 to monitor the filing of the submissions. The Claimant had filed a brief one page written submissions containing 2 paragraphs. The Claimant had stated in the submissions that all the documents that was submitted reflected the truth and that she was constructively dismissed on the 03.09.2021 by the Company.

[27] In view of the fact that this case is a constructive dismissal case, this Court is duty bound to hear the Claimant's testimony first to determine if the claim of constructive dismissal is proven. It is only when the Claimant succeed in proving that she was dismissed by way of constructive dismissal , this Court can proceed to determine whether that dismissal amounts to a dismissal without just cause or excuse. The Claimant must first pass the hurdle that she was dismissed by the Company.

EVALUATION OF EVIDENCE AND THE FINDINGS OF THIS COURT

[28] The Claimant's claim of constructive dismissal arose due to the alleged conduct of the chairman of the Company allegedly threatening the Claimant to hand over the Company's bank token failing which a police report will be lodge against the Claimant. The Claimant had also alleged various other conducts of the chairman that were deemed a constant harassment, abuse and unjust treatment given to the Claimant which resulted in the Claimant claiming constructive dismissal.

[29] Having perused the statement of case, the witness statement, the testimony and the documents tendered in this Court by the Claimant, this Court had observed a host of highly unsatisfactory features in the Claimant's claim of constructive dismissal. The Claimant through her evidence had also demonstrated to this Court that she was in actual fact unsure of the circumstances giving rise to the alleged constructive dismissal. The Claimant had also failed to show whether she had understood what it takes for her to successfully claim constructive dismissal.

[30] The Claimant had made a representation in the Industrial Relations department that she was dismissed on the 03.09.2021. In the statement of case the Claimant had stated that she was dismissed on the 31.08.2021 ***(see paragraph 2 of the statement of case)***. In the statement of case the Claimant had claimed constructive dismissal but the exact date of the constructive dismissal is not known based on the pleaded case neither was it stated in the statement of case clearly. However based on the averment in paragraph 2 of the statement of case it can be construed that her pleaded case of the constructive dismissal was on the 31.08.2021.

[31] Despite the Claimant claiming constructive dismissal in the statement of case, the Claimant had given evidence in Court that she was retrenched by the Company ***(please see QA5 of the witness statement of the Claimant).*** These questions and answers were prepared and presented by the Claimant who had self-represented herself during the hearing of this matter. In the same QA5 of the witness statement the Claimant gave evidence that the chairman had sacked her without any valid reasons. Based on all the documents before this Court, there is no clarity whether the Claimant was sacked for the reasons stated by the Claimant,

retrenched or constructively dismissed **(*see also QA 6 of the witness statement of the Claimant*)**

[32] The Claimant had also testified in Court that she was constructively dismissed but seemed very unsure of the exact date of the constructive dismissal. The Claimant was unsure during the testimony in Court as to the circumstances of her alleged termination from employment. At one point the Claimant testified that she was terminated from her employment on the 03.09.2021 and it was on this date that she submitted her letter of constructive dismissal and at another point she had testified that she tendered her resignation letter on the 20.09.2021 which is consistent with her resignation letter dated 20.09.2021 as exhibited in this Court. This resignation letter if consistent with her pleaded case at paragraph 4 of the statement of case and if this Court had to rely on this resignation letter and her pleaded case as the true account, then it will reveal another set of fact that on the 03.09.2021 the Claimant was still working for the Company and the claim of constructive dismissal on the 03.09.2021 must necessarily fail.

[33] There are more inconsistencies in the Claimant's claim of constructive dismissal. If it is true that the Claimant had claimed constructive dismissal on the 03.09.2021, then there must be sufficient proof of that claim of in some written form. However there is nothing before this Court that the Claimant had notified the Company that she had claimed constructive dismissal on the 03.09.2021. Merely stating in her letter of resignation dated 20.09.2021 that she is making reference to her notice of constructive dismissal dated 03.09.2021 is insufficient as this Court needs to see the contents of the purported notice of constructive dismissal and the complaints of the Claimant contained in the notice. In any event if the notice of constructive dismissal and the date of constructive dismissal were on the 03.09.2021, then it beckons the question as to when the Claimant gave the Company sufficient notice to remedy all her grievances. There should have been a letter/notice even before the date of 03.09.2021 from the Claimant to the Company with all her complaints of the breaches of the essential terms of the contract of employment and giving the Company sufficient time to remedy the same. Such notice is not before this Court. Notice to the Company to remedy the breaches of the essential terms are a prerequisite before the Claimant can successfully claim constructive dismissal and only if after the notice period the Company had not remedy

the breaches which evinces an intention on part of the Company to no longer be bound by the essential terms of the contract of employment.

[34] This Court also finds doubtful that the Claimant was an employee/workman of the Company. This finding of this Court is based on the Claimant's own pleaded case and evidence adduced in Court. The Claimant had pleaded that she is the rightful shareholder of the Company with a 10% ownership of the shares of the Company and that it was entirely within her right as a shareholder to have access to the management account. The Claimant had also claimed to be the managing director and executive director of the Company and complains that her rights as a minority shareholder is violated. The Claimant had further given evidence that she was the person who set up the Company from its inception and due to the Company's conduct, her reputation was affected due to the Company's unwillingness to settle the outstanding payments due to the vendors in Malaysia and this had cause other companies to blacklist her name. To this Court's mind all of this pleaded case and evidence led in Court suggest that the Claimant is more of an employer rather than an employee and that the Claimant do not fall within the definition of a workman pursuant to Section 2 of "The Act". In any event, even if the

Claimant claims to be a workman, the Claimant had still not proven that she was constructively dismissed based on the pleaded case, the documents tendered in Court and the evidence of the Claimant. As this case is a claim of constructive dismissal, despite the absence of the Company, this Court is duty bound to enquire if there was a dismissal of the Claimant by the Company before this Court can consider further the elements of dismissal without just cause or excuse.

[35] Pursuant to Section 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 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 without just cause or excuse is no longer an issue that this Court needs to consider and determine in the circumstances of this case.

[36] Accordingly, the Claimant's claims against the Company hereby dismissed.

HANDED DOWN AND DATED THIS 10th DAY OF AUGUST 2022

-Signed-

(AUGUSTINE ANTHONY)
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
KUALA LUMPUR