MATRIX GLOBAL EDUCATION SDN BHD

v.

FELIX LEE ENG BOON

Court of Appeal, Putrajaya
Lee Swee Seng, Supang Lian, Nordin Hassan JJCA
[Civil Appeal No: W-01(A)-477-09-2020]
9 December 2022

Administrative Law: *Judicial review — Application for — Industrial Court award, application to quash — Constructive dismissal — Pleadings — Whether an agreement had been reached between company and employee — Fundamental breach of contract — Whether employee had resigned from his employment with company on agreed terms*

Labour Law: *Industrial Court — Award — Judicial review — Application to quash Industrial Court award — Constructive dismissal — Pleadings — Whether an agreement had been reached between company and employee — Fundamental breach of contract — Whether employee had resigned from his employment with company on agreed terms*

Industrial Court: *Award — Judicial review — Application to quash Industrial Court award — Constructive dismissal — Pleadings — Whether an agreement had been reached between company and employee — Fundamental breach of contract — Whether employee had resigned from his employment with company on agreed terms*

This was a case of an alleged constructive dismissal before the Industrial Court where the employee claimant/respondent, a legally-qualified Chief Executive Officer (CEO) of the appellant company, asserted that he had been dismissed without just cause and excuse by being forced to resign. The Industrial Court believed him and made an award of back wages and compensation *in lieu* of reinstatement (Award), and the High Court affirmed the Award. The company argued before this Court that there was no forced resignation and that the termination of employment had been on terms mutually agreed by both parties as evidenced from the final letter from the employer to the claimant setting out the terms mutually agreed, which letter was acknowledged by the claimant with no reservation of rights. It fell upon this Court to examine whether the Award of the Industrial Court should be upheld or whether it should be quashed on ground of being irrational in that any tribunal faced with the facts as adduced would have come to the conclusion that this was ultimately a case of mutual separation on terms. The main issues requiring determination were whether: (i) the claimant had departed from his pleadings with respect to constructive dismissal; (ii) the respondent and the appellant company had entered into a negotiated settlement of separation on terms mutually agreed and that an agreement had been reached; and (iii) the appellant company had

committed any fundamental breach of the contract of employment to justify the respondent treating himself as being constructively dismissed.

Held (allowing the appeal):

(1) This Court should not be unduly pedantic and fastidiously fixated where pleadings were concerned in the Industrial Court where the procedures were designed to be simple and shorn of the sophistication of superior Courts' strict rules on pleadings. After all, the proceedings were originally designed to be conducted even without the need for lawyers and through the years the practice evolved where legal representation had been allowed simply by alluding to the reason that there were complicated and convoluted points of law to be argued. Whilst it was true that the final email on the respondent's resignation alluded to acceding "... to the request of the Company and tender my resignation as the CEO of Matrix Global Education Sdn Bhd" and that prior events were not referred to at all, this Court would nevertheless allow some leeway to the respondent as claimant in the Industrial Court the liberty to plead what he perceived to be the accumulation of events that culminated in "his forced resignation." This view was fortified considering that the operative words of

s 20(1) of the Industrial Relations Act 1967 was that: "...if a workman considers himself to have been dismissed without just cause and excuse.." It was thus his subjective perception of his dismissal and if he so perceived that it was a series of events as narrated by him that culminated in his ultimate email where he said ".I accede to the request of the Company and tender my resignation as the CEO of Matrix Global Education Sdn Bhd", then so be it for it was after all what Parliament had allowed him, ie the liberty to narrate the events that ultimately resulted in his treating himself as being constructively dismissed. This was even more imperative when the fact that the IRA was a social piece of legislation designed to protect the workman who was generally the weaker party with less of a bargaining power in an industrial dispute with the company, was considered. (paras 52-55)

(2) If an employee agreed to put in his unqualified letter of resignation or acceded to the request that he should resign, it would be difficult for him to later complain about it that it was a "forced resignation" unless there was evidence to show that he had been manhandled or threatened to be bashed up unless he resigned. The respondent as claimant in the Industrial Court with legal training would be conscious of his rights under the law and would not have caved in into resigning just because the managing director said so. He could refuse to resign at that suggestion and treat himself as being constructively dismissed. But the moment he put in his letter of resignation on terms agreed, that was a concluded contract, and no longer a case of constructive dismissal. The evidence of negotiations negated the respondent's claim of being forced to resign and his email of his resignation could not be interpreted as that coming from a CEO who was forced to resign. The Industrial Court failed to take into consideration the above relevant factors and instead had taken into

consideration the irrelevant factors of events prior to his resignation which were, at best, already water under the bridge. The Award of the Industrial Court founded on constructive dismissal thus could not stand and had to be quashed and, consequently, set aside and with that the order of the High Court too that had affirmed the said Award. (paras 87, 88, 102 & 103)

(3) If at all the appellant's actions were fundamental breaches, which were so serious for him to claim constructive dismissal, it would not have been reasonable for the respondent to negotiate a better severance package, in which several proposals were accepted by the appellant. The negotiations had, on the facts, broken the chain of the breaches complained by the respondent. His dissatisfaction with the transfer and more than that, his contention that there was a breach by the employer striking at the root of the contract, was no longer at play when he entered into a series of negotiations with the company for a mutually acceptable severance package. The respondent could not approbate and reprobate. The advice to him to resign was no longer the proximate cause of his so-called forced resignation. Therefore, the appellant did not commit any actions which were fundamental breaches to justify the respondent's claim of constructive dismissal and even if there were (though there was no evidence for that), the respondent's delay and conduct of entering into negotiations, had affirmed the said breaches. The finding of the Industrial Court that the respondent as claimant before it had been constructively dismissed was irrational in that it was so devoid of any plausible justification that no reasonable body of persons could have reached them, more so when the respondent himself had entered into a settlement on terms as a result off which he tendered his resignation letter and resigned from the company. (paras 117-120)

(4) It was this Court's finding that the respondent as claimant in the Industrial Court had resigned from his employment with the appellant on agreed terms which terms the company had discharged. (para 121)

Case(s) referred to:

Ang Beng Teik v. Pan Global Textile Bhd, Penang [1996] 1 MELR 14; [1996] 1 MLRA 520 (refd)

Anwar Abdul Rahim v. Bayer (M) Sdn Bhd [1997] 1 MELR 50; [1997] 2 MLRA 327 (refd)

BBC Brown Boveri (M) Sdn Bhd v. Yau Hock Heng [1990] 2 MELR 92 (refd)

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 1 MLRA 738 (refd)

Bouzourou v. The Ottoman Bank [1930] AC 271 (refd)

Christopher Dass Muniandy @ Mathew v. Clasquin (Malaysia) Sdn Bhd [2022] 1 MELR 275 (refd)

Donovan v. Invicta Airways Ltd [1970] 1 Lloyds (refd)

Kontena National Bhd v. Hashim Abd Razak [2000] 3 MELR 32 (refd)

Logan Salton (Appellant) v. Durham Country Council (Respondents) [1989] 1 RLR 99 (refd)

Maritime Intelligence Sdn Bhd v. Tan Ah Gek [2022] 1 MELR 200; [2022] 1 MLRA 56 (refd)

Michael Brian Davis v. Microsoft Malaysia Sdn Bhd [2000] 3 MLRH 276 (refd)

Moo Ng v. Kiwi Products Sdn Bhd Johor & Anor [1998] 3 MELR 116; [1998] 2 MLRH 203 (refd)

Norizan Bakar v. Panzana Enterprise Sdn Bhd [2014] 1 MELR 1; [2013] 6 MLRA 613 (refd)

Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2003] 1 MELR 21; [2003] 2 MLRA 114 (refd)

Quah Swee Khoon v. Sime Darby Bhd [2000] 1 MLRA 856 (refd)

R Rama Chandran v. Industrial Court of Malaysia & Anor [1996] 1 MELR 71; [1996] 1 MLRA 725 (refd)

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2009] 3 MLRA 597 (refd)

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2012] 1 MELR 129; [2010] 5 MLRA 696 (refd)

Sanbos (Malaysia) Sdn Bhd v. Gan Soon Huat [2021] 3 MELR 375; [2021] 5 MLRA 133 (refd)

Sheffield v. Oxford Controls Co Ltd [1979] ICR 396 (refd)

Southern Investment Bank Bhd & Anor v. Yap Fat & Anor [2017] 2 MELR 183; [2017] 3 MLRA 408 (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 1 MLRA 268 (folld)

Tan Cheng Leng v. Futuristic Store Fixtures Sdn Bhd [2019] MELRU 1180 (refd)

Teoh Hang Swee @ John Teoh Hang Soon lwn. Yang Berhormat Menteri Sumber Manusia, Malaysia & Anor [2010] 8 MLRH 775 (refd)

VP Nathan & Partners v. Subramaniam Govindan Nair & Anor & Another Appeal [2009] 1 MELR 58; [2009] 2 MLRA 621 (refd)

Weltex Knitwear Industries Sdn Bhd v. Law Kar Toy & Anor [1998] 4 MLRH 774 (refd)

Woo Kit Seong v. Synthes Malaysia Sdn Bhd [2017] 2 MELR 247 (refd)

Wong Chee Hong v. Cathay Organisation Malaysia Sdn Bhd [1987] 1 MELR 32 (refd)

Legislation referred to:

Industrial Court Rules 1967, rr 3, 9(3)

Industrial Relations Act 1967, ss 20(1), 27, 30(5)

Counsel:

For the appellant: Datuk Seri Gopal Sri Ram (N Sivabalah, Yasmeen Soh Sha-Nisse, Benedict Ngoh Ti Yang with him); M/s Shearn Delamore & Co

For the respondent: Ravi Nekoo (Amelia Maisara Zainal Abidin with him); M/s Nekoo

JUDGMENT

Lee Swee Seng JCA:

[1] This is a case of an alleged constructive dismissal before the Industrial Court where the employee/claimant, a legally-qualified Chief Executive Officer ("CEO") of the company, asserted that he had been dismissed without just cause and excuse by being forced to resign. The Industrial Court believed him and made an award of back wages and compensation *in lieu* of reinstatement ("Award"). The High Court affirmed the Award.

[2] The employee/claimant was the 1st respondent in the High Court and the 2nd respondent was the Industrial Court with the company being the applicant in the judicial review proceedings. Before us in the Court of Appeal the company is the appellant and the employee/claimant the only respondent. For ease and consistency of reference the company shall be referred to as the appellant company and the claimant as the respondent.

[3] Before us it was argued that there was no forced resignation and that the termination of employment had been on terms mutually agreed by both parties as evidenced from the final letter from the employer to the claimant setting out the terms mutually agreed which letter was acknowledged by the claimant with no reservation of rights. We shall now examine whether the Award of the Industrial Court should be upheld or whether it should be quashed on ground of being irrational in that any tribunal faced with the facts as adduced would have come to the conclusion that this was ultimately a case of mutual separation on terms

[4] The respondent before us was employed as the CEO of the appellant under a fixed term employment contract dated 1 August 2014. He was based at the Matrix Global Schools ("MGS") in Sendayan, Negeri Sembilan. As is not uncommon, the respondent was subject to being transferred within the Matrix group of companies in accordance with the business requirements of the appellant.

[5] His scope of duties and responsibilities as the CEO, would encompass his proper management of the MGS which included Matrix International School ("MIS") and Matrix Private School ("MPS") so as to achieve continued growth and ensure long term profitability.

[6] Alas, since 2016, the appellant had received numerous complaints from parents in respect of the declining academic standards and drop in quality of MIS and MPS. The parents complained of the decline in syllabus quality as well as the quality of the teachers. In response to the numerous complaints, the founder of MGS and the Group Managing Director, Dato' Lee Tian Hock, decided to refund the school tuition fees and security deposit for all Year 10 and 11 students for the academic year 2016. The sum refunded was in the excess of RM 1 million.

[7] The appellant suffered a decrease in student admission and student retention in the years 2016 and 2017 which the appellant attributed to MGS's drop in quality of education provided under the tenure of the respondent as CEO. The appellant believed that the respondent, as its CEO, must take responsibility for the continuing decline in standards of MPS and MIS.

[8] The appellant was concerned about the respondent's continued ability to manage the MGS. The appellant decided that it was in its best interest to relieve the respondent from his role as the CEO and in his stead to appoint one Tuan Haji Mohamad Nor as the interim CEO with effect from October 2017.

[9] What should the appellant do with the respondent? Exercising its managerial prerogative, it reassigned the respondent to the appellant's headquarters to assist the Deputy Managing Director (Mr Ho) with the Group's marketing from January 2018.

[10] Despite what was perceived by the appellant company as the respondent's less than satisfactory performance in his previous role, the appellant offered the respondent an alternative position to serve within the group through a letter dated 6 February 2018 (inadvertently stated as 2017), where the respondent was offered the position of Head, Group Corporate Affairs & Communications on a contract basis from 1 February 2018 to 31 December 2019.

[11] Meanwhile the appellant company received information that the respondent was involved in certain irregularities during his tenure as CEO of MGS. This placed further concerns in respect of the respondent's suitability of employment within the company.

[12] In the light of the aforesaid, the appellant, through Tuan Haji Mohammad Nor, had immediately on 13 February 2018 notified the respondent via WhatsApp message of the withdrawal of the offer letter dated 6 February 2018. The respondent was also advised to resign and was informed that he would be given 6 months' salary *in lieu* of the notice.

[13] The respondent entered into a negotiation with the appellant to achieve a better severance package for his resignation. The respondent then issued another email dated 28 February 2018 wherein he boldly requested for 12 months' salary *in lieu* and for the Appellant's Car Ownership Scheme ("COS") to be deemed fully executed.

[14] Soon after that, a meeting was held on 2 March 2018 between Tuan Haji Mohammad Nor and the respondent wherein the former informed the respondent that in the event the respondent opted to resign, he would be paid 6 months' salary *in lieu*.

[15] The respondent wrote an email dated 2 March 2018 to the appellant wherein he tendered his resignation as CEO of the appellant and in language both warm and cordial, he also further thanked the appellant for the opportunity to work with them and expressed his intentions to assist MGS, if need be in the

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

[16] The appellant company by its letter of 5 March 2018 accepted the respondent's resignation and informed him that his last date of employment was on 3 March 2018. The appellant committed itself in writing as negotiated that as a result of his resignation, the respondent would be granted the following:

(a) Six (6) months' salary *in lieu* of notice;

(b) Full waiver of his child's tuition fees with MIS until completion of the remaining academic term; and

(c) Restructuring of the COS in order to allow the respondent an additional 3 months to repay the car loan under the COS.

[17] The appellant company honoured what had been agreed. The 6 months' salary *in lieu* of notice was paid by the appellant to the respondent. The respondent received the benefit of a full waiver of his child's tuition fees with MIS until the remaining of the academic term and the repayment of the car loan was restructured.

Before The Industrial Court

[18] The respondent however took the position that he was forced to resign and that those terms negotiated do not bar him from claiming that he had been constructively dismissed. The Industrial Court believed him and in its decision in Award No 2139 of 2019 dated 25 July 2019, ruled that the respondent was dismissed without just cause and excuse and ordered the appellant company to pay backwages and compensation *in lieu* of reinstatement amounting to RM381,720.00.

[19] Briefly, as summarised by learned counsel for the appellant company, the Industrial Court's decision was premised on the following:

(a) The appointment of Tuan Haji as interim CEO, was supposedly to humiliate the respondent;

(b) The transfer from the respondent's position as CEO to the appellant's headquarters, purportedly, without any reasons, and to a role which was inconsistent with the terms of his contract of employment;

(c) The offer and subsequent withdrawal of offer of appointment as Head of Group of Corporate Affairs and Communications; and

(d) when the respondent was 'advised' to resign, it was in fact an order by Dato' Lee, which purportedly must be obeyed.

Before The High Court

[20] The company failed in its application for judicial review and the High Court on 27 August 2020 dismissed its application. As summarised by learned counsel for the appellant company the High Court ruled as follows:

(a) In his claim for constructive dismissal, the respondent did not depart from his pleadings as the respondent had pleaded the facts leading to the constructive dismissal;

(b) That the appellant was aware of the respondent's case as the appellant's counsel did not object to the respondent's evidence during the course of cross-examination; and?

(c) That the respondent did not depart from his pleadings in so far that he had "stated several facts leading to his constructive dismissal".

Principles Applicable In Judicial Review

[21] Gone are the days where in a judicial review application the High Court would only review the process of decision-making and not the merits of the decision itself. We need go no further back then to the Federal Court's exposition of the law in *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2012] 1 MELR 129; [2010] 5 MLRA 696:

> "[15] Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. *Rama Chandran* is the mother of all those cases. The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permits the courts to scrutinise the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds.
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> ...
>
> [19] Decided cases cited above have also clearly established that where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider relevant matter into consideration, such findings are always amendable to judicial review."

[22] The new perspective with a shift from focusing on the process of decision making of a tribunal or the manner of arriving at a decision to scrutinising the substance of the decision or the merits of a decision started with the Federal Court's case of *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1996] 1 MELR 71; [1996] 1 MLRA 725.

[23] It is said that a decision of an inferior tribunal may be quashed if the tribunal has failed to take into consideration relevant factors or that it took

into consideration irrelevant factors or that it has misinterpreted the law or the relevant contract between the parties or that the decision arrived at is not supported by the facts or that it is so outrageous in its defiance of logic or of accepted moral standards that no reasonable tribunal with a proper appreciation of the facts as presented could have arrived at. See the Federal Court case of *Norizan Bakar v. Panzana Enterprise Sdn Bhd* [2014] 1 MELR 1; [2013] 6 MLRA 613.

[24] We are mindful that in *Rama Chandran*'s case *(supra)* the Federal Court itself placed some restraint on the more liberal approach to interfere with factual findings and consequently to mould the remedy to suit the justice of the case as follows at p 95:

> "Needless to say, if, as appears to be the case, that this wider power is enjoyed by our Courts, the decision whether to exercise it, and if so, in what manner, are matters which call for the utmost care and circumspection, strict **regard being had to the subject matter, the nature of the impugned decision and other relevant discretionary factors. A flexible test whose content will be governed by all the circumstances of the particular case will have to be applied.**
>
> For example, where policy considerations are involved in administrative decisions and Courts do not possess knowledge of the policy considerations which underlie such decisions, Courts ought not to review the reasoning of the administrative body, with a view to substituting their own opinion on the basis of what they consider to be fair and reasonable on the merits, for to do so would amount to a usurpation of power on the part of the Courts."
>
> [Emphasis Added]

[25] Even in *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd (supra)* the scope and ambit of *Rama Chandran (supra)* was clarified and explained as follows:

> "[17] The Federal Court, in *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 1 MELR 21; [2003] 2 MLRA 114 again held that the reviewing court may scrutinise a decision on its merits but only in the most appropriate of cases and not every case is amenable to the *Rama Chandran* approach. Further, it was held that a reviewing judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or plain irrationality, even where the reviewing judge might not have come to the same conclusion.
>
> [18] The Court of Appeal has in a number of cases held that where finding of facts by the Industrial Court are based on the credibility of witnesses, those findings should not be reviewed (see *William Jacks & Co (M) Sdn Bhd v. S Balasingam* [1996] 1 MELR 312; [1996] 2 MLRA 678, *National Union of Plantation Workers v. Kumpulan Jerai Sdn Bhd (Rengam)* [1999] 1 MLRA 656, *Quah Swee Khoon v. Sime Darby Bhd* [2000] 1 MLRA 856, *Colgate Palmolive (M) Sdn Bhd v. Yap Kok Foong & Another* [2001] 1 MLRA 472. However, there are exceptions to this restrictive principle where:

(a) reliance upon an erroneous factual conclusion may itself offend against the principle of legality and rationality, or

(b) there is no evidence to support the conclusion reached. (See *Swedish Motor Assemblies Sdn Bhd v. Hj Md Ison Baba* [1998] 1 MELR 1; [1998] 1 MLRA 275."

[26] In *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 1 MELR 21; [2003] 2 MLRA 114 at p 116, the Federal Court in affirming the award of the Industrial Court in favour of the company which employee had alleged constructive dismissal and thus setting aside both the High Court and the Court of Appeal decisions issued this cautionary note as follows:

"Clearly therefore, not every case is amenable to the *Rama Chandran* approach. It depends on the factual matrix and/or the legal modalities of the case. This is certainly a matter of judicial discretion on the part of the reviewing judge...

...There is still the question of whether the High Court had properly examined and appreciated the facts presented in the Industrial Court. Could it be said, as the Court of Appeal had held, that no reasonable tribunal, similarly circumstanced, would have arrived at the decision which the Industrial Court had? At this point, I find the following observation expressed by Sudha CKG Pillay in her article "The Ruling In *Rama Chandran* — A Quantum Leap in Administrative Law [1998] 3 MLJ lxii" to be particularly apt. She said this:

The new powers that have been entrusted to the courts are enormous and like any other powers are open to abuse. Thus, it is vital for the reviewing courts to display caution and circumspection in the exercise of these wider powers. To this end, the courts should not be quick to wield their new powers in each and every case that comes before it. It has to weigh a multitude of factors before coming to a decision to exercise such powers. In so far as the review of Industrial Court awards are concerned, the reviewing courts must balance not only the competing interest of both the employee and the employer but also the need to preserve the functions of the Industrial Court and to prevent the remedy of s 33A from fading into oblivion and becoming obsolete. If the ruling in *Rama Chandran* is taken to authorize the exercise of the wider powers of the courts in each and every case where the award of the Industrial Court is challenged, the spirit in which these new powers was conferred by the majority in *Rama Chandran* will have been misunderstood and, perhaps, inadvertently, pave the way for an unnecessary emasculation of the functions of the Industrial Court.

The fear of unnecessarily emasculating the functions of the Industrial Court can be laid to rest if the reviewing courts, in the exercise of their powers, constantly bear in mind that the review of the Industrial Court's award on the merits is akin to, though not the same as, the exercise of appellate powers. The courts should also remind themselves that the Industrial Court operates under the Industrial Relations Act 1967, in accordance with principles quite different from those in the civil courts. For example, s 30(4) and (5) of the Act stipulates:

(4) In making its award in respect of trade dispute, the court shall have regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries;

(5) The court shall act according to equity, good conscience and the substantial merits of the case without regard to the technicalities and legal form."

[Emphasis Added]

[27] Whilst a review may be akin to an appeal, it is not the same as an appeal. The source and subsequent separation between a review and an appeal is distinctly different. A review may come close to resemble an appeal only when the decision of the tribunal cannot be justified at all, infected as it is with illegality, irrationality, procedural impropriety or proportionality. Otherwise the Court in exercising its review jurisdiction which is of a supervisory nature would defer to finding of facts of the tribunal. In some jurisdictions like the United States and New Zealand, the expression "low-intensity" review of finding of facts of tribunals and of matters within the peculiar expertise of the decision-maker, has come to be in vogue.

[28] With respect to the test to be applied for the claimant in the Industrial Court to prove constructive dismissal, we need only to turn to the *locus classicus* in the Supreme Court case of *Wong Chee Hong v. Cathay Organisation Malaysia Sdn Bhd* [1987] 1 MELR 32 at p 35:

"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. It must be observed that para (c) never used the words "constructive dismissal". This paragraph simply says that an employee is entitled to terminate the contract in circumstances entitling him to do so by reason of his employer's conduct. But many thought, and a few decisions were made, that an employee in addition to his common law right could terminate the contract if his employer acted unreasonably. Lord Denning MR, with whom the other two Lord Justices in the case of *Western Excavation (supra)* reiterating an earlier decision of the Court of Appeal presided by him (see *Marriott v. Oxford and District Co-operative Society Ltd* [1969] 3 All ER 1126) rejected this test of unreasonableness...

Thus, it is clear that even in England, "constructive dismissal" does not mean that an employee can automatically terminate the contract when his employer acts or behaves unreasonably towards him. Indeed, if it were so, it is dangerous and can lead to abuse and unsettled industrial relation. Such proposition was rejected by the Court of Appeal. What is left of the expression is now no more than the employee's right under the common law, which we have stated earlier

and goes no further. Alternative expression with the same meaning, such as "implied dismissal" or even "circumstantial dismissal" may well be coined and used. But all these could not go beyond the common law test.

...

When the Industrial Court is dealing with a reference under s 20, the first thing that the Court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse. Dismissal without just cause or excuse may well be similar in concepts to the UK legislation on unfair dismissal, but these two are not exactly identical. Section 20 of our Industrial Relations Act is entirely different from para (c) of s 55(2) of the UK Protection of Employment Act 1978. Therefore, we cannot see how the test of unreasonableness which is the basis of the much advocated concept of constructive dismissal by a certain school of thought in UK should be introduced as an aid to the interpretation of the word "dismissal" in our s 20. We think that the word "dismissal" in this section should be interpreted with reference to the common law principle. **Thus, it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it. In such situation the employee is entitled to regard the contract as terminated and himself as being dismissed.** (See *Bouzourou v. The Ottoman Bank* [1930] AC 271 and *Donovan v. Invicta Airways Ltd* [1970] Lloyd's LR 486)."

[Emphasis Added]

[29] As for the burden of proof of constructive dismissal, guidance may be had from the *dicta* in *Moo Ng v. Kiwi Products Sdn Bhd Johor & Anor* [1998] 3 MELR 116; [1998] 2 MLRH 203 at p 220 where the High Court observed as follows:

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

[Emphasis Added]

Whether The Claimant Had Departed From Its Pleading With Respect To Constructive Dismissal

[30] The fact that the Industrial Court is duty bound to scrutinise the parties' pleadings and to adjudicate accordingly is beyond question and one needs only to refer to the dicta of the Federal Court in *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1996] 1 MELR 71; [1996] 1 MLRA 725, where it was observed as follows:

"It is trite law that a party is bound by its pleadings. The Industrial Court must scrutinize the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having strict regards to the issues. It is true that the Industrial Court is not bound by all the technicalities of a civil court (s 30 of the Act) but it must follow the same general pattern. The object of pleadings is to determine what are the issues and to narrow the area of conflict. **The Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion.** The Industrial Court must at all times keep itself alert to the issues and attend to matters it is bound to consider."

[Emphasis Added]

[31] It is therefore imperative to peruse the respondent's pleadings. At the outset, the appellant recognises that the respondent had narrated the facts prior to his claim of constructive dismissal in his Statement of Case. The paramount consideration, however, is in relation to the reasons behind the respondent's decision to claim constructive dismissal.

[32] Learned counsel for the appellant submitted with considerable persuasion that the respondent's Statement of Case provides that the reasons for his resignation was due to the request of COW-2 through a phone call as follows:

"26. Contrary to cl 12 of the Contract of Employment, the Claimant was made to resign via phone call during which Tuan Haji Mohamad Nor informed that the Claimant that Dato Lee had said that if the Claimant does not resign, he will be terminated.

...

30. **The Claimant states that the Claimant's resignation was a result of the Company's request that the Claimant resigns and it was not a resignation of the Claimant's own volition and as such, the Claimant regards himself to be constructively dismissed.**"

[Emphasis Added]

[33] Learned counsel then drew our attention to the respondent's Rejoinder where he pleaded as follows:

"4.10 With specific reference to para 4.10 of the Statement in Reply, the Claimant reiterates paras 26 until 28 of the Statement of Case and states that the Claimant was told by Tuan Haji Mohamad Nor that if the Claimant did not resign, he would be terminated when the Claimant returned to work."

4.11 Further, the Claimant states that any attempt to achieve amicable settlement as evident in the trail of e-mails between Tuan Haji Mohamad Nor and the Claimant was made before the forced resignation which was on the 2 March 2017.

4.12 With specific reference to para 4.12 of the Statement in Reply, the Claimant states:

4.12.1 That the meeting on the 2 March 2017 was between Dato Lee, Tuan Haji Mohamad Nor and the Claimant in Dato Lee's office.

4.12.2 The Claimant reminded Dato Lee that the Claimant's contract was different to that of the Principal, Ms Denise Sinclair which is that the notice *in lieu* was not 6 months since it was a fixed term contract.

4.12.3 However, the Claimant was told to accept the offer or the Claimant would be terminated."

[34] The texture and thrust of the respondent's case was that he resigned due to the series of events as alleged. Based on his pleadings, his resignation was purportedly because of the COW-2's request for him to resign, failing which he would be terminated via the phone call and the meeting of 2 March 2018.

[35] This position was credibly consistent with the respondent's own email dated 2 March 2018 where he did not mention the purported series of events which led to his resignation as follows:

"Our conversation today refers, I would hereby accede to the request of the Company and tender my resignation as the CEO of Matrix Global Education Sdn Bhd I thank you for the opportunity with the Group over these years.

I will continue to assist MGS in any way on the outside if needed as MGS will always be a large part of me"

[36] Learned counsel for the appellant company referred us to the case of *Sanbos (Malaysia) Sdn Bhd v. Gan Soon Huat* [2021] 3 MELR 375; [2021] 5 MLRA 133 where the Court of Appeal explained that in determining a claim of constructive dismissal, the Industrial Court need to only consider the reasons stated in the letter of resignation, and any reasons not stated in the letter are irrelevant as follows:

"[38] We are of the considered view that the learned High Court Judge erred in reversing the decision of the Industrial Court on the issue of constructive dismissal. Our reasons are as follows. As stated in the authorities we cited earlier, an employee is only entitled to regard himself as dismissed if there is a breach of the fundamental terms of the contract of employment. **In the letter of resignation, the respondent only gave two reasons for leaving employment, ie, the revision of sales commission rate and the change in his area of sales coverage which would reduce his monthly earnings. Therefore, the only question that arises is whether these two complaints amounted to a breach of the fundamental terms of the employment contract. The other reasons he advanced at the Industrial Court hearing are not relevant as an employee cannot rely on reasons not given for considering himself constructively dismissed.** Anyway, both the Industrial Court and High Court rightly did not address them."

[Emphasis Added]

[37] Likewise, conversely, the Federal Court in *Maritime Intelligence Sdn Bhd v. Tan Ah Gek* [2022] 1 MELR 200; [2022] 1 MLRA 56 ruled that employers are only able to rely on the reasons stated in the letter of dismissal to justify the dismissal:

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

[38] Learned counsel for the appellant company submitted that a similar proposition should also be applied for the inverse instance where employees claim constructive dismissal, consistent with the principle of *Gan Soon Huat*'s case *(supra)*. It was argued that to enable an employee to add additional grounds in justifying his claim of constructive dismissal before the Industrial Court would be inherently unjust and/or unfair. After all the principle of constructive dismissal is premised on an employee considering that the employer had committed an act or a series of acts that were so serious to enable the employee to claim constructive dismissal.

[39] Learned counsel for the appellant company sought to prevail upon us that, if at all, the series of actions as narrated were as serious as alleged, surely the respondent would have seen fit to place the said actions in his letter of resignation. It was impressed upon us that the respondent is the former CEO, with a legal background and not a rank and file employee. It was submitted that it would have been ordinarily incumbent upon him to state the exact reasons for his claim of constructive dismissal. This was not forthcoming in his resignation email.

[40] Learned counsel for the appellant company then invited our attention to the inconsistent stance at different junctures as follows:

> (a) At the time the respondent resigned
>
> When the respondent resigned, he had only made reference to the appellant's request for him to resign as per the email dated 2 March 2018. There was no mention of the series of actions which allegedly led him to resign or the purported incident where he was asked to resign, failing in which he would be dismissed;
>
> (b) In his pleadings
>
> In his Statement of Case and the Rejoinder, the respondent then suddenly claimed that he was asked to resign by COW-1, failing which he would be terminated and that there was allegedly a meeting on 2 March 2018 with COW-1 and COW-2, where he was again forced to resign;

(c) Before the Industrial Court

The respondent then relied on an entirely different angle and allege that the series of events that occurred prior to the alleged request to resign was part of his reasons to claim constructive dismissal.

[41] Learned counsel for the appellant company emphasised the attempt of the respondent to add more reasons to justify his claim of constructive dismissal and as these factors were not stated in his email of resignation whatsoever, they should be relegated to the realm of an afterthought. It was further submitted that the Industrial Court, by accepting the respondent's contention had therefore, exceeded its jurisdiction when it failed to confine itself to the pleadings.

[42] We appreciate that the respondent is at liberty to narrate the facts prior to his resignation but the pertinent question to be asked is when is the defining moment when he claimed himself to have been constructively dismissed. As none was forthcoming in his letter of resignation, it was submitted that that by itself, render his claim fatal.

[43] It is true that the High Court had relied on the decision of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 1 MLRA 738 and held that the appellant was aware of the respondent's pleaded case (see para 29 of the Grounds of Judgment) and did not object to the evidence. Learned counsel for the appellant company was careful to caution that simply because the appellant's counsel did not object to the evidence, that does not mean that the respondent may rely on grounds not stated in his letter of resignation and his pleadings. It was further argued that to enable the respondent to rely on additional grounds simply because the appellant did not object runs afoul to the fundamental principle of the Industrial Relations Act 1967. It was iterated that the crucial question to be asked was, what exactly was the reason that led to the respondent claiming constructive dismissal.

[44] It was submitted by learned counsel for the appellant company that taking the High Court's decision to its logical end would suggest that employees or conversely, employers, may lead additional evidence to justify the claim of constructive dismissal (or from the employer's perspective, to justify the grounds of dismissal) and as long as the opposing party does not object, despite the same not pleaded in the first place, the Industrial Court is justified in considering the same. It was argued that this reasoning would run afoul against the decision of *Maritime Intelligence (supra)*.

[45] Learned counsel for the appellant company laboured the point that it was crucial for the respondent to not only plead the facts but to state the very incident that resulted in his claim of constructive dismissal. The decision of *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2009] 3 MLRA 597 was cited, where the Court of Appeal quashed the Industrial Court's decision for embarking on a "frolic of its own" in ruling that there was victimisation when the same was never pleaded. The Court of Appeal recognized the specialised

domain of industrial jurisprudence and placed emphasis on r 9(3) of the Industrial Court Rules 1967, which required parties to plead not just the facts but also the arguments, as follows:

> "(3) Such Statement of Case shall be confined to the issues which are included in the case referred to the Court by the Minister or in the matter required to be determined by the Court under the provisions of the Act and shall contain:
>
> (a) a statement of all relevant facts and arguments;

[46] The Court of Appeal further affirmed the principle expressed in *Rama Chandran (supra)* and ruled,

> "[19] Our analysis of the judgment in *Superintendent of Lands & Mines, supra*, shows that it was not concerned with the construction of s 30(5) and r 9, *supra*. Instead, it revolves around the procedure generally applicable to ordinary civil litigation. It does not relate to the specialized domain of industrial jurisprudence.
>
> [20] With particular reference to industrial jurisprudence, there are two weighty authorities, of the (then) apex court, which reflect the second school of thought, and at variance with the approach adopted in *National Union of Plantation Workers, supra*. The first is *R Rama Chandran, supra*, where the Industrial Court did not consider the issues raised in the parties' pleadings.
>
> ...
>
> [21] The second authority was established by another coram of the (then) Supreme Court in *Kumpulan Perangsang Selangor Bhd, supra*, which followed the principle propounded in *R Rama Chandran, supra*. There, the Industrial Court had acted on a ground which was not advanced in the pleaded case. The award by the Industrial Court was quashed: per Gopal Sri Ram JCA (now FCJ) speaking for the (then) Supreme Court.
>
> [22] The existence of the two different schools of thought makes it imperative for us to indicate our choice for the better view. **With respect, we subscribe to and agree with the principle propounded in the second school of thought which sets out the correct judicial approach relating to the specialized domain of industrial jurisprudence.**"
>
> [Emphasis Added]

[47] To refresh our memory, the respondent's reasons for resigning (which he alleged was a constructive dismissal) was stated at paras 26 and 30 of his Statement of Case as follows:

> "26. Contrary to cl 12 of the Contract of Employment, the Claimant was made to resign via phone call during which Tuan Haji Mohamad Nor informed that the Claimant that Dato Lee had said that if the Claimant does not resign, he will be terminated
>
> ...

30. The Claimant states that **the Claimant's resignation was a result of the Company's request that the Claimant resigns and it was not a resignation of the Claimant's own volition** and as such, **the Claimant regards himself to be constructively dismissed.**"

[Emphasis Added]

[48] Learned counsel for the appellant company then concluded that to then expand the reasons for his claim of constructive dismissal to the alleged series of events, is a clear departure of his pleadings. It was further submitted that the Industrial Court had gone on a frolic of its own, and committed an error of law, as illustrated in the case of *Ranjit Kaur (supra)*, which warrants an interference by this Court as follows:

"[28] On the basis of this specific conclusion by the Industrial Court, in relation to the unpleaded issue of victimization for which there was no positive proof, we are of the view that the Industrial Court had gone on a frolic of its own in finding that the employee had been victimized. It is manifestly wrong for the Industrial Court to proceed to embark on "the possibility of victimization" when it should have been concerned with probabilities ie, on a balance of probabilities. This principle setting out the standard of proof is both fundamental and elementary."

[49] Hence, learned counsel for the appellant company concluded that the Industrial Court committed an error of law when it exceeded its jurisdiction in considering the purported series of events to justify the respondent's claim of constructive dismissal.

[50] To be fair to the respondent, we are of the considered view that he had pleaded with some particularity the series of events which to him amounted to constructive dismissal of him from his position as the CEO of the appellant. The respondent's pleaded case as seen from the Statement of Case ("SOC") and Rejoinder are as follows:

(a) SOC — Paragraph 8

The facts **leading to the constructive dismissal** of the Claimant are as specifically set forth in the Statement of Case below.

[Emphasis Added]

(b) SOC — Paragraphs 9 — 29

Thereafter in 21 paragraphs, beginning from para 9 and ending in paragraph 21, the respondent had set out all the incidences from 28 September 2017 to 5 March 2018 that led to the Claimant sending in the resignation letter.

(c) Further, the respondent, had reiterated in the Rejoinder, the fact that there were a series of conducts, which the respondent had relied upon to claim constructive dismissal.

[51] Learned counsel for the respondent stated that the respondent's case is clear — there were several facts leading to the constructive dismissal of the respondent and these facts must be read together with para 30 of the respondent's SOC.

[52] We are of the view that we should not be unduly pedantic and fastidiously fixated where pleadings are concerned in the Industrial Court where the procedure are designed to be simple and shorn of the sophistication of superior Courts' strict rules on pleadings. After all the proceedings were originally designed to be conducted even without the need for lawyers and through the years the practice has evolved where legal representation has been allowed simply by alluding to the reason that there are complicated and convoluted points of law to be argued. See s 27 Industrial Relations Act 1967 ("IRA"), Rule 3 of the Industrial Court Rules 1967 and Form A thereof.

[53] Whilst it is true that the final email on the respondent's resignation alluded to acceding "…. to the request of the Company and tender my resignation as the CEO of Matrix Global Education Sdn Bhd" and that prior events were not referred to at all, we would nevertheless allow some leeway to the respondent as claimant in the Industrial Court the liberty to plead what he perceived to be the accumulation of events that culminated in "his forced resignation."

[54] We are fortified in our view considering that the operative words of s 20(1) of the Industrial Relations Act 1967 is that: — if a workman considers himself to have been dismissed without just cause and excuse…." It is thus his subjective perception of his dismissal and if he so perceives that it was a series of events as narrated by him that culminated in his ultimate email where he said ".I accede to the request of the Company and tender my resignation as the CEO of Matrix Global Education Sdn Bhd", then so be it for it is after all what Parliament had allowed him ie the liberty to narrate the events that ultimately resulted in his treating himself as being constructively dismissed.

[55] This is even more imperative when we consider the fact that the IRA is a social piece of legislation designed to protect the workman who is generally the weaker party with less of a bargaining power in an industrial dispute with the company. We can do no better than to refer to the Federal Court's case of *Maritime Intelligence Sdn Bhd v. Tan Ah Gek* [2022] 1 MELR 200; [2022] 1 MLRA 56 where it was observed as follows:

> "[40] To that end, the Act **and s 20 comprise social legislation promulgated by Parliament to ensure that a workman's right to earn a livelihood is not truncated arbitrarily at the will of an employer**. Section 20 in particular precludes arbitrary and capricious decisions taken to cease/halt a person's employment, because it is recognised that the right to earn a livelihood is a fundamental liberty and entitlement, that deserves protection. As social legislation, it is incumbent upon this court, when construing its provisions to give the statutory provisions a construction which would assist to achieve the object of the Act. The evolution of industrial law in this jurisdiction and many decisions of this court have emphasised the importance, significance

and relevance of having regard to the fact doctrine of social justice. See for instance, *Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v. Kesatuan Kebangsaan Pekerja-pekerja Hotel, Bar & Restoran Semenanjung Malaysia* [2021] 2 MELR 84; [2021] 2 MLRA 696.

[41] s 20 of the Act provides such protection. Where a "workman" or employee considers that he has been dismissed "without just cause or excuse" by his employer, he may make representations as outlined in the Act, seeking the remedy of reinstatement to his former employment.

[42] **Section 20(1) therefore makes it clear that representations ie, a grievance may be lodged, based on the workman's own subjective view that his employment has been terminated without a well- grounded, impartial and reasonable basis.** This affords the workman an immediate avenue of redress and access to justice. The remedy is reinstatement, which means that the workman is entitled to return to work, with no loss suffered, where there was no reasoned basis for the dismissal."

[Emphasis Added]

[56] We appreciate that while a company may have access to immediate legal advice and counsel in drafting a show cause letter and a letter of dismissal of an employee, an employee would often have to fend for himself and rely on the goodwill of friends to assist him with respect to the direction he should take.

[57] For so long as the events leading to the decision to treat himself as being constructively dismissed have been pleaded and the appellant company indeed have both the opportunity to reply and indeed to crossexamine the claimant accordingly at the Industrial Court hearing, we would not penalise the claimant on an expansive or a less than elegant pleading. It would be for the claimant to persuade the Industrial Court that even though there was some lapse of time before he treated himself as being constructively dismissed, the circumstances of the case was such that it was excusable.

[58] We do not think that there was such a divergent departure from the pleaded facts that the Industrial Court could be said to decide on a matter not properly pleaded before it. Whether or not the respondent's claim of constructive dismissal had been proved by the claimant in spite of the long lapse of time before his being replaced by Tuan Haji Mohamad Nor and his final email on his departure is another matter altogether.

[59] The appellant company at the Industrial Court was not taken by surprise and indeed learned counsel for the appellant company did crossexamine the respondent on this very issue of the events that were said to have a connection with each other leading to the claim for constructive dismissal.

8. Can you explain the circumstances that led to the situation where you regarded yourself to be constructively dismissed?

It began from 28 September 2017 onwards when Dato Lee Tian Hock ("Dato Lee"), the founder of MGS had received a complaint via email about Ms

> Denise Sinclair, the Principal of MGS. The complaint was made by a parent, Ms Aiwee Chooi. Dato Lee then instructed me and Tuan Haji Mohamad Nor to investigate the complaint. Ms Denise Sinclair, Tuan Haji Mohamad Nor and I met up with the complainant, Ms Aiwee Chooi to listen to her grievances and complaints.
>
> In fact, the meeting was led by Tuan Haji Mohamad Nor and I only joined the meeting halfway in which Ms Aiwee Choo was made to repeat the complaints about Ms Denise Sinclair. Subsequently, Ms Aiwee Chooi had complained to Dato Lee about the manner I handled her complaint.
>
> Dato Lee without any further investigation, in reliance of Aiwee Chooi's complaint sent out an email to Ms Aiwee Chooi stating that Tuan Haji Mohamad Nor would be the 'temporary de facto CEO'.

[60] We are satisfied that the respondent himself had referred to his Witness Statement in his Answer to Question 8 as follows:

> We are with the learned counsel for the respondent when he submitted that the respondent was cross-examined on the aforesaid issue as follows:
>
> Counsel for Appellant: And would you, you can confirm also that following the meeting with the parent in view of the concerns raised by the parent the decision was for you to be removed as CEO of the school, am I correct?
>
> Respondent: That's what the email suggest
>
> Sivabalah: Can you confirm that under this clause you are subject to transfer to any of the company's subsidiaries within the group?
>
> Felix: Yes
>
> Sivabalah: No, I'm asking you just to confirm as a fact that you were informed and notified in December that you will be transferred out of the school with effect from January?
>
> Felix: Yes
>
> Sivabalah:...In fact, Mr Lee you carried out the job your new role effect from January until your departure in March am I correct
>
> Felix: But I wasn't assigned anything to do
>
> Sivabalah: You did not allege when you were transferred that it was a demotion, would you agree? Did you in any documentation allege that you were demoted?
>
> Felix: Because I was not told what I was transferred for.
>
> Sivabalah: And in fact, Mr Felix. You also confirm in your new role, you were CEO of Marketing in the holding company am I correct?
>
> Felix: No that was not what I said in my statement

[61] Thus it can fairly be surmised that the respondent's case as claimant in the Industrial Court was that through a series of events commencing to being replaced as the CEO by Tuan Haji Mohd Nor as the interim CEO and his subsequent reassignment to various positions as CEO of Marketing and then to Head of Corporate Affairs and Communications of the Group and the advice to resign were all interconnected and thus leading to what he perceived to be constructive dismissal; a matter known to the appellant company and which allegations the appellant company had every opportunity and which they did rebut.

[62] Conversely learned counsel for the claimant also did crossexamine the company's key witness in Tuan Haji Mohammed Nor (COW- 2), the Group Human Resource Manager, at length on the transfer exercise, without any objection from counsel for the appellant that they were venturing into the uncharted waters of unpleaded facts and that they are caught by surprise. The cross-examination of Tuan Haji Mohammad Nor (COW-2) where relevant to illustrate the above is reproduced below:

> RN: I am putting it to you that you were appointed as a temporary de-facto CEO carrying out the role of the Claimant at that point of time do you agree or not?
>
> Tuan Haji: I do not agree
>
> RN: In November 2017, 6 November 2017 to be specific, there was a head of department meeting. Are you aware of that meeting? 6 of November 2017, there was a head of department meeting at the school. Are you aware of the meeting?
>
> Tuan Haji: Yeah
>
> RN: You attended the meeting?
>
> Tuan Haji: I think I attended the meeting your honour
>
> RN: And at this meeting, there was an announcement that the claimant would only be performing his job in respect of marketing only, do you agree?
>
> Tuan Haji: yes, your honour
>
> RN: Sometime, in December 2017, Tuan Haji, Dato Kalsom was appointed, the director of education was appointed to replace the claimant as the CEO in the school, do you agree?
>
> Tuan Haji: Yes
>
> RN: Tuan haji would you agree with me that the job of CEO or rather okay let me put it this way, the job of marketing, assisting in marketing duties is different form a job of a CEO of a company, do you agree?
>
> Tuan Haji: Specifically, when-
>
> RN: Do you agree or not?

Chairman: Please answer the question. You can explain later

RN: I am waiting for the answer

Tuan Haji: okay agree

RN: Therefore, I am putting it to you that this transfer is not consistent with the claimant's job as a CEO, do you agree with me?

Tuan Haji: I do not agree with you.

RN: I am putting it to you the whole purpose of this transfer was a start of the company's attempt to constructively or rather to dismiss the claimant or to force the claimant to resign? Do you agree with me?

Tuan Haji: I disagree."

[63] We do not think an Industrial Court's proceedings and pleadings should be subject to greater strictures that those of a superior Court, being an employment tribunal that is enjoined by s 30(5) as follows:

> "(5) The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

It is clear that undue technicality is eschewed with a bias towards substance rather than form and with that a staying and steering clear from the sophistication of a trial court.

[64] We would therefore hearken to the clarion call of the Federal Court in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 1 MLRA 738 to go back to first principle and to remind ourselves of the following:

> "In our judgment, the requirement of these rules is sufficiently met if the material facts giving rise to the estoppel are sufficiently pleaded without actually using the term 'estopped'. (See, *Lal Somnath Singh & Ors v. Ambika Prasad* AIR 1950 All 121 at p 131). It may be desirable for a pleader to use that term; but it is not fatal if he does not. **One must not lose sight of the object of modern pleadings which is to prevent surprise and to enable disputes to be litigated in an orderly fashion**: *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLRA 57 at p 320."
>
> [Emphasis Added]

[65] In like vein we are reminded of the observation of the Court of Appeal in *Quah Swee Khoon v. Sime Darby Bhd* [2000] 1 MLRA 856 where a failure to use the terms "constructive dismissal" in the claimant's pleading was held not to be fatal so long as the narration of events and effect were pleaded.

Whether The Respondent And The Appellant Company Had Entered Into A Negotiated Settlement Of Separation On Terms Mutually Agreed And That An Agreement Had Been Reached

[66] What is more pertinent and indeed pivotal in this case is whether both the High Court and the Industrial Court had failed to consider the relevant fact that the respondent, prior to his resignation, had entered into negotiations with the appellant to discuss a better severance package.?

[67] In order to prove a claim of forced resignation, it was incumbent upon the respondent and the burden is on him to adduce evidence to show that he was placed in a position where he was forced to resign, failing in which, he would be dismissed unlawfully. This principle, as pointed out by the appellant, was outlined by the High Court in the case of *Weltex Knitwear Industries Sdn Bhd v. Law Kar Toy & Anor* [1998] 4 MLRH 774 as follows:

> "So, it is for the first respondent to establish so by the evidence. From the evidence before the learned chairman, can it be said that the applicant by its conduct had placed the first respondent in a position in which she really has no option but to tender her resignation for an inference to be drawn that she is dismissed by the applicant?"

[68] According to para 26 of the Statement of Case and 4.12 of the Rejoinder, the respondent pleaded:

(a) That there was phone call between COW-2 and the respondent where the respondent was forced to resign; and

(b) There was another meeting of 2 March 2018 with COW-1 and COW-2 where the respondent was forced to resign, otherwise, he would be terminated.

[69] We note that both COW-1 and COW-2 had expressly denied the respondent's contention in their evidence.

[70] Where one version is asserted by the employee and another by the employer with respect to whether an employee had been forced by the employer to resign, the Industrial Court then must scrutinise the facts not in dispute and see if the allegation of forced resignation had been proved.

[71] What is not disputed here is that there was a suggestion from the appellant company that the respondent should consider resigning in the light of the numerous complaints by parents on the quality of teaching and education and the company having to refund the fees paid to the parents to the tune of more than RM1 million for that academic year. It cannot be denied as it had become fiat accompli that, upon the suggestion of resignation being raised, the respondent had entered into negotiations with the appellant for a better severance package. Evidence to this effect can be found at the following:

(a) Email dated 26 February 2018 (p 98 of encl 15) where the respondent sought for a 12 month compensation and a waiver of his son's remaining tuition fees:

"However, taking into account what was said earlier and the understanding that we had, may I humbly suggest the following:

1.

...

"..Having said that, **I am hoping we can come to a compromise to the 22 months and my suggestions would be a 12 month compensation subject to point 1 being agreed upon.**

3. I am assuming that the staff waiver of fees and payment by the Company of our benefit in kinds taxation would be honoured for my son's remaining tenure at Matrix International School as confirmed..."

[Emphasis Added]

(b) Email dated 26 February 2018 (p 99 of encl 15) where the respondent reaffirmed his intention to achieve an amicable settlement as follows:

"As per our standing in our meeting held today, **I would thereby accede to the Applicant's request for my resignation as CEO from Matrix Global Education Sdn Bhd, subject of course to the understanding that we will arrive at an amicable settlement arrangement.** As you are well aware and agree, I am always in support of the Company and the group and as such would look forward to a settlement arrangement agreeable by all parties. I have made my request known in the earlier email and trust that we would be able to arrive at an amicable arrangement expediently."

[Emphasis Added]

(c) Email dated 27 February 2018 (p 100 of encl 15) where the respondent again reiterated his proposal as following:

"I still do believe that my proposal is a very equitable one bearing in mind that mine was a fixed term contract."

(d) Email dated 28 February 2018 (p 100 of encl 15) where the respondent proposed additional terms for his resignation,

My humble proposal:

1. To treat the contract as if it has been fully served.

2. Instead of paying the unexpired term of 22 months, only to pay for 12 months (out of fairness to the Applicant)

3. Since contract is deemed served, the COS is deemed to be fully executed too."

(e) The respondent's own evidence before the Industrial Court that he was agreeable to discuss and did discuss with the company on a mutually acceptable severance package.

[72] The conduct of the respondent in entertaining and entering into negotiations for settlement on terms does not sit snugly and indeed cannot support what he later asserted in the Statement of Case and at the Industrial Court that he had been constructively dismissed.

[73] The respondent cannot have the best of both worlds; negotiating and accepting the terms of a separation and then at the same time claiming that he had been constructively dismissed. He cannot have the cake and eat it; entering into a negotiated settlement without reservation of rights and then launching a claim for more on account of being constructively dismissed.

[74] If the respondent as claimant in the Industrial Court is so certain that the narrated actions of the appellant company are so connected with one another as to culminate in a repudiation of the employment contract, then he must show and be seen to have dissociated and distanced himself from the actions of the company and to forthwith walk out of the employment and treat himself as being constructively dismissed.

[75] A mere suggestion, advice or option to resign is not conclusive of constructive dismissal or forced resignation. The higher one is in the employment ladder and here we are talking about the top executive position of a CEO just below that of the managing director or executive director, the higher the test that one has been forced to resign.

[76] We were referred by learned counsel for the respondent to the High Court case of *Michael Brian Davis v. Microsoft Malaysia Sdn Bhd* [2000] 3 MLRH 276, where the High Court held that forced resignation is a dismissal and quoted from the case of *BBC Brown Boveri (M) Sdn Bhd v. Yau Hock Heng* [1990] 2 MELR 92 at p 99 where the Industrial Court held as follows:

> "…. What is this concept [of indirect dismissal] and what does it involve? A fair description of it can be found in a passage from *The Law of Redundancy* (by Cyril Grunfield) at p 110 therein which states:
>
> '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 is 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 emphasize 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 has no option to tender his notice.** In such a situation the reality is… that the employee is dismissed."
>
> [Emphasis Is Ours]

[77] We must emphasised the fact that whether a resignation is a "forced resignation" is very much fact-centric and fact-sensitive and in the above case the High Court had noted that there were two separate occasions where the company had prepared letter of resignation for the employee to sign.

[78] In the present case not only is the claimant legally qualified, but he had himself written his own email tendering his resignation in measured and mellowed language of maturity — marking a memorable departure from service with the company as "MGS will always be a large part of me."

[79] The suggestion or advice to resign must be viewed in its proper perspective and proportion. In industrial disputes between a company and its employee or workman, it is always a plus for industrial harmony if any severance of employment can be done on terms mutually adoptable. In a case where the company considers the employee to have committed a misconduct, not of the criminal kind but of say poor performance, parties may well enter into a negotiation for a severance of the employment contract on terms mutually agreed and this may even have been commenced after the company has suggested that the employee should consider or even should resign.

[80] In a genuine case where the employee should resign perhaps on account of poor performance, a negotiated settlement would obviate the necessity of a show-cause letter and a domestic inquiry and finally having the matter ended up in the Industrial Court where all its Awards are invariably reported in the Industrial Law Report ("ILR") and any prospective employer can always do a search to find out if the prospective employee has a previous claim in the Industrial Court.

[81] In the event that the employee loses in the Industrial Court, the findings of the Industrial Court are available for all to read. This is enough to discourage a prospective employer from engaging that employee.

[82] A negotiated settlement works to the good of the company, knowing that once the negotiated sum and other benefits are paid out or agreed, the matter ends there. The employee who chooses to resign on terms can afford to keep the matter confidential or at least away from the glare of the ILR.

[83] Granted there would be instances where the employee takes the stand that he has not committed any misconduct, much less having to go for an alleged poor performance as the company's CEO. He is perfectly entitled to remain and the company would have to decide whether to issue a show-cause letter followed by a domestic inquiry to dismiss him. The company would still have to pay him his full pay until he is suspended pending his domestic inquiry. If the company in the interim demotes him or makes report to his subordinates or takes away his perks and benefits, he may have recourse to treat himself as being constructively dismissed.

[84] Any claim by an employee that he has been "forced to resign" must be carefully scrutinised by the Industrial Court as to how the "force" was done. If it is just that the company would sack him, then he should just wait for the company to sack him and then bring the matter to the Industrial Court. With the recent amendment, he is sure that his complaint of being dismissed without just cause and excuse will be referred to the Industrial Court.

[85] The amended s 20 of the IRA as amended by the Industrial Relations (Amendment) Act 2020 (Act A1615) which amendment came into force on 1 January 2021 reads as follows:

> "20. Representations on dismissals
>
> (1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.
>
> (1a) The Director General shall not entertain any representations under subsection (1) unless such representations are filed within sixty days of the dismissal:
>
> Provided that where a workman is dismissed with notice he may file a representation at any time during the period of such notice but not later than sixty days from the expiry thereof.
>
> (2) Upon receipt of the representations **the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at**.
>
> [(2) Am Act A1615: s 12]
>
> (3) Where the Director General is **satisfied that there is no likelihood of the representations being settled** under subsection (2), **the Director General shall refer the representations to the Court for an award**.
>
> [(3) Ins Act A1615: s 12]"
>
> [Emphasis Added]

[86] If in spite of the suggestion or advice to resign and he does not so resign and the company dismisses him after a domestic inquiry, then he could still bring the matter to the Industrial Court. Thus, for an employee to say that he was "forced to resign" for otherwise he would be sacked, the Industrial Court must inquire further as to why he was scared of being sacked when he has done nothing wrong as in having committed a misconduct.

[87] If an employee agrees to put in his unqualified letter of resignation or acceded to the request that he should resign, it would be difficult for him to later complain about it that it was a "forced resignation" unless there is

evidence to show that he had been manhandled or threatened to be bashed up unless he resigns.

[88] The respondent as claimant in the Industrial Court with a legal training would be conscious of his rights under the law and would not have caved in into resigning just because the managing director said so. He can refuse to resign at that suggestion and treat himself as being constructively dismissed. But the moment he puts in his letter of resignation on terms agreed, that is a concluded contract, and no longer a case of constructive dismissal.

[89] The email of resignation coupled with thanking the company and offering to help in the future should the need arise are all the language of conciliation and closure with no trace of resentment or recrimination. It is said that out of the abundance of the heart, the mouth speaks and words are written down and it is to those words written that we look for any sign of "forced resignation." With respect to both the High Court and the Industrial Court, we find no trace of it for the very words employed negated it. On the contrary the words used have all the elements of a voluntary resignation with unqualified acceptance of the terms with no reservation of rights and certainly not on a "without prejudice" basis.

[90] Learned counsel for the respondent referred us to the case of *Teoh Hang Swee @ John Teoh Hang Soon lwn. Yang Berhormat Menteri Sumber Manusia, Malaysia & Anor* [2010] 8 MLRH 775, where Mohd Zawawi Bin Salleh J (later FCJ) quoted from the case of *BBC Brown Boveri (M) Sdn Bhd v. Yau Hock Heng* [1990] 2 MELR 92 cited the decision of the Industrial Court Chairman as follows:

> "The concept of indirect dismissal can be distilled from the various decisions of the industrial tribunals in England: see *Sutcliffe v. Hawker Aviation Ltd* [1974] ITR 58 (NIRC); *Coenan v. S England Tyre Service Ltd* [1971] ITR 41 (DC); *East Sussex Country Council v. Walker* [1972] ITR 280 (NIRC) & *District Sheffield v. Oxford Controls Ltd* [1979] IRLR 1339 (EAT). It covers a grey area between direct dismissal and constructive dismissal. **Here, the series of actions and the course of conduct taken by the company from the time of its decision to reorganize the electronics department to the moment when the agreement Exhibit C01 was signed, do suggest an overall effect of placing the claimant in a position where he had practically no or very little option but to leave. The underlying current was ominous, that there was the likelihood that if he did not leave, he might be dismissed from the company. The signals were subtle but nevertheless clear**."
>
> [Emphasis Is Ours]

[91] It must be pointed that Justice Mohd Zawawi nevertheless dismissed the judicial review application for an order of *certiorari* to quash the decision of the Minister not to refer the dispute to the Industrial Court. The applicant had tendered his resignation and received his severance package which he did under protest. In our present case there was no protest manifested or written when the

agreed terms were set out in the email which the respondent "acknowledged receipt."

[92] It is both important and imperative to note that the appellant in their letter of 5 March 2018 captioned "Re: Acceptance of Resignation" had in fact accepted part of the respondent's proposal and treated the respondent's contract as fully utilised and further agreed to waive his two children's school fees for the remaining school term as follows:

> "The management agrees to waive the notice period of hundred eighty (180) days and in return you will be paid *in lieu* of notice period.
>
> In addition, **the management had also agreed to continue with the School Fee Waiver of your children (xxxx and xyxy)**... until the completion of the term.
>
> ...
>
> Upon your acceptance of this letter with the terms as offered and fulfilment of conditions as required, **it shall be construed as an amicable conclusion and with no further claim by either party.**
>
> We take this opportunity to thank you and wishing you all the best in your future endeavours."
>
> [Emphasis Added]

[93] It cannot be over emphasised that a resignation made pursuant to a series of negotiations completely negates the allegations of forced resignation as upheld by the Employment Appeal Tribunal in the case of *Sheffield v. Oxford Controls Co Ltd* [1979] ICR 396 as follows:

> "In cases such as that which we have just hypothesised, and those reported, the causation is the threat. It is the existence of the threat which causes the employee to be willing to sign, and to sign, a resignation later or to be willing to give, and to give, the oral resignation. But **where that willingness is brought about by other considerations and the actual causation of the resignation is no longer the threat which has been made but is the state of mind of the resigning employee, that he is willing and content to resign on the terms which he has negotiated and which are satisfactory to him,** then we think there is no room for the principle to be derived from the decided cases. **In such a case he resigns because he is willing to resign as the result of being offered terms which are to him satisfactory terms on which to resign. He is no longer impelled or compelled by the threat of dismissal to resign, but a new matter has come into the history, namely that he has been brought into a condition of mind in which the threat is no longer the operative factor of his decision; it has been replaced by the emergence of terms which are satisfactory.** Therefore, we think that the finding that Mr Sheffield had agreed to terms upon which he was prepared to agree to terminate his employment with the company — terms which were satisfactory to him — means that there is no room for the principle and that it is impossible to upset the conclusion of the Tribunal that he was not dismissed."
>
> [Emphasis Added]

[94] The Employment Appeal Tribunal went on to dismiss the employee's claim as the employee therein had resigned voluntarily after he had agreed to satisfactory terms/offer of financial benefits. There it was held in the head notes as follows:

> "Held: dismissing the appeal, that where an employee was threatened that if he did not resign he would be dismissed and the threat caused the resignation, that amounted to a dismissal in law; but where the resignation was brought about not by the threat of dismissal but by other factors such as the offer of financial benefits, there was no dismissal; that accordingly, since the employee had agreed satisfactory terms upon which he was prepared to resign so that the threat of dismissal was not in fact the cause of his resignation, he had not been dismissed and the industrial tribunal's decision was correct."

[95] In *Logan Salton (Appellant) v. Durham Country Council (Respondents)* [1989] 1 RLR 99, the Employment Appeal Tribunal held that the employee's employment had been terminated by mutual agreement in accordance with an agreement, in which the employee had entered into freely and without duress and under which he benefited from a financial consideration. The Employment Appeal Tribunal held in the head notes as follows:

> "The Industrial Tribunal had not erred in holding that the appellant's employment had been terminated by mutual agreement in accordance with the terms of a valid agreement which the appellant had entered into freely and without duress and under which he benefited from a financial consideration. In reaching that decision, the Industrial Tribunal had not failed to take account of the fact that when the appellant agreed to those terms, he was aware that a recommendation had been made that he be summarily dismissed."

[96] Learned counsel for the appellant company submitted that the aforementioned principle has likewise been adopted by the Industrial Court in Malaysia, as can be seen in the following cases:

- *Christopher Dass Muniandy @ Mathew v. Clasquin (Malaysia) Sdn Bhd* [2022] 1 MELR 275 Award No 1393 of 2021;

- *Tan Cheng Leng v. Futuristic Store Fixtures Sdn Bhd* [2019] MELRU 1180 Award No 1180 of 2019;

- *Woo Kit Seong v. Synthes Malaysia Sdn Bhd* [2017] 2 MELR 247 Award No 433 of 2017.

[97] The High Court, however, erroneously ruled that the appellant's case was that the respondent had resigned because "negotiations failed" (see para 35, p 17 of encl 15). We accept that this was not appellant's case. The appellant's case was that the respondent had resigned, after negotiating the terms of his resignation.

[98] One can often sense and discern the very mood of a writer from the words used in his writing and here the words chosen by the respondent in his resignation email were redolent of respect and best regards. At the risk of

repetition but to assist us to capture the conciliatory closure of a chapter in the respondent's employment with the appellant company, the email is reproduced below as follows:

> "I would hereby accede to the request of the Company and tender my resignation as the CEO of Matrix Global Education Sdn Bhd. **I thank you for the opportunity with the Group over these few years**.
>
> **I will continue to assist MGS in anyway on the outside if needed as MGS will always be a large part of me.**
>
> **Please let me know how else I can assist to ensure a smooth process.**
>
> Thank you."
>
> [Emphasis Added]

[99] Indeed the case of *VP Nathan & Partners v. Subramaniam Govindan Nair & Anor & Another Appeal* [2009] 1 MELR 58; [2009] 2 MLRA 621 is instructive where the Court of Appeal has no hesitation to set aside the finding of the Industrial Court of constructive dismissal as affirmed by the High Court and to conclude that the employees' qualification as members of the Bar was relevant in deciding that their "Request for resignation" as captioned in their letters of resignation was made voluntarily as follows:

> "[23] When we refer specifically to the employees' letters which expressly stated their "REQUEST FOR RESIGNATION", there can be no doubt whatsoever that the employees themselves had requested to resign. They were not forced to resign. It is singularly significant to note that the employees were on the material dates advocates and solicitors of some seven years standing. That is a professional qualification which enables them to accept two qualified persons as chambering students for subsequent admission to the Malaysian Bar. **The employees are senior learned members of the Bar. The employees have expressed their "REQUEST FOR RESIGNATION" in their letters explicitly. We are of the view that in law, the employees had voluntarily resigned and were not dismissed. With the utmost respect, the learned judge's treatment of the question as one of pure facts is an abdication of jurisdiction, constituting a jurisdictional error which is capable of being corrected on appeal.**"
>
> [Emphasis Added]

[100] We are of the considered opinion that the respondent as the CEO with a legal qualification and background was both conscious and careful in his choice of words in his email of resignation and along with his conduct of negotiating his terms of settlement, he cannot be said to be an employee who was "forced to resign" for fear of being terminated.

[101] We agree with learned counsel for the appellant company that the Industrial Court and the High Court's omission to consider the above principles of law, as stated in *Sheffield (supra)* and *VP Nathan (supra)* is an error of law that

justifies appellate intervention, as declared in the case of *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 1 MLRA 268, where the Court of Appeal held:

> "It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. **But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.**"
>
> [Emphasis Added]

[102] Both the evidence of negotiations negated the respondent's claim of being forced to resign and his email of his resignation cannot be interpreted as that coming from a CEO who was forced to resign. The Industrial Court had failed to take into consideration the above relevant factors and instead had taken into consideration the irrelevant factors of events prior to his resignation which are at best, already waters under the bridge.

[103] The Award of the Industrial Court founded on constructive dismissal thus cannot stand and has to be quashed and consequently set aside and with that the order of the High Court too that had affirmed the said Award.

Whether The Appellant Company Had Committed Any Fundamental Breach Of The Contract Of Employment To Justify The Respondent Treating Himself As Being Constructively Dismissed

[104] Learned counsel for the appellant further submitted that the Industrial Court, in deciding that there was constructive dismissal due to the series of conduct of the appellant, had committed an error when it failed to apply the proper legal test of a constructive dismissal.

[105] The Industrial Court found that the purported series of conduct which justified the respondent's claim of constructive dismissal were as follows:

(a) The appointment of Tuan Haji as interim CEO, which was supposedly to humiliate the respondent;

(b) The transfer from the respondent's position as CEO to the appellant's headquarters, purportedly, without any reasons, and to a role which was inconsistent with the terms of his contract of employment;

(c) The offer and subsequent withdrawal of offer of appointment as Head of Group of Corporate Affairs and Communications; and

(d) when the respondent was 'advised' to resign, it was in fact an order by Dato' Lee, which purportedly must be obeyed.

[106] We agree with the appellant that points a and d (ie that the appointment of COW-2 was meant to humiliate him and that the advice to resign was in fact an order), were never pleaded by the respondent. The Industrial Court, in arriving in the aforesaid decision had therefore decided on an unpleaded point, which is an error of law.

[107] We accept that the respondent's transfer to the appellant's headquarters was within the scope of the contract of employment which clearly provides that he was subject to be transferred as follows:

> "3.2 The Person may be required in pursuance of his duties and without further fees or remuneration, to perform services not only for the Company but also for any subsidiaries or associated company, and to accept any office or position in any subsidiaries or associated company which is consistent with his position with the Company, in any location in Malaysia in which the Company or the Group operates, as the Board or the Company may from time to time reasonably require."

[108] We find no merits in the respondent's argument that the appellant's decision to withdraw the offer of Head of Group of Corporate Affairs and Communications, was a breach of contract. The appellant, as an employer, was empowered to offer a new role and is also allowed to withdraw the same, if necessary. A mere decision to withdraw the offer cannot amount to a constructive dismissal unless there was no new job assigned to the respondent or that the respondent's pay had been slashed or that he was asked to report to someone lower in rank to him or that he was otherwise demoted or treated as being demoted. To accept the respondent's argument of constructive dismissal in the circumstances of the case would effectively curtail the appellant's prerogative to manage its operations.

[109] It is said that the higher one goes up the corporate ladder, the more flexible and versatile one has to be and more so when one has the skills that come with being a CEO. The respondent must, in the circumstances of this case, where there are no other schools with the company to transfer the respondent to, be prepared to adjust and adapt to other roles be it as the CEO for Marketing for the Holding Company or later as Head of Corporate Affairs and Communications of the Group, the latter being at least to some extent law-related. It is not unusual for a new position not to have any defined job-scope and the initiated would take the lead in charting new territories for the company.

[110] If indeed there was a fundamental breach even in the absence of the matters alluded to above the respondent must not have delayed in treating himself as being constructively dismissed and certainly not in entering into negotiations on terms for the separation. He should have put in his letter treating himself as being constructively dismissed on ground that the company had breached the fundamental terms of its contract of employment with him or a breach going to the root of the contract or that the company had evinced no

intention to be bound by the said contract. See the cases of *Ang Beng Teik v. Pan Global Textile Bhd, Penang* [1996] 1 MELR 14; [1996] 1 MLRA 520, *Bouzourou v. The Ottoman Bank* [1930] AC 271 and *Donovan v. Invicta Airways Ltd* [1970] 1 Lloyds Rep 486.

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

[112] The Court of Appeal in *Southern Investment Bank Bhd & Anor v. Yap Fat & Anor* [2017] 2 MELR 183; [2017] 3 MLRA 408, reaffirmed the position that an employee ought to take immediate steps to walk out of employment for a claim of constructive dismissal as follows:

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

[113] In the present case, we agree with the appellant that the following evidence cannot be seriously disputed:

(a) COW-2 was appointed as interim CEO as early as October 2017. However, the respondent did not at any time place on record his dissatisfaction of this nor did he plead that the appointment of COW-2 as interim CEO was his basis of claiming constructive dismissal;

(b) the respondent was notified that he was to be transferred as CEO to the appellant's headquarters in December 2017. Not only did the respondent not object to such transfer, on the contrary, he had expressed his willingness to assist in the new role as stated in his email.; and

(c) If anything, the first time the respondent expressly indicated that such transfer was a breach of his contract was when he filed his Rejoinder on 22 November 2018, which was approximately 11 months after he was notified of the transfer;

[114] Learned counsel for the appellant referred to *Kontena National Bhd v. Hashim Abd Razak* [2000] 3 MELR 32 at p 44, where the High Court opined

that the Employee's delay of two weeks in claiming constructive dismissal pursuant to a transfer order amounted to an affirmation of the transfer order as follows:

> "In the instant case the respondent was aware of his transfer as early as 16 September 1996, however he only elected to treat himself as having been constructively dismissed on 1 October 1996, after a lapse of over two weeks. If anything, the respondent's conduct from the notification of the transfer is reflective of an affirmation of a breach if any which nevertheless is denied. Either the transfer was a breach or it was not. If it was, then the respondent's delay in treating himself as having been constructively dismissed only on 1 October 1996 is fatal as reflected in the foregoing awards."

[115] We further agree with learned counsel for the appellant that very pertinently and of paramount importance was the respondent's actions of entering into negotiations with the appellant through his emails of February 2018 which further reinforced the fact that he had affirmed the breaches, if at all there were breaches to begin with.

[116] In the case of *Anwar Abdul Rahim v. Bayer (M) Sdn Bhd* [1997] 1 MELR 50; [1997] 2 MLRA 327 at p 332, the Court of Appeal held that where an employee is relying on cumulative conduct to justify his claim of constructive dismissal, the evidence must show that each conduct was connected that it forms part of the same transaction as follows:

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

[117] We find merits in the appellant's submission that if at all the appellant's actions were fundamental breaches, which were so serious for him to claim constructive dismissal, it would not have been reasonable for the respondent to negotiate a better severance package, in which several proposals were accepted by the appellant. The negotiations, as elaborated above, had broken the chain of the breaches complained by the respondent. His dissatisfaction with the transfer and more than that, his contention that there was a breach by the employer striking at the root of the contract, was no longer at play when he entered into a series of negotiations with the company for a mutually acceptable severance package. The respondent cannot approbate and reprobate. The advice to him to resign was no longer the proximate cause of his so-called forced resignation.

[118] Like all negotiations one may finally settle for less than one's initial offer but that does not transform the acceptance into a qualified acceptance of the settlement terms subject to a reservation of rights to claim for the balance unless it is expressly stated. In brief, the respondent as claimant in the Industrial Court had not made out a case of constructive dismissal.

[119] We therefore agree that the appellant did not commit any actions which were fundamental breaches to justify the respondent's claim of constructive dismissal and even if there were (though there is no evidence for that), the respondent's delay and conduct of entering into negotiations, had affirmed the said breaches.

[120] The finding of the Industrial Court that the respondent as claimant before it had been constructively dismissed is irrational in that it is so devoid of any plausible justification that no reasonable body of persons could have reached them and more so when the respondent himself had entered into a settlement on terms as a result off which he tendered his resignation letter and resigned from the company.

Decision

[121] We find merits in the appeal and we had allowed the appeal and quashed and set aside the Award of the Industrial Court and with that the order of the High Court that had affirmed the said Award. It is our finding that the respondent as claimant in the Industrial Court had resigned from his employment with the appellant on agreed terms which terms the company had discharged.

[122] Based on the peculiar facts of this case and as indicated too by learned counsel for the appellant, we made no order as to costs.

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v. Felix Lee Eng Boon

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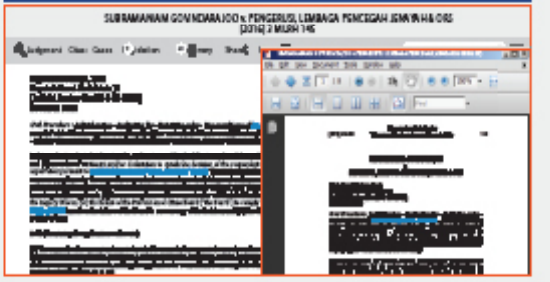

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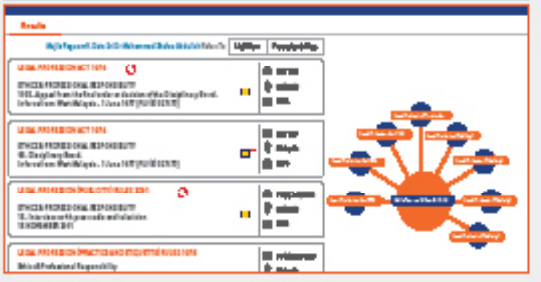

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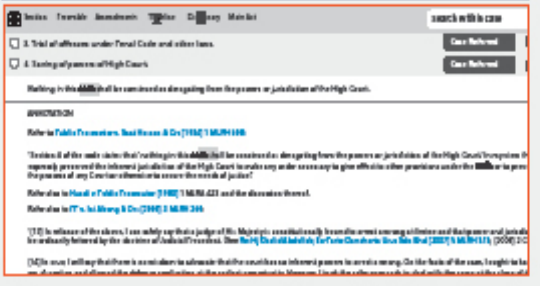

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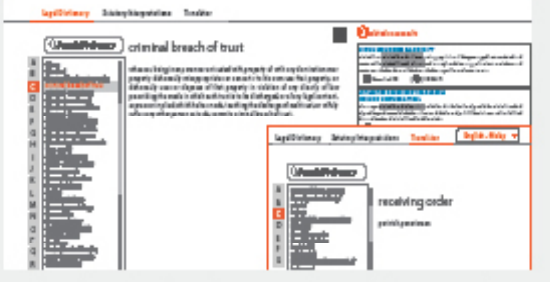

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