

TENG MEE CHENG v. CEMPAKARAYA SDN BHD

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INDUSTRIAL COURT, KUALA LUMPUR

AMRIK SINGH

AWARD NO. 678 OF 2026 [CASE NO: 6-4-347-24]

4 MAY 2026

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Abstract – (i) *An employer's failure to conduct a formal, impartial investigation into a credible complaint of sexual harassment, particularly when the alleged harasser holds a position of high authority, constitutes a fundamental breach of the employment contract. The employer's duty is not merely to acknowledge the grievance but to implement effective safety measures that do not penalise the victim;* (ii) *Proposed 'remedies' that require the victim to unilaterally alter their fundamental terms of employment, ie, working after hours, permanent relocation, or isolation to avoid the harasser, while the harasser remains unaffected, constitute a repudiatory breach. Such actions signal the employer's intention to no longer be bound by the original contract, justifying a claim for constructive dismissal.*

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LABOUR LAW: *Employment – Dismissal – Constructive dismissal – Sexual harassment – Allegations of physical and verbal harassment – Failure of employer to conduct formal investigation or inquiry – Employer proposed employee work from home or after office hours to avoid harasser – Whether unilateral alteration of employment terms – Whether employer breached implied term of mutual trust and confidence – Whether employer failed to provide safe and conducive working environment – Whether claimant successfully proved constructive dismissal – Industrial Relations Act 1967, s. 20(3)*

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CONTRACT: *Employment contract – Breaches – Claim for constructive dismissal – Sexual harassment – Allegations of physical and verbal harassment – Failure of employer to conduct formal investigation or inquiry – Employer proposed employee work from home or after office hours to avoid harasser – Whether unilateral alteration of employment terms – Whether employer breached implied term of mutual trust and confidence – Whether employer failed to provide safe and conducive working environment – Whether employer's conduct amounted to fundamental breach going to root of employment contract – Whether there were breaches of employment contract*

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The claimant was the Human Resource Assistant Manager at the respondent ('company'), a family-run business led by its Executive Director, Liang Sing Kup ('LSK'). While assisting the 82-year-old LSK with an online banking transaction in his office, the claimant alleged that he touched her hair and rubbed her hand and back. Later that same day, LSK allegedly summoned her again, pulled her into a hug, sniffed her face, and made inappropriate

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- A remarks about her 'soothing' presence and weight. A third incident involved LSK making suggestive comments about taking the claimant for coffee. The fourth act involved LSK stalking the claimant by making repeated missed calls, enquiring about her home address, and appearing unannounced at her residence after she took leave to avoid him. The claimant promptly informed
- B her colleagues, her husband, and LSK's son and fellow director, YK Liang. Despite YK Liang apologising *via* WhatsApp and acknowledging the conduct as inappropriate, the company failed to conduct a formal investigation or implement safety measures. Instead, the company proposed that the claimant
- C either work from home permanently or relocate to an associated office, which the claimant viewed as a unilateral change to her terms and an embarrassment. Negotiations were subsequently handled by a third party ('Mr Chee'), who allegedly used intimidating analogies and warned the claimant that the company had the resources to drag the case out for years. Following the rejection of her settlement proposal and the lack of
- D disciplinary action against LSK, the claimant claimed constructive dismissal, citing the following breaches by the company of her employment contract: (i) failure to provide a safe and conducive working environment; (ii) failure to adequately investigate or address her grievances; (iii) unilateral alteration of employment terms; (iv) breach of the implied term of mutual trust and confidence; and (v) failure to protect her dignity at work.

E **Held (allowing claim; awarding claimant RM136,188):**

- (1)(a) The demeanour of the claimant when giving evidence during cross-examination remained consistent throughout. She stood her ground, was unhesitant to reply to the questions posed and was candid and forthright in giving her evidence. She was a highly credible and
- F reliable witness. Further, her oral testimony did not stand alone. It was sufficiently corroborated by the contemporaneous WhatsApp communications sent immediately after the incidents to several persons. When an immediate narration of an incident relating to
- G sexual harassment is conveyed to a person or persons known to the victim, the immediate act of doing so would have not only lend credence to her credibility and the likelihood of the truth of the matter but a reliable corroboration of her account of the incident taking place. (paras 111 & 115-117)
- H (1)(b) YK Liang himself had expressed to the claimant that what LSK did was wrong and was also angry with LSK. Had YK Liang not believed the claimant, his reaction would have been markedly different. (paras 118 & 119)
- I (1)(c) The evidence was overwhelming that LSK did subject the claimant to sexual harassment within the workplace. The acts complained of by the claimant constituted a clear and serious case of sexual harassment, perpetrated by LSK against the claimant during the course of her employment. (para 120)

- (2) What was damning against the company was its failure to take responsible steps to ensure the claimant would not be subjected to any further acts of harassment while she was still in employment. On the contrary, the company took the opposite approach by asking the claimant to avoid LSK and instructed her to attend office after LSK had left. That was the only measure taken in response to her complaint. (para 125) A B
- (3) The company had decided to vary the claimant's working hours by requiring her to attend office once a week. This change required her to carry out her work after office hours that significantly changed the terms and conditions of her employment. It undermined the very foundation of her employment contract specifically the express terms of her workdays and hours by isolating her rather than taking actions which would prevent LSK from getting close to her in any way possible. (paras 128 & 129) C
- (4) The substance and nature of the conversation during the meeting between Mr Chee and the claimant was far from a genuine investigative inquiry, rather, it was a warning clearly devised to indicate to the claimant that the company would go to any lengths and utilise every available resource to challenge her allegations. In furtherance to that, after the meeting between Mr Chee and the claimant, the company was not forthcoming with the claimant on how and what actions would be taken against LSK and in carrying out the investigation. Mr Chee had been biased by siding the company and showed no genuine interest in investigating the claimant's complaints. While the claimant was expecting the company to take the necessary action in respect of her complaints, the company instead, acted deceptively towards her and chose to intimidate and deter her from pursuing those complaints further. (paras 134 & 135) D E F
- (5) The conduct of the company to have engaged Mr Chee for the very purpose of instilling fear and exerting intimidation onto the claimant led to an inescapable conclusion that the company had breached its fundamental terms of her employment contract namely the implied duty of mutual trust and confidence, by abusing its managerial authority. (para 141) G
- (6) Since the complaints were primarily directed against LSK whose position and authority represented the very 'brain and mind' of the company, he was never subjected to any internal questioning. Nor did the company convene an inquiry to investigate or adjudicate the matter. The failure to conduct an investigation or an inquiry despite having full knowledge of the complaints demonstrated its unwillingness to question the conduct of its own executive director or to impose any disciplinary action should he be found culpable. Not a H I

- A single charge was preferred against him notwithstanding the complaints lodged by the claimant. Instead, the company elected not to take any action against its founder. While LSK was allowed to continue coming and going as he pleased without consequence, the claimant was instead asked to change her working hours. The company's conduct amounted to acquiescence in its Executive Director's conduct. (para 142)
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- (7) The claimant had established, with credible evidence, that the company committed the first to fifth breaches of the terms of her employment contract which were fundamental breaches, express and implied, which went to the root of the contract and evinced an intention to no longer to be bound by it. The claimant had been driven out of her employment due to the fundamental breaches of her employment terms which related to the trust and confidence she had with the company and her basic safety at workplace to which the company had evinced an intention to no longer be bound with such terms. The claimant therefore, had successfully proven that she had been constructively dismissed. (paras 143 & 155)
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- (8) The company's conduct were breaches that went to the root of the claimant's employment contract and subsequent to that, the company itself gave no importance to the claimant's complaints. Its conduct was calculated to have caused serious damage and destroyed the relationship of trust and confidence between the claimant and the company. The company had shown no interest to protect the claimant's dignity, rights and security for the rest of her employment tenure had she continued to stay on. Her dismissal was therefore without just cause and excuse. The claimant was awarded the sum of RM136,188. (paras 156 & 163)
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Award(s) referred to:

Ireka Construction Bhd v. Chantiravathan Subramaniam James [1995] 2 ILR 11 (Award No. 245 of 1995)

- G *Stamford Executive Centre v. Paun Dharsini Ganesan* [1986] 1 ILR 101 (Award No. 263 of 1985)

Waleta Malaysia Sdn Bhd v. Tew Meing Hock [1998] 1 ILR 301 (Award No. 72 of 1998)

Case(s) referred to:

Bayer (M) Sdn Bhd v. Anwar Abd Rahim [1996] 2 CLJ 49

- H *Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor* [2001] 3 CLJ 541

Goon Kwee Phoy v. J & P Coats (M) Sdn Bhd [1981] CLJU 30; [1981] 1 LNS 30

Govindasamy Munusamy v. Industrial Court Malaysia & Anor [2007] 10 CLJ 266

Keretapi Tanah Melayu Bhd v. Mohan Vythialingam & Anor And Another Appeal [2023]

- I 4 CLJ 532

Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 4 CLJ 449

Southern Bank Berhad v. Ng Keng Lian & Anor [2002] 2 CLJ 514

Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314 A
UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785
Western Excavating (ECC) Ltd v. Sharp [1978] 1 QB 761
Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 B

Legislation referred to:

Anti-Sexual Harassment Act 2022, s. 2
Employment Act 1955, s. 81A
Evidence Act 1950, s. 114(g)
Industrial Relations Act 1967, ss. 20(3), 30(5)

For the claimant - Roeshan Gomez & Jenny Ng Juen Yee; M/s Ng & Gomez C
For the company - Bala Gopal Kerisnan; M/s Bala Gopal & Assocs

Reported by Lina E

AWARD
(No. 678 of 2026) D

Amrik Singh:

Background Facts

[1] The company is the parent entity of Fenix Sdn Bhd and is a family-run business founded and managed by its Executive Director Mr Liang Sing Kup, (hereinafter LSK). Its board of directors comprises of LSK, his wife Siow Ah Lek, his son Liang Yee Kang (YK Liang), and his daughter Liang Sook Sook (LSS). E

[2] Prior to her transfer to the company as the Human Resource Assistant Manager, the claimant had been employed in the same position with Fenix Inn Sdn Bhd since 21 March 2011 pursuant to an employment letter dated 14 February 2011. F

[3] Her transfer to the company on 1 January 2019 was based on the same terms and conditions of her employment with Fenix Sdn Bhd and her length of service, salary, benefits and other terms and conditions remained unchanged. G

[4] The claimant reported directly to YK Liang and her last drawn salary with the company was RM4,365 and further received approximately RM4,365 as yearly bonus. H

[5] In September 2023, YK Liang travelled to India accompanied by his wife to seek medical treatment. He returned to Malaysia on 29 September 2023. Prior to his return on 11 September 2023, when only the claimant and LSK were present in the office, the claimant was called by LSK to his room to assist with an online banking transaction using his handphone. LSK was 82 years of age at that time. The events that subsequently unfolded led the I

A claimant to complain to YK Liang of the sexual harassment committed against her by LSK. She later escalated the matter by letter to him, seeking an urgent resolution.

B [6] Eight days later, on 19 October 2023, the claimant claimed that she had been constructively dismissed by the company due to its failure to take any action to remedy the situation, and the lack of intention to protect her safety or dignity, particularly in relation to LSK.

C [7] On the contrary, the company denies her sexual harassment allegations and contends that the allegation was merely concocted to extort the company into paying the claimant RM520,000.

[8] The claimant prays for an order for backwages and consequential orders which includes punitive, aggravated and exemplary damages.

The Claimant's Case

D [9] It is noted in the statement of case, that the claimant categorised the four instances of sexual harassment allegedly committed against her by LSK as the first breach of her employment contract. The second breach of her employment contract is the company's inaction to resolve her complaints against LSK. The third breach concerns the unilateral changes to the terms of her employment requiring her to work irregular hours. The fourth breach relates to the company's alleged deception regarding the role of Mr Chee, a third party. The fifth breach is the company's attempt to intimidate and/or threatened and/or manipulate the claimant through a meeting with Mr Chee.

The First Act Of Sexual Harassment

F [10] Prior to 11 September 2023, on two occasions, LSK called the claimant to his office to assist him to fill up an online health declaration form for his upcoming trip to China. Despite the claimant's persuasion that LSK gets his daughter, Liang Sook, to assist him, but he insisted that he would do it himself.

G [11] On 11 September 2023, LSK again called the claimant to his office purportedly to discuss work related matters. During the conversation, LSK was seated while the claimant after a short while knelt beside him to view his handphone. At that point, LSK touched the claimant's hair and said "Never mind, let it be" and continued to touch her hand and back (hereinafter referred to as "the first harassment incident").

H [12] The claimant felt extremely uncomfortable and shocked by LSK's conduct, and promptly ended the conversation before returning to her workstation.

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The Second Act Of Sexual Harassment

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[13] Later, on the same day, LSK summoned the claimant again to his office room to enquire on her work status. The claimant walked in and stood opposite of his table. LSK then said “Come, give me a hug, Ms Teng” and moved to hug the claimant. He later asked if she thought anyone would come in while he sniffed the claimant’s face and remarked “So soothing”, “Ms Teng, for so long I never had this kind of comfort”, “You lost weight, huh, Ms Teng” after giving her a hug.

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The Third Act Of Sexual Harassment

[14] Stunned and traumatised by LSK’s conduct and words, the claimant, immediately left his room. LSK did not stop there. He then asked her if he were to invite her for coffee, what would people think and remarked that it would be nice if she was with him when he went for coffee some time back.

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The Fourth Act Of Sexual Harassment

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[15] Following the three acts of sexual harassment, the claimant informed her colleague Ms Kannie, her husband and Ms Jean the daughter in law of LSK. YK Liang then suggested that the claimant temporarily work from home and only attend the office when LSK was not around.

[16] Thereafter from 13 September 2023 to 14 September 2023, LSK continued to stalk and give unwanted attention to the claimant. He is said to have enquired about the claimant’s residential address from Ms Kannie, made repeated missed calls to the claimant despite knowing that she was on leave, appeared unannounced at the claimant’s residence and repeatedly rang her doorbell.

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[17] For purposes of convenience, each incident of sexual harassment narrated above would be collectively referred to as “the sexual harassment”.

The Second Breach Of Her Employment Contract

[18] It is not disputed that LSK and YK Liang have been the directors of the company throughout the claimant’s tenure.

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[19] While YK Liang extended an apology *via* WhatsApp messages, and subsequently received an official notice of sexual harassment, submitted to him by the claimant on 20 September 2023, in which she requested an urgent resolution due to feeling helpless, insecure and fearful at her workplace, no investigation was carried out into her complaint. No safety measures were implemented for the claimant’s safety nor were any disciplinary proceedings taken against LSK and the company did not apprise her of any steps taken to resolve her predicaments. The claimant believed that YK Liang would take the necessary action against LSK since he had acknowledged LSK’s conduct as amounting to sexual harassment.

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A [20] On the contrary, after numerous follow ups with YK Liang regarding the company's action on her sexual harassment complaint, in a meeting held on 1 October 2023 between the claimant and him, it was proposed to her that she would have to work from home permanently or at the office premise or at an associated company or be paid with a settlement sum as a compensation.

B [21] The proposal came as a disappointment to the claimant, leaving her feeling dejected. Considering that much time had passed, the claimant then mentioned a settlement sum in an effort to explore a possible resolution. There was, however, a complete inaction in resolving her complaints.

C *The Third Breach Of Her Employment Contract*

D [22] While YK Liang was still in India, and upon his instruction, the claimant agreed to a temporary arrangement to work from home until his return and due to this new arrangement, the claimant had to work at night at the office to avoid meeting LSK. The situation caused the claimant embarrassment in the eyes of her peers.

E [23] However, upon his return on 29 September 2023, YK Liang instructed the claimant on 1 October 2023, to permanently work from home. The claimant disagreed as it was not in accordance with the terms of her employment contract.

The Fourth Breach Of Her Employment Contract

F [24] On 3 October 2023, YK Liang informed the claimant that her proposed settlement had been rejected by the company's Board. Instead, she was asked to meet one Mr Chee, to discuss the proposed settlement, who she was told was a friend of YK Liang's family.

G [25] When the claimant enquired from YK Liang whether the company had carried out an investigation into her complaint, he replied that the company would only commence an investigation if no settlement was reached. The claimant vented her frustration that so much time had passed and yet no investigation had been carried out by the company. In response, YK Liang appeased the claimant by stating that the company's board had appointed Mr Chee to investigate on the sexual harassment.

H *The Fifth Breach Of Her Employment Contract*

I [26] A meeting then took place between the claimant and Mr Chee on 5 October 2023. During the meeting, Mr Chee suggested the claimant to obtain legal representation but cautioned that the involvement of lawyers could further escalate the situation. He further told her that if no resolution was reached, the company would set up a committee to investigate her complaints and added that the company was prepared for the claimant to leave and file a constructive dismissal claim while emphasis that any legal issues arising therefrom would be between the claimant and LSK.

[27] During the meeting, Mr Chee made several condescending remarks by advising her to use her brain rather than her feelings by drawing analogies against her about “eating too many apples” and “stepping on a lion’s tail”. He further stated that the legal process could drag on for years and highlighted the perceived harsh realities of legal battles and the personal toll it could have on her which he said could cause her much stress and warned her if the complaint she made against LSK is untrue, her employment contract would be terminated.

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[28] In furtherance of the foregoing, Mr Chee framed the sexual harassment as a “he said, she said” situation suggesting that an investigation might not yield conclusive findings and advised her not to overestimate her chances in court as she may face potential embarrassment or defeat.

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[29] He also made reference to Christianity, suggesting to her that she should not be stubborn, but to think sensibly and should consider practical outcomes over principles and not to overreact in anger.

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[30] To torment her further, he warned that the company and LSK had the resources to fight the case all the way through while the claimant may be subjected to stress which would lead her to unnecessary hardship.

[31] He implied that the company had many lawyers ready to defend the company in a long and challenging legal process.

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[32] The claimant pleaded that Mr Chee’s conduct as the representative of the company was wholly intended to intimidate, threaten, manipulate and coercing her into accepting a settlement under duress.

[33] *Vide* letter dated 19 October 2023 issued to the company, the claimant placed on record that she had been constructively dismissed in which she averred that the company had breached the implied terms and conditions of her employment contract when it conducted itself as follows:

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(i) acted in a manner likely to damage or destroy the relationship of confidence and trust between the parties as employer and employee;

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(ii) exercised its powers against the claimant in a callous manner, placing the claimant’s mental and/or physical health at risk;

(iii) to lower the claimant’s dignity and self-esteem amongst her colleagues and family; and

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(iv) failed to exercise its power in relation to the claimant’s complaints fairly and reasonably.

[34] The claimant further avers that the manner in which the company handled her complaints and the sexual harassment constitutes multiple breaches of the employment contract, including but not limited to:

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(i) failing to provide a safe working environment;

- A (ii) neglecting to take appropriate disciplinary action against LSK;
(iii) failing to conduct a proper investigation into the claimant's complaints;
and
(iv) attempted to coerce and intimidate the claimant into staying quiet
B through bad faith negotiations.

[35] The claimant contends that her dismissal was unlawful, *mala fide*, arbitrary, capricious and carried out in breach of the principles of natural justice and fair labour practice. She was dismissed without just cause or excuse. She prays that the court orders a reinstatement to her former position
C (or *in lieu* of compensation) without any loss of wages.

[36] The claimant further prays for all statutory contributions including but not limited to interest/and or dividends be made payable by the company. In addition to all of the above, the claimant claims punitive, aggravated and exemplary compensation for the distress and losses suffered.

D **The Company's Case**

[37] The company denies that it was in breach of the employment contract which goes to the root of the contract or that they evinced an intention to no longer be bound by it. Accordingly, it denies that the claimant was
E entitled to treat herself as dismissed from further obligations under her employment contract.

[38] The claimant was under duty to attend to the tasks assigned to her and to report to her superiors including LSK, the company's Executive Director as and when necessary. In the performance of her duties, reporting to LSK
F many times a day to the satisfaction of the company is mandatory.

[39] The company denies the averments made by the claimant, contending that they are framed and contorted the truth with the motive to blackmail the company through threats to lodge a police report.

G [40] The company contends that the first, second and third incidents of sexual harassment as narrated by the claimant in her official letter dated 20 September 2023, in the police report dated 17 October 2023 and as pleaded in her statement of case contain significant material contradictions, variations and embellishments.

H [41] The company's narrative of events in regard to the claimant's complaints is as follows:

- (i) on 11 September 2023, the claimant assisted LSK in his room to check his online banking transaction and to facilitate a transaction with Hong Leong Bank. LSK recalled and told the claimant that he had used
I RM120 to top up TNG;

- (ii) the claimant commented that it was unusual that the transaction did not appear in his SMS; A
- (iii) LSK then told the claimant “Never mind, let it be” after which the claimant left the room to be at her workstation;
- (iv) sometime later, the claimant again went into LSK’s room and updated him on works assigned to her; B
- (v) after the claimant updated him on the work, LSK stood up to leave the office at which point he felt giddy, staggered and lost his balance. The claimant, who was standing in front of him managed to support him and prompted her to ask him if anything had happened to him and whether he is alright; and C
- (vi) the claimant admitted that she enquired about his health condition three or four times. After sitting down, LSK told her that he was alright.
- [42] The company contends that the claimant was either delusional or had fantasised that LSK had touched her hair as if removing something, and rubbed her hand and her back. In this regard, the company contends that she confessed that she “got mixed feelings wondering am I too sensitive”. D
- [43] The company denies the claimant’s account that when she returned to her workstation, LSK gave her unwanted attention, and made inappropriate statements while she was in a traumatised state asserting these events never took place. E
- [44] YK Liang instructed the claimant to work from home until his return from India. However, the claimant offered to attend the office when LSK was not present. F
- [45] In relation to the fourth act of sexual harassment alleged against LSK, the company contends that the claimant did not report for work on 12, 13 and 14 of September and did not inform LSK about her not reporting for work. On 13 September 2023, LSK wanted the claimant to attend to certain matters. The claimant knew why LSK was looking for her, that is for her to complete her works. Instead, LSK called the claimant on 13 September 2023 to enquire the reason she did not report for duty, which she did not answer. G
- [46] Another call was made by LSK on 14 September 2023, but was not answered. He then went to her house to enquire why she had not reported for work for the last two days. He left her house after no one answered the doorbell. He then sent a message to her after failing to contact her to inform her that he and YK Liang needed her. H
- [47] LSK subsequently found out from YK Liang that the reason why the claimant had not reported for work was because “she had problem at home”. I

- A [48] The company contends that the acts of sexual harassment are the product of the claimant's scheme to extort RM520,000 from the company, despite that she did not suffer any emotional distress, disturbed, alarmed, placed in a fearful state, anxious or was harassed.
- B [49] After YK Liang returned from India, the company conducted a domestic inquiry which the claimant did not attend although she was duly served with the notice of proceedings.
- C [50] The company contends that the statements quoted from YK Liang's text message that he acknowledged discussing the incident with LSK and that LSK admitted to the inappropriate nature of his conduct is a sweeping statement that is misconceived and intended to mislead.
- D [51] The company contends that the claimant acknowledged in her official complaint letter that YK Liang would only return from India by end of September 2023 and was willing to wait to meet him to resolve the issue directly contradicts her current assertion that no investigation or safety measure were taken.
- E [52] A meeting with the claimant was held on 1 October 2023, a Sunday morning around 11am, a day after YK Liang had returned from India. The matters which came up for discussions were:
- F (i) pending investigation of the claimant's complaints, the claimant was required to work from home and would be provided with wi-fi and a laptop to work. However, she was required to attend the office once a week to discharge her duties as the Head of Human Resources and oversee the staff;
- G (ii) the claimant was offered another office to work which she declined;
- (iii) the claimant gave an ultimatum to YK Liang that the company pay her RM520,000 as compensation for her 10 years' salary to settle the matter and maintaining confidentiality, failing which she would sue the company and charge LSK; and
- (iv) the claimant gave a dateline of three days to the company to decide on the ultimatum given;
- H [53] After the meeting, the claimant texted YK Liang, thanking him for his understanding and for respecting her decision and further enquired when the appropriate time is to attend the office while awaiting the issue to be finalised.
- I [54] In response, YK Liang stated that the company has to decide on her demand for RM520,000. On 2 October 2023, the company called for an emergency Board meeting and decided that since the company is a family-based company, a non-member of the company should be appointed to investigate the claimant's complaints.

[55] The company then informed the claimant that her demand for RM520,00 had been declined and Mr Chee had been appointed to do whatever he deemed necessary to resolve the matter. A

[56] The company contends that the claimant's statement that she was disappointed with YK Liang's response to her demand was merely her frustration as he did not promise her anything. She had no reason to feel dejected unless her scheme did not work as planned. B

[57] The company contends that the claimant was fully apprised of the prevailing circumstances in regard to the temporary arrangements put in place to avoid any such incidents from arising and complaints being made. C

[58] The company contends that it had every right to explore an amicable settlement with the claimant and she was clearly informed that the meeting was not convened for the purpose of an investigation, but to seek a resolution.

[59] The company further contends that the claimant was not intimidated, threatened or manipulated by the company through Mr Chee and neither did the claimant, as a result of that meeting, agreed or admitted to any form of settlement adverse to her or that caused injustice to her. D

[60] When the claimant became aware that the company would not accede to her unlawful demands to resolve her alleged complaints, the claimant issued the constructive dismissal letter to the company. E

The Role And Function Of The Industrial Court

[61] It is settled that the function of the Industrial Court in s. 20(3) of the IRA reference is two-fold as explained by His Lordship Raja Azlan Shah, CJ (Malaya) (as His Royal Highness then was) in the Federal Court case of *Goon Kwee Phoy v. J & P Coats (M) Sdn Bhd* [1981] CLJU 30; [1981] 1 LNS 30; [1981] 1 MLRA 415; [1981] 2 MLJ 129 opined that: F

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

[62] Reference is also made to the decision of the Federal Court in *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449; [1995] 3 MLJ 537; [1996] 1 AMR 049, His Lordship Mohd Azmi Kamaruddin, FCJ explained the role of the Industrial Court under s. 20 of the IRA as follows: I

- A As pointed out by the court recently in *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344; [1995] 1 MLRA 412; [1995] 2 MLJ 753; [1995] 2 AMR 2145, the function of the Industrial Court in dismissal cases on a reference under s. 20 is two-fold; firstly, to determine whether the misconduct complained off by the employer has been established,
- B an secondly whether the proven misconduct constitutes just cause or excuse for the dismissal. Failure to determine these issues on the merits would be a jurisdictional error ...

The Standard And The Burden Of Proof

- C [63] It is trite law that the burden of proof that the employee has committed the misconduct and that the dismissal was with just cause or excuse rests squarely on the employer as stated by the Industrial Court Chairman in *Stamford Executive Centre v. Paun Dharsini Ganesan* [1986] 1 ILR 101 (Award No. 263 of 1985) as follows:

- D It may further be emphasised here that in a dismissal case the employer must produce convincing evidence that the workman committed the offence or offences the workman is alleged to have committed for which he has been dismissed. The burden of proof lies on the employer. He must prove the workman guilty, and it is not the workman who must prove himself not guilty. This is so
- E basic a principle of industrial jurisprudence that no employer is expected to come to this court in ignorance of it.

- [64] The standard of proof required in dismissal cases is clearly explained and decided by the Court of Appeal in *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314; [2002] 1 MLRA
- F 188 is the balance of probabilities. The standard of proof requisite in the industrial jurisprudence before an industrial court hearing a claim of unjust dismissal is not beyond reasonable doubt but on a balance of probabilities. At p. 327 His Lordship Abdul Hamid Mohamad JCA (as he then was) said:

- G On the other hand, we see that the courts and learned authors have used such terms as “solid and sensible ground”, “sufficient to measure up to a preponderance of the evidence”, “whether a case ... has been made out”. “on the balance of probabilities” and “evidence of probative value”. In our view the passage quoted from *Administrative Law* by H.W.R. Wade & C.F. Forsyth offers the clearest statement on the standard of proof required, that is the
- H civil standard based on the balance of probabilities, which is flexible, so that the degree of probability required is proportionate to the nature of gravity of the issue.

- [65] In *Ireka Construction Bhd v. Chantiravathan Subramaniam James* [1995] 2 ILR 11 (Award No. 245 of 1995); [1995] 1 MLER 373, it was stated that:

- I It is a basic principle of Industrial Jurisprudence that in a dismissal case the employer must produce convincing evidence that the workman committed the offence or offences the workman is

alleged to have committed for which he has been dismissed. The burden of proof lies on the employer to prove that he has just cause and excuse for taking the decision to impose the disciplinary measure of dismissal upon the employee. The just cause must be, either a misconduct, negligence or poor performance based on the facts of the case.

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What Sexual Harassment Means

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[66] The act of sexual harassment is defined in several Acts.

[67] Pursuant to s. 81A of the Employment Act 1955, “complaint of sexual harassment” means any complaint relating to sexual harassment made (i) by an employee against another employee; (ii) by an employee against any employer, or (iii) by an employer against an employee.

C

[68] Under s. 2 of the Anti-Sexual Harassment Act 2022, sexual harassment means any unwanted conduct of a sexual nature, in any form, whether verbal, non-verbal, visual, gestural or physical, directed at a person which is reasonably offensive or humiliating or is a threat to his well-being.

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[69] Under the Code of Practice on the Prevention and Eradication of Sexual Harassment (the Code) in the workplace, section 4 of this Code stipulates that sexual harassment means:

Any unwanted conduct of a sexual nature having the effect of verbal, non-verbal, visual, psychological or physical harassment:

E

- That might, on reasonable grounds, be perceived by the recipient as placing a condition of a sexual nature on her/his employment; or
- That might, on reasonable grounds, be perceived by the recipient as an offence or humiliation, or a threat to his/her well-being, but has no direct link to her/his employment.

F

[70] It was further explained in the code that sexual harassment encompasses various conducts of a sexual nature which can manifest themselves in five possible forms, one of which that needed to be emphasised here is the form of physical harassment (as submitted by learned counsel for the company) namely:

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Inappropriate touching, patting, pinching, stroking, brushing up against the body, hugging, kissing, fondling, sexual assault.

The Law On Constructive Dismissal

H

[71] The common law principle in relation to constructive dismissal was expounded in the seminal case of *Western Excavating (ECC) Ltd v. Sharp* [1978] 1 QB 761; [1978] 2 WLR 344 wherein it was held that:

If the employer is guilty of conduct which is significant breach going to the root of the contract of employment, or which shows that he no longer intends to be bound by one or more of the

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- A essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at that instant without giving any notice at all, or alternatively, he may give notice and say
- B he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for if he continues for any length of time without leaving he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.
- C [72] The law relating to constructive dismissal was first set out in the case of *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298; [1987] 1 MELR 32; [1987] 1 MLRA 346; [1988] 1 MLJ 92; that encapsulated and adopted as trite that the correct test to be
- D applied in a constructive dismissal case is the contract test as opposed to the reasonableness test. The application of the contract test was explained in the case of *Bayer (M) Sdn Bhd v. Anwar Abd Rahim* [1996] 2 CLJ 49; [1995] 4 MLRH 53 as follows:
- E Thus, it is settled law that the test applicable in a constructive dismissal case, is the 'contract test' and not the 'test of reasonableness'. To claim constructive dismissal four conditions must be fulfilled. These conditions are:
- F
1. There must be a breach of contract by the employer.
 2. The breach must be sufficiently important to justify the employee resigning;
 3. The employee must leave in response to the breach and not for any other unconnected reasons and;
 4. He must not occasion any undue delay in terminating the contract; otherwise he will be deemed to have waived the breach and agreed to vary the contract.
- G
- H [73] The principle from *Western Excavating (supra)* was then enunciated and affirmed in the *locus classicus* case of *Wong Chee Hong (supra)* where an employee has the common law right to repudiate his contract of service in a situation when the conduct of his employer is such that the employer is guilty of a breach going to the root of the contract or where the employer has evinced an intention to no longer be bound by the contract that gives the employee the right to regard himself as being dismissed.
- I [74] The case of *Govindasamy Munusamy v. Industrial Court Malaysia & Anor* [2007] 10 CLJ 266; [2007] 3 MELR 306; [2007] 1 MLRH 133 brought about an additional condition which is to be met for a claim of constructive dismissal to succeed. *Govindasamy's* case (*supra*) was affirmed and echoed by

the Court of Appeal in the case of *Keretapi Tanah Melayu Bhd v. Mohan Vythialingam & Anor And Another Appeal* [2023] 4 CLJ 532; [2023] 3 MLRA 722: A

[5] To succeed in a case of constructive dismissal, it is sufficient for the claimant to establish that:

(i) the company has by its conduct breached the contract of employment in respect of one or more of the essential terms of the contract; B

(ii) the breach is a fundamental one going to the root or foundation of the contract; C

(iii) the claimant had placed the company on sufficient notice period giving time for the company to remedy the defect; D

(iv) if the company, despite being given sufficient notice period, does not remedy the defect, then the claimant is entitled to terminate the contract by reason of the company's conduct and the conduct is sufficiently serious to entitle the claimant to leave at once; and

(v) the claimant, in order to assert his right to treat himself as discharged, left soon after the breach.

[75] The High Court in the case of *Southern Bank Berhad v. Ng Keng Lian & Anor* [2002] 2 CLJ 514; [2001] 3 MELR 534; [2001] 4 MLRH 569; [2002] 2 AMR 1747; [2002] 5 MLJ 553 held as follows: E

... The Industrial Court, however, answered the issue in the negative when it decided that an employee is not required to inform her employer that she considered herself as having been constructively dismissed before making the representation under s. 20(1) read with s. 20(1A) of the IRA. The Industrial Court therefore found that the claim was not premature and refused the applicant's preliminary objection. If the Industrial Court is correct in its view, then any employee can walk out of employment for whatever reasons (eg, for a better job) without first informing her employer or giving notice to her employer and then when things do not go the employee's way, the employee can say that he or she was in fact constructively dismissed by the employer. This would be an abuse of a claim of constructive dismissal. F

[76] The High Court in *Southern Bank Berhad's* case (*supra*) further held that: G

... The decision of the Industrial Court on the issue is also, as may be seen later, incompatible with the contract test in constructive dismissal cases as postulated in the leading Supreme Court case of *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298; [1987] 1 MELR 32; [1988] 1 MLJ 92; H

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- A [77] In view of the principle that an employer should not be left in the dark, not knowing what the grievance of the employee was or left to guess about the breach he committed, that drives the claimant to walk away from his employment, it is essential for an employee to provide notice to the employer of the breach that has been committed and would resort to claim constructive dismissal should the breach remain unremedied.
- B

[78] In *Waleta Malaysia Sdn Bhd v. Tew Meing Hock* [1998] 1 ILR 301 (Award No. 72 of 1998); [1998] 1 MELR 121, the court held in regard to the assumption made by the claimant:

- C The claimant had also in this case “jumped the gun”. It would have been in order for the claimant to accept the transfer and report to the new position. If he then finds the transfer is indeed a demotion, then only should he walk out. He should not walk out because he anticipates or fears that the transfer is a breach of his contract of service. The claimant should have considered very seriously before leaving the company on the grounds of constructive dismissal. He cannot treat every complaint that he may have against the employer as an act of victimisation or breach of a fundamental term of the contract of employment.
- D

Issues Before This Court

- E [79] The issues to be determined by this court are as follows:
- (i) whether the claimant was constructively dismissed by the company and if so proven; and
 - (ii) whether the dismissal was done with just cause and excuse.

F Evaluation And The Findings

- [80] Premised on the claimant’s letter of constructive dismissal, the company submitted that the court is only permitted to consider the reasons given by the claimant in her constructive dismissal letter. The company submitted that the issue to be considered is whether the claimant left the employment in response to the breach or because the company rejected her settlement proposal of RM520,000 on 3 October 2023. It is the company’s position that the claimant left her employment because her proposal for settlement was rejected on 3 October 2023.
- G

- H [81] In essence, the claimant’s letter notifying the company of her constructive dismissal contained the narrative of events detailing the five breaches of her contract. In her narrative of the second alleged breach of contract, the claimant stated that she was surprised to receive a message from YK Liang informing her that her proposal for a settlement sum of RM520,000 had been rejected by the company’s Board.
- I

[82] The company urges this court to conclude that the reason the claimant left the company on 9 October 2023 was the rejection of her settlement proposal on 3 October 2023 and not by reason of the other breaches set out in her constructive dismissal letter. A

[83] I find this argument by the company to be untenable and self-serving. The claimant's letter of constructive dismissal makes it plain that the reasons for her constructive dismissal claim are based upon a chronology of events which gave rise to several breaches. Her reference to being "surprised" by the rejection of her proposal was merely a reaction to a proposal she submitted at the company's own invitation. It was a final event in the chronology of events and cannot be inferred as the sole reason for her leaving the company. B C

[84] In the circumstances, this court is unable to accept the contention that the claimant's departure was occasioned by the rejection of her settlement proposal. A fair reading of the claimant's letter does not support such conclusion. It is one of the events mentioned in her narrative and not the cause of her decision to leave the company. D

[85] In determining whether there has been a fundamental breach of the terms of the claimant's contract, the five reasons raised by the claimant in her letter of constructive dismissal, which she claims amount to breaches of her contract, must be assessed using the contract test, which requires the fulfilment of the conditions mentioned earlier. E

[86] The claimant's case as set out in her dismissal letter and pleadings, treats the four acts of sexual harassment committed by LSK as the first breach of the contract. Each allegation will be evaluated in the sequence it occurred. F

[87] The claimant's version is that the first act of sexual harassment committed on her occurred when she was called by LSK to his room to check the validity of an online transaction he had performed using his handphone. While the claimant was squatting beside LSK to assist him, LSK touched her hair and said "Never mind, let it be" and continued to rub her hand and back. G

[88] It was not disputed by the company that on 11 September 2023, during the claimant's working hours, LSK had called the claimant to his room to assist him with work-related matters as well as the online transaction. The company in its submission questioned how it was plausible for LSK to touch the top of claimant's hair, rub her hand and back when he was holding the phone in his right hand and she was squatting on his right side. The company submitted that if LSK held the phone on his right hand, any such contact would require the use of his left hand, which the company contended was unlikely. The company further submitted that it was only natural to hold the phone in the right hand to show someone on his right side. H I

- A [89] It is my observation that the company's argument that LSK held the phone in his right hand rests largely on surmise, conjecture or assumption rather than on LSK's account or the claimant's admission. Had LSK held his phone in his right hand, that evidence should have been tendered by the company for the claimant to rebut or challenge.
- B [90] Even if LSK had held the phone in his right hand throughout without shifting it to his left hand, in the absence of any convincing evidence to that effect, there is nothing to displace the claimant's version. This, in term, lends credence to the claimant's case. Such facts were not canvassed during the trial or put to the claimant, to prove that LSK could not have touched her using
- C his right hand. The court believes the claimant's version that it was the claimant who was holding his handphone when she was touched.
- [91] It was argued by the company that the claimant had manipulated her evidence during re-examination by stating that she was "coaching" LSK whereas in her official complaint letter, she had stated that she was scrolling and wondering why there was no SMS at the time she alleged that LSK had rubbed her hand and back and not while coaching LSK.
- D [92] The mere use of the word "coaching", does not give rise to any apparent or material discrepancy present in her evidence in regard to her being touched by LSK. It does not warrant any findings of disbelieving the claimant or that the first act of sexual harassment did not occur.
- E [93] It is undisputed that LSK said "Never mind, let it be" when the claimant squatted beside him. However, the company submitted that these words were uttered in the context of him having realised what had happened to his money transfer despite not receiving the SMS. This was said after the claimant noted that other banks would normally send SMS to notify, and those words by LSK were not uttered in the context as alleged by the claimant.
- F [94] LSK's admission that he uttered those words supports the claimant's version of events, which occurred in her presence, and strengthens her credibility as a witness whose account is consistent, credible, and without any distortion.
- G [95] Going by the claimant's chronology of events, the second act of sexual harassment happened sometime later on the same day, after she had returned to her desk and was called again by LSK to his room to report on her work status.
- H [96] The claimant's account is that in his room, she kept her distance by standing near the chair placed on the left side of the table as she enters the room. LSK then stood up, and asked for a hug by saying, "Come, give me a hug, Ms Teng" and hugged the claimant. She did not have time to refuse.
- I He then asked "Do you think anybody will come in?". He smelled her face and remarked "So soothing" adding "Ms Teng, for so long I never had this kind of comfort". After the hug, he said "You lost weight, huh Ms Teng".

[97] The company's version is that after the claimant had updated him on certain matters, as he stood up to leave the office, he felt giddy. At that point, he lost his balance. He claims that had the claimant not held him, he would have fallen in his office. During this time, the claimant repeatedly asked him what happened to him and whether he was alright.

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[98] In his testimony, LSK stated that after suffering the giddiness, he felt unwell. He was focused on walking out of the office to his car and was not even in a state of mind to thank the claimant for preventing him from falling.

B

[99] The company's defence that the claimant held LSK to prevent him from falling amounts to an admission that close physical contact occurred as soon as he stood up. Crucially, it confirms that LSK moved into the claimant's immediate personal space, whether by accident or design, thereby corroborating her assertion that a physical encounter occurred in his office.

C

[100] In regard to the third act of sexual harassment which allegedly occurred after the claimant returned to her workstation, the claimant claims that LSK approached her and continued to give her unwanted attention making the following inappropriate remarks:

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Ms Teng, do you think if I were to invite you for coffee, what would people think? Oh, nothing, that day I went for coffee and thought how nice it would be if Ms. Teng were with me ...

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[101] The fourth alleged act of sexual harassment occurred during the claimant's leave, when LSK surreptitiously obtained her address from her doctor and appeared at her home uninvited. He repeatedly rang her doorbell and attempted to contact her by making multiple phone calls.

[102] It was undisputed that LSK had called the claimant's mobile phone a number of times and had gone to her house, rang the doorbell and in both occasions, the claimant did not respond.

F

[103] Considering the evidence as a whole, there is a common starting point. Both parties described a moment of close physical contact in LSK's office. The company attributes this to LSK losing his balance, whereas the claimant describes it as a requested hug amounting to sexual harassment. Although the company does not admit to the words alleged by the claimant, the account of physical movement supports her version that a physical encounter did take place in LSK's office after he stood up when she was in his room for the second time.

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H

[104] This was followed by another undisputed incident in which LSK went to the claimant's house on 14 September 2023 to meet with her uninvited, and had called her multiple times.

[105] Returning to the first to third act of sexual harassment, soon after LSK left the office, the claimant immediately informed her husband, Ms Kannie, a colleague and YK Liang through his wife that she had been sexually

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- A harassed by LSK. There is sufficient and credible evidence showing that she had informed the respective persons about the occurrence of the incidents. The text messages and communications sent to them were not seriously challenged by the company.
- B [106] Her evidence that she texted her husband, and called him to inform him is well corroborated by her husband, whose evidence remained uncontroverted. The chronology of these events strongly supports the conclusion that her immediate conduct lends credence to her version of the first to the third acts of sexual harassment.
- C [107] I find that LSK's version that he felt giddy upon standing and was about to fall, yet thereafter was sufficiently composed to walk out to get to his car does not sit well with the condition of a person of his age allegedly suffering long lasting dizziness or vertigo. He did not utter any words of appreciation or apology to the claimant despite the occurrence of close bodily contact. His version is unconvincing and lacks credibility.
- D [108] The company further submitted that the claimant had ample opportunity to leave his office, had he in fact hugged her. It is the court's findings that her evidence that she repeatedly asked him three to four times whether he was alright, strongly suggest that, although she did not expressly refuse, she was bewildered and uncertain of his conduct. Her repeated questioning indicates that she was attempting to understand his intention. The claimant's conduct is consistent with a person who was shocked and caught off guard in a bizarre situation with her employer.
- E [109] In regard to the time stamp encompassing the second act of sexual harassment, which the company submitted would not have permit LSK to conduct himself in the manner alleged, given his advanced age, this court finds that the issue is not to be determined by a minute scrutiny of the precise timing of each movement made by LSK. The proper enquiry is whether the impugned act in fact occurred. It would be misplaced to dissect, with mathematical precision, every action and movement or to expect a victim to recount exactly the duration, sequence and minutiae of the conduct.
- F [110] The claimant relied on the full tenor and context of her contemporaneous WhatsApp messages and phone calls in reporting to YK Liang's wife, YK Liang, her colleague, Ms Kannie and her husband of what had happened between her and LSK in the office. Her immediate actions to communicate with them serves as sufficient contemporaneous evidence of the trauma and distress she suffered, confirming the consistency of her account regarding the words uttered by LSK in his room and prior to his departure, from the moment the harassment occurred.

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[111] When an immediate narration of an incident relating to sexual harassment is conveyed to a person or persons known to the victim, the immediate act of doing so would have not only lends credence to her credibility and the likelihood of the truth of the matter but a reliable corroboration on her account of the incident taking place.

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[112] This principle has been applied in numerous industrial court cases. It goes to support the claimant's position to convey her traumatised state of mind, the fear and shock she experienced from what had just happened to her which outweighs the notion that there may be fabrication, afterthought or imagination.

B

Credibility Of The Claimant

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[113] The claimant's testimony in court was cross-examined at length which provides this court ample opportunity to observe her credibility, as it is central to her complaints against the company.

[114] The Federal Court in *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785; [2018] MLJ (Supp) 363; [2010] 2 MLRA 668 held as follows:

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On these issues of demeanour and inconsistency, the court relies on *Sarkar's Law of Evidence*, 15th edn, Vol 1, Wadha and company Nagpur 1999:

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The demeanour and bearing of a witness should be very closely observed. Unless a witness is a skilled actor; his demeanour frequently furnishes a clue to the weight of his testimony. It is because the trial judge had the advantage of seeing the witness that it has been repeatedly held that his decision on question of fact should not be lightly disturbed... When the question of credibility depends on the demeanour in the box, the manner in which the witness answers and by how he seems to be affected by the question put and so on, the trial has an advantage.

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[115] In the present case, the demeanour of the claimant when giving evidence during cross-examination remained consistent throughout. She stood her ground, was unhesitant to reply to the questions posed and was candid and forthright in giving her evidence. The court finds her to be a highly credible and reliable witness.

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[116] Her oral testimony does not stand alone, it was sufficiently corroborated by the contemporaneous WhatsApp communications sent immediately after the incidents to several persons.

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[117] The court therefore come to a conclusion that LSK did sexually harass the claimant on 11 September 2023 in the office before he left the office for the day.

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- A [118] The court also take into account the trails of WhatsApp communications between the claimant and YK Liang, who upon hearing the claimant strongly suggested her to work from home until his return from India. YK Liang himself had expressed to the claimant that what LSK did was wrong and was also angry with LSK.
- B [119] It would defy all logic and good sense to believe that YK Liang did not confront his father after receiving such serious allegations from the claimant. Had YK Liang not believed the claimant, his reaction would have been markedly different. The fact that YK Liang expressed his anger towards his father through his WhatsApp messages to the claimant (CLB3 p. 7) and
- C permitted the claimant to work from home strongly suggest that YK Liang had confronted LSK. At that material time and for reasons best known to him, he accepted the claimant's account without reservation.
- [120] Taken in its totality, the court finds the evidence to be overwhelming that LSK did, in fact, subject the claimant to sexual harassment within the workplace. Consequently, this court finds that the acts complained of by the
- D claimant constitutes a clear and serious case of sexual harassment, perpetrated by LSK against the claimant during the course of her employment. The first breach of her employment contract is therefore proven.
- E [121] The second breach of contract raised by the claimant is in respect of the company's conduct and/or response to the sexual harassment, *ie*, failure to take the necessary actions to investigate and implement safety measures despite receiving both informal and written complaint *vide* letter dated 20 September 2023. The company failed to provide a safe working
- F environment for the claimant despite having encountered such incidents.
- [122] While YK Liang gave the claimant assurance that the matter will be dealt with accordingly and suggested that she work from home and only attend the office after LSK's absence, no measures whatsoever was taken in regard to address her complaints or to ensure a safe workplace for her.
- G [123] When the claimant enquired about her working hours, YK Liang left it to the claimant to decide but suggested that she attend the office after 2.30pm or 3pm. However, he still required her to be physically present in the office in the afternoon until he resolve and finalise the matter.
- H [124] The company contended that it conducted a domestic inquiry on 15 October 2023 which the claimant did not attend even though she was served with the notice of proceedings. Despite such claim, the company failed to produce any minutes of meeting of the domestic inquiry or evidence of investigation having conducted. YK Liang was not able to provide any
- I solid and cogent evidence of the persons who were involved in the domestic inquiry and their respective roles. The court finds that during his

cross-examination, there were pauses and he was frequently evasive and at times refused to reply to question posed. His evidence is bristled with inconsistencies.

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[125] What is damning against the company is its failure to take any responsible steps to ensure the claimant would not be subjected to any further acts of harassment while she is still in employment. On the contrary, the company took the opposite approach by asking the claimant to avoid LSK and instructed her to attend office after LSK had left. Looking at the evidence as a whole, that was the only measure taken in response to her complaint. This second breach of her contract flies in the face of the company's statutory duty to provide a safe and harassment-free working environment.

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[126] The third breach concerns the unilateral changes made to the terms of the claimant's contract.

[127] The company pleaded that, following a discussion between the claimant and YK Liang, and pending the investigation of her complaints, YK Liang instructed her to work from home with the requirement that she attend the office once a week to discharge her duties as the Head of Human Resources and to oversee staff. The claimant was also offered another office to work but she declined.

D

[128] From the company's pleaded case, it is apparent the company had decided to vary the claimant's working hours by requiring her to attend the office once a week.

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[129] These changes required her to carry out her work after office hours that significantly changes her terms and conditions of her employment. It undermined the very foundation of her employment contract specifically the express terms of her workdays and hours by isolating her rather than taking actions which would prevent LSK from getting close to her in any way possible.

F

[130] The fourth breach of the terms of her employment contract is the deception by the company on Mr Chee's role and the status of the investigation.

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[131] The claimant contends that YK Liang had informed her that the company's Board of Directors had appointed Mr Chee to investigate into the claimant's complaints.

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[132] The company contends that on 2 October 2023 it had called for an emergency board meeting and decided to appoint Mr Chee who is not related to the members of the company to do 'whatever deems necessary to resolve the matter'.

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- A [133] It is observed that the substance and nature of the conversation during the meeting between Mr Chee and the claimant was far from a genuine investigative inquiry, rather, it was a warning clearly devised to indicate to the claimant that the company would go to any lengths and utilise every available resource to challenge her allegations.
- B [134] In furtherance to that, after the meeting between Mr Chee and the claimant on 2 October 2023, the company was not forthcoming with the claimant on how and what actions would be taken against LSK and in carrying out the investigation.
- C [135] The evidence of the meeting between the claimant and Mr Chee shows that Mr Chee had been biased by siding with the company and showed no genuine interest in investigating the claimant's complaints. While the claimant was expecting the company to take the necessary action in respect of her complaints, the company instead, acted deceptively towards her and chose to intimidate and deter her from pursuing those complaints further.
- D [136] The company pleaded that the claimant had been clearly informed that the meeting between her and Mr Chee was not an investigation, rather it was an attempt to find a once and for all solution.
- E [137] However, the evidence of the meeting convinces this court that the fourth breach is established as the claimant was made to believe that Mr Chee would investigate on her complaints.
- [138] The fifth reason for claiming constructive dismissal is premised on the company's attempt to intimidate, threaten and manipulate the claimant through a meeting with Mr Chee on 5 October 2023.
- F [139] The proof of this intimidation and threat is glaringly evident in Mr Chee's statements and his dismissive response to her about her safety which clearly favoured the company's position at the expense of a fair investigation. This conduct signifies a fundamental breach of the implied term of trust and confidence.
- G [140] The role played by Mr Chee is particularly damning. It demonstrates the company's *mala fide* intention to intimidate and to subject the claimant to fear so as to deter her from pursuing her complaints and any actions against the company. This is apparent from the Mr Chee's assertions made during the meeting and tendered through recordings and minutes of their meeting.
- H Mr Chee had no qualms to leverage his position as a former senior lawyer to inform the claimant that he would protect the company from anything that would affect his business relationship with the company.
- I [141] The conduct of the company to have engaged Mr Chee for the very purpose of instilling fear and exerting intimidation onto the claimant leads to an inescapable conclusion that the company had breached its fundamental terms of her employment contract namely the implied duty of mutual trust and confidence, by abusing its managerial authority.

[142] It is observed that since the complaints were primarily directed against LSK whose position and authority represents the very 'brain and mind' of the company, he was never subjected to any internal questioning. Nor did the company convene an inquiry to investigate or adjudicate the matter. The failure to conduct an investigation or an inquiry despite having full knowledge of the complaints demonstrates its unwillingness to question the conduct of its own executive director or to impose any disciplinary action should he be found culpable. Not a single charge was preferred against him notwithstanding the written complaint lodged by the claimant. Instead, the company elected not to take any action against its founder. While LSK was allowed to continue coming and going as he pleases without consequence, the claimant was instead asked to change her working hours. The company's conduct amounts to acquiescence in its executive director's conduct.

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[143] It is the court's considered view that the claimant had established with credible evidence that the company committed the first, second, third, fourth and fifth breaches of the terms of her employment contract which were fundamental breach, express and implied which goes to the root of the contract and evinced an intention no longer to be bound by it.

D

[144] The company was procedurally flawed in its handling of the claimant's complaints and failed to take necessary steps and action to resolve the complaints and to ensure that she no longer felt unsafe at work. Instead, the company treated its executive director, LSK, as though he were immune from any disciplinary action.

E

[145] In regard to the second criterion, the claimant is required to prove that she left the company in response to the breach and not for any other reason. This court has dealt with this issue earlier and concluded that the claimant left her employment due to the company's breaches of her employment contract.

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[146] In regard to the third criteria wherein the claimant was required to give sufficient notice period to the company to remedy the breaches, the first formal notice given by the claimant was *vide* letter dated 20 September 2023 addressed to YK Liang, highlighting the company to treat the claimant's complaints on urgent basis as she found it difficult to be at work and willing to wait for his return from India to find a solution.

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[147] It was not disputed that YK Liang had a meeting with the claimant on 1 October 2023. However, despite the meeting, the company failed to address any of her complaints raised nor did it implement any remedial measures to safeguard her livelihood.

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[148] Far from addressing the claimant's concerns, the company's proposals to change her workplace, working hours, alongside a request for a settlement sum effectively treated her complaints as inconsequential.

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- A [149] Her letter of constructive dismissal served to the company on 9 October 2023 after nine days from the meeting on 1 October 2023 has provided the company sufficient time to remedy the breach of the terms of her employment contract.
- B [150] As the claimant had left immediately after tendering her letter of constructive dismissal, there is no flaws in her claim for constructive dismissal and it proves that she had not waived the breaches she raised against the company or agreed to vary the contract after YK Liang's return from India. She left her employment with the company in response to the breaches she raised and not for any other unconnected reasons, and there was
- C no undue delay on her part.
- D [151] The company urges this court to draw an adverse inference under s. 114(g) of the Evidence Act 1950 against the claimant for failing to call her colleagues or YK Liang's wife, Ms Jean. This is premised on para. 10 of the rejoinder, where the claimant indicated that she would call her colleagues to testify to provide "detailed evidence and witness testimonies to substantiate the claimant's account" but failed to do so.
- E [152] However, this court is of the view that the failure to call the claimant's colleagues does not justify the drawing of an adverse inference against the claimant as the evidential burden rests on the claimant to establish her case of constructive dismissal and it cannot be assumed that the evidence of her colleagues would have been unfavourable to her since the alleged act of sexual harassment did not occur in their presence. At most, their evidence would have been limited to recounting what the claimant had told them, rather than providing direct evidence of the incidents.
- F [153] In regard to the CCTV recording, the company submit that based on the claimant's evidence that her colleague, Kannie had told her to review the CCTV recording footage, the claimant's failure in doing so suggested that she did not avail herself of the evidence that could have corroborated her allegation of the third act of sexual harassment.
- G [154] Such argument by the company appears to be perplexing. The company itself would have access to the CCTV footage and could have adduced it if it supported its case. It also suggests that there was no evidence from the CCTV footage that could have provided any exculpatory evidence in its favour in the event it was in good working order.
- H [155] The claimant had been driven out of her employment due to the fundamental breaches of her employment terms which relates to the trust and confidence she had with the company and her basic safety at workplace, to which the company had evinced an intention to no longer be bound with such terms. The claimant therefore, has successfully proven that she has been
- I constructively dismissed.

Whether The Dismissal Was With Just Cause Or Excuse

A

[156] The company's conduct were breaches that goes to the root of the claimant's employment contract and subsequent to that, the company itself gave no importance to the claimant's complaints. Its conduct is calculated to have caused serious damage and destroyed the relationship of trust and confidence between the claimant and the company. The company had shown no interest to protect the claimant's dignity, rights and security for the rest of her employment tenure had she continued to stay on. Her dismissal was therefore without just cause and excuse.

B

[157] In reaching its decision, this court acted pursuant to s. 30(5) of the Act which mandates the consideration of equity, good conscience and substantial merits of the case without regard to technicalities and legal forms.

C

Remedy

[158] Since there has been irreparable hostility and discord between the parties in this case, reinstatement would not be appropriate. In the alternative, a compensation *in lieu* of reinstatement would be awarded in this case.

D

[159] As the claimant's tenure with the company was a continuance from her employment with Fenix Sdn Bhd, it would be deemed to be just to compute her employment tenure which began on 21 March 2011 under the same terms and conditions until 9 October 2023 when she was dismissed from her employment by the company. The claimant had worked for 12 years and approximately seven months to which for compensation *in lieu* of reinstatement, the multiplier will be 12 months' salary.

E

[160] In calculating backwages, the Federal Court in *Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor* [2001] 3 CLJ 541; [2001] 1 MELR 17; [2001] 1 MLRA 305; [2001] 3 MLJ 529 His Lordship Steve Shim CJ (Sabah and Sarawak) stated that:

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... In our view, it is in line with equity and good conscience that the Industrial Court, in assessing quantum of backwages, should take into account the fact, if established by evidence or admitted, that the workman has been gainfully employed elsewhere after his dismissal. Failure to do so constitutes a jurisdictional error of law. *Certiorari* will therefore lie to rectify it. ...

G

[161] The testimony in relation to her post-dismissal earnings is this. From 9 October 2023 until December 2023, the claimant sold "nasi lemak" to generate income for her family. In December 2023, a friend of hers had approached her to request for her help in a newly set up company as a Human Resource personnel and was paid RM3,500 a month with no statutory contributions. The claimant left her friend's company in November 2024.

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A [162] Based on the facts, the claimant had only secured an employment for a year from December 2023 till November 2023. In line with equity and good conscience, since the claimant had been employed but with a lesser salary, there will be a deduction of 20% from the full backwages computation she is entitled to:

B Backwages of 24 months
RM4,365 x 24 months = RM 104,760
Less 20% = - (RM 20,952)
= RM83,808

C Compensation *in lieu* of reinstatement:
RM4,365 x 12 = RM52,380
Total = RM136,188

D **Final Award**

[163] This court hereby orders the company to pay the claimant the sum of RM136,188 (Ringgit Malaysia One Hundred Thirty Six Thousand One Hundred Eighty-eight Only) less any statutory deductions, if any, through the claimant's counsel Messrs. Ng & Gomez within 30 days from the date of this award, together with interest at the rate of 8% per annum, accruing after the 30 days until its full and final settlement.

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