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KEVIN COLANDAIRAJ v. HEALTHCARE OPTIMISATION PARTNERS SDN BHD

INDUSTRIAL COURT, KUALA LUMPUR
NOOR RUWENA MOHD NURDIN
AWARD NO. 1399 OF 2021 [CASE NO: 2(12)/4-473/20]
B 21 SEPTEMBER 2021

DISMISSAL: *Abandonment – Claimant not agreeing with the direction the company had been moving towards and failing to realign himself with his co-founders – Whether he had abandoned his job – Evidence adduced – Evaluation*
C *of – Effect of*

DISMISSAL: *Constructive dismissal – Change in job function – Claimant given a deadline to revert with an answer on whether he is onboard with the company's plans – Whether imposing a deadline on him to revert with an answer had been*
D *unreasonable – Factors to consider – Evidence adduced – Evaluation of – Effect of – Whether he had been constructively dismissed – Whether dismissal without just cause and excuse*

DISMISSAL: *Constructive dismissal – Change in reporting structure and demotion – Whether the company's implementation of OpPlan19 had been a fundamental*
E *breach of his contract of employment – Factors to consider – Evidence adduced – Evaluation of – Effect of – Claimant's position in the company – Whether he had been obliged to comply and participate – Perusal of his employment contract – What it had shown – Whether the company had indicated any mala fide intention towards him – Effect of – Whether he had been constructively dismissed – Whether*
F *dismissal without just cause and excuse*

DISMISSAL: *Constructive dismissal – Salary – Claimant's salaries not paid/part paid – Whether it had constituted a fundamental breach of his contract of employment – Factors to consider – Evidence adduced – Effect of – Whether he had condoned it – Claimant's position in the company – What it had reflected –*
G *Whether he had been constructively dismissed – Whether dismissal without just cause and excuse*

EVIDENCE: *Documentary evidence – Whether the claimant had been a workman within the definition of the Industrial Relations Act 1967 – Factors to consider – Evidence adduced – Effect of – Claimant wearing multiple hats in the company,*
H *including that of a majority shareholder – Effect of – Industrial Relations Act 1967, s. 2*

The claimant had been one of the co-founders of the company, a startup company, with its nature of business registered as "Business management consultancy services in the healthcare system" and he had been its Chief
I Commercial Officer (CCO). Approximately a year after joining it, the company had implemented Operation Plan 19 (OpPlan19) which had

restructured it and reassigned his duties. The company started to suffer financially due to insufficient business from the Government and/or private hospitals and this had culminated in the claimant's and the co-founder's salaries being unpaid for a few months and then them only taking part payment of their salaries for a part of that. The company then carried out a Management Performance Review (MPR) for the financial year ending 2019 and had purportedly identified significant "shortcomings" in the claimant's performance. The claimant disputed the MPR's findings and a meeting was held, at which time his scope of duties had once again been readjusted, he had been reassigned to sales and he had been put under a Performance Improvement Plan (PIP). He had also been asked to transfer his business contacts to a junior executive in the company, which the company had planned to hire. Further, he had been asked to "realign" with the company's co-founders and given a deadline to do so. This had then culminated in him resigning as a Director, alleging breach of the fundamental terms of his contract of employment and claiming constructive dismissal. The company on the other hand contended that he had resigned on his own accord as a Director, but had retained his shares in it, that its requirement for him to realign with it within a deadline had been to ensure its survival and that he had actually abandoned his employment with it. There were two main issues that had arisen for determination. The first issue had been whether the claimant had been a workman and the second had been whether he had been constructively dismissed from the company.

Held in favour of the company: dismissal with just cause and excuse

(1) On the issue of whether the claimant had been an employee of the company, the benefit of doubt would be given to him and it would be answered in the affirmative. A perusal of the evidence had shown that (i) his Letter of Appointment had contained the usual clauses or terms and conditions of employment such as duties, remuneration, benefits, statutory deductions and income tax and his salary slip had confirmed these payments and deductions, (ii) he had been wearing three hats in the company, including that of a major shareholder and his functions had been indicative of executive powers carried out by an employee and (iii) he had still retained his shares in the company when he had resigned as a Director in it. Further, in his witness statement, he had referred to being "equal partners of the Company". Thus, he had had direction and control over the company, despite being an employee, by virtue of his shareholding (paras 20, 30, 34, 36 & 37).

(2) On the issue of whether he had been constructively dismissed, in relation to the non-payment of his salaries, the evidence had shown that he had condoned the company's actions re the delay/non-payment of it. Being a Director, he had been aware of the company's financial situation and/or its predicament and its reasons for proceeding with OpPlan19,

ie, to improve its finances. Thus, the non-payment and part payment of his salaries had not been a material breach of his employment contract, evincing an intention to no longer be bound by it. On his contention that he had not been aware of OpPlan19, that he had not agreed to the same and that the change in his reporting structure had been a demotion, the evidence had shown that the parties had been equals in the company. It had been hard to see how the company's actions of moving forward and requesting him to realign with its other founders in order to ensure its survival had been a fundamental breach of the terms and conditions of his employment contract. The decision had been taken in a shareholder's meeting and the claimant had been present and expressed his unwillingness and refusal to realign as suggested and a deadline had been fixed for him to revert with his decision. Further, the evidence had shown that the deadline had been set by the shareholders and not the company, that the partnership had gone sour, that the claimant as one of the co-founders could not agree with the direction the company had been taking to ensure its survival and that he had simply refused to participate further in discussions when things had not gone his way. As one of the three directors and employees of the company, the claimant had frustrated the company's efforts to move forward *vide* the implementation of OpPlan19, by refusing to participate in the same. Despite his claim that the company had victimized him, there had not been any evidence of *mala fide* intention on its part in implementing OpPlan19. Clause 5 of his employment contract had provided that "Further roles and responsibilities as required by the management of the company, to be informed from time to time" and he had signed and agreed to it. He had, based on all the evidence adduced, resigned when he had tendered his letter of constructive dismissal, together with his resignation letter from the post of Director. Thus, he had abandoned his employment when he could not agree with the direction the company had been moving towards and by his failure to realign himself with his co-founders. He had failed to prove that there had been fundamental breaches to the terms and conditions of his employment contract. Giving him a deadline to make a decision on whether he had been willing to realign with the co-founders had not been unreasonable (paras 59, 61, 62, 63, 65, 67, 69, 70, 74, 77, 78 & 79).

[Claim dismissed.]

Award(s) referred to:

Bu Yoon Lian v. Meng Sin Corner (Award No. 1183 of 2021)

Fong Choon Hing v. Flyglobal Charter Sdn Bhd [2020] 2 LNS 1300 (Award No. 1300 of 2020)

Puah Keng Ming & Ors v. Canyong Packaging Sdn Bhd & Ors [2020] 2 LNS 0825 (Award No. 825 of 2020)

Suechi Industries Sdn Bhd v. Umah Jeralene Louis Adaikalasami [2005] 1 ILR 54 (Award No. 1319 of 2004)

Case(s) referred to:
Bayer (M) Sdn Bhd v. Anwar Abdul Rahim [1996] 2 CLJ 49
Chong Kim Sang v. Metatrade Sdn Bhd [2004] 2 CLJ 439
Dr A Dutt v. Assunta Hospital [1981] 1 LNS 5
Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687
Hotel Malaya Sdn Bhd & Anor v. National Union of Hotel, Bar & Restaurant Workers & Anor [1982] CLJ 460; [1982] CLJ (Rep) 124
Mary Colete John v. South East Asian Insurance Bhd [2010] 8 CLJ 129
Western Excavating (EEC) v. Sharp [1978] 1 All ER 713
Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298
Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 344

Legislation referred to:
Industrial Relations Act 1967, ss. 2, 20(1), 30(5)

Other source(s) referred to:
Ashgar Ali, *"Dismissal From Employment and The Remedies"*, 2nd edn (2007), p. 121

For the claimant - Sakthy Vell Saminathan; M/s Sakthy Vell
For the company - Lachman Kumar Ramanathan (Surekaa Santhiran with him); M/s Prem & Assocs

Reported by Sharmini Pillai

AWARD
(NO. 1399 of 2021)

Noor Ruwena Mohd Nurdin:

[1] The Ministerial reference in this case required the court to hear and determine the claimant's complaint of dismissal by the company on 2 October 2019 and was received by the Industrial Court on 27 February 2020.

Factual Matrix

[2] The company was a startup company incorporated on 18 August 2017 with its nature of business registered as "Business management consultancy services in the healthcare system". The claimant was one of the co-founders of the company and the other two were Dr. Armijn Fansuri Mustapa and Mohd Iqbal Shamsul. All three were Directors, shareholders and the only employees of the company. The founders developed a system to address the issue of delays in Government hospitals by bridging the divide between Government hospitals and private hospitals through optimization of the healthcare facilities between the two sectors. The three of them held senior management positions in the Company where the claimant was the Chief

Commercial Officer (CCO), Mohd. Iqbal Shamsul was the Chief Executive Officer (CEO)/Chief Finance Officer (CFO) and Dr. Armijn Mahpha Fansuri Bin Mustapa was the Chief Operation Officer (COO).

[3] The claimant commenced employment on 1 January 2018 as the company CCO with a basic salary of RM20,000 and subjected to a probationary period of three months. The claimant's duties as stipulated in the Letter of Appointment dated 15 December 2017 were:

i. to develop commercial strategy, tactics and products

ii. to oversee and manage the marketing and sales activities

iii. to manage provider relationships

iv. product and IT management including:

- IT development specification and project management, including internal tools such as C-suite dashboards
- bug fixes and product optimisations
- co-ordination and leadership of technical/coding team
- front and back-end architecture.

v. further roles and responsibilities as required by the management of the company, to be informed from time to time.

[4] Around 12 February 2019, the company implemented Operation Plan 19 (OpPlan19). It was pleaded by the claimant in his Statement of Case (SOC) that pursuant to the OpPlan19, his workload was unilaterally increased without first obtaining his consent. He was purportedly required to carry out the duties and/or functions of the COO, which he alleged amongst others, the management of internal resources and ensuring delivery of service to clients and driving clinical procedure and practices by working with medical operators and regulations from public or private sectors. Despite the additional duties, the claimant, being a co-founder of the company, carried them out in the best interest of the company. He alleged further that the other two co-founders did not take any initiative to claim ownership of their other roles and responsibilities but instead they outsourced them to third parties. Contrary to this claim, the other co-founders contended that the claimant's responsibilities under the OpPlan19 had been reduced. For instance, no new provider engagement shall be initiated whereas existing engagements to be followed through by the respective person in charge. It claimed that the claimant had allegedly unilaterally relinquished all responsibilities in the supervision and management of software platform deliverables in November 2018, this comprised approximately half of his stipulated duties. Part of the claimant's duties were also outsourced to third parties. These were pleaded in the company's Statement in Reply (SIR).

[5] The claimant complained that his contributions to the company were not recognized and he was portrayed to be slacking and falling behind schedule on his duties whereas the other two co-founders depicted themselves as being hardworking and dedicated employees. He was not issued any warning letter despite their claims as such. Due to insufficient business from the Government and/or private hospitals, the company started to suffer financially. The claimant's and the co-founders' salaries for the months of July, August and September 2019 were not paid. Eventually, they managed to secure some funds and all were paid RM10,000 as part payment of the July salary. The company admitted that it only generated less than RM100,000 in revenue in 2018 from non-core business and less than RM10,000 in 2019 from core business.

[6] Around 7 August 2019, the company carried out a Management Performance Review (MPR) for the financial year ending 2019. The claimant questioned the need to conduct the MPR as the company was not a big entity and alleged that it was done only on him, but the company disputed it because they too participated in the exercise and it was done fairly based on the assigned duties and responsibilities. It was the company's contention further that Peer Review was an integral part of the MPR and pursuant to the investors' requests. It was also material to conduct the MPR because the whole company was underperforming after the end of the financial year 2019 including on its commercial aspects to be self-sustaining and to remain financially viable. It was also necessary to ensure that the company could achieve the targets set for the OpPlan19.

[7] The company purportedly had identified significant "shortcomings" in the claimant's performance. It alleged that these "shortcomings" were inconsistent with the claimant's level and experience as stated in his curriculum vitae that was provided to the company. Further, the company contended that the MPR was conducted on all three of them and included Peer Review by the others as a method of ensuring fairness in the assessment. It claimed that the claimant's allegations that the MPR was unfair was an afterthought to hide his true job performance. The claimant had alleged that the other co-founders "ganged-up" against him and clearly he was outnumbered 2-1.

[8] Pursuant thereto, a meeting was arranged upon the claimant's request after the result of the MPR was out as he did not agree with the findings of the other two co-founders. He claimed that some aspects of his works were overlooked and others were overstated. He also claimed that he was unfairly blamed for the company's underperformance as the company had been a year in business and management set unreal milestones and achievements when they only had three patients at the material time. On 18 September 2019, during the shareholders meeting, the claimant was informed verbally that his scope of duties would be readjusted again and he was reassigned to sales. He

alleged that he would also be put under a Performance Improvement Plan (PIP) without an indication of a definitive period for the PIP. He was asked to transfer his business contacts to a junior executive which the company was planning to hire at that time. Therefore, he claimed that the PIP was effectively to drive him out of his employment. With the reassignment of duties, the claimant was to report to the COO, contrary to the terms of his appointment whereby he reported to the CEO and Board of Directors. The claimant claimed that the reassignment of his duties constituted a breach of the terms and conditions of his employment. The claimant told the meeting that:

i. he was unhappy with the MPR which was biased towards him;

ii. he was unpaid his salary for three months;

iii. the co-founders were giving misleading information about him to the shareholders;

iv. he did not agree to the proposed new structure and reassignment of his position under the OpPlan19; and

v. he had lost the trust and confidence of his co-founders.

[9] During the same meeting, the company told the claimant that he had no choice as an employee but to carry out his duties and responsibilities as directed by the company. He was asked to "realign" with the company's co-founders. The company reminded him that he had alternatives, namely to stay and voice his concerns through the proper channel, or if his concerns were not resolved he may choose to resign, or if his performance did not improve the company may terminate his employment. The company told him to make a decision by 23 September 2019. He claimed that the company's action was intended to intimidate him and/or designed to drive him out of the company.

[10] On 30 September, one of the co-founders, Mohd Iqbal Shamsul (CEO) sent an e-mail to the claimant demanding that he make known his decision as was told in the previous meeting. He was reminded of the initial deadline of 23 September 2019. The CEO also reminded the claimant about the company's dire financial position and accordingly demanded the claimant to make a decision on that day, failing which the company would take the necessary action to "cut the losses and/or bleeding" to move forward. The claimant claimed that as a result of the above, he did not have any other choice but to consider himself constructively dismissed by the company on 2 October 2019 *vide* his letter to the company dated the same. The claimant averred that the grounds for the constructive dismissal were cumulative but the straw that broke the camel's back was when the company asked him to make a decision by 30 September 2019. He claimed that he tendered the

resignation as a Director to enable the company to move forward without any hindrance. It was not an admission or a relevant factor in his constructive dismissal claim.

[11] The claimant averred that with 20 years' experience, he had the most network with service providers when compared to the other two co-founders. Originally he was in-charge of the private hospitals whereas the COO was in-charge of the Government hospitals. Under the OpPlan19, some of the COO's duties were reassigned to the claimant and they were not limited to those duties that were outlined in the SIR by the company. He pleaded in the Rejoinder in response to the company's claim that he never objected to the OpPlan19. At a lunch meeting during the fourth quarter of 2018, he had emphasized that they were equal partners of the company and accordingly, the original reporting line to the CEO by the claimant as per the employment contract must be maintained.

[12] The company denied the constructive dismissal claim and contended the claimant resigned on his own accord when he also resigned as a Director of the company. Nevertheless, he still owned his shares in the company. It was also the company's contention that the realignment of the company's founders was to ensure its survivability and the decision was made in the shareholders meeting where the claimant was also present. He had expressed his unwillingness and refusal to realign with the other co-founders to continue with the company and hence a deadline was fixed for the claimant to inform them of his decision.

[13] Further the company contended that the discussion during the meeting focused on the claimant's position as a shareholder and founder and it was not directed at his position as an employee; it was the claimant who expressed his unwillingness to continue with the company and he stated that he had lost the trust and confidence of the other co-founders. The company contended that the claimant in actual fact abandoned his employment on 2 October 2019 and there was never any fundamental breach of the employment terms and conditions. The crux of the claimant's claim for constructive dismissal was misconceived and baseless as it originated from a deadline which was issued not by the company but by the shareholders themselves in the meeting on 18 September 2019. It was also an afterthought to hide his inability to meet the performance and targets expected of him, as well as his failure to secure the position of the CEO during the said shareholders meeting.

Establishing The Fact Of Dismissal

[14] The claimant prays that this court holds that his dismissal by the company as without just cause or excuse. The claimant pleaded for reinstatement to his former position in the company without any loss of seniority, wages or benefits, whether monetary or otherwise.

[15] Where representations on unfair dismissal have been made and are referred to the Industrial Court for inquiry, it is the duty of the Court as stated by the Federal Court in the case of *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344 to determine whether the termination or dismissal is with or without just cause or excuse. In *Hotel Malaya Sdn Bhd & Anor v. National Union of Hotel, Bar & Restaurant Workers & Anor* [1982] CLJ 460; [1982] CLJ (Rep) 124 it was stated that in exercising this *quasi* judicial function, the court's functions comprise investigating and analysing the facts, making findings of facts and lastly applying the law to those findings. Hence, the role of the court is to determine whether the claimant was indeed dismissed on 2 October 2019 and if so, whether the dismissal was without just cause or excuse. Although it is incumbent upon the court to inquire into the issue of justness or the excuse on its merits, the court must first be satisfied that the claimant was dismissed.

[16] In this claim, the fact of dismissal is disputed by the company. Hence, it is for the claimant to establish the facts, on a balance of probabilities. In the case of *Weltex Knitwear Industries Sdn Bhd v. Law Kar Toy* [1998] 1 LNS 258, it was held:

> The law is clear that if the fact of dismissal is not in dispute, the burden is on the company to satisfy the court that such dismissal was done with just cause or excuse. This is because, by the 1967 Act, all dismissal is *prima facie* done without just cause or excuse. Therefore, if an employer asserts otherwise, the burden is on him to discharge. *However, where the fact of dismissal is in dispute, it is for the workman to establish that he was dismissed by his employer. If he fails to, there is no onus whatsoever on the employer to establish anything for in such a situation no dismissal has taken place and the question of it being with just cause or excuse would not arise.*
>
> (emphasis added)

Evaluation And Findings By The Court

Was The Claimant An Employee Of The Company?

[17] The main issues that the court has to decide are as follows:

(a) whether the claimant was a workman; and

(b) whether the claimant was constructively dismissed from the company.

[18] The claimant was the sole witness for his case and his witness statement was admitted and marked as CLWS1. The COO was the company's first witness (COW1) and the CEO was the company's second and last witness (COW2). For brevity, the court will not repeat certain facts which were not disputed. The claimant's Letter of Appointment dated 15 December 2017 was exhibited in the claimant's Bundle of Documents marked as CLB1 at pp. 1-5. It was signed by the CEO (COW2) and bore the

claimant's acceptance at the last part of the letter but without the date of signing. The claimant also exhibited the CEO's Letter of Appointment at pp. 6-10 of CLB1. It was a similar letter, signed by the claimant instead and also bore the CEO's signature without the signing date. In the said letter, one of the duties of the claimant (and similarly the CEO), was to carry out further roles and responsibilities as required by the management of the company, to be informed from time to time. This meant that the employees of the company by the company could be tasked with additional roles and responsibilities, as and when necessary.

[19] The claimant was confirmed in May 2018 after the expiry of his probation and extended probation period. Although the company disputed that he was ever confirmed, the claimant was indeed confirmed in his position by virtue of cl. 3 of the Letter of Appointment which provided that "In the event no confirmation or termination letter is issued to you at the conclusion of the probation period or extended probation period(s), your probation period will be deemed to have been extended for a period of 1 month. If at the end of the extended probation period the company does not confirm your employment, your employment will be considered confirmed."

[20] Confirmation is one issue but the other more important issue is whether the claimant is an employee of the company. The company raised the issue that the claimant was not an employee within the meaning of a "workman" in s. 2 of the 1967 Act due to the fact that he was wearing three hats, as shareholder, Director and employee of the company. Firstly, I will deal with the issue of whether the claimant was a "workman" within the ambit of s. 2 of the 1967 Act. But before that, there is this nomenclature of the terms "contract of employment" and "contract of service" to get over with. In the case of *Mary Colete John v. South East Asian Insurance Bhd* [2010] 8 CLJ 129 on the interchangeable use of the terms "contract of employment" and "contract of service", the Federal Court ruled at p. 151:

> [31] It is apparent that in Malaysia, the term "contract of employment" is used interchangeably with "contract of service" as noted above in the Employment Act 1955 and the Industrial Relations Act 1967 respectively. However, despite the difference in the way in which legislation has defined the term "contract of service" or "contract of employment" the essential characteristic of these definitions is that the contract must be between an employer and employee. It is also to be noted that by statutory definition the term "workman" is used interchangeable with the term "employee."

[21] Sub-section 20(1) of the 1967 Act provides the procedure for making a complaint to the Director General of Industrial Relations as follows:

A Where a workman, irrespective of whether he is a member of a trade union of workman 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
B employment from which the workman was dismissed.

[22] A "contract of employment" and a "workman" is defined in s. 2 of the 1967 Act as follows:

"contract of employment" means any agreement, whether oral or
C in writing and whether express or implied, whereby one person agrees to employ another as a workman and that other agrees to serve his employer as a workman;

…

"workman" means any person, including an apprentice, employed
D by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute.

E

[23] The term "workman" was deliberated by the Federal Court in the decision of *Dr A Dutt v. Assunta Hospital* [1981] 1 LNS 5. The question that arose, *inter alia*, was whether the Industrial Court was correct in arriving at a conclusion whether the appellant was a workman under s. 20(1) of the Industrial Relations Act 1967. In his judgment, Chang Min Tat FJ said:

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As for the determination whether Dr. Dutt was or was not a workman within the Act, we have, in an earlier decision *Assunta Hospital v. Dr A Dutt* [1981] 1 MLJ 115, said that the question is **a mixed question of fact and law and it is for the Industrial Court to determine this question.** The fact is the ascertainment of the
G relevant conduct of the parties under their contract and the inference proper to be drawn therefrom as to the terms of the contract and the question of law, once the terms have been ascertained, is the classification of the contract for services or for service: see also *Australian Timber Workers Union v. Monaro Sawmills Pty Ltd* (1980) 29 ALR 322.

H

(emphasis added)

[24] In *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687, the Federal Court made a comparison between a "contract of service" and an "independent contractor who is engaged under a contract for
I service", with the latter not being categorised as a workman. Gopal Sri Ram JCA (as he then was) at p. 712 stated:

In our judgment, the correct test to be applied in determining whether a claimant is a workman under the Act is that enunciated by Chang Min Tat FJ in *Dr A Dutt v. Assunta Hospital* [1981] 1 MLJ 304 at p. 311. **We accordingly hold that a workman under the Act is one who is engaged under a contract of service.** An independent contractor who is engaged under a contract for services is not a workman under the Act. We take this view because it provides, as earlier observed, for a flexible approach to the determination of the question. It is fairly plain to see why flexibility is achieved by having resort to this test.

In all cases where it becomes necessary to determine whether a contract is one of service or for services, **the degree of control of which an employer exercises over a claimant is an important factor, although it may not be the sole criterion.** The terms of the contract between the parties must, therefore, first be ascertained. **Where this is in writing, the task is to interpret its terms in order to determine the nature of the latter's duties and functions.** Where it is not then its terms must be established and construed. But in the vast majority of cases there are facts which go to show the nature, degree and extent of control. These include, but are not confined to the conduct of parties at all relevant times. Their determination is a question of fact. When all the features of the engagement have been identified, it becomes necessary to determine whether the contract falls into one category or the other, that is to say, whether it is a contract of service or a contract for services.

(emphasis added)

[25] The Federal Court held:

The definition of "workman" applies to all contracts of service but not to independent contractors who are engaged under contracts for services. In all cases where it becomes necessary to determine whether a contract is one of service or for services, the degree of control which an employer exercises over a claimant is an important factor but may not be the sole criterion. It is a question of fact. The capacity in which one is employed or the purpose of the employment does not answer the question of the definition of a "workman". It is the function of and the duty actually discharged by the particular claimant that is important and not merely the label that is attached to the particular employment or indeed the purpose of the engagement.

Further at p. 712, his Lordship continued:

We approve the approach taken by Eusoff Chin J (now Chief Justice) in *Syarikat 3M Malaysia Sdn Bhd v. Nik Kamaruddin bin Ismail* [1990] 2 ILR 180; [1990] 1 MLJ 365, where he said (at p. 366):

I am inclined to think that the Industrial Court was not concerned with nomenclature or position held by the claimant, but was concerned to get the truth of the claimant's duties and functions

> in the company. In this case in order to determine whether the claimant was or was not a workman, the Industrial Court had heard oral evidence, and perused documents submitted to it, and came to the conclusion that from the duties and functions performed by the claimant, he could not be said to be the mind and brain of the company. A figure-head director who merely signs documents as directed by the company's board of directors certainly cannot be said to be a part of the mind and brain of the company.
>
> The reference to the need to have been the brain or controlling mind of a company in the passage cited was necessary by reason of the decision in *Inchcape* which constituted binding precedent. That aside, the importance of the passage cited lies in the approach suggested by the learned Chief Justice, namely, an examination of the functions of the claimant. This establishes what we regard as the true principle: that it is incorrect to state in absolute terms as was done by Seah SCJ in *Inchcape* that a company director can never be a workman.

[26] As set out above, the determination of whether the claimant was a workman is a mixed question of law and fact. The question of law pertains to the definition of "workman" in the 1967 Act and the facts to its determination must be to establish that there was a contract of employment in existence. Where there is such a contract between the parties, the court will then have to determine whether it was a contract of service or a contract for service. There was a written contract in the present case. What is the distinction between these two phrases?

[27] The difference lies in the obligations of the employer to provide employee benefits because there is an employer-employee relationship in the case of a contract of service. The 1967 Act meanwhile, provides for protection of the employee/workman for a reference to be made to the Minister where there is a dismissal claim. On the contrary, in a contract for service, there is no employee-employer relationship as the person is usually self-employed or an independent contractor who provides his services for a fee and he controls his own work performance. He would be governed by the general laws of contract. Hence, the employer in the case of a contract for service is not obliged to provide any employee benefits for the work performed. Therefore, the court will look to the intention of the company at the time when the offer for work to the claimant was made as well as the duties tasked upon him.

[28] In the case of *Chong Kim Sang v. Metatrade Sdn Bhd* [2004] 2 CLJ 439, the Court of Appeal held that the claimant was a workman and stated at p. 453:

> The relationship of employer and employee exists where a worker is employed under a contract of employment, ie, a contract of service. According to *The Concise Oxford Dictionary* (9th edn), an

> "employee" is "a person employed for wages or salary". A person who is appointed director of a company does not become an employee of the company. Whether he is entitled to receive remuneration as a director would depend on the articles of association and that would normally have to be determined by the company in a general meeting. An employee of a company can of course be appointed a director of that company. He remains an employee of the company as long as his contract of employment has not been terminated and would still be entitled to receive wages or salary. As director, he would further be entitled to any remuneration as determined by the company in general meeting if that is what is provided for and allowed by the articles of association of that company … .

[29] At p. 454, the Court of Appeal continued:

> The contract of employment between the appellant and the respondent, as executive directors, is a contract of service. Whilst carrying out his duties and functions as executive director, he still had to "report to and be responsible to the Managing Director". He was also required to carry out other duties and responsibilities "assigned by the Managing Director from time to time". He clearly fell within the contemplation of the meaning of "workman" under the Act. … In this respect, we would agree with the contention of the appellant's counsel that the appellant was wearing two hats, namely, one as director and one as employee and that he was terminated as an employee.

[30] After perusing the evidence and documents submitted, the court finds that the Letter of Appointment contained the usual clauses or terms and conditions of employment such as Duties, Remuneration and Benefits (including leave), Commencement Date, Working Hours, Termination and Confidential Information, to name a few. The parties to the contract of employment were the company and the claimant. The signatories were COW2 on behalf of the company and the claimant. There was provision for statutory deductions on EPF, SOCSO and personal income tax. The claimant's salary slips confirmed these payments and deductions. The claimant's duties were set out earlier in this Award. Later, the company sought to reassign the claimant to sales and this was one of the reasons for him to declare that he had been constructively dismissed. It appeared, therefore, that the claimant was an employee based on the written contract of employment in the form of the Letter of Appointment dated 15 December 2017.

[31] Earlier the court has noted that the claimant had accepted the terms of the Letter of Appointment as CCO (employee) and COW2 was the signatory on behalf of the company. He also exhibited COW2's Letter of Appointment as CEO (an employee) which he (the claimant) signed on behalf of the company. Obviously the claimant was wearing two hats, and not to

mention the third hat *ie*. as a major shareholder of the company. From the exhibit in p. 4 of the company's Bundle of Document 1 (COB1), the SSM search showed that the claimant held 3,000,000 shares in the company. COW2 and Achdiat Mahpha Fansuri Bin Mustapa (Achdiat) both also held 3,000,000 shares each therein. Meanwhile, there were two other investors each holding RM500,000 shares in the company. Achdiat was the brother of COW1 and a friend of the claimant. COW1 and COW2 were cousins. The case authorities above dealt with the issue of employees who was also a director of the companies. What is the position of the law where the employee is also a shareholder in the company?

[32] The court refers to a recent decision of the Industrial Court in the case of *Bu Yoon Lian v. Meng Sin Corner* (Award No. 1183 of 2021) where the claimant with two others owned shares in and were the owners of that coffee shop. The claimant's claim was dismissed. It was stated by the learned Chairman:

> [36] The company further raised an issue that the claimant was never dismissed by the company. *The company contends that the claimant was one of the shareholder of the company, and also took part in all the meetings involving the shareholders. This shows that the claimant was not an employee but a shareholder who has the full right to make decision. Therefore, dismissal will not take place as shares were owned by the claimant and thus she was one of the owner of the company.*
>
> [37] The court agrees with the company's contention that the claimant has failed to prove that she was dismissed by the company. In the Statement of Case, the claimant did not plead the crucial issue of how she was dismissed by the company. The claimant bears the evidential burden to prove that she was dismissed.
>
> [38] From the facts of the case it is not disputed that from the middle of 2017, the parties had several discussions to end the shareholder's relationship between the parties. COW3 then decided to buy over all the shares from CLW2 and the claimant. The shareholders' relationship ended on 7 September 2017 when COW3 handed over a cheque, consisting of the amount invested by CLW2 including the share CLW2 holds on behalf of the claimant. Prior to the handing over, there was a meeting attended by COW3, CLW2 and also the claimant who took part in the discussion. Immediately after the handing over, the claimant passed the keys of the shop to COW3 and left the shop. She didn't turn up at the coffee-shop after the handing over and never inquired on her employment status with COW3. This clearly shows that she is fully aware that as a shareholder of the company, her duties and responsibility in the company immediately ceased after the dissolution of the partnership. *There is no issue of dismissal as regard to a share-holder as there was no employer-employee relationship between the parties.*
>
> (emphasis added)

[33] In another case, *Puah Keng Ming & Ors v. Canyong Packaging Sdn Bhd & Ors* [2020] 2 LNS 0825 (Award No. 825 of 2020), the same Chairman decided in favour of the claimants where they were also employees, directors and shareholders of the companies. It was held that the first and second claimants' roles as Managing Directors of Next and Canyong (companies) were respectively removed pursuant to a resolution passed at the shareholders EGM of Profound and Canyong which were held on 8 January 2014. Although they were removed by the company's shareholders, the said removal amounted to a dismissal of the employee by the company and was subject to s. 20 of the IRA 1967. The learned Chairman stated:

> [56] From the evidence adduced in this court, it is obvious that COW1 removed the claimants as he represented the majority share holders of Profound. This evidence shows that COW1 was the directing mind of the companies. The claimants were unable to stop their own removal. COW1 was the brain and mind of the Companies and not the 1st or 2nd claimant. The excuse and reasons the claimants was being removed show clearly that the claimants were at all times at the mercy of COW1.

Degree Of Control

[34] As stated in the earlier case authorities above, degree of control is not the sole criteria but however it is still an important factor to be considered whether the claimant is an employee of the company. The claimant in his evidence attempted to portray that the company had control over him because he was its employee. In the same breath, he also testified that he was unhappy with the company's attempt to "realign" him to submit to the direction the OpPlan19 was heading. He was unhappy due to the manner it was carried out and he did not have a say in it when in actual fact, he said, **they were equal partners in the venture.** From the evidence of COW1, COW2 and the claimant on his duties and responsibilities (refer to CLWS1, COWS1, COWS2 and pp. 1-5 of CLB1), the court is satisfied that the claimant's functions in the company were indicative of executive powers which were carried out by an employee because mere directors do not carry out executive functions. In the same manner, it can be said that COW1 and COW2 as the COO and CEO of the company, respectively, were also employees and directors. For the record, COW1 did not hold any shares in the company but was listed as a director. As stated earlier, COW2 was listed as a shareholder and director. COW2 also held the same number of shares as the claimant. When the claimant resigned, purportedly due to his constructively dismissal, he still held on those shares which he owned. Effectively, with 30% of shareholding in the company, it cannot be said that the claimant was a minority shareholder because the claimant, COW2 and Achdiat equally held 30% of the shares in the company. The other 10% shares were owned by Ivy Ho and Ahmad Shahizam. The claimant alleged

that both COW1 and COW2 "ganged-up" against him but to my mind it did not point to that fact because the claimant, Achdiat and COW2 were equally majority shareholders since COW1 did not own shares in the company.

[35] From the evidence available before the court, the facts alleged by the claimant during the meeting on 18 September 2019 and undisputed by the company's witnesses were as follows:

i. he told the meeting was unhappy with the MPR which he said was biased towards him;

ii. he complained about his unpaid salary for three months;

iii. he alleged that the co-founders were giving misleading information about him to the shareholders;

iv. he did not agree to the proposed new structure and reassignment of his position under the OpPlan19; and

v. he told the meeting that he had lost the trust and confidence of his co-founders.

[36] To my mind, from the above, it could be seen that the claimant was not a mere employee or a mere director but also a shareholder with 30% shares in the company which translated to a certain extent having control and direction in the company. He did not agree to the direction that the other two co-founders wanted to go under the OpPlan19 whereby the claimant's duties and roles were to be redesignated to doing sales. The claimant in his answer to Question 12 of CLWS1 stated "… I personally informed the COO and/or COO verbally that I did not agree to the arrangement under OpPlan19. In fact, during the same lunch meeting, I emphasized that we (CEO, COO and CCO) were **equal partners of the company**, and accordingly, the original position of the reporting to the CEO by me under the Employment Contract must be respected and maintained."

[37] The case laws of *Hoh Kiang Ngan* and *Chong Kim Sang* did not concern the issue of a claimant being a shareholder as well, and the Court has looked at the cases of *Bu Yoon Lian* and *Puah Keng Ming & Ors* to determine whether the claimant was an employee of the company. In the court's view of these two later cases, the principle in the case of *Puah Keng Ming & Ors* (which was a re-hearing after it had gone for judicial review at the High Court) is followed. At the date of the company's incorporation on 18 August 2017, he was listed as a shareholder of the company and it was only on 1 January 2018 that he joined the company as an employee. The claimant had direction and control over the company despite being an employee by virtue of his shareholding therein. The company submitted that the claimant was not an employee and cited the case of *Harmony Plastic v. Ng Swee Kee* [1991] 2 ILR 754. Nevertheless, the benefit of doubt is given to the claimant and **the court**

holds that he is an employee within the spirit and meaning of "workman" under s. 2 of the 1967 Act, as it is a piece of social legislation not to be construed too rigidly.

[38] Having said that, the court will move on to determine the crux of the matter of the constructive dismissal claim which the court has to decide as follows:

(i) whether there was a dismissal from employment on 2 October 2019; and

(ii) whether the dismissal was without just cause or excuse.

The Law On Constructive Dismissal

[39] The foundation of the claimant's case rests on the primary issue of the constructive dismissal letter. The question of whether there has been a fundamental breach of the contract of employment must be answered first pertaining to the claimant's allegation of constructive dismissal. Hence, it is pertinent to set out the law in regard to constructive dismissal.

[40] The burden of proof in a case of constructive dismissal is on the **employee to prove that there has been a fundamental breach of contract,** and that such breach was not rectified by the employer. It is not for the company to prove that there was a dismissal. The law is clear and well settled as enunciated in the case of *Weltex Knitwear* (cited earlier) and *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298. In the latter case it was held:

> Constructive dismissal it has been said is likened to "a double-edged sword". *The reason for resigning it is said should be such that at it affects the important fundamentals of his terms and conditions of service, or the employer's action was such that no reasonable employee could tolerate such an action. It is important that there is no condonation on the part of the employee. This is because any failure on the part of the employee to ensure these two conditions are fulfilled may result in his resignation not meeting the criteria for constructive dismissal and result in his claim being dismissed by the court.*
>
> Hence for a claim of constructive dismissal to succeed it is crucial that the employee shows that the employer's actions are significant breaches going to the root of the contract of employment … .
>
> (emphasis added)

[41] Further in the case of *Wong Chee Hong (supra)* the learned judge at page 95 stated:

> … 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

A longer to be bound by it. In such situations the employee is entitled to regard the contract as terminated and himself as being dismissed. (see *Bouzourou v. The Ottoman Bank* [3] and *Donovan Invicta Airways Ltd* [4]).

[42] The test for constructive dismissal was laid down in the English Court B of Appeal in the case of *Western Excavating (EEC) v. Sharp* [1978] 1 All ER 713. Dr. Ashgar Ali in his book, *"Dismissal From Employment and The Remedies"*, 2nd edn (2007), examined the development of this doctrine and at p. 121 he listed down the four conditions in the English case above, that must be satisfied by an employee in order to succeed in a claim for C constructive dismissal as follows:

(i) that the employee must show that the employer no longer intends to be bound by one or more of the essential terms of the agreement;

(ii) the employee must leave the employment immediately for reason of the employer's breach and for no other cause; D

(iii) the employer's breach must be a significant one, going to the root of the contract, entitling the employee to terminate it without notice; and

(iv) the employee had not terminated the contract before the employer's breach.

E **[43]** The proper test for such a claim to succeed is the "contract test" and not the "reasonableness test". Without properly evaluating the evidence available, unreasonable behaviour of an employer cannot by itself amount to a fundamental breach of contract. In the case of *Wong Chee Hong* the relevant passage is at p. 303 of the report, where the Supreme Court held as follows: F

> Looking at the award, it is clear to everyone that the Industrial Court in coming to the conclusion that the appellant was dismissed did not misdirect itself in law. The court only spoke of constructive dismissal in the context of the contract test. It never made any reference to the reasonableness test. This is made clear by the G following passage at p. 9 of the award:
>
> 'past cases of constructive dismissals dealt with by this court……are agreed that *whether or not there has been a constructive dismissal is to be determined by the contract test: that is, did the employer's conduct amount to a breach of the contract which entitled the employee to* H *resign? And did the employee make up his mind and act at the appropriate point in time soon after the conduct of which he complained had taken place.'*
>
> We accept this passage to be the correct statement of law. The questions asked by the Industrial Court in fact are similar to that part of the judgement of Lord Denning M.R. in *Western Excavation*'s case where the learned Master of the Rolls set out the I

contract test. Only in those circumstances can an employee be held to be constructively dismissed and that is what constructive dismissal is.

[44] The case of *Suechi Industries Sdn Bhd v. Umah Jeralene Louis Adaikalasami* [2005] 1 ILR 54 (Award No. 1319 of 2004) endorsed this view where it stated that it is well established whether or not there has been constructive dismissal is to be determined by the contract test (the aforesaid conditions) being established by the claimant at the hearing. If the claimant succeeds in satisfying the "contract test" then the burden will shift to the company to prove that the dismissal was with just cause and excuse.

[45] In the case *Bayer (M) Sdn Bhd v. Anwar Abdul Rahim* [1996] 2 CLJ 49 on the contract test application, it was held as follows:

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:

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.

(See *Wong Chee Hong v. Cathay Organisation, supra*)

If the employee leaves in circumstances where the conditions have not been met, he will be held to have resigned and there will be no dismissal within the meaning of the Act.

[46] The summary of all the principles above is that whether the company's conduct amounted to a fundamental breach going to the root of the contract which entitled the employee to resign? Further, did the claimant leave at the appropriate point in time soon after the employer's conduct of which the complained had occurred? If an employee leaves in circumstances where these conditions are not met, there will be no dismissal within the meaning of the Act as he will be held to have resigned. In deciding to leave because of the constructive dismissal, the employee must not delay too long in determining the contract. Otherwise he may be deemed to have "condoned" the employer's conduct or waived the breach and agreed to vary the contract.

A **Was There A Constructive Dismissal Of The Claimant By The Company?**

[47] The grounds for claiming constructive dismissal were set out in 12 paragraphs as per the claimant's letter dated 2 October 2019. It is best to reproduce the said letter for ease of reference as follows:

B To

Healthcare Optimisation Partners Sdn Bhd
Level 11, Menara KEN TTDI,
No. 37, Jalan Burhanuddin Helmi,
Taman Tun Dr Ismail
60000 Kuala Lumpur

C To the Board of Directors and Shareholders,

Dear Sirs,

RE: Constructive Dismissal

D I refer to the above; I hereby wish to inform the company that I consider myself to be constructively dismissed from the company based on the following grounds:

1. I have been subjected to an unfair, unrealistic and biased review of my performance. The performance appraisal was conducted by a total of three (3) persons of which two (2) of the other appraisers are related. They have given me extremely low marks despite all the work I have done for the company while giving themselves high marks and patting themselves on the back. The appraisal also failed to appreciate the scope of work carried out by each employee.

2. I feel that the workload has been increasingly heaped on my shoulders and I have been taking up more and more duties over the course of the past six (6) months specifically since the announcement of OpPlanl9. For the record, I am holding the role of Chief Commercial Officer (CCO) but I was also covering the following duties, which were not included in my Letter of Appointment:

   Job scope under Chief Operations Officer

   a. Internal resource management and ensuring delivery of services to clients

   b. Public / Ministry of Health ("MOH") / clinical working level engagement

   c. Driving clinical procedural and practices by working with medical operators and regulators from public or private sectors

   d. Management of client and operational relationships with service providers.

I The above-mentioned job roles are above and over the duties which were assigned to me in my Letter of Appointment.

3. In contrast, the other employees of this company have not taken any initiatives to claim ownership of any other roles and responsibilities on top of their existing responsibilities. I feel that they have continuously enlarged the scope of my duties without my permission and agreement. For example, referring to the performance matrix that was presented by the other 2 partners, most of their job responsibilities are outsourced.

   As the CEO/CFO, his job roles are narrow due to all accounting and legal matters are outsourced to third party firms. As the key person responsible for securing funding for our company, he only managed to get bridge funding. He did not prepare ahead or push for the much -needed full funding that was required for developing the company further.

   As for the COO, his job roles are limited as we also outsourced the payroll to third party company.

5. Despite my continuous dedication and effort, I was dismayed that the minutes of the company and communication of management to its stakeholders did not reflect the true situation. I have been portrayed as someone who is slacking and falling behind in his duties while the other employees portray themselves as hard workers and dedicated to the company.

6. Despite all the other partners having very limited job roles and stakeholders agreeing that I have been carrying the bulk of the business development since the beginning of this company, I have been singled out to be put under Performance Improvement Program (PIP).

7. I was shocked to recently discover that one of the other employees had been engaged in another business, namely "FD Nano". This is happening despite the clear terms of each of our Letter of Appointment which prohibits employees from being engaged in any other companies or businesses. The matter was brought up during the recent shareholder's meeting without any disciplinary action or consequence or reprimand towards this employee that I know of.

8. After an unfair and biased appraisal of my performance, the management of the company has now dictated that the scope of my duties should now be changed once again. I was informed verbally during meetings with the top management that I would be reassigned to sales, I would be forced to undergo a Performance Improvement Program, and I would be required to transfer my business contacts to a junior executive. I anticipate that there will be a breach of employment contract when the partners are trying to reduce or reassign my responsibilities without my permission and set unreasonable targets without my agreement as demonstrated in OpPlanl9. It also seems to hint at a future reduction in salary.

A

9. I wish to also state that under the proposed OpPlanl9,1 would now be reassigned to report directly to the COO. In contrast with the previous position, as a CCO, I was answerable to the board of directors and CEO only. However, the directive from the management that I would be required to be reassigned and repositioned to report to the COO constitutes a demotion of my position in the company?

B

10. As the CCO, I was also shocked to find out that I was excluded from on-going important business discussions with PMCare and Mitsui that was not informed to me. These are important accounts and the discussions would clearly be within the scope of my position to participate in. This is clearly withholding of information, which is aimed at isolating me and not allowing me to carry out my duties faithfully to the company. I had spoken to the management of the company and I was dismayed to be informed that I had no need to know about such arrangements. I feel that I am being set up to fail because the appraisal of my work would cover such commercial endeavors and I am now being excluded so that I cannot be seen to perform my work satisfactorily.

C

D

11. I would like to highlight that I was not paid my full salary from July - September 2019. Despite my pleas and requests to the management for my salary, I was denied my salary and was paid only RM10,000 as an advance after much delay. The management knew that I have commitments and it is unfair for the management of the company to withhold my salary.

E

12. As per the email dated 30 September 2019, I have been asked by the management of the company to sign a statutory declaration to EPF to forgo entirely the company's monthly contributions to EPF and SOCSO. In addition, the company had failed to pay contributions towards my EPF and SOCSO during the last three months.

F

For all the above-mentioned reasons, I have been unduly victimized and put under duress. I have no choice but to conclude that the management had carried out the various misdeeds as stated above to force me to leave the company out of frustration or to engage in a sham appraisal to try and justify a dismissal on grounds of poor performance. The company has escalated its mistreatment of me in bad faith recently and I am, for those reasons, forced to conclude that I am constructively dismissed.

G

Finally, I demand payment of all unpaid and outstanding salary, EPF and SOCSO contributions to be effected by the company within seven (7) days from the date of this letter. If payment is not made by the expiry of such date, I will take steps to commence legal action against the company.

H

Thank you.

Yours sincerely,

I

...

Kavin Colandairaj
02 OCT 2019

To

Healthcare Optimisation Partners Sdn Bhd
Level 11, Menara KEN TTDI,
No. .37, Jalan Burhanuddin Helmi,
Taman Tun Dr Ismail
60000 Kuala Lumpur

To the Board of Directors and Shareholders,

Dear Sirs,

Re: Letter Of Resignation

As the Board is aware, due to recent events, I had no choice but to tender my letter of constructive dismissal. Considering the circumstances, it would not be proper for me to remain as a director of the company until the matter is resolved

As such I hereby tender my, resignation as a director of the company with immediate effect.

Thank you.

Yours sincerely

...

Kevin Colandairaj

[48] The salient facts surrounding the events leading to the constructive dismissal had been highlighted earlier in the Award. To sum up, around 7 August 2019, the company carried out the MPR for the financial year ending 2019. The claimant questioned the need to conduct the MPR as the company was not a big entity and alleged that it was done only on him, but the other co-founders disputed it because they too participated in the exercise and it was done fairly based on the assigned duties and responsibilities. It was also material to conduct the MPR because the whole company was underperforming after the end of the financial year 2019 including on its commercial aspects to be self-sustaining and to remain financially viable. It was also necessary to ensure that the company could achieve the targets set for the OpPlan19. Further, the company contended that the MPR was conducted on all three of them and included Peer Review by the others as a method of ensuring fairness in the assessment.

[49] The claimant did not agree with the company's findings regarding purported "shortcomings" in his performance. The claimant alleged that the other co-founders "ganged-up" against him and clearly he was outnumbered 2-1. They allegedly gave good reviews about each other but gave bad reviews about the claimant's performance as they were the majorities. He claimed that some aspects of his works were overlooked and others were overstated. He also claimed that he was unfairly blamed for the company's

underperformance as the company had been a year in business and management set unreal milestones and achievements when they only had three patients at the material time. He also stated that he was never warned about his performance or any disciplinary action taken against him for the shortcomings prior to the MPR being done. In his answer to Question 33, the claimant said the MPR and Peer Review was an exercise in disguise as the reality on the ground at that time was that the company was suffering from cashflows, and accordingly, they wanted to place him under the PIP to frustrate him out of his employment. Meanwhile, the company claimed that the claimant's allegations that the MPR was unfair was an afterthought to hide his slacking job performance.

[50] On 18 September 2019, during the shareholders meeting, the claimant was informed verbally that his scope of duties would be readjusted again and he was reassigned to sales. The claimant alleged that he would also be put under a PIP without an indicative period for the PIP. He was asked to transfer his business contacts to a junior executive which the company was planning to hire at that time. Therefore, he claimed that the PIP was effectively to drive him out of his employment. With the reassignment of duties, the claimant was to report to the COO, contrary to the terms of his appointment whereby he reported to the CEO and Board of Directors. The claimant claimed that the reassignment of his duties constituted a breach of the terms and conditions of his employment and/or demotion of his position in the company. The claimant exhibited his payslips, the MPR documents, summary of his comments on the MPR, minutes of shareholders meetings, the e-mail from COW2 to the claimant dated 30 September 2019 pressuring him to make a decision on his alignment to the company, and the Constructive Dismissal Letter and Resignation Letter as Director of the company.

[51] The claimant in his answer to Question 26 of CLWS1 replied that he considered the **reasons for considering himself constructively dismissed** on 2 October 2019 were as follows:

(a) the company's decision to vary and/or add his duties and obligations purportedly under the guise of OpPlan19 including the proposed reassignment of his duties and responsibilities and/or PIP;

(b) the company's decision to reassign and reposition his reporting line from the CEO to COO of the company contrary to the terms of the claimant's Employment Contract;

(c) the company's failure to pay his salaries for the period between July and September 2019, combined with the failure of the company's obligation to pay the relevant statutory authorities.

[52] In support of its case, the company adduced the same documents and more e-mail trails, the company's bank account statements to show the state of its financial affairs (which could also be seen in the SSM search (pp. 1-5 of COB1)), and WhatsApp conversation trails as evidence to prove the claimant was the one who evinced the intention to no longer be bound by the contract of employment. In this case, the employee must show that the employer no longer intends to be bound by one or more of the essential terms of the agreement (contract).

[53] To rebut the claimant's allegations, COW1 in his witness statement stated that the MPR was based on two things. Firstly, on the Financial and Operational/Commercial KPI for the period ending June 2019 and a 360 degree Peer Review. The latter was to enable each individual team member to appraise himself and the other members in a face-to-face discussion, scoring each other on the achievements of their own job scope. It could be seen that at pp. 13-14 of CLB1, the claimant did not complete the part for the employee's comments. According to COW1, the claimant also did not complete the Peer Review process with both him and COW2. They set appointments for multiple sessions from 7 August 2019 onwards to complete the task but the claimant failed to be present to discuss. The claimant did not deny this fact because he did not agree with the comments made against him alleging that he fell short on his performance as CCO. COW1 stated that there was no disagreement among all involved that the company's KPIs were not met and the whole team had been put on notice for underperformance. He added that a diagnosis of what went wrong must be conducted and areas of accountability must be established. The two clear areas of focus were the delays in the software platform development, as well as the ineffectual commercial rollout which lacked a proper strategy even coming into 2019. Both these areas were under the claimant's responsibility, according to COW1. He stated further:

> In particular as Chief Commercial Officer, the parlous state of the company finances did not and could not have come without warning since this was a key factor in OpPlan19 deliberations since late 2018, and the lack of a cohesive strategy and *de minimis* revenue/business generation of the company in 2019 points to a singular failure in the Commercial department.

[54] The company only had three referrals which was way below the target set and blamed the claimant for this shortcoming due to the lack of cohesive strategy and income generation by the claimant's department, *ie,* Commercial. COW2 also denied the claimant's allegation that there was a breach of the terms and conditions of the employment contract because the company had acted *bona fide* in the interest of the company. He stated in answer to Question 15 of his witness statement:

A No truth whatsoever. Pursuant to the Shareholders Meeting on 18 September 2019, the shareholders had directed the Board of Directors to mandate changes in the operation of the company which only involves realignment of the founders of the company to ensure survivability of the company. The decision was taken during the Shareholders Meeting and in which the claimant was also called and he had expressly stated he had lost trust in the other founders to continue with the company. Hence, a deadline was fixed for the claimant himself to inform whether he wished to remain with the company in any position. Further, it was never the Board of Directors that initiated the deadline at all material times. Rather, it was initiated by the investor shareholder of the company and the claimant. (Refer to pp. 40 to 43 of COB1).

[55] Now, pp. 40 to 43 of COB1 consisted of e-mail communications between the three of them and copied to the investor shareholders. The claimant in his answer to Question 35 of CLWS1 denied the allegation that he had set the deadline 23 September 2019 to revert to the company on his next course of action in respect of its request to him to realign with the other co-founders. He stated that the deadline was fixed by the company during the shareholders meeting through an advisor and/or shareholder and/or investor with the agreement of the CEO and COO. Further, he stressed that he did not fix and neither did he agree to the deadline proposed by the company.

[56] In regard to the claimant's allegation, it is important to look at the Minutes of the Meeting on 18 September 2019 reproduced below for ease of reference:

Minutes of Meeting

Shareholders meeting: All-hands discussion: company alignment

Time: 1000 hrs

Date: 18 September 2019

Venue: HOP Office, CG TTDI, Menara Ken TTDI, Kuala Lumpur.

Present:

Ahmad Shahizam Mohd Shariff (AS)	Advisor/Shareholder (Chairperson)
Mohd Iqbal Shamsul (IS)	CEO
Kevin Colandairaj (KC)	CCO
Dr Armijn Fansuri Mustapa (DRA)	COO
Ivy Ho (IH)	Shareholder

AGENDA

1. Appointment of chairperson

2. Company alignment issues

No.	Matters discussed	Action
1	Appointment of chairperson IS proposed that AS is today's Chairperson. All members agreed. Opening by Chairperson • AS is truly concerned with what he is seeing and where things are going with the team and the company • He is not concerned about the direction of the company as expressed in the recent in-depth analysis of the current status of the company • HopQ is a validated business case, very doable and there is a market for it • Everyone has to carry their role and execute the plan • A real concern now is, in executing tactical shifts, not every founder is functioning as needed - not all cylinders of the company is firing, we are not pulling towards the same direction • Has not been informed that the team has not agreed on any of the company's direction, strategy or plans • It is apparent is that marketing tactics were not clearly defined • Following the recent meetings, the team needs to address commercial issues • AS and IG have invested on the founders, and if the founders are not working in sync then it needs to be resolved immediately • Frustrated the company's forward movement at it's most crucial stage is lost due to the team not working in harmony • Even though we are a small company, governance and processes of the highest standards must be adopted as if we are a much bigger company e.g. performance review	

	IH: • Agrees with AS on all counts • Crucial that founders and investors have the same direction and objectives • The company is ready to generate income - system, provider, doctors are all ready. • Reminds that there are always challenges in a startup company • Has given full confidence to founders to make decisions and execute the plan • Any falling out between the founders need to be resolved to move the company forward • Performance review is needed - this is the first performance review since the company started thus IH is very keen to know how individuals have performed	
2	Company alignment issues AS - are the founders still aligned? IS • Not much has changed in terms of direction • Business case has been validated - we have proof even though we have low volume • We've had to pivot a few times e.g. our approach with providers, MOH/MCO issues etc. KC • On the ground, there is a need from doctors and patients at KKM Hospital • We have a viable business DRA • Direction and core strategy remains the same • Tactical pivots were necessary as we went along	

	AS • Since the founders are saying the positive points above, then the question remains whether we are all still working towards the common goal? • The recent review of the company activities, progress, landmarks, achievements and the performance review was a necessary exercise and must not be misunderstood as a method to raise blame • Asks KC to explain why is he protesting to the performance review KC • Claims that performance review process was done totally wrong • It was waste of time that could have been used to move the company forward • An elaborate process was not needed - a quick discussion was more appropriate • Referring to the "matrix" that was used in the discussion prior to the performance review process, KC felt insulted as it insinuated that he has not delivered when compared to the other founders while claiming that he was the one responsible for the bulk of the workload AS • The review of company's current status during the meeting on the 14 August 2019 was the forum during which AS expected to have been informed of KC's concerns and grievances • Expressed disappointment that KC was absent during that meeting • If it was the case that KC has carried the majority burden of the workload, then we should have addressed the imbalance of responsibilities as one team member should not have been spread so thinly. • Also that if the majority of the workload was done by KC, then the accountability of the said work also applies.	

	KC • Agrees with accountability on the scope of work claimed as imbalanced workload • Clarified that the reason he did not attend that meeting was he was "disgusted" from the performance review process that was initiated the week before • Unhappy with matrix and claims it was biased against him • Time wasted doing the performance review while still doing daily functions even though we have not paid salaries for close to three months • Based on each founders job descriptions, KC's has the most important functions • The other founders have given misleading information about him to the shareholders • Have not agreed to the proposed new structure detailed in OpPlan19 • Have lost all respect and trust in his founding partners AS • Performance review needs to be completed • It is the platform to raise KC's concerns • It is important that these grievances are documented in the appraisal form so that issues can be addressed formally • Surprised to hear the said skewed workload and roles as he has not seen where the claimed unbalanced roles are • If everyone can realign, founders need to agree on a defined allocation and division of roles and responsibilities to avoid recurrence DRA • What are exactly the extra workload taken up and delivered by KC?	

	IH • Too much on shoulder therefore unable to deliver the desirable outcome • Recognises passion but an individual is unable to carry the burden of other team members • It true, then it is not appropriate that KC continues to carry the major workload and naturally should be shared • If one insists to take on more that supposed to, one must also ensure desirable performance/outcome KC • Thanks IH for support • KC disagrees with appraisal method and as we need to push forward, why is the appraisals done at this juncture • Also claims that he is "holding the helm in doing most of the company's important parts AS • We have not achieved visibility of hopQ as quickly as we could have • Wanted to discuss with KC as the outcomes were not apparent • Even in recent discussion when asked what are the doctor recruitment targets/ what were the numerical commercial targets, the response were unclear • AS felt concerned if KC was still aligned with the team • The past few months is when the CCO has been expected to step up but AS has not seen this taking place. The same sentiment has been expressed by the other founders. • While KC has claimed that he has done the most for the company, form his own observation, AS is unable to find enough evidence to agree to that claim.	

	• If the claim that the company going the wrong direction is due to misallocation of responsibilities, then it has to be resolved by having explicitly defined roles, responsibilities, accountabilities and deliverables • Also noted that KC has lost the respect and trust of the other founders, of which AS says is the worst thing an investor would want to hear. It clearly show that there is disharmony and the team working together with unified objectives IH • KC should have reached out to the investors if the lopsided responsibilities were an issue. IH and AS is open to listen and step-in when required. • Has not had feedback from KC for some time • Referring to "the company needs more time", the investors want to see outcome and the company does not have the luxury of the given examples of other startups which took 4 years to bear substantial return on investment. • We need to act fast if not competitor will start to take advantage. • Suggests KC to take in ideas from fellow founders or change the way he works • Completion of performance review is a must notwithstanding the size of the company. The performance review is to ensure each team member is aligned to the companies objectives and KPIs • Suggesting that the performance review may have been done too late as there are significant targets that were not achieved • It is timely to get the company back on track	

	AS • Can the founders still work together? • Does KC still want to push the company forward with the other founders? KC • "What are my options?" AS • KC has to decide for himself. The company is clear on the next steps and has to move forward. KC • As an employee, the current situation is working out. "I do not trust my CEO". • Highlights the issue of CEO's priorities are not with the company due to holding posts at other companies conflicting with appointment letter. Speculates that CEO not focusing on HOP's funding due to focus on the other companies. AS • The issue of CEO holding posts in other companies will be discussed in another session privately with KC • Both AS and IH has agreed that any new funding found will not happen with the current operational and commercial state of the company. The value of the company will be lower as a result of the lack of traction, which is not what any of the current shareholders would like to proceed to IS • Founders had the same discussion re: funding - need to show traction before any new funding round AS • Ultimately founders need to be aligned. If alignment is not possible, then decision have to be made in the best interest of the company	

	• As a shareholder and director, KC can propose a change in management, of which the other directors may not agree DRA • Bearing the CCO title, KC has to have full ownership of commercial. Highlights that the company is yet to even have detailed commercial strategy document. KC • Claims that there is a commercial strategy document. AS • Requests to review the commercial strategy document. IS • The company has a clear direction on the next steps as agreed in the shareholders meeting on 29 August 2019. Also agreed was KC delivering a social media strategy and work plan as part of our campaign to raise public awareness. DRA • The agreed deadline for the social media strategy and work plan was 8 September 2019 and as yet, KC has yet to submit. KC • Clarified that he has held back the social media strategy and work plan due to being shocked at the effects of the performance review process. AS • Advises KC that he needs to change his attitude, as KC has just acknowledge that he has not performed his required duties, KC's action by not delivering the social media strategy and workplan, he is acting against his own best interest as an employee. An employee does not have the right to not do his job just because he/she	

	is unhappy with work environment. An employee has the option to stay and voice concerns through appropriate channels. If concerns are not resolved, the employee can resign, or if continues to underperform, the company can move to terminate employment. • KC has to decide on his own next steps. • Reiterated that if KC chooses to realigning himself to the other founders, he must comply with the agreed defined roles, responsibilities, accountables and deliverables. • In view of the time-sensitive nature of the company's situation, KC is given until 23 September 2019 to inform the shareholders of his decisions.	
3	Meeting adjourned at 1215 hrs.	

Prepared by,

DRA

[57] The court noted also COW2's evidence in respect of the company's response to the claimant's constructive dismissal letter which he summarized in his answer to Question 16 of his witness statement as follows:

> In short, No. the claimant's whole claim for constructive dismissal is no more than afterthought disguised to hide his inability to meet performance targets and expectations set by the company and the failure to secure the position of the Chief Executive Officer during the shareholders meeting on 18 September 2019. In any event, the company had by a letter dated 24 October 2019 replied to the claimant's claim of Constructive Dismissal which addressed all the issues raised in his letter. In the said letter, the Company had stated, amongst others, as follows:
>
> (a) That the performance review phase was conducted at the request of the company's investors to examine the root causes of the current company situation, given that it is already in commercialisation phase since the beginning of 2019;
>
> (b) That each founder is to take on multiple simultaneous roles in support of company success and this has been discussed extensively from the beginning;

(c) That the company is focused on creating efficiency in the healthcare system and therefore every employee has to focus on efficiency and return on investments;

(d) That the company waits for the claimant's admission in being personally accountable for overall lacklustre commercial outcomes;

(e) That the minutes and communications to stakeholders reflect the best understanding of the relevant situation at any given time;

(f) That it is the view among the supermajority of shareholders that despite the various issues and hurdles encountered in the past 18 months, the major company milestones were met *albeit* with delays;

(g) That the claim that one of the other employees having been engaged in another business, namely "FD Nano" or any other, is irrelevant to the claimant's claim that he has been constructively dismissed. Furthermore, the company management and Board of Directors have been fully aware of the CEO's shareholding in that company, which had remained dominant throughout the material period;

(h) That the company's founders are expected to be agile, dynamic, and responding to changing requirements as the company evolves;

(i) That it has been explained that the discussion with PMCare is a co-marketing/referral arrangement; and

(j) That the company has not received any request, formal or otherwise, claiming unpaid salaries and statutory payments for July to September 2019.

(Refer to pp. 48 to 52 of COB1).

[58] COW2 stated also that on the one hand the claimant claimed he was constructively dismissed on 2 October 2019 but on the other hand, the claimant had also resigned from his position as a company Director on the same day. This shows that the claimant had voluntarily resigned and this present claim for constructive dismissal is no more than an afterthought. Further, the claimant had clearly abandoned his employment on 2 October 2019 as he had clearly indicated his own unwillingness to continue with the company.

[59] Dealing with the issue of non-payment of salaries first, the court refers to the case decided by this court earlier in *Fong Choon Hing v. Flyglobal Charter Sdn Bhd* [2020] 2 LNS 1300 (Award No. 1300 of 2020). The facts of that case were that from January 2019 until June 2019, the company failed to pay and/or delayed paying his salary and allowances and that it further failed to make statutory payments for KWSP and PCB deductions since October 2018 even though the said deductions were deducted from the claimant's salary and allowances. The claimant claimed that after numerous

reminders *via* emails were sent to the company and verbal queries made for the non-payment of salaries, allowances and statutory payments to the company's Human Resources, Admin. and Legal Department as well as the Operations Department, and the Director of Flight Operations. The company only made payment for salaries for the month of January 2019 sometime in March 2019 and for April 2019 sometime in June 2019 leaving the outstanding salaries for the month of February 2019, March 2019, May 2019 and June 2019 and statutory payments unpaid since October 2018. The claimant claimed that there were further outstanding allowances, namely, "productive allowances" for the months of January 2019, February 2019, March 2019, April 2019, May 2019 and June 2019 which were still unpaid by the company. The relevant paragraphs are reproduced below for ease of reference:

> *[13] The claimant in his letter dated 19 July 2019, gave notice of constructive dismissal as he could no longer condone the serious breach by the non-payment of his salaries, allowances and statutory payments. The claimant thereafter gave the company three days to rectify its breach for non-payment of his salaries, allowances and statutory payments. However, the company did not adhere to his request. Therefore, the claimant by way of letter dated 24 July 2019 duly considered himself as being constructively dismissed from the company with immediate effect.* The claimant alleged that the company did not protest his constructive dismissal letter and proceeded to issue a Staff Exit Clearance Form dated 24 July 2019 and a Letter of Confirmation of Employment dated 26 July 2019. He said the company owed him a total sum of RM195,230.77 for his salaries, allowances and statutory payments. He wished to be reinstated to his former position as Pilot with the company.
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> …
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> [17] Despite the claimant's evidence aforesaid, the court does not have any evidence from the company in regard to its financial situation apart from the SSM search in CLB1 which reported its revenue to SSM as RM155,434,044. But there was also that e-mail from the CEO dated 4 January 2019 in CLB2 stating that "Today we are not short of business at all. We have just concluded a four-year ACMI deal with flyNAS of Saudi Arabia and shortly, most of you will be deployed to Jeddah. We completed one of the most challenging ACMI contracts, with Biman, successfully."
>
> [18] Now, the failure of the company to attend court showed that it was not interested in defending itself against the claimant's claim. However, under the law, the court is bound to apply the principles of equity, good conscience and substantial merits of the case when it is making the Award as provided for under sub-s. 30(5) of the 1967 Act.
>
> (emphasis added)

[60] In the above case, this court accepted the claimant's explanation for the delay in walking out from the employment after the first and second breaches by the employer because it was not unreasonable for the claimant to continue working after getting assurances that his outstanding salaries, allowances and statutory payments would be paid. There were no witnesses called by the company to rebut such evidence as the hearing was conducted on an *ex-parte* basis and that company did not file any documents for the court's consideration. Meanwhile, the claimant had produced plenty of documentary evidence to back up his claim. Although the claimant in that case had stayed on after the first breach was committed and he was given assurances by the company that his salary would be paid, he walked out of the employment after the third breach when the company did not honour its obligations by not paying his salaries for the stipulated months. He did not condone the company's actions.

[61] The material difference with the present case was that three employees, including the claimant, were aware of the company's dire financial situation at that time. In fact later they received RM10,000 each as part payment for the July 2019 salary and have not been paid to date for the August and September 2019 salaries. The claimant condoned the company's action in the delays/non-payment of their salaries. There was evidence in the form of messages between the three of them (pp. 67-69 of COB1) which showed their discussions on the company's financial situation and the proposal to take an advance of RM30,000 *ie.* about RM10,000 for each of them to cover their expenses as they were not getting their salaries then. The dates of the conversation was from 27 to 28 August 2019. Therefore, the *Fong Choon Hing*'s Case could be distinguished from the facts of the present case. Despite it being a case decided by this court, it does not hold the same view because that case was heard *ex-parte* where the company did not appear to defend itself against the claims of the claimant and two other claimants whose cases were heard together. On this issue of non-payment of salaries, the court finds from the evidence available before it that all of them being directors of the company, were aware of the company's financial situation, all were affected by the predicament and there was no dispute about it. That was why the company wanted to proceed with OpPlan19 in order to turnaround the company and improve its finances.

[62] Although the claimant argued that the non-payment of salaries for the CEO and COO were not relevant to his claim for constructive dismissal, the court finds that it is a relevant fact in regard to this ground which he relied upon. Hence, the court does not find that the non-payment and part payment of salaries for the three months as complained by the claimant was a material breach of the employment contract by the company. The company's actions in delaying their salary payments for the three months were condoned by the claimant because he knew of their situation and had participated in the

discussions pertaining thereto. It cannot be said then that the company had evinced an intention to no longer be bound by the terms and conditions of the employment contract. Therefore, on a balance of probabilities, the court finds that this ground is untenable as one of the basis for the constructive dismissal claim and he has not proved that the company had evinced an intention to no longer be bound by the terms and conditions of the employment contract by the delay and/or non-payment of the salaries for the months of July to September 2019.

[63] Regarding the second ground for the constructive dismissal claim, the claimant denied the company's allegation that he was aware of OpPlan19 and had agreed to the same. The claimant stated in his answer to Question 29 of his witness statement as follows:

> I deny this allegation. In reply, I state that the OpPlan19 was a revision of my duties and obligations under the Employment Contract. Further, the duties and obligations mentioned in the OpPlan19 were not part of the duties and responsibility of mine under the Employment Contract. I wish to emphasise in this context that some of the duties and obligations mentioned in OpPlan19 were duties and obligations of the COO, Dr. Armijn Mahpha Fansuri Bin Mustapa. Importantly, the duties and obligations of the COO and me were separate and distinct in that I was in-charge of the private hospitals, and on the other hand, the COO was in-charge of government hospitals. However, pursuant to OpPlan19, some of the duties and obligations of the COO were assigned to me including, but not limited to focus on recruitment of doctors and referral conversion for the period of six (6) months, contacting and providing training for doctors and medical staff and to follow up with relevant Head of Department from various public and private sector hospitals for the purposes of securing patients for the benefit of the company.

[64] On the third ground for constructive dismissal, the claimant in his answer to Question 17 of CLWS1 stated:

> … In addition to the above, I wish to emphasise in this context that during the proposed reassignment of my duties and responsibilities and/or Performance Improvement Plan, I was asked to report directly to Chief Operation Officer (COO) in contrary to the terms of the Employment Contract where I was required to report to the Chief Executive Officer (CEO) and the Board of Directors of the company. Therefore, I believe that the company's decision to reassign and reposition of my reporting line contrary to the terms of the Employment Contract will constitute a breach of the terms and conditions of the Employment Contract and/or demotion of my position in the company.

[65] The claimant did not elaborate on how the change in reporting structure had been a demotion for him because from the evidence adduced by both parties, it appeared that they were all equals in the company.

[66] The court will deal with these two grounds together as they were purportedly as a result of the company's action in implementing the OpPlan19 which the claimant claimed he did not give his consent prior to its implementation. The claimant claimed that he had no other option but to walk out of his employment due to the pressure placed upon him by the company, particularly COW2, to realign himself with the direction that the company was embarking on pursuant to the implementation of OpPlan19.

[67] Based on all the evidence available before it, the court does not see the company's actions to move forward and requesting the claimant to realign with the company's other founders in order to ensure its survivability was a fundamental breach of the terms and conditions of the employment contract. The decision was made in the shareholders meeting where the claimant, as a shareholder, director and employee was also present. In that meeting the claimant had expressed his unwillingness and refusal to realign with the other co-founders to continue with the company and hence a deadline was fixed for the claimant to inform them of his decision.

[68] It was the company's contention that the discussion during the meeting focused on the claimant's position as a shareholder and founder and it was not directed at his position as an employee; but the claimant expressed his unwillingness to continue with the company when he said openly that he had lost the trust and confidence of the other co-founders. There was evidence in the claimant's written speech for the meeting on 18 September 2019 (at pp. 28 of CLB1), where the claimant stated "If you feel I am incompetent in my role, I am more than willing to switch role with you to be CEO of this company. I am prepared to assume the role to lead the company. The question is, do you have what it takes to take up my role?". He then listed the roles he held in the company. In the court's view, the significance of this statement is not so much about what COW2 claimed *ie*, the claimant wanted the CEO post for himself, but that the claimant did not think much of the other co-founders, because he believed that he was so much better than them.

[69] The company contended that the claimant's claim for constructive dismissal was misconceived and baseless as it originated from a deadline which was issued not by the company but by the shareholders themselves in the meeting on 18 September 2019. The court agrees with the company's contention aforesaid because the evidence in pp. 38-40 of CLB1 as reproduced earlier supported the company's evidence that it was not the co-founders but the investor that had requested for the MPR to be completed in order for the company to move forward in addressing the shortcomings they identified as being the claimant's; and it was the same investor who had

put the deadline of 23 September 2019 for the claimant to give his decision on whether he would realign with the other co-founders. The claimant also did not disprove the statement in p. 37 of CLB1 where Ahmad Shahizam stated "While KC claimed that he has done the most for the company, from his own observation, AS is unable to find enough evidence to agree to that claim." The burden of proof is on the claimant in this case and by not disproving the above statement, it stands in the record. Moreover, it was the claimant who adduced the minutes of the meeting on 18 September as evidence before the court.

[70] Now, remember that the MPR date was 7 August 2019. The undisputed evidence before the court was that the claimant was reluctant to participate in the exercise and questioned the need for it bearing in mind that theirs was not a big company. Later, he criticized the approach taken by COW1 and COW2 in an e-mail dated 12 August 2019 and things went further downhill after that, and the rest is history. The court does not wish to repeat the facts all over again as the facts are clear. The question is, has the claimant proved on a balance of probabilities that the things he complained about were fundamental breaches of the terms and conditions of his employment contract? The cumulative effect of all these evidence, in the court's view, pointed to the only conclusion that this was a partnership that had gone sour where one of the co-founders of the company could not agree with the direction that the company was to take in order to ensure its survivability beyond the fourth quarter of 2019. The claimant simply refused to participate further in the discussions when things did not go his way.

[71] Having perused the said minutes of meeting, the court noted that it was true Ahmad Shahizam as one of the investors had stated (at p. 36 of CLB1) that:

- Performance review needs to be completed
- It is the platform to raise KC's (the Claimant) concerns
- It is important that these grievances are documented in the appraisal form so that issues can be addressed formally
- Surprised to hear the said skewed workload and roles as he has not seen where the claimed unbalanced roles are
- If everyone can realign, founders need to agree on a defined allocation and division of roles and responsibilities to avoid recurrence

[72] Further down the minutes at page 38, it was noted:

KC

- "What are my options?"

AS

- KC has to decide for himself. The company is clear on the next steps and has to move forward.

KC

- As an employee, the current situation is working out. "I do not trust my CEO".
- Highlights the issue of CEO's priorities are not with the company due to holding posts at other companies conflicting with appointment letter. Speculates that CEO not focusing on HOP's funding due to focus on other companies.

AS

- The issue of CEO holding posts in other companies will be discussed in another session privately with KC.

[73] And he continued at p. 40:

AS

- Advises that he needs to change his attitude, as KC has just acknowledged that he has not performed his required duties … If concerns are not resolved, the employee can resign, or if continue to underperform, the company can move to terminate the employment.
- KC has to decide on his own next steps
- Reiterated that if KC chooses to realigning himself with the other founders, he must comply with the agreed defined roles, responsibilities, accountables and deliverables
- In view of the time-sensitive nature of the company's situation, KC is given until 23 September 2019 to inform the shareholders of his decision.

[74] The Minutes of Meeting on 18 September 2019 adduced by the claimant was a contemporaneous document, and it reflected what was going in the mind of the claimant as well as the other attendees. Clearly it showed that a discussion was going on and at some point, the claimant felt that he could not persuade the shareholders and investors to agree with him. He then asked what were his options. COW2 in his cross-examination explained that the claimant could have taken some time off to consider whether he wanted to remain in the company and in what capacity. There was nothing in this statement to suggest that the company forced him to resign or wanted to dismiss him. COW1 and COW2 also explained the company's position and was trying to best manage the situation given the financial difficulties and constraints (demand for the service) it was facing at that time. Based on the

content of the document, the court is satisfied on a balance of probabilities that the claimant being one of the three directors and employees of the company frustrated the company's efforts to move forward *via* the implementation of OpPlan19 by refusing to participate in the same. Despite the claimant's claim that the company victimized him, the court is not satisfied that the company had any *mala fide* intention by implementing OpPlan19. The claimant's employment contract provided in cl. 5 provided "Further roles and responsibilities as required by the management of the company, to be informed from time to time". He had signed and agreed to this term in December 2017.

[75] Where the employee alleged victimization, again the burden is on him to prove the said victimisation. With Ahmad Shahizam's observation on what was happening at them material time, as an investor of the company (he was not involved in the day-to-day operations), the court could not simply disregard this piece of evidence which remained unchallenged by the claimant. He could have called one or both investors to testify on his behalf but he chose not to. The company need not call them to prove its case because the company disputed that a dismissal had taken place. Therefore, the claimant bears the risks for not calling them as witnesses in court. After considering the cross-examination of both the company's witnesses, the court finds that their credibility were intact and their evidence stand in the records. With due respect of the claimant, the court views that his answers during the cross-examination by the company's counsel were evasive at times. He alleged that the company set the deadline of 23 September 2019. But it was shown from the minutes that it was Ahmad Shahizam, the investor who set the deadline for the claimant to revert with his decision. More often than not, when compared to the company's version of events, as supported by the documents tendered by both parties, the court views that the company's version was more probable than the claimant's version.

[76] Going back to the principles in the *Western Excavating* Case and *Wong Chee Hong*'s Case, the law test requires an employee (in order to succeed in a claim for constructive dismissal), to satisfy the contract test. The first limb of the contract test is that the employer no longer intends to be bound by one or more of the essential terms of the agreement. The reason for the employee resigning must be such that at it affected the important fundamentals terms and conditions of service; in this case, the complaints were the implementation of the OpPlan19, his reporting line was changed to the COO and the delay in the salary payment.

[77] It must be borne in mind that the position of the law is the (breach of) contract test and not whether the employer had acted unreasonably. It is also important that there is no condonation on the part of the employee. The employee must also leave the employment immediately for reason of the

employer's breach and for no other cause. In the claimant's submissions to the court, he portrayed that he was victimised and pressured into leaving the company due to the breaches of the terms and conditions of his employment contract. However, the court is not convinced on the claimant's evidence that a constructive dismissal had taken place on 2 October 2019. The court finds that the claimant in fact had resigned on his own accord when he tendered the Letter of Constructive Dismissal together with the notice of resignation from the Director's post. It is the courts' finding that the claimant had abandoned his employment on 2 October 2019 because he could not agree with the direction that the company was moving towards and he was asked to realign himself with the other co-founders.

[78] In order to prove a dismissal in a constructive dismissal case, the claimant must satisfy the four conditions of the contract test first. Therefore, as the first question in the *Bayer* Case (which applied *Wong Chee Hong*) is answered in the negative and the condition is not fulfilled, it is not necessary to answer the second, third and fourth questions. Be that as it may, from the facts, the court finds that the claimant had not delayed leaving the company but the second question in the contract test has not been answered by the claimant in the affirmative. I am also doubtful that the claimant left in response to the breach and not for any other unconnected reasons such as being a major shareholder in the company with 30% shareholding, the claimant was unable to persuade the other shareholders to agree with him on the direction of the company when they decided to proceed further on the implementation of OpPlan19. I have considered both parties submissions and I do not wish to repeat them all here, save to state that I am not persuaded by the claimant's submissions that there were fundamental breaches of the terms and conditions of the employment contract by the company.

[79] The law requires the company to have committed a fundamental breach of the contract of employment, that is, a breach that goes to the very root of the contract and which warrants a repudiation of the contract by the claimant. In the present case, the acts of the company between 7 August until 2 October 2019 that were considered by the claimant as breaches of the contract were sufficiently explained by COW1 and COW2. As stated above, the court has found that the evidence which the claimant himself adduced into court did not support his contention that there were fundamental breaches of the terms and conditions of the employment contract, particularly the Minutes of Meeting on 18 September 2019 showed the claimant's state of mind. He was asked to make a decision on his stand regarding the request to realign with the co-founders and a deadline given of about five days. This was not unreasonable in the court's view. Seeing that

it was already going into the fourth quarter of 2019, the company was justified in asking the claimant to make known his stand in order for it to move forward with OpPlan19. It was the claimant who delayed to give them his decision and this was undisputed. It is clear from these facts that the claimant has not discharged the burden of proof as required by law.

Conclusions

[80] It is said that there is a two-stage inquiry into a claim for constructive dismissal that the Court must observe. The court must first decide whether there has been a dismissal which requires the employee to prove that the employer's conduct led him to terminate the employment relationship. Only if the employee discharges this burden of proof, then the employer is required to call the relevant evidence to rebut that the dismissal was for just cause or excuse. In this case, it is a finding of fact by the court on the facts and evidence made available before it that the claimant's actions, at that point in time on 2 October 2019, showed an intention that he no longer wanted to be bound by the employment contract and had resigned on his own accord.

[81] In conclusion, the court finds, having considered all evidence available before it and bearing in mind sub-s. 30(5) of the 1967 Act to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form, the claimant has been unable to prove on a balance of probabilities that he has been constructively dismissed. Accordingly, the claimant's case is hereby dismissed.