

Labour Issues on Constructive Dismissal

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ABSTRACT

Constructive dismissal is unlike any other form of termination in that the employer takes the initiative by leaving his employment and yet, a dismissal is considered to have taken place. How is this possible? The industrial law recognizes the right of an employee to walk off the job when the actions and behaviours of the employer are so unacceptable and unreasonable that they amount to a breach of contract. This paper will discuss labour issues on constructive dismissal especially on the differences between constructive dismissal and unfair dismissal; circumstances that may give rise to a claim for constructive dismissal; and procedures on how to deal with the constructive dismissal issues.

Keywords: *Constructive dismissal, unfair dismissal, labour issues.*

Introduction

What is constructive dismissal?

According to the Dictionary of Law by Curzon (1993), constructive dismissal is 'an indirect dismissal where, the employer unilaterally changes the terms of the relationship so that an employee has no choice but to resign'.

Oxford Dictionary of Law 1997 defined constructive dismissal as 'the termination of an employment contract by an employee because his employer has shown that he does not intend to be bound by some essential term of the contract'. Although the employee has resigned, he has the same right to apply to an industrial tribunal as one who has been unfairly dismissed by his employer.

Constructive dismissal is a 'deemed dismissal' where the employee terminates the contract, with or without notice, in circumstances that he

is entitled to terminate it without notice by reasons of the employer's conduct. Constructive dismissal occurs where, although it is the employee who appears to terminate the employment by walking out, it is the employer's conduct, which constitutes a breach of the contract, and the employee accepts the breach by resigning.

The key element of the definition is that the employee must have been entitled to leave without notice because of the employer's conduct. The word "entitled" means that the employee could leave when the employer's behaviour towards him was so unreasonable that he could not be expected to stay.

The law on constructive dismissal has been fully expounded in the landmark case of *Western Excavating (ECC) Ltd v. Sharp* (1978) IQB 761 2 WLR 344, where Lord Denning (MR) explained the concept of constructive dismissal as follows:

"If the employer is guilty of conduct which is a significant breach going to the root of the employment contract, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled to those circumstances to leave at that instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must be in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

The doctrine of constructive dismissal in Malaysia has been expounded in the case of *Wong Chee Hong v. Cathay Organisation* (1988) 1 CLJ 45; (1988) 1 MLJ 92, where Salleh Abbas LP states:

"The common law has always recognized the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such a breach as affects the foundation of the contract or if the employer has evinced or shown an intention

not to be bound by it any longer. It was an attempt to enlarge the right of the employee to unilateral termination of his contract beyond the perimeter of the common law due to unreasonable conduct of his employer, that the expression 'constructive dismissal' was used'.

In this case, the claimant, Mr. Wong worked with the respondent company as a Personnel and Industrial Relation Manager and had in that capacity successfully negotiated a new collective agreement with the trade union. The trouble started after he had taken steps to implement the award confirming the collective agreement. In June 1985, he was told that he would be transferred to manage a cinema theatre belonging to the respondent. Mr. Wong did not accept the transfer order as he regarded it as a breach of contract entitling him to hold the respondent company liable for dismissing him without just cause or excuse. The Industrial Court held that Mr. Wong's dismissal was unjustified and without excuse and allowed an appeal. It upheld an Industrial Court award of RM70,633 in compensation to Mr. Wong as he had been "constructively dismissed".

Differences Between Constructive Dismissal and Unfair Dismissal

Dismissal is the terminating of an employee's contract with or without notice by an employer, for reasons of employee committing misconduct, or his unsatisfactory performance. A dismissal is a particular kind of termination and the term "dismissal" is often used to refer to a termination, which involves misconduct. The effect of a dismissal is the same as for a termination, that is, the employee is no longer to be engaged in employment due to the termination of contract of service (Hew Soon Kiong 2002).

The Employment Act (EA) 1955 protects employees from unfair and unreasonable dismissal by their employers. Section 14 (1) of EA 1955 states that "An employer, on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service, after due inquiry:

- i. dismiss without notice the employee
- ii. downgrade the employee; or
- iii. impose any other lesser punishment as he deems just and fit."

An employee who fails to carry out these job duties in a satisfactory manner should be dismissed. However, dismissal can and should only take place if the employee:

- i. has been warned of his unsatisfactory performance
- ii. has been accorded sufficient opportunity to improve
- iii. has failed to improve

(Industrial Court award 248 of 1991;
Sime Darby vs. Mathi Arasu a/l Kalimuthu)

Unfair dismissal is the terminating of an employee's contract by an employer without proper cause or excuse. Where the Industrial Court finds that an employee has been dismissed by his employer without proper cause or excuse, the court declares such dismissal as "Dismissal Unjustified" and may order reinstatement or compensation in lieu of reinstatement.

Constructive dismissal differs from unfair dismissal in that it is the employee who terminates the employment contract by walking out of his job, but the real reason for the termination is in some way the prior conduct of the employer. In order to claim constructive dismissal, the employee should be absolutely certain that the employer's actions are significant breaches of the employment contract and it is impossible for him to continue his employment with the said employer.

Claims of constructive dismissal are dealt with like all other claims of unfair dismissal. An employee who has been dismissed can place a complaint of unfair dismissal and a request for reinstatement with the Director General of Industrial Relations within 60 days of his dismissal. This machinery is established under Section 20 (1) of the Industrial Relations Act 1967. Where the employee does not want to seek reinstatement, he may file an appeal, within 60 days with the Labor office nearest to his place of employment under Section 69 of the Employment Act 1955. He can claim indemnity in lieu of notice, termination benefits and leave pay if any, but he cannot claim reinstatement or compensation in lieu of reinstatement (Maimunah 2003).

What Are the Circumstances in Which An Employee Can Resign and Yet Claim Constructive Dismissal

D'Cruz (2003) in his book entitled "A Handbook of Malaysian Labour Laws" lists some of the circumstances that may give rise to a claim for constructive dismissal:

- i. Arbitrary reduction in wages, commission, allowance etc.
- ii. Withdrawal of contractual benefits eg: car, housing, entertainment, free meals, free laundry services, etc, provided they are stipulated in the contract of service.
- iii. Altering or taking away facilities reflective of the position e.g.: company direct telephone line, room, and personal secretary.
- iv. Demotion to a lower post, with or without reduction in salary, fringe benefits, etc.
- v. Transfer to a different location if such transferability is not clearly stated in the Letter of Appointment.
- vi. Substantial changes in the job function, especially if the employee is incapable of performing those functions.
- vii. Behaviour of the employer, intended to humiliate the employee.
- viii. Acts of victimization e.g.: setting unattainable deadlines, constant faultfinding and harassment.
- ix. Threatening with dismissal if the employee does not resign from the job.

Procedures on Dealing with Constructive Dismissal Issues

Claim of constructive dismissal is dealt with like all other claims of unfair dismissal under Section 20 (1) of the Industrial Relations Act 1967, "Where a workman, irrespective of whether he is a member of a trade union or workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make a representation in writing to the Director General to be reinstated in his former employment, the representation may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed" (Maimunah 2003).

In deciding either reinstatement or compensation in lieu of reinstatement, the court should also give due consideration for the pain, suffering, embarrassment, humiliation and financial difficulties the unfairly dismissed employee has undergone from the day of his dismissal to the day of the Court's Award. Even if he succeeds in getting another employment, he may lose in terms of wages and seniority in his new employment.

For the employee to prove constructive dismissal has taken place, he must be able to show that:

- i. the employer has breached a fundamental term of his employment contract or the employer's action was such that no reasonable employee could tolerate such an action;
- ii. the employee has terminated the employment contract by reason of the employer's conduct and the conduct is sufficiently serious to entitle the employee to leave at once; and
- iii. the employee left in a timely manner, otherwise he may be deemed to have waived the breach and agreed to vary the contract.

When an employee believes that his employer has breached the employment contract, he should, in most situations:

- i. make a formal complaint to the employer requesting that the problem be rectified.
- ii. if no satisfactory rectification is made, the employee can walk off the job.

He must not delay in terminating the contract in response to the employer's breach. If he does, the Industrial Court may decide that by waiting he has accepted the change in the contract and his claim for constructive dismissal will fail.

For an employee to claim constructive dismissal, the burden of proof is on him and not on the employer, to prove that the employer has committed a breach of contract thereby entitling him to plead constructive dismissal. In *Lewis v. Motor World Garages Ltd.* (CA) (1986) IRLR, Glide Well LJ stated the principle as follows:

"In order to prove he has suffered constructive dismissal, an employee who leaves his employment must prove that he did so as a result of a breach of contract by his employer, which shows that the employer no longer intends to be bound by the essential terms of the contract".

Western Excavating held that constructive dismissal was to be determined by the 'contract test', i.e. did the employer's conduct amount to a breach of contract which entitled the employee to resign? The 'contract test' was also adopted in *Wong Chee Hong*, which also rejected the 'reasonableness test'. It follows, therefore, that only those cases where employer's conduct amounted to a breach of contract can be regarded as authoritative. Thus, if the employer tries to impose a unilateral change in employment terms, such as a change in the job, a lowering in earnings, a significant change in the location of employment, then provided there is no contractual right to do so, such conduct will entitle the employee to resign.

In *MPH Bookstores Sdn Bhd v. Lim Jit Sen*, Award No: 179 of 1987, it was held that for a claim of constructive dismissal to succeed, both limbs of the contract test must be present, that is, firstly, did the employer's conduct amount to a breach of the contract, and secondly, did the employee make up his mind and act the appropriate time soon after the conduct which he had complained of had taken place.

Constructive dismissal is considered as a double-edged sword. The employee's reason for resigning should be such that 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 action. The timing of the resignation should also be appropriate, to avoid being accused of condonation. Any failure on the part of the employee to ensure these 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.

Industrial Court Awards on Constructive Dismissal

Case 1

The company employed the claimant as a sales executive. The letter of employment provided for a basic salary and a commission of 1% on the gross monthly sales brought in by him. The company failed to pay his commission and unilaterally varied the terms of his employment by relieving him of his field sales thereby depriving him of the opportunity to earn commission on sales for the future. The claimant thereby considered as constructively dismissed.

Held:

- a. There can be no doubt from the terms of the employment letter and the testimony of the witnesses that the claimant is entitled to his 1% commission on the gross monthly sales brought in by him and not on a collection basis.
- b. The conduct of the company in directing the claimant to undertake entirely a different work from that which he was engaged to do was a fundamental breach of the employment contract. The company had repudiated the contract of employment. Therefore, dismissal was unjustified and the court ordered compensation in lieu of reinstatement.

(Award 121 of 1984)

Case 2

The company charged the claimant on two counts for soliciting items from the company's suppliers allegedly for his personal benefit. A domestic inquiry was held and the conclusion was that the charges were not proved. However, the company ordered that the claimant had no authority to act in its name or on its behalf. The claimant averred that on resumption of work he was given duties inferior to those he performed prior to his suspension. He further averred that whilst his designation and salary remained the same, he was in fact demoted. He, then, resigned and alleged constructive dismissal.

Held:

- a. For a claim of constructive dismissal to succeed both the limbs of the common law contract test must be present, i.e. firstly, did the employer's conduct amount to a breach of the employment contract going to the root of the contract or had he evinced an intention no longer to be bound by the contract thereby entitling the employee to resign? Secondly, did the employee make up his mind and act the appropriate point in time after the conduct of which he had complained had taken place?
- b. If the employee continued in employment without demur it was fatal to a claim of constructive dismissal at a later date for then the employee would be taken as having waived the repudiation by the employer and, thus, forfeited his right to claim constructive dismissal.

This was the position in the claimant's case and for this reason alone his claim of having been dismissed failed.

(Award 179 of 1987)

Case 3

The claimant, who averred constructive dismissal in sequel to his transfer from the position of manager of maintenance, security and bell departments to the position of store manager by the Hotel with erosion of managerial functions, contended his termination was without just cause and excuse. He further cited humiliation and victimization, and alleged that the Hotel did not accede to his request for a job description.

The company, however, refuted the allegations of the claimant. It contended the transfer was in sequel to management reorganization, and the position of store manager as analogous to that of a cost controller in other hotels.

Held:

- a. The claimant should not have been appointed to another position which was inferior in rank or status to that of manager. Although there was no change of remuneration, he was basically nothing more than a storekeeper. He was neither given any overriding powers or authority to control costs in the various departments nor the purchasing department placed under his control.
- b. The claimant left the services of the Hotel solely because of the repudiatory conduct of the Hotel, and exercised his option to bring his contract of employment to an end.
- c. The relegation of the claimant, who was holding a managerial position, to a storekeeper's position, could not be seriously contended as a step which was taken pursuant to a management reshuffle, and the dismissal of the claimant was without cause or excuse. The court considered that an award of compensation consisting of payment of arrears of backwages and benefits and compensation in lieu of reinstatement would do justice to the claimant.

(Award 375 of 1994)

Case 4

The claimant, who was a financial administrator of the company, was dismissed for refusing to a "new assignment" in another branch office in

Kota Kinabalu. The claimant was appointed by the company as a finance and administration manager on 2 February 1977. In October 1979, the company promoted the claimant as its financial administrator. He held this position until the date of dismissal on 8 April 1988.

The dispute arose when the company assigned the claimant to manage its account at its Kota Kinabalu office and requested him to report for duty 9 days after issuing the transfer letter dated 25 March 1988. The claimant failed to report for duty. The claimant in his letter dated 2 April 1988, objected to the transfer, contending that he was not an accountant and there was no transfer clause in his terms and conditions of employment. The claimant's letter of promotion also contained no specific or express transfer clause. The claimant reported for duty as usual at the Kuala Lumpur office on 28 March 1988. However, he was isolated, given a table and chair on another floor and was not supposed to communicate with the other staff. He tried to see the managing director no less than six times to clarify the matters in respect of his transfer and his duties but was unsuccessful. He claimed for constructive dismissal.

Held:

- a. It was plain law that when the claimant's service agreement and letter of promotion specifically detailed the terms and conditions of employment without insertion of a transfer clause, it must be presumed in good sense that it was not the intention of the company to transfer the claimant to Kota Kinabalu or to its other branches. The court was of the view that the dismissal of the claimant for refusing to accept the transfer, was clearly in breach of the terms and conditions of his service agreement, rendered his dismissal as being without just cause or excuse.
- b. The transfer of the claimant to Kota Kinabalu to manage the accounts was a demotion from the position, functions, status and responsibilities of the position of a financial administrator of the company.
- c. Failure of the managing director to see the claimant and hear out his problems and failure to clarify matters in respect of his duties, constituted an iniquitous form of victimization and unfair labor practices.
- d. The court ordered the company to pay the claimant 24 months back wages and one month's salary in lieu of every completed year of services as compensation in lieu of reinstatement. These orders had to be complied with within one month of the date of the award.

(Award 245 of 1991)

Case 5

The claimant was accused by the Production Manager of being a money lender and his resignation was demanded. The claimant went to see his Human Resource Manager who then wrote out a letter of resignation for him. This was subsequently re-written by the claimant and signed.

Held:

- a. Industrial tribunals had consistently held that a forced resignation was a dismissal. It has also been held that the use of persuasion by an employer to obtain an employee's resignation may be a dismissal.
- b. Evidence showed clearly that there was some kind of threat or coercion or persuasion made by the Production Manager and the Human Resource Manager as a result of which the claimant submitted his resignation letter.
- c. This involuntary resignation by the claimant was tantamount to dismissal of the claimant by the Company without just cause and excuse.

(Award 428 of 1994)

Conclusion

From the above discussion, it can be concluded that constructive dismissal differs from unfair dismissal. Although both give rises to the same effect, that is, the employee is no longer be engaged in employment due to the termination of the employment contract, but in the constructive dismissal it can be said that the real reason for the termination of the employment is in some way the prior conduct of the employer. Claims of constructive dismissal are dealt with like all other claim of unfair dismissal under Section 20 (1) of the Industrial Relations Act 1967. However, for an employee to claim constructive dismissal, the burden of proof is on him and not on the employer, to prove that the employer has committed a breach of contract. Five (5) Industrial Court Awards are presented in this paper to prove that constructive dismissal could be likened to a double-edged sword.

Three (3) conditions must be fully met in order for the employee to be able to claim constructive dismissal:

- i. the employer has breached a fundamental term of his employment contract or the employer's action was such that no reasonable employee could tolerate such an action;
- ii. the employee has terminated the employment contract by reason of the employer's conduct and the conduct is sufficiently serious to entitle the employee to leave at once, and
- iii. the employee left in a timely manner, otherwise he may be deemed to have waived the breach and agreed to vary the contract.

Any failure on the part of the employee may result in his resignation not meeting the criteria for constructive dismissal and result in his claim being dismissed by the Court.

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