

Constructive Dismissal: Lesson Learnt from Malaysian Industrial Court Cases

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Abstract

The objectives of this study are to provide an analysis of constructive dismissal cases and to explore several practical issues involving claims of constructive dismissal. It starts by analyzing the Malaysian case laws which been categorized in eight dimensions namely (i) work/job (ii) transfer (iii) salary & benefits (iv) series of actions (v) disciplinary cases (vi) forced resignation (vii) demotion and (viii) general cases. It then explores on the lesson learnt for both the employer and employee by looking on various judgment made by the industrial court. It further analyses some cases on what employer's actions constitute constructive dismissal, such as unilateral changes in work/job and changes to the level of pay or the benefits structure. The methodology used is qualitative analysis approach by examining 350 cases of case laws under the pretext of 'constructive dismissal' from Malaysian Industrial Court cases for a period of 10 years (1995-2004). From the analysis it was found only 136 cases (43.7%) are in favour of employees and the 175 cases (56.3%) are in favour of employers. The highest cases is the job/work dimension which stood at 28% or 87 cases and the least is the demotion dimension which stood at 3.2% or 10 cases only. Finally this paper highlights a few tips for employers and employees in managing the issues of constructive dismissal in the workplace.

Keywords: Constructive Dismissal, Dismissal, Termination, Malaysian Industrial Court, Case Laws, Lesson Learnt

Introduction

In the general law of contract, if one party commits a repudiatory breach of a contract, the innocent party is entitled to terminate the contract and then sue for damages. This principle also applies to employment contracts. When an employee resigns or quits in response to a repudiation of the contract by the employer, the law recognizes that this was not a true resignation. Instead the employer is deemed to have dismissed the employee. Since no actual dismissal has taken place, this is referred to as a constructive dismissal. In other words, constructive dismissal denotes a summary termination of the contract of employment not by the employer but by the employee by reason of the employer's conduct (Anantaraman, 2000)

The law of constructive dismissal requires a balance between the competing interests of employees and employers. Employers must be able to arrange their business in the most profitable way possible. This means that they must have the flexibility in order to modify job assignments, work schedules, compensation structure and other terms and conditions of employment to respond to rapidly changing economic and technological conditions. On the other hand, employees should be able to reasonably rely upon the fact that the essential nature of their job will remain intact.

The constructive dismissal doctrine allows employees to rely upon promises made by employers and quit without financial penalty when those promises are broken. The constructive dismissal doctrine therefore enhances the degree of trust that an employee feels in his or her employment by making it more expensive for employers to make fundamental changes to that employment.

In Malaysia, the concept of "constructive dismissal" was given judicial recognition by the then Supreme Court in *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* (1988) (1) MLJ 92. In that case, the Supreme Court said that "constructive dismissal" means no more than the common law right of an employee to repudiate his contract of service where the conduct of his employer is such that the employer is guilty of a breach going to the root of the contract of where he has evinced an intention no longer to be bound by the contract.

Literature Review

This literature review is conducted to conform to the textbooks, recognized journals or articles for the research topic, contents and theories. The main textbooks used are books on employment laws and industrial relations. Whereas the journals are mainly extracted from Current Law Journal (CLJ), Malayan Law Journal (MLJ), Emerald, Nexis and EBSCO.

Dismissal

B Lobo (1996), examined critically on two landmark cases of the decision of Court of Appeal i.e. *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* (1996) MLJ 261 ; and *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* (1996) 1 MLJ 481. He pointed out that these two cases have direct and important implications both on the substantive and procedural law of unjust dismissal and the law of judicial review of administrative actions. The Court of Appeal's decision in these two cases held that Article 5(1) and 8(1) of the Federal Constitution have a profound impact on the statutory law of unjust dismissal. Among others, an employee has the right not to be dismissed except for just cause, is required to be given reasons for a dismissal and has the right to be heard before his dismissal.

Furtherance to that, Anantaraman (1996), highlighted the concept of procedural fairness especially in the issue of 'no inquiry' and 'defective inquiry' in the Malaysia labour laws. He further elaborated on the basic principle of natural justice that must be observed in order to eliminate unfair and harsh practices in industry. He further criticized on the 'curable principle' in *Hong leong Assurance's* case and the *Dreamland's* case where, in both cases, the courts should be blamed for creeping legalism due to misinterpreting the provisions of the social welfare legislation such as the Industrial Relation Acts 1967 and Employment Act 1955.

Constructive Dismissal

Rabiahtuladawiah (2019) shows a study on employees that were dismissed on the ground of constructive dismissal and looking into what are the proper test to be conducted. Is it reasonableness test or contract test? Shuib (1998), critically discussed the definition of 'dismissal' under s.20 of the Industrial Relations Act 1967. It encompasses termination of contract made by an employer according to contractual terms. He further elaborated on issues of 'resignation under compulsion' and 'constructive dismissal' in relevance to the landmark cases such as the *Wong Chee Hong, Goon Kwee Phoy, Dr. A Dutt and Ang Beng Teik* cases. He concluded that the definition of the word 'dismissal' under the said section is not confined to formal dismissal but generally to confer protection to a weaker party in the employer-employee relationship.

On the same score, Anantaraman (2000), also elaborated on the doctrine of constructive dismissal. He commented on the test that is applicable for constructive dismissal cases such as contract test, and unreasonable test. He further explained on the issue of fundamental breach of contract and what the nitty-gritty issues are under the constructive dismissal cases. Why constructive dismissal cases failed was also discussed in depth by him.

Methodology

This paper is a research paper adopting the concept of critical analysis approach of Malaysian legislations using qualitative methodology. In legal study, qualitative methodology refers to any new, thorough, systematic, investigative or legal analysis. Its aim is to explore, revise, value add, and improving the concept, theory, principles and application of law (Hassan & Lee, 2015). Hence, this research adopts the method of legalistic analysis that emphasizes on legal issues in the form of case laws. Using the *content analysis technique*, this research objective is to explore and investigate the constructive dismissal issues pertaining to its root cause and the outcomes of it.

Legal research relies on primary and secondary data, with the former referring to legislation, parliamentary hansards and court cases from Malaysia and foreign countries. Cases decided by courts are primary documents in legal research ((Hassan & Lee, 2015). In this research, we adopted Malaysian's court cases for use as the main content analysis to study the pattern and root cause of constructive dismissal in the work place. The multiple dimensions of the constructive dismissal root cause and the finding of the courts are the end results of this research which in conformity with some findings on a review of the literature.

For this research paper, we selected 350 Industrial Court cases of Malaysia from 1995 to 2004 which regards to dismissal cases under the pretext of 'constructive dismissal'. The Industrial Court is a specialised court hearing disputes on employer-employee relationship and its power and jurisdiction is vested from Part 7 of the Industrial Relations Act 1967. Decisions of the Industrial Court can be challenged by way of 'judicial Review' at the apex courts but this research is not focusing on the 'judicial review' that focuses on questions of

law matters. Hence, this research is mainly looking at the issues of constructive dismissal which has been referred by the minister under section 20(3) of IRA 1967 to the Industrial Court and the award made by the said court under section 30 of the same Act. This paper has analysed 311 constructive dismissal cases that had been adjudicated by the Malaysian Industrial Courts for the duration of ten years i.e. 1995 till 2004. These cases were taken from the Industrial Law Report based on its year of publication although some of the cases had been awarded earlier. Constructive dismissal cases which were withdrawn halfway during the litigation process, preliminary objection and without any decision or award have been omitted from the review.

Claims for Constructive Dismissal

Before considering cases in which the Industrial Court applied the law on constructive dismissal, a few basic details relating to claims for constructive dismissal must be really understood. If the dismissal is to be constructive, the formal termination of the contract must come only as a result of some action such as stopping work, walking out of his employment or resigning from the job on the part of the workman, even though that act may have been the result of pressure from the employer. By virtue of the concept of constructive dismissal, Industrial Law treats some resignations as dismissals and therefore, extends statutory dismissal rights, mostly payment of compensation and occasionally reinstatement, to those employees who are forced to resign because of their employers' conduct. It does not matter whether the employee left with or without notice, provided he or she was entitled to leave by reason of the employer's conduct¹.

It is for the Industrial Court to decide what constitutes a fundamental term of the contract of employment. The basic starting point in the inquiry is to ask about the terms which the employer is alleged to have breached. Having identified the terms, the next to consider is whether the said terms are essential in the contract of employment. The court will then have to assess the evidence adduced in order to determine whether or not the employer has by his conduct committed such a breach of the contract as to entitle the claimant to consider that he has been constructively dismissed.

The Industrial Court in adjudicating the claim of constructive dismissal should confine itself to the issues raised (pleaded) in the employee's statement of claim and those included in the employer's statement in reply. Issues not pleaded are to be discarded by the court. If the court considers the issues not pleaded, it is an infringement of r.9 of the Industrial Court Rules. By considering issues not pleaded by the employee, it is possible for the Industrial Court to uphold the claim of constructive dismissal whereas disregarding those issues not pleaded, the court would have arrived at a different decision altogether. Decisions arrived at by the court taking into account issues not pleaded are open to being quashed in certiorari proceedings on the ground that the decisions are tainted by the *Wednesbury* principle of unreasonableness. In *Anwar Abdul Rahim's* case the Court of Appeal commented the Industrial Court for taking into account irrelevant considerations.

In the *Hotel Malaya* case, the Industrial Court dealt with the process of deciding constructive dismissal cases in considerable detail. In adjudicating constructive dismissal claims by employees, the Industrial Court will generally have to undertake a two-stage process, that is after deciding that there is a constructive dismissal, the court should then proceed to determine whether or not the employer has just cause or excuse for bringing about the constructive dismissal. In other words, a finding of constructive dismissal must necessarily also involve a conclusion that the dismissal is without just cause or excuse.

Furthermore, the onus of proving constructive dismissal is on the employee whereas the burden of proving that the dismissal is with just cause or excuse squarely lies with the employer. The employer who has committed a breach of his essential contractual obligations would be liable for damages in common law. Whether or not he will be liable to the statutory remedies, which are available to an aggrieved workman under s.20(1) of the IRA 1967, has to be determined by the court's finding on whether or not the dismissal, constructive or actual, is with or without just cause or excuse.

For there to be a constructive dismissal, the conduct has to be by reason of something which the law regards as the conduct of the employer. When the employee complains against the conduct of his immediate supervisor, can it be argued that since the immediate supervisor is not the employer or the company, his behavior cannot amount to the employer's conduct? The Employment Appeal Tribunal in *Hilton International Hotels (UK) Ltd v Protopapa* (1990) 1 RLB 316 states that whether or not the conduct of the supervisory employee binds the employer, it is governed by the general law of contract, according to which the employer is bound by acts done in the course of an employee's employment.

Analyses

We analysed 311 constructive dismissal cases and divided them into eight categories namely (i) work/job (ii) transfer (iii) salary and benefit (iv) series of actions (v) disciplinary (vi) forced resignations (vii) demotions and (viii) general cases such as sexual harassment etc. We then elaborate or highlight the lessons learnt for employers and employees as to note the causes for their failures and to consider the points of determination or legal reasoning (*ratio decidendi*) made by the court for each particular case in dispute. Lastly, we conclude our review with recommendations for employers in order to avoid constructive dismissal cases in the workplace.

In this research, we found that there are many cases (based on the fact of case) similar to each other. Matters related to job/work i.e. relegation of duties, no-work given, etc. are the most common issues that were adjudicated by the Industrial Court under the constructive dismissal claim.

Job/work cases constitute 87 or 28 % of the overall constructive dismissal claims under review and the success rate of employers is 47 cases or 54 % whereas the number of cases in favour of the employees is only 40 or 46%. It is observed that the second highest constructive dismissal claims are related to transfer order cases. These constitute 78 cases or 25.1% of the overall cases under review. Such claims include transfers to other locations in the same organisation or transfers to other subsidiaries or transfers within the organisation but involving different job functions. Since it is well established under the law that a transfer is the managerial prerogative provided that such transfer does not entail a change to the detriment of a workman in regard to his terms of employmentⁱⁱ; we reveal that the court is in favour of employers where 44 cases or 56.4% of transfer cases are won by them.

Furtherance of the two categories as mentioned above, the third highest number of constructive dismissal claims involve the salary and benefit issues. The number of cases pertaining to this matter stands at 55 cases or 17.7% of the overall cases under review. Out of that number, 58.2% is in favour of employees and the remaining 23 cases are in favour of employer. A series of employers' conduct or acts constitute 9.3% or 29 cases out of 311 cases. Under this category, we find that the success rate for both parties (the employer and the employee) is the same where employers' success rate is 14 (48.3%) cases and the employees is more or less alike at 15 (51.7%) cases.

Next are matters relating to disciplinary and domestic inquiry cases. These claim stand at 8.4% out of the total number of constructive dismissal claims cases. It is interesting to note that the failure rate of employees under this category is so substantial i.e. 80.8% or 23 cases. There are only five cases that are in favour of the employees. Later we will discuss at great length the causes of the employees' failure in these issues. Cases involving forced resignation or also known as 'indirect dismissal' constitute less than 6% of the overall constructive dismissal cases under review. There are only 16 cases that involve forced resignations, however, the success rate in favour of employees is so nominal i.e. only 4 cases or 25% as compared to that of the employers which is overwhelming at 12 cases or 75%.

The least disputed issue under constructive dismissal claims is the issue of demotion i.e. direct demotion from a higher grade to a lower grade, irrespective of whether there is a reduction of wages/benefits or not. In this research, it is revealed that there are only 10 cases out of 311 cases under review; and out of that number, the success rate of employees against employer is only 50%. Lastly, we found that there are about 10 (3.2%) cases that do not fall under any categories as those mentioned above. Out of these 10 cases, 2 cases concern sexual harassment while the rest are about disagreements with performance appraisals, colourable treatment, not receiving offer letters, changes in management and etc.

In our analysis we also found that the number of cases involving employees within the scope of Employment Act (EA) 1955 is lesser than the number of employees who are not covered by the same Act. The number of employees governed by the EA who claim constructive dismissal is only 62 (19.9%), whereas the remaining 249 employees fall out of the EA scope. Out of these 62 cases, only 23 or 37.1% succeed in their claim as compared to the employees that are out of the EA scope whose success rate stands at 46.2% or 115 cases.

Based on our finding, we note that out of 311 cases under review, only 138 cases are in favour of the employees. These constitute 44.4% of the total cases under review, and out of this number, 15 (10.9%) cases are awarded reinstatement, 119 (86.2%) compensation and another 4 (2.3%) cases are to be determined later. In our observation the monetary compensation awarded varies between cases and there is no uniformity exercised by the industrial courts chairmen. We do concur with Ashgar Ali's (2004) view in particular on the backwages calculation when he said, *"The unfettered discretion of the Industrial Court Chairman is evidently clear in the assessment of backwages, where they exercise their discretion entirely on conscience unhampered by judicial precedent. Just as equity varies like the Chancellor's foot, so is the assessment of backwages varied according to the conscience of the Industrial Court Chairman"*.

Job/Work

It is found in this survey that the highest claims for constructive dismissal are related to claims under the category of job/work. There are 87 cases out of 311 cases under review. The success rate for employees is 46 % and out of that number 82.5% is awarded compensation. Employees under the scope of EA 1955 stand at 14.9% and the remaining 85.1% comprises employees who are out of the EA scope. The main reason for constructive dismissal arises from the employer's conduct breaching expressed terms of the employment contract such as failure to give work to the employee when there is work available and need to be done, change in job functions leading to erosion of duties or relegation of responsibilities resulting in reduction in job status, and changes in working arrangements like changes in reporting line.

In the case of *Arah Dagang Sdn Bhd v. Low Teck Seong* the claimant was employed as a sales manager for a domestic and export market company. Due to some misunderstanding with his bosses, the claimant was not given any work to do, instead he was asked to teach an accounts clerk how to do his job. He spent his time in the office reading newspapers and going down to the store to see employees doing their work. Relying on the contract test and after having seen and heard testimonies from the witnesses of both parties, the court found ample evidence to substantiate the claimant's allegation that he was not given work to do and had been asked to leave the company. The court therefore arrived at the conclusion that the actions of the company which not only went to the root of the contract but had also shown their intention not to be bound by the contract anymore, justified and entitled the claimant to treat himself as being constructively dismissed.

In another interesting case of *K&N Kenanga Bhd v. Rahayu Ezrani Abd Rahman* the claimant commenced employment as a Trainee Dealer's Representative on 4th October 1996. It was a condition in the appointment that the claimant had to pass the necessary examination and be issued with a Dealer Representative License by the Securities Commission Malaysia. After a few months, the claimant was issued with a Dealer's Representative License and was also confirmed as a Trainee Dealer's Representative. However, in January 1998, the claimant was transferred to the accounts department to do clerical work such as separating contract notes, ensuring that the amount paid on the sales cheques tallies with the amount on the sales receipts and etc. To this, the claimant claimed that she was performing clerical work that had no connection to her job title and qualification as a Licensed Dealer Representative. From the evidence adduced, the court found that there were no explanations or reasons given to the claimant prior to her transfer to the accounts department. Transferring the claimant to another department, on the pretext of giving her the necessary exposures or trainings while the so-called training was non-existent, is sufficient to entitle the claimant to consider herself constructively dismissed. Hence, the court finding was that the act of the employer amounted to repudiating the contract of employment of the claimant.

Transfer

Cases related to transfers stand at 25.1% or 78 cases which is the second highest claims under the constructive dismissal. Out of that figure, the success rate for employees is 43.8% whereas cases in favour of employers stood at 56.4%. Claims made by employees under the EA are 27 and the remaining 51 are employees who are not governed by the EA. From 34 cases that are in favour of employees, 3 are reinstated, 29 are given monetary compensation and 2 cases have not been determined.

In the case of *MCSB Software Development Sdn Bhd v. Leong Mun Kam* the claimant, an IT Manager was transferred from its parent company in Kuala Lumpur to a subsidiary or an associate company in Johor Bahru. The court held that the company was in breach of the claimant's constitutional rights when it transferred the claimant to work for another company in Johor Bahru when the new company was actually of a different legal entity. The court was very much persuaded by the decision in an English case, *Kemp v. Robin Knitwear Ltd* (1974) IRLR 69, in concluding that the employee had the right to decline or protest against a transfer or a relocation to another company of a separate legal entity, especially when the contract of employment did not provide so. This is because compelling an employee to work for a particular employer, without affording him a choice in the matter, is merely one form of forced labour which is against Article 6(2) of the Federal Constitutionⁱⁱⁱ.

In another similar case the *Store (Puchong Jaya) Sdn Bhd v. Anandan Linga* the claimant an assistant manager of human resources was transferred from The Store, Puchong to Seremban. He wrote an appeal letter stating that he was unable to accept the transfer because of his financial hardship and family predicaments i.e. having a new born baby with medical complications who needed to be attended to all the time. He also requested that the transfer be deferred due to the above reasons. The court was of the opinion that the employer's failure to consider the claimant's appeal for consideration or even for the deferment of the transfer for six months had conducted itself in a position that would breach the mutual trust and confidence of the claimant to continue his employment with the employer. In the employer's written reply, not a single word was referred to the claimant's pleas but the employer chose to state its stand solely on its contractual rights.

Salary

From 311 cases, matters related to salary constitute 17.7 % or 55 cases. Out of 55 cases, 23 (41.8%) cases are in favour of employers and the remainder which are 32 (58.2%) cases are in favour of employees. The number of employees governed under the EA is only 8 (14.5%) whereas employees that are not governed by the EA are 47 (85.5%) employees. There are many cases in which the Industrial Court has upheld claims of constructive dismissal on grounds of non-payment of salary, non-payment on the due date, reduction in salary and unilateral change in the method of payment. It is well established that every one of the above repudiatory acts of the employer constitutes not only a breach that goes to the root of the contract but also a conduct that shows the employer's intention of no longer wanting to be bound by the contract of employment

In the case of *Lee Kok Thai v. Minconsultant Sdn Bhd*, the claimant was employed as a civil engineer and his remuneration varied depending on whether he was based at the head office or at a work site. When he was based at the head office, he received a monthly salary but when he was given an assignment at a work site the terms of his remuneration differed. A separate contract was entered into by both parties for each assignment at a worksite where his remuneration was specified. In addition to a fixed monthly salary, he was paid an additional remuneration upon completion of his assignment for the project duration at the work site. The claimant averred that he should have been paid additional remunerations for three projects i.e. "Kertih", 'SSAA' and 'KHTP'. However, the company contended that they were not bound to pay the claimant's additional remunerations in respect of the Kertih and KHTP projects as the claimant had not completed his assignments for the duration of the projects. The company also alleged that the claimant performed poorly and issued him with a show cause letter. The court cited *Wong Chee Hong's* case, and held that by not complying with the contract of employment, the company had breached the implied term of mutual trust and confidence which was a fundamental term in the contract of employment, hence it held that the company had constructively dismissed the claimant.

In the case of *RNC Corporation Bhd v. Kesvaran TP Murugasu* the claimant was employed as a senior general manager and after confirmation, his salary was increased from RM12,000 to RM 13,000. The claimant was subsequently promoted to chief executive officer and be provided with additional benefits. However, when the company began facing dire financial difficulties, it placed into effect a wide cost cutting programme unilaterally. The claimant was therefore affected whereby his monthly salary was reduced from RM13,000 to RM 8,450 and several benefits were also withdrawn. Relying heavily on the contract test, the court concluded that the cost cutting exercise was not justifiable because the salary cut was

not made across the board but affected only four staff at the company level and hence was done on a selective basis. The court opined that although the company was facing a financial crisis its action was not justified when imposing this measure of reducing the claimant's salary by a massive 30%. In conclusion, the court held that the company's cost cutting exercise was not bona fide and was a façade to justify its consequent action especially with regard to the claimant.

Series of Actions

Cases under the category of series of actions by the employer stand at 9.3% or 29 cases from the total under review i.e. 311 cases. The success rate for employees against employers is 51.7 % and 48.3 % respectively. Out of 15 cases in favour of employees, 86.7% are awarded monetary compensations whereas 13.3% are given reinstatements. The number of employees under the scope of the EA 1955 is 6.9% and the rest are employees that are not governed by the EA.

In the case of *Kumpulan Sepang Utama Sdn Bhd v. Lam Chee Chai* the claimant contended that he was demoted without justification, his salary was unilaterally reduced and all his benefits were withdrawn inclusive of his office and desk. Based on the pleadings and evidence adduced in court, the court is satisfied that the company, after having demoted the claimant from project manager to quantity surveyor, decided to remove the claimant's company car and office desk and belongings in order to effect a so-called transfer. The court found that the company had committed the above series of acts which were calculated to drive the claimant out of his job, and which tantamount to the company's repudiation of essential terms of the claimant's contract of employment. The court is also convinced that the company had committed the above fundamental breaches which affected the root of the contract of employment.

In another case, *Yaohan Marketing (M) Sdn Bhd v. Teong Kok Kong*, the claimant was an area sales manager and based in Kuala Lumpur. The claimant contended that the company had harassed him by omitting his name in the notices of a meeting, calling him up and asked him not to be in the meeting because the boss did not want to see him, rejecting his claim, transferring him to Johor Bharu without any letter, not giving any job to do and lastly withdrawing his company-paid petrol for personal use benefit. Having considered the evidence in its totality, the court arrived at the conclusion that the actions by the company according to law amounted to a breach which was constituted by a series of incidents, which went to the root of the contract and which justified and entitled the claimant to treat himself as being constructively dismissed.

Disciplinary & Domestic Inquiry

In this study we find that there are numerous cases where employees claim constructive dismissal when they are confronted with disciplinary issues or misconduct. We observe that out of 311 cases under review, there are 26 (8.4%) cases of constructive dismissal related to misconduct. Out of the figures, the success rate of employers is very much higher as compared to the success rate of employees. Cases in favour of employers stand at 80.8% whereas for employees there are only 19.2%. The number of employees under the scope of the EA is only 9 and employees not governed by the EA are 17 people.

In the case of *Citec International Sdn Bhd v. Selvaraja N Gandhi*, the claimant was employed as a manufacturing supervisor with a last drawn pay of RM2000. The claimant was charged for allegedly falsifying overtime claims and was being suspended from work for 10

days with half salary. He was found guilty by the panel of domestic inquiry and was given a final warning plus a week of unpaid leave. The claimant contended that the company had committed fundamental breach of the contract by suspending him on half pay and for another 7 days without pay and refusing to let him call in two material witnesses during the enquiry which is a denial of natural justice. The court found that by taking disciplinary action and suspending the claimant on half pay, convening a domestic inquiry, finding him guilty and then suspending him without pay for seven days with a final warning letter, the company had conducted itself in a manner that destroyed the contractual relationship between the company and the claimant. There was no provision by which the company may issue and implement rules and regulation to provide guidelines for the conduct and behavior of its employees and as an employee the claimant was expected to observe these rules and regulations. Since there was no such provision, the court found that the company has no right to suspend the claimant on half pay and subsequently on no pay at all.

In another disciplinary case, *Watertec (M) Sdn Bhd v. Lee Yoke Peng*, the claimant was employed as secretary cum sales coordinator and subsequently promoted to secretary to the managing director's office. She was suspended and issued with a notice of domestic inquiry where she was alleged to have committed four acts of misconduct i.e. insubordination and mistreating her superior, disobeying orders and sabotaging the MD's office, misusing of company's property and performing unsatisfactorily. After the inquiry the claimant was found guilty of allegation number one by the panel and issued with a letter of warning. After a period of time, her suspension was then lifted and she was directed to resume her normal duties. However, when she reported back to work, she received a letter of transfer to the store department with immediate effect but with no loss in salary, seniority and benefits. The court found that it was abundantly clear that the transfer to the store department as a store secretary entailed functions and duties inconsistent and incompatible with the claimant's functions, status and dignity as secretary cum sales coordinator. In other words, the transfer entailed a change to the detriment of the claimant in regard to her terms of employment. The court was also of the view that since the transfer came soon after the domestic inquiry it was another punishment for the claimant since the warning she had received was to be the only punishment meted out to her by the panel of the domestic inquiry. The court thus concluded that the claimant's transfer to the store department, not being given a proper place and etc., constituted a gross breach and repudiation of her employment contract that seriously damaged the relationship between the claimant and the company.

Forced Resignation

Forced resignation constitutes 5.1% or 16 cases of the overall cases under review. There are 74.5% of cases in favour of employers and 25.5% or 4 cases are in favour of employees. However, all cases that are in favour of employees are given monetary compensation and none is reinstated. The category of employees under the scope of EA stands at 12.5% and the remainder are employees who do not fall under the scope of the EA.

In the case of *BBM Business Systems (M) Sdn Bhd v. Sathia Narayan Letchumanan* the claimant as a general manager with an earning of RM8000 was told by the managing director to resign with immediate effect because the company could not afford to continue to pay his salary and allowance. He was also told not to come to the office anymore and as such he had to leave the company. Since the company failed to attend the hearing and no evidence was adduced from the company, the court found that the actions of the company were a dismissal of the claimant and hence the claimant was entitled to treat himself as being constructively

dismissed. In the absence of evidence by the company, therefore the claimant's dismissal was one without just cause or excuse.

In another similar case, *Ipacs E-Solution (M) Sdn Bhd v. Lee Hui Lin*, the claimant commenced employment as a system analyst receiving a basic monthly of RM5,520. The claimant contended that the company's MD and group chairman who was based in Singapore visited the company's office at Petaling Jaya on 11 January 2001 and met her. In this meeting she was told by the MD that the company was not doing well for the financial year of 2000 and therefore her services were no longer required and that she would have to resign from the company immediately failing which her services would be terminated by the company. The court after perusing the evidence adduced by both parties found that on the balance of probabilities, the claimant had discharged the onus of proving that she was forced to resign from the company's employment. The conduct of the company had shown that they no longer wanted to be bound by the employment contract defining their relationship and thus indicating that the company's conduct amounted to a breach of the said employment contract.

Demotion

In our observation, there are only 10 or 3.2% of cases related to direct demotion out of 311 cases under review. The success rate for both employers and employees is 50% or 5 cases each. Four cases in favour of employees are awarded compensation while one case is awarded reinstatement. All cases involve employees out of the EA scope.

In the case of *MBF Unit Trust Management Bhd v. Hamzah Mohamad* the claimant was appointed as the area General Manager and subsequently promoted to the position of senior Vice President of Research & Development Unit under grade SE 1. The claimant last drawn pay was RM9,875 per month and was entitled to a company maintained car as well as received other benefits pursuant to the terms and condition of his employment. The claimant contended that the company demoted him from grade 21 to 15 and he was to be transferred to its non-existent subsidiaries in Tonga or Papua New Guinea. The court in applying the contract test, found that the claimant was downgraded to grade 15 from grade 21. The whole conduct of the company and the chain of events from downgrading, offering the claimant a transfer to its subsidiaries in Tonga and Papua New Guinea to removing part of the claimant's functions and responsibilities by splitting the research and development unit into two all led to the claimant issuing a letter to the company considering himself dismissed by it with immediate effect and showed that the company was guilty by conduct which was significant breach going to the root of the contract of employment.

In another case *Q'Mass Network (M) Sdn Bhd v. Mohd Azman*, the claimant commenced employment with a direct selling company as General Manager with a salary of RM3,653 per month. The claimant was called by the Executive Director and was informed that he would be demoted from General Manager to Marketing Executive and he was to report to the Marketing Director. The claimant averred that demoting him from the position of General Manager to Marketing Executive was tantamount to a breach of contract by the company. The court after referring to the contract test and studying the totality of the evidence, made a finding that the company was guilty and had gone against the root of the contract of employment, by breaching the implied term of mutual trust and confidence in the employer/employee relationship.

General Cases

Under the miscellaneous category, we produce two types of cases which are significant and peculiar to constructive dismissal claims.

Sexual Harassment

Based on our review of 311 constructive dismissal cases, we find that there are only two cases pertaining to sexual harassment at the workplace where the court's finding are in favour of both the appellants.

In the case of *Sitt Tatt Berhad v. Gnanapragasa* the claimant was employed as a Personnel Executive in the Human Resource Department. In her statement of claim, she had pleaded specifically that she was forced to resign because she was harassed sexually by her immediate superior. Despite all her complaints to the top management no positive steps were taken to punish the perpetrator, on the contrary their response was cold and dismissive that she could no longer bear the ignominy and was spurred into writing a letter of resignation. The court, in applying the contract test, found that the incidents of harassment and annoyance and the non-action on the part of the higher management of the company to react to the complaints by the claimant were a breach of implied and /or express term of the contract of employment which was to provide a safe and healthy surrounding. The judgement of the court is in line with the decision made by Wood J in *Bracebridge Engineering Ltd V Darby* (1990) IRLR 3

In another similar and well-known case, *Jennico Associates Sdn Bhd v. Lilian Therera De Costa* the claimant was appointed as the Director of Operations of a proposed hotel which would bear the name "Mint Hotel". Barely three months and two weeks later, the claimant handed in a letter of resignation to the company alleging in her statement of case that she had been constructively dismissed and/or forced to resign from her position by virtue of her Managing Director's sexually harassing conduct. The court had found that the Managing Director being the alter ego of the company, had constituted a breach of an essential term of the contract of employment between the claimant and the company relating to mutual trust, confidence and respect. In this regard, the learned chairman of the Industrial Court held that there was an implied essential term of all contracts of employment that an employer had the obligation to respect an employee's person, dignity and esteem and that he would not wilfully violate the same.

Employment without offer letter

In this unique case, *Plateau Industries Sdn Bhd v. Khoo Kay Cheang*, the claimant testified that he had been working with Diethelm Sdn Bhd for the past eight years when he applied for a job at the company (Plateau). The claimant was offered a job as area sales manager for Penang and the Northern Area with a salary of RM3,000 and other benefits as well. Having received the letter of offer, the claimant then tendered his resignation by giving a three month notice to his former company. After reporting for duty at the new company, the claimant was told to go back and wait for the company's telephone call as the company had to settle some matters. After waiting for a few months, the claimant unfortunately received neither any news nor any payment of salary.

The court was of the view that there was ample evidence of constructive dismissal in this case. The claimant was offered a job and as a result he had left his former job of eight years in order to work at the new company. However, the company had left him jobless. No reason was given to the claimant as to his status or why the company had refused to accept him after giving him hope and the prospect of a new job. The company had shown no interest

in the claimant's welfare and as such the court held that the dismissal was without just cause or excuse and in breach of the fundamental principles of natural justice.

Lesson Learnt

Based on our review of 311 constructive dismissal cases from the year 1995 to 2004; we observed that numerous lessons could be learnt by the employers in all categories of cases i.e. job/work, transfer, discipline and others. First let us elaborate on the concept of constructive dismissal. This is paramount for employers to understand due to its implications in managing employees in an organisation. In the landmark English case of *Western Excavating (ECC) Ltd v. Sharp*, Lord Denning MR explained the concept of constructive dismissal thus: "If the employer is guilty of conduct which is a significant breach to the root of the contract of employment or 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 his contract by reason of the employer's conduct". It is also an implied term of the contract of employment. In *Woods v. WM Car Services (Peterborough) Ltd*, the Employment Appeal Tribunal held as follows, "In our view it is clearly established that there is implied in a contract of employment a term that the employer will not without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"

Secondly, employers should be more cautious when exercising their managerial rights especially on transfer matters. It is a well-established principle that an employer has the prerogative to assign duties and job functions to its employees and this includes the right to transfer its employees (unless the right to transfer is specially excluded in the contract of employment). However, although the transfer of employees is a managerial prerogative such prerogative is not absolute and unfettered. In B.R. Ghaiye's "Misconduct in Employment" the author has set down well recognised restrictions to the power to transfer as follows, (i) management has acted *bona fide* and in the interest of its business (ii) management is not actuated by any indirect motive or any kind of *mala fide* (iii) the transfer is not made for the purpose of harassing and victimizing the workman and (iv) the transfer does not involve a change in the conditions of service.

Thirdly, an employer has to provide job/work to an employee when there is job/work to be done. In the case of *USG Interiors (Far East) Sdn Bhd*, the Industrial Court President held that it was a constructive dismissal when the company transferred his employee to another department but failed to provide any duties at the new workplace; when the employee is capable of doing so. Another salient point that needs to be addressed and managed correctly is the salary and benefits matter. Selwyn's Law of Employment (11th edn) at para 3.184 states that "An employer has no right unilaterally to vary the terms of a contract of employment e.g. by reducing wages or salaries". The same matter had also been raised by the High Court in the case of *Dr Rayenold Pereira v. Menteri Sumber Manusia & Anor*, where the High Court enunciated as follows "... The allegation of breach of contract of employment through the salary cut and non-payment of March 1999 salary are not without basis. There is no provision for loan in the contract enabling the salary cut."

Finally, employers must bear in mind that they are restricted from exercising contractual right to terminate the contract of service without any regard to the the employee's right. In *Goon Kwee Phoy* case, the Federal Court declared "We do not see any material difference between a termination of the contract of employment by due notice and

a unilateral dismissal of a summary nature. The effect is the same and the result must be the same. Where representations are made and are referred to the Industrial Court for inquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse."

From the statistic given earlier it is crystal clear that only 136 (43.7%) out of 311 cases were in favour of the employees. The main reason why employees had failed in their claims is mainly due to the lack of technical knowledge in constructive dismissal. Good examples are cases related to premature claims; failing to act within reasonable time; disciplinary matters and refusal of *bona fide* transfers. Firstly, an employee must be able to understand and distinguish between constructive dismissal and direct dismissal. Before an employee can refer a claim for constructive dismissal under s.20 of IRA 1967, he or she must have terminated the contract of employment and lodged a complaint within 60 days from the date of dismissal. In the case of *Ang Beng Teik v. pan Global Textiles Bhd Penang*^{iv}, the court of appeal articulated as follows "A workman can have recourse to s. 20 even if there has been no formal dismissal or termination. As long as the workman considers 'that he has been dismissed' whether through some conduct on his employer's part or an order of demotion or a transfer, s.20(3) can be relied on. Such conduct has been referred to as 'constructive dismissal' which categories are not closed".

Bearing the above principles in mind, what the employee has to establish in a claim for constructive dismissal are (i) that the employer has by its conduct breached the contract of employment in respect of one or more of the essential terms of the contract (ii) that the breach is a fundamental one going to the root or foundation of the contract (iii) that the employee has terminated the contract by reason of the employer's conduct and the conduct is sufficiently serious to entitle the employee to leave at once and (iv) that the employee in order to assert his right to treat himself as discharged leaves soon after the breach.

Secondly, an employee has no right to intervene with management prerogative such as salary, increment or bonus (which is not contractual). In the case of *Eng Lian Enterprise Sdn Bhd v. Stephenie Liew*, the claimant's contention was that the company had badly treated her on bonus and increment when compared to other staff under her at the workplace. The court did not see any fundamental breach done by the company in the claimant's contract of employment to entitle her to claim constructive dismissal, as the clause on bonus/increment is at the discretion of the company and it was right for the company not to yield to the threat by the claimant.

In another interesting case, *T/N Nordin Hamid & Co. v. Lim Meng Koon*, the company had employed the claimant based on the three representations made by the claimant. However, the claimant had misrepresented his capabilities to the company and this is proved by his inability to bring in the required work for the company and failure to achieve his target. The company then summarily terminated the claimant's employment and the claimant accepted the termination. However, the claimant claimed constructive dismissal on the ground that his salary was not paid. The court ruled that based on the facts of the case and the claimant's own pleadings, there had been no breach of any essential term of his contract. He had been terminated from the services of the company which he had accepted. He did not leave because he was not paid.

Thirdly, an employee also needs to know that it is trite law that where the employee's claim for reinstatement under s.20 of the IRA 1967 is founded on constructive dismissal, the onus to prove such treatment is on the employee himself. In the case of *Morigates (M) Sdn*

Bhd & Anor v. Vinodhan, the claimant contended that his room had been converted to part of the production floor and his table and chair were pushed to a corner, which would not enable him to sit or work. Further, he averred that there was another person who had taken over his responsibility of overseeing the whole production plant and this created an unpleasant situation for him. As stated earlier, the burden of proving that his employer has breached a fundamental term of the contract lies on the claimant. However, in this case, the claimant has failed to provide any evidence of his employer's conduct that can be reasonably inferred as a breach perpetrated by the company. Nowhere in the evidence has it emerged that the employer evinced an intention not to be bound by the contract of employment between them. It is abundantly clear that the claimant had "jumped the gun" and therefore the court had dismissed his claim of constructive dismissal.

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