“I have been dismissed”

VS.

“I did not dismiss you”

Untangling the Tale of CONSTRUCTIVE DISMISSAL

By THOO YEE HUAN

The human resource industry in our nation is experiencing a challenging time in the face of the unprecedented COVID-19 pandemic. The present situation has further exposed and highlighted the dire need for a better employee protection in place, whilst also forging a healthier employer-employee relationship without sacrificing the prerogative rights of employers.

While it will be much easier for a court of competent jurisdiction to adjudicate a workforce termination or dismissal directly issued by employers, the courts are currently being inundated with another common limb of termination claims, namely - constructive dismissals.

CONSTRUCTIVE DISMISSAL: A DISMISSAL IN DISGUISE?

Constructive dismissal is the right of an employee to terminate his employment contract (“Contract”) by regarding himself as discharged from his/her obligations as an employee when the employer is guilty of a fundamental breach of the Contract. In simpler terms, it refers to a situation where an employee is forced to resign or leave the employment as a result of a serious breach of the Contract committed by the employer so as to be ‘constructively dismissed’ or indirectly terminated by the employer.
WHAT AMOUNTS TO CONSTRUCTIVE DISMISSAL?

Constructive dismissal is a common law right, i.e. it is a judge-made law established in case laws that is not explicitly provided under any statutory legal provisions.

A leading authority on constructive dismissal in Malaysia is the case of Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92 where the Supreme Court adopted the definition of constructive dismissal given by the English Court of Appeal in Western Excavating (ECC) Ltd v. Sharp [1978] IRLR 27 as follows:

‘it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it’ whereupon ‘the employee is entitled to regard the contract as terminated and himself as being dismissed’.

Constructive dismissal is not about “unfairness”. However, employees often regard the unreasonable conducts of their employers as the basis for their purported claims of constructive dismissal. This misconception was well addressed by the Supreme Court in the case Wong Chee Hong (supra) where it was clarified that -

‘constructive dismissal does not mean that an employee can automatically terminate the contract when his employer acts or behaves unreasonably towards him’.

It was further reasoned that, if such was the case, it would be dangerous as it would potentially lead to abuse and many unsettled industrial relations between employers and employees.

In rejecting the “unreasonableness test”, the Court of Appeal in Anwar Abdul Rahim v Bayer (M) Sdn Bhd [1998] 2 CLJ 197 held that the proper approach or threshold in deciding whether constructive dismissal has taken place is adopting the “contract test” i.e. whether “the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or that it illustrates the employer’s intention of not wanting to pursue the contractual relationship anymore” or in simple words, whether the employer no longer intend to be bound by the contract.

There are four material conditions to be met before a claim of constructive dismissal can be successfully established by an employee as provided by the Court of Appeal in Southern Investment Bank Bhd. Southern Bank & Anor v Yap Fat & Anor [2017] 3 MLJ 327:

- Gross breach of the employment contract by the employer
- The breach must be sufficiently important to justify the resignation of the employee
- The employee must leave in response to the breach and not for any other unconnected reason
- The employee must not occasion any undue delay in terminating the contract
The severity of each alleged breach will have to be analysed and examined by the court on a case to case basis. As a general rule, if any of the four essential conditions (above) are not met, the court will not rule in favour of a constructive dismissal claim.

Apart from establishing that the employer had breached a fundamental term of the employment contract, case law has also been clear that there must not be a delayed expressed response to the employer’s repudiatory act or conduct of which the employee complains of.

This is premised on the implication that any delay in doing so means the employee agrees to stay on and/or does not regard his employer's conduct as entitling him to terminate his contract in which the employee will be deemed to have waived the breach of the employer and agreed to vary the contract so as to allow for the conduct complained of by the employee.

Pursuant to the above requirements, in order to satisfy a claim of constructive dismissal, it is imperative on the part of the employee to take immediate steps in walking out of his employment within a reasonable period of time after the alleged breach of contract. This is to avoid any considerable difficulties from arising if these labour principles are not strictly adhered to. An employee should not have the best of both worlds as this will lead to abuse of the legal remedy.

As pointed out by the Court of Appeal in Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9, the human ingenuity is boundless and that the categories in which constructive dismissal can occur are not closed. Either a single act of oppression or a series of actions when being considered in its entirety could tantamount to a repudiatory breach of the implied contractual term of mutual trust and confidence and the duty to act in good faith by the employer.

Albeit there being no fixed circumstances that could amount to constructive dismissal nor there is an exhaustive list of such confirmed scenarios. The law is nevertheless clear that the burden of proof lies on employees to prove their claims, before the onus shifts to the employer.
THE COMMON CASES:
Departmental transfer, demotion & change of job description

Although the right to transfer an employee is no doubt the prerogative of management, employers should ensure that any transfer of an employee does not involve a demotion and any significant change in their employment terms and conditions. The transfer must be justified with valid and genuine reasons and be between entities which are within the same group of companies.

The Industrial Court normally will not interfere in cases of ‘transfers’ unless the complainant employee proves that the transfer is in fact actuated with improper motive or any kind of mala fide. It is well established that if the transfer is by way of victimisation and the same can be sufficiently proved on a balance of probabilities, then it will not be a bona fide transfer, and hence a constructive dismissal. This can be seen in the case of Chua Yeow Cher v Tele Dynamics Sdn Bhd [2000] 1 MLJ 168.

In Govindasamy Munusamy v. Industrial Court Malaysia & Anor [2007] 10 CLJ 266, the alleged transfer was held to be not bona fide when evidence revealed that there were attempts to eliminate the employee from the service of the company by transferring him to a different entity which was not part of the contractual term.

Similar and not surprisingly, in Ang Beng Teik v. Pan Global Textile Bhd Penang [1996] 4 CLJ 313, a demotion without any just cause or excuse can be classified as a dismissal.

Whether failure to pay salary constitute a constructive dismissal?

In North Malaysia Distributors Sdn Bhd v. Ang Cheng Poh [2001] 3 ILR 387 and the recent case of Tan Kok Chai v. Mega 9 Housing Sdn Bhd [2020] 2 LNS 0013, the salary of an employee has been regarded as a fundamental factor in a contract of employment and any non-payment of salary by the employer has been regarded as a fundamental breach of the contract of employment.

In the case of Noor Hazlina Kamarudin v Nusapetro Sdn Bhd [2019] 2 LNS 2846, the employer failed to pay a few months’ salary and statutory deductions from the employee’s monthly salary to the statutory body. After having failed to resolve the matter with the management, the employee tendered her notice of resignation and left the job. The Industrial Court held that there was constructive dismissal and held inter alia that the non-payment of salaries for the said period, combined with the failure of the company to pay the relevant statutory authorities for the deductions made tantamounted to a breach of fundamental terms of the employment contract.
Having said so, the issue as to whether the non-payment or deduction of salaries arising from the current Covid-19 pandemic will constitute a constructive dismissal is yet to be tested in courts since this is a special or genuine circumstance particularly, whereby a number sectors are unable to operate due to the movement control orders put in place, which can be distinguished from the common cases discussed above.

**What should be practically done to claim constructive dismissal?**

As decided in *Southern Bank Bhd v Ng Keng Lian & Anor* [2002] 5 MLJ 553 and *Moo Ng v Kiwi Products Sdn Bhd* [1998] 3 CLJ 475, it is a legal requirement for employees to inform their employers before the former claims for constructive dismissal. It has been a norm that employees will usually provide a deadline to their employer to remedy the breach or in restoring the employee’s position. In the case of *Govindasamy Munusamy (supra)*, the High Court held that in order to succeed in a case of constructive dismissal, it is sufficient for the employee to establish 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
- The breach is a fundamental one going to the root or foundation of the contract.
- The employee had placed the employer on sufficient notice period giving time for the employer to remedy the defect.
- If the employer, despite being given sufficient notice period, does not remedy the defect then the employee is entitled to terminate the contract by reason of the employer’s conduct and the conduct is sufficiently serious to entitle the employee to leave at once.
- The employee, in order to assert his right to treat himself as discharged, left soon after the breach.

In reliance of *Section 20 of the Industrial Relations Act 1967*, an employee who has been unfairly dismissed without just cause or excuse by his employer, may lodge a representation to the Director General of Industrial Relations within 60 days from the date of his termination. This requirement applies to constructive dismissals as well. As such, any employee who wishes to claim constructive dismissal has to file a written representation at the nearest office of the Director General of Industrial Relations (“DGIR”) to the place of employment within the mandatory 60 days after s/he walks out from the employment. Upon receipt of the representation, the DGIR will attempt to resolve the issues arising between the employer and employee through conciliation meetings failing which the matter may be referred by the Minister of the Ministry of Human Resources to the Industrial Court for determination. Affected by any such decision from the Minister or the eventual Industrial Court award, any aggrieved party may file a judicial review application in High Court to challenge the said decision.

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