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# **THE DOCTRINE OF CONSTRUCTIVE DISMISSAL**

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by

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## THE DOCTRINE OF CONSTRUCTIVE DISMISSAL

### A. The Concept

1. Under normal circumstances, when an employer decides to dismiss an employee, that decision of dismissal will either be communicated in writing or verbally. The employee will be informed that he/she has been dismissed. On the other hand, the concept of constructive dismissal pertains to the situations where the employer does nothing to communicate to the employee that he/she is being dismissed but by reason of the employer's actions, words or omissions, the employee feels that he has been dismissed. What is emphasised in this concept is the **“employer's conduct”** with respect to the particular employee concerned against the backdrop of the employee's contract of employment.
2. There is no legislation governing constructive dismissal, however there are cases decided by the judicial courts, including the Industrial Courts. It is a common law right of the employee to repudiate the contract of service.
3. Where the employer's conduct is such that it constitutes a significant or fundamental breach going to the root of a contract of employment and it shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, an employee is entitled to walk out on his employer and to treat himself as discharged from any further performance of his obligations under his/her contract of employment, on the ground that he has been **“constructively dismissed”**.

4. Hence, what is in contemplation within this concept is a breach of a fundamental or essential term of the contract of employment. In this context, fundamental breach of contract is also regarded as “repudiatory conduct” which goes to the root of the contract of employment.
  
5. 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 p. 92**. In that case, Wong Chee Hong was the Personnel & Industrial Relations Manager of Cathay Organisation (M) Sdn Bhd for the whole of Malaysia. In that capacity, he negotiated a Collective Agreement with the Union and was in the process of implementing the newly negotiated Collective Agreement when he was abruptly issued with a transfer order and asked to report for duty as Cinema Manager of Cathay’s cinema theatre at Overseas Union Garden, Kuala Lumpur. The Company also informed him that the terms and conditions of his employment remained unchanged. He refused to abide by the transfer order and lodged a complaint under **Section 20 of the Industrial Relations Act, 1967**. The Industrial Court held that he had been “constructively dismissed”. The Supreme Court upheld the decision of the Industrial Court and adopted the definition of constructive dismissal given by the English Court of Appeal in **Western Excavating (ECC) Ltd v. Sharp (1978) IRLR p.27**. 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. In such a situation, the employee is entitled to regard himself as being dismissed and walk out of his employment.
  
6. Therefore, the two prong question arises for consideration in determining whether a claim based on constructive dismissal can succeed.

- (i) Did the employer's conduct amount to a breach of the contract of employment going to the root of the contract? Was there a "fundamental breach"? It is fundamental breach if it deprives the other party of substantially the whole benefit that was intended to be conferred under the contract.
- (ii) Did the employee make up his mind and act at the appropriate point in time soon after the conduct of which he had complained had taken place?

**B. Conduct of Employer Need No be a Single Act**

7. The conduct complained may consist of a series of acts or incidents, some may be quite trivial but cumulatively can amount to a breach which is calculated to destroy or seriously damage the relationship of confidence and trust between the employer and employee which can amount to constructive dismissal.  
**Lewis v Motorworld Garage Ltd (1985) IRLR 465**

**C. Burden of Proof is on the Employee**

8. In a claim of constructive dismissal, the employee is responsible for proving that he/she has been constructively dismissed. In **Selangor Medical Centre v Zainal Abidin Md Tamami (2002) 2 ILR 527**, the Court held:-

*“There is no convincing evidence offered by the claimant to prove that the Company had failed the contract test or had repudiated the contract of employment. The claimant is not able to discharge the burden of proof which is on him to prove, on a balance of probabilities, that the Company,*

*as the employer, had been guilty of any fundamental breach which goes to root of the contract or that the Company had evinced any intention of no longer to be bound by it. As such, the claimant is not entitled to regard his contract of employment as being terminated or that he was constructively dismissed.”*

**D. Unilateral Variation of the Contract of Employment**

9. As a general proposition, it can be said that a unilateral variation of the contract of employment by the employer can amount to a fundamental breach and can be regarded as repudiatory conduct which gives rise to a complaint of constructive dismissal.
10. In **Lewis v. Motorworld Garages Ltd (1985) IRLR p.465**, the Claimant was demoted to an unfair position. His actual pay was reduced and he was criticised persistently over eight (8) months by the employer and threatened with dismissal if his performance did not improve. The Court held that the Claimant was entitled to treat the conduct of the employer as amounting to a breach of the implied obligation of mutual trust and confidence and thereby enabling the Claimant to complain that he had been constructively dismissed.
11. In **Amanah Butler (M) Sdn Bhd v. Yike Chee Wah (1994) IRLR p.5**, the Court held that the Claimant had been constructively dismissed by reason of the action of the employer in unilaterally varying/reducing the salary of the Claimant.
12. In **Hotel Malaya v. Goh Hock Fong (1994) 2 ICR p.810**, the Claimant was transferred from a managerial position to what was in fact a storekeeper’s position. The Claimant was held to have been constructively dismissed.

13. In recent times, we have heard of employers unilaterally (that is, without the employee's consent) reducing the salaries of employees. Conceptually, that is fundamental breach and the affected employees can complain that they have been "constructively dismissed".
14. For a complaint of constructive dismissal to succeed in the Industrial Court, it is essential that the employee should act with promptness. It is fatal to a claim based on constructive dismissal if there is undue delay in responding to the changes that were imposed by the employer or generally, in reacting to the repudiatory conduct of the employer.

In **Pexxon Sdn Bhd v. Sia Qui Yau (1989) (1) ILR p.240**, the Industrial Court dealt with the question of the employee's delayed response to a fundamental breach by the employer and said:-

*"So the length of time is a crucial factor by which the Claimant must act to repudiate the contract based on the breach, that goes to the root of that contract. The period of one month has been held to be unreasonable for the Claimant not to have acted against his employer. It seems that once an employee has discovered that there is substantial breach or breaches of employment that goes to the root of the contract of the employment he must so act immediately either by protesting or giving notice to the employer and walking out of the job, otherwise he might be said to have affirmed the new term of the contract, thereby accepting it with the terms added. All this is to be decided on the facts of each case."*

15. However, if the employee stays on under protest, then it is not fatal. In **Marriot v. Oxford and District Co-Operative Soc. Ltd. (No. 2) 1970 (1) Q.B. p. 186**, the Court held that the Claimant had not lost his right to complain of constructive dismissal because he had rigorously protested against the alternative employment that was offered to him at a reduced status and with a reduced wage level. He continued to perform, his tasks under the contract despite these changes, until he could take it no more.
16. It is therefore, essential that the employee make up his mind soon after the changes to the terms of the contract are implemented by the employer. The concept of constructive dismissal is derived from the **non-consensual unilateral variation** of the contract of employment by the employer. Hence, the dissatisfied employee is entitled to consider the variation to be a repudiation of his contract and is entitled to complain that he had been constructively dismissed and so he must, **as soon as he perceives that his contract has been varied without his consent, walk out of his employment.** If he stays on without protest and continues to work under the new terms/conditions imposed on him by the employer, the employee will be regarded as having affirmed the contract and impliedly consented to these changes.

**E. Reasonableness Test or Contract Test**

17. At first blush, it appears as if almost any type of conduct by the employer may be regarded as having the potential for a complaint of constructive dismissal. Initially, it was thought that “unreasonable conduct” by the employer could form the basis for a complaint of constructive dismissal. This is called the **“reasonableness test”**. However, the Courts very wisely rejected the reasonableness test and decided that the correct test is the “contract test”. What does this mean?

18. The contract test simply means that the complaint of constructive dismissal can only succeed where the employee is able to prove that the employer was guilty of **conduct which was repudiatory of the contract**, that is, that the employer had **breached a fundamental term of the contract** and therefore, the employee is entitled to deem that the contract of employment is being terminated. The emphasis here is the contract.
19. The Supreme Court in **Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd**, followed the English Court of Appeal in **Western Excavating (ECC) Ltd v. Sharp (1978) 2 WLR 344** and held that the proper test is the contract test. Subsequently, we have had two Court of Appeal decisions on this issue. In **Ang Benz Teik v. Pan Global Textile Bhd (1996) 3 MLJ p.137**, the Court of Appeal held that the proper question to ask, in the context of a complaint of constructive dismissal, is **whether what happened to the workman was just and equitable**. In doing so, the Court of Appeal appears to have **liberalised the scope** for complaints of constructive dismissal. However, in **Anwar Bin Abdul Ibrahim v. Bayer (M) Sdn Bhd** (Court of Appeal Civil Appeal No. W-02-281-1995), another division of the Court of Appeal reiterated that the proper test is the “contract test”. The Court said:-

*“It has been repeatedly held by our Courts that the proper approach in deciding whether constructive dismissal has taken place is not to ask oneself whether the employer’s conduct was unfair or unreasonable (‘the unreasonableness test’) but whether “the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he evinced an intention no longer to be bound by the contract”.*

20. Thus, it appears that even the superior Courts are still debating on the proper test for constructive dismissal. For the present, it would be prudent to take the position that the “contract test” is the proper test. However, the reasonableness of the employer’s conduct is not irrelevant. Indeed, it may be very relevant in the context of a breach of an implied term as well as in the context of the way in which an express term of the contract of employment is used by the employer.

**F. What Conduct Would Amount to a Breach of Contract?**

21. The following have been held to be breaches of contract entitling the employee to successfully claim constructive dismissal:
- (a) non-payment of contractual bonus (**Persatuan Pemaju Perumahan Malaysia v Yeoh Yong Woi (1995) 1 ILR 367** (Award 91/95))
  - (b) withdrawal of fixed travelling and entertainment allowances (**Persatuan Pemaju Perumahan Malaysia v Yeoh Yong Woi (1995) 1 ILR 367** (Award 91/95))
  - (c) failure to pay salary (**Megaron Sdn Bhd v Toh Yan Fak (1996) 2 ILR 1660** (Award 582/96))
  - (d) changing unilaterally an employee’s remuneration computing basis (**Elite Management Training Centre v Blanche Therese Wilfred (1995) 2 ILR 245** (Award 312/95))

22. The above examples are all breaches of **express terms** of the contract of employment and quite straight forward. However, like all contracts, a contract of employment contains many **implied terms** in addition to its express terms. The Industrial Court has consistently held that a breach of an implied term of the contract of employment entitles an employee to claim constructive dismissal.
23. The following are implied terms of a contract of employment which if breached would be considered constructive dismissal:-
- (i) implied term of mutual trust and confidence (**Kuala Lumpur Glass Manufacturers Co Sdn Bhd v Lee Poh Kheng (1995) 2 ILR 917** (Award 507/95))
  - (ii) putting an employee in cold storage (**Kuala Lumpur Glass Manufacturers Co Sdn Bhd v Lee Poh Kheng (1995) 2 ILR 917** (Award 507/95))
  - (iii) Relegation of job duties (**Amanah Merchant Bank Bhd v Lim Yorke Peng (1995) 2 ILR 260** (Award 314/95); and
  - (iv) Not giving duties (**Bayer (M) Sdn Bhd v Rugayah Bt. Parman (1995) 2 ILR 93** (Award 267/95).
24. In **Wong Chee Hong's** case the Claimant was transferred to an inferior position but the express terms and conditions of his contract of employment remain unchanged. However, the Court held that the employer humiliated the Claimant by demoting him to an inferior position. Thus, it is quite clear that whilst the express terms remained intact in that case, what seems to have happened was that the employer had breached the implied term, that is, the duty/obligation not to do anything that could destroy mutual trust and confidence that should subsist between employer and employee.

25. An employer may invoke an express term in the contract of employment and direct the employee to do a particular thing. The way in which the express term is utilised may call into question the **reasonableness** of the employer's conduct.
26. So, as an illustration, a **transfer clause in a contract of employment** may expressly empower the employer to transfer the employee to any branch within the country. Does the employer have to act reasonably in invoking the transfer clause? Can there be constructive dismissal if the employer acts/behaves "unreasonably" in invoking an express term such as a transfer clause?
27. In **Rank Xerox Ltd v. Churchill (1988) IRLR p.280**, the English Employment Appeals Tribunal, in dealing with a case of where an employee was transferred pursuant to an express transfer clause, held that in determining where under his contract of employment an employee can be required to work, the correct analysis of the terms and conditions of employment is the same as that indicated by the Court of Appeal in **Western Excavating (ECC) Ltd v. Sharp** in respect of constructive dismissal, that is, through contract and not through the overall superimpositions of a test of reasonableness. Thus, according to the decision of the Court in that case, **no question of reasonableness arises** for consideration where an employer transfers an employee pursuant to an express transfer clause.

28. However, in United Bank Ltd. v. Akhtar (1989) IRLR p.507, another division of the Employment Appeal Tribunal held that an **employer was obliged to act reasonably even if it was a transfer pursuant to an express transfer clause**. Unreasonable conduct on the part of the employer may be construed as conduct which is repudiatory of the contract and may give rise to a claim of constructive dismissal. In that case, the employee sought an extension of time to comply with the transfer order as he had very extenuating family/personal reasons which precluded him from immediately going on transfer. The employer's insistence that he abide by the transfer order immediately was regarded as a breach by the employer of the **implied duty of co-operation** placed upon the employer and a duty not to frustrate the other party's attempt to perform the contract.
29. In the United Kingdom, it seems that the employer is expected to display reasonableness even if the employer were relying upon an express term in the contract of employment. The element of reasonableness is important because the lack of it can lead to the inference that the employer is prepared to breach the **implied duty of co-operation** and the **implied duty not to do anything which might damage or erode the relationship** which is based on **mutual trust and confidence**.
30. In Malaysia, there does not appear to be a coherent body of case law on the subject. In Malaysia transfers have frequently given rise to industrial disputes and these are broadly categorised under the rubric of "constructive dismissal." Whilst the Industrial Court recognises that transfer is a management prerogative, it will nevertheless strike down the transfer order if it is found to be a form of victimization or unfair labour practice or if there are mala fides.

**G. Transfer Orders amounting to Constructive Dismissal**

31. In **Amatuer Photo Stores (M) Sdn Bhd v. Peter Ouek (1995) 1 ILR p.384**, the Court held that the Company had no right to force the Claimant to accept a transfer which he deemed as a demotion. The Court found that the transfer was probably mooted in sequel to the Claimant being a prime suspect for the theft of Company files and subsequently having been interviewed by the police. The **dubious circumstances** in which the transfer was imposed on the Claimant and the Company's loss of confidence in the Claimant were sufficient grounds for the Claimant to conclude that he was driven out of his job and therefore constructively dismissed.
  
32. In **Kangaroo Route Sdn Bhd v. Loke Kok Cheong (1994) 1 ILR p.124**, the Claimant held the position of Assistant Production Manager and was later transferred to another branch and was given duties of general services equivalent to a chageman. Whilst recognising that the transfer of employees was a management prerogative, the Court held that such prerogative is not absolute and unfettered and that it **cannot be exercised unreasonably and arbitrarily to the detriment of the employee**. The work given to the Claimant was unsuitable/unbefitting the Claimant's position and to insist on him performing them amounted to a fundamental breach of the contract of employment.
  
33. In **BP Malaysia Sdn Bhd v. Chua Among (1995) 1 ILR p.357**, the Claimant was transferred pursuant to a transfer clause in his letter of appointment and in the Collective Agreement. The Claimant had raised objection to his transfer and had lodged an appeal. The Court dealt with the attitude/conduct of the Claimant who was found to be guilty of indiscipline/insubordination by refusing to accede to or abide by the transfer order. However, and more importantly, it should be noted that the Court ultimately struck down the

transfer order as the Company had failed to have regard to the fact that the Claimant had put in nearly 20 years of service and was nearing retirement and that in the **interest of fairness/social justice**, the Company should have considered the grievances speedily and should have informed the Claimant of the outcome of his appeal instead of pressing for his transfer. The Court held that the Claimant had been dismissed without just cause or excuse but reduced the award of compensation by 40% by reason of the Claimant's contributory conduct. It is interesting to note that the Court also stated that **even if without a provision in writing, a transfer would be implied in a contract of employment and that a transfer should not be challenged at random.**

34. In the recent case of **Chong Lee Fah v The New Straits Times Press (M) Bhd & anor (2006) 1 MLJ 289**, the Company had decided to transfer the Claimant to the Company's subsidiary Company on the ground that the terms of contract of employment empowered the Company to do so. Justice Ram Sharif (as he then was) held that although the transfer was to a subsidiary Company, the Claimant was enjoying better benefits at the parent Company. In the subsidiary Company the benefits were substantially lesser and as such the drastic change amounted to a fundamental breach of contract on the part of the Company and the Claimant was right to consider herself constructively dismissed.
35. Generally, it would therefore be unsafe to imply transferability from one branch to another. Where there is no such provision, or where the transfer is said to be an act of victimization or unfair labour practice, then the Court is likely to rule that such a transfer is improper and the Claimant may claim to have been constructively dismissed.

36. In **Yee Lee Corporation Bhd v. Kannan & Anor (1995) (1) ILR p.231**, the Claimants complained that the Company had repudiated their contracts by effecting a transfer to a subsidiary body in sequence to their Union activities. Being dissatisfied with the Company's manoeuvres, they claimed that they had been "constructively dismissed". The Company adduced evidence that it had issued a memorandum informing that employees were subject to transfer within the Company group. The Court held that the Claimants had been constructively dismissed as the Company had breached a fundamental term of the contract as it **had no contractual capacity to transfer the Claimants**.

#### **H. Re-organisation/Restructuring**

37. The next area of management activity which can give rise to claims of constructive dismissal is reorganisation/restructuring which may necessitate transfers or the employee may find that, he has been cold stored/demoted. Clearly, if as a result of restructuring/reorganisation, an employee is placed in cold storage or is demoted, then based on the principles that were discussed earlier, there would be a basis for a complaint of constructive dismissal
38. In **Lotteries Corp. (Sabah) S/B Sabah v Vincent Lee, Sabah (1991) 1 ILR p.544**, the Claimant was promoted as Personnel and Administration Manager of the company with effect from December 1, 1998. At a special meeting of the company on September 25, 1989 in line with the company's new organisation chart, his name was dropped as personnel and administration manager. He was not transferred to any other position. He was stripped of all his previous powers and duties and was put in "cold storage". In short, his status and position in the company was dramatically altered for the worse. He alleged that the company committed acts of repudiation of his contract of employment. Subsequently, he was informed that he would be transferred to the marketing section with effect from January 1, 1990 without any specific job designation although his salary was not changed. The Court held as follows:-

*“Any transfer or job functions inconsistent and incompatible with claimant’s functions, duties, status and dignity as the personnel and administration manager of the company constitutes a gross breach and repudiation of the contract of employment and is conduct that will seriously damage the relationship between the claimant and the company, entitling him in industrial law to claim that he was constructively dismissed. His transfer to the marketing section was in fact a demotion.*

*From September 25, 1989, he was unilaterally reduced in rank and status and stripped of all his powers, responsibilities and duties and humiliated to the utmost. The fact that the new organisation chart, apart from dropping his name as personnel and administration manager, did not indicate that he was transferred to the marketing section, was clear evidence of mala fides and victimisation.*

*The failure of the company to provide work for the Claimant when there was work was a clear breach of the claimant’s contract of employment - these repudiatory acts taken cumulatively established a strong and indefensible case of constructive dismissal”*

## **I. Forced Resignation amounting to Constructive Dismissal**

39. Forced resignations also have the potential for claims of constructive dismissal. Hence, where there is evidence to show that there was some kind of **threat** and/or **coercion** and/or **persuasion** made by the employer and as a result thereof the employee is **compelled to submit his letter of resignation**, the employee is entitled to complain that his resignation was not voluntary and that he was **constructively dismissed**. (See **Mattel Tools Sdn Bhd v. Gerard Wong (1994) (2) ILR p. 950**).

40. In MST Industrial System Sdn Bhd v. Foo Chee Lek (1993) (1) ILR p.202, the Claimant had tendered his resignation and later maintained that he was forced into resigning and that he had therefore been constructively dismissed. The Court rejected the claim of constructive dismissal. The Court said that:

*“The pressure the employer uses must be repudiatory in nature in order to entitle the employee to resign and claim constructive dismissal. In the circumstances of this case, the time has not come for a man to say “I cannot work here; I must go” The Claimant had acted prematurely. Even as a Court of equity and good conscience it cannot draw conclusion based on assumption. I do not think such an inference can be properly drawn as a matter of course. There is no evidence before this Court of intimidation, threat, duress or what was the state of mind when the Claimant made it crystal clear he had intended to resign voluntarily and in compliance with the contractual term of giving two months’ notice. On the other hand, I am more inclined to the proposition as expressed in his resignation letter that the Claimant wanted to resign of his own accord on 24 January 1991 otherwise the resignation letter should be worded differently. The words and phrases are clear and precise. They are simple enough to apprehend. It has an element of finality. It has the effect of expressing a clear intention. The letter is brief and consisting of a few sentences. As an educated and experienced man holding a position as an Assistant General Manager, surely he would have known what the words or phrases meant as well as their effect or effects. If there had been demand on the Claimant or any pressure applied on him in any way for his resignation he would quite naturally have been expected to raise some kind of objection to the words or phrases he used in his letter. In not doing so at the crucial and material time, must, to some extent, consolidate the contention of his true intention to resign voluntarily.”*

Hence, whether the resignation was voluntary or whether the employee was coerced/forced into resignation is a matter for the Court to decide based on the evidence available.

## **J. Conclusion**

41. It is clear that under the broad concept of “constructive dismissal”, the Courts are adding more and more responsibilities on employers. Employers have to now shoulder greater responsibilities towards its employees in the context of health and safety, co-operation and trust and confidence etc.
  
42. In conclusion, we may say that for the future, more emphasis will be placed on the employer’s conduct with respect to express terms and the way in which the express terms are invoked or utilized, as well as the employer’s conduct with respect to implied terms, particularly the implied term relating to co-operation and mutual trust and confidence. Employers would be well advised to give much thought to their actions and should refrain from conduct which is likely to lead the employee to think that he/she is being squeezed out of employment. Such a concern was expressly dealt with by the Employment Appeal Tribunal in **Woods v. WM Car Services (Peterborough) Ltd (1981) IRLR p.307**, where it was said:

*“In cases of constructive dismissal, an employee has no remedy even if his employer has behaved unfairly, unless it can be shown that the employer’s conduct amounts to a fundamental breach of the contract. Experience has shown that one of the consequences of the Court of Appeal’s decision in Western Excavating (ECC) Ltd. v. Sharp has been that employers who wish to get rid of an employee, or alter the terms of his employment without becoming liable either to pay unfair dismissal compensation or a redundancy payment have resorted to methods of “squeezing out” an*

*employee. Stopping short of any major breach of the contract, such an employer attempts to make the employee's life so uncomfortable that he resigns or accepts the revised terms. Such an employer, having behaved in a totally unreasonable manner, then claims that he has not repudiated the contract and therefore that the employee has no statutory right to claim either a redundancy payment or compensation for unfair dismissal. For this reason, the implied term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust is of great importance."*

43. In summary, it can be stated that the following conditions have to be satisfied in a claim for constructive dismissal as set out in **Secure Guards Sdn Bhd v Her Bhajan Kaur (1996) 2 ILR 1342**
- (a) There must be a breach of contract by the employer, which may be either an actual breach or an anticipatory breach.
  - (b) The breach must be sufficiently important to justify the employee resigning; or else it must be the last in a series of incidents which justify his/her leaving. However, a genuine, interpretation of the contract by the employer does not constitute a repudiation in law.
  - (c) The employee must leave soon in response to the breach and not for some unconnected reason.

- (d) The employee must not delay in terminating the contract in response to the employer's breach. If there is a delay, he/she will be deemed to have accepted the employers breach.

Apart from the above conditions, it would be advisable for the employee to inform the employer why he/she is pleading constructive dismissal before walking out on the employer.

