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What is constructive dismissal?

By Dzran Desa

According to Cambridge Dictionary, constructive dismissal defines **as "actions taken by the employer that intentionally make working conditions for an employee feels forced to leave the job"**. Constructive dismissal is often used by an employer to get rid or reduce the staff which leads to an employee dismissal or resignation from the company.

An employee who was forced to resign or leave the company can file an action against the employer at Industrial Court on the ground of constructive dismissal. A constructive dismissal is also a right of an employee to terminate his employment contract by regarding himself as discharged from his/her obligations as an employee when the employer is guilty of a fundamental breach of contract.

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During Covid-19 pandemic which hit Malaysia since 2020, a lot of companies could not sustain their business and suffered losses and as a result, they are not able to maintain their staffs and most of the employees were being terminated. There are also situations where the employer had breached their contract with the employee by doing certain actions which caused dissatisfaction from the employee which eventually forcing the staff to resign or terminate his contract. In this article, it will focus on the actions by the employer which may constitute a constructive dismissal, burden of proof or elements need to be established by the employee and the procedural steps to be taken by an employee who intend to claim for constructive dismissal in accordance with provisions in **Industrial Relations Act 1967**.

A. What are the actions by the employer which constitute a constructive dismissal?

1. Demoting to a lower rank, transfer to other departments or change of job descriptions.

There are some employers who had breached the terms of the contract of employment by demoting the employee to a lower rank without any justification.

In certain cases, the employee was forced to do jobs which he is not qualified or has no experience. This situation might cause uneasiness or dissatisfaction to the employee.

In order for an employee to claim for constructive dismissal, he must prove that the demotion, transfer and change of job description is not a bona fide act by employer and the act is in fact actuated with improper motive and without justification.

In case of WONG **CHEE HONG v CATHAY ORGANIZATION (M) SDN BHD [1988] 1 MLJ 92**, the Supreme Court held:

"the common law has always recognized the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer'

In contrast, if the employer's action is bona fide, the employee will not succeed in claiming constructive dismissal. This can be seen in the case of **MAK WENG KIT v REED EXHIBITIONS 2001 MLJ 215**, whereby in this case the employee claimed for constructive dismissal when he was re-assigned from his position and claimed that the re-assignment was a demotion.

The Industrial Court held that the re-assignment was not a demotion and therefore the claim for constructive dismissal failed. Dissatisfied with the decision, the employee filed a judicial review at the High Court and the Court held that there was a bona fide action by the employer as the transfer of post is a part of reorganization exercise and was done without improper and the claim for constructive dismissal shall fail.

2. Reduction or non-payment of salary

If the employer cut off or fail to pay the employee salary, can it be considered as constructive dismissal?

An employee salary is a fundamental term in a contract between employer an employee and failure to fulfil the terms by the employer may amount to constructive dismissal. In case of **TAN KOK CHAI v MEGA 9 HOUSING SDN BHD [2020] 2 LNS 0013**, it was held that there was a fundamental breach of contract by the employer when the employee's salary was not paid by the employer.

However, if the employee filed an action on the ground of reduction on commission, he will not succeed in his application. In the case of **CHUA YEOW CHER v TELE DYNAMICS SDN BHD [2000] 1 MLJ 168,** it was held that:-

"An employer has the power to transfer its employees at its absolute discretion. A ground that an employee would receive less earning if transferred to another place because he would receive less commission or no commission at all is not a valid reason to refuse a transfer."

There are other actions by the employer which might amounting constructive dismissal such as sexual harassment, deprivation of work and marginalization which all these acts are without improper motive and subsequently leads to the employee's resignation.

B. What are the necessary elements which need to be established by the employee in order to claim for constructive dismissal?

Before an employee can succeed in his claim against the employer, certain requirements must be fulfilled. The law on constructive dismissal is clearly stated in the case of **ANWAR BIN ABDUL RAHMAN v BAYER (M) SDN BHD [1998] 2 MLJ 599**:-

It is settled that the prerequisite in filing a claim for constructive dismissal are as follows:

a) there must be a breach of contract by the employer/defendant. This may either be an actual breach or anticipatory breach;

b) that breach must be sufficiently important to justify the employee/plaintiff resigning or else it must be the last in a series of incidence, albeit erroneous interpretation of the contract by the employer will not be capable of constituting a repudiation in law;

c) the employee must leave in response to the breach and not for some other, unconnected reason; and

d) the employee must not delay too long in terminating the said contract in response to the alleged breach by the employer or else he may be deemed to have waived the alleged breach.

C. What are the steps need to be taken by the Employee after resignation?

An employee who feels that he 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.

Under the provision of **Section 20(1) of the Industrial Relations Act 1967**,

20.(1) ***Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.***

The representations to the Director General of Industrial Relations must be done within sixty days and failure to do so within the prescribed time, the representations will be rejected.

(1a) The Director General shall not entertain any representations under subsection (1) unless such representations are filed within sixty days of the dismissal

D. Conclusion

After representations being lodged by employee in accordance with **Section 20(1) of the Industrial Relations Act 1967**, two (2) reconciliation sessions between the employee and employer will be held for amicable settlement between parties. There will be a mediator to conduct the sessions and representation by solicitors is not permitted at this stage. If both parties fail to reach amicable settlement, the representation will be referred to the Industrial Court for determination, at this point of stage an employee is allowed to be represented by a solicitor. At the end of hearing at Industrial Court, a decision will be made and an award will be given to the successful parties and in accordance with **Section 33C(1) Industrial Relations Act 1967 (as amended by Industrial Relations (Amendment) Act 2020)** parties who are not satisfied with the Industrial Court's decision may apply a judicial review to the High Court within **fourteen (14) days** from date of receipt of the award.

ABOUT THE AUTHOR

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