Introduction

Constructive dismissal denotes summary termination of the contract of employment not by the employer but by the employee by reason of the employer's conduct.

The doctrine of constructive dismissal is well established in English law, and the employee's right to constructive dismissal is specified in s 55(2)(c) of the Employment Protection (Consolidation) Act 1978 which stipulates that:

An employee shall be treated as dismissed by his employer if, but only if ... (a) the contract under which he is employed by the employer is terminated by the employer ... or (c) the employee terminates that contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct. n1

However, it gives rise to a diversity of views among 'the presiding officers of industrial tribunals and judges of the Employment Appeal Tribunal on what principles of law operate to bring a contract of employment to an end by reason of the employer's conduct: should it be the contract test or the test of unreasonableness'? To put it differently, what type of employer's conduct will justify constructive dismissal: should it be the employer's conduct in breach of the terms of employment contract or unreasonable behaviour on his part that leads the employee to walk out of his employment? n2

In the Western Excavating Ltd v Sharp case decided by the Court of Appeal, Lord Denning MR opted for the contract test and stated the law of constructive dismissal as:

If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which (his conduct) shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct which he complains of: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract. n3
The Malayan Law Journal Articles

Concept under Malaysian law

Following the confirmation of the doctrine of constructive dismissal by the Court of Appeal in *Western Excavating's* case, the Industrial Court in two early cases upheld the plea of constructive dismissal. The decisions of the Industrial Court in both these cases upholding the entitlement of the employees to constructive dismissal were not challenged. It was when the Industrial Court gave an award in favour of the employee, Wong Chee Hong, in *Cathay Organization's* case holding that Wong was constructively dismissed and should be awarded compensation, that this decision was challenged in certiorari proceedings. However, it is interesting to note that notwithstanding earlier awards of the Industrial Court and the unassailable British precedent in *Western Excavating's* case, Justice Harun who heard the case in the High Court ordered the award of the Industrial Court to be quashed on the ground that 'constructive dismissal was not within the ambit of s 20(1) of the Industrial Relations Act 1967. The Industrial Court, therefore, had no jurisdiction.' Since the High Court did not provide the rationale for this conclusion, it might be surmised that it was due to the fact that s 20(1) of the Malaysian Industrial Relations Act 1967 is entirely different from para (c) of s 55(2) of the UK Protection of Employment Act 1978. Needless to say that while this UK Act specifically recognized the right of the employee to terminate the contract of employment by reason of the employer's conduct, the corresponding Malaysian Act on dismissal is silent on this aspect of dismissal.

Nevertheless, when this case went to the then Supreme Court, Salleh Abas LP argued that constructive dismissal could be brought within s 20(1) of the Act when the word 'dismissal' in this section was interpreted with reference to the common law principle. He stated:

The common law has always recognized the right of the 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.

With this ruling by the Supreme Court, the doctrine of constructive dismissal was firmly established in the industrial law of Malaysia. Furthermore, since constructive dismissal has been brought within the ambit of s 20(1) of the Act, dismissal rights under the law — reinstatement or payment of compensation in lieu — are extended to those employees who are compelled to resign because of their employers' conduct.

The criterion currently used in the United Kingdom to determine whether a constructive dismissal has taken place is not whether the contributory conduct of the employer was unreasonable, but specifically:

(a) whether it had breached the contract;
(b) whether the term of the contract breached was fundamental; and
(c) whether the workman left his employment in response to the breach within a reasonable time.

As it will be seen, all these criteria are being applied by the Malaysian Industrial Court in adjudicating constructive dismissal cases. Since it was the common law interpretation of dismissal that brought the concept of constructive dismissal within the meaning of s 20(1) of the Industrial Relations Act 1967, it is logical and imperative that the Supreme Court in *Wong Chee Hong*’s case should require the Industrial Court to apply only the contract test to determine constructive dismissal: common law cannot countenance any other criterion other than breach of contract. The current practice in England lends additional support to the Supreme Court’s requirement that our Industrial Court adheres to this ruling.

In *Lee Chai Siok Elisabeth*’s case, for example, while the Industrial Court held that the claimant was constructively dismissed, the High Court argued that, 'if it had applied the contract test, there would have been 'no constructive dismissal' and the Industrial Court would have had no jurisdiction to act. In wrongly deciding that there was constructive dismissal based on the 'unreasonable test' the Industrial Court committed an error of law which went to its jurisdiction.'

It is appropriate to note at this juncture that eschewing the test of unreasonableness in the determination of constructive dismissal is quite easy so long the Industrial Court following the contract test confined itself to express terms of the contract of employment. As will be explained later in this article, when the focus of the Industrial Court is extended to include not only express terms of contract but also the implied term of contract, then it is inescapable that unreasonable behaviour of the employer comes through the back door to influence the decision of the Industrial Court. This becomes evident when one considers the definition of the implied duty of the employer under the contract: 'Employers will not
conduct themselves in a manner calculated or likely to destroy or seriously damage their relationship of confidence and trust between employer and employee.’ \(^n13\)

**Nitty gritty of 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 are set out below:

(a) 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. \(^n14\) 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 conduct.

(b) 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 what are the terms which the employer is alleged to have breached. Having identified the terms, the next to consider is whether the said terms were essential terms of the contract of employment. The court will then have to assess the evidence adduced before it to determine whether or not the employer had by his conduct committed such a breach of the contract as to entitle the claimant to consider that he had been constructively dismissed. \(^n15\)

(c) 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. \(^n16\) Issues not pleaded are to be discarded by the court; if the Industrial 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 were tainted by the Wednesbury principle of unreasonableness. It is because the court is presumed to have taken into account irrelevant considerations. As will be dealt with later, the Court of Appeal quashed the decision of the Industrial Court on this ground in *Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd*[1998] 2 MLJ 599 at p 607.

(d) In *Hotel Malaya’s case* \(^n17\) the Industrial Court dealt with in considerable detail the process of deciding constructive dismissal cases. In adjudicating constructive dismissal claims by employees, the Industrial Court would generally have to undertake a two-stage process, that is, after deciding that there was a constructive dismissal, the court should then proceed to determine whether or not the employer had 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 was without just cause or
excuse. Furthermore, the onus of proving constructive dismissal is on the employee whereas the burden of proving that the dismissal was with just cause or excuse squarely lies with the employer. In Wong Chee Hong's case, Salleh Abbas LP, in delineating the responsibilities of the employer and the employee in constructive dismissal cases, said that since the appellant had succeeded in showing that he was constructively dismissed, it was for the respondent company to show that the dismissal was with just cause or excuse.

(e) While constructive dismissal was decided by applying the contract test, the rationale for the test of just cause or excuse was succinctly stated by the Industrial Court in the aforementioned Hotel Malaya's case (at p 810): 'The employer who has committed a breach of his essential contractual obligations would be liable for damages in common law. Whether or not he would be liable to the statutory remedies, which are available to an aggrieved workman under s 20(1) of the Industrial Relations Act 1967, has to be determined by the court's finding on whether or not the dismissal, constructive or actual, was with or without just cause or excuse.' In other words, for the employee to become eligible for a statutory remedy of reinstatement or payment of compensation, in lieu, it must be established that the dismissal (actual or constructive) was without just cause or excuse. In Hotel Malaya's case, the claimant, a manager of maintenance, security and bell departments proved on a balance of probabilities that he was constructively dismissed when the company transferred him to the position of manager (Store). When it was the turn of the hotel to establish that it had just cause or excuse for transferring the claimant to the position of manager (store), the company sought to justify the move on the grounds of a management reshuffle. Since the court found that the employer could not establish that the reshuffle was responsible for the transfer of the claimant, it concluded that the transfer was without just cause or excuse.

(f) For there to be a constructive dismissal, the conduct had to be by reason of something which the law regarded as the conduct of the employer. When the employee complained against the conduct of his immediate supervisor, could it be argued that since the immediate supervisor was not the employer or the company, his behaviour could not amount to employer's conduct? The Employment Appeal Tribunal in Hilton International Hotels (UK) Ltd v Protopapa [1990] 1 RLB 316 stated that whether the conduct of the supervisory employee binds the employer, 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. n18

Fundamental breaches

A review of the past cases on constructive dismissal, as adjudicated by the Industrial Court applying the contract test, allows us to broadly classify the claims for constructive dismissal into claims relating to: (a) salary; (b) work; (c) transfers; and (d) others.

Salary

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 no longer to be bound by the contract of
employment.

For example, in *Forari Corporation's* case n19 the Industrial Court held the unilateral decision of the company to reduce the claimant's salary from RM1,500 to RM750 per month constituted a significant breach going to the root of the contract of employment. ‘It is a failure of performance and renunciation by the employer; this is constructive dismissal.’

In a similar case, n20 the assistant general manager of a company earning a gross salary of RM12,000 per month was given a termination letter which also appointed him as a manager for a salary of RM5,200. The claimant spurned the offer by not reporting for work. The Industrial Court, in applying the contract test, held it to be a case of constructive dismissal as there was a fundamental breach of the claimant's contract in relation to his salary, allowances and other benefits besides his status and the security of tenure of his position.

*Kenneison Brothers Sdn Bhd v Selvaratnam* was an interesting case. The claimant was taking excessive medical leave though for bona fide health reasons (psoriasis). The company unilaterally limited his medical leave to 22 days per year on the basis of the average number of days of medical leave he was taking in the past years, and converted his ‘excess medical leave’ into no-pay leave which in fact tantamounted to a reduction in salary. The Industrial Court upheld his claim of constructive dismissal stating that by limiting the claimant’s medical leave to 22 days after his 14 years of service and converting the excess medical leave into no pay leave, the employer was attempting to vary the essential terms of the claimant's contract of employment. n21

In *Maldo-Kaj Communications Sdn Bhd v Abdul Kadar bin Mohd* [1995] 2 ILR 494, the claimant (who was an advertising manager) was not paid his December 1993 salary. The company did not pay his fixed monthly salary because it had decided to pay him on a commission basis. He claimed constructive dismissal and left his job. The Industrial Court decided that the company was guilty of a breach going to the root of the contract because the company's decision to pay him only on a commission basis was not found in the terms of contract.

Finally in *Kilang Beras Ban Eng Thye Sdn Bhd v Yacob bin Noor Mohamed & Anor* [1998] 5 MLJ 195, two of its employees terminated their services on the ground that the company failed to pay their salary by 12 April 1994 whereas in accordance with s 19 of the Employment Act 1955, it should have been given on 7 April 1994. The High Court ruled that when the employer fails to pay their employees' salary within the due date, such a breach of contract was, prima facie, wilful and intentional unless satisfactory evidence to the contrary was given by the employer to rebut the inference. The employer explained that the delay was due to quarrels and misunderstandings at its managerial level. Since the court was not satisfied with this excuse, it upheld the claim of constructive dismissal. n22

These cases aforementioned clearly establish that an employer's duty to pay agreed remuneration is a basic obligation under the contract of employment. A failure to pay agreed wages either at the customary time or at all for any substantial period could be a sufficiently serious breach to amount to repudiation.

In determining constructive dismissal, the repudiatory acts of the employer can be taken individually or cumulatively to establish a strong case of constructive dismissal. In breaches like non-payment of wages or unilateral reduction in wages, a single act of repudiation of contract term is adequate to establish constructive dismissal. Sometimes, repudiatory acts have to be cumulatively considered to prove that the employer's conduct shows an intention not to be bound by the contract of employment. n23 In fact in *Forari*’s case, n24 the Industrial Court considered not only the failure of the employer to pay the claimant's salary but also his unilateral decision to change the mode of payment from a fixed monthly salary to that on a commission basis in coming to the conclusion that the employer had evinced an intention not to be bound by the contract of employment any longer.

More cases involving multiple breaches of terms of contract by the employer will also be presented under the next group of claims of constructive dismissal.

Work

The second group of claims for constructive dismissal arises from the employer's conduct breaching express terms of the employment contract such as failure to give work to the employee when work is available, changes in job functions leading to erosion of duties or relegation of responsibilities resulting in reduction in job status, and changes in working arrangements like working hours.

Failure on the part of the employer to give work when work is available is a ground for claiming constructive dismissal. In *Langston v Amalgamated Engineering Works & Anor*[1974] 1 All ER Lord Denning MR said: 'We have
repeatedly said that a man has a right work which the court will protect ... by which I mean that the man should be given the opportunity of doing his work when it is available and he is ready and willing to do it ... that is, he has the right to have the opportunity of doing his work when it is there to be done. If any person knowingly induces the employer to turn the man away and thus deprive him of the opportunity of doing his work that person induces the employer to break his contract. It is nonetheless a breach even though the employer pays him full wages.'

Sebastian Fernandez, a senior field conductor in an estate, was transferred to another estate and, for no given reason, was not given any work for ten months when there was work to be done. On the strength of Lord Denning's dicta in Langston, the Industrial Court in this case held that this was another breach (there were other breaches in the case) and a repudiation of the claimant's contract of employment that went to the root of the contract and in the circumstances he could claim to have been constructively dismissed. n25

In East Wealth Trend Sdn Bhd & Anor v Chan Phaik Boi[1998] 2 ILR 188, the claimant was a building draughtswoman and the problem with her boss seemed to have emanated by her simple-minded honesty in rectifying the mistake in the instructions given by her boss to her junior Sim in the architectural department which caused embarrassment to her boss (a loss of face); in his instructions to Sim, her boss stated that the number of raisers (the straight portion of a step) for high-rise building plans was 25 whereas the claimant rectified it by changing the number to 19. The next day her boss walked into her office and removed 60% of her work and gave it to her junior. He did not give her any other work to do. The court ruled that it was a repudiation on the part of the company which went to the root of the contract and entitled the claimant to claim that she was driven out of her employment by the unjustified action of the company.

In Koh Ying Woodworking and Lacquering Sdn Bhd v Ali Ak Ginow, n26 the claimant who was a machine operator injured his right thumb while working at the company's planing machine. He was on daily wages and the medical officer certified that he was not fit for work. After 19 days, however, he was certified fit for light work for one month; but the company refused to give him light duty when light work was available. Instead, he was asked to return to work when he was able to resume his normal duties. In the meantime the employee was left to his own wits to provide for his and his dependants' sustenance. The court, citing Lord Denning in Langston's case, n27 ruled that 'employer's refusal to give work when work was there is a fundamental breach going to the root of the contract'.

Jaya Jusco Stores Sdn Bhd v Ganesan a/l Rajoo[1991] 1 ILR 321 illustrated a fundamental breach of contract involving change in work duties. The workman Ganesan was assigned to dishwashing and cleaning duties. He established, on the balance of probabilities, that the changes in his work duties were completely at variance with those that he was contracted to perform as a maintenance mechanic.

Similarly, in Ladang Minyak's case, Ramasamy who was contracted to work as a gardener, was asked to work as a field worker on expiry of his leave. Ramaswamy did not turn up for work in the fields the very same day which he was directed to do so and successfully claimed constructive dismissal alleging that this directive was a breach of his contractual position. n28

Mitsui-Soko's case n29 very vividly illustrates how the employer's conduct resulted in changes in the claimant's duties and responsibilities when the employer relegated her to a position of lesser responsibilities. The claimant was employed as the administration personnel executive and the reported breaches of contract happened when her department was reorganized pursuant to the resignation of her superior. The claimant was relieved of her responsibility of preparing the staff payroll (it was given to her subordinate). Besides being relieved of this function, she was deprived of her other duties of approving claims, maintaining the office equipment and purchasing of various office items as well. The claimant also ceased to sign the company's letters. Whereas before she had two assistants to assist her in her work, she had none later. Furthermore, all staff in the department stopped reporting to her. Finally her responsibility for recruitment of staff was also taken away from her. The responsibility for dealing with existing cases; if there were no new cases, then she would have no work to do. The court held that the changes affected to her job were to the detriment of the claimant in regard to her terms of employment, and constituted a gross breach and repudiation of her employment contract. Her claim for constructive dismissal was upheld.

Another interesting episode of the erosion of a claimant's duties is to be found in May Plastics Industries's case. n30 The claimant was the group human resource manager with responsibilities for recruitment, discipline, ISO, employee counselling and training, besides security. He was reporting to the general manager. When the company recruited a senior group human resource manager, the claimant was told that the new man was only to be in charge of security. However, what transpired was totally different: all the functions were taken away from the claimant and given to the new man.
Added to this was the requirement that the claimant should report to the new man instead of the general manager. The claimant was stripped of all his duties and reduced to signing gate passes to the employees. The last straw which made the claimant realize that he was no longer required to stay in the company was when he was asked to resign. The court decided that the changes brought about in the claimant's job duties showed that the company had a motive to drive the claimant out of the company. The claim of constructive dismissal was granted on the ground that this series of breaches by the employer showed his 'intention not be bound by the contract any longer', thus entitling the claimant to regard the contract as terminated and to treat himself as constructively dismissed.

Dynamic Management Sdn Bhd (Johor) v Yong Yuk Swan[1999] 1 ILR 456 (Award No 277 of 1999) is a recent case where the conduct of the employer clearly showed his intention not to be bound by the contract of employment any longer. The claimant was an assistant marketing manager who was given a promise that she would be made a marketing manager. She was supervising the sales and marketing department. Instead of promoting her as promised, the sale and marketing department was split into two separate divisions. A new marketing manager was recruited to look after marketing activities whereas she was asked only to supervise sales. She protested on the ground that it was a demotion but the company did not respond to her protest. She went on maternity leave and on her return after her leave her name was nowhere to be located in the organizational chart. Her computer had been removed and her cabinet was locked. She wrote to the company and walked out claiming that she had been constructively dismissed. The court ordered her reinstatement within one month without any loss, monetary or otherwise, to her. The reinstatement need not be to the identical post as that previously held but could be to a similar post or any equivalent post.

In JW Palace Hotel's case n31 illustrates that an employer could create a situation where the employee was left with no other choice but to either walk out of her job or resign. The claimant worked as a personnel manager and reported to Eddie, the general manager. When she was promoted to the group personnel manager's post she reported to Ben Raja, the chief general manager. At the time of her annual appraisal, in the absence of Ben Raja who was in Oman, Eddie appraised her performance as the group human resource manager. As a result, not only was her probationary status not terminated but her salary was reduced from RM3,000 to RM1,300 whereas she was drawing RM2,200 on her previous position as the personnel manager. She also contested the validity of the appraisal by Eddie as in her current position she reported to Ben Raja, not to him. In response to her representation, she received a letter containing unfounded allegations and was later suspended for a week. She was also instructed to return all the company's property. On her return from suspension, she was not assigned any work but was told that if she wished to resign, she could do so. The court had no difficulty in upholding her claim of constructive dismissal on the ground that the conduct of the company was clearly in breach of the claimant's contract of employment and was also clearly intended to drive her out of her job. The company was ordered to pay her compensation.

In Motorfil Industries (M) Sdn Bhd v Tan Ah Chye[1995] 2 ILR 57 (Award No 243 of 1995), the claimant was the group human resource manager for the Titan group of companies. He was in charge of the whole range of human resource functions. Consequent on reorganization, he was redesignated as the assistant to the vice-president of human resource and asked to be in charge of only one of the human resource functions, viz benefits and compensation. His other human resource functions like industrial relations, personnel administration, manpower planning and training were taken away from him and assigned to other managers. The claimant considered the reallocation of his functions and the change in his designation to be a demotion though other terms were not changed. He contended that his redesignation as assistant to vice-president was no better than the job of a secretary to the vice-president. He appealed to the company to reconsider its decision and reinstate him to his former position. Pending the outcome of his appeal, the claimant worked under protest for two and a half months. When the company failed to respond, he claimed constructive dismissal which was upheld on the ground
that 'his new position entailed duties incompatible to the claimant's previous functions, status and dignity as the group human resource manager'.

Transfer

It is well established in industrial law that the right to transfer an employee from one department to the other or from one part of the establishment to another, from one branch of the company to another or one company to another within the organization is the prerogative of the management. The consent of the employee is not required in the exercise of such prerogative. However, it is reasonable to expect that there should be some genuine consultation between the two parties wherein the adverse effects of transfer upon the employee may be minimized. However, when there is an express transfer clause in the contract of employment specifically recognizing the right of the employer to transfer his employee, failure on the part of the employer to consult and obtain the claimant's consent is at the most an unreasonable conduct of the employer which is not a ground for claiming constructive dismissal.

Though the right to transfer an employee is the prerogative of the management, this prerogative power is not absolute. The employee can claim constructive dismissal when, for example, the transfer involves a change in the conditions of service to the detriment of the claimant or the transfer is made for the purpose of harassing and victimizing the workman, or in transferring an employee the management is actuated by any indirect motive or any kind of mala fide. Of course, when there is a transfer clause in the contract of employment and it expressly takes away the employer's implied right to transfer or curtails it, the conduct of the employer contrary to the transfer clause will be regarded as a fundamental breach going to the root of the contract. Generally speaking, any transfer involving job functions inconsistent and incompatible with the claimant's functions, duties, status and dignity will constitute a gross breach and repudiation of the contract regardless of the employer's implied right to transfer made mala fide.

In Hotel Malaya Sdn Bhd v Goh Hock Fong [1994] 2 ILR 810, the hotel claimed that consequent to a management reorganization, it had to transfer the claimant from the position of manager of maintenance, security and bell department to the position of store manager. However, the claimant considered it as a transfer which tantamounted to a demotion without justification. Although there was no change in remuneration, he was not given any power to control cost or control of purchases. The Industrial Court held that the relegation of the claimant, who was holding an impeccable record of efficiency and performance to what was de facto a store-keeper's position could not be seriously contended as a step which was taken pursuant to a bona fide management reshuffle. It upheld his claim of constructive dismissal and ordered compensation to be given to him.

In Hotel Malaya Sdn Bhd v Say Lip Nyen [1994] 1 ILR 464, the action of the hotel in transferring its maintenance executive to the newly created job of 'car park executive' without any indication of duties and functions was claimed by the claimant as both mala fide and a breach of contract. When he asked for a job description, the executive director was alleged to have told him that his duty was 'to go and stand around the car park'. Dressed in coat and tie without any duties or functions to perform, he felt frustrated and humiliated. The Industrial Court found that the claimant's new job functions at the car park tantamounted to that of a car park attendant. The company was not only guilty of a significant breach of contract but its conduct showed an intention not to be bound by the contract any longer. It upheld the claim of constructive dismissal and rightly ordered reinstatement to his former position in the maintenance department without any loss whatsoever.

In Amanah Merchant Bank's case the claim for constructive dismissal was on the ground that the transfer of the claimant entailed a change to the detriment of the claimant. The claimant who was a senior secretary in the company with 14 years of service as a secretary, mostly to heads of the various departments, was transferred to a newly created job of 'pool secretary.' Since there was no 'secretaries pool' she, in fact, ended up in the 'pool of clerical typists'. She alleged that when she met the executive director on this transfer, he told her to jump out of the window if she was so upset. To add insult to injury, she was asked to report to the human resource manager's secretary who was recruited and trained by her. The court held that labelling the claimant as a pool secretary, a non-existent position in the company, lent weight to the contention that the transfer resulted in a demotion and downgrading of the claimant's position in the company. Although there was no change in salary and benefits, it was a change made to her detriment, a relegation of job duties and responsibilities, humiliation and loss of esteem among fellow employees and a breach of contract that went deep into its roots.

In Harta Maintenance Sdn Bhd v Vanaja Chelliah & Ors [1999] 1 ILR 639, the claimants were cleaners in Kajang...
Hospital and because of their trouble with their supervisor they were transferred to Kuala Lumpur Hospital. Though the right to transfer was the prerogative of the employer, it should not entail a change to the detriment of the employees. The claimants accepted the cleaner's job in Kajang because the place of their work was just one block away from their homes. However, transfer was detrimental to the claimants as it caused them economic loss, an increase in travelling expenses, and a decrease in their monthly income in terms of overtime income. The court upheld their claim of constructive dismissal.

In Dicklin Sdn Bhd v Bathma Subramanian [1991] 2 ILR 750 (Award No 216 of 1991), the claimant was employed as a receptionist and the company at Kuala Lumpur, claiming it had the right to transfer her, posted her to Sabah. The company ignored her appeal on the basis that her family life would be uprooted as her husband was employed locally and further, that she was looking after her aged, widowed mother. Moreover, in the absence of any promise of meeting relocation expense and air fare to Kota Kinabalu, her meagre salary would cause her financial hardship. The court held that the implied transfer right of the employer did not extend to transferring an employee from West to East Malaysia. Secondly, the company's insistence on her transfer, ignoring her financial and personal problems, was intended to get rid of her without having to retrench her in which case the company had to pay retrenchment benefits. The claim of constructive dismissal was upheld on the ground that the transfer was motivated by mala fide and compensation was ordered.

In Perak Textile Mills Sdn Bhd v Mohd Noor Hawi [1999] 1 ILR 918 (Award No 264 of 1999), the claimant was seen by three officers of the company including the mill's general manager and personnel manager attending to the repair of his car at a workshop in the city while he was on sick leave. Some exchange of rude language had taken place. Subsequent to this event, the claimant was transferred from his department to the newly created department of health, safety and environment, of course without prejudice to his salary or status. However, the department that was created was non-existent before the event. The court upheld the claim of constructive dismissal on the ground that the transfer was activated by mala fide by the company and constituted a fundamental breach of the employee's contract of employment.

In Primasan Sdn Bhd v Chin Ooi Leng [1996] 2 ILR 1708, the claimant was a marketing executive of the company. When in 1995, the allegation of corruption against her was not proven, she demanded and obtained from the company a letter clearing her of all the allegations of corruption. After ten days, she was transferred to a non-existent branch of the company in Kuantan. She refused to accept the transfer and walked out. The court held that the company's intention of sending her on transfer to Kuantan was tainted with bad faith and riddled with suspicion. The alleged Kuantan office was actually the residence of one of the company's employees which informally operated as their branch. Her claim of constructive dismissal was upheld on the ground that the transfer was activated by mala fide by the company and constituted a fundamental breach of the employee's contract of employment.

Other grounds for constructive dismissal

In Plastic Tecnic Sdn Bhd v Saraswathy d/o Manickam & Ors [1991] 1 ILR 643 (Award No 173 of 1991), the company relocated itself from Petaling Jaya to Bangi promising its employees that a free transport service would be continuously provided. However, the bus service stopped after two months. The conduct of the company in stopping the bus service was held to be a repudiation of a fundamental term of the contract, and the employees were, therefore, entitled to regard themselves as having been constructively dismissed.

In Kedah Cement Sdn Bhd v Ahmad Razif Abdulla [1998] 3 ILR 619 (Award No 570 of 1998), the claimant, who was a senior executive officer, was entitled to housing and he was allotted a semi-detached house. Later he agreed to give the house to a new comer on the condition that the company allocated an apartment to him. When one of the company's apartments became vacant, it was allocated to somebody else. Having had his request refused on several past occasions, the claimant considered himself constructively dismissed and the court upheld his claim on the ground that the employer's conduct made continued employment impossible for the claimant.

In Tamil Nesan Sdn Bhd v Ramasamy s/o A Periasamy, Ramasamy, the claimant, was promoted to general manager and looked after the accounts and administration of the office. After he was in his post as general manager of the company for about a year, two new appointments were made, one to look after finance and the other, the office administration. The claimant contended that with these two appointments all his job functions had been taken away. In response he was demoted to the rank of just a manager with no reasons given and a letter from the chairman withdrew two of the perks Ramasamy as general manager was enjoying, viz reimbursement of petrol bills and toll gate bills. Subsequently the size of his room was halved and he was directed to return all the personal files of staff to one of the new appointees. The last straw was the reduction in his salary from RM2,040 to RM1,540. There was no response to his formal protest either to his demotion or reduction in his salary. The outrageous conduct of company proved that 'an employer can place his employee
in a position in which the employee has no option but to tender his notice. In such a situation the reality is and the finding ought to be that the employee is dismissed. It was not surprising that the court upheld the constructive dismissal claim and ordered reinstatement within one month from the date of the award without any loss of benefits, monetary or otherwise. What was more surprising was the application by the company to the High Court to quash the decision of the Industrial Court. It is wise to record that the High Court upheld the decision of the Industrial Court.

**Dubious claims of constructive dismissal**

One of the conditions the claimant is required to prove in claiming constructive dismissal is that he terminated the contract by reason of the company's conduct and for no other reason. The following three cases illustrate the failure of the claimants to succeed in their claims for constructive dismissal because of their hidden motive in seeking constructive dismissal.

In *Dynamics Sdn Bhd v Chua Yeow Cher* [1999] 1 ILR 23, the claimant was offered a posting to Johor Bahru on a promotion to assistant sales manager with a higher salary and other benefits. However, he declined the transfer because as a manager he would not be able to claim variable payments such as commissions. He claimed that without the commission he would receive a lower income and his family commitments precluded acceptance of the transfer. The court held that he could not refuse the transfer because there was a transfer clause in his contract and his entitlement to commission was not due to any term of contract but to an administrative circular. While holding that the claimant could not refuse to go on transfer because of the transfer clause in his contract, the court stated that on the basis of its finding the claimant's refusal to go to Johore Bahru was not because of his family commitments and the amount of his monthly emoluments but because of his plan to join a new company called SMD Technologies Sdn Bhd. His claim of constructive dismissal was only a camouflage to deceive the company. His claim was disallowed.

In *Ming Court Hotel (KL) v Rudy Darius Ogou* [1998] 3 ILR 779, it was alleged that the claimant who was the front office assistant, allotted a room to a customer, collected RM230 by way of room rent but neither keyed in the details nor handed over the money to the cashier. He was suspended pending inquiry with half-pay initially and with full pay later till the end of the inquiry. Though the domestic inquiry found him guilty of the charge, the hotel did not penalize him but cautioned him to be more diligent. He was asked to report for duty on 9 April 1997 and the claimant came back to work. He was subsequently questioned about the behaviour of a female employee at the front desk listening to music on her walkman; but no action was taken then against him. From the totality of evidence adduced the court held that the hotel had not breached any express or implied terms of the contract or employment, and the reason attributed by the claimant, viz that he was put to shame by the inquiries, was frivolous and vexatious. After these events the claimant went on medical leave and while on leave applied for jobs elsewhere. He claimed constructive dismissal on the last day of his leave after securing another job. The court held that since he had already secured another position his claim of constructive dismissal was to make some money from the suit, if by chance, his claim succeeded. His claim of constructive dismissal failed.

In *Jean (M) Sdn Bhd Perak v Premalatha Ponnusamy* [1998] 1 ILR 124 (Award No 26 of 1998), the claimant was an administrative assistant manager in the company. She contended that a series of acts by the company prior to 2 March 1996 coupled with her assignment to a lower position of hostel officer cumulatively amounted to constructive dismissal. The last straw doctrine applied to this case since the events prior to 2 March 1996 were relatively minor compared to her transfer to a lower position: these series of actions comprised a reduction in her normal duties as well imposition of unfair conditions of employment like watching staff clocking in and clocking out which is the responsibility of security guards.

So it was her demotion to the position of hostel officer that broke the camel's back. This last straw doctrine would have helped her to succeed in her claim for constructive dismissal but for the fact that she accepted a new job offer while still technically in the employ of the company. There is nothing wrong in leaving one's job because of a new job offer. However, when the claimant also claimed that she was leaving because of the repudiatory breach by the employer, the Industrial Court must find out what was the effective cause of the resignation depending on the individual circumstances.

The relevant English authority for this approach is the decision of the employment appeal tribunal which held: In deciding whether an employee left employment in consequence of a fundamental breach of contract by the employer, the industrial tribunal must look at whether the repudiatory breach was the effective cause of the resignation. It does not have to be the sole cause. In a situation of potential constructive dismissal, particularly in today's labour market, there may well be concurrent causes operating on the mind of an
employee whose employer has committed fundamental breaches of contract entitling the employee to put an end to the contract. Thus, an employee may leave both because of the fundamental and repudiatory breaches, and also because of the fact that she found another job. In such a situation, the industrial tribunal must find out what the effective cause of the resignation was, depending on the individual circumstances of any given case.

In the present case knowing the attitude of the employer the claimant looked for other jobs and accepted one on 2 March 1996 when technically she was on medical leave till 6 March 1996. She came to know of her demotion from her friend in the office before it became official on 6 March 1996. Her claim of constructive dismissal made on 6 March 1996 was held to be a bold try by the claimant to claim constructive dismissal benefits. Her claim was dismissed.

Time factor

According to the law laid down by Lord Denning MR in the Court of Appeal case of Western Excavating, for a claim of constructive dismissal to succeed, the two limbs of the common law contract test must be present. n39 The first condition is whether the employer's conduct amounted to a significant breach of the contract of employment. The second requirement of the contract test is whether the claimant resigned or walked out of his employment in response to the breach of the contract within a reasonable time. It is important that the workman makes up his mind and acts at the appropriate point in time soon after the employer's repudiatory act or conduct of which he complains had taken place:

If the workman continues for any length of time without actively rejecting or protesting against the act or conduct of the employer, he would be regarded as having elected to affirm the contract, and would lose the right to treat himself as discharged. n40

Although the period of one month has been held to be unreasonable for the claimant not to have acted against his employer either by protesting or giving notice to him and walking out of the job, n41 in the final analysis it is for the Industrial Court to decide, on the facts of each case, whether the claimant resigned in response to the breach of contract within a reasonable time. In Pexcon Sdn Bhd, n42 the claimant worked as a marketing executive; the company by reducing a number of benefits accruing to the claimant had indeed repudiated the contract by a breach that went to the root of the contract. From the facts of the case, it was shown that the letter to the claimant informing him of the reduction in his benefits was dated 17 July 1986 and the reply by the claimant was dated 28 August 1986, a lapse of one month and one week. From the circumstances of the case, the court assumed that the claimant had accepted the new terms. He therefore could not claim constructive dismissal.

In MPH Bookstores Sdn Bhd v Lim Jet Seng[1987] ILR June 585, the claimant who was of an executive status was posted to supervise a bookstore on 28 July 1985 and was thereby forced to carry out duties of a subordinate staff. He further contended that while his designation and salary remained unchanged, he was in fact demoted and was subject to unfair and oppressive working conditions designed to humiliate him and to force him to resign. However, his claim of constructive dismissal on 28 August 1985 failed since he continued in employment without a demur and this became fatal to his claim at a later date and he had thus forfeited his right to claim constructive dismissal.

Another poignant reminder of this crucial requirement is the case of the personnel manager in Kelang Container Terminal Bhd. He was redesignated by a letter dated 5 December 1990 to the post of public affairs manager which he accepted. However, it was found later that he was relegated to a position performing work of a trivial nature. While the Industrial Court found the redesignation as tantamount to a significant breach which entitled him to resign, it, however, ruled that 'by signing the letter of acceptance and moving to his new job and staying on between 5 December 1990 to 24 January 1991, in the circumstances of the case, this implied that the claimant had agreed to an otherwise repudiatory change. He implied by the delay that he had elected to affirm the new terms of the contract.’ n43

In Merlin Management Corp Bhd & Faber Group Bhd v Abdul Rahim Jenali [1994] 2 ILR 1128, the marketing and sales director of the company was asked to report to the new head of the department of marketing and sales, to discharge his functions with the approval of the new head and even to vacate his room and move into a small room to accommodate the new head. Though the conduct of the company constituted a repudiatory breach of the director's contract of employment, the claimant did not protest against these changes effected on 27 September 1989; when he later claimed constructive dismissal on 18 October 1989, the delay of 22 days in terminating the contract in response to the company's
conduct was deemed to be an implied waiver of the variations effected in the contract. His claim was not upheld.

In *Hotel Malaya Sdn Bhd v Say Lip Nyen* [1994] 1 ILR 464, the sales executive of the company was transferred to the position of car park executive; after working in the car park for two days, the claimant found that his new job at the car park tantamounted to that of a car park attendant and therefore claimed constructive dismissal. The court was of the view that the claimant’s resignation two days after reporting for work at the car park was not an election to affirm the variation. In the circumstances of the case, it may be acceptable for the workman to stay on for a while in his new post so that he would be in a position to know whether there was any breach of his contract of employment. The court therefore ruled that there was no affirmation of the contract.

In *Funai Electric (Malaysia) Sdn Bhd v Salliah Ahmad* [1997] 2 ILR 1002, the claimant, an assistant manager (shipping) claimed constructive dismissal on the ground that her transfer to the service parts department resulted in erosion of her duties and responsibilities. She claimed constructive dismissal only after reporting to the new position and after being there for 12 days. The court allowed her claim of constructive dismissal notwithstanding the delay of 12 days on the ground that the claimant had to report to the new position and spending 12 days to find out whether it was indeed a demotion was not fatal to her claim.

Similarly, in *Titan Polyethylene (M) Sdn Bhd v Othman Busu* [1997] 3 ILR 505 when the company demoted the claimant from the position of group human resource manager to assistant to the vice-president of human resource, he wrote to the managing director to reconsider his decision and reinstate him in his former position. Pending the outcome of his appeal, the claimant worked under protest for 2.5 months before claiming constructive dismissal. He explained that the delay was there because he wanted to give the company a chance to remedy the breach. The court did not hold the delay as amounting to affirmation of the new terms of his contract.

In *Konnas Jet Cargo Systems Sdn Bhd v Cheah Cheong Tian* [1995] 2 ILR 800 the claimant was a general manager of the company and a memo from the company dated 3 February 1987 unilaterally altered his duties and responsibilities and also made him subservient to an assistant general manager brought in from the parent company. The breach of contract as alleged occurred on 3 February 1987 but the claimant only left his employment on 6 July 1987, more than five months later. Since the company insidiously committed a series of breaches inconsistent and incompatible with the claimant's functions, duties, status and dignity as general manager of the company only after its letter dated 3 February 1987, the court ruled that the delay was not fatal.

In the strange case of *Akmal a/l Lazarus*, when Akmal resumed duty after being under disciplinary suspension for six years, he was relentlessly subjected to a continuous series of acts by the company in order to frustrate him and to force him to leave the job. Since he protested against the fundamental and substantial breaches of the contract right from the start and never ceased to protest till the date he left, the Industrial Court held that the claimant resigned in response to the breaches within a reasonable time, though these breaches and protests lasted over a period of ten months.

*Breach of implied term of contract*

The contract test, instead of the more generous test of unreasonableness, restricts the scope for claiming constructive dismissal. However, the severity of the restrictive contract test has been considerably reduced in England by the employment appeal tribunal when in the *Woods* case it set out a general implied contractual duty 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 confidence and trust between employer and employee. This case also emphasized that it was an overriding obligation independent of and in addition to the literal terms of the contract.

This implied term is regarded as one of great importance in good industrial relations, and ‘any breach of that implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract.’ The Court of Appeal in *Motorworld's case approving Woods* test added that the breach of this implied obligation of trust and confidence ‘may consist of a series of acts or incidents, some of them quite trivial, which cumulatively amount to a repudiatory breach of the implied term of the contract.’ Furthermore, it was stated that ‘for a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract. The tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. To put it differently, if the cumulative impact of a series of acts or incidents were to be such that the employee cannot be expected to put up with it, he can successfully claim constructive dismissal on the ground of a breach of this implied term of contract.'
The following cases, randomly selected, portrays very vividly the type of employer's conduct which breaches this implied term of contract. Some of these cases may also illustrate one or two additional dimensions of this implied duty or obligation of the employer toward the employee.

The case of **Sebastian Joseph Fernandez** was perhaps the earliest in which the Industrial Court applied the *Woods* test to establish constructive dismissal. This case also vividly illustrates a vindictive transfer reflecting harassment and victimization of a senior employee. The claimant was a senior field conductor in Bhutan Estate and his refusal to connive with management malpractices and his espousal of the workers' cause against management's unjust conduct towards them were responsible for his transfer to Bukit Cherakah Estate and for the dehumanizing treatment he received when he reported for duty at Bukit Cherakah Estate.

The claimant was put through a humiliating ritual for ten months; the management refused to give him any work all these ten months when there was work to be done; he was forced to live in the guard room since proper accommodation for him was refused; the manager refused to talk to him and the labourers threatened his safety. While his salary was paid at the Bukit Cherakah office for eight months, it was sheer malice that the claimant was asked to go to the head office to get his salary for the last two months.

The Industrial Court held that the outrageous conduct of the management was a clear breach of the implied term in the claimant's contract of employment that he would be accepted in his place of work, given work and treated at least with a modicum of decency and respect and briefed on his duties. Particularly, the conduct of the company which led the claimant to seek shelter in the guard room of the estate for ten months was a gross breach of that implied term referred to in the *Woods* case and amounted to a clear repudiation of the claimant's contract of employment, a repudiation that went to the root of the claimant's contract. Commenting on the employer's treatment of a senior field conductor of 13 years' experience, the Industrial Court observed that it was a form of unmerited punishment and gross victimization. Even prisoners condemned to penal servitude for life were treated with more humanity. It was needless to say that this case bore testimony to the observation of Sir John Donaldson that 'an employer can put his employee in a position in which the employee has no option but to tender notice; in such a situation the reality is and the finding ought to be that the employee is discharged.'

Sebastian Joseph Fernandez as well as the *Lotteries Corp*'s case as analyzed by the learned Chairman of the Industrial Court, Satchithanandhan brilliantly demonstrate that the conduct of the employers in these cases is such that it lends itself to uphold the claim of constructive dismissal on the grounds of all the known laws governing constructive dismissal encompassing not only the express and implied terms of contract of employment but also the dicta of Lawton in the *Western Excavating* case.

In *Lotteries Corporation*, the claimant Vincent Lee was a confirmed Personnel and administration manager with an unimpeachable work performance; under the purported reorganization exercise, the new organizational chart retained the position of personnel and administration manager but dropped the claimant's name under this position. He seemed to have disappeared into oblivion since he was neither transferred nor given another designation. Thereafter, the company committed a series of acts calculated to damage and destroy the relationship of trust and confidence between the claimant and the company.

The claimant after the new reorganization was stripped of all his previous powers and duties and was put on cold storage for three months without any specific job designation although his salary was not changed. Most of the time he was staring at the walls of his room. In other words, even though his position was not made redundant, he was not given work when work was available and he was willing to do it. After three months of 'no work' he was transferred to the marketing department without any specific job designation. Since he was not a marketing man, he objected to the transfer to the marketing department. The company turned a deaf ear when he wrote to the general manager and executive director seeking clarification on his job duties and when there was no response he wrote to the executive director stating that he construed his transfer as a demotion entailing a loss of his status and dignity. The lack of response from the company despite his protests was construed by the court as evidence of its mala fide. Finally he wrote to the executive director a letter in which he said that his purported transfer to the marketing department was obviously contrived to secure his eviction from employment and left the service of the company claiming constructive dismissal.

The court held that the failure of the company to provide work to the claimant when there was work was a clear breach of his contract of employment. Furthermore, the claimant was unilaterally reduced in rank and status and stripped of all his powers, responsibilities and duties and humiliated to the utmost. The court upheld the claim of Vincent on the
ground that these series of acts taken cumulatively established a strong case of constructive dismissal.

_Sri Ramakrishna_'s case n56 is peculiar in that a highly qualified expatriate engineer who was brought in from India to occupy a position of great responsibility in the company claimed constructive dismissal within only six months after his employment commenced by reason of the employer's repudiation of the implied term of his contract of employment. The managing director of the company resentened the amendments which the claimant made in the offer of appointment letter. The changes related to provision of furnished family accommodation, provision of telephone in the said accommodation and reimbursement of air tickets and also some corrections in the words used in the offer letter.

Not openly showing his displeasure towards the claimant, the managing director, when the claimant arrived to report for duty, promoted him to group project co-ordinator and not only promised two months' bonus but also the inclusion of the benefits which the claimant requested in the revised letter of appointment to be given to the claimant. However, no revised letter was given; instead he was asked to move from the second floor to the first floor which was occupied by junior engineers and was given a cubicle without a telephone while all the time his room on the second floor was left unoccupied. Moreover, he was made to type progress reports and minutes of meetings. In the course of time, he ended up typing personal letters of the managing director. Often times, outside of office hours and during Sundays as well, the managing director would ask him to come to office only to be told 'I needed you then; not now; you can go back.' Finally, his salary for June 1994 was not paid on the due date, but only by the end of July which is a breach of a fundamental term of the contract of employment.

The series of actions by the employer over a period of time was considered by the court as current and operating even up to the time the claimant left the company claiming constructive dismissal. In the court's opinion the claimant who held a senior post of manager was demoted in his duties to that of a glorified stenographer. The court held that the conduct of the employer amounted to a clear breach of the implied term of the contact of employment, for 'this breach of implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amounted to a breach of the implied term though each individual incident may or may not be so'.

_Hydrabend_'s case n57 illustrates that the repudiatory conduct by the employer may consist of a series of acts or incidents some of them quite serious, some of them quite trivial which cumulatively amount to a repudiatory breach of the implied term of the contract. The claimant was a production manager in the employ of the company, and personal differences between Peter Yap, the general manager, and the claimant was the reason for the series of actions emanating from Peter Yap. Summoning the claimant for a meeting in his office, and Peter Yap told the claimant to vacate his office immediately and to sit with the administrative staff. When the claimant asked Peter Yap for the reason, the latter told him to do what he was ordered to do. The claimant's functions in the factory as the production manger were taken away and he was asked to record names of employees who visited the toilet and to record the time they spent in there. When the claimant refused to vacate his office in the factory, Peter Yap ordered the security guard to escort him out and remove all the claimant's personal effects from the office which he occupied. Finally, after the claimant was forced to vacate his office, Peter Yap instructed the security guard to bar the claimant from entering the factory the next day. Stating that the company must realize that no man worthy of self-respect and self-esteem would bear such blatant acts of utmost humiliation, the court not only upheld the claim of constructive dismissal but ordered reinstatement of the claimant in his former position without any loss of benefit, monetary or otherwise, within one month of its award.

_Abe Hatome (M) Sdn Bhd v Chan Kuan Hong_[1998] 1 ILR 132 (Award No 28 of 1998) is another case in which the employer's conduct was deemed to have been calculated to cause humiliation and loss of esteem to the claimant among his fellow workers. The facts of the case are as follows: The claimant, a public relations officer of the company, was earlier dismissed and reinstated due to successful conciliation by the industrial relations department. Displeased with his reinstatement, the managing director resorted to a series of conduct which, according to the Industrial Court, constituted a breach of the implied term of the contract: on the claimant's return to work he was asked to sit next to the managing director so that he could be spied upon; he was deprived of the use of his telephone extension; and was subject to a new rule made for him requiring him to requisition stationery and other office items only with the approval of the managing director. When on medical leave, he was asked to give a written report of the reason why he was unable to work; he was not only not restored to his normal duties but made to perform the functions of a chauffeur for the Japanese guest of the company during the period of the guest's stay. He waited like a regular driver to bring the Japanese guest Mr Wada from his home and to take him home from office often after office hours. Mr Wada also treated him as a driver by sitting at the back when the claimant took him for sightseeing to Melaka and back. Thus he was made to perform jobs incommensurate with his position. The cumulative effect of this series of events further constituted a repudiatory breach of the implied
contractual term of trust and confidence which entitled the claimant to successfully claim that he was constructively dismissed.

In *Citra Technology*’s case, n58 the claimant came from another company taken over by Citra Technology Berhad and was to be appointed as a facilities engineer in Citra. A clause pertaining to the continuity of his service was included in his contract of employment only after his representation to the Labour Department. Annoyed with the claimant for dragging the company to court, the employer resorted to a series of actions aimed at frustrating the claimant and forcing him out of employment. To start with, he was not required to attend the heads of department meetings; his subordinates were asked to report to the manufacturing engineer; his normal duties were given to one Mr Chu who has just joined the company. In lieu of his former responsibilities he was given very minor duties such as getting quotations from suppliers and contractors, and to pay office utility bills. His claim for constructive dismissal on the ground that he was put in ‘cold storage’ was upheld. The court held that the conduct of the employer amounted to a breach of the implied term of contract.

In *May Plastics*’s case, n59 the claimant was a group human resource manager and he functioned as the Head of human resources with responsibilities for the whole spectrum of human resource functions including recruitment, discipline, security, ISO employee counselling and training. When the company appointed an army colonel as senior group human resource manager, the general manager told the claimant that he was brought in to be in charge of security and the claimant would continue to be the head of human resource. However, what transpired was totally different. Not only were all the human resource functions taken away from the claimant and given to the new man but the claimant was required to report to the new man instead of the general manager as previously.

There was no doubt that the company's conduct was a serious breach of the express terms of his contract of employment and showed that the company had a motive to drive the claimant out of the company. Instead of claiming constructive dismissal and leaving, the claimant, however, chose to continue his employment with this company. Gradually, his position in the human resource department became apparent by a series of actions by the company; no more he was required to attend heads of department meetings nor the meeting of the safety committee. The new man as the head of human resource took over these responsibilities. The last straw which made the claimant realize that he was no longer required to stay on in the company was when the general manager and the new head demanded him to resign from the company, offering compensation of three months' salary if he obliged. The claimant wrote a letter on 19 October 1993 treating himself as constructively dismissed.

Though the claimant could have been considered as having affirmed the serious changes in his position, the court not only held otherwise but also ruled in favour of the claimant that he was constructively dismissed. In so deciding, the Industrial Court had drawn support from the issue of principle which the Court of Appeal (UK) raised and answered in the affirmative in *Lewis v Motorworld Garages*’s case n60:

> If the employer is in breach of an express term of a contract of employment, of such seriousness that the employee would be justified in leaving and claiming constructive dismissal, but the employee does not leave and accepts the altered terms of employment; if subsequently, a series of actions by the employer might constitute together a breach of the implied obligation of trust and confidence; is the employee then entitled to treat the original action by the employer which was a breach of the express terms of the contract as a part — the start of the series of actions which taken together with the employee's other actions might cumulatively amount to a breach of the implied term? In my judgement the answer to this question is clearly 'yes'.

*Why constructive dismissal claims fail?*

The foregoing analysis of cases involving claims of constructive dismissal bears ample testimony to the fact that employers tend to find ingenious methods to frustrate their employees in their jobs in order to obtain their resignations. Eversince the introduction of the contract test in Western Excavating’s case, experience in the industrial relations arena in the United Kingdom also confirms this kind of employer's conduct with an improper motive. Lord Browne-Wilkinson explicitly recognized this kind of conduct on the part of the employers as the reason for implying into all contracts of employment (to keep within the contract test) the implied term that the employer will not, without reasonable and proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and
trust between the employer and employee. n61

To quote Lord Browne-Wilkinson in *Western Excavating's* case has been that employers who wish to get rid of an employee or alter the terms of employment without becoming liable either to pay compensation for unfair dismissal or a redundancy payment have had to resort 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. It is for this reason that we regard the implied term we have referred to as being of such importance. In our view, an employer who persistently attempts to vary an employee's conditions of service (whether contractual or not) with a view to getting rid of the employee or varying the employee's terms of service does act in a manner to breach the implied term. Any breach of that implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract.

The Court Of Appeal (UK) in approving the *Woods'* test added a liberal guideline that 'although a single act by the employer may not tantamount to a fundamental breach, a series of acts which by themselves may not be fundamental breaches can tantamount to a fundamental breach if looked at it cumulatively'. n63

Notwithstanding the decisions, definitions and guidelines on constructive dismissal by the courts both in the United Kingdom and in Malaysia, it should be emphasized that 'the conduct of the employer which justifies an employee walking out of his job and claiming that he had been constructively dismissed from service still remain undefined. This has caused problems of two types: firstly, workmen are now assuming that any conduct which offends them in any manner tantamounts to a breach of contract. Many of them have found too late in the day that not every conduct of the employer can tantamount to such a breach as to justify them walking out of their jobs; secondly, there are also many employees who attempt to abuse the doctrine of constructive dismissal in an attempt to get a windfall from the employer.' n64 Since we have illustrated the second problem with cases n65 it remains to be seen 'on what grounds the industrial courts have come to the conclusion that the claimants have not been constructively dismissed but have either resigned or abandoned their jobs and also why some claims of constructive dismissals are dismissed on the ground that they are either premature or defective. The cases considered below exclude those claims of constructive dismissal not upheld by the courts on the ground of deemed affirmation or acceptance of the varied terms of the contract by the employee.

In *Kilang Kelapa Sawit Morib Sdn Bhd v Philip Kutty Thomas*[1997] 2 ILR 266 (Award No 262 of 1996), the claimant was a mill executive in the company. He returned after a major surgery to report for work. However, in view of his medical condition the company thought it was best for the claimant to be transferred to Gadong Estate as a field supervisor which would not entail any hazardous work. Since he was already a mill executive the claimant refused the transfer as it was a demotion and alleged that the company had committed a fundamental breach of his employment term. Realizing its mistake, the company revoked its order and asked the claimant to report back to his mill job. However, he was adamant and claimed constructive dismissal. Since the company revoked its order even before the claimant made his representation to the Industrial Relations Department the Industrial Court decided that the claim of the claimant that he was constructively dismissed was premature and without any basis whatsoever.

*Kilang Port Management Sdn Bhd v Mohd Zulkifle bin Jamalum* [1995] 2 ILR 613 (Award No 409 of 1995) is a case concerning a senior traffic officer in the cargo division of Kilang Port Management. His service contract included a clause that as a part of his duties he could be asked to perform any other duties as instructed from time to time. His division faced an acute shortage of stevedores and the claimant was assigned the work of planning the manpower for the cargo division for the next five years. Since he could not complete the work within the required time period of two weeks, the company relieved him of his duties and responsibilities as traffic officer and delegated them to his subordinate so that he could attend to the manpower planning assignment. However, the claimant claimed that he was stripped of all his duties and responsibilities and assigned to do work of a clerical nature. Since the claimant was relieved of his duties only as a temporary measure to enable him to complete the assignment which he is best suited to do and there was nothing clerical about the job, his claim of constructive dismissal was not upheld, on the ground that it was premature.

In *Helu-Trans Sdn Bhd v Anitha Rani a/p Shivan Ditta*[1995] 2 ILR 989 (Award No 523 of 1995), the claimant was the secretary to the expatriate executive director of the company. Since he left all of a sudden, the claimant did not have much work. The company asked her to take unrecorded leave with pay. After the expiry of the unrecorded leave, the claimant wanted an extension of leave. The company gave her annual leave instead and after a day asked her to report for work within three days since a new director had arrived. She failed to report for work. Nor did she give any reasons.
for not doing so. Arguing that granting an employee unrecorded leave was an ordinary act and not deprivation of work especially when there was a valid reason for doing so, the court held that it could not be a breach of contract when the employee readily accepted the paid holiday and after enjoying the leave complained that the employer had not provided her with work. Similarly, asking the claimant to hand over the keys to the director's room where some files were kept when she went on unrecorded leave was not unreasonable. Since the company had not breached any term of her contract nor evinced any intention to get rid of her, the court held that she had resigned or abandoned her job.

In **TDM Bhd/Top Plantation Management Sdn Bhd v Cik Dhalia Ahmad** [1993] 2 ILR 7 (Award No 185 of 1993), the claimant was a personnel and administrative officer in TDM Bhd and was transferred to its subsidiary, also to the position of personnel and administrative officer. Though no job specifications were given to her in the new place, she was given an insurance file to look into. She wrote to the company that unless she was notified of her designation and duties by 30 April, she would consider herself constructively dismissed. The court held that since she continued to hold the same position of personnel and administrative officer, there was no need for the company to give her any job specification. Furthermore, she did not return to work on 30 April 1990, the deadline that she had given the company for explaining her job function. Since there was no breach of contract by the company, the claimant was deemed to have abandoned her employment.

In **Bayer (M) Sdn Bhd v Anwar Bin Abd Rahim** [1994] ILR 473 (Award No 171 of 1994), Anwar was the personnel and administrative manager of the company; when a new managing director took over, Anwar claimed constructive dismissal on the basis of a series of changes which the new managing director brought about which affected his job functions and job status. These included taking away his administrative manager's post from him, taking away his responsibilities from warehouse and transport, taking away his car park lot to give it to an expatriate, removing his secretary and his staff, not naming him as personnel and administrative manager in the board of governors' meeting, asking him to report to his colleague instead of the managing director and finally proposing that the claimant and TS Chee exchange their present rooms to meet the additional space required by the diagnostic section. Seriously objecting to this proposed exchange of rooms which gave him the impression that the MD wanted him to leave the organization, Anwar claimed constructive dismissal and walked out soon after handing the letter to the MD's secretary.

The Industrial Court took into account the chain of events including the final conduct of the employer in proposing Anwar to move to a smaller room and ruled that the employer was guilty of breaching the implied term of contract. However, it was a fact that all the events listed above except the proposed change of rooms took place around three months before the claimed constructive dismissal, and the claimant did not take up the issue of protest till he left the service of the company.

The Court of Appeal did not uphold Anwar's claim of constructive dismissal on the following grounds: firstly, the doctrine of waiver or condonation applied equally to employees. Therefore, if cumulative misconduct was being argued, it must be pleaded and evidence had to be given to show that each misconduct was so connected with the culminating act of misconduct as to form part of the same transaction. Secondly, the Industrial Court had erroneously permitted the claimant to raise all sorts of other matters not pleaded. n66

Since the Court of Appeal isolated the issue of the proposal to move Anwar to a smaller room from the events that preceded it, it confined the inquiry to whether the company's proposal was made with a view to finding a solution to problems of space or whether it was done to evince an intention no longer to be bound by the contract. Applying the contract test (only this test could be applied to judge this single act of the company), the court held that there was no fundamental breach that went to the root of the contract. When the case went to the Federal Court, it also decided that Anwar was not entitled to consider himself dismissed because the acts 'did not go to the root of the contract’. n67

**Development of law of constructive dismissal**

**Contract test**

Constructive dismissal, we know, denotes summary termination of the contract of employment, not by the employer but by the employee by reason of the employer's conduct. However, in the absence of any guidelines in the English industrial law, the issue as to ‘what principles of law operate to bring the contract of employment to an end by reason of the employer's conduct’ took some time to be settled. To put it differently, what needed to be decided was whether the employer's conduct entitling the employee to repudiate the contract should be determined by the contract test or the test of
unreasonableness. The reasoning by Lord Denning in *Western Excavating's case* n68 resulted in the ruling of the English Court of Appeal in favour of the contract test in determining constructive dismissal.

Since it was the common law interpretation of the word ‘dismissal’ that brought the concept of constructive dismissal within the coverage of s 20(1) of the Industrial Relations Act 1967, Salleh Abas LP of the Supreme Court in *Wong Chee Hong's case* n69 had no other option but to adopt the contract test, to determine constructive dismissal: common law would not countenance anything other than the contract test.

For a claim of constructive dismissal to succeed under the contract test, both the limbs of the contract test must be present: n70

Firstly, did the employer's conduct amount to a breach of the contract of employment going to the root of the contract or had he evinced an intention no longer to be bound by the contract, thereby entitling the workman to resign?

Secondly, did the workman make up his mind and act at the appropriate point in time soon after the conduct of which he had complained, had taken place?

The actual and the anticipatory breaches of the contract of employment by the employer and the requirement that the employee's response to this employer's conduct must be within a reasonable time have been amply illustrated in this article.

The next stage of development of the law on constructive dismissal was marked by the inclusion of an implied term of contract, a breach of which constituted a solid ground for constructive dismissal. This implied term of the contract of employment requires the employer:

... not to conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. n71

It is to be emphasized that this implied term of contract is an overriding obligation independent of, and in addition to, the literal terms of contract. n72 Furthermore, the breach of this implied obligation of trust and confidence may consist of a series of acts and incidents, some them quite trivial which cumulatively amount to a repudiatory conduct by the employer. n73

Constructive dismissal cases illustrating the conduct of employers breaching the implied term of contract in all its ramifications have been included under the section dealing with the implied term of contract.

As noted in the introduction, the contract test, instead of the more generous unreasonable test, restricts the scope for constructive dismissal claims. However, the severity of the restrictive contract test has been considerably reduced in Malaysia when in the early nineties the Industrial Court adopted Woods test of implied contractual dismissal to determine constructive dismissal. As observed by the author, the adoption of Woods' test brought in the test of unreasonableness through the back door. The oft quoted observation of Sir John Donaldson confirms this inclusion of unreasonable conduct of the employer constituting a strong ground to uphold claims of constructive dismissal:

An employer can place his employer in a position in which the employee has no option but to tender his notice. In such a situation the reality is and the finding ought to be that the employee is dismissed. n74

**Lawton test**

It is appropriate at this juncture to consider Lawton LJ's approach to the determination of constructive dismissal. It is better to articulate this approach through Lawton's own words:

I do not find it either necessary or advisable to express any opinion as to what principles of law operate to bring a contract of employment to an end by reason of the employer's conduct. Sensible persons have no difficulty in recognizing such conduct when they hear about it. What is required for the application of this provision (s 55(2)(c) of the Trade
Union and Labour Relations Act 1974 (UK)) is a large measure of common sense. n75

For example, Lawton LJ himself stated that 'persistent and unwanted amorous advances by an employer to a female member of the staff would be the kind of behaviour which would be regarded as so intolerable that the employee could not be expected to put up with it'. n76 There is no denying that it must be rightly decided as conduct justifying the employee repudiating the contract, even if no breach of contract would have been involved.

Some cases both in England and in Malaysia have been judged on Lawton's dicta in determining claims of constructive dismissal. For example, the decision in Palmanor's case n77 is based on Lawton's reasoning; call it Lawton's test if you like. In this case, the claimant was a Spanish bar-tender who was taken to task by his employer for coming to work late; actually he was on time, not late, according to internal arrangements made with a co-worker. While he was trying to explain the situation to the employer, the employer did not listen to him but used unprintable abusive words, the least offensive of which was 'bastard'. It should be emphasized that though the claimant's employer threw at him invectives, there was definitely no intention on his part to breach the contract in such a way that the breach went to the root of the contract. When the claimant walked out of his job, all that his employer expected of the claimant was to swallow the invectives and come back to his job. This was evident from the employer's outburst at the claimant: 'If you leave me now don't bother to collect your money, papers or anything else. I will make sure you don't get a job anywhere in London.'

The employment appeal tribunal rightly observed that it was required to ask itself the question of whether the employer's conduct was so unreasonable that it really went beyond the limits of the contract. Though the employers' conduct had not breached any terms of the contract of employment nor did he seem to have evinced any intention no longer to be bound by the contract, the foul-mouthed treatment extended to the Spanish bar tender by the employer was held to be a repudiation of the contract.

The Malaysian Syarikat Sports Totocase, n78 in which the Industrial Court relied on Lawton's dicta in addition to that of Wong Chee Hong is a strange and the most extraordinary one in the annals of industrial relations. There can be no other case where a company paid an employee salary and did not require that person to do any work for a period of six long years.

It was alleged that the claimant, a sales manager, made 'unfavourable remarks, accusations and insinuations against senior officers of the company including the general manager himself. His secretary and the sales staff working directly under him were taken away; his direct telephone line was disconnected; the company car given to him was withdrawn along with the parking lot allotted to him. When he protested through his solicitor, he was, via a letter, relieved of all his official duties but was required to be in office during normal working hours on working days. Two months later, a domestic inquiry was conducted on the charges but the finding was neither disclosed nor implemented.

Six years after he was charged, the company decided not to punish him but to put him back to work. Even after this decision, the claimant was not officially restored to the position of sales manager and the staff car he was previously assigned was not returned; he was not given the benefits of a direct telephone line and parking lot. Nor was he granted his normal annual increments and bonuses which he would have got had he not been cast into limbo during these six years. He gave notice that unless all these privileges were restored to him he would be forced to tender his resignation and consider himself constructively dismissed. When the company failed to grant his claims, he left the company.

Quoting Lawton LJ that 'sensible persons have no difficulty in recognizing such conduct when they hear about it', the Industrial Court held that 'in applying the tests of Lord Lawton and Lord Denning to the facts and circumstances of the instant case in its totality, the court has no doubt whatsoever that the company is guilty of conduct which are significant breaches going to the root of the contract of employment or which shows that the company no longer intended to be bound by one or more of the essential terms of the contract'.

PANGLOBAL TEST

In the recent Court of Appeal decision on Ang Beng Teik's case, n79 Gopal Sri Ram JCA blazed a new trail in arguing that the concept and claims of constructive dismissal could be accommodated within the meaning of s 20(1) of the Industrial Relations Act 1967 without there being any need to rely on the common law interpretation of the word 'dismissal' for this purpose. The way he defined constructive dismissal makes this possible: constructive dismissal describes a situation 'where there is no formal order of dismissal, but there is conduct on the part of an employer which makes a workman consider that he has been dismissed without just cause or excuse'.
He relied on two statements of law advanced by the Federal Court in Goon Kwee Phoy's case: firstly, there is no difference between termination and dismissal; n80 and secondly, s 20(1) of the Industrial Relations Act is deliberately couched in subjective terms. n81 The first proposition implies that termination of a contract of employment either by the employer or the employee is dismissal and as such comes within the ambit of s 20(1) which deals with dismissal. The second proposition may be interpreted to mean that the workman need not have to wait till he is formally dismissed to make a representation under s 20(1). However, he can do so when the conduct of the employer, like the alleged transfer made mala fide, is considered by him (the subjective formulation) as dismissal without a just cause or excuse. To elaborate, ‘a workman may treat some conduct on the part of the employer towards him which falls short of actual dismissal or termination as amounting to a dismissal. The workman may consider his demotion or transfer as being the same as dismissal. Thus although there has been no formal dismissal or termination, the workman may have recourse to s 20(1) of the Act.’ n82

The significance of this approach to constructive dismissal is far reaching. Most importantly, the Industrial Court need not be applying the contract test of the common law — express or implied — but only the test of unfair dismissal. Secondly, the time constraints in making representations is liberalized; no more he will be required to make up his mind and act at the appropriate point in time after the conduct of which he had complained, had taken place. Now the workman can make his representation for reinstatement within 60 days of his deemed dismissal, the time limit stipulated under s 20(1).

Statutory just and equitable test

After the Supreme Court decision in Wong Chee Hong's case, it has been repeatedly held by our industrial courts that the proper approach in deciding whether constructive dismissal has taken place is not to ask oneself whether the employer's conduct is unfair or unreasonable but whether the employer is guilty of a breach going to the root of the contract or whether he has evinced an intention no longer to be bound by the contract. n83

In the context of the aforementioned observation, it is indeed an irony that the logic behind the statutory 'just and equitable test' advocated by Lobo in his recent article n84 strongly supports his contention that the right test for constructive dismissal under s 20(1) of the Act is not the contract test but a test of unfairness or unreasonableness. It is all the more so since the Federal Court in Anwar's case has again implicitly reiterated the contract test as expounded in Wong Chee Hong as the correct test to apply in examining whether or not there was a constructive dismissal on the facts of the case. n85

The main thrust of Lobo's argument is the following: The issue in Wong's case as initially framed by the Supreme Court was whether the concept of constructive dismissal could be accommodated within the meaning of s 20(1) of the Act. To be precise, the whole of s 20(1) was before the Supreme Court for construction. But it did not answer that question framed by it but only the meaning of one word 'dismissal' in that s 20(1) of the Act. For example, the Supreme Court in Wong's case 'did not interpret or construe the meaning of the phrase 'where a workman considers that he has been dismissed without just cause or excuse'. n86

It was argued both by Gopal Sri Ram and B Lobo n87 that had the Supreme Court been made aware of the previous Federal Court's observation in Goon Kwee Phoy's case, it would have been convinced that there was no need to resort to common law interpretation of the word 'dismissal' to accommodate constructive dismissal within the ambit of s 20(1), for in its ruling the Federal Court stated that there was no difference between dismissal and termination; secondly this section is framed in subjective terms, viz 'where a workman ... considers that he has been dismissed without just cause or excuse'. The Federal Court averred that this subjective formulation must focus the attention of the Industrial Court not on whether the workman had been dismissed (actual dismissal) without just cause or excuse but 'how he considers he has been treated by his employer'. n88

Lobo, therefore, argued that when the workman considers his transfer/demotion as a dismissal, the court should decide (as it would decide an actual dismissal) whether the constructive dismissal (a termination of contract by the employer by reason of the employer's treatment of him, for example, a transfer) has been for a just cause or excuse, by applying the test of unfairness. It is needless to say that this test of unfairness is not a contract test. In fact, as Lord Denning noted, the concept of unreasonableness is similar to that of unfairness used in the Act. n89 In addition, Lobo argues that in deciding any case under s 20(1) the Industrial Court, following the mandatory requirement of s 30(5) of the Act, 'shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form'. n90

To conclude, in deciding a constructive dismissal case under s 20(1), the Industrial Court must apply not only s
20(1) but also s 30(5). It is needless to say that when these two sections of the Industrial Relations Act spell out clearly the process of deciding constructive dismissal, the basis cannot be the contract test but the unreasonableness test only. Specifically, in deciding constructive dismissal cases, the Industrial Court should ask: was it ‘just and equitable’ for the employer to have acted the way he did with regard to the complaint of the workman. This test is statutory since it borrows the word ‘just’ from s 20(1) itself and the word ‘equitable’ from another statutory provision, viz s 30(5) of the Industrial Relations Act 1967. ‘Equity is a generic term which embraces the other words and elements in s 30(5).’

In brief, Lobo contends that the correct test to be applied in construing the word ‘dismissal’ in s 20(1) of the Act is the unreasonableness test but with a Malaysian flavor. (is it Durian?) He further asserts that the test should be applied today for it is congruent with s 17(A) of the Interpretation Acts of 1948 and 1967: in the interpretation of a provision of the Act, a construction that would promote the purpose or object of the underlying the Act shall be preferred to a construction that would not promote that purpose or object. ‘

It is pertinent to conclude this section on the development of the law on constructive dismissal by noting that while the Supreme Court’s decision on Wong’s case relied on the UK Western Excavating’s case, the Pan Global decision heavily relied on the previous Federal Court decision in Goon Kwee Phoy’s case. What Salleh Abas LP would have done had he been made aware of Goon Kwee Phoy’s case is speculative; it is indeed a fact that the Court of Appeal’s decision in Pan Global cannot supercede that of the Supreme Court in Wong Chee Hong’s case. The contract test continues to be the right test even today for the Supreme Court’s ruling cannot be overruled by the current Court of Appeal. Our current Federal Court, though at the same level as the former Supreme Court, could change the precedent established in Wong Chee Hong’s case if deemed necessary. However, it is not good news for the reformers to know that the Federal Court in Bayer (M) Sdn Bhd v Anwar bin Abd Rahim seemed to still favour the contract test when it held on 18 May 1999 that Anwar was not entitled to consider himself dismissed because the acts ‘did not go to the root of the contract’. Maybe ‘constructive dismissal’ is not ‘just a label nor meant to confuse’ others.

Conclusion

Statutory amendment

The relationship between the employer and employee is governed by the contract of employment. The terms of the contract of employment may only be varied with the consent of both parties, and there is no such power which enables one side to act unilaterally. It follows that a unilateral variation which is not accepted by the other party amounts to repudiation of the contract. Thus, if an employee is demoted, this will be repudiatory conduct by the employer and a consequent resignation by the employee will be an acceptance of the repudiation, and hence is, in law, a dismissal by the employer.

While the foregoing observation by Selwyn underscores the importance of the contract test for determining constructive dismissal, the enlargement of the scope of the contract test to include the implied term of contract would more than adequately cover any unreasonable behaviour on the part of the employer in determining constructive dismissal. In brief, the contract test broadly defined to include both the express and implied terms of the contract of employment is what is needed as a governing principle for an employee to bring to an end the contractual relationship between him and his employer.

The next question that was considered was whether this contract test could be accommodated within the meaning of s 20(1) of the Industrial Relations Act? A lot of time and effort of our legal minds have been wasted by the narrow focus of their discussions. The question that has been bothering the author is, ‘what is so special about s 20(1) of the Act to impel them to force an entry into this specific statutory provision of the Act? Why not there be a suggestion for a comprehensive review of the entire s 20 of the Act from various angles in order to overcome its inadequacies in many respects; nothing prevents our reformers from using as a benchmark the UK industrial law governing dismissal.

Essentially, there are four yawning gaps in Malaysian industrial law governing dismissal, which our apex courts sought to fill through the judicial process of statutory interpretation and construction:

(a) absence of a provision to cover the cause of action under s 20 of the Act; 
(b) absence of a provision to cover payment of compensation in lieu of reinstatement as a statutory remedy for unjust dismissal; 
(c) absence of a provision to make it mandatory for the employer to conduct a predismissal inquiry before dismissing a workman; and
(d) absence of a definitive provision to cover constructive dismissal.

The lacuna in respect of a cause of action for dismissal was sought to be overcome through an involved interpretation of art 5(1) of the supreme law of the land, namely, the Federal Constitution of Malaysia. n99 Payment of compensation in lieu of reinstatement was implied into s 20(1) of the Act, hardly a year after Parliament, in its wisdom, dropped this remedy from the statute. n100 Predismissal inquiry was made redundant by the Federal Court affirming the curable principle and following the literal approach to statutory interpretation. n101 Finally, the Supreme Court resorted to common law interpretation of the word 'dismissal' to accommodate constructive dismissal within the meaning of s 20(1) of the Industrial Relations Act 1967. n102

All these interpretations of s 20(1) by our superior courts have one thing in common, namely, all of them are consistent with the pro-management stance of the government in the interest of the economic development of the country. It may be argued that the reliance of the contract test of Lord Denning MR to determine constructive dismissal does not affect management interest seriously since all that the employer has to do in order not to get trapped in the net of constructive dismissal is to avoid breaching only the express terms of the contract of employment. It is needless to say that the contract test of Western Excavating's case was originally limited to the breach of the express terms of the contract of employment.

It was the abuse of the contract test by the employers in the United Kingdom that led the employment appeal tribunal to imply into the contract test, the breach of the implied term of contract on the part of the employer as an important ground for upholding a claim of constructive dismissal. n104 The Court of Appeal in Lewis' case, in approving the Woods' test and allowing the cumulative effect of a series of acts or incidents calculated to destroy the relationship of trust and confidence to become an unimpeachable ground for upholding the claim of constructive dismissal, did indeed liberalize its application.

The adoption by our Industrial Court of the contract test of the Western Excavating case and also the Woods' test of the employment appeal tribunal along with the Court of Appeal's guidelines in Lewis' case and, more importantly, the Malaysian experience in applying this contract test (broadly defined to include conduct of the employer which breaches either the express terms of the contract, or the implied terms of contract or both) must be taken into account to consider the necessity or desirability of any other alternative approach in determining constructive dismissal. Proceeding from this premise, the author is convinced that what is needed is an amendment to s 20(1)(B) of the Industrial Relations Act 1967 encompassing a provision very similar to s 55(2)(c) of the UK Employment Protection (Consolidation) Act 1978 n106 and our Industrial Court applying this 'broadly defined contract test' as the right test for determining a claim of constructive dismissal. This will also make the irksome two-stage process of deciding constructive dismissal redundant.

Since this broad definition of the contract test includes breach of the implied terms of the contract in addition to that of express terms of the contract, it would ensure the long delayed but much desired social justice to the workmen as partners in the industrial development of the country.

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FOOTNOTES:

n1 Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 (CA), Lord Denning MR at p 225.

n2 Wong Chee Hong v Cathay Organization (M) Sdn Bhd [1988] MLJ 92 at p 95. In the UK many thought and a few decisions were made that an employee in addition to his common law right could terminate the contract if his employer acted unreasonably.

n3 Ibid, at p 95. Lord Denning MR in the case of Western Excavating 'rejected this test of unreasonableness: 'in no uncertain terms, the learned Master of the Rolls declared that the test of dismissal in respect of para (c) is a contract test'.

n4 Lee Kim v Tai Lee Chan Plywood Agency (Award No 119 of 1980): Constructive dismissal denotes conduct by an employer amounting to a breach of contract such as entitles the workmen himself to terminate
the contract summarily ...

A unilateral alteration of the contract of employment by the employer, at least in an important aspect, gives the workman the right to terminate the contract without notice, and so may amount to constructive dismissal.

n5 *Cathay Organization (M) Sdn Bhd v Wong Chee Hong* (Award No 26 of 1986).

n6 *Wong Chee Hong (M) Sdn Bhd*, supra, n 2 at p 94.

n7 Supra, n 1.

n8 Section 20(1) of the Industrial Relations Act 1967 stipulates:
Where a workman ... 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; ...

n9 Ibid.

n10 Supra, n 2 at p 95.

n11 Alternative approaches to accommodating constructive dismissal within the ambit of s 20(1) have surfaced. Two such approaches include the one suggested by Gopal Sri Ram JCA in *Ang Beng Teik v Pan Global Textiles Bhd, Penang* [1996] 3 MLJ 137 and the second recently suggested by labour lawyer B Lobo in his article, 'Wither The Test For Unjust Constructive Dismissal in Malaysia', [1999] 3 MLJ at pp xc-cviii. These two approaches will be dealt with in a separate section of this article.


n14 *Jaya Jusco Stores Sdn Bhd v Ganesan a/l Rajoo* (Award No 101 of 1991); [1991] 1 ILR 321. While an employee can walk out of his employment due to his employer's conduct without notice and still claim constructive dismissal, a carefully drafted notice of resignation will go a long way to help him substantiate constructive dismissal subsequently before the Industrial Court. The notice given by the employee in the *Jaya Jusco* case is reproduced below as an illustration of a good notice drafted by the workman in consultation with his union:

I would refer to your memo dated 8 May 1989 changing my employment from the higher position of maintenance technician to the under-mentioned lower job functions and responsibilities:
- Dish washing
- Cleaning of tables/chairs, floors and kitchen
In the circumstances, I am unable to accept your order of demotion and I hereby tender my resignation 'without prejudice' to my rights to plead 'constructive dismissal' by the company and pursue all remedies available to me within the law.
The reason for the above is that the company has by its conduct rendered my continuance of service in the company untenable.

n15 *Hotel Malaya Sdn Bhd v Goh Hock Fong* [1994] 2 ILR 810 at p 814. See also *Abd Rahman Abd Manaf* [1999] 1 ILR 327 (Award No 73 of 1999).

written statement in a civil action served by each party on the other, containing the allegation of facts that the party proposes to prove at trial (but not the evidence by which they are to be proved) and stating the remedy that the party claims in the action. The purpose of pleading is to define clearly the issues in the action and to give the parties notice of the other side's case. Sufficient particulars must be given of each allegation. Pleadings are usually settled by counsel whose signature must appear on the pleadings.

In Malaysia, when the Registrar of the Industrial Court fixes a date for hearing of the case, the employee, in a constructive dismissal case, files the statement of his case (comprising his allegations) and the statement of reply by the management is also filed within seven days. Actually the court grants one month to each party: S Kukanesan, retired Registrar of the Industrial Court, in a paper presented at the workshop on labour law organized by MECA Employers' Consultancy Agency on 20–21 April 1998.

n17 Hotel Malaya, supra, n 15 at p 811.


n21 Kenneison Bros Sdn Bhd v Selvaratnam a/l Thambiah[1993] 1 ILR 86 (Award No 39 of 1993): 'It is true that an employee who tenders medical leave frequently can be a source of irritation to the management. But one cannot tell when one is to be sick and for how long. For an employer, it is part and parcel of his work force. Of course there are procedures where an employee falls sick too often or goes on medical leave for too long: he can be medically boarded out. That will be more appropriate than to deduct the employee's salary after he has been medically certified unfit to work. To be healthy is a blessing and to be ill and unable to work is unfortunate but to be deprived of one's earnings on account of illness is totally unfair and inhuman.'

n22 In Adams v Charles Zub Associates Ltd [1978] IRLR 551, it was held that: failure to pay an employee's salary on the due date may amount to conduct which constitutes a breach going to the root of the contract or which shows that the employer has no intention thereafter to honour the contract and thus justifies the employee in resigning from his job. But the circumstances of each case must be looked at.

n23 Western Excavating's case, supra, n 1. Anticipatory breach of contract may be said to occur when the conduct of the employer 'shows that he no longer intends to be bound by one or more of the essential terms of the contract'.

n24 Forari's case, supra, n 19. See also Eu Finance Bhd v Chong Tap Yaw [1994] 1 ILR 202. Where the cumulative effect of two breaches, viz asking the claimant who was the manager of the Penang branch of the company to assist a manager of equal rank and removing the claimants right to issue cheques and grant loans constituted a breach eliciting constructive dismissal.


n27 Supra 25 p 104, also see n 55.


n32 Malayan Racing Association v Ong Huat Leng [1995] 2 ILR 22. In this case, the obligation of the employer to consult the employee prior to the transfer was upheld but only in the circumstance of the absence of a transfer clause in the contract.

Harapan Ramai Sdn Bhd v Jayaindaran [1999] 1 ILR 770 at p 771. If there is no provision for transfer in the contract, the right to do so becomes implied. It can only be taken away or curtailed where it is expressly provided for.

n33 In Waleta Malaysia Sdn Bhd v Tew Meing Hock [1998] 1 ILR 301 at p 312. In this case Tew was governed by an express transfer clause in the contract stipulating that ‘the company shall have the right to transfer you from one department to another in Malaysia or in any country and it may likewise transfer you to any associated or subsidiary company of the group of companies to which the company belongs whether the said associated or subsidiary company is located in Malaysia or in any other country.’


n35 MP Jain, ‘Administrative Law in Malaysia and Singapore’ at p 284 cited in George Town Holdings Bhd v Chan Wang Tak [1997] 3 ILR 935 at p 946. Mala fide or bad faith vitiates a discretionary decision even though the concerned authority acts within the legal limits of its powers. The expression ‘malafide’ is being used here in a narrow sense implying dishonest intention or corrupt motive or personal animosity on the part of the authority concerned. Mala fide thus includes those cases where the motive behind a discretionary act is personal animosity, spite, vengeance against the person affected. It also includes cases where the authority concerned or the relations or friends thereof stand to gain or derive some benefit from the discretionary act. If an administrator uses this power to satisfy his private or personal grudge or to achieve a political purpose then the act is said to be vitiates by mala fide.


n38 Jones v F Sirl and Sons Ltd [1997] IRLR 493.

n39 supra, n 37.

n40 Western Excavating, supra, n 1 at p 717.


n42 Ibid.


n44 Syarikat Sports Toto (M) Sdn Bhd v Akmal a/l Lazarus, Negeri Sembilan [1988] 1 ILR 29 (Award No 29 of 1988); see also infra, n 78.


n46 Courtalds Northern Textiles Ltd v Andrew [1979] IRLR 84. Breach of the implied term of contract was added on to the contract test in order to overcome the abuse of the contact test by the employer. See also infra, n 62.
n47 Lewis v Motorworld Garages Ltd [1985] IRLR 465.


n50 Ibid, p 103.


n53 Supra, n 1 at p 229. Lawton LJ said this of constructive dismissal in the context of the contract test:
I do not find it necessary or advisable to express any opinion as to
what principles of law operate to bring a contract of employment to an
end by reason of the employer's conduct. Sensible persons have no
difficulty in recognizing such conduct when they hear about it.

n54 Supra, n 52.

n55 This decision of the Industrial Court in this case is based on the authority of Lord Denning in the Court of
Appeal case Langston v Amalgated Union of Engineering Workers [1974] 1 All ER, cited in Sebastian's case; n 49
at p 104.


n60 Lewis v Motorworld Garages Ltd [1985] IRLR 465 at para 7.

n61 B Lobo, 'Wither The Test For Unjust Constructive Dismissal In Malaysia', [1999] 3 MLJ xc at p c1.


n63 Lewis Motorworld Garages Ltd [1985] 1 IRLR 465 cited by Jayasingam, infra, n 64.

n64 B Jayasingam, Advocate and Solicitor, High Court of Malaysia, 'Constructive Dismissal — A new
Management Nightmare', a paper presented at the National Workshop On Employee Relations, organized by the

n65 Supra, p xxi in the quote by Lord Browne-Wilkinson.

n66 Rama Chandran v Industrial Court of Malaysia [1997] 1 AMR 433. Eusoff Chin CJ said:
It is trite law that a party is bound by its pleadings. The Industrial
Court must scrutinize the pleadings and identify issues, take evidence,
hear the parties arguments and finally pronounce its judgment having
strict regard to the issues ... . The object of pleadings is to determine what are the issues and to narrow the area of conflict. The Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion. The Industrial Court must at all times keep itself alert to the issues and attend to matters it is bound to consider. (See also supra, n 16, for additional information on pleadings.)


n68 Western Excavating Ltd v Sharp [1978] 2 WLR 344.


n71 Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347. In this case Lord Browne-Wilkinson J said:
In our view it is clearly established that there is implied in a contract of employment a term that the employers will not without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage their relationship of confidence and trust between employer and employee.

n72 To constitute a breach of implied term it is not necessary to show that the employer intended any repudiation of the contract. The tribunal’s function is to look at the employers conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it (British Aircraft Corp Ltd v Austin [1978] IRLR 332).

n73 The Court of Appeal in the Lewis v Motorworld Garages Ltd [1985] IRLR 465 held:
It is now established that the repudiatory conduct may consist of a series of acts or incidents, some of them quite trivial which cumulatively amount to a repudiatory breach of the implied term of contract.


n75 Lawton LJ in Western Excavating’s case, supra, n 1 at p 772.

n76 Ibid, p 772.

n77 Palmanor Ltd v Cedron 1978 June 9, Employment Appeal Tribunal.


n80 Goon Kwee Phoy v J & P Coats (M) Bhd [1981] 2 MLJ 129 per Raja Azlan Shah at p 136: 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 ... .

n81 Supra, n 79: The issue is not whetheere the workman had been dismissed (actual dismissal) without just cause or excuse, but 'how he considers he has been treated by his employer'.

n82 In the words of Gopal Sri Ram JCA, 'It is not a requirement that an employee should be formally dismissed by the employer for this s 20(1) to be applicable. What should be examined was how the employee considered the treatment he received from the employer, whether he considered it a dismissal. There is no need for a formal order of dismissal but there is conduct on the part of the employer which makes a workman consider that he has been dismissed without a just cause or excuse. It could be an order of transfer or demotion; or it could be that the workman is asked to retire. The categories are not closed.' He further explained that where a workman challenges his employer's conduct, it is on the basis that the case is not one of true redundancy but a dismissal disguised as a redundancy, retrenchment or resignation.

n83 Anwar Abdul Rahim v Bayer (M) Sdn Bhd [1998] 2 MLJ 599 at p 605.

n84 B Lobo, 'Wither the Test for Unjust Constructive Dismissal in Malaysia', [1999] 3 MLJ xc-cix.

n85 Ibid, p xc. Another ground for dismissing Anwar's claim of constructive dismissal (by the Federal Court) was that the Industrial Court applied the unreasonableness test and not the contract test to decide the claim.

n86 Ibid, p xcii. To put it more precisely, initially the court in Wong's case framed the issue in very wide terms (the construction of the whole of s 20(1) but later framed it in very narrow terms (to the construction of the word 'dismissed' or 'dismissal') in that section. This is evident from what the Supreme Court said further down on the same page: 'We are here only concerned with the definition of "dismissed" or "dismissal".' Section 20(1) of the Industrial Relations Act 1967 is reproduced below:

Where a workman ... 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 ... .


n88 Ibid, p 136.

n89 Western Excavating, supra, n 1 at p 226.

n90 Section 30(5) of the Industrial Relations Act 1967.

n91 Supra, n 4 p (c); also see: Farid Sufian bin Shuaib, 'Dismissal Without Just Cause Or Excuse: The Interpretation of the Word 'Dismissed' under section 20 of the Industrial Relations Act 1967', [1998] 4 MLJ xciv. Even a year earlier, Farid argued in favour of the just and equitable test by saying that 'there are several reasons for the adoption of the more elastic test of what is just and equitable taking into account s 30(5) of the Act'.

n92 Supra, n 84 at p xcviii.

n93 Supra, n 65 at p cvii .

n94 Supra, n 65 at p xc.

n95 In Ang Beng Teik v Pan Global Textiles Bhd (Penang)[1998]. Gopal Sri Ram JCA said that constructive dismissal was a convenient label; there is no magic in the word. In Amanah Butler (M) Sdn Bhd v Yike Chee
Wah[1997] 2 CLJ 79, Gopal Sri Ram JCA added that 'no useful purpose will be served by saying whether the respondent was constructively dismissed. The phrase "constructive dismissal" is a mere label. It does nothing to clarify matters; on other hand, it causes confusion. It is better that the phrase be not resorted to at all.' In Moo Ng v Kiwi Products Sdn Bhd Johor & Anor, the High Court did not agree with this characterization of constructive dismissal by the Court of Appeal. Abdul Malik Ishak J said: ‘... in my judgment the doctrine of constructive dismissal is here to stay. It is not a mere label coined to benefit the employee in an industrial dispute. It is a doctrine that gives life to an employee who has been dismissed without just cause or excuse. It is a doctrine that existed from time immemorial and has been adopted vigorously by the then Supreme Court in Wong Chee Hong's case, and this doctrine hinges on the contract test.’ When the High Court said that this doctrine existed from time immemorial perhaps it was referring to what Lord Denning said in Western Excavating's case: 'The words of para 5(2)(c) express a legal concept which is already well settled in the books on contract under the rubric "discharge by breach".', supra, n 1 at p 226.


n97 Supra, n 1 at p 229. Section 55(2) of the Employment Protection (Consolidation) Act 1978 states that: ... an employee shall be treated as dismissed by his employer if, but only if,
(a) the contract under which he is employed by the employer is terminated by the employer, whether it is so terminated by notice or without notice; or
(b) the employee terminates that contract with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct.

n98 Lobo, B, 'Security of Tenure in Employment – Constitutional and Proprietary Rights of Employees' [1996] 3 MLJ cxviii at p cxxi:
Section 20(1) of the Act does not create a cause of action but provides a remedy for a pre-existent cause of action, namely, the workman's right not to be unfairly dismissed. Where do we find the cause of action? We cannot find it at common law because common law only recognizes unlawful dismissal, not unfair dismissal. Statutory law could provide for it but s 20(1) does not contain this right unlike the United Kingdom where it has been provided for in the Employment Protection (Consolidation) Act 1978. Specifically, s 54(1) of this Act stipulates that "in every employment to which this section applies ... every employee shall have the right not to be unfairly dismissed by the employer":

n99 Ibid, p cxxi. Lobo argued that when the cause of action is not available, either at common law or at statutory law, one could look for it in the constitutional law of countries with written constitutions. In fact, such a right not to be unfairly dismissed is enshrined in art 5(1) of the Federal Constitution of Malaysia.

n100 V Anantaraman, 'The Enigmatic Law on Unfair Dismissal in Malaysian Industrial Relations' [1999] 2 MLJ iii at pp cív-cv.

n101 Wong Yuen Hock v Sykt Hong Leong Assurance Sdn Bhd & Anor [1995] 2 MLJ 753.


n103 Western Excavating Ltd v Sharp [1978] 2 WLR 344.

n104 Woods v WM Car Services (Peterborough) Ltd[1981] IRLR 347. Also see supra, p xxix.
n105 Lewis v Motorworld Garages Ltd [1985] IRLR 465.

n106 Supra, n 96.