INTRODUCTION

A dismissal from employment takes place when the employer terminates the contract of employment of an employee. Dismissal is one of the types of termination of an employment contract; others include resignation, retirement, frustration of the contract, ending of a fixed term contract and retrenchment. Dismissal is normally a kind of termination of an employment contract by an employer due to the workman's misconduct, which is not consistent with the expressed or implied terms of employment. The Industrial Relations Act 1967 and the Employment Act 1955 regulate the dismissal of an employee in the context of Malaysian employment relations (Balakrishnan and Balakrishnan 2007). Dismissal is the severest punishment, which can be awarded to a delinquent workman by his employer for some act of misconduct. In some circumstances the employer's act of making unilateral changes in the terms and conditions of the employment contract, force the workman to terminate the contract with or without notice. This kind of unfair dismissal is popularly known as 'constructive dismissal'.

CONSTRUCTIVE DISMISSAL

Limited studies have been conducted in the area of industrial relations issues in Malaysia as a whole and constructive dismissal specifically. Amminudin (2003), Ayadurai (1996), Anantaraman (1996; 2000), C’ruz (1999), Idid (1993), Kiong (2002), Gomez (1997), Wu (1995) and Parasuraman (2004) were the authors, who have written about the Malaysian employment relations, however except Anantaraman (2000), none of the studies have specifically dealt with constructive dismissals in depth. Constructive dismissal is a 'deemed dismissal' if an employer is guilty of a breach of the employment contract which goes to the root of the contract. It arises when a workman terminates his/her contract of employment and therefore considers himself/herself discharged from further obligations because of the conduct of the employer.
Constructive dismissal denotes the conduct of an employer, which is outrageous and makes continued employment impossible; a workman need not tolerate it and can therefore treat himself as dismissed. n2 Constructive dismissal simply means that 'an employer does not like a workman. He does not want to dismiss him and face the consequences. He wants to ease the workman out of his organisation ... Generally speaking he will make life so unbearable for the workman so as to drive the latter out of employment'. n3

In a constructive dismissal an employer is guilty of a breach of the employment contract which goes to the root of the contract or if the employer has shown and committed unreasonable actions or behaviour which repudiates the contract of employment. In such situations, the workman is entitled to regard the employment contract as having terminated and construe himself/herself as having been constructively dismissed.

The Supreme Court (now Federal Court) ruling by Tun Salleh Abas LP in *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* n4 firmly established the doctrine of constructive dismissal in Malaysian employment law. As a result, constructive dismissal has been brought within the ambit of s 20 n5 of the Industrial Relations Act 1967, which means dismissal rights under the law are now extended to those workmen who are compelled to resign because of the conduct of their employers. n6 However, constructive dismissal cases need to be analysed from a different perspective. Unlike wrongful dismissals and unfair dismissals or other types of employment terminations, in a constructive dismissal the burden of proof is on the workman to prove his/her employer is guilty. In order to succeed in constructive dismissal claim, contract test must be present. The contract test was used in *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* n7 and the learned judge commented 'Thus it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract or it he has evinced an intention no longer bound by it. In such a situation, the employee is entitled to regard the contract as terminated and himself as being dismissed'.

In *Western Excavating (ECC) Co Ltd v Sharp*, which was an English case in early 1978, it was established that reference must be made to the contract of employment in order to see whether the employer's conduct constitutes a fundamental breach of contract. n8 This principal, which was also used in the case of *MPH Bookstores Sdn Bhd v Lim Jet Seng*. n9 This case made it clear that in order for a claim of constructive dismissal to be successful, both limbs of the common law 'contract test' must be present. This required a consideration of the following:

(a) Whether the employer's conduct amounted to a breach of the contract or whether the employer had evinced an intention not to be bound by the contract any longer thereby entitling the workman to resign, and

(b) Whether the workman had made up his mind to act at the appropriate point in time soon after the conduct complained of had taken place.

Therefore the onus of proof is on the workman and not the company to prove on a balance of probability that he/she was dismissed. The claimant has to prove that the company has breached the contract thereby entitling him/her to plead constructive dismissal. In order to prove that he/she has suffered constructive dismissal, an employee must prove that as a result of a breach of contract by his/her employer, the employee no longer intends to be bound by the essential terms of the contract.

The key element of constructive dismissal is that the workman was entitled to leave without notice because of the employer's conduct. The word 'entitled' means that the employee could leave when the employer's behaviour towards him/her was so unreasonable that he/she could not be expected to stay on. n10

**SOME CASES OF CONSTRUCTIVE DISMISSAL**

**Transfer of a Workman**

The right to transfer a workman within the employer's organisation, be it a business or trade organisation, is a
managerial right; however such a transfer does not entail a change that is to the detriment of the workman in regard to his or her terms of employment. In *Supermix Concrete (M) Sdn Bhd v Raduan Ahmad*, n11 the claimant argued that his transfer to another plant was a breach of a fundamental term of the contract. The judge held that in transfer provisions, the company had the discretionary power to transfer a workman from one location to another depending on where the services of the workman were needed the most. Therefore, there was no victimisation involved as the company's power to transfer the claimant in this case was a bona fide exercise. n12

However in the case of *Dicklin Sdn Bhd v Bathma Subramaniam* n13 the court held that the transfer provision was only limited to transfer from one section, division or associated company to the other and that under the contract of service, the company had no contractual right to transfer the claimant from West Malaysia to East Malaysia. The company's action was mala fide because it was actuated by an indirect motive. There was an on-going retrenchment exercise in the company at that time and and the company knew that such a transfer will force the employee to resign and thereby relieve the company of paying her any retrenchment benefits.

In *Funai Electric (Malaysia) Sdn Bhd Johore v Salliah Ahmad*, n14 the claimant, an assistant manager (shipping) claimed constructive dismissal on the grounds that her transfer to the service parts department resulted in an 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 grounds that the claimant had to report to the new position and spend 12 days in that position to find out whether the transfer was indeed a demotion.

In *Hotel Malaya Sdn Bhd v Say Lip Nyen*, n15 the action of the hotel in transferring its maintenance executive to the newly created job of car park executive, without any indication of his new duties and functions was according to the claimant both mala fide and a breach of contract. The court found that the claimant's new job functions at the car park tantamounted to that of a car park attendant. It therefore upheld the claim of constructive dismissal and rightly ordered the claimant's reinstatement to his former position in the maintenance department without any loss whatsoever.

In *Harta Maintenance Sdn Bhd v Vanaja Chelliah & Ors*, n16 the claimants were cleaners in Kajang Hospital and because of certain misunderstandings with their supervisor 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 cleaning job in Kajang because the place of work was close to their homes. However, the transfer was detrimental to the claimants as it caused them economic loss. There was 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 and ordered compensation to be paid to the claimants.

In *Kian Joo-Southcorp Sdn v Nurul Syafiqah bt Abdullah*, n17 the court referred to Gaiye's Misconduct in Employment in respect of the employer's power to transfer, which is subject to well-recognised restrictions, namely:

(i) There is nothing to the contrary in terms of employment;
(ii) The management has acted bona fide and in the interests of its business;
(iii) The management is not actuated by any indirect motive or any kind of mala-fide;
(iv) The transfer is not made for the purpose of harassing and victimising the workman; and
(v) The transfer does not involve a change in the conditions of service.

**Setting Unreasonable Targets**

In *Informatics v George Varkey Sebastian*, n18 the claimant contended that the company had set unreasonable targets when there was a re-designation of the claimant. After applying the contract test the judge held that in a constructive dismissal claim, the onus is upon the claimant to establish on a balance of probabilities that the company
by its conduct had breached a term or terms (express or implied) of the contract; that the breach is a fundamental breach that goes to the root or foundation of the contract; that the claimant has terminated the contract by reason of the company's conduct and the conduct is sufficiently serious to entitle the claimant to leave at once; and that the claimant in order to treat himself as discharged had to leave soon after the breach.

**Lasalle International Design School Sdn Bhd v Azhari Haltami** n19 is an interesting case in which the claimant, a lecturer claimed he was unfairly dismissed when the company re-structured its organisation. However the company alleged that it based the dismissal on unsatisfactory work performance. The court held that where there was an allegation of unsatisfactory work performance, then the company had to prove that it had given sufficient warnings or notice to the employee for him to improve his quality of work, failing which the employee could be asked to leave. In the process of re-structuring its organisation, the management has the right to reduce the number of workmen in accordance to its needs; however this exercise must be bona fide and genuinely undertaken. Since there were no evidence to show that the claimant was put to notice of retrenchment and warnings about unsatisfactory performance, the dismissal was unfair.

**Unilateral Changes in Contract**

In **Kononas Jet Cargo Systems Sdn Bhd v Cheah Cheong Tian** n20 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.

**Payment of Wages**

In the case **ATI Technologies (M) Sdn Bhd & Anor v Jamilah Abu Bakar**, n21 the claimant was held to be constructively dismissed when she was not paid her monthly salary, the court viewed this as unjust dismissal and ordered the claimant to be paid back wages and compensation in lieu of reinstatement. In **TKS Kitcheneering Studio (SA) Sdn Bhd v Chia Mooi Keng**, n22 the company was held to have constructively dismissed the claimant via her demotion and the drastic salary reduction without any reasons given.

**Repudiation of Contract**

In **Plastic Tecnic Sdn Bhd v Saraswathy d/o Manickam & Ors** n23 a company that relocated from Petaling Jaya to Bangi promised its employees that a free transport service would be continuously provided, to transport them to and from work. However, this bus service was discontinued 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.

**Breach of an Implied Term**

In **Aik Poh Rubber Industries Sdn Bhd v Goh Seng Hooi**, n24 the court applied the common law principle to hold that the company, which had humiliated, intimidated and assaulted the claimant, and therefore made him fear for his future safety was guilty of breach of an implied term which goes to the root of the contract of employment. This was therefore an implied dismissal of the employee by the company. In **Multrapac Sdn Bhd v Low Kok Piew**, n25 the court
held that no employer has the right to assault his employee for whatever reason. Therefore the claimant, who was thus assaulted, had the right to walk out after the assault and treat himself as dismissed by the company. In *Syarikat Pengurusan Ladang Sdn Bhd v Sebastian Joseph Fernandez*, n26 the court held that according to the law when the conduct of an employer became outrageous and made continued employment impossible, then a workman need not tolerate such conduct but can instead treat himself as dismissed.

CONCLUSION

Constructive dismissals have created new challenges in employment relationship not only in Malaysia but also in other parts of the world. The cases of constructive dismissal presented above will be a helpful guide to employers and employee relations' practitioners to prevent constructive dismissal claims in their respective organisations. This will also help in reducing the number of cases, referred to the Ministry of Human Resources under s 20 of the Industrial Relations Act 1967 and to create co-operative and harmonious employment relations in the industry. Harmonious employee relations arise from employers who believe and treat their employees as an important asset to their organisations.

References


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FOOTNOTES:

n1 Employee as defined in Employment Act 1955 s 2(1) -- any person, irrespective of his occupation, who has entered into a contract of service with an employer under which such person's wages do not exceed Ringgit Malaysia one thousand and five hundred (RM 1500).

n2 Satchithanandhan, W, *Chairman in Lotteries Corporation (Sabah) Sdn Bhd and Vincent Lee* (Industrial
Court Award 159, 1991).

n3 Dato’ Gopal Sri Ram JCA in *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600.

n4 *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ 45.

n5 Section 20(1) -- ‘Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representation may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed’.


n7 Supreme Court Civil Appeal No 194 of 1986, the learned judges commented that the word ‘dismissal’ in s 20(1) of the Industrial Relations Act 1967 should be ‘be interpreted with reference to common law principle’.

n8 Anantaraman, V, *op cit*.

n9 Industrial Court Award No 179 of 1987.


n13 Award No 216 of 1991, ILR p 750. The claimant worked in Subang Jaya as a receptionist and the company ordered her to go Sabah. This was held to be a repudiation of the contract of employment.

n14 [1997] 2 ILR 1002.


n17 [2003] 2 ILR 344.
n18  [2002] 1 ILR 300.


n20  [1995] 2 ILR 800.


n23  Industrial Court Award - No 173/1991.

n24  Industrial Court Award - No 251/1991.

n25  Industrial Court Award - No 13/1991.

n26  Industrial Court Award - No 27/1991.