

CONSTRUCTIVE DISMISSAL IN MALAYSIA: WHEN RESIGNATION BECOMES DISMISSAL

“I resign.” Two simple words that usually signal an employee’s decision to leave their employment. But what if those words are not the result of a genuine choice? What if an employee resigns because the employer’s conduct has made it impossible for them to continue working? Can such a resignation legally amount to a dismissal?

INTRODUCTION

This is where the concept of constructive dismissal becomes relevant. Constructive dismissal is where the employer does not expressly terminate the employee’s employment. Instead, the employer’s conduct may amount to a fundamental breach of the terms of the employment contract, which may entitle the employee to treat the employment contract as terminated and resign in response to that breach.

The contrast is important because not every resignation is voluntary, and not every difficult workplace situation amounts to constructive dismissal. The law therefore looks beyond the resignation itself and examines the circumstances that led to it. The issue raised is whether the employer’s conduct was sufficiently serious to amount to a fundamental or repudiatory breach of the employment contract, and whether that breach caused the employee to resign.

LAW ON CONSTRUCTIVE DISMISSAL

In Malaysia, this issue is relevant under *section 20 of the Industrial Relations Act 1967*,
“20. (1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.”

This section allows a workman who considers that he or she has been dismissed without just cause or excuse to make representations to the Director General of Industrial Relations for reinstatement. Under *section 20(1A) of the Industrial Relations Act 1967*, the representation must be filed within 60 days from the date of the dismissal.

The leading Malaysian authority on constructive dismissal is *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92. The Supreme Court recognised the ‘contract test’, under which an employee may treat himself as constructively dismissed where the employer commits a breach that goes to the root of the employment contract or demonstrates an intention no longer to be bound by the contract. The relevant inquiry is therefore not merely whether the employer acted unfairly or unreasonably, but whether the conduct amounted to a fundamental or repudiatory breach of the employment contract.

This position was reaffirmed by the Federal Court in *Tan Lay Peng v RHB Bank Berhad & Anor* [2024] 5 MLRA 171. The Federal Court expressly confirmed the contract test, rather than the reasonableness test. Under the contract test, the employee must establish that the employer's conduct, whether through a single act or a series of acts, amounted to a fundamental or repudiatory breach going to the terms of the employment contract, or demonstrated an intention by the employer no longer to be bound by the express or implied terms of the contract. The Court further clarified that the reasonableness of the employer's conduct may be considered as a factor, but reasonableness alone is insufficient to establish constructive dismissal.

ELEMENTS OF CONSTRUCTIVE DISMISSAL

To establish constructive dismissal, an employee must first show that the employer has committed a *serious or fundamental breach of the employment contract*. This means that the employer's conduct must be serious enough to affect an important part of the employment relationship. For example, significant reduction in salary without agreement, or a major change to the employee's contractual duties. However, not every disagreement or unfair treatment will amount to constructive dismissal. The employer's conduct must be serious enough to amount to a breach of the employment contract.

Secondly, the employee must show that the *resignation was caused by the employer's breach*. In other words, there must be a clear connection between what the employer did and the employee's decision to resign. For instance, if an employer significantly reduces an employee's salary and the employee resigns shortly afterwards because of the reduction, this may support a claim for constructive dismissal. However, if the employee resigns for an unrelated reason, such as receiving a better job offer, the employer's earlier breach may not be enough to establish constructive dismissal.

Thirdly, the employee must not unduly delay in responding to the employer's breach. If an employee becomes aware of a fundamental or repudiatory breach but continues working for a substantial period without taking steps to treat the employment contract as terminated, the employer may argue that the employee has affirmed the contract or accepted the breach. The timing and circumstances of the resignation are therefore important in determining whether the employee genuinely treated the employer's breach as bringing the employment relationship to an end.

In establishing a claim for constructive dismissal, the employee must also produce sufficient evidence to prove the alleged breach and the circumstances leading to the resignation. Such evidence may include the employment contract, salary records, emails, written complaints, messages or other relevant documents. Resignation alone does not amount to constructive dismissal. As reaffirmed by the Federal Court in *Tan Lay Peng v RHB Bank Berhad & Anor* [2024] 5 MLRA 171, the applicable test is the **contract test**: the focus is on whether the employer's conduct amounted to a fundamental or repudiatory breach of the employment contract, rather than merely whether the employer acted unreasonably.

CONDUCT THAT MAY LEAD TO CONSTRUCTIVE DISMISSAL

There are several types of conduct by an employer that may lead to constructive dismissal. However, the conduct must be serious enough to amount to a breach of the employment contract.

1. SALARY REDUCTION

An employer significantly reduces an employee's salary without the employee's agreement. Since salary is an important part of the employment contract, this may amount to a serious breach.

2. UNJUSTIFIED DEMOTION

An employee is moved to a lower position or given fewer responsibilities without a proper reason. If the demotion seriously affects the employee's position or contractual rights, it may lead to constructive dismissal.

3. MAJOR CHANGES TO JOB DUTIES

An employer makes significant changes to an employee's duties that are very different from what was originally agreed. If the changes are serious and not allowed under the

employment contract, the employee may have grounds to claim constructive dismissal.

4. NON-PAYMENT OF SALARY

An employer fails to pay the employee's salary or other important benefits. If the failure is serious and the employee resigns because of it, this may amount to constructive dismissal.

5. UNREASONABLE TRANSFER

A transfer may potentially amount to constructive dismissal where it breaches an express or implied term of the employment contract, is exercised mala fide, or is carried out in circumstances amounting to a fundamental or repudiatory breach of the employment relationship.

6. SERIOUS HARASSMENT OR BULLYING

Serious or repeated harassment, bullying or other misconduct by an employer may, depending on the circumstances, contribute to a fundamental breach of the employment relationship and potentially support a claim for constructive dismissal. These are only some examples of situations that may lead to constructive dismissal.

Other forms of employer conduct may also amount to constructive dismissal, depending on the circumstances and whether the conduct constitutes a serious breach of the employment contract.

CONCLUSION

Constructive dismissal shows that not every resignation is truly voluntary. An employee may resign because of serious conduct by the employer, and in certain situations, the law may treat that resignation as a dismissal. However, the employee must show that the employer seriously breached the employment contract, that the employee resigned because of that breach, and that the employee did not, by continuing to work without objection for an extended period, affirm the employment contract after becoming aware of the alleged breach.

In Malaysia, constructive dismissal is mainly based on the contract test, which looks at whether the employer's conduct was serious enough to amount to a fundamental breach of the employment contract. Not every disagreement or difficult situation at work will amount to constructive dismissal. The employee must establish that the employer's conduct amounted

to a fundamental or repudiatory breach of the employment contract and that the employee resigned in response to that breach. Ultimately, constructive dismissal protects employees who are effectively forced to leave because of their employer's conduct, while ensuring that ordinary voluntary resignations are not wrongly treated as dismissals.

Should You Resign Before Seeking Legal Advice?

Where possible, employees should seek legal advice before resigning. The timing and circumstances of the resignation can be important because an employee must generally show that the resignation was in response to the employer's fundamental breach and that the employee did not unduly delay in treating the employment contract as terminated.

Get Legal Advice

If you are facing a constructive dismissal issue or require advice on your employment rights, please contact us at +6011-1120 0223 or email ysling@yslingco.com to arrange a legal consultation.

***Disclaimer:** This article is intended for general informational purposes only and does not constitute legal advice. The law and its application may vary depending on the facts and circumstances of each case. Readers should seek independent legal advice before taking any action in relation to their employment.*