LABOUR LAW FRAMEWORK: THE MALAYSIAN PERSPECTIVE *

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Termination of employment contract under Malaysian law – Introduction:

Under contract law, a party to a contract may terminate a contract by merely giving the requisite notice of termination as provided for in the contract.

In the case of **Goon Kwee Phoy v J.P Coats (M) Sdn Bhd (1981) 2 MLJ 129**, the Federal Court said as follows:

"we do not see any material difference between a termination of 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 the Court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to inquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proven, then the inevitable conclusion must be that the termination was without just cause or excuse. The proper inquiry of the Court is the reason advanced by it, and the Court or the High Court cannot go into another reason not relied on by the employer, or find one for it."

The above however does not apply to employment contracts in Malaysia. This is very much due to the existence of the Industrial Relations Act 1967 which establishes the Industrial Court of Malaysia. Section 20 (1) of the Industrial Relations Act 1967 provides that an employee may make a representation of unfair dismissal if

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he is of the view that his dismissal/termination was without just cause or excuse. Once such a representation has been made, a mandatory conciliation exercise is undertaken by the Industrial Relations Officers with a view to aiding parties to reach an amicable settlement. If no such settlement is reached, the responsibility will devolve on the Minister of Human Resources, who in most cases, will refer the case to the Industrial Court for an award.

Thus, the Industrial Relations Act 1967 provides a mechanism for an employee to challenge his dismissal on the grounds that it is without just cause or excuse, whereby in most cases, the dispute will be referred to the Industrial Court for an award.

I may now briefly deal with the situations the Courts accept as just cause or excuse as a basis for dismissal.

What amounts to just cause or excuse?

The 3 grounds accepted by the Courts as justifying a termination are as follows:-

- Poor Performance
- Misconduct
- Retrenchment

It must be borne in mind that it is the employer who has the burden of proving that it had just cause or excuse to terminate the employee's services.

The standard of proof required is on a balance of probabilities.

There are various prerequisites expected of an employer prior to termination, for example, in cases of poor performance, sufficient warnings are required to be given. In cases of misconduct, although a failure to hold a domestic inquiry is not fatal, an employee should be given an opportunity to explain his conduct. In cases of retrenchment, although having no force of law, the Code of Conduct for Industrial harmony is expected to be adhered to such as "the last in first out" principle.

It is not uncommon for many an employee to succeed in the Industrial Court. As such, employers have started undertaking other courses of conduct to essentially

frustrate an employee into leaving employment. One of these courses of conduct is requesting an employee to resign. I shall proceed to deal with this issue briefly.

Can Resignation Tantamount to a Dismissal?

Forced resignation or what is sometimes termed as 'indirect dismissal' is where the employer invites the employee to resign and makes it clear to him that if he refuses to resign, he will in any case be dismissed.

In **BBC Brown Boveri (M) Sdn. Bhd. v Yau Hock Heng (1990) 2 ILR 2**, the Industrial Court considered the concept of indirect dismissal/forced resignation as being 'interesting and by no means irrelevant'. The Court made a reference to a passage from the Law of Redundancy by Cyril Grunfield which at page 110 stated as follows:

"Indirect dismissal is not a special term of art. I am using the phrase to distinguish cases of termination by the employer in which, while he is not dismissed directly, he has also not broken the contract (or otherwise behaved) so as to justify constructive dismissal. Some important kinds of dismissals for redundancy take this form and it is useful to emphasise their character as dismissals by the employer. The most obvious kind of indirect dismissal is where the employer invites the employee to resign in circumstances in which it is clear that, otherwise, the employee will in any case be dismissed. The precise formulation by the employer is immaterial whether it be by invitation, request or dictation so long as the substance of it is that the employer places his employee in a position in which the employee really has no option but to tender his notice. In such a situation, the reality is ... that the employee is dismissed."

It can be seen therefore that a forced resignation is really another term for indirect dismissal.

It is now trite law that a resignation obtained under compulsion or threat of other consequences is in law a dismissal. In ***Award No. 323/1991,*** the Industrial Court held as follows:-

"Industrial tribunals have consistently held that a forced resignation is a dismissal and it has also been held that the use of persuasion by an employer to obtain an employee's resignation will be treated as a dismissal if the employee is invited to resign and it is made clear to him that unless he/she does so he/she will be dismissed."

The burden is on the employee to prove that he was forced into resigning and that it was not a voluntary act.

(VP Nathan & Partners v Illangovan s/o Dorairaj A. Suppiah [2002] 1 MLJ 341)

In the case of **Weltex Knitwear Industries Sdn Bhd v Law Kar Toy (1998) 7 MLJ 359** the High Court, in illustrating the rationale for the burden of proof, held as follows:

"Next is the burden of proof on the issue of forced resignation raised by the first respondent. The law is clear that if the fact of dismissal is not in dispute, the burden is on the Company to satisfy the court that such dismissal was done with just cause or excuse. This is because, by the 1967 Act, all dismissal is prima facie done without just cause or excuse. Therefore if an employer asserts otherwise, the burden is on him to discharge. However, where the fact of dismissal is in dispute, it is for the workman to establish that he was dismissed by his employer. If he fails, there is no onus whatsoever on the employer to establish anything, for in such a situation, no dismissal has taken place and the question of it being with just cause or excuse would not at all arise..."

In the case of **Stanley Ng Peng Hon v Aaf Pte. Ltd. [1979] 1 MLJ 57,** the precedent of which has been adopted by the Malaysian Courts, the Singapore High Court held:-

"A resignation obtained under compulsion is no resignation in law".

In the **Industrial Court Award No. 144/2000,** the issue before the Court was whether the claimant therein had been forced to resign. The Court in holding unfair dismissal, stated as follows:-

"This Court is convinced the claimant was told that if she did not resign, they would sack her immediately and blacklist her name in the education industry. The Court is also convinced that the claimant signed the three copies of the letter of resignation to avoid embarrassment and to protect, as she averred her unblemished reputation up to then."

The Court also further stated,

"It is the finding of this Court that the claimant's purported letter of resignation was not given on her own volition. How could a resignation be voluntary when the employee is given an option to resign or face disciplinary action?"

Based on the oral and documentary evidence, the court held that the claimant did not resign voluntarily. The claimant was dismissed by the college and her dismissal was without just cause or excuse.

As can be seen, the real issue is one involving the question of fact i.e., was there exercise of force to cause the employee to resign. In instances where an employee has resigned pursuant to a mutual separation agreement executed with the employer, again, unless the employee concerned can prove coercion, it will not amount to a forced resignation. In Industrial Court Award No. 1687 of 2005, the Court held as follows:-

"The law is that an employer who does not wish to continue the services of a workman for any reason whatsoever may secure the workman's departure from employment through a negotiated settlement obtained by mutual consent and free will between both. A departure so obtained is not in law a dismissal".

Other forms of dismissal – Constructive Dismissal.

The Doctrine of Constructive Dismissal was authoritatively recognized in **Wong Chee Hong v Cathay Organization (M) SDN BHD [1988] 1 CLJ 45** as follows:

"..The Common Law has always recognized the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as

affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer. It is for an attempt to enlarge the right of an employee of unilateral termination of his contract beyond the parameter of the common law by an unreasonable conduct of the employer that the expression "constructive dismissal" was used."

The above doctrine was adopted from Lord Denning's judgment in the case of **Western Excavating (ECC) Ltd. V. Sharp** [1978] 1 QB 761, wherein, he stated as follows:

"...If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which 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 his contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances, at the instant without giving any notice at all or, alternatively, he may give notice. But the conduct must in either case be sufficiently serious for him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; 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."

His Lordship Gopal Sri Ram JCA, attempted to explain what the phrase "constructive dismissal" meant in the following manner:

"...The task is no different where a case of constructive dismissal is alleged. The Industrial Court must in such a case also determine firstly whether there was a dismissal. And secondly, whether that dismissal was with just cause or excuse. That is a statutory formula employed by. S.20(1) of the Act.

Constructive dismissal can take place, as we have attempted to demonstrate, in a number of cases. Since human ingenuity is boundless, the categories in which constructive dismissal can occur are not closed. Accordingly, a single act or acts may, according to particular and peculiar circumstances of the

given case, amount to a constructive dismissal. There are cases which fall as illustrations at either end of the spectrum...

....Whether one would describe the conduct complained of as amounting to constructive dismissal or the breach of the implied term governing mutual trust and confidence is really a matter of semantics. Nothing turns upon it. At the end of the day, the question simply is whether the appellant was driven out of employment or left it voluntarily...."

As opposed to a normal dismissal, the burden of proving constructive dismissal rests with the employee in that he must prove:

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

b) that breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving.

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

d) he must not delay too long in terminating the contract in response to the employer's breach whereby he will be deemed to have agreed to vary the contract. If an employee does not respond immediately to a breach by the employer, even assuming the Court holds that there was a breach of contract, the Court will still dismiss the employee's claim as he is deemed to have waived such breach: See Industrial Court Award No. 1/93.

If the employee fails to prove all the above, his claim will be dismissed.

Issue then is what sort of conduct an employee can rely upon for it to amount to a breach of contract and thus being entitled to plead constructive dismissal?

How breach of contract by Employer amounts to Constructive Dismissal.

At first, it was thought that "unreasonable conduct" by the employer could form the basis for a complaint of constructive dismissal otherwise known as the unreasonable

test. However, the Courts have since rejected the reasonableness test and adopted the contract test.

A complaint of constructive dismissal will succeed where the employee is able to prove that the employer was guilty of conduct which was repudiatory or a fundamental breach of the contract of employment such as non-payment of wages, unilaterally changing the terms and conditions of service as well as removal of other benefits such as contractual bonus and allowances.

However, employees must bear in mind that claims for Constructive Dismissal would not necessarily succeed in every situation as the Industrial Courts play a vital role in striking a proper balance between the welfare of the employees as well as the employers, and as such, they should not be too quick to claim constructive dismissal.

Courts are ever ready to imply terms into a contract of Employment

We have just seen from the illustrations above the manner in which a contract of employment can be breached. However, it is difficult if not impossible to envisage each and every conduct of an employer that may amount to constructive dismissal. As stated by His Lordship Justice Sri Ram JCA in Quah Swee Khoon v Sime Darby Bhd (2000) 2 MLJ 600,:-

"Since human ingenuity is boundless, the categories in which constructive dismissal can occur are not closed."

It is imperative for the courts to imply terms into a contract of employment. Under the broad concept of constructive dismissal, the courts are adding more and more responsibilities on employers. Employers now have to shoulder greater responsibilities towards employees in the context of health and safety, cooperation, and trust and confidence.

One of the terms that is more readily implied into a contract of employment by the courts is what is referred to as "mutual trust and confidence", i.e. that employers, will not, without reasonable and proper cause conduct themselves in a manner

calculated or likely to destroy or seriously damage the relationship of trust and confidence between an employer and employee.

Implied terms are becoming more prominent in the context of complaints of constructive dismissal, particularly the implied terms relating to cooperation and mutual trust and confidence between employers and employees.

In Campbell Cheong Chan (M) Sdn. Bhd. v Ayyawoo Nadeson (Award No. 310/1998), the court held that:

"While it is true that an employer has every right to reorganize his business in any manner for the purpose of economy or convenience, provided that he acts bona fide, and no court would interfere with the bona fide exercise of that right. But based on the facts and evidence, I am of the opinion that it was not justifiable to request the claimant to move out from his room and to occupy a table at the general office meant for section managers. After the joint, the claimant was re-appointed financial controller who was occupying a room. After the redesignation, he became an accounting manager and lost his entitlement to a room. It is clear his new position was not on par with his original post. This was corroborated by the necessity to move out of his room to the general office, disqualified to use the Volvo 740 and insignificant job functions."

The Court further stated that:

"In an employer-employee or master and servant situation, the breach of an implied obligation of trust and confidence may consist of a series of acts taken cumulatively to amount to breach of contractual terms. To constitute a breach of an implied term, it is not necessary to show that the employer intended any repudiation of the contract. The function of this court 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".

In **Bayer (M) Sdn. Bhd. v Rugayah Bte. Parman (Award No. 267/1995)**, the courts held:

"The relationship between the claimant and her superior deteriorated, to the extent that it was not possible for both to work harmoniously together. The claimant's superior had not only progressively reduced her work, but had taken steps which effectively undermined her position as a programmer. Her superior's conduct in his capacity as the EDP Manager was sufficient to constitute a breach of the company's contractual obligation to refrain from conduct which is calculated to or likely to destroy the relationship of trust and confidence between the company and the claimant. The conduct of the claimant's superior in denying work to the claimant is tantamount to a breach of an implied obligation of an employer to give his employee the opportunity to do work when there is work to be done."

The Court further held:

"The company in initiating disciplinary action rather than trying to resolve the problems caused by the claimant's superior, had continued to commit further breaches of its contractual obligation and this gave the claimant adequate cause for believing that her employer had no intention whatsoever of redressing her grievances. Hence, the claimant was entitled to leave the employ of the company forthwith without waiting for the expiry of the time stated in her earlier letter. The company had by its cumulative breaches of its implied obligations given the claimant grounds for considering herself constructively dismissed."

It is also an implied term in every contract of employment that the employee should be given work by his employer when there is work to be done. In Bayer (M) Sdn. Bhd. v Rugayah Bte. Parman (supra), the Industrial Court stated as follows:

"The Court might also add that the conduct of COW 2 in denying work to the claimant when there is ample work to be done in the EDP department would

also be tantamount to a breach of the implied obligation of an employer to give his employee the opportunity to do his work when there was work to be done."

In the case of *Langston v Amalgamated Union of Engineering Workers & Anor* (1974) ICR 180. Lord Denning held as follows:

"In these days an employer, when employing a skilled man, is bound to provide him with work. 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. A skilled man takes pride in his work. He does not do it merely to earn money. He does it so as to make his contribution to the well-being of all. He does it so as to keep himself busy, and not idle. To use his skill and to improve it".

Remedy for an unfair Dismissal

The primary remedy is reinstatement. However reinstatement is not often awarded for obvious reasons. Section 30(6) of the Industrial Relations Act 1967 clearly states as follows:-

"In making its award, the Court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under subsection 20(3), but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under subsection 20(3)".

The factors that should be taken into consideration when handing down awards are governed by Section 30(6A) of the Industrial Relations Act 1967 which states as follows:-

"(6A) Notwithstanding subsection (6), the Court in making an award in relation to a reference to it under subsection 20(3) shall take into consideration the factors specified in the Second Schedule."

For ease of reference, the factors of the Second Schedule are reproduced herein:-

1. In the event that backwages are to be given, such backwages shall not

exceed twenty-four months' backwages from the date of dismissal based on the last-drawn salary of the person who has been dismissed without just cause or excuse;

2. In the case of a probationer who has been dismissed without just cause or excuse, any backwages given shall not exceed twelve months' backwages from the date of dismissal based on his last-drawn salary;

3. Where there are post-dismissal earnings, a percentage of such earnings, to be decided by the Court, shall be deducted from the backwages given;

4. Any relief given shall not include any compensation for loss of future earnings; and

5. Any relief given shall take into account contributory misconduct of the workman.

Employment Act 1955

The Employment Act 1955 provides for minimum terms and conditions of employment such as annual leave, notice periods, medical leave, termination benefits and overtime.

The Employment Act sets up the Labour Court and a mechanism for workers to lodge claims or any other financial benefits not provided to them in accordance to the Act.

Labour Courts

The Labour Court is a quasi-judicial system that provides for workers to lodge claims on wages or any other financial benefits owed to them.

The Labour Court tries claims regardless of the amount and it adopts simple and informal proceedings while still complying with the judicial principles as those practiced in the Civil Courts.

Unlike the Industrial Courts, where all workmen irrespective of how much he/she earns can make a representation for unfair dismissal, the Employment Act predominantly applies to only those earning RM2000.00 and below per month.

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