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CONSTRUCTIVE DISMISSAL

BY

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INTERNATIONAL ISLAMIC UNIVERSITY
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2008

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ABSTRACT

The employment laws in Malaysia have provided for security of tenure and equated this right to be engaged in gainful employment to a proprietary right. This proprietary right provides safeguards to the employee against termination save and except for just cause or excuse. The courts in Malaysia have also recognizes the security of tenure as a fundamental constitutional and proprietary rights under Articles 5(1) and 8(1) of the Federal Constitution. In exercising the management prerogatives, employers from time to time find it necessary to terminate the employees for many reasons. In the context of employment in Malaysia nowadays, all termination of employment initiated by the employer may be viewed as dismissals. In some cases, contract of employments have been terminated arbitrarily and the employees were dismissed without just cause or excuse. In certain circumstances, the employee may deemed himself to be 'constructively dismissed' even though he was not being formally dismissed by his employer. This dissertation examines the nature and position of the employer and employee relationship by referring to the employment laws in Malaysia and in the United Kingdom. A thorough study on all relevant cases has also been made to determine 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 or other type of tests? 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? The applicability of the doctrine of constructive dismissal in the interpretation of Section 20 under the Malaysian Industrial Relations Act is always an issue. The Supreme Court found that the common law always recognizes the right of an employee to terminate a contract of service if the employer was guilty of such breach that affected the foundation of contract or had evinced the intention not to be bound by the contract any longer. But a point to note is that even though the Industrial Court is not a court of law, but it regards itself as being bound by decision of courts of law under the doctrine of precedent. Furthermore, since constructive dismissal has been brought within the ambit of Section 20(1) of the Industrial Relations 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 study also revealed the prevailing issues on the constructive dismissal, the awards granted to the unfairly dismissed employees as well as the lacunae in the current legislations and the dire needs for legislative interference in regulating the exercise of discretion in making the awards to the dismissed employee.

ملخص البحث

لقد وضعت قوانين العمل في ماليزيا لحماية صاحب المنصب وتم تعديل هذا القوانين لأن يكون العمل المربح مرتبطا بحق الامتلاك. وهذا الحق الامتلاكي يوفر الوقاية من الانفصال من العمل إلى العامل إلا بسبب أو عذر عادل ومنصف. يعترف نظام القضاء في ماليزيا ويقر بأن حماية حقوق العمال لمن الحقوق الأساسية وفقا للمادة 5 (1) والمادة 8 (1) من الدستور الوطني. وصاحب العمل أثناء ممارسة صلاحياته الإدارية، من وقت لآخر، يجد بأنه من الضروري أن يفصل بعض العمال من العمل وذلك على إثر سبب من الأسباب. وفي سياق العمالة اليوم في ماليزيا، جميع حالات الفصل من العمل تكون من قبل أصحاب العمل' ويمكن النظر إليها على أ ا نوع من الطرد من الوظيفة. في بعض الحالات، يتم إ اء عقد العمل بشكل إعتباطي ويطرد العمال أو الموظفين بدون أي سبب أوقضية عادلة. وفي بعض الحالات، يجوز للموظف أن يعتبر نفسه مطرودا بشكل إيجابي على الرغم من أن صاحب العمل لم يفصله من عمله بشكل رسمي. هذه الرسالة تتناول طبيعة العلاقة بين صاحب العمل وبين العامل وموقفه تجاه العامل استنادا إلى القوانين العمالة في ماليزيا وفي المملكة المتحدة البريطانية. وهي دراسة أجريت بشكل متعمق في جميع القضايا ذات الصلة لتحدد؛ ماهي الأصول القانونية التي من شأ ا إ اء عقد العمل نتيجة تصرف صاحب العمل: هل ينبغي أن يكون هناك معيار للعقد نفسه أو معيار لعدم صلاحية السبب أو أي نوع آخر من المعايير؟ أي نوع من تصرفات صاحب العمل يبرر انفصال العامل من عمله بشكل إيجابي: هل ينبغي أن يكون تصرف صاحب العمل في خرق أو مخالفة شروط عقد العمل أو أي تصرف آخر مبني على سبب غير مقبول يكون باعثا لترك العامل عمله؟ إن تطبيق مفهوم الانفصال الإيجابي من العمل في تفسير المادة 20 من القانون الصناعي الماليزي يكون نقطة النقاش على الدوام. ووجدت المحكمة العليا بأن القوانين العامة دائما تعترف بحق الموظف في ا اء عقد الخدمات إذا ثبت أن صاحب العمل قد أخل بالعقد بصورة أثرت في مبادئها أو أبدى أنه لم يعد ملتزما بالعقد. وهناك ملاحظة مهمة وهي على الرغم من أن المحكمة الصناعية ليست محكمة قانونية، لكنها تعتبر نفسها ملزمة بما تقره المحاكم القانونية بموجب المفهوم السابق. أضف إلى ذلك، بما أن قضية الانفصال الإيجابي من العمل طرحت ضمن نطاق المادة 20 (1) من القوانين الصناعية فإن حقوق الانفصال - الإرجاع إلى العمل، دفع التعويض أو البدل - تعطى للذين يرغمون على الاستقالة بناء على تصرف من أصحاب العمل. وكشفت الدراسة أيضا القضايا السائدة في مسألة الانفصال الإيجابي من العمل، والتعويضات المدفوعة إلى العمال المفصولين من العمل بشكل غير عادل، فضلا عن الثغرات في التشريعات الحالية وكذا الحاجة الماسة إلى تدخل النظام التشريعي في ضبط الممارسة الحكيمة في إعطاء التعويضات إلى العامل المفصول من العمل.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Laws.

…….
Nik Ahmad Kamal Bin Nik Mahmod
Supervisor

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Laws.

……..……..……
Ashgar Ali Bin Ali Mohamed
Examiner

This dissertation was submitted to Ahmad Ibrahim Kulliyyah of Laws and is accepted as partial fulfilment of the requirements for the degree of Master of Comparative Laws.

…….……
Zaleha Binti Kamaruddin
Dean
Ahmad Ibrahim Kulliyyah of Laws

DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institution.

Noraishah Binti Mohd Radzi

Signature: ……..... Date: ……

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……. ……

Signature Date

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Trade Unions Act, 1959, Malaysia

LIST OF ABBREVIATIONS

AC	Appeal Cases
AIR	All Indian Reporter
AII ER	All England Reports
Anor	Another
Bhd	Berhad
Cal.	All Indian Reporter, Calcutta Series
Ch.	Chancery Division
CLJ	Current Law Journal
CLR	Commonwealth Law Reports
Corp.	Corporation
EA	Employment Act
EAT	Employment Appeal Tribunal
Guj.	All Indian Reporter, Gujerat Series
ILR	Industrial Law Reports
IRA	Industrial Relations Act
IRLR	Industrial Relations Law Reports
KB	King's Bench Law Reports
LP	Lord President
MLJ	Malayan Law Journal
M.L.L.R.	Malayan Labour Law Reports
Nag.	All Indian Reporter, Nagpur Series
Ors	Others
PC	Privy Council
QB	Queen's Bench Law Reports

CHAPTER 1

INTRODUCTION TO CONSTRUCTIVE DISMISSAL

1.1 INTRODUCTION

As Malaysia embarked towards industrialization, the challenge for most organizations is to ensure the Malaysian work force acquire work related skills and obey the norms, rules and regulations, or code of conduct. Organization without norms, rules and sanctions could not progress and be competitive.

Deviation from the expected group behaviour is normally not tolerated by the members of the organization, or if so tolerated, is not for long. Whether such ignorance to the rules and norms is serious or not, is not the issue. In an organization, due to its closed structure and intimate work relationship, ignorant to the rules and norms can be disruptive and even counter-productive. Disruption, will add to cost regardless of whether it is caused by one individual or group.

The purpose of discipline in industry or in any organization is to ensure that the operation of the office and works is effectively and efficiently carried out. Discipline can promote the objectives of the company, as well as the well being and safety of the employees. Rules set the standard of conduct at work; procedures helps to ensure that the standards are adhered to and also provide a fair method of dealing with alleged neglect or failure to observe them. Discipline includes the mental attitude where individuals accept observance of policies and rules as the norm. For this, the Management is responsible for maintaining discipline within the organization and for ensuring that there are adequate disciplinary rules and procedures.

For a multitude of reasons, employers find it necessary from time to time to terminate the services of their employees. There are a number of ways to terminate a contract of employment, *inter alia*, by giving notice, retrenchment, or dismissal due to misconduct(s) committed by the employee. However, in the context of employment in Malaysia nowadays, all termination of employment initiated by the employer may be viewed as dismissals. Indeed, even if an employee walks off of the job and appears to have resigned there may be a case of 'constructive dismissal'.

Employment laws protect employees from unfair and unreasonable dismissal and the laws also recognize the right of an employee to walk out of the employment where the actions and conducts of the employer are so unacceptable and unreasonable that they amount to a breach of contract by the employer. The Employment Act 1955 declares vide Section 14 that:

(a) An employer may, on the ground of misconduct inconsistent with the fulfilment of the express or implied conditions of his service, after due inquiry –

   a. Dismisses the employee without notice;

   b. Downgrades the employee; or

   c. Imposes any lesser punishment as he deems just and fit, and where a punishment of suspension without wages is imposed, it shall not exceed a period of two weeks.

Section 20 of the Industrial Relations Act 1967 provides the machinery for a workman who considers himself dismissed without just cause or excuse to set in motion upon dismissal by his employer, availing himself to be reinstated or granted compensation in lieu of reinstatement if the dismissal was unjustified. Several elements constitute the essence of the provision:

(b) There must be a dismissal without just cause or excuse;

(c) The workman making the representations may be a member of a trade union of workmen or otherwise;

(d) The representations must be for a reinstatement and made in writing;

(e) The representations must be filed at the office of the Director General nearest to the place of employment from which he was dismissed;

(f) Compliance with a strict time limit: the representations must be filed within sixty days from the date of dismissal (if the dismissal was with notice, the representations may be filed at any time during the period of notice but not later than sixty days from the expiry thereof).

1.2 CONTRACT OF EMPLOYMENT

Because in normal circumstances, no man can live without work, those in position of providing work tend to exploit and abuse the power and advantages against the employees who are in weaker position. Employment protection legislations were introduced to provide protections to the employees as well as to provide guidance on the acceptable conducts of both the employer and the employees involved in employment relationship. The increase in employment legislations has driven labour law into the role of regulating business decisions though the legislations were prompted by the need to provide the employees certain forms of protection and to improve the employees' vulnerable position.

The employment relationship comprises not only the employer and the employee but also the employment contract between them. The employment contract constitutes the foundation of the industrial relations; without which there is no 'employer' and 'employee' relationship.

A contract is an agreement that gives rise to obligations and rights that are enforceable or recognised by the law. The factor that distinguishes contractual from other legal obligations is that the former is based on the agreement of the contracting parties[1] and are voluntarily assumed by the parties enjoying the freedom to contract. However, in case of contract of employment, the liberty is a qualified one as the contracting parties are normally expected to observe certain standards of behaviour in the form of implied terms imposed by the legislations. The contract of employment is meant to secure the positions and rights of both parties and determine the extent of their rights and obligations towards one another.

1.2.1 Contract of Service and Contract for Services

For the purpose of an employment contract, a distinction is drawn between a "contract of service" and a "contract for services". An employee is the one governed by the contract of service whereby an independent contractor is governed by a contract for services. Hence, an independent contractor is not considered as an employee, rather he is regarded as self-employed. The significant differences between an employee and an independent contractor are, *inter alia*, summarised as below:

Compulsory contributions like the EPF, SOCSO, pension fund and even income tax deduction are only applicable to employees; not to the independent contractors.

i. Except for certain circumstances, an employer will not be vicariously liable for the tortuous acts committed by independent contractors.

[1] Dunston Ayadurai, *Industrial Relations in Malaysia*, MLJ Sdn Bhd, 1998 at 18

ii. However, an employer will be liable for the torts committed by his employees in the course of their employment that resulted in injury and damage to a third party.

iii. Under the common law, the employer owes a duty to his employees to take reasonable care for their safety and well-beings. This duty is however not applicable in case of an independent contractor.

iv. Employees who fall within the definition of the industrial or labour statutes would be entitled to rights and protections afforded by these statutes. However, these statutes are not applicable to an independent contractor.

1.3 TERMS AND CONDITIONS OF EMPLOYMENT

The employer-employee relationship is essentially contractual in nature. Although both parties are free to enter into the employment contract and both are at liberty to negotiate and agree to the terms and conditions, in reality, there is no equality in the bargaining power between the prospective employee and the prospective employer. The hands of the prospective employee are more often than not tied in negotiating the terms and conditions of employment since he is more in need of the employment than the prospective employer of him. The law, under the concept of freedom to contract, will enforce such agreement irrespective of the fact that one of the parties is 'forced' to agree with the terms and conditions designed to protect the other party's interests.

Because of that, the Employment Act 1955 regulates the employment contract itself by legislating some basic and minimum terms and conditions of employment. The Employment Act declares that the employment contract cannot stipulate terms

and conditions, which are less favourable to the employee than the terms and conditions legislated by the Act.[2] Section 7 of the Employment Act states :-

> "Subject to Section 7A, any term and condition of a contract of service or of an agreement, whether such contract or agreement was entered into before or after the coming into force of this Act, which provides a term or condition of service which is less favourable to an employee than a term or condition of service prescribed by this Act or any regulations, order or other subsidiary legislation whatsoever made thereunder shall be void and of no effect to that extent and the more favourable provisions of this Act or any regulations, order or other subsidiary legislation whatsoever made thereunder shall be substituted therefore."

Some of the terms of employment contract legislated by the Employment Act are:

i. Hours of works[3]

ii. Wages[4]

iii. Rest Days and Public Holidays[5]

iv. Leaves – e.g. annual, sick and maternity[6]

v. Termination, layoff and maternity benefits[7]

However, Section 7A of Employment Act also states that the employment contract can stipulate terms and conditions which are more favourable to the employee than the terms and conditions legislated by the Act. The Act further stipulates in Section 7B that the employment contract can stipulate terms and conditions other than the terms and conditions stipulated by the Act.

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[2] Ibid.
[3] Section 60A of the Employment Act 1955
[4] Sections 18-31 of the Employment Act 1955
[5] Sections 59 & 60D of the Employment Act 1955
[6] Sections 60E & 60F of the Employment Act 1955
[7] Sections 60J & 60A of the Employment Act 1955

The Employment Act also requires the employment contract to be in writing and to specify the ways by which it can be terminated by either party to the contract [Section 10(1) and (2)].

1.4 TERMINATION OF CONTRACT

As the relationship of employee and employer is contractual in nature, generally, the right to terminate the contract and the manner of exercising such right would be included in the contract of employment.[8] The employment contract may be terminated by either party to contract by several ways or circumstances. Where, however, the contract is terminated by the employer because of the perceived misconduct of the employee, then – whatever the reason or excuse given by the employer for the termination of the employee – the termination is termed 'dismissal'. The Employment Act prescribes the manner how termination of contract of service takes place, whereby the Industrial Relations Act provides the statutory mechanism of addressing the alleged wrongful dismissals.

Section 10(2) of the Employment Act 1955 provides that a clause shall be included in every written contract of employment/service setting out the manner in which the contract can be terminated by either party to the contract in accordance with Part II of the Employment Act. There are basically 4 types of termination enumerated by the Employment Act as follows: [9]

[8] Farid Suffian bin Shuaib, "Dismissal Without Just Cause or Excuse: The Interpretation of the Word 'Dismissed' Under S. 20 of the Industrial Relation Act 1967", [1998], 4 MLJ xliv at xlvii
[9] Upex, R, *The Law of Termination of Employmen(4th Edn*), Sweet & Maxwell, 1994 at 157

(a) Termination by Effluxion of Time

This kind of termination is governed by Section 11 of the Employment Act. Termination takes place when:

i. the specified work contracted for in the contract of service has been completed, or

ii. the duration of service, if specified in the contract of service, expires.

The above contract however can also be terminated in accordance with Part II of the Employment Act. The same applies for a contract of service for an unspecified period of time and shall continue in force until terminated in accordance with the provisions of Part II of the Employment Act, e.g. termination by giving notice such as resignation of the employee from the company, termination of contract without notice e.g. by paying the other party an indemnity for the sum equal to the amount of wages which could have been accrued by the employee during the term of such notice or during the unexpired term of such notice or in the event of wilful breach of a condition of the contract of service by the other party .

(b) Termination by Notice

Section 12 of the Employment Act deals primarily with this kind of termination which is synonymously know as *termination simpliciter* i.e. termination by contractual notice and for no reason. It takes place when either party gives to the other notice of his intention to terminate the contract. The notice shall be in writing and may be given at any time, and the day on which the notice is given shall be included in the period of the notice.[10]

[10] See Section 12(4) Employment Act 1950.

Section 12(2) provides that length of such notice shall be the same for both employer and employee and shall be determined by a provision made in writing for such notice in the terms of the contract of service. In the absence of any such provision in the contract, the length of the notice shall be as provided for in the section, where it shall not be less than:

(a) four weeks' notice if the employee has been so employed for less than two years on the date on which the notice is given;
(b) six weeks' notice if he has been so employed for two years or more but less than five years on such date;
(c) eight weeks' notice if he has been so employed for five years or more on such date.[11]

Provided that this section shall not be taken to prevent either party from waiving his right to a notice under this sub-section.

The proviso to the section provides that either party may waive his right to a notice. If it is the employee who wishes to give notice of his intention to resign, there is rarely any difficulty but the problem usually surface when it is the employer who decides to terminate the employee's service. Section 12 has been interpreted to read that the employer has a right to terminate the service of the employee without assigning any reason provided that he complies with the requirement of giving proper notice. This is what is termed as termination *simpliciter*.

However, if termination of service of the employee is attributable wholly or mainly to any of the reasons enumerated by Section 12(3), the employer has a right to give notice, notwithstanding anything to the contrary in the contract. The length of such notice shall not be less than provided by Section 12(2) regardless of anything to the contrary in the contract of service.

[11] Note that the longer the period of service, the longer is the period of notice. One presumption is that the longer an employee has served his employer, the more indispensable he becomes. Thus, in the event where the employee wishes to terminate the contract, he should warn the employer way ahead to enable sufficient time for the latter to find a suitable replacement.