

## The Tests to Determine 'Constructive Dismissal': The Malaysian Legal Perspectives

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### *Abstract*

*In so far as Malaysia is concerned, there are certain tests adopted by the courts to determine whether the acts of the employer tantamount to constructive dismissal or not. These tests are, - the 'Contract Test' and the 'Just and Equitable Test or Unreasonable Test'. However, courts in Malaysia have yet to resolve which one of these tests is the most prevailing and practical one? There are cases that apply the former test whilst in others the latter test is applied. This paper attempts to define what are these tests, their origins, rationale and applications in cases involving constructive dismissal and to forward suggestions to improve and suggest the best test in determining 'constructive dismissal' in Malaysia.*

**Keywords:** Tests, Constructive Dismissal, Law and Malaysia

### *Introduction*

The termination and dismissal of workers has always been a matter of great anxiety and inevitably poses a common equitable and legal problem to the employer on the one part and the employees on the other. To minimize and prevent any inequality and injustice in industrial relations and to secure industrial harmony, certain law and regulation have been established. It is trite law that legal rules not only enumerate rights and duties of the employer/employee before and during the course of employment, but it also seeks to provide provisions governing the process of its termination and dismissal. This transparency between employer and employee ensure that disputes arising will be dealt with objectively and in accordance with equity and justice. There are various 'ever kept recurring' issues in employment law which deserve special attention. But one of the most important issues to reckon with is 'indirect dismissal' or what is commonly known as the 'constructive dismissal'. This is because the law relating to this type of dismissal, as far as the legal position in Malaysia is concerned, is to a certain extent still shrouded in uncertainty. In this type of dismissal, normally, it does not require any express words or manifest act on part of the employer which could understandably denote dismissal. In fact, the occurrence of such dismissal may not be realized by the employee concerned for it rarely involve any clear and unequivocal sign that shows there was in fact 'a dismissal', unless guided by the principles of law.

The only statutory provision in Malaysia which deals with the right of the employee where there is a dismissal is the notorious section 20(1) of the Industrial Relations Act 1967 ('IRA 1967'). This section provides that a workman who believes that his employer has dismissed him without just cause or excuse may make representations in writing to the Director General of the Industrial Relation for reinstatement or other relief. However, the provision does not mention and define 'constructive dismissal' and its applicable test.

### *Objectives*

The purposes of this paper is as follows:

- 1) To identify the applicable tests applied by the courts in Malaysia in determining 'constructive dismissal'; and,
- 2) To examine the tests, their origins, rationale and applicability, and to then propose the best test that the court should apply.

### *Approach*

This paper will be divided into several parts. First, the author will explain the meaning of constructive dismissal as proposed and formed by the learned judges and jurists. This would be followed by probing into the tests that have been adopted and applied by the courts in Malaysia in relation to constructive dismissal through decided cases. The final part would be the commentaries on the principles adopted, and thereafter, the authors' conclusion.

### *The Meaning of Constructive Dismissal*

The relevant laws in Malaysia dealing with employment do not provide any statutory definition as to what 'constructive dismissal' actually is. The IRA 1967, the Act which specifically deals with industrial relations and employment<sup>1</sup>, for example, has no such definition. According to certain quarters, the labelling of 'constructive dismissal' is rather confusing and should not be used at all.<sup>2</sup> It is thought that 'constructive dismissal' is also a type of 'dismissal'. The IRA 1967 merely provides that pursuant to its section 20(1), a workman or employee is entitled for reinstatement of his former job if he has been dismissed 'without just cause or excuse' by his employer. It does not specifically states 'constructive dismissal'. The full provision of this section worth reproducing reads as follows:

*'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'* (the emphasize is added by the author)

According to Oxford Dictionary of Law (2000), 'constructive dismissal', literally, means 'termination of a contract of employment by an employee because his employer has shown that he does not intend to be bound by some essential terms of the contract, and although the employee has resigned, he has the same right to apply to an employment tribunal as one who has been unfairly dismissed by his employer'.

On the other hand according to Maimunah (2003), constructive dismissal is:

*where the behaviour of the management causes the employee to resign...management takes certain actions to make continued employment intolerable...the employee can consider himself as has been 'constructively dismissed'. The employer's conduct must amount to a breach of contract in order for constructive dismissal to take place.*<sup>3</sup>

From the above suggested definitions, we can deduce that constructive dismissal is when an employee terminates his service (with or without notice) with the employer due to the employer's behaviour, action or non-action, treatment or non-treatment that expressly or impliedly shown that the employer does not intend to be bound by the contract entered into or has repudiated their contract of employment.

Section 20(1) of the IRA which states 'where a workman,...considers that he has been dismissed without just cause or excuse...', must connote the following situations:

- 1) Where the employer, manifestly, has dismissed him without any reasonable ground; or
- 2) Where the employee involuntarily or voluntarily, terminates his employment because of the conduct of the employer which caused him to be driven out of the employment. In other word, the act or conduct of the employer towards him in the course of his employment could not be accepted or borne by him any longer and the conduct of the employer has forced him to leave his employment.

The first situation, it is submitted, is a 'direct dismissal' whilst the second is an 'indirect dismissal' or 'constructive dismissal'. What it means is that the employer has at the very outset evinced an intention to dismiss the employee, subtle or otherwise, that finally would cause such employee realizes that he could no longer carry out his duty reasonably. The question then is what are the elements or guidelines that could indicate to us if there is in fact a constructive dismissal?

### *The Test To Determine Constructive Dismissal*

Based on the decided cases, there exist at present, two types of test that are being applied by courts in Malaysia to determine constructive dismissal. The tests are:

<sup>1</sup> See also Professor V Anantaraman, *Malaysian Industrial Relations: The Doctrine of Constructive Dismissal*, (2000) 3 MLJ xvii, especially at page lviii.

<sup>2</sup> In *Ang Beng Teik v Pan Global Textiles Bhd (Penang)* (1996) 3 MLJ, 137, Gopal Sri Ram JCA said that constructive dismissal was a convenient label; there is no magic in the word. In *Amanah Buttler (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 'constructive dismissal' is a mere label. It does nothing to clarify matters; on other hand, it causes confusions. It is better that the phrase be not resorted to at all'.

<sup>3</sup> Maimunah Aminuddin, *Malaysian Industrial Relations and Employment Law*, 4<sup>th</sup> Edition, 2004, Mc Graw Hill, p. 5.

- 1) The Contract Test; and,
- 2) The Just and Equitable Test or The Unreasonable Test.

### *The General Provision Provided in IRA 1967 In Respect of The Test*

There is no statutory provision that states the above tests. However, section 20(1) of the IRA 1967 states that if an employee 'considers that he has been dismissed without just cause or excuse by his employer', he could make an application or representation to the Director General of Industrial Relations office for reinstatement of his position. This provision does not provide the meaning of 'dismissed' and 'without just cause or excuse'. The meaning of these words and sentences depend on the interpretation of the court. According to Quah Swee Khoo v Sime Darby Bhd<sup>4</sup>, 'dismissal' means 'the employee had been driven out of employment'. The question follows that whether the reasons that had caused 'the employee being driven out of the employment' were made with 'just cause or excuse or not'? If not then, that employee is entitled under section 20(1) of the IRA 1967 to apply for his reinstatement.

There are several types of dismissal.<sup>5</sup> These include - direct dismissal, termination of contract of employment, forced resignation and constructive dismissal. However, these dismissal as required by section 20(1) of the IRA 1967 above, shall only be exercised with 'just cause or excuse' by the employer, failing which the court would nullify the termination.

### *The Contract Test*

The proponent jurists of this test advocate that there should exist a contractual relationship between the employer and employee. What is meant by contract of employment is that, the employee is entitled to be rewarded and to receive appropriate consideration or treatment from the employer in return to the exercise of his consideration or treatment for the benefits of his employer under the contract of employment. In other words, each party has duty and obligation to one another as prescribed in the terms and conditions of that contract. In employment law, once the terms and conditions of the contract of employment have been breached, this may lead to the determination of the contract, and as usually the case is, the termination or dismissal of the employee or the worker. This termination is either at the request of the employer or the employee himself opts to terminate it due to the failure of the employer to comply with the said terms and conditions of the contract.

Further, could constructive dismissal occur when there is a breach of an implied terms? What is the 'implied terms' then in the contract of employment?. The answer lies in the ratio of Lord Browne-Wilkinson J in Woods v WM Car Services (Petersborough) Ltd<sup>6</sup> case. He said 'the implied term or 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 the employer and employee.*

*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. 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'*

To illustrate this, take for example, if the express term of the contract of employment states that the employee is entitled to get certain payment from the employer on the completion of certain works and it happens that the employer fails to pay that certain payment, and this finally lead to the termination of the employee concerned. Well, this would certainly lead to a 'constructive dismissal' because the employer had breached the contract to make the certain payment as promised. On the other hand, if in case there is an implied term that the employee is guaranteed to receive certain rate of bonus when the profits of the business reaches certain amount, yet the employer only gave the bonus to certain employees, neglecting others out of spite, could it be said that there was a constructive dismissal against the employee who did not received it, if at the end of the day, because of this ill treatment and unfair practice, the employee concerned believed himself to have been driven out of the employment? In this case, it is humbly

<sup>4</sup> (2000) 2 MLJ. Per Gopal Sri Ram at page 611.

<sup>5</sup> See generally Farid Sufian Shuaib, *Dismissal Without Just Cause or Excuse: The Interpretation of The Word 'Dismissed' Under S. 20 of The Industrial Relations Act 1967*, (1998) 4 MLJ xlv.

<sup>6</sup> (1993) 1 MLJ 217.

opined that under this circumstance it would amount to constructive dismissal. Cases relevant on this point are Palmanor Ltd v Cedron<sup>7</sup> and Syarikat Sports Toto (M) Sdn Bhd v Akmal a/l V A Lazarus, Negeri Sembilan<sup>8</sup>.

Based on this definition, the test to be applied in determining the 'constructive dismissal' is the contract test. The judge in Wong Chee Hong's case applying the contract test held that the appellant had been constructively dismissed by the employer when instead of obtaining reward for the good work he had done, he was demoted from being the Head of one of the employer company's department to a mere cinema manager, a position which he had held some fifteen years ago as a junior executive, albeit on the same terms and conditions of service. Such relegation of responsibility with its consequence humiliation and frustration and loss of estimation amongst his fellow employees made it impossible for the appellant to carry on being employed under the employer company's organization. In other words, he had been driven out of his employment and been dismissed.

Some judges have laid down specific guidelines to further explain the test. This guideline states that in order to ensure that a claim of constructive dismissal succeeds under the contract test, two limbs of the contract test must be present:<sup>9</sup>

*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?*

Other example of cases that followed the principle in Wong Chee Hong that apply the 'contract test' are Southern Bank Bhd v Ng Keng Lian & Anor<sup>10</sup>, Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd<sup>11</sup>, Christoph Hoelzl v Langkawi Island Resort Sdn Bhd<sup>12</sup>, Rudy Darius Ogous v Ming Court Hotel<sup>13</sup>, Michael Brian Davis v Microsoft (M) Sdn Bhd<sup>14</sup>, Tan Cheng Hing v Federal Metal Printing Sdn Bhd<sup>15</sup>, Kumpulan Jerai Sdn Bhd, Rengam v National

<sup>7</sup> Cited as 1978 June 9, Employment Appeal Tribunal cited from Professor V Anantaraman, *Malaysian Industrial Relations: The Doctrine of Constructive Dismissal*, (2000) 3 MLJ, p. li. See also Woods v WM Car Service (Peterborough) Ltd (1981) IRLR, 347.

<sup>8</sup> (1998) 1 ILR 79. See also Professor V Anantaraman, *Malaysian Industrial Relations: The Doctrine of Constructive Dismissal*, (2000) 3 MLJ, p. li, lii and liii.

<sup>9</sup> MPH Bookstores Sdn Bhd v Lim Jit Seng (1987) ILR June, 585.

<sup>10</sup> (2002) 5 MLJ, 553. In this case, the court specifically referred to contract test to determine constructive dismissal and not to unreasonable test. Faiza Tamby Chik J said at page 571"

'And, in determining questions on a constructive dismissal...common law principles, viz, the contract test as propounded in Wong Chee Hong's case, are to be applied'.

<sup>11</sup> (1998) 2 MLJ, 599. Mahadev Shankar CJA said, at page 605 – 606:

'It has been repeatedly held by our courts that the proper approach in deciding whether constructive dismissal has taken place is not to ask oneself whether the employer's conduct was unfair or unreasonable (the unreasonableness test) but whether 'the conduct of the employer was such that the employer was 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'

<sup>12</sup> (1998) 6 MLJ, 162. Mohd Noor Ahmad J said, at page 168:

'With regard to the impugned clause in the new job, descriptions, I am of the view that it does not detract from the original terms of employment which could have been spelt out at the inception of the employment had there been a written job description as the amendments are within the ambit of the functions and duties of the general manager. Therefore, the defendant cannot be said to be guilty of a breach which goes to the root of the contract or had evinced an intention no longer to be bound by it.'

<sup>13</sup> (2000) 6 MLJ, 780. KC Vohrah J said, at page 786:

'The issuance of the show cause letter was part and parcel of the investigation, and it also gave him an opportunity to explain the alleged misconduct for alleged breach of the house rules, and I cannot understand how it could have constituted an act of victimization. The show cause letter cannot amount to a fundamental breach of the contract of employment'

<sup>14</sup> (2000) 3 MLJ 669. Faiza Tamby Chik J said at page 675:

'Therefore the tests for establishing constructive dismissal is two pronged, namely:

a) is there a breach of contract, or...'

<sup>15</sup> (1999) 3 MLJ, 564. Where Faiza Tamby Chik J, said at page 573:

Union of Plantation Workers<sup>16</sup>, Holiday Inn, Kuching v Lee Chai Siok Elizabeth<sup>17</sup>, Campbell Cheong Chan (M) Sdn Bhd v Ayyawoo a/l Nadeson<sup>18</sup>.

### *The Just and Equitable Test (or Unreasonable Test)*

#### *Origin of the Test*

This test was based on the statutory provision contained in section 20(1) of the IRA 1967. This section requires that every dismissal or termination employment shall only be exercised by the employer on just cause or excuse. Failure to comply with this requirement will mean that the act of dismissing and terminating the employee to be null and void. The employee in question may lodge a complaint and make representation to the Director General of the Industrial Relation for reinstatement. This test has been applied in several cases.

In Goon Kwee Phoy v J & P Coats (M) Bhd<sup>19</sup>, the appellant's employment had been terminated by the respondent Company on the ground of redundancy. However, this ground had not been proven and it was evident that it was merely a fallacy. So, the appellant applied to the Director General of Industrial Relation that the act of the respondent amounting to dismissal without just cause and excuse. Pursuant to section 20(1) of the IRA, if the dismissal was made without just cause and excuse, the appellant was entitled to reinstatement. The DG later referred to the Minister and then the Minister referred to Industrial Court for determination. The Industrial Court found that the ground given by the respondent Company was fallacious and held that this had amounted to dismissal without just cause and excuse. The respondent company appealed to the High Court. The High Court agreed that there was no redundancy. However, the High Court allowed the appeal of the respondent on the ground that the respondent Company was merely exercising its right under the contract of employment in terminating the appellant by giving one month's notice and an ex-gratia payment of six months' notice by way of retrenchment benefit in recognition of the appellant's past services. The respondent company's act was justified as being derived from the terms of the contract, however fallacious the ground of termination on the appellant would be. Dissatisfied with this finding, the appellant appealed to the Federal Court. The Federal Court held that irrespective whether there was a termination of employment in the exercise of their right under the contract or an outright dismissal, such act of the respondent must and ought to have been carried out only with just cause and excuse. This is required under section 20(1) of the IRA 1967. By terminating the appellant's employment based not on just cause and excuse, ie by giving reason that there was a redundancy which in fact there was none in order to convince the appellant to accept the termination of employment would certainly tantamount to dismissal without just cause and excuse, which warrant the court to grant compensation in lieu of reinstatement to the appellant.

Other cases that followed the principle of unreasonable test (just and equitable test) are Supercomal Wire & Cable Sdn Bhd v Anjana Devi A/P Satiavelu and Ors<sup>20</sup> (even though it is doubtful whether this case would fall under 'unreasonable test' as the judge in this case had applied 'the rule against natural justice'), in upholding that the appellant employer had exercised discrimination in dismissing the respondents employee, thereby had breached the rule against natural justice when it only chose the respondents to face the allegation of misconduct and even though there were also others too involved in such misconduct), Dr A Dutt v Assunta Hospital<sup>21</sup>, and Ang Beng Teik v Pan Global Textile Bhd, Penang (except when the case was brought to the Federal Court, where the Federal Court had applied contract test).<sup>22</sup>

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'Therefore I am of opinion that it was incumbent upon the applicant to establish that the respondents committed a fundamental breach which went to the very root of the applicant's contract'

<sup>16</sup> (1996) 3 MLJ, 221. Low Hop Bing, J said at page 238:

'Therefore, in a termination of service under section 15(2) there is no requirement to have an enquiry as the employee is deemed to have broken his contract: ...'

<sup>17</sup> (1992) 1 MLJ.

<sup>18</sup> (1998) 7 MLJ 10.

<sup>19</sup> (1981) 2 MLJ 129.

<sup>20</sup> (2003) 6 MLJ 729.

<sup>21</sup> (1981) 1 MLJ 304.

<sup>22</sup> (1996) 3 MLJ, 137.

*Conclusion: Which Test Is The Most Appropriate and Should Be Adopted by Courts?*

It is apparent that the prevailing test applied and preferred by the apex court on constructive dismissal in Malaysia is the contract test. This is because, apart from Wong Chee Hong and the like, there is a recent Federal Court decision of Ang Beng Teik that reversed the decision of Gopal Sri Ram JCA who had applied the 'just and equitable test' in the Court of Appeal. However, Gopal Sri Ram JCA<sup>23</sup>, B Lobo<sup>24</sup> and Farid Sufian Shuaib<sup>25</sup> argued that the 'just and equitable test' should be preferred on the grounds that:<sup>26</sup>

1) Before Wong Chee Hong there was Goon Kwee Phoy, a case decided by the Supreme Court which applied the statutory 'just cause and excuse' test. Thus, in Wong Chee Hong, the Federal Court should not have applied the 'the contract test' as applied in England in Western Excavating. In Goon Kwee Phoy, the Supreme Court had examined in a considerable length about 'termination' and 'dismissal' and eventually accepted the 'just and equitable' statutory test as the test to determine constructive dismissal;

2) It follows that, according to the principle of 'just cause and excuse', the court should look into the alleged act of 'constructive dismissal' on part of the employer and then determine whether the dismissal (which could include 'constructive dismissal') is with just cause or excuse or not;

3) In addition, section 30(5) IRA 1967 imposes certain principle to the court to settle industrial dispute 'in accordance with equity, good conscience and the substantial merits of the case without regard to technicalities and legal form'. Thus, it means that the court should apply the principle of equity and not restricting itself to the common law principle such as the contract test as propounded by Lord Denning in Western Excavating; and,

4) The test 'just and equitable' should be preferred because it is in congruent with section 17(A) of the Interpretation Act 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 Act shall be preferred to a construction that would not promote that purpose or object. It is submitted that the purpose of the IRA 1967 and employment law as practised in Malaysia is to preserve industrial harmony based on equity and good conscience as heralded by section 30(5) of the IRA 1967.

It is also in the authors' view that, 'just and equitable test' would be the best test in determining 'constructive dismissal'. Apart from the above grounds, the author would like to emphasize the limitation imposed by section 3 (1) of the Civil Law Act 1956. Pursuant to this section 3(1)(a), in West Malaysia, the law that shall be applied are the written laws in force in Malaysia except where there is none, then the common law of England and the rules of equity as administered in England as at 7 April 1956. On the other hand, section 3 (1) (a) and (b) provide that in the case of Sabah and Sarawak, apart from common law and rules of equity, the civil courts shall apply, provided that there is no written law, the statutes of general application as administered or in force in England. The application of these sources of law is that only those that are practised and applied in England as at 1st December 1951 for Sabah, and as at 12th December 1949 for Sarawak. However, the application of these sources of law is subject to the proviso 'so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary'.

Thus, if we see the grounds of judgment made under Wong Chee Hong, it is clear that these grounds were based on the law decided in Western Excavating, a case that had been decided after 7<sup>th</sup> April, 1956. It follows that the principle of law on the contract test applicable to determine constructive dismissal should not have been applicable in Malaysia because of this statutory prohibition. However, it can be argued that what has been laid down by the IRA 1967 in particular section 20(1) does not specifically mention the test to be applied, and this lacuna warrant the Courts to refer to the law as applied in England. However, as Western Excavating was decided after 7<sup>th</sup> April 1956, whatever principles of law adopted in that case including the contract test propounded by Lord Denning MR would not be applicable here in Malaysia. It should be remembered that before Western Excavating, particularly as at 7<sup>th</sup> April 1956, neither in England was there any definite applicable test to determine 'constructive dismissal'. Thus, Malaysian Courts, it is submitted, have erred when they regard the 'contract test' as the conclusive law as at 7<sup>th</sup> April 1956 applicable in England.

<sup>23</sup> See his judgment in Ang Beng Teik v Pan Global Textile Bhd, Penang (1996) 3 MLJ 137.

<sup>24</sup> See article entitled: *Whither The Test For Unjust 'Constructive' Dismissal in Malaysia?* (1999) 3 MLJ xc.

<sup>25</sup> See his article entitled: *Dismissal Without Just Cause or Excuse: Interpretation of The Word 'Dismissed' Under Section 20 of the Industrial Relations Act 1967*, (1998), 4 MLJ xlv.

<sup>26</sup> See Professor V Anantaraman, *Malaysian Industrial Relations: The Doctrine of Constructive Dismissal*, (2000) 3 MLJ, p. lv and lvi

Finally, in the event the above contention and grounds is still not enough to settle such a problem on the appropriate test applicable, it is suggested that certain amendments be made on the IRA 1967. These amendments must necessarily give a definition of 'constructive dismissal' as well the statutory test to determine it.<sup>27</sup>

### *Comments on Recent Case – Ang Beng Teik*

It needs no reiteration that a definite test applicable in relation to constructive dismissal is very essential or there would be 'chaos'. For example, in Ang Beng Teik, the Industrial Court decided that the test is the 'just and equitable'. However, when this case went to the High Court, the judge reversed and applied the contract test instead. Aggrieved with the decision, the appellant later appealed to the Court of Appeal and the Court of Appeal applied the 'just and equitable' test which resulted in his appeal being allowed. Then, at the Supreme Court, it was reversed again, and restored the 'contract' test adopted by the High Court. The Supreme Court held that the refusal of the appellant to take up the demoted position offered by the respondent employer tantamount to breach of his contract of employment, which warrant the employer to dismiss him. However, the court did not consider the chain of events leading to his refusal to accept the offer ie the facts or events that had caused him to be driven out of the employment. The dissatisfaction of the appellant was that the domestic inquiry held, had not called all witnesses and evidence before convicting him. This inquiry certainly, contended by the appellant, was formed by the respondent company as a means to victimize him in order to get rid off him. Accordingly this 'chain of event' had influenced him not to take up the offered demoted position. Now, let us examine certain issues below, in order to see the problem faced by the judicial minds in Ang Beng Teik clearer.

1) Can we say that at the time of holding the first domestic inquiry, the respondent employer/company had breached the contract, in that the appellant employee alleged that the inquiry did not conduct itself properly? We could say so as there was proof that showed that there was indeed acts of victimization on part of the respondent employer/company towards the appellant employee during the course of domestic inquiry conducted by the respondent employer/company;

2) Can we say that the domestic inquiry undertaken by the respondent employer/company was made without just cause and excuse? Similarly, we would agree as there was proof of unjustified acts of the respondent employer/company during the domestic inquiry; and,

3) Can we say that when the appellant employee refused to accept the demoted position because of his frustration with the finding of the domestic inquiry which finally found that there were several 'baseless' and 'unfounded' charges which finally had been unduly proven, made against him, there was a breach of contract on his part or had he by so acting shown unreasonable attitude warranting his dismissal? In this respect, it is difficult to say that he had breached the contract. This is because he considered that he had been victimized in the domestic inquiry held earlier and that by so refusing to accept the offer, he indicated his protest against the offer. However, this very non-complying act of the appellant employee had persuaded the Supreme Court to hold that he was the one who had breached the contract and that the dismissal by the respondent employer/company was justified. This is because, at the time of his objection and refusal, to report for duty, to the demoted position offered, he was still an employee, and that during the course of employment he is under a contractual obligation to comply with the instruction of the respondent employer/company. Thus, by not complying with the instruction of the respondent employer/company, he had breached the contract of employment and that the dismissal by the respondent employer/company was justified. On the other hand, before the case came to the Supreme Court, the Court of Appeal had a contrary view on this point. According to the Court of Appeal, the act of the appellant employee by not complying with the instruction of the respondent employer/company was justified. The refusal by the appellant to take up the demoted position offered indicated his objection against the victimization done by the respondent employer/company during the domestic inquiry. Accordingly, the Court of Appeal held that 'the chain of events' occurred, prior to the objection by the employee to take up the demoted post, should be looked at and be taken into consideration, viz - the act of victimization (committed by the domestic inquiry held earlier) done by the respondent employer/company was made without just cause and excuse and this had finally caused the appellant employee to be driven out of his employment. In the result, the Court of Appeal held that the constructive dismissal committed (the domestic inquiry process was conducted without hearing all evidence and witnesses, which was detrimental to the appellant's case) by the respondent employer/company was done without just cause or excuse. And that because of this victimization the appellant employee refused to accept the demoted position offered by the respondent employer/company.

<sup>27</sup> See Professor V Anantaraman, *Malaysian Industrial Relations: The Doctrine of Constructive Dismissal*, (2000) 3 MLJ, p. 1x.

Thus, it is important for Court in Malaysia to put a stop to this state of uncertainty and tussle. Again, as reasoned out above, the preferred test would be the just and equitable test. If this test is applied, then Ang Beng Teik (the appellant) would win the case.

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