

Understanding Constructive Dismissals

(an extract from RIGHT TO LIVELIHOOD & EMPLOYMENT DISMISSALS by b mathew)

There are generally 2 types of employment dismissals when your employer fires you;

1. Direct dismissals

&

2. Constructive dismissals

Examples of direct dismissal

Mr. Brutus is the President of XYZ Motors Ltd. One morning, after quarreling with his wife he charges ragingly into his office and it so happens an unlucky Mr. John the office clerk crosses his path. Mr. Brutus summons Mr. John into his office and screams directly at his face, "I don't like the look of your face and your rabbit teeth sticking out of your stinking mouth and therefore you are hereby fired!" And gives a kick on his back and there goes Mr. John rolling and tumbling to the doors of the local employment tribunal. The employment tribunal then declares Mr. John's **direct dismissal as a dismissal without just cause or reason** and slaps General Motors with a hefty compensation sum to be paid to Mr. John.

Mr. Cunning Fox works for XYZ Ceramics Ltd as a General Manager. During a business trip to Japan, a Japanese businessman took him out for one hell of an entertainment and got a fully drunk Cunning Fox to pour out the entire trade secrets of XYZ Ceramics to him. Thereafter Mr. Fox returns home to face a domestic enquiry panel at the directive of Mr. Barking Smith. The panel of enquiry finds Mr. Fox guilty of breaching a fiduciary duty of trust & confidence. And Mr. Barking Smith gives a kick on his back and there goes Mr. Fox rolling and tumbling to the doors of the local employment tribunal. The employment tribunal then declares Mr. Fox's **direct dismissal as a dismissal for just cause or reason**.

That was very kind of Mr. Brutus and Mr. Smith and Mr. Brutus in particular was indeed a good, merciful and compassionate man. At least Mr. Brutus told directly at John's face that he did not like him and sent him off for good.

Examples of constructive dismissal

Mr. Ali works as an Administration Manager for XYZ Semi-Conductor Ltd. He is a perfect worker who starts his work at 7.30 am and leaves office at 10.00 pm. His Managing Director, Dato Thomas hates this man from day 1 but simply could not get rid of him. The Dato, then appoints Mr. Yusop as senior administration Manager to supervise Mr. Ali. Mr. Yusop discovers many trivial and petty issues in Mr.

Ali. Mr. Ali then receives waves after wave of showcause, caution, warning letters from Dato. The Dato and Mr. Yusop then make a mountain out of every petty faults of Ali. Ali gets blood pressure. He becomes depressed severely; he beats up his wife and children. The Dato and Yusop then overload him with additional assignments which forces Ali to work 16 to 18 hours a day including rest days and public holidays. The Dato then removes Ali's key responsibilities and gives them to Yusop. Ali's annual increments and bonuses are frozen due to poor performance. Almost every day, Ali's superiors yell and scream at him for unsatisfactory performance. Ali is then instructed to move out of his office to sit in common office area and all office staffs now laugh and make fun of him. Unable to bear his disgrace and mental agony, Mr. Ali resigns and leaves and goes crying to the labour tribunal. The tribunal says Ali has been constructively dismissed and slaps Ali's employer a hefty compensation sum to be paid to him.

Now that was indeed sinister, evil and diabolical of Dato Thomas.

Now, before going into constructive dismissal let us look at the elements of an employer employee relationship so as to comprehend a deeper understanding of a constructive dismissal

What is an employer employee relationship?

A contract of service or employment is an agreement or a binding covenant between an employer and an employee and is the basis of all employment relationship. The fundamental element of any binding contract is an OFFER & an ACCEPTANCE. Hence a binding employer and employee contractual relationship comes into effect when an offer of employment by the employer is accepted by the employee. And thereafter, a number of enforceable rights and obligations recognized by law bind this contractual relationship.

Implied terms of a contract of service

1.2 Duty & Obligation of mutual Trust & Confidence

The employee and employer have a mutual or bilateral duty of trust. The employer has a duty of trust & confidence towards his employee. In like manner, an employee has a duty of trust & confidence towards an employer.

Let us now look at the following case:

[2002] IRLR 9 - Morrow v Safeway Stores PLC

In this case, the higher court ruled that all breaches of an implied duty & obligation of trust & confidence between an employer and employee tantamount to a serious repudiatory breach of an employment contract going to its very roots. Here the employee was scolded and insulted by her Company's manager creating unbearable embarrassment for her in front of her customers. She then walked out of her employment claiming constructive dismissal arguing that the company had breached an implied duty of trust and confidence.

The lower court found the company having breached an implied duty of trust and confidence but nevertheless not serious enough entitling her to walk out on constructive dismissal. The higher court then declared that the lower court had erred in its decision in having considered a demarcation between a fatal and a non-fatal breach of an implied duty of trust and confidence, because “...a finding that there had been conduct amounting to a breach of the implied term would inevitably mean that there had been a fundamental or repudiatory breach that necessarily went to the root of the contract as the Employment Appeal Tribunal had recognised in *Woods v W M Car Services (Peterborough) Ltd (1981) IRLR 347. (2)* “

Hence, any breach of an implied duty of trust and confidence would tantamount to a fundamental breach going to the very root of an employment contract.

Another example would be that of divulging an employer’s trade secrets and if an employee is found guilty of this implied duty of trust and confidence, an employer would be justified in dismissing him for just cause and reason.

What divulged information could be considered a trade secret so as to warrant a breach of an implied relationship of mutual trust between an employer and an employee?

The information or data must be a trade secret on the foundation of which the company operates its business

The information must have substantial commercial value and a substantial potential for business exploitation by potential competitors;

In a constructive dismissal situation, the common law fiduciary duty of trust & confidence between an employer and an employee is seriously undermined and damaged by an employer after the employer decides intentionally to dishonor his contract of employment with his employee. And this intention then induces and leads the employer to consciously & unconsciously, knowingly & unknowingly to indulge unilaterally in a series of acts, conducts and behaviors to seriously damage a fiduciary duty of trust and confidence between him and his employee culminating in an indirect dismissal called Constructive Dismissal.

The manifestation of a constructive dismissal situation first starts when the employer begins evincing intentions to avoid his contractual obligations and on the surface it always appears that the employer is solely to be blamed. Nothing can be further from the truth; sometimes the employee’s conduct could be the main contributing factor.

What are the signs of an impending Constructive Dismissal

When the employer evinces intentions to avoid their contractual obligation with the employee concern, the following signs amongst others will be clearly manifested;

- Fault-finding over trivial, non-fatal issues on work matters
- And in furtherance to the foregoing intention, convening domestic enquiries to further insult and tarnish the employee’s self-esteem and reputation
- Meting out disciplinary actions against the employee grossly out of proportion to his purported faults, eg suspending the employee concern over a trivial non-fatal issue, bombarding the employee concern with waves of wave of warning letters, showcase letters and other forms of vengeful actions to break the employee’s will and tenacity to continue employment

- Demanding the employee concern to meet unreasonable & unrealistic deadlines.

In the following actual case, the employee took a right step in notifying his employer of their contractual breaches, giving them reasonable notice period to rectify such breaches and upon their failure to do so, walked out of his employment on construction. For reasons of anonymity I have changed the actual names of the parties concern. The employee concern issued a letter to his employer as follows before walking out of his job. In the letter below, the employee concern, carefully highlighted each and every repudiatory conduct and at the same time skillfully rebutted each and every allegation leveled by the employer and then finally gave the employer a reasonable notice period to mend his repudiatory conducts:

Employee

Address

Date

BY COURIER

&

AR REGISTERED

TO,

THE EMPLOYER

ADDRESS

Dear Employer,

COMPANY'S REPUDIATORY CONDUCT & NOTICE OF CONSTRUCTIVE DISMISSAL

A. ENQUIRY OF 30 OCTOBER 2008

B. INCIDENT OF 23 SEPTEMBER 2008

C. DEMANDS TO MEET UNREASONABLE DELIVERY DEADLINES

D. REPLIES TO SHOWCAUSE / SUSPENSION LETTER DATED 22 DECEMBER 2008

A. ENQUIRY OF 30 OCTOBER 2008

1. On 14 January 2006, I commenced employment with the Company as Factory Manager and interalia;

- I. *My primary job scope was to take charge and be responsible for batch output of production by way of managing incoming raw materials, the given machines and given manpower.*
 - II. *As a secondary or auxiliary job scope I am to render assistance to R&D and QC departments in their product sampling testing which being a mere trial & error testing, albeit clearly and obviously not a part of the said batch production of finished furniture products, which being a distinct and separate experimental activity.*
2. *And to this end, that is, in respect of the said sampling activity, I am to arrange and make available the production facilities for the R&D & QC departments to carry out their experimental projects through trial & error methods to explore the possibility of meeting unique / special demands by customers.*
 3. *The aforesaid demarcation between Production and R & D departments was further evidenced by the fact that*
 - I. *sometime year 2006, where the R&D department was strictly placed under direct responsibility and hierarchal control of the directors, A and B.*
 - II. *A documented confirmation of this fact is shown in the Company's latest approved organization chart for ISO 9002, duly revised on 02 September 2008, confirming that all R&D operations viz sampling / experimental projects were under direct hierarchal control, management and supervision of the said directors and **not** under the factory manager.*
 4. *Against the aforementioned backstage, you had on 30 October 2008 subjected me to a grueling and humiliating enquiry before a united team of a grossly biased and prejudiced board of panel and a high-handed prosecuting officer. The subject matter of the charge / accusation leveled against me (the accused) was on a certain Reylon sampling experimental project, where trial & error experiments were conducted by the R&D team under direct supervision by the R&D's head and director, A, using Medium Density Board (MDB) material in an attempt to meet special / unique and stringent requirements demanded by the fastidious customer Reylon. The aforesaid R&D experiment using the said MDB material then failed and Laurent as head of R&D instead of accepting full responsibility for the failed project conveniently put the blame on me, resulting in the Domestic Inquiry (DI) of 30 October 2008. I was thereafter found guilty for the failed Reylon Sampling project and unfairly suspended for seven days without pay*
 5. *And in respect of the foregoing paragraph 4, it is my averment that the panel of enquiry was defective and has committed serious errors as follows as shown in the DI notes;*
 - I. *The panel had instead of taking an inquisitorial approach in enquiring impartially into the material facts of the case absurdly took an adversarial approach to assist company's prosecutor by posing incriminating questions to the accused in its endeavour to prosecute and corner him as evidenced in the DI notes*
 - II. *Panel's failure to inquire and establish as to whether company's existing production facilities and manpower have the respective standard and skill to meet quality benchmark demanded by fastidious customers*
 - III. *Panel had apparently purposefully condoned Company prosecutor's leading questions posed to Company's witness as shown in the DI notes, which conduct tantamount to a breach of rules of evidence in respect of examination and re-examination of its own witnesses*
 - IV. *The panel, the Company and its prosecutor had concealed and / or had deliberately failed to distinguish the demarcation between the factory manager's primary job responsibility and his secondary job responsibility, in that,*
 - *all R&D / QC sampling and / or experimental operations / projects do not come under direct hierarchal control of the factory manager*

- *but under direct hierarchal control of the directors, A and B as shown in the latest organization chart in the ISO 9002 manual.*
- V. *And to this effect, the company, its prosecutor and the panel in a concerted effort to conceal this material fact, did not tender as exhibit nor enquired into the company's organization chart in its ISO 9002 manual, which chart being a documented evidence proving that all R&D sampling projects do not come under direct hierarchal control of the factory manager but instead come under direct hierarchal control and responsibility of Laurent*
- VI. *The impugned Reylon sampling testing using MDB material (the subject matter of the said domestic enquiry) was merely a experimenting project which was meant to be handled strictly by the R&D and its head, A. Furthermore, from the notes of the DI, A is evidently both actively and directly involved in the impugned Reylon sampling experiments along with R&D team And in respect of the aforementioned Reylon sampling experiments, notes of DI show that Mr Mag of Reylon only liaisons actively with A and other R&D team but not with the factory manager (the accused) for obvious reasons and the panel had deliberately and purposefully closed its eyes and refused to take cognizance of these material facts. There being only one logical conclusion to the aforesaid demeanour of the panel, that it had leaned blindly and unjustly in favour of the Company which apparently had placed its hand-picked members to the panel so as to nail the accused by all means.*
6. *Due to reasons as aforesaid the said domestic inquiry was tainted with mala fide, and as such, is defective. It is my averment that my suspension for seven days without pay is therefore null and void. Whereof I demand, **which I hereby do serve a notice of demand, that you fully compensate and restore the seven days wage** which you have deducted illegally on the basis of a defective domestic inquiry tainted with mala fide. **If you fail or do not do so before or by 07 January 2009, then I would have no other alternative but to treat it as one of my grounds to consider myself as constructively dismissed***

B. INCIDENT OF 23 SEPTEMBER

7. *On 23 September 2008, you had demanded that I resign from my employment or failing which you had threatened to drive me out of employment by making my working life miserable, the same was conveyed to me through your assistant, Mrs ALice. This would tantamount to a repudiatory conduct on your part, having evinced an unequivocal intention to abandon my contract of service with you.*

C. DEMANDS TO MEET UNREASONABLE DELIVERY DEADLINES

8. *Since the incident of 23 September 2008 you have faithfully mounted insurmountable work pressure on me in a calculated attempt to break my will and tenacity to continue my employment in the company. And to this diabolical end, you have forced upon me the herculean task of meeting impossible delivery deadlines instructing me to produce and complete unscheduled products brought in the last moment in breach of incumbent production schedule of ongoing products for scheduled customer deliveries.*
9. *Please take notice, that under implied terms of a contract of service, employers are not entitled and / or are precluded by law from repudiatory conducts such as in furtherance of an intent to drive an employee out of employment,*
- I. *Instructing or assigning jobs / tasks which are unreasonable, unconscionable and impossible of performance by a reasonable man possessing similar skills*
 - II. *Applying high-handed tactics like incessant fault-finding and caviling, shouting, and hurling abusive words to break an employee's mental and emotional tenacity to remain in employment.*
 - III. *Placing an employee under duress through a work environment filled with abnormal extremes of fault-finding emails, showcause letters, warning letters, enquiries, intolerance and perfectionism demands and in particular over non-fatal mistakes / faults emanating from normal human frailties*

D. REPLIES TO SHOWCAUSE / NOTICE OF SUSPENSION DATED 22 DECEMBER 2008

10. You have on 23 September 2008, had evinced an intention to repudiate my contract of service by threatening me that if I do not resign from my employment, you are going to make my working-life miserable (unbearable). It is therefore clear that your showcause and notice of suspension dated 22 December 2008 would be in furtherance of an unlawful attempt to make my working life unbearable, inflicting pain of unbearable ignominy and insults before my own peers and subordinates through unabated suspensions, fault-finding emails, **showcause** and warning letters, domestic enquiries, hurling vulgar derogatory insults over unsubstantiated accusations. Furthermore, the company had demanded that I retrieve my reply-letter of 25 November 2008 or failing which serious action would be taken against me. It is therefore clear that your showcause / notice of 22 December 2008 was also due to my refusal to retrieve my letter of 25 November 2008. But nevertheless, without prejudice to my aforesaid averments of your repudiatory conduct, my replies to the said showcause are set out in the succeeding paragraphs 11 to 23;
11. On query number 1, my reiteration would be as per my earlier letter dated 25 November 2008 under paragraph 4 and I have nothing to add further. Your repetition of this query despite my unequivocal reply to your earlier query dated 20 November 2008 on the same and self-same matter would tantamount to a fault-finding harassment over a petty and trivial issue which could have been resolved otherwise than through a draconian showcause letter or a formal domestic enquiry. This would further tantamount to an unequivocal evidence of a mala fide query which is petty, frivolous and vexatious that would serve no useful purpose otherwise than for your determination to break my will and tenacity to remain in my employment.
12. On query number 2, I totally agree with you that "...disobeying a reasonable, bonafide and lawful order or query from a superior would amount to insubordination ". But however, the same cannot be true for queries from superiors / employers that are frivolous, unreasonable and tainted with malafide. On 23 September 2008, B had conveyed a threat to me through her assistant Mrs Alice that if I do not resign from my job, she (B) is going to make my life miserable. Following this incident of 23 September 2008, she being true to her intent to drive me out of my employment began assailing a volley of frivolous, vexatious and malafide queries and amongst others the said emails of 5 & 6 November 2008. Do I have a bounden duty under contractual terms to answer frivolous and vexatious emails tainted with malafide and in particular from an employer who has evinced intention to repudiate the said contract of service ? It is therefore my averment that it is humanly not possible to continue in an employment where hail & brim stones of frivolous, vexatious and malafide queries, suspensions, warning letters, domestic enquiries are rained upon me unabatedly. Furthermore, it is humanly not possible to focus, concentrate and perform your job effectively with the sword of Damocles (unabated fault-findings) hanging over my head.
13. On query number 3 (a), I deny having given any false information to management in regards to the aging and near-expired electrostatic machine. Your imputation of questionable integrity of my person and incumbent office is not only untrue but is also slanderous. The said electrostatic machine is old and has depreciated its book value, and hence its reliability and efficiency factors are low / sub-standard. And this being an undisputable fact which no one can deny. In a given situation where reliability and efficiency factors for the said electrostatic machine are low, would my explanation of 07 November 2008 to management appear implausible when I had said that the delay of P1 2990 was due to the breakdown of the expired electrostatic machine ?
14. On queries number 3 (b) and 4 on purported misinformation given to management in regards to P1 EC 18 product and on purported delays in production please take cognizance of the following facts which are dictated by production scheduling norms when meeting delivery deadlines;
- i. Timely arrival of raw materials in the right / required quantum
 - ii. Right number of manpower
 - iii. Existing production capacity
 - iv. Strict adherence to a suitable production schedule (order of production priorities)
 - v. Output capacity to meet delivery deadlines
 - vi. Acceptance of sales orders in accordance to the foregoing capacities
15. Where in respect of the foregoing norm, (i) must be greater or equal to (ii) and (ii) must be greater or equal to (iii) and (iii) must be greater or equal to (iv) and (iv) must be greater or equal to (v) and (v) must be greater or equal to (vi). If there is an upward surge in (vi), efforts must be taken to increase the other 5 factors in the said equation but certainly not the reverse. You also need to note, where deadlines are committed by production, some plus or minus leeway need to be given. For example, when I had deferred the 16 December 2008 deadline in regards to the delivery of P1 EC18, it could be a few days later. This is proven by empirical results of production output in all types of industries both in regards to volumetric and batch systems. No where in the world is there a perfect utopian schedule where planned delivery deadlines and actual delivery deadlines perfectly coincide. And for you to insist otherwise would be very unreasonable. Furthermore, when accepting sales orders, customers need to be informed / educated on the aforesaid plus or minus leeway in addition to giving strict consideration to the aforesaid equation factors so as to ensure smooth delivery of products to customers. When ongoing production queue in the schedule is interrupted by slotting-in a new product as priority, it would result in delays for the rest of other queued up products and not only this, but the other production factors in the aforesaid equation are also detrimentally affected. And this is another reason for all these meaningless showcauses, domestic enquiries,

warning letters and suspensions you are raining upon me. You have in your ignorance, interrupted the aforesaid equation as follows and then place the blame on me when things go wrong or when delivery deadlines are delayed.

- *It is an undeniable fact that you have reduced workforce from 190 workers in January 2008 to about 80 workers presently, thereby upsetting the aforesaid equation*
 - *It is an undeniable fact that you have failed to upgrade and improve existing production facilities despite knowing several aging machines having expired even their book values, thereby upsetting the aforesaid equation*
 - *It is an undeniable fact that you have failed and / or refused to comply ongoing production schedule by interrupting / jumping ongoing product queue, thereby upsetting the aforesaid equation*
16. *On query 5 (a), your allegations are hereby denied and not admitted save and except priorities for ongoing customer deliveries must prevail over experimental sampling projects. Would it be unreasonable to give priority to urgent customer deliveries over experimental projects ?*
17. *On query number 5 (b), your allegations are hereby denied and not admitted*
18. *On queries number 6 (a), (b) and (d), it is my averment that I am fully entitled to speak out on the basis of justification and fair comment, especially if the stated facts are true and when it is for the benefit of the company should strict compliance to production schedules be adhered.*
19. *Query 6 (c) is denied and not admitted*
20. *Query 7 (a) is petty and frivolous in the light of my explanation in reference to queries 3 (b) and 4*
21. *Query 7 (b) is denied and not admitted save and except my contributions on waste reduction and improvement projects on manufacturing facilities which you certainly are aware of but chose to conceal and ignore.*
22. *Queries 8 (a) and (b) are petty, frivolous and vexatious in which you are making a mountain out of an ant hill. The purported wastage of which you are making an issue of was within the control / tolerant limits, given the low efficiency level of the said machine / facility. Furthermore, the said production was during peak delivery urgency. You have superficially and generally stated " wastage was high " but you did not state the precise percentage or quantum of wastage.*
23. *Your queries as aforesaid are clearly petty, frivolous and vexatious, picking up trivial issues related to quotidian matters at work floor where it is not uncommon to see occasional non-fatal mistakes, errors and faults due to normal human frailties. For you to demand a Utopian perfection from me or any employee is unreasonable and absurd and certainly not within the contemplation of any contract of service either implied or expressed and in particular in a high volume batch production system like our's.*
24. *Wherefore, it is abundantly clear from your showcase / notice of suspension dated 22 December 2008;*
- i. *that you have failed to make a distinction between fatal errors and non-fatal trivial errors committed by a workman.*
 - ii. *that you demand and have so demanded a Utopian perfection from me and that you are trigger ready*
 - iii. *that you in your obsessive effort to drive me out of employment have gone to a ridiculous extent of meting out draconian disciplinary actions over purported "mistakes / misconducts" that are petty and / or unsubstantiated and / or untrue and / or non-fatal and / or trivial.*

*I fully agree that as an employer, you are fully entitled to mete out showcause letters, hold domestic enquiries, issue warning letters, suspend and dismiss an employee over genuine / serious misconducts. But to do so over conjured up faults and unsubstantiated accusations and in particular over issues / matters / mistakes / faults which are non-fatal, petty and trivial, emanating from normal human frailties would amount to a **Wednesbury Absurdity**; where your queries / issues leveled against me are so outrageous in its defiance of logic or accepted standards that no sensible person who had applied his mind to the issue could have arrived at it. And to do so in furtherance of an intention to force an employee to resign from employment would amount to a repudiatory conduct on your part.*

*In the aforesaid premise, **TAKE NOTICE**, you are required to rectify the aforesaid breaches and cease your repudiatory conduct before or by 07 January 2009*

TAKE FURTHER NOTICE, that if you do not rectify the breaches as aforesaid and / or cease your repudiatory conduct as aforesaid and fail to restore the seven(7) days wage which you had deducted illegally on the basis of a defective domestic enquiry, ***I would have no other alternative but to treat myself as constructively dismissed with effective from 07 January 2009 to seek redress under section 20 (1) of the Industrial Relations Act 1967 without any further notification or reference to you***

Yours faithfully,

Employee