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Forced Resignation Or Constructive Dismissal? Employee To Take A Stand

SUHANA ABDUL SAMAD v AUTOMOTIVE
INDUSTRIES SDN BHD

(Kuala Lumpur Industrial Court Case No.: 4/4-1356/21)

In cases of forced resignation and constructive dismissal, the facts of an employees' dismissal are in dispute. In view of this, the burden is on the employee to prove on a balance of probabilities that he / she was either forced to resign or constructively dismissed.

Commonly, in both situations of forced resignation and constructive dismissal, the employee would take the position that he / she left employment as a result of the employer's conduct and hence, was dismissed without just cause or excuse. However, it is important to recognize that there are significant differences between forced resignation and constructive dismissal, particularly, the elements that the employee is required to satisfy in order to prove that he / she was either forced to resign or constructively dismissed.

Therefore, an employee cannot simply claim that she was both forced to resign and constructively dismissed. On one hand, it must be established by the employee claiming constructive dismissal that:

- (a) The employer had by its conduct, breached the very essence or root of the employment contract;
- (b) The employer failed to remedy the breach despite being given sufficient notice by the employee; and
- (c) The employee left his / her employment in response to the said breach and not for any unconnected reasons.

On the other hand, in alleging forced resignation, the employee must establish that he / she was coerced, persuaded, driven, directed or even invited to resign by the employer, failing which, he / she would be terminated. In the instant case, the Claimant had attempted to abuse the process of the Industrial Court by pleading that she was forced to resign and / or constructively dismissed, despite stating in her letter to the Company (“**Notice of Constructive Dismissal**”) that she was “***constructively dismissed with immediate effect***”. The said allegation by the Claimant came after the Company commenced a preliminary investigation against her and other relevant employees, upon discovering a shortage of stock, which led to the Company incurring additional air freight costs of RM186,224.59.

In dismissing the Claimant’s case, the Industrial Court opined that she had changed her stance to one of forced resignation instead of constructive dismissal in preparation of her case when she realised that her claim of constructive dismissal would naturally fail to satisfy the elements of constructive dismissal due to the glaring inadequacies and inconsistencies in her factual narration.

The learned Chairman of the Industrial Court further examined the Claimant's Notice of Constructive Dismissal and held that other than a vague remark that the Company is fully aware of its alleged "fundamental breaches of her employment contract", the Claimant failed to set out the said "fundamental breaches" and failed to give the Company an opportunity to remedy those breaches. The learned Chairman further held among others, as follows:

- (a) The Claimant must have realised much later that her claim of constructive dismissal was fundamentally flawed due to subsequent events whereby the Company placed on record that it cannot remedy any breaches not known to it, thereby abandoning her claim of constructive dismissal and pursuing a case of forced resignation;
- (b) The Company had written to the Claimant on 3 occasions immediately after she left the Company's employment, asking her to report back to work to air her grievances so that the same can be addressed accordingly by the Company;
- (c) The Company has a right to proceed with its investigations on matters that it considers necessary to investigate and the entire investigation process did not in any way suggest that the Company was employing any underhanded methods to force the Claimant to resign;
- (d) There was not a single shred of evidence even remotely suggesting that the Company had engaged in any acts that can be considered as coercing or forcing the Claimant to resign; and
- (e) The Company had no interest in seeing the Claimant leave its employment in the midst of

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an ongoing preliminary investigation as can be seen from the Company's conduct in asking the Claimant to return to work on 3 occasions.

It is clear from the instant case that an employee cannot abuse the Industrial Court's process by claiming both forced resignation and constructive dismissal for the purpose of falling back on either one, in the event that the other claim fails. Further, the employers conduct subsequent to an allegation of either forced resignation or constructive dismissal is crucial in protecting its interest and rebutting such baseless allegations. This is demonstrated by the Industrial Court's extensive consideration of the Company's act of fervently hoping for the Claimant's return to work to help the Company with the investigation process. Therefore, employers ought to take immediate remedial actions upon receipt of any allegation of forced resignation or constructive dismissal by employees.

The employer was represented by partner Shariffullah Majeed, and senior associate Arissa Ahrom, of Lee Hishammuddin Allen & Gledhill. The Industrial Court Award may be found [here](#).

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