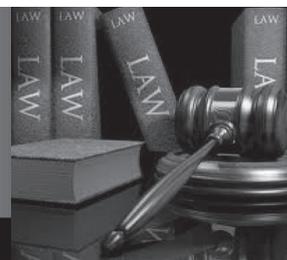


Malaysian Court Practice

Bulletin

Issue 3 of 2018



PP 11356/01/2013 [031727]

LEGAL CONSEQUENCES FROM UNILATERAL DEDUCTION OF EMPLOYEES' WAGES OR SALARY

Introduction

The contract law which is the product of the industrial revolution and the doctrine of *laissez-faire* as its justification applies to a contract of employment. A contract may be created without formal documents or even an express agreement, be it in written form or orally made. It can also arise from non-verbal agreements such as conduct. For a contract to bind the parties, they must intend to create a legally binding obligation. One of the significant or fundamental terms of the employment contract is the payment of wages or salaries.¹ It must be paid promptly and within the period specified by the law or as agreed to by the parties. Further, any deduction from the employee's wages or salary must be done with the consent of the employee. The implications ensuing from a unilateral deduction of an employee's salary or wages forms the discussion of this article with reference to the awards of the Industrial Court.

Wages or Salary Payment

Wages payable must be adequate to meet the basic needs of the worker and his or her family. Undoubtedly, the wages earned would be used to provide the employed and his family with the basic necessities of life such as food, clothing, education, housing, leisure activities and eventually, saving for retirement. The level of wages or salary² is generally set either by the market force (supply and demand) or by a

collective agreement. The International Labour Conference had, in its 54th session on 22 June 1970, adopted the Minimum Wage Fixing Convention, 1970 (No. 131) and the Minimum Wage Fixing Recommendation 1970 (No. 135), which provides, inter alia, that the ratifying states to establish a minimum subsistence wage. In response to the above international instruments, the Minister of Human Resources and Manpower of Malaysia has enacted the Minimum Wages Order 2012 which makes it mandatory for employers to pay monthly wages at the minimum at most. The Minimum Wages Order applies to basic salary which does not include the allowance and commission.³

1 where Whyatt CJ said: "Salary' is not defined in the EA [Employment Act]. Nor is it defined in any social legislation, such as the Employees Provident Fund Act, the employees Social Security Act or the Workmen's Compensation Act. What is 'salary' then? Does it have a wider meaning than 'wages'? According to *Webster's Third New International Dictionary*, 'salary' is a 'fixed compensation paid regularly (as by the year, quarter, month or week) for services'. It is also meant as pay for something done. And 'wage' in the same dictionary means: 'a pledge or payment usually monetary remuneration by an employer especially for labour or services usually according to contract and on an hourly, daily, or piecework basis and often including bonus, commission, and amount paid by the employer for insurance, pension, hospitalisation, and other benefits.' But 'wage', 'salary', 'stipend', 'fee', 'pay', and 'emolument' appear to be synonymous. Then can all mean the price paid to someone for his labour, ie wage. So much for the meaning of 'salary' or 'wage' as commonly used. But meaning, as it includes various allowances specified in the Act. There is therefore no merit in the contention that 'salary' has a wider meaning than 'wages'. In our view, the term 'salary' in the 1988 Collective Agreement means 'wages'. It cannot mean anything else. Any other meaning will result in lesser benefits accruing to the employees."

3 See *Agenda Wira Sdn Bhd v Amat Safii bin Karian & 34 Yang Lain* [2017] MLJU 1198.

1 *Salleh Abas CJ (Malaya) in Pa Pereira & Anor v Hotel Jaya Puri & Anor* [1983] 2 MLJ 314 at 316 stated: 'The expression 'wages', in its ordinary meaning, connotes the remuneration payable by an employer to a workman under a contract of service'.

2 'Salary' and 'wages' terminology was highlighted in *Tarasingh v Chairman, Sailors' Institute Committee, Singapore* [1959] 25 MLJ

Civil Procedure



Legal Editor
Shalini Sunderajan

Editorial Operations Associate
Agnes Tan

Managing Editor,
Southeast Asia
Annie Yeoh Leng Leng

Printed in Malaysia by
Sincere Service Centre Sdn Bhd
67-4, Wisma Ann Koai,
Jalan Ampang
50450 KL

LexisNexis, a division of Reed Elsevier (Singapore) Pte Ltd RES (2008), is a leading provider of legal and professional information in Asia, with offices in Malaysia, Singapore, Hong Kong, India, and other regions. The complete range of works published by LexisNexis include law reports, legal indexes, major works, looseleaf services, textbooks, electronic products and other reference works for Asia.

LexisNexis Malaysia Sdn Bhd
(formerly known as Malayan Law Journal Sdn Bhd)
T1-L6, Level 6, Tower 1, Jaya 33
No.3, Jalan Semangat
Seksyen 13
46200 Petaling Jaya
Selangor Darul Ehsan
Tel: 03 7882 3500
Fax: 03 7882 3506
Website: www.lexisnexis.com.my

Civil Procedure is a publication of LexisNexis. Copyright in all material published in this newsletter is retained by LexisNexis. No part of this newsletter may be reproduced or transmitted in any form or by any means, including recording or photocopying without the written permission of the copyright holder, application for which should be addressed to LexisNexis. Written permission must also be obtained before any part of this publication is stored in a retrieval system of any nature. The newsletter does not accept liability for any views, opinions, or advice given in the newsletter. Further, the contents of the newsletter do not necessarily reflect the views or opinion of the publisher and no liability is accepted in relation thereto.

Apart from the above, it is trite law that an employer must pay wages to its employees within the period specified by the law or as agreed to by the parties. Where the employee is not paid wages according to the contract, the affected employee is entitled to resign and to have his resignation treated as a constructive dismissal because the employer had repudiated an essential or fundamental term of the contract of employment.⁴ In *Shuhaila Ibrahim & Ors v Atlas One Malaysia Sdn Bhd*,⁵ both the claimants claimed for constructive dismissal due to the failure of the company to pay their salaries. Jalaldin Hussain, Chairman of the Industrial Court stated that the 'non-payment of salary was by itself a fundamental breach going to the very root of the employment contract between the parties. The company by its conduct had repudiated the employment contract and no longer had an intention to honour the claimants' contracts. Thus the claimants had been entitled to resign and treat themselves as being constructively dismissed.'

In *Lee Ting Fong v Mybiz Malaysia Sdn Bhd*,⁶ the Industrial Court held inter alia, 'no matter how bad the respondent financial position was, it does not permit the respondent to delay or not to pay the salary of the employees.' The breach by the employer has to be looked at as a whole and its cumulative impact assessed. In *Adam v Charles Zub Associates LTD*,⁷ the Employment Tribunal held inter alia, that the failure to pay an employee's salary on the due date may amount to conduct which constitutes a breach going to the root of the contract or which shows that the employer has no intention thereafter to honour the contract and thus justifies the employee in resigning. But the circumstances of each case must be looked at.

4 In *Viking Askim Sdn Bhd v National Union of Employees in Companies Manufacturing Rubber Products & Anor* [1991] 2 MLJ 115, Edgar Joseph Jr J stated: '[I]f an employee is ready to perform his services during the period covered by his contract of employment, which provides for payment of wages at certain times, he is entitled to the wages, although the employer has no work for him.'

5 [2012] 4 ILR 209

6 [2013] 4 ILJ 66; [2013] 3 ILR 58, YA Rosenani Abd Rahman, Chairman of the Industrial Court.

7 [1978] IRLR 551

The claimants in *Ricky Lim Han Keong & Yang Lain v Siemens Malaysia Sdn Bhd*⁸ admitted that their salaries were credited into their account on 8 January 2007 which was about three days after they claimed constructive dismissal. The claimants further agreed that it was the very first time that their salary payment had been delayed. Based on the circumstances of this case, the Industrial Court held that the delay of payment was not a fundamental breach that entitles the claimants to rely on the doctrine of constructive dismissal.

Deductions from the wages

Apart from the employer's obligation to pay the agreed wages promptly, any deduction from or retention of wages must be justified by contractual authority of some kind, such as an express or implied term or an implied right of set-off for breach of contract. An employer is not allowed to withhold or deduct any portion of an employee's wages except when it is authorised for example by statute or where the employer has written authorisation from the employee for the deduction.

The International Labour Organisation's Protection of Wages Convention 1949 provides, inter alia, that deductions from wages shall be permitted only under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreement or arbitration award. The Convention further provides that where deductions are made, the affected workers shall be informed, in the manner deemed most appropriate by the competent authority.

The Employment Act 1955 prevents an employer from making any kind of deductions from the wages of an employee except those provided in section 24(2). Deductions of wages is allowed when the employee was absence from work, for the recovery of any advanced or over-paid wages to the employee, the value of food and accommodation supplied to the employee by the employer, deductions in respect of contributions to be paid by the employee through the employer for any medical scheme or retirement scheme and the deductions for the recovery of any loan made by the employer to the employee. Likewise,

8 [2011] ILJU 1430; [2013] 3 ILR 685.



the Income Tax Act 1967 allows income taxes deductions from an employee's salary, among others.

Apart from the above, deduction can also be made pursuant to a court order directing an employer to make a deduction from an employee's wages and send the money to a third party for example, pursuant to an attachment of income order. The Married Women and Children (Enforcement of Maintenance) Act 1968 for example, empowers the court to order attachment of earnings of the person to whom the order to provide maintenance was issued or directed. Deduction from an employee's wages would also be possible if the employee has signed a written statement authorising such deduction.

Unilateral Deduction of Employee's Wages

Any unilateral decision to reduce or deduct an employee's wages, in the absence of a statutory authority or a contractual right would be deemed unlawful as it constitutes a variation of an essential term of the employment.⁹ Such a move by the employer may envisage that the employer had no longer intended to be bound or had evinced an intention no longer to be bound by the contract of employment. In the aforesaid circumstances, the employee may treat his contract as terminated and himself as constructively dismissed. In *Kumpulan SF Powertech Sdn Bhd v M Marnokarrun D Maruthamuthu*,¹⁰ P Iruthayaraj D Pappusamy, Chairman of the Industrial Court stated:

'The principle of law is that it is an employer's duty to pay an employee his agreed remuneration which is a basic obligation under the contract of employment. The employer is not entitled to deduct part of an employee's salary for whatsoever reason without prior notification. If the employer deducts part of his salary without notifying the claimant for any other reason for doing so (besides statutory deductions), and also without the claimant's knowledge and agreement then such unilateral reduction of salary could be a sufficiently serious breach to amount to repudiation of the employee's contract of employment.'

9 See *China Airlines v Puan Lim Lee Chang & Anor* [2011] MLJU 530.

10 [2013] 2 ILR 237.

At this juncture, it is worthwhile noting that the term 'constructive dismissal' is not defined in the Industrial Relations Act 1967. However, from various court judgments, constructive dismissal denotes that the employer is in breach of a significant term of the contract going to the root of the contract. The wrongful conduct of the employer entitles the worker to claim that the employer had evinced an intention no longer to be bound by the contract of employment, thus enabling the worker to regard himself as being dismissed.

It is pertinent that the claimant alleging constructive dismissal must prove that the company by its conduct, had breached an essential term or terms of the claimant's contract of employment or evinced an intention no longer to be bound by it. The alleged breach must be a significant or fundamental breach going to the root or foundation of the contract. The claimant must leave in response to the breach and not for some unconnected reason. Further, the claimant must not delay too long in terminating the contract in response to the company's breach, otherwise he may be deemed to have waived or condoned the breach.

In *Western Excavating (ECC) Ltd v Sharp*,¹¹ the English Court of Appeal laid down the test of constructive dismissal as follows:

'(i) the employee must show that the employer no longer intends to be bound by one or more of the essential terms of the agreement; (ii) the employee must leave the employment immediately for reason of the employer's breach and for no other cause; (iii) the employer's breach must be a significant one, going to the root of the contract, entitling the employee to terminate it without notice; and (iv) the worker had not terminated the contract before the employer's breach.'

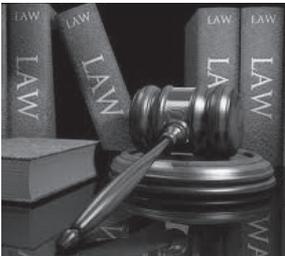
In other words, the employer's wrongful conduct must be serious, amounting to a fundamental breach of contract where a reasonable person would be able to conclude that the employer had evinced an intention not to be bound by the contract any longer. In *Southern Investment Bank*

11 [1978] 1 All ER 713, CA (Eng). *The Court of Appeal in Anwar Bin Abdul Rahim v Bayer (M) Sdn. Bhd.* [1998] 2 MLJ 599 adopted this decision.



Article





Article

Bhd/Southern Bank & Anor v Yap Fat & Anor,¹² Mohd Zawawi Salleh JCA, delivering the judgment of the Court stated:

'It is important, therefore, to be cautious in adopting a wide interpretation of what conduct by an employer that would constitute constructive dismissal because of the danger of inviting a flood of employees who resign and then resile and claim to be constructively dismissed. The paramount consideration is the requirement that the breach must be so serious which goes to the root of the contract and the employee cannot be expected to continue with the contractual arrangement.'

It may be further added that the test for constructive dismissal is the contract test.¹³ In applying this test, the question to ask is whether the conduct of the employer was such that they were guilty of a breach going to the root of the contract or whether they have evinced an intention no longer to be bound by the contract. If the answer is in the affirmative, then the employer is said to have repudiated the contract of employment and the employee would be entitled to regard himself as having been constructively dismissed. The employer's wrongful conduct must have amounted to a fundamental breach of contract where a reasonable person would be able to conclude that the employer had evinced an intention not to be bound by the contract any longer. The employee can regard himself as having been dismissed and resigned from employment without serving notice and thereafter alleging unfair dismissal.

Having said the above, it is undisputable that any unauthorized deduction of employees' salary constitute a fundamental breach of the employment contract and this is reflected in several awards of the Industrial Court as discussed below.

¹² [2017] MLJU 279

¹³ In determining constructive dismissal under the Industrial Relations Act 1967 s 20(1), the common law principle, *vide* the contract test as propounded in the *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 is followed, namely, 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 to no longer be bound by the contract.

Industrial Court Awards

In *North Malaysia Distributors Sdn Bhd v Ang Cheng Poh*,¹⁴ despite the claimant objecting to the pay-cut, the company went on with the pay-cut from the claimant's salary. The Industrial Court held that such pay-cut was a clear wilful breach of the employment contract by the company. The breach was a fundamental term which goes to the root or foundation of the contract. Under the aforesaid circumstances, the claimant was already entitled to treat the contract as terminated, which the claimant did, by reason of the company's conduct.

Again, in *RNC Corporation Bhd & Anor v Kesvaran TP Murugasu*,¹⁵ as a result of a cost-cutting exercise by the employer, the claimant's salary was reduced and certain benefits of the employee were withdrawn. The claimant wrote to the company protesting that its unilateral action in reducing his salary and withdrawing his benefits amounted to a fundamental breach of the contract by the company. The Industrial Court held that the deduction of the claimant's salary was in fact a variation of an essential term of his contract of employment which was done unilaterally and without any valid justification. By doing so the company had acted in a manner calculated or likely to destroy the relationship of confidence and trust between the company and the claimant. In other words, the company by its unilateral decision to reduce the claimant's salary had in fact breached a fundamental term of the contract of employment.

In *Thamil Val Arasu Chinniah Krishnan v Sun Innovation Sdn Bhd*,¹⁶ the claimant had been absent from work without informing or notifying the company. He was also frequently late for work without valid reasons and had left the office before office hours ended. Hence, the company paid the claimant his salary for 15 working days for the month of February 2011 due to his unauthorised absent. The Industrial Court held that the deduction of salary was lawful and as the company had not issued a dismissal letter, the claimant failed to prove that the company had constructively dismissed him from employment.

¹⁴ [2001] ILJU 43.

¹⁵ [2004] ILJU 23.

¹⁶ [2013] 4 ILJ 189; [2013] 4 ILR 123, YA Anna Ng Fui Choo, Chairman of the Industrial Court.





Article

In *Ricky Lim Han Keong & Yang Lain v Siemens Malaysia Sdn Bhd*,¹⁷ the claimants alleged inter alia, the late payment of salary and the non-payment of variable income bonuses. The Industrial Court held inter alia, that although there had been a delay in payment of the claimant's salary for the month of December 2006, it had not amounted to a fundamental breach. Further, in relation to the variable income bonuses, clause 18 of the company's Guidelines for Variable Income was clear that the claimants were not been entitled to it. Based on the totality of the evidence adduced, the claimants had failed to prove that the company had evinced an intention not to be bound by the contracts of employment.

In *Lee Ting Fong v Mybiz Malaysia Sdn Bhd*,¹⁸ the Industrial Court held inter alia, that the company's failure to pay the claimant her salary when it had fallen due, had been a serious breach which had entitled the claimant to walk out of her employment. In fact, in this case, the claimant had raised the problem of her salary with the management. The respondent had been fully notified and as a result the respondent kept making promises to the claimant. There had been ample time for the respondent to rectify the situation but failed to do so.

In *Kumpulan SF Powertech Sdn Bhd v M Marnokarrun D Maruthamuthu*,¹⁹ the company had deducted the claimant's salaries and failed to inform him of the reasons for the said deductions. The Industrial Court held inter alia, that the failure of the company as aforesaid had amounted to a repudiation and a breach of a fundamental term of the claimant's contract. Further, the company's failure to renew the road tax for the company car had prevented the claimant from performing his official duties and had definitely been a breach of a fundamental term of his contract of employment. Thus, the claimant had been justified in claiming constructive dismissal.

In *Shuhaila Ibrahim & Ors v Atlas One Malaysia Sdn Bhd*,²⁰ the Industrial Court stated that the non-payment of salary was a fundamental breach going to the very root of the employment contract between the parties. The company by its conduct had repudiated the employment contract and no longer had an intention to honour the claimant's contracts. Thus the claimants had been entitled to resign and treat themselves as being constructively dismissed. The six months lapse before the claimants had walked out of their employment was justified. The facts of this case had shown that they had first given oral notice to the company, then written notices followed by written reminders in the hope that the company would rectify the situation. They had stayed on and worked with the company based on the promise that they would be paid.

In *Tang Pui Sun v Ahmad Zaki Sdn Bhd*,²¹ the evidence showed that the claimant was entitled to his claim as per his contract of employment. The company was alerted by its own officer that some of the claimant's claims had to be paid. The company was wrong not to have paid the claimant his dues and not to have assured the claimant that his claims were being processed and would be paid. The claimant had established that the company had repudiated the contract of employment by its conduct and actions and the claimant was right to have considered himself constructively dismissed.

It is worthwhile noting that the law only accorded protection against deduction of employee's salary or wages and does not include special allowances such as travelling, transfer and entertainment allowances. Special allowances are generally payable to an employee at the discretion of the employer unless the employment contract specifically mentions payment of such allowance alongside with his basic salary. In *Asia Motor Co Sdn Bhd v Ram Raj & Anor*,²² the Federal Court noted that the term wages does not include commission or allowances. Salleh Abas LP delivering the judgment of the Court stated:

17 [2011] ILJU 1430; [2013] 3 ILR 685, YA Ong Geok Lan, Chairman of the Industrial Court.

18 [2013] 4 ILJ 66; [2013] 3 ILR 58, YA RosenaniAbdRahman, Chairman of the Industrial Court.

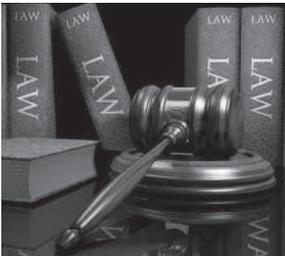
19 [2013] 2 ILR 237, YA P Iruthayaraj D Pappusamy, Chairman of the Industrial Court.

20 [2012] 4 ILR 209, YA Jalaldin Hussain, Chairman of the Industrial Court.

21 [2012] 3 ILR 385.

22 [1985] 2 MLJ 202.





Article

“whether commission and bonus are to be regarded as part of the SMR (Statutory Minimum Remuneration). Whilst all those sums form part of an employee’s earnings, it is a matter of common sense and general practice that they are treated as distinct and separate from wages ... Commission is definitely not wages. It is paid in cash to the worker to encourage him to work harder. The amount of commission therefore varies according to his output. Bonus is paid when an employer makes a profit ...”.

In *Tang Pui Sun v Ahmad Zaki Sdn Bhd*,²³ the company failed to pay the claimant his allowances and other outstanding entitlements. The evidence showed that those allowances were an integral part of his salary structure as they were expressly stated in the contract of employment. The Industrial Court held that the terms of the contract providing for the payment of the allowances and therefore, the company were bound by it. The claimant had established that the company had repudiated the contract of employment by its conduct and actions and the claimant was right to have considered himself constructively dismissed.

Again, in *Choy Yon Kong v Wah Chan Gold & Jewellery Corp Sdn Bhd & Anor*,²⁴ the employer stopped payment of the employee’s performance allowance without his consent. From the evidence adduced it was proven that the applicant had failed to achieve his sales target and his performance was poor and that he has failed to improve his performance despite opportunities given to do so. The Industrial Court held inter alia, that there were valid grounds for the respondent to withhold the payment of the performance

23 [2012] 3 ILR 385.

24 [2011] MLJU 733.

allowance. In dismissing the judicial review application, the High Court held that the undue delay on the applicant’s part in leaving or terminating his employment upon the occurrence of the alleged breaches by the first respondent negates his claim of constructive dismissal.

Conclusion

Wages is a fundamental factor in a contract of employment and must be paid promptly. It must be paid within the period specified by the law or as agreed to by the parties. An employer cannot delay in the payment of wages to the employees. The Employment Act provides inter alia, that wages must be paid not later than the seventh day after the last day of any wage period the wages. The non-payment of wages would constitute a fundamental breach of the employment contract where the affected worker may resign from employment and have his resignation treated as a constructive dismissal because the employer had repudiated an essential term of the contract. Further, no employer may deduct any portion of an employee’s wages except when it is authorised by the law or where the employer has written authorisation from the employee for such deduction. Again, any unilateral deduction of an employee’s wages would amount to a significant or fundamental breach going to the root of the contract of employment where the affected employee is entitled to resign and to have his resignation treated as a constructive dismissal.

By

**Professor Dr. Ashgar Ali Ali Mohamed
Ahmad Ibrahim Kulliyah of Laws (AIKOL)
International Islamic University Malaysia
(IIUM)**

ashgar@iium.edu.my

F E E D b a c k

**If you have any feedback or comments about the newsletter, please
send an email to: shalini.sunderajan@lexisnexis.com;
esther.low@lexisnexis.com**

Please let us know of other information that should be included in future issues.