

**CONSTRUCTIVE DISMISSAL CLAIMS OF
SENIOR MANAGEMENT EMPLOYEES IN
MALAYSIA: A CRITICAL DISCOURSE
ANALYSIS**

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ABSTRACT

This thesis delved into the significant yet underexplored issue of constructive dismissal (CD) within the senior management level. As the second layer of management, senior management employees play a pivotal role in shaping and maintaining an organisation's culture. Their departure, particularly when it is a result of constructive dismissal, can have far-reaching implications for the organisation. The primary objective of this research was to address the existing gap in knowledge by scrutinising the perceptions and triggers of CD claims made by senior management employees in Malaysia. Additionally, it sought to understand the stance of the Malaysian Courts on these matters. The research methodology involved purposive sampling of award reports from the legal databases operated by the Current Law Journal (CLJ). Data extracted from these reports were then coded using Critical Discourse Analysis (CDA) and Thematic Analysis (TA). These analytical methodologies were applied within the theoretical framework of the Social Exchange Theory, providing a comprehensive lens through which the data were scrutinised. The findings of this research revealed that the primary reason claimants resigned from their positions was a breach of fundamental contract terms, triggered by what was referred to as the "Brick Wall circumstance" - a situation where the employer completely disregarded the claimants' grievances. The Courts however did not concur with the claimants in every case. The study therefore concluded that intervention and mediation by Human Resources (HR) might be necessary to identify potential CD risks and to mitigate these risks. The findings of this study aimed to deepen HR practitioners' understanding of the CD doctrine and provided a solid foundation for future research on the subject. This research contributed to the field of HR management by offering a nuanced understanding of CD, particularly within senior management, and its implications for organisational culture and stability.

Keywords: Constructive dismissal, human resources management, critical discourse analysis, thematic analysis

APPROVAL

This is to certify that this thesis conforms to acceptable standards of scholarly presentation and is fully adequate, in quality and scope, for the fulfilment of the requirements for the degree of Doctor of Philosophy.

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Prof Dato' Dr Sayed Mushtaq Hussain

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31st May 2024

DECLARATION

I hereby declare that the thesis submitted in fulfilment of the PhD degree is my own work and that all contributions from any other persons or sources are properly and duly cited. I further declare that the material has not been submitted either in whole or in part, for a degree at this or any other university. In making this declaration, I understand and acknowledge any breaches in this declaration constitute academic misconduct, which may result in my expulsion from the programme and/or exclusion from the award of the degree.

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LIST OF ABBREVIATIONS

AeU	Asia e-University
CA	Court of Appeal
CD	Constructive Dismissal
CDA	Critical Discourse Analysis
DGIR	Director-General of Industrial Relations
HC	High Court
HR	Human Resources
HRM	Human Resources Management
ICM	Industrial Court of Malaysia
IR	Industrial Relations
MASCO	Malaysia Standard Classification of Occupations
SET	Social Exchange Theory
TA	Thematic Analysis

CHAPTER 1

INTRODUCTION

1.0 Background of the Study

The prominence given by social media platforms to cases involving workplace disputes, direct and indirect unfair dismissals and retrenchment issues, and the seemingly unquenchable public thirst for details of the latest scoop on these topics piqued this researcher's interest to explore these phenomena. What this researcher discovered, during the course of exploration, was the public's interest in the employee's courage in bringing the matter to the Industrial Relations Department (IRD) and subsequently have the matter tried at the Industrial Court of Malaysia (ICM).

This researcher observed that the level of interest was especially keen when such cases involved high-ranking employees, and decided to probe further. A search of awards decided by the ICM, published by Current Law Journal (CLJ) and e-Law, revealed that a number of cases originated from complaints of constructive dismissal (CD), of which the complainants were senior management employees. CD is a doctrine of 'deemed dismissal' or indirect dismissal, where an employee terminates the employment contract without notice for reasons of the employer's conduct. Such circumstances may arise where, per the late Dato' Gopal Sri Ram, JCA in *Quah Swee Khoon v Sime Darby Bhd (2000) 2 MLJ 600, CA.*:

“An employer does not like a workman. He does not want to dismiss him and face the consequences. He wants to ease the workman out of his organization. He wants to make the process as painless as possible for himself. He usually employs the subtlest of means. He may, under the guise of exercising the management power of transfer, demote the workman ... Alternatively; he may take steps to reduce the workman in

rank by giving him fewer or less prestigious responsibilities than previously held. Generally speaking, he will make life so unbearable for the workman so as to drive the latter out of employment.”

CD claims by senior management employees reflect, primarily, a deficit of trust towards the top management or owners of the company (Kim et al., 2018). This deficit of trust issue has become more prevalent recently in that the workplace has become less centralised and relationships in the corporate world are becoming increasingly complex (Chernyak-Hai & Rabenu, 2018) and may throw a challenge to human resources (HR) practitioners to inculcate an ethical culture in the organisation (Mulki et al., 2006). In playing their role as caretakers of legal rights of individuals to work free from discrimination, legal protections that allow people to work in a safe environment and legal rights of employees (Ulrich, 2016). HR professionals therefore need to be able to accurately diagnose current and future business problems (Ulrich, 2016), which include intention to quit on grounds of CD.

To borrow the belief of Mello (2015) managing an organisation’s employees mandated the development of an appropriate and integrated approach to HRM that is consistent with the organisation’s strategy. This called for an investigation of the behaviours and emotions of employees, including those that lead to them claiming CD and bringing their complaints to court. In addition, the legal framework had been constantly embellished by evolving case law and court decisions, which formed the practical infrastructure of employment law. Running alongside this legislative framework and the creation of increasingly complex workplace policies, had been an extensive but inconclusive debate on whether employment law have swung the balance of power in employment relations in favour of the employer or the employee.

This thesis had shed some light on this issue, by having put forth, and analysed in detail, the factors leading to senior management CD. Results were aimed at guiding HR practitioners in understanding the challenges that senior management faced in the workplace, and more importantly, how to identify risks of CD and mitigate them. An extensive literature review was performed by this researcher as well as an in-depth reading of a corpora of awards using the legal databases Labour Law Box (operated by Current Law Journal) and e-Law. In deciding which cases to include in this study, the inclusion criteria determined by the researcher were adopted, as follows:

1. The sampling of awards was purposive in that they were picked by the researcher for their richness and completeness in potential for academic discussion;
2. They represent the category of “Managers” in the Malaysia Standard Classification of Occupations (MASCO); and
3. The cases are confined to those heard by the Malaysian Courts.

1.1 Problem Statement and Research Gaps

On this sub topic the researcher explains in details the problem statement and research gaps in this research.

1.1.1 Problem Statement

CD in Malaysia was given judicial recognition by the Supreme Court in *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd (1988) (1) MLJ 92*. The Supreme Court in *Wong Chee Hong* had adopted the definition of CD given by the English Court of Appeal in *Western Excavating (ECC) Ltd v. Sharp (1978) IQB 761* and held that CD is no more than the common law right of an employee to repudiate his contract of service where the conduct of his employer is such that the employer is guilty of a

breach going to the root of the contract, of where he has evinced an intention no longer to be bound by that contract.

Malaysian industrial law experts such as (Thavarajah & Low, 2023; Mohamed, 2014; Muniapan, 2013; Gaganathan, 2012; Thavarajah, 2008; Muniapan & Parasuraman, 2007; Ramasamy, 2006; Aminuddin, 2008; Pathmanathan et al., 2003; D’Cruz, 2007; Hew, 2002; Anantaraman, 2000; Ayadurai, 1996; Wu, 1995) have written on CD only but generally, except for the specialist studies done by (Anantaraman, 2000; Thavarajah, 2008). In spite of this, the level of knowledge and awareness of the doctrine of CD amongst both employees and employers in Malaysia left much to be desired (Yusof et al., 2020) therefore giving rise to the need for HR practitioners to expand their level of understanding the antecedent factors of CD claims as well as the factors affecting the decision of the courts. A study by Ling and Dhillon (2018) found that Malaysian employers were generally ill-equipped to deal with unfair dismissal claims by their former employees, due to the fact that they were unaware of dismissal laws. Yusof et al. (2020) found that employees fared no better: many had failed in their CD claims due to the lack of technical knowledge in CD.

1.1.2 Research Gaps

This thesis plugged the gap in the literature and contributed to the body of knowledge on the doctrine of CD, in order for HR practitioners to be able to add worth to things that are of value to the stakeholder, particularly legal and compliance issues (Ulrich, 2016). This thesis moved from merely describing what were in the law reports, to what the actors in them were actually voicing out, to offering a reflexive interpretation of the patterns or themes observed by the researcher, and finally their implications. It took on the approach of qualitative narrative inquiry, and contributed to the knowledge and understanding of CD claims amongst senior management employees in Malaysia, in

line with one of Ulrich's requirements of a HR practitioner i.e. "embedded HR professions need to be able to accurately diagnose current and future business problems" (Ulrich, 2016).

1.2 Research Objectives

The Research Objectives for this thesis were:

Research Objective 1:

To explore the perceptions of constructive dismissal (CD) of the senior management employees in Malaysia.

Research Objective 2:

To determine how the perceptions of CD triggered CD claims by senior management employees in Malaysia.

Research Objective 3:

To examine how the courts arrived at the decision whether to allow or dismiss the CD claims.

1.3 Research Questions

The Research Questions for this thesis were:

Research Question 1:

What were the perceptions of CD of the senior management employees in Malaysia?

Research Question 2:

How did the perceptions of CD trigger CD claims by senior management employees in Malaysia?

Research Question 3:

How did the Malaysian Courts arrive at the decision whether to allow or to dismiss the CD claims?

Table 1.1 below represented an amalgamated dashboard of the theoretical, practical and methodological gaps addressed in this thesis, and how the underpinning theory, research objectives and research questions were aligned with the problem statement.

Table 1.1: Research gaps, research objectives and research questions

Research gaps	Gaps in literature	Gaps in theory	Gaps in methodology
	Knowledge and awareness of the doctrine of CD amongst both employees and employers in Malaysia are at a level that left much to be desired (Yusof et al., 2020).	This thesis contributed to the application of Social Exchange Theory (SET) (Hossen, 2020) on HR issues, specifically on CD of senior management employees.	This thesis paired together the methodology of Critical Discourse Analysis (CDA) using Fairclough’s Three-Level Model (1989, 1995) and Thematic Analysis (TA) (Braun & Clarke, 2022) to form a holistic research framework.
Research objectives	Research Objective 1	Research Objective 2	Research Objective 3
	To explore the perceptions of constructive dismissal (CD) of the senior management employees in Malaysia.	To determine how the perceptions of CD triggered CD claims by senior management employees in Malaysia.	To examine how the courts arrived at the decision whether to allow or dismiss the CD claims.
Research questions	Research Question 1	Research Question 2	Research Question 3
	What were the perceptions of CD of the senior management employees in Malaysia?	How did the perceptions of CD trigger CD claims by senior management employees in Malaysia?	How did the Malaysian Courts arrive at the decision whether to allow or to dismiss the CD claims?
How this thesis addressed the research gaps	This thesis created the Doctrine of the Brick Wall, based on the “play dumb” concept by Connelly et al. (2012). It also created the Caper Emissarius Causal Model of CD, based on a synthesis of Ulrich’s “Care for the other” principle of HR (2016), Connelly’s “playing dumb” (2012) and Zakiyy’s Islamic concept of industrial relations (2021)		

1.4 Operational Definitions

Table 1.2 provided the definitions of academic terminology and table 1.3 presented the glossary of legal terms.

Table 1.2: Academic terminology

Term	Definition
Senior Management Employees	<ol style="list-style-type: none"> 1. Should normally include the first layer of management below the Board level (Kershaw, 2012). 2. The one responsible to create the culture of ethical behaviour in the organisation (L'Aquila, 2001); 3. A team of individuals at the highest level of organisational management who have the day-to-day responsibilities of managing a corporation (Yussof, 2000). <p>For the purpose of this thesis, the researcher shall consider first layer management staff, including those holding the title of "Director" but whose reporting line is to the Board.</p>
Social Exchange Theory (SET)	One of the gold standards to understand workplace behavior (Cropanzano & Mitchell, 2005) which has evolved to include the concept that employee empowerment and employment stability contributed positively to job satisfaction (Hossen, 2020).
Critical Discourse Analysis (CDA)	An interdisciplinary approach to the study of discourse that views language as a form of social practice and focuses on the ways social and political domination are reproduced in text and talk. Since Norman Fairclough's <i>Language and Power</i> in 1989, CDA has been deployed as a method of multidisciplinary analysis throughout the humanities and social sciences (Shahab et al., 2019)
Epistemology	The branch of philosophy concerned with the nature and scope of knowledge. It questions what knowledge is and how it can be acquired, and the extent to which knowledge pertinent to any given subject or entity can be acquired (Babbie, 2020).
Hermeneutics	The theory of text interpretation (George, 2020).

Reflexivity	Reflection on and awareness of the researcher's bias, the effect of the researcher's experience on the data and interpretations (Creswell, 2017).
Thematic Analysis (TA)	Thematic analysis is used in qualitative research and focuses on examining themes or patterns of meaning within data to emphasise both organisation and rich description of the data set and theoretically informed interpretation of meaning (Braun & Clarke, 2006)
Victimisation	Acts of the employer that included, but not limited to, the following: <ul style="list-style-type: none"> • Humiliating an employee • Denying an employee access to his place of work or office without just cause and excuse • Forcing an employee to resign • Giving transfer orders or redesignating an employee with <i>mala fide</i> intentions • Unfairly treatment of an employee
Unilateral Variation of Contract	Where the employer altered the terms and conditions of the contract of employment without the employee's consent, such as: <ul style="list-style-type: none"> • Demoting an employee • Taking away an employee's privilege or benefits that came with his contractual role • Taking away an employee's authority or power and responsibilities that came with his contractual role, or reducing his workscope

Unpaid Remuneration	<p>This included where the employer:</p> <ul style="list-style-type: none"> • Did not pay salaries and not making compulsory statutory contributions (such as Social Security and Employee Provident Fund contributions) • Did not paying contractual commissions or bonuses • Reduced or deducted from an employee's salary without the employee's consent
Loss of Trust	<p>In the context of this thesis, loss of trust happened where an employee perceived that his employer's decision to reorganise the Company's structure was cloaked in <i>mala fide</i>, with the hidden agenda of removing him from employment.</p>
Company Unable to Disprove Claim	<p>Where the Company was not able to disprove a CD claim made against it if, <i>inter alia</i>:</p> <ul style="list-style-type: none"> • The Company lacked evidence to defend its case • The Company could not produce defence witnesses.
Company Condoned Claimant's Action	<p>When the Claimant had informed the Company that he was walking out on his employment based on CD grounds, but no action was taken by Company in response.</p>
Timely Exit	<p>Where the Claimant walked out in timely manner after informing the Company that he is leaving on CD grounds.</p>
Claimant Unable to Prove Claim	<p>Reasons for the failure of of a CD claim may include, but not limited to:</p> <ul style="list-style-type: none"> • Where the court views that the Claimant's resignation was voluntary • Where the Claimant did not specify the breach committed by the Company in his Statement of Claim • Where the Claimant lacked evidence to prove that there was indeed a breach by the Company • Where the Claimant's testimony was deemed by the court to be unreliable
Court views Company's action justified	<p>The court did not allow the Claimant's claim because the Company's evidence was stronger.</p>