

CONSTRUCTIVE DISMISSAL IN THE THAI CONTEXT

To avoid lawsuits and damages, employers should be cognisant of the concept of "constructive dismissal" and its implied application in Thailand. Those from western jurisdictions may be familiar with the concept of "constructive dismissal" in labour contexts. Constructive dismissal refers to a situation where the employer does not actually terminate the employee's employment, but the employer's conduct towards the employee is so bad that the employee feels that he or she has no choice but to resign. The employer's conduct must also amount to a material breach of the employment contract. The employee may then file a claim for unfair dismissal and demand compensation from the employer.

As Thailand is a civil law country and there is no specific provision of the labour law which refers to constructive dismissal, employers may erroneously conclude that constructive dismissal does not exist under Thai law. In fact, Thai law does have a concept of "unfair dismissal" which is similar to "constructive dismissal." If a Thai court deems any termination to be unfair, then the court would provide a remedy to employees who have been unfairly dismissed.

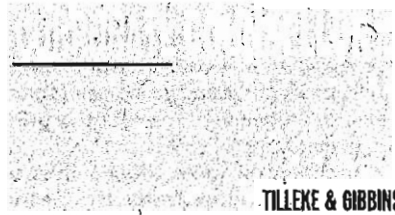
Section 49 of the Act Establishing Labour Courts and Labour Procedure B.E. 2522 (A.D.1979) outlines the concept of unfair termination, and provides that:

"In the trial of a case of dismissal of an employee by an employer, if the labour court is of the opinion that such a dismissal is not fair to the employee, the labour court may order the employer to accept the said employee to work at the rate of wage being at the time of dismissal. If the labour court is of the opinion that the employer and the employee cannot work together any more, the labour court shall fix the amount of damages as compensation to be paid by the employer by taking into consideration the age of the employee, the working period of the employee, the hardship of the employee at the time of dismissal, cause of the dismissal, and the compensation the employee is entitled to receive."

Termination includes acts that "prevent an employee from continuing to work." Section 118 of the Labour Protection Act provides the following guidance on the meaning of "termination":

Employment termination under this section shall mean any act done by an employer to prevent an employee from continuing to work and to discontinue payment of wage, whether due to the termination of an employment contract or for any other reason, and shall include the case where the employee could not work and did not get paid because the employer could no longer operate the business.

Therefore, employer actions that would amount to constructive dismissal in western jurisdictions would likely also be considered a termination in



accordance with the above definition.

There are relatively few Supreme Court precedent cases on what constitutes conduct by the employer amounting to a material breach of the employment contract. However, the following are examples of circumstances that may represent a material breach of the employment contract and may result in a claim of unfair termination:

- ◆ Changes in an employee's conditions of employment without the consent of the employee.
- ◆ Unnecessary and unjustified reorganisation resulting in a significant change in location of work and/or work responsibilities.
- ◆ Unapproved or forced changes in compensation.
- ◆ Hostile and threatening work environments created, tolerated, or otherwise condoned by the employer.
- ◆ Forced resignation under threat of lower or no compensation if the employee does not accept the resignation. This is relevant especially where the employee has a limited educational background, is mentally challenged, or is in a position of low bargaining power.

An unfair termination is deemed a termination without serious cause. When the employer terminates an employee without serious cause, the employer must pay the employee statutory severance pay in accordance with Section 118 of the Labour Protection Act based on the employee's length of service, up to a maximum of 10 months' salary.

In unfair termination cases, in addition to the entitlement of statutory severance, payment in lieu of advance notice, and unused annual leave, the employee will be eligible for compensation for unfair termination in an amount determined by the Labour Court in its absolute discretion, which is exercised based upon a number of factors. The Labour Court has adopted the practical standard that compensation for unfair termination may be awarded in an amount of one month's salary for every one year of service.

As acts carried out by supervisors and other managers within a company may be attributed to the company, it is important that those with managerial or supervisory responsibilities over other employees have sufficient training on the type of conduct that may be considered to be a constructive dismissal.

This article was prepared by Sasirum B. Chunhakasikarn, attorney-at-law, and Sally V. Mouhim, consultant, in the Dispute Resolution Department at Tilleke & Gibbins. Please send comments to Andrew Stoutley at andrew.s@tillekeandgibbins.com