

Court takes a firm stance on constructive dismissal

Summary

A recent English case¹, *Cockram*, has provided a useful reminder that employees who seek to claim that they have been constructively dismissed must resign – that is, accept the repudiation as bringing an end to the contract - without undue delay and should not seek to work beyond their contractual notice period. The employee in *Cockram* gave notice in excess of double his contractual notice period in order to continue to be paid his substantial salary. He was therefore found to have affirmed his contract to the effect that he could not claim constructively to have been dismissed.

Facts

Cockram was employed by Air Products plc and his contract of employment required him to give three months of notice to terminate his employment. Cockram resigned on the grounds that he could not remain in employment because of his employer's unacceptable conduct. However, Cockram gave seven months of notice to terminate his employment because he had "no other work secured to enable [him] to leave immediately". He then claimed constructively to have been dismissed.

Relevant Law

The English common law provides that employees may resign with immediate effect in response to their employer's repudiatory breach of contract and claim to have been constructively dismissed. However, employees lose the right to claim to have been constructively dismissed if they affirm the contract by, for example, continuing in employment for any length of time before resigning.

The English Employment Rights Act 1996 (the "ERA") amends the common law position to the effect that an employee may claim to have been constructively dismissed even if they give notice of their resignation to their employer. That amendment ensures that employees who altruistically give their employer notice of their resignation, such as a professor who seeks not unnecessarily to disrupt his students' learning, are not disadvantaged by their altruism.

¹ *Cockram v Air Products plc* UKEAT/0038/14

Decision

The English Employment Appeal Tribunal (the “EAT”) held that the giving by Cockram of seven months of notice instead of the contractually required period of three months constituted his affirmation of his contract of employment. The EAT accepted that the ERA permitted Cockram to resign on notice without being treated as having affirmed the contract. Nevertheless, the EAT held that there must be some limit on the length of notice than an employee may give to an employer without affirming the contract. This prevents employees from securing the benefit of working a longer period of notice than their contractual notice period whilst at the same time retaining a future right to claim to have been constructively dismissed.

Implications for Employers in Hong Kong

The courts in Hong Kong have previously followed the decisions of the English courts when ruling on the issue of constructive dismissal. For example, the right of an employee to give notice of his resignation and nevertheless claim constructive dismissal derives not from the Employment Ordinance but from the courts of Hong Kong following the judgment of the English courts that forms the basis of the EAT’s decision in *Cockram*.

Cockram therefore means that it is likely that the courts in Hong Kong will not permit employees successfully to claim that they have been constructively dismissed if they have given notice to their employer in excess of their contractual notice period. *Cockram* is therefore useful for employers because it should prevent employees from, for example:

- (a) giving a long period of notice in order to remain in employment until the date on which a bonus is paid and then nevertheless seeking to claim that they have been constructively dismissed; or
- (b) choosing to work a long period of notice during which they can prepare to set up in competition with their employer before claiming to be free from post-termination restrictions with immediate effect from the date that their notice period expires by virtue of their constructive dismissal.

This publication is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. Should you have any questions on issues reported here or on other areas of law, please contact one of your regular contacts, or contact the editors.

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