



OLDHAM, LI & NIE

# EMPLOYMENT

**OLN** OLDHAM, LI & NIE  
LAWYERS

**CONSTRUCTIVE DISMISSAL IN A  
NUTSHELL IN THE TIME OF  
COVID-19 PANDEMIC**



# Constructive dismissal in a nutshell in the time of COVID-19 pandemic

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## **Practice Areas**

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Tax Advisory | Employment

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With the worldwide economy being hit hard with the COVID-19 pandemic, employers, irrespective of the scale of the business, have been forced to reduce costs to survive this economic ice age. With the diminished demand for labour force due to the stagnant economy, it is always tempting for employers to start cutting costs by downsizing the labour force or making alternative working arrangements with their employees (including requesting the employees to take no pay leave or to have a pay cut). Employers should, however, beware of constructive dismissal in the course of implementing such downsizing plan or alternative working arrangements; otherwise the additional costs incurred thereof might outweigh the costs saved by these costs-cutting measures.





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## Constructive dismissal - General legal position

Subject to the factual matrix of each particular case, common circumstances which give rise to a claim for constructive dismissal include but not limited to unilateral variation of the contract of employment (for example, reduction in wages or substantial reduction in working hours), failure to pay wages, failure to provide reasonable amount of work, failure to pay statutory entitlements and discriminatory conduct at workplace etc.

In the event of constructive dismissal, an employee may terminate his employment contract without notice or payment in lieu of notice. In such case, although the employee is the party who terminates the employment contract, such dismissal is referred to as a "constructive dismissal" because the laws construe the employee's termination of employment as a *de facto* dismissal by his employer. That being said, such finding might be rebutted by acts of the employee pointing to the otherwise.

TERMINATION?  
CONSTRUCTIVE  
DISMISSAL?



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## *Unilateral variation of the terms of employment*

The relevant general legal position in Hong Kong is that an employer may not unilaterally vary the terms of employment (including imposing a substantial reduction in working hours (thus a reduction in pay) and requesting its employee to take on no pay leave), unless the relevant employment contract contains an express provision allowing the employer to do so. In the absence of any express provision to that effect, any unilateral variation of the terms of employment can therefore amount to constructive dismissal. This allows the employees to terminate their employment contracts without the need to give notice or payment in lieu of notice to the employer, and to bring common law claims for damages against the employer for any loss suffered by them as a result of the constructive dismissal. Damages which can be recovered by the employees might include:- (a) the amount which the employees would have earned had their employment been terminated with proper notice (including any outstanding wages, payment in lieu of notice, end of year payment, annual leave pay, holiday pay, bonus payment and other benefits and other payments due under the employment contract); (b) damages for breach of implied term of trust and confidence which the Court may assess the same by considering the potential loss of salary and contractual benefits on the employees' part caused by the constructive dismissal; and (c) the legal costs of the claims.

In addition, section 32A(1)(b) of the Employment Ordinance (Cap. 57 of the laws of Hong Kong) ("**EO**") confers upon an employee who has been employed under a continuous contract the right to claim remedies for "unreasonable dismissal" in the circumstances where his employer unilaterally varies the terms of his employment contract by the reason that his employer intends to extinguish or reduce any statutory right or benefit conferred upon such employee by the EO.

Section 32A(3) of the EO further presumes that "*the variation of the terms of the contract of employment by the employer as referred to in that subsection [i.e. section 32A(1)(b) of the EO] shall, unless a valid reason is shown for that variation within the meaning of section 32K, be taken to be a variation of the terms of the contract of employment by the employer by reason that the employer intends to extinguish or reduce any right, benefit or protection conferred or to be conferred upon the employee by this Ordinance [i.e. the EO]*".

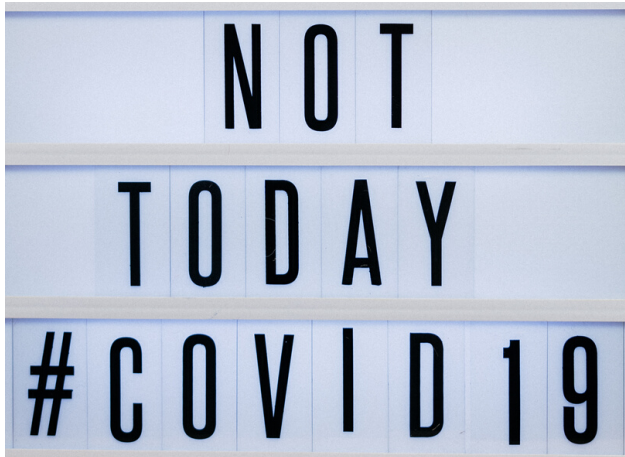
Given that section 32K(c) of the EO specifically sets out that a dismissal, or the variation of an employment contract, may be regarded as valid in the circumstances where the same is resulting from the redundancy of the employee or other genuine operational requirements of the business of the employer, it is therefore arguable that the COVID-19 pandemic triggers the application of section 32K and protects the employer from the statutory claim of "unreasonable dismissal".

Notwithstanding the foregoing, the provisions under section 32K of the EO may only protect employers from the statutory claim of "unreasonable dismissal". The general legal position remains that employers may not unilaterally vary the terms of employment in Hong Kong, unless the relevant employment contracts contain an express provision to allow the employers to do so.





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## *Requesting for voluntary resignation by the employees*

It is commonly seen that an employer would ask an employee to resign “voluntarily” for face saving or in return for a favourable reference letter; otherwise the employment would still be terminated by the employer by way of dismissal.

If an employer gives notice to an employee requiring him to resign, or giving him the option to resign or be dismissed, and subsequently the employee tenders his resignation, the Court is likely to characterize such termination as constructive dismissal rather than a resignation. That being said, the situation could be quite different in circumstances where an employer wishes to give an employee the genuine option of being able to resign rather than being dismissed by way of summary dismissal.

## *Discriminatory conduct at workplace*

Under the anti-discrimination laws in Hong Kong, an employer is prohibited from treating an employee less favourably in relation to employment on the grounds of an employee’s sex, disability, family status, or race. An employee may treat himself as constructively dismissed if he is subjected to discrimination or victimization conduct by his employer under the Sex Discrimination Ordinance (Cap. 480 of the laws of Hong Kong), the Disability Discrimination Ordinance (Cap. 487 of the laws of Hong Kong), the Race Discrimination Ordinance (Cap. 602 of the laws of Hong Kong), or the Family Status Discrimination Ordinance (Cap. 527 of the laws of Hong Kong), if it can be shown that the conduct complained about is initiated, encouraged or tolerated by the employer.

It is not unusual for an employer to consider (subject to the employee’s consent, if the circumstances may require):- (a) requesting some or all employees to take no pay leave; (b) requesting some or all employees to lower their working hours thus the salary on a pro-rata basis; or (c) implementing lay-off, in order to manage its costs in the time of COVID-19 pandemic. However, when implementing any of these costs-cutting measures, an employer is prohibited from selecting the employees pertaining to the employees’ sex, disability, family status, or race; otherwise, that could amount to constructive dismissal.



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## How can OLN helps?

As can be seen, the downsizing of labour force by an employer in the time of the COVID-19 pandemic could easily give rise to constructive dismissal. We practical experience in helping an employer with the implementation of temporary employment measures during the time of the COVID-19 pandemic and the review relevant documentation to ensure the same complies with the employment law regime in Hong Kong and to protect the employer from any potential claims.

On the other hand, we also assist, from time to time, an employee on the review of the employment measures implemented by employers and advise the employee to take appropriate legal actions against the employer if any of the employment measures are in contravention of the employment laws.

If you have any question regarding the topic discussed or other employment issues, please contact our senior associate Mr. Victor Ng at [victor.ng@oln-law.com](mailto:victor.ng@oln-law.com) or our associate Ms. Barbara Kwong at [barbara.kwong@oln-law.com](mailto:barbara.kwong@oln-law.com) for further assistance.

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