

## COMMON EMPLOYMENT DISMISSAL TYPES AND PROCEDURES IN MALAYSIA

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### ABSTRACT

*From the outset, the purpose of this paper is to provide an explanatory guideline to the worker and the employer on what to expect when a dismissal occurs, what are the procedures that need to be adhered to and what are the common types of dismissal. From a worker's perspective, being dismissed from employment is an extremely distressing and upsetting experience to say the least. It inflicts severe economic hardships upon the said worker. It is a given that he would be deprived of his major source of livelihood; it is also likely that he would suffer non-pecuniary damages such as injury to feelings and mental distress, serious trauma from being dismissed, and basically embarrassment and humiliation of being labeled "unemployed". In general, there are three (3) branches of dismissal namely summary dismissal, constructive dismissal, and forced resignation. From the employer's point of view, to conduct a dismissal wrongly may bring about serious ramifications to his business be it on the ethical or financial point of view. As such, the author has analysed the various types of dismissal and relevant procedures to enlighten all those who may encounter problems pertaining to this area of employment law.*

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### DISMISSAL LAWS IN MALAYSIA

#### DISMISSAL PROCEDURE

In Malaysia, the dismissal issues are governed by the Employment Act 1955 (hereinafter referred to as EA 1955) and the Industrial Relations Act 1967 (hereinafter referred to as IRA 1967). Generally, the requirements for a lawful dismissal are a valid substantive justification followed by a fair procedure. The justified reasons for dismissals normally are misconduct, poor performance or negligence. Only after the ground of that particular dismissal has been determined, the procedure will take place which would eventually lead to the lawful dismissal of employee. The dismissal procedure varies with the grounds of the dismissal. This section will highlight strengths and weaknesses of the dismissal procedure in Malaysia.

The most common procedure of a lawful dismissal practiced is one that provides suitable and proper notice. This act of giving such a notice is mandatory as it is clearly stated in the section 12 of the EA 1955. Section 12(1) of the EA 1955 provides that any one of the parties to a contract of service may serve the other with a notice of an intention to terminate the said contract at any material time. It shows that if an employer has the intention to terminate a contract of service, he must give a notice to the particular employee in informing his intention of termination. Moreover, the notice must be given in accordance with the duration as stated in the statutory provision.<sup>1</sup>

The section 12(2) provides that the period of notice is determined through a written provision in the contract of service. However, if a situation arises where the contract of service is silent on the period of notice, the length of notice shall be four weeks provided that the employee has been employed for less than two years on the date such notice is given. A six week notice shall be given to the employee who has been employed for a time span between two to five years. And lastly, an employee that has worked for more than five years shall be given the length of notice which is eight weeks. Hence, giving notice of termination to the employees within a reasonable period by the employer is mandatory in Malaysia.

Even if the contract of service contains a stipulation that no notice is required for termination of contract, the employee is still entitled to the notice in writing in the situations stated in the section 12(3)(a)-(f).<sup>2</sup> Thus, it can be seen that the procedure of giving notice is vital in terminating a contract of service. Giving notice of dismissal to employees is definitely an important step as it not only prepares them to face possible disciplinary actions but also prepares them to face the worst consequence: being sacked the company. This strict procedure is both strength and a weakness in itself. It benefits the employee but may be a technical disadvantage for the employer where a slight mistake may result in a voidance of dismissal or a non performing employee.

<sup>1</sup> Section 12(2) of the EA.

<sup>2</sup> (a) the employer has ceased, or intends to cease to carry on the business for the purposes of which the employee was employed;

(b) the employer has ceased or intends to cease to carry on the business in the place at which the employee was contracted to work;

(c) the requirements of that business for the employee to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish;

(d) the requirements of that business for the employee to carry out work of a particular kind in the place at which he was contracted to work have ceased or diminished or are expected to cease or diminish;

(e) the employee has refused to accept his transfer to any other place of employment, unless his contract of service requires him to accept such transfer; or

(f) a change has occurred in the ownership of the business for the purpose of which an employee is employed or of a part of such business, regardless of whether the change occurs by virtue of a sale or other disposition or by operation of law.

A due inquiry is also an important procedure that needs to be conducted before a dismissal is justified. Malaysia legislation has included the due inquiry process in section 14(1)(a) of the EA 1955. It states that an employer may on the grounds of misconduct where an action violates the express or implied conditions of his service, after due inquiry dismiss the employee without notice. The so called due inquiry or a proper domestic inquiry adopts the principle of natural justice. In the case of **Eastern Plantation Agency Sdn Bhd v Association of West Malaysian Plantation Executives**,<sup>3</sup> the court commented on the concept of natural justice which has twin rules namely the rule of a fair hearing and the rule against bias. The former demands a fair hearing. It is important as it can be used to against the employer as a violation of the whole code of administrative or procedural rights. The latter rule against bias is also of equal importance where a man should not be judged in his own cause of justice. As the saying goes, justice must not only be done but also clearly seen to be done. Both these tangents of natural justice can be upheld through a proper due inquiry.

With all that said, the necessity of due inquiry is still debatable. This is because the section merely states 'due inquiry' without providing any other detail like the procedure of the due inquiry. This issue is subsequently examined in the case of **Mohd Ibrahim Hassan v Diamond Cutting Sdn. Bhd**,<sup>4</sup> In this case, the court decided that the requirement of a domestic inquiry has acquired great significance in our industrial law, and has become a statutory requirement prior to the inflicting of punishment for misconduct as laid down in section 14 of EA 1955. The effect of this provision is that before an employer can dismiss an employee on the grounds of misconduct, the employer must hold a proper domestic inquiry. Thus, natural justice is served by holding of such a domestic inquiry.

As mentioned earlier, dismissal procedure may vary according to the grounds of dismissal. In Malaysia, an employee can also be dismissed on the grounds of incompetency<sup>5</sup>. In **Shamsudin Mat Amin and Austral Enterprises Bhd**<sup>6</sup>, it is stated that "...the evidence in this case establishes a pattern of workmanship that the management made a decision that it could longer afford to suffer..." According to this court's interpretation, an employer has the prerogative right to dismiss any employee that has no productivity to the company which at the end of the day may cause the company to lose profit. A dismissal procedure for incompetency dismissal includes the procedure of giving notice and also the principle of natural justice.

With reference to the IRA 1967, the employee can only be dismissed due to a just cause or excuse.<sup>7</sup> In the judgment of a high court's appeal case, **Dreamland Corp. (M) Sdn. Bhd. v Choong Chin Sooi & Anor**,<sup>8</sup> the court observed that under section 20(1) where a workman seriously believes that he has been dismissed without just cause or reasoning by his employer, not only the reasons for his dismissal but also the manner of the dismissal has to be taken into consideration. This means a due inquiry involving the rules of natural justice need to be observed. Furthermore, in the case of **Great Eastern Life Assurance Bhd**, the Industrial Court, in recognizing the employee's right to be heard before his dismissal, stipulated the rule that "the accused must be given ample chance not only to know the case against him but also to answer or defend it."<sup>9</sup> Therefore, the domestic inquiry is impliedly required before a dismissal under this section.

However, in the case of **Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn. Bhd. & Ors**,<sup>10</sup> the federal court held that the omission to hold a due inquiry will not influence or determine whether the employee was dismissed from a contract of service without just cause or excuse. The court also interpreted section 20 of IRA in a different way, where it is referred to in determining whether such a misconduct complained of by the management was in fact committed by the workman, and if so, whether such grounds constitute just cause for the dismissal. The court stated further that the just cause or excuse of a dismissal does not include a due inquiry which complies with the rule of natural justice. Hence, the vagueness in interpreting such section needs to be eliminated.

## SUMMARY DISMISSAL

Summary dismissal is also known as instant dismissal, which is the dismissal of an employee on the spot without notice. Summary dismissal is normally due to serious or gross misconduct or breach of an important term of the contract of the service. Although no notice or warning of dismissal will be given to the employee, the dismissal must still be with just cause or excuse. General rules of procedural fairness such as the rules of natural justice are required to obey. Thus, a domestic inquiry will always be conducted before a summary dismissal is justified. If there is a failure conduct of such domestic inquiry by the employer, he recovered the defect by convening a board before the learned judges in the court or an adjudicating body.

The employee is still entitled to wages, holiday pay and any other benefits under the contract of service even he is dismissed on the spot. This summary dismissal, in fact, is impliedly provided in the section 13 of the EA 1955. The section states that a contract of service may be terminated by either party without notice, by the payment of an 'indemnity' to the other party with a sum equivalent to the amount of pay. The basic principle of summary dismissal is that a summary dismissal will more easily be

<sup>3</sup> [1985] 1 ILR 339.

<sup>4</sup> (1980) Malaysian Labour Law Report 144.

<sup>5</sup> incapability, inefficiency, unsatisfactory performance or poor performance.

<sup>6</sup> (Award 47 of 1974).

<sup>7</sup> section 20(1) of the IRA 1967.

<sup>8</sup> [1998] 1MLJ 111.

<sup>9</sup> V.Anantaraman, Malaysian Industrial Relations Law & Practice, Universiti Putra Malaysia Press 1997, pg287.

<sup>10</sup> [1995] CLJ 344; [1995] 2 MLJ 753.

justified with a more serious misconduct. Examples of gross misconduct are assault or fighting,<sup>11</sup> dishonesty or fraud,<sup>12</sup> drunkenness and drug abuse<sup>13</sup> and insubordination.<sup>14</sup> In **Menon v The Brooklands (Selangor) Rubber Co. Ltd.**,<sup>15</sup> the issue before High Court was whether the employer can summarily dismiss an employee for insubordination without giving notice required under the Act. The employee refused to acknowledge receipt of warning letter for careless and negligence. The High Court said that the refusal to acknowledge that the receipt of the warning letter warranted summary dismissal without any notice, since it relates to the fundamental conditions of his contract of service, which demands that he be a diligent and responsible estate contractor. The mutual confidence which is so essential to the relationship master and servant has been violated. In other words, there is a breach of an important term of the contract of the service. Thus, the summary dismissal is justified.

### CONSTRUCTIVE DISMISSAL

Constructive dismissal denotes the employee terminates the contract, with or without notice, by reasons of the employer's conduct. It occurs in situations where it may appear as if the employee terminates such an agreement by throwing in the towel, it still can be said that the true reason for termination of the employment was in some way due to the conduct of the employer. This type of dismissal is necessary in order to avoid the employer abusing the power and dismissing employees at will simply by hiding behind the shield of the employee allegedly resigning. In Malaysia, by virtue of the concept of constructive law, industrial law treats some resignations as dismissal and thus extends statutory dismissal such payment of compensation to those employees who are forced to resign.

Light was first shed on this concept of in the Supreme Court case in **Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd**<sup>16</sup>. The brief facts of this case states that the claimant refuted a transfer order and subsequently filed a complaint under Section 20 of IRA 1967. The Industrial Court held that it is a constructive dismissal and the Supreme Court also upheld the decision of the Industrial Court by adopting the definition of constructive dismissal given by the English Court of Appeal in **Western Excavating (ECC) Ltd v. Sharp**.<sup>17</sup> The judgment of the Court was that the claimant had been humiliated by the employer with the demotion of his. Therefore, it can be concluded that the mutual trust and confidence that should exist between employer and employee had been breached.

Moving on, constructive dismissal can only be established if the conduct complained off has been executed in a chain of actions or a chronology of incidents. A breach which amounts to the destruction or severe tearing of the fabric of relationship of confidence and trust between the employer and employee can also be tantamount to constructive dismissal.<sup>18</sup> In a claim of constructive dismissal, the burden of proof lays on the shoulders of the employee not the employer.<sup>19</sup> The employee can choose to a complaint of constructive dismissal so far as there is a unilateral variation of the employment contract, which would than amount to a fundamental breach, placing it in a position of a repudiatory conduct. The unilateral variation includes reducing the salary,<sup>20</sup> demotion<sup>21</sup> as well as a transfer of position.<sup>22</sup> To have a successful claim of constructive dismissal, the said employee need to act immediately upon the conduct of employer without any delay. This requirement is provided in the case of **Pexxon Sdn Bhd v Sia Qui Yau**.<sup>23</sup> A reasonableness test or contract test will be applied in determining how genuine such a constructive dismissal claim is. Finally, a three step procedure to establish the claim of constructive dismissal is laid out in **Secure Guards Sdn Bhd v Her Bhajan Kaur**.<sup>24</sup>

### FORCED RESIGNATION

Forced resignation happens in the circumstances that the employer made threat, coercion or persuasion with the intention to mandatorily force the employee to submit his letter of resignation. In such situation, the employee has the right to make complaint that his resignation was involuntary and that he was constructively dismissed. Hence, somehow the forced resignation is just another kind of constructive dismissal. In **MST Industrial System Sdn Bhd v. Foo Chee Lek**,<sup>25</sup> the claimant had tendered his resignation and later maintained that he was forced into resigning and that he had therefore been constructively dismissed. The Court rejected the claim on the grounds that the pressure the employer uses must be repudiatory in nature in order to entitle the employee to resign and claim constructive dismissal.

<sup>11</sup> Pernas OuePenang Sdn Bhd v Jasbindar SuraiSingh [1997]1 ILR 111.

<sup>12</sup> Perwira Habib Bank(M) Bhd v TanTeng Seng [1997] 2 ILR8 39.

<sup>13</sup> Austral Enterprises Bhd v Venugopal GK Nair [1998] 1 ILR 15.

<sup>14</sup> Sg Pedu Estate v Sha'Ban Ramli [2001] 1 ILR 704.

<sup>15</sup> [1968] 1 MLJ 15.

<sup>16</sup> (1988) (1) MLJ p. 92.

<sup>17</sup> (1978) IRLR p.27. The Supreme Court said that "constructive dismissal" means 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 the contract. In such a situation, the employee is entitled to regard himself as being dismissed and walk out of his employment.

<sup>18</sup> Lewis v Motorworld Garage Ltd (1985) IRLR 465.

<sup>19</sup> Selangor Medical Centre v Zainal Abidin Md Tamami (2002) 2 ILR 527.

<sup>20</sup> Amanah Butler (M) Sdn Bhd v. Yike Chee Wah (1994) IRLR p.5.

<sup>21</sup> Lewis v. Motorworld Garages Ltd (1985) IRLR p.465.

<sup>22</sup> Hotel Malaya v. Goh Hock Fong (1994) 2 ICR p.810.

<sup>23</sup> (1989) (1) ILR p.240.

<sup>24</sup> (1996) 2 ILR 1342.

<sup>25</sup> (1993) (1) ILR p.202.

## FINDINGS

In a nutshell, there are loopholes in the Malaysia's dismissal procedure and law. Firstly, in the procedural aspect, although the section 14(1)(a) of the EA 1955 states 'after due inquiry - dismissal without notice the employee', it does not clearly provide any other details like the procedure of the due inquiry. Generally, a due inquiry or a domestic inquiry should include a few steps.<sup>26</sup> First, the employee who is going to be dismissed has the right to be informed of the accusation that has been made to them in writing. Next, the employee is provided with a chance to defend himself. Before he is brought to the proceedings, a reasonable period is given for him to prepare all the related information as well as evidence that might secure him from disciplinary actions. Then, another strict condition of conducting such inquiry is that the panel of domestic inquiry must be from any unbiased parties to avoid any conflicts. These due inquiry's steps are strongly recommended to be included in the statutes to make the due inquiry a mandatory procedure. This step would clear up a lot of the fog surrounding this issue. A dismissal based on the ground of misconduct only can be justified lawful after a conduct of due inquiry.

Moving on, another loophole of the dismissal procedure is that lack of comprehensible steps for the dismissal which based on the ground of poor performance. Ayudurai (1998)<sup>27</sup> stated that the connotation for natural justice in dismissal due to incompetency should be interpreted in broader view and consist of fair procedure. Fair procedure means the procedure must consist of three elements. First, the employer needs to inform the employee about his poor performance. It is the responsibility of any employer to inform the particular underperforming employee that he is not living up to the organization's expectation. Then, the employer has the obligation to warn the employee about the consequences. It is also the responsibility of an employer to give such a warning in writing, stating the consequences that the affected employee may face for his poor work performance. Lastly, an opportunity should be given to improve performance. The employer must provide a reasonable opportunity for the affected employee to improve his performance and a chance to prove that he has changed. These 3 elements of a fair procedure should have also been included or stated in the statute, in order to provide a guideline for an employer to deal with such dismissal or assist them in conducting a dismissal procedure in a fair manner.

Then, the judge's interpretation to section 20 of IRA which the just cause or excuse of a dismissal does not include a due inquiry which complies with the rule of natural justice is definitely a loophole in the current law. A definite meaning of the just cause or excuse should be given by Parliament, whether it includes the procedure of due inquiry or just merely denotes the justified reasons for a dismissal. Overall, in Malaysia, there is still no legislation provides a comprehensive and complete of dismissal procedure.

For the dismissal law in Malaysia, a deficiency or unfairness of summary dismissal is that no investigation or due inquiry will be carried out before the dismissal. In other words, the employee totally has no chance to defend himself or other opportunity to improve his performance. In that sense, the procedure for summary dismissal can be said indirectly goes against the rules of natural justice which is right to be heard. The loophole of constructive dismissal, however, is that no legislation governing this particular area. The cases which deal with constructive dismissal are mostly decided by the judicial courts, including the Industrial Courts according to their conscience. In a long line of the development of the constructive dismissal, three steps procedures to establish the claim of constructive dismissal have been introduced.<sup>28</sup> It is recommended that a legislation regarding to the constructive dismissal been enacted and incorporate these three steps as elements of constructive dismissal in that legislation. The loophole of forced resignation is that when there arise issues; whether the resignation was voluntary or whether the employee was coerced or forced into resignation, it will normally be the matter for the Court to decide based on the evidence available since there are no proper and standardize legislation to govern it. Thus, there is a risk that justice cannot be served.

## CONCLUSION

Employment law procedures and types of dismissal can be quite a labyrinth for the unexperienced worker who is about to be dismissed or an employer that is about to dismiss. It is hoped that this paper provides a clearer understanding on the various scenarios that may occur under any dismissal in Malaysia and that worker's as well as employers be provided the necessary informative resources when faced with such problems after reading this paper.

<sup>26</sup> Organization, Employee And Community Relations, Employee's Dismissal Procedure In Malaysia: An Overview.

<sup>27</sup> Ayadurai, Dunston (1998), Industrial Relation In Malaysia. Kuala Lumpur. Malaysia Law Journal Sdn Bhd.

<sup>28</sup>Secure Guards Sdn Bhd v Her Bhajan Kaur (1996) 2 ILR 1342:

- (a) There must be a breach of contract by the employer, which may be either an actual breach or an anticipatory breach.
- (b) The breach must be sufficiently important to justify the employee resigning; or else it must be the last in a series of incidents which justify his/her leaving. However, a genuine, interpretation of the contract by the employer does not constitute a repudiation in law.
- c) The employee must leave soon in response to the breach and not for some unconnected reason.