

ORGANIZATION, EMPLOYEE AND COMMUNITY RELATIONS

**EMPLOYEE'S DISMISSAL PROCEDURE IN MALAYSIA:
AN OVERVIEW**

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INTRODUCTION

Dismissal is one of the important aspects when discussing relationship between an organization and its employee and part of employment relationships. Dismissal itself is considered as the last choice of punishment by the employer to terminate the contract of employment with the employer.

Dismissal is the severest punishment which can be awarded since it will create unneeded outcome whether to an organization or the affected employee. In some cases, the dismissal decision itself has been challenged back by the employee and brought to the court to be heard.

Realizing the unneeded effect of dismissal against the organization, some executives and managers try to avoid making that decision by using alternative approaches when dealing with 'problematic' employee like transfer the employee to another supervision or department, promote the employee to another area and in some cases arrange the employees to resign on their own accord.

Malaysia's Employment Act 1955 has clearly stated that the right to terminate and dismiss employee is a management prerogative, yet dismissal as a matter of fact is one of the most difficult task for any executive or manager. As a matter of fact employee in this country can only be terminated due to valid and justified reasons of disciplinary cases or misconduct and poor work performance.

Definition of Employee

There are two acts specifically deal with employment relation in Malaysia, The Employment Act (EA) 1955 and Industrial Relation Act (IRA) 1967. Both acts define what the term 'employee' in Malaysia means is. Ayadurai (1998) stated that the term 'workman' is defined broadly in the IRA than the term 'employee' defined by EA.

In EA, an 'employee' is considered as any person or class of person:

- a) Included in any category in the first schedule to the extend specified therein; or
- b) In respect of whom the Minister of Human Resources make an order under section 2(3) or section 2A.

While Industrial IRA defines 'Employee/Workman' as any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute

Contract of Employment

The EA has define contract of employment as a "contract of service" which means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee and includes an apprenticeship contract.

IRA 1967 define "contract of employment" as means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as a workman and that other agrees to serve his employer as a workman.

DEFINITION OF EMPLOYEE'S DISMISSAL

The term dismissal in Malaysia legal perspective is actually originated from termination of employment contract. This is what Ayadurai (1998) explain; the term 'Termination' in Malaysian Industrial Law refers to the termination of employment relationship, but as this relationship is a contractual one, it is identified with the termination of the employment contract.

Where the contract is terminated by the employer because of perceived misconduct of the employee, then the termination is termed as dismissal.

Ayadurai (1998) also refers “dismissal” as termination of a particular kind (due to specific cause) and moreover one moreover that is easily distinguishable from any other kind. The statutory provisions regarding termination and dismissal stated that it’s the management prerogatives. Means that it is the right of the organization or management to exercise its right, however it must in accordance with due valid reasons of disciplinary cases or misconduct and poor work performance.

Idid, S. Ahmad (1997) explained that there is no doubt dismissal is the severest punishment which can be awarded to delinquent employee by his employer for some act of misconduct, but if there is no misconduct, there can be no punishment.

MISCONDUCT AND TYPES OF MISCONDUCT

Misconduct is actually the act of incorrect, erroneous as defined by Oxford Dictionary of Law (2003). While in Malaysia’s legal perspective misconduct is an “improper behavior, intentional wrong-doing or deliberate violation of a rule or standard of behavior...Any conduct inconsistent with the faithful discharged of his duties.” [Holiday Inn Kuching v Elizabeth CS Lee Award No. 255 of 1990].

From the above interpretation the term misconduct must be accompanied by intention and deliberate action. An act or conduct that adversely affects employee’s duties towards the employer. The misconduct complained of must have some relation with employee’s duties or the work entrusted to him by the employer. Any breach of an express or implied duty on the part of an employee, unless it be of trifling nature would amount to misconduct [Sykt. Kenderaan Kelantan Berhad v Rosidi bin Zakaria Award No 542/1995].

Ayadurai (1998) stated that the Industrial Court confirmed that it is for employer to determine initially whether or not an employee has committed misconduct, but must be in fair and reasonable. There are two major possible sources of misconduct which are the right basis of employer and the right basis in the responsibilities of employees.

It is the right basis of an employer to determine and establish rules and regulation governing the conducts of its employee at the workplace and during working hours, and normally the organization has made it specifically in writing and is distributed to the employee within the organization. Whereas the right basis in the responsibilities of employees means what employees should or should not do while performing his duty towards employer and organization.

Types of misconduct

Idid, S. Ahmad (1997) went further to discuss the acts of misconduct which attract the penalty of dismissal which are;

- a) Prejudicial or likely to be prejudicial to the interest of the master;
- b) Inconsistent and incompatible with employee's duty to master;
- c) Unsafe conduct for the employer to retain the employee in service;
- d) Immoral conduct acknowledged by reasonable persons;
- e) Unfaithful conduct which make it difficult for master to rely on;
- f) Not properly discharging duties properly;
- g) Abusive or disturbing the peace at workplace;
- h) Insulting or insubordinate behaviour between employer and employee;
- i) Negligence of duties which is engaged; and
- j) Act of neglect tends to cause serious consequences

There are more than 30 incorrect behaviors treated as treated of misconducts, these are some kind of acts which are treated as misconduct:

- a) Disobedience;
- b) Theft, fraud;
- c) Willful damage or loss of employer's goods;
- d) Habitual absence;
- e) Habitual late attendance;
- f) Drunkenness, fighting;
- g) Sleeping during working hours;
- h) Habitual negligence;
- i) Smoking in prohibited areas;
- j) Failure to follow safety rules;
- k) Sexual harassment; and
- l) Resorting to industrial action in contravention of the provisions of the Industrial Relation Act or other laws

MALAYSIA'S LAW COVERING EMPLOYEE'S DISMISSAL

EA and IRA specifically cover the dismissal issues. Section 14 of the EA clearly stated that an employer may, on the grounds of misconduct inconsistent with the fulfillment of the express or implied conditions of his service, after due inquiry :

- a) Dismiss without notice the employee;
- b) Downgrade the employee; or
- c) Impose any other lesser punishment as he deems just and fit, and where a punishment of suspension without wages is imposed, it shall not exceed a period of two weeks.

For the purposes of an inquiry under subsection (1), the employer may suspend the employee from work for a period not exceeding two weeks but shall pay him not less than half his wages for such period:

Provided that if inquiry does not disclose any misconduct on the part of the employee the employer shall forthwith restore to the employee the full amount of wages so withheld.

An employee may terminate his contract of service with his employer without notice where he or his dependants are immediately threatened by danger to the person by violence or disease such as such employee did not by his contract of service undertake to run.

While in section 15 the EA also covers when contract is deemed to be broken by employer and employee:

- a) An employer shall be deemed to have broken his contract of service with the employee if he fails to pay wages in accordance with Part III.
- b) An employee shall be deemed to have broken his contract of service with the employer if he has been continuously absent from work for more than two consecutive working days without prior leave from his employer, unless he has a reasonable excuse for such absence and has informed or attempted to inform his employer of such excuse prior to or at the earliest opportunity during such absence.

Dismissal Due To Incompetency

Other than dismissal due to misconduct, an employee in Malaysia also can be dismissed or terminated for unsatisfactory performance or incompetency. Incompetency literally means incapability, inefficiency, unsatisfactory performance or poor performance.

Under Malaysia legislation, it is acceptable basis for an employer to dismiss an employee due to incompetency. In *Shamsudin Mat Amin and Austral Enterprises Bhd (Award 47 of 1974)*:

“...and the evidence in this case establishes a pattern of workmanship which the management decided it could longer afford to suffer..”

From the above court interpretation, an employer has the right to terminate or dismiss any employee that brings no productivity to the organization which at the end of the day may cause the organization to lose profit.

Dismissal due to incompetency is also covered by a principle of 'natural justice'. Ayudarai (1998) 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 3 (three) elements of:

Inform the employee about the poor performance

It is the responsibility for any employer to inform the particular or under performance employee that he is doing his job not to organization's expectation.

Warning the employee about the consequences

It is the responsibility of an employer to give warning in writing about the consequences that affected employee may face for his poor work performance.

Give opportunity to improve performance.

An employer must give appropriate opportunity for the affected employee to improve his performance and chance to prove that he has change.

DISMISSAL PROCEDURES IN PRIVATE SECTORS

Private Sector

For the private sector, the dismissal procedure is covered under Section 14(1) of Employment Act 1955, which detailed the dismissal permission as "An employer may on the grounds of misconduct inconsistent with the fulfillment of the express or implied conditions of his service, after due inquiry:

- a) Dismiss without notice the employee;
- b) Downgrade the employee; or
- c) Impose any other lesser punishment as he deems just and fit, and where a punishment without wages is imposed, it shall not exceed a period of two weeks.

The act went further to describe that:

- a) The employer may suspend the employee from work for a period not exceeding two weeks but shall pay him not less than half his wages for such period.
- b) Provided that if inquiry does not disclose any misconduct on the part of the employee the employer shall forthwith restore to the employee the full amount of wages so withheld.
- c) An employee may terminate his contract of service with his employer without notice where he or his dependants are immediately threatened by danger to the person by violence or disease such as such employee did not by his contract of service undertake to run.

Legislation provided by the EA shows that dismissing an employee in Malaysia is not as easy as expected. It has to be done in proper procedures and failure to follow the procedure will lead to further dispute between the employee and employer.

Domestic Inquiry

Ayudarai (1998) described that 'due inquiry' means a 'proper inquiry', means that a domestic inquiry that is held in conformity with the principles of natural justice. In the case of Ibrahim Hassan and Diamond Cutting Sdn Bhd (Award 79 of 1980) the court has decided that the requirement of a domestic inquiry has acquired great significant in Malaysia's industrial law, and has become a statutory requirement prior to the inflicting of punishment of misconduct. Thus, natural justice is served by the holding of such a domestic inquiry.

It has been stated that the domestic inquiry must be held in accordance of the principles of natural justice which covers items below:

The worker has the right to know about the accusation.

The employee in whatever situation has the absolute right to know what accusation has been made to them in writing and it is the responsibility of the employer to inform and brief the affected employee the details and information about the accusation. There shouldn't be any silent or hidden accusation against the affected employee.

The worker has the right to speak in his own defense.

Since the affected employee has been informed and noticed about the accusation against him, then he must be given fair opportunity and chance to speak for his own defense before the employer. Failure in giving the affected employee his right to be heard will make the dismissal procedure null and void.

The worker must be given enough time to reply for the accusations.

While the affected employee has been given opportunity to defense himself, an appropriate time frame should be given for him to prepare all the relevant information and details as well as evidence that might secure him from disciplinary actions.

The inquiry must be conducted by an unbiased party.

To ensure any conflict of interest during the inquiry's process, the panel of domestic inquiry must be from any unbiased parties. Idid, S. Ahmad (1997) outlined the domestic inquiry procedures as must consist of these elements:

a) The complaint

Disciplinary action against employee emanate from a complaint against him for misconduct or inefficiency or contravention of any of the rules and regulation of the company

b) Investigation

The departmental head upon hearing the complaint must immediately carry out investigation to find and establish a prima facie case toward the affected employee.

c) Unjust complaint

If, after due investigation, it is found that the complaint is frivolous, unjustified or false then the case should be closed.

d) Letter of allegation

If there is a prima facie case against the employee, the company must issue a letter of allegation to the employee and details of the allegation made against him.

e) Service of the letter of allegation

The letter containing the allegation must be served on the workman against whom the allegation is made and the workman concerned must be made to acknowledge the service.

f) Letter of explanation from the workman

The employee concerned then may admit, submit his explanation or neglect to reply to the letter.

g) Minor misconduct and punishment

If the investigation discloses that the workman against whom the complaint is made has committed misconduct, the departmental head then will consider the type of punishment whether to be verbal warning, written warning, or major punishment like suspension without pay, demotion or dismissal.

h) Suspension pending query

The employee may be suspended from entering company's premises during inquiry procedures for a maximum of two weeks with half basic salary.

i) Notice of inquiry

Upon receipt or failure of receipt of the letter of explanation, after having sufficient evidence in hand, commence to frame proper charge against employee concerned and issues notice of inquiry.

j) Panel of inquiry

The panel of inquiry shall be nominated by head of personnel in consultation with the divisional or departmental heads concerned. The member must be properly nominated and avoid any conflict of interest.

k) Presentation of the management case

The case of the company must be presented by an officer appointed by the head of personnel in consultation with divisional head or departmental heads concerned.

l) Preparation for the presentation of the case

The officer representing the company shall prepare the case throughouhly for presentation at the inquiry and has sufficient fact as well as briefing the company's witnesses.

PROTECTION AGAINST WRONGFUL DISMISSAL

It has been clearly stated in part VI of IRA, 1967 that “where a workman who is not a member of a trade union of workmen considers that he has been dismissed without just cause or excuse by his employer he may, within one month of the dismissal, make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.”

The procedures for claim against wrongful dismissal are outlined below:

- a) Upon receipt of the representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement there of is arrived at within a period of not more than thirty days from the date of receipt of the representations. Where the Director General is satisfied that there is no likelihood of the representations being settled within the said period of thirty days or where the representations remain unsettled at the end of the said period of thirty days the Director General shall notify the Minister accordingly.
- b) Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the Court for an award.
- c) Where an award has been made under subsection (3), the award shall operate as a bar to any action for damages by the workman in any court in respect of wrongful dismissal.
- d) This section shall not apply to the dismissal of a workman in circumstances arising out of a contravention of section 59 where proceedings have been commenced before a court in respect of an offence under section 59 (1); where, while proceedings are pending under this section, proceedings arising out of the same dismissal are commenced before a court in respect of an offence under section 59 (1), the proceedings under this section shall not be proceeded with further.

Constructive Dismissal

Constructive dismissal is one of the important issues relating to dismissal. Literally it can be interpreted as a termination of a contract of employment by an employee because his employer has shown that he does not intend to be bound by some essential term of the contract. Although the employee has resigned, he has the same right to apply to an employment tribunal as one who has been unfairly dismissed by his employer (A Dictionary of Law Fifth Edition, Elizabeth A. Martin, Oxford University Press, 2003).

Ayudarai (1998) explained that in order for the employee to be able to claim constructive dismissal, four conditions must be met:

- a) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach;
- b) That breach must be sufficiently important to support and justify the employee's resign;
- c) He must leave in response to the breach and not for some other connected reason; and
- d) He must not delay to long in terminating the contract in response to the employer's breach.

Claim for constructive dismissal happens in private sector but as far as the study concerned there wasn't any constructive dismissal claim involving public sector.

Unfair Dismissal

The claim for unfair dismissal will be handled by the Industrial Court. If the Court agrees with the employer's action after hearing the complaint, the dismissal will be upheld. However, if the dismissal was considered to be unjustified, then the Court has an authority to order the employer to reinstate the employee. However, the employee will get back his job if it is practical to do so. If not, the Court will decide to give compensation in lieu of reinstatement. The legislation covering unfair dismissal is also same which is section 20 of IRA as already discussed in the earlier paragraph.

STATISTIC OF DISMISSAL CASE IN MALAYSIA

For the private sector, Industrial Court has produced the statistic of cases and awards that has been decided in the year 2001 up to 2008 as stated in the table 1 below:

**Table 1:
Analysis of Awards of Dismissal Cases**

Analysis of Awards of Dismissal Cases (2001 - 2008)								
TYPES OF TERMINATION	2001	2002	2003	2004	2005	2006	2007	2008
Constructive	26	35	40	34	22	42	97	126
Misconduct	726	810	763	1638	2144	2051	1200	878
Retrenchment	41	52	61	61	16	32	422	155
Others	-	-	-	-	-	-	402	573
TOTAL	793	897	864	1733	2182	2125	2121	1732
() CONSENT AWARD								

Source: Malaysia Industrial Court, <http://www.mp.gov.my/>

From the above table it can be seen that there is an increase in court awards regarding constructive dismissal claim from 97 cases in 2007 to 126 cases in 2008. While award for misconduct claim has decrease form 1200 cases in 2007 to just 878 cases in 2008.

COURT CASES INVOLVING EMPLOYEES DISMISSAL

This study has compiled few court cases regarding dismissal which are appropriated to be examined to get better understanding and clear picture of the dismissal procedures in Malaysia.

Case One : Broadway Typesetting Sdn Bhd v. Puan Ho Nyet Khoon, 1987

The employee claimed that she was dismissed because she was 4 ½ months pregnant. The employer contended that the claimant was negligent in her work.

The issue regarding this case is to find the exact reason for claimant dismissal, the claimant claimed that she had been dismissed for her pregnancy while the employer stated that she had done misconduct as being negligent in her work.

The court held that the claimant was dismissed in order to avoid paying maternity leave. The Court found that there was no just cause or excuse to dismiss the claimant and ordered the employer to pay back wages from the date of dismissal up to the last date of hearing, less 50%.

Case Two : Projek Lebuhraya Utara Selatan Bhd.V.Azahar Ahmad Industrial Court, Kuala Lumpur, Case No: 6/4-156/97 15 April 1998

The claimant had been dismissed on the ground that he had sexually molested one of the company's female employees ('the complainant'). The claimant was the complainant's supervisor. The incident was alleged to have taken place around 4 a.m. in the company's premises. There were no other witnesses to substantiate the complainant's allegation.

The court dismissed the claim since after a careful scrutiny of the totality of the evidence the court is of the view that the company's version of events is the more probable one. In this case what the claimant had done was incompatible with the due and faithful discharge of his duties and the company can no longer repose in him the necessary trust and confidence.

Case Three : Jaman Saidin V. Hotel Istana Industrial Court, Kuala Lumpur Award No. 1032 Of 2006 [Case No. 23/4-506/04] 9 June 2006

The claimant was employed by the company as an Executive Chef. Whilst he was in the company's employ, two staff members brought allegations of sexual harassment against him. A domestic inquiry was conducted and by way of letter dated 21 February 2002, the company terminated the claimant's contract of employment alleging immoral conduct of the claimant by his sexual harassment of two staff members. The claimant alleged that he had been unfairly

dismissed and a reference under s. 20(3) of the Industrial Relations Act 1967 was brought before this court.

The company failed to file an appearance and a statement of reply and despite repeated notifications to attend court, failed to do so culminating in this matter being heard ex parte the company.

The court held that the termination of the claimant by the company was without just cause or excuse and the court orders the claimant to be reinstated to his former position with arrears of wages from the date of dismissal to the date of reinstatement

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Court cases:

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- b) Projek Lebuhraya Utara Selatan Bhd.V.Azahar Ahmad;
- c) Jaman Saidin V. Hotel Istana
- d) Holiday Inn Kuching v Elizabeth CS Lee Award No. 255 of 1990
- e) Sykt. Kenderaan Kelantan Berhad v Rosidi bin Zakaria Award No 542/1995
- f) Shamsudin Mat Amin and Austral Enterprises Bhd(Award 47 of 1974)