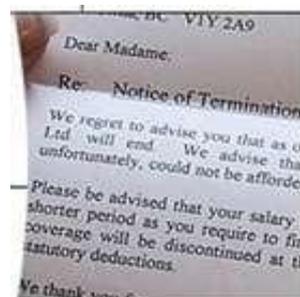




LABOUR LAWS & INDUSTRIAL RELATIONS SERIES FOR HR PROFESSIONALS (April 19, 2007)

Topic: **HANDLING TERMINATION OF EMPLOYEES**

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(I) TERMINATION OF EMPLOYMENT : WHAT DOES IT MEAN LEGALLY ?

1. Every employment engagement has its roots in the law of contract. Thus a termination of employment must naturally, and in every instance, involve a termination of the contract of employment. Where one party elects to treat such a termination as a repudiation or breach of contract, the contractual remedy (ies) afforded is usually damages.

2. Under the common law, two principles have been long recognized :

- that there can be no specific performance of a contract for personal services; and
- that the measure of damages for breach of an employment contract is usually payment for the notice period.

[per Lord Morris in *FRANCIS v. MUNICIPAL COUNSELLORS OF KUYALA LUMPUR* [1962] 28 MLJ 407]

3. This common law position has been materially altered in Malaysia by the coming into force of the Industrial Relations Act 1967. Now, a workman who claims (and proves) wrongful dismissal may seek reinstatement to his previous position as well as backwages for his post-dismissal period. By this means, the workman has now been provided with a 'cheap and speedy remedy to obtain reinstatement'

[per Raja Azlan Shah CJ in see *FUNG KEONG RUBBER MNFG v. LEE ENG KIAT* [1981] 1 MLJ 238]



4. The Industrial Law regime under the IRA 1967 is thus regarded as a piece of beneficent social legislation but with a legislative policy for the promotion of industrial harmony. In **SYARIKAT KENDERAAN MELAYU KELANTAN BHD V. TRANSPORT WORKER UNION** [1995] 2 MLJ 317, the Court of Appeal said thus:-

“It is beyond doubt that the Act is a piece of beneficent social legislation by which Parliament intends the prevention and speedy resolution of disputes between employers and their workmen. In other words the object of Parliament enacting the law is to promote industrial harmony.”

5. It is thus clear that with the IRA 1967 being a beneficent social legislation, any acts or omissions on the part of the Employer not in keeping with the law, or good industrial practice, will be frowned upon and possibly struck down. A termination of employment can thus validly be for ‘just cause and excuse’. This is in keeping with judicial recognition that the right to employment is part of a citizen’s right to Life under Article 5 of the Federal Constitution : **HONG LEONG EQUIPMENT v. LIEW FOOK CHUAN** [1996] 1 MLJ 481, CA.

6. With regards termination of employment, there are only 2 categories of workers that are protected under law : **MOHD AHMAD v. YDP MAJLIS DAERAH JEMPOL** [1997] 3 CLJ 135, FC.



(II) TERMINATION OF PROBATIONERS : DISTINCTION WITHOUT A DIFFERENCE ?

7. Some employers labor under the misconception that a non-confirmation of a probationer is not a termination of employment. They cannot be more wrong. A probationer is every bit the 'workman' under s.2 of the IRA 1967 and has full recourse to s.20 thereunder. This was clearly explained in **HARTELEGA SDN BHD v. SHAMSUL HISHAM** [2004] 3 MLJ 117 / **KHALIAH BTE ABAS v. PESAKA CAPITAL** [1997] 1 MLJ 376);

8. Where a probationer continues in employment after expiry of the probation period, the question is whether, in law, he or she is deemed to have been confirmed. This was settled by the Federal Court in **K.C.MATHEWS v. KUMPULAN GUTHRIE SDN BHD** [1981] 2 MLJ 320 and **V.SUBRAMANIAM v. CRAIGIELEA ESTATE** [1982] 1 MLJ 317. ;

- However, some uncertainty seems to have arisen after the Court of Appeal decision of **ABDUL MAJID v. PAARI PERUMAL** [2002] 2 MLJ 640 (but this should be relegated to its own facts).



9. However, where the reason for termination is poor performance, there is a difference in the standard of proof to be met by the Employer. The High Court in **HARTALEGA SDN BHD v. SHAMSUL HISHAM** [2004] 3 MLJ 117 (while distinguishing **KHALIAH BTE ABAS v. PESAKA CAPITAL** [1997] 1 MLJ 376) held:-

"Merely bringing the probationer within the ambit of s.20 IRA 1967 does not automatically imply that the probationer is elevated to the status of a confirmed employee as this was not the intention of the legislature... It was conditional for the probationer to perform his functions to the satisfaction of the employer. Failure to do so would render the probationer liable to be dismissed, save that such a decision must not be capricious or arbitrary".

10. In the event of an extension of the probation period, the judicial test to be applied is the 'bona fide' test : **ROBERT JOHN REEVES v. MENTERI SUMBER MANUSIA** [2000] 1 CLJ 180, HC;



(III) TERMINATION FOR MISCONDUCT: GROUNDS & PROCEDURE?

11. Misconduct in the employment context usually encompasses a breach, on the part of the employee, of some rule or regulation of employment and/or a duty or obligation imposed by law.

12. In the event of misconduct, natural justice dictates that the employee be given a chance to be heard in his defense. This usually involves the holding of a domestic inquiry and compliance with all procedures connected thereto: **METROPLEX ADM SDN BHD v. MOHD ELIAS** [1998] 5 CLJ 467, HC;

13. However, it is now settled beyond peradventure that the non-holding of a DI is by itself not fatal : **WONG YUEN HOCK v. HONG LEONG ASSURANCE** [1995] 2 MLJ 753, FC;

14. This is principally because the Industrial Court is mandated under the IRA 1967 to sit and decide as an impartial tribunal. In **MULTITONE ELECTRONICS V. TAN SOO PIN** [2000] 1 ILR 554, the IC held:

"...failure of natural justice by itself does not stop the IC from coming to a finding as to justification for dismissal. This is because the hearing before the IC provides a better and impartial forum for the employee than the DI for him to be heard in accordance with the rules of natural justice".



15. The function of the Industrial Court in a case of misconduct is two-fold: firstly, it must determine whether the misconduct complained of has been established, and secondly, whether it constitutes just cause and excuse for the dismissal [see **MILAN AUTO SDN BHD v. WONG SEH YEN** [1995] 4 CLJ 449].

16. Where the punishment meted out is disproportionate to the misconduct, the dismissal ought to be struck down by the Industrial Court : **ABU SAMAH OTHMAN v. ORIENTAL ASSEMBLERS SDN BHD** [2007] 7 CLJ 188, HC.



(IV) TERMINATION FOR POOR PERFORMANCE

17. Poor performance, although a term of art, refers essentially to unsatisfactory or below-par work performance of an employee. In short, it generally encompasses the 3 I's i.e Incompetency , Inefficiency and/or Inaptitude:

Inefficiency which discloses a course of negative conduct is a sufficient ground for termination... Incompetency also is a ground for dismissal, indeed, inaptitude resulting in failure to perform the duties of the service, destroys the whole reality of the contract from the point of view of the employer. It must be remembered that the vast majority of employees make their employers the judges of their efficiency, and so long as the employer acts bona fide, i.e. he is genuinely discontented with an employee, he is quire entitled to give notice of termination” (Award No.47 of 1974)

18. Generally, before an employee is to be dismissed on the grounds of poor performance, natural justice dictates that:-

- the employee be warned about his/her shortcomings;
- that he /she be accorded sufficient opportunity to improve; and
- notwithstanding that opportunity, he / she has failed to improve.

19. Except in businesses / industries wit set KPI's or where work performance can readily be measured with some degree of mathematical accuracy, an employee's performance is usually very much a question of perception and degree. The courts are thus vigilant to ensure that any such termination is done in good faith.



20. Thus, where the Claimants were repeated slacking in their work despite warnings to improve, a dismissal for poor performance would be held to be justified : **MOHD KHADZIL AZHARI v. TM KAY FERTILIZERS SDN BHD** [2007] 1 ILR 108.

21. In the final upshot, it is incumbent on the employer to satisfactorily prove the employee's poor performance. This necessarily involves producing documentary or consistent and concrete evidence by the employer:-

HEWLETT PACKARD (M) SDN BHD V. LCA [1993] 1 ILR 308; termination upheld and Court said "*the standard of fairness adopted by the Company far exceeds the reasonable standards expected of an employer*"

LANG FURNITURE SDN BHD V. ONG CHING PING [2005] 2 ILR 30: probationers termination upheld : "*The appointment of a probationer is tentative and dependant on the employer's satisfaction as to his suitability. But this satisfaction must be a reasonable satisfaction*"



ASTRAL GRD HANDLING SERVICES V. K.GOVINDASAMY [2005] 1 ILR 745; dismissal struck down and Court said “ *the company failed to prove that the claimant had been given warnings of his poor performance , that he had been accorded sufficient opportunity to improve and that he failed to show significant improvement despite being given the opportunity to do so. As such, the company failed to prove that the claimant was guilty of poor performance.*”

22. The prerequisites for termination for unsatisfactory performance were also clearly outlined in **ARTWORLD ADVERTISING SDN BHD v. NOR AZIAN** [2004] 7 MLJ 349: HC



(V) TERMINATION DUE TO VOLUNTARY SEVERANCE

23. One method by which employers seek to 'reduce headcount' or 'trim down their workforce' , instead of carrying out a retrenchment exercise, is by a voluntary separation scheme (VSS) or mutual separation scheme.

24. This usually entails the payment of a monetary sum (not by way of compensation) to the employee(s) in return for his / her resignation or undertaking that it is in full and final settlement of any dispute he /she may have arising therefrom. Usually, such an understanding is cemented in the form of an agreement of release and discharge signed by the employee.

25. Such an agreement, under contract law, would create an estoppel against the employee seeking to nonetheless renege on his /her undertaking after receipt of payment. The doctrine of accord and satisfaction would also act, both in equity and in law, against the employee.



26. However, in the context of industrial law or jurisprudence, and particularly in view of s.30(5) of the IRA 1967 that dictates the Industrial Court to act with “equity and good conscience”, several issues arise, particularly :-

- that of ‘forced resignation’ : **CB MARKETING v. TAN TEE MING** [2002] 3 ILR 798
- whether there has been accord and satisfaction, and if so, whether the Court is precluded from adjudicating on the dispute : **BEST ENGINEERING v. BEH SUN SUN** [2005] 3 ILR 91

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