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**EMPLOYEE DISMISSALS IN MALAYSIA – A LEGAL GUIDE
FOR THE EMPLOYER**

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Abstract

To be on the right footing with the Industrial Court at the adjudication stage, the employer ought to demonstrate that they have complied with the basic procedures prior to dismissal. A failure to provide evidence of compliance to the basic procedures could render the dismissal to be unlawful even if there were valid grounds to dismiss. Having said this, there is also a school of thought that it is not detrimental if basic procedures were not complied with. The Courts will hear the whole case as in '*de novo*'. Here, cases adopting the '*de novo*' approach will be highlighted. Hence, there is no clear direction whether basic procedures need to be complied with prior to dismissal. In lieu of the above, cases that contribute to the development of this employment law area will be examined. This paper will also illustrate three types of dismissal claims that the employer may face and could be classified, but not limited to, the following: outright dismissals, constructive dismissals and forced resignation. The finding is that if employers do not comply with the basic procedures prior to dismissal, it is not detrimental from a legal aspect and that the case can be heard '*de novo*' in the Industrial Court. The Industrial Court will find the dismissal to be lawful if the employer can prove it was done with 'just cause and excuse' albeit in the absence of the basic procedures prior to dismissal.

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1. Introduction

Employers are usually very perplexed when they are faced with errant employees and are not quite sure how to proceed with persons who are performing poorly at work or who have had committed a misconduct (Geyzel, 2016). At times, employer may have committed a breach of a fundamental term of the employment contract causing the employee to claim constructive dismissal; on other instances, an employee may have tendered or signed a letter of resignation and later declared that he was forced to resign due to the actions of the employer, whether impliedly or expressly (Dhillon, 2013). As such, this area in relation to dismissals in employment law is a maze for the inexperienced employer and if not navigated well enough could bring about dire financial circumstances for the employer and company or organisation that is involved.

2. Problem Statement

Firstly, there is no clarity in Malaysian employment law pertaining the recommended procedures prior to dismissing an employee that need to be complied with by the employer. Some schools of thought seem to suggest that it is mandatory to follow the procedures, or else the dismissal should be rendered unlawful. Yet, others opine that it is not detrimental, as the case can be heard 'de novo' i.e. in the Industrial Court proceedings itself. This is the dilemma that many employers face, should they or should they not comply with the basic procedures that have been outlined?

Secondly, employers are usually of the opinion it is only they who could affect a dismissal unto the employee but this is far from the truth. Employers are unaware that the laws on dismissals also include constructive dismissals and forced resignation. Many employers are unable to distinguish the various types of dismissals in Malaysia and hence, they are ill equipped to deal with the various types of dismissal claims that could follow suit.

3. Research Questions

1. What are the procedures to be complied with by the employer prior to the dismissal of an employee?
2. Would it be fatal if employers are found to be in non-compliance of the said procedures?
3. What are the common types of employment dismissals?

4. Purpose of the Study

The purpose of this study is to provide legal information to all employers in Malaysia pertaining to the law on dismissals. This paper is intended to guide employers on the basic procedures that need to be complied with prior to dismissing an employee. In addition, this paper also highlight that there are times that courts may not be so stringent with compliance of the basic procedures as long as the dismissal was done with 'just cause and excuse'. Last but not least, this paper will also explain the various types of dismissal that an employee could lodge in the Industrial Relations Department against the employer.

5. Research Methods

The authors conducted the research by library-based and qualitative approach. The theoretical framework of this research comprised of relevant Malaysian statutes and regulations, case law, textbooks, journals articles and other reliable sources, encyclopaedia's, internet resources, and other law related material in the assistance of constructing the content of this paper.

Data was collected in the form of documents, archival records and any other socio and legal sources that were relevant to the research area. The data collection is library and web based. For library-based, the author referred to printed material such as, employment law textbook, printed statutes and law journals or reports. For web-based, Industrial Law Report and Current Law Journal from the online database was referred to.

5.1.Primary Data

The primary data was acquired through statutes and cases. The relevant statutes are Employment Act 1955 and Industrial Relations Act 1967. Numerous cases were cited, such as *Edi Hidayat Zulkefli v Pelabuhan Tanjung Pelepas Sdn Bhd [2017] 2 ILR 326*; *Surinding Singh Kanda v. Government of Federation of Malaya [1962] MLJ 169*; *Skypak International (M) Sdn Bhd v. Foong Kah Tin [1987] 1 ILR 495*; *Yasmin Haron v Extol Corporation (M) Sdn Bhd [2017] 2 ILR 359* etc.

5.2.Secondary Data

The secondary data was derived from academic journal and reliable legal website. The academic journals referred are the International Journal of Business, Economics and Law, the legal Network Series, the Industrial Law Report and the Malayan Law Journal. The reliable legal website is the Malaysian lawyers.

6. Findings

6.1.Basic Procedures Prior to Dismissing an Employee

In Malaysia, Employment dismissals are governed by the Employment Act 1955 ("EA 1955") and the Industrial Relations Act 1967("IRA 1967"). To be on the right footing with the Industrial Court pertaining to a dismissal matter, the employer must demonstrate that they have complied with the basic procedures prior to dismissal. A failure to provide evidence on compliance with the basic procedures could render the dismissal to be unlawful even if there were valid grounds to dismiss (Ashgar & Farheen, 2009).

This act of issuing notice is mandatory as it is clearly stated in S 12 of the EA 1955. S 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. Although this provision refers to actual termination of the said contract, nevertheless, it lays the groundwork that a notice is mandatory if there is intention by any party to possibly do away with their employment contractual obligations (Dhillon, 2013).

In *Edi Hidayat Zulkefli v Pelabuhan Tanjung Pelepas Sdn Bhd [2017] 2 ILR 326*, no notice of Domestic Inquiry ("DI") was served to the claimant and prior to the DI, the claimant had only been given an hour to prepare his defence. In fact, the employer's witness testified in the Industrial Court that, the

DI's notice shall be served on the claimant at least seven days before the DI hearing. The Industrial Court held that, failure to serve a DI's notice on the claimant is a violation to the doctrine of natural justice and it occasioned a blatant miscarriage of justice. Due to the failure of serving the DI's notice, the claimant had lost a significant opportunity to prepare a proper defence to the allegations against him and the opportunity to get his witnesses to testify for him.

In relation to the importance of the rules of natural justice, the Industrial Court quoted the principles established by the Privy Council in *Surinder Singh Kanda v. Government of Federation of Malaya [1962] MLJ 169*, where there are two pillars in upholding the doctrine of natural justice. Firstly, the rule of '*audi alteram partem*' meaning no one is to be condemned unheard and secondly, the rule against bias under the maxim of '*nemo judex in causa sua*' meaning no one should be a judge in his own cause.

To highlight natural justice further, the Industrial Court also quoted the principles laid down in *Skypak International (M) Sdn Bhd v. Foong Kah Tin [1987] 1 ILR 495*, where firstly, a workman must be served with a reasonable notice of DI, which must inform him the allegation(s) that he will need to defend during the DI. Secondly, a workman must have a reasonable opportunity of being heard in his own defence in pursuant to the maxim of '*audi alteram partem*', which means no one is to be condemned unheard and this includes *inter alia*, the opportunity to face and challenge his accusers, witnesses and whatever evidence that is against him. Thirdly, the DI must be conducted by an impartial panel, which is consistent to the maxim of '*nemo judex in causa sua*'.

Therefore, giving notice to the employees is definitely an important step as it not only prepares them to face possible disciplinary actions and gives them opportunity to prepare their defence but also prepares them to face the worst consequence: being dismissed the employer. In the notice to the employee, the notice shall notify the employee on the grounds of an alleged breach of the employment contract, either on the ground of poor performance or misconduct.

For poor performance cases, the basic procedure to be complied with is that a notice should be sent to the employee indicating that he had been performing poorly and as a result had breached the term(s) of the employment contract (Mitra, 2016). In addition, the employee should be given further training and counselling so that he could improve his job performance. Further, a time period to improve must also be given to the employee before an idea of dismissal comes into the employer's mind (Mitra, 2016).

In *Yasmin Haron v Extol Corporation (M) Sdn Bhd [2017] 2 ILR 359*, the claimant was on probation as an Assistance Business Manager of the employer's company. One of the claimant's job descriptions was to achieve sales target set by the employer's company and she had accepted it. The employer's company extended her probationary period for a further 3 months as the claimant did not meet her sales target. The Claimant had accepted the said extension without any objection. However, at the end of the extended three months probationary period, the claimant failed to hit the sales target and as a result, she was dismissed. The claimant contended that her dismissal was without just cause and excuse because she was unaware of any sales target that she was required to achieve.

The Industrial Court was satisfied with the evidence, i.e. The employer gave 3 months further probation, for her to improve performance and change her work attitude, but she still failed to demonstrate her fitness to hold the position, as expected by the employer. During her extended

probationary period, the employer had issued two notices or letters to the claimant i.e. a warning letter to the claimant regarding her failure to submit her daily sales activities to her superior and a show cause letter for being late to attend the company's training sessions. Due to the evidence tendered, the Industrial Court held that the employer had complied with the basic procedure prior to the claimant's dismissal and such dismissal was on a bona fide basis.

For misconduct cases, a due inquiry process which would include amongst others, a domestic inquiry ("DI"). This DI will need to be conducted by the employer before a dismissal is justified. The due inquiry process is specified in the S 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 the service, after due inquiry, dismiss the employee without notice. The so called due inquiry or a proper DI adopts the principle of natural justice (Geyzel, 2016).

In the case of *Mohd Ibrahim Hassan v. Diamond Cutting (M) Sdn Bhd, Kota Bharu [1980] 1 ILR 194*, the court decided that the requirement of a DI 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 S 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 DI, otherwise, the doctrine of natural justice is not complied with.

In the case of *Eastern Plantation Agency Sdn Bhd v Association of West Malaysian Plantation Executives [1985] 1 ILR 339*, the court commented on the concept of natural justice namely the rule of a fair hearing and the rule against bias. The former demands a fair hearing. It is especially important for the employer to demonstrate that a fair hearing was conducted and such hearing was conducted by an independent committee or commission in the organisation before deciding to dismiss the particular employee. Neglecting such basic procedures could be a violation of the whole code of administrative or procedural rights. As the saying goes, 'justice must not only be done but also clearly seen to be done'.

In *Dreamland Corp. (M) Sdn. Bhd. v Choong Chin Sooi & Anor [1998] 1MLJ 111*, the court observed that if a workman has been dismissed without just cause or excuse by his employer, not only the reasons for his dismissal but also the manner of the dismissal has to be taken into consideration. The court, in recognising 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.*" Therefore, it seems that DI is impliedly required before a dismissal is held valid.

6.2. Non-Compliance with the Basic Procedures Prior to Dismissal – 'De Novo' Cases

However, this supposedly implied requirement came to a muddle due to the decision of the Supreme Court's (currently known as Federal Court) in *Dreamland Corporation (M) Sdn Bhd v. Choong Chin Sooi & Industrial Court of Malaysia [1988] 1 CLJ 1*, where it was held that, a defective DI or an omission to hold a DI will not influence or determine whether the employee was dismissed without just cause or excuse. Such a decision was then followed by the Federal Court's decision in *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 344* (Goh, 2016).

What this means in layman terms is that it is not detrimental on the part of the employer if a defective DI was conducted or not so long as the employer can prove that he had dismissed the claimant

with 'just cause and excuse' in the *de novo* proceedings before the Industrial Court. Therefore, as it stands, it seems that the procedural requirement of having to show on the part of the employer that a DI had been conducted prior to the dismissal is not mandatory (Goh, 2016).

In *Mohamad Rafie Mohd Razi v Hume Concrete Sdn Bhd [2017] 2 ILR 161*, the Industrial Court contended that the so called DI conducted by the employer was unacceptable, incomplete and inaccurate due to the first page of the DI's notes was half blank and none of the employer's witnesses can provide explanation on this. The employer did not provide evidence as to who had recorded the handwritten minutes of the DI. Also, no explanation on the cancellations in some notes taken down in the DI. However, despite the fact that the employer had conducted a flawed DI, the Industrial Court followed the principles laid down in *Dreamland* and *Wong Yuen Hock* where it held that a defective DI or failure to conduct a DI is not a fatality but merely an irregularity that is curable by *de novo* proceedings before the Industrial Court.

Furthermore, in the recent case of *Liew Wing Fai @ Lew Wing Fai v Dry Cut Sdn Bhd [2017] 1 ILR 582*, the claimant was dismissed due to misconduct and prior to his dismissal, he was not issued with any warning or show cause letter and no DI was conducted against him. The claimant alleged that he was dismissed without just cause and excuse.

The Industrial Court, though agreed to the fact that no DI was conducted, quoted the principles derived from *Dreamland*, where Wan Suleiman SCJ (as he then was) held that, an omission of DI or a defective DI is not a fatality but only an irregularity, the employer is allowed to justify before the Industrial Court by adducing all relevant evidence. Unless the Industrial Court has found that the dismissal was without just cause or excuse, the Industrial Court has no jurisdiction to grant any relief in regards to the omission of DI or a defective DI. The Industrial Court was then proceeded to hear the case '*de novo*'.

6.3.The Three Main Types of Dismissals

6.3.1. Outright Dismissals

Outright dismissals happen normally due to the breach of an important term of the contract of service. These types of dismissals can fall under two (2) main limbs i.e. misconduct and poor performance.

Based on the *de novo* principle, for dismissal due to misconduct, especially for serious misconduct, it is not a paramount fatality if there is a failure to issue any notice or warning to the employee or omission to conduct a DI but the employer shall prove such dismissal was with 'just cause and excuse' in the Industrial Court. Examples of major misconduct are assault or fighting, dishonesty or fraud, drunkenness and drug abuse and insubordination (Ashgar, 2016).

In *Chai Kian Huat & Anor v DS Albedo Sdn Bhd [2017] 2 ILR 110*, the claimants were dismissed by the employer due to serious criminal misconduct of misappropriation of money or cheating the company's funds. The company had called the claimants for a meeting, but not a DI, in order to notify them of their misconduct, police report that was lodged against them and to give them a chance to resolve the matter by proposing a way to refund the misappropriated monies. However, the claimant did not attend the meeting and as a result, the company dismissed them with a summary dismissal. The Industrial

Court held that such a summary dismissal by the company was justified due to the misconduct being serious in nature, which involved dishonesty or lack of integrity. Besides, due to company's omission to conduct a DI, the Industrial Court had also relied on the *de novo* principle and held that it was not a fatality but merely an irregularity.

However, for minor misconducts, for instance, leaving workplace without permission, occasional absence from work or late for work, occasional failure to wear uniform and/or name tags appropriately etc. (Ashgar, 2016). It is advisable to follow the basic procedures prior to dismissal even though it is not detrimental (Ashgar & Farheen, 2009).

In *Damien Thanam Divean v CSC (M) Sdn Bhd [2014] 2 LNS 1266*, the claimant was dismissed due to misconduct for coming late to work. The claimant alleged the dismissal was without just cause and excuse as he had merely committed a minor misconduct. The Industrial Court, after scrutinising all the evidence, held that, the dismissal was proper and justified. In the evidence, the employer had proven that basic procedures prior to the dismissal were complied with i.e. the claimant was given official verbal counselling, issued with three warning letters and a show cause letter prior to the DI. After the DI, the employer decided to dismiss the claimant as he was late to work for a total of 25 times.

Besides, the burden of proof for these type of cases is on the employer as per the civil maxim, '*He who asserts must prove*'. This principle is established in *Ireka Construction Berhad v Chantiravathan A/L Subramaniam James [1995] 2 ILR 11*, where the Industrial Court chairman highlighted that:

"It is a basic principle of industrial jurisprudence that in a dismissal case the employer must produce convincing evidence that the workman committed the offence or offences the workman is alleged to have committed for which he has been dismissed. The burden of proof lies on the employer to prove that he has just cause and excuse for taking the decision to impose the disciplinary measure of dismissal upon the employee. The just cause must be, either a misconduct, negligence or poor performance based on the facts of the case."

6.3.2. Constructive Dismissals

Another type of dismissal that an employer may be asked to justify at the Industrial Court is constructive dismissal. This type of dismissal denotes that the employee has terminated the employment contract but alleges that it is due to the employer's breach of a fundamental term in the employment contract. On the face of it, it may appear that the employee has resigned but the underlying reason of this type of sudden withdrawal by the employee from the organisation is due to an alleged conduct by the employer (Ashgar, 2015).

The concept of constructive dismissal was first introduced in the Supreme Court's decision in *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd (1988) 1 MLJ 92*. The brief facts of this case states that the claimant refuted a transfer order, which was a demotion in disguise and subsequently claimed that he was dismissal constructively. The Supreme Court (currently known as the Federal Court) upheld the Industrial Court's decision by adopting the definition of constructive dismissal derived from the English Court of Appeal in *Western Excavating (ECC) Ltd v. Sharp (1978) ILR 27*. The English Court of Appeal defines "constructive dismissal" as 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, which evinced an intention no longer to be bound by the contract.

The judgment of the Supreme Court (currently known as Federal Court) in *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* (1988) 1 MLJ 92 was that the claimant had been humiliated by the employer with his demotion and thus, the implied term of mutual trust and confidence between the employer and employee had been breached.

A claim for constructive dismissal will only succeed if it can be established that the breach was a fundamental breach going to the root of the contract i.e. that there was a unilateral variation of the contract, thereby placing it in a position to be repudiated (Cheah & Ho, 2017). The unilateral variation could include reduction of the salary, demotion as well as positional transfer (Dhillon, 2013). A breach that amounts to the destruction or severe tearing of the fabric of relationship of confidence and trust between the employer and employee may also be tantamount to constructive dismissal (Dhillon, 2013). Further, the alleged breach must have been conveyed to the employer at the first reasonable opportunity, otherwise a claim in this area is likely to fail (Ashgar, 2015).

A reasonableness test or contract test will be applied in determining how genuine such a constructive dismissal claim is. A four-step procedure to establish the claim of constructive dismissal is laid down in *Secure Guards Sdn Bhd v Her Bhajan Kaur* (1996) 2 ILR 1342:

- a) There shall be a breach of contract by the employer. It can be either an actual breach or an anticipatory breach.
- b) The breach shall be satisfactorily important to justify the employee's resignation and the employer's misinterpretation of the contract shall not consider as a repudiation in law.
- c) The employee shall resign due to the breach and not due to other unrelated reasons.
- d) The employee shall not delay too long in terminating the contract in response to the employer's breach, or else, he may be deemed to have waived the breach and agreed to vary the contract.

In a claim of constructive dismissal, the burden of proof lays on the shoulders of the employee but not the employer as according to *Selangor Medical Centre v Zainal Abidin Md Tamami* (2002) 2 ILR 527. In this case, the Industrial Court rejected the claimant's contention of constructive dismissal as the claimant, under the burden of proof, failed to adduced cogent and convincing evidence that the alleged constructive dismissal was due to employer's action.

6.3.3. Forced Resignation

Employers could also be faced with allegations from certain employee's that they were forced to resign from their jobs. Forced resignation could happen in circumstances where it is alleged that the employer made threats, coerced or persuaded the employee to 'voluntarily' submit a letter of resignation, otherwise, the employee will be dismissed. In such situation, the employee has the right to make complaint that his resignation was involuntary and the courts will construe this type of representation as a constructive dismissal (Anantaraman, 1997). Forced resignations are in fact very difficult to prove and the

onus of proving is on the employee rather than the employer since on the face of it, the employee had resigned from the employment (Dhillon, 2013).

In *MST Industrial System Sdn Bhd v. Foo Chee Lek* (1993) 1 ILR 202, the claimant had tendered his resignation and later maintained that he was forced to resign and hence, he had therefore been constructively dismissed. The Court rejected the claim of constructive dismissal as it failed to satisfy the criteria established in the contract test for constructive dismissal as mentioned above.

In *Angus Samuel Ogilvy v Foetus International Sdn Bhd* [2015] 2 LNS 0903, the claimant contended that he was in the situation of “resign or be sacked” as he was forced to resign and sign on a pre-prepared letter of resignation. The Industrial Court held that, since it was the claimant who asserted that he was threatened and coerced to sign the resignation letter, the onus was on the claimant to prove on balance of probabilities that he was dismissed by the company. The Industrial Court held that, the claimant had not sufficiently prove his contention of forced resignation.

Moreover, in *Innovative Plastics LNP Malaysia Sdn Bhd v Mahkamah Perusahaan Malaysia & Anor* [2015] 1 LNS 485, the applicant filed for judicial review to quash the Industrial Court’s decision. The High Court quashed the Industrial Court’s decision and held that, due to the evidence shown that there was a separation agreement signed by the claimant and the claimant had accepted a separation package of RM RM97, 259.62 offered by the applicant, the claimant was not forced to resign. The High Court quoted *Mazli Mohammad v. SAP Holdings Bhd* [2012] 1 ILR 399, which stipulated that if the claimant resigned and it can be shown that it was beneficial to him to tender such resignation, then the claimant’s resignation was not forced by the employer but it was a voluntary resignation by the claimant.

In a nutshell, there is a high threshold for the claimant to prove forced resignation and it is settled law that the claimant has an onus to prove that he was forced to resign.

7. Conclusion

As it stands, it would appear that even if employers do not comply with the basic procedures prior to dismissal, it is not detrimental from a legal aspect and that the case can be heard ‘de novo’ in the Industrial Court. The Industrial Court will find the dismissal to be lawful if the employer can prove that the dismissal was done with ‘just cause and excuse’ albeit in the absence of the basic procedures prior to dismissal. The authors have also demystified the common types of dismissals into three main types to allow the employer to comprehend and defend the type of dismissal allegations that could be raised. It is sincerely hoped Malaysian employers have a much better understanding on employment dismissals after reading and digesting this paper.

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