

CARRYING OUT FAIR TERMINATION IN MALAYSIA

Termination of an employee is a sensitive and critical aspect of the employer-employee relationship. It requires careful consideration and adherence to legal and ethical principles. In Malaysia, the termination process is governed by comprehensive labor laws^[1] which were drafted and enforced to protect the rights of both employers and employees. Employers must adhere to these laws to ensure fair treatment and avoid legal complications. It is also imperative to maintain a harmonious work environment and preserve the dignity of the departing employee. In this article, we will explore the key aspects of fair termination in Malaysia and provide a guide for employers on how to conduct terminations in compliance with the law while upholding employee rights.

An employment contract can be in the form of an oral agreement or a written agreement. If a contract of service covers a period exceeding one month, there shall be a clause setting out termination provisions.^[2] It is very common for employment agreements to contain provisions that allow either party to terminate the employment agreement by serving the notice set out in the agreement. However, this is not as straightforward as it appears when it comes to an employer terminating the employment agreement.^[3]

In Malaysia, the common law principle of '*termination simpliciter*' is **not recognized**, which means that employers are not allowed to terminate an employment pursuant to the termination clause only, i.e. by giving due notice and without substantiating said termination with a **just and legitimate reason**. This non-applicability of termination simpliciter has been demonstrated in the following cases:

(a) In *Omar bin Othman v Kulim Advanced Technologies Sdn Bhd (previously known as KTPC Technologies Sdn Bhd)* [2019] 1 MLJ 625, the Court of Appeal reinstated the Industrial Court's decision which held that a termination by way of termination simpliciter would amount to unlawful dismissal.

(b) The Federal Court in *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304 held that the action of termination simpliciter which is not grounded on any just cause or excuse would enable the Industrial Court to award compensation if it would not order reinstatement.

(c) The Industrial Court in the case of *Malaysia Milk Sdn Bhd v Ng Chee Meng* [1987] 1 ILR 175 (Award No 59 of 1987) held that termination simpliciter is no longer acceptable as valid if challenged in industrial law. The Court further stated that the termination of the employment of a workman contractually, if ungrounded on just cause or excuse as envisaged in s 20 of the Industrial Relations Act 1967 (Revised) – a provision of the law which gives protection of security of job tenure to workmen.

(d) Furthermore, in *Abdul Hayy Seenivasan bin Narayanan v 9 Bukit Utama JMB* [2021] 1 ILJ 41, it was ruled that there is no place for termination simpliciter in Malaysian industrial jurisprudence. Although the employer in this case relied on the provisions of the employment contract in bringing an early end to the Claimant's employment, the employer still had to show that such a termination was done with just cause and excuse - to which they have failed to do so.

As such, the burden lies on the employer to prove that the termination of the employment agreement done was with just cause and excuse.

However, there are reasons that an employer may rely on in carrying out termination such as:-

Termination for Misconduct[4]

Employers have the right to terminate an employee without notice if the employee is found guilty of misconduct. However, it is essential for employers to follow proper disciplinary procedures and conduct a fair inquiry before making a decision to terminate an employee for misconduct.

Retrenchment[5]

Employers may need to retrench employees due to business restructuring, economic reasons, or technological advancements. However, retrenchment should be carried out in a fair and non-discriminatory manner, and certain employees may be entitled to retrenchment benefits based on their length of service.

Poor Performance

Poor performance is a valid ground to dismiss an employee. However, given the subjective elements, Malaysian law does require employers to ensure certain criteria are met before an employee can be terminated for poor performance. The criteria are summarised as follows[6]:

- The employee must have been warned about the poor performance;
- The employee must have been given sufficient opportunity to improve;
- Despite the above, the employee has failed to improve his or her performance.

Steps to Carry Out Fair Termination:

1. Establish Clear Policies and Procedures:

Fair termination practices start with having clear and well-documented company policies and procedures. These policies should outline the grounds for termination, disciplinary procedures, etc. for different categories of employees. Ensuring that all employees are aware of these policies promotes transparency and consistency.

2. Conduct a Fair and Transparent Disciplinary Process:

Before terminating an employee for misconduct, employers must conduct due inquiry. At times, a disciplinary inquiry may be required and the process should involve notifying the employee of the allegations against them, allowing them to present their defense, and ensuring an unbiased panel conducts the inquiry. All evidence and statements collected during the inquiry should be documented.

3. Offer Retrenchment Benefits:

If retrenchment becomes absolutely necessary, the process has to be done in good faith and employers must plan the process carefully and if possible, offer retrenchment benefits to eligible employees. These benefits should be calculated based on the employee's length of service[7] and should be communicated clearly to the affected employees. Termination can be a traumatic experience for employees. Employers could consider providing counselling and support services to help employees cope with the emotional impact of termination and facilitate their transition to new opportunities.

4. Prioritize Communication:

Effective communication with the employee throughout the termination process is crucial. Employers should explain the reasons for termination clearly and provide the employee with an opportunity to ask questions or seek clarification. Showing empathy and compassion during this challenging time can make the process more manageable for the departing employee.

5. Keep Accurate Records:

Employers should maintain accurate and detailed records of all communication, decisions, and evidence related to the termination process. These records can be vital in case of any legal disputes that may arise later.

6. Non-Discriminatory:

Termination decisions must not be based on discriminatory grounds, such as race, gender, religion, or disability. Such actions are in violation of the Employment Act[8] and other anti-discrimination laws[9] in Malaysia.

Carrying out fair termination practices in Malaysia is not only a legal obligation but also an ethical responsibility for employers. In the event of a dispute in the form of an allegation of unfair dismissal, the burden is on the employer to prove[10] that the dismissal was with just cause and that the employer had acted fairly and in good faith.

Adhering to the Employment Act 1955 and other relevant labor laws ensures that the termination process is conducted with transparency, respect for employee rights, and compliance with the country's employment regulations.

By establishing clear policies, conducting fair inquiries, and communicating openly with employees, employers can navigate the termination process in a sensitive and lawful manner. A commitment to fair termination practices fosters a positive employer-employee relationship, builds trust, and reinforces the organization's commitment to ethical conduct and employee welfare.

Ultimately, carrying out fair termination not only avoids potential legal disputes but also contributes to a healthy work culture and enhances the reputation of the company as a responsible employer. As businesses evolve and adapt to changing circumstances, treating employees with fairness and respect during termination sets a positive precedent for future employment relationships and strengthens the overall fabric of the workforce in Malaysia.

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1. i.e. Employment Act 1995, Industrial Relations Act 1967, etc
 2. Section 10 Employment Act 1995
 3. Section 12 Employment Act 1995
 4. Muniandy a/l Ayasamy & Ors v Intel Technology Sdn Bhd [2022] 4 ILJ 27
 5. Section 60n Employment Act 1995
 6. <https://mahalaw.com.my/poor-performance-reason-for-termination/#:~:text=First%20and%20foremost%2C%20it%20is,justify%20his%20or%20her%20dismissal.>
 7. Section 21 Employment Act 1995
 8. Section 41a and Section 42 of the Employment Act 1995
 9. Article 8 Federal Constitution
 10. Ng Chang Seng v Technip Geoproduction (M) Sdn Bhd & Anor [2021] 1 MLJ 447

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8 December 2023

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