

DISMISSING EMPLOYEES IN MALAYSIA

The COVID-19 pandemic has caused mass redundancies, retrenchment, and dismissals of employees across all sectors of employment locally as well as internationally with the closure and downsizing of businesses. Now more than ever, it is important for employees to arm themselves with knowledge of their legal rights to ensure that they are not unfairly dismissed.

In Malaysia, the law governing the dismissal of employees (and labour law in general) is premised upon the notion of fairness and is a relatively well-balanced system. Employer-employee relationships in Malaysia are governed by the Employment Act 1955 and the Industrial Relations Act 1967.

For context, 'dismissal' or 'termination' refers to when an employer ends the employee's contract of service. In Malaysia, an employer may not dismiss an employee for convenience by relying on the termination clause in an employment contract. The requirements for a lawful dismissal are valid and substantive justifications, as well as a fair procedure. Per section 20(1) of the Industrial Relations Act 1967, an employee can only be dismissed with just cause or excuse. Whilst 'just cause or excuse' is not defined by the statute, valid reasons for dismissal include gross misconduct on the part of the employee, redundancy, poor performance, and negligence.

When an employee is dismissed, section 12 of the Employment Act 1955 provides that an employee must be given due notice. This means that if an employer intends to terminate a contract of service, they must give the employee notice to inform of them of said intention and the justification behind it. Notice must be given within the period stated in the contract of service. Where a contract of service is silent as to the notice period, employers must abide by the statutory notice period per section 12(2) of the Employment Act 1955. However, in the event of misconduct, an employer may dismiss an employee without due notice ("summary dismissal").

In Malaysia, all employees are protected from unjust dismissal. Employers must ensure that the employee is dismissed in a procedurally fair manner. Per section 14(1)(a) of the Employment Act 1955 one of the procedures that must be conducted before a dismissal for misconduct can be justified is a 'due inquiry' or 'domestic inquiry'. The purpose of this provision is to ensure that the principle of natural justice of allowing the employee to be heard is upheld through the process of due inquiry where misconduct is alleged against an employee.

Further to the above, employers may also dismiss an employee for poor performance. Poor performance often refers to an employee who is unable to produce the standard of work accepted by the employer, or low productivity. Nevertheless, an employer may not dismiss an employee immediately for poor performance. In *IE Project Sdn Bhd v Tan Lee Seng [1987]*,^[1] the Industrial Court held that where an employee is found to be performing poorly, the employer must first give the employee sufficient notice or warning highlighting their poor performance. The employee must also be given a reasonable opportunity to improve their work performance. If an employer fails to abide by these conditions, the dismissal may not be lawful. Where an employee is dismissed on grounds of poor performance and files a complaint of unfair dismissal, the burden is on the employer to prove that they have met the conditions outlined by the Industrial Court in *IE Project Sdn Bhd v Tan Lee Seng [1987]*.

Constructive dismissal is when an employer's conduct results in an employee terminating their contract of service and is often caused by an employer's abuse of power. On the other hand, forced resignations is where an employer has created an inhospitable work environment with the intention of forcing an employee to resign. This may include harassment, coercion, and threats. In both situations, an employee may make written representations to the Department of Industrial Relations within 60 days from the date of the employee's dismissal.^[2] The Department will then appoint an officer to act as a mediator and arrange for a meeting with the employer and employee to reach a settlement. If a settlement is not possible, the matter is then referred to the Minister of Human Resources to decide whether the case should be escalated to the Industrial Court.

If an employee's claim is referred to the Industrial Court, the court will establish whether the employee's dismissal was lawful. If the court is of the opinion that the dismissal is without just cause and excuse, the court may grant certain remedies as it sees fit. One example of the remedies available to employees who have been unfairly dismissed is the reinstatement of the dismissed employee. However, reinstatement is not granted often, as most frustrated employees do not wish to continue to work with their employers, and most employers do not wish to work with frustrated employees. As such, alternatively, the Court may award the payment of backwages from the date of the dismissal to the date of the award, up to a maximum of 2 years and compensation in lieu of reinstatement.

COVID-19 has instilled and amplified the fear of unemployment amongst Malaysians. Hence, the information above was laid out with the hope of providing insight as to the actions and remedies available under the employment landscape in Malaysia.

[1] IE Project Sdn Bhd v Tan Lee Seng [1987] 1 ILR 65.

[2] Industrial Relations Act 1967, s 20(1A).

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