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CCS Insights: Frequently Asked Questions about Dismissal without just Cause or Excuse in Malaysia

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Please consult with your own Legal Counsel or HR Consultant on your situation and specific legal questions you have.

Law on Dismissal in Malaysia

In Malaysia, employer-employee relationships are governed by the Industrial Relations Act (IRA) 1967 and the Employment Act 1955.

Employment Act 1955

The Employment Act (EA) applies to employees employed in West Malaysia who:

- earn a monthly salary of 2,000 Malaysian ringgit and below; or
- regardless of salary quantum, are employed:
    - as manual labourer or supervisors of manual labourer;
    - to operate or maintain any mechanically propelled vehicle for the purpose of transporting passengers or goods or for reward or commercial purposes;
    - as a domestic servant; and
    - in certain positions on seagoing vessels.

The states of Sabah and Sarawak in East Malaysia have equivalent legislation (with some differing provisions) that cover similar categories of employees.

The Director General of Labour (appointed under the EA) has the power to investigate complaints of discrimination related to a foreign employee, sexual harassment or a breach of the terms and conditions of employment. The latter category extends to employees who earn no more than 5,000 ringgit a month.

Industrial Relations Act 1967

This Act applies to all employees regardless of salary quantum in Malaysia and governs the relations between employers and employees (including trade unions) and the prevention and settlement of disputes.

Overview

'Dismissal' is when an employer ends the worker's employment.

The term "dismissal" is given its widest meaning in that it covers any situation where a termination of employment has occurred including termination on the grounds of misconduct, redundancy, poor performance, non-confirmation of a probationer, forced resignation, ending of a fixed-term contract, frustration of contract and constructive dismissal or breach of contract by the employer.

In another words, an employee is not considered dismissed if he/she has been suspended for misconducts, or resigned by his/her own choice.

When this happens, the employee will be given a notice period as stated in the employment contract, or, for those under the purview of the Employment Act 1955 ('EA 1955'), a statutory prescribed notice period is stated in Section 12.

The employer, however, do not have to give the employee notice with period if the situation justifies an immediate dismissal, for example, for gross misconducts.

When can you dismiss an employee?

Malaysia does not have an "at-will employment" system. Security of tenure in employment is so important that the courts in Malaysia have equated it to a 'property right'. Furthermore, the courts have given a liberal interpretation to the phrase 'right to life' in Article 5(1) and Article 8(1) of the Federal Constitution to include a 'right to livelihood'.

Therefore, employers cannot just hire and fire "at-will". They can only terminate an employee's services if it is justified, done in good faith, and is procedurally fair.

The employment contract says that either party may terminate the contract by providing one month's notice in writing or by making payment in lieu of notice. Does this mean that as employer, we can terminate the contract for any reason as long as by providing the employee one month's notice or payment in lieu?

Despite the notice clause in your contract, the employer is still required to show "just cause and excuse" before terminating the contract of employment. This means employer must show good grounds for the termination and cannot merely rely on the notice clause to terminate the employment.

Termination by an employer based solely on the notice clause could result in an employer facing a claim for unfair dismissal.

Please note that the requirement to show "just cause and excuse" only applies to the employer, an employee can terminate their employment/resign from employment for any reason by following the notice clause.

Breach of Employment Contract

Generally, when the employer breaches the employment contract, the requirement of mutual obligations of confidence and trust that is supposed to exist between the parties are thereby infringed and, as a result, the employee can file a complaint to the nearest Labour Office.

The Labour Office is empowered to inquire into complaints relating to disciplinary action taken against an employee which results in his dismissal, demotion, or other punishment including a suspension without pay.

The Labour Office may order the employer to pay:

a) Termination benefits;

b) Wages in lieu of notice; and

c) Wages in lieu of any annual leave due to the employee

If an employee has been punished with a warning for having committed misconduct or some other punishment which does not involve loss of wages or other payment, the Labour Office is not authorised to order the employer to withdraw the punishment.

A complaint by an employee relating to punishment (dismissal, demotion or some lesser penalty) must be filed at the Labour Department within 60 days of the penalty being imposed.

Redundancy Payments

A redundancy payment can be either in the form of a retrenchment benefit or a termination benefit. In essence, both the terms could be used synonymously as compensation for loss of employment brought about by a situation of redundancy. But, however, the term 'retrenchment benefit' is a commercial phrase, the usage of which is confined strictly to compensatory payments granted to employees whose services are terminated for reasons of redundancy. It does not include payments made to employees for loss of office arising from business closure or liquidation. On the other hand, 'termination benefit' is a statutory phrase with a wider meaning that includes retrenchment benefits and compensatory payments made to employees on closure of business or liquidation.

The term 'termination benefit' is used in the Employment (Termination and Lay-Off Benefits) Regulations 1980 (the '1980 Regulations'), a subsidiary legislation enacted under s. 60J of the EA. Being a creature of the EA, naturally the 1980 Regulations cover only those employees who are within the purview of the EA. It does not apply to those employees who are outside the jurisdiction of the EA. As such, only those categories of employees who are covered by the EA are entitled to receive termination benefits as provided for under the 1980 Regulations.

Dismissal without just Cause or Excuse

Section 20 of the Industrial Relations Act 1967, which came into force on or about 10 February 1989, was introduced to provide protection to workers who have been dismissed for no reason and/or without just cause or excuse.

All employees in the private sector who consider that they have been dismissed without just cause or excuse can file a claim for **reinstatement** at the Department of Industrial Relations nearest to their workplace. The claim must be filed within 60 days of the dismissal.

Conciliation of claims for reinstatement

Once a claim for reinstatement by a dismissed worker has been received, an officer of the Department of Industrial Relations will be assigned to conduct a conciliation session. The employer and the dismissed employee will be called to the Department office for a meeting at which the officer will endeavor to bring about a resolution of the dispute between the two parties. A number of possible outcomes may result from this process as follows:

- The employer may agree to reinstate the employee; or
- The employee may agree to withdraw his claim; or
- The employer may agree to pay compensation in lieu of reinstatement which the employee agrees to accept in full settlement of the dispute; or
- No settlement is achieved.

If the employee fails to attend the conciliation sessions called by the Department of Industrial Relations, without any reasonable excuse, it will be deemed that he has withdrawn his claim.

Reference to the Industrial Court

If settlement of a dismissal dispute is not achieved by way of conciliation, the Director General of Industrial Relations is required to report to the Minister of Human Resources who has the discretion to decide whether or not to refer the dispute to the Industrial Court for adjudication.

Remedies and Compensation for Dismissal Without just Cause or Excuse

Once an employee's case is referred to the Industrial Court, the court will determine if the dismissal was for just cause and excuse.

Unlike at common law, where the breach of a contract of employment usually gives rise to a claim for damages, equivalent to the period of the notice of termination, express or implied in the contract of employment, under the statutory provision of Employment Act 1955, an unfairly dismissed employee may be awarded remedies.

In the event of a successful claim for **Dismissal Without just Cause or Excuse**, the Industrial Court it may order reinstatement of the employee concerned.

It may alternatively order compensation in lieu of reinstatement if it thinks that this remedy is more appropriate in the circumstances.

When deciding upon the amount of compensation that should be paid by the employer to the dismissed employee, the Court is required to comply with the Second Schedule to the Industrial Relations Act which states that the following factors must be taken into consideration when awarding compensation:

a) Backwages not to exceed 24 months' salary, based on the last drawn salary of the employee [In the case of a probationer, backwages must not exceed 12 months' salary];

b) Compensation in lieu of reinstatement, if reinstatement is not applicable;

c) If the employee has been gainfully employed post-dismissal, a percentage, the amount of which is to be decided by the Court, is to be deducted from the backwages;

d) Compensation may not be ordered for loss of future earnings; and

e) Compensation awarded must take into account any contributory misconduct by the employee.

Back wages are rewarded to cover the period from the date of dismissal to the date of the award.

Compensation in lieu of reinstatement is usually awarded at the rate of 1 month for every year of service, but this is not a fixed formula and is still subject to the discretion of the Court.

The monetary award given is meant to cover all losses relating to the termination, and employees cannot claim for additional damages for things like loss of future earnings, loss of reputation, or mental and emotional stress.

What does "just cause and excuse" mean?

The Act does not define "just cause and excuse". It is quite challenging to place an exact meaning on this phrase since it will differ from business to business.

Generally, the principle of "just cause and excuse" means that the employer must have proper justification and reasons to terminate the employee.

Some of the examples are:

- Major misconduct, like theft and fraud, drug and alcohol use, offensive behavior (such as threats to self and others, physical fights, bullying or harassing actions such as stalking), sexual harassment, breach of safety protocol or damage to property, etc.
- The Court will also distinguish between major and minor misconduct.
- Negligence in performing duties;
- Poor performance;
- Redundancy and closing the business.

The court has described misconduct as any conduct inconsistent with the faithful discharge of duties, or an act that adversely affects employees' duties towards employers.

The misconduct must have some relation to the employee's duties, or the work entrusted to him.

Procedurally fair manner

The Industrial Court also takes into account "procedural fairness", so it is also entirely possible that an employer may have good grounds for dismissal but still lose the unfair dismissal case because the dismissal was procedurally unfair or against the rules of natural justice.

Under Malaysian labour law, a domestic inquiry is an internal investigation process that is launched when an employer needs to determine whether an employee has committed an act (or acts) of misconduct.

Under section 14 of Malaysia's Employment Act 1955, employers have a statutory obligation to conduct a 'due inquiry' to ascertain whether an employee is guilty of misconduct before they can dismiss or impose a major penalty on them.

However, a domestic inquiry should always be seen as a last resort – if the issue can be resolved through discussion with the involved parties and handled appropriately, there is no need to perform a domestic inquiry.

Issuance of a Show Cause Letter

Before the letter is issued, the employer needs to contact the accused employee for an appropriate, professional discussion on the matter. This will allow the accused employee to tell their side of the story and prevents any form of victimisation from happening. After that, it can be determined if there is a case to decide upon.

1. The employer must issue the employee with a Show Cause Letter that sets out the allegations of the misconduct clearly and precisely to the employee. Show Cause Letter shall include the specific charge of the offence, date, time, place and which rules or regulations have been violated.
2. The employee shall respond the show cause letter within the stipulated timeframe by providing his/her explanation in writing as to why disciplinary action should not be taken
3. If the explanation is acceptable and satisfactory, no punishment should be imposed on the employee, and the case is closed.
4. If the employee fails to respond and/or if the explanation is unacceptable, the Employer can either: -
    a. Issue a warning letter; or
    b. Issue a notice of domestic inquiry if it feels the allegations are serious enough to warrant it.

Contents of a Show Cause letter

There is no safe formula or template for a show case letter. Each has to be tailored to the specific issues being raised, although it should generally:

- be written in a clear and unambiguous language that is direct and easy to understand;
- be issued as soon as practicable;
- identify the workplace issue giving rise to the disciplinary action, references to relevant clauses of the company's policies and/or employment contract and/or offer letter;
- identify any relevant workplace history, including any prior written warning letters;
- a clear explanation of the alleged misconduct against the employee requiring a response. Such particulars will likely require the times, dates, places and circumstances for each allegation being made. In some instances, names of witnesses or supporting information (such as documents) should be disclosed;
- be accurate and not omit or misrepresent any relevant circumstance; and,
- afford a fair time for the employee to make an effective response.
- The suspension can be issued together with the show cause letter or before the domestic inquiry, if it is necessary, pending further investigation of the allegation of the misconduct.

  The maximum period of suspension is not more than 2 weeks with half wages. However, the Employer must pay back the remaining wages if the employee is later found to be not guilty.

The basic steps in holding a Domestic Inquiry

The purpose of the domestic inquiry is to investigate the situation and to obtain facts and information to establish whether the alleged misconduct is proven or not and if proven, to recommend a punishment that is appropriate to the offence committed.

In order to hold a domestic inquiry, preparation is necessary. All of the following actions must be taken by the employer:

1. An investigation must be conducted to gather evidence to prove the employee's guilt
2. An inquiry panel must be appointed
3. A prosecutor must be appointed
4. A secretary must be appointed
5. The accused employee must be informed of the time, date and place of the domestic inquiry
6. Charges against the employee must be drafted and given to the accused employee
7. The venue for the inquiry must be booked and prepared
8. Witnesses for the employer must be given notice to attend the inquiry

After the completion of a domestic inquiry, the panel of inquiry must prepare and submit a written report and the management must decide upon a suitable penalty if the employee is found guilty.

Management's decision generally falls into these categories: -

- To dismiss the employee without notice; or
- Downgrade the employee; or
- Impose any other lesser punishment as deemed just and fit (eg: 2 weeks suspension with half wages, denied salary increase or bonus)

Practical approach:

1. The first thing is not to issue a warning letter or dismiss the employee
2. Employer should communicate with the employee before issuing a show cause letter
3. Allow the employee reasonable time to respond to the Show Cause Letter
4. If the communication does not pan out well, you could issue another show cause letter requesting a written reply.
5. To consider the next course of action based on their explanation and justification.
6. After looking at the justification, the following could be the possible outcome:

    a) The truth has surfaced, and the staffs were wrongly accused, and the company decided not to pursue the matter further.

    b) The truth has surfaced, and grave misconduct is discovered. The company decided to fire him or her (most severe punishment).

    c) The truth has surfaced. The inquiry has verified and established a case of misconduct with the staff. The company decides to give him, or her another chance but downgrading the staff's level of responsibility as punishment.

    d) The truth has surfaced. The misconduct of the staff was deemed less severe. The company decided to issue a warning letter to record the misconduct (least severe punishment).

Key Takeaways

Employers should consider the severity of employees' poor performance/misconduct and should not immediately terminate their employment even if the explanation is found not to be satisfactory.

Due to the many forms of movement control orders that were imposed by the Malaysian Government and the shrinking income and profit of business players globally, employers may have to restructure their business in order to create a leaner workforce to reduce operating costs to cope with the impact of the current landscape of the global and local economy.

It must be noted that out of the many employment dismissal cases that end up in the Malaysian Industrial Court, there is in fact, a considerable number of dismissals founded purportedly on the ground of redundancy or retrenchment which have been found by the court to be unfair dismissal.

Once an employee is retrenched and his services terminated, he is entitled to file a complaint for unfair dismissal to the Industrial Relations Department if he feels he has been dismissed without just cause and excuse. If the matter is not settled at the Industrial Relations Department stage, it will be referred to the Industrial Court for adjudication.

Ramifications of an unfair dismissal claim can be far-reaching and, in some cases, catastrophic to business. For example, unfairly dismissing a senior, highly paid employee with many years of service, could cost the employer hundreds of thousands of Ringgits. The employee is also entitled to file a civil claim for damages against the employer.

An employer who does not invest in doing some groundwork before termination may find himself begrudgingly paying a large settlement sum to a dismissed employee in order to avoid more significant liability.

This is likely to lead to one big question – how much could this potentially cost your business?

For further consultation, please contact:

Chin Chee Seng
Partner
+6012 365 4331
cschin@ccs-co.com

Jared Low
Assurance Manager
+6018 763 4813
jared@ccs-co.com

Wong Woei Teng
Audit Manager
+6017 237 8233
woeiteng@ccs-co.com

Vivian Lim
HR Manager
+6012 618 6220
vivian@ccs-co.com

CCS & Co