

DISMISSING A SENIOR EXECUTIVE

This Practice Note provides guidance on the legal and practical issues for an employer to consider in relation to the dismissal of an employee who holds a senior executive position. It further explains the position on the dismissal of a senior executive employed in the private and public sector.

Factors to take into account prior to the dismissal of Senior Executive

As a matter of good practice, the employer should take into account amongst others, the following factors before arriving at a decision to dismiss a senior executive:

- (1) Employers should provide reasons on the decision for dismissal;
- (2) Employers should obtain credible evidence to support the reason for dismissal;
- (3) Employers should provide notice in accordance with the requirements stipulated in the employment contract;
- (4) Employers should act reasonably and comply with the procedure leading up to the dismissal in a fair manner; and
- (5) Employers should consider offering a severance pay or to recompense the contractual sum which has accrued to the senior executive upon the dismissal.

Tactical Issues and Reasons for Dismissal

The employer should bear in mind the consequences arising from the dismissal of the senior executive before communicating the said dismissal. It is important for employers to take into

account the long-standing service and contribution of the senior executive and to consider the impact of the said dismissal on the senior executive.

It is advisable therefore, for the employer to provide written reasons for the dismissal of the senior executive in accordance to the employment contract and/or the procedure of the company in order to minimise the risk of a claim against the employer for unfair dismissal.

The most common reasons for dismissal of senior executives may typically include redundancy, poor performance at work and/or serious allegations involving gross misconduct.

It is imperative to note that the threshold of providing a warning to a senior executive to be made aware of their reasons for dismissal is lower from that of an employee who has been in employment for a shorter period.

In [*Chiew Foong Ngor v Tujuan Ehsan Sdn Bhd \[2015\] 1 ILJ 324*](#), the Industrial Court held as follows:

“The claimant was holding a senior post and not a young probationer. She had ten years working experience as a finance manager. Hence, the claimant need not be trained and counseled like a young probationer who joined the workforce for the first time. It was sufficient for COW3 and COW1 who had from time to time advised her and told her of her mistakes and weaknesses.”

This is because the position in law is such that it places a considerable expectation on a senior and experienced employee to possess the requisite skill and ability to be made fully aware of what is expected of them. See: [*James v Waltham Holy Cross UDC \[1973\] IRLR 202*](#).

Albeit the law being relaxed on the importance of giving warning or reason of dismissal to the senior executive, the employer should exercise caution and provide reasons for the senior

executive's dismissal. See: [*Ireka Construction Bhd v Chantiravathan Subramaniam James \[1995\] 2 ILR 11.*](#)

Reasonable notice

Generally, lawful dismissal is effected by giving reasonable notice. Therefore, the employer should exercise care and caution by serving appropriate and reasonable notice as expressly provided for in the employment contract.

How the Dismissal should be Handled

An employer should consider following a fair procedure in accordance to the employment contract to ensure a seamless handover process before the dismissal of a senior executive is effected.

Examples of effective ways for an employer to ensure a seamless handover process are as follows:

- (i) Review contracts – look out for the notice period and any post-termination restrictions;
- (ii) Follow due process – provide the senior executive with an opportunity to respond to reasons for dismissal;
- (iii) Adopt and discuss a sensible approach for the transfer of work in order to minimise damage to the business and to safeguard the company's interest; and
- (iv) Proposed an amicable settlement – payment in lieu of notice or phased payments to recompense the contractual sum which has accrued to the senior executive upon the dismissal.

Dismissal of a Senior Executive by the Employer in the Public Sector

Pursuant to Article 135 of the Federal Constitution, employees in the public sector are afforded with a special protection wherein such employees shall not be dismissed or reduced in rank without being given an opportunity to be heard. See: [*Nq Hock Cheng v Pengarah Am Penjara & Ors \[1998\] 1 MLJ 153.*](#)

Employees of the public sector are not to be dismissed or lowered in its rank by any authority subordinate to that other authority which has the power to appoint him. See: [*Lembaga Tata tertib Perkhidmatan Awam Hospital Besar Pulau Pinang and Anor v Utra Badi a/l K Perumal \[2001\] 2 MLJ 417.*](#)

Generally, it is viewed that employees who are gainfully employed by the federal or state government is afforded with a security of tenure up to their retirement age.

Dismissal of a Senior Executive by the Employer in the Private Sector

Although senior executives in the private sector are not afforded with the security in tenure of employment, the law places an emphasis on the requirement of dismissal to be carried out in a fair manner.

In view of that, the employers in the private sector should ensure that the dismissal of the senior executive was carried out with just cause and excuse by providing a reasonable reason and justification.

The Industrial Court in [*Cisco \(M\) Sdn Bhd v Raja Mohan PV Nathan \[2003\] 3 ILR 407*](#) held that the dismissal of the Senior Manager for Systems and Technologies was without a just cause and excuse. The decision by the Court was premised on the following reasoning:

“In the absence of such specific sales targets being specified in the Claimant’s letter of appointment or in any other document, the Court is of the opinion that it is totally unjust

for the Company to consider that the work performance of the Claimant was poor or unsatisfactory.”

It is worth reiterating that the need for issuing a warning to a senior executive who is in the private sector and an opportunity for improvement is less stringent. See: [*United Oriental Assurance Sdn Bhd v Kamala Rangithan A/L Selladuray \[1992\] 2 ILR 280*](#). This is by reason of the fact that the law places an expectation on senior employees to be fully aware of the skills and experience required of them.

Note: This article does not constitute legal advice on any of the issues addressed above. Please contact the following persons should you have any queries:

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