

DISTINGUISHING DISMISSAL FROM OTHER FORMS OF TERMINATION

This Practice Note provides guidance on the various forms of termination of an employment contract with specific focus on the dismissal of an employee from his/her employment.

Forms of Termination

An employment contract can be terminated through various forms. For example:

- a. Through the dismissal of an employee by the employer;
- b. By resignation of the employee;
- c. By mutual consent of the employer and the employee;
- d. The expiry of a fixed term employment contract; or
- e. By operation of the law.

Dismissal of an Employee by the Employer

Generally, the power to dismiss an employee is considered to be the prerogative of the employer. Employers have the right to hire and fire an employee as deemed fit for the effective and viable running of their business.

In Malaysia, if an employer decides to dismiss an employee, the dismissal must be with just cause or excuse. See: [*Goon Kwee Phoy v J & P Coats \(M\) Bhd \[1981\] 2 MLJ 129*](#). In the event the dismissal of an employee is without just cause or excuse, then this would entitle the employee to bring an action for unfair dismissal against the employer pursuant to **Section 20 of the Industrial Relations Act 1967**.

An employee may be dismissed from employment on various grounds and this includes but is not limited to misconduct and incompetency.

Misconduct is the most common ground for dismissal and this concerns the unacceptable behaviour of the employee during his/her employment with the company. When an employee commits an act of misconduct at the workplace, the employer is justified in dismissing the employee after giving him/her an adequate opportunity to refute the allegation framed against him/her. In [*Plaat Rubber Sdn Bhd v Goh Chok Guan* \[1995\] 1 ILR 79](#), the Industrial Court defined misconduct as follows:

“Misconduct means such act or conduct as adversely affects employees’ duties towards the employer. The misconduct complained of must have the same relations with the employees’ duties or the work entrusted to him by the employer or his competency to perform the same. Any breach of an express or implied duty on the part of the employee, unless it is a trifling nature, would amount to misconduct.”

Whether or not the misconduct committed by the employer warrants dismissal from employment, is determined with reference to the facts and circumstances of each individual case. In this regard, the following factors will have to be considered:

- (i) the nature and degree of the alleged misbehaviour;
- (ii) the impact in relation to the employer and to the position held by the employee;
- (iii) the effect on the relationship between the employer and the employee against the consequences of a dismissal; and
- (iv) the misbehaviour must go to the root of the contract between the employer and the employee.

Examples of misconduct by an employee warranting a dismissal by the employer can include the following:

- (i) Insubordination – Wilful refusal by an employee to obey a lawful and reasonable order or instruction given to him/her by a superior at the workplace. See: [*Alec Bus Sdn Bhd v Sudin Yakob \[2007\] 2 LNS 1463.*](#)
- (ii) Absenteeism – Absence from work for more than two consecutive working days without a valid reason and without prior leave from the employer. See: [*Pan Global Textiles Bhd, Pulau Pinang v Ang Beng Teik \[2002\] 2 MLJ 27.*](#)
- (iii) Drug abuse – Possession of any dangerous drugs in the workplace or consumption of dangerous drugs by the employee. See: [*Mathewson v R B Wilson Dental Laboratory Ltd \[1988\] IRLR 513.*](#)
- (iv) Theft – Tempering with property at the workplace. See: [*RHB Bank Berhad v Ramnain Tani \[2006\] 2 ILR 1356.*](#)
- (v) Dishonesty – A display of blatant dishonesty and self-serving interests at the workplace. See: [*Susu Lembu Asli Marketing Sdn Bhd v Tan Chong Hin \[2005\] 2 ILR 953.*](#)
- (vi) Sexual Harassment – Outraging the modesty of colleagues, using obscene language, making suggestive remarks or unwanted physical contact at the workplace. See: [*Khoo Ee Peng v Galaxy Automation Sdn Bhd \[2009\] 2 LNS 656.*](#)

Another ground warranting the dismissal of an employee is incompetence. An employer is not bound to retain an employee who has demonstrated poor work performance. However, it is important to note that it is an established principle of employment law that an employer cannot dismiss an employee who is incompetent without first having informed him/her of the mistakes alleged to have been made and without giving the employee an opportunity to correct himself/herself. The employee must also be warned of the risk of dismissal if the mistakes made are not corrected.

In [Rooftech Sdn Bhd v Ho Inn, Penang \[1986\] 2 ILR 818](#), the Industrial Court held as follows:

“Inefficiency which discloses a course of negative conduct no doubt is a sufficient ground for termination but there must necessarily be sufficient proof that a procedure has been followed. Ordinarily there must be sufficient written communication to the Claimant in order to establish inefficiency or poor performance before the company can rely on it to justify dismissal.”

Resignation of the Employee

An employee is entitled to terminate his/her employment by tendering his/her resignation. The resignation has to be in accordance with the notice requirements stated in the employment contract. The notice requirements may however be waived with payment being made in lieu of notice.

It is however worth bearing emphasis that an employee who tenders his/her resignation due to the acts of oppression or victimization of the employer may bring an action for constructive dismissal against the employer. A constructive dismissal is where the action of the employer has the practical effect of terminating the employment relationship that has been in existence.

In order to establish a claim for constructive dismissal, an employee must establish that the employer has committed a fundamental breach which goes to the root of the contract or if the employer evinces an intention to no longer be bound by the contract. If the employee fails to establish the employer had committed such a breach, then the employee will be deemed to have resigned voluntarily and that he/she has not been constructively dismissed. See: [Quah Swee Khoon v Sime Darby Bhd \[2000\] 2 MLJ 600](#).

Mutual Consent of the Employer and the Employee

Similar to any other contractual relationship, an employer and an employee may mutually agree to bring an end to their contractual relationship.

Expiry of a Fixed Term Employment Contract

A fixed term employment contract is where an employee is employed for a specific period of time only. The contractual relationship will come to an end upon the expiry of the period of employment unless renewed.

Operation of the Law

An employment contract can come to an end by the operation of the law. One example is frustration.

A contract is frustrated where an unforeseeable event occurs after the formation of the contract which renders performance of contractual obligations impossible or unlawful through no fault of either party.

An employment contract may be frustrated due to the following reasons:

- (i) Death of an employee;
- (ii) Permanent injury rendering the employee unable to work;
- (iii) Prolonged illness;
- (iv) Long-term imprisonment;
- (v) Revocation of professional license required for the job;
- (vi) Change in the law; or
- (vii) War.

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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