



ISSUE ARISING FROM TERMINATION

PRACTICE NOTE

WAIVER OF NOTICE OF TERMINATION

This Practice Note provides a brief guidance on the circumstances in which an employer or employee are able to waive their right to give notice when their employment relationship comes to an end, either contractually or according to the statutory notice conditions.

Waiver of Notice of Termination

The Employment Act 1955 requires the employer to give adequate notice to the employee prior to termination. Generally, most employment contracts require an employer or employee to provide prior notice before bringing the employment contract to an end.

Nevertheless, the employer or employee may by mutual consent waive compliance with the notice period pursuant to **Section 13 of the Employment Act 1955**. In such circumstances, the employer shall then make an equivalent payment to the employee in lieu of the notice period for termination.

The principle of waiver was explained by Lord Denning in the case of [*Barret Bros \(Taxis\) Ltd v Davies \[1966\] WLR 1334*](#), wherein he enunciated the following:

“The principle of waiver is simply this. If one party by his conduct leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict rights when it would be inequitable for him so to do.”

The above authority was referred to in the case of [John Driscoll v Teleplan Technology Services Sdn Bhd \[2012\] 10 MLJ 267](#) where Chew Soo Ho JC in the High Court opined that:

“...Therefore, there must be a clear provision in the memorandum of agreement to say to that effect that by that settlement, the plaintiff has waived his claim for the RM300,000 which is due and owing to him by the defendant. The clear intention must be explicit to reflect the waiver of an existing outstanding sum. It does not suffice to pin on a general clause to construe that it means to cover a specific known fact.”

Further, the High Court found for the Plaintiff in the case where it held as follows:

“The fact the plaintiff had not objected to the defendant's unilateral arrangement to pay the RM600,000 by six monthly payments did not change the fact the payment in lieu of notice had accrued upon the termination of his employment without notice.”

There are certain exceptional circumstances where an employer can be relinquished from its obligation to provide prior notice to an employee before terminating the employment contract. In this regard, **Section 14 of the Employment Act 1955** exempts the employer from providing prior notice of termination where the employee is found to have committed gross misconduct.

In such circumstances, the employer bears the burden to establish that the termination was executed for a just cause. This is where the employee has breached the employment contract by either committing a gross misconduct, or by virtue of exhibiting conduct deemed to be criminal in nature.

It is imperative that the employer has conducted due inquiry and demonstrates that all necessary progressive corrective measures were taken prior to the termination. Such measures include the employer having provided sufficient warning and time to the employee to comply with the terms of the employment contract and the opportunity to render his/her work satisfactorily. This is due to the fact the burden of proving that the employee has committed a misconduct lies with the employer.

The Industrial Court requires the employer to conduct proper due inquiry prior to termination of an employee without notice on the grounds of misconduct. This position is reflected in the cases of [*Milan Auto Sdn Bhd v Wong Seh Yen \[1995\] 3 MLJ 537*](#) and [*Pelabuhan Tanjung Pelepas Sdn Bhd v Industrial Court, Malaysia & Anor \[2020\] MLJU 1301*](#).

In [*Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and Another Appeal \[1995\] 2 MLJ 753*](#), the Federal Court held as follows:

“The statutory requirement of 'due inquiry' before dismissing an employee under s 14(1)(a) of the Employment Act 1955 does not excuse the Industrial Court from discharging its duty to enquire into the question of just cause or excuse as required by s 20 of the Act.”

Factors to take into account prior to waiving notice of termination

As a matter of good and safe practice, it is advisable for an employer or an employee to document any waiver of either side’s right to notice in order to avoid any possible legal ramifications arising from such a waiver including unfair dismissal claims.

Where the employment contract does not make reference to a waiver of termination notice, the employer should exercise caution by having the consent to waive recorded in writing.

Similarly, an employer should ensure that any salary payment arrangements in lieu of termination notice recorded in writing and signed by both the employer and employee in order to avoid possible claims for unpaid salary.

An employer should also consider offering compensation to the employee in lieu of waiving the termination notice. In the case of [*Rajathurai A/L Suppiah v Starship Agencies Sdn Bhd \[2015\] MLJU 798*](#), YA Tuan Lee Swee Seng J decided the following at paragraph 86:

“In the circumstance a 3-month salary in lieu of the notice period would be fair compensation in that had the defendant terminated the employment of the plaintiff with a reasonable notice

period, the defendant would have expected to serve a 3-month notice of termination of his employment.”

Effective date of Termination

Typically, the employment contract is brought to an end on the date the notice is agreed to be waived or payment in lieu of notice has been accepted.

Thus, depending on the agreed terms of the waiver of termination notice, an employer will need to be certain of the date of termination in order to work out the final payment of salary to be paid to the employee in lieu of the termination notice.

Notwithstanding the above and as a matter of courtesy, the employer should also consider any outstanding wages for the hours the employee has worked, any accumulated annual leave and/or any benefits the employee is entitled to as payment in lieu of notice.

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:

1. Rohan Arasoo Jeyabalah
Partner
rohan@hlplawyers.com

2. Teoh Yen Yee
Senior Associate
yenyee@hlplawyers.com

3. Esvine Maria Saganathan
Associate
esvine@hlplawyers.com

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