

ISSUE ARISING FROM TERMINATION

PRACTICE NOTE

GROSS MISCONDUCT

This Practice Note provides guidance on the legal issues relating to gross misconduct and examines the different types of misconduct.

What is Misconduct?

An employee may be dismissed from employment on various grounds and the most common ground for dismissal is gross misconduct. Misconduct relates to the unacceptable behaviour of the employee during his or her employment.

An employee is obliged to faithfully discharge his or her duty to the employer in accordance with the terms of his or her employment. When the employee fails to do so, this would give rise to a right for the employer to dismiss the employee on the ground of misconduct after having given an opportunity to refute the allegations framed against him or her.

In [*Plaat Rubber Sdn Bhd v Goh Chok Guan \[1995\] 1 ILR 79*](#), the Industrial Court in dealing with the issue of misconduct held as follows:

“Misconduct means such act or conduct 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.”

In [*Syarikat Kenderaan Melayu Kelantan Sdn Bhd v Transport Workers Union \[1990\] 1 MLJ 5*](#), misconduct was described as follows:

“Conduct so seriously in breach of the accepted practice that by standard of fairness and justice the employer should not be bound to continue the employment.”

Misconduct Warranting a Dismissal

Whether the misconduct committed by an employee warrants the employee’s dismissal from employment would depend on the facts and circumstances of each particular case. The following factors will have to be considered:

- (a) The nature and degree of the misbehavior;
- (b) The significance in relation to the employer and to the position held by the employee;
- (c) The effect on the confidential relationship between them as against the severe consequences of dismissal; and
- (d) The misbehavior must be such that it goes to the heart or root of the contract between the parties.

Types of Misconduct

Gross misconduct includes but is not limited to the following:

- (a) Insubordination;
- (b) Absenteeism;
- (c) Theft of employer’s property;
- (d) Drug abuse;
- (e) Dishonesty; and
- (f) Sexual harassment.
- (g) Causing the company grave embarrassment;
- (h) Violence, abuse, assaults or threats; and
- (i) Habitually coming late and/or leaving work early without permission.

A. Insubordination

Insubordination is where the employee willfully disobeys a lawful and reasonable order or instruction of a superior in an organization. It is trite that an employee is expected to obey all lawful and reasonable orders or instructions given to him or her by a superior during the course of his or her employment. See: [Ngeow Voon Yean v Sungei Wang Plaza Sdn Bhd/Landmarks Holdings Bhd \[2006\] 5 MLJ 113, FC.](#)

When an employee willfully disobeys any such orders or instructions, it could result in chaos to the organization in terms of its operations and discipline.

Insubordination is a form of misconduct which would warrant the employee's dismissal from employment by the employer. See: [Alec Bus Sdn Bhd v Sudin Yakob \[2007\] 2 LNS 1463.](#)

It is however worth bearing emphasis that an employee is not obliged to obey any illegal or unlawful order of a superior. If an employee is dismissed from employment for not complying with an illegal or unlawful order, the dismissal would be deemed to be unlawful. In this regard, reference is made to the case of [JT International Trading Sdn Bhd v Mat Kamel Jusoh & Ors \[2005\] 3 ILR 985](#) where it was held as follows:

"Obedience to the orders of a superior is not without limits and hence it is not a defence for an employee to carry out any act instructed by a supervisor that is illegal or unlawful."

B. Absenteeism

Any employee must obtain the prior permission of the employer before absenting himself or herself from work. In essence, an employee who intends to be absent from work must apply for leave. In the case of an employee who has continuous service of 12 months or more, then he or she is entitled to annual leave. Annual leave must be applied and it is subject to the discretion of the employer.

An employee who is absent from work without prior permission or fails to report for duty or fails to secure the approval of the employee for his or her absence from work shall be deemed to have committed a fundamental breach of his or her obligations as an employee. Absenteeism is a form of gross misconduct warranting dismissal from employment. See:

- (i) **Section 15(2) Employment Act 1955**; and
- (ii) [*Pan Global Textiles Bhd, Pulau Pinang v Ang Beng Teik \[2002\] 2 MLJ 27, FC.*](#)

C. Theft of employee's property

An employee who tampers with property belonging to the employer would be deemed to have committed a serious misconduct which warrants a dismissal from employment. See: [*RHB Bank Berhad v Ramnain Tani \[2006\] 2 ILR 1356.*](#)

It must be noted that honesty and integrity are principles that must be adhered to by an employee in any organization irrespective of their position. See: [*Southern Bank Bhd v Azmi Ali \[2003\] 1 ILR 614.*](#)

D. Drug abuse

Drug abuse among employees at the workplace constitutes a serious misconduct which naturally warrants a dismissal from employment. This includes possession of any drugs or illegal substances. See: [*Mathewson v R B Wilson Dental Laboratory Ltd \[1988\] IRLR 513.*](#)

E. Dishonesty

The relationship between an employer and employee is deemed to be fiduciary in nature. See: [*Pantas Cerah Sdn Bhd v Lau Boon Seng \[1993\] 3 ILR 216.*](#)

Any employee who by his or her conduct breaches the trust and confidence of the employer could be deemed to have committed a misconduct. In this regard, if an employee does

anything that is incompatible with the faithful discharge of his or her duties to the employer, then this would give rise to a right to the employer to dismiss the employee.

In [Susu Lembu Asli Marketing Sdn Bhd v Tan Chong Hin \[2005\] 2 ILR 953](#), it was held as follows:

“... a single display of blatant dishonesty and self-serving interests deserves the most serious form of punishment and shall constitute justification of a summary dismissal of the same.”

F. Sexual harassment

Sexual harassment at the workplace essentially refers to sexual conduct which is imposed by an employee and unsolicited or unreciprocated by the recipient. This would include outraging the modesty of colleagues, making suggestive remarks or making unwanted physical contact.

Sexual harassment at the workplace can be committed against administrators of the company, peers, colleagues or even customers of the company.

Sexual harassment is a serious misconduct warranting dismissal from employment. There are many cases where employees have been dismissed on the grounds of sexual harassment at the workplace. See for example:

- (i) [Edwin Michael Jalleh v Freescale Semiconductor Malaysia Sdn Bhd \[2008\] 2 LNS 2160](#)
– Physically molesting staff by touching parts of their bodies;
- (ii) [Insko Sdn Bhd v Swan Hui Mooi \[1995\] 1 ILR 685](#) – Making suggestive comments as a reward for arranging a transfer; and
- (iii) [Khoo Ee Peng v Galaxy Automation Sdn Bhd \[2009\] 2 LNS 0656](#) – Inviting a female employee to share a hotel room with a superior.

G. Other forms of misconduct

There are various other forms of conduct by an employee during his or her employment which could constitute gross misconduct warranting a dismissal. For example:

- (i) Causing the company grave embarrassment – An employee has a duty to protect the name and reputation of his or her employer. If an employee acts in a manner which causes great embarrassment to the employer, then this could be deemed to be misconduct on the part of the employee. In [*Jagdish Singh Gill Amir Singh v Bayer Cropscience \(M\) Sdn Bhd \[2013\] 2 LNS 1645*](#), the Industrial Court upheld the dismissal of an employee as he made a representation which was injurious to the interest and reputation of his employer.
- (ii) Violent conduct, abuse, assault or threats – Any employee who indulges in any such act during his or her employment will be deemed to have committed a serious misconduct. See: [*Bakti Comintel Manufacturing Sdn Bhd v Ibrahim Abdullah \[1997\] 3 ILR 358*](#).
- (iii) Habitually coming late and/or leaving work early without permission – An employee who regularly comes in late to work and/or leaves the workplace early without prior permission shall be deemed to have committed a serious act warranting a dismissal. See: [*Leo Burnett Advertising Sdn Bhd v Teh Bee Bee \[2005\] 1 ILR 141*](#).

Conclusion

In summary, there can be no doubt that the courts view an act of misconduct by an employee during his or her employment very seriously. In this regard, the dismissal of an employee who has committed an act of misconduct would in most circumstances be deemed to be justified. The dismissal by the employer would be considered to have been carried out with just cause or excuse.

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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