

TERMINATION OF EMPLOYMENT AND DISMISSAL

How an employment contract may be terminated:

- + When the contract period on a fixed –term contract expires
- + When he retires upon attaining the retirement age
- + When he resigns voluntary from his job
- + When he resigns in protest against the breach of contrast by the employer (constructive dismissal)

On the initiative of his employer due to any of the following situations:

- + The employee is unable to perform the work for which he was employed (frustration of contract)
- + The employee's job performance is not satisfactory
- + There is a breach of contract by the employee
- + The employee has abandoned his employment

- + There is redundancy (retrenchment)
- + There is a closure or sale of the employer's business
- + The employee is found guilty of misconduct (dismissal)

Security of tenure

Simple invoking of a termination clause of contract of employment to terminate an employee's service is not acceptable

Hence, for every termination, if challenged by an employee must be proven by the employer to be with just cause

- + What amounts to just cause or excuse?
- + The 4 accepted grounds for termination of an employee's services are:
- + Misconduct
- + Poor performance
- + Redundancy
- + Closure or sale of business

Summary dismissal

- One form of termination that is swift and without due notice
- Summary dismissal is restricted by legislation, in particular sec 20 IRA which imposes the just cause or excuse - burden on the employer
- The word ‘dismissal’- for the IRA
- The word ‘termination’ –for the EA

Constructive dismissal

- The repudiation of the contract of employment by the employer may involve breach of express term of a contract or of an implied term.

Some of the circumstances that may rise to a claim for constructive dismissal:

- Arbitrary reduction of wages, commission, allowance, etc
- Withdrawal of contractual benefits e.g. car, housing, entertainment, free meals, provided they are stipulated in the contract of service

- Demotion to a post, with or without reduction of salary, fringe benefits
- Transfer to a different location if such transferability is not clearly stated in the letter of appointment
- Altering or taking away facilities reflective of the position (e.g. company direct telephone line)
- Substantial changes in the job function, especially if the employee is incapable of performing those functions

- + Behavior by the employer, intended to humiliate the employee
- + Acts if victimization (e.g. harassment, setting unattainable deadlines, content fault-finding)
- + Threatening with dismissal if the employee does not resign from the job

- In order for an employee to be able to claim constructive dismissal, 4 conditions must be met:
- There must be a breach of contract by the employer
- The breach must be sufficiently important to justify the employee resigning- to the reasons for constructive dismissal
- He must leave in response to the breach and not for some other unconnected reason;
- He must not delay too long in terminating the contractor in response to the employer's breach.

- + The period of time within which the employee must act to plead constructive dismissal is a crucial factor.
- + Where the employee discovers a breach, he must act immediately either by protesting or giving notice to the employee, or he must leave the company. Otherwise such delay could be construed to mean that the employee affirmed the new terms of contract, or had condoned to the employer's act.
- + The employee waives his right to go on constructive dismissal if he does not take any action to leave the company within a reasonable time

- Dismissal of a Probationer

Employees on probation would come within the purview of sec 20 of the IRA, and the Industrial Court would have jurisdiction to hear and determine whether the dismissal was with or without just cause

The requirement of bona fide was essential in the dismissal of an employee on probation.

If the dismissal was a result of discrimination or unfair labor practice, the Industrial Court would have the jurisdiction to interfere and to set aside such dismissal

- + A probationer has no right to his job. He is liable to be terminated from employment at any time by notice if his performance is unsatisfactory, or summarily dismissed for misconduct.

Whether the services of a probationer could be terminated before the expiry of the probationary period

- The employment of a person on probation does not give the employer absolute discretion to terminate his or her service. The employer should be reasonably satisfied that the employee is not suitable for the employment.
- The employer must have sufficient reason before terminating the probationer service within the probationary period.

Forced resignation (indirect dismissal)

- + A resignation is defined as the voluntary termination of the employment contract by the employee. If the resignation is not voluntary, it is considered as a dismissal and the employee has the right to claim unfair dismissal under sec 20 IRA.
- + It is well settled law that 'forced resignation' such as where the employee resigns under duress, is a dismissal, sometime known as indirect dismissal.

Whether voluntary resignation a dismissal

- + Just as an employer has the right to terminate the service of an employee, similarly an employee has a right to put an end to his contract of employment by intimating to his employer his intention to quit by the way of resignation.
- + When employer accepts his resignation, the contract of employment comes to an end, ending the employer-employee relationship

Redundancy

- + It has established that redundancy may be justifiable reason for retrenchment, provided that the redundancy is real and on the grounds of industrial or trade reasons and the decision to retrench or dismiss is not capricious or without reason, or was mala fide, or was actuated by victimization or unfair labor practice.

- + Where an employee has been dismissed for redundancy, he may be entitled to claim that the redundancy was unfair dismissal under the following factors:
- + That the selection for his retrenchment was unfair such as for reasons related to trade union activities, or against an agreed procedure e.g. the principle of last in first out, or that the employer had made an unreasonable selection between or among comparable employees

- + That the employer had made an unreasonable decision concerning the necessity of redundancy at that particular time or in view of particular commercial condition
- + That the employer had failed to give prior warning of the impending redundancy and to consult the employee concerned
- + That the employer had failed to make reasonable efforts to look for alternative employment before declaring him redundant

- + These measures are to help and protect workers against what is called unfair or unreasonable redundancy.
- + These measures have been adopted as guidelines by the Industrial Court in redundancy and retrenchment cases, and are included in the Code of Conduct for Industrial Harmony 1975.

What is meant by reorganization?

- + Reorganization of the employer's business is usually the reason for redundancy. Although reorganization does not give rise to a reduction in work, there is a situation where the implementation of new technology in a business requires the recruitment of an employee with new skill.
- + It is for the management to consider and decide the strength of staff which is necessary for efficiency in its undertaking and terminate the services of employees that are redundant.

What is meant by retrenchment?

- + Basically the termination of a contract of service for reasons of redundancy.
- + The Industrial Court confined the usage of the term retrenchment to mean a discharge of surplus labor and established that the term does not include termination of contract of employment arising from other causes.

- + The court also held that the term retrenchment connotes that the business itself is being continued but that a portion of the workforce is being discharged as surplus and as such the term retrenchment does not include discharge on closure of business. Retrenchment is permissible due to reorganization of business.
- + Hence there is a distinction between termination of service by retrenchment and termination of service or discharge on closure of business.

If an employee is laid-off , he still continues to be in employment. Thus, his employment is not terminated. The continuity of a contract of service of an employee shall not be traded as broken by any layoff .

Layoff is alternative to retrenchment . Clause 20 under the Code of Conduct for industrial Harmony 1975 provides that :

- + In circumstances where redundancy is likely to happen, an employer should in consultation with his employee's representatives and Ministry of Human Resource take positive steps or minimize reduction in the workforce by adoption of several measures such as:

- + Limitation on requirement
- + Restriction on overtime
- + Restriction of work on weekly day of rest
- + Reduction in number of shifts
- + Reduction in the number of hours of work
- + Retraining and/transfer to other department

- + The employer practicing lay-off is necessary for industrial harmony. If the employer is moving towards a retrenchment, he is required to practice lay-off first and if he is unable to continue lay-off, only then should he choose to retrench the affected employees.

- + It is well settled in industrial law that the employer should comply with the Code of Conduct for Industrial Harmony 1975 if retrenchment becomes necessary.
- + This is an agreement between the Malaysian Trades Union Congress (MTUC) and the Malaysian Council of Employer Organization (MCEO) which, with the approval of the Minister of Labour, has been given statutory recognition by sec 30(5A) of the IRA

OBLIGATIONS OF MANAGEMENT UNDER THE CODE OF CONDUCT

- + The code on ‘areas for cooperation and agreed industrial relation practices’ provided under clause 7, stipulates the guidelines for employers in the event of redundancy and retrenchment:
- + The employers should take steps to minimize reduction of workforce (e.g. limitation on recruitment; restriction of overtime; reduction in the number of hours of work; etc)

- + The employer should also adopt the following measures such as:
- + Provide early warning to the workers concerned
- + Implement schemes for voluntary separation and retirement
- + Retire employees who are beyond their normal retirement age
- + Ensure that no announcement on retrenchment is made before the workers and their representatives of trade union have been informed

- + The LIFO principle (Last in, first out)

The Industrial Court allows for a departure based on this principle - relating to retrenchment exercise.

In view of the Court's insistence on selecting junior employees for retrenchment, employers who wish to retain younger employees could offer Voluntary Separation Schemes (VSS) with substantial benefits

Retirement

What is meant by retirement?

Retirement means giving up one's regular job or work upon attaining the age of retirement

In the case of an employee who was asked to retire and considered himself having been dismissed without just cause , the court considered that this was not of simple dismissal, but more like a case of constructive dismissal.

Where the contract of service of an employee does not stipulate an age of retirement, it would appear that the employee can work regardless of age and that if he is terminated for reasons other than misconduct, he is entitled to termination benefits.

- + It is important to ensure that every contract of employment should contain a clause on retirement. When an employee is retired on the date of retirement as stated in the contract of service, it is unlikely that he will seek redress under sec 20 of IRA, and even if he does , he will be unlikely to success.