

CHALLENGES INVOLVED IN MANAGING POOR PERFORMERS BY



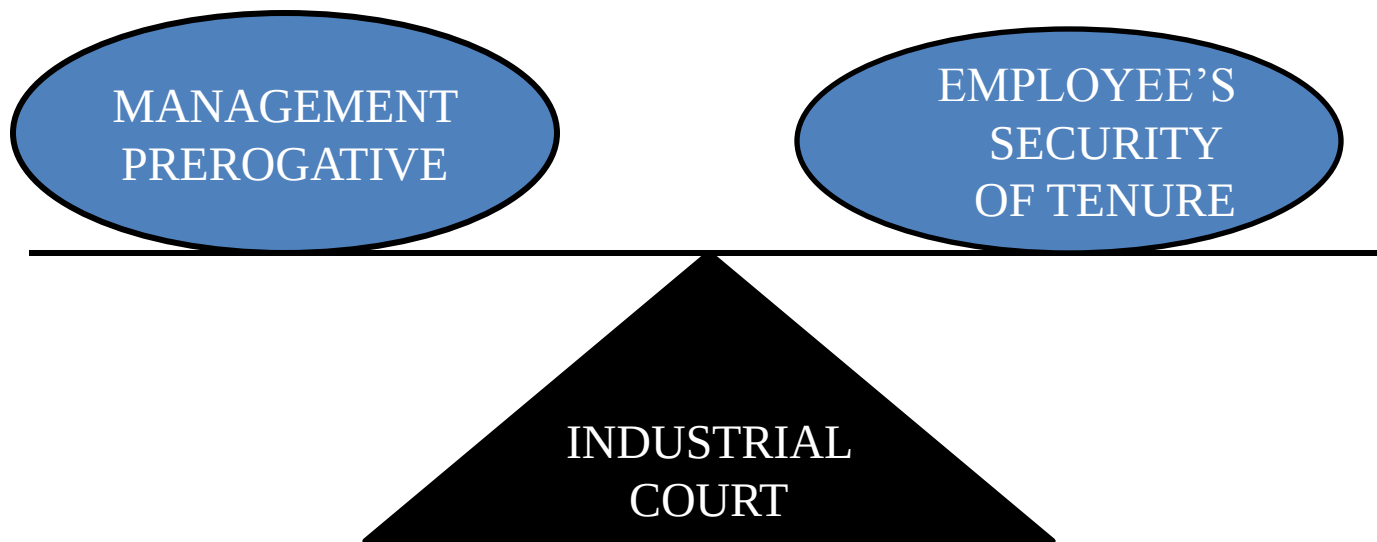
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KIM REALTY v. JALAJAH PALANISAMY
[2002] 1 ILR 184

“Inefficiency which discloses a course of negative conduct is a sufficient ground for termination. Incompetency also is a ground for dismissal; indeed inaptitude resulting in failure to perform the duties of the service, destroys the whole reality of the contract from the point of view of the employer... so long as the employers act bone fide i.e. if he is genuinely discontented with an employee, he is quite entitled to give notice of termination.”



BALANCE BETWEEN EMPLOYER AND EMPLOYEE'S INTEREST

- Essential that employer does not suffer through the inefficiency of particular employee;

AND

- Employee whose work is below satisfactory standards should be treated fairly.

BONA FIDE EXERCISE OF MANAGEMENT PREROGATIVE

- Genuine dissatisfaction with employee's performance;
- Reasonable grounds for belief;
- No element of bad faith, victimisation or unfair labour practice;
- Fair and just process.

FAIR PROCESS TO BE ADOPTED

- Industrial Courts look at the process adopted by employer when terminating employee on poor performance;
- Employer has a duty to adopt and adhere to a fair procedure

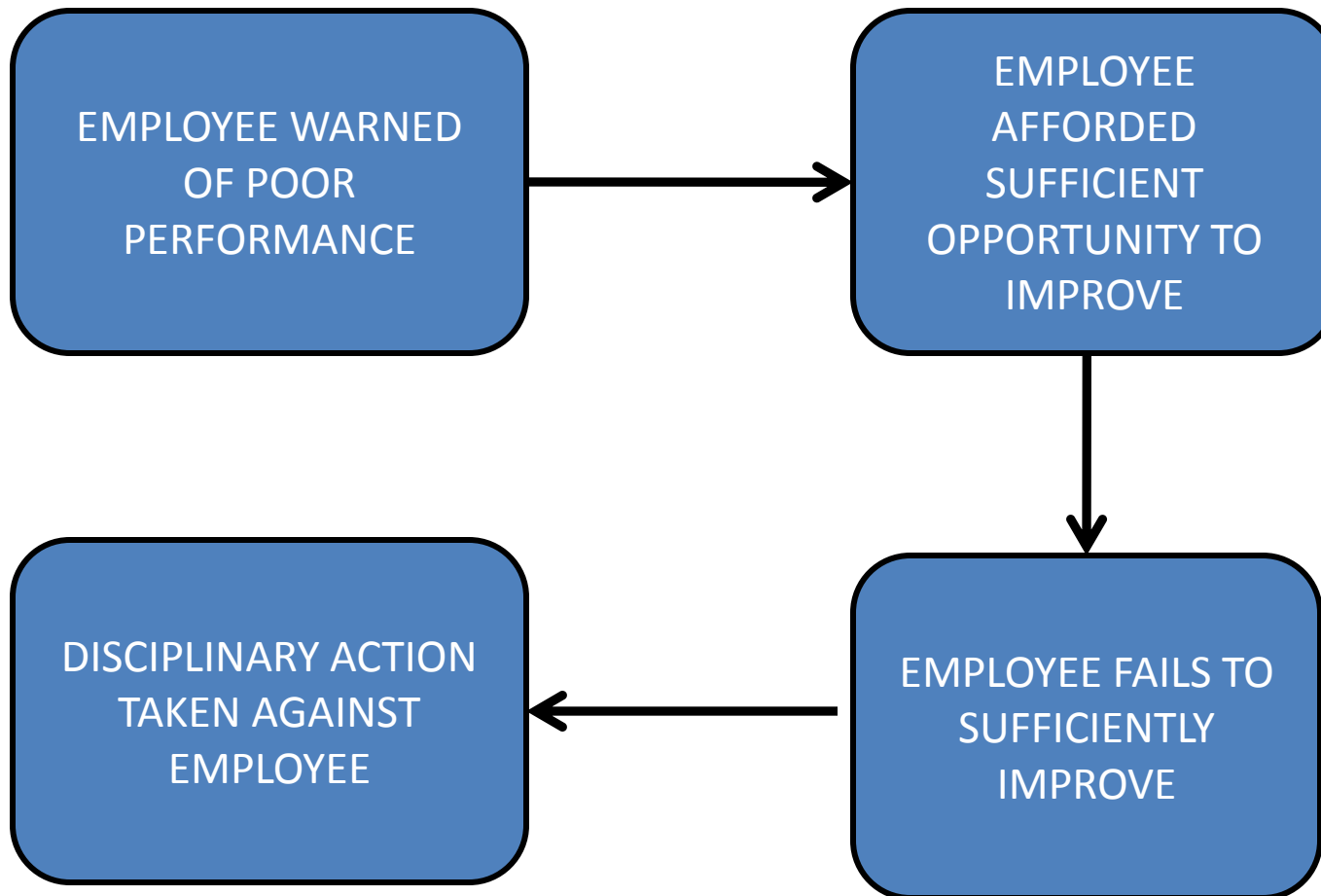
DETERMINE CAUSE OF POOR PERFORMANCE

- Determine if root cause is employee failing to exercise himself sufficiently;
- Consider if proper training, guidance, equipment for the job, supervisions and instruction has been afforded;
- Ascertain if cause is company's inefficiency in the system/operations;
- Employer to tackle root cause of employee's failure to perform.

LEGAL REQUIREMENTS

ON TERMINATING

POOR PERFORMANCE



STANDARD AND TEST

LAI D DOWN BY THE

COURTS

BURDEN OF PROOF

- If dismissal not in dispute, the burden is on the Company to satisfy the court that the dismissal was with just cause and excuse;
- By virtue of the Industrial Relations Act 1967 (***IRA 1967***), all dismissals are prima facie done without just cause and excuse;
- If an employer asserts otherwise, the burden is on him to discharge.
- ***Weltex Knitwear Industries Sdn. Bhd. v. Law Kar Toy & Anor [1998] 1 LNS 258;***

*Grand Banks Yachts Sdn. Bhd. v.
Komander (B) Teng Tiung Sue*
[2002] 1 ILR 802

- Employer must adduce **convincing & cogent evidence** that employee incapable of performing duties for which employee dismissed;
- Requirement of *bona fide*;
- If dismissal is result of discrimination or unfair labour practice, industrial Court has jurisdiction to interfere and set aside dismissal.

cont.

QUESTIONS THAT THE COURT WILL ASK:-

- Did the employer in fact become dissatisfied with the employee's performance of his or her work duties?
- If so, did the employer inform the employee of that dissatisfaction and require the employee to improve and achieve a higher standard of performance?
- Did the employer give reasonable time for the employee to attain those standards?
- After the expiry of the reasonable time [did] the employer make a fair decision to the question whether the employee has improved and achieved the standard?

WARNING

Ginder Singh Transport Co. Sdn. Bhd. v. Bijir Singh Juala Singh

“A formal written letter of warning provides an employer with the evidence to rebut his employee's claim that he had not been sufficiently made aware of any deterioration in his work and of the prospect of the employer terminating his services should he fail to improve upon his performance. It does not, however, mean that an employer must in all cases issue such a letter The rational underlying the requirement for a warnings procedure is to ensure that an employer had duly communicated to the employee that his poor performance is a matter of sufficient concern to the former that if the latter failed to improve, his employment might have to be terminated.”

Inter Pacific Development Sdn. Bhd. v. Mat Juhari Bin

“The Court does not think that it ought to impose a similar rule that explicit warnings of the prospect of dismissal are required in the case of a probationer who has been found to have failed to perform satisfactorily. . . . It cannot be gainsaid that probationary employment means precisely that if an employee proves to be unsuitable for regular employment the employer has the prerogative, provided always that he acts bona fide, to bring the claimant's probationary employment to an end.”

MONITORING PERFORMANCE

Beverly Hill Collection Sdn. Bhd. v. Yau Yok Chuan [1999] 1 ILR 786

- Evaluation of employee's performance;
- Graduated process of evaluation;
- Absence of such evaluation- court can only conclude that allegation is baseless.

CONVINCING & COGENT EVIDENCE

- Sales target
- Performance Appraisals
- Performance Improvement Plan (PIP)

IS DOMESTIC INQUIRY
(DI) A NECESSITY
BEFORE DISMISSING A
PROBATIONER/POOR
PERFORMER?

*Wong Yuen Hock v. Syarikat Hong Leong
Assurance Sdn. Bhd. & Anor*
[1995] 3 CLJ 344

*“The Industrial Court was not competent to declare the dismissal void for failure to comply with the rules of natural justice. The very purpose of the inquiry before the Industrial Court was to give both parties to the dispute an opportunity to be heard irrespective of whether there was a need for the employer to hold a contractual or statutory inquiry. We are confident that the Industrial Court as constituted at present was capable of arriving at a fair result by fair means on all matters referred to it. **If therefore there had been a procedural breach of natural justice committed by the employer at the initial stage, there was no reason why it could not be cured at the re-hearing by the Industrial Court.**”*

- Irregularities that occur during a domestic inquiry or even absence the domestic inquiry itself would not *per se* render the dismissal as unfair- ***Naza Bikers Dream Sdn. Bhd. v. Ow Kean Leong*** [2008] 2 ILR 677
- hearing in the Industrial Court is a hearing *de novo* or a fresh hearing and any procedural breach of natural justice or failure of the company in not conducting a domestic inquiry is not fatal for as long as such defect can be cured during the present hearing- ***Sidel Industry (M) Sdn. Bhd. v. Thanusia Malar Raja Gopal*** [2006] 1 ILR 116

*Wearne Brothers Services Malaysia
Sdn. Bhd. v. Yuen Ah Man @ Yan
Soon
Onn*
[1982] 2 ILR 128

*“...Inefficiency is not a misconduct
which necessitated an inquiry...”*

TRANSFERRING A
POOR PERFORMER-
DOES IT AMOUNT
TO CONSTRUCTIVE
DISMISSAL?

"Misconduct in Employment" **by BR Ghaiye**

*The employer may think that the workmen are not suitable for the duties and are guilty of indiscipline and misbehaviour. Nonetheless, it may not propose to punish them and merely want to set the matters right by affecting transfer. Exigencies of service may call for transfer of employees on variety of grounds... **When transfer is made by way of punishment, it is necessary that explanation should be called and if it is challenged then justification should be proved strictly. When transfer is not made at the request of the workman concerned but after warning to show that it may be by way of punishment, then justification has to be proved. When transfer order is based on complaints against the employee, it is necessary to give him chance to explain his conduct and observe the principles of natural justice.***

cont.

The power to transfer is however subject to the following well recognized restrictions :-

- there is nothing to the contrary in the terms of the employment;
- the management has acted *bona fide* and it is in the interests of its business;
- the management is not actuated by any indirect motive or any kind of *mala fide*;
- the transfer is not made for the purpose of harassing or victimising the workman;
- the transfer does not involve a change in the conditions of service

DEMOTION AS A CONSEQUENCE FOR POOR PERFORMANCE

Selwyn's Law of Employment, Norman Selwyn, Butterworths 12th edn, 2002

An employee whose conduct is such that the employer has lost all confidence in his ability to do the job in question may be demoted, with or without review, and at a lower earning rate if this is appropriate ... But if the employer has acted fairly, and with the interests of the employee at heart, such dismissal will be fair.

REQUESTING A POOR
PERFORMER TO
RESIGN-IS IT A VIABLE
OPTION?

**Harpers Trading (M) Sdn. Bhd. v. Kesatuan
Kebangsaan Pekerja-Pekerja Perdagangan**
[1988] 2 ILR 314

*“It is a well-established principle of industrial law that **if it is proved that an employer offered the employee the alternatives of 'resign or be sacked' and, without anything more, the employee resigned, that would constitute a dismissal.** The principle is said to be one of causation - the causation being the threat of the sack. It is the existence of the threat of being sacked which causes the employee to be willing to resign. **But where that willingness is brought about by some other consideration, and the actual causation is not so much the sacking but other accepted considerations in the state of mind of the resigning employee, then it has to be said that he resigned voluntarily** because it was beneficial to him to do so that then there has therefore been no dismissal”.*

What was employee's state
of mind when he/she
tendered the letter of
resignation?

Threat of being dismissed

Some other
Consideration

Forced Resignation

Voluntary Resignation

~THANK YOU~



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