



CORPORATE LEGAL COUNSEL CONFERENCE:

"TERMINATION OF EMPLOYMENT : PROTECTING THE COMPANY'S INTEREST"

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OUTLINE OF ISSUES :

(A) Termination of Employment : *Legal significance and consequences under Malaysian law.*

(B) Protecting the Company's interest : *Role of Corporate Counsel.*

(C) Issues requiring Care and Caution : *Pitfalls for the Company.*



(A) TERMINATION OF EMPLOYMENT

- **Contractual Termination** : only brings an end to the **Employment Contract**, **NOT** to the **Employment Relationship** :
 - breaches of the Employment Contract may be adjudicated either by the Civil Courts or the 'Labour Court' (i.e inquiry by the DG Labour) ;
 - Action in the civil courts will be subject to respective court's jurisdiction :
ABDUL MAJID v. PAARI PERUMAL [2002] 2 MLJ 640: AC
 - Right to lodge a complaint under **Section 69(1) E.A 1955** (right of E.A Employee to lodge complaint);
- NB: (1) **Section 69B(1)** (extends to Employees with salaries not exceeding RM 5,000);
(2) **Section 69C** (right of Employer to also lodge complaint for indemnity for termination without due notice)
- In either of the above recourses, the Company's exposure is monetary.
But see: **NIK OMAR B. NIK MAN v. BSN** [2005] 6 MLJ 616



- Where there is **termination *simpliciter*** (i.e without just cause and excuse), such termination is susceptible to being 'undone' by the Industrial Court:
- **s.20(1) IRA 1967** allows a workman to make a representation where he considers that he has been "***dismissed without just cause or excuse***". The Federal Court in **DR. A. DUTT v. ASSUNTA HOSPITAL** [1981] 1 MLJ 304, per Chang Min Tat FCJ, held:-

"It further follows that on a proper interpretation of the relevant sections of the Act, there is no material distinction between dismissal and termination. Either must be with just cause or excuse to justifiable; otherwise the Industrial Court may make an award."

- The right not to be dismissed without just cause and excuse has been recognised in Malaysia as a fundamental constitutional right : **HONG LEONG EQUIPMENT v. LIEW FOOK CHUAN** [1996] 1 MLJ 481 AC, per Sri Ram JCA:-

"Whether a particular right is a fundamental liberty is a question that has to be dealt with on a case by case basis. This case concerned the right to livelihood which was one of the fundamental liberties guaranteed by Pt II of the Federal Constitution."



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- In this context, the Company's exposure may be just monetary i.e an order to pay backwages and/or compensation in lieu of reinstatement :

DR. JAMES ALFRED v. KOPERASI SERBAGUNA [2001] 3 CLJ 541, FC;
TELEKOM MALAYSIA BHD v. RAMLI AKIM [2008] 1 CLJ 440, AC,

- The Industrial Court may also order reinstatement of the Workman to his previous position.

CHAN HOCK LIONG v. ASSOC MOTOR INDUSTRIES [2007] 5 CLJ 298



(B) Protecting the Company's interest : Role of Corporate Counsel.

(1) To ensure termination by the Company is effected for *valid reasons* i.e :-

- *Misconduct***
- *Poor Performance***
- *Redundancy***
- *Mutual Separation***

(2) To ensure due compliance with legal requirement, procedures or practices e.g :-

- *due disciplinary process for Misconduct;***
- *sufficient warnings, objective assessment for Poor Performance***
- *LIFO, Code of Conduct, Borang PK for Redundancy***

***WONG YUEN HOCK v. SYKT HONG LEONG ASSURANCE* [1995] 2 MLJ 753,FC;**

"The Industrial Court is an independent statutory body capable of reaching a fair result by fair means on all matters referred to it. Therefore, if there had been a breach of natural justice by the employer at the initial stage, it could be cured at the rehearing by the Industrial Court".



(3) Ensuring Confidentiality and Integrity of Domestic Process(es) :-

- need for suspension pending investigation/inquiry ?
- notice / communication with general body of employees ; what to say and what NOT to say
- efficacy of anonymous 'whistleblowing' provisions
- guarding against witness intimidation, interference or reprisals

(4) The Adduction and Preservation of Evidence :-

- ensuring that only *admissable* evidence forms basis of decision;
- ensuring that material evidence is preserved in an admissable form e.g Statutory Declaration, Audio-Visual-Digital storage Media;

(5) The Termination itself :-

- objectively sustainable based on the evidence;
- Notice of Termination / Dismissal accurately worded;
- Employee is given his dues, not MORE, not LESS.



(C) Issues requiring Care and Caution : *Pitfalls for the Company.*

- A typical Section 20(1) IRA representation comprises of four (4) statutory levels ; *Conciliatory Reporting, Referral and Adjudicatory levels.*
KATHIRAVELU GANESAN v. KOJASA HLDGS BHD [1997] 2 MLJ 685
- Reconciliation meeting: golden opportunity to raise whether the s.20 representation is *valid in law*?
- Minister's Reference : 40 day period for Judicial Review
KATHIRAVELU GANESAN v. KOJASA HLDGS BHD [1997] 2 MLJ 685:
- Adjudication by Industrial Court : s.30(5) mandates that award be with 'equity and good conscience'.
CHAN HOCK LIONG v. ASSOC MOTOR INDUSTRIES [2007] 5 CLJ 298
BUT see:
MUSCATINE HLDGS v. CHUAH CHYE HIN [2005] 2 ILR 78 : IC
RANBAXY v. RAVINDRA KUMAR [2005] 1 ILR 702: IC