Giving Notice of Termination and Without Assigning Reasons

The employment relationship at **common law is contractual** where the employer may end the employment relationship by giving notice of termination and without assigning reasons. But where the employee had committed gross misconduct such as immorality at the workplace, insolence, insubordination or other criminal conduct, the employer may summarily and without notice dismiss the worker. The only requirement for the employer to establish is that the worker has been guilty of gross misconduct which renders the further continuation of the employment relationship impossible. The burden of proving misconduct justifying summary dismissal is on the employer on the balance of probabilities. As from the above, the term **'termination' of service** and **a 'dismissal'** have different connotations. In the sphere of industrial jurisprudence however, an employer cannot dismiss or even contractually terminate the services of his employee save and except with just cause or excuse. All terminations or dismissals must be with substantive justification and procedurally fair. A substantive justification would relate to the capacity or conduct of the worker or based on the operational requirements of the undertaking. Further, the impending dismissal must be carried out fairly where the employer is expected to observe the rules of natural justice. The employer ought to conduct an inquiry into the allegation that has been made and must listen to the explanation put forward by his employee, so that he can then form a balanced opinion of the matter at hand.

If the employee in question has been found at fault, the penalty to be imposed must be fair and proportionate, having regard to the circumstances surrounding the case, failing which such punishment might be quashed on grounds of harshness or undue severity. From the above, unlike at common law where an employment relationship may be ended by serving the appropriate notice of termination or payment in lieu thereof, under the **Industrial Relations Act 1967 (IRA)** the employer must prove substantive and procedural justification for a termination. In fact, the Act makes no distinction between a termination and dismissal as either must be with just cause or excuse Hence, this article addresses on the requirements of establishing just cause or excuse before terminating the employment relationship. In relation to the above, the recent Court of Appeal's decision in **Omar bin Othman v Kulim Advanced Technologies Sdn Bhd (previously known as KTPC Technologies Sdn Bhd) [1],** is discussed where the **High Court held inter alia**, that termination by mutual consent of the parties is not termination simpliciter, and that the acceptance of the payment in lieu of notice with no objection ends lawfully the employment relationship.

The Court of Appeal however held that **section 20 of the IRA** makes it incumbent on the employer to demonstrate that the termination was based on just cause and excuse. In fact, the Federal Court had, in **Dr A Dutt v Assunta Hospital [2]**, stated inter alia, that the so called 'termination simpliciter', a termination by contractual notice and for no reason must still be grounded on just cause or excuse. This decision was reaffirmed by the **Federal Court in Goon Kwee Phong v J & P Coats (M) Bhd [3], where Raja Azlan Shah CJ** (as he then was) stated: 'We do not see any material difference between a termination of the contract of employment by due notice and a unilateral dismissal of a summary nature. The effect is the same and the result must be the same. Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal Is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse.

The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.' **A Termination and dismissal at common law** as stated earlier, at **common law** the employer may terminate the employment relationship by serving the appropriate notice of termination as provided in the contract of employment. Once notice is properly communicated, the employer is free to terminate the employee on any ground with no obligation to reveal the reason for the termination [4]. However, in the absence of an express notice provision in the contract, the employer would be required to give reasonable notice to end the employment relationship and the factors that constitute reasonable notice are determined objectively with reference to the facts and the surrounding circumstances of each case. The factors that are normally considered include, inter alia, the age of the employee, seniority in employment, nature of the work, the availability of similar alternative employment and economic crisis or recession. Wrongful dismissal occurs when the employee is terminated from employment without notice or with inadequate notice. Failure to give the notice of termination, expressed in the contract or implied reasonable notice may give rise to a claim for compensation representing the period of notice agreed but not served on the other party.

The above **common law principle** is reinforced in the **Employment Act 1955**, **S 12** where it provides that either party to a contract of service may at any time terminate such contract of service by giving to the other party the notice of termination. The length of notice shall be the same for both employer and employee and shall be determined by a provision made in writing for such notice in the terms of the contract of service. In the absence of a writing provision, the length of notice shall be determined with reference to the number of years of service that is, if employed for less than two years, four weeks' notice; if employed more than two years but less than five years, six weeks' notice, and if employed for five years or more, eight weeks' notice. This section shall not be taken to prevent either party from waiving his right to a notice. Further, **section 13(1)** provides that either party to a contract of service may terminate such contract of service without notice or, if notice has already been given in accordance with **section 12**, without waiting for the expiry of that notice, by paying to the other party an indemnity of a sum equal to the amount of wages which would have accrued to the employee during the term of such notice or during the unexpired term of such notice. In certain circumstances however, the contract of service may terminate without notice namely, when there is any wilful breach by the other party of a condition of the contract of service. **Section 14(1)** provides that an employer may, on the grounds of misconduct and after due inquiry dismiss the employee without notice, downgrade the employee or impose any other lesser punishment as the employer deems just and fit. From the above provisions of the **Employment Act**, it appears that there is a **distinction between termination of employment service and a dismissal** and this can further be seen with reference to several cases of the civil courts as discussed below.

In Government of Malaysia v Lionel [5], Viscount Dilhorne stated: **"Under English law a servant may be summarily dismissed for disobedience to orders or misconduct** or may have his employment terminated by notice or the payment of wages in lieu of notice. Under the **laws of Malaysia** a similar distinction between **dismissal and termination** of services appears to exist and in their Lordships' opinion there is nothing in the Constitution which affects the right of the Government to terminate temporary employment in accordance with the terms of the engagement." The Privy Council's decision in Lionel's case was cited with approval by the Court of Appeal in **Abd Rauf bin Alif v Suruhanjaya Pasukan Polis & Anor [6]. Again, in Lembaga Kemajuan Wilayah Kedah (KEDA) v Puan Nur Dini binti Mohd Noh [7], the Court of Appeal held inter alia, that by virtue of condition 4(f) of the Letter of Offer**, the appellant had every right to terminate the respondent's contract of employment without assigning any reason for the termination by paying one month's salary in lieu of notice. In **Sitti Badriyah Shaik Abu Bakar v Dr Hamzah Darus & Anor [8], clause 11** of the contract of

employment between the appellant and the second respondent empowers either party to the contract the right to terminate the contract by giving the other three months' notice. In reliance on this clause, the second respondent, gave the appellant the three months' notice of their intention to terminate her services. Dissatisfied with the termination, the appellant applied for a declaratory order to set aside the termination by arguing that the notice of termination was null and void. The appellant contended that as the respondents had issued her the show cause letter, the termination of her contract of employment could not be carried out without first instituting the disciplinary proceedings.

The second respondent however argued that the relationship between the parties was contractual where either party has the right to terminate the contract by giving the other the three months' notice and in this case, the notice of termination was duly issued. The trial judge held that the appellant's employment was validly terminated in accordance with the contract. Against the said decision, the appellant appealed to the Court of Appeal. The main issue for determination of the court was whether the respondents had waived their contractual right under clause 11 of the contract of employment when they issued a show cause letter. In dismissing the appeal, the court held that pursuant to clause 11 of the contract of employment, the respondents had the contractual right to terminate the appellant's services by giving her the three months' notice, regardless of whether she had misconducted herself or not. In delivering judgment of the court, **Zaleha Zahari JCA, stated: "On the facts of this case under cl 11 of the contract of employment**, the respondents, are clearly conferred with the contractual right to terminate the appellant's services by giving three months' notice, whether or not she had misconducted herself. Applying the **principle in Lionel's case**, the fact that there were earlier allegations of **misconduct and or indiscipline** made against the appellant did not preclude the respondents from exercising their **contractual right to terminate** her employment.

The decision to terminate the appellant's services was, as in Lionel's case, probably taken to save the appellant from the ignominy of a dismissal and in accordance with the conditions of her appointment which she had agreed to on accepting such appointment. The learned trial judge did not err in dismissing the appellant's claim. He was right in finding that the appellant's employment was validly terminated in accordance with her terms of appointment." Lastly, in **Shaffarizan bin Mohamad v Government of Malaysia c/o Attorney Generals Chambers & Anor [9], the applicant was hired as Pegawai Perkhidmatan Pendidikan Siswazah** and he was placed on probation. However, on 7 May 2013, the second respondent had issued a letter to the applicant to terminate his service pursuant to Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012 as he had not fulfilled the conditions for confirmation in the service. His application to set aside the termination was dismissed by the court. It was held that the applicant's termination was based on the letter of appointment namely, that the applicant was given one-month notice in accordance with the contract. Interestingly, in this case the court noted that a probationary officer would be terminated in his post whereas a permanent officer would be dismissed in his post.

Termination and dismissal under industrial jurisprudence

The drawbacks at common law wrongful dismissal had paved the way for the statutory protection against an unjustified, initially promoted by the International Labour Organisation's Termination of Employment Recommendation No. 119 of 1963 which was subsequently uplifted to Convention No. 158 of 1982. The primary remedy of an employee who alleges that his dismissal is unfair or unjustifiable is reinstatement or re-engagement, if it is practicable to order so and the alternative remedies include monetary compensation and/or redundancy compensation in the event of genuine reorganisation or restructuring of the company. **In Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and Another Appeal [10], Gopal Sri Ram JCA** stated: 'the legislature has willed that the relationship of employer and workman as resting on a mere consensual basis that is capable of termination by the employer at will with the meagre consequence of paying the hapless workman a paltry sum as damages should be altered in favour of the workman. It has accordingly provided for security of tenure and equated the right to be engaged in gainful employment to a proprietary right which may not be forfeited save, and except, for just cause or excuse. As stated earlier, in the sphere of industrial jurisprudence, following the **Federal Court's decision in Dr A Dutt v Assunta Hospital [11]**, there is no material distinction between a termination and dismissal. A termination supposedly based on a contractual notice must still be grounded on just cause or excuse. The decision in **Dr A Dutt's case was followed by the Federal Court in Goon Kwee Phoy v J & P Coats (M) Bhd. [12]. In Smart Glove Corp Sdn Bhd v Industrial Court, Malaysia & Anor [13]**, the company terminated the claimant's employment at the end of the probationary period on grounds of unsatisfactory performance.

The claimant however, contested his dismissal as being without just cause or excuse. The company however argued that the claimant's termination was a termination simpliciter and not a dismissal, based on clause 6 of the letter of appointment which provides inter alia, that either party may terminate the employment by giving two weeks' notice and without any reasons whatsoever. Hence, it was contended that the claimant was properly terminated in accordance with the contract of employment between the parties. The Industrial Court held inter alia, while it may be lawful for the company to terminate the employment of the claimant in accordance with clause 6 of the letter of appointment but what is considered to be lawful according by the law of contract and the principle of freedom to contract can never be deemed as a dismissal with just cause or excuse according to industrial jurisprudence. It was further stated that the importance of giving reasons in the case of termination simpliciter has been well established by numerous awards of the **Industrial Court. Raja Azlan Shah CJ (Malaya) had, in Goon Kwee Phoy v J & P Coats (M) Bhd. [14]**, succinctly stated: 'where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse.' Again, in **Khaliah bte Abbas v Pesaka Capital Corp Sdn Bhd [15], the Court of Appeal held inter alia,** that an employer cannot simply dismiss a probationer by way of termination simpliciter unless it is proven that the dismissal was with just cause and excuse.

In **Aliah bte Yasin and Chartered Bank [16]**, the Industrial Court stated: "It is well-establish in industrial law that an employer is at liberty at any time to terminate the service of his employee by contractual notice or by payment of wages in lieu thereof, but if such termination, although ostensibly in pursuance of the term of the contract, is in reality for certain deficiencies or acts of misconduct, the employer cannot rest his case merely on the contract and say that having exercised his right under the terms of the contract, there is nothing more to be said by him to justify his action. Once his action is challenged, he must offer for the termination of his employee's service, for a 'termination simpliciter' (ie a termination by contractual notice and for no reason), if ungrounded on any just cause or excuse, would still be a dismissal without just cause or excuse." Again, in **Kedah Bioresources Corp Sdn Bhd v Aminudin bin Shuib & Anor [17]**, the first respondent, the chief executive officer of the applicant's company was terminated with immediate effect, vide a notice dated 23 July 2013 and was compensated with three months' salary in lieu of the notice of the termination.

The Industrial Court held that the first respondent's dismissal was without just cause or excuse and accordingly, awarded him a sum of RM245,725.75 as monetary compensation. In allowing the applicant's judicial review application to quash the said award, Hashim Hamzah J stated inter alia, that termination simpliciter would amount to a dismissal without just cause or excuse if the employer fails to show that the termination was grounded on any just cause or excuse. However, as in the case of **Kedah Bioresources**, where the termination was with immediate effect, the receiving of compensation in lieu of notice without any objection indicates that the employee had accepted his termination. In arriving at the said conclusion, the trial judge had relied on the Industrial Court's award in **Mohamad Faziron Musa v Aseania Resort Langkawi [18]**. The **High Court's decision in Kedah Bioresources Corp** has in fact, ignored the earlier superior courts decisions on the importance of giving reasons in the case of termination simpliciter. It may be added that the technical rules such as estoppel, laches, limitations, acquiesces or other please have no place in industrial adjudication, and cannot be invoked to defeat claims that are just and proper [19]. **C.Omar bin Othman v Kulim Advanced Technologies Sdn Bhd [20] (previously known as KTPC Technologies Sdn Bhd)** : A Review In **Omar bin Othman v Kulim Advanced Technologies Sdn Bhd (previously known as KTPC Technologies Sdn Bhd), the Court of Appeal held inter alia**, that a termination simpliciter based on the terms of the contract was without just cause and excuse. In this case, the appellant, who was employed by the respondent for a two-year term, was terminated with immediate effect on 23 July 2013 and was paid with three months' salary in lieu of notice. His termination was pursuant to contractual right to terminate under clause 3 of the conditions of contract. The Industrial Court held that the appellant's termination simpliciter based on the terms of the contract was without just cause and excuse and accordingly, awarded him a sum of RM209,000 as monetary compensation [21].

Dissatisfied with the decision, the respondent filed a judicial review application. The High Court in allowing the application held that it was not a case of termination simpliciter but was termination by mutual consent of the parties where the appellant not only had not objected to his termination but had proceeded to accept the payment given in lieu of notice. The Court of Appeal in allowing the appeal had set aside the High Court's order and reinstated the Industrial Court's award. The Court stated inter alia, that the termination simpliciter, the absolute common law right of an employer to terminate the employee in accordance with the provisions of the contract, violates section 20 of the IRA that makes it incumbent on the employer to demonstrate that the dismissal was based on just cause and excuse. In delivering judgment of the court, **Hamid Sultan JCA, stated: "The notice of termination impinges on s 20 of the IRA 1967** as well as settled principles enunciated by case laws.

Whether it is probationary period, fixed term contract, etc where termination takes place before the expiry of the term, etc; it was incumbent on the employer to demonstrate that the dismissal was based on just cause and excuse. Otherwise, the termination is unlawful and cannot stand. Support for the proposition is found in a number of cases." The learned judge further added that 'termination simpliciter' a concept of common law is not part of industrial jurisprudence of Malaysia - under the Industrial Relations Act 1967 but may be relevant in limited circumstances under the Employment Act 1955. It was further stated that 'in the **law of industrial relations**, pleas of estoppel, res judicata, acquiescence, waiver or laches, are regarded as technicalities which are passed over in favour of the substantive merits in the case and where principles of equity and good conscience prevail.

CONCLUSION

At common law the employer may terminate the employment relationship by serving the appropriate notice or pay in lieu of notice. Once notice is properly communicated or payment in lieu made, the employer is free to terminate the employee on any ground and with no obligation to reveal the reason for the termination. Wrongful dismissal occurs when the employee is terminated from employment without notice or with inadequate notice. In fact, at common law there is a distinction between termination of services and dismissal. However, in the sphere of industrial jurisprudence, it was not open for the employer to terminate the service of the employee simply by giving due notice in accordance with the contract of employment and without giving reason for it. The courts have insist that a termination supposedly based on a contractual notice must still be grounded on just cause or excuse and thus, the term 'termination' and 'dismissal' is used interchangeably. The Court of Appeal in **Omar bin Othman's case** had aptly stated that the termination simpliciter, the absolute common law right of an employer to terminate the employee in accordance with the provisions of the contract, violates **section 20 of the IRA** that makes it incumbent on the employer to demonstrate that the dismissal was based on just cause and excuse.

REFERENCES

1. [2019] 1 MLJ 625 (CA).

2. [1981] 1 MLJ 304.

3. [1981] 2 MLJ 129.

4. See Ridge v Baldwin [1964] AC 40, 65, [1963] 2 All ER 66 HL; Pillai v Singapore City Council [1968] 1 WLR 1278, 1284, PC; Malloch v Aberdeen Corp [1971] 2 All ER 1278, HL.

5. [1974] 1 MLJ 3 at 5, PC.

6. [2003] 1 MLJ 18.

7. [2018] MLJU 75.

8. [2009] 2 MLJ 233.

9. [2015] 7 MLJ 504. 10. [1996] 1 MLJ 481 at 510, CA

11. [1981] 1 MLJ 304.

12. [1998] 2 MLJ 129.

13. [2006] 6 MLJ 664.

14. Ibid.

15. [1997] 1 MLJ 376.

16. Award 93 of 1981.

17. [2018] 10 MLJ 518.

18. [2012] 2 LNS 131.

19. See for example, Kamunting Corp Bhd v Fadzil bin Ahmad [1991] 1 ILR 704; Exxon Chemical (Malaysia) Sdn Bhd v Menteri Sumber Manusia, Malaysia & Ors [2004] 1 CLJ 451, CA. 20. [2019] 1 MLJ 625 (CA). 21. See Omar Othman Lwn. KTPC Technologies Sdn Bhd [2016] 2 LNS 0894 IC.

Prepared by;
Norilakasmanira Noor
Jabatan Perhubungan Perusahaan Kelantan