

DCE 5643
Employee, Organization and Community Relations

Termination/dismissal of employment

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Introduction

- ▶ Security of tenure in employment is important to every employee as he has an economic interest to remain in the job as long as he is capable of doing his job or until he attains retirement age (Ashgar Ali, 2007).
- ▶ Work is one of the most fundamental aspect in a person's life.....A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. (Re Public Service Employee Relations Act [1987]1 SCR 313 cited by Ashgar Ali 2007)
- ▶ The right to livelihood is constitutionally guaranteed under Article 5(1) of the Federal Constitution (Gopal Sri Ram, 2007)



Safeguards of security of tenure in employment in Malaysia

▶ Private sector employee:

- ▶ S20 IRA – dismissal must be with just cause and excuse.
 - ▶ The just cause and excuse must be based on facts of each case, either a misconduct, negligence or poor performance. The onus is on the employer to prove just cause and excuse [Great Wall Shopping Sdn Bhd v Gan Shang eng Award 241 of 1988]

▶ Public sector employee:

- ▶ Art 135 Federal Constitution:
 - ▶ 'dismissal' under art 135(2), the civil servant is entitled to **a reasonable opportunity of being heard**
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Balance between **employee security of tenure** and **employer right to terminate/dismiss employees**

▶ Private sector employees:

- ▶ S13(3) IRA – termination and dismissal of employees are regarded as management prerogatives which includes:
 - ▶ the promotion by an employer;
 - ▶ the transfer by an employer of a workman within the organization of an employer's profession, business, trade or work, provided that such transfer does not entail a change to the detriment of a workman in regard to his terms of employment;
 - ▶ the employment by an employer of any person that he may appoint in the event of a vacancy arising in his establishment;
 - ▶ **the termination by an employer of the services of a workman by reason of redundancy or by reason of the reorganization of an employer's profession, business, trade or work or the criteria for such termination;**
 - ▶ **the dismissal and reinstatement of a workman by an employer;**
 - ▶ the assignment or allocation by an employer of duties or specific tasks to a workman that are consistent or compatible with the terms of his employment.
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▶ **S12 Employment Act 1955 – Termination with notice**

- ▶ Either party to a contract of service may at any time **give to the other party a written notice of his intention to terminate** such contract of service. But, only allowed for the following reasons:
 - ▶ the employer has ceased, or intends to cease to carry on the business
 - ▶ the employer has ceased or intends to cease to carry on the business in the place at which the employee was contracted to work
 - ▶ the requirements of that business for the employee to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish
 - ▶ the requirements of that business for the employee to carry out work of a particular kind **in the place** at which he was contracted to work have ceased or diminished or are expected to cease or diminish
 - ▶ the employee has refused to accept his transfer to any other place of employment, unless his contract of service requires him to accept such transfer
 - ▶ a change has occurred in the ownership of the business for the purpose of which an employee is employed or of a part of such business, regardless of whether the change occurs by virtue of a sale or other disposition or by operation of law,



▶ **Section 13, EA, 1955 - Termination of contract without notice**

- ▶ (1) 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
- ▶ (2) Either party to a contract of service may terminate such contract of service without notice in the event of any wilful breach by the other party of a condition of the contract of service.



▶ **Section 14 EA, 1955**

- ▶ An employer may, on the grounds of misconduct inconsistent with the fulfillment of the express or implied conditions of his service, after **due inquiry** dismiss without notice the employee

▶ **Section 15 EA, 1955**

- ▶ An employee shall be deemed to have broken his contract of service with the employer if he has been continuously absent from work for >2 consecutive working days without prior leave from his employer, unless he has a) a reasonable excuse for such absence and b) has informed or attempted to inform his employer of such excuse prior to or at the earliest opportunity during such absence
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▶ **Public sector employees:**

- ▶ Article 132 (2) of the Federal Constitution
 - ▶ **Who are public servants?**
 - (a) the armed forces; (b) the judicial and legal service; (c) the general public service of the Federation; (d) the police force; (f) the joint public services mentioned in Article 133; (g) the public service of each State; and (h) the education service.
 - ▶ Article 132 (2A) Every person who mentioned in (a), (b), (c), (d), (f) and (h) of holds office **during the pleasure of the Yang di-Pertuan Agong**, and, every person who is a member of the public service of a State holds office **during the pleasure of the Ruler or Yang di-Pertua Negeri**.
 - ▶ Article 135 FC
 - Public servants can be dismissed provided they are given the right to be heard.
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- ▶

Termination vs. Dismissal – Private Sector employees

- ▶ Is there any difference between termination of employment & dismissal for private sector employees?
 - ▶ Termination = termination of the employment contract either by employer for specific reasons such as retrenchment or by employee when he resigns (Ayadurai, 1998).
 - ▶ Dismissal = an act of an employer to terminate the contract of service unilaterally (Ahmad Mir & Kamal, 2003).
 - ▶ Dismissal is a form of termination of employment where an employee is dismissed due to misconduct, negligence or poor performance (*Great Wall Shopping Sdn. Bhd. and Gan Shang Eng Award 241 of 1988*).
 - ▶ Employee **termination or dismissal** must be with just cause and excuse and the common law principle of 'termination simpliciter' (i.e. a termination by contractual notice and for no reason) is not applicable in view of s 20 of the Industrial Relations Act.
 - ▶ The Federal Court, in the case of *Goon Kwee Phoy v J & P Coats [1981]2 MJL 129* held: '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.'
 - ▶ In *Dr. A. Dutt v Assunta Hospital [1981]1 MLJ 304* held: '... there is no material distinction between dismissal and termination. Either must be with just cause and excuse to be justifiable.....'
 - ▶ Therefore, for private sector employees they **cannot be terminated without just cause or excuse either summarily or with notice.**

Termination vs Dismissal – Public Sector Employees

- ▶ Made distinction between termination and dismissal:
 - ▶ **Appointment at pleasure** of the YDPA/State Ruler – government servant can be **terminated at pleasure** by giving notice or payment in lieu of notice to end the contract.[Doctrine of pleasure]
 - ▶ Termination of service differed from dismissal in that it did not ipso facto entail forfeiture of eligibility for a pension [*Mahan Singh v Govt of Malaysia, 1978 Appeal no 5 of 1976*].
 - ▶ Public servant can be terminated at any time at the pleasure of the Crown subject to restrictions under the FC
 - ▶ Contract employees employed by government can be terminated [*Mahan Singh v Govt of Malaysia, 1978 Appeal no 5 of 1976*].
 - ▶ Only if **dismissed** right to be heard should be given (Art 135 FC).
 - ▶ Dismissal carries a penal element (as a form of punishment).
 - ▶ Termination of employment in consequence of a recommendation of a Disciplinary Authority under reg. 30(11) constitutes "dismissal" for the purposes of Article 135(2) of the Constitution
 - ▶ Case: *Government of Malaysia v Lionel [1974] 1 MLJ 3 (PC)*.

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- ▶ Zakiah's case
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Termination of the contract of employment under the Malaysian Laws

- ▶ Death to employees
 - ▶ Resignation
 - ▶ Termination under S13(2), S12(1) EA 1955
 - ▶ Breach of contract under S15 EA
 - ▶ Misconduct
 - ▶ Poor performance
 - ▶ Termination at the end of probation period
 - ▶ Expiry of fixed term contract
 - ▶ Frustration of contract
 - ▶ Change of business ownership, closure of business
 - ▶ Insolvency
 - ▶ Redundancy & Retrenchment, VSS
 - ▶ Retirement
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Death of employees

- ▶ Death to employees – the employment will automatically terminate.
 - ▶ Employer still responsible to pay salary/benefit earned but not paid to the deceased personal representatives. [Kumpulan Guthrie Sdn Bhd v Sukumari Amma N Menon Award No. 33/73.]
 - ▶ If claiming unjust dismissal under S20 IRA and thereafter deceased – the legal representative or administrator of estate of the deceased cannot continue with the action because only remedy under S20 IRA is reinstatement. “Industrial Court cannot reinstate a dead man” (Netto, 2009; Thien Tham Sang v United States Army Medical Research Unit & Anor (1983) 2 MLJ 49.
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Termination under S 13 & 12 EA

- ▶ Termination under S 13(2) – willful breach of contract by employer. Employee entitled to terminate his employment and claim for termination benefits. (eg: failure to pay wages)
 - ▶ Termination under S 12 – give notice to terminate due to reasons stated in S12(3). Notice of termination must be given
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Termination under S15 EA

- ▶ Absent for more than 2 consecutive working days
 - ▶ Without valid reason
 - ▶ Fail to or attempt to inform employer



Termination for misconduct

- ▶ Definition of misconduct
 - ▶ “improper behavior, intentional wrong-doing or deliberate violation of a rule or standard of behavior...Any conduct inconsistent with the faithful discharged of his duties.” [Holiday Inn Kuching v Elizabeth CS Lee Award No. 255 of 1990]
 - ▶ An act or conduct that adversely affects employees duties towards the employer. The misconduct complained of must have some relation with employees duties or the work entrusted to him by the employer. Any breach of an express or implied duty on the part of an employee, unless it be of trifling nature would amount to a misconduct [Sykt. Kenderaan Kelantan Berhad v Rosidi bin Zakaria Award No 542/1995].



Misconduct

- ▶ Misconduct can be either minor or major – the classification affects the penalty chosen
- ▶ Gross misconduct – action that warrant summary dismissal or severe disciplinary action on one single incident.
 - ▶ A single act of misconduct may justify dismissal only where the misconduct is such that it goes to the root of the contractual relation of master and servant (Transport Workers Union v Kartar & Sundar Singh Omnibus Co. Ltd (Award 7 of 1970).
 - ▶ Minor misconduct – offences that only warrants verbal warning for single incident but progress to more severe disciplinary action and eventual dismissal for persistent offender. – Progressive Discipline



Acts treated as misconduct

- Disobedience
- Theft, fraud
- Willful damage or loss of employer's goods
- Habitual absence
- Habitual late attendance
- Drunkenness, fighting
- Sleeping during working hours
- Habitual negligence
- Smoking in prohibited areas
- Failure to follow safety rules
- Sexual Harassment
- Resorting to industrial action in contravention of the provisions of the Industrial Relation Act or other laws
- **For Public Servant – types of misconduct is stated in Article 4 – 18 of the general order.**



Sexual Harassment is a misconduct

- ▶ *Melewar Corporation Bhd lwn. Abu Osman (1994)2 ILR 807*
 - ▶ Sexual harassment is a misconduct
 - ▶ “An employer owes a contractual obligation to his employees, female or otherwise to ensure that he provides a safe and conducive working environment in which they can function. In the context of the problem of sexual harassment in the workplace, it cannot be emphasized strongly enough that the employer would be in breach of a fundamental and essential term of the contracts of employment existing between the employer and his employees if he failed to take steps to put a stop to acts of sexual harassment which had been duly brought to his attention.”
- ▶ Claim for constructive dismissal in *Jennico & Associates Sdn Bhd lwn. Lillian Theresa de Costa (1996)*, *Sitt Tat Bhd lwn. Flora Ganapragasam (2002) case*.



Misconduct – private in nature

- ▶ If legitimate interest of the employer is jeopardized or injured by the employees private conduct disciplinary action can be taken [Subramaniam & Sarathambal v Merlimau Pegoh Ltd Award 2 of 1975]
- ▶ For an employee to be justifiable dismissed on the ground of his private conduct, it has to be of exceptional gravity or be capable of damaging the employer’s business. [Transport Workers Union v Syarikat Pengangkutan Kemajuan Sri Perak Bhd Award 161 of 1981]



Example of cases

- ▶ Selling samsu to workers. Activities did not affect his performance. No suggestion that the productivity of various tapper has declined due to intoxication. However illegal sale of samsu did affect the legitimate interest of the estate – dismissal upheld. [Subramaniam & Sarathambal v Merlimau Pegoh Ltd Award 2 of 1975].
 - ▶ Employee committed khalwat – moral misconduct grave enough to ruin the image of the company [Transport Workers Union v Syarikat Pengangkutan Kemajuan Sri Perak Bhd Award 161 of 1981].
 - ▶ Sexual immorality by an employee in his private life is industrial misconduct depends on whether it will tarnish the employer’s reputation or detract from his good will [Permit Plywood Sdn Bhd v Kesatuan Pekeja-Pekerja Perakayuan Semenanjung Malaysia Award no 98/1993]
 - ▶ Intruding into the privacy of female toilets [Plant Rubber Sdn Bhd v Gih Chok Guan Award No. 30/1995]
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**Disciplinary action can be taken
against employees even in
circumstances when there is no
particular written or express rule
covering the situation**



Basis of argument

- ▶ Employees certain duties to his employer which arise from the term of the employment contract or are implicit in the employer-employee relationship.
 - ▶ Some duties may be expressed or implied
 - ▶ Any conduct which is inconsistent with the fulfillment of these duties or obligations is a misconduct as long as it is not trifling in nature.
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Domestic Inquiry (DI) – Is it necessary?

- ▶ Before a worker is dismissed, certain procedures are necessary
 - ▶ S14 EA require DI.
 - ▶ S20 IRA does not specifically mention DI.
 - ▶ Art 135 FC – require due hearing be given
 - ▶ Private Sector Employees
 - ▶ *Dreamland Case [1988]1 CLJ* – not conducting DI is not a fatal error. Only considered irregular for employee not under EA.
 - ▶ *Wong Yuen Hock Case [1995]3 CLJ* - not conducting DI is considered irregular for employee under the EA and otherwise. *Milan Auto case [1995]4 CLJ* also supported the decision.
 - ▶ *Said Dharmalingam case [1998]* – DI must be held for employees under EA.
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▶ **Currently still not conclusive at Industrial Court:**

- ▶ **Review of cases 1995 – 2001, 3 decisions:**
 - ▶ No DI is curable
 - ▶ Court reprimanded employer that did not conduct DI but still continue to hear the case on merit and decide whether the dismissal is with just cause and excuse.
 - ▶ Must hold DI before terminating employees under EA
- ▶ **Dunston Ayadurai (1998) see pg. 164 suggest –**
 - ▶ Employee under EA need DI
 - ▶ For other employee need DI where there is a contractual obligation to hold one.
 - ▶ Others not necessary to conduct DI – curable under the IR Court.



Recommended procedures

- ▶ An inquiry can be considered mandatory even where the worker is caught “red handed” committing the misconduct
- ▶ The effecting discipline - must be conducted according to the principle of natural justice.
- ▶ NJ is a great humanizing principle intended to invest law with fairness. Its aim is to secure justice and to prevent miscarriage of justice.



Principles of Natural Justice

- ▶ Two essential elements of NJ:
 - ▶ No man shall be judged in his own cause (*nemo debet esse iudex in propria causa*)
 - ▶ Rule against bias
 - ▶ The DI must be conducted by an unbiased party what he is accused
 - ▶ No one should be condemned unheard (*audiatur e altera pars*) & hear the other side (*audi alteram partem*)
 - ▶ The worker must be given time to reply to accusations/defend himself



Penalties for misconduct

- ▶ Oral warning
- ▶ Written warning
- ▶ Downgrading
- ▶ Suspension of not more than 2 weeks
- ▶ Dismissal



Penalties

The Employment Act [S.14]:

- ▶ “An employer may, on grounds of misconduct after **due inquiry**
 - ▶ Dismiss the worker without notice
 - ▶ Downgrade the employee
 - ▶ Impose any the lesser punishment as he deems just and fit and where a punishment of suspension without wages is imposed, it shall not exceed a period of two weeks.”



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- ▶ General Order No. 38 Public Officers (Conduct and Discipline) Regulations 1993 (the General Orders – the GO) as amended in 2000. Penalty that can be imposed.

- ▶ Warning
- ▶ Penalty
- ▶ Emolument right rescinded
- ▶ Defer salary movement
- ▶ Reduce salary
- ▶ Downgrade
- ▶ Dismissal



Termination for unsatisfactory performance

- ▶ Disciplinary action can also be taken when an employee's work performance is unsatisfactory – a major problem to the employer
- ▶ It is essential for managers to make an accurate diagnosis of the weakness in the worker
- ▶ Incompetency – incapability, inefficiency, unsatisfactory performance, poor performance.



Fair Procedure on the Grounds of Inefficiency

- ▶ An employer should be very slow to dismiss upon the ground that the employee is found to be unsatisfactory in his performance or incapable of performing the work which he is employed to do without **first telling the employee of the respects that he is failing to do his job** adequately, **warning him of the possibility or likelihood of dismissal** on this ground and **giving him an opportunity of improving his performance**. It is for the employer to find out from the employee why he is performing unsatisfactorily and to warn him that if he persists in doing so he may have to go [IE Project Sdn Bhd v Tan Lee Seng Award No. 56 of 1987].
- ▶ Employer must justify for unsatisfactory work performance



Termination for change in business ownership (S12(2) EA)/closure of business

- ▶ Need to issue notice to terminate to employee & pay termination benefits if employee refuse to change employment.
 - ▶ Cannot directly transfer the employee.
 - ▶ Employee has the right to choose his/her employer
- ▶ Closure of business acceptable reason for termination, but must be with notice and payment of termination benefits *Chemetic Mega Sdn Bhd case, S 13 EA*



Constructive Dismissal

- ▶ A form of indirect dismissal.
 - ▶ Employee leaves the employment due to employer's undesirable conduct
- ▶ Occurs when an employee's contract is breached by the employer
- ▶ For an employee to prove constructive dismissal, he must be able to show that:
 - ▶ The employer breached a fundamental term of his employment contract
 - ▶ The employee left his employment in direct response to that breach; and
 - ▶ The employee left in a timely manner



Remedy for unfair dismissal; Industrial Court awards on unfair dismissal

- ▶ Private Sector employee
 - ▶ S20 IRA
 - ▶ Reinstatement or compensation in lieu of reinstatement (1 month salary x years of service)
 - ▶ Back wages from the time of dismissal to the last date of hearing at the Court (max. of 2 yrs). Court will consider if he has engaged into new job and re-scale the back wages. (see the case of **Ravi Chanthran S. Sithambaran v Pelita Akademi Sdn Bhd [2007] I ILR 475 (Award No. 130 of 2007)**,
 - ▶ Termination benefits under the Employment Act 1955
 - ▶ Civil court – claim for damages
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- ▶ Public sector employee
 - ▶ Writ remedies and declaration at the High Court
 - ▶ Refer to high court to declare the dismissal as null and void
 - ▶ Seek to be reinstated to former position
 - ▶ Payment of back wages
 - ▶ Damages for breach of contract
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▶ In **Anwar Abdul Rahim v Bayer (M) Sdn Bhd [1998] 2 CLJ 197**. His Lordship Mahadev Shanker held as follows:

- ▶ It has been repeatedly held by our Courts that the proper approach in deciding whether constructive dismissal has taken place is not to ask oneself whether the employer's conduct was unfair or unreasonable (the unreasonableness test) but whether **the conduct of the employer was such that the employer was guilty of a breach going to the root of contract** or whether he has evinced an intention no longer to be bound by the contract”.



Cases of constructive dismissal (See Anantharaman (2003) & Balakrishnan (2008))

▶ **Non-payment, reduction of wages**

- ▶ *Forari Corporation's case* the unilateral decision of the company to reduce the claimant's salary from RM1,500 to RM750 per month constituted a significant breach going to the root of the contract of employment.
- ▶ *Kilang Beras Ban Eng Thye Sdn Bhd v Yacob bin Noor Mohamed & Anor [1998] 5 MLJ 195*, two of its employees terminated their services on the ground that the company failed to pay their salary by 12 April 1994 whereas in accordance with s 19 of the Employment Act 1955, it should have been given on 7 April 1994.



▶ **Change in work duties**

- ▶ *Jaya Jusco Stores Sdn Bhd v Ganesan a/l Rajoo*[1991] 1 ILR 321 The workman Ganesan was assigned to dishwashing and cleaning duties. He established, on the balance of probabilities, that the changes in his work duties were completely at variance with those that he was contracted to perform as a maintenance mechanic.
- ▶ *Hotel Malaya Sdn Bhd v Say Lip Nyen* case the action of the hotel in transferring its maintenance executive to the newly created job of car park executive,



▶ **Transfer of workman**

- ▶ A management prerogative but this prerogative power is not absolute.
- ▶ Employee can claim constructive dismissal when, the transfer results to a change in the conditions of service to the detriment of the claimant or the transfer is made for the purpose of harassing and victimizing the workman, or in transferring an employee the management is actuated by any indirect motive or any kind of mala fide
- ▶ Employees are also subject to transfer clause in their contract



▶ Breach of implied duties

▶ Being harassed, assaulted at work

- ▶ In *Aik Poh Rubber Industries Sdn Bhd v Goh Seng Hooi* case the act of company - humiliated, intimidated and assaulted the claimant, and therefore made him fear for his future safety was guilty of breach of an implied term which goes to the root of the contract of employment. This amounts to CD

▶ Company dereliction of duties – sexual harassment

- ▶ *Sitt Tatt Berhad v Flora Ganapragasam's* case – claimant was sexually harassed, complained to employer, but the employer failed in taking any remedial measures



Can public servant claim constructive dismissal?

▶ Yes, based on the following case:

▶ *Rosneli Bt. Kundor V Kelantan State Economic Development Corporation (Perbadanan Kemajuan Iktisad Negeri Kelantan)* Rayuan Sivil No. D-02-492-97

▶ Transferred to a different legal entity on the basis of the following clause in letter of appointment:

“2(f) Tuan/puan boleh ditugaskan berkhidmat di mana-mana tempat yang diarahkan oleh Perbadanan.”

Considered CD because she was transferred to a different entity without her consent.

