

**UNFAIR DISMISSAL OR UNLAWFUL TERMINATION: A REVIEW OF SECTION 20,
INDUSTRIAL RELATION ACT 1967**

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ABSTRACT

The concept of “unfair dismissal” or “unlawful termination” is not new in Malaysia. Over the years, there has been a heightened awareness about employee rights in Malaysia. Nevertheless, there are many misconceptions that have not been corrected. The issues of wrongful dismissal still had been discussed everyday. We can see there are a lot of cases concerning the issue of wrongful dismissal in Malaysia and claim for wrongful dismissal has increased steadily. Why all of this still happened? Did the authority effectively prevent an employer from dismissing an employee without good cause? What are the procedures they follow? Did the compensation given to them was enough for everything that they suffered? This paper seeks to analyse the procedures taken for reinstatement by the authority in order to develop a summary of these workers and also this paper discuss about the compensation available for the workers.

Keywords : Unfair dismissal, unlawful termination, termination of a contract of employment

***PEMECATAN SECARA TIDAK ADIL ATAU PENAMATAN MENYALAHU UNDANG-
UNDANG: ANALISA TERHADAP SEKSYEN 20, AKTA PERHUBUNGAN PERUSAHAAN
1967***

ABSTRAK

Konsep "pemecatan tidak adil" atau "penamatan menyalahi undang-undang" bukanlah sesuatu yang baru di Malaysia. Selama bertahun-tahun, terdapat kesedaran yang tinggi tentang hak pekerja di Malaysia. Walau bagaimanapun, terdapat banyak salahfaham dan ketidakfahaman yang masih belum diperjelaskan. Isu pemecatan yang salah masih dibincangkan setiap hari. Kita dapat melihat terdapat banyak kes mengenai isu pemecatan yang salah di Malaysia dan tuntutan untuk pemecatan salah telah meningkat dengan serius. Kenapakah semua ini masih berlaku? Adakah pihak yang berwajib telah berjaya menghalang majikan daripada memecat pekerja tanpa sebab yang baik? Adakah prosedur yang mereka ikuti? Adakah pampasan yang diberikan kepada mereka sudah cukup untuk semua alami oleh pekerja? Artikel ini bertujuan untuk menganalisis prosedur yang digunapakai iaitu jaminan untuk diambil bekerja semula oleh pihak majikan dan juga artikel ini turut membincangkan tentang peruntukan pampasan kepada pekerja.

Kata Kunci: Pemecatan yang tidak adil, penamatan yang tidak sah, penamatan kontrak pekerjaan

INTRODUCTION

Unfair dismissal is defined as termination of a contract of employment for unfair or inadmissible reasons. Unfair dismissal may arise in any number of circumstances such as the employee suffered from discrimination which includes inappropriate or unfair treatment due to an employees race, sex, religious belief, disability or sexuality. Employees are entitled by law to be members of a Trade Union and to take part in union activities and employees are also entitled to refuse to belong to a union. If the employee is dismissed because they did, or did not join a union then the dismissal may be unfair. Another situation for example the employer terminates the services of the employee, the employees had been forced to terminate their services and the employees themselves want to terminate the service of employment due to certain reasons for example constructive dismissal.

When challenged in a court, the employer must establish that the dismissal was based on a substantial reason such as gross misconduct, lack of qualification, incapability to perform assigned duties, or redundancy. In such cases, the courts usually take the employee's statutory rights into consideration. There are many instances where employers approached the solicitor for advice when things have gone terribly wrong in their firing or termination process of an employee and that they want advice on how to defend an unfair dismissal claim case in the industrial court. In many instances employers lost their case because they followed inadequate procedures. Where the cause of dismissal was misconduct, the Court expected the employer to carry out a domestic inquiry run according to the principles of natural justice. Indeed, this requirement is mandatory for employees covered by the Employment Act, 1955. A great number of employers have tried to argue in the Court that an inquiry is not always necessary and while the Court has contradicted itself on occasions, the general thinking of the Court is that a fair hearing is an essential requirement for a workman to be properly dismissed.

Statistics provided by the Ministry of Human Resources showed that 384 cases were brought to court, of which 336 cases were related to unfair dismissal. In terms of awards, and up to March this year, the sum of RM1,903,359 was awarded for back wages, RM737,159 for compensation in lieu of reinstatement, and together with other awards, the total was RM5,473,095 (Industrial Court – statistic 2016). This gives the impression that the employers underestimated the importance of industrial relations, employment and labour laws.

In 2016, cases brought to the Industrial Court were 1,340, out of which 1,226 related to unfair dismissals. This figure of 1,340 is an average of approximately 112 new cases per month. Additionally, in 2016, 994 cases were settled by the Industrial Court, out of which 869 related to unfair dismissal. In terms of awards for 2016, a sum of RM9,524,058 was awarded as back wages and RM2,849,508 as compensation in lieu of reinstatement and together with awards, the total was RM21,841,008 (quoted by The Honorable Dato' Umi Kalthum binti Abdul Majid, Judge Court of Appeal on 13th September 2017, the 13th MECA Industrial Relations Convention at the Berjaya Times Square Hotel, Kuala Lumpur).

UNLAWFUL TERMINATION/DISMISSAL OF THE EMPLOYEES

The relevant legislation covering unfair dismissal is the Industrial Relations Act of 1967 (amended 1989) (IRA). When an employee considered that he or she had been dismissed without just cause or excuse by their employer, they could file a representation under Section 20 of the Industrial Relations Act 1967 at the nearest Industrial Relations Department. This department has the duty of reconciling any differences between the employer and employee with the aim to arrive at a settlement between the parties such that the matter ends at this stage without the need to proceed further.

The main provision is section 20(1) of IRA.

“Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.”

It should be noted, referring to IRA 1967 stated the meaning of “workman” is:

“...any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute.

In brief Section 20, IRA 1967 explaining the words workman covering anybody includes apprentices that had been employed by the employer under contract of employment to work for the purpose of getting salary or income.

The procedures for application

The procedures need to be followed by the employee in order to file an action against the employer are the employee must be a “workman” which was defined under IRA 1967. In the case of *Inchape Malaysia Holdings Bhd v RB Gray*, [1985] 2 MLJ 297, the decision of the court stated that the director of the company is not considered as “workman” under IRA 1967. The judge further stated that to fall under the meaning of “workman” the person needs to be taken as an employee and the most important thing is what the reason and function the person had been employed. In this case it clearly shows that the Respondent as the Director of the Company has a special position in the company and also has different responsibilities toward the operation of the company. As a Director of the company, the Respondent acted on behalf of the company, therefore he can employ the employees, terminate the services of the employees and can also be a representative to sign any collective contract with the trade unions.

The employee need to file representations and filed it's within sixty days of the dismissal by written to the Director General. The failure to follow such requirement the court will not have any jurisdiction to hear the case. If the court continues to hear the case, the decision given by the court will be render unlawful and can be set aside.

In *Fung Keong Rubber v Lee Eng Kiat*, [1981] 1 MLJ 238, where the Respondent had been dismissed on 7th November 1973 because he had been suspected involving in the loss of the goods in the factory. On Jun 1976, he had been acquitted and discharge against the offences and on July, the Respondent filed an application for representation to reinstate him back to the former employment and the Appellant reject the Respondent application due the failure of the Respondent to file the application within the stipulated time provided.

Further Gopal Sri Ram JCA observed in the case of *Ang Beng Teik v Pan Global Textile Bhd., Penang*, [1996] 3 MLJ 137, where the appellant, a general manager of the respondents company was suspended on grounds of misconduct on 16 January 1989. Out of the 11 charges made against him 8 charges were established. The respondent decided to demote him. However the appellant did not agree with the demotion and did not return to work. The respondent on the 6th of June, 1989 terminated the appellant's services on the ground that he was no longer interested in working. On 20 July 1989 the appellant made representation to the Director-General under section 20 of the said Act, alleging that he was dismissed without just cause and excuse.

One of the issues before the Court of Appeal was whether the representation was made within the limitation period? The Industrial Court held in the affirmative that the representation was presented before the Director-General within the limitation period. However, the High Court held otherwise. The Court of Appeal upheld the decision by the Industrial Court stating that:

On the facts of this case, it is beyond question that the 60 – day time frame did not commence from the date of the demotion-which was never challenged-but from the date of the impugned termination. It follows that the representations were made within the prescribed time limit. The Industrial Court was accordingly not without jurisdiction to entertain the reference...

What constitute “dismissed without just cause and excuses”?

When the representation had been filed by the employees against the employer, the burden to proof whether the dismissal was lawful or not was shifted to the employer. If the employer successfully give the valid and reasonable reason, therefore dismissal consider lawful and with good cause. There is no set definition for what amounts to just cause and excuse in the statute because what amounts to a just cause differs from situation to situation. It could range from employee misconduct such as thievery, fighting in the office and continuous tardiness.

It could also cover situations which involve retrenchment. The key takeaway point from this is that regardless of whether you had acted in a way that prompted a dismissal or not, the employer must give a reason for dismissal. In order to determine whether such dismissal valid or not, the test is very subjective. If the employees thinks that he/she had been terminated

wrongfully or without good cause, therefore he/she can use Section 20 (1) IRA to file an action against the employers.

Raja Azlan Shah JCA in the case of *Goon Kwee Phoy v J & P Coats (M) Bhd*, [1981]2 MLJ 129, stated that:-

‘...Section 20 (1) is, in our view deliberately, couched in subjective terms. Where a non-union workman considers that his dismissal is without just cause or excuses, he may make representations for his reinstatement. It is not whether he had been dismissed without just cause or excuses; but it is how he considers he had been treated by his employer that constitutes the test for his action.’

This section is also applicable to the employees who had been constructively dismissed by their employers.

According to Lord Denning MR in the case of *Western Excavation (ECC) Ltd v Sharp*, [1978]ICR 221 stated that :

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct.”

The judge in this case decided that the employer must prove that a root part of your contract was breached, so the decision to leave the company was due to this breach than for any other reasons. Hence, the test to determine the termination is lawful is not the test of reasonableness but contract test.

Section 20(1) clearly requires that a workman must at all time seek to be reinstated before the Industrial Court can exercise jurisdiction. However in *Holiday Inn, Kuching v. Lee Chai Siok Elizabeth* [1992] 1 MLJ 230, the respondent in her representations initially wanted reinstatement which is in accordance with s. 20(1) of the Industrial Relation Act but subsequently in the hearing before the Industrial Court, she changed her stand and instead asked for damages in lieu of reinstatement. In this case, the respondent clearly did not want her job back as she is now gainfully employed by Hilton, Kuching.

Haidar J ruled that under such circumstances the Industrial Court no longer had jurisdiction to adjudicate the matter. His Honour noted that the respondent clearly could not come within the provision of s. 20(1) and (3) of the Industrial Relation Act as the legislature intended that recourse to the Industrial Court only in respect of reinstatement and once reinstatement is no longer applied for, the Industrial Court ceases to have jurisdiction. Thus there is no basis for awarding damages or compensation in lieu of reinstatement. From this case, it is clear that the claimant must seek reinstatement in his/her prayers and must at all time maintain that he/she request reinstatement, before the Industrial Court can deal with the matter.

However, the Kuala Lumpur Industrial Court (2016) in the case of *Sivabalan a/l Poobalasingam v Kuwait Finance House (Malaysia) Berhad*; [Industrial Court Case No. 7/4-459/13, Award No.132 of 2016 dated 12th February 2016] has recently granted an award in favour of the Claimant, including punitive compensation in lieu of reinstatement, back wages and also his benefit of a higher than usual Employee Provident Fund (“EPF”) contribution by the Company. In this case, Sivabalan a/l Poobalasingam (the “Claimant”) was dismissed from employment on the basis that his position had been made redundant. The Claimant was the only employee in the Company who was dismissed at that material point in time. Upon termination of the Claimant’s employment, another individual was then appointed to hold the role of his position.

The Court had to decide whether the Claimant’s termination was with just cause or excuse, specifically:

- (i) Whether the redundancy situation and consequent retrenchment was a colorable exercise by the Company to get rid of the Claimant; and
- (ii) Whether the managerial power to reduce costs by dismissing the Claimant by reason of redundancy was exercised bona fide or for collateral reasons as decided by the Company.

Deciding in favour of the Claimant, the Court found that the Company’s dismissal of the Claimant by reason of redundancy was irresponsible and clearly showed bad faith on the part of the Company. The alleged redundancy of the Claimant’s position was a flimsy excuse concocted to replace the Claimant with other preferred candidate. There was unrebutted evidence that the Claimant’s position remained, despite the fact the Company had claimed the position was itself redundant. Furthermore, no effort was made to provide the Claimant with alternative employment within the Company. In the circumstances, the Court awarded two months’ salary for each completed year of service as punitive compensation in lieu of reinstatement, back wages and also granted the Claimant’s benefit of a higher than usual EPF contribution by the Company.

Whilst it is undoubtedly within a company’s prerogative to organise its business in the manner it thinks best, this case stresses the importance placed on an employer’s duty to act and make decisions in good faith. An employer whose decision is tainted with bad faith may find themselves having to contend with ‘punishment’ in the form of punitive compensation in favour of the employee. This case should serve as a reminder to employers to ensure that the reason for terminating an employment arrangement can withstand scrutiny by the Industrial Court and that the process is undertaken in good faith. If the reason for termination is that the employee's role is redundant, sufficient evidence should be kept; redundancy should not be advanced as a reason for a termination if the real reason lies elsewhere.

In *Segaran Venoo v PPG Coatings (Malaysia) Sdn Bhd*; [2012] 3 MELR 617, the Industrial Court found in favour of the Company and dismissed the Claimant’s claim. The Claimant was employed as a maintenance worker with PPG. In November 2008, pursuant to a restructuring of the PPG group of companies in the region, the Claimant’s position was made redundant and he was retrenched. Retrenchment benefits of approximately 54 months of the Claimant’s last drawn salary were paid to the Claimant, in recognition of his long service with

the Company. The Claimant was dissatisfied with the retrenchment benefits provided and claimed unfair dismissal. The Claimant alleged, among other things, that the Company had failed to comply with a Collective Agreement entered into between the Company and the union, and that there was a shortfall of retrenchment benefits in the sum of RM85,240.08.

The court ruled that the Company had successfully proven the existence of a redundancy situation as there was substantive evidence adduced to show that the retrenchment was made pursuant to a restructuring of the PPG Group in order to reduce costs due to the Group's poor financial performance at the time. The decision to carry out the retrenchment exercise is within the Company's managerial right and prerogative, taking into account the severe difficulties faced by the Company at the time. This case once again establishes the importance for Companies to have complete and proper documentation when undergoing a termination exercise, especially large scale retrenchments or restructuring.

This case also reaffirms the managerial prerogative of companies to reorganise and restructure their business to achieve commercial efficacy. That being said, employers must be mindful that such prerogative should not be exercised carelessly and without regard to the principles of natural justice. If the Company is able to prove that there were legitimate grounds for the retrenchment, they can be assured in the fact that the Industrial Court will dismiss attempts by former employees to extract further monetary payment from their former employers.

CONCILIATION PROCESS

Next, after that all the procedures had been followed, the officer in charge the case need to set the date for conciliation. Conciliation is the process in order to settle the dispute between employees and employer whether in industrial matters or in appeal cases to reinstate the former employment. It is the process to gather all of the parties which one it's involving third parties to helps to settle the disputes. The purpose of conciliation is to obtain an amicable settlement of a dispute through the resolution of issues with the help of the conciliator (mediator i.e. Industrial Relations Officer). The conciliator is not empowered to carry out an inquiry or use any technical rules. The method of conciliation is voluntarily be done among the disputes parties. The employee and the employer will be called by a letter to present the conciliation process on the date, time and places that had been decided. However, when the Director-General is satisfied that there is no likelihood of the representations being settled, he shall notify the Minister accordingly.

According to National Human Resource Centre (NHRC) Malaysia, conciliation is carried out by the Industrial Relations Department either if an employee who has been dismissed and has made a representation for reinstatement under Section 20 of the Industrial Relations Act 1967 or if a case of victimisation under Section 8 of the Industrial Relations Act 1967 or a trade dispute has been referred to the department under Section 18 of the Industrial Relations Act 1967.

On receiving such notification, the Minister of Human Resources and Manpower may, if he thinks fit, refer the representations to the Industrial Court for an award. The representative that been allowed to represent the employer are the employer themselves, the owner of the company, any officers that had been delegates the power to represent or officer from any Union

that had been registered in Malaysia for example Malaysian Employers Federation. While for the employees, the representative will be either themselves or any officers from the any Union that been registered in Malaysia for example Malaysian Trade Union Congress. The employee and the employer cannot be representing by the lawyer, legal adviser and negotiator. Industrial Relation Department will helps both of the parties to find out the resolution where have been laid down under Section 20 (2) IRA 1967, which stated:

“Upon receipt of the representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at;...”

While in Section 18 (2) IRA 1967, stated as follows:

“The Director General shall consider any dispute reported to him under subsection (1) and take such steps as may be necessary or expedient for promoting an expeditious settlement thereof.”

Even though it does not stated clearly about the steps to be taken in order to resolve the problem to find out the solution for the disputes, but in practice conciliation is one way to be done in order to settle the disputes among the parties. The conciliator who being a thirds party between these parties doesn't have any power to decide or make judgments. When the employees and the employer together with their representative came in the process of conciliation, the Conciliator will explain the process of the conciliation. The conciliator will also give their opinion and advise by looking into the fact of the case, the relevant laws, judgments from the Industrial Relation Courts or from the High Court and also based on the experience that their face before. When both of the parties agreed to the settlement, the memorandum will be signed by both parties testified by the Conciliator. If the party does not agree with the settlement provided, the Conciliator will prepare the report to the Minister of Human Resources for their decisions. If the Ministry in their opinion stated that the case had merit to proceed for trial, the case will be referred to the Industrial Courts and the case will be closed.

REMEDIES

As referred to the above discussion, it should be notice that the major remedies available under Section 20 (1) of the IRA were application to reinstate to the former employment which put back the employees to his/her position with the same rights and priority. Under Section 2 of the IRA interpreted awards as the decision given by the court. Award can be granted to the Applicant rather than to give reinstatement, when the conciliation process or if reinstatement have been allowed it's would not helps both parties in order to harmonize the industry especially in the capacities that involve trust and fidelity.

CONCLUSION

Despite the various preventive steps being taken by all parties, unlawful dismissal could not be prevented, but it may be reduced to a certain extent. This could be further reduced by the efforts and programs in educating the employees about the right procedures that they should followed

and the remedies available for them. The procedures process carried out by the Department of Industrial Relation is relatively hassle-free but the arbitration proceedings both delay and complicate the attempt of the worker to either be reinstated or get compensation for the loss of employment.

Based on the law provide under Section 20, there were a guarantee given to the employees, that the employer would not simply terminate the services of the employees without good reason and just cause. Even, the law given the rights to the employer to terminate the contract of their employees services but its need to followed the principle laid down to ensure justice had been given to the employees.

The issues arise, when the employees filed an action against the employer he/she need to state in their application must seek for reinstatement and that once this remedy is no longer seek, the Industrial Court will seize to have jurisdiction to adjudicate the grievance. The trial within the industrial take several of time which at the means time the applicants might already be gainfully employed elsewhere. Besides that, the order for reinstatement is not practical and can create more problems. This is because it is impossible when the employees have been unlawful terminated and later on filed an action against the employer work back at the same office. It will cause hardship for the employees themselves and difficult to create the harmonize industries. Therefore, needs a reformation towards Industrial Relation Act which the employees can straight away claim for any damages rather than applied for reinstatement which it is a waste of time. The amendment of the Act need to be implementing in order to put another clause for remedies available to applicant or the claimants. When the conciliation process was not successfully, the next steps is to refer the application to the minister when the minister thinks it fit whether to refer the matter to the Industrial Court or not.

The process refer to the minister also need to be look comprehensively whether it is necessary or not. Nowadays, the applicant or claimants seek the remedies but due to certain delay in the process of claiming the right of the applicant have be denied impliedly and indirectly. The delay can cause hardship and difficulties to the applicant in order to support their self, family and other when he/she has been unlawfully dismissed without good cause. The authority need to take serious consideration in order to made a necessary changes and amendment in the Act.

As a conclusion, section 20 Of the IRA 1967, provides protection to an employee from unfair dismissal however an employer is allowed to terminate employment if it is carried out in a fair and reasonable manner. The termination of employment can be lawful if the employee cannot properly carry out their job or if the employee is guilty of serious misconduct or if they are unable to work for any reason. Dismissal can be fair if it is by reason of redundancy however there are detailed procedures which must be followed by an employer if the termination is not to be deemed unfair dismissal. It is almost always worth considering the redundancy process as there are many hurdles where an employer can fall thereby giving an employee the opportunity to claim compensation always providing that the employee has been employed by that employer for at least two years.

In order to establish that the termination of employment is fair an employer must be shown to have acted in a reasonable manner. An employer is required to fully investigate the situation leading up to the termination and to be able to fully justify the dismissal failing which the employee may have a valid claim for compensation. It is due to the reason when employees behave in unreasonable manner and if his conduct is unacceptable including theft, dishonesty, corruption, drug abuse, drunkenness, abusive behaviour, unjustified absences, then an employer may dismiss the employee without fear of retribution from Tribunal. Another reason if an employee is unable to do the job in a satisfactory manner then the employer is entitled to replace him with some who can do the job.

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