PRE-DISMISSAL RIGHT TO BE HEARD IN THE PRIVATE SECTOR IN MALAYSIA: LESSONS FROM ENGLAND AND INDIA

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ABSTRACT

The right to livelihood is a fundamental right guaranteed by the Federal Constitution. This right is reflected in the employment legislations including the pre-dismissal right to be heard on the grounds of misconduct. Unfortunately, in practice, issues on whether the right is mandatory; whether it is curable or whether it is applicable to all private sector employees are still being debated and the above forms the theme of this paper.

Keywords: Pre-Dismissal, Right To Be Heard, Employees, Mandatory.

INTRODUCTION

It is pertinent to ensure that there is a cordial and harmonious relationship between an employer and employee for an organisation to progress. The employee has a legitimate expectation to expect to be gainfully employed and retain his/her job for as long as he/she can carry his/her duty or until retirement (Ali, 2010). Terminating the employment prematurely would result in social and economic consequences on both the parties, more so on the individual (Kamal and Ahmad, 2008). Whenever an employee/workman is dismissed for misconduct, it carries with it a social stigma, more so if it is criminal in nature (Ayadurai, 1998). Whilst the management has the prerogative of the right to *"hire and fire*", however, labour laws have been enacted to safeguard the employee/workman against unfair dismissals. In light of this, the courts have held that a due enquiry must be conducted out to ascertain the gravity of the offence and the punishment undertaken must be proportionate with the offence.

Definition of Employees

The Malaysian employees are divided into public and private sectors, with different set of legislations and rules applicable to both sectors. This paper only discusses the private sector employees which can be further divided into three, those who are covered by the Employment Act 1955 (Act 265) (EA 1955) which is applicable to Peninsular Malaysia; Sabah Labour Ordinance (Chap 67) (Sabah Ordinance) which is applicable to State of Sabah; and Sarawak Labour Ordinance (Chap 76) (Sarawak Ordinance) which is applicable to State of Sarawak based on their wages not exceeding RM2,000 per month or nature of their work, and those who are not within the application of the said legislations. For the latter, they have to rely on their individual contract as the source of their terms and conditions of employment.

The Legal Framework on the Pre-Dismissal Right to be heard in Malaysia

In Malaysia, the employment legislations which comprises of the EA 1955, Sabah Ordinance and Sarawak Ordinance provides the mandatory requirement for a pre-dismissal right to be heard prior to dismissal for misconduct. The provisions on this right are in pari materia with each other; as such references are made throughout this discussion to the provision in EA 1955.

Section 14(1) of the EA 1955 provides that:

> *"An employer, may on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of service, after due inquiry-*
>
> 1. *Dismiss without notice the employee; or*
> 2. *Down-grade the employee; or*
> 3. *Impose any other 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."*

Even though the said provision clearly envisages the mandatory requirement to a pre-dismissal right to be heard prior to dismissal for misconduct, there have been a lot of concerns regarding this right due to the following two conflicting Federal Court decisions. The first one is Dreamland Corporation (M) Sdn. Bhd. v Choong Chin Sooi (1 MLJ 111) in which the court had held that the failure of the employer to conduct an enquiry prior to dismissal was not fatal to the employer's case. The court further stated that although there was a breach of natural justice, it can be cured by conducting a hearing before the Industrial Court. However, if the employee does not challenge the decision in the Industrial Court, the dismissal remains status quo. The second case is Said Dharmalingam bin Abdullah v Malayan Breweries (1 MLJ 352). Here the Court held that the failure of the employer to conduct a pre-dismissal inquiry was fatal and the curable principle may not be invoked by the Industrial Court. The Federal Court made a distinction between the above two cases by stating that the employee in Said's case fell under the ambit of the EA 1955 whereby prior to taking any action against the employee the requirement of a due enquiry is mandated by s 14(1) of the said Act. In the light of this interpretation by the Federal Court, it is clear that the employees covered by the EA1955 are protected but not those who all outside the ambit of the Act. Perhaps this led to the increase in unfair dismissal cases due to misconduct as shown in Table 1 below. Mandating pre-dismissal right to be heard for all the employees regardless of wages or nature of work may be away to reduce the number of cases filed in the Industrial Court.

Table 1
ANALYSIS OF INDUSTRIAL COURT'S AWARDS FOR DISMISSAL CASES (2011-2019)

	Types of Cases	2011	2012	2013	2014	2015	2016	2017	2018	2019
1.	Constructive	91	96	86	87	81	51	77	192	226
2.	Misconduct	639	540	567	457	477	291	416	877	807
3.	Retrenchment	90	62	91	59	57	102	123	320	336
4.	Others	640	735	818	545	527	665	839	1546	1480

(Source: Industrial Court Malaysia, Kuala Lumpur)

An employee, irrespective of his wages or nature of work, who was dismissed may lodged a written complaint with the Director-General for Industrial Relations under section 20(1) of the Industrial Relations Act 1967 (the IRA 1967). At the hearing by the Industrial Court, some decisions held that the failure to adhere to the mandatory requirement of "due enquiry" would render the dismissal to be without just cause or excuse under s 20(1) of the IRA 1967 whist other decisions which held to the contrary, that is, a failure to hold a due enquiry was not fatal and may be cured by the Industrial Court in the de novo hearing before it. In Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd (2 MLJ 753) Mohd Azmi FCJ stated, inter alia that the Industrial Court, being an independent quasi-judicial statutory tribunal, is clothed with the jurisdiction to cure a breach of natural justice (Kumar, 2005). The Federal Court went on to state that this curing principle is applicable to all cases, regardless of whether or not the claimant falls within the coverage of the EA 1955. Additionally, the Federal Court stated that the statutory requirement of "*due inquiry*" prior to dismissal under s 14(1) of the EA1955 does not absolve the Industrial Court from discharging the duty to inquire into the question of "*just cause or excuse*" provided in s 20 of the IRA 1967. His Lordship Mohd Azmi FCJ in the case of Milan Auto Sdn Bhd v Wong Seh Yen (3 MLJ 537) held that the function of the Industrial Court in dismissal cases on a reference under s 20 of the IRA 1967 is two-fold, namely:

> *"First, to determine whether the misconduct complained of by the employer has been established, and secondly whether the proven misconduct constitutes just cause or excuse for the dismissal. Thus, the two questions which the court has to ask itself are:*
>
> 1. *Was there a dismissal;*
> 2. *If the answer to (i) is affirmative, was the dismissal with or without just cause or excuse.*

The Federal Court did not explain the reason for stating so. The Federal Court simply said that the requirement of "*due inquiry*" prior to dismissal in s 14(1) EA 1955 was not mandatory. Additionally, the Court stated that even if it was a defective inquiry, it was "*curable*" whereby the Industrial Court could still go on to hear the matter and uphold the same if there were proper grounds to do so.

Hence, the conflicting decisions by the Federal Court on the pre-dismissal right to be heard had cause confusions pertaining to the mandatory requirement of holding a domestic enquiry prior to dismissal of an employee for misconduct. The curable principle in Dreamland was considered to be undesirable and when seen in the context of Milan Auto, it becomes even more apparent that whether or not employees fell under the ambit of the EA 1955, they do not have the right to a pre-dismissal enquiry. Due to the conflicting decisions in Milan Auto and Said Dharmalingam pertaining to the mandatory effect of the right to be heard under s 14 (1) EA 1955, there was a disarray at the lower courts. With the above approach taken by the courts, employers do not have any legal obligation to conduct a due enquiry as envisaged in s 14(1) EA 1955 before dismissing employees for misconduct.

The mere fact that there is a provision for due enquiry in s 14(1) EA 1955, means that Parliament intended that a mandatory requirement that a pre-dismissal enquiry prior to a dismissal of an employee. If this was not the case, it would imply employers had unfettered rights to dispose of any inconvenient person at any time on the whims and fancies of the employer. Additionally, this would also imply that the employee is at mercy of the employer and this sort of action is in fact, in breach of the rules of natural justice. Lord Reid observed in Ridge v Baldwin (AC 40), that there must be something against a man to warrant his dismissal,

"… I find an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation"

The House of Lords in W. Devis & Sons Ltd. v Atkins (AC 931) further emphasised that the statutory test of fairness is concerned with the conduct of the employer in treating those reasons as sufficient grounds for the dismissal. Therefore, any facts which suffice after the dismissal of the employee and which may not have any bearing upon the employer's decision to inflict the punishment of dismissal become irrelevant to the question of whether the employer had acted reasonably at the time of dismissal. There may even be occasions where this rectifying process never takes place at all.

Table 2 below shows the statistics of reinstatement claims which were not referred to the Industrial Court.

Table 2
SETTLEMENT OF CLAIMS FOR REINSTATEMENT DEALT, 2014-2018 AND 2019

Year / Methods	2014	2015	2016	2017	2018	2019
Resolved through conciliation	1769	2791	2846	1977	2545	3227
Referred to Industrial Court	1001	2768	1388	1654	2395	2234
Not referred to Industrial Court	357	370	393	3625	256	294
Total	3127	5929	4627	7256	5196	5755

(Source: Industrial Court Malaysia, Kuala Lumpur)

As evidenced by statistics above, it may be contended that although the Industrial Court should provide a better and unbiased forum by rectifying any failure to hold a domestic enquiry, it is certainly of no use to the employee if his case is not referred to the Industrial Court for adjudication.

The Legal Framework on the Pre-Dismissal Right to be heard in England

In the United Kingdom, s 94 of The Employments Rights Act 1996 prevents the employer from unfairly dismissing the employee. An employer must specify the reason that resulted in the employee's dismissal. Due to the complexity of dismissal cases, the UK Government Crown Body which is known as the Advisory, Conciliation and Arbitration Service (ACAS), created a Code of Practice (ACAS Code of Practice) on disciplinary and grievance procedures for handling workplace employment related issues. There are clear parameters set for both employers and employees in the ACAS Code of Practice that must be followed when handling of workplace issues. Although the ACAS Code of Practice offer guidelines which are, in them, not legally binding on employees or employees, these guidelines play an important role within Employment Tribunals (ET), in that, a tribunal will consider whether the employer has followed the ACAS Code of Practice. Any compensation that is awarded by the ET may be adjusted by up to 25% if the ET is of the view that employer has unreasonably failed to comply

with the guidelines in the Code of Practice. The power of ET to adjust the amount of compensation indirectly mandated the pre-dismissal right to be heard for the employees.

The Legal Framework on the Pre-Dismissal Right to be heard in India

The primary sources of law and regulations in relation to employment relationships in India are the Constitution of India, labour statutes, judicial, collective agreements, individual agreements, and the judicial precedence. In India, labour and employment regulations are regulated at both the federal and the state levels. The main federal statutes which regulate employment termination are the Industrial Employment (Standing Orders) Act 1946 and Industrial Disputes Act (IDA) 1947, as amended. The IDA 1947 provides the mechanism for the amicable resolution of disputes and promoting a harmonious relationship between the employers and the workers. The Model Standing Orders under the IESOA 1946 require an employer to spell out the process by which the suspension, dismissal for misconduct and the termination of employment of the employer's workmen shall take place. The Second Schedule to the IDA 1947 in turn provides for matters relating to the propriety or legality of orders which will be undertaken by the employer under the Standing Orders and matters relating to discharge or dismissal of workmen. While section 11 of IDA 1947 considerably increased the jurisdiction of the Tribunal to grant the appropriate relief in cases of dismissal or discharge of workmen where the employer had failed to do so. A systematic code of procedure for the employer to comply with when the said employer intends to commence an action against his workman was introduced.

In the private sector, the requirement for holding an enquiry is set out in the standing orders under the Annexure to the Industrial Employment (Standing Orders) Central Rules 1946 IESOA 1946 which has legal effect and constitute the statutory terms of employment. The IESOA 1946 requires that employers of certain industrial establishments to clearly make provisions for the conditions of service by issuing standing orders which have been duly certified by the state labour commissioner. These certified standing orders (CSO) must define the acts and omissions which constitute misconduct. Any establishment not covered by IESOA 1946 may formulate their own service rules or policies and this has the same effect as the CSO. This in turn will permit the employer to institute disciplinary action against the employees if the employee's conduct falls short of the standards prescribed by the CSO or service rules.

Under the IDA 1947, court awards or court settlements may also provide for the procedure for departmental enquiry and by virtue of statutory provisions these are also binding (Ghaiye, 1998). However if there is no procedure for enquiry laid down by these awards or settlements, employers are expected to adhere to a reasonable procedure, failing which, their action may be liable to be set aside by the courts or industrial tribunal. The authorities who decide on disputes between parties or punishment that needs to be inflicted where there are no procedures laid down in the law, have to comply with the principles of natural justice. The view adopted by the Indian Courts is that any order made by depriving an employee of natural justice is void and a nullity (Jain, 2011).

Lessons for Malaysia

When a comparison is made on the scope of procedural fairness right to be heard in Malaysia with that of England and India, it is evident that the Malaysian scope falls below the

procedural standard. Both England and India have more comprehensive statutory procedures as compared to that of Malaysia. In England, the ACAS Code of Practice provides for clear parameters for both employers and employees alike which must be adhered to when handling issues at the workplace. Even though the ACAS Code of Practice is a mere guideline and is not legally binding on employers or employees, the ET's are legally required to take the provisions in the ACAS Code of Practice when deciding any relevant claims.

In India, the procedure for conducting a domestic enquiry in the private sector is laid down by the Standing Orders which are framed under the IESOA 1946. These Standing Orders have the force of law and amount to statutory terms of employment. If there is no procedure laid down, then the domestic enquiry must still be conducted in accordance with the principles of natural justice and any non-adherence of these principles would be fatal to the said enquiry (Dhingra, 1997).

In Malaysia since there is no procedure laid down in the EA 1955 or the IRA 1967 of what and how to conduct a "*due enquiry*", the courts rely on the common law rules of natural justice. The application of the curable principle in the private sector employment indicates an overall lower security of tenure in employment. As far public servants are concerned, this right is provided by the Federal Constitution, the same Constitution provides for exceptions as clearly laid down by art 135(1) and 135(2) of the Constitution. Likewise, for the private employment sector, if there were to be any exceptions to the "due enquiry" requirement in s 14(1) EA 1955, it should be statutorily provided for to avoid any uncertainty and chaos such as which has been caused by the curable principle.

It is not practical to have a "*one size does not fit all*" especially for smaller businesses where manpower is an issue. Additionally, equating "due inquiry" in s 14 to be a full-blown domestic inquiry may not be practical for all employers. It may be workable for larger companies or organisations but not for the much smaller ones as they may not have the required resources or expertise to conduct a full-blown domestic inquiry. These small businesses may have to engage expertise from outside which would prove to be costly for them. It is suggested that for these smaller businesses, the approach suggested in the case of Jusco Florist v Tan Mooi Hun (Award 265) may be a better option whereby the employer writes a letter to the accused employee stating the complaints against the employee. This will provide an opportunity for the employee to be aware of the allegations and to defend himself.

CONCLUSION

The domestic inquiry process must be streamlined, and a common procedure must be adopted so that there is consistency in the law on the right to be heard. In this respect, the approach taken by England and India is undeniably a better one. Both these countries have clear guidelines in terms of the right to be heard prior to dismissal and Malaysia may consider adopting a procedure based on a combination of both the approaches and based on local needs.

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