DISMISSAL FROM EMPLOYMENT AND THE REMEDIES

DR. ASHGAR ALI ALI MOHAMED
LL.B (Hons), MCL (IIUM),
LL.M (Hons) (University of Auckland, New Zealand),
Ph. D (Business Law),
Non-practising Advocate & Solicitor
of the High Court of Malaya
## Members of the LexisNexis Group Worldwide

<table>
<thead>
<tr>
<th>Country</th>
<th>Address</th>
</tr>
</thead>
<tbody>
<tr>
<td>MALAYSIA</td>
<td>Malayan Law Journal Sdn Bhd, Level 12A (Tower 2), Kelana Brem Tower,</td>
</tr>
<tr>
<td></td>
<td>Jalan SS 7/15 (Jalan Stadium), 47301 Kelana Jaya, Selangor Darul Ehsan</td>
</tr>
<tr>
<td>ARGENTINA</td>
<td>LexisNexis Argentina, BUENOS AIRES</td>
</tr>
<tr>
<td>AUSTRALIA</td>
<td>LexisNexis Butterworths, Chatswood, NEW SOUTH WALES</td>
</tr>
<tr>
<td>AUSTRIA</td>
<td>LexisNexis Verlag ARD Orac GmbH &amp; Co KG, VIEll'N</td>
</tr>
<tr>
<td>CANADA</td>
<td>LexisNexis Butterworths, Markham, ONTARIO</td>
</tr>
<tr>
<td>CHILE</td>
<td>LexisNexis Chile Ltda, SANTAGO DE CHILE</td>
</tr>
<tr>
<td>CZECH REPUBLIC</td>
<td>Nakladatelstvi Orac sro, PRAGUE</td>
</tr>
<tr>
<td>FRANCE</td>
<td>Editions du Juris-Classseur SA, PARIS</td>
</tr>
<tr>
<td>HONG KONG</td>
<td>LexisNexis, HONG KONG</td>
</tr>
<tr>
<td>HUNGARY</td>
<td>HVG-Orac, BUDAPEST</td>
</tr>
<tr>
<td>INDIA</td>
<td>LexisNexis, NEW DELH</td>
</tr>
<tr>
<td>IRELAND</td>
<td>Butterworths (Ireland) Ltd, DUBLIN</td>
</tr>
<tr>
<td>ITALY</td>
<td>Giuffre Editore, MILAN</td>
</tr>
<tr>
<td>NEW ZEALAND</td>
<td>Butterworths of New Zealand, WELLINGTON</td>
</tr>
<tr>
<td>PRC</td>
<td>LexisNexis Beijing Representative Office, BEIJING</td>
</tr>
<tr>
<td>POLAND</td>
<td>Wydawnictwo Prawnicze LexisNexis, WARSZAW</td>
</tr>
<tr>
<td>SINGAPORE</td>
<td>LexisNexis, SINGAPORE</td>
</tr>
<tr>
<td>SOUTH AFRICA</td>
<td>Butterworths SA, DURBAN</td>
</tr>
<tr>
<td>SWITZERLAND</td>
<td>Stampfli Verlag AG, BERNE</td>
</tr>
<tr>
<td>UNITED KINGDOM</td>
<td>LexisNexis Butterworths Tolley, LONDON AND EDINBURGH</td>
</tr>
<tr>
<td>USA</td>
<td>LexisNexis, Dayton, OHIO</td>
</tr>
</tbody>
</table>

© LexisNexis
A Division of Reed Elsevier (Singapore) Pte Ltd
2007

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, including photocopying and recording, without the written permission of the copyright holder, application for which should be addressed to the publisher. Such written permission must also be obtained before any part of this publication is stored in a retrieval system of any nature.

The Publisher, authors, contributors and endorsers of this publication each excludes liability for loss suffered by any person resulting in any way from the use of, or reliance on this publication.

†Company No. 76125-H

Printed in Malaysia by Vivar Printing Sdn Bhd
Table of Contents

Dedication ........................................................................................................ v
Foreword ........................................................................................................ vii
Acknowledgment ........................................................................................ ix
Preface ........................................................................................................... xi
Table of Cases .............................................................................................. xxv
Table of Statutes ........................................................................................... lxv

Chapter 1
Security of Tenure in Employment and the Employer’s Prerogative

Introduction .................................................................................................... 1
Loss of Employment: Its Effect on Workers .................................................. 4
  Employees in the Public Sector ................................................................. 8
  Employees in the Private Sector ............................................................... 11
Employer’s Prerogative to Make Commercial Decisions ......................... 16
Methodology Adopted .................................................................................. 19
Objectives of the Study ............................................................................... 22

Chapter 2
Security of Tenure in Employment: The Development

Introduction ................................................................................................... 25
Security of Tenure in Employment ............................................................. 26
  ‘Property Right’ in Employment .............................................................. 27
Evolution of Worker’s Status and Security of Tenure ............................... 31
  In England ............................................................................................. 31
Forced Labour ............................................................................................. 33
Combination of Workers: Promoting Workers’ Status in Employment .......... 36
Forced Labour Abolished ........................................................................... 38
Change in the Terminology from ‘Master’ and ‘Servant’ to ‘Employer’ and ‘Employee’ .......................................................... 39
Doctrine of Laissez-Faire in Employment Relationship ............................ 40
Development of ‘General Hiring’ Theory .................................................... 42
The ‘At-Will’ Employment Doctrine of the United States ....................... 44
TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discharge on Good Faith Doctrine</td>
<td>49</td>
</tr>
<tr>
<td>Discharge in Violation of Public Policy</td>
<td>49</td>
</tr>
<tr>
<td>Status of Workers during British Administrative Authority in the Malay Peninsular</td>
<td>51</td>
</tr>
<tr>
<td>Migration of Foreign Labourers into the Malay Peninsular</td>
<td>51</td>
</tr>
<tr>
<td>Workers’ Status during British Administration of the Malay Peninsular</td>
<td>53</td>
</tr>
<tr>
<td>International Labour Organisation (ILO): Promoting and Protecting Worker’s Status and Security of Tenure in Employment</td>
<td>57</td>
</tr>
<tr>
<td>An Overview of the International Labour Organisation</td>
<td>57</td>
</tr>
<tr>
<td>ILO Recommendation No. 119 of 1963</td>
<td>59</td>
</tr>
<tr>
<td>ILO Convention No. 158 of 1982</td>
<td>61</td>
</tr>
<tr>
<td>ILO Recommendation No. 166 of 1982</td>
<td>65</td>
</tr>
<tr>
<td>The Application of the ILO’s Guidelines in Malaysia</td>
<td>70</td>
</tr>
<tr>
<td>Conclusion</td>
<td>72</td>
</tr>
</tbody>
</table>

**Chapter 3**

**Common Law Wrongful Dismissal and Statutory Unfair Dismissal**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>73</td>
</tr>
<tr>
<td>Security of Tenure: Common Law Approach</td>
<td>74</td>
</tr>
<tr>
<td>Notice of Termination of the Contract of Employment: Binding Effect</td>
<td>75</td>
</tr>
<tr>
<td>Reasonable Notice of Termination</td>
<td>77</td>
</tr>
<tr>
<td>Termination of Contract of Employment: Reasonable Notice in England</td>
<td>81</td>
</tr>
<tr>
<td>Termination of Contract of Employment: Reasonable Notice in Canada</td>
<td>82</td>
</tr>
<tr>
<td>Termination of Contract of Employment: Reasonable Notice in Australia</td>
<td>84</td>
</tr>
<tr>
<td>Termination of Contract of Employment: Reasonable Notice in New Zealand</td>
<td>84</td>
</tr>
<tr>
<td>Termination of Contract of Employment: Reasonable Notice in Malaysia</td>
<td>85</td>
</tr>
<tr>
<td>Waiver of Notice of Termination: The Circumstances</td>
<td>86</td>
</tr>
<tr>
<td>Specific Performance of a Contract of Employment</td>
<td>87</td>
</tr>
<tr>
<td>Mitigation of Loss</td>
<td>92</td>
</tr>
<tr>
<td>Statutory Unfair or Unjustifiable Dismissal</td>
<td>94</td>
</tr>
<tr>
<td>Substantive Justification</td>
<td>95</td>
</tr>
</tbody>
</table>
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Procedural Justification</td>
<td>96</td>
</tr>
<tr>
<td>Application in Selected Countries</td>
<td>96</td>
</tr>
<tr>
<td>Remedies for Unfair or Unjustifiable Dismissal</td>
<td>100</td>
</tr>
<tr>
<td>Reinstatement or Re-engagement</td>
<td>100</td>
</tr>
<tr>
<td>Monetary Compensation</td>
<td>101</td>
</tr>
<tr>
<td>Mitigation of Loss</td>
<td>103</td>
</tr>
<tr>
<td>Redundancy Compensation</td>
<td>104</td>
</tr>
<tr>
<td>Wrongful Dismissal and Unfair or Unjustifiable Dismissal: The Comparison</td>
<td>106</td>
</tr>
<tr>
<td>Conclusion</td>
<td>111</td>
</tr>
</tbody>
</table>

## Chapter 4

### Types of Dismissal and the Grounds

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>113</td>
</tr>
<tr>
<td>Direct Dismissal</td>
<td>115</td>
</tr>
<tr>
<td>Constructive Dismissal</td>
<td>116</td>
</tr>
<tr>
<td>Constructive Dismissal: Definition</td>
<td>117</td>
</tr>
<tr>
<td>Constructive Dismissal: The Development</td>
<td>121</td>
</tr>
<tr>
<td>Employment Relationship: Mutual Trust and Confidence</td>
<td>122</td>
</tr>
<tr>
<td>Conduct Infringing the Implied Trust and Confidence</td>
<td>127</td>
</tr>
<tr>
<td>Burden of Proof in Constructive Dismissal</td>
<td>131</td>
</tr>
<tr>
<td>Grounds of Dismissal</td>
<td>133</td>
</tr>
<tr>
<td>Misconduct</td>
<td>134</td>
</tr>
<tr>
<td>Disobedience of Lawful and Reasonable Orders</td>
<td>137</td>
</tr>
<tr>
<td>Absenteeism</td>
<td>142</td>
</tr>
<tr>
<td>Drug Abuse in the Workplace</td>
<td>147</td>
</tr>
<tr>
<td>Theft of Employer’s Property</td>
<td>151</td>
</tr>
<tr>
<td>Sexual Harassment</td>
<td>154</td>
</tr>
<tr>
<td>Poor Work Performance</td>
<td>171</td>
</tr>
<tr>
<td>Non-Renewal of Fixed Term Contract of Employment</td>
<td>175</td>
</tr>
</tbody>
</table>

## Chapter 5

### Retrenchment of Surplus Labour: When It Constitute a Dismissal?

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>181</td>
</tr>
<tr>
<td>The Law on Retrenchment in Malaysia</td>
<td>182</td>
</tr>
<tr>
<td>Terminologies</td>
<td>183</td>
</tr>
<tr>
<td>Lay-off</td>
<td>183</td>
</tr>
<tr>
<td>Retrenchment</td>
<td>184</td>
</tr>
<tr>
<td>Redundancy</td>
<td>185</td>
</tr>
</tbody>
</table>
Redundancy to Retrenchment: The Circumstances .................. 186
   The Business Disappears – The Company is Shutting down the Business Entirely ......................... 188
   The Place of Work Disappears – The Employer is Shutting down the Business in the Place where the Employee Works...................................................... 189
      Where the Mobility Clause is Expressly Clear and Unambiguous .............................................. 190
      Harshness of the Mobility Clause.......................................................... 190
   Implied Terms of Transfer ........................................................................ 191
   The Job Disappears – The Company Eliminates the Work the Employee Does, either Generally or in a Particular Workplace ................................................................. 192
   Fewer People are Required to Do the Work – The Number of People Doing that Job is to be Reduced but Not Eliminated ............................................................. 193
Retrenchment Benefits ............................................................................. 195
   Qualification for Retrenchment Benefits in Malaysia.......................... 196
   Amount of Termination and Lay-off Benefits and Mode of Calculation ......................................... 199
Availability of Retrenchment Benefits for Workers
   Outside the Purview of the Employment Act 1955 ............ 199
   Individual Contract of Employment ....................................................... 200
   Collective Agreement........................................................................... 200
   Implied Term for the Payment of Retrenchment Benefit................................. 201
   Invoking the Code for the Payment of Retrenchment Benefit................................. 203
Acceptance of the Retrenchment Benefits and thereafter Alleging Dismissal without Just Cause or Excuse ................................................................. 203
Dismissal in the Guise of Retrenchment .................................................. 205
   Did a Redundancy Situation Arise Leading to a Retrenchment? ................................................. 206
   If There was a Redundancy Situation, was the Consequent Retrenchment Made in Compliance or in Conformity with the Accepted Standards of Procedure? ......................................... 206
Proof and the Test of Redundancy .............................................................. 208
Conclusion ............................................................................................... 210
**Chapter 6**

Dismissal without Just Cause or Excuse: The Adjudication Process

Introduction ........................................................................................................... 213

Dismissal from Employment:
  - The Preliminary Consideration ................................................................. 214
  - The Limitation Period to Make Representation ......................................... 215
  - The Claimant in His Representation must Pray for Reinstatement ........... 219

Death and Survival of Action ............................................................................ 222
  - The Common Law Approach ...................................................................... 224
  - The Statutory Unfair Dismissal Approach .................................................. 225
  - A Review of Hotel Istana v Nor Azam Baharin .......................................... 230

Process of Adjudication of Dismissal Cases under Section 20 of the IRA .... 239

The Conciliation Process in IRD ...................................................................... 242

Discretion of the Minister to Refer Dismissal Cases to the Industrial Court .... 246

Industrial Court: The Adjudication Process .................................................. 251
  - Industrial Court: An Overview ................................................................. 251
  - The Composition of the Industrial Court ................................................. 255
  - Types of Cases Heard in the Industrial Court .......................................... 257
  - Industrial Court: A Court of Equity and Good Conscience Promoting Social Justice .......................................................... 259
  - Industrial Court: The Process .................................................................. 264
  - Legalism in the Industrial Court ................................................................. 266

Conclusion ........................................................................................................... 272

**Chapter 7**

Reinstatement in Dismissal without Just Cause or Excuse: By Analysis and Case Study

Introduction ........................................................................................................... 275

Reinstatement: The Primary Remedy for Dismissal without Just Cause or Excuse ................................................................. 277

Reinstatement: Definition ..................................................................................... 278

Reinstatement includes Re-engagement ............................................................. 279

The Remedy of Reinstatement: Within the Discretion of the Industrial Court ................................................................. 280

The Wishes of the Claimant ............................................................................... 281

Whether the Award of Reinstatement is Expedient ......................................... 283
The Existence or otherwise of Mutual Trust and Confidence ............................................ 284
Harmonious Relationship at the Workplace cannot be Restored .................................... 287
Examples of the Circumstances where Reinstatement Awarded ........................................ 288
An Award of Reinstatement: The Events Subsequent to its Compliance .............................. 291
Reinstatement Becoming a Lost Remedy ............................................................................. 292
Reinstatement in Dismissal Cases: A Case Study ............................................................... 294
Nature of the Claimant’s Employment ................................................................................ 295
Permanent Employment ........................................................................................................ 295
Employees on Probationary Period ..................................................................................... 298
Employees on a Fixed Term Contract ................................................................................. 299
Part-Time Worker ................................................................................................................ 301
Casual Workers .................................................................................................................... 302
Employees under Work Sharing .......................................................................................... 302
Home Workers .................................................................................................................... 304
Voluntary Workers .............................................................................................................. 305
Foreign Workers .................................................................................................................. 306
The Grounds of the Dismissal and the Remedy of Reinstatement ...................................... 308
Dismissal on Alleged Poor Work Performance .................................................................. 308
Misconduct ............................................................................................................................ 310
Constructive Dismissal ........................................................................................................ 311
Redundancy Situation ......................................................................................................... 312
Non-Appearance of the Employer during Trial: The Preferred Remedy for Dismissal without Just Cause or Excuse ................................................................. 313
Delay of Adjudication: Its Effect on Reinstatement ......................................................... 314
Interim Reinstatement ......................................................................................................... 318
Interim Reinstatement: The Practice in England ............................................................... 319
Interim Reinstatement: The Practice in New Zealand ......................................................... 319
Conclusion ............................................................................................................................ 325

Chapter 8
Monetary Compensation for Dismissal without Just Cause or Excuse

Introduction ............................................................................................................................. 327
The Types of Monetary Compensation .............................................................................. 331
Compensation in lieu of Reinstatement .............................................................................. 332
TABLE OF CONTENTS

Back Wages................................................................. 333
The Assessment of Monetary Compensation:
   Its Drawbacks ....................................................... 334
Assessment of Compensation in lieu of Reinstatement ....... 334
The Inconsistency in the Award of Back Wages .......... 340
Loss of Future Earning ............................................. 354
Scaling Down of Monetary Compensation ..................... 355
Where the Claimant has been Gainfully Employed
   Elsewhere during the Interim Period ....................... 356
When the Claimant had in any way Caused or
   Contributed to His Own Predicament ....................... 360
Global Assessment of the Monetary Award..................... 363
Legislative Guidelines in the Assessment of Monetary
   Compensation: Proposed Reform ............................. 371
Maximum and Minimum Cap of Compensation .................. 372
Interest on the Monetary Award ................................. 373
Cost of the Proceedings ............................................ 374
Proposed Clauses on Remedies for Dismissal to be
   Entrenched into the IRA......................................... 374
Remedies................................................................. 374
Reinstatement to be Primary Remedy .......................... 375
Provisions Applying if Reinstatement Ordered ............... 375
The Industrial Court may Order Interim Reinstatement... 375
Reimbursement ......................................................... 376
Compensation ........................................................... 376
Remedy Reduced if Contributing Behaviour
   of Workman ........................................................ 377
Mitigation of Loss ..................................................... 377
The Limitation of Monetary Compensation .................... 377
Power to Award Costs ............................................... 378
Interest on the Monetary Award of the
   Industrial Court ................................................ 378
Conclusion ............................................................... 378

Chapter 9
Judicial Review of the Industrial Court Award

Introduction .............................................................. 379
Contesting Award of the Industrial Court ..................... 380
Judicial Review is Concerning the Decision
   Making Process ................................................... 383
Development of Judicial Review since South East Asia Firebrick's ........................................ 385
Judicial Review of the Awards of the Industrial Court:
Its Blemish ........................................................................................................ 391
Judicial Review of the Award ........................................................................... 392
Not Keeping in tandem with the Spirit of the IRA .......................................... 392
An Unequal Legal Battle ................................................................................ 396
The Infusion of Common Law Principles into Industrial Jurisprudence ......... 397
The Mechanism of the Industrial Appeal Court .............................................. 405

Chapter 10
Enforcement of the Industrial Court Award
Introduction ...................................................................................................... 409
Stay of Execution of the Industrial Court’s Award ........................................ 410
Enforcement of the Award: The Process and the Mode .............................. 414
Whether Advocates Precluded at the Hearing under
Section 56 ....................................................................................................... 420
Execution of the Award .................................................................................. 422

Chapter 11
Insolvent Corporate Employer: Whether Worker’s Claims Arising Out of Employment Adequately Protected?
Introduction .................................................................................................... 425
Inadequate Protection of Workers’ Statutory Entitlements ......................... 426
Winding-up Order of the Corporate Employer and Its Effect on Contract of Service .............................................................. 428
Distribution of the Assets of the Insolvent Employer and the Preferential Payment ................................................................. 431
ILO’s Convention and Recommendation .................................................... 431
Distribution of the Insolvent Employer’s Assets ........................................ 434
‘Wage Earner Corporate Insolvency Fund’ ............................................... 438
Conclusion ...................................................................................................... 440

Chapter 12
Employment Obligations: The Islamic Perspective
General ............................................................................................................ 441
Seeking Employment: The Islamic Approach .............................................. 442
The Employer/Employee Relationship ....................................................... 445
Employee’s Obligation to Discharge ‘Amanah’ or Trust ............................ 447
TABLE OF CONTENTS

Discharging Duties Conscientiously: The Employees' Responsibilities .............................................. 450
Failure to Discharge Responsibilities Conscientiously ................................................................. 452
Protection of Human Dignity ........................................................................................................... 456
Sexual Harassment: The Islamic Approach ...................................................................................... 459
Drug Abuse in the Workplace and Rights of the Employer ............................................................... 461
Transforming the Islamic Injunction into Law .................................................................................. 462
Accountability in the hereafter ......................................................................................................... 464

Appendix ........................................................................................................................................... 467

Bibliography ..................................................................................................................................... 521

Index ................................................................................................................................................ 549