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EMPLOYER'S SAFETY AND HEALTH RESPONSIBILITY: WITH REFERENCE TO SELECTED WORKPLACE VIOLATIONS

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INTRODUCTION

Safety and health of workers at the workplace is a duty of the employer and this covers both the safe system of work and safe place of work. The employer is not required to insure the workers or to protect them against all kinds of risks but they are obliged to provide a reasonably safe system of work and to take reasonable care of their employees against reasonably foreseeable dangers and hazards. The place of work is not restricted to the actual worksite but include any area the employee uses in connection with and in furtherance of the employment. Many countries have enacted occupational safety and health law with a view of ensuring safety, health and welfare of persons at workplace and to promote an occupational environment adaptable to the person's physiological and psychological needs. In fact, it was initiated by International Labour Organisation ('ILO') through its conventions on occupational safety and health such as Occupational Safety and Health Convention 1981 (No 155) and Occupational Health Services Convention No 161 of 1985, among others.

In Malaysia, the Occupational Safety and Health Act 1994 and Factories and Machinery Act 1967 requires the employer to protect workers safety and health by ensuring that the working environment is free from dangerous or hazardous substances to health. Breach of the obligation would not only entail penal sanction but also possible civil claims for negligence. It is equally important for an employee to take reasonable care of himself at the workplace and to avoid acts which could adversely affect the safety or health of others. Any violation of the employer's rules on safety and health is considered a misconduct that would entail disciplinary action. The following acts or conducts of an employee which may compromise the health and safety of others at the workplace are discussed: (a) threats, intimidation and violence; (b) sexual harassment; (c) smoking at restricted or prohibited areas; (d) drugs and alcohol abuse; and (e) sleeping while on duty. Such occurrence in the workplace is considered rampant and hence, the consequences ensuing from violation thereto is discussed in the context of employer's workplace safety and health obligation.

OCCUPATIONAL SAFETY AND HEALTH STATUTES

The Occupational Safety and Health Act 1994 ('the OSHA') and Factories and Machinery Act 1967 are two pertinent statutes relating to workers safety and health at the workplace in Malaysia. The objectives of OSHA are to

ensure safety, health and welfare of persons at workplace and that the workplace should be safe without risk to health. The Act is applicable to industries specified in the first schedule namely; (a) manufacturing; (b) mining and quarry; (c) construction; (d) agriculture, forestry and fishing; (d) transport, storage and communication; (e) wholesale and retail trading; (f) hotels and restaurant; and (g) finance, insurance, real estate, business service. The Act requires the employer to ensure that workers performing dangerous tasks are provided with necessary equipment and clothing. This is aside from providing the necessary information, instruction, training and supervision. Safety and health officers must be employed. Their duties would include ensuring compliance with the Act and to promote safe conduct at the workplace and where more than 40 workers are employed, the employer must establish a safety and health committee. An employer who neglects and/or disregards health and safety at the workplace is committing an offence and on conviction would be liable to fine up to RM50,000 or imprisonment for a term not exceeding two years, or both.¹

In *Jabatan Kesihatan dan Keselamatan Pekerja v Sri Kamusan Sdn Bhd*,² the respondent was charged under [s 15\(1\)](#) of the [OSHA](#) for the death of the deceased who fell off the tractor used as a means of transportation of workers to the workplace.³ The appellant contended that the respondent had failed to supervise the use of tractor causing the deceased to ride and consequently, fell off the tractor. In affirming the trial court's decision to discharge and acquit the respondent, the High Court held that for an offence under [s 15\(1\)](#) to be sustained it must be shown that the respondent was an employer of the deceased at the material time, that the deceased was exposed to risk to the health and safety, the deceased was at work at that material time, and there was a causal nexus between the respondent's breach and the risk to the deceased's safety. In this case however the deceased was not working at the material time and what the deceased did was not an activity that could be described as part of the employer's undertaking. Further, the respondent had not only taken all the reasonable steps and due diligence to ensure the safety of the workers at the plantation but had also taken precaution of the foreseeable danger by putting up warning signage at the vicinity.

Aside from the above, the Factories and Machinery Act 1967 deals with control of factories with respect to matters relating to the safety, health, and welfare of persons in the factory, and the registration and inspection of machinery. It ensures safety requirements at the workplace such as cleanliness, ventilation, room temperature, lighting, sanitary convenience, personal protective clothing and appliances, drinking water and washing facilities. The Act requires that an occupier of a factory must report to the nearest inspector when: (a) an accident either causes loss of life or bodily injury to any person; and (b) serious damage to machinery or other property takes place. Failure to do so is an offence where the occupier shall on conviction be liable to a fine and imprisonment.⁴

It may be added that in the event a worker is involved in an accident in the course of employment, he would be entitled to compensation under the Employees' Social Security Act 1969 and the scheme is administered by the Social Security Organisation which is contributed by the employer and employee. The level of benefits that a particular employee is entitled to would depend on his earnings and contribution record. In *Liang Jee Keng v Yik Kee Restaurant Sdn Bhd*,⁵ the plaintiff, a waiter at the defendant's restaurant, was injured whilst cleaning the meat mincing machine. He filed a suit against the defendant for damages for the injuries suffered which he alleged arose out of the negligence of the defendant. The plaintiff contended that the defendant failed to provide a safe system of work and that there had been breaches of the Factories and Machinery Act 1967 and the Factories and Machinery (Fencing of Machinery & Safety) Regulations 1970. The issue before the court was whether at the time of the accident the plaintiff was an 'insured person' under [s 2\(11\)](#) of the Employees Social Security Act.⁶ If the answer was in the affirmative, then by virtue of [s 31](#), the plaintiff would not be entitled to receive or recover from the defendant, any compensation or damages under any other law, including the common law, in respect of the employment injury sustained by him.⁷ In relation to the above issue the court held that the plaintiff was caught by [s 31](#) of the Employees' Social Security Act 1969 and thus, was precluded from making any claim for compensation or damages against the defendant under any other law, including the common law.

EMPLOYER'S COMMON LAW DUTY TO PROVIDE SAFE PLACE OF WORK

The common law imposes a duty on the employer to provide a safe system of work and a safe place of work which includes any area that the employee uses in connection with and in furtherance of the employment.⁸ In *Abdul Rahim bin Mohamad v Kejuruteraan Besi dan Pembinaan Zaman Kini*,⁹ Arifin Zakaria J stated: 'At common law, a master is under a duty, arising out of the relationship of master and servant, to take reasonable care for the safety of his workpeople in all the circumstances of the case so as not to expose them to unnecessary risk (see 20 *Halsbury's Laws of England* (4th Ed) para 978). Among these duties are: (a) the provision of proper and suitable plant and appliances; and (b) the provision and maintenance of a reasonable safe system of working'.

It is noteworthy that any injury arising from the employer's failure to provide a safe place of work may expose them to a civil claim for negligence namely, failure to exercise the required degree of care that a reasonably prudent person would exercise in like circumstances. In the tort of negligence, as long as there has been neglect in the exercise of the ordinary skill and care by the employer towards the employee, and the employee, without contributory negligence on his part, has suffered injury either to his person or his property, he has an actionable claim in negligence.

In *Alamgir v Cass Printing & Packaging Sdn Bhd*,¹⁰ the plaintiff, while working on a night shift at the printing machine, was injured when his right hand was caught between the rollers of the machine. Which later resulted in the amputation of his right arm from the shoulder. The plaintiff claimed for the tort of negligence against the defendant, the employer, as it was submitted that the defendant had failed to ensure that the machinery in the factory was in safe working condition; failed to ensure that proper training was provided to operate and/or repair the machines; and failed to repair the auto stop switches in the machine. The defendant however argued that it was the plaintiff himself who had removed the grill cover and had thus, worked in an area of the machine that was unsafe and therefore the resulting injury was brought on by himself. The issues before the court was whether the defendant was negligent and if so, whether there was contributory negligence by the plaintiff.

In allowing the plaintiff's claim, the court held that the defendant was negligent when it breached its duty of care in not ensuring that, at all times, the grill cover was fixed onto the machine when the plaintiff was working. The plaintiff was injured in the accident as a result of the defendant's breach of duty of care. The court further held that the plaintiff had partly by his own fault in cleaning the rollers at the wrong portion of the machine contributed to the accident and thus, should be made 50% liable for contributory negligence.

Again, in *Abdul Rahim bin Mohamad v Kejuruteraan Besi dan Pembinaan Zaman Kini*,¹¹ the plaintiff claimed for damages arising out of an accident which occurred while in the employment of the defendant. After finishing work in one part of the ceiling, the plaintiff refused to come down from the scaffolding despite being asked to do so by SP3. While the plaintiff was on the scaffolding, SP3 pushed the scaffolding to another part of the hall and in so doing the scaffolding fell to the ground and injured the plaintiff. The plaintiff's refusal to come down from the scaffolding was in breach of [s 24\(1\)\(a\)](#) and [\(d\)](#) of the [OSHA](#). The above section provides:

(1) It shall be the duty of every employee while at work —

(a) to take reasonable care for the safety and health of himself and of other persons who may be affected by his acts or omissions at work; and

...

(d) to comply with any instruction or measure on occupational safety and health instituted by his employer or any other person by or this Act or any regulation made thereunder.

In dismissing the plaintiff's action, the court held that the plaintiff ought to have known that by remaining on the scaffolding while the same was being pushed was in fact exposing himself to the unnecessary risk of injury to himself should the scaffolding collapse. In particular, Arifin Zakaria J stated: 'both the plaintiff and the defendant are equally to blame for the accident. I say so for the simple reason that the accident would not have occurred had the defendant exercised proper supervision of the work. With proper supervision, it is reasonable to expect that the plaintiff would not be allowed to remain on the scaffolding when the same was being pushed. The plaintiff, on the other hand, in the interest of his own safety, should not have remained on the scaffolding. He should have come down while the scaffolding was being pushed and, only after it has been securely set up, should he go up the scaffolding again'.

Having said the above, the following discussion is in relation to specific workplace violations which may compromise workers safety and health and the consequence ensuing therefrom.

Threats, intimidation and violence at the workplace

An employer has a duty to ensure the workplace is safe and free from threats, intimidation and violence. Workplace violence, abusive conduct, assault and threatening to assault or cause injury to other workers within the company is a serious violation of employer's common law duty and thus, may warrant dismissal. Assaulting or throwing objects at the superior,¹² uttering abusive and threatening words,¹³ fighting at the factory premises during working hours,¹⁴ and causing bodily injury to a colleague¹⁵ are examples of gross misconduct that may warrant discipline up to and including dismissal. Using derogatory, insolent and impertinent language towards superior¹⁶ is offensively contumacious and tends to lower the dignity and position of one's superior and thus, a misconduct which warrants none other than dismissal.¹⁷

It is noteworthy that an employer may be vicariously liable for failure to take precautions to prevent violence in the workplace. In *Zulkipli bin Taib & Anor v Prabakar a/l Bala Krishna & Ors and other appeals*,¹⁸ in order to extort a confession, the plaintiff was assaulted by the first to seventh defendants while in the detention room. He was punched, kicked and splashed with hot water. The sessions court convicted the first and second defendants for the offence of voluntarily causing hurt to the plaintiff under [s 330](#) of the [Penal Code](#) and sentenced to four years of imprisonment while the third to seventh defendants were acquitted. In a civil claim for assault, the plaintiff made the ninth defendant, the employer of the second to seventh defendants, vicariously liable for the acts of the defendants. In affirming the general, aggravated, exemplary and punitive damages awarded by the trial judge, the Court of Appeal held, inter alia, that 'the impugned acts of the defendants were closely connected with the acts that they were authorised to do ie the 'interrogation'. They had wanted an admission out of the plaintiff and in order to extricate this admission from the plaintiff, they were beating and splashing hot water on the plaintiff'.

Further, the workplace must be free from all forms of fear and for this, it is common for the employer to prohibit employees from carrying or bringing any dangerous or lethal weapons into the workplace. The prohibition is usually contained in the employee handbook and a violation thereto is a serious infraction of work rules and may result in discipline up to and including dismissal. A dangerous or lethal weapon refers to a deadly weapon when misused is capable of causing injury that could even lead to death. These include guns, swords, pistols and knives.¹⁹ In *Read v Donovan*,²⁰ Lord Goddard CJ stated: 'A lethal weapon means a weapon capable of causing injury'. Again, in *Moore*

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v Gooderham,²¹ Lord Parker CJ stated the word 'lethal' refers to weapon which causes the injury 'of a kind which may cause death'. In *Indah Water Konsortium Sdn Bhd v Rahimi Mehat*,²² the supervisor was attacked with a dangerous weapon, ie, a small knife, with the intent of causing him bodily injuries, when the latter was executing related duties at his workplace. The Industrial Court held that the act of attacking a superior officer with dangerous weapon was a serious misconduct warranting dismissal.

In *Adar Ya v Proton Edar Sdn Bhd*,²³ the Industrial Court stated:

It is recognised that 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. It cannot be emphasised strongly enough that the employee cannot take the law into his own hands. There are remedies available to redress his alleged grievances. In court's view that claimant ought to know better than to take the law into his own hands. To say that it was done in the heat of the moment and in self defence is no excuse. To allow such a conduct to go unpunished would be detrimental to the morale and discipline of the company. It is a conduct which is very much against the grain of industrial peace and harmony. An employee cannot be expected to work in environment shrouded in fear, physical violence in a working environment should be abhorred. The punishment of dismissal in this instance cannot be said to be excessive.

In *Adar Ya's* case, the claimant had in his possession a lethal weapon ie, 'parang' within the company's premises and had used the weapon to threaten a co-worker. He was dismissal from employment for violating the company's policy which provides, inter alia, that possesses of a lethal weapon in the company's premises is a gross misconduct.

Again, in *Gardenia Bakeries (Kl) Sdn Bhd v Gunasegaran Ramasamy*,²⁴ the claimant was dismissed when the domestic inquiry panel found him guilty of threatening a co-worker with a dangerous weapon, a hammer, and had also uttered serious verbal threats against him namely, 'I will cut your throat'. The Industrial Court held that 'fighting and disorderly misconduct in the workplace is a serious misconduct warranting dismissal. It is not necessary to wait until there is an actual physical injury sustained before it could be considered as a serious misconduct. The misconduct proved against the claimant was such, so as to justify the penalty of dismissal'.

In *Corporate Dynamics Sdn Bhd v Maikon Tambaka*,²⁵ the claimant was dismissed with immediate effect as he had brought in a *parang*, a dangerous and an offensive weapon into the company premises without authorisation. The claimant was also alleged to have threatened the superior with the weapon by saying 'I am gonna cut off your neck!'. Further, the claimant had also uttered abusive words towards the superior besides threatening to burn the company. In affirming the claimant's dismissal to be with just cause or excuse, YA Chew Soo Ho, Chairman of the Industrial Court, stated:

Assault or threatening to assault a superior office during working hours in the work place has been held to be a gross misconduct justifying dismissal ... Any threat of violence or act of violence with a lethal weapon should be frowned at and deplored by this court as one of the most treacherous disruption of harmonious industrial relations and ought to be deterred at all costs in order to maintain a conducive and harmonious relationship among employees and employees with their employers in the working environment. Here in our case, the assault or threats were indeed grave as the Claimant had not only expressly asserted that he would kill and cut off one's head but also emphasised his threat by his act of waving a 'parang' right in the face of or in the presence of his victims who were his superiors. For such gross misconducts, this Court holds that dismissal is inevitable.

Sexual harassment

Dignity, honour and reputation of an individual is a priceless possession and is protected by the domestic

legislation. Outraging the modesty of another is totally abhorred and thus, an actionable crime in any civilised society. In *Freescale Semiconductor (M) Sdn Bhd v Edwin Michael Jalleh & Anor*,²⁶ the Industrial Court held, inter alia, that the punishment of dismissal for slapping the buttock of the victim while she was working at the saw machine to be too harsh. In setting aside the award of the Industrial Court, the Court of Appeal held inter alia, that the Industrial Court had failed to take certain relevant matters into consideration and this include the religious sensitivity of others. In particular, the court stated: 'One must expect in a multicultural society such as in this country, that the workplace is also multicultural. In such multicultural work environment, industrial harmony, one of if not the main object(s) of industrial relations, is achieved not by one acting on the norms acceptable to himself, but he must be sensitive to what is acceptable by others'. In *Freescale's* case, the misconduct was committed in a place where a saw machine is used which suggests a certain disregard for safety.

Undeniably, the incidents of sexual assault and inappropriate behaviour at the workplace are on the rise and is frequently reported in the media. In Malaysia, sexual assault, physical molestation, indecent exposure and rape, among others is a serious crime under the Penal Code. Likewise, words or gestures intended to insult the modesty of a person is also an actionable crime under the Code. In *Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor*,²⁷ the Federal Court stated, inter alia, that 'sexual harassment is a very serious misconduct and in whatever form it takes, cannot be tolerated by anyone. In whatever form it comes, it lowers the dignity and respect of the person who is harassed, let alone affecting his or her mental and emotional well-being. Perpetrators who go unpunished, will continue intimidating, humiliating and traumatising the victims thus resulting, at least, in an unhealthy working environment'.

In fact, a number of theoretical and empirical studies have demonstrated that sexual assault has a tendency of causing long term psychological disturbances to the victims. Incidents of sexual assault contribute immensely to the low self-confidence, self-esteem and more detrimentally, it affects the psychological well-being of the victims. Hence, severe punishments are prescribed by law for sexual assault and harassment with its primary aim to send a clear message and set a precedent that offences of this nature would not be tolerated. The above has been highlighted by Suriyadi FCJ in *Mohd Ridzwan's* case:

The ingredients of sexual harassment are present in abundance, namely the existence of a persistent and deliberate course of unreasonable and oppressive conduct targeted at another person (in this case the respondent), calculated to cause alarm, fear and distress to that person. This conduct is heavily spiced with sexual hallmarks as illustrated by the continuous leery and obscene verbal remarks uttered by the appellant, which culminated in the respondent displaying symptoms of emotional distress, annoyance and mental depression due to the alarm, fear and anxiety.

Sexual assault and harassment is categorised as a major misconduct that could warrant instant dismissal, if found guilty. Part XVA of the Employment Act 1955 makes it obligatory on the employer to attend to their employee's complaints of sexual harassment committed either by a co-worker, client or customer of the employer. An employer who failed to act on the complaint of sexual harassment promptly is deemed to have committed an offence and may be liable to fine of up to RM10,000, if found guilty.

Apart from initiating criminal proceedings against the harasser by lodging a police report for various sexual offences under the Penal Code, or resigning from employment due to unsafe workplace and thereafter filing a claim against the employer for constructive dismissal,²⁸ a victim of sexual harassment may initiate a tortious lawsuit against the harasser in the civil court for sexual assault or battery. A sexual assault involves a person who intentionally puts another person in fear of harm by threats, words or gestures of a sexual nature without bodily contact. Sexual battery claim may lie if it involves physical touching of the private parts of another person. Further, an emotional and psychological harm claim may also lie against the harasser when the sexual assault causes emotional distress to the victim. Where the claim is well-founded, the court may award damages to the victim for the physical and emotional harm suffered. The quantum however will depend on the fact and nature of harm or injury suffered.²⁹

Where the victim is a customer or client of the company and where it is proven that the company had not taken measures to rectify or prevent the sexual assault, the customer or client may file the abovementioned tortious claim not only against the harasser but also the company. Civil claim against the company is founded on the basis of failure to use reasonable care to protect its customer or client against foreseeable sexual assault. Before the company can be made vicariously liable as principal for any claim in tort, the employee who was responsible for the alleged tortious act must be made a party to the suit and his liability be established.

In *Dyer and Wife v Munday and Another*,³⁰ Lord Esher MR stated: 'The liability of a master does not rest merely on the question of authority, because the authority given is generally to do the master's business rightly; but the law says that if, in the course of carrying out his employment, the servant commits an excess beyond the scope of his authority, the master is liable'. Lopes LJ, delivering a separate judgment, in the above case, stated: 'The law says that for all acts done by a servant in the conduct of his employment, and in furtherance of such employment, and for the benefit of his master, the master is liable, although the authority that he gave is exceeded'. In *Maslinda Ishak v Mohd Tahir Osman & Ors*³¹ for example, the Federal Government together with the Director-General of Rela and the Federal Territories Islamic Religious Department (*Jawi*) was ordered to pay the appellant, a former guest relations officer, damages, a sum of RM100,000, because they were found vicariously liable for the act of the respondent, a Rela member who took a picture of her relieving herself in a lorry. Suriyadi Halim Omar JCA delivering the judgment of the court stated: 'As he took the unauthorised photographs, whilst in the course of the work or employment for which he was instructed to carry out, at a time when the operation was in progress, the respondents must be held vicariously liable'. In short, sexual assault is a serious crime and a major misconduct at the workplace. Apart from possible criminal charges against the harasser, the victim has an option to file a civil suit against the harasser for tortious action for damages.³²

Smoking at restricted or prohibited areas

Smoking has been identified as a major cause of risk of lung cancer and cardiovascular disease. Besides being a health hazard due to toxic substances, cigarettes are also known to cause potential fire hazards. In the workplace, workers should have the right to breathe smoke-free air and should not be asked to choose between their livelihood and their health. Smoking affects productivity, increasing health care costs, risking employer's property to fire and accidental injuries. Many organisations have imposed the 'no smoking area' within the designated areas of their premises as well as in certain workplace vehicles. Aside from protecting employees, customers and visitors to the company's premises from harmful and toxic effects of tobacco smoke, the ban is also to ensure safety of the site and avoid any untoward incidents due to the presence of highly inflammable products or materials.³³

Any infringement of the company's rules on smoking ban is usually a minor misconduct where a one-off breach does not lead to dismissal but rather results in a written warning being issued and counselling. A repeated minor misconduct can, cumulatively, amount to a more serious offence which could lead to termination of service. In *Lim Gaik Sim v Sri Suria Mutiara Sdn Bhd*,³⁴ the claimant was fined RM100 by the employer for smoking at a non-smoking area and the said amount was deducted from the claimant's monthly salary. Again, in *Metro Pacific Sdn Bhd v Azman bin Awang*,³⁵ the claimant was dismissed from employment after he was found guilty of smoking in the prohibited area of the company. This is despite the claimant being reprimanded for the same offence previously.

However, the company's disciplinary procedures may strictly prohibit smoking anywhere inside the non-designated area and any violation thereto may entail a more severe punishment.³⁶ In *Toyo Ink Sdn Bhd v Ahmad Yazid Adenan*,³⁷ the claimant was dismissed from employment as he was found smoking within the factory premises, a non-smoking area. In the above case, the company was involved in manufacturing ink from petroleum based solvents which were placed outside as well as inside the factory building. Again, in *Malaysian Airline System Bhd v Mohd Shah Mohd Yahya*,³⁸ the claimant was found smoking in the rear toilet of the aircraft which was contrary to his

terms and conditions of employment.

Drug and alcohol abuse

The offences involving drug misuse or abuse amongst the Malaysian workforce is considered serious.³⁹ Besides having devastating impact on the individual's mental and physical health, drug related offences in the workplace will have negative impacts on organisational performance. A person addicted to drugs usually have symptoms such as sudden mood changes, unusual irritability and/or aggression, confusion, abnormal fluctuations in energy levels, poor concentration and performance of tasks, poor time keeping, repeated short term sickness absence, deterioration in relationships with friends, colleagues, managers and customers, among others. It compromises the employer's common law duty to ensure a reasonable safe and conducive working environment.⁴⁰

Drug abuse in the workplace as well as outside the workplace during working hours has often been viewed as acts of gross misconduct which justifies dismissal from employment. In *Mathewson v RB Wilson Dental Laboratory Ltd*,⁴¹ a dental technician who had been employed for almost five years with the respondent was arrested and charged with possession of cannabis. He was subsequently dismissed from employment on the ground that it was not appropriate to retain the services of a skilled worker who was using drugs and who might influence the young staff.

Likewise, consuming intoxicating liquor or possessing alcoholic drinks in the company's premises is viewed seriously and may lead to termination of service.⁴² This is because alcohol impairment at workplace can put the drinker and others not only at risk of injury but may also lead to an increased likelihood of violent or aggressive behaviour. Hence, in *Kesatuan Kebangsaan Pekerja Perusahaan Petroleum Dan Kimia Semenanjung Malaysia v Unichamp Mineral Sdn Bhd*,⁴³ the collective agreement provided, inter alia, that an employee consuming intoxicating liquor in the company's premises shall be liable to face the following disciplinary action: (a) first offence, a written warning letter; (b) second offence, a final written warning and an advice verbal warning; and (c) third offence shall result in the dismissal of the employee.

Sleeping while on duty

Sleeping while on duty or sleeping on the job is a workplace misconduct that compromises the employer's duty to ensure safety of others at the workplace.⁴⁴ Besides projecting an unprofessional conduct, an employee is deemed to be not performing work for which he is being paid. The seriousness of sleeping while on duty is dependent on the nature of duty. In some occupations, it is deemed a minor misconduct in which a written warning would be sufficient, and any further incidents of this nature will result in additional disciplinary action up to and including dismissal. Whilst in some other occupations such as pilots, air traffic controllers, security guards, lifeguards or those operating machinery will have a zero tolerance with respect to sleeping on the job and if the allegation is found to be true, would lead to dismissal of employment. The act of the employee sleeping on the job could pose a huge risk to health and safety of others which may lead to more serious outcomes such as serious injury, death and environmental disasters should any untoward accidents were to occur.

In *Bradken Malaysia Bhd, Ipoh v Kesatuan Pekerja-Pekerja Perusahaan Membuat Jentera*,⁴⁵ the claimant, a machinist, was dismissed when he was found sleeping while the machine operated by him was moving but the cutting tool was not cutting the product. The Industrial Court held that the company had proved that the claimant was found sleeping while on duty which was a grave misconduct. Again, in *Straits Trading Company v Kesatuan Kebangsaan Pekerja-Pekerja Perusahaan Pelesenan Logam*,⁴⁶ the Industrial Court held, inter alia, that the act of sleeping by a security guard while on duty not only undermines the trust and confidence but also compromised safety of the workplace.

In *Johan Ceramics Bhd v Mohd Yusof Ali*,⁴⁷ the claimant, a production supervisor, was dismissed by the company

after a domestic inquiry found him guilty of sleeping while on duty during a night shift operation. In affirming the claimant's dismissal to be with just cause or excuse, the Industrial Court stated, *inter alia*, that the claimant's misconduct could have caused serious damage to company's properties and endangered fellow workers working during the night shift if any accidents had occurred. Lastly, in *The Malayan Thread Co Sdn Bhd v Roslan bin Hussain*,⁴⁸ the claimant was found sleeping while at work by the General Manager. The Industrial Court held, *inter alia*, that sleeping while on duty is regarded as a serious misconduct more so when the offender is a security guard and therefore responsible for the safety and security of the area he has to guard. The punishment meted out to him was justified.

CONCLUSION

Workers safety and health is the duty placed on the employer and this duty includes both the safe system of work and safe place of work used by employee in connection with and in furtherance of the employment. Any breach of the employer's obligation as above may give rise not only to penal sanction under the Occupational Safety and Health Act 1994 and the Factories and Machinery Act 1967, but also possible civil claims for negligence namely, failure to exercise the required degree of care that a reasonably prudent person would exercise in like circumstances. It is equally important for an employee to take reasonable care of himself at the workplace and to avoid acts which could adversely affect the safety or health of others. Any violation of the employer's rules on safety and health is considered a misconduct that would entail disciplinary action as seen in the following circumstances namely, workplace violence, sexual harassment, smoking at the prohibited areas of company premises, abuse of drugs and alcohol at the workplace and sleeping while on duty.

¹

[Section 19](#) provides: 'A person who contravenes the provisions of [section 15](#), [16](#), [17](#) or [18](#) shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding two years or to both'.

² [\[2015\] 7 MLJ 397](#).

³ [Section 15\(1\)](#) provides: 'It shall be the duty of every employer and every self-employed person to ensure, so far as is practicable, the safety, health and welfare at work of all his employees.'

⁴ The offences and the penalties are contained in [ss 50](#) and [51](#), respectively.

⁵ [\[2002\] 2 MLJ 650](#); [2002] 2 CLJ 750.

⁶ [Section 2\(11\)](#) provides: 'Insured person means a person who is or was an employee in respect of whom contributions are, were or could be payable under this Act, notwithstanding that such industry or employee was not so registered, so long as the industry was one to which this Act applies'.

⁷ Section 31 provides: 'An insured person or his dependants shall not be entitled to receive or recover from the employer of the insured person, or from any other person who is the servant of the employer, any compensation or damages under any other law for the time being in force in respect of an employment injury sustained as an employee under this Act'.

⁸ See *Gelau anak Paeng v Lim Phek San & Ors* [\[1986\] 1 MLJ 271](#).

⁹ [\[1998\] 4 MLJ 323](#)

¹⁰ [\[2015\] 7 MLJ 270](#).

¹¹ [\[1998\] 4 MLJ 323](#).

¹² In *Yamate (M) Sdn Bhd v Ng Siew Lan* [2006] 4 ILR 2588, the claimant was alleged to have thrown a plastic tumbler at COW1, the claimant's boss. Due to the seriousness of the claimant's misconduct, the Industrial Court held that the company's decision to terminate the claimant summarily was deemed to be with just cause and excuse. Again, in *Malaysia Smelting Corporation Bhd v Abu Bakar Muhamad* [2000] 2 ILR 128 the claimant was dismissed for assaulting the engineering/maintenance manager. In *Key Asset Sdn Bhd v Sangaran Ragavan* [1999] 2 ILR 124, the claimant was dismissed for uttering threats against superior officer and creating chaos in the factory. In *Torita Rubber Works Sdn Bhd v Maniarsm Kandasamy* [1999] 2 ILR 293, the claimant was dismissed because he was alleged to have threatened and intimidated COW2 in the canteen in the presence of three other staff. In *Jasvender Singh Seran Singh v Malaysian Airlines System Berhad* [2012] 4 ILR 57, the claimant was dismissed due to gross misconduct namely, for throwing a cup of hot Nescafe at a worker of the company's cafeteria and threatening to kill him.

¹³ In *Lion Steelworks Sdn Bhd v Mohd Kamal Hassim* [2005] 2 LNS 2238, the claimant had pulled COW1's hand and had pushed him backwards causing him to jerk forward although he did not fall. He had also uttered abusive/threatening words, wherein the court held that the claimant had committed a serious misconduct which warrants his dismissal. Again, in *Jaya Jusco Stores Bhd v Abdur Rahim Othman* [2004] 3 ILR 226, the claimant, a merchandise officer, was dismissed after being found guilty by the domestic inquiry on the charge of engaging in acts of violence against a fellow employee. It was alleged that the claimant had grabbed and held the shirt of COW1, who was then pushed and forced by the claimant to follow him to the office. The claimant had stopped short of hitting or punching COW1. The Industrial Court held that the claimant had committed the misconduct of which he had been accused. On the question whether the claimant's misconduct constituted just cause or excuse for the dismissal, the court held that from the facts, it was shown that COW1's personal conduct had aggravated and contributed to the incident. It followed therefore, the misconduct committed was not so gross so as to warrant the harsh penalty of dismissal. However, the backwages awarded to the claimant was scaled down by 40% on account of claimant's contributory misconduct. In *Shoon Kee Fruit Juice Sdn Bhd v Tee Mun Yew* [1999] ILJU 109; [1999] 1 ILR 530, the claimant uttered threats, ie that he would chop COW1 up if he had the chance, and pursued to make some rude remarks. It was held that assaulting or threatening to assault a superior officer during working hours in the workplace is a gross misconduct as it shows a complete disregard of respect due to the superior and a manifest defiance of their authority. A single act of this nature may justify instant dismissal.

¹⁴ See *Kesatuan Pekerja-Pekerja Pesusahaan Membuat Tekstil & Pakaian, Pulau Pinang & Seberang Perai and Allied Malayan Development Bhd* (Award 30 of 1980).

¹⁵ In *Nishitetsu-Global Cargo Services (M) Sdn Bhd v Azizudin Mohamed Noordin* [2009] 2 LNS 490 the claimant was dismissed for causing bodily injury to a colleague.

¹⁶ *Guna Ratnam S Subramaniam v Shin-Etsu Polymer (Malaysia) Sdn Bhd* [2011] 3 ILR 578.

¹⁷ *Barney Production BC Sdn Bhd v Philomina FF Silviri* [1994] 2 ILR 60. In *Bahari Hamzah v Island & Peninsular Bhd* [2008] 1 ILR 500, the Industrial Court held that the use of insulting and abusive language is an indication of insubordination challenging authority therefore, is contrary to the basic character of the employer and employee relationship. in *Bakti Comintel Manufacturing Sdn Bhd v Ibrahim Abdullah* [1997] 3 ILR 358 the Industrial Court held that the use of abusive and threatening words is clearly an all subversive of discipline which warrants nothing less than the punishment of dismissal.

¹⁸ [\[2015\] 2 MLJ 607](#).

¹⁹ It is noteworthy that in Malaysia unlawful possession of firearms and ammunition is a very seriously offence in Malaysia: see [s 7\(1\)](#) of the [Firearms \(Increased Penalties\) Act 1971](#). See also *Public Prosecutor v Teh Ah Cheng* [\[1976\] 2 MLJ 186](#).

²⁰ [\[1947\] 1 All ER 37](#).

²¹ [\[1960\] 3 All ER 575](#).

²² [2005] 3 ILR 533.

²³ [2011] 2 LNS 0064.

²⁴ [2004] 2 ILR 586.

²⁵ [2005] 2 LNS 1810.

²⁶ [\[2013\] 6 MLJ 552](#).

²⁷ [\[2016\] 4 MLJ 282](#).

²⁸ See *Melewar Corporation Bhd v Abu Osman* [1994] 2 ILR 807 at p 840.

²⁹ In *Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor*, the Federal Court affirmed the decision of the High Court to grant the general and aggravated damages for the proven tort of sexual harassment.

³⁰ [1895] 2 QB 742.

³¹ [2009] 6 CLJ 653 (CA).

³² See Ashgar Ali Ali Mohamed and Farheen Baig Sardar Baig. *Workplace Stress: The Employer's Liability* v [\[2019\] 2 MLJ cxxxiv](#).

³³ See *Sankar Raju v Ichi-Ban Plastic (M) Sdn Bhd* [2013] 2 LNS 1275.

³⁴ [2009] 2 LNS 0657.

³⁵ [1995] 1 ILR 545.

³⁶ In *Smith v Michelin Tyre plc* [2007] IDS Employment Law Brief 839, where the Employment Tribunal held that the company had acted reasonably in dismissing the claimant for a one-off breach of the employer's smoking policy. The company had for many years operated a strict smoking policy and had made it clear that smoking in non-authorised areas amounted to gross misconduct. In this case, the claimant who had worked for the company for 12 years was dismissed when he was found smoking

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at staff locker room with the fire door opened. It was a non-authorized area for smoking. The employee had violated the company's smoking policy. The smoking policy and its consequences was adequately communicated and explained to the employees.

³⁷ [2003] 1 ILR 87.

³⁸ [2002] 2 ILR 713.

³⁹ The former Assistant Industrial Development Minister, Jainab Ahmad Ayed stated that 80 per cent of the total 277,000 drug addicts recorded in the country so far were from the working class. She added that 37 per cent of general workers and labourers in the country are involved in drug abuse. Most of them were from the private sector, with most of them working as general labourers or in the sales, manufacturing, public transportation service, construction and agriculture sectors: see '37% of General Workers, Labourers Take Drugs' (2007) *The Borneo Post*.

⁴⁰ In *Gelau Anak Paeng v Lim Phek San and Ors* [1986] 1 MLJ 271, Roberts CJ stated: 'The common law duty of an employer is to take reasonable precautions to protect his workers against danger. He is not required to insure them and to protect them against all risks of any kind but he is obliged to provide a reasonably safe system of work and to take reasonable care for his employees.'

⁴¹ [1988] IRLR 513.

⁴² See *Kesatuan Kebangsaan Pekerja Perusahaan Petroleum Dan Kimia Semenanjung Malaysia v Dic Epoxy (Malaysia) Sdn Bhd* [2014] 2 LNS 1069.

⁴³ [2014] 2 LNS 732.

⁴⁴ See *Kuala Lumpur Glass Manufactures Co Sdn Bhd v Hamzah Gemok* [1988] 2 ILR 155. See also *Zan Izumi Md Zainal v Smart Print & Stationer Sdn Bhd* [2013] 2 LNS 364; *Intra Marine (PK) Sdn Bhd v Thomas a/l Pappu* [1995] 1 ILR 654; *Kumpulan Tebong Sdn Bhd, Malacca v Sivashanmugam a/l v Hanggaraja, Malacca* [1985] 1 ILR 478; *General Ceramics Manufacturers Sdn Bhd v Kesatuan Pekerja-Pekerja Perkilangan Keluaran Galian Bukan Logam* [1984] 1 ILR 231; *Malaysia Smelting Corp Sdn Bhd v Gerald Ambrose Stothard* [1988] 1 ILR 246; *Persolekan Uniseks Salon Kimma v Yong Soon Meng* [2004] ILJU 75; ; [2004] 1 ILR 924.

⁴⁵ [1983] 1 ILR 188.

⁴⁶ Award No 10/69.

⁴⁷ [2001] 3 ILR 766.

⁴⁸ [1994] 1 ILR 368. In *Kuala Lumpur Glass Manufacturers Co Sdn Bhd v Hamzah Gemok* [1988] 2 ILR 155.