

MAPA NEWSLETTER

JUNE. 2020.

DIRECTOR WRITES



Dear readers,

Welcome to the first and latest issue of MAPA Newsletter for the year 2020.

As with our previous issues, we strive to provide our members the latest legal update and relevant labour and Industrial Relations issues in this Newsletter. We hope you will find the articles in this edition covering relevant topics informative. Our objective is to share the legal news on labour and Industrial Relations issues.

We wish everyone happy reading and please contact us if you have any comments or suggestions on our Newsletter or if you like to contribute to this publication.

Director
MAPA

MAPA SERVICES

AS A SERVICE ORIENTED ORGANISATION AND BEING THE LARGEST EMPLOYERS' TRADE UNION IN THE PLANTATION INDUSTRY, WE PROVIDE NUMEROUS SERVICES FOR THE BENEFIT OF OUR MEMBERS, SOME OF WHICH ARE AS FOLLOWS :

TO PROVIDE GUIDANCE AND RENDER ADVICE ON ALL MATTERS PERTAINING TO LABOUR AND INDUSTRIAL RELATIONS;

TO REPRESENT AND ASSIST MEMBERS AT CONCILIATION MEETINGS AT THE INDUSTRIAL RELATIONS DEPARTMENT, MINISTRY OF HUMAN RESOURCES;

TO REPRESENT AND ASSIST MEMBERS AT HEARINGS AT THE LABOUR COURT OR INDUSTRIAL COURT; AND

TO REPRESENT AND ASSIST MEMBERS DURING NEGOTIATIONS AT ESTATE/NATIONAL LEVEL.

COURT CASES

PRINCIPLE OF PROPORTIONALITY - PUNISHMENT

Court of Appeal, Putrajaya [CIVIL APPEAL NO: P-02(IM)-974-06-2015]

Between

NGIAM GEOK MOOI

And

PACIFIC WORLD DESTINATION EAST SDN BHD

Chairman:

MOHD ZAWAWI SALLEH JCA

VERNON ONG LAM KIAT JCA

ABDUL RAHMAN SEBLI JCA

Facts:

The appellant had been employed by the respondent since 1 November 1989. There had been no disciplinary issues with the Employee prior to the actions which led to her dismissal by the Employer on 30 December 2009.

According to the respondent, the appellant i)refused to follow her superior's instructions to make payment for a corporate expense and make adjustments to the company budget; and ii)wrote an e-mail saying she would no longer report to the said superior. The Employee applied for reinstatement at the Industrial Court. The Industrial Court found that the Employee was indeed guilty of insubordination (one act of insubordination, due to the abovementioned email), but that the Employer's decision to terminate was too harsh, and ordered the Employer to pay compensation and backwages to the Employee.

The Employer applied to the High Court for a judicial review of the Industrial Court's decision, and the High Court allowed the application and quashed the award of the Industrial Court. The Employee subsequently appealed to the Court of Appeal. The sole issue to be decided by the Court of Appeal was whether the decision to terminate the Employee's services was proportionate to the proven misconduct.

Findings:

The Court of Appeal stressed the importance of the principle of proportionality, which required the court "to strike an effective balance between the severity of an employee's conduct and the sanction imposed". The Court pointed out the well-settled position in Malaysia that the Industrial Court has jurisdiction to substitute its own view regarding the quantum and/or degree of punishment imposed by an employer on an employee.

Applying the proportionality test, the Court of Appeal held that the High Court committed a grave error in interfering with the Industrial Court's award. The Employer's decision to dismiss the Employee was unduly harsh and grossly disproportionate to the gravity of the misconduct committed by the Employee, and the Employee had therefore been dismissed without just cause and excuse.

The Court of Appeal justified its decision as follows:

- 1.The Employee had worked for the Employer for 20 years.
- 2.The Employee had an unblemished employment record.
- 3.The Employee was instrumental in setting up the Employer's headquarters in Penang and the branch office in Kuala Lumpur.
- 4.The Employee's tireless and faithful service to the Employer is evidenced by the profits earned by the Employer.
- 5.The Employee had committed a single act of insubordination.
- 6.The said insubordination was the Employee's first misconduct in her long years of service. There was no history of past misconduct; not even a warning was given to her at any point of time.

The Court of Appeal stressed that the management's prerogative to discipline its employees must be exercised in a manner which is reasonable and fair. Before dismissing an employee, an employer should consider whether a less severe punishment might suffice.

Held:

The following award of the Industrial Court was therefore affirmed: Total payment by the Employer to the Employee of RM1,044,480.00, less statutory deductions, calculated as follows: Compensation in lieu of reinstatement of one month's wages per year of service: $RM32,640 \times 20 = RM652,800.00$. Backwages of 24 months (the maximum pursuant to the Industrial Relations Act): $RM32,640 \times 24 = RM783,360.00$ – but subject to rescaling downwards of 50% for the Employee's contributory conduct due to the insubordination = $RM391,680.00$.

COURT CASES

FORCED RESIGNATION

Industrial Court Award No: 443 of 2017

Between

Aezrine Shah Abdullah

And

Fat Boy Records Sdn Bhd

(Chairman : Y.A. ANDERSEN ONG WAI LEONG)

Facts:

The Employee's employment with the Employer commenced in April 2004. On 1 January 2014, performance review meeting was held between the Employee and the CEO.

At the meeting several allegations were raised against the Employee involving continued late work attendance, late delivery of work, lack of teamwork, conducting outside/freelance projects during office hours, using office facilities and equipment for the outside/freelance projects and poaching the Employer's clients. At the meeting, which last 4 hours, the Employee was provided with evidence of these allegations.

Pursuant to the meeting, the Employee submitted a resignation letter dated 10 January 2014. His last working date was 22 January 2014, and the Employer paid an amount equivalent to two months' salary as severance payment.

The Employee later claimed that he was coerced and forced to resign, denying all the allegations against him, and contended that his forced resignation was a dismissal without just cause/excuse. The Employer maintained that they did not coerce or force the Employee to resign, and claimed that the fact that the Employee negotiated the severance package and his early release showed that he resigned voluntarily.

Findings:

The court decided that the burden was firstly on the Employee to prove that he was forced or coerced to resign. The Employee's counsel submitted that the Employee was wrongfully confined and restrained from leaving the meeting room for 4 hours, but the court found that the Employee had failed to establish this allegation, as there was no evidence that the Employee was physically restrained from leaving the room.

The Employee's counsel also submitted that the Employee's free will was sapped because the CEO threatened him with repercussions if he did not resign. The Employee alleged that the CEO gave him two options either to resign or, if he refuses, then the Employer would issue a warning letter every month for 3 months, and then he would be dismissed.

The court reiterated the position that it is settled law that a forced resignation is not a resignation, but is instead a dismissal in fact. However, the court stressed that merely because an employer suggests to an employee to resign to leave the company does not automatically mean that a resignation was forced. There must be a clear evidence of compulsion and an inevitable conclusion that the employee would be dismissed if he did not resign and that the resignation was caused by this threat.

The court cited Stanley Ng Peng Hon v. AAF Pte Ltd, where it was held: It will be clear that the underlying basis of the doctrine of “forced resignation” is the existence of facts showing that an employee was put under compulsion to resign and that if he declined to do so, the employer would proceed to dismiss him in any event.

However, the court also pointed out that if the resignation was brought about by other factors (other than the threat of dismissal), it would not be a forced resignation amounting to a dismissal. The court explained that, if the Employee had the opportunity to take independent advice and then offered his resignation, that fact would strongly support a resignation rather than a dismissal.

In this case the Employee gave evidence that he did not leave the room throughout the 4 hours, and that his request to the CEO for some time to talk to someone about the matter was rejected. The CEO told him that he could only have a little bit of thinking time, and was not allowed to go home to deliberate or to get back to the CEO a few days later. Due to that circumstances, he felt confused when asked to resign, and was afraid that if he did not resign he would be dismissed.

The court’s view was that, given the circumstances and the fact that he was not given reasonable time to deliberate or seek advice on the CEO’s request for him to resign, the Employee was not in the right frame of mind when he signed the resignation letter, and that it was not the “antithesis of free, unpressurised resignation”.

The court did not accept the argument that the Employee should be deemed to have voluntarily resigned because he had negotiated his ex-gratia payment and early release, as the Employee had not been warned that the purpose of the meeting had been to dismiss him. In the circumstances, the court concluded that the Employee had been doing his best to salvage what he could from the inevitable fact that he was about to be dismissed.

Held:

The court decided that the Employee had been dismissed by the Employer and had not resigned voluntarily. However, the Claimant’s excessive tardiness, in duration and frequency and the blatant disregard to the Company’s regulations, governing the working hours amounted to serious misconduct, warranting dismissal the court went on to conclude that the Employee had justified or contributed to his own dismissal by misconduct. Accordingly, it is the finding of this Court that the Claimant had justified or contributed to his own dismissal by misconduct. The Claimant’s case against the Company is hereby dismissed.

PRINCIPLES & DOCTRINES

"Unpaid Sick Leave"

The Company had appointed Clinics in Klang area to provide them with medical attention and treatment when they so required. And yet, none of the four employees went for treatment in these Clinics. Therefore, they are not entitled to sick leave with pay thereof.

(Industrial Court Award No. 33/1989)
Carlsberg Brewery (M) Sdn. Bhd. v.
National Union of Drink
Manufacturing Industry Workers
By Y.A. Tam Kam Weng

"Employers' Burden of Proof"

It must be emphasized here that the employer must produce convincing evidence that the workman committed the offence(s) he is alleged to have committed and for which he has been dismissed. The burden of proof lies on the employer. He must prove the workman guilty, and it is not the workman who must prove himself not guilty. This is so basic a principle of industrial jurisprudence that no employer is expected to come to this court in ignorance of it.

(Industrial Court Award No. 33/1989)
Carlsberg Brewery (M) Sdn. Bhd. v.
National Union of Drink
Manufacturing Industry Workers
By Y.A. Tam Kam Weng

"Hospitalization Leave"

"The onus is on the Union to prove that the Claimant falls under Article 23(e). This they could have done so by getting a further certificate from the General Hospital Pulau Pinang to that effect or even calling as witnesses the doctors who signed the medical certificates. If Claimant for reasons of her own wants to recuperate at home and the medical officer deems that she still needs hospitalization but allows her to recuperate at home, then she can enjoy the paid hospitalization leave of up to 60 days as provided for in Article 23(a) (iv). It is for her to satisfy the Company and the Court that she is "ill enough to need to be hospitalized".

((Industrial Court Award No. 178/1986)
ACE Electrical Manufacturing Sdn. Bhd. v.
Electrical Industry Workers Union.
By Y.A Fong Seng Yee

INDUSTRIAL RELATIONS SCENE

FREE
MALAYSIA
TODAY

6 June, 2020

Foreigners can be employed on permanent basis, rules apex court

By V Anbalagan - June 6, 2020 2:19 PM

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The Federal Court held that in considering whether a contract is a fixed-term one or permanent employment, the courts would have to consider the intention of the parties involved.

PUTRAJAYA: The Federal Court has held that citizenship is not a factor in deciding whether an employee is in permanent employment or under a fixed-term contract.

A five-member bench, chaired by Chief Justice Tengku Maimun Tuan Mat, said Article 10 of the International Labour Organization's Migrant Workers (Supplementary Provisions) Convention 143 of 1975 held that "all workers should be treated with fairness, dignity and equality, without distinction whether they are local or foreigners".

"This is also in consonant with Article 8 (1) of the Federal Constitution which essentially provides that all persons are equal before the law and entitled to equal protection of the law," said judge Mohd Zawawi Saleh, who wrote the 50-page judgement made available last week.

The bench, also consisting of Idrus Harun (now appointed attorney-general), Nallini Pathmanathan and Abdul Rahman Sebli, delivered its oral ruling on Nov 28 last year.

INDUSTRIAL RELATIONS SCENE

FREE
MALAYSIA
TODAY

6 June, 2020

The apex court's decision arose when it allowed an appeal by Singaporean Ahmad Zahri Mirza, who was dismissed from employment by AIMS Cyberjaya Sdn Bhd in 2013.

He initially commenced work with AIMS Data Centre 2 Sdn Bhd (ADC) in 2009 on the understanding that he would invest and build the business for the company.



Judge Mohd Zawawi Saleh wrote the 50-page judgement.

Zahri had a valid working pass and his yearly contract with ADC was automatically renewed without any application by him.

ADC was consolidated into AIMS Cyberjaya, another company in the AIMS Group of companies in 2011.

His contract was again automatically renewed without any change to the terms and conditions of his employment contract by AIMS Cyberjaya.

However, in 2013, the company terminated his contract on the purported basis that it had expired but he refused to accept the removal of his entitlement to a performance bonus.

The Industrial Court in 2016 held Zahri was a permanent employee and as such the dismissal was without just cause and excuse.

The High Court in January 2017 also dismissed the employer's judicial review but the Court of Appeal reversed the findings later that year.

Two legal questions were posed before the Federal Court: whether a need for a work permit is a material consideration in determining whether an employment contract is a genuine fixed-term contract; and whether a contract of employment, which is renewed successively, is in reality a permanent employment?

INDUSTRIAL RELATIONS SCENE

FREE
MALAYSIA
TODAY

6 June, 2020

The Federal Court also found that there was an essential unity of group enterprise between ADC and AIMS Cyberjaya.

Zawawi said that the Industrial Court may, in special and appropriate circumstances, lift the corporate veil to reveal who is the true employer in order to achieve social justice so that employees are not adversely affected.

He said the apex court found that Zahari's employment was in fact, continuous employment from ADC to AIMS Cyberjaya.

The Federal Court also held that in considering whether a contract is a genuine fixed-term one or permanent employment, the courts would have to consider the intention of parties, conduct of the employer subsequently and the nature of the employer's business and nature of work the employee is engaged to perform.

Counsel Alex De Silva, VK Raj and Tan Yang Qian represented Zahari while Vijayan Venugopal and Jamie Goh appeared for the company.

INDUSTRIAL RELATIONS SCENE

MALAYSIA
GAZZETE

8 May, 2020

Syarikat boleh mula operasi tanpa surat kelulusan, saringan pekerja tak wajib

By Bernama - 8 May 2020



KUALA LUMPUR – Syarikat boleh memulakan operasi pada 4 Mei 2020 tanpa surat kelulusan Kementerian Perdagangan Antarabangsa dan Industri (MITI) dan saringan pekerja adalah tidak wajib, menurut MITI.

Dalam kenyataan berhubung soalan lazim berkaitan Perintah Kawalan Pergerakan Bersyarat (PKPB) di sini hari ini, MITI berkata seperti yang diumumkan Perdana Menteri pada 1 Mei lepas, semua syarikat, kecuali di dalam senarai yang dilarang yang dikeluarkan Majlis Keselamatan Negara (MKN), boleh beroperasi bermula tarikh tersebut.

Katanya syarikat-syarikat tidak lagi perlu untuk membuat permohonan kepada MITI.

Menurut MITI, majikan boleh memanfaatkan Program Saringan Pertubuhan Keselamatan Sosial (PERKESO) dan maklumat lanjut tentang program ini boleh didapati melalui pautan <https://prihatin.perkeso.gov.my>.

"Program saringan kesihatan bagi COVID-19 ini diberi secara percuma kepada pekerja bagi majikan yang berdaftar dengan PERKESO. Sekiranya mempunyai pertanyaan lanjut, boleh menghubungi PERKESO melalui talian 03-42645555 / 03-80915100 / 1-300-22- 8000," katanya.

Bagi pekerja asing (bukan warganegara) industri pembinaan, katanya adalah diwajibkan untuk menjalani ujian COVID-19 melalui Program Saringan PERKESO, seperti mana dinyatakan dalam prosedur operasi standard (SOP) industri pembinaan.

"Manakala bagi pekerja asing (bukan warganegara) lain-lain sektor industri, majikan perlu mengikuti arahan dan pengumuman kerajaan dari semasa ke semasa," katanya.

INDUSTRIAL RELATIONS SCENE

MALAYSIA
GAZZETE

8 May, 2020

Bagaimanapun, katanya jika pekerja, sama ada pekerja tempatan atau pekerja asing yang didaftarkan dijangkiti COVID-19, rawatan perlu dilakukan di hospital kerajaan dan kos perubatan akan ditanggung kerajaan.

"Bagi individu yang dikesan mempunyai kontak dengan pesakit, individu tersebut perlu menjalani kuarantin mengikut perintah kuarantin tertakluk kepada ketetapan Kementerian Kesihatan Malaysia (KKM)," katanya.

Menurut MITI, jika pekerja (yang menjadi kontak rapat akibat bekerja) perlu dikuarantin di tempat lain selain hospital kerajaan dan rumah sendiri, kos penyediaan pusat kuarantin perlu ditanggung oleh majikan.

"Jika pekerja, sama ada pekerja tempatan atau pekerja asing yang didaftarkan, dijangkiti COVID-19, rawatan perlu dilakukan di hospital kerajaan dan kos perubatan akan ditanggung kerajaan, termasuk warga asing (sekiranya ujian mengesahkan COVID-19)," kata MITI.

Bagi individu yang dikesan mempunyai kontak dengan pesakit, individu tersebut perlu menjalani kuarantin mengikut perintah kuarantin tertakluk kepada ketetapan KKM.

"Jika pekerja (yang menjadi kontak rapat akibat bekerja) perlu dikuarantin di tempat lain selain hospital kerajaan dan rumah sendiri, kos penyediaan pusat kuarantin perlu ditanggung oleh majikan.

"Sebarang kos lain yang berkaitan logistik lain-lain di luar dari fasiliti hospital kerajaan atau klinik kerajaan, juga adalah ditanggung oleh majikan," menurut MITI.

Jika pekerja menolak arahan bekerja daripada syarikat, katanya syarikat perlu merujuk kepada Jabatan Tenaga Kerja (JTK) dan boleh menghubungi JTK melalui alamat e-mel di projkpp@mohr.gov.my atau majahar@mohr.gov.my.

Jika majikan tidak mematuhi SOP yang ditetapkan, yang juga merupakan satu kesalahan undang-undang, aduan boleh dibuat secara terus kepada pihak berkuasa yang berkaitan seperti berikut;

i. Aduan mengenai premis perniagaan/peruncitan dipanjangkan kepada Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna (KPDNHEP) dan Pihak Berkuasa Tempatan (PBT).

ii. Aduan mengenai kilang-kilang atau pengusaha sektor pembuatan boleh dipanjangkan kepada MITI di covid19sec@miti.gov.my.

iii. Aduan mengenai premis makanan (restoran, medan selera, pusat penjaja dll) dipanjangkan kepada PBT.

iv. Aduan mengenai penginapan asrama/CLQ boleh dipanjangkan kepada JTK di jtksm@mohr.gov.my, jtknsabah@mohr.gov.my, jtknsarawak@mohr.gov.my.

v. Aduan mengenai tapak bina/premis boleh dipanjangkan kepada Kementerian Kerja Raya di www.kkr.gov.my.

vi. Aduan mengenai syarikat kawalan keselamatan swasta dipanjangkan kepada Kementerian Dalam Negeri (KDN).

INDUSTRIAL RELATIONS SCENE

MALAYSIA
GAZZETE

8 May, 2020

Manakala bagi sektor lain, MITI berkata syarikat boleh merujuk/menghubungi kementerian/agensi berkaitan.

"Menjadi tanggungjawab bersama semua pihak untuk memahami dan mematuhi semua arahan semasa pihak Majlis Keselamatan Negara (MKN) dan juga SOP Pencegahan COVID-19 yang dikeluarkan oleh KKM untuk sama-sama mengurangkan risiko dan membendung penularan pandemik COVID-19," katanya, sambil menambah sebarang perubahan terkini sejajar dengan arahan terbaru pihak MKN dan KKM akan dimaklumkan dari semasa ke semasa.- BERNAMA

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QUESTIONS OF INTEREST



1. Paid Leave for Trade Union Course

Q: The estate received a letter from the NUPW State Branch nominating the Chairman and Secretary of the Local Union Committee to attend a trade union course for a period of 3 days in Kuantan. Should the estate grant the leave and, if so, is such leave paid or unpaid?

A: If the trade union course is approved by the Ministry of Human Resources (MOHR), then the leave granted should be paid to a maximum of three days per annum as in accordance with Article 32 - Paid Leave of the MAPA/NUPW Field and Other General Employees and Fringe Benefits Agreement, 2019. Preferably, the Chairman and Secretary of the Local Union Committee should submit individual leave application enclosing the letter from the NUPW as well as the letter from MOHR. If they failed to do, such leave would be considered as approved unpaid leave.

2. Prolonged Illness Leave

Q: A Chief Clerk suffering from a stroke had been on prolonged illness leave and he had recently exhausted his entitlement under Article 30 of the MAPA/AMESU Agreement, 2018. Since he is now on unpaid sick leave and still unable return to work, can the state now terminate his service?

A: The service of the Chief Clerk could be terminated on medical ground provided he is declared medically unfit for further employment by the Company's Visiting Medical Officer (VMO). Upon his termination of service, termination benefits calculated in accordance with the Employment (Termination and Lay-off Benefits) Regulations, 1980 would be payable. In this connection, Article 46 - Termination of Employment on Medical Grounds of MAPA/AMESU Agreement 2018 is relevant.

3. Death of Family Member

Q: In January 2020, the mother of a Weighbridge Operator passed away after a long illness. The Weighbridge Operator was given 4 working days compassionate leave with pay. Recently, his father passed away. Is he entitled to any further compassionate leave?

A: The entitlement to compassionate leave with pay is stipulated under Article 24 of MAPA/AMESU Agreement, 2018. The granting of such leave is based on the circumstances and not on annual basis. Under the circumstances, the Weighbridge Operator would still be eligible for 4 working days of compassionate leave with pay on the occasion of the demise of his father.



TIPS & THOUGHTS



10 TIPS TO ACHIEVE ANYTHING YOU WANT IN LIFE

1. Focus on commitment, not motivation.

Just how committed are you to your goal? How important is it for you, and what are you willing to sacrifice in order to achieve it? If you find yourself fully committed, motivation will follow.

2. Seek knowledge, not results.

If you focus on the excitement of discovery, improving, exploring and experimenting, your motivation will always be fueled. If you focus only on results, your motivation will be like weather—it will die the minute you hit a storm. So the key is to focus on the journey, not the destination. Keep thinking about what you are learning along the way and what you can improve.

3. Make the journey fun.

It's an awesome game! The minute you make it serious, there's a big chance it will start carrying a heavy emotional weight and you will lose perspective and become stuck again.

4. Get rid of stagnating thoughts.

Thoughts influence feelings and feelings determine how you view your work. You have a lot of thoughts in your head, and you always have a choice of which ones to focus on: the ones that will make you emotionally stuck (fears, doubts) or the ones that will move you forward (excitement, experimenting, trying new things, stepping out of your comfort zone).

5. Use your imagination.

Next step after getting rid of negative thoughts is to use your imagination. When things go well, you are full of positive energy, and when you are experiencing difficulties, you need to be even more energetic. So rename your situation. If you keep repeating I hate my work, guess which feelings those words will evoke? It's a matter of imagination! You can always find something to learn even from the worst boss in the world at the most boring job. I have a great exercise for you: Just for three days, think and say positive things only. See what happens.

6. Stop being nice to yourself.

Motivation means action and action brings results. Sometimes your actions fail to bring the results you want. So you prefer to be nice to yourself and not put yourself in a difficult situation. You wait for the perfect timing, for an opportunity, while you drive yourself into stagnation and sometimes even into depression. Get out there, challenge yourself, do something that you want to do even if you are afraid.

7. Get rid of distractions.

Meaningless things and distractions will always be in your way, especially those easy, usual things you would rather do instead of focusing on new challenging and meaningful projects. Learn to focus on what is the most important. Write a list of time-wasters and hold yourself accountable to not do them.

8. Don't rely on others.

You should never expect others to do it for you, not even your partner, friend or boss. They are all busy with their own needs. No one will make you happy or achieve your goals for you. It's all on you.

9. Plan.

Know your three steps forward. You do not need more. Fill out your weekly calendar, noting when you will do what and how. When-what-how is important to schedule. Review how each day went by what you learned and revise what you could improve.

10. Protect yourself from burnout.

It's easy to burn out when you are very motivated. Observe yourself to recognize any signs of tiredness and take time to rest. Your body and mind rest when you schedule relaxation and fun time into your weekly calendar. Do diverse tasks, keep switching between something creative and logical, something physical and still, working alone and with a team. Switch locations. Meditate, or just take deep breaths, close your eyes, or focus on one thing for five minutes.

