



**Date and Time:** Wednesday, 18 December, 2019 12:09:00 PM MYT

**Job Number:** 105590208

## Document (1)

1. [Workplace Misconduct and the Requirement of Due Inquiry: With Reference to the Practice in Malaysia \[2019\] 5 MLJ cxii](#)

**Client/Matter:** -None-

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Malayan Law Journal Articles

WORKPLACE MISCONDUCT AND THE REQUIREMENT OF DUE INQUIRY: WITH REFERENCE TO THE PRACTICE IN MALAYSIA

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## INTRODUCTION

Misconduct is the most common ground for dismissal, and this refers to unacceptable behaviour of an employee which may be categorised into three sub-headings, namely misconduct related to duty, misconduct related to discipline and misconduct related to immorality. Whilst the employer may establish guidelines of what constitutes gross misconduct and the consequences if an employee engages in any of the listed misconduct that does not necessarily mean that serious misconduct has automatically occurred. In every case before deciding whether serious misconduct has occurred, the employer must consider all the facts and the employee's response. Further, in determining whether the misconduct merits dismissal from employment the employer must prove that the wrongful conduct of the worker was sufficiently serious that it undermines the trust and confidence that the employer has in the employee. In this regard, before termination of employment relationship, the rule of natural justice must be observed in the sense that the accused employee must be informed of the charges levelled against him and must to be accorded the right to be heard. Having said the above, this paper discusses the concept of workplace misconduct and the requirement of a domestic or due inquiry to establish the alleged act and with reference to the practice in Malaysia. The issues considered herein are as follows: (a) whether the disciplinary or domestic inquiry is essential in an impending dismissal for alleged gross misconduct; and (b) whether the dismissal carried out without convening a disciplinary inquiry violates the principles of natural justice thereby rendering the dismissal unfair.

At this juncture it is worthwhile to note that the Court of Appeal in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* have stated, inter alia, that art 5(1) of the Federal Constitution was considered the fountain of justice in regards to right to livelihood.<sup>1</sup> In this case Gopal Sri Ram JCA, created a novel jurisprudence narrative on principle of natural justice<sup>2</sup> in relation to the principle of procedural fairness and the constitutional rights of a civil servant.<sup>3</sup> The implication and acceptance of this case shows that there is a duty to observe the rules of fairness as a prequalification to the lawful employment of a statutory authority.

## WORKPLACE MISCONDUCT

The main mechanism to implement an employer-employee relationship is the contract of employment. The contents of contract lay out the rights and duties of both parties to the contract. Certainly, from an ethical and moral point of view, these terms and conditions in the contract of employment are there to ensure an equal bargaining power between the employer and the employee and maintain harmony at workplace. However, in relation to misconduct, the obligations of the employee are not only laid out in the contract of employment but also the company's handbook. More often than not, when one peruses through the handbook, the nature of misconduct varies depending on the position and nature of work. In as much as a contract of employment or for that matter of fact the company handbook is there to ensure equality at workplace, however many a time it may not be the case. Employers are seen always to have an upper hand<sup>4</sup> in the drafting of the employment contract and also the company handbook, therefore in many cases of misconduct the employer are seen to be in a stronger position that creates an unequal bargaining power.<sup>5</sup>

In this regards it is important to revisit the definition given by definition of misconduct. The above term simply means an act or omission which is inconsistent with the fulfilment of the express or implied terms and conditions of an employee's contract of service. It is also known as a form of improper behaviour or an intentional wrongdoing or a deliberate violation of a rule or standard of behaviour. The conduct of the employee may involve either gross negligence or a deliberate departure from accepted standards.<sup>6</sup> The wrongdoing of the employee must be detrimental to the property and reputation of the employer as well as their business concern.

*Black's Law* dictionary defines 'misconduct' as 'a transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behaviour, wilful in character, improper or wrong behaviour'.<sup>7</sup> Again, *Prem's Judicial Dictionary* states that the two criteria that must be established for misconduct are: firstly, the intentional doing of something which the doer knows to be wrong; and secondly, which he does recklessly, nor caring what the result would be.<sup>8</sup>

The courts in Malaysia have also attempted to define misconduct, for example in *Plaat Ruber Sdn Bhd v Goh Chok Guan*,<sup>9</sup> where the Industrial Court stated: 'Misconduct means such act or conduct as adversely affects employees' duties towards the employer. The misconduct complained of must have the same relations with the employees' duties or the work entrusted to him by the employer or his competency to perform the same. Any breach of an express or implied duty on the part of the employee, unless it is a trifling nature, would amount to misconduct'. Again, in *Holiday Inn, Kuching, Sarawak v Puan Elizabeth Lee Chai Siok, Sarawak*,<sup>10</sup> misconduct was defined as any conduct inconsistent with the faithful discharge of his duties or any breach of the express or implied duties of an employee towards his employer. In *Syarikat Kenderaan Melayu Kelantan Sdn Bhd v Transport Workers Union*,<sup>11</sup> misconduct was defined as 'conduct so seriously in breach of the accepted practice that by standard of fairness and justice the employer should not be bound to continue the employment'.

The courts in other jurisdiction such as the English courts had also attempted to define the above term. English common law defined the relationship between an employer and an employee as that of master and servant. Lord Esher MR in *Pearce v Foster*<sup>12</sup> stated that:

The rule of law is, that where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him. The relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faithfully, and if by his own act he prevents himself from doing so, the master may dismiss him.

In *Pearce v Foster*,<sup>13</sup> Lopes, LJ stated: 'If a servant conducts himself in a way inconsistent with faithful discharge of his duty in the service, it is misconduct which justifies immediate dismissal. That misconduct, according to my view, need not be misconduct in carrying of the service or the business. It is sufficient if it is conduct which is prejudicial or is likely to be prejudicial to the interests or to the reputation of the master and the master will be justified, not only if he discovered at the time, but also if he discovers it afterwards, in dismissing that servant'.

Again, in *Clouston & Co v Corry*,<sup>14</sup> Lord Hereford stated: 'There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course, there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal'.

As from the above, misconduct refers to an improper behaviour, intentional wrongdoing or deliberate violation of rules or standard of behaviour. The conduct of an employee is inconsistent with the faithful discharge of his duties, or breach of the express or implied duties of an employee towards his employer and that such acts or conduct of the employee adversely affects his or her duties towards the employer.

Having said the above, it is noteworthy that it would be wrong to assume that any misconduct on the part of an employee would warrant dismissal from employment. In fact, misconduct can be categorised into gross or serious

misconduct and minor misconduct. To justify dismissal the misconduct must be sufficiently serious that it undermines the trust and confidence of the employer towards the employee. The examples of gross misconduct include, but are not limited to, misuse of drugs and alcohol, theft, dishonesty, harassment and discrimination towards other employees, customers or the employer, negligence, absenteeism, insubordination, leaking confidential information, internet abuse and conflict of interest.

Meanwhile, minor misconduct refers to employee's offensive conduct such as late-coming, sleeping on duty, and continuously breaching company's rules and regulations which in most circumstances would not warrant termination from employment for a single act but may instigate the issuance of a warning letter. However, an employee who habitually comes late to work despite being repeatedly warned and counselled by the employer would be deemed to have committed a gross misconduct and thus, justifying his dismissal. In addition, sleeping on duty may also constitute a gross misconduct. BR Ghaiye's in his book entitled *Misconduct in Employment* (3rd Ed) at p 930 states as follows:

Sleeping on duty has always been regarded as indiscipline and dereliction of duty. Under some Standing Orders, it is a serious misconduct entailing dismissal. Sleeping on duty is a misconduct. Coupled with past misconduct, even though resulting in minor punishments, it becomes grave misconduct. A workman was found lying fast asleep on duty at his working place. On three earlier occasions also, he was found guilty of misconduct but only some minor punishments had been imposed. Taking into consideration his past conduct, it was held to be major misconduct.

While the list of serious and minor misconduct being subjective and might vary depending on the nature of each business, whether or not the misconduct warrants dismissal is determined with reference to the facts and circumstances of each individual case. Generally, reference is made to the nature and degree of the alleged misbehaviour; its significance in relation to the employer and to the position held by the employee; its effect on the confidential relationship between the parties as against the severe consequence of dismissal; and the misconduct must be such that it goes to the heart or root of the contract between the parties.<sup>15</sup> In some cases, a single act of misconduct may justify instant dismissal especially when the misconduct is such that 'it goes to the root of the contractual relation of master and servant so as to indicate unwillingness on the part of the servant to be bound upon his original terms of contract'.<sup>16</sup>

It is also worth noting that the punishment meted out against the employee for the alleged misconduct has to be proportionate with the nature and gravity of his action or deed.<sup>17</sup> Misconduct of a serious nature such as insubordination, falsifying company documents, theft of the employer's property, violating the company's security or safety regulations or any substantive violation, may result in dismissal from employment.

The burden is on the employer to justify the dismissal, namely, that they had just cause and excuse for dismissing the worker.<sup>18</sup> This is in line with the International Labour Organization's Convention No 158 of 1982 art 8(2)(a) which provides that the burden of proving the existence of a valid reason for the termination shall rest on the employer. The quantum of proof is on the balance of probabilities, even if the misconduct complained of is of a criminal nature, such as theft, criminal misappropriation, criminal breach of trust and cheating, among others. The court does not require the employer to prove their case against the employee beyond reasonable doubt as in a criminal trial before the ordinary courts of law. The term 'balance of probabilities' simply means: 'if the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not'.<sup>19</sup>

## **MISCONDUCT: DISCIPLINARY INQUIRY**

The International Labour Organisation's Termination of Employment Convention No 158 of 1982<sup>20</sup> provides, inter

alia, that an employee cannot be terminated unless there is a valid reason for such termination, which is connected to the capacity, conduct of the worker, or based on the operational requirement of the undertaking, establishment or service.<sup>21</sup> The circumstances which does not constitute valid termination is mentioned in article 5 namely, union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours; seeking office as, or acting or having acted in the capacity of, a workers' representative; the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities; race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin and absence from work during maternity leave. Article 6 separately provides that temporary absence from work due to illness or injury shall not constitute a valid reason for termination

The employee's right to be heard in the event of termination for reasons related to his conduct or performance is emphasised in article 7<sup>22</sup> and the burden of proof to show the existence of a valid termination is on the employer.<sup>23</sup> This implies that a person whose rights are affected must have a reasonable notice of the case he has to meet; he must have reasonable opportunity of being heard in his defence; it should be heard by an impartial tribunal; and lastly, the tribunal should act fairly, impartially and reasonably.<sup>24</sup>

In relation to the above, the Industrial Relations Act 1967 provides that a workman cannot be dismissed save and except with just cause or excuse. The terms 'just cause or excuse' connotes that an impending dismissal must be substantively justified and procedurally fair. Substantive justification relates to the capacity or qualification of the employee for performing the work he was employed to do by the employer, the employee was redundant or that it related to conduct of the employee. While procedural fairness requires that a person whose rights are affected must have a reasonable notice of the case he has to meet; a reasonable opportunity of being heard in his defence; trial by an impartial tribunal, who is neither directly nor indirectly a party to the case or has interest in the matter; and that the authority or tribunal should act fairly, impartially and reasonably.<sup>25</sup> In the context of employment law, before an employee could be dismissed from employment, the rule of natural justice must be observed in the sense that the accused employee must be informed of the charge levelled against him and is given the right to be heard.

In relation to workplace misconduct, before appropriate disciplinary action is taken against an affected employee, the employer is required to hold a domestic enquiry or due inquiry and observe the principle of natural justice namely, that the accused employee must be given a fair chance to challenge the charges levelled against him; to present evidence of his own choice; to cross-examine the company's evidence; and to explain his point of view without any pressure or fear. The enquiry must be conducted before an impartial tribunal. If the alleged misconduct is established based on the evidence presented, the punishment imposed must be proportionate to the gravity of the misconduct.<sup>26</sup> As noted earlier, this article addresses the issue as to whether the disciplinary or domestic inquiry is essential in an impending dismissal for alleged gross misconduct and whether the dismissal carried out without convening a disciplinary inquiry violates the principles of natural justice thereby rendering the dismissal unfair.

### **DISMISSAL WITHOUT DOMESTIC INQUIRY: WHETHER FAILURE TO CONVENE FATAL OR A MERE IRREGULARITY?**

Prior to the decision of *Dreamland Corporation (M) Sdn Bhd v Choong Chin Sooi & Anor*,<sup>27</sup> the courts in Malaysia have been saying that the absence of a domestic inquiry was considered fatal, resulting in the dismissal being without just cause or excuse. This is also provided in s 14 of the Employment Act 1955 namely, that the employer must conduct an immediate investigation and, if the complaint is established and upon the recommendation of the panel of domestic inquiry, take appropriate action against the accused employee. The same is also fortified by the Industrial Relations Act 1967 [s 20\(1\)](#) which uses the term 'dismissal without just cause or excuse' and as discussed earlier, it implies that an impending dismissal must be substantive, justified and procedurally fair.

However, after *Dreamland Corporation's* decision, failure to hold a domestic inquiry or a defective inquiry was a mere irregularity curable by de novo proceedings before the Industrial Court. In *Dreamland's* case, at the Industrial Court level, it was evident that no domestic inquiry was held. The Industrial Court proceeded to hold its own inquiry as to whether the dismissal of the claimant was without just cause or excuse. The court found in favour of the claimant and accordingly awarded him monetary compensation. The High Court affirmed the decision of the Industrial Court. In relation to the failure to hold a domestic inquiry, the Supreme Court stated: 'Absence of a domestic inquiry or the presence of a defective domestic inquiry is not a fatality, but merely an irregularity. It is open to the employer to justify his action before the Industrial Court, by leading all relevant evidence before it, and by having the entire matter open before the court'.

In arriving at the above conclusion, the Supreme Court had relied on the ratio in *Workmen of the Motipur Sugar Factory Private Limited v The Motipur Sugar Factory Private Limited*,<sup>28</sup> an Indian case, and *British Labour Pump Co Ltd v Byrne*,<sup>29</sup> an English Employment Appeal Tribunal's decision. In *Motipur Sugar Factory's* case it was held that: 'Where an employer has failed to make an inquiry before dismissing or discharging a workman, it is open to him to justify his action before the tribunal by leading all relevant evidence before it. The entire matter would be open before the tribunal. It will have jurisdiction not only to go into the limited questions open to the tribunal where domestic inquiry has been properly held, but also to satisfy itself on the facts adduced before it by the employer whether the dismissal or discharge was justified. The important effect of omission to hold an enquiry is merely that the tribunal would not have to consider whether there was a prima facie case but would decide for itself on the evidence adduced whether the charges have really been made out'.

In *British Labour Pump Co Ltd v Byrne*, the Employment Appeal Tribunal stated: 'Where an employer has not followed a proper procedure, the right approach is for the Industrial Tribunal to ask two questions. First, have the employers shown on the balance of probabilities that they would have taken the same course had they held an inquiry, and had they received the same information which that inquiry would have produced? Second, have the employers shown that in the light of the information which they would have had, had they gone through the proper procedure, they would have been behaving reasonably in still deciding to dismiss?'.

The principal of *Dreamland's* case was cited with approval by the Federal Court in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal*,<sup>30</sup> where it was stated, inter alia, that failure by the employer to hold an inquiry could be cured by a hearing before the Industrial Court. Mohamad Azmi FCJ, delivering the judgment of the Federal Court, stated: 'In our opinion, *Dreamland* did not belittle the importance of complying with any statutory or contractual enquiry before dismissal in all master and servant cases outside the purview of the Industrial Relations Act 1967. What *Dreamland*, following the curable principle in *Motipur* and *Calvin* laid down, was that failure on the part of the employer to hold a proper domestic inquiry should not deprive the Industrial Court of jurisdiction nor excuse it from the obligation to hear the reference on its merits. We therefore could not find any reason to reject the two authorities. In any event, we held the view that once a case of wrongful dismissal had been properly referred by the Minister under [s 20\(3\)](#), the Industrial Court was seized with jurisdiction and was obliged under the Act to determine the dispute on its merits. Thus, even where there was a breach of contractual or statutory obligation to hold an inquiry, the Industrial Court should proceed to determine on the merits first, whether the misconduct complained of was in fact committed by the employee, and secondly, whether the nature and extent of the misconduct could constitute just cause or excuse for the dismissal'.

The Supreme Court's decision in *Dreamland Corp* and the Federal Court's decision in *Wong Yuen Hock* had been followed both by the civil courts and the Industrial Court thereby dispensing the requirement of a domestic inquiry in an impending dismissal.<sup>31</sup> In *Sil Ad (Johor Bahru) Sdn Bhd v Hilton Oswald Franciscus*,<sup>32</sup> Abdul Malik Ishak J stated that: 'there was no necessity for the company to conduct an inquiry before terminating the employment. It was sufficient for the company to lead evidence before the Industrial Court to show reasons for the termination. It is therefore respectfully submitted that the domestic inquiry being defective is not ipso facto fatal. The court is still at



liberty to decide on the issue based upon evidence adduced'. Again, in *Ganesan G Suppiah v Mount Pleasure Corp Sdn Bhd*,<sup>33</sup> the High Court stated that the Industrial Court provides an impartial forum and the minister's reference should be viewed as a hearing de novo by an independent statutory tribunal. In particular, Abdul Kadir Sulaiman J stated: 'Invariably, the hearing before the Industrial Court itself which indeed provides a better and impartial forum for the employee than most domestic tribunals, should be taken as sufficient opportunity for the employee to be heard to satisfy natural justice and thereby rectify any omission to hold any domestic inquiry. Indeed, the Minister's reference should be viewed as a hearing de novo by an independent statutory tribunal'.

Likewise, in *Asiatic Development Bhd v Kanesan a/l Manayah and Anor*,<sup>34</sup> the court took the view that it should not be concerned with the domestic inquiry held by the employer. In particular, Abdul Kadir Sulaiman J stated: 'The Industrial Court when carrying out its duty in hearing the reference by the Minister ought not to be influenced by the fact that a domestic inquiry was held by an employer before dismissing his workman. Were it otherwise, the guilt or innocence of a workman upon a charge of misconduct would be decided not by the Industrial Court, but by the employer himself. That, with all respect, is not the purpose for which Parliament went through the elaborate process of legislating the Act and setting up a special machinery for the vindication of the rights of workmen'.

In light of the above, failure to hold a domestic inquiry or one that is flawed or defective is not fatal to the company's case. It is curable in the sense that at the trial before the Industrial Court, the unfair dismissal claim would be heard afresh and on merits. It must be added that where a domestic inquiry was held by the company, the findings of the domestic inquiry panel are not binding on the Industrial Court. It is common for the Industrial Court to take into consideration the panel's findings when determining whether or not an employee has been dismissed with or without just cause or excuse.<sup>35</sup> The court would also inquire whether the domestic inquiry applied the correct procedure and had reached the correct conclusion having regard to all the evidence adduced before the inquiry panel. In *Metroplex Administration Sdn Bhd v Mohamed Elias*,<sup>36</sup> the High Court noted that where a domestic inquiry was held, the Industrial Court should first consider the procedure adopted at the inquiry and its findings and that a failure to do so would constitute an error of law. Low Hop Bing J (as he then was) stated:

Where a domestic inquiry is held and the rules of natural justice have been applied, the Industrial Court should first consider the adequacy or otherwise of the procedure adopted in the proceedings for the domestic inquiry in order to determine whether the domestic inquiry has applied the correct procedure and reached the correct conclusion having regard to all the evidence, documentary and oral, adduced at the domestic inquiry. If at the domestic inquiry, the rules of natural justice were properly applied, the employee being given the opportunity to be heard and to present his case, and should a finding be made against the employee based on the evidence which was presented to the domestic inquiry, the Industrial Court ought to consider the finding of the domestic inquiry in order to conclude whether the employee has been dismissed without just cause or excuse. The rule that a domestic inquiry should be held is after all a rule of the court's own devising.

Again, in *Bumiputra-Commerce Bank Bhd v Mahkamah Perusahaan Malaysia & Anor*,<sup>37</sup> Raus Sharif J (as he then was) stated: 'Where due inquiry has been held ... the Industrial Court should first consider whether or not the domestic inquiry was valid and whether the inquiry notes are accurate. In the absence of such consideration and a finding on the validity of the domestic inquiry and accuracy of the inquiry notes, the Industrial Court's action in proceeding to decide the matter without any regard to the notes of inquiry cannot be described as anything more than an error of law'. As from the above, where a domestic inquiry was held by the employer, then so long as the rules of natural justice had been properly observed, the employee given an opportunity to be heard and the finding arrived at was based on the evidence presented at the domestic inquiry, the duty of the court is merely to consider the findings of inquiry panel with a view to decide whether the decision of the panel was perverse or otherwise.<sup>38</sup>

In addition, it must be noted that as far as employees who fall within the ambit of the Employment Act, s 14(1)

mandates that a 'due inquiry' has to be held before dismissal. In *Milan Auto Sdn Bhd v Wong She Yen*<sup>39</sup> per Mohd Azmi bin Kamaruddin FCJ (delivering the judgment of the court held as follows:

[1] ...

[2] The initial defect in natural justice in not holding a statutory or contractual domestic inquiry is 'curable' by the inquiry held by the Industrial Court itself. Industrial Court could not therefore shy away from determining the two issues required to be determined in dismissal cases under [s 20](#) reference. In omitting to carry out its basic functions, the Industrial Court in the present appeal had clearly committed a jurisdictional error. It follows that the learned High Court Judge, in dismissing the appellant's application, had fallen into similar error.

[3] The requirement of due inquiry before dismissal by s 14(1) of the Employment Act for employees whose earning did not exceed RM1,250 per month, could not by mere inference change the policy of the law in [s 20](#) of the *Industrial Relations Act*. There is no basis in law to hold that the defect in natural justice could only be cured if the workman earned more than RM1,250 per month. The principle of curability should not be limited to certain category of workmen depending on their salary.

[4] In the absence of clear words by Parliament, the Court must hold that none of the Amending Acts to the Employment Act 1955 viz Act A 91/1971, Act A 360/1976, and Act A 497/1980, was intended to alter the policy of the law under the Industrial Relations Act 1967.

### **ABSENCE OF DOMESTIC INQUIRY NOT A FATALITY BUT A MERE IRREGULARITY: WHETHER COMPATIBLE WITH MALAYSIA INDUSTRIAL JURISPRUDENCE**

What is apparent from the above discussion is that it is not compulsory for the company to hold a domestic inquiry before dismissing an employee for alleged misconduct. In other words, the failure by the employer to conduct a due inquiry process will not constitute a dismissal without just cause or excuse. In *Wong Yuen Hock's* case, Mohd Azmi FCJ noted, inter alia, that the Industrial Court was not competent to declare the dismissal void for failure to comply with the rules of natural justice. Again, in *Milan Auto Sdn Bhd v Wong She Yen*,<sup>40</sup> the Federal Court noted that the High Court and the Industrial Court fell into similar error when it held that the claimant was dismissed without just cause or excuse purely on violation of the principles natural justice and the failure to hold a domestic inquiry.

It is sufficient for the employer to lead evidence before the Industrial Court to show the reasons for the dismissal and with an opportunity given to the employee to rebut the allegations against him. The very purpose of an inquiry before the Industrial Court is to give both the disputants an opportunity to be heard. The court will determine whether the misconduct complained of has been established and whether the proven misconduct constitutes dismissal with just cause or excuse. As aptly stated by Mohamad Azmi FCJ in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal*:<sup>41</sup>

Invariably, the hearing before the Industrial Court itself which indeed provides a better and impartial forum for the employee than most domestic tribunals, should be taken as sufficient opportunity for the employee to be heard to satisfy natural justice and thereby rectify any omission to hold any domestic inquiry. Indeed, the Minister's reference should be viewed as a hearing de novo by an independent statutory tribunal. In our view, this was a far cry from saying that a statutory or contractual requirement for a pre-dismissal inquiry could be totally ignored in all disputes involving master and servant, even though outside the parameter of [s 20](#). In the circumstances, we failed to understand the complaint of the Industrial Court that for it to inquire into the merits the question of 'just cause or excuse' would be 'grossly unfair'. Carrying out one's function could not possibly be described as an unfair exercise.

Whilst it is not disputed that the hearing before the Industrial Court would provide an opportunity for the employee to be heard, the real question is whether this approach is compatible with the industrial jurisprudence in Malaysia. To succumb to the courts approach as above would be akin of adopting the common law master and servant principles namely, that an employee who had committed gross misconduct may be dismissed summarily and without notice. The burden of proving misconduct justifying dismissal is on the employer who should lead evidence at the trial before the Industrial Court, should the case be referred to the court by the Minister pursuant to [s 20\(3\)](#) of the [Industrial Relations Act 1967](#). In fact, at common law the employer is free to dismiss an employee on any grounds with no obligation to reveal the reason for the dismissal<sup>42</sup> and the employer may even rely on the reasons for dismissal discovered subsequent to the dismissal.<sup>43</sup> Therefore, applying the principles of *Dreamland Corp* and *Wong Yuen Hock*, employer is free to fire an employee without assigning reasons for the dismissal nor according the employee the right to be heard, hence, dispensing the rules of natural justice.

As stated earlier, at common law, an employment relationship may be ended by giving the employee an appropriate notice of termination or payment in lieu thereof. However, pursuant to [s 20\(1\)](#) of the [Industrial Relations Act 1967](#), the employer must follow the requirements of establishing substantive justification and procedural fairness. In fact, the Act makes no distinction between a termination and a dismissal as either must be with just cause or excuse. The Federal Court had, in *Dr A Dutt v Assunta Hospital*,<sup>44</sup> stated, inter alia, that the so called 'termination simpliciter', a termination by contractual notice and for no reason must still be grounded on just cause or excuse.

It is also worthwhile noting that pursuant to [s 20\(1\)](#) of the [IRA](#), a workman who alleges that his dismissal was without just cause or excuse, has to file his written representation at the office of the Director General not later than 60 days from the moment he considers himself to have been dismissed without just cause or excuse. The representation will then pass different levels, namely, the conciliatory level (where the Director General of the Industrial Relations Department (IRD) seeks to conciliate over the dispute), reporting level (where the Director General reports to the Minister after finding the dispute irreconcilable), referral level (where the Minister decides whether or not to refer the dispute to the Industrial Court), and the adjudicatory level at the Industrial Court.

Upon receiving the representation from the workman, the Industrial Relations Department will invite the disputants for a conciliation meeting. The officer of IRD will act as a facilitator where his task is essentially to convene the parties to resolve their differences, to find points of common interest and defuse tension. He will allow the parties to express their views, will examine the statement of the case made by the parties, and deliver an opinion as to the best or most likely outcome of the dispute. The parties, however, retain the right to say whether they do or do not accept any suggested settlement. The conciliator does not make decision on the merits of the case or recommend the acceptance of any possible solution. It is up to the parties concerned to reach a final agreement on any proposed settlement.

When an alleged dismissal was carried out without due inquiry and with no reasons assigned, it would be obvious that the conciliation meeting would not be so effective. Instead of being a forum for amicable settlement of the dispute, the conciliation meeting would become a mere hurdle for the parties to pass for purposes of reference to the Industrial Court. It is reiterated that while conciliation does not guarantee a settlement, it is an essential feature of our industrial relations, a very positive method of resolving disputes without the need to use a more formal process. Therefore, if the basic tenets of fairness in an impending dismissal are properly followed, including conducting a due inquiry into the allegation made against the employee and accord the employee a chance to vindicate himself at the inquiry, the conciliation meeting will then become more effective in the sense that the conciliator would have a clearer understanding of the dispute and thus, able to effectively communicate with the parties with a view of arriving at an amicable solution.

It may be further added that where the conciliation fails to arrive at an amicable solution, the Director General will

refer the matter to the Minister who in turn will determine whether the representation merits referred to the Industrial Court for an award. The courts have repeatedly said that the Minister's discretion under the [s 20\(3\)](#) of the [Industrial Relations Act 1967](#) may be questioned by certiorari when the Minister acted ultra vires, unfairly or unjustly, or where there were flaws in his decision-making process.<sup>45</sup> In *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan*<sup>46</sup> the Court of Appeal stated inter alia, that if the Minister decided not to refer the dispute to the Industrial Court, he should give reasons for his decision, because a workers right to livelihood is involved. If he gives no reasons, or gives inadequate reasons, it is open to the court to infer that the Minister had no good reason for the decision he made. It is important therefore for the Minister to exercise his discretion sparingly without any improper motive and not to take into account extraneous or irrelevant matters.<sup>47</sup>

It follows that where there is a challenge by way of certiorari of the exercise of the discretion by the Minister under [s 20\(3\)](#) of the [IRA](#) the High Court will undertake a meticulous examination of the facts that were made available to the Minister. If the examination reveals that the representations made under [s 20\(1\)](#) of [IRA](#) were neither perverse or frivolous, nor vexatious, or if it raised serious questions of fact or law calling for adjudication, a decision not to refer is liable to be quashed by an order of certiorari. In other words, where the dispute raises questions of law, the proper forum to decide on this is the Industrial Court, and not the Minister.<sup>48</sup> If however, the representation is clearly trivial, frivolous or vexations, the Minister's refusal to refer the representation to the Industrial Court will not be interfered.

The question arises namely, how would the minister make a decision to refer or otherwise the representation to the Industrial Court when the due inquiry has been dispensed with? It is submitted that without a domestic inquiry, the Minister's reference of the representation to the Industrial Court would become a merely procedural formality. This is primarily because the Minister would not be able to sufficiently digest whether the representation merits reference to the Industrial Court.

It is further submitted that the superior courts approach in *Dreamland Corporation* and *Wong Yuen Hock* may be tenable if there is an automatic reference of dismissal cases to the Industrial Court. Undoubtedly, the Industrial Court would indeed provide a better and impartial forum for the employee to raise objection to his dismissal. In other words, where there is a complaint against the employer for unfair dismissal or where there has been victimisation or unfair labour practice or violation of the principle of natural justice, or where the decision to dismiss was baseless or perverse, the matter ought to be adjudicated in the Industrial Court without reference to the Industrial Relations Department and the Minister.

In fact, in other jurisdictions an aggrieved workman who believes that his dismissal was unfair or unjustifiable, may refer his grievance directly to the tribunal or court for adjudication. The UK Employment Rights Act 1996, s 94(1) for example provides that an employee has the right not to be unfairly dismissed by his employer and s 111 further provides that a complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer. Likewise, in New Zealand Employment Relations Act 2000, s 102 provides that an employee who believes that he or she has a personal grievance such as unjustifiable dismissal, may file his grievance with the Employment Relations Authority. It is obvious from the above, that the proper forum to filter out frivolous cases is the court or the tribunal that will exercise its power only in plain and obvious cases and only where it can be clearly seen that the claim is on the face of it obviously unsustainable. Hence, it is submitted that the decision of the superior courts on the waiver of domestic inquiry in an impending dismissal is reasonable and sound provided that all claims for dismissal without just cause or excuse is referred directly to the Industrial Court, bypassing the Industrial Relations Department and the Minister.

## CONCLUSION

Workplace misconduct refers to the conduct of an employee which is inconsistent with the faithful discharge of his

or her duties, or any breach of the express or implied duties of an employee towards his employer. Whether or not the misconduct warrants dismissal is determined with reference to the nature and degree of the alleged misbehaviour; its significance in relation to the employer and to the position held by the employee; its effect on the confidential relationship between the parties as against the severe consequence of dismissal; and misconduct must be such that it goes to the heart or root of the contract between the parties.

Prior to the superior court's decision in *Dreamland Corporation (M) Sdn Bhd v Choong Chin Sooi & Anor*,<sup>49</sup> and in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal*,<sup>50</sup> the absence of a domestic inquiry in an impending dismissal was considered fatal, resulting in the dismissal being without just cause or excuse. In the above cases however, it was held that failure to hold a domestic inquiry or a defective inquiry was a mere irregularity curable by de novo proceedings before the Industrial Court. The decision in the above cases had been followed by the Industrial Court in numerous of its awards. The approach taken by the superior courts as above is akin of endorsing the common law master and servant principles namely, that where an employee had committed gross misconduct the employer may summarily dismiss the employee with no obligation to reveal the reason for the dismissal.<sup>51</sup> The employer may even rely on the reasons for dismissal discovered subsequent to the dismissal.<sup>52</sup> The employer will only be required to justify the dismissal when the case is referred to the Industrial Court during which time the employee would be accorded the right to be heard.

It is submitted that without holding a proper inquiry in an impending dismissal due to an alleged misconduct would make the parties feel that the conciliation meeting at the Industrial Relations Department is insignificant. Instead of becoming a forum for amicable settlement of the dispute, the conciliation meeting would become a mere hurdle for the parties to pass through before the same could be referred to and adjudicated by the Industrial Court. In addition to the above, even the minister who has the prerogative under [s 20\(3\)](#) of the [IRA](#) would not be able to decide effectively whether the representation merit reference to the Industrial Court. Hence, the Minister's reference of the representation under the IRA to the Industrial Court would become a merely procedural formality in bringing the dispute to the court.

Undoubtedly, the superior courts' approach in *Dreamland Corporation* and *Wong Yuen Hock's* may be justified if there is an automatic reference of dismissal cases to the Industrial Court. It would then become the function of the Industrial Court to determine whether the dismissal was with or without just cause or excuse and whether the employee was given sufficient opportunity to be heard to satisfy the rules of natural justice. As aptly noted by Raja Azlan Shah CJ (as he then was) in *Goon Kwee Phong v J & P Coats (M) Bhd*:<sup>53</sup> 'Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it'.

As a final remark it is also worth noting the observation by Chief Justice Dickson<sup>54</sup> that 'Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being'. The above statement perhaps sheds light and holds true that that misconduct can be argued in the context of human frailty that is couched upon the premise that no behaviour is good or bad in it however it is the consequences that have been spawned by the organisation that will consider being good or bad. However, at the same time no excuses ought to be given for gross misconduct as the work place requires workers to be emotional resilient. In moderation, the rule of law in the practice of proper response in



the perils of bad behaviour that most likely will result in misconduct must be crafting contractual terms that will produce a more unambiguous formalisation of an employment relationship.

<sup>1</sup>

Gopal Sri Ram in the case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 where he stated: 'They (judges) should, when discharging their duties as interpreters of the supreme law, adopt a liberal approach in order to implement the true intention of the framers of the Federal Constitution. Such an objective may only be achieved if the expression 'life' in art 5(1) is given a broad and liberal meaning. Adopting the approach that commends itself to me, I have reached the conclusion that the expression 'life' appearing in art 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the rights to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. It includes the right to live in a reasonably healthy and pollution free environment. For the purposes of this case, it encompasses the right to continue in public service subject to removal for good cause by resort to a fair procedure'.

<sup>2</sup> See the history of natural justice and origins of the two important principles of natural justice: *audi alteram partem* and *nemo judex in causa sua* in <http://www.legalservicesindia.com/article/1528/Origin-and-Development-of-Principles-of-Natural-Justice.html>.

<sup>3</sup> Keeping in mind that art 135 of the Federal Constitution, 'dismissal' under art 135(2), the civil servant is entitled to a reasonable opportunity of being heard.

<sup>4</sup> P Davies and M Freedland, *Kahn-Freund's Labour and the Law* (3rd Ed 1983), at p 18: [T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination ...

<sup>5</sup> K Swinton in *Contract Law and the Employment Relationship: The Proper Forum for Reform*, in BJ Reiter and J Swan, eds, *Studies in Contract Law* (1980) 357, at p 363: the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure.

<sup>6</sup> See *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197.

<sup>7</sup> Bryan A Garner (General Editor), *Black's Law Dictionary* (7th Ed).

<sup>8</sup> Daulat Ram Prem, *Prem's Judicial Dictionary* (Words and Phrases Judicially Defined in India, England, USA, and Australia), Arora Law House, 1964. See *Tractors Malaysia Berhad and Wong Kam Yoon* (Award 29 of 1972).

<sup>9</sup> [1995] 1 ILR 79.

<sup>10</sup> [1990] 2 ILR 262.

<sup>11</sup> [1990] 1 MLJ 5 at p 11.

<sup>12</sup> [1886] 17 QBD 536.

<sup>13</sup> [\[1885\] 15 QBD 114](#).

<sup>14</sup> [\[1906\] AC 122](#) at p 129 (PC).

<sup>15</sup> See *Cyril Leonard & Co v Simo Securities Trust Ltd and others* [\[1971\] 3 All ER 1313](#).

<sup>16</sup> See *Transport Worker Union and Kartar & Sundar Singh Omnibus Co Ltd* (Award 7 of 1970).

<sup>17</sup> See *Malaysian Airlines v Teo Chui Ping* [2005] 2 ILR 15.

<sup>18</sup> See *Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor* [2002] 3 CLJ 314.

<sup>19</sup> Per Lord Denning in *Miller v Minister of Pensions* [\[1947\] 2 All ER 372](#) (Eng) at p 374.

<sup>20</sup> *International Labour Conventions and Recommendations 1977-1995 Vol III* (1996) 164. The Convention and Recommendation of 1982 supersedes the 1963 Recommendation.

<sup>21</sup> Article 4 provides that 'The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service'.

<sup>22</sup> Article 7 provides that 'The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity'.

<sup>23</sup> See the Termination of Employment Convention 1982 article 9.

<sup>24</sup> See *Ridge v Baldwin* [\[1964\] AC 40](#); *Ketua Pangarah Kastam v Ho Kwan Seng* [\[1977\] 2 MLJ 152](#) (FC); *Surinder Singh Kanda v Government of the Federation of Malaya* [\[1962\] 1 MLJ 172](#) (PC); *Skypark International (M) Sdn Bhd v Foong Kah Tin* [1987] 1 ILR 495.

<sup>25</sup> See *Ridge v Baldwin* [\[1964\] AC 40](#); *Ketua Pangarah Kastam v Ho Kwan Seng* [\[1977\] 2 MLJ 152](#) (FC); *B Surinder Singh Kanda v The Government of the Federation of Malaya* [\[1962\] 1 MLJ 169](#) (PC); *Skypark International (M) Sdn Bhd v Foong Kah Tin* [1987] 1 ILR 495.

<sup>26</sup> In *Norizan bin Bakar v Panzana Enterprise Sdn Bhd* [\[2013\] 6 MLJ 605](#), the Federal Court held, inter alia, that the Industrial Court can substitute its own view as to what is the appropriate penalty for the employee's misconduct, for the view of the employer concerned.

<sup>27</sup> [\[1988\] 1 MLJ 111](#).

<sup>28</sup> (1965) AIR SC 1803.

<sup>29</sup> [\[1979\] IRLR 94](#) (EAT).

<sup>30</sup> [\[1995\] 2 MLJ 753](#).

<sup>31</sup> See *Ladang Rakyat Terengganu v Md Roslan Bin Md Naim And Anor* [\[2011\] MLJU 217](#), *Gymtech Feedmill (Malacca) Sdn Bhd v Rajendram a/l Annamalai* [\[2008\] MLJU 248](#), *Intrakota Consolidated Berhad v Mohamad Raslin bin Md Shah & Anor* [\[2008\] MLJU 538](#), *Projek Lebuhraya Utara-Selatan Berhad v Cik Norhamiza Binti Mohd Noh* [\[2004\] MLJU 255](#), *Bumiputra Commerce Bank Berhad v Mahkamah Perusahaan Malaysia & Anor* [\[2004\] 7 MLJ 441](#), *Justin Michael Francis v Sabah Golf & Country Club* [2014] 2 LNS 0668, *Florence Chang Mee Kheng v Kelab Taman Perdana Diraja Kuala Lumpur* [2013] 2 LNS 1895, *Encik Murugiah a/l Samikaneu v Nittsu Transport Service (M) Sdn Bhd* [2011] ILJU 50, *Chai Yaw Bon v Pentel (Malaysia) Sdn Bhd* [2013] 2 LNS 1, *Harianto Effendy Zakaria & Ors v Mahkamah Perusahaan Malaysia & Anor* [2011] 5 CLJ 188, *Ngeow Voon Yean v Sungei Wang Plaza Sdn Bhd & Anor* [\[2004\] 1 MLJ 512](#), *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [\[1996\] 1 MLJ 481](#), *Ahmad Kafrawi Mohamad v Celcom (M) Sdn Bhd* [2014] 2 LNS 0313, and *Bohari Hamden v Malaysia Airlines System Berhad* [2014] 2 LNS 0217.

<sup>32</sup> [\[1996\] MLJU 288](#); [1998] 3 CLJ 233.

<sup>33</sup> [\[1997\] MLJU 148](#); [1998] 1 CLJ 637.

<sup>34</sup> [\[1998\] MLJU 198](#).

<sup>35</sup> See *Harold Fernandez Sebastian Wilfred Fernandez v Mahkamah Perusahaan Malaysia & Anor* [2013] 2 MELR 401.

<sup>36</sup> [1998] 5 CLJ 467.

<sup>37</sup> [\[2004\] 7 MLJ 441](#).

<sup>38</sup> See *Metroplex Administration Sdn Bhd v Mohamed Elias* [1998] 5 CLJ 467.

<sup>39</sup> [\[1995\] 3 MLJ 537](#); [1995] 4 CLJ 449.

<sup>40</sup> [\[1995\] 3 MLJ 537](#).

<sup>41</sup> [\[1995\] 2 MLJ 753](#).

<sup>42</sup> In *Re Arbitration Between the African Association Ltd and Allen* [\[1910\] 1 KB 396](#), 400, the contract of employment for a term of two years provided that the employers might at any time at their absolute discretion terminate the engagement at any earlier date than specified. This according to Bray J 'that seems to me to give an option in favour of the employers, which option can, however, only be exercised by them on the usual and implied term of giving reasonable notice of their intention to exercise it'. See also *Ridge v Baldwin* [\[1964\] AC 40](#); [\[1963\] 2 All ER 66](#) (HL); *Pillai v Singapore City Council* [\[1968\] 1 WLR 1278](#) at p 1284 (PC); *Malloch v Aberdeen Corp* [\[1971\] 2 All ER 1278](#); [\[1971\] 1 WLR 1578](#) 1581 (HL).

<sup>43</sup> In *Cyril Leonard & Co v Simo Securities Trust Ltd* [\[1971\] 3 All ER 1313](#) at p 1321, Sachs LJ stated that where 'an employee has in fact been guilty of uncondoned misconduct so grave that it justifies instant dismissal, the employer can rely on that



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misconduct in defence of any action for wrongful dismissal even if at the date of the dismissal the action was not known to him'.

<sup>44</sup> [\[1981\] 1 MLJ 304](#).

<sup>45</sup> See, for example, *Minister of Labour v Sanjiv Oberoi* [\[1990\] 1 MLJ 112](#) at p 113 (SC).

<sup>46</sup> [\[1996\] 1 MLJ 481](#).

<sup>47</sup> See, for example, *Michael Lee Fook Wah v Minister of Human Resources* [\[1998\] 1 MLJ 305](#) (CA); *National Union of Hotel, Bar and Restaurant Workers v Minister of Labour and Manpower* [\[1980\] 2 MLJ 189](#) at p 190 (FC); *Minister of Labour, Malaysia v Lie Seng Fatt* [\[1990\] 2 MLJ 9](#) at p 10 (SC).

<sup>48</sup> See, for example, *Minister for Human Resources v Thong Chin Yeong* [\[1999\] 3 MLJ 257](#) at pp 260–261 (CA).

<sup>49</sup> [\[1988\] 1 MLJ 111](#).

<sup>50</sup> [\[1995\] 2 MLJ 753](#).

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<sup>53</sup> [\[1981\] 2 MLJ 129](#).

<sup>54</sup> See *Re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC); [1987] 1 SCR 313 at p 368.