

Proper dismissal procedures to avoid consequences

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Dismissal of employees is one aspect of human resource management not to be neglected by employers, as businesses could face the risk of being dragged into unnecessary lawsuits if the issue is not rightly addressed.

"Be slow to hire and quick to fire" is a regularly mentioned business mantra. However, as Malaysia does not practice the principle of "at will" employment, managers have to be aware that a "quick to fire" approach also brings significant risks.

In order to get a better idea of the potential complexities surrounding such disputes, *MALAYSIA SME*® got in touch with industrial and employment law specialist, lawyer Donovan Cheah.

"If employers do not carry out the proper steps and precautions before reaching a decision to dismiss an employee, they may find themselves at the wrong end of a lawsuit," said Cheah.

An unfair dismissal case can bring significant impact upon an employer. In the situation where the Industrial Court issues an award in favour of a highly paid employee, the employer would be paying a hefty amount of compensation and backwages. This could be a burden to businesses, especially small and medium enterprises (SMEs) operating on smaller budgets.

Cheah continued, "There are quite common opinions of Malaysia having a 'pro-employee' legislative landscape, which are reflective of the actual state to a certain extent. If employees feel they have been wrongly dismissed, the law in our country offers several avenues for them to seek reparation."

Nevertheless, there are still proper means to dismiss employees in Malaysia, provided that employers first fulfil certain legal requirements.

As stated in section 20 of the Industrial Relations Act 1967 (IRA 1967), an employee who claims to have been unfairly dismissed may make a representation to the Director General for Industrial Relations within 60 days from the date of his dismissal.

After a representation is filed, the Industrial Relations Department (IRD) will organise a conciliation meeting between the employee and



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the employer in trying to settle the matter amicably.

If a settlement cannot be achieved, the matter will be referred to the Minister of Human Resources, who will then decide whether or not to refer the matter to the Industrial Court. Once the matter is referred to the Industrial Court, a trial will be heard before the Chairman of the Industrial Court.

He noted, "In the event where

the Industrial Court concludes that the employee has been unlawfully dismissed, the employee will be awarded reinstatement and backwages; or compensation in lieu of reinstatement and backwages."

In reference to the IRA 1967, backwages are also awarded to cover the period between the date of dismissal and the date of the award. For confirmed employees, backwages awarded by the Industrial

Court are capped at a maximum of 24 months of the employee's last drawn salary. The cap for probationers is 12 months.

Speaking on the complaints procedure, Cheah said that it could take months and sometimes more than a year before a complaint was referred to the Industrial Court for determination.

As a lawyer with extensive experience in unfair dismissal claims, he opined that the Industrial Relations Department should look into investing more resources and manpower to clear the backlog of cases to ensure speedy referral of matters.

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"High earning employees will still have recourse through the civil courts, where frivolous cases will be discouraged as a losing party will be liable to pay costs," he said.

Speaking on the effectiveness of the conciliation procedure, he stated it strongly depends on the personalities involved and also the role played by the presiding Industrial Relations (IR) officer.

"While some IR officers may treat the conciliation procedure as an administrative process, others may try harder to get parties to reach a middle ground that will result in an amicable resolution," he said.

Employers will have to prove the dismissal of an employee is done "with just cause and excuse", so as to successfully defend an unfair dis-

missal claim. The phrase is ambiguous and perhaps intentionally so.

The principle of "just cause and excuse" in general means that the employer must have proper justification and reasons to dismiss the employee.

Cheah cited the threshold will differ depending on the reasons for dismissal. For example, dismissal on grounds of redundancy may require the employer to prove that the functions of the employee were eliminated or were in excess to the needs of the company.

As the Industrial Court prides itself on being a "court of equity and good conscience", they determine cases on the substantial merits without regard to technicalities and legal form. Consequently, the flexibility of the Industrial Court comes at the detriment of certainty.

On the other hand, "procedural fairness" is another aspect taken into account by the Industrial Court. Hence, there is the possible scenario of an employer with good grounds for dismissal but still losing the wrongful dismissal case because the dismissal was procedurally unfair or against the rules of natural justice.

Cheah revealed although the procedure for claiming unfair dismissal under the Act is necessary to protect employees, it is also open to abuse.

"As costs are not awarded at the Industrial Court there is little to no monetary consequence to employees who file frivolous unfair dismissal complaints."

"In contrast, employers who successfully defend an unfair dismissal claim and are vindicated by the Industrial Court will still be out of pocket as they have to incur legal fees which cannot be recovered from the employee," he stated.

In his opinion, an unfair dismissal claim can result in far-reaching consequences and in some cases, bring catastrophic effect to business. In order to avoid more significant liability, an employer who does not invest in doing some groundwork before termination, may be paying a large settlement sum to a dismissed employee.

"In what may be the biggest tragedy of all, these settlement sums possibly will even surpass the sums commonly paid as bonuses to outstanding, high performing employees," Cheah concluded. **MSME**