

WARM WELCOME TO OUR NEW VICE CHANCELLOR/PRESIDENT

With great pleasure the Legal Office takes note of the appointment of a distinguished educationist, YBhg Emeritus Professor Dato' Dr Hassan Said who has been appointed the new Vice Chancellor of UiTM, effective 1 February 2016. He takes over from YBhg Tan Sri Dato' Sri Prof Ir Dr Sahol Hamid Abu Bakar whose term as Vice Chancellor of UiTM ended on 31 December 2015.

Prior to his appointment, Emeritus Professor Dato' Dr Hassan Said was the Vice Chancellor and President of Taylor's University, as well as the former Director-General of the Department of Higher Education, Ministry of Higher Education (January 2005 - April 2008). He holds a Bachelor's Degree in Mathematics from the University of Manchester, UK (1979), Master of Science from Brunel University, UK (1981) and a PhD from Brunel University (1984). He specialises in Computer-Aided Geometric Design.

We, at PPUU warmly welcome our new Vice Chancellor to UiTM. We are confident that in view of his excellent leadership record and academic achievements, YBhg Emeritus Professor Dato' Dr Hassan Said will take UiTM to a higher level, both in the richness of education and the quality of its staff.



*"Allah never changes a condition which
He has conferred upon a people until they
change what is in their own selves"*

(Holy Qur'an, Surah 8:53).

THE LAW RELATING TO ORDERS OF SURCHARGE AGAINST PUBLIC SERVANTS AND EMPLOYEES OF STATUTORY BODIES

By: Shad Saleem Faruqi*

Public office is a public trust. This is especially so in the matter of handling the nation's or the public's money. The law on surcharge refers to the penalty imposed on a fiduciary for breaching his fiduciary duty.

Purpose

The purpose of the law on surcharge is to enforce financial responsibility, honesty and efficiency within public services.

Another aim is to compensate the government or a statutory body for losses suffered as a result of an employee's negligence, dereliction of duty, dishonesty, carelessness or inefficiency.

The law empowers the government or a statutory body to initiate proceedings for surcharge in lieu of, or in addition to, disciplinary proceedings.

Laws applicable

The main laws relating to surcharge are: the Financial Procedure Act 1957 [Act 61], Public Officers (Conduct & Discipline) Regulations 1993 and Statutory Bodies (Discipline & Surcharge) Act 2000 [Act 605].

In addition, most statutory bodies have provisions on surcharge in their parent laws. Some examples of these laws are: Universiti Teknologi MARA Act 1976 [Act 173], Rubber Industry Smallholders Development Authority Act 1972 [Act 85], Lembaga Kemajuan Terengganu Tengah Act 1973 [Act 104], Employees Social Security Act 1969 [Act 4] and Labuan Financial Services Authorities Act 1996 [Act 545].

The surcharge provisions in these laws are presumably superseded by the Statutory Bodies (Discipline & Surcharge) Act 2000 [Act 605] because the latter law is a special piece of legislation on discipline and surcharge applicable to all statutory bodies. However, it will not be surprising if, in case of conflict between Act 605 and a statutory body's parent legislation, someone argues in court that Act 605 is a general law and the statutory authority's own parent law is a special law that should prevail due to the rule "special overrides general".

Who is liable to an order of surcharge?

Any employee or ex-employee of the federal government, state governments or a statutory body including a university may be subjected to an order of surcharge.

A person who has retired, resigned or been terminated or dismissed may be liable in the same manner as a serving officer: Act 61, s. 18; Act 605, s. 14. The liability is a lifelong liability.

Who has authority to issue an order of surcharge?

1. In the case of federal or state employees, the appropriate Service Commission after "consultation with the financial authority" may order imposition of the surcharge: Act 61, s. 18.

"Financial authority" is defined in Act 61, s. 3. "Financial authority" in relation to the Federal Consolidated Fund means the Treasury and in relation to the Consolidated Fund of a State means the State Financial authority. "State financial authority" means "the principal officer, by whatever name called, in charge of the financial affairs of a state".

It is also noteworthy that the term "consultation" does not mean "consent". The appropriate Service Commission is the ultimate authority on surcharge matters. It is required, by way of procedure to consult and hear out the appropriate financial authority. However the opinions of the financial authority are not binding.

2. If statutory bodies are involved, then the Board of Directors of a statutory body (and not the Jawatankuasa Tata tertib) is the authority for ordering imposition of the surcharge: Act 605, s. 15.

Grounds for surcharge

Under Section 19 of Act 61 and Section 14 of Act 605, the following five acts of commission or omission can trigger the law on surcharge. The law for the government and statutory bodies is largely similar.

1. Failure to collect any monies owing to the federal or state government or to the statutory body when it was the officer's responsibility to do the collection. Possible

*Emeritus Professor of Law and Legal Advisor to the University

examples here are: failure of a university to collect fees from students while permitting them to pursue the academic programme; failure to initiate procedures against violators of scholarship agreements; failure to collect fines; failure to collect fines for late delivery of goods or services: Act 61, s. 18(a); Act 605, section 14(a).

2. Improper payment of public monies or money of the statutory body. For example, if claims are approved or project-payments are authorized without proper scrutiny or supervision or without determining whether contractual obligations have been complied with, or for corrupt motives, these may well be grounds for surcharge. Also if payment of monies was not duly approved: Act 61, s. 18(b); Act 605, section 14(b). Excess payment of salary may be a ground for surcharge.
3. Causing, whether directly or indirectly, any deficiency in or destruction of any money, stamps, securities, stores or other property of the federal or state government or a statutory body: Act 61, s. 18(c).
4. Accounting officer failing to keep proper accounts or records: Act 61, s. 18(d); Act 605, section 14(d). This is likely to include failing to monitor accounts and records.

“Accounting Officer” under Act 61, s. 3 refers to “every public officer who is charged with the duty of collecting, receiving, or accounting for, or who in fact collects, receives or accounts for, any public money, or who is charged with the duty of disbursing, or who does in fact disburse, any public moneys, and every public officer who is charged with the receipt, custody or disposal of, or the accounting for, public stores or who in fact receives, holds or disposes of public stores”.
5. Failing to make any payments due from the government or the statutory body or university: Act 61, s. 18(e); Act 605, section 14(e). This includes delay in the payment of monies due from the government or the statutory body or the university.

Procedure for surcharge

The law provides a very brief, rudimentary procedure for initiating surcharge proceedings.

In relation to the government: For the government, there is no requirement under Act 61, section 19 to serve a show cause notice on the person to be surcharged! However, in practice, this is done.

If no notice to show cause is given, the courts will surely strike down the whole exercise as a breach of the common law principle of natural justice which is firmly embedded in our system of procedural justice. All that section 19 of Act 61 requires is that the Chairman of the appropriate Service Commission shall notify the head of the department of the person surcharged and the head will then notify the person surcharged!

In relation to universities: For statutory bodies the law is much more just from the procedural point of view. The Board of Directors of a statutory body shall serve a written notice on the officer concerned: Act 605, section 15. The Officer concerned has 14 days to show cause in writing: Act 605, section 16. No oral hearing is required (but there is no legal bar if the Board of Directors wishes to permit an oral hearing). The Board shall deliberate on the written reply of the officer and make a decision: Act 605, section 16. The decision on the surcharge must be communicated in writing to the officer: Act 605, section 17.

It is humbly submitted that the procedure for imposing surcharge in the public services and statutory bodies (specially the former) is extremely obsolete and not in keeping with modern trends of natural justice.

It must be borne in mind that no one should be deprived of any right or interest or legitimate expectation without a proper “hearing”.

In several cases courts have held that “hearing” to be fair must be oral and not just in writing.

“Hearing” is now regarded by the superior courts as part of the constitutional right to personal liberty (Article 5) and part of the right to equality (Article 8).

Surcharging an employee involves depriving him of part of his salary or pension. Salary and pension are “property” under Article 13 of the Constitution. “Property” cannot be deprived except in accordance with “law”. “Law” is not only statutory law laid down in Act 61 but also includes the Federal Constitution’s chapter on fundamental liberties. “Law” also includes common law rules of natural justice.

From the above it follows that some provisions of Act 61 may be unconstitutional and must be amended to fall in line with modern notions of due process.

Even the law in Act 605 for statutory bodies falls short of the requirements of due process in that there is no statutory provision for a thorough prior investigation. Oral hearing is not allowed. There is no representation by a lawyer or by a friend or colleague of the person to be surcharged.

It is humbly recommended that Act 61 and Act 605 must be amended to mandate a prior statutory investigation in all cases of alleged negligence, default etc. that may lead to a surcharge totaling more than two month’s basic salary.

At the investigation, the “accused” must be heard orally, must be allowed to bring witnesses, cross-examine all official witnesses, have a right to examine incriminating documentary evidence, right to introduce his own documentary evidence in defence, right to request that he be allowed to be represented by a lawyer or a learned friend in the discretion of the Chairman of the Investigation Committee.

Such a procedure for an investigation committee already exists under Act 605 for cases that may lead to dismissal or reduction in rank. The procedural rights in disciplinary cases must be introduced in surcharge cases as well.

At UiTM, though the law (Act 605) does not call for a prior investigation, the practice is that in all surcharge cases, no matter how trivial or serious, a prior, internal investigation is always done. The Legal Office vets the processes and the findings. Only then the Board of Directors examines the file to determine whether there is a prima facie case and whether a notice of show cause must be sent or not.

No appeal

No appeal to the Minister or to the courts is allowed. However, the subject of the order can apply to the Board for reconsideration and the Board has the power to (i) withdraw any order (Act 61, s. 20; Act 605, section 18) or (ii) to reduce the amount of surcharge (Act 605, s. 18), or (iii) write-off the loss (Act 61, s. 17).

Judicial Review

Despite the absence of appeal, no law can prevent the superior courts from exercising their inherent power of review by way of certiorari, mandamus, injunction and declaration. This means that those conducting surcharge proceedings must be vigilant that judicial questioning cannot be discounted.

Amount of surcharge

The amount of surcharge that can be imposed depends on the nature of the act or omission: Act 61, s. 18 and Act 605, s. 14.

Act of Omission	Amount that can be surcharged
1. Under section 14(a), Act 605 for failure to collect monies	Amount not collected
2. Under section 14(b), Act 605 for improper payment.	Amount of improper payment.
3. Under section 14(c), Act 605 for causing loss, destruction etc	Value of the deficiency or value of property destroyed.
4. Under section 14(d), Act 605 for failing to keep accounts	Such sum as the Service Commission or the Board deems fit.
5. Under section 14(e), Act 605 for failing to make or delaying payment	Such sum as the Service Commission or the Board deems fit.

Recovery of surcharge

A surcharge is a civil debt owed by the officer to the government or the statutory body or the university: Act 61, s. 21; Act 605, s. 20. It can be recovered in the following ways:

- Deduction from salary by equal monthly installments not exceeding one fourth of the total monthly salary.
- Deduction from pension by equal monthly installments not exceeding one fourth of the total monthly pension.
- Civil suit in a court of law.

Surcharge does not bar disciplinary action

An order of surcharge does not bar concurrent or subsequent disciplinary proceedings: Act 605, section 22.

Surcharge does not bar criminal action

An order of surcharge does not bar concurrent or subsequent criminal proceedings: Act 605, section 22.

This means that on the same set of facts, a person can be (i) surcharged, (ii) subjected to discipline and (iii) prosecuted by the Public Prosecutor for a battery of criminal offences or for corruption. Is this not a violation of the rule against double jeopardy under Article 7(2) of the Federal Constitution?

Record

An order of surcharge goes into the personal record of the public servant: Reg. 51(2), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) (Pindaan) 1993.

Concluding remarks

Surcharge cases raise broader issues of management, organization, accountability and adequacy of standard operating procedures. For example, the failure to collect moneys that are due or failure to maintain accounts is often caused by frequent transfer of officers and the ignorance of new officers of past transactions.

Hundreds of contracts are signed but there is no emphasis on “contract management”. Instead of continuous monitoring of projects, deadlines and performance, attention is drawn to the project only when things go wrong by which time it is almost too late to give proper notice within time in order to claim compensation. There is absence of the culture of periodic servicing and maintenance.

Loss of government property is endemic. Part of the problem is inadequate security measures and multiple sharing of responsibility. When responsibility is too widely shared, often there is no responsibility.

We need to examine the surcharge issue holistically and to reduce or eliminate the root causes that cause loss of public funds. Officers who are surcharged often claim that they are scapegoats for the failures of the system.

ENEMIES

“Respond to an evil deed with something good and see how someone who is separated from you because of enmity becomes a dear friend”

(Holy Qur’an, Surah 41:34).