



**LEX**

Friends of the Law

**AMICUS**

BULLETIN OF THE OFFICE OF THE LEGAL ADVISOR  
UNIVERSITI TEKNOLOGI MARA, SHAH ALAM

VOL. 1 – JUNE 2015

# STAFF FACING CRIMINAL PROCEEDINGS:

## SOME CONSIDERATIONS

by Shad Saleem Faruqi<sup>1</sup>

### INTRODUCTION

It is an unfortunate reality that now and then facts come to light involving strong suspicion of criminality on the part of our staff. Sometimes the complainant is an outsider. At other times, the complaint to the police or to the university authorities is filed by our own students or by other members of the staff. The police, in their discretion, question the accused and subsequently either close the file or arrest him and charge him in a court of law.

In relation to employees facing criminal proceedings, the University has powers, duties and disabilities. The powers and duties vary depending on the stage at which the criminal proceedings are. The main disability is that once a criminal proceeding is instituted, a disciplinary charge *on the same ground* as the criminal charge cannot be instituted till the employee is either acquitted, discharged or convicted: Statutory Bodies (Discipline and Surcharge) Act 2000 [Act 605], Second Schedule, Regulation 29(1).

<sup>1</sup> Emeritus Professor of Law, UiTM and Legal Advisor to the University

**Definition of crime:** "Crimes" are wrongs against the state for which the prosecution is commenced by public authorities and not private individuals. In strict theory, "criminal law" refers not only to the penal code, the law relating to drugs, corruption and arms control but also to the law relating traffic offences, littering and violations of health and environmental regulations. In theory syariah offences are also criminal offences. There is no dearth of cases involving staff in illicit sex relationships or staff accused of contracting marriages outside the local syariah courts.

**Arrest:** There is a difference between "being arrested" and "being charged". A person arrested may subsequently be released without any charge being laid against him. In cases in which an employee is arrested but not yet charged in a court of law, the university is not required to take any disciplinary action under Reg. 27(4).

What are the powers and duties of the university in situations in which its staff members are facing criminal charges? This note will provide an overview of the

following situations:

- A. Reporting of the offence to the appropriate authorities
- B. Non-disciplinary action against an officer who is the subject of a criminal proceeding
- C. Administrative action of interdiction against an officer charged in a court of law
- D. Action if officer is acquitted
- E. Action if there is an appeal by the Public Prosecutor against acquittal.
- F. Action if the acquittal is reversed on appeal (officer is convicted)
- G. Action if there is an appeal against conviction
- H. Action if officer is detained under a preventive law

#### A. REPORTING OF OFFENCE TO APPROPRIATE AUTHORITIES

In criminal cases the powers of the university are inadequate to handle the investigation and the charge. For instance, in cases of attempted rape, arson, theft, embezzlement, assault, corruption or drug peddling, the university is better advised to file a criminal report against its employee with the relevant authorities. In theory, we all have a duty to report a crime. In practice, discretion is used and most cases are handled administratively and are not handed over to the criminal law enforcement agencies.

However, there are several disadvantages of filing a criminal report:

- Whether our report will result in prosecution or not is outside our control. To the Public Prosecutor mere suspicion is not enough. If an investigation produces no evidence or insufficient evidence, the public prosecutor will not launch a prosecution.
- This means that till the police close the file, or till the case results in acquittal, discharge or conviction (a process that may take months or years), the university cannot launch its own disciplinary proceedings! This is a serious moral dilemma for the university authorities especially if the allegations are serious. In some cases, e.g. when an allegation is made that a lecturer sexually molested a student, immediate action is needed to remove the accused from the scene. Keeping him on duty may subsequently expose the university to a civil action in negligence by the parents of the student.
- Once criminal "proceedings are instituted", Regulation 29(1) of Schedule 2 of Act 605 mandates that no disciplinary action can be taken based on the same grounds as the criminal charge till the

criminal case is completed. The words "where criminal proceedings have been instituted" do not refer to mere arrest. They refer to a person being charged before a court of law.

Due to the disability imposed by Reg. 29(1), we need to find alternative courses of action against an officer who is the subject of a (possibly dilatory) criminal investigation. The more serious the allegation, the more imperative it is for us to take some action lest we are accused of condoning his alleged wrongdoing. Our options are the following:

1. After making the police report, the university may leave the matter entirely to the police and take no further action till discharge, acquittal or conviction.
2. Alternatively, along with filing a police report, the university may immediately commence disciplinary action under Reg. 29(2) and/or a full-fledged investigation under Reg. 36. The disciplinary proceeding must not be on the "same grounds as the criminal charge". It must be for a different charge than the one the police are seized with. What is the meaning of the words "on the same grounds as the criminal charge" in Reg. 29(1) and "any other ground" in Reg. 29(2) is not explained in Act 605. Does it refer to "same facts" or "same offences"? It is submitted that in the light of Reg. 29(2), the words "same grounds" mean "same ingredients of an offence". Thus disciplinary proceedings can be initiated but only for a ground other than the one cited in the criminal proceeding. For example an officer reported to the police for theft, could be tried under Regulations 3(1)(d) or 3(1)(g) – bringing disrepute or acting irresponsibly.
3. If the police take no further action, the disciplinary proceeding can continue. But if criminal proceedings are instituted, the university will have to suspend the disciplinary trial, but only if the disciplinary charge was the same as or similar to the offence alleged in the court. This is because of Regulation 29(1) which states that where criminal proceedings have been instituted and are still pending, no disciplinary action can be taken against the officer *based on the same grounds* as the criminal charge.
4. Even if a criminal proceeding has been commenced, disciplinary action on other grounds is not forbidden. If the facts and circumstances surrounding the arrest are serious, it is permissible, in appropriate circumstances, to charge the employee under Akta 605, Jadual Kedua, Peraturan 3(d) with "berkelakuan dengan sedemikian cara sehingga memburukkan atau mencemarkan nama badan berkanun". Such a course of action should be

resorted to only in exceptional cases because the employee may object that he is being subjected to “double jeopardy”. We can resist such an allegation on the ground that the disciplinary charge under Peraturan 3(d) and the criminal charge are not one and the same and, therefore, no double jeopardy results. It is notable that Peraturan 29(2) implies that disciplinary proceedings need not wait till after completion of criminal proceedings.

**B. NON-DISCIPLINARY ACTIONS AGAINST OFFICER WHO IS THE SUBJECT OF A CRIMINAL PROCEEDING**

Disciplinary action is only one of several options available to the university to deal with errant staff. Under Act 605 and the law of contract and the common law several other options are available to the employer. Among them are the following:

- Lateral transfer
- Reversion to former post
- Contractual termination of employment
- Non-confirmation of probationary officer resulting in his termination
- Termination in the public interest under section 9 Act 605
- Compulsory premature retirement under section 13 Act 605 and section 10(5)(d) of the Statutory and Local Authorities Pensions Act 1980 (Act 239)
- Invitation to officer to apply for optional retirement
- Imposition of an order of surcharge under sections 14-22 of Act 605.

Each of the above non-disciplinary measures merits separate and detailed discussion which is outside the scope of this article.

**C. ADMINISTRATIVE ACTION OF INTERDICTION AGAINST AN OFFICER CHARGED IN A COURT OF LAW**

**Interdiction:** Once criminal proceedings are instituted i.e. the officer is brought to court and the formal charge is read out to him, the university may, in its discretion, interdict the officer under Regulation 27(4) without disciplinary proceedings. The substantive law and the procedure are as follows:

- Interdiction means that though the officer is still on the pay roll, he is not allowed to report for duty: Reg. 27(2), 27(3), 27(4) and 46(6).
- If an employee has been charged for an offence

and criminal proceedings have been instituted, the Head of Department concerned shall obtain from the relevant Court all necessary information and forward it to the appropriate Disciplinary Committee together with a recommendation as to whether the employee should be interdicted from duty: Reg. 27(2), 27(3) and 27(4).

- The appropriate Disciplinary Committee has the discretion whether to interdict or not: Reg. 27(4).
- Such interdiction can, in the university’s discretion, be on full or half salary or some other proportion that is not less than half. Under Reg. 46(6), the officer shall be entitled to receive “not less than half” of his emoluments. This means that he could, in the discretion of the Committee, get anywhere from 50% to his full salary. The maximum cut is half his salary.
- Interdiction on the ground that a criminal proceeding has been instituted is regulated by Reg. 46. Under Reg. 46(2) the interdiction may be made effective from the date he was arrested or from the date the summons were served on him.
- Interdiction on this ground has no time limit. This is in contrast with interdiction for the purpose of investigation under Reg. 45(1). Under Reg. 45(1), interdiction is permissible for a period not exceeding two months to facilitate investigation.

<b>Interdiction for purpose of investigation</b>	<b>Interdiction in case of criminal proceedings or in case of disciplinary proceeding with a view to dismissal or reduction in rank</b>
<b>Duration:</b> Interdiction shall not exceed two months (Reg. 45(1)).	<b>Duration:</b> Interdiction is not confined to any definite period
<b>Emoluments:</b> full emoluments during period of interdiction (Reg. 45(4)).	<b>Emoluments:</b> The University may withhold no more than half of the emoluments unless the officer is suspended: Reg. 46(6).
<b>Commencement:</b> Interdiction under Reg. 45 can commence on a date to be determined by the Disciplinary Committee.	<b>Commencement:</b> Interdiction in case of criminal proceedings under Reg. 46(1) may be effective from the date an officer is arrested or a summons is served on him: Reg. 46(2).
	Interdiction in case of disciplinary proceedings may be made effective from such date as determined by the Disciplinary Committee: Reg. 46(3).

**Recall to duty:** An officer under interdiction may be recalled to resume his duties: Reg. 46. In such a case he shall be paid his full emoluments from the date he resumes his duties. However, any emoluments not paid due to the interdiction, shall not be paid until the criminal proceedings have been completed and a decision as regards such emoluments has been made by the Disciplinary Committee.

**Disciplinary proceeding:** During the pendency of the criminal proceedings, the University is not barred from instituting disciplinary action: Reg. 29(2). But no disciplinary action shall be taken based on the same grounds as the criminal charge: Reg. 29(1).

#### D. ACQUITTAL

If an employee who is charged with a criminal offence is acquitted or discharged and there is no appeal by the Prosecutor, all rights of the employee are restored: Reg. 27(7). He may resume his duty. Emoluments withheld must be returned to him.

However, if the officer is acquitted in the criminal court, he may still be tried for indiscipline. This will not amount to double jeopardy provided that the disciplinary charge is not the same as in the criminal court.

#### E. APPEAL AGAINST ACQUITTAL

If there is an appeal against the acquittal, the Disciplinary Committee may, in its discretion, interdict or continue the interdiction of the employee: Reg. 27(8).

If on appeal, the employee is convicted, he shall be suspended: Reg. 27(10).

#### F. CONVICTION

If the officer is convicted, the following consequences ensue:

**Suspension:** The university shall suspend the officer: Regulation 27(6) and 27(10). Such a suspension will be on no pay with effect from the date of conviction: Reg. 27(6) and 27(10). Regrettably Reg. 47(1)(a) contradicts Reg. 27(6) and 27(10) by giving the University discretion in the matter of suspension. It is noteworthy that suspension, as opposed to interdiction, is on no salary: Reg. 47(3)(b).

**No prior hearing needed:** No disciplinary trial or prior hearing is required prior to the suspension as the court conviction is sufficient evidence of wrongdoing.

**Recommendations from Head of Department:** Subsequent to the conviction, the Head of the Department must make recommendations to the Disciplinary Committee whether the employee should be-

- dismissed
- reduced in rank
- subjected to some other punishment, or
- no punishment should be imposed.

The Committee may make any one of the above decisions.

**Disciplinary proceedings:** Disciplinary proceedings may be commenced: Regulations 27-28. In such a situation, we have to be careful not to violate the constitutional law "rule against double jeopardy". This means that the charge must NOT be the same as the charge in the criminal court. It must be a disciplinary charge under the Second Schedule - for instance a charge of acting irresponsibly or dishonestly or using our official position for personal advantage or bringing shame to the University.

The disciplinary punishment subsequent to a trial does not amount to double jeopardy provided that the charge is not the same as in the criminal case: *Mohamed Yusoff Samadi v AG Singapore* [1975] 1 MLJ 1. Also Article 7(2) of the Federal Constitution.

---

...when a staff is facing a criminal investigation or trial, the university has many rights, duties and disabilities. Whether it should interpret the law literally or creatively depends on the factual matrix of each case.

---

#### G. APPEAL AGAINST CONVICTION

**Acquittal on appeal:** If an employee appeals and wins his case, all his rights are restored.

**No bar to disciplinary proceeding:** Even if on appeal there is an acquittal, there is no bar to subsequent disciplinary proceedings on other grounds: *Yusoff Samadi v A.G.* and Article 7(2) of the Federal Constitution.

## H. DETENTION

**Discipline:** If an officer is subjected to an order of preventive detention, supervision, restricted residence, banishment or deportation, the University is permitted, without trial, to take the following actions against the officer:

- dismissal
- reduction in rank
- imposition of a lesser punishment, or
- imposition of no punishment : Reg. 31 (2).

The exclusion of a right to a hearing is provided for by Reg. 32(2) (a).

**Suspension:** An employee may be suspended without disciplinary proceedings in two circumstances:

- If he has been convicted by a criminal court: Reg. 47(1)(a).
- If an order of detention, banishment etc. has been made against him under Regulation 31 and Reg. 47(1)(b). Suspension results in total loss of emoluments.

From the above it should be clear that when a staff is facing a criminal investigation or trial, the university has many rights, duties and disabilities. Whether it should interpret the law literally or creatively depends on the factual matrix of each case.



*Canseleri Tuanku Syed Sirajuddin*

LEX  
AMICUS



الجامعة  
UNIVERSITI  
TEKNOLOGI  
MARA

*Konsep, reka bentuk dan terbitan:*

**Jabatan Komunikasi Korporat**

Aras 2, Canseleri Tuanku Syed Sirajuddin

Universiti Teknologi MARA

40450 Shah Alam, Selangor

Tel : +603-5544 2102 Faks : +603-5544 2086