IS DOMESTIC INQUIRY NECESSARY BEFORE AN EMPLOYEE IS DISMISSED?

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ABSRACT

It is an established fact that when an employee accepts employment from an employer, he also agrees to be subjected to the authority of the employer and the discipline to the employer's undertaking. In other words, if the employee commits an act that is contrary to the system of rules in the organization, he is said to have committed an offence or misconduct and liable to be punished. Under the Employment Act 1955, an employee can only be dismissed after due inquiry (domestic inquiry). The requirement of a domestic inquiry has acquired great significance in our industrial law and towards this end it has now become a statutory requirement prior to the inflicting of punishment for misconduct as laid down under Section 14 of the Employment Act 1955. The effect of this provision is that before an employer could dismiss or downgrade the employee or suspend the employee from work for a certain period, the employer must hold a fair and proper domestic inquiry. This is to ensure that his rights as laid down by law, i.e.: - natural justice has been served. However it should be noted that when discussing this issue, a number of questions may arise, such as; Does Section 14(1) of the Employment Act 1955 make a domestic inquiry mandatory? What would be the position of an employee outside the ambit of the Employment Act 1955? What are the consequences of not holding a proper inquiry? This paper will try to answer these issues.

WHAT IS DOMESTIC INQUIRY?

Domestic inquiry refers to a formal hearing held by an employer, to search for the truth of a charge of misconduct, framed against the employee.

By virtue of Section 14(1) of the Employment Act 1955 (Amendment 1998), (1) an employer may, on the grounds of misconduct inconsistent with the fulfillment of the express or implied conditions of his service, after due inquiry:

(a) Dismiss the employee without notice;
(b) Downgrade the employee; or
(c) Impose any other lesser punishment as he deems just and fit, and where a punishment of suspension without wages is imposed, it shall not exceed a period of two weeks.

(2) For the purposes of an inquiry under subsection (1), the employer may suspend the employee from work for a period not exceeding two weeks but shall pay him not less than half of his wagesfor such period:

Provided that if the inquiry does not disclose any misconduct on the part of the employee, the employer shall forthwith restore to the employee the full amount of wages so withheld.

In ***Ladang Sungai Tamu v. National Union of Plantation Workers (Award No. 1 of 1991),*** the term "due inquiry" has not been defined but nevertheless the Industrial Courts have quite clearly established that the employer's procedure for dismissal on the ground of misconduct must conform to the rules of natural justice, that is to say, the employee must be informed of the grounds alleged against him and he must be given a chance to answer the charge.

In I.C.Award 382/97, the judge explained;" For industrial adjudication, the domestic inquiry has dual functions, to confirm with the principles of natural justice and the finding of inquiry will also have an important bearing on the evidential value as to the truth of the matter before the Industrial Court, having been conducted soon after the event. It is the view of this court that when there is a statutory requirement of due inquiry before dismissal for misconduct an employer will not be acting reasonably in treating misconduct as a reason for dismissal unless he has taken steps to comply with the legal requirement. In the present case, to dismiss the claimant summarily without giving him a chance to explain in the form of a show-cause letter or an opportunity to defend himself on charges preferred against him is an unfair labour practice".

IS DOMESTIC INQUIRY NECESSARY BEFORE AN EMPLOYEE IS DISMISSED?

The domestic inquiry is a development of common law in which the basic principles of natural justice applies. The concept of natural justice has two basic components; (i) the right to be heard/ the rule of fairness *(audi alteram partem)* and (ii) the rule against bias *(nemo judex in causa sua)*. These principles of natural justice apply to all workmen, even those who are outside the scope of the Employment Act 1955, provided he is an employee. The right to be heard is an opportunity to give reasons by the employee before he is dismissed. The right against bias on the other hand requires that the adjudicator not only be impartial and neutral in fact between the parties but he must also appear to be above board. For a man should not be judge in his own cause, and justice must not only be done but manifestly seen to be done. This was stated in the case of ***Eastern Plantation Agency Sdn. Bhd. and Association of West Malaysia Plantation Executives (Awards 93 of 1985).***

Under the ***Employment Act 1955***, "employee" means any person or class of persons; a] whose wages do not exceed RM1000 (which by the 1989 amendment was raised to RM1250 and by November 1995, this was raised to RM1500) who is engaged in manual labour or supervises/oversees other such employees; who works in a registered-in- Malaysia vessel and not being an officer, or who is a domestic servant; b] any person or class of persons approved by the Minister under section 2A(3). ***The Industrial Relations Act 1967*** and the ***Trade Union Act 1959*** on the other hand, cover any 'workman'; and such term means, "any person, including an apprentice, employed by the employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as consequence of that dispute or whose dismissal, discharged or retrenchment has led to that dispute.

As regards to the first principle, *audi alteram partem, in* ***I.C. award 138/85,*** the Court held that *"though the claimant was outside the scope of the Employment Act, once an employee was alleged to have committed misconduct, more so as grave as in this case, there should be due inquiry with the charge or charges framed and the employee given ample opportunity to defend himself or be heard."* And as for second principle, the Industrial Court has in many of its awards stated *"the inquiry is to be conducted, as far as possible, by such officers who are not directly connected with the investigation of the misconduct so as to give the hearing impartiality."* This is further emphasizes in the case ***I.C. Award 247/86*** where the Industrial Court states: - *"Award no. 142 of 1986 serves as a good lesson for the employer. Great care must be taken to see that the rules of natural justice are followed. If there is any failure in that respect by the employer, the employer has to pay dearly for the error, so that security of employment, a commodity now precious, can be safeguarded."*

In Malaysia, there was no statutory requirement of due inquiry under the ***Industrial Relation Act 1967*** (Hereinafter refer to as ***IRA***) before an employee is dismissed. However, ***Section 14 of the Employment Act 1955*** (hereinafter refer to as ***EA***), apparently requires "due inquiry" prior to the taking of any diplomacy action, court decisions have focused on the necessity of a proper inquiry only before dismissal is effected. According to ***Section 20(1) of IRA*** which states that *"where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment..."* and under ***section 20(3),*** it states *".... upon receiving the notification of the Director General...the Minister may, if he thinks fit, refer the representations to the court for an award."*. Thus, it does not state that due inquiry is necessary. In contrary, ***section 14(1) EA 1955*** provides that "an employer may, on the grounds of misconduct inconsistent with the fulfillment of the express or implied conditions of his service, ***"after due inquiry"***- a] dismiss without notice the employee; b] downgrade the employee; or c] imposed any other lesser punishment as he deems just and fit, and where a punishment of suspension without wages is imposed, it shall not exceed a period of two weeks".

In ***Plastic Centre Sdn. Bhd. V. Kesatuan Pekerja-Pekerja Kimia Malaysia (Award no. 5 of 1990),*** it was held that it is clear and unambiguous that an employee can be summarily dismissed under section 14(1) only after due inquiry. An employer ought to satisfy this Court on the sufficiency of the inquiry, that it was a bona fide inquiry; and that the rules of natural justice have been reasonably observed and a record of the proceedings maintained. Similarly, in ***Mohd Ibrahim Hassan & Diamond Cutting Sdn Bhd (Award No. 79 of 1980),*** it was decided that it is a statutory requirement to hold a domestic inquiry prior to dismiss an employee for misconduct as laid down in section 14 of EA. The effect of this section is that an employer can dismiss an employee on ground of misconduct; the employer must hold a proper inquiry which is the paramount requirement.

On the other hand, it must be noted that the rule requiring pre-dismissal inquiry in dismissal cases lodged under ***section 20(1) of IRA*** is the rule of the Industrial Court's own devising, and did not rely on ***section 14(1) of EA.*** This was confirmed by the Industrial Court in ***Transport Workers Union v. Lee Chee Omnibus Co. Ltd (Award No. 12 of 1970-72)*** when it asserted that "*this rule will be applied by the court without reliance on any similar statutory provision such as the Employment Act 1955*". Thus in ***Dreamland Corporation (M) Sdn. Bhd. V. Choong Chin Sooi [1989]1*** **MLJ** it was held that "*where a person had joined an organization or body and was deemed, on the rules of that organization and the contractual context in which he joined, to have agreed to accept what in the end was a fair decision, notwithstanding some initial defect, the task of the court was to decide in the light of the agreement made and having regard to the course of proceedings, whether at the end of those proceedings there had been a fair result reached by fair methods*". The decision to dismiss the claimant was, therefore, unfair in the contractual context, in the sense that it was not arrived at by a fair method of following a stipulated procedure laid down by the company to hold an inquiry. It is a deep-rooted principle of law that before anyone can be punished or prejudices in his person or property, he must have notice of the charges and must be afforded a reasonable opportunity of being heard. Failure to follow a fair procedure will lead to a finding of unfair dismissal. However, Supreme Court in the same case made it clear or reiterates that the absence of a domestic inquiry or the presence of a defective domestic inquiry is not 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. Unless the Industrial Court has found that the dismissal was without just cause or excuse, the court has no jurisdiction to offer any relief. Accordingly, this would mean that when an employer did not conduct a proper inquiry according to the rule of natural justice or the employer fails to hold a pre-dismissal inquiry, it could be cured or rectified by hearing and adducing all the relevant evidence before the Industrial Court. As such, this has led to what we called the "curable principle". In deciding ***Dreamland Corporation,*** the Supreme Court seemed to have relied heavily relied on the ruling by the Indian Supreme Court in ***Workmen of Motipur Sugar Factory Pte Ltd AIR 1965 SC 1803***. The Court stated: "*Where an employer has failed to hold an inquiry before dismissing a workman, it is open to him to justify his action before the industrial tribunal by leading all relevant evidence before it. The entire matter would be open before the tribunal*".

However, it must be noted that in ***Dreamland Corporation Sdn Bhd v. Choong Chin Sooi (1988) 1 MLJ 111,*** the monthly salary earned by the manager in this case is RM2, 400, therefore, did not fall within the ambit of EA. The question arose was whether this case applies to employees whose monthly salary is below RM 1,500. This issue has been decided in ***Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd [1995] 2 MLJ 753*** The Federal Court summarized; (i) failure by the employer to hold a pre-dismissal inquiry could be cured by the Industrial Court hearing subsequently; (ii) it is not open to the Industrial Court to travel beyond the terms of reference to it by the Minister, and in any case the Minister's term of reference to it under ***section 20 (1) of the IRA*** would limit its power and jurisdiction to deciding only whether the dismissal was for a just cause or excuse, not whether it was wrong on procedural ground; (iii) the action of the Industrial Court in holding dismissal wrongful solely on procedural grounds and sending it back to the employer for proper domestic inquiry is indeed immical to the expeditious determination of the dispute without delay as required under **section 29 (9) and section 30 (3) of the IRA**; (iv) the curable principle applies to all case regardless of whether or not the claimant is an employee within the meaning of the EA on the grounds that the application of the "curable principle" must not depend on the salary of a workman; (v) since the Federal Court viewed the Minister's reference as a hearing de novo by an independent statutory tribunal, it follows that breach of employer's obligation to hold a domestic inquiry under a collective agreement or the terms of the employment contract may also be curable by the Industrial Court hearing. In addition, the Federal Court held; the principle that an initial breach of natural justice by the employer could be cured by the Industrial Court inquiry applies to all cases, regardless of whether or not the claimant is an "employee" within the meaning of the EA. The statutory requirement of "due inquiry" before dismissing an employee under ***section 14 (1) of the Act*** does not excuse the Industrial Court from discharging its duty to enquire into the question of just cause or excuse as required by section 20 of the IRA.

The decision was adopted by the Federal Court in ***Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 3 MLJ 537*** where the Court was of the view that 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. Further, there would be no basis in law for holding that the defect in natural justice could only be cured if the workman earned more than RM 1,250 per month. As such, the Federal Court in ***Milan Auto Sdn Bhd v. Wong She Yen [1995] 3 MLJ 537*** cannot accept that the principle of curability should be limited only to a certain category of workmen depending on their salary. The Industrial Court could not therefore excuse itself from

determining the two issues required to be determined in dismissal cases under a ***section 20 of IRA*** reference and in its view the Industrial Court had in this case committed jurisdictional error in omitting to carry out the basic function.

WHEN A PROPER DOMESTIC INQUIRY MAY NOT BE POSSIBLE OR NECESSARY

There are certain situations where a detailed domestic inquiry may not be possible or even necessary to be held. For example, where there are only a handful of employees under one employer, the employer may have to be the investigator, prosecutor, inquiry officer and punishing authority. If the employee has been informed of the charges against him and has been given adequate time to prepare his defence, and also sufficient opportunity to present his defence, including any documentary proof and witnesses he may have to support his defence, it can safely be assumed that the requirements of a 'due inquiry' have been satisfied.For instance, in the case of **I.C. Award 3/79**, though no inquiry was held, the Court upheld the dismissal stating that inquiry was not necessary since the acts of misconduct, (conflict of interests) were clearly known to the accused employee, and the company's request for an explanation from him was sufficient for the purpose of **Section 14 (1) of the Employment Act 1955.** Similarly in **I.C.Award 258/85**, the counsel for the company appealed to the Court to take into consideration the fact that the company was a small concern and did not have the facilities to hold a formal inquiry. The 15-minute informal inquiry on the spot, he argued, should be considered adequate 'due inquiry' under the circumstances. This argument was accepted by the Court.

Another situation is that, where the charges against the employee are clear-cut (e.g. theft, fraud, misappropriation, habitual absence, forgery) the employer could issue a show-cause letter to the employee concerned, stating the specific charges and asking him to give reasons within a specified number of days, as to why disciplinary action should not be taken against him. If he admits the charges leveled against him, the employer may proceed with appropriate disciplinary action. Similarly, if he refuses to answer the show-cause letter, in spite of repeated reminders, the employer may take appropriate disciplinary action. In all such situations, the employer must act bona fide and must be devoid of ulterior motives. In **I.C.Award 85/79**, the Court held an inquiry was not absolutely necessary in this case, where an employee was dismissed for habitual neglect of duty, in spite of repeated warnings.

CONCLUSION

From the above discussion, it can be concluded that for employees within the ambit of Employment Act 1955, a proper inquiry is mandatory prior to dismissal, failure of which will render the dismissal unfair and invalid. On the other hand, for employees within the ambit of Industrial Relation Act 1967, some form of inquiry conforming substantially with the rules or principles of natural justice is necessary prior to dismissal for misconduct, particularly where there is a contractual obligation to hold one. However, it should be noted that the initial breach or defect in natural justice in not holding a statutory or contractual domestic inquiry is "curable" by the inquiry held by the Industrial Court itself. No doubt that there are various critiques of the present principle but the law in ***Dreamland Corporation Sdn. Bhd. v. Choong Chin Sooi (1988) 1 MLJ 111, Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. [1995] 2 MLJ 753*** and ***Milan Auto Sdn. Bhd v. Wong She Yen [1995] 3 MLJ 537*** still stands firmly till today.

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