

# TERMINATION OF CONTRACT OF SERVICE

- The term 'termination' in industrial law really refers to the termination of the employment relationship, but as this relationship is a contractual one here, it is usually identified with the termination of the employment contract.
- However, where the contract is terminated by the employer because of the perceived misconduct of the employee then whatever the reason given by the employer for the termination of the employee, the termination is termed a "dismissal".

# TERMINATION OF CONTRACT OF SERVICE

- Termination and dismissal are two distinct actions with different legal consequences.
- Termination of contract is exercisable by both parties by notice while dismissal is a prerogative of the employer to end the workers' employment on the ground of misconduct.



# TERMINATION OF CONTRACT OF SERVICE

The contract may be terminated by the employer (when he retrenches, for example) or by the employee (when he resigns) or even by an event (such as age or death).

# TERMINATION OF CONTRACT OF SERVICE

- In other words, termination of contract of employment is:

“The ending of the contractual relationship by way of notice as stipulated in the contract of service. There is no requirement to give reason. In lieu of the notice, the law allows the parties to ignore the notice requirement by paying certain amount of money which is called ‘payment of expected wages’ or ‘wages already paid’. Termination right was applied to both parties.”

# TERMINATION OF CONTRACT OF SERVICE

- In *Raman a/l Perumal Thever v National Land Finance Cooperative Society Ltd. and Industrial Court Malaysia*, the High Court sanctioned this proposition of law when it held that:

“the reason for termination or dismissal must be given in the notice of dismissal or termination itself, and if not so given, then the termination or dismissal is without reason”.

# TERMINATION OF CONTRACT OF SERVICE

- It is clear in the High Court's view that, if no reason is given in the notice of termination, the Industrial Court has no right to inquire into other grounds subsequently put up by the employer to justify the dismissal.
- However, the Federal Court on appeal allowed the application and overruled the High Court decision.

# TERMINATION OF CONTRACT OF SERVICE

The law as it now stands is that even if no reason or another reason is given in the notice of termination, the Industrial Court has the right to enquire into other grounds subsequently put up by the employer to justify the dismissal. The Industrial Court is bound by the decision of Federal Court and must follow it.

# TERMINATION OF CONTRACT OF SERVICE

- The contract of service laid down the rule to terminate the contract, i.e., by giving notice.
- It means that notice is an essential requirement in termination of contract but there is no requirement to give reason, i.e., no need to justify the reason for termination.



# TERMINATION UNDER THE COMMON LAW

- Under common law, the primary remedy of an employee who has been unlawfully dismissed is to commence an action for breach of contract for damages.



- The standard measure of damages is the amount that the employee would have earned under the contract for the period until the employer could have lawfully terminated the employment in accordance with the contract.

# TERMINATION UNDER THE COMMON LAW

- Where an employer initiates an action for damages for breach of contract in the civil courts against an employee, he bears the burden of proof of the allegation of breach.
- The burden of proof simply means the obligation to prove and in the civil courts the standard of proof is on balance of probabilities that the employee committed a breach of contract.
- This would entail proving all issues which are essential, e.g. the employer must prove the existence of contract, the breach and the consequential loss suffered.

# TERMINATION UNDER THE COMMON LAW

- Under common law, the employee cannot sue for the wounded feelings, loss of reputation or future loss of earnings. The employee cannot further obtain an order of reinstatement under the common law.
- The position of an employee at common law is well summarized by the Court of Appeal in *Aetna Universal Insurance Sdn. Bhd. v Ooi Meng Sua* [2001] 3 CLJ 1.

# TERMINATION UNDER THE EMPLOYMENT ACT 1955

- Part II of the Employment Act 1955 prescribes when and how the employment contract terminates or may be terminated as follows:
  - Termination by effluxion of time
  - Termination by notice
  - Termination without notice
  - Termination for special reason


# TERMINATION OF CONTRACT OF SERVICE

## Termination by Effluxion of Time

- Section 11 of the Employment Act 1955 provides that a contract of service for a specified period of time or for performance of a specified piece of work terminates when the period of time for which the contract was made has expired or when the piece of work specified in the contract has been completed.
- It should be noted that a contract of service for an unspecified period of time can be terminated only in accordance with the provisions of Part II.

# TERMINATION OF CONTRACT OF SERVICE

## Termination by Notice

- It is stated that a lot of confusion exists concerning the rights of the parties to the employment contracts to terminate such contracts.
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- A contract of service may be terminated by one party giving notice to the other party of his intention to terminate the contract.
  - Basically, Section 12 of the Employment Act 1955 provides for the right to terminate such contracts.

# TERMINATION OF CONTRACT OF SERVICE

## Termination by Notice

*“Either party to a contract of service may at any time give to the other party notice of his intention to terminate such contract of service”*

**(Section 12 of Employment Act 1955)**

# TERMINATION OF CONTRACT OF SERVICE

## Termination by Notice

- Section 12 has been taken to mean that the employer has the right to dismiss an employee without assigning any reason providing he gives proper notice.
- There are two provisions of the Employment Act relating to notice of termination of a contract of employment.

# TERMINATION OF CONTRACT OF SERVICE

## Termination by Notice

- It should be noted that the length of such notice must be the same period for employer and employee and be specified in the contract of service.
- If it is not specified, the minimum length of such notice shall be as follows:
  - Less than two years' service – four weeks' notice;
  - Two years or more but less than five years' service – six weeks' notice;
  - Five years' service or more – eight weeks' notice.



# TERMINATION OF CONTRACT OF SERVICE

## Termination by Notice

- In certain circumstances, an employee is entitled to written notice of termination of service from his employer, as well as to a period of notice that is not less than that specified in paragraphs (a), (b) or (c) above (as the case may be) 'regardless of anything to the contrary contained in the contract of service' between them.

# TERMINATION OF CONTRACT OF SERVICE

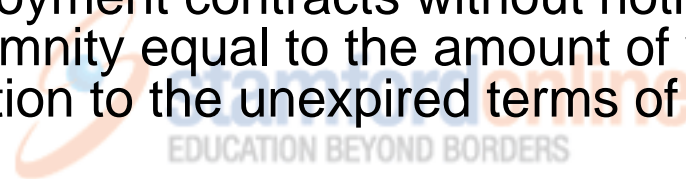
## Termination without Notice

Is it possible for either an employer or an employee to terminate the contract of service without giving notice?

# TERMINATION OF CONTRACT OF SERVICE

## Termination without Notice

- By virtue of Section 13 of the Employment Act, either party may terminate the employment contracts without notice by paying the other party an indemnity equal to the amount of wages for the notice period or in proportion to the unexpired terms of the notice.
- In other words, a contract of service may be terminated either party without notice or, if notice has already be given in accordance with the provision II without waiting for the expiry of that notice, by the payment of an 'indemnity' to the other party of a sum equal to the amount of wages.



# TERMINATION OF CONTRACT OF SERVICE

## Termination without Notice

- The amount of wages is basically a sum of money which would accrue to the employee during the term of such notice or during the unexpired term of such notice.
- This is a flexibility given by the law where an employee may leave the employment.

# TERMINATION OF CONTRACT OF SERVICE

## Termination without Notice

The Common Law gives the minimum notice period if the contract is unclear or does not stipulate the length of notice. The minimum period is one month and it is considered as sufficient.

# TERMINATION OF CONTRACT OF SERVICE

## Termination without Notice

- Termination is originally by notice in accordance with the duration laid down in that provision.
- In other circumstances, one month's notice is considered sufficient.
- In the case of *Sellamuthu v Karai Nagar Estate*, the Court held that the defendant was entitled to terminate the service of the plaintiff by giving one month's notice and the application for declaration should be dismissed.



# TERMINATION OF CONTRACT OF SERVICE

## Termination for Special Reasons

An employer may, inter alia, 'dismiss without notice' an employee for misconduct (that is to say, summarily terminate the contract of service between them) but he may do so only after 'due inquiry' i.e. a proper domestic inquiry.

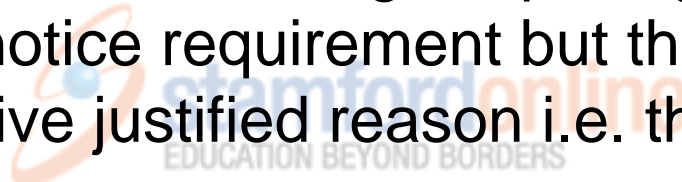
# TERMINATION OF CONTRACT OF SERVICE

## Termination for Special Reasons

Similarly, an employee may summarily terminate his contract of service with an employer if he or his dependants are immediately threatened with bodily danger through violence or disease if he did not by the contract undertake to run.

# DISMISSAL

- Dismissal means:  
“the ending of contractual relationship by the employer who is exercising his prerogative to dismiss. There is no notice requirement but the employer is required to give justified reason i.e. the ground of misconduct.”



# DISMISSAL

- In *Great Wall Shopping Sdn. Bhd. and Gan Shang Eng*, the Court declared:

“It is well established and well known that for an employer to dismiss any workman, there must be just cause or excuse. The just cause or excuse must be based on the facts of each case, either a misconduct, negligence or poor performance. The onus is on the employer to prove just cause or excuse.”

# DISMISSAL Misconduct

- Furthermore, Section 14 of the Employment Act 1955 provides the right for an employer to dismiss, downgrade or impose any other lesser punishment of an employee who, after a 'due inquiry', is found guilty of misconduct.

# DISMISSAL

## Misconduct

Misconduct is behaviour of an employee which is inconsistent with express or implied condition of his employment contract.



# DISMISSAL Misconduct

- Therefore, an employer may, after due inquiry, on the grounds of misconduct inconsistent with the express or implied condition of his service:
  - Dismiss him without notice;
  - Downgrade him;
  - Suspend him from work without wage for a period not exceeding two weeks; or
  - Impose any other lesser punishment.

# DISMISSAL

## Due inquiry

### WHAT IS 'DUE INQUIRY'?

- 'Due inquiry' means a proper domestic inquiry which involves the application of natural justice.

# DISMISSAL

- Section 15 of the Employment Act 1955 provides for a deeming provision of making the contract deemed to be broken by the parties.
- According to this section, if the employer failed to pay wages, the contract is deemed to have been broken.
- An employee is deemed to have broken the contract for being continuously absent from work for more than two consecutive working days without prior leave from the employer unless he has reasonable excuse and has informed or attempted to inform his employer prior to or at the earliest opportunity during such absence.

# DISMISSAL

- Before the Employment Act 1955 could be applied, either one of these two tests must be satisfied:
  - **Mean Test:** employee who earns wages not exceeding RM1500 per month as stated in the contract of service.
  - **Employment Test:** employee who has entered into the contract of service and also earns more than RM1500 per month and employed in the manual labour or in similar capacity.

# TERMINATION AND DISMISSAL

- As far as Common Law is concerned, the distinctions between termination and dismissal remain until today.
- Termination is brought about under a contract of employment with notice but without any reason mentioned while dismissal is also a termination of employment without notice but for a cause or reason.

# TERMINATION AND DISMISSAL

- The employee whose contract is terminated does not have so much right under the law as it is part and parcel of the contractual relationship, but in the case of dismissal, the employer needs to prove that there are justified reasons for the employee misconduct.
- There are some cases which provide distinction between termination and dismissal.

# TERMINATION AND DISMISSAL

- Furthermore, the Industrial Court has also made it clear that there are differences between a termination and dismissal.
- In the case of *I Rajespaire and Iskandar Polo Club*, the Court pointed out:
  - “the applicant contended that the respondent had committed a breach of the rules of natural justice when he failed to comply with Section 14 of the Employment Act 1955 before he dismissed the applicant.

# TERMINATION AND DISMISSAL

With respect, the contention cannot be accepted, for due inquiry is necessary only when an employee is to be dismissed on the ground of misconduct.

- The Court further observed that the question of due inquiry or the question of the rules of natural justice does not arise, for the applicant was not dismissed on grounds of misconduct [but terminated by contractual notice].

# TERMINATION BENEFITS

The Employment Act 1955 sets out the provision for employee whose services are terminated to receive termination benefits from the employer.



The relevant regulation which provides for the entitlement of termination and lay-off benefits is the Employment (Termination and Lay-off Benefits) Regulations 1980.

# TERMINATION BENEFITS

## continued...

- Employees are NOT entitled to termination benefits in the event that:
  - He retires pursuant to the contract of service;
  - He is dismissed on the ground of misconduct (after enquiry);
  - He voluntarily terminates his contract (unless due to employer's wilful breach of contract or when employment is threatened by danger, violence or disease to the employee or his dependants);

# TERMINATION BENEFITS

## continued...

- His contract is renewed or he is re-engaged by the same employer on terms and conditions which are not less favourable than the previous contract;
- He unreasonably refuses the offer of renewal/re-engagement; and
- He leaves service after receiving due notice of termination of contract without the employer's prior consent or without paying indemnity to the employer as required under Section 13.

# TERMINATION BENEFITS

## case

### MALAKOFF BHD v KUPPUSAMY & ORS

- The appellant terminated the service of the respondents by notice, on attaining the retirement age. The respondent then claimed for termination benefits as provided under Regulation 4(1) of the Employment (Termination and Lay-off Benefits) Regulations 1980.
- The appellant claimed on the ground of retirement age.
- The court held that the respondents were entitled to the termination benefits under the said regulation.