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TERMINATION OF THE CONTRACT OF EMPLOYMENT WITH SPECIAL REFERENCE TO DISMISSAL FOR MISCONDUCT AND PRE-DISMISSAL INQUIRY

BY

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ABSTRACT OF THE THESIS

Termination of employment or termination *simpliciter* and dismissal without just cause or excuse has caused great concern in the area of employment law since and still is. Contracts of employment have been terminated arbitrarily on grounds of exercise of discipline and employees have been dismissed arbitrarily, quoting "misconduct" as the reason for dismissal. Ironically, no definition or description is provided in any of the governing legislation on what amounts to misconduct. Due to this, continuous attempts have been made by the courts concerned to explain on what is considered as misconduct.

This dissertation looks at all the definitions and explanation through a microscopic lens in search of a general guideline. A thorough study on all the relevant cases has been made and the result: it is an area that is continuously growing, of an organic character and could not be restrained to rigid definitions. This is only true as what could be considered as unbefitting in a particular employment, changes with time and wavelengths. In order to make the law a "living rule", it should live according to the relevant time zone.

Nonetheless, there should be a general guideline as a reference. Parties should always fall back on the contract that binds them and determine the issue accordingly. Something categorized as misconduct in an industry may not be considered as such in another. Consequently, it is upon the employers to ensure that their employees are

adequately informed of their terms of employment. On the other hand, employees should be inquisitive and aware of the "reigns" that their employers hold upon them.

In addition, the importance of a pre-dismissal inquiry can never be undermined. It serves as a safeguard, as a saviour for the employees to fall back on in cases of dismissal. It checks the employers and protects the employees. Having said that, it is obvious that justice in employment law may never exist in disregard of such need and it is recommended that an inquiry be made compulsory to complete a disciplinary package as a whole.

ملخص البحث

إنَّ إنهاء أو إلغاء عقود العمل بدون سببٍ عادلٍ أو عذرٍ مقبولٍ، نال ولا يزال ينال اهتمامًا من لدن أصحاب قانون التشغيل. لقد تم إنهاء عقود العمل العديد من العمال بصورة تعسفيَّة، وبدعوى تطبيق نظام التأديب، كما تمَّ فصل عمالٍ بصورةٍ تعسفيَّة بناءً على ذات الدعوى. ومما يدعو للسخرية، أنَّه ليس هنالك تعريف أو تصور واضح من المحاكم المعنيَّة حول العمل الذي مخلاً بالآداب والأخلاق.

واعتبارًا باستمراريَّة هذه الظاهرة في التفاقم والتوسع، حاولت هذه الدراسة أن تنظر إلى مختلف التعريفات والتصورات بصورة مجهريَّةٍ أملاً في الخروج بإرشادات عامَّة في هذا الشأن. ناقش البحث بصورة عميقة كل القضايا المتعلقة بهذا الموضوع، وتوصل إلى نتيجة مغزاها: يعتبر هذا الموضوع من الموضوعات التي تشهد التطور المستمر والتغير الدائم، مما يتعذَّر معه الاكتفاء أو الوقوف عند تعريف بعينه. بل لا بد من تحديد القول في تعاريفه والتصورات الواردة عنه.

على كلٍّ، يجب أن تكون هنالك إرشادات عامَّة، ويجب على أطراف عقود العمل توضيح ذلك والالتزام بها. وربَّما اعتبر شيءٌ مخلاً بالآداب والأخلاق في مؤسَّسةٍ ما، ولكنَّ ذات الشيء لا يعتبر مخلاً بالآداب في مؤسَّسة أخرى. وإنَّه من مسؤوليَّة أصحاب العمل ضمان العمَّال بشروط عملهم. وفي المقابل يجب على العمَّال أن يكونوا على دارية تامَّة بحقوق أصحاب العمل تجاههم.

وإضافةً على هذا، فإنَّ ثمة أهميَّة للاستعلام المبدئي بالفصل ولا ينبغي الاستهانة بهذا الاستعلام، ذلك لأنَّه يمكن له أن يكون له بمثابة حمايةٍ للعمَّال في حالة تأكد فصلهم من العمل، كما يمكن له أن يحمي أصحاب العمل والعمَّال في الوقت نفسه. بناءً على هذا الاقتراح، فإنَّه ليس من الوارد تحقيق عدالة في مجال قانون التشغيل في حالة غياب التزام بهذا المبدأ، ولذلك، فإنه ينبغي أن يكون واجبًا على جميع أصحاب العمل الالتزام بالاستعلام المبدئي تمهيدًا للفصل النهائي.

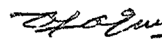
APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Laws.

....

Nik Ahmad Kamal Nik Mahmod
Supervisor

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Laws.



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Anwarul Yaqin
Examiner

This thesis was submitted to the Kuliyyah of Laws and is accepted as partial fulfillment of the requirements for Degree of Master of Comparative Laws.

....

Nik Ahmad Kamal Nik Mahmod
Dean, Kulliyyah of Laws

DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references and a bibliography is appended.

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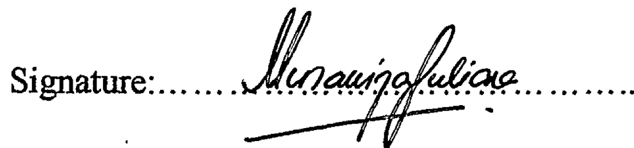
Signature:......  .... Date:....21 . 5 . 2001.......

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Occupational Safety and Health Act, 1994, Malaysia

Trade Unions Act, 1959, Malaysia

LIST OF ABBREVIATIONS

AC	Appeal Cases
AIR	All Indian Reporter
All ER	All England Reports
Anor	Another
Bhd	Berhad
Cal.	All Indian Reporter, Calcutta Series
Ch.	Chancery Division
CLJ	Current Law Journal
C.L.R.	Commonwealth Law Reports
Corp.	Corporation
EA	Employment Act
EAT	Employment Appeal Tribunal
Guj.	All Indian Reporter, Gujerat Series
ILR	Industrial Law Reports
IRA	Industrial Relations Act
IRLR	Industrial Relations Law Reports
KB	King's Bench Law Reports
MLJ	Malayan Law Journal
M.L.L.R.	Malayan Labour Law Reports
Nag.	All Indian Reporter, Nagpur Series
Ors	Others
PC	Privy Council
QB	Queen's Bench Law Reports

QBD	Queen's Bench Division
S.C.	Supreme Court
Sdn Bhd	Sendirian Berhad
US	United States of America
WLR	Weekly Law Reports

CHAPTER 1

THE CONTRACT OF EMPLOYMENT

1.0 An Introduction

Man need to work to maintain their existence and more often than not, this is achieved by being employed. There are two ways of deciphering this statement, on one hand, man need to work to live (using this term loosely) and on the other, "manual labour" is needed by the society to maintain its life cycle. To serve this purpose, the concept of employment came into existence. For the purposes of this dissertation, emphasis will be placed on the relationship looked at from the Malaysian and Islamic perspective and occasionally, reference made to the position under English law. [1]

The term "employ" is defined as "to give work to, to use the services of" and "employment" as "the state of being employed" or " work done as an occupation or to earn a livelihood".[2]

[1] During the 18th and early 19th Century in England, the employment relationship was governed by multifarious Master and Servant Acts, regulating the pre-modern system of employment. This was the era whereby the master's power of direction and discipline was extensive, backed up by legal sanctions. An example is the Act of 1747 that gave the local magistrates the power to order payment of wages due on the one hand and on the other to punish the servant or labourer for any "misdemeanour, miscarriage or ill behaviour" by the abatement of wages or imprisonment for up to a month. Not only that, they could also discharge the servant from the contract. However, the Master and Servant Acts were abolished in 1875 wherein the option of criminal sanctions against the employee for breach of contract was removed. Henceforth, only civil remedies apply on both sides.

[2] *The Oxford Study Dictionary*, Fajar Bakti Sdn. Bhd., Kuala Lumpur, 1992, p. 223.

From this, one is immediately struck with the fact that such a phenomenon is at the core of the very existence of man, as a means of livelihood. It is difficult for one to live without being employed, in one sense or another it is equally difficult for the life cycle of man to be maintained without anyone "working", supplying labour and workforce.

This fact was endorsed by the Court of Appeal in the case of *Tan Tek Seng* v *Suruhanjaya Perkhidmatan Pendidikan & Anor*[3] where it held:

> In my judgment, the courts should keep in tandem with the national ethos when interpreting provisions of a living document like the Federal Constitution lest they be left behind while the winds of modern and progressive change pass them by. Judges must not be blind to the realities of life. Neither should they wear blinkers when approaching a question of constitutional interpretation. They should, when discharging their duties as interpreters of the supreme law, adopt a liberal approach in order to implement the true intention of the framers of the Federal Constitution. Such an objective may only be achieved if the expression 'life' in art 5(1) is given a broad and liberal meaning.
>
> Adopting the approach that commends itself to me, I have reached the conclusion that **the expression 'life' appearing in art 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and gainful employment** and to receive those benefits that our society has to offer to its members. It includes the right to live in a reasonably healthy and pollution-free environment. (Emphasis is mine)

Thus, the law itself has accorded the right to seek and be engaged in a lawful and gainful employment due recognition by holding that such is the interpretation that should be given to the meaning of "life" as found in article 5(1) of the Federal Constitution.

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[3] [1996] 1 MLJ 261 per Gopal Sri Ram JCA at p. 288.

Due to its importance and the fact that man can never (almost!) do without it, those in position of providing the means to employment tend to misuse and abuse this advantage of theirs, thus jeopardizing those in the weaker position, the worker. Consequently, exploitation and abuse became rampant. This is where the legal hand extends its reach. Employment protection legislation were being introduced, affording protection in view of the crucial importance of guiding the conduct of both the employer and employee involved in the employment relationship.

The employment relationship, or rather the industrial relations,[4] which is a more appropriate connotation in this modern and contemporary world, is governed by two main statutes in Malaysia, i.e. the Employment Act 1955 (EA) and the Industrial Relations Act 1967 (IRA).[5] The EA applies only to West Malaysia whilst the IRA applies throughout Malaysia. But this difference is not really significant, for the Sabah and Sarawak each have laws similar to the EA- the Sabah Labour Ordinance and the Sarawak Labour Ordinance. Furthermore, the EA applies strictly to the private sector while the IRA applies nominally to both sectors. This difference however is more apparent than real as most parts of the IRA do not apply to the public sector.

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[4] The term "industrial relations" is more appropriate in circumstances where the employees are unionised. As a discipline, Industrial Relations is affiliated to the Human Resource Management. Both are concerned with management of employees but the former assumes that the employees are unionised whilst the latter does not. Industrial Relations concentrates on the management of unionised employees and trade unions are an essential element, whilst it is not in Human Resource Management. For the purposes of this dissertation, the former term will be used throughout the work.

[5] There are a number of other related legislation, for example the Trade Unions Act 1959, the Factories and Machinery Act 1967, the Occupational Safety and Health Act 1994 and several more.

The EA regulates the "employer-employee" relationship established on a **contractual** footing and is the principal legislation dealing with the relationship in Malaysia. It lays down provisions protecting workers from exploitation and provides for minimum benefits. It applies mainly to those employees whose basic wages do not exceed RM1500 per month also to those whose wages exceed RM1500 per month but not exceeding RM5000.[6] Those employed in specified occupations like manual labour and others as specified in the First Schedule of the Act are also covered.

As for the IRA, it regulates the employer-trade union relations as well as laying down rules to help prevent and settle disputes between them. It is crucial to note that both Acts perceive this relationship as being essentially **contractual** in nature. But unlike the IRA, the EA goes further when it regulates the employment contract itself, specifically in Part II of the Act. The difference that one might note perhaps lies in the terminology used, where the EA describes the employment contract as a "**contract of service**" whilst the IRA describes it as a "**contract of employment**".

Despite this difference in terminology, it basically refers to the same contract, by which an employee/workman is employed and thus for the purpose of clarity and consistency, the term "contract of employment" will be used. Whilst there is no essential difference between the term "contract of employment" and "contract of service", both "employer" and "workman" are defined more broadly in the EA than the definition of "employer" and "employee" in the IRA. Thus, while both are

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[6] This is however only an exception as found in Section 69B of EA. This section confers additional powers to the Director General to inquire into complaints and decide any dispute between an employee and his employer in respect of wages or any other payments in cash due

apparently identical in nature, the scope of "contract of service" is clearly wider than the scope of "contract of employment".

It should be noted that in the case of *American International Assurance Co Ltd* v *Dato Lam Peng Cheng & Others,*[7] an observation was made that although there is no definition of "contract of service" in the IRA, section 41 of it suddenly talks about "contract of service". The issue raised was whether the section gives a different meaning or connotation from that given under the "contract of employment" in the Act. It was concluded that it does not and there is no distinction between the two.

1.1 Why contract?

Man spend most of their time working, earning their living and spending most of their time around those they work with. It is the "...central feature of modern industrial society. It occupies much of the time available to most people for the majority of their lives and the economic rewards obtained from it determine an individual's standard of living, and, to a considerable extent, his social status".[8]

Judging from its importance and the fact that it occupies the major part of man's existence, the desire of one or sometimes both of the parties for a particular form of engagement to secure their rights are rarely irrational. This kind of engagement usually

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to such employee under any term of the contract of service wherein the employee earns more than RM1500 but not exceeding RM5000.

[7] Award No. 275/88 (1988) 2 ILR 420.

[8] Davies, D. R. & Shackelton, V. J., *Psychology and Work,* Methuen, London, 1975, p. 9 as cited in Maimunah Aminuddin, *Malaysian Employment Law and Industrial Relations*, McGraw-Hill Book Co, Singapore, 1996, 2nd Edition, p. 2.