

I HAVE previously written on the need for caution on the part of employers in terminating the services of an employee. This is because under the law whatever the specific stipulations to the contrary, an employment cannot be terminated without just cause.

A reader has expressed surprise over the fact that even some lawyers are advising their clients to terminate an employee's employment without giving any reason. He also asked if the situation is different for an employee under probation.

Note that what a lawyer advises his client would depend on the particular facts of each case which are available to him. There may well be reasons for such advice. It must also be appreciated that there is a difference between having a reason to terminate an employment and giving the employee the reasons.

It would be proper and fair to the employee to be told the reason for terminating his employment. However, the employer may feel that there is no need to give the reasons as the employee would already know what they are!

In the interest of employer-employee relations, it has long been the practice to facilitate communication of an employee's shortcomings by holding a domestic inquiry prior to dismissal.

This industry practice is recognised and encouraged by the Industrial Court under the Industrial Relations Act although it is not required by common law.

At such an inquiry, a charge would be preferred against the employee setting out the complaint against him.

He would have to show cause through answering those complaints and presenting his evidence in rebuttal if any. This served the purpose of giving an employee a right to be heard.

At one time, the Industrial Court took the view that not holding a domestic inquiry was

Firing a worker

There must be valid reasons for termination of employment even for probationers.

Articles of Law

BHAG SINGH

star2@thestar.com.my

itself grounds to declare termination invalid. This was also the view adopted in instances where a domestic inquiry was held to be defective such as on the grounds of breach of the rules of natural justice.

The matter is now looked at somewhat differently. The fact that the domestic inquiry was not held or that it was defective by itself is no longer grounds to conclude that the termination cannot be justified. If and when the matter is referred to the Industrial Court, the employer will have the opportunity to present his evidence to justify the termination and the employee to rebut it.

Of course where a domestic inquiry has been earlier held the proceedings before the Industrial Court could be substantially a repetition of what happened in the domestic inquiry.

However, the evidence will all be reviewed and upheld depending on the finding of the Industrial Court based on the proceedings before it.

With regard to an employee under probation, he too cannot be terminated at will.

There will usually be a stipulated period of

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termination of the employment during probation. This will usually be much shorter than an employee who has been confirmed. In some cases, it may be just 24 or 48 hours.

Just as in the case of confirmed employees, the employer is not entitled to rely on such a clause in the Employment Contract to terminate the employment arbitrarily but must show that the termination is for just cause.

This is because when someone is employed and on probation, his employment is not for the period of probation, say, three months; as a matter of fact, he is engaged with a view to long-term employment.

It is therefore the duty and obligation of the employer to observe the performance of the employee on probation.

If he is not performing as expected, the employer should point this out so that the

employee can rectify his shortcomings.

Of course, if the employee has made representations as to certain abilities and capabilities which are not now reflected in his performance, this should also be pointed out to the employee. This is again to enable the employee to remedy such shortcomings if he can.

This should all be done in writing. If the employer does not care to caution and counsel the employee, as happens in many cases, this could make things difficult for the employer if the matter should go to court.

If a dispute arises and is taken to court, the employer will still have an opportunity to justify the termination of the employment. Failure to have cautioned or advised the employee will no doubt be considered but inability or incompetence as well as deliberate disregard of the working conditions will be given much more weight.

If the termination or dismissal is upheld, the matter will end there. However, if the termination is held to be without just cause the court may either reinstate the employee which will revert such employee to his probationary status or order compensation to be paid.

The latter is more likely, especially in the case of a probationary employee. However, the compensation such employee is likely to get will be much smaller compared to a confirmed employee, especially one who has been in the company's employment for a long time.

The compensation could be to cover the employee's remaining period of probation or an extended period.

As can be seen, there is a difference between putting an employee on three months' probation and engaging a person on a three-month contract.

In the latter case, no reason needs to be given if the person's employment is not extended.