



SKRINE

Highly valued employees becoming perpetrators of misconduct such as workplace harassment/ discrimination, breaching of office rules and procedures with management closing an eye to it

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High achievers/ high value employees

But what happens if that person behaves badly?

Misconduct

Misconduct means such act or conduct as adversely affects employees duties towards the employer. The misconduct complained of must have the same relations with the employees duties or the work entrusted to him by the employer or his competency to performance the same. Any breach of an express or implied duty on the part of the employee, unless it be of a trifling nature, would amount to misconduct.

(Industrial Court in *Plaat Rubber Sdn Bhd v. Goh Chok Guan* [1995] 1 ILR 79)

Behaviour amounting to misconduct

- a) Harassment and bad treatment of staff such as bullying, threatening, intimidating, sexual harassment;
- b) Insubordinate;
- c) Conflict of interest;
- d) Committing fraud/excessive claims;
- e) Conducting personal business during office hours; and
- f) Breach of Employer's rules/policies such as absenteeism, lateness, leaving work early.



EXAMPLE CASES

Sexual harassment

The Head of Research and Technology Division in the Company was dismissed with just cause and excuse for sexually harassing his subordinate by:-

- Touching and squeezing her hand several times despite her pulling away
- Verbal harassment by saying: "I don't plan to marry another one but you can never know... nafsu lelaki satu, nafsu perempuan banyak? ... you know la nafsu lelaki itu apa?"
- Going close to her despite her saying "I have nothing to say to you" and continuously moving closer until she said "do not make me make a scene here"

Cont.

- Sending personal SMS/using language that is uncalled for - "... sama macam my wife... I tengok you tak sembahyang." "Sorry, maybe I didn't see that you sembahyang" "Tell me ... what you have to say about me, I know you have a lot to say." "Look at me ..., look at me" "Don't tell this to anyone".

Court held that it was reasonable for the Company to dismiss the Claimant and the dismissal was with just cause and excuse

***Yahya Mat Wazir v Petroliaam Nasional Berhad (Petronas) [2015]
2 ILR 201***

Conflict of Interest

The Claimant was a project engineer in the Company. The Company received an email from one of its suppliers which contained an email from the Claimant who presented himself as the Managing Director/Chairman of Oilfields Drilling Technologies (M) Sdn Bhd. It was discovered that the Claimant had set up Oilfields Drilling with his son and that he was one of the directors and shareholders. Oilfields Drilling's nature of business was listed as oil and gas engineering, services and supplies, which is similar to the Company's nature of business. The Court considered the Claimant's termination to be reasonable and justified.

Jacob Along v Mi Drilling Fluids (Malaysia) Sdn Bhd [2015] 2 LNS 0315

Conducting personal business during office hours

A general manager of the Company was discovered to have been actively pursuing his own business opportunities.

- He visited Bangkok at the Company's cost and expense on the pretext of visiting "country office and meeting potential client" when he instead to help promote another company, Cepak.
- He also abused his authority over a subordinate and made the latter promote Cepak's business.
- He was also found to have left his company car and petrol card with his family to be used by them.

Cont.

The Court found that the claimant, by his actions, had not only put himself in a position of conflict of interest but had also misused and abused his position to carry out other business outside his official duties to the company for his own personal interest, and abused his authority in making his subordinate promote Cekap's business. His dismissal was found to be appropriate.

Mohamad Muda v M3nergy Berhad [2015] 2 ILR 64

Making false claims

The Claimant was the Senior Vice President of the Company. She was found to have made false claims on numerous occasions, including:-

- Claims for Secret Recipe cakes which she said was given to customers, when it was actually for her department's staff's birthdays;
- She had lunches with colleagues, but claimed reimbursement in respect of entertainment with customers;

Cont.

- Used false particulars on several counts when making claims – the claim particulars did not match the receipts

Court held that the Claimant held a very senior position. In light of the numerous occasions in which the claimant had submitting false claims, the bank could no longer repose the necessary trust and confidence in her.

Lee Yu Meng v Alliance Bank Malaysia Berhad [2016] 1 ILR 216

But these business considerations may come to mind ...

- Who has greater value : high achiever vs complainant
- What if a confrontation upsets the high achiever and he / she decides to leave? The employer may decide to not say anything, allowing his/ her misbehaviour or misconduct to perpetuate and worsen.

WHAT ARE THE OPTIONS?

Option 1:

**Don't take action
against the high
achiever**

1) No action taken

Legal Ramifications

Constructive Dismissal of the Complainant

If no action is taken against the high achiever, the Company may be faced with the constructive dismissal of the complainant.

Constructive Dismissal of the Complainant

What is constructive dismissal?

Constructive dismissal arises when an employee terminates his contract of employment at the appropriate time and therefore considers himself discharged from further obligations because the employer is guilty of such breach as affects the foundation of the contract or because the employer has evinced or shown an intention to no longer be bound by it.

Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92

Constructive Dismissal of the Complainant

Situations which give rise to Constructive Dismissal include:-

- Sexual/Other Harassment
- Abusive treatment
- Intolerable behaviour / bad language
- Failure to give necessary support/ treating employee in a cavalier and dismissive manner
- Persistent attempts to vary conditions of employment
- Constantly undermining the employee
- Demoting the employee



Constructive Dismissal of the Complainant

Example Cases

The Claimant claimed that he was constructively dismissed as the Managing Director would:-

- scold him in the presence of others for mistakes;
- use profanities towards him;
- verbally abused him with vulgar words for mistakes done by a security guard;
- call for a meeting and ridicule and insult him in the presence of his colleagues;
- Shown his fist towards the Claimant whilst saying that he would not be able to sustain a punch from him and he was a former athlete and had a lot of strength;
- Told another employee to assault the Claimant while warning the Claimant that the said other employee was a former American soldier and hold a "Dan 2" in Tae Kwon Do;

Constructive Dismissal of the Complainant

Example Cases

- Threw a bundle of documents on the table angrily to intimidate the Claimant
- Another colleague saw the MD holding the Claimant by his neck;

The Court found that the MD was a temperamental person with a violent character who likes to shout and raise his voice at employees who could not answer him properly or whose performance was not up to his expectation. He would use profanities and at times resort to violence by assaulting them.

The Court found that the Claimant succeeded in proving that he was constructively dismissed and that the dismissal was without just cause or excuse.

Mampu Jaya Sdn Bhd v Aloysies Fathianathan [2008] 2 LNS 2011

Constructive Dismissal of the Complainant

Example Cases

The Claimant was being sexually harassed by her immediate superior.

- Her superior requesting that she spend the night with him in his hotel room
- asking her out for dinner after office hours
- commenting on her dress
- asking her to attend an outstation office trip with him but getting angry when she made her own travel arrangements to go by herself (agreeing to bear the expenses herself) and booking the overnight accommodation on her own
- When the Claimant raised the issue with the Company's senior management, no action was taken to protect her

The Court found that there was a breach of her employment contract.

Sitt Tatt Berhad v Flora Gnanapragasam [2006] 1 MLJ 497

HARASSMENT

Liability of the Employer

The recent case of *Mohd Ridzwan bin Abdul Razak v Asmah binti Hj Mohd Nor [2016] 4 MLJ 282*, the Federal Court recognised the tort of harassment, with sexual harassment being a part of it, as a valid cause of action in Malaysia.

Following the recognition of the tort of sexual harassment, employers may find themselves vicariously liable for the harassment by their employee.

HARASSMENT

Liability of the Employer

What is vicarious liability?

Essentially, it is the principle of the employer being responsible for the act of its employee, in the course of his employment (*Maslinda bt Ishak v Mohd Tahir bin Osman & Ors [2009] 6 MLJ 826*).

“In the course of employment” means in the course of his specific work for which he is employed and what is incidental to it.

SEXUAL HARASSMENT

Liability of the Employer

Part XVA of the Employment Act 1955 was introduced on 1 April 2012 to deal specifically with sexual harassment in the workplace.

Under this Part, employers are required to inquire into any complaint relating to sexual harassment. If the employer is satisfied that the sexual harassment has been proved, disciplinary action must be taken against the accused employee which may include dismissal.

Failure to inquire into the complaint of sexual harassment is an offence and, on conviction, the employer shall be liable to a fine not exceeding RM10,000.

Unjust Dismissal by the high achiever superior

If a high achiever superior unjustly dismisses a subordinate, it is the employer who faces the liability.

Consequences due to corruption of the high achiever

- Employers should also be aware of the MACC Amendment Bill 2018 (passed in Dewan Negara on 6.4.2018).
- This amendment introduces corporate liability on commercial organisations if a person associated with the organisation corruptly gives, agrees to give, promises or offers to any person any gratification whether of the benefit of that person or another person with the intent to obtain or retain business or an advantage for the commercial organisations or to obtain or retain an advantage in the conduct of business for the commercial organisation.

Consequences due to corruption of the high achiever

- Upon conviction, the organisation, its directors, officers and management may be liable to:-
 - A maximum fine of 10 times the sum of gratification involved or RM1 million, whoever is more;
 - A maximum jail term of 20 years or
 - Both penalties of fine and jail term

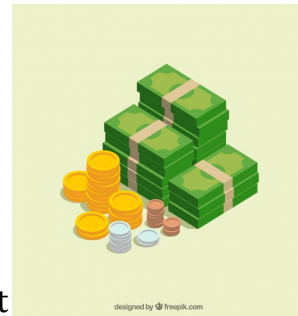


If no action is taken...

**Ultimately, the misconduct/
tortious behavior of the high
achiever will result in liability for
the employer.**

Related financial consequences

- a) Payment of compensation to the wronged employee (whether the complainant/subordinate or even the high achiever)
- b) Costs in defending legal action by employees
- c) Financial losses due to fraud
- d) Costs in commencing legal action against employee who committed the misconduct



1) No action taken

Non- Legal Ramifications

What could happen if the Employer takes no action against the high achiever / high value employee

- a) Staff may be ill-treated due to abuse of power
- b) Fraud may grow unchecked
- c) Company rules not followed by others

Non-Legal Ramifications

- d) Decreased productivity of employees
 - Loss of employee morale, culture of apathy and negativity, leading to a loss of productivity
 - Stress related absenteeism
 - Employees deciding to leave the Company

Non-Legal Ramifications

e) Reputation of the Company at stake

- Unable to attract and recruit good new staff
- Unable to retain good staff
- Less attractive to customers (no one wants to hire a company seen to allow fraud/ sexual harassment/ bad treatment of staff and customers)
- May attract media publicity, especially in the age of social media and connectivity.

Non-Legal Ramifications

The employee may take non-action as acceptance/ condonation and the behavior may escalate.

In the long run, it will be destructive to the Company

Option 2:

**Take action
against the high
achiever**

2) Take action

Legal Ramifications

Potential claims of constructive / unlawful dismissal

- Once misconduct is discovered following an investigation and the high achiever has not given satisfactory reasons for his/her misconduct, the employer is faced with the decision of which punishment to impose.
- If the employee is dismissed, the employer may face a claim for unjust dismissal and have to defend the same in the Industrial Court.
- If the punishment is less than dismissal, the employee may not be satisfied and claim constructive dismissal, which again results in the employer defending its decision in the Industrial Court.

2) Take action

Non- Legal Ramifications

- a) The high achiever may leave;
- b) The high achiever may take a team of loyal subordinates;
- c) He/she may be demoralised to work and not be interested in work;
- d) He/she may take out his/her anger on the complainant.

**Dealing with
legal risks as not
to mar the
organization's
reputation and
potential liability**

Dealing with the legal risks

WHY?

- The employer runs the risk of reduced productivity if not managed properly
- Successful business is about a team and building on such team
- Employees feel more connected to the values of the employers if they witness a culture of integrity through their superiors.
- Otherwise, risk of no continuity and no growth in the long run just because high achiever's behaviour allowed.



Mitigating the legal risks

HOW?

Have a companywide assessment of the ethical culture

Ensure that there is an ethical culture, where:-

- Employees believe that the employer does not tolerate unethical behaviour
- Employees believe that management responds quickly and consistently to unethical behaviour when it occurs.
- Actions speak louder than words
- Visibly enforce the Company's ethical commitments

Have a company policy regarding workplace behaviour in line with the culture and have trainings and sessions to ensure that employees know what behaviour is acceptable and what is not.

Keep the behaviour in check – quickly

- Have regular reviews with employees and keep their performance/behaviour in check through clear KPIs.
- If the poor performance is serious, conduct Performance Improvement Plans.
- In cases of misconduct, take action immediately. If not, a bad example will be set. Give warnings and opportunities for the employee to improve. If no improvement, start disciplinary action.

How to deal with the misbehaving employee?

- Be calm and have an informal chat with the employee
- Begin with asking if the employee is aware of any ongoing issues
- If unaware, describe the unacceptable behaviour in a honest but neutral manner. Ensure that examples of such behaviour are given.
- Allow the employee to respond, and listen to them.
- Have a senior mentor and follow up with the employee and give constructive feedback
- If the behaviour is not improving, the employer may need to consider whether to take disciplinary action.

Have a proper and effective grievance mechanism

- Have a mechanism where employees can air their grievances and complaints
- An independent complaints/grievance committee can be formed
- In cases where the misconduct involves a superior, have a channel for complaints to be made directly to a complaints committee
- Ensure that employees feel safe reporting misconducts and need not be concern of retaliation

Have a mechanism to combat Sexual Harassment

- Have a policy statement prohibiting sexual harassment in the company;
- Clear definition of sexual harassment;
- Complaints/grievance procedure;
- Disciplinary rules and penalties against harasser and false accusers;
- Protective and remedial measures for victim;
- Promotional and educational programmes to explain company's policy and to raise awareness of sexual harassment and its adverse consequences.

(as recommended by the Ministry of Human Resource in the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace)

Prevent fraud and corruption in the workplace

- Be aware of where fraud and corruption is likely
- Understand and manage the areas of risk under your control
- Have a good understanding of why people engage in corrupt/fraudulent activity in your industry
- Lead by example, from top down
- Ensure internal controls are adequate and effective in preventing and detecting and appropriately responding to potential incidences
- Encourage employees to speak up if something doesn't look right

Prevent fraud and corruption in the workplace

- Some internal control examples:-
 - Establish clear job descriptions
 - Avoid having one person being responsible and undertaking an entire transaction by himself/herself
 - Staff awareness, education and training to ensure that staff can recognize signs of possible corruption/fraud
 - Have a culture where staff are comfortable and able to raise concerns
 - Ensure protective measures are implemented to safeguard assets and data
 - Have a records management policy

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