
AN OVERVIEW OF A DOMESTIC ENQUIRY

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A. INTRODUCTION

1. A domestic inquiry is an internal hearing held by an employer to ascertain whether an employee is guilty of misconduct. The purpose of a domestic inquiry is to find out the truth of the allegations made against the workman.
2. The Industrial Court, in the course of adjudicating whether a dismissal is without just cause or excuse within the context of **Section 20 of the Industrial Relations Act 1967**, does not merely examine whether there were proper grounds for the employer to terminate the services of the employee but also examines whether the process by which the employee was terminated was fair or unfair.
3. This aspect of “procedural fairness” in the taking of disciplinary action, against an employee may often be a crucial factor in deciding whether the dismissal will be upheld by the Court.
4. It is therefore, imperative to recognise that upholding a dismissal in the Industrial Court involves satisfying 2 criteria:
 - (a) That there were proper grounds for terminating the employee;
 - (b) That the procedure by which the employee was terminated was fair.
5. In conducting a domestic inquiry the rules of natural justice must be adhered to. Justice must not only be done but must be seen to be done; the “twin pillars” of natural justice being “No person shall be condemned unheard” and “No person shall sit in judgment in his own cause or in any in which he is interested”.

6. It is in this context that the importance of conducting a proper domestic inquiry assumes significance.
7. The domestic inquiry should not be regarded by the employer as a “mere formality” nor an unnecessary inconvenience but an integral part of the disciplinary process whereby the employer can establish that the termination of the employee was with just cause or excuse. The objective of holding a domestic inquiry is twofold. Firstly, to give the opportunity to the employer to prove the charges of misconduct against a delinquent employee before punishment is meted out and secondly to give the employee sufficient opportunity to defend himself/herself.
8. Rather than view the domestic inquiry as burden on the management, and an unnecessary waste of time, resources and expense, the employer, should view the process of the inquiry as a means to show that every possible means was made available to avail the employee of meeting the charges against him and, if possible, clearing himself.

B. POSITION UNDER THE EMPLOYMENT ACT 1955

9. Under **Section 14(1) of the Employment Act, 1955**, it is stated that an employer may, AFTER DUE INQUIRY, dismiss the employee or take other disciplinary action including downgrading and suspension of the employee on grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of service.

10. The effect of the incorporation of the term “DUE INQUIRY” into the provisions of **Section 14(1) of the Employment Act 1955** was considered in detail in the recent Federal Court decision of **Said Dharmalingam v. Malayan Breweries (Malaya) Sdn Bhd (1997) 1 CLJ 646** where the Court stated as follows:

“In R. v. BBC, ex parte Lavelle (1982) 1 RId? 404, Woolf J indicated, albeit obiter, that when there is a procedure for dismissal in an employment not covered by statute at all, employers must comply with that procedure for the dismissal to be valid. If the contractual procedure was infringed an injunction should issue to prevent the dismissal. This view was partly based on the notion that employment protection legislation had substantially changed the position at common law, so that ‘the ordinary contract between master and servant now has many of the attributes of an office.’

In the present case, there is a statutory requirement, to wit, s. 14(1) of the Act, providing for the elementary safeguard of the right to “due inquiry” by the employer. It follows, that at least, prima facie, a dismissal in breach of s. 14(1) would be void.

Having said that, we must add, that when, as here, a claimant is an employee within the meaning of the Act, he has by s. 14(2) thereof a statutory right to “due enquiry” by his employer, and so, the approach of the Industrial Court or for that matter the High Court, in considering the question whether the claimant had been dismissed without just cause or excuse, would be, to examine the decision not just for substance but for process as well.”

11. The decision of the Federal Court in Said Dharmalingam clearly states in respect of employees governed by the Employment Act that unless there is due enquiry prior to dismissal for misconduct, the dismissal can be struck down by the Industrial Court even if the employer can show sufficient grounds to dismiss. Hence, “procedural fairness” is crucial in successfully upholding the dismissal.
12. It should perhaps be noted that an earlier Federal Court decision in **Milan Auto Sdn Bhd v Wong Sen Yen (1996) 1 AMR 49** held that the requirement of “due inquiry” before dismissal in **Section 14(1) of the Employment Act** was not mandatory and, even if there was a defective inquiry, it was “curable” in the sense the Industrial Court could still enquire into the decision to dismiss and uphold the same if proper grounds were made out.
13. It is respectfully suggested that the decision in the **Milan Auto** case can be explained on the basis that there, the Industrial Court wrongly struck down a dismissal without inquiring into the merits of the dismissal which it was required to do under **Section 20 of the Industrial Relations Act, 1967**. However, given that the most recent pronouncement on the question of due inquiry, is as set out in the said Dharmalingam’s case, it is respectfully suggested that all prudent employers should, when dealing with complaints of misconduct of employees governed by the Employment Act, ensure that a proper inquiry is conducted or run the risk of dismissal being struck down.

C. POSITION OF EMPLOYEES NOT GOVERNED BY THE EMPLOYMENT ACT, 1955

14. With regard to these employees, the general rule that a failure to hold a domestic inquiry or the holding of a defective inquiry will not automatically vitiate or nullify the dismissal still applies.

15. This was the approach taken by the Federal Court in the case of **Ong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd (1995) 2 MLJ** based on the earlier leading decision in **Dreamland Corporation (M) Sdn Bhd v. Choong Chin Sooi (1988) 1 MLJ**. Essentially, these decisions state that even if the domestic inquiry held was defective, it is still open to the employer to satisfy the Industrial Court that the dismissal was proper on the merits.
16. It is respectfully suggested that as a matter of good industrial practice and irrespective of which the employee is governed by the Employment Act or not, a domestic inquiry should be held whenever a complaint of misconduct is brought to ensure that the employee is accorded fair treatment in answering the charge.
17. We shall now examine briefly the various stages of the domestic inquiry and the necessary procedures to ensure that no challenge can be successfully taken to claim the inquiry as unfair.

D. BRIEF GUIDELINES FOR CONDUCTING A PROPER INQUIRY

18. It is essential to keep bear in mind, at all times, that there are no fixed criteria as to what constitutes a proper inquiry. Every case must necessarily depend on the particular circumstances and the degree of formality and rules adopted would also be determined by the prevailing circumstances.
19. What is of utmost importance, however, is that the **basic principles of natural justice** are observed. These may be summarised as follows:-
 - (i) That the employee is given an opportunity to know, in full, the charges made against him.

- (ii) The employee has reasonable opportunity of defending himself against the charges.
 - (iii) The management team which sits as the Inquiry Panel should be unconnected with the events and circumstances surrounding the charge:
20. It would be noticed that these are not simply legal requirements but basic concepts of fairness and justice designed to ensure that the employee is given a proper hearing to answer the charges made against him.

E. PROCEDURE PRIOR TO INQUIRY

E1. INVESTIGATION OF COMPLAINT

21. Normally, the source of the complaint comes from the employee's immediate superior or a fellow employee.
22. It is essential to investigate the complaint as soon as possible. This has the double advantage of obtaining the relevant evidence before it becomes difficult or impossible to trace and also to avoid any allegation by the employee subsequently that the employers have "condoned" the alleged misconduct.
23. It is always useful to interview all parties concerned in the complaint and have their statements recorded. In charges involving financial irregularities and misconduct, it is best that an internal audit be conducted and full and comprehensive report be compiled. A difficulty can sometimes arise, if the complaint is from an outside source i.e. not within the employment, organisation and such person is reluctant to give any written statement to substantiate his complaint. There could be difficulties if the employee, when confronted, makes a total denial of the allegation.

24. To obviate the difficulty, it is suggested that the outsider complainant (i.e. the third party), should be persuaded to reduce his complaint in writing so that disciplinary action can be instituted against the employee concerned. At the same time, the investigation officer should ascertain if other supporting evidence from within the Company can be obtained to corroborate or support the complaint so that the third party's complaint does not stand by itself.
25. It is also important that the investigating officer is unconnected with the allegations and not a person who is likely to be selected to sit on the Inquiry Panel. If the investigation involves some special expertise and skill or understanding of a particular area of the operations, a suitably qualified person well versed in the area should be approached to assist in the investigation.

E2. SHOW CAUSE LETTER

26. If the investigation establishes a prima facie case justifying the complaint which calls for an explanation from the employee, the employer should then proceed to issue a show cause letter.
27. The letter should be drafted in clear and unambiguous language setting out all the allegations to which the employee is requested to "show cause". It should normally be signed by the Personnel Manager or Head of the Department. Where the charges are of a technical nature, i.e. misappropriation or breach of trust, it is best to, draft the same in the format of a charge in a criminal case. This will immediately highlight the elements of the offence that need to be proved and would also provide for precision in the drafting. A vague or ambiguously worded charge in a show cause letter is often indicative that the employers are unsure of the circumstances giving rise to the charge or even worse, create an impression that the charges are not bona fide.

28. Where possible, the charge should specifically refer to which rules or regulations, that have been breached. If no specific rules have been breached, it is best to state the charges constitute either a breach of both the express and/or implied terms of the contract of employment.
29. The show cause letter should be confidential and preferably delivered to the employee personally. If this is not possible, the letter should be sent to the employee's address.

E3. SUSPENSION DURING PERIOD TO SHOW CAUSE

30. Care must be taken that the period of suspension and the amount of pay the employee receives during the period of suspension are in accordance with the provisions of the Employment Act or relevant Collective Agreement, where applicable.
31. If extension of the period of suspension is required to complete investigations, especially upon receipt of the employee's reply to the show cause letter, the employee must be notified accordingly. It is advisable to ensure that the employee receives his full salary for any extended period of suspension.
32. It is normal that suspension is invoked where the presence of the employee is likely to jeopardise the safety and discipline of the Company and hence, should only be resorted to where charges of major misconduct are made or there are several charges.
33. Furthermore, the letter of suspension should not give instructions that the employee should stay at his place of residence during working hours as such an order amounts to house arrest and is unlawful. **Malayan Banking Berhad v. Association of Bank Officers Peninsula Malaysia** (Award 347 of 1986)

34. Depending on the reply received from the employee, the Company may proceed to institute a domestic inquiry. This may be necessary even if an employee, in his reply to the show cause letter, gives a vague response and appears to admit to only some of the charges or just part of the charge.

E4. THE DOMESTIC INQUIRY PROPER

35. The first step is to send a notice of the domestic inquiry to the employee concerned. The notice should give particulars of the date, time and place of the inquiry and should stipulate that the employee would be entitled to cross-examine the employer's witnesses and may, himself, produce witnesses or documents to rebut the charges.
36. Where there are several charges of a detailed nature, care must be taken to ensure that the period of time between the notice of domestic inquiry and the actual inquiry is of a reasonable period to prepare his defence.
37. In the meanwhile, the employers should proceed to select the panel of members for the inquiry. The basic criteria for the selection should be:
- (a) Officers who are not involved directly with the investigation and circumstances of the case.
 - (b) Officers should normally be of a rank or status above the employee facing the disciplinary charges.
 - (c) The Chairman should be adequately well versed with the, general, legislation involving employment and the Industrial Court awards.
38. Of particular importance is the rule that the Panel should not be seen to be biased or even appear biased. In a number of cases the Industrial Court has held that the element of bias vitiates the fairness of the dismissal.

39. In **Oriental Bank Bhd v Zulkiflee b. Hassan, Kaiang (1986) 2 ILR 1332** the Claimant was dismissed for breach of the express terms and limit of authority by which he was bound and/or breach of general duty of care obligatory upon him.
40. The Claimant contended that the inquiry held was not carried out properly and his dismissal was unlawful, mala fide and amounted to an unfair labour practice.
41. In this case, the Chairman of the Inquiry was fully informed of the results of the investigation conducted by the investigator. Subsequently, he had a meeting with the Claimant before the Inquiry where the Claimant gave his own story. Another member of the inquiry was also present during the meeting. The Chairman and the member knew all the facts of the allegation prior to the inquiry.
42. It was held that there was an element of bias because some of the members of the inquiry had known the facts of the allegations. Although the claimant was guilty of gross negligence and was rightly dismissed, since there was bias in the inquiry the Claimant was entitled to backwages.
43. Similarly, care must be taken to ensure that the Panel does not appear overly keen to question the employee. This role should be left to the employer's representative presenting the case. While the Panel may always clarify points arising during the course of the proceedings they should not turn the inquiry into an inquisition.

E5. NOTES OF INQUIRY

44. All statements given in the inquiry should be carefully recorded either by the Panel Member or a member of staff for that purpose. Further, the notes should be typed up and made available for the employee to counter-sign to avoid any challenge subsequently by the employee. See **OYL Condoir Industries Sdn Bhd v. Kulijan a/i Muthusamy & 2 ors (1992) 2 ILR 33** where the Court held that the domestic inquiry was conducted unfairly and unjustly as the Claimants were not allowed to call witnesses, no notes of proceedings were recorded nor made.

45. The general procedure at the inquiry would normally be as follows:

The Charge must be read to the employee and explained to him at the commencement of the inquiry. If he admits the charge, he should be given the opportunity to express the circumstances that led him to commit the offence and mitigates his case. The Chairman then will ask the officer presenting the case to briefly state the facts of the case including how the offence was committed to enable the Panel to recommend the appropriate punishment or continue with the proceedings.

If the employee concerned is absent without an explanation offered, the case may still be heard in his absence and the outcome of it must be communicated to him.

Any witnesses, called by either party to give statements, is to be subject to cross-examination by the other party. In other words, there will be an examination in chief by one party, cross examination by the other party and re-examination by the former party of witnesses. Statements made by these witnesses must be recorded and signed by them. They must not be in the room where the inquiry is being held until called in by the Chairman.

46. It must also be noted that while an employee may be accompanied by a Union representative at the inquiry, he is not entitled to insist on legal representation. **Petroleum Nasional Bhd v. Mohd Radzuan B. Rarnli 1993 1 ILP. 100** and **Sime Darby Plantation Sdn Bhd v. Wong Chu Meng 1983 2 ILR 210.**

E6. PROCEDURE SUBSEQUENT TO INQUIRY

47. After the inquiry, the Chairman should discuss the case with the Panel Members and decide upon the merits of the case.
48. Findings should be contained in a report which should be based on the material and evidence produced at the inquiry giving reasons in brief for conclusions on the charges.
49. In **Standard Chartered Bank v. Cliff a/l James (1991) 2 ILR 1168**, the Court held that as no finding of the inquiry was recorded at the end of the notes of inquiry, this effectively invalidated the inquiry and the Court was entitled to disregard the notes of inquiry.
50. The Report, once finalised, is then sent to the appropriate executive or officer in management for taking the requisite action. Unless it is expressly empowered to do so, the Panel should refrain from determining what the punishment should be meted out although they may merely recommend disciplinary actions. The reason is that the question of meting out the appropriate punishment does not involve the deliberation of the finding of the charges but other factors such as the employee's previous records, warnings etc. which would not normally be available to the Panel.

51. Once management is in a position to fully consider all the relevant factors, then the appropriate disciplinary action can be taken. If dismissal is decided, the employee should be informed as soon as possible and also on what grounds he is being dismissed. If there is a right of appeal within the disciplinary procedures against the decision, the employee should be directed to that fact and informed of the period and to whom he may exercise his right of appeal. In this regard, the decision of Said Dharmalingam is again of importance. In that case, the Court held that it is incumbent on an employer to provide the employee an opportunity to make a plea in mitigation.

52. As was stated by the Court:

“Due inquiry for the purposes of Section 14 of the Act includes the right to make representations against the punishment proposed as a result of adverse findings by a domestic body”

The Court, however, held that a plea of mitigation is not necessary where the employment contract states that dismissal mandatory upon a particular finding or where the misconduct is so grave that no useful purpose would be served by a plea in mitigation.

53. Once all avenues for internal appeals are exhausted and assuming that the employees appeal is rejected, the employee should be so informed. It is normal to pay the employee whatever monies due subject to income tax clearance and request that all company property be returned.

54. If these procedures and guidelines are adhered to, an employer should be well on his way to being able to defend successfully an unfair dismissal complaint in the Industrial Court.