Abstract

This paper is based on the analysis of two of the most important pieces of Malaysian employment legislation (Employment Act 1955 and Industrial Relations Act 1967) and the Malaysian Industrial Court awards (criterion-based sampling) on misconduct, domestic inquiry and the rules of natural justice. Misconduct is a conduct by the employee which is inconsistent with the fulfillment of the expressed or implied conditions of his service. In Malaysian employment relations, there seems to be an increasing number of Industrial Court cases related to employment misconduct. In 2005, 98.2% of the dismissal awards from the Industrial Court were related to the employment misconduct. Ineffective management of employment misconduct especially the violation of the rules of natural justice in the conduct of domestic inquiries results an employee (workman) claiming unfair dismissal under Section 20, Industrial Relations Act 1967. Therefore the due (domestic) inquiry is a requirement (Section 14.1 of the Employment Act 1955, and the principles of common law), which the employer must adhere before meting out any punishment for employment misconduct. Recently, there had been several questions on the interpretation of Section 14(1) of the Employment Act 1955 on the need for domestic inquiry before dismissal for workman who are not within the scope of the Employment Act 1955. However findings from the Industrial Court awards reveals that many awards were made against the employers as they failed to conduct domestic inquiry and violated the principles of natural justice. This means domestic inquiry must be held for serious misconduct cases and the accused employee must be accorded to a fair hearing based on the rules of natural justice. In this paper the authors are suggesting some proactive measures which can be taken by employers to minimize and to prevent employment misconduct, besides other guideline to improve employment relationship in the context of Malaysia.
Key Words: Malaysian Industrial Relations, Employment Misconduct, Domestic Inquiry, and Rules of Natural Justice

Introduction

Before we discuss on misconduct, domestic inquiry and the rules of natural justice in the context of Malaysian employment relations, it is important to define employment relations and industrial relations in the Malaysian context, beginning with the local scholars. Aminuddin defines industrial relations as 'the relationship between workers and employers within a work environment', but argues that such a relationship exists only when employees are unionized. Aun considers industrial relations as 'the subject which deals with the manner in which the relationship between an employer or groups of employers and employees is carried on, and the methods which they use in their relationship with each other'. Ayadurai even goes a step further:

Industrial relations refer to the relations created by employment between parties who are concerned with employment. Depending on how broadly or narrowly it is defined, it can embrace every aspect, or be confined just to some aspects (perhaps only one) of these relations. Similarly, it can also embrace all the parties who are concerned with employment, or be confined only to the principle one.

Furthermore, Idrus argues that the study of industrial relations as relationship is centred in the workplace between employee, unions, employers' association and the state. This argument is supported by Dunlop, who popularized the 'system approach', with managers, employees -- and their respective representatives -- and specialized government agencies as the three actors. Along with the industrial relations perspective in Malaysia, dismissal, misconduct, termination and other labour legislations are very significant in current study of Malaysian employment relations. Furthermore, it is more significant as Malaysia is going to be a developed nation by 2020.

This paper is based on the analysis of two of the most important pieces of Malaysian employment legislation (Employment Act 1955 and Industrial Relations Act 1967) and the Malaysian Industrial Court awards (criterion-based sampling) on misconduct, domestic inquiry and the rules of natural justice.

An overview on dismissal cases in Malaysia

Dismissal is a kind of termination of employment contract by an employer due to the workman's misconduct, which is not consistent with the expressed or implied terms of employment. Industrial Relations Act 1967 and the Employment Act 1955 regulate the dismissal of an employee in the context of Malaysian employment relations. Dismissal is the severest punishment, which can be awarded to a delinquent workman by his employer for some act of misconduct. The Malaysian Industrial Court's statistics over the last five years have shown an increase in dismissal cases especially dismissals due to employment misconduct. In 2005, 98.2% of the dismissal awards were related to the employment misconduct. The statistics (Table 1.1.) below shows the types of dismissal cases referred to the Industrial Court from 2000-2005.

<table>
<thead>
<tr>
<th>TYPES OF TERMINATION</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
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<tbody>
<tr>
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<td>20</td>
<td>26</td>
<td>35</td>
<td>40</td>
<td>34</td>
<td>22</td>
</tr>
<tr>
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<td>726</td>
<td>810</td>
<td>763</td>
<td>1638</td>
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<td>Retrenchment</td>
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<td>41</td>
<td>52</td>
<td>61</td>
<td>61</td>
<td>16</td>
</tr>
<tr>
<td>SUB-TOTAL</td>
<td>520</td>
<td>793</td>
<td>897</td>
<td>864</td>
<td>1733</td>
<td>2182</td>
</tr>
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Table 1.1 Analyses of Awards Relating To Dismissal Cases (2000-2005)
In Malaysia, s 13(3) of the Industrial Relations Act 1967 recognizes the following managerial prerogatives or management rights, which includes dismissal:

1. the right to promote by an employer of any workman from lower grade or category to a higher grade or category;
2. the right to transfer by an employer of a workmen within the organization of an employer's profession, business, trade or work, provided that such transfer does not entail a change to the detriment of a workman in regard to his terms of employment;
3. the right to employ by an employer of any person that he may appoint in the event of a vacancy arising in his establishment;
4. the right to terminate by an employer of any workmen by reason of redundancy or by reason of the reorganization of an employer's profession, business, trade or work or the criteria for such termination;
5. the right to dismiss and reinstatement of a workman by an employer;
6. the right to assign or allocate by an employer of duties or specific tasks to a workman that is consistent or compatible with the terms of his employment.

The s 20 of the Industrial Relations Act 1967 on the other hand provides remedies for dismissal without just cause or excuse. In this context, whether a workman is a member of a trade union or not, he can file a representation to the Director General of Industrial Relations ('DGIR') in writing within 60 days of his dismissal seeking for reinstatement to his former employment if he considers he was dismissed without just cause or excuse. Upon receipt of the representation, DGIR will take steps as necessary or expedient for a settlement. The DGIR will try to resolve the case through conciliation. If there is a failure to do so through conciliation, the DGIR will refer the case to the Minister, who may, if he thinks fit refer the matter to the Industrial Court for an award. Thus from the above process, it is clear that a dismissed workman cannot bring his case directly to the Industrial Court as only the Minister of Human Resources can refer his case to the Industrial Court.

An award, decision or order of the Court is final and conclusive and can not be challenged, appealed against, reviewed, quashed or called in question in any court.

Although the award or decision made by the Court is final, however it can be challenged in the High Court by way of certiorari on ground of error of law or excess of jurisdiction.

In most of the employment misconduct cases, the awards were made against the employer due to the failure of the employers to adhere to the requirements of domestic inquiry and the violation of the rules of natural justice. The employers are still ignorant that the burden of proving the misconduct is in their (employers) hands and not the employee. This is basic a principle of industrial jurisprudence as commented by the Industrial Court in Stamford Executive Center and Dharsini Ganesan n3, as follows:

It may further be emphasized here that in a dismissal case the employer...
must produce convincing evidence that workman committed the offence(s)
he is alleged to have committed and for which he has been dismissed.
The burden of proof lies on the employer. He must prove the workman
guilty, and it is not the workman who must prove himself not guilty.
This is so basic a principle of industrial jurisprudence that no
employer is expected to come to this court in ignorance of it.

Methodology

Research in industrial relations law is qualitative in nature and involves analysis of both statutes and case laws. The
statutes are primary while the case laws are secondary. Thus, this paper is based on the analysis of the Employment Act
1955, Industrial Relations Act 1967 and the Industrial Court awards. The Industrial Court analysis is done based on
criterion based sampling, which means only related cases in employment misconduct, domestic inquires and rules of
natural justice were analyzed. The authors is also familiar and has been involved in the field of industrial relations in
Malaysia as lecturers and consultants, and they are also familiar with the industrial laws in Malaysia such as the

Literature review on Misconduct

Limited studies have been conducted in the area of employment relations issues in Malaysia generally and
management of employment misconduct specifically. Pathmanathan et al (2003), Thavarajah and Low (2003),
Kiong (2002), Gomez (1997) and Wu (1995) were the authors, whom have written about the Malaysian employment
relations, however except Idid (1993) and Gomez (1997), none of the studies have specifically dealt with the
management of employment misconduct in depth.

In fact none of the statutes related to Malaysian industrial laws formally define the term employee 'misconduct'
although s 14(1) of the Employment Act 1955 implies that misconduct is a conduct by the employee that is 'inconsistent
with the fulfillment of the express or implied conditions of his service'.

Ayadurai (1996), states that misconduct has two sources that overlaps to some extent. One is the right of the
employers, while the other is the responsibility of the employees. It is generally accepted that every employer has the
right to establish rules and regulations governing the conduct of his employees. Among these includes areas such as
attendance, insubordination, intoxication, smoking, gambling, fighting, theft, dishonesty, safety and etc. These are
usually in writing.

In Liew Ken & Ors and Malayan Thung Pau Bhd v4, the Industrial Court observed the following:
The dictionary meaning of the word 'misconduct' are improper behaviour,
intentional wrong doing or deliberate violation of a rule or standard
of behaviour. Insofar as the relationship of industrial employment is
concerned, a workman has certain express or implied obligations towards
his employer. Any conduct on the part of an employee inconsistent with
the faithful discharge of his duties, or any breach of the express or
implied duties of an employee towards his employer would constitute an
act of misconduct.

OP Malthora in The Law of Industrial Disputes (cited by Thavarajah and Low, 2003) defines misconduct as
follows:
Any act on the part of employee inconsistent with the faithful
discharge of his duties towards his employer would be misconduct. Any
breach of express or implied duties of an employee towards his
employer, therefore, unless it be of trifling nature, would constitute an act of misconduct. In industrial law, the word 'misconduct' has acquired a specified connotation. It cannot mean inefficiency or slackness. It is something far more positive and certainly deliberate. The charge of 'misconduct', therefore, is the charge of some positive act or conduct which would be quite incompatible with the express and implied terms of relationship of employee to the employer.

The Industrial Court has recognized 'misconduct' as being such act or conducts as adversely the employees' duty towards employer. The misconduct complained of must have some relation with the employee's duties or work entrusted to him by the employer. Any breach of an express or implied duty on the part of an employee, unless it is of a trifling nature, would amount to misconduct. The categories of misconduct are not closed and it remains a question of fact as to what amounts to misconduct.


(i) The intentional doing of something which the doer knows to be wrong; and
(ii) Which he does recklessly not caring what the results will be ...

In the case of *Kannan v NLFC* n5 , the Industrial Court observed the followings:

It is established that misconduct in industrial employment can broadly be dealt with under three headings, namely:

(i) Misconduct relating to duty;
(ii) Misconduct relating to discipline; and
(iii) Misconduct relating to morality.

Misconduct relating to duty refers to employee conduct that is inconsistent with the due and faithful discharge of duties, eg dishonesty, theft and breach of confidential company information.

Misconduct relating to discipline refers to breach of discipline of the employer's rules, eg coming late to work, leaving early, sleeping on duty, etc.

Misconduct relating to morality refers to immoral conduct, eg engaging in improper relationship with another employee.

The employer has to prove the misconduct alleged against the employee. In *Rasa Sayang Hotel and National Union of Hotel Bar & Restaurant Workers* n6 the Industrial Court said:

The court agrees with the union that there is no denying the right of the employer to punish, but there is also the right of the employee not to be punished if there has been no offence. Before the hotel can show that the punishment does fit the crime, it must first prove the crime.

As one of the managerial prerogatives or rights provided in s 13(3) of the Industrial Relations Act 1967 is the right to dismiss workman due to employment misconduct, it is however not an absolute right n7 . The rules of natural justice need to be adhered, one of which is the conduct of due (domestic) inquiry as required by s 14(1) of the Employment Act 1955 specifically for those employee who are within the scope of the Act.

**Domestic inquiry**

The domestic inquiry is an investigation exercise conducted by the employer to establish full facts of a misconduct
act committed by a workman; the facts also include the circumstances leading to the committal of the said act misconduct and recommended punishment. On 10 October 1969, the Government of Malaysia introduced certain amendments to the Employment Act 1955, which included a provision for disciplinary action. Section 14(1) stated clearly that an employer may, after due injury:

* Dismiss without notice an employee employed by him on the grounds of misconduct inconsistent with the fulfillment of the express or implied conditions of his service; or
* Down-grade the employee; or
* Suspend him from work without payment of wages for a period not exceeding one week.

The above provision (c) has been amended on 1 August 1998 and now reads; impose any other lesser punishment as he deems just and fit, and where the punishment of suspension without wages is imposed, it shall not exceed a period of two weeks.

It must be noted that the employer can only justify the disciplinary action he takes against the employee:

* On the grounds contained in the show cause or charge sheet; and
* The conclusions of the domestic inquiry.

It must be further noted that past offences, which were not part of the inquiry, should not be considered when handing out the punishment as they have been either condoned or forgiven unless such forgiveness has been conditional.

Where a workman in answer to a charge leveled against him admits his guilt there will be nothing more for the company to inquire into and, in such a case, the holding of an inquiry would be empty n8. Similarly, where an employee 'absconds' for a few days after committing misconduct (eg petty theft, fighting, etc.), it would be better to send him a letter under s 15(2) n9 regarding his absence, than to set in motion the whole process of domestic inquiry.

To dismiss an employee summarily without giving him a chance to explain in the form of a show-cause letter or an opportunity to defend himself on charges preferred against him is an unfair labor practice n10. As far as the conduct of the domestic inquiry is concerned, D'Cruz (1999) argues that before deciding to have an inquiry, the management should carefully consider the following facts:

* Was the misconduct inconsistent with the fulfillment of the 'express' or 'implied' conditions of his service?
* Was it a serious breach of the company's rules and regulations? If so, which particular rule or regulation has he breached?
* Had the management 'condoned' such misconduct earlier for the same employee or other employees?
* Are there any mitigating factors to be considered?

* Is it equitable to give the employee any other form of punishment or lesser punishment (other than the three mentioned in s 14(1) of the Employment Act 1955), taking into account his good past record?
* Finally, has the company enough evidence to present a convincing case to the panel of inquiry/inquiry officer.

A number of decisions by the Industrial Court has held that a failure to comply with the mandatory requirements of s 14(1) of the Employment Act 1955 renders the dismissal void and therefore without just cause or excuse of the purposes of Section 20(1) of the Industrial Relations Act 1967. In Wong Yuen Hock v Syarikat Hong Long Assurance Sdn Bhd & Anor n11, an insurance claims manager ('the claimant') was dismissed from his employment on the ground of gross dereliction of duty, in that he had improperly sold to himself two motor wrecks belonging to the employer ('the
The company had held no domestic inquiry prior to the dismissal. Pursuant to a reference by the Minister made under s 20 of the Industrial Relations Act 1967 to determine the propriety of the dismissal, the Industrial Court held that the failure by the company to hold a domestic inquiry constituted a clear breach of natural justice that rendered the dismissal of the claimant wrongful, and on that ground alone, deemed it unnecessary to examine the merits of the reference to ascertain whether the dismissal was or was not with just cause or excuse. Both parties, dissatisfied with award for different reasons, applied to the High Court for certiorari to quash the award. The applications were dismissed by the learned Judge who ruled that the Industrial Court in the circumstances had not committed any jurisdictional error. The parties, hence, appealed further to the Federal Court, which reversed the decision of the High Court.

The Industrial Court in *Milan Auto Sdn Bhd v Wong Seh Yen* n12, ruled that it was unnecessary for it to examine the evidence and determine whether the company's allegations against the claimant were in fact established, or to consider whether such misconduct if established constituted 'a just cause or excuse' for the dismissal, and that it was sufficient to dispose of the dispute purely on account of the company's failure to comply not only with the principle of natural justice but also with the statutory requirement of 'due inquiry' before dismissal under s 14(1) of the Employment Act 1955. Earlier, the Supreme Court (now Federal Court) case in *Dreamland Corp (M) Sdn Bhd v Chong Chin Sooi & Anor* n13, stated the following:

Where an employer has failed to make an inquiry, before dismissing or discharging a workman it is open to him to justify his action before the tribunal by leading all relevant evidence before it. The entire manner would be open before the tribunal. It will have jurisdiction not only to go into the limited questions open to a tribunal where domestic inquiry has been properly held, but also to satisfy itself on the facts adduced before it by the employer whether the dismissal or discharge was justified. The important effect of omission to hold an inquiry is merely that the tribunal would not have to consider only whether there was a prima facie case but would decide for itself on the evidence adduced whether the charges have really been made out.

It is also an established principle of industrial law that the employer must establish sufficient circumstances justifying dismissal such as misconduct. His Lordship Mohd Azmi FCJ stated in the case of *Milan Auto Sdn Bhd v Wong She Yen* n14, the function of the Industrial Court in dismissal cases on a reference under Section 20 of the Industrial Relations Act 1967 is two-fold, namely:

... first, to determine whether the misconduct complained of by the employer has been established, and secondly whether the proven misconduct constitutes just cause or excuse for the dismissal.

Thus the two questions, which the court had to ask itself, are: (i) was there a dismissal; and (ii) if the answer to (i) is in the affirmative, was the dismissal with or without just cause or excuse.

Earlier in *National Union of Newspaper Workers v Harian Tamil Malar* n15, the Industrial Court held the following:

In view of the failure on the part of the company to hold an inquiry into the claimant's misconduct prior to terminating his service the court is of opinion that this was unfair labor practice. Failure on the part of the company to conduct an inquiry and establish the guilt of the claimant before terminating his service amounts to a violation of the principles of natural justice.

As the basic principle of industrial jurisprudence is that it is the employer who must prove the workman guilty, and not the workman who must prove himself not guilty. A domestic inquiry is therefore required especially in the cases of serious or gross misconduct of the employee. However, in conducting the domestic inquiry the rules of natural
justice need to be adhered. The most important thing is that the persons who conduct the inquiry should do so impartially. They should not be biased or prejudiced.  

In the case of Public Express Sdn Bhd Sarawak v Thong Sii Tiew, as the employment of an employee is at stake, the court said:  

... it is a settled principle of law that before anyone can be punished in his person or property he must have notice of the charges and must be afforded a reasonable opportunity of being heard. Failure to follow the laid down procedure will result in a finding of unfair dismissal. It is a universal requirement that any act, which affects the right of a worker, must be exercised judicially.  

Some employers in Malaysia still tend to question whether s 14(1) of the Employment Act 1955 make a domestic inquiry mandatory, if so how formal and also do the strict rules of evidence apply in a domestic inquiry. Whatever the questions may be, it is advisable to hold the inquiry if the alleged misconduct of an employee, if proved, may elicit serious punishments like suspensions, downgrading or dismissal because an employer ought to give an employee the opportunity to be heard, as it is the fundamental rules of natural justice, which no employer can afford to ignore. Holding the inquiry may reveal any shortcomings, irregularities or laxity in the enforcement of safety, security, rules and regulations, or operation procedures, which might have escaped the management's attention. It may also provide the management with the opportunity to assess the motives of the supervisory staff entrusted with enforcement of discipline among the employees under their charge. Furthermore, an employee who has been charged merely on suspicion of having committed misconduct will get the opportunity to vindicate his innocence at the inquiry by producing trustworthy witnesses in support of his defiance. The very experience of attending an inquiry may also deter the employee from committing any misconduct in the future. Therefore the advantage of holding a domestic inquiry should outweigh all other consideration.  

Where the Employment Act 1955 is concerned, it is mandatory. For other employees, justice and fairness require the holding of an inquiry before a decision is being made to dismiss an employee. It is always good to hold a domestic inquiry because the company will have the opportunity to prepare its case before the court and the claimant will be aware of the allegations, to be adduced by the witnesses for the company, so both the parties have advantage to each other.  

Rules of Natural Justice  

The term natural justice on the other hand, stood for justice administered without reference to statute in the decision of the law court, where the judge is being guided by what is called conscience of the natural sense of what is right or wrong. Industrial Court in Eastern Plantation Agency (Johore) Sdn Bhd v Association of West Malaysian Plantation Executives, Seremban commented as follows:  

The concept of natural justice has two basic components: 1) the rules of audi alteram partem and 2) the rule against bias. The of audi alteram partem rule, or the rule requiring a fair hearing is of importance and can be used to construe a whole code of administrative procedural rights. The rule against bias is also of equal importance for a man should not be judged in his own cause and justice must not be done but seen to be done. An adjudicator should not be a party to the dispute if he has some interest therein and it is not necessary to prove that a particular decision made by the adjudicator was in fact influenced by bias. It is sufficient if there is a reasonable suspicion about his fairness. He must not only be free from bias, but there must not be even an appearance of bias.  

The above two principles of natural justice applies not only to employees within the scope of the Employment Act 1955 but to all workman who are not within the scope of the Employment Act 1955 but within the Industrial Relations
Act 1967. By holding a domestic inquiry in the case of misconduct as required by s 14(1) of the Employment Act which
states that the employer may, on grounds of misconduct inconsistent with the fulfillment of the express or implied
conditions of his service, after due inquiry 1) dismiss without notice the employee 2) downgrade the employee and 3)
impose any other lesser punishment as he deems just and fit, the employer adheres to the first principles of natural
justice \textit{audi alteram partem} ie the right to be heard.

In \textit{Kuala Lumpur Hilton v National Union of Hotel, Bar and Restaurant Workers} \textsuperscript{n21}, the Industrial Court stated
that:

A due (domestic) inquiry under \textit{s 14(1)} ought to comply with the
time-honored rules of natural justice. It ought to be a bona fide
inquiry. It must be conducted in a fair and responsible manner. This
court has to take a look at the practical effect if any of
any failure to observe a proper procedure in the inquiry in order to
decide whether the dismissal was \textit{procedurally fair} as distinguished
from reason the reason for dismissal.

(Emphasis added.)

The Industrial Court in \textit{Sawmill & Timber Industry Workers Union v Asia Plywood Company Sendirian Berhad, Sg
Petani} \textsuperscript{n22} further stressed this as follow:

Time and again has time court as court of equity emphasized the
principle of natural justice requiring that employee cannot be
condemned without being heard.

However the employer need to be careful in the case of second principles of natural justice ie the rule against bias
which means those people who are involved or have any interest in the case should not be in the inquiry panel. As
regards to this, the employer should pick an independent panel. Industrial Court in \textit{Malayan Banking Berhad v
Association of Bank Officers, Malaysia} \textsuperscript{n23} states as follows:

Great care must be taken to see that the rules of natural justice are
followed. If there is any failure in that respect by the employer, the
employer has to pay dearly for that error, so that security of
employment, a commodity now becomes precious, can be safeguarded.

Previously the Industrial Court in \textit{Husin Bin Mohd Sam v Nakafreight (M) Sdn Bhd} \textsuperscript{n24} provided the following
opinion:

Natural justice requires that no man shall be condemned unheard and
applies to every case where an individual is adversely affected by an
administrative action. The accused should not only know the case
against him but he must have the opportunity of confronting,
questioning or repudiating the witness, statements or evidence against
him. Merely stating the company's allegations without substantiating
with proof and by the investigating officer himself, is clearly a
breach of the principles of natural justice. There is nothing else for
the claimant to do but to make a bare denial and claim that the company
had no proof against him.

In one of the landmark case on the principles of natural justice was \textit{Surinder Singh Kanda v Government of the
Federation of Malaysia} heard in 1962 which was cited by the Industrial Court in \textit{Audio Electronics Sdn Bhd and Kuldip
Singh} \textsuperscript{n25} (Award 193/1987). In that landmark case Lord Denning had this to say:

If the right to be heard is a real right, which is worth anything, it
must carry with it a right in the accused to know the case, which is
made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or to contradict them. The accused must be given sufficient opportunity not only to know the case against him but also to answer it.

The principles of natural justice cannot be ignored. By breaching the right to defend himself (accused) an employer breaches the principles of natural justice which may lead the employee to claim for unfair dismissal according to s 20, Industrial Relations Act 1967 which states:
Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representation may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.

In *Perusahaan Kemas Maju Sdn Bhd v Ramli bin Abu Hassan* n26, the Industrial Court held the following:
In the field of industrial relations a breach of the principles of natural justice has been, and properly so, castigated as unfair labor practice. The law has, however, deemed that such a breach, notwithstanding that obligation to comply with the requirement of natural justice are imposed either by contractual undertakings or by the law, and often times by both, does not ipso facto render dismissal as one which was without just cause or excuse. It would have be an extremely unhealthy development in industrial relations and practice if due to the lack of a legal sanction, employers, continue to flout the reasonable demands of the principles of natural justice which are expected to be complied with not only by the reasonable dictates of good conscience and fairness but also by the law of the land.
Employer should bear in mind that the purpose served by faithful adherence to the principles of natural justice is not only to safeguard the rights of their employees. It also engenders self-discipline at the level of management vested with disciplinary powers when performing its disciplinary powers when performing its disciplinary functions. It ensures that employers act with due circumspection as well as deep sense of responsibility and only after carefully considering all the facts and circumstances of the alleged disciplinary offence.

In Malaysia, as well as in other commonwealth countries, the right for employment is protected. This is evident in *Kuching Plywood Bhd v Ng Tiong Hie* n27, whereby the dicta from an Indian case of *Delhi Transport Copr v DTC Mazdoor Congress*[1990] was cited as follows:
The right to life includes the right to livelihood. The right to livelihood therefore cannot hang on to the fancies of individuals in authority. Employment is not a bounty from them nor can its survival be at their mercy. Income is the foundation of many fundamental rights and when work is the sole source of income the right to work becomes as much fundamental. Fundamental rights can ill afford to be consigned to the limbo of undefined premises and uncertain applications. That will be a mockery of them.
Recommendations

With the increasing employment misconduct, the management of human resources becomes more challenging with legal implications for employers. As a result, from the perspectives of the authors the following recommendations and suggestion can be useful guide to reduce or even to prevent employment misconducts. The recommendation includes creation of harmonious employment relations, consultative management approach, and effective grievance handling machinery and effective human resource strategies. These recommendations are also useful for the success in management of human resources.

Firstly, the creation of harmonious employment relations is essential. Employees are to be considered the most important resource that the organization has because they are the ones that ensure the organization grows and becomes successful. Like any other resources in the organization they need to be managed; but unlike any other physical resources, employees are human beings that has feelings, freedom of thoughts and making choices, liberty to act, or not to act, in a certain manner, etc. Because employees are considered unique and vital organizational resources, they need to be managed properly. Employment relations, human resource managements essentially are 'human relations' and understanding the 'humane' and 'human' aspect of human resource management is the first step in creating a harmonious employment relations.

Besides, both employers and employees should regard each other as partners to build lasting relationships. They need to adopt a consultative approach in resolving issues through dialogue, taking into consideration the needs and concerns of both parties. The employers or the management should also provide effective leadership and direction in the overall interest of all parties. They should lead by example and take responsibility. The employers should adopt participative management or employee involvement or participative decision-making as the authoritarian or directive management styles is not suitable in many organizations in the current business environment.

Handling of employee grievance with an effective grievance handling machinery is must to resolve any disputes at the supervisory level. A grievance is like a small fire, the earlier you put it out is better. The grievance should be studied thoroughly and objectively, and due consideration given to the social and cultural aspects of the grievance and the parties involved. The grievance handling must be done in a fair and equitable solution for parties, the employer and the employees. The solution should be just (firm), but justice should be tempered with compassion wherever possible. Finally, the solution to the grievance should not only be effective in redressing the present grievance but should also be effective in avoiding recurrence of such grievances in the future.

Effective human resource management strategies in terms of employee selection, induction, training and development, performance management and appraisal, compensation management and employee relations are also essential. As previously stated, employers should regard their employees as their most important asset as it is not great product or services, which makes great organization but great people. Investment in their employees and developing them is also a must for the organizations to remain competitive in the marketplace. Every manager manages human resources, although not every manager is a human resource manager in organizations. The expectation on human resources is also shifting from managing the organization of the business to managing the business of the organization.

Conclusions

Even today, in Malaysia, there several managers for various reasons are reluctant or refuse to hold domestic inquiry as they argue it is the management's right to discipline an errant employee with interference or intervention from outside body. However, it is the requirement of law and also the practice to hold a domestic inquiry based on the rules of natural justice before meting out the punishment to employee, otherwise the employee (workman) may use his option to file representation for unfair dismissal under s 20, Industrial Relations Act 1967. As a result is a must for the employer not to violate the rules of natural justice in the management of employment misconduct. This will also help in reducing the
number of cases, referred to the Ministry of Human Resources under s 20 of the Industrial Relations Act 1967. In this paper the meaning of misconduct in employment based on the Industrial Court awards were explored, besides discussing the issue of domestic inquiry requirement, the rules or principles of natural justice and some recommendations in managing employment misconduct.

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FOOTNOTES:

n1 The term workman is different from term 'employee' as defined in the Employment Act 1955. In the Industrial Relations Act 1967 the term 'workman' is defined as 'any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute ...'. In this paper both the term 'employee' and also 'workman' are used interchangeably depending on the context of Employment Act 1955 and also the Industrial Relations Act 1967.

n2 Employee as defined in Employment Act 1955, s 2(1) -- any person, irrespective of his occupation, who has entered into a contract of service with an employer under which such person's wages do not exceed Ringgit Malaysia one thousand and five hundred (RM1,500).

n3 Ibid, Award 263 of 1985.

n4 Industrial Court, Award 37 of 1974.

n5 Ibid, Award 95 of 1977.
n6  Ibid., Award 82 of 1982.

n7  The Industrial Court in *Lim Sim Tiong and Palm Beach Hotel* (Award 48 of 1974), stated, 'It is the basic principle of industrial law that a court would be wrong to interfere with bona fide exercise of powers which are given to management by common law and by contracts of service or which are inherent in management. If there has been no abuse of discretion, no discrimination, no capricious or arbitrary action, if management has acted in goods faith and upon fair investigation, an arbitrator should not disturb the decision taken by the employer. However as a court of equity and good conscience, this court will interfere not only where there has been victimization, but also where it is opinion that upon the substantial merits of the case the action taken by the management was perverse, baseless or unnecessarily harsh or was not just or fair, or where there has been a violation of principles of natural justice, or where there has been unfair labor practice or other mala fide action on the part of the management in the exercise of its powers'.

n8  Industrial Court, Award 47 of 1993.

n9  Section 15(2) of the Employment Act 1955 -- An employee shall be deemed to have broken his contract of service with the employer if he has been continuously absent from work for more than two consecutive working days without prior leave from his employer, unless he has a reasonable excuse for such absence and has informed or attempted to inform his employer of such excuse prior to or at the earliest opportunity during such absence.

n10  Industrial Court, Award 382/1997.

n11  [1995] 3 CLJ 344 (FC).

n12  [1995] 3 MLJ 537 (FC).

n13  [1988] MLJ 111.

n14  Civil Appeal, No 02-154 of 1994.

n15  Industrial Court, Award 9 of 1978.

n16  Industrial Court, Award 347 of 1986.


n21  Ibid, Award 66 of 1990.


n23  Ibid, Award 247 of 1986.


n30 Alex, KB Yong, Strategic HR: Invent and Innovate, Genuine Circuit, Kuala Lumpur, 2005, p 3.