



## ABUSE OF DRUGS IN THE WORKPLACE: THE EMPLOYER'S REMEDY

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### ABSTRACT

*Trafficking in dangerous drugs or the possession of such drugs is a serious offence in Malaysia which carries the mandatory death sentence, if found guilty. There can be no doubt whatsoever that the accused must have the mens rea possession of the drug, that is he knew the nature of the drug he possessed and that he had the power of disposal over it. Abuse of dangerous drugs may occur in different circumstances and places. Thus, it can also happen in the workplace. In this paper the writer has analysed the abuse of drugs in the workplace and the mode of handling the problem including the remedies available to an employer inclusive of whether the employer can dismiss the worker concerned forthwith or suspend him during the investigation proceeding of the case. Should the accused be charged in court for possession or trafficking in dangerous drugs or be involved in the abuse of such drugs, how can an employer safely terminate or dismiss the worker without being subject to any subsequent litigation for dismissal without just cause or excuse under the Industrial Relations Act, 1967 or under the common law for wrongful dismissal? In short, the paper addresses the issue on drug abuse in the workplace and the effective mode of handling such situations with reference to the law and practices in Malaysia as well as some reference to the Islamic Law.*

### ABSTRAK

*Pengedaran dadah berbahaya atau memiliki dadah berkenaan dianggap sebagai suatu perbuatan jenayah yang serius di Malaysia, yang membawa kepada hukuman mati mandatori, jika didapati bersalah. Mereka yang dituduh*

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*melakukan kesalahan tersebut, tanpa ragu-ragu lagi memang mempunyai niat untuk menyimpan bahan tersebut, mempunyai pengetahuan tentang jenis dadah yang dimilikinya dan berkemampuan untuk melupuskannya. Penyalahgunaan dadah pula biasanya berlaku dalam situasi dan pada tempat-tempat tertentu, dan ini termasuklah di pejabat. Melalui kertas kerja ini, penulis cuba membincangkan tentang penyalahgunaan dadah di pejabat dan cara menanganinya termasuklah hak-hak dan tanggungjawab seorang majikan. Beberapa persoalan sama ada majikan boleh memecat kakitangannya yang berkenaan atau menggantung kerjanya sehinggalah siasatan terhadapnya selesai, ada dibincangkan. Jika sekiranya kakitangan berkenaan dihadapkan ke mahkamah di atas tuduhan memiliki atau mengedarkan dadah berbahaya atau menagih dadah, bagaimanakah cara terbaik majikan boleh memecat kakitangan tersebut tanpa perlu dihadapkan ke mahkamah kerana memecat kakitangan tanpa sebab yang munasabah dan adil di bawah Akta Perhubungan Perindustrian 1967, atau 'Common Law' yang berkaitan dengan pembuangan pekerja yang bertentangan dengan undang-undang? Kesimpulannya kertas kerja ini memperkatakan tentang isu penyalahgunaan dadah di tempat kerja dan kaedah paling berkesan dalam menanganinya dengan merujuk kepada sistem perundangan negara dan pelaksanaannya serta turut melihatnya dari sudut perundangan Islam.*

## **Introduction**

The term 'drug' in the context of social problem means a certain chemical substance that has a psychoactive effect – the effect of which can alter moods, perception, consciousness or behaviour as a result of alterations in the brain. "The term 'drug abuse' is defined as the intake of a chemical substance under circumstances or at dosage levels that significantly increase the hazard potential, whether or not the substances are used therapeutically, legally, or as prescribed by a physician. But in layman's terms, 'drug abuse' refers to such uses of psychoactive substances that are socially disapproved and legally forbidden"<sup>2</sup>. The serious negative effects of all psychoactive drugs are that they produce dependence, both physical and psychological<sup>3</sup>. In the former, the body becomes dependent on the drug for normal functions whereas in the latter, there is a desire or craving for the drug so as to achieve the desired satisfaction.

In the "Foreword" of the book entitled, "*DADAH (Illicit Drugs) What You Need To Know*", published in 1992 by the Anti-Narcotics Task

<sup>2</sup> Anwarul Yaqin, *Law and Society in Malaysia*, (Kuala Lumpur, International Law Book Services, 1996) pg. 165-166.

<sup>3</sup> Ibid.



Force, National Security Council, Prime Minister's Department, the former Prime Minister, Tun Dr. Mahathir Mohamad stated that "The drug problem is no longer perceived as purely a social malaise but as a community problem with the potential of becoming a national threat if not controlled". Thus, the drug problem is a serious concern since it has the potential of becoming a national threat if it is left uncontrolled. A person who is reasonably suspected to be a drug dependent (consumes or self-administers dangerous drugs) may be taken into custody by any rehabilitation officer or any police officer pursuant to the Drug Dependents (Treatment and Rehabilitation) Act, 1983 (Act 283). The preamble to the said act sets out the scope of the act in the following words: "An act to provide for the treatment and rehabilitation of drug dependants and for matters connected therewith".

Similarly, a person who is trafficking in dangerous drugs or presumed to have possession and control over dangerous drugs may be arrested and charged in court pursuant to the Dangerous Drugs Act, 1952. The 1952 Act makes provisions for regulating importation, exportation, manufacture, sale and use of a large number of substances viewed as dangerous to health and safety. The act defines offences relating to drug activities such as possession, use, trafficking, importation and exportation, and manufacturing of a number of specified drugs, and cultivation of cannabis, marijuana, opium and cocaine.

Having stated the above, this paper will analyse the rights of an employer if and when any of its workers are reasonably suspected of being involved with drug abuse. At this stage, it would be pertinent to note that the drug abuse offence committed by the employees in Malaysia is an alarming phenomenon and is worrying the Government. The Assistant Industrial Development Minister, Jainab Ahmad Ayed stated that 80% of the total 277,000 drug addicts recorded in the country so far were from the working class. She added that 37% of the general workers and labourers in the country are involved in drug abuse. Most of them were from the private sector, with most of them working as general labourers or in sales, manufacturing, public transportation service, construction and the agricultural sectors<sup>4</sup>.

Having stated the above, the following questions will be discussed; whether an employer can dismiss the worker who is suspected of drug

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<sup>4</sup> "37% of General Workers, Labourers Take Drugs" *The Borneo Post* (Sabah), Monday, March 19, 2007 at pg. 2 (no attributed author).



abuse, should the employer hold a domestic inquiry before taking appropriate measures including dismissal. How can the employer effectively dismiss a worker suspected of drug abuse in the workplace without being dragged unnecessarily to court for dismissal without just cause or excuse? On the other hand, assuming the employee was detained and subsequently charged of drug trafficking and if at the end of the criminal proceedings, he or she is found not guilty, is the employer obliged to reinstate him into his former employment?

The above are some of the questions that would be considered in this paper. At this stage it must be noted that every employee is eligible for medical treatment from the company's doctor or any medical practitioner referred by the company's doctor. However, expenses incurred as a result of injury, illness or disease caused by misconduct, attempted suicide, carelessness, drunkenness, wilful negligence of duty, the performance of an unlawful act and drug abuse will not normally be covered by the company.

### **Employment Relationship: The Workplace Rules**

The relationship between the employer and employee is found in the various employment statutes, the contract of employment and the in-house rules of the company. In relation to the discipline of workers, most organisations will have the workplace rules that prescribe the acts that may constitute misconduct. Drug abuse in the workplace is, in most circumstances, classified as a major misconduct justifying disciplinary action including the right to terminate or dismissal of the affected employee from employment.

Furthermore, the common law courts have implied many terms into the contract which includes duty to render faithful and loyal service towards the employer; duty to obey a lawful instruction; duty to exert reasonable degree of competence and skill; duty to protect the employer's property; and in exercising the trust placed on him by the employer. It also includes the duty not to dishonestly secure benefits at the employer's expense; not to accept commission, bribe and not to work, in their spare time, with a competitor of the original employer. The employee is also under the duty of not disclosing confidential information acquired during the course of employment<sup>5</sup>.

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<sup>5</sup> See Chetty on Contract Vol. 2.



In *Lister v Ramford Ice & Cold Storage Co Ltd*,<sup>6</sup> Viscount Simond stated: "it has been said on many occasions that an employee has a duty of fidelity to his employer, a general proposition that is indisputable. The practical difficulty in any given case is to find exactly how far that rather vague duty of fidelity extends. *Prima facie* it seems to me that on considering the authorities and the arguments that it must be a question on the facts of each particular case. It can very well understand that the obligation of fidelity which is an implied term of the contract may extend very much further in the case of one class of employee than it does in others". As from the above, it is submitted that drug abuse in the workplace is incompatible with the faithful discharge of duty by the employee and further, may tarnish the image and reputation of the employer in which case dismissal may be warranted after an appropriate due inquiry. In *Courtaulds Northern Textiles Ltd. v Andrew*<sup>7</sup>, Arnold J stated that, "any conduct which is likely to destroy or seriously damage that relationship must be something which goes to the root of the contract, which is really fundamental in its effect upon the contractual relationship".

### **Drug Abuse: A Gross Misconduct**

As noted above, drug abuse among the employees in the workplace as well as outside the workplace during working hours has often been viewed as acts of major gross misconduct on which the employer would be justified in terminating the services of the affected employee. Likewise, possession of any dangerous drugs in the workplace would also tantamount to misconduct and termination of employment and is reasonable in the interest of discipline. In *Pearce v Foster*,<sup>8</sup> Lopez LJ stated that "Misconduct...need not be misconduct in the carrying on of the service or the business. It is sufficient if it is conduct which is prejudicial or is likely to be prejudicial to the interests or the reputation of the master and the master will be justified, not only if he discovers it afterwards, in dismissing that servant".

In *Clouston & Co v Corry*,<sup>9</sup> Lord Hereford stated that, "There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course, there may be misconduct in a servant which will

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<sup>6</sup> [1957] AC 555.

<sup>7</sup> [1979] IRLR 84, 86.

<sup>8</sup> 17 QBD 536, 542.

<sup>9</sup> [1906] AC 122 (PC).



not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal". Hence, whether or not the act of misconduct would justify dismissal from employment would depend on the nature of service of the employee and the post or position held in the organisation, among others. What is certain is that an act of gross misconduct in the workplace or outside the workplace during the working hours, if established against the employee, will entitle the employer to dismiss the employee.

In *Mathewson v R.B. Wilson Dental Laboratory Ltd*,<sup>10</sup> a dental technician who had been employed for almost 5 years with the respondent was arrested and charged with the possession of cannabis. He was subsequently dismissed from employment on the grounds that it was not appropriate to retain the services of a skilled worker who was using drugs and who might influence the younger staffs. The Employment Appeals Tribunal confirmed the termination of the service on the ground that the employer's reputation is something that ought to be defended and where the employer could prove that the service retention of a drug addict might tarnish his image, the employer is entitled to terminate the service of the employee. In this situation, the employer has no confidence left in the employee.

When an employee has been detained by the authority for drug offences, the employer cannot be reasonably expected to keep his job open indefinitely or grant leave *ad infinitum*. The length of imprisonment will certainly prevent the employee from fulfilling his obligations in terms of the service contract. In the aforesaid circumstances, the employer can terminate his services on the basis of frustration of contract due to the impossibility of performance. The question of frustration of contract will be determined by the period of time the employee has to be away from work and is unable to perform his share if the contract gives rise to the need for the employer to find a replacement. BR Ghaiye, the author of the book entitled "*Misconduct in Employment*", stated that "Every employer has got two distinct rights. He may either treat the absence on account of imprisonment or detention as misconduct and may take disciplinary action amounting to dismissal or otherwise. Alternatively, he may treat the said absence on account of imprisonment as inability or

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<sup>10</sup> [1988] IRLR 513.



incapability on the part of the employee to fulfil the contract of service, and therefore he may cancel the contract by an order of discharge simplicitor”.

### **Holding a Due Inquiry or Domestic Inquiry Before Dismissing the Affected Worker**

An employer must treat workers with concern and common decency. They must also refrain from maintaining wrongful accusations of drug abuse, drunkenness and theft, among other things. Such unscrupulous conducts of the employer may give rise to embarrassment, humiliation and damage to one's self-worth and self-esteem. Any unfair treatment of the employee in employment, including at the time of dismissal, may give rise to a cause of action for breach of the implied trust and confidence term. Maliciously defaming an employee with the intention of inflicting mental distress may also find a cause of action in tort.

It has now been accepted that whenever an employee is to be dismissed, demoted or reprimanded for his conduct, the affected employee should be fairly dealt with and given the opportunity to answer the allegation. For example, the Employment Act, 1955 provides the circumstances where an employee can be dismissed from employment for gross misconduct. Section 14(1) of the Act provides that “An employer may on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service, after due inquiry - (a) dismiss the employee without notice; (b) downgrade the employee; or (c) impose any other lesser punishment as he deems just and fit, and where a punishment of suspension without wages is imposed, it shall not exceed a period of two weeks”. Based on this, it can be deduced that a due inquiry or domestic inquire must be held before the employer decides to terminate the services of the affected employee.

The same also applies in the common law. An employer may dismiss a worker from employment without notice when the employee has committed gross misconduct, such as immorality at the workplace, insolence and insubordination, criminal conduct, or any conduct inconsistent with the relationship between an employer and his employees. The conduct that justifies summary dismissal must, however, be so serious that it entitles the injured or the innocent party to terminate the contract since the continuation would not be consistent with a proper relationship between the parties. In other words, to justify a summary or instant dismissal as opposed to a dismissal on notice, expressed or implied, it

must be shown that the worker has been guilty of serious misconduct of such gravity so as to render the further continuation of the employment relationship thoroughly impossible<sup>11</sup>. The burden of proving misconduct justifying summary dismissal lies with the employer who has to establish such conduct on the balance of probabilities. As noted above, it has now been accepted that whenever an employee is to be dismissed, demoted or reprimanded for his conduct, the affected employee should be fairly dealt with and given the opportunity to answer the allegation.

An impending dismissal should be implemented fairly where the affected worker should be notified and given appropriate opportunity to rebut any allegations against him. The employer must furnish him with the full particulars of the allegations that have been made. He should then be given the opportunity to present his own version of the facts and events that have occurred. The employer is under the obligation to conduct an enquiry into the allegation that has been made and must also listen to the explanation put forth by his employee, so that he can then form a balanced opinion on the matter at hand. This is subject to the condition that in doing so, the employer must be impartial and observe the rules of natural justice.

In determining whether the conduct of the employee justifies summary dismissal, regards has to be on: (i) the nature and degree of the alleged misbehaviour; (ii) its significance in relation to the employer and to the position held by the employee; (iii) its effect on the confidential relationship between them as against the severe consequence of dismissal; and (iv) misbehaviour must be such that it goes to the heart or root of the contract between the parties<sup>12</sup>. If the employer finds that the employee in question has been at fault then he can only impose a penalty which is fair and appropriate with regards to the circumstances surrounding the case, failing which such punishment might be quashed on the grounds of harshness or undue severity.

The House of Lords, in *Polkey v AE Dayton Services Ltd*,<sup>13</sup> emphasised on the importance of procedure and substantive requirement.

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<sup>11</sup> Following are some examples of instances which may justify instant dismissal; (a) failure to satisfy the duties in a justifiable manner; (b) conduct incompatible with his duties or prejudicial to the employer's business; (c) wilful disobedience of the employer's order in a matter of substance; and (d) misconduct inconsistent with the fulfilment of the express or implied conditions of service.

<sup>12</sup> See *Sinclair v Neighbour* [1967] 2 QB 279.

<sup>13</sup> [1988] ICR 142 (HL).



Lord Bridge stated that: "Thus, in the case of incapacity, the employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to mend his ways and show that he can do the job; in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation; in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employee affected or their representatives, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation"<sup>14</sup>.

It must however, be noted that detailed principles and rules on justifiable and unjustifiable dismissal is not possible. Whether or not a dismissal is substantively justifiable and procedurally fair will depend on the circumstances surrounding each particular case. It is submitted that a slight or immaterial deviation from procedural fairness should not render a dismissal unfair or unjustifiable. This is mainly because an employer's conduct of an inquiry into an allegation is not to be put under a microscope and subject to pedantic scrutiny. The employer cannot be compelled to comply with the stringent procedural requirement before dismissing their workers from employment.

In *Said Dharmalingam Abdullah v Malayan Breweries (Malaya) Sdn Bhd*,<sup>15</sup> – a case involving an employee who was denied the opportunity to make a plea in mitigation before the domestic inquiry – the Federal Court stated that it would have been a useless formality to have accorded the employee the right to make a plea in mitigation since the penalty would have been the same even if that right had been exercised. In other words, the denial of an opportunity to be heard would seem to offer no prejudice to the affected party since the employer would have no discretion but to dismiss him. In particular, the court observed: "In the present case, the misconduct proved against the employee, was very grave indeed, involving the element of dishonesty and a high degree of premeditation and preparation. The employee must have been aware, that in the event of an adverse finding on the issue of liability, dismissal would be a mandatory sequel. Indeed, no other punishment was possible, given the circumstances of the case". Thus, the least expected of an

<sup>14</sup> *Ibid.*, pp. 162-163 (HL).

<sup>15</sup> [1997] 1 CLJ 646 (FC).

employer is that they must have reasons for the dismissal and the affected workers must be given necessary opportunity to refute any allegation made against him.

### **Burden and Standard of Proof in the Industrial Court**

The employer must produce cogent evidence that the worker committed the offence for which he is alleged to have committed. In *Milan Auto Sdn Bhd v Wong Seh Yen*,<sup>16</sup> Mohd Azmi FCJ stated that “As pointed out by this court recently in *Wong Yuen Hock v. Hong Leong Assurance & Another Appeal* [1995] 3 CLJ 344, the function of the Industrial Court in dismissal cases on a reference under Section 20 is twofold; 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. It is a basic principle of industrial relations jurisprudence that in a dismissal case the employer must produce convincing and compelling evidence that the workman committed the offence or offences he is alleged to have committed for which he has been dismissed. The burden of proof lies on the employer to prove that he has just cause or excuse for taking the decision to impose the disciplinary measure of dismissal upon the workman. The just cause must be a misconduct, negligence or poor performance based on the facts of the case”.

The burden of proof lies on the employer and this is consistent with article 9(2)(a) of the International Labour Organisation’s Convention No. 158 of 1982 which provides that the burden of proving the existence of a valid reason for the termination shall rest on the employer. The Court of Appeal in the case of *Telekom Malaysia Kawasan Utara v Krishnan Kutty Sanguni Nair & Anor*,<sup>17</sup> clearly stated the standard of proof required to be met where criminal related misconducts are concerned.

The court observed: “Thus, we can see that the preponderant view is that the Industrial Court, when hearing a claim of unjust dismissal, even where the ground is one of dishonest act, including “theft”, is not required to be satisfied beyond reasonable doubt that the employee has “committed the offence”, as in a criminal prosecution ...In our view the passage quoted from Administrative Law by H.W.R. Wade & C.F. Forsyth offers the clearest statement on the standard of proof required, that is the civil standard based on balance of probabilities, which is flexible, so that

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<sup>16</sup> [1995] 4 CLJ 449.

<sup>17</sup> [2002] 3 CLJ 314 (CA).



the degree of probability required is proportionate to the nature of gravity of the issue. But, again, if we may add, these are not “passwords” that the failure to use them or if some other words are used, the decision is automatically rendered bad in law”.

In drug abuse cases, it is common to ask the claimant to undergo a urine test for the purpose of detecting whether he was involved in drug abuse. The test will be carried out by a chemist whose report would confirm whether the urine test of the claimant is positive in that it contains active ingredients of drugs such as cannabis, morphine etc.<sup>18</sup>.

### **Drug Abuse Cases in the Workplace Adjudicated in the Industrial Court**

One of the indications of drug addiction or drug abuse is absenteeism and this is prevalent among drug addicts as they are unable to concentrate in their work. It would be worthwhile analysing the case of *Malaysian Airline System Bhd v Samson Anuar Haron*.<sup>19</sup> In that case, the claimant commenced employment with the company on 9<sup>th</sup> December 1969 as a customer service officer and had remained in that position until he was dismissed by the company on 28<sup>th</sup> February 2001. During the claimant's tenure of employment, he was constantly taking excessive medical leave from various clinics. Over this period he was regularly informed by the company through letters that he had exceeded his medical leave entitlement and hence, the excess days would be regarded as leave without pay. To overcome this problem the company decided to confine the claimant to seek medical attention from selected panel clinics, namely, the MAS Medical Centre and the General Hospital.

Through a letter dated 6<sup>th</sup> June 1997, the company informed the medical services manager to subject the claimant to a medical examination due to the excessive number of medical leave which he had taken in 1995, 1996 and 1997. Earlier, on 17<sup>th</sup> January 1997 the claimant was examined by Dr. Jamil Ibrahim, the company's medical services controller, who *vide* a letter dated 13<sup>th</sup> June 1997 stated, that upon conducting the relevant test, he found the claimant's urine sample tested positive for morphine. In July 1997, the claimant was subjected to another urine test and as a result, one Dr. Ling from the MAS Medical Centre confirmed that his urine sample collected on 9<sup>th</sup> July 1997 had tested positive for morphine.

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<sup>18</sup> See *Baharuddin bin Kamsin v Pihak Berkuasa Sidang Panglima Armada Pengkalan TLDM Lumut* [1996] 4 MLJ 184

<sup>19</sup> [2003] 3 ILR 1407 (IC).

On receipt of the medical report, the company *vide* a letter dated 24<sup>th</sup> July 1997 instructed the claimant to provide a written explanation as to why disciplinary action should not be taken against him. Unable to accept the claimant's bare denial, the company charged him for being under the influence of drugs *vide* letter dated 2<sup>nd</sup> October 1997 and he was directed to attend a domestic inquiry on 12<sup>th</sup> November 1997. At the conclusion of the domestic inquiry, the claimant was found guilty of the charge and it was decided that disciplinary action was to be taken against him, this being a suspension from duty without pay for a period of ten days. Although the company had offered to place the claimant in a drug rehabilitation institution to deal with his drug problem in an effective manner he refused the offer. *Vide* letter dated 31<sup>st</sup> January 1998, the company revoked the disciplinary action that was to be accorded to the claimant on humanitarian grounds and the claimant was instead accorded a strict warning not to repeat similar incidences in the future.

However the claimant did not heed the warning and continued taking excessive medical leave and unapproved leave. As a consequence he was instructed by the company to subject himself to another urine test by the MAS Medical Centre to determine if he was still under the influence of drugs at that point in time. The claimant's urine sample which was collected on 23<sup>rd</sup> June 2000 was forwarded to Gribbles Pathology. The pathology report dated 24<sup>th</sup> June 2000 received by the company confirmed the existence of opiate class drugs. Another specimen was referred to the laboratory on 29<sup>th</sup> June 2000 and the test was performed by Gribbles Pathology, Melbourne, Australia.

The pathology report dated 5<sup>th</sup> June 2000 identified the drugs as codeine and morphine. Thereafter, the claimant was given a show cause letter dated 17<sup>th</sup> August 2000 to which he responded *vide* letter dated 5<sup>th</sup> September 2000 denying he was under the influence of drugs but that he was on medication at that time because he was sick. Unable to accept his explanation, the company issued the claimant with another charge letter dated 15<sup>th</sup> September 2000. A domestic inquiry was subsequently held on 8<sup>th</sup> November 2000 and 12<sup>th</sup> December 2000 and at the end of it the claimant was found guilty of the charge of being under the influence of morphine. As such the company was left with no alternative but to terminate the claimant's services with effect from 28<sup>th</sup> February 2001 *vide* letter dated 21<sup>st</sup> February 2001.



The claimant's representation for dismissal without just cause or excuse under section 20(1) of the IRA was referred to the Industrial Court by the Minister. Before the Industrial Court, the following issues were raised: (i) What was the misconduct the claimant was alleged to have committed for which he has been dismissed? (ii) Has the misconduct been established? (iii) If so, is the misconduct serious enough to warrant the extreme punishment of dismissal? The Industrial Court held that it is abundantly clear that the claimant was a morphine user and this was a probable reason for his frequent absenteeism at the workplace. This was not the only time because he had also been warned on two earlier occasions concerning his drug taking habit but for humanitarian reasons, the company had decided to give him another chance. The court was of the view that the misconduct the claimant committed was a serious misconduct. The company cannot be expected to retain an employee who was a drug user and was frequently absent from work. The claimant has proved himself to be unfit and unsuitable for the job. In the circumstances the court held that the claimant was dismissed for just cause or excuse.

Another example would be the case of *Suatman Laso v TM Cellular Sdn Bhd*<sup>20</sup>. In that case, the claimant commenced employment with Mobikom Sdn Bhd on the 7<sup>th</sup> August 1995 pursuant to a letter of offer dated 28<sup>th</sup> July 1995. *Vide* letter dated 30<sup>th</sup> August 2000, the claimant was notified of a change of management from Mobikom Sdn. Bhd. to Telekom Cellular Sdn. Bhd. Pursuant to the change of management, the claimant was offered continued employment with Telekom Cellular Sdn. Bhd. which was subsequently changed to TM Cellular Sdn. Bhd.

Through a letter dated 10<sup>th</sup> January 2001, Telekom Cellular Sdn. Bhd. informed the claimant that new terms and conditions for the company would be introduced together with a new payroll structure and that the new terms and conditions would take effect on 1<sup>st</sup> February 2001. The claimant was given a choice whether he wished to accept the new terms and conditions or to remain on the existing terms and conditions that were applicable to him at that time. The claimant accepted the new terms and conditions of service. The said form was dated 23<sup>rd</sup> January 2001. One of the clauses in the new terms and conditions of the service agreement was Clause 12.8. This clause is related to disciplinary actions to be taken against any of its employees who is detained by the

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<sup>20</sup> [2007] 1 ILR 145 (IC).



authority for criminal offences committed. It provides: “*Syarikat akan mengambil tindakan tatatertib ke atas pekerja yang telah ditahan oleh pihak yang berkuasa dan/atau terlibat dan/atau dipenjarakan kerana kesalahan jenayah, pecah amanah atau kesalahan lain yang boleh menjejaskan nama, reputasi dan kepercayaan ke atas syarikat*”.

Sometime in the month of September or October 2002, the company became aware that the claimant had been allegedly arrested by the police on 2 occasions by the Narcotics Department of the Contingent Headquarters of Police. Accordingly, the company wrote to the police to seek the relevant police reports relating to the claimant’s arrests. The police, *vide* a letter dated 18<sup>th</sup> October 2002, responded to the company and furnished the following documents: A copy of the police report LBN /RPT/803/2002; Results of a urine test conducted by the Pathology Department of the Hospital Kuala Lumpur relating to the report LBN/RPT/803/2002; A copy of the police report LBN/RPT/4414/2000; and the results of a urine test conducted by the Pathology Department of the Queen Elizabeth Hospital, Kota Kinabalu relating to the report LBN/RPT/4414/2000.

In view of the fact that the claimant had been arrested on two occasions and that his urine results had been tested positive for dangerous drugs known as Amphetamine / Methamphetamine the company issued a show cause letter to the claimant dated 26<sup>th</sup> November 2002 requesting him to explain and show cause why disciplinary action should not be taken against him.

The claimant did not furnish any reply to the show cause letter. In the absence of any satisfactory reply by the claimant, the company proceeded to notify the claimant *vide* its letter dated 8<sup>th</sup> January 2003 that a Domestic Inquiry would be held to inquire into the 2 charges levelled against him. The complaints in Charge 1 were, (i) that based on the police report dated 30<sup>th</sup> November 2000 the claimant was arrested by Konstabel Awangku and Konstabel Ramli because he was suspected of being involved in drug; (ii) that the claimant’s urine test by the Pathology Department, Hospital Queen Elizabeth Kota Kinabalu showed that it contained drugs known as Amphetamine / Methamphetamine. Whereas in Charge 2, there were also two complaints, namely: (i) based on the police report dated 18<sup>th</sup> February 2002 the claimant was arrested by Konstabel Jusman and Konstabel Ramlan because he was suspected of being involved in drugs; (ii) that the claimant’s urine test by the Pathology



Department, Hospital Kuala Lumpur showed that it contained drugs known as Amphetamine / Methamphetamine.

The Domestic Inquiry against the claimant proceeded as scheduled on 20<sup>th</sup> January 2003 and the claimant attended it. After hearing the testimony of all the witnesses and after considering all the evidence produced during the Inquiry, the Inquiry Panel unanimously found the claimant guilty on both allegations. Based on the findings of the Inquiry Panel and taking into account the seriousness of the misconduct committed by the claimant, the company terminated the claimant's service with effect from 11<sup>th</sup> February 2003 *vide* its letter to the claimant dated 5<sup>th</sup> February 2003.

Before the Industrial Court, the claimant raised the following issues; (i) Whether the claimant was guilty of the 1st and 2nd Charges preferred against him; and (ii) If found guilty, whether they constitute just cause or excuse for the claimant's dismissal. The Industrial Court in determining the above two questions noted that the principle of law is that in cases where Domestic Inquiry has been conducted, the court should first consider whether or not the Domestic Inquiry was valid and whether the inquiry notes are accurate. The learned Chairman referred to and applied the principle of law propounded by the Court of Appeal in *Hong Leong Equipment Sdn. Bhd. v Liew Fook Chuan*.<sup>21</sup>

In *Hong Leong Equipment's* case, the Court of Appeal stated that "The fact that an employer has conducted a domestic inquiry against his workman is, in my judgment, an entirely irrelevant consideration to the issue whether the latter had been dismissed without just cause or excuse. The findings of a domestic inquiry are not binding upon the Industrial Court which rehears the matter afresh. However, it may take into account the fact that a domestic inquiry had been held when determining whether the particular workman was justly dismissed. Were it otherwise, the guilt or innocence of a workman, upon a charge of misconduct would be decided not by the Industrial Court, but the employer himself. That, with all respect, is not the purpose for which Parliament went through the elaborate process of legislating the Act and setting up special machinery for the vindication of the rights of workmen".

Having considered the above observation, the Industrial Court stated that "drug abuse is something that is clearly not tolerated in

<sup>21</sup> [1997] 1 CLJ 665.



Malaysia and any employer would be at liberty to discipline its employees for such conduct. The company's case is fortified by the fact that there is an express clause paving the way for action to be taken against those who are found to be involved in criminal misconduct. This is what the company did in this instance where it was so clear that the claimant was a repeat offender of drug abuse".

In relation to interpreting cl. 12.8, the Court noted that "Based on the wordings of cl. 12.8, the company had submitted that 'the evidence would show that the claimant had been arrested [ditahan] (which in fact is also undisputed) and had been found to have been involved in [terlibat dan/atau disabitkan] a criminal offence, ie, abuse of dangerous drugs [kesalahan jenayah].' On the facts of this case, what were the evidences that had been adduced during the trial and at the Domestic Inquiry for having found the claimant guilty of Charges 1 and 2 and in contravention of cl. 12.8? In the court's view the claimant's arrest by the police on both occasions because he was suspected of being involved in drugs as well as the claimant's urine test which showed that it contained drugs known as Amphetamine/Methamphetamine mentioned in Charges 1 and 2 did fall within criminal wrongdoings of cl. 12.8.

Placing all necessary weight on the consideration of the evidences produced by both the company and the claimant with regards to the two charges, the court was led to the undoubted conclusion on the balance of probabilities that the claimant had been found guilty on all the said charges which were serious misconducts and as such the punishment of dismissal was justified in the circumstances of the case. In this instant, the Industrial Court found that the claimant had been dismissed with just cause or excuse. Accordingly, the claimant's claim was thereby dismissed.

### **The Islamic Approach to Drug Abuse in the Workplace and the Rights of the Employer**

In Islam, the lawful acquisition of wealth in order to provide a means of personal and family livelihood is not only obligatory but also worthy of religious merits (*ibadah*). Furthermore, Islam has accorded full protection to the rights of the employer and the employee. The parties are required to adhere to the established principles of justice and equality. They should transact their business with kindness, courtesy, amity and mutual co-operation. In Islam, a worker who has accepted the job should perform his responsibility with honesty, trust and concentration. A worker who



discharges his responsibility conscientiously shall be rewarded twice. The Prophet (saw) was quoted as saying; "God wants that when a man accepts a responsibility he should develop a feeling of conscientiousness"<sup>22</sup>. The Prophet (saw) further stated that; "Three kinds of people shall get double rewards. One of them is the worker, who is discharging his responsibilities towards his master and serving God as well"<sup>23</sup>.

In relation to drug abuse, Islam insists on a righteous living and therefore, the religion prohibits Muslims to eat or drink anything which may cause them health hazards<sup>24</sup>. Since illicit drugs have the potential of causing devastating health hazards such as nausea, diarrhoea, craving, irritability, nervous tension, anxiety or sleep disturbance, among others, therefore, its consumption has been included in the prohibited category of drinking wine (*khamr*). The prohibition of alcohol has been extended to illicit drugs by analogy. This is because drugs produce the same effect on the user's mind and cause the same public harm that led to the prohibition of alcohol<sup>25</sup>.

According to Sheikh al-Islam Ibn Taymiyyah "solid grass (*hashish*) is "haram" whether or not it produces intoxication. Sinful people smoke it because they find it produces rapture and delight, an effect similar to drunkenness. While wine makes the one who drinks it active and quarrelsome, *hashish* produces dullness and lethargy; furthermore, smoking it disturbs the mind and temperament, excites sexual desire, and leads to shameless promiscuity, and these are greater evils than those caused by drinking. The use of it has spread among the people after the coming of the Tartars. The *hadd* punishment for smoking *hashish*, whether a small or large amount of it, is the same as that for drinking wine, that is eighty or forty lashes"<sup>26</sup>. Since its consumption involves a sinful act which may warrant appropriate punishment, if found guilty, the employer cannot reasonably be expected to retain the service of the affected worker, in which case, dismissal may be warranted after.

<sup>22</sup> *Sahih Bukhari*, Vol. 3 Book 46, No 727.

<sup>23</sup> *Ibid.*

<sup>24</sup> "Say: Who has forbidden the beautiful (gifts) of Allah, which He has produced for His creatures, and the things clean and pure (which he has provided)" (Quran, 7: 32); "And do not kill yourselves; indeed, Allah is ever Merciful to you" (Quran, 4: 29); "And do not be cast into ruin by your own hands..." (Quran, 2: 195). Prophet (saw) said: "Do not harm yourself or others" (Reported by Ahmad and Ibn Majah).

<sup>25</sup> Anwarul Yaqin, see above at fn. 2, at pg. 154.

<sup>26</sup> Fatwa Ibn Taymiyyah, Vol 4, pg. 262. Quoted from Yusuf al-Qaradawi, *The lawful and the Prohibited in Islam*, translated by Kamal El-Helbawy et.al. (Kuala Lumpur, Islamic Book Trust, 1995) pg. 78.



## Conclusion

Drug abuse among the employees in the workplace as well as outside the workplace during the working hours has often been viewed as acts of major gross misconduct justifying the service termination of the affected employee. Likewise, the possession of any dangerous drugs in the workplace would also tantamount to misconduct and termination of employment is reasonable in the interest of discipline. When an employee has been detained by the authority for drug offences, the employer cannot be reasonably expected to keep his job open indefinitely or grant leave *ad infinitum*. In the aforesaid circumstances, the employer can terminate his services on the basis of frustration of contract due to the impossibility of performance. Whether the conduct of the employee justifies dismissal, the courts will generally have a regard to: (i) the nature and degree of the alleged misbehaviour; (ii) its significance in relation to the employer and to the position held by the employee; (iii) its effect on the confidential relationship between them as against the severe consequence of dismissal; and (iv) misbehaviour must be such that it goes to the heart or root of the contract between the parties.

Apart from the substantive justification warranting a dismissal, procedural fairness must also be seriously considered. Whenever an employee is to be dismissed, demoted or reprimanded for his conduct, the affected employee should be fairly dealt with and given the opportunity to answer the allegation. If the employer finds that the employee in question has been at fault then he can only impose a penalty which is fair and appropriate, with regards to the circumstances surrounding the case, failing which such punishment might be quashed on the grounds of harshness or undue severity.

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