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TRIPARTITE GUIDELINES ON WRONGFUL DISMISSAL

(I) Introduction

1. A dismissal is defined as a termination of a contract of service between an employer and an employee at the initiative of the employer, with or without notice, including salary-in-lieu of notice. It also includes involuntary resignation.

2. In accordance with the Employment Act, dismissing an employee without just or sufficient cause is wrongful. These Tripartite Guidelines on Wrongful Dismissal provides illustrations to guide employers, employees, mediators, and adjudicators on what constitutes dismissals that are not wrongful and what constitutes wrongful dismissal under the Employment Act.

3. Both employee and employer have the right to contractually terminate their employment relationship. But cases may arise in which an employer believes he contractually terminated the employment relationship, but the employee believes that he was wrongfully dismissed. In order to reach an objective appraisal of the facts, and to resolve the matter, an employee can file a mediation request with the Tripartite Alliance for Dispute Management (TADM).

(II) Circumstances where misconduct or poor performance are cited

4. Where misconduct or poor performance is cited as the reason for the dismissal, the employer bears the burden of proving that ground for dismissal. The dismissal is considered wrongful if the employer is unable to do so.

Misconduct

5. Misconduct is the only legitimate reason for dismissal without notice. An employer may, after due inquiry, dismiss an employee without notice for misconduct. Misconduct includes but is not limited to theft, dishonest or disorderly conduct at work, insubordination, and bringing the organisation into disrepute.

Illustration 1

A was employed as a preschool teacher. He hit a student. An inquiry was done which established this fact. The employer dismissed A on the ground of misconduct, as hitting a student fell short of the conduct expected of a teacher towards his students.

This dismissal was due to misconduct, and was not wrongful as it was based on the following:

- (a) Hitting a student fell short of the conduct expected of a teacher towards a child under his care and protection; and
- (b) A was given a chance to be heard, but could not offer any legitimate explanation for falling short of the conduct expected of him.

Poor Performance

6. In a case of poor performance, an employer cannot dismiss without notice. The employer would need to substantiate if poor performance is cited as the reason for dismissal with notice.

Illustration 2

B was employed as a warehouse assistant. She was involved in multiple incidents that resulted in poor quality services provided by the warehouse. Her supervisor documented these shortcomings in the performance reviews. Despite this, her performance did not improve. The employer dismissed B with notice and stated that this was because of B's poor work performance.

This dismissal was not wrongful. There was documented proof of B's poor performance and the employer rightly exercised his right to terminate (with notice) the employment.

If, on the other hand, the employer terminated the contract without notice, the dismissal would have been wrongful because it is not clear that B's performance was so poor as to amount to misconduct. Furthermore, the employer had not conducted a proper inquiry and given B a chance to be heard (see Illustration 1).

(III) Circumstances where the right to contractually terminate is invoked

7. As both employee and employer have a right to contractually terminate employment with notice, dismissals with notice are presumed not to be wrongful.

Illustration 3

C was dismissed with notice. His employer did not give any reason for the dismissal. When C asked for a reason, the employer continued to not give a reason, and explained that it was termination in accordance with the contract. C is unable to point to any facts, incidents or situations which could suggest that the employer's intention was anything other than termination in accordance with the contract.

This dismissal with notice was not wrongful.

Illustration 3A (for dismissals related to COVID-19 vaccination)¹

C, who is medically eligible for COVID-19 vaccination but unvaccinated, was dismissed with notice. His employer had implemented a company policy, based on lawful and reasonable considerations,* that required employees physically present at the workplace to be fully vaccinated. As C's contracted job required him to be physically present at the workplace (as determined by his employer), but he was unvaccinated, he was therefore unable to be physically present at the workplace to perform his contracted job. C's employer had considered other options, such as re-deployment and no-pay leave, but did not find such options to be suitable. Accordingly, C's employer terminated C's employment contract with notice in accordance with the employment contract.

This contractual termination of employment was not wrongful because notice was given in accordance with the employment contract. Further, the termination was due to C's inability to comply with the above company policy and to perform his contracted job.

* The national posture on living with COVID-19 has a bearing on what considerations, and hence company policy, of the employer would be taken to be reasonable. From 1 January to 9 October 2022, reasonable considerations would be of health and safety risks, business needs and/or operational risks to business continuity. From 10 October 2022, reasonable considerations would be based on genuine occupational requirements for the employee's job role, taking into consideration the workplace health and safety and operational needs of the business.

Redundancy

8. For avoidance of doubt, redundancy is another legitimate reason for dismissing an employee with notice². Redundancy occurs when the employer has excess manpower, the company is undergoing restructuring, the old job no longer exists, or the employee's job scope has changed.

Illustration 4

An F&B establishment underwent restructuring to focus on its food operations and less on its bar operations. As a result, the employer dismissed the bartender, D, with notice. D claimed that his dismissal was wrongful.

The dismissal was on the ground of redundancy and was not wrongful. The employer was indeed changing his business model and no longer needed the services of D.

¹ The Updated Advisory on COVID-19 Vaccination at the Workplace provides further guidance to employers and employees on vaccination-related arrangements at the workplace.

² The Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment provides further guidance on how to retrench workers in a responsible manner.

(IV) Circumstances where dismissal with notice is wrongful

9. To succeed in claiming that a dismissal with notice is wrongful (where no reason is given for the dismissal), an employee must substantiate a wrongful reason for the dismissal. Wrongful reasons include discrimination, deprivation of benefit, or to punish an employee for exercising his employment right. If an employer gives a reason for dismissal with notice, but the reason given is proven to be false, the dismissal would also be wrongful.

10. Dismissing an employee because of discrimination e.g. against the employee's age, race, gender, religion, marital status and family responsibilities, or disability is wrongful.

Illustration 5

An employer dismissed E with notice. No reason was given for the dismissal.

But E reported that the employer had made numerous discriminatory remarks about the employee's race, stating that he preferred to hire someone of another race. This was confirmed by other employees.

Even though the employer dismissed E with notice, the employer's conduct showed that he adopted a discriminatory attitude towards E. Taken together, the facts support the conclusion that the employer dismissed E because of discrimination. Hence, the dismissal was wrongful.

11. Dismissing an employee to deprive the employee of benefits/entitlements the employee would otherwise have earned is wrongful.

Illustration 6

F informed her employer of her pregnancy. She had worked for her employer for 3 years. The employer dismissed her with notice soon after, without paying her maternity benefits.

The facts suggest the dismissal was with a view to deprive her of her maternity benefits because:

- (a) The employer was unable to provide a legitimate reason for the dismissal;
- (b) The employee was dismissed shortly after she informed her employer of her pregnancy; and
- (c) The employer did not pay the employee her maternity benefits.

12. Dismissing an employee to punish the employee for exercising his or her employment right, e.g. filing a mediation request with TADM, or declining a request to work overtime, is wrongful.

Illustration 7

G was a workman earning less than \$4,500. He declined his employer's request to work overtime as he needed to take care of his infant child. The employer dismissed him with notice. The employer told G that he could not afford to have someone who prioritised his care-giving duties over working overtime.

The dismissal was wrongful as there was substantiated evidence from G that the employer wanted to punish the employee for exercising his statutory right to decline to work overtime due to his care-giving duties.

Illustration 8

H filed a mediation request with TADM as his employer had not paid him his salary for 3 months. The employer dismissed him with notice after finding out that he had filed a request for mediation with TADM.

The dismissal was to punish H for exercising his right to file a mediation request with TADM, and was wrongful as the facts indicate that it was to punish H for seeking remedy at TADM.

13. If an employer gives a reason for dismissal with notice, but the reason given is proven to be false, the dismissal would also be wrongful.

Illustration 9

J was told by his employer that his company was restructuring, and his job would no longer exist. He was then dismissed with notice. J later found out that what his employer said was not true. In fact, there remained a vacancy for the exact job he used to do, and his former employer had recruited someone else to fill his post.

On the face of it, this is a case of dismissal with notice. The employer did not need to provide a reason. But he provided a reason, which was shown to be untrue. Hence, the dismissal was wrongful.

(V) Conclusion

14. These guidelines set out what constitutes wrongful dismissal and what does not. With the transfer of the adjudication for wrongful dismissal to the Employment Claims Tribunals, these guidelines will provide a reference for mediators and adjudicators at the TADM and ECT respectively. They also serve as a reference for HR practitioners, employers and employees, to better prepare all parties for the change in adjudicators, and also to prevent and minimise disputes over dismissal matters.