DOMESTIC INQUIRY - RECENT PERSPECTIVES

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Domestic Inquiry ("**DI**") is an essential component of Malaysian employment law, serving as an internal mechanism for employers to assess allegations of employee misconduct before taking disciplinary action. Rooted in the principles of natural justice, DI ensures that employees are given a fair opportunity to be heard and to defend themselves as well as right against bias. Over the years, the legal framework governing DI has evolved, adapting to changes in employment practices and judicial interpretations.

Legislative Background

The concept of DI in Malaysia has its origins in the British colonial administration, which introduced labour and industrial relations laws. The Industrial Relations Act 1967 ("**IRA**") and the Employment Act 1955 ("**EA**") (EA is specifically for Peninsular Malaysian and Federal Territories) are the present-day legislations that safeguard procedural fairness in disciplinary proceedings. The Labour Ordinances of Sabah and Sarawak govern employment matters in their respective states, while the IRA applies uniformly across all states in Malaysia, including Sabah and Sarawak.

Legal Framework

Under Section 14(1) of the EA, Section 13(1) of the Sabah Labour Ordinance and Section 14(1) of the Sarawak Labour Ordinance, an employer may, on the ground of misconduct, dismiss an employee or impose disciplinary measures including demotion or suspension – "*after due inquiry*", provided that the misconduct in question is in contradiction with the express or implied terms of employment. This principle is fortified by Section 20(1) of the IRA, which emphasises that dismissals must not occur "*without just cause or excuse*". The dual legal framework statutorily implies that termination of employment or a dismissal must be both substantively warranted and procedurally fair, thus ensuring adherence to principles of justice and fairness.

Although the EA and both Sabah and the Sarawak Ordinances do not expressly mandate a full-blown DI, case law has established that conducting a proper DI is often cardinal to demonstrate procedural fairness. The Industrial Court and Superior Courts have consistently held that an employer must provide an employee with a reasonable opportunity to present his case before dismissal.

A properly held DI is expected to have fulfilled the procedural safeguards enshrined in the twin principles of natural justice specifically, the right to be heard (*audi alteram partem*) and the rule against bias (*nemo judex in causa sua*). Procedurally, this is ensured via giving of notice of the alleged misconduct or infraction committed by the accused employee, serving a charge sheet containing all the material details of the allegations,

constituting a neutral and unbiased DI Panel and allowing the employee to adduce all evidence that can exonerate him from the employer's accusations including the right to cross-examine the witnesses whom have been called on behalf of the employer to prove the allegations.

Judicial Developments and Case Laws on DI

I. Section 14(1) of the Employment Act 1955

Section 14(1) of the EA states as follows:-

> ***"14. Termination of contract for special reasons.***
> *(1) An employer may, on the grounds of misconduct inconsistent with the fulfillment of the express or implied conditions of his service, after* ***due inquiry****-*
>
> *(a) dismiss without notice the employee;*
> *(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."*

With the 2022 amendment to the EA which came into effect with effect from 1st January 2023 the whole paradigm of the EA 1955 and the scope of its coverage have radically changed. In brief, prior to the said amendment, only employees with wages RM2,000.00 and below, including those engaged in manual labour or supervising manual labour were covered under the EA (First Schedule of the EA (*prior to 2022 amendment*). With the amendment however, ALL employees regardless of their salary scale are covered by the EA, except certain key monetary provisions which are limited to those employees whose wages are RM4,000.00 and below as well as those who are engaged in manual labour and supervising manual labour (First Schedule of the EA (post *2022 amendment*). As such, it is safe to say that now, Section 14(1) of the EA applies to all employees with a contract of service.

II. Position Pre-Supreme Court Decision in Dreamland Case

In the 1980's, the Industrial Court took the view that procedural fairness required employers to observe the rules of natural justice before dismissing a workman. In the case of *Syarikat Great Eastern Life Assurance Bhd v. Kesatuan Sekerja Kebangsaan Pekerja-Pekerja Perdagangan (Award No. 21 of 1969)*, the Industrial Court established that employers must comply with the rules of natural justice in their procedures for the dismissal of a workman. It further held that a workman must be given sufficient opportunity, not only to know the case against him, but to also be able to answer it. Then in 1971, the EA was amended to introduce Section 14(1) as stated above, reinforcing procedural fairness in dismissals. What must be noted is that the rule requiring a domestic inquiry to be held before a dismissal could be carried out, was a principle developed by the Industrial Court's own devising and was not mandated by any legislative intervention. This raised the question of whether the Industrial Court could annul a dismissal solely on procedural grounds i.e. the absence of a DI, without considering the merits of the case.

III. Dreamland Case

Thus, the Supreme Court, in *Dreamland Corporation Sdn Bhd v Choong Chin Sooi & Anor* [1988] 1 MLJ 111 held that a failure to hold a domestic inquiry or a defective inquiry was a mere irregularity curable by de novo or fresh proceedings before the Industrial Court. In the Dreamland case, the employer did not hold any domestic inquiry to investigate the allegations of misconduct. Consequently, the Industrial Court took it upon itself to conduct an independent inquiry to determine whether the dismissal of the claimant was justified. The Supreme Court addressed the issue of omitting to conduct a domestic inquiry, stating:

> *"Absence of a domestic inquiry or the presence of a defective domestic inquiry is not a fatality, but merely an irregularity. It is open to the employer to justify his action before the Industrial Court, by leading all relevant evidence before it, and by having the entire matter open before the court"*

> *The Dreamland case marked a paradigm shift in Malaysia's approach to domestic inquiries. The Supreme Court's reasoning drew support from the Indian case of Workmen of the Motipur Sugar Factory Private Limited v The Motipur Sugar Factory Private Limited [1965 AIR SC 1803]. In Motipur, the Indian Supreme Court held that procedural deficiencies in disciplinary inquiries could be remedied if the tribunal was satisfied, based on evidence, that the dismissal was justified."*

The Federal Court, in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd* [1995] 2 MLJ 753 endorsed and further consolidated and reinforced the principles laid out in *Dreamland case*. Here, the Court held that procedural lapses in domestic inquiries did not invalidate dismissals if the Industrial Court, upon examining the substantive merits, found just cause or excuse. Therefore, if there had been a breach of natural justice by the employer at the initial stage, it could be cured at the hearing before it. The Federal Court further held that the Industrial Court had committed a jurisdictional error when it held that Wong (the Appellant) was dismissed without just cause or excuse purely on the basis of the failure of the employer (the Respondent) to conduct a domestic inquiry. The principle that an employer's initial breach of natural justice may be remedied by the Industrial Court applies universally, irrespective of whether the claimant falls within the definition of an "employee" under the EA. The statutory right to due inquiry conferred upon certain categories of employees under Section 14(1) of the EA (prior to 2022 amendment) does not alter the legal framework governing "workmen" under Section 20 of the IRA. Accordingly, the statutory requirement under Section 14(1) does not absolve the Industrial Court of its obligation to adjudicate on the issue of "with just cause or excuse" as mandated by Section 20.

The twin decisions of the Supreme Court in *Dreamland* case and Federal Court in *Wong Yuen Hock* case in truth allowed employers to terminate their workmen without providing concrete or specific reasons and ensuring that they are afforded an opportunity to be heard before their dismissal. Consequently, an employee who is suspected of having committed a serious misconduct could be summarily dismissed with no notice and the employer could then justify the dismissal in the Industrial Court without facing recrimination. This effectively sidestepped the principles of natural justice, reducing the procedural safeguards for a workman facing impending dismissal.

The principle that the failure to hold a DI was curable before the Industrial Court, was once again applied in the Federal Court case of *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449. The decision again held that the requirement for a "due inquiry" was not mandatory and that a defective inquiry could be remedied by the Industrial Court, provided sufficient grounds for dismissal were established. This interpretation introduced a degree of flexibility for employers, allowing them to rectify procedural lapses in post-dismissal proceedings in the Industrial Court. By allowing post-hoc justifications in the Industrial Court however, the procedural safeguards intended to protect employees were watered down by these judgments of the Federal Court.

IV. Revisit Dreamland Case

Almost a decade later, the Federal Court in *Said Dharmalingam bin Abdullah v Malayan Breweries* [1997] 1 MLJ 352, revisited this issue. The Federal Court in this case held that the employer's failure to conduct a pre-dismissal inquiry was a fatal procedural flaw, and the curable principle could not be invoked by the Industrial Court to remedy this omission. The Federal Court distinguished its judgment from the earlier decisions of the Federal Court in *Wong Yuen Hock and Milan Auto (supra*). In doing so, the Federal Court chose to emphasise that the dismissed employee in this case, Said Dharmalingam, was protected by the provisions of the EA. Specifically, Section 14(1) of the EA mandates a "due inquiry" before any disciplinary action can be taken against him.

In addition, Lord Justice Edgar Joseph Jr. FCJ in delivering the unanimous judgment of the Federal Court held that the statutory right to due inquiry included the right to enter a plea in mitigation in relation to the issue of penalty. His Lordship went on to hold that a failure of process, in not being allowed to enter a plea in mitigation, would only vitiate the outcome if there was discretion in the issue of punishment. If however, dismissal was the mandatory or obvious punishment, then the right to enter a plea in mitigation would be a useless formality. On the facts before it, his Lordship held that as the misconduct of theft was very grave, dismissal was the only possible punishment. Consequently, the failure of the employer to allow Said Dharmalingam to enter a plea in mitigation did not amount to a failure of the statutory requirement of due inquiry.

The views expressed by his Lordship were a departure from the earlier Federal Court decisions which presented a different view. Further, the decision raises critical questions about the weight afforded to procedural rigor versus substantive evidence. While it grants employees a safety net, it increases risks for the employer who is unable to adhere to the procedural rigours of the inquiry process. This could create a tension between flexibility and fairness, a challenge that continues to haunt legal practitioners and HR professionals alike.

In the views expressed by the Federal Court in the cases of *Wong Yuen Hock, Milan Auto* and *Said Dharmalingam* underscores a critical dichotomy in Malaysian labour law. Employees who fall within the ambit of the EA enjoy statutory safeguards, including the requirement of procedural fairness before dismissal. However, those outside the scope of the EA do not benefit from these protections, leaving them more vulnerable to the discretionary practices of their employers.

The Federal Court's conflicting decisions on the pre-dismissal right to be heard have

introduced significant ambiguity regarding the mandatory requirement to conduct a DI before dismissing an employee for misconduct. The principle established in Dreamland case, which allowed procedural defects to be cured through subsequent proceedings, has been widely criticised for undermining the importance of procedural safeguards. When considered alongside the ruling in *Milan Auto* case, it becomes evident that employees, whether covered under the EA or not, do not enjoy a right to pre-dismissal inquiry. Consequently, these conflicting judgments have resulted in a level of uncertainty or inconsistency leaving employers and employees unclear about the extent of the obligation to conduct pre-dismissal inquiries or the right to expect the employer to hold an inquiry before meting out punishment for misconduct.

Thus, the lack of a unified judicial stance on this critical issue did not only undermine procedural fairness that the employers are required to put in place but also disrupted the uniform application of the labour laws pertaining to handling employees' discipline and workplace misconduct, which in turn posed challenges for the consistent enforcement of employee rights in Malaysia. It further raised doubts about the balance between procedural safeguards and operational exigencies. From a jurisprudential perspective, the Industrial Court's role as a corrective tribunal ensures that procedural lapses do not eclipse substantive justice. However, the erosion of procedural safeguards risks undermining employee rights, placing a heavier burden on workers to contest dismissals in post-facto proceedings.

V. Recent Developments

Amendments to the EA effective from 1st January 2023, enhances employee protection, indirectly influencing DI practices by strengthening procedural fairness expectations. As mentioned earlier, no more the application of the common distinction of "Employees who fall within the ambit of the EA or Not" - as post amendment, everyone under a contract of service is now covered by the EA. Thus, based on the Said Dharmalingam case, it can be said that it is mandatory for all employers to abide by Section 14(1) of the EA and failure to do so could result in an improper dismissal.

The Court of Appeal's ruling in Lini Feinita binti Muhammad Feisol v Indah Water Konsortium Sdn Bhd [2021] 3 AMR 375, further refined the approach of the courts to the process of DI. The case involved an employee who was dismissed based on charges of misconduct, with her dismissal justified by the employer on grounds that extended beyond the findings of the DI panel. The Industrial Court ruled in favour of the employee, emphasising that the employer could not rely on charges for which the DI panel had found the employee not guilty. The Court of Appeal supported this view, highlighting that when a DI has been conducted, its findings are binding on the employer, and the Industrial Court's role is limited to evaluating charges substantiated during the DI. This decision marks a significant shift, aligning the role of the DI panel more closely with that of a quasi-judicial body. Employers now face heightened scrutiny in their reliance on DI findings, with less latitude to introduce new justifications during the DI. To add to that, in the more recently, the Federal Court in its judgment in the case of Amirul Fairuz Ahmad v Universiti Teknologi Petronas [Federal Court Case No. 01(f)-15-05/2022(A)] (unreported), held that the company cannot arbitrarily substitute the findings of the domestic inquiry panel, which had found the claimant not guilty, without giving him an opportunity to defend himself as it is against the principles of natural justice.

Notably, the Federal Court's judgment in Maritime Intelligence Sdn Bhd v Tan Ah Gek [2021] MLJU 2189 emphasises that the justifiable basis for termination of the service of a workman (an employee under a contract of service) must be with reference to the matters, events or factors operating in the mind of the employer during the time when the decision to terminate was taken, and not matters or facts that occurred post the decision to dismiss the workman.

VI. Section 69(3) of the EA v Section 20 of the IRA

The discourse surrounding Section 14(1) of the EA and Section 20(1) of the IRA is well-established; however, there is a relative paucity of scholarly discussion on the legal implications of Section 69(3) of the EA. For the avoidance of doubt, Section 69(3) is reproduced hereinbelow:-

> *"(3) In addition to the powers conferred by subsections (1) and (2), the Director General may inquire into and confirm or set aside any decision made by an employer under subsection 14(1) and the Director General may make such consequential orders as may be necessary to give effect to his decision:*
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> *Provided that if the decision of the employer under paragraph 14(1)(a) is set aside, the consequential order of the Director General against such employer shall be confined to payment of indemnity in lieu of notice and other payments that the employee is entitled to as if no misconduct was committed by the employee:*
>
> *Provided further that the Director General shall not set aside any decision made by an employer under paragraph 14(1)(c) if such decision has not resulted in any loss in wages or other payments payable to the employee under his contract of service:*
>
> *And provided further that the Director General shall not exercise the power conferred by this subsection unless the employee has made a complaint to him under the provisions of this Part within sixty days from the date on which the decision under section 14 is communicated to him either orally or in writing by his employer."*

Under Section 20(3) of the IRA, an employee who believes he has been unfairly dismissed may file a claim to the Industrial Relations Department (IRD). If the case is not amicably conciliated in the IRD, it has to be referred to the Industrial Court, which will then determine if the dismissal of the workman was "with just cause or excuse".

Section 69(3) of the EA meanwhile provides an alternative remedy in that employees may file a claim to the Labour Department on their alleged wrongful termination of employment, which may then be heard by the Labour Court. While traditionally, dismissal cases were thought to fall exclusively under the jurisdiction of the Industrial Court and to be filed within 60 days from the date of the dismissal, the Labour Court is now statutorily vested with the authority to hear cases filed by employees aggrieved by any of the employer's decision made pursuant to Section 14(1) of EA. The High Courts, in *J.K. Carpet Sdn Bhd lwn. Ruslan Mohd Noor* [2023] CLJU 2845 and *Acacia Industries (Kelantan) Sdn Bhd lwn. Erwiza Aeza Mohamat Zapiru* [2021] CLJU 2617, upheld the decisions of the Labour Courts made pursuant to Section 69(3) of the EA. Both cases involved similar factual circumstances, where employees were dismissed

without notice on allegations of misconduct and without proper DI being conducted by the employer. Dissatisfied with their termination, the employees filed complaints to the Labour Department, seeking termination benefits and payment in lieu of notice. Despite the precedents set in the *Dreamland*, *Wong Yuen Hock*, and *Milan Auto* cases, the High Court in these cases ruled that conducting a domestic inquiry is a mandatory requirement before effecting a dismissal.

Conclusion: Toward a Unified Framework

The evolution of DI in Malaysian employment law underscores the growing emphasis on procedural fairness in workplace discipline. Employers must ensure that their DI processes align with legal principles and judicial expectations to mitigate the risk of unfair dismissal claims. The Industrial Court primarily assesses whether the dismissal was "with just cause or excuse", and while a DI is not an absolute requirement under the IRA, its absence may weigh against the employer when justifying the dismissal.

With ongoing digital advancements and legislative reforms, the landscape of DI will continue to evolve, requiring employers to remain vigilant in ensuring compliance and implementing best practices to safeguard against legal disputes in both the Industrial Court and the Labour Court.

Key Takeaway Points for Employers:

1. Ensure DI procedures are conducted fairly and transparently to comply with principles of natural justice.
2. Provide employees with clear and detailed charges of misconduct in the Notice to Show Cause, Notice of DI and Charge Sheet and an opportunity to present their defence and to mitigate the act of misconduct.
3. Maintain an impartial inquiry panel to avoid claims of bias or procedural unfairness.
4. Keep records of DI proceedings, including witness statements and findings, to support the disciplinary action and to justify the punishment chosen.
5. Stay updated with legal developments and court rulings to ensure DI practices align with the latest legal expectations.
6. Consider digital solutions for conducting virtual inquiries where necessary, ensuring procedural integrity is maintained.
7. Engage in continuous training for HR personnel and DI panel members to uphold best practices in disciplinary proceedings.

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