1 SEPTEMBER 2022

Taking Leave From Work – A Privilege

Contact Persons:

Datuk D P Naban
Senior Partner
+603 6209 5405
naban@rdslawpartners.com

Kenny Lam Kian Yip
Partner
+603 6209 5400
kenny@rdslawpartners.com

Nagarajah Muttiah
Partner
+603 6209 5400
naga@rdslawpartners.com

Nur Syafinaz Vani
Partner
+603 6209 5422
syafinaz@rdslawpartners.com

Rosli Dahlan
Partner
+603 6209 5420
rosli@rdslawpartners.com

R Rishi
Partner
+603 6209 5400
rishi@rdslawpartners.com

Shaun Tan
Partner
+603 6209 5400
shaun@rdslawpartners.com

While recent amendments have been made to the Employment Act 1955 to confer more flexibility in terms of leave days to employees, one thing remains constant: permission is still needed from the employer to allow an employee to take leave from work.

This alert discusses Section 15(2) of the Employment Act 1955 (EA 1955) and the authorities supporting the presumption that a breach of Section 15(2) of the EA 1955 entitles the employer to dismiss the employee with just cause or excuse.

Section 15(2) Of The EA 1955

The law governing the contract between an employer and an employee is Section 15 of the EA 1955. Based on a plain and literal reading of Section 15(2) of EA 1955, an employee may voluntarily break his/her contract of employment by being absent from work for more than 2 consecutive days without leave of his/her employer. The excerpt is reproduced below for emphasis:

> "*15 When contract is deemed to be broken by employer and employee*
>
> *(2) 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."*

The gravity of this breach was discussed by the Federal Court in *Pan Global Textiles Bhd, Pulau Pinang v Ang Beng Teik* [2002] 2 MLJ 27 where it was held that the employee's

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absence from work amounted to misconduct which entitled the employer to dismiss him. In doing so, the Federal Court endorsed the following passage from OP Malhotra's book, *The Law of Industrial Disputes* (2nd Ed):

> *"No employee can claim leave of absence as a matter of right and remaining absent without leave will itself constitute gross violation of discipline. Hence, continued absence from work without permission will constitute misconduct justifying the discharge of a workman from service. (Emphasis added)."*

In *Thawendran Wendran v Malaysian Airline System Berhad* [2014] 2 ILR 570, it was held that absenteeism from work is a clear breach of company policy and is grounds for dismissal. The following excerpt captures the consequences of the misconduct of employees from the employer's standpoint:

> "*Absenteeism may appear to be a minor misconduct but when it is prolonged and employers are not notified of the 'emergency' leave that has not been applied for or the unexplained leave afterwards of employees as in the case of the claimant, it can subsequently become a very serious problem. The result is that employers will be left in a lurch having to find other staff to cover the absent employees' work and naturally, will cause disharmony in the work place. The court is of the opinion that the company was justified in dismissing the claimant after the company had indeed given the claimant many opportunities to improve on his punctuality and attendance at work. Accordingly, the claimant's claim is dismissed. In arriving at this decision, the court has acted with equity and good conscience and the substantial merits of the case without regard to technicalities and legal form*."

Thus, it is stated that absenteeism from work is a misconduct which goes to the root of the contract of employment between an employee and the employer. It is emphasized here that a breach in Section 15(2) of the EA 1955 only

occurs if the employee takes leave without the approval of the employer and does so without providing any reasonable excuse or justification (see *Chandramogan M Beeman v. Affin Bank Berhad* [2021] 2 ILR 459).

A Breach Of Section 15(2) Of The EA 1955 Does Not Warrant An Immediate Dismissal

In interpreting whether a breach in Section 15(2) of the EA 1955 warrants an immediate dismissal by the employer, the Industrial Court will take into account external factors such as, *inter alia*, the nature of the employee's work and whether the employers themselves had condoned the employee's absenteeism.

In respect of the nature of the employee's work, the case of *Wan Ahmad Firdaus Bin Wan Rossman v Hong Leong Berhad* [Industrial Court Case No:15/4-88/18] is used as guidance. The Industrial Court held that the employee's dismissal on grounds of absence for four consecutive days without permission and/or approval from the employer was without just cause and excuse. This was due to the nature of the employee's work wherein he was given the liberty to work outside of the office. Here, the employee was actually away for 3 months and the employer knew but chose not to do anything about his absence.

In respect of the principle of condonation, the Federal Court in *Public Services Commission Malaysia & Anor v Vickneswary RM Santhivelu* [2008] 6 MLJ 1 provided the following definition of condonation:

> "*I hold, in this present case, that there was no condonation. Condonation in the context of employment contract is an act by the employer to excuse or forgive him for the wrongful act committed by the employee. Condonation can be in the active form ie by the act of telling the person that he has been forgiven for the wrongful act done or by a passive act of not taking any action*"

The principle of condonation therefore acts as a *"waiver of the employer's right to punish for misconduct"* (see the Court of Appeal case of *National Union of Plantations Workers v*

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syafinaz@rdslawpartners.com

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Partner
+603 6209 5420
rosli@rdslawpartners.com

R Rishi
Partner
+603 6209 5400
rishi@rdslawpartners.com

Shaun Tan
Partner
+603 6209 5400
shaun@rdslawpartners.com

Kumpulan Jerai Sdn Bhd, Rengam [2000] 2 MLJ 144). The additional limb to this waiver is, however, the employer needs to have full awareness of the employee's misconduct and ultimately elected to do nothing about it (see the Federal Court case of *Ranjit Kaut A/P S. Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1).

To put things into perspective, if the employer such as that in *Wan Ahmad Firdaus Bin Wan Rosman* continued to employ him despite being fully aware of his absenteeism, this may also constitute wrongful dismissal without just cause and excuse. Thus, the employer had not only provided for the employee's nature of work but had also acquiesced to his absence.

Conclusion

In summary, Section 15(2) of the EA 1955 is a provision which entitles the employer to dismiss an employee for a breach of an employment contract. While the Industrial Court may take into account external factors to assess the validity of such dismissal, it is advisable for employees to err on the side of caution and to always seek permission and approval from employers before going on leave from work. Granted that there are circumstances which warrant immediate leave from work i.e. emergency leave or a medical leave, this must still be communicated to the employer to prevent the hassle of invoking Section 15(2) of EA 1955.

Authored by Ezzamel Zarif, a pupil from the Firm's Dispute Resolution practice.