

The logo for MahWengKwai & Associates features the company name in a serif font, with a thin yellow curved line underneath it.

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A wide-angle, nighttime photograph of a city skyline, likely Kuala Lumpur, Malaysia. The image shows numerous illuminated skyscrapers and buildings against a dark sky with some clouds. The Petronas Twin Towers are prominent on the right side. A yellow semi-transparent banner is overlaid on the bottom half of the image, containing the title and author information.

Understanding Unfair Dismissal Claims and Managing Poor Performance

BY DIANA CHEAK & JOHN CHAN

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About Us

- Welcome to MahWengKwai & Associates!
- Trusted by small medium enterprises (SMEs), family businesses and individuals.
- Established in 1985 by Dato' Mah Weng Kwai, now a consultant with the firm.
- Medium-sized law firm with 18 lawyers and 20 staff.

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Our Services

- Full-service law firm with 4 Departments:
 - Corporate
 - Dispute Resolution
 - Employment
 - Individuals & Families

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Our Practice Groups

- 5 Practice Groups:
 - ASEAN-China Desk
 - Construction
 - Foreign Direct Investment
 - Real Estate
 - Sports & eSports

MWKA Lunch Talks

- Organised once a month over lunch from 12:30-2:30pm
- To share knowledge, raise awareness, encourage networking
- For clients, potential clients, in-house counsel
- Last month on 22.8.2019:
 - The Role of Directors under the Companies Act 2016
- Next month on 23.10.2019
 - How to Help Foreigners Buy Property in Malaysia

Diana Cheak

- Senior Associate in our Dispute Resolution and Employment departments
- Bachelor of Laws (Hons) from University of Malaya.
- Admitted to the Malaysian Bar in 2014
- Certified Mediator (Bar Council Malaysian Mediation Centre)
- Mediation, corporate and commercial litigation, partnership disputes, director and shareholder disputes, employment advisory, disciplinary procedure advisory, unfair dismissal disputes, reviewing and drafting employment contracts

John Chan

- Associate in our Dispute Resolution and Employment departments
- Bachelor of Laws (Hons) from Universiti Kebangsaan Malaysia
- Admitted to the Malaysian Bar in 2014
- Unfair dismissal disputes, drafting and reviewing employment contracts, employment advisory
- Contractual and commercial disputes, debt recovery, joint management bodies & management corporations, director and shareholder disputes

Employment Law

- Advisory
- Employment Contracts, Policies and Handbooks
- Disciplinary Procedures
- Unfair Dismissal
- Constructive Dismissal
- Employment related disputes

Talk Points

- Basic procedures from dismissal to the Industrial Court award.
- How to manage poor performance - the legal perspective.

Understanding Unfair Dismissal Claims

Section 20 Industrial Relations Act 1967

- S. 20. (1) Where a workman 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 representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.

Section 20 Industrial Relations Act 1967 (cont.)

- ***Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & Anor:***

*“The legislature has willed that the relationship of employer and workman as resting on a mere consensual basis that is capable of termination by the employer at will with the meagre consequence of paying the hapless workman a paltry sum as damages should be altered in favour of the workman. It has accordingly provided for **security of tenure** and **equated the right to be engaged in gainful employment to a proprietary right** which may not be forfeited save, and except, for just cause or excuse.”*

- security of tenure
- right to employment = right to property
- dismissal only with “just cause and excuse”

Section 20 Industrial Relations Act 1967 (cont.)

- 20. (1A) The Director General shall not entertain any representations under subsection (1) unless such representations are filed within **60 days** of the dismissal.

Provided that where a workman is dismissed with notice he may file a representation at any time during the period of such notice but not later than **60 days** from the expiry thereof.

Filing a Representation

- To Jabatan Perhubungan Perusahaan (Industrial Relations Department)
- Within 60 days of termination date/last day of work
- By way of current Borang Lampiran P1
- Walk-in / over the counter
- No lawyers involved

Rundingan Damai (Settlement Negotiation) at the IRD

- IRD issues letter to both parties to attend. Letter will state:
 - Name of complainant
 - Name of employer
 - Date of dismissal
 - Date of filing
- Conducted by IRD officer
- Procedure may vary
- No lawyers involved
- May be held more than once
- If amicable settlement achieved, matter ends there

Minister's Reference

- If no likelihood of settlement, IRD shall notify the Minister accordingly.
- Upon receiving the notification, the Minister may, if he thinks fit, refer the representation to the Industrial Court.
- “Minister” means Minister in charge of human resources.
- Current Minister - M. Kulasegaran
- Previously, 3 to 5 months before reference to Industrial Court.

Minister's Reference (cont.)

- In early June 2018, M. Kulasegaran, told the press that the Minister's power to consider and screen a case before referring it to the Industrial Court will be cancelled.
- To accelerate the disposal of unfair dismissal cases.

“I become a filtering process. I do not think that's necessary. If anyone wants to refer to the Industrial Court, he must go straight (to court), not to the Minister”.

- Effect: Employee gets his day in Court

Industrial Court - start to finish

- Court KPI - 6 to 9 months
- Court issues Form F - Notice of Mention of Case
- Parties usually appoint solicitors at this stage
- Filing of Form A - Application to be Represented
- Filing of Form B - Warrant of Authority
- Claimant files Statement of Case
- Company files Statement in Reply
- Claimant files Rejoinder
- Parties file respective Bundle of Documents
- Witness Statements
- Trial
- Written Submissions
- No oral submissions
- Award

Industrial Court - jurisdiction & principles

- No civil jurisdiction
- Can go concurrently with civil proceedings, if any
- No inherent jurisdiction, creature of statute
- Court of equity and good conscience
- Applies basic rules of evidence
- Strict rules of evidence and Evidence Act do not apply
- S. 30 (5) - The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

- Reality: Anything is arguable and can swing either way

Industrial Court - pleadings

- Pleadings may be filed in English only
- No filing fees
- Claimant's **Statement of Case** must pray for reinstatement, in the alternative, compensation.
- Company's **Statement in Reply** must contain substantial facts and specific position taken
- Claimant's **Rejoinder**
- Parties are bound by their pleadings

Industrial Court - role and burden of proof

- Federal Court in *Goon Kwee Phoy v J & P Coats (M) Bhd*:

“Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, **the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse.** The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.”

Industrial Court - role and burden of proof (cont.)

- Company bears the burden of proof
- For constructive dismissal, burden of proof is on the Claimant
- Standard of proof is “on a balance of probabilities”
- Proceedings may proceed ex parte

Industrial Court - common reasons for

- No reasons given
- Forced resignation
- End of fixed term contract
- Misconduct
(absent, conflict, sexual harassment, criminal offence, insubordination)
- Other breaches of contract
- Poor performance
- Retrenchment and redundancy
(relocation, resize, restructuring, economy)
- Retirement
- Medical boarding out
- Constructive dismissal

dismissal

Industrial Court - constructive dismissal

- Breach of contract by the employer leaving the employee no choice but to resign
 - Breach must be sufficiently important to justify the employee resigning
 - Employee must leave in response to the breach and not for any other unconnected reasons
 - Employee must not delay in leaving
 - Employee must give notice of his complaint

Industrial Court - Company's evidence

- Documentary evidence
 - Discovery
 - Investigation
 - Meetings, discussions and consultations
 - Show cause letter(s)
 - Suspension letter
 - Domestic inquiry (not mandatory)
 - Decision making process
 - Disciplinary action
(warning, reduction of benefits, performance improvement plan, letter of termination)
- Oral evidence
(CEO, HR, supervisor, subordinate, victim, eye-witness, clients, etc)

Industrial Court - Claimant's reliefs

- Reinstatement
- If reinstatement not suitable, then compensation in lieu
- Compensation:
 - 1 month's salary for every 1 year of service
- Backwages:
 - Max 12 months for probationer
 - Max 24 months for permanent
 - Including any bonus, incentive, allowance

Industrial Court - award

- Industrial Court's Client Charter
 - 3 months from the date of the last written submission
- Uploaded on website - <http://www.mp.gov.my/en/>
- Served on parties' solicitors
- Appeal by way of Judicial Review against the opponent and the Chairman of the Industrial Court

Managing Poor Performance

Poor Performance

- Unsatisfactory work performance
- Inability to meet required work standard
- Poor work quality
- Low productivity
- Inefficiency

Note: Poor performance ≠ misconduct

Principles

Ireka Construction Berhad v Chatiravathan A/L Subramaniam James [1995] 2 ILR 11

“... As far as unsatisfactory performance is concerned the Industrial Court has laid down that in order to justify the dismissal of the claimant on this ground, the **company** has to establish:

- (i) that the claimant was **warned** about his poor performance;
- (ii) that the claimant was accorded **sufficient opportunity to improve**; and
- (iii) that notwithstanding the above, the claimant **failed to sufficiently improve his performance**.”

Principles

Rooftech Sdn Bhd v Ho Inn, Penang [1986] 2 ILR 818

“... inefficiency which discloses a course of negative conduct, no doubt is sufficient ground for termination but there must necessarily be **sufficient proof** that a **procedure had been followed**. Ordinarily, there must be **sufficient written communication** to the claimant in order to establish inefficiency or poor performance before the company can rely on it to justify dismissal.”

Principles: Reasonable Standard

Cisco (M) Sdn Bhd v Raja Mohan PV Nathan [2003] 3 ILR 407

- The Employee was the Senior Manager for Systems and Technologies.
- The Company terminated the Employee due to his failure to achieve the Company's sales targets of RM3 millions. These sales targets were not stated in his employment contract.
- The IR Court held that the dismissal of the Employee was without just cause and excuse.

Principles: Reasonable Standard

Cisco (M) Sdn Bhd v Raja Mohan PV Nathan (Cont'd)

“In the absence of such specific sales targets being specified in the Claimant’s letter of appointment or in any other document, **the Court is of the opinion that it is totally unjust for the Company to consider that the work performance of the Claimant was poor or unsatisfactory** ... Since there is **no documentary proof** that the Claimant had to achieve the specific sales target of RM 3 million as averred in paragraph 2 of the Company’s Statement In Reply, it would be rather **unrealistic and grossly harsh and unjust for the Company to require the Claimant to achieve such a high sales figure in the face of adverse circumstances resulting from the severe economic downturn in the country during the 1997 and 1998 period.**”

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Principles: Written Warning

American Malaysian Life Assurance Sdn Bhd v Sivanasan Kanagasabai [1997] 3 ILR 242

- The IR Court held that the allegations made against the claimant in the letter of termination and in the statement of reply were bare allegations, and the company failed to produce any evidence to cite that the claimant was uncooperative and wilfully refused to be a team player in carrying out the company's project.
- In order to justify the claimant's dismissal on the grounds of unsatisfactory work, inefficiency or failure to come up to the standard set by the company, **there must be oral or written warnings**. The Company has failed to show such.

Principles: Written Warning

I.E. Project Sdn Bhd v Tan Lee Seng [1987] 1 ILR 65

“Dismissal for unsatisfactory work or incompetency should almost invariably have been preceded by warnings. In the event of poor performance being the reason for the dismissal one should always endeavour to show that the work complained of was performed subsequent to warnings.”

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Principles: Written Warning

Anthony Stiven Sandanasamy v Hannover Rueck SE Malaysian Branch [2018] 4 ILR 528

“On the company's contentions that the claimant had lacked interpersonal skills and courtesy, that the staff had complained of being unable to work with him as he had been aggressive and uncooperative, and that it had been dissatisfied with his performance, it had failed to substantiate it by **documentary evidence**. COW2 had stated that he had warned him of his behaviour and attitude **but had not documented it** as he had not been aware that there had been a need to do so...”

Principles: Sufficient Opportunity

Rohimi Yusoff v Alfa Meli Marketing Sdn Bhd & Anor [2001] 6 CLJ 182

- The Claimant was a Marketing Manager. He was terminated by the Company due to his inability to generate business for the Company.
- The IR Court held that the Claimant's termination was done with just cause and excuse. The Claimant appealed to the High Court.
- The High Court quashed the decision of the IR Court and held that:

“It is observed that the claimant was dismissed **without any warning** and was working with AMPI just for **ten weeks only**. It was **too early** to say that the claimant failed to generate the business during that period.”

Principles: Sufficient Opportunity

Muhammad Jamil Sabdani v Prima Union Plywood (M) Sdn Bhd [2008] 2 LNS 2112

- The Company issued 3 warning letters to the Claimant on 3.8.2005, 26.8.2005 and 2.9.2005 for failing to perform his duties as an Assistant Superintendent and later he was dismissed by the Company.

Principles: Sufficient Opportunity

Muhammad Jamil Sabdani v Prima Union Plywood (M) Sdn Bhd (cont'd)

- The IR Court found that the Claimant's dismissal was done without just cause and excuse as the **Company did not give adequate opportunity to the Claimant to improve his work performance**. The warning letters were issued **within a span of 1 month without affording sufficient time for him to rectify his alleged shortcomings** with regards to his work performance and quality of work if the sale allegations were found to be true.

Principles: Sufficient Opportunity

Akim Rungkiu v CIMB Bank Berhad [2012] 2 LNS 271

- The Claimant had been constantly performing poorly and unsatisfactorily for a period of 5 years continuously.
- The Claimant's poor performance was stated in his performance appraisal form.
- The Court dismissed the Claimant's claim and held that the Company had given the Claimant sufficient opportunity to improve - the Company provided various kinds of support, assistance and guidance to the Claimant since 2002 to 2007.

Principles: Sufficient Opportunity

Akim Rungkiu v CIMB Bank Berhad (Cont'd)

- Discussion on the Claimant's development plan
- Mid-year and annual review
- Advice and feedback on the Claimant's performance
- Training courses, sales and marketing talks/seminar,
- Coaching and guiding the Claimant towards achieving his target and improving his performance (all stated in the Claimant's Performance Appraisal Form).

Principles: Sufficient Opportunity

Suziyana Mohd Zin v Malayan Banking Berhad [2018] 2 LNS 2822

“The Claimant's performance may have declined, as submitted by the Bank, from 30.29% in 2015 to 18.6% in September 2016, but the Court finds that **this is due largely to the Bank's inexplicable reluctance to provide sufficient assistance and guidance to the Claimant to improve her performance**, in particular under the CM Programme. **The constant rating of poor performance on the Claimant by the Bank without providing a proper assistance or solution clearly demotivated the Claimant.**

Under the circumstances and based on the evidence, the Court finds that the Bank has failed to prove on a balance of probabilities its allegation of poor performance against the Claimant.”

Probationer

Hartalega Sdn Bhd v Shamsul Hisham Bin Mohd Aini [2004] 3 CLJ 257

- The Claimant's employment with the Company was not confirmed after the Claimant undergone 3 months of probationary period based on the reason that the Claimant did not meet the standard required by the Company.
- The IR Court held in favour of the Claimant and the Company appealed to the High Court.

Probationer

Hartalega Sdn Bhd v Shamsul Hisham Bin Mohd Aini (Cont'd)

- The High Court opined that the rigid tests as expounded in Ireka and Rooftech should **not** be applied to employees on probation, especially with regard to requiring a written warning. The monthly appraisal report produced by the applicant which was communicated and discussed with the respondent was sufficient for reason of dismissal.

Senior Employee

United Oriental Assurance Sdn Bhd v Kamala Rangithan A/L Selladuray [1992] 2 ILR 280

“...But those employed in **senior management** may by the nature of their jobs be fully aware of which is required of them and fully capable of judging for themselves whether they are achieving that requirement. In such circumstances, the **need for warning and an opportunity for improvement is much less apparent**. Again, cases can arise in which the inadequacy of performance is so extreme that there must be an irredeemable incapability. In such circumstances, **exceptional though they no doubt are, a warning and opportunity for improvement are of no benefit to the employee and may constitute an unfair burden on the business.** ”

Senior Employee

Robert John Reeves v Menteri Sumber Manusia Malaysia & Anor [2000] 1 CLJ 180

“It is observed that the applicant now challenged the basis for his dismissal on the grounds of poor performance by complaining that there was no performance appraisal and/or complaints about his performance by the 2nd respondent, it cannot be disputed that **the applicant was holding a senior management position and he was expected to know the standard of job performance required of him.** He therefore cannot plead or seek refuge in his purported ignorance of what was expected from him by the 2nd respondent. This is a trite principle of Employment Law in cases concerning poor performance of senior employees.”

Senior Employee

Ng Kim Eng v Hatten Asset Management Sdn Bhd (Award No 1328 of 2019)

“It is the Company's case that the Claimant had fail to perform his duties and function as a Project Manager up to satisfactory level. **The question to be asked is whether the Claimant was warned about his poor performance.** Here the Court agree with the Company's submission that the requirement for such warning is much less apparent if the employee is holding a Senior Management position. As stated in the case of Sitt Tatt Bhd v Ong Chee Meng [2004]2 ILR 388 that this is because the employee was expected to know the demand of his job and Company's expectation of him. **Nevertheless the Claimant submits that the Company had failed to warn the Claimant either by oral or written warning about his alleged poor performance...**

Senior Employee

Ng Kim Eng v Hatten Asset Management Sdn Bhd (Award No 1328 of 2019) (Cont'd)

... The Court is of the view the failure to give any kind of warning may indicate that the Claimant is a good performance who know his duties and responsibilities so much so no warning is required. It is not only no warning was given, the Company also did not give him a proper show cause letter for the Claimant to reply and explain himself and give him the opportunity to improve his performance ... The Company cannot lump the entire blame in regard to the incidents on the Upper Deck to the Claimant simply because he happened to be the overall head that is the Senior Project Manager. Each team and individual involved in the construction project were also responsible and to be blame for all the incidents that happened...

Employer's Checklist in Managing Poor

✓ Have a discussion with the employee

✓ Identify the underlying issue/problem

✓ Outline the improvement required and the consequences of continued poor performance

✓ Devise a solution with the employee to improve performance

✓ Develop an action plan/PIP/KPI - include time frame for improvement, parties to agree and sign

✓ Counselling/training/coaching/providing support

✓ Schedule another meeting to review the employee's performance against the agreed action plan/PIP/KPI

Note: All discussions relating to poor performance, including actions to be taken are to be **documented/recorded** in case further action (or legal action) is required.

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The Drawbacks

- Increment of salary
- Bonus
- Promotion
- Prior appraisal/assessment of “good performer”, “good team player”, “good employee” etc
- Weakness in the Company’s system which caused the employee unable to perform
- Delay/condonation of past poor performance
- Improvement in performance

Questions?

Thank you!