

Employees Dismissal Cases: Analysis of the Industrial Court Awards

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ABSTRAK

Analisa terhadap award yang telah diputuskan oleh Mahkamah Perusahaan yang berkaitan dengan pembuangan kerja menunjukkan bahawa terdapat enam jenis salah laku di dalam organisasi iaitu ponteng kerja, ketidakpatuhan arahan majikan, mutu kerja yang rendah, tidak jujur, pelanggaran peraturan dan cuai. Kajian ini memeriksa apakah faktor yang dipertimbangkan oleh Mahkamah Perusahaan untuk memutuskan bahawa pembuangan kerja adalah wajar di dalam setiap jenis salahlaku tersebut. Memahami penyebab pembuangan kerja dan keputusan mahkamah menyebelahi pekerja boleh membantu sesebuah organisasi meningkatkan prosedur dan sistem pengurusan khususnya berkaitan tindakan pembuangan pekerja. Di dalam mengambil tindakan pembuangan pekerja, majikan mestilah mematuhi prinsip dengan sebab dan alasan yang munasabah, jika gagal, majikan akan bertanggungjawab untuk membayar pampasan kepada pekerja kerana membuang pekerja secara salah.

ABSTRACT

Analysis of the Industrial Court awards related to dismissal cases have shown that there were six types of misconduct in organizations such as absenteeism, insubordination, poor performance, dishonesty, violation of rules and negligence. This study examines what factors were taken into consideration by the Industrial Court to justify the dismissal in each type of misconduct. Besides, this study examines what are the reasons employers lost their cases in the Industrial Court. Understanding the causes of dismissal and reasons the court decided in favour of employees will help the organizations to improve their procedures and management systems particularly in termination action. In taking a dismissal action against an employee, the employer must comply with the principle of “just cause and excuse”, otherwise, the employer will be liable to pay unnecessary compensation to the employee for a wrongful dismissal.

CHAPTER 1

INTRODUCTION

1.1. Introduction

The relationship between an employer and an employee was originally based on the *laissez-faire* principle whereby both parties have a freedom to design their own contractual agreement and to choose any term or condition in their employment contract. Normally, this contract used to be one sided and exploitative, in the sense that the employer, due to strong economic position, could easily bargain with employee (Mir and Kamal, 2003).

One of the usual terms that is incorporated in the agreement is the right of the employer to dismiss his employee on any ground with no obligation to reveal the reason for dismissal. This right has been used arbitrary by employers which caused many problems to the employees. It can be a distressing experience that shatters the life of the employees as it has both financial and psychological repercussions (Ali Mohamed, 2002). The employees may also suffer two types of losses; reputation losses that may hinder their efforts to find replacement jobs and relocation costs associated with finding new employment (Franz, 1997). It could also cause a decrease in motivation and satisfaction among the existing employees as it indicates a failure on the part of the management to create a good working environment in their organizations. The existing employees may feel upset by the way of dismissal of their fellow colleagues was carried out and their negative feelings may affect their productivity (Aminuddin , 1993).

Thus, minimum protective legislation against unfair dismissal has been introduced into the labor laws to protect the interest of the employees against victimization and exploitation by the employers due to unequal bargaining power that employers have. Under section 20(1) of the Industrial Relations Act 1967 (IRA), a dismissed workman can make representation in writing to the Director General for reinstatement, if he considers that he has been dismissed from the service “without just cause or excuse” by his employer. Once the department receives the representation from an employee, the department will initiate a conciliation process between the employer and the employee. The Conciliation Officer from Industrial Relations office would act as a mediator between the two parties and induce both parties to resolve their differences to reach an amicable settlement. If the conciliation process fails, the dispute will be referred to Human Resource Minister who may send the case to the Industrial Court for arbitration. Table 1 below shows a statistic of the number of cases which were referred to the Industrial Court from the period of 2001-2005.

Table 1

Number of Cases Reported to Industrial Court (2001-2005)

	Years				
	2001	2002	2003	2004	2005
Subject					
Total Cases Forward	1788	1881	2015	2212	3830
Total Cases Referred	1056	1092	1085	3406	1859
Total Cases for the year	2844	2973	3100	5618	5689
Total Cases Heard/ given awards	963	958	888	1788	2209
Total Cases pending	1881	2015	2212	3830	3652

(Source : [http:// mp.mohr.gov.my](http://mp.mohr.gov.my))

Table 2 below is the analysis of awards relating to dismissal cases from 2001-2005. Termination is divided into 3 major categories which are constructive dismissal, misconduct and retrenchment. Most of the termination cases are categorized as misconduct and the cases are increasing every year. A total of 2144 of misconduct cases were referred to the Industrial Court in the year of 2005.

Table 2

Analysis of Award Relating to Employees Dismissal (2001-2005)

	Years				
	2001	2002	2003	2004	2005
Types of Termination					
Constructive	26	35	40	34	22
Misconduct	726	810	763	1633	2144
Retrenchment	41	52	61	61	16
Total	793	897	864	1733	2182

(Source:<http://mp.mohr.gov.my>)

The Industrial Court will hear as well as consider the argument and evidence provided by the disputed parties and make a decision known as an award. If the court is satisfied that the employer has dismissed his employee without “just cause or excuse”, the court will make a decision to uphold the employee’s complaint by ordering the employer to reinstate the employee to his original job or post together with a compensation of back wages. However, in most cases, it is not practical to order

reinstatement of the employee. Thus, the court will order the employer to pay a back wages compensation calculated based on his last drawn salary from the date of dismissal to the date of last hearing of the case and compensation in lieu of reinstatement is calculated based on his last drawn salary for each completed year of service. A study by Ali Mohamed (1998) on the trend of Industrial Court decisions between 1992 until June 1996 found that the reinstatement had been ordered in only a few cases compared to compensation in lieu of reinstatement.

Table 3

Number of Industrial Court decisions of reinstatement and compensation in lieu of reinstatement

Year	Reinstatement with back	Compensation in lieu
	Wages	Reinstatement
1992	17 (10.49%)	145 (89.51%)
1993	13 (6.67%)	182 (93.33%)
1994	12 (4.00%)	288 (96.00%)
1995	13 (4.15%)	300 (95.85%)
1996	23 (8.27%)	255 (91.73%)

According to Sher (2006), employers in Malaysia paid out more than RM28 million to former employees as compensation for wrongfully dismissing them from their services. This figure is expected to increase to more than RM35 million in the year 2006 with a total of more than 3000 companies expected to be brought before the Malaysia's Industrial Court to answer allegations that they had wrongfully dismissed their employees. According to a newspaper report (www.thestar.com.my) dated 22nd June 2006; the highest compensation award given to an employee for wrongful dismissal by the Industrial Court was RM410, 670.00.in the case of *Ramli Akin v. Telekom Malaysia Berhad (TM)*. As the case took almost four years and five months to conclude, the Industrial Court found TM liable to pay him for this period. What is even more significant was that the judge ruled that Ramli was also entitled to loss of future earnings as he was approaching 51 years of age, and as such, the prospects of him finding employment terms similar to what he enjoyed at TM were unlikely. The judge, therefore, ruled that TM was also liable to pay Ramli 57 months' salary as compensation for loss of future earnings until he turned 55, his mandatory retirement age.

The above scenario raises a question on why the employers were unable to defend their actions and lost their cases in the Industrial Court. Why they failed to convince the court that they dismissed the employees who on certain circumstances deserve to be dismissed? Ironically, it also involves big organizations which are supposed to have qualified and specialized human resource managers who are well versed in conducting dismissal process in their organizations. It could be inferred that the issues of terminating employees are still not be given adequate attention by the organizations. The employers may have little knowledge about the current rules and procedures, particularly the

application of just cause principle in dismissal process. Thus, it is important for organizations to ensure that their human resource policies and procedures are solidly in place and protected from unnecessary payout as consequences of wrongfully dismissing their employees.

In order to get a better understanding about the dismissal issues, a study of cases which were decided by the Industrial Court particularly on misconduct cases will provide a valuable understanding to employers and organizations as how the court justified the dismissal of each type of misconduct cases and the factors on why the employers lost their cases .

1.2. Problem Statement

Section 20(1) of the Industrial Relations Act 1967 does not specify what is constituted of “just cause or excuse” dismissal nor it provides the procedures on how the dismissal should be taken against employees by the employers. Besides, there is no statutory definition of misconduct that can be used as guidelines for employers even though misconduct is the common problems in any organization which could affect the organization’s productivity and effectiveness. In order to ensure these problems do not affect the organization’s efficiency and productivity, dismissal actions are sometimes unavoidable. Thus, the organization must be able to handle dismissal process properly and carefully in order to avoid wrongful dismissal. Ignoring the importance of conducting dismissal process in proper and fair procedures can be costly to the organizations as they are liable for unnecessary cost of paying compensation to their former employees as well as the cost of recruiting and training new employees. The fact that the organizations have

to pay a lot of compensation in terms of back wages and compensation in lieu of reinstatement for wrongful dismissal can be contributed by several factors such as they lack of clear and well defined dismissal policies in their organizations, little knowledge on how to conduct dismissal process and failed to investigate and conduct the inquiry with certain required standard. Besides the financial cost incurred, wrongful dismissal could also affect the moral of the existing employees which could lead to decreasing in productivity and organization's competitiveness. The Industrial Court plays a significant role in setting legal precedent of dismissal cases in Malaysia and has over time developed general principles which are valuable for everyone who is involved in the management of human resource in organizations. Therefore, this study investigates dismissal cases that involve employees misconduct in order to identify several factors taken into consideration by the court whether the dismissal are with "just cause or excuse".

1.3. Research Objectives

This study examines employee dismissal cases which have been reported in the industrial law journals specifically on issues of employee misconduct. This study will be divided into the quantitative and qualitative analysis of the Industrial Court's awards. In the first part, it will explore the relationship between employee's gender and status and the court's decisions whether to uphold or deny the claims of wrongful dismissal. In the second part, it will explore on what factors the court justified the dismissal in each type of misconduct and the reasons why employers lost their cases in the court.

1.4. Research Questions

In order to have better understanding of what constitutes just cause and excuse dismissal, the following research questions will be studied in this paper:

- 1) Are there any relationships between employee's gender and status and the court's decisions to uphold or deny the wrongful dismissal claims?
- 2) What factors are taken into consideration by the Industrial Court to justify the dismissal in each type of misconduct?
- 3) What factors are taken into consideration by the Industrial Court to uphold the unfair dismissal claims by employees?

1.5. Significance of the Study

Although there have been several studies of the Industrial Court's decisions in employee dismissal cases (Hew, 2006; Aminuddin, 1996; Syed Iskandar, 1997) these studies did not analyze the causes of employee dismissal in organizations. The significance of this study is the analysis of the various types of misconduct that happened in organizations and what are the factors taken into consideration by the Industrial Court to justify the dismissal in each type of misconduct. Further, it will analyze the reasons why employers lost their cases in the Industrial Court.

1.6. Definition of the Term

Award : Industrial Court decisions whether to uphold or deny the unfair dismissal claims by employees (Aminuddin, 2001)

Uphold : Industrial Court decisions which are in favour of employees (Chelliah and D'Netto,2006)

Deny : Industrial Court decisions which are in favour of employers (Chelliah and D'Netto, 2006)

Reinstatement : The order of the court to restore an employee of his former job
(Ali Mohamed, 1998)

Compensation of back wages : Amount of the compensation calculated on the number of
months from the date of dismissal until the last hearing
date of case. (Ali Mohamed, 1998)

Compensation in lieu of reinstatement: Amount of compensation calculated based on his
last drawn for each completed years of service.
(Ali Mohamed, 1998)

1.7. Structure of the thesis

The first chapter starts with an overall introduction and the purpose of the study. It is then followed by the research questions and the significance of study. Chapter 2 will provide a literature review of the study and Chapter 3 will discuss the theoretical framework of the study, the hypotheses to be tested and how the data were collected. Chapter 4 will provide the results of study and the last chapter will provide the conclusion and discussion on the study. References and appendixes including SPSS output are attached at the back of the report to provide relevant materials and documents needed.

CHAPTER 2

LITERATURE REVIEW

2.1. The Concept of Just Cause Principle

In the legal theoretical context, just cause dismissal must conform to the rule of natural justice (Raman, 1996). Burke (1973), defined natural justice as the rules and procedure to be followed by any person or body in charge of the duty of adjudicating upon dispute between, or the rights of others. The chief rules are to act fairly, in good faith, without bias, to give each party the opportunity to defend his case, and correcting or contradicting any relevant statement prejudicial to his case, and not to hear one side behind the back of other (Burke, 1973). According to Xavier (1980), natural justice has two principles; that an adjudicator be disinterested and unbiased (*nemo iudex in causa sua*) and that the parties be given adequate notices and opportunities to be heard (*audi alteram partem*). The rule prohibiting an adjudicator to adjudicate upon a case to which he is a party is basic to adjudicating tribunals because the adjudicator ought to be, and is supposed to be, indifferent between parties (Raman, 1993). This means that any decision, however fair it may seem, is invalid if made by a person with a financial or other interest in the outcome or any known bias that might have affected his impartiality (Martin, 2002). Raman (1993) has further viewed that persons who are likely to be directly affected by the decisions or proceedings should be given adequate notice of the proceedings so that they may be able to:

- a) effectively prepare their cases and answer the cases of the opponent, if any;
- b) make their representations ; and

c) appear at the hearings.

In the case of *Ketua Pengarah Kastam v Ho Hwan Seng (1977) 2 MLJ 154*, Raja Azlan Shah FJ stated that:

The rule of natural justice that no man be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter whether it is labeled 'judicial', 'quasi judicial', or 'administrative' or whether or not the enabling statute makes provision of a hearing.

Therefore, just cause or excuse dismissal recognizes the employee's right to be heard before his dismissal that he must be given sufficient opportunities not only to know the case against him but also to answer it.

In terms of socio-psychological context, just cause dismissal can be related to the concept of organizational justice. Organizational justice is one of the important concepts that have been used to understand the behavior of individuals in organizations. According to Homans (1961) and Adam (1963) as cited by Dunford and Devine, (1998) organizational justice was viewed in term of the perceived fairness of rules used to allocate valued outcomes and focused on one of those rules, equity. In equity principle or later known as distributive justice, a sense of fairness arises in individuals when their perceived ratio of inputs to outcomes is equal (or very similar) to the perceived ratio of other persons in the organization (Dunford and Devine, 1998). Later, procedural justice has been introduced, it focuses on the how fair the process of underlying organizational decisions independent of the outcome (Dunford and Devine, 1998). Noe, Hollenbeck, Gerhart and Wright (2005), have identified interpersonal justice, a concept of justice referring to the interpersonal nature of how the outcome were implemented. Interpersonal

justice has four determinants which are: 1) Explanation; emphasize aspect of procedural fairness that justifies the decision, 2) Social sensitivity; treat the person with dignity and respect, 3) Consideration; listen to the person's concerns, 4) Empathy; identify the person's feelings.

Folger (1993) and Schein (1980) as cited by Roehling (2002) suggested a concept of justice perspective and argued that the freedom from arbitrary discharge is likely to be viewed by employees as an aspect of fundamental right to be treated with dignity and respect in the workplace. Kim (1997) and Rock and Wachter (1996) as cited by Roehling (2002) have applied theory relating to the operation of internal labor market (ILM) to help explain their observation that a clear norm exists that employer will not discharge an employee without cause. They argued that the good cause norm arises in response to the distinctive contracting problems that exist in employment contracting; the combination of match-specific investment, information asymmetry and transaction cost that create both the potential for gains as well as the threat of opportunistic behavior. According to theory explaining ILM, both employees and employers make specific investments, however, some mechanisms are needed to constrain overreaching by either side. An integration of these two theoretical perspectives supports the proposition that fundamental dignity and respect concerns give rise to a widely shared belief among employees that employers should have a good reason for discharging an employee, and that the operation of ILM reinforces and strengthens that normative belief because of its role in facilitating successful employee-employer exchange (Roehling, 2002). Therefore, the concept of just cause or excuse principle in organizations is a fundamental right that has to be recognized and acknowledged by every employer.

2.2. The Law of Just Cause Dismissal

The International Labor Organization Conference initiated the minimum protection legislation and in 1982, it adopted Convention No. 158 which recommended the term of “unjustifiable dismissal” (Ali Mohamed, 2004). Thus, many countries in the world offer statutory protection against an unjustified dismissal in one form or another. For example, in England, the term used is “unfair dismissal”, in New Zealand “unjustifiable dismissal”, in Canada “ unjust dismissal” and in Australia, the term used is “harsh and unreasonable” (Ali Mohamed, 2004). In Malaysia, the term used is “just cause or excuse” as provided under section 20 of the Industrial Relations Act 1967 which is stated as follows:

where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without “ just cause or excuse” by his employer, he may make representations in his writing to the Director General to be reinstated in his former employment .

Under the Employment Act 1955, section 14(1) stated that the employer may, on the grounds of misconduct inconsistent with the fulfillment of the expressed or implied conditions of his service after due inquiry, dismiss without notice the employee. Thus, under this Act, it is mandatory for the employer to hold an inquiry before taking dismissal action against his employee.

In addition, certain articles of the Federal Constitution have been applied to the employment relationship. The nature of employment has therefore changed from being

governed first by contract, then statute and now constitutional consideration (Vijavan, 2000). In the case of *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* (1996) 1 MLJ 481, CA Judge, Gopal Sri Ram has expressed the following view:

It (Parliament) has accordingly provided for security of tenure and equated the right to be engaged in gainful employment to a propriety right which may not be forfeited save, and except for just cause or excuse...Quite apart from being a property right, the right of livelihood is one of those fundamental liberties guaranteed under Part II of the Federal Constitution ...the expression of “life” appearing in Article 5(1) of the Federal Constitution is wide enough to encompass the right to livelihood

Thus, employee’s dismissal is subjected to the statutory protection as provided under section 20 of the Industrial Relations Act 1967 as well as constitutional protection as decided by the *Hong Leong* case.

2.3. The Role of Industrial Court

The Industrial Court is established under Part VII of the Industrial Relations Act 1967. It is a special court to resolve a dispute between an employer and an employee related to a claim of unfair dismissal. The court is one of the government agencies under the Ministry of Human Resources with the objective to provide speedy, fair and just resolutions to differences between parties to contract of employment (Ali Mohamed, 2004). In *Hotel Malaya Sdn. Bhd. & Anor. v. National Union of Hotel, Bar & Restaurant Workers & Anor.* [1982] 1 CLJ 640; [1982] 2 MLJ 237 at 240, Raja Azlan Shah CJM described the function of the Industrial Court in these terms:

It exercises a quasi-judicial function. It gives a full reasoned judgment in the nature of an award (s. 30). Its functions comprise an investigation of the facts, an analysis of the facts, findings of facts, and lastly, the application of the law to those findings.

In the case of *Milan Auto Sdn.Bhd v Wong She Yeh (1995) CLJ 449*, Mohd Azmi FCJ stated that the functions of the Industrial Court in dismissal cases in reference to section 20 of the Industrial Relations Act 1967 are firstly to determine whether the misconduct complained of by the employer has been established, and secondly whether the proven misconduct constitute “just cause or excuse” for the dismissal. Thus, the Court has to ask two questions, firstly, was there a dismissal, and secondly if the answer is affirmative, was the dismissal with or without “just causes or excuses”.

It has the power to hear any dispute relating to claims of wrongful dismissal and can make the order to reinstate the employee, to uphold the dismissal and to order the employer to pay compensation to the employee. However, the court seldom makes an order of reinstatement. According to Ali Mohamed (1998) among the reasons why order of reinstatement is impractical are due to the deterioration of personal relationship between workmen and employers, disappearance of the relationship of mutual confidence and trust between the two parties, contributory conduct on the part of the employees, physical inability to start employment immediately, delay between dismissal and the determination of the grievances, possibility that there might be disruptive behaviour particularly in small organizations and other events subsequent to the dismissal such as bankruptcies or lay-offs.

The Industrial court is required to take into account the public interest and national economy in adjudicating the dispute. Section 30(4) IRA provides as follows:

In making its award in respect of a trade dispute, the court shall have regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also the probable effect in related or similar industries.

In *Arab Malaysian Development Berhad v. Perak Textile & Garments Manufacturing Union* [1987] 1 ILR 118 (Award 45 of 1987), the Industrial Court stated as follows:

the fixing of a wage structure is always a delicate task, because a balance has to be struck between the demands of social justice which requires that the employees should receive their proper share of the national income which they help to produce, with a view to improving their standard of living, and the depletion which every increase in wages makes in the employer's profits, as this tends to divert capital from industry into other channels thought to be more profitable.

The Industrial Court in adjudicating the dispute would give way to common sense notions and commonly held principles of equity and good conscience. A case must be decided on its substantial merits. Section 30(5) of the Act provides that the court shall act according to equity, good conscience and the substantial merit of the case without regard to technicalities and legal form. Technicalities, whether based upon procedural or evidentiary rules, found in ordinary civil litigation will not be permitted to divert the court from its duty to determine the matter before it on the substantial merits.

Exclusionary rules found in administrative law which bar a person from seeking recourse to judicial reviews will not apply in industrial adjudication. Therefore, the function of the Industrial Court is to provide the venue for employees to seek a remedy if they consider themselves have been wrongly dismissed by their employers.

2.4. The Causes of Dismissal

Misconduct is the most common reason of employee dismissal. Misconduct can be defined as deliberate and willfully violation of the employer's rules and may include stealing, rowdy behavior, absenteeism, lateness, drug, alcohol abuse and insubordination or refuse to follow orders or proper procedures (Dessler, 1999). According to Aminuddin (2001), any act or omission inconsistent with the fulfillment of the express or implied terms of the contract of employment is called misconduct. A study by Chelliah & D'Netto (2006) have identified the common causes of dismissal which were excessive absenteeism, absent without leave, negligence, insubordination, dishonesty, unsatisfactory performance and violation of rules. Absenteeism, according to Pierce and Gardner (2002), is unexcused absences which occur when employees, with no advance approval, simply failed to show up for work when scheduled. Under Employment Act section 15(2) stated that any worker who is absent for more than two consecutive working days without the employer's permission and who has no reasonable excuse and has not attempted to inform the employer the reason for his absence is deemed to have broken his contract. In the case of *Sekolah Menengah Tsung Tsin Sabah v Pardhan Singh Mangal* (2005) 3 ILR 803, the court has viewed that continued absence from work without permission will constitute misconduct justifying the discharge of a workman from the service.

The term of insubordination was discussed in the case of *Cllse Sdn.Bhd v Low Chee Beng (2005) 3 ILR 544* where the court defined the insubordination as unwillingness to submit to authority, disobedience to orders, infraction of rules, or generally disaffected attitude towards authority. According to Dessler (1999), an act of insubordination includes contemptuous display of disrespect; making insolent comments, and participate in an effort to undermine and remove the boss from power. Insubordination can also be referred as willful disregard of expressed or implied directions and refusal to obey reasonable orders (Stevens, 1980). In the case of *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union (1995) 2 CLJ 748*, the court held:

I think such act of disobedience can only justify dismissal if it is of a nature which goes to show that the claimants are repudiating their contract of service or one of its essential condition, and for that reason I think such disobedience must at least have the character of being willful.

An employee is required to do his job honestly and not to allow conflict of interest (Aminuddin, 1993). In the case of *The Strait Trading Company Limited & STC Reality (BW) Sdn.Bhd v Ong Wan Chin (2006) 4 ILR 2706*, the Industrial Court has cited the case of *Pearce v Foster (1886) (71) QBD 536*, Lord Eshar said as follows:

The rule of law is that where a person has entered into the position of servant, if he does anything incompatible with the due or faithfully discharge of his duty to his master, the latter has the right to dismiss. The relationship of master and servant implies necessarily that the servant shall be in a position to perform his

duty duly and faithfully, and if by his own act he prevents himself from doing so, the master may dismiss him.

In the case of *Pantas Cerah Sdn.Bhd v Lau Boon Seng (1999) 3 ILR 216* the court held :

When employer employs an employee, it is implied the employee will faithfully, with loyalty and honesty, further interests of the employer. There is a fiduciary relationship between employer and the employee. An employee under the payroll of the employer should not do any act which causes detriment to the interest of the employer.

Poor performance dismissal is related to inefficiency, incompetence or ineptitude affords a clear and acceptable basis for an employer to dismiss an employee (Hew, 2006). Poor performance or unsatisfactory performance is defined as a persistent failure to perform assigned duties or prescribed standard on the job (Dessler, 1999). According to Idid (1989), the person who is recruited has declared that he can do a certain standard, so if during his service he was unable to perform according to his declaration and employer was unable to obtain from him the desired results, then he must go. In the case of *Shamsudin bin Mat Amin v Austral Enterprise Berhad (Award No: 47 of 1974*, the court held that a charge of inefficiency which, if well founded and satisfactory explained, will entitle an employer to dismiss an employee, for no employer is or can be expected to retain a worker who has proved himself to be unfit or unsuitable for his job. In the case of *Rectron (M) Sdn Bhd v. Tan Leak Kea (award no : 72 of 2000) ,* the court has laid down guidelines for dealing with poor performance as follows:

An employer ought first in the first place to ascertain the cause for employee's poor performance. Some of the causes may attributable to the company's own

weaknesses or inefficiencies in the system of its operation. The Claimant may not have been given the right training or the equipment to do the task assigned to him. He might not have been adequately instructed as to what was expected of him. If so, the employer attends to the problem which is the source of the employee's failing to perform, and the latter can be expected to get on with his work.

Careless or serious negligence which leads to loss or damage to the employer is certainly a cause for dismissal (Aminudin, 1993). According to Idid (1989), negligence is where the performance of the work is such that it causes problem for other people. Every work place is expected to be run efficiently, smoothly and with diligence. Every employee is also expected to observe his company's rules, regulations, terms and conditions of his employment. Serious breaches of his expressed and implied terms and conditions of his service as to amount to gross misconduct which justifies dismissal. Serious violation of terms and conditions include fraud, robbery, extortion, sexual harassment, drug and alcohol (Ratapol and Kleiner, 2005).

2.5. Proof of Just Cause Dismissal

A dismissal under the principle of just cause and excuse must be substantively justified and procedurally fair (Ali Mohamed, 2004). He further added that substantively justified provides that an employee cannot be terminated unless there is a valid reason, which is connected to the capacity or conduct of the employee or based on the operational requirement of the undertaking, establishment or service. Procedural justification implies that before the start of any action relating to the dismissal of an

employee, the employer must furnish the employee with full particulars of the allegations that had been made against him.

In the case of *Goon Kwee Phoy v J & P Coats (M) Sdn.Bhd (1981) 2 MLJ*, Raja Azlan Shah, CJ (Malaya), (as he then was) stated that:

Where presentations are made and are referred to the Industrial Court for enquiry, it is the duty of the 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 an 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 find 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 reasons advanced by it and the court or the High Court cannot go into another reason not relied on by the employer or find one for it.

It is a basic principle of industrial relations jurisprudence that in dismissal case the burden of proof lies on the employer on balance of probabilities to adduce evidence that the employee was dismissed for “just cause or excuse”. According to Aminuddin (1989) there are four basic reasons why the employers were unable to justify the dismissal of their employees; 1) employers could not prove the case due to insufficient documents or no documentations, witnesses were either lacking or unconvincing, 2) they failed to follow proper procedures, 3) they acted apparently in ignorance of the employees’ rights or 4) purposely victimized workers especially as regards to the trade union activities. Kleiner (2003) argued that the organization must competently execute progressively discipline process in order to avoid wrongful dismissal. According to Chelliah and

D'Netto (2006), the court would likely to uphold the employees' complaints of unfair dismissal when the employers failed to apply progressive discipline, failed to provide warnings of unsatisfactory performance and when there was an improper promulgation of work rules. In the case of *Ireka Construction Bhd v Chantiravathan a/l Subramaniam James* (1995) 2 ILR 11 the court held that the employer must produce convincing evidence that the workman committed the offence or offences the workman 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 and excuse in taking the decision to impose the disciplinary measure of dismissal upon the employee. In dealing with dismissal cases of poor performance, the employer must be able to prove that the employee was warned about his poor performance and accorded sufficient opportunities to improve himself before being dismissed.

2.6. Profile of the Employees

2.6.1 Gender

According to Aminuddin (1989), in the 1990 cases of the Industrial Court, only 41 of the 83 cases were female employee dismissed for misconduct. Aminuddin (1989) viewed that generally women are more conformist and more accepting of organizational discipline, thus they are not likely to commit misconduct. She further added that women are less aware of their rights or more timid and thus unwilling to fight back if faced with dismissal. A study by Lind, Greenberg, Scott and Welchans (2000), Wagar and Grant (1996) as cited by Magnusson (2004) found that female employees had been socialized to avoid disputes and were less likely to sue their former employers for wrongful dismissal.

own pleasure and will terminate the probationer's employment without any genuine consideration being given to the latter's suitability for regular employment with the former.

According to Hew (2006), the court must be mindful that there is an intrinsic and material distinction between employees under probation and confirmed permanent employees. The court must be satisfied that the termination was bona fide exercise of the power conferred by the contract. Chelliah and D'Netto (2006) argued that the predictor year or service of an employee has strong relationship with the court decision. They found that where employee was found to have more years of service, the more likely the court would uphold the complaint of unfair dismissal. This discussion seems to suggest that the background of employees such as gender, probation and employee and the length or service are associated with the causes of dismissal and the court decisions.

From the relevant literature review on employee dismissal as cited above, it seems that the "just cause or excuse" principle has been adopted by the Court to determine whether the dismissal is valid or otherwise. However, there is no similar study that compiles the cases on misconduct and its relation with the principle of "just causes or excuse". Thus, this study will fill the gap by analyzing what factors the Industrial Court takes into consideration to justify the dismissal of each type of misconduct. It will also examine the reasons why the employers lost their cases in the Industrial Court.