

Would An Arrest By The MACC Warrant Dismissal?

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When faced with the issue of an arrest of an employee by the Malaysian Anti-Corruption Commission (“MACC”), employers must be cautious in handling such a delicate matter. It is pertinent to note that the criminal investigation of criminal charges levelled against an employee on their own cannot form a basis for an employer to commence disciplinary proceedings and take disciplinary actions against the employee.

This is particularly the case when an employer does not have any information on the grounds of the employee’s arrest, nor any evidence of any offence being committed. In such situations, an employer would therefore not have any basis to frame a charge or conduct an inquiry into the employee’s alleged wrongdoing.

Unfair to Dismiss on Mere Suspicion

In **Abdul Bakar Samsudin v Malaysia Airports Holdings Berhad¹**, the Industrial Court held that the dismissal of an employee merely following his arrest by the MACC was without just cause or excuse. In that case, the employer had proceeded to dismiss the employee on the ground that he had purportedly blemished the company’s reputation due to his arrest by the MACC, which became the subject of news reports and the company’s name being mentioned as his employer.

The Industrial Court found that the employer had failed to establish any ground of misconduct and mere suspicion by the employer that the employee might be abusing his position and accepting a donation as a form of bribery did not constitute fair dismissal. The learned Chairman in the above case referred to the fundamental right of presumption of innocence under Article **11 (1)** of the Universal Declaration of Human Rights (“UDHR”) and went on to explain as follows:

[59] This basic principle of human rights is well stated in Article 11 (1) of the Universal Declaration of Human Rights (UDHR) which provides that:

“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”

¹ [2022] 2 LNS 1804



[60] Based on the above provision of Article 11 (1) of UDHR, it is obvious that the presumption of innocence is a fundamental right of each and everyone of us. On the same breath, it is of the utmost importance to note that the presumption of innocence is essential in ensuring everyone is given a fair chance.

[63] In the present case, there is no dispute that, at the time of the dismissal, there was no Charge preferred against the Claimant in any Court of law. The Claimant was arrested by MACC based on a suspicion that the Claimant was involved in an act of corruption and according to the Company the arrest of the Claimant has caused the image of the Company being

blemished. This Court is of the view that a mere suspicion alone without any cogent evidence does not justify a dismissal."

The courts have consistently held that dismissing an employee pursuant to an arrest by the MACC is against public policy and it is not sufficient for the employer to state that its reputation had been blemished by the arrest without any proof that it is not merely their personal perception².

Internal Investigation

Thus, in determining whether an employer may commence disciplinary proceedings against an employee, an investigation is a necessary pre-

requisite. The fact that an employer is required to act promptly on acts of misconduct ought not to compromise a full and detailed investigation being carried out in respect of any alleged acts of misconduct. This is of utmost importance as the employer should not appear to be acting hastily in prosecuting any employee without making a thorough investigation into the matter³.

Once an employer has obtained information on the basis of the MACC arrest, the next step would be to conduct an internal investigation to determine whether there are indeed any irregularities or transgressions in transactions which the employee may have been apart of. In this regard, the

² Abas Tuah v Malaysia Airports Holdings Berhad [2022] 4 ILR 288

³ Development & Commercial Bank Berhad v Michael Raman Shanmugam [1987] ILR 599

employer would need to refer to its internal policies and procedures in place, such as its code of ethics and procedures on management of misconduct.

The internal investigation should be carried out in a fair and proper manner by which the following procedures ought to at least be complied with:

(a) Recording statements from the relevant parties including outside sources, where relevant;

(b) Providing the relevant parties time and opportunity to respond to any questions or questionnaires prepared;

(c) Ensuring that the statements contain all the necessary information relating to the transaction under MACC investigation or any act of misconduct;

(d) Ensuring that the statements are verified and signed by the relevant parties; and

(e) Collating all necessary information and documentation that are relevant to the issue at hand including among others, relevant correspondence and reports.

In the event the internal investigation does not disclose any act of misconduct on the part of the employee, the employer would not have any ground to support the commencement of disciplinary proceedings against him. However, if the internal investigation does disclose a *prima facie* case against the employee, the report of the investigation would form the



basis of the charges to be preferred the accused employee and the employer may then commence disciplinary proceedings.

Suspension of the Accused Employee

It is trite industrial relations principle that there is an implied right vested in employers to suspend an employee – so long as the suspension is with full pay and where necessary, such as to allow the employer to carry out investigation into allegations of the employee's misconduct⁴.

Further, Section **14 (2)** of the Employment Act 1955 provides as follows:

"(2) For the purposes of an inquiry under subsection (1), the employer may suspend the employee from work for a period not exceeding two weeks but shall pay him not less than half his wages for such period:

Provided that if the inquiry does not disclose any misconduct on the part of the employee the employer shall forthwith restore to the employee the full amount of wages so withheld."

The burden is on the employer to prove that a suspension is necessary due to the exigencies of the case and thus, cannot simply be imposed on an employee at the employer's absolute discretion.

Instead, it may be invoked by the employer where there is a real, rather than imagined or speculative risk, that the process of the investigations would be prejudiced by the presence of the said employee.

In certain circumstances, employers must also bear in mind its own policies and procedures regarding suspension, and to act within the ambit provided

⁴ MBF Finance Berhad v Abd Aziz Hashim [1995] 2 ILR 753



under the same to avoid risking a breach of a term of the employee's contract of employment and giving rise to a claim of constructive dismissal.

Conclusion

To conclude, any ongoing investigations or proceedings in a criminal court brought by the MACC against an employee should not have any bearing on an employer's internal disciplinary process and affording due inquiry to the accused employee. In the case of **Zulkeflee Abdullah v Malaysia Airports Holdings Berhad**⁵, the Industrial Court emphasised the need for employers to make proper enquiries into the alleged wrongdoing by the accused employee instead of acting hastily based on mere suspicion.

Conversely, even if the accused employee is found not guilty of the charges levelled against him at the criminal court, an employer's finding of guilt of the employee's misconduct internally, may still stand even if he is acquitted by the criminal court⁶.

The Industrial Courts have consistently held that the acquittal of employees from criminal prosecutions have no bearing on unfair dismissal claims before the Industrial Court. The stance taken by the Industrial Courts is since the prosecution bears the burden of proving that the accused employee is guilty beyond all reasonable doubt, while an employer needs to prove on the balance of probabilities that it had just cause and excuse to dismiss the employee.

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⁵ [2021] 2 ILR 129

⁶ Akmal Hidayat Zamhari v BHIC Marine Technology Academy Sdn Bhd (Award No.: 480 of 2019), Colgate-Palmolive (M) Sdn Bhd v Yap Shyan Meng [2007] 2 ILR 313