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IMPORTANCE OF INCORPORATING KPIs IN EMPLOYMENT CONTRACTS OF SALES ADVISORS

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MOHD ZAKI MOHAMAD v PERODUA SALES SDN BHD
(Kes Saman Ketua Pengarah Tenaga Kerja No.:
KBR/10301/2025/0355)

A Key Performance Indicator (KPI) is a measurable value used to assess how effectively an individual, department, or organisation is achieving its objectives. Properly designed KPIs help align employee efforts with organisational goals while promoting accountability and transparency. Most employers do not set out detailed KPIs in the employment contract itself. Instead, the contract typically contains clauses such as:

"The Employee shall meet such performance targets and key performance indicators as may be determined by the Company from time to time."

This approach provides flexibility for the employer to revise targets annually without having to amend the employment contract. However, there are certain roles where KPIs are clearly spelt out in the employment contract itself. The most common examples are sales executives where specific numerical targets are frequently

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incorporated directly into employment contracts because commissions and bonuses depend upon them. Under industrial jurisprudence, failure to achieve KPIs is generally treated as poor performance, not misconduct.

Misconduct requires some element of blameworthy, wilful, dishonest, or improper conduct. In view of this, does this mean employee who are dismissed because of inability to fulfil their KPIs, would be entitled to termination benefits under the Employment Act 1955 (“**EA 1955**”)? The provision of termination benefits under the EA 1955 serves as a cushion against the hardships faced by an employee who has to contend with the loss of his / her employment and the consequential loss of his / her immediate means to earn an income.

Regulation 4 (1) of the Employment (Termination and Lay-Off Benefits) Regulations 1980 (“**Regulations**”) provides that an employee shall be entitled to termination benefits where his / her employment contract is terminated “for any reason whatsoever” except:

- (a) where the employee has reached the retirement age specified in the contract; or
- (b) the employment is terminated due to misconduct following a proper inquiry; or
- (c) the employee voluntarily resigns unless the resignation falls within the relevant provisions of the EA 1955.

Since Regulation 4 (1) does not explicitly exclude poor performing employees from being entitled to termination benefits, can inefficiency / poor performance be classified under the heading of ‘misconduct’? This issue often arises when such dismissed employees claim for termination benefits through complaints at the Labour Court. There are 2 school of thoughts on this matter. The first school of thought draws a clear distinction between poor performance and misconduct. In **TAH POH THIAM v INDUSTRIAL COURT OF MALAYSIA & DAILY FRESH SDN BHD [2015] 1 LNS 1534**, the Court of Appeal held that poor performance, negligence, or inefficiency cannot automatically be equated with misconduct. Rather, misconduct requires a higher threshold, and the two concepts must be kept conceptually distinct.

On the other hand, the second school of thought recognises that persistent poor performance may, in certain circumstances, amount to misconduct. In **MOHD HILMI ALHAM v BERMAZ MOTOR TRADING SDN BHD [2020] ILRU 0393**, the Industrial Court held that culpable incompetence or inefficiency, particularly where it stems from negligence, carelessness, or unwillingness to perform duties may constitute misconduct justifying dismissal. This position was further reinforced by the Shah Alam High Court in **NXP MALAYSIA SDN BHD v NURSHAKILA SAHLAN [2026] 7 MLJ 546**, where it was held that persistent poor performance, after warnings and opportunities to improve, could amount to misconduct.

Accordingly, the High Court held that the Labour Court had erred in awarding termination benefits to the employee who was terminated on the grounds of poor performance. Against this backdrop, the Labour Court in **MOHD ZAKI MOHAMAD v PERODUA SALES SDN BHD** was once again called upon to determine whether an employee dismissed for persistent

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poor performance was entitled to termination benefits. The Complainant, a Sales Advisor, claimed termination benefits amounting to RM79,561-00 following his dismissal from the Company on the grounds of his poor performance.

Pursuant to the terms of his employment contract, the Complainant was required to achieve a monthly sales target but consistently failed to do so despite being placed on a Performance Improvement Plan (“PIP”) for 5 months. Throughout the PIP, he was given multiple counselling sessions, guidance on improving sales, and coaching from his direct supervisor. He also received several warnings and three show-cause letters requiring him to explain his continued failure to meet the required sales targets. Nonetheless, he failed to benefit from the numerous warnings, coaching sessions, and opportunities provided throughout the PIP and his performance remained below the required standard.

The Labour Court found that the Complainant’s persistent failure to fulfil his contractual performance obligations, despite repeated interventions and opportunities to improve, constituted culpable inefficiency amounting to misconduct. This is consistent with the principle articulated in **PLAAT RUBBER SDN BHD v GOH CHOK GUAN [1995] 1 ILR 79**, where it was held that any breach of an express or implied duty on the part of the employee, unless of a trifling nature, may amount to misconduct. Therefore, he was not entitled to termination benefits under Regulation 4 (1) of the Regulations.

This case demonstrates the importance of incorporating clear and measurable KPIs into employment contracts, particularly for performance-driven roles such as sales advisors. Where such KPIs are expressly stipulated as contractual obligations, an unjustified failure by the employee to achieve them amounts to a breach of the express terms of employment, thus exempting the employee’s entitlement to termination benefits under Regulation 4 (1) of the Regulations.

The Company was represented in the Labour Court by Partners, Shariffullah Majeed and Arissa Ahrom, of Lee Hishammuddin Allen & Gledhill.

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