

What is an employer employee relationship?

By B Mathew

A contract of service or employment is an agreement or a binding covenant between an employer and an employee and is the basis of all employment relationship. The fundamental element of any binding contract is an OFFER & an ACCEPTANCE. Hence a binding employer and employee contractual relationship comes into effect when an offer of employment by the employer is accepted by the employee. And thereafter, a number of enforceable rights and obligations recognized by law bind this contractual relationship.

Going by Common Law principles, a contract of employment or a contract of service need not be in writing and it could be effected through mere verbal agreement. For example, a man makes a verbal offer to marry a lady and she gives a verbal consent (acceptance) and thereafter a binding contract comes into effect which becomes enforceable in a court of law. Section 2 of the EA 1955 says, "*contract of service*" means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee and includes an apprenticeship contract.

However, for those coming within the meaning of the EA 1955, and that is those earning less than RM1500 there's a mandatory provision under section 10 of the Act requiring an employment contract exceeding one month tenure to be in writing;

Contracts to be in writing and to include provision for termination

(1) A contract of service for a specified period of time exceeding one month or for the performance of a specified piece of work, where the time reasonably required for the completion of the work exceeds or may exceed one month, shall be in writing.

In the event of non-compliance of the said section 10 and an unscrupulous employer denies ever employing a worker just because there was no written contract of service, the labour court could still have recourse to the foregoing common law rule to give effect to a verbal contract of service.

1.1 Expressed & Implied terms of a contract of Service

Expressed terms in an employment contract are those agreed terms and conditions, that are explicitly documented and signed by the employee and the employer and includes interalia:

- wages, overtime or bonus pay details
- hours of work,
- annual leaves entitlement
- sick pay
- redundancy pay
- notice period for termination of contract

The expressed contractual terms may not be comprehensively or exclusively documented in your appointment letter, but may be in a number of different documents. They may not be written at all. The expressed terms may be found in:

- the job advertisement
- a written statement of main terms and conditions any letters sent by your employer to you before you started work
- anything you were asked to sign when or since you started work
- instructions or announcements made by your employer on a notice board at work
- an office manual
- payslips.

You may not have possession of all the relevant papers. You may be able to get copies from your Personnel Department, foreman, or trade union representative. You should always keep any papers given to you by your

employer. Because a contract will still exist even if there is nothing written down, anything which was said to you by your employer about your rights, and anything which you agreed verbally, should be recorded.

Implied terms of a contract of service

Implied terms in an employment contract are those terms which are not specifically documented or written out or spelled out in a contract of service between the employer and employee.

Implied terms are:

- general terms which are implied into most contracts of employment; terms implied by custom and practice
- terms from agreements made with the employer by a trade union or staff association.
- General implied

The following duties and obligations will be implied into any contract of employment:-

1.2 Duty & Obligation of mutual Trust

The employee and employer have a duty of trust to each other. This means, for example, that if you give your employer's industrial secrets to a competitor, you will have broken an implied contractual term of trust. The adage "information is power" is usually linked to having access to an employer's trade secrets. When used strategically, trade secrets often provide a significant competitive advantage in the market place. Further, trade secrets can be central to the creation of a market niche which competitors may find it difficult to penetrate. Competitive advantage is often acquired by simply keeping strategic information confidential or secret as outsiders are prohibited by law (in most countries) to use or copy secret or confidential information without the consent of the owner of that information. Divulging an employer's trade secrets would tantamount to a serious or a grave breach of a duty and obligation of a mutual trust and therefore if an employee is found guilty, he would be liable for dismissal, which dismissal would be for just cause and reason.

What divulged information could be considered a trade secret so as to warrant a breach of an implied relationship of mutual trust between an employer and an employee?

1. The information must be secret or shared in a context of confidentiality;
2. The information must have commercial value by virtue of being secret;
3. The owner of the information should have made reasonable efforts under the relevant circumstances to keep the information secret.

A trade secret may be any type of information such as formulae, devices, patterns, financial information, business plans, client lists, and unannounced products and so on that an enterprise considers being valuable and offers it an advantage over its competitors. Trade secrets are but one tool amongst a collection of different intellectual property tools and when used appropriately complement and strengthen the other tools. Enterprises that successfully protect their trade secrets strengthen other IP assets that they have; for example, when Coca-Cola protects its secret formula as a trade secret, by doing so it also strengthens its trademark.

Keeping the confidentiality of a trade secret is an endless challenge as the fear of disclosure is always present. Generally employees are a main threat because there is no guarantee that the "non-disclosure agreement" and "non-compete agreement" will be sufficient to prevent the use or unauthorized disclosure of secret information by departing employees. In any case, a non-compete clause is not an absolute guarantee, as it is often bound by restrictions on its duration as well as a geographic limitation.

There have been major changes in the business world and the workforce in the last couple of decades. In the past, once hired an employee believed it was a life time job and managers expected their unstinted loyalty to the

enterprise. Similarly, workers used to be devoted to their employer. This image of employment loyalty has gradually changed with the advent of “globalization” when employees began to face restructuring, company relocations, and downsizing. Employers ‘broke the rules’, mutual obligations are reconsidered, life time employment and devotion is no longer expected, job-hopping is considered to be a normal phenomenon, and people are constantly striving for higher salaries or better working conditions. Loyalty and trust have become more difficult to obtain and give in the work place.

Statistics from research conducted in 2000 in the American workplace by Fortune Personnel Consultants have shown that the size of an enterprise has an influence on the state of employees’ loyalty to their employer. The results indicate that almost 80 percent of people working in SMEs feel loyal to their companies, whereas under 50 percent of people working in large enterprises feel loyal to their organization

Trade secret law tries to balance competing policy options. On the one hand, there is interest in promoting innovation and creativity and protecting companies that invest in innovative and creative activities. On the other hand, there is interest in promoting healthy competition and the freedom of employment. The complexities of these differing and often conflicting policy interests are demonstrated in the ‘inevitable disclosure doctrine and the spring board doctrine’ in common law countries.

The ‘inevitable disclosure doctrine’ has developed around the issue of employees seeking new employment in a similar business. The underlying principle is that employees who have had access to confidential information will inevitably disclose the information to a future employer if working in the same field. Even if the employee has good intentions the doctrine presumes that it is inevitable that the information, skills and knowledge absorbed while working in one employment will automatically or instinctively come out when working in the next employment if it is in the same field. The policy considerations referred above come into play here. On the one hand, society needs to protect the confidential information of its enterprises but it also cannot restrict the freedom of employment of its members.

The judicial decisions in this area have revolved around the particular facts and circumstances of individual cases^[8]. In general, an order preventing an employee from taking on a new employment has been made if it was found that the former employee was likely to bring into the new job information which was neither generally known nor readily ascertainable by competitors in the industry. Specific confidential information must be separated from the ordinary skills and knowledge that the employee had developed while in his former employment. He/she cannot be prevented from using the latter information. The PepsiCo Inc. vs. Redmond case is an example where the doctrine was applied to prevent an employee from working with a competitor. PepsiCo asked for an injunction against former employee of Redmond to prevent him from working for Quaker Oats Co., which was a direct competitor of PepsiCo Inc. at that time. PepsiCo won the case on the ground that due to the position offered by Quaker, Redmond would have inevitably disclosed PepsiCo’s trade secrets and confidential information. The court also prevented Redmond forever from disclosing PepsiCo trade secret^[9].

The ‘springboard doctrine’ is applied to constrain an employee who by virtue of his/her employment has been able to access the employers’ confidential information and intend to use the said information for his own benefit and thus gaining an unfair advantage vis à vis the former employer. An example is the ROGER BULLIVANT vs. ELLIS case where the managing director resigned from his company to join a competing business and took with him technical and commercial documents, trade secrets and customers’ information from his former employer. There is no doubt in this case that the ex-employee would have gained an unfair advantage by using this information and thus was prohibited from using this information. A springboard injunction can also be applied even if relevant information is already in the public domain, in order to prevent a former employee who during his employment has acquired a particular production/manufacturing skill/knowledge from using the said skill/knowledge in the production of a competing product. This is due to the fact that such knowledge would give the former employee an unfair head start, over others who have access to the publicized information. However, issuing an injunction is not easy because the issue of confidentiality is complex, as it is difficult to clearly identify and separate the knowledge that an employee already has at the time of beginning an employment and the one that he acquires during his subsequent employment.

The changes in the working environment and consequently in employee loyalty that have occurred during the last few decades have increased the chances of breach of a psychological contract. It is, therefore, time to pay greater attention to building employee loyalty as a tool for protecting trade secrets. It can only be to the advantage of the

employer to regain commitment because it increases performance and, more importantly, it discourages mobility and reduces the percentage of turnover, and thus minimizes the risk of divulging trade secrets.

1.3 A duty of care towards each other and other employees

This means, for example, that the employer should provide a safe working environment for the employee and that the employee should use machinery safely. The employee has a duty to obey any reasonable instructions given by the employer. There is no legal definition of reasonable, but it would not be reasonable to tell an employee to do something unlawful, for example, a lorry driver should not be told to drive an uninsured or untaxed vehicle.

1.4 A duty to pay your wages and provide work.

As long as you are willing to work, your employer must pay your wages even if no work is available, unless your contract says otherwise.

1.5 A written contract of service need not be exhaustive

A written contract of service need not be exhaustive, detailing out every micro terms and conditions of employer employee relations because in addition to expressed and implied terms contained in a contract of service, the courts also recognize the following unwritten terms of an employer employee relationship;

- auxiliary terms and conditions in the form of collective-agreements, employee-handbooks, official company memorandums containing terms & conditions and customary organizational practices.

For those earning RM1500 and above are not covered by the EA 1955, hence they are covered only by terms and conditions stipulated in their appointment letter. Can it be said, since the EA 1955 does not cover those earning RM1500 above, it does not have legal sanction for this category of employees? Now, this may not be accurate because many implied terms including many sections of the EA 1955 could be read into a contract of service because of the employer and employee's customary practices over time or through a company's auxiliary documents particularly if an employee has taken cognizance of such terms and conditions without challenge.

An example: A works as general manager for B for a basic wage of RM10000. He has been with the company for the last 6 years. His appointment letter stipulates one month's notice of resignation to be served regardless of his tenure. However, sometime later the company's managing director issues a memorandum changing notice period for resignation of general managers who have served the company for more than five years to be two months instead. All the general managers in the company acknowledged the said directive and signed the said memorandum without protest. As such, the managing director's memorandum adopting section 12 of EA 1955 becomes incorporated into A's contract of service:

12. Notice of termination of contract

(1) Either party to a contract of service may at any time give to the other party notice of his intention to terminate such contract of service.

(2) The length of such notice shall be the same for both employer and employee and shall be determined by a provision made in writing for such notice in the terms of the contract of service, or, in the absence of such provision in writing, shall not be less than

(a) four weeks' notice if the employee has been so employed for less than two years on the date on which the notice is given;

(b) six weeks' notice if he has been so employed for two years or more but less than five years on such date;

(c) eight weeks' notice if he has been so employed for five years or more on such date:

Another example would be where, section 65 of the Malaysian Evidence Act 1950 reads the circumstances and situations where secondary or auxiliary documents could be used and admitted as evidence in court hearings. Now let's take another example: if in the aforesaid A's appointment letter, nothing is ever mentioned about notice period of resignation, then is A entitled to walk-out of his employment immediately without serving any notice? The answer is negative, because the aforesaid managing director's memorandum could be used as an auxiliary document.

Now let's go to a third example where A's appointment letter is totally silent on his notice period of resignation and furthermore, the company has never issued any memorandum to this effect, thereby creating a lacuna situation. Is A entitled to walk-out without serving any notice on his employer? Once again the answer is in the negative because

the courts could still address a lacuna situation and adopt a customary practice in respect of resignation notice period for general managers.

1.7 Is there a distinction between a Dismissal and a Termination?

In Malaysia, the industrial courts do not make a distinction between a termination and a dismissal and they are termed synonymously. And by virtue of section 20 (1) of the IRA 1967, even a constructive dismissal or a forced resignation or a forced retirement is still considered a dismissal in a true sense. Hence the law does not make any distinction between these 2 terms. As such, even a resignation letter from an employee does not guarantee an employer that he is safe from a legal sued for wrongful dismissal.

However, the term “dismissal” connotes a discharge from employment for misconducts and poor job performance while the term “termination” connotes a discharge from employment for reasons otherwise than for misconducts and poor job performance, for example, closure of company’s business, medical incapacity, and retrenchments.

Unfair dismissal

Employees whether they are probationers, permanent or fixed term employees have a right not to be unfairly dismissed because an unfair dismissal bearing negative connotation of serious allegation of misconducts severely tarnishes an employee’s credibility, reputation and image and seriously affects his future employment prospects.

In order to dismiss fairly, an employer must:

- have a good and fair reason for dismissal; and
- the dismissal must follow proper procedures in compliance to principles of natural justice

The benchmark for fair and just dismissals are:

- capability;
- conduct;
- redundancy;
- retirement
- medical incapacity

Once it is established that the dismissal falls within one of the potentially fair reasons, it is necessary to consider the fairness of the dismissal. This will involve an assessment of:

for misconduct dismissals, whether a reasonable investigation was conducted; for poor performance dismissals, whether the employee was warned as to their performance and given an opportunity to improve; and for redundancies, whether the employee was consulted, whether there was a fair selection process and whether alternative employment was considered.

If you have been unfairly dismissed, then you will be entitled to an award, based on length of service. A Tribunal will award the compensatory award on a just and equitable basis.

Wrongful termination

If your employer has breached your contract of service by failing to fulfill his contractual obligations then you are entitled to make a claim for wrongful termination against your employer. Wrongful termination is a contractual claim against an employer which bears a negative connotation on the employer for failing to honour and make good his contractual obligations for example failing to pay wages, overtimes or leave pays, etc.

If you have committed an act of gross misconduct and your employer has terminated for that reason, then you would not be entitled to receive notice or payment in lieu of notice. However in any other circumstances, in order to terminate your employment, your right to notice means your employer must either allow you to work out your notice or make a payment in lieu of notice (garden leave). If you have been wrongfully dismissed, you are under a duty to mitigate your loss.

Constructive Dismissal

The employer has not actually dismissed you but you feel that you have been given no option but to leave. A claim for constructive dismissal can be brought against your employer if you believe staying with the employer is impossible. In order to bring a successful claim for constructive dismissal there must be a fundamental breach of contract by the employer. You need to leave alleging constructive dismissal. Staying on in your job and working your notice may be inconsistent with the argument that you believe you have no option but to leave. Therefore if you are relying on a breach of contract, you must act promptly after that breach occurs. If you are successful in claiming a constructive dismissal, potential claims for both wrongful and unfair dismissal may follow. If you are unsuccessful then you will be regarded simply as having resigned. If your employer does not have a fair reason for your dismissal, you may be able to bring a statutory claim for unfair dismissal. Fair reasons the employer may use to dismiss someone include capability, misconduct or redundancy.

1.8 The entire spectrum of employer and employee relationship

Commodities like cars, houses and lands can be bought or sold under commercial rules and procedures. But the same cannot be true for a workman, for labour takes priority over commodities including over that of capital. It is said that a probationary worker holds no lien on his job:

In Equatorial Timber Moulding Sdn. Bhd. Kuching v. John Michael Crosskey [1986] 2 ILR 1666 the Industrial Court said at p. 1671: 5 3(6)/4-2430/06

"Being a probationer he has no substantive right to hold the post. He holds no lien on the post. He is on trial to prove his fitness for the post for which he offers his service. His character, suitability and capacity as an employee is to be tested during the probationary period and his employment on probation comes to an end if during or at the end of the probation period he is found to be unsuitable."

If the foregoing is a trite law in respect of a probationary workman, then conversely, a confirmed worker holds lien or proprietary or property rights over his job. For example a farmer who cultivates a land acquires rights to the land after a number of years.

Hence the entire spectrum of an employer and employee relationship should not be left to Adam Smith's Invisible Hand. This is where the labour and industrial courts fit themselves in for a critical role in balancing the supply and demand forces against the rights of livelihood of workmen.

The Malaysian Industrial Courts and Labour Courts are not courts of law in a strict sense but rather courts of social justice, established for moderating employer and employee relationships which has gone wrong. In other words, to investigate various types of employment terminations.

How is an Employee's service terminated?

- Termination by the employer
- Termination by the employee
- Automatic termination

Types of Termination Of Service

Termination By Employer

a. Disciplinary

- Dismissal
- Discharge for Misconduct

b. On grounds of continued ill-health

c. Retrenchment

- Surplus

d. Expiry of contract where post remains

e. Discharge on transfer of undertaking

f. Discharge on closure of undertaking

Termination By Employee

a. Resignation

b. Voluntary Retirement

c. Automatic Termination

d. Compulsory retirement or superannuation