

## RIGHTS RECEIVED BY THE VICTIMS OF TORTIOUS DEVIANT BEHAVIOUR.

AMBIKAI S THURAISSINGAM<sup>a\*</sup>

ZAHIRA MOHD ISHAN<sup>b</sup>

---

### ABSTRACT

*The purpose of this study is to investigate the rights received by the victims of tortious deviant behavior in the workplace. It aims to explore the existing rights received by the victims of the tortious deviant behavior under the statutory measures. In this paper, we review the existing protection under the statute in three different jurisdictions surrounding the phenomenon of tortious deviant behavior at the workplace, paying particular attention to factors causes of such conduct. We will also provide an overview of the perplexing nature of such conduct and how countries like Australia and India extend protection under the law for affected victims. In Malaysia, there is no specific law which governs the provisions for conduct of tortious deviant behaviour in the workplace. This is a conceptual research paper which will address the statutory measures that have been employed in several private and public organisations. This study aims to analyse and determine whether the victims have received adequate protection and rights due to such conduct. Finally, due to inadequacy of empirical evidence and focus on assessment and treatment for victims are recognized in this paper, and several suggestions are made for future research and treatment avenues relating to the tortfeasors.*

*Keywords: tortious, deviant behavior and right of victims*

---

### 1.0 Introduction

This study addresses the extent of rights received by the victims of tortious deviant behaviour under the statute and the judicial measures available in Malaysia, Australia and India. For the purposes of this study, deviant activity involves intentionality and counter-normative activity within the workplace. Such transgressions of workers are being examined by researchers as a pervasive workplace behaviour that can produce either functional or dysfunctional results. Organisational behavioural (OB) theorists identify a variety of terms and nuances describing what are collectively known as 'dysfunctional behaviours' in the workplace or 'organisational misbehaviour'. These definitions commonly deem behaviour as dysfunctional if it threatens the interests or well-being of work colleagues, the organisation as a whole, or its stakeholders; or if it offends organisational or societal norms.

Limited studies have been conducted in the area of employment relations issues in Malaysia generally and management of employment misconduct specifically. Pathmanathan et al (2003), Thavarajah and Low (2003), Parasuraman (2004), Amminudin (2003), Ayadurai (1996), Anantaraman (1996; 2000), C'ruz (1999), Idid (1993), Kiong (2002), Gomez (1997) and Wu (1995) were the authors, whom have written about the Malaysian employment relations, however except Idid (1993) and Gomez (1997), none of the studies have specifically dealt with the management of employment misconduct in depth. In fact none of the statutes related to Malaysian Industrial Laws formally define the term employee 'misconduct' although s.14(1) of the Employment Act 1955 implies that misconduct is a conduct by the employee that is 'inconsistent with the fulfilment of the express or implied conditions of his service.'

### 1.1 Problem Statement

The prevalence and costs of misconduct or deviance in the workplace make its study imperative. It is very likely that the increasing tension in organizations that resulted from economic changes, increasing global competitiveness, and trends toward downsizing and restructuring, will lead to significant misconducts in the workplace. Given that much of the subject matter of organisational misbehaviour had been generally misunderstood and neglected in the past, empirical analysis of remote and immediate cause of organisational misconducts should be a matter of serious concern. Therefore, this study offers a considerable intellectual challenge to industrial/organisational psychologists, HR practitioners, and indeed for effective management practice.

## 1.2 Rationale and Significance of the Study

On the contrary, significant importance has been imposed in the organizations to maintain and assure the harmony in work place and maintain the well-being of the workers. Several laws and guidelines have been formulated to supplement the regulations that may be implemented by the organization. Alongside, most of the employees that have a conflict with the peers or the firm may feel at ease to contact the law enforcing agencies to further streamline their operations and feel equally facilitated with fair and just decision on the basis of the issue that has been raised by them. Therefore, in this paper, the governing judicial measures the namely Employment Act, Penal Code and the Occupational Health & Safety Act available in Australia, India and Malaysia will be reviewed to deduce the loopholes in the laws and propose protection for the victims of tortious deviant behaviour.

## 1.3 Objective of the Study

This research paper aims to achieve the following objectives:

- i. To identify the extent of rights received by the victims of tortious deviant in the workplace in Malaysia
- ii. To analyse the victims' rights under the statute and the judicial measures available in Malaysia, Australia and India.

## 2.0 Literature Review

### 2.1 Provisions under Statute - The Employment Law

In Australia, an aggrieved worker whose employment has been prematurely terminated may be eligible to file an unfair dismissal claim if he or she believes that dismissal was 'harsh, unjust or unreasonable'. The 'harsh, unjust or unreasonable' grounds enable employees to seek recourse if they believe they have either substantive or procedural grounds on which to make a case. This means employees may have a recourse if they perceive their dismissal was unwarranted (a substantive ground) and/or if they believe the dismissal process itself was executed unfairly by the employer (a procedural ground).

By examining dismissals resulting from serious misconduct, the aim of this study is to provide insight into the types of defence that employees provide for their actions. This insight contributes to the broader pursuit of organisational behaviour theorists to provide 'a more complete and accurate representation of organisational behaviours. The relevancy of the issue can be addressed by the considerations of the fact that, employees and employers have been banded by the tort laws; therefore, all of the process execution is done as per the rules defined in the laws. Hence, the present study has made use of multiple existing torts that can be used to cater the needs of the professional conducts.

Under the Fair Work Act 2009, Fair Work Australia (FWA) is the federal tribunal that will manage unfair dismissal claims occurring from 1 July 2009. Until this time unfair dismissal claims were heard by the Australian Industrial Relations Commission (AIRC) under the Workplace Relations Act 1996. The act was replaced because of the increasing number of resentful and dissatisfied employers asking for the change of unfair dismissal regulation.

The general protections provisions of the Fair Work Act 2009 (the Act) aim to protect workplace rights and freedom of association and to provide protection from workplace discrimination. The general protections provisions protect people from 'adverse action'. This is a key definition that intersects with a number of the protections. What constitutes adverse action in a particular case depends on the nature of the relationship between the relevant persons. For example, adverse action taken by an employer against an employee includes dismissal, discrimination, refusing to employ a person, or prejudicially altering the position of the person. The definition covers certain conduct of employers, employees, industrial associations, independent contractors and principals.

It also extends to protect prospective employees from adverse action in certain circumstances (Section 342 Fair Work Act 2009). In Fair Work Act 2009, for example, the Act allows employers to refuse the request of employees to provide them with flexible working arrangements based on reasonable grounds. However, these reasonable grounds are not defined or explained in detail.

A person (such as an employer) must not take any adverse action against another person (such as an employee) because the other person has a workplace right, has exercised a workplace right, or proposes to exercise such a right. 'Workplace rights' has a broad meaning. For example, a person has a workplace right to complain or sue if he or she has an entitlement under an award or agreement or a workplace law, is able to initiate a proceeding under a workplace law or is able to make a complaint or inquiry in relation to their employment. Moreover, the examples depend on an entitlement under an award, agreement or workplace law. An employer must not take any adverse action against an employee (or prospective employee) because of his or her race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin. If a person believes they have been dismissed and allege that their dismissal was in contravention of the general

protections provisions of the Fair Work Act 2009, they can apply to Fair Work Australia to deal with the dismissal. Fair Work Australia must convene a private conference in an attempt to deal with the dispute either through mediation or conciliation, or by making a recommendation or expressing an opinion.

If the dismissal remains unresolved FWA must issue a certificate. The applicant can then make an application to a court to deal with the matter. This must occur within 14 days of the certificate being issued. If FWA considers that such an application would not have a reasonable prospect of success, it must advise the parties accordingly. A general protections dismissal application must be lodged within 60 days of the dismissal taking effect and there is a fee of \$59.50 to make the application. FWA can also deal with unlawful termination claims (Division 2 of Part 6-4 Fair Work Act 2009).

The unlawful termination protections in Section 772 broadly reproduce the unlawful termination grounds in the now repealed subsection 659(2) of the Workplace Relations Act 1996. The unlawful termination protections apply to all employees in Australia. However, a person can only make an unlawful termination claim if he or she is unable to make a general protections claim, i.e. if the nature of the dispute is not covered under general protection. In Australia the application of the employee laws and regulations are enacted to ensure the well being of the corporate world. In this regard, several laws have been formulated to safeguard the well being of the employees and maintain the uniformity in the operations. Maximum efforts have been made to enforce the laws that must be with the proper alignment of the moral and ethical sentiments of the employees along with the proper safeguarding of the norms and the professional consents of the organization by the Malaysian government. In handling with riots and the protests by employees, the Australian government promulgated the "Conciliation and Arbitration Act 1904".

The regulation, with the sole purpose of catering the employee issues was enforced throughout the commonwealth with the intention to assure the efficiency in the execution of the operations and catering the legal issues that were related to the provision of justice to the employees. However, due to several ambiguities regarding the name of the Act it was renamed various times; until 1996 when it was finally named as "Workplace Relations Act 1996" (hereinafter referred to as the WRA) without changes to any of its provisions.

The provision of the WRA provided the labours and workers where they can easily put forth their issues and seek justice. There was machinery for the preventions and negotiation of the disputed issues within the industrial domain. The WRA also focused at settling the industrial disputes and allows the enforcement of the individual and collective agreements as well as broadly regulates the procedures of the employer organizations and the trade union. The act is also granting the provision of the safety of the freedom of the workers and the employers to fit in the employer organization. Moreover, the Common Wealth has passed several laws and legislations providing the public service and discouraging secondary boycotts. However, the current conservative led government is presently attempting to visibly amend the act.

The Employment Act 1955 in Malaysia on the other hand encompasses the rights of employer and employees, and also includes terms and conditions associated with the employment process. The Act has been applied in Malaysia throughout with proper specifications in regards with the environment and rules and norms of an organization. The act covers the most significant and broader issues related to the misconduct committed in the organization. The misconduct can take place in the form of violence that could cause damage and harm to any of the individual at the workplace. In the accordance with this act, the employer has the right to dismiss the any of the employee who conduct or even tend to conduct any kind of misconduct that eventually would harm the organization people or its resources. An individual would be dismiss if found on the basis of investigation engaged in wrongdoings. The employers are expected to the employers are expected to satisfy the Industrial Court that the inquiry made is sufficient and qualifies for the employee's dismissal.

Ayadurai (1996), states that misconduct has two sources that overlaps to some extent. One is the right of the employers, while the other is the responsibility of the employees. It is generally accepted that every employer has the right to establish rules and regulations governing the conduct of his employees. Among these includes areas such as attendance, insubordination, intoxication, smoking, gambling, fighting, heft, dishonesty, safety and etc.

In Liew Ken & Ors and Malayan Thung Pau Bhd, the Industrial Court observed the following:

*"The dictionary meaning of the word 'misconduct' are improper behaviour, intentional wrong doing or deliberate violation of a rule or standard of behaviour. Insofar as the relationship of industrial employment is concerned, a workman has certain express or implied obligations towards his employer. Any conduct on the part of an employee inconsistent with the faithful discharge of his duties, or any breach of the express or implied duties of an employee towards his employer would constitute an act of misconduct".*

On the basis of thorough investigation the employer must be motivated towards the employee dismissal in order to maintain safety for others at the workplace. However, the piece of law can be perceived to be reactive. In the Act, another provision highlighted the actions to be taken by employees whenever they feel threaten at the workplace. The Act's section 14(3) (3) An employee may terminate his contract of service with his employer without notice where he or his dependants are immediately threatened by danger to the person by violence or disease such as such employee did not by his contract of service undertake to run. In such a case, the provision specifies some of the actions that can be undertaken by the employees under circumstances of danger or violence threats at the workplace. On the contrary, this legislation provides a mechanism through which the employees may escape from dangerous occurrences, however, there are limited studies addressing these issues, therefore, leaving a gap for this study.

The specifications hesitated that is failed to specify other means and methods that the employees may adopt under various consequences. Indeed, the specification's intention is noble, but remains impractical because of the normal circumstances operations in which some of the employees may not find it luxurious to terminate employment. The specification does not particularly highlight the actions on compensation. Such actions are related when employees by themselves terminates the employment on the basis of coercion instinct. The Act frees the employer from being dutiful for compensation provision to the aggrieved party and there is major weakness in the specifications.

Therefore, all the Malaysian organizations must develop a relationship among the employer and the employee. Also a relationship must be developed between the employees that are specified in the Employment Act 1955 and Penal Code. The specifications mentioned in the Act provide the victims the right against threat by providing alternatives in case of projected deviance. The weaknesses compromise the effectiveness of adopting and applying the Act and the Code, as well as safety assurance in the workplace, thus, leaving a loophole to be addressed in this study. Imminent danger is construed as a deviant behaviour as it is a practice that arises to cause serious injury or death.

## 2.2 The Penal Code

In many organizations of Malaysia, two kinds of violence exist at the workplace, criminal and non-criminal acts. For example of a criminal act would be if any of the employees of an organization tries to hurt the boss or leader with a rod would be punished on the basis of criminal law. The Penal Code of Malaysia is justifiable to be adopted in case of criminal acts. Therefore, with the aid of Penal Code the offender can be charged. However, there are certain deviance behaviours that cannot be defined to operate in accordance with the Penal Code, as it also carries a reactive act part. In this part specifications are given step wise that can be implemented against an individual who has committed the crime. Also, the Penal Code has established the nature and type of punishment conducted by the wrong doers. Malaysia implements the Penal Code for addressing the deviant behaviours at the workplace.

However, the situation in India seem to differ from Malaysia wherein, under the Muslim law and the Hindu law in India, tort had a much slenderer idea than the tort of the English law. The punishment of crimes in these systems occupied a more prominent place than compensation for wrongs. The law of torts in India is mainly the English law of torts which itself is based on the principles of the common law of England. This was made suitable to the Indian conditions appealing to the principles of justice, equity and good conscience and as amended by the Acts of the legislature. Its origin is linked with the establishment of British courts in India.

The expression justice, equity and good conscience was interpreted by the Privy Council to mean the rules of English Law if found applicable to Indian society and circumstances. The Indian courts before applying any rule of English law can see whether it is suited to the Indian society and circumstances. The application of the English law in India has therefore been a selective application. On this, the Privy Council has observed that the ability of the common law to adapt itself to the differing circumstances of the countries where it has taken roots is not a weakness but one of its strengths. Further, in applying the English law on a particular point, the Indian courts are not restricted to common law. If the new rules of English statute law replacing or modifying the common law are more in consonance with justice, equity and good conscience, it is open to the courts in India to reject the outmoded rules of common law and to apply the new rules. For example, the principles of English statute, the Law Reform (Contributory Negligence) Act, 1945, have been applied in India although there is still no corresponding Act enacted by Parliament in India. This law has basic aspects of the defence of contributory negligence and it is objective in nature.

In this research case studies were chosen from a public service organization. In this research, the public service chosen is the police services to explain the phenomenon of workplace violence against women with the specific reference to the issue of sexual harassment. Around ten cases with a similar background have been cited as illustrations of offences of a sexual nature at the workplace. In each of the case the harassment is by a higher official against a woman official of a lower rank. The cases go on to display the absence of an effective redressal system to handle such issues. In most cases the victim is harassed for a period of time before seeking help.

The Vishaka guideline of 1997 which recognizes sexual harassment as an offence and has laid down the creation of a woman's grievance cell is seldom followed in any of the cases. In fact the non-adherence of these guidelines was brought into focus with case of S. K. Valli in 2004. This sensational case highlighted how sexual harassment runs rampant in the police organizations and is disregarded as trivial or as part of the job. The scenario leaves a lot to be desired requiring more stringent measures to safeguard the interests of women employees in the organization and ensure existing legislation are enacted favourably.

The development in Indian law need not be on the same lines as in England. In *M.C. Mehta v. Union of India*, Justice Bhagwati J said, we have to evolve new principles and lay down new norms which will adequately deal with new problems which arise in a highly industrialized economy. We cannot allow our judicial thinking to be constructed by reference to the law as it prevails in England or for the matter of that in any foreign country. We are certainly prepared to receive light from whatever source it comes but we have to build our own jurisprudence.

It has also been held that Section 9 of The Code of Civil Procedure, which enables the civil court to try all suits of a civil nature, impliedly confers jurisdiction to apply the Law of Torts as principles of justice, equity and good conscience. Thus

the court can draw upon its inherent powers under section 9 for developing this field of liability. It has also been held that section 9 of The Code of Civil Procedure, which enables the civil court to try all suits of a civil nature, impliedly confers jurisdiction to apply the Law of Torts as principles of justice, equity and good conscience. Thus the court can draw upon its inherent powers under section 9 for developing this field of liability.

In a more recent judgement of **Jay Laxmi Salt Works (P) Ltd. v. State of Gujarat, Sahai, J.**, observed: truly speaking the entire law of torts is founded and structured on morality. Therefore, it would be primitive to close strictly or close finally the ever expanding and growing horizon of tortious liability. Even for social development, orderly growth of the society and cultural refines the liberal approach to tortious liability by court would be conducive.

### **2.3 Occupational Safety & Health Act 1994**

Furthermore, as pointed in literature, organizations are acknowledging the seriousness of the cases of workplace violence, and are even coming up with organizational initiatives to define the culture that would discourage cases of workplace violence. Indeed, one of the current dominant approaches to fostering Occupational Health and Safety approaches has been to look to large organizations in fostering standards of health safety and occupation.

In the past, Malaysia has witnessed significant implementations to the workplace law. The enforcement of the law has led to extensive modifications and revision of Malaysia's workplace practices, achieved by significant provisions in the commercial code. In light of the Malaysian context, most of the cases regarding the workplace deviance that have been developed are ready to serve the cause for the provision of the rights that have been granted to the victims. Following up to the cases that have been encountered during the course of time, it has been observed that most of the cases are the ones that have been granted with fair and just decision in the favour of the plaintiff. On the other hand, it also has to be ensured that none of the rights of the employees or the employers are ignored. Hence, every aspect has to be considered with attention to details before landing on to a result. According to the study, it has been found that, most of the cases that have been brought up to the Malaysian courts regarding the employee laws and regulations have been considered as serious offence and the decision of the tribunal has been in direct accordance of the procedural norms that are to be followed in order to grant a fair and just decision to both of the involved parties.

In the past years various cases have been brought to Malaysian courts that had to be granted with the justice. Among them are the ones that have been fought between the companies and the employees individually. However, the cases had to be considered such that all of the aspects of the tortious laws must have been addressed to the maximum extent along with fulfilment of the needed procedures that were meant to be followed to grant the justice. Moreover, the Malaysian law tends to differ from the conventional and the classical English law; therefore, each of the clauses of the book has been made accordingly in order to regulate the law and the order situation in the country. In order to elaborate the need and the significance of the law and the regulations that have been developed, it has been felt to enlighten the issue in the light of some cases. Therefore, the researchers have highlighted some of the cases in order to understand the procedural norms of the country.

### **3.0 Discussions**

In the proper analysis of the mentioned literature, it can be said that, employees and the staff at workplace are inevitable asset that cannot be rebated at any cost. Moreover, most of the countries along with inclusion of the countries that had been discussed in the above mentioned literature have developed some serious laws to safeguard the right of the employees. The chapter has also been successful in elaborating the existing norms and the procedures that have been defined to treat the cases to the maximum extent. In the minute considerations of the facts and the figures, it has been found that all of the mentioned countries have been highly successful in addressing the needs of the daily torts.

Moreover, supplementary theories have also been highly effective in aiding the law enforcing agencies to grant the involved parties with right decision. In further context, it can also be said that, the sole judgement is based upon the act or the deed that is committed by the person. In addition, it also depends on the law that has been defined in the courts and the laws of the country. Therefore, it shall lie with the case and the judgement panel to grant with the decision with keeping in considerations of all the deeds that have been committed by the person.

### **4.0 Conclusion and Recommendation**

In order to reduce or eliminate workplace deviance to enhance business security, managers need to consider the employees reactions to organisational policies and practice, as well as the views members hold and what attract them most to the organisation. If the member's reaction to organisational practices is positive, they will be likely attracted by the harmonious relationships maintained in the workgroup. Consequently, group members may engage in deviant behaviour as a way to ventilate their dissatisfaction with the organisation or simply to retaliate upon their peers. In order to avoid this situation, managers need to build a trusting environment. When group members show high positive reactions to their organisations they tend to perform their jobs better with little or no supervision, as suggested by our findings.

## REFERENCES

- Ayadurai, D. (1996), *Industrial Relations in Malaysia: Law and Practice*, Malaysian Law Journal: Kuala Lumpur.
- Bennett, R.J., and Robinson, S.L. (2003). The past, present and future of workplace deviance research, In J.Greenberg (Ed.) *Organisational behaviour: The state of the science*, (2nd Ed.) Lawrence Erlbaum. <http://dx.doi.org/10.1037/0021-9010.85.3.349>
- Gomez, AB, (1997), *Malaysian Industrial Court Precedent*, A B Gomez: Petaling Jaya
- Griffin, R.W. and Lopez V.P, (2004). *Toward a mode of the person-situation determinants of deviant behavior in organizations*. Academy of Management. New Orleans.
- Kidwell, E., (2005). *Sears Automotive*. In Kidwell and L.C Martin (eds) *Managing Organizational Deviance*. Thousand Oaks California; Sage Publications.
- Parasuraman, B, (2004), *Malaysian Industrial Relations: A Critical Analysis*, Pearson Education: Kuala Lumpur.
- Pathmanathan, N, Kanagasabai, SK and Alagaratnam, S, (2003), *Law of Dismissal*, Capital Asia Pte Limited: Singapore
- Thavarajah, T, and Low, TC, (2001), *Employment Termination Law &Practice in Malaysia*, CCH Asia Pte Limited: Singapore
- Vardi, Y. and Weitz, E. (2004). *Misbehavior in organizations: Theory, research and management*. Mahwah: Lawrence Erlbaum Associates.
- Workplace Relations Act 1996 Part 12, Division 4[635]; Fair Work Act 2009 Part 3-2, Division 3[385]).
- Fair Work Act 2009 (Cth). Available at: <http://www.alrc.gov.au/publications/16-fair-work-act-2009-cth/fair-work-act-2009-cth>

## INDIA

- Occupational Health and Safety Act (India) 1948
- Indian Penal Code 1860
- Employment Act (India) 1946

## MALAYSIA

- Employment Act 1955 (Act 265)
- Penal Code Act 574
- Occupational Health and Safety Act 1994 (Act 514)

AMBIKAI S THURAISSINGAM<sup>a\*</sup>

<sup>a</sup>Taylor's University

e-mail: [ambikai.sthuraisingam@taylors.edu.my](mailto:ambikai.sthuraisingam@taylors.edu.my)

ZAHIRA MOHD ISHAN<sup>b</sup>

<sup>b</sup>University Putra Malaysia