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ADVOCATES AND SOLICITORS



Speaker
Naveen Joshua
Senior Associate



Speaker
Tharani Kunasekaran
Associate



Moderator
Aishah Rahim
Associate

Wed 28 May 2025

3:00 pm (GMT +8)

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MWKA ONLINE TALKS

**Termination of Employment and Claims
for Wrongful Dismissal**



DATO



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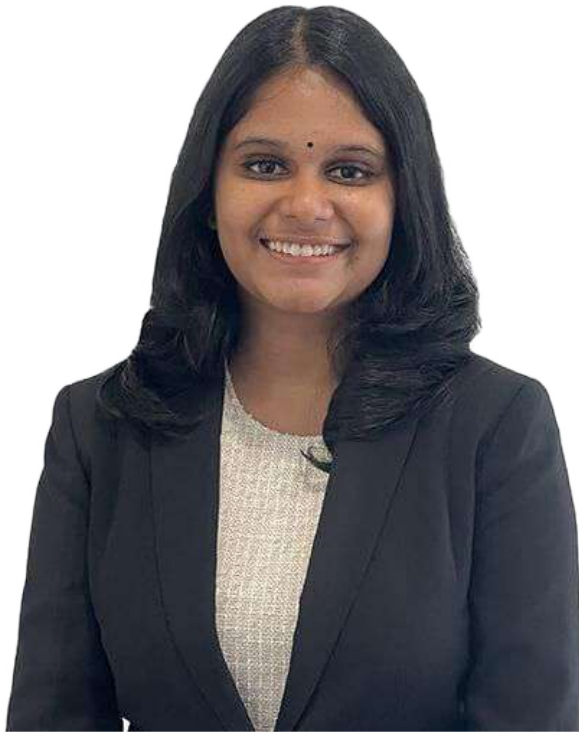
Naveen Joshua

Senior Associate

- ❖ Admitted to the Malaysian Bar in April 2017
- ❖ Senior Associate in our Dispute Resolution, Employment Law & Industrial Relations and Individuals & Families departments
- ❖ Areas of practice includes the laws on employment and industrial relations advisory and litigation matters as well as general litigation which includes contractual disputes and debt recovery

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Tharani Kunasekaran

Associate

- ❖ Associate in our Dispute Resolution Department
- ❖ Graduated with a Bachelor of Laws (Honours) from the University of Liverpool in July 2021 and subsequently completed Bar Practice Course (BPC) and LLM from the University of Law in 2022.
- ❖ Admitted to the Malaysian Bar in March 2024
- ❖ Areas of practice includes medical law, personal injury cases, employment law, etc.

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Talk Points

- Malaysian Laws on Dismissal:
 - The Common Law's Position on Employment Relationship;
 - Industrial Relations Act 1967
 - Employment Act 1955
- Misconduct and Summary Dismissal
- Conducting Domestic Inquiries
- Alternatives to Dismissal

The Common Law Position's on Employment Relationship

The Contract & Notice Period

- A contractual relationship between employer and employee and contains the rights and obligations of both parties.
- Termination can be exercised by giving notice or paying salary in lieu.
- If the contract is terminated by the employer by breaching the terms and condition, the employee can sue for breach of contract.
- If the notice period is not expressly mentioned in the contract, the Court can make an inference as to what would amount to reasonable notice, based on the prevailing labour laws of the Country.

Breach of Employment Contract

- If Employee is guilty of gross misconduct, employer has the right to dismiss without notice or salary in lieu;
- Employee cannot claim damages for wounded feelings, loss of reputation, or reinstatement at common law.
- Remedy is limited to damages for lack of notice (salary equivalent).
- If the employee could have quickly found another job, the damages may be reduced

Common Law Remedies - Case Laws

- ***Shell Malaysia Trading Sdn Bhd v Sathiaval a/l Maruthamuthu***
[1998] 1 AMR 454
 - Courts will not grant specific performance (i.e., compelling reinstatement);
 - An employer has the right to dismiss an employee even if it breaches the employment contract;
 - The only remedy available to the wrongfully dismissed employee is to sue for damages, not reinstatement

Common Law Remedies - Case Laws

- ***Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors [1981] 1 MLJ 238***
 - Distinguishes common law remedies from remedies available under the Industrial Relations Act 1967.
 - Reaffirmed the principle that damages for wrongful dismissal are generally limited to what the employee would have earned during the notice period.
 - Reinstatement not a common law remedy.
 - Reinstatement claims must be done through the Industrial Court within 60 days under Section 20 of the Industrial Relations Act.

Fixed-Term Employment Contracts:

- Contract automatically terminates upon:
 - The expiry of the agreed period; or
 - The completion of the specific task.
- If an employer prematurely ends a fixed-term contract:
 - Employee may sue for breach of contract;
 - would generally be entitled to damages;
 - Damages would be the total salary the employee would have received for the balance of his contract period.

Fixed-Term Employment Contracts:

- ***Celcom (Malaysia) Bhd v Chin Chun Yean [2008] 3 ILR 462***
 - Fixed-term contracts can be terminated prematurely if parties contractually agreed (with compensation).
 - In this case, the claimant received compensation under the contract and thus the Court decided that there no unfair dismissal.

Industrial Relations Act 1967

(IRA 1967)

Objective

- Regulates relations between employers, workers, and unions.
- Focused on settling disputes and maintaining industrial peace.

Major Amendments to IRA 1967

- Minister's role removed.
- Director General of Industrial Relations (DGIR) now refers cases automatically if settlement fails.
- Industrial Court may impose 8% interest on monetary awards.
- The claim can continue via next-of-kin, if the employee dies in the process
- Statutory right of appeal against Industrial Court awards introduced

New Process under Section 20 IRA 1967

- Any workman dismissed without just cause or excuse can file a claim under Section 20.
- To be filed 60 days of dismissal or expiry of notice.
- A representation is filed at the nearest DGIR office, which attempts conciliation and, if unsuccessful, refers the case to the Industrial Court.

New Process under Section 20 IRA 1967

- No advocates or solicitors are allowed to represent the employee during the conciliation stage.
- Employees and Employers can be represented by:
 - Themselves;
 - Trade union officials; or
 - Other authorized persons (non-lawyers).

Definition of "Workman"

Section 2 IRA 1967:

- A workman includes:
 - Employees (including probationers and expatriates) engaged under a contract of employment.
 - Dismissed, discharged, or retrenched workers.
 - anyone engaged by a contract of service instead of a contract for services

Date of commencement of employment

- ***Kuala Lumpur City Securities Sdn Bhd v Elizabeth Voo Sook Ling [2003] 2 ILR 570***
 - The candidate delayed reporting for the job, leading the company to withdraw the offer before she commenced work.
 - Court held that:
 - Although oral assurances were given, she had not commenced employment.
 - Without starting work, she was not yet a "workman" under Section 2 IRA 1967.
 - Thus, she had no right to file a dismissal claim under Section 20.

Remedy of Reinstatement under Section 20 IRA 1967

- Primary remedy for wrongful dismissal under the Industrial Relations Act is reinstatement.
- Employee who feels they were terminated or dismissed without just cause or excuse may:
 - Lodge a complaint with the Director General of Industrial Relations;
 - Request reinstatement to their former position

Remedy of Reinstatement under Section 20 IRA 1967

- Reinstatement includes returning to the same employment position with no loss of salary, seniority, or other employment benefits.
- Reinstatement is not automatic and is the Court's discretion.
- The Industrial Court may order compensation in lieu of reinstatement plus backwages if reinstatement is impractical.
- Reinstatement is denied when the employee has already reached retirement age.
 - ***Hj Mohd Ison Baba v Swedish Motor Assemblies Sdn Bhd.***

Time-frame for filing a Claim for Wrongful Dismissal

- The dismissed employee must file the complaint within 60 days from:
 - The date of dismissal, or
 - If dismissed with notice, within 60 days after the expiry of notice period.
- failure to comply with the time frame would result in the claim being time-barred and thus cannot proceed.
- ***UMW Toyota (M) Sdn Bhd v Chow Weng Thiam [1996] 5 MLJ 678.***

Calculation of Backwages

- Backwages are calculated from date of dismissal to the date of award.
- Subjected to the 24-month cap for confirmed workers (12 months for probationers).
- Court can also consider reductions if the employee earned alternative income during dismissal period.
- Calculation of backwages includes:
 - basic salary;
 - potentially fixed allowances; and
 - discretionary bonuses that are contractually guaranteed.

Calculation of Backwages

- ***Great Eastern Mills v Ng Yuen Ching [1998] 6 MLJ 214***
 - Scaling down backwages due to alternate income is not mitigation in a strict legal sense but it's an adjustment to fairness.
- ***Dr. James Alfred v Koperasi Serbaguna Sanya Bhd [2001] 3 CLJ 541*** - Reinforced that backwages may be discounted if alternative income is proven.
- ***Chua See Gee v Fuji Xerox Asia Pacific Pte Ltd & Anor***
 - High Court held that the Company had treated commissions as part of monthly wages and as a result ordered that sales commissions be included in the calculation of backwages

Employment Act 1955

Director General's power to inquire into complaints

- Can inquire and conclude any disputes between the employee and employer such as follows:
 - wages and other types of payments;
 - any term of the contract of service
 - any provisions that fall under EA 1955 or its Regulations; or
 - any provisions that fall under the National Wages Consultative Council Act 2011 and its orders.

Director General's power to inquire into complaints

- The DG can hear and conclude on claims by
 - An employee who falls within the definition of 'Worker' under Section 33 of the Employment Act 1955.
 - a contractor for labour against a contractor or sub-contractor, or
 - an employer against his/her employee(s) in respect of indemnity due to such employer under s. 13(1) of the Employment Act 1955.
- Inquire and confirm or overturn any decision made by the employer under Section 14(1) of the Employment Act 1955.

Procedure of the Inquiry

- A complainant submits a written or verbal complaint to the Director General (DG), who examines them.
- The DG then decides whether the complaint merits investigation.
- If so, the DG notifies the person complained against, providing details of the complaint and hearing.
- Both parties may bring witnesses.
- DG examines witnesses
- May proceed in the absence of any summoned party who fails to attend.
- The DG's decision is recorded in a prescribed order, enforceable by the court.

Employer's rights

- Burden is on the employee to prove that he did not commit any misconduct and that the termination entitles him to indemnity in lieu of notice under s.12 of the Employment Act 1955 and termination benefits.
- Under Section 14(1) of the Employment Act 1955, the employer has the right to
 - dismiss the employee without notice;
 - downgrade the employee; and
 - impose lesser punishment if it is just and fit on the grounds of misconduct.

Domestic Inquiry

- Due inquiry:
 - A prerequisite before imposing punishments for employee misconduct;
 - Amounts to an investigation to confirm the employee committed the misconduct; and
 - Does not necessarily require a formal domestic inquiry

Failure to Hold a Domestic Inquiry

- Failure to conduct a domestic inquiry is not fatal to the company's case if litigated before the Industrial Court.
 - ***Dreamland Corporation (M) Sdn Bhd v Choong Chin Sooi & Anor [1988] 1 MLJ 111***
- Breaches of natural justice can be cured in a subsequent Industrial Court hearing.
 - ***Syarikat Hong Leong Assurance Sdn Bhd v Wong Yuen Hock [1995] 2 MLJ 753***

Employee's Right to be Heard

- 'Due inquiry' includes the employee's right to respond to proposed punishment
- Employees must be given a fair hearing, including the chance to make a plea in mitigation.
- Denying the opportunity to plead in mitigation is a partial denial of 'due inquiry'.
- Employees should be allowed to present arguments on both liability and penalty.
- Monetary limits under the law provide statutory protection for lower-income workers against arbitrary dismissal.
- The rule of audi alteram partem (natural justice) requires that no one be punished without being heard.

Misconduct & Summary Dismissal

Defining Misconduct

- An act or omission which violates or affects the employee's expressed or implied obligations to the Company
- Related to employees' duties at work and his position as an employee of the Company outside of work
- Behavior affecting the Company's image or reputation

Defining Misconduct

- ***Azahari Shahrom & anor v Associated Pan Malaysia Cement Sdn Bhd [2010] 1 ILR 423, 436***

“It is trite that the association between employer and employee out of necessity is fiduciary in nature. There has to be mutual trust and confidence that one would deal with the other in all fairness and rectitude over the rights and obligations flowing between the parties under the employment agreement. If one does an act or commits an omission which is inconsistent with that fiduciary relationship, then that act or omission will be mala fide ...”

Types of Misconduct

- Tardiness, Attendance and Mannerisms at Work
 - Persistent tardiness at work without justification or prior notification
 - Absenteeism without approval
 - Running personal errands during work hours
 - Disrupting others in the workplace
 - Negligence of duty at work resulting in losses to the Company
 - Insubordination

Types of Misconduct

- Disregard for Company Safety and Security Measures
 - Non-compliance with security measures
 - Tampering with safety devices or machinery
 - Gross disregard for Company Safety Procedures, endangering others
 - Being under the influence while at work
 - Falsification of records

Types of Misconduct

- Confidentiality Breaches
 - Sharing private information about finances, business practices and customer relationships
 - Failure to return Company property when requested
 - Wilful damage to Company Property
 - Improper usage of Company IT facilities
 - Theft
 - Fraud

Case Study

- ***Sebastian Matthias Boehme v Siemens Malaysia Sdn Bhd* [2017] 3 ILR 50**

- Employee was drunk, misbehaving at the hotel bar and sexually harassing and assaulting the hotel staff and guests
- Employee argued that the incident happened after office hours and thus, had been personal and done on his own time
- Dismissal was done with just cause or excuse
- By his actions, employee had shown himself to be a staff of the company who could not be trusted to uphold its values.
- Employee had potentially exposed the company to legal risk and harmed its reputation.

Case Study

- ***Mattel Tools Sdn Bhd v Anuar bin Hassan* [1995] 1 ILR 783**
 - Employee was dismissed for being drunk and misbehaving at the company's annual dinner
 - Dismissal was held as unfair because another senior manager who was also drunk and misbehaving was let off with just a warning
 - Employee had misbehaved at an important function of the company and thereby tarnishing the image of the company. Court deducted 50% from the total amount of compensation awarded to the employee for his misbehaviour.

Case Study

- ***Ngiam Geok Mooi v Pacific World Destination East Sdn Bhd [2016] 3 ILR 229, CA***
 - Employee was dismissed due to insubordination to superior's orders
 - *refused to follow her superior's instructions to make payment for a corporate expense and make adjustments to the company budget*
 - *wrote an email saying she would no longer report to the superior*
 - Although found guilty of insubordination, Industrial Court held that the punishment of termination from service was too harsh a penalty
 - Single act of insubordination and the first misconduct in the employee's 20 years of service

Summary Dismissal

- Swift dismissal without notice/payment.
- Burden is on the employer to prove that dismissal was just cause and excuse.
- Dismissal must be justified based on facts.
- ***Telekom Malaysia Kawasan Utara v Krishnan Kutty Sanguni Nair [2002] 3 MLJ 129*** - the case has to be proved on a balance of probabilities like in civil cases even when the ground of termination is a dishonest act.

Grounds for Summary Dismissal

- Grounds for misconduct
 - Gross misconduct (ie; Dishonesty, Cheating);
 - breach of trust;
 - criminal behavior (ie; Theft, Sexual Harassment, giving or taking bribes); and
 - serious insubordination
- For acts of misconduct outside the scope of employment, whether it would affect the employee's ability to perform duties or employer's reputation.

Case Laws

- ***Malaysian Airline System Bhd v Ritzerayan Abdul Rashin & Ors [1998] 3 ILR 971***
 - Court held that although the Claimant's dismissal were based on circumstantial evidence, it was strong enough to point to their guilt.
 - "The conduct of the claimants was **a breach of the company's guidelines and tantamount to an act of fraud. It was misconduct which justified summary dismissal**"
- ***Aminuddin Baki @ Sabtu Esa v Scan Associates Berhad [2016] 2 LNS 0801***
 - To establish criminal breach of trust, the prosecution need not prove the exact mode of misappropriation, **as long as it shows that the accused was entrusted with property and dishonestly failed to account for it, breaching an obligation.**

Case Laws

- ***Samba Murali Krishna v Malaysia Airlines Berhad [2021] 2 LNS 0916***
 - “The Company was justified in its action to dismiss the Claimant from service as he had committed a serious act of misconduct. The **Claimant's conduct had clearly breached his fiduciary relationship with the Company**, which is one of trust when he committed the act of sexual harassment against COW-1”
- ***Mohammad Zamani Ibrahim v ARH Jurukur Bahan Sdn Bhd & Anor [2022] 1 LNS 2387***
 - “From the above incident, it is clear that the **refusal of the Applicant to adhere to a lawful and reasonable order given by his superior is a serious act of misconduct and amounted to insubordination** on the part of the Applicant.”
 - “The Claimant by not adhering to the lawful and reasonable order given by his superior COW-5, to come back into the meeting room and sit down has breached a fundamental condition of his employment”

Employer Bound by Reasons in Dismissal Letter

- Only reasons stated at dismissal time are relevant.
- Grounds that are relied upon by employers which are not mentioned in the termination or dismissal letter will not be considered as genuine and will be regarded as afterthought.
- Valid reasons or grounds that the employer was aware of beforehand but were not mentioned in the termination letter will not be considered by the court.

Employer Bound by Reasons in Dismissal Letter

- ***Goon Kwee Phay v J & P Coats (M) Sdn Bhd [1981] 2 MLJ 129***
 - Court must decide based only on the employer's stated reasons.
- ***Maritime Intelligence Sdn Bhd v Tan Ah Gek [2021] 4 ILR***
 - The Federal Court held that post-dismissal discoveries cannot be used to justify the dismissal.
 - However, post-dismissal discoveries are relevant for the assessment of compensation and remedies.

Domestic Inquiry

Domestic Inquiries

- Section 14 (1) Employment Act 1955
 - Employer may on the grounds of misconduct terminate an employee without notice, downgrade the employee or impose any other lesser punishment as he deems just and fit after **due inquiry**.

Domestic Inquiries

***Jeana Yeo See Nah v. Virgoz Oils & Fats Sdn Bhd Industrial Court
Kuala Lumpur [2021] 1 ILR 516***

- A domestic inquiry is part of an internal process conducted by an employer to investigate whether an employee has committed an act of misconduct
- The Employment Act 1955 states that an employer can only punish the employee if they have conducted “due inquiry”. The Act does not define what is “due inquiry” and it does not necessarily mean that an employer must conduct a formal domestic inquiry. What is important is that the employer must investigate the matter fairly.
- In some cases, even discussing with the employee in question can be considered as “due inquiry”

Types of Suspension

- Pre-inquiry suspension
 - Allowed under Section 14(2) of Employment Act 1955 for a maximum of 2 weeks with at least half wages.
- Punitive suspension
 - Post-inquiry punishment - limited to 2 weeks without wages under Section 14(1)(c) Employment Act 1955.

Nature of Suspension

- To enable a fair and unprejudiced investigation
- Only the primary job duties are suspended
- Employee is still entitled to all the benefits
- The employee remains contractually bound:
 - Must be available for investigation.
 - Cannot take leave, travel, or work elsewhere without approval.
 - Cannot access company files or premises (unless directed).

Show-Cause Letter

- To give the employee a chance to explain allegations before formal charges.
 - The letter must be specific, detailing date, time, and nature of misconduct.
 - Best Practices:
 - Allow adequate time (7–14 days) to respond.
 - Poorly drafted or vague letters can void the dismissal.
- ***Esso Production (M) Inv v Maimunah bte Ahmad & Anor [2002] 2 MLJ 458.***

Domestic Inquiry Procedures

- Formation of Panel:
 - At least 3 impartial members of higher rank.
 - Must not be involved in the investigation.
- The employee should be allowed to enter his plea and given an opportunity to defend himself. For employee's with a Union, they can have their Union representative present during the inquiry.
- If the employee fails to attend the inquiry, the panel should adjourn it to another date.
- If the employee still fails to turn up, the panel may proceed ex parte.

Domestic Inquiry Procedures

- Documentation
 - Notes of the domestic inquiry should be taken down in verbatim
 - Transcripts of witness statements should be signed by witness
 - Findings by the panel should be in writing and submitted to the management.
 - Panel should not make recommendations in respect of the punishment. Only their findings as any decision should be made by the Management.

Guidelines and Best Practices

- Charges must be drafted precisely with details of misconduct
- Panel members should not be investigating officers or prosecuting officers
- Investigating officers must not be related to the incident or the individuals involved
- Right to be heard - accused employee should be given full opportunity to present his case, including the evidence to support his arguments
- Proceeding of the DI must be recorded and transcript of the proceeding must be verified and signed by the accused employee
- Panel members may ask clarifying questions during the proceeding
- Panel members should consider and analyse all available facts and evidence before finding whether the employee is guilty or not

Summary of Domestic Inquiry

- Search for truth, facts, or circumstances concerning charges alleged by the employer against its employee.
- It is an inquiry created by the management against its own employee who allegedly committed certain acts of misconduct.
- The process begins after the issuance of the "show cause" letter to the accused employee.
- Once the response to the show cause letter is unsatisfactory, the employer can commence Domestic Inquiry.
- Domestic Inquiry is merely a fact-finding exercise. It does not decide on the disciplinary action or punishment to be taken against the employee.

Alternative to Dismissal

Warning

- Acts as a precursor to a dismissal
 - Appropriate in cases of absenteeism or late-coming
 - Must be documented
 - Repeated final warnings should be exercise with caution.
- ***Jaffnese Co-operative Society v Kamal Loshanee a/p Ambalavanar***
- High Court held that past warnings were relevant and cannot be considered as spent.

Transfer

- Must not constitute a change in the employee's salary, position and benefits.
- Circumstances where it is appropriate to transfer the employee:
 - Where the employee is a poor performer;
 - Employee is alleged to have committed a misconduct and the company has no sufficient evidence to prove it.

Other alternatives

- Suspension
- Demotion
- Withholding increments or annual bonus
- Fines

Doctrine of Condonation

An overview on the Doctrine of Condonation

- Condonation occurs when an employer, with full knowledge of an employee's misconduct, chooses to retain them
- The employer must have complete awareness of the misconduct for condonation to apply
- By retaining the employee, the employer waives the right to punish the employee for the misconduct
- Condonation can be expressed through direct forgiveness or implied by inaction

Plea of Condonation

- A claimant who wishes to rely on the principle of condonation must expressly plead the same in his or her pleadings
 - ***Malaysian Airline System Bhd v Ritzerayan Rashid & Ors [1998]***
- However, where the issue of condonation is raised without objection and fully argued at the trial court, condonation may be relied upon notwithstanding the fact that it was not pleaded
 - ***National Union of Plantation Workers v Kumpulan Jerai Sdn Bhd [2000]***

Case Laws (Condonation)

- ***District Council v Vithal Vinayak AIR 1941 Nag 125 HC***
 - Once a master has condoned any misconduct, they cannot go back upon his election to condone and claim a right to dismiss the servant or impose any other punishment in respect of the offence which he has condoned.
- ***Mohamad Azlan Mohamad Noor v Rawang Specialist Hospital Sdn Bhd [2022] 2 LNS 2047***
 - The Claimant contended that the Company knew about his wrongdoings but decided not to do anything about it and relied on the defence of condonation.
 - The Industrial Court dismissed the Claimant's claim against the Company, as there was no evidence that the Company had full knowledge of the Claimant's wrongdoings
- ***Booi Kim Lee v Menteri Sumber Manusia & Anor [1999] 3 MLJ 515***
 - A delay of approximately one month in commencing disciplinary action was held by the High Court as not constituting condonation.

Case Laws (Condonation)

- ***Chong Fui Thung V. Sena Diecasting Industries Sdn Bhd [2024] CLJU 487***
 - The Court of Appeal had stated as follows:-
 - (2) The HCJ's reasoning that the concept of **condonation applied equally to a workman was misconceived**. The concept of condonation **could not be applied vice versa in that it could not apply against an employee**.
 - [28] ... the concept of **condonation** is an **established principle** which **functions as a "shield" for an employee in a wrongful dismissal case**. The concept of condonation works against an employer for not taking action, whether expressly or impliedly, against the employee for his/her misconduct in the first available opportunity. Any inordinate delay in taking action or "long delay, may, when coupled with some other circumstances, amount to strong evidence of condonation on the part of the employer of the employee's misconduct" (M Sentivelu R Marimuthu v. Public Service Commission Malaysia & Anor [2005] 3 CLJ 778, p. 784, CoA)

Questions?

Upcoming Talks

Date	Topic	Speakers
11 June 2025 (Wednesday)	Common Property Disputes: Recovering or Defending Ownership Claims	Kirbasyini Chandran
18 June 2025 (Wednesday)	Understanding Your Options under Shariah Estate Planning (Wasiat & Hibah)	Anis Mohd Sohaimi & Mira Mashor
25 June 2025 (Wednesday)	Cryptocurrency and Anti-Money Laundering Risks: Trends in Malaysia	Agalya J Munusamy & Kirthika Padmanapan



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Thank you!

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