

# Remote Working - How to manage employees' performance and disciplinary issues?

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# Remote Working

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- telecommuting or commonly now known as “Work From Home” (WFH)
- Work from home and to communicate by phone, email, computer, online platform and remote communication technology.



# Topics of Discussion

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**1.0** Unsatisfactory Work Performance

**2.0** Misconduct

**3.0** Disciplinary Proceeding



# Basic principles of law governing Unsatisfactory Work Performance

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- i. that the employee was **warned** about his unsatisfactory performance
- ii. that the employee was **accorded sufficient opportunity** to improve and
- iii. that notwithstanding the above, the **employee failed to sufficiently improve** his performance

(Nestle Manufacturing (Malaysia) Sdn Bhd v Mahkamah Perusahaan Malaysia & Anor [2020] 1 LNS 653)



# Industrial Relations Act 1967 – Section 30

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*(4) In making its award in respect of a trade dispute, the Court shall have regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries.*

*(5) The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.*



# Work From Home: Challenges

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- **No idea how to perform work from home**
- **No appropriate working tools or gadgets**
- **Inconvenience: Turning house into a workplace**
- **Distraction from children/immediate family**
- **No teamwork support**



# Case Studies

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## 1. **Ginder Singh Transport Co Sdn Bhd v Bijir Singh Juala Singh [1995] 1 ILR 516**

*“An employer ought in the first place to ascertain the causes for the employee’s poor performance. Some of the causes may be attributable to the company’s own weaknesses or inefficiencies in the system of its operations. The claimant may not have been given right training or the equipment to do the task assigned to him. He might not have been adequately instructed as to what was expected of him.”*



## Case Studies (cont'd)

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### 2. *I.E. Project Sdn. Berhad v Tan Lee Seng* [1987] 1 ILR 165

*“The Claimant had performed his task to the best of his ability. If he was prevented from doing his task properly, it was purely because of insufficiency of manpower or lack of spare-parts...”*

### 3. *Hong Leong Islamic Bank Berhad v Azhar Abdullah & Anor* [2020] 1 LNS 140

- Targets set for performance improvement plan were significantly higher
- Short period to achieve the targets
- The branch was understaffed

# **Remote Working – Managing Unsatisfactory Performance**



# Employer's responsibilities

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## Working at the office

- Desktop, working desk, office chair, internet connection, guidance, communication

## Remote working

- What is required?



# Unsatisfactory Work Performance

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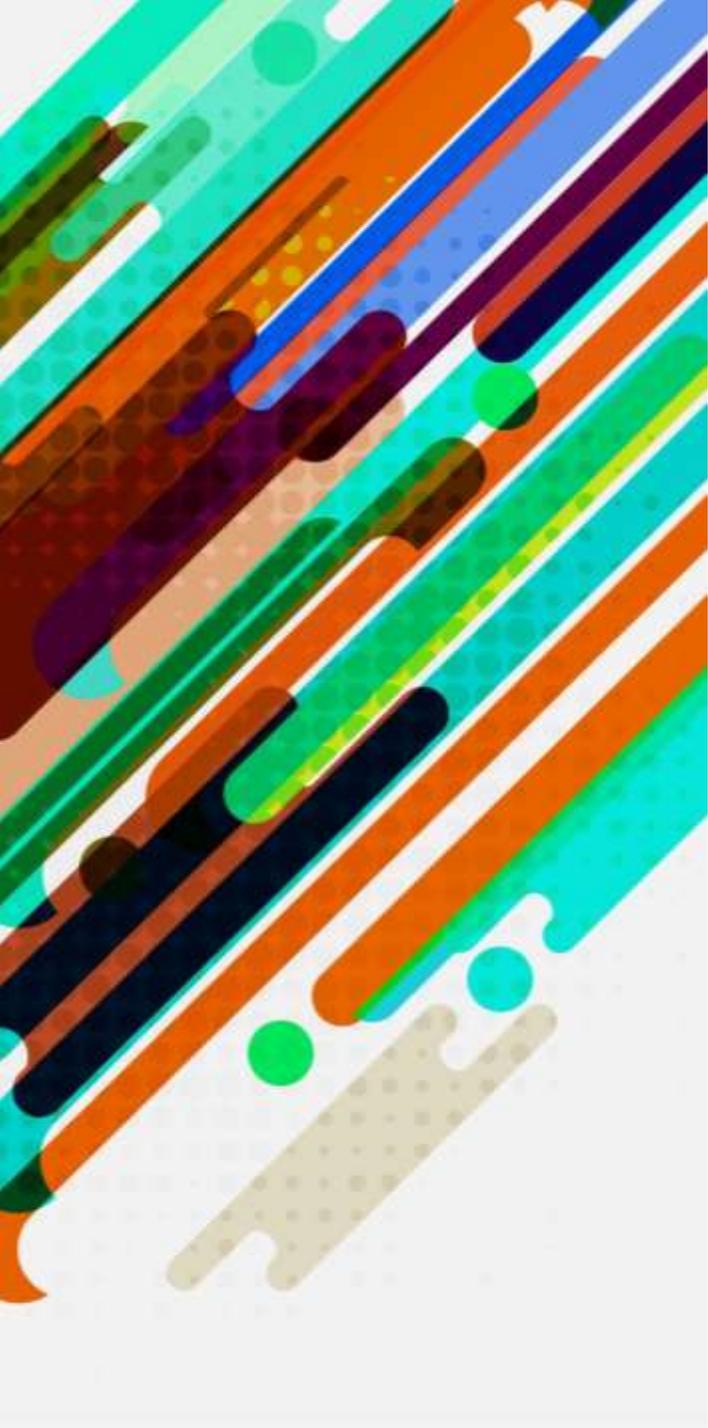
- Not engaging in one's tasks and producing work of a poor quality
- Inability to comply with the required work hours and schedules
- Not contactable/ Taking a disproportionately long time to respond to emails or calls
- Failing to attend online meetings



## Before assessing the performance of employees who work from home, what does the employer need to do?

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1. Draw up and communicate the expectations at the outset clearly - work from home policy?
2. Provide right type of equipment or facilities
3. Provide adequate instruction or training
4. Provide additional means of communication
5. Consider whether there could be other factors contributing to the poor performance
  - whether the employee has a proper working environment at home
  - whether the employee needs to take care of children at home



# Recommended Practice

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## 1. Appraisal

- Tell precisely the aspects in which the employee is failing
- Ascertain the causes of inability to perform
- Attend to the problem

## 2. Minute the appraisal / evaluation, and the **report shall be sent to the employee to confirm the matters discussed**



## Recommended Practice (Cont'd)

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3. Issue **a written warning** to the employee about his poor / unsatisfactory performance, and shall:
  - refer to the appraisal/evaluation report;
  - warn of the possibility or likelihood of dismissal on this ground
  
4. Keep **records** of all documents and correspondences, either physical or electronic communication, which are related to the employee's work performance

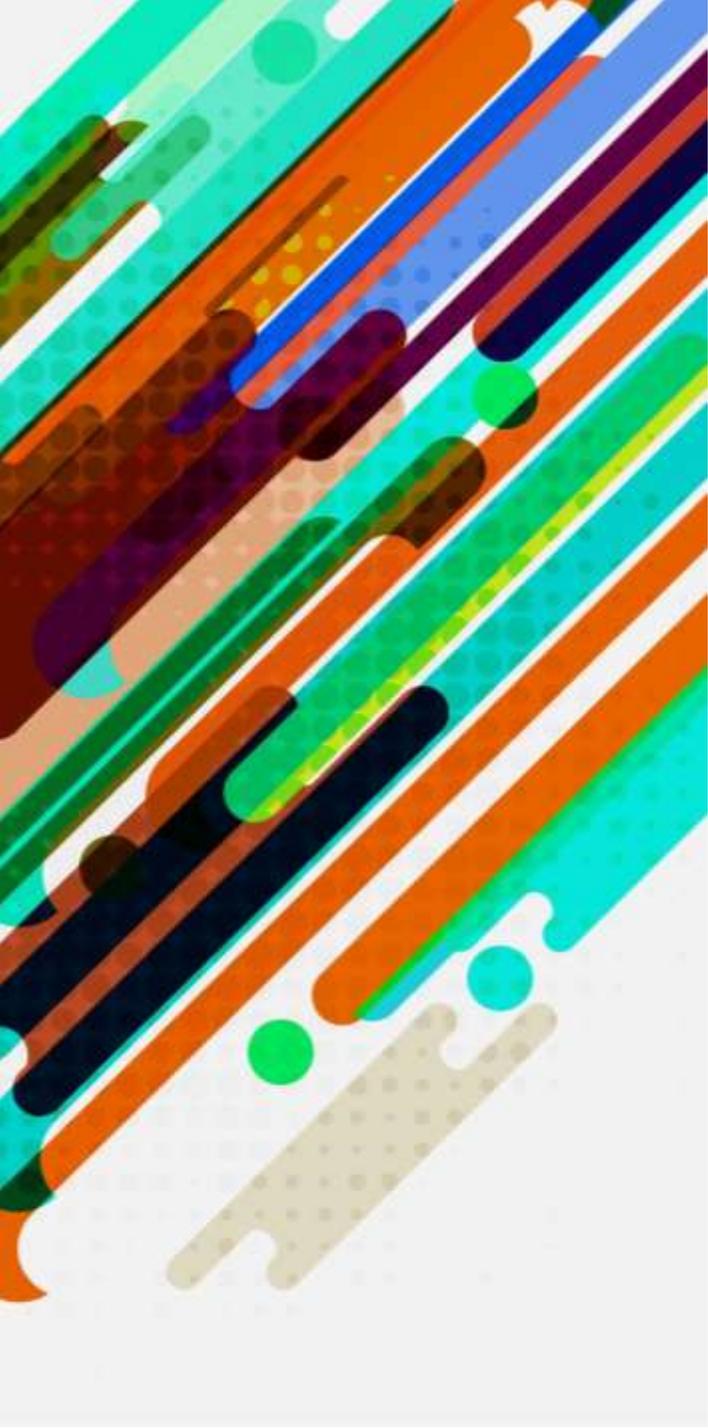


## Probationer – WFH Context

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- It is opened to the employer whether to confirm the employee at the end of the probationary period, so long as the employer is reasonably satisfied that the employee is not suitable for the job
- Suitability – performance, conduct, behaviour, aptitude, attitude, competence

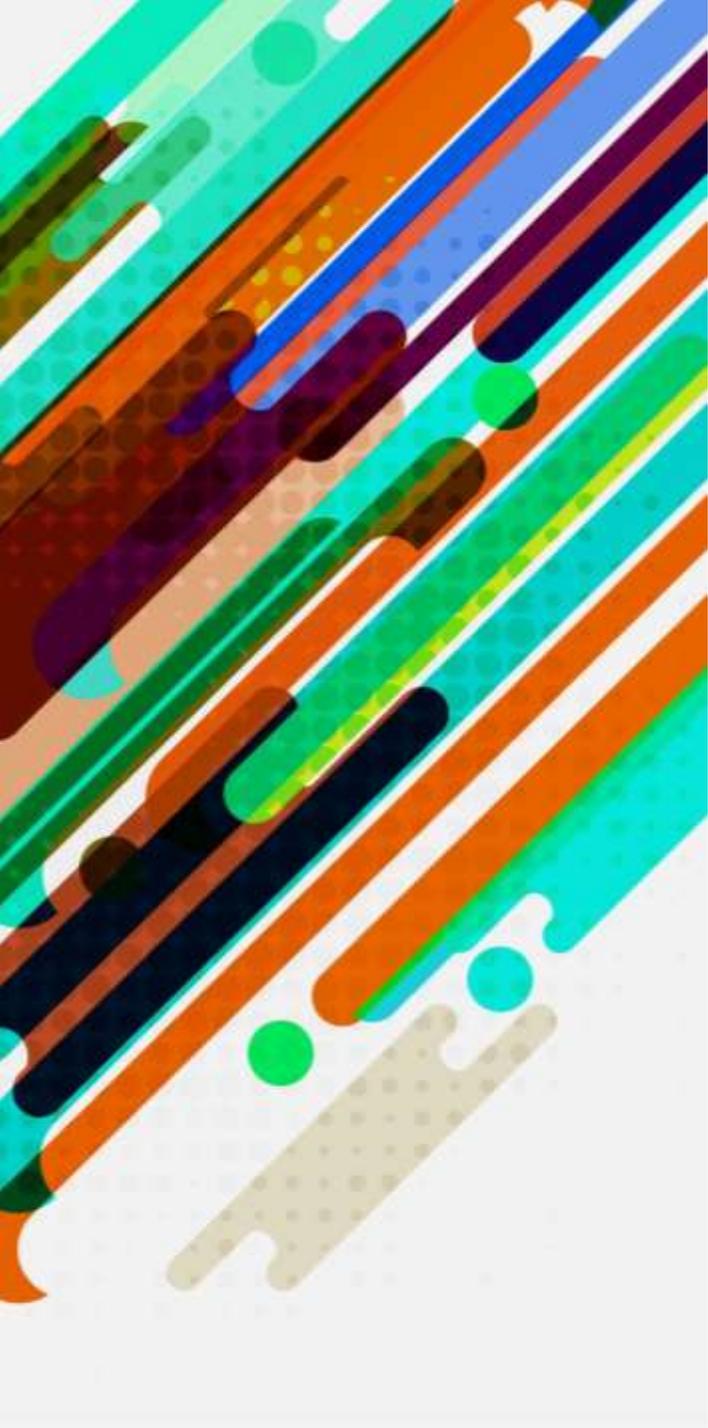
**Equatorial Timber Moulding Sdn Bhd, Kuching v John Michael Crosskey [1986] 2 ILR 1666**



## What to take note of?

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- **Make sure the probationer understand his/ her real job scope**
- **Provide sufficient guidance**



# ***Catherine Law Cheng Gaik v Sawai Land Sdn Bhd*** [2018] 4 ILR 123

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- She was directed by various individuals in the company to do a variety of work and even for associate companies
- She was never briefed about her role as an administrator
- The immediate superior had not been delegating any job functions or monitored her progress
- No guidance nor appraisals

**Held: Unfair labour practice to accuse poor performance.**

# **Remote Working – Managing Employee’s Misconducts**



# What constitutes misconduct

## - WFH Context

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- Failure to comply with the working hours
- Attend to personal matters during office hours without taking leave
- Breach of confidentiality
- Malingering – feign sickness to avoid performance of work such as attending meetings
- Failure to comply with SOPs – damaging company's reputation?
- Waiting for test result and the need for quarantine
- Refusal to get vaccinated



## PELAN PEMULIHAN NEGARA – FASA 1 SEKTOR PENGILANGAN DAN PEMBUATAN

Dikemaskini pada 17 Ogos 2021

### Merangkumi

- Pengilangan dan pembuatan dalam sektor ekonomi perlu.

### Aktiviti Yang Tidak Dibenarkan

- Sila rujuk kepada Senarai Aktiviti yang Dilarang di dalam SOP Am PPN
- Operasi di kawasan PKPD.

### Arahan Tetap

- Peraturan 16 P.U. (A) 293/2021.
- Akta 342.
- Ordinan Darurat (Pencegahan dan Pengawalan Penyakit Berjangkit) (Pindaan) 2021.
- Tertakluk kepada peraturan di dalam SOP umum MKN mengenai PPN Fasa 1.
- Tertakluk kepada peraturan pihak berkuasa tempatan yang berkuatkuasa.

Waktu Beroperasi:

24 jam

Waktu Kehadiran Pelanggan:

Normal

Kapasiti Pekerja:

- Rujuk jadual di muka surat 12

### AKTIVITI DAN PROTOKOL

Tindakan	Penerangan Ringkas								
Aktiviti Pengilangan dan pembuatan yang dibenarkan mengikut kadar vaksinasi lengkap (2 dos) bagi setiap syarikat	<ul style="list-style-type: none"> <li>• Syarikat yang telah mencapai kadar vaksinasi berikut dibenarkan beroperasi pada semua fasa PPN (walaupun tidak tersenarai dalam senarai aktiviti di muka surat 15) mengikut kapasiti yang ditetapkan dibawah::</li> </ul> <table border="1"> <thead> <tr> <th>Kadar Vaksinasi Lengkap (2 dos vaksin)</th> <th>Kapasiti Operasi di Semua Fasa PPN</th> </tr> </thead> <tbody> <tr> <td>40% - 59% dari jumlah pekerja berdaftar</td> <td>60%</td> </tr> <tr> <td>60% - 79% dari jumlah pekerja berdaftar</td> <td>80%</td> </tr> <tr> <td>80% - 100% dari jumlah pekerja berdaftar</td> <td>100%</td> </tr> </tbody> </table> <ul style="list-style-type: none"> <li>• Bagi syarikat yang masih belum mencapai kadar vaksinasi minimum 40%, syarikat perlu mematuhi syarat yang ditetapkan dalam SOP PPN yang berkuatkuasa.</li> <li>• Tindakan penguatkuasaan secara rawak akan diadakan bagi memastikan kesahihan maklumat yang dikemukakan dan tindakan undang-undang termasuk tindakan penutupan akan dilaksanakan dengan serta merta jika didapati terdapat pemalsuan maklumat vaksinasi pekerja)</li> <li>• Semua syarikat di bawah sektor pembuatan masih perlu mematuhi SOP sedia ada (elemen penjarakkan sosial, pengurusan kes, protokol kesihatan dan elemen lain) yang dinyatakan dalam SOP Am MKN dan SOP Khusus Pembuatan &amp; Pengilangan yang diwartakan walaupun status vaksinasi telah mencapai tahap yang tinggi.</li> </ul> <p>*bagi tujuan pengiraan kadar vaksinasi pekerja, pekerja yang telah divaksin sebanyak dua (2) dos vaksin adalah layak untuk dimasukkan didalam kiraan.</p>	Kadar Vaksinasi Lengkap (2 dos vaksin)	Kapasiti Operasi di Semua Fasa PPN	40% - 59% dari jumlah pekerja berdaftar	60%	60% - 79% dari jumlah pekerja berdaftar	80%	80% - 100% dari jumlah pekerja berdaftar	100%
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# Can employers compel employees to be vaccinated?

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- I. No statutory provisions to provide for mandatory COVID-19 vaccination yet
- II. However, employers may formulate **COVID-19 vaccination policies**. A breach of company's policy can constitute a misconduct.
- III. Consider the employee's reason for refusing vaccination

# Remote Domestic Inquiry Hearing



TARIKH KEMAS KINI: 25 OGOS 2021

Aktiviti Dibenarkan
<ul style="list-style-type: none"> <li>Sektor Perkhidmatan Perlu yang dibenarkan.</li> <li>Membeli atau mendapatkan barang keperluan.</li> <li>Mendapatkan rawatan kesihatan dan perubatan.</li> <li>Menjalankan urusan Rasmi Kerajaan.</li> </ul>
Aktiviti Tidak Dibenarkan
<ul style="list-style-type: none"> <li>Pergerakan rentas daerah dalam kawasan PPN dan rentas negeri lain tanpa kebenaran PDRM.</li> <li>Pergerakan keluar dan masuk kawasan PPN tanpa kebenaran PDRM.</li> <li>Sila rujuk Senarai Aktiviti Yang Tidak Dibenarkan.</li> </ul>
Arahan Tetap
<ul style="list-style-type: none"> <li>Peraturan 16 P.U. (A) 293/2021.</li> <li>Akta 342.</li> <li>Ordinan Darurat (Pencegahan dan Pengawalan Penyakit Berjangkit) (Pindaan) 2021.</li> <li>Tertakluk kepada ketetapan yang dikeluarkan oleh MKN dan KKM.</li> <li>Arahan dan peraturan di bawah PBT.</li> <li>Tertakluk kepada laporan <i>Hotspot Identification for Dynamic Engagement (HIDE)</i> dan penilaian risiko KKM.</li> <li>Lain-lain arahan dari semasa ke semasa yang dikeluarkan oleh Ketua Pengarah Kesihatan.</li> </ul>

Waktu Berkuat Kuasa	Seperti ketetapan dalam penerangan ringkas	Waktu Aktiviti Dibenarkan	Seperti ketetapan dalam penerangan ringkas	Pergerakan	Bersyarat
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AKTIVITI DAN PROTOKOL	
Aktiviti	Penerangan Ringkas
19. Mesyuarat	<ul style="list-style-type: none"> <li>Mesyuarat perlu dilaksanakan secara sidang video.</li> </ul>
20. Seminar, Bengkel, Kursus, Latihan dan Ceramah	<ul style="list-style-type: none"> <li>Seminar, bengkel, kursus, latihan dan ceramah <b>tidak dibenarkan</b> kecuali latihan dalam perkhidmatan yang sedang berjalan boleh dilaksanakan dalam kawasan latihan menerusi kaedah <i>Camp Based Training</i>.</li> <li>Seminar, bengkel, kursus, latihan dan ceramah yang dilaksanakan secara dalam talian (<i>online</i>) adalah <b>dibenarkan</b>.</li> <li>Temuduga kritikal yang perlu dilaksanakan adalah <b>dibenarkan</b> secara bersemuka dan dalam talian.</li> </ul>



# Domestic Inquiry (DI) – Necessary?

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- Amendment to **Section 20 of Industrial Relations Act 1967**

*(3) Where the Director General is satisfied that there is no likelihood of the representations being settled under subsection (2), the **Director General shall** refer the representations to the Court for an award.*

- Any defect in the domestic inquiry can be cured by the *de-novo* hearing before the Industrial Court



## DI – Necessary? (Cont'd)

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- To collate proper and adequate evidence
- To preserve relevant evidence
- To ensure fair and objective decision making process (Good Faith)



# Remote Domestic Inquiry Hearing - Challenges

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1. Employee might not **consent** to virtual DI proceeding
2. Employee and/or his witnesses might not be **tech-savvy**
  - How to “share screen”?
  - Whether the employee and the witnesses have access to internet?
3. How to ensure **fairness & reasonableness** of the proceeding
  - How to avoid possible witnesses coaching?
  - Where is the most appropriate location?



# Remote Disciplinary Proceedings - Guideline

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1. Same principles apply as to one carried out physically – consider amending the existing disciplinary procedure to include remote proceeding
2. Consider using the same platform for all meetings, interviews and session
3. Ensure that all parties involved have access to the appropriate tools/devices and have stable internet connection for the disciplinary proceeding
4. Ensure that all parties be supplied with the relevant evidence and documentation
5. Conduct a test run before the actual DI
6. Provide all parties a copy of the transcripts

An HR guide to investigating misconduct remotely

By [Edie-Louise Diemar](#)



# Case Studies

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## 1. *D & B Information Services Sdn Bhd v Nooruzzalina Zainal* [1997] 2 ILR 814

The employee was dismissed for not being punctual for work.

### Held:

The company **fails to prove the employee's work tardiness** because it has no punch card system and no other means to monitor the attendance of the employee other than oral evidence.



## Case Studies (cont'd)

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### 2. *Ahmad Ritzialli Ahmad Rosli v Casasl Gourmet Sdn Bhd* [2021] 2 ILR 498

The employee exited the company's Whatsapp Group

#### Held:

- a) There is **no company's SOP**, memo, guidelines or policy that says the Whatsapp Group is the main and only communication channel.
- b) The letter of offer does not state that company's **permission must first be obtained**.
- c) The employee **exiting the Whatsapp Group** was **not a good reason for termination**.



## Case Studies (Cont'd)

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### 3. *Dalia Ash'ari v Malaysia Airports (Niaga) Sdn Bhd* [2020] 1 ILR 472

Employer found out that the employee actually travelled to Thailand while she was on medical leave

#### Held:

- a) The employee had been **malingering** – to feign sickness in order to escape from work.
- b) It is **not up to the employee to decide** on what she can or cannot do depending on the gravity of her illness.
- c) When the **medical certificate** was issued, it was **assumed** the employee was **unfit to work and unfit to travel**.



# Covid-19 vaccination not mandatory

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*“But we also encourage **sectoral persuasion**. It’s not law or federal mandate, where companies say, ‘if you want to come for a meeting or you want to come to work, you have to be vaccinated.’ and that’s up to the companies”*

**- Health Minister, Khairy Jamaluddin**

# Thank you!

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# Key Takeaways

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- **Formulate a work from home policy**
  - ✓ What are the expectations required of the employees working from home
  - ✓ What is prohibited and may constitute a misconduct
- **Formulate a vaccination policy**
  - ✓ Compulsory except for special circumstances
- **Consider revising the existing domestic inquiry policy and procedure**
  - ✓ To include “remote DI proceeding”



# What is the TEST to be applied?

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- The burden is on the employer to prove that the employee has committed the misconduct
- **Test:** *whether the employer acted reasonably in thinking the employee did it*
- Employer must show that they had made reasonable enquiries and did not form their belief hastily and that they had given employee a fair opportunity to explain himself
- Consider what is the proportionate punishment

*Telekom Malaysia Kawasan Utara v Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314