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P&I Correspondent in the Philippines

Topics of interest relating to the Philippine Maritime Industry and Shipping

Alleged Unfair Dismissal Cases

Avoiding a potential unfair dismissal case, ensuring the court recognise that Due Process has been followed.

Guidance for ships Masters



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Alleged Unfair Dismissal

The issue of a potential unfair dismissal is always a lively one and there are no short cuts to getting it right. Over the years we have seen too many where one could easily reason the dismissal was fair, however unless the allegation is a strong one and falls under Section 33 of the POEA contract as a **grave abuse with endangerment to the vessel or the lives of those onboard**, then immediate dismissal is difficult.

In cases where it surrounds the performance and capability of an individual then the court will focus on evidence and very much if “*Due Process*” has been followed. In a recent (July 2019) decision the Supreme Court commented;

“It is settled that in termination cases, the burden of proof rests upon the employer to show that the dismissal is for a just and valid cause. Failure to do so would necessarily mean that the dismissal was illegal. For this purpose, the employer must present substantial evidence to prove the legality of an employee's dismissal. “Substantial evidence is defined as such amount of relevant evidence which a reasonable mind might accept as adequate to justify a conclusion.”

“In termination proceedings, it is settled that for the manner of dismissal to be valid, the employer must comply with the employee's right to procedural due process by furnishing him with two written notices before the termination of his employment. The first notice apprises the employee of the particular acts or omissions for which his dismissal is sought, while the second informs the employee of the employer's decision to dismiss him.”

The Supreme court also talks about proof being entries in the deck log book, depending on the flag of the vessel, this maybe in the Deck Log Book, Engine Room Log Book or for some flag states there is an Official Log book.

It is therefore imperative that due process and evidence is available to demonstrate to the court;

SECTION 17. DISCIPLINARY PROCEDURES

The Master shall comply with the following disciplinary procedures against an erring seafarer:

- A. *The Master shall furnish the seafarer with a written notice containing the following:*
 - 1. *Grounds for the charges as listed in Section 33 of this Contract or analogous act constituting the same.*
 - 2. *Date, time and place for a formal investigation of the charges against the seafarer concerned.*
- B. *The Master or his authorized representative shall conduct the investigation or hearing, giving the seafarer the opportunity to explain or defend himself against the charges. These procedures must be duly documented and entered into the ship's logbook.*
- C. *If after the investigation or hearing, the Master is convinced that imposition or a penalty is justified, the Master shall issue a written notice of penalty and the reasons for it to the seafarer, with copies furnished to the Philippine agent.*
- D. *Dismissal for just cause may be affected by the Master without furnishing the seafarer with a notice of dismissal if there is a clear and existing danger to the safety of the crew or the **ship**. The Master shall send a complete report to the manning agency substantiated by witnesses, testimonies and any other documents in support thereof.*

When the Supreme Court refers to “two notices” this is also found in the Labour Code Of the Philippines and is also referenced in the POEA above in 1) Section A, and 2) Section C. This is where there could be a potential conundrum as the Supreme Court as in several areas of Sea-based decisions, blend the Standard Employment Contract (SEC) which for Filipino seafarers is the Philippines Overseas Employment Administration (POEA) and The Labour Code of the Philippines.



Therefore, in providing a guide to Ships Masters and to ensure that if a case is referred to the Philippine legal system it can be demonstrated that Due Process was followed, we suggest the following:

Dismissal; The Labour Code of the Philippines (LCOTP) and the POEA.

The supreme Court in looking for Due Process will look if “**two notices**” have been issued.



The first written notice.

This comes under Section 17 item (A) of the POEA SEC and should contain the specific details, causes and grounds for termination being levelled against the seafarer. To include reference to a heading under Section 33 of the POEA SEC TABLE OF OFFENCES AND CORRESPONDING ADMINISTRATIVE PENALTIES. The notice to also include date, time and place on board the vessel for a formal investigation of the charges against the seafarer concerned. It is preferable that the seafarer sign a copy for receipt. Master to place in vessels log book that a notice has been served, date and time.

The POEA SEC is silent about time lines and the LCOTP sates “*The employer will furnish the worker whose employment is sought to be terminated a written notice containing a statement of the causes for termination and shall afford the latter ample opportunity to be heard in defending himself.*”

The Supreme Court in decisions surrounding alleged dismissal cases has stated a period of five (5) days as a reasonable period to respond to a show/cause letter.



Hearing and investigation.

The POEA SEC Section 17 (B) states;

“The Master or his authorized representative shall conduct the investigation or hearing, giving the seafarer the opportunity to explain or defend himself against the charges. These procedures must be duly documented and entered into the ship’s logbook”.

As specified within the first written notice a hearing will be held, minutes of key points should be taken. The hearing will cover all aspects of the causes and grounds as stated in the first written notice. The LCOTP states that “*the employee to be heard and to defend himself with the assistance of a representative if he so desires*”. If the seafarer wishes to bring a co-worker this should be respected and the person’s name and rank recorded. The seafarer must be allowed the opportunity to fully respond. Any written reply properly documented.

Depending on the cause of the complaint against the seafarer there may be some difference in time line going forward and there maybe need to refer to any special clauses under the relevant Collective Bargaining Agreement (CBA)



The Second written notice.

The POEA SEC Section 17 (C) states;

If after the investigation or hearing, the Master is convinced that imposition or a penalty is justified, the Master shall issue a written notice of penalty and the reasons for it to the seafarer, with copies furnished to the Philippine agent.



In regards to log book extracts or any documents that are to be filed in court as evidence should be consularized by the nearest Philippine Embassy.

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