TERMINATION OF EMPLOYMENT IN MALAYSIA

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PART 1:

TERMINATION OF EMPLOYMENT DUE TO MISCONDUCT

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INTRODUCTION

- In Malaysia, the law governing the dismissal of employees (and labour law in general) is premised upon the notion of fairness and is a relatively well-balanced system. Employer-employee relationships in Malaysia are governed by the ***Employment Act 1955*** and the ***Industrial Relations Act 1967***.

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What is termination?

- For context, 'dismissal' or 'termination' refers to when an employer ends the employee's contract of service. In Malaysia, an employer may not dismiss an employee for convenience by relying on the termination clause in an employment contract.
- The requirements for a lawful dismissal are valid and substantive justifications, as well as a fair procedure. **An employee can only be dismissed with just cause or excuse** as per section 20(1) of the Industrial Relations Act 1967.
- Whilst 'just cause or excuse' is not defined by the statute, valid reasons for dismissal include gross misconduct on the part of the employee, redundancy, poor performance, and negligence.

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- In Malaysia, all employees are protected from unjust dismissal. Employers must ensure that the employee is dismissed in a procedurally fair manner as per ***section 14(1)(a) of the Employment Act 1955.***
- One of the procedures that must be conducted before a dismissal for misconduct can be justified is a '**due inquiry**' or '**domestic inquiry**'.

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Why?

- The purpose of this provision is to ensure that the principle of ***natural justice*** of allowing the employee to be heard is upheld through the process of due inquiry where misconduct is alleged against an employee.

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So, what is misconduct?

- The Malaysian law does not expressly state what amounts to a "misconduct" by employees. ***Section 14(1) of the Employment Act 1955*** ("**EA 1955**") indicates that a misconduct may be the ground of employment termination if such act was inconsistent with the fulfilment of the ***express or implied conditions*** of the employee's service after a due inquiry has been conducted.

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Examples of Misconduct:

a. Violence, Assault, Theft, Fraud, Bribes, Causing Harm, Gambling, Fighting.
b. Absenteeism & health condition
c. Disobedience of Lawful orders
d. Insubordination
e. Sexual Harassment
f. Falsifying records
g. Breach of Terms of Contract
h. express condition –employment conduct
i. Implied condition –duty of fidelity, good faith, loyalty to employer, mutual trust and confidence.

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What should you do if you suspect your employees of misconduct?

a. **Investigate the Allegations** - Conduct a thorough and fair investigation to gather evidence

b. **Issue a Show Cause Letter** - If the investigation suggests that misconduct may have occurred, issue a show cause letter to the employee, giving them an opportunity to explain

c. **Hold a Domestic Inquiry** - If the employee's explanation is unsatisfactory, you may conduct a domestic inquiry

d. **Take Disciplinary Action** - Based on the findings of the domestic inquiry, you can decide on appropriate disciplinary action.

e. **Document Everything** - Ensure that all steps taken are properly documented

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Punishment for Misconduct

- Pursuant to ***Section 14 (1) of the Industrial Relations Act 1967***, punishments for misconduct are as follows:
  - Dismissal without notice
  - Downgrade of position
  - Suspension for not more than 2 weeks
  - Any other lesser punishment that is deemed just and fit

NOTE: the punishment imposed should be proportionate to the severity of the misconduct.

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Termination of Employment for Misconduct

Question: In what circumstances can an employer terminate an employee immediately?

- Terminating an employee immediately without notice or payment of salary in lieu of notice is usually referred to "***summary dismissal***".
- Summary dismissal is allowed in cases where the act of misconduct **is so serious** that the employer is justified in terminating the employee immediately.
- That being said, there are some types of misconduct which would warrant summary dismissal – for example, committing a **crime at work (eg: theft, fraud), giving or taking bribes, or intoxication at work causing risk of injury or death**.

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Band of Reasonableness Test

- In determining whether dismissal is a proportionate punishment, the Company must consider the gravity of the misconduct and ask itself **whether a reasonable employer would dismiss the employee for the same misconduct?**

- This is known as the band of reasonableness test which is laid down by the Federal court in ***Norizan Bakar v. Panzana Enterprise Sdn Bhd [2014] 1 MELR 1; [2013] 6 MLRA 613*** as follows:

> "There is a band of reasonableness within which one employer may reasonably take one view: another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him then the dismissal must be upheld as fair; even though some other employers may not have dismissed him".

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Case Analysis

Siti Zarifah Zakaria v. Usains Holding Sdn Bhd [2024] MELRU 531

Case Facts:

- The Claimant was charged for **six counts of corruption**. After conducting Domestic Inquiry, the Company found her guilty of all **six charges** and subsequently dismissed her.

Held:

- In view of the severity and seriousness of the misconduct committed by the Claimant coupled with the Claimant's role and duties in the Company, the Court found that no reasonable employer would be expected to repose the necessary trust and confidence in the Claimant. Henceforth, the Claimant's dimissal is fair, justified and proportionate to the nature and seriousness of the misconduct.

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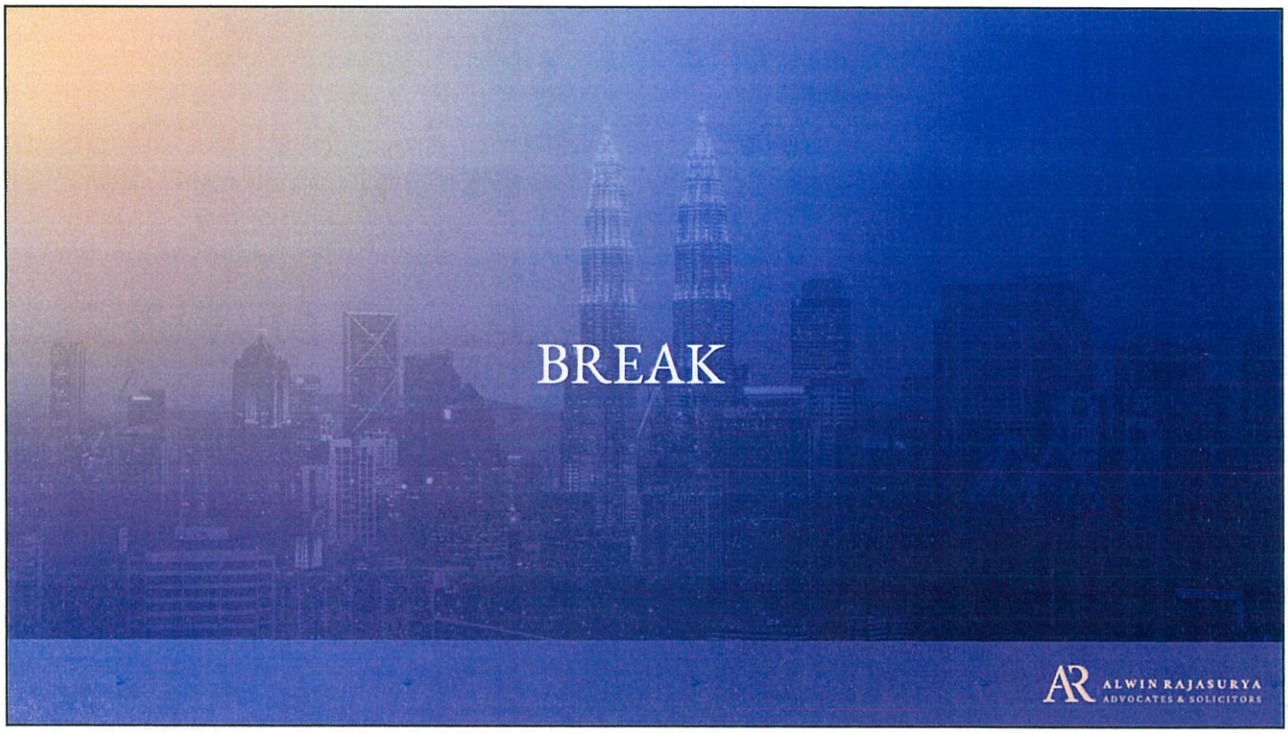
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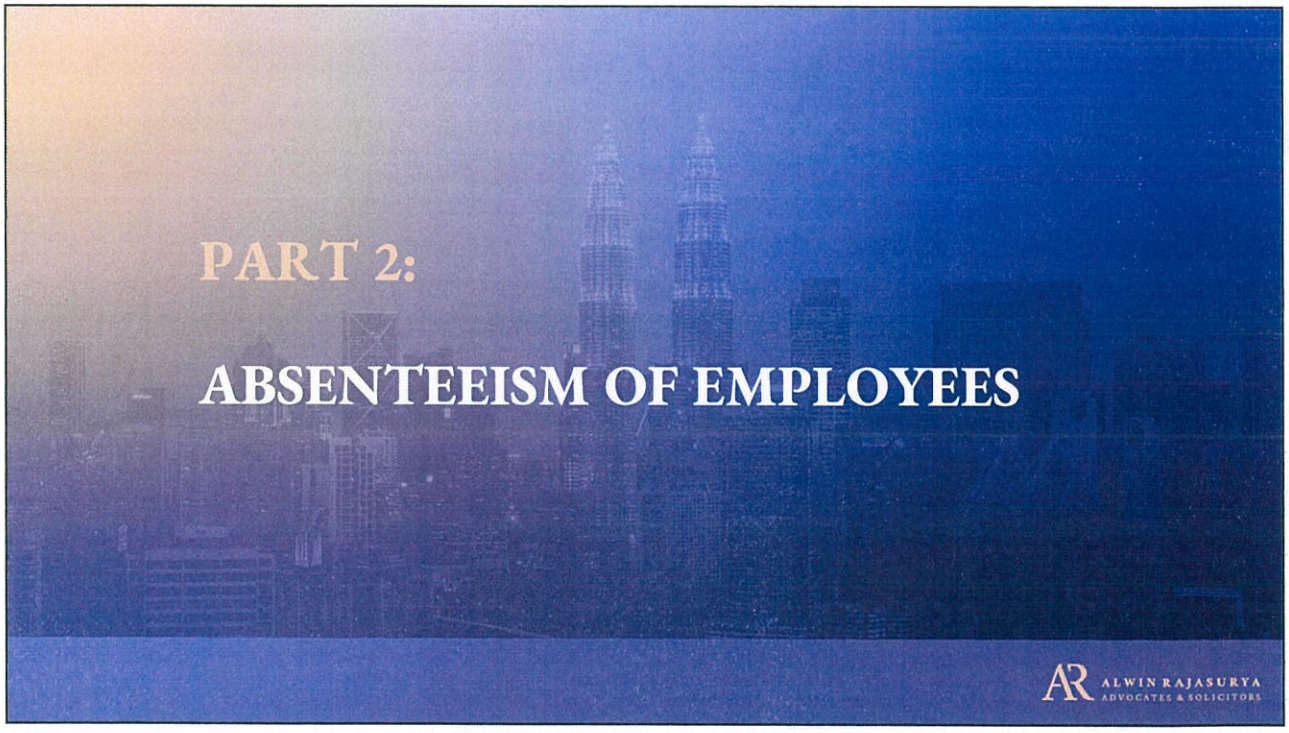
PART 2:
ABSENTEEISM OF EMPLOYEES
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Question : Does long absenteeism consider as a misconduct?

What is prolonged Absenteeism?

- ***Prolonged Absenteeism*** refers to an employee's **continuous absence from work without valid reason or approval**, typically beyond a reasonable period (e.g: 2 - 3 consecutive days or longer, depending on company policy).

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Cont.

Authorised vs Unauthorised Absence:

- **Authorised absenteeism** includes approved leave, medical leave, or other forms of permitted absences.
- **Unauthorised absenteeism** occurs when the employee fails to report to work without notifying the employer or obtaining prior approval.

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Absenteeism

- Absenteeism without any just excuse is a **misconduct**.
- The Federal Court in ***Pan Global Textiles Bhd Pulau Pinang v. Ang Bang Teik [2001] 1 MELR 39; [2001] 1 MLRA 657*** cited OP Malhotra on The Law of Industrial Disputes as follows:

> *"No employee can claim as a matter of right leave of absence without permission and when there might not be any permission for the same. Remaining absent without any permission is gross violation of discipline. Hence continued absence from work without permission will constitute misconduct justifying the discharge of a workman from service".*

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Absenteeism

- However, absenteeism alone does not justify summary dismissal of an employee.
- The Industrial Court in ***Hang Edzharsyah Hang Tuah lwn. Maybank [2013] MELRU 104*** ruled as follows:

> *"... the absence or non attendance of the Claimant at the working place does not automatically warrant a dismissal and the Court needs to consider the reasons of non-attendance and whether such non-attendance jeopardised the operation of the company."*

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Absenteeism due to sick leave

- In general, an employee is entitled for sick leave pursuant to ***Section 60F of the Employment Act 1955.***

- However, it is crucial for the employee to inform the employer at the earliest possible opportunity.

> *"An absent workman misconducts himself if he was absent from work without reasonable excuse or, if he had such reasonable excuse, fails to inform or attempt to inform his employer of such excuse prior to or at the earliest possible opportunity during his absence".*
>
> *See:* ***Crowne Plaza Riverside Kuching v. Mohamad Zulkarnaen Suhaili [2000] 1 MELR 636***

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- Failing which, an employee would be deemed absent without reasonable excuse.

> *"It is trite that an employee who absents himself on medical leave is statutorily required to inform his employer of such sick leave and his failure to so inform his employer shall be deemed to absent from work without reasonable excuse".*
>
> *See:* ***Rosedi Mokhtar v. Malaysian Airlines System Berhad [2015] MELRU 689***

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Question: Can a company terminate its employee on long absenteeism due to his/her health condition ?

- The quick answer to this question is yes. However, such termination would amount to an unfair dismissal if it was done without careful consideration.
- There must be a balance between the need of the employer for work to be completed and the essential recovery period required by an employee.

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Doctrine of Frustration

- A contract is frustrated when the performance or execution of the contract is impossible due to an event that occurred without the fault or default of any party.
- An employment contract is frustrated when the employee is unable to fulfill the work or tasks assigned to them by the employer due to their medical condition.

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The Employer must consult the Employee to ascertain the medical condition.

- The employer must take reasonable steps to consult with the employee to ascertain their medical condition, including the nature of the illness, the possibility of recovery, and the expected period for recovery.

- The employer must ensure that they are adequately and accurately informed about the medical condition, and they must make sure that the decision to dismiss the employee is made based on this information

See: ***Lynock v. Cereal Packaging Ltd [1988] IRLR 510; [1988] ICR 670***

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- Only after confirming the medical condition can the employer fairly decide whether it is justified to terminate the employment of the employee. In doing so, they must consider the employee's medical condition along with other relevant factors, such as the length of absence and the urgency of the assigned work/task.

  See: ***Spencer v. Paragon Wallpapers Ltd [1976] IRLR 373, [1997] ICR 301***

- The employer cannot solely rely on the Medical Board to ascertain the employee's medical condition. The employer must also approach the employee and consider any evidence that may be favorable to the employee.

  See: ***MHS Aviation Sdn. Bhd. v. Zainol Akmar Mohd Noor [2001] ILJU 48***

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CASES INVOLVING TERMINATION OF EMPLOYEE DUE TO HEALTH CONDITION

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Case Analysis

MHS Aviation Sdn. Bhd. v. Zainol Akmar Mohd Noor [2001] ILJU 48

Facts:

- The Claimant was a helicopter pilot and was diagnosed with "*acute inferior and posterior myocardial infarction*". Due to his health condition, he was on medical leave and no flying duties for six to nine months and reassessment of his flying status after this said period.
- The Company terminated his service after considering the Medical Report prepared by Dr. Dalbir that stated the diagnosis is a serious medical condition and likely to be permanent.
- The Company admitted they made no inquiries, merely issued the termination notice based on Dr. Dalbir's certification, assuming the diagnosis is of permanent nature.

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MHS Aviation Sdn. Bhd. v. Zainol Akmar Mohd Noor [2001] ILJU 48

Held:

The Industrial Court found the Claimant was **dismissed without just cause or excuse** based on the following reasons:

- The Company had not weighed or assessed the situation properly between the conflicting needs of its business and the needs of the employee, more specifically the employer's need for the work to be done and the employee's need for time in which to recover his health.
- The Company failed to show understanding of the situation or predicament the Claimant was in and sought no consultation with the Claimant but unilaterally issued the termination notice with a preconceived or predetermined mind that his medical incapacity was likely to be permanent.

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Guideline

- If an employee is incapacitated by ill health and is no longer able to perform the job for which he was employed, his employer should consider ***whether or not the employee could be kept in employment in another capacity***.
- If there is an existing job, even if it is paid lower, the employer should offer the alternative employment to the employee.
- If the employee refuses any such offers, then it seems reasonable for the employer to dismiss the employee.
- It should be noted that the employer is only required to consider the employee's ability to perform existing jobs – there is no duty on the employer to create a new job or modify an existing one, in order to continue the employment.

*See: **Unfair Dismissal Case' by John McGlyne, 1976 Edition***

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The employer must consider any alternatives jobs scope.

- The employer must also consider whether the employee can be retained through alternate employment, be it by way of a change of job scope or transfer to another department.

- The employer is expected to act reasonably in accordance with its obligations of social consciousness and should attempt to offer alternative employment to the employee, even if it might be a lower paying job.

See: ***Gopalakrishnan A/L Vasupillai v Goodyear Malaysia Berhad [2010] MLJU 651***

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Case Analysis

Dapat Hotel Sdn. Bhd. (holiday Inn, Johore Baru) v.D Kesatuan Kebangsaan Pekerja-pekerja Hotel,bar & Restoran

Facts

- The Claimant was an Assistant Headwaiter at $350.00 per month with 4 points. However, the Claimant was later diagnosed with bronchial asthma and it was discovered that the Claimant has an allergic skin condition affecting his forearm which is recurrent and can be attributed to an inherent atopy.
- The Company offered him alternative appointment as a Doorman with a salary of $180.00 plus 2 points which is deemed suitable for him as he is exposed to fresh air, away from smoke, and good for his health. However, the Claimant rejected the offer.

Held:

- The Industrial Court dismissed the Claimant's claim for unfair dismissal in following the guideline laid in "Unfair Dismissal Case" by John McGlyne, 1976 Edition.

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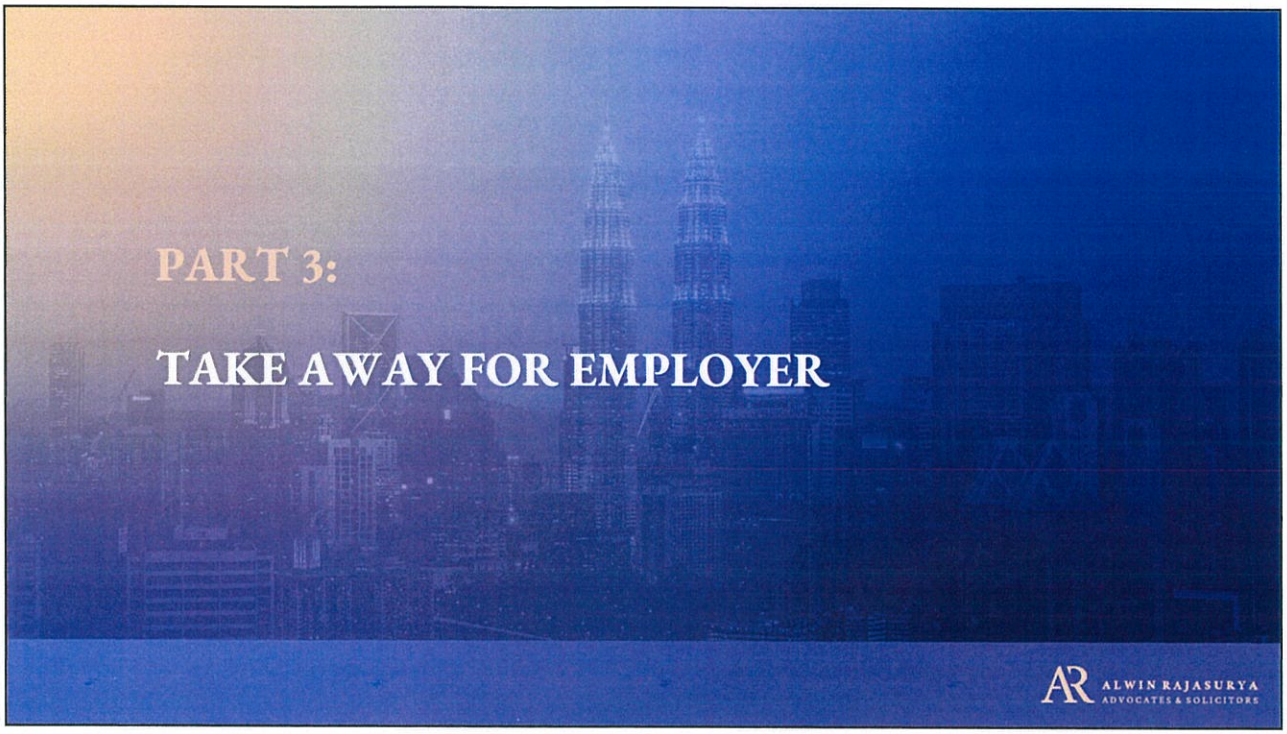

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Recommendation

1. **Implement a medical board out policy or guideline.**

- It is important to have a Company policy or guideline to clearly provide for internal mechanisms where employees fall critically ill. This gives clarity to both employer and employees in such an unfortunate event occurs.

2. **Discussion between the employer and employee.**

- It is the responsibility of the employer to take the first step and approach the employee in understanding the medical condition of the said employee as to the seriousness of the illness, the prospect of recovery and the estimated period of recovery. The employer cannot simply rely on medical opinion and must gather such information from the Claimant himself.

3. **Offer alternative employment.**

- It is expected from the employer to offer alternate employment to the employee although it may involve different job scopes or lesser payment. Nevertheless, it is not expected from the employer to create a specific job merely to cater to the needs of the employee.

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Conclusion

- The employer indeed can terminate an employee on the ground of ill absenteeism given that the employer must fairly weigh between the employer's need for the work to be completed and the employee's need to recover their health.

- This has often led to a moral debate. It would be unfair to terminate an employee and disregard his possibility for recovery. On the other hand, it would also be detrimental to the employer and its business if they must wait indefinitely for a potential recovery.

- Therefore, it is recommended for employers to take practical steps to ensure a fair dismissal process that protects the interests of both parties.

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