Employment : Overview of the Common Employment Issues in Malaysia

INTRODUCTION

It is often said that when you take care of your employees, they will take care of the rest for you. In many ways, the employees are the bedrock of the economy. They are the gears that move the wheel of the economy and they double up as the largest consumer base that greases it.

In most instances, employees' remuneration and benefits form a substantial part of a business operational expenditure. However, if the relationship is not managed with sufficient care, the consequences can prove to be even costlier.

The employer employee relationship is extensively regulated, both by the respective employment contracts as well as by various laws and regulations on the matter. In this article, we provide an overview of the following common issues that arise in Malaysia:-

1.0 Employer & Employee Relationship

- 1.1 Contract of Service vs. Contract for Service
- 1.2 Minimum Standard of Employment
- 1.3 Safe Working Place

2.0 Security Of Tenure

- 2.1 Section 20 IRA 1967 – *"Just Cause or Excuse"*
- 2.2 Dismissal With Just Cause Or Excuse
  - (i) Misconduct
  - (ii) Poor Performance
- 2.3 Constructive Dismissal – Employee Considering Himself / Herself Dismissed
- 2.4 The Remedies For Dismissal Without Just Cause Or Excuse

3.0 Rightsizing And Restructuring

- 3.1 Purpose
- 3.2 Implementation

1.0 EMPLOYER & EMPLOYEE RELATIONSHIP

1.1 Contract of Service vs Contract for Service

A traditional employer-employee relationship is in the nature of a **contract of service** whereas a **contract for service** denotes the appointment of an independent contractor. However, the demarcation is sometimes not clear-cut and the Industrial Court had laid down tests to determine the relationship as a mixed question of law and facts.

It is imperative to ascertain the nature of the contract as the protections accorded under the relevant employment legislations, such as security of tenure under the Industrial Relations Act 1967 ("**IRA 1967**"), are only available to the employees under a Contract **of** Service and not to the independent contractors.

In this regard, it is important to note that the mere description of the contractual document entered into between the parties is not conclusive of the nature of the relationship.

1.2 Minimum Standard of Employment

The Employment Act 1955 ("**EA 1955**") is the core legislation that regulates the minimum standard and / or terms of employment in Peninsula Malaysia. Generally, the EA 1955 applies to the employees specified under its First Schedule, i.e.:-

(i) Employee whose wages does not exceed RM2,000.00 a month; or

(ii) Irrespective amount of wages, if such employee is engaged in manual labour, operation maintenance of mechanically propelled vehicle for transport of goods / passengers, supervises other employees in manual labour, engaged in vessel registered in Malaysia (save for exempted positions) or a domestic servant.

For the employees who are covered under the EA 1955, the EA 1955 provides for the minimum standard and / or terms of employment in relation to matters such as payment of wages, annual leave entitlement, sick leave entitlement and retirement benefits. It further provides the avenue to lodge complaints if the employer fails to comply with such minimum standard. However, certain protections such as maternity benefits and protection against sexual harassment are accorded to all employees irrespective of the amount of wages earned.

The EA 1955 also clothes the Director General of Labour with the powers to inquire into and decide any dispute between the employer and the employee in respect of wages or any other payments in cash due to the employee. For disputes on the payment of wages or cash pursuant to the contract of service, the Director General of Labour's powers extend to the employees whose wages exceeds RM2,000.00 but not more than RM5,000.00.

If the employee does not fall under the EA 1955, then the employee's benefits would be governed by the terms of the contract of service between the employer and the employee (subject to certain statutory obligations such as EPF and SOCSO). Simply put, the employer and the employee are at liberty to mutually agree upon the terms of employment as long as it does not contravene any existing laws. Having said that, it is good practice to adopt the benefits under the EA 1955 as the minimum standard.

1.3 Safe Working Place

Apart from providing the minimum standard of employment and / or security of tenure, the law also requires the employers to provide a safe working place to their employees. The **Occupational Safety and Health Act 1995** ("**OSHA 1995**") imposes duties on an employer / self-employed to, amongst others, *"ensure, so far as is practicable, the safety, health and welfare to work of all his employees".* OSHA 1995 applies to the industries specified under Schedule 1 of the OSHA 1995. A person who contravenes the duties imposed shall be guilty of an offence and shall, upon conviction, be liable to a fine not exceeding RM50,000.00 or imprisonment for a term not exceeding 2 years, or both. Apart from the statutory duties, the employer also has common law duties, amongst others, to take reasonable care for the safety of its workers and a breach of such duties may attract liabilities for negligence.

Further, **Part XVA of the EA 1955** imposes a duty on the employer to inquire into sexual harassment complaints made by the employees, irrespective of the amount of wages earned by the employees. It also provides for consequences where the employer refuses to carry out such inquiry and the avenue for the complainant to lodge a complaint with the Director General of Labour. If the Director General of Labour finds that sexual harassment had been proven, the complainant may terminate his / her contract of service without notice and is entitled, amongst others, to wages as if notice had been given as well as termination benefits. An employer who fails to carry out the duties under this Part of the EA 1955 commits an offence and shall, upon conviction, be liable to a fine not exceeding RM10,000.00.

2.0 SECURITY OF TENURE

2.1 SECTION 20 IRA 1967 – *"JUST CAUSE OR EXCUSE"*

An employee is accorded with the security of tenure by virtue of Section 20 of the IRA 1967 in that he / she cannot be dismissed without just cause or excuse. Where the employee considers that he / she has been *"dismissed without just cause or excuse"* by his / her employer, a representation in writing can be made to the Director General for Industrial Relations ("**DG IR**") for the employee to be reinstated to his / her former employment. Such representation must be made within 60 days from the dismissal. The DG IR shall thereafter assist parties to reach a settlement. If there is no likelihood of a settlement, the Human Resources Minister may refer the representation to the Industrial Court for an award. It is then incumbent upon the employer to show that the dismissal was with just cause or excuse, failing which, the Industrial Court may find that the dismissal is wrongful and make an award against the employer, amongst others, for reinstatement or compensation in lieu of reinstatement and back wages.

Naturally, the security of tenure of a fixed term contract should not last beyond the fixed term, or does it? A fixed term contract is not per se excluded from the IRA 1967 as at times, ordinary / permanent employment may be dressed up in the form of a fixed term contract and be continuously renewed upon the expiry of the fixed term. The employer must be able to show that the fixed term contract is genuine and that it was intended to be only for a fixed duration, failing which, the non-renewal of such "fixed term" contract may tantamount to a wrongful dismissal. In determining whether a fixed term contract is genuine or otherwise, the Industrial Court will consider, amongst others, the following:-

(i) Whether the fixed term contract was continuously renewed?
(ii) Whether the nature of the employment is temporary / seasonal or otherwise?
(iii) Whether the employee enjoyed benefits of a permanent employee?

In summary, dismissal of an employee in a permanent employment must be with just cause or excuse. This is the case even if the contract of service provides for termination by notice. In other words, terminating by merely giving the notice period in the contract of employment is not sufficient to justify "*just cause or excuse"*. What then constitute *"just cause or excuse"* to warrant the dismissal of an employee?

2.2 Dismissal With Just Cause or Excuse

(I) Misconduct

Any conduct that is inconsistent with or in breach of the express and / or implied duties of an employee towards the employer may tantamount to misconduct, unless such inconsistency / breach is of trifling nature. Express duties are the duties expressly stipulated in the contract of service such as working hours, whereas implied duties are duties which are not expressly provided for in the contract of service but may be inferred from the relationship of the employer and the employee, such as the duty to act honestly.

In cases of misconduct, it is important to accord a fair opportunity to the employee to defend himself or herself against the allegations of misconduct through show cause and / or domestic inquiry. Notwithstanding any finding of guilt after due inquiry into the alleged misconduct, the punishment meted out ought to be proportionate to the severity of the misconduct. The misconduct of an employee does not automatically warrant a dismissal and the Industrial Court is still empowered to determine whether the nature or extent of the misconduct constitutes just cause or excuse to dismiss the employee.

(II) Poor performance

The poor or unsatisfactory performance of an employee may constitute just cause or excuse for a dismissal. Having said that, poor performance is not misconduct, as misconduct connotes an act of non-disciplinary behavior. As such, there is no need to carry out an inquiry. However, the Industrial Court will still inquire as to whether the employee’s dismissal was in accordance with due process. In order to justify the dismissal based on poor performance, the employer has to establish that:-

(i) The employee was warned about his / her performance;
(ii) The employee was accorded with sufficient opportunity to improve; and
(iii) Notwithstanding the above, the employee had failed to sufficiently improve his / her performance.

This is where a performance improvement plan (“**PIP**”) comes into place. The PIP is a tool to give an employee with poor performance the opportunity to improve to the satisfaction of the employer by providing the employee with the necessary assistance and tools to assist the employee to perform better in the given work. The purpose of the PIP is to help the employee to attain the desired level of performance and should not be treated as a mere precursor to a planned dismissal based on the performance issue.

In certain limited instances, the Industrial Court has held that the obligation to provide opportunity to improve may be lesser in instances where the employee is employed specifically to deliver the performance complained of.

2.3 Constructive dismissal – Employee Considering Himself / Herself Dismissed

Apart from actual dismissal, i.e. where the employer dismisses the employee, Section 20 of the IRA 1967 also extends to situation where the employee considers himself / herself to be constructively dismissed.

A constructive dismissal happens when an employee terminates his / her contract (resigned) and discharges himself / herself from further obligations in response to the employer's breach that *"affects the foundation of the contract, or if the employer has evinced an intention not to be bound by it any longer."* Depending on the circumstances, such breach could manifest itself in a single act of oppression or victimisation or through a series of actions designed to engineer the employee's resignation.

To succeed under Section 20 of the IRA 1967, the employee must first prove that: -

(i) The employer had breached the express and / or implied terms of the contract;
(ii) The breach affects the foundation of the contract;
(iii) In response, the employee elected to treat the contract as terminated and left employment; and
(iv) There is no undue delay in terminating the contract.

Once the employee is able to establish that he / she has been constructively dismissed, the onus then shifts to the employer to justify that such dismissal, albeit constructive, was with just cause or excuse.

2.4 The Remedies for Dismissal Without Just Cause or Excuse

In the event that the Industrial Court finds that the employee was dismissed with just cause or excuse, the employee's claim will be dismissed. However, if the Industrial Court finds that the dismissal was without just cause or excuse, the Industrial Court may order the following remedies against the employer: -

Backwages payment	Last drawn salary x (no. of months from dismissal until the decision by the Industrial Court). Limited to a maximum of 24 months for permanent employee or 12 months for probationer. However, the employee has a duty to mitigate his / her loss of income as the Industrial Court has powers to make adjustment or deduction to the backwages payment.
Reinstatement	The employee to be reinstated in the Company
Payment in-lieu of reinstatement:	If the Industrial Court finds that a reinstatement is not suitable due to loss of trust and confidence between the employer and employee, the Industrial Court will award payment in-lieu of reinstatement which is calculated based on: Last drawn salary x number of complete years of service. *1 complete year of service = 1 months last drawn salary

Where an award has been made by the Industrial Court following a representation under Section 20 of the IRA 1967, the award will operate as a bar to any action by the employee in any court in respect of the wrongful dismissal.

3.0 RIGHT SIZING AND RESTRUCTURING

3.1 Purpose

It is within the management prerogative of an employer to undertake rightsizing or restructuring to ensure that the business is operating at optimum level. Typically, these exercises are the reaction to economy recession and / or declining profits. However, an employer is also entitled to carry out these exercises to improve the business efficacy. Often time, such rightsizing or restructuring will lead to the redundancy of employees, i.e. surplus of labour, resources and/or functions.

3.2 Implementation

Before resorting to retrenchment and depending on the circumstances, it is always a good practice for the employer to first explore other alternatives such as pay-cut measure or temporary lay-off (subject to the terms and conditions of employment agreement or parties' mutual agreement) or by offering Voluntary Separation Scheme ("**VSS**") or Mutual Separation Scheme ("**MSS**") to the employees. This is in line with the Code of Conduct for Industrial Harmony ("**the Code**"). Further, this may also reduce the likelihood in accusations of unfair dismissal.

In the event that redundancy cannot be averted, it is imperative that the retrenchment is carried out bona fide and not actuated by bad faith or victimisation of certain employee. As a matter of good practice, the employer must observe the measures set out in the Code and based its selection on established standard practices such as the *"Last In, First Out"* principle ("**LIFO**"), unless there are justifications for its departure, to avoid any accusation of unfair dismissal. The employer shall also provide retrenchment benefits to the retrenched employees, which are usually spelt out in the employment contract. Where the employee is covered under the EA 1955, the retrenchment benefits are as follow:-

Year of Employment	Retrenchment Benefit
< 2 years	10 days wages for every year of employment
2 – 5 years	15 days wages for every year of employment
> 5 years	20 days wages for every year of employment

Where the employee is not covered under the EA 1955 and the contract of service is silent on the retrenchment benefits, it is a good industrial relations practice that the employee is paid one month wages for every year of employment.

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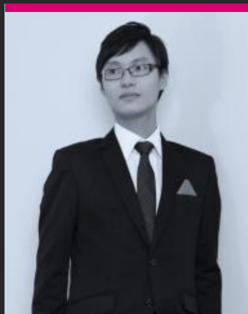

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