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An Overview of the Significant Changes Proposed by the Employment (Amendment) Bill 2021

Employment & Administrative Law Update

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The Employment (Amendment) Bill 2021 ("the Bill") was tabled for its first reading on 25 October 2021, seeking to amend the **Employment Act 1955** ("the Act"). In this update, Vijayan Venugopal, Grace Chai and Nur Najehah set out the key changes that the Bill proposes to introduce and analyse the potential impact of such proposed amendments.

1. Protections on pregnancy, maternity and paternity

The main changes envisaged by the Bill are arguably the amendments to the provisions relating to protection on pregnancy and maternity.

Restriction of termination of pregnant employees

Firstly, a new provision, section 41A is proposed, whereby terminating a female employee who is pregnant or is ill due to her pregnancy would be an offence under the law. The only exceptions to this general rule are dismissal on the grounds of wilful breach of the employment contract, misconduct, and closure of the employer's business. The burden of proof is on the employer to prove that such termination is not related to the employee's pregnancy.

As can be seen, termination for reasons such as medical, poor performance or redundancy would not be acceptable grounds for dismissal of a pregnant employee. This provision would provide increased protection to pregnant employees against dismissal from employment, since the protection under the current Act only covers the period of 90 days-post maternity leave for illnesses arising from pregnancy (under section 42 of

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the Act). This development is a welcome step forward in the development of anti-discrimination law in Malaysia.

Maternity leave

The Bill seeks to amend the statutory paid maternity leave entitlement by increasing the same from the current 60 days to 90 days. This is another welcome amendment, as it would bring the maternity protection for employees in the private sector to the same level as what is already accorded to the employees in the public sector. The proposed standard of protection would also be closer to the International Labour Organisation's (ILO) recommendation of at least 14 weeks (equivalent to 98 days) of paid maternity leave.

However, the Bill also confusingly proposes to delete section 44A of the Act, which is the provision which affords maternity protection to all female employees irrespective of their monthly wages. With this amendment, it would mean that the 90-day entitlement to paid maternity leave will only be extended to a very limited scope of female employees (i.e. those who are under the purview of the Act), leaving the remaining female employees who are outside the scope of the Act completely unprotected by any law on maternity leave in Malaysia.

Paternity leave

Another main amendment proposed by the Bill is the introduction of paternity leave, whereby married male employees would be entitled to three consecutive days of paternity leave for up to five confinements, irrespective of the number of spouses. This is a long-awaited amendment as it also goes on to show the commitment in recognising paternal responsibilities as part of the caregivers. However, it is to be noted that the Bill only proposes to extend such paternity leave benefit to married employees who are currently under the purview of the Act.

2. Protection against discrimination

The Bill also seeks to introduce protection against discrimination, which is a new development in the laws of

Malaysia, considering that anti-discrimination laws are sorely lacking in Malaysia. The Bill proposes that non-compliance of the employer with such orders of the Director General in this regard would constitute an offence on conviction. Nonetheless, the Bill is silent as to what constitutes "*discrimination*", and it remains to be seen how far this provision would be applied to accord such protection to employees against discrimination.

3. Sexual harassment

It is encouraging to note that the Bill proposes to increase the fine on employers who fail to carry out their statutory duties in relation to dealing with workplace sexual harassment complaints. Further, the Bill also proposes a new duty on the employer to conspicuously exhibit notices at the workplace to raise awareness on this issue. It is hoped that with this amendment, the issue of workplace sexual harassment will be taken more seriously by employers.

However, the Bill again confusingly proposes to delete section 81G of the Act, which is the provision which affords sexual harassment protection to all employees irrespective of their monthly wages. With this amendment, it would mean that sexual harassment protection would only be extended to a limited scope of employees (i.e. those who are under the purview of the Act), leaving the remaining employees who are outside the purview of the Act completely unprotected by any statute against sexual harassment. It is envisaged this might be a deliberate step and that this apparent lacuna will be filled by the enactment of the long-delayed Sexual Harassment Bill.

4. Flexible working arrangement

One major change to the workplace environment since the pandemic is the normalisation of remote working pattern. It is exciting to note that the Bill is keeping up with the changing landscape of working habits and seeks to propose the right for an employee to apply for a flexible working arrangement. This will entail varying the hours, days and place of work. The employer would then decide whether the application is approved or refused, and in the event of refusal, provide his reasons for the same. However, it is unclear whether in the

event of refusal, the employee would have the right to challenge the same, and it is equally unclear what are the criteria that employers can take into consideration when approving or refusing such applications.

5. Access to the Labour Department

Currently, employees earning not more than RM5,000 (including those outside the scope of the Act) can make a complaint to the Director General at the Labour Department on issues in respect of wages and other payments due under their contract of employment. However, the Bill now seeks to remove the RM5,000.00 cap.

It is unclear whether with the deletion of the provision on the cap, the effect of it would mean that all employees (irrespective of their wages) can bring complaints to the Labour Department, or whether such right to file a complaint would then be restricted to only employees under the purview of the Act. Clarification in this regard is urged, as it is important to clarify the categories of employees who have access to the Labour Department.

6. Apprenticeship

Presently, an apprenticeship recognised under the Act is one that is for a period of not less than two years. The Bill seeks to amend the same to a period between six to 24 months. This would mean that any apprentice arrangement of lesser than six months or more than 24 months would therefore fall outside the purview of the Act.

7. Hours of work

The weekly maximum hours of work under section 60A of the Act is proposed to be reduced from 48 hours to 45 hours. This would mean that any additional hours of work beyond 45 hours would now be subject to overtime pay. This would be a significant amendment to businesses which currently practice a 48-hour workweek. Such businesses would have to either revise the hours of work downwards or be prepared to pay significant sums in overtime payments.

8. Calculation of wages for incomplete month's work

The Bill also introduces a new section, section 18A, which provides a statutory formula for the calculation of wages for work done in less than a full month:

$$\frac{Monthly\ wages}{Number\ of\ days\ of\ the\ wage\ period}\ x\ Number\ of\ days\ in\ the\ eligible\ wage\ period$$

However, the "*number of days in the eligible wage period*" is not defined in the Bill. Further, this new section provides that the section is applied "*notwithstanding section 60I [of the Act]*", which provides the formulae of:

- "*ordinary rate of pay*", i.e. $\frac{Monthly\ rate\ of\ pay}{26}$ OR, if the employee is employed on a weekly rate, $\frac{Weekly\ rate\ of\ pay}{6}$;
- "*hourly rate of pay*", i.e. ordinary rate of pay divided by the normal hours of work.

Currently, section 60I is the formula used to calculate the wages for maternity protection, rest days, holidays, and other conditions of service. In light of this, it is unclear how the new section 18A would be applied harmoniously with section 60I.

9. Employment of foreign employees

It is proposed by the Bill that employers must now obtain prior approval from the Director General before employing any foreign employee, and failure to do so would be an offence.

There are also stringent conditions for such approval — the employer must have no outstanding matter under the Act, the **Employees' Social Security Act 1969**, the **Employees' Minimum Standards of Housing, Accommodations and Amenities Act 1990** or the **National Wages Consultative Council Act 2011** have not been convicted for any anti-trafficking in persons and forced labour-related offences. This is a big step forward from the current requirement, which is only to furnish the Director General with particulars of the foreign employee within 14 days of his employment.

The Bill further proposes that termination of the foreign employee's employment must also be informed to the Director General within 30 days (if termination was initiated by the employer, for immigration, repatriation, or deportation reasons) or 14 days (if termination was initiated by the employee or if the employee absconds from his workplace).

10. Labour contractors to have contract in writing with the principals

The Bill proposes to amend section 33A of the Act, which imposes a requirement for contractors for labour to have a written contract with such third party to whom they supply their employees. The contractors for labour are also required make such contract available for the Director General's inspection, and failure to do so would be an offence.

11. Forced labour

The Bill seeks to introduce a new offence of forced labour, where if an employer threatens, deceives or forces an employee to do any work, and prevents him from moving beyond the place or area where such work is done, this would amount to an offence.

12. Financial penalties

In the absence of any specific penalty, the Bill proposes that the penalties for contravention of the Act or its subsidiary legislations is increased from RM10,000 to RM50,000. This is most likely introduced to increase the deterrent effect and ensure better compliance with the Act.

13. Court order for payment due to employees

Further, the Bill also proposes that where any payment is payable to an employee because the employer has been convicted of an offence under the Act, the court may order the employer to make such payment due to the employee. In the event that the employer fails to comply with such order, the court is empowered to issue a warrant to levy the employer's

property for such payment due by way of distress and sale of property, or by way of a fine provided under the Criminal Procedure Code. Again, this is most likely introduced to increase the deterrent effect and ensure employers' compliance with orders to make payments to employees.

14. Presumption as to who is an employer and employee

It is interesting to note that where it relates to a proceeding for an offence under the Act, in the absence of a written contract of service for the employees under the purview of the Act (pursuant to the First Schedule), the Bill proposes that the Act shall presume that a person is an employer or employee based on the respective criteria. This is a rebuttable presumption if the contrary could be proved. The criteria are as follows:

Presumption as employee:

- Where his manner of work is subject to the control or direction of another person;
- Where his hours of work are subject to the control or direction of another person;
- Where he is provided with tools, materials or equipment by another person to execute work;
- Where his work constitutes an integral part of another person's business;
- Where his work is performed solely for the benefit of another person; or
- Where payment is made to him in return for work done by him at regular intervals and such payment constitutes the majority of his income.

Presumption as employer:

- Where he controls or directs the manner of work of another person;
- Where he controls or directs the hours of work of another person;
- Where he provides tools, materials or equipment to another person to execute work;
- Where the work of another person constitutes an integral part of his business;

- Where another person performs work solely for his benefit; or
- Whether or not payment is made by him in return for work done for him by another person.

Whilst these criteria are largely in line with the common law test on as enunciated in the leading case of **Dr A Dutt v Assunta Hospital**[1], it will be interesting to see whether this provision, if passed, would have any influence or effect on the development of the common law test in Malaysia.

Recently, on 2 December 2021, the Deputy Human Resources Minister indicated in the *Dewan Rakyat* that pursuant to this amendment, it would in effect now include gig economy workers (such as e-hailing drivers, food delivery riders, etc) into the definition of "*employees*" under the Act. This amendment seems to be intended to address the decision of the High Court earlier this year in **Loh Guet Ching v Myteksi Sdn Bhd (berniaga atas nama Grab)**[2], where the High Court held that e-hailing drivers were not employees/workmen within the strict parameters of the **Industrial Relations Act 1967**, and that the contract between Grab and its drivers is essentially a commercial agreement.

With the inclusion of gig economy workers as "*employees*" under the Act, Malaysia will be one of the first countries in the region to expressly recognise such individuals as employees. Whilst arguments could be made that this would accord more protections to gig economy workers, it remains to be seen whether this would have a positive impact on the gig economy, since the ethos of the gig economy is to move away from the strict control *ala* master-servant of an employment relationship.

15. Deletion of provisions

Apart from the above, the Bill also proposes to remove certain provisions in the Act, including the power of the Director General to enquire into complaints relating to local employee being discriminated against in relation to a foreign employee, and the prohibition of female employees in night work and underground work.

Conclusion

Whilst it is encouraging that the Bill seeks to introduce many positive changes, many of which are timely, the practical impact of such amendments remains to be seen. This is especially so when some of the proposals seem to narrow down the scope of protected employees, who were originally protected by some provisions of the Act. Many of the proposals are also lacking in detail, leaving questions as to how the same would bring about material impact on the protection of employees in Malaysia.

It is pertinent to note that since the Bill has only been tabled for first reading, it is still uncertain whether all these proposed amendments will eventually be passed by the Parliament. It is hoped that more clarity would be given in the subsequent reading of the Bill to ensure that the amendments bring about practical impacts and achieve the goals which are envisaged.

Endnotes:

[1] [1981] 1 LNS 5.

[2] (Judicial Review Application No. WA-25-296-10/2020).

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