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Proposed Amendments to IRA

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Introduction

The Industrial Relations Act 1967 ("the Act") was gazetted on 12 August 1976 and came into effect on 7 August 1967. It is one of the major law governing employment relationship in Malaysia which contains, among others, provisions on representation on unfair dismissal, claim for recognition by a trade union and collective bargaining.

The Ministry of Human Resources ("the Minister") has recently proposed several amendments to the Act which see several major changes being made to the Act. This article will highlight the major amendments being proposed.

Claim for recognition under Section 9 of the Act

In respect of a claim for recognition under Section 9 of the Act, the proposed amendment grants power to the Director General of Industrial Relations ("Director General") to give his decision as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity and communicate in writing the decision to the trade union of workmen, to the employer and to the trade union of employers concerned.

It should also be noted that if an employer is served a claim for recognition under Section 9(3) of the Act, the timeline to accord recognition or if recognition is not accorded, to notify the trade union, is reduced from 21 days to 14 days. The proposed amendment further seeks to introduce a requirement for the trade union of workmen or employer or trade union of employer to furnish such information to the Director General for the purpose of satisfying himself that any claim for recognition are in accordance with the Act or of any regulations made thereunder.

It is further proposed that upon expiry of the notification under Section 9(3) of the Act, the Director General shall take such steps to ascertain the percentage of the workmen in respect of whom recognition is being sought, who are members of the trade union of workmen making the claim. Currently, the Director General is required to ascertain the competency of the trade union of workmen to represent any workmen and the percentage of the workmen by way of secret ballot.

The proposed amendment seeks to remove the Minister's power to accord the recognition and seeks to leave it to the Director General to decide that recognition is to be accorded on the trade union concerned. This amendment seeks to reflect the reality whereby the Minister would almost invariably act on the advice of the Director General, based on the latter's investigations.

New provision on the application for bargaining rights

The proposed amendment seeks to introduce a new provision (Section 9A) to deal with a situation where there are more than one trade union of workmen been accorded recognition by the same employer to represent the same workmen. In such a situation, either the employer or the trade union of workmen make an application to the Director General and the Director General shall take such steps to ascertain by way of secret ballot, the highest number of votes indicating the preference to be represented by the trade union of workmen concerned. If the result of the secret ballot shows a tie, a further ballot will be carried out until the highest number of votes is obtained. Under this new provision, the Director General will decide that the trade union of workmen which obtained the highest number of votes shall have the sole bargaining rights to represent such workmen and no other application from another trade union of workmen shall be made under the new Section 9A within three years from the Director General's decision. This is timely amendment in view of the increasing number of situations where there are more than one trade union acts for the same category of workmen. It should be noted that there is already a separate provision under Section 15(2) of the Trades Union Act 1959 that deals with the same issue but it is hardly invoked by the Director General of Trade Union. It is only reasonable for the Director General to determine this point when dealing with recognition issues.

Collective bargaining under Section 13

There are two main amendments proposed for Section 13 of the Act.

Firstly, it seeks to introduce a new provision whereby in a situation where there are more than one trade union of workmen has been accorded recognition by the same employer to represent the same workmen or class of workmen, the trade union of workmen which has succeeded in its application under Subsection 9A(1) may invite the employer to commence collective bargaining with such employer. However, if there is an existing collective agreement, the new invitation shall not be made until the expiry of such collective agreement.

Secondly, it is proposed that Section 13(3) of the Act is removed in its entirety. Section 13(3) of the Act is significant as it prohibits a trade union of workmen to include in its proposal for a collective agreement the following, among others: -

- The promotion of an employee from a lower grade/category to a higher grade/category;
- The transfer of an employee;
- The employment of any person in the event of a vacancy arising in the employer's establishment.

Representation on unfair dismissal under Section 20 of the Act

A significant amendment would be in respect of the representation on unfair dismissal under Section 20 of the Act. Currently, the law requires the Director General of Industrial Relations to notify the Minister of Human Resources in the event there is no likelihood of an amicable settlement at the conciliation stage. The Minister may then, if he thinks fit, refer the representation to the Industrial Court for an award. The proposed amendment seeks to remove the requirement to notify the Minister and instead, the Director General of Industrial Relations shall refer the representation to the Industrial Court for an award, if there is no amicable settlement at the conciliation stage. It will be noted that the word "shall" connotes mandatory requirement on the part of the Director General to make the reference. This would mean that if parties cannot reach settlement, the representation will be automatically referred to the Industrial Court.

This amendment is long over due in view of the numerous decisions of the High Court in ruling that the Minister is obliged to refer the representations to the Industrial Court except for frivolous and vexatious cases. This amendment will reduce the number of challenges made against the Minister in respect of his decision to refer, or not to refer, the matter to the Industrial Court for adjudication.

New provision on discrimination in employment

Currently in Malaysia, we do not have a specific law that deals with discrimination at workplace. What we have is Article 8 of the Federal Constitution which states that all persons are equal before the law and entitled to the equal protection of the law. With the proposed amendment, the Act seeks to expressly prohibit employers from discriminating employees on the grounds of gender, religion, race or disability which is connected with the employment or the terms and conditions of employment. An employee who is discriminated may file a written complaint to the Director General. However, there is no timeline provided for the employee to make such a written complaint. The new provision further accords the Director General to refer the complaint to the Industrial Court for hearing.

Penalty for industrial action

Currently, the Act provides that any workman who participates in an illegal strike or instigating or inciting other employees to participate in an illegal strike or lock-out shall be guilty of an offence and shall, on conviction, be liable to imprisonment for a term not exceeding one year or to a fine not exceeding RM1,000.00 or to both. However, the proposed amendment seeks to remove the sentence of imprisonment, which would mean that any employee who is guilty of such acts will only be liable to pay the fine.

Essential services under the First Schedule

Another significant proposal is in respect of the list of essential services under the First Schedule. It is to be noted that the First Schedule is proposed to be amended by deleting the following from the list: -

- banking services;
- port, dock, harbour and airport services;
- postal services;
- production, refining, storage, supply and distribution of fuel and lubricants;
- radio communication services; and
- industries declared by the Minister by notification in the Gazette as essential to the economy of Malaysia.

It is proposed that the following is included under the First Schedule: -

- air traffic control;
- the provision of food to pupils of school age and cleaning of schools; and
- a service may become essential due to the duration of the strike as may be determined by the Minister.

The above proposal is crucial as it also has a bearing on Section 60A the Employment Act 1955 where under the said provision, an employee may be required to work beyond the limitation of working hours and to work on a rest day in the case of work to be performed by employees in essential service as defined by the Act.

The introduction of the Industrial Appeal Court

Kindly note that the Minister has proposed the introduction of the Industrial Appeal Court. However, the details of it and the proposed provisions to be inserted in the Act are yet to be released by the Minister. It is to be noted that under the current law, a party who is dissatisfied with the decision of the Industrial Court may file a judicial review application to challenge/set aside the decision.

This is a welcome amendment as it provides an automatic right of appeal for a party to challenge the decision as opposed to the more stringent requirements of Section 33A of the Act. It is arguable whether the creation of the Industrial Appeal Court will exclude or limit the right of parties to still apply to the High Court for judicial review to challenge an impugned decision of the Industrial Court.

Conclusion

The Minister is currently consulting and seeking feedbacks from the stakeholders on the proposed amendments. The above proposed amendments represent a significant potential development in the laws of our country, in particular the representation on unfair dismissals and the introduction of the Industrial Appeal Court.

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