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Employment 2021

Malaysia: Law & Practice
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MALAYSIA

Law and Practice

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1. INTRODUCTION

1.1 Main Changes in the Past Year

Industrial Relations (Amendment) Act 2020

The Industrial Relations (Amendment) Act 2020 introduced several amendments to the Industrial Relations Act 1967, most of which came into effect on 1 January 2021.

The following are some of the key amendments that came into effect:

- automatic referral by the Director General of Industrial Relations to the Industrial Court for unfair dismissal claims;
- an employer or employee may now be represented by any person of their choice (except a legal representative) during a conciliation process at the Industrial Relations Department, subject to the permission of the Director General;
- Industrial Court awards can now be appealed to the High Court;
- the Industrial Court may now impose interest on an award (including an interim award) of up to 8% per annum; and
- the Minister of Human Resources is now empowered to order a strike or lock-out to stop if it "endanger[s] the life, safety, or health of the whole or part of the population".

Service Charges Are Excluded from the Computation of Minimum Wages

In March 2021, the Federal Court finally answered the question as to whether service charge received by hotels can be used to supplement the monthly salaries paid to hotel workers, to meet the statutory minimum wage.

In the case of Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia [2021] MLJU 385, the Federal Court held that the hotel may not use the service charge paid by its customers to fulfil the minimum wage requirement. The Federal Court held that the purpose of the minimum wage legislation is to increase the basic wages of workers. For that purpose, service charges do not form part of the "basic wages", and therefore cannot be included in the calculation of minimum wages paid to the employees.

Pembangunan Sumber Manusia Berhad Act 2001

The *Pembangunan Sumber Manusia Berhad* Act 2001 was amended in March 2021, expanding the types of businesses required to pay into the Human Resources Development Fund (HRDF) to 48 new industries.

The amendment streamlined Malaysian companies' eligibility criteria across all industries, resulting in all industries being covered by HRDF training except for the federal and state governments, as well as NGOs involved in social welfare activities.

Extension of SOCSO and EIS to Domestic Workers

The Social Security Organisation (SOCSO) and Employment Insurance System (EIS), vide gazetted orders, have extended their coverage to include domestic workers, with effect from 1 June 2021.

1.2 COVID-19 Crisis

COVID-19 Act

On 23 October 2020, the Malaysian government gazetted the Temporary Measures for Reducing the Impact of the Coronavirus Disease 2019 (COVID-19) Act 2020 (COVID-19 Act). The purpose of the Act was to provide temporary measures to ease the impact of COVID-19 on various sectors and industries in Malaysia. However, the COVID-19 Act has had limited employment-related repercussions. In this regard, only Sections 39 and 40 of the COVID-19 Act provide

for the extension of limitation periods under the Industrial Relations Act 1967. Only the period from 18 March 2020 to 9 June 2020 is excluded from the computation of the statutory limitation periods, specifically:

- the 21-day period for employers or a trade union of employers to accord recognition or notify the trade union of workmen concerned in writing of the grounds for not according recognition, pursuant to Section 9(3);
- the 14-day period for a trade union of workmen to make any report of non-recognition or non-compliance to the Director General for Industrial Relations (DGIR), pursuant to Section 9(4); and
- the 60-day period for any aggrieved employee to file their unfair dismissal claim to the DGIR, pursuant to Section 20.

The subsequent extensions of the operations of the COVID-19 Act was not applicable to the foregoing sections.

Financial Aids

The government of Malaysia rolled out financial relief in stages to employers who have met the requirements. These reliefs are only temporary in nature and are of a one-off nature. The current applicable reliefs are:

- the PEMULIH Wage Subsidy Programme 4.0, which is open for applications from 1 August 2021 to 30 October 2021; and
- effective 1 June 2021 to 31 December 2021, all employers registered with the HRDF-Corp are exempted from paying the mandatory HRDF levy under the *Pembangunan Sumber Manusia Berhad* Act 2001.

2. TERMS OF EMPLOYMENT

2.1 Status of Employee

Domestic Workers

Employees in Malaysia are broadly separated into two categories: employees protected by the Employment Act 1955, and employees outside the purview of Employment Act 1955.

Generally speaking, the provisions of the Employment Act 1955 apply to all employees in Peninsular Malaysia whose monthly wages do not exceed MYR2,000 (approximately USD470). The Employment Act 1955 does not apply to Sabah and Sarawak, where there are separate employment ordinances.

Employees under the purview of Employment Act 1955 are entitled to the minimum standards of legal protections as set out under the said Act, whereas for employees outside the scope of the said Act, their terms of employment are governed by their individual employment contracts or any applicable collective agreement.

Insofar as employment laws are concerned, legal protection in Malaysia does not distinguish between "blue-collar" and "white-collar" workers. Nonetheless, employees who are engaged in manual labour or direct supervision of the same, automatically fall under the purview of the Employment Act 1955, irrespective of the quantum of their wages. Other categories of employees who are protected by the Employment Act 1955 include those who are engaged in the operation or maintenance of any mechanically propelled vehicle, engaged in any capacity in any vessel registered in Malaysia, or engaged as domestic servants.

Foreign Workers

For foreign workers, depending on their skills, different work permits will be issued by the

Immigration Department of Malaysia. The government draws a distinction between:

- blue-collar workers in manufacturing, construction, plantation, agriculture and services, who will be eligible for the "temporary employment pass"; and
- expatriates, who are generally involved in white-collar and/or highly skilled jobs, who are eligible for the "employment pass" and "professional visit pass" (see **5. Foreign Workers**).

2.2 Contractual Relationship

In Malaysia, employers may engage workers under two main types of contract:

- contracts of service, also known as "employment contracts"; or
- contracts for services, also known as "independent contracts".

For engagement made under items contracts of service, the workers are recognised as "employees" who are protected by the labour and employment laws of Malaysia – such as protection against unfair dismissal – whereas engagement under contracts for services is considered as non-employment (ie, those involved have independent contractor status) and the relationship is purely contractual.

For employment contracts, the different arrangements which may be entered into include:

- permanent employment;
- fixed-term employment; and
- part-time employment.

Employment Contracts

There is no legal requirement that employment contracts must be in writing in order to be valid. There are also no specific formalities that are required by the law to formalise an employment contract. In fact, the Employment Act 1955 recognises "any agreement whether oral or in writing and whether express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee". The exception to the foregoing is Section 10 of the Employment Act 1955, which provides for the requirement of an employment contract to be in writing where it is for a fixed term or for a specific piece of work that lasts for a specific period exceeding a month.

Nonetheless, as best practice and for practical reasons, employment contracts are generally in writing. Salient terms of employment that are included in the employment contract include:

- period of employment (whether permanent or for a specific period);
- rate of remuneration;
- job scope;
- work location;
- working hours;
- wage period;
- notice period;
- employment benefits; and
- holidays, annual and sick leave entitlements.

2.3 Working Hours

Working Hours

For employees under the purview of the Employment Act 1955, Section 60A (1) of the Act provides that an employee shall not be required to work:

- more than five consecutive hours without a period of leisure of not less than 30 minutes duration;
- more than eight hours in one day;
- in excess of a spread-over period of ten hours in one day;
- more than 48 hours in one week.

For employees outside the purview of the Employment Act 1955, the hours of work will be determined by the contract of employment and there is no legal regulation of the same.

Overtime Work

The Employment (Limitation of Overtime Work) Regulations 1980 limits the total hours of overtime to be of 104 hours in a month. The Employment Act 1955 prescribes that the minimum rate of pay for overtime work is 150% of the hourly rate of pay.

For employees outside the purview of the Employment Act 1955, there are no specific regulations on overtime work.

2.4 Compensation

Minimum Wage Requirements

Section 23 of the National Wages Consultative Council Act 2011 grants power to the Minister to gazette minimum wages orders to prescribe for the minimum wages for a given time.

At the time of writing, the order in effect is the Minimum Wages Order 2020, which came into force from 1 February 2020. Pursuant to the Minimum Wages Order 2020, the minimum wage for areas under the categories of City Council or Municipal Council are MYR1,200 per month, whereas for the remaining parts of Malaysia, the minimum wage is MYR1,100 per month.

It is worth noting that failure to pay the minimum wage constitutes an offence under the National Wages Consultative Council Act 2011. On conviction, the employer shall be liable to a fine of not more than MYR10,000 for each employee.

Bonuses and 13th Month Pay

Payment of bonuses, or "13th month pay", to employees is not mandated by the law or policy, unless the same are provided for as a term of employment. It is common for employers to grant a discretionary bonus to employees, where payment of the same is subject to, inter alia, the employees' individual performance and the business's overall performance.

Increments

Similar to bonuses, there is no law or policy mandating any form or scale of increment of salaries of employees. Unless the same is provided for as a term of employment in the individual employment contract, increments are generally granted on a discretionary basis and are not considered as an "as of right" entitlement of the employees. However, where there is a collective agreement in place, it will often provide for mandatory salary increments.

2.5 Other Terms of Employment

Employment Act Leave

The Employment Act 1955 provides for the minimum requirements for several leave entitlements, as follows.

Annual leave

Section 60E of the said Act provides for the minimum number of days of annual leave, depending on the length of service of each employee, as follows:

- eight days for every 12 months of continuous service with the same employer if the employee has been employed by that employer for a period of less than two years;
- 12 days for every 12 months of continuous service with the same employer if the employee has been employed by that employer for a period of two years or more but less than five years; and
- 16 days for every 12 months of continuous service with the same employer if the employee has been employed by that employer for a period of five years or more.

Sick leave

Section 60F of the Employment Act 1955 provides that where it is certified by a registered medical practitioner, employees are entitled to the following minimum number of days of sick leave in each calendar year:

- 14 days, if the employee has been employed for less than two years;
- 18 days, if the employee has been employed for two years or more but less than five years;
- 22 days, if the employee has been employed for five years or more.

Where hospitalisation is necessary, an employee shall be entitled to 60 days of sick leave in the aggregate in each calendar year.

Public holiday

Section 60D of the Employment Act 1955 provides that employees shall be entitled to a total of 11 days of gazetted public holidays per calendar year, of which five days shall be:

- the National Day;
- the birthday of the King of Malaysia;
- the birthday of the ruler of the respective state or federal territory;
- the Workers' Day; and
- Malaysia Day.

On top of that, employees shall also be entitled to any day declared as a public holiday under Section 8 of the Holidays Act 1951.

The foregoing are only applicable to employees who are under the purview of the Employment Act 1955 and they are merely the minimum standards set by the law. There is nothing in law preventing employers from providing terms or benefits that are more favourable than the foregoing standards.

For those who do not fall within the scope of Employment Act 1955, their leave entitlements would be dependent upon their contractual terms.

Maternity leave and other familial leave

Maternity protection is provided for under Part IX of the Employment Act 1955, where under Section 37 of the said Act, every female employee shall be entitled to maternity leave for a period of not less than 60 consecutive days. It is worth noting that despite being provided for by the Employment Act 1955, this part of the Act extends to all female employees irrespective of whether they fall under the purview of the Employment Act 1955.

Other types of familial leave – such as parental, child-care and adoption leave – are not mandated by the law, and are relatively uncommon in Malaysia. Similarly, paternity leave is not mandated by law and is not common in Malaysia.

Implied Terms of Employment

Apart from the express terms and conditions that are provided for in the contract of employment, the common law also imposes various implied terms of employment into an employment relationship.

The relationship between employer and employee has been described as a relationship of master and servant, where there is an implied duty to maintain the mutual trust and confidence between the employer and the employee. This is also described as the duty of fidelity, which requires the employee to faithfully serve the employer and provides that the former must not act against the interests of the employer.

Examples of these duties include a duty on the employee to protect the confidential information and trade secrets of the employer and a duty to not damage the reputation of the employer.

In fact, the courts have repeatedly upheld the principle that any breach of mutual trust and confidence as well as the good faith obligation, which is likely to damage the reputation of the employer, may constitute gross misconduct and will lead to disciplinary action up to and including dismissal.

3. RESTRICTIVE COVENANTS

3.1 Non-competition Clauses

As a general rule, non-compete clauses in any agreements, including employment agreements, are not enforceable in Malaysia. This is because, unlike other jurisdictions, Section 28 of the Contracts Act 1950 provides that any agreement to restraint the exercise of a lawful profession, trade, or business of any kind, is void under the law. The purpose of this section is to promote free trade and the free movement of labour.

Pursuant to Section 28 of the Contracts Act 1950, the common law test of reasonableness does not apply in Malaysia. Similarly, the courts have no discretion but to declare a non-compete clause void and unenforceable. Nonetheless, in practice, this clause is often included in employment contracts for deterrent purposes.

However, where it relates to the protection of confidential information, the employee will still be bound by any confidentiality provisions stated in their employment contract. Even in absence of any confidentiality provisions, there is also an implied duty of confidentiality imposed on the employee. The duty of confidentiality extends beyond the employment – ie, the employee is still obliged to keep confidential the confidential information and trade secrets to which they was exposed in the course of their employment.

3.2 Non-solicitation Clauses – Enforceability/Standards

Non-solicitation of Customers/Business Relations

These clauses are in principle valid and protected under the confidentiality law. Therefore, such a clause would be enforceable if the employer is able to prove that the customers or business-related information are the confidential information of the business. The duty of confidentiality extends perpetually until such information becomes available in the public domain.

In practice, however, it may be difficult for the employer to prove that such customers or business information are the confidential information of the company, or that such information has been misappropriated by the ex-employee during the course of their employment, and subsequently divulged by the ex-employee to the company's competitor. Nonetheless, such clauses may have a deterrent effect on the employee.

Non-solicitation of Employees (Non-poaching)

Generally, this is not enforceable as employees are not protected as "confidential information" of the employer. Nonetheless, in practice, this clause is often included in employment contract for deterrent purposes.

4. DATA PRIVACY LAW

4.1 General Overview

The main legislation governing the protection of personal data in Malaysia is the Personal Data Protection Act 2010 (PDPA). The PDPA imposes certain obligations on data users in processing the personal data of data subjects. In the context of employment law, employers are usually the "data users", whereas the employees whose personal data will be processed represent the "data subjects".

Under the PDPA, employers must obtain the consent of their employees prior to collecting and processing their personal data. Where "sensitive personal data" is involved, explicit consent should be obtained.

The employees must be provided with a personal data notice that is issued in both English and the Malay language. Essentially, in the notice, employees must be notified on the nature and purpose of the collection of their personal data, to whom it will be disclosed, and that the employee has a right to access and correct their personal data.

In terms of managing the personal data, the employer shall take practical steps to protect the personal data from any loss, misuse, modification, unauthorised or accidental access or disclosure, alteration or destruction. There is also a duty on the employer to take reasonable steps to ensure that the personal data is accurate, complete, not misleading and kept up to date (having regard to the purpose for which the personal data was collected and further processed).

The PDPA also provides that the personal data shall not be retained for a period longer than is necessary for the fulfilment of the purpose of its collection, and shall be permanently destroyed or deleted if it is no longer required. In this regard, employers should be mindful in relation to retaining the personal data of employees after the cessation of employment. Nonetheless, employers should also bear in mind that Section 61 of the Employment Act 1955 provides that there is a duty on the employers to retain the register of employees' information for a period of at least six years.

Failure to comply with the PDPA 2010 constitutes an offence which, on conviction, is punishable by a fine not exceeding RM300,000 or imprisonment for a term not exceeding two years, or both.

5. FOREIGN WORKERS

5.1 Limitations on the Use of Foreign Workers

Foreign workers are only allowed to work in certain sectors in Malaysia. These include manufacturing, construction, plantation, agriculture and services.

Apart from the above, it should be noted that foreign workers are only permitted to work for one employer and to be stationed at one work location, as per the name and address of the employer on their respective work passes. Employers are not entitled to assign these foreign workers to any subcontractor, party, or sector other than those specified on their work passes.

5.2 Registration Requirements

Employment Permits

The type of work permit issued by the government depends on the skill of the foreign applicant, as well as the remaining quota for that sector. It is a requirement for employers to apply for and obtain approval from the relevant government agencies prior to hiring foreign workers.

There are three types of employment permits for which foreign workers can apply in Malaysia, and the differences between each of these passes are summarised below.

Employment passes (EP)

The EP is a work permit that allows an expatriate to work under a contract of service for a Malaysian company and is further classified into three categories, depending on the expatriates' positions and salaries.

The employer has to request approval to hire the applicant through the expatriate committee (EC) or another authorised approval agency. This is referred to as applying for an expatriate post. Once the expatriate post application is approved, the employer must submit the employment pass application at the Immigration Department of Malaysia.

Temporary employment passes (TEP)
The TEP is issued to semi-skilled or unskilled workers in certain approved sectors. There are two categories of TEP, those for:

- foreign workers in the manufacturing, construction, plantation, agriculture and services sectors; and
- foreign domestic helpers (FDH).

Professional visit pass (PVP)
Foreign talents with acceptable professional qualifications or skills are issued a PVP. The PVP is different from the other types of Malaysian work permits because such an individual would not actually be employed by a Malaysian company or organisation.

6. COLLECTIVE RELATIONS

6.1 Status/Role of Unions
Under Article 10 of the Federal Constitution of Malaysia and Section 4 of the Industrial Relations Act 1967, all workers or employers in Malaysia have the right to form or join trade unions and to participate in their lawful activities.

Malaysia has several active workers' trade unions, the largest of which are the Malaysian Trade Union Congress (MTUC), the National Union of the Teaching Profession (NUTP), the National Union of Plantation Workers (NUPW) and the National Union of Bank Employees (NUBE).

A trade union is defined under the Trade Union Act 1959 as any association of workmen or employers within particular or similar establishments, trades, occupations or industries with one or more of the following objectives:

- to regulate and promote good working relationship between the workmen and employers, improving the working conditions of workmen or enhancing their economic and social status, or increasing productivity;
- to regulate the relationship amongst the workmen or amongst the employers;
- to provide representation in trade disputes;
- to conduct or deal with trade disputes and their related matters;
- to improve the working conditions for an employee; and
- to promote, organise, or finance its members during a strike or lockout.

6.2 Employee Representative Bodies
Once a trade union is established, Section 8 of the Trade Union Act 1959 requires any organisation that meets the requirements to apply for union registration within one month of its establishment. The Registrar of Trade Unions may extend this period at their discretion, but such extension may not exceed six months.

The process of registration of trade unions is provided for in Section 10 of the Trade Union Act 1959. The following steps are to be taken in order to form and register a trade union:

- the application must be signed by at least 7 members;
- it must be in the prescribed form and accompanied by the prescribed fees;

- a printed copy of the rules of the union (in the national language of Malaysia) signed by the seven members has to be submitted;
- the names, occupations, and addresses of the members making the application should be included;
- the name and address of the head office of the union should be included; and
- the name, age, citizenship and occupation of the office-bearers should be submitted.

In these circumstances, Section 12 of the Trade Union Act 1959 empowers the Director General to register the Trade Union. After registering a trade union under Section 12, the Director General shall issue the trade union a certificate of registration in the prescribed form, and that certificate, unless proven to have been cancelled or withdrawn, shall be conclusive evidence for all purposes that the trade union has been duly registered under the Act. It should also be noted that, according to Section 59 of the Trade Union Act 1959, a union is prohibited from engaging in any activity until the Director General issues a registration certificate.

Notwithstanding the foregoing, Section 12 also gives the Director General the authority to refuse to register a trade union for one of the following reasons:

- the Director General believes that the union is likely to be used for unlawful purposes or contrary to its objectives and rules;
- any objectives of the union are unlawful; or
- the Director General is not satisfied that the trade union has complied with the provisions of the Act.

6.3 Collective Bargaining Agreements

The Industrial Relations Act 1967 (IRA 1967) defines a "collective agreement" as an agreement in writing concluded between an employer or a trade union of employers on the one hand, and a trade union of workmen on the other, on matters relating to the terms and conditions of employment and work of workmen or concerning relations between such parties; whereas "collective bargaining" is defined as "negotiating with a view to the conclusion of a collective agreement".

The steps taken to enter into collective bargaining and form a collective agreement are summarised below.

Union Recognition

The process by which an employee trade union seeks official acceptance from the employer to act on behalf of the employees who fall under the scope of its representation is known as "Union Recognition". The aim of securing such "Union Recognition" is to enable the trade union of employees to act on their behalf and commence collective bargaining. Without an order of recognition, the trade union has no locus standi to represent the employees within the scope of its representation for the purposes of collective bargaining.

Invitation to Commence Collective Bargaining

Once a trade union is recognised by an employer, Section 13 of the IRA 1967 provides that the trade union would have the automatic right to enter into contract negotiations as a principal with the employer on the terms and conditions of employment to be contained in a collective agreement. In these situations:

- the trade union of workmen may invite the employer or trade union of employers to commence collective bargaining; or
- the employer or the trade union of employers may invite the trade union of workmen to commence collective bargaining.

This invitation must be in writing and must include the proposals for a collective agreement.

Upon receipt of such invitation, the invitee must respond in writing (to the inviter) within 14 days, indicating acceptance or rejection of the invitation. The collective bargaining must commence within 30 days of the receipt of the acceptance.

If an invitation is rejected or is not accepted within 14 days, or if collective bargaining does not commence within 30 days, the inviter may file a formal complaint with the Director General. The Director General has the authority to compel parties to commence collective bargaining. If collective bargaining does not take place, a trade dispute is deemed to exist.

Negotiation

Once collective bargaining has commenced, the parties must negotiate the provisions that will be included in the collective agreement. In this respect, any proposals or counter-proposals from either party must be in writing and the ultimate outcome of a successful negotiation is the collective agreement.

7. TERMINATION OF EMPLOYMENT

7.1 Grounds for Termination

Malaysia does not recognise "at will employment" – ie, employers cannot simply terminate an employee for any reason. Termination of an employee's services can only be carried out provided that it is justified, done in good faith, and done in a fair and reasonable manner. This principle is reflected in the Industrial Relations Act 1967, where Section 20 of the Act provides that where a dismissal was done "without just cause or excuse", the employee would have the right to file an unfair dismissal representation to the Director General of Industrial Relations.

Under the common law, the grounds for termination which are accepted as "just cause or excuse" include:

- misconduct;
- poor performance; and
- redundancy.

Depending on the grounds of dismissal, different procedures ought to be adopted to ensure procedural fairness.

Misconduct

For a dismissal on the grounds of misconduct, due inquiry ought to be conducted before determining the guilt of the employee. In fact, Section 14 of the Employment Act 1955 also requires that due inquiry be conducted before disciplinary action (including termination) can be taken against the employee. A domestic inquiry is not a legal requirement when enquiring into an allegation of misconduct of an employee – what is required is that the employee is accorded the opportunity to explain, for example, by way of a show cause letter.

Poor Performance

For a dismissal due to poor performance, the employee must first be warned about their poor performance and be given sufficient opportunity to improve. This can be done by way of a performance improvement plan. If the employee does not show the expected improvement within the stipulated time, the employer can then proceed with the dismissal.

Redundancies

For redundancies, the Code of Conduct for Industrial Harmony provides guidance on conducting a retrenchment exercise. Nonetheless, the courts have repeatedly held that the provisions of the Code do not have the force of law. Therefore, departure from the same does not necessarily mean that the retrenchment is unfair.

Once it is established that there is a redundancy situation, the next step is the selection of employees to be retrenched. Under Section 60N of the Employment Act 1955, foreign employees must be retrenched first before retrenching Malaysian employees. Thereafter, the default selection is based on the principle of "last in, first out" (LIFO), but the employer may depart from the LIFO principle by using its own selection criteria, as long as the same can be shown to be fair and reasonable.

For a collective dismissal, it is recommended that the employer should give a warning as early as practicable. Where the employees are represented by a trade union, the employer is advised to consult with the union and ensure that they comply with any applicable collective agreement. The employer may also offer mutual or voluntary separation schemes to the employees for amicable departure of the employees.

It is compulsory for an employer to submit a report on retrenchment to the Department of Labour office Malaysia in the relevant form. Under Section 63 of the Employment Act 1955, failure to do so will constitute an offence and the employer shall be liable to a fine of MYR10,000.

7.2 Notice Periods/Severance

There is no statutory prescribed notice period. Employers and employees are free to agree upon the length of any notice period to be binding on both parties. In the absence of any agreed notice period in writing, Section 12 of the Employment Act 1955 provides for the minimum notice periods, which are:

- four weeks' notice if the employee has been so employed for less than two years on the date on which the notice is given;
- six weeks' notice if the employee has been so employed for two years or more but less than five years on such date; and
- eight weeks' notice if the employee has been so employed for five years or more on such date.

The agreed notice period should be put in writing as a term of employment as a matter of best practice. Generally, the term of notice period is also accompanied by the agreement between parties to accept salary in lieu of such notice period.

7.3 Dismissal For (Serious) Cause (Summary Dismissal)

Summary dismissal is an action of immediate dismissal where the employer does not give the employee any notice of termination or salary in lieu of notice. This can only be done in the event that the employee has committed gross misconduct.

There is no statutory definition of gross misconduct, but, generally, it can be understood as actions or behaviour that are so serious in undermining the mutual trust and confidence between the employer and employee, that they justify the punishment of instant dismissal.

Due Inquiry

Prior to carrying out a summary dismissal, the employer should first conduct investigations into the matter, and thereafter due inquiry into the allegation of such gross misconduct. As explained in **7.1 Grounds for Termination**, domestic inquiry is not mandated by law. However, the employee must be given a chance to respond before the decision to dismiss them is made.

Where the employer is of the view that the presence of the employee at the workplace would hamper or prevent any investigations, the employee may be suspended.

When the employee is asked to provide their response to the allegation(s), whether by way of issuing a show cause letter or a domestic inquiry, the employee must be made aware of the nature of allegations against them. The employee should also be given reasonable time to respond to the charge(s).

If the employer is unsatisfied with the employee's explanation, and after taking all circumstances into account, reasonably believes that the employee is guilty of a gross misconduct, the employer should then decide whether the gravity of the misconduct justifies a summary dismissal. If in the affirmative, the employer should issue a written letter of dismissal to the employee. The reason for dismissal should be made known to the employee.

Failure to adopt a fair dismissal procedure could expose the employer to potential liabilities. If the employee believes that they have been terminated without just cause or excuse, they can file a complaint with the Industrial Relations Department under Section 20 of Industrial Relations Act 1967 seeking the remedy of reinstatement and back wages of up to 24 months (or up to 12 months for probationers).

7.4 Termination Agreements

As discussed in **7.1 Grounds for Termination**, there is no "termination at will" in Malaysia. All termination must only be carried out with just cause and excuse.

However, employers can offer mutual separation schemes (MSS) or voluntary separation schemes (VSS) to their employees, which involve the parties voluntarily bringing the employment relationship to an end by entering into an MSS or VSS agreement.

A VSS is a mechanism where the employer offers its employees the choice to terminate the contract of service voluntarily. The VSS offer is generally accompanied by a compensation package offered by the company.

On the other hand, an MSS is a mechanism where the employer identifies the particular employees to whom to extend such offer of separation. Generally, the employer and employee can negotiate the compensation package of the MSS and the employee can then decide whether to accept or reject that offer.

The fundamental element of a mutual/voluntary separation is that the employer agrees to a monetary payment in exchange for the employee agreeing to voluntarily resign. The agreement, however, must be entered into voluntarily and not through use of force, subtle or otherwise, or by coercion or under duress in any form or by any unfair labour practice. In this regard, if the court determines that one of the aforementioned elements was present in the formation of the agreement, the court may hold that this was, in fact, a dismissal and the employer would be obliged to show just cause or excuse.

7.5 Protected Employees

Section 37(4) of the Employment Act 1955 provides that a female employee shall not be terminated during the period in which she is entitled to maternity leave except on the grounds of closure of the employer's business.

Section 5(1)(d) of the Industrial Relations Act 1967 provides that employers shall not dismiss or threaten to dismiss an employee by reason that they propose to become or persuade others to become involved in a trade union or participate in the formation, promotion or activities of a trade union.

8. EMPLOYMENT DISPUTES

8.1 Wrongful Dismissal Claims

An employee who considers themselves to have been dismissed without just cause and excuse has the right to file a representation to the Director General of Industrial Relations, who would subsequently take steps to resolve the dispute amicably. If the parties are unable to reach a settlement, then the Director General of Industrial Relations shall refer the representation to the Industrial Court for adjudication.

Where an employer is unable to prove "just cause and excuse" for a dismissal, such dismissal will be deemed as "unfair". In such circumstance, the Industrial Court may grant the following remedies to the employee.

- Reinstatement of the employee to their last held position; if reinstatement is not granted or not practical, the Industrial Court will order compensation in lieu of reinstatement, which is computed at the rate of one month's salary for each year of completed service.
- Back wages (ie, wages from the day of dismissal up to the date of the Industrial Court decision), capped at 24 months of the employee's last drawn salary, or 12 months if the employee is a probationer.

However, where an employee chooses to file their claim for breach of employment contract before the civil courts, the common law provides that the damages that the employee is entitled to are limited to the wages due during the notice period. An employee is not entitled to damages for loss of earnings or injured feelings. This is set out in the case of Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors [1981] 1 MLJ 238.

8.2 Anti-discrimination Issues

Article 8 of the Federal Constitution prohibits any form of discrimination against citizens on the grounds of religion, race, descent, place of birth or gender. Notwithstanding the foregoing, the Federal Court, in the case of Beatrice AT Fernandez v Sistem Penerbangan Malaysia & Anor [2005] 3 MLJ 681, held that Article 8 of the Federal Constitution only applies to the legislature, government authorities and Parliament, and does not extend to the private employment sector.

In this regard, employees in the private sector may rely on the following provisions, which prohibit workplace discrimination.

- Section 60L of the Employment Act 1955 – any employee (local or foreign) may submit a complaint to the Director General of Industrial Relations on the grounds that they are being discriminated against in relation to being a foreign employee/local employee in respect of the terms and conditions of their employment.
- Section 5(1)(c) of Industrial Relations Act 1967 – employers shall not discriminate against any person regarding employment, promotion, any condition of employment or working conditions on the grounds that they are a member or officer of a trade union.

Aside from the above provisions, employees may also pursue civil tortious claims for unfair discrimination. The following elements must be present for an employee to claim unfair discrimination under the scope of this tort.

- There must be some form of discrimination; discrimination occurs only when equals are treated unequally.
- The discrimination must be unfair; discrimination must be accompanied by an element of harshness or unfairness, or that there was an

unjust or unreasonable unfair bias in favour of one and against another.
- There must be resultant harm or injury that is recognised by law – ie, pecuniary or non-monetary loss.

The burden of proof for tortious claims for unfair discrimination, like other civils claims, is on the balance of probabilities, and legal remedies for this claim are often pecuniary damages to be paid to the victim as compensation for loss or injury.

9. DISPUTE RESOLUTION

9.1 Judicial Procedures

Industrial Court

The Industrial Court is a statutory tribunal that was created to hear matters relating to the Industrial Relations Act 1967, such as unfair dismissal claims, trade disputes or trade union recognition. Generally, all employees (excluding independent contractors) are eligible to file their claim before the Industrial Court.

Section 27 of the Industrial Relations Act 1967 provides for representation before the Industrial Court. Briefly, parties may represent themselves by appearing personally (or in the case of an employer, any duly authorised officer of the company), be represented by their trade union representative or by a lawyer.

Labour Court

The Labour Court is established to hear any dispute or claim relating to the provisions of the Employment Act 1955 and its regulations, as well as certain contractual claims.

The Labour Court only has the power to hear complaints from two categories of workers:

- those who are covered by the Employment Act 1955; and
- those who are earning a basic salary of up to MYR5,000 per month.

9.2 Alternative Dispute Resolution

An arbitration clause is rarely seen in employment contracts, but in the presence of any, the same will be enforceable and there is nothing to stop parties from arbitrating employment-related disputes.

Nonetheless, as the amount involved in employment disputes is generally quite low in comparison to the costs of an arbitration, arbitrations are not the usual choice of forum to resolve employment-related disputes as the costs do not justify the quantum claimed.

On the other hand, mediation is a more common ADR process to resolve employment-related disputes. This is because the Industrial Court also plays a relatively active role in encouraging/assisting parties in mediation in order to resolve their dispute.

9.3 Awarding Attorney's Fees

Costs are not awarded at the Industrial Court. Each party will bear their own legal fees, irrespective of whether they win or lose the case.

On the other hand, it is common for costs to be awarded to the winning party by civil courts. Nonetheless, the costs awarded are determined by the court and most of the time, will not cover all legal fees.

Shearn Delamore & Co is a premier full-service law firm that prides itself on providing creative, pragmatic and cost-effective solutions for its clients. The firms' Employment & Administrative legal practice group consists of six partners and several associates. It offers comprehensive representation and assistance to clients involved in various stages of employment-related dispute resolution as well as representation before the judicial forums. Shearn Delamore & Co has been engaged in cases that have contributed to the evolution and expansion of employment and administrative law in Malaysia. The practice continues to keep abreast of changes to the law and regularly advises clients on the nature and implications of key amendments.

AUTHOR

Vijayan Venugopal is a partner of Shearn Delamore & Co who has worked with the firm for over 27 years and has been exclusively practising in the field of employment law throughout that period. He has extensive experience dealing with the law on dismissals, trade union disputes, collective bargaining, contracts of service, employment issues, industrial action, judicial reviews, employment law aspects of mergers and acquisitions, minimum wage, occupational health and safety legislation, reorganisations and retrenchment, statutory benefits, and union recognition. He has conducted hearings at various levels of the judicial hierarchy, including the Labour Court, the Industrial Court, the Magistrate's Court, the Sessions Court, the High Court, the Court of Appeal and the Federal Court.

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