The Employment Law in Malaysia

Topic 2
Introduction

- **Why is paid employment important to employee?**
  - Source of income
  - As a means of identity
    - What goes on within the employment relationship is crucial.

- **Why is paid employment important to employer?**
  - Skills & knowledge of workers – HR as the core resource.
  - Organize HR to meet company goals and employees needs.

- **Why is paid employment important to society?**
  - Change the condition of the society – unemployment, women in the workforce.
Employment relationship

- Employment relationship – a relationship between an employer and employee
- 2 parts (Flanders, 1974):
  - Market relations – price of labor, hours of work
  - Managerial relations – the process that takes place within an employment. Quantity of work done, who decided what, etc.
Employment Act, 1955 is the most important piece of legislation for Malaysian employees.

The purpose of this Act is to provide a number of minimum benefits for those workers covered by the Act and to establish certain rights for both employers and employees.
Individual Employment Contracts

- Employment law only applies to employees – self employed persons are not protected by employment laws
- An employee is employed under a contract of service
- Need to distinguish between contract OF service and contract FOR service. EA refer as contract of service. IRA refer as contract of employment.
- Contract FOR service – someone who has been hired to provide services (painting, renovation etc) for the organization – he is not an employee, thus not covered by the employment laws
Contract of service, contract of employment
Definition of employer
EA – employee, IRA – workman
  Include part-time workers, apprenticeship
Contract of service
  An agreement whether oral or in writing and whether express or implied whereby one person agrees to employ another as an employee and the other agrees to serve his employer as an employee, and includes an apprenticeship contract (S2 EA)
Contract of Service

A combination of factors will be examined and several questions asked to differentiate between contract OF service and contract FOR service:

- Does the employer control when and how the work is done and who does it?
- Does the employer provide tools, raw materials and equipment necessary to do the work?
- How is payment made? On a regular basis or on completion of the work? Does the party providing the service have to submit an invoice to get paid?
- Are contributions to statutory funds such as the EPF being made?
- Is there a written contract and if the is what are the terms of this contract?
- Does the worker have to follow the organizational rules
Contract of Service

- Labour legislation in Malaysia does not differentiate between part-time workers, temporary workers, foreign workers recruited legally to work in Malaysian establishments, and others.
- All such workers are protected equally by the law.
Why is it important to differentiate between COFS vs CFORS?

Test to determine the differences:
- Control test – subject to the command of his master as to the manner in which he shall work
- Organizational or integration test – person part and parcel of the organization. Degree of integration with the organization
- Mixed or multiple test/composite test – 4 indicia
  - The power of selection
  - The payment of wages
  - The right of suspension or dismissal
  - The right of control
Entrepreneur Test – Is the person who has engaged himself to perform these services performing them as a person in business on his own account?. If yes CFORS

Whether a director is an employee? (Inchape Holdings Bhd v RB Gray & Anor (1985) 2MLJ 297)

- Directors – the directing mind/will of the company. In reality control the fate of the company. Therefore not employee
Contract of Service

Criteria of a well-written employment contract:
- Compliant with the law
- Understandable
- Complete
- Long lasting

A contract of employment does not have to be in writing. However, it is vital to have the contract in writing because if a dispute arises about the terms of that contract, both parties will have difficult time proving to the Labour Department or a Court what the agreed terms are.
Terms and Conditions of the Contract of Employment

- The terms are the contents of the contract or the promises made by each party to each other.
- Statutory minimum of the terms is set down in the Employment Act.
- Implied terms of an employee’s contract:
  - Due care
  - Obediently
  - Faithfully
Express Terms in a Contract of Employment

- Job title
- Wages and details of other monetary payments
- Normal working hours, and whether there is requirement to work overtime
- Holiday and leave entitlements
- Other benefits
- Probationary period

- Notice period prior to termination
- Retirement age
- Requirement of confidentiality
- Requirement to give exclusive service
- Mobility requirement
- Requirement to comply with company rules and penalties for misconduct
Changing the Terms of a Contract

- Employee contracts are mutual agreements between an employer and an employee.
- The terms and conditions of the contract can only be changed with mutual consent.
- Unilateral changes to the contract by the employer constitute a breach of contract.
Duration of the Employment Contract

Employment contracts can be:

- For a particular period of time – fixed term contracts
  - Contracts terminated automatically at the end of the stated time period or when the work is finished.
- Open-ended for unspecified duration
  - The jobs belong to the employees until their services are formally terminated by the employer or they decide to leave the organisation
Coverage of the Employment Act

- Any person, who entered into a contract of service with an employer under which such person’s wages do not exceed RM 1,500 a month
- Any person, who has entered into a contract of service with an employer, without regard to his wages who:
  - Is engaged as a manual labourer
  - Supervises employees engaged in manual labour
  - Is engaged in the operation or maintenance of any vehicle for the transport of passengers or goods
  - Is engaged as a domestic servant
Unfair terms of contract

- Must be fair and reasonable
- Term not valid if not just, fair & reasonable.
- No Unfair Contract Term Act, but governed by case law:
  - Perdzaha Maneekji Framroz v Nowroji Rustamji Mistri (1932) MLJ 96 – join similar business
  - Acme Canning Corporation Lyd v Lee Kim Seng (1977)1 MLJ 252. – claim for overtime.
- Implied terms applicable.
Employee’s Right to Unionise

- Employers may not put any clause in a contract of employment which in any way restricts the right of an employee to join a registered trade union, to participate in the activities of that union or to join with others for the purposes of forming union [Section 8]
Notice to Terminate a Contract

- The employer can decide on the notice period required and have this agreed to in the contract of employment.
- In case where the contract is silent on the length of the notice period then the notice shall not be less than:
  - 4 weeks’ notice – being employed less than 2 years
  - 6 weeks’ notice – being employed more than 2 years but less than 5 years
  - 8 weeks’ notice – being employed more than 5 years

[Section 12]
Termination for Misconduct

- An employer has the right to dismiss, downgrade or impose any other lesser punishment on an employee who, after a “due inquiry”, is found guilty of misconduct.
- Employer may suspend the employee up to 2 weeks during the investigation process.
Breach of Contract

- Employers – fail to pay wages as required by relevant section on wages
- Employees – being absent without permission for more than 2 consecutive working days
The employment Act does not establish minimum wages, but lay down certain procedures relating to the payment of wages to ensure workers are not exploited:

- Wage period
- Advances on wages
- Priority of wages
- The truck system

Current initiative – introduce reasonable pay
Employment of Women

- Women may not work between the hours of 10.00 pm – 5.00 am
- Women may not work in underground mining operations
- All female employees are entitled to 60 days’ maternity leave each and every time they give birth
Working Hours and Leave

- Rest day
- Maximum working hours
- Overtime
- Public holidays – 10 gazetted public holidays
- Annual leave
- Sick leave
Termination Benefits

Only those workers with a minimum of 12 months’ service are entitled to termination benefits. The quantum is:

- 10 days’ wages for every year of employment if the worker has been employed less than 2 years
- 15 days’ wages for every year of employment if the worker has between 2 years and 5 years service with his employer
- 20 days’ wages for every year of employment if the worker has 5 or more years service with his employer
Employment of Foreigners

- Foreign workers who are legally employed in Malaysia (those within the scope of First Schedule, EA 1955) are protected by the Employment Act and are entitled to the same benefits as locals.
- If employer is conducting a retrenchment exercise, foreigners employed in the jobs concerned must be retrenched before local workers.
Changes to the Employment Act

Changes as suggested by several unions:
- Coverage of the Act
- Annual Leave
- Definition of wages
- Sick leave
- Maternity leave – increase to 84 days
Children and Young Persons (Employment) Act, 1966

- A child – under the age of 14
- A young person – between 14 and 16 years of age
- A child may be employed in light work suitable to his capacity in his family’s undertaking
- Children may not work between the hours of 8.00 pm and 7.00 am and must be permitted a rest of 30 minutes after every 3 consecutive hours of work
- Children may not work more than 6 hours per day
Children and Young Persons (Employment) Act, 1966

- Young persons may be employed in the same circumstances as children with the following conditions:
  - They are not permitted to work between 8.00 pm and 6.00 am
  - They are entitled to a rest break at least 30 minutes every 4 hours
  - They may not work more than 7 hours in one day
Labour Court

- When a dispute arises between an employer and his employee concerning the employee’s entitlement under the Act, the Labour Officers are empowered to hear the dispute and make a decision – this process is commonly known as “labour court”
- Different and should not be confused from the Industrial Court
Labour Court

Type of claims at Labour Court:
- Termination benefits
- Maternity benefits
- Overtime payments
- Sick pay
- Annual leave pay
- Public holiday pay
The Labor Court

Claim Process at the Labour Court

1. Employee makes complaint to Labour Department
2. Case is recorded
3. Employer is summoned
4. If dispute is not settled, labour courts is convened
Enforcement of the Employment Act

- It is the responsibility of the Department of Labor to enforce compliance with the Employment Act
- State-level Labour Offices:
  - Carry out routine inspections of places of employment
  - Investigate complaints from employees
  - Make decisions on employees’ claims when they are disputed by the employer
  - Answer queries on the Employment Act (and other labor legislation) from employers and employees
  - Prosecute employers who refuse to comply with the Act
The Industrial Relations Court

- Established under the IRA (Industrial Relations Act) 1967.
- Main objective of the IR court:
  - Provide a peaceful and unbiased means of settling disputes between employer & employee.
  - Prevents and resolve conflicts between employer & employee.
  - Grant cognizance to the collective agreements jointly deposited by the employers/ trade union of employers and trade union of employees.
- Highest number of case referred to IR court – claim for reinstatement under Section 20 IRA.
- Many principles or precedents were established from court ruling.
Structure of the Court

- 7 IR courts
  - KL, Johore, Trengganu, Penang, Perak, Sabah & Sarawak
  - 1 President, 6 Chairman.
- Dismissal case – heard by Chairman alone.
- Dismissal cases involving trade union – heard by President/Chairman + panel representing employer and employee
### Number of Cases referred to IR Court

<table>
<thead>
<tr>
<th>Subject</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
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<tbody>
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<td>Total Cases Carried Forward</td>
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<td>Total Cases Settled</td>
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<td>956</td>
<td>887</td>
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Source: http://www.mp.gov.my
No. of CA deposited & given cognizance

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<th>SUBJECT</th>
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<th>2002</th>
<th>2003</th>
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<th>2005</th>
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<tr>
<td>Total Of Collective Agreement Carried Forward For Cognizance</td>
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Source: http://www.mp.gov.my
### Analysis of Awards of Non-Dismissal Cases (2001 - 2008)

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<td>Trade Disputes</td>
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Source: http://www.mp.gov.my
## Analysis of Awards of Dismissal Cases (2001 - 2008)

<table>
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<tr>
<th>TYPES OF TERMINATION</th>
<th>2001</th>
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<th>2005</th>
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<th>2008</th>
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<td>2182</td>
<td>2125</td>
<td>2121</td>
<td>1732</td>
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( ) CONSENT AWARD

Source: http://www.mp.gov.my
Types of Cases Referred to the Court

Types of cases referred to the Industrial Court

- Refered By the Minister of Human Resourse
  - Section 20(3) Industrial Relations Act 1967 (Dismissal)
  - Section 26(1) Industrial Relations Act 1967 (Trade Dispute)
  - Section 26(2) Industrial Relations Act 1967 (Trade Dispute)
  - Section 8(2A) Industrial Relations Act 1967 (Discrimination)

- Direct reference to the Court
  - Section 56(1) Industrial Relations Act 1967 (Non Compliance of Award/Collective Agreement)
  - Section 33(1) Industrial Relations Act 1967 (Interpretation of Award/Collective Agreement)
  - Section 33(A) Industrial Relations Act 1967 (Points of law)
  - Section 33(2) Industrial Relations Act 1967 (Variation of Award/Collective Agreement)
Awards of the Court

- IR court decision = AWARD
- Awards are legally binding. Fail to comply is an offence (S56 IRA)
- Awards are final, cannot be appealed or challenged (S33 IRA). But party dissatisfied with IR court decision may file for a writ of certiorari (an order to quash/annul the IR court award) to the High Court. A High court decision can be appealed to the higher court.
References

- [http://www.mp.gov.my](http://www.mp.gov.my)