

LABOUR RELATIONS IN MALAYSIA-AN EVALUATION OF THE  
DISPUTE RESOLUTION PROCESS AND PROPOSALS FOR  
REFORM

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# CHAPTER 1

## Introduction

Industrial dispute is inevitable in employer employee relationship. But it is crucial that such disputes are handled properly because, otherwise, there is a chance that the relationship would be soured and this can have adverse effects on job performance. As such, great emphasis is placed on alternative dispute resolution to deal with labour disputes.

In Malaysia, the two major labour laws namely Employment Act 1955<sup>1</sup> ( hereinafter referred to as the “Employment Act”) and Industrial Relations Act 1967<sup>2</sup> (hereinafter referred to as the “IRA”) provides for various dispute resolution mechanisms to address and resolve disputes arising between employer and employee. The IRA besides dealing with other issues, provides an avenue for dealing with and settling collective disputes and individual disputes. The Employment Act on the other hand deals with disputes concerning non-payment of wages. Though various dispute resolution mechanisms are provided for by the IRA and the Employment Act, there are still problems of dealing with and disposing off cases at the various stages of dispute resolution processes.

In light of this, it is submitted that the main objective of this paper is to scrutinise and evaluate the workings of various dispute resolution mechanisms under the IRA and the Employment Act and suggest reforms to enhance the dispute resolution mechanisms based on other countries.

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<sup>1</sup> Act 265 & Regulations and Order

<sup>2</sup> Act 177 & Rules and Regulations



## CHAPTER 2

### Evaluation of Dispute Resolution under the Industrial Relations

#### Act 1967

- 2.1 Introduction
- 2.2 Current Dispute Resolution Mechanism
  - 2.2.1 Conciliation
  - 2.2.2 Fact-Finding
  - 2.2.3 Arbitration
  - 2.2.4 Evaluation of Dispute Resolution Mechanism
- 2.3 Collective Disputes
  - 2.3.1 Trade Union Recognition
  - 2.3.2 Collective Bargaining and Trade Dispute
  - 2.3.3 Interpretation and variation of Collective Agreement and Awards
  - 2.3.4 Non Compliance of Award and Collective Agreement
  - 2.3.5 Victimisation and Unfair Labour Practice
- 2.4 Individual Disputes

#### 2.1 Introduction

The purpose of the IRA is stated in the preamble of the Act as follows:

An Act to provide for the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom. s

In regulating employer employee relationship the IRA provides for matters such as union recognition, collective bargaining processes and dispute resolution mechanisms.

It has been opined that the IRA gives paramount importance to dispute resolution process as it is a '*beneficent social legislation which intends the prevention and peaceful resolution of disputes between employers and their workers and the promotion of industrial harmony*'<sup>3</sup>.

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<sup>3</sup> Lim Heng Seng, "The Role of Industrial Court: Present and Future [1999] ILR vii



His Lordship Raja Azlan Shah had stated in the case of *National Union of Hotel, Bar & Restaurant Workers v Minister of Labour & Ors*<sup>4</sup>, that the IRA in trying to prevent and settle trade disputes, provides for machinery to conduct investigation and various mechanisms such as collective bargaining, conciliation and reference of trade disputes to the Industrial Court for the resolution of the same. In line with this, His Lordship Gopal Sri Ram J further reiterated in the case of *Kathiravelu Ganesan & Anor v Kojasa Holdings Sdn Bhd*<sup>5</sup>, that 'the legislature's paramount concern in passing the Act is to ensure speedy disposal of Industrial Disputes'.

The main aim of this chapter is to evaluate the effectiveness of the dispute resolution mechanism provided for under the IRA. This would be done by firstly looking into the workings of the dispute resolution mechanism such as arbitration, conciliation and mediation in dealing with trade disputes, namely the collective labour disputes and individual disputes, the current challenges faced by the same and the possible reasons thereof. It has been noted that currently there are back logs and delays in disposing off cases in the Industrial Court<sup>6</sup>.

Amongst others, one of the main contributing factors to the problems of delays and back logs in the Industrial Court is due to the ineffectiveness of the conciliation process itself in dealing with disputes. Another reason could be because of a standard method of dispute resolution mechanism for all trade disputes regardless of the types of disputes which could be dealt with in a more effective way rather than the traditional 3 part procedure that is conciliation both by the Director General and Minister and reference of the Minister of the dispute to the Industrial Court for arbitration.

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<sup>4</sup> [1980] 2 MLJ 189

<sup>5</sup> [1997] 2 CLJ 777

<sup>6</sup> This would be dealt with in detail below

In order to appreciate the challenges faced by the dispute resolution mechanism under the IRA, it is essential to look into the current workings of the dispute resolution mechanism in dealing with disputes and evaluate the effectiveness of the current system in addressing the dispute.

## 2.2 Current Dispute Resolution Mechanism

In the event a trade dispute arises, there are several methods available in settling the dispute which includes negotiation, conciliation and arbitration. Negotiation would be an ideal way of settling disputes where an employer and union in dispute comes together to discuss and seek a satisfactory compromise.<sup>7</sup> Negotiation is viewed as a mature and harmonious way of settling any disputes. The reason is because settlement reached by mutual decision between two parties without the outsider being involved are more likely to result in a smooth implementation without further damaging the relationship between the parties in dispute.<sup>8</sup> In practice however, more often than not, parties are unable to reach agreement with regards to matters in dispute and this would cause relationship to breakdown.<sup>9</sup> As such, in these circumstances the parties in dispute would resort to alternative dispute settlement mechanisms provided for in the IRA.<sup>10</sup> This includes conciliatory proceedings by the Director General of Industrial Relations and arbitration by the Industrial Court<sup>11</sup>.

Besides these two forms of dispute settlement, the IRA in Part VIII provides for the establishment of a Committee of Investigation or Board of Inquiry to deal with the disputes. Investigation and inquiries would be resorted to when certain disputes,

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<sup>7</sup> Marilyn Aminuddin, *Malaysian Industrial Relations*, [McGraw Hill Book, ] page 69

<sup>8</sup> *ibid*

<sup>9</sup> Wu Min Aun, *Industrial Relations Law of Malaysia* (Kuala Lumpur: Pearson Longman, 2006), 240-241

<sup>10</sup> *ibid*

<sup>11</sup> Ayadurai, D, "Malaysia", *Labour Law and Industrial Relations in Asia Eight Country Studies*, Ed Deery, S and Mitchell R, (Longman: Cheshire) at page 75



because of their nature and circumstances, are not amenable to be dealt with under the normal settlement methods. This form of investigation and inquiry is better known as fact-finding. These dispute resolution mechanisms namely conciliation and arbitration and the fact-finding mechanism would be dealt with in detail below.

### 2.2.1 Conciliation

Conciliation is a dispute resolution mechanism that involves intervention of a third party who would attempt to mediate between the parties in dispute<sup>12</sup>. In the context of the IRA conciliation is a process where two parties in dispute would proceed to work together to come up with a solution with regards to a matter in dispute and the Director General of the Industrial Relations Department or his or her authorised officers would intervene to help in the settlement of the dispute<sup>13</sup>. Provisions pertaining to conciliation can be found in various parts in the IRA, the main one being Part V section 18 to 19B, section 20 and section 9(4A) IRA.

Section 18(1) (a) and (b) IRA states that where a trade dispute exists or is apprehended, then an employer or trade union of employer or a trade union of workmen may report the dispute to the Director General who can then take "*such steps as may be necessary or expedient for promoting an expeditious settlement thereof*" and this refers to conciliation by the Director General. Other than conciliation, the Director General can refer the dispute for settlement to any appropriate machinery that exists pursuant to an agreement between disputing parties. If the parties still fail to reach a settlement using the machinery agreed by the parties or if the Director General opines that 'it is unlikely that the dispute will

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<sup>12</sup> Ashgar Ali Mohamed, "A Critical Appraisal of Adjudication Process of Dismissal under the Industrial Relations Act 1967" XXXIII No 3 *INSAF* at page 35

<sup>13</sup> *Supra* n 12 at 35

be promptly settled through such machinery<sup>14</sup>, then the matter could be dealt with by way of conciliation.

Section 18(5) IRA provides that the Director General can notify the Minister if the Director General is satisfied that the trade dispute is not likely to succeed. The new provision inserted in the IRA, that is section 19A further states that the Minister can conciliate in any trade dispute if he considers it necessary or expedient to do so.

Section 19 IRA<sup>15</sup> deals with issues pertaining to information, documents and compulsory conference for conciliation. Section 19B IRA on the other hand deals with representation in conciliation proceedings<sup>16</sup> namely on how employers are to be represented and trade union of workmen to be represented. Section 19B(2) IRA excludes advocate, adviser, consultant or any other persons to be representative of the parties in dispute.

### 2.2.2 Arbitration

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<sup>14</sup> Section 18(4)(a) and (b) Industrial Relations Act 1967

<sup>15</sup> Section 19 Industrial Relations Act 1967

(1) Where a trade dispute has been reported to the Director General Under section 18(1) or where the Director General has taken steps under subsection (3) of that section, the party reporting the dispute and, if directed to do so by the Director General, the other party shall furnish to the Director General within such period as may be specified in the direction all the necessary information relating to the matters in dispute, together with, wherever possible and appropriate, an agreed statement setting out the points, if, one which they have already reached agreement and the points on which there is still disagreement,

(2) The Director General may, if he deems if necessary or expedient, direct any person engaged in or connected or indirectly with the trade dispute in respect of which steps have been taken under section 18 to attend a conference to be presided over by the Director General or such person as he may appoint at such time and place as may be specified in the direction.

<sup>16</sup> Section 19B Industrial Relations Act 1967 Representation in conciliation proceedings

(1) In any conciliation proceedings under this Part-

- (a) an employer who is a party to the trade dispute may represent himself or be represented by his duly authorised employee, or, where he is a member of a trade union of employers be represented by an officer or employee of such trade union of employers, or, notwithstanding anything to the contrary contained in any written law anything to the contrary contained in any written law relating to the registration of trade unions, by any official or an organisation of employers registered in Malaysia (not being a trade union of employers);
- (b) a trade union of workmen which is a party to the trade dispute may be represented by an officer or employee of such trade union, or, notwithstanding anything to the contrary contained in any written law relating to the registration of trade unions, by any official of an organisation of workmen registered in Malaysia (not being a trade union of workmen).

(2) Save as provided in subsection (1), a party to a trade dispute shall not, in any conciliation proceedings under this Part, be represented by an advocate, adviser, consultant or by any other person whatsoever.



Arbitration on the other hand refers to a system of determining disputes by a private tribunal constituted for that purpose by parties in dispute or via laws.<sup>17</sup> The Industrial Court is a statutory tribunal created by statute that is the IRA and meant to be an exclusive body to deal with industrial disputes in Malaysia.<sup>18</sup> It should be noted that though the Industrial Court is called a court, it is really a misnomer because in reality, it is actually a tribunal.<sup>19</sup>

The main purpose of setting up the Industrial Court is to ensure speedy settlement of trade disputes without being subject to formalities and technicalities that are prevalent in the ordinary civil courts.<sup>20</sup> Besides conferring exclusive jurisdiction to hear industrial dispute, the Industrial Court is the final step in the statutory mechanism to resolve and settle the same<sup>21</sup>.

The Industrial Court being a quasi-judicial tribunal is supposedly unfettered by any traditional judicial process.<sup>22</sup> As such, unlike regular courts, the Industrial Court does not have inherent jurisdiction and not being a superior court, its decisions do not create a binding precedent.<sup>23</sup> Furthermore, unlike an ordinary civil court, the scope of inquiry of an Industrial Court is not restricted to the law but also takes into account a broader aspect of equity and good conscience to promote social justice<sup>24</sup>.

In ensuring expeditious settlement of dispute, the Industrial Court is obliged to *'arrive at a decision after a sound and in-depth analysis of the facts and*

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<sup>17</sup> Butterworths Concise Australian Legal Dictionary, Second Edition, Butterworths.

<sup>18</sup> Nik Ahmad Kamal Mahmod, "Industrial Disputes Resolutions in Malaysia: The Interventionist Approach of the Mainstream Judicial System", (2005) 5 MLJ i at i

<sup>19</sup> Wu Min Aun, *op cit.*, 259 and 260

<sup>20</sup> Lim Heng Seng, "The Role of Industrial Court: Present and Future", *op.cit.*, at i

<sup>21</sup> *ibid*

<sup>22</sup> Ashgar Ali Mohamed, *supra* n 25 at lxx

<sup>23</sup> Wu Min Aun, *supra* n 9 at 259-260

<sup>24</sup> *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304;

*circumstances of each case*<sup>25</sup>. Furthermore, legal cost in Industrial Court is inexpensive compared to costs in ordinary courts<sup>26</sup> and the Industrial Court proceedings are generally less formal and technical compared to proceedings in the civil courts. This contention can be supported by section 30(5) of the IRA which states that the proceedings in the court is to be conducted with as little formality and technicality as the circumstances of the case permits and meeting justice expeditiously and correctly.

So far, we have looked into the basis underlying the establishment of Industrial Court. We will now proceed to scrutinise its composition, powers and jurisdictions. The composition of the Industrial Court is set out in the IRA. The Industrial Court basically consists of a President or a Chairman and panel of persons, one representing the employers and the other representing the employees whom both are appointed by the Minister of Human Resource.<sup>27</sup> The President and the Chairmen are appointed by the Yang di Pertuan Agong.<sup>28</sup>

The IRA also sets out the general parameter of its powers and jurisdiction.<sup>29</sup> Amongst others, the most relevant provision that defines the dominant function of the court is contained in section 26 of the IRA that is to determine *trade disputes* referred to the Court by the Minister of Human Resource<sup>30</sup>.

Though the Minister is conferred with wide powers in deciding whether to refer the dispute to the Industrial Court, the Minister's discretion is subject to judicial review.

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<sup>25</sup> Ashgar Ali Ali Mohamed, "Revamping the Industrial Court System: An Analysis", *op cit.*, at lxxvii

<sup>26</sup> *Supra* n 3 at i

<sup>27</sup> Section 21(1)(b) Industrial Relations Act 1967 (Act 177)

<sup>28</sup> Section 21(1)(a) *ibid*

<sup>29</sup> M.N D Cruz, *A Comprehensive Guide to Industrial Relations in Malaysia*, (Kuala Lumpur: Malayan Law Journal, 2001) at 195

<sup>30</sup> *Supra* n 3 at page i



An example would be a situation where the Minister refuses to refer the dispute to the Industrial Court. This contention can be supported by the Federal Court decision in the case of *National Union of Hotel, Bar and Restaurant Workers v Minister of Labour & Manpower*<sup>31</sup>, where it was held that the decision of the Minister on whether to refer or not to refer a dispute to the Industrial Court would be subject to judicial review where the exercise of discretion defeats the policy and objects of the Act. The Federal Court further held that the policy was to regulate the relations between management and labour, and also to prevent and settle trade disputes through various mechanisms including conciliation and reference to the Industrial Court<sup>32</sup>.

However, in the event the Minister exercises his discretion and refers the trade dispute to the Industrial Court, the Industrial Court has powers to hear and make awards with regards to any or all issues, by virtue of section 30(1) of the IRA.<sup>33</sup> Other than this, the IRA also empowers the Industrial Court to award reinstatement for a workman wrongfully dismissed and the Federal Court in *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors*<sup>34</sup> had noted that it is a statutory form of specific performance.

In the event the matters are with regards to interpretation of an award or collective agreement or complaints of non-compliance with award or agreement, then pursuant to section 33 and section 56 of the IRA, the parties in dispute can directly

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<sup>31</sup> [1980] 2 MLJ 189

<sup>32</sup> Anwarul Yaqin and Nik Ahmad Kamal Nik Mohamad, "Ministerial Discretion to Refer a Dispute to the Industrial Court: Some Issues of Reviewability" [2002] 4 MLJ clxvii at clxxii

<sup>33</sup> As noted by M.N D'Cruz, *op cit.*, 198

<sup>34</sup> [1981] 1 MLJ 328

refer the matter to the Industrial Court for determination of issues without the need for the Minister to refer to the Industrial Court.<sup>35</sup>

### 2.2.3 Fact-Finding

Besides the conciliation procedures and the Industrial Court, Part VIII sections 34-37 of the IRA sets down an avenue for investigation and inquiry on certain types of trade disputes. Section 34 of the IRA states that where any trade dispute exists or is apprehended, then the Minister can appoint a Committee of Investigation or Board of Inquiry and refer to these two bodies any matters appearing to the Minister to be connected with or relevant to the dispute. This provision further states that the establishment of the Committee and Board does not prejudice conciliation proceedings in Part V or proceedings before the Industrial Court under Part VII.

This provision was never used since its enactment in 1967. Therefore, currently we do not have any authority regarding how this provisions works in Malaysia. However, various writers have given their opinions regarding the workings of these provisions. For instance, one author contended that the Committee or Board is usually set up in exceptional circumstances, such as where the trade dispute is of national importance and the matters regarding the dispute has to be investigated and inquired upon.<sup>36</sup>

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<sup>35</sup> Wu Min Aun, *op.cit.*, 263

<sup>36</sup> *Id* at 256



After perusing section 35 of the IRA, the author further opined that the Committee is likely to be a smaller body consisting of 'one or more persons appointed by the Minister'.<sup>37</sup> He further states that the Committee's sole function is to investigate the causes and circumstances of trade dispute and that the Minister would use this body to gain information regarding a dispute and in certain circumstances, recommend reform of laws to the legislative bodies<sup>38</sup>.

The Board on the other hand is stated to be a more encompassing body with power to inquire into matters regarding trade dispute upon reference to the Board by the Minister. Just like the Committee of Investigation, it has one or more persons appointed by the Minister and has jurisdiction over any trade dispute referred to it for fact-finding by him.<sup>39</sup> However, there are certain differences between the Committee and the Board. For example, compared to the Committee, a Board has more powers because, besides power to inquire into trade disputes referred to it by the Minister, the Board has the power to summon witnesses and to require them to give evidence on oath or affirmation.<sup>40</sup> Furthermore, there are also differences between these two bodies with regards to reporting arrangement.

A Committee after appointment can investigate causes and circumstances of any trade dispute and report the same to the Minister. The Board however has wider powers regarding reporting arrangement. For instance, pursuant to section 37(1) IRA, the Board is empowered to inquire into any matter referred to it and report it to the Minister.

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<sup>37</sup> Wu Min Aun, *op.cit.*, 256

<sup>38</sup> *ibid*

<sup>39</sup> Dunston Ayadurai, *The Employer the Employee and the Law in Malaysia* (Singapore: Butterworths, 1985) at 78

<sup>40</sup> Section 36(3) Industrial Relations Act 1967 (Act 177)

Furthermore, the Board has to lay down any report made before the Dewan Rakyat and subsequently, the Minister may publish from time to time any information obtained or conclusion arrived at the by Board.<sup>41</sup> It is pertinent to note at this juncture that though the IRA provides an avenue for investigation and inquiries, it has never been used.<sup>42</sup>

#### 2.2.4 Evaluation of Dispute Resolution Mechanism

Though these dispute resolution mechanisms are provided for and used by disputants, it is questionable whether they are really effective in resolving trade disputes speedily and also at the same time, successful in preserving harmonious relationship between employers, employees and their trade unions.

One main problem in our current dispute resolution process is the delay in resolving trade disputes. The delay starts at the conciliation stage itself. It has been stated that in cases involving disputes under section 20(3) IRA, it takes about two and a half years from the date the dispute is reported to the Industrial Relations Department until the time when a reference is made to the Industrial Court<sup>43</sup>. It also had been noted that many representations had been pending at the conciliation stage for two to three years and this could be due to various reasons that include progressive increase in the number of representations, the long time taken at the conciliation stage and the delays in deciding whether to refer a representation to the Industrial Court, in the event conciliation had failed<sup>44</sup>. It has been reported that more than 6000 complaints regarding wrongful dismissal are

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<sup>41</sup> Section 37(4) Industrial Relations Act 1967

<sup>42</sup> Evaluation of this provision would be discussed below in the next sub topic

<sup>43</sup> N Sivabalah presented at the "Workshop on Industrial Adjudication Reform"

<sup>44</sup> Anwarul Yaqin and Nik Ahmad Kamal Nik Mohamad, *op.cit.*, clxviii



pending before the Industrial Relations Department, some of which filed as long as 6 years<sup>45</sup>.

Another reason for delay in resolving disputes is because of

"the three cornered approach to Industrial Relations when conciliation steps in after negotiation and adjudication follows conciliation, settlement of industrial disputes is cumulatively delayed"<sup>46</sup>.

Furthermore, it has been contended that there would be for a start a lapse of time before a trade dispute is referred to the Director General of Industrial Relations pursuant to section 18 of the IRA<sup>47</sup>. The conciliation process that follows would take further time and delay is bound to arise due to bargaining and conciliation process<sup>48</sup>. It could take up to 4 years or more from the time the aggrieved party lodges a complaint under section 20 IRA that deals with dismissal until the case is referred to the Minister of Human Resource and consequently to the Industrial Court.<sup>49</sup>

Normally in practice, the Industrial Relations Officer is the one who would initially initiate the conciliation process.<sup>50</sup> This conciliation process can be quite taxing on the patience of the conciliator.<sup>51</sup> The reason is because the officer has to conduct several meetings between the parties and put in alternative proposals to the parties.<sup>52</sup> The parties then need time to consider the proposals.<sup>53</sup> All this procedure

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<sup>45</sup> *New Straits Times*, April 11, 2004, at p 11

<sup>46</sup> Prof V Anantaraman, "The Industrial Relations Act 1967: A Review From the Workers' Perspective" [2002] 1 MLJ i at xxvii

<sup>47</sup> *ibid*

<sup>48</sup> *ibid*

<sup>49</sup> *News Straits Times* Wednesday July 2, 2003. Column 2-6 page 6. See *Malay Mail*. Tuesday, .July 1 2003

<sup>50</sup> Industrial Court Award 234 of 1986

<sup>51</sup> M.N D Cruz, *Op.cit.*, 76

<sup>52</sup> *ibid*

<sup>53</sup> *ibid*

is fairly time consuming and contribute to the delay.<sup>54</sup> The problem would be much aggravated if the conciliators are not properly trained to handle conciliation meetings.

Furthermore, these processes should be resorted to by parties in dispute before being able to have the dispute tried in Industrial Court<sup>55</sup> through the reference of the Minister, except in certain cases such as interpretation or non-compliance of awards or collective agreements. In the event the conciliation proceedings fail to settle the matter, the Director General would then refer the matter to the Minister. The Minister would then decide on whether to refer the matter to the Industrial Court and in the event the Minister fails to refer the matter to the Industrial Court, the Minister's decision would be subject to judicial review.

Another reason for the delays and backlogs in the processing of disputes especially pertaining to unfair dismissal in the Industrial Relations Department, the Minister's office and the Industrial Court is due to the usage of the same statutory scheme used to settle both collective disputes and individual disputes.<sup>56</sup>

In the current dispute resolution scheme in dismissal cases, representations are made by the parties in dispute to the Director General of Industrial Relations for conciliation. In the event the Director General fails to settle the matter through conciliation, the Director General would notify and report to the Minister for the

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<sup>54</sup> M.N D Cruz, *supra*, 51

<sup>55</sup> As noted by Prof V Anantaraman, "The Industrial Relations Act 1967: A Review From the Workers' Perspective" *op.cit.*, xxvii of CP Mills opinion in CP Mills, Industrial Disputes Law in Malaysia, Malayan Law Journal Sdn Bhd 1984 at page 158

<sup>56</sup> Lim Heng Seng, *supra* n 3 at xxxii & xxxiii



Minister to decide whether to refer the representation to the Industrial Court and finally refer the disputes to the Industrial Court.<sup>57</sup>

It has been noted that these forms of graduated steps that is needed in resolving sensitive and difficult trade dispute that can cause breach of industrial harmony, is not viable to be adopted to resolve individual disputes pertaining to dismissal without just cause or excuse pursuant to section 20 of the IRA.<sup>58</sup> As such, this contributes to the delays and backlogs in processing industrial disputes with regards to unjust dismissal in the Industrial Relations Department, the Minister's office and the Industrial Court<sup>59</sup>.

Other than the reasons stated above, another reason that had caused backlog of cases in the Industrial Court is because of the delay of the Industrial Court in handing down awards. Section 30(3) IRA states the Industrial Court shall make its awards without delay, namely within 30 days from the date of reference to it. However, this provision is stated to be too optimistic.<sup>60</sup> The reason is because in reality, it can on average take up to 2 years for the dispute to be settled and disposed of at the Industrial Court level, after the initial referral of the dispute to the Industrial Court by the Minister.

Other than the reasons appended thus far, another reason why there is significant delay at the Industrial Court stage is due to the involvement of lawyers in at the Industrial Court level. Though lawyers are restricted from representing the disputing parties, unless with prior approval or permission of the President or the Chairman of the Industrial Court pursuant to section 27(1) IRA, still the

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<sup>57</sup> Lim Heng Seng, *supra* n 3 at xxxii & xxxiii

<sup>58</sup> *Ibid*

<sup>59</sup> *Ibid*

<sup>60</sup> V Anantaraman, *supra* 46 at xxviii

involvement of lawyers is said to contribute to the delay in disposing of disputes<sup>61</sup>. One of the main reasons is because the lawyers frequently ask for postponement due to their busy schedule of attending to other cases<sup>62</sup>. Furthermore, when lawyers get involved, the process of dispute resolution tends to become legalistic and would be expensive for the parties in dispute as legal assistance can be fairly expensive<sup>63</sup>. Besides causing delay, the involvement of lawyers in the arbitration tends to make the arbitration process legalistic, procedural orientated with emphasis on technicalities and increase the costs for the parties in dispute as seeking of legal assistance can be fairly expensive. The drawback tend to contribute to the inefficiency of the Industrial Court and also goes against the underlying basis of having arbitration which is supposed to be non-legalistic without emphasis on technicalities and procedures.

Though the Industrial Court had expressed its reluctance in adjourning cases, in practice, the Industrial Court tend to accede to requests for adjournment, though it does so reluctantly<sup>64</sup>. A good example to illustrate this point is the case of *Kandiah v Golden Hope Plantation Ltd*<sup>65</sup>, where the Court had allowed postponements which resulted in a 15 day hearing to be stretched over a period of 18 months.

It has to be noted at this point that even if the disputes are referred to the Industrial Court where an award is granted, this award can be further delayed from being enforced as the losing party can commence action in the High Court to seek for order of *certiorari* or *mandamus* and commence judicial review proceedings where necessary.

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<sup>61</sup> V Anantaraman, *supra* 46 at xxviii

<sup>62</sup> *ibid*

<sup>63</sup> *Ibid*

<sup>64</sup> CP Mills, *Industrial Disputes Law in Malaysia*, (Malayan Law Journal Sdn Bhd, 1984), page 68

<sup>65</sup> Award No 134 of 1977



It has been stated that recourse to judicial review through prerogative writs had led to delays leading to injustice to the parties<sup>66</sup>. For instance, in the event a Minister fails to refer the dispute to the Industrial Court or the award by the Industrial Court is delayed, then the affected party can have recourse to judicial review to the High Court, followed by an appeal to the Court of Appeal and then to the Federal Court. This process contributes to the delay in disposing of disputes in the Industrial Court level.

The judicial review process itself has been noted to be time consuming because, it has to go through two levels of appeal namely the Court of Appeal and the Federal Court<sup>67</sup>. In the event the High Court overrules an Industrial Court award with regards to question of law, the right principle of law must be confirmed so as to avoid the Industrial Court from perpetuating the same erroneous principle<sup>68</sup>. However, if the matter goes on appeal to the higher courts, it will be years before the correct principle of law is finally confirmed by the highest court<sup>69</sup>. If judicial review is invoked, then the Industrial Court can only decide on the issue after this whole process of judicial review.

The delays in having a dispute decided when judicial review is invoked would be from two to five years. The employers in a powerful bargaining position can afford these delays but not the employee with a lesser bargaining power<sup>70</sup>. Other than the cases referred above, another good case that illustrates the issue of delay is

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<sup>66</sup> Lim Heng Seng, "Industrial Disputes Resolution System in Malaysia: Key Areas in Urgent Need for Review and Reforms" [2004] 3 ILR xxv at xxxvi

<sup>67</sup> Lim Heng Seng, "Industrial disputes resolution processes and structure in Malaysia: A preliminary paper on proposal for some urgent reforms", The Malaysian bar Council Industrial/Employment Law Seminar, 16-17 February 2004, at p14 (unpublished) as observed by Nik Ahmad Kamal Mahmod, *supra* n 18 at vii

<sup>68</sup> Lim Heng Seng, "Industrial disputes resolution processes and structure in Malaysia"

<sup>69</sup> *ibid*

<sup>70</sup> Nik Ahmad Kamal Mahmod, "Industrial Dispute Resolutions in Malaysia, the Interventionist to the Judicial Mainstream", *op.cit.* at ii



the case of *Dr James Alfred (Sabah) v Koperasi Serbaguna Sanya Bhd*<sup>71</sup> concerning dismissal matter, where it took almost 9 years for the Industrial Court to dispose the matter, from the date the appellant was dismissed which was on June 1986. The appellant then applied for judicial review against the Industrial Court's decision and the matter was finally decided by the Federal Court in 2001.

From these discussions, it is clear that though this mechanism to resolve trade disputes is available there are still problems of delay. Surely these forms of inordinate delays would not have been envisaged by the Parliament in passing the IRA. It should be noted at this juncture that with delay in disposing of the existing cases and with a concurrent rise in new disputes, backlog of cases is inevitable.<sup>72</sup> These problems pose a hindrance to the workers and employers from seeking justice.<sup>73</sup>

In order to comprehend how critical the problem of backlog of cases in the Industrial Court is, it is pertinent to analyze the statistics by the Industrial Court with regards to number of cases reported to the Industrial Court from year 2000 to 2005 and pending.

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<sup>71</sup> [2001] 1 MLJ 529 as noted by Ashgar Ali Mohamed, "Revamping The Industrial Court System:An analysis", [2004] 4 MLJ lxx at lxxxvi

<sup>72</sup> *Supra* note 71

<sup>73</sup> *Id* at lxxxii

# NO. OF CASES REPORTED TO INDUSTRIAL COURT (2000 - 2005 )<sup>74</sup>

Table 1

SUBJECT	YEARS					
	2000	2001	2002	2003	2004	2005
Total Cases Carried Forward	1442	1788	1881	2015	2212	3830
Total Cases Referred	1050	1056	1092	1085	3406	1859
Total Cases Heard / Given Award	704	963	958	888	1788	2209
Total Cases Pending	1788	1881	2015	2212	3830	3652

(Source: Industrial Court)

In 2004, the number of cases pending in 2003 amounting to 2212 was carried forward to 2004. In addition to this backlog of cases, there were additional 3406 cases referred to the Industrial Court in the year 2004. Thus, the total number of cases pending in the Industrial Court in 2004 was 5618, out of which only 1788 was heard and settled. Consequently, this had created a backlog of cases in the Industrial Court in 2004 amounting to 3830. This backlog was carried forward to year 2005.

Similarly in 2005, the backlog of cases that was carried forward from 2004 amounting to 3830 was increased with additional cases referred to the Industrial Court in that year, thus totalling the number of cases pending to be 5689. From this total, only 2209 cases were heard and settled. Therefore, there is still 3652 number of cases pending in the Industrial Court which is then carried forward to year 2006.

<sup>74</sup> As noted by Ashgar Ali Ali Mohamed, "A Critical Appraisal of the Adjudication Process of Dismissal under the Industrial Relations Act 1967", (2004) *No 3 INSAF* xxxiii

This analysis shows very clearly that backlog of cases is at a critical level and certainly this backlog is not consistent with the intention of the Industrial Relations system in Malaysia to ensure speedy and just settlement of trade disputes.

Both this delay and backlog directly and indirectly pose problems of increased costs both to the aggrieved parties and to the courts. The employers who have the financial capacity may not be too concerned in pursuing the matter in Industrial Court and further carrying out judicial review in the High Court,<sup>75</sup> but what happens to the employee who may not have the financial capacity?

Besides delay and backlog, other problems faced by aggrieved parties in trade disputes are the very nature of proceedings of Industrial Court that is being more often than not, technical in nature with a lot of formality with emphasis on "*strict procedural rectitude*"<sup>76</sup>.

It has been stated that the IRA is a

beneficent social legislation which intend the prevention of and peaceful resolution of disputes between employers and their workers and the promotion of industrial harmony<sup>77</sup>.

However, it is questionable whether the current IRA and dispute resolution mechanism actually promotes fast and efficient dispute resolution while at the same time preserving industrial harmony between aggrieved parties.

Industrial Court proceedings which are turning to be adversarial in nature surely would create hostility between the employer and the employee. Moreover, the

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<sup>75</sup> V Anantaraman, "Labour Relations in Malaysia: An Evaluation", [2003] 2 CLJ xxxvii at xlvii

<sup>76</sup> As noted by Ashgar Ali Mohamed, "Revamping The Industrial Court System: An analysis", *op.cit.*, at lxxix of the decision in the Federal Court case of *R Ramachandran v The Industrial Court of Malaysia and Anor* [1997]

1 MLJ 145

<sup>77</sup> Lim Heng Seng, "The Role of the Industrial Court: Present and Future", [1999] ILR vii



Industrial Court's approach which is more technical oriented is certainly not user friendly for the parties concerned especially for the workmen who may not be able to comprehend the legalistic and procedural-oriented Industrial Court.

Furthermore, as stated above<sup>78</sup>, besides conciliation and the Industrial Court, the IRA provides for investigation and inquiries by the Board and Committee appointed by the Minister in Part VIII of the IRA. The Board and Committee are set up only in exceptional circumstances, for example where a trade dispute is of national importance and there is need to investigate or inquire into matters surrounding the dispute.

However, this provision has never been used since its enactment in 1967. Does this mean that Malaysia has never faced any trade dispute that calls for the involvement of the Committee and Board or was the mode just overlooked by the Minister? Furthermore, supposing these provisions are rendered redundant, why isn't it repealed from the IRA. These are some issues that need to be addressed.

## **2.3 Collective Dispute**

### **2.3.1 Trade Union Recognition**

Trade union is defined in section 2 of the Trade Unions Act 1959<sup>79</sup>. The objects of the trade union are to regulate relations between workmen and their employers, to promote good industrial relations between workmen and employers, improve working conditions of workmen, enhance their economic and social status or to

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<sup>78</sup> In sub topic 2.2

<sup>79</sup> Trade Unions Act 1959 Act 262 & Regulations

Any association or combination of workmen or employers, being workmen whose place of work is in West Malaysia, Sabah or Sarawak, as the case may be, or employers employing workmen in West Malaysia, Sabah or Sarawak, as the case may be-

- (a) within any particular establishment trade, occupation or industry or
- (b) within any similar trades, occupations or industries; and
- (c) whether temporary or permanent;...

increase their productivity. Furthermore, trade unions can also represent the workmen or employers in trade disputes and matters related, to promote, organize or finance industrial actions in any trade or industry or the provisions of pay or other benefits for its members during an industrial action<sup>80</sup>.

Even if a trade union is properly registered, the IRA requires the employee union to be recognized by the employer concerned before the former can represent the workers who are members of the union.<sup>81</sup> In Malaysia, the provisions do not allow automatic recognition from the employer.<sup>82</sup> Therefore, the employee union needs to apply to the employer to obtain recognition.<sup>83</sup> This is provided in section 9(2) of the IRA. Upon an application by the employee's union, section 9(3) of the IRA requires one of the three compulsory responses from the employer concerned within 21 days of service of the claim<sup>84</sup>.

When recognition is granted, the parties concerned can proceed with collective bargaining.<sup>85</sup> However, if the employer refuses to give recognition or purposely delays the recognition process, then a trade dispute is deemed to exist.<sup>86</sup> Some of the reasons that an employer may rely on to defeat recognition is that the union is not competent in the sense the union is not in the same or similar trade,

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<sup>80</sup> *supra* n 2

<sup>81</sup> Ayadurai, D, "Malaysia, Labour Law and Industrial Relations in Asia Eight Country Studies", *op.cit.*, at page

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<sup>82</sup> Kamal Halili Hassan Rose Effendi Hussein, *Undang-Undang Pertikaian Perusahaan dan Mogok di Malaysia*, (Malaysia: Penerbit University Kebandsaan Malaysia, 2003) page 20-21

<sup>83</sup> *ibid*

<sup>84</sup> (a) accord recognition; or  
(b) refuse to accord recognition in which case it must notify the trade union in writing the grounds for not according recognition; or  
(c) apply to the Director General to ascertain whether the workers in respect of whom recognition is being sought are members of the trade union, and give a written notice of such application to the trade union concerned.

<sup>85</sup> Wu, Min Aun., *op.cit.*, 123-124

<sup>86</sup> Kamal Halili Hassan Rose Effendi Hussein, *loc.cit.*,



occupation or industry as the workmen in whose respect the union is seeking recognition.<sup>87</sup>

Section 10 of the Trade Unions Act 1959 states that the application for registration shall be made to the Director General in the prescribed form and signed by at least 7 members of the union. Other procedures with regards to registration is also contained under the Trade Unions Act, which includes fees imposed, restrictions imposed pending the registration process and powers and options that can be exercised by the Director General of Trade Union with regards to the application and registration of trade union.<sup>88</sup>

Recognition is a process where a party determines that the other can act as the exclusive bargaining agent and in the case of trade union of employee, recognition gives rights to the union to represent the employee members in a bargaining unit<sup>89</sup>. In Malaysia, the very recognition of trade union especially of the workmen is a very challenging task due to the strict rules with regards to the registration of trade union to according of recognition of the same. The very fact of not according recognition is a trade dispute. It has been observed that issue pertaining to recognition of trade union especially of employee union "*is a constant source of conflict in the industrial relations arena*"<sup>90</sup>.

If a trade union is not accorded recognition, how can it represent the workmen? This would surely put the workmen at a disadvantage when he or she is seeking certain forms of redress though dispute resolution mechanisms provided for in the

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<sup>87</sup> Ayadurai, D, "Industrial Relations in Malaysia: Issues and Responses", <http://mgv.mim.edu.my/MMR/9004/900405.Htm>

<sup>88</sup> Wu, Min Aun., *op.cit.*, 31

<sup>89</sup> *ibid*

<sup>90</sup> *ibid*



IRA. This is because, a workman cannot be effectively represented by a trade union that is not recognized.

Another situation where disputes would arise with regards to recognition of trade union is where an employer, in relying on section 9(1) of the IRA would try to defeat an application for the establishment of trade union by workmen on the reason that the majority of the members consists of workmen in managerial, executive, confidential or security capacity. Section 9(1) (a) to (d) of the IRA provides that recognition of trade union by workmen in those categories mentioned above cannot be granted.

If any of the situation stated above occurs causing non-recognition of trade union then the trade union of workmen or trade union of employers affected can report the matter to the Director General<sup>91</sup> and the Director General on the receipt of reference of dispute pursuant to section 9(1A) of the IRA, application under section 9(3)(c) of the IRA or a report under section 9(4) of the IRA may *“take such steps or make such enquiries as he may consider necessary or expedient to resolve the matter”*<sup>92</sup>. The Director General in carrying out his function can require the parties concerned to furnish relevant information and the Director General of Industrial Relations may refer the matter to the Director General of Trade Union for his decision regarding competence of trade union to represent workers or class of workers in respect of whom recognition is sought<sup>93</sup>.

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<sup>91</sup> Section 9 (1A) Industrial Relations Act 1967

<sup>92</sup> Section 9 (4A) Industrial Relations Act 1967

<sup>93</sup> Section 59(4B) Industrial Relations Act

The Director General provides an intermediate agency for settling disputes between the parties<sup>94</sup>. This would normally be carried out through conciliation or fact-finding. The Director General however is not empowered to make any binding decisions on whether recognition should be accorded to a particular trade union<sup>95</sup>. The ultimate power to accord recognition for trade union is conferred on the Minister of Human Resource who pursuant to section 9(5) IRA, *'shall give his decision thereon'* and *'where the Minister decides that recognition is to be accorded, such recognition shall be deemed to be accorded by the employer or trade union of the employers'*.

The irony is that, the ultimate power to decide whether recognition can be conferred on a trade union lies in the hands of a politician and not in the hands of a public servant<sup>96</sup>. Moreover, the Minister is not bound by any guidelines in making a decision pertaining to as section 9(5) IRA states that *"upon receipt of a notification...the Minister shall give his decision thereon"*. Furthermore the legislature confers the ultimate power on the Minister to give a final decision with regards to the issue of recognition of trade union and not even to the court as section 9(6) IRA provides that the decision of the Minister is *"final and shall not be questioned in any court"*. Such conferment of extensive powers on the Minister without proper guidelines with regards to the exercise of the discretion by the Minister would lead to abuse of power by the Minister<sup>97</sup>. The only way of checking on the Minister's exercise of power is by way of judicial review.

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<sup>94</sup> Wu, Min Aun., *op.cit.*,126

<sup>95</sup> Wu, Min Aun., *op.cit.*,at 27

<sup>96</sup> *Id* at 126

<sup>97</sup> *Id* at 127

Based on the recognition process of a trade union, it is certainly a problem especially for the employees to be represented effectively by the trade union when disputes are referred to the dispute resolution mechanism, due to such strict rules pertaining to registration and recognition of trade union. A reform is certainly needed on the current laws pertaining to the process of recognition of trade union by the Minister.

Other than recognition of trade union, collective dispute includes disputes appended in the table below. The disputes include non compliance of collective agreement, interpretation of collective agreement, variation and amendment to collective agreement and disputes with regards to terms and conditions pertaining to collective agreement, victimisation, disputes to determine question of law and issues pertaining to terms and conditions of collective agreement.



# ANALYSIS OF AWARDS RELATING TO NON-DISMISSAL CASES (2000 - 2005)<sup>98</sup>

Table 2 (Source: Industrial Court)

SUBJECT	YEARS					
	2000	2001	2002	2003	2004	2005
Non-Compliance Of Award	70	52	58	64	59	60
Non-Compliance Of Collective Agreement	54	60	64	39	43	60
Interpretation Of Award / Collective Agreement	7	8	87	4	9	16
Variation Of Award Collective Agreement	5	1	1	3	3	7
Amendment To Collective Agreement (By Court Order)	-	2	-	0	0	1
Collective Agreement (Terms And Conditions)	42	40	54	46	47	46
Questions Of Law	6	7	5	4	5	12
Victimization	-	-	-	2	-	-
<b>TOTAL</b>	<b>184</b>	<b>170</b>	<b>189</b>	<b>162</b>	<b>166</b>	<b>202</b>

## 2.3.2 Collective Bargaining and Trade Dispute

Collective bargaining is defined in the IRA as '*negotiating with a view to the conclusion of a collective agreement*' between employer or employer union and employee union.<sup>99</sup> Collective bargaining is an important procedure in industrial relations which regulates relationship between an employer and the employee union. This is done by including provisions with regards to the right to commence

<sup>98</sup> As noted by Ashgar Ali Ali Mohamed, 'A Critical Appraisal of the Adjudication Process of Dismissal under the Industrial Relations Act 1967', (2004) No 3 INSAF xxxiii

<sup>99</sup> *ibid*; M.N D Cruz termed collective bargaining as follows:  
'process by which the management and the union meet to discuss, propose, counter-propose, agree, disagree or defer the various items (Articles in the Collective Agreement). It is where each party try to get the best bargain. The Union wants MORE wages, allowances, sick leave, annual leave, public holidays, retirement and termination benefits, etc. the Management on the other hand tries to MINIMISE labour costs to maximize profit.'

collective bargaining.<sup>100</sup> The result of a successful collective bargaining would be a collective agreement. Collective agreement is defined in section 2 of the IRA<sup>101</sup>.

Part IV of the IRA namely section 13 to section 17 governs matters pertaining to collective bargaining and collective agreement. Section 17 of the IRA deals with the effect of collective agreement.<sup>102</sup> When a trade union for employee ("the trade union") is recognized pursuant to section 9 of the IRA, the union has the right to invite the employer or employer union in order to commence collective bargaining process.<sup>103</sup> During the bargaining process, the trade union would submit proposals to the employers to reach a collective agreement.<sup>104</sup>

The whole bargaining process is complicated as there is complex interchange of ideas with combining of arguments, bargaining, bluffs, threat and so on.<sup>105</sup> Either party can invite the other to commence collective bargaining. If the invitation is accepted and collective bargaining is carried out resulting in collective agreement, then once the agreement is ratified, it would be binding and enforceable against the parties concerned.

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<sup>100</sup> Ayadurai, D, *Industrial Relations in Malaysia Law and Practice*, 3<sup>rd</sup> Edition., (Kuala Lumpur: Malayan Law Journal Sdn Bhd, 2004) page 130

<sup>101</sup> 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 relating to the terms and conditions of employment and work of workmen or concerning relations between such parties.

<sup>102</sup> Section 17 of the IRA Effect of collective agreement

(1) A collective agreement which has been taken cognisance of by the Court shall be deemed to be an award and shall be binding on-

(a) the parties to the agreement including in any case where a party is a trade union of employers, all members of the trade union to whom the agreement relates and their successors, assignees or transferees; and

(b) all workmen who are employed or subsequently employed in the undertaking or part of the undertaking to which the agreement relates.

(2) As from such date and for such period as may be specified in the collective agreement, it shall be an implied term of the contract between the workmen and the employers bound by the agreement that the rates of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with the agreement unless varied by a subsequent agreement or a decision of the Court

<sup>103</sup> M.N.D'Cruz, *loc.cit.*,

<sup>104</sup> *ibid*

<sup>105</sup> B-10 as noted the opinion of V Anantaraman, "Malaysian Industrial Relations-Law & Practice", page 250



However, if the union's invitation to proceed with collective bargaining is rejected or ignored by the employer, then pursuant to section 13(6) of the IRA, the party making the invitation can notify the Director General in writing. The Director General would then take necessary steps to persuade the parties to commence collective bargaining. In the event this fails, then a trade dispute is deemed to exist<sup>106</sup>.

Another instance where there would be a trade dispute with regards to collective bargaining process would be where the invitation is accepted by the employer to commence collective bargaining but the bargaining process was not successful.<sup>107</sup> In this event a trade dispute is deemed to exist.<sup>108</sup> Based on the above discussion it is submitted that collective bargaining process itself is not a trade dispute but rather the failure to do so or being unsuccessful in collective bargaining.

#### 2.3.4 Interpretation and variation of Collective Agreement and Award

Other than the above stated disputes, section 33(1) IRA also provides mechanism to redress issues pertaining to interpretation and variation of awards and collective agreement taken cognisance of by the Court, which is the Industrial Court<sup>109</sup>.

Section 33(2) further provides that a Court on an application by any party, can vary the terms of an award or agreement via order, '*if it considers desirable so to do for the purpose solely of removing ambiguity or uncertainty*'. As such, parties in dispute can directly access the Industrial Court jurisdiction for an interpretation or

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<sup>106</sup> Section 13(7) Industrial Relations Act 1967

<sup>107</sup> Ayadurai, D, *Industrial Relations In Malaysia Law and Practice*, op cit page 134

<sup>108</sup> *ibid*

<sup>109</sup> Section 33(1) IRA states as follows:

If any question arises as to the interpretation of any award or collective agreement taken cognizance of by the Court, the Minister may refer the question, or any party bound by the award or agreement may apply, to the Court for a decision on the question.



variation of award or collective agreement<sup>110</sup>, without the need to go through the conciliation at the Industrial Relations Department and referral by Minister of the dispute to the Industrial Court.

A good example to illustrate a case on interpretation is the case of *Hotel Furama Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers*<sup>111</sup>. In this case, a dispute arose between the Hotel Furama ("Hotel") and the National Union of Hotel, Bar & Restaurant ("the Union") with regards to interpretation of article 28 of the collective agreement entered into between the Hotel and the workmen on 27<sup>th</sup> May 1991 which is regarding service charge to be paid to certain persons specified in appendix.

The appendix specifies different types of employees with regards to the nature of their job and their status, that is tip for probationary worker, confirmed employee and employees working more than 12 months and allotted tip points to each category of employees. The Hotel and the Union also entered into another agreement on 27<sup>th</sup> May 1991 which provided that employees outside the scope of the 1991 agreement must get the tip points on a personal to holder basis and listed down the names of 5 employees who were not earlier stated in appendix ("the May agreement"). The issue was on the interpretation of article 28. The Hotel's contention was that, article 28 must be read together with the May agreement in order to interpret that the five employees under the May agreement were also entitled to the service charge. The Union argued otherwise.

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<sup>110</sup> *Supra* note 109

<sup>111</sup> [1992] 2 ILR 418

Here the court held that only the 1991 agreement that had cognizance by the court is binding on the parties and not the May agreement. The court then interpreted article 28(a) of the 1991 Agreement and held that it is clear and unambiguous. It further held that the 1991 agreement only provides for distribution of service charge for all the employees in the appendix and does not include employees listed in the May agreement. As such, only the employees listed in the appendix can get service charge. This is one example of a case of interpretation of award.

However, it is submitted that when the Industrial Court is interpreting an award or collective agreement, then the Court is only cloaked with jurisdiction to interpret the award and not to resolve a trade dispute. An example to illustrate this contention would be the case of *Ericsson Telecommunications Sdn Bhd v Electrical Industry Workers' Union*<sup>112</sup>.

Therefore, in circumstances where a Court has to exercise its jurisdiction beyond interpreting or varying an award or collective agreement, that is in determining disputes of facts, then the Industrial Court cannot hear the matter unless it has gone firstly through conciliation and then was referred to it by the Minister pursuant to section 26 IRA. A case to illustrate this point is the case of *National Union of Plantation Workers v Revertex (M) Sdn Bhd*<sup>113</sup>. In this case, the Industrial Court in its award held that the company ought to recognise the election of some of its workers as the union's representative.

<sup>112</sup> (Award 260/1983) where the Court had stated as follows:  
" On the facts before us, we find that a trade dispute has arisen between the parties...Such a dispute should properly be referred to us under section 26. We would be exceeding our jurisdiction if we resolved the dispute in this application for interpretation [under section 33]".

<sup>113</sup> [2004] 4 CLJ 298



The High Court had set aside the Industrial Court's award and this was upheld by the Court of Appeal on the ground that the Industrial Court should decline in exercising its jurisdiction under section 33(1) IRA if it was asked to determine disputed questions of facts. This is to ensure that trade disputes referred under section 26(1) IRA is not short-circuited to the Industrial Court in the pretext of interpreting issues.

The Court of Appeal then held that there is no dispute between the parties with regards to interpretation of collective agreement but rather the dispute was with regards to refusal of the company to recognise the election of some of its workers as representative of the union. This was a trade dispute and therefore, the Court of Appeal held that the resolution is by way of reference to the Industrial Court pursuant to section 26(1) IRA.

It is submitted that the current mechanism of section 33 that allows direct access for parties to resort to Industrial Court for issues pertaining to interpretation of award and collective agreement may not be the best mode. One of the main reasons is because the proceedings in the Industrial Court can be very much procedurally orientated with emphasis on legal technicalities. The atmosphere may even create hostility between disputant parties and may affect employment relationship between parties.

Furthermore, when the issues are pertaining to interpretation of awards, it is within the contemplation of the parties that the employer employee relationship would continue to subsist. Therefore, in trying to interpret collective agreement in the Industrial Court atmosphere may affect the relationship between the employer and the employee.



Based on this contention, it is submitted that when the issue is pertaining to interpretation of award or collective agreement, it is crucial that on-going relationship between the parties in dispute is preserved as the employment relationship would be intended to continue rather than being terminated. Therefore, other modes such as mediation or conciliation is proposed to be more appropriate mechanism to deal with issues pertaining to interpretation of award and collective agreement.

Another problem that arises out of the current application of section 33 of the IRA is hardship caused to the disputing parties in terms of time and money. Furthermore, the current application of section 33 as illustrated in the case of *National Union of Plantation Workers v Revertex (M) Sdn Bhd* would certainly cause hardship to the disputing parties in terms of loss of time and money. The reason is because the parties in dispute after having to go through the proceedings may be found by the Industrial Court that the matter in dispute is not merely with regards to interpretation and non-compliance of collective agreement or awards pursuant to section 33, but the matter involves question of facts that has to go through the normal procedure namely through conciliation, followed by arbitration in the Industrial Court, referred to it by the Minister. This sort of system would certainly cause hardship to both the employer and employee and would certainly interfere with the relationship due to the fact that there are issues hovering over them without a finality.

Looking at Table 2, it is submitted that in 2002, there had been the highest number of cases that the Industrial Court had dealt with regards to interpretation of collective agreement and award, that is 87 cases. In 2003, the number of cases heard by the Industrial Court had reduced drastically to 4 but increased to 7 and

16 in 2004 and 2005 respectively. These cases with regards to interpretation of award, though small in number, still contribute to the backlog of cases in the Industrial Court.

#### 2.3.5 Non Compliance of Award and Collective Agreement

Pursuant to Table 2, it is submitted that non-compliance of award and collective agreement are two disputes that are significantly dealt with by the Industrial Court, in the category of non-dismissal cases. In 2005, around 59.4% of cases that were heard by the Industrial Court were with regards to disputes relating to non-compliance of awards and collective agreement and in 2004 and 2003, 61.4% and 63.58% of cases were heard respectively by the Industrial Court with regards to these matters. From these statistics, it is submitted that the Industrial Court hears significantly disputes pertaining to non-compliance of awards and collective agreement, within the category of non-dismissal cases.

Section 56 IRA allows direct access to the Industrial Court provided it is a complaint regarding non-compliance with any term of an award or a collective agreement taken cognizance by the Industrial Court. Parties in dispute namely persons bound by the agreement or trade union as representative can make a complaint in writing to the Court.

Section 56(3) IRA states the consequences of non-compliance with the Court order pursuant to section 56(2) IRA which is a fine not exceeding two thousand ringgit or imprisonment up to one year or both and a further fine of RM500.00 per day for every day the offence continues. However, these punishments relating to

non-compliance would only follow upon conviction, in which legal procedure must be involved for prosecution<sup>114</sup>.

Furthermore, pursuant to section 56(4) IRA, claimants can register the Industrial Court awards as judgments of the High Court or Sessions Court. However, for an aggrieved party to enforce the High Court or Sessions Court judgment duly registered, the party has to find the financial and legal means to have justice done.

Similar to the workings of section 33 IRA with regards to interpretation of collective agreement or award, if one wants to bring up the dispute pertaining to non-compliance of award or collective agreement, one can directly access the Industrial Court without the need to go through the conciliation proceedings and referral by the Minister of the dispute to the Industrial Court.

Therefore, this attracts similar challenges discussed with regards to interpretation of collective agreement and awards that is, if the issues to be determined are beyond non-compliance issue, then the complainant cannot have direct access to the Industrial Court but would have to go through the normal dispute resolution process namely the conciliation, referral by the Minister of the issue to the Industrial Court and followed by determination of issues by the Industrial Court.

Another issue that arises pertaining to non-compliance and interpretation of award or collective agreement is whether the Court is only conferred jurisdiction to determine non-compliance matters under section 56 IRA or does the Court have

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<sup>114</sup> *supra* 46 at xxv



the jurisdiction to exercise its interpretative powers under section 33 IRA for non-compliance proceedings<sup>115</sup>.

This is an important issue to be discussed because, if section 56 IRA is read in a restrictive manner, thus precluding the Court from interpreting awards or collective agreement in a non-compliance issue, then a party applying a complaint for non-compliance of award or collective agreement then upon determination of the matter has to apply again to the Court for a decision on the interpretation of the award or collective agreement. This certainly would contribute to the delay and problem of backlog as the same parties in dispute have to file two different actions. It would certainly be more practicable for the Court determining non-compliance to also interpret the award or collective agreement at the same time.

However, this decision is not good in the light of a recent Federal Court decision in the case of *National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia v Tanjong Jara Beach Hotel Sdn Bhd*<sup>116</sup>, that had unanimously agreed with the decision of the Court of Appeal in *National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia v Tanjong Jara Beach Hotel Sdn Bhd*<sup>117</sup>. One of the issues which was considered by the Court of Appeal is whether the Industrial Court has the jurisdiction to exercise its interpretative powers pursuant to section 33 IRA for proceedings brought under section 56 IRA for non-compliance of awards or collective agreement. Gopal Sri Ram JCA held that the Industrial

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<sup>115</sup> The Federal Court in the case of *Holiday Inn Kuala Lumpur v National Union of Hotel, Bar and Restaurant Workers* [1988] 1 MLJ 306 at 311 held with regards to this issue as follows:-

'In my judgment, under section 56 of the Act the Industrial Court is charged with the enforcement of an award or collective agreement which has been taken cognisance of by the court after a complaint has been received alleging non-compliance with one or more terms of the award of said collective agreement...the Industrial Court is not charged with the duty of interpreting or adjudicating the term of terms of an award or collective agreement which are disputed by the contracting parties concerned. Section 33 provides for this...any question of interpretation or adjudication of a term of an award or collective agreement is not within the scope of section 56'.

<sup>116</sup> [2004] 4 CLJ 657

<sup>117</sup> [2003] 3 CLJ 330

Court had the jurisdiction to interpret a collective agreement in order to determine if there had been non-compliance with awards or collective agreements. It is submitted that such interpretation of section 33 and section 56 IRA is good because if it is interpreted otherwise, then it would lead to absurdity and would contribute to the ineffectiveness of the dispute resolution mechanism.

### 2.3.6 Victimization and Unfair Labour Practice

Dispute with regards to rights to join trade union and victimization and unfair labour practice is another form of collective trade dispute. The relevant provisions with regards to these forms of trade disputes would include sections 4, 5 and section 59 of the IRA.

Section 4 of the IRA is a general provision that protects the rights of workmen and employer to form and assist in the formation of trade union. This provision states that no person shall interfere, restrain or coerce a workman or employee in the exercise of his rights to form and assist in the formation of a trade union.

*Section 5 and section 59(1) of the Act* prohibits various acts of victimization. Victimization occurs where an employer takes any wrongful action such as dismissal or unlawful actions against employee due to the latter's involvement in trade union activities.<sup>118</sup> Section 7 of the IRA prohibits workers or their trade unions from engaging in certain activities<sup>119</sup>. Section 59(1)(a) of the IRA makes it an offence for an employer to dismiss, injure or threaten to injure him in his

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<sup>118</sup> Wu Min Aun, *op cit.*, 104

<sup>119</sup> Section 7 IRA lists the 'certain activities' as follows  
(a) except with the consent of the employer, to persuade a worker to join or refrain from joining trade union, during working hours and at the employer's place of business.  
(b) prohibits a worker from intimidating a person to become or to refrain, cease or continue to become a member or officer of a trade union  
(c) prohibits a worker to induce a person to refrain from becoming a member of trade union by conferring a person for doing so an advantage.



employment or alter or threaten to alter his position to his prejudice due to the reason that the workman is or propose to become an officer or member of trade union or an association that has applied to be registered as a trade union. This is a penal provision and contravention of this provision would render the employer to be guilty of an offence and shall be liable on conviction to imprisonment for a year, a fine of RM2000 or both.<sup>120</sup> Based on the discussions above it is submitted that trade dispute is deemed to exist when an employee exercises his rights to association but is prevented by his employer as stated above.<sup>121</sup>

However, the problem is that, when one is dismissed, the matter is dealt with as a dismissal under section 20 IRA. Therefore, the issue of victimisation has not been addressed. Two consequences ensue from this is. Firstly, the matter is dealt with as if it is a case of dismissal rather than a case of victimisation and at the end, the basic underlying problem of victimisation is not addressed at the dispute resolution level<sup>122</sup>.

Secondly, the penal provision cannot be invoked to punish the offender since the provision is only applicable if invoked to prove victimisation and unfair labour practice. It has been opined that an employee who was dismissed due to victimisation would be better protected and the employer would be more deterred against such acts if the case was brought pursuant to section 59 IRA rather than under section 20 IRA<sup>123</sup>.

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<sup>120</sup> Section 59(2) Industrial Relations Act 1967

<sup>121</sup> Kamal Halili Hassan and Rose Effendi Hussein *op cit.*, 18

<sup>122</sup> Opinion of Professor Sharifah Suhanah Syed Ahmad, Faculty of Law University of Malaya

<sup>123</sup> Sharifah Suhanah Syed Ahmad, "Section 59 Industrial Relations Act 1967-The Forgotten Remedy" [1996]

23 JMCL 95 at 105



Therefore, if a dismissal case involving victimisation is treated more like victimisation than as a dismissal case, there would be a chance that the dismissal cases dealt by the Industrial Relations Department and the Industrial Court may be reduced and at the same time, penal provisions such as section 59(2) IRA acts as a deterrent for the employers from victimising the employees who got involved in trade union activities.

## 2.4 Individual Dispute

It is to be noted at this juncture that trade dispute does not only cover collective disputes but also includes individual action without union representation. It is further contended that disputes that frequently arise and cause rifts on an employer employee relationship are disputes that involves individual workers<sup>124</sup>. This is better known as individual grievance or individual dispute.

The main provision pertaining to dismissal without just cause or excuse is section 20 of the IRA<sup>125</sup>. This provision applies to workmen represented by union or otherwise. Though disputes pertaining to dismissal are individual disputes as opposed to trade disputes that are collective in nature, the same statutory scheme of settlement and resolution of trade disputes of a collective nature between union of workmen and employees was extended to disputes concerning dismissal of an employee without just cause or excuse<sup>126</sup>. Complaints regarding dismissal of workmen are processed in the same way as complaints pertaining to trade disputes that are of collective nature.

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<sup>124</sup> Kamal Halili Hassan & Rose Effendi Hussein, *op.cit.*, 25

<sup>125</sup> Section 20 Representations on Dismissals

(1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by the employer, he may make representations in writing to the Director-General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.

<sup>126</sup> Lim Heng Seng, *supra* n 66 at xxv

Therefore, just like lodging a complaint with regards to trade dispute, the workman has to lodge a complaint that he has been dismissed without just cause or excuse and make representation to the Director General of Industrial Relations for reinstatement. The Director General of Industrial Relations or his officers would proceed to conciliate the matter and if the matter is settled, then the dispute would be referred to the Minister who would then determine if the dispute is to be referred to the Industrial Court.

It has been noted that the usage of the same dispute resolution mechanism for both disputes of collective nature and individual disputes between individual employees and their employers with respect to the termination of the former's employment is the root of the problem of delays and backlogs in processing of disputes at the Industrial Relations Department, Minister's office and the Industrial Court<sup>127</sup>. The reason for this contention is because,

"the same graduated steps carefully designed for resolving fractious, sensitive and difficult trade disputes which have potential for causing a breach of industrial harmony from representations to and conciliation by the DGIR, notification and report to the Minister for his decision whether to refer a representation and finally reference to the Industrial Court is adopted in toto for the resolution of individual disputes concerning unjust dismissal under section 20. Herein lies the root of the problem of delays and backlogs in the processing of industrial disputes pertaining to unjust dismissal claims at the Industrial Relations Department, the Minister's office and the Industrial Court"<sup>128</sup>.

It has also been noted that the lengthy and involved steps that is imperative to resolve trade disputes of a collective nature are quite inappropriate to be used for individual disputes concerning claims with regards to termination of employment

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<sup>127</sup> *ibid*

<sup>128</sup> Lim Heng Seng, *supra* n 66 at xxv



without just cause or excuse<sup>129</sup>. The reason is because, the administrative time by the Director General in conciliating the dispute and the ministerial time taken by the Minister in contemplation on whether to refer the matter to the Industrial Court was originally intended to deal with collective trade disputes that affect industrial peace and harmony and therefore are matters of public interest<sup>130</sup>. However, this dispute resolution system intended for collective disputes is now used to deal with individual disputes concerning termination of employer<sup>131</sup>. Disputes between employer and employee with regards to the termination of employment having little bearing upon industrial peace and harmony and also of public interest and therefore, does necessitate the involvement of the Director General of Industrial Relations and the Minister<sup>132</sup>.

Table 2 below indicates the amount of cases dealt with by the Industrial Court and is divided into three broad categories that include dismissal for misconduct, constructive dismissal and retrenchment. Comparing the statistics in Table 1 with Table 2, it can be stated that the majority of cases dealt with by the Industrial Court is with regards to dismissal cases rather than non-dismissal cases.

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<sup>129</sup> *ibid*

<sup>130</sup> *ibid*

<sup>131</sup> *ibid*

<sup>132</sup> *ibid*

ANALYSIS OF AWARDS RELATING TO DISMISSAL CASES (2000 - 2005)<sup>133</sup>

Table 2

TYPES OF TERMINATION	2000	2001	2002	2003	2004	2005
Constructive	20	26	35	40	34	22
Misconduct	479	726	810	763	1638	2144
Retrenchment	21	41	52	61	61	16
SUB-TOTAL	520	793	897	864	1733	2182
Others	-	-	-	-	-	-
TOTAL	520	793	897	864	864	2182
() CONSENT AWARD						

(Source: Industrial Court)

As such, it is submitted that the current dispute resolution system of referring a dispute regarding termination of employment to the Director General of Industrial Relations for conciliation and subsequently to the Minister of Human Resource before a final referral to the Industrial Court should be reviewed as these tedious steps are not necessary to deal with individual disputes such as dismissal cases. It would be more feasible for the parties in dispute to refer the matter directly to the Industrial Court rather than going through the Director General of Industrial Relations and the Minister as sooner or later the matter concerned is susceptible to end up for hearing at the Industrial Court.

<sup>133</sup> Ashgar Ali Ali Mohamed, 'A Critical Appraisal of the Adjudication Process of Dismissal under the Industrial Relations Act 1967', *op.cit.*, xxxiii



## CHAPTER 3

# Evaluation of Dispute Resolution under the Employment Act 1955

- 3.1 Introduction
- 3.2 Complaints and inquiries under Part XV
  - 3.2.1 Role of the Labour Department in Resolving Disputes
  - 3.2.2 Parties who can resort to the investigation and inquiries
  - 3.2.3 Director General's powers with regards to investigation and inquiries and limitations
- 3.3 Observation of an investigation and inquiries proceeding
- 3.4 Evaluation of the Dispute Resolution Mechanism Under Part XV
- 3.5 Conclusion

### 3.1 Introduction

The Employment Act 1955 regulates the employer employee relations<sup>134</sup> as well as conditions under which Labour may be employed. The Act is applicable to West Malaysia and the Federal Territory of Labuan<sup>135</sup>. The Employment Act, unlike the IRA is restricted in its application as it only applies to certain categories of people. The Department of Labour is responsible to ensure compliance with the Employment Act by employers and employees. Besides this, the Department of Labour plays a vital role in hearing disputes between employer and employee as the Director General of Labour is conferred powers by the Act to do so.

Some of the complaints or disputes that are brought to the Department of Labour by the employees include disputes pertaining to termination benefits, maternity benefits, overtime benefits, sick pay, annual leave pay and disputes relating to wages or any other cash payments.

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<sup>134</sup> Ayadurai, D, *supra* note 11 at page 55

<sup>135</sup> Lobo, B, "Access to Local Industrial Adjudication Systems by Foreign Employees in Malaysia" [2006] 5

The main focus of this chapter is to scrutinise in detail the investigation and inquiries procedure under Part XV of the Employment Act to resolve disputes that would rise between employer and employee and evaluate the efficiency of the same.

### **3.2 Complaints and inquiries under Part XV**

#### **3.2.1 Role of the Labour Department in resolving disputes**

As submitted previously, the Department of Labour plays an important role in resolving disputes between an employer and an employee. It is a common notion that the disputes are heard by the Director General of Labour. The Employment Act does not provide for such a thing as a 'labour court' unlike the IRA that expressly provides for the Industrial Court. Instead the Employment Act part XV confers powers on the Director General to inquire into complaints<sup>136</sup>. It is submitted that the Employment Act should be amended so as to provide a specific body to deal with disputes between employer and employee, such as the Employment Tribunal in the United Kingdom.

#### **3.2.2 Parties who can resort to the investigation and inquiries**

Persons who can resort to the Labour Department to make complaints are the employees within the definition of section 2 of the Employment Act<sup>137</sup>. If the employee falls within this category as defined in section 2, then the employee can

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<sup>136</sup> This would be dealt with in detail in 3.2.3

<sup>137</sup> "employee" means any person or class of persons-

(a) included in any category in the First Schedule to the extent specified therein; or  
(b) in respect of whom the Minister makes an order under subsection (3) or section 2A.

The First Schedule of the Act states employee as any person irrespective of his occupation, who has entered into a contract of service with an employer and the employee's wages does not exceed RM1500.00.



in addition to its rights to lodge complaint to the Director General, the employee would also be entitled to the benefits conferred by the Employment Act<sup>138</sup>.

The definition of employee was extended through an amendment on 1<sup>st</sup> August 1998 that enable persons earning more than RM1500.00 but not exceeding RM5,000.00 per month would be able to seek redress from the Labour Department<sup>139</sup>. However, this category of employees can only raise disputes in the Labour Department with regards to wages or other payments in cash due to them pursuant to their individual contracts of service or collective agreement<sup>140</sup> and not issues pertaining to statutory benefits provided under the Act<sup>141</sup>.

As stated previously, employees who are protected are only employees under a contract of service with an employer<sup>142</sup>. It does not apply to persons under contract for service such as atypical, marginal, casual and foreign workers but thus far, the Act has been only extended to part-timers<sup>143</sup>.

### 3.2.3 Director General's powers of investigation and inquiries and limitations

Section 69 of the Employment Act confers on the Director General powers to inquire into complaints and decide any dispute that may arise between an employer and an employee with regards to *wages or any other payments in cash* due to the employee pursuant to the terms and conditions of the contract of service between the employer and the employee, pursuant to any provisions in this

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<sup>138</sup> Pathmanathan, Nalini, Kanagasabai Siva Kumar, Alagaratnam Selvamalar, *Law of Dismissal*, (Singapore: CCH Pte Ltd, 2003) page 286

<sup>139</sup> Section 69B Employment Act 1955 (Act 265) & Regulations and Order

<sup>140</sup> Voon Shian, C, *Industrial Relations Skills for Managers*, (Malaysia: CCH Asia Pte Ltd, 2004) at 23

<sup>141</sup> *ibid*

<sup>142</sup> Charles, A, *A-Z Employment Practice Malaysia*, (CCH Asia Pte Ltd) page 25

<sup>143</sup> "Part time employee" means a person included in the First Schedule whose average hours of work as agreed between him and his employer does not exceed seventy per centum of the normal hours of work of a full-time employee employed in a similar capacity in the same enterprise whether the normal hours of work are calculated with reference to a day, week, or any other period as may be specified by regulations;

Act or any subsidiary legislation or the provisions of the Wages Council Act 1947. The Director General can also order the employer to make payment to the employee.

Another power conferred on the Director General is the power to hear and decide any *claim* by an employer against his employee with respect to *indemnity due to such employer pursuant to* section 13(1) of the Employment Act<sup>144</sup>. In the event the employee fails to comply with the issuance of notice under section 13(1) of the Act, then the employer may lodge a complaint with the Labour Court to recover the same. The Director General is also conferred with power to deal with indemnity in lieu of notice if the employer terminates the contract of service without proper notice<sup>145</sup>.

Besides the powers stated above, pursuant to section 69(3) of the Employment Act, the Director General can also inquire into, confirm or set aside any decision that an employer may make under section 14(1) of the Employment Act<sup>146</sup>. It should be noted at this juncture that if the employee is dismissed and the Director General sets aside the dismissal, then the Director General can only order the employer to pay indemnity in lieu of notice and cannot order the employer to reinstate the employee to his former position<sup>147</sup>. This is one of the limitations on

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<sup>144</sup> Section 13(1) of the Act provides that either party to a contract of service may terminate such contract of service without notice or with short notice, provided the party pays to the other an indemnity of a sum equal to the amount of wages which would have accrued to the employee during the term of such notice or during the unexpired term of such notice.

<sup>145</sup> Section 69(c) of the Employment Act 1955

<sup>146</sup> Section 14(1) states that an employer may on the grounds of misconduct that is inconsistent with the fulfilment of the conditions of service, dismiss the employee without notice, downgrade the employee or impose any other lesser punishment that the employer thinks just and fit. If the punishment is suspension without wages, then it should not exceed 2 weeks.

<sup>147</sup> Pathmanathan, Nalini, Kanagasabai Siva Kumar, Alagaratnam Selvamalar, *op.cit*, page 287



the Director General's powers. Another limitation of the Director General's powers is stated in section 69A of the Employment Act 1955<sup>148</sup>.

The procedures for disposing issues under sections 69, 69B and 69C of the Act are provided for in section 70 paragraph (a) to (i) of the Employment Act. Paragraph (a) provides that the complainant has to present to the Director General his complaint and remedy that he is seeking, either in writing or in person. Paragraph (b) then states that the Director General must as soon as practicable examine the complainant on oath and record the substance of the complainant's statement in his case book. Failure of the Director General to do so is not fatal to the case but only an irregularity that can be cured by taking evidence on oath at the inquiry<sup>149</sup>.

The Director General can make inquiries that he deems necessary to satisfy himself that the complaint discloses matters which he thinks ought to be inquired into and can summon the person complained against or can summon a person even without an inquiry, if it appears to the Director General without any inquiry that the complaint discloses matters that must be inquired into<sup>150</sup>. Paragraphs (d) and (e) deal with the contents of summons and the notice to the complainant respectively.

Pursuant to section 70(f) of the Act, the Director General is empowered to summon any other person that he believes has financial interest and would be

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<sup>148</sup> Notwithstanding section 69, the Director General shall not inquire into, hear and decide or make any order in respect of any claims, dispute or purported dispute which, in accordance with the Industrial Relations Act 1967-

(a) is pending in any inquiry or proceedings under the Act;  
(b) has been decided upon by the Minister under section 20(3) of the Act; or  
(c) has been referred to, or is pending in any proceedings before, the Industrial Court.

<sup>149</sup> *Ahmani Sdn Bhd v Abu Karim Baharom & Ors* [2000] 2 CLJ 625

<sup>150</sup> Section 70(c) of the Act

affected by the decision or has knowledge of the matters in issue or can give relevant evidence. Section 70(g) provides how material evidence are to be dealt with, section 70(h) of the Act deals with situations where persons summoned had failed to attend at the time and place appointed in the summon, which would then allow the Director General to hear and decide the complaint in the absence of such persons summoned *'notwithstanding that the interests of such person may be prejudicially affected by his decision'*.

Once an order is made, the Director General can embody his decision in such form as may be prescribed to enable a court to enforce the decision. This provision can be read with section 75 that allows a Director General's order to be enforced by the Sessions Court. Section 77 of the Employment Act provides an avenue for appeal for persons whose financial interests are affected and is dissatisfied with the decision can appeal to the High Court.

### **3.3 Observation of an investigation and inquiries proceedings**

I had witnessed an investigation and inquiries procedure in the Labour Department on 3<sup>rd</sup> April 2007. The interior of the venue of where the inquiries were made was similar to a court. The inquiries were conducted by an officer of the Labour Department. Firstly, the Labour officer sat at the table with the disputing parties that is Mr Madurai who was the employee/complainant and Mr Paramesawaran who represented the employer. The officer started off the inquiries by giving the parties in dispute two options that is either to discuss the matter and try to settle or go through a hearing. Then the officer asked the employee if he had resigned and the employee answered in the affirmative but added that he did not approach the employer with regards to claiming of balance payments on the grounds that the employer would not entertain his claim even if he asks. To this, the Labour Officer



contended that the employee should have asked the employer directly with regards to non-payment of balance wages and further asked the employer "any offer"? To this, the employer contended that they can pay for the balance of leave unused but not certain allowance such as performance allowance that was claimed by the employee.

The Labour Officer then stated that she would proceed with the hearing and went up and sat on the bench. The officer explained the procedure of investigation and inquiries that is, Mr Madurai would give evidence and Mr Parameswaran can question and cross examine Mr Madurai and would further be subjected to re-examination and further stated that the 'court' would ask questions where necessary. Mr Madurai then was called to the dock and took an oath. The Officer told the parties to give evidence slowly so that she can take down the information.

The hearing then proceeded where the employee Mr Madurai stated that he was seeking payment of wages. He said that he joined Kris Force Security Sdn Bhd on October 2005 as supervisor and was given operations manager post on 1<sup>st</sup> March 2006 with wages of RM1500 per month and allowances of RM300 for transport allowance, RM200 telephone allowance but on March 2006, he was only paid RM1500. He further stated that he was paid in full RM2000 to the months of April, May and June but was only paid RM1500 for the month of July, August, September and October and on 12<sup>th</sup> November 2006, he said that he resigned. He then contended that he was claiming arrears of non payment of balance of RM500 from July to October, payment for annual leave that was not used that is for 7 days and non-payment of performance allowance. The Labour Officer then gave opportunity for the employer to question the employee and the employer stood and started questioning.

The whole procedure took around 3 hours where the employer questioned and examined the employee's claims of payment and wages. During the whole questioning process, the Labour officer took down the notes of evidence and clarified with the employer and employee on question and the answer. After the question and answer session, the Labour Officer said that she would notify the parties in dispute a day for decision and the date would be notified to them through letter.

The whole procedure though it was in a room that is similar to a court in its arrangement was informal and relaxed and the parties represented and submitted their cases quite well without the involvement of lawyers. Though the lawyers were not involved, the process went on fairly smoothly where the employee submitted his case and the employer cross examined the employee with regards to his case. However, when it came to actually quantifying the actual claims of payment of cash and wages, the Labour Officer got confused because the employee was trying to explain why he was entitled to claim RM2000 as opposed to RM 1500 for the month of July to November 2006. The employer had in his cross examination of the employee managed to clarify this issue where it was found that from the month of July to November 2006, the position of operations manager was taken away from the employee due to poor performance of work and given to another employee. However, out of good will the employer's representative stated that the employer allowed the employee Mr Madurai to continue to work with a lesser salary of RM1500 where he was supposed to do marketing. There were also disputes with regards to allowance claims. After all the clarification, the matter was adjourned for decision to another day, to be decided by the Labour Department. Overall, the whole process went on smoothly without involvement of lawyers.



However, it should be noted that not all employees can represent themselves effectively and confidently as Mr Madurai.

3.4 Evaluation of the dispute resolution mechanism under Part XV

Number of Labour cases dealt with in the period of year 2006 in the Labour Department in Wilayah Persekutuan, Kuala Lumpur

Table 3

Data of cases dealt by the Labour Court	Number of cases
Number of cases handled	1913
Number of cases settled	1557
Number of cases received in 2006	1401
Number of cases brought forward to 2006	512
Percentage of cases settled	81%
Number of cases settled with 60 days period	867
Number of cases settled with 60 to 90 days period	213
Number of cases settled within 290 days period	474

(Source: Labour Department of Federal Territory, Kuala Lumpur<sup>151</sup>)

Based on the statistics in Table 3, it is submitted that though 81% of the cases are settled, there is still room for improvement. The reason is because the number of cases brought forward to the year 2006 was 512. This is still quite a significant number and this would contribute to the delay in disposing off the cases as new cases are reported in the subsequent years and this contribute to the backlog of cases. Though compared to the dispute resolution mechanism under the IRA, the dispute resolution mechanism under the Employment Act is more effective, there are still certain flaws in the system which could be improved in order to enhance the overall efficiency of the resolution system.

<sup>151</sup> Statistics obtained from the Jabatan Tenaga Kerja Negeri, Wilayah Persekutuan Kuala Lumpur, Tingkat 17, Menara Perkeso, 281, Jalan Ampang, 50532 Kuala Lumpur

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One of the major flaws in the current Employment Act which has a direct impact on the dispute resolution mechanism is the fact that there are restrictions on the persons who can bring grievances to the Labour Department, that is persons earning below RM1500 can seek both non payment of wages and cash and employees earning between RM1500 to RM5000 who can only claim non payment of cash and wages and not statutory benefits. This means, a large group of employees would not fall under this category because, generally more and more employees are earning more than RM1500.00 and therefore, would be able to only bring their grievances within the ambit of Industrial Relations Department and the Industrial Court. This causes the Industrial Relations Department and the Industrial Court to handle more cases than necessary.

Furthermore, the persons who can seek redress under the Labour Department are persons who fall within the definition of employee under section 2 that is those who had entered contract of service with an employer. This definition excludes large number of workers such as independent contracts, atypical workers, marginal workers, free lancers and casual workers. However, Malaysia in its move towards knowledge based economy is attracting more and more these types of workers. The reason is because, one of the major impact of globalisation and knowledge based economy is that the traditional workplace concept of full time employment with the same employer for many years is being replaced by atypical, marginal and casual workers and free lancers who may have contract for service rather than contract for service. If the definition of employee in the Employment Act is interpreted strictly, then these workers would be excluded from seeking statutory benefits conferred by the Employment Act. The effect would be that the marginal, atypical and casual workers and free lancers would be left without remedy under the Employment Act. In the event conflict arises between the employer and such



workers and no proper grievance is provided, this would act as a barrier to productivity.

Furthermore, there is limitation on the powers of the Director General of Labour in the sense, the Director General can only hear disputes relating to non payment of wages and other payments and can order an employer to pay the employee whatever money is due. The Director General cannot order reinstatement for cases involving termination of service. In these circumstances, though the complainant falls within the ambit of the definition of employee under the Employment Act 1955 in that the employee is earning below RM1500.00, but because the employee is seeking reinstatement, the employee has to bring the dispute through the Industrial Relations Department where the Director General of Industrial Relations and the Industrial Court is empowered to order reinstatement. This further contributes to the problem of backlog in the Industrial Court and Industrial Relations Department.

With regards to the appeal procedure under section 77 Employment Act, it is submitted that normally labour disputes do not deal with very complicated issues but rather deals with matters pertaining to non-payment of wages and cash and statutory benefits. It is questionable whether it is necessary to go through an appeal procedure to the High Court. It is submitted that the better option is to follow the example of the Employment Appeals Tribunal in the United Kingdom where appeals from the Employment Tribunal goes to the Employment Appeals Tribunal.

### **3.5 Conclusion**

In conclusion, it is submitted that major reforms are needed generally on fairly archaic Employment Act 1955 especially with regards to the limitations of powers imposed on the Director General of Labour and the scope of applicability of the Employment Act 1955 to a limited class of employee namely those earning lesser than RM1500.00 and under a contract of service. The reason is because, more and more workers that emerge are workers under a contract for service such as marginal workers, casual workers and free lancers. These workers must be provided with an avenue of redress for their grievance.



## CHAPTER 4

# Alternative Dispute Resolution Mechanisms and their Relevance to Industrial and Employment Dispute Resolution in Malaysia

- 4.1 Introduction
- 4.2 ADR-Its Meaning, characteristics and relevance to Labour disputes
  - 4.2.1 What is Alternative Dispute Resolution
  - 4.2.2 Characteristics of ADR
  - 4.2.3 Relevance of ADR in resolving Labour Disputes
- 4.3 Conciliation
  - 4.3.1 Introduction
  - 4.3.2 Role of Conciliator
  - 4.3.3 Conciliation Process
  - 4.3.4 Limitations
  - 4.3.5 Observation of Conciliation Proceedings
  - 4.3.6 Evaluation of Conciliation Proceedings
- 4.4 Mediation
  - 4.4.1 Meaning and comparison with conciliation
  - 4.4.2 Court-annexed mediation
- 4.5 Fact-finding

### 4.1 Introduction

Based on the above chapters, it is clear that the current dispute resolution mechanism in employment and industrial law context calls for an improvement, especially with regards to enhancing the alternative dispute resolution procedures so as to reduce backlog of cases and delays in disposing of cases.

It has been contended that '*Malaysian government*' and the '*members of the Malaysian legal fraternity*' supports and have taken 'concrete step towards greater usage of alternative dispute resolution'<sup>152</sup>. This attempt is not just confined to cases of civil nature but also includes industrial relations and employment dispute cases. In support, it can be stated that alternative dispute resolution has been

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<sup>152</sup> Aida Othman, "Introducing Alternative Dispute Resolution in Malaysia: Prospects and Challenges [2002] 2 MLJ ccxxiv at ccxxvi

adopted and practiced in many developed countries to resolve industrial dispute and employment dispute and it had been very successful.<sup>153</sup>

In chapter 2, we had proceeded to look at the relevant provisions in the IRA and Employment Act with regards to conciliation. Below, we would proceed to deal with the concept and characteristics attributable to alternative dispute resolution and scrutinize the actual workings of conciliation theoretically and based on an empirical study of an actual conciliation proceedings conducted at the Industrial Relations Department, which I had observed.

## **4.2 ADR-Its Meaning, characteristics and relevance to Labour disputes**

### **4.2.1 What is Alternative Dispute Resolution**

There have been many views of what is meant by alternative dispute resolution or better known as ADR. One view with regards to ADR is that, it is a device to resolve disputes between parties in an expeditious and economical manner.<sup>154</sup> Another view is that, ADR methods comprise of a variety of techniques and approaches that encourages and promote early intervention and fast resolution of disputes that includes intervention of a neutral party who mediates and assists the parties in dispute in resolving their disagreements<sup>155</sup>. Yet another description of ADR is stated as a 'spectrum of dispute resolution processes that are alternatives to going to court'<sup>156</sup>. These are just a few of the many descriptions that is attributable to ADR.

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<sup>153</sup> Kamal Halili Hassan, "Alternative Dispute Resolution in Industrial Dispute", [2006] 5 MLJ xiii

<sup>154</sup> Ranjan Chandran & Chitravahy Balasingham, 'Alternative Dispute Resolution-The Vision of Tomorrow' [1998] 2 MLJ iv as noted by Kamal Halili Hassan *supra* n 153 at xvi

<sup>155</sup> B.K Lau, *Dismissal of Trial Practices, Precedents and Principles*, (Kuala Lumpur: AGS Management Consultants Sdn Bhd, 2004) page 203

<sup>156</sup> Bowers, J & Gill, M, 'Employment Disputes: ADR Options', page 57



In short, ADR is a dispute resolution mechanism that falls short of going to court or arbitration to litigate issues formally and this is done to expeditiously settle a dispute and at the same time, preserving the harmony between the disputant parties. ADR consists of many forms that includes conciliation, mediation, fact-finding, facilitation, Early Neutral Evaluation, mini-trials, settlement conferencing and so on. What differentiates the different types of ADR options *'is the degree of initiative taken by the third party and the degree to which the parties retain control of the settlement'*<sup>157</sup>.

In Malaysia however, the most commonly used methods to resolve Industrial and Employment dispute is conciliation and mediation. This would be dealt with in detail below. In doing so, the degree of initiatives taken by third party and the amount of control asserted by the parties concerned in settlement would be discussed. This analysis is important so as to be able to recommend the most appropriate ADR to settle certain types of industrial and employment disputes which would be dealt below.

#### 4.2.2 Characteristics of ADR

Some of the characteristics include it is cheaper than going through litigation where advocates are not required for representation as the disputing parties can represent themselves or be represented by the appropriate trade unions in an ADR.

Furthermore, the emphasis of ADR is not on winning but rather in settling a dispute.<sup>158</sup> Therefore, the procedures adopted in carrying out its dispute resolution

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<sup>157</sup> Bowers, J & Gill, M, *loc.cit*

<sup>158</sup> Bowers, J & Gill, M, 'Employment Disputes: ADR Options', page 57

mechanism would often be non-confrontational so as to be able to reach a settlement that is conducive in maintaining the relationship between the disputant parties<sup>159</sup>. This is in contrast with arbitration and litigation where a winner and a loser is provided without considering a resolution that 'takes into account the varying needs, interests and concerns of the different parties and the nuances so often inherent in a complex consensual settlement'<sup>160</sup>.

#### 4.2.3 Relevance of ADR in resolving Labour Disputes

Now that we have seen some characteristics attributable to ADR, why is ADR given much emphasis in industrial and employment disputes by various exponents? Several authors have addressed this issue. For instance, an author had queried the reason for placing great importance on alternative dispute resolution in industrial and employment disputes as follows:

"Why is there a need to suggest ADR in employment law or in particular in industrial adjudication or resolution? Is it not perplexing to suggest a new mechanism where the original system of dispute resolution in employment law was based on the concept of alternative or special dispute resolution, a mechanism that operates outside the mainstream judicial system? For example, the Malaysian Industrial Court was established as an alternative to the mainstream system, applying different principles and procedures"<sup>161</sup>.

The above proposition can be supported on the ground that there is delay in disposal of cases in the Industrial Court and an increase in back log of cases<sup>162</sup> and that the Industrial Court had been criticised by many quarters that it had failed to achieve its objective of being able to resolve disputes in a speedy manner<sup>163</sup>.

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<sup>159</sup> PS Sangal, 'Alternative Dispute Resolution: A Glance at the Law of Malaysia and India', [1996] 3 *Malayan Law Journal* xxix at liii

<sup>160</sup> Brown, H.J & Marriot, A.L, *ADR Principles and Practice* 2ed, (London: Sweet & Maxwell, 1999) at page 274

<sup>161</sup> Kamal Halili Hassan, 'Alternative Dispute Resolution in Industrial Dispute', *op.cit.*, xiii

<sup>162</sup> *Id* at xv

<sup>163</sup> *Id* at xiv



In the United Kingdom, the rationale for ADR in Industrial Disputes and the importance of using ADR to resolve Industrial Disputes has been noted<sup>164</sup>. In support of the above proposition it has been asserted that employer-employee relationship is a special relationship that has to continue even after the dispute had been resolved<sup>165</sup>. Their disputes would not be amenable to judicial pronouncement and also would not be appropriate for the solution to be one where one party wins and the other loses, that is prevalent in litigation<sup>166</sup>. Therefore, the best solution would be to arrive at an agreement with an element of mutual give and take<sup>167</sup>. This is more possible through Alternative Dispute Resolution rather than through litigation<sup>168</sup>. With this optimum conditions are created for satisfactory continuing relationship, where litigation would in contrast contribute to hostility in the working environment<sup>169</sup>.

We would now proceed to look into the actual workings of ADR in Industrial and Employment disputes. This study is essential in order to understand the actual workings of the ADR process in industrial and employment dispute in Malaysia to determine appropriate method in the light of the type and nature of the dispute. The reason is because, the type of dispute that is, whether it is a grievance dispute or disputes concerning collective bargaining that relates to prospective and not existing rights would affect the nature of the dispute resolution mechanism that may be employed<sup>170</sup>.

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<sup>164</sup> Brown, H.J and Marriot A.L, *ADR Principles and Practice*, (London: Sweet & Maxwell, 1993) at 211

<sup>165</sup> *ibid*

<sup>166</sup> *ibid*

<sup>167</sup> *ibid*

<sup>168</sup> Brown, H.J and Marriot A.L *loc.cit*

<sup>169</sup> *Supra* Note 168

<sup>170</sup> *Id* at 274

We would firstly look into the workings of conciliation in terms of its composition, powers of the officers, the role of the conciliator, jurisdictions and limitations. These issues would be looked at from a broader perspective based on actual workings and technicalities involved in a conciliation meeting and not just based on the IRA that merely describes circumstances leading to and surrounding conciliation<sup>171</sup>.

### **4.3 Conciliation**

#### **4.3.1 Introduction**

Conciliation is a method of settlement where a third party would intervene in bringing the disputing parties together to resolve the dispute<sup>172</sup>. In the event a dispute arises between the employer and the employee and where the latter comes forward to the Industrial Relations Department and lodge a complaint, the Industrial Relations Department can invite both the employer and the workman or employee for a conciliation meeting<sup>173</sup>.

#### **4.3.2 Role of Conciliator**

The role of the Director General of Industrial Relations is not to adjudicate the matter but rather facilitate the parties to reach an amicable settlement. This issue in reference to the Director General's role was discussed in the case of *Kumpulan Guthrie Sdn Bhd v Minister of Labour & Manpower & Ors*<sup>174</sup> and in the case of *Minister of Labour & Manpower & Anor v Wix Corporation SEA Sdn Bhd*<sup>175</sup>.

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<sup>171</sup> Dunston, A, *The Employer, the Employee and the law in Malaysia*, (Singapore: Butterworths, 1985)

<sup>172</sup> Wu, Min Aun. *op.cit.*, 242

<sup>173</sup> Ashgar Ali Ali Mohamed, *supra* n 12 at xxxiii

<sup>174</sup> [1986] CLJ 426

<sup>175</sup> [1980] 2 MLJ 248



In the former case, the court had held that the Director General as a mediator has to leave the terms of settlement to the parties. The Court in *Wix* case further held that the Director General in conciliating under section 20 is not imposed with any duty to decide issues of any kind to ascertain the law and the facts. "*He is only required to deal with the situation in the way he thinks best to get the employer and the employee to settle the dispute*".

At this juncture it is pertinent to note that though conciliation is stated to be carried out by the Director General, in practice, the Director General upon receiving representation or complaints of dismissal without just cause or excuse or complaints regarding trade dispute would issue notice of conciliation meeting to both parties.<sup>176</sup> The meetings would be heard by the Industrial Relations Officers who would hear the facts from both the parties in dispute, and where appropriate point out the strength and weaknesses of the parties' case.<sup>177</sup> This is done, not for the purpose of making a decision on the matter but rather to urge the parties to settle amicably.<sup>178</sup>

In India, an author<sup>179</sup> had made certain observations of the role of the conciliator based on section 67 of the Arbitration and Conciliation Ordinance 1996<sup>180</sup>. It is

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<sup>176</sup> Pathmanathan, Nalini, Kanagasabai Siva Kumar, Alagaratnam Selvamalar, *op.cit.*, page 253

<sup>177</sup> *ibid*

<sup>178</sup> *ibid*

<sup>179</sup> PS Sangal, "Alternative Dispute Resolution: A Glance at the Law of Malaysia and India", [1996] 3 MLJ xxix at lix

<sup>180</sup> As noted *ibid*

- (a) The conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute;
- (b) The conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other thing, the rights and obligations of the parties, the usage of the trade concerned and the circumstances surrounding the dispute...;
- (c) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that a conciliator hear oral statements, and the need for a speedy settlement of the dispute;
- (d) The conciliator may, at any stage of the conciliation proceedings, make proposals for settlement of the dispute...

submitted that this description of the role of the conciliator is applicable to conciliation in Malaysia, namely involved in industrial and employment disputes.

#### 4.3.3 Conciliation Process

In conciliation, a conciliator would hold a meeting with the parties in dispute, listening to their differences, take notes and even asks questions to clarify issues<sup>181</sup>. This form of dispute resolution mechanism provides an avenue for the two parties in dispute namely the employer and the employee to come together to work out a solution with regards to the matters in dispute.

In conciliation a conciliator namely the Director General and his authorized officers would play an intrusive role in asking the disputing parties whether they want to settle the case or not<sup>182</sup>. The conciliator would also go one step further and suggest to the parties that *'it is better to get something rather than nothing at all'*<sup>183</sup>. At a certain point during the conciliation session, the conciliator would decide to talk to each of the parties with regards to settling the dispute amicably and in the process, he would also propose a solution and draw up a compromise memorandum of agreement. In helping the parties to understand their legal positions, the conciliator can provide the parties with relevant data describing their legal position, relevant legislation and case laws and also state the procedural matters relevant to their disputes<sup>184</sup>. A conciliator can also express an opinion on the appropriateness or fairness of a particular settlement option provided the conciliator is aware of the subject matter in dispute even if the conciliator does not decide or coerce the outcome<sup>185</sup>.

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<sup>181</sup> Kamal Halili Hassan, *supra* Note 144 at xviii

<sup>182</sup> *ibid*

<sup>183</sup> *ibid*

<sup>184</sup> *ibid*

<sup>185</sup> Carlton, R, *Dispute Resolution Guidebook*, (Australia: LBC Information Services, 2000) at 335



#### 4.3.4 Limitations

However, it should be noted that there are certain limitations imposed on a conciliator. For instance a conciliator cannot make an evaluation of the case in dispute before him<sup>186</sup>. A conciliator also cannot express his view with regards to the merits of the case but instead can only help the parties themselves to reach consensus based on the parties being fully aware of their legal position and the options available for them<sup>187</sup>.

Furthermore, in a conciliation proceeding, the parties can only be represented by those permitted under section 19B(1) of the Act and therefore, lawyers, advisers or consultants are precluded from representing the disputant parties. It has been contended that Parliament, in passing this provision intended '*that outsiders unrelated to a dispute should not be allowed to muddy the water at the stage of conciliation*'<sup>188</sup>.

If 'experts' such as lawyers are allowed at conciliation stage, they may bring in technicalities and hinder the conciliation process, which could proceed better with a common sense approach without being tainted with technicalities.<sup>189</sup>

#### 4.3.5 Observation of Conciliation Proceedings

On 27<sup>th</sup> February at around 9.30 am, I witnessed a conciliation proceeding conducted by Encik Ramli Saad, the 'Ketua Penolong Pengarah' (hereinafter referred to as the Industrial Relations Officer or Officer) of the Industrial Relations Department, where the claimant Hema a/p Gurusamy was claiming against CIMB

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<sup>186</sup> Brown, H.J & Marriot, A.L, *op.cit.*, 277

<sup>187</sup> *ibid*

<sup>188</sup> Wu Min Aun, *op.cit.*, 246

<sup>189</sup> *ibid*

Bank Bhd for wrongful dismissal. The claimant was at all material time prior to the dismissal a clerical staff in CIMB Bank Bhd earning RM940.00.

From my observation, the conciliation proceeding started of in an informal and relaxed manner where the Industrial Relations Officer went through the preliminary issues by asking from the parties in dispute, the relevant documents and also to introduce themselves. The claimant was represented by two officers from the Malaysian Trade Union Congress that is Mr Gunaseelan and Mr Padmanaban and Encik Imran from CIMB Bank represented the employer.

The officer then commenced the conciliation proceeding by stating that the Department had received a complaint from Hema a/p Gurusamy. The complaint was that the claimant was terminated from her work by her employer on 24<sup>th</sup> November 2006 and therefore she was asking reinstatement. The Officer then stated the 3 options of settlement for the parties that is:

- i) reinstatement with backwages paid to the claimant;
- ii) claimant could be given compensation in lieu of reinstatement;
- iii) the matter can be referred to the Minister who can then decide whether to refer the dispute to the Industrial Court.

After this, the officer facilitated the discussion by firstly asking the employer's representative to state the reason for terminating the claimant's employment contract. Mr Imran for the employer stated that Hema was a contractual staff where her contract was renewable every 6 months for 2 years and her contract was supposed to end in April 2007. However, from May 2006 onwards, the claimant was absent frequently from work and produced medical certificates from



various clinics to justify her absence. Mr Imran then stated that the company was lenient with the employees by giving 14 days of medical leave.

He then further asserted that on 23<sup>rd</sup> November 2006, the claimant had failed to show up for work and also failed to notify her employers regarding the reason for absence and therefore, the employer terminated her service on the ground that she failed to be present at her work and no reason was given for her absence. Mr Imran then stated that the employer had via letter dated 13<sup>th</sup> December 2006, claimed from her a refund of money since she had taken medical leave more than allowed by her contract of service, which was for 14 days. The Officer asked Mr Imran how the employer came up to the refund figure and this was explained by the latter.

The Officer then gave an opportunity for the claimant to respond to the employer's contention by asking why the termination was regarded as unfair. The claimant did not respond directly to the question but did through her representative Mr Gunaseelan who stated that claimant had actually met with an accident on 29<sup>th</sup> April 2004 (Mr Gunaseelan paused to clarify with the claimant regarding the date of the accident) where she was admitted for 3 months in University Hospital, and continued to assert that when the claimant was absent from work on 23<sup>rd</sup> November 2006 she had called Mr Jalal Bank to inform the reason for her absence namely that she went for medical check up. The officer then asked who is Mr Jalal, to which the MTUC representative, upon clarification from the claimant stated that Mr Jalal was the officer in charge of contract of employment at CIMB Bank.

In response to this, Mr Imran asserted that when she went on medical leave on 30.4.2006, she was only given 7 days medical leave, that her medical certificate

came from various clinics and that no medical certificate was produced after 24<sup>th</sup> November 2006. To this, the Officer had requested the MTUC officer to explain regarding the 3 months she was in hospital. In answer to this, the MTUC Officer asserted that he had personally seen her in the University Hospital in bad shape and that after her discharge, it was not feasible for her to go each time to University Hospital since she lived in Rawang, which is quite a distance from University Hospital. Therefore, she goes to the nearest clinic to seek medical assistance and pain killers.

At this juncture, a minor confrontation had ensued since the MTUC officer asserted that the employer is very unreasonable and not understanding towards their employees who are going through hardship. At this point, the Industrial Relations Officer intervened and requested for the MTUC officers and the claimant to wait outside so as to clarify certain issues with Mr Imran.

The Industrial Relations officer then asked Mr Imran, 'what is the mandate for you to settle?'. In response to this, Mr Imran stated that since the claimant had breached the contract due to absence from work on 23<sup>rd</sup> November 2006 without giving a reason, the employer would neither reinstate her nor compensate her, but instead the employer is claiming from her RM2700 for being absent for longer period than she was entitled to but her wages were paid nevertheless. The officer then asked the employer whether compensation could be paid to the claimant that is wages up to 3 months, to which the employer's representative answered that the claimant never produced medical certificate to justify her absence on 23<sup>rd</sup> November 2006.



The Industrial Relations Officer then stated that section 15(2) of the Employment Act provides that if an employee fails to attend 2 consecutive days without notice, then he is deemed to have terminated his employment contract and therefore can be dismissed. The Industrial Relations Officer asked Mr Imran why didn't the bank write to the claimant to seek an explanation from the complainant with regards to her absence. In response, Mr Imran answered that it was not necessary as the law does not expressly provide for this.

The Industrial Relations Officer then asked Mr Imran to leave the conciliation room and requested the claimant and her representative to enter the room where the officer clearly stated to the claimant that the employer is not willing to reinstate her and further asserted that he wants to know the claimant's claim regarding compensation.

Mr Imran was then called in where the MTUC officer asked the former regarding compensation to which the former replied that he would have to firstly discuss with the employer's management and that he would get back to the MTUC with regards to the compensation amount to the employee.

From this conciliation proceeding, it was observed that as stated theoretically regarding conciliation, the whole proceeding was conducted in a relaxed, informal and friendly manner where the Industrial Relations Officer had facilitated the proceeding by asking relevant questions and clarifying issues with the parties in dispute. Furthermore, the officer had also defused a near confrontational situation by intervening, summarizing the facts and requesting to meet the parties in dispute separately without the presence of the other.

Moreover, in this case, it is submitted that it was good that the claimant was being represented by the MTUC as she was not very capable of representing herself, especially looking at the fact that she was a clerical staff and not an executive of some sort, she was not very brave in voicing out her side of the story directly. She was also timid. Most of the time, she had just told the facts to the MTUC representative who then spoke on behalf of her.

In matters involving dismissal, it is best that the matter is sent for conciliation rather than mediation since in the former, the claimant can seek to be represented unlike proceeding in the latter dispute mechanism. Therefore, in the event the claimant cannot for some reason represent himself or herself effectively, the claimant would at least have reasonable representation via trade union, in a conciliation proceeding.

#### 4.3.6 Evaluation of Conciliation Proceedings

Based on the above observation it is submitted that one of the main reason why there is backlog in the Industrial Relations Dispute Resolution mechanism is because, Hema who could have brought the matter within the Labour Court since she is an employee earning less than RM1500.00 brought the matter under the Industrial Relations dispute resolution mechanism because she wanted to claim reinstatement.

Unlike the Director General of Industrial Relations who can order reinstatement, the Director General of Labour cannot order reinstatement. Just because of this restriction imposed on the Director General of Labour, many cases that could have been heard by the Labour Department instead were heard by the Industrial Relations Department. This could be one of the major cause of increase of cases



especially of dismissal cases in the Industrial Relations Department, which then has a direct effect on creating backlogs and delay in disposal of cases brought to the Industrial Court.

Besides this assertion, it should be noted that though conciliation is still resorted to by the disputing parties, it is however not entirely satisfactory or effective. According to Ashgar Ali Mohamed, in 2004 there is a backlog of 5000 cases pending conciliation in the Industrial Relations Department<sup>190</sup>. One of the main reasons is due to inadequacy of staff to deal with the mounting number of Labour disputes being reported at the Department<sup>191</sup>.

Another reason for its inefficiency is due to the fact that there is no time period specified in the current Act within which the Director General or his officers should conciliate between the parties<sup>192</sup>. Before 1980, a time limit of 30 days was ascribed to the Director General to reach a settlement.<sup>193</sup> But now, no such time limit is given for settlement. According to the Director of the Industrial Relations Department Mr Ho Leng Fatt, it took an average of 6 months for a matter conciliated to reach some form of finality. This is certainly a long wait especially if an employee is claiming for unfair dismissal.

In the event a settlement is reached via conciliation, an employee faces yet another challenge that is, where the employers deliberately ignore the settlement arrived at the conciliation proceeding<sup>194</sup>. In such circumstances, the employee is

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<sup>190</sup> Ashgar Ali Ali Mohamed, 'A Critical Appraisal of the Adjudication Process of Dismissal under the Industrial Relations Act 1967.', *op.cit*, at 41

<sup>191</sup> *ibid*

<sup>192</sup> *supra* note 191

<sup>193</sup> Industrial Relations (Amendment) Act 1980 (Act 484)

<sup>194</sup> Ashgar Ali Ali Mohamed, 'A Critical Appraisal of the Adjudication Process of Dismissal under the Industrial Relations Act 1967.', *op.cit*, 42

left in a helpless and vulnerable position because if they want to enforce the settlement arrived at, then they have to go through the legal channel and this would mean further costs to them. This certainly would cause hardship to the defendant<sup>195</sup>.

#### **4.4 Mediation**

##### **4.4.1 Meaning and comparison with conciliation**

It should be noted and clarified at this point that though many authors use the phrase conciliation and mediation interchangeably however there are differences between these two dispute resolution mechanisms. Unlike a conciliator who plays an intrusive role in carrying out his function, a mediator does not perform such an intrusive role<sup>196</sup>. Another perception of mediation is that, it is synonymous with negotiation but in actual fact mediation is more than a negotiation<sup>197</sup>.

In mediation, a neutral third party or more than one would facilitate a settlement between the disputing parties but at the same time they would not impose a settlement on the parties. This neutral third party is better known as mediator<sup>198</sup>. A mediator helps the parties to settle their disputes, where their modus operandi being, meeting each party privately and listen to their views in order to ensure that each party understands the point of view of the other<sup>199</sup>. A mediator would also seek to bring the disputing parties together in order for the latter to reach a compromise<sup>200</sup>. The mediator would then systematically isolate the disputed issues

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<sup>195</sup> *ibid*

<sup>196</sup> Ranjan Chandran & Chitravahy Balasingham, *op.cit.*, v

<sup>197</sup> PG Lim, "Mediation-Slow Starter in Alternative Dispute Resolution", [2004] 1 MLJ xv

<sup>198</sup> *ibid*

<sup>199</sup> Ranjan Chandran & Chitravahy Balasingham, *loc.cit*

<sup>200</sup> *ibid*



to develop options, consider alternatives and reach a consensual settlement that will accommodate the disputing parties' needs<sup>201</sup>.

At the end, the aim of the mediator is to bring the parties to what is perceived as a "win-win" result<sup>202</sup>, and this can be contrasted with arbitration or litigation where one party wins and the other loses. A mediator is required to have got some legal qualifications or other professional training or experience in dispute resolution process<sup>203</sup>.

#### 4.4.2 Court-annexed mediation

In dealing with Industrial disputes, the Malaysian Industrial Court had from August 2004 onwards implemented court annexed mediation.<sup>204</sup> Court annexed mediation is one form of alternative dispute resolution process where a judge or officer of the court is empowered to refer the dispute to a mediator at anytime during the litigation process<sup>205</sup>.

In Malaysia, the Minister of Human Resource Datuk Dr Fong Chan Onn in commenting on court annexed mediation stated that the new voluntary mediation mechanism in the Industrial Court would complement the conciliation conducted by the Industrial Relations Officers<sup>206</sup>. It has been noted that the court annexed mediation would be conducted by the Industrial Court Chairman and if no settlement is reached, then the dispute would be heard by another Chairman<sup>207</sup>.

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<sup>201</sup> J Folberg and A Taylor, 1984. *Mediation: A comprehensive Guide to Resolving Conflict Without Litigation*, (San Francisco: Jossey-Bass), page 7 as observed by Kamal Halili Hassan, *supra* Note 153 at xxi

<sup>202</sup> PG Lim, *loc.cit*

<sup>203</sup> PG Lim, *loc.cit*

<sup>204</sup> *supra* n153 at xxiii

<sup>205</sup> Court Annexed Mediation-An Overview, Speech by Law Council President John North to the Malaysian Law Conference-November 17, 2005

<sup>206</sup> *Utusan Malaysia Online*, July 29, 2004

<sup>207</sup> Kamal Halili Hassan, 'Alternative Dispute Resolution in Industrial Dispute', *op.cit.*, xxiii

Unlike a traditional mediation process, in a court-annexed mediation, parties can be represented by lawyers during the mediation<sup>208</sup>. Industrial Court President Yussof Ahmad, in commenting with regards to court-annexed mediation to resolve industrial dispute had stated that this form of dispute resolution mechanism which was proven successful in countries like Australia, provides an option for disputing parties to reach a settlement<sup>209</sup>.

However, after this mechanism was implemented, there had been comments by various officers of the court in Malaysia who doubted the efficiency of court-annexed mediation. This gives rise to an issue of whether court-annexed mediation is a good mechanism to deal with industrial disputes. There are arguments for and against court-annexed mediation.

Some of the advantages of court-annexed mediation is that, it provides parties in dispute with more dispute resolution options and increased satisfaction with the court system<sup>210</sup>. Furthermore, American studies show that parties who had resorted to court-annexed mediation rather than court adjudication were very much satisfied with the former mode of dispute settlement rather than the latter as it provided a fairer and a more personal forum than court adjudication<sup>211</sup>. Furthermore, it has also been stated that when court annexed mediation is done effectively, it provides<sup>212</sup>.

"A less intimidating process in which the parties have control over the decision and can explore a range of options; A process providing an opportunity for disputants to express

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<sup>208</sup> Kamal Halili Hassan, 'Alternative Dispute Resolution in Industrial Dispute', *loc.cit*

<sup>209</sup> *Utusan Malaysia Online*, July 29, 2004

<sup>210</sup> S Press. 'Court-connected ADR: policies and issues', (1995) 28 *Forum* 5 as observed Boulle, L and Nestic, M, 'Mediation Principles Process Practice', (London: Butterworths, 2001) at 382

<sup>211</sup> J Pearson, 'An evaluation of alternatives to court adjudication', (1982) 7 *Justice System Journal* 420 as observed by Boulle, L and Nestic, M *ibid*

<sup>212</sup> Court Annexed Mediation-An Overview, Speech by Law Council President John North to the Malaysian Law Conference-November 17, 2005



their interests without fear and their legal rights will be compromised or their relationships jeopardized by the process of dispute resolution”.

In Malaysia, though court-annexed mediation started off on a positive platform where it was supposed to lighten the burden of the Industrial Court that is bogged down by increasing number of cases and to increase the efficiency of dispute resolution mechanism in industrial and employment dispute, some are of the opinion that it is working otherwise<sup>213</sup>. In support, it has been contended that the President is not the best persons to conduct mediation since they are very legalistic in their approach in dealing with issues<sup>214</sup>. There are techniques of conducting a mediation and a mediator would normally go through some form of training on mediation and therefore, a President of the Industrial Court may not be an appropriate person to conduct mediation. It is better for mediation to be conducted by trained mediators<sup>215</sup>.

Furthermore, since court annexed mediation would involve lawyers, experience shows that mediation may not perform as well as it should<sup>216</sup>. This problem is not only realized in Malaysia but also in New Zealand where mediation is available within the Employment Tribunal. In New Zealand, some criticised court-annexed mediation as follows:

...mediation at the tribunal has become a legal forum where advocates with vested economic interests argue against each other from prepared mediation statements, acting out choreographed tactical exchanges, designed to assess the opposition's arguments rather than resolve the dispute<sup>217</sup>.

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<sup>213</sup> Kamal Halili Hassan, 'Alternative Dispute Resolution in Industrial Dispute', *op.cit.*, xxiii

<sup>214</sup> *ibid*

<sup>215</sup> *ibid*

<sup>216</sup> Kamal Halili Hassan, 'Alternative Dispute Resolution in Industrial Dispute' [1997] ELB 24

<sup>217</sup> L Skiffington, "There must be a better way: alternative dispute resolution"

We would later scrutinize below on how we can improve the court annexed mediation based on workings in other countries. Now, we will evaluate the fact finding mechanism provided for in the IRA.

#### 4.5 Fact-finding

Fact-finding is a mechanism that is provided in part VIII of the IRA namely section 34 to section 37 of the Act. Section 34 of the Act confers powers on the Minister of Human Resource to appoint a Committee of Investigation or a Board of Inquiry and refer to them a trade dispute that exists or apprehended. It has been stated that fact-finding mechanism is supposed to be used in occasions where certain disputes are of such a nature and special circumstances that the particular dispute is not amenable to be dealt with through normal dispute resolution mechanism.<sup>218</sup>

Committee would encompass one or more persons and upon its appointment by the Minister, it is conferred with powers to investigate the causes and circumstances of any trade dispute or matter referred to it and it would then be required to report the matter to the Minister<sup>219</sup>. The Minister may rely on the Committee to better inform himself regarding a particular dispute and make recommendations to amend the laws where necessary<sup>220</sup>. The Board of inquiry is viewed as a more encompassing body with powers conferred on it to inquire into any matter that is connected with a trade dispute, in the event the Minister refers the dispute to it.

The Board of Inquiry's composition is provided for in section 36(1) of the Act which states that 'the Board may consist of a Chairman and such other persons as the

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<sup>218</sup> Chen Voon Shian *op cit.*, 223

<sup>219</sup> Section 35(1)&(2) Industrial Relations Act 1967(Act 177) and Rules and Regulations

<sup>220</sup> Wu Min Aun, *op.cit.*, 257



Minister thinks fit or may consist of one person'. Section 36(4) of the Act deals with the right of representation of the parties.<sup>221</sup> Section 37 deals with the reporting procedure by the Board of Inquiry to the Minister.

The Board, when it reports to 'the Minister, any report emanating from it must be tabled in the Parliament before the Dewan Rakyat and published from time to time and in such manner he thinks fit, any information obtained or conclusion arrived at by the Board'<sup>222</sup>.

It has also been further asserted that since the enactment of this provision, it has never been used nor invoked by anyone. One reason could be because, fact-finding mechanism is a government machinery that is supposed to be used in large scale industrial dispute where big corporations or essential services or transport corporations and involved<sup>223</sup>. Therefore, this form of mechanism is not appropriate for dismissal cases<sup>224</sup>. Moreover, another reason on why this mechanism was not used may be due to the fact that the very nature of the mechanism where findings has to be submitted to the Parliament, this could cause serious tensions between disputing parties<sup>225</sup>. Therefore, the better approach to deal with disputes is by normal administrative mechanisms such as conciliation<sup>226</sup>.

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<sup>221</sup> Section 36(4) of the Act-'A person may be represented in proceedings before a Board, with the permission of the Chairman, by any officer or employee of a trade union of employers or workmen, or, notwithstanding anything to the contrary contained in any written law relating to the registration of trade unions, by any official of an organization (not being a trade union) of employers or of workmen registered in Malaysia, or by an advocate.

<sup>222</sup> Section 37(4) as noted by Wu Min Aun, *loc.cit.*

<sup>223</sup> Based on an interview with Kamal Halili Hassan, the Dean of University Kebangsaan Malaysia Law Faculty on 22 February 2007.

<sup>224</sup> *ibid*

<sup>225</sup> *ibid*

<sup>226</sup> *ibid*

## CHAPTER 5

### Reform of Dispute Resolution Mechanisms in labour disputes in Malaysia

- 5.1 Introduction
- 5.2 Reform based on United Kingdom labour dispute resolution system
- 5.3 Reform based on Australia labour dispute resolution system
- 5.4 Reform based on New Zealand labour dispute resolution system
- 5.5 Reform based on United States of America labour dispute resolution system
- 5.6 Other reforms

#### 5.1 Introduction

In this chapter, we will be examining various alternative dispute resolution mechanisms in other countries particularly the UK and other countries like Australia, New Zealand and United States of America. Based on the studies, reforms will be proposed to the current dispute resolution mechanism in Malaysia. This is to ensure that the Labour laws in Malaysia actually is as effective as envisaged by the Parliament by ensuring speedy disposal of disputes and at the same time preserving harmonious relationship between the disputing parties namely the employer and the employee.

#### 5.2 Reform based on United Kingdom labour dispute resolution system

One of the proposals for reform that can be introduced in Malaysia with regards to dealing with industrial disputes is to introduce a mediation or a voluntary arbitration such as the English ACAS Scheme short for Advisory, Conciliation and Arbitration Service.<sup>227</sup> This system is embodied under the Employment Protection Act 1975 and continued by virtue of the Trade Union and Labour Relations (Consolidation)

<sup>227</sup> Kamal Halili Hassan, 'Alternative Dispute Resolution in Industrial Dispute', *op.cit.*, xiv



Act 1992 (TULR(C)A s247)<sup>228</sup>. The general duty of ACAS is to promote the improvement of industrial relations<sup>229</sup>.

A council consisting of a Chairman and nine members, 3 of whom are appointed after consulting the employers' organization, 3 appointed after consulting workers organizations and 3 neutral that is academic appointments carries out its work.<sup>230</sup> Though ACAS carries out its function on behalf of the Crown, it is independent of the Minister's directions or control<sup>231</sup>. Amongst others, one of the most important and significant function carried out by the ACAS Scheme is providing voluntary arbitration for unfair dismissal cases<sup>232</sup>.

This is provided for by virtue of the Employment Rights (Dispute Resolution) Act (ER(DR)A) 1998<sup>233</sup>. The main emphasis of the Act is that, in certain cases where the parties agree, ACAS rather than the employment tribunal plays a role in adjudicating unfair dismissal cases<sup>234</sup>.

How does voluntary arbitration work? This scheme of voluntary arbitration became a reality when the ACAS Arbitration Scheme (England and Wales) Order came into force in May 2001<sup>235</sup>. In dealing with unfair dismissal disputes, this scheme provides an alternative adjudicative route<sup>236</sup> through voluntary arbitration which would otherwise be brought before a tribunal<sup>237</sup>. This voluntary arbitration mechanism is useful in cases which are not complex in nature. It has also been

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<sup>228</sup> Selwyn, N, *Law of Employment*, 11<sup>th</sup> Ed (London: Butterworths, 2000) at 1

<sup>229</sup> *ibid*

<sup>230</sup> *ibid*

<sup>231</sup> *ibid*

<sup>232</sup> Kamal Halili Hassan, 'Alternative Dispute Resolution in Industrial Dispute', *op.cit.*, xxiv

<sup>233</sup> *ibid*

<sup>234</sup> *ibid*

<sup>235</sup> Dolder, C, "The Contribution of Mediation to Workplace Justice", (Dec, 2004) Vol 33 ILJ 320 at 322

<sup>236</sup> *ibid*

<sup>237</sup> Chris Chapman et al, 2003, ADR in *Employment Law*; p2 as observed by Kamal Halili Hassan, *supra*, xxiv

contended if most cases of unfair dismissal could be resolved and disposed, the backlog in the employment tribunal can be reduced.

Based on this contention, it is proposed that Malaysia could introduce a dispute resolution mechanism that is similar to ACAS in UK to deal with dismissal cases. Furthermore, an employment tribunal should be introduced in the industrial and employment dispute resolution mainstream so that the employment tribunal can focus on cases of dismissal. This can significantly reduce the number of cases dealt with by the Industrial Court since the majority of the cases dealt with by the Industrial Court refers to dismissal cases. It is suggested that if Malaysia has a scheme similar to ACAS and provides and encourages disputing parties to resort to voluntary arbitration in dealing with dismissal cases thus slowing the involvement of Industrial Court in dismissal cases, it could result in speedier resolution of dispute, thus reducing back log of cases in the Industrial Court.

One of the main contributing factors to speedy settlement through voluntary arbitration is due to the fact that the scheme is not required to deliberate on jurisdictional issues that are technical and questions of law such whether the claimant is an "employee" or not<sup>238</sup>. If parties in dispute are clear that issues such as this would not be invoked, then it would be beneficial to resort to voluntary arbitration where the 'real' issues can be dealt with namely the issues pertaining to dismissal and whether it is fair or unfair. In the event the parties are disputing on issues on whether the claimant is an 'employee', then the parties can resort to tribunals such as the Industrial Court<sup>239</sup>.

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<sup>238</sup> Kamal Halili Hassan, 'Alternative Dispute Resolution in Industrial Dispute', *op.cit.*, xxiv  
<sup>239</sup> *ibid*



The precondition to invoke this voluntary arbitration scheme is for the disputing parties to submit to ACAS a conciliated settlement or a compromise agreement<sup>240</sup>. Once this is satisfied, a single arbitrator hears and makes a decision based on the powers conferred to it just like an employment tribunal<sup>241</sup>. An arbitrator hears both sides of the parties in dispute and then make a binding decision. The whole proceeding would be conducted in an inquisitorial manner where no direct cross examination would be held, though the arbitrator may put through questions<sup>242</sup>.

Privacy is also ensured for the parties where decisions would be issued directly to the parties, compared to employment tribunal where the decision is made open to the public<sup>243</sup>. This aspect of voluntary arbitration however has been criticized on the grounds that since the outcome of arbitration is 'internal' in nature, they will not produce precedents for future applications by courts or tribunals<sup>244</sup>. However, by looking at the overall picture, it is submitted that ACAS Scheme of voluntary arbitration is good and should be considered by Malaysia.

## 5.7 Reform based on Australian labour dispute resolution system

The Workplace Relations Act 1996 (Cth) deals with dispute resolution in a way that is slightly different from what we have seen so far. The reason is because, this Act purports to shift the primary responsibility of determining employment matters from third parties to the employers and the employees themselves, both at the workplace level or at the enterprise level<sup>245</sup>.

<sup>240</sup> Kamal Halili Hassan, 'Alternative Dispute Resolution in Industrial Dispute', *op.cit.*, xxiv

<sup>241</sup> *ibid*

<sup>242</sup> Chris Chapman et al, 2003, *ADR in Employment Law*, p2 as observed by Kamal Halili Hassan, 'Alternative Dispute Resolution in Industrial Dispute', *op.cit.*, xxiv

<sup>243</sup> *Ibid* Kamal Halili Hassan

<sup>244</sup> Dolder, C. *op.cit.*, 324

<sup>245</sup> Wolski, B, "The Model Dispute Resolution Procedure for Australian Workplace Agreements a Dispute System Design Perspective" [1998] *Bond Law Review* 2

Section 170VG(3) of the Act requires the Australian Workplace Agreements (AWA's) that was entered into by employers and individual employees to include a dispute resolution procedure as a prerequisite for filing and approving of the workplace agreement. In doing so, the parties have three options:

- i) draft a customized prerequisite clause;
- ii) adopt one of the various standard clause provided by professional dispute resolution bodies; or
- iii) adopt the model dispute resolution procedure in the Act<sup>246</sup>

However, In the event the workplace agreement does not contain matters with regards to dispute resolution, then the model dispute resolution procedure prescribed by subregulation 30ZI(2) of the Act would be applicable<sup>247</sup>. The model procedure includes mediation, which is thought to be a renowned procedure in focusing problem solving and promoting a mutual understanding between the parties<sup>248</sup>.

It should be noted at this juncture that the role of unions is significantly reduced in the operations of AWAs', the most significant of which, the unions have no rights to represent an employee in any dispute that arises in connection with the AWA.

With regards to this, it is proposed that such a drastic move in excluding employee being represented by trade union in Malaysia may not be good at this juncture since there are large number of workforce especially at the lower level who are not strong enough to represent themselves or 'loud' enough to have their voice 'heard' against the employer's who is in a better bargaining position. However, the

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<sup>246</sup> *ibid*

<sup>247</sup> *ibid*

<sup>248</sup> Wolski, B. *loc.cit.*



boarder system of AWA should be considered by Malaysia in trying to reform its dispute resolution process. The reason is because, by leaving the decision of the types of dispute resolution mechanism to the employers and employees themselves is better than forcing through some dispute mechanism through the Act. The contracting party namely the employer and the employee would be in a better position to decide on the best mode of dispute resolution mechanisms in the light of the nature of the job, the relationship their bargaining powers and so on. A person in a lower category workforce and who may not be able to represent herself or himself effectively may be better off resorting to conciliation since a conciliator in carrying out his duty in a more intrusive and active role can equalize the imbalance of bargaining powers between employers and employees.

Dispute system design (DSD) is another aspect of Australian employment law that involves 'the design and implementation of a dispute system, that is a series of procedures for handling disputes, rather than an individual procedure. One of the significance of DSD is that, it categorizes dispute resolution process based on the best approach to deal with certain types of disputes.

Basically, emphasis is given to whether a dispute resolution process is dealing with 'interest' or 'rights' of the disputing parties. Based on this division, the most appropriate dispute resolution mechanism is suggested, based on the technicalities involved, the types of parties involved, the frequency of the cases and so on.

In reference to DSD, it is suggested that Malaysia should come up with a special task force to evaluate the whole industrial dispute resolution procedure, distinguish

disputes that affects rights and interests and based on this prescribe the best and the most appropriate dispute resolution mechanism.

### 5.3 Reform based on New Zealand labour dispute resolution system

In New Zealand, much emphasis has been placed on mediation to deal with Industrial and Employment disputes. This is done through New Zealand Employment Relations Act 2000(NZ ERA 2000) that emphasized the use of mediation. 'The most important reform under this Act is the complete abolishment of the Employment Tribunal'<sup>249</sup>.

Therefore, when an employer-employee dispute arises, the Act requires the parties to attempt early resolution via mediation<sup>250</sup>. This mediation is provided by the Department of Labour<sup>251</sup>. If mediation is unsuccessful, then either party can seek determination through the Employment Relations Authority, which is a body that has replaced the Employment Tribunal<sup>252</sup>.

The mediation process, in striving to reduce the level of legalism associated with the tribunal system, requires a mediator to keep confidential any statements, admission or documents used in mediation<sup>253</sup>.

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<sup>249</sup> G Anderson, *Labour's Labour Law: Labour Law Reform in New Zealand under a Labour Government* (London: Institute of Employment Rights, 2001) as noted by Dolder, C. *op.cit.*, 328

<sup>250</sup> Dolder, C. *loc.cit.*

<sup>251</sup> *ibid*

<sup>252</sup> G Davenport, 'National Labour Law Profile: New Zealand' (2001) International Observatory of Labour Law at: <http://www.ilo.org/public/English/dialogue/ifdial/11/observatory/profiles/nz.htm>

<sup>253</sup> Dolder, C. *loc.cit.*



#### 5.4 Reform based on United States of America labour dispute resolution system

In the United States of America, there is a requirement under the law that the voluntary arbitration clause be incorporated into every collective agreement<sup>254</sup>. This clause provides for referral of disputes to an impartial umpire that is acceptable to both parties and the decision of the umpire is final and binding<sup>255</sup>. The fees of the arbitrator is borne equally by both parties, and this is to ensure that his decision is final and binding<sup>256</sup>.

In the United States of America, the arbitrators amongst others consists of Professors of Industrial and Labour Relations in the Universities where some of the eminent Professors serve as referees to arbitrate disputes between powerful unions and managements such as America Automobile Companies like GM, Ford and Chrysler on one side and the United Auto Workers on the other side<sup>257</sup>.

The USA<sup>258</sup> approach in incorporating a voluntary arbitration clause in collective agreement can be followed by Malaysia in order to handle the Industrial and Labour Relations disputes.

#### 5.5 Conclusion

Based on the above discussions, we can see that there are many ways that our current dispute resolution mechanism can be reformed. Malaysia should consider having a similar body to ACAS especially with regards to the voluntary arbitration scheme to deal with unfair dismissal cases. This is because, more often than not,

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<sup>254</sup> V Anantaraman, *supra* n 46 at xxxi

<sup>255</sup> *ibid*

<sup>256</sup> *ibid*

<sup>257</sup> V Anantaraman, *supra* n 46 at xxxi

<sup>258</sup> Example in the state of California as in <http://www.employlaw.com/arb.htm> Employment Law Forum in California

unfair dismissal cases, which have usually be fact based, may not involve complex and technical issues. Another proposal for reform would be to encourage a similar agreement in organizations as the workplace agreement in Australia which at most instances, gives an opportunity for the employer and employee to decide which form of dispute resolution they would want to resort to in the event dispute arises. Furthermore, categorizations of disputes namely the types of disputes (whether it is a collective dispute or individual grievance and whether it affects interests or rights) would be very helpful in deciding the most appropriate mechanism.

With regards to the New Zealand approach, it is submitted that, abolishing of arbitration mechanism namely the Industrial Court is a good idea because, though Industrial Court need not deal with dismissal cases, however when a dispute arises that involves technicalities or interpretation of agreements, then the Industrial Court may be a good option since to a certain extent, rules and laws can assist in dealing with the technicalities.



## CHAPTER 6

### Conclusion

So far, we have seen the dispute resolution mechanisms under the IRA and the Employment Act and have also scrutinised in detail the challenges and limitations faced by the current dispute resolution mechanisms. It is submitted that a harmonious industrial relations and employer employee relations is crucial for overall economic development and progress because it is only when the employer and employee are in good terms that they can work together to build their businesses and this directly would have positive impact on the economy, growth and productivity.

Furthermore, since Malaysia is moving from industrial era to knowledge based economy era, it is crucial that the employer and employee relationship is maintained so that knowledge can be shared in the most effective way among the employer and employee thus contributing to the success of the business and the job.

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