EFFECTIVENESS OF CONCILIATION PROCEEDINGS IN DISMISSAL CASES UNDER SECTION 20, INDUSTRIAL RELATIONS ACT, 1967

J. CHANDRASEGARAN

Projek Penyelidikan bagi
memenuhi sebahagian daripada
syarat-syarat untuk Ijazah
Sarjana Undang-Undang

2008/2009

TABLE OF CONTENTS

ABSTRACT

ACKNOWLEDGEMENT

CHAPTER 1 : INTRODUCTION

1.1	Development of the law of dismissal in Malaysia	1
1.2	Position prior to 1969	1
1.3	Position after 1969	3
1.4	Grounds on which Industrial Court awards have been quashed	
	1.4.1 Decision without jurisdiction	4
	1.4.2 Decisions in excess of jurisdiction	5
	1.4.3 Unreasonable decision	5
1.5	The Industrial Court	6
1.6	What constitutes a dismissal?	7

CHAPTER 2 : **Preliminary consideration under section 20, Industrial Relations Act, 1967**

2.1	Section 20(1) of the Industrial Relations Act, 1967	9
2.2	Section 20(1A) of the Industrial Relations Act, 1967	9
2.3	The important aspects or consideration of section 20, of the Industrial Relations Act, 1967	10
2.4	The requirement of being a workman	10
2.5	Limitation period of 60 days	16
2.6	Plea of reinstatement	20

CHAPTER 3 : Procedures for conciliation proceedings 24

3.1 The sample letter, for representation under section 20 25

3.2 The function and power of Director General, Industrial Relations Department 29

3.3 Flow chart for the claim of reinstatement process 31

CHAPTER 4 : Interpretation of data and statistics from Industrial Relations Department

4.1 Claims for reinstatement by sector 2003-2007 33

4.2 Claims for reinstatement by nature of dismissal 2003-2007 34

4.3 Claims for reinstatement by method of settlement 2003-2007 36

4.4 Claims for reinstatement by state 2003-2007 37

CHAPTER 5 : Conciliation proceedings

5.1 What is conciliation? 38

5.2 What qualities does a conciliator need? 39

5.3 What preparations are needed for conciliation? 41

5.4 Conduct of conciliation meeting 42

5.5 After the conciliation meeting 43

CHAPTER 6 : Shortcomings of conciliation proceedings at Industrial Relations Department

6.1	Conciliation proceedings at Industrial Relations Department	44
6.2	Suggestions on how to improve the conciliation proceedings	47
6.3	Latest statistics from the Industrial Relations Department	49
6.4	No. of cases referred to the Industrial Court (2001 – 2009)	49
6.5	How does the Industrial Relations Department reduce the cases?	50
6.6	At what expense is this being done?	51
6.7	Real life experiences at the Industrial Relations Department	53

CHAPTER 7 : Rights as an employee and remedies

7.1	The Employment Act, 1955	57
7.2	The Industrial Relations Act, 1967	58
7.3	Other remedies	62

CHAPTER 8 : Conclusion 63 - 68

List of cases

List of statutes

Bibliography

ABSTRACT

A workman who considers himself dismissed without just cause or excuse by his employer can make representations in writing to the Director General to be reinstated in his former employment as provided under Section 20, of the Industrial Relations Act, 1967. As evidenced from the statistics available from the Industrial Relations Department, the majority of cases referred to the Industrial Relations Department for conciliation and to the Industrial Court for adjudication, are cases involving dismissal without just cause or excuse.

This project paper will analyze the overall effectiveness of conciliation proceedings in dismissal cases under Section 20, of the Industrial Relations Act 1967. This paper will look at the aspects of the preliminary consideration under the said Section 20 that is the requirement of being a workman, the 60 days limitation period and the plea of reinstatement, the procedures involved in the conciliation proceedings, interpretation of relevant data and statistics from the industrial relations department as well as the sufferings and problems faced by ordinary workmen due to the outcome of conciliation proceedings at the Industrial Relations Department.

It cannot be denied that the process of conciliation proceedings need to be reviewed and reformed in order for it to be more effective as the Industrial Relations Act, 1967 is a piece of beneficent social legislation.

Acknowledgement

Apart from the efforts of me, the success of any project depends largely on the encouragement and guidance of many others. I take this opportunity to express my gratitude to the people who have been instrumental in the successful completion of this project.

I would like to show my greatest appreciation to my supervisor Profesor Madya Dr. Sharifah Suhanah Syed Ahmad. I can't say thank you enough for her tremendous support and help. I feel motivated and encouraged every time I attend her lecture and discussion. Without her encouragement and guidance this project would not have materialized.

I also would like to remember my mentor, the late Mr A. Murugavell who have guided and has been a source of inspiration for me to take up law and to prepare this project paper.

CHAPTER 1

1. Introduction

1.1 Development of the Law of Dismissal in Malaysia

The adoption in 1963 by the International Labour Conference of Recommendation No. 119 [1] concerning Termination of employment at the initiative of the employer resulted in wide legislative activity throughout the world to provide for security of tenure in the job and for payment of compensation for retrenched employees. It was only after the amendment to the Industrial Relations Act 1967 on 10th October 1969 that workers were provided for the first time with the right to seek reinstatement to their jobs. The Employment Act 1955 was amended at the same time providing for a *'due inquiry before an employee is dismissed or downgraded'*. The development of the law since then has been significant both in the area of substantial justice and natural justice on proper procedure.

1.2 Position prior to 1969

Prior to the 1969 amendment, unorganized workers within the purview of the Employment Act could only claim the indemnity in lieu of notice when they were dismissed without just cause. Organized workers could after the setting up of the Industrial Court in 1967 (in its present form) seek reinstatement. However, the Employment Act's purview was (and is) limited generally to employees at non-executive

[1] *http://www.ilo.org/ilolex/cgi-lex/convde.pl?R119*

levels. Trade Unions of workmen too generally catered for workmen at non-executive levels.

Employees at executive and higher levels has scarce remedies if they were dismissed and whatever claims they could succeed in was limited to their rights under the contract of employment. The time and expense of litigating a claim through the Courts was itself a deterrent. The relief of reimbursement was possible only indirectly and under limited circumstances as the Specific Relief Act 1950, S.20(1)(6), disallowed a contract to render personal services from being specifically enforced.[2]

The Federal Court held that, in the case of a claim for wrongful dismissal, a workman may bring an action for damages at common law. This is the usual remedy for breach of contract e.g. a summary dismissal where the workman has not committed misconduct. The rewards, however, are rather meager because in practice, the damages are limited to pay which could have been earned by the workman had the proper period of notice is served and if it can be proved that he could obtain similar job immediately or during the notice period with some other employer. He cannot sue for feelings or loss of reputation caused by a summary dismissal where for instance he was dismissed on a groundless charge of dishonesty. At common law it is not possible for a wrongfully dismissed workman to obtain an order for reinstatement because the common law knows only one remedy viz. an award of damages.[3]

---

[2] *B.S.S. Kanda v The Govt. of Malaysia–(1962) 2 MLJ 169.PC*
[3] *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors (1981) 1 MLJ 238*

1.3 Position after 1969

Thus the 1969 amendment was significant in that for the first time workers at all levels could not only challenge the decision to dismiss them but also seek to be reinstated. The process of using the conciliation services of the Ministry of Labour (now Ministry of Human Resources) and ultimately the Industrial Court was more expeditious and less expensive than processing a claim through the common law courts. Consequently disputes relating to dismissals have occupied the major part of the Industrial Court's time. In recognition of the need to hand down final decisions on industrial disputes by a Court specially set up for that purpose, section 33B of Industrial Relations Act 1967 provides that '*an award, decision or order of the Court under this Act (including the decision of the Court whether to grant or not to grant an application under section 33A (1)) shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court*'.

However, a limited right of appeal against the awards are provided for in section 33A of the Industrial Relations Act 1967. The Appeal to the High Court (if allowed by the Industrial Court) is on questions of law :-

(a) which arose in the course of the proceedings;

(b) the determination of which by the Court has affected the award;

(c) which, in the opinion of the Court, is of sufficient importance to merit such reference;

(d) the determination of which by the Court raises, in the opinion of the Court, sufficient doubt to merit such reference.

The High Court is empowered to treat such a reference as an appeal against the award and may consequently confirm, vary, substitute or quash the award or make such other order as it considers just or necessary. A decision of the High Court on such reference on question of law is itself final and conclusive.

However, the ouster clauses are effective only where the Industrial Court (or the High Court under section 33A) have made decision, awards or orders within their inherent supervisory rights to quash the Industrial Court's awards on a variety of grounds.

1.4 Grounds on which Industrial Court awards have been quashed

1.4.1 Decision without jurisdiction

The Industrial Court ordered the employer in the case of *Inchcape Malaysia Holdings Bhd v. R.B. Gray & Anor* to compensate Gray at the time of his dismissal who was employed as an Executive Director. The Supreme Court in quashing this decision [4] held that Gray was employed as a Director and as such he "is the very brain of the company or their directing mind' and as such he was not a 'workman' within the Industrial Relations Act. The Court further held that the question of whether a person is a 'workman" or not is a jurisdictional question. The Industrial Court could not vest itself with jurisdiction by wrong decisions.

[4] *(1985) 2 MLJ 297*

1.4.2 Decisions in excess of jurisdiction

The Industrial Court in the case of *Lee Wah Bank v National Union of Bank Employees* [5] awarded that benefits due to the dismissed employee under the collective agreement be paid as the reasons for the dismissal (which the Industrial Court upheld) were not criminal in nature. This decision was quashed in the High Court as it was held that the Industrial Court had acted in excess of jurisdiction by awarding compensation after finding the dismissal was with just cause. The court further states that '*It is an established principle that a creature of statute has such powers only as are conferred by the statute which creates it*'.

1.4.3 Unreasonable decision

In the case of *Malayan Banking Bhd v Association of Bank Officers*[6] the Supreme Court quashed an Industrial Court award where a Bank Officer was awarded compensation in lieu of reinstatement as the punishment of dismissal was held to be too harsh. He had issued 'dud' cheques, borrowed money from customers of the bank and impersonated as bank manager. The Supreme Court in quashing the award held that the decision of the Industrial Court was clearly perverse and so devoid of plausible justification that no reasonable body of persons could have reached it and that the Industrial Court had thus transcended its jurisdiction in making the award.

---

[5] *(1981) 1 MLJ 169*
[6] *(1988) 3 MLJ 204*

Thus it can be seen that the grounds upon which awards can be quashed covers an extremely fertile area. Application for writs of certiorari to quash these awards increased many fold only after decisions on dismissals involved employees at higher levels. Due to the high salaries and consequent orders for thousands of dollars as compensation[7] employers as well as the workmen involved in these cases were more than prepared to try and reverse decisions adverse to them through the High Court and the Supreme Court/Federal Court. It was not rare for one party to try this by simultaneously using section 33A Industrial Relations Act as well as an application for a writ of certiorari.

The result of such increased litigation has been a wealth of decisions of the High Court and the Supreme Court and now known as Federal Court contributing tremendously to the development of the law on dismissals.

1.5 The Industrial Court

The Industrial Court was established pursuant to Part VII of the Industrial Relations Act, 1967 and Section 30(5) of the Industrial Relations Act, 1967 states that;

> "The court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form".

The Industrial Court often referred to in good honor as a court of equity has once too often found its decision branded as having stretched too far in the case of *Hotel Jaya Puri v National Union of Hotel, Bar and Restaurant Workers Union*[8], where having

---

[7] *Assunta Hospital v Dr Dutt Industrial Court Award 178/79 - a sum of RM522,000.00 was ordered as compensation)*

[8] *Hotel Jaya Puri v National Union of Hotel, Bar and Restaurant Workers Union [1980] 1 MLJ 109*

concluded that the employees were 'terminated' the court nevertheless ordered compensation. The net result of increased challenges to the Industrial Court decision has made the Industrial Court itself more aware that equity and good conscience come in only when there is a legal basis for it.

1.6 What constitutes a dismissal?

The burden of proving that he or she has been dismissed is on the workmen. Once he does this than it is up to the employer to prove that he had substantial reasons for his action. There has been much argument in court as to whether is not eligible to the remedies available if he was terminated. In the case of *Goon Kwee Phoy v J & P Coats*[9], it was argued by the company that the Industrial Court had failed to distinguish between dismissal and termination. The Industrial Court had concluded in *Award 66/79* that;

> *"We do not see any material difference between a termination of the contract by due notice and a unilateral dismissal of a summary nature. The effect is the same and result must be the same"*

The Federal Court stated further;

> *"It is the duty of the court to determine whether the termination or the dismissal is without just cause or excuse. The duty of the court will be to enquire whether the excuse or reason (given by the employer) has or has been made out. If it finds that it has not been proved, than the inevitable conclusion must be that the termination or dismissal was without just cause or excuse."*

[9] *Goon Kwee Phoy v J & P Coats [1981] 2 MLJ 129*

The above decision in fact followed the Federal Court decision in *Dr A. Dutt v Assunta Hospital*[10] where it was held that;

> *"a termination by contractual notice and for no reason, if ungrounded on any just cause or excuse would still be a dismissal without just cause or excuse and on the workmen's representation, the Industrial Court may award reinstatement or compensation in lieu of reinstatement."*

It is not well settled in law that whatever term is used by the employer to explain the cessation of employment, the courts are entitled to be told the reasons for such action and to examine the adequacy of the reason.

[10] *Dr A. Dutt v Assunta Hospital [1981] 1 MLJ 304*

CHAPTER 2

2. Preliminary consideration under section 20, Industrial Relations Act, 1967[11].

2.1 **Section 20(1) of the Industrial Relations Act, 1967 reads as follows:**

*"Where a **workman,** irrespective of whether he is a member of a trade union of workman or otherwise, considers that he has been dismissed without just cause or excuse by his 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."*

2.2 **Section 20(1A) of the Industrial Relations Act 1967 reads as follows;**

*"The Director General shall not entertain any representations under subsection (1) unless such **representations are filed within sixty days** of the dismissal:"*

The above section 20 of the Industrial Relations Act 1967 provides that an employee, who considers himself unfairly dismissed, could seek the remedy of reinstatement by approaching the Industrial Relations Department nearest to his or her workplace. Even though the major role of the Industrial Relations Department is to focus on industrial

[11] *Industrial Relations Act, 1967*

disputes between employers and trade unions, there has been steady increase of cases involving dismissal without just cause or excuse.

2.3 The important aspects or consideration of section 20 of the Industrial Relations Act, 1967;

i) Must be a workman (Section 52 of the Industrial Relations Act provides that the conciliation and representation on dismissal are not applicable to Government servants);

ii) Must make his representation to the nearest Industrial Relations Department to his workplace within 60 days from the date of dismissal and;

iii) He must only seek the remedy of reinstatement to the position held prior to the dismissal.

2.4 The requirement of being a workman

In order for a Claimant to make representations to the Director General for reinstatement, he must first fall under the definition of a "workman". Section 2, of the Industrial Relations Act provides that *"workman" means any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purpose of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute."*

The definition under Section 2 of the Industrial Relations Act is very wide and seems to cover anyone and everyone who is employed by an employer under a contract of employment. The Judiciary is of the opinion that it is a deliberate legislative policy to keep the definition flexible.[12] It is vital for us the see some of the landmark cases to understand the current position in Malaysia with regards to the definition of "workman".

The Federal Court in determining whether a "Consultant Radiologist" was a "workman" in *Dr A. Dutt v Assunta Hospital*[13] held that;

> *"As for the determination whether Dr Dutt was or not a workman within the Act, we have, in an earlier decision Assunta Hospital v Dr A. Dutt [1981] 1 MLJ 115, said that the question is a mixed question of fact and law and it is for the Industrial Court to determine this question. The fact is the ascertainment of the relevant conduct of the parties under their contract and the inference proper to be drawn therefrom as to the terms of the contract and the question of law, once the terms have been ascertained, is the classification of the contract for services or of service :*

Hence the Federal Court in *Dr Dutt's* case confirmed two principles:

(a) That the determination of whether an individual is a workman is a mixed question of fact and law and it is for the Industrial Court to decide this and;

(b) A "workman" under the Act is one who is engaged in a contract of service and not a contract for service.

This definition is wide enough to include people of all professions including doctors, lawyers, engineers, managers, executives, secretaries etc. As long as there is a

---

[12] *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369*
[13] *[1981] 1 MLJ 304*

contract of service, they are considered workman under the Industrial Relations Act, 1967.

The Supreme Court in *Inchcape Malaysia Holdings Bhd v R.B. Gray & Anor*[14], however, changed the test in determining whether a claimant falls under the category of 'workman' under the Section 2, Industrial Relations Act 1967. In this case, the respondent was employed by the appellant as a Director. Subsequently his employment was terminated and the respondent was given six months salary in lieu of notice. In determining whether the respondent was a workman, Salleh Abas LP, observed as follows:

> *"..... Whilst a contract of employment is part of the definition, it does not follow that every person who is employed under a contract of employment or being an employee of another is a workman. To be a workman a person must be employed as a workman. If he is employed in other capacity he cannot be a workman."*[15]

Though a contract of employment existed between the appellant and respondent, the Court was unwilling to regard the respondent as a workman because he was holding the position of a director.

The Supreme Court in Inchcape thus held that since the respondent was a director, he is the very brain of the company or their directing mind and will, determine and formulating the company's policies. Thus, the Court held that, the respondent cannot fall under the definition of workman under the Industrial Relations Act, 1967. It states as follows;

---

[14] *[1985] 2 MLJ297*
[15] *[1985] 2 MLJ 300*

> *"Under the law as a director the respondent is the very brain of the companies or their directing mind determining and formulating the companies' policy. Thus, I cannot see how in the circumstances of this case, the respondent could be held to be workman. I hold that the ruling the Industrial Court on this issue is clearly erroneous."*[16]

The Federal Court in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor*[17] (involving a general manager) disapproved the decision of Inchcape and reverted to the "contract of service test" as in Dr Dutt's case as opposed to 'the directing mind and will of the company' test.

The Federal Court stressed that the Parliament would have had a reason to leave the definition of workman unchanged despite several amendments made to the Act:-

> *"In our judgment, there is a very good reason for Parliament to have provided these definitions and left them in the state in which they appear, untouched by the several amendments made to the Act since its original enactment. This, points to the conclusion that Parliament intended to keep the definition of the term "workman" flexible, with a view of being worked out on a case by case basis. It was not the intention of Parliament to assign a fixed or rigid meaning to these expressions."*

The Federal Court also said that the courts must determine whether a claimant is a workman or not by looking at the degree of control an employer exercises over an employee as though the contract of employment.

> *"In all cases where it becomes necessary to determine whether a contract is one of service or for services, the degree of control which an employer*

---

[16] *[1985] 2 MLJ 304*
[17] *[1995] 3 MLJ 369*

exercises over a claimant is an important factor, although it may not be the sole criterion. The terms of the contract between the parties must, therefore, first be ascertained. Where this is in writing, the task is to interpret its terms in order to determine the nature of the latter's duties and functions. Where it is not then its terms must be established and construed. But in the vast majority of cases there are facts which go to show the nature, degree and extent of control. These include, but are not confined, to the conduct of the parties at all relevant times. Their determination is a question of fact. When all the features of the engagement have been identified, it becomes necessary to determine whether the contract falls into one category or the other, that is to say, whether it is a contract of service or a contract for service."[18]

The Supreme Court in *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd*[19] has finally overruled the decision in Inchcape and considered it a bad law. The principle to be applied henceforth is that found in the *Dr Dutt's* case which was approved in the case of *Hoh Kiang Ngan.*

Following the trend of judgments of recent Malaysian cases, the courts are leaning more towards social policy which seems to underlie the Industrial Relations Act, 1967 when it comes to protecting the rights of workman. We can see this trend by the courts in situations where they exercise their judicial powers to interpret the word "workman" as wide as possible to cover all categories of claimants, especially those who are bound by a contract of service. The courts tend to look deeper into the contract of employment rather than just the letter of the contract of employment that is the degree of control exercised by the employer and the manner in which the contract of employment was carried out are important factors in determining whether the claimant was engaged for a contract of service or a contract for service.

---

[18] *[1995] 3 MLJ 391 - 392*
[19] *[1997] 2 MLJ 685*

We may also look at the English courts on the social policy approach in the case of *Hall (I.O.T) v Lorrimer*[20] where the court has stated as follows;

> *"In oder to decide whether a person carries a business on his own account is is necessary to consider many different aspects of the person's work activity. This is not a mechanical exercise of running through items on a check-list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detail picture which had been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another."*

In an another English court case of *James v London Borough v Greenwich*[21] the Court states that "……. *nothing to prevent wise employers from recognizing that their long term interests may be better served by treating their entire workforce in a responsible and considerate way than by insisting on the strict letter of the law."*

[20] *[1992] 1 W.L.R. 944*
[21] *[2008] IRLR 302 (CA)*

2.5. LIMITATION PERIOD OF 60 DAYS

The other important consideration is that the representation should be made within 60 days from the date the workman considers himself dismissed without just cause or excuse. The 60 days limitation is mandatory where section 20 (1A) clearly states that:-

"The Director General shall not entertain any representations under subsection (1) unless such representations are filed within sixty (60) days of the dismissal: Provided that where a workman is dismissed with notice he may file a representation at any time during the period of such notice but not later than sixty days from the expiry thereof."

Section 54(1)(a) of the Interpretation Acts 1948 and 1967[22] provides that *'a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing, is done'.*

The reasons for setting such a strict time limit is to bring the matter, to the attention of employer at the soonest and the disputes could be brought to an end as soon as possible. This will also allow the workman to get the remedy of reinstatement into his former position as if no dismissal had taken place without much delay and without incurring too much expense. The employer will have to wait forever which could lead to uncertainty in day to day business if there is no time frame to make the representation.[23]

---

[22] *Interpretation Acts 1948 and 1967*
[23] *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat and Anor. [1981] 1 MLJ 238, 240*

The Court in the case of *V. Sinnathamboo v Minister of Labour and Manpower*[24] held that *"to conclude otherwise would result in serious consequence, in that the Industrial Court would be flooded with stale appeals, and employers would be left in a state of uncertainty as to when a dismissed workman would exercise his right under Section 20(1). Such state of affairs would certainly not help in promoting industrial peace in this country".*

Therefore, the sixty days limitation period is mandatory and the section 20(1A) strictly provides that the Director General cease to have the power to entertain any representations under section 20(1) if the said representation is not filed within sixty days of the dismissal. It doesn't make any difference even if the employer consents for the representations to be filed after the expiry of the said period.[25]

Lord Denning MR in *Dedman v British Building and Engineering Appliances Ltd*[26] stated that;

> *"The time limit is so strict that it goes to the jurisdiction of the tribunal to hear the complaint. By that I mean that, if the complaint is presented to the tribunal just one day late, the tribunal has no jurisdiction to consider it. Even if the employer is ready to waive it and says to the tribunal: 'I do not want to take advantage of this man. I will not take any point that he is a day late'; nevertheless the tribunal cannot hear the case. It has no power to extend the time….."*

Section 30(5), Industrial Relations Act, 1967 requires the Industrial Court to act in accordance with equity and good conscience, and the substantial merits of the case

---

[24] *[1981] 1 MLJ 251, 254*
[25] *Pan Global Textiles Bhd, Pulau Pinang v Ang Being Teik [2002] 1 CLJ 181 (FC)*
[26] *[1974] 1 All ER 520, 524*

without regard to technicalities and legal form. It can be argued that denying a person his right merely on the failure to submit representation within the specified time period, can lead to miscarriage of justice as the matter were decided upon a technicality and not upon its substantial merits and equities.

In Malaysia, we do not have a provision which can be used by the employee in exceptional circumstances to extend the limitation period of 60 days. However, in countries such as England and New Zealand, there are provisions in their legislation to extend the limitation period in exceptional circumstances.

The English Employment Rights Act 1996, section 112[27] provides that an unfair dismissal should be presented to the Industrial Tribunal before the end of a period of three months beginning with the effective date of termination. Cases outside the time frame may still be referred to the Tribunal, provided that the affected employee establishes to the satisfaction of the Tribunal, that it was 'not reasonably practicable' for the employee to present the grievances to the Tribunal before the end of the limitation period.

Likewise, in New Zealand, the Employment Relations Act 2000, section 114(1)[28] provides that a personal grievance for unjustifiable dismissal should be presented to the employer within 90 days beginning from the date on which the alleged action, amounting to a personal grievance occurred, or come to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

---

[27] *The English Employment Rights Act 1996*
[28] *The Employment Relations Act 2000*

Subsection 3 of section 114[29] further provides that where the employer does not consent to the personal grievance being raised after the expiration of the 90 days period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of the period. Where the Authority, after giving the employer an opportunity to be heard, is satisfied by the delay in submitting the personal grievance was occasional by exceptional circumstances, and where it considers just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks fit.

There is no strict rule as to what constitutes 'not reasonably practicable' or 'exceptional circumstances'. Each case has to be determined on its own individual facts. The circumstances considered exceptional, is explained in section 115 of the Employment Relations Act 2000, and this includes;

(a) Where the employee has been so affected or traumatized by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified;

(b) Where the employee authorized an agent to raise the grievance and the agent unreasonably failed to ensure that the grievance was raised within the required time; and

(c) Where the employer failed to comply with the requirement of giving a statement of reasons for dismissal. However, ignorance of the law or the lack of knowledge of employees' rights has been held not to constitute exceptional circumstances.

[29] *The Employment Relations Act 2000, New Zealand*

Taking the above jurisdiction as an example and to make sure that the employees are not denied their right of justice, it is important for our legislation to have a provision to extend the limitation period under exceptional circumstances. The Industrial Court can determine on case to case basis whether the said "exceptional circumstances" is valid or otherwise.

2.6 PLEA OF REINSTATEMENT

An important feature of section 20(1) of the Industrial Relations Act, 1967 is that the employee who claims that he or she has been dismissed without just cause or excuse must and can only pray for the remedy of reinstatement into his or her former position. Whether or not reinstatement will be awarded depends on the facts and circumstances of each case.

The Court has clarified what 'reinstatement' means, and has indicated how 're-employment' differs from reinstatement. In *Han Chiang High School & Anor and National Union of Teachers in Independent Schools*[30] the Court stated:

> *The law is clear on the issue of reinstatement:*
> *'Reinstatement requires the employer to treat the employee as if he had never been dismissed, thus restoring all pension, pay, holiday, and seniority rights, and arrears of pay must be made to the employee' (Employment Protection) Jowitt's Dictionary of English Law (2nd cumulative supplement to the 2nd Ed p 140).*

[30] *Industrial Court Award 330 of 1990*

Furthermore:

'The effect of an award of reinstatement is merely to set at naught the order of wrongful dismissal of a workman by the employer and to reinstate him in the service of the employer and to restore him to his former position and status as if the contract of employment originally entered into has been continuing.' Malhotra Law of Industrial Disputes (Vol 2, 4th Ed) p 934.

The representation under section 20(1) of the Industrial Relations Act, 1967 for dismissal without just cause or excuse is only in respect of reinstatement. If the Claimant dies during the period of representation, the claim for reinstatement will die with him as the Industrial Court cannot reinstate a dead workman and the Court cannot recognize different person other than the Claimant. The maxim *actio personalis moritur cum persona* – the action abates with the death of the claimant applies in this matter. As such the Court will not be able to accept any other person as substitute for the representation under section 20 of the Industrial Relations Act, 1967.

The Federal Court in the case of *Thein Thang Sang v United States Army Medical Research Unit* [31] held that *"..... if the legal representative or administrator of the estate of the deceased workman were allowed to appear at the Industrial Court in proceedings under Section 20(3) of the Act, express provision would be provided for it in the Act. But none was so provided either in the Act or in the Industrial Court Rules 1967.....'.* As such, the Court could not accept any substitution or representation of a deceased party by any other person.

---

[31] *[1983] 2 MLJ 49*

In the case of *Holiday Inn, Kuching v Lee Chai Siok Elizabeth*[32], the Claimant, changed her plea and opted for compensation in lieu of reinstatement. The High Court stated that the Court ceases to have jurisdiction once reinstatement is no longer sought as the remedy of any aggrieved workman under the Industrial Relations Act is reinstatement.

Due to long delay in Industrial Court cases, it is not practical for the Claimant to wait forever for his case to finish before he can find a new job. Thus it is not fair to expect the Claimant to return to his former employment. It is only on the paper that the Claimant wanted a reinstatement but in reality he or she will only pray and hope for good compensation in lieu of reinstatement and backpay which comes with it.

The Industrial Court in the case of *Sibu Steel (Sarawak) Sdn Bhd v Ahmad Termizie Bujang*[33] stated that :

> *'.....[is] the Court to permit itself to be vested with or divested of jurisdiction depending upon the 'yes' or 'no' response of a claimant to the crafty questioning of Counsel representing the employer? If so, the consequence will be that, notwithstanding the like circumstances of two workmen, an upright workman will be denied the right to have his case heard by the Court while another workman who is deceitful can continue to pursue his claim. Is the Court to permit itself to be a forum for perpetuating an inequity of this nature? It seems obvious that such a proposition need only be stated to be rejected forthwith'.*

[32] *Ibid., 236*
[33] *[1996] 2 ILR 885*

It is important for the Industrial Relations Act, 1967 to rectify the above situation and allow the claimant to pray for compensation in lieu of reinstatement in the Industrial Court as it is not practical for the claimant to pray for reinstatement where majority of the claimants have been gainfully employed by the time the cases are being heard in the Industrial Court. Many of them will take leave from their current employment to attend Industrial Court cases and it is mockery of the system to pray for reinstatement while he or she is gainfully employed elsewhere.

CHAPTER 3

3.0 Procedures for conciliation proceedings

Section 20(1) of the Industrial Relations Act, 1967 reads as follows:

"Where a workman, irrespective of whether he is a member of a trade union of workman or otherwise, **considers** that he has been dismissed without just cause or excuse by his 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."

The following is how the Industrial Relations Department under the Ministry of Human Resources described the Procedures for the claim of reinstatement;[34]

Under Section 20 of the Industrial Relations Act, 1967, a workman who considers his dismissal as without just cause or excuse may file a claim for reinstatement within 60 days of his dismissal. Upon receiving the representation by the workman, the department will invite both the employer and workman for a conciliation meeting. Where the claimant fails to attend any of the conferences without any reasonable excuses, the representation is deemed withdrawn. The Conciliation Officer's role will be to explain the practices and principles of law that are applicable including judgment of the courts, both the Industrial Court and civil courts, so that the parties are aware of their rights and liabilities. With this explanation it is expected that they would be able to resolve their differences and come to an amicable settlement. If the conciliation efforts fail, the case

[34] *www.jpp.mohr.gov.my*

will then be referred to the Honourable Minister of Human Resources who will exercise his discretionary powers to refer the matter to the Industrial Court or otherwise. When a reference is made to Industrial Court, the court will adjudicate the matter."

In practice, the workmen must make representation in writing to the Director General of the Industrial Relations Department nearest to his place of employment. The representation must include details such as employee's and employer's name and address, his last position in the company, appointment date as well as date of dismissal and reasons for dismissal (if any). He is also required to attach all relevant documents.

3.1 **The sample letter, as follows have to be prepared and submitted to the Industrial Relations Department nearest to the workplace of the Claimant.**

Nama dan alamat penuh pekerja
.....
.....

Tarikh:

Ketua Pengarah/Pengarah
Jabatan Perhubungan Perusahaan Malaysia
(Alamat Jabatan terdekat)

Tuan,
Representasi Di Bawah Seksyen 20(1)
Akta Perhubungan Perusahaan 1967

Saya dengan hormatnya melaporkan kepada Tuan bahawa saya telah diberhentikan kerja oleh majikan saya. Bersama-sama ini saya lampirkan salinan surat pemberhentian kerja saya untuk rujukan Tuan. Pada hemat saya, tindakan majikan saya memberhentikan perkhidmatan saya adalah tidak adil dan munasabah.

Butiran peribadi saya selanjutnya adalah seperti berikut;

i) No K/P: ..... *Jantina* .....

ii) Alamat rumah .....
No Tel ..... *H/P:* .....

iii) Nama Majikan .....

iv) Alamat Majikan .....

Alamat Tempat Kerja
.....

v) No Tel ..... No Faks .....
vi) Jawatan Terakhir .....

vii) Gaji Terakhir .....

viii) Tarikh mula bekerja .....

ix) Tarikh dibuang kerja .....

x) Nama Kesatuan (Jika ada) .....

xi) Alamat Kesatuan: _____

Sukacita dapat kiranya tuan membantu saya agar dipulihkan semula ke jawatan asal saya.

Sekian, terima kasih.

Yang benar,

Nama:

(Source[35])

[35] *www.jpp.mohr.gov.my*

In the case of *Kathiravelu Ganesan v Anor v Kojasa Holdings Bhd*[36], the Court of Appeal aptly described the stages a claimant will have to go through before his allegation of unfair dismissal may be adjudicated in the Industrial Court;

> *"First, there is the conciliatory level. Here, all that the Director General of Industrial Relations is concerned with is whether the parties are able to settle their differences. All that is required to activate the conciliatory jurisdiction is a complaint under Section 20(1) of the Act. Consequently, there is no question of there being any wider jurisdiction at this stage.*
>
> *Second, the reporting level. Once the Director General of Industrial Relations finds the dispute irreconcilable, he merely makes his report to the Minister. If it is found that he has exceeded his powers, his action is liable to be quashed in a certiorari proceedings*[37]*. Again, there is no wider jurisdiction.*
>
> *Third, the referral level. When the Minister receives notification from the Director General that the dispute cannot be settled, he must decide whether to refer it to the Industrial Court. He is not to refer all disputes to the Industrial Court. The question he must ask himself is whether, having regard to the facts and circumstances of the given case, the representations made by the workman is frivolous or vexatious…..*
>
> *Fourth and last, the adjudicatory level. It is important to observe that, save in very exceptional cases which are not relevant to the present discussion, the Industrial Court, unlike the ordinary Courts, is not available for direct approach by an aggrieved party. Access to it may only be had through the three levels earlier adverted to."*

---

[36] *[1997] 3 CLJ 777*

[37] *Minister of Labour and Manpower & Anor. V Wix Corp South East Asia Sdn Bhd [1997] 1 CLJ 665; Hong Leong Equipment Sdn Bhd v Liew Fook Chuan [1996] 1 MLJ 481,521*

As seen from the above observation, the representation for dismissal without just cause or excuse must be filed with the Industrial Relations Department (IRD) for conciliation before the same can be referred to the Industrial Court.

At the conciliation proceedings, only the parties and their authorized agents are allowed. An advocate, adviser, or consultant cannot represent the parties to the dispute. At the conciliation meeting, the conciliation officer acts as a facilitator where he will persuade and induce the parties to come to an amicable settlement of the matter in dispute. His task is essentially to convince the parties to resolve their differences, to find points of common interest and defuse tension. He will allow the parties to express their views, will examine the statement of the case made by the parties, and deliver an opinion as to the best or most likely outcome of the dispute. He will also explain to the parties the applicable practices and principles of law, with a view that the parties are aware of their rights and liabilities. With that advice, it is probable that the parties would be able to resolve their differences and come to an amicable settlement.

The parties however, retain the right whether they do or do not accept the suggested settlement by the conciliation officer. The conciliation officer will continue to offer advice and suggestions throughout the process. He is not supposed to take sides of either party to the dispute and remain impartial and neutral at all times; neither will he make a decision on the merit of the case or recommend any possible acceptable solution to the dispute. It is entirely up to the parties concerned to reach a final agreement on any proposed settlement.

Where the parties have amicably arrived at a settlement, a memorandum setting out the terms of the settlement is drawn up and signed by both the parties, or by their

representatives. The legal effect of the agreed settlement is that it shall bind the parties, and any decision recorded in the memorandum of settlement becomes part of the contract of employment. Henceforth, the parties to the settlement would be barred from denying the agreed terms by a writ of certiorari.

If, however, the conciliator were unable to arrive at an amicable settlement, he would then submit a report of the dispute to the Minister, who will then decide whether the case merits reference to the Industrial Court. The Court will only hear disputes referred to it by the Minister. There is no legal requirement that merely because representations are made to the Director General, they must automatically be referred to the Industrial Court.

3.2 The function and power of Director General, Industrial Relations Department

In elaborating about the functions of the Director General of Industrial Relations Department during the conciliation proceedings, the Federal Court in the case of *Minister of Labour and Manpower & Anor v Wix Corp South East Asia Sdn Bhd*[38] *stated as follows;*

> *'Section 20(2) of the Act plainly does not impose any duty on the Director General or his representative to decide or determine questions of any kind and to ascertain the law and facts. He is merely required to deal with the situation in the way he thinks best to get the employer and employee to settle the dispute. If he is satisfied that there is no likelihood of settlement..... he is to notify the Minister. Any meeting convened is merely intended to be for the purpose of bargaining between the employer and the employee so that one can see the other's viewpoint and*

[38] *[1980] 2 MLJ 248, 250*

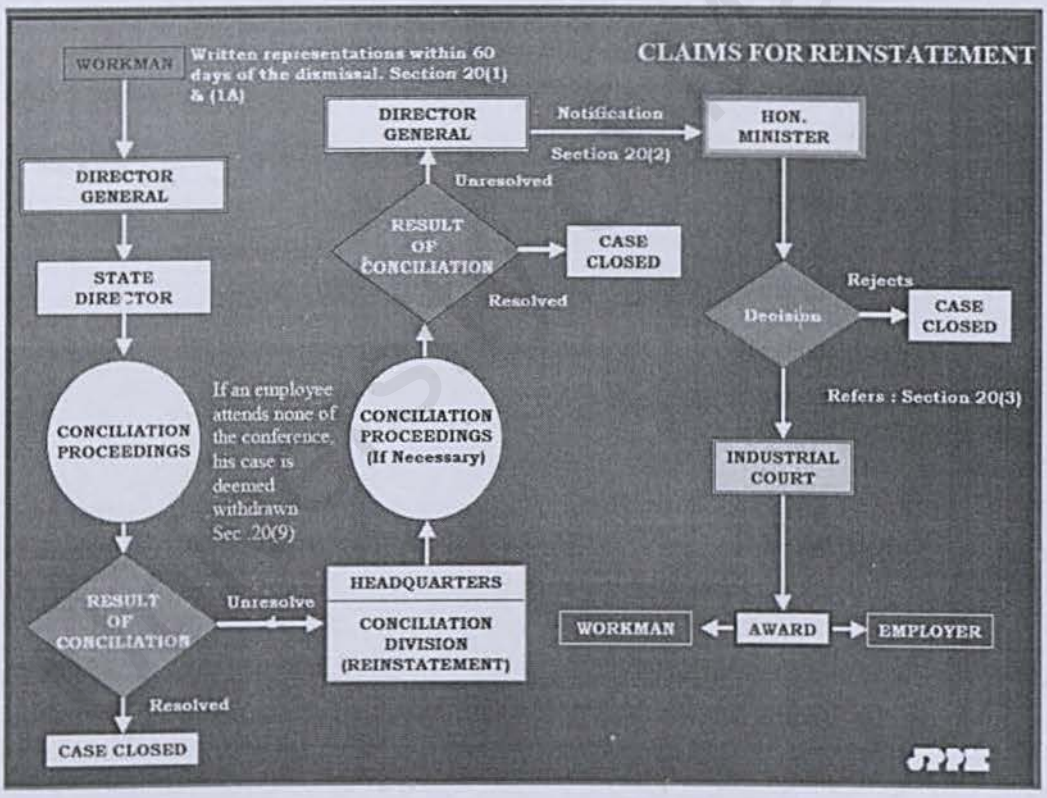
settle the dispute themselves. It is not a forum for discussing rights and the law. The Director General or his representatives sits in the meeting not as an adjudicator but as a mediator or, to use the word envisaged by the provisions relevant in the Act, conciliator. In such position, he is not prevented from expressing his views on any matter which arises for the benefit of either party, having regard to his experience in similar situations and industrial relations in general. Whether or not a settlement is reached is a situation brought about by the parties and not by his assessment of facts. The result is not his decision or determination of questions of any kind. The very fact that the Director General is not required to notify the Minister when there is a settlement but only when there is no settlement, indicates that the result is determined by the parties and not by him. In notifying the Minister, section 20(2) of the Act does not appear to require him to do so in the form of a report on the circumstances leading to there being no settlement. He is merely to notify the Minister that there has been no likelihood of settlement. Further, in convening a meeting he has no power to compel the attendance of any party..... if one party does not attend, he may take it that the party desires no settlement.... The Director General or his representative under section 20(2) of the Act cannot be said to exercise any powers that are analytically judicial. He is merely required to make a notification of an existing fact. No doubt he has in effect to consult both parties before notifying the Minister that there has been no settlement. If he makes his notification without consulting one party, in our view, the effect is that the notification is bad, not because he did not act judicially but because he acted in bad faith by ignoring the requirements of law'.

Over the years the majority cases referred to Industrial Relations Department for conciliation and to the Industrial Court are cases involving dismissal without just cause or excuse. This can be attributed to the privatization introduced by the Government in 1990's as well as increasing awareness of their rights among the employees. The large number of employees who was government servants before became private employees and could use the provisions under Section 20, Industrial Relations Act, 1967 whenever

they have grievances. This directly or indirectly contributes towards the increase in number of complaints at the Industrial Relations Department.

Further, the economic recession in late 1980's have resulted in large number of employees being laid down and retrenched by large and medium size companies. This has domino effects in many small and medium size enterprises which give rise to increase of number of complaints and activities at the Industrial Relations Department.

3.3 Flow chart for the claim of reinstatement process;



(Source [39])

[39] *www.jpp.mohr.gov.my*

The above flow chart clearly shows that workmen must go through conciliation proceedings first at the state level and then at the headquarters level where senior officers will try to settle the matter before the matter can be referred to the Minister who then makes the final decision whether to refer or not to refer the matter to Industrial Court for adjudication.

CHAPTER 4

Interpretation of data & statistics from industrial relations department

4.1 Claims for Reinstatement by Sector 2003-2007[40]

RAYUAN PEMULIHAN KERJA MENGIKUT SEKTOR 2003-2007
CLAIMS FOR REINSTATEMENT BY SECTOR 2003-2007

SEKTOR *SECTOR*	BILANGAN KES *NUMBER OF CASES*				
	2003	2004	2005	2006	2007
Pertanian, Pemburuan dan Perhutanan *Agriculture, Hunting and Forestry*	182	203	318	126	124
Perikanan *Fishing*	1	8	2	7	4
Perlombongan dan Pengkuarian *Mining and Quarrying*	90	65	65	46	62
Pembuatan *Manufacturing*	2,002	2,117	1,991	2,153	1,528
Bekalan Elektrik, Gas dan Air *Electricity, Gas and Water Supply*	41	44	102	67	65
Pembinaan *Contruction*	437	417	392	263	201
Perdagangan Jual Borong dan Jual Runcit, Pembaikan Kenderaan Bermotor, Motosikal dan Barangan Persendirian dan Isi Rumah *Wholesale and Retail Trade, Repair of Motor Vehicles, Motocycles and Personal and Household Goods*	773	610	741	617	602
Hotel dan Restoran *Hotel and Restaurants*	367	264	323	874	242
Pengangkutan, Penyimpanan dan Komunikasi *Transport, Storage and Communications*	613	550	529	636	495

RAYUAN PEMULIHAN KERJA MENGIKUT SEKTOR 2003-2007 (sambungan)
CLAIMS FOR REINSTATEMENT BY SECTOR 2003-2007 (continued)

SEKTOR *SECTOR*	BILANGAN KES *NUMBER OF CASES*				
	2003	2004	2005	2006	2007
Pengantaraan Kewangan *Financial Intermediation*	202	165	159	134	161
Aktiviti Hartanah, Penyewaan dan Perniagaan *Real Estate, Renting and Business Activities*	576	528	748	711	758
Pentadbiran Awam dan Pertahanan dan Keselamatan Sosial Wajib *Public Administration and Defence and Compulsory Social Security*	28	24	23	54	0
Pendidikan *Education*	123	127	138	107	95
Kesihatan dan Kerja Sosial *Health and Social Work*	66	60	89	66	89
Aktiviti Perkhidmatan Komuniti, Sosial dan Persendirian Lain *Other Community, Social and Personal Service Activities*	164	198	247	347	418
Isi Rumah Persendirian dengan Pekerja Bergaji *Private Households With Employed Persons*	1	2	5	1	0
Organisasi dan Badan-Badan di Luar Wilayah *Extra-territorial Organisations and Bodies*	0	8	3	2	2
Jumlah *Total*	5,666	5,390	5,875	6,211	4,846

[40] *www.jpp,mohr.gov.my*

As per the above Table, the claim for reinstatement by sector shows that, the manufacturing sector is where the majority of the cases are coming from. This is where majority of Malaysians are employed and working conditions as well as salaries are always an issue. The total number of claims for reinstatement has always been in the same range for the last almost 10 years.

4.2 Claims for reinstatement by nature of dismissal 2003 - 2007[41]

RAYUAN PEMULIHAN KERJA MENGIKUT JENIS PEMBUANGAN 2003-2007
CLAIMS FOR REINSTATEMENT BY NATURE OF DISMISSAL 2003-2007

JENIS PEMBUANGAN *NATURE OF DISMISSAL*	BILANGAN KES *NUMBER OF CASES*				
	2003	2004	2005	2006	2007
Salahlaku *Misconduct*	1,691	1,468	2,212	1,707	1,535
Pembuangan Terancang *Constructive Dismissal*	441	318	318	827	291
Pelanggaran Seksyen 15(2) Akta Kerja 1955* *Breach of Section 15(2) Employment Act 1955**	85	187	48	343	50
Pengenepian *Retrenchment*	1,190	898	845	1,280	918
Tidak Disahkan Ke Dalam Jawatan *Probationer*	381	199	206	146	180
Kontrak Bertempoh Tetap *Fixed Term Contract*	51	37	38	7	72
Pembuangan Berpunca dari Penindasan/Penganiayaan *Victimisation*	264	45	43	30	55
Pembuangan Kerja *Termination Simpliciter*	795	994	1,359	1,124	1,064

*Nota : Seksyen 15(2) Akta Kerja 1955 - Tidak hadir bekerja lebih daripada dua hari kerja berturut-turut tanpa kebenaran daripada majikan dan tanpa alasan yang munasabah.

(Source : Webpage of the Jabatan Perhubungan Perusahaan, Malaysia)

[41] *www.jpp.mohr.gov.my*

RAYUAN PEMULIHAN KERJA MENGIKUT JENIS PEMBUANGAN 2003-2007 (sambungan)
CLAIMS FOR REINSTATEMENT BY NATURE OF DISMISSAL 2003-2007 (continued)

JENIS PEMBUANGAN *NATURE OF DISMISSAL*	BILANGAN KES *NUMBER OF CASES*				
	2003	2004	2005	2006	2007
Dipaksa Letak Jawatan *Forced Resignation*	311	511	209	112	190
Letak Jawatan Secara Sukarela *Voluntary Resignation*	14	27	10	31	55
Kontrak Yang Mengecewakan *Frustration of Contract*	5	2	12	16	35
Sebab-sebab Kesihatan *Medical Grounds*	9	13	4	15	29
Persaraan *Retirement*	15	13	7	7	22
Lain-lain *Others*	414	678	563	566	350
Jumlah *Total*	5,666	5,390	5,874	6,211	4,846

(Source : Webpage of the Jabatan Perhubungan Perusahaan, Malaysia)

As per the above table, the majority of claims for reinstatement, mostly involve the matters pertaining to misconduct, constructive dismissal, retrenchment, probationer, victimization, termination simpliciter and forced resignation. All these matters involve points of laws and the question we have to ask ourselves are how prepared the conciliation officers at the Industrial Relations Department are in dealing with matters of such nature. Are they being properly trained, guided and have sufficient exposure in dealing with such matters? As the officers are subjected to inter departmental transfers, many of them who are new to the Industrial Relations Department will have to be properly trained before they can be allowed to be an officer at conciliation proceedings.

4.3 Claims for reinstatement by method of settlement 2003-2007[42]

RAYUAN PEMULIHAN KERJA MENGIKUT CARA PENYELESAIAN 2003-2007
CLAIMS FOR REINSTATEMENT BY METHOD OF SETTLEMENT 2003-2007

CARA PENYELESAIAN *METHOD OF SETTLEMENT*	2003	2004	2005	2006	2007
(A) SELESAI MELALUI RUNDING DAMAI *(A) RESOLVED THROUGH CONCILIATION*					
1. Pemulihan Kerja Semula *Reinstatement*	245	243	439	1,178	215
2. Dibayar Pampasan *Payment of Compensation*	1,529	1,251	1,337	1,213	1,065
Amaun Pampasan *Compensation Amount*	RM11,083,040.30	RM13,763,935.20	RM4,332,254.82	RM2,041,722.02	RM10,533,190.71
3. Rayuan Ditarik Balik *Claims Withdrawn*	842	669	809	598	484
4. Kes Ditutup (Perayu tidak hadir) *Cases Closed (Claimants absent)*	107	88	128	83	123
5. Kes Ditutup (Dipindahkan ke pejabat lain) *Cases Closed (Transfer to other office)*	15	30	38	100	81
6. Kes Ditutup (lain-lain) *Cases Closed (others)*	-	-	-	-	3
(B) LAIN-LAIN *(B) OTHERS*					
1. Dirujuk ke Mahkamah Perusahaan *Referred to Industrial Court*	1,677	4,605	3,108	2,954	1,842
2. Tidak Dirujuk ke Mahkamah Perusahaan *Not Referred to Industrial Court*	408	2,235	779	1,691	886
Jumlah *Total*	4,823	9,121	6,638	7,817	4,699

PENGENDALIAN KES RAYUAN PEMULIHAN KERJA 2003-2007
CLAIMS FOR REINSTATEMENT DEALT 2003-2007

PERKARA *PARTICULARS*			2003	2004	2005	2006	2007
Dibawa Dari Tahun Lepas *Brought Forward From Previous Year*		Bil. *No.*	8,797	9,640	5,909	5,145	3,539
Dilaporkan *Reported*		Bil. *No.*	5,666	5,390	5,874	6,211	4,846
Dikendalikan *Dealt*		Bil. *No.*	14,463	15,030	11,783	11,356	8,385
Diselesaikan *Cases Resolved*		Bil. *No.*	4,823	9,121	6,638	7,817	4,699
		Peratus *Percentage*	33.35	60.69	56.34	68.84	56.04
Baki *Balance*		Bil. *No.*	9,640	5,909	5,145	3,539	3,686
CARA PENYELESAIAN *METHOD OF SETTLEMENT*							
i. Diselesaikan Melalui Runding Damai *Resolved Through Conciliation*		Bil. *No.*	2,738	2,281	2,751	3,172	1,971
ii. Diselesaikan Melalui Laporan Yang Dikemukakan ke Y.B.Menteri Sumber Manusia *Resolved Through Report to Honourable Minister of Human Resources*	Dirujuk ke Mahkamah Perusahaan *Referred to Industrial Court*	Bil. *No.*	1,677	4,605	3,108	2,954	1,842
	Tidak Dirujuk ke Mahkamah Perusahaan *Not Referred to Industrial Court*	Bil. *No.*	408	2,235	779	1,691	886
Jumlah *Total*		Bil. *No.*	4,823	9,121	6,638	7,817	4,699

(Source : Webpage of the Jabatan Perhubungan Perusahaan, Malaysia)

[42] *www.jpp.mohr.gov.my*

The above table shows that the representations to the Industrial Relations Department have been settled through conciliation in the following manner; In the year 2003, 57% of the cases have been resolved through conciliation proceedings, whereas in the year 2004, 25% is settled, in the year 2005, 41% is settled, in the year 2006, 40% is settled and finally in the year 2007, 42% cases have been resolved. This is the pattern of the performance of Conciliation Officers at the Industrial Relations Department since 1998.

4.4 Claims for reinstatement by state 2003-2007[43]

RAYUAN PEMULIHAN KERJA MENGIKUT PEJABAT 2003-2007
CLAIMS FOR REINSTATEMENT BY OFFICE 2003-2007

PEJABAT *OFFICE*	BILANGAN KES *NUMBER OF CASE*				
	2003	2004	2005	2006	2007
Ibu Pejabat	0	993	265	2	0
Johor	307	472	415	481	291
Perak	280	275	433	229	279
Pulau Pinang	725	555	402	935	639
Negeri Sembilan	266	169	267	183	206
Kedah/Perlis	286	403	216	246	155
Kelantan	28	24	55	89	18
Terengganu	26	54	101	384	36
Pahang	88	82	73	210	123
Melaka	81	97	117	162	73
Kluang	62	70	56	52	43
Muar	50	44	63	26	41
Sabah	113	107	333	174	127
Sarawak	565	717	488	271	275
Wilayah Persekutuan/Selangor*	2,789	1,328	8	-	-
Wilayah Persekutuan*	-	-	1,043	975	909
Selangor*	-	-	1,539	1,792	1,631
Jumlah *Total*	5,666	5,390	5,874	6,211	4,846

(Source : Webpage of the Jabatan Perhubungan Perusahaan, Malaysia)

The above table shows that the majority of cases are from Wilayah Persekutuan & Selangor states as this is where the majority of learned workforce are employed and they are very much aware of their rights as an employee.

---

[43] *www.jpp.mohr.gov.my*

CHAPTER 5

5. CONCILIATION PROCEEDINGS

5.1 What is conciliation?

Conciliation is an expression of one the highest virtues which can be practiced – the desire to understand and be just to one another. Each time that one attempts to resolve a conflict without force, one renders to men an enormous service in leading them in the path of wisdom and of respect for themselves and for each other.[44]

Conciliation has three main features:

(a) it is a peace making process;

(b) there is a neutral third party involved (an individual or a board);

(c) the aim is to assist the parties in reducing the extent of their differences and to find an agreed and amicable solution.

Access to conciliation may be sought when the parties themselves are not able to resolve their differences or when bargaining fails. Conciliation can thus be defined as 'an extension to the bargaining process in which parties try to reconcile their differences. A third party, acting as an intermediary – independent of the two parties – seeks to bring the disputants to a point where they can reach agreement. The conciliator has no power of enforcement, and does not actively take part in the settlement process but acts as a broker, bringing people together.'

---

[44] *Meeting of minds: A way to peace through mediation (New York, McGraw-Hill, 1952)*

This definition distinguishes conciliation from mediation, in which the third party is more actively involved and attempts to suggest proposals and methods for actual resolution of the problem. It also distinguishes conciliation from arbitration in which the independent third party considers the arguments of both sides and then takes a decision binding on the parties in the dispute.

A further distinction can be made between voluntary and compulsory conciliation.

Compulsory conciliation does not mean that the whole process needs to result in an agreement. What it does mean is that some of the features of the process will be compulsory, such as the obligation of the disputing parties to attend a conciliation meeting when invited, or the prohibition of the parties to organize a strike or lock out without first attempting conciliation. The reasoning behind a compulsory conciliation is to try to bring the parties towards a cooperative rather than a conflictual attitude.

Where conciliation takes place on an entirely voluntary basis, the parties are left entirely free to accept or not accept an invitation to a conciliation meeting. The reasoning here is that there is no use trying to bring about conciliation if the parties are not really interested in it.

5.2 What qualities does a conciliator need?[45]

The conciliator has a very important role to play in promoting and maintaining industrial peace. To be an effective conciliator, a person will need both professional and personal qualities. On a professional level, there is no need for any formal qualifications as, for

[45] *Grievance and dispute settlement: an introduction, by ILO/EASMAT-Bangkok*

example, being a lawyer. The conciliator will need to have a good knowledge of the way the economy is structured, the features and institutions of the industrial relations system, the applicable laws and regulations, the organization and power of the parties, knowledge of particular industries and their weak points and some finance-related issues as well as knowledge of the negotiation process. It is of course impossible for a conciliator to know everything. Therefore a thorough preparation in relation to each specific dispute and knowledge of the facts of a particular case will be necessary. The conciliator also needs to have the ability to form judgements – not on the outcome of the dispute (that is not the task of a conciliator), but rather on question like how to proceed in a certain case or how to convey certain messages.

In terms of personal attributes, the conciliator will in the first place need to be committed to his/her job, and more specifically to the parties. Conciliation is not a 9 to 5 job and therefore the conciliator himself should be convinced of the values and importance of the job. Each conflict is unique and a challenge for the inventiveness of the conciliator. A conciliator needs to be independent and impartial and to appear and behave as such during the whole conciliation process. He or she needs to be patient, sincere, a good communicator and listener, and will need a sense for timing. He or she will also need physical and emotional stamina and the ability of self analysis. Finally it will certainly help to release some of the tension between parties if the conciliator has a good sense of humour.

5.3 What preparations are needed for conciliation?[46]

To enhance the chance of conciliation, both general and specific preparations will be needed. General preparation mean, that a conciliator must be ready at any time to intervene in a dispute. This implies that he or she must have documentation and information available, or at least must know where to find it. When conciliation is provided through an administrative unit, this general preparation is a shared responsibility of the conciliators in the unit. The information that should be available is mainly background information on the parties in general as well as on the relationship between the parties, on existing collective agreements or awards in a particular sector or industry, on regulations as well as on current trends and developments in the economy as a whole or in a particular industry.

Apart from this general readiness, the conciliator will need to prepare for the specific dispute for which his or her services are needed. The conciliator should be ready to handle any issue that may arise during the whole process. Therefore he or she will need to collect as much information as possible on the conflict itself, on its features, on the possible underlying causes of the conflict, on the facts and on the parties involved. It is important to remember that, even if through the collection of all this information the conciliator is likely to form a certain idea on the dispute, he or she should never prejudge the situation.

Before commencing the actual conciliation meeting, the conciliator assigned to handle a particular dispute will make preliminary contact with the parties. By doing so he will inform them of his or her entry into the case and – if necessary – explain them his or her

[46] *Grievance and dispute settlement: an introduction, by ILO/EASMAT-Bangkok*

role, try to acquire as much information as possible about the conflict, the parties involved and the attitudes of the parties towards the conflict, as well as establish positive and cooperative working relations. During this preliminary contact, the conciliator should be cautious to appear impartial.

5.4 Conduct of Conciliation Meeting[47]

There are two main types of conciliation meetings; joint conferences with both parties and separate meetings with only one party. The choice of the type of meeting will depend on the particular circumstances of a dispute.

One of the chief purposes of a joint conference is to set out clearly the unresolved issues that prevent the parties from reaching an agreement. Such meetings give the conciliator a good opportunity to observe the parties in their relationship with each other and to make sure that the parties clearly understand each other's point of view. The disadvantages of these meetings are that they tend to be very formal and the parties remain rigid in their ideas as well as role of adversaries. Joint conferences should be held on neutral ground e.g. the office of the conciliator.

A separate meeting may (but does not have to) take place in connection with a joint conference. On the request of the conciliator or the parties themselves, the conciliator can suspend a joint conference and meet with each of the parties separately. During this meeting he or she may obtain information which one party is not willing to give in the presence of the other party or the conciliator may offer suggestions and advice. The

[47] *Grievance and dispute settlement: an introduction, by ILO/EASMAT-Bangkok*

disadvantage of separate meetings is the possible suspicion of the absent party about what is said during this party's absence.

5..5 After the conciliation meeting[48]

Any follow up action to the conciliation process will mainly depend on whether the conciliation was successful or not. If a dispute is settled, this will be reflected in an agreement, drafted by the conciliator or by the parties, depending on national practice. When no conciliation can be reached – which will in most cases become clear when one of the parties breaks off the negotiations, the conciliator should write a conciliation report. This report will be important in case negotiations are re-opened. It will also be a good source of information for further settlement of the dispute through arbitration or adjudication. It is important to note that even if no agreement is reached, the conciliator should make it clear that the door for conciliation remains open.

[48] *Grievance and dispute settlement: an introduction, by ILO/EASMAT-Bangkok*

CHAPTER 6

6. Shortcomings of conciliation proceedings at Industrial Relations Department

6.1 Conciliation proceedings at Industrial Relations Department

In a workshop held by The Bar Council Industrial Court Practice Committee titled 'Industrial Adjudication Reforms', it conclude that the settlement through conciliation is not very successful.[49] Similar findings were done by the Malaysian Trade Union Congress (MTUC) where the Secretary General said that 'the conciliation machinery which forms an essential and integral part of the Malaysian Industrial Relations system is in need of urgent and serious attention'.[50]

The above findings show that while conciliation is still resorted to, it is not effective and satisfactory. It can be attributed to various reasons but the main reasons are that the officers at the Industrial Relations Department are subjected to inter departmental transfers and they are being transferred out soon after they have the grasp of the subject matter pertaining to trade disputes which need skill and practical training to master it. The increase on the workload in the Industrial Relations Department have put a tremendous pressure among the officers in the Industrial Relations Department and this has resulted in various finger pointing among the employers, employees as well as trade unions. The Malaysian Trade Union Congress had submitted various memorandum to the Government complaining against long delays in the disposal of cases in the Industrial Relations Department as well as Industrial Courts. There have been cases where it took more than 9 years for a case to come to an end.

---

[49] *www.malaysianbar.org.my*
[50] *www.mtuc.org.my*

Further to this, various measures have been taken by the Human Resources Ministry such as engaging judges of the High Court to preside over the Industrial Court and introducing mediation process by the presidents in the Industrial Court. This has resulted in increasing pressure among the Industrial Relations Department officers where they are expected to find solutions to the cases referred to the Industrial Relations Department.

In order to improve the process at the Industrial Relations Department, we have to analyse the effectiveness of current procedures and what can be done to further improve the conciliation proceedings at the Industrial Relations Department to reduce and alleviate the sufferings and problems faced by the employees who chose the option of referring their unfair dismissal cases to the Industrial Relations Department. There is no doubt that major reform is needed in order to make conciliation proceedings at the Industrial Relations Department more effective and efficient.

Apart from above, there is no specific period the Industrial Relations Department should conciliate between the parties although 30 days was ascribed to the Director General to reach a decision prior to 1980. In the case of *Kumpulan Guthrie Sdn Bhd v The Minister of Labour and Manpower & 2 ors.*, [51], the judge stated that;

> *"Section 20(2) of the Act was amended by Act A484/80, and came into force on 30.5.80. The effect of the amendment was the removal from that section the period of thirty days from the date of representation made under section 20(1) of the Act within which the representation should be settled. If the Director General was satisfied that the representation was unlikely to be settled within the period of 30 days, or if the representation remained unsettled at the end of the period of 30 days, the Director*

[51] *[1986] 1 CLJ 566, 571 (HC)*

General should notify the Minister accordingly. My view is that the removal of this period of 30 days is to give the parties more time to negotiate with each other, and the Director General is not bound by any period of time for the purpose of notifying the Minister. I am further of the view that notwithstanding the words ' expeditious settlement thereof' appearing in Section 20(2) of the Act, the Director General should give to the parties as much time as is reasonable so long as the Director General is satisfied that there exists a likelihood of an amicable settlement being reached by the parties. The period of negotiations between the parties, therefore, is not dictated by the Director General, but by the parties themselves. Where the parties require more time to negotiate, or where, as in the instant case, the parties had agreed to wait the result of the 3rd respondent's criminal case before resuming further negotiations, my view is that the Director General acted reasonably in granting the time requested for by the parties as long as he is satisfied that there was likelihood that the parties would reach a settlement on the dispute.'

The Client's Charter of the Industrial Relations Department[52], provides that the Department (a) will respond to each representation , complaint or trade disputes within 14 days of receipt; (b) conduct conciliation services in a fair and just manner; (c) attend to each representation or complaint received from either employer, employee or trade union.

It is noteworthy that many employers do ignore the settlement arrived at the conciliation proceedings and in this case the employees remain helpless although they can enforce in through legal means. Enforcing it through legal means will cost the employee both in terms of time and monetary damages and many employees are helpless in this case.

[52] *http://jpp.mohr.gov.my/index.php?option=com_content&task=view&id=24&Itemid=129*

6.2 Suggestions on how to improve the conciliation proceedings[53]

It is agreed that conciliation does not guarantee a settlement. However it is an essential feature of our industrial relations systems. It can assist the parties to re establish trust and respect and also it can help to prevent damage to an ongoing relationship. Based on the above, the conciliation officers must have the right skill and experience to effectively handle trade disputes. It is to be noted that there is no consistent and Standard Operating Procedure & System in place. There is certainly a need to have one in place.

There is no defined time frame for the completion of conciliation proceedings. A defined time frame is required. For example a time frame of within 3 months from the date the claimant lodged the complaint of wrongful dismissal. A period of 3 months from the date of the complaint lodged for this conciliation process is practical and realistic to be implemented and enforced. A further period of 3 months is recommended for the Minister to decide to refer the cases to the Industrial Court or otherwise. As for the Industrial Court, the time frame should be 18 months from the date of reference by the Minister for the hearing to be completed and the Award issued. This time frame will give some real meaning to the term "expeditious" in the Industrial Relations Act.

The questionable level of competencies amongst the Industrial Relations Officers is also frequently mentioned. In earlier days, the practice was that Industrial Relations Officers were seasoned and well experienced Labour Officers. This can be re-visited and re-implemented.

---

[53] *Seminar: Dismissal: Development of Industrial Jurisprudence, Review, and the way ahead*

A structured training program for Industrial relations officers incorporating a "Mentor Program" is recommended. This program should also include significant hands on exposure (a minimum period of a 6 months assignment) in the private sector for familiarization of the actual working environment.

In the long term, the claimants should be allowed the freedom of choice on his or her representative in these proceedings, subject to the competency of the chosen representative not to be used as an issue for failure to achieve desired outcome. A clearly defined list of criteria need to be established for eligibility and suitability for this purpose, including a prescribed period of actual hands on field experience or exposure e.g. a minimum of 7 years hands on field exposure and practice in people management and industrial relations.

As an immediate measure, the 1989 Industrial Relations (amendment) Act barring lawyers, consultants, advisers and others need to be reviewed with a view to repealing it and restoring the pre 1989 provision.[54]

The current scenario compels the parties to use the resources of Malaysian Employers Federation (for Employers) and Malaysian Trade Union Congress (for Employees). With only 10% membership in both this organizations, their limited resources contribute significantly to delays.

Further, the settlement between the employer and employee at the Industrial Relations Department should be registered at the Industrial Court and should be considered or given legal effect as the consent Award of the Industrial Court.

---

[54] *Adopted by a Seminar held by Malaysian Association of Human Resource Consultants*

6.3 Latest statistics from the Industrial Relations Department[55]

JABATAN PERHUBUNGAN PERUSAHAAN
DEPARTMENT OF INDUSTRIAL RELATIONS

DATA PENTING SEHINGGA SEPTEMBER 2009
KEY INDICATORS UNTIL SEPTEMBER 2009

Perkara *Subject*	Baki Dari Tahun Lepas *Balance From Previous Years*	Diterima hingga Sept 2009 *Received Until Sept 2009*	Diselesaikan *Resolved*	Baki *Balance*
Tuntutan Pengiktirafan *Claims For Recognition*	134	53	59	128
Pertikaian Perusahaan *Trade Disputes*	101	253	252	102
Rayuan Pemulihan Kerja *Claims for Reinstatement*	1288	3902	3453	1737
Piket *Pickets*	-	11	11	-
Mogok *Strikes*	-	4	4	-
Semakan Kehakiman *Judicial Reviews*	2	30	18	14
Lain-Lain Aduan *Miscellaneous Complaints*	33	86	85	34

6.4 No. of cases referred to Industrial Court (2001 – 2009)[56]

SUBJECT	YEARS								
	2001	2002	2003	2004	2005	2006	2007	2008	2009
Total number of cases carried forward	2017	2074	2098	2331	4143	3723	4566	4612	3342
Total number of cases referred	1056	1092	1085	3406	1859	2990	2346	665	647
Total number of awards handed down	1026	1081	1026	1911	2403	2332	2599	2170	1485
Total number of cases pending	1935	2098	2331	3966	3723	4566	4612	3342	2627
Total number of cases disposed	963	956	887	1788	2209	2233	2367	1980	1390

[55] *www.jpp.mohr.gov.my*
[56] *www.mp.gov.my – Industrial Court of Malaysia*

Following can be concluded from the above tables. As per the latest statistics available with the Industrial Relations Department for the year 2009 and also as per the Industrial Court statistics, there has been drastic reduction of total number of cases referred to the Industrial Court in the year 2008 and 2009. Since 1990's until the year 2007 there has been steady increase of cases referred to the Industrial Court and even though there has been delay in dispensing justice, the victimized employee will get justice done soon or later.

6.5 How does the Industrial Relations Department reduce the cases?

However, lately the Industrial Relations Department in responding to the call of the Minister of Human Resources to reduce the number of cases referred to the Industrial Court has chosen the path of forcing many employees to take whatever little the employers offer to settle the matter "amicably". The poor employee, have no other choice but to settle the matter.

The Human Resources Ministry is very proud to announce that there have been fewer cases referred to the Industrial Court in the year 2008.[57] The Industrial Relations Department, Director General stated that only 432 cases were referred to the Industrial Court since January 2008 till November 2008. This is compared to 1842 cases referred to the Industrial Court in 2007 and 2954 cases in the year 2006. It is shocking 85% drop in cases referred to the Industrial Court. All this is to fulfill the whims and fancies of newly appointed Human Resources Minister who wanted to reduce the backlog of cases in the Industrial Court. His statement says that "we are serious in wanting to increase

[57] *New Straits Times, 20 November 2008*

the number of cases solved so that those involved should only wait for a maximum of 2 years from the time the case was received".

Further analysis and research from Industrial Court website shows that only 665 cases in total including dismissal cases and other trade disputes have been referred to Industrial Court in the year 2008 and in the year 2009 only 647 cases have been referred to the Industrial Court. The total cases referred to the Industrial Court are inclusive of dismissal cases as well as other trade disputes.[58]

6.6 At what expense is this being done?

The Human Resources Minister has taken over the functions of the Industrial Court in a decisive manner by reducing referrals from 3,500 cases to a mere 500 cases. Employers would be relieved by the announcement. The moot question now is, do we need Industrial Courts or most of them if our minister continues to wield the big stick in not referring most cases to the court.

Our concern is that the Industrial Relations Act is an essential piece of social legislation to maintain and buttress industrial peace and harmony in the workplace in particular and the country as a whole. It acts as a social valve to prevent violent acts by aggrieved employees who seek justice and fairness from our Industrial Court. If such an avenue is denied then the possibility may arise where the aggrieved employee may take the law into his own hands in which event a purely industrial dispute may end up being the precursor for civil disturbance and societal chaos. The government should treat with

[58] *www.mp.gov.my*

extreme caution matters affecting the livelihood and welfare of our workforce. The said livelihood is enshrined and protected in our constitution, that is, the law of the land.

The issue of too many cases being referred should be dealt with differently by legislative or regulatory process. The minister should avoid the danger of micro-managing dismissal cases which ultimately may fly in his own face. The action undertaken by the minister would be tantamount to the home minister doing away with the Penal Code which of course is not the case.

The Human Resources Ministry should look into and understand the history of our labour legislation which hitherto by and large kept industrial peace in the country. The very basis of our labour legislation is to enable the "weak" workman to stand up to the "mighty" employer. Dismissal of whatever form should be adjudicated for which we have competent courts. This will give sufficient protection to the employees and protect welfare of the people which in turn will ensure social harmony and social justice in our country. It is time that better counsel and wisdom prevail over misguided short-term measures to overcome issues related to one's very livelihood.

What an easy way to reduce the backlog of cases in the Industrial Court? The Human Resources Ministry chose not to refer cases to Industrial Court so that they could reduce the backlog of cases in the Industrial Court. So, the pressure is on the conciliation officers at the Industrial Relations Department to take whatever step to make sure the matter is settled at the Department level. In this process who will become the victim?

Undoubtedly the employee is the one who have to face the brunt of the shortsighted and self serving policy of the Human Resource Ministry. How do they do that?

6.7 Real life experiences at the Industrial Relations Department

Following are the real life case where the short sighted and self serving policy of the Human Resources Ministry makes many employees suffers in silent.

CASE A[59]

"Over a year ago, after a traumatic episode with my former employee, I filed my case with the Industrial Relations Department to seek a measure of justice available to me as an aggrieved employee. Since then, the Industrial Relations Department has mediated in several meetings between my former employer and me. These meetings were loose, short and shallow, with the main objective being to attain some form of reconciliation or failing which, a settlement in lieu of going to court. Arguably, less attention was paid to what happened that led to the disputes, and more attention was paid to what could be the "amicable settlement".

To be precise, these meetings did not have (and probably were not intended to have) a systematic and comprehensive means of collecting and processing evidence – documentary or otherwise. The meetings also did not involve witnesses and lawyers.

After an "amicable settlement" was not reached, came a wait of almost six months where nothing happened. Earlier this month, I received a short single sentence letter

[59] *The Sun, 30 December 2008*

communicating the Human Resources Minister's decision that my case would not be referred to the Industrial Court. No reason was given at all. Calls to the Human Resources Ministry failed to reveal any further information or reasons, except that the "minister's decision is final".

That was it. Seemingly, my case was over. The Minister had played judge and jury. All I was asking for, given the facts of my case, was to be given a fair hearing in the Industrial Court. At the very least, the Minister should have considered that both sides presented arguments that clearly indicated that there was a genuine dispute. That should have given enough "benefit of doubt" to have the case referred to the Court – irrespective of whether or not this would further burden the court's case load.

Now, the next legal remedy available to me is to file a judicial review to quash and to reverse the Minister's decision. This is apparently a civil action that will essentially pit me (the aggrieved employee) against the Human Resources Ministry, or indirectly against the government. So, it is not anymore a case of the proverbial weak workman against the mighty employer, but it is now far worse.

Ironically, while I will be forced to waste more time and spend more money to try to reverse this travesty of justice, a civil court will now have to be engaged to hear my challenge against the minister's decision. So much for reducing the backlog. Imagine if every aggrieved employee in a similar situation takes the same remedial action, assuming they could afford it.

It is indicated that the number of cases referred could have dropped drastically. Does the drop in referral ratio truly reflect that justice has been fairly served to all those

adversely affected, or is it merely window dressing? The doors to getting justice done are shut just like that, and without a proper hearing in a proper court of law? What is the point of having the Industrial Relations Act and the Industrial Court?"

CASE B[60]

Employee A was hired to work for ABC Sdn. Bhd. through PA Sdn. Bhd.. The employee reported to work at ABC Sdn Bhd and reported to the superior there for 6 months. Never once this employee reported for work at PA Sdn. Bhd. At the end of 6 months a shocking news awaited the employee when she was told by ABC Sdn Bhd that her services were no longer required. ABC Sdn Bhd even gave her a letter thanking her for her services. At the same time PA Sdn Bhd did not give any duties to the affected employee.

The employee filed a representation against ABC Sdn Bhd claiming that ABC Sdn Bhd is the rightful employer of her. The matter went through the conciliation proceedings and the Industrial Relations Department and the officer in charge insisted that the employee is at fault and accept whatever the ABC Sdn Bhd is giving as compensation. Employee A insisted that the matter involves questions of law which only the Industrial Court can adjudicate. The conciliation proceedings failed and further shock awaits the employee A when she received a letter from the Minister stating that the matter is not fit to be referred to Industrial Court. The poor Employee A could not pursue the matter in the High Court due to financial constraints. At the end of the day the conciliation proceedings has done more damage than good to the poor employee.

---

[60] *real life case handled by the writer of this paper*

CASE C[61]

Miss A was forced to resign from company XYZ and was told that she will be paid all arrears of salaries and allowances upon submitting her resignation. Having no choice she resigned but the company failed to keep their promises of paying her salaries and allowances due to her. Miss A filed a representation under Section 20, Industrial Relations Act and waited for few months before conciliation proceedings started. The officer, instead of being an effective conciliator forced her to accept the settlement amount of RM8000.00 offered by her former employer. The employee refused to accept the said offer and insisted that the matter should be referred to the Industrial Court so that she can get justice done. The matter was delayed for another 2 years. Miss A pursued the matter persistently and finally the matter is now in the headquarters of Industrial Relations Department.

Upon enquiry of the status of her case in the headquarters, Miss A were once again approached by an Officer from the headquarters now and forced her to receive the amount of RM8000.00 and settle the matter once for all without the need to refer the matter to the Industrial Court. The employee refused it and is now in fear that her case may not be referred to Industrial Court because she is going against the advice of the relevant officer. The matter is still pending and it is interesting to see what will be the outcome.

[61] *real life case handled by the writer of this paper*

CHAPTER 7

7. Rights as an employee and remedies

Any employee who feels aggrieved over a wrong perceived to be done to him could seek remedy in the courts of the land. However, there are many limitations that stand in the way and the aggrieved person may end up not getting what he hoped for. To start with, the underlying matter that gives rise to the feeling of being aggrieved must have a factual basis. In order to exert his rights and seek relief, the aggrieved party must be able to show that a wrong has been done to him and that the party against whom he is complaining, has no justification for doing so.

A person who has his employment terminated will undoubtedly feel aggrieved. But the employer may have good reasons for asking the employee to leave. If this is the case, the employee would have no remedy. If the employee does not agree with the action taken against him, what options does he have?

7.1 The Employment Act, 1955

The above act, applied as a general rule, to all employees earning not more than RM1,500.00 per month. However, manual workers are artisans are covered regardless of earnings.

Under section 69 of the Employment Act, 1955 the Director General of Labour is empowered to enquire into any dispute between an employee and his employer in respect of wages or any other payment in case due under the terms of the contract of

service or the provisions of the said Act and to make an order for the payment of any monies deemed just.

The Director General of Labour is also empowered to confirm or set aside any decision by the employer to dismiss, downgrade or suspend any employee. Provided, however that the complaint is made within 30 days of the punishment awarded by the employer. In case of a dismissal, the Director General of Labour is only empowered to order indemnity in lieu of notice and other payments (for example Termination and Lay Off Benefits under the 1980 regulation) that the employee is entitled to as if no misconduct was committed by the employee.

A decision of the Director General of Labour is appealable as of right to the High Court. There are no costs at the Director General of Labour's level.

7.2 The Industrial Relations Act, 1967

The above Act covers all workmen employed under a contract of employment. Section 20(1) of the Act provides that;

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

If he is a member of a Union he can always seek the assistance of the Malaysian Trade Union Council (MTUC) after his employment was terminated. If he is not a member of the union, he can lodge a complaint with the Industrial Relations Department and to deal with the matter on his own under Section 20(1) of the Industrial Relations Act 1967.

For a workman to bring his case within the requirements of Section 20, he has to fulfill the following conditions;

(a) he must be a 'workman' as defined under the Industrial Relations Act, 1967

(b) he must be 'dismissed'

(c) he must make a representation in writing to be reinstated within 60 days of the dismissal to the Director General of Industrial Relations.

The agony of the employee begins, if after a long wait the employee who lodged a complaint received a letter stating the decision of the Human Resources Minister that the matter will not be referred to the Industrial Court. The poor employee will be most probably still jobless and cannot engage a lawyer. He will not receive any more letters from the Human Resources Ministry. It is because the decision not to refer the matter to the Industrial Court has already been made, so there is nothing more for the minister to say. The ball is at the complainant's feet and if he has not taken any further action, his right under the Industrial Relations Act 1967 that he may have had would have ceased to exist.

This is because access to the Industrial Court in such cases is only through reference by the Minister. A person who is aggrieved over his dismissal cannot go direct to the Industrial Court to file a claim or pursue the matter. If the minister declines to refer a complaint to the Industrial Court, the matter ends there unless the decision is

challenged. The challenge in such a case involves commencing proceedings in the High Court to seek an order of certiorari to quash the minister's decision and at the same time seek an order of Mandamus to direct the minister to refer the complaint to the Industrial Court.

This power of the minister has not always been used in the best of ways. Cases which should be referred to the Industrial Court have not been referred to, whereas cases which should not be referred to the Industrial Court, have been referred to the Court. Aggrieved individuals do not always have the financial strength or emotional determination to take on the combined resources of the corporate employer and the Human Resources Minister.

In any event, if the individual wants to challenge the decision, he has to initiate proceedings not later than six weeks from the date of the decision, unless an extension of time is obtained. If this is not done, the right to go to the Industrial Court is lost forever.

The area of law has seen much litigation involving not merely whether the claimant is a workman[62] but including whether he was dismissed[63], whether he had made his representation within the time limit[64], whether the representation was made before the dismissal took effect[65], effect of the death of claimant before conclusion of the case[66],

[62] *Industrial Court Award No 223/86*
[63] *Industrial Court Award No 12/87*
[64] *Industrial Court Award No 181/87*
[65] *Industrial Court Award No 93/87*
[66] *Industrial Court Award No 82/87*

whether he is estopped from making such a claim after accepting monies paid at time of the dismissal[67].

The flurry of activity in the courts regarding claims under this section are obviously related to the issues regarding payment of back wages and compensation in lieu of reinstatement should the decision go against the employer. Due to inconsistency in awarding back wages and compensations by the Industrial Court as well as superior Courts, in 2008 the Government amended the Industrial Relations Act, 1967 where the back wages and compensation was limited to 24 months only. Further, the common law principle of mitigation of damages has been held not to apply to Industrial cases.

The time honored principles of natural justice had for long found a warm abode in the Industrial Court until the then Supreme Court decision in the case of *Dreamland Corporation v Choong Chin Sooi & Anor*[68]. Prior to this decision, the Industrial Court award back wages to an employee from date of dismissal to date of award, if the employee was found to have been dismissed for sound reason, but without a proper inquiry (failure to adhere to natural justice). The effect of the *Dreamland* decision was that any defect in a domestic inquiry could be 'cured by the Industrial Court'. This has given the unfortunate impression to employers that they could first dismiss an employee summarily and seek to prove the reasons at the Industrial Court. The *Dreamland* decision is thus a dream come true for employers and a nightmare for employees.

---

[67] *Sivaperuman v Heah Seok Yeng Realty [1979] 1 MLJ 150*
[68] *Supreme Court Civil Appeal No 414 of 1986*

7.3 Other remedies

The right to seek damages under the contract in common law still exists but is seldom resorted to. However, it is useful for those who are not covered by the Industrial Relations Act and the Employment Act or those who have not acted within the prescribed time limits or those who wish to enforce the terms of the contract for example for liquidated damages.

Ancillary relief by way of injunctions is available for those who may wish to maintain the status quo. A workman may stop an employer from evicting him from the company quarters pending disposal of his case under section 20.

Much development of the law is the result of the inquiring minds of lawyer representing the employers and employees at both conciliation and arbitration levels. The 1989 amendments to the Industrial Relations Act have disallowed legal representations at conciliation. The effect of this may be to slow down representation at conciliation. The effect of this may be to slow down future development of the law as a majority of cases may be settled 'amicably' without either party realizing the legal and equitable rights involved.

With greater awareness of their rights and of the remedies available, the area of dismissals promises to continues to occupy the majority of the Court's time.

CHAPTER 8

CONCLUSION

The Bar Council of Malaysia has repeatedly requested the Government to set up Employment Appeal Tribunal to speedily dispose off unfair dismissal cases but to no avail. Employee will be more confident in pursuing the conciliation proceedings as the cases will not be delayed the way it is being delayed now. This will give renewed confidence among the employees as many of them are being forced into submission to the employers and Industrial Relation officers due to the worry of when or how long will these cases take to finish. He or she will settle whatever little compensation offered due to this fear of long delays.

At present, an employee an employee who has been unjustly dismissed has to make representation at the Industrial Relations Department (IRD) within 60 days in order to be reinstated. An industrial relations officer would then try to conciliate the dispute. Should this fail, it would be up to the minister to refer the case to the Industrial Court, a process which could take up to two years, and another two years for the matter to be settled.

In case of refusal by Minister to send the matter to the Industrial Court, leaving the employee to seek a review at the High Court, it could take even longer. A protracted court battle between employer and employee could take up to 10 years.

It is preferable for the Industrial relations lawyers to file their claims directly with the Industrial Court. Parties unhappy with the Industrial Court award could appeal to the (Employment Appeals) tribunal and finally, to the Court of Appeal.

The practice of going to the Industrial Relations Department and giving the minister the power to refer the matter to the Industrial Court should be done away with. There are cases filed at the IRD in 2004 and the minister refused to refer it to the Industrial Court. The judicial review application has now been fixed for 2013 at High Court in Kuala Lumpur. He said employees stood to lose from long delays if the companies were wound up or witnesses could not be located.

Any delay will be against the intent and purpose of the Industrial Relations Act 1967. The tribunal would absorb the workload of judges at the three Appellate and Special Powers Division of the High Court in Kuala Lumpur as Judicial review applications involving industrial dispute matters alone make about 20 per cent of cases registered in the three courts.

We must keep in mind that unfair dismissal cases involved the livelihood of workers and any early disposal would benefit employees. According to news reports, out of the 26 years and six months it took to dispose of Senthivelu's case, 22 years were spent in the civil courts. Considering this, the Bar Council's Industrial Court Practice Committee's call for an Employment Appeals Tribunal appears to be justified. As the legal adage goes, justice delayed is justice denied. If the current practice continues, an employee close to retirement, who was wrongfully dismissed, might never see any form of redress in his or her lifetime.

In a recent statement, the Minister of Human Resources announced that he has managed to reduce cases referred to the Industrial Court to 500 from the previous figure of 3,500.[69]

---

[69] *New Straits Times, 20 November 2008*

Whilst statistics may appear attractive and reflect his ministry's apparent efficiency, this is far from the truth as the drastic reduction has been at the expense of justice to the dismissed workman.

What avenue does the dismissed workman have now? He has to file an appeal to the High Court to reverse the decision of the minister, which cost money and time. If the High Court upholds the decision of the minister, the dismissed workman will end up paying both legal fees and cost.

He is in a 'no win' situation. Now, was that the intention of parliament - to deny justice to the dismissed workman and/or clear the backlog of cases?

Lest we forget the intention of parliament in enacting the Industrial Relations Act, let me cite what an eminent Chief Justice. His Lordship Justice Raja Azlan Shah said in the case of *Non-Metalic Mineral Products Mfg Employee's Union & Ors v South East Asia Firebricks Sdn Bhd*[70] *said:*

> *'The Act (Industrial Relations Act 1967) seeks to achieve social justice. Social justice is something more than mere legal justice. It is a social philosophy imposed on the legal system.*
>
> *'Industrial Courts and tribunals are not only not bound by the contracts of the parties, they can make new contracts and revise old contracts.*
>
> *'They are not strictly bound by the law of master and servant. Otherwise there would be no point in creating such industrial tribunals. It is to free workers from contracts and obligations that were unfair and inequitable'.*
>
> *In Hong Leong Equipment Sdn. Bhd. [1997] 1 CLJ 671, Court of Appeal, Kuala Lumpur, His Lordship, Gopal Sri Ram said:*
>
> *'Parliament has created three separate and distinct powers in respect of the subject-matter and conferred each of them upon separate authorities.*

[70] *[1976] 2 MLJ*

First, there is the conciliatory power vested in the director-general whose sole function is to mediate and attempt to settle disputes as early as possible.

'It is no part of his function to ascertain the law or the facts or to make any determination upon either. If his attempt to reconcile the parties fails, he merely notifies the minister of this fact. If he is found in any case to have done more than what the law permits, his action will be liable to be quashed on the grounds that it is ultra vires the Act.

'Second, there is power vested in the minister to refer representations made under s. 20(1). It is a power he must, by reason of the combined operation of the provisions of Arts. 5(1) and 8(1) of the federal constitution, exercise fairly.

'Third, there is the power to adjudicate upon the same representation vested in the Industrial Court which, by the terms of the Act, is enjoined to act, inter alia, according to equity and good conscience when making its award.

'The way in which the Act is constructed makes it clear that it is only the Industrial Court which is conferred with an adjudicatory function. The two preceding powers, namely, the director-general and the minister cannot therefore assume a function expressly reserved to the third. It follows that prima facie, considerations that are irrelevant to the Industrial Court's decision-making process cannot be, and are not relevant, vis-a-vis the referring authority.

'Quite apart from being a proprietary right, the right to livelihood is one of those fundamental liberties guaranteed under Part II of the Federal Constitution. Suffice to say that the expression 'life' appearing in Article 5(1) of the Federal Constitution is wide enough to encompass the right to livelihood.

'The desire of Parliament to protect the nation's work-force from the harshness of an unbending and inveterate common law and doctrines of

equity, as expressed by the passing of the Act, may thus be seen to be entirely in harmony with the terms of the supreme law of the Federation.

'The high standards of social justice so carefully established by the legislature and by the framers of the federal constitution ought not, in my judgment, to be consciously lowered by any decision of this court'.

In light of the above expressed intentions of parliament, we should ask the minister that, can the need to reduce the backlog of cases at the Industrial Court, justify non-reference? We must also not lose sight of another vital fact ie, the government has, prior to the minister taking charge of the ministry in 2008, over the last few years, increased the number of Industrial Courts to 28, so that more cases can be heard and be disposed off.

The present president of the Industrial Court, in order to expedite hearings, has made it compulsory that each chairperson hears and disposes of a certain number of cases each month and that more than one case needs to be set for hearing per day, in order to ensure that at least one matter will be heard, if another cannot proceed.

This has resulted in the courts disposing of the accumulated backlog. Matters referred as recently as in the year 2007 are presently being heard. This being the case, the minister needs to review his decision to drastically reduce references, in order to avoid injustice to the workman dismissed without just cause or excuse and to uphold the intention of parliament.

In the case of *R. Ramachandran v The Industrial Court of Malaysia*[71] case, His Lordship states that;

> *"employers can certainly afford to employ a number of lawyers and prolong litigation and thereby tiring the workers. The poor workman can ill afford a lawyer or prolong litigation because this will lead to immense hardship, suffering and exorbitant expenses."*

Hence, the conciliation proceedings should be a platform to bring two disputing parties together and if possible to find a solution. It should not be a platform to force either employer or employee to submit to the demands of the Conciliation Proceedings officers.

[71] *[1997] 1 MLJ 145*

LIST OF CASES

1. B.S.S. Kanda v The Govt. of Malaysia–(1962) 2 MLJ 169.PC
2. Dr A. Dutt v Assunta Hospital Industrial Court Award 178/79
3. Dr A. Dutt v Assunta Hospital [1981] 1 MLJ 304
4. Dedman v British Building and Engineering Appliances Ltd [1974] 1 All ER 520, 524
5. Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors (1981) 1 MLJ 238
6. Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat and Anor. [1981] 1 MLJ 238, 240
7. Goon Kwee Phoy v J & P Coats [1981] 2 MLJ 129
8. Hotel Jaya Puri v National Union of Hotel, Bar and Restaurant Workers Union [1980] 1 MLJ 109
9. Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369, 391-392
10. Hall (I.O.T) v Lorrimer [1992] 1 W.L.R. 944
11. Hong Leong Equipment Sdn Bhd v Liew Fook Chuan [1996] 1 MLJ 481,521
12. Han Chiang High School & Anor and National Union of Teachers in Independent Schools (Industrial Court Award 330 of 1990)
13. Holiday Inn, Kuching v Lee Chai Siok Elizabeth Ibid., 236
14. Inchcape Malaysia Holdings Bhd v. R.B. Gray & Anor (1985) 2 MLJ 297
15. Inchcape Malaysia Holdings Bhd v R.B. Gray & Anor[1985] 2 MLJ 297, 300
16. Industrial Court Award No 223/86
17. Industrial Court Award No 12/87
18. Industrial Court Award No 181/87

LIST OF CASES

19. Industrial Court Award No 93/87
20. Industrial Court Award No 82/87
21. James v London Borough v Greenwich [2008] IRLR 302 (CA)
22. Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd[1] [1997] 2 MLJ 685
23. Kathiravelu Ganesan v Anor v Kojasa Holdings Bhd [1997] 3 CLJ 777
24. Kumpulan Guthrie Sdn Bhd v The Minister of Labour and Manpower & 2 ors., [1986] 1 CLJ 566, 571 (HC)
25. Lee Wah Bank v National Union of Bank Employees(1981) 1 MLJ 169
26. Labour and Manpower & Anor v Wix Corp South East Asia Sdn Bhd [1980] 2 MLJ 248, 250
27. Malayan Banking Bhd v Association of Bank Officers (1988) 3 MLJ 204
28. Minister of Labour and Manpower & Anor. v Wix Corp South East Asia Sdn Bhd [1997] 1 CLJ 665;
29. Non-Metalic Mineral Products Mfg Employee's Union & Ors v South East Asia Firebricks Sdn Bhd [1976] 2 MLJ
30. Pan Global Textiles Bhd, Pulau Pinang v Ang Being Teik [2002] 1 CLJ 181 (FC)
31. R. Ramachandran v The Industrial Court of Malaysia [1997] 1 MLJ 145
32. Sibu Steel (Sarawak) Sdn Bhd v Ahmad Termizie Bujang [1996] 2 ILR 885
33. Sivaperuman v Heah Seok Yeng Realty [1979] 1 MLJ 150
34. Supreme Court Civil Appeal No 414 of 1986
35. Thein Thang Sang v United States Army Medical Research Unit [1983] 2 MLJ 49
36. V. Sinnathamboo v Minister of Labour and Manpower [1981] 1 MLJ 251, 254

LIST OF STATUTES

1. Industrial Relations Act, 1967
2. Interpretation Acts 1948 and 1967
3. The English Employment Rights Act 1996, England
4. The Employment Relations Act 2000, New Zealand

BIBLIOGRAPHY

1. Website of International labour organization, www.ilo.org
2. Website of Industrial Relations Department, www.jpp.mohr.gov.my
3. Website of Malaysian Trade Union Congress, www.mtuc.org.my
4. Website of Bar Council, Malaysia, www.malaysianbar.org.my
5. Website of Industrial Court of Malaysia, www.mp.gov.my
6. Meeting of minds: A way to peace through mediation (New York, McGraw-Hill, 1952)
7. Grievance and dispute settlement: an introduction, by ILO/EASMAT-Bangkok
8. Seminar Paper: Dismissal: Development of Industrial Jurisprudence, Review, and the way ahead.
9. A critical appraisal of the adjudication process of dismissal under the Industrial Relations Act, 1967 INSAF (2004) XXXIII No 3, 19
10. Industrial Court Awards
11. New Straits Times dated 20th November 2008
12. The Sun dated 30th December 2008
13. Industrial Relations Department's clients case files
14. Industrial Disputes Law in Malaysia by C.P. Mills

EFFECTIVENESS OF CONCILIATION PROCEEDINGS IN DISMISSAL CASES UNDER SECTION 20, INDUSTRIAL RELATIONS ACT, 1967

J. CHANDRASEGARAN

Projek Penyelidikan bagi
memenuhi sebahagian daripada
syarat-syarat untuk Ijazah
Sarjana Undang-Undang

2008/2009

TABLE OF CONTENTS

ABSTRACT

ACKNOWLEDGEMENT

CHAPTER 1 : INTRODUCTION

1.1	Development of the law of dismissal in Malaysia	1
1.2	Position prior to 1969	1
1.3	Position after 1969	3
1.4	Grounds on which Industrial Court awards have been quashed	
	1.4.1 Decision without jurisdiction	4
	1.4.2 Decisions in excess of jurisdiction	5
	1.4.3 Unreasonable decision	5
1.5	The Industrial Court	6
1.6	What constitutes a dismissal?	7

CHAPTER 2 : **Preliminary consideration under section 20, Industrial Relations Act, 1967**

2.1	Section 20(1) of the Industrial Relations Act, 1967	9
2.2	Section 20(1A) of the Industrial Relations Act, 1967	9
2.3	The important aspects or consideration of section 20, of the Industrial Relations Act, 1967	10
2.4	The requirement of being a workman	10
2.5	Limitation period of 60 days	16
2.6	Plea of reinstatement	20

CHAPTER 3 : Procedures for conciliation proceedings 24

3.1 The sample letter, for representation under section 20 25

3.2 The function and power of Director General, Industrial Relations Department 29

3.3 Flow chart for the claim of reinstatement process 31

CHAPTER 4 : Interpretation of data and statistics from Industrial Relations Department

4.1 Claims for reinstatement by sector 2003-2007 33

4.2 Claims for reinstatement by nature of dismissal 2003-2007 34

4.3 Claims for reinstatement by method of settlement 2003-2007 36

4.4 Claims for reinstatement by state 2003-2007 37

CHAPTER 5 : Conciliation proceedings

5.1 What is conciliation? 38

5.2 What qualities does a conciliator need? 39

5.3 What preparations are needed for conciliation? 41

5.4 Conduct of conciliation meeting 42

5.5 After the conciliation meeting 43

CHAPTER 6 : Shortcomings of conciliation proceedings at Industrial Relations Department

6.1	Conciliation proceedings at Industrial Relations Department	44
6.2	Suggestions on how to improve the conciliation proceedings	47
6.3	Latest statistics from the Industrial Relations Department	49
6.4	No. of cases referred to the Industrial Court (2001 – 2009)	49
6.5	How does the Industrial Relations Department reduce the cases?	50
6.6	At what expense is this being done?	51
6.7	Real life experiences at the Industrial Relations Department	53

CHAPTER 7 : Rights as an employee and remedies

7.1	The Employment Act, 1955	57
7.2	The Industrial Relations Act, 1967	58
7.3	Other remedies	62

CHAPTER 8 : Conclusion 63 - 68

List of cases

List of statutes

Bibliography

ABSTRACT

A workman who considers himself dismissed without just cause or excuse by his employer can make representations in writing to the Director General to be reinstated in his former employment as provided under Section 20, of the Industrial Relations Act, 1967. As evidenced from the statistics available from the Industrial Relations Department, the majority of cases referred to the Industrial Relations Department for conciliation and to the Industrial Court for adjudication, are cases involving dismissal without just cause or excuse.

This project paper will analyze the overall effectiveness of conciliation proceedings in dismissal cases under Section 20, of the Industrial Relations Act 1967. This paper will look at the aspects of the preliminary consideration under the said Section 20 that is the requirement of being a workman, the 60 days limitation period and the plea of reinstatement, the procedures involved in the conciliation proceedings, interpretation of relevant data and statistics from the industrial relations department as well as the sufferings and problems faced by ordinary workmen due to the outcome of conciliation proceedings at the Industrial Relations Department.

It cannot be denied that the process of conciliation proceedings need to be reviewed and reformed in order for it to be more effective as the Industrial Relations Act, 1967 is a piece of beneficent social legislation.

Acknowledgement

Apart from the efforts of me, the success of any project depends largely on the encouragement and guidance of many others. I take this opportunity to express my gratitude to the people who have been instrumental in the successful completion of this project.

I would like to show my greatest appreciation to my supervisor Profesor Madya Dr. Sharifah Suhanah Syed Ahmad. I can't say thank you enough for her tremendous support and help. I feel motivated and encouraged every time I attend her lecture and discussion. Without her encouragement and guidance this project would not have materialized.

I also would like to remember my mentor, the late Mr A. Murugavell who have guided and has been a source of inspiration for me to take up law and to prepare this project paper.

CHAPTER 1

1. Introduction

1.1 Development of the Law of Dismissal in Malaysia

The adoption in 1963 by the International Labour Conference of Recommendation No. 119 [1] concerning Termination of employment at the initiative of the employer resulted in wide legislative activity throughout the world to provide for security of tenure in the job and for payment of compensation for retrenched employees. It was only after the amendment to the Industrial Relations Act 1967 on 10th October 1969 that workers were provided for the first time with the right to seek reinstatement to their jobs. The Employment Act 1955 was amended at the same time providing for a *'due inquiry before an employee is dismissed or downgraded'*. The development of the law since then has been significant both in the area of substantial justice and natural justice on proper procedure.

1.2 Position prior to 1969

Prior to the 1969 amendment, unorganized workers within the purview of the Employment Act could only claim the indemnity in lieu of notice when they were dismissed without just cause. Organized workers could after the setting up of the Industrial Court in 1967 (in its present form) seek reinstatement. However, the Employment Act's purview was (and is) limited generally to employees at non-executive

[1] *http://www.ilo.org/ilolex/cgi-lex/convde.pl?R119*

levels. Trade Unions of workmen too generally catered for workmen at non-executive levels.

Employees at executive and higher levels has scarce remedies if they were dismissed and whatever claims they could succeed in was limited to their rights under the contract of employment. The time and expense of litigating a claim through the Courts was itself a deterrent. The relief of reimbursement was possible only indirectly and under limited circumstances as the Specific Relief Act 1950, S.20(1)(6), disallowed a contract to render personal services from being specifically enforced.[2]

The Federal Court held that, in the case of a claim for wrongful dismissal, a workman may bring an action for damages at common law. This is the usual remedy for breach of contract e.g. a summary dismissal where the workman has not committed misconduct. The rewards, however, are rather meager because in practice, the damages are limited to pay which could have been earned by the workman had the proper period of notice is served and if it can be proved that he could obtain similar job immediately or during the notice period with some other employer. He cannot sue for feelings or loss of reputation caused by a summary dismissal where for instance he was dismissed on a groundless charge of dishonesty. At common law it is not possible for a wrongfully dismissed workman to obtain an order for reinstatement because the common law knows only one remedy viz. an award of damages.[3]

---

[2] *B.S.S. Kanda v The Govt. of Malaysia–(1962) 2 MLJ 169.PC*
[3] *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors (1981) 1 MLJ 238*

1.3 Position after 1969

Thus the 1969 amendment was significant in that for the first time workers at all levels could not only challenge the decision to dismiss them but also seek to be reinstated. The process of using the conciliation services of the Ministry of Labour (now Ministry of Human Resources) and ultimately the Industrial Court was more expeditious and less expensive than processing a claim through the common law courts. Consequently disputes relating to dismissals have occupied the major part of the Industrial Court's time. In recognition of the need to hand down final decisions on industrial disputes by a Court specially set up for that purpose, section 33B of Industrial Relations Act 1967 provides that '*an award, decision or order of the Court under this Act (including the decision of the Court whether to grant or not to grant an application under section 33A (1)) shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court'.*

However, a limited right of appeal against the awards are provided for in section 33A of the Industrial Relations Act 1967. The Appeal to the High Court (if allowed by the Industrial Court) is on questions of law :-

(a) which arose in the course of the proceedings;

(b) the determination of which by the Court has affected the award;

(c) which, in the opinion of the Court, is of sufficient importance to merit such reference;

(d) the determination of which by the Court raises, in the opinion of the Court, sufficient doubt to merit such reference.

The High Court is empowered to treat such a reference as an appeal against the award and may consequently confirm, vary, substitute or quash the award or make such other order as it considers just or necessary. A decision of the High Court on such reference on question of law is itself final and conclusive.

However, the ouster clauses are effective only where the Industrial Court (or the High Court under section 33A) have made decision, awards or orders within their inherent supervisory rights to quash the Industrial Court's awards on a variety of grounds.

1.4 Grounds on which Industrial Court awards have been quashed

1.4.1 Decision without jurisdiction

The Industrial Court ordered the employer in the case of *Inchcape Malaysia Holdings Bhd v. R.B. Gray & Anor* to compensate Gray at the time of his dismissal who was employed as an Executive Director. The Supreme Court in quashing this decision [4] held that Gray was employed as a Director and as such he "is the very brain of the company or their directing mind' and as such he was not a 'workman' within the Industrial Relations Act. The Court further held that the question of whether a person is a 'workman" or not is a jurisdictional question. The Industrial Court could not vest itself with jurisdiction by wrong decisions.

[4] *(1985) 2 MLJ 297*

1.4.2 Decisions in excess of jurisdiction

The Industrial Court in the case of *Lee Wah Bank v National Union of Bank Employees* [5] awarded that benefits due to the dismissed employee under the collective agreement be paid as the reasons for the dismissal (which the Industrial Court upheld) were not criminal in nature. This decision was quashed in the High Court as it was held that the Industrial Court had acted in excess of jurisdiction by awarding compensation after finding the dismissal was with just cause. The court further states that '*It is an established principle that a creature of statute has such powers only as are conferred by the statute which creates it'.*

1.4.3 Unreasonable decision

In the case of *Malayan Banking Bhd v Association of Bank Officers*[6] the Supreme Court quashed an Industrial Court award where a Bank Officer was awarded compensation in lieu of reinstatement as the punishment of dismissal was held to be too harsh. He had issued 'dud' cheques, borrowed money from customers of the bank and impersonated as bank manager. The Supreme Court in quashing the award held that the decision of the Industrial Court was clearly perverse and so devoid of plausible justification that no reasonable body of persons could have reached it and that the Industrial Court had thus transcended its jurisdiction in making the award.

---

[5] *(1981) 1 MLJ 169*
[6] *(1988) 3 MLJ 204*

Thus it can be seen that the grounds upon which awards can be quashed covers an extremely fertile area. Application for writs of certiorari to quash these awards increased many fold only after decisions on dismissals involved employees at higher levels. Due to the high salaries and consequent orders for thousands of dollars as compensation[7] employers as well as the workmen involved in these cases were more than prepared to try and reverse decisions adverse to them through the High Court and the Supreme Court/Federal Court. It was not rare for one party to try this by simultaneously using section 33A Industrial Relations Act as well as an application for a writ of certiorari.

The result of such increased litigation has been a wealth of decisions of the High Court and the Supreme Court and now known as Federal Court contributing tremendously to the development of the law on dismissals.

1.5 The Industrial Court

The Industrial Court was established pursuant to Part VII of the Industrial Relations Act, 1967 and Section 30(5) of the Industrial Relations Act, 1967 states that;

> "The court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form".

The Industrial Court often referred to in good honor as a court of equity has once too often found its decision branded as having stretched too far in the case of *Hotel Jaya Puri v National Union of Hotel, Bar and Restaurant Workers Union*[8], where having

---

[7] *Assunta Hospital v Dr Dutt Industrial Court Award 178/79 - a sum of RM522,000.00 was ordered as compensation)*

[8] *Hotel Jaya Puri v National Union of Hotel, Bar and Restaurant Workers Union [1980] 1 MLJ 109*

concluded that the employees were 'terminated' the court nevertheless ordered compensation. The net result of increased challenges to the Industrial Court decision has made the Industrial Court itself more aware that equity and good conscience come in only when there is a legal basis for it.

1.6 What constitutes a dismissal?

The burden of proving that he or she has been dismissed is on the workmen. Once he does this than it is up to the employer to prove that he had substantial reasons for his action. There has been much argument in court as to whether is not eligible to the remedies available if he was terminated. In the case of *Goon Kwee Phoy v J & P Coats*[9], it was argued by the company that the Industrial Court had failed to distinguish between dismissal and termination. The Industrial Court had concluded in *Award 66/79* that;

> *"We do not see any material difference between a termination of the contract by due notice and a unilateral dismissal of a summary nature. The effect is the same and result must be the same"*

The Federal Court stated further;

> *"It is the duty of the court to determine whether the termination or the dismissal is without just cause or excuse. The duty of the court will be to enquire whether the excuse or reason (given by the employer) has or has been made out. If it finds that it has not been proved, than the inevitable conclusion must be that the termination or dismissal was without just cause or excuse."*

[9] *Goon Kwee Phoy v J & P Coats [1981] 2 MLJ 129*

The above decision in fact followed the Federal Court decision in *Dr A. Dutt v Assunta Hospital*[10] where it was held that;

> *"a termination by contractual notice and for no reason, if ungrounded on any just cause or excuse would still be a dismissal without just cause or excuse and on the workmen's representation, the Industrial Court may award reinstatement or compensation in lieu of reinstatement."*

It is not well settled in law that whatever term is used by the employer to explain the cessation of employment, the courts are entitled to be told the reasons for such action and to examine the adequacy of the reason.

[10] *Dr A. Dutt v Assunta Hospital [1981] 1 MLJ 304*

CHAPTER 2

2. Preliminary consideration under section 20, Industrial Relations Act, 1967[11].

2.1 **Section 20(1) of the Industrial Relations Act, 1967 reads as follows:**

> *"Where a **workman,** irrespective of whether he is a member of a trade union of workman or otherwise, considers that he has been dismissed without just cause or excuse by his 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."*

2.2 **Section 20(1A) of the Industrial Relations Act 1967 reads as follows;**

> *"The Director General shall not entertain any representations under subsection (1) unless such **representations are filed within sixty days** of the dismissal:"*

The above section 20 of the Industrial Relations Act 1967 provides that an employee, who considers himself unfairly dismissed, could seek the remedy of reinstatement by approaching the Industrial Relations Department nearest to his or her workplace. Even though the major role of the Industrial Relations Department is to focus on industrial

[11] *Industrial Relations Act, 1967*

disputes between employers and trade unions, there has been steady increase of cases involving dismissal without just cause or excuse.

2.3 The important aspects or consideration of section 20 of the Industrial Relations Act, 1967;

i) Must be a workman (Section 52 of the Industrial Relations Act provides that the conciliation and representation on dismissal are not applicable to Government servants);

ii) Must make his representation to the nearest Industrial Relations Department to his workplace within 60 days from the date of dismissal and;

iii) He must only seek the remedy of reinstatement to the position held prior to the dismissal.

2.4 The requirement of being a workman

In order for a Claimant to make representations to the Director General for reinstatement, he must first fall under the definition of a "workman". Section 2, of the Industrial Relations Act provides that *"workman" means any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purpose of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute."*

The definition under Section 2 of the Industrial Relations Act is very wide and seems to cover anyone and everyone who is employed by an employer under a contract of employment. The Judiciary is of the opinion that it is a deliberate legislative policy to keep the definition flexible.[12] It is vital for us the see some of the landmark cases to understand the current position in Malaysia with regards to the definition of "workman".

The Federal Court in determining whether a "Consultant Radiologist" was a "workman" in *Dr A. Dutt v Assunta Hospital*[13] held that;

> *"As for the determination whether Dr Dutt was or not a workman within the Act, we have, in an earlier decision Assunta Hospital v Dr A. Dutt [1981] 1 MLJ 115, said that the question is a mixed question of fact and law and it is for the Industrial Court to determine this question. The fact is the ascertainment of the relevant conduct of the parties under their contract and the inference proper to be drawn therefrom as to the terms of the contract and the question of law, once the terms have been ascertained, is the classification of the contract for services or of service :*

Hence the Federal Court in *Dr Dutt's* case confirmed two principles:

(a) That the determination of whether an individual is a workman is a mixed question of fact and law and it is for the Industrial Court to decide this and;

(b) A "workman" under the Act is one who is engaged in a contract of service and not a contract for service.

This definition is wide enough to include people of all professions including doctors, lawyers, engineers, managers, executives, secretaries etc. As long as there is a

---

[12] *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369*
[13] *[1981] 1 MLJ 304*

contract of service, they are considered workman under the Industrial Relations Act, 1967.

The Supreme Court in *Inchcape Malaysia Holdings Bhd v R.B. Gray & Anor*[14], however, changed the test in determining whether a claimant falls under the category of 'workman' under the Section 2, Industrial Relations Act 1967. In this case, the respondent was employed by the appellant as a Director. Subsequently his employment was terminated and the respondent was given six months salary in lieu of notice. In determining whether the respondent was a workman, Salleh Abas LP, observed as follows:

> *"..... Whilst a contract of employment is part of the definition, it does not follow that every person who is employed under a contract of employment or being an employee of another is a workman. To be a workman a person must be employed as a workman. If he is employed in other capacity he cannot be a workman."*[15]

Though a contract of employment existed between the appellant and respondent, the Court was unwilling to regard the respondent as a workman because he was holding the position of a director.

The Supreme Court in Inchcape thus held that since the respondent was a director, he is the very brain of the company or their directing mind and will, determine and formulating the company's policies. Thus, the Court held that, the respondent cannot fall under the definition of workman under the Industrial Relations Act, 1967. It states as follows;

---

[14] *[1985] 2 MLJ297*
[15] *[1985] 2 MLJ 300*

> *"Under the law as a director the respondent is the very brain of the companies or their directing mind determining and formulating the companies' policy. Thus, I cannot see how in the circumstances of this case, the respondent could be held to be workman. I hold that the ruling the Industrial Court on this issue is clearly erroneous."*[16]

The Federal Court in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor*[17] (involving a general manager) disapproved the decision of Inchcape and reverted to the "contract of service test" as in Dr Dutt's case as opposed to 'the directing mind and will of the company' test.

The Federal Court stressed that the Parliament would have had a reason to leave the definition of workman unchanged despite several amendments made to the Act:-

> *"In our judgment, there is a very good reason for Parliament to have provided these definitions and left them in the state in which they appear, untouched by the several amendments made to the Act since its original enactment. This, points to the conclusion that Parliament intended to keep the definition of the term "workman" flexible, with a view of being worked out on a case by case basis. It was not the intention of Parliament to assign a fixed or rigid meaning to these expressions."*

The Federal Court also said that the courts must determine whether a claimant is a workman or not by looking at the degree of control an employer exercises over an employee as though the contract of employment.

> *"In all cases where it becomes necessary to determine whether a contract is one of service or for services, the degree of control which an employer*

---

[16] *[1985] 2 MLJ 304*
[17] *[1995] 3 MLJ 369*

exercises over a claimant is an important factor, although it may not be the sole criterion. The terms of the contract between the parties must, therefore, first be ascertained. Where this is in writing, the task is to interpret its terms in order to determine the nature of the latter's duties and functions. Where it is not then its terms must be established and construed. But in the vast majority of cases there are facts which go to show the nature, degree and extent of control. These include, but are not confined, to the conduct of the parties at all relevant times. Their determination is a question of fact. When all the features of the engagement have been identified, it becomes necessary to determine whether the contract falls into one category or the other, that is to say, whether it is a contract of service or a contract for service."[18]

The Supreme Court in *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd*[19] has finally overruled the decision in Inchcape and considered it a bad law. The principle to be applied henceforth is that found in the *Dr Dutt's* case which was approved in the case of *Hoh Kiang Ngan.*

Following the trend of judgments of recent Malaysian cases, the courts are leaning more towards social policy which seems to underlie the Industrial Relations Act, 1967 when it comes to protecting the rights of workman. We can see this trend by the courts in situations where they exercise their judicial powers to interpret the word "workman" as wide as possible to cover all categories of claimants, especially those who are bound by a contract of service. The courts tend to look deeper into the contract of employment rather than just the letter of the contract of employment that is the degree of control exercised by the employer and the manner in which the contract of employment was carried out are important factors in determining whether the claimant was engaged for a contract of service or a contract for service.

---

[18] *[1995] 3 MLJ 391 - 392*
[19] *[1997] 2 MLJ 685*

We may also look at the English courts on the social policy approach in the case of *Hall (I.O.T) v Lorrimer*[20] where the court has stated as follows;

> *"In oder to decide whether a person carries a business on his own account is is necessary to consider many different aspects of the person's work activity. This is not a mechanical exercise of running through items on a check-list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detail picture which had been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another."*

In an another English court case of *James v London Borough v Greenwich*[21] the Court states that "*……. nothing to prevent wise employers from recognizing that their long term interests may be better served by treating their entire workforce in a responsible and considerate way than by insisting on the strict letter of the law."*

[20] *[1992] 1 W.L.R. 944*
[21] *[2008] IRLR 302 (CA)*

2.5. LIMITATION PERIOD OF 60 DAYS

The other important consideration is that the representation should be made within 60 days from the date the workman considers himself dismissed without just cause or excuse. The 60 days limitation is mandatory where section 20 (1A) clearly states that:-

"The Director General shall not entertain any representations under subsection (1) unless such representations are filed within sixty (60) days of the dismissal: Provided that where a workman is dismissed with notice he may file a representation at any time during the period of such notice but not later than sixty days from the expiry thereof."

Section 54(1)(a) of the Interpretation Acts 1948 and 1967[22] provides that *'a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing, is done'.*

The reasons for setting such a strict time limit is to bring the matter, to the attention of employer at the soonest and the disputes could be brought to an end as soon as possible. This will also allow the workman to get the remedy of reinstatement into his former position as if no dismissal had taken place without much delay and without incurring too much expense. The employer will have to wait forever which could lead to uncertainty in day to day business if there is no time frame to make the representation.[23]

---

[22] *Interpretation Acts 1948 and 1967*
[23] *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat and Anor. [1981] 1 MLJ 238, 240*

The Court in the case of *V. Sinnathamboo v Minister of Labour and Manpower*[24] held that *"to conclude otherwise would result in serious consequence, in that the Industrial Court would be flooded with stale appeals, and employers would be left in a state of uncertainty as to when a dismissed workman would exercise his right under Section 20(1). Such state of affairs would certainly not help in promoting industrial peace in this country".*

Therefore, the sixty days limitation period is mandatory and the section 20(1A) strictly provides that the Director General cease to have the power to entertain any representations under section 20(1) if the said representation is not filed within sixty days of the dismissal. It doesn't make any difference even if the employer consents for the representations to be filed after the expiry of the said period.[25]

Lord Denning MR in *Dedman v British Building and Engineering Appliances Ltd*[26] stated that;

> *"The time limit is so strict that it goes to the jurisdiction of the tribunal to hear the complaint. By that I mean that, if the complaint is presented to the tribunal just one day late, the tribunal has no jurisdiction to consider it. Even if the employer is ready to waive it and says to the tribunal: 'I do not want to take advantage of this man. I will not take any point that he is a day late'; nevertheless the tribunal cannot hear the case. It has no power to extend the time….."*

Section 30(5), Industrial Relations Act, 1967 requires the Industrial Court to act in accordance with equity and good conscience, and the substantial merits of the case

---

[24] *[1981] 1 MLJ 251, 254*
[25] *Pan Global Textiles Bhd, Pulau Pinang v Ang Being Teik [2002] 1 CLJ 181 (FC)*
[26] *[1974] 1 All ER 520, 524*

without regard to technicalities and legal form. It can be argued that denying a person his right merely on the failure to submit representation within the specified time period, can lead to miscarriage of justice as the matter were decided upon a technicality and not upon its substantial merits and equities.

In Malaysia, we do not have a provision which can be used by the employee in exceptional circumstances to extend the limitation period of 60 days. However, in countries such as England and New Zealand, there are provisions in their legislation to extend the limitation period in exceptional circumstances.

The English Employment Rights Act 1996, section 112[27] provides that an unfair dismissal should be presented to the Industrial Tribunal before the end of a period of three months beginning with the effective date of termination. Cases outside the time frame may still be referred to the Tribunal, provided that the affected employee establishes to the satisfaction of the Tribunal, that it was 'not reasonably practicable' for the employee to present the grievances to the Tribunal before the end of the limitation period.

Likewise, in New Zealand, the Employment Relations Act 2000, section 114(1)[28] provides that a personal grievance for unjustifiable dismissal should be presented to the employer within 90 days beginning from the date on which the alleged action, amounting to a personal grievance occurred, or come to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

---

[27] *The English Employment Rights Act 1996*
[28] *The Employment Relations Act 2000*

Subsection 3 of section 114[29] further provides that where the employer does not consent to the personal grievance being raised after the expiration of the 90 days period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of the period. Where the Authority, after giving the employer an opportunity to be heard, is satisfied by the delay in submitting the personal grievance was occasional by exceptional circumstances, and where it considers just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks fit.

There is no strict rule as to what constitutes 'not reasonably practicable' or 'exceptional circumstances'. Each case has to be determined on its own individual facts. The circumstances considered exceptional, is explained in section 115 of the Employment Relations Act 2000, and this includes;

(a) Where the employee has been so affected or traumatized by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified;

(b) Where the employee authorized an agent to raise the grievance and the agent unreasonably failed to ensure that the grievance was raised within the required time; and

(c) Where the employer failed to comply with the requirement of giving a statement of reasons for dismissal. However, ignorance of the law or the lack of knowledge of employees' rights has been held not to constitute exceptional circumstances.

[29] *The Employment Relations Act 2000, New Zealand*

Taking the above jurisdiction as an example and to make sure that the employees are not denied their right of justice, it is important for our legislation to have a provision to extend the limitation period under exceptional circumstances. The Industrial Court can determine on case to case basis whether the said "exceptional circumstances" is valid or otherwise.

2.6 PLEA OF REINSTATEMENT

An important feature of section 20(1) of the Industrial Relations Act, 1967 is that the employee who claims that he or she has been dismissed without just cause or excuse must and can only pray for the remedy of reinstatement into his or her former position. Whether or not reinstatement will be awarded depends on the facts and circumstances of each case.

The Court has clarified what 'reinstatement' means, and has indicated how 're-employment' differs from reinstatement. In *Han Chiang High School & Anor and National Union of Teachers in Independent Schools*[30] the Court stated:

> *The law is clear on the issue of reinstatement:*
> *'Reinstatement requires the employer to treat the employee as if he had never been dismissed, thus restoring all pension, pay, holiday, and seniority rights, and arrears of pay must be made to the employee' (Employment Protection) Jowitt's Dictionary of English Law (2nd cumulative supplement to the 2nd Ed p 140).*

[30] *Industrial Court Award 330 of 1990*

Furthermore:

'The effect of an award of reinstatement is merely to set at naught the order of wrongful dismissal of a workman by the employer and to reinstate him in the service of the employer and to restore him to his former position and status as if the contract of employment originally entered into has been continuing.' Malhotra Law of Industrial Disputes (Vol 2, 4th Ed) p 934.

The representation under section 20(1) of the Industrial Relations Act, 1967 for dismissal without just cause or excuse is only in respect of reinstatement. If the Claimant dies during the period of representation, the claim for reinstatement will die with him as the Industrial Court cannot reinstate a dead workman and the Court cannot recognize different person other than the Claimant. The maxim *actio personalis moritur cum persona* – the action abates with the death of the claimant applies in this matter. As such the Court will not be able to accept any other person as substitute for the representation under section 20 of the Industrial Relations Act, 1967.

The Federal Court in the case of *Thein Thang Sang v United States Army Medical Research Unit* [31] held that *"..... if the legal representative or administrator of the estate of the deceased workman were allowed to appear at the Industrial Court in proceedings under Section 20(3) of the Act, express provision would be provided for it in the Act. But none was so provided either in the Act or in the Industrial Court Rules 1967.....'.* As such, the Court could not accept any substitution or representation of a deceased party by any other person.

---

[31] *[1983] 2 MLJ 49*

In the case of *Holiday Inn, Kuching v Lee Chai Siok Elizabeth*[32], the Claimant, changed her plea and opted for compensation in lieu of reinstatement. The High Court stated that the Court ceases to have jurisdiction once reinstatement is no longer sought as the remedy of any aggrieved workman under the Industrial Relations Act is reinstatement.

Due to long delay in Industrial Court cases, it is not practical for the Claimant to wait forever for his case to finish before he can find a new job. Thus it is not fair to expect the Claimant to return to his former employment. It is only on the paper that the Claimant wanted a reinstatement but in reality he or she will only pray and hope for good compensation in lieu of reinstatement and backpay which comes with it.

The Industrial Court in the case of *Sibu Steel (Sarawak) Sdn Bhd v Ahmad Termizie Bujang*[33] stated that :

> *'.....[is] the Court to permit itself to be vested with or divested of jurisdiction depending upon the 'yes' or 'no' response of a claimant to the crafty questioning of Counsel representing the employer? If so, the consequence will be that, notwithstanding the like circumstances of two workmen, an upright workman will be denied the right to have his case heard by the Court while another workman who is deceitful can continue to pursue his claim. Is the Court to permit itself to be a forum for perpetuating an inequity of this nature? It seems obvious that such a proposition need only be stated to be rejected forthwith'.*

---

[32] *Ibid., 236*
[33] *[1996] 2 ILR 885*

It is important for the Industrial Relations Act, 1967 to rectify the above situation and allow the claimant to pray for compensation in lieu of reinstatement in the Industrial Court as it is not practical for the claimant to pray for reinstatement where majority of the claimants have been gainfully employed by the time the cases are being heard in the Industrial Court. Many of them will take leave from their current employment to attend Industrial Court cases and it is mockery of the system to pray for reinstatement while he or she is gainfully employed elsewhere.

CHAPTER 3

3.0 Procedures for conciliation proceedings

Section 20(1) of the Industrial Relations Act, 1967 reads as follows:

"Where a workman, irrespective of whether he is a member of a trade union of workman or otherwise, **considers** that he has been dismissed without just cause or excuse by his 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."

The following is how the Industrial Relations Department under the Ministry of Human Resources described the Procedures for the claim of reinstatement;[34]

Under Section 20 of the Industrial Relations Act, 1967, a workman who considers his dismissal as without just cause or excuse may file a claim for reinstatement within 60 days of his dismissal. Upon receiving the representation by the workman, the department will invite both the employer and workman for a conciliation meeting. Where the claimant fails to attend any of the conferences without any reasonable excuses, the representation is deemed withdrawn. The Conciliation Officer's role will be to explain the practices and principles of law that are applicable including judgment of the courts, both the Industrial Court and civil courts, so that the parties are aware of their rights and liabilities. With this explanation it is expected that they would be able to resolve their differences and come to an amicable settlement. If the conciliation efforts fail, the case

[34] *www.jpp.mohr.gov.my*

will then be referred to the Honourable Minister of Human Resources who will exercise his discretionary powers to refer the matter to the Industrial Court or otherwise. When a reference is made to Industrial Court, the court will adjudicate the matter."

In practice, the workmen must make representation in writing to the Director General of the Industrial Relations Department nearest to his place of employment. The representation must include details such as employee's and employer's name and address, his last position in the company, appointment date as well as date of dismissal and reasons for dismissal (if any). He is also required to attach all relevant documents.

3.1 **The sample letter, as follows have to be prepared and submitted to the Industrial Relations Department nearest to the workplace of the Claimant.**

Nama dan alamat penuh pekerja
.....
.....

Tarikh:

Ketua Pengarah/Pengarah
Jabatan Perhubungan Perusahaan Malaysia
(Alamat Jabatan terdekat)

Tuan,
Representasi Di Bawah Seksyen 20(1)
Akta Perhubungan Perusahaan 1967

Saya dengan hormatnya melaporkan kepada Tuan bahawa saya telah diberhentikan kerja oleh majikan saya. Bersama-sama ini saya lampirkan salinan surat pemberhentian kerja saya untuk rujukan Tuan. Pada hemat saya, tindakan majikan saya memberhentikan perkhidmatan saya adalah tidak adil dan munasabah.

Butiran peribadi saya selanjutnya adalah seperti berikut;

i) No K/P: ..... Jantina .....

ii) Alamat rumah .....
No Tel ..... H/P: .....

iii) Nama Majikan .....

iv) Alamat Majikan .....

Alamat Tempat Kerja
.....

v) No Tel ..... No Faks .....
vi) Jawatan Terakhir .....

vii) Gaji Terakhir .....

viii) Tarikh mula bekerja .....

ix) Tarikh dibuang kerja .....

x) Nama Kesatuan (Jika ada) .....

xi) Alamat Kesatuan: _____

Sukacita dapat kiranya tuan membantu saya agar dipulihkan semula ke jawatan asal saya.

Sekian, terima kasih.

Yang benar,

Nama:

(Source[35])

[35] *www.jpp.mohr.gov.my*

In the case of *Kathiravelu Ganesan v Anor v Kojasa Holdings Bhd*[36], the Court of Appeal aptly described the stages a claimant will have to go through before his allegation of unfair dismissal may be adjudicated in the Industrial Court;

> *"First, there is the conciliatory level. Here, all that the Director General of Industrial Relations is concerned with is whether the parties are able to settle their differences. All that is required to activate the conciliatory jurisdiction is a complaint under Section 20(1) of the Act. Consequently, there is no question of there being any wider jurisdiction at this stage.*
>
> *Second, the reporting level. Once the Director General of Industrial Relations finds the dispute irreconcilable, he merely makes his report to the Minister. If it is found that he has exceeded his powers, his action is liable to be quashed in a certiorari proceedings*[37]*. Again, there is no wider jurisdiction.*
>
> *Third, the referral level. When the Minister receives notification from the Director General that the dispute cannot be settled, he must decide whether to refer it to the Industrial Court. He is not to refer all disputes to the Industrial Court. The question he must ask himself is whether, having regard to the facts and circumstances of the given case, the representations made by the workman is frivolous or vexatious…..*
>
> *Fourth and last, the adjudicatory level. It is important to observe that, save in very exceptional cases which are not relevant to the present discussion, the Industrial Court, unlike the ordinary Courts, is not available for direct approach by an aggrieved party. Access to it may only be had through the three levels earlier adverted to."*

---

[36] *[1997] 3 CLJ 777*

[37] *Minister of Labour and Manpower & Anor. V Wix Corp South East Asia Sdn Bhd [1997] 1 CLJ 665; Hong Leong Equipment Sdn Bhd v Liew Fook Chuan [1996] 1 MLJ 481,521*

As seen from the above observation, the representation for dismissal without just cause or excuse must be filed with the Industrial Relations Department (IRD) for conciliation before the same can be referred to the Industrial Court.

At the conciliation proceedings, only the parties and their authorized agents are allowed. An advocate, adviser, or consultant cannot represent the parties to the dispute. At the conciliation meeting, the conciliation officer acts as a facilitator where he will persuade and induce the parties to come to an amicable settlement of the matter in dispute. His task is essentially to convince the parties to resolve their differences, to find points of common interest and defuse tension. He will allow the parties to express their views, will examine the statement of the case made by the parties, and deliver an opinion as to the best or most likely outcome of the dispute. He will also explain to the parties the applicable practices and principles of law, with a view that the parties are aware of their rights and liabilities. With that advice, it is probable that the parties would be able to resolve their differences and come to an amicable settlement.

The parties however, retain the right whether they do or do not accept the suggested settlement by the conciliation officer. The conciliation officer will continue to offer advice and suggestions throughout the process. He is not supposed to take sides of either party to the dispute and remain impartial and neutral at all times; neither will he make a decision on the merit of the case or recommend any possible acceptable solution to the dispute. It is entirely up to the parties concerned to reach a final agreement on any proposed settlement.

Where the parties have amicably arrived at a settlement, a memorandum setting out the terms of the settlement is drawn up and signed by both the parties, or by their

representatives. The legal effect of the agreed settlement is that it shall bind the parties, and any decision recorded in the memorandum of settlement becomes part of the contract of employment. Henceforth, the parties to the settlement would be barred from denying the agreed terms by a writ of certiorari.

If, however, the conciliator were unable to arrive at an amicable settlement, he would then submit a report of the dispute to the Minister, who will then decide whether the case merits reference to the Industrial Court. The Court will only hear disputes referred to it by the Minister. There is no legal requirement that merely because representations are made to the Director General, they must automatically be referred to the Industrial Court.

3.2 The function and power of Director General, Industrial Relations Department

In elaborating about the functions of the Director General of Industrial Relations Department during the conciliation proceedings, the Federal Court in the case of *Minister of Labour and Manpower & Anor v Wix Corp South East Asia Sdn Bhd*[38] *stated as follows;*

> *'Section 20(2) of the Act plainly does not impose any duty on the Director General or his representative to decide or determine questions of any kind and to ascertain the law and facts. He is merely required to deal with the situation in the way he thinks best to get the employer and employee to settle the dispute. If he is satisfied that there is no likelihood of settlement..... he is to notify the Minister. Any meeting convened is merely intended to be for the purpose of bargaining between the employer and the employee so that one can see the other's viewpoint and*

[38] *[1980] 2 MLJ 248, 250*

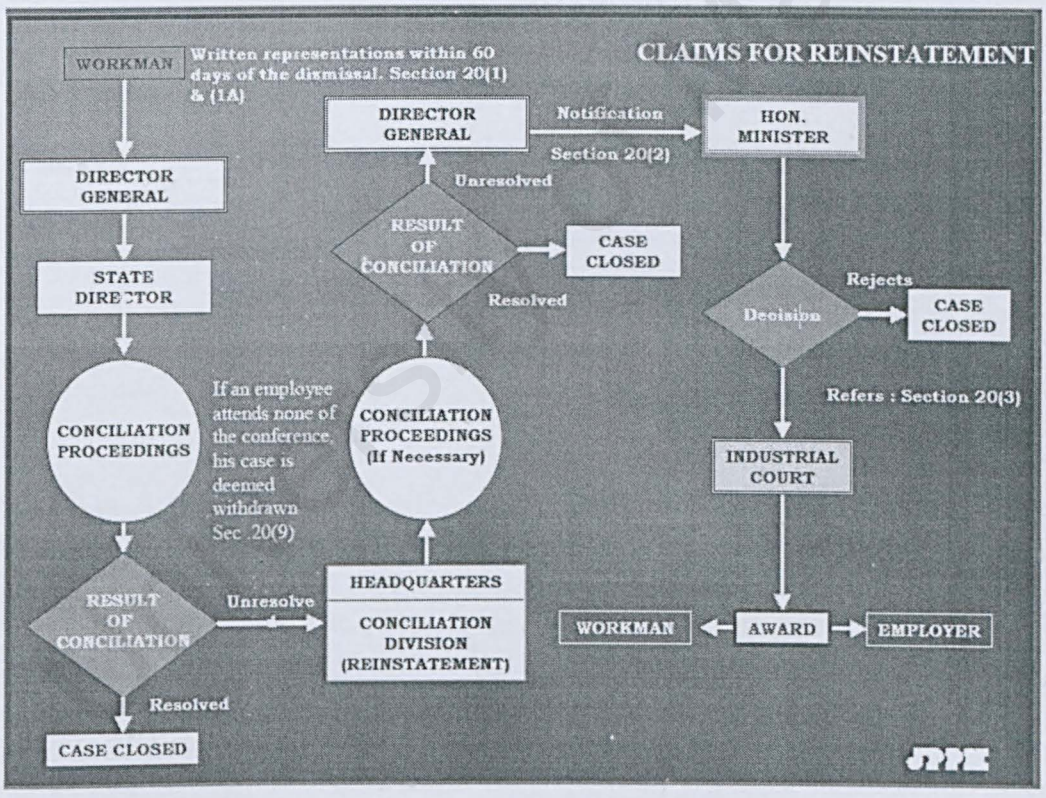
settle the dispute themselves. It is not a forum for discussing rights and the law. The Director General or his representatives sits in the meeting not as an adjudicator but as a mediator or, to use the word envisaged by the provisions relevant in the Act, conciliator. In such position, he is not prevented from expressing his views on any matter which arises for the benefit of either party, having regard to his experience in similar situations and industrial relations in general. Whether or not a settlement is reached is a situation brought about by the parties and not by his assessment of facts. The result is not his decision or determination of questions of any kind. The very fact that the Director General is not required to notify the Minister when there is a settlement but only when there is no settlement, indicates that the result is determined by the parties and not by him. In notifying the Minister, section 20(2) of the Act does not appear to require him to do so in the form of a report on the circumstances leading to there being no settlement. He is merely to notify the Minister that there has been no likelihood of settlement. Further, in convening a meeting he has no power to compel the attendance of any party….. if one party does not attend, he may take it that the party desires no settlement…. The Director General or his representative under section 20(2) of the Act cannot be said to exercise any powers that are analytically judicial. He is merely required to make a notification of an existing fact. No doubt he has in effect to consult both parties before notifying the Minister that there has been no settlement. If he makes his notification without consulting one party, in our view, the effect is that the notification is bad, not because he did not act judicially but because he acted in bad faith by ignoring the requirements of law'.

Over the years the majority cases referred to Industrial Relations Department for conciliation and to the Industrial Court are cases involving dismissal without just cause or excuse. This can be attributed to the privatization introduced by the Government in 1990's as well as increasing awareness of their rights among the employees. The large number of employees who was government servants before became private employees and could use the provisions under Section 20, Industrial Relations Act, 1967 whenever

they have grievances. This directly or indirectly contributes towards the increase in number of complaints at the Industrial Relations Department.

Further, the economic recession in late 1980's have resulted in large number of employees being laid down and retrenched by large and medium size companies. This has domino effects in many small and medium size enterprises which give rise to increase of number of complaints and activities at the Industrial Relations Department.

3.3 Flow chart for the claim of reinstatement process;



(Source [39])

[39] *www.jpp.mohr.gov.my*

The above flow chart clearly shows that workmen must go through conciliation proceedings first at the state level and then at the headquarters level where senior officers will try to settle the matter before the matter can be referred to the Minister who then makes the final decision whether to refer or not to refer the matter to Industrial Court for adjudication.

CHAPTER 4

Interpretation of data & statistics from industrial relations department

4.1 Claims for Reinstatement by Sector 2003-2007[40]

RAYUAN PEMULIHAN KERJA MENGIKUT SEKTOR 2003-2007
CLAIMS FOR REINSTATEMENT BY SECTOR 2003-2007

SEKTOR *SECTOR*	BILANGAN KES *NUMBER OF CASES*				
	2003	2004	2005	2006	2007
Pertanian, Pemburuan dan Perhutanan *Agriculture, Hunting and Forestry*	182	203	318	126	124
Perikanan *Fishing*	1	8	2	7	4
Perlombongan dan Pengkuarian *Mining and Quarrying*	90	65	65	46	62
Pembuatan *Manufacturing*	2,002	2,117	1,991	2,153	1,528
Bekalan Elektrik, Gas dan Air *Electricity, Gas and Water Supply*	41	44	102	67	65
Pembinaan *Contruction*	437	417	392	263	201
Perdagangan Jual Borong dan Jual Runcit, Pembaikan Kenderaan Bermotor, Motosikal dan Barangan Persendirian dan Isi Rumah *Wholesale and Retail Trade, Repair of Motor Vehicles, Motocycles and Personal and Household Goods*	773	610	741	617	602
Hotel dan Restoran *Hotel and Restaurants*	367	264	323	874	242
Pengangkutan, Penyimpanan dan Komunikasi *Transport, Storage and Communications*	613	550	529	636	495

RAYUAN PEMULIHAN KERJA MENGIKUT SEKTOR 2003-2007 (sambungan)
CLAIMS FOR REINSTATEMENT BY SECTOR 2003-2007 (continued)

SEKTOR *SECTOR*	BILANGAN KES *NUMBER OF CASES*				
	2003	2004	2005	2006	2007
Pengantaraan Kewangan *Financial Intermediation*	202	165	159	134	161
Aktiviti Hartanah, Penyewaan dan Perniagaan *Real Estate, Renting and Business Activities*	576	528	748	711	758
Pentadbiran Awam dan Pertahanan dan Keselamatan Sosial Wajib *Public Administration and Defence and Compulsory Social Security*	28	24	23	54	0
Pendidikan *Education*	123	127	138	107	95
Kesihatan dan Kerja Sosial *Health and Social Work*	66	60	89	66	89
Aktiviti Perkhidmatan Komuniti, Sosial dan Persendirian Lain *Other Community, Social and Personal Service Activities*	164	198	247	347	418
Isi Rumah Persendirian dengan Pekerja Bergaji *Private Households With Employed Persons*	1	2	5	1	0
Organisasi dan Badan-Badan di Luar Wilayah *Extra-territorial Organisations and Bodies*	0	8	3	2	2
Jumlah *Total*	5,666	5,390	5,875	6,211	4,846

[40] *www.jpp,mohr.gov.my*

As per the above Table, the claim for reinstatement by sector shows that, the manufacturing sector is where the majority of the cases are coming from. This is where majority of Malaysians are employed and working conditions as well as salaries are always an issue. The total number of claims for reinstatement has always been in the same range for the last almost 10 years.

4.2 Claims for reinstatement by nature of dismissal 2003 - 2007[41]

RAYUAN PEMULIHAN KERJA MENGIKUT JENIS PEMBUANGAN 2003-2007
CLAIMS FOR REINSTATEMENT BY NATURE OF DISMISSAL 2003-2007

JENIS PEMBUANGAN *NATURE OF DISMISSAL*	BILANGAN KES *NUMBER OF CASES*				
	2003	2004	2005	2006	2007
Salahlaku *Misconduct*	1,691	1,468	2,212	1,707	1,535
Pembuangan Terancang *Constructive Dismissal*	441	318	318	827	291
Pelanggaran Seksyen 15(2) Akta Kerja 1955* *Breach of Section 15(2) Employment Act 1955**	85	187	48	343	50
Pengenepian *Retrenchment*	1,190	898	845	1,280	918
Tidak Disahkan Ke Dalam Jawatan *Probationer*	381	199	206	146	180
Kontrak Bertempoh Tetap *Fixed Term Contract*	51	37	38	7	72
Pembuangan Berpunca dari Penindasan/Penganiayaan *Victimisation*	264	45	43	30	55
Pembuangan Kerja *Termination Simpliciter*	795	994	1,359	1,124	1,064

*Nota : Seksyen 15(2) Akta Kerja 1955 - Tidak hadir bekerja lebih daripada dua hari kerja berturut-turut tanpa kebenaran daripada majikan dan tanpa alasan yang munasabah.

(Source : Webpage of the Jabatan Perhubungan Perusahaan, Malaysia)

[41] *www.jpp.mohr.gov.my*

RAYUAN PEMULIHAN KERJA MENGIKUT JENIS PEMBUANGAN 2003-2007 (sambungan)
CLAIMS FOR REINSTATEMENT BY NATURE OF DISMISSAL 2003-2007 (continued)

JENIS PEMBUANGAN *NATURE OF DISMISSAL*	BILANGAN KES *NUMBER OF CASES*				
	2003	2004	2005	2006	2007
Dipaksa Letak Jawatan *Forced Resignation*	311	511	209	112	190
Letak Jawatan Secara Sukarela *Voluntary Resignation*	14	27	10	31	55
Kontrak Yang Mengecewakan *Frustration of Contract*	5	2	12	16	35
Sebab-sebab Kesihatan *Medical Grounds*	9	13	4	15	29
Persaraan *Retirement*	15	13	7	7	22
Lain-lain *Others*	414	678	563	566	350
Jumlah *Total*	5,666	5,390	5,874	6,211	4,846

(Source : Webpage of the Jabatan Perhubungan Perusahaan, Malaysia)

As per the above table, the majority of claims for reinstatement, mostly involve the matters pertaining to misconduct, constructive dismissal, retrenchment, probationer, victimization, termination simpliciter and forced resignation. All these matters involve points of laws and the question we have to ask ourselves are how prepared the conciliation officers at the Industrial Relations Department are in dealing with matters of such nature. Are they being properly trained, guided and have sufficient exposure in dealing with such matters? As the officers are subjected to inter departmental transfers, many of them who are new to the Industrial Relations Department will have to be properly trained before they can be allowed to be an officer at conciliation proceedings.

4.3 Claims for reinstatement by method of settlement 2003-2007[42]

RAYUAN PEMULIHAN KERJA MENGIKUT CARA PENYELESAIAN 2003-2007
CLAIMS FOR REINSTATEMENT BY METHOD OF SETTLEMENT 2003-2007

CARA PENYELESAIAN *METHOD OF SETTLEMENT*	2003	2004	2005	2006	2007
(A) SELESAI MELALUI RUNDING DAMAI *(A) RESOLVED THROUGH CONCILIATION*					
1. Pemulihan Kerja Semula *Reinstatement*	245	243	439	1,178	215
2. Dibayar Pampasan *Payment of Compensation*	1,529	1,251	1,337	1,213	1,065
Amaun Pampasan *Compensation Amount*	RM11,083,040.30	RM13,763,935.20	RM4,332,254.82	RM2,041,722.02	RM10,533,190.71
3. Rayuan Ditarik Balik *Claims Withdrawn*	842	669	809	598	484
4. Kes Ditutup (Perayu tidak hadir) *Cases Closed (Claimants absent)*	107	88	128	83	123
5. Kes Ditutup (Dipindahkan ke pejabat lain) *Cases Closed (Transfer to other office)*	15	30	38	100	81
6. Kes Ditutup (lain-lain) *Cases Closed (others)*	-	-	-	-	3
(B) LAIN-LAIN *(B) OTHERS*					
1. Dirujuk ke Mahkamah Perusahaan *Referred to Industrial Court*	1,677	4,605	3,108	2,954	1,842
2. Tidak Dirujuk ke Mahkamah Perusahaan *Not Referred to Industrial Court*	408	2,235	779	1,691	886
Jumlah *Total*	4,823	9,121	6,638	7,817	4,699

PENGENDALIAN KES RAYUAN PEMULIHAN KERJA 2003-2007
CLAIMS FOR REINSTATEMENT DEALT 2003-2007

PERKARA *PARTICULARS*			2003	2004	2005	2006	2007
Dibawa Dari Tahun Lepas *Brought Forward From Previous Year*		Bil. *No.*	8,797	9,640	5,909	5,145	3,539
Dilaporkan *Reported*		Bil. *No.*	5,666	5,390	5,874	6,211	4,846
Dikendalikan *Dealt*		Bil. *No.*	14,463	15,030	11,783	11,356	8,385
Diselesaikan *Cases Resolved*		Bil. *No.*	4,823	9,121	6,638	7,817	4,699
		Peratus *Percentage*	33.35	60.69	56.34	68.84	56.04
Baki *Balance*		Bil. *No.*	9,640	5,909	5,145	3,539	3,686
CARA PENYELESAIAN *METHOD OF SETTLEMENT*							
i. Diselesaikan Melalui Runding Damai *Resolved Through Conciliation*		Bil. *No.*	2,738	2,281	2,751	3,172	1,971
ii. Diselesaikan Melalui Laporan Yang Dikemukakan ke Y.B.Menteri Sumber Manusia *Resolved Through Report to Honourable Minister of Human Resources*	Dirujuk ke Mahkamah Perusahaan *Referred to Industrial Court*	Bil. *No.*	1,677	4,605	3,108	2,954	1,842
	Tidak Dirujuk ke Mahkamah Perusahaan *Not Referred to Industrial Court*	Bil. *No.*	408	2,235	779	1,691	886
Jumlah *Total*		Bil. *No.*	4,823	9,121	6,638	7,817	4,699

(Source : Webpage of the Jabatan Perhubungan Perusahaan, Malaysia)

[42] *www.jpp.mohr.gov.my*

The above table shows that the representations to the Industrial Relations Department have been settled through conciliation in the following manner; In the year 2003, 57% of the cases have been resolved through conciliation proceedings, whereas in the year 2004, 25% is settled, in the year 2005, 41% is settled, in the year 2006, 40% is settled and finally in the year 2007, 42% cases have been resolved. This is the pattern of the performance of Conciliation Officers at the Industrial Relations Department since 1998.

4.4 Claims for reinstatement by state 2003-2007[43]

RAYUAN PEMULIHAN KERJA MENGIKUT PEJABAT 2003-2007
CLAIMS FOR REINSTATEMENT BY OFFICE 2003-2007

PEJABAT *OFFICE*	BILANGAN KES *NUMBER OF CASE*				
	2003	2004	2005	2006	2007
Ibu Pejabat	0	993	265	2	0
Johor	307	472	415	481	291
Perak	280	275	433	229	279
Pulau Pinang	725	555	402	935	639
Negeri Sembilan	266	169	267	183	206
Kedah/Perlis	286	403	216	246	155
Kelantan	28	24	55	89	18
Terengganu	26	54	101	384	36
Pahang	88	82	73	210	123
Melaka	81	97	117	162	73
Kluang	62	70	56	52	43
Muar	50	44	63	26	41
Sabah	113	107	333	174	127
Sarawak	565	717	488	271	275
Wilayah Persekutuan/Selangor*	2,789	1,328	8	-	-
Wilayah Persekutuan*	-	-	1,043	975	909
Selangor*	-	-	1,539	1,792	1,631
Jumlah *Total*	5,666	5,390	5,874	6,211	4,846

(Source : Webpage of the Jabatan Perhubungan Perusahaan, Malaysia)

The above table shows that the majority of cases are from Wilayah Persekutuan & Selangor states as this is where the majority of learned workforce are employed and they are very much aware of their rights as an employee.

[43] *www.jpp.mohr.gov.my*

CHAPTER 5

5. CONCILIATION PROCEEDINGS

5.1 What is conciliation?

Conciliation is an expression of one the highest virtues which can be practiced – the desire to understand and be just to one another. Each time that one attempts to resolve a conflict without force, one renders to men an enormous service in leading them in the path of wisdom and of respect for themselves and for each other.[44]

Conciliation has three main features:

(a) it is a peace making process;

(b) there is a neutral third party involved (an individual or a board);

(c) the aim is to assist the parties in reducing the extent of their differences and to find an agreed and amicable solution.

Access to conciliation may be sought when the parties themselves are not able to resolve their differences or when bargaining fails. Conciliation can thus be defined as 'an extension to the bargaining process in which parties try to reconcile their differences. A third party, acting as an intermediary – independent of the two parties – seeks to bring the disputants to a point where they can reach agreement. The conciliator has no power of enforcement, and does not actively take part in the settlement process but acts as a broker, bringing people together.'

---

[44] *Meeting of minds: A way to peace through mediation (New York, McGraw-Hill, 1952)*

This definition distinguishes conciliation from mediation, in which the third party is more actively involved and attempts to suggest proposals and methods for actual resolution of the problem. It also distinguishes conciliation from arbitration in which the independent third party considers the arguments of both sides and then takes a decision binding on the parties in the dispute.

A further distinction can be made between voluntary and compulsory conciliation.

Compulsory conciliation does not mean that the whole process needs to result in an agreement. What it does mean is that some of the features of the process will be compulsory, such as the obligation of the disputing parties to attend a conciliation meeting when invited, or the prohibition of the parties to organize a strike or lock out without first attempting conciliation. The reasoning behind a compulsory conciliation is to try to bring the parties towards a cooperative rather than a conflictual attitude.

Where conciliation takes place on an entirely voluntary basis, the parties are left entirely free to accept or not accept an invitation to a conciliation meeting. The reasoning here is that there is no use trying to bring about conciliation if the parties are not really interested in it.

5.2 What qualities does a conciliator need?[45]

The conciliator has a very important role to play in promoting and maintaining industrial peace. To be an effective conciliator, a person will need both professional and personal qualities. On a professional level, there is no need for any formal qualifications as, for

[45] *Grievance and dispute settlement: an introduction, by ILO/EASMAT-Bangkok*

example, being a lawyer. The conciliator will need to have a good knowledge of the way the economy is structured, the features and institutions of the industrial relations system, the applicable laws and regulations, the organization and power of the parties, knowledge of particular industries and their weak points and some finance-related issues as well as knowledge of the negotiation process. It is of course impossible for a conciliator to know everything. Therefore a thorough preparation in relation to each specific dispute and knowledge of the facts of a particular case will be necessary. The conciliator also needs to have the ability to form judgements – not on the outcome of the dispute (that is not the task of a conciliator), but rather on question like how to proceed in a certain case or how to convey certain messages.

In terms of personal attributes, the conciliator will in the first place need to be committed to his/her job, and more specifically to the parties. Conciliation is not a 9 to 5 job and therefore the conciliator himself should be convinced of the values and importance of the job. Each conflict is unique and a challenge for the inventiveness of the conciliator. A conciliator needs to be independent and impartial and to appear and behave as such during the whole conciliation process. He or she needs to be patient, sincere, a good communicator and listener, and will need a sense for timing. He or she will also need physical and emotional stamina and the ability of self analysis. Finally it will certainly help to release some of the tension between parties if the conciliator has a good sense of humour.

5.3 What preparations are needed for conciliation?[46]

To enhance the chance of conciliation, both general and specific preparations will be needed. General preparation mean, that a conciliator must be ready at any time to intervene in a dispute. This implies that he or she must have documentation and information available, or at least must know where to find it. When conciliation is provided through an administrative unit, this general preparation is a shared responsibility of the conciliators in the unit. The information that should be available is mainly background information on the parties in general as well as on the relationship between the parties, on existing collective agreements or awards in a particular sector or industry, on regulations as well as on current trends and developments in the economy as a whole or in a particular industry.

Apart from this general readiness, the conciliator will need to prepare for the specific dispute for which his or her services are needed. The conciliator should be ready to handle any issue that may arise during the whole process. Therefore he or she will need to collect as much information as possible on the conflict itself, on its features, on the possible underlying causes of the conflict, on the facts and on the parties involved. It is important to remember that, even if through the collection of all this information the conciliator is likely to form a certain idea on the dispute, he or she should never prejudge the situation.

Before commencing the actual conciliation meeting, the conciliator assigned to handle a particular dispute will make preliminary contact with the parties. By doing so he will inform them of his or her entry into the case and – if necessary – explain them his or her

[46] *Grievance and dispute settlement: an introduction, by ILO/EASMAT-Bangkok*

role, try to acquire as much information as possible about the conflict, the parties involved and the attitudes of the parties towards the conflict, as well as establish positive and cooperative working relations. During this preliminary contact, the conciliator should be cautious to appear impartial.

5.4 Conduct of Conciliation Meeting[47]

There are two main types of conciliation meetings; joint conferences with both parties and separate meetings with only one party. The choice of the type of meeting will depend on the particular circumstances of a dispute.

One of the chief purposes of a joint conference is to set out clearly the unresolved issues that prevent the parties from reaching an agreement. Such meetings give the conciliator a good opportunity to observe the parties in their relationship with each other and to make sure that the parties clearly understand each other's point of view. The disadvantages of these meetings are that they tend to be very formal and the parties remain rigid in their ideas as well as role of adversaries. Joint conferences should be held on neutral ground e.g. the office of the conciliator.

A separate meeting may (but does not have to) take place in connection with a joint conference. On the request of the conciliator or the parties themselves, the conciliator can suspend a joint conference and meet with each of the parties separately. During this meeting he or she may obtain information which one party is not willing to give in the presence of the other party or the conciliator may offer suggestions and advice. The

[47] *Grievance and dispute settlement: an introduction, by ILO/EASMAT-Bangkok*

disadvantage of separate meetings is the possible suspicion of the absent party about what is said during this party's absence.

5..5 After the conciliation meeting[48]

Any follow up action to the conciliation process will mainly depend on whether the conciliation was successful or not. If a dispute is settled, this will be reflected in an agreement, drafted by the conciliator or by the parties, depending on national practice. When no conciliation can be reached – which will in most cases become clear when one of the parties breaks off the negotiations, the conciliator should write a conciliation report. This report will be important in case negotiations are re-opened. It will also be a good source of information for further settlement of the dispute through arbitration or adjudication. It is important to note that even if no agreement is reached, the conciliator should make it clear that the door for conciliation remains open.

[48] *Grievance and dispute settlement: an introduction, by ILO/EASMAT-Bangkok*

CHAPTER 6

6. Shortcomings of conciliation proceedings at Industrial Relations Department

6.1 Conciliation proceedings at Industrial Relations Department

In a workshop held by The Bar Council Industrial Court Practice Committee titled 'Industrial Adjudication Reforms', it conclude that the settlement through conciliation is not very successful.[49] Similar findings were done by the Malaysian Trade Union Congress (MTUC) where the Secretary General said that 'the conciliation machinery which forms an essential and integral part of the Malaysian Industrial Relations system is in need of urgent and serious attention'.[50]

The above findings show that while conciliation is still resorted to, it is not effective and satisfactory. It can be attributed to various reasons but the main reasons are that the officers at the Industrial Relations Department are subjected to inter departmental transfers and they are being transferred out soon after they have the grasp of the subject matter pertaining to trade disputes which need skill and practical training to master it. The increase on the workload in the Industrial Relations Department have put a tremendous pressure among the officers in the Industrial Relations Department and this has resulted in various finger pointing among the employers, employees as well as trade unions. The Malaysian Trade Union Congress had submitted various memorandum to the Government complaining against long delays in the disposal of cases in the Industrial Relations Department as well as Industrial Courts. There have been cases where it took more than 9 years for a case to come to an end.

---

[49] *www.malaysianbar.org.my*
[50] *www.mtuc.org.my*

Further to this, various measures have been taken by the Human Resources Ministry such as engaging judges of the High Court to preside over the Industrial Court and introducing mediation process by the presidents in the Industrial Court. This has resulted in increasing pressure among the Industrial Relations Department officers where they are expected to find solutions to the cases referred to the Industrial Relations Department.

In order to improve the process at the Industrial Relations Department, we have to analyse the effectiveness of current procedures and what can be done to further improve the conciliation proceedings at the Industrial Relations Department to reduce and alleviate the sufferings and problems faced by the employees who chose the option of referring their unfair dismissal cases to the Industrial Relations Department. There is no doubt that major reform is needed in order to make conciliation proceedings at the Industrial Relations Department more effective and efficient.

Apart from above, there is no specific period the Industrial Relations Department should conciliate between the parties although 30 days was ascribed to the Director General to reach a decision prior to 1980. In the case of *Kumpulan Guthrie Sdn Bhd v The Minister of Labour and Manpower & 2 ors.*, [51], the judge stated that;

> *"Section 20(2) of the Act was amended by Act A484/80, and came into force on 30.5.80. The effect of the amendment was the removal from that section the period of thirty days from the date of representation made under section 20(1) of the Act within which the representation should be settled. If the Director General was satisfied that the representation was unlikely to be settled within the period of 30 days, or if the representation remained unsettled at the end of the period of 30 days, the Director*

[51] *[1986] 1 CLJ 566, 571 (HC)*

General should notify the Minister accordingly. My view is that the removal of this period of 30 days is to give the parties more time to negotiate with each other, and the Director General is not bound by any period of time for the purpose of notifying the Minister. I am further of the view that notwithstanding the words ' expeditious settlement thereof' appearing in Section 20(2) of the Act, the Director General should give to the parties as much time as is reasonable so long as the Director General is satisfied that there exists a likelihood of an amicable settlement being reached by the parties. The period of negotiations between the parties, therefore, is not dictated by the Director General, but by the parties themselves. Where the parties require more time to negotiate, or where, as in the instant case, the parties had agreed to wait the result of the 3rd respondent's criminal case before resuming further negotiations, my view is that the Director General acted reasonably in granting the time requested for by the parties as long as he is satisfied that there was likelihood that the parties would reach a settlement on the dispute.'

The Client's Charter of the Industrial Relations Department[52], provides that the Department (a) will respond to each representation , complaint or trade disputes within 14 days of receipt; (b) conduct conciliation services in a fair and just manner; (c) attend to each representation or complaint received from either employer, employee or trade union.

It is noteworthy that many employers do ignore the settlement arrived at the conciliation proceedings and in this case the employees remain helpless although they can enforce in through legal means. Enforcing it through legal means will cost the employee both in terms of time and monetary damages and many employees are helpless in this case.

[52] *http://jpp.mohr.gov.my/index.php?option=com_content&task=view&id=24&Itemid=129*

6.2 Suggestions on how to improve the conciliation proceedings[53]

It is agreed that conciliation does not guarantee a settlement. However it is an essential feature of our industrial relations systems. It can assist the parties to re establish trust and respect and also it can help to prevent damage to an ongoing relationship. Based on the above, the conciliation officers must have the right skill and experience to effectively handle trade disputes. It is to be noted that there is no consistent and Standard Operating Procedure & System in place. There is certainly a need to have one in place.

There is no defined time frame for the completion of conciliation proceedings. A defined time frame is required. For example a time frame of within 3 months from the date the claimant lodged the complaint of wrongful dismissal. A period of 3 months from the date of the complaint lodged for this conciliation process is practical and realistic to be implemented and enforced. A further period of 3 months is recommended for the Minister to decide to refer the cases to the Industrial Court or otherwise. As for the Industrial Court, the time frame should be 18 months from the date of reference by the Minister for the hearing to be completed and the Award issued. This time frame will give some real meaning to the term "expeditious" in the Industrial Relations Act.

The questionable level of competencies amongst the Industrial Relations Officers is also frequently mentioned. In earlier days, the practice was that Industrial Relations Officers were seasoned and well experienced Labour Officers. This can be re-visited and re-implemented.

---

[53] *Seminar: Dismissal: Development of Industrial Jurisprudence, Review, and the way ahead*

A structured training program for Industrial relations officers incorporating a "Mentor Program" is recommended. This program should also include significant hands on exposure (a minimum period of a 6 months assignment) in the private sector for familiarization of the actual working environment.

In the long term, the claimants should be allowed the freedom of choice on his or her representative in these proceedings, subject to the competency of the chosen representative not to be used as an issue for failure to achieve desired outcome. A clearly defined list of criteria need to be established for eligibility and suitability for this purpose, including a prescribed period of actual hands on field experience or exposure e.g. a minimum of 7 years hands on field exposure and practice in people management and industrial relations.

As an immediate measure, the 1989 Industrial Relations (amendment) Act barring lawyers, consultants, advisers and others need to be reviewed with a view to repealing it and restoring the pre 1989 provision.[54]

The current scenario compels the parties to use the resources of Malaysian Employers Federation (for Employers) and Malaysian Trade Union Congress (for Employees). With only 10% membership in both this organizations, their limited resources contribute significantly to delays.

Further, the settlement between the employer and employee at the Industrial Relations Department should be registered at the Industrial Court and should be considered or given legal effect as the consent Award of the Industrial Court.

---

[54] *Adopted by a Seminar held by Malaysian Association of Human Resource Consultants*

6.3 Latest statistics from the Industrial Relations Department[55]

JABATAN PERHUBUNGAN PERUSAHAAN
DEPARTMENT OF INDUSTRIAL RELATIONS

DATA PENTING SEHINGGA SEPTEMBER 2009
KEY INDICATORS UNTIL SEPTEMBER 2009

Perkara *Subject*	Baki Dari Tahun Lepas *Balance From Previous Years*	Diterima hingga Sept 2009 *Received Until Sept 2009*	Diselesaikan *Resolved*	Baki *Balance*
Tuntutan Pengiktirafan *Claims For Recognition*	134	53	59	128
Pertikaian Perusahaan *Trade Disputes*	101	253	252	102
Rayuan Pemulihan Kerja *Claims for Reinstatement*	1288	3902	3453	1737
Piket *Pickets*	-	11	11	-
Mogok *Strikes*	-	4	4	-
Semakan Kehakiman *Judicial Reviews*	2	30	18	14
Lain-Lain Aduan *Miscellaneous Complaints*	33	86	85	34

6.4 No. of cases referred to Industrial Court (2001 – 2009)[56]

SUBJECT	YEARS								
	2001	2002	2003	2004	2005	2006	2007	2008	2009
Total number of cases carried forward	2017	2074	2098	2331	4143	3723	4566	4612	3342
Total number of cases referred	1056	1092	1085	3406	1859	2990	2346	665	647
Total number of awards handed down	1026	1081	1026	1911	2403	2332	2599	2170	1485
Total number of cases pending	1935	2098	2331	3966	3723	4566	4612	3342	2627
Total number of cases disposed	963	956	887	1788	2209	2233	2367	1980	1390

[55] *www.jpp.mohr.gov.my*
[56] *www.mp.gov.my – Industrial Court of Malaysia*

Following can be concluded from the above tables. As per the latest statistics available with the Industrial Relations Department for the year 2009 and also as per the Industrial Court statistics, there has been drastic reduction of total number of cases referred to the Industrial Court in the year 2008 and 2009. Since 1990's until the year 2007 there has been steady increase of cases referred to the Industrial Court and even though there has been delay in dispensing justice, the victimized employee will get justice done soon or later.

6.5 How does the Industrial Relations Department reduce the cases?

However, lately the Industrial Relations Department in responding to the call of the Minister of Human Resources to reduce the number of cases referred to the Industrial Court has chosen the path of forcing many employees to take whatever little the employers offer to settle the matter "amicably". The poor employee, have no other choice but to settle the matter.

The Human Resources Ministry is very proud to announce that there have been fewer cases referred to the Industrial Court in the year 2008.[57] The Industrial Relations Department, Director General stated that only 432 cases were referred to the Industrial Court since January 2008 till November 2008. This is compared to 1842 cases referred to the Industrial Court in 2007 and 2954 cases in the year 2006. It is shocking 85% drop in cases referred to the Industrial Court. All this is to fulfill the whims and fancies of newly appointed Human Resources Minister who wanted to reduce the backlog of cases in the Industrial Court. His statement says that "we are serious in wanting to increase

[57] *New Straits Times, 20 November 2008*

the number of cases solved so that those involved should only wait for a maximum of 2 years from the time the case was received".

Further analysis and research from Industrial Court website shows that only 665 cases in total including dismissal cases and other trade disputes have been referred to Industrial Court in the year 2008 and in the year 2009 only 647 cases have been referred to the Industrial Court. The total cases referred to the Industrial Court are inclusive of dismissal cases as well as other trade disputes.[58]

6.6 At what expense is this being done?

The Human Resources Minister has taken over the functions of the Industrial Court in a decisive manner by reducing referrals from 3,500 cases to a mere 500 cases. Employers would be relieved by the announcement. The moot question now is, do we need Industrial Courts or most of them if our minister continues to wield the big stick in not referring most cases to the court.

Our concern is that the Industrial Relations Act is an essential piece of social legislation to maintain and buttress industrial peace and harmony in the workplace in particular and the country as a whole. It acts as a social valve to prevent violent acts by aggrieved employees who seek justice and fairness from our Industrial Court. If such an avenue is denied then the possibility may arise where the aggrieved employee may take the law into his own hands in which event a purely industrial dispute may end up being the precursor for civil disturbance and societal chaos. The government should treat with

[58] *www.mp.gov.my*

extreme caution matters affecting the livelihood and welfare of our workforce. The said livelihood is enshrined and protected in our constitution, that is, the law of the land.

The issue of too many cases being referred should be dealt with differently by legislative or regulatory process. The minister should avoid the danger of micro-managing dismissal cases which ultimately may fly in his own face. The action undertaken by the minister would be tantamount to the home minister doing away with the Penal Code which of course is not the case.

The Human Resources Ministry should look into and understand the history of our labour legislation which hitherto by and large kept industrial peace in the country. The very basis of our labour legislation is to enable the "weak" workman to stand up to the "mighty" employer. Dismissal of whatever form should be adjudicated for which we have competent courts. This will give sufficient protection to the employees and protect welfare of the people which in turn will ensure social harmony and social justice in our country. It is time that better counsel and wisdom prevail over misguided short-term measures to overcome issues related to one's very livelihood.

What an easy way to reduce the backlog of cases in the Industrial Court? The Human Resources Ministry chose not to refer cases to Industrial Court so that they could reduce the backlog of cases in the Industrial Court. So, the pressure is on the conciliation officers at the Industrial Relations Department to take whatever step to make sure the matter is settled at the Department level. In this process who will become the victim?

Undoubtedly the employee is the one who have to face the brunt of the shortsighted and self serving policy of the Human Resource Ministry. How do they do that?

6.7 Real life experiences at the Industrial Relations Department

Following are the real life case where the short sighted and self serving policy of the Human Resources Ministry makes many employees suffers in silent.

CASE A[59]

"Over a year ago, after a traumatic episode with my former employee, I filed my case with the Industrial Relations Department to seek a measure of justice available to me as an aggrieved employee. Since then, the Industrial Relations Department has mediated in several meetings between my former employer and me. These meetings were loose, short and shallow, with the main objective being to attain some form of reconciliation or failing which, a settlement in lieu of going to court. Arguably, less attention was paid to what happened that led to the disputes, and more attention was paid to what could be the "amicable settlement".

To be precise, these meetings did not have (and probably were not intended to have) a systematic and comprehensive means of collecting and processing evidence – documentary or otherwise. The meetings also did not involve witnesses and lawyers.

After an "amicable settlement" was not reached, came a wait of almost six months where nothing happened. Earlier this month, I received a short single sentence letter

[59] *The Sun, 30 December 2008*

communicating the Human Resources Minister's decision that my case would not be referred to the Industrial Court. No reason was given at all. Calls to the Human Resources Ministry failed to reveal any further information or reasons, except that the "minister's decision is final".

That was it. Seemingly, my case was over. The Minister had played judge and jury. All I was asking for, given the facts of my case, was to be given a fair hearing in the Industrial Court. At the very least, the Minister should have considered that both sides presented arguments that clearly indicated that there was a genuine dispute. That should have given enough "benefit of doubt" to have the case referred to the Court – irrespective of whether or not this would further burden the court's case load.

Now, the next legal remedy available to me is to file a judicial review to quash and to reverse the Minister's decision. This is apparently a civil action that will essentially pit me (the aggrieved employee) against the Human Resources Ministry, or indirectly against the government. So, it is not anymore a case of the proverbial weak workman against the mighty employer, but it is now far worse.

Ironically, while I will be forced to waste more time and spend more money to try to reverse this travesty of justice, a civil court will now have to be engaged to hear my challenge against the minister's decision. So much for reducing the backlog. Imagine if every aggrieved employee in a similar situation takes the same remedial action, assuming they could afford it.

It is indicated that the number of cases referred could have dropped drastically. Does the drop in referral ratio truly reflect that justice has been fairly served to all those

adversely affected, or is it merely window dressing? The doors to getting justice done are shut just like that, and without a proper hearing in a proper court of law? What is the point of having the Industrial Relations Act and the Industrial Court?"

CASE B[60]

Employee A was hired to work for ABC Sdn. Bhd. through PA Sdn. Bhd.. The employee reported to work at ABC Sdn Bhd and reported to the superior there for 6 months. Never once this employee reported for work at PA Sdn. Bhd. At the end of 6 months a shocking news awaited the employee when she was told by ABC Sdn Bhd that her services were no longer required. ABC Sdn Bhd even gave her a letter thanking her for her services. At the same time PA Sdn Bhd did not give any duties to the affected employee.

The employee filed a representation against ABC Sdn Bhd claiming that ABC Sdn Bhd is the rightful employer of her. The matter went through the conciliation proceedings and the Industrial Relations Department and the officer in charge insisted that the employee is at fault and accept whatever the ABC Sdn Bhd is giving as compensation. Employee A insisted that the matter involves questions of law which only the Industrial Court can adjudicate. The conciliation proceedings failed and further shock awaits the employee A when she received a letter from the Minister stating that the matter is not fit to be referred to Industrial Court. The poor Employee A could not pursue the matter in the High Court due to financial constraints. At the end of the day the conciliation proceedings has done more damage than good to the poor employee.

[60] *real life case handled by the writer of this paper*

CASE C[61]

Miss A was forced to resign from company XYZ and was told that she will be paid all arrears of salaries and allowances upon submitting her resignation. Having no choice she resigned but the company failed to keep their promises of paying her salaries and allowances due to her. Miss A filed a representation under Section 20, Industrial Relations Act and waited for few months before conciliation proceedings started. The officer, instead of being an effective conciliator forced her to accept the settlement amount of RM8000.00 offered by her former employer. The employee refused to accept the said offer and insisted that the matter should be referred to the Industrial Court so that she can get justice done. The matter was delayed for another 2 years. Miss A pursued the matter persistently and finally the matter is now in the headquarters of Industrial Relations Department.

Upon enquiry of the status of her case in the headquarters, Miss A were once again approached by an Officer from the headquarters now and forced her to receive the amount of RM8000.00 and settle the matter once for all without the need to refer the matter to the Industrial Court. The employee refused it and is now in fear that her case may not be referred to Industrial Court because she is going against the advice of the relevant officer. The matter is still pending and it is interesting to see what will be the outcome.

[61] *real life case handled by the writer of this paper*

CHAPTER 7

7. Rights as an employee and remedies

Any employee who feels aggrieved over a wrong perceived to be done to him could seek remedy in the courts of the land. However, there are many limitations that stand in the way and the aggrieved person may end up not getting what he hoped for. To start with, the underlying matter that gives rise to the feeling of being aggrieved must have a factual basis. In order to exert his rights and seek relief, the aggrieved party must be able to show that a wrong has been done to him and that the party against whom he is complaining, has no justification for doing so.

A person who has his employment terminated will undoubtedly feel aggrieved. But the employer may have good reasons for asking the employee to leave. If this is the case, the employee would have no remedy. If the employee does not agree with the action taken against him, what options does he have?

7.1 The Employment Act, 1955

The above act, applied as a general rule, to all employees earning not more than RM1,500.00 per month. However, manual workers are artisans are covered regardless of earnings.

Under section 69 of the Employment Act, 1955 the Director General of Labour is empowered to enquire into any dispute between an employee and his employer in respect of wages or any other payment in case due under the terms of the contract of

service or the provisions of the said Act and to make an order for the payment of any monies deemed just.

The Director General of Labour is also empowered to confirm or set aside any decision by the employer to dismiss, downgrade or suspend any employee. Provided, however that the complaint is made within 30 days of the punishment awarded by the employer. In case of a dismissal, the Director General of Labour is only empowered to order indemnity in lieu of notice and other payments (for example Termination and Lay Off Benefits under the 1980 regulation) that the employee is entitled to as if no misconduct was committed by the employee.

A decision of the Director General of Labour is appealable as of right to the High Court. There are no costs at the Director General of Labour's level.

7.2 The Industrial Relations Act, 1967

The above Act covers all workmen employed under a contract of employment. Section 20(1) of the Act provides that;

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

If he is a member of a Union he can always seek the assistance of the Malaysian Trade Union Council (MTUC) after his employment was terminated. If he is not a member of the union, he can lodge a complaint with the Industrial Relations Department and to deal with the matter on his own under Section 20(1) of the Industrial Relations Act 1967.

For a workman to bring his case within the requirements of Section 20, he has to fulfill the following conditions;

(a) he must be a 'workman' as defined under the Industrial Relations Act, 1967

(b) he must be 'dismissed'

(c) he must make a representation in writing to be reinstated within 60 days of the dismissal to the Director General of Industrial Relations.

The agony of the employee begins, if after a long wait the employee who lodged a complaint received a letter stating the decision of the Human Resources Minister that the matter will not be referred to the Industrial Court. The poor employee will be most probably still jobless and cannot engage a lawyer. He will not receive any more letters from the Human Resources Ministry. It is because the decision not to refer the matter to the Industrial Court has already been made, so there is nothing more for the minister to say. The ball is at the complainant's feet and if he has not taken any further action, his right under the Industrial Relations Act 1967 that he may have had would have ceased to exist.

This is because access to the Industrial Court in such cases is only through reference by the Minister. A person who is aggrieved over his dismissal cannot go direct to the Industrial Court to file a claim or pursue the matter. If the minister declines to refer a complaint to the Industrial Court, the matter ends there unless the decision is

challenged. The challenge in such a case involves commencing proceedings in the High Court to seek an order of certiorari to quash the minister's decision and at the same time seek an order of Mandamus to direct the minister to refer the complaint to the Industrial Court.

This power of the minister has not always been used in the best of ways. Cases which should be referred to the Industrial Court have not been referred to, whereas cases which should not be referred to the Industrial Court, have been referred to the Court. Aggrieved individuals do not always have the financial strength or emotional determination to take on the combined resources of the corporate employer and the Human Resources Minister.

In any event, if the individual wants to challenge the decision, he has to initiate proceedings not later than six weeks from the date of the decision, unless an extension of time is obtained. If this is not done, the right to go to the Industrial Court is lost forever.

The area of law has seen much litigation involving not merely whether the claimant is a workman[62] but including whether he was dismissed[63], whether he had made his representation within the time limit[64], whether the representation was made before the dismissal took effect[65], effect of the death of claimant before conclusion of the case[66],

[62] *Industrial Court Award No 223/86*
[63] *Industrial Court Award No 12/87*
[64] *Industrial Court Award No 181/87*
[65] *Industrial Court Award No 93/87*
[66] *Industrial Court Award No 82/87*

whether he is estopped from making such a claim after accepting monies paid at time of the dismissal[67].

The flurry of activity in the courts regarding claims under this section are obviously related to the issues regarding payment of back wages and compensation in lieu of reinstatement should the decision go against the employer. Due to inconsistency in awarding back wages and compensations by the Industrial Court as well as superior Courts, in 2008 the Government amended the Industrial Relations Act, 1967 where the back wages and compensation was limited to 24 months only. Further, the common law principle of mitigation of damages has been held not to apply to Industrial cases.

The time honored principles of natural justice had for long found a warm abode in the Industrial Court until the then Supreme Court decision in the case of *Dreamland Corporation v Choong Chin Sooi & Anor*[68]. Prior to this decision, the Industrial Court award back wages to an employee from date of dismissal to date of award, if the employee was found to have been dismissed for sound reason, but without a proper inquiry (failure to adhere to natural justice). The effect of the *Dreamland* decision was that any defect in a domestic inquiry could be 'cured by the Industrial Court'. This has given the unfortunate impression to employers that they could first dismiss an employee summarily and seek to prove the reasons at the Industrial Court. The *Dreamland* decision is thus a dream come true for employers and a nightmare for employees.

---

[67] *Sivaperuman v Heah Seok Yeng Realty [1979] 1 MLJ 150*
[68] *Supreme Court Civil Appeal No 414 of 1986*

7.3 Other remedies

The right to seek damages under the contract in common law still exists but is seldom resorted to. However, it is useful for those who are not covered by the Industrial Relations Act and the Employment Act or those who have not acted within the prescribed time limits or those who wish to enforce the terms of the contract for example for liquidated damages.

Ancillary relief by way of injunctions is available for those who may wish to maintain the status quo. A workman may stop an employer from evicting him from the company quarters pending disposal of his case under section 20.

Much development of the law is the result of the inquiring minds of lawyer representing the employers and employees at both conciliation and arbitration levels. The 1989 amendments to the Industrial Relations Act have disallowed legal representations at conciliation. The effect of this may be to slow down representation at conciliation. The effect of this may be to slow down future development of the law as a majority of cases may be settled 'amicably' without either party realizing the legal and equitable rights involved.

With greater awareness of their rights and of the remedies available, the area of dismissals promises to continues to occupy the majority of the Court's time.

CHAPTER 8

CONCLUSION

The Bar Council of Malaysia has repeatedly requested the Government to set up Employment Appeal Tribunal to speedily dispose off unfair dismissal cases but to no avail. Employee will be more confident in pursuing the conciliation proceedings as the cases will not be delayed the way it is being delayed now. This will give renewed confidence among the employees as many of them are being forced into submission to the employers and Industrial Relation officers due to the worry of when or how long will these cases take to finish. He or she will settle whatever little compensation offered due to this fear of long delays.

At present, an employee an employee who has been unjustly dismissed has to make representation at the Industrial Relations Department (IRD) within 60 days in order to be reinstated. An industrial relations officer would then try to conciliate the dispute. Should this fail, it would be up to the minister to refer the case to the Industrial Court, a process which could take up to two years, and another two years for the matter to be settled.

In case of refusal by Minister to send the matter to the Industrial Court, leaving the employee to seek a review at the High Court, it could take even longer. A protracted court battle between employer and employee could take up to 10 years.

It is preferable for the Industrial relations lawyers to file their claims directly with the Industrial Court. Parties unhappy with the Industrial Court award could appeal to the (Employment Appeals) tribunal and finally, to the Court of Appeal.

The practice of going to the Industrial Relations Department and giving the minister the power to refer the matter to the Industrial Court should be done away with. There are cases filed at the IRD in 2004 and the minister refused to refer it to the Industrial Court. The judicial review application has now been fixed for 2013 at High Court in Kuala Lumpur. He said employees stood to lose from long delays if the companies were wound up or witnesses could not be located.

Any delay will be against the intent and purpose of the Industrial Relations Act 1967. The tribunal would absorb the workload of judges at the three Appellate and Special Powers Division of the High Court in Kuala Lumpur as Judicial review applications involving industrial dispute matters alone make about 20 per cent of cases registered in the three courts.

We must keep in mind that unfair dismissal cases involved the livelihood of workers and any early disposal would benefit employees. According to news reports, out of the 26 years and six months it took to dispose of Senthivelu's case, 22 years were spent in the civil courts. Considering this, the Bar Council's Industrial Court Practice Committee's call for an Employment Appeals Tribunal appears to be justified. As the legal adage goes, justice delayed is justice denied. If the current practice continues, an employee close to retirement, who was wrongfully dismissed, might never see any form of redress in his or her lifetime.

In a recent statement, the Minister of Human Resources announced that he has managed to reduce cases referred to the Industrial Court to 500 from the previous figure of 3,500.[69]

---

[69] *New Straits Times, 20 November 2008*

Whilst statistics may appear attractive and reflect his ministry's apparent efficiency, this is far from the truth as the drastic reduction has been at the expense of justice to the dismissed workman.

What avenue does the dismissed workman have now? He has to file an appeal to the High Court to reverse the decision of the minister, which cost money and time. If the High Court upholds the decision of the minister, the dismissed workman will end up paying both legal fees and cost.

He is in a 'no win' situation. Now, was that the intention of parliament - to deny justice to the dismissed workman and/or clear the backlog of cases?

Lest we forget the intention of parliament in enacting the Industrial Relations Act, let me cite what an eminent Chief Justice. His Lordship Justice Raja Azlan Shah said in the case of *Non-Metalic Mineral Products Mfg Employee's Union & Ors v South East Asia Firebricks Sdn Bhd*[70] *said:*

> *'The Act (Industrial Relations Act 1967) seeks to achieve social justice. Social justice is something more than mere legal justice. It is a social philosophy imposed on the legal system.*
>
> *'Industrial Courts and tribunals are not only not bound by the contracts of the parties, they can make new contracts and revise old contracts.*
>
> *'They are not strictly bound by the law of master and servant. Otherwise there would be no point in creating such industrial tribunals. It is to free workers from contracts and obligations that were unfair and inequitable'.*
>
> *In Hong Leong Equipment Sdn. Bhd. [1997] 1 CLJ 671, Court of Appeal, Kuala Lumpur, His Lordship, Gopal Sri Ram said:*
>
> *'Parliament has created three separate and distinct powers in respect of the subject-matter and conferred each of them upon separate authorities.*

[70] *[1976] 2 MLJ*

First, there is the conciliatory power vested in the director-general whose sole function is to mediate and attempt to settle disputes as early as possible.

'It is no part of his function to ascertain the law or the facts or to make any determination upon either. If his attempt to reconcile the parties fails, he merely notifies the minister of this fact. If he is found in any case to have done more than what the law permits, his action will be liable to be quashed on the grounds that it is ultra vires the Act.

'Second, there is power vested in the minister to refer representations made under s. 20(1). It is a power he must, by reason of the combined operation of the provisions of Arts. 5(1) and 8(1) of the federal constitution, exercise fairly.

'Third, there is the power to adjudicate upon the same representation vested in the Industrial Court which, by the terms of the Act, is enjoined to act, inter alia, according to equity and good conscience when making its award.

'The way in which the Act is constructed makes it clear that it is only the Industrial Court which is conferred with an adjudicatory function. The two preceding powers, namely, the director-general and the minister cannot therefore assume a function expressly reserved to the third. It follows that prima facie, considerations that are irrelevant to the Industrial Court's decision-making process cannot be, and are not relevant, vis-a-vis the referring authority.

'Quite apart from being a proprietary right, the right to livelihood is one of those fundamental liberties guaranteed under Part II of the Federal Constitution. Suffice to say that the expression 'life' appearing in Article 5(1) of the Federal Constitution is wide enough to encompass the right to livelihood.

'The desire of Parliament to protect the nation's work-force from the harshness of an unbending and inveterate common law and doctrines of

equity, as expressed by the passing of the Act, may thus be seen to be entirely in harmony with the terms of the supreme law of the Federation.

'The high standards of social justice so carefully established by the legislature and by the framers of the federal constitution ought not, in my judgment, to be consciously lowered by any decision of this court'.

In light of the above expressed intentions of parliament, we should ask the minister that, can the need to reduce the backlog of cases at the Industrial Court, justify non-reference? We must also not lose sight of another vital fact ie, the government has, prior to the minister taking charge of the ministry in 2008, over the last few years, increased the number of Industrial Courts to 28, so that more cases can be heard and be disposed off.

The present president of the Industrial Court, in order to expedite hearings, has made it compulsory that each chairperson hears and disposes of a certain number of cases each month and that more than one case needs to be set for hearing per day, in order to ensure that at least one matter will be heard, if another cannot proceed.

This has resulted in the courts disposing of the accumulated backlog. Matters referred as recently as in the year 2007 are presently being heard. This being the case, the minister needs to review his decision to drastically reduce references, in order to avoid injustice to the workman dismissed without just cause or excuse and to uphold the intention of parliament.

In the case of *R. Ramachandran v The Industrial Court of Malaysia*[71] case, His Lordship states that;

> *"employers can certainly afford to employ a number of lawyers and prolong litigation and thereby tiring the workers. The poor workman can ill afford a lawyer or prolong litigation because this will lead to immense hardship, suffering and exorbitant expenses."*

Hence, the conciliation proceedings should be a platform to bring two disputing parties together and if possible to find a solution. It should not be a platform to force either employer or employee to submit to the demands of the Conciliation Proceedings officers.

[71] *[1997] 1 MLJ 145*

LIST OF CASES

1. B.S.S. Kanda v The Govt. of Malaysia–(1962) 2 MLJ 169.PC
2. Dr A. Dutt v Assunta Hospital Industrial Court Award 178/79
3. Dr A. Dutt v Assunta Hospital [1981] 1 MLJ 304
4. Dedman v British Building and Engineering Appliances Ltd [1974] 1 All ER 520, 524
5. Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors (1981) 1 MLJ 238
6. Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat and Anor. [1981] 1 MLJ 238, 240
7. Goon Kwee Phoy v J & P Coats [1981] 2 MLJ 129
8. Hotel Jaya Puri v National Union of Hotel, Bar and Restaurant Workers Union [1980] 1 MLJ 109
9. Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369, 391-392
10. Hall (I.O.T) v Lorrimer [1992] 1 W.L.R. 944
11. Hong Leong Equipment Sdn Bhd v Liew Fook Chuan [1996] 1 MLJ 481,521
12. Han Chiang High School & Anor and National Union of Teachers in Independent Schools (Industrial Court Award 330 of 1990)
13. Holiday Inn, Kuching v Lee Chai Siok Elizabeth Ibid., 236
14. Inchcape Malaysia Holdings Bhd v. R.B. Gray & Anor (1985) 2 MLJ 297
15. Inchcape Malaysia Holdings Bhd v R.B. Gray & Anor[1985] 2 MLJ 297, 300
16. Industrial Court Award No 223/86
17. Industrial Court Award No 12/87
18. Industrial Court Award No 181/87

LIST OF CASES

19. Industrial Court Award No 93/87

20. Industrial Court Award No 82/87

21. James v London Borough v Greenwich [2008] IRLR 302 (CA)

22. Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd[1] [1997] 2 MLJ 685

23. Kathiravelu Ganesan v Anor v Kojasa Holdings Bhd [1997] 3 CLJ 777

24. Kumpulan Guthrie Sdn Bhd v The Minister of Labour and Manpower & 2 ors., [1986] 1 CLJ 566, 571 (HC)

25. Lee Wah Bank v National Union of Bank Employees(1981) 1 MLJ 169

26. Labour and Manpower & Anor v Wix Corp South East Asia Sdn Bhd [1980] 2 MLJ 248, 250

27. Malayan Banking Bhd v Association of Bank Officers (1988) 3 MLJ 204

28. Minister of Labour and Manpower & Anor. v Wix Corp South East Asia Sdn Bhd [1997] 1 CLJ 665;

29. Non-Metalic Mineral Products Mfg Employee's Union & Ors v South East Asia Firebricks Sdn Bhd [1976] 2 MLJ

30. Pan Global Textiles Bhd, Pulau Pinang v Ang Being Teik [2002] 1 CLJ 181 (FC)

31. R. Ramachandran v The Industrial Court of Malaysia [1997] 1 MLJ 145

32. Sibu Steel (Sarawak) Sdn Bhd v Ahmad Termizie Bujang [1996] 2 ILR 885

33. Sivaperuman v Heah Seok Yeng Realty [1979] 1 MLJ 150

34. Supreme Court Civil Appeal No 414 of 1986

35. Thein Thang Sang v United States Army Medical Research Unit [1983] 2 MLJ 49

36. V. Sinnathamboo v Minister of Labour and Manpower [1981] 1 MLJ 251, 254

LIST OF STATUTES

1. Industrial Relations Act, 1967
2. Interpretation Acts 1948 and 1967
3. The English Employment Rights Act 1996, England
4. The Employment Relations Act 2000, New Zealand

BIBLIOGRAPHY

1. Website of International labour organization, www.ilo.org
2. Website of Industrial Relations Department, www.jpp.mohr.gov.my
3. Website of Malaysian Trade Union Congress, www.mtuc.org.my
4. Website of Bar Council, Malaysia, www.malaysianbar.org.my
5. Website of Industrial Court of Malaysia, www.mp.gov.my
6. Meeting of minds: A way to peace through mediation (New York, McGraw-Hill, 1952)
7. Grievance and dispute settlement: an introduction, by ILO/EASMAT-Bangkok
8. Seminar Paper: Dismissal: Development of Industrial Jurisprudence, Review, and the way ahead.
9. A critical appraisal of the adjudication process of dismissal under the Industrial Relations Act, 1967 INSAF (2004) XXXIII No 3, 19
10. Industrial Court Awards
11. New Straits Times dated 20th November 2008
12. The Sun dated 30th December 2008
13. Industrial Relations Department's clients case files
14. Industrial Disputes Law in Malaysia by C.P. Mills