



AHRAL's EMPLOYMENT LAW ASIA 2008 : TERMINATION OF EMPLOYMENT UNDER MALAYSIAN LAW

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OUTLINE OF ISSUES :

- (A) Statutory Protection for Employees / Workman : *A Brief Overview;***
- (B) Termination of Employment : *Contractual v. Industrial Perspectives;***
- (C) Mutual Termination : *Mutual / Voluntary Separation ;***
- (D) 'Constructive Dismissal' : *The Concept and Consequences;***



(A) STATUTORY PROTECTION FOR EMPLOYEES/ WORKMAN : A *Brief Overview*

- **Industrial Relations Act 1967 :**
SYKT KENDERAAN MELAYU v. TRANSPORT WORKERS UNION [1995] 2 MLJ 317, AC:-

"It is beyond doubt that the Act is a piece of beneficent social legislation by which Parliament intends the prevention and speedy resolution of disputes between employers and their workmen. In other words the object of Parliament enacting the law is to promote industrial harmony."

- **Employment Act 1955 :** to be given a wide and liberal construction.
NEOH CHOO EE & CO SDN BHD V. VASALAMANY GOVINDASAMY [2004] 3 CLJ 321, AC:

"The Act, like the Industrial Relations Act 1967, is a piece of beneficial social legislation by which Parliament intends the prevention and peaceful and speedy resolution of disputes between employers and their workmen. In other words the object is to promote industrial harmony. The Act is therefore legislation which ex necessitae rei must receive a liberal interpretation."



Where the employee falls under the **Employment Act 1955 (EA)** :

s.7. More favorable conditions of service under EA to prevail

Subject to s.7A, any term or condition of a contract of service or of an agreement...which provides a term or condition of service which is less favorable to an employee than a term or condition of service prescribed by this Act or any regulations, order or other subsidiary legislation whatsoever made thereunder **shall be VOID** and of no effect to that extent and the more favorable provisions of this Act...shall be substituted therefor.

s.7A. Validity of any term or condition more favorable

Subject to any express prohibition under this Act..., nothing in section 7 shall be construed as preventing an employer and an employee from agreeing to any term or condition of service under which an employee is employed, or shall render invalid any term of condition of service stipulated in any CA or in any award of the IC, **which is more favorable to the employee** than the provisions of this Act...

s.7B. Removal of doubt on matters not provided for in EA

For the removal of doubt it is hereby declared that if no provision is made in respect of any matter under this Act..., it shall not be construed as preventing such matter from being provided for in a contract of service, or from being negotiated between an employer and an employee.



EMPLOYEE'S RECOURSE FOR (ALLEGED) BREACH OF CONTRACT :-

- **COMPLAINT UNDER EA 1955** (procedure as set out in s.70) in 2 instances:-

s.69(1) complaint : for breach of any term of the contract of service/ provisions of EA / provisions of Wages Council Act 1947

(NB: Employee must fall within EA 1955, s.2(1) and Schedule 1)

s.69B complaint : for breach of any term of the contract of service (where wages exceed RM1,500 but does not exceed RM5,000)

(NB 1: only Parts XV and XVI applies

2: s.69C on claims for indemnity after amendment w.e.f 5.10.2000)

- **CIVIL ACTION** (for damages, compensation for breach of contract)

- **UNDER IRA 1967**

representation under **s.20(1)** (constructive dismissal)
where union involved:-

- 'trade dispute' reference under **s.26(1)** or **(2)**;
- non-compliance complaint under **s.56**;



(B) TERMINATION OF EMPLOYMENT : *Contractual v. Industrial Perspectives;*

General rule: contract of service not specifically enforceable, but 2 exceptions: **MOHD AHMAD v. YDP JEMPOL** [1997] 3 CLJ 135, FC.

➤ UNDER ARTICLE 132 FEDERAL CONSTITUTION

➤ UNDER IRA 1967

- 4 stage statutory process : *Conciliatory, Reporting, Reference and Adjudicatory*
- Whether representation made within ambit of IRA 1967;
KATHIRAVELU GANESAN v. KOJASA HLDGS BHD [1997] 2 MLJ 685
CHONG KIM SANG v. METATRADE SDN BHD [2004] 2 CLJ 439: AC
- Industrial Court has no extra-territorial jurisdiction :-
KATHIRAVELU GANESAN v. KOJASA HLDGS BHD [1997] 2 MLJ 685
MUSCATINE HLDGS v. CHUAH CHYE HIN [2005] 2 ILR 78 : IC
- Non-application of principles of contract and/or common law/equity
THILAGAVATHY v. MENG SING GLASS [1997] 3 MLJ 735: HC
KUMPULAN PERANGSAN v. ZAID HJ MOHD [1997] 1 MLJ 789, SC;
TELEKOM MALAYSIA v. KRISHNAN KUTTY [2002] 3 CLJ 314: AC



- Award Of *reinstatement, backwages* and *prospective wages*:-

R.RAMA CHANDRAN v. INDUSTRIAL COURT [1997] 1 CLJ 147, FC;
TELEKOM MALAYSIA BHD v. RAMLI AKIM [2008] 1 CLJ 440, AC;

- Difficulties with dismissal under Civil v. Industrial Law
FUNG KEONG RUBBER v. LEE ENG KIAT [1981] 1 MLJ 228, FC;
NIK OMAR v. BANK SIMPANAN NASIONAL [2005] 6 MLJ 616, AC;

TERMINATION UNDER E.A.1955

- The **limitations** on the DG Labour's statutory powers ;
 - can only order payment of "*such sum of money as he deems just without limitation of the amount*" : s.69(1)
 - blanket prohibition under s.69A where there is an IR dispute;
 - limited remedy under s.69(3) where dismissal under s.14(1) set aside;

Execution of DG Labour's Orders;

- enforce as a judgment of the Sessions or Magistrates Court : s.75
- prohibitory order may be issued against 3rd party : s.73 (NB: distinction from a regular 'garnishee' order)



(C) MUTUAL TERMINATION : Mutual / Voluntary Separation

- Non-application of contract and/or common law principles in Industrial jurisprudence;
JOHARI AHMAD v. LIM PENG SIEW [1998] 1 LNS 407: HC
TELEKOM MALAYSIA v. KRISHNAN KUTTY [2002] 3 CLJ 314: AC
- Difficulties in ensuring finality of settlement/payment
BEST ENGINEERING v. BEH SUN SUN [2005] 3 ILR 91, IC;



(D) CONSTRUCTIVE DIMSISAL : Concept and Consequences

- Concept of constructive dismissal:
WONG CHEE HONG v. CATHAY ORGANISATION [1988] 1 CLJ 145: SC
QUAH SWEE KOON v. SIME DARBY [2001] 1 CLJ 9:AC
- Special considerations for constructive dismissal;
SOUTHERN BANK BHD v. NG KENG LIAN [2002] 5 MLJ 553: HC
- Burden to prove dismissal on the Workman;
MILAN AUTO SDN BHD v. WONG SEH YEN [1995] 4 CLJ 449: FC

END