



DRAFTING AND NEGOTIATING COMMERCIAL CONTRACTS CONFERENCE:

"FUNDAMENTALS OF DRAFTING EMPLOYMENT CONTRACTS FOR EXECUTIVE STAFF"

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OUTLINE OF ISSUES :

(A) Particular aspects pertaining to Malaysian Employment and Industrial Law : *Employment Act 1955 (E.A. 1955) and Industrial Relations Act 1967 (IRA 1967).*

(B) Some particular terms/conditions of employment : *Efficacy and Significance.*

- Termination Clauses**
- Resignation Clauses & Notice**
- Probation Clauses**
- Transfer Clauses**
- Confidentiality / Non-Compete Clauses**

(C) Case Studies : *Some considerations for the Company.*



(A). PARTICULAR ASPECTS : E.A 1955 AND IRA 1967

1. Beyond doubt that **E.A. 1955** has, at its heart, the protection of employees who fall within the ambit of the Act. The Court of Appeal, in **NEOH CHOO EE & CO SDN BHD V. VASALAMANY GOVINDASAMY** [2004] 3 CLJ 321, left little doubt of this:-

"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."

2. Similarly, the **IRA 1967** is also a piece of social beneficent legislation :

"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."



(B) PARTICULAR TERMS : **EFFICACY & SIGNIFICANCE**

- **Termination Clauses: 2 effects in contract law**
 - **Compliance is to ensure contract properly terminated; and**
 - **That notice period duly complied with.**
- However, under Malaysian Industrial law, such termination may only be effective in bringing an end to the **Employment Contract, NOT** to the **Employment Relationship** : **s.20 IRA 1967** requires “**just cause and excuse**”.
- Where there is **termination *simpliciter*** (i.e without just cause and excuse), such termination is susceptible to being ‘undone’ by the Industrial Court:
- **s.20(1) IRA 1967** allows a workman to make a representation where he considers that he has been “***dismissed without just cause or excuse***”. The Federal Court in **DR. A. DUTT v. ASSUNTA HOSPITAL** [1981] 1 MLJ 304, per Chang Min Tat FCJ, held:-

“It further follows that on a proper interpretation of the relevant sections of the Act, there is no material distinction between dismissal and termination. Either must be with just cause or excuse to justifiable; otherwise the Industrial Court may make an award.”



- The right not to be dismissed without just cause and excuse has been recognized in Malaysia as a fundamental constitutional right : **HONG LEONG EQUIPMENT v. LIEW FOOK CHUAN** [1996] 1 MLJ 481 AC, per Sri Ram JCA:-

"Whether a particular right is a fundamental liberty is a question that has to be dealt with on a case by case basis. This case concerned the right to livelihood which was one of the fundamental liberties guaranteed by Pt II of the Federal Constitution."

- breaches of the Employment Contract may be adjudicated either by the Civil Courts or the 'Labour Court' (i.e inquiry by the DG Labour) ;
- Right to lodge a complaint under **Section 69(1) E.A 1955** (right of E.A Employee to lodge complaint);

NB: (1) **Section 69B(1)** (extends to Employees with salaries not exceeding RM 5,000);

(2) **Section 69C** (right of Employer to also lodge complaint for indemnity for termination without due notice)

- In either of the above recourses, the Company's exposure is monetary.
But see: **NIK OMAR B. NIK MAN v. BSN** [2005] 6 MLJ 616



Resignation Clauses: Allows employee to bring an end to contract.

- Save where specifically required, common law does not require Employer's acceptance of resignation before resignation can be effective:
- However, during notice period, contract of employment is still valid and subsisting : so to consider issue of gardening leave, disciplinary proceedings, constructive dismissal etc.

Probation Clauses: Allows Employer to subject employees to period of 'trial' before confirmation.

- Probationers are nonetheless regarded as "*workmen*" under s.2 IRA 1967 and may lodge representation for wrongful dismissal; ***KHALIAH BTE ABBAS V. PESAKA CAPITAL CORP SDN BHD*** [1997] 1 MLJ 376.
- However, test for probationers is really: Whether Employee has performed functions to satisfaction of Employer, arbitrariness or capriciousness aside? ***HARTALEGA SDN BHD V. SHAMSUL HISHAM*** [2004] 3 MLJ 117.



Transfer Clauses:

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Confidentiality and Non-Compete Clauses:

- Probationers are nonetheless regarded as “*workmen*” under s.2 IRA 1967 and may lodge representation for wrongful dismissal; ***KHALIAH BTE ABBAS V. PESAKA CAPITAL CORP SDN BHD*** [1997] 1 MLJ 376.
- However, test for probationers is really: Whether Employee has performed functions to satisfaction of Employer, arbitrariness or capriciousness aside? ***HARTALEGA SDN BHD V. SHAMSUL HISHAM*** [2004] 3 MLJ 117.



(C). CASE STUDIES: **CONSIDERATIONS FOR THE COMPANY**

1. Beyond doubt that **E.A. 1955** has, at its heart, the protection of employees who fall within the ambit of the Act. The Court of Appeal, in **NEOH CHOO EE & CO SDN BHD V. VASALAMANY GOVINDASAMY** [2004] 3 CLJ 321, left little doubt of this:-

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(B) Protecting the Company's interest : *Role of Corporate Counsel.*

(1) To ensure termination by the Company is effected for *valid reasons* i.e :-

- *Misconduct***
- *Poor Performance***
- *Redundancy***
- *Mutual Separation***

(2) To ensure due compliance with legal requirement, procedures or practices e.g :-

- *due disciplinary process for Misconduct;***
- *sufficient warnings, objective assessment for Poor Performance***
- *LIFO, Code of Conduct, Borang PK for Redundancy***

***WONG YUEN HOCK v. SYKT HONG LEONG ASSURANCE* [1995] 2 MLJ 753,FC;**

"The Industrial Court is an independent statutory body capable of reaching a fair result by fair means on all matters referred to it. Therefore, if there had been a breach of natural justice by the employer at the initial stage, it could be cured at the rehearing by the Industrial Court".



(3) Ensuring Confidentiality and Integrity of Domestic Process(es) :-

- need for suspension pending investigation/inquiry ?
- notice / communication with general body of employees ; what to say and what NOT to say
- efficacy of anonymous 'whistleblowing' provisions
- guarding against witness intimidation, interference or reprisals

(4) The Adduction and Preservation of Evidence :-

- ensuring that only *admissable* evidence forms basis of decision;
- ensuring that material evidence is preserved in an admissable form e.g Statutory Declaration, Audio-Visual-Digital storage Media;

(5) The Termination itself :-

- objectively sustainable based on the evidence;
- Notice of Termination / Dismissal accurately worded;
- Employee is given his dues, not MORE, not LESS.



(C) Issues requiring Care and Caution : *Pitfalls for the Company.*

- A typical Section 20(1) IRA representation comprises of four (4) statutory levels ; *Conciliatory Reporting, Referral and Adjudicatory levels.*
KATHIRAVELU GANESAN v. KOJASA HLDGS BHD [1997] 2 MLJ 685
- Reconciliation meeting: golden opportunity to raise whether the s.20 representation is *valid in law*?
- Minister's Reference : 40 day period for Judicial Review
KATHIRAVELU GANESAN v. KOJASA HLDGS BHD [1997] 2 MLJ 685:
- Adjudication by Industrial Court : s.30(5) mandates that award be with 'equity and good conscience'.
CHAN HOCK LIONG v. ASSOC MOTOR INDUSTRIES [2007] 5 CLJ 298
BUT see:
MUSCATINE HLDGS v. CHUAH CHYE HIN [2005] 2 ILR 78 : IC
RANBAXY v. RAVINDRA KUMAR [2005] 1 ILR 702: IC



- In this context, the Company's exposure may be just monetary i.e an order to pay backwages and/or compensation in lieu of reinstatement :

DR. JAMES ALFRED v. KOPERASI SERBAGUNA [2001] 3 CLJ 541, FC;
TELEKOM MALAYSIA BHD v. RAMLI AKIM [2008] 1 CLJ 440, AC,

- The Industrial Court may also order reinstatement of the Workman to his previous position.

CHAN HOCK LIONG v. ASSOC MOTOR INDUSTRIES [2007] 5 CLJ 298