A Critical Appraisal of the Adjudication Process of Dismissal Under the Industrial Relations Act, 1967

By
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1 INTRODUCTION

An employee who alleges that he has been unfairly dismissed from employment may have his grievance litigated in the Industrial Court pursuant to section 20 of the Industrial Relations Act, 1967 (hereinafter referred to as 'the IRA') or in the ordinary court of law for common law wrongful dismissal. This article will only focus on adjudication process of dismissal without just cause or excuse pursuant to the IRA. It will be noted in the later part of this article, that the majority of cases referred to the Industrial Relations Department (hereinafter referred to as 'the IRD') for conciliation and to the Industrial Court for adjudication are cases involving dismissal without just cause or excuse, which have increased over the years because, apart from the privatisation exercised by the government in the late 80's, the workers have become more aware of their rights than previously.

This article will analyse the adjudication process of dismissal cases to determine among others, whether the current working of the system is effective in enforcing a worker's security of tenure in employment. The writer will attempt to give a bird's-eye view from the very start of the dismissal and the stages that a worker will have to undergo before his representation could be referred to and adjudicated in the Industrial Court. The discussion is necessary to show all the trials and tribulations that a worker has to go through, which in the opinion of the writer requires attention and reform.

The Malaysian Trade Union Congress (MTUC), for example, had submitted a memorandum to the Prime Minister, YAB Datuk Seri Abdullah

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Ahmad Badawi, expressing among others, their dissatisfaction of the existing process of adjudication, where there has been long delay in the disposal of cases, of which some of the cases have taken many years to be settled, due to the serious backlog of cases[1]. Further to the above, the discussion will also include various proposals recently made by the Minister of Human Resources, in a bid to overcome backlog of cases in the Industrial Court, such as engaging judges of the High Court to preside over the Industrial Court system[2], introducing mediation process in the Industrial Court[3] and referring certain dismissal cases to the civil courts[4], among others.

2 ADJUDICATION PROCESS OF DISMISSAL WITHOUT JUST CAUSE OR EXCUSE: THE PRELIMINARY CONSIDERATION

A workman in the private sector[5], whether or not he is a member of a trade union, if dismissed from employment without just cause or excuse by his employer, may make representation in writing to the Director General of the IRD[6] in order to be reinstated into his former employment. Section 20(1) of the

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[1] A memorandum containing the resolutions was handed to Prime Minister, YAB Datuk Seri Abdullah Ahmad Badawi in Putrajaya on 19 Jan 2004. See also New Straits Times, 2004, 10 January.

[2] 'Industrial Court to be overhauled' New Straits Times, 7 April 2004 p. 4.

[3] 'Mediation first for Industrial Court cases' The Star, 20 May 2004 at p. 12.

[4] New Straits Times, 28 May 2004 at p. 9.

[5] Section 52 of the IRA provides that, among others, the conciliation and representation on dismissals are not applicable to Government service or to any service of any authority or to any workman employed by them. Public servants or employees of a statutory body, if dismissed unfairly, may challenge the dismissal in the High Court. The remedy sought by the worker under the above circumstances is a declaration that his dismissal was invalid, null and void. If the order is granted, the dismissal is nullified and the worker is reinstated into his former position as if the dismissal had never taken place.

[6] The IRD since its establishment in 1958 has been one of the many organisations under the Ministry of Human Resources. The Director General of Industrial Relations, who is responsible to the Minister of Human Resources, heads the Department. At the headquarters in Kuala Lumpur, the Director General is assisted by the Director of each of the four Divisions, namely Planning & Policy Studies, Recognition & Trade Dispute, Conciliation (Reinstatement) and Industrial Harmony. The Department has ten branches located in the state capitals of Peninsular Malaysia (except for the state of Perlis), each headed by a State Director of Industrial Relations. In addition, two sub-offices in the districts of the state of Johore are headed by Assistant Directors. In Peninsular Malaysia, there are 58 officers and 57 supporting staffs in the Department. Industrial relations matters in the states of Sabah and Sarawak however, are administered by the respective State Directors of Labour. (Source: Industrial Relations Department)

IRA requires that where a workman is dismissed without just cause or excuse, he must make his representation in writing, which must be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.

There are however no set formalities for the workman to adopt, nor is he expected to make a written submission to present a grievance. All that is required is that his representation must be in writing to the Director General of the IRD. The representation will normally state the following; (a) his and his former employer's name and address; (b) his occupation; (c) the date of his appointment and the date of his dismissal; (c) the reasons for the dismissal (if any); (d) whether or not he is a member of a union; and (e) the remedy he is seeking is reinstatement;. Together with the letter, the aggrieved worker may enclose copies of all relevant documents.

There are however, two important considerations that must be addressed, (i) the limitation period to make the representation under section 20(1) of the IRA; and (ii) in his representation, the claimant must seek to be reinstated into the position held immediately before the dismissal.

(i) The limitation period to make representation

It is important that the representation should be made not later than sixty days from the moment the workman considers himself to have been dismissed without just cause or excuse[7]. If 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. 'An objective assessment of the particular case will disclose the point of time at which the workman had by word or conduct considered himself as dismissed'[8]. Section 54(1)(a) of the Interpretation Acts 1948 and 1967 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'.

[7] The 60 days time limit under the IRA was substituted by Act A718 of 1989, which came into force on the 10th February 1989.

[8] Per Gopal Sri Ram J.C.A. in *Ang Beng Teik v Pan Global Textile Bhd., Penang* [1996] 3 MLJ 137 (CA).

The underlying rationale of the time limit are twofold; firstly, to bring the impending application to the attention of the employer so that the dispute could be resolved expeditiously, and secondly, to allow the workman to obtain a cheap and speedy remedy to be reinstated into his former position as if no dismissal had taken place. If however, there was no time-frame to make the representation under section 20(1) of the IRA, it would certainly place the employer in a difficult position if claims for reinstatement could be made months or even years after the dismissal[9]. As rightly noted by Muhammad Azmi J. in *V Sinnathamboo v Minister of Labour and Manpower*[10], the '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 s.20(1). Such state of affairs would certainly not help in promoting industrial peace in this country'[11].

The sixty days limitation period is therefore mandatory. Section 20(1A) of the IRA provides that the Director General shall not entertain any representations under subsection (1) unless such representations are filed within sixty days of the dismissal. Where a workman fails to refer the representation within the aforesaid period, it goes to the powers of the Director General to hear the complaint. If there is a delay of even one day, the Director General will cease to have the power to entertain the representation. It does not matter whether the employer consents for the dispute to be submitted after the expiry of the aforesaid period[12]. Lord Denning MR in *Dedman v British Building and Engineering Applicances Ltd.*[13] while referring to the 28 days period for the filing of a dismissal in the tribunal under the former Industrial Relations Act, 1971 stated that:

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[9] See, for example, *Fung Keong Rubber Manufacturing (M) Sdn. Bhd.v Lee Eng Kiat and Anor*. [1981] 1 MLJ 238, 240.

[10] [1981] 1 MLJ 251, 254.

[11] In *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia and Anor*. [1995] 3 MLJ 369, 387, Gopal Sri Ram JCA noted that the IRA 'is a piece of beneficent social legislation by which Parliament intends the prevention and speedy resolution of disputes between employers and their workmen'.

[12] See, for example, *Pan Global Textiles Bhd. Pulau Pinang v Ang Beng Teik* [2002] 1 CLJ 181 (FC); *Malaysian Airline System v Sim Kooi Soon* [2001] 2 ILR 498.

[13] [1974] 1 All ER 520, 524.

> '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 extent the time...'

It may be argued that to deny a person from enforcing his security of tenure in employment merely for the failure to submit the grievance within the period specified, can lead to miscarriage of justice, since the case is decided upon a barren technicality, and not upon its substantial merits and equities. It may be further argued that section 30(5) of the IRA requires the Industrial Court to act in accordance with equity and good conscience, and the substantial merits of the case without regard to technicalities and legal form. Hence, it would be contrary to equity and good conscience, and repugnant to justice to deny anyone the right of access to justice for purely technical procedural reasons.

It is submitted that this is the requirement of the law which is to be given effect, and so cannot be abrogated by invoking equity and good conscience. The Industrial Court in *Ladang Johor Labis and Plantation Des Terres Rouhes v Muniande a/l Sennasamy*[14] while enforcing the limitation requirement under the IRA, stated that although being 'a Court of equity and good conscience, this is a fitting case where equity has to follow the law'.

It is however, very unfortunate that in Malaysia, unlike in other common law countries, there is no room to extent the limitation period, or to present the grievance outside the limitation period by invoking exceptional circumstances. In this regard, it would be useful to examine the position in other jurisdictions. The writer will refer to the position in England and New Zealand where there are provisions in their respective legislation to invoke exceptional circumstances to extent the limitation period.

[14] [1994] 1 IBL 399, 401.

For example, the English Employment Rights Act 1996, section 112 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 grievance to the Tribunal before the end of the limitation period.

Similarly, in New Zealand, the Employment Relations Act 2000, section 114(1) 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 came 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.

Subsection 3 of section 114 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 hard and fast 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 traumatised 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 authorised 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[15] or the lack of knowledge of employees' rights[16] has been held not to constitute exceptional circumstances.

In the light of the approaches in the above jurisdictions, the writer submits that while the limitation period is mandatory, it is suggested that the legislature might have overlooked instances of 'exceptional circumstances', which do occur in our everyday life. This omission has left the Director General of Industrial Relations with no jurisdiction to handle the representation referred to it after the expiration of the 60 days period.

It is therefore pertinent that the legislature, in all fairness and justice, consider incorporating into section 20(1A) a proviso for leave to submit the representation after the expiration of that period on grounds of exceptional circumstances. The power to enlarge the limitation period may be vested with the Industrial Court. The writer therefore proposes that the following clause to be inserted into the IRA;

> '(1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he must submit his representation in writing to the Industrial Court within the period of 60 days beginning with the date on which the action alleged to amount to dismissal without just cause or excuse occurred or comes to the notice of the workman, whichever is the later.
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> (2) Where the workman fails to submit the representation within the period specified in para (1) above, he may apply to the Industrial Court for leave to submit the representation after the expiration

[15] See, for example, *Trevelyans (Birmingham) Ltd. v Norton* [1991] ICR 488; *Papparis v Charles Fulton and Co.Ltd.* [1981] IRLR 104 (incorrect advice from Solicitor); *Croydon Health Authority v Jaufurally* [1986] ICR 4; *Syed v Ford Motor Co. Ltd.* [1979] IRLR 335; *Times Newspapers Ltd. v O'Regan* [1977] IRLR 101 (Advice from Union Representatives); *Hammond v Haigh Castle and Co. Ltd.* [1973] 2 All ER 289 (Advice from a professional body); *Reiley v Tesco Stores Ltd.* [1980] ICR 323; [1980] IRLR (CA) (Advice from Citizens Advice Bureau). However, reliance of advice from official sources may be a good ground, see *Rybak v Jean Sorelle Ltd.* [1991] ICR 127.

[16] See, for example, *Thomson v Thomson* [1992] 2 ERNZ 84.

of that period.

(3) Where, on an application under para (2) above, the Industrial Court, after giving the employer the opportunity to be heard, - (a) is satisfied the delay in submitting the representation under para (1) above was occasioned by exceptional circumstances; and (b) considers it just to do so, - the Industrial Court may grant leave accordingly, subject to such conditions (if any) as it thinks fit'.

The inclusion of such a clause is not to suggest an inclusion of leniency into this provision, but more importantly to give the workman a chance to explain why the representation was not brought within the aforesaid period. If the reasons are considered exceptional, the Industrial Court may extend the time-frame under the IRA and entertain the complaint.

(ii) The claimant in his representation must pray for reinstatement

The distinctive feature of section 20(1) of the IRA is the provision enabling an unfairly dismissed employee to pray for reinstatement into his former position before the grievance can be adjudicated. Whether or not reinstatement will be awarded depends on whether it is practicable under the circumstances of each individual case for such order to be complied by the employer.

(a) Action abates with the death of the claimant. Will an action for dismissal without just cause or excuse continues to subsist on the death of the claimant before the case is adjudicated, or before the award is handed down and whether his heirs or legal representatives can continue the proceedings on behalf of the claimant? It is pertinent to note that on this issues there is no provision in the Industrial Relations Act 1967, or in the Industrial Court Rules 1967. It may however, be inferred from section 20(1) of the IRA where the representation for dismissal without just cause or excuse is only in respect of reinstatement. Where the claimant dies during the pendency of such an application, the primary consideration of reinstatement is extinguished because the Industrial Court cannot reinstate a dead workman and the Court cannot recognise a person other than a workman.

Thus, the maxim *actio personalis moritur cum persona* - the action abates with the death of the claimant, applies and it does not survive to the legal representative or administrator of the estate of the deceased workman. The former Federal Court in the *Thein Thang Sang v. United States Army Medical Research Unit*[17] 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…'. Therefore, in the absence of a specific provision under the IRA, the Court is in no position to accept any substitution or representation of a deceased party by any other person or party.

(b) Claimant failed to plead reinstatement or change his plea to monetary compensation. Another related question to be considered is will the Industrial Court ceases to have jurisdiction to adjudicate the grievance when the claimant, in his representation, does not desire reinstatement, or where he initially desired reinstatement, changes his plea for compensation in lieu of reinstatement. On this question the courts are divided of their views, where in some cases, the courts have held that once reinstatement is no longer pleaded, the Industrial Court ceases to have any jurisdiction. While in other cases, it has been held that the omission of the claimant to ask for reinstatement did not preclude the Industrial Court from hearing and determining the case.

For example, in *Holiday Inn, Kuching v Lee Chai Siok Elizabeth*[18], the claimant, who initially prayed for reinstatement pursuant to section 20(1A) of the IRA, changed her plea and opted for compensation in lieu of reinstatement because she had found gainful employment elsewhere after her dismissal. The High Court noted that the remedy of an aggrieved workman under the IRA is reinstatement, therefore, once reinstatement is no longer sought, the Court ceases to have jurisdiction. From the above, the claimant must at all time maintain that he desires reinstatement before his case may be adjudicated under section 20 of the IRA.

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[17] [1983] 2 MLJ 49. See also *Sistem Penerbangan Malaysia v Rozalia Omar* [1992] 2 ILR 128 and *Puan Elizabeth Thein Nee Lee Geok Choo and United States Army Medical Research Union* [1981] 1 ILR 257.

[18] Ibid., 236.

However, in *The Borneo Post Sdn. Bhd. v. Margaret Wong Kee Sieng*[19], the High Court held that the omission of the claimant to ask for reinstatement at the stage of pleadings did not preclude the Industrial Court from hearing and determining the case. Denis Ong J. stated:

> 'Whether or not reinstatement must be expressly prayed for in the statement of the case is a point of procedure. The omission in the statement of the case to state it as a specific relief does not affect the jurisdiction of the Industrial Court to hear and determine the case on the merits...The Industrial Court derives its jurisdiction from the order of reference by the minister made under s. 20(3) of Act 177 and which such court must exercise...'

The Industrial Court is also divided on this issue. In *Selaco Aluminium Bhd. v Razali Mohamed and Ors.*[20]; *Kewangan Usaha Bersatu Bhd. v Mohammad Hatta Rosli*[21]*; Syarikat Sanyo Sales and Services Sdn. Bhd. v Foo Lee Jin*[22]*; Sungai Pedu Estate v Sha'ban Ramli*[23] and *Mara Shipyard and Engineering (Terengganu) Sdn. Bhd. v Hussain Ab Rahman* [24], it was held that once reinstatement is no longer applied for, the Industrial Court ceases to have jurisdiction to make an award and there is no basis for awarding compensation in lieu of reinstatement.

However, in *Sibu Steel (Sarawak) Sdn. Bhd. v Ahmad Termizie Bujang*[25]; *Stamford College v Leslie Dolores Swanson*[26], and in *Academia Sdn. Bhd. v Devarajan VSD Panicker*[27] the Court noted that it has jurisdiction to deal with the case before it, notwithstanding the claimant's statement in Court that he no longer wishes for reinstatement.

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[19] High Court in Sabah and Sarawak at Kuching O.M. No. KG. 4 of 1994/I; [2001] 8 CLJ 758 (HC).
[20] [1999] 1 ILR 375 .
[21] [1994] 1 ILR 170.
[22] [1995] 1 ILR 293.
[23] [2001] 1 ILR 704.
[24] [2003] 3 ILR 177.
[25] [1996] 2 ILR 885.
[26] [1997] 1 ILR 152, 162.
[27] [2003] 3 ILR 279.

Recently, the Court of Appeal in *Malayan Banking Bhd. v Mohd Bahari bin Mohd Jamli @ Mohd Jamal*[28], had the opportunity to express its views on the above matter. The Court had to consider whether the respondent's claim for reinstatement under s.20(1) of the IRA could be entertained by the Industrial Court given the fact that s.56 of the Banking and Financial Institutions Act 1989 (Act 372) prohibited the appellant from employing a bankrupt. The Court upheld the decision of the High Court where *Holiday Inn, Kuching's* case was distinguished from the present case. It was stated that in *Holiday Inn, Kuching* the prayer for reinstatement was abandoned, leaving only a claim for damages. In the present case, the prayer for reinstatement still subsisted, even though the Industrial Court could only award compensation, if successful. Having said that, Justice Abdul Hamid Mohamad JCA observed: 'We would however like to make it clear that we do not in this appeal give any view whether *Holiday Inn, Kuching* was rightly decided or not'[29].

The issue is therefore left unsettled. The writer submits that the approach set out by the High Court in *The Borneo Post Sdn. Bhd. v. Margaret Wong Kee Sieng* is desirable given the fact that there is delay in the disposal of dismissal cases, partly because the Court is overburdened with a backlog of cases and partly, because of unnecessary delay in the hearings caused by prolonged litigation.

This state of affairs has placed workers in considerable difficulty, as they might well have to wait several years to be heard on their representation to be reinstated by the Court. In the meantime, the claimant might have obtained employment elsewhere and settled into his new employment conformably. Thus, it would not be realistic to expect the claimant to maintain the same enthusiasm to return to his former employment, which he had when he first made his representation for reinstatement to the Director General of the IRD soon after his dismissal.

It may be noted that a worker who does not want reinstatement for various reasons, is very likely to tell an untruth and insist on reinstatement for the

[28] [2003] 4 MLJ 432 (CA).
[29] Ibid., at p. 439.

Industrial Court to adjudicate the dispute. The Industrial Court in *Sibu Steel (Sarawak) Sdn. Bhd. v Ahmad Termizie Bujang*[30] noted:

> '…[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'[31].

The writer is of the view that s. 20(1) of the IRA must receive a liberal interpretation with the aim of preserving good industrial relations and fair dealings. Therefore, the true construction of the above section should be that where representation is referred to the Director General of the IRD, he is to ensure that the claimant, in his written representation, is praying for reinstatement. If the claimant is praying for other than reinstatement, the Director General will not be legally bound to entertain such representation or take effective steps to settle the representation. However, when the representation has been referred to the Industrial Court by the Minister pursuant to s.20(3) of the IRA, failure to pray for reinstatement in the statement of case should not affect the jurisdiction of the Industrial Court to hear and determine the case on its merits because the Court derives its jurisdiction from the order of the reference by the Minister[32].

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[30] [1996] 2 ILR 885.

[31] Ibid., at 891-892.

[32] Where the conciliation before the Director-General fails to result in an amicable settlement, he shall notify the Minister of Human Resources and Manpower pursuant to section 20(2) of the IRA. Upon receiving the notification, the Minister may if he thinks fit, refer the representation to the court for an award.

3 PROCESS OF ADJUDICATION OF DISMISSAL CASES UNDER SECTION 20 OF THE IRA

Having considered the above preliminary issues, the following discussion will focus on the adjudication process of dismissal cases. A workman's representations under section 20(1) of the IRA for dismissal without just cause or excuse must be lodged with the IRD of the locality where he resides. The adjudication of the representations will have to pass different levels, namely (i) the conciliatory level i.e where the Director General of the IRD seeks to conciliate over the dispute; (ii) the reporting level i.e. where the Director General reports to the Minister after finding the dispute irreconcilable; (iii) the referral level i.e where the Minister decides whether or not to refer the dispute to the Industrial Court, and (iv) the adjudicatory level. It would be worthwhile reproducing the commentary by Gopal Sri Ram JCA in *Kathiravelu Ganesan & Anor. v Kojasa Holdings Bhd.* [33]:

> '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 s. 20(1) of the Act. Consequently, there is no question of there being any wider jurisdiction at this stage.
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> 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 certiorari proceedings. See, *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. Again, there is no wider jurisdiction.
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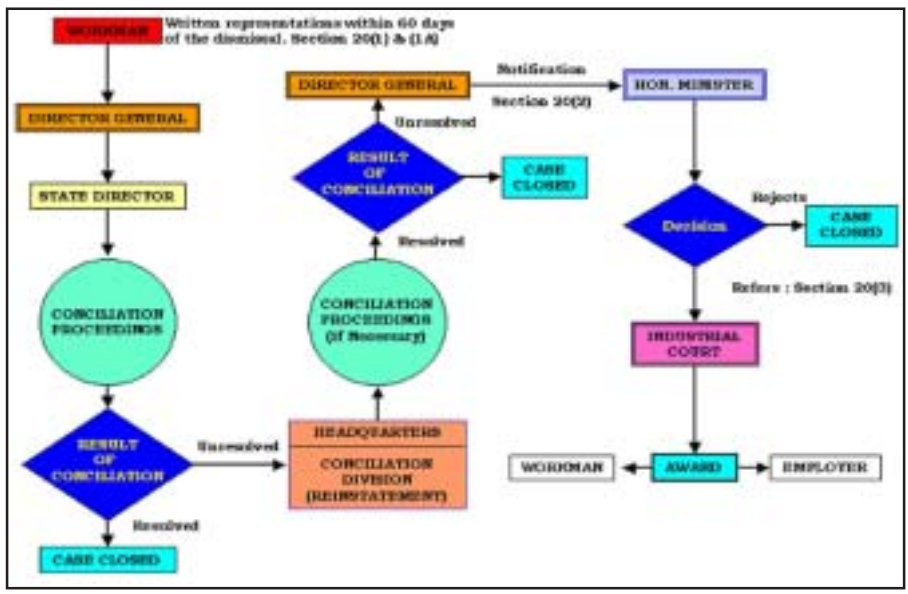
> Third, the referral level. When the Minister receives notification from the Director-General that the dispute cannot be settled, he must decide whether to refer it to the Industrial Court. He is not to refer all disputes to the Industrial Court. The question he must

[33] [1997] 3 CLJ 777 (SC).

> 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. This is called the 'Hashim Yeop test'. See, *Minister of Labour, Malaysia v. Lie Seng Fatt* [1997] 1 CLJ 665; *Hong Leong Equipment Sdn. Bhd. v Liew Fook Chuan* [1996] 1 MLJ 481, 514. All that is required to call for an exercise of power by the Minister is the existence of a notification that a trade dispute - as defined by the Act, which is the sense in which that expression is employed in this judgment - cannot be settled. There is therefore no question of any wider jurisdiction existing at this stage.
>
> But the act of the Minister making the reference has, as will be seen in a moment, jurisdictional consequences. The decision to refer or not to refer a dispute is therefore a separate and distinct act that may be questioned in judicial review proceedings.
>
> 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. The Industrial Court is therefore empowered to take cognisance of a trade dispute and adjudicate upon it only when the Minister makes a reference. In other words, it is the reference that constitutes threshold jurisdiction'.

The above may be further illustrated with reference to the following diagram that sets out the procedure on the adjudication under section 20(1) of the IRA:

ADJUDICATION OF DISMISSAL CASES UNDER SECTION 20 OF THE IRA: ITS PROCEDURES



(Source: The Industrial Relations Department)

As noted from the above diagram, all cases involving dismissal from employment will be referred to the IRD before they can be referred to the Industrial Court. Table A and B below further provides that statistic of the nature of the dismissal and number of cases referred to the various IRD in Malaysia respectively, for conciliation.

TABLE A: CLAIMS FOR REINSTATEMENT BY NATURE OF DISMISSAL 1997-2003

NATURE OF DISMISSAL	NUMBER OF CASES						
	1997	1998	1999	2000	2001	2002	2003
MISCONDUCT			2,035	1,743	1,519		
CONSTRUCTIVE DISMISSAL			478	426	400		
BREACH OF SECTION 15(2) EMPLOYMENT ACT			113	65	53		
RETRENCHMENT			1,165	974	1,403		
PROBATIONER			279	199	283		
FIXED TERM CONTRACT			75	39	81		

VICTIMISATION			166	100	117		
TERMINATION SIMPLICITER			408	736	1,244		
FORCED RESIGNATION			156	233	248		
VOLUNTARY RESIGNATION					1		
OTHERS			494	263	153		
TOTAL	3,524	8,819	5,369	4,778	5,502	6,429	5,663

(Source: Industrial Relations Department)

TABLE B: CLAIMS FOR REINSTATEMENT BY OFFICE 1997-2003

PEJABAT	NUMBER OF CASES						
	1997	1998	1999	2000	2001	2002	2003
IBU PEJABAT	6	483	15	0	0	0	0
WILAYAH PERSEKUTUAN/ SELANGOR	1,599	3,704	2,452	2,419	2,815	2,934	2,789
JOHOR	234	393	380	249	319	379	307
PERAK	250	599	296	352	380	327	280
PULAU PINANG	300	777	447	412	486	628	723
NEGERI SEMBILAN	152	259	143	136	126	163	266
KEDAH/PERLIS	107	322	210	140	184	188	285
KELANTAN	66	119	68	55	128	74	28
TERENGGANU	38	104	41	65	55	22	26
PAHANG	86	81	62	86	72	97	88
MELAKA	87	185	125	74	147	92	81
KLUANG	85	55	95	38	81	121	62
MUAR	23	47	37	43	53	95	50
SABAH	38	808	105	136	125	692	113
SARAWAK	453	883	893	573	531	617	565
JUMLAH/TOTAL	3,524	8,819	5,369	4,778	5,502	6,429	5,663

(Source: Industrial Relations Department)

What is apparent from Table B above is that Wilayah Persekutuan/Selangor has the largest number of cases referred to the IRD.

The conciliation process in the IRD

Upon receiving the representation from the workman, the IRD will invite both the employer and workman for a conciliation meeting, either jointly or separately. Conciliation means intervention by a third party who attempts to mediate between the disputing parties. The two parties would get together to work out a solution to the matter in dispute and the third party is the Director General of the IRD or his authorised officer who can intervene to help in the settlement of the dispute.

At the conciliation proceedings, only the parties and their authorised agents are allowed. However, an advocate, adviser, or consultant cannot represent the parties to the dispute. In the event that one of the disputing parties does not attend the conciliation meeting, the meeting will be adjourned to another date and if the party again fails to attend, the conciliator will draw inference that that party desires no settlement.

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. It is understood that he cannot mediate in the conciliation of a dispute in the manner adopted by the courts. In other words, the conciliator will act not in a judicial capacity, but in a purely administrative capacity.

His task is essentially to convene the parties to resolve their differences, to find points of common interest and defuse tension. He will convene meetings between the disputing parties, 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, both the Industrial Court and civil courts, so that the parties are aware of their rights and liabilities. With that advice, it is expected that they would be able to resolve their differences and come to an amicable settlement.

The parties however, retain the right to say whether they do or do not accept any suggested settlement. He will continue to offer advice and suggestions throughout the process. He will not take side of either party to the dispute and remains impartial at all times; neither do he make decisions on the

merits of the case or recommend the acceptance of any possible solution. It is up to the parties concerned to reach a final agreement on any proposed settlement.

In *Minister of Labour and Manpower & Anor. v Wix Corp. South East Asia Sdn. Bhd.* [34], the former Federal Court stated, in relation to conciliation proceedings;

> '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 settle the dispute themselves. It is not a forum for discussing rights and the law. The Director-General or his representative 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

[34] [1980] 2 MLJ 248, 250 (FC).

> 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'.

Where the parties amicably arrive at a settlement, a memorandum setting out the terms of the settlement is drawn up and signed by both 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. The parties to the settlement will be barred from denying the agreed terms by a Writ of Certiorari.

If, however, the conciliator is unable to arrive at an amicable settlement, he will then submit a report of the dispute to the Minister of Human Resources, who will then decide whether the case merits reference to the Industrial Court[35]. 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.

It must be note that proceedings before the Director General are held on a 'without prejudice' basis[36]. Section 54(2) of the IRA provides that no evidence

[35] The conciliator merely notifies the Minister that there is no likelihood of settlement but he need not submit a complete report of the circumstances leading to there being no settlement.

[36] According to Lindley LJ in *Walker v Wilsher* [1889] 23 QBD 335 at 337, 'without prejudice' 'mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted, a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one'. Section 23 of the Evidence Act 1950 is concerned with communication either oral or written that pass between parties to a civil dispute with a view to settling their dispute under the provision of the 'without prejudice' privilege.

shall be given of any proceeding before the Director General under section 20(2) other than a written statement in relation thereto agreed to and signed by the parties to the reference. Therefore, the Court would not be concerned with what transpired at the conciliation proceeding, and where there is no settlement, the Court need only concern itself with the facts of the case. The exclusion is 'to avoid prejudice in the mind of the Industrial Court against either party'[37]. This exclusion has been extended to all proceedings including in the ordinary courts, who are the final arbiter on questions of law[38].

The writer is of the view that the process of conciliation in the settlement of disputes between parties is of great importance, especially in today's context where the alternative dispute resolution process such as conciliation and mediation has become popular, and frequently resorted to, compared to ordinary court litigation which incurs high cost of litigation apart form the inordinate delay in the disposal of the cases. Although the conciliation proceeding does not guarantee a settlement, nevertheless, it is a very positive method of resolving disputes speedily and inexpensively, unlike seeking redress in the civil courts as noted above.

Table C below provides the statistics of the method of settlement by the IRD form 1998 to 2000. It also includes the unresolved cases in the IRD that has been referred to the Minister for his consideration and referral to the Industrial Court for adjudication.

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[37] Per Harun J. in *Wix Corp South East Asia Sdn. Bhd. v Minister for Labour and Manpower and Ors.* [1980] 1 MLJ 224, 226 (HC).

[38]See, for example, *Wix Corp South East Asia Sdn. Bhd. v Minister for Labour and Manpower and Ors* [1980] 2 MLJ 248. 250 (FC). See also *Kuasatek (M) Sdn. Bhd. v Rahman bin Uda Itam* [1999] 5 MLJ 385 (HC).

TABLE C: METHOD OF SETTLEMENT IN THE IRD FORM 1998 TO 2000

METHOD OF SETTLEMENT	1998	1999	2000
Reinstatement	396	263	257
Compensation Paid	3,085	2,040	1,484
Amount (RM)	22,428,575.00	14,344,950.00	10,872,772.60
Case Withdrawn	1,346	939	756
Case Closed (Claimant Absent)	176	104	93
Others			
Reference to Industrial Court	886	1,419	1,235
No Merit For Reference	778	368	167
Total	6,667	5,133	3,992

(Source: Webpage of the Kementerian Sumber Manusia, Malaysia (http://www.mohr.gov.my)

From the above Table, almost half the number of cases referred to the IRD is resolved through conciliation proceedings. For example, in the year 2000, out of the 3,992 cases referred to the IRD, 1741 or 43.6% of the cases were amicably settled, of these, in 257 (6.4%) cases, reinstatement awarded, and in 1,484 (37.1%) cases, monetary compensation for loss of employment awarded. 849 (21.26%) cases were closed, and from this 93 (2.3%) cases were closed because the claimant was absent at the conciliation proceedings and 756 (18.9%) cases were closed because the parties withdrew their cases. Further to the above, 1,235 (30.9%) cases were referred to the Industrial Court for adjudication while 167 (4.18%) cases were not referred because there was no merit for reference.

The demerits of conciliation in the IRD

The Bar Council Industrial Court Practice Committee in a workshop entitled 'Industrial Adjudication Reforms' noted that the settlement through conciliation has not been very successful[39]. The Malaysian Trade Union Congress (MTUC) in their Triennial Delegates Conference Report made a similar comment. Its secretary, G. Rajasekaran, stated that the 'conciliation machinery which forms

[39] Workshop organised by the Bar Council Industrial Court Practice Committee entitled 'Industrial Adjudication Reforms' held at the Bar Council Auditorium on the 11th May 2002.

an essential and integral part of the Malaysian Industrial Relations system is in need of urgent and serious attention'.

As from the above commentary, it is noted that while conciliation is still resorted to, it is however, not entirely effective and satisfactory. The ineffectiveness of the conciliation process has been attributed partly to the fact that the conciliation officers of the IRD who are civil servants, are subject to inter departmental transfers, and partly because of the mounting number of labour disputes filed in the IRD and with the shortage of the conciliation officers.

In relation to the former, it must be admitted that the industrial relationship is 'comparable with matrimonial relationship in that what matters between the parties is not who is right but what is right for their harmonious relationship to continue'[40]. The conciliation process therefore is a fine art of assisting both parties to be flexible in the approach to their differences and the skill of conciliation is developed through years of experience. The conciliator should have the requisite skill and experience for expeditious settlement of the representation and this could be acquired if they are permanently appointed for that purposes.

In relation to the latter, currently, there is a backlogs of more than 5000 cases pending conciliation in the IRD. The longer the parties are at a distance, the more difficult it is to bring them together. The Ministry of Human Resources and Manpower had recently, requested additional conciliation officers from the Public Services Department. According to the Minister, YB Datuk Dr. Fong Chan Onn, 'we give importance to the amicable settlement of industrial disputes because this will help reduce the workload of the Industrial Court'[41]. To ease the workload in the IRD, retired staffs of the Department are engaged on contractual basis[42]. The IRD has also resorted hiring human resources consultants as private conciliators to handle the industrial relations disputes[43].

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[40] K.Somasundram, 'Settlement of Trade Dispute' [1981] 1 M.L.J. lxxiv, at p. lxxxvii.
[41] See The Sun, 2001, 25 July.
[42] See New Straits Times, 2001, 18 July. See also The Star, 2004, 17 February.
[43] See New Straits Times, 2003, 14 May.

There are other drawbacks that require immediate attention, and this includes:

(i) When a dispute is brought to the notice of the Director General, and the parties are invited to a discussion, often, the employers - the small time industrialists and businessmen - tend to ignore the notice sent by the officers. The possible reasons could be either that they are ignorant of the importance of attending such a discussion, or that they are not aware that the IRD has been empowered to step in and conciliate the grievance of an employee brought to its notice;

(ii) There is no specific period within which the Director General or his authorised officer should conciliate between the parties, although prior to 1980, 30 days was ascribed to the Director General to reach a decision[44]. In *Kumpulan Guthrie Sdn. Bhd. v The Minister of Labour and Manpower & 2 Ors.*[45] , Eusoff Chin J stated:

> ' 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 30 days, or if the representation remained unsettled at the end of the period of 30 days, the Director 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,

[44] See Industrial Relations (Amendment) Act 1980 (Act 484).
[45] [1986] 1 CLJ 566, 571 (HC).

> 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 IRD however, provides that in 'fostering positive and harmonious relations between employers, employees and their trade unions with the view to maintain a healthy investment climate, and to ensure the well being of employees, hereby pledge to:- (a) attend to each representation or complaint received from employers or employees or trade unions; (b) respond to each representation or complaint within 14 days of receipt; (c) conduct conciliation services in a fair and just manner.

(iii) Many employers seem to ignore the settlement arrived at through conciliation before the Director General. The employee remains helpless if the settlement is ignored, although it is possible to enforce it through legal means. This approach is however not favourable to workers generally because it involves further cost to them.

The writer reiterates that while conciliation does not guarantee a settlement, it is an essential feature of our industrial relations, a very positive method of resolving disputes without the need to use a more formal process. Conciliation can assist parties to re-establish trust and respect, and it can help to prevent damage to an ongoing relationship. Based on the foregoing, the writer submits that the conciliators should have the necessary experience and skill to effectively handle trade disputes and this would only be possible if their appointment in the IRD is made permanent and not subject to transfer to other departments. In short, if their appointment is as conciliators, they should remain so throughout their tenure to enable them to obtain the requisite experience.

Furthermore, the conciliation among the disputing parties should be done

as early as possible, and there should be a fixed period for conciliation which may only be extended in cases where the conciliator considers that a settlement is very likely within a short additional timeframe. It is further suggested that the settlement arrived at in conciliation proceeding should be registered in the Industrial Court and thereafter be deemed as the consent award of the Court. If however, no settlement is reached, the Director General is to notify the Minister, who may then decide whether to refer the representation to the Industrial Court.

4 DISCRETION OF THE MINISTER TO REFER DISMISSAL CASES TO THE INDUSTRIAL COURT

Unlike in an ordinary civil court, an aggrieved worker cannot directly invoke the jurisdiction of the Industrial Court to adjudicate his grievances[46]. The Court only derives its jurisdiction from the reference of the dispute by the Minister of Human Resources. The law does not require the Minister to refer every matter to the Industrial Court. Once the Minister has made a reference to the Industrial Court, the Court cannot decline jurisdiction unless there are any jurisdictional defects in the reference[47].

The Minister has a very subjective discretion which could not be easily impugned or questioned by the Court. It may be obvious that there is a dispute of facts between parties, but s.20(3) of the IRA however, provides that 'the Minister may, if he thinks fit, refer the representation to the Court for an award'. The subjective formulation of the provision shows that it is for the Minister to be satisfied upon considering the facts that were made available during the conciliation proceedings, disclosing serious questions of fact or law that requires adjudication[48].

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[46] Reference from the Minister to the Industrial Court is the source of the jurisdiction of the Court for a claim for dismissal without just cause and excuse. See, for example, *Kurnia Insurance (Malaysia) Bhd. v Clara Tai Saw Lan and Anor.* [2000] 2 All MR 1694, 1703 (HC).

[47] In *Kesatuan Pekerja-pekerja Kenderaan Sri Jaya v The Industrial Court and Ors.* [1970] 1 MLJ 78, it was stated that once the Minister referred the dispute to the Industrial Court, 'the Court is at once invested with jurisdiction and is obliged to decide one way or another'. The same principle was also stated in *Assunta Hospital v Dr. A. Dutt* [1981] 1 MLJ 115; *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn. Bhd. and Anor.* [1995] 2 MLJ 753, 762.

[48] See, for example, *Hong Leong Equipment Sdn. Bhd. v Liew Fook Chuan and Anor* [1996] 1 MLJ 481, 519 (CA).

There is no express statutory duty either in the IRA or the Rules made thereunder that requires the Minister to give reasons for the course of action that he took. The Supreme Court has repeatedly re-affirmed this stand[49]. An application for judicial review may lie when the Minister, in exercising of his discretion under s. 20(3) of the IRA, declines to refer the representation to the Industrial Court for an award. In the same vein, the Minister's discretion in referring the representation to the Industrial Court may also be subject to judicial review[50].

Where an application is referred to the High Court for a Writ of Certiorari and Mandamus irrespective of whether the Minister exercised his discretion correctly under section 20(3), the Court will usually rely on the affidavit filed by the Minister. The affidavit will only contain the fact that the Minister had considered all the relevant facts surrounding the circumstances leading to the complaint made by the applicant to the Director General. These reasons are insufficient to justify his refusal to refer the dispute to the Court. The Court of Appeal in *Hong Leong Equipment Sdn. Bhd. v Liew Fook Chuan*[51] however, required that if the Minister decided not to refer the dispute to the Industrial Court, he should give reasons for his decision, because a worker's right to livelihood is involved. If he gives no reasons, or gives inadequate reasons, it is open to the court to infer that the Minster had no good reason for the decision he made.

Recently, however, the Federal Court in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [52] - a case dealing with the cancellation of the entry permit into the state of Sabah - held that although the current trend requires decision-makers to give reasons which are consistent with increased openness in matters of government and administration, there is no general duty universally imposed on them. The Court concluded that whether or not the

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[49] See, for example, *Minister of Labour, Malaysia v National Union of Journalists Malaysia and Anor Appeal* [1991] 1 MLJ 24 (SC); *Minister of Labour, Malaysia v Chan Meng Yuen and Anor Appeal* [1992] 2 MLJ 337 (SC).

[50] See, for example, *Exxon Chemical (Malaysia) Sdn. Bhd. v Menteri Sumber Manusia, Malaysia & Ors.* [2004] 1 CLJ 451 (CA)

[51] [1996] 1 MLJ 481.

[52] [2002] 4 CLJ 105 (FC).

decision-maker is required to give reasons for the decision would proceed on a case-by-case basis.

Despite the above decision in *Sugumar Balakrishnan's* case, there are many authorities where the courts have repeatedly stated that the Minister ought to exercise his discretion sparingly without any improper motive and not to take into account extraneous or irrelevant matters[53]. 'So long as the Minister exercises his discretion without improper motive, the exercise of discretion must not be interfered by the court, unless he has misdirected himself in law, or had taken into account irrelevant matters, or had not taken into consideration relevant matters or his decision militates against the object of the statute'[54]. In other words, the Minister's discretion under section 20(3) of the IRA may be questioned by certiorari when he acted *ultra vires*, unfairly or unjustly, or where there were flaws in his decision-making process[55]. The Federal Court, in *The Minister for Human Resources v Thong Chin Yoong and anor.*,[56] reaffirmed the above stand.

It follows that where there is a challenge by way of certiorari of the exercise of the discretion by the Minister under section 20(3) of the IRA, the High Court will 'undertake a meticulous examination of the facts that were made available to the Minister. If the examination reveals that the representations made under section 20(1) are neither perverse or frivolous, nor vexatious, or if it raised serious questions of fact or law calling for adjudication, a decision not to refer is liable to be quashed by an order of certiorari'[57]. For example, where the dispute raises questions of law, the proper forum to decide on this is the Industrial Court, and not the Minister[58]. If however, the representation is clearly

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[53] See, for example, *Michael Lee Fook Wah v Minister of Human Resources* [1998] 1 MLJ 305 (CA); *National Union of Hotel, Bar and Restaurant Workers v Minister of Labour and Manpower* [1980] 2 MLJ 189, 190 (FC); *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9, 10 (SC).

[54] See, for example, *Minister of Labour Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9, 12 (SC).

[55] See, for example, *Minister of Labour v Sanjiv Oberoi* [1990] 1 MLJ 112, 113(SC).

[56] [2001] 3 CLJ 933, 940 (FC).

[57] Per Gopal Sri Ram JCA in *Hong Leong Equipment Sdn. Bhd. v Liew Fook Chuan and Anor.* [1996] 1 MLJ 481, 519 (CA).

[58] See, for example, *Minister for Human Recources v Thong Chin Yeong* [1999] 3 MLJ 257, 260-261 (CA).

trivial, frivolous or vexations, his refusal to refer the representation to the Industrial Court will not be interfered. The court must however, 'be vigilant and resist any temptation to convert the jurisdiction of the court to review, into a reconsideration on the merits as if it is an appeal'[59].

As noted from the above, the Minister in exercising the discretion under section 20(3) of the IRA will filter out any vexatious or frivolous cases, but many have suggested that the Minister 'should cease to be a conduit to refer unresolved disputes to the Industrial Court'[60]. The Malaysian Trade Union Congress (MTUC)[61] and the Bar Council Industrial Court Practice Committee[62] have suggested that if the workman's representation under s.20(1) of the IRA is not resolved within 6 months of its reference to the IRD, it should automatically be referred to the Industrial Court.

The Malaysian Employer's Federation (MEF) however, opposed the above suggestion. According to them, the current practice of referring dismissal cases to the Industrial Court at the discretion of the Minister, besides vetting out frivolous and vexations cases, will not overburden the Industrial Court. Instead, they are of the view that the conciliation process before the IRD should be improved to ensure cases are disposed within 6 months[63].

The Minister of Human Resources and Manpower is also not receptive of the suggestion by MTUC and Bar Council Industrial Court Practice Committee. According to the Minister, YB Datuk Dr. Fong Chan Onn, an automatic reference of cases to the Court will affect the conciliation where parties would feel no urgency or pressure for a settlement. The resulting consequence would be that it would only clog up the Industrial Court with backlog of cases[64]. In other words, the automatic reference would only shift

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[59] Per Shaik Daud JCA in *Michael Lee Fook Wah v Minister of Human Resources Malaysia* [1998] 1 MLJ 305,311 (CA).

[60] See B. Lobo 'Industrial Relations Act 1967: Evaluation of the Industrial Court in Industrial Relations' {1986} 1 C.L.J. 149, 152; and Bar Council Industrial Court Practice Committee 'Industrial Adjudication Reforms' supra at footnote 39.

[61] The Star, Friday, 2003. 16 May.

[62] New Straits Times, 2003. 2 June.

[63] New Straits Times, 2003. 31 May.

[64] New Straits Times, 2003, 22 May; and New Straits Times, 2003, 8 June.

the backlog from one system to another. Instead, he wants the Industrial Court to settle the cases referred to it within 6 months[65]. The Bar Council Industrial Court Practice Committee expressed reservation over the Minster's suggestion, given the fact that there is serious backlog of cases in the Industrial Court[66]. Apart from the above, the Ministry is also contemplating a guideline of the dismissal cases that ought not to be referred to the Industrial Court, for example, where a workman committed a criminal act such as criminal breach of trust[67].

The writer is supportive of the idea for an automatic reference of dismissal cases to the Industrial Court when the IRD failed to bring the parties to an amicable settlement. This is because the Minister's reference of the representation under section 20(1) of the IRA to the Industrial Court is merely procedural in bringing the dispute to the court[68]. In *Hong Leong Equipment Sdn. Bhd. v Liew Fook Huan and Anor.*[69], Gopal Sri Ram JCA stated that:

> '…It cannot be gainsaid that Parliament intended to elevate the status of a workman as defined in the Act from the weak and subordinate position assigned to him by the common law to a much stronger position. The legislature has willed that the relationship of employer and workman as resting on a mere consensual basis that is capable of terminating by the employer at will with the meagre consequence of paying the hapless workman a *paltry sum* as damages should be altered in favour of the workman. It has accordingly provided for security of tenure and equated the right to be engaged in gainful employment to a *proprietary right* which may not be forfeited save, and except, for just cause or excuse…'

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[65] New Straits Times, 2003, 5 June.
[66] New Straits Times, 2003. 6 June.
[67] New Straits Times. 2003, 8 July.
[68] Although the Act did not prescribe the time limit to make a decision to refer, or not to refer, the dispute to the Industrial Court, s.108 of the Interpretation Acts 1948 and 1967 (consolidated and revised 1989) however, requires the Minister to act promptly and expeditiously.
[69] [1996] 1 MLJ 481, 509-510 (CA). See also *Ang Beng Teik v Pan Global Textile Bhd., Penang* [1996] 4 CLJ 313, 323 (CA); *Malayan Banking Bhd. v Mohd Bahari bin Mohd Jamli @ Mohd Jamal* (unreported) (O.M. No. R1-25- 134-94 (High Court Kuala Lumpur) (Abdul Kadir Sulaiman J.) *Tetracon Engineering Sdn. Bhd. v Abdul Latiff Chek Mat* [1997] 1 ILR 93.

As from the above passage, a worker should have a right to believe that their security of tenure in employment can only be brought to an end with reasonable justification and not subject to discretionary acts of the employers, as prevalent at common law. What the courts have been insisting by adopting the concept 'property right' is that a worker has interest proprietary in nature in the continuation of his employment where dismissed from employment can only be effective save and except for just cause or excuse[70]. If there is a complaint against the employer for unfair dismissal or where there has been victimisation or unfair labour practice or violation of the principle of natural justice, or where the decision to dismiss was baseless or perverse, the proper forum to deal with this is the Industrial Court.

It is noted that in other jurisdictions, for example in England[71], Canada[72], New Zealand[73] and Australia[74], an aggrieved workman who believes that his dismissal was unfair or unjustifiable, may refer his grievance directly to the tribunal or court for adjudication. The proper forum to filter out frivolous cases is the court or the tribunal that will exercise its power only in plain and obvious cases and only where it can be clearly seen that the claim is on the face of it obviously unsustainable.

5 ADJUDICATION OF DISMISSAL CASES IN THE INDUSTRIAL COURT

The Industrial Court - established pursuant to Part VII of the IRA - is a government agency under the Ministry of Human Resources and Manpower with its headquarters in Kuala Lumpur and four other divisions around the country[75]. The Court is a quasi-judicial tribunal adjudicating trade disputes

[70] P. Davies and M. Freedland (eds.), *Labour Law: Text and Material* 2nd ed. (London: Weidenfield and Nicolson, 1981) 428.
[71] See Employment Rights Act 1996, s.112.
[72] See Canadian labour Code 1985, s. 242.
[73] See Employment Relations Act 2000, s. 156.
[74] See Workplace Relations Act 1996, s.170CE and s.170CFA.
[75] There are several divisions of the Industrial Court throughout the country namely, Northern Region (Penang); Central Region (Ipoh, Perak); Southern Region (Johor Bharu) and East Malaysia (Sabah/Sarawak). It is the policy of the government to establish divisions for the convenience of the parties. Therefore, a case has to be instituted in the fair and appropriate venue. To have a case transferred from one division of the Court to another, the Court will consider the financial

involving workers in the private sector[76]. Unlike an ordinary court of law, whose functions are purely declaratory of the laws enacted by Parliament or upholding the doctrine of freedom of contract, the Industrial Court is unfettered by any of the traditional judicial processes in the sense that the Court is not subject to technical and legal considerations peculiar in the civil courts. Its primary objective is to provide speedy, fair and just resolutions to differences between parties to contracts of employment. The underlying objective of its establishment was aptly noted by the promoter of the Industrial Relations Bill, the then Minister of Labour, the late Tuan V. Manickavasagam when he stated in the *Dewan Rakyat*, that it 'is to expedite the settlement of disputes with considerations of equity and good conscience'[77].

(a) The composition of the Industrial Court

The adjudicatiory functions of the Industrial Court have been vested with the President and Chairmen, either sitting alone, or with equal panels representing employers and workmen. The President is the head of the organisation, and he is responsible for all the functions and activities of the Court. He hears and determines disputes relating to the interpretation, variation and non-compliance of awards or collective agreements or cases relating to references to the High Court on questions of law, and cases relating to writ of certiorari. The Registrar, who is also the Chief Administrator of the Court, assists the President[78].

Apart from the President, there are currently 20 Chairmen in several divisions of the court. They are entrusted among others, to adjudicate dismissal cases

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capacities of the parties by asking the following question; 'who will be better able to absorb the financial hardship from the hearing being held in their non-preferred venue'. See *JC Chang (Pte) Ltd. v. Chow Kok Leong* [2000] 3 ILR 1.

[76] This article will not include employees in the public sector whose application will be referred to the High Court for a declaration to nullify the dismissal. Nor will it include the unlawful termination under the Employment Act 1955, which is heard before the Director-General of Labour or his subordinate officers.

[77] National Assembly Malaysia, 1967 Debate on Industrial Relations Bill, *Penyata Resmi Dewan Rakyat* 26 June 1967, 672 at p. 700.

[78] The Registrar's responsibility includes matters relating to administration, services, personnel and finance. He is also in charge of confirming cases for mention and hearing. The Deputy Registrar and five Assistant Registrars assist the Registrar.

and cases of industrial disputes on terms and conditions of employment under section 26 of the IRA or such other cases as the President may direct. The divisions of the Court, and the number of Chairmen in each division can be seen in the Table D below;

TABLE D

No.	Location	Number of Chairmen
1.	Penang	2
2.	Ipoh	1
3.	Kuala Lumpur	13
4.	Johor Bharu	2
5.	Sabah and Sarawak	2

(Source: Industrial Court, Malaysia)

The President and the Chairmen of the Industrial Court are appointed by his Majesty the Yang di-Pertuan Agong. A person is qualified for appointment as President under section 21(a), and as Chairman under section 23(2) of the IRA if, for the seven years preceding his appointment, he has been an Advocate and Solicitor within the meaning of the Legal Profession Act 1976, or a member of the Judicial and Legal Services of the Federation or legal service of a state.

The President and 7 of the Industrial Court Chairmen are appointed on a fixed-term contract for two years, renewable at the discretion of the Minister, subject to the maximum age limit of 65. The remaining 13 Chairmen occupy cadre positions whose appointments are also on a contract basis for two years. The cadre chairman is occasionally on secondment from the Judicial and Legal Service, subject to be recalled or transferred at short notice[79]. Many experienced lawyers, opting for full-time employment, would think twice to an offer of appointment as an Industrial Court Chairman for a two-year contract, renewable only at the discretion of the Minister.

Recently, the tenure of the Chairmen of the Industrial Court became the focus of public attention when the Minister of Human Resources and Manpower

[79] This was noted by the Bar Council Industrial Court Practice Committee in a workshop on 'Industrial Adjudication Reforms' supra at footnote 39.

decided not to renew the contract of some existing Chairmen. The decision came as a surprise to the members of the professional body, the Malaysian Trade Union Council (MTUC) and the Malaysian Employers Federation (MEF).

The sudden move by the Minister could have created legal chaos in the Industrial Court and it could have affected cases that had been fully heard and were awaiting an award by the Chairman. It could also have affected partly heard cases. Those cases would be then subject to postponement, or would have to be heard *de novo*. This would certainly subject parties to further delay and expense as well as the inconvenience of recalling witnesses.

The President and the Chairmen occupy a central position in the compulsory adjudication system. They hold great responsibility with considerable judicial authority[80], therefore, their integrity and independence should be beyond question. There should not arise in the minds of a reasonable person, any suspicion of undue influence and pressure by the Minister in the decisions or awards of a Chairman. As aptly stated by Dr. Rais Yatim, Minister in the Prime Ministers Department 'the Court is an institution, its independence ought not to be subject to doubts and suspicion of undue influence or pressure of the Minister'[81].

In a press statement, Encik Abu Hashim Abu Bakar, a Chairman of the Industrial Court, noted that 'the judges feel humiliated as their plight has never been looked into although they work just as hard as the other judges. They are suffering in silence as they do not want to put down the judiciary'. He added that the struggle to get the terms and conditions of their appointment gazetted under the Industrial Relations Act 1967, has been on going for 30 years and he appealed to the Government, including the Prime Minister, to look into their plight.

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[80] The Industrial Court is set up on the principles of equity and good conscience, its adjudication function unfettered by traditional judicial procedures. The IRA has conferred upon the Court quasi-legislative powers. It may create new obligations or modify contracts in the interest of industrial peace, to protect the legitimate trade union activities and to prevent unfair practices or victimization

[81] The Star, 2002, 9 April.

In light of the above, vesting the Minister with the discretion to decide on their re-appointment undermines their integrity and independence. Therefore, there should be a review of the policy on the appointment of the officers of the Industrial Court. It is therefore suggested that the President and Chairmen of the Industrial Court should be appointed on a permanent basis in the same way as judicial officers of the civil courts. They should hold office until they attain the age of sixty-five and should not be removed from office, except on the grounds of misconduct or infirmity of body or mind, or other causes that could obstruct him from properly discharging the functions of his office.

Recently, the Minister was quoted as saying that as for long-term action plans, there were plans to establish the court as a distinct legal system under the Federal Constitution and widen the functions of the court to include Appeals from decisions made under Section 69 of the Employment Act 1955 (Labour court) and Appeals from Social Security Organisation decisions. There are also plans to provide chairmen security of tenure up to 65 years, review their designation from chairman to that of Industrial Court Judge and Industrial Court to be changed to Employment Court. He further said that there were also plans to create an Appellate Court[82].

(b) Types of cases heard in the Industrial Court

Disputes between the employer and workmen or their trade unions may arise due to various reasons, be it economic or non-economic. Any dispute emanating from their relationship may be referred to the Industrial Court, either by the Minister, or by the parties under certain circumstances. Most of the cases that are referred to the Industrial Court for adjudication involve the following:

(i) Dismissal of workmen under section 20 of the Industrial Relations Act 1967, which have been referred to the Court by the Minister;
(ii) Trade disputes between an employer and the trade union of a workman, which has been referred to the Court by the Minister;
(iii) Cases of victimisation in connection with trade union activities.
(iv) An application by any party bound by any award or collective agreement

[82] See New Straits Times, 2004, 19 November.

for interpretation or variation by the Court of the terms of the awards or collective agreement;

(v) Application by any party bound by any award, referred to the High Court on a question of law; and

(vi) Complaints on the non-compliance of any of the terms of award or collective agreement.

Table E below provides the statistics of the number of cases referred to the Industrial Court for the period from 1996 to 2003. It contains among others cases referred to the Court in the current year, cases carried forward, the number of cases heard or award given and the total number of cases pending in the Court.

TABLE E: Number of cases reported to Industrial Court (1996-2003

SUBJECT	YEARS							
	1996	1997	1998	1999	2000	2001	2002	2003
Total Cases Carried Forward	717	655	731	1122	1442	1778	1881	2015
Total Cases Referred	548	692	905	1027	1050	1056	1092	1085
Total Cases Heard/ Given Award	610	616	664	707	704	963	958	888
Total Cases Pending	**655**	**731**	**972**	**1442**	**1788**	**1881**	**2015**	**2215**

(Source: Industrial Court, Malaysia)

Tables F and G below unveil the analysis of the awards relating to dismissal cases and non-dismissal cases from 1996 until the end of 2002, respectively.

TABLE F: ANALYSIS OF AWARDS RELATING TO DISMISSAL CASES (1996-2003)

TYPES OF TERMINATION	1996	1997	1998	1999	2000	2001	2002	2003
Constructive	19	34	58	36	20	26	35	40
Misconduct	366	407	403	445	479	726	810	763
Retrenchment	50	14	17	20	21	41	52	61
SUB-TOTAL	435	455	478	501	520	793	897	864
Others	162	156	186	218	-	-	-	-
TOTAL	597	611	664	719	520	793	897	864

(Source: Industrial Court, Malaysia)

TABLE G: ANALYSIS OF AWARDS RELATING TO NON-DISMISSAL CASES (1996 – 2003)

SUBJECT	YEARS							
	1996	1997	1998	1999	2000	2001	2002	2003
Non-Compliance Of Award	67	60	69	85	70	52	58	64
Non-Compliance Of Collective Agreement	16	30	42	80	54	60	64	39
Interpretation Of Award / Collective Agreement	10	5	28	6	7	8	87	4
Variation Of Award Collective Agreement	1	2	12	6	5	1	1	3
Amendment to Collective Agreement (By Court Order)	-	-	-	1	-	2	-	
Collective Agreement (Terms and Conditions)	57	49	26	26	42	40	54	46
Questions Of Law	10	9	5	12	6	7	5	4
Victimization	1	1	4	2	-	-	-	2
TOTAL	**162**	**156**	**186**	**218**	**184**	**170**	**189**	**162**

(Source: Industrial Court, Malaysia)

What is apparent from Tables F and G above is that the main body of the Court's adjudication workload consists of cases of dismissal without just cause or excuse. In other words, dismissal from employment forms an integral part of our industrial relations jurisprudence.

(c) Proceedings in the Industrial Court

As noted earlier, the Industrial Court is an informal quasi-judicial body, specialising in industrial jurisprudence, and is central to the Malaysian Industrial Relations regime. Its main function is to resolve labour disputes expeditiously and arrive at a decision after sound and in-depth analysis of the facts and circumstances of each case. Unlike an ordinary court of law, which is bound by contractual rights, duties or obligations with no authority to transform, alter or even create rights when justice of the matter demands, the Industrial Court is not purely judicial - it is not confined to the administration of justice in

accordance with law[83]. Its scope of enquiry is not only restricted to the law, but also has a broader aspect of equity and good conscience with the view of promoting social justice. In the interest of industrial peace, the prevention of unfair labour practices or victimisation, the Court may confer rights and privileges on either party, which it considers reasonable or proper, irrespective of whether it is within the express agreement between the parties.

Furthermore, the Court may free parties from any unfair terms of their contracts entered into by reason of the inequality. It may override contracts incompatible with justice or create rights which exist independently from the contract. The Court in exercising its powers is to dispense social justice mainly to ensure peace and harmony in industrial relations. Section 30(5) of the IRA provides for the proceedings in this court to be conducted with as little formality, technicality, and form as the circumstances of the case permits, and meeting justice expeditiously and correctly. In other words, the proceedings in the Court should be less formal and not subject to the shackles of legal technicalities and defects common in an ordinary court of law.

Generally, the Court is master of its own procedure, provided however, that the rules of natural justice are adhered. The Industrial Relations Regulations 1967 and the Industrial Court Rules 1967 regulate the proceedings in the Court. To ensure the trial proceeds expeditiously, openly, and without surprise, section 29 of the IRA empowered the Court with broad jurisdiction and powers to hear any application made by the parties, notwithstanding that there is no specific provision, either in the IRA, or in the rules and regulations. Thus, the Court may order discoveries, interrogatories or other relevant facts needed to inform the parties to a dispute of the nature of their case that would allow them to know what evidence they ought to prepare for the trial[84].

Furthermore, the Industrial Court may join a party who is trying to evade a remedy sought by the workman, and it is empowered to make an award against a party so joined as long as such party is given an opportunity to be

[83] See, for example, *South East Asia Fire Bricks v Non-Metallic Mineral Products (Manufacturers Employees Union and Ors)* [1980] 2 MLJ 165

[84] See, for example, *AC Nielsen (Malaysia) Sdn. Bhd. v Tan Chong Suen* [2001]3 ILR 823.

heard. It has the power to reinstate the case if good grounds are shown, despite having been previously struck off due to his absence from court, or when the party failed to file a statement of case[85]. It also has the power to decide the appropriate venue of the trial by considering the financial capacities of the parties by asking itself 'who is better able to absorb the financial hardship'. The Court however, does not have extra-territorial jurisdiction, and thus it cannot compel an employer incorporated outside Malaysia to be joined as a party to a trade dispute[86].

The Court is not bound by the strict rules of evidence, but rather it is entitled to act on any material which is logically probative, even though it is not evidence in a court of law. Thus, the technical rules such as estoppel, laches, limitations, acquiesces or other pleas have no place in industrial adjudication, and cannot be invoked to defeat claims that are just and proper[87]. Similarly, the Court is not bound by precedents to guide them in the settlement of disputes by way of an award, because awards are given in circumstances peculiar to each dispute[88]. In practice, however, the Court does take cognisance of the principles underlying the provision found in the Evidence Act[89] and is subject to the rule of *res judicata*[90].

In awarding appropriate remedy for dismissal without just cause or excuse, section 30(6) of the IRA provides that the Court is not obliged to limit the remedies specified in the contract of employment, but may award any remedy suitable depending on the facts and the circumstances of the case before it. The only limitation imposed on the Court is that it shall have regard to public

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[85] See, for example, *Radicare (M) Malaysia Sdn. Bhd. v. Shaharom Sulaiman* [2001] 3 ILR 821.
[86] See, for example, *Cik Aniza Yaacob and 763 Ors v Mostek Malaysia Sdn. Bhd.* [1998] 1 MLJ 451.
[87] See, for example, *Kamunting Corp Bhd. And Fadzil bin Ahmand* [1991] 1 ILR 704; *Exxon Chemical (Malaysia) Sdn. Bhd. v Menteri Sumber Manusia, Malaysia & Ors.* [2004] 1 CLJ 451 (CA).
[88] See, for example, *Edaran Otomobil National Sdn. Bhd. And Neoh Hock Lye and Ors.* (Award No. 171 of 1991).
[89] See, for example, *Sitt Tatt Bhd. v Flora Gnanaprasagam* [2002] 1 ILR 98 where s.114(g) of the Evidence Act was applied by the Industrial Court. See also *Harpers Trading (M) Sdn. Bhd. v National Union of Commercial Workers* [1991] 1 MLJ 417, 419.
[90] See, for example, *National Union of Hotel, Bar and Restaurant Workers v Casuarina Beach Hotel* [1986] 2 MLJ 16.

interest and the macro-economic aspects affecting both the industry and the country[91]. Finally, section 33B(1) of the IRA provides that an award, decision or order of the Court is final and conclusive, and cannot be challenged, appealed against, reviewed, quashed or called in to question in any court.

(d) The current problems afflicting the proceedings in the Industrial Court: The Court is becoming too legalistic

Despite the above, in recent years the Court has become comparable to the court of law of general jurisdiction. One often hears complaints that it is overly legalistic, the presentation of the trials being adversarial in character, and deciding cases judicially and time consuming. There is formality of proceedings, and the procedural rules and evidence with which the lawyers are accustomed to, are freely used in the Court.

The law on procedure and evidence commonly used in civil trials is freely followed in the Industrial Court, such as subjecting parties to pleadings, requiring parties to submit bundles of documents, examination of witnesses and submission of the case. For example, in *R. Rama Chandran v The Industrial Court of Malaysia and Anor*[92], the Federal Court set the rule that there should be strict procedural rectitude regarding pleadings. In particular, Eusoff Chin CJ noted that the 'Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion'.

The rationale of pleadings is to give the opponent the points that are being taken in support of one's case and to prevent surprises. His Lordship further added, 'Industrial Court must scrutinise the pleadings and identify the issues; take evidence; hear the parties arguments, and finally pronounce its judgment having strict regards to the issues'. Therefore, it follows that where an issue is not raised in the pleading, it would be objected to when and where it was

[91] See, for example, section 30(4) of the IRA.
[92] [1997] 1 M.L.J. 145 (FC). See also *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn. Bhd.* [1995] 2 MLJ 753, 761 (FC).

adduced, unless an application is made to amend the pleadings which is at the discretion of the court to allow, or otherwise an amendment[93].

Despite the Federal Court ruling in *R. Ramachandran's* case, the Court of Appeal in *National Union of Plantation Workers v. Kumpulan Jerai Sdn Bhd (Rengam)*[94], appears to have modified the apparent strictness of the rule regarding pleadings. Whilst agreeing that the fate of a party's case must depend upon its pleadings, the Court of Appeal nevertheless held that the rigours of strict pleading rules has often been dispensed with when no injustice is occasioned to the party raising the objection. In this case, the issue of condonation, although not pleaded in the statement of case, has been properly considered because it was fully placed and argued before the Industrial Court.

It is submitted that the latter approach of the Court of Appeal should be preferred because failure to comply with procedural technicalities such as pleading ought not to hinder the Industrial Court from dealing with the substance of the matter. This is particularly so because the IRA enjoins the Court to act in accordance with equity and good conscience and the substantial merits of the case without regard to technicalities and legal form.

Raising preliminary objections on the threshold jurisdiction of the Industrial Court is another example where the Courts juggle with technicalities. Raising such technical points is altogether perfect in a strict legal forum, raising them in the Industrial Court is surely inconsistent with the intention of the legislature for a speedy disposal of industrial disputes. It is admitted that the preliminary objection affecting the jurisdiction of the court should be dealt in a special session, for otherwise it may involve a waste of time, money and energy if

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[93] See, for example, *Amanah Butler (M) Sdn. Bhd. v Yike Chee Wah* [1997] 2 AMR 1653. The court will allow such amendment as will cause no injustice to the other parties. Whether or not it will cause injustice, the court will analyse the following considerations; (a) whether the application was bona fide; (b) whether the prejudice caused to the other side can be compensated by cost; (c) whether amendment would not in effect turn the suit from one character into a suit of another and inconsistent character. See, for example, *Yamaha Motor Co. Ltd. v Yamaha Malaysia Sdn. Bhd. and Ors.* [1983] 1 CLJ 191 (FC).

[94] [2000] 1 CLJ 681.

during the full hearing, the court were to conclude that it has no jurisdiction to entertain the dispute.

As stated earlier, the threshold jurisdiction of the Industrial Court is only acquired when the Minister refers the representation to the Court. In *Kathiravelu Ganesan and Anor. v Kojasa Holdings Bhd.*,[95] the Federal Court noted that 'an objection on the threshold jurisdiction of the Industrial Court to adjudicate the matter is to be raised, save upon the limited ground that the representation under s.20(1) have made out of time, the aggrieved party should seek an order of certiorari to quash the Minister's reference to the Court, and in the same proceeding he must also seek for an order of prohibition against the Industrial Court from entertaining the dispute upon the ground that the Court has no jurisdiction to make an adjudication'. Therefore, failure to challenge the Minister's discretion to refer the representation to the Industrial Court would therefore, defeat the spirit and intention of the IRA[96].

The MTUC has called upon the Industrial Court to be less technical and should not, for example, overly insist on technical documents forming part of evidence, as it merely strengthens employers' position and subjugates workers. Its former president, Senator Zainal Rampah, stated that 'this gradual transformation of the Industrial Court into yet another court of law will make industrial adjudication more expensive and protracted'[97].

It is noted that legal representatives who are freely allowed to represent the parties largely contribute to the legalism in the Industrial Court. One cannot deny the fact that parties represented by a qualified lawyer will be helped in their case. As a matter of interest, legal representation before the Industrial Court, unlike that in a civil court, is only a privilege and not a right[98]. It follows that a party to any proceedings before the Industrial Court, who wish to be legally represented, must first obtain the permission of the President, or the

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[95] [1997] 2 MLJ 685 (FC).

[96] See, for example, *Aetna Universal Insurance Sdn. Bhd. v Tan Ann and 4 others* [1997] 1 LNS 200 (HC).

[97] New Straits Times, 2002, 29 November.

[98] See, for example, *Federal Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers* [1983] 1 CLJ 67.

Chairman of the Court under section 27 of the IRA. The permission is granted upon due submission by the applicant of the warrant of authority in favour of the legal representative in form B, and the application proper in form A in due compliance with rule 3 and 4 of the Industrial Court Rules 1967.

The liberty of an aggrieved person to go to court and seek relief, is one of the many facets of personal liberty guaranteed by the Federal Constitution, and so not allowing parties to be represented by a legally qualified person of his choice would be contrary to article 5(1)[99]. Apart from the above, the civil courts have stated that the right to legal representation in dismissal cases on the grounds of criminal misconduct is a *sine qua non*, because lawyers are trained in the skill of cross-examination[100].

Furthermore, with the recent liberalisation of judicial review, the Court is obliged to exercise the adjudication function reasonably. It must hear and determine matters in accordance with the law and cannot ignore altogether agreements or existing obligations for any reason whatsoever, nor can it ignore the fundamental principles of law, such as natural justice or exceed its jurisdiction. The Court is bound to give a full reasoned judgment in the nature of an award. Where the Court committed an error of law, this *prima facie*, enables the party affected by the award to seek remedy by way of a prerogative writ of certiorari to quash the Industrial Court's award resulting from an error of law. The power to review an award of the Industrial Court has been conferred on the High Court by virtue of Paragraph 1 of the Schedule to the Court of Judicature Act 1964 and the Rules of the High Court 1980, Order 53.

(e) Backlog of cases in the Industrial Court

Currently, the Industrial Court is facing with a serious problem in the administration of justice, namely the backlog of cases – as noted in Table E

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[99] It must be noted that the Federal Court in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 4 CLJ 105, has taken a literal and narrow interpretation to right to life in Article 5(1) of the Federal Constitution where it was held that the above Article merely deals wit personal liberty and not of liberty simplicitor.

[100] See, for example, *Esso Production Malaysia Inc. v Aladdin bin Mohd Hashim* [2000] 3 MLJ 275 (CA).

above - and the practical difficulty of getting them disposed of as soon as possible. In a bid to overcome backlog of cases, which is hindering justice for workers and employers, the Ministry has proposed various measures, namely;

(i) To appoint judges of the High Court to preside over the Industrial Court system[101]. It is believe that with a better system of case management, the cases in the Industrial Court would be heard faster and further, the appeal process would be shortened as appeal cases can go directly to the Court of Appeal and the Federal Court, instead of the current system where it goes first to the High Court, then to the Court of Appeal and on to the Federal Court. Earlier to this however, there had been on going discussions on the establishment of an Industrial Appeal Court, which was considered by many as a solution to cut back on the delay and other appeal problems. The Minister, at that material time, was quoted as saying that his Ministry was considering the establishment of an Industrial Appeal Court and is in the discussion stage with the Attorney-General's Department[102];

(ii) To refer certain dismissal cases to the civil courts, particularly, for employees who earn more than RM5,000 per month[103];

(iii) To introduce mediation process in the Industrial Court. For every case referred to the court from the IRD, the Industrial Court Chairman will first convene the case as a mediator. The Minister of Human Resources stated: 'as a mediator, he will be able to tell the parties involved, the merits of the case. Hopefully, the parties will pick up the hints and resolve the case themselves'[104]. If mediation fails, then the chairman would convene the case as a hearing.

(iv) To increase the number of the Industrial Court chairmen from the current 21 to another 20[105].

In light of the various suggestions, as above, particularly, the suggestion in

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[101] 'Industrial Court to be overhauled' New Straits Times, 2004, 7 April, at p. 4.
[102] New Straits Times, 2002, 7 November, at p. 4.
[103] New Straits Times, 2004, 28 May, at p. 9.
[104] 'Mediation first for Industrial Court cases' The Star, 2004, 20 May, at p. 12.
[105] Ibid.

paragraph (i) and (ii) above, the writer is of the view that the following must be seriously considered before its implementation;

(i) Industrial law is a specialised subject: In industrial jurisprudence, the Court 'has to maintain a balance between the differing or conflicting interests, and be able to reconcile the variables, in order to maintain industrial peace and harmony'[106]. The exclusive jurisdiction to adjudicate industrial dispute has been conferred on the Industrial Court - a specialist tribunal. The Court's duty is to adjudicate cases based on equity and good conscience and the substantial merits of the case without regard to technicality and legal form. The scope of its inquiry is not confined to the law as in a civil suit in the High Court but to broader aspects of equity and social justice. Furthermore, in making an award, the Court must have regard to public interest and macro-economic aspects affecting both the industry and the country.

(ii) Serious backlog of cases in the superior civil courts: There are serious problems facing the administration of justice in the civil courts, namely the backlog of cases and the practical difficulty of getting them disposed off as soon as possible. The statistics available in the Central Registry in Kuala Lumpur shows that there are thousands of cases in the civil courts pending adjudication and thus justice gets delayed. Table H below provides the statistics of the number of civil cases pending adjudication in the subordinate and superior civil courts, as of 1st July, 2004.

TABLE H: Backlog of civil pending in the Subordinate and Superior Courts: As of 1st July, 2004

Court	Pending as at 1.4.2003	Registered from 1.4.2003 to 30.6.2004	Disposed Off from 1.4.2003 to 30.6.2004	Pending as at 1.7.2004
Magistrate Court	122,151	257,346	276,843	102,654
Sessions Court	74,345	124,754	122,190	76,909
High Courts	48,587	69,474	60,471	57,590
Court of Appeal	6,897	2,753	2,995	6,655
Federal Court	313	284	310	287

(Source: The Palace of Justice: Inaugural Report of the Superior and Subordinate Courts in Malaysia)

Responding to the backlog of cases, the former Deputy Minister in the Prime Minister's Department, Datuk Tengku Adnan Tengku Mansor stated that it is 'unrealistic to expect the Government to continuously make a bigger and bigger allocation for the courts with the hope of reducing the backlog of cases and improving the machinery of justice'[107].

Many steps have been taken to ensure faster and more efficient disposal of civil cases so as to reduce the backlog of cases, including the recent setting up of two types of courts – the 'Fast Track' and the 'Normal Track'[108]. The steps taken are certainly hoped to reduce the backlog of cases but it does not promise speedy hearing of cases, in particular, reviewing of the awards of the Industrial Court. And now, with the new proposal by the Ministry, it will further add on to the existing backlog of cases to the civil courts.

(iii) Cost of the proceeding in the civil courts: Apart from delay in the adjudication, the application to review an award of the Industrial Court is not only tedious with cumbersome procedures, but more importantly it is an unequal legal battle. Employers generally, want to win the case and they have greater resources behind them and are able to seek recourse to appeal by way of judicial review. They may adopt delaying tactics to deny a workman the remedy awarded by the Industrial Court and are able to hire lawyers to represent them in the proceedings. The lawyers, who are accustomed to the rules of proceedings, may make things difficult by confusing the issues by way of raising legal technicalities.

When a workman is confronted with lengthy and complicated documents filled with legal jargon or using linguistic formulae in documents, among others, it would certainly require professional legal advise. This causes sheer pressure on workers and worries them as it involves not only delay in the execution of the award of the Industrial Court but also the cost of the litigation which is

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[106] Abu Hashim Abu Bakar, 'The Philosophy and Concept of Industrial Relations in Malaysia and the Acts relevant to it' [2002] 3 ILR i, v.

[107] The Star, 31 June 2002, at p. 17.

[108] The 'Fast Track' court will deal with all legal applications involving affidavit evidence, whereas the 'Normal Track' court will deal with all legal applications involving oral hearings. See New Straits Times, 2002, 14 September, at p. 1.

immense where they have to incur substantial payout to legal representatives, although it is true that the cost of an appeal will normally be awarded to the party succeeding in the appeal.

The imbalance would become more paramount when the worker happens to be unemployed. This state of affairs was aptly noted by Eusoff Chin CJ in *R. Rama Chandran v The Industrial Court of Malaysia and Anor*[109], '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'. This reinforces the view of an ordinary person that 'the law and our legal system are slow, expensive and unsatisfactory'[110].

Based on the foregoing discussion, the writer suggests that if the proposal to engage judges of the civil courts to preside over the Industrial Court system is accepted, the judges must canvass a case based on industrial law and not to transform the Industrial Court into yet another court of law, as such a move will only make industrial adjudication more expensive and protracted. This is particularly so because the IRA enjoins the Court to act in accordance with equity and good conscience and decide on the substantial merits of the case without regard to technicalities and legal form.

Apart from the above, many writers, academics, practitioners of industrial law and judges, have suggested for the establishment of an Industrial Appeal Court to hear and adjudicate appeals of the awards or decisions of the Industrial Court. Despite many calls for its establishment, nothing has materialised so far, and now we hear of the Minister's statement that with High Court judges deciding in the Industrial Court, the appeal process would be shorter as such cases may be referred directly to Court of Appeal and Federal Court.

The writer submits that in the new proposed system, delays in the adjudication of review by the Court of Appeal and Federal Court will be inevitable

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[109][1997] 1 MLJ 145 (FC).

[110] Per Saville L.J. in *British Steel Plc v Customs and Excise Commission* [1997] 2 All ER 366, 379.

due to the already existing backlog of cases and will cause a further delay, which is likely to aggravate the existing delay. However, by having a separate Industrial Appeal Court, it is suggested that this delay would be reduced immensely as it would not add on to the list of backlog cases in the civil courts. Apart from speeding up settlement of industrial disputes, the appeals would be heard and determined in light of the ethos of the industrial jurisprudence of the country, in line with the objective of the Industrial Relations Act, 1967.

Furthermore, the expenses that would be incurred would not be as much as that incurred in the civil appeal system because a workman can choose to be represented by a union officer or by Malaysian Trade Union Congress, knowing fully well that in the industrial appeal system, technicality and legal form will not be the basis of the decision but instead, it will be based on social justice, equity and good conscience. Lastly, it would ensure certainty and uniformity in the application of industrial jurisprudence principles.

As a final remark, it would be worthwhile reproducing the commentary by Justice Gopal Sri Ram JCA, 'if you want to canvass a case based on industrial law, go to the Industrial Court, if you can. But if you come to us, the ordinary courts, then, the merits of your claim will be dealt with according to the common law master and servant'[111]. His Lordship further added, 'for too long have the ordinary courts by the use of the prerogative remedies exerted an influence over industrial law. This has resulted in an injection of medieval common law concepts into industrial law on a fairly regular basis. To stop this, what is required is the introduction of an appellate tier within the adjudicatory system'[112].

Mediation in the Industrial Court

In order to alleviate backlog of cases and to expedite the settlement of disputes, the Ministry had recently proposed fostering disputants to use the mediation process as a means of resolving their disputes instead of the traditional litigation

[111] Dato Gopal Sri Ram JCA, in his keynote address on 'Industrial Adjudication Reforms' organised by the Bar Council Industrial Court Practice Committee, supra at footnote 39; also appeared in [2002] 1 ILR i, iii.
[112] Ibid. at p. xi.

process. The mediation process – as an automatic first step towards resolving disputes between the parties – is widely practiced in the civil courts of England, Australia, New Zealand, Singapore and the United States. If the mediation failed then the chairman would convene the case as a hearing. The Minister was quoted as saying, 'for every case referred to the Department, the Industrial Court chairmen will first convene the case as a mediator. As a mediator, he will be able to tell the parties involved merits of the case. Hopefully, the parties will pick up the hints and resolve the case themselves'[113]. It was noted that this is the system practiced in Australia and it has been successful in reducing the Industrial Court cases in that country.

Mediation is an alternative dispute resolution, intending to resolve the disputes between the disputants in a manner so as to find a resolution expeditiously and economically, without the expense and delay of formal investigation and litigation. In this process, a neutral third party – the mediator, namely, the chairman of the Court – will assist the parties in reaching a settlement. The mediator has no power to compel or even recommend a resolution or settlement. The process works because the parties are given the power and obligation to seek solutions that meet their own needs and interests. A successful mediation results in a binding agreement between the parties. If however, mediation is unsuccessful and an agreement cannot be reached, parties may pursue their cases in the courts before another chairman who would convene the case as a hearing.

The advantages of mediation are; (a) flexibility of outcome, where the parties seek their own outcome which can be very different from the result ordered by a court; (b) flexibility of process, where the mediator can design a process that suits the needs of the parties and is most likely to lead to a quick and acceptable result; (c) speedy and cheaper process, where the mediation process usually takes a fraction of the time of a trial or hearing and an average mediation will cost the parties a small fraction of the same; (d) preservation of relationship, the mediation can be used so as to address issues before there is

[113] 'Mediation first for Industrial Court cases', The Star, 2004, 20 May, at p. 12.

breakdown of relationship; and (e) privacy, where the mediation is confidential and privileged.

The desire of implementing mediation process mandatory before the case is listed for hearing in courts is highly desirable in settling trade disputes. Although it does not guarantee a settlement, it is a very positive method of resolving disputes without the need to use a more formal process and it has potential of reducing the backlog of cases in the courts. It is an excellent tool for the resolution of conflicts and for solutions that are invested in by the parties who take part in the mediation. Mediation can assist parties to re-establish trust and respect, and it can help to prevent damage to an ongoing relationship. Furthermore, it is an effective and affordable complement to litigation.

The writer is of the view that it would be a waste of precious time to have a two step informal process, firstly, conciliation before the IRD and secondly, mediation before the Industrial Court, before the case could be listed for hearing in the Industrial Court. It is suggested that there should only be one informal process, namely, mediation, and for this the writer will propose that the conciliation proceedings, before the IRD, should be absorbed into the Industrial Court system. Any settlement arrived at before the mediation proceeding – conducting either by the chairman or by the officers of the IRD - should be registered in the Industrial Court, and upon registration, it should be deemed as a consent award of the Industrial Court. Thereafter the parties may enforce the award in the same way as the award of the Court. If however, the mediation failed in arriving at an amicable settlement, the matter would then be referred to the Industrial Court for adjudication.

6 CONCLUSION

The Malaysian industrial relations system was ranked 13th best in the world[114], with the Industrial Court central to the system, whose functions are to prevent and resolve disputes expeditiously with the least technicality and legal form.

[114] Lokman Mansor 'High Marks for Our Industrial Relations' Business Times, Monday 24 April 2000, quoted from the 'World Competitiveness Yearbook 2000' prepared by the Switzerland based International Institute for Management Development.

The Court acts in accordance with equity and good conscience where it will take into account all relevant facts of a case, and any decision to be arrived at will be based on a broad concept of fairness, complying with the basic rules of natural justice. The main body of the Court's adjudication workload consists of cases of dismissal without just cause or excuse. As noted earlier, a claimant must pray to be reinstated into his former employment before his representation under s.20(1) of the IRA could be conciliated by the officers of the IRD. Furthermore, his grievance may only be referred to the Industrial Court at the discretion of the Minister, which is in the opinion of many quarters, an unfavourable practice.

It is submitted that the country is spearheading towards a developed nation status in its vision 2020, so too must the laws in this country. Laws must be reviewed and antiquated provisions must be replaced with provisions that can measure up to the standards of development and new circumstances which did not exist in the past. As such, s.20 of the IRA has to be reviewed because the situation in the 1980's and now are different. Compared to the past, there are now more employees who need their complaints to be attended to. Thus, cases should be referred automatically to the Industrial Court without the Minister's intervention, as this is the cause of much delay. Besides this, the Minister who does not meet the complainant himself, might be influenced by extraneous factors. A court has to serve its function of doing justice to man whereas the Minister does so at his own discretion. Let the purpose of the court be served without sieving workers passage to seeking justice.

It is also submitted that hand in hand with this, the appointment of chairman of the court must be given much respect and their appointment should be on a permanent basis. On the issue of backlog of cases, various initiatives have been forwarded including increasing the number of industrial relations department officers, employing more contract officers, increasing the number of industrial court chairmen, having a mandatory mediation system in the Industrial Court and the move to elevate industrial court chairmen to judges. These are however, mere suggestions which must be carefully studied and implemented only after taking into consideration the views of various parties involved in the industry.