Movement Control Order (MCO) & Rights of Employers/ Employees

In view of the fact that various views have been expressed on the concerns of employers in having to pay salaries of employees when no work can be done during the MCO period, I have decided to contribute my 2 cents worth of what I believe is the correct position in law, which is as follows:

It is trite, that the legal basis for employers to continue the obligation "*to pay wages*" is that the remuneration of monthly rated employees is governed by their respective contracts of service, which are not dependent upon their employers providing work. Given the fact that there is likely to be no provision in the contracts of service for part payment of salary or for salary deduction for any reason(s), the employees are entitled to be paid their salaries in full for the month.

MOHR Guidelines also confirm that during the restriction period between 18 March 2020 and 31 March 2020 (now extended to 14 April 2020), employers should continue making salary payments to their employees, including daily rated employees, as agreed in their contracts of service, and if not agreed, not less than the daily rates set out under the Minimum Wages Order 2020, whether the employee is working or not [See MOHR FAQ dated 19 March 2020 (Q & A No. 2) and MOHR FAQ dated 31 March 2020].

Suspension of Obligations under the Contract of Service

There is no merit in the argument that the obligations "*to provide work*" and "*to provide services*" are suspended by reason of the Movement Control Order as the suspension of obligations under the contract of service does not automatically apply unless there is a force majeure clause in the said contract, which alters parties' obligations and/or liabilities when an extraordinary event or circumstance beyond their control prevents one or all of them from fulfilling those obligations.

Force majeure is a creature of contract. As a result, whether a particular clause relieves a party of contractual liability will, under Malaysian law, depend on the precise wording used in the clause, the allocation of risk between the parties provided for by the contract as a whole, the circumstances in which the parties entered into the contract and the situation that has arisen. Each case has to be decided on its own facts. It is for the party seeking to rely on a force majeure clause, in order to excuse its non-performance or late performance, to satisfy a court or any other tribunal that this is the effect of the clause.

Subject to the existence of a force majeure clause in the contract of service, it may be likely that the Covid-19 outbreak and/or the Movement Control Order issued by the Government would constitute a force majeure event in view of the unprecedented nature of the Covid-19 outbreak and/or the action of the Malaysian Government (including the actions of governments around the world) in response of the Covid-19 outbreak. However, just because a force majeure event has occurred does not necessarily mean that the parties will be protected from liability for failing to perform or delay in performance. A party seeking to rely on a force majeure clause must also show that:

(i) The force majeure event was the cause of the inability to perform or delayed performance. The fact that performance is more difficult or expensive is insufficient. Therefore, if work can be performed through work-from-home arrangements, the parties will not be protected from liability for failing to perform the obligations under the contract;

(ii) Their non-performance was due to circumstances beyond their control; and

(iii) There were no reasonable steps that they could have taken to avoid or mitigate the event or its consequences.

Doctrine of Frustration of Contract

Where there is no force majeure clause, the question that arises is whether it is possible to rely on the common law doctrine of frustration of contract in situations faced by employers as a result of the Movement Control Order due to the Covid-19 pandemic. Frustration will only apply if the following 3 conditions are fulfilled:

a) The underlying event is not the fault of any party to the contract;

b) The event occurs after the formation of the contract and was not foreseeable by any parties; and

c) It becomes **physically or commercially impossible to fulfill the obligations** set out under the contract or it changed the nature of the contractual obligation from what was initially agreed upon under the contract.

Based on case laws, the Courts have interpreted "**physically and commercially impossible**" to mean impossibility of performance over a prolonged period of time. As such, employers may not rely on frustration during the restriction period under the MCO unless the restriction period extends for **a prolonged period of time** such that the performance of the contract becomes impossible. "**Prolonged period of time**" has not been defined in the case laws. In one case, the period that the employee would be under detention for 2 years, was held to be a prolonged period of time enabling the frustration of the contact. In fact, even the guidelines by MOHR states that the restriction period under the MCO cannot be considered as a frustration of contract because the failure of the employer and employee to fulfil the contractual obligations do not involve a long period of time. It is my view that the MCO period between 18 March 2020 and 31 March 2020 and the extended period between 1 April 2020 to 14 April 2020, do not constitute a "prolonged period of time", to justify invoking frustration of contract.

Conclusion

Whilst it may not be fair that employers be required to pay full wages to their employees during the restriction period, including the extended restriction period, when employees do no work at all, given the fact that there is no provision in the contract of service for part payment of salary or for salary deduction for any reason(s), the employees are entitled to be paid their

salaries in full for the month until such time the relevant and authorized Government body (very likely the National Security Council) issues an emergency directive which exempts employers from making salary payments during the extended restriction period(s), assuming such powers exist.

Proposal to Set off against accrued annual leave and advance annual leave for the remainder of the year.

The taking of annual leave is an employee's contractual right and cannot be forced upon him unless the employer's right to do so is expressly provided for in the contract of service or the employee had voluntarily consented to the employer's request for him to go on annual leave. More importantly, employers cannot order their employees to take annual leave at the expense of their leave entitlement during a future period as such an order will be contrary to the provisions of Section 60E of Employment Act 1955 which provides that an employee shall be entitled to paid annual leave of the specified number of days for every 12 months of continuous service with the same employer. However, employers do retain the right to reject an employee's application for annual leave, if necessary.

My suggestion is that the better alternative to help mitigate the financial impact on employers and/or to avoid retrenchment from service is to propose for the following emergency directives:

(1) To exempt employers generally from making payments for fixed monthly allowances that are given for a specific purpose since the purpose is not met during the MCO; and

(2) To exempt employers who have incurred decreased revenue by more than 50% since 1 January 2020 from making full salary payments to all employees** during the extended restriction period(s) by giving employees the following options:

(i) to take unpaid leave;
(ii) to take annual leave (where available); and/or
(iii) to take a salary reduction/pay-cut not exceeding 50% of full salary payments.

**Not applicable to employees earning below RM4, 000 for 3 months after the "Wages Subsidy Program" is implemented as announced by the Prime Minister on 27 March 2020.

However, the above are only my suggestions, which have no force of law, unless legislated upon by the Government.

Please note that on 27 March 2020, the Prime Minister announced the "Wages Subsidy Program" (Program Subsidi Upah) to help employers maintain employees in employment.

Through this programme, the Government will provide wages amounting RM600 per month per employee for a period of 3 months subject **to (1) the employee earning below RM4,**

000 and (2) the employer having incurred decreased revenue by more than 50% since 1 January 2020 (whatever this means).

For the subsidy to apply, employers must ensure that employees are not dismissed, directed to take unpaid leave or take a reduction of salary **for a period of 3 months after the programme is implemented.**

In the light of the above the Government appears to be absolutely against the implementation of forced unpaid leave and reduction of salary as a means of assisting employers. Instead it is encouraging employers to keep the employees working at the same salary and discouraging employers from forcing employees to go on unpaid leave or taking a salary cut by a implementing a subsidy programme known as Program Subsidi Upah. Given this, it is unlikely that the Government is going to implement any type of policy which will allow employers to force employees to go on unpaid leave or to reduce salaries, during the MCO order period, either through changes in the law or through orders made through the National Security Council (if such powers exist). However, based on the Prime Minister's statement, there is some indication that an option may be given to employers to postpone payment, restructure or reschedule the employer's portion of contribution to the EPF, in some manner, with effect from 15 April 2020, through the Khidmat Rundingan Majikan programme. To date, no details of this have been provided.

In the circumstances, although I sympathize with some of your views (being an employer myself), my opinion is that the position some of you have taken has no basis in law and at most is what you hope the Government will allow in the difficult circumstances employer's find themselves in as a result of employees being paid full salaries when there is no work that can be done during the period of the MCO.

Finally I write to inform you that most of this write up and research on the law was done by my Industrial Relations Partner, Ms. P. Thavaselvi, for which I must express my appreciation and thanks.

Thank you.

Regards,

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Advocate & Solicitor
1 April 2020