RIGHTS AND OBLIGATIONS UNDER THE EMPLOYMENT CONTRACT DURING MCO AND COVID-19 PANDEMIC

On 16 March 2020, the Prime Minister of Malaysia announced the Government's decision that a nationwide Movement Control Order (**"MCO"**) would be imposed from 18 March 2020 until 31 March 2020 ("**the Period**") under the Prevention and Control of Infectious Diseases Act and the Police Act 1967.

On 18 March 2020, the Government issued the Prevention and Control of Infectious Diseases (Measures within Infected Local Areas) Regulations 2020 ("**Regulation No. 1**") which laid down relevant regulations to implement the MCO.

Further, on 25 March 2020, the Prime Minister announced the extension of the MCO for a further period from 1 April 2020 to 14 April 2020 ("**the Extended Period**").

In addition, on 1 April 2020, the Prevention and Control of Infectious Diseases (Measures Within Infected Local Areas) (No. 2) Regulations 2020 ("**Regulation No. 2**") took effect in particular reference to the Extended Period.

Background

The Ministry of Human Resources ("**MOHR**") had taken proactive actions by issuing Frequently Asked Questions ("**MOHR FAQ**") regarding employment issues which included questions on payment of wages and annual leave during the MCO period. The MOHR FAQ were issued on 19 March 2020; 20 March 2020; 23 March 2020; and 31 March 2020.

Validity of MOHR FAQ

The MOHR FAQ, in particular the answers given therein, have been referred to as "directives" from the MOHR. This has given rise to concerns about whether the MOHR FAQ or MOHR "directives" have legal binding force on employers. This concern is particularly relevant to the "directive" that employers shall pay full wages to employees during the MCO period even though there is no business operations and no work done by the employees. *[For purposes of this discussion, employees who continue to work from home are assumed to be able to receive their full wages with no objections from employers.]*

A directive is indeed not a law and cannot be said to be legally binding. The case of ***Tenaga Nasional Berhad v Manfield Development Sdn Bhd & Anor [2010] MLJU 909*** illustrates the point that a Government's directive is indeed not legally binding:

"As a company, the defendant has its own board of directors who owes a fiduciary duty and is accountable to the shareholders; and the company is subject to the Companies Act 1965 and to legal principles concerning corporate governance. **It cannot just obey the directive of the Government blindly.** Perhaps in the past there might had been occasions where the defendant

had abided by the directives of the Government on matters pertaining to commercial dealings of the defendant with private entities. But in those situations, **unless such a directive is clearly pursuant to a specific statutory provision, compliance with the Government's directives was merely out of deference for the Government, and not as a legal obligation."**

However, is the MOHR FAQ a directive? No. An FAQ is not a directive. The MOHR FAQ is a guideline issued to the public for purpose of clarifying uncertainties in the law.

The MOHR FAQ contain the MOHR's interpretation or statements of the current positions in employment law when applied to the MCO situation. This interpretation may be challenged in a court of law. Similarly, the interpretation taken by the Bar Council, trade union, consultant or private citizen (whether published officially, online or in the print media) are subject to challenge in a court of law.

Are the answers in the MOHR FAQ legally binding? Yes, if the answers are based on correct statements of employment law. If the MOHR FAQ is in compliance with the applicable law, then there should arise no issue with regard to the enforceability of it since the basis for its validity or enforceability will stem from such applicable law.

Employers Shall Pay Full Wages during MCO Period: What is the Legal Basis?

Under Malaysian industrial or employment law, the employer's obligation to pay wages or salary is premised upon the contractual term in the employment contract.

In the case of ***Syarikat Permodalan Kebangsaan Bhd. v Mohamed Johari Abdul Rahman [2004] 2 ILR 803***, the Industrial Court held thus:

"Salary is the nub of the relationship between a servant and the master. Any change to this, whatever the reason may be, totally destroys the relationship. The master ought not be allowed to justify reducing the salary of his servant for the reason that he has insufficient means. A change in salary augurs a new relationship. One which the servant may accept or reject freely. That an employer suffers from financial hardship is no reason to force the same upon his workman."

The obligation to pay salary is not conditional upon work being provided by the employer or work being done by the employee, unless the employment term provides as such. In the case of ***Viking Askim Sdn Bhd v National Union of Employees in Companies Manufacturing Rubber Products [1991] 2 MLJ 115***, the High Court held that where there is a collective agreement that provided for payment of a fixed rate of monthly wages regardless of availability of work, the employer may not reduce the monthly wages on the ground that there was no work available as a result of a fall in orders. His Lordship Edgar Joseph Jr J held thus:

"As for the collective agreement, my attention was directed by counsel for the union to certain provisions thereof, to which I shall now refer. Article 15(1) provides for the payment of a fixed rate of monthly wages regardless of the availability of work."

In ***Viking Askim*** the Court further held that employees were entitled to keep their salaries in full during periods of cut back in production when no work is done at all, if there is no provision in the collective agreement for part payment of salary or salary deduction during periods of temporary lay-off. By reference to the Employment Act, the Court held:

"Counsel for the union then made the point that **nowhere in the Act was there any provision authorizing an employer to make any deduction from wages for periods of shutdown.** The only provision authorizing an employer to make a deduction from wages was s 24 which had no application to the present case. **Accordingly, any deduction from wages for periods of shutdown would be illegal."**

"For the sake of completeness, counsel then drew my attention to reg 5 of the Employment (Termination and Lay-Off Benefits) Regulations 1980, which provides for the payment of lay-off benefits to employees whose remuneration depends upon work being provided by the employer. But, of course, **this did not apply to the company's employees in this case because they were monthly rated and their remuneration did not depend upon work being provided by the company.**

But, said counsel, this was understandable, because the object of **reg 5 is to ensure that employees whose remuneration depends upon the availability of work are not without an income for their needs during a period of lay-off.** But, in the case of monthly rated employees, like those of the company here, there was no need for such statutory protection because under their contract of service, their remuneration is not dependent upon their employers providing work. To emphasize the point, counsel referred to reg 5 which obliges the company to pay its employees full wages even for days when the company is unable to provide work."

In the case of ***Dunlop Malaysian Industries Berhad v. Dunlop Malaysian Industries Employees Union [1982] 1 ILR 161***, a trade dispute arose between the company and the union due to the former's action in requiring its employees not to come to work for periods of 4 to 12 days, as the company was producing more tyres than it could sell. All the affected employees did not report for work on the dates stated and the equivalent of the wages on the days they did not work was treated as a loan to the employees. This being an interim measure pending determination of the dispute. The question for decision therefore was whether the employees should be paid during the period they were required not to work.

His Lordship Harun J in ***Dunlop*** rejected the company's leave proposal, whether paid or unpaid, to compensate for the days the employees were not required to work. As all the employees were monthly rated, the effect of the proposal was to deduct from salaries for the month in question sums equivalent to the number of days they were not required to work although there was no

provision in the collective agreement concerned or the Employment Act 1955 which authorized the company to do so. Having said that, the court noted that the Legislature seems to have intended that the rates of compensation to workmen during periods of temporary lay-off should be negotiated between employer and employee and incorporated in a collective agreement.

The Court in ***Dunlop*** thus held the following:

a) The Company has the right to cut-back production at any time and in so doing may layoff its employees temporarily or place them on short-time;
b) The Company cannot ask its employees to go on paid annual leave or no pay leave during periods of cut-back in production; and therefore, the employees acted rightly by refusing to apply for such leave between 6.3.82 and 20.3.82;
c) The Company cannot deduct from the monthly salaries of its employees any portion of such salary equivalent to the number of day's wages such employees were required by the Company not to report for work; and therefore, the 299 employees are entitled to keep their March 1982 salaries in full.

Section 2 of Employment Act 1955

Section 2 of the Employment Act 1955 defines wages as "basic wages and all other payments in cash payable to an employee for **work done** in respect of his contract of service…". This has been argued to be the legal basis for the notion of **"no work, no pay"** even though the Employment Act does not provide that the employer shall not pay wages where work is not done by the employee.

The definition of wages under Section 2 of the Employment Act provides for the items of remuneration that are to be included in the calculation of wages. It is pertinent to note that the words "basic wages" stands separately from the words "payments in cash payable to an employee for work done". Therefore, the words "work done" are related to the definition of "payments in cash" and not related to the definition of "basic wages". "Basic wages" will be the amount as agreed and stated in the contract of service. "Payments in cash" could be any other allowances or cash benefits given by the employer. For the purposes of the Employment Act, these "payments in cash" will be considered as "wages" if they are paid for "work done" as opposed to cash payments which are given ex-gratia or not related to work done.

In ***Lee Fatt Seng v Harper Gilfillan (1980) Sdn Bhd [1988] 1 MLJ 245***, the case considered the issue of whether Saturday and Sunday, being rest days, should be included in the computation of wages as per the definition under section 2 of the Employment Act 1955. The Supreme Court held as follows: -

"In the definition of "wages" in the Employment Act of Malaysia, **the words "work done" are not expressly used with reference to any particular time or period.** There is no indication anywhere that they are intended to be used with reference to any particular time or period.

Therefore, **in my opinion, it is not correct to say that "wages" are only in respect of days on which work is actually done."**

"The wages or salary is of the same amount irrespective of whether there are the same number of working days in January as in any other month. In other words, the number of working days in the month is not relevant."

In ***Lee Fatt Seng*** Wan Hamzah SCJ also opined as follows:

"It seems that the words "work done" in the definition of "wages" are used so as to stress on the requirement that the remuneration must be for work done in respect of the contract of service of the employee concerned, so that **any payment made to him by the employer ex gratia, not for work done or to be done, and not in connection with the contract of service, is not part of the wages."**

Force Majeure - Suspension of Obligations under the Contract of Service

There is the argument that the obligations "to provide work" and "to provide services" are suspended by reason of the MCO. This argument cannot sustain as the suspension of obligations under the contract of service does not automatically apply unless there is a force majeure clause in the employment 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 MCO 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:

(a) 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;

(b) their non-performance was due to circumstances beyond their control; and
(c) there were no reasonable steps that they could have taken to avoid or mitigate the event or its consequences.

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 MCO 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 fulfil 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. What amounts to "prolonged period of time" has been decided by the Courts on a case by case basis without any established period being defined.

In the case of ***V Kandiah v. The Government Of The Federation Of Malaya [1952] 1 MLJ 97***, the court accepted that the employee's contract of service with the Government of the Federated Malay States was terminated by reason of frustration due to the occupation of Malaya by the Japanese Forces for 3 and a half years.

In ***Nordman v Rayner & Sturges (1916) 33 TLR 87***, the plaintiff, a German, was under contract with the defendants when war broke out in 1914 and was interned for one month. The Court held that "the internment for **one month** was not sufficient to cause a substantial frustration of the business engagement."

In the case of ***Hare v Murphy Brothers Ltd [1974] 3 All ER 940***, Lord Denning expounded the test applicable to determine the frustration of an employment contract:

"…In the case of a contract of employment you must look at **the length of time he has been employed,** the position which he held, and of course, most important of all, **the length of time**

which he is likely to be away from his work and unable to perform it — and the **importance of getting someone else to do his job meanwhile."**

In the case of ***Maxwell v Walter Howard Designs Ltd [1975] IRLR 77*** the employee was absent from work for approximately 1 year and 7 months due to ill health. The tribunal decided that the employee's absence did not amount to frustration of his contract. Frustration occurs where an employee's incapacity is of such a nature or likely to continue for such a period that further performance of his obligations under the contract would in future be either impossible or would be something radically different from that undertaken by him and accepted by the employer under the agreed terms of his employment.

In the case of ***Sathiaval Maruthamuthu v. Shell Malaysia Trading Sdn Bhd [1998] 1 CLJ Supp 65*** the doctrine of frustration of contract was applied as the period of non-performance by the employee was at least 2 years given his detention at the rehabilitation centre:

"… inability of the plaintiff to continue his employment with the defendant was not due to the default or fault of the defendant. It is also clear that the defendant would not be available for work for **at least two years** in which event it would have been necessary for the defendant to **employ another handyman in his place.** The circumstances were such that one can reasonably find that there had been a **radical change** of what had been undertaken by the parties in the employment contract to conclude that it had been **frustrated by the plaintiff's detention**… The plaintiff's claim is dismissed with costs…"

Based on the above case law on frustration of contract, it is unlikely that the MCO period (currently about 1 month long) would satisfy the principles of frustration of contract under employment law.

Section 52 of Contracts Act 1950

Section 52 of Contracts Act 1950 reads as follows:

"When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise."

We have not found the application of Section 52 of the Contracts Act 1950 in employment contracts.

In the case of ***Reignmont Estate Sdn Bhd v Jaya Ikatan Plantations Sdn Bhd [2013] 9 MLJ 1,*** the Court turned to the Indian Supreme Court in the case of ***JP Builders v A Ramadas Rao (2011) 1 SCC 429*** in determining the meaning of the element 'ready and willing' in Section 52 of the Contracts Act 1950:

"The words 'ready' and 'willing' imply that the person was prepared to carry out the terms of the contract. The distinction between 'readiness' and willingness' is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally, readiness is backed by willingness …"

"… To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract…"

The application of Section 52 to justify non-payment of wages would unlikely succeed in the Industrial Court given the MCO and Covid-19 situation. This is because employees who are not employed in the Essential Services are not permitted to work by reason of the MCO. Employers and employees are both ready and willing to perform their respective obligations under the employment contracts but they are prevented from doing so by the MCO.

Further, the Industrial Court may be slow to endorse the application of Section 52 of the Contracts Act 1950 to allow employers to either stop payment of salary during the MCO or terminate the employment contract during the MCO as the Industrial Court is enjoined by Section 30(5) of the Industrial Relations Act 1967 to act in accordance with "equity, good conscience and the substantial merits of the case".

In the case of ***Encik Zainal Abidin Bin Abdul Majeed v. Glaxo Wellcome (Malaysia) Sdn Bhd (Glaxo SmithKline Pharmaceutical Sdn Bhd) [2006] ILJU 59*** it was held thus:

"…In short, the Industrial Court which is, by statute, enjoined to be governed in its procedure and awards by equity, good conscience and the substantial merits of the case without regard to technicalities and legal form (section 30(5)) is a Court of Conscience which is different from the Civil Courts, which are regulated by established principle of law and equity. As such, **the Industrial Court is required to decide a case of dismissal by reference not only to contractual rights between the parties but what also what is fair.** What this means is that if, on investigation, the Court finds that there has been victimization, unfair labour practice or other mala fide action then it will intervene and set aside the dismissal…"

Indeed, the Industrial Relations Act 1967 and Employment Act 1955 are social legislations and the Courts are likely to give more emphasis to the beneficent purpose of such legislations when dealing with the specific area of employment law as opposed to contract or commercial law.

Striking a Balance between Employer and Employee Rights amidst the Covid-19 Pandemic

It appears that the current position in employment law (as stated by the MOHR FAQ) does little to help alleviate the dire financial difficulties faced by employers.

Perhaps the Supreme Court of India's decision in the case of ***Gujarat Agricultural University v. All Gujarat Kamdar Karmachari Union, (2009) 15 SCC 335*** may lend some guidance on striking a fair balance in "peculiar circumstances" such as the MCO and Covid-19 situation. In this case, the employer is an educational institution which declared the 2nd and 4th Saturday of every month as holidays and 11 days as Diwali holidays. Accordingly, the daily rated labourers engaged by the employer were not provided any work during these holidays. These workmen prayed for declaration that the action of the employer in forcing leave on 2nd and 4th Saturday and 11 days during Diwali without pay was illegal. They prayed that the employer be ordered to pay wages in lieu of all such forced holidays/leave granted to them.

The Supreme Court in the ***Gujarat Agricultural University*** case held thus:

"... In these peculiar circumstances, a just balance needs to be struck and the principle of `no work, no pay' does not deserve to be given a complete go-by. In our thoughtful consideration, the interest of justice would be served if the employer is directed to pay 50% wages to the complainants in lieu of additional leave/holidays granted to them in excess of one day weekly off and 11 days Diwali holidays from the month of May, 1991. We order accordingly."

Conclusion

In these circumstances, the solution lies with the Government to enact urgent laws to address the situation to strike a balance between the rights of employers and employees. This is necessary to save both businesses and jobs at the same time. It would not be ideal for employers and employees to have to resort to litigation to find answers to questions on their rights and obligations arising from the MCO and Covid-19 situation. As the Prime Minister put it, *"This unprecedented situation of course requires unprecedented measures."*

P. Jayasingam
Wong Keat Ching
Thavaselvi Pararajasingam
Advocates & Solicitors
6 April 2020