BAR COUNCIL INDUSTRIAL COURT PRACTICE COMMITTEE

"THE LAW ON S.20 REPRESENTATIONS"

24th June 2006

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1. INTRODUCTION

S.20 of the Industrial Relations Act 1967 ("the Act"), in its present form, came into force on or about 10th February 1989. Its purpose is aptly described by Gopal Sri Ram JCA where his Lordship said in the case of ***Hong Leong Equipment Sdn. Bhd. v Liew Fook Chuan & Other Appeals***[1]:-

> " It cannot be gainsaid that Parliament intended to elevate the status of workman as defined in the Act from the weak and subordinate position assigned to 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 termination by the employer at will with the meagre consequence of paying the hapless workman a paltry sum of 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 which may not be forfeited **save and except for just cause and excuse**. Due recognition of this higher status must therefore be accorded by our Courts if they are to act in obedience to the will of Parliament."

With the introduction of S.20 a dismissed workman is no longer confined to seeking damages at common law for breach of contract. He/She could now seek the statutorily recognized remedy of "reinstatement". Reinstatement really means putting the workman back into a position as if he/she was never dismissed. This would mean that with the remedy of reinstatement the workman will be entitled to his/her job back and all salaries the workman would have earned had he/she not been dismissed.

2. THE INDUSTRIAL COURT

The Industrial Court is a creature of statute. It is a statutory tribunal established under the Act. It is not a Court of law hence no originating process is issued by the Court. As a creature

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[1][1997] 1 CLJ 665

of statute it's jurisdiction is confined to the four corners of the Act and the Industrial Court Rules. It derives its jurisdiction from the Minister of Human Resources. It follows therefore that the Minister of Human Resources is the one who decides whether a case is a "fit" or "unfit" for adjudication by the Industrial Court. S.20 of the Industrial Relations Act prescribes a procedure which every complaint of unfair dismissal has to go through before it finally arrives at the Industrial Court for hearing.

3. **S.20 (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 may make representations in writing to the Director General **to be reinstated in his former employment**; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed."*

(a) **"workman"**

The term "workman" is defined under the Act as "any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute"[2]

Our highest courts have ruled that the term "workman" is to be interpreted liberally and flexibly. The question of whether an individual is a "workman" or not for the purposes of the Act is a mixed question of fact and law and it is for the Industrial

[2] See S.2 of Industrial Relations Act 1967

Court to determine this question[3]. There is no hard and fast rule in deciding this question and it very much depends on the facts of each individual case. The starting point would be to ascertain whether the individual is employed under a "contract of service" or a "contract for service". For example a independent contractor who is engaged for a specified period of time and for specified tasks or on a project basis would be under a contract for service and will not be considered a "workman" for the purposes of the Act.

You will find out soon enough that in Industrial Law it is almost impossible to compartmentalize an individual as either falling under a "contract of service" or a "contract for service". There are, very often, instances where this distinction is blurred. For example an Executive Director of a Company who is at the same time engaged as the General Manager of the Company. Is he a workman or is he the directing mind and brain of the Company such that he could not be considered an "employee"?[4] A person who is initially engaged on a fixed term contract but his contract is subsequently renewed automatically over a long period of time. Is he workman or just a person employed on a "contract for service"?[5]

The Federal Court has also said that the label attached to the workman is irrelevant and that it is the functions and duties actually discharged by the particular workman and the purpose of the engagement which is important.

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[3] See judgment of Chang Min Tat FJ in Dr. A. Dutt v Assunta Hospital [1981] 1 MLJ 304

[4] See Chong Kim Sang v Metatrade Sdn. Bhd. [2004] 2 CLJ 439

[5] See Han Chiang High School Penang, Han Chiang Associated Chinese Schools Association and National Union of Teachers in Independent Schools [1988] 2 ILR 611

In ***Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor***[6] , Gopal Sri Ram JCA said:-

> "In all cases where it becomes necessary to determine whether a contract is one of service or for services, the degree of control which an employer exercises over a claimant is an important factor, although it may not be the sole criterion. The terms of the contract between the parties must, therefore, first be ascertained. Where this is in writing, the task is to interpret its terms in order to determine the nature of the latter's duties and functions. Where it is not then its terms must be established and construed. **But in the vast majority of cases there are facts which go to show the nature, degree and extent of control. These include, but are not confined, to the conduct of the parties at all relevant times. Their determination is a question of fact.** When all the features of the engagement have been identified, it becomes necessary to determine whether the contract falls into one category or the other, that is to say, whether it is a contract of service or a contract for services."

Disputes as to whether a complainant is a "workman" within the Act has to be dealt with by the Industrial Court after hearing all the evidence together with the merits of the case. It is not to be dealt with by way of a preliminary objection nor by way of judicial review proceedings to quash the Minister's reference. In ***Tan Chong Motor Holdings Bhd v Menteri Sumber Manusia***[7], Wan Afrah J followed the decision of ***John Hancock Life Insurance (M) Bhd v Menteri Sumber Manusia*** and decided that the issue of whether a person was a "workman" or not was a threshold jurisdiction issue and the Minister is under a duty to decide that issue. However both the decisions in ***Tan Chong Motor*** and ***John Hancock*** has been overruled by the Court of Appeal recently and is currently pending appeal to the Federal Court.

As the law stands now any challenge which is to be taken to the issue as to whether a person is a "workman" has to be taken together with the merits of the case and is

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[6] [1995] 3 MLJ 369

[7] [2004] 7 CLJ 279

to be decided by the Industrial Court in the process of handing down its award.

(b) **"considers that he has been dismissed without just cause and excuse"**

It is important to note here that it is the workman who has the "privilege" of considering himself as having been dismissed without just cause. The views and opinions of the employer is irrelevant for this purpose. The employer may try to cite a 101 reasons after the fact as to why he had to dismiss his employee. But none of these matter because it is the employee who has been bestowed the statutory right to make representations that he had been dismissed without just cause and excuse. He will just have to wait for his day in court to prove his reasons for doing so. His reasons may even come to naught if the reasons given were not the actual reason for dismissing the employee.

In ***Goon Kwee Phoy v J & P Coats (M) Bhd***[8], Raja Azlan Shah CJ (as his Highness then was said:-

> "Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. **If the employer chooses to give a reason for the action by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out**. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse."

(c) **Dismissals**

Dismissals occur in a variety of circumstances. Direct dismissals occur where the employer issues a letter of dismissal to the employee dismissing him with immediate

[8] [1981] 2 MLJ 129

effect and/or with notice. There is also the concept of Constructive dismissal where, put simply, the employee sacks the employer. In such cases there would almost never be a dismissal letter and it takes effect upon the employee giving the employer notice that he has deemed himself as having been constructively dismissed.

The most common cases of dismissals and constructive dismissals may be categorized as follows:-

(i) **Direct Dismissals**

- **Dismissal for misconduct**

  Where the employer dismisses the employee, whether with or without the formality of a domestic inquiry, for misconduct e.g. theft, conflict of interest, fighting, insubordination, absenteeism, negligence, breach of policy/procedures, sexual harrasment etc. The classes of misconduct is ever growing.

- **Dismissal for Poor/Unsatisfactory Performance**

  Where the employer dismisses the employee on performance related grounds e.g. failing to meet targets, failing to keep to work schedules, performance generally not up to mark etc.

- **Dismissal on grounds of redundancy**

  Where the employer dismisses and/or retrenches an employee on the grounds that he is surplus to the company's requirements

- **Forced Resignations**

  Where the employer for one reason or the other induces or coerces the employee to resign. In such cases the employee bears the burden of proving, on a balance of probabilities, that he/she was forced to resign. If it is proven that the resignation was forced then this would constitute a dismissal for which the employer will have to prove just cause and excuse for inducing and/or procuring the resignation.

- **Non-Confirmation of Probationers**

  Where an employee on probation is not confirmed.

- **Termination due to Retirement**

  Where the employee reaches the contractual age of retirement. A dispute normally arises in such cases because the contract of employment does not contain a clause on retirement nor does it prescribe the age for retirement.

- **Termination Simpliciter**

  Where the employer relies on the contractual notice clause to terminate the employee

(ii) **Constructive Dismissals**

- Breach of an express and/or implied term of the contract of employment

- Victimization
- Demotions/Resignations
- Reduction in job responsibilities
- Loss of trust and confidence

Direct dismissal case and Constructive dismissal cases form the bulk of the work in the Industrial Court.

(d) **"To be reinstated to his former employment"**

A complainant who seeks to exercise his statutory right to lodge a representation must seek reinstatement to his former employment. A complainant has no right to claim for damages or compensation under S.20(1) of the Act. In ***Hong Leong Equipment Sdn. Bhd. v Liew Fook Chuan***[9] Gopal Sri Ram JCA had stated in no uncertain terms that:-

> "Reinstatement is the primary remedy in industrial law, and an acceptance of it or an unreasonable rejection of it by the workman must be treated as having put an end to the dispute."

In ***Holiday Inn, Kuching v Lee Chai Siok, Elizabeth [1992] 1 MLJ 230***, the High Court had held that the Industrial Court will cease to have jurisdiction to determine a dispute if the Claimant does not want reinstatement. This has been followed and applied by the Industrial Court.

[9] [1997] 1 CLJ 665

In ***Selaco Aluminium Berhad v Razali Mohamed & Ors [1999] 1 ILR 375*** the Claimants did not plead for reinstatement but rather pleaded for an award of compensation. A preliminary objection was raised and the Industrial Court struck off the claims at the outset. This is how the Court held:-

> "It is obvious that the representation by the honourable minister to the Industrial Court under S.20(3) of the Act must necessary confine to representations for reinstatement by virtue of S.20(1) of the Act. The power to make an award by the Industrial Court is provided by S.30(1) of the Act which is as follows:-
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> > "The court shall have power in relation to a trade dispute referred to it or in relation to a reference to it under S.20(3), to make an award (including an interim award) relating to all or any of the issues.
>
> (Emphasis supplied)
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> It would clearly appear therefore that if a workman does not require reinstatemet there would not be a reference to the Industrial Court under S.20(3) of the Act. In ***Holiday Inn, Kuching v Elizabeth Lee Chai Siok [1991] 1 CLJ p. 141*** the High Court, inter alia, held as follows:-
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> > "The respondent clearly could not come within the provisions of S.20(1) and (3) of the Industrial Relations Act as the legislature intended that recourse to the Industrial Court is only in respect of reinstatement and once reinstatement is no longer applied for the Industrial Court ceases to have jurisdiction. In this case, as the respondent did not want her job back as she is now gainfully employed, there was no basis for awarding damages or compensation in lieu of reinstatement. The award of the Industrial Court was accordingly quashed."
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> In ***Dr. A. Dutt v Assunta Hospital [1980] 1 MLJ 304***. Chang Min Tat FCJ observed as follows:-
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> > "If a workman complains he has been dismissed without just cause and excuse it does mean that he is dissatisfied with his dismissal or termination of services and he wants his job back. However there may exist circumstances and reasons why

reinstatement should not be ordered."

It is a principle of industrial jurisprudence that for compensation in lieu of reinstatement to arise, the workman, firstly, must "want his job back" and secondly, although the workman wants his job back the court after considering the circumstances would not order reinstatement.

The statement of case submitted by both claimants have not pleaded that they want or are seeking reinstatement. It is trite law that a party is bound by its pleadings. Pleadings are not mere pedantry or formalism.....In ***Amanah Butler (M) Sdn. Bhd. V Yike Chee Wah [1997] 2 CLJ 79; [1997] 2 AMR 1653***, the Court of Appeal held, inter alia, that although the Industrial Court is not bound by all the technicalities of a civil court, the fate of the appellants must depend upon its pleadings to the Industrial Court.

In the instant case the claimants do not dispute that they have not pleaded that they want reinstatement. They have also averred that they want compensation instead. In the circumstances bearing in mind the above principles enunciated, the court is of the considered view that it cannot entertain their claims.

Accordingly the claimant's claims are struck off."

In ***South Johore Omnibus Sdn. Bhd. v Maino Dull [1999] 1 ILR 973,*** the claimant similarly claimed compensation and an apology from the employer in his pleadings. There was no claim for reinstatement pleaded. This is what the Court said:-

"Bahawa mahkamah ini tidak mempunyai bidangkuasa untuk membicarakan pertikaian ini kerana tuntutan pihak menuntut tidak memohon pengambilan kerja semula (reinstatement) selaras dengan s.20(1) Akta.

Para 21 Penyata Kes seperti yang sedia ada dan tanpa pindaan memang jelas menunjukkan bahawa pihak menuntut tidak memohon "reinstatement" bahkan telah memohon hanya "gantirugi bagi pemberhentian yang salah yang harus ditaksirkan oleh mahkamah" dan "satu perma'afan secara bertulis dari South Johor" yang mana adalah tidak menuruti kehendak S.20 Akta tersebut dan oleh sebab itu mahkamah hendaklah memberhenti membicarakan

pertikaian ini kerana tidak mempunyai bidangkuasa asas langsung untuk bertindak sedemikian.

Seksyen 20 dengan terang lagi jelas menunjukkan bahawa perkara yang dirujuk oleh Menteri mestilah pertikaian yang membabitkan pembuangan kerja yang tidak sah dan pengambilan berkerja semula sahaja dan bukan tuntutan gantirugi dan kema'afan. Seksyen 20 telah menanugerahkan bidangkuasa kepada Mahkamah untuk membicara pertikaian-pertikaian yang dirujuk oleh Menteri yang teratur atau selaras dengan S.20. Oleh itu jika terdapat kecacatan di dalam pliding sahaja dan bukan tentang rujukan oleh Menteri maka mahkamah bolehlah membicarakannya dalam perbicaraan bantahan awal dan membuat penentuan (ruling) tanpa dihalang oleh tegahan seperti yang dipertetapkan oleh kes Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd [1997] 3 AMR 2484. Dalam kes di hadapan sekarang pihak Syarikat tidak mempersoalkan kesahihan rujukan oleh Menteri tetapi hanya mempertikaikan sama ada mahkamah ini mempunyai bidangkuasa atau tidak apabila pliding itu cacat kerana langsung tidak menepati s.20 Akta.

Pendapat mahkamah ini ialah seandainya pihak yang menuntut pada 18 Mac 1999 telah gagal mendapat perintah meminda plidingnya di para 21 maka sewajarnya mahkamah ini tidak dianugerahkan dengan bidangkuasa untuk membicarakan kes ini langsung.

Oleh kerana satu perintah mahkamah telah diperolehi untuk meminda plidingnya supaya menepati kehendak s.20 Akta maka mahkamah ini menolak bantahan awal pihak syarikat dan meneruskan semula perbicaraan yang telah tertangguh ini."

It is clear from that case that the position at law is that if the pleadings do not specifically plead reinstatement then it is not in compliance with S.20 and the Industrial Court will not have jurisdiction to adjudicate on the claim. It is also clear that the Claimant in that case had, prior to the hearing, obtained leave to amend his pleadings, and it was only on this ground did the Court in that case overrule the preliminary objection raised by the Company. Had he failed to do so then the Court would have similarly struck out the claim.

There is however a contrary position taken by the High Court on the same issue. In ***The Borneo Post Sdn. Bhd. v Margaret Wong***[10] the High Court held that the failure to plead reinstatement was not fatal as the requirement to plead reinstatement was merely procedural.

> "As I said earlier, whether or not reinstatement must be expressly prayed for in the statement of case is a point of procedure. The omission in the statement of 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: see S.29(d) of Act 177. 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, so it was held in Assunta Hospital v Dr. A Dutt [1981] 1 MLJ 115"

An Industrial Court following the decision in ***The Borneo Post*** case would most likely decide to decide to take the issue together with the merits and rule on it. However where the facts clearly show that the Complainant is not interested in reinstatement then it is suggested that a challenge be taken against the Minister's reference as compliance with S.20(1) is an issue concerning the threshold jurisdiction of the Industrial Court[11].

A perusal of the Complainant's Borang S.20 filed at the Industrial Relations Office will reveal this.

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[10] [2001] 8 CLJ 758

[11] Chandra Sekaran a/l Murugesu v Mentakab Veneer & Plywood Sdn. Bhd. [2004] 3 ILR 355

(e) **"to be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed"**

Representations are made by filling up a form and submitting the same with the Industrial Relations Department (Jabatan Perhubungan Perusahaan) [12]

A sample of the Form which needs to be filled up can be found at the following webpage :-

http://www.mohr.gov.my/depart/jpp/eng/borang1.html

The addresses and location of the Headquarters and the branches of the Jabatan Perhubungan Perusahaan can be found at the following webpage:-

http://www.mohr.gov.my/depart/jpp/eng/address.php

It would be advisable to submit the forms by hand and to obtain an acknowledgment of receipt thereof by the Industrial Relations Department as this form is evidence that a representation has been lodged.

4. **S.20(1A)**

*"The Director General shall not entertain any representations under subsection (1) unless such representations are **filed within sixty days of the dismissal**:*

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[12] It is important not to confuse this department with the Labour Department which is also known as the Jabatan Tenaga Kerja. The Labour Department is established under the Employment Act 1955 and deals with disputes and complaints under that Act.

Provided that where 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***."

(a) **Time Limit**

This section prescribes the time limit wherein the representation has to be made. A representation has to be made within 60 days from the date of the dismissal or, where the dismissal is with notice, not later than 60 days from the **expiry** of the notice period. The time limit has to be observed strictly. **Failure to do so would be fatal to the complaint**[13].

Counsel acting on behalf of employers would not normally know when a representation has been made. The Company will probably only know that a representation has been made when it receives notification that the matter has been referred or not referred to the Industrial Court.

A sample of the standard letter issued by the Industrial Relations Department can be found at Annexure "A". This letter is addressed to the Industrial Court and is carbon copied to all parties concerned. It is vital for Counsel to make a quick check of the dates of dismissal and the date of receipt of the representation (tarikh surat rayuan diterima oleh Jabatan Perhubungan Perusahaan). If the receipt of the representation is in excess of 60 days from the date of dismissal then the representation would be out of time. For this purpose it would also be incumbent upon Counsel to check with the client or against the termination letter to see whether any notice was required to be served.

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[13] See judgment of Raja Azlan Shah CJ in Fung Keong Rubber Manufacturing (M) Sdn. Bhd. v Lee Eng Kiat & Ors [1981] 1 MLJ 238

If the representation is indeed made in excess of 60 days then Counsel should raise a preliminary objection at the outset of the hearing before the Industrial Court and the Industrial Court, if satisfied, will rule that it has no jurisdiction to hear the case and hence strike it off[14].

(b) **Premature Claims**

A claim is said to be premature if the representation is made **before** the actual date of dismissal. Such claims would also be outside the time frame prescribed by S.20(1A). For this purpose the actual date of dismissal is the date the dismissal is to take effect.

In ***Supermix Concrete (M) Bhd v Teoh Boon Beng***[15] , the Industrial Court said:-

> "The phrase "within thirty days of the dismissal" is the operative phrase in this Section. It stipulates the time by which the representation is to be made, i.e. thirty days after the dismissal. The word "dismissal" is the key word to this phrase as the concept of effective date of dismissal is very important in that it indicates when a workman is to make the representation and also the time starts to run from that effective date of dismissal."

In ***Shaw Computer & Management Services Sdn Bhd. v Chong Kiew***, the Claimant was dismissed on 31.5.87 but he made his representation to the Director General of Industrial Relations on 22.5.97 i.e. nine days earlier than the effective date of his dismissal. The Industrial Court followed the Supermix case as affirmed by the then Supreme Court and said:-

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[14] See Gardenia Sales & Distribution Sdn. Bhd. v Ramadzan Omar [2001] 3 ILR 365

[15] [1987] 1 ILR 275. This decision was affirmed by the Supreme Court (unreported) as confirmed in the case of ***Shaw Computer & Management Services Sdn Bhd. v Chong Kiew [1989] 1 ILR 261***,

"At the time of writing this Award, the Supreme Court judgment is not available. But the proper inference from the Supreme Court decision is that the Court must give a strict interpretation to Section 20(1) of the Act and that is the representation made to the Director General of Industrial Relations must be made within thirty days from the date of dismissal. If the representation is made outside this time frame, the Court has no jurisdiction to deal with the dispute."

(c) **Preliminary Objections as to Time**

In the Federal Court case of ***Kathiravelu Ganesan & nor v Kojasa Holdings Bhd*** [16]the court ruled that only objections that a representation has been made out of time may be raised as a preliminary objection before the Industrial Court. It said:-

"It follows that in all cases where a party to a trade dispute intends to question the threshold jurisdiction of the Industrial Court to make an adjudication, **save upon the limited ground that the representations under s. 20(1) were made out of time**, he must do so by seeking to quash, by *certiorari*, the Minister's reference and, in the same proceedings, seek an order of prohibition against the Industrial Court from entertaining the dispute upon the ground that the latter has no jurisdiction to make an adjudication. Where a challenge is not thus taken, the Industrial Court must be permitted to decide the dispute to conclusion and in the process to deal with the jurisdictional question, eg, whether the particular claimant is or is not a workman or whether the matter involves the exercise of extra-territorial jurisdiction. **On no account ought such matters to be taken or dealt with as preliminary objections**. Any other course would, as we have earlier observed, obstruct a speedy disposal of a trade dispute and thereby cut across the spirit and intendment of the Act"

It follows that any other challenge to the threshold jurisdiction of the Industrial Court has to be made by way of judicial review against the Minister's reference and not by way of a preliminary objection.

[16] [1997] 3 CLJ 777

However a preliminary objection will only be allowed if the representation is, on the face of the record, clearly out of time or clearly premature. If there is any dispute as to the date of dismissal then the Industrial Court will not allow it to be dealt with as a preliminary objection but rather together with the merits of the case and make its ruling on the issue at the time it hands down its award[17]

5. **S.20(2)**

"Upon receipt of the representations the Director General ***shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at****; where the Director General is satisfied that there is no likelihood of the representations being settled, he shall notify the Minister accordingly".*

(a) **Procedure**

Upon receipt of a representation in the form prescribed a conciliation officer will be assigned to the matter who would then fix a conciliation meeting between the parties to be held at the premises of the Industrial Relations Department. On an average a meeting would normally be fixed between 3 weeks to a month from the date the representation is lodged. Notice of the meeting will be sent to all parties concerned together with what is called the Borang S.20. (see Annexure "B"). Parties will be required to fill up the form and to annex all relevant documents to the form and to bring it together with them on the day of the meeting. The form and the documents will have to be submitted to the conciliation officer and an acknowledgment of receipt should be obtained.

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[17] See Chandra Sekaran Murugesu v Mentakab Veneer & Plywood Sdn. Bhd. [2004] 3 ILR 355

As a matter of prudence it would be advisable for parties to annex all relevant documents to the Borang S.20. The reason for this is that if the Minister's decision to refer or not to refer is subsequently challenged the reviewing Court is confined to examine **only the documents and facts which were placed before the Minister** in deciding whether the Minister's reference or non-reference was proper or not[18]. Extraneous documents or documents which are not before the Minister will not be taken into consideration.

(b) **The Conciliation Meeting**

The meeting is normally attended by the Complainant employee and the Employer's representatives. The meeting is presided over by the conciliation officer. The conciliation officer is concerned only with the expeditious settlement of the dispute. For this purpose he is authorised to take all steps necessary and expedient to do so. The meeting is not meant to be adversarial in nature and the Conciliator does not exercise any powers which are analytically judicial.

The role and function of the conciliator has been exhaustively set out in the Federal Court case of ***Minister of Labour and Manpower & Anor. v Wix Corporation South East Asia Sdn. Bhd.***[19]. In that case the Court said:-

> "S.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 the facts. He is merely required to deal with the situation in the way he thinks best to get the employer and the employee to settle the dispute. If he is satisified that there is no likelihood of settlement within a month, he is to notify the Minister. Any meeting convened is merely

[18] Hong Leong Equipment Sdn. Bhd. v Liew Fook Chuan [1997] 1 CLJ 665 ; Exxon Chemical (M) Sdn. Bhd. v Menteri Sumber Manusia [2004] 1 CLJ 451

[19] [1980]2 MLJ 248

intended to be for the purpose of bargaining between the employer and the employee so that one can see the other's view point and settle the dispute themselves. It is not a forum for discussing rights and the law. The Director-General or his representatives sits in the meeting not as an adjudicator but as a mediator or, to use the words envisaged by the provisions relevant to the Act, conciliator. In such a 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 compel the attendance of any party. See Patterson's case above. If one party does not attend, he may take it that the party desires no settlement."

In reality however a bargaining process takes place at the conciliation meeting. It would normally be an inquiry as to whether the employer is prepared to reinstate the complainant or whether the employer is prepared to pay an agreed sum as compensation to get rid of the problem. Either one, if agreed to by the parties, would lead to the settlement of the dispute. A settlement agreement is then drawn up. This is commonly called the "Memorandum Persetujuan" wherein the terms of settlement will be spelt out. The parties then sign the Memorandum Persetujuan in the presence of the Conciliation Officer. Upon compliance with the terms of the agreement the dispute terminates and the Conciliator's file is closed whereupon the case settled becomes nothing more than a statistic.

If, on the other hand, where conciliatory efforts have failed and there is no settlement then the duty of the conciliator is to notify the Minister. It is believed that the Conciliator will notify the Minister through a report which would transmit all facts and documents placed before him to the Minister for a decision to be made under

S.20(3) of the Act.

(c) **Representation at the Conciliation Meeting**

S.20(6) and S.20(7) sets out the persons who may lawfully be present to represent a complainant at the Conciliation meeting.

An Employer may be represented by himself, or by a duly authorized employee, or an officer or employee of a Trade Union of Employers to which the said employer is a member of. Example of a Trade Union of Employers is the Malaysian Employer's Federation (MEF).

An Employee may represent himself or an officer or employee of a Trade Union to which he is a member. There are whole host of established Unions in Malaysia which are ready and available to represent employees at conciliation meeting.

S.20(7) prohibits representation by an advocate & solicitor, adviser or a consultant.

6. **S.20(3)**

"Upon recieving the notification of the Director General under subsection (2), ***the Minister may, if he thinks fit, refer the representations to the Court for an award****."*

(a) **The discretion**

It is not disputed that S.20(3) confers upon the Minister a very wide discretion to decide whether or not to refer representations to the Industrial Court. The wide

discretion conferred may be culled from the existence of the words "if he thinks fit". Although it is a wide discretion the discretion is not unfettered and the Minister's discretion must be exercised according to law. It follows therefore that whilst the Minister may have a wide discretion either to refer or not to refer his decision, as a decision of a public decision maker.is subject to challenge in judicial review proceedings[20].

(b) **Manner in which discretion is to be exercised**

In ***Minister of Labour, Malaysia v Lie Seng Fatt***[21] the Supreme Court said:-

> "The minister's discretion under S.20(3) is wide, but not unlimited. As stated earlier, so long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with 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 that his decision militates against the object of the statute**. Otherwise he had a complete discretion **to refuse to refer a complaint which is clearly frivolous or vexatious** which in our view this is one."

In ***Hong Leong Equipment Sdn. Bhd. v Liew Fook Chuan***[22] Gopal Sri Ram JCA dubbed the above test as the "Hashim Yeop test" and explained its application as follows:-

> "Put simply, the **first question** which the Minister ought to ask himself is whether the way in which he proposes to exercise his discretion will have the effect of preventing or settling the particular dispute; for that is what the Act is primarily aimed at. However, as I have explained just a moment ago, this approach to the exercise of the discretion is only a very

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[20] Hong Leong Equipment Sdn. Bhd. v Liew Fook Chuan [1996] 1 MLJ 481

[21] [1990] 2 MLJ 9

[22] see note 17 above

general guide because a rigid adherence to it may result in every case being referred to the Industrial Court. That this is certainly not what Parliament intended is certainly manifested by its conferment upon the Minister of a discretion whether to refer, or not to refer, a representation to the Industrial Court.

The **second question** that the Minister must ask himself is whether, objectively speaking, the representations made under S.20(1) are frivolous or vexatious. If they are, then he may well be justified in refusing a reference. Whether they are or not depends upon the facts of each case. But there are some pretty obvious cases where a reference may be properly denied.

Take the case of a workman who has admitted the commission of serious misconduct such as an assault upon his employer or a fellow employee, or to the theft of his employer's property; or where, for example, the employer, after dismissing the workman repents and reinstates, or offers to reinstate him in his former employment without loss of any benefits or priveleges. In all these examples, the Minister may well be within the purview of the section in declining a reference. In the last example, there is simply nothing to refer because of the reinstatement or the offer thereof. If in such a case, the Minister does decide to refer, then the exercise of his discretion may be quashed in certiorari proceedings as being obviously unreasonable. Reinstatement is the primary remedy in industrial law, and an acceptance of it or an unreasonable rejection of it by the workman must be treated as having put an end to the dispute."

His Lordship went on further to say:-

"I pause to emphasize that the Minister's decision, one way or the other, upon the question whether representations made under S.20(1) are frivolous or vexatious, is neither final nor conclusive, and may be reopened in judicial review proceedings. A court may, **upon an objective assessment of the facts and material that was placed before the Minister**, fairly come to the conclusion that the representation is, or is not frivolous or vexatious and hence merits reference to the Industrial Court for an award."

A point was made earlier that it is only prudent if not imperative that all relevant facts and documents be placed before the Conciliator which would ultimately reach the Minister for his consideration under S.20(3). The importance of this cannot be

stressed more in light of what was said by Gopal Sri Ram JCA that in judicial review proceedings the reviewing court, in their objective assessment, will be confined to only the facts and material placed before the Minister. For example in a case where an employee has admitted to misconduct and the admission is recorded it would obviously be foolish not to place the document evidencing the admission before the conciliator. Or if reinstatement was offered but was flatly turned down by the employee the failure to place documents evidencing the same may lead to a reference being made. After all it would be impossible to contend that the Minister failed to take into account a relevant consideration if there was nothing before him to consider.

(c) **Minister may conduct prima facie examination of the merits but cannot determine disputes as to facts or law**

In considering whether to refer a matter or not the Minister does not have the power to decide or come to a conclusion on the merits of the case. What he can do is to conduct a *prima facie* examination on the merits of the dispute. If even on a prima facie examination the representation is frivolous or vexatious then the Minister is well within his bounds not to refer it. However if upon a prima facie examination of the merits serious questions of law or of fact arise then the Minister must refer the representation for adjudication.

In ***Hong Leong Equipment*** it was said:-

> "It follows from these decisions that the Minister must bear in the forefront of his mind that the Act has established a special tribunal to adjudicate upon a dispute arising from representations made under S.20(1) of the Act, and that it is therefore no part of his function to arrive at a concluded view upon the merits of the dispute. His role is limited to ascertaining whether, on the facts and material placed before him, the representations raise serious questions of fact or of law calling for adjudication. And, as I have already said, his

determination upon the question one way or the other is not conclusive".

Below are some examples as to some of the issues which have been said to give rise to serious issue of fact and/or law calling for adjudication:-

(a) Whether a workman has been constructively dismissed (see ***Minister for Human Resources v Thong Chin Yoong and anor appeal [1999] 3 MLJ 257***)

(b) Whether complainant is a workman for the purposes of the Act (see ***Rajan Chelliah v Menteri Sumber Manusia, Malaysia & Anor [2000] 7 MLJ 203***)

(c) Issues concerning the identity of the employer (see ***Exxon Chemicals (M) Sdn. Bhd. v Menteri Sumber Manusia [2004] 1 CLJ 451***)

7. **S.20(4)**

"Where an award has been made under subsection (3), the award shall operate as a bar to any action for damages by the workman in any court in respect of wrongful dismissal"

In cases where the workman's representation is not referred and chooses not to challenge the non-reference, the workman may proceed to institute legal proceedings in the civil courts for wrongful dismissal. But where the representation has been referred and the employee loses the case then the award will operate as a bar to him commencing any action in respect of the same dismissal.

8. **S.20(5)**

"This section shall not apply to the dismissal of a workman in circumstances arising out of a contravention of section 59 where proceedings have been commenced before a court in respect of an offence under S.59(1); where while proceedings are pending under this section, proceedings arising out of the same dismissal are commenced before a court in respect of an offence under S.59(1), the proceedings under this section shall not be proceeded further."

S.59(1) of the Act states that :-

> "Subject to the provisions of section 5(2), **it shall be an offence** to dismiss a workman or injure or threaten to injure him in his employment or alter or threaten to alter his position to his prejudice, by reason of the circumstances that the workman -
>
> (a) is, or proposes to become, an officer or member of a trade union or of an association that has applied to be registered as a trade union;
>
> (b) is entitled to the benefit of a collective agreement or an award;
>
> (c) has appeared or proposes to appear as a witness, or has given or proposes to give any evidence in any proceeding under this Act;
>
> (d) being a member of a trade union which is seeking to improve working conditions, is dissatisfied with such working conditions;
>
> (e) is a member of trade union which has served an invitation under section 13 or which is a party to negotiations under this Act or to a trade dispute which has been reported to the Director General in accordance with Part V or Part VII;
>
> (f) has absented himself from work without leave for the purpose of carrying out his duties or exercising his rights as an officer of a trade union where he applied for leave in accordance with section 6 before he absented himself and leave was unreasonably deferred or withheld; or

(g) being a member of a panel appointed under section 21 has absented himself from work for the purpose of performing his functions and duties as a member of the Court and has notified the employer before he absented himself."

S.59(1) makes it an offence for an employer to dismiss a workman for the reasons stated in paragraphs (a) to (g). S. 59(2) speaks about conviction with penal sanctions. It follows that if an employer dismisses a workman for any one of the reasons stated therein then the employer would have committed a criminal offence and be liable to prosecution by the Public Prosecutor.

An employee may have lodged a representation under S.20 for dismissal without just cause and excuse and at the same time lodge a police report in relation to a contravention of S.59. If a criminal prosecution is commenced then the proceedings under S.20 will cease.

9. **S.20(8)**

"For the purpose of carrying out his functions under this section the Director General -

(a) shall have the power to direct either party to furnish to him, within such period as may be specified in that direction, such information as he may be consider necessary or relevant; and

(b) may, if he deems it necessary or expedient, direct any person engaged in or connected with directly or indirectly with the dismissals to attend a conference to be presided over by the Director General or such person as he may appoint at such time and place as may be specified in the direction."

This is an enabling section giving the Director General the said powers to carry out his functions under S.20(2). It is important to note that once the Director General notifies the

Minister under S.20(3) he becomes ***functus officio*** and is no longer vested with the powers conferred upon him by S.20(8).

In short the Director General may only exercise these powers for the purposes of conciliation proceedings.

JABATAN PERHUBUNGAN PERUSAHAAN
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Ruj. Tuan :

Ruj. Kami : *Bil(2)dlm.JPPM.SEK.20.*

Tarikh : 12-12- *2005*

"A"

RECEIVED

Yang Di Pertua,
Mahkamah Perusahaan,
50544 KUALA LUMPUR.

Tuan/Puan,

Rujukan ke Mahkamah Perusahaan Oleh Y.B. Menteri Sumber Manusia Mengenai Pembuangan Kerja

Oleh **Pada**

29.01.2003.

Dengan ini adalah dimaklumkan bahawa Y.B. Menteri Sumber Manusia telah memutuskan rayuan mengenai pembuangan kerja dirujuk ke Mahkamah Perusahaan di bawah Seksyen 20(3) Akta Perhubungan Perusahaan 1967, untuk satu keputusan.

2. Tarikh surat rayuan diterima oleh Jabatan Perhubungan Perusahaan ialah pada 22.02.2003.

Sekian, terima kasih.

" BERKHIDMAT UNTUK NEGARA "
"Pekerja Cemerlang Negara Terbilang "

Saya yang menurut perintah,

(HJ. HARUN BIN AB. GHANI)
b.p Ketua Pengarah
Perhubungan Perusahaan
Malaysia.

(Sila sebutkan bil. rujukan Jabatan ini apabila menjawab)

'B'

LAMPIRAN C

BORANG MAKLUMAT

SEKSYEN 20 AKTA PERHUBUNGAN PERUSAHAAN 1967

1. Butir-butir mengenai perayu

(a) Nama :
(seperti dalam Kad Pengenalan)

(b) (i) No.kad pengenalan :

(ii) No. Pas Lawatan Kerja/Pasport :) *Bagi pekerja-pekerja asing*

(iii) Kerakyatan :)

(iv) Tempoh Pas Lawatan Kerja (Tarikh Berkuatkuasa dan Luput) :)

(c) Jantina :

(d) Tarikh Lahir :

(e) Alamat Surat Menyurat :

(f) Nombor Telefon/ Telefon Bimbit (jika ada) :

(g) Jawatan Terakhir :

(h) i) Kadar Gaji Pokok :

ii)Pendapatan Purata Sebulan (termasuk elaun) :

(i) Tarikh Mula Bekerja :

(j) Tarikh Dibuang Kerja :

Diisi oleh perayu sahaja

(k) Ahli Kesatuan/Bukan Ahli :

(l) Nama dan Alamat Kesatuan/ Pertubuhan Yang Mewakili Perayu (jika diwakili)

2. Butir-butir mengenai majikan *(Diisi oleh majikan sahaja)*

(a) Nama dan Alamat :

(b) No. Telefon dan Fax :

(c) Jenis Perniagaan :

(d) Bilangan Tenaga Kerja :

(e) Nama dan Jawatan Wakil/ Wakil-Wakil Majikan Dalam Mesyuarat Rundingan Damai :

3. Latar Belakang Kes/Sebab-Sebab Pembuangan Kerja
(Sekiranya ruang tidak mencukupi sila gunakan kertas tambahan)

4. Jika ada kesalahan-kesalahan yang lepas, sila sebutkan tarikh/jenis kesalahan dan hukuman.

5. Pendirian sekarang atas tuntutan pemulihan kerja dan cadangan alternatif (jika ada) untuk menyelesaikan kes ini.

6. Sila sertakan tiga (3) salinan dokumen-dokumen yang berkaitan jika ada, dan sila isi borang yang dilampirkan. Tandakan X di dalam petak berkenaan.

(i) Surat pemberhentian kerja/ Surat perayu kepada majikan menganggap dirinya ditamatkan secara konstruktif/surat perayu meletak jawatan ☐

(ii) Surat perlantikan jawatan ☐

(iii) Nota siasatan dalaman (jika ada) ☐

(iv) Salinan pas lawatan kerja/ Pasport (bagi pekerja asing) ☐

(v) Surat amaran (jika ada) ☐

(iv) Lain-lain dokumen yang relevan ☐