Validity of the Ministry of Human Resources' ("MOHR") directive on forced leave during the MCO Period

The Movement Control Order ("**MCO**") was issued pursuant to the Prevention and Control of Infectious Diseases Act 1988 (Act 342) ("**the PCID Act**") and the Police Act 1967 to restrict movement from 18-3-2020 to 1-4-2020. It has since been extended to 14-4-2020 ("the MCO period from 18-3-2020 to 14-4-2020 is referred to as the "MCO Period")

The MOHR have issued directives[1] which essentially say that save for those providing essential services[2], everyone else is to stay at home and not go to work. These directives in the form of Frequently Asked Questions amongst others say that:-

1. the employer cannot direct the employee to take or deduct the employee's annual leave during the MCO Period;[3]
2. the employer cannot force the employee to go on unpaid leave during the MCO Period purportedly because the MCO is one made under the PCID Act;[4]
3. the employer must pay the full wages of the employee during the period the MCO is on foot;[5]
4. there is no frustration of the Employment contract;[6]
5. if the Employer were to breach the directives it would have committed an offence pursuant to Regulation 7 of the Prevention and Control of Infectious Diseases (Measures Within The Infected Local Areas) Regulations 2020 ("**the Regulations"**), and can be fined an amount not exceeding RM 1000 or imprisoned for a term not exceeding 6 months or both.[7]

The MOHR directives and in particular, the directive that the employer must pay the wages of the employee in full during the MCO Period has been widely publicised, and as it comes from the Ministry, the public will get the impression that this particular directive is lawfully binding.

The MOHR ought to categorically state under what law it is relying upon when disseminating such a directive using words that seek to advise the employers and employees of their legal rights and liabilities. This would help to avoid sowing seeds of expectations that could very likely lead to discord and disharmony in industrial relations.

However, seeing that the MOHR has not done so[8], a study is then made of the provisions of the PCID Act, the Police Act, the Regulations or the Employment Act 1955 and decided cases under industrial relations and employment law to see whether there is any law which give the

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[1] FAQ I - Ministry of Human Resources (19-3-2020) - Perintah Kawalan Pergerakan (https://drive.google.com/file/d/1Tq6H4Ix3IuI7i_QIF6hISEHeq1AN9DxF/view?usp=sharing); FAQ II- Ministry of Human Resources (23-3-2020) - Perintah Kawalan Pergerakan (https://drive.google.com/file/d/1Kz05ZaSNW629JDe3btq9L3pMqhn1Yoor/view?usp=sharing)
[2] Ibid, FAQ I, Annexure A
[3] Supra no. 1, FAQ II, Q&A 16
[4] Supra no. 1, FAQ I, Q&A 6
[5] Supra no. 1, FAQ I, Q&A 2&4
[6] Supra no. 1, FAQ II, Q&A 23
[7] Supra no. 1, FAQ I, Q&A 11
[8] In this regard, attempts have been made to ascertain which specific provision of law was relied upon by calling the dedicated MOHR Hotlines provided for handling COVID-19 issues. The response given was that the directive was made under the PCID Act but the person could not specify under which provision.

Minister of Human Resources and his Ministry the power to issue the directive that seek to confer rights and impose liability, both civil and criminal in a situation where leave of absence from work is **forced** upon both the employer and employee.

The Minister mentioned in the PCID Act, has powers under sections 6(1), (2) and (3), 11(1) and (2), 29(1) and (2), 30 and 31 to amongst others, declare places within and outside Malaysia as infected areas, make regulations for the prevention of infectious diseases, exempt any person, thing, animal or pathogen from the provisions of the PCID Act, make regulations for the restriction of movement of people and things, regulate sanitary standards and regulating quarantine stations, detention, isolation and observation of people suspected of having infectious diseases, cleansing and disinfection of premises, and such other matters as may be advisable for the prevention and mitigation of infectious diseases. There is, however, **no provision** in the PCID Act that confers upon the Minister the power to declare or make regulations to impose liability, both civil and criminal, to regulate the paying of salaries by employers where both employers and employees cannot or are prevented from working.

Before going further, it is noteworthy that the Government's decision for coming out with the measure to, amongst others, allow employees to claim for unpaid leave for up to six months seems to be a measure grounded on a similar policy consideration as that of the UK Government[9] **to assist businesses to survive** during the period that the employers could not provide work and the employees having no work to do. In UK, the government has come up with a policy that it would pay up to 80% of the wages of the employee to assist the employer to hold onto its business so that the employee has a job to go back to once the pandemic is over.[10] In Thailand, where there is forced closure of business by the authorities, the simple rule they abide by is "No work, no pay"[11]

We now turn to other areas of law which the Minister may possibly rely upon to make the directive on compelling employers to pay for forced leave during the MCO Period.

The relationship of employer and employee is principally governed by contract subject to certain statutory constraints such as the Employment Act 1955 ("**the Employment Act**"), Industrial Relations Act 1967 and the regulations made thereunder. The PCID Act[12] and the Regulations[13] made thereunder and the Employment Act[14], do not have any statutory provisions that specifically provide that if an employer is lawfully prevented from giving work to his employee who in turn is lawfully prevented from working, the employer must still pay the wages of the employee. To the contrary, section 2 of the Employment Act defines wages as ***"basic wages and all other payments in cash payable to an employee for work done…"***

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[9] https://www.bbc.com/news/business-51982005
[10] Ibid
[11] Options for Employers in Thailand, p.1, Q&A 3 (https://drive.google.com/file/d/13uJdSI1BRl0Ej_RTqPfQr_waKSQRs14q/view?usp=sharing)
[12] Prevention and Control of Infectious Diseases Act 1988 (https://drive.google.com/file/d/1_E6tQ0mjrtfWxy137Zn8RJkZGLmv7-NC/view?usp=sharing)
[13] Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations 2020 (https://drive.google.com/file/d/1OVE-TbAJ_ZH2dC92bPLMR0t7wHMMRGPr/view?usp=sharing)
[14] Employment Act 1955 (https://drive.google.com/file/d/1xhA5fCPzu9UCYAzSL-u7-wk4Olg3vm6g/view?usp=sharing)

Section 57(2) of our Contracts Act 1950 provides that a contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, **becomes void** when the act becomes impossible or unlawful. Illustration (d) that comes with this provision seems rather apt in our current Government's war against the Corona Virus, COVID-19. The illustration provides that *"A contract to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared."* It follows that if the promisor (employee) cannot go to work because the Government has under the PCID Act declared that the premises is out of bounds, the contract, at least for the duration of the MCO Period would be void and the promisee (employer), should not be liable to pay for this period of forced unemployment. A less dramatic provision can be found in **section 52 of our Contracts Act 1950** which provides that when a contract consists of reciprocal promises to be simultaneously performed, no promisor (employer) need perform his promise unless the promisee (employee) is ready and willing to perform his reciprocal promise. With the employee prevented from doing his work by reason of the MCO, he can hardly be said to be ready to perform his promise.

Case law[15] provides that if due to a business downturn, the employee has no work to do, the employer must still pay his employees and cannot call upon the employees to take their annual leave. This is because annual leave is for the employee to use at his discretion and the employee who is ready and willing to work should not be penalised if the employer cannot provide any work. However, if the employer has work but both the employer and employee are prevented from having the work done, it has been held[16] that it would be unfair for the employer to bear all the consequences.

As for the situation forced upon both the employer and employee where no work could be done, the English case of **Browning And Others v. Crumlin Valley Collieries, Limited. [1924. B. 5969.] [1926] 1 K.B. 522**[17] is rather instructive. In this case, the workplace which is a mine was found to be unsafe for work and had to be closed down through no fault of the employer and for safety measures to be undertaken. The court asked itself this question ***"Is it to be implied in the engagement that the wages are to be paid when through no fault of the employer the work cannot be done?"***. The court held that the men did not work, that they were not ready and willing to work in the state the mine was in, and the agreement was silent on whether they were in these circumstances entitled to be paid wages and that in business transactions such as this, the law should not impose on one side all the perils of the transaction or to emancipate one side from all chances of failure. The court went on to order that to give effect to the presumed intention of both parties to the contract of employment, it was necessary to imply a term that, in the event which happened, the mine owners *"**should***

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[15] Dunlop Malaysian Industries Berhad V. Dunlop Malaysian Industries Employees Union [1982] 1 ILR 161 (https://drive.google.com/file/d/1Ejz3cxPxQIlOr4RAhjpi3kUWYpoMvM20/view?usp=sharing); Kesatuan Kebangsaan Pekerja-pekerja Pewter dan Kraftangan Semenanjung Malaysia v Royal Selangor International Sdn Bhd 2011 4 ILJ 90 (https://drive.google.com/file/d/1Eo4ddYoaQ1LBXoaz2j0s2TN4xVwydRa8/view?usp=sharing); Viking Askim Sdn Bhd v National Union of Employees in Companies Manufacturing Rubber Products & Anor [1991] 3 CLJ (Rep) 195 (https://drive.google.com/file/d/1oNnHNOAjx89R1zr16beZBA6uPIIJA8aV/view?usp=sharing)

[16] Browning And Others V. Crumlin Valley Collieries, Limited. [1924. B. 5969.] [1926] 1 K.B. 522 (https://drive.google.com/file/d/14-FhNOr5B-MVzX5ijARa2Uv-fIRxIT9W/view?usp=sharing)

[17] Ibid, p. 528-529

not be liable to pay wages or damages to their workmen during the time which was reasonably required to put the mine into a safe condition*."*

In summary, there is no law as it stands that provides the Minister with the power to impose liability on the employer to pay wages for work not done and which could not be done through no fault of the employer.

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