

## **Dismissed Employees: Swift Redress or Lengthy Litigation?**

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Employees who have been dismissed naturally find themselves in a financial limbo. They have, after all, lost their means of making ends meet. The law acknowledges that laborious and costly litigation would be a burden that would deprive these employees of the remedy they seek.

Thus, the objective of the Industrial Relations Act 1967 (the “**IRA**”) is to promote social justice, and prevent or resolve disputes expeditiously. The Industrial Court, a forum created by the IRA, acts in accordance with equity and good conscience by taking into account all relevant facts of the case<sup>1</sup>, and by arriving at a decision based on a broad concept of fairness and natural justice.<sup>2</sup> As such, parties in the Industrial Court are not bound by legal complications and technicalities typical to the civil courts and would be deemed to be a court of equity.

However, this privilege and flexibility are often sacrificed when one party, dissatisfied with the outcome of the initial dispute before the Industrial Court, take the matter up further to the civil courts via judicial review or a subsequent appeal. The very same burden the law sought to avoid makes a comeback at this stage, especially if the employee does not have sufficient funds to bear the cost of the judicial review or appellate process against the employer. The inequality of financial might would ultimately tilt in favor of the employer.

Judicial review in employer-employee disputes may arise in two circumstances: first, at the initial stage whereby the Minister of Human Resources’ (the “**Minister**”) exercises discretion to refer the complaint to the Industrial Court<sup>3</sup>; second, at the post-adjudication stage after the Industrial Court makes an award. The application for judicial review is made to the High Court, and parties who are subsequently dissatisfied with the High Court’s decision may appeal to the Court of Appeal against the said decision<sup>4</sup>.

### **Issues at the Referral Stage**

At this juncture, it is worth to note that the Minister has announced on 18.6.2018 that amendments are being drafted into the Industrial Relations Act to remove this discretion. Nonetheless pending the amendments, the status quo remains and the position currently is such that the Industrial Court will adjudicate upon a dispute only if the Minister refers a representation to the Industrial Court by exercising his discretion under Section 20(3) of IRA. The IRA, however does not provide clear principles or guidelines in the exercise of this discretion. Caselaw has established that the Minister’s discretion is not unfettered. The court can interfere if the Minister has wrongly directed himself on a point of law, considered irrelevant or extraneous deliberations, omitted to consider relevant provisions, or made a decision contrary to the objective of the enabling statute.<sup>5</sup>

In the case of *Minister of Labour Malaysia v. Lie Seng Fatt* [1990] 2 MLJ 9, the court held as follows at page 12:-

*“The minister had a discretion under Section 20(3) of the Act and that is not in dispute. The issue is whether the discretion is unfettered. To say it is an unfettered discretion is contradiction in terms. Unfettered discretion is another name for arbitrariness.”*

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<sup>1</sup>*Industrial Relations Act 1967 (Act 177)*, s. 30(5).

<sup>2</sup>Ashgar Ali Ali Mohamed, A Critical Appraisal of the Adjudication Process of Dismissal Under the Industrial Relations Act, 1967 (2004) XXXIII No 3 at page 68.

<sup>3</sup>Rules of Court 2012, O.53

<sup>4</sup>*Ibid*, O. 53, r. 9

<sup>5</sup>Guru, D (2012). Current Judicial Review & Appeals in Industrial Relations Disputes – Unfairness of the Highest Order to the Workman. *Legal Network Series* 1(A) xvi.

As parties aggrieved by the Minister's decision may apply for a judicial review of his decision<sup>6</sup>, it can be said that such conferment of discretion to the Minister causes further unwanted and unnecessary delay in processing disputes, despite the *dicta* in the case of *Hong Leong Equipment* requiring the Minister to carry out careful scrutiny of the case and to provide reasons for his decision.<sup>7</sup> The dispute in the Industrial Court will inevitably be stayed pending the disposal of the judicial review application in the High Court.<sup>8</sup> Further, such a review by the High Court does not consider the merits of the case. At this stage, the High Court is only interested in determining if the Minister had acted *ultra vires* in making the decision, and thus will only consider the preliminary issues of the dispute. If the High Court is of the view that the dispute ought to be referred to the Industrial Court, the High Court will issue a *mandamus order*. As such, the ultimate relief sought by the employee for reinstatement will not be granted at this stage.

In *Kumpulan Guthrie Sdn Bhd v Minister of Labour and Manpower* [1986] 1 CLJ 566, three years had passed before the dispute was referred to the Industrial Court. Subsequently, the employer challenged the reference on the ground of unwarranted delay in the reference.<sup>9</sup>

In *Kathiravelu Ganesan & Anor v. Kojasa Holding Bhd* [1997] 3 CLJ 777, the employer raised a preliminary objection as to whether the Industrial Court had extra-territorial jurisdiction after the Minister referred the employee's representation to the Industrial Court. The case was eventually brought to the Court of Appeal, whereby the Court of Appeal finally ordered the representation to be remitted to the Industrial Court after a delay of **SIX** years from the date of dismissal.<sup>10</sup>

In *National Union of Hotel, Bar and Restaurant Workers v Minister of Labour and Manpower*<sup>11</sup>, the Minister's refusal to refer the dispute to the Industrial Court was challenged all the way to the Federal Court, which eventually found that the Minister's discretion had been correctly exercised<sup>12</sup>.

Thus, it is clear that the available existing mechanism to challenge the Minister's decision may not be favourable to an aggrieved employee who is keen and genuine in seeking redress.<sup>13</sup> The financial might of the employer and willingness to go on a protracted lengthy and costly endeavor before the Civil courts would ultimately frustrate the aggrieved employee.

As such it would be a welcome sight indeed for the proposed amendments to the Industrial Relations Act to see the light of day so that spirit of industrial relations law to provide a just and equitable means to resolve employment disputes is kept intact. The author here however throws caution that the removal of ministerial discretion must be equally tempered with a mechanism within the Industrial Courts system to sieve through the valid claims from frivolous claims. A sudden influx of cases may cause a further backlog of cases and where justice is hurried, justice may inadvertently be buried.

For the benefit of readers of this article, the proposed amendment to section 8 of the IRA is as follows :-

(2) *The Director General upon receiving any complaint under subsection (1) may take such steps or make such enquiries as he considers necessary or expedient to resolve the complaint; where the complaint is not resolved the Director General shall ~~notify the Minister~~ refer the complaint to the Court for hearing*

<sup>6</sup>V. Anantaraman, Prof. (2003). Labour Relations in Malaysia: An Evaluation. *Current Law Journal* 2(xxxvii).

<sup>7</sup>Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665.

<sup>8</sup>Ashgar Ali Ali Mohamed (2010). Judicial Review of Industrial Court Awards: Its Blemish and Proposed Reform. *Industrial Law Report* 1(i).

<sup>9</sup>MP Jain (1997). Administrative Law of Malaysia and Singapore (3<sup>rd</sup> ed). *Malayan Law Journal Sdn Bhd*.

<sup>10</sup>Ashgar Ali Ali Mohamed (2004). Revamping the Industrial Court system: An Analysis. *Malayan Law Journal* 4(lxx).

<sup>11</sup>*National Union of Hotel, Bar and Restaurant Workers v Minister of Labour and Manpower* (1980) 2 MLJ 189

<sup>12</sup>Wu Min Aun, *The Industrial Relations Law of Malaysia*, (Kuala Lumpur Heinemann Educational Books (Asia) Ltd.).

<sup>13</sup>Ashgar Ali Ali Mohamed (2010). Judicial Review of Industrial Court Awards: Its Blemish and Proposed Reform. *Industrial Law Report* 1(i).

### **Post-Adjudication**

The rationale of Section 33B of the IRA was to ensure that the decisions of the Industrial Court are conclusive and final, in order to ensure that proper redress is swift for dismissed employees.<sup>14</sup> However, the opening of the gates for judicial review of the Industrial Court's decisions has caused several problems that contradict the spirit and intent of the IRA. Judicial review proceedings have become the preferred route for aggrieved parties to challenge an Industrial Court award.<sup>15</sup>

The problem arises when the rigid technicalities and rules of the civil courts are transposed onto the Industrial Court by the High Court at this stage, when the Industrial Court was intended to be a court of equity and good conscience as spelled out under Section 30(5) of the IRA.

The court in the case of *Menara Panglobal Sdn Bhd v Arokianathan Sivapirasagasam* [2006] 2 CLJ 501 observed that the Industrial Court is not meant to be burdened with the civil courts' technicalities and procedures but is to be based on equity and good conscience.

While the decisions or awards of the Industrial Court are meant to be conclusive and final, the civil courts, in granting leave for judicial review to scrutinize such decisions or awards, are not keeping in tandem with the spirit and intent of IRA.<sup>16</sup> The setting up of Industrial Court is so that employees who have been unfairly dismissed have access to a speedy disposal of trade disputes.

Again, a judicial review in the High Court may make its way up to the Court of Appeal, and possibly finally to the Federal Court, causing more delays not only for the dispute in question, but other disputes that originated in the civil courts.

The civil courts have been adamant that the ouster clause that is Section 33B cannot shelter the Industrial Court from judicial review even if the IRA itself has declared that an award by the Industrial Court is to be final and conclusive.<sup>17</sup> There is no doubt that the intention of Section 33B is to prevent the civil courts from exercising the additional powers of judicial review against the Industrial Court's decisions, but it appears that the "current" is too strong to be stopped<sup>18</sup>. Thus, Section 33B has become a dead letter, as the civil courts continue to expand the grounds for their interference.

### **The Issue with Appeals**

Case law has developed to allow the decisions of supervisory courts to substitute the decision of the Industrial Court. However, such a development of the law does not properly address the issues arising from an appeal against the decisions of the High Court for judicial review of industrial dismissal disputes. This decision may lead to an usurpation of the statutory functions of the Industrial Court.<sup>19</sup> The main issue of exorbitant costs and unwanted delay suffered by the dismissed employees is not properly solved with this development. Parties are only able to get redress after a lengthy legal battle.<sup>20</sup>

In *Rama Chandran v The Industrial Court of Malaysia & Anor*, the employee's appeal against the decision of the High Court made its way to the Federal Court, on the issue of whether the Award of the Industrial Court should be quashed, and if so, whether in the particular circumstances of this case the Federal Court had the power not to merely quash the Award and remit the case to the Industrial Court to hear and determine the same

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<sup>14</sup> Ashgar Ali Ali Mohamed (2004). Revamping the Industrial Court system: An Analysis. *Malayan Law Journal* 4(1xx).

<sup>15</sup> Steven T. and Gregory D. (2013). *Employment and Industrial Relations Law in Malaysia*. The Malaysian Current Law Journal SdnBhd, Malaysian Society for Labour and Social Security Law.

<sup>16</sup> V. Anantaraman, Prof. (2003). Labour Relations in Malaysia: An Evaluation. *Current Law Journal* 2(xxxvii).

<sup>17</sup> ILBS Legal Research Board (no date), Industrial Relations Act 1967 (Act 177) [With Notes on Cases], Practitioner's Reference. *International Law Book Services* (Selangor Darul Ehsan).

<sup>18</sup> *Pendaftar Pertubuhan Malaysia v. PV Das* (bagipihak People's Progressive Party of Malaysia (PPP)) (Datuk M Kayveas, Intervener) [2003] 3 MLJ 449.

<sup>19</sup> Steven T. and Gregory D. (2013). *Employment and Industrial Relations Law in Malaysia*. The Malaysian Current Law Journal SdnBhd, Malaysian Society for Labour and Social Security Law.

<sup>20</sup> C.P. Mills (1984). *Industrial Disputes Law in Malaysia*. Malayan Law Journal Sdn Bhd.

according to law, but to go further and find that the employee had been dismissed from service without just cause or excuse, and to award fair compensation.<sup>21</sup> These issues were brought up the Federal Court by the employee through the time-consuming process of judicial review and appeals. Thus, in order for employees to seek a remedy in the Industrial Court, they will most likely be subjected to a lengthy litigation process, if they are able to afford the litigation costs and deal with the time cost.

The following cases show that dismissal disputes that undergo appeal may take place over a period of at least 7 years from the date of dismissal to final disposal by the appellate court.

Case	No. of Years
<i>Thangasamy Brown DN Gnanayutham v. Pelabuhan Tanjung Pelepas Sdn Bhd &amp; Anor</i> [2009] 6 CLJ 144	8
<i>Petroliam Nasional Bhd v Nik Ramli Nik Hassan</i> [2003] 4 CLJ 625	14
<i>VP Nathan &amp; Partners v. Subramaniam Govindan Nair &amp; Anor &amp; Another Appeal</i> [2009] 6 CLJ 673	12
<i>Ranjit Kaur &amp; Gopal Singh v. Hotel Excelsier (M) Sdn Bhd</i> [2009] 1 LNS 695	12
<i>Telekom Malaysia Bhd v. Ramli Akim</i> [2008] 1 CLJ 440	10
<i>Jye Tai Precision Industrial (M) Sdn Bhd v. Victoria Arulsamy</i> [2008] 1 CLJ 760	8
<i>Chan Hock Liang v. Associated Motor Industries (M) Sdn Bhd</i> [2007] 5 CLJ 298	16
<i>Exxon Chemical (Malaysia) Sdn Bhd v. Menteri Sumber Manusia, Malaysia &amp; Ors</i> [2007] 2 CLJ 97	11
<i>Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam</i> [2006] 2 CLJ 501	8
<i>Ngeow Voon Yean v. Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd</i> [2006] 3 CLJ 837	18
<i>M Vasagam Muthusamy v. Kesatuan Pekerja-Pekerja Resorts World, Pahang &amp; Anor</i> [2005] 4 CLJ 93	9
<i>Chong Kim Sang v. Metatrade Sdn Bhd</i> [2004] 2 CLJ 439	11

Despite what can be said to be a quantum leap in the development of the law, where by the appellate court can substitute the decisions of Industrial Court (thus granting the remedy sought at the appellate stage) and is not bound to order a *certiorari*, parties would have waited a long time for the said remedy. Hence, the issue of unwanted delay and prolonged litigation has not been properly resolved.<sup>22</sup>

The Bar Council has called for the setting up of an Employment Appeals Tribunal since 2008. The President of the Court of Appeal, Tan Sri Mohd Raus Sharif in 2014 (as he was then) even mooted the idea of a specialized Industrial Appeals Court. This was not taken up by the Minister then.

On 3.11.2018, it was announced by the Minister, M. Kulasegaran that there are proposed amendments concerning the setting up of an Industrial Appeal Court. Although the particulars, powers and function of this court has not been revealed, it is hoped that such an appeal mechanism is not placed under the Civil Courts jurisdiction for the reasons clearly stated in this article thus far and that it remains as a court established under the Industrial Relations Act. As there are clear differences on the law pertaining to the narrow scope of judicial reviews as opposed to appeals, it would augur well for industrial relation disputes to have a direct appeals mechanism.

### Legal costs affect the access to justice

In addition, actual costs in the civil courts, such as solicitors' fees and the relevant court fees apply. Although dismissal disputes in the Industrial Court can be brought free of charge, court fees and legal fees will become an

<sup>21</sup> *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145

<sup>22</sup> B. Lobo (2000). Current Trends in Judicial Review in Employment Law. *The Journal of the Malaysian Bar* 3 (XXVIX) pp 18-34.

issue for employees when the matter is brought to the civil courts. As legal aid is not available for judicial review proceedings<sup>23</sup>, the employee will have to bear the relevant filing fees and affirmation fees, whilst legal fees will be incurred when they require legal representatives for the judicial review and appeal, from lawyers who demand substantial payout.

As such, legal costs certainly affect access to justice for parties concerned, especially the struggling employee. The financial imbalance between the parties becomes more apparent at this stage.<sup>24</sup>The court in *R Rama Chandran*<sup>25</sup>held that:

*“Instances are legend where workmen have been dragged by Employers in endless litigation with preliminary objections and other technical pleas to tire them out. A fight between a workman and his employer is often times an unequal fight. The legislature was thus aware that because of the long pendency of disputes in tribunals and courts, on account of the dilatory tactics adopted by the Employer, workmen had suffered.”*<sup>26</sup>

Although the cost of the appeal will be awarded to the winning party, the employee will still have to bear a substantial payout to their solicitors. This game of costs then becomes the employer’s manipulating tool, and they may then seek to prolong the litigation process to further burden employee.

### **Conclusion**

Time-consuming legal battles affect the possibility of reinstatement, as the employer might hire new employees to fill that particular position, or the dismissed employee may seek new employment for their personal sustainability. A dismissed employee will usually find themselves in an unstable financial situation, in an uphill battle against employers with deep pockets and proper legal representation. The dismissed employee may have no choice but to accept a lesser amount in pursuit of an amicable settlement in light of insufficient funds to go all the way in their pursuit of justice.

In conclusion, the current legal system for the adjudication of Industrial Court dismissal disputes is no longer suitable in the present industrial environment. It is time to admit that the IRA in its current form is no longer able to ensure a speedy disposal of dismissal disputes to safeguard and protect the interests of the dismissed employees. As such, the proposed amendments to the IRA by the Minister would hopefully address all these concerns raised in this article. At the point of writing this Article, the author has reviewed only the proposed table of amendments prepared by the Ministry of Human Resources as at 4.12.2018

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<sup>23</sup>Legal Aid Act 1971 (Act 26), Third Schedule

<sup>24</sup>Dr.Ashgar Ali Ali Mohamed, *Dismissal From Employment And The Remedies* (LexisNexis 2007) p 396 & 397

<sup>25</sup>*R Ramachandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 45

<sup>26</sup>*Paari A/I Perumal v Abdul Majid HjNazardin&Ors* [2000] 6 MLJ 602 at p 61