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THE ESSENTIAL OF LABOUR LAWS IN REGULATING THE EMPLOYER AND EMPLOYEE RELATIONSHIP: A STUDY ON THE MEASURE TO RESOLVE THE GRIEVANCES AND DISPUTES

BY

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Synopsis

As Malaysia embarked towards industrialization, the challenge ahead for most organizations is to ensure the Malaysian work force to acquire work related skills in obeying the norms, rules and regulations, or code of behaviour. Imagine the Malaysian work force in today's industry without norms, rules and their accompanying sanctions either voluntary or involuntary. Such organization could not progress and compete in the work place for very long before devient, fractional and individual behaviour disconsonent with the rest, will be uncomfortably felt.

Deviation from the expected group behaviour is normally not to be tolerated by the members of the organization, or if so tolerated is not for long. Whether such ignorance to the rules and norms either serious or not, is not the issue. In an organization, due to it closed structure and intimate work relationship, an ignorant to the rules and norms can be disruptive and even counter productive. The reason is that an organization exists for very specific purpose and the rules governing the behaviour are regimental. Disruption normally add to cost regardless of whether it is caused by one individual or group.

Employers in large companies, which are complex organizations, cannot perform by themselves all the tasks necessary for success. As employer, employee and trade union representing them are jointly and fully responsible for

a good relations, the first need is for both management and trade union to accept responsibility at the highest level. To ensure a good relationship exist between these parties, it is vital to understand the Labour Laws, particularly the Industrial Relation Laws.

The Industrial Relation Laws governed the employer and the employee relationship. It focuses on areas such as the laws which influenced the work environment, terms and conditions of work, right of employer and employee and the terms by which the rules and terms are made. The industrial relations system itself is a tripartite, i.e. involving the employer, employee and also the government. Parties of the system would consist the employers and their organizations, employees and their organizations, the govenment and the international organizations (Unions and International Labour Organization).

Approval Page

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DECLARATION

I hereby declare that this project paper is the result of my own investigations, except where otherwise stated. Other sources are acknowledged by reference notes and a bibliography is appended.

Date: 30th October 1997

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CHAPTER ONE

1.0.0 Historical context of the Labour laws in Malaysia

Prior to the invasion of Malaya by the British, the local Malays were mainly involved in the agricultural sector. Later, when the Chinese immigrants came and settled, they started small businesses, opened and worked at the tin mines. The working condition of these immigrants were generally poor and most of them were unscrupulously exploited by their employers.[1] Later, in the late nineteenth century, the sugar cane and coffee plantations were introduced by the British. This brought in the immigrant workers mainly from the Southern India. These workers generally worked on the two to three years contractual basis. In the early twentieth century, when the rubber plantation were introduced to replaced the sugar cane and coffee plantation , more and more migrants workers were brought in by the British to cope with the rapid development of the agricultural production.

Realising that there is a need for some laws and regulations to deal with the Labour force special legislation was enacted particularly to deal with the peculiarities of the labour force, for example, in 1877, a Protector of Chinese was appointed in the Straits Settlement to manage the affairs of the Chinese community. Legislations were also enacted to regulate the coming and return of the Indian migrant workers from India.

Most of the Labour laws enacted in the nineteenth and early twentieth century were meant to deal with immigration and regulating the working conditions of

[1] Wu Min Aun . *The Industrial Relations Law of Malaysia(1990)*.p xviii

the migrant workers.[2] In 1912, a Labour Department was established for the Straits Settlements and the Federated Malay States. The Labour Code was also enacted for the Straits Settlements and Federated Malay States in 1912 and 1920, respectively. The Code was applicable to all races but mainly focussed to the workers of the tin mining and plantation industries. Today, after 40 years of independence, the Malaysian Labour laws are still greatly influenced by the British Common Law. However, the application of the common law is subjected to sections 3 and 5 of the Civil Law Act 1956 which generally states that the common law is not applicable if there is an existing written law in Malaysia. However, if there is any lacuna in the written laws then only the common law can be referred and applied to fill in the gap.

Along with the common law, the Malaysian Labour laws are also referred to any related written laws (statutes) and the decisions of the Industrial and Civil courts. Among the major statutes which relates to the labour relations are[3] :

a) Employment Act 1955 (Rev 1981) (Amended 1989)

b) Trade Union Act 1959 (Rev 1981) (Amended 1989)

c) Industrial Relations Act 1967

d) Factories and Machinery Act 1967

e) Occupational Safety and Health Act 1994

f) Workmen's Compensation Act 1952

g) Wages Council Act 1952

h) Children and Young Persons (Employment) Act 1966

i) Employees Provident Fund Act 1991

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[2] Ibid.,p xiv

[3] Maimunah Aminuddin ,*Malaysian Employment Law and Industrial Relations*,p 9

j) Employees Social Security Act 1969

k) Employment (Restrictions) Act 1968

l) Labour Ordinance, Sabah (Cap 67) and Sarawak (76)

m) Pensions Act 1980

n) Private Employment Agencies Act 1981.

1.0.0 Brief Overview on Major Areas of Labour Laws

The Labour laws comprise of few principal areas such as the Employment Laws, the Industrial Relations laws and the Industrial Safety law[4] and a great deal of its background takes its principle from other disciplines than law , for example, politics, economics and social psychology.[5] As far as employer and employee relationship is concern, the main area which regulated the aspect is the Industrial Relations Laws. Other than the employee and employer, the Industrial Relations also involved the government as nearly all industrial relations system are tripartite[6]. International bodies also play a role in the industrial relations as many unions are affiliated to international bodies to whom they may appeal for help, for example during a protracted dispute between the Airline Employees Union and the Malaysian Airline System (MAS), where the International Transport Workers Federation intervened in the dispute and encouraged the Australian Unionist to boycott Malaysian aeroplanes[7].

Despite the paramount role played by the industrial relations laws in employer and employee relationship, the other areas of the labour laws, i.e. the

[4] I.T Smith & J.C Wood *Industrial Law* (1989), p 3
[5] Ibid.,p 23

Employment Act 1955 and the Occupational, Safety and Health Act are also essential in regulating this aspect.

1.1.1 Employment laws

The Employment Act 1955 is the most important legislation as regards to the Employment laws. The Act main objective is to provide some minimum benefits for the workers covered by the Act and to establish certain rights for both employees and employers. The Act, however does not cover every types of employees. Those covered are listed in the first schedule of the Act which include :

- Any person who has entered into a contract of service with an employer and received wages not exceeding RM1,500 per month.
- Any person who has entered into a contract of service with an employer without regard to his wages who is engaged as a manual labourer, engaged in the operation or maintenance of any vehicle for the transport of passengers of goods, supervises other employees engaged in manual labour or engaged as domestic servant.

The employees of civil service, statutory bodies and local authorities are exempted from the Act as they normally received better benefits than provided by the Public Services Department. One important point to note is that the Act

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[5] Supra note 3 at p 6
[6] Ibid

only applies to West Malaysia. The workers in Sabah and Sarawak are covered under separate legislations.

The enforcement of the Act is the responsibility of the Department of Labour and it is done through the various state level Labour Offices. The main objective of the Department is to ensure that employees should know their rights and come forward to make formal complaints when their rights had been violated or exploited. The Labour offices normally conduct regular checks at the workplace. However, due to insufficient staff, the Department's enforcement activities greatly depend upon complaints from the employees themselves. Other than doing the regular check and entertaining complaints, the Department is also required to enforce the Employment Act and other labour legislation, advises employers on government policies and their implementation at the workplace and investigates claims of unfair labour practices such as sexual and racial discrimination.

The Labour Department is also responsible and empowered to settle dispute between employers and employees pertaining to the Employment Act 1955. This is normally done by the Department's officers in the "labour court". This court is different from the Industrial Court. Common type of claims heard in the labour court are termination benefits, maternity benefits, overtime payments, sick pay, annual leave pay and public holiday pay.[8]

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[8] Id at p 18-22

1.2.2 The Industrial Safety Laws

Another principal law pertaining to employment laws is the industrial safety laws. In Malaysia, this area is known as the Law on Occupational Safety and Health. The main legislation utilised by the government to ensure occupational safety and health are the Occupational Safety and Health Act (OSHA) 1994 and the Factories and Machineries Act 1967. The latter Act only applies to 'factories' which is define under section 2 of the Act. The enforcement of this legislation was given to the Department of Factories and Machineries. The officers of this Department have the duty to carry out inspection to ensure that the regulations of the Act are abide, conduct training programmes for all the parties involved in occupational safety and health and to organise promotional activities to make the employees and employers aware of the importance of industrial safety.

The latest major legislation enacted by the Government to regulate the industrial safety law is the Occupational Safety and Health Act 1994. This Act stipulates the responsibilities of the employers and employees and ensure that all parties at the workplace are held equally responsible for safety and health. All industries and sectors (with exception to the Armed Forces and the workers governed by the Merchant Shipping Ordinances) are covered by this Act. One good aspect about this Act is that it applies throughout Malaysia. Under this Act an advisory council known as the National Council for Occupational Safety and Health is established. This council comprises of 12 to 15 members appointed by the Minister of Human Resources to meet periodically and to discuss proposed amendments to the health and safety legislation, to keep relevant statistical

records, to develop codes of practice and to give ideas and suggestions on the improvement of the administration and enforcement of the occupational and health matters.[9]

Along with the two above legislations, the Employees Social Security Act 1969 and the Workmen's Compensation Act 1952 are also enacted to establish an insurance schemes for the workers and to ensure that the foreign workers are provided with insurance coverage, respectively. The former legislation is enforced by the Social Security Organisation whilst the latter is enforced by the Labour Department. Nonetheless both statutes are meant to deal with insurance coverage of workers who are involved in accidents and diseases which are not successfully averted.

1.1.2 Industrial Relations Laws

Generally, the industrial relations laws govern the employers and employees relationship. It focuses on areas such as those which influenced the work environment, terms and conditions of works, rights of employers and employees and the terms by which the rules and terms are made. Parties of the system generally consist of the employers and their organisations, employees and their organisations, the government and the International Organisations (Unions and International Labour Organisation).

The relevant legislations which govern the Industrial Relations are the Industrial Relations Act 1967 and the Trade Unions Act 1959. Together with this two

[9] Id at p 43-47

statutes. the Industrial Court also plays a significant role in dealing with trade disputes which involves industrial relations.[10]

1.1.3(a) Industrial Court

The Industrial Court was established by the Industrial Relations Act 1967 as a successor to the Industrial Arbitration Tribunal and the Arbitration Court. It specialises and deals with trade disputes cases only. It is also responsible for giving cognisance to collective agreements. The main purpose of this court is to act as arbitrator and provide a peaceful and unbiased means of settling disputes between employers and employees.

Decisions of the Industrial Court is called '*awards*' and it is binding on the parties involved. The decision is final and can not be challenged or appealed except on the questions of law which could be made to the High Court. Even this appeal normally failed. For example in 1993, there were 12 applications for reference to the High Court and all of them were disapproved[11]. However, despite the serious effect of the Industrial Court's awards, the Court itself has no power to prosecute offenders. For any non compliance of the awards, the Court Registrar can send the copy of the award to the High Court or the Sessions Court which have power to enforce the award.

1.1.3 (b) Trade Union

Trade union is one of the main organs of the Industrial Relations. It is basically an organisation of workers in a particular field with object to improve their economic situation, to ensure that their rights are protected and for social

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[10] Id at p 2-8
[11] Id at p 16

reasons[12]. The trade unions are regulated by the Trade Unions Act 1959. There are basically three categories of unions in Malaysia :

Public sector employees' union

Private sector employees' union

Employers' union

The public sector consists of the civil service, the statutory bodies and the local authorities. Examples of this unions are the National Union of the Teaching Profession, Malayan Nurse Union and Malayan Technical Services Union. The discussions on the wages and terms of services of the public sector employees at the national level are normally done by the Congress of Unions of Employees in [13]the Public and Civil Service (CUEPACS) with the government.

The private sector on the other hand, consists of either the national or in-house unions. The national unions basically cover all workers of the same industry, trade or occupation. It does not cover workers nationwide but restricted to only workers in Peninsula Malaysia, Sabah or Sarawak. The in-house unions on the other hand, is where members are employed by the same employer and from different occupations[14].

The Employers' unions or usually known as associations are formed mainly to promote and protect the interest of their members, to negotiate and deal with employees' trade unions and to represent their members in any trade disputes between an individual member and the employees' union. Examples of this associations are Malayan Mining Employers' Association (MMEA),

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[12] Id at p 58
[13] Id at p 90
[14] Id at p 80-81

Commercial Employers' Association of Penisular Malaysia, Malayan Commercial Banks Association (MCBA) and Electrical Industry Employers Association (EIEA)[15].

[15] Id at p 89-90

CHAPTER TWO

2.0.0 The relationship of employer and employee

It is very important in the employment to distinguish between 'employer' and 'employee'. Historically, the approach used to differentiate them was the 'control test', i.e, could the employer control not just what the person do, but also the manner in which the task was performed. If the answer is yes, then that person was his employee. This test was applied for example in the case of *Performing Right Society Ltd v Mitchell and Booker (Palais de Danse) Ltd [1924] KB 762* and *Mersey Docks and Harbour Board v Coggins and Griffiths Ltd* [1947] AC 1[1]. However, with the development of the economics system, the test was no longer suitable. The modern approach is to abandon the single test approach and instead to take a multiple or 'pragmatic' approach, weighing up all the factors for and against a contract of employment and determining on which side the scales eventually settle. Factors which are usually important in this approach are the power to select and dismiss, the direct payment of some form of remuneration, deduction of government income tax and the employees' fund contributions. This approach was adopted by the court for example in the case of *Global Plant Ltd v Secretary of State for Health and Social Security [1972] 1 QB 139* and in *Hitchcock v Post Office* [1980] ICR 100[2]. Two other tests which are commonly used are the organisation and composite tests. In the organisation test which is also known as

[1] I.T Smith and J.C Wood, *Industrial Law(1989)*, p 10

[2] Ibid., p 11

the integral part of the business test wherein under the contract of employment the employee is employed as part of the business and the work done by the employee must form an integral part of the business. The main question in this test is whether the person employed plays an important and integral part in the business. This test was introduced by Lord Denning in the case of *Cassidy v Ministry of Health [1951] 2 KB 343* and later was applied in many cases such as in *Bank Voor Handel v Slatford [1953] 1 QB 248*[3].

In the composite test, the main question is whether the person employed did the work as if he did it for his own business. If the answer is yes, then that person is merely a person employed under a *contract for employment* and if the answer is no, then that person is a person employed under the *contract of employment.* This test was used and clarified by Cooke J in an authority case *Market Investigations Ltd v Minister of Social Security [1969] 2 WLR 1*[4].

Despites various approaches and tests used to distinguish and determine the position of employer and employee, the main reference is still made on the *contract of employment*[5].

2.1.0 Contract of employment

" A contract of service is but an example of contracts in general, so that the general law of contract will be applicable"

[3] Kamal Halili Hassan. *Hubungan Undang-Undang Majikan dan Pekerja(1990),* p 17-18
[4] Ibid
[5] Id at pp 12-15

per *Lord Evershed MR in Laws v London Chronicle [1959] 2 All ER 285.*

A contract of employment is often depicted as a particular application of the general rule of contract, based on the general assumptions of contract. The hiring stage is regarded as the agreement characterised by offer and acceptance by employer and employee, the consideration provided by the mutual exchange of promises : the employer to pay wages or salary and the employee to perform work. In theory, the important terms of the contract are agreed by the parties and any variation or changes in such terms must be mutually agreed. The termination is also regarded as consisting of the mutual right of equal parties to the contract with each having the right to freely terminate the contract for any reason as long as proper notice is given[6].

Despite the similarities to the common law contract theory, to picture the contract employment as exclusively or predominantly contractual can be misleading. For example, the employees would only know the terms of the employment contract-pay and other forms of remuneration, hours of work, type of work, place of work , etc after they are hired and even this are pre-determined by the employers. The terms of the contractual relationships and the terms in which they intended to be bound, to a large extent had been pre-established by the employers for the employees. Furthermore along with the express terms of the contract, there is a virtual code of standard terms, implied into all employment contracts by the law. This is clearly against the principle of freedom to contract. Nonetheless, the

[6] Steven D Anderman, *Labour Law, Management Decisions & Workers Right* . p 30

contract of employment still resembles and applied the general principle of common law contracts and there is still room for discussions to reach an agreement before entering the employment contract, for example during the interview, the candidate would normally asked as to the amount of salary they required or expect to get and the benefits which they want to be entitled .

The main difference between common law contract and contract of employment actually lies in the 'relationship'. In the latter, the relationship is between master and servant and this clearly eliminates the equal bargaining powers, liabilities and responsibilities.

Whilst in the former, the court will normally insist on equal freedom to contract and contractual rights as the contractual parties. One of the criteria used to distinguish a contract of employment from the common law contract is on the existence of the 'employer and employee'. Once it is proved that an 'employer – employee' relationship exist in the agreement, then the contract is a contract of employment rather than a common law contract[7]. There are many test which are applied to determine the existence of an employer and employee. In Malaysia, from the case law, it is found that the approach which are commonly used to determine the existence of 'employer-employee' are the 'control' and 'organisitions or integral part of the business' tests[8].

[7] Supra note 3 at p 14

[8] For example in the case *Lembaga Kumpulan Simpanan Pekerja v M.S Ally & Co. Ltd [1975]2 MLJ 89*