## 1.1 Labour Laws of Malaysia

The main employment legislation in Malaysia includes:

- *Industrial Relations Act 1967* (IRA 1967), which governs the relations between employers, employees and their respective trade unions
- *Employment Act 1955* (EA 1955), which prescribes **minimum** terms and conditions of employment in respect of employees within its scope. EA 1955 applies in Peninsular Malaysia and the Federal Territory of Labuan. In Sabah and Sarawak, instead of EA 1955, the *Sabah Labour Ordinance* and the *Sarawak Labour Ordinance* are applicable
- *Trade Unions Act 1959* (TUA 1959), which governs the formation, registration, membership and functioning of trade unions
- *Occupational Safety and Health Act 1994*, which imposes duties on employers and employees alike to secure workplace health and safety for all employees and others who may be affected by the activities at the workplace
- *Factories and Machinery Act 1967*, which provides for the safety of workers at the place of employment and the certification of fitness of machinery used therein
- *Employees' Social Security Act 1969*, which provides for the payment of benefits for employees who contract occupational diseases or are injured or killed in the course of employment
- *Employees Provident Fund Act 1991*, which regulates a statutorily created fund whereby every employee and employer of a person who is an employee within the meaning of the said Act is required to make monthly contributions to ensure financial security to employees upon their attaining a certain age or meeting the other criteria for the withdrawal of contributions.
- *Minimum Retirement Age Act 2012* (MRA 2012), an Act to provide for the minimum retirement age and for any related matters.
- *Minimum Wages Order 2012*, created pursuant to the *National Wages Consultative Council Act 2012*.
- *Personal Data Protection Act 2010* (PDPA 2010), an Act to regulate the processing of personal data in commercial transactions and to provide for matters connected therewith and incidental thereto.

Other legislation includes:

- *Children and Young Persons (Employment) Act 1966*
- *Employment Information Act 1953*
- *Holidays Act 1951*
- *National Wages Consultative Council Act 2011*
- *Pembangunan Sumber Manusia Berhad Act 2001*
- *Private Employment Agencies Act 1981*
- *Weekly Holidays Act 1950*

- *Workers' Minimum Standards of Housing and Amenities Act 1990*
- *Workmen's Compensation Act 1952.*

Employers must be aware of the wide range of labour-related legislation, which to an extent places constraints and limitations on employment and termination practices.

# 1.2 Recruitment

## 1.2.1 The recruitment process

The recruitment process is complex and time-consuming. It involves many considerations including logistics, manpower and finance, amongst others.

Recruitment is a procedure that is undertaken by the employer before the master-servant relationship is formalised. The recruitment exercise entails the employer carrying out a number of procedures and formalities that will eventually lead to the hiring or rejection of a prospective employee. An employee may for example, fail the medical examination requirement at the final stage of the recruitment exercise that could result in his rejection.

The recruitment exercise would cover advertising, interviews and could be a time-consuming and costly affair, depending very much on the position to be offered and the status/financial position of the company as well. The higher the position, the greater the likelihood that more emphasis would be placed on the advertising and interview process. For such positions, head-hunters and recruitment agencies may be called upon and the cost incurred would no doubt be significantly higher.

Most people do not realise the significance of the recruitment process until much later. The exercise would normally commence with the advertising for the position. It would then be followed by interviews, reference checks, medical examination and negotiations in respect of the terms and conditions of employment that would eventually lead to an offer of employment being made.

The offer stage could come some weeks or months after the initial advertisement for the position being made. This of course depends very much on the position that is being advertised and the urgency to fill the position at the material time.

Before embarking on the recruitment exercise, it is advisable for the employer to assess the situation as a whole by looking at its operational needs and requirements. If the position/situation is immediate, the recruitment/selection process may take a shorter time. In this context, it is also important to bear in mind the cost of the recruitment exercise. Alternatives to recruitment could take the form of redeployment and retraining of existing employees. A situation may arise where the employer may decide to take on temporary staff instead or decide to contract out the work or position – see 1.6 "Types of Work Arrangements".






The ultimate aim of a recruitment exercise is to ensure that the company is adequately staffed at all times and running at a level where its losses are minimised and profits are maximised. The selection process must eventually result in the right person being hired for the right job, failing which, much time and effort will have to be spent counseling, training and eventually terminating the services of the employee concerned.

## 1.2.2 Common recruitment issues

Recruitment could arise for several reasons. A vacancy may exist upon the resignation, retirement, death or termination without notice of an employee. A new position may arise as a result of restructuring or as a result of the impact of globalisation on the overall operations of the company.

At the last stage of the recruitment exercise and before the letter of offer is given, it is imperative that the terms and conditions be decided and to an extent agreed upon, bearing in mind the fact that the contract of employment is the fundamental link between the hiring and subsequent termination of the employee. The termination provisions are fundamental terms of the contract of employment and if left vague and uncertain, could cause problems for both the employer and employee at a later stage.

It is therefore important at this stage to consider and take into account all material provisions that would have an impact on the contract of employment before the contract is formalised. Once a contract has been duly accepted, the employer would not be able to unilaterally vary at a later date any of the terms of the said contract. Any proposed variance to the terms and conditions of the contract of employment at a later date must be **mutually agreed** upon by both the employer and the affected employee.

*Legal capacity*

It is important to also ensure that the employee has legal capacity to enter into the contract and that the same complies with the relevant statutory provisions, ie *Children and Young Persons (Employment) Act 1966*, *Employment Act 1955*, *Immigration Act 1959/63 (Revised 1975)*.

*Employment contract considerations*

The following provisions must at least be considered and addressed before the contract of employment is formalised:

- Position
- Place of work
- Remuneration
- Working hours
- Transfer provision
- Retirement age

- Termination notice
- Confidentiality
- Conflict of interest
- Fringe benefits.

### 1.2.3 Employee register

Section 44 of the *Employment Act 1955* (EA 1955) requires all employers to keep a register, in a form prescribed by the Minister through regulations made under the Act, of all payments made to female employees under Pt IX (Maternity protection) and of such other matters incidental thereto as may be prescribed by such regulations.

Section 61 of EA 1955 makes it obligatory for the employer to prepare and keep one or more registers containing such information regarding each employee employed by him/her as may be prescribed by regulations made under this Act. Every such register shall be preserved for such period that every particular recorded therein shall be available for inspection for not less than six years after the recording thereof.

The register must contain the following:

(a) **Personal details:**

(1) Name
(2) Sex
(3) Age (date of birth)
(4) National Registration Identification Card Number
(5) Employment Permit or Immigration Work Pass Number (if applicable) and date of expiry
(6) Permanent home address
(7) Occupation or appointment
(8) Date of commencing employment
(9) Date of leaving employment
(10) Amount of termination or lay-off benefits paid and the date of such payment
(11) the method of computing the termination or lay-off benefits payments.

(b) **Details of terms and conditions of employment:**

(1) Name of employee and National Registration Identification Card Number
(2) Occupation or appointment
(3) Wage rates (excluding other allowances)
(4) Other allowances payable and rates
(5) Rates for overtime work
(6) Other benefits (including approved amenity and service)






(7) Agreed normal hours of work per day
(8) Agreed period of notice for termination of employment or wages in lieu
(9) Number of days entitlement to holidays and annual leave with pay
(10) Duration of wage period.

(c) **Details of wages and allowances earned during the each wage period:**

(1) Where pay is calculated by reference to time, that is by the hour, day, week or month:
  (i) Rate of pay
  (ii) Total number of days of normal hours of work during each wage period
  (iii) Total amount of wages for normal hours of work during each wage period
  (iv) Rate of pay per hour for overtime work
  (v) Total number of hours of overtime work done during each wage period
  (vi) Total amount of overtime wages during each wage period.

(2) Where pay is calculated by reference to work done, that is, by piece, volume or task of work:
  (i) Rate of pay per piece, volume or task of work during normal hours of work
  (ii) Total number of piece, volume, or task of work done during normal hours of work in each wage period
  (iii) Total amount of wages earned during normal hours of work in each wage period
  (iv) Rate of pay per piece, volume or task of work done exceeding normal hours of work per day
  (v) Total number of piece, volume or task of work done exceeding normal hours of work in each wage period
  (vi) Total amount of overtime wages earned exceeding normal hours of work in each wage period.

(3) Total number of days work or total number of piece, volume or task of work done on rest days and holidays with pay during each wage period
(4) Amount of wages paid in lieu of annual leave with pay in each wage period
(5) Details of other allowances payable during each wage period
(6) Total amount of wages and allowances earned during each wage period under para (1) to (5)
(7) Details of advances made during each wage period
(8) Details of deductions made during each wage period
(9) Balance of wages and allowances payable at end of each wage period

*Damage to organisation's reputation*

Frequent advertisements in respect of employment vacancies will have an adverse impact on the reputation of the organisation. A high labour turnover would not be a good indication of the company's work environment, thus to an extent, causing damage to its reputation.

*Retraining cost*

The cost of training an unsuitable candidate would be immense.

*Renegotiating the contract of employment*

In the event the candidate proves to be unsuitable for the position, it may be necessary to renegotiate the terms of his contract to suit the current situation, ie alter the conditions of employment to enable the candidate to better perform the tasks assigned to him.

## 1.2.8 Consequences of inappropriate termination procedures

The direct or indirect cost of any termination exercise can be substantial.

The cost would escalate further in the event the termination is held to be unlawful or without cause/excuse. The backwages and salary in lieu of reinstatement that the Industrial Court may award could be substantial and so would the legal costs of such an exercise.

As with a flawed or inappropriate recruitment exercise, there will also be adverse effects on the organisation when the termination procedure is flawed or inappropriate.

The following are typical examples of the adverse consequences of an inappropriate termination of the contract of employment:

*Unfair dismissal*

An employee may challenge his termination from service. Section 20 of the *Industrial Relations Act 1967* (IRA 1967) provides an aggrieved employee with the avenue of challenging his termination from service and the employer is burdened with the duty of demonstrating just cause or excuse for such a termination. In the event the employer fails to discharge the burden, the employer may become liable to an order of reinstatement from the Industrial Court. Along with the aforesaid order comes the burden of paying backwages and/or compensation in lieu of reinstatement. The process is a lengthy one and may take two to three years to complete. If it proceeds to the High Court and further, the time-frame will be even longer.

*Damage to reputation*

An employer which frequently terminates the services of its employees, may develop a reputation of being an undesirable organisation to work for. Most proceedings before the Industrial Court are reported in industrial law reports and the local media.






*High legal cost*

The cost of defending unfair dismissal claims is not cheap. Legal fees can go into tens of thousands of ringgit, and this will no doubt have an impact on the organisation's finances.

*Morale*

A badly handled termination exercise would also have an adverse impact on the morale of existing employees – the same fate could befall them. Low morale would in turn reduce productivity levels at the workplace.

It may also lead to other problems, for example, industrial action which could include strikes, pickets, go-slow, etc.

The high cost and legal issues involved in "hiring and firing" would necessitate proper policies and procedures being put in place to ensure minimal exposure to both employers and employees.

It is therefore important to have the following in place:

- A proper recruitment and termination policy/guidelines.
- Communicate the policy and guidelines to the staff concerned.
- Ensure that the staff comply with the policies and guidelines.
- Develop a back-up system.

## 1.2.9 The interview process

The preliminary selection process from the short-listing of potential candidates to the interview proper should establish the essential and desirable criteria for the job. The selection criteria must be established before the interview process commences.

The next step would be to ensure that all applicants have been provided with the job description. This is to avoid a situation where candidates who do not possess the requisite or necessary qualifications apply, resulting in considerable time being spent vetting and deleting unsuitable applications.

Next, would be the selection of the interviewer/panel of interview. The interviewer must at the interview stage consider all candidates against the same objective selection criteria. The interviews should be structured to ensure that each candidate is provided an equal quantitative and qualitative consideration.

Finally, the interviewer or selection team ought to put their observations in writing, detailing the strengths and weaknesses of each candidate with respect to the selection criteria for management's ease of reference and consideration.

### 1.2.10 Important considerations in the interview process

(a) **Need analysis**

- Is there a need for the position?
- If so, can it be done by someone within the establishment?
- If not, can it be done by outsourcing or by an independent contractor?
- If not, develop a recruitment plan.

(b) **Recruitment plan**

- Appoint a selection panel best-suited to address the intricacies of the position.
- Prepare together with the selection panel, the job description and the criteria or requirements of the ideal candidate.
- Work out the remuneration and benefits package.
- Advertise in the appropriate newspapers (local, business, or international, depending on the position to be filled).

(c) **Selection panel**

- Must have detailed knowledge of the position advertised.
- Must be in a more senior capacity than the position offered.
- Need not be more than two officers of the company.
- Must be briefed of their role and responsibilities at the interview.

(d) **Advertisement**

- In the appropriate newspaper, depending on the job/position.
- Local daily for local position.
- Must contain the position, brief job description, remuneration package, contact person and benefits that come with the position.
- Selection criteria, closing date.

(e) **The interview proper**

- Prepare the venue.
- Ensure that the venue is communicated to potential candidates (with proper directions).
- Ensure that the security department is informed in advance of the venue for the interview.
- Prepare a list of questions, preferably typed with remarks and rating columns.
- Ensure panel members are briefed once again on the position, their duties and responsibilities.

### 1.2.11 Information at interview

The employer should have in hand, copies of the applicant's documents (ie certificates, testimonials, curriculum vitae, references, etc).






All the terms and conditions of employment ought to be set out and communicated (preferably with acknowledgement) before the employment relationship commences.

It is important to obtain the necessary acknowledgement/acceptance of the employer's offer before the commencement of employment so as to ensure that neither party is misled into believing the existence or non-existence of any term.

If the offer is not acknowledged by a written acceptance, the contract would still be considered to be at a negotiation stage and thus not legally enforceable. It is therefore prudent to obtain the acceptance in writing from the prospective employee before the date of commencement.

### 1.2.12 The job offer

The job offer is the starting point in every employment relationship. It has to be done by an authorised personnel/officer of the company and it is usually made soon after the interview process. The offer will set out the terms and conditions of employment and the person making the offer needs to be aware of a number of essential issues relating to the job/position. The employment status of the potential candidate is one such consideration. Whether the employee is to be engaged on a full-time basis or on a fixed-term contract, whether a probationary period is necessary, whether a work permit has to be applied for are important considerations to be taken into account by the person making the offer.

An offer of employment can either be verbal or in writing but it is preferable that the offer is made in writing as it would be easier to clarify the position of the parties in the event a dispute should arise at a later date.

The advertisement placed in respect of the job/position does not amount to an offer of employment but merely constitutes an invitation to treat. It has no legal implications.

The offer itself is not binding until the employee accepts it.

Whether written or verbal, the job offer should at least contain the following information:

- The position and job title
- Place of work
- Date of commencement
- Duration
- Wages/salary
- Employment status, ie full-time or fixed-term
- Termination provisions
- Any other special terms and conditions of employment.

It is important to note that most job offer letters are not employment contracts. The offer itself is not binding until the employee accepts it.

*Difference between an employment contract and a letter of offer*

An employment contract is a signed legal contract between the employer and the employee. Contracts are more extensive than offer letters and usually include information such as compensation, benefits, duties and circumstances under which an employee can be terminated.

Offer letters are usually very brief and are used to informally offer a position to a candidate. Typically, the candidate and employer have already verbally discussed the job that has been offered, and the letter is sent to confirm the conversation.

**Note:** there is no doubt that the employment contract cannot contain all the terms and conditions of employment. Some of the terms and conditions are contained in other company documents, for example, the employee manual and handbook. Reference should be made in the offer letter or employment contract to such manuals or handbooks.

### 1.2.13 Unsuccessful applications

It is a good practice to notify candidates who have been unsuccessful in their application for employment. This ought to be done promptly and in a tactful manner.

The length of time to keep candidates' applications is a question of fact and depends very much on the operational requirements of each organisation. Regard has to be made to the provisions of the *Personal Data Protection Act 2010* (see – Chapter 10 "Data Protection and Privacy in Employment").

Some employers keep the applications in their records as there may be instances where the successful candidate/employee may not turn up, or prematurely terminates the contract by resigning all of a sudden without due notice, or the employer may be compelled to terminate the employee's services summarily on the grounds of poor performance or misconduct.

With the candidates' information on record, the company may save time and cost by not being required to advertise and go through the formalities of the recruitment process all over again. The next most suitable candidate can be called upon, subject to his availability at that material point in time.

After a certain time-frame, the application forms and records of unsuccessful candidates ought to be destroyed recognising the candidates' right to privacy.

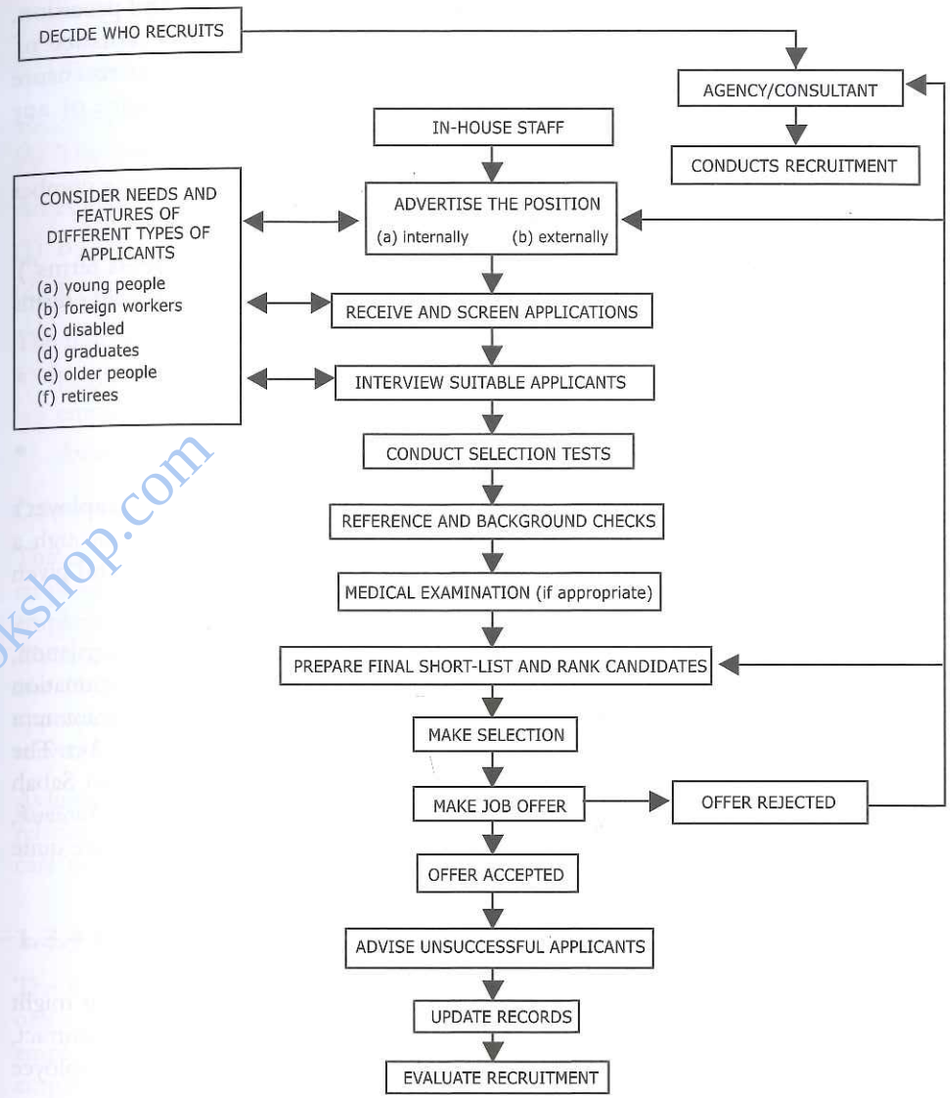
The flowchart on the following page summarises the recruitment process.







**Flowchart: The recruitment process**






## 1.3 The Employment Contract

### 1.3.1 Basis of the employment relationship

An employment contract is an agreement between employer and employee and is the basis of the employment relationship, as it sets out their employment rights, responsibilities and duties. These are called the "terms" of the contract. Since the employment contract gives rise to certain legal rights and obligations

to both the employer and the employee, it is therefore crucial that the terms and conditions of the employment contract be spelt out with care and precision. Therefore, it is vital to obtain the necessary acknowledgement/acceptance of the employer's offer before the commencement of employment so as to ensure that neither party is misled into believing the existence or non-existence of any term or condition.

Once the employment contract is agreed to by the employer and employee, a number of rights and duties, enforceable by law, arises.

Not all terms are always explicitly agreed in writing (see – 1.3.5.1 "Express terms"). The courts have established that all employment contracts have the following terms included, whether express or implied (see – 1.3.5.2 "Implied terms"):

- to maintain trust and confidence through cooperation
- to act in good faith towards each other
- to take reasonable care to ensure health and safety in the workplace.

Some implied terms can become part of the contract because of the employer's and employee's behaviour, through custom and practice over time, or through a firm's rules (particularly if the employee has been made aware of them and given access to them).

Employers must also be familiar with the wide range of labour-related legislation, which to an extent places constraints and limitations on employment and termination practices. For instance, the *Employment Act 1955* (EA 1955) provides for the minimum standards in relation to terms of employment for employees covered by the Act. The Act applies to Peninsular Malaysia and the Federal Territory of Labuan. In Sabah and Sarawak, the *Labour Ordinance of Sabah* and the *Labour Ordinance of Sarawak*, respectively, are applicable. Both labour ordinances contain provisions that are quite similar to EA 1955.

### 1.3.2 An employment contract exists for all employees

All employees have an employment contract with their employer, although it might not be in writing. Even if an employee does not have a written employment contract, an employment contract would have automatically been created when the employee started to work for his employer.

### 1.3.3 Features of a valid employment contract

The essential features that ensure the employment contract to be legally binding are:

(1) There must be an "intention" between the parties to create a legal relationship, the terms of which are enforceable.

(2) There must be an offer by one party and its acceptance by the other.

(3) The contract must be supported by valuable consideration.






(4) The parties must be legally capable of making a contract (eg the employee must be of legal age and sound mind) and that the same complies with the relevant statutory provisions (ie *Employment Act 1955* (EA 1955), *Children and Young Persons (Employment) Act 1966, Immigration Act 1959/63*).

(5) The parties must genuinely consent to the terms of the contract.

(6) The contract must not be entered into for any purpose which is illegal.

An employment contract can be created in one of the following ways:

(1) By express terms which could either be written or verbal.

(2) By implication.

The following can further affect the content and shape of the employment contract:

- Legislation, eg EA 1955, which prescribes the minimum terms and conditions of employment.
- Awards of the Industrial Court, in particular collective agreement awards.

*Other considerations*

The employer may either be a natural person, a corporation or a partnership. The employee must possess the legal capacity to enter into the agreement with the employer. In general, any person above the age of 16 may enter into such agreements. There are legal restrictions imposed by the *Children and Young Persons (Employment) Act 1966*, EA 1955 and the *Immigration Act 1959/63* and an employer must seek appropriate legal advice on such issues particularly when it involves engaging the services of children, young persons or foreign workers.

As highlighted above, there is a wide array of legislation that intrudes into the contractual relationship between the employer and the employee. In these circumstances, great care must be taken when drafting the employment contract.

### 1.3.4 Definitions

The *Employment Act 1955* defines a **contract of service** as "any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee and includes an apprenticeship contract".

The *Industrial Relations Act 1967* defines a **contract of employment** as "any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as a workman and that other agrees to serve his employer as a workman".

**Note:** In this publication, the term "employment contract" is used to encompass both "contract of service" and "contract of employment".

### 1.3.5 Express terms, implied terms and conditions of employment

Generally, the terms and conditions are a matter of contract between the employer and the employee. There are, however, other factors that influence the content and shape of the employment contract, eg local legislation, custom and practice. Local legislation is relevant principally on the basis that **one cannot contract out of a statute**.

There are also terms that could be incorporated into employment contracts by way of reference to work rules, notices and regulations. In order to bind the employee to such terms, it is imperative that he be asked to sign and acknowledge receipt or confirmation of the same, failing which there will always be that opportunity to argue at a later date the validity and applicability of such rules, notices or regulations. It is important to note at this juncture that there is a distinction between work rules, regulations and instructions as to how to work.

*Changing dynamics at the workplace*

Like the law, the employment relationship is dynamic, changing daily to meet the socio-economic developments of the time. The impact of information technology (IT) has had a profound effect on the employer–employee relationship. Some contracts or letters of appointment date back to the 1960s. The terms and conditions are simple and suited the requirements of the organisation or employer at that point in time. With industrialisation, the content and shape of the employment contract is no longer the same as what it was before. New innovative clauses have replaced archaic and outdated clauses.

Changes have been brought about in working practices particularly with the more frequent use of IT at the workplace. With globalisation, employees may be compelled to move from one geographical location to another. The employer must be able to visualise and anticipate such eventualities and provide for the same in the employment contract.

#### 1.3.5.1 Express terms

Express terms of an employment contract could either be verbal, in written form or both. Such terms would include the position and job title, remuneration/salary, place of work, hours of work, leave entitlement, job scope and responsibilities, transfer provisions, and termination notice.

The express terms and conditions of a contract of service are usually found in the letter of appointment, company handbook and collective agreements.

*Express incorporation of employee handbook*

The contents of an employee handbook in most instances represent the terms and conditions of employment at the workplace. Where the letter of appointment expressly refers to some extraneous documents, then the employee handbook would automatically, by express incorporation, be considered as another source of terms and conditions of employment aside from the letter of appointment. The case of *Firex*






*Sdn Bhd v Cik Ng Shoo Waa* [1990] 1 ILR 226 provides an illustration of a situation where the Industrial Court adopted the provisions of the Employee Handbook which mandated a notice of termination of three months to be given to an employee.

*Collective agreements*

Collective agreement awards do also to a certain extent affect the employment relationship. Most collective agreement awards impose on the parties minimum standards that would benefit the employee. These minimum standards merely modify the effect of the employment contract but do not in any way dispense with the need for it. Awards of the Industrial Court operate with the force of the enabling statute, which is the *Industrial Relations Act 1967* (s 30, IRA 1967).

#### 1.3.5.2 Implied terms

Most contracts of employment do not exhaustively contain the respective rights and obligations of each party to the agreement. Parties may, for various unforeseen reasons, fail to reach express agreement on certain aspects of the employment relationship. In such circumstances, reliance is placed on the legal system, which includes the courts and relevant legislation to add terms that are necessary or relevant into the employment relationship.

Examples of such terms that are implied into the employment relationship would include the duty to act in the best interest of the employer, the duty of care by the employer to the employee, the duty to provide a safe system or place of work, the duty to maintain confidentiality, the duty not to act in conflict of interest, the duty to act honestly, the duty to obey the employer's lawful instructions, etc. There are also instances where although the terms of the employment contract are in writing, the practical reality of the same and the demands of business efficacy may require or necessitate additional terms being implied into the contract to make it workable.

There are certain contractual terms that may be implied by law, eg hours of work, overtime as prescribed by the *Employment Act 1955* or the statutory duty to make contributions as prescribed by the *Employees Provident Fund Act 1991*.

There are also instances where the company handbook or manual may contain certain terms which although separate from the employment contract, are implied into the employment relationship. In most cases such an implication is through the legal process of **incorporation by reference**.

*Consistent and clear implied terms*

Under the law, it is possible that a consistent practice in a particular establishment or industry may give rise to an implied term. However, such practice must be consistent and clear. *Harvey on Industrial Relations and Employment Law* at p A103 aptly summarises the position:

> "Taking the matter one step further, if a term is regularly adopted in a particular trade or industry or in a particular area, then it may be possible to assert that the term has

> become customary and falls to be implied into every contract in that trade or industry or area. Again, the basis is that the parties must be taken to have agreed upon the obvious (*Sagar v H Ridehalgh & Son Ltd* [1931] 1 Ch 310: 'Every weaver in Lancashire know…'). The custom must be proved, but if it is proved, it apparently does not matter that the individual concerned was unaware of the custom. If 'everybody knows' then he ought to know too; and it is his own fault if he does not. The other party will reasonably have assumed that he does know, and therefore he is bound by the custom."

*Express term overrides implied term*

However, it would be pertinent to note that the law is equally clear that an implied term cannot override an express term on the same subject matter. In *Johnson v Unisys* [2001] 2 WLR 1076, the House of Lords had held the following at p 1,091:

> "… any terms which the courts imply into a contract must be consistent with the express terms. Implied terms may supplement the express terms of the contract but cannot contradict them. Only Parliament may actually override what the parties have agreed."

### 1.3.6 Duties of the employer and employee

To be legally enforceable, the employment contract must contain rights and obligations of both the employer and the employee. This can consist of a benefit conferred upon one by the other as a result of something done by that one for the other, ie wages for work.

The employer's duty to an employee would, among others, be as follows:

- To provide work.
- To provide a safe system/place of work.
- To pay for work undertaken.
- To reimburse for expenses incurred.
- To honour the terms and conditions of employment.

The employee's duty towards the employer would, on the other hand, include the following:

- To obey the lawful instructions of the employer.
- To work skilfully and competently.
- To maintain the confidentiality and trust placed by the employer.
- To account for all monies and property received in the course of employment.
- To disclose information to the employer.
- To make available inventions made in the course of employment.
- To comply with the various rules, regulations and policies of the employer.






### 1.3.7 Contents of the employment contract

When drafting the employment contract, it is important to express the contents in such language which both parties can understand and interpret without ambiguity.

The contents of the employment contract would typically include the following:

- Job title/position
- Remuneration
- Place/location of work
- Commencement date
- Probationary period
- Duration
- Working hours
- Leave provisions
- Medical benefits
- Transfer/relocation provisions
- Confidentiality/non-competition
- Disciplinary procedure
- Grievance procedure
- Termination of employment
- Conflict of interest
- Company policies.

While it is important that the contract is comprehensive, its contents ought to be simple and easily understood by a lay person.

Careful attention should also be paid to the terminology and expressions contained in the employment contract. For senior executives, it is desirable to have a precise and detailed written contract whereas for those engaged at the lower levels, it would suffice to have a letter of appointment enclosing a standard set of basic terms and conditions.

(1) *Job title/position*

The contract should specify the job title or position to which the employee is being employed.

(2) *Remuneration*

Remuneration is an important component of the employment contract. It would include the basic salary due and other benefits such as EPF, bonus, increments and overtime (if applicable).

Other non-financial benefits such as club membership or entitlement to a company vehicle would also come within this component. The method and timing of payment should be specified together with the review periods.

(3) *Commencement date*

The commencement date should be clearly specified. In the event the employee fails to turn up on the specified date, the employer can canvas the argument that there has been a breach committed by the employee entitling the employer to deem the contract terminated.

(4) *Probationary period*

This is an important clause as it will not only assist the employer in assessing the suitability and competency of the employee but would also assist the employee to determine whether he likes the working environment and the conditions that are imposed upon him. The clause should stipulate the length of the probationary period and the possibility of extensions.

(5) *Duration*

If the employment relationship is for a specified time frame, then the duration should be clearly stated. This is specially so for contracts of a fixed-term nature or for a specific project. Although there is security of tenure for all those engaged under a contract of service, in such situations, the security of tenure is limited up until the expiry of the fixed-term period.

(6) *Hours of work*

The normal hours of work should be specified although in most situations, employees do work in excess of these hours. "Hours of work" is defined by the *Employment Act 1955* (EA 1955) as the time during which an employee is at the disposal of the employer and is not free to dispose of his own time and movements. This is another key component of the employment contract.

(7) *Leave provisions*

Provisions relating to annual leave, sick leave, compassionate leave and other forms of leave should be clearly spelt out. Public holidays can also be set out in detail but it is sufficient to simply state that the statutory provisions or gazetted holidays would apply.

(8) *Medical benefits*

The various medical or hospitalisation benefits should be set out. This would also include insurance policies taken by the employer for the benefit of the employee. The limit of the entitlements should be clearly spelt out to avoid any dispute at a later date.

(9) *Transfer clause*

Where it is foreseeable that the employee could be transferred or relocated to other workplaces operated by the employer, it is imperative that such a clause be specifically incorporated into the contract to avoid any potential claim for breach which could include a claim for constructive dismissal by an employee. This clause may become necessary at a later date particularly when the employer has to reorganise due to business exigencies, globalisation, etc.






(10) *Conflict of interest*

This is a complex area which has to be carefully addressed. The clause has to be very carefully drafted. A breach by the employee of this clause could lead to his summary dismissal as the employee shall not for the duration of the contract set himself up or engage in private business or undertake other employment which would be in direct/indirect competition with the employer.

(11) *Confidentiality/non-competition*

This is an important term of the employment contract bearing in mind the increasing awareness relating to intellectual property. This clause has to be drafted with extreme care as it involves issues which are highly technical in nature.

In respect of restraint of trade, s 28 of the *Contracts Act 1950* expressly provides that "every agreement by which anyone is restrained from exercising a lawful professional, trade, or business of any kind, is to that extent void". There are however three exceptions namely:

- *Exception 1: Saving of agreement not to carry on business of which goodwill is sold*

  One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the court reasonable, regard being had to the nature of the business.

- *Exception 2: Agreement between partners prior to dissolution*

  Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within such local limits as are referred to in Exception 1.

- *Exception 3: During continuance of partnership*

  Partners may agree that some or all of them will not carry on any business, other than that of the partnership, during the continuance of the partnership.

(12) *Termination of employment*

Notice provisions are relevant in particular where the employee leaves without providing the requisite notice of termination. In such situations, the employer can recover the salary in lieu of notice. The notice period also provides the employer the opportunity to reassign the duties undertaken by the employee who has tendered his resignation to others or to reorganise the department pending the recruitment of a replacement.

It is important that the retirement age be provided in the employment contract, failing which the employer may have to pay employee termination benefits under the *Employment (Termination and Lay-off Benefits) Regulations 1980* if the employee is covered under EA 1955, or if the employee is not covered under EA 1955, he may file a claim for reinstatement under s 20 of IRA 1967.

The *Minimum Retirement Age Act 2012* (MRA 2012) provides a minimum retirement age for those employed in the private sector. The Act, which came into operation on 1 July 2013, states that the minimum retirement age of an employee shall be upon the employee attaining the age of 60 years [s 4(1), MRA 2012].

The MRA 2012 contains a provision for premature retirement where it stipulates at s 5 that an employer shall not prematurely retire an employee before the employee attains the minimum retirement age. Section 5 further goes on to clarify that a premature retirement shall not include an optional retirement.

Optional retirement is defined in s 6 to mean that notwithstanding minimum retirement age, an employee may retire upon the age of optional retirement as agreed in the contract of service.

The MRA 2012 further states in s 7 that any retirement age in a contract of service made before, on or after the date of coming into operation of this Act which is less than the minimum retirement age provided under this Act shall be deemed to be void and substituted with the minimum retirement age provided under the Act. Section 7 carries on to state that any term in a contract of service relating to retirement age shall be void if it excludes or limits the operation of any provision of the Act.

The Act does not apply to nine categories of employees which amongst others include the following:

(a) a person who is employed on a permanent, temporary or contractual basis and is paid emoluments by the Federal Government, the Government of any State, any statutory body or any local authorities;

(b) a person who works on a probationary term;

(c) an apprentice who is employed under an apprenticeship contract;

(d) a non-citizen employee;

(e) a domestic servant;

(f) a person who is employed in any employment with average hours of work not exceeding seventy percent of the normal hours of work of a full-time employee;

(g) a student who is employed under any contract for a temporary term of employment but does not include an employee on study leave and an employee who studies on part-time basis;

(h) a person who is employed on a fixed-term contract of service, inclusive of any extension, of not more than twenty four months; and

(i) a person who, before the date of coming into operation of this Act, has retired at the age of fifty five years or above and subsequently is re-employed after he has retired.






(13) *Company policies*

Relevant company policies, etc, such as human resources and training, retirement, insurance schemes, etc, should all be incorporated into the employment contract. The same can be done by express reference in the employment contract. This is to avoid any dispute arising at a later stage that a condition of employment has been unilaterally imposed by the employer.

## 1.3.8 Termination provisions

The termination provisions are fundamental terms of the employment contract and if left vague and uncertain, could cause problems for both the employer and employee at a later stage. A common example is the retirement age: it is well accepted that where a "retirement age" clause exists in a contract of service, an employee's contract may be terminated upon the employee attaining the specified age of retirement. The problem arises where the contract is silent on the retirement age. In such cases, the employee can claim to be entitled to work for as long as they want, or until they are unable to do their job properly. The employer can only terminate the contract with just cause and excuse (eg for misconduct, poor performance or redundancy) and will have to follow the procedures set out in the employment contract and established principles laid down by case law. The courts have held that it is unfair discrimination for employers to terminate their employees' services just because of their age.

*Case examples*

In *Roche (Malaysia) Sdn Bhd v Chin Yoon Khin* [1999] 3 ILR 560 (Award 712 of 1999), the employee claimed that the company had unjustly retired him at age 55 when there was no express clause in his contract of service stipulating his retirement age. The company contended that it was their policy to retire staff at age 55. Notwithstanding the absence of such a term in the claimant's contract, there was an employee's handbook by which their employees were informed of the retirement age. The claimant, however, contended that he was never given a copy of the handbook.

In *Pelangi Enterprise Sdn Bhd v Oh Swee Choo* (2001) 1 ILR 492 (Award 115 of 2001), the Industrial Court was faced with the situation where the claimant's letter of appointment was silent in respect of her compulsory retirement age. The Court found that the company in purporting to unilaterally retire the claimant at 55 years in the absence of an express term allowing the company to do so, did commit a breach of the claimant's contract of employment. The Court found the breach to be a fundamental breach going to the root of the contract. To retire an employee in breach of contract is to deprive that employee of his right to continue to earn a living, ruled the Industrial Court. Justice *Raus Sharif* (as his Lordship then was) upheld the Award of the Industrial Court in *Pelangi Enterprises Sdn Bhd v Oh Swee Choo & Anor* [2004] 1 LNS 76.

# 4.1 Introduction

Human Capital is an appreciating asset that determines the well-being of a business enterprise. One of the prerequisites of an efficient business enterprise is to strike the right equilibrium between industrial output, profits and its manpower requirements. A business entity would not be able meet its commercial requirements particularly if there is shortage of manpower.

Likewise, the entity would be operating inefficiently if there is surplus manpower. Surplus of manpower is common in business cycles, particularly in times of economic crisis. This chapter seeks to elucidate on the ways to carry out a lawful reduction of excess manpower. Although the right to reorganise a business is always the prerogative of management, this right must be exercised in accordance with the established principles of industrial relations that have evolved over the years. These principles have come about through the development of case law, legal principles and statutory enactments.



# 4.2 Principles of Retrenchment

## 4.2.1 Definition of retrenchment

Retrenchment is a legal expression used to describe an exercise where a business entity terminates the services of employees that it considers as **surplus** to its business requirements. In *William Jacks & Co (M) Bhd v S Balasingam* [1997] 3 CLJ 235, the Court of Appeal held that:

> "Retrenchment means the discharge of surplus labour or staff by an employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action."

It is pertinent to note that a retrenchment exercise is distinguishable from an exercise involving a closure of business. In a business closure, **all** employees are discharged as a result of cessation of operations. Thus, a closure of business is separate and distinct from a retrenchment.

This distinction was drawn by the Supreme Court in *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109. In that case, the court accepted the following observation:

> "Retrenchment connotes in its ordinary acceptation that the business itself is being continued but that a portion of the staff or the labour force is discharged as surplusage. The termination of services of all the workmen as a result of the closure of the business cannot, therefore, be properly described as retrenchment. Though there is discharge of workmen both when there is retrenchment and closure of business, the compensation is to be awarded under the law, not for discharge as such but for discharge on retrenchment, and, as retrenchment means in ordinary parlance, discharge of the surplus, it cannot include discharge on closure of business."

As such, a retrenchment in its ordinary meaning, implies that the business itself is being continued but a portion of the staff is discharged as surplusage (see – *Stephen Bong v FCB* [1999] 3 MLJ 411).

The general rule is that it is for the management of the business enterprise to decide on the strength of its staff, which it considers necessary for efficiency of its undertakings. The decision to dispense off surplus manpower could arise as a result of a number of factors, for example, business conditions, economic climate and other variables.

### 4.2.2 Requirements for a retrenchment exercise

In carrying out a retrenchment exercise, the following requirements must be complied with:

(1) There must be a legal basis and justification to carry out the reorganisation or restructuring;

(2) The position of the employee affected must be redundant as a result of the reorganisation; and

(3) The retrenchment exercise must be carried out in accordance with the principle of Last-In-First-Out (LIFO) or other accepted standards of industrial relations practice.

The Industrial Courts have consistently applied the above criteria in determining whether the business entity or employer is justified in reorganising and subsequently terminating employees who are in excess of their requirements. It is important to note that retrenchment is one of the justifiable grounds for dismissal as recognised by the Industrial Courts. (See – s 20 of the *Industrial Relations Act 1967*). In *Pn Ong Lean Phaik v CF Sharp & Co (M) Sdn Bhd* (Award 121 of 1980), the Industrial Court in recognising the employer's right to reorganise made the following observations:

> "It has been well established that, in industrial law, the employer has every right to reorganise his business in any manner for the purpose of economy or convenience provided he acts *bona fide* and no arbitrator should interfere with the *bona fide* exercise of that right. It is also well settled that it is for the management to decide the strength of its staff, which it considers necessary for efficiency in its undertakings. Where the management decides that workmen are surplus and that there is, therefore, a need for retrenchment, an arbitration tribunal will not intervene unless it can be shown that the decision was capricious, without reason or was *mala fide* or was actuated by victimisation or unfair labour practice. This principle has been consistently followed by the Industrial Court and I have not known of any one instance where the Industrial Court has departed from it."

In *Dijaya Enterprise Berhad v Koh Bee Lan* (Award 915 of 2003), the Industrial Court was faced with a reference involving a claim for unfair dismissal by a senior human resources executive who was served with a notice of retrenchment. The company cited the financial crisis ravaging the country in 1997 and the huge losses suffered






by them in that year as the reasons that necessitated them to review its manpower requirements and adopt cost-cutting measures to achieve better business efficacy. Downsizing measures was one of the options forced upon the company by the prevailing adverse economic conditions.

The Industrial Court referred to two decisions of the Court of Appeal namely *William Jacks & Co (M) Bhd v S. Balasingam* [1997] 3 CLJ 235 and *Bayer (M) Sdn Bhd v Ng Hong Pau* [1999] 4 CLJ 155.

In *William Jacks v S. Balasingam*, the Court of Appeal held as follows:

> "Whether the retrenchment exercise in a particular case is *bona fide* or otherwise, is a question of fact and of degree depending on particular circumstances of the case. It is well settled that the employer is entitled to organise his business in the manner he considers best. So long as the managerial power is exercised *bona fide*, the decision is immune from examination even by the Industrial Court. However the Industrial Court is empowered, and indeed duty bound to investigate the facts and circumstances of the case to determine whether the exercise of power is *bona fide* ..."

In *Bayer (M) Sdn Bhd v Ng Hong Pau*, the Court of Appeal held as follows:

> "On redundancy it cannot be gain said that the appellant must come to court with concrete proof. The burden is on the appellant to prove actual redundancy on which the dismissal was grounded (see *Chapman & Ors v Goonvean & Rostowrack China Clay Co Ltd* (1973) 2 All ER 1063). It is our view that merely to show evidence of a reorganisation in the appellant is certainly not sufficient."

The central issue for the court's determination was whether there was a redundancy situation afflicting the company necessitating the company to embark on a retrenchment exercise.

The court made the following finding on the facts and evidence:

> "It is my findings that on the balance of probabilities there was in fact a redundancy situation afflicting the company contributed primarily by the financial and economic crisis ravaging the nation back then. It is also my findings that the company did indeed suffer huge financial losses resulting therefrom, compelling the company to embark on retrenchment exercises and the said exercises were carried upon as a last resort after exhausting all means available to allay the losses suffered. I also accepted COW-2's evidence relating to the recruitment of new employees, which in my view is a necessary incidence of a reorganisation process for the company to remain resilient and where its priority to refocus its strategy is achievable. In any event it is trite law that the company is entitled to organise its business in the manner it considers best. It is also my view that in so doing, the company had as much as possible adhered to the requirements of Art 20 of the *Code of Conduct for Industrial Harmony*, which provides:
>
> 'In circumstances where redundancy is likely, an employer should, in consultation with his employees' representatives or their trade union, as appropriate, and in consultation with the Ministry of Labour and Manpower, take positive steps

In doing so, *K.C. Vohrah* J (retired Judge of the Court of Appeal), held that the decision of the Industrial Court was wrong and perverse in particular when ignoring such relevant evidence. The learned judge held, *inter alia,* as follows:

> "... it is necessary to bear in mind that the law is that the Employer has the prerogative to reorganise its business and here the severe losses which were proved as having occurred, and which the [Industrial] Court erroneously said was not proved, gave good reason for having the retrenchment."

The High Court further held that the Industrial Court fell into error in ruling that the retrenchment as a result of bad management was wrong. The learned judge observed that:

> "... it is not the law of retrenchment that bad management resulting in losses disentitles the employer from retrenching its employees; should that be the case, then every employer facing losses in a company arising from bad management would never be able to retrench its employees."

### 4.3.2 Closure of a department or section

The Industrial Courts have also in the past ruled that a closure of one of the department or business section of an enterprise may be an acceptable justification for reorganisation. In *Excella Wood Industries Sdn Bhd v Mohd Zikri Binyamin* [2000] 1 ILR 643, the court ruled that a reorganisation may be carried out in such a manner as to result in the closure of one or more units of the business operations. The right to reorganise includes hiving off business or outsourcing a section of its business to an independent contractor or to another company.

In *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109, the Supreme Court took the view that the closure of a restaurant within the Hotel was proper as it was facing financial losses. The court ruled that the retrenchment of the employees of the restaurant division was in the circumstances, proper.

### 4.3.3 Reduced turnover

Reduced turnover has also been held to be an acceptable reason for a retrenchment exercise, particularly where it can be established that there is a declining trend of business over the years or months depending on the circumstances of each case. A declining trend of business would normally indicate a reduction of the company's profits that would justify a reduction in the output and workforce. The Courts also require that the decline must be **significant** and not nominal.

A typical example of a significant reduction in turnover is the case of *Firex Sdn Bhd v Cik Ng Shoo Waa* [1990] 1 ILR 226 wherein evidence was adduced before the Industrial Court that the turnover nose-dived by 50%. The learned Chairman Steve Shim (now Chief Justice of Sabah and Sarawak) ruled that the retrenchment exercise conducted by the company was perfectly valid.






Another case noteworthy of consideration is *Stephen Bong v FCB* [1999] 3 MLJ 411. This was a case where the Industrial Court ruled that there was a redundancy situation, which was caused by a soft and depressed market resulting in the loss of sizeable accounts and clients. In another case, *Dunlop Estates Bhd v Persatuan Pentadbir-pentadbir Ladang Malaysia Seremban* [1989] 2 ILR 159, the company suffered a significant reduction in turnover and profits in one year. As a result, the company embarked on a rationalisation exercise and amalgamated several small estates into a single management. This resulted in the closure of the Engineering Department. The Manager and several employees in the said department were retrenched. Although the company was still registering profits, the Industrial Court took cognisance of the fact that there was a significant reduction in turnover and net profits, thus justifying the restructuring exercise. In doing so, the court ruled as follows:

> "It is generally the prerogative or the right of any employer to close down any part of the department within the company for the purpose of cost-cutting (so it was in this case that the company took 14 steps to do so) and to maximise profit for the company after a substantial down trend in the profits by the company."

### 4.3.4 Reduced productivity

Reduced productivity or low production may also be cited as a reason for carrying out a retrenchment exercise.

In *First Belting (M) Sdn Bhd v Muniandy Pathen* [1999] 1 ILR 56, the claimant who was employed as boilerman was terminated by the company. When the matter was called up for reconciliation under s 20 of the *Industrial Relations Act*, the company offered to reinstate him. When the claimant reported back for work, he was informed that the company did not need him anymore as a boilerman since the position no longer existed. The company contended that its boiler operations were outsourced to another company. The company then decided to give the claimant an alternative job as a security guard. The claimant left before the company could give him the letter of offer. The company thereafter made a decision to retrench the claimant and gave him termination benefits.

The Industrial Court held that the company had produced convincing evidence that there was a *bona fide* retrenchment exercise carried out due to the company's low production. The fact that there was no prior consultation or early warning did not render the retrenchment as *mala fide* (in bad faith).

The same approach was taken by the court in *United MS Cable MFG Sdn Bhd v They Teo Hong* [2000] 2 ILR 156 where a company was compelled to close down its sales operations due to the economic crisis in 1998. A sales-executive based in the office in East Malaysia was retrenched as there were no other branches or divisions in East Malaysia. The learned Chairman took the view that the retrenchment exercise was properly managed as it was necessitated by the redundancy situation in a manner consistent with the standards of good and acceptable industrial relations practice.

In some instances, the courts have indicated its reluctance to rule that a retrenchment exercise was unfair merely because the company had failed to establish that it was suffering losses. Instead, the courts have accepted the argument that the reorganisation was implemented with a primary purpose of enhancing business efficacy and efficiency (see – *Trebor (M) Sdn Bhd v Gopal* [1987] 1 ILR 99). Nevertheless, based on the current trends of the Industrial Court, it appears that any attempt to justify a reorganisation exercise in the absence of cogent evidence of financial loss or reduced turnover would be fraught with risks.

### 4.3.5 Government policy

Changes in a government policy which makes a position in an employment untenable may be viewed as a valid reason for retrenchment. In a decided case, an attempt was made to justify a redundancy based on changes in the policy of the government. In *Maju Commercial Institute v Hee Yok Lai* [1999] 2 ILR 489, the company attempted to justify their claim that the employee's position was redundant due to changes in the policy and guidelines of the Ministry of Education. In this case, the claimant was employed as lecturer cum administrator to teach LCCI Diploma. In 1998, the Ministry of Education imposed a new guideline, which mandated that a lecturer of a diploma course be a degree holder. This ruling affected the claimant who was thereafter not entitled to teach diploma courses.

The Industrial Court, however, ruled that there was no redundancy as the company had failed to prove that there was indeed such oral directive by the Ministry of Education that the claimant was not eligible to teach. In fact, the claimant's teaching permit for the year 1998 was never revoked by the Ministry. It is pertinent to note that the employer in this case did not succeed in proving that there was such an oral directive. However, had the employer succeeded in doing so, there would have been a basis to justify the retrenchment. In addition, the Industrial Court did not make any adverse comment on the possibility of justifying retrenchment on the premise that there was a change in government policy.

### 4.3.6 Contracting out

Contracting out of business is part of globalisation today. As part of its business strategy, an enterprise may decide to contract out certain aspects of its business. Over the past years, the Industrial Court had recognised that an employer may hive off or contract out part of its business to a third party to maintain efficacy of its undertakings.

The early position taken by the courts is that as long as the contracting out does not involve an essential part or integral part of the employer's business, the employer may embark on such a course of action. In *Palm Beach Hotel Rasa Sayang Beach Hotel Penang Berhad v National Union of Hotel Bar & Restaurant Workers Union* [1989] 2 ILR 716, the hotel closed down its laundry department and retrenched all the staff in that department. The hotel's laundry requirements were contracted out to a sister hotel. The court upheld the retrenchment and ruled that the employer was entitled to do so.






In *Hyundai Engineering and Construction Co Ltd v Construction Workers' Union* [1987] 2 ILR 24, the Industrial Court also upheld the retrenchment of an employee although there was evidence that the work previously done by the employee had been contracted out to a contractor.

However, in recent times, the Industrial Court has taken a more liberal view to recognise the contracting out of core businesses.

In *Hume Industries (M) Berhad v Mohamad Bin Shafie & 48 Ors* (Award 1471 of 2005), the company had ceased its main functions in respect of the manufacture of piles and reinforced concrete (RC) products at its Beranang plant and contracted out its production to a contractor. In so doing, it had retrenched the claimants. The Industrial Court noted that although the company had contracted out the production to a third party contractor, this was within the rights of the company to restructure and reorganise the company and hence the retrenchment of the employees was held to be with just cause and excuse because their services were redundant.

In *Natseven TV Sdn Bhd v Shahirman & 21 Ors* [2007] 1 ILR 413, a major Malaysian TV station/channel had embarked on a massive retrenchment exercise in 1998 due to business restructuring towards the brand management business model. It closed down its production unit department which produced in-house shows and contracted out the shows to third party companies. The Industrial Court ruled that the retrenchment exercise was carried out fairly and was in accordance with the law. A major endorsement of the Industrial Court was on the employer's right to retrench employees pursuant to an outsourcing exercise. In so ruling, the court noted the following:

> "It is clear … that the law recognises that redundancy can arise if the company closes down a particular department and outsources the functions played by that department to third party companies."

The cases of *Palm Beach*, *Hume Industries* and *Natseven TV* serve to confirm that contracting out has been held to be a valid reason to constitute redundancy and hence justifies a retrenchment exercise.

However, there exists a contrary school of thought which takes the view that contracting out cannot be used as a basis to retrench employees since there is no actual redundancy because the job still exists, except that it is now being carried out by a third party contractor. In *Ipoh City & Country Club Berhad v Mohd Khurshaid* [2006] 3 ILR 1756, the Industrial Court ruled that it was not open for the employer to retrench its security manager on the premise that the club had outsourced its security services to a third party contractor. The court held the following:

> "The company cannot use the excuse of outsourcing its security services by way of reorganisation to render the claimant's services redundant. This is inequitable and doing a disservice to the claimant and the other security guards whose means of livelihood was snuffed out suddenly and without any warning or indication… There was no proof of any real redundancy on which the dismissal was grounded. The same security services were still required by the company but under the guise of outsourcing at the expense of the claimant's employment."

### 4.5.4 Limitations of LIFO

The limitations of LIFO were elaborated by the Industrial Court in *Associated Pan Malaysia Cement Sdn Bhd v Kesatuan Pekerja-pekerja Perusahaaan Simen (M) Perak* (Award 375 of 1986). In that case, the learned Chairman observed that the LIFO principle is subject to two limitations. Firstly, it operates only within the establishment in which the retrenchment is to be carried out, and secondly, the rule applies only to the category to which the retrenched workers belong. The chairman also observed that the expression "establishment" should be construed in its ordinary sense, which means "the place at which the workmen are employed, and it is of essence of the concept of an industrial establishment that it is local in its set-up".

If there was failure to comply with the LIFO principle, the retrenchment is *prima facie* invalid and the dismissal would be without just cause or excuse, unless the employer is able to show reasonable and cogent excuse for departing from the principle. The Industrial Court would then have the power to order reinstatement of the employee to his former position together with the necessary monetary compensation.

### 4.5.5 Position of employees on secondment

The position of employees on secondment is an important consideration in a retrenchment exercise. The law on secondment is clear. It means that an employee is still under the employment of the original employer although the employee is instructed to carry out his services for another person or entity. The authorities are clear that a secondment does not amount to a transfer.

O.P. Malhotra in *The Law on Industrial Disputes*, Volume I, 3rd Edition defines secondment as follows:

> Therefore so long as the contract is not terminated, a new contract is not made and the employee continues to be in employment of the original employer even if the employer orders the employee to do certain work for another person. The employee still continues to be in his employment. The only thing that happens in such cases is that the employee carries out the orders of the master; hence he has a right to claim his wages from the employer and not from the third party to whom his services are lent or hired. It may be that such third party may pay his wages during the time he has hired his services, but that is because of his agreement with his real employer. However, that does not have the effect of transferring the service of the employee to the other employer. The hirer may exercise control and discretion in doing of the thing for which he has hired the employee or even the manner in which it is to be done. But if the employee fails to carry out his direction, he cannot dismiss him and can only complain to the actual employer. The right of dismissal is vested in the employer(s).

It is therefore clear that when an employee is seconded from one company to another secondee-company, there is no change of his employer. The purpose of a secondment exercise is merely to require the employee to provide services to the secondee-company. The ultimate employer remains the same.






The principle of secondment elucidated in Malhotra was applied in *Comex Services Asia Pacific Region, Miri v Grame Ashley Power* [1987] 2 ILR 34. In that case, the Industrial Court ruled that although the claimant (an expatriate) was seconded and assigned to work for Comex (M) Sdn Bhd, at all material times he remained an employee of Comex Services SA in Singapore and was properly terminated by Comex Services Singapore. The Court dismissed the claimant's claim on the basis that his employer was a foreign company with no registered office in Malaysia and accordingly, it had no jurisdiction over the company.

A business enterprise that is conducting a retrenchment exercise must take into account its employees that are serving elsewhere on a secondment company. This is premised on the basis that the ultimate employer is still the seconder company and a secondment exercise does not entail a change in the employer.

On the other hand, where the entity carrying out the retrenchment exercise happens to be the secondee company, it need not take into account "seconded employees" that are serving at their premises since the secondee company is not the employer. The employee on secondment would therefore have to be reverted back to his ultimate employer as his retention may affect the justification of the reorganisation exercise.

### 4.5.6 Requirement to retrench all foreign workers first

Apart from LIFO, there is a requirement that mandates all employers to comply with s 60N of the *Employment Act 1955* when carrying out a retrenchment exercise. With effect from 1998, where an employer is required to reduce his workforce by reason of redundancy, the employer shall not terminate the services of a local employee unless he has first terminated the services of all foreign employees employed by him in a capacity similar to that of the local employee.

Should there be a breach of s 60N, then a local employee has the option of lodging a complaint at the Labour Office claiming that he is being discriminated against in relation to a foreign employee in respect of his terms and conditions of employment. The Director General of Labour may then issue a directive under s 60L(1) as may be necessary and expedient to resolve the matter. Anyone who fails to comply with any directive of the Director General commits an offence under the Employment Act and shall be punishable with a fine not exceeding RM10,000.

### 4.5.7 Application of LIFO on a group basis

It was once thought that the application of LIFO principle was only restricted to a company which undertook a retrenchment exercise. Today, many companies have a group transfer clause in its terms and conditions of employment. Employees are moved from one organisation to another freely. Employers justify the same as a career development exercise for the employees. It is pertinent to note that the courts may invoke the doctrine of lifting the veil of incorporation to view whether the company operates as a group or a single entity.

In *Hotel Jaya Puri Bhd v National Union Of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109, the Supreme Court applied the doctrine of lifting the corporate veil in the context of industrial law when it ruled that:

> "It is true that while the principle that a company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence is well established in company law, in recent years the court has, in a number of cases, by-passed this principle if not made an inroad into it. The court seems quite willing to lift "the veil of incorporation" (so the expression goes) when the justice of the case so demands. Thus the facts of the case may well justify the court to hold that despite separate existence a subsidiary company is an agent of the parent company or *vice versa* as was decided in *Smith, Stone and Knight v Birmingham Corporation* [1938] 4 All ER 116; *Re FG (Films) Limited* [1955] 1 WLR 483; and *Firestone Tyre & Rubber Co v Llewelyn* [1957] 1 WLR 464. Professor Gower in his *Principles of Modern Company Law,* 3rd Edition, p 213, said that the courts:
>
> > '… are coming to recognise the essential unity of a group enterprise rather than the separate legal entity of each company within the group. Other examples of this can be found. In The Roberta (1937) 58 Ll LR 159, a parent company was held liable on a bill of lading signed on behalf of its wholly owned subsidiary, the court saying that the subsidiary was a separate entity … in name alone and probably for the purposes of taxation'."
>
> In another case, *Spittle v Thames Grit & Aggregates Ltd* [1937] 4 All ER 101, the court found no difficulty in treating a subsidiary as 'to all intents and purposes' the same as the parent company which held 90 per cent of its shares. A licensing authority in exercise of its discretion has been held entitled to have regard to the fact that a parent and subsidiary company, though technically separate legal persons, in fact constituted a single commercial unit (*Merchandise Transport Ltd v British Transport Commission* [1962] 2 QB 173, *Devlin* LJ at p 202) … A good example of this is *Bird & Co v Thos Cook & Son* [1937] 2 All ER 227, in which an indorsement of a cheque to 'Thos. Cook & Son Ltd.' was treated as an indorsement to the allied but separate company of Thos. Cook & Son (Bankers) Ltd. by regarding it as a mere misdescription to be ignored under the principle *falsa demonstratio non nocet.*"

In that case, the Supreme Court ruled that a restaurant, which operated under a different management from a Hotel where the restaurant was situated in, were in reality one single establishment due to the functional unity between the two entities.

There is a case where the LIFO principle was given an extended application to a group of companies. In *Sejati Motor Sdn Bhd & 3 Ors v Peter Lam Aming* [1994] 2 ILR 1083, a welder was retrenched by Sejati Motor on grounds of redundancy. He contended that his retrenchment was unfair on the grounds that it breached the principle of LIFO in the context of the group of companies that Sejati Motor belonged to.

The Industrial Court ruled that if viewed on a company basis, his retrenchment would be fair as he was the only person in his category. The Court, however, examined the case on a broader picture and ruled that the retrenchment exercise should be viewed from a group basis since there was evidence to show that the group of companies actually belonged to a single establishment. In ruling that the retrenchment was unfair






on the grounds of a breach the LIFO principle, the Industrial Court observed as follows:

> "The next issue to be considered is whether the claimant's retrenchment should be viewed from a company basis or a group basis. Whether 'Last In First Out' should be applied on a company basis or group basis will depend on whether the company or holding company, as well as its subsidiaries, form one single industrial establishment. I am of the view that the company is within a conglomerate and there is some evidence, from its corporate history, of a common management at some level and mixing-up staff. It is evident that the employees in the company and its subsidiaries can be transferred from one to the other indicating they constitute one integrated whole. I have also given some consideration to the work being done by the claimant and the interchangeability with other work apart from the job title. It is always difficult to be specific as to what constitutes a single industrial establishment. In the circumstances of this case there is strong indication that the company and its subsidiaries should not be regarded as separate entities for the purpose of retrenchment."

It is pertinent to note that the above decision was affirmed by the Court of Appeal in Civil Appeal No.: W-04-53-96 of 1996. In view of the above, the employer should exercise extra caution when implementing a retrenchment exercise, particularly when the company operates on a group basis. Whether the LIFO principle should be applied on a group basis or company basis will depend on a variety of factors.



### 4.5.8 Differentiating between a group and a single industrial establishment

A starting point of inquiry would be to examine the corporate history of the company, and its affiliation with its related companies. One should also enquire whether the companies operate their business alike, whether the terms and conditions of employment are generally consistent with each other, whether an employee is transferable within the group of companies and whether the composition of board of directors of the respective companies is substantially similar. The factors that may influence the court are not exhaustive.

Guidance on what may constitute a single industrial establishment is found in the Indian case of *Tulsidas Khimji v F Jeejeebhoy* [1961] I LLJ 42 wherein the High Court laid down the test to determine whether a group of companies may constitute a single industrial establishment, thus necessitating the application of LIFO on a group basis:

(1) Have the employers recruited the workmen on the basis that they belong to one particular category of the various departments, branches or units taken as an *integrated whole* or is the recruitment made on the basis of that particular category belonging to each of the different departments *separately*?

(2) Can the employment of a clerk be regarded as employment in a single category of clerks by reason of the unity of ownership of the different departments or by reason of:

   (a) geographical proximity of different departments? or

(b) the fact that there is a Head Office supervision of different departments and ultimate amalgamation of the accounts?

(3) Are the different departments functionally integrated by reasons of the condition of transferability or seniority amongst the clerical cadre, or can the departments be treated as forming a single integrated industrial establishment?

The fact that an employee is transferable from one unit to another is a persuasive factor that may influence the Industrial Court to conclude that LIFO must be applied on a group basis, though this is not conclusive. In *Koperasi Jayadiri (M) Sdn Bhd v Lai Chui Yin* [1993] 1 ILR 74, the claimant was employed by the Koperasi as Sales Clerk and was subsequently transferred to another associate company. Two years later, she was again transferred to another company where she was retrenched barely a year later. The claimant contended that her retrenchment amounted to a dismissal without just cause on the ground that it was in violation of the LIFO principle. She also contended that she was senior to three other clerks in the Head Office who were not retrenched. The court, after taking into account the fact of transferability of the employees and the uniformity of grade and scales of pay, ruled that the Koperasi and its branches were not functionally independent and separate but were in fact functionally integral. All the clerks of the Head Office and the branches came within one category notwithstanding differences in the job functions. As such, there was an unjustified departure from the LIFO principle.

This decision may be contrasted with *Associated Pan Malaysia Cement Sdn Bhd v Kesatuan Pekerja-pekerja Perusahaaan Simen (M) Perak* [1986] ILR December 1612 where the Industrial Court adopted a narrower meaning regarding the term "establishment". In this case, several lorry attendants and drivers were retrenched by the company. The Union alleged that the retrenchment was unfair as the company had failed to take into account its workforce in another of its factory in the retrenchment exercise.

The Industrial Court held that the company was not in breach of the LIFO principle in confining it to the factory and in not taking into account its workforce in another factory, although there were isolated cases of transfers within the two factories and that both factories shared a common collective agreement. In doing so, the Industrial Court recognised the practical difficulties in applying LIFO on a group basis, as follows:

> "It would otherwise be absurd, to stretch a point, to require a company, say with six of seven branches over the country, to compile a list of all its general labourers country-wide and involve them in a retrenchment exercise should one or two labourers become redundant in one branch."

### 4.5.9 Breach of the LIFO principle

A breach of the LIFO principle, in the absence of any justifiable reason, renders the retrenchment unfair. As a consequence, the dismissal of the retrenched employee would be without just cause or excuse. In *Dismissal, Discharge, Termination and Punishment* by Malhotra, 10th Edition, Volume I at p 791, the author opined that:






> "If the preferential treatment given to juniors ignores the well-recognised principle of industrial law that 'last come first go' without acceptable or sound reasoning, the Tribunal would be justified to hold that the action of the management was not *bona fide*."

This principle was applied by the High Court in *Tan Hong Yak v Nixdorf Computer (M) Sdn Bhd* [1997] 2 CLJ Supp 382. In that case, there was evidence that a more junior clerk was retained in favour of another senior clerk who was retrenched. The High Court ruled that the Industrial Court had wrongly applied the principle of the LIFO principle as both clerks actually belonged to the same category of employment. The fact that the other clerk was from another division of the company was irrelevant. There was no good or sound reason to treat the employees differently. The failure of an Industrial Court to apply the LIFO principle correctly rendered its decision defective.

In *AMZ Corporation Sdn Bhd v Sye Ah Chai* [1989] 1 MLJ 238, a more senior clerk was retrenched whilst a more junior clerk was retained. The employer tried to justify the departure from the LIFO principle on the grounds that the more junior clerk performed more duties than the claimant, as the former worked at headquarters and had additional functions as secretary to the managing director whereas the respondent was only a clerk at the estate office. The Industrial Court held that both employees were actually from the same category of "workman" as both were actually clerks and that there was no reason for the more senior clerk of the two, namely, the claimant, to be retrenched first. This decision was affirmed by the High Court.

## 4.6 Departure from LIFO

### 4.6.1 LIFO principle not mandatory

The LIFO principle is not a mandatory principle or rule of law. It may be departed from in certain exceptional circumstances. It is pertinent to note that whilst the Industrial Courts have consistently insisted on strict adherence to the LIFO principle, it has on several occasions, accepted departures from LIFO for valid reasons.

In this context, the Industrial Court in *Supreme Corporation Bhd v Doreen Daniel & Ong Kheng Liat* [1987] 2 ILR 522 ruled that:

> "... LIFO is not an absolutely mandatory rule which cannot be departed from by an employer when retrenching staff. That the employer is not denied the freedom to depart from the LIFO procedure is made obvious by cl 22(b) of the *Code of Conduct for Industrial Harmony 1975*.
>
> ... If however, in the light of other objective criteria and special circumstances, the employer has sound and valid reasons for departure from the LIFO procedure, all authorities agree that he should be allowed to do so. This is the position in our own industrial law. This is the guiding principle adopted by this court."

In summary, decided authorities have indicated that LIFO may be departed from in the following circumstances:

(1) Where the employer has adopted an objective and fair selection criteria in the retrenchment exercise;

(2) Where it can be established that a more senior employee who was retrenched (in breach of LIFO) had a record of poor performance;

(3) Where it can be established that a more junior employee who was retained in favour of a more senior employee has special skill or qualification.

### 4.6.2 Objective and fair selection criteria

A valid departure from the LIFO principle would be where the employer is able to justify that the selection criteria adopted by it was fair, objective and reasonable. In fact, the LIFO principle is merely one of the considerations that the company has to take into account in a retrenchment exercise. Article 22(b) of the *Code of Conduct of Industrial Harmony* stipulates that:

> **22(b)** The employer should select employees to be retrenched in accordance with an objective criteria. Such criteria, which should have been worked out in advance with the employee's representative or trade union, as appropriate, may include:
>
> (i) need for the efficient operation of the establishment or undertaking;
>
> (ii) ability, experience, skill and occupation qualifications of individual workers required by the establishment or undertaking under (i);
>
> (iii) consideration for length of service and status (non-citizens, casual, temporary, permanent);
>
> (iv) age;
>
> (v) family situation;
>
> (vi) such criteria as may be formulated in the context of national policies."

A case that has left an indelible mark in our industrial jurisprudence is *Malaysia Shipyard & Engineering Sdn Bhd Johor Bahru v Mukhtiar Singh & 16 Ors* [1991] 1 ILR 626, where, an independent selection criteria adopted by the company was expressly endorsed by the Industrial Court. Instead of adopting the LIFO principle, the company applied a selection criteria which was based on a point system that took into account **age, performance, medical** and **disciplinary records** of the employees in the organisation.

The Industrial Court observed that the burden of proof is on the employer to show the selection criteria that he has relied upon in selecting employees for retrenchment was fair. The employer is also expected to act reasonably in his determination of the issue. The Industrial Court held that in evaluating the alternative selection criteria, the test is **not** "whether the decision of the management was wrong" but rather "whether the criteria was so wrong that no sensible or reasonable management could






have relied on the decision which was arrived at in redundancy selection." On MSE's selection criteria, the court ruled as follows:

> "From the evidence as a whole, the company's position is abundantly clear namely that it has opted to apply a selection criteria devised by itself. I find that this selection criteria was reasonable in all the circumstances. In my view, the company had adduced sufficiently sound and valid reasons for departing from complying with the LIFO principle."

Similarly, in *Supreme Corporation Bhd v Pn Doreen Daniel* [1987] 2 ILR 522, the Industrial Court made the following observation:

> "... in the light of other objective criteria and special circumstances, the employer has sound and valid reasons for the departure from the LIFO procedure, all authorities agree that he should be allowed to do so. This is our position in our own industrial law. This is the guiding principle adopted by the Court."

In *Sarawak Shell Bhd v Ismail Sahat & Ors* [2002] 2 ILR 371, the company had departed from the principle of LIFO in totality and instead adopted an alternative selection criteria which was based on three factors: **performance, number of skills** and the **level of expertise of a number of skills**. Under the alternative selection criteria, seniority was not part of the criteria. The Industrial Court affirmed that the principle of LIFO can be validly departed from for sound and valid reasons. The onus is on the employer to justify the said departure and prove that there are sound and valid reasons for such a departure. The Court held that the selection criteria adopted by the company was reasonable and fair. In addition, it was also noted that the test for reasonableness of the selection criteria is applied by examining to what extent the principles of Art 22(b) of the "Areas for Co-operation and Agreed Industrial Relations Practices" annexed to the *Code of Conduct for Industrial Harmony* have been complied. In determining whether the retrenchment of the claimants were fair, the Industrial Court held that the test would be to examine whether the selection of the retrenched employees were in accordance with the alternative selection criteria and not LIFO.

### 4.6.3 Poor performance

The Courts have in the past, accepted records of poor performance of an employee as a justification for a departure from the LIFO principle. Nevertheless, it may be noted that the requirement of **giving warnings is mandatory** if the employer attempts to depart from LIFO on grounds of poor performance. In *Swadesamitran Ltd v Their Workmen* AIR 1960 SC 762, the Supreme Court of India held that:

> "When it is said that, other things being equal, the rule of 'last come first go' must be applied, it is not intended to deny freedom to the employer to depart from the said rule for sufficient and valid reasons. The employer may take into account considerations of efficiency and the trustworthy character of the employees, and if he is satisfied that a person with a long service is inefficient, unreliable or habitually irregular in the discharge of his duties, it would be open to him to retrench his services

# 8.1 What is "Industrial Relations"?

"Industrial relations" is the interplay of relationships that takes place between people in the work situation, ie between workers and employers (and their organisations), and between these organisations and public authorities.

In order to be more efficient in the field of industrial relations, workers are often organised into trade unions which, together with employers and the government, form the three social partners for national development.

# 8.2 Relevant Laws

The main labour laws affecting industrial relations are:

- *Trade Unions Act 1959* (TUA 1959)
- *Industrial Relations Act 1967* (IRA 1967)
- *Employment Act 1955* (EA 1955)
- Labour Ordinance of Sabah, and
- Labour Ordinance of Sarawak.

In addition to labour laws, the government has found it expedient to formulate codes of practice or conduct for specific subjects in order to promote good industrial relations practices in the workplace. One such code is the *Code of Conduct for Industrial Harmony*.

# 8.3 Trade Unions

There are two statutes that govern the conduct and affairs of trade unions, both in-house and national: the *Industrial Relations Act 1967* (IRA 1967) and the *Trade Unions Act 1959* (TUA 1959). The TUA 1959 and its related regulations contain the mechanism to regulate the conduct and affairs of trade unions, its members, officers and affiliates.

Trade unions are subject to a great degree of regulation in respect of their conduct and affairs. There are legal controls imposed upon unions, which include the regulation of the scope and content of their constitution and rules, as well as the management of their funds and accounts.

# 8.4 Malaysian Law on Trade Unions

## 8.4.1 What is a trade union?

A trade union is commonly understood as an association formed with the principal object of espousing claims on behalf of a group of employees within the scope

of its representation as regards to the regulation of industrial relations between the group of employees and the employer.

In Malaysia, the primary laws that regulate the registration and operations of trade unions are TUA 1959 and IRA 1967. The TUA 1959 defines a trade union as:

> Any association or combination of workmen or employers, being workmen or employers whose place of work is in West Malaysia, Sabah or Sarawak, as the case may be, or employers employing workmen in West Malaysia, Sabah or Sarawak, as the case may be –
>
> (a) within any particular establishment, trade, occupation or industry or within any similar trades, occupations or industries; and
>
> (b) whether temporary or permanent; and
>
> (c) having among its objects one or more of the following objects –
>
> (i) the regulation of relations between workmen and employers for the purposes of promoting good and harmonious industrial relations between workmen and employers, improving the working conditions of workmen or enhancing their economic and social status, or increasing productivity;
>
> (ia) the regulation of relations between workmen and workmen, or between employers and employers;
>
> (ii) the representation of either workmen or employers in trade disputes;
>
> (iiA) the conducting of, or dealing with, trade disputes and matters related thereto; or
>
> (iii) the promotion or organisation or financing of strikes or lock-outs in any trade or industry or the provision of pay or other benefits for its members during a strike or lock-out;

It can therefore be seen that what characterises a trade union is not its personnel but rather the objects that it was formed to achieve and espouse. A trade union enjoys an independent entity separate from its members upon registration. It can commence legal proceedings and be sued in law. The powers and scope of representation of a trade union are usually contained in its Rules or Constitution of Membership.

**Law:** s 2, *Trade Unions Act 1959*.

### 8.4.2 In-house unions and national unions

In-house unions are trade unions of employees that represent employees in a particular company. It cannot represent employees from another company even though the latter may belong to the same trade or industry.

On the other hand, a national union is comprised of workmen from other companies but sharing the common trade, industry or profession that the national union is competent to represent.

No one workman may become a member of two trade unions. A workman can only have membership in one trade union which he is qualified to join.






### 8.4.3 Purpose of trade unions

The primary purpose of a trade union of employees is to act on behalf of its members to negotiate collectively in respect of terms and conditions of employment. Once a trade union is accorded recognition by the employer in a particular industry, it has the power to "contract" on behalf of its members. It acts as a **principal** and not as an agent of its members. Any agreement between a trade union and the employer binds the employees within the scope of the trade union's representation, regardless of whether they are members of the trade union or not. A trade union of employees is also traditionally recognised as a body of persons that represent the voice of the employees to safeguard their interest at the workplace.

### 8.4.4 Safeguards for employees who are members of trade unions

The IRA 1967 provides for various safeguards for employees in relation to their trade union membership and activities. The following are the various safeguards:

(a) By s 4(1) of the *Industrial Relations Act 1967* (IRA 1967), no person shall interfere with, restrain or coerce a workman in the exercise of his rights to form and assist in the formation of and join a trade union and to participate in its lawful activities.

(b) The trade union and its members enjoy protection under s 4(2) of IRA 1967 from unlawful interference in regards to its establishment, functioning and administration. To protect the independence of the trade union, s 4(3) of IRA 1967 also prohibits an employer from supporting either directly or indirectly any trade union of employees by financial or other means with the object of placing the trade union under its control or influence.

(c) In addition to the above, s 5 of IRA 1967 precludes the employer from carrying out the following acts:

(i) Imposing any condition in a contract of employment seeking to restrain the right of a person who is a party to the contract to join a trade union or to continue his membership in a trade union;

(ii) Refusal to employ any person on the ground that he is or is not a member or an officer of a trade union;

(iii) Discrimination against any person in regard to employment, promotion, any condition of employment or working conditions on the ground that he is or is not a member or officer of a trade union;

(iv) Dismissing or threatening to dismiss a workman, injure or threaten to injure him in his employment or alter or threaten to alter his position to his prejudice by reason that the workman –

- is or proposes to become or seeks to persuade any other person to become a member or officer of a trade union; or
- participates in the promotion, formation or activities of a trade union.

(v) Inducing a person to refrain from becoming or to cease to be a member or officer of a trade union by conferring or offering to confer any advantage on or by procuring or offering to procure any advantage for any person.

(d) Section 59 of IRA 1967 provides that it shall be an offence, *inter alia*, to dismiss 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 –

- 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;
- is entitled to the benefit of a collective agreement or an award;
- has appeared or proposes to appear as a witness, or has given or proposes to give any evidence in any proceeding under IRA 1967;
- being a member of a trade union which is seeking to improve working conditions, is dissatisfied with such working conditions;
- is a member of a trade union that has served an invitation for collective bargaining or who is a party to negotiations under IRA 1967 or to a trade dispute which has been reported to the Director General for Industrial Relations;
- 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 before he absented himself, he had applied for leave for this purpose but the application was unreasonably deferred or withheld; or
- being a panel member of the Industrial Court 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.

The aforesaid section also stipulates that any person who contravenes any of the above shall be guilty of an offence and shall be liable, on conviction, to imprisonment for a term not exceeding one year or to a fine not exceeding RM2,000 or to both.

**Law:** s 4(1), s 4(2), s 4(3), s 5(1), s 59(1) and s 59(2), *Industrial Relations Act 1967*.

### 8.4.5 Prohibition on trade unions in respect of certain acts

Although a trade union of employees and its members are accorded protection as stated above, s 7 of the *Industrial Relations Act 1967* (IRA 1967) prescribes several prohibitions on trade unions in respect of certain acts, such as:

- persuading a workman to join or refrain from joining a trade union, without the consent of the employer, during office hours at the employer's place of business;
- intimidating any person to become or refrain from becoming or to continue to be or cease to be a member or officer of a trade union; or
- inducing any person to refrain from becoming or cease to be a member or officer of a trade union by conferring or offering to confer on any person or by procuring or offering to procure any advantage.






Section 8(1) of IRA 1967 also provides that any complaint of any contravention of the above matters (s 4, s 5 and s 7 of IRA 1967) may be lodged in writing to the Director General for Industrial Relations stating the facts and circumstances constituting the complaint and the Director General shall then take steps to resolve the matter.

Where the dispute lodged under s 8 is not resolved, the Director General shall notify the Minister of Human Resources under s 8(2) of IRA 1967 who shall thereafter exercise his discretion whether to refer the matter to the Industrial Court for a hearing or otherwise, under s 8(2A) of IRA 1967.

### 8.4.6 Purpose of the Trade Unions Act 1959

The preamble of the *Trade Unions Act 1959* (TUA 1959) declares itself to be a statute "relating to trade unions". It contains 13 parts, which deal comprehensively with most facets of trade union matters.

The TUA 1959 introduced a system of registration for trade unions in Pt III of said Act. This is in order to promote consistency in the establishment of trade unions. Registration under TUA 1959 will import legal consequences pertinent for a trade union to function effectively as a body that espouses the claims of employees.

The TUA 1959 also regulates the constitution of a trade union and its rights and liabilities. To promote consistency, TUA 1959 introduced a system of account-reporting to the Director General of Trade Unions such as inspection of accounts and records and provisions for submitting annual returns to the Director General of Trade Unions. Pt VI of the Act lays down the mechanism for the settlement of internal disputes within a trade union.

## 8.5 Registration of a Trade Union

### 8.5.1 Rationale for registration

Registration is necessary to maintain a degree of control on union activities. Legal entities like companies and societies are governed by the *Companies Act 1965* and *Societies Act 1966* respectively. Likewise, trade unions are required to comply with the necessary pre-requisites under the *Trade Unions Act 1959* before they can obtain the necessary legal protection and entity.

In addition, since trade unions represent employees in a particular trade, industry or profession, it is essential to have such registration requirements in order to avoid duplication of trade unions which may lead to industrial disharmony and defeat the very purpose of the various labour legislation passed by Parliament. For policy reasons, registration is necessary as a check and balance against trade unions that may have unlawful objects or purposes.

### 8.5.2 Registration mechanisms

Part III of the *Trade Unions Act 1959* (TUA 1959) prescribes the mechanisms and procedures for registration of trade unions. These procedures are mandatory and there are severe legal consequences if such procedures are not complied with.

*Register of Trade Unions*

A "Register of Trade Unions" is kept by the Director General of Trade Unions (DGTU), which contains the various particulars relating to any registered trade union (s 7, TUA 1959).

### 8.5.3 Requirement for registration

Section 8 of the *Trade Unions Act 1959* requires every trade union established after the commencement of the aforesaid Act to apply for registration within a period of one month after the date of its establishment. The DGTU, however, has the discretion to grant an extension of the period to register beyond the one-month time limit but such an extension shall not exceed six months. A trade union will be considered as established on the first date on which any workmen or employers agree to become or to create an association or combination within any particular establishment, trade, occupation or industry.

**Law:** s 8(1) and s 8(2), *Trade Unions Act 1959*.

### 8.5.4 Application for registration

Any application for registration of trade unions must be made to the DGTU in a prescribed form (ie "Form BB", *Trade Unions Regulations 1959*) and signed by at least seven members of the union, any of who may be officers thereof. The application must be in accordance with s 10 of the TUA. The following particulars must be enclosed together with the application:

(a) the names, occupations and addresses of the members making the application;

(b) the name of the trade union and the address of its head office; and

(c) the titles, names, ages, addresses and occupations of the officers of the trade union, and such other information regarding such officers as the DGTU may in any particular case require to be furnished.

Registration not only grants a trade union legal status; it also confers on the trade union certain rights and privileges. Among others, the rights and privileges enjoyed by a trade union includes immunity for civil suits (s 21, TUA 1959), liability in tort (s 22, TUA 1959) and contract (s 23, TUA 1959), and the power to call for strikes.

**Law:** s 10(1) and s 10(3), *Trade Unions Act 1959*.






### 8.5.5 Consequences of failure to register or cancel registration

Where a trade union fails to apply for registration on time, or if the registration of a trade union is refused, withdrawn or cancelled, or the trade union is declared null and void by any court, then:

- the trade union shall be deemed to be an unlawful association and shall cease to enjoy any of the rights, immunities or privileges of a registered trade union. The trade union, however, may still be subject to any liabilities incurred or to be incurred which may be enforced against the union and its assets
- the trade union shall not, nor shall any of its officers, members or agents, take part in any trade dispute or promote, organise or finance any strike or lock-out, or provide pay or other benefits for its members during a strike or lock-out
- the trade union shall be dissolved and its funds disposed of in such manner as may be prescribed and subject to the rules of the union
- no person shall take part in the management of the trade union or act on behalf of the union or as an officer of the union except for the purpose of dissolving the union and disposing of its funds.

Law: s 10, *Trade Unions Act 1959*.

### 8.5.6 Registration of a trade union by the DGTU

The Director General of Trade Unions (DGTU), upon receiving an application for registration, may exercise his powers under s 12 of the *Trade Unions Act 1959* (TUA 1959) to register the trade union in the prescribed manner.

*Refusal to register where another trade union already exists*

The DGTU has a discretion to refuse to register a trade union in respect of a particular establishment, trade, occupation or industry if he is satisfied that there is already in existence another trade union representing workmen in that particular establishment, trade, occupation or industry and it is not in the interest of the workmen concerned that there be another trade union in respect thereof.

*Application of s 12(2), TUA 1959*

Section 12(2) of TUA 1959 stipulates as follows:

> The Director General may refuse to register a trade union in respect of a particular establishment, trade, occupation or industry if he is satisfied that there is in existence a trade union representing the workmen in that particular establishment, trade, occupation or industry and it is not in the interest of the workmen concerned that there be another trade union in respect thereof.

There are several authorities that have dealt on the scope of s 12(2) of TUA 1959.

In *Kesatuan Kebangsaan Pekerja-pekerja Bank (NUBE) v Ketua Pengarah Kesatuan Sekerja & Kesatuan Pekerja-pekerja AmFinance Berhad (KEPPA)* [2006] 1 LNS 289, NUBE applied to the High Court to deregister the in-house union of AmFinance Berhad on the basis that the in-house union's registration contravened s 12(2) of TUA 1959. The High Court rejected NUBE's application on the basis that at the time the in-house union was formed in AmFinance, NUBE was not representing employees in AmFinance as it was only representing employees in AmBank Berhad. NUBE's application was made after AmFinance took over the business and employees of AmBank in a merger. In so ruling, the *Raus* J (as his lordship then was) held:

> "To me, the impediment to register a trade union under s 12(2) would only arise if there is another union **representing** the employees in a particular establishment, trade, occupation or industry. Clearly, in this instance, at the time when the third respondent was registered by the first respondent, there was no other union representing the employees of AmFinance Berhad. Thus, the issue of multiplicity of unions within the particular establishment, trade, occupation or industry does not arise." [Emphasis added]

Another useful case to consider is *Association of Bank Officers, Peninsular Malaysia v Ketua Pengarah Kesatuan Sekerja Malaysia & Kesatuan Pegawai-pegawai Bumiputra Commerce Bank Berhad (Kepak Bumiputra)* [2004] 1 LNS 683. In that case, the High Court allowed ABOM's application to quash the registration prior to the merger of two banks, namely BBMB and Bank Of Commerce (BOC), there were two trade unions in BOC, namely ABOM (which represented employees in Grade 34) and an in-house union (which represented employees in Grades 35 and 36). The in-house union called Kepak Bumiputra was registered after the merger which would allow it to represent employees in grades 34, 35 and 36 – the same categories of employees that were within the purview of ABOM and the other pre-existing in-house union. The learned judge *Raus* J (as his lordship then was) held:

> "To me, the first respondent has not properly exercised his statutory discretion under s 12(2) of TUA. This is because when the first respondent failed to consider the fact that the scope of the second respondent's membership was overlapping with the scope of membership of the applicants. This overlapping factor should have put the first respondent on guard because of s 12(2) …
>
> The first respondent in his reasons stated that he registered the second respondent in order to protect the interest of all workmen of BCB and to bring them under one umbrella. But to me, what the first respondent did was the opposite and contrary to s 12(2) of TUA which discourages multiplicity of union within the same industry or trade or establishment or occupation. By allowing the second respondent to be registered, the first respondent has failed to realise that his action will cause industrial unrest in the establishment. *This is because the existing unions, ie ABOM and BOCESU* ***have been accorded recognition*** *by BCB. They are already* ***representing*** *employees in Grade 34–36 in BCB.* By allowing the second respondent to represent the same grades in the same occupation ie, Grade 34-36 officers, is not proper and just exercise of discretion. In fact the first respondent by registering the second respondent has created a rift between the unions and employees of BCB and also the employer of BCB." [Emphasis added.]






The above decision was affirmed on appeal by the Court of Appeal (see – *Kesatuan Pegawai-pegawai Bumiputra-Commerce Bank Bhd (Kepak Bumi-Commerce) v ABOM* [2006] 4 CLJ 901).

In *Persatuan Pegawai-Pegawai Bank Semenanjung Malaysia v Minister of Labour, Malaysia & Ors* [1989] 1 MLJ 30, the Supreme Court ruled that registration of an in-house trade union known as Association of Maybank Officers (in 1986) to be null and void on the basis that the registration contravened s 12(2) of TUA 1959. This was because there was already another pre-existing national union (ABOM) that received recognition and was representing the existing officers of the bank and that there was a failure to consider the interest of the workmen. In so ruling, the Supreme Court ruled:

> "The Registrar did not state that he had also taken into consideration the interest of other workmen in similar occupation as the officer in the bank. It should be noted that sub-s (2) requires that the interest of the workmen in the particular occupation should be considered, not just the interest of the officers in the employment of the bank. Therefore it is clear that the Registrar had failed to correctly take into account the provision of sub-s (2). In our judgment the registration of the association as a trade union was a nullity because the Registrar had failed to take into consideration the interest of the workmen in the particular occupation, which he was required by the law to take into consideration, and he had no power to register the association as a trade union without considering their interest. Similarly the decision of the Minister on appeal to confirm the registration was a nullity because it cannot be said that all matters required by law to be taken into consideration had in fact been taken into consideration by him."

Based on the foregoing cases, it is clear that for s 12(2) to apply, the DGTU must be satisfied of two mandatory conditions:

Firstly, it must be shown that that there is in existence a trade union representing the workmen in that particular establishment, trade, occupation or industry.

Under this condition, there are two sub-conditions, which are:

(i) that there is in existence another trade union;

If there was no another trade union at the time of registration, which was the case in *ABOM v DGTU & KEPPA*, by default s 12(2) would not apply.

(ii) that the pre-existing trade union must be **representing** the workmen in that particular establishment, trade, occupation or industry.

This means that the pre-existing trade union must be representing the workman. That was the exact scenario in *Kepak Bumiputra* and the *Persatuan Pegawai-Pegawai Bank Semenanjung Malaysia v Minister of Labour, Malaysia* cases wherein the national trade unions were already granted recognition by the employer and were representing the employees at the time of the registration of the new in-house unions. That was the main reason why the Courts had ruled that the registration of the in-house unions contravened s 12(2).

Secondly, it must be shown that it is not in the interest of the workmen concerned that there be another trade union in respect of that particular establishment, trade, occupation or industry. In this respect, the *Kepak Bumiputra* and the *Persatuan Pegawai-Pegawai Bank Semenanjung Malaysia v Minister of Labour, Malaysia* cases illustrate the failure of the DGTU to consider this point which resulted in the Courts' intervention.

The mere fact that there is another trade union which has not been granted recognition by the employer does not hinder the registration of another in-house trade union. For s 12(2) of TUA 1959 to apply, all the elements of s 12(2) must apply and this includes the demonstration that there is already a pre-existing trade union that is representing the same categories employees.

*Grounds for refusal to register*

The DGTU is mandated to refuse registration where:

(a) he is of the opinion that the trade union is likely to be used for unlawful purposes or purposes contrary to or inconsistent with its objects and rules;

(b) any of the objects of the trade union is unlawful;

(c) he is not satisfied that the trade union has complied with this Act and of the Regulations under the TUA;

(d) he is satisfied that the objects, rules and constitution of the trade union conflict with any of the provisions of TUA 1959 and of any regulations made under the aforesaid Act;

(e) the name of the trade union applying for registration is –

- identical to that of another trade union or so nearly resembles the name of such other trade union as, in the opinion of the DGTU, is likely to deceive the public or members of either trade union; *or*
- in the opinion of the DGTU undesirable.

**Law:** s 12(1), s 12(2) and s 12(3), *Trade Unions Act 1959*.

### 8.5.7 Certificate of registration

Where the registration of a trade union has been approved, the DGTU shall issue a certificate of registration in the prescribed form. This certificate shall be conclusive evidence that the trade union has been duly registered under the TUA.

**Law:** s 13, *Trade Unions Act 1959*.

### 8.5.8 Effect of registration

A registered trade union shall enjoy the rights, immunities or privileges conferred under Pt IV of the *Trade Unions Act 1959* (TUA 1959). In short, a registered trade union may do the following:






(a) **Legal entity under its registered name**

A trade union that has been registered may, under s 25(1) of TUA 1959, sue or be sued and be prosecuted under its registered name.

(b) **Claim for recognition**

A registered trade union may serve on an employer or company a notice of claim for recognition under the *Industrial Relations Act 1967* and subsequently commence collective bargaining on behalf of members within the scope of its representation. Upon the completion of collective bargaining, it contracts on behalf of its members by entering and signing a document known as a "Collective Agreement" which comprises the terms and conditions of employment.

(c) **Immunities from civil suits in certain cases**

Section 21 of TUA 1959 provides that no suit or legal proceedings shall be maintainable in any civil court against any registered trade union for any act done in contemplation or in furtherance of a trade dispute to which a member of the trade union is a party on the basis that:

- it induces some other person to break a contract of employment; or
- that it is an interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or of his labour as he wills.

In *National Union of Plantation Workers v Abdul Hamid* (1963) 20 MLJ 73, a libel action was filed against the Union and its officers for an alleged defamatory statement published in the Union's newsletter. The Court of Appeal held that under the *Trade Unions Ordinance*:

> "A trade union is not liable to be sued for a libel published by its servants or indeed for any other tortious acts where liability springs from the ordinary principle of vicarious liability."

The Court of Appeal also held that s 22 prevents an action against the union or a representative action in which its members are sued as representative defendants.

A similar approach was taken by the Federal Court in the case of *Malaysia Galvanised Iron Pipes Sdn Bhd v Metal Industry Employees' Union & Ors* [1971] 2 MLJ 173. In that case, the Federal Court ruled that it was not possible for a company to obtain an injunction to restrain the Union or its members from erecting a shed in front of the company's premises for the purposes of picketing, on the basis of s 21 and 22 of the TUA.

Similarly in *Kuantan Beach Hotel Sdn Bhd v Kesatuan Kebangsaan Pekerja-pekerja Hotel, Bar & Restaurant Semenanjung Malaysia* [2004] 5 AMR 342, the Hotel had failed to pay the employees their contractual bonus under the collective agreement. The Union notified the Hotel that the bonus was due and if the Hotel continued to delay the bonus payment, it would proceed to picket at the Hotel's premises. By an *ex-parte* application, the Hotel obtained an order from the High Court to prevent the Union

and its members from picketing. The Union then filed a summons to strike out the Hotel's application and sought to set aside the *ex-parte* order. The High Court allowed the Union's application on the ground that s 21 of TUA 1959 did not give the court the jurisdiction to entertain the Hotel's action.

(d) **Liabilities in tort and contract**

By s 22 of the TUA, a registered trade union also enjoys a certain degree of immunity in respect any tortious acts alleged to have been committed by or on behalf of the trade union. Nevertheless, a trade union is still liable in respect of:

- matters concerning the specific property or rights of a trade union; or
- any tortious acts arising substantially out of the use of any specific property of a trade union other than acts committed in contemplation or furtherance of a trade dispute.

In respect of liability in contract, a registered trade union is liable on any contract entered into by it or by an agent acting on its behalf.

(e) **Authority to call for strikes or lock-outs**

The registered trade union has the power to commence strikes or lock-outs provided the necessary requirements under TUA 1959 and IRA are complied with.

### 8.5.9 Controlling trade unions

The *Trade Unions Act 1959* (TUA 1959) provides for a line of safeguards, which are primarily aimed at controlling the activities of a trade union that may depart from the purposes that it was set up for.

One of these relates to the power of the Director General of Trade Unions (DGTU) to cancel or withdraw a certificate of registration under s 15 of TUA 1959 where he is satisfied, amongst others that:

- Any one of the objects or rules of the trade union is unlawful;
- The constitution of the trade union or its executive is unlawful;
- The trade union has been or is being or is likely to be used for any unlawful purpose or for any purpose contrary to its objects or rules;
- The trade union has contravened any provision of TUA 1959 or any of its regulations;
- The funds of the trade union are or have been expended in an unlawful manner or on an unlawful object or on an object not authorised by the rules of the union.

The DGTU is also armed with the powers to suspend a branch of a trade union under s 17 of TUA 1959 if he is satisfied that the branch has contravened the provisions of TUA 1959 or the rules of the union.

The suspension takes effect upon the issuance of an order of suspension, which may contain such directions as the DGTU may consider expedient. Until the order of suspension is revoked by the DGTU, the branch of the trade union in respect






of which the suspension order is made is prohibited from carrying on any activity, except as may be specified in the order of suspension.

The most severe form of control is the power of the Minister of Human Resources to suspend a trade union under s 18 of TUA 1959. The Minister of Human Resources has the absolute discretion, with the concurrence of the Minister responsible for internal security, to suspend for a period not exceeding six months any trade union which, in his opinion is or is being, used for purposes prejudicial to or incompatible with the interests of security of or public order in Malaysia or any part of Malaysia.

The order of suspension shall be published in the *Gazette* and may, at any time, be varied or revoked by the Minister. The order of suspension carries with it three consequences:

(1) The certificate of registration of the trade union shall cease to have effect and the trade union shall cease to enjoy any of the rights, immunities and privileges of a registered trade union;

(2) The trade union shall be prohibited from carrying on any activity whatsoever; and

(3) No person shall take part in its management or organisation, or act or purport to act on behalf of the union as an officer of the union.

Law: s 15(1)(b), s 17(1), s 17(4), s 18(1) and s 18(6), *Trade Unions Act 1959*.

## 8.6 Recognition of Trade Union

### 8.6.1 The recognition process

The expression "recognition of a trade union" denotes a process where a trade union of employees seeks official acceptance from the employer to act on behalf of the employees of the company to commence collective bargaining. Recognition is a prerequisite to Collective Bargaining. This is an essential step as once recognition is granted by the employer or company, it cannot revoke its recognition and grant recognition to another trade union while the former trade union is still in legal existence, save for exceptional situations.

Part III of the *Industrial Relations Act 1967* (IRA 1967) provides for a comprehensive mechanism to settle industrial disputes relating to claim for recognition of trade unions. Section 9(1) of IRA 1967 provides that a trade union of workmen that has majority membership of workmen other than those engaged in the managerial, executive, confidential and security capacity, may seek recognition in respect of such majority workmen other than those engaged in the specified categories. The recognition process involves the following stages:

(1) Claim for recognition

(2) Employer's stand on recognition

(3) Action by the Director General for Industrial Relations

(4) Minister's decision.

The law on trade union recognition underwent significant changes brought by the *Industrial Relations (Amendment) Act 1990* which came into effect on 28 February 2008 and *the Industrial Relations Regulations 2009* which came into effect on 8 October 2009.

### 8.6.2 Stage 1: Claim for recognition

The trade union of employees serves on the employer or trade union of employers under s 9(2) of the *Industrial Relations Act 1967*, a claim for recognition in a prescribed form in respect of the workmen or any class of workmen employed by such employer.

### 8.6.3 Stage 2: Employer's stand on recognition

Under s 9(3) of the *Industrial Relations Act 1967* (IRA 1967), an employer or trade union of employers, upon being served with the claim for recognition, has two options, which must be taken within 21 days after the claim for recognition has been served:

(1) Accord recognition to the trade union. Upon according recognition, the employer shall notify the Director General for Industrial Relations (DGIR), or

(2) If the employer decides not to accord recognition, it must notify the trade union concerned in writing the grounds for not according recognition. If the trade union receives a notification from the employer informing that recognition is not accorded, the trade of workmen may within 14 days of receipt of the notification report the matter in writing to the DGIR.

Where the employer fails to revert with a decision on whether recognition has been accorded or not within the 21 days stipulated above, the trade union of workmen may report the matter in writing directly to the DGIR. This must be done within 14 days after the 21-day period has lapsed, failing which such claim of recognition shall be deemed to have been withdrawn under s 9(4) of IRA 1967.

**Law:** s 9(3), s 9(3A) and s 9(4), *Industrial Relations Act 1967*.

### 8.6.4 Stage 3: Action by the DGIR

Where the matter in regards to trade union recognition is brought to the Director General for Industrial Relations (DGIR)'s attention by the trade union of workmen concerned, the DGIR has a duty to take such steps or make such inquiries to ascertain:

(a) the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom the recognition is sought to be accorded, and

(b) by way of secret ballot, the percentage of the workmen or class of workmen, in respect of whom recognition is being sought, who are members of the trade union of workmen making the claim.






For the purpose of carrying out the above functions, the DGIR:

- is empowered to require the trade union of workmen, the employer, or the trade union of employers concerned to furnish such information as he may consider necessary or relevant within the period specified in the requirement
- may refer to the Director General of Trade Unions (DGTU) for him to ascertain the issue competence
- may enter any place of employment where any workmen in respect of whom a claim for recognition is sought to be accorded are being employed to examine any records or documents or to conduct secret ballot.

The role of the DGIR under s 9 is aptly summarised by the High Court in the case of *Chugai (Malaysia) Sdn Bhd v Ketua Pengarah Perhubungan Perusahaan & 2 Ors* [2000] 4 AMR 4553 as follows:

> "From the nature of his functions as set out in sub-s (4A) and (4B) of s 9, the DGIR may take such steps or make such enquiries as he may consider necessary or expedient to resolve the matter. Obviously, he has to examine the constitution of the union, the nature of the work done by the employer in manufacturing goods or providing services, the nature of work of the workmen, etc. He could also visit the work place and call for clarification from the union or the employer. He may enlist the help of the Registrar of Trade Unions (primarily to determine 'similarity of trades, etc.' See *Minister of Labour & Manpower v Paterson Candy (M) Sdn Bhd* [1980] 1 LNS 46) for his 'decision' on the competency of the trade union concerned to represent the workmen of the employer."

Before the DGIR can make any recommendation on the issue of recognition, he would have to make the necessary enquiries to ascertain whether the Union has satisfied three mandatory requirements:

(a) Firstly, the trade union must be competent to represent the employees of the employer that it seeks to represent. Under s 9(4A)(a) of the Act, the DGIR must "take steps to ascertain the competence of the trade union concerned to represent any workmen or class of workmen in respect of whom the recognition is sought to be accorded." Competency check is to be done by the DGTU to determine whether the union can represent employees in the employer based on the profession, etc and also whether the employees it seeks to represent fall within the scope of its representation under its own Rules.

It is instructive to note that s 26(1A) of TUA 1959 also provides that:

> No person shall join, or be a member of, or be accepted or retained as a member by, any trade union if he is not employed or engaged in any establishment, trade, occupation or industry in respect of which the trade union is registered.

In *Attorney General Malaysia v Chemical Workers' Union of Malaya & Anor* [1971] 1 MLJ 38, an issue was brought before the High Court as to whether the Registrar of Trade Unions was correct in ruling that a company's industries were similar to those enumerated in the rules of the union. In the course of dealing with the said issued, the High Court held that: