A COMPARATIVE APPROACH IN JUDICIAL DECISION-MAKING

A paper by

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Introduction

The focus of this paper is on the growth of industrial law in Malaysia. There are historical reasons for a comparative approach in judicial decision-making in Malaysia. The labour, employment and industrial legislation are a legacy of the British colonial government[1]. The earliest decisions of the courts followed the common law tradition. This trend has continued and decisions from the courts in the Commonwealth are of persuasive authority.

The decisions on industrial law emanate from the Industrial Court[2] which has the jurisdiction to decide on trade disputes [3]. The Industrial

1 The Federation of Malaya became independent on 31 August 1957. Malaysia was formed when the states of Malaya, Sabah, Sarawak and Singapore joined as a federation on 16 September 1963. Singapore ceded on 9 August 1965.
2 There are twenty-six divisions of the Industrial Court in Malaysia.
3 The jurisdiction of the Industrial Court is by way of references by the Honourable Minister of Human Resources

Court has quasi-judicial powers and is subject to the supervisory jurisdiction of the High Court[4].

The powers of the Industrial Court were highlighted by the Federal Court[5] as follows:

> "At the outset, it is we think, necessary to reflect on the extraordinary powers conferred upon the Industrial Court in resolving industrial disputes. They are all encompassing. This is s.30(5) of the Industrial Relations Act 1967 (the Act) which stipulates :
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> > 'The Court shall act according to equity good conscience and the substantial merits of the case without regard to technicalities and legal form.'
>
> It has been said, quite rightly, that industrial jurisprudence and industrial justice have a prior obligation and adherence to social justice as distinguished from legal justice and therefore have far wider powers than ordinary civil courts in the prescription, recognition and creation of rights, duties and obligations so as to achieve industrial harmony thereby enhancing the economic well-being of the nation: (see Insaf Vol. XXI no.3 - *The philosophy and concept. of industrial relations in Malaysia* - by Abu Hashim bin Hj. Abu Bakar, Chairman, Industrial Court.) In applying the powers under s. 30(5) above, the Industrial Court has to bear in mind the underlying objectives and purposes of the Act itself ie, that it is a piece of legislation designed to ensure social

in respect of trade disputes pursuant to 26(2) or a complaint by a trade union of workmen pursuant to section 8(2A) or a dismissal of an individual workmen irrespective of whether or not he is a member of a trade union of workmen pursuant to section 20(3), Industrial Relations Act 1967.

4 There are two High Courts which are the High Court of Malaya and the High Court of Sabah and Sarawak.

5 Tanjong Jara Beach Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers Peninsular Malaysia [2004] 3 ILR i at pages xiv and xv.

> justice to both employers and employees and to advance the progress of industry by bringing about harmony and cordial relationship between the parties; to eradicate unfair labour practices; to protect workmen victimization by employers and to ensure termination of industrial disputes in a peaceful manner. Clearly therefore, the *raison d'etre* of the Industrial Court is to endeavour to resolve the competing claims of employers and employees by finding a solution which is just and fair to both parties with the object of establishing harmony between capital and labour and fostering good relationship."

Legislative history

The beginnings of industrial law is a legacy of the British colonial government[6]. The growth of industrial law has been in tandem with the economic growth and the industrialisation of the country[7].

The first legislation were the Industrial Courts Enactment 1940 by the Federated Malay States, Industrial Courts Ordinance 1940 for the Straits Settlement and the Industrial Courts Enactment 1360 of Kedah. When the Federation of Malaya was formed in 1948, these laws were repealed and the Industrial Courts Ordinance 1948 was enacted. The Industrial Courts Ordinance 1948 provided for the settlement of trade

6 "The Industrial Relations Law of Malaysia" by Wu Min Aun .

7 "Human Capital Transformation: 55 Years of Malaysian Experience" by the Institute of Labour Market Information and Analysis, Ministry of Human Resources.

disputes by a permanent Industrial Court and *ad hoc* Boards of arbitration and inquiry. It provided for a voluntary system of arbitration of trade disputes.

The Essential (Arbitration in the Essential Services) Regulations 1965 and the Essential (Prohibition of Strikes and Proscribed Industrial Action) Regulations 1965 provided special provisions for certain industries during a period of emergency. They were later repealed by the Essential (Trade Disputes in the Essential Services) Regulations 1965.

The present Industrial Court was established under the Industrial Relations Act 1967. The Industrial Courts Ordinance 1948 and the Essential (Trade Disputes in the Essential Services) Regulations 1965 were repealed by the Act. The present legislation provides for the compulsory arbitration of trade disputes if a trade dispute is referred to the Industrial Court by the Honourable Minister of Human Resources.

The Industrial Court also has the jurisdiction to decide on the unjust dismissal of an individual workman irrespective of whether or not he is a member of a trade union of workmen if the matter is referred to the Industrial Court by the Honourable Minister of Human Resources.

The precedents by the Privy Council

The decisions of the Federal Court were subject to appeal to the Privy Council until the abolition of the final appeal to the Judicial Committee of the Privy Council on 1 January 1985. The review by the Privy Council of the decisions which emanate from the Industrial Court are essentially on the supervisory jurisdiction of the High Court in respect of the decisions of inferior courts.

In South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union and others[8], the Privy Council interpreted the ouster clause in section 29(3)(a), Industrial Relations Act 1967. The Privy Council held as follows:

> ".....there is no doubt that the dispute between the company and the respondents was a trade dispute within the definition in section 2 of the Industrial Relations Act 1967. It was therefore a dispute which the Minister had power to remit to the Industrial Court under section 23(2). The Industrial Court applied its mind to the proper question for the purpose of making its award. The award was accordingly within the jurisdiction of that court, and neither party has contended to the contrary. For the present purpose their Lordships will assume, without deciding, that the

8 [1980] 3 W.L.R. 318.

> award contained one or more errors of law upon its face. If so, the error or errors did not affect the jurisdiction of the Industrial Court and their Lordships are therefore of opinion that section 29(3)(a) effectively ousted the jurisdiction of the High Court to quash the decision by certiorari proceedings. Accordingly their Lordships agree with the decision, though not with the reasoning, of the Federal Court and they will advice His Majesty the Yang di-Pertuan Agong that the appeal should be dismissed."

The decision of the Federal Court[9] in the same case highlights the inheritance of the common law on the supervisory jurisdiction of the High Court. Raja Azlan Shah, Federal Judge (as he then was) held as follows:

> "The jurisdiction of the High Court to issue orders of certiorari is neither an appellate nor a revisional jurisdiction. Also from the very nature of the power conferred under section 25 of the Courts of Judicature Act, 1964, it is clear that in exercise of this power the High Court exercised original jurisdiction stems from the prerogative jurisdiction inherited from the United Kingdom courts and its object is mainly to enable the superior courts to keep inferior tribunals within the bounds of their authority. The supervisory character is essential for always in the background there is the beguiling illusion that an inferior tribunal entrusted to hand down awards of a final nature may hand down awards as it likes. Therefore the jurisdiction may for convenience be described as an extraordinary original jurisdiction. The circumstances under which the High Court can interfere with the decision of the Industrial

9 Non-Metallic Mineral Products Manufacturing Employees Union & Others v South East Asia Fire Bricks Sdn Bhd [1976] 2 M.L.J. 67 per Raja Azlan Shah FJ at page 68.

> Court are limited. For instance, it has no jurisdiction under section 25 of the Courts of Judicature Act to interfere with the findings of fact reached by the Industrial Court on the ground that the decision is erroneous except where there is a clear error of law on the face of the record. It cannot arrogate the powers of a Court of Appeal by substituting its own judgment for that of the Industrial Court on questions of fact and cannot review the evidence."

Subsequently, the Federal Court in R Rama Chandran v Industrial Court of Malaysia and Another[10] took a more liberal view of the supervisory jurisdiction of the High Court. Eusoff Chin, Chief Justice held as follows:

> "Section 33B(1)(previously s.29(3)(a) of the Industrial Relations Act provides that an award of the Industrial Court shall be final and conclusive and shall not be challenged, appealed against, reviewed, quashed or called in question in any Court of law. Yet, our High Courts and Federal Court intervene to quash the awards of the Industrial Court in appropriate cases, all for the cause of justice. Therefore, even when the statute declares an award is final, the Courts can still intervene. (See *Sungai Wangi Estate v. Uni [1975] 1 MLJ 136). Similarly, in Minister of Labour, Malaysia v. National Union of Journalists, Malaysia* [1991] 1 MLJ 24, where the Minister has refused to refer a trade dispute to the Industrial Court under s. 26(2) of the Industrial Relations Act, the Supreme Court when upholding the decision of the High Court granting certiorari to quash the decision of the Minister, did not order the Minister to reconsider the matter *de novo* but instead arrogated itself the powers of the Minister and granted the relief to the workman by directing the Minister to refer the trade dispute to the Industrial

10 [1997] 1 CLJ 147 per Eusoff Chin CJ at pages 167, 169 and 176.

Court.

It is clear that the High Courts and the Federal Court have adopted a liberal and progressive approach in certiorari proceedings, and I find that where the particular facts of the case warrant it the High Court should endeavour to remedy an injustice when it is brought to its notice rather than deny relief to an aggrieved party on purely technical and narrow grounds. The High Court should mould the relief in accordance with the demands of justice.

...

I am, therefore, of the view that based on the facts on record, this is a fit and proper case where the jurisdiction of the Court should not end with the quashing of the award.

The High Court jurisdiction should not be curtailed or narrowed or constricted by mere reference to the old historical development in which the writ of certiorari was developed and came to be granted by the Courts in England. Of course if the application for certiorari is dismissed, that ends the matter. But if the application is allowed, the Court has surely to mould the order. If we were to merely grant certiorari to quash the award and nothing more, this will deprive the writ of its vital and effective meaning and may result in grave injustice being caused to the claimant.

...

I would suggest that the intensity of the Court's review of administrative action may vary according to the nature of the case. The Courts in the United Kingdom have identified particular classes of cases where the exercise of power will be subject to rigorous examination. To illustrate, the interference with human rights should be subject to close scrutiny. (See, R. *v. Secretary of State for the Home Department, ex parte, Brind* [1991] I AC 696, 757).

Similarly when the result of an impugned decision may put life or liberty at risk, the duty which rests on the Court will be especially onerous. In this context, I would refer to *Bugdaycay v. Secretary of State for the Home Department London Borough Council* [1987] 1 All ER 940 (HL) where Lord Bridge stated that Courts are entitled within limits :

> 'To submit an administrative decision to a more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.'

And Lord Templeman said this :

> 'Where the result of a flawed decision may imperil life or liberty a special responsibility lies on the Court in the examination of the decision-making process.'

And, 'life' in Article 5(1) of the Constitution, as Sri Ram JCA has said in *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 AMR 1617, 1654, is wide enough to encompass the right to be engaged in lawful and gainful employment.

The categories of such cases are, of course, not closed.

I would say that in reviewing the award of the Industrial Court for *substance* and not just *process*, we were amply supported by the reasoning and the authorities cited above and, that therefore, there was *a legal basis* for us to have done so."

The persuasive value of decisions from the courts in the Commonwealth

The industrial jurisprudence of Malaysia has been enriched by the citation of cases from the Commonwealth countries.

In Re Application By Dunlop Estates Bhd v All Malayan Estates Staff Union[11], Mohamed Azmi J, High Court Judge (as he then was) followed the decision of the Federal Court in Non-Metallic Mineral Products Manufacturing Employees Union and others v South East Asia Fire Bricks Sdn Bhd[12] and cited the decision of the Indian Supreme Court in M/S Hindustan Hosiery Industries v F.H. Lala and another[13] where it was held that the Indian Industrial Disputes Act 1947 was intended to be a self-contained one which seeks to achieve social justice on the basis of collective bargaining, conciliation and arbitration.

Abdul Hamid Mohamad, Court of Appeal Judge (as he then was) referred to decisions of the courts in the Commonwealth in Telekom Malaysia Kawasan Utara v Krishnan Kutty Sanguni Nair and another[14] in deciding that the standard of proof which an employer had to prove

11 [1980] 1 M.L.J 243
12 [1976] 2 M.L.J 67
13 [1974] 1 L.L.J 340
14 [2002] 3 CLJ 314

that an employee had committed a misconduct was on a balance of probabilities and that the degree of probability required should be proportionate to the nature and gravity of the issue. The Court of Appeal overruled the decision of the High Court[15] which had applied the burden of proof in a criminal case of beyond reasonable doubt. The Court of Appeal also reviewed the statutory provisions in particular section 30(5), Industrial Relations Act 1967 and local decisions and held that the Industrial Court should not be burdened with the technicalities regarding the standard of proof, the rules of evidence and procedure which are applied in a court of law.

The Court of Appeal had considered the decisions of the English Court of Appeal in Monie v Coral Racing Ltd[16] , Indian Supreme Court in Management of Balipara Tea Estate v Its Workmen[17] and the Court of Appeal of New Zealand in Airline Stewards and Hostesses of New Industrial Union of Workers v Air New Zealand Ltd[18] and Honda New Zealand Ltd v New Zealand Boilmakers' etc Union[19].

The Court of Appeal held from pages 137 to 140 as follows:

15 [1996] 1 MLJ 481
16 (1981) ICR 109
17 AIR 1960 Supreme Court 191
18 [1990] 3 NZLR 549.
19 [1991] 1 NZLR 392.

" Since no court in this country higher than the High Court has made a pronouncement on this issue, perhaps we should also look at other jurisdictions.

In *Monie v. Coral Racing Ltd* (1981) ICR 109, the Court of Appeal in England had to decide an appeal by an employee who had been dismissed for dishonesty. Money was stolen from the employers' safe in circumstances such that only the employee or an assistant manager could have taken it. The employers did not know who was responsible and dismissed them both for dishonesty. The Court of Appeal, dismissing the appeal by the employee held, *inter alia* :

> 'Held, dismissing the appeal, (1) that whether a dismissal based on mere suspicion of an employee's theft was fair depended in whether in all the circumstances of the case the employer had acted reasonably in treating their suspicion as a sufficient reason for dismissing the employee: that such reason was in the circumstances a 'reason related to the conduct of the employee'; and that the industrial tribunal, having asked themselves whether there were solid and sensible grounds on which the employers could reasonably suspect dishonesty, were entitled to find that the employers had discharged the onus of proof under para 6(8) of Sch 1 to the Act (post, pp 121Dm 122G-123E, 124C-G, 126G-127A, D-R, G-128B).'

In *Employee's Misconduct As Cause for Discipline and Dismissal in India and the Commonwealth* by Alfred Avins, (1968 Ed), the learned author, citing numerous authorities says:

> 'Section 284 - Proof
> The British Columbia Supreme Court has ruled that an employer need not prove the guilt of an employee beyond a reasonable doubt to impose disciplinary sanctions, and hence acquittal of theft by a criminal court is no bar to dismissal by the employer. A fortiori, an employer need not reinstate an employee

> dismissed for theft because the conviction has been set aside on appeal. As the Hyderabad High Court has remarked: 'It is for ….(the employer) to see how far the services of such a suspicious character can be safely continued taking into view … the value of the property with which … (he) had to deal.
>
> The standard of proof must be sufficient to measure up to a preponderance of the evidence, taking all reasonable inferences into account.'

The Supreme Court of India in *Management of Balipara Tea Estate v. Its Workmen* AIR 1960 Supreme Court 191, says :

> 'In making an award in an industrial dispute referred to it, the tribunal has not to decide for itself whether the charge framed against the workman concerned (in this case falsification of accounts and misappropriation of fund) has been established to its satisfaction; it has only to be satisfied that the management of a business concern was justified in coming to the conclusion that the charge against its workman was well founded. If there is finding by the tribunal that the management has been actuated by any sinister motives, or has indulged in unfair labour practice, or that the workman has been victimised for any activities of his in connection with the trade unions, it may have reasons to be critical of the enquiry held by the management.
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> The tribunal misdirects itself in so far as it insists upon conclusive proof of guilt to be adduced by the management in the inquiry before it. It is well settled that a tribunal has to find only whether there is justification for the management to dismiss an employee and whether a case of misconduct has been made out at the inquiry held by it.'

Normally, one would expect the Indian Court to be very technical in its approach and insist of the higher burden, but this judgment shows otherwise.

Two judgments of the Court of Appeal, Wellington, New Zealand will also throw some light on

the approach of the court on the issue. In *Airline Stewards & Hostesses of New Industrial Union of Workers v. Air New Zealand Ltd* (1990) 3 NZLR 549, four Air New Zealand Ltd cabin crew members were believed by United States Customs to have attempted to import into Hawaii alcohol removed from the bonded stock in the aircraft. Air New Zealand was fined US$500 for violation of United State Customs Regulations. Air New Zealand, after making extensive inquiries into the matter, dismissed them for serious misconduct. Air New Zealand did not allege that the employees had committed theft, but did allege that they caused the company grave embarrassment by being found attempting to bring on shore bonded stock from the aircraft. The Court of Appeal, held, *inter alia*:

> (2) The employer is required to prove, however, on the balance of probabilities that on the facts available to him after reasonable inquiry made by him the dismissal has been shown to be justifiable (see p 554 line 39).
>
> (3) The test is whether the employer has shown that the decision to dismiss was in the circumstances and at the time a reasonable and fair decision. He must show that he had reasonable grounds to believe and did honestly believe that there had been misconduct by the employee of sufficient gravity to warrant dismissal (see p 555 line 51).'

It is interesting to note that MP Jain, the learned author of *Administrative Law of Malaysia and Singapore*, as meticulous as he is, does not deem it fit to discuss the question of standard of proof under a specific heading or subheading. However, at p 327 of the 3rd Ed of the book, the learned author says:

> 'What is needed to sustain findings of fact by an adjudicatory body is some evidence of probative value. A finding based on evidence of no probative value is no good.'

HWR Wade and CF Forsyth, in the 7th Ed of *Administrative Law* discussed the 'Standard and Burden of Proof' under a sub-heading. On the standard of proof, the learned authors have this to say:

> 'Nearly all the cases which concern administrative law are civil, as opposed to criminal, proceedings. The standard of proof of facts, accordingly, is the civil standard, based on the balance of probabilities, as contrasted with the criminal standard which requires proof beyond reasonable doubt. Even where, as sometimes in disciplinary proceedings, the language of the Act or regulations has a criminal flavour, speaking of 'offences', 'charges' and 'punishments', the standard of proof remains the civil standard.
>
> But the civil standard is flexible, so that the degree of probability required is proportionate to the nature and gravity of the issue. Where personal liberty is at stake, for example, the court will require a high degree of probability before it will be satisfied as to the facts justifying detention; and the requirement will not be much lower in matters affecting livelihood and professional reputation, or where there is a charge of fraud or moral turpitude.'

It should be remembered that the question of standard of proof is closely connected with the question of finding of facts."

In applying the decisions of court from outside the jurisdiction, the courts are mindful that there are different laws prevailing and the local statutes must be adhered to. In Viking Askim Sdn Bhd v National Union of Employees in Companies Manufacturing Rubber Products & Anor[20], Edgar Joseph Jr , High Court Judge (as he then was) held as follows:

20 [1991] 2 MLJ 115 per Edgar Joseph Jr J at pages 121 and 122.

"A final point must be made. It was argued by way of alternative, by counsel for the union that if, contrary to his primary submission, there was no legal basis in employment law or under the collective agreement, for the Industrial Court to have made the award concerned, it was still open to the Industrial Court to create rights and obligations which it considers essential for keeping industrial peace. The following passage in the judgment of Mukherjee J in *Bharat Bank Ltd Delhi v. Employees of the Bharat Bank Ltd Delhi* cited with approval by Chang Min Tat FJ in *Dr. A Dutt v. Asunta Hospital* at page 312 was quoted :

> 'In settling disputes between employers and workmen the function of the Tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or to give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace.'

In reply, counsel for the company submitted that Chang Min Tatt FJ's approval of the passage in Mukherjee J's judgment was only obiter and that the learned judge had loosely adopted the reasoning in certain Indian decisions. As for the Indian decisions, counsel argued that an uncritical adoption of them could be misplaced because industrial jurisprudence in India is very much influenced by the Indian Constitution and the statement of state policy therein, known as the Directive Principles of State Policy contained in Part IV of the Indian Constitution, art 36 et seq. (See *Basu's Commentary* (6th, Ed, 1981 (Vol E) at p 79). To illustrate the role played by the Directive Principles in decision making in a labour dispute, counsel also cited the cases of *State of Mysore v. Workers at p 928 and Workman Shift In Charge v.*

Presiding Officer Industrial Tribunal Delhi. He then drew attention to the case of *Phang Chin Hock v. PP* where Suffian LP in making a comparison between the Indian and Malaysian Constitutions listed the Directive Principles as one of the distinguishing features between the two documents.

Having said that counsel acknowledged that the Directive Principles may carry laudable concepts, but the question was whether it should not be left to Parliament to decide whether these principles should infuse our labour legislation rather than for the courts to import them vicariously by the adoption of Indian decisions without qualification.

…

Secondly, the dicta to be found in the judgments in the Indian cases on the functions and powers of Industrial Tribunals referred to by the Federal Court in *Dr. Dutt*'s case, are based not on art 38 of the Indian Constitution and its Directive Principles of State Policy, as argued by counsel for the company, but on the following statement by Ludwig Teller in his book, entitled L*abour Disputes and Collective Bargaining* (Vol 1) at p 536 :

> 'Industrial arbitration may involve the extension of an existing agreement, or the making of a new one or in general the creation of new obligations or the modifications itself with interpretation of existing obligations and disputes relating to existing agreements.'

On the contrary, I am satisfied that the power of the Industrial Court to create new rights and obligations is derived from sub-ss (4), (5) and (6) of s.30 of the Industrial Relations Act 1967 (reproduced above), though, it goes without saying, that this is a power which must be exercised reasonably and not arbitrarily."

The Industrial Court has established principles on job security. Prior to the Minimum Retirement Age Act 2012 which came into force on 1 July 2013, the Industrial Court held that in the absence of a retirement clause in the contract of employment, an employer could impose a retirement age for its employees which was reasonable. In Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong[21] , Lim Heng Seng, Chairman of the Industrial Court held at pages 854 to 855 as follows:

> "In a s.20 reference a workman's complaint consists of two elements; firstly, that he has been dismissed and secondly that such dismissal was without just cause or excuse. It is upon these two elements being established that the workman can claim his relief to wit an order for reinstatement which may be granted or nor at the discretion of the court.
>
> As to the first element, industrial jurisprudence as developed in the course of industrial adjudication readily recognises that any act which has the effect of bringing a contract employment to an end is a dismissal within the meaning of s.20 of the Act. The terminology used and the means resorted to by an employer is of little significance; thus contractual terminations, constructive dismissals, non-renewals of employment contracts, forced resignations and retrenchments are all species of the same genus which is dismissals. Retirement likewise is also a dismissal for the purpose of industrial adjudication under s.20 of the Act.
>
> In this context, the term 'dismissal' carries no implication of fault or breach of discipline, but purely a

21 [1998] 3 ILR 843

neutral meaning indicative of the termination of an employment relationship at the instance or behest of the employer. This is in contrast with its common usage of the term in association with some justificatory reason for the employee's termination, e.g. misconduct, poor performance or breach of conduct.

When an employee's services have been terminated on the grounds that he had attained his retirement age, the just cause or excuse advanced by an employer when the termination is challenged will invariably be a justification based on a contractual provision. An employer will point to the agreement signed between the parties or to a usage or custom in a particular trade to establish his just cause. Or, where an employer is in the position to do so, he might rely on an implied term. The parties to that agreement have agreed, expressly or impliedly, that unless the employee misconducted himself or failed to perform his work satisfactorily, he shall be engaged in the service of the employer until the former attains the stipulated retirement age. Like an employee in a genuine fixed term contract of employment who leaves at the expiration of his fixed term, the retired employee has completed his engagement with his employer for a definite term on which event he gracefully retires. that is just cause enough for an employer to formally bring an end to their employment relationship.

In this case, however, the company is unable to rely upon a contractual provision stipulating that the claimant ought to retire at 55. When retired one year and three months after he attained that age the claimant complains that he had been dismissed without just cause or excuse. He claims that employees in his category normally retire at 60. The court is of the opinion that the claimant ought to be permitted to contend that in the absence of a contractually agreed retirement age, he is entitled to work up to the normal retirement age of employees in his category. This requires a determination of what that normal retirement age is, an issue which the court

will now address.

> The non-existence of a retirement clause in an employment contract cannot mean that no employer can ever bring an employee's service to an end by retiring him at a certain retirement age, or that such an action would tantamount to dismissal without just cause or excuse. The court has to constantly remind itself - and the parties before it - that in reference under s.20, the true question posed to the court for adjudication is not whether a termination of an employee's services services is lawful in that it was pursuant to a contractual provision or otherwise, but whether the same was for just cause or excuse. A justification based on contractual grounds might be a relevant factor; however, it will certainly not be conclusive of the matter.
>
> A fundamental aspect of industrial adjudication is the proposition that the function of the court is not confined to interpreting and giving effect to the contractual rights and duties or obligations of the parties. The court must have the authority to recognise and even create rights which exists independently of the contract whenever the justice of the matter requires were the court to meaningfully perform the statutory function entrusted to it in the realm of industrial relations, in particular in the resolution of the claims arising out of the conflicting demands, interests and aspirations of the disputing parties."

The Court of Appeal[22] upheld the decision of the Industrial Court in that case. Gopal Sri Ram , Court of Appeal Judge (as he then was) held at page 16 as follows:

22 Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal [2001] 3 CLJ 9

"This, in my view, is a perfectly correct direction. It has the support of the decision of the House of Lords in Waite v. Government Communications Headquarters [1983] ICR 653, an authority referred to be the learned Chairman in his award. In Waite (ibid), Lord Fraser summed up the principle applicable to a case as the present as follows (at p. 662):

> 'I therefore reject the view that the contractual retiring age conclusively fixes the normal retiring age. I accept that where is a contractual retiring age, applicable to all, or nearly all, the employees holding the position which the appellant employee held, there is a presumption that the contractual retiring age is the normal retiring age for the group. But it is a presumption which, in my opinion, can be rebutted by evidence that there is in practice some higher age at which employees holding the position are regularly retired, and which they have reasonably come to regard as their normal retiring age. Having regard to the social policy which seems to underlie the Act - namely the policy of securing fair treatment, as regards compulsory retirement, as between different employees holding the same position - the expression 'normal retiring age' conveys the idea of an age at which employees in the group can reasonably expect to be compelled to retire, unless there is some special reason in a particular case for a different age to apply. 'Normal' in his context is not a mere synonym for 'usual'. The word 'usual' suggests a purely statistical approach by ascertaining the age at which the majority of employees actually retire, without regard to whether some of them may have been retained in office until a higher age for special reasons such as a temporary shortage of employees with a particular skill, or a temporary glut of work, or personal consideration for an employee who has not sufficient reckonable service to qualify for a full pension. The proper test is in my view not merely statistical. It is to ascertain what would be the reasonable expectation or understanding of the employees holding that position at the relevant time. The contractual retiring age will *prima facie* be the

normal, but it may be displaced by evidence that it is regularly departed from in practice."

The future

The nature of work and employment relationships is constantly evolving. Where the nature of work and employment relationships is transnational, issues on the jurisdiction of the Industrial Court have arisen[23]. The use of technology has also changed the landscape of work and employment relationships. It is anticipated that new issues on the jurisdiction of the Industrial Court will arise. There could be an overlapping of jurisdictions in such cases.

These trends provide further impetus for a comparative approach in judicial decision-making in Malaysia.

Dated : 2 August 2013.

23 Kathiravelu Ganesan and another v Kojasa Holdings Bhd[1997] 2 M.L.J 685 (Supreme Court). The highest court has been renamed as the Federal Court; Nacap Asia Pacific Bhd v Jeffrey Ronald Pearce and another [2011] 5 CLJ 791 (High Court).