An Introduction to the Industrial Court of Malaysia

A paper presented by Y.A. Tuan Fredrick Indran X.A. Nicholas, Chairman Industrial Court of Malaysia, Perak Branch on 11th July 2013 at the Blue Lecture Hall, Level 1, Royal College of Medicine, Perak at Greentown Ipoh organised by The Faculty of Medicine, University Kuala Lumpur, Royal College of Medicine Perak at No. 3, Jalan Greentown, 30450 Ipoh, Perak Darul Ridzuan.

UNIVERSITI KUALA LUMPUR

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Certificate of Appreciation

We hereby would like to extend our heartiest Appreciation to

Mr. Fredrick Indran X. A. Nicholas

As a speaker for Monthly CPD Programme RCMP on:-

'An Introduction To The Industrial Court of Malaysia For Medical Profession'

Date: 11-07-2013 (Thursday)

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A Paper

by

Fredrick Indran X. A. Nicholas

Chairman
Industrial Court of Malaysia
Perak Branch

Presented on 11th July, 2013 at the Blue Lecture Hall, Level 1

Royal College of Medicine Perak,

At Greentown, Ipoh.

The Honourable' Dean of the Faculty of Medicine, Royal College of Medicine Perak, Professor Dr. Osman Ali; (Respected Dignitaries in order of precedence); Distinguished Members of the Faculty and respected students ~ I have the honour today of addressing you on a paper entitled "*An Introduction to the Industrial Court of Malaysia".*

I would like to begin by sincerely thanking the Dean for allowing me this opportunity to present this discourse to this august body; and I would also like to record my appreciation to Assoc. Prof. Dr. Tin Win for being instrumental to me being here today.

Introduction

The organizational complexities of modern industrial & commercial enterprise have thrown up a variety of arrangements which represent the relationship between the employers, employees and their trade unions. These arrangements may be entirely satisfactory to all concerned when things are moving along cordially; but woe betide when things go wrong in that relationship! Legal rights and responsibilities *then* may frequently be at the mercy of ill-defined distinctions and distracting complications; and lack that elegant simplicity of the 19th Century

concept of ***"Master & Servant"*** {***id est.*** *('i.e.') a principal, superior or master to his loyal worker, employee or servant*}. Though, perhaps a somewhat antiquated notion, but each party to *that* senescent relationship, at least, knew where they stood without the need for forensic investigations into the niceties and legality of their mutual association.

Coming back to the present, it has increasingly become the task of the Industrial Court in proceedings before it, particularly in s.20 references (more on this later in relation to the Industrial Relations Act 1967); to sometimes have to establish the true relationship between the parties. If there is a ***'Contract of Employment'***, or some such document however described, the answer will normally be found therein. However, if there is an assertion that the document concerned does not truly and/or fully represent the relationship, the Industrial Court will then be entitled to consider not only the words of the written document itself, but also other incidental matters and peripheral considerations subject to regard being had to the relevant jurisprudence; including where appropriate, the subsequent conduct and attitude of the parties in relation to each other, ***to wit***. in their employment relationship.

The Structure & Workings of the Court

The long title of the Industrial Relations Act 1967 (the 'IRA') reads as follows:

> *"An Act to promote and maintain industrial harmony and to provide for the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom."*

Composition:

The Industrial Court is composed of a President and currently 25 Divisional Chairmen (*all appointed by DYMM Yang di-Pertuan Agong*) and of two panels, one representing employers and the other representing employees, whose members are appointed by the Minister of Human Resources, Malaysia. Of the 26 Divisions of the Court (inclusive of that of the Court of the Honourable President), 19 sit in Kuala Lumpur; 2 in Penang; 1 in Ipoh; 2 in Johor Baru; 1 in Sabah & 1 in Sarawak. Under normal circumstances, each individual Divisional Court is constituted by the President or a Chairman; sitting with two panel members ~ one from each panel. There are however specified cases where the President or a Chairman presides alone.

Jurisdiction:

The industrial Court has jurisdiction over trade disputes referred to it for arbitration by the Minister. Once the Minister refers a dispute to it, the Court is immediately cloaked with the jurisdiction to hear and dispose of it. It cannot refuse the exercise of its jurisdiction nor call into question the exercise of the Minister's discretion to refer the dispute to it. Any challenge then by an aggrieved party to the exercise of the Minister's discretion must be taken to the High Court by way of a procedure known as *prerogative writs*; but due to the constraints of time I shall refrain from going into that complex area of law today.

A *"trade dispute"* has been defined by the IRA as *"any dispute between an employer and his workman which is connected with the employment ..... or the terms of employment or the conditions of work of any such workman."* The Minister may, after conciliation has failed between the parties refer the dispute to the Court *either* on his own motion if he is satisfied that it is expedient to do so; or on the joint request of the employer and employee union who are parties to the dispute. There is however a caveat to this ministerial power in that the Minister cannot refer a trade dispute in the *public sector* (i.e. concerning government employees & employees of statutory bodies, eg. the E.P.F., SOCSO, etc.) to the Court for arbitration,

without the consent of the *Yang di-Pertuan Agong* or the state authority concerned (as the case may be).

The Court has jurisdiction over all *collective agreements* concerning terms and conditions of service concluded between employers and workers unions in that it can approve, reject them, require amendments or amend them itself, and interpret and enforce such agreements.

The Court also has the jurisdiction over complaints alleging *unfair labour practice* made by employers, employees and their unions, and over representations alleging *unjustified dismissal* made by a workman against his employer. The procedure for this is as follows:

> The workman, being aggrieved by the circumstances surrounding the cessation of his employment, will have to make written representations to the Director-General for Industrial Relations under section 20 (1) of the IRA 1967. The office of the Director-General will then take action to conciliate between the parties. If the conciliatory labours prove unproductive the Director-General will then refer the matter to the Honourable Minister of Human Resources under section 20 (2) of the Act; with a notification of the

breakdown of the reconciliation process. The Honourable Minister, in turn and if it is found appropriate, will exercise those statutory powers found under section 20 (3) of the Act to refer the matter to the Industrial Court of Malaysia. As a result, the workman's initial representations will be transformed into a ministerial reference conferring lawful jurisdiction upon the Industrial Court to hear and determine the complaint (case).

This conveniently leads to the next sub-heading:

Powers:

The Industrial Court has the power to summon, join, substitute or strike off parties, take evidence on oath or affirmation, compel the production before it of books, papers, documents and things, conduct proceedings in private, call in the aid of experts, and generally direct and do all such things as are necessary or expedient for the expeditious determination of the matter before it (section 29 of the IRA). All this leads to that most important of powers ~ and that is to hand down its decision in a case which is commonly called "An Award". This is somewhat similar to what is called a "judgement" in a regular Court of Law.

Awards (section 30 of the IRA):

The Industrial Court is required to make its Awards without delay, and if at all possible within 30 days of the date a dispute is referred to it (section 30 (3) of the IRA). In this day and age that would be a tall order and is observed more in the breach than in the compliance. This is mainly because of the tremendously increased workload that confronts the Court and the augmented complexity of the cases before it. However, we make every effort to expeditiously complete all our cases in the shortest possible time; and in any case we strive to bring closure of the trial of a dismissal case within 16 months of the date of initial reference; with Awards being handed down within 6 months of the last date of hearing; and for Collective Agreements ~ to give cognizance (judicial recognition) within 6 weeks of the agreement being deposited with the Court. The law (section 16 of the IRA) requires that all Collective Agreements between employers and trade unions must be deposited with the Court within 1 month of it being signed by the parties.

In making an Award, the Court is required to act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal form. The Court is also required to consider public interest, the financial implications and the effect of the Award on the national economy and on the

particular industry concerned; and the probable effect of the Award on similar or related industries.

Awards of the Industrial Court shall be final and conclusive and shall not be challenged, appealed against, reviewed, quashed or called into question in any court. An Award is binding on all parties to the proceedings before the Court and on their successors, assignees or transferees. It also supersedes any employment contracts that exist between employers and their employees ~ in other words the Court can take an employment contract and rewrite it as it sees fit! This power goes way beyond those of an ordinary court of law, which in the norm only interprets clauses in a contract to ascertain if a breach has occurred. They (the courts of law) cannot rework it (the contract) for any reason.

Why?; … you may ask is this power given to the Industrial Court. The answer is this ~ and I invite you to look back to the opening words of the long title of the IRA:

*"**An Act to promote and maintain industrial harmony**…."*

It has thus been said that the Industrial Court is a court of ***social justice*** that exists under a piece of beneficent social legislation (i.e. the IRA).

In the case of **PATCO MALAYSIA Bhd. v. SARIP bin HAMID** (Award No. 89 of 1992) it was held:

> *"It is clear that this court is not strictly confined to the administration of justice in accordance to the law, but is an instrument for the dispensation of social justice according to equity and good conscience. Now,* social justice *and* legal justice *are two different concepts, although their common object is to ensure that justice is done. It is to free workmen from contracts and obligations that are unfair and inequitable that the concept of social justice has been evolved."*

In the case of **NON-METALLIC MINERAL PRODUCTS MANUFACTURING EMPLOYEES UNION & OTHERS v. SOUTH EAST ASIA FIRE BRICKS Sdn. Bhd.** [1976] 2 MLJ 67 His Lordship the Chief Justice Raja Azlan Shah (as ***His Royal Highness DYMM The Sultan of Perak Darul Ridzuan*** then was) speaking for the Federal Court ruled: -

> *"The employer's freedom of contract has frequently been raised in industrial adjudication; and it has consistently been held that the said right is now subject to certain principles which have been evolved by industrial adjudication in advancing the cause of social justice ..... The doctrine of the absolute freedom of contract has thus to yield to the higher claim for social justice."*

In the Indian case, which has persuasive authority in this country, of **BHARAT BANK v. EMPLOYEES OF BHARAT BANK** [1950] SCR 459 (*Supreme Court of India*), Mukherjee J. said:

> *"In settling disputes between employers and workmen, the function of the Industrial Tribunal is not confined to the administration of justice in accordance with the law. It can confer rights and privileges on either party which it considers reasonable and proper, although they may not be within the terms of any existing agreement. It acts not merely to interpret or 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 the book "Industrial Jurisprudence" by Mahesh Chandra, he states:

> *"On the other hand, social justice goes much further than merely adjudicating upon the rights of the contending parties on the basis of contract; the tribunals administering social justice are not restricted merely to interpreting the contract; they can revise old contracts and make new contracts for the contending parties. These tribunals not only are not bound by the contracts of the parties, but also are not restricted by the ordinary law of master and servant, because if they were to be so bound and restricted, there would be no point or purpose in creating such*

separate tribunals and resorting to a different forum. It is to enable workmen to free themselves from contracts and obligations which are unfair and inequitable to them that the concept of social justice has been devised, and new forums have been founded. These new forums have to do justice unrestricted by the contract between the parties or the law of master and servant, and unhampered by purely technical and legalistic considerations which lead to rigidity or inflexibility."

C.P. Mills in his book "Industrial Disputes Law in Malaysia" made this noteworthy observation:

"Just as the Court of Chancery [a type of English Court that dealt with equitable principles] *developed to mitigate the harshness of* [English] *common law rules in certain areas, with power to create* ***rules of equity*** *which prevailed over* ***common law*** *rules where the two were in conflict, so an industrial court is designed to create in its field new rules that will displace the accepted rules of common law. A court of equity will avoid a contract which has been procured by the undue influence of one party over the judgement of the other, and similarly an industrial court may, so far as its remedies allow it, override a contract which is incompatible with what it sees as the* ***principles of industrial equity****. More than that, an industrial court, which is an arbitral tribunal, has as its principal function*

not so much the determination of existing rights and obligations between contesting parties, but rather with adjusting those rights and obligations and creating new ones by making awards which will govern the relationship between the parties in the future. Its role is essentially legislative. Accordingly, in the industrial jurisdiction, where it is claimed that the agreement is inequitable, it is no answer to say that the parties have so agreed; that would merely be saying that no agreement could ever be inequitable unless there was fraud or overreaching. If that were the position, an industrial court would have no function to perform, for all the issues that might arise between employers and employees could be settled by the ordinary law courts according to the terms of the contract of employment.

It is clear that the Industrial Court in making its awards is freed from the tyranny of formal legalism and the rigours of the ***common law****. It has a creative function and impulse of its own, which flows from the juxtaposition of 'equity' and 'good conscience' in section 30 (5) of the IRA, and the injunction to eschew 'technicalities' and 'legal form' in the same subsection.*

Following from the above the Industrial Court has held that it is not bound by *technical principles* or *legal doctrines*, especially in cases where such principles and doctrines are invoked either by way of 'preliminary objections' or to defeat claims which are 'just and proper'.

In the case of **NADARAJAH & ANOTHER v. GOLF RESORT Bhd.**[1992] 1 MLJ 506; the High Court stated:

> *"Under section 30 (5) of the IRA, the Industrial Court must act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal form. Technical legal rules such as* ***estoppels****,* ***limitation****,* ***laches****,* ***acquiescence*** *etc have no place in industrial adjudication, and they should not be allowed to be invoked for defeating claims which are just and proper."*

In **GUEST KEEN WILLIAMS Pte. Ltd. v. P. J. STERLING & OTHERS** [1959] AIR SC 1279 the Indian Supreme Court held that in dealing with industrial disputes, the application of technical legal principles should as far as reasonably possible be avoided. An industrial tribunal should be slow and circumspect in applying such principles in the adjudication of industrial disputes. In other words, a case should not be thrown out merely upon a technical objection.

The Workman:

The employment relationship embraces not only the employer and employee, but also the particular type of **employment contract** between them. There are two

major types of employment contract, one denoting an actual *employer-employee* relationship and the other that of a *principal-contractor* relationship. The first is called a *'contract of service'* or an *'employment contract';* and the latter a *'contract for services'.* The IRA only regulates the first type, i.e. the *'contract of service'.*

The provisions of the IRA protect the *security of tenure* of a workman who has been engaged under a *'contract of service'.* This principle of *security of tenure* guarantees an employee's legitimate expectation to continue in his employment and to earn his livelihood until his age of retirement or other legitimate time/circumstance for the cessation of his service; this is so unless his employer has just cause or excuse to terminate his services before that specified time; *e.g.* for proven misconduct at work.

However, not every person performing work or rendering services for another is, or can be considered to be, a "workman" under the Act (IRA). There are specific provisions in the Act; and through industrial jurisprudence vide adjudication that have, over the course of time, defined the divide between a legitimate "workman", on the one hand and what is commonly known as an "independent contractor", on the other. For although the latter may perform work and/or provide

services for another, he does so ***not*** as an employee qua employee but as an autonomous, self-governing entity under the terms of a contract ***for*** services. A comprehensive explanation of these concepts will require more time then I have now; so I will refrain from getting into it here.

But why then, you may ask did I bring it up?

The answer is simply this ~ as I am faced today with Doctors, future Doctors and other related professionals, I thought that you may be interested to know if medicos', which term I use with the utmost respect, would be considered "workman" under the IRA.

The resolution of this query is not a simple 'Yes' or 'No'! It would depend very much upon the type of contract entered into between the employer and the individual concerned.

In the ***locus classicus*** of **Dr. A. DUTT v. ASSUNTA HOSPITAL** [1981] 1 MLJ 304 (Federal Court) it was held by Chang Min Tat *FJ;* that Dr. Dutt, a long time anesthesiologist at the Hospital who was an expatriate from India, was indeed a "workman" covered under the Act by virtue of the terms and conditions of his

contract of service, read alongside the circumstances of his employment at the Hospital.

However, in contrast, in the recent case of **DAVID VANNIASINGHAM RAMANATHAN v. SUBANG JAYA MEDICAL CENTRE Sdn. Bhd.** [2013] 1 ILR 616, the Industrial Court at Kuala Lumpur held that the Claimant (a Doctor) was not a "workman" under the Act. Perhaps a brief look at the facts & the relevant decision in this case may prove useful here; and it is as follows:

The Facts:

> *"The claimant was a doctor with the company (the hospital) for nearly 20 years until he alleged that he was dismissed without just cause or excuse. The company contended that the claimant was not dismissed but that his contract <u>for</u> services was not renewed. The issue was whether the claimant was a "workman" under s. 2 of the IRA or whether he was under a contract <u>of</u> service to justify his claim for unjust dismissal."*

For ease of reference I will reduce here under the definition of "workman" under section 2 of the IRA:

"workman" means any person, including an apprentice, employed by an employer under a ***contract of employment*** *to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute."*

And *"Contract of Employment"* has been defined in the same section of the Act 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."

Coming back to the **SUBANG JAYA MEDICAL CENTRE** case (*supra*) the Industrial Court held (*the relevant decision is paraphrased as follows*):

Held for the company (dismissing the claimant's claim):

i. There was no intention on the part of the company to create legal relations with the claimant on the basis of an employer-employee

relationship. There was in fact no written contract of employment between the parties;

ii. Unlike some other medical officers in the company who had formal letters of appointment as employees, the claimant did not. This went to show that the company did not intend to treat the Claimant as an employee in their formal relationship between themselves;

iii. In the absence of a written contract of employment, the conduct of the parties and other relevant evidence of their actual relationship had to be examined to determine the real status quo;

iv. The documentation adduced at trial (*e.g. several consecutive "Agreement Active Status" contracts*) taken together with the conduct of the parties between themselves as presented thereat & upon a due and proper examination of the same ~ it was revealed that the 20 year relationship between them had all the while been nothing more than that of ~ *an independent contractor with his principal*;

v. Thus, the true relationship between them was for all intents and purposes a *contract **for** services* by the claimant to the company; and

not one of a *contract **of** service* between them (i.e. he was not a "workman" as defined by the Act);

vi. It was in effect a business venture whereby the company provided the premises and medical facilities/equipment; whilst the claimant in return provided his medical skills & expertise for their mutual benefit.

As a consequence a medical professional working for another could either be an "employee/workman" or an "independent contractor" depending upon the particular and peculiar circumstances of each case. If it comes to the crunch where there is a dispute, it will be the Industrial Court that will make the final determination of whereat the truth lies; and it will do so by the expedient reference to s. 30 (5) of the Industrial Relations Act 1967 ~ which enjoins the court to act according to equity, good conscience and the substantial merits of the case.

Conclusion

I end this presentation with grateful thanks for your undivided and kind attention; but before I close, I must bring to your notice something very droll upon which I stumbled during my research for this paper ~ and that is, *'believe it or not'*, a

situation where there is or appears to be, no employer, in the earthly sense of the word, in an ostensible employment type situation.

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(8) God's workers have no rights'

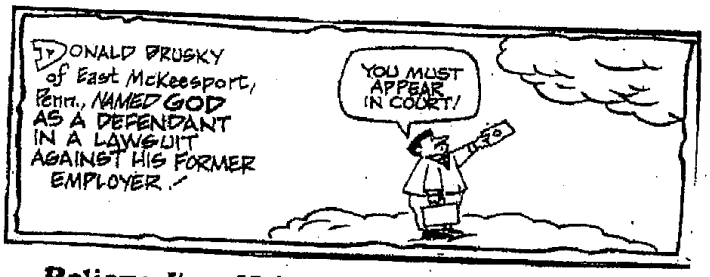
SLIDE 24

LONDON: A court has ruled that priests have no rights under Britain's employment laws because they work for God and not an earthly employer.

Three appeal court judges decided on Friday that Anglican curate Rev Alex Coker had no right to take his case for unfair dismissal before an industrial tribunal. "A minister of religion serves God and his congregation but does not serve an employer. There is not a contract that he will serve a terrestrial employer in the performance of his duties." Lord Justice Christopher Staughton ruled. Coker, 48, claimed he was unfairly sacked in 1994 from his job as a curate in southwest London. On the argument that priests worked for God, judge Staughton said: "I don't think you have an address for Him so you will not be able to serve any documents." - Reuter.

(Press Report: 13/7/97)

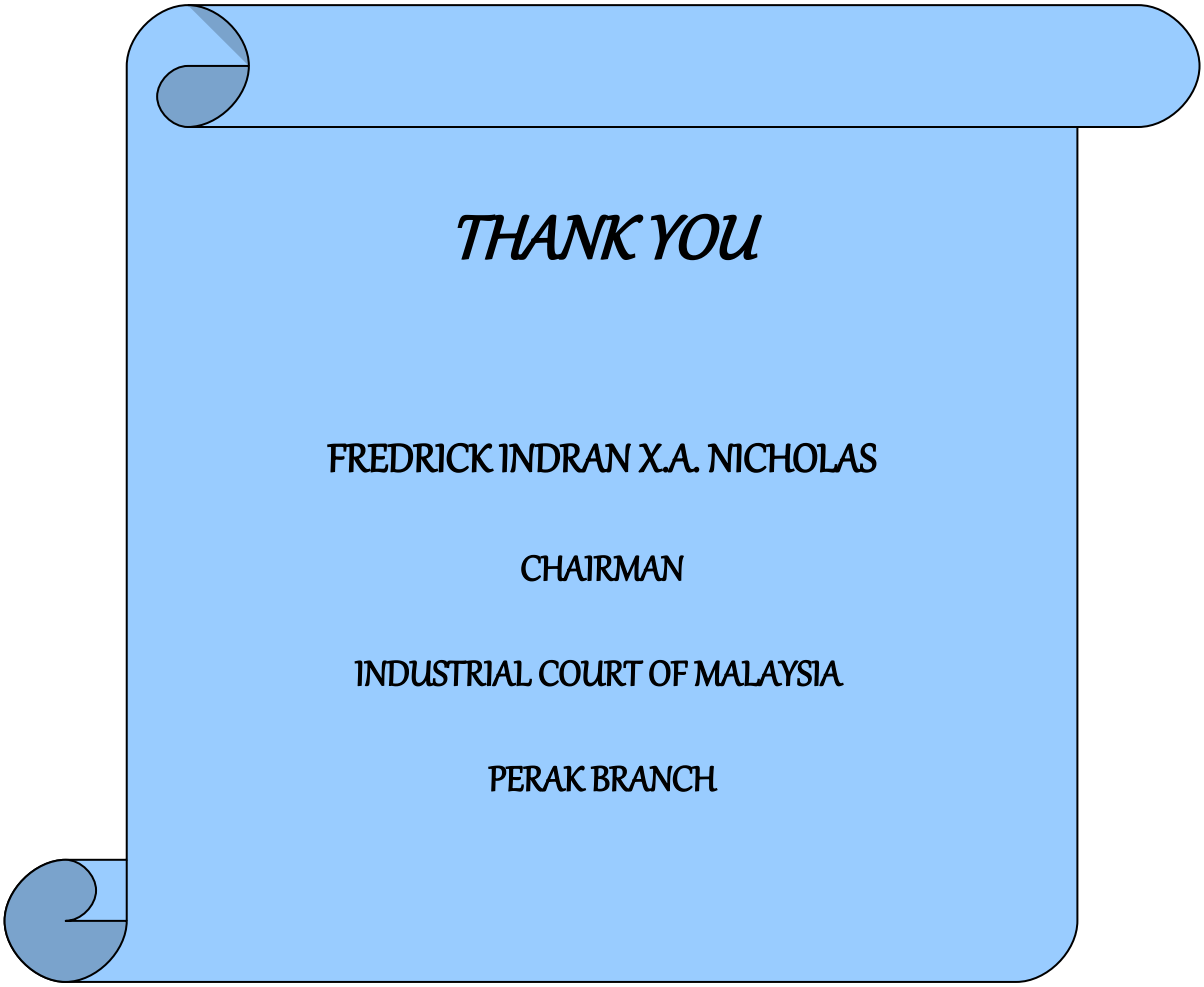
Citation: Diocese of Southwark v. Coker [1996] ICR 896, EAT, [1997] 29 LS Gaz R 29, 141 Sol Jo LB 169, CA.



SLIDE 25

Believe It or Not!

Sunday Times 22/8/1999


THANK YOU
FREDRICK INDRAN X.A. NICHOLAS
CHAIRMAN
INDUSTRIAL COURT OF MALAYSIA
PERAK BRANCH

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x. A Paper presented by Y.A. Dato' Umi Kalthum bte Abdul Majid (*a former President of the Industrial Court of Malaysia*) entitled **"The Constitution and Practice of the Industrial Court"** presented on 13.4.2007 at a Labour Law Conference in Kuala Lumpur.