

**Dual and Multiple Employment of
Insured Persons under the
Employees' Social Security Act
1969
(Act 4)**

A Paper

By

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Introduction:

Y.A. the Honourable' Madam President of the Industrial Court of Malaysia, (Respected Dignitaries in order of precedence), Y.A. the Chairmen of the Social Security Appellate Board from the various states, SOCSO officers, Ladies & Gentlemen and the Chairman of this session ~ I have the honour of addressing you on a paper with a focus on '*Dual and Multiple Employment of Insured Persons under the Employees' Social Security Act 1969*'.

It is a theme that came into somewhat febrile prominence in the realms of social security jurisprudence not long ago by way of an Appellate Board decision from Sarawak; that went on for appeal to the High Court, that was followed by an appeal to the Court of Appeal & then even on to the Federal Court, for leave to take it there.

I will endeavor to communicate in this paper, as best I can, the basic nature of the provisions under the Act that impacts upon the subject matter; and then briefly comment upon the Sarawak case and the law as it stands at present.

Back to the Basics:

To begin with let us consider the nature of the entity called the Social Security Organization Board. It is a body corporate with perpetual succession incorporated under the Laws of Malaysia and in particular by section 59B of the *Employees' Social Security Act 1969* ('the Act'); under which provision it was formally established. It comes under the auspices of the Ministry of Human Resources Malaysia and is governed, regulated, administered and ruled by the provisions of the Act and the *'Employees' Social Security (General) Regulations 1971'*, as amended from time to time.

In common parlance this organization is referred to as 'SOCSO' or 'PERKESO' (its acronym in Bahasa Malaysia). Its primary ambit is the provision of societal protection in the form of social insurance in terms of medical and cash benefits, the equipping of artificial prosthesis and the rehabilitation of its ill and/or injured members. In short, it provides guarantees and protection as a social blanket or a safety net for those of its participating members who may have fallen foul of the unfortunate exigencies of life.

I used the phrase “members” just now. What exactly do I mean by this?

It is simply this ~ every employee who is a Malaysian citizen or permanent resident employed under a contract of service or apprenticeship; and earning up to a ceiling wage of RM3,000.00 (and below); must be compulsorily registered by law as a contributing member of SOCSO. This includes each and every employee under the stated wage threshold, whether the employment is of a permanent, temporary or a casual nature. Such “members” are defined under the Act as ***‘insured persons’***.

It goes without saying that the stated definition thus excludes certain categories of the employed in this country ~ such as those earning above the threshold limit of RM3,00.00 per mensem, Government Servants and Domestic Workers serving private dwelling houses such as cooks, maids, gardeners, drivers, watchmen, washers of clothes and such like citizens.

It must be noted that there is no age criterion for registration as a contributing member, i.e. to become an insured person. However, there is a rider and it is that those who have attained the age of 55 years and over; and those that are registered as insured persons for the first time after the age of 50 years, are covered for the purpose of employment injury only. Insured persons below the stated age threshold

are covered for both employment injury and for invalidity. This can be seen from the “*Contribution Schedule*”, which is attached to this paper and marked as Annexure 1.

*[As an aside, this Act provides cover for Malaysian citizens and permanent residents only. What of foreign nationals employed in this country, you may ask? Well, Parliament has not left them out as they are afforded some benevolent protection under the ‘**Workmen’s Compensation Act 1952**’. That statute, however, is outside the province of this paper and so it will be left there.]*

Contributions:

There are particular sections under the Act that have direct relevance to the theme of this paper; and they are: Sections 6, 7, 8, 9 & Section 2 (9) & 2 (19) (*all annexed hereto and marked as Annexure 2*).

Looking briefly at each section:

Section 6 relates to contributions payable under the Act. The early sub-sections relate to '*by whom*', to '*what category*' and the '*rates*' that are payable and when '*it falls due*', *et al.* The sub-sections of particular interest to us for the purposes of this

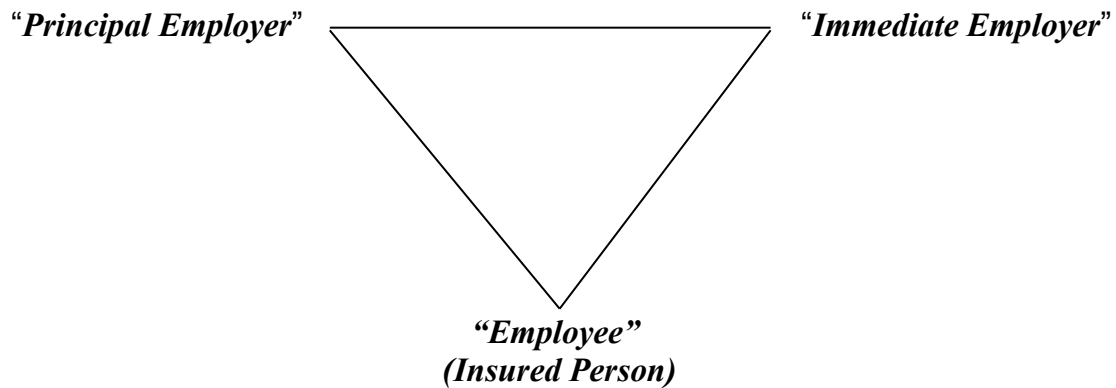
paper are sub-sections (9) and (10) to section 6; which provides for situations where two or more contributions are paid in respect of the same insured person for the same month; implying that the insured person concerned has two or more employers in that month on a contemporaneous basis.

Section 7 makes it compulsory for those known as the “principal employer” to pay contributions in the 'first instance'; and section 8 provides for the recovery of contributions paid by the “principal employer” in the 'first instance', from those referred to as the “immediate employer”.

The “immediate employer” and the “principal employer” are defined under section 2 (9) and (19) respectively.

Section 9 deals with the general provisions as to payment of contributions.

From a careful perusal of the relevant sections above, it would seem that what is provided for and recognized under the Act is a triangular employment situation as envisaged by the New Zealand case of **MALCOM JAMES MCDONALD v. ONTRACK INFRASTRUCTURE Ltd. & one other** [2010] NZEMPC 132 CRC 26/09 (*the judgment is annexed hereto and marked as Annexure 3*); and illustrated by the following diagram:



The Act goes on to provide for the benefits payable and to whom it becomes payable to in the event of the insured person’s death. The relevant provisions with regard to these benefits are, apart from the above said section 6 (9) & (10); the following sections ~ section 17; section 17A, section 20A and the Eighth Schedule to the Act (*all annexed hereto for ease of reference and marked as Annexure 4*).

At first blush these provisions may seem as clear as day to the initiated. However, the Sarawak case that I mentioned when we first started, threw up some ostensible complexity in the whole mix with regard to the interpretation and application of these provisions.

The issues that were generally aroused by that case can perhaps be reduced conveniently into the following four queries:

1. *Is it compulsory for an insured person to make contributions in respect of each and every salary that he/she earns from multiple employers?;*
2. *In such a multiple employment situation and if it is simultaneous employment, are each of the employers obliged to make the monthly contributions for the same insured person?;*
3. *Is an insured person in such a situation entitled to benefits based on his/her total contributions or is there a capping?; and*
4. *In the event of such an insured person's death are his/her dependents/survivors entitled to benefits based on the total contributions made by the insured person and the multiple employers?*

In the case of ***HUGH TEO YU HENG v. KETUA PENGARAH PERTUBUHAN KESELAMATAN SOSIAL [JRKS(SR) 6/2000]*** ~ the Sarawak case mentioned earlier; the predominant issue that arose was that of the computation of survivors' pension, i.e. whether the survivors' pension should be based on the total contribution which was made by the deceased insured person and her multiple employers' or whether it could be capped by SOCSO.

For a clearer picture of the circumstances of the case we will now delve into the brief facts of the case. This case stemmed from the death on 21.7.1999 of an insured person under the Act by the name of Chang Ai Choo (*f*). The action against the Director General of SOCSO was brought by her widower/husband, one Hugh Teo Yu Heng on behalf of himself and the deceased four dependent children, all under the age of 21 years at the time. The claim was for survivors' pension.

The insured person prior to her death was employed as a Secretary by multiple employers, at various times ~ sometimes in a full time capacity and at other times on a part time basis, sometimes simultaneously and at other times separately, where each employer had made the required monthly contributions to the SOCSO Board over her total period of employment of approximately 20 years prior to her death.

The employers' concerned were all based in Kuching, Sarawak and are named as follows:

- 1) Alpha Bahagia Sdn Bhd
(Employer's Code – F8609526P)
- 2) Alpha Jelita Sdn Bhd
(Employer's Code – F8607839K)
- 3) Dewan Niaga (Sarawak) Sdn Bhd
(Employer's Code – F8604649X)

- 4) Mahligai Agencies Sdn Bhd
(Employer's Code – F8604647B)
- 5) Concordance Sdn Bhd
(Employer's Code – F8604646K)
- 6) CMS Transportation Sdn Bhd
(Employer's Code – F8601143Y)
- 7) Achi Corporation Sdn Bhd
(Employer's Code – F8604648Z)
- 8) Sarawak Securities Sdn Bhd
(Employer's Code – F8602707X)
- 9) RHB Delta Finance Bhd
(Employer's Code – F8600905V)
- 10) PPES Edar Sdn Bhd
(Employer's Code – F869170K)

Whilst this type of employment situation appears rather unusual, I venture to suggest that it is probably more commonplace than meets the eye. For example, an employee might be engaged by a holding or parent company to perform similar duties (e.g. H.R. Services) in related or sister companies; where each may pay a portion of that employee's wage on the basis of an "accounting arrangement" between the companies which will give rise to the payment of multiple contributions; but here I digress and return to the facts of the case at hand.

To illustrate the pattern of payment I can do no better than to refer to a document entitled: 'Employee Monthly Contribution; a print out relating to that caption regarding the deceased insured person; marked as Annexure 5.

A perusal of the said Annexure 5 will reveal the contributions attributed to the deceased insured person from 1979 through to 1999, at or about the time of her death. It shows that she had between one and five employers (simultaneously) at any one time over her total period of employment. The contributions shown on this computer print out reflects the level of earnings during the relevant periods of employment.

A cross reference between Annexure 5 and Annexure 1 will show the approximate monthly earnings of the deceased insured person at any one time. For example, if we look at last page of Annexure 5 for contributions made in 1999 in the month of January, it will be seen that it ranged from RM43.90 to RM16.90. Cross referenced with Annexure 1 (Contribution Schedule) it shows at page 3 of the said Annexure that the total contribution of RM43.90 equates to a monthly salary of between RM1,900.00 to RM2,000.00; and for that of RM16.90 a monthly salary of between RM700.00 and RM800.00 (see page 2 of Annexure 1). In passing, I mention that the Contribution Schedule also shows the respective share of contributions made by the insured person as well as the employer.

It should be noted here that the decision of the Appellate Board in Sarawak concerned the law as it stood prior to the insertion of a proviso to section 6 (10) of the Act *vide* 'Amendment Act A1232/2004' which came into force on 1.5.2005; i.e. well after the date of death of the insured on 21.7.1999 . This proviso placed a clear and irrefutable cap on the maximum assumed monthly wage (*see Annexure 2 for the proviso*).

The position prior to the amendment to Section 6(10) of the Act.

The threshold limit of the monthly wage for compulsory contribution at the material time of this case was RM2,000.00. The assumed monthly wage arrived at by SOCSO for the case was in accordance to its reading of section 4 of the Fourth Schedule of the Act (*annexed hereto for ease of reference and marked as Annexure 6*).

Based on the said section 4 of the *Fourth Schedule* of the Act, SOCSO's practice was premised upon the capping of the assumed monthly wage. So, where the actual monthly wage exceeded RM1,900.00, as in this case, the assumed monthly wage was capped at RM1,950.00. Therefore, regardless of the average actual wages paid by the deceased multiple employers under which her contributions were made, the average of assumed monthly wage could not exceed RM1,950.00 as far as SOCSO was concerned.

The Social Security Appellate Board sitting in Sarawak on this case made an order that where an insured person pays more than one contribution, the benefits payable must be based upon and reflect the total sum of all these multiple contributions that have been made to and accepted by SOCSO. This meant that SOCSO was ordered to pay monthly benefits to the widower and the other dependents at a considerably higher rate than it had previously calculated based on its (SOCSO's) understanding of the applicability of a capping of the assumed monthly wage and in accordance to its usual practice.

Although the Appellate Board made its decision in this case after the proviso to section 6 (10) came into force (*NB/- the Sarawak Board's decision was pronounced on 23.3.2006*), it ruled that the proviso had no retrospective effect and went on to make the order that it did (*see annexure 7 – the Award by Y.A. Tuan Muniandy a/l Kannyappan dated 23.3.2006*).

Being dissatisfied with this order by the Appellate Board, SOCSO filed an appeal at the High Court in Sabah & Sarawak at Kuching vide (Tribunal Pentadbiran) Case No: 16-01-2006-I between The Appellant: D.G. Social Security Organization v. The Respondent: Hugh Teo Yu Heng before The Honourable Datuk Linton Albert J. This appeal was heard and then dismissed by the said High Court; where the decision of

the Appellate Board was maintained in its entirety; and where the High Court, incidentally, also upheld the ruling of the Appellate Board that the insertion of the proviso to section 6 (10) of the Act *vide* 'Amendment Act A1232/2004', which came into force on 1.5.2005, had no retrospective effect, i.e. the "capping provision" provided there could not be relied on by SOCSO in this particular case. The case was unreported. (*The Ground of Decision of the High Court is attached hereto and marked as Annexure 8*).

SOCSO's dissatisfaction not being assuaged by the appeal to the High Court, then appealed to the Court of Appeal, Malaysia *vide* Civil Appeal No: Q-02-577-08 between The Appellant: D.G. Social Security Organization v. The Respondent: Hugh Teo Yu Heng; which allowed SOCSO's appeal with no order as to costs. (*A copy of the draft order of the Court of Appeal is attached hereto and marked as Annexure 9*). Unfortunately, to date the grounds of decision of the Court of Appeal have not been made available and the case remains unreported.

The widower & dependents being dissatisfied with the Court of Appeal's decision filed an application for leave to appeal to the Federal Court of Malaysia *vide* Civil Application No: 08 (f) - 546-11/2-11(Q) between The Appellant: Hugh Teo Yu Heng

v. The Respondent: D.G. Social Security Organisation (unreported); which application as I have been informed, has been dismissed on 27.6.2012. The decision of the Federal Court to dismiss, as I understand it to be, is by virtue of section 96 of the *Courts of Judicature Act 1964* which provides as follows:

Appellate Jurisdiction – Civil Appeals

96. Conditions of appeal.

Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court-

- (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or
- (b) from any decision as to the effect or any provision of the Constitution including the validity of any written law relating to any provision.

As interesting as that case may be for its particular & peculiar facts, it is really of academic but thought provoking interest now. The law as it stands in its present form, thanks to the proviso stated above to section 6 (10) of the Act, makes it unmitigatedly clear that the aggregate of multiple assumed monthly wages **shall** be such maximum monthly wage as provided for under section 4 of the *Fourth Schedule* of the Act.

As such all and any benefit or survivors' pension currently payable by SOCSO for similar cases in the future shall be based on that maximum assumed monthly wage sum as determined under the said **Fourth Schedule** of the Act.

Conclusion:

To wrap up I revert to the four questions posed earlier and reproduced here:

1. *Is it compulsory for an insured person to make contributions in respect of each and every salary that he/she earns from multiple employers?;*
2. *In such a multiple employment situation and if it is simultaneous employment, are each of the employers obliged to make the monthly contributions for the same insured person?;*
3. *Is an insured person in such a situation entitled to benefits based on his/her total contributions or is there a capping?; and*
4. *In the event of such an insured person's death are his/her dependents/survivors entitled to benefits based on the total contributions made by the insured person and the multiple employers?*

As to the 3rd and 4th questions above I suggest that both have been addressed to some extent either directly (viz. the 4th question) and by implication (viz. the 3rd question) by the case that we have just considered, in view of the Court of Appeal's decision upon it; though admittedly we do not have the rational behind that decision.

As to the first two questions I hesitate to even attempt an answer here, as whilst the triangular employer/employee situation is statutorily recognized under the Act; that of the multiple employment situation and its ramifications remains somewhat vague and in need perhaps of closer scrutiny.

With that I conclude this paper with sincere gratitude for your kind patience and the attention with which you have obliged me here today.

Thank you.



*Presented at the SOCSO Seminar 2012 on 20th October 2012,
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October 2012 by:*

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