“Impact of Foreign Labour On Industry”

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IMPACT OF FOREIGN LABOUR ON INDUSTRY

Introduction

The presence of foreign workers in Malaysia is not a new phenomenon. During the colonial period, foreign workers were recruited from China, Indonesia, and India to work in the mines and rubber estates. Malaysia imported foreign workers in the 19th century to develop its plantations and mines. Since both plantations and mines offered year-round jobs, permanent immigrants were encouraged to move to Malaysia [1]. In the process many of them acquired citizenship upon the independence of Malaya in 1957. Since, then strict controls were imposed on migration of labour whereby foreign workers who came into Malaysia now are no longer allowed to reside in the country permanently. Thus, it is more apt to refer to them as foreign workers. [2]

The perceptible economic growth of the country since the seventies has created a regular and increasing demand for foreign workers in all sectors of the economy. Therefore, the employment of foreign workers in Malaysia has now become a regular phenomenon. Now, there are more than 2 million foreign workers in Malaysia including legal and illegal workers from Indonesia, Thailand, Bangladesh, The Philippines, India and other countries (Ghosh, 1998). In the words of the World Bank, Malaysia is now a small island in the sea of potential foreign workers.

In this paper, I shall discuss the impact of foreign labour on industry from the

Industrial Court's perspective in the following manner:-

(a) **Factors attracting foreign workers to Malaysia.**

Essentially, there are 2 main factors namely :

(i) Malaysia offers higher wages and opportunities compared to their home state.

(ii) There is a demand for workers especially in the agricultural, manufacturing, plantation, and construction sectors and also due to the 3D jobs (dangerous, dirty, difficult).

(b) **Costs incurred by industries in employing foreign workers**

Employers can incur substantial costs in recruiting foreign workers to work in their industry. They are required to pay an annual levy for each worker whereby the rates depended on the sector that employs them for instance, for manufacturing the annual levy is (RM1,200); construction (RM1,200); plantation (RM540); agriculture (RM360); domestic helper (RM360); services (welfare homes)(RM600); services (island resorts) (RM1,200); services (others) (RM1,800). **[3]**

Besides the cost of levy there are also other costs that has to be incurred such as (a) fixed costs -transportation (air ticket) and (b) annual recurrent costs consisting of annual medical check up, accommodation, transport allowance , visa (PLKS), multiple entry visa, processing fee (plantation), Bank Guarantee

(deposit), Foreign Workers' Compensation Scheme, Medical (annual average per worker), other incidental costs. Therefore the total costs of employing a foreign worker (an Indonesian) for example could be around the region of **RM3,813.00**. **[4]**.

At this rate of cost is it viable, affordable and practical for employers to continue hiring foreign workmen to work in their industries and if so for how long in the future? What are the other options available to the employers besides employing or reducing foreign workmen in the near future without having to curtail their business expansion plans?

(c) **Supply of Labour Force by Contractors for Labour**

The amendments to the Employment Act 1955 has introduced a definition of "**contractor for labour**" and new Section 33A, which requires such contractors to "**register**" with the Director General of Labour before supplying employees and to maintain the information of employees in a registry.

According to the definition a "contractor for labour" '*means a person who contracts with a principal, contractor or sub-contractor to supply the labour required for the execution of the whole or any part of any work which a contractor or sub-contractor has contracted to carry out for a principal or contractor* 'as the case may be.

Views expressed by those who are supportive of the concept of contractor for labour and those who are opposed to this concept are diverse indeed. On the

one hand those who advocate such a concept have expressed inter alia the following views:-

(i) It is to ensure more protection for all workers as well as to clarify the positions the employers are in;

(ii) The definition for contractor for labour was necessary as it was intended to clarify the relationship between principal, contractor and sub-contractors who supply labour;

(iii) The provision requiring the contractor for labour to keep and maintain the information of employees supplied in a register is for monitoring and inspection purposes by the Labour Department;

(iv) This provision is not to institutionalize or promote employment through contractor for labour, but it seeks to ensure that workers employed by the contractor have protection of their rights under the law;

(v) That this new provision is very important in addressing the dilemma of the principal, contractor and sub-contractors, especially in the plantation sector. With this amendment, the Labour Department will have a complete list of the records of the contractor and enable workers' protection;

(vi) The amendments will expand the scope of coverage and investigation of complaints to employees earning up to RM2,000, an increase from RM1,500 previously. [5]

On the other hand those who oppose this contractor for labour concept have

expressed *inter alia* the following views:-

(i) That the amendments would allow workers to be supplied by a third party and this would "kill" workers' rights and their job security tenure and promote modern day slavery;

(ii) They want the abolition of the contract labour system;

(iii) In order to ensure that workers enjoy the protection and benefits under the Employment Act, Section 33A of the Act should instead make the party which receives the workers, that is the principal, contractor or sub-contractor , to be the employer of workers for the purposes of the Employment Act. This is because a contractor for labour merely supplies the workers to the party concerned, and is not responsible for their work conditions;

(iv) If there is any contravention of the Employment Act, it would be difficult to take action against the contractor for the offence and the real culprit who ill treats the workers will escape punishment unless he is deemed to be their employer by law. [6]

The question is since Parliament has passed the said amendments should time be allowed to enable all the stakeholders to assess the outcome of its implementation. If after having evaluated the results and it is found that the system needs further improvement then it may be an opportune time to bring about some constructive changes if the situation warrants it.

(d) **Foreign Workers and Trade Unionism/Collective Agreements**

Can foreign workers become union members?. Previously they were prohibited from becoming union members. However, Section 8 of the Employment Act 1955 and Section 4 & 5 of the Industrial Relations Act 1967 do not prohibit any employee foreign or local to become Union members. Foreign workers have the right to enjoy the same treatment as local employees regarding social scheme benefits. The local workmen have the social security benefits (SOCSO) to cover them whereas the foreign workers are covered under the Workmen Compensation Act 1952 where the Employer must ensure that foreign workers are insured with an insurance company appointed to the panel of Foreign Workers Compensation Insurance Scheme.

Section 17(1) of the Industrial Relations Act 1967 stipulates that a Collective Agreement shall be binding on all workmen who are employed or subsequently employed in the undertaking or parts of the undertaking to which the agreement relates. In ***Dynamic Plantations v Kesatuan Kebangsaan Pekerja-Pekerja Ladang (NUPW)*** (2002) 2 ILR 445 the dispute over alleged discriminating practice of the Company in granting wage increments and ex-gratia payments only to the Malaysian employees but not to foreign workers employed in the same estate was referred to the Court for adjudication. The Court held that since the Company was a member of MAPA, the terms of the collective agreements between the Company and the Union will flow to the employees employed in the Company. It follows therefore that the terms apply

to all employees regardless of whether they are Malaysian or non Malaysian.

In the High Court case of ***Sabah Plantation Industry Employees Union v Bal Plantations Sdn Bhd [1997] 1 LNS 63*** it was held that parties to a collective agreement may exclude certain categories of workmen from the scope of the collective agreement. In this case the parties to the collective agreement had excluded temporary employees, probationers, employees on temporary assignment for a period not exceeding three months. In fact the expression "to which the collective agreement relates" in Section 17(1)(b) of the Industrial Relations Act 1967 allows for the exclusion of certain categories of workmen.

In some of the trade disputes before the Industrial Court, foreign workers were excluded from some of the provisions of the collective agreement. In ***Hospital Fatimah v Kesatuan kebangsaan Pekerja-Pekerja Dalam Perkhidmatan Perubatan dan Kesihatan Swasta [2002] 3 ILR 444,*** a trade dispute pertaining to the terms of a collective agreement was referred to the Industrial Court by the Honourable Minister of Human Resources The matter was settled amicably and a consent award which incorporated the terms of the collective agreement was handed down. There were provisions in the collective agreement which excluded foreign workers from Articles which refers to Prolonged illness, Retirement and Retirement Benefits, Retrenchment and Retrenchment Benefits, Salary Scales and Annual Increments, and Salary Adjustment & Arrears. The Industrial Court approved the collective agreement as the parties had agreed to

the terms.

In a recent Industrial Court Award 743 of 2011 dated 24.05.2011 ***Between Kesatuan Kebangsaan Pekarja-Pekerja Perusahaan Alat-Alat Pengangkutan Dan Sekutu And Denso (Malaysia) Sdn. Bhd*** the Learned President of the Industrial Court Y.A. Susila Sithamparam stated at the end of her Award that "*Foreign workmen should receive the same wages and benefits as local workmen for the same type of work which they are doing in the same undertaking.*"

In ***Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v MCIS Safety Glass Sdn Bhd***, Case 1/2-1187/07, Award 1104 of 2010 (Unreported), the court stated (obiter dictum) that "*it does not augur well for industrial relations in the country if foreign workmen are excluded from the scope of collective agreements and receive lesser wages and benefits than local workmen.*" The local workmen were covered by a collective agreement as the employer was a party to a collective agreement. The foreign workmen were not covered by a collective agreement as they were employed by another employer under an ***outsourced arrangement*** Both categories of workmen worked in the same factory.

The other issue is whether foreign workmen are entitled to the same wages and benefits as local workmen? In ***Chong Wah Plastics Sdn Bhd v. Idris Ali and others*** [2001] 1 ILR 598, the Court's answer was in the affirmative. However, in ***Dynamic Plantation Bhd. v Kesatuan Kebangsaan Pekerja-Pekerja Ladang***

(NUPW) [2002] 2 ILR 445 the Industrial Court by a majority held that foreign workmen were not entitled to the wages incentive and *ex-gratia* payments which were not included in the collective agreement but were paid to local employees under a ***separate arrangement***.

A further issue to be considered is whether foreign workers should be included in the Collective Agreement. In this regard, we are at the cross roads as to whether foreign workers should be included in the Collective Agreement and if so to what extent should foreign workers be covered under the Collective Agreement. What are the practical limitations that we may face when determining whether or not to include the foreign workers in the Collective Agreement.

A further issue for consideration is whether foreign workers should be terminated first in the case of retrenchment. In the Industrial Court case between ***Kesatuan Pekerja-Pekerja Perusahaan Letrik Malaysia Sdn. Bhd. v Panasonic AVC Networks, Kuala Lumpur Malaysia Sdn. Bhd.*** (2009) 1 ILR 259 , where the Union contended that the Company should first downsize by terminating the services of its foreign workers, the Court accepted the contention of the Company that it could not immediately terminate the foreign workers considering the fact that they were employed in a manufacturing process which Malaysian workers were reluctant to work in. The Court held that there was no absolute rule that foreign workers should be retrenched first

although the Code of Conduct for Industrial Harmony appears to suggest that.

Another issue is whether foreign workers can be excluded from Collective Agreements by way of an Agreement. In the Industrial Court Award No. 642 of 2005 between ***Soon Soon Oil Mills Sdn. Bhd. v. Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan*** (2005) 2 ILR 258, the Industrial Court handed down a Consent Award where it was stipulated that the scope of the Award will exclude all foreign workers working under work permit issued by the Immigration Department, Malaysia. The question for consideration is whether this contravenes Section 17(b) of Industrial Relations Act 1967.

Another issue for consideration is what is the financial implication of increasing wages of foreign workers and what is the effect on the economy of the country taking into account Section 30(4) of the IRA 1967. In the Industrial Court case between ***NUPW v MAPA*** (2011) 1 ILR 179, the Union raised the following issues :

(a) A significant trend in the plantation industry in recent decades has been the displacement of Malaysian workers with foreign workers;
(b) In 2008, it was estimated that approximately 334,800 foreign workers were employed in the plantation industry. (reflecting 2/3 of work force);
(c) This results in perpetuation of low wage policy and precarious labour and suppression of wages and displacement of Malaysian workers;
(d) The presence of foreign workers is a major cause of concern to the

Government, in respect of economic and social cost,; community health, crimes and consumption of public goods and services;

(e) As regards repatriation of earnings by foreign workers to their countries, based on the assumption of RM500 per month per worker 334,000 workers will repatriate RM167,000,000 per month or approximately RM2.004 billion a year.

The critical question here is would increasing wages of plantation workers solve these problems?

(e) **"Contract substitution"**

Another area of concern is that many of the foreign workmen who have been recruited by contractors to work in factories in Malaysia are largely unaware of their rights with regard to Malaysian labour laws and policies, and the avenues for redress. Many of them are confused about their terms of their contract because they can become victims of "contract substitution". This means that migrant workers sign a contract in their country of origin with a labour recruiter that usually offers lucrative pay and conditions, but when they arrive in Malaysia , they are compelled by their employer to sign a different contract, usually with much lower wages and benefits, which is presented to them as their legal contract. This issue came up in the High Court case of ***Sampath Kumar Vellingiri & 78 Yang Lain v. Chin Well Fasterners Co Sdn Bhd*** [2003] 1 LNS 260.

In this case one hundred Indian nationals were recruited for work as manual workers in Malaysia by the Defendant through their consultant **Amarjeet Singh**. The Indian Government had stipulated a basic wage of RM600.00 before the Protector of Emigrants would allow these workers to leave India. The Defendant had engaged the services of Amarjeet Singh to Liaise with the Ministry of Manpower and to help fill the forms and assist in the recruitment. Amarjeet engaged **Mithun Travels Pte. Ltd** (**Mithun**) to do the recruitment.

The High Court found as follows:-

"Amarjeet testified that he faxed the two demand letters to Mithun. One stipulated that the "wages" was to be RM350.00. The other said that the basic wage was RM600.00. The workers were to sign the contract based on the first letter of demand. They were never to be shown the second letter. The workers testified that Mithun told them they would get Rs10,000 per month whose equivalent in Ringgit as agreed by parties was RM750.00. Amarjeet testified that he had informed Mithun to explain that the wages was RM600.00.

The Defendant says he has no dealings with Mithun. In fact the Plaintiffs were told that the Defendant did not know "what your agent had promised you". However the Defendant has given a Power of Attorney to Mithun to recruit workers. The Defendant has also given a letter of demand to Mithun to recruit workers. On the facts the Court held Mithun as an agent of the Defendant, under the Power of Attorney.....

As for Amarjeet Singh it is clear that he was acting as the Defendant's gratuitous agent in this case. His conduct is most deplorable. He had no qualms about duping the fifty-two workers and the Government of India in order to earn himself an exorbitant commission of USD950 per worker. It was alright for him to deceive the Protector of Emigrants by showing a demand letter of RM600.00 and a contract document showing the basic income of the worker as RM600.00, when all along he had intended that the workers be paid only KM350.00. This whole episode is a conspiracy by the Defendant, Amarjeet and Mithun to cheat innocent workers who had mortgaged their lands, pledged or sold their jeweleries and had signed promissory notes so that they could earn a fair and reasonable sum from their employment. Instead they had been cheated, degraded and denied food and basic amenities. It is necessary and appropriate for both Governments to look into this ***recruitment procedure*** *for manual workers more intently so that such an episode is never repeated....."*

In short, the Court held that there was a contract between the Plaintiffs and the Defendant and that they had been promised a sum of Rs10,000 whose equivalent is RM750.00 per month with overtime to be calculated. The Plaintiffs will also be entitled to all the benefits as stated in the earlier letter of demand and as stated in the contract document signed by the Managing Director. The Plaintiffs are also entitled to the levies which they had paid that is either USD1,000 or USD950.00 as endorsed in their respective passports, since there is no provision in the Employment Act 1957 that enables the Defendant to deduct such levies. The Plaintiffs will also be entitled to the air fares to and from

Malaysia and costs of this suit.

(f) **Who is the ultimate employer of the Foreign Workers in a triangular or tripartite employment relationship?**

When a contractor for labour supplies foreign workers to the principal who is the end user, the issue that may arise is who is the ultimate employer of the workers in a triangular or tripartite employment relationship?

Some of the principles in the New Zealand case of ***Malcom James McDonald v Ontract Infrastructure Ltd. And Another*** [2010] NZEMPC 132 CFC 26/09 may be of some assistance in deciding the issue as to who is the ultimate employer in a triangular or tripartite employment relationship even though this case does not involve foreign workers. The Plaintiff, Mr McDonald had a written agreement (described as an "Individual Employment Agreement (Casual Staff)" (the written casual agreement)), with the second defendant (Allied Work Force limited)("**Allied**"), a labour hiring company that provides individuals on a casual basis to clients to cover temporary work requirements.

One of those clients was the first defendant (Ontrack). Ontrack has a number of permanent employees but also uses Allied to source casual labour as and when required. There is a formal contractual relationship between Ontrack and Allied for the supply of such temporary workers. There is no suggestion that these

contractual agreements are a sham.

In March 2007 the plaintiff accepted an assignment from Allied to work for Ontrack, in a gang of 11, repairing the railway line between Picton and Invercargill. Nine members of the gang were permanent employees of Ontrack, the plaintiff and one other member of the gang had come from Allied. This placement was terminated on 08 November 2007.

Mr McDonald claims that the circumstances of the placement constituted a contract of service between him and Ontrack which enabled him to invoke the provisions of the Employment Relations Act 2000 (the Act) and to bring a personal grievance that he had been unjustifiably dismissed by Ontrack.
The issue that needed to be decided between the parties is what test or approach should be applied to determine whether there was a contract of service and with whom.

Decision by the Court

(i) To decide whether a person is employed by another person under a contract of service, the Court must determine the real nature of the relationship between them (s.6(2) of the Employment Relations Act 2000).

(ii) If the real nature of the relationship between the parties is something other than a contract of service, there is no coverage under the Act.

(iii) The onus is on Mr McDonald to establish the existence of a contract of

service between himself and Ontrack. Such a contract must satisfy the common law requirements of offer, acceptance, contractual intention, consideration, and certainty.

(iv) To determine the real nature of the relationship the Court must consider "all relevant matters" including those that indicate the intentions of the parties and is not to treat any statement of the parties describing the nature of their relationship as determinative (s.6(3)) of the Employment Relations Act 2000.

(v) As was stated in ***Bryson v Three Foot Six Ltd*** [2005] ERNZ 372 "all relevant matter certainly include the written and the oral terms of any contract between the parties".

(vi) It is not helpful to set out rules or even factors to be taken into account in determining whether the real nature of the relationship between a worker and the end user in a tripartite agreement is a contract of service : that in the end will turn on the facts of each case and a consideration of all relevant matters.

(vii) This is an area of law where, although Parliament has legislated (in s. 6 of Act), a considerable overlay of Judge made law will be necessary. As mentioned at the outset of this judgment, this is the first case of this sort of which we are aware in New Zealand. Courts should move cautiously in developing doctrines such as ***implied triangular employment relationships,*** especially where, as in this case, only very broad principles can be stated. As in many such cases, the inquiry will be intensely factual

and the result of the case determined accordingly.

(viii) For these principles, the Court is confident in saying that, by reference to s.6 of the Act and legal principles enunciated in other jurisdictions, it is open potentially for someone such as Mr McDonald to argue that he was employed by an entity at the third point of the triangle, that is by a person who was not originally his employer but with whom his employer had a commercial relationship which included the exclusive provision of the employee's services to that third party. It will be for Mr McDonald to establish that legal position on the particular facts of this case if he is to maintain his claims against the first defendant.

(ix) The Court gave consequential orders that the issue of who was Mr McDonald's employer and the merits of any proven grievance against that employer will now be determined by a single Judge. A call-over conference to make appropriate directions concerning such matters as the evidence to be led, the venue and length of the fixture will be arranged with counsel through the registry.

Conclusion

There is no doubt that Malaysia aims to become a high–income nation that is both inclusive and sustainable by 2020. In the wake of economic liberalization and in the context of Malaysia's objective in becoming a high income nation although the local labour resources play a significant part in the national economic development of Malaysia we must also recognize that foreign labour

also play an equally important part in this regard. Therefore the impact of foreign labour must have a positive dimension in their contribution towards Vision 2020. Consequently, the employment benefits that are accorded to local employees must also be extended to foreign workmen where ever it is practicable and possible. Probably, as our country moves towards modernization, industrialization and a high-income nation, the dependence on foreign labour could also be gradually reduced by various means.

Thank You

P Iruthayaraj D Pappusamy
Industrial Court Chairman
Dated : 19.06.2012.

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