"INDUSTRIAL DISPUTE - A CRITICAL ANALYSIS OF THE ALTERNTIVE DISPUTE RESOLUTION MECHANISM"

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Industrial Disputes - A Critical Analysis of the Alternative Dispute Resolution Mechanism

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1. Introduction

In recent years a diverse range of conflict resolution processes [often known as ADR] has been established in various jurisdictions. In Malaysia, the more commonly known form of ADR are mediation and arbitration. In civil litigation, there has been a shift towards ADR in settling their disputes, particularly those that have an international flavour. ADR is now seen as an important way of enhancing access and participation in court proceedings. Provisions have now been made for referral to ADR processes by the civil courts. However, the same cannot be said of industrial adjudication. The adjudication system that has been put in place by the Industrial Relations Act 1967 is still the preferred mode for a variety of reasons. In view of the continuing importance of the Industrial Court, I will briefly touch on its history and subsequently explain its system of adjudication and show how the introduction of the ADR process has further made the system more effective.

2. **Brief history**

When the Industrial Court was established under the Industrial Court Ordinance 1948, it was a court of voluntary arbitration to which the then Commissioner of Industrial Relations could refer industrial disputes only when parties to a dispute consented to the reference and undertook to abide by its decision[1]. I am pointing this out to emphasize the point that the framers of the Ordinance in 1948 realised the importance of the parties voluntarily submitting to the jurisdiction of the court. But unfortunately, there were not many takers. Between 1948 and 1964, although industrial unrest was widespread,only four major disputes were heard by the court. They involved wage claims in the mining and rubber industries and conditions of employment in the pineapple industry and railways.

However, the period of confrontation with Indonesia changed the government's perception of voluntary arbitration. Now, they felt the need to control trade disputes in the essential services and they established the Industrial Arbitration Tribunal to deal with disputes in the essential services, with one important difference, now the arbitration was compulsory. When a dispute was referred by the Labour Minister under the Regulations of the Emergency Act 1964 to the Tribunal, its award was final and binding on the parties.

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1 Malaysian Industrial Relations
Law & Practice by V. Anantaraman

The Industrial Arbitration Tribunal 1965 and the Industrial Court of 1948 continued to co-exist. But what the government realised was that with the introduction of compulsory arbitration, was there was a marked decrease in the loss of working days due to strikes. Hence, in 1967 the Industrial Court of 1948 and Industrial Arbitration Tribunal of 1965 were both replaced with the present-day Industrial Court, which was established under the Industrial Relations Act 1967 (the Act) which provided for compulsory adjudication.

3. **Adjudication of disputes**

[a] Types of disputes

The Industrial Court is empowered to deal with disputes between the employer and workman or trade union of workmen which may be referred by the Minister [compulsory adjudication] or directly referred by the parties [voluntary adjudication] and examples of such cases are as follows:

[i] dismissal under section 20;

[ii] trade disputes between an employer and the trade union of workmen under section 26;

[iii] cases of victimisation in connection with trade union activities under section 8;

[iv] interpretation or variation of the terms of the award or collective agreement under section 33;

[v] referral on a question of law to the High Court by any party bound by the award under section 33A; and

[vi] complaint of non- compliance of the terms of an award or collective agreement under section under section 56 [1].

However, the majority of the cases referred to the Industrial Court are dismissal cases under section 20. Much of the industrial jurisprudence is developed through the awards handed down in these cases, which sometimes end-up in the Federal Court, the highest court in the land. This being the case, I will deal with the adjudication process relating to dismissal cases. In this regard, I can do no better then to quote what the eminent Court of Appeal Judge Gopal Sri Ram said about the adjudication procedure in the case of ***Hong Leong Equipment Sdn. Bhd v Liew Fong Chuan [1997] 1 CLJ 665 at p. 716,*** which is as follows:

"Parliament has created three separate and distinct powers in respect of the same subject-matter and conferred each of them upon separate authorities. First, there is the conciliatory power vested in the Director-General whose sole function is to mediate and attempt to settle disputes as early as possible. It is no part of his function to ascertain the law or the facts or to make any determination upon either. If his attempts to reconcile the parties fails he merely notifies the Minister of this fact. See *Minister of Labour and Manpower & Anor v Wix Corp South East Asia Sdn*

Bhd. If it is found in any case to have done more than what the law permits, his action will be liable to be quashed on the ground that it is ultra vires the Act. Second, there is the power vested in the Minister to refer representations made under s 20(1). It is a power he must, by reason of the combined operation of the provisions of Arts. 5(1) and 8(1) of the Federal Constitution, exercise fairly. Third, there is the power to adjudicate upon the same representations vested in the Industrial Court which, by the terms of the Act, is enjoined to act, inter alia, according to equity and good conscience when making its award. The way in which the Act is constructed makes it clear that it is only the Industrial Court which is conferred with an adjudicatory function. The two precedent powers, namely, the Director-General and the Minister cannot therefore assume a function expressly reserved to the third. It follows that, prima facie, considerations that are irrelevant to the Industrial Court's decision-making process cannot be, and are not, relevant considerations vis-a-vis the referring authority."

[b] Three stages

The dismissed workman in Malaysia does not have direct access to the Industrial Court unlike the litigant in the civil courts. When a workman is dismissed, he is required by section 20[1A] of the Act, to make his representation to the Director General of Industrial Relations within 60 days of

the dismissal. Once this is done, his representation will have to undergo the stages outlined by the learned Judge. The first stage is called the conciliation process. By virtue of section 20[2] the Director General must act expeditiously in bringing the the two parties in dispute together for negotiation and for the settlement of the dispute. He then mediates the dispute. It is not his function to ascertain the law or the facts as stated above in the judgement. His main purpose is to effect a compromise acceptable to both parties by persuasion. The parties are given ample time to negotiate and only when he is satisfied that there is no likelihood of settlement that he then notifies the Minister. The benefit of this procedure is that the disputing parties have a third party assisting them to settle their dispute within a short period of time, at no cost to either party. The procedure is informal and only parties involved in the dispute participate in the proceedings. No lawyers are allowed. The parties retain the power to make a decision on the dispute and to preserve their relationship. However, the conciliator has to be skilful as the emotions will still be running high. Hence, unlike the litigant in the civil court, the disputing parties in an employment dispute have the benefit of going through an ADR process before the Minister makes a decision as to whether to refer the case to the Industrial Court.

The second stage is when the Minister is notified of the failure to settle the dispute. The Minister will then have to decide whether to refer the dispute to the Industrial Court and this is based on the recommendation of the

conciliation officer. Hence, the Minister acts as a filtering mechanism and not all cases get referred to the Industrial Court.

The third stage is when the dispute is referred to the Industrial Court for adjudication and for an award to be handed down. The Industrial Court is a tribunal exercising quasi-judicial powers under the Ministry of Human Resources and Manpower, whose aim is to provide for a speedy, fair and just resolution of industrial disputes in the private sector. In keeping the process for the resolution of disputes simple, the Industrial Court Rules 1967 provides only a few rules unlike the rules of the Subordinate Courts and the High Courts. Even then section 29[d] of the Act provides that the Industrial Court may hear and determine the case notwithstanding the failure of any party to submit any written statement of case or reply to the court within the prescribed time period. To keep the matter simple, right to representation is not automatic. The Rules require any party seeking representation to seek permission. However, over the years, with more lawyers practicing in the Industrial Court, has inevitably brought about formalised and technical arguments and procedures, which was not the intention of the Act.

[c] <u>The dispute resolution process in the Industrial Court</u>.

The Industrial Relations Act 1967 under which the Industrial Court is established is a piece of beneficent social legislation which intends the

prevention and peaceful resolution of disputes between employers and their workers and the promotion of industrial harmony. The prime object of the Act is the attainment of social justice and industrial peace. When making an award in respect of a trade dispute, the court is to have regard to the public interest, the financial implications and the effect of the award on the economy, the industry concerned and also to the probable effect in related industries. The Act further provides that the Industrial Court "shall act according to equity,good conscience and substantial merits of the case without regard to technicalities and legal form". What this means is that the Industrial Court is not subject to rigid rules of evidence and procedure but adopts a flexible approach.

When a case is referred to the Industrial Court, it is registered and the parties then file their statement of case and reply together with the bundle of documents. At the trial, the process is somewhat similar to what happens in a civil court. The company will generally start the case, having the burden of proof and their witnesses will be cross-examined by the claimant's counsel and re-examined by their own counsel. Sometimes the cross-examination of the employer can be lengthy and his credibility is called into question. The same is done during the claimant's case. This process makes the hearing adversarial and confrontational. At the end of the day, when the court hands down its award, there is only one winner and a loser. This whole process further exacerbates the relationship of the parties. The relationship of the parties although based on contract, is for the provision of personal service. At

common law, there is no remedy of specific performance on a contract of personal service. But the primary remedy under section 20 of the Act is reinstatement and it can only be granted, where the relationship of the parties has not broken down. Hence, it is no surprise in a majority of the awards of the Industrial Court, the claimants' are given compensation where the dismissal is found to be without just cause or excuse.

Hence, the Industrial Court has realised some time ago that there was a need to introduce a less confrontational process and it should return to the original spirit that it functions as an arbitration tribunal, in order to preserve the harmonious relationship between employer and employee. The court in 2004 introduced mediation as a way of helping the parties to resolve the dispute. For this purpose, the Chairmen of the Industrial Court have attended courses in mediation. At the pre-trial stage, parties can now request for the case to be mediated before another Chairman of their choice. The Chairman not being the trial judge is free to use both facilitative and evaluative approach to help the parties to settle the dispute. One factor in our favour is that at this stage, a lot of the emotion generated by the initial event would have dissipated and parties are more inclined to settle. I can personally say that some of these sessions have been therapeutic for the parties and it ended-up as a win-win situation for both parties. However, if the matter cannot be settled, the case then reverts to the trial Chairman and is set down for hearing.

Finally, I would like to comment on the issue of costs and this could be a deterrent to parties seeking ADR outside the court system. Although the Industrial Court has the power to order costs, it rarely does so. This means that the losing party in the Industrial Court does not pay any costs as in the civil courts. Further, they do not have to pay for the mediation or adjudication. Hence, the only costs they have to worry about is their lawyer's fees. But in the case of private mediation, they have to bear the additional burden of paying the mediator's fees. This will certainly discourage the dismissed workman, who is unemployed and is hard-pressed to even pay his legal fees.