A Paper Presented by

Y.A Rajendran Nayagam
Chairman
Industrial Court, Malaysia

at the

The Symposium

Organised by the Central Labour Court of Thailand

from

28th to 30th August, 2013

at the

Way Hotel, Pattaya

THE INTRODUCTION OF ALTERNATIVE DISPUTE RESOLUTION MECHANISM AND COMPUTERISATION OF THE INDUSTRIAL COURT IN EXPEDITING THE PROCESS OF INDUSTRIAL ADJUDICATION IN MALAYSIA

by
Y.A. Rajendran Nayagam
Chairman
Industrial Court Malaysia

1. Introduction

Before I delve into the subject matter of this paper, it would make for better understanding and appreciation, if I were to set out the historical perspective of the Industrial Court of Malaysia. The beginnings of modern labour law in Malaysia can be traced to the period when the then Malaya was colonised by the British. In 1912 a Department of Labour was established for the first time to enforce the 1912 Labour Code. This Code laid down provisions relating to working hours, minimum pay, housing and accommodation. Under the colonial administration, labour organisations began to grow and become more aggressive, increasing the need for a mechanism to facilitate negotiations between unions and employers, in order to prevent long drawn out disputes. Prior to 1940 there was no specific court to deal with trade disputes. Hence, in 1948 the Industrial Courts Ordinance based on the United Kingdom legislation was enacted, which established the Industrial Court, albeit not a permanent court. 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. 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 in 1965 due to a threat to national security, the government's perception of voluntary arbitration changed. They now felt the need to control trade disputes in the essential services and they established the Industrial Arbitration Tribunal [1965] to deal with disputes in the essential services, with one important difference, arbitration was now compulsory and the award of the Industrial Arbitration Tribunal [1965] was final and binding on the parties.

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

Another reason for the government to opt for compulsory arbitration was the need to attract foreign direct investment. The government acknowledges that foreign

direct investment has succeeded in developing the Malaysian economy.

Today, the Industrial Court is central to the Industrial Relations System in Malaysia. The Industrial Court is not a law court. It is a quasi-judicial tribunal and is not subject to technical and legal considerations as in the civil courts. This is because the court is directed by section 30(5) of the Act to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form. Its primary objective is to promote and maintain industrial harmony by providing speedy and fair resolutions to trade disputes. It was established to arbitrate disputes between employers and unions and certain disputes between employers and employees, notably unjustified dismissals. It may also arbitrate trade dispute involving any statutory authority, which has been referred to it with the consent of the King or the State Authority. Its awards are final and cannot be appealed against. But it is subject to the supervisory jurisdiction of the High Court. The Industrial Court is normally constituted of the President/Chairman with two panel members, one representing the employers' union and the other, the employees' union. Finally, access to the Industrial Court is not direct but through the Minister of Human Resources. For the Industrial Court to have jurisdiction to adjudicate a trade dispute, it must be referred by the Minister.

2. **The current system**

The Industrial Court handles a wide variety of cases but the bulk of the cases

referred by the Minister are dismissals of individual workmen under section 20(3) of the Industrial Relations Act 1967. When an employee's employment is terminated by the employer for whatever reason, the employee has 60 days from the date of dismissal to lodge a complaint with the Director General of Industrial Relations nearest to his place of employment. The Industrial Relations Department may attempt to resolve the dispute by way of conciliation, failing which, the dispute is referred to the Minister, who may then refer the dispute to the Industrial Court. Hence, the reference is not automatic. In the event, the dispute is referred to the Industrial Court. It is registered as a case and assigned to one of the panels of the Industrial Court headed by a Chairman. The employee known as the claimant will have to file the statement of case together with the bundle of documents, which will be served on the employer and he will have to file a reply together with a bundle of documents, followed by a rejoinder by the claimant. But this is optional. The case is then set down for hearing. 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. Although the employment relationship is based on contract, at common law, the employee cannot obtain a remedy of specific performance on the contract. In contrast, section 20 of the

Industrial Relations Act 1967 provides for reinstatement of the employee but in reality it is only granted, where the relationship of the parties has not broken down. Hence, it is no surprise that in a majority of the awards of the Industrial Court, the claimants are given compensation instead of reinstatement.

3. **Alternative Dispute Resolution Mechanism**

The Industrial Court realised some time ago that there was a need to introduce a less confrontational process and that it should return to the original spirit of functioning as an arbitration tribunal in order to preserve the harmonious relationship between employer and employee. Hence, in 2004 the Industrial Court introduced mediation as a way of helping the parties to resolve the dispute. For this purpose, the Chairmen of the Industrial Court were sent for 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 hearing judge is free to use both facilitative and evaluative approaches to help the parties to settle the dispute. One factor in favour of the mediating chairman is that at this stage, a lot of the emotion generated by the initial dismissal 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 ended up as a win-win situation for both parties. However, if the matter is not settled, the case then reverts to the hearing chairman and is set down for hearing.

In 2010 the Industrial Court also introduced early evaluation for dismissal cases

by the issuance of Practice Note 3 of 2010 by the Learned President, pursuant to section 29(g) of Industrial Relations Act 1967. This procedure allows the parties to select a Chairman to evaluate their case based on merits to enable them to settle the case.

Finally, I would like to comment on the issue of costs and this is another reason as to why the parties would prefer ADR offered by the Industrial Court. 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. 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, from seeking private mediation.

4. **Computerisation of the court process**

The Industrial Court launched the e-Industrial Court on 26th. September, 2006 and the website is www.mp.gov.my. The public can now through the public portal access the website and view the status of a case, including requests for postponements, documents filed, the mention, mediation and hearing schedules by entering the case number or the name of either party. Further, all decisions handed down since 26th. September, 2006 and collective agreements which have been given

cognizance since 1982, can also be viewed. In addition, a weekly list of all the latest decisions which have been handed down is also displayed. The computerised system consists of six modules: case registration module, case management module, enforcement module, reports module and forms module. Statistics are generated weekly, monthly and yearly. They aid the President in the management of the courts throughout the country.

The Industrial Court has in 2010 launched one technology court as a pilot project. In the technology court, the evidence given by a witness is electronically recorded and this eliminates the need for the Chairman to write the evidence given in the narrative form. This has been the bane of the Chairman hearing the case. The writing of the evidence by the Chairman is laborious and this has slowed down the proceedings greatly. Now, with the electronic recording, the proceeding is very swift. At the end of the day, the evidence is recorded in a disc. The disc is both audio and visual. The only problem is the transcription of the disc. This requires a person who is competent in the languages spoken to transcribe the disc. To overcome this problem, the Court is currently looking into the voice recognition system, which will automatically reproduce the spoken work in the written form. It is now recognised that the way forward is through the computerisation of the court process. The future computerisation of the court process will include e-filing and e-service of documents and all the 11 courts will be equipped with audio-visual recording system.

5. **Conclusion**

In conclusion, whatever system we may have is only as good as the people managing it. Managing industrial relations is about understanding human nature and the person tasked with the responsibility of managing it must be savvy enough to identify the issue and be able to nudge the parties down the right path in resolving their dispute.