

MALAYSIAN EMPLOYMENT LAWS: TRACKING THE RECENT UPDATES

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ABSTRACT

Recently, there have been a number of significant developments in Malaysian employment laws. These have been mainly as a result of legislative deliberation. This article is aimed at providing an outline of many of those changes and taking into account that the Employment Act 1955 is the fundamental legislation that regulates the relationship between employers and employees in private sectors, the recent amendments that have been attended to it will be carefully analyzed. In addition, this paper will also consider few other related statutes that affect the changes to the employment laws. Furthermore, the writer attempts to evaluate the extent those amendments enhance the legal protection of private sector workers' rights in Malaysia. Finally, it is intended to confer the readers to the constructive comments of the selected statutory provisions and look into possible legislative changes in the future.

Keywords: Employment laws, Employment Act 1955, private sector workers' rights

INTRODUCTION

Globally, nature of work shows significant changes mainly due to technological advancements, delocalization of production throughout the world, increasing competition between high-wage and low-wage countries as a consequence of the globalization process (Bronstein, 2009; Saad, 2011). Consequently, the need and interest of employers and employees are changing. The similar trend is shown in Malaysian employment landscape. The writer therefore agrees with Kesavan (Malaysian Bar, 2010) that the changes and reform to Malaysian industrial and employment laws are necessary to reflect the reality and current circumstances. Undeniably, there are many changes have been introduced and adopted in the Malaysian employment laws to ensure Malaysia is able to remain competitive especially for the foreign investors and keep pace with the current standard of other countries employment laws in general.

This paper is intended to provide a framework of many of those changes and some brief analysis on the practical effects of these law changes. It is also pertinent to note that those changes take place largely due to the legislative deliberation. Reference will be attended to legislative changes which have been introduced in approximately the last 2 years.

EMPLOYMENT ACT 1955

The Employment Act 1955 (Act 265) (the EA 1955) is the fundamental legislation of all labour statutes recently enforceable in Malaysia. s. 1 (2) of the EA 1955 however limits its application to Peninsular Malaysia and by virtue of coming into being Federal Territory of Labuan (Extension and Modification of Employment Act) Order 2000 (P.U. (A) 400/2000) it is also enforceable in the Federal Territory of Labuan since 1st November 2000. Historically, according to D'Cruz (2008) and Mohamed (2005), this legislation is described as the most important employment statute due to the fact that it recognizes the security of tenure in employment and it moved away the earlier position of employee as "servant" during British administration (started in 1824 when the Dutch gave permanent occupation of Malacca to British until 1957 when Federation of Malaya proclaimed its independence on 31st August 1957) (Hamzah, 2009) to "employee/worker". Largely, the provisions in the EA 1955 are meant to protect the rights of employees in the private sectors who duly enter into contracts of service. The legislation outlines the minimum rights that employees shall entitle within the employment relationship with employers (see s. 7, 7A and 7B of the EA1955). Several amendments had been attended to this principal labour Act through the passing of Acts by Parliament and Regulations made by Minister in the provisions as far behind the time to keep with the fast changing in the current needs of employment environment particularly for the benefits of employees. Major amendments to the EA 1955 had been made in 1998 through the passing of Employment (Amendment) Act (Act A1026) and in 2000 (Employment (Amendment) Act (Act A2085)).

However, the recent amendment that has come into force on 1st April 2012 by virtue of the Employment Act (Amendment) 2012 (Act A1419) (the Amendment Act 2012) can be described as a timely move attempted by legislature to reform the employment laws. It contains significant changes which extensively address the recent needs of employees in private sectors particularly.

KEY CHANGES

The author will be highlighting the changes to the EA 1955 which are very pertinent to the recent practice of industrial relations and employment in this country. Note that the author will use the term the new EA 1955 which refers to the Employment Act 1955 after incorporating the recent amendments introduced by the Amendment Act 2012. Set out below the area of changes that are stipulated by the Amendment Act 2012.

- Extending the scope of employees covered by the EA 1955 based on wages received;

- Enhancing the maternity-related rights;
- Widening the circumstances under which the employees within the coverage of the EA 1955 may receive advances on wages;
- Enhancing the security measure of paying employee;
- Introducing sexual harassment-specific criminal offences in the workplace;
- Recognizing the role of contractor for labour in employment i.e. supplying employees and laying down his statutory duties;
- Extending the liability of employer as a capacity of company to officers of company;
- Recognizing Malaysia Day as one of the compulsory public holiday; and
- Imposing report to the DG upon employment and termination of foreign domestic servants.

EMPLOYEES

It should be noted that the EA 1955 is not applicable to all workers. Before the coming into force the Amendment Act 2012, s. 2 and First Schedule of the Act 1955 defines “employee” as any person who enters into a contract of service with an employer whose wages do not exceed RM1500 a month irrespective of his occupation. Another category of workers who is protected by the EA 1955 is any person who concludes a contract of employment with an employer irrespective of his amount of wages a month but engages in manual labour, engages in the operation or maintenance of any mechanically propelled vehicle, supervises other employees engaged in manual labour, engages as workers in vessel registered in Malaysia and engages as a domestic servant (First Schedule of the EA 1955). By virtue of the Employment (Amendment of First Schedule) Order 2012 (P.U. (A) 88) the scope of workers whose employment is governed by the minimum standards prescribed by the EA 1955 regardless of work performed had been extended to those employees whose monthly wages do not exceed RM2000. There is no change however to the scope of protected employees regardless of wage amount such as manual labourers. Consequently, the threshold for an employee who is not covered by the EA 1955 but may seek the redress from the Labour department if they do not receive their wages or any other contractual rights of a financial nature is increased i.e. those employees who earn from RM2000 to RM5000 (s. 23 of the Amendment Act 2012). Previously the wage threshold starts at RM1500 (s. 69B(1) of the EA 1955). The extension of coverage of employees based on wages under the EA 1955 is viewed as very imminent taking into consideration the present day economic realities. Nevertheless, considering the fact that Malaysia is moving towards a high income nation and the introduction of minimum wage policy recently, this extension seems far behind the expectation. Additionally is it viewed as contrary to the effort of Ministry of Human Resources to modernize the employment laws in line with the New Economic Model and the High Income Nation policy. Even though with this amendment, it was reported by Secretary-General of the Human Resources Ministry (Semau, 2011) the number of workers covered under the EA 1955 increases from 50% to 70% it is still considerably important to widen the protections offered by the EA 1955 to as many workers as possible.

MATERNITY-RELATED PROTECTION

Every female employee regardless of whether she falls within the ambits of the EA 1955 is assured to enjoy her maternity-related rights as provided under Part IX of the EA 1955 (s. 37-s. 44A). This is due to the enactment of new provision to the existing EA 1955 particularly s. 44A. The entitlements are a period of maternity leave of not less than 60 consecutive days and a maternity allowance during this period (s. 37 (1) (a) of the existing EA is reworded to clearly identify these rights). Female employees may now start their maternity leave from the 22 weeks of pregnancy compare to the previous position of 28 weeks (s. 2 of the Amendment Act 2012 amends the definition of “confinement”). Besides that, the new subsection (4) of s. 37 of the EA 1955 prohibits against the termination of a female employee during the period she is eligible to maternity leave. An employer who terminates the service of a female employee during the period commits an offence except the termination is proved as a result of the closure of the employer’s business.

The idea of commencing a maternity leave as early as 22 weeks of pregnancy is opined as welcoming to address the issues of miscarriage, stillbirths and premature births. Even though some countries i.e. Nicaragua and Panama (ILO, 2010) recognize different eligibility period for leave due to different types of births particularly stillbirths and premature births by giving lesser period of leave and allowance but this new amendment to the EA 1955 indicates a relatively serious attention is given to protect the female employees’ rights. Nevertheless, it will be good to specifically spell out the rights of female employees in cases of miscarriage which may happen as early as 8 weeks pregnancy. Furthermore, despite confirming the prohibition of termination during the maternity leave, the word “closure of business” is not specifically defined which leave a question as to what kind of closure of business is within the scope of this provision. It is left opened to decide whether the closure of only part of the employer’s business, would be permitted (Wong & Partners, 2012). Additionally, the legislature should also consider to confirm the paternity leave entitlement for male employees through the enactment of specific statutory provision even though undeniably it is now the common practice of many employers to spell out such entitlement in the written contract of employment.

ADVANCES OF WAGES

The changes made to the existing s. 22 of the EA 1955 seems very useful and beneficial to employees who urgently need financial assistance for relatively important reasons in their survival and well being of himself and his family members. The Amendment Act 2012 widens the situations that employers are allowed to give an advance on wages (s. 5 of the Amendment Act 2012). S. 22 (1) (db)-(de) of the new EA 1955 respectively states that employees can now get an advance to purchase a

computer, to pay for medical expenses for himself or his immediate family members i.e. his parents, children, siblings or any other person under his guardianship (s. 22 (2) of the EA 1955), to pay for daily expenses in relation to temporary disablement and to pay for educational expenses for himself or his immediate family members (same interpretation as per stated earlier, s. 22 (2) of the EA 1955). All the above situations are truly realistic taking into consideration the common needs of employees.

MODE OF PAYING EMPLOYEES

The changes to the method of paying wages to employees should be treated as a timely move to ensure the main employment legislation remains relevant and reliable even though generally most of employers have been using the method for the past years. S. 25 (1) of the EA 1955 is amended and now has the effect that employers are required to pay the salary of employees into their bank account, unless otherwise requested by employees (s. 25A (1) of the new EA 1955). The previous position is a reverse of current practice. Besides that, in a case of domestic servants, consent from Director General of Labour Department is required to pay their salary in cash or cheque (s. 25A (2) of the new EA 1955). This mode of payment is unarguably much quicker and safer means of getting pay compare to the previous method. Regrettably, the definition of “wages” in s. 2 of the EA 1955 is not amended accordingly to address the changes that made in the mode of payment. The definition remains the following words ... *in cash payable to an employee...* Any further amendment in future should take into account this issue in order to avoid unnecessary disputes that may take place due to this minor error.

SEXUAL HARASSMENT

It is undeniably that of the various amendments introduced in the Amendment Act 2012, the introduction of a new Part XVA to the EA 1955 is most certainly welcomed and a long awaited amendment (Kuok & Kazombiaze, 2012; Lee, 2010). The fundamental employment statute finally addresses the main concern of particularly female employees regarding the incidents of sexual harassment in the workplace. Even though it is admitted that sexual harassment may penetrate against men but men are less frequent become the victims. In fact, it was reported by Ismail *et. al* (2007) that according to previous studies the cases of sexual harassment commonly involve females as victims and male as penetrator or harasser. Prior to the introduction of Part XVA of the new EA 1955, there are no laws that specifically address the issue of sexual harassment in employment relationship. However taking into consideration that in order to combat sexual harassment incidents in the workplace effectively requires the full cooperation from employers, in August 1999 the Ministry of Human Resources launched the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace (the Code) (Ministry of Human Resources, 1999). The Code is not legally binding and is implemented by employers on voluntary basis. The code is intended as guidelines to employers in the public and private sectors to set up in-house mechanisms to deal with sexual harassment cases (Paragraph 1 of the Code). The in-house mechanism that is proposed by the Code should constitute some key elements for instance a policy statement prohibiting sexual harassment at the organization level, a comprehensive definition of sexual harassment, a complaint or grievance procedure, disciplinary rules and penalties against the harasser and against those who make false accusation, protective and remedial measures for the victim, promotional and educational programmes to explain the company’s policy on sexual harassment and to create awareness of sexual harassment and its adverse consequences (Paragraph 9 of the Code). Unfortunately, the Code since its inception due to non-mandatory in nature has been received a poor response from the employers. It is reported until March 2001 only 1.125% of the 400,000 employers have adopted the Code (Joint Action Group Against Violence Against Women (JAG), 2002). The understanding of the nature and main concerns of the Code for the purpose of this report is relatively important since some comparisons will made to the relevant provisions in Part XVA of the new EA 1955.

Part XVA of the new EA 1955 encompasses of s. 81A to s. 81G. It deals with complaints of sexual harassment in the workplace. This part applies to all employees who entered into contract of service regardless of whether they are not in a category of employees as per defined in First Schedule of the EA 1955 (s. 81G of the new EA 1955). Sexual harassment is defined as “*any unwanted conduct of a sexual nature, whether verbal, non-verbal, visual, gestural or physical, directed at a person which is offensive or humiliating or is a threat to his well-being, arising out of and in the course of his employment.*” This definition is added under the interpretation section of the existing EA 1955 particularly s. 2. Nevertheless, it indicates significant difference with the definition given by the Code. Paragraph 4 of the Code defines sexual harassment as “*any unwanted conduct of a sexual nature having the effect of verbal, non-verbal, visual, psychological or physical harassment:*

-*that might, on reasonable grounds, be perceived by the recipient as placing a condition of a sexual nature on her/his employment; or*

- *that might, on reasonable grounds, be perceived by the recipient as an offence or humiliation, or a threat to his/her well being, but has no direct link to her/his employment”.*

Based on the above definition, the Code classifies sexual harassment into 2 forms particularly sexual coercion and sexual annoyance (Paragraph 5 of the Code). Sexual coercion which is further described as sexual harassment that results in some direct consequence to the victim’s employment (this category of sexual harassment is also referred by various writers as “quid pro quo” or “this for that” (Bhatt, 2007; McCann, 2005; Westrick & Dempki, 2009) whereas sexual annoyance is sexually-related conduct that is offensive, hostile or intimidating to the recipient, but nonetheless has no direct link to job benefit. Bhatt (2007) describes a “hostile environment” refers to a situation where the employee is not inflicted any employment-related adverse effect but the employee has to tolerate this bothersome working environment in order to continue working. Even though these 2 forms of sexual harassment are well recognized by most jurisdictions, the definition of sexual harassment under s. 2 of the new EA 1955 does not clearly state out sexual coercion. Consequently, in order any cases of sexual harassment to be within the ambit of s. 2 of the new EA 1955, the conduct must arise out and in the course of an individual’s employment. Lee (2010) suggests that

taking into consideration that sexual harassment can occur outside the office hours, it is necessary that the phrase “in the course of his employment” should be interpreted widely. The approach made by the Employment Appeal Tribunal (the EAT) in the English case of *Chief Constable of the Lincolnshire Police v Stubbs* [1999] IRLR 81 is worthwhile to be used as reference to this issue. The EAT was of the opinion that an act can be considered to be in the course of employment even if it took place in a social context after work hours. Such an event is an ‘extension’ of employment (the case is referred in Honeyball, 2010). In addition to that, s. 2 of the new EA 1955 omits from the definition of sexual harassment the term psychological harassment i.e. repeated, relentless and unwanted social invitations (Alagappan *et. al.*, 2011; Ismail *et. al.*, 2007) which is positively recognised by the Code.

The new EA 1955 (s. 81B (1)) imposes a legal obligation on the employer to inquire into any sexual harassment complaints in the workplace in a manner prescribed by the Minister of Human Resources. Complaint of sexual harassment is defined widely to include complaints by an employee against another employee, an employee against an employer or an employer against an employee (s. 81A (i)-(iii) of the new EA 1955). In the event an employer refuses to inquire into the complaint, he must as soon as practicable, but no later than 30 days after the date of the receipt of the complaint, inform the complainant of the refusal and the reasons for the refusal in writing (s. 81B (2) of the new EA 1955). An employer may refuse to inquire into a complaint in 2 circumstances particularly if the complaint has previously been inquired into and no sexual harassment has been proven or if the employer is of the opinion that the complaint is frivolous, vexatious or is not lodged in good faith (s. 81B (3) of the new EA 1955). Furthermore s. 81B (4) and (5) of the new EA 1955 provides an avenue for an employee who is not satisfied with his employer’s refusal to inquire his complaint. The provision allows the said employee to refer the matter to the Director General of Labour (hereinafter referred to as the DG) who will review the matter and if thinks the matter should be inquired into, either directs the employer to do so or if he agrees with the employer’s decision, inform the employee that no further action will be pursued.

If, upon conducting an inquiry, the employer is satisfied that sexual harassment is proven, disciplinary action may be taken against the employee i.e. dismissing without notice, downgrading or imposing any other lesser punishment which the employee deems just and fit (s. 81B (1) (a) of the new EA 1955). If an employer imposes the punishment of suspension without wages, it shall not exceed 2 weeks (s. 81B (1) (a) (iii) of the new EA 1955). A complaint of sexual harassment may also be directed to the DG. This avenue is specified in s. 81D of the new EA 1955. The DG upon receipt of the complaint shall assess such complaint and may direct an employer to inquire into a complaint. The employer who is so directed under an obligation to submit a report of inquiry to the DG within 30 days from the date of such direction. If a complaint is made by an employee against an employer who is sole-proprietor, the DG is required to inquire into the complaint (s. 81D (4) of the EA 1955). If upon inquiry by the DG, the sexual harassment is proven, the employee may terminate his contract of employment without having to comply with termination notice-related requirements. Moreover, the complainant is entitled to termination benefits and indemnity (in lieu of notice) as provided for under the Act or the contract of service (s. 81E (2) (b) of the new EA 1955). According to subsection (a) of the same section the complainant’s right of wages is also can be denied since the termination should be treated as he has given a proper notice of termination of contract of employment. The new EA 1955 in its s. 81F (a) – (d) stipulates that the failure of employers to inquire into complaints of sexual harassment; or to inform complainants of their refusal to inquire and reason for refusal; or to inquire into complaints of sexual harassment when so directed by the DG; or to submit a report of inquiry into sexual harassment to the DG, commits an offence and shall, on conviction, be liable to a fine not exceeding RM10,000.

The introduction of the new Part XVA to the EA 1955 is certainly welcomed since it absolutely fills up the loophole of Malaysian employment laws in addressing the major issue in the workplace i.e. preventing the incidents of sexual harassment in the workplace. Ministry of Women, Family and Community Development (2011) reports that as of 2010, women workers comprise 36% of the total 11,129,400 workers. It perceives a relatively high percentage of women participation’s in employment and the importance of women’s contribution in the economic development. Besides that, according to the recent trend more women are entering employment in industries that commonly dominated by male such as construction, mining and transportation. Thus, female workers increasingly posed to the likelihood of sexual harassment in their workplace. The serious implication of sexual harassment is generally described in many literatures (Mohamed, 2004; Marican & Ab Rahman, 2012; Nathan, 2010; Anantaraman, 2004). Sexual harassment does not only affect victim’s morale and job performance but also may create intimidating, hostile and offensive work environment which. Consequently, the protection that is offered by the new statutory provisions come at very right time.

However, more in depth analysis on the relevant provisions is considerably important. It is worthwhile to note the shortcomings of the recent changes for the purpose of considering improvements in future. Among the drawbacks of this new part of the EA 1955 is the scope of a complaint of sexual harassment is not widely covered incidents of sexual harassment committed by other than employer and employee for example a customer, supplier or visitor at the workplace against an employer or an employee (Lee, 2010). It is also arguable that a sexual harassment complaint by or against an independent contractor is likely not within the ambit of s. 81A of the new EA 1955 (Wong & Partners, 2012). Additionally, s. 81C (b) of the new EA 1955 states out that where the penetrator is not an employee which can be interpreted as an employer, such harasser shall be brought before an appropriate disciplinary authority to which the harasser is subject. This procedure is not further detailed out and left vague which will likely to be abused by an employer. The new laws imposed address complaints after the sexual harassment had been lodged. The provisions do not provide details as to what a victim should do after the harassment and before a complaint is carried out. Similarly, the amendment is silent on interim measures that the employer should take to protect the complainant and other parties concerned during the investigation of the complaint. The adequate interim measures are significantly important to ensure maximum confidentiality so as to minimize embarrassment to the victim. Furthermore, the new Part XVA of the EA 1955 does not oblige employers to establish a written workplace sexual harassment policy as required by the Code. Such written policy is very helpful to create awareness among all stakeholders of the various rights and obligations relating to sexual harassment

incidents. It is suggested in Wong & Partners (2012) that until definitive guidelines are issued by the Ministry of Human Resources, employers should refer to the non-binding Code. The new amendment imposed also seems does not provide an adequate protection to employers from a claim of unfair dismissal by the offender when his contract of service is terminated notwithstanding the fact that the employer may have acted in accordance with the procedures stipulated by the EA 195 in handling a sexual harassment complaint. Finally, these laws that deals with sexual harassment issues at work certainly do not meet the expectation of many groups since from beginning they have called for a separate legislation. The main objective is that to ensure the said law is comprehensive and effective in eradicating sexual harassment incidents in the workplace and creating a healthy working environment across the country. Nevertheless, it is hoped that all the shortcomings noted earlier will be overcome in time through further amendments to the principal Act itself or enactment of new subsidiary legislation as well as judicial decisions.

CONTRACTOR FOR LABOUR AND REGISTRATION OF EMPLOYEES

Another aspect that is pertinent to be noted in the latest amendments of the EA 1955 is the recognition of the role of contractors for labour in employment landscape. The practice of contractors supplying workers has been existed for decades in the country, especially in the plantation sectors and construction sectors. This method of recruitment of labour through intermediaries or contractors is also known as outsourcing. Thus, in summary outsourcing generally means an outside source is engaged to carry out job functions particularly of non-core activities which were originally done by the company's own employees (D' Cruz, 2008). One of the benefits of this mode of recruiting employees are payment is based entirely on the work performed and therefore cost effective and lessen the cost of supervision. Moreover, the management can focus on the more important aspects of production. It is understandable that outsourcing of non-core activities by companies may lead to better efficiency but by recognizing the role of "contractor for labour" or "outsourcing agents" in the principal employment statute, the legal position of contractor for labour is questionable. The Amendment Act 2012 (s. 2 (c)) defines "contractor for labour" as "*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*". Briefly, the major role of a contractor for labour is to supply workers, particularly foreign workers to the owner (the principal) of any trade or business. It is well-established legal position under the EA 1955 that for an employee to be protected and enjoyed the basic rights provided by this statute or even most related-employment statutes, such employee must enter into a contract of service with the employer. Such contract of service is however irrelevant in the event employees are supplied by contractor for labour to the owners of any trade or business. This system of employment in common involves a conclusion of a contract for service between the principal and a contractor who for an agreed fee, provides the principal the service he has contracted to perform. Therefore, there is no employment relationship between the principal and the employees. This would be most detrimental to the protection and benefits of workers. Stephanie (2011) in her literature reported that based on studies by union and NGO researchers many cases of labour abuses occurring under the guise of labour contractors. Practically, such labour abuse may take place when workers are treated differently in terms of wages or work benefits as their employers are different.

The new EA 1955 under s. 33A imposes legal obligation on a contractor for labour to register with the Director General of Labour Department (the DG) if he intends to supply any employee and to keep and maintain the information of employees supplied in a register for monitoring and inspection purposes by the Labour Department. Failure to comply with this provision commits an offence and shall on conviction be liable to a fine of up to RM10,000. The inception of this procedure can be agreed to provide some form of protection to workers however at the same time arguably this also may open floodgates of abuse by contractor for labour. It will lead to creation of labour supply companies, who will only pay the workers a fraction of the fees they charge to the company. Thus, the Malaysian Trades Union Congress (MTUC) since the proposal stage of the law strongly opposed this provision (The Staronline, 2012). Finally, Minister of Human Resources answered the MTUC's calls by passing the Employment (Exemption) Order 2012 (P.U. (A) 87) (the Order) which has the effect that the provisions in the new EA 1955 (s. 31, s. 33A, s. 61 and s. 73) will only apply to the plantation or agriculture sector. Nonetheless, it is arguable that the major concern of MTUC i.e. fear of legalizing of outsourcing agents, has not been fully addressed by the Order. It remains vague on the legal status of the "outsourcing concept" since the Order among other things only exempts the contractor for labour from registering with the DG before supplying employees.

It is therefore suggested that an urgent legal intervention is vital in this context to end this uncertainty. There should be a clear-cut statutory provision to address the status of contractor for labour i.e. whether the contractor for labour should be regarded as the actual employer to the workers when he supplies them to the owner of the workplace. Total abolition of the outsourcing system seems impractical taking into consideration some sectors require high demand of manpowers and the demand can easily be addressed by having this system. Alternatively, a clear provision on the issue is hoped may rectify all these uncertainties.

OFFENCES BY BODY CORPORATE

Prior to the coming into force of the Amendment Act 2012, only the employer will be subject to the penalties under the EA 1955. Therefore, in the event that an employer is a body corporate fails to comply with any of the EA 1955 provisions, the liability of such body corporate will not extend to either directors or management members. This legal position is held based on the principle of separate legal entity under the company law. This is likely to be one of the principal factors contributing towards the less than satisfactory level of compliance. Therefore, the introduction of s. 101B to the new EA 1955 is very much welcomed. It is now a director or manager, partner or office-bearer shall be deemed to have committed the offence and may be charged jointly or severally in the same proceedings.

PUBLIC HOLIDAYS

The Amendment Act 2012 (s. 60D of the existing EA 1955 is amended) increases the number of paid holidays that an employee should be entitled from 10 to 11. This is by recognizing Malaysia Day as one of the 11 gazetted public holidays.

FOREIGN DOMESTIC SERVANT

New provisions are introduced to monitor and regulate a registration system of foreign employees. The Amendment Act 2012 inserted s. 57 A and s. 57B to the existing EA 1955 which oblige an employer to inform the DG of the employment of a foreign domestic servant within 30 days upon commencement of contract of service, failure which shall amount as an offence and upon conviction, be liable to a fine not exceeding RM10,000. The same obligation is imposed on employer in the cases of termination of service of foreign domestic servant. The report must take place within 30 days upon termination. Termination in this context includes situations where the employee absconds from his place of employment. Failure to comply attracts a fine of up to RM10,000. This new requirement gives the Government an additional means to monitor and control the numbers of foreign domestic servants in this country.

OTHER EMPLOYMENT-RELATED STATUTES

NATIONAL WAGES CONSULTATIVE COUNCIL ACT 2011 AND MINIMUM WAGES ORDER 2012

The first national minimum wage policy was announced by the Malaysian Prime Minister, Datuk Seri Najib Tun Razak on the eve of Labour Day 2012. The said policy is laid down in the Minimum Wages Order 2012 (P.U. (A) 214) (the Order). The Order which was gazetted on July 16, 2012 has to be read together with the National Wages Consultative Council Act 2011 (Act 732) (the Act). The Act has come into effect on 23 September 2011 (refer P.U. (B) 507) with the principal intention to set up a National Wages Consultative Council (the Council). The main responsibility of the Council is to conduct studies on all matters concerning minimum wages and to make recommendations to the Government to make minimum wages order according to sectors, types of employment and regional areas, and to provide for related matters (see long title of the Act). Due to the coming into place of the Act, the Wages Council Act 1947 (Act 195) (the 1947 Act) is abolished and all wages councils set up under the 1947 Act are dissolved (s. 58 of the Act). Consequently all the Orders that regulate the minimum remuneration for certain categories of workers for instance shop assistants, cinema workers, Penang Stevedores and cargo-handlers, announced by the established wages councils will be revoked (Paragraph 7 of the Order). It is evident that limited numbers of employees were benefitted with the earlier position of laws. In contrast, the new minimum wage scale would be more comprehensive since it will affect employees in all economic sectors, except for domestic services, involving maids and gardeners (Paragraph 3 of the Order). Note that the term employees for the purpose of the Order is cross-referred to the First Schedule of the EA 1955 and the Schedule of Sabah and Sarawak Labour Ordinances respectively.

The term “minimum wages” is described by the International Labour Organization (ILO, 1928 and 1970) as the minimum sum payable to a worker for work done or services rendered, within a specified period, whether accounted on the ground of time or output, which may not be reduced either by individual or collective agreement and is assured by law and is fixed in such a way to cover the minimum needs of the worker and his or her family, in the light of national economic and social conditions. The ILO (1970) also recommends that the minimum wage should be set above the poverty line. The minimum wage figures that are introduced by the Order seems in line with the said criteria set out by the ILO since the Malaysian poverty line is RM763. Paragraph 4 of the Order specifies minimum wage of RM900, or RM4.33 an hour, for the Peninsular Malaysia and RM800, or RM3.85 an hour, for Sabah, Labuan and Sarawak. This new scale of wage will take effect on 1 January 2013 for an employer who employs more than 5 employees and those employers regardless of numbers of employees who involve in professional business activities i.e. medical and dental clinic, law, architectural and consulting firm. Meanwhile, the effective date for small-time employers or micro enterprises with at least 5 workers is extended to 1 July 2013 to ensure they have ample time to make necessary adjustments. The affected employers are however allowed to apply to the Council to postpone the implementation of new wages scale to another date (Paragraph 2 (2) of the Order). Paragraph 5 of the Order further articulates the minimum wages of probationers. It gives permission to an employer to reduce a minimum wage for a probationer not more than 30% of the basic wage rate. The Act (s. 43) provides that an employer who fails to comply with this new policy commits an offence and shall upon conviction be liable to a fine not exceeding RM10,000 for each employee.

This new policy is not without criticism particularly on technical aspects i.e. the ambiguity of definition of term “wages” and “minimum wages” as well as the varying figures of the minimum wage rate according to region. As regards to the former, the secretariat of the Council (Thestaronline, 2012) came forward and clarified that the term “wages” should be defined based on the definition of “wages” provided by the EA 1955 (s. 2), as the case of Peninsular Malaysia, Sabah and Sarawak Labour Ordinances, respectively (s. 2 of the Labour Ordinances (Cap 67 and Cap. 76 respectively). Therefore, the Industrial Court’s awards will be very useful to determine some allowances that should not be amounted as wages or vice versa (see the case of *Asia Motor Co. (KL) Sdn Bhd v Ram Raj & Anor* [1985] 2 MLJ 202). Meanwhile, the term “minimum wages” is defined as basic wages (s. 2 of the Act). The rationale of having 2 different terms of “wages” in the Act is that the general term of ‘wages’ is also used in sections 4, 28, 31, 32, 33, 34, 36 and 38 of the Act which refer to a wider context of wages and not the ‘minimum wages’. Thus, distinction between the term ‘minimum wages’ which is referred to as ‘basic wages’ in Act and ‘wages’ has to be made (Thestaronline, 2012). Paragraph 6 of the Order further allows employers to restructure the wage system before the implementation of the Order and negotiate with employees or unions to convert some of the allowances paid in cash as part of basic wages. In order to overcome all these ambiguities the parties, employers and employees may seek an assistance from the

Guidelines on the Implementation of the Minimum Wages Order 2012 (the Guidelines). The Guidelines have been issued by the Council's Secretariat mainly to facilitate the implementation of the Order i.e. by providing some illustrations for easy understanding. Meanwhile, as regards to the criticism on varying minimum wage scale, the Prime Minister (NST, 2012) indicated that it is due to differences of salaries and cost of living.

The author at this stage intends to highlight some aspects in the Act and Order that require further consideration of legislative deliberation or judicial assistance. Firstly, as regards the definition of wages, it will be relatively important to have a standard or clearer guidelines of what are the types of payment shall or shall not count as wages. Based on the awards of industrial courts and/or civil courts' decisions, it seems no standard and consensus opinion on this issue. The writer agrees to Glofcheski (2010) that the widest possible interpretation of wages that is provided by the principal employment statutes serves employees' interest, it is otherwise under the Act and the Order, due to the fact that employers will argue that the statutory minimum wage has been paid if other benefits are taken into account (see the case of *Asia Motor Co. (KL) Sdn Bhd v Ram Raj & Anor* [1985] 2 MLJ 202 and *Chin Swee Hin Sdn Bhd v Mohamed Arif bin Khalid* [1977] 2 MLJ 31). Legislative interference is strongly encouraged to resolve this issue. Furthermore, in terms of enforcement, the Act is silent on the rights of employees in the event they were underpaid. Therefore, impliedly it is understood that the common mechanism that is provided by the EA 1955 is applicable i.e. complaints can be channelled to the Director General of Labour. It is proposed that to prevent cumbersome, a useful means would be to establish for employees to report recalcitrant employees. In addition, the Act provides little in the way of protecting employees' rights not to be subjected to any detriment to include not to be dismissed in the case employer does not comply with any of the provisions in the Act or/and the Order. As a comparison, the UK National Minimum Wage Act 1998 (1998 c. 39) specifically addresses these matters (see s. 23-26). An employee who makes a complaint must be given sufficient level of protection not merely on the secrecy of the identity of the complainant (s. 53 of the Act) but his right not to be dismissed. Finally, there is no specific provision stated in the Act which requires employer to keep records of employees' pay even though the Act stipulates the rights of Council to investigate such records. A specific statutory duty of keeping record imposes on employers are necessary to ensure the smoothness of police system by the Council.

MINIMUM RETIREMENT AGE ACT 2012

The Minimum Retirement Age Act 2012 (Act 753) (the MRA 2012) was published in the gazette on 16th August 2012 and it is now awaiting for the appointment date by the Minister to be enforceable. After a long call by the MTUC, the national statutory minimum retirement age for private sector employees was finally passed by the Parliament in June 2012 and obtained the royal assent on 5 August 2012. The main justifications of raising the retirement age from 55 (common retirement age set out by parties in private sector employment contracts) to 60 are due to people longer life span and the rising of living costs. The term "retirement" is defined in s. 2 of the MRA 2012 as termination of a contract of service of an employee on the ground of age. S. 4 (1) of the MRA 2012 articulates that the minimum retirement age for private sector employees is at the age of 60. This statutory retirement age is applicable to the private sector employee who has entered into a contract of service irrespective of wages (s. 2 of the MRA 2012) but does not include 9 categories of employees i.e. a person who is employed on a permanent, temporary or contractual basis and is paid emoluments by the Federal Government, any state government, any statutory body or any local authority, a person employed on probation, an apprentice, a non-citizen employee, a domestic servant, a person who is employed in any employment with average working hours not exceeding 70% of the normal working hours of a full-time employee, a student who is employed on contract for a temporary term of employment, and a person who is employed on a fixed-term contract of not more than 24 months and a person who has retired before this law comes into effect at the age of 55 and is re-employed (Schedule of the MRA 2012). The Act makes unlawful to retire an employee before the employee attains the age of 60 (s. 5 (1) of the MRA 2012). Failure on the part of employer to comply with the minimum retirement age may cause him to be convicted of an offence punishable with a fine not exceeding RM10,000 (s. 5 (2) of the MRA 2012), he may have to reinstate or compensate an employee who has been prematurely retired (s. 8 (5) of the MRA 2012). Irrespective of the minimum retirement age, an employee may retire when he reaches the optional retirement age agreed upon in the contract of service or collective agreement (s. 6 of the MRA 2012). Any retirement age specified in a contract of service or a collective agreement made before, on or after the coming into operation of the MRA 2012 which is less than 60 years will be deemed void and substituted with the minimum retirement age (s. 7 (1) of the MRA 2012). Interestingly, subsection (2) further does not allow exclusion or limitation of its provisions through any term in a contract of service or a collective agreement.

The coming into force of this statutory retirement age will certainly resolve any uncertainties that employees commonly face when the retirement age is not expressly stated out in the contract of service. At this point, some aspects that may require attention is that on its implementation and exempting some categories of employees from the coverage of this Act. For the former issue, the writer strongly supports employers' demand to commence this new policy in phases over 5 years to allow industry players to adjust and plan ahead for their workforce needs (TheEdge, 2012; Thestaronline, 2012). The progressive and systematic implementation of compulsory retirement age in France is relatively beneficial as a reference (Baker & McKenzie, 2011). France has announced its statutory minimum retirement age at the age of 62 in November 2010. The minimum retirement age will be increased by 4 months per year until 2018 (Baker & McKenzie, 2012). Whilst, for the issue of exempting certain employees from the MRA 2012 especially those involve in heavy physical and manual work i.e. construction, airline and transportation must be carefully considered before the Minister exercises its power to come out with any exemption order (s. 18 of the MRA 2012). By the coming into force of this policy in the near future, the relevant development that must be noted is that the Human Resources Minister recently announced that the Employees Provident Fund Act 1991 (Act 425) would be amended to allow private sector employees to fully withdraw their Employees Provident Fund savings either at 55 or 60 years. Additionally, employees who withdraw their savings at 55 would have to continue making contributions until they retire (Chin & Dass, 2012).

CONCLUSION

It is concluded that based on the aforementioned discussion, generally, it is able to identify the trends and regulation in the Malaysian employment context. The serious effort of particularly Malaysian government to assure Malaysia remains competitive in attracting investors and at the same time considerably protecting the rights of the employee can be seen from various changes and transformation that have been introduced to the employment laws. The recent development of the Amendment Act 2012 has widely addressed important issues pertaining to employment. Generally, the principal objective of the EA 1955 as to provide basic protection for workers in private sectors is well enhanced by virtue of these recent amendments. It is also evident based on the fact that the Amendment Act 2012 will be supported with three separate regulations to iron out the implementation and enforcement of particularly the sexual harassment provisions, the rights of domestic workers and ensure that the provisions of contractor for labour is not manipulated by parties with interest (Seman, 2011). Despite some of the changes may increase the cost of doing business for employers i.e. inception of the Minimum Wage Order 2012 and Minimum Retirement Age Act 2012 but it can be argued that these changes bring Malaysia up to par with labour practices in other developed countries and are absolutely welcomed as they create a more tolerant, professional and most importantly promotes healthy and safe working environment in the country. Nevertheless, taking into consideration all the above analysis, a more serious and consistent effort on the part of policymaker in the country is necessary to ensure any changes that were introduced in future will achieve the optimum level of effectiveness. A careful and comprehensive analysis on the possible consequences of the amendments and changes will definitely help the success of the laws. Furthermore, at this point the author asserts that it is worthwhile to extend this research to analyze other employment-related statutes since they are relatively important in understanding the direction of employment laws in Malaysia especially towards becoming a high income nations. Among the Acts and subsidiary regulations that require investigation are the Whistleblower Protection Act 2010, Data Protection Act 2010 and Employment (Part Time Employees) Regulation 2010.

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