MALAYSIAN
INDUSTRIAL RELATIONS
&
EMPLOMENT LAW

4th Edition

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Maimunah Aminuddin

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Dedication

This book is dedicated to my dearest Masuria. We named you Golden Sun. For 17 years you brought light into my life. Even though you have gone, the memories are always with me and will never fade.

About the Author

Professor Maimunah Aminuddin is a lecturer in the Faculty of Business Management, MARA University of Technology and has been teaching human resource management and industrial relations for more than 28 years.

At the University she has co-ordinated the teaching of management subjects, been responsible for an MBA programme jointly conducted with Cardiff Business School, University of Wales and currently teaches students undertaking undergraduate and masters programmes.

She has written several books in the area of human resource management and is frequently called upon to facilitate seminars and training programmes, both public and in-house, on topics related to industrial relations, employment law, disciplinary systems, training for trainers and supervisory skills.

Maimunah is a Fellow of the Malaysian Institute of Human Resource Management and has served on the Council and a number of committees of the Institute. She has also been involved in a number of consultancy projects for various companies in the Klang Valley.

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I would like to express my thanks to the people who have helped me write this book. I am indebted to the many officers of the Ministry of Human Resources, the Industrial Court and the Ministry's reference library who kindly and patiently provided me with up-to-date information.

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INDUSTRIAL RELATIONS

To study industrial relations is to study the relationship between workers and their employers within the work environment. Industrial relations is also known as employee or labour relations. However, in many local organisations, employee relations refers to the management of employee welfare and internal communications. Industrial relations, on the other hand, stresses the importance of three major areas: the relationship between employers and trade unions; employment law; disciplinary procedures and termination of the employment contract. Once workers unionise, they have a collective relationship with their employer and there is a need for both parties to understand each other's rights and obligations under the laws relating to industrial relations. Employment law and the manner by which the employment contract may be terminated are important topics whether or not the employees are unionised.

Industrial relations focuses on areas such as:

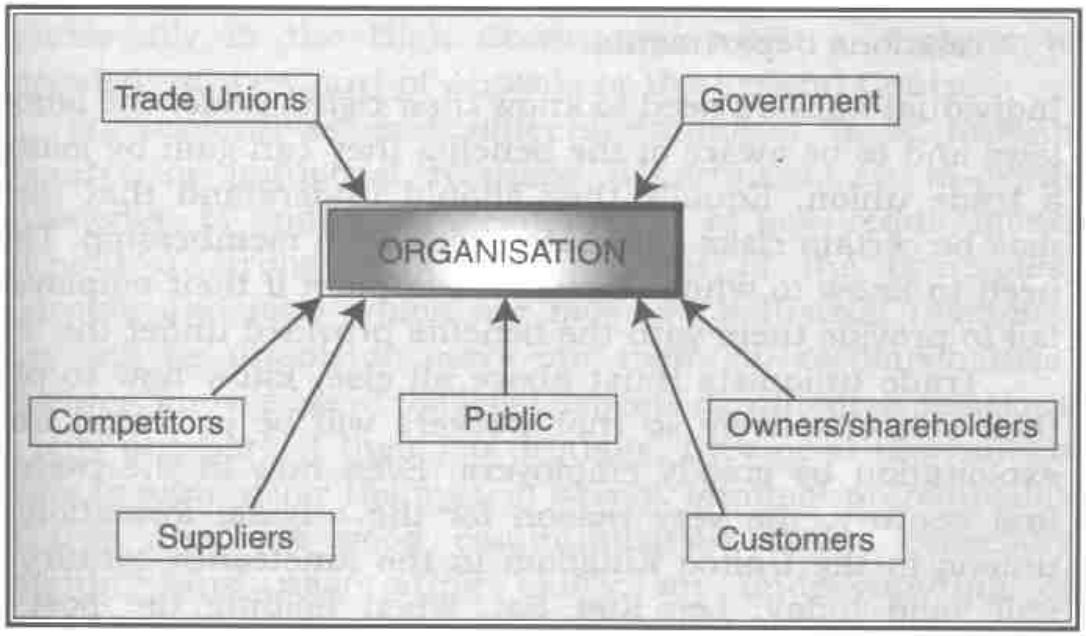
- laws and rules which impact on the work environment;
- terms and conditions of work;
- rights and obligations of employers and employees; and
- processes by which the rules and terms are made, i.e. the decision making process.

Work has been described as a "central feature of modern industrial society. It occupies much of the time available to most people for the majority of their lives and the economic rewards obtained from it determine an individual's standard of living, and, to a considerable extent, his social status."[1] The working environment is thus very important to most people and in the last eight decades a considerable amount of literature devoted to studying people's behaviour at work has developed. The wide range of topics studied by researchers

includes motivation, leadership, team building, supervision, and quality management.

Most people work in organisations. However, the characteristics of these organisations vary widely. Organisations can be big or small, in the private or public sector, manufacturers of goods or providers of a service. The list of variations is endless. Furthermore, these organisations operate in a particular environment which impacts upon their systems and structures, hence affecting their functioning. The practices, policies, attitudes and values are the differing variables in an organisation's environment which affect the type of industrial relations system it has. Examples of the forces affecting a particular organisation are shown in Figure 1.1

Figure 1.1
The Impact of Specific Forces on the Organisation[2]



The one common variable that all organisations must cope with is change. The environment is dynamic and is continuously changing, so managers, trade unions and other participants in the industrial relations system have to cope

with disputes over what is appropriate in the changed circumstances and what is not.

WHO NEEDS TO STUDY INDUSTRIAL RELATIONS?

There are at least five groups of people who need to understand the theory and practice of industrial relations. These are:

- workers;
- trade union leaders;
- managers;
- lawyers; and
- officers and executives in human resource and industrial relations departments.

Individual workers need to know their rights under the labour laws and to be aware of the benefits they can gain by joining a trade union. Equally they should understand that there may be certain risks associated with such membership. They need to know to whom they can complain if their employers fail to provide them with the benefits provided under the law.

Trade unionists must above all else, know how to play their role effectively so that workers will be protected from exploitation by greedy employers. Even now in the twenty-first century, the very reason for the original formation of unions in the United Kingdom in the nineteenth century is still valid today. Lee Kim Sai, when holding the post of Minister of Labour, once said that many employers still breach the labour laws by neglecting their workers' rights. Many of them practice a biased personnel policy which caters to their own interest while the workers' interest is ignored.

As such, managers at supervisory level who deal directly with the workforce must constantly try to upgrade their

understanding of industrial relations, which is not a static body of knowledge but a dynamic field of study. Even a quick glance at the daily newspapers will show that new industrial relations issues are frequently being aired.

Industrial relations is important to managers because there is a direct link between profitability and good industrial relations. When the relationship between the employer and his employees is poor, i.e. it is characterised by distrust, ongoing conflict, miscommunication and negative attitudes on the part of both parties, strikes (both legal and illegal) may occur. There will be high turnover rates as workers leave to look for more satisfying work places elsewhere. Productivity will be low amongst those workers who stay, and staff morale will be poor. Good management requires good industrial relations.

Lawyers' involvement in industrial relations begin when they are called upon to represent workers or employers at the Industrial Court or at Labour Department hearings, and occasionally in the High Court; and when a decision is appealed, in the Court of Appeals or the Federal Court.

For executives and officers employed in a human resource or industrial relations department, an in-depth knowledge of industrial relations is a key requirement. Without a strong working knowledge of the principles, concepts and laws which are basic to industrial relations, they will be unable to carry out their job responsibilities. However, knowledge of the legal aspects of industrial relations is only one part of their job. Equally, they need the human skills to administer the system wisely. Minimal prerequisites in this area are good communication skills, especially listening and negotiating skills; an understanding of psychology; and the personal qualities of patience, firmness and, above all, fairness.

The practice of industrial relations is far more complex than the materials in this book would suggest. The art of managing in a unionised environment cannot be taught in an academic programme or in a classroom. The term industrial

relations tells us that the relationship between managers, union leaders, employees and government officials is the key to this subject. This relationship is affected by the parties' attitudes, values, objectives and use of power. Individual managers and plant or office union leaders may frequently battle over who controls and influences the workers and who has the power to make decisions. It is not unknown for managers to reject a worker's request in relation to some personal matter if the worker chooses to be represented by his union. Management usually prefer to settle any difficulties without the intervention of a trade union. Indirectly, the worker is being informed that if he had brought the problem up without the support of the union, the manager would have been willing to grant the worker's request.

INDUSTRIAL RELATIONS SYSTEMS ARE TRIPARTITE

Nearly all industrial relations systems are tripartite, i.e., they are made up of three parties. The parties or participants in an industrial relations system are:

- the employer;
- the employees; and
- the government.

The differing ways in which these three groups interact account for the variations in different countries' systems of industrial relations. A key variable in industrial relations is decision-making in areas relating to work life. Rules and regulations on compensation, workers' rights, discipline and the duties and performance of employees can be made in any of three ways - unilaterally, bilaterally or in a tripartite manner.

Where decisions are made unilaterally, they are made by management on behalf of the employer without any

interference by the workers or any other party. For many managers and companies this is the preferred situation. They strongly believe in the right or prerogative of management to make decisions without the involvement of any third party. However, if the workers have some right to participate in such decision-making, as is common when the workers organise themselves into trade unions, then the process is said to be bilateral. From time to time, the government of the country plays a role in drafting and presenting to Parliament labour laws which affect work life. In Malaysia, before such laws are presented to Parliament there are tripartite discussions, i.e., all the three parties - employers, unions representing the employees and the government - will sit together to agree on what laws or amendments to the laws are necessary.

The machinery for this tripartite discussion is the National Labour Advisory Council (NLAC). This advisory body consists of representatives from each of three sectors - 14 representatives for the workers, 14 for the employers and 12 for the government. The Minister of Human Resources chairs the discussion and appoints the government representatives. The other members of the council are appointed after consultation with the relevant bodies such as the workers' organisations, the Malaysian Trades Union Congress (MTUC), and the Congress of Unions of Employees in the Public and Civil Service (CUEPACS) as well as the Malaysian Employers Federation (MEF) representing the employers. The Council meets at least twice a year; it also meets when there are urgent matters to attend to, such as before approving amendments to the law.

INFLUENCE OF INTERNATIONAL BODIES

Although the most important participants in the industrial relations system are the employers and their organisations, the workers and their unions and the government, certain

international bodies also play a role in Malaysian industrial relations. Many unions are affiliated to international bodies to whom they may appeal for help. For instance, during a protracted dispute between the Airlines Employees Union and the Malaysian Airlines System (MAS) in 1979, the International Transport Workers Federation intervened in the dispute and encouraged Australian unionists to boycott Malaysian aeroplanes. With this action Malaysian planes were stranded at Australian airports and unable to fly out. These foreign unions and their federations provide financial assistance to local unions from time to time, mostly for the purposes of research and education.

The International Labour Organisation (ILO), an agency of the United Nations based in Geneva, also plays a role in the Malaysian industrial relations system. The ILO, which Malaysia joined in 1957, has 175 member states and is a tripartite body which provides an international forum for discussion on all matters relating to labour by holding annual meetings of members every June in Geneva. The Conference sets labour standards, which it expects member countries to ratify and implement. However, very few of these conventions have been widely ratified. While the concept of having international labour standards has been widely accepted, there have been major difficulties in setting standards applicable to all situations. Indeed, it appears to many developing countries that the ILO is dominated by richer nations whose agendas are different to that of the newly developing nations. Dato' Lim Ah Lek, the Malaysian Minister of Human Resources in 1997, told the Conference that, "The Malaysian government supports efforts to promote the ratification of core labour standards among members of the ILO. However, such efforts should acknowledge differential socio-economic realities and technical capabilities of member states."[3]

Malaysia has ratified conventions relating to:

- Abolition of forced labour
- Guarding of machinery
- Minimum age (underground work)
- Recruiting of indigenous workers
- Contracts of employment (indigenous workers)
- Penal sanctions
- Labour inspection
- Employment service
- Protection of wages
- Right to organise
- Right to bargain collectively

Ratification of conventions is an on-going process. In the year 2000 Malaysia ratified a convention on the Worst Forms of Child Labour.

Table 1.1 compares the number of conventions ratified in selected countries.

Table 1.1
Ratification of ILO Conventions

Country	No. of Ratifications
Thailand	11
Singapore	21
Philippines	21
Malaysia	23
New Zealand	55
Japan	37
Indonesia	8

Country	No. of Ratifications
Belgium	79
France	104
Spain	108
United Kingdom	77
United States of America	7

Source: World Labour Report, Geneva: ILO, 1996 and MTUC website.

The above table shows that it is difficult to persuade different countries, with their diverse economic systems and cultures to accept common labour standards.

The ILO not only formulates international labour standards but it also provides technical assistance to member states, training and advisory services and carries out many research projects and publishes these. It's main journal, the International Labour Review includes many articles of interest related to labour-management practices.

The ILO is run by a governing body of 14 full members, 14 deputy members (with no voting rights) and 14 reserve members. Representatives are made up of government, employer and trade union officials. A number of Malaysians have been elected as deputy members, including Datuk Dr. Mokhzani Abdul Rahim, Senator Zainal Rampak, V.David and S.J.H.Zaidi.

The body is financed by the members but most of the burden is carried by seven countries - USA, Japan, Germany, France, Britain, Italy and Canada. The organisation's money is used for administrative purposes, research, publications and country or regional assistance projects.

The ILO convention widely regarded as the most important is that on Freedom of Association. A committee has

been formed to examine allegations of violations of this convention, whether or not the countries concerned have ratified the convention. Other key labour standards established by the ILO relate to collective bargaining, abolition of forced labour, child labour and equality of opportunity and treatment. The ILO has no means by which it can directly penalise any member who fails to ratify conventions or implement these labour standards. Rather it uses "moral persuasion". Malaysia has always been an active member of the ILO, attending its annual meetings in Geneva regularly

Although the influence of the International Labour Organisation (ILO) should not be underestimated, any form of external interference in Malaysian industrial relations matters is discouraged by the government. The Minister of Human Resources was quoted as saying, "The labour movement should break free from the influence of the international labour secretariats.... such secretariats do not have the genuine interests of the Malaysian workers at heart."[4]

Figure 1.2 lists the parties important to the Malaysian industrial relations system.

Figure 1.2
Parties in the Industrial Relations System

- Employers and their Organisations
- Employees and their Trade Unions
- The Government
- International Organisations
  - ◊ Unions
  - ◊ The International Labour Organisation

As industrial relations only exists when workers form associations known as trade unions, the emphasis in this discussion will be on unions, their activities, rights and

functions. What unions can or cannot do is prescribed by laws, specifically the Trade Unions Act, 1959 and the Industrial Relations Act, 1967. It is therefore necessary to make frequent references to these Acts of Parliament.

For those companies and organisations whose employees are not members of any union, employment laws still have an important role to play. The officers responsible for employee relations (which is usually a welfare function) and those in charge of human resource management in general need to be familiar with a wider range of employment legislation as described in the following section.

EMPLOYMENT LEGISLATION

The major pieces of employment-related legislation are:

- Employment Act, 1955;
- Trade Unions Act, 1959;
- Industrial Relations Act, 1967;
- Factories and Machinery Act, 1967;
- Occupational Safety and Health Act, 1994;
- Workmen's Compensation Act, 1952;
- Wages Councils Act, 1947;
- Children and Young Persons (Employment) Act, 1966;
- Workers Minimum Standards of Housing and Amenities Act, 1990;
- Employees Provident Fund Act, 1991;
- Employees' Social Security Act, 1969;
- Weekly Holidays Act, 1950;
- Private Employment Agencies Act, 1981;
- Pensions Act, 1980;

- Public Services Tribunal Act, 1977;
- Employment (Restriction) Act, 1968; and
- Labour Ordinance, Sabah (Cap 67) and Sarawak (Cap 76).

The Employment Act lays down provisions to protect workers from exploitation and to provide minimum benefits for all workers covered by the Act, i.e., those who earn not more than RM1,500 per month, those who carry out manual labour, or who supervise such workers, or are employed to drive or maintain vehicles. The benefits provided include termination and maternity benefits, the right to a weekly rest day, annual leave and sick leave. These benefits will be dealt with in detail in Chapter 2.

The Employees Provident Fund Act establishes a system of compulsory savings so that employees will have money to support themselves once they retire. The Act covers all employees and is administered by the Employees Provident Fund Board. Discussion on the Act can be found in Chapter 3.

The Employees Social Security Act, administered by the Social Security Organisation (SOCSO), ensures that employees receive compensation in case of work-related accidents or illness. SOCSO and the Employees Provident Fund form Malaysia's social security system for workers. Details are in Chapter 3.

The Occupational Safety and Health Act establishes guidelines, and lays down the responsibilities of the various parties in industry in relation to safety and health. This, the most recent of the labour laws, will be discussed in Chapter 4.

The Trade Unions Act seeks to control the activities of trade unions so that they can develop in an orderly and peaceful manner. This is done by laying down rules and regulations which unions are required to follow. Chapter 5 will deal with the rights of trade unions and their members.

The Industrial Relations Act regulates the relations between employers and workmen and their unions as well as laying

down rules to help prevent and settle disputes between the two parties, thus ensuring peaceful industrial relations as far as possible. The provisions of the Industrial Relations Act are discussed in Chapters 6, 7 and 8.

These laws have been amended a number of times. A detailed knowledge of their contents is essential for anyone involved in industrial and employee relations. The government's overall goal in the area of industrial relations is to encourage a harmonious relationship between employers and employees in the interest of the nation's productivity. A thorough understanding and proper implementation of the employment laws at the organisational level will go a long way to help achieve this objective.

CONFLICT

It is often said that employers' and workers' needs are in conflict. One British expert on human resource management, Derek Torrington, has summarised some of the sources of conflict in the work environment. He lists these as follows:

- the aggressive impulse which is inborn in mankind;
- divergence of interests between managers and workers;
- competition for a share of limited resources; and
- organisational tradition.[5]

As Torrington points out, conflict leads to a number of serious problems in the work environment. In particular, much time and energy are wasted on the conflict situation which could be put to better use by both unions, workers and management. The emotional stress resulting from conflict at work may lead to some managers and workers becoming inefficient at their jobs. Certainly, a hostile environment typified by poor communication and frequent withdrawal of co-operation by the workers will have adverse effects on an organisation's productivity.

Is conflict inevitable in an industrial relations system? Employers wish to maximise profits and employees want higher wages and better terms and conditions of service. It is widely believed that higher wages can only be paid at the expense of lowering profits. Thus, what the employer wants and what the employees ask for are diametric opposites. Yet, it is equally true that the employer and the workers need each other. Good labour relations will lead both parties to work for a common goal - the increasing growth and success of the organisation so that its future is guaranteed and both profits and wages can be assured. This concept of the employer and the employees being interdependent reflects the unitary frame of reference for understanding industrial relations. However, certain experts believe that conflict is inevitable and therefore there is a need to establish mechanisms and institutions to resolve the conflict. This is the pluralist way of thinking. The purpose of legislation on labour matters is to establish procedures to regulate the way employers deal with their workers, particularly those who are unionised, to create machinery to ensure a peaceful relationship between the parties is maintained, and to set minimum standards to protect workers from exploitation. Radical thinkers, including the Marxists, do not accept that collective bargaining and other such machinery can improve the economic situation of the workers. They believe that a more drastic change in society is necessary to achieve this aim.

ROLE OF THE GOVERNMENT IN INDUSTRIAL RELATIONS

The government plays three major roles in the Malaysian industrial relations system. It acts as legislator through Parliament, administrator through the Ministry of Human Resources, and participant by way of being the largest employer in the country.

MINISTRY OF HUMAN RESOURCES

The Ministry of Human Resources is responsible for administering and overseeing the industrial relations system. The basic objectives of the Ministry are:

- to protect the welfare of workers - their safety, health and rights;
- to promote good employer-employee relationships through a stable and peaceful industrial relations system;
- to equip the unemployed with basic industrial skills and to improve the skill level of the work force; and
- to assist in maximising the country's manpower resources through manpower planning.

Figure 1.3 below lists the names of the Ministers of Human Resources (previously Labour) since 1955.

Figure 1.3
The Ministers of Human Resources
1955-2002

Tun. V.T. Sambanthan	1955 – 1957
Tun Omar Yoke Lin Ong	1957 – 1959
Encik Bahaman Samsudin	1959 – 1964
Tan Sri Dato' V. Manickavasagam	1964 – 1974
Datuk Lee San Choon	1974 – 1978
Datuk Richard Ho	1978 – 1982
Datuk Mak Hon Kam	1982 – 1985
Encik Lee Kim Sai	1985 – 1989
Dato' Lim Ah Lek	1989 – 1999
Dato' Dr. Fong Chan Onn	1999 –

The Ministry of Human Resources has seven departments which are:

- Department of Labour, Peninsular Malaysia,
- Department of Labour, Sabah,
- Department of Labour, Sarawak,
- Department of Industrial Relations,
- Department of Trade Unions,
- Department of Occupational Safety and Health,
- Manpower Department.

There are also related organisations which either report to the Ministry of Human Resources or, as in the case of the Employees Provident Fund, to the Ministry of Finance, or are independent but nevertheless deal with labour matters such as:

- Social Security Organisation;
- Employees Provident Fund;
- Human Resource Development Corporation; and
- Industrial Court.

Department of Labour, Peninsular Malaysia

The Labour Department is headed by a Director-General who is assisted by a Deputy Director-General. There are four Directors of Labour who supervise the state-level labour offices and sub-offices. The department enforces the Employment Act, 1955; the Workmen's Compensation Act, 1952; the Wages Councils Act, 1947; the Children and Young Persons (Employment) Act, 1966; the Employment (Restriction) Act, 1968; and the Workers Minimum Standards of Housing and Amenities Act, 1990. Through the labour court the department inquires into disputes between workers and employers over payment or non-payment of wages, allowances, retrenchment and retirement benefits.

Department of Industrial Relations

Like the Labour Department, the head of the Industrial Relations Department is a Director-General. Reporting to him are a Deputy Director-General, the Director of Labour for Sabah, and the Director of Labour, Sarawak. These two officers report to the Department of Industrial Relations because in their respective states they are responsible for the functions of labour and industrial relations matters. Peninsular Malaysia is divided into five regions, each with a Director of Industrial Relations and a number of Industrial Relations officers. The department administers the Industrial Relations Act, 1967 and is noted for its attempts to help settle disputes between employers and employees through conciliation.

Department of Trade Unions

This department, which is headed by a Director-General, is responsible for enforcing the Trade Unions Act, 1959. This gives it a central role in the growth of the trade union movement. It has the authority to register newly formed unions, de-register unions found breaking the law, check union's annual accounts and generally to investigate any specific complaints made against a particular union, for example in relation to use of union funds and the election of union officials.

Department of Occupational Safety and Health

Until 1994, this department was known as the Department of Factories and Machinery. The name was changed because of the introduction of the Occupational Safety and Health Act, 1994 which makes the department responsible for the major task of implementing the new Act as well as the Factories and Machinery Act, 1967. The name change reflects the wider authority and extended duties charged to the department.

Social Security Organisation (SOCSO)

This statutory body reporting to the Ministry implements the Employees' Social Security Act, 1969 which provides benefits to workers and their dependants in the event of work-related accidents. It is an insurance scheme with compulsory membership for all workers earning less than RM2,000.

Employees Provident Fund

Like SOCSO, the Employees Provident Fund is an organisation to which all employees and employers must make monthly contributions. This money is then made available to employees on their retirement. The purpose of the Employees Provident Fund Act, 1991 is to ensure workers are not destitute once they retire from work.

Human Resource Development Fund

In order to encourage employers to train their workers, a Fund has been established by virtue of the Human Resource Development Act, 1992. Employers in certain sectors of the economy are required to contribute 1 per cent of their payroll to this fund every month. When approved training is conducted the company concerned can claim for reimbursement of the costs involved.

Industrial Court

The functions of the Industrial Court will be dealt with extensively in this book. It is a specialised tribunal established under the Industrial Relations Act, 1967 to arbitrate disputes between employers and employees. While it is an independent body governed by the rules of the judiciary it plays a crucial role in the Malaysian industrial relations system.

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REVIEW QUESTIONS

1. Who are the parties involved in the industrial relations system? What is the role and function of each of these parties?
2. Malaysia has a tripartite system of industrial relations. What does this mean?
3. List the major labour laws. What is the purpose of each? Which department in the Ministry of Human Resources is responsible for enforcing each of these laws?

Chapter 2

The Employment Act and Related Acts

- *Introduction*
- *Individual Employment Contracts*
  - *Contract of Service*
  - *Written and Oral Contracts*
  - *Terms and Conditions of the Contract of Employment*
  - *Express Terms in a Contract of Employment*
  - *Changing the Terms of a Contract*
  - *Duration of the Employment Contract*
- *Enforcement of the Employment Act*
- *Labour Court*
- *Coverage of the Employment Act*
  - *Wages*
  - *Manual work*
- *Employees' Right to Unionise*
- *Notice to Terminate a Contract*
- *Termination for Misconduct*
- *Breach of Contract*
- *Minimum Days of Work for Estate Workers*
- *Payment of Wages*

- *Wage Periods*
- *Advances on Wages*
- *Deductions from Wages*
- *When No Wages Need be Paid*
- *Truck System*
- *Priority of Wages*
- *Non-payment of Wages and Other Monetary Terms of the Contract*

❦ *Employment of Women*
- *Women and Night Work*
- *Women and Underground Work*
- *Maternity Protection*

❦ *Working Hours and Leave*
- *Rest Day*
- *Maximum Working Hours*
- *Overtime*
- *Public Holidays*
- *Annual Leave*
- *Sick Leave*

❦ *Termination Benefits*

❦ *Employment of Foreigners*

❦ *Changes to the Employment Act*

❦ *Children and Young Persons (Employment) Act, 1966*
- *Employment of Children*
- *Employment of Young Persons*

References

Revision Questions

Discussion Questions

INTRODUCTION

Individual employees and employers are free to form employment contracts but these contracts must comply with the relevant employment legislation. Probably the most important piece of legislation as far as Malaysian employees are concerned is the Employment Act, 1955. The purpose of this Act is to provide a number of minimum benefits for those workers covered by the Act and to establish certain rights for both employers and employees. In many ways the Act is now outdated. Although it has been amended a number of times since it was first introduced, some of the changes have only served to make it more difficult for employers to apply the requirements of the Act. Some sections are in conflict and others rather vague. A number of proposals have been put forward to upgrade, or even radically alter, the existing Act but none of these have so far been acceptable to all the interested parties.

Key sections from the Act are quoted in full in Appendix B for further reference.

This chapter gives an outline of the importance of employment contracts and the main provisions of the Employment Act. As interpretations of certain parts of the Act may change over time, either because of clarifications made by the Courts or because of a change of public policy, it is advisable for the student in this field to watch out for current developments. This chapter does not attempt a detailed study of the Employment Act. A number of books are available on this subject.

This chapter will also briefly cover the Children and Young Persons (Employment) Act, 1966.

INDIVIDUAL EMPLOYMENT CONTRACTS

Employment law only applies to employees. Self-employed persons, and other workers who are not employees, are not protected by employment laws. An employee is employed under a contract of service, also known as a contract of employment. It is sometimes difficult to distinguish between a worker who is employed under a contract of service and someone who has been hired under a contract for services and is therefore not an employee. Where a company outsources services to another company, a dispute over the status of those who do the work is not likely to arise. However, the situation can become confusing when an individual is hired to carry out an assignment, especially where the work is continuous rather than a once-off project.

Contract of Service

There are two types of contract which govern the relations between an employer and those who do work for him. An employee is one who has a contract of service, but if there exists a contract for services, the person providing the services is an independent contractor, and is not an employee. A contractor is in business for himself; he is self-employed.

Some instances illustrating the difference between these two types of contract appear obvious. For example, if an individual home-owner pays a person or group of persons to paint his house, the contract between them is a contract for services. Equally, if a factory manager engages a person specifically to repaint his factory it can be assumed that the contract is for services rendered and the painter is not to be considered an employee. Yet it is equally possible that the factory manager may employ a worker on a temporary contract of employment to do the painting job. This question as to who is considered employed on a contract of service has

been put to the courts both in Malaysia and in the United Kingdom a number of times.

In determining the employment status of a worker the courts have developed a number of tests to assist in the decision-making process. Normally, a combination of factors will be examined and several questions asked such as:

- Does the employer control when and how the work is done and who does it?
- Does the employer provide the tools, raw materials and equipment necessary to do the work?
- How is payment made? On a regular basis or on completion of the work? Does the party providing the service have to submit an invoice to get paid?
- Are contributions to statutory funds such as the Employees Provident Fund being made?
- Is there a written contract, and if there is what are the terms of this contract?
- Does the worker have to follow the organisational rules?

An understanding of the different types of employment contract is vital because only those workers with a contract of service are covered by the Employment Act, Employees Provident Fund Act, the Employees Social Security Act, the Industrial Relations Act and other labour laws. Sometimes, the labels used to describe a particular type of employment contract are not helpful. For example, many employers confuse part-time and temporary contracts of service. Temporary workers are often called "contract workers" and their employers assume that they do not have employment rights similar to those employees in traditional employment.

Note that at this point of time labour legislation in Malaysia does not differentiate between part-time workers, temporary workers, foreign workers recruited legally to work in Malaysian establishments, and others. This means that all such workers are protected equally by the law.

Contracts of employment should be drafted in such a way that they are as clear as possible. Ambiguity only leads to future misunderstandings and conflict between the employer and the employee which can act as a barrier to productivity. However, it is neither practical nor desirable to have a standard employment contract like the uniform sales and purchase agreement used in the property market. Even in the same organisation, workers doing the same job may be offered differing packages of remuneration and benefits. Most employment contracts are negotiated individually between an employer and an employee. Of course, typically, the bargaining power between these two parties is not very equal and therefore employees often have to accept whatever terms and conditions are offered by the employer if they want the job. Where a trade union has been recognised by the employer as the representative of his workers, the terms of the employment contract may be bargained over and documented in a collective agreement. This process will be discussed in Chapter 6. In this chapter emphasis will be given to the individual employment contract.

Employment contracts should be carefully drafted. A well-written contract will fulfil certain criteria. An employment contract should be:

- Compliant with the law;
- Understandable;
- Complete; and
- Long lasting.

Written and Oral Contracts

A contract of employment does not have to be in writing. If a worker has no written letter of appointment it does not mean that no contract of employment exists between him and his employer. Such a contract can be implied by the fact that he is working for the employer. However, if a dispute arises about the terms of that contract, both parties will have a difficult

time proving to the Labour Department or a Court what the agreed terms are.

Terms and Conditions of the Contract of Employment

What is meant by the "terms" of a contract? The terms are the contents of the contract or the promises made by each party to the other. In return for providing his labour, i.e., for doing a particular job, an employee is rewarded with certain benefits including wages, holidays, and in some jobs, perks such as the use of a car. The terms of a contract would include the number of hours per day or per week the employee is to be available to do the employer's work. For many of these terms a statutory minimum is set down in the Employment Act, which is intended to serve as a protective device to employees. There is nothing, however, to prevent employers offering better benefits to their employees than those stipulated in the Act. Probably a majority of employers do offer significantly better terms and conditions of service to attract and retain workers.

The express terms of a contract are usually found in letters of appointment, company handbooks, and collective agreements. These documents may also contain materials which are not terms of the contract. Patricia Leighton and Aidan Odonnell,[1] writers on employment law, point out that it is important to be able to distinguish between items which are terms of the contract and those which are not. They suggest that items in a letter of appointment or company handbook may be descriptive, discretionary or prescriptive. Descriptive items are only for the purposes of information and are not legally binding. Policy statements may come into this category. An employer may include in a handbook statements about the importance of training and that the organisation will endeavour to train and re-train its staff as and when necessary. Such a statement, if correctly worded, does not create any legal obligation to provide training to employees. Discretionary matters are those which the employer reserves

the right of choice whether to give a certain benefit or not. For example, a contract of employment may specifically state that bonus and increment payments are made entirely at the discretion of the employer. Prescriptive items are those which are intended to be legally binding and failure to comply with them is a breach of contract.

Terms put in writing or agreed orally are known as express terms of the contract. There are also implied terms in every contract of employment. The law courts will imply certain terms into a contract on the grounds that these items are so obvious that there is no need to put them expressly in the contract. It is an implied term of an employee's contract that he will serve his employer:

- with due care - doing his work responsibly and safely
- obediently - he will carry out any lawful order of his employer
- faithfully - he will not take any action which would harm his employer's business or undertakings.

Express Terms in a Contract of Employment

As has been pointed out earlier in this discussion, every employment situation is different and thus the terms of the contract of employment of the workers concerned will vary too. Some of the terms and conditions that employers may consider including in a contract of employment are:

- Job title;
- Wages and details of other monetary payments;
- Normal working hours, and whether there is a requirement to work overtime;
- Holiday and leave entitlements;
- Other benefits;
- Probationary period;

- Notice period prior to termination;
- Retirement age;
- Requirement of confidentiality;
- Requirement to give exclusive service;
- Mobility requirement; and
- Requirement to comply with company rules and penalties for misconduct.

Changing the Terms of a Contract

Employee contracts are mutual agreements between an employer and an employee. The terms and conditions of the contract can only be changed by mutual consent. Any employer who tries to unilaterally change the contract may be accused of breach of contract by the employee concerned. Where an employer breaches a major term of the employment contract, an employee may claim constructive dismissal. Further discussion on this topic will be found in Chapter 9. It must also be kept in mind that the employment relationship may be long lasting and for both parties to achieve their respective goals, give-and-take is necessary. Just as the employer may, from time to time, offer increased wages and benefits to employees to keep them happy, so also there will be times when the employer needs the co-operation of employees to accept changes in the contracts which are to their detriment.

Duration of the Employment Contract

Employment contracts can be for a particular period of time or they can be open-ended and not specify the duration. The former are known as fixed-term contracts. Such contracts specify the time period for which the worker is to be employed, or they may say that the employee is to be employed until the completion of a given project or task. A fixed-term contract for any period longer than one month or

one terminating on the performance of a specified piece of work which may be expected to take longer than one month must be in writing. Such contracts terminate automatically at the end of the stated time period or when the work is finished. An employee on such a contract is protected by the Employment Act if he is within its scope. The majority of employees are offered open-ended contracts for unspecified periods of time, meaning that the job is theirs until such time as their services are formally terminated by the employer or they decide to leave the organisation.

ENFORCEMENT OF THE EMPLOYMENT ACT

It is the responsibility of the Department of Labour to enforce compliance with the Employment Act. This is done through the state-level Labour Offices found throughout the country. Each office is manned by a number of officers who are required to:

- carry out routine inspections of places of employment
- investigate complaints from employees
- make decisions on employees' claims when they are disputed by the employer
- answer queries on the Employment Act (and other labour legislation) from employers and employees
- prosecute employers who refuse to comply with the Act

Like many other government departments, the Labour Department has difficulty in coping with an ever-increasing workload. The number of officers employed has generally not kept pace with the growth of industry, especially in the major development areas of the Kelang Valley, Johore and Penang. For example, in 1994 the Seremban Labour Office had only 10 enforcement officers to cover some 12,000 employment

premises.[2] In 1999 the Port Klang Labour Office with a jurisdiction stretching from the Port to as far away as Subang Jaya, Sepang and Kuala Selangor had 9 officers to protect employees in 19,000 premises. As of 1998 approximately 300,000 establishments were registered with the Labour Department throughout the country. The total number of officers employed in the Department, including those at headquarters, is around 270. Thus, to a great extent their enforcement activities rely on complaints from employees. A proactive position of regular checks on employers is difficult to achieve given the limited number of staff available. The focus of the Department therefore tends to be on those employees who know their rights and are willing to come forward and make a formal complaint. Many workers are still being exploited by their employers, who take advantage of the employees' ignorance to deprive them of even the basic benefits provided for under the Act. It is also true that some employers do not provide the statutory benefits because they are ignorant of the requirements of the law. In order to facilitate inspection of employment premises, all establishments are required to register with the Labour Department in their area within 90 days of their commencing operations.

The Department of Labour is not merely reactive in its work. It is required to enforce the Employment Act and other labour legislation. To do this it not only carries out inspections as suggested above and prosecutes employers when necessary; it also advises employers on government policies and their implementation at the work place. For example, if it is found that a major establishment is not keeping to the racial quotas for employees as required by the government's New Economic Policy, it will be advised to take steps to change any racial imbalance. If Muslim employees are not given adequate prayer facilities or time off to pray, the Department may remind the employer of Muslim employees' rights. The Department is currently very active in encouraging employers to adopt the Code of Practice on

Prevention and Eradication of Sexual Harassment at the Workplace. To achieve this objective it has been holding a number of seminars for employers to help explain what steps can be taken to implement this Code.

The Department also investigates claims of unfair labour practices such as discrimination on grounds of sex or race, sexual harassment, etc. While Malaysia has no specific law on such matters, the Department has sufficient authority that its recommendation to any individual employer to stop such practices is usually followed.

The Port Klang Labour Office

LABOUR COURT

It can be seen from the above functions of the Labour Department that it has certain quasi-judicial functions. When a dispute arises between an employer and his employee

concerning the latter's entitlements under the Act, the Labour Officers are empowered to hear the dispute and make a decision. This process is commonly known as "the labour court". This court should not be confused with the Industrial Court. The latter, which will be discussed in Chapter 8, deals with trade disputes between employers and employees, including claims of unfair dismissal. Under the Employment Act an employee has the right to bring certain complaints (not trade disputes as defined in the Industrial Relations Act) to the attention of the Department of Labour. The concept of a labour court has existed in Malaysia since the 1890s when the Perak state government established a court to cater for complaints made by Chinese mine workers.

The type of claims heard by the Labour Department officers relating to the provisions of the Employment Act include claims for:

- termination benefits
- maternity benefits
- overtime payments
- sick pay
- annual leave pay
- public holiday pay

The Department of Labour may also, under the Employment Act (Section 69), inquire into and confirm or set aside any decision of an employer to dismiss, downgrade or give any other punishment to an employee under Section 14 of the Act. However, if an employee wishes to claim reinstatement under the Industrial Relations Act, Section 20 (as discussed in Chapter 9) and he has made a complaint to the Director-General of Industrial Relations, he cannot also make a claim at the labour court. The employee must choose the remedy he prefers.

Figure 2.1 shows the process by which claims are made and heard at the labour court. Appeals from the labour court

can be made to the High Court if either party is dissatisfied with the decision. If, after a hearing, the court orders an employer to pay certain sums of money due to an employee but he fails to do so, the Department of Labour can sue the employer on behalf of the employee in the Sessions Court.

Figure 2.1.
Claim Process at the Labour Court

Table 2.1 lists the subject matter of the cases dealt with by the labour courts from 1994 to 2000.

Table 2.1
Claims at the Labour Court, Peninsular Malaysia, 1994-2000

Year	1994	1996	1998	2000
Claims against Employer	9,316	10,876	10,057	7,462
Claims against Employee	76	257	781	780

Source: Website, Ministry of Human Resources.

The court is only available to employees and their employers. Should a question arise as to whether a complainant is indeed an employee, the question may need to be referred to the High Court for a decision.

Hearings of the labour court are less formal than the civil and criminal courts of justice, but the basic rules of judicial procedure are followed.

Decisions of the Labour Officer may be appealed to the High Court and subsequently to the Federal Court. The decisions of the higher courts have proven invaluable in interpreting some of the more confusing sections of the Act.

COVERAGE OF THE EMPLOYMENT ACT

Not all employees are protected by the Employment Act. Those covered, according to the first schedule to the Act, include:

1. Any person, who has entered into a contract of service with an employer under which such person's wages do not exceed RM1,500 a month.
2. Any person, who has entered into a contract of service with an employer, without regard to his wages who:
   - is engaged as a manual labourer
   - supervises employees engaged in manual labour
   - is engaged in the operation or maintenance of any vehicle for the transport of passengers or goods
   - is engaged as a domestic servant

Although domestic servants are within the scope of the Act according to the First Schedule, they are exempted from all the key provisions relating to minimum benefits. The only section of any importance which applies to domestic servants is a requirement that the servant must give 14 days' notice prior to resigning. Domestic servants include all categories of workers who are employed in private homes, such as a maid, butler, nanny, cook or gardener.

The Employment Act only applies to West Malaysia. Workers in Sabah and Sarawak are covered under separate legislation which, on the whole, provides lesser benefits. There have been a number of requests that employees in these two states be offered the same protection as their counterparts in the rest of Malaysia but this has largely been resisted by employers.

Public sector employees, consisting of the civil service, statutory bodies and local authorities, have been exempted from the Act. In most cases, employees in this sector enjoy better benefits than those provided for under the Act.

A number of questions arise about who is given protection under the Act. It is commonly believed that employees holding the title "executive" or "manager" are not covered. A careful reading of the First Schedule to the Act (see Appendix "B") will reveal that job title is not the key factor in deciding whether or not a person is covered by the Act. Wages and occupation are more significant. Thus, all employees in the private sector in West Malaysia whose wages are not more than RM1,500 per month are covered even if they are holding positions as executives, officers or managers.

Wages

For the purpose of deciding whether an employee is protected by the Act, "wages" is defined as basic wages and all other payments due under the contract of service excluding:

- annual bonus,
- overtime payments,
- commissions,
- subsistence allowances, and
- travelling allowances.

Determining whether remuneration can be considered wages or not is a vexing question and different laws use different definitions. In particular, both the Employees Provident Fund

Act and the Employees Social Security Act have definitions of "wages" which differ from the Employment Act. See Chapter 3 for more details on these definitions.

Manual Work

Another potentially tricky question is what type of work should be considered "manual" work. This term is hardly used today in industry. The dictionary will tell us that manual work is work done with the hands. However, most jobs require the use of the hands at some point. A lecturer writes with her hands on the white board. Is she a manual worker? A doctor may touch and feel his patient with his hands to diagnose a problem. He then writes a prescription and case notes. Is he a manual worker? Commonly, the term manual labourer connotes someone who uses his hands (and probably feet too) as an adjunct to certain simple tools. He uses his brainpower very little. Thus a ditch digger, a gardener, a member of a road tarring gang all come to mind. The picture begins to blur a little, however, when we think about a machine minder or operator who uses his hands to turn the machine on and off, to tighten screws when necessary, to insert raw materials and to remove finished goods. This work may not require a great deal of physical exertion, but it does need a minimal amount of brain work to provide quality output from the machine. If the machine is computerised, the amount of physical work probably decreases even further, but the worker must ensure proper settings of the machine, which requires him to think more. At present all such jobs are generally classified as manual work. Sometimes, manual and non-manual workers are differentiated by asking whether the employee works in an office or not. Thus, office workers could be considered non-manual workers. However, even this test breaks down in some situations. Unfortunately, on this issue as to what is manual labour and what is not there are no helpful local court decisions. Nor are there any recent English court decisions as the term "manual worker" has long been removed from British legislation.

At present, most manual workers are covered by the Act because their wages are less than RM1,500 per month. However, with the current rate of inflation and general increase in wages it is possible that this question will become pressing in the near future..

EMPLOYEES' RIGHT TO UNIONISE

Employers may not put any clause in a contract of employment which in any way restricts the right of an employee to join a registered trade union, to participate in the activities of that union or to join with others for the purposes of forming a union. (Employment Act, Section 8) While the Trade Unions Act and the Industrial Relations Act are the more important pieces of legislation as far as the rights of employees to form and join trade unions is concerned, the Employment Act, which in fact predates both of these Acts, makes it clear that employees are to have the right to unionise. Employers can not interfere with that right. Americans coined the term "yellow dog contract" for an employment contract whereby the worker signs away his right to join a union. Such a contract is clearly illegal in Malaysia.

NOTICE TO TERMINATE A CONTRACT

A lot of confusion exists concerning the right of the parties to a contract of service to terminate that contract. The Employment Act (Section 12) says:

> *"Either party to a contract of service may at any time give to the other party notice of his intention to terminate such contract of service."*

If the employee wishes to give notice of his intention to resign there is no difficulty. The problem arises when employers decide that they wish to terminate the employee's services. Section 12 has been taken to mean that the employer has the right to dismiss an employee without assigning any reason providing he gives proper notice. However, as will be seen in Chapters 8 and 9, the Industrial Relations Act, (Section 20) provides machinery for dismissed employees to make claims of reinstatement if they believe their dismissal to be unfair. Such claims, if not resolved through conciliation, are arbitrated by the Industrial Court which has repeatedly said that "termination simpliciter" (dismissing an employee without a proper reason) is not acceptable in Malaysia today. Not only must the reason for the dismissal be reasonable, but the procedures followed prior to the dismissal should be fair. Security of employment is an important social principle which is strictly upheld by the Court as a court of equity and good conscience.

There are two provisions of the Employment Act relating to notice of termination of a contract of employment. First, the employer can decide on the notice period required and have this agreed to in the contract of employment. However, where there is no such clause in the contract, then the provisions of the Employment Act will apply. Section 12 states that where the contract is silent on the length of the notice period then the notice shall be not less than:

> *"four weeks' notice if the employee has been employed for less than two years on the date on which the notice is given;*
>
> *six weeks' notice if he has been employed for two years or more but less than five years;*
>
> *eight weeks' notice if he has been employed for five years or more."*

A number of terms and conditions of employment in the Employment Act are dependent on the employee's length of

service. These include his right to paid sick leave, annual leave and termination benefits. In all these cases, the same categories are used, viz., employees with less than 2 years service, those with 2-5 years' service and those with 5 years or more service. The second requirement of the Act concerning notice prior to termination is that whatever notice period is agreed between the employer and the employee, it must be the same for both parties.

Either the employer or the employee can terminate a contract of service without giving the required notice if he pays to the other party an indemnity, i.e, a sum of money equivalent to the amount of wages which would have been earned during the notice period. (Section 13) Where an employee has given notice as required by his contract, an employer has the right to disallow the worker from working during the notice period and pay him an indemnity. An employer might do this if, for example, he believed the worker was leaving to join a competitor and might make use of the notice period to collect information to be passed on to the competitor which would be damaging to the business of the employer. If an employee's services are summarily terminated, i.e. he is not given the proper notice nor is he paid the indemnity mentioned above, then he can make a complaint at the nearest Labour Office to claim the indemnity. He cannot, however, also make a claim of unfair dismissal at the Industrial Relations Department. (Section 69 of the Employment Act) He must choose which remedy he wishes to pursue.

The provisions on notice stated above do not apply to domestic servants. The contract of a domestic servant can be terminated by either party, the employer or the employee, by giving 14 days' notice or wages in lieu of the notice period unless there is a written contract between them with a clause providing for a different period of notice. If the contract is terminated on the grounds of misconduct no notice or wages in lieu thereof are payable.

The general principle that the length of the notice period prior to termination of the employee's service depends on the agreement between the two parties does not apply when employees are retrenched. In this situation, the minimum notice to be given to employees is 4 weeks, 6 weeks or 8 weeks depending on the length of the employee's service with the employer.

TERMINATION FOR MISCONDUCT

Section 14 gives the right to an employer to dismiss, downgrade or impose any other lesser punishment on an employee who, after a "due inquiry", is found guilty of misconduct. If, prior to holding the inquiry, usually known as a domestic inquiry, the employer wishes to suspend the employee from work to facilitate investigations or for any other reason he can do so up to a maximum of two weeks. During that suspension period the worker is entitled to half his wages. If he is subsequently found not guilty of any misconduct, the remaining half-pay must be paid back to the worker concerned. Chapter 9 gives details as to how a domestic inquiry should be constituted.

BREACH OF CONTRACT

Both employers and employees can be guilty of breaching the contract of employment. According to Section 15, if an employer fails to pay wages as required by the relevant section on wages, then he is guilty of breach of contract. In such a case, if the employer intentionally refused to pay the employee's wages, the latter could walk off the job without giving notice. He could, in fact, claim constructive dismissal.

More commonly, employees are found to breach the contract of employment by being absent without permission. Section 15 (2) is another section of the Employment Act which causes a lot of confusion. The Act says:

> *"An employee shall be deemed to have broken his contract of service with the employer if he has been continuously absent from work for more than two consecutive working days without prior leave from his employer, unless he has a reasonable excuse for such absence and has informed or attempted to inform his employer of such excuse prior to or at the earliest opportunity during such absence."*

Before a breach of the contract can be assumed on the grounds of absence, an employer has to look at a number of factors. The breach does not occur until the employee has been absent for more than two consecutive working days. Thus, absence for one or two days is misconduct for which disciplinary action can be taken, but it cannot be cause to assume the employee has breached his contract. Furthermore, if the employee has a "reasonable" excuse for his absence and he has informed, or tried to inform, the employer as to why he is absent, then once again he has not breached his contract of employment.

MINIMUM DAYS OF WORK FOR ESTATE WORKERS

Daily rated workers on agricultural estates are guaranteed work (and therefore payment) for at least 24 days per month provided the employee is willing and fit to work. This provision of the Act (Section 16) is necessary because in rubber estates it is not always possible for trees to be tapped in wet weather. In the monsoon season, therefore, workers might find that they were only able to tap rubber for a few

days each month, thus seriously reducing their take-home pay. As the weather is certainly not within the control of the worker it would be unreasonable for him to forego his pay in such circumstances.

PAYMENT OF WAGES

As far as employees are concerned, wages are an area of great concern. Malaysia does not have a minimum wage for all workers. The Wages Councils Act of 1947 gives the authority to specially constituted Wages Councils to set such minimum wages in certain industries. Councils have been set up in only a few sectors, mostly where workers have traditionally found it difficult to group themselves into unions and fight for their own rights. The Wages Councils currently in existence are in the following industries:

- Cinema workers;
- Shop assistants;
- Hotel and catering industry workers; and
- Port of Penang stevedores.

Not only is the coverage of the Councils strictly limited but the minimum wages set are infrequently upgraded. For example, the Catering and Hotel Wages Council last amended its regulations in 1982. The minimum wage set for the workers in this sector is RM185 per month (for those over 18 years of age). However, most workers do in fact receive more than the minimum because over time employers have been forced to pay more, given the rising wage rates generally throughout the country and also because of the increasing difficulty in getting workers.

Should Malaysia legislate a minimum wage for all workers? The government has generally resisted any suggestions that there should be a minimum wage applicable

throughout the country. It has been pointed out that the cost of living varies from region to region, and between cities and smaller towns. A high wage suited to the needs of areas with a higher cost of living would be too expensive for employers in smaller towns or those newly established. A very low minimum wage would be meaningless in the larger cities. Therefore, the government believes that wage levels should be left to market forces or, as will be seen in Chapter 6, to negotiation between employees' unions and their employer through collective bargaining.

The Employment Act does not establish minimum wages, but it does lay down certain procedures relating to the payment of wages to ensure workers are not exploited. In particular, the Act deals with:

- wage periods
- advances on wages
- deductions from wages
- priority of wages
- the truck system

Wage Periods

Wages must be paid at least once every month. Employers may pay more frequently, but not less. The wage period does not have to be a calendar month. For the sake of banking and accounting convenience, an employer may decide, for example, that the wage period in his company is to be from the 15th of one month to the 14th of the next month. Having decided on a wage period, the employer must make payment of wages not later than 7 days after the end of that wage period. This means that wages must be paid regularly and within the stipulated period so that workers are able to plan their financial requirements and be certain as to when they will be receiving their wages.

Advances on Wages

Employers are not encouraged to lend money to their employees as this may lead to all kinds of industrial relations problems. Therefore, the giving of advances on wages and subsequent deductions are strictly regulated. However, some employers are willing to offer an advance on wages to their employees at certain times of the year, particularly at festival times.

If an employer agrees to give one or more of his employees an advance on wages, the maximum advance that can be given is the equivalent of one month's wages. The only exception to this restriction is when the purpose of the advance is to help the employee buy a house (or land); livestock, a car, motorcycle or bicycle; or to assist the employee buy shares in the employer's business offered for sale by the employer. Should the employer want to provide an advance for any other purpose where the amount is more than one month's wages he must request permission from the Director-General of Labour.

Deductions from Wages

Deductions from employees' wages are only allowed in certain restricted circumstances. Furthermore, the maximum monthly total deduction must not exceed 50 per cent of the employee's wages unless the amount to be deducted includes repayment of a housing loan. In this case, with the permission of the Director-General of Labour, the total deductions may be increased to 75 per cent of the monthly wage.

The employer has the right to make certain deductions such as for the purpose of:

- recovery of wages overpaid in the immediately preceding three months prior to the month of deduction;

- payment to the Employees Provident Fund, Employees Social Security Organisation and Inland Revenue Board; and
- recovery of advances where no interest is charged.

If the employee wishes deductions to be made and paid on his behalf to a third party, this may be done if the employee puts his request in writing and providing the deduction is for payment to a trade union (the check-off system), or co-operative society. Any other deductions require the written permission of both the employee and the Director-General of Labour. Such deductions include:

- Payment into a welfare or insurance scheme, which is for the benefit of the worker;
- Repayment of any advance given to the worker where an interest payment is imposed;
- Payment to a third party;
- Payment for purchases of the company goods made by the employee; and
- Payment of rental for accommodation provided by the employer or the cost of any service provided by the employer to the employee.

When No Wages Need Be Paid

Employers are not required to pay wages in the following situations:

- The employee is being held in custody by the authorities;
- The employee is in prison; or
- The employee is required to attend a court hearing or trial (except where he is a witness for the employer).

Truck System

To prevent exploitation of workers, the Employment Act stipulates that wages must be paid in legal tender. With the employee's written agreement, payment may also be paid directly into the employee's bank account or by cheque. For many years, employees had the right to insist on receiving their wages in cash. No doubt at the time the Employment Act was first introduced banks and their branches were not so plentiful and fewer people, therefore, kept their money in such institutions. Now, many large factories have automated teller machines in the factory premises to make it easy for workers to withdraw cash as and when necessary. Payment of wages in cash is, therefore, an anachronism. Apart from the administrative difficulties involved in collecting cash from the bank, counting it out and giving it personally to each worker and having him sign for it, there is added danger of robbery. It is not unknown for factory buses to be waylaid on pay day. Thus in 1998 the Act was amended to make it clear that workers could only insist on being paid in cash if they had a strong reason. If the employer is not willing to accept the employee's reason, the latter can raise the matter at the Labour Department, which will decide whether the employee should be paid in cash or not. Section 25 of the Employment Act is intended to ensure that workers get paid in money for their services rather than being forced to take unwanted goods as payment.

Priority of Wages

If an employer is forced by a court to sell off property and assets to pay debts, employees who have not been paid their wages receive priority over all debtors, but they can only claim a maximum of four months' wages.

Non-payment of Wages and Other Monetary Terms of the Contract

Any employee, including an employee who earns between RM1,500 per month and RM5,000 per month, can make a claim against his employer at the Labour Department if he is not paid wages or any other monetary benefits payable under his contract. This provision (found in Section 69B of the Act) does not entitle workers earning more than RM1,500 per month (unless they are within the scope of the First Schedule to the Act as described above) to the benefits of the Act, but it does mean that if they are owed wages by their employer, they do not have to resort to the civil courts to get payment.

EMPLOYMENT OF WOMEN

The Employment Act provides special protection for female workers. The Act does not require equal pay for equal work, nor does it outlaw discrimination against women. The provisions of the Act relating to women mostly concern working hours and maternity benefits.

Women and Night Work

Women may not work between the hours of 10.00 p.m. and 5.00 a.m. in industrial and agricultural undertakings. However, the Director-General of Labour has the power to exempt any group of female employees from this restriction upon the application of the employer. If the Director-General is satisfied that there would be no unduly negative effects on the employees concerned, exemption is usually granted, albeit with a number of conditions which relate to the provision of transportation, payment of shift allowance for the female workers and the establishment of a rotating shift

system. It could be argued that, in this age of equality of the sexes, such protective measures are not necessary and are discriminatory.

Women and Underground Work

The law also stipulates that women may not work in underground mining operations. Such a restriction is not very meaningful in the current economic climate of Malaysia where underground extraction of minerals is very rare. Thus, this is another example reflecting the age of the Employment Act and the fact that most of its provisions were borrowed from the British economic context.

Maternity Protection

All female employees are entitled to 60 days' maternity leave each and every time they give birth. There is no restriction on the number of times an employee may take maternity leave. Every time she gives birth she will be entitled to maternity leave. Up to a maximum of 30 days of this leave may be taken before the worker gives birth. Generally, most women prefer to keep all their maternity leave for the period after their baby is born. If a doctor appointed by the employer certifies that the pregnant employee is unable to satisfactorily carry out her duties, the employer can insist she start her maternity leave up to 14 days before her expected confinement.

During the maternity leave period a female employee does not receive wages, but is entitled to be paid a maternity benefit or allowance which is an amount equivalent to her wages if, at the time of confinement, she has no more than 5 surviving children and she has served the employer for at least 90 days. This sum is payable even if the employee should die (from any cause) during the maternity leave period. It must also be paid if the employee resigns from her job during the last four months of her pregnancy.

Employees who are on unpaid maternity leave, either because they already have 5 children, all of whom are alive, or because their service is less than 90 days, can return to work at any time during the 60 day leave period, providing the employer agrees and a medical practitioner confirms that the employee is fit to work.

An employee may not be dismissed for any reason during her maternity leave.

One of the weaknesses of the Act is that it does not provide paternity leave for male employees. It would seem appropriate that men be given the opportunity to take paternity leave to help their wives and children and to be able to bond with their new-born child. Most employers do, however, allow employees a few days off for this purpose, either by permitting them to use their annual leave or by granting compassionate leave. Nevertheless, this is an area in which the Act could be improved.

WORKING HOURS AND LEAVE

Exploitative employers have been known to require employees to work very long hours without a break in order to ensure the maximisation of profits. While short-term gains may be achieved in this way, the health of the employees will suffer and eventually the quality of work will also be affected.

Working hours of employees have varied widely throughout recent history and are still very different in different countries. Table 2.2 shows the average number of working hours per year of workers in a number of countries.

Table 2.2
Average Annual Working Hours 1997 and 2000

Country	Average annual working hours 1997	Average annual working hours 2000
Taiwan	2,330	2,176
Hong Kong	2,312	2,181
Mexico	2,302	2,150
Turkey	2,263	2,074
Chile	2,256	2,244
Thailand	2,245	2,092
Malaysia	2,157	2,217
New Zealand	1,880	1,873
United Kingdom	1,839	1,833
Denmark	1,689	1,687

Source: The World Competitiveness Yearbook. Switzerland: IMD, 1998 and 2001.

Rest Day

There is some research evidence to suggest that accidents are more likely to occur at night or late in the day when workers are tired and sleepy. The Employment Act, therefore, requires all employees protected by the Act to be permitted one rest day per week. Most employees in the construction, manufacturing, hotel and agricultural sectors work a full 6 day week. Traditionally, office workers and executive staff have worked fewer hours. In most commercial undertakings, the norm has been for employees to work 5½ days per week. Lately, however, there has been a growing trend for companies to introduce a 2-day weekend break. Employers with a 5-day work week may require their employees to work longer hours per day to make up the time lost at the weekend.

When a daily rated employee agrees to work on his rest day at the request of his employer he is entitled to a higher than normal rate of pay, i.e., if he works less than half his

normal hours of work, he is to be paid one full days' wages and if he works between half the normal hours and the full hours he is entitled to 2 days' wages. A monthly rated employee who works on a rest day will not only receive his normal monthly wages; but he is also entitled to an extra half-days' wages for up to a half-days' work and a full days' wages if he works between half the normal hours and a full day.

Maximum Working Hours

According to the Act, the maximum working hours per day that can be required of an employee are 8. With overtime, this can be increased to 12 (overtime is voluntary in most circumstances). If the organisation does not require the employee to work 6 full days per week than the daily working hours can be increased to 9. Usually, any lunch and tea breaks are not considered working hours unless employees are not free to leave the company premises in which case working hours will be inclusive of such breaks.

The Director-General of Labour has the authority to exempt any group of employees from the sections of the Act referring to working hours. A number of organisations have been granted such exemption, especially those in the tourism industry.

Overtime

Overtime rates and maximum number of overtime hours that can be worked per month are included in the Act and its regulations. Rates of pay for overtime work for monthly rated workers are 1.5 times the hourly rate of pay. Currently, the maximum number of hours of overtime that can be worked is 104 hours per month. Any employer who allows an employee to work more overtime than permitted by the law commits an offence for which he could be prosecuted.

Public Holidays

It is reasonable to expect that employees should be able to enjoy public holidays. However, the Act only entitles workers to 10 public holidays per year whereas Malaysia has 16 (or 17, depending on the state) such holidays. Again, manufacturing industries tend to allow their employees only the minimum number of public holidays whereas in the commercial sector it is the norm to close on all of these holidays. If a worker is requested to work on one of the public holidays to which he is entitled, he must be paid at premium rates, i.e. he is entitled to two day's extra wages over and above his holiday pay, even if he works less than his normal daily hours.

Annual Leave

The amount of annual leave granted to workers depends on their length of service with their employer. Workers with less than two years service are entitled to 8 days per year, those with 2-5 years' service can take 12 days per year and those with more than 5 years' seniority have a right to 16 days' annual leave per year. This system should serve as a disincentive to job-hopping. However, in practice it does not seem to make any difference. Higher wages, and possibly the search for a more conducive work environment, seem to be more important factors when employees decide to change jobs.

Emergency leave or compassionate leave is not provided for in the Employment Act although in practice many employers do permit employees to take such leave, often on an unpaid basis.

Sick Leave

A further benefit to which employees are entitled under the Employment Act is paid sick leave. Before they can avail themselves of this privilege they must undergo an

examination by a registered medical practitioner appointed by the employer (known as a panel doctor) and be certified unfit for work by the doctor. The employer is required to pay for this medical examination and he frequently also pays for any treatment recommended by the doctor. The employer does not have to accept medical certificates from doctors not on his duly appointed panel unless the employee, being faced with a medical emergency, was unable to seek treatment from his company's panel doctor.

An employee's sick leave entitlement, like his annual leave and other benefits, depends on his length of service. Thus, if he has less than 2 years' service he is entitled to 14 days' sick leave per year. If he has 2-5 years' service he can take up to 18 days' sick leave and if he has served his employer for 5 years or more, then he is entitled to 22 days' annual sick leave. There seems to be an assumption in the law that the more senior the employee the more likely he will need to take sick leave.

Many employers believe that employees take advantage of the sick leave benefit by claiming to be ill and persuading a doctor to certify them unfit for work when in fact there is little wrong with them. This is a very sensitive and vexing issue. Employers have been known to warn their panel doctors not to provide medical certificates unnecessarily to employees. Doctors are then faced with an ethical dilemma. If their patients complain of certain symptoms which may be difficult to see or scientifically test, the doctor must decide whether the patient is merely malingering or whether he is indeed telling the truth - a difficult decision to make. The medical code of conduct requires the doctor in this situation to give the benefit of the doubt to the patient. Yet, if he issues medical certificates too frequently he may be in danger of losing a lucrative source of income, i.e., he will be removed from the employer's panel of doctors.

When hospitalisation is required the employee is entitled to up to 60 days' paid medical leave per year inclusive of any sick leave entitlement.

TERMINATION BENEFITS

The Employment Act entitles employees whose services are terminated to receive termination benefits from the employer. If an employee wishes to challenge the validity of his termination, he can make a request for reinstatement under the machinery of the Industrial Relations Act as outlined in Chapters 8 and 9. If he accepts his termination but is not paid the benefits due, then he can make a complaint at the Labour Office.

Employees are NOT entitled to termination benefits if they retire at the age stipulated in their employment contract, if they are dismissed for misconduct, or if they resign of their own accord.

Only those workers with a minimum of 12 months' service are entitled to termination benefits. The quantum is :

a) 10 days' wages for every year of employment if the worker has been employed less than 2 years;

b) 15 days' wages for every year of employment if the worker has between 2 years and 5 years service with his employer;

c) 20 days' wages for every year of employment if the worker has 5 or more years service with his employer.

It should be noted that, in a number of instances, workers do not receive the termination benefits to which they are entitled. This is generally in the circumstances where a company has been taken over by a court-appointed receiver on the grounds of insolvency. If the company is declared bankrupt and the services of the employees are terminated, the workers are entitled to benefit. They will only receive the money, however, if there are sufficient funds available once all other debtors have been paid off by the receivers. Under the Companies Act payment of termination benefits is given a low priority.

EMPLOYMENT OF FOREIGNERS

Foreign workers who are legally employed in Malaysia, and who are within the scope of the First Schedule, are also protected by the Employment Act. They are entitled to the same benefits as locals. If the employer discriminates between locals and foreigners in relation to their terms and conditions of service, the workers concerned can make a complaint at the Labour Department. After an investigation the Labour Department may order the employer to provide similar terms to both groups of workers.

However, if the employer is conducting a retrenchment exercise, foreigners employed in the jobs concerned must be retrenched before local workers.

CHANGES TO THE EMPLOYMENT ACT

A number of parties have recommended the complete overhaul of the Employment Act, which is seen as archaic and the cause of many difficulties to employers, especially those in small and medium sized enterprises. Furthermore, it does not effectively help the workers it is supposed to protect. Although enforcement difficulties lie more in the problems of the Department of Labour rather than in the Act itself, undoubtedly if the Act was clearer and simpler there would be less cases of employers breaking the law out of ignorance and confusion.

Most small organisations do not have qualified, experienced human resource management officers. The staff delegated to handle personnel matters are often unaware of even the most basic law, and thus make many mistakes. In a National Workshop[3] it was pointed out that many smaller employers assume that mutual agreement between employer

and employee can override the Employment Act. For example, if a worker signs an agreement that he will not claim overtime but will accept time off in lieu of the overtime payment or if a female employee agrees to forego maternity leave, the employer may be shocked to discover at some later date that the employee has made a claim at the Labour Office for the payments due. If a number of employees are involved, large sums of money may be due to the workers.

A group of 21 unions[4] suggested the following changes be made to the Employment Act:

- Coverage of the Act. There should be no wage restriction. All employees irrespective of wages earned should be protected by the Act. The Act should be extended to cover workers in Sabah and Sarawak.
- Annual Leave. It should be clarified to what extent the employer can utilize employees' annual leave for the purpose of annual maintenance shut-downs and other purposes whereby the employees are forced to use up their annual leave against their wishes.
- Definition of Wages. There needs to be a standardization of the definition of wages between all the labour legislation. This would simplify matters for both employers and employees.
- Sick Leave. The Act should require employers to pay for treatment of sick employees.

In 1994, the Malaysian Trades Union Congress (MTUC) suggested that maternity leave should be extended in both the private and public sectors to 84 days, as recommended by the International Labour Organisation.[5]

CHILDREN AND YOUNG PERSONS (EMPLOYMENT) ACT, 1966

For many years, this Act has largely been ignored in the business community. The prevalence of children working has not been well documented, although from time to time the mass media have highlighted the exploitation of child labour by unscrupulous and uncaring employers. It appears that the serious labour shortage facing the manufacturing sector in the 1990s forced certain employers to resort to recruiting young people in breach of the law.

The International Labour Organisation has a convention relating to the employment of children, but this has not been ratified by Malaysia. Certain parts of the convention are not agreeable to the government, particularly in relation to the need to provide compulsory education to all children. While Malaysia does in fact provide free education to all children up to secondary level, it does not wish to make this education compulsory. However, in the year 2000, the Malaysian government decided to ratify a new convention on the worst forms of child labour.

Malaysian law does not prohibit children from being employed. It does however, try to protect them from abuses. The Children and Young Persons (Employment) Act sets out the rules and conditions for employing children and young persons. Like the Employment Act, it is enforced by the Department of Labour and it also covers employment in West Malaysia only.

A child is defined as a person under the age of 14 and a young person is between 14 and 16 years of age. Thus once a worker attains the age of 16 he is considered adult for the purposes of employment, and is given no special consideration.

Employment of Children

A child may be employed in "light work suitable to his capacity" in his family's undertaking. He may also work in public entertainment or in areas relating to his studies in any school or training institution or as an apprentice. For the purposes of the latter, he must have an apprenticeship contract in writing which is to be deposited with the Director-General of Labour.

Children may not work between the hours of 8.00 p.m. and 7.00 a.m. and they must be permitted a rest of 30 minutes after every 3 consecutive hours of work. They may not work more than 6 hours per day. The restriction on night work does not apply if the child is working in any public entertainment.

Employment of Young Persons

Young persons may be employed in the same circumstances as children as described above, and also in any work suitable to his capacity (not necessarily in a family business), in any office, shop, cinema, club, factory and so on. Females may not, however, work in a hotel, bar, restaurant or club unless this organisation is controlled by their parents.

Young people are not permitted to work between 8.00 p.m. and 6.00 a.m. and they are entitled to a rest break of at least 30 minutes every 4 hours. They may not work more than 7 hours in one day although apprentices may work for a full 8 hours each day. If the young persons are employed in public entertainment or the agricultural sector, the restrictions on night work do not apply.

The Factories and Machinery Act also plays a part in restricting the employment of young persons. This Act, which is discussed in more detail in Chapter 4, prohibits young persons from carrying out work involving machinery or in proximity to such machinery.

Whether child labour should be permitted at all is a difficult issue. There are many instances where the parents of the children concerned prefer that they work as they are unable to cope with school work and may have dropped out of school. By working, they are using their time productively and are less likely to be tempted into criminal and unsociable activities. The mother of a 15-year old found working in a construction company was said to have given the company a letter of permission allowing the boy to work. She had hoped to "keep him away from bad company".[6] There are also parents who pressure their children to work in order to supplement the family's income. In most cases neither the children nor their parents are aware of the existence of the laws to protect the children.

Table 2.3 shows that the Department of Labour is constantly taking steps to enforce the Children and Young Persons (Employment) Act. It is very likely, however, that these figures reveal only a small percentage of the number of instances of children working.

Table 2.3
Number of Prosecutions under the Children and Young Persons (Employment) Act, 1994-1998.

Year	Number of Prosecutions	Total Fines Collected (RM)
1994	24	8,040
1995	13	7,550
1996	13	12,100
1997	4	6,500
1998	3	4,900

The existence of child labour reflects the negative side of the country's economic development and the desperate measure employers will take when short of labour. A major electronics

company in Seremban was caught by the Labour Department employing a "child" and 64 "young persons". The employees concerned were found to be in excess of the permitted daily working hours; were not given the required rest breaks and were working after 8.00pm - all offences under the law.[7]

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4 Conference Conclusions and Recommendations of the National Conference on "Towards a Positive Relationship Between Trade Unions and Employers in Achieving Vision 2020". Kuala Lumpur, April 1992.

5 *The Star.* 25 July, 1994.

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7 *The New Straits Times,* 15 December, 1994.

REVIEW QUESTIONS

1. What is the main reason for the existence of the Employment Act?
2. Which workers are protected by the Employment Act?
3. Outline the main benefits provided for under the Employment Act.

DISCUSSION QUESTIONS

1. What are the major changes which you would recommend be made to the Employment Act
2. To what extent is it reasonable to expect the Labour Department to be able to protect all workers from exploitation?
3. Should the law relating to child labour be amended?
4. Other than the existing laws, what other labour legislation might be useful in Malaysia?

Chapter

The Social Security Laws

- *Social Security Systems*
- *Employees Provident Fund*
  - *Membership*
  - *Contributions*
  - *Withdrawals*
- *Employees Social Security Act*
  - *Scope of the Act*
  - *SOCSO Schemes*
  - *Effectiveness of the Social Security Organisation*
- *Workmen's Compensation Act*
- *References*
- *Review Questions*

SOCIAL SECURITY SYSTEMS

In an ideal world every individual would make arrangements so that in the event of any financial problem, he or she would have sufficient funds to deal with such eventualities. Some of these contingencies may never happen, but for others there is a high probability that they will occur. Because the average person is not able to put aside money for the future, most countries' governments have established some system of ensuring the social security of its citizens. These systems are designed to protect people who are faced with:

- Unemployment;
- Post-retirement;
- Accident; or
- Serious illness.

There exist large differences in the social security systems which have developed throughout the world. Countries in Northern and Western Europe have, since the middle of the last century, introduced a wide range of benefits available to their people (not only employees) including old age pensions, unemployment benefit (often referred to as "the dole"); children's benefit paid to their parents to assist in their upbringing; accident compensation; and free medical services. Most of these benefits are paid for out of the taxation raised by the government and all citizens (and sometimes permanent residents too) are eligible to claim what is due to them. Countries which provide a wide range of generous benefits are often called "welfare states."

Not all developed countries give their people state aided assistance from "cradle to grave". In the United States of America, while unemployment benefits are widely provided by the authorities, old-age pensions are not.

Some 50 years after the introduction of welfare-state benefits in countries like New Zealand, Australia and Western Europe a number of disturbing trends have been identified

which suggest that major problems may have to be dealt with very soon or the system may collapse. For example, many unskilled school-leavers in New Zealand do not try to look for a job. Upon attaining the age of 16 (after which schooling is no longer compulsory) the youngsters apply for the unemployment benefit. Once this is granted, they team up with their like-minded friends, pool their resources by living together and spend their time partying, swimming or just lounging at the beach. In other words, the system has unintentionally become a disincentive to work.

Probably the most worrying welfare benefit is the old-age pension provided by the state, funded from current taxation. In many developed countries the population structure is changing rapidly. There are increasing numbers of older people and less younger, working adults. This means that as the pension money comes from taxation, a smaller and steadily reducing workforce has to support a growing population of elders.

The Malaysian government has decided that, as a developing country, Malaysia simply cannot afford to introduce a welfare state. However, that does not mean citizens are left to fend for themselves entirely. The Employees Provident Fund was established prior to Independence to ensure workers have an adequate source of income once they retire. In 1965 the Employees' Social Security Act was introduced to provide compensation and financial assistance to workers who are unable to work, either temporarily or permanently, as a result of a work-related accident or illness. The remainder of this chapter will discuss these two forms of social security.

EMPLOYEES PROVIDENT FUND

Post-retirement income security can be provided in a number of ways including:

- Voluntary savings and investment by individual workers;
- State provided pensions;
- Employer provided pensions; and
- Saving schemes contributed to jointly by both employers and employees which may be voluntary or required by law.

Most countries encourage a combination of one or more of the above systems. Furthermore, different groups of people in society may be covered by different schemes. For example in Malaysia, public sector employees are provided with a pension by their employer whereas private sector employees contribute to a state-run provident or savings scheme.

As mentioned earlier in this chapter, while the authorities can encourage individuals to save part of their earnings for their old age, the reality is, many either earn too little to save, or, they may save but lose the money through bad investments, or, they may be just too shortsighted to see the need for saving for the post-retirement period. Furthermore, in many developing countries, including Malaysia, there is a widely held belief that children will look after their aged parents and so there is no necessity to save.

In the modern world, no government can afford to rely on its people to voluntarily save sufficient money to last through the post-retirement years, especially as better health facilities and medical knowledge have led to this period increasing in duration.

It has already been pointed out that state-financed pensions for all citizens are a very expensive proposition. The Malaysian government currently does not have any plans to provide such pensions.

Pension schemes can also be established and administered by employers. In the USA employer-financed pensions have been the scheme of choice for over half a century. However, the American government recognized early on that there is a need to regulate these pensions to protect workers. Before such laws were introduced a number of scandals came to light whereby employers, temporarily short

on cash, had solved their difficulty by dipping into the employee pension fund. No doubt the companies concerned had intended to re-pay the money "borrowed" from the fund but when they failed to do so many hundreds and even thousands of workers were left without a pension because, by the time they retired, no money was left in the fund.

Many employer-provided pensions existed in Malaysia before the Employees Provident Fund was established. When the Fund was first set up, most of the existing funds closed. Only those with equal or better benefits were allowed to survive. By the mid 1980s nearly all of these schemes were discontinued.

The Employees Provident Fund, which is similar to the scheme in Singapore, is a compulsory government-run savings scheme to which both employers and employees are required to contribute on a monthly basis. Hong Kong has also recently introduced a compulsory joint-venture savings scheme but instead of paying into a government agency, contributions are made into any one of several government approved private investment funds administered by financial institutions.

The Employees Provident Fund Act was first introduced in 1951 and has since been amended several times but, in essence, the scheme has not changed greatly. The Act establishes a statutory body under the control of a Board which makes all policy decisions concerning the Fund. The Board has a Chairman, Deputy Chairman and 18 other members including representatives from the government, employers and employees. The Fund controls very large amounts of money which need to be carefully invested so as to increase the return to members and yet at the same time remain safe. Therefore, an investment panel is appointed, separate from the Board, to formulate investment policies.

Membership

All employees are required to become members of the Fund. An employee is defined in the Act as "any person.....employed

under a contract of service or apprenticeship, whether written or oral and whether expressed or implied, to work for an employer." The previous chapter discussed the tests for distinguishing between a contract of service and a contract for services. As long as a worker is employed under a contract of service he is required to become a member of the Fund. Thus part-time workers and temporary workers are employees as are foreign workers, with the exception of domestic servants. Any worker over the age of 55 who has not withdrawn all his savings from the Fund remains a member and continues to contribute if he is still employed. If he has already withdrawn his savings and wishes to re-contribute, he may do so..

Certain categories of employee have the option whether or not to join as members of the Fund. Workers who have retired and have withdrawn their savings can elect to re-join if they are employed.

Foreign workers earning less per month than an amount specified by the Board were required to contribute to the Fund from 1998 onwards. For a number of reasons this coverage was discontinued in the year 2001.

One of the weaknesses of the current system is that self-employed persons do not have to contribute although they may elect to do so if they wish. Thus, the many small-holders, fishermen, padi farmers, shop-keepers and other self-employed persons (including professionals like doctors who own their own clinic or lawyers who run a practice by themselves) do not have funding for their old age unless they have put aside sufficient savings.

Contributions

Over the years, the minimum rate of contributions for employers and employees has changed depending on the government's economic policy at the time. Table 3.1 shows the gradual changes that have been made to the rate of contributions over the years.

Table 3.1
Rate of Contributions to the Employees Provident Fund

Period	Member's Contribution %	Employer's Contribution %	Total %
June 1952-June 1975	5	5	10
July 1975-Nov. 1980	6	7	13
Dec. 1980 - Dec. 1992	9	11	20
Jan. 1993- Dec. 1995	10	12	22
Jan. 1996 to present	11	12	23

Source: Lee Hock Lock. Financial Security in Old Age

From 1996 to 2001 the minimum rate of contribution was 11 per cent and 12 per cent of the employee's monthly wages for employees and employers respectively. This rate may be compared to the Singapore Provident Fund rates of 36% and the Hong Kong Provident Fund of 5 per cent contributed by each party. In 2001 the employee's contribution was reduced temporarily to encourage consumer spending and help revive the economy which was in the doldrums. A year later, the rate of employee's contribution reverted to the rate of 11 per cent. The level of contribution set by law is a minimum requirement. Many employers, to attract and retain employees, offer higher levels of contribution.

Contributions to the Fund are based on an employee's monthly wages. The Employees Provident Fund Act defines wages as,

> *"all remuneration in money, due to an employee under his contract of service or apprenticeship.....and includes any bonus or allowance payable by the employer to the employer..., but does not include:*
>
> a. service charge;
>
> b. overtime payment;

c. any gratuity;

d. any retirement benefit;

e. any retrenchment or termination benefit; or

f. any travelling allowance.

Thus it can be seen that the definition of wages includes all monies, by whatever name, paid to employees, but does not include the items specifically excluded. This definition should be compared with that found in the Employment Act.

The responsibility for making the monthly contributions to the Fund lies with the employer. He must deduct the employee's contribution from the latter's wages and remit the money together with his own contribution to the Fund. Failure to pay EPF contributions is an offence and employers are regularly prosecuted if they fail to carry out this obligation. Employees will receive an annual statement from the Fund so that they can check that the correct amounts have been remitted into the Fund by their employer. An employee can also request a report on the status of his account at any time by contacting his local EPF office.

Withdrawals

Currently, a member's savings in the Fund are divided into three "accounts". No withdrawals are permitted from the first and biggest account until the employee reaches the age of 55. The second account, into which 30% of the monthly contributions are put, is available for withdrawals for purposes such as housing, education and upon reaching the age of 50. From the last account, the smallest, members can withdraw if they need to pay for medical treatment.

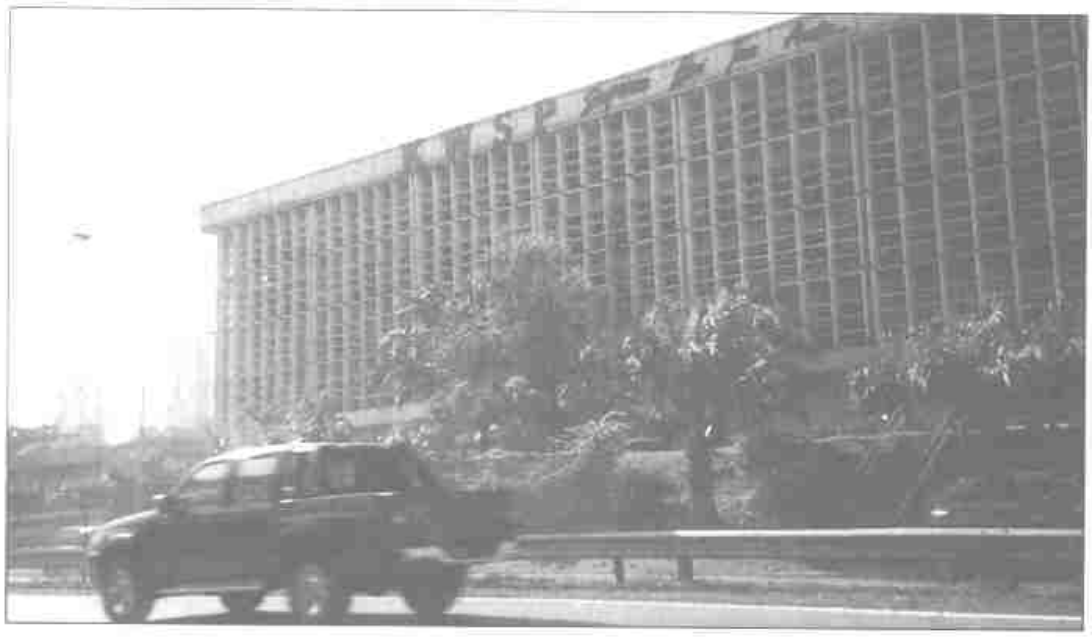
Once a Fund member reaches 55 years of age he can withdraw all the remaining money in his accounts, which consists of the accumulated contributions paid by his employer and himself, plus the annual dividend which has been declared by the Employees Provident Fund Board. Unfortunately, when employees withdraw all the money

certain negative consequences may occur. Most commonly, as shown in a study conducted by the EPF in 1995, a large percentage of members squander all the money within three years of retiring from the workforce. As the average Malaysian can expect to live well into his or her 70s, this means that, unless some other source of income is available, the members are going to be very short of money for 10-15 years at least!

In recent years more and more schemes have been introduced by the Employees Provident Fund Board allowing members to withdraw a portion of the money in their account for various purposes. Money can be withdrawn to:

- Buy or build a house or to pay off a housing loan taken from a commercial bank or other source;
- Pay for medical expenses for the member or his immediate family;
- Pay for living expenses for a worker who has been incapacitated by an accident or serious illness;
- Pay fees for tertiary education for the member or his children;
- Invest in unit trusts; and
- Buy a computer.

Critics say that these withdrawals partially defeat the key objective of the Fund as reflected in its slogan "Simpanan Hari Tua Anda." (Savings for Old Age) While there is no doubt that these schemes are for the benefit of members in the short term, it could also be said that a negative message is being sent to workers, namely that there is no need to save for whatever you want. Just take the money from your EPF account and you can have the goods today.



EPF Office in Kuala Lumpur

Unfortunately, some workers have abused and misused the schemes being offered to them by the Employees Provident Fund Board. For example, a number of scams relating to the purchase of computers were discovered. Members of the Fund withdrew their money to buy a computer but, after making a deal with the computer vendor, they never took possession of the computer. The money was used for other purposes.

In July 2000 the Employees Provident Fund Board offered a new scheme designed to overcome the problem of workers squandering their savings within a few years of their retirement. An annuity scheme was provided for interested members whereby they were permitted to purchase an insurance policy from a panel of insurance companies using money from their EPF account. This policy would pay the member a fixed monthly pension upon his retirement. However, as a result of wide-spread criticism, mostly from the Malaysian Trades Union Congress, the scheme was suspended as of May 2001.

If a worker dies before withdrawing his money, his dependents or family members will be paid the funds remaining to his credit.

Every year members of the Fund anxiously await the announcement of the annual dividend. The Act requires that a minimum 2.5 per cent dividend be declared. In recent years the rate of dividend declared has been dropping, largely owing to the generally weaker economy which gives the Fund lower returns on its investments. Much criticism has been hurled at the Fund because of the drop in the dividend rate. Table 3.2 shows the dividends declared by the Fund since 1952.

Table 3.2
EPF Dividend Rates 1952-2000

YEAR	RATE	YEAR	RATE
1952-1959	2.50	1979	7.25
1960-1962	4.00	1980-1982	8.00
1963	5.00	1983-1987	8.50
1964	5.25	1988-1994	8.00
1965-1967	5.50	1995	7.50
1968-1970	5.75	1996	7.70
1971	5.80	1997	6.70
1972-1973	5.85	1998	6.70
1974-1975	6.60	1999	6.84
1976-1978	7.00	2000	6.00

Source: Lee Hock Lock, Financial Security in Old Age and The New Straits Times, 26 March 2000.

EMPLOYEES' SOCIAL SECURITY ACT

Scope of the Act

The Employees' Social Security Act was first introduced in 1969 and its coverage was limited to only certain areas of the country but it now applies throughout all of Malaysia in all

industries in the private sector. All Malaysian employees who earn less than RM2,000 are required to become members of the Social Security Organisation. The only exception is foreign workers who are protected under the Workmen's Compensation Act.

The once-in-always-in principle is applied to employee members, i.e., even if an individual worker's wages are, at a subsequent date, raised above the RM2,000 level he remains a member of the Social Security Organisation (SOCSO) and continues to contribute monthly. An employee who is not required to become a member of SOCSO because his salary for his first job was more than RM2,000 can opt to become a member, providing his employer agrees to contribute on his behalf, i.e., there must be mutual agreement. In practice, most managerial and executive staff earning salaries of RM2,000 or more in medium to large establishments are protected in the event of accident by insurance policies taken out on a group basis by their employers, and thus very few workers avail themselves of this privilege.

Public sector workers have been exempted from the Social Security scheme since 1983 because they are covered by the Pensions Act and are entitled to medical benefits under their scheme of service. Since 1993, foreign workers in the country are no longer protected by SOCSO. Instead, employers are required to buy insurance to cover their liabilities to these workers as stated in the Workmen's Compensation Act.

The main purpose of the Social Security Act is to establish an insurance system so that employees involved in an accident at work or who develop a work-related disease, will be provided with compensation and financial assistance.

Employers are responsible for registering their employees as members of the Social Security Organisation if they are not already members and to remit the mandatory contributions monthly to the Organisation. Any employer who fails to register and to make contributions is liable to be prosecuted. For example, a legal firm was fined RM1,200 in 1994 when it

was prosecuted for not making contributions for its employees.[1] A medical clinic operating in Menara Perkeso, SOCSO's Kuala Lumpur headquarters, was fined RM3,000 in 2000 for failing to make contributions.[2] According to SOCSO's 1997 Annual Report, a total of 190 cases were brought to court and the employers concerned had to pay a total of RM238,330 in fines and some RM800,000 in backdated contributions. In 1999, the number of cases brought to court increased to 212.[3]

SOCSO contributions, like Employees Provident Fund contributions, are paid by both the employer and the employee. The current rates total approximately 2.5 per cent of the employee's monthly wages with the employer paying a higher proportion than the employee. The definition of wages provided in the Act is different from that in either the Employment Act or the Employees Provident Fund Act. Section 2 of the Act states that:

> *"wages means all remuneration payable in money by an employer to an employee including any payment in respect of leave, holidays, overtime, and extra work on holidays, but does not include:*
>
> a. any contribution payable by the principal employer or the immediate employer to any pension fund or provident fund, or under this Act;
>
> b. any travelling allowance or the value of any travelling concession;
>
> c. any sum paid to an employee to defray special expenses incurred as a result of his employment;
>
> d. any gratuity payable on discharge or retirement;
>
> e. annual bonus;
>
> f. any other remuneration as may be prescribed.

SOCSO Schemes

SOCSO has two schemes, the Employment Injury Insurance Scheme and the Invalidity Pension Scheme. The former scheme entitles the worker to treatment at a clinic on the SOCSO panel or at any government hospital. The bills are paid by SOCSO. If the worker is certified unfit for work for not less than 4 days, he will be paid a temporary disablement benefit while he is on medical leave. Should the employee be certified as being permanently disabled as a result of an employment-related accident, he will get either a lump sum payment or a monthly pension (depending on the amount due to him). If a person is so severely incapacitated that he needs the constant personal attendance of another person to look after him, he can claim an allowance for this purpose. Should an accident result in the death of the employee, his dependants are entitled to a monthly benefit for a certain period of time as well as a funeral benefit. SOCSO also takes steps to provide facilities for physical rehabilitation of injured workers and even gives vocational training to help workers who are disabled find suitable jobs.

Under the Invalidity Pension Scheme workers are entitled to a pension or a grant and other benefits if they become invalid from whatever cause, providing they have contributed to the Organisation for a minimum period of time.

Since 1982, the SOCSO scheme also covers accidents incurred when workers travel to and from work or travel on a journey for any reason directly related to their work. Given the tremendous number of road accidents in the country, SOCSO is required to pay out a large proportion of its funds for this type of accident. To prevent fraudulent claims, travelling accidents must be reported to the police. If the worker involved in the accident has interrupted his journey to or from work for any reason, he is not entitled to compensation from SOCSO. Table 3.3 shows the number of travelling accidents for which SOCSO claims were made from 1995 to the year 2000.

Table 3.3
Travelling Accidents Reported to SOCSO, 1995-2000

1995	1996	1997	1998	1999	2000
14,721	14,771	13,503	16,759	18,309	19,276

Source: SOCSO website, August, 2001

Any worker who is dissatisfied with decisions made by SOCSO concerning payments can appeal to an Appellate Board which is independent of SOCSO.

Because the Employees Provident Fund also requires compulsory contributions from employers and employees, it is not uncommon for workers to confuse the two organisations. In the case of the former, the money contributed is kept in trust for the worker until he retires and is a method of ensuring workers will not be destitute in their old age. When the worker reaches the age of 55, he is entitled to withdraw his monies from the Fund. However, the Social Security Organisation provides a form of compulsory insurance coverage for workers. This means that if the worker does not have an accident during his working life, nor does he get any industrial disease, his contributions to the Organisation are not returnable.

Effectiveness of the Social Security Organisation

There have been some criticisms of the Social Security Organisation. Many employers do not contribute on behalf of their workers, either through ignorance or plain wilfulness. SOCSO officers carry out regular checks on employers to ensure they are registered with the organisation and are making payments as required by the law, but as was seen in the case of the Labour Department (as described in the previous chapter), there are too few officers to check on all employers.

As SOCSO collects large sums of money monthly, it has been suggested that it should increase the quantum of the

benefits it gives out. Since 1998 SOCSO has provided educational assistance for the school-going children of workers receiving benefits as a result of disablement. This benefit was introduced in response to requests from the public and interested bodies. There have also been proposals that SOCSO should provide loans to contributors for educational purposes.[4]. However, the Ministry of Human Resources has rejected the idea that employees who have no accidents should be given a "no-claim bonus" on their retirement. Yet this is a concept worth exploring in some detail, especially if the "bonus" were extended to employers, i.e. employers whose workers made no claims in a particular time period would also be given a bonus, refund or credit to their account. Hopefully, the financial reward so offered would encourage employers to take more care with their employees' health and safety in line with the requirements of the Occupational Safety and Health Act.

There are many complaints against SOCSO for delaying payments to workers. There are a number of causes for such a situation, including the fact that fraudulent cases are not unknown and therefore the Organisation has to investigate carefully every claimant. Furthermore, SOCSO cannot approve claims without proper reports from the medical practitioners who treated the employees concerned. The hospital authorities are frequently unable to complete their medical reports within a reasonable time frame. Of course, as public hospitals are heavily understaffed and the doctors overworked, this is not surprising. Sometimes, SOCSO is unable to pay compensation to an injured worker as his status as an employee may be in question. The Employee's Social Security Act, like all other employment laws, only provides protection to employees. If a worker is not employed under a contract of service, he has no entitlement to benefits.

It has been suggested by the Malaysian Trades Union Congress that a retrenchment benefit fund could be established by SOCSO. Employers and employees could pay a small monthly contribution into a fund specifically for this

purpose and if employees are later retrenched, a benefit would be paid out.

The Social Security Organisation also plays a part in trying to prevent industrial accidents and in encouraging employers to establish a safe and healthy working environment. It works with various bodies to promote awareness of the importance of safety at work and ways to reduce accidents. It has produced a number of video tapes which are available to organisations and can be used in their training programmes.

WORKMEN'S COMPENSATION ACT

For many years, the Workmen's Compensation Act remained on the statute books but was not being applied to any group of workers. However, in 1993 the Act once again became important - to foreign workers in the country. These workers had previously been covered by SOCSO, as described above. With the huge influx of foreign workers which began in the early 1990s, the Social Security Organisation found it increasingly difficult to cope with the problem of providing compensation to workers who were no longer in the country. There were many who, as a result of serious work related accidents, were no longer able to work and had returned to their countries of origin. Paying out compensation, particularly on a monthly basis, proved to be very cumbersome. Tracing families of those who had died was even more difficult. The problem was compounded because many such foreign workers were employed in high risk industries, especially construction, where the number of accidents occurring was high. As a result, the Ministry of Human Resources resurrected the Workmen's Compensation Act.

The Workmen's Compensation Act is enforced by the Labour Department, as is the Employment Act and other labour legislation. The Act provides that foreign workers, with

the exception of domestic servants, who are injured as a result of a work-related accident and who are disabled for a period of 4 days or more are entitled to be paid compensation. Should the worker die as a result of his injuries or from a work-related disease, his family or dependants are entitled to compensation. All claims for compensation are made via the Labour Department. If there is any disagreement about the amount to be paid to a worker, the Department of Labour has the authority to hear both sides and make a decision.

The quantum of compensation is fixed by the Act. Where death has occurred, a maximum lump sum of RM14,400 is payable (or 45 months earnings, whichever is less) to the worker's dependants. Where permanent total disablement results, the worker is entitled to RM20,000 or eighty-four months earnings, whichever is the less. In the case of temporary disablement, the worker is to be paid at half-monthly intervals a maximum sum of RM 135. This amount is cut proportionately if the disablement period is less than a half-month.

The employer is required to buy an insurance policy from a panel of registered insurance companies to cover his liabilities under this Act.

REFERENCES

1. *The Star*, January 13, 1994.
2. *The Star*, January 23, 2000.
3. Website of The Social Security Organisation at *www.perkeso.gov.my*
4. *The Star*, August 9, 1994.

REVIEW QUESTIONS

1. Explain the concept of social security.
2. What is the main purpose of the Employees Provident Fund Act?
3. What are the main benefits provided by the Employees Social Security Act?
4. Outline the main criticisms of the Employees Social Security Organisation. To what extent are these criticisms valid?

Chapter

The Law on Occupational Safety and Health

- *Introduction*
  - *Significance of Compliance with the Safety Laws*
- *Factories and Machinery Act, 1967*
- *Occupational Safety and Health Act, 1994 (OSHA)*
  - *National Council for Occupational Safety and Health*
  - *Duties of Employers*
  - *Duties of Manufacturers, Designers and Suppliers*
  - *Duties of Employees*
  - *Regular Medical Surveillance*
  - *Appointment of a Safety and Health Officer*
  - *Safety and Health Committees*
  - *Notification of Accidents and Occupational Diseases*
  - *Improvement and Prohibition Notices*
- *Safety and Health, a Continuing Cause for Concern*
- *References*
- *Review Questions*

INTRODUCTION

This chapter will examine the major legislation and requirements relating to industrial health and safety. The laws on health and safety involve the use of two different approaches. On the one hand, there is an attempt to prevent and reduce the number of industrial accidents and occupational diseases in the work-force through the Factories and Machinery Act, 1967 and the Occupational Safety and Health Act (OSHA), 1994. However, to deal with the accidents and diseases which are not successfully averted, the Employees Social Security Act, 1969 which establishes an insurance scheme for workers has been introduced. This Act was discussed in detail in the previous chapter. The Workman's Compensation Act, 1952 provides similar protection to foreign workers.

Common law has always recognised the obligation of an employer to provide a safe working environment for his workers. It is an implied term of every contract of employment that the employer will ensure safety at work for his employees. To further emphasise this responsibility, Malaysia has introduced laws which make it compulsory for employers to introduce certain measures relating to safety. Nevertheless, as the statistics show, accidents are still a major problem in the workplace.

Table 4.1 shows that Malaysia still has a large number of industrial accidents every year.

Table 4.1
Reported Accidents, 1995-2000

YEAR	No. of Accidents	No. of Fatalities
1995	114,134	952
1996	106,508	1,207
1997	86,589	1,307

YEAR	No. of Accidents	No. of Fatalities
1998	85,338	1,046
1999	92,074	909
2000	92,676	989

Source: Social Security Organisation (SOCSO) quoted in The Sun, 12 June, 2001 and the SOCSO website: www.perkeso.gov.my

The statistics in Table 4.1 suggest that generally, as the years go by, the number of industrial accidents is steadily decreasing although the fatalities remain persistently high. These figures may not accurately reflect the number of accidents in the country because many accidents are probably never reported to the authorities. Some employers may not be aware that all accidents must be reported to the Department of Occupational Safety and Health. Alternatively, an employer may choose not to report an accident for fear that his operations may be stopped by order of the Department if they are found to be dangerous. Obviously, any accident involving illegal workers is not likely to be reported. Furthermore, the statistics in Table 4.1 do not include accidents involving foreign workers as these are reported to the Labour Department which is responsible for administering the Workmen's Compensation Act. As foreign workers are typically employed in hazardous industries and jobs, we can expect a high rate of accidents amongst such workers.

In order to be able to compare one country's accident statistics with another, it is usual to calculate the number of accidents per thousand workers. According to the Department of Occupational Safety and Health, in 1994 (when OSHA was first introduced) the rate of accidents was 16 per thousand. By 1999 it had declined to 11 per thousand. This figure can be compared with Thailand which had 29-30 accidents per thousand workers in 1999. However, Scandinavian countries had a much better record with only 3 accidents per 1,000 workers.[1]

Significance of Compliance with the Safety Laws

There are very good reasons why employers should put effort into providing a safe system of work and insisting that employees implement the system. It may be difficult to accurately calculate the costs of industrial accidents but clearly they are high not only in financial terms, but also in relation to the suffering of those involved in accidents. Some of these costs include:

- Cost of wages paid to an injured worker who is on medical leave;
- Cost of medical bills;
- Cost of transporting worker to clinic or hospital;
- Time cost of those involved in investigating and reporting the accident;
- Cost of repairs to machinery or goods damaged in the accident;
- Cost of damage to company image when media publicize the accident;
- Cost of lost production if the Department of Occupational Safety and Health conduct an investigation into the accident; and
- Cost of lowered morale amongst staff.

The Minister of Human Resources estimated that in 1999 the direct and indirect costs of accidents in Malaysia amounted to over RM1.9 billion. He pointed out that although the Employees Social Security Organisation (SOCSO) paid out over RM497 million to employees and their families the indirect cost of accidents was estimated to be 4 times this amount.[2] In the year 2000, the payout by SOCSO increased to RM608.5 million.

FACTORIES AND MACHINERY ACT, 1967

The history of government intervention in industrial safety goes back to 1878 when the first Boiler Inspector was appointed. In 1892, the first law was enacted, i.e. the Selangor Steam Boiler Enactment. During the 1960s and 1970s while Malaysia was being transformed into an industrialised country, the Factories and Machinery Act was the main tool utilised by the government to ensure occupational safety and health. This Act, enforced by the Department of Occupational Safety and Health, has a number of limitations. Most importantly, the Act only applies to "factories" and thus protects not more than 25-30 per cent of the work-force. According to Section 2 of the Act, the definition of factory is:

"Factory means any premises ..... where -

a. *..... persons are employed in manual labour in any process for or connected with ..... the making, altering, repairing, ornamenting, sorting, finishing, cleaning, washing, breaking, demolishing, constructing, re-constructing, fitting, refitting, adjusting or adapting or any article or part thereof; and*

b. *the said work is carried on by way of trade for the purposes of gain or incidentally to any business so carried on, and .....the expression factory also includes the following premises in which persons are employed in manual labour:*

   i. *any yard or dry dock ... in which ships or vessels are constructed, repaired, refitted .....*

   ii. *any premises in which printing by letter press ... or other similar process or bookbinding is carried on by way of trade .....*

iii. any premises used for the storage of gas in a gasholder having a storage capacity of not less than 5,000 cubic feet;

but does ***not*** *include -*

i. any premises where five or less persons carry on any work in which machinery is used."

It is evident from the above summary of the coverage of the Factories and Machinery Act that many businesses and their employees are not covered. The Act itself is very brief and covers the following provisions:

1. Officers of the Occupational Safety and Health Department have the right to inspect machinery used in factory premises.
2. Buildings and premises constructed for the purposes of a factory must be designed and maintained in such a way as to be safe to the users.
3. Fire precautions must be observed.
4. Machinery is to be soundly constructed and guarded.
5. Certain machinery must not be operated without a current certificate of fitness.
6. The health of the workers in the factory must be safeguarded. Factories must be kept clean, sufficient space provided for each worker, proper measures must be taken for ventilation, ensuring reasonable temperatures and lighting, and the provision of sufficient sanitary conveniences.
7. Where necessary personal protective equipment may be prescribed.
8. For the purposes of welfare of workers, first aid equipment and drinking water must be available.
9. Workers are required to be trained before using machinery.
10. Certain machinery can only be operated by certificated staff. The Department of Occupational Safety and Health

is responsible to examine candidates for this purpose and issue competency certificates.

11. Accidents which lead to:

    - serious damage;
    - bodily injury leading to the worker being more than 4 days off work; and
    - fatalities

    must be reported to the Department of Occupational Safety and Health. The Department is then required to carry out an investigation and decide whether criminal proceedings should be instituted against any person involved.

12. Doctors treating workers suffering from any of the industrial diseases listed in the Schedule to the Act are required to give a report to the Department.

13. All occupiers and users of factory premises and contractors involved in building operations must register with the Department.

14. All installation of machinery requires the written approval of the Department. Should the machinery be moved to a different part of the premises which affects its safety, again written approval is needed.

The Regulations appended to the Act are very detailed and cover a wide range of different circumstances. For example, there are regulations on various aspects of industrial hygiene such as noise exposure, mineral dust, lead, and contact with asbestos. There are requirements relating to plant layout, sanitary fittings, contents of first aid boxes and so on. The Regulations require a regular inspection of all factory premises by an inspector of the Occupational Safety and Health Department every fifteen months. A fee is charged for these inspections. In the year 2000, DOSH conducted inspections on more than 95,000 workplaces.[3]

Not only does the Factories and Machinery Act have limited scope, it is also very prescriptive and does not take into consideration the many technological changes that are taking place. Furthermore, many parties felt that it lead to the responsibility for safety being given to the government rather than to employers and employees. Thus, the Occupational Safety and Health Act was introduced to overcome these problems.

OCCUPATIONAL SAFETY AND HEALTH ACT, 1994 (OSHA)

Having recognised the weaknesses in the Factories and Machinery Act, the government, after a lengthy period of planning and drafting, introduced the Occupational Safety and Health Act. While many of the principles of the previous legislation have been retained, a number of new ideas have been introduced and the penalties for breach of the regulations have been increased.

The Act recognises that the biggest barrier to improving the safety and health at work of workers is the negative and even fatalistic attitudes of employers and employees. Therefore the Act tries to ensure that all parties at the workplace are held equally responsible for safety and health. The responsibilities of each of the interested parties are spelled out in the Act.

The philosophy of OSHA is:
"The responsibility to ensure safety and health at the workplace lies with those who create the risk and with those who work with the risk."

The Act applies throughout Malaysia to all industries and sectors. The only exceptions are those employed in the Armed Forces and workers governed by the Merchant Shipping laws.

National Council for Occupational Safety and Health

A National Council for Occupational Safety and Health has been established under the Act, consisting of between 12 and 15 members appointed by the Minister of Human Resources. Like most bodies dealing with employment-related matters, the Council is tripartite. Apart from representatives of employees, employers, and the Ministry, the Council has at least three members, one of whom must be a woman, from professional bodies in the field of safety and health.

The Council is an advisory body which meets periodically to discuss proposed amendments to the health and safety legislation, to keep relevant statistical records, to develop codes of practice and to generally give ideas and suggestions on the improvement of the administration and enforcement of occupational safety and health matters.

Duties of Employers

The Act spells out the duties of employers in relation to occupational safety and health. Employers are responsible to provide a work place which, "*so far as is practicable*" (author's italics) is without risk to health. This obligation extends to:

- ensuring proper arrangements for the use or operation, handling, storage and transport of plant and substances;
- the provision of information, training and supervision to ensure safety of employees;
- the maintenance of the place of work and its entrances and exits; and
- the provision of adequate welfare facilities for workers.

The employer's responsibilities extend to any independent contractor and his employees who may be working in the employer's premises. Some organisations engage labour contractors who recruit workers, whether local or foreign, for a particular task or job within the premises. Alternatively, a contractor and his men may be carrying out a once-off job such as renovation or maintenance within the plant. The employer is equally responsible for the safety and health of these people while they are working in his organisation.

Safety Policy

Every employer with more than 5 employees is required to prepare a written statement of his safety and health policy and to make this policy known to his employees. For many employers, the concept of written policies is alien, especially those in small and medium sized establishments. The Act gives no detailed guidelines as to what should be in such a policy nor does it state in what manner the policy should be communicated to the employees. Many companies seem unable to carry out the requirements of the Act without the help of outside consultants and as a result, a flourishing business has sprung up whereby such organisations provide assistance to companies to establish documentation and systems to ensure a safe workplace.

Figure 4.1 gives an example of a safety and health policy developed by a local organisation.

Figure 4.1
CIMB Group Safety and Health Policy

CIMB Group will endeavour to promote a safe and healthy working environment for all employees in line with the Occupational Safety and Health Act, 1994.

We have a firm commitment and fundamental responsibility to ensure that our employees work in a safe and healthy environment.

We will comply with all safety and health laws and regulations and take all necessary measures to prevent work-related injuries and diseases by providing, amongst others, the following:

- Equipment and a system of work that are safe and without risks to health;
- Information, training and instructions that ensure the safety and health of employees and promote a culture of safety and health amongst employees;
- Safe workplace conditions including entrances and exits; and
- A safe office environment for employees, clients, contractors and visitors.

Each CIMB Group employee plays an important role in the promotion of our safety and health programmes and should commit to the objectives above.

Not withstanding any of the above, all employees are required to cooperate with Management in our efforts to maintain the required level of safety and health at CIMB Group.

Signed by CEO

Source : CIMB Group Bhd, used with permission.

Once the employer, preferably with input from his staff, has drafted a safety policy, it must be communicated to all employees. This can be done in a variety of ways including:

- Framing the policy and hanging it in a prominent place visible to all workers;
- Giving every individual employee a copy;
- Printing the policy on the inside cover of the collective agreement or company handbook; and
- Including a discussion on the policy and related matters during induction programmes.

Employers also have the duty to ensure the safety and health of people other than their employees who may be exposed to risk as a result of actions taken by the employees. For example, visitors to the plant can be required by the employer to wear appropriate safety equipment, such as helmets, where necessary.

Safety Training

One of the requirements of the law (Section 15 (2)) is that employers give appropriate information and training to their workers so that they will know how to work in a safe manner. Many accidents are caused through the ignorance of workers. The employer can conduct in-house courses for the bulk of his employees and send some individuals, especially those appointed as members of the safety committee, to external programmes. A number of organisations offer such programmes, including the Federation of Malaysian Manufacturers and the National Institute of Occupational Safety and Health. NIOSH conducted almost 600 courses in the year 2000 with some 13,000 participants.

In industries which are particularly hazardous the employers are grouping together to develop suitable training programmes. For example, the Construction Industry Development Board, the Master Builders Association, the National Institute for Occupational Safety and Health (NIOSH) and the Department of Occupational Safety and Health (DOSH) have all collaborated to prepare a basic induction programme for construction workers. Those who have attended the course will be given a card. Only workers who have such a card will be permitted to work on construction sites.[4]

The safety training given to employees can be both general, concerning the importance of safety at the workplace, and specific. Courses dealing with the hazards most likely to be faced in the course of the employee's work are essential. These may include:

- Fire prevention and evacuation drills;
- First aid, including CPR;
- Electrical hazards;
- Dangers of working in confined spaces;
- Safe forklift useage.

Duties of Designers, Manufacturers and Suppliers

It has been recognised by the legislature that those who design, manufacture and supply plant, machinery, equipment and substances play a major role in occupational safety. They are therefore required to take all steps to test their equipment and substances to ensure their safety and to provide sufficient information about their proper use.

Duties of Employees

Employees are equally responsible with their employers for safety and health at work. Many employers take a great deal of care to provide the best personal protective equipment for their workers and give adequate training on safety. Their efforts to provide a safe work place are thwarted, however, by the attitudes of their workers, many of whom seem to believe they are invincible. These employees refuse to wear the equipment given them and generally show no regard for their own safety.

The Act requires employees to wear at all times any protective equipment or clothing provided by the employer for their safety and to comply with any instructions relating to safety. Depending on the nature of the job, safety equipment might include:

- Safety helmet
- Eye goggles or glasses
- Earplugs or muffs

- Face shield
- Apron
- Safety shoes
- Gloves
- Respirator
- Safety harness

The requirement to comply with the employer's orders on safety and health are, of course, understood as part of the employee's obligations under his contract of employment and the employer has the right to take disciplinary action against any worker who refuses a legitimate order. (See Chapter 9) The Act serves to strengthen the employer's hand in such matters by making it an offence to contravene this section of the law, the penalty for which is a fine of up to RM1,000 or a period of imprisonment for up to 3 months or both. While it is most unlikely that this provision of the law would be used against employees, the fact of its existence should act as a warning to stubborn employees who refuse to follow rules on safety and health.

Regular Medical Surveillance

The Minister has the power to make regulations under the Act requiring regular medical examination of workers in high-risk industries and organisations.

Appointment of a Safety and Health Officer

Designated industries and organisations may be required by the Minister to employ a qualified safety and health officer. Currently a number of high-risk industries have been identified as needing such an officer. Thus employers in the following categories need to recruit an officer;

- Building and engineering construction, where the contract price exceeds RM20 million;

- Ship building, with more than 100 workers;
- Gas and petroleum industry, with more than 100 workers;
- Chemical and allied industries, with more than 100 workers;
- Metal industry, with more than 100 workers;
- Woodworking, with more than 100 workers;
- Cement manufacturing, with more than 100 workers; and
- Manufacturing firms with more than 500 workers.

Safety and health officers employed in the above listed industries must be registered with the Director-General of Occupational Safety and Health. In order to register, they are required to hold an approved professional or other qualification in safety and health or have been working in the area of occupational safety and health for at least 10 years.

The duties of a safety and health officer are laid out in the regulations to the Act. They include the requirement to submit a report to the employer every month on matters relating to health and safety at the workplace.

In order to increase the number of qualified safety officers available, a number of reputable organisations are now offering short courses on occupational safety and health, including those at the National Institute for Occupational Safety and Health (NIOSH), situated in Bangi, Selangor which is headed by the highly respected Datuk Lee Lam Thye and those conducted by the Malaysian Society for Occupational Safety and Health (MSOSH).

The NIOSH certification programme has a duration of 3 weeks, full-time and 21 weeks for part-timers. The minimum entry requirement is *Sijil Pelajaran Malaysia* (SPM) or equivalent plus 2 years' relevant working experience.

Safety and Health Committees

All employers with more than 40 employees are required to establish a safety and health committee at the work place. There are detailed regulations outlining the composition and functions of this committee which plays a crucial role in ensuring safety at the workplace.

The committee must consist of a chairman, a secretary, representatives of the employer (who should be senior managers) and representatives of the employees. If the company has a designated safety officer, he should be the secretary to the committee. The size of the committee depends on the number of employees in the organisation. The regulations require that where there are fewer than 100 employees, there should be at least 2 management representatives and 2 employee representatives appointed to the committee. Where there are more than 100 persons employed, the number of committee members increases to 8. There is no harm in exceeding this number as it is important to ensure all departments in an organisation are represented on the committee. Having too large a committee may be unwieldy, however, and a system of sub-committees may be better.

The committee's functions are:

- To assist in the development of safety and health rules and safe systems of work;
- To review the effectiveness of safety programmes;
- To carry out studies on accident trends or occupational diseases;
- To recommend improvements in work systems and revisions to any practices or policies which prevent work being carried out safely.

The committee is required to inspect the place of work at least once every three months and investigate any accidents.

Safety committee meetings must be held at least once in three months. They can, of course, meet more often if necessary.

Notification of Accidents and Occupational Diseases

Employers must inform the Occupational Safety and Health Department (DOSH) of all accidents or occupational diseases which afflict their workers. If thought necessary, the Director-General of the Department can then hold an inquiry into the nature and cause of the occurrence.

Improvement and Prohibition Notices

Probably the most useful weapon available to the officers of the Occupational Safety and Health Department in forcing employers to provide a safe working environment is the use of the improvement or prohibition notice.

If an officer of the Department identifies a serious risk at the work place he can serve an improvement notice on the employer requiring him to take steps to remove the danger or to make such changes as to reduce the risk as are deemed necessary. If the working conditions are such that there is immediate danger, the officer can prohibit the machinery or plant or place of work from operating until the danger is removed. In other words, the officer can order a complete shut-down of an operation until adequate measures have been taken to ensure the safety of all those at the site. In the year 2000, 1,700 improvement and prohibition notices were issued by DOSH.[5]

PLANT TO STOP OPS AFTER SIX DEATHS

A stop-work order has been issued to a textile factory in Seremban following the recent death of a worker- the sixth - in its premises.

The Department of Occupational Safety and Health (DOSH) director-general said the stop-work order was issued on the day the incident occurred.

Last Wednesday, a 23-year-old worker died when part of his right arm was squashed between the rollers of a machine. He was the sixth victim since the factory opened in 1996.

The company management would have to propose to the department how it could reduce the risk of another accident involving the machinery. The proposal would have to be to the Department's satisfaction before the stop-work order is revoked.

The Department would be carrying out a thorough inspection of the factory.

Source: The Star, 10 December 1998.

SAFETY AND HEALTH, A CONTINUING CAUSE FOR CONCERN

Although safety legislation as described earlier has been in force for more than 25 years, the Department of Occupational Safety and Health has never been able to keep up with the growth in industrialisation. The number of officers appointed to the Department has hardly changed throughout the years, even though the country has been transformed. Even now the Department has only 705 posts available for enforcement officers throughout the country To make it worse, in 2001 only 71% of these positions have been filled.[6] The fact that the work of the Department overlaps with a number of other public agencies has not made their job any easier. For example, factory building plans have to be submitted not only to the Department for approval, but also to the relevant local

authorities. Fire protection systems are examined both by the Department and the Fire Services.

The Department not only carries out the inspections and investigations required under the law, it also runs training programmes for all the parties involved in occupational safety and health. A number of promotional activities are organised from time to time either by the Department itself or in conjunction with other bodies to make employers and employees aware of the importance of industrial safety. According to estimates made by the Department, as many as 80 to 90% of industrial accidents involve workers from small and medium sized industries (SMIs).[7] To deal with this problem, a number of initiatives have been introduced including a loan incentive programme whereby financial institutions and other bodies who provide loans to SMIs are encouraged to incorporate requirements relating to safety and health at the workplace into the loan agreements. Another method, which the Department recommends to foster more commitment to safety issues amongst SMIs, is the mentor system, whereby big companies assist their suppliers and vendors to upgrade the safety systems in their respective organizations.[8]

Most of the discussion above refers to safety issues at the workplace. Health-related problems still tend to be largely ignored. Some of the most common health problems which employees have to contend with are:

- Excessive noise, leading to potential hearing loss;
- Exposure to mineral and other dusts, leading to lung disease;
- Exposure to lead and asbestos;
- Exposure to radiation and other cancer-causing substances;
- Stress from both the physical and psychological environment.

While the Factories and Machinery Act requires employers to monitor some of these situations, as was seen earlier in the chapter, this Act only applies to certain employers. Thus, workers in noisy environments such as shops selling music tapes and videos may not even realise the damage which is being done to their hearing. Employers in such establishments are typically unaware of their responsibility to provide a safe and healthy working environment for their staff.

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REVIEW QUESTIONS

1. Outline the main differences between the Factories and Machinery Act and the Occupational Safety and Health Act.
2. Identify the main duties of an employer under the Occupational Safety and Health Act.
3. What are the functions of a safety committee?
4. How does the Department of Occupational Safety and Health enforce the law?

Chapter

Trade Unions

- *Introduction: The Union Movement*
- *Why Do Workers Join Trade Unions?*
  - *Economic Motive*
  - *Protection of Rights*
  - *Social Reasons*
- *Trade Union Objectives*
- *Legal Definition of a Trade Union*
- *Membership of a Trade Union*
  - *Right to Form and Join a Union*
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- *Employers' Attitudes to Unions*
- *Victimisation of Trade Union Activists*
- *Creating a Non-union Environment*
- *Registration of a Trade Union*
- *Union Funds*
- *Union Executives*
- *Union Employees*

INTRODUCTION: THE UNION MOVEMENT

In the year 2000 some 734,000 Malaysian workers belonged to a union. While this is not a large proportion of the workforce (roughly 9%), the influence of unions goes beyond their membership. As we will see in the next chapter, the collective agreements which unions sign with employers do not cover union members only. All workers in an establishment who are eligible to be union members receive

the terms and conditions of service laid down in the agreement whether or not they are union members. Furthermore, trade unions act as a pressure group on the government pushing for the introduction of legislation and systems which will benefit workers in general.

Workers in most sectors of the economy have been organised into unions. Organisation has not been confined to production workers, but includes those in supervisory and management-level jobs, white-collar workers and many executives. Why do workers join trade unions? Who can join a trade union? How does a new union get itself registered? These are some of the questions to be addressed in this chapter.

WHY DO WORKERS JOIN TRADE UNIONS?

Extensive research in this area has shown that " much of time and money has been spent trying to discover why workers unionize, and many theories have been proposed. There is no simple answer to the question, partly because each worker probably joins for his or her own reasons."[1]

There are three main reasons which explain why workers form and join trade unions. They are:

- to improve their economic situation;
- to ensure their rights are protected; and
- for social reasons.

Economic Motive

Workers join unions to improve their terms and conditions of service, i.e., their pay and benefits. Alone, the individual worker has limited bargaining power compared with that of the employer. In theory, when a worker accepts a contract of employment he has entered into that contract willingly. He understands and agrees to the terms of the contract which

have been negotiated between himself and the employer. The reality is, of course, very different. In modern society, people need paying jobs in order to survive. There are times when they have to take whatever they can get, albeit unwillingly. If the employee is not satisfied with the terms offered by the employer, he is powerless in the bargaining process. He is easily replaceable. It is only when workers join together and form trade unions that they acquire strength. Workers who associate themselves with the legitimate activities of a trade union are given protection under the law. This gives them the power to effectively bargain with the employer for better terms and conditions.

A commonly repeated slogan of the trade union movement is "Solidarity!" which reflects the basic concept behind trade unions whereby workers unite together to support and help each in the fight for their rights. Trade unionists generally refer to each other as "Brother", "Sister" or "*Saudara/i*". Each member is equal to all other members and differences of race, religion, colour, gender and job status are not recognised. Unity gives workers the collective strength to negotiate for better terms from their employer. Unity gives them a voice to express their needs and demands to the government.

Workers need an employer for the wages and benefits he provides, but similarly, the employer needs the workers to contribute labour, either physical or mental, to his business. Thus, if the workers are needed by employers for the labour they give, then the workers must have the right as a group to refuse to labour in order to force the employer into conceding the workers' demands. Refusal to work, i.e., going on strike, is an important technique occasionally used by trade unions. This will be discussed in detail in Chapter 7.

Trade unions attempt to improve the terms and conditions of employment of workers through the process of bargaining with the employer, a process known as collective bargaining. The successful outcome of this bargaining is put in writing and is called a collective agreement. This is a

document which lays out the terms of employment and benefits to be offered to the workers over a particular time period.

Unions not only negotiate with employers to achieve better terms for workers; but they also give benefits directly to their members. Attractive benefits can help to persuade workers to join a union. The type of benefit given depends very greatly on the financial standing of the union. This, in turn, depends on the membership of the union and the quality of its financial management. The National Union of Bank Employees gives its members good service and insurance coverage. It has a training centre cum holiday resort in Port Dickson which can be used by members for a nominal fee. Many unions give funeral benefits to the families of members who pass away. At one time, the National Union of Plantation Workers tried to give scholarships for the education of members' children. The National Union of Petroleum and Chemical Industry Workers has a group insurance scheme for members, gives compensation to the family of a member who has died, and has a fund to provide compensation to a member whose property is affected by flood or fire.

Protection of Rights

Workers join trade unions so that they can increase the amount in their pay packets. However, they also expect unions to protect them against discrimination by their employer. In some organisations, management may try to discriminate against a group of workers or an individual. In one of the most well-documented strikes in Malaysian history, the workers at SEA Firebricks told a researcher[2] that one of the reasons they joined a trade union was because they found the management was paying different salaries for the same work done. Their pay not only depended on the workers' gender but also took into account their racial origin. *Ang Pow* were given out to Chinese workers during Chinese New Year,

but not to other workers during their respective festivals. While it is true that the company was under no legal obligation to provide an *ang pow*, within the social context of the factory an *ang pow* was seen as a token of appreciation for the contribution rendered by the workers. Those who received no such recognition thus felt frustrated. In this company, the workers also perceived discrimination between management and non-management staff. For drinking water the non-management staff had to make do with stream water which was polluted and dirty. The management staff, however, had access to a government-supplied pipe-line.

As such, workers hope that their unions would cut across racial barriers, ensure fair treatment for all, and minimise and eliminate unfair practices and favouritism. Unions' attempts to acquire fair treatment for all workers can be illustrated by their insistence that employers use the principle of seniority when choosing candidates for promotion. Most unions believe that when managers rely on criteria such as merit for purposes of deciding whom to promote, elements of bias and preferential treatment for certain groups or individuals are sure to creep into the decision making process. Therefore, it is better to rely on purely objective criteria such as seniority. The same applies in situations of retrenchment when management are required to choose who, in a group of workers, should be retrenched. The last in, first out principle ensures objectivity.

Allen Flanders considers "protection" to be one of the main purposes of unions. He stressed that unions help to set workplace rules which "provide protection, a shield for their members. And they protect not only their material standards of living, but equally their security, status and self-respect; in short their dignity as human beings."[3]

Workers expect the union to protect their rights; to protect them from exploitation and to protect them from unfair treatment at work. The government, through the Ministry of Human Resources, acts to prevent exploitation. The officers of the Labour Department will investigate such

claims and on their routine checks of the workplace will be on the lookout for any such problems, particularly racial discrimination. However, the Ministry is not able to oversee every business and organisation in the country. The union therefore acts as a "watch-dog" over its members and will take steps to rectify instances of unfair treatment.

One of the most important rights which unions try to protect is job security for workers. Without his job the worker cannot survive, so unions will try to protect workers from retrenchment and unfair dismissal. Their role in these processes will be noted in later chapters.

Protection also extends to ensuring members receive the benefits to which they are entitled under the labour legislation. In the SEA Firebricks case mentioned above, the company refused to provide paid annual leave or any other type of leave including maternity leave, to workers on the grounds that the workers were categorised as "daily labour" and were therefore not entitled to such benefits. The company believed in the maxim "no work, no pay."

Social Reasons

As mentioned earlier, workers may be influenced to join a trade union to show solidarity with their fellow workers and to be protected. Mankind's desire to belong to a group has been well described by Maslow[4] in his "*hierarchy of needs*" theory. There is no doubt that the majority of people have social needs which extend to the work context and help them to decide whether to join a trade union. If many other workers in an organisation already belong to a union, it is quite likely that the new recruit will also join to show his support for his colleagues' activities. There may even be intense peer pressure to become a member, particularly if the union is at a crucial stage in its growth, such as when it is applying for recognition. The recognition process is described in detail in the next chapter. It is possible that zealous union officials may exert force to persuade workers to join a trade union

although (as will be seen later) this is illegal. In Malaysia, no worker can be forced to join a trade union. Rohana Ariffin,[5] in a research study of women in trade unions, found that 74 of her 120 respondents knew nothing about the role of unions prior to joining and only 43 knew "a little". Comments from those interviewed are revealing. One respondent said, "The line leader came round one day, and told me she was from the union, and would I join. I asked her what the subscription was and what the benefits were and so on, and she told me. She also told me that all the others on the line were already members, so I joined at once." (Author's underlining) These workers illustrate very clearly the influence of group pressure and the desire to conform and be "part of the group".

On the more positive side, some workers may join a trade union because they believe they have the attributes of a leader and they see opportunities to exercise their leadership qualities in the union hierarchy. They may genuinely feel that they are in a position to help their fellow workers better their terms and conditions of employment by contributing to the union's work. Figure 5.1 summarises the reasons why workers join unions.

Figure 5.1.
Why Do Workers Join Unions?

- ✓ Increased wages and benefits
- ✓ Job security
- ✓ Protection against unfair treatment
- ✓ Co-operation with fellow workers
- ✓ Peer pressure

TRADE UNION OBJECTIVES

The reasons why workers join trade unions and the objectives of these unions are, of course, overlapping. One of Malaysia's largest unions includes the following objectives in its constitution.[6]

- to promote the industrial, social and intellectual interests of its members;
- to obtain and maintain for its members just and proper rates of remuneration; security of employment and reasonable hours and conditions of work;
- to promote the material, social and educational welfare of the members; and
- to promote legislation affecting the interests of the members in particular or trade unionists in general.

The above listing suggests that trade unions are involved in furthering the interests of their members not just at the work place, but also in a wider context. Unions are interested in their members not only as workers but as whole individuals in society with needs to be met outside the workplace.

In 1944, the United Kingdom Trade Union Congress in its "Post-War Reconstruction Interim Report" outlined the main objectives of the trade union movement as "First.... unquestionably that of maintaining and improving wages, hours and conditions of labour. This in itself relates to more than rates of wages or earnings measured in monetary terms or other payments and conditions settled by collective bargaining. We are also concerned with what wages can buy, with the cost of living and the general level of prices. We are, in fact, concerned with increasing the size of the real national income and with the share of it which should accrue to work people in terms of goods and services, conditions of work and leisure, as well as opportunities for individual and social development."

The trade union movement is concerned with the opportunities which exist for the workers to obtain work. "Full employment is an aim which the trade unions have always pursued... and thirdly, the trade union movement exists to extend the influence of work people over the policies of industry and to arrange for their participation in its management".

Of course, any activities initiated by the unions to further their objectives must comply with the Trade Unions Act, 1959.

LEGAL DEFINITION OF A TRADE UNION

The Trade Unions Act (Section 2) defines a trade union as follows:

> *"any association or combination of workmen or employers..... whose place of work is in West Malaysia, Sabah or Sarawak,....*
>
> *a. within any particular establishment, trade, occupation or industry or within similar trades, occupations or industries; and*
>
> *b. whether temporary or permanent; and*
>
> *c. having among its objects one or more of the following:*
>
> *ii. the regulation of relations between workmen and employers for the purposes of promoting good industrial relations between workmen and employers, improving the working conditions or enhancing their economic and social status, or increasing productivity;*
>
> *iii. the regulation of relations between workmen and workmen, or between employers and employers;*
>
> *iv. the representation of either workmen or employers in trade disputes;*

v. the conducting of .... or dealing with trade disputes and matters related thereto; or

vi. the promotion organisation or financing of strikes or lockouts in any trade or industry or the provision of pay or other benefits for its members during a strike or lockout."

This definition has certain implications such as:-

1. A trade union need not be called a union. Many unions call themselves associations. This is particularly common where the members are professionals or senior officers, e.g., the University of Malaya Academic Staff Association and the Association of Maybank Class One Officers, which is open only to Maybank staff classified as Class One Officers. All the unions of employers are labelled associations, e.g., the Malayan Commercial Banks Association.

2. Membership of unions is limited geographically. Workers in Peninsular Malaysia may only join a union all of whose members work in the Peninsular. Workers in Sabah can only join a union whose members work in Sabah, and the same applies to workers in Sarawak. Membership in a particular union therefore, is limited to workers in any one of the three geographical regions. This leads to some duplication of unions. For example, there is a Kesatuan Pekerja-pekerja Securicor (Malaya) Ltd and a Kesatuan Pekerja-pekerja Securicor (M) Sdn Bhd, Sarawak to cater for Securicor workers, and there is a National Union of Commercial Workers, West Malaysia plus a Sabah Commercial Workers Union. It must be emphasised that this limitation refers to the worker's place of work and has nothing to do with his birth place, his home or his nationality. There are no laws preventing foreign workers with valid work permits from joining trade unions. Very few of them do so, largely because of the nature of their employment contract, which is usually for a short period of time, after which they are repatriated to their home country.

3. Unions of a general nature are not permitted. Members of a trade union must be homogeneous, i.e., they must work in a particular establishment, trade, occupation or industry and therefore possess common interests. The Director-General of Trade Unions will decide which trades, occupations or industries are similar should any doubts exist. For example, the Director-General has decided a number of times that the electrical industry and the electronic industry are not one and the same and, therefore, one union cannot represent workers in both areas.

4. Employers and employees both have the right to form and join unions, but they must be separate from each other and must satisfy the conditions explained above, i.e., they must be within any particular trade, occupation or industry. Although a number of employer's trade unions exist as will be described later in this chapter, the focus of this book will be on the activities of employees' trade unions.

5. Any organisation or group of workers established to achieve one or more of the objectives stated in the Act is considered having formed a trade union, and must therefore conform to all legislative requirements of a trade union.

MEMBERSHIP OF A TRADE UNION

Right to Form and Join a Union

Workers in Malaysia have the right to form and join trade unions. This is known as the freedom of association and the right is protected in the Industrial Relations Act (Section 5).

The Act states that:-

i. No employer shall prevent a worker from joining a union by putting a condition in his contract of employment,

ii. No employer shall refuse to employ a worker on the grounds he is a trade union member or officer,

iii. No employer shall discriminate against a worker (for example in terms of promotion) on the grounds he is a trade union member or officer, and

iv. No worker shall be threatened with dismissal or dismissed if he proposes to join a trade union or if he participates in union activities.

Any complaints by a worker that his rights under this section of the Act have been violated can be reported to the Department of Industrial Relations, which has the authority to investigate the matter and give such advice as they think helpful in settling the matter. If, however, they are unable to settle the complaint they will make a report to the Minister of Human Resources, who may refer the issue to the Industrial Court for a hearing. Such cases are rare, largely because it is difficult for workers to provide adequate proof of their allegations.

Although workers have the legal right to join unions there are a number of qualifications which will be dealt with in the next section.

Workers also have the right not to join a trade union. Workers may not be forced to join a union. (Section 7, Industrial Relations Act). Thus, the concept of the "closed shop" is not practised and is not legal in Malaysia. In some countries, such as the United States and the United Kingdom, some unions may make an agreement with an employer that only union members shall be employed in that particular organisation. This is called a "closed shop" or union shop agreement and it effectively forces any worker who wishes to work for that organisation to become a union member. Such agreements are becoming less common today. In the United Kingdom in the 1970s, some 40 per cent of the work force were covered by such an agreement. The number of union

membership agreements has decreased significantly since then. Although it may not seem very democratic to force workers to join a trade union if they are reluctant to do so and could be considered an infringement of their right to individual liberty, it is also not fair that they should benefit from the efforts of the union to improve the terms and conditions of employment when they are not paying members. This comes about because of the process of collective bargaining and collective agreements which cover all the eligible workers in a particular group or company whether or not they are members of the union.

Who Can Join a Union?

Any worker over 16 years of age is eligible to apply to join the union which is relevant to his trade, occupation or industry. "Workman" is the term used in the Trade Unions Act, and it refers to any person who is employed by an employer under a contract of employment. However, union members under 18 years of age are restricted in their union activities. They are not entitled to vote on matters involving strikes, imposition of a levy, dissolution of the union or amendment of the rules of the trade union. Union members under 21 are not eligible to be elected as officers of the union.

It follows that students cannot join trade unions unless they are bona fide workers and over the age of 18. Thus, a worker granted study leave by his employer and who enrols at a local college or university would still be eligible for union membership, as would a worker who is studying part-time.

Public sector workers can only join unions formed by workers in the same occupation, department or ministry. An example of a public sector union representing an occupational group is the Amalgamated Union of Government Storekeepers. The Inland Revenue Officers Union speaks for the officers working in the Inland Revenue Board. There are very few unions representing a full ministry. A similar restriction exists for employees of statutory bodies and local authorities. Such

employees can join unions, but the membership must be confined to workers in the same body or authority. Many ministries, statutory bodies and local authorities have more than one union representing the employees. There is indeed a proliferation of unions representing public sector workers. Some 214 unions represent the 800,000 strong public sector workforce. The size of these unions varies from tiny (for example, the Penang Hill Railway Employees Union with some 35 members in 2000) to very large (by Malaysian standards). For instance, the Malay Teachers Union, West Malaysia has 14,000 members.

Certain groups of government servants are not allowed to join unions at all. These are employees in the Police, Prison Service and the Armed Forces and those in confidential or security work. The rights of these workers are restricted in the interests of the security and safety of the country. Employees who join a trade union are generally given the right to strike if they can find no other way to settle a dispute with their employer. Of course, the right to strike is strictly limited in the Malaysian context as will be seen in Chapter 7. An example of what can happen when the police go on strike to further their demands for higher salary was seen in July 2001 in Brazil. A crime wave erupted leading to the deaths of 30 persons. The situation required the government to call in army troops to restore calm and order.[7]

Employees in the professional and managerial group in the public sector also cannot join a trade union unless they are exempted by the Chief Secretary to the Government.

The final limitation on union membership is that certain categories of employees are not permitted to join unions whose membership is not of the same category as themselves (Industrial Relations Act, S.9 (I)). These groups are managers, executives and staff in confidential or security positions. However, a problem may arise as to who belongs to these groups. Should a dispute over such matters occur, the Minister of Human Resources has the power to make a final decision. It is not uncommon for employees in these

categories to have the impression that they cannot join trade unions at all. This is clearly incorrect. A number of unions exist to represent managerial and executive level staff and security staff. Some of these are in-house unions and some are national unions. In the year 2000 there were approximately 27 unions registered open to executives or senior officers. For example, in the banking industry, Association of Bank Officers Malaysia (ABOM) represents banking officers. In the same industry there are also in-house unions of officers such as Association of Maybank Executives with some 544 members. Tenaga Nasional Bhd has a large executives' union which has more than 1,900 members. Even in the hospitality industry an executives' union can be found, such as Resorts World Executives Association. The total membership of these executive unions was around 13,500 in 2000. This represents not more than 2 per cent of the total union membership in the country.

EMPLOYERS' ATTITUDES TO UNIONS

How do employers perceive trade unions? Do they accept the idea of their workers joining unions? Employer's responses can be broadly classified as follows:

a) *Conflict or open hostility*

In the United States and United Kingdom, such attitudes were very common up to World War II. In Malaysia, there are some employers who are prepared to use a number of tactics, some of which may be illegal, in order to prevent their workers joining unions. They consider unions to be a "third party" intervening in the worker-employer relationship. These employers may believe so strongly in their stand against unionisation that they will openly inform the workers that they would rather close down the business than allow union interference in the running of their business.

b) *Controlled hostility*

The employer recognises that employees have the right to form and join unions. However, discreet attempts are made to discourage workers from joining and being active in a union. Such action, if proven, would amount to interfering with the legitimate rights of workers and is an offence under the Industrial Relations Act.

c) *Accommodation*

This attitude is one of realism. The employer is prepared to compromise with the union, tolerate it and be as reasonable as possible. This is a fairly typical attitude of most large companies today.

d) *Co-operation*

The management works closely with the union to promote the welfare of the organisation. Joint effort is seen as essential for the survival of the enterprise.

VICTIMISATION OF TRADE UNION ACTIVISTS

Are workers victimised by their employers for participating in trade union activities? Do employers interfere in the legal right of their employees to form, join and be active in a trade union? There are no figures available to show the extent of the presence of victimisation. Though unions and their members frequently claim victimisation, they can rarely prove its occurrence. Occasionally, obvious cases of victimisation are brought to light in the Industrial Court. For example, a company once refused to renew the contracts of employment of two workers because they had been involved in trade union activities. The Court (Award No. 278 of 1988) described the case as a "classical case of victimisation for trade union activities". In the Han Chiang High School case (Award No. 306 of 1988) 35 teachers were not offered renewal of their 2-year fixed-term contracts because they were active members

of the union which their employer had been at great pains to keep out. The Court found that the intention of the School in failing to renew the teachers' contracts "was to rid itself of the Union. The School's attitude and action blatantly fly in the face of the law and Government's policy on the freedom of workers to form trade unions."

Another case involved a purported retrenchment exercise whereby a whole division was closed down, and the 19 workers therein were thus made redundant. The Industrial Court will not normally interfere with the right of an employer to down-size his business if it is done for sound economic reasons. However, in this case (Award No.83 of 1989) within 4 months of the workers' union applying for recognition the company closed down the division where the unionised workers were to be found. The dismissed workers gave evidence at the Court hearing concerning the pressure put upon them to desist from their union activities. The managers called the workers up, one by one, to advise them to withdraw from the union or otherwise "face the consequences". The Court considered the employer's actions in this case particularly unfair and ordered punitive damages be paid to the workers.

In another dispute heard at the Industrial Court (Award No. 12 of 1992) an employee was dismissed for unsatisfactory work performance, absenteeism and lateness. However, she had been given no warnings as to the management's dissatisfaction with her work; her instances of absence were spread over 14 months and the employer had taken no action to discipline her for this misconduct at that point of time. Her late arrivals were described by the Court as "trivial indeed"; she had arrived at work as follows: 8.02, 8.01, 8.16, 8.12, 8.09, 8.05 and 8.02. The Managing Director admitted in evidence given to the Court that the dismissed worker was the most active member of the union and she had been actively collecting signatures and asking workers to join the union. The dismissal came 4 days after the union's claim for recognition. The Court agreed with the claimant that she had

been victimised for trade union activities and that her dismissal was unfair.

The majority of documented cases of victimisation for trade union activities involve dismissals because these cases are given an open hearing in the Industrial Court. However, employers do use other tactics to try to persuade employees from joining and being active in unions. Once the company is able to identify the union leaders, transfers from one location to another and promotions to jobs of higher level are common. In the case of transfers, it will be difficult for the union leader to prove that the sole reason for the relocation is his union activities in the face of the company's assertion that somebody needed to be transferred to this particular location and this person was the most suited. If a union leader is offered promotion to a level whereby he is no longer eligible to be a member of the workers' union, he has little choice. For the sake of his future and his family he may have to accept the post, albeit unwillingly.

It is impossible to estimate how serious and pervasive are the anti-union activities of employers. It will suffice to say that no responsible employer advised by a professional industrial relations practitioner would stoop to such practices which can only lead to a rapid deterioration in the relationship between the employer and his employees.

Can an employer take any steps to discourage his workers from joining trade unions? Many employers do, in fact, take certain actions which are quite legal to try to prevent their employees from wanting to join a union. Whether or not the employer will take such steps depends upon his attitudes towards the concept of unions.

CREATING A NON-UNION ENVIRONMENT

Some companies are proactive in their attempts to prevent their workers joining trade unions. They take positive steps to

reduce or eliminate the need for their workers to join unions. Such organisations:

1. Pay higher wages and give better benefits than those prevailing in comparable companies that are organised in the same locality. Electronics companies are a good example of organisations using this strategy.

2. Involve employees in all levels of decision-making and effectively implement an open-door policy by the elimination of barriers of status. People are encouraged to interact informally at break times. There will be no separate dining facilities for management and non-management staff. Social occasions are organised to further foster better relations between staff.

3. Offer training, development and a measure of security of tenure. Investment in training by the company shows that it values its employees and is interested in their development.

4. Develop a climate of trust and loyalty in the organisation. Through regular feedback techniques management can gather information about factors that are causing dissatisfaction. Workers' problems, however trivial, are attended to and as far as possible solved with the help of the organisation's management. If resolution is not possible, the workers are told the reason. There is emphasis on the training of supervisors to be effective, especially in terms of ensuring they are fair in assigning duties, evaluating performance and giving praise and punishment.

An example of a company which has successfully resisted the unionisation of its factory is the Canadian Alcan plant which is situated in the heart of an area in which more than 50 per cent of private sector workers belong to unions. Steps taken as part of the company's strategy to keep its workers happy and therefore uninterested in joining a union include:-

- making parking space available to all on a first-come, first-served basis;
- encouraging workers to visit factories which use the materials produced at the Alcan factory. This is to instil a sense of responsibility and pride;
- paying workers ten per cent more than the local norm; and
- improving working conditions by providing a gymnasium, cafeteria and a clean production area.[8]

In the Malaysian context, the electronic factories situated in and around Kuala Lumpur have resisted unionisation for many years. The steps taken by these electronic factories to ensure a satisfied labour force include:-

- payment of competitive wages;
- establishment of a large human resources department, responsible for the regular counselling of workers;
- providing pleasant and safe working conditions;
- giving subsidised, clean and air-conditioned cafeterias; and
- providing free transport to and from the place of employment.

REGISTRATION OF A TRADE UNION

Workers wishing to form a trade union must apply to the Director-General of Trade Unions for registration within 1 month of establishing the union. Should the period of 1 month be insufficient, a request for an extension of up to 6 months can be made to the Director-General. The application for registration must be signed by at least 7 members, which is the minimum number needed to form a union. The application form must be accompanied by the required fees

and a printed copy of the rules or constitution of the union. The application must include the name of the union and its address, the names, addresses and occupations of the members making the application and the names, ages, addresses and occupations of the union's officers. The Department of Trade Unions may also require other information such as a copy of the minutes of the inaugural meeting of the workers who wish to establish the union.

Registration by the Director-General of Trade Unions is by no means automatic. The Director-General will refuse registration in the following circumstances:

- if any of the union's objectives are unlawful;
- if any part of the union's constitution conflicts with the Trade Unions Act;
- if the name of the union is undesirable or identical to another already existing or if the name is deceiving;
- if the union is likely to be used for unlawful purposes.

The Director-General has very wide powers in respect of registration of trade unions. Section 12 of the Trade Unions Act allows the Director-General to refuse to register a trade union in a particular trade, occupation or industry, if he is satisfied that there is in existence a union representing workmen in that particular trade, occupation or industry and if he believes it is not in the interest of the workmen concerned that there should be another union.

If there are two or more trade unions registered which represent the same group of workers in a trade, occupation, industry or individual place of employment, the Director-General has the powers to de-register the union which covers a minority of the workers or to order that union to remove from its membership register the affected workers.

The Director-General also has the powers to de-register or cancel the registration of a union if it was obtained or issued by fraud or mistake, if it is being used for unlawful purposes, or if it does anything to contravene the Trade

Unions Act. The cancellation of a union's registration also occurs when the composition of the executive is unlawful and if the funds of the union have been unlawfully used or if the union has ceased to exist.

In 1997 19 unions were de-registered for failing to submit their annual accounts as required by the Act. The most publicised example of a union being de-registered for unlawful activities is the Airlines Employees Union. In 1979, there was a major dispute between the Airlines Employees Union and the Malaysian Airlines System (MAS). The union was found to have encouraged its members to take part in an illegal strike. The workers refused to work overtime which is considered a strike in the transport-related industries. The union's active involvement in this illegal strike led to its de-registration.

UNION FUNDS

Upon being accepted as a member of a union a worker has to pay an entrance fee and a monthly subscription of, on the average, between RM3.00 to RM8.00. The use of this money is confined to purposes set out in the Trade Unions Act (Section 50), and the rules of the trade union. The Act states that union funds can only be used for the stated purposes which include the paying of:

- expenses related to salaries for employees of the union;
- expenses related to the upkeep of an office;
- expenses related to the settlement of a trade dispute;
- compensation to members for losses arising out of trade disputes (i.e. a strike allowance);
- allowances to members and their families on account of death, old age, sickness, accident or unemployment;
- expenses related to the publishing of a newsletter;

- expenses related to the organisation of social, sports, educational and charitable activities of the members.

Most importantly, the law prohibits unions from using their funds for any political purposes, including providing funds to a political party. In this respect, Malaysian unions differ markedly from their British counterparts, where political funds are set up by trade unions to support the party they believe will help them achieve their objectives. The British unions are mostly active supporters of the Labour Party, which is one of the two major parties in the British political system. It is Malaysian policy to separate, as far as is practical, the trade union and the political systems. Trade union leaders are not encouraged to be active in party politics although individuals retain their rights to participate in such activities. The next section which outlines the historical background to unionism in Malaysia will show the reason for this policy.

To ensure that union funds are only used for the purposes allowed by the law and the union constitution, unions are required to submit annual, audited accounts to the Department of Trade Unions for checking. Failure to send in such accounts will, after adequate warning has been given, lead to the union being de-registered.

UNION EXECUTIVES

Unions are led and managed by executives elected by the members at biennial or triennial conferences. Thus, most such officials hold term for 2-3 years. There are certain restrictions on who is eligible for such positions. Union leadership is confined to Malaysian citizens who have been employed for at least 1 year in the related trade, occupation or industry which the union represents.

Trade union executives may not be chosen from those who are office-bearers or employees of a political party. Further, if they have been convicted of any criminal offence or

have been adjudged bankrupt, they are disqualified from being elected to executive posts.

Most union constitutions allow for the election of a president, general secretary, treasurer and council members. If the union has branches, as the largest unions do, a council member may be elected to represent each of the branches.

UNION EMPLOYEES

Most of the bigger trade unions employ full-time staff to run the daily business of the union. Such employees must be Malaysian citizens resident in either Peninsular Malaysia, Sabah or Sarawak, depending on whom the union represents. Those convicted of criminal offences, those who are officers or employees in other trade unions or those who are office-bearers or employees of a political party are not eligible to be recruited as employees of a union.

HISTORICAL BACKGROUND

In order to understand the concept of unions and their purposes, it is useful to trace their history. Unions were first formed in Great Britain as a result of the development of the factory system in the nineteenth century which led to the exploitation of workers, poor working conditions and job insecurity. Throughout the nineteenth century, attempts were made to organise unions but the restrictive laws and strong anti-union attitude of the employers made it difficult for the newly formed unions to survive. It was not until 1915 that the union movement in the United Kingdom won the legal right to exist and to take industrial action.

In Malaysia, organisations functioning as unions first emerged in the 1920s with the development of estates and tin

mines. The relatively late development of unions in Malaysia can be explained by looking at the nature of the workers. The huge majority considered themselves to be working in Malaysia on a temporary basis. Their families remained in the home countries of China or India. A portion of the workers' wages was sent home regularly. Most believed they would return home when they had earned sufficient funds. Many of the labourers were happy to have a job which provided them with enough money to support their families. In such a situation, workers are not likely to want to join permanent organisations such as trade unions - organisations which were strongly opposed by their employers. (Interestingly history repeated itself in Malaysia in the 1990s. The very large foreign labour force which rapidly increased in numbers has very much the same attitudes as their counterparts some 70-80 years ago.)

However, from the 1920s onwards the Communist Party of Malaya deliberately set out to develop the labour movement, and thus it encouraged unskilled workers to unionise. They succeeded in getting the newly formed unions to go on strike several times in the 1930s. There was then no legislation relating to trade unions and union activity in Malaysia. The aggressive activity of the unions led employers to exert pressure on the colonial government to introduce laws which would curb and restrict the unions. At the employers' insistence, the first laws relating to trade unions were implemented in 1940. However, this legislation could not be enforced because of the invasion by Japanese troops and their subsequent occupation of Malaysia for 4 years.

Immediately after the war, it became evident that local attitudes had changed. The political consciousness of the people had been awakened and the work-force by then certainly no longer considered itself transient. The Communist Party tried to take advantage of this, especially when the country was still facing severe shortages of essentials such as food and clothing. The Communists' strategy was to capture the leadership of the trade unions and

thereafter to gain control of the working class. Using the workers for support, the Party leadership intended to create a revolutionary climate in which they would be able to take over the government from the colonial powers. At the same time, there is no doubt that there were a number of workers volunteering to lead the newly formed unions who had no ties or allegiance to the Communist Party. They believed that, through worker solidarity, improvements in basic working conditions could be made, especially in the plantation sector. Employers demanded and received police assistance to break up meetings and pickets. Laws of trespass were invoked when meetings were held in estates. On a number of occasions the police charged unionists with holding illegal assemblies. Violence and bloodshed were not uncommon when the police took action to disperse the union members.

In 1946, the government took two major steps in response to the increased trade union activities. First, a Trade Union Advisers Department was set up with the appointment of a Registrar of Trade Unions. Second, a Trade Union Enactment containing these three important clauses was passed:

- All trade unions had to be registered;
- Federations of trade unions could only be formed by unions in the same industry; and
- Union officials had to have been employed for a minimum of three years in the industry which they represented.

Evidently, this legislation was intended to limit Communist Party involvement within the trade unions, to restrict their size and therefore their power by disallowing general workers unions, and to control the trade union movement by requiring unions to register with the newly appointed Registrar of Trade Unions.

As a result, some 100 unions were de-registered and disbanded. This meant that the Communist Party was unable to use the labour movement to bring about a revolution. Many

trade union officials who were communists took the union funds and moved into the jungle to begin guerilla warfare.

In the 1950s, the trade union movement was revived. Many of the major national unions were formed in this decade. Their activities were carefully regulated and controlled by the relevant legislation but at the same time, the government accepted the right of the unions to exist.

UNIONS TODAY

Before a brief description of the trade union movement today is given, it should be noted that when analysing figures on trade unions, it is important to check whether the statistics include both employers' associations and workers' unions or only the latter, and whether the statistics cover Malaysia or only Peninsular Malaysia.

WORKERS' UNIONS

Number of Unions

The growth in the number of unions is shown in Table 5.1:

Table 5.1.
Growth in Number of Unions, 1984-2001

Year	No. of Unions
1984	386
1986	401
1988	414
1990	468
1992	479
1994	501

Year	No. of Unions
1996	516
1998	531
2000	563
2001	578

Source: Department of Trade Unions, Register of Trade Unions

Table 5.1 shows that the number of unions has been steadily increasing. Most of the newly registered unions are in-house unions because by the 1980s a national union already existed in each of the major industries in the country.

At the end of 2000 there were 563 employees' unions in existence. By end of 2001 the number had risen to 578. Table 5.2 shows the number of unions by sectors. As can be seen, half the unions are in the private sector and half in the public sector with a slightly higher membership in the private sector.

Table 5.2
Trade Unions by Sector, 1993-2000

	1993	1997	2000
Private Sector	276 (56%)	306 (58%)	351 (62%)
Civil Service	132 (26%)	130 (25%)	127 (23%)
Statutory Bodies & Local Authorities	88 (18%)	91 (17%)	85 (15%)
Total	**496 (100%)**	**527 (100%)**	**563 (100%)**

Source: Department of Trade Unions, Register of Trade Unions.

Size of Unions

It is important to remember that the strength and power of the trade union movement cannot be judged by the number

of registered unions. The size and density of membership and the financial status of the unions are very significant factors. The 15 biggest unions in 2000 in terms of membership are listed in Table 5.3.

Table 5.3.
The Largest Trade Unions, 2000

Name of Union	Membership
The National Union of the Teaching Profession	91,000
The National Union of Plantation Workers	40,000
The National Union of Bank Employees	30,000
The Electrical Industry Workers Union	26,000
ANULAE *	19,000
The Metal Industry Employees Union	17,000
The National Union of Telekom Employees	15,000
The Malay Teachers Union, West Malaysia	14,000
The National Union of College Trained Teachers	13,000
Tenaga Nasional Employees Union	12,000
The National Union of Commercial Workers	11,000
The National Union of Petroleum and Chemical Industry Workers Union	10,000
The Non-Metallic Mineral Products Workers Union	9,000
The Timber Employees Union	8,000
Malaysian Airlines Employees Union	7,000

* ANULAE = Amalgamated National Union of Local Authorities Employees.

Source: Department of Trade Unions, Register of Trade Unions.

As unions are basically dependent on members' subscriptions to finance their activities, the size of the membership is a key factor in union strength. An active union which is vigorously trying to improve the financial status of its members will find it easier to increase its enrolment. Thus there is an inherent problem here. The government and the employers expect

unions to be as co-operative as possible. Employers, especially, would prefer union leadership to be pliant and understanding. The union membership, however, expects their democratically elected leaders to push for improvements in the workers' lot. Provided the leadership gets results, the members are not too concerned about how aggressive the union may appear to be. It is, therefore, very difficult for the union leaders to find a middle road acceptable to all.

In 2000, there were 65 employee unions with more than 2,000 members. However, there were some 237 unions with fewer than 200 members. It is expected that the ability of these small unions to serve their members would be strictly limited. Yet, it is also true that the ability of the union to obtain fair terms for its members and to safeguard their interests depends on the dedication and quality of the leadership. Furthermore, some of these smaller unions are in-house unions where the large majority of the eligible workers are members of the union. The fact that the union represents most of the workers gives it a strong voice. Table 5.4 shows the size of employees' unions.

Table 5.4.
Size of Employees' Unions, 2000

Membership	No. of Unions	%
100 or fewer	146	26
101-200	91	16
201-500	117	21
501-1,000	93	16
1,001-2,000	57	10
2,001-5,000	36	6
5,001-10,000	16	3
10,001 and above	13	2
Total	**569**	**100**

Source: Department of Trade Unions, Register of Trade Unions.

Types of Unions

There are basically three categories of unions in Malaysia:

- public sector employees' unions,
- private sector employees' unions, and
- employers' unions.

Public sector unions

The public sector consists of the civil service, the statutory bodies and the local authorities. In 2000 there were 212 unions in this sector. These include some of the largest unions in the country, such as the National Union of the Teaching Profession, the Malayan Nurses Union and the Malayan Technical Services Union. But there are also very small public sector unions such as the Dental Technicians Union with 275 members or the Union of Industrial Relations Officers in the Ministry of Human Resources with 122 members. The Trade Unions Act provides that workers in the public sector can only form and join unions whose members are in the same ministry, department or occupation. This is to ensure that discussions are possible with the employer on a logical basis. The public sector is large, and problems tend to be peculiar to a certain department or ministry. Wages and other terms of service are discussed at the national level between the government and the Congress of Unions of Employees in the Public and Civil Service (CUEPACS). The number of union members in the public sector is dropping as a percentage of the total number of employees who are unionists. This is not because of a loss of interest by public sector employees in unionism but because of the government's policy of privatisation whereby many of the largest bodies which are heavily unionised have become private sector organisations, for example the National Electricity Board is now Tenaga Nasional Bhd; Keretapi Tanah Melayu has also been converted into a corporate entity. This process is on-going and, therefore, the number of

organisations being converted from public to private sector is likely to increase still further.

One significant difference between public sector unions and their counterparts in the private sector is that they are not involved in collective bargaining. This process (described in detail in the following chapter) whereby unions negotiate with employers to improve the terms and conditions of service of employees does not apply in the public sector. While CUEPACS has frequently called upon the government to allow collective bargaining in the public sector the system is not likely to be changed in the near future.

Private Sector Unions

Private sector unions are either **national or in-house.** National unions attempt to cover all workers in the same industry, trade or occupation. The larger unions have a sophisticated structure with regional branches and local/plant level committees. A union purporting to be national in coverage is not necessarily a large union in terms of membership. The size of the membership depends on the number of potential members and the degree of success of the union officers in persuading these potential members to join the trade union. Note that the national unions do not cover workers throughout Malaysia but only Peninsular Malaysia, or Sabah, or Sarawak as the case may be, as required by law.

An in-house union is one where members are all employed by the same employer. This immediately suggests that members of such unions can and will be involved in different occupations. The government's policy is to encourage the formation and growth of such unions.

In 2000, there were 244 in-house unions in the private sector with some 150,593 members. By comparison in 1985 there were only 52 in-house unions with a combined membership of 25,000. The number of in-house unions has been increasing rapidly and will probably continue to do so. This is partly due to the fact that most new unions being

registered are in-house unions given that in all the major industries national unions already exist. In-house union development has also been affected by the attitudes of employers and the government, both of whom are more amenable to and more co-operative with such unions. The government believes that in-house unions are more likely to be appreciative of the situation in their place of employment and problems of their employer and less influenced by "outsiders". Thus there will be a closer relationship between employer and union which will lead to more peaceful industrial relations. The co-operative spirit so developed will lead to higher levels of productivity, and such an atmosphere should encourage more and continued foreign investment in the country.

Employers also prefer their employees to be represented by in-house unions. It is quite common that at the point of time when workers in a particular company start to take an interest in becoming members of a national union, the company will take steps to encourage the establishment of an in-house union.

The effectiveness of in-house unions is a very controversial issue. In the United States of America, such unions are called "yellow unions" and are considered to be dependent on the employer. They may be indirectly controlled by the employer, who provides them with financial help, physical facilities, and representatives of management will be involved in running the union. Those against in-house unions contend that close ties between union and employer make it difficult for the union to oppose the employer in any meaningful way. In a discussion on the issue, one journalist said, "the most common argument against in-house unions is their susceptibility to manipulation and control by employers. National unions, being larger and more in the public eye, are theoretically less vulnerable to bullying."[9] However, it should be noted that in-house unions are not necessarily small in terms of membership. The Malaysian Airlines Employees Union, for example, with some 7,000 members rivals many of the national unions in size. Two of the largest unions in the

country are in-house unions, namely, the Telekom Bhd Employees Union and the Tenaga Nasional Bhd Employees Union. The strength of a union is not so much measured by the number of members, but the percentage of the workforce in the organisation who are members of the union and the quality of the union leadership.

Latiff Sher Mohamed in his book on in-house unions lists out the disadvantages of in-house unions as follows:

1. In-house unions are generally weak because membership is limited and confined to workers in one particular company....
2. The leadership of such unions must be chosen from the small number of members which may give rise to the possibility of the employer trying to exploit such leaders.
3. The union's financial strength will not enable it to carry out its normal trade union activities.....
4. Fear of victimisation among union leaders (particularly in relation to promotions, termination of employment, transfers and assignment of duties which are management prerogatives;
5. In-house unions with small memberships will be unable to provide scholarships and other social benefits for their members.[10]

The national trade union movement has strongly opposed the establishment of in-house unions where a national union already exists.

The Malaysian Employers Federation (MEF) foresaw as early as 1982 that in-house union leaders would be more amenable during collective bargaining sessions. They said that the bargaining would be conducted by people who would have a truer feeling for the well-being and expectations of both the company and its employees. The process leading to the signing of a collective agreement would likely to be quicker, smoother and less contentious. To what extent this

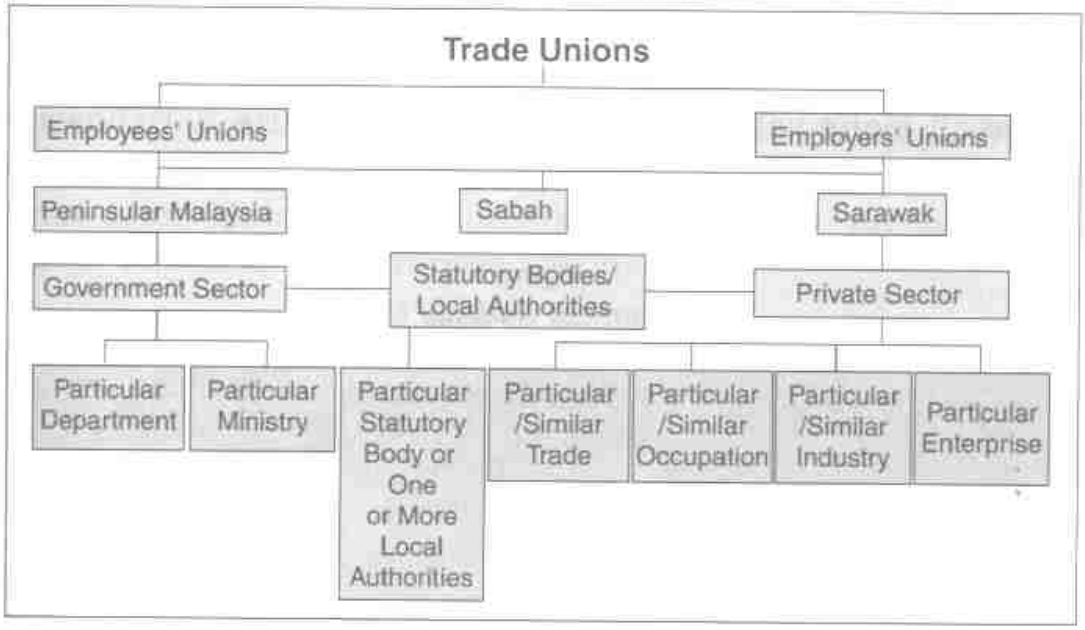
is true has yet to be proven. Some companies have found that the process of collective bargaining is in fact more difficult when dealing with an in-house union because of the inexperience and poor negotiating skills of the in-house union leaders. They tend to be ignorant of the bargaining process, which requires give and take. With their better knowledge of the company's financial position they can be rather stubborn in holding out for better terms and conditions of employment. The question of which type of union, in-house or national, can get better benefits for its members is still unanswerable as there is no data on the matter. A comparison of two companies making tyres, one with an in-house union and one whose workers are members of a national union, gives rather inconclusive data. The following table compares certain benefits provided for under their respective collective agreements.

Table 5.5
Comparison of Benefits Obtained by an In-House Union and a National Union[11]

Benefit	In-House	National
Bonus	2 3/4 months	2 1/4 months
Public Holidays	All	All
Shift Allowance	RM 50-75	RM 60-72
Marriage Leave	6 days	4 days
Working Hours per week	45	45

Figure 5.2 shows the type of trade unions presently existing in Malaysia.

Figure 5.2
Type of Trade Unions in Malaysia

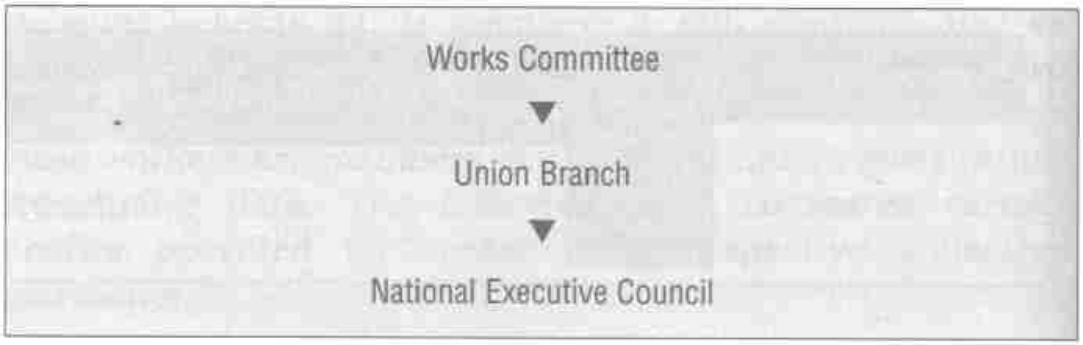


Structure of Unions

Most of the national trade unions have a similar structure in that a works committee is set up in each company where they have members. This committee, elected by the members, is responsible for liaising with the management on behalf of the members and gathering information on members' problems and grievances to be passed up the union hierarchy. If the union is large enough, groups of members in a particular geographical region will form a branch and will elect a branch committee to run the branch. At the national level, the officials of the union, known as the executive council, elected by the members at a national delegates conference, will decide on policy matters and ensure the efficient running of the union's business. The size of the executive council will depend on the structure and the constitution of the union. If it has branches then representatives of these branches will sit on the Executive Council. For example, the National Union of Bank Employees executive council is made up of 8 principal officers and 2 representatives from each of the union's

branches. The chairman and secretary of each branch are automatically chosen to sit on the Executive Council. The Transport Workers Union has a similar system, with representatives from its 6 branches sitting on the executive council along with the elected officials. Figure 5.3 shows the typically hierarchical structure of national unions.

Figure 5.3.
Structure of National Unions



Affiliation to Other Bodies

Trade unions in Malaysia are permitted to affiliate to other bodies, both within and outside the country. However, affiliation to foreign bodies requires the express permission of the Director-General of Trade Unions.

Many unions, therefore join the Malaysian Trades Union Congress to get support and advice. There are also unions who affiliate with overseas organisations. For example, the Transport Workers Union is affiliated to the International Transport Workers Federation (ITF). These international labour organisations provide assistance, training and funding for certain projects. Certain parties are very suspicious of the friendship and help extended by foreign unions and consultative bodies towards their local counterparts. There are those who question the motives of the foreigners, especially those in the developed countries. It has been suggested that these unionists encourage Malaysian workers to push for increased wages and benefits so that Malaysian

products will be less competitive in world markets. This, in turn, will mean that employers in their own countries are less likely to want to invest in production plants offshore, thus ensuring jobs for the workers in the developed countries, many of which are facing high rates of unemployment. Criticism of the role of these foreign bodies has even come from some Malaysian unionists. Arokia Dass, an influential leader in one of the stronger unions says,

> *"Over the past 40 years, it has become clear to a lot of us that many of the so-called international trade union centres in effect serve the interests of transnational corporations.....Agents of these international trade union centres, usually known as their education or welfare officers, approach trade union centres in developing countries with offers of help in trade union awareness courses and skills training for local leaders and members. They come in the guise of allies of the workers and then systematically destroy the effectiveness of the national trade union centres by luring away good leaders with job opportunities elsewhere, and bribing other leaders with foreign training programmes and study tours."*[12]

Strength of the Trade Union Movement

Some writers who are supportive of the trade union concept comment that Malaysian employees' unions are distressingly weak. Dunston Ayadurai, in a paper presented at a National Labour Laws Conference in 1985, said, "in 1983 only 15 per cent of employees in the country were unionised; this 15 per cent were distributed among more than 360 employee unions." Ayadurai suggested four reasons why very small unions prevail in Malaysia. These reasons are:

- the incompetence of the labour leaders;
- the hostility of employers to unions;

- government policies; and
- the legislation relating to unions.[13]

There is very little evidence to suggest that the situation has changed since Ayadurai made those comments. A decade later, an experienced union leader said, "the labour movement in Malaysia is in a state of stagnation and does not seem to move with time".[14] Strict control over the union movement is exercised by the Department of Trade Unions as required by the Trade Unions Act. Unions not only have to apply for registration, as was discussed earlier in this chapter, they are inspected regularly by the Department to ensure that they are in compliance with the requirements of the law. The Department has to be notified by the union of any changes in the union's name, office, or office-bearers. Any amendments to the union's constitution have to be agreed to by the Department. If the union wishes to affiliate to a similar body outside the country, they must first apply for permission from the Department. Many smaller unions fail to comply with the law because of ignorance of the required procedures. Clearly, trade union leaders believe that the industrial relations laws should be blamed for the weaknesses in the union movement. R. Sivarasa, a lawyer who is supportive of workers' rights said, "The trade union movement has struggled over these last 40 years, and notwithstanding these restrictions, has managed a degree of vibrancy and success. But such laws have also created serious retardation of potential growth and weakness in structure which have greatly reduced the capacity of the trade union movement to deliver to its members a fairer share of the wealth produced in this country."[15]

It would seem that the number of workers joining trade unions is declining in many countries. Table 5.6 shows the percentage of the work force unionized in selected countries in Asia as well as the UK and the USA.

Table 5.6
Percentage of Work-force Unionised

Country	Percentage
United Kingdom	40
Sri Lanka	35
Philippines	25
Japan	23
Hong Kong	22
United States of America	15
Singapore	15
Malaysia	10
Thailand	5
Indonesia	4

Source: The Japan Institute of Labour Management Relations, 1997.

While some trade union executives may be struggling to lead their members, a number of highly competent, skilled and dedicated trade union leaders have emerged over the years. Influential and respected leaders of the trade union movement include, among others, the secretary-general of the Malaysian Trades Union Congress, G. Rajasekaran, who is also the executive secretary of the Metal Industry Employees Union and Syed Shahir, the executive secretary of the National Union of Transport Equipment and Allied Industry Workers.

G. Rajasekaran, *the Secretary-General of the MTUC since 1992, first joined the union movement in the 1960s as a founder-member of the Metal Industry Employees Union of which he was elected the Secretary-General in 1963. He subsequently became the Executive Secretary of the*

Union and currently sits on a number of tripartite bodies including the Employees Social Security Board and the Workers Panel of the Industrial Court.

Syed Shahir Syed Mohammad, *the Executive Secretary of the National Union of Transport Equipment and Allied Industry Workers, has been an active trade unionist since 1975 when the motor vehicle assembly industry was still in its infancy. He is a member of the industrial relations committee of the MTUC and has represented his union and the MTUC at various regional and international conferences including the ILO. Tn. Syed recognises that globalization is bringing with it new challenges for the union's members and leadership. He believes that the future of workers is more uncertain than ever before. The on-going task of the union is to explain to workers the importance of belonging to a trade union. Tn. Syed dreams of developing a group of young union leaders who will be able and willing to work for the good of their colleagues and society, even if it means making personal sacrifices.*

Are Unions Good or Bad?

Many people have very strong views about unions. Such views are dependent upon a person's position in society, background and experiences. Certainly, the public image of unions is less than respectable. Stagner and Rosen point out, "less than one hundred years ago, unions (in the USA) were commonly considered criminal conspiracies...The image of the union as a "low class", disreputable organisation still persists."[16] In the early years of union development in Malaysia, there was a generally held view that communism and trade unions were closely allied.

Some people, especially employers and businessmen, criticise unions for making exorbitant wage demands, thus pushing up the cost of doing business, causing inflation, protecting incompetent workers, disrupting important public services such as transport and utilities and even committing acts of violence. The Malaysian Employers Federation Executive Director was quoted as saying, "spiralling wages were outstripping inflation and productivity. Recently concluded collective agreements indicated a 10 to 15 per cent overall wage increment while inflation is just about four per cent." [17] The president of the Korean Institute for International Economic Policies, in similar vein, said, " the rising wages and salaries, which in South Korea are horrendously high, were the result of the liberalisation of economic policies under the former Korean president. One of the forms of liberalisation was to allow for collective bargaining by trade unions."[18]

Those who support unions claim that workers need to be protected from the exploitation of greedy employers and unjust management actions. Exploitation is not a phenomenon found only in the past, in the "dark ages" of industrialization but is an on-going problem. Examples of employers who deduct Employees Provident Fund contributions from their employees' wages but do not remit the money to the Fund are common.[19]

Unions are often seen as a negative force limiting the powers of management to run their organisations as they see fit. Unions are viewed as a pressure group trying to obstruct managers in their jobs. In the UK and the USA, there has been a long history of hostile relations between unions and employers where industrial relations is seen as a battleground with a truce being in force most of the time.

In the USA, the UK and in Korea, there have been many incidents of violence which have served to sour the relations between workers and employers.

In 1914, a coal-mining company in the USA decided to operate its mine on a non-union basis. Since the company expected trouble from workers belonging to the United Mine

Workers, it hired armed guards, bought guns, evicted workers from company quarters and built a fence around the mine. In the violence that followed, several non-union workers and guards were killed and many others injured. The mine itself was damaged by flooding and eventually destroyed by dynamite. [20]

Does industrial relations have to be a scenario involving conflict? Can unions not co-operate with employers so that both parties can benefit? There is no sound reason why unions cannot harmoniously work together with managers to increase the productivity of the organisation. Japanese unions have been reasonably successful in achieving this objective. In order for there to exist accord between employers and unions, workers must be confident that any increased profits which result from their efforts will be fairly shared between the company's owners and themselves. They must trust the management of the organisation to balance the interests of all the affected parties including shareholders, customers, the management themselves and the workers. This trust is fragile and easily lost. Examples abound of where management have awarded themselves large pay increases but retrenched lower level workers in the same year on the grounds of financial difficulties facing the company. Actions such as these make it difficult for union leaders and workers to believe in the fairness of employers. Seigo Kojima, who was appointed director of the East Asian office of the International Metalworkers Federation in 1993, says, "a distressing phenomenon has set in among many developing countries whereby benefits of national economic growth are shared only by a self-perpetuating oligarchy while a considerable portion of the work-force is subject to a low-wage regime.... Such countries promote systems whereby wage structures allow for disproportionate allocations which guarantees astronomical salaries for higher categories of employees while those in the lower categories have to contend with minimal salary increases." [21] It is problems such as these which further the "them" and "us" gap between workers' unions and employers

and give impetus to the continued support workers give unions.

EMPLOYERS' ASSOCIATIONS

Workers have the right to join trade unions, and so do employers. Normally when one thinks of a trade union, the picture in one's mind is that of a group of employees. However, employers have equal rights to form unions, which are mostly known as associations. Employers' unions are a response to the large and powerful national trade unions of employees. Their main objectives are to promote and protect the interests of their members, to negotiate and deal with trade unions of employees, and to represent their members in any trade dispute between an individual member and the employees' union.

The rules for forming and joining a trade union are the same for both unions of employees and of employers. Thus, any group of employers wishing to form a union must apply to the Director-General of Trade Unions, and the members must be from the same trade, industry or occupation.

In the year 2000 there were 14 employers' unions, of which 9 are in Peninsular Malaysia. The most active are:

- Malayan Agricultural Producers' Association (MAPA) - Plantation industry;
- Commercial Employers' Association of Peninsular Malaysia - Commercial industry;
- Malayan Commercial Banks' Association (MCBA) - Banking industry;
- Association of Insurance Employers (AIE) - Insurance industry.

The newest employer's association to be established is the Association of Hotel Employers, Peninsular Malaysia.

CONGRESS OF UNIONS OF EMPLOYEES IN THE PUBLIC AND CIVIL SERVICE (CUEPACS)

CUEPACS is a federation of trade unions of government workers. It serves as the spokesman for the public service workers and was first registered in 1959. The Trade Unions Act, Section 72 permits unions in a similar trade, occupation or industry to form a federation. Such a federation must register with the Department of Trade Unions.

The objectives of CUEPACS include:

- to promote the interests and improve the working of its affiliate trade unions;
- to protect the interests of the affiliate trade unions and their members;
- to endeavour to improve the conditions of employment of the members of the affiliate trade unions, and
- to promote legislation affecting the interest of the member unions in particular or trade unionists in general.

Membership is open to all registered trade unions in the public and civil service in West Malaysia. Each trade union wishing to affiliate must take a secret ballot of its members to decide whether or not to affiliate.

The administration of CUEPACS is carried out by a council elected at a convention held once in three years.

MALAYSIAN TRADES UNION CONGRESS (MTUC)

The Malaysian Trades Union Congress (MTUC) plays an important although sometimes controversial role in the

industrial relations system. Unfortunately, many people tend to get confused over the role of the MTUC. For example, a senior member of the government was quoted as saying, "It is not proper for the MTUC to include any form of politics in its movement. This is contrary to its objectives *as a trade union*." (Author's italics)[22] The MTUC is not a trade union, but a society registered with the Registrar of Societies.

Members of the MTUC are individual trade unions which choose to affiliate to it. In 1998 it had some 180 members, most of which were unions in the private sector.

Its function is to act as the spokesman for trade unions both at national and international levels. For many years, it represented the workers' viewpoint on tripartite bodies such as the National Labour Advisory Council (NLAC) and the Employees Provident Fund Board. In addition to speaking on behalf of workers, the MTUC also advises unions on any matters for which they seek assistance. It runs training programmes to help union leaders understand their roles and responsibilities.

As such, the objectives of the MTUC include:

- providing an advisory service to its members;
- presenting the labour viewpoint to the government;
- presenting workers' views on national issues, e.g., development plans and education;
- helping to organise workers who do not belong to a union;
- representing the Malaysian labour movement at forums abroad;
- providing trade union education; and
- carrying out research on matters of trade union interest.

To carry out the above functions, the MTUC has a number of committees responsible for different areas as follows:

- Women's affairs

- Youth affairs
- Education
- Safety and health
- Consumer matters
- Industrial Relations
- Organising the unorganised

Although the key position of the MTUC in representing workers' interests has never been denied, it has never had the total support of all employees' unions. At various times, some of the biggest unions left the MTUC because of dissatisfaction with its leadership or its weak financial position which limits the help it can give its members.

In 1982 five of the bigger unions with a combined membership of 80,000 disaffiliated from the MTUC although they returned in 1986. In the same year, the third largest affiliate, the National Union of Bank Employees (NUBE) left the MTUC.

In 1988 there was a major disagreement between the MTUC and CUEPACS, which represents unions in the public sector. The publicity given to this split between the two organisations representing the workers' interests certainly was not beneficial for workers or trade unions. In 1994, there was again a well-publicised squabble between the MTUC and CUEPACS as to who should represent the workers' side at the International Labour Organisation's annual meeting.

In 1989, a number of the largest and most stable unions, particularly the National Union of Bank Employees, were extremely unhappy with the way the MTUC was being run. They noted a decline in unionisation and that many unions were ineffective and in need of assistance. The political and aggressive stance of some of the union leaders in the MTUC was negatively affecting the effectiveness of that organisation. As a result the Malaysian Labour Organisation (MLO) was formed and registered in 1990 as an alternative to the MTUC.

While the MLO had similar objectives to the MTUC it believed in using a low-profile, non-confrontational approach to achieve them. It especially abhorred the MTUC's tradition of fighting with the government. Given the government's major role in the Malaysian industrial relations system, the MLO felt that co-operation with the Ministry of Human Resources and other groups would achieve more for workers than an aggressive stance which only serves to annoy government officials. Its policy could be described as one of "building bridges" rather than burning them down.[23]

Sporadic fighting between the MTUC and the MLO did not help the image or effectiveness of either organisation. In March 1993 the MLO accused the MTUC of influencing its affiliates and persuading them to pull out of the former.[24] Such arguments negatively affected the credibility of both bodies.

On Labour Day 1996, the two organisations agreed to merge. The MLO members agreed to re-affiliate to the MTUC and the MLO dissolved itself. It seems that the chief union leaders recognised that the existence of two trade union centres is not good for the union movement in the country.

The MTUC is constantly in the headlines of the mass media and frequently receives criticism from various quarters. For example, The Star's columnist, V.K.Chin, commented, "the recent behaviour of some of the MTUC leaders is cause for concern and unless something is done, it may put the whole organisation under a cloud as to the direction it is heading."[25]

From time to time there is debate as to the effectiveness of the MTUC in representing workers' and unions' interests. Certain groups are unhappy that the MTUC has appeared on occasion to support opposition party politicians rather than the governing parties. These groups would prefer that the MTUC remain neutral in terms of the country's politics, e.g., the National Union of Newspaper Workers' general secretary said, "the MTUC's decision to take part in the next general election was totally unacceptable... A labour movement should be

completely free of any kind of political involvement."[26] He added further that, "the labour movement cannot afford to play party politics as its membership is representative of every community, religion and political hue."[27]

On the other hand, some unionists believe that the MTUC is totally ineffective in espousing workers' causes because the leadership have been more interested in using the organisation for their own personal gain. Arokia Dass comments that while his union was temporarily placed at the MTUC offices he saw, "constant infighting, indifference towards small unions, and a marked disregard of requests for union organising in small companies."[28]

One of the on-going problems facing the MTUC is the lack of funds to carry out activities. Its debts mounted to such an extent that in 1993 it was forced to sell its 24-year old headquarters in Petaling Jaya. Staff costs were eating up more than half the annual income of the organisation[29] leaving very little available for training, research and its other activities. Recently, however, with better financial management, the MTUC has been able to buy a new building in Subang Jaya and has worked to rebuild its public image as an organisation willing and able to fight for the rights of workers.

Wisma MTUC, Subang Jaya

The extent of the success of the MTUC in attaining its objectives is highly debatable. Nevertheless the MTUC remains a vocal body and plays a vital role in the industrial relations scene.

MALAYSIAN EMPLOYERS FEDERATION (MEF)

The Malaysian Employers Federation (MEF) is the employers' equivalent of the MTUC. The MEF has representatives on a number of councils and bodies such as the National Labour Advisory Council (NLAC), the Employees Provident Fund Board, the Social Security Organisation's Board, the National Productivity Corporation and the National Council for Occupational Safety and Health. It is registered as a society: its members are individual companies and also employer's associations.

The objectives of the MEF are:

- to secure the organisation of all employers;
- to co-ordinate and present the opinions of the employers on labour matters;
- to promote, protect and defend the interests of employers in general;
- to inform and advise members on the implementation of the labour laws; and
- to advise members on the settlement of trade disputes.

An important function of the MEF is to carry out research needed by its members, especially for collective bargaining purposes.

As such, it carries out wage and benefits surveys and monitors the Consumer Price Index (CPI). The organisation also conducts training for its members by organising seminars and lectures on topics relating to labour legislation

and other industrial relations matters. The MEF provides industrial relations services to its members by representing them at the Industrial Court, advising them during the collective bargaining process, and generally giving any other assistance requested by its members.

The MEF also publishes a newsletter entitled The *Malaysian Employer* which keeps members informed on the activities of the organisation, decisions of the Industrial Court and other related issues.

MEF

Monthly Newsletter of THE MALAYSIAN EMPLOYERS FEDERATION

The Malaysian Employer

CORPORATE GOVERNANCE PRACTICES IN HUMAN RESOURCE MANAGEMENT AND INDUSTRIAL RELATIONS IN THE ASEAN COUNTRIES IN THE LIGHT OF AFTA IMPLEMENTATION AND GLOBALISATION

Contents

- Corporate Governance Practices in HR and IR
- 27th ACE Meeting, CEOs and Board of Directors Meeting
- Service to Members
- Summary of Industrial Court Award
- Financial Sector Workforce hit by MoA
- Consumer Price Index
- Courses for the month of May 2001

The challenges arising from globalisation and trade liberalisation include increased pressure on corporate competitiveness and corporate governance. These challenges forces companies to increase their efficiency, productivity, ability to innovate, customer responsiveness and the quality of products and services. Companies are compelled to be more accountable to a wider group of stakeholders – employees, customers, investors and suppliers.

Private enterprise has been called upon by government and the public to play a more active role in tackling the increased social and ecological downside of global economic competition. More fundamentally, people both within and outside the business community are asking questions about the wider impact of business and accounting methodologies used to measure corporate performance. This in addition to traditional corporate ethics and values, is driving business at the transition from corporate philanthropy to corporate citizenship and social responsibility. There is also a growing awareness of the need to develop new types of consultation and partnership between companies and their secondary stakeholders – communities, governments, non-governmental organisations and the general public.

The ASEAN Confederation of Employers (ACE)/NIKKEIREN International Cooperation Center (NICC) Workshop held in Manila from 21 - 22 February 2001 brought together representatives from

THE MEDIA AND THE TRADE UNION MOVEMENT

The union movement is often portrayed negatively in the media. Assistance given to members is rarely highlighted. Stories about unions cooperating with employers are rarely given coverage. Instead, headlines like these are common:

- "Union (the TWU) gets time to settle RM13m debts."
- "MTUC HQ sold to Thifty supermart."
- "NUPW fined for not paying EPF."
- "RM92,000 missing from NUPW funds".

Unions in other countries also receive the same bad press. For example, the Australian government accused union leaders of being corrupt and decided that a formal inquiry would be launched to examine the reports being received concerning the construction unions in the country. A report by a government official alleged that union officials had been given cash commissions or property in return for industrial peace or withdrawing excessive demands during collective bargaining.[30]

To survive in the 21st century unions need to clean up their act, ensure the accountability and honesty of their elected leaders and learn to improve their public image.

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REVIEW QUESTIONS

1. Why do workers join trade unions?
3. What actions can employers take to discourage their employees from joining a trade union?
4. Who can join a union? Who cannot join a union?
5. Is registration of a trade union by the Director-General of Trade Unions automatic?
6. Comment on the strength of the trade union movement today.
7. Why do employers join unions?
8. What is the role and function of bodies like the MTUC and the MEF?

DISCUSSION QUESTIONS

1. Why are so many employers anti- trade union?
2. What are the consequences of strong unions? What are the consequences of weak unions?
3. Can the trade union movement and politics be totally separated?
4. Are trade unions outmoded in the 21st century?

Chapter 6

Collective Bargaining

- *Private Sector*
  - *Deciding Terms and Conditions of Service*
  - *Collective Bargaining*
  - *Recognition Procedure*
  - *De-recognition?*
  - *Bargaining Procedure*
  - *Negotiation Techniques*
  - *Collective Agreement*
- *Public Sector*
  - *Terms and Conditions of Service*
  - *Salaries Commissions*
  - *Public Services Department*
  - *National Joint Councils (NJCs)*
  - *Public Services Tribunal*
- *References*
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PRIVATE SECTOR

Deciding Terms and Conditions of Service

What is meant by "terms and conditions of service"? An employee carries out the duties and responsibilities assigned to him by his employer. In return, he is entitled to wages and a number of other benefits, such as payment of medical bills, paid holidays and possibly a share in the company's profits, usually in the form of a bonus. His wages and the other benefits agreed to in his contract of employment are called his "terms and conditions of service".

Who decides on the wages and benefits to be given to each worker or group of workers? The decision relating to employees' wages and benefits can be made unilaterally or bilaterally. In the public sector and in non-unionised companies in the private sector, unilateral decision-making usually takes place, i.e. the employer makes all the decisions as to what wages and benefits to give his employees. Naturally, his decisions in this area will be affected by both his industry and location; and his ability to pay. He does not make his decision in a total vacuum. He may conduct a formal survey to find out the preferences of his workers in relation to benefits, or he may even use the grapevine in his organisation to discover the expectations of his employees. However, in the end it his decision, and his alone, to decide what remuneration and benefits to provide. If workers are unhappy with the terms they are receiving, their only alternative is to resign and look for a better paying job elsewhere. Only a few individuals are able to negotiate successfully with their employer for better terms. These are workers who have special skills or experience which are difficult to find in the labour market. Of course, in times of severe labour shortage, such as those faced by employers in Malaysia in the early 1990s, individual workers could not only negotiate with their employers for better terms, they could even blackmail them by stating, "Increase my terms and benefits, or I will resign!"

In the private sector, however, when the workers are organised into a trade union, collective bargaining is the process by which representatives of the employees (the trade union) meet together with the employer to negotiate and decide upon workers' wages and other terms and conditions of service. It involves joint decision-making by the employer and the employees and is, therefore, a form of bilateral rule-making. Successful negotiations lead to the signing of a collective agreement, which is a document laying down the wages and benefits the employees will receive for a fixed period of time. Thus, collective bargaining is a peaceful means by which workers can try to improve their wages, decrease their number of working hours, and increase their benefits. The workers act collectively to negotiate for better terms as they have little individual power or influence to negotiate for better terms.

Apart from improvement in wages, unions have other objectives in conducting collective bargaining:

- To protect workers' rights by including provisions to check any abuse of power by the employer and prevent him from acting unjustly, and
- To allow workers to participate in decision-making in areas which are of vital interest to them.

At present in Malaysia, collective bargaining mostly focuses on economic issues but it could be further expanded to include a host of other areas relating to the welfare of workers, especially in the areas of safety and productivity schemes. For example, the Minister of Human Resources is encouraging employers and trade unions to include a clause on sexual harassment in their collective agreements.[1] In this way, collective bargaining could be transformed into a form of consultation. However, this change would require a reform of the current industrial relations climate, which is sometimes hostile.

Decision-making on wages and other benefits is mostly either unilateral or bilateral (through the system of collective bargaining). There also exists a third method for setting wages

in the private sector, viz. the Wages Councils. The Wages Councils Act, 1947 is a piece of minimum wage legislation meant for the protection of workers who do not have the machinery or power to get fair terms from their employers. There are 4 Wages Councils covering:

- Shop assistants;
- Hotel and catering workers;
- Cinema workers; and
- Stevedores and cargo handlers employed by private employers in the port of Penang.

Each council consists of representatives of employers' organisations, employees' bodies and an independent member. The Minister of Human Resources has the authority under the Wages Councils Act to vary the scope of the existing councils or to abolish them, especially when the workers have developed their own bargaining machinery.

Collective Bargaining

For effective bargaining to take place, there are 2 necessary pre-conditions:

1. Workers must have the right to form collective associations; and
2. Unions must have bargaining strength.

Right to form collective associations

As has been seen in the previous chapter, workers have the right to form and join trade unions. Within the limitations set by the law, trade union activity is legal. Collective bargaining could not take place without this right.

Union bargaining strength

The most important prerequisites to effective collective bargaining are that the union:

- Be recognised by the employer;
- Has adequate financial strength; and
- Members are united.

Recognition is the starting point for collective bargaining. The Industrial Relations Act requires unions to attain recognition before they can proceed to invite an employer to commence collective bargaining. When an employer "recognises" a trade union, it means that the employer concedes that the union is the legitimate representative of his workers and has the right to speak on their behalf. Once a union has been given recognition by an employer, it gains the following important advantages:

- The union can represent individual members who have a grievance or complaint; and
- The union can negotiate for better terms and conditions on behalf of all workers in the workplace who are eligible to be members of the union, whether or not they are members of the union. A collective agreement by law covers all bargainable employees in a particular workplace.

Registration of a union gives it the legal right to exist, but recognition means an individual employer is willing to accept the union as the rightful representative of his workers. Recognition is so important to trade unions that, in the interests of harmonious relations, the law (Industrial Relations Act, Section 4) lays down the procedure for unions to follow when claiming recognition.

Recognition Procedure

Once a union has successfully organised the workers in a particular workplace, it will try to obtain recognition from the employer. To do this it fills out a Claim for Recognition Form (Form A in the Schedule of the Industrial Relations Act) and presents it to the employer. A copy of the form will also be

forwarded to the Director-General of Industrial Relations. The form requires the union to state its name and address and specify the workers for whom the union is requesting recognition. A copy of the union's constitution must also be included.

Figure 6.1 provides an example of the Claim for Recognition Form.

Figure 6.1
Notice of Claim for Recognition Form
Form A

To.....
(*name of employer or trade union of employers*)

.....
(*address*)

We.....
(*name of trade union*)

of .....
(*registered address*)

hereby serve this claim for recognition pursuant to section 9(2) of the Industrial Relations Act 1967 in respect of

*(i) All workmen employed by you, except those in a managerial, executive, confidential or security capacity;

*(ii) The following class or classes of workmen employed by you

.....

A copy of the rules of our trade union is enclosed.

Dated the ..... 20 .....

Signature: .....

Name: .....
(*Block Capitals*)

Designation: .....

c.c. Director-General for Industrial Relations, Ministry of Human Resources.

* *Delete whichever is not applicable.*

An employer receiving such a claim must reply within 21 days. The employer has 3 possible responses. The ideal response in terms of peaceful industrial relations is voluntary recognition by the employer. Whether or not the employer will be prepared to voluntarily give recognition very much depends on the attitude and philosophy of the management towards unions as discussed in the previous chapter. If the union making the application is an in-house union there is an increased likelihood of the union getting recognition with a minimum of fuss. If, however, the employer is virulently anti-union, the response can be expected to be negative. While there are no figures available, many companies do resist attempts by unions to gain recognition. They are aware that granting recognition will be followed by the collective bargaining process and that the union will surely put pressure on the management, not only to increase terms and benefits for the workers, but also to allow the union representatives the right to participate in decision-making in areas of concern to their members. The evidence on whether the collective bargaining process does indeed lead to higher salaries being paid out is not clear. D.Q. Mills says that in the USA, "on balance", unionised employees receive higher levels of benefits than do non-unionised employees."[2] Managers also believe that once recognition has been granted the

introduction of changes will become more difficult, especially in terms of efficiency improvement methods.

An employer can refuse to grant recognition, in which case he must inform the union of this decision and give reasons for his refusal. Alternatively, the employer can request the Director-General of Industrial Relations (DGIR) to verify whether the union is the correct union for his particular industry and whether the workers concerned are, in fact, members of the union. If the employer refuses to give recognition or fails to reply to the union's claim, the union can report to the Director-General, who will investigate and take whatever steps he considers necessary to bring about a settlement of the dispute between the union and the employer. If the employer still refuses to grant recognition, the Director-General will report the matter to the Minister of Human Resources, who has the power, under Section 9 of the Industrial Relations Act, to decide whether or not the union should be recognised. His decision, which is final, binding on the parties and cannot be questioned, will be based upon the recommendation of the Director-General of Industrial Relations who, with the aid of the Director-General of Trade Unions, will have taken steps to find out what percentage of the workers concerned belong to the union. If more than 50 per cent of the eligible workers in the organisation belong to the union, the Minister will normally order recognition.

The Department of Trade Unions uses either of two methods to ascertain the percentage of workers who belong to the union in the company where a claim for recognition has been made.

Traditionally, the Department has carried out a membership check by requesting the company to furnish a name list of eligible employees and the union to provide a list of paid-up members in the company concerned. These two sets of information would then be checked one against the other by Department officers to find out whether a majority of the eligible employees were, in fact, members of the union. Over the years, both employers and unions raised a number

of complaints about this procedure. Both sides accused each other of providing false and misleading information. Employers suggested that many employees had been coerced into joining the union and that they had not willingly signed the application forms for union membership. Occasionally, it was alleged by employers that unions falsified the application forms and forged signatures on them. Unions, on the other hand, complained that employers were purposely slow to respond to the Department of Trade Unions' request for information in order to buy time to persuade union members to withdraw from membership. Unions also criticised employers for giving incorrect information to the Department by including on the payroll list names of people who had left the organisation. Furthermore, unions were impatient with the time taken by the Department to carry out the membership check.

To reduce the dissatisfaction with the above system, the Department of Trade Unions now sometimes uses an alternative method to ascertain the percentage of workers who have joined the union. When the Department feels it is more practical and efficient, they hold a secret ballot of the workers concerned to find out whether they are indeed voluntary members of the union. This procedure requires a Department officer to visit the place of work where a claim for recognition has been made, to collect the workers together and to distribute ballot papers. From the employer's point of view this system should ensure a more accurate counting of the number of workers in the company who are union members, although a certain amount of production time will be lost. If the workers are on shifts and the employer is unable to bring them together at one time for the purpose of the secret ballot this method may not prove practical, and the Department will revert to checking on the information provided by the employer and the union. Some unions are dissatisfied with this technique for checking the representativeness of their organisation. They find employers are using certain tactics which mean that they are unable to

prove that they do, in fact, represent a majority of the employees. For instance, large number of workers might be sent out-station on the employer's business on the day the secret ballot is held.

The issue of whether a particular national union is eligible to represent workers in a specific company is very much at the discretion of the Department of Trade Unions. They examine the job duties of the workers concerned and the nature of the business of the company, and compare this information with the constitution of the union making the recognition claim. For example, in a company making mattresses it was decided by the Department that the Union of Employees Manufacturing Textiles and Clothes was not a suitable union to represent the workers. The workers in a well-known pewter company joined the Metal Industry Employees Union (MIEU). The Department of Trade Unions found that the nature of their business was "making decorative items" and therefore the MIEU was not a suitable union for these workers.

It must be emphasised that there is no legal requirement that a union which represents more than 50 per cent of the workers in a particular company will be granted recognition. This has become the established practice based upon democratic principles that the majority have the right to speak on behalf of all the workers concerned. The decision to order the employer to recognise the union is within the prerogative powers of the Minister of Human Resources, who will make the final decision when there is a dispute over the matter between the employer and the union. As it is the government's stated policy to encourage collective bargaining and as recognition is a prerequisite to this process, it follows that where a union has shown itself to be the representative of a majority of the workers in a company the Minister will usually order recognition be granted.

If a union's claim for recognition is rejected, after intervention by the Minister, or by decision of the Minister, it must wait 6 months before it can submit another claim.

Obviously, there is no point in the union putting forward another claim until it has increased its membership in the organisation in question. Thus the union needs to increase its efforts to win over new members by conducting a membership campaign. Insufficient members means recognition will not be granted. Without recognition, the union cannot begin collective bargaining to improve the workers' terms and conditions of service.

The time period during which a recognition claim is being processed can be very tense for both the union, the workers concerned, and the employer. To ensure peace during the recognition process, the Industrial Relations Act (Section 10) makes it illegal for an employer to declare a lock-out or for workers to picket or strike while a claim is being disposed of. It is not unknown for some employers who disapprove strongly of trade unions to resort to certain tactics to try and weaken the union and to prevent it from getting recognition. The law states that an employer cannot terminate the services of a worker (except on disciplinary grounds) pending a recognition claim. This is to prevent an unscrupulous employer from getting rid of those workers, especially the leaders, who have joined the union. Some employers threaten to dismiss or transfer workers who are known union activists. The employer may even try to persuade workers into resigning from the union by offering them promotion to supervisory or executive level whereby the worker may no longer be eligible to be a member of the union concerned.

De-recognition?

The recognition procedures in the Act seem adequate. And yet recognition is still a sensitive issue. The way recognition is gained is very important for the future relationship between the union and the employer. If the union has to struggle and fight the employer to get recognition, and if the union perceives that the employer is using unfair tactics to prevent them getting recognition, the relationship between the union

and the employer may become very strained. If and when the union finally gets recognition, it may act in an aggressive and obstreperous manner - the very behaviour the employer fears most.

As we have seen in Chapter 5, all unions must be registered. They may lose their registration, which is granted by the Department of Trade Unions, if they carry out unlawful activities or fail to comply with the requirements of the law. In contrast, a union which has been granted recognition by an employer cannot have that recognition taken away. At present there is no legal provision for de-recognition as there is for de-registration. This means that it is possible that a union which has been granted recognition for many years may have lost the support of the workers in a particular organisation. Over time, the workers may have resigned from the union and thus it may no longer have at least 50 per cent of the relevant workers on its membership list. Yet it retains its recognition from the employer. It does not seem proper that an employer should have to continue to recognise a union which does not have the support of the workers.

However, should the workers join another union they can request recognition for this union, but only after 3 years have elapsed from the granting of recognition to the first union. This has led to inter-union battles, most commonly between a national union and an in-house union set up with the encouragement of the employer. The management of the company may believe that an in-house union would be less aggressive in its demands, particularly in relation to terms and conditions of service than the national union. They, therefore, foster the formation of such a union and voluntarily grant this in-house union recognition. In these circumstances, the Director-General of Trade Unions has the power under the Trade Unions Act (Section 15) to cancel the registration of the union which does not have majority support (in the case of an in-house union), or to issue an order requiring the union to remove from its membership list those members who belong to the union. This means these members would then have to

choose whether to join the union which represents the majority, or not to join a union at all.

Bargaining strength is dependent not only on the union having sufficient members so that it can get recognition from the employer, but also on its financial position. Of course, the more members a union has, the higher its monthly income will be. But it is necessary for the union to manage its finances well. If the union has not enough money to establish a "strike fund" and this is known to the employer, it will be difficult for the union to persuade the employer at the bargaining table that, if absolutely necessary, the union members would be willing to strike to back up their demands. Unions which lack funds are also less able to carry out the research necessary for collective bargaining purposes.

The solidarity of the workers is also significant. If the employer is aware that the workers are divided among themselves and unable to agree on the demands to be put to the employer, he can use this against the union by refusing to give in to their demands.

The last factor affecting bargaining strength is largely outside the control of the workers. The economic situation and the level of unemployment in the industry and the country generally would influence the position taken by a union during negotiations. When the economy is booming and there is a labour shortage, the unions would seem to have the upper hand. The opposite is true in times of recession. If the employer is struggling to survive, there is no point in the union demanding large increases in wages and benefits. Unions need to protect the jobs of their members as much as try to improve their working conditions. If the union insists on excessively high increases in pay, the company may give in but subsequently find themselves bankrupt. Such a situation could be described as "lose-lose" for both parties.

Bargaining in "good faith"

For collective bargaining to take place, workers must have the right to join and be active in unions. Recognition must be

granted to the union by the employer, and both the employer and the union must be willing to bargain in good faith. This means that the company must send to the bargaining sessions management representatives who have the authority and the intention to sign an agreement with the union. Also, both the union and the management must be willing to compromise. If the first demand made by the union is the very least they are willing to accept, then bargaining is not possible. The same applies to the employer. In most, if not all, instances, proposals and counter-proposals by both the union and the employer are not acceptable to the other party in their original form. There will be several meetings over some weeks, and sometimes months, before both parties can see some areas for agreement or compromise. Some proposals have to be dropped as a trade-off for other concessions. Collective bargaining can be a tedious, tension-filled and long drawn-out process. The parties need to communicate and negotiate with an open mind and the intention to come to an agreement.

Bargaining climate

A major factor affecting the outcome of collective bargaining is the nature of the relationship between the two parties, the union and the company. Where a close, harmonious atmosphere is prevalent, those involved will have an open mind. They will be more willing to use a problem-solving approach to bargaining. However, where there is a history of distrust, and possibly some personal animosity between those at the negotiating table, the bargaining climate can be tense and unfriendly. The relationship between the parties to the negotiations will be built up over time. It will be affected by events in both the near and distant past. It is essential, therefore, that positive steps are taken by both parties to develop and maintain a good working relationship. Regular meetings with the union leadership will assist in developing this relationship.

Bargaining Procedure

Bargaining levels

Collective bargaining can take place between a single employer and a trade union of employees or between a group of employers and a union of employees. The employees' union may be either in-house or national in scope of membership. The majority of collective agreements signed between employers and trade unions are in this category.

Multi-employer bargaining is found where an employers' association or trade union exists, e.g. the National Union of Bank Employees (NUBE) bargains with the Malayan Commercial Banks Association (MCBA) which represents many of the larger banks, and the National Union of Plantation Workers (NUPW) bargains with the Malayan Agricultural Producers Association (MAPA). In terms of numbers of workers covered, multi-employer bargaining is more significant, although the majority of agreements are made between unions and a single employer. Some employers have to carry out bargaining with a number of different unions. This happens if different groups of employees in the company belong to separate unions. Thus many banks bargain not only with the NUBE, which represents non-executive employees, but also with the Association of Bank Officers Malaysia (ABOM). Malaysian Airlines negotiates with four unions, namely the Malaysian Airlines Employees Union, Peninsular Malaysia (MASEU) for non-executive graded staff, the Malaysian Airlines Executive Officers Union, Sabah, the Airlines Workers Union, Sarawak, and the Malaysian Airlines Executive Staff Association (MESA).

Procedure

Collective bargaining is considered by the government to be the best way for private companies to decide on workers' terms and conditions of service. The procedure for collective bargaining is laid out in the Industrial Relations Act, Section 13.

The first step in the collective bargaining process is when the trade union submits in writing a proposed collective agreement to an employer and invites the latter to begin negotiations. The employer must reply to the invitation within 14 days. If the organisation agrees to begin negotiations, the first bargaining session must start within 30 days of the agreement. However, the employer may refuse to negotiate, in which case a trade dispute is deemed to exist and the union may inform the Director-General of Industrial Relations (DGIR) and request conciliation. Should the employer fail to reply to the invitation to commence negotiations, the union could take the same action. The DGIR will try to persuade the company to bargain with the union.

The law also allows the employer to take the initiative, put forward a proposal and invite the union to bargain. However, in most cases the employer will wait for the union to take the first step.

Once the employer has agreed to negotiate, the representatives of the workers and the employer will meet and, in a number of sessions, bargain until an acceptable compromise is reached. This agreement will be put in writing and signed by both parties, after which it must be deposited with the Industrial Court within one month of its being signed. The Court's function is to check through the agreement to ensure that it complies with the law. This function of the Court is called "taking cognisance" of the agreement. Once the collective agreement has been given cognizance, it becomes a binding document enforceable by the Industrial Court.

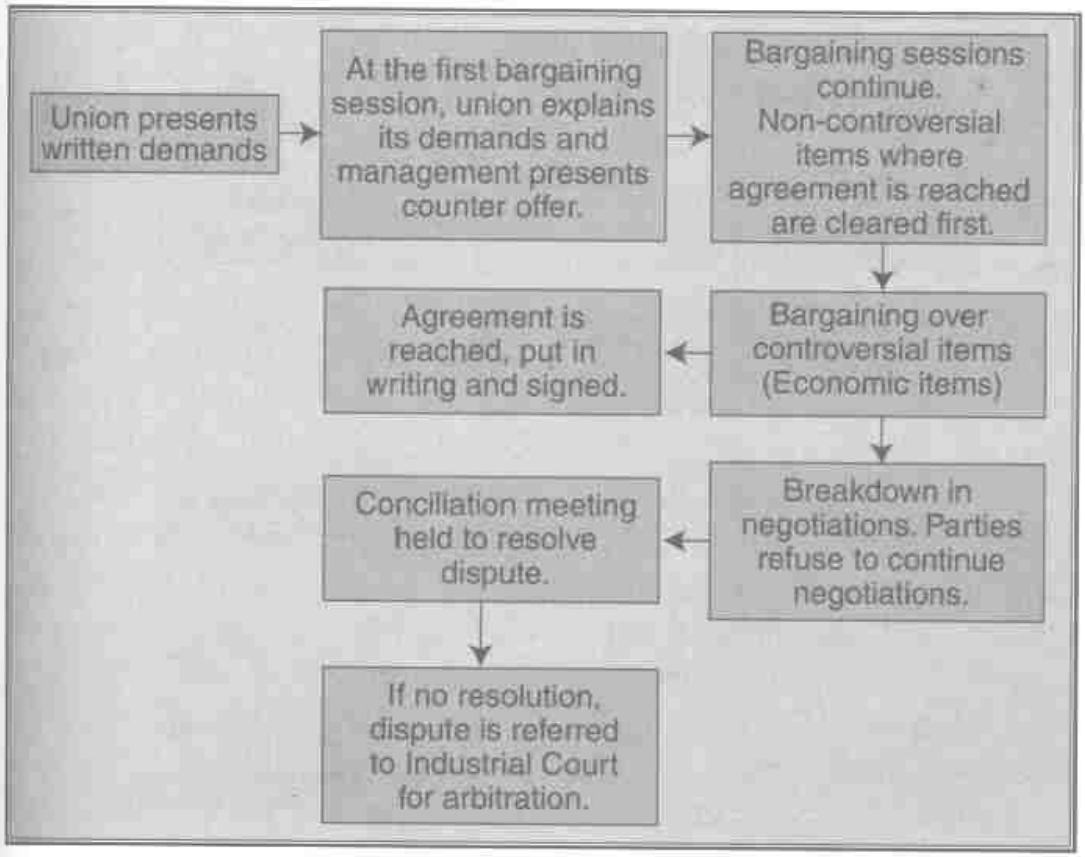
What if, after a series of meetings, there is a deadlock, i.e. the parties negotiating are unable to come to a satisfactory agreement? In this situation, either party can request the Director-General of Industrial Relations to conciliate. If the Industrial Relations Department officers are successful in helping the parties reach a compromise then an agreement may be reached. If, after conciliation, the parties are still unable to come to an agreement, they can jointly request the Minister of Human Resources to refer their dispute to the

Industrial Court for arbitration. Alternatively, the Minister can use his authority under the Industrial Relations Act to refer the dispute to the Court. The Industrial Court will examine the issues and items which are in dispute and will hear the presentations of both parties and will make a decision. In this respect, the Court decides on the final outcome of the collective agreement.

It should be evident from the above discussion that once the collective bargaining process begins, it will inevitably end with a collective agreement. If the two parties (the employer and the union of employees) cannot come to an agreement of their own accord, the Court will decide for them what should be the contents of the agreement.

Figure 6.2 shows the collective bargaining procedure in diagrammatic form.

Figure 6.2
Collective Bargaining Procedure

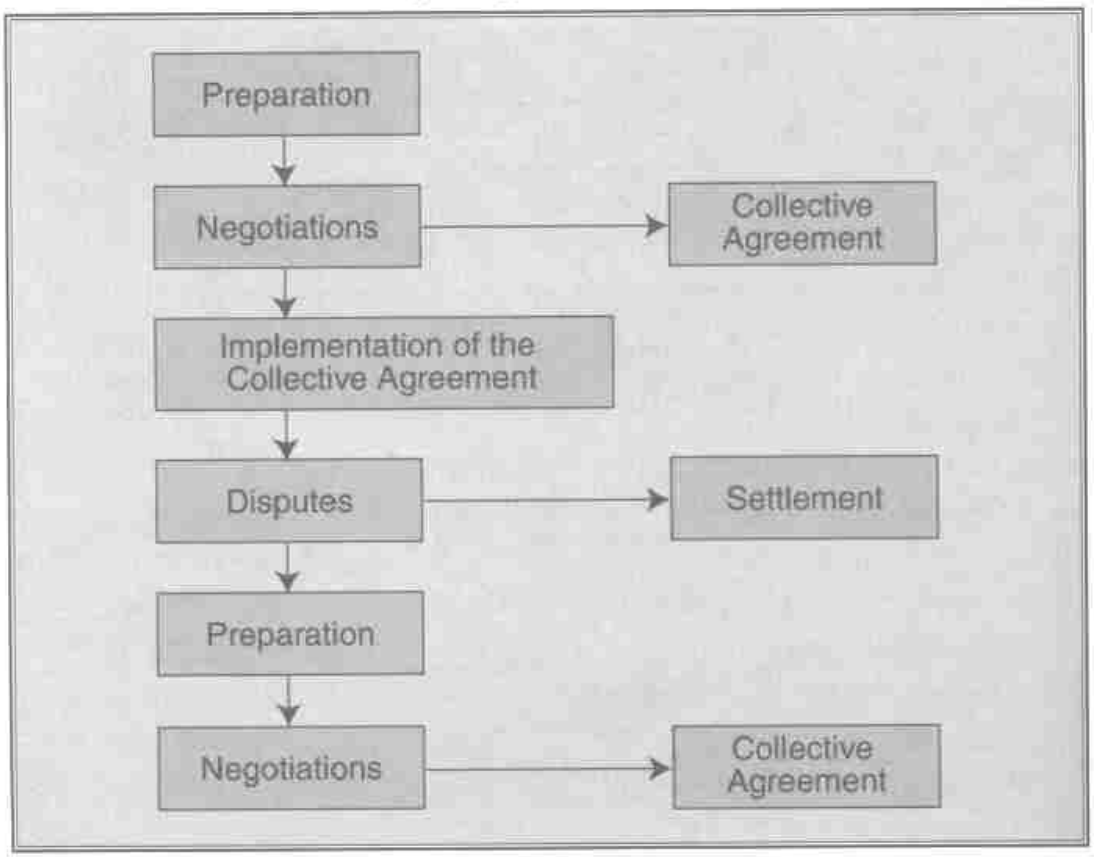


Negotiation Techniques

Preparation for negotiation

Before the two parties meet at the bargaining table, a great deal of preparation has to be done. The nature of collective bargaining is such that because of the preparatory work and the follow-up in terms of implementing the agreement it is a continuous process, not something that occurs once in three years. The iceberg concept applies to collective bargaining, i.e. the visible part of bargaining is the meeting between the two negotiating teams. This, however, forms only 10 per cent of the full bargaining process. The other 90 per cent is hidden, and is in the form of preparation and follow-up. Figure 6.3 shows the continuous nature of collective bargaining.

Figure 6.3
Collective Bargaining as a Continuous Process



The collection of data needed for the bargaining process cannot be left until the last minute. Some of the information will come from problems associated with the current agreement. Any disputes over interpretation, for example, which have been adjudicated by the Industrial Court will often lead to reworking of an item in the next round of bargaining. Any item which, although agreed to by the union and the employer, causes a lot of complaints or grievances by the workers may need to be re-examined.

What has to be done before negotiations begin? Both sides need to choose a bargaining team, decide on venue, and ensure they have all the relevant financial data needed. They will probably want to decide on bargaining strategies and tactics. The leader of each team will need to get a mandate for bargaining purposes. These factors will be described in more detail in the following section.

Membership of the bargaining team

The outcome of collective bargaining depends greatly on the skills of those involved. Both parties (the employer and the union) will choose a committee to represent them at the bargaining table. The respective committees will be responsible for all preparation prior to negotiations as well as the negotiation itself. Membership of the negotiation team will vary depending on the situation. The management group usually consists of the Industrial Relations Manager or the Human Resource Manager, if the company has no specialist in industrial relations; the Finance Manager, whose skills in costing the union's proposals will be necessary; and one or two line managers. Should the most senior executive officer sit on the bargaining team? In relatively small companies the Chief Executive Officer (CEO) may want to be directly involved, but a common management strategy is to ensure the CEO is not on the team so that in the event of a problem cropping up during the bargaining, the team leader can insist on a break or a postponement so that he can confer with his

superior officer. Obviously, if the chief is sitting in the negotiating room this tactic will not be available.

If the union involved in the bargaining is a national one, the committee members will be a mixture of representatives from the union headquarters who are full-time officers or employees of the union, possibly including the executive secretary and the industrial relations officers who have plenty of bargaining experience, and company level union leaders. In many instances, the union's team will be far larger than the employer's because of the need to allow the site committee representatives to sit in, even though they may make no direct contribution during the bargaining session. Their role will be to support their headquarters team and report back to their colleagues the progress of the talks. In-house unions will choose their union executive council members to bargain on their behalf. For these leaders, collective bargaining is done only once in 3 years, and thus it is more difficult for them to build up expertise and skill in this area. However, the same is true of the managers in their company; so in that respect, they are equal.

Choice of members to sit on the bargaining committee has a significant effect on the outcome of the negotiations. The bargaining sessions can be lengthy, tiring, and stressful. Therefore, it is essential the negotiators are patient people not prone to outbursts of temper which might jeopardise the successful conclusion of an agreement. Figure 6.4 suggests some other characteristics which are important for negotiators.

Figure 6.4
Characteristics of Effective Negotiators

Effective Negotiators:
- Are patient and don't lose their cool when provoked
- Have strong communication skills
  - They listen well

- They speak clearly and to the point
- They check out their understanding of what has been agreed
- Are physically fit to withstand long sessions
- Are knowledgeable of the employment laws and the industrial relations system

A number of different roles need to be played by the members of the negotiating team. Therefore, before bargaining begins, both sides will decide who is to do what. The team leader will do most of the talking and questioning. Another member may be given the task of summarising material when necessary, clarifying what has been agreed and what has not, and generally keeping the negotiations on track. One person can be specifically assigned to carry out costing of proposals and counter-proposals and do any calculations necessary during the bargaining session. It is sensible for at least one member of the team to have a computer at the bargaining table. Other members will normally be observers ready to help out their team leader if requested.

Collection of information

Both sides involved in collective bargaining need to collect certain types of information before they sit together. Knowledge of each other is helpful. Economic data is essential.

Know the opposition

Management needs to find out as much as possible about the union before they begin to negotiate. They could look into its financial strength, its total membership, the power structure and personality of those leaders likely to be on the bargaining team and probe to see whether the union is having any internal problems which might weaken its position.

The ideal method of getting to know the union well is by having regular formal and informal contacts with the union leaders at both headquarters and plant or site levels. Such meetings will bring about a number of advantages. They not only provide useful information for the collective bargaining process; they may, in themselves, improve the relationship between the company and the union, and thus make bargaining a smoother process. It may also be possible to have discussions with other companies who have dealings with the same union. Union newsletters may contain useful information.

The management team responsible for negotiation needs to collect as much information as possible about the union, but they must not omit to study the wishes and expectations of their workers. Through regular opinion polls or attitude surveys, it may be possible to ascertain what demands the union is likely to make on behalf of the workers. Analysis of complaints and grievances will give an indication of the worker's areas of concern.

Other agreements recently negotiated by the union should be carefully examined as they will provide clues as to the level of wage increases that the union expects. Any new benefits provided in the collective agreement of another company in the same industry may be an indicator that the union will push the company to provide the same benefit.

Economic information

The collection of pertinent economic data is probably the most important activity in preparation for collective bargaining. Herman suggests that this data is used as a tool or weapon during bargaining sessions. Therefore, each side will select the data which best suits their arguments. However, he says, the use of inaccurate or misleading data will weaken the credibility of the party who uses it.[3]

Typically, both parties will have analysed recently signed agreements in comparable companies and industries. Of course, whether a particular company is indeed comparable

is a subjective issue. One company may be making similar products in a similar location to another, but one of them may be a huge, well-established, profitable company which is part of a major conglomerate, and the other small and new, still struggling to survive. To compare their terms and conditions of service would probably be considered unfair to the smaller company.

Wages and benefits are undoubtedly the most momentous and difficult items to get agreement on in a collective agreement. Workers expect to get an increase in wages every time a new agreement is signed. Only when there is a bad recession would it be acceptable for wages to remain static, and even then only if the survival of the company is at stake. If the company has been making large profits for many years and has sizeable reserves of funds, workers will still assume that the company is able to increase their wages. Union negotiators will argue that wage increases should at least be in line with increases in the cost of living and should also be commensurate with seniority in the organisation. Both sides will therefore collect information on the current Consumer Price Index (CPI) and the changes that have taken place since the previous agreement was signed.

The Consumer Price Index is a statistical representation of the change in the cost of living over a particular period. By checking the prices of a "basket" of goods used by an average Malaysian family on a monthly basis, the CPI is a useful tool to indicate rates of inflation. The items regularly included in the "basket" of goods and services are classified into nine main groups including food (which also covers clothing, rent and furniture) and services (items such as medical expenses, transport and entertainment). Each of these groups has a different weightage, depending on the importance of the item. Currently, the base year for the CPI is 1990 when a household survey was carried out by the Department of Statistics.

Wages and benefits need to have some relationship to those paid in other companies. If the employer is powerful enough to insist on a relatively lower wage level than that

offered in other companies, he may find he faces an exodus of workers who will quit his company and offer their services to other, higher paying companies. If, on the other hand, the employer is pushed into paying wages, allowances and benefits way beyond those being given by other companies, he may face bankruptcy as his costs will be significantly higher than his competitors and he may be unable to provide goods or services at an acceptable price to the market. Both parties will carry out wage surveys to find out what is the current state of the labour market as far as wages and benefits are concerned. Some companies carry out their own surveys of comparable establishments, but this process is costly and time consuming. Furthermore, the data may not be accepted as accurate by the union. Thus, it may be better for the company to purchase the information needed from management consultants or other bodies, such as the Malaysian Employers Federation, who specialise in such activities.

The union's ability to push for increased wages will depend to a certain extent on the profitability of the company. Thus, the union needs financial information on the company so that it can formulate realistic proposals. However, there is no statutory requirement that companies divulge information to the union. This means that unions representing workers in private limited companies may have difficulty getting the relevant figures unless their members have the necessary information.

Deciding objectives, strategies and tactics

The bargaining team will decide on the strategies they will use to achieve their objectives. Their strategy is their overall plan of action. Tactics also need to be thought about in advance of the first bargaining session. Tactics are the detailed methods and steps used to implement their strategy.

For each item in the proposed collective agreement the negotiators will establish what they would like to achieve, i.e. their most favoured position or target, and the bottom-line or

what they must achieve. The latter is the limit or resistance point, the minimum they will accept. The settlement range is the difference between the management's and the union's resistance points, and is the area within which bargaining can take place.

The management will certainly want to prepare a contingency plan in case of a deadlock leading to a strike. They must decide whether they will hire temporary replacements if a strike is likely to be lengthy, or whether it is possible to get staff not involved in the strike action, such as supervisors and confidential staff, to take over operations for a short period. They need to think through the consequences of these actions. If, for example, temporary staff are brought in there is a danger of violence erupting between these people and the striking workers. In the Malaysian environment, as will be seen in the next chapter, it is highly unlikely that employees will go on strike, and if they do, the duration of the strike will probably be not more than one or two days at the most.

Both sides will have to decide whether they will be willing to make press statements throughout the duration of the bargaining. Mills warns against a media war.[4] He says negotiations should be conducted at the table, not in the press, and that the parties concerned should agree to a news blackout until the agreement is signed.

Tactics may legitimately take into account psychological traits of the other side, but psychological tricks are likely to negatively affect the bargaining climate. Mills quotes a room arrangement where the union side's chairs had been specially placed by the management so that the union members had to look up at the management team, thus making the union representatives feel uncomfortable and at a disadvantage. Such tactics have high risks attached to them. It must be remembered that in collective bargaining, unlike certain other negotiating situations, the relationship between the two parties (union and management) is continuous and will still exist after the current negotiations. Any actions by one side

which are seen as excessively humiliating to the other are likely to lead to deterioration in this relationship.

Other tactics include purposely delaying the negotiations and spreading the meetings over a lengthy time period. It may be technically possible for an agreement to be concluded in one meeting, especially where the original demands are reasonable and realistic. However, those to whom the negotiators have to report, i.e. the top management and the union members, may perceive that speedily concluded negotiations mean that their representatives have achieved less than what was possible. The negotiators' prestige will increase if they can show how difficult the bargaining was. This also explains why ridiculously high or low proposals are presented in the first round of bargaining. This allows room for plenty of give and take. The negotiators can show their constituents how much they have achieved. For example, the management side can tell their superiors that, although the union asked for a particular percentage increase in salary, they were beaten down by x per cent.

Another tactic commonly used by employers is to threaten to withdraw their agreement to the check-off procedure unless the union reduces its demands. In the short term, this can be very effective in persuading the union to moderate its demands, but it is also likely to lead to deterioration in the relationship between the two parties. The union will perceive the threat as a union-busting tactic designed to reduce the influence of the union and its ability to serve its members efficiently.

Getting a mandate

Normally, the bargaining team will have to clarify what their principals want before negotiations begin. The union team will need to be sure what is the minimum their members will accept, and the management will have to check with the senior officers in the company what they are willing to give away during the bargaining process. Union leaders in Malaysia usually have a good deal of authority delegated to

them by their members in this respect. There is no formal ratification process, as is found in some countries, whereby before the final agreement is signed, the union members will take a vote whether to accept its terms or not. Nevertheless, the union negotiators will need to check on the solidarity of their members. If worst comes to worst, are they willing to picket and strike?

Stages in bargaining

The term "bargaining" suggests a certain amount of give and take. The final outcome depends greatly on the skills of the negotiators and the power each side possesses. J.T. Dunlop and J.T. Healey describe collective bargaining as a mixture of "a poker game combining deception, bluff, luck and ability; a debating society with long-winded speeches to impress one's colleagues and possibly have some effect on the opposition; power politics or pure brute strength in forcing terms of settlement on the weaker party and finally a rational process in which appeal to facts and to logic reconciles conflicting interests in the light of common interests."[5]

The negotiations take place in some suitable room with each party seated at a table. If the relationship between the parties is less than cordial, a neutral meeting place would be ideal. Where a good deal of trust exists between management and the union it may be agreed to alternate between union and company premises for the bargaining sessions. It is common practice for the signing ceremony at the end to be done in some style, with the employer footing the bill. Whether this happens or not will depend largely on the nature of the relationship between the two parties.

In the first session, it is usual for the union to present its demands. If the management team is ready, it will present a counter-offer. The remaining sessions will be scheduled and an agenda drawn up. During the remaining meetings, bargaining will take place over the items in the union proposals. There should be a process of "give and take"; for example, in return for the employer's agreement on one item,

the union may withdraw another. Easily agreed items will be covered first as this gives a psychological boost to the proceedings. At later sessions, the more controversial items will be dealt with. There may be numerous adjournments or breaks when one side or the other requests time out to meet privately amongst themselves or with others. They may want to reformulate strategy in these breaks, check whether the proposals are acceptable to those in authority, resolve disagreements amongst the bargaining team or gather extra information. They may merely want a rest to re-gather their energy without breaking the momentum of the session.

When and if agreement is reached, the agreement will be put in writing, using language which is as precise as possible, and signed. However, it is equally possible that an impasse or a deadlock is reached; this is a breakdown in negotiations, with one or both parties being unwilling to continue negotiations sessions. The procedures for settling such disputes are discussed in Chapter 7.

Once agreement is reached, a formal signing ceremony is often held with an invited guest from the Ministry of Human Resources or elsewhere to act as witness to the process. It is hoped that the subsequent publicity in the mass media will reflect well on the parties involved and illustrate the harmonious nature of the relationship between the union and the company, which in turn will strengthen public confidence in the organisation. For example, the Minister of Human Resources himself attended the signing of a collective agreement between the Association of Insurance Employers and the National Union of Commercial Workers.[6]

Finally, each bargaining team will carry out a post-mortem to evaluate the extent to which they achieved their objectives and make a note of those strategies and tactics which proved useful. This material can be helpful for the next round of bargaining.

Collective Agreement

A collective agreement is an agreement in writing between an employer, or a trade union of employers, and a trade union of workers relating to the terms and conditions of employment or the relations between the two parties (Industrial Relations Act, 1967). The agreement regulates the relationship between the employer and his employees for a set period of time. It also becomes an implied term of the contract of employment of the individuals who work in the organisation. If the employer fails to comply with the terms contained in the collective agreement, any trade union or individual can lodge a complaint with the Industrial Court.

For the Industrial Court to take cognisance of the agreement (i.e. recognize it as a binding, valid document enforceable by the Court) it must fulfil certain conditions:

- It must specify the parties to the agreement;
- It must specify the duration of the agreement - which cannot be less than 3 years;
- It must include a procedure for modification and termination of the agreement;
- It must specify the procedure to be used to settle any dispute over interpretation or implementation of the agreement; and
- It must not include items which are considered managerial prerogatives. The Industrial Relations Act does not give a list of bargainable items, but it does state that certain issues cannot be included in a union proposal for an agreement (Section 13 (3). These prerogatives include promotion, transfer, recruitment, dismissal, termination for redundancy and assignment of work. However, general issues relating to procedures on these matters can be, and frequently are, found in collective agreements.

The Court may require the signatories to amend the agreement if it does not comply with the requirements of the law as stated above. Once accepted, the agreement becomes an award of the Industrial Court and is therefore binding on both parties. Should either party not comply with the agreement, of if there is any dispute over its interpretation, the Court has the role of enforcer and interpreter. The next chapter will illustrate with some examples this role of the Court.

Although the effective duration of an agreement must be for a minimum of 3 years, the parties can vary the terms within that period by mutual consent. This variation must also be brought to the Industrial Court.

What happens when a collective agreement has expired but a new one has not been signed? It is now usual practice to include a clause which clearly states that any current agreement will remain in force until a new agreement is signed.

It is common for parties to a collective agreement to sign supplementary memoranda or agreements relating to some points in the original collective agreement. If these are not deposited with the Industrial Court they are not binding agreements as they are not considered an integral part of the original agreement. Thus, they are not enforceable. They should, therefore, be sent to the Court for cognisance, with a covering letter stating that they are meant to be read together with the collective agreement.

The wording of collective agreements should be as simple and as unambiguous as possible. In the heat of the negotiating session, it may not be realized that a term used and agreed upon is very vague and will later on cause difficulty in implementation. For example, one collective agreement provided for compassionate leave for the employee when any of his dependants or close family members had a "serious illness certified by a medical practitioner."[7] In the company concerned, doctors, management and employees had differing perceptions of the meaning of "serious illness", leading to conflict between employees and the company.

The language used in the agreement must be understandable by the workers in the organization. The employer usually agrees to give every employee a copy of the agreement for his reference so that he knows to what benefits he is entitled. For this reason, in multi-racial, multilingual Malaysia many agreements are prepared in several languages. It is important, therefore, to include a clause to state which language version is the main one in case of any conflict between the versions as a result of the translation. A typical clause for this purpose might read:

> *"This agreement shall be published in Bahasa Malaysia and English and in the event of dispute arising out of this Agreement, the English version shall be regarded as the official version."*

An industrial relations problem arose in one company because of difference in the Bahasa Malaysia and English versions of the Agreement. The former stated:

> *"Syarikat setuju memberi cuti ehsan atas kejadian berikut:*
>
> a. . . . . .
>
> b. . . . . .
>
> c. dalam hal-hal kecemasan yang sejati melibatkan suami/isteri, anak, ibu bapa, banjir dan kebakaran melibatkan pekerja atau hartabenda." (author's underlining)

In the English version, the same section reads:

> *"The company will grant paid leave on compassionate grounds as follows:*
>
> a. . . . . .
>
> b. . . . . .
>
> c. In genuine cases of emergency, involving critical illness of a terminal nature (as certified by a registered medical practitioner) in the immediate family (parent, parent-in-law, wife, husband,

brother/sister, children or grandparent) and disasters resulting in the employees' house being totally or half-burnt, destroyed or washed away by flood or other natural calamity."

In this case, workers using the Bahasa Malaysia version of the agreement were under the impression that when there was a flood in the area of Shah Alam where they lived, and the flood waters entered their houses, they would be entitled to paid leave. They were highly upset to find out after they had taken the day off to clean up their houses that this was not so.

The parties will also have to decide when the collective agreement will become effective. Will it be from the date of signing the agreement, or be made retrospective to the date bargaining began, or the date of expiry of the previous agreement? If they are unable to come to an agreement, and this issue is referred to the Industrial Court for settlement, the Court is only authorized to backdate a collective agreement up to a maximum of 6 months.

Items commonly found in collective agreements

Although each agreement is different, certain items are to be found in virtually all agreements.

Recognition

This section usually appears in the beginning of the collective agreement. Its purpose is to identify the union that is recognized as the bargaining representative and to describe the scope of the agreement, that is, the employees who are covered by the agreement. A typical recognition section might read:

> *"The XYZ Company recognizes the ABC Union as the exclusive bargaining agency in respect of such categories of employees who are eligible for membership thereof employed by the Company in Peninsular Malaysia."*

Frequently, a list of employees who are specifically excluded from the agreement will be also included here, such as those employees engaged in security or confidential work. The decisions as to which jobs are "confidential" will vary from one organization to another depending on the nature of the business. In a large company in the business of selling cars [9], a list of confidential positions is clearly laid down in the collective agreement. It includes employees in the human resources division, internal audit officers, secretaries, computer operators, management accounts staff and employees dealing with payroll matters. The union and the employer may also agree to exclude other workers such as probationers, apprentices or temporary workers.

Union security

Unions will try to induce the employer to include a check-off clause in the agreement. The check-off is an agreement by the employer to deduct union members' monthly union subscriptions from their wages and remit the money directly to the union. Such an agreement is greatly valued by the union as without it collection of subscriptions would be very difficult and could result in its members falling out of benefit if their subscriptions are not paid over a period of 3 months. A member who is out of benefit is technically not a member until his arrears are paid; during such time he cannot be represented by the union.

The wording of a typical check-off agreement is:

> *"Deduction of Union Dues. The Company agrees to collect union dues from members and remit them to the Union provided that prior written consent is received from the members for the deduction."*

Even though the check-off agreement is in the collective agreement, the employer still has to insist that individual union members give their written approval to have their wages deducted for the purpose of remitting their union

subscription to the union. This is because most of the members will be protected by the Employment Act which, in Section 24, makes it mandatory for the employer to get such consent before deducting employees' wages.

In recent years, a number of employers have been withdrawing their prior agreement to the check-off. When this issue has been brought to the Industrial Court as a trade dispute, the Court has repeatedly stated that it has no jurisdiction to order an employer to institute the check-off as it does not come under the definition of a trade dispute which refers to the terms and conditions of employment. In Court Award No. 250 of 1992, the court noted that the previous collective agreement had a check-off clause. "But now the company, sad to say, had decided to withdraw the privilege. Since it is not a subject of a trade dispute, we have no jurisdiction to adjudicate on it." This has been established law since the Non-Metallic Mineral Products Manufacturing Employees Union vs Malaya Glass Factory Bhd (1984) (CLJ 9) case in the Federal Court.

Compensation and benefits

Typically, this section is the longest in most collective agreements. Some of the items commonly found are:

- Salary scales
- Bonus payment
- Overtime rates
- Retirement benefits
- Holidays
- Leave benefits
- Medical benefits
- Allowances.

The Malaysian government is encouraging employers and unions to link wages to productivity. It is being suggested that

wages should be a combination of fixed and variable components. The former provides income stability to the worker and the latter will drive improved performance by rewarding increased levels of productivity.

The National Productivity Corporation[10] has identified several clauses in collective agreements which show that some employers, at least, are linking wages and productivity. These include:

- Non-contractual bonus
- Combination of contractual and non-contractual bonus
- Bonus based on profit level reached by the employer
- Piece-rate system
- Bonus based on group or individual targets
- Salary increment based on merit
- Service charge
- Attendance incentive.

Existing benefits

Some companies may offer various benefits which are not specifically included in the collective agreement. To prevent the employer unilaterally removing or reducing these benefits, it is common to include a clause in the agreement which states:

> *"All other existing benefits and practices not herein covered in this Agreement shall continue to be in force."*

Number of collective agreements signed per year

Table 6.1 shows the number of collective agreements which were taken cognisance of (accepted) by the Industrial Court from 1991 to the year 2000.

Table 6.1
Collective Agreements 1991-2000

Year	No. of Agreements
1991	379
1992	334
1993	332
1994	348
1995	404
1996	398
1997	412
1998	284
1999	239
2000	324

Source: Industrial Court, Malaysia

Note that collective agreements cover all workers, including those who are not union members. This ensures uniformity of conditions of service, but is perceived as being somewhat unfair to unionists who pay union subscriptions and support the union when the benefits achieved by the union are received by all workers in the enterprise.

Details of the Industrial Court's powers to interpret collective agreements are included in Chapter 8.

PUBLIC SECTOR

Terms and Conditions of Service

It must be stressed once again that the legal procedures relating to collective bargaining do not apply to the public sector. There has been no negotiating between unions and the government over wages and other terms of service since the

1960s. How, then do wages and other benefits get decided upon in the public sector? The following brief discussion will show that decisions on wages and other terms of service for government employees and workers in statutory bodies and local authorities are made through unilateral action by the Public Services Department and the salaries commissions which have been appointed at various times.

Why is the public sector treated differently from the private sector? The government is Malaysia's largest employer, and therefore the terms and conditions of service granted to public sector employees influence the terms paid out in the private sector. Any increase in wages in the public sector would have immediate financial implications on the country. First, an increase in wages would lead to a perceived need for an increase in wages in the private sector. Second, an increase in public sector wages would mean an increase in public expenditure, and thus lead to an increase in taxation. Most countries differentiate between the private and public sectors when it comes to industrial relations systems for the above reasons.

Until 1973, collective bargaining existed in the public sector through the machinery of the Whitley Councils, which were established in 1953 on the British model. However, these councils were replaced in 1973 with 3 National Joint councils. Six years later, the number of councils was increased to 5.

If there is no collective bargaining in the public sector, how then are terms and conditions of service decided upon? The employer (the government) unilaterally makes all such decisions. To aid their decision-making, the government has appointed a number of special commissions and committees from time to time.

Salaries Commissions

Since the 1960s, a series of ad hoc commissions have been established to review the salaries and other terms of service in

the public sector and report their findings to the government. The most important commissions are listed in Table 6.2

Table 6.2
Salaries Commissions and Committees

Date	Name	Coverage
1967	Suffian Report	Public Service
1971	Tun Aziz Report	Judiciary Service
1971	Abdul Aziz Report	Teaching Service
1973	Harun Report	Statutory Bodies & Local Authorities
1975	Ibrahim Ali Report	Public Sector
1977	Cabinet Committee Report to examine the Ibrahim Ali Report	Public Sector

In 1992, the existing schemes were totally overhauled and the New Remuneration Scheme was introduced. As well as re-grading many groups of employees, under this system a number of new benefits, such as paternity leave, were introduced. However, the key feature of this system is that fixed annual increments are no longer provided for. Instead, increments became dependent on the employee's performance as measured through an annual appraisal system. CUEPACS has never been satisfied with the implementation of this system and has repeatedly requested its modification or total withdrawal.

Public Services Department

The Public Services Department (PSD) or *Jabatan Perkhidmatan Awam* (JPA), which is under the Prime Minister's Department, acts as the personnel department of the Federal government. It has 8 divisions:

- Recruitment Division
- Service Division
- Training and Career Development Division
- Wages and Allowances Division
- Pensions Division
- Negotiations Division
- *Institut Tadbiran Awam Negara* (INTAN)
- Administration Division

The Public Services Department is thus responsible for all planning and implementation of personnel-related functions in the public service. Its activities include supervising the National Joint Councils.

National Joint Councils (NJCs)

The National Joint Councils (NJCs) were originally set up in 1973, when 3 councils were established to replace the 2 Whitley councils established in 1953. In 1979, the system was modified to increase the number to 5. These NJCs are forums for discussion between unions representing employees in the public sector and their employer (the government). In 1973, the main function of the restructured councils was to negotiate wages and benefits for employees in the public sector. However in 1979, the right to negotiate was withdrawn and the functions of the councils severely limited. Presently, the councils can be described as a form of joint consultation in that they provide a channel of communication for the government to receive feedback from the unions in the public service on the views of the public sector workers. The constitution of these councils does not allow any negotiation to take place, so they cannot be equated with the collective bargaining sessions of the private sector.

Public Services Tribunal

In 1977, a Public Services Tribunal was established to determine any dispute in regard to anomalies in the implementation of the Cabinet Committee Report (CCR) on salaries and terms and conditions of service. Such anomalies were first referred to the Public Services Department (PSD). Where the PSD rejected a worker's claim that the CCR was being incorrectly implemented, an appeal could be made to the Tribunal. Between 1978 and 1996, the tribunal heard and adjudicated over 380 cases related to anomalies under the CCR. From 1993 to 1999, a further 123 cases arising out of the New Remuneration Scheme have been decided upon.

It should be evident from the above discussion that in the Malaysian industrial relations systems, there are 2 separate subsystems which relate to the setting of wages and other terms and conditions of service. In the private sector, a bilateral system is encouraged; employers and workers' representatives are expected to bargain together in good faith within procedures set down in the Industrial Relations Act. However, in the public sector the government as employer acts unilaterally to decide on salaries and other benefits for public servants. It is the government's belief that it is not in the best interests of the country for collective bargaining to take place in the public service.

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10. National Productivity Corporation, *8th Productivity Report*, 2000.

REVIEW QUESTIONS

1. What is the difference between unilateral and bilateral decision-making?
2. What is the procedure proscribed by the law by which a union applies for recognition from an employer?
3. Describe the preparation prior to collective bargaining.
4. What are the requirements for a collective agreement to be given cognizance by the Industrial Court?

5. Describe the contents commonly found in a collective agreement.
6. Why is the wage-setting system in the public sector different from that in the private-sector?

Chapter

Trade Disputes and Industrial Action

- *Trade Disputes*
- *Preserving Industrial Harmony*
- *Industrial Action by Employees*
  - *Picketing*
  - *Strikes*
  - *Strike Procedures*
  - *Incidence of Strikes*
- *Industrial Action by Employers*
  - *Lockout*
- *Settlement of Trade Disputes*
  - *Direct Negotiation*
  - *Conciliation*
  - *Mediation*
  - *Arbitration*
  - *Fact-Finding Machinery*
- *References*
- *Review Questions*
- *Discussion Questions*

TRADE DISPUTES

It cannot be denied that occasionally the path of industrial relations does not run as smoothly as it should. Disputes between an employer and his employees are unavoidable. What is a "trade dispute"? It is defined by the Industrial Relations Act as:

> *"any dispute between an employer and his workers which is connected with the employment or non-employment or the terms of employment or the condition of work of any such worker."*

Trade disputes are also known as industrial disputes. A dispute could be caused by:

i. an individual who has a grievance, and is represented by his union and who has exhausted the grievance procedure without getting a satisfactory result;

ii. a difference of opinion between a union and an employer as to the appropriate terms and conditions of service for the workers;

iii. a difference of opinion as to the interpretation of a collective agreement or Industrial Court award; or

iv. the non-implementation of an agreement or award.

An individual worker's complaint is termed a "grievance". Only when his union is willing to represent the worker can a grievance lead to a dispute. Most unionised companies have a grievance procedure, and this will probably be included in the collective agreement. A typical procedure requires an aggrieved employee to bring up his complaint to his immediate supervisor. A time limit will be provided at all stages of the procedure to ensure no manager "sits on" the complaint. If the supervisor is unable to satisfactorily settle the grievance, it will be passed up to a higher level until it is

finally either settled or the union takes it over as a dispute. Figure 7.1. illustrates the grievance procedure in a collective agreement between the National Union of Petroleum and Chemical Industry Workers and a company in Penang.

Figure 7.1.
Sample Grievance Procedure

A. **Purpose**

It is the desire of both parties to this Agreement that grievances arising between an employee and the Company or between the Union and the Company be settled as equitably and as quickly as possible. In pursuance of this, it is agreed that grievances should be processed accordingly to the following procedures, with the aims of reaching agreement at the lowest possible level and of maintaining continuous good relations between both parties.

B. **Definition of Grievance**

A grievance shall be defined as a reasonable and legitimate complaint by the employee concerned which he brings to the attention of his immediate supervisor/officer and which is subsequently not settled to the satisfaction of the employee.

C. **Procedure**

Step 1.

If the employee fails to obtain satisfaction from his immediate supervisor/officer, he may approach his manager, if he so desires, with a union branch official. If the employee still fails to obtain satisfaction within five working days, he may refer his grievance in writing either directly or through the union as he wishes to the Personnel Manager.

Step 2.

If the matter is still not settled within a further seven working days the union's branch shall make representation in writing to the general manager or his appointed deputy. The general manager or his appointed deputy will then arrange a meeting to be held within ten working days of the receipt of the union letter.

Step 3.

If the matter is still not resolved after this meeting or any further meeting which both parties may agree to hold, the Union may make formal representation to the company in writing through the General Secretary within ten working days of the date of the final meeting at this level.

On receipt of the union's letter, the company will offer arrangements for a meeting between the company and the union which will be attended by senior officials of the Company and the Union, such meeting to be held within ten working days of the receipt of the Union's letter.

Step 4.

If the matter still remains unresolved after this meeting or any further meeting which both parties agree should be held, both parties agree to refer the dispute for settlement under the provisions of the Industrial Relations Act.

For a trade dispute to exist, the employee or employees concerned must be represented by their union. However, there are two exceptions to this rule. First, an individual worker who has a complaint concerning alleged interference

by an employer in the worker's right to join or not to join a union may complain to the Director-General of Industrial Relations who, if he is unable to settle the problem, can refer it to the Industrial Court. Where the employer claims that the worker is employed in a managerial position and is, therefore, not eligible to join a union comprising non-managerial workers, or if the worker holds a post dealing with confidential matters, the Minister retains the power to resolve the issue. Such cases have been rare in recent years.

Second, individuals who have a complaint of unfair dismissal can request reinstatement by making a report at the Department of Industrial Relations. The Minister can refer such a complaint to the Industrial Court. Disputes of this kind between an employer and an employee do not require the employee to be represented by a trade union. The complex area of terminations and dismissals will be dealt with in detail in Chapter 9.

There are certain issues or disputes between a union and an employer over which the Industrial Court has no jurisdiction. For example, as has been seen in the previous chapter, the Supreme Court has ruled that the Industrial Court cannot order an employer to implement a check-off agreement. Thus, issues which are not connected specifically with the wages or terms of employment of workers are not considered a trade dispute.

Conflict between an employer and his employees is an inherent possibility given that they have clashing interests, especially in terms of wages. Employers wish to maximise profits, which means controlling and limiting costs as far as possible. On the other hand, employees want higher wages, more fringe benefits, and more conducive working conditions, all of which will increase the employer's costs.

Non-economic factors may also lead to dispute. Disciplinary action taken by the employer may be considered unfair or unwarranted. Alternatively, there may be interference with the right of the employee to participate in trade union activities, i.e., victimisation.

PRESERVING INDUSTRIAL HARMONY

In order to preserve industrial harmony in a unionised environment, an employer has to be proactive and take positive steps to avoid industrial disputes. There are a number of methods available by which this can be done, for example, by providing training for plant union leaders, involving union leaders and members in company decision making, training supervisors to work together with union representatives and by providing the union with certain physical facilities such as notice boards and other means to communicate with their members.

It is a well-known saying that employers get the union they deserve. This illustrates the two-way nature of the relationship between the union and the management team in a company. Where the company takes positive action to improve the skills of the union leaders at plant level by providing them with suitable training, the leaders' level of maturity and knowledge will improve, thus allowing them to understand principles of costing, business productivity and other matters which form the basis for successful collective bargaining and agreement implementation. Ignorant leaders will make unreasonable demands without realising they are unreasonable.

Union leaders in the plant can be invited to sit on any number of committees to show their input is valued. In this way it is hoped they will be more open to managerial suggestions for change and improved work processes rather than fall into the rut of objecting to new ideas merely because they are new and come from management. Certain committees should always have union representation, e.g., the company safety committee. If an ad hoc committee is set up to look into the existing company rules and evaluate their usefulness, the union could be invited on to this committee. In all such cases, it must be made very clear the role of the

committee concerned, specifically what is the authority of the committee and what topics can and cannot be discussed. If union leaders are regularly invited to be involved in company decision-making, particularly in those areas which affect their members directly, a very co-operative and collaborative atmosphere will develop. Some unions may not want to participate in decision making at this level because they feel it limits their ability to officially object to management plans of which they do not approve.

When employees are represented by an in-house union, it is common practice for the employer to provide certain physical facilities for the daily operations of the union. For example, a room with office equipment and telephone may be made available to the union leaders. Excessive help extended to the union in this respect will however lend credence to the belief that the union is not independent and is employer-sponsored.

Certainly, supervisors need to be trained to understand the rights of management and union respectively. They need to be equipped with the skills to handle grievances, talk to union site leaders and generally ensure that workers feel that they are valued. To achieve this, the organisation must commit resources in the form of money and time. The key skills that supervisors need to carry out their jobs in a unionised environment are the ability to listen and solve problems. Only then can they handle grievances capably.

INDUSTRIAL ACTION BY EMPLOYEES

When peaceful methods fail to settle a dispute (the methods for settling trade disputes will be discussed later in this chapter), the trade union may attempt to force a settlement by using or threatening to use more aggressive methods.

The two types of industrial action permitted by the law are pickets and strikes. Very rarely, other forms of industrial

action may be taken but these are generally discouraged and only used as a last resort by unions. For example, in a dispute between the National Union of Bank Employees (NUBE) and the Malayan Commercial Banks Association (MCBA) over an increase in wages, the union members decided to come to work wearing *sarungs*, T-shirts and slippers to show in a graphic and very visual manner that they could not afford to buy suitable clothing for work unless they received a pay increase.[1]

It would be very exceptional for a responsible union such as the National Union of Bank Employees to take industrial action such as that described above. However, there have been occasions when workers in other industries have made mass visits to the doctor with the express purpose of disrupting production schedules. They call in sick or take emergency leave thus causing the employer to be short-staffed. For example, it was reported in one case[2] that almost all the bus conductors in a particular company reported sick on the same day, causing the bus service to be suspended for the day. The reason for the conductors' action is that they were pressing for a 2-month bonus. It is not unknown for workers to use very creative means of putting pressure on employers to give in to their demands, for example, by visiting the bathrooms far more frequently than usual, which has the same effect as the visit to the doctor; it reduces output.

Another possible weapon used by unions is the boycott. That is, the union members refuse to use or buy a company's products. Usually, the union will try to encourage other workers and supporters to follow suit, thus exerting economic pressure on the employer to give in to their demands. Generally, the boycott is rarely used in Malaysia. To be truly successful, a union-organised boycott would need to be supported by members of other unions as well as the general public.

Sabotage of the employer's machines is also known to occur. According to Stagner and Rosen[3], the term "sabotage"

is derived from the French "*sabot*", a wooden shoe. The term developed from the practice of French factory workers allowing a wooden shoe to fall into the machinery when they were unhappy with their working conditions.

The only forms of employee industrial action recognised by the labour laws are picketing and strikes.

Picketing

Picketing is the most common form of industrial action taken by workers. The Industrial Relations Act (Section 40) allows workers to attend at or near their workplace when they have a trade dispute for the purpose of peacefully giving information to the public and other workers and to persuade other workers not to work if a strike has already been declared. However, such picketing must not intimidate anyone, must not obstruct the entrance or exit to the organisation, and must be peaceful. Only those workers directly involved in the dispute can participate in the picket, although an officer or employee of the union can be present to ensure the picketing is carried out according to the law. Picketers, providing they keep within the confines of the law as outlined above, do not require a police permit for their activities. Neither can they be dispersed by the police, as picketing is a legal activity. Picketing is used both to communicate issues to the public and to embarrass the employer. This is done by the prominent display of banners and placards with derogatory comments about the employer and management; by requesting passers-by to show their support by pressing their vehicle horns and by a willingness to give information to the mass media, which will in turn publicise the dispute between the workers and the union.

Picketing is commonly the first attempt at industrial action taken by workers. This picketing is often held at lunch-time and before or after working hours. If, however, a strike has been declared, picketing will be held throughout the day

by the striking workers. As will be seen later in this chapter, a number of conditions make it difficult for workers to go on strike legally. Thus, picketing becomes even more important as a pressure tactic in a union's attempt to get an employer to give in to the workers' demands. On 26th April 1988, it was reported by *The Star* that some 2,000 workers of Syarikat Telekom Malaysia picketed in front of their headquarters during lunch break and after office hours to support their demand for payment of bonus. In 1999, once again the Telekom workers were threatening to picket over the same issue - payment of bonus. However, on this occasion, the matter was settled before picketing commenced. In 1988, some 84,000 workers in statutory bodies picketed at their respective places of work to press for a salary revision. In August of the same year, some Malacca textile workers picketed because their management was delaying negotiations for the company's first collective agreement.

Picketing can on rare occasions cause quite a spectacle. In February 1992, the Tenaga Nasional Executives Association members not only picketed outside their Kuala Lumpur headquarters, but also took turns to beat with a long rattan pole effigies supposedly of the senior management.[4] The editor of a large English-language daily newspaper described the union's action as "a show of childish behaviour."[5] The editorial of the day said, "Is picketing the answer (to the union's dispute with the management)? It must weigh the choices it has - to add fuel to the fire or douse the flames."

In some instances the mere threat of a picket publicised in the mass media is sufficient pressure to force the employer to respond positively to union demands.

Workers picketing outside their factory

Strikes

A strike occurs when a group of workers refuses to work until their employer accepts their demands. As defined by the Industrial Relations Act (Section 2) a strike is:

> *"The cessation of work by a body of workmen acting in combination, or a concerted refusal or a refusal under a common understanding of a number of workmen to continue work or to accept employment, and includes any act or omission by a body of workmen acting in combination or under a common understanding, which is intended to or does result in any limitation, restriction, reduction or cessation of or dilatoriness in the performance or execution of the whole or any part of the duties connected with their employment."*

In brief, a strike is any stopping of work by a group of workers including any attempt to limit or slow down production on purpose.

It is significant that there are various forms of industrial action which are included under the above definition, e.g., the go-slow, work-to-rule and a ban on overtime. Workers continue to work, but in these variations of industrial action there is a reduction of output and, therefore, they are considered strikes. Industrial Court Award No. 28 of 1975 states that, "A slow-down or go-slow and work-to-rule by workers are forms of strike under the Industrial Relations Act."

On the whole, such forms of action are not encouraged by the Industrial Court. In Award No. 324 of 1987 the Court quoted a number of sources on go-slows which reflected its views. For example, "Slow-down is an insidious method of undermining the stability of a concern... In our opinion, it is not a legitimate weapon in the armoury of labour."

With reference to the views of the Indian Supreme Court, the Award quoted, "go-slow is one of the most pernicious practices that discontented or disgruntled workers sometimes resort to. For, while thus delaying production and thereby reducing the output, the workmen claimed to have remained employed and thus be entitled to full wages."

In this particular case, during negotiations for a new collective agreement, the workers went on a go-slow thus seriously disrupting production. The Court upheld the subsequent dismissals of the workers involved in leading the go-slow on the grounds they had committed acts of misconduct serious enough to warrant dismissal. The Award concluded by saying, "any workman who participates in such acts... would not receive any sympathy or leniency from this court."

A ban on overtime by a group of workers will be considered a strike in an essential service (as defined in the Industrial Relations Act) as in such organisations workers can be required to work overtime by the employer. A mass

refusal of the workers to work overtime would therefore, be a form of strike.

Strike Procedures.

Unlike the procedures on registration and recognition of trade unions and the procedures for collective bargaining, the industrial relations laws do not clearly lay out the procedures to be followed to ensure the legality of a strike. The various requirements and restrictions are found in both the Trade Unions Act and the Industrial Relations Act.

Strikes are only legal if they comply with the regulations in the Industrial Relations Act and Trade Unions Act. As such, the right to strike is only extended to members of a registered trade union. Strikes must be in furtherance of a trade dispute (Industrial Relations Act, Section 45). Only where a group of workers have a trade dispute with their employer can they take strike action. Sympathy and political strikes or general strikes are illegal in Malaysia.

A sympathy strike is where a group of workers who are not involved in a trade dispute decide to go on strike to show support and solidarity with another group of workers who are legitimately on strike. Of course, when one group of workers is on strike, other workers and unions may offer their support in many ways. For example, they may offer financial support so that an allowance can be paid by the trade union concerned to the striking workers. A political or general strike is a strike aimed not an employer but at the government. The striking workers hope to force the government to give in to their demands, which may not be economic in nature. They may want certain laws amended or governmental policies changed. They assume that their strike may disrupt the economy and, therefore, pressure the government into giving in to them.

For example, in November 1988 the British Broadcasting Corporation (BBC) television journalists voted to go on strike in protest over a government ban on interviews with Irish

nationalist guerillas. This change in government policy was perceived as a form of censorship by the journalists. In 1992, 12 million Indians went on a one day strike to protest against their government's economic reforms which they feared would jeopardise their jobs.[6] In the same year Australian workers went on strike against the introduction of new labour laws.[7]

Before a strike takes place a secret ballot must be held by those eligible to strike, clearly stating the issues leading to the proposed strike. (Trade Unions Act, Section 40). The results of this ballot must be sent to the Director-General of Trade Unions by the union secretary within 14 days of taking the ballot. The strike can only take place if two-thirds of those entitled to vote agree to the action and after waiting seven days after the ballot results have been sent to the Director-General. This compulsory "cooling off " period is intended not only to allow the Director-General time to check the validity of the ballot, but it also gives the union members time to change their mind. With this threat of an impending strike, the employer may give in to the employees' demands or they themselves may have second thoughts, given the seriousness of their impending action. More importantly, this 7-day period allows the Minister of Human Resources to intervene and refer the dispute to the Industrial Court for arbitration, thus making a strike illegal. Section 44 (b) of the Industrial Relations Act says:

> *"No workman shall go on strike and no employer of any such workman shall declare a lock-out after a trade dispute or matter involving such workman and such employer has been referred to the Court and the parties concerned have been notified of such reference."*

The secret ballot is only valid for 90 days, and if the strike has not taken place within this period, a new ballot will be required if the union intends to continue with the strike action.

A "wildcat" strike is a strike which is called without taking any ballot or following the above procedures. The workers make a decision to strike, and do so immediately. They can be said to "down tools", i.e., refuse to go on with their work. Such strikes do occasionally occur, especially in the agricultural estates, but the strikers are not supported by their union and such action is strongly discouraged. Wildcat strikes, also known as "lightening strikes", are illegal in Malaysia.

Strikes in the Essential Services.

In certain select industries known as the essential services, there are further procedures which must be followed before a strike can be considered legal. The essential services as gazetted by the government include:

1. Banking services
2. Electricity services
3. Fire services
4. Port, harbour and airport services
5. Postal and telecommunication services
6. Prison service
7. Public health service
8. Water service
9. Transport services
10. Broadcasting (TV and radio)
11. Petroleum and gas industries
12. Certain government departments including:
    i. Customs and excise
    ii. Immigration
    iii. Marine

iv. Meteorology

v. Printing

In these services, besides following all other procedures, intending strikers must give 21 days notice of the strike to their employer. When an employer receives such notice, he is required to inform the Director-General of Industrial Relations. Thus the cooling off period and time for the government to take appropriate action to prevent the strike is prolonged in these services which are considered vital to the economy.

When is a strike not permitted?

A strike is not permitted over the following issues or in the following situations:

i. over a collective agreement which has been deposited with and accepted by the Industrial Court;

ii. over management prerogatives, i.e., those matters prohibited from being included in collective bargaining proposals;

iii. during and immediately after the proceedings of a Board of Inquiry appointed by the Minister;

iv. after a trade dispute has been referred to the Industrial Court for arbitration;

v. over a recognition dispute which is being resolved by the Minister;

vi. when the YDP Agong has refused permission for a trade dispute in the public sector to be referred to the Industrial Court for arbitration.

A careful analysis of the above shows why it is very difficult for unions to go on strike legally, especially in the public sector. The government, through the Director-General of Industrial Relations, retains powers which effectively prevent strikes. As will be seen, once a dispute exists between a union

and an employer the Director-General has the power to call for compulsory conciliation meetings and if these fail to bring about a settlement the Minister of Human Resources will refer the dispute to the Court, thus making a strike illegal. If the dispute is in the public sector, the union is even less likely to be able to strike as the permission of the YDP Agong is needed before any dispute is referred to the Industrial Court. If this is granted, a strike is not permissable and if it is refused, equally any strike action would be illegal.

Penalties for Illegal Strikes

If a trade union is found to be involved in illegal strike activity, the executives can be fined or imprisoned or both. Members of a union who participate in any illegal strike action cease to be members of the union and they are not eligible to rejoin the union or any other union without the express permission of the Director-General of Trade Unions. For example, in 1985, an estate in Selangor built new quarters for its employees as the old houses had been condemned by the Labour Department. However, when the new houses were ready for occupation the workers refused to move in on the grounds that the quarters were too isolated. The estate management threatened to cut off the workers' water supply if they did not move in promptly. In retaliation to this threat, 31 of the workers, including some who were not residents in the estate quarters, stopped going to work. This incident was investigated by the (then) Registrar of Trade Unions who declared that the workers had participated in an illegal strike and could therefore no longer be considered members of the National Union of Plantation Workers (NUPW). The union was required to strike their names off the union membership list.

Illegal strikers also run the risk of being penalised under the Internal Security Act (ISA) which allows imprisonment for an indefinite period without benefit of trial if a person is believed to be a security risk. During the 1979 strike of the Airlines Employees Union, the ISA was used against a

number of the union leaders. Indeed, it is an offence under the Industrial Relations Act, Section 46 for a workman to take part in an illegal strike, the penalty being a jail term for up to one year or a fine not exceeding RM1,000 or both. Employers would like to see this part of the Act being enforced more strictly.

Employers have the right to dismiss workers who participate in an illegal strike, and they commonly make use of this right. In 1991 some 369 workers of Tan Chong Motors were terminated for taking part in an illegal wildcat strike. Although subsequently most of the workers were offered re-employment, none of the workers re-applied for jobs with the company.[8]

Right to Strike

Do workers have "the right to strike"? We hear of the right to practise one's choice of religion, the right to freedom of expression and the right to own property. There are many other rights but they are not absolute, e.g., under the constitution, people have the freedom of movement but this is subject to laws on security, public order, public health and the punishment of offenders. Is there then a right to strike? Of course, no person can be forced to work for a particular employer and can choose the employer he wishes to work for, or choose not to work at all. This right, however, does not apply to groups of workers who collectively refuse to work in order to disrupt the employer's business.

It was only in 1980 that the question of whether or not Malaysian workers have the legal right to strike was finally settled. A decision by the law courts was necessary as the industrial relations laws are not specific on this matter. Nowhere does it clearly state that workers have the right to strike but by inference as there exist procedures which must be followed when a strike is to be held, it can be assumed that strikes are legal providing they fulfil certain conditions. The landmark case which finally clarified the position was South

East Asia Fire Bricks vs Non-Metallic Mineral Product Manufacturing Employees Union.

In 1974, seventy-three of the Non-Metallic Mineral Products Manufacturing Employees Union members who were employees of S.E.A. Fire Bricks Sdn Bhd went on strike from the 4 - 16 February, following the refusal of the company to commence collective bargaining even though the union had, on the directive of the Minister of Labour (as he was then), been granted recognition by the company.

The union had submitted proposals for a collective agreement to the company on 2 October 1973. As the company gave no reply, the union sent a further letter to the company stating that if negotiations had not begun by 14 January 1974, the Union would be forced to take industrial action. As there was still no response, a strike ballot was held on 3 February. The workers were unanimous in their decision to strike. The strike began on 4 February and lasted 12 days. (This strike took place before the amendments to the Trade Unions Act which requires the workers to "cool off" for seven days before commencing a strike.) On 12 February, the Minister of Labour referred the dispute to the Industrial Court. On the advice of the union, the strikers then returned to work, but the company refused to accept them. The company justified its action by holding that the workers absented themselves from work without prior leave or reasonable excuse. This was on the basis of Section 15.2 of the Employment Act which reads:

> *"An employee shall be deemed to have broken his contract of service with the employer if he has been continuously absent from work for more than two days: without prior leave from his employer, unless he has a reasonable excuse for such absence and has informed or attempted to inform his employer of such excuse..."*

The union, however, maintained that an illegal lockout was being imposed. Thus, the main issue at stake here was

whether participation in a legal strike constitutes a "reasonable excuse" for absence from work within the meaning of the Employment Act. After hearing the arguments, the Industrial Court made an Award in favour of the workers thereby directing the company to reinstate all the affected workers. This Award of the Court was not complied with, and, as a consequence, a non-compliance petition against the company was filed. The case was heard and a further Award, No 12 of 1975 directing the company to reinstate the locked out workers was made.

Dissatisfied with the decision and the order of the Industrial Court, the company appealed against the awards to the High Court. This Court held that there was an error of law, and rejected both the awards of the Industrial Court.

The workers, with the aid of the MTUC, filed a memorandum of appeal to the Federal Court on 2 August 1975. The Federal Court held that the "workmen are entitled to withdraw their labour by concerted action for any lawful purpose connected with management. Workmen who down tools do not risk the loss of employment. The contract of service is suspended by the strike; it is not terminated and the workmen are entitled to the same terms and conditions" and set aside the order of the High Court and restored the Awards of the Industrial Court by a judgement dated 14 April 1978.

In 1980, the company's final appeal to the Privy Council was overruled. The Privy Council ruled that the High Court had misused its authority to overthrow the Industrial Court's decision and, thus, upheld the Federal and the original Industrial Court decision.

Although workers have the right to strike if they fulfil the legal requirements, strikes are certainly not encouraged. The Industrial Court in Award No.38 of 1974 made its stand clear. It said, "So far as we are concerned the important question which transcends and outweighs that of the right to strike is whether there is any cause or necessity to embark upon

either a strike or a lockout? Now that we have the Industrial Relations Act, it is our view that the right to strike is incompatible with the basic assumptions of the system of compulsory and voluntary arbitration which the Act makes available."

Incidence of Strikes

The economic consequences of strikes are very serious indeed. At the organisational level, a strike may lead to loss of output and a failure to meet deadlines, which in turn may result in the company losing needed contracts and customers. It is well known that Japanese companies choose their suppliers by their reliability and stability and whether or not they are able to deliver on time. Any company which is unable to fulfil such promises will not be able to supply any Japanese organisation.

At the national level, the strike tendency of workers is a vital factor influencing the investment decision by multinational companies. Malaysia's strategy to attract industry to this country, which will in turn mean the provision of jobs, relies on having a responsible and co-operative workforce. Ministers of the government have frequently reminded Malaysians that strikes can only harm the interests of workers. The Prime Minister himself said that "workers' unions must not quickly resort to industrial action to seek redress for grievances as this would only result in losses to the nation."[9]

The number of strikes in the last few years, the numbers of workers involved and the man days lost can be seen from Table 7.1.

Table 7.1.
Incidence of Strikes, 1990-2000

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
No. of Strikes	17	23	17	18	15	13	9	5	12	11	11
Workers involved	98,510	4,207	6,110	2,400	2,289	1,748	995	812	1,778	3,452	2,969
Man-days lost	301,978	23,448	16,164	7,160	5,675	4,884	2,553	2,396	2,685	10,554	6,068

Source: Department of Industrial Relations.

The number of strikes alone does not tell us a great deal about whether or not strike activity is serious. Two other factors have to be considered: the duration of the strikes and the number of workers involved. Obviously, a month-long strike is far more serious than a 2-day strike. A majority of strikes are relatively short, lasting 1-3 days only. This is due to the conciliation efforts by the Industrial Relations Department, and intervention by the Minister. The result of these actions is that the disputes are referred to the Industrial Court for arbitration. The other reason for relatively short strikes is because the workers cannot afford to go without pay for any length of time and union strike funds tend to be very limited. Another way to assess the seriousness of strike activity is to examine the number of workers involved in a particular strike. Again, a one-day strike involving thousands of workers is likely to have more serious repercussions than a strike involving only a handful of workers.

In summary, the number of strikes has been steadily falling since 1945. The largest number of strikes (295) was in 1947. In 1956 there were 213 strikes. After 1968, the number of strikes never exceeded 100. In the 1960s, the average number of strikes per year was 57, and between 1990 and 1999 the average number was 14.

In order to decide whether Malaysia has a "strike problem", it is useful to compare with other countries. Table 7.2 gives comparative figures for a number of other countries.

Table 7.2
Comparative Strike Figures, 1991-1998

Country	1991	1992	1993	1994	1995	1996	1997	1998
Hong Kong	5	11	10	3	9	17	7	8
Thailand	14	33	23	15	39	18	23	N/a
Singapore	–*	–	–	–	–	–	–	–
New Zealand	71	54	58	68	69	72	42	35
Malaysia	23	17	18	15	13	9	5	12

*Singapore has no reported strikes since 1987.

Source: Year Book of Labour Statistics, Geneva: ILO, 1999

Of course, merely examining the number of strikes in a country per year will not tell us much about the strike-proneness of its workers unless we take into consideration the size of the workforce.

The following data in Table 7.3 collected by the authors of the *World Competitiveness Year* book shows the working days lost in Malaysia and a number of other countries as a result of industrial action.

Table 7.3
Working Days Lost Per 1,000 Inhabitants Per year
(average, 1994-1996 and 1999)

Country	Days 1994-1996	1999
Singapore	0.00	0.00
Austria	0.005	0.00
Colombia	0.07	–

Country	1994-1996	1999
Malaysia	0.21	0.46
Hong Kong	0.22	0.04
Germany	2.34	0.97
Indonesia	5.98	6.26
Philippines	9.04	3.05
United Kingdom	11.39	4.06
New Zealand	15.51	4.38
India	18.58	8.98
USA	19.90	7.31
Australia	–	34.2
Korea	–	29.1

Source: World Competitiveness Yearbook. Switzerland: IMD, 1988 and 2001.

The cost of strikes should be kept in proper perspective. While all industrial relations procedures are designed to keep the number of strikes to a minimum, it must be remembered that losses from industrial accidents, absenteeism, turnover and employee illness are far greater than those resulting from strikes.

"No Strike Clauses"

A recent trend in the USA and the UK is the inclusion of "no strike clauses" in collective agreements. Unions are voluntarily giving up their right to strike in return for increased benefits, agreements to negotiate any disputes and promise of increased job security. It would appear that such clauses in Malaysia would seemingly conflict with the Employment Act, Section 8, which prohibits such a clause. The Act says, "Nothing in any contract of service shall in any manner restrict the right of any worker who is party to such contract—

a. to join a registered trade union;

b. to participate in the activities of a registered trade union, whether as an officer of such union or otherwise; or

c. to associate with any other persons for the purpose of organising a trade union in accordance with the Trade Unions Act 1959."

Support for Strike Action

Many parties believe that workers should not go on strike as by doing so they may gain what they want, but they inconvenience others. When public transport workers like bus and train drivers strike, many people cannot get to work on time. Massive traffic jams may be caused by workers taking their own cars to work instead of riding public transport. When certain professional groups such as doctors strike, there may be wide-spread concern for patients who suffer as a result. For example, in South Korea in 2000, doctors in hospitals and clinics went on strike for several days over a change in the law giving pharmacies the right to dispense medicines. There was an outcry in the media over the consequences of this strike on sick members of society.

INDUSTRIAL ACTION BY EMPLOYERS

Lock-out

In normal circumstances, employees' unions are the ones who take industrial action against the employer to pressure them to give in to the workers' demands. However, on rare occasions, the employer will take action against the workers. The most common industrial action taken by an employer is the lock-out, i.e. the employer refuses to allow the workers to work until the dispute between them is settled. Sometimes a lock-out is declared in response to an illegal strike by the workers. The Industrial Relations Act (Section 2) defines a lock-out as:

> *"the closing of a place of employment, the suspension of work, or the refusal by an employer to continue to employ any number of workers employed by him, in furtherance of a trade dispute, done with a view to compel those workers to accept terms or conditions of work or affecting employment."*

The procedures for a lockout are the same as those for a strike.

Alternatively, the employer can take steps to fight a strike by keeping the firm operating, either by placing managerial or non-union employees in the strikers' jobs or by hiring replacement workers. This can be a very effective way of ending a strike because when workers realise that their action is not having any negative economic consequences on the employer, they may decide to go back to work. During the 1979 strike in Malaysian Airline System (MAS) the management brought in trainees from Dusun Tua, a training centre for youth, to take over from the cabin staff. The trainees were given special, intensive training and were put to work to replace the striking staff.

The ultimate weapon of the employer against the union is the total closure of a factory or plant, leading to loss of employment for all workers involved. This response to aggressive union activity is not uncommon especially among multi-national employers who choose to place their factories in an environment most conducive to making profits.

SETTLEMENT OF TRADE DISPUTES

How do trade disputes get resolved? The four methods available for settling disputes are:

- direct negotiation;
- conciliation;

- mediation; and
- arbitration.

Direct Negotiation

The ideal method for settling a dispute is where the two parties involved (the employer and the union) are willing to come together for discussion until a satisfactory compromise is reached. Solutions arrived at by mutual decision between the two parties without the involvement of an outsider are more likely to result in smooth implementation without further damaging their relationship. A negotiated settlement is seen as a mature and harmonious way of settling any dispute. Voluntary negotiations are encouraged in the Industrial Relations Act. For example, a collective agreement must include a grievance procedure, i.e., a method the parties can use to settle any dispute arising out of the implementation of the agreement.

Another example of the Act stressing the importance of voluntary negotiation is the condition whereby the Director-General of Industrial Relations cannot impose compulsory conciliation until the parties have failed in their attempts at direct negotiation. As it is common for one of the parties to be unwilling to negotiate with the other to find an acceptable solution, an alternative is therefore necessary. This alternative, which is the next best method to settle a trade dispute, is conciliation.

Conciliation

Conciliation is the process of arriving at a settlement of a trade dispute with the help of a third, neutral party. In trade disputes, conciliation is carried out by officers of the Department of Industrial Relations. Conciliation can be voluntarily requested by either of the disputing parties or the Director-General of Industrial Relations may intervene "in the public interest", requiring the parties to attend a conciliation

meeting. This is known as compulsory conciliation and is common in public utilities and other important industries where the public might be inconvenienced if a settlement is not found quickly. The Director-General cannot intervene, however, until he is sure the parties' efforts to settle the problem themselves through negotiations have failed.

Conciliation is carried out by the Industrial Relations Officer(s) who will meet the parties, either separately or jointly. After a briefing on the problem, he will help the parties arrive at a compromise which is acceptable to both sides. It must be noted that the officers have no authority to insist that the parties accept any particular recommendation. They merely advise the employer and the employees involved in the dispute. On the average, 70-80 per cent of trade disputes are settled in this way annually. Indeed in 1991, the Department announced an 89 per cent success rate and in 1992, it increased to 93 per cent.[10] Conciliation, therefore, remains the most important method for settling trade disputes.

Role of the Conciliator

The conciliator identifies the issues in a dispute and promotes a settlement through recommendations and advice. A senior officer in the Department of Industrial Relations described the role of the conciliator thus: " He (the conciliator) is not a mere badminton bird to be knocked back and forth between the parties, but rather a fearless eagle demanding and receiving respect. He tells the parties when he thinks a proposal is completely out of line, and when the situation dictates, he offers positive leadership."[11] Stagner and Rosen describe the conciliator as a "kind of technical consultant to both sides, helping them find a solution. He has only such tools as his prestige as an official mediator, his persuasiveness, his sense of humour, and his ability to see the facts as they appear to each of the parties."[12]

Mediation

Mediation is a relatively rare method of settling a trade dispute. It is not mentioned in the labour laws but is, nevertheless, occasionally used. Mediation is similar to conciliation in that a neutral third party is called in by the parties to a dispute to help them find a settlement, but the mediator is not usually from the government. He is a person who is considered unbiased and impartial and is sufficiently respected and trusted by both parties. A politician or other local leader may intervene in a dispute and be able to bring about a settlement. Perhaps the reason why this method of settling disputes is so rare is because it is difficult for the parties to find a suitable mediator acceptable to them both.

Arbitration

When the disputing employer and union cannot find a solution by themselves or with the help of the Department of Industrial Relations, arbitration may be the only way to settle the dispute. In arbitration, an impartial third party is given the authority to settle the dispute by examining the information given by both sides and making a judgement. In Malaysia, only the Industrial Court has the power to arbitrate labour disputes. The Industrial Court's functions will be discussed in greater detail in the next chapter.

Fact-finding Machinery

The Industrial Relations Act also provides for two types of machinery which can be used to assist in the settling of trade disputes. These are the Board of Inquiry and the Committee of Investigation.

Board of Inquiry and Committee of Investigation

The Industrial Relations Act allows the Minister of Human Resources to appoint a Committee of Investigation or a Board

of Inquiry where a trade dispute exists. Such a committee or board is an investigative body and does not, in fact, take steps to settle any dispute. Its function is to look into the causes of the dispute and make recommendations either to the Minister (in the case of a committee) or to the House of Representatives in Parliament (in the case of a board). There have been no known cases of the appointment of a committee or a board since the introduction of the Industrial Relations Act. The government prefers to deal with trade disputes through the machinery of the Industrial Court.

What causes workers to go on strike?

Mostly workers strike to improve their terms and conditions of service. But sometimes other issues cause a "down tools". For example, oil palm plantation workers in Kuala Selangor refused to work for a day because they were unable to watch the Tamil movie on TV3 on Thursdays which is aired at 1.00pm.They were not able to watch because electricity was only supplied to their houses by the management at 2.30pm. They had requested their employer to provide electricity earlier but their request had been ignored.[13]

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REVIEW QUESTIONS

1. What is a trade dispute and what causes such disputes?
2. List the types of industrial action that may be taken by workers.
3. Are a picket and a demonstration the same?

4. Is a go-slow a strike?
5. What is a lock-out?
6. How can an employer continue production once a strike has been called?
7. Under what conditions would a strike be illegal?
8. What is the role of the Ministry of Human Resources in settling trade disputes?
9. Explain the difference between voluntary and compulsory arbitration.
10. What are the differences between conciliation and arbitration?

DISCUSSION QUESTIONS

1. Should all workers have the right to strike? (Consider special groups such as doctors, post office staff and banking employees.)
2. The Union of Transport Employees (UTE) had for the last six months been negotiating with XYZ Bus Company on proposals for their third Collective Agreement. However after five meetings the company refused to continue negotiations. Advise the union representatives what actions they might take to solve this problem. Make sure you inform them of the possible consequences of their actions.
3. What are the economic consequences of strike action?
4. In case of impending strike action by employees what preparations might an employer make?

Chapter 8

The Industrial Court

- *Introduction*
- *Structure and Proceedings of the Court*
- *Awards of the Court*
- *Jurisdiction of the Court*
  - *Unfair Dismissal Claims*
  - *Court's Powers in Respect of Unfair Dismissal*
  - *Unfair Dismissal and Retrenchment*
  - *Code of Conduct for Industrial Harmony*
  - *Trade Disputes*
  - *Interpretation of Collective Agreements or Awards*
  - *Complaints of Non-Compliance*
  - *Cognisance of Collective Agreements*
- *References*
- *Review Questions*

INTRODUCTION

The concept of arbitration by a court or tribunal for the purpose of settling trade disputes is not new in Malaysia. The Industrial Court Ordinance of 1948 provided that a tribunal could hear disputes at the request of the parties involved. The awards (decisions) so made were not legally binding and therefore the early tribunal was very limited in its effectiveness. In 1965, the Industrial Arbitration Tribunal was set up to deal with disputes in essential services. Thus at this time there was a dual system of voluntary and compulsory arbitration existing side by side. The Government found compulsory arbitration to be a very effective method of reducing the incidence of strikes.

The present Industrial Court was established by the Industrial Relations Act of 1967 as a successor to the Industrial Arbitration Tribunal and the Arbitration Court. The Court is highly specialised and deals only with trade disputes. It does not have powers to hear any other types of cases. The Court's powers are clearly laid out in the Industrial Relations Act.

The main purpose and objective of the Industrial Court is to provide a peaceful and unbiased means of settling disputes between employers and employees, which is to carry out the function of arbitration. It has developed many important principles or precedents that over time have become guidelines for parties involved in industrial relations practice. It should be noted that the Court not only plays a major role in resolving conflicts, but it also effectively prevents conflict from escalating. The Industrial Relations Act provides (Section 44) that once a dispute has been referred to the Court for arbitration, industrial action in the form of a strike becomes illegal. This provision has resulted in a major reduction of strike activity.

The major role of the Court is in settling trade disputes. The importance of this role is reflected in the growth of the

number of chairmen needed. In the 1970s, the Court consisted of a President and two Chairmen; in the 1990s the number of chairmen was increased to 7 and currently there are 15 chairmen. Furthermore, there has been a progressive increase in the number of cases heard by the Court as is shown in Table 8.1.

Table 8.1.
Number of Industrial Court Awards, 1990-2000

Year	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
No. of Awards	329	391	360	432	570	549	610	616	696	719	721

Source: The Industrial Court

STRUCTURE AND PROCEEDINGS OF THE COURT

The Court is headed by a President appointed by the Agong and a number of chairmen to assist the President. The Industrial Relations Act requires that the President have at least 7 years of experience as a lawyer before his appointment, or he must be a member of the judicial service.

Cases in which a trade union is involved are heard by the President or one of the chairmen and a 2-member panel: a person from a panel representing employers and another representing employees. Prior to 1988 the Court panel consisted of 3 members; a representative of Malaysian employers, a representative of employees, and an independent. This last panel position was abolished by an amendment to the Industrial Relations Act as the position was considered superfluous.

The panels' members are appointed by the Court President after consultation with relevant organisations such

as the MTUC and the MEF. These bodies submit lists of persons considered suitable to sit on the panels. The President is empowered to choose from these lists. The panel members are then rostered to attend court hearings.

However, where the case being heard is a complaint of unfair dismissal the President or Chairman can sit alone without a panel.

The proceedings of the Court are similar to any court of law, but are simplified. The parties to a dispute may be represented at the hearing as follows:

- The employer may choose one of his officers to present his case or, if the company is a member of a trade union of employers, it can be represented by an officer or employee of the union, or it can be represented by an officer from the MEF.
- The union may appoint an officer or employee of the union, or an official of the MTUC to represent them and put their case at the Court hearing.
- An employee may be represented by an official or employee of the MTUC or a Union, or may speak on his own behalf.
- Lawyers are only permitted to represent the parties when the Court gives express permission. In practice, permission is usually granted.

Figure 8.1 illustrates the representation of parties at the Industrial Court.

Figure 8.1.
Representation at Industrial Court Hearings

Employer	Employee	Union
1. Company officer	1. Himself	1. Union officer or employee, or
2. Employers association officer	2. MTUC or union official	2. MTUC official or employee
3. MEF official or employee	3. Lawyer	3. Lawyer
4. Lawyer		

The Court has the power to call witnesses and documents when necessary. The usual manner in which the Court operates is that the parties to a dispute are required to submit a written summary of their arguments, called "pleadings", in advance of the hearing. During the hearing itself, each party is given the opportunity to orally present its version of the events leading to the dispute, and to introduce witnesses and documents to prove its case. From time to time, the Court President or Chairman may ask questions of the witnesses or officer presenting the case. Each party is permitted to cross-examine witnesses from the other side. When all arguments are completed, the Court adjourns to make its decision, which will be written up and is entitled an award of the Court.

Occasionally, a hearing will be held *ex parte*, i.e., when one of the parties to a dispute does not turn up in court and the court is satisfied that the party concerned was well aware of the date of the court hearing, the case will be heard even though that party is not present. There are times when the employer chooses not to attend court. In such circumstances it is most likely that the employee or the union will win their case as the employer is not there to rebut the evidence offered.

AWARDS OF THE COURT

Decisions of the Court are called awards and are binding on the parties involved. The Industrial Relations Act (Section 56) states that any party who does not comply with the terms of an award is guilty of an offence, and if convicted, can be fined or jailed. However, the Court itself has no powers to prosecute offenders. Should an award not be complied with, the Court Registrar can send a copy of the award to the High Court or the Sessions Court which has the power to enforce the award. This means that if the compliance order is still ignored, the claimants can proceed to request the Court for a writ of seizure and sale of the offender's property and can even get the employer declared bankrupt if necessary. Total disregard of awards is not common however. In 1987 it was estimated that 0.6 per cent of awards had not been implemented[1]

When making an award, the Court does not have to agree with the demands of either party but is empowered to make its own decisions, "having regard to public interest, the financial implications and the effect of the Award on the economy of the country and on the industry concerned" and also "to the probable effect in related or similar industries" (Industrial Relations Act, Section 30.4). In addition, the Court may take into consideration agreements or code of employment practices which have been approved by the Minister of Human Resources, such as the Code of Conduct for Industrial Harmony.

The Code of Conduct for Industrial Harmony is a guideline for good industrial relations practice jointly drawn up in 1975 by the Ministry of Labour (as it then was), the MTUC and the Malayan Council of Employers Organisation (MCEO), the forerunner of the MEF. Its aim is "to lay down principles and guidelines to employers and workers on the practice of industrial relations for achieving greater industrial harmony." It includes sections on employment policy, training, redundancy and retrenchment, collective bargaining and collective agreements, procedure for settling disputes, procedures for disciplinary action, communication and consultation.

Awards of the Court are not only binding, they are also final, i.e., they cannot be challenged or appealed. However, at the discretion of the Court, questions of law can be referred to the High Court. An example of a question of law being raised in the High Court arose from Industrial Court Award No. 141 of 1986 whereby an employee dismissed without the holding of a domestic inquiry was awarded backwages from the period of his dismissal to the last date of hearing, a period of 26 months. The Company questioned whether the Court had the authority to award compensation in the form of backwages in a case where the worker's dismissal was upheld by the Court.

Applications for permission to refer a question of law to the High Court are not particularly common. In 1998, for example, there were a total of 2 applications for reference to the High Court. One of these was subsequently withdrawn by the party making the application, and the other was rejected by the Court. In the year 2000, there were 5 such applications. All of these were rejected.

According to Section 33 of the Industrial Relations Act, awards of the Industrial Court:

> *"shall be final and conclusive, and no such decision shall be challenged, appealed against, reviewed,*

quashed or called in question in any other court or before any other authority, judicial or otherwise, whatsoever".

It would appear that it was the intention of Parliament that once the Industrial Court had arbitrated a dispute, it would be settled for good and all. However, the Malaysian higher courts, i.e., the High Court and the Federal Court have supervisory powers over lower level courts and tribunals. Thus, it is possible for a party dissatisfied with a decision of the Industrial Court to file in the High Court for a writ of certiorari (an order of the court to quash or annul an Industrial Court award). A High Court decision can, in turn, be appealed against in the Court of Appeals and the Federal Court. The higher level court does not re-hear the case but decides whether the Industrial Court had jurisdiction to hear the case and make an award and, if it did, whether the Court properly applied the law.

A large percentage of the Court's awards are consent awards i.e., the disputing parties settle their differences out of Court. The Court then accepts the terms agreed by the parties and records them. This is particularly common in cases of unfair dismissal. In some cases, the parties may agree to settle their dispute and withdraw their case. However, if the terms of the settlement are not recorded by the Court and either party subsequently fails to implement the agreement, the aggrieved party has no way of enforcing the agreement.

JURISDICTION OF THE COURT

The Court deals with various types of trade disputes and related matters and is responsible for giving cognisance to collective agreements.

Unfair Dismissal Claims

The bulk of the Court's cases relate to the dismissal of employees. Table 8.2 shows the percentage of unfair dismissal cases heard by the Industrial Court.

Table 8.2
Claims of Unfair Dismissal, 1990-2000

Year	No. of Claims	Percentage of Total Cases
1990	186	56
1991	264	67
1992	231	64
1993	293	68
1994	462	81
1995	439	80
1996	426	70
1997	453	73
1998	500	72
1999	485	67
2000	507	70

Source: Industrial Court Awards

An employee who has been dismissed can place a complaint of unfair dismissal and a request for reinstatement with the Director-General of Industrial Relations within 60 days of his dismissal. This machinery is established under Section 20 of the Industrial Relations Act. The interpretation of the 60-day limit is extremely strict. The Federal Court in Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat stated that the time clause "is so strict that it goes to the jurisdiction of the Industrial Court to hear the complaint. That is to say, if the claim is presented just one day late, the Court has no jurisdiction to consider it."[2] In this case, the judge, Raja Azlan

Shah explained that, "quite clearly it would be extraordinarily difficult for employers to keep industry going if claims for reinstatement on the ground of wrongful dismissals could be made many months or years .....after dismissal has taken place." On average, around eighty per cent of trade disputes claims are settled by conciliation but if the Director-General of Industrial Relations is unable to bring about a settlement, he must notify the Minister who may refer the case to the Court. For example, in 1998, 75 per cent of claims lodged by employees were settled at the conciliation stage. However, in 1999 the success rate dropped to 65%.[3]

In respect of claims of unfair dismissal, a preliminary issue which may need to be decided before a case is heard, is whether a claimant is an employee or "workman" under the law. If the claimant is not a workman, the Court has no jurisdiction to hear the case. In Chapter 2 it was noted that the question of whether a worker is an employee or not is significant because only employees have rights under the employment laws. In a number of claims of unfair dismissal being heard by the Industrial Court, the employer objected to the hearing being held at all on the grounds that the person dismissed was not a "workman" as defined by the Industrial Relations Act. How does the Act define a "workman"? In Section 2 of the Act it states:

> *"Workman means any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute."*

In Award No. 275 of 1988, the definition of a workman is dealt with at length. The Court quoted part of a judgement made by the Supreme Court in Inchcape Malaysia Holdings Bhd v R.B.

Grey & Anor[1] which decided that a director is not a workman. However, the Industrial Court pointed out "that nowhere in the judgement of the Inchcape case has an attempt been made to answer the question "who is a WORKMAN". In this very long award, the Court chairman states that there are three tests for deciding whether a person has a contract of employment or a contract of service and is therefore a workman under the Act. These are:

- the traditional control test;
- the organisation or integration test;
- the mixed or multiple test.

The Award stated "the traditional or control test refers to the control of an employee by another, not only as to what he must do but also as to how and when he must do. The organisation or integration test which has been little used and which depended on whether the person is part and parcel of the organisation." Given the weaknesses of both these tests, the Courts have recently preferred to use a multiple or mixed test. "It has been suggested that a multiple test should be applied in two stages. First, it must be asked whether there is control and second, it must be asked whether the provisions of the contract are consistent with it being a contract of service."

A further detailed quote from the above-mentioned Award may be useful in showing the approach the court will take when deciding the vexing question of whether or not a person is a workman. "Since no test is conclusive, the courts will have to look at the following list of elements of the relationship which are important:

1. The employer's right of control is an element which is likely to be important as an indication of a contract of employment where the skills are simple or the exercise of control is large.

2. The employee is an integral part of the business which may be of importance where the person contracted to work does not devote himself entirely to the other party.

3. If the person contracted has a chance of profit and a risk of loss, it may be evident that there is no contract of employment.

4. The factors relating to the ownership of the instrumentalia and the onus to provide will be of increasing importance generally where the instrumentalia belongs to those who undertake to work and are complex, specialised or expensive. In this case, the contract will be a contract for service.

5. The entitlement to exclusive service is indicative although not conclusive of the relationship of employer and employee.

6. Payment of fixed remuneration for a specific period, e.g. payment of wages, sickness pay and holiday pay, and by whom payment is made is evidence of the relationship of employer and employee.

7. The power of selection and appointment is indicative of the contract of employment as is the unilateral imposition of the terms of the contract by one of the parties on the other although the absence of a power of selection will not defeat a contract of employment service.

8. In a contract of employment service it is usual for the employer to have power to suspend the employee and to dismiss him.

9. The power to fix the place, time of work and the times at which holidays are taken are matters that may be seen as an element of control and the existence of this power in the contract will suggest the relationship of employer and employee.

10. Whilst the parties cannot alter the true nature of the relationship between them by the label they give it, where

there is doubt or ambiguity, then intentions and the agreement between them may be decisive or strong evidence as to the true nature of the relationship.

Many employers believe that senior management are not included in the category of workman and are therefore not protected by the laws. This, however, is incorrect. In Award No. 207 of 1988, the Court ruled:

> *"It is clear that in the case of a company, it is the exclusive and necessarily very small group of employees including the Managing Director definitely, and other working directors of the board possibly, who together are the very will and mind of the company and who in reality hold the control and fate of the company among them in their hands - it is this group of employees who may not be treated as workmen".*

There have been many instances of senior managers who have been dismissed and who have successfully won their cases in the Court.

Court's Powers in Respect of Unfair Dismissal

When the Court hears a complaint of unjustified dismissal, it will decide whether or not the dismissal was indeed without just cause and excuse or whether the employee was properly and fairly dismissed. If the Court agrees with the employer that the employee deserved to be dismissed and proper procedures were followed leading up to the dismissal, the Court will uphold the dismissal. However, should the Court agree with the employee that the dismissal was unfair, the Court may choose to order reinstatement of the employee; he must be given his job back with all privileges at the time of dismissal. An order of reinstatement is usually accompanied by the requirement that the employer pay the unfairly dismissed employee backwages from the time of the dismissal to the handing down of the Court's award.

Reinstatement is relatively rare because, by the time the Court hears the case, the worker is likely to have found another job or because the relationship with his former superiors would have become too strained for work to be carried out effectively.

As such, in most cases, where the Court finds that a worker has been unfairly dismissed, it will order the employer to pay compensation in lieu of reinstatement and backwages, usually calculated from the date of dismissal to the last day of hearing.

The Court is given the responsibility for settling claims of unfair dismissal, an important function which it is expected to carry out speedily. However, it is common for the time from an employee's dismissal till a court decision is made to stretch to up to 2 years or more.

The delay occurs for several reasons. First, the process of conciliation and the decision by the Minister on whether to refer the case to the Court requires a certain time period. Second, delays may be caused by the parties' (or their lawyer's) request for postponement, either because they are not prepared to present their case or, more commonly, because the lawyer is busy in another court. Third, the Court itself frequently faces a shortage of chairmen to hear the cases. It has been suggested that the Court could deal with claims of unfair dismissal more speedily if the claims were filed directly with the Court. At present, however, this is not possible as the Industrial Relations Act requires claims to be made to the Director-General of Industrial Relations.

Unfair Dismissal and Retrenchment

A significant portion of the claims of unfair dismissal relate to cases where the employee was retrenched. Termination of service for reasons of redundancy was a serious problem in the mid 1980s and again after 1996 because of nation wide recession. Table 8.3 shows the number of workers retrenched between 1985 and the year 2000.

Table 8.3.
Number of Workers Retrenched 1985-2000

Year	Number Retrenched
1985	43,644
1986	20,212
1987	13,712
1997	18,863
1998	83,865
1999	35,949
2000	25,235

Source: The Star, 2 May 1988; New Straits Times, 27 February 1999 and Ministry of Human Resource website: www.jaring.my/ksm.

Many organisations are forced to lay off workers when faced with an economic crisis. Even in a booming economy companies still carry out retrenchments. They may close unprofitable branches or product lines or take steps to streamline their operations resulting in redundancies and retrenchment.

Retrenchment is a management prerogative (as was described in Chapter 6) and therefore not a bargainable issue. Nevertheless, it can cause a trade dispute between a union and an employer or it can lead to a complaint by an employee under Section 20 of the Industrial Relations Act that he has been unfairly dismissed.

The right of an employer to retrench his workers is not in question. The Court recognises that employers must be able to decide how many employees are necessary for their business and if they have surplus workers (albeit such a situation suggests poor planning by the management) to terminate the services of such workers by way of retrenchment. The Court's role is to ensure that any retrenchment exercise is carried out as fairly as possible. The Court cannot, however, award any retrenchment benefits to workers unless they are union members and their union has

signed a collective agreement with the employer which includes provision for such benefits. In this case, employees who are retrenched but do not get the benefits as agreed can lodge a complaint of non-compliance with the Court. Employees who are not covered by a collective agreement but who are entitled to retrenchment benefits under the Employment Act can seek the help of the Department of Labour to ensure they get their benefits. Of course, if a dispute relating to retrenchment reaches the Industrial Court and the Court finds the retrenchment exercise to have been unfair, the Court will either order reinstatement of the workers or, as described above, order the employer to pay compensation for the loss of the workers' jobs.

What are the views of the Industrial Court on retrenchment? Although employers have the right to retrench workers they may be required to justify any retrenchment exercise to the Industrial Court. The Court has stated that, "it is well established that where an employer coming to this Court to answer a claim of unjustified dismissal pleads redundancy as the reason for the dismissal, the very first step, before all other considerations, is for him to satisfy the Court that redundancy was in fact the real reason for retrenchment." (Industrial Court Award No. 348 of 1986) Additionally, (Industrial Court Award No. 295 of 1988), "When a case of retrenchment has been referred to this Court by the Honourable Minister, then the Court is bound to examine and consider whether the impugned retrenchment was effected for proper reasons and was justified, and that it was procedurally fair."

In Award No. 243 of 1990 the Court set out 2 questions which must be addressed when an employee claims he has been unfairly retrenched. These are:

> *"Did a redundancy situation arise leading to retrenchment?*
>
> *This means considering whether or not the company had made a reasonable decision concerning the*

necessity of redundancy at that particular time or in view of the particular commercial conditions.

If there was a redundancy situation, was the consequent retrenchment made in compliance or in conformity with accepted standards of procedure?

This means considering whether or not the Company made a reasonable selection between or among comparable employees, i.e. in compliance with the principle of "last in, first out".

There have been instances where a worker's service was terminated on the grounds of retrenchment. However, evidence was brought to the Court's attention that the management disliked the worker for personal reasons and thus wished to get rid of him. In such cases, a test of whether the worker's services were really surplus is if the worker is replaced within a short period. If the organisation recruits a new worker to replace the retrenched worker then it is evident that the worker was not, in fact, surplus and the organisation cannot therefore claim the worker was redundant. (See for example, Award No. 214 of 1987.)

In another case the employer claimed it was financially weak and thus could not afford to keep a group of workers. Yet at the time of retrenchment the company leased 37 cars for the use of its managerial staff and these same staff were given free petrol and the company paid the vehicles' road tax and insurance.

Code of Conduct for Industrial Harmony

As described earlier in the chapter, the Code of Conduct for Industrial Harmony laid down guidelines in a number of areas of industrial relations practice. The Industrial Court accepts this Code as ideal practice. Divergence from the suggestions laid out in the Code may lead the Court to decide a particular case of retrenchment was unfairly carried out. It

is thus appropriate to quote the relevant section of the Code on retrenchment.

> *"The ultimate responsibility for deciding on the size of the workforce must rest with the employer, but if any decision on reduction is taken there should be consultation with the workers or their trade union representatives on the reduction.*
>
> *a. If retrenchment becomes necessary, despite having taken appropriate measures, the employer should take the following measures:*
>
> *i. giving as early a warning, as practicable, to the workers concerned;*
>
> *ii. introducing schemes for voluntary retrenchment and retirement and for payment of redundancy and retirement benefits;*
>
> *iii. retiring workers who are beyond their normal retiring age;*
>
> *iv. assisting, in cooperation with the Ministry of Labour and Manpower, the workers to find work outside the undertaking;*
>
> *v. spreading termination of employment over a longer period;*
>
> *vi. ensuring that no such announcement is made before the workers and their representatives or trade union have been informed.*
>
> *b. The employer should select employees to be retrenched in accordance with an objective criteria. Such criteria, which should have been worked out in advance with the employees' representatives or trade union, as appropriate, may include:*
>
> *i. need for the efficient operation of the establishment or undertaking;*
>
> *ii. ability, experience, skill and occupational qualifications of individual workers required by the establishment or undertaking under i.;*

iii. *consideration for length of service and status (non-citizens, casual, temporary, permanent);*

iv. *age;*

v. *family situation;*

vi. *such other criterion as may be formulated in the context of national policies."*

Generally, one of the criteria relevant to whether or not a particular retrenchment exercise was fair is the rule of "last-in, first-out" (LIFO). This means, all other things being equal, the most junior workers will be retrenched before any worker with longer service is laid off. There have been allegations that some employers intentionally choose senior workers to be retrenched as such employees have higher wages than their juniors and therefore the organisation's wages bill will be further trimmed.[5] However, if the company has valid reasons it may choose not to follow the LIFO principle. For example,

a. where a blind worker who was junior in service to another worker performing the same job was retained, the Court held that the consideration was for valid reasons. (Award No. 206 of 1983);

b. where the workman retained, though junior in service, was of different category. (Award No. 256 of 1985);

c. where the workman retained, though junior, was performing a specialist function which the retrenchees, though senior in service, could not have performed. (Award No. 117 of 1985);

d. where the retrenchee has taken excessive medical leave, thus unable to perform the tasks efficiently;[6]

The Court further stated in Award No. 375 of 1986 that, "the LIFO principle is subject to two limitations: Firstly, the rule operates only within the establishment in which the retrenchment is to be made, and secondly, the rule applies only to the category to which the retrenched workmen belong."

In Chapter 2 it was pointed out that the Employment Act requires that, in the event of a retrenchment exercise, any foreigners employed and working alongside locals must be retrenched before the locals; thus the principle of foreigners out first (FOF) overrides LIFO.

Not only should the LIFO principle be followed wherever possible, but the Court looks unfavourably on retrenchment where insufficient notice is given to the retrenched workers. The Court stated in Award No. 363 of 1987, "It is regrettable to mention that no warning whatsoever was given to the Claimant of his retrenchment. This no doubt is a breach of the Code of Conduct."

Trade Disputes

The Court arbitrates on trade disputes where:

i. an individual worker has a grievance and is represented by his union; or

ii. a union, representing the workers in a particular company, has a dispute with an employer over terms and conditions of service.

Such cases are either referred to the Court by the Minister when he feels arbitration is the best way to settle the dispute, i.e., after other methods of settlement have failed or a dispute can be referred to the Court by the Minister at the request in writing of both the disputing parties. Trade disputes where an individual worker has a grievance and is represented by his union are not common. An example of such a grievance could be a case where the employee claims the employer has taken unfair disciplinary action against him. For example, in Award No. 15 of 1988, the Court dealt with a dispute between a bank employee and the bank. The employee had been charged with misconduct, found guilty and punished by stopping his annual increments for 2 years. The Court, after hearing the arguments from both the employer and the employee, decided that the worker had not committed misconduct, had carried

out his duties properly and, therefore, his increments should be restored to him.

> NOTE: In cases of disputes in the public sector, the consent of the Agong is required before the Minister can refer such a dispute to the Court.

Most of the cases falling into this category relate to a breakdown in collective bargaining between a union and an employer. When conciliation fails to settle a dispute of this nature, it is referred to the Court as a matter of course by the Minister. A careful reading of Court Awards in this area provides useful information to those involved in collective bargaining as the Court has been reasonably consistent in its treatment of the issues heard by it. The following section illustrates the thinking of the Court on some of the matters relating to collective agreements brought before it by disputing parties.

Scope of a collective agreement

On occasion, the parties involved in collective bargaining have been unable to agree as to the coverage or scope of the agreement. The employer may wish to exclude temporary and casual employees (see Award No. 94 of 1988). The union, however, objected to their exclusion. The Court said, quoting a prior award:

> *"there is no distinction between casual and temporary or permanent workers (under the Industrial Relations Act.) They are all workmen, including apprentices and probationers. It follows that if temporary workers are employed to do any of the jobs that are within the scope of the collective agreement, then there should be terms regarding their employment. Of course, temporary workers cannot enjoy the same terms as*

the permanent employees but the terms of their employment must be spelt out in the agreement itself."

Bonus

An issue which frequently causes a dispute between unions and employers is that of payment of bonus. It has become a wide-spread practice in the private sector to provide employees with a bonus as part of the compensation package. Indeed, this practice is encouraged by the government as it forms an essential ingredient in the flexi-wage system whereby workers are rewarded financially if the company improves its productivity. Bonuses can be either contractual or non-contractual. The former is, in fact, deferred salary as the employer agrees in advance to pay out a certain sum, usually expressed as "x month's salary" on an annual basis. This sum is to be paid whether or not the employer has made any profits for the year in question and whether or not the individual worker deserves the extra remuneration. A non-contractual bonus is normally made contingent on the employer's profit position and also on the individual's work performance as assessed in an appraisal system. This type of bonus is the basis for the flexi-wage system in which workers are encouraged to increase their productivity and put maximum effort into their respective tasks so that the organisation as a whole can profit. They are then rewarded with a share in the company's increased revenue. Non-contractual bonuses are at the discretion of the employer. The Court's decisions relating to bonus have been very constant. The Court will not turn a contractual bonus into a non-contractual bonus and neither will it make a non-contractual bonus contractual. In Award No. 42 of 1988 the Court said:

"once annual bonus is made contractual by the parties, the court will not make it discretionary, if it is paid to employees at company's discretion the court will not make it contractual."

The request by an employer to vary the quantum of a contractual bonus will be considered very carefully by the Court, and may be granted depending on the financial circumstances of the company.

Salary increases

The level of salary increases is one of the most commonly disputed items when there is a deadlock in collective bargaining. For many employees the salary and bonus payments are the key items in the collective agreement. There is, therefore, a great deal of pressure on union leaders to get the maximum increases for their members. The Court's stand on salary increases has been stated in many awards, for example in Award No. 266 of 1992 the Court said:

> *"the factors governing the wage fixation policy are well established and they are:*
>
> *a. wages and salaries in comparable establishments;*
>
> *b. any rise in the cost of living since the existing wages and salaries were last revised;*
>
> *c. the financial capacity of the employer to pay the increase; and*
>
> *d. the legitimate desire of the employer to make a reasonable profit."*

Managerial prerogatives

An area of some concern to management and union alike is the decision over what can and can not be included in a collective agreement. When negotiating a collective agreement, union leaders hope not only to improve the terms and conditions of employment of the workers concerned but also to influence managerial decision-making in areas which affect the welfare and careers of their members. Managerial prerogatives or rights have been laid down in the Industrial Relations Act (Section 13 (3) as follows:

> *"no trade union of workmen may include in its proposals for a collective agreement a proposal in relation to any of the following matters, that is to say-*
>
> *a. the promotion by an employer of any workman*
>
> *b. the transfer by an employer of a workman*
>
> *c. the employment by an employer of any person*
>
> *d. the termination by an employer of the services of a workman*
>
> *e. the dismissal and reinstatement of a workman by an employer*
>
> *f. the assignment or allocation by an employer of duties or specific tasks to a workman."*

In Award No. 254 of 1992, a union wished to include a detailed job description into the collective agreement. The proposed job description said, among other things: "in the event the bank (the employer) proposed to increase the scope of the above mentioned job description, both parties shall negotiate for revised rates of pay/allowances." The Court said, in referring to Section 13 of the Industrial Relations Act, that "to tie the Bank down strictly according to the job descriptions may have infringed upon the right of the Bank to manage its own business according to its needs and aspirations. And this, we are not in a position to do." Thus, the Court rejected the union's proposal.

Reduction of existing benefits

Would the Court allow the reduction of existing benefits? In Award No. 42 of 1988 the Court said:

> *"Of course, with justification and reasons, we can, as there is no rule to say that these terms cannot be reduced when circumstances so require..... If, upon an examination of the Company's financial position, the Company really cannot bear the burden of the existing ... benefits, this Court should not hesitate to*

grant it the relief sought..... But if, on the other hand, the Company's financial position is sound and it is making profits, then we see no justification in the Company's contention for a reduction, otherwise the benefits, which the union achieved for its members through collective bargaining over the years, will be reduced to nought. And this will not only make a mockery of the concept of collective bargaining ... it will also create an unhealthy feeling amongst the employees."

It should be evident from the above examples that a study of the Industrial Court awards in relation to collective bargaining will reveal helpful information to those involved in negotiations for collective agreements.

Interpretation of Collective Agreements or Awards.

The third and fourth grouping of cases heard by the Court can be referred directly to it by the parties concerned. It is the Court's responsibility to interpret the meanings of any part of a collective agreement or court award which may be disputed by the parties concerned. At the time of writing up a collective agreement, the union and the employer may have been confident that they both agreed on the meaning of a particular clause or section. However, when it is time to implement this part of the agreement it may become evident that the two parties do not agree on what should be the correct interpretation. Thus, it is up to the Court to decide the interpretation of a particular clause or section and how it should be implemented.

For example, in Award No. 223 of 1988 the union applied for an interpretation of two clauses in their collective agreement. Article 15 of the Agreement stated: "With effect from 1st March 1986, all employees within the scope of this Award shall be given a pay rise of five per cent to their last drawn salary as at 28th February 1988 rounded off to the nearest highest dollar." The union argued that every employee

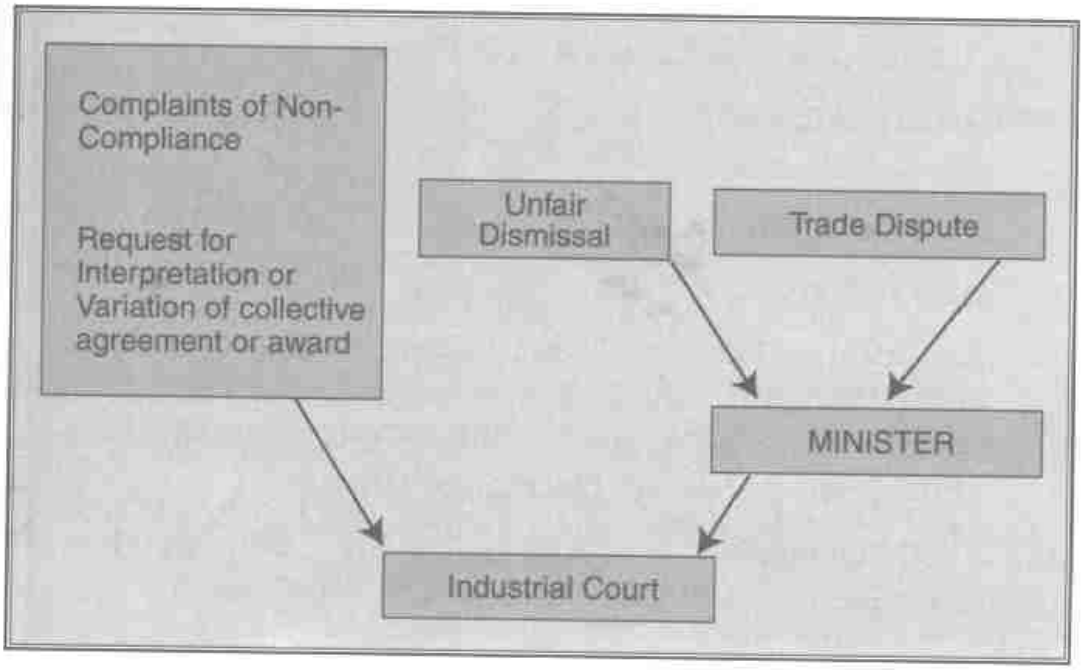
should get the 5 per cent pay rise, including those whose salary was on the maximum of their scale. The company disagreed with this viewpoint. The Court decided that the company was correct and ruled, "If an employee is by salary adjustment, allowed to cross over the maximum, then the purpose of having a ceiling for a salary scale is defeated."

Complaints of Non-compliance

The last area of jurisdiction of the Court is to hear complaints of non-compliance with a collective agreement or a court award. If an employer fails to comply with a court award or does not give workers benefits and terms as agreed in a collective agreement, the union or any individual affected may request the Court to order the employer to comply. Whenever the country is faced with a financial crisis, there will be a large number of cases where companies failed to pay out bonuses and increments as agreed in their collective agreements on the grounds that the company is unable to afford such payment. In Award No. 156 of 1987, the Court stated, "Variations have been and will be very sparingly allowed. The financial crisis within the company must be at such a critical stage that it threatens the very survival of the company..... We would not want to see companies refusing to comply with collective agreements on inadequate grounds and flood this Court with non-compliance applications." In 1999, there were 159 complaints of non-compliance heard by the Court representing some 23 per cent of the total awards handed down. The following year, 2000 saw a slight reduction in such complaints. There were 120 cases of non-compliance, representing 17 per cent of the total awards.

Figure 8.2. illustrates how the above cases reach the Court, i.e., though direct reference or through the Minister of Human Resources.

Figure 8.2.
Reference of Cases to the Industrial Court



Cognisance of Collective Agreements

Finally, the Court has an important role in taking cognisance of collective agreements. All signed agreements must be deposited with the Court. They will be checked to see that they fulfil all legal requirements and that they do not include any items contrary to any law which would render them invalid. The Court has the power to require the signatory parties to amend any part of the agreement where necessary. Once accepted by the Court, they become awards of the Court and enforceable by the Court.

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REVIEW QUESTIONS

1. What is the main purpose for having an arbitration system?
2. What is the main function of the Industrial Court?
3. Describe the structure of the Industrial Court.
4. Who can represent the parties during Court proceedings?
5. Can Court awards be appealed?
6. Describe the type of cases the Court has the jurisdiction to hear.
7. What type of cases can be referred direct to the Court by the parties concerned?

Chapter

Discipline at the Workplace

- *Taking Disciplinary Action*
- *When is Disciplinary Action Needed?*
  - *Organisational Rules*
  - *Penalties*
  - *Disciplinary Action for Misconduct*
  - *Disciplinary Action for Unsatisfactory Performance*
- *Guidelines for Taking Disciplinary Action*
  - *Domestic Inquiry*
- *Right to Hire and Fire*
  - *Recommended Procedures*
- *Special Procedures for Sexual Harassment*
- *Industrial Court Awards on Unfair Dismissal*
- *Can a Worker be Dismissed for Poor Performance?*
- *Constructive Dismissal*
- *References*
- *Review Questions*

TAKING DISCIPLINARY ACTION

Discipline is necessary in all organisations so that organisational objectives can be reached. All organisations have rules, regulations and procedures which are necessary to provide an orderly environment in which workers can achieve organisational goals. The existence of rules is not restricted to the workplace, but extends to a wider context. Rules are found at many levels of society, from the family unit up to the rules which govern a whole country and are called laws.

The majority of workers do not violate organisational rules. They recognise the need for self-discipline. However, organisations should take disciplinary action against the few who do break the rules. It is essential that disciplinary action be carried out in a proper manner, otherwise industrial relations problems may follow. Ignorance of acceptable methods of disciplining employees may lead an employee to challenge the disciplinary action taken by making a complaint at the Labour Department or at the Industrial Relations Department, and the dispute may even end up in the Industrial Court.

WHEN IS DISCIPLINARY ACTION NEEDED?

Employers should take disciplinary action in either of two situations:

a. When a worker disobeys the rules set by the employer, or his behaviour is unacceptable, i.e., he commits misconduct, and/or

b. When a worker fails to perform his job up to the required standard.

Organisational Rules

No two organisations have the same rules and regulations. Every organisation must draft rules suitable for its particular work environment. The following is an example of work rules that a company might typically wish to enforce.

1. All workers must punch their own time cards before and after work. Anyone caught punching other worker's cards shall be liable to immediate dismissal.
2. All workers must be punctual for work. Any worker who reaches the factory five (5) minutes after the bell has rung will be considered late for work and any worker who leaves the work place before the bell is rung without prior permission from the management will be considered to have left early.
3. The following acts shall be treated as misconduct:
   i. Wilful insubordination or disobedience, whether alone or in combination with others, to any lawful and reasonable order of a superior.
   ii. Theft, fraud or dishonesty in connection with the employer's business or property;
   iii. Wilful damage to or loss of employer's goods or property;
   iv. Habitual absence without leave;
   v. Habitual late attendance (three or more occasions within six months);
   vi. Drunkenness, fighting, riotous or disorderly or indecent behaviour, acts of indiscipline or acts subversive of discipline;

vii. Sleeping during working hours;
viii. Habitual negligence or neglect of work;
ix. Smoking in prohibited areas of the factory or stores;
x. Failure to follow safety rules and regulations; and
xi. Resorting to industrial action or inciting others to resort to industrial action in contravention of the provisions of the Industrial Relations Act or of any other law.[1]

Over time, the company's rules will need updating and revising. In some organisations, there are rules being implemented yet no one knows why they are necessary. They may have been introduced many years ago and have remained on the rule-book ever since, even though the reason for having them has long gone.

Rules must be reasonable and relevant to the individual circumstances of the organisation. A strict dress code, for example, might be reasonably imposed on workers dealing with the public, particularly in those businesses where corporate image is deemed important to success. It would be equally unreasonable to expect car mechanics to wear spotless white shirts to work.

Rules must be consistently upheld. It would be considered unfair if an employer took action against one employee for a specific act of misconduct but "closed his eyes" to the same misconduct committed by another employee.

If the organisation has too many rules, there is a greater probability of workers becoming confused as to what they can do and cannot do. Furthermore, when there are too many

rules worker morale may be affected. The working environment will be seen to be restrictive and lacking in trust. The more non-conforming workers may delight in spending their energies on finding ways to circumvent the rules. On the other hand, too few rules may mean that discipline is lax.

Disciplinary action can be taken against employees even in circumstances when there is no particular written or express rule covering the situation. In Chapter 2 there was a brief discussion on the implied duties of employees. There is an implied obligation in every contract of employment that the employee will work carefully and faithfully. These two obligations cover most situations. Nevertheless, it is useful to include a clause in the company's list of rules which makes it clear that the list is only a guideline to illustrate those areas which are likely to lead to disciplinary action and that the list is not exhaustive.

It is the responsibility of the employer to make the organisation's rules known to the employees. A copy of the rules should be given to every employee when he joins the organisation and appropriate oral explanations should be provided.

Penalties

Employers can penalize employees guilty of misconduct in the following manner:

- Oral warning, which should be combined with counselling;
- Written warning(s);
- Downgrading;
- Suspension of not more than 2 weeks; or
- Dismissal.

The Employment Act (Section 14) states that:

> *"An employer may, on the grounds of misconduct after due inquiry*
>
> *a. dismiss the worker without notice*
>
> *b. downgrade the employee*
>
> *c. impose any other lesser punishment as he deems just and fit and where a punishment of suspension without wages is imposed, it shall not exceed a period of two weeks."*

Pending an inquiry, an employee charged with misconduct can be suspended for up to 2 weeks on half-pay. (If the inquiry panel finds the worker innocent, the remainder of the wages due for the period must be paid to him.) In any of the following circumstances, suspension may be necessary:-

- when the worker's presence might threaten the work situation;
- when there is a perceived need for a cooling off period, e.g., when physical violence has taken place;
- when it is necessary to remove the employee from the opportunity to continue his misconduct, e.g., when criminal breach of trust (CBT) or embezzlement is suspected; and
- when it is suspected the employee may have the opportunity to tamper with documentary evidence or threaten witnesses.

The question as to what is meant by "lesser punishment" in the Employment Act is often posed. As is clear from the wording of the section itself, a suspension without pay of up to 2 weeks can be imposed. Employers have no right to suspend a worker who is not within the scope of the Employment Act on anything less than full pay. The exception to this rule would be where the contract of employment specifically allows for suspension on half-pay or no pay. Fines

for various offences ranging from late-coming to loss of tools, breakage of equipment and cash shortages are not legal for workers protected by the Employment Act.

Any other forms of punishment will depend on the terms of the employee's contract of service. For example withholding of contractual increments cannot be imposed unless the employee's employment contract allows it.

If the employee is covered by a collective agreement it is unlikely that the employer can impose any penalties other than those listed in the agreement. For example an agreement between the Non-Metallic Mineral Products Manufacturing Employees Union and an employer reads as follows:

> *"The Company may take disciplinary action against any employee in the event of misconduct, inefficiency, negligence or indiscipline. Such disciplinary action shall be confirmed in writing.*

The company may, after due inquiry:-

a. *suspend an employee without pay up to one week;*

b. *downgrade the employee;*

c. *dismiss the employee without notice on the grounds of misconduct inconsistent with the fulfilment of the expressed or implied conditions of service; or*

d. *if it considers the offence does not in itself justify dismissal, issue a written warning to the employee."*

Disciplinary Action for Misconduct

Misconduct has been defined by the Industrial Court in Award No. 255 of 1990 as follows: "improper behaviour, intentional wrong-doing or deliberate violation of a rule or standard of behaviour ... Any conduct inconsistent with the faithful discharge of his duties."

Misconduct can be either minor or major. The classification is important as it affects the penalty chosen. Thus the first violation of a rule which is considered minor

should lead to a warning whereas major misconduct may result in immediate dismissal. Table 9.1 suggests examples of misconduct and a possible classification.

Table 9.1
Examples of Misconduct

Major	Minor
Being drunk at work or	Lateness
on drugs at work	Using rude language
Fighting	Inappropriate clothes
Refusing to work	
Theft	

It is not possible to make an exhaustive listing of acts of misconduct and classify them according to whether they are major or minor. A lot depends on the circumstances. For example, sleeping on the job in an office may be considered minor misconduct but if a security guard is found sleeping on the job he may be faced with immediate dismissal as his offence is more serious because of the potential danger to the organisation. A sales assistant who gives the wrong goods to a customer may have committed a lesser wrong-doing compared to a nurse who gives the wrong medicine to a patient. Furthermore, when committed for the first time an offence may be considered minor but if repeated, the misconduct becomes more serious and the penalty therefore heavier.

Disciplinary Action for Unsatisfactory Performance

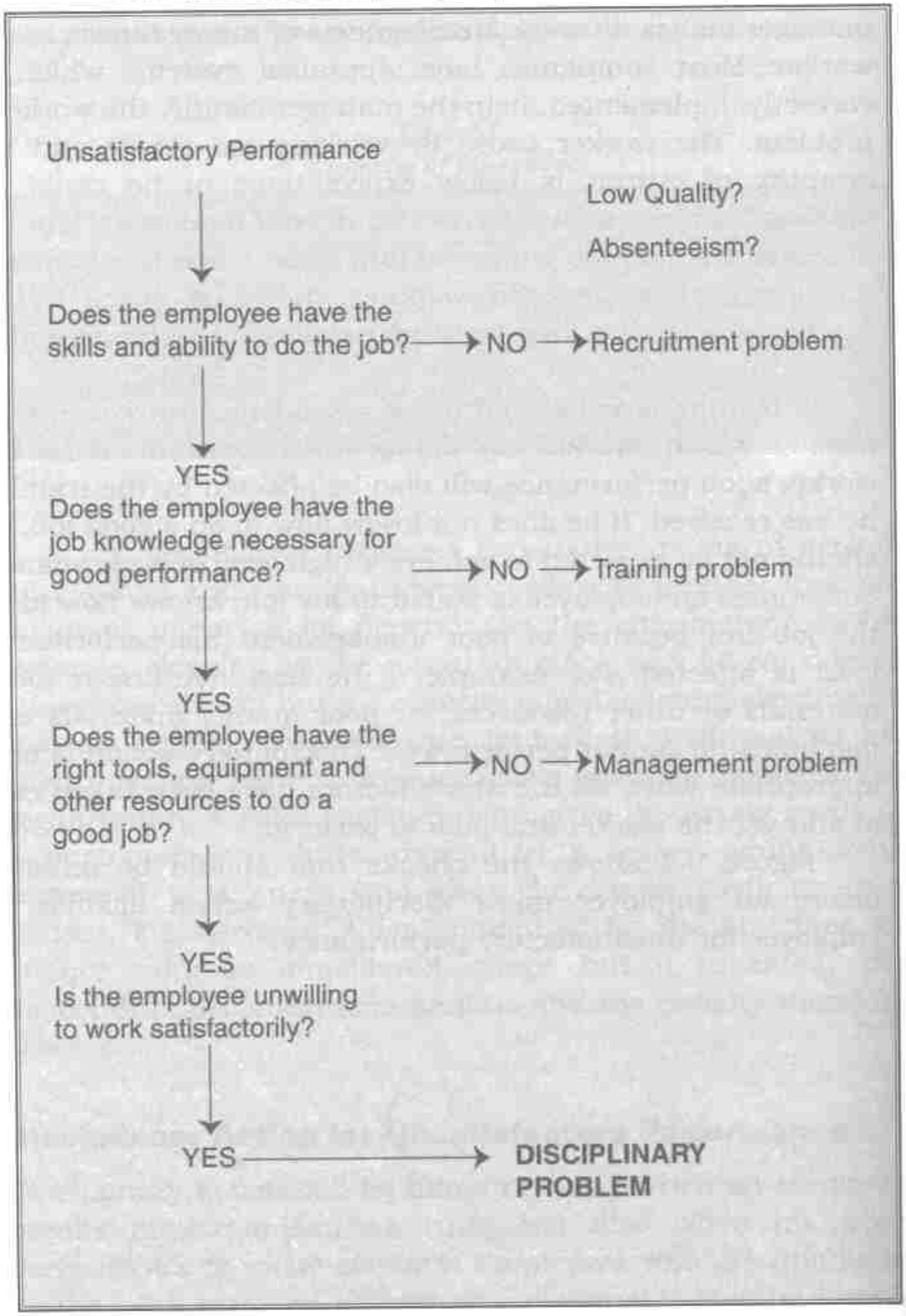
Disciplinary action can be taken not only when an employee breaks the organisation's rules but also when his work performance is unsatisfactory. Employees who are unable to do the work assigned to them at a reasonable standard are a

major problem to the employer. When a manager identifies a worker whose work is unsatisfactory, it is essential the manager makes an accurate diagnosis of the weakness in the worker. Most companies have appraisal systems which, if correctly implemented, help the manager identify the worker's problem. The worker could be working too slowly and his quantity of output is below expectations or he could be making too many mistakes leading to poor quality work or his absenteeism may be unacceptably high. Once the manager has identified a worker's weakness he must check to see whether the worker has the proper skills and ability to do the job.

It is quite possible that those responsible for recruitment have placed the worker in a job for which he is unsuited. The worker's job performance will also be affected by the training he has received. If he does not know how to do a good job, he should not be expected to achieve a high level of performance. Sometimes an employee is suited to his job, knows how to do the job but because of poor management his performance level is affected. For example, if he has insufficient tools, materials or other resources, or poor quality materials and machines he cannot perform well. Disciplinary action is only appropriate when all the above factors have been taken care of and yet the worker still fails to perform.

Figure 9.1 shows the checks that should be initiated before an employer takes disciplinary action against an employee for unsatisfactory performance.

Figure 9.1
Flow Chart on Unsatisfactory Performance and Discipline



GUIDELINES FOR TAKING DISCIPLINARY ACTION

The following guidelines should be kept in mind when disciplinary action is necessary.

1. *It should be given in private.*
   No worker likes to be embarrassed in front of his colleagues. Therefore, any disciplinary action, especially an oral warning, should be given in private. Of course, recognition for good work and praise are given in public.

2. *It should be expected.*
   The employees must know the rules of the organisation and the penalties for breaking the rules. Every worker should be given a copy of the rules and be offered an oral explanation of them to ensure he understands. The employee should be asked to sign a copy of the rules stating that he has read and understood those rules. This statement should be filed in the employee's personal file. By so doing, the employee cannot, at a later date, complain he was not told the rules of the company.

   The company rules should be given to the employee as soon as he is recruited into the organisation preferably during an induction programme. From time to time rules may need to be reviewed and employees reminded of the rules. This can be done through notices in appropriate places and through the organisation's in-house magazine. Where the company has a collective agreement the rules may be included and certainly the procedures for disciplinary action will be laid down. For example, in one agreement the article on discipline reads:

   > *"The Company has the exclusive right to discipline any employee for cause.*

Cause shall include but not be limited to insubordination, drunkenness, incompetence, theft, sabotage, failure to perform work as required, failure to observe safety rules, violations of the Company's rules or this Agreement, gambling, sleeping, fighting within the premises, or committing any immoral act."

Any change in the rules should be discussed with the union if the employees are unionised.

3. *Action should be consistent*

This is probably one of the trickiest areas in disciplinary action. Consistency means that the same act of misconduct committed by two different workers should lead to the same penalty. Thus, there should be no question of supervisors' favourites being permitted to break the rules, but others being punished. Furthermore, different supervisors must give the same penalties to their subordinates when rules are broken. It is likely to destroy morale when one supervisor usually ignores acts of misconduct while another is very strict on taking action. To ensure consistent disciplinary action within the organisation supervisors should periodically undergo training together to give them a common frame of reference.

Consistency also requires that any time misconduct is committed and the employer becomes aware of it, a penalty will follow. If the employer takes no action, he is said to have condoned or accepted the behaviour. Condoning misconduct is quite common either because managers are ignorant of the consequences, or because they are reluctant to risk unpopularity by punishing their subordinates.

Action must always be taken against those who commit misconduct but the principle of consistency does not require that the penalty meted out to different individuals

be exactly the same. The penalty may depend on the individual situation and whether there are any mitigating circumstances. When deciding on a penalty to be imposed on a worker guilty of misconduct a number of factors need to be considered such as:

- his track record, i.e., his length of service and whether he has a clean record;
- whether there was provocation, e.g., did the employee commit misconduct such as assaulting a fellow worker or superior after continuous bullying or teasing?;
- the reason for the employee's misconduct, e.g., did he steal to pay for a spouse's medical expenses?;

4. *It should be immediate*
Disciplinary action should be taken immediately or as soon as possible after the misconduct is discovered. Hasty action, however, is not advisable, i.e., the management must take adequate time to find out the facts of the case and should never rely on hearsay. Proof of misconduct is necessary; mere allegations are insufficient.

5. *It should be progressive*
Progressive discipline seeks primarily to correct the employee's behaviour rather than punish him. Therefore, it requires that increasingly severe penalties be imposed on workers who repeat an act of misconduct. In other words, the first time a particular act of misconduct is committed, unless it is very serious, the worker will be given a relatively light penalty. But, should he repeat the same misconduct the second time the penalty will be heavier. It is necessary for organisations to have a clear policy on the time period after which an employee's record will be considered clear. It is surely unfair that if an act of misconduct is repeated some 5 or more years

after the first offence, and the offence is of a minor nature that a severe penalty be imposed. Progressive disciplinary procedures are outlined in Figure 9.2.

Fig. 9.2
Progressive Disciplinary Procedures

Offence	Penalty	Management Involvement
Minor Misconduct	Oral Warning	Supervisor
Repeated Minor Misconduct or Serious Misconduct	Written Warning(s)	Departmental Manager
	Final Written Warning	Departmental Manager or Human Resource Manager
Gross Misconduct	Demotion/ Suspension/ Dismissal	Senior Manager or Human Resource Manager

Typically in a progressive disciplinary system, the penalties begin with an oral warning plus counselling session. The supervisor should keep a note of any discussion, but no formal records would be kept. If an oral warning fails to correct the employee's behaviour, written warnings should be given. Most companies will give up to three such warnings before moving to the next stage. In these warning letters, the misconduct should be described in detail with reference to any previous oral warnings. It is also useful to include a brief statement explaining the purpose of the rule which has been broken. If the worker involved belongs to a union, it is a good idea to send a copy of the warning to the union secretary.

Here is a sample of a typical warning:

MEMO

To: ..... Date: .....

From: Supervisor, XYZ Department

Subject: **WRITTEN WARNING**

On the 12th November 2001 you arrived 30 minutes late to work and were unable to give an adequate excuse. You committed the same offence on Monday 5th November and on that day you were warned that lateness is not an acceptable conduct. Failure to report to work on time may result in your dismissal.

A written warning should include:

- A statement of the problem;
- Identification of the misconduct committed;
- Consequences resulting from the misconduct;
- Corrective action required of the employee;
- Proposed action by the employer, failing corrective action; and
- Reference to previous warnings and dates given.

Domestic Inquiry

Before a worker is dismissed, certain procedures are necessary. It is absolutely essential that organisations follow these procedures carefully because any employee who is dismissed and who feels he has a case of wrongful dismissal can, under Section 20 of the Industrial Relations Act, appeal to the Director-General of Industrial Relations for reinstatement. This is provided the claim is made within sixty

days of the dismissal. If the Director-General is unable to settle the dispute, he notifies the Minister of Human Resources, who may refer the case to the Industrial Court for a decision.

Note: Reinstatement is the term for restoring back to a worker the job from which he has been dismissed.

RIGHT TO HIRE AND FIRE

For centuries it was considered the absolute right of an employer to choose whom to recruit and whom to dismiss.

However, in the 20th century, the right of the employer to hire and hire as he pleases has become more and more restricted.

In the USA and the UK, there is increasingly pervasive legislation preventing employers from discriminating against certain groups of people when they are recruiting new employees. For example, in the USA, employers cannot discriminate against people on the grounds of their race, religion, sex or age. American courts have been very strict in implementing these laws. In Malaysia, positive discrimination, also known as affirmative action, is practised in that government policies require companies to employ at least 30 per cent Bumiputra staff. This requirement thus limits the choice of the employer as to whom he can recruit.

Compared with the right to hire, the right of the Malaysian employer to dismiss employees is very restricted. Many employers seem to be totally unaware that they no longer have the absolute right to terminate the services of an employee. An interesting case was described in Award No. 279 of 1988 in which an express bus company was ordered to

reinstate 17 drivers and conductors who had been dismissed for picketing. The company's chairman of the Board of Directors, on visiting the company and finding the workers picketing, promptly on the same day, gave the workers termination letters. The workers subsequently claimed unfair dismissal. At the Court hearing, the company chairman appeared to view picketing as an offence. The Court made it clear that workers cannot be summarily dismissed (i.e. without an inquiry) and they certainly cannot be dismissed for carrying out peaceful and legal activities.

The reason why employers frequently lose their cases at the Industrial Court is that they have not followed the procedures which have been recommended by the Court in a number of awards. One writer says, " the figures demonstrate a very poor batting average by the management team in its efforts to sustain its dismissal actions."[1]

Recommended procedures

Firstly, an inquiry can be considered mandatory even where the worker is caught "red-handed" committing the misconduct. Secondly, the inquiry must be held according to the principles of natural justice. The Industrial Court in Award No. 247 of 1986 stated that, "great care must be taken to see that the rules of natural justice are followed. If there is any failure in that respect by the employer, the employer has to pay dearly for the error, so that security of employment, a commodity now become precious, can be safe-guarded." In Award No. 93 of 1985, the Court said, " the concept of natural justice has two basic components:

1. the rule requiring a fair hearing and
2. the rule against bias."

The principles of natural justice include:

1. The worker has the right to know of what he is accused. Therefore he must be presented with a written charge

sheet which clearly lays out the nature of the misconduct which the employee has allegedly committed.

2. No one should be condemned unheard. Thus the worker charged with misconduct has the right to speak in his own defence or to have a representative speak on his behalf. If the accused worker is a union member, he has the right to be represented by his union. In the case of a non-unionised employee, a colleague may help the accused. It would be very rare for an outsider to be allowed to represent a worker at a domestic inquiry and certainly the employer would be within his rights to refuse permission for an outsider to be present.

3. The worker must be given time to reply to accusations. Domestic inquiries should not be unduly delayed. It is in the interest of both the worker and the organisation for the inquiry to be held as soon as possible after the alleged misconduct has been detected and investigated. However, a reasonable amount of time should be given to the employee, perhaps between 48 hours to 7 days to prepare himself. The amount of notice given should depend on the nature of the alleged misconduct. If the worker requests more time to prepare his defence, within reason this should be granted.

4. The inquiry must be conducted by an unbiased party. An Inquiry Officer must be appointed to preside over the hearing and to act as chairman of the panel of inquiry. He should be someone impartial and more senior than both the complainant and the accused employee. He should not be briefed in advance as to the nature of the case or be given access to the detailed evidence against the employee accused of misconduct.

Once the inquiry has been held and where the employee is found guilty, a decision must be made as to a suitable penalty. The punishment must be appropriate to the

seriousness of the misconduct and take into account any mitigating factors as described above.

> **Note:** Before dismissing an employee for misconduct, a domestic inquiry should be held.

SPECIAL PROCEDURES FOR SEXUAL HARASSMENT

Sexual harassment is an example of a misconduct which should not be tolerated by an employer. The procedures for dealing with sexual harassment are basically the same as for any other type of misconduct as described above. However, because of the nature of the misconduct, certain modifications may be necessary to an employer's normal disciplinary procedures.

When an employee complains that he or she has been sexually harassed, it is essential that the employer take immediate steps to investigate the matter. Such a complaint should never be ignored or brushed off as merely a personal problem between the victim and the alleged harasser. The Code of Practice on Preventing and Eradicating Sexual Harassment in the Workplace recommends that every employer prepare a complaints procedure and make sure that every employee is aware of the procedure.[2] It is adviseable for an employer to appoint a special committee of investigators to deal with any complaint of sexual harassment. These should be people trained in counselling and interviewing techniques. The committee should consist of both males and females.

Investigation of a claim of sexual harassment must be conducted in such a manner that confidentiality is maintained, yet at the same time, proof must be collected that

the harassment took place. Without proof, disciplinary action cannot be taken against the harasser. For this reason, employers are encouraged to hold training sessions with their staff to explain the procedures in place for dealing with this problem, to ensure all staff recognise behaviour which may be considered sexual harassment, and to advise employees who are facing harassment that they should, wherever possible, keep records of any incidents of harassment and refer any documents or other evidence of the harassment to the investigating committee.

Martin N. D'Cruz in his book entitled " A Practical Guide to Grievance Procedure, Misconduct and Domestic Inquiry"[3] describes very well the steps which could be taken by a victim of sexual harassment. He says:

> *"If the harasser is a colleague, the following steps may be taken by the victim:*
>
> 1 *Tell him at the very first instance that you are not amused with his behaviour and warn him not to repeat it; but keep your cool.*
>
> 2 *Avoid losing control of your emotions or temper and do not throw tantrums.*
>
> 3 *Should he repeat his action, give him a second and final warning in a plain and straightforward way.*
>
> 4 *Do not show him that you are afraid of or intimidated by him in any way.*
>
> 5 *If you know others who are also victims of this particular harasser, get them together and give him a tongue-lashing, outside office hours, may be in the canteen.*
>
> 6 *If his actions persist, take up the matter with your boss or report him to his boss.*
>
> 7 *If the problem still persists, make a written complaint to the Personnel Manager and at the same time refer the matter to the union, if you are a union member."*

Is sexual harassment minor or major misconduct? Every case of alleged sexual harassment will have to be looked at on its own merits. Where an employee is found guilty of harassing another, a number of factors should be taken into consideration before deciding on a suitable penalty. If the employee has never harassed anyone before, a lighter penalty may be appropriate. However, if a supervisor or manager sexually harasses a subordinate, most people would consider such an action a serious misconduct deserving dismissal. When the harassment is physical in nature, the misconduct would also be serious as such behaviour is an offence under the Penal Code.

INDUSTRIAL COURT AWARDS ON UNFAIR DISMISSAL

On hearing a complaint of unfair dismissal, the Industrial Court may find itself in agreement with the action taken by the employer. In this case, the dismissal will be upheld. If, however, the dismissal was considered to be unjustified, the Court has the authority to order the employer to reinstate the employee involved. The Court will only decide that the worker should be given his job back in cases where it is practical to do so. If the relationship between the employee and the employer has become very strained or if the employee has found himself a job elsewhere or if the position the worker held no longer exists, the Court may decide that reinstatement is not the best remedy in which case compensation in lieu of reinstatement will be awarded.

The normal formula used by the Court to decide on the amount of compensation to be paid by employers to unfairly dismissed employees is:

a. Backwages from the time of dismissal to the last date of hearing at the Court (up to a maximum of 2 years); and

b. One month's wages for every year of service.

However, the Court will vary this formula on occasion. For example, in cases of blatant victimisation against employees for legitimate trade union activities the Court has been known to double the amount of compensation to be paid to the employee. Equally, where the Court finds that the behaviour of the employee contributed to his dismissal the quantum of compensation may be cut by up to 30 or 40 per cent. A certain proportion of the compensation may also be reduced if the employee has been gainfully employed since his dismissal.

CAN A WORKER BE DISMISSED FOR POOR PERFORMANCE?

Employers do not have the right to dismiss employees at will or as they please. Job security is considered an important right of the worker. However, it should be clear from the above discussion that workers can be dismissed for proper cause. In other words, any worker who breaks organisational rules is liable to lose his job. The same applies to any worker whose work is not up to the standard required of him. The procedures on dismissal are not quite the same when the reason for the dismissal is poor performance. Indeed it is probably more difficult to dismiss an employee in such circumstances.

It is essential that before an employee is dismissed for sub-standard performance he is informed that his work is not up to standard, and once he has been warned that his work is not acceptable he must been given adequate time to improve. How much time is reasonable? The answer depends on the type of job. A manual worker or machine operator may need less time to improve than a manager or executive. The

Industrial Court has repeatedly stressed that before an employee is dismissed for poor work performance, he must be warned and given the opportunity to improve.

In Award No. 39 of 1987 the Court stated,

> *"If an employee is not measuring up to the job, it may be because he is not exercising himself sufficiently or it may be because he really lacks the capacity to do so. An employer should be very slow to dismiss upon the ground that the employee is found to be unsatisfactory in his performance or incapable of performing the work which he is employed to do without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground and giving him an opportunity of improving his performance."*

Every employer should design a clear procedure so that supervisors and managers know how to handle problem employees whose performance is not satisfactory. Managerial staff must be trained how to identify and diagnose performance problems, how to counsel employees and how to draft warning letters.

CONSTRUCTIVE DISMISSAL

Dismissal is normally an action taken by an employer who terminates an employee's services. When an employee commits misconduct or fails to carry out his assigned work at a reasonable standard, the employer may find it necessary to dismiss the worker. Under such circumstances, the dismissal is an outcome of the behaviour of the worker.

Constructive dismissal, however, occurs when an employee's contract is breached by the employer. When the employer breaks the employment contract, the employee has

the right to leave his job and claim that the employer's actions amount to a dismissal. Any employee making such a claim will have to provide adequate proof that the employer had breached the employment contract should the claim be referred to the Industrial Court. Mere allegations are not sufficient.

Claims of constructive dismissal are dealt with like all other claims of unfair dismissal under Section 20 of the Industrial Relations Act, i.e. the employee making the claim will leave his employment and report to the Industrial Relations Department; conciliation will be conducted, and if no settlement is reached, the Minister of Human Resources will decide whether or not to refer the dispute to the Industrial Court for arbitration.

For an employee to prove constructive dismissal has taken place, he must be able to show that:

- The employer breached a fundamental term of his employment contract;
- The employee left his employment in direct response to that breach; and
- The employee left in a timely manner.

When a claim of constructive dismissal fails, it is most likely to do so by reason of failing to fulfil the first of the above requirements. What constitutes a fundamental breach of an employment contract? Employment contracts, as was seen in Chapter 2, contain both express and implied terms. Express terms include, among others, wages, benefits and working hours. Where an employer fails to meet his commitments under the contract, or he attempted to impose a change in these terms to the detriment of the employee, there could be a cause for a claim of constructive dismissal.

Other express terms relate to the employee's position within the organisation and its hierarchy and the nature of the work which the employee agrees to perform. Thus, if an employee were ordered to carry out work which is not within

his job scope, or if he were demoted from one level to another without his agreement, he may be able to successfully argue a case of constructive dismissal. For an employee to show that constructive dismissal has occurred, the new duties must be radically different than those for which the employee was hired. A relatively clear-cut case can be illustrated by a case heard in the Industrial Court (Award No. 101 of 1991) whereby an air-conditioning technician in a department store was re-assigned to dish washing duties in the store's fast food outlet.

In some claims of constructive dismissal the employee is accused of breaching an implied term of the employee's contract of employment, most commonly the obligation on the part of the employer to maintain a climate of mutual trust and confidence between himself and his employees. If the employer takes certain actions calculated to humiliate and embarrass the employee, hoping that the latter will not be able to withstand the stress and will resign his post, then the employer's acts may amount to constructive dismissal, especially if there are a series of such acts. If, for example, the employer removes an employee's name and position from the organisation chart, disallows the employee from carrying out his normal job functions, and generally makes it clear that he is no longer wanted, the employee will have a good case of constructive dismissal.

When an employee believes that his employer has breached their employment contract, he should, in most situations, first make a formal complaint to the employer requesting that the problem be rectified. For example, an employee who has been ordered to go on transfer, in circumstances where the employer has no right to transfer the worker, should write to his employer asking for the order of transfer to be withdrawn. If no satisfactory rectification is made, the employee can walk off the job. The law of constructive dismissal requires the employee to leave in a timely manner. He must not delay too long. If he does, the Industrial Court may decide that by waiting he has accepted

the change in his contract and his claim of constructive dismissal will fail.

REFERENCES

1. Syed Ahmad Idid, *The Law of Domestic Inquiries and Dismissals*, Kuala Lumpur:Pelanduk Publications., 1988, p.36.
2. Tengku Omar and Maimunah Aminuddin, *A Guide to the Malaysian Code of Practice on Sexual Harassment in the Workplace*, Kuala Lumpur: Leeds, 2000, p.65.
3. M.N. D'Cruz, *A Practical Guide to Grievance Procedure, Misconduct and Domestic Inquiry*, Kuala Lumpur: Leeds, 1999, p.60.

REVIEW QUESTIONS

1. When do organisations need to take disciplinary action against employees?
2. List examples of misconduct which, in your opinion, are serious enough to justify dismissal.
3. What is meant by "progressive discipline"?
4. What penalties can an employer use to punish an employee?
5. What preparation is necessary before a domestic inquiry is conducted?
6. What is meant by natural justice?
7. What is constructive dismissal?

Appendix

Example of A Collective Agreement (with Notes)

The following collective agreement is intended merely as an illustration of a typical agreement. No two agreements are exactly alike. The details of the benefits will differ from union to union and organisation to organisation. However, this agreement shows the type of items commonly found in collective agreements.

This agreement is made this day of Two Thousand and ..... between the ..... being a trade union of employees registered under the Trade Unions Act 1959 (hereinafter called the "Union" on the one part and ..... (hereinafter referred to as the "Company") on the other part, wherein it is agreed that the terms and conditions of employment shall be observed by the Union and the employees of the Company of the one part and by the Company of the other part as specified in this Agreement.[1]

ARTICLE 1 TITLE

This agreement shall be known as ".....Agreement 200.."[2]

ARTICLE 2 SCOPE OF THE AGREEMENT[3]

(1) The Company recognises the Union as the exclusive collective bargaining agency in respect of and on behalf of employees who are eligible for membership thereof employed by the Company in their various offices and branches in Peninsular Malaysia excluding the following:

a) Managerial, Executive, and Supervisory staff having the authority in the interest of the Company to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, or discipline other employees or responsibility to direct them or to adjust their grievances or effectively recommend the above actions;

b) Confidential staff whose major functions are generally of confidential nature, i.e., matters and correspondence covering such subjects as staff, finance, tax and company policy;

c) Employees engaged in security work;

d) Probationers on first appointment;

e) Temporary employees for a period of not more than 6 months;

(2) This agreement shall be the only binding document in regard to the terms and conditions of employment for all employees of the Company except those excluded by virtue of Clause 2(1) above.

(3) The Company undertakes to inform all employees falling within the scope of this Agreement, a copy of any letter to this effect being extended to the Union, that their terms of employment are governed by the provisions of this Agreement and a copy of this Agreement shall be given to all such employees.

(4) The Company further undertakes that it shall not do anything to restrain an employee covered by this Agreement from joining the Union and not to give any better terms and conditions of service to such employees who are not Union members than those provided in this Agreement.

ARTICLE 3 EFFECTIVE DATE AND DURATION[4]

(1) This Agreement shall come into force on ..... and shall remain in force until the ..... or thereafter until suspended by a new Agreement.

ARTICLE 4 MODIFICATION AND TERMINATION[5]

(1) During the currency of this Agreement neither the Company, nor the Union, save by mutual agreement, shall seek to add to, vary, modify or annul any of its terms or conditions in any way whatsoever or to seek to impose any new terms, conditions or benefits.

(2) Should any new legislation supersede, vary, repeal, or add to any of the provisions of this Agreement, then the relevant provisions of this Agreement shall be amended accordingly if it is so required by the said legislation. However, if the benefits contained in this Agreement are

more favourable they will continue to apply, if it is so permitted by the said legislation.

(3) This Agreement may be terminated by either party by serving on the other 3 months notice in writing, but no such notice shall be given before ..... (3 months prior to the expiry date of the agreement.)

ARTICLE 5 SETTLEMENT OF DISPUTES[6]

(1) Interpretation/Implementation

Any dispute relating to the interpretation or implementation of this Agreement shall, unless settled by negotiation between the Company and the Union, be referred to the Industrial Court for a decision.

(2) Grievance Procedure[7]

(a) The existence of this Grievance Procedure shall not prevent either party to this Agreement initiating informal exchange of views between the Union and the Company on matters of mutual interest.

(b) Recognising the value and importance of full discussion in clearing up misunderstandings and preserving harmonious relations, every reasonable effort shall be made both by the Company and the Union to dispose of any grievance or complaints from employees or the Company at the lowest possible level. Under normal circumstances the procedure shall be as follows:

STEP I

Within 5 working days of a grievance arising, the employee concerned may raise the grievance with his immediate Supervisor, or alternatively if he so desires, he shall approach

the officer to whom his immediate supervisor is responsible, accompanied by at least two members of the Office Committee.

STEP II

If the matter is still not settled within a further 7 working days, following representations made under Step 1 above, the Union may make formal presentation to the Company in writing. On receipt of the Union's letter the Company will without delay offer arrangements for a meeting between the Branch Manager and/or an accredited official of the Company and the Union which will be attended by the Union's Branch Secretary and/or his appointed deputy. Such a meeting shall be held within 7 days of receipt of the Union's letter.

STEP III

If the matter remains unsettled, the grievance may be discussed between a Director of the Company and/or his accredited official and the Union's General Secretary and/or his appointed deputy within 10 days.

STEP IV

If the matter still remains unsettled after this meeting or any further meetings between the Company and the Union, then the matter will be referred to the Ministry of Human Resources for conciliation.

STEP V

If the dispute still remains unresolved after reconciliation proceedings by the Ministry of Human Resources both parties may refer the dispute to the Industrial Court, for settlement under the provisions of the Industrial Relations Act, 1967, or such other law as may then be in force.

ARTICLE 6 RECOGNITION OF THE COMPANY

The Union recognises the right of the Company to operate and manage its business in all respects under normal circumstances. However, the Company's exercise of its right to manage its business shall not entail a change to the detriment of the employee in regard to his terms and conditions of employment.

The Union and its members jointly undertake to co-operate loyally with the Company to the best of their ability, and to conscientiously fulfil all work for the advancement of the Company's business.

ARTICLE 7 LEAVE ON TRADE UNION BUSINESS[8]

Full paid leave shall be granted to employees attending trade union courses or seminars approved by the Ministry of Human Resources, subject to the following conditions:

(a) That leave granted shall not exceed one week per member per calendar year;

(b) That not more than two members shall attend the same course/seminar at any time and in any one calendar year.

ARTICLE 8 UNION MEETING

Upon request and where available, the Company shall provide the Union Office Committee with places and facilities, where necessary, for meetings.

ARTICLE 9 NOTICE BOARD

The Company shall provide space for a notice board for Union matters for the employees in the premises of the Company for the purpose of communication between the Union and employees and such notices shall be vetted by the Company before they are displayed on the notice board.

ARTICLE 10 CHECK-OFF[9]

The Company agrees to collect Union subscriptions from employees who so wish, and remit same to the Head Office of the Union. This is subject to having fulfilled the requirements of the Employment Act, 1955 and the employee having completed the authorization form as set out in the appendix to this agreement. Provided that the Company shall have no responsibility for the completion of this form and shall not have any other part than the deduction of Union subscriptions where requested in writing by the employee.

ARTICLE 11 PROBATION[10]

(1) All technical staff on first appointment shall be appointed on up to 6 months probation and all other employees on first appointment shall be appointed on 3 months probation to enable the Company to ascertain whether the employee concerned is suitable for employment. The probationary period for a new employee may be extended by another 3 months.

(2) Should any employee remain in the employment of the Company after serving 6 months or 9 months as the case

may be on probation, he shall be deemed to have been confirmed in his employment.

(3) On successful completion of the probationary period, the employee will be given a letter of confirmation, copied to the Union.

ARTICLE 12 SALARY STRUCTURE

(1) Employees will be paid in accordance with the salary scales set out in the Appendix to this Agreement.[11]

(2) New employees may be taken on at a starting salary commensurate with their value to the Company provided it is not below the minimum for the appropriate job grade.

(3) Annual Increment for new employees

(a) An employee who joins the Company on or before 31st December of the year, shall receive his first annual increment on 1st July of the following year.

(b) An employee who joins the Company after 31st December will not receive any annual increment on 1st July of that year but he shall receive his first annual increment on 1st July of the subsequent year.

ARTICLE 13 PROMOTION

(1) As and when vacancies occur, the Company shall consider the promotion of suitable existing employees from lower categories to higher categories including executive positions.

(2) The Company shall notify existing employees (by means of the Company's notice board) of vacancies.

(3) An employee who has been selected for promotion shall at the Company's discretion be required to serve a probationary period not exceeding 6 months.

(4) Upon successful completion of his probationary period, the employee selected for promotion will be informed as to whether he is confirmed in his new position. In the event that he is not confirmed, he shall revert to his previous position or similar post without any change to his salary or grade.

(5) An employee who is selected for promotion and is subsequently confirmed in his new position shall receive an adjustment to his salary retrospective to the date he was put on probation.

ARTICLE 14 ACTING ALLOWANCE

Where the Company requires an employee to act in a job or relieve another employee in the next grade above his own for a period of not less than 3 days he will be paid an acting allowance of RM ..... per day and where an employee is required to relieve another employee in a job two or more grades above his own, he will be paid an acting allowance of RM ..... per day.

ARTICLE 15 DISABLEMENT

The Company will do its best to provide alternative employment for any employee who suffers disability due to sickness, or accident, subject to the circumstances at the

time and where alternative employment is provided, the conditions of employment and the salary shall be determined by the Company in consultation with the Union.

ARTICLE 16 TRANSFER

(1) An employee who is required by the Company to be transferred to another town at a place which is not less than 80 kilometres distance, where the business of the Company is located, shall be paid the following:

(a) Cost of transportation and insurance on personal effects by arrangement of the Company.

(b) 2nd Class rail fares for spouse and children by arrangement of the Company.

(c) A dislocation allowance will be payable on the following scale:

- A sum of RM ..... will be payable to married employees on taking up the new appointment by 3 monthly instalments.
- A sum of RM ..... will be payable to single employees on taking up the new appointment by 3 monthly instalments.

(2) Where the employee is required to make a visit to his new location prior to taking up his new appointment an additional visit allowance of actual expenses incurred up to RM ..... for a married employee and RM ..... for a single employee will be paid. Paid leave shall be granted to the employee for this purpose.

(3) Transfers can only be effected at the request of the Management and with the consent of the employee, but such consent shall not be unreasonably withheld.

ARTICLE 17 REMOVAL COMPENSATION

In the event of the Company removing its premises or place of business from one locality to another, the Company will compensate the employee on consideration of the merits of individual cases in consultation with the Union.

ARTICLE 18 OUTSTATION HOTEL ALLOWANCE

A hotel allowance shall be paid to all staff without bill at RM .... per night or at a hotel designated by the Company, when an employee is required to travel and stay outstation on the Company's business.

ARTICLE 19 OUTSTATION MEAL ALLOWANCE

(1) All employees shall where required to travel outstation on the Company's business be given the following allowances:

Breakfast	–	RM .....
Lunch	–	RM .....
Dinner	–	RM .....

(2) All staff who entertain clients to breakfast, lunch or dinner at the expense of the Company shall not be eligible to claim for such breakfast, lunch, dinner allowance as the case may be.

(3) Breakfast allowance shall be payable to an employee, who on Company's business, is away from his home-station for one hour or more before the normal commencement time of the office.

(4) Lunch allowance shall be payable to an employee who is away from his home-station on company's business for the whole of his normal lunch-hour.

(5) Dinner allowance shall be payable to an employee who is outstation on Company's business, returns to his home-station after 7.00 pm.

(6) "Home-station" shall mean all areas within a 35 kilometre radius of the Company's premises.

ARTICLE 20 DEFERRED PAYMENT OF SALARY

(1) The Company will make an annual deferred payment of salary historically known as Bonus at the close of each financial year calculated on the basis of the last drawn salary as at 30th June each year.

(2) The Company shall pay an annual deferred payment of salary equivalent to 2 months last drawn basic salary as on 30th June each year to each employee. Such payment shall not be later than 31st August of each year.

ARTICLE 21 FESTIVAL AND EMERGENCY ADVANCES

(1) The Company shall at the employee's request grant an advance of not more than half a month's basic salary to be repayable in 4 equal monthly instalments over the succeeding 4 months due to the following events:

(a) When an employee celebrates his major festivals;

(b) Due to death of the employee's spouse, children, parents or grandparents;

(c) Due to fire or flood which affects the employee's property or person.

(2) Provided that at the time of the request for advance, the employee shall not have any outstanding payments from any other advance taken earlier.

ARTICLE 22 UNIFORMED STAFF

(1) The Company shall provide three sets of uniforms to all uniformed staff per year and subsequently supply of uniforms shall be on the anniversary date of supply.

(2) The Company shall arrange and pay for laundry of the uniform.

(3) All uniformed employees provided with uniforms shall wear such uniforms at all times during working hours.

(4) Footwear - The Company will supply two pairs of leather shoes to uniformed employees per year. The clerk-of-works will be provided with one pair each of safety boots and leather shoes each year.

(5) Crash Helmets - As and when required by law, the Company will provide employees whose job functions require the use of motorcycles on Company's business, with a crash helmet, complying to a standard approved by law. The crash helmet will remain the property of the Company and will be issued to the employee against signature, and he will be responsible for it.

(6) Raincoats - All employees who are required to be on the field shall receive one raincoat each.

(7) Replacement - In the event of normal wear and tear to the uniform before the next supply of uniform, such items shall be replaced by the Company. However, where such

wear and tear are due to wilful damage or neglect, the employee concerned will be responsible for such expenses in replacement of the items.

ARTICLE 23 WORKING HOURS

(1) The working hours of the employees shall be as follows:

(a) Head Office
Mondays to Fridays – 8.30 am to 1.00 pm
2.00 pm to 5.30 pm

(b) Employees at Construction Site
Mondays to Fridays – 8.30 am to 12.00 pm
1.00 pm to 5.30 pm

(c) Drivers
Mondays to Fridays – 8.30 am to 5.30 pm
Lunch: 1 hour between 12.00 noon and 2.00 pm

(2) The Company may change these hours of work in consultation with the Union.

(3) The Company will grant Muslim employees an extension of one hour on their lunch period from 12.30 pm to 2.30 pm on Fridays solely for the purpose of prayers at a mosque/surau.

ARTICLE 24 OVERTIME[12]

(1) Definition of Overtime
Overtime is work performed at the prior request of the Company outside the normal working hours applicable to the employees concerned and with the consent of the employee.

(2) Overtime on weekdays

An employee who works overtime on a weekday shall be paid at time and a half for such work. For any period of overtime worked for the first half hour, the payment shall be half an hour and thereafter overtime will be calculated in units of 30 minutes rounded up to the nearest 30 minutes.

(3) Emergency Overtime

In the event of exigencies of work where an employee is recalled from his house to work overtime outside his normal schedule of hours of work, the employee shall be granted a minimum of 3 hours' work calculated at one time and a half.

(4) Overtime Calculation

The rate per hour for each employee shall be calculated based on the following:

$$\frac{\text{Monthly wages} \times 12}{52 \times \text{weekly hours of work}} = \text{Rate per hour}$$

(5) Overtime Meals

In the event an employee is required to perform overtime work, the employee shall be given a meal allowance of RM .... per session of overtime with the following conditions:

(a) The employee has worked overtime up to 7.30 pm and at least 2 hours from the time he started work.

(b) The employee shall not be paid double meal allowance on any one day.

(6) Transport

An employee who does not have his own means of transport, and is required to work overtime beyond 9.30 pm shall be reimbursed the actual cost of transport or alternatively transport to be arranged by the Company.

ARTICLE 25 REST DAYS & PUBLIC HOLIDAYS

(1) Rest Days

The Company will grant to its employees a rest day each week. Subject to Article 23 of this Agreement, the normal rest day shall be Sunday. The Company may require an employee to work on a rest day subject to the provisions of the Employment Act, 1955.

Work on a Rest Day

(a) An employee who works on a rest day shall be paid for any period of work:

(i) which does not exceed half of his normal hours of work, one day's wages at the ordinary rate of pay for work done on that day; or

(ii) which is more than half his normal hours of work, at the rate twice his hourly rate of pay and calculated in half hourly periods to the nearest half hour.

(b) For any work carried out in excess of the normal hours of work on a rest day by an employee, he shall be paid for such excess hours at the rate three times his hourly rate of pay and calculated in half hourly periods.

(2) Public Holidays

The Company will grant to its employees paid holidays on all public holidays gazetted by the central government or by the government of the State in which the employee is serving. Where any of the gazetted public holidays or any other day substituted therefore falls within the period during which an employee is on maternity leave, sick leave or annual leave to which the employee is entitled, the Company shall grant another day as a paid holiday in substitution for such public holiday or the day

substituted therefore.

Work on a Gazetted Public Holiday

(a) Where an employee is required to work on a gazetted public holiday he shall be paid twice his ordinary rate of pay for that day regardless of the period of work done on that day.

(b) Where an employee is required to work on a gazetted public holiday in excess of his normal hours he shall be paid at a rate four and a half times his hourly rate of pay, a part of an hour being calculated as an hour for this purpose.

(3) For the purpose of this Article the rate of pay per hour shall be based on:

$$\frac{\text{Monthly wages} \times 12}{52 \times \text{weekly hours of work}}$$

(4) An employee who absents himself on the working day immediately preceding or immediately succeeding the public holiday(s), without prior approval, shall not be entitled to any public holiday pay for that public holiday(s).

(5) Transport
An employee who does not have his own means of transport, and is required to work overtime beyond 9.30 pm shall be reimbursed the actual cost of transport or alternatively transport to be arranged by the Company.

ARTICLE 26 ANNUAL LEAVE

(1) Employees shall be entitled to annual leave as follows:

(a) on completion of 12 months continuous service = 14 working days.

(b) on completion of 5 years continuous service = 21 working days.

(2) Annual leave shall be in addition to rest days, gazetted public holidays and sick leave.

(3) An employee shall not absent himself from duty for the purpose of annual leave without approval of the Company.

(4) (a) Annual leave shall be taken in accordance with an annual leave roster to be drawn up by the Company at the beginning of each calendar year. Provided that 7 days of annual leave entitlement is left outside the leave roster for the purposes of attending to contingencies which do not qualify for leave in accordance with Article 28.

(b) The wishes of each employee as to the time annual leave shall be taken, will be considered having due regard to the requirements of the Company and its interest, and to relief and substitute arrangements, and to the desirability of releasing employees evenly over the year.

(5) Annual leave may be accumulated by an employee with the approval of the Company, for purposes of overseas travels (except Singapore), pilgrimage, examination and marriage subject to the following conditions:

(a) Annual leave in excess of statutory provisions may not be accumulated for a period exceeding 3 years and shall be taken in full in the year immediately following the accumulated period.

(b) Accumulated leave not taken under the conditions and within such periods stipulated above shall be forfeited absolutely.

(6) Where an employee has completed 12 months continuous service after initial engagement, his annual leave entitlement shall be calculated up to the end of the

calendar year during which he has completed 12 months service, thus converting annual leave entitlement to a calendar year basis. Thereafter, he shall be granted annual leave during the calendar year in respect of service during that same calendar year.

(7) Pay in lieu of annual leave not taken, excluding any accumulated leave, will be granted when an employee leaves the Company, except in the case of dismissal for misconduct.

(8) Where an employee leaves the Company, the proportionate leave entitlement in that year's service will be allowed.

(9) An employee who becomes ill or injured whilst on annual leave may have his leave credited back to his entitlement by one day for each working day he is certified unfit for work, either by the Company's doctor or a Medical Officer, provided the employee or his representative informs the Company of the sick leave immediately when it commences.

(10) The provision of Article 30(2) on Medical Attention shall apply whilst the employee is on annual leave within Malaysia.

ARTICLE 27 SPECIAL PAID LEAVE

(1) The Company will give sympathetic consideration to the granting of paid leave subject to a maximum of 7 days per year on application in the following cases:

(a) Where the employee takes an examination which the Company feels will be of benefit to the employee in his present work or future assignments with the Company.

(b) To employees representing sports and cultural teams at State or National level.

(2) On request, the Company may at its discretion consider granting extended paid leave in order that an employee may pursue studies towards a recognised qualification, provided that the Company judges the course of study to be in the interest of the Company and the employee with regard to his work, and further provided the employee remains in the Company's employ thereafter for an agreed period of time at least twice the period of paid leave or refund the paid leave granted should the employee decide to resign from the Company before the expiry of the required period of time.

ARTICLE 28 COMPASSIONATE, EMERGENCY AND CONGRATULATORY LEAVE

In the following events, the Company shall grant paid leave to affected employees up to a maximum of 10 days in any one calendar year:

(a) Death of employee's spouse, children, parents, brothers, sisters, grandparents, parents-in-law: 3 days.

(b) Serious illness of employee's spouse, children, parents and parents-in-law: 2 days

(c) Fire or flood which affects the employee's person and/or property: 2 days

(d) Birth of legal child: 2 days

(e) First legal marriage of the employee: 3 days.

ARTICLE 29 MATERNITY LEAVE

(1) A female employee who has been employed for a period of not less than 90 days during the nine months

immediately preceding her confinement, will be granted 60 consecutive days maternity leave on full pay. Maternity leave will only be granted after the 28th week of pregnancy. Not more than 60 consecutive days paid leave will be allowed in respect of any one confinement.

(2) Leave on account of miscarriage prior to the 28th week of pregnancy will not be considered as maternity leave but as normal sick leave.

(3) Payment for the first month's maternity leave shall be made within 7 days of receipt of notification of confinement from the employee. Payment for the second month's maternity leave shall be made not less than 7 days prior to the expiry of the maternity leave. Payment may at the option of the employee concerned, be made to a representative authorised in writing by the employee to receive such payment and the signed receipt of such representative shall be deemed to be the valid receipt of the employee concerned.

ARTICLE 30 MEDICAL BENEFITS

(1) Sick Leave

(a) All employees shall be entitled to paid sick leave as follows:

(i) 28 days sick leave each year if no hospitalisation is necessary; and in addition

(ii) 60 days each year if hospitalisation is necessary.

(b) Sick leave shall be granted on the recommendation of a registered medical practitioner appointed by the Company, or in cases of emergency, by any registered medical practitioner within a reasonable time and distance from the employee's home.

(c) An employee who reports to a registered medical practitioner appointed by the Company and who is not subsequently granted sick leave by the medical practitioner shall report for duty as soon as possible after completion of the medical examination.

(2) Medical Attention

(a) (i) All employees will be eligible for free medical attention and treatment by a medical practitioner appointed by the Company or where the employee is referred by the Company for specialist treatment the Company shall pay for the cost of medicines and treatment.

(ii) In case of emergency, the Company will reimburse the employee against receipted bills for the cost of the treatment and medicines, by any registered medical practitioner and further subject to the case being handed over to the Company's doctor as soon as possible.

(b) The Company shall not pay for the cost of the following:

(i) Medical or surgical or other appliances, including spectacles.

(ii) Any dental expenses including dentures.

(iii) Any expenses in respect of confinement, pregnancy or miscarriage. However all expectant mothers will continue to receive medical treatment on illnesses unrelated to pregnancy until the date of confinement.

(iv) Any expenses arising out of proven self-inflicted injury, illness or disease.

(v) Any expenses for treatment in mental cases which have been certified by a Government Doctor in charge of psychiatric cases.

(vi) Any expenses incurred in respect of illness, injury or disablement, arising from any proven fault of the employee's participation in or attending any hazardous sport, pursuit or pastime, attempted suicide, the performance of any unlawful act, exposure to any unjustifiable hazards, except when endeavouring to save human life, provoked assault, the use of drugs not medically prescribed, illegal abortifacient measures, excessive use of alcohol, or any breach of the peace or disorderly conduct.

(c) Provided it is certified as necessary by a registered medical practitioner appointed by the Company, or in cases of emergency by any other registered medical practitioner, all employees will be granted free hospital accommodation and second class ward charges in a government or government controlled hospital, and, where necessary, X-rays, specialist's fees and operation fees will be included.

(d) The total liability of the Company in respect of hospitalisation, X-rays, surgical, anaesthetic and specialist treatment provided in accordance with clause (c) above shall be limited to RM ..... for each employee in any one calendar year.

(e) (i) On the recommendation of the Company's Doctor, any employee suffering from tuberculosis, leukaemia, cancer, paralysis or any other illness of the like of a prolonged nature which renders him unfit to perform his duty, shall be granted, in addition to his sick leave entitlement in Article 30 (1) on Sick Leave, prolonged illness benefit of 6 months leave with full pay, 6 months with half pay and a further 6 months leave with no pay.

(ii) In cases where early prognosis, certified by the Company's approved doctor, indicates 6 months or more of prolonged illness the employee may,

at his option, elect to resign from the service of the Company. In such cases, the Company shall pay in one lump sum, in addition to such other payments, if any, for which he may be entitled, the balance, if any, of prolonged illness payments as set forth in Article 30 (2) (i) above.

ARTICLE 31 RETRENCHMENT

(1) The provisions of this Article shall apply to those employees who are either:

(a) found redundant by virtue of being surplus to the Company's requirements, or

(b) redundant by virtue of the Company's decision to close or cease its business operation.

(2) In the event of redundancy as defined in Clause 31(1) it is agreed that the Company will give written notice of retrenchment to redundant employees not later than 2 months before the date on which their employment is to be terminated. However, the Union shall be notified of the retrenchment as early as possible but not later than one month before service of notice of retrenchment to the redundant employees, to provide the opportunity for discussions between the Company and the Union on the Company's decision to retrench.

(3) An employee shall not be eligible for retrenchment compensation unless he has completed a minimum of one year's continuous service, inclusive of any period of probation on first appointment in accordance with the provisions of this Article.

(4) An employee whose employment is terminated on the grounds of redundancy shall be paid a lump sum payment hereinafter referred to as retrenchment payment as follows:

(a) Less than 10 years' service:
One month's last drawn salary for each completed year of service or proportionately for any incomplete year of service based on completed months.

(b) Above 10 years' service:
One and a quarter months' last drawn salary for each completed year of service or proportionately for any incomplete year of service based on completed months.

(5) In the event of a vacancy occurring within 12 months of retrenchment, the Company will consider applications from suitably qualified employees declared redundant on the previous occasion.

(6) Should the Government introduce any form of unemployment benefit or relief to which the employer is made to contribute and which increases the Company liability under this Article then the payment of retrenchment compensation shall be open to re-examination between the Union and the Company.

(7) Retrenchment will be guided as far as possible by the principle of "Last in First Out".

ARTICLE 32 RETIREMENT

(1) (a) All employees who have attained the age of 55 shall retire.

(b) In the absence of a birth certificate, the date of birth as shown in the identity card of the employee concerned shall be deemed to be the date of birth for the purposes of determining the retirement age.

(c) The Company may invite an employee to continue in the employ of the Company for a further period beyond the age of 55, but such extension of

employment shall be with the written consent of the employee concerned. The Company will give 3 months notice of the intention either to call for retirement or to invite the employee to extend the period of employment.

(d) All such extension of employment beyond the age of 55, shall be for periods of not more than one year at a time and shall be subject to the employee being certified physically fit by a medical practitioner appointed by the Company.

(2) The Company shall make a lump sum payment, hereinafter referred to as Retirement Benefit, in accordance with the following provisions:

(a) To employees who have attained the age of retirement as laid down in this Article or at any later date which may be agreed between the employee and the Company in writing, subject to the employee having completed a minimum of 5 years continuous service with the Company.

(b) To employees who retire or opt to retire on account of incapacity as recommended by a Company appointed doctor.

(c) Elect to resign under provision of Article 30(2)(ii).

(d) Resign after 5 years of reaching the age of 55 years.

(e) Resign after 5 years' continuous service with the Company except in the case of dismissal for misconduct involving dishonesty, theft, misappropriation of Company's funds and the like or resignation to avoid such dismissal.

(f) On the death of the employee, to the heirs or assignees of such employee.

(g) Retrenched after 5 years' continuous service with the Company.

(3) Retirement Benefits

The Company shall make a lump sum payment, hereinafter referred to as Retirement Benefit, calculated in accordance with the following provisions:

15% of the total basic salary LESS the Company's contribution to the EPF based on such basic salary.

ARTICLE 33 DISCIPLINE

(1) Where the Company institutes an inquiry, the Company will inform the employee concerned in writing, stating the charges referred against him, and the time, date and location of such inquiry, copied to the Union, and at such inquiry allow the representation of the employee concerned either on his own behalf or through the Union depending on the nature of the misconduct. The Company may after due inquiry either:

(a) Issue the employee with a letter of warning; or

(b) Suspend the employee without wages for a period not exceeding two weeks; or

(c) Withhold the annual increment of the employee; or

(d) Downgrade the employee; or

(e) Dismiss the employee without notice on ground of misconduct.

In the event of mitigating factors, the Company may, at its discretion, in lieu of such dismissal for misconduct, downgrading or suspension, issue a letter of final warning.

(2) For the purpose of the inquiry the Company may suspend the employee for a period not exceeding two weeks during which period he shall be paid half of his basic salary only. Provided that if the inquiry does not

disclose any misconduct on the part of the employee the Company will restore the full basic salary so withheld.

(3) During any period of suspension for the purpose of an inquiry, the employee may be notified in writing to report at his normal place of work on such days and at such times during working hours as may be required by the Company.

(4) An employee who has been suspended from duty and who has been issued with property or equipment belonging to the Company shall return, when expressly requested, such articles within the suspension period.

(5) Where the Company gives an employee a written warning pursuant to the provisions of this Article, a copy of such warning shall be extended to the Union.

(6) Right of Appeal
An employee who is subject to any disciplinary action provided in this Article shall have the right of appeal in accordance with the Grievance Procedure set out in Article 5 (2).

ARTICLE 34 EXISTING BENEFITS

The parties agree that, notwithstanding the provisions of this Agreement, existing benefits not covered by the provisions of this agreement which are practised by the Company on or after ..... shall continue to apply.

ARTICLE 35 DRIVING LICENCE

Those employees who are employed as drivers or are required to drive Company vehicles on a regular basis will be

reimbursed the annual driving licence renewal fees. It shall be the responsibility of such employees to renew their driving licences.

ARTICLE 36 MOTORCYCLE LOAN

(1) Only confirmed employees with satisfactory job performance who are required to make substantial use of motorcycles in the course of their day to day duties are eligible to apply for a motorcycle loan.

(2) An employee who is provided with a Company motorcycle will not be eligible to apply for the loan.

(3) Where a used motorcycle is purchased, such motorcycle shall not be more than 3 years old and should be properly valued by the vehicle agent and subject to satisfactory inspection report by the Company's representative.

(4) The maximum loan shall be RM .... or 80% of the purchase price of the motorcycle whichever is lesser.

(5) Repayment towards the loan shall be by monthly instalments to be deducted from the employee's monthly salary. The employee shall be required to sign a written authorization to this effect.

(6) The maximum repayment period shall be 48 months for new motorcycles and 36 months for used motorcycles.

(7) The interest rate for the loan for the purchase of a motorcycle shall be at 5% per annum on annual interest.

(8) This Article shall be subject to the monthly instalments (comprising principle and interest) not exceeding 30% of the employee's basic monthly salary and subject further to the total of all deductions not exceeding 50% of the employee's basic monthly salary.

(9) An employee with an outstanding motorcycle loan shall repay such loan immediately upon cessation of employment.

ARTICLE 37 MILEAGE ALLOWANCE

An employee who is authorised by the Company to use his motor vehicle on Company's business may claim car/motorcycle allowances based on the following rates:

Motorcar	Motorcycles
1st 800 km	unlimited
@ 40c/km	@ 25c/km
In excess of 800km @ 3c/km.	

(b) The appropriate mileage form should be used at all times.

(c) All employees who are requested to travel by public transport in the course of duty, shall be reimbursed the actual costs incurred accordingly.

ARTICLE 38 LANGUAGE

This Agreement shall be published in English and Bahasa Malaysia and in the event of a dispute arising out of interpretation of the Agreement, the English version shall prevail.

NOTES

1. The names of the parties to the Agreement are inserted here (the Union and the Employer). The date the Agreement is signed is also written in.

2. The title of the Agreement is usually merely stated as the names of the parties and the year signed, e.g., National Union of Commercial Workers - XYZ Co. Sdn Bhd Agreement, 2001.

3. (a) The terms of the collective agreement specifically exclude certain categories of employees. The first two groups are the managerial, executive, supervisory and confidential group of staff who are not eligible to be represented by the same union as other workers in the company.

   (b) If the Company has branches in Sabah or Sarawak as well as Peninsular Malaysia, the employees in the former are not covered by the Agreement as they are not eligible to join the Peninsular Malaysia union. If the workers in these branches belong to a union, their union would sign a separate agreement with the Company.

4. This article is required by the Industrial Relations Act. The law requires that the agreement must be valid for a minimum of 3 years. This clause ensures continuity between one agreement and the next as it may take 6 months or more for negotiations to be completed for the succeeding agreement.

5. This article is required by the Industrial Relations Act.

6. This article is required by the Industrial Relations Act.

7. Most agreements contain a grievance procedure. This one is fairly typical of most. The procedure aims to provide an orderly method for settling any grievance a worker may have. Wherever possible the grievance should be settled at the lowest organisational level, i.e., the worker involved should discuss the problem with his immediate superior. If he is not satisfied with the decision of his superior the grievance will be taken to a higher level. Once the grievance cannot be settled within the company, it is termed a dispute. This procedure requires

that all disputes be referred to the Ministry of Human Resources.

8. Items such as those found in Articles 7,8,9 and 10 are commonly granted when a union has been given recognition by the employer. They are not terms and conditions of service for the employees but are useful privileges for the union.

9. The Employment Act is very specific about the types of deductions from wages that may be made by an employer. The law states that such deductions may be made but the employees wishing this service must apply in writing to the employer.

10. All following articles (except for Article 33) refer to specific benefits the employer agrees to give the workers covered by the Agreement. Articles 11,13,14,16 and 17 deal with personnel systems such as probation, promotion and transfer. Article 12 covers the key areas of salaries and is supplemented by an appendix covering the details (not included here.) Working hours are detailed in Article 23 as are the rates of payment for work carried out outside normal working hours. Articles 26 to 29 establish the amount and the types of leave to which the workers are entitled.

11. Not included here.

12. As far as possible all terms used in the Agreement should be carefully defined to prevent later argument over interpretation.

Appendix

Excerpts from the Employment Act

Excerpts from the Employment Act which relate to the text are presented here for further reference. Readers are recommended to check the relevant Act themselves for more detail.

FIRST SCHEDULE [SECTION 2 (1)]: APPLICABILITY OF ACT

1. Any person, irrespective of his occupation, who has entered into a contract of service with an employer under which such person's wages do not exceed one thousand five hundred ringgit a month.
2. Any person who, irrespective of the amount of wages he earns in a month, has entered into a contract of service with an employer in pursuance of which -

(1) he is engaged in manual labour including such labour as an artisan or apprentice;

Provided that where a person is employed by one employer partly in manual labour and partly in some other capacity such person shall not be deemed to be performing manual labour unless the time during which he is required to perform manual labour in any one wage period exceeds one-half of the total time during which he is required to work in such wage period;

(2) he is engaged in the operation or maintenance of any mechanically propelled vehicle operated for the transport of passengers or goods or for reward or for commercial purposes;

(3) he supervises or oversees other employees engaged in manual labour employed by the same employer in and throughout the performance of their work;

(4) he is engaged in any capacity in any vessel registered in Malaysia and who -

(a) is not an officer certificated under the Merchant Shipping Acts of the United Kingdom as amended from time to time;

(b) is not the holder of a local certificate as defined in Part VII of the Merchant Shipping Ordinance, 1952; or

(c) has not entered into an agreement under Part III of the Merchant Shipping Ordinance, 1952; or

(5) he is engaged as a domestic servant

(Sections 12, 14, 16, 22, 61, 64 and Parts IX, XII and XIIA do not apply to domestic servants.)

3. For the purposes of this Schedule "wages" means wages as defined in section 2, but shall not include any payment by way of commission, subsistence allowance and overtime payment.

SECTION 1: PRELIMINARY

(1) This Act may be cited as the Employment Act, 1955.

(2) This Act shall apply to West Malaysia only.

SECTION 2: DEFINITIONS

"Confinement" means parturition resulting after at least twenty-eight weeks of pregnancy in the issue of a child or children, whether alive or dead, and shall for the purposes of this Act commence and end on the actual day of birth and where two or more children are born at one confinement shall commence and end on the day of the birth of the last-born of such children, and the word "confined" shall be construed accordingly;

"Contract of service" means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer and includes an apprenticeship contract;

"**Day**" means:

(a) a continuous period of twenty-four hours beginning at midnight; or

(b) for the purposes of Part XII in respect of an employee engaged in shift work, or in work where the normal hours of work extend beyond midnight a continuous period of twenty-four hours beginning at any point of time;

"**Employee**" means any person or class of persons -

(a) included in any category in the First Schedule to the extent specified therein; or

(b) in respect of whom the Minister makes an order under subsection (3) or section 2A.

"**Foreign employee**" means an employee who is not a citizen;

"**Part-time employee**" means a person included in the First Schedule whose average hours of work as agreed between him and his employer do not exceed seventy per centum of the normal hours of work of a full-time employee employed in a similar capacity in the same enterprise whether the normal hours of work are calculated with reference to a day, a week, or any other period as may be specified by regulations;

"**Underground working**" means any undertaking in which operations are conducted for the purpose of extracting any substance from below the surface of the earth, the ingress and egress from which is by means of shafts, adits or natural caves;

"**Wage period**" means the period in respect of which wages earned by an employee are payable;

"**Wages**" means basic wages and all other payments in cash payable to an employee for work done in respect of his contract of service but does not include -

a. the value of any house accommodation or the supply of any food, fuel, light or water or medical attendance, or of any approved amenity or approved service;

b. any contribution paid by an employer on his own account to any pension fund, provident fund, superannuation scheme, retrenchment, termination, lay-off or retirement scheme, thrift scheme or any other fund or scheme established for the benefit or welfare of the employee;

c. any travelling allowance or the value of any travelling concession;

d. any sum payable to the employee to defray special expenses entailed on him by the nature of his employment;

e. any gratuity payable on discharge or retirement; or

f. any annual bonus or any part of any annual bonus.

[Sections 3-7 omitted herein]

SECTION 8: RIGHT OF EMPLOYEES TO UNIONISE

Nothing in any contract of service shall in any manner restrict the right of any employee who is a party to such contract:

a. to join a registered trade union;

b. to participate in the activities of a registered trade union, whether as an officer of such union or otherwise; or

c. to associate with any other person for the purpose of organising a trade union in accordance with the Trade Unions Act 1959.

[Section 9 repealed]

SECTION 10: TERMINATION OF CONTRACTS

(1) A contract of service for a specified period of time exceeding one month or for the performance of a specified piece of work, where the time reasonably required for the completion of the work exceeds or may exceed one month, shall be in writing.

(2) In every written contract of service a clause shall be included setting out the manner in which such contract may be terminated by either party in accordance with this Part.

[Section 11 omitted herein]

SECTION 12: NOTICE OF TERMINATION

(1) Either party to a contract of service may at any time give to the other party notice of his intention to terminate such contract of service.

(2) The length of such notice shall be the same for both employer and employee and shall be determined by a provision made in writing for such notice in the terms of the contract of service, or in the absence of such provision in writing, shall be not less than -

a. four weeks' notice if the employee has been so employed for less than two years on the date on which the notice is given;

b. six weeks' notice if he has been so employed for two years or more but less than five years on such date;

c. eight weeks' notice if he has been so employed for five years or more on such date.

Provided that this section shall not be taken to prevent either party from waiving his right to a notice under this subsection.

(3) Notwithstanding anything contained in subsection (2), where the termination of service of the employee is attributable wholly or mainly to the fact that:

(a) the employer has ceased, or intends to cease to carry on the business for the purposes of which the employee was employed;

(b) the employer has ceased, or intends to cease to carry on the business in the place at which the employee was contracted to work;

(c) the requirements of that business for the employee to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish;

(d) the requirements of that business for the employee to carry out work of a particular kind in the place at which he was contracted to work have ceased or diminished or are expected to cease or diminish;

(e) the employee has refused to accept his transfer to any other place of employment, unless his contract of service requires him to accept such transfer; or

(f) a change has occurred in the ownership of the business for the purpose of which an employee is employed or of a part of such business, regardless of whether the change occurs by virtue of a sale or other disposition or by operation of law,

the employee shall be entitled to, and the employer shall give to the employee, notice of termination of service, and the length of such notice shall be not less than that provided under subsection (2) (a), (b) or (c), as the case may be, regardless of anything to the contrary contained in the contract of service.

SECTION 13: INDEMNITY IN LIEU OF NOTICE

(1) Either party to a contract of service may terminate such contract of service without notice or, if notice has already been given in accordance with Section 12, without waiting for the expiry of that notice, by paying to the other party an indemnity of a sum equal to the amount of wages which would have accrued to the employee during the term of such notice or during the unexpired term of such notice.

SECTION 14: TERMINATION FOR MISCONDUCT

(1) An employer may, on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service, after due inquiry:

a. dismiss without notice the employee;

b. downgrade the employee; or

c. impose any other punishment as he deems just and fit, and where a punishment of suspension without wages is imposed, it shall not exceed a period of two weeks.

(2) For the purposes of an inquiry under subsection (1), the employer may suspend the employee from work for a period not exceeding two weeks but shall pay him not less than half his wages for such period:

Provided that if the inquiry does not disclose any misconduct on the part of the employee the employer shall forthwith restore to the employee the full amount of wages so withheld.

SECTION 15: PAYMENT OF WAGES

(1) An employer shall be deemed to have broken his contract of service with the employee if he fails to pay wages in accordance with Part III.

(2) An employee shall be deemed to have broken his contract of service with the employer if he has been continuously absent from work for more than two consecutive working days without prior leave from his employer, unless he has a reasonable excuse for such absence and has informed

or attempted to inform his employer of such excuse prior to or at the earliest opportunity during such absence.

[Section 16 and 17 omitted herein]

SECTION 18: WAGE PERIOD

(1) A contract of service may specify wage periods not exceeding one month.

SECTION 19: PAYMENT OF WAGES

(1) Every employer shall pay to each of his employees not later than the seventh day after the last day of any wage period the wages, less lawful deductions, earned by such employee during such wage period:

Provided that if the Director General is satisfied that payment within such time is not reasonably practicable, he may, on the application of the employer, extend the time of payment by such number of days as he thinks fit.

SECTION 20: PAYMENT ON TERMINATION OF CONTRACT

The wages, less lawful deductions, earned by but not yet paid to an employee whose contract of service terminates in accordance with section 11(1) or of section 12 shall be paid to such employee not later than the day on which such contract of service so terminates.

[Section 21 omitted herein]

SECTION 22: ADVANCES OF WAGES

No employer shall during any one month make to an employee an advance or advances of wages not already earned by such employee which exceeds in the aggregate the amount of wages which the employee earned in the preceding month from his employment with such employer, or if he has not been so long in the employment of such employer, the amount which he is likely to earn in such employment during one month, unless such advance is made to the employee -

a. to enable him to purchase a house or to build or improve a house;

b. to enable him to purchase land;

c. to enable him to purchase livestock;

d. to enable him to purchase a motorcar, a motorcycle or a bicycle;

da. to enable him to purchase shares of the employer's business offered for sale by the employer;

e. for any other purpose :

   i) in respect of which an application in writing is made by the employer to the Director General;

   ii) which is, in the opinion of the Director General, beneficial to the employee; and

   iii) which is approved in writing by the Director General, provided that in granting such approval, the Director General may make such modifications thereto or impose such conditions thereon as he may deem proper;

f. for such other purpose as the Minister may, from time to time, by notification in the *Gazette*, specify either generally in respect of all employees, or only in respect of

any particular employee, or any class, category or description of employees.

SECTION 23: WAGES NOT PAYABLE

Wages shall not become payable to or recoverable by any employee from his employer for or on account of the term of any sentence of imprisonment undergone by him or for any period spent by him in custody or for or on account of any period spent by him in going to or returning from prison or other place of custody or for or on account of any period spent by him in going to, attending before or returning from a court otherwise than as a witness on his employer's behalf.

SECTION 24: DEDUCTIONS FROM WAGES

(1) No deductions shall be made by an employer from the wages of an employee otherwise than in accordance with this Act.

(2) It shall be lawful for an employer to make the following deductions:

a) deductions to the extent of any overpayment of wages made during the immediately preceding three months from the month in which deductions are to be made, by the employer to the employee by the employer's mistake;

b) deductions for the indemnity due to the employer by the employee under section 13 (1);

c) deductions for the recovery of advances of wages made under section 22 provided no interest is charged on such advances; and

d) deductions authorized by any other written law;

(3) The following deductions shall only be made at the request in writing of the employee:

a) deductions in respect of the payments to a registered trade union or co-operative thrift and loan society for any sum of money due to the trade union or society by the employee on account of entrance fees, subscriptions, instalments and interest on loans, or other dues; and

b) deductions in respect of payment for any shares of the employer's business offered for sale by the employer and purchased by the employee.

(4) The following deductions shall not be made except at the request in writing of the employee and with the prior permission in writing of the Director General:

(a) deductions in respect of the payments into any superannuation scheme, provident fund, employer's welfare scheme or insurance scheme established for the benefit of the employee;

(b) deductions in respect of repayments of advances of wages made to an employee under section 22 where interest is levied on the advances and deductions in respect of the payments of the interest so levied;

(c) deductions in respect of payments to a third party on behalf of the employee;

(d) deductions in respect of payments for the purchase by the employee of any goods of the employer's business offered for sale by the employer; and

(e) deductions in respect of the rental for accommodation and the cost of services, food and meals provided by the employer to the employee at the employee's request or under the terms of the employee's contract of service.

(5) The Director General shall not permit any deduction for payments under subsection (4)(e) unless he is satisfied that the provision of the accommodation, food or meals is for the benefit of the employee.

(8) The total of any amounts deducted under this section from the wages of an employee in respect on any one month shall not exceed fifty per centum of the wages earned by that employee in that month.

(9) The limitation in subsection (8) shall not apply to:

(a) deductions from the indemnity payable by an employee to an employer under section 13 (1);

(b) deductions from the final payment of the wages of an employee for any amount due to the employer and remaining unpaid by the employee on the termination of the employee's contract of service; and

(c) deductions for the repayment of a housing loan which, subject to the prior permission in writing of the Director General, may exceed the fifty per centum limit by an additional amount of not more than twenty-five per centum of the wages earned.

SECTION 25: PAYMENT OF WAGES

(1) Except as otherwise expressly permitted by this Act, the entire amount of the wages earned by, or payable to, any employee in respect of any work done by him shall be actually paid to him in legal tender, and every payment of, or on account of, any such wages made in any other form shall be illegal, null and void.

SECTION 25A: MODE OF WAGE PAYMENT

(1) Nothing in section 25 (1) shall operate so as to render unlawful or invalid any payment of wages by the employer to the employee with the employee's written consent in any of the following ways:

(a) payment into an account at a bank or a finance company registered under the Banking and Financial Institution Act 1989 in any part of Malaysia being an account in the name of the employee or an account in the name of the employee jointly with one or more persons;

(b) payment by cheque made payable to or to the order of the employee.

(2) The consent of the employee under this section may be withdrawn by him at any time by notice in writing given to the employer. Such notice shall take effect at but not before the end of the period of four weeks beginning with the day on which the notice is given.

(3) The consent of the employee to the mode of payment of wages under subsection (1) shall not be unreasonably withheld or, if granted, shall not be unreasonably withdrawn by the employee notwithstanding section (2).

(4) Any dispute as to whether an employee has unreasonably withheld or withdrawn his consent to the mode of payment of his wages under subsection (1) shall be referred to the Director General whose decision on the matter is final.

[Sections 26-29 omitted herein]

[Section 30 deleted from the Act]

[Sections 31-33 omitted herein]

SECTION 34: EMPLOYMENT OF WOMEN

(1) Except in accordance with regulations made under this Act or any exemptions granted under the proviso to this subsection no employer shall require any female employee to work in any industrial or agricultural undertaking between the hours of ten o'clock in the evening and five o'clock in the morning nor commence work for the day without having had a period of eleven consecutive hours free from such work:

Provided that the Director General may, on application made to him in any particular case, exempt in writing any female employee or class of female employees from any restriction in this subsection, subject to any conditions he may impose.

SECTION 35: UNDERGROUND WORK

No female employee shall be employed in any underground working.

[Section 36 omitted herein]

SECTION 37: MATERNITY PROTECTION

(1) (a) Every female employee shall be entitled to maternity leave for a period of not less than sixty consecutive days in respect of each confinement and, subject to this Part, she shall be entitled to receive from her employer a maternity allowance to be calculated or prescribed as provided in subsection (2) in respect of the eligible period.

(aa) Where a female employee is entitled to maternity leave under paragraph (a) but is not entitled to receive maternity allowance from her employer for the eligible period under paragraph (c), or because she has not fulfilled the conditions set out in subsection (2) (a), she may, with the consent of the employer, commence work at any time during the eligible period if she has been certified fit to resume work by a registered medical practitioner.

(b) Subject to section 40, maternity leave shall not commence earlier than a period of thirty days immediately preceding the confinement of a female employee or later than the day immediately following her confinement:

Provided that where a medical officer or the registered medical practitioner appointed by the employer certifies that the female employee as a result of her advanced state of pregnancy is unable to perform her duties satisfactorily, the employee may be required to commence her maternity leave at any time during a period of fourteen days preceding the date of her confinement as determined in advance by the medical officer or the registered medical practitioner appointed by the employer.

(bb) Where a female employee abstains from work to commence her maternity leave on a date earlier than the period of thirty days immediately preceding her confinement, such abstention shall not be treated as maternity leave and she shall not be entitled to any maternity allowance in respect of the days during which she abstains from work in excess of the period of thirty days immediately preceding her confinement.

(c) Notwithstanding paragraph (a), a female employee shall not be entitled to any maternity allowance if at

the time of her confinement she has five or more surviving children.

(d) For the purposes of this Part, "children" means all natural children, irrespective of age.

(2) (a) A female employee shall be entitled to receive maternity allowance for the eligible period from her employer if:

(i) she has been employed by the employer at any time in the four months immediately before her confinement; and

(ii) she has been employed by the employer for a period of, or periods amounting in the aggregate to, not less than ninety days during the nine months immediately preceding her confinement.

(b) A female employee who is eligible for maternity allowance under subsection (1) (a) shall be entitled to receive from the employer for each day of the eligible period a maternity allowance at her ordinary rate of pay for one day, or at the rate prescribed by the Minister under section 102 (2) (c) whichever is the greater:

(c) A female employee employed on a monthly rate of pay shall be deemed to have received her maternity allowance if she continues to receive her monthly wages during her abstention from work during the eligible period without abatement in respect of such abstention.

(d) Where a female employee claims maternity allowance under this section from more than one employer, she shall not be entitled to receive a maternity allowance of an amount exceeding in the aggregate the amount which she would be entitled to receive if her claim was made against one employer only.

[Section 38-39 omitted herein]

SECTION 40: PROHIBITION ON DISMISSAL OF EMPLOYEE DURING MATERNITY LEAVE

Any employer who dismisses a female employee from her employment during the period in which she is entitled to maternity leave commits an offence.

[Sections 41-43 omitted herein]

SECTION 44: MATERNITY REGISTER

Every employer shall keep a register, in a form to be prescribed by the Minister by regulations made under this Act, of all payments made to female employees under this Part and of such other matters incidental thereto as may be prescribed by such regulations.

[Sections 45-56 repealed from the Act]

SECTION 57: DOMESTIC SERVANTS

Subject to any express provision to the contrary contained therein, a contract to employ and to serve as a domestic servant may be terminated either by the person employing the domestic servant or by the domestic servant giving the other party fourteen days' notice of his intention to terminate the contract, or by the paying of an indemnity equivalent to the wages which the domestic servant would have earned in fourteen days:

Provided that any such contract may be terminated by either party without notice and without the paying of an

indemnity on the ground of conduct by the other party inconsistent with the terms and conditions of the contract.

[Section 58 omitted herein]

SECTION 59: REST DAY

(1) Every employee shall be allowed in each week a rest day of one whole day as may be determined from time to time by the employer, and where an employee is allowed more than one rest day in a week the second of such rest days shall be the rest day for the purposes of this Part.

Provided that this subsection shall not apply during the period in which the employee is on maternity leave as provided under section 37, or on sick leave as provided under section 60F, or during the period of temporary disablement under the Workmen's Compensation Act 1952, or under the Employees Social Security Act 1969.

(1A) Notwithstanding subsection (1) and the interpretation of the expression "day" in section 2 (1), in the case of an employee engaged in shift work any continuous period of not less than thirty hours shall constitute a rest day.

(1B) Notwithstanding subsection (1), the Director General, on a written application by an employer and subject to any conditions he may deem fit to impose, may permit the employer to grant the rest day for each week on any day of the month in which the rest days fall and the day so granted shall be deemed to be the employee's rest day for the purposes of this section.

SECTION 60: REST DAY WORK

(1) Except as provided in section 60A (2), no employee shall be compelled to work on a rest day unless he is engaged in work which by reason of its nature requires to be carried on continuously or continually by two or more shifts:

Provided that in the event of any dispute the Director General shall have the power to decide whether or not an employee is engaged in work which by reason of its nature requires to be carried on continuously or continually by two or more shifts.

(3) (a) In the case of an employee employed on a daily, hourly or other similar rate of pay who works on a rest day, he shall be paid for any period of work -

(i) which does not exceed half his normal hours of work, one day's wages at the ordinary rate of pay; or

(ii) which is more than half but does not exceed his normal hours of work, two days' wages at the ordinary rate of pay.

(b) In the case of any employee employed on a monthly rate of pay who works on a rest day, he shall be paid for any period of work -

(i) which does not exceed half his normal hours of work, wages equivalent to half the ordinary rate of pay for work done on that day; or

(ii) which is more than half but which does not exceed his normal hours of work, one day's wages at the ordinary rate of pay for work done on that day.

(c) For any work carried out in excess of the normal hours of work on a rest day by an employee mentioned in paragraph (a) or (b), he shall be paid at

a rate which is not less than two times his hourly rate of pay.

(d) In the case of an employee employed on piece rates who works on a rest day, he shall be paid twice his ordinary rate per piece.

SECTION 60A: HOURS OF WORK

(1) Except as hereinafter provided, an employee shall not be required under his contract of service to work -

(a) more than five consecutive hours without a period of leisure of not less than thirty minutes duration;

(b) more than eight hours in one day;

(c) in excess of a spread over period of ten hours in one day;

(d) more than forty-eight hours in one week:

Provided that:-

(i) an employee who is engaged in work which must be carried on continuously and which requires his continual attendance may be required to work for eight consecutive hours inclusive of a period or periods of not less than forty-five minutes in the aggregate during which he shall have the opportunity to have a meal; and

(ii) where, by agreement under the contract of service between the employee and the employer, the number of hours of work on one or more days of the week is less than eight, the limit of eight hours may be exceeded on the remaining days of the week, but so that no employee shall be required to work for more than nine hours in one day or forty-eight hours in one week.

(2) An employee may be required by his employer to exceed the limit of hours prescribed in subsection (1) and to work on a rest day, in the case of -

(a) accident, actual or threatened, in or with respect to his place of work;

(b) work, the performance of which is essential to the life of the community;

(c) work essential for the defence or security of Malaysia;

(d) urgent work to be done to machinery or plant;

(e) an interruption of work which it was impossible to foresee; or

(f) work to be performed by employees in any industrial undertaking essential to the economy of Malaysia or any essential service as defined in the Industrial Relations Act 1967.

(3) (a) For overtime work carried out in excess of the normal hours of work, the employee shall be paid at a rate not less than one and half times his hourly rate of pay irrespective of the basis on which his rate of pay is fixed.

(b) In this section "overtime" means the number of hours of work carried out in excess of the normal hours of work per day.

(4) (a) No employer shall require or permit an employee to work overtime exceeding such limit as may be prescribed by the Minister from time to time by regulations made under this Act.

(7) Except in the circumstances described in subsection (2) (a), (b), (c), (d) and (e), no employer shall require any employee under any circumstances to work for more than twelve hours in any one day.

[Section 60B omitted herein]

SECTION 60C: SHIFT WORK

(1) Notwithstanding section 60A, (1) (b), (c) and (d), but subject to subsection (1) (a) thereof, an employee who is engaged under his contract of service in shift work may be required by his employer to work more than eight hours in any one day or more than forty-eight hours in any one week but the average number of hours worked over any period of three weeks, or over any period exceeding three weeks as may be approved by the Director General, shall not exceed forty-eight per week.

(1A) The approval of the Director General in subsection (1) may be granted if the Director General is satisfied that there are special circumstances pertaining to the business or undertaking of the employer which render it necessary or expedient for him to grant the permission subject to such conditions as he may deem fit to impose.

SECTION 60D: PUBLIC HOLIDAYS

(1) Every employee shall be entitled to a paid holiday at his ordinary rate of pay on ten gazetted public holidays in any one calendar year, four of which shall be:

(a) the National Day

(b) the Birthday of the Yang di-Pertuan Agong

(c) the Birthday of the Ruler or the Yang di-Pertua Negeri, as the case may be, of the State in which the employee wholly or mainly works under his contract of service, or the Federal Territory Day, if the

employee wholly or mainly works in the Federal Territory; and

(d) the Workers' Celebration Day;

Provided that if any of the said ten gazetted public holidays falls on a rest day the working day following immediately thereafter shall be a paid holiday in substitution therefor.

(2) Any employee who absents himself from work on the working day immediately preceding or immediately succeeding a public holiday or two or more consecutive public holidays or any day or days substituted therefor under this section without the prior consent of his employer shall not be entitled to any holiday pay for such holiday or consecutive holidays unless he has a reasonable excuse for such absence.

(3) (a) Notwithstanding subsection (1), (1A) and (1B), any employee may be required by his employer to work on any paid holiday to which he is entitled under the said subsections and in such event he shall, in addition to the holiday pay he is entitled to for that day -

(i) In the case of an employee employed on a monthly, weekly, daily, hourly, or other similar rate of pay, be paid two day's wages at the ordinary rate of pay; or

(ii) in the case of an employee employed on piece rates, be paid twice the ordinary rate per piece, regardless that the period of work done on that day is less than the normal hours of work.

(aa) For any overtime work carried out by an employee referred to in paragraph (a) (i) in excess of the normal hours of work on a paid public holiday, the employee shall be paid at a rate which is not less than three times his hourly rate of pay.

SECTION 60E: ANNUAL LEAVE

(1) An employee shall be entitled to paid annual leave of :

(a) eight days for every twelve months of continuous service with the same employer if he has been employed by that employer for a period of less than two years;

(b) twelve days for every twelve months of continuous service with the same employer if he has been employed by that employer for a period of two years or more but less than five years; and

(c) sixteen days for every twelve months of continuous service with the same employer if he has been employed by that employer for a period of five years or more,

and if he has not completed twelve months of continuous service with the same employer during the year in which his contract of service terminates, his entitlement to paid annual leave shall be in direct proportion to the number of completed months of service:

And provided further that where an employee absents himself from work without the permission of his employer and without reasonable excuse for more than ten per centum of the working days during the twelve months of continuous service in respect of which his entitlement to such leave accrues he shall not be entitled to such leave.

(1B) Where an employee who is on paid annual leave becomes entitled to sick leave or maternity leave while on such annual leave, the employee shall be granted the sick leave or the maternity leave, as the case may be, and the annual leave shall be deemed to have not been taken in respect of the days for which sick leave or maternity leave is so granted.

(2) The employer shall grant and the employee shall take such leave not later than twelve months after the end of every twelve months continuous service and any employee who fails to take such leave at the end of such period shall thereupon cease to be entitled thereto:

Provided that an employee shall be entitled to payment in lieu of such annual leave if, at the request of his employer, he agrees in writing not to avail himself of any or all of his annual leave entitlement.

(3A) If the contract of service has been terminated by either party before an employee has taken the paid annual leave to which he is entitled under this section, the employer shall pay the employee his ordinary rate of pay in respect of every day of such leave:

Provided that this subsection shall not apply where an employee is dismissed under section 14 (1) (a).

SECTION 60F: SICK LEAVE

(1) An employee shall, after examination at the expense of the employer -

(a) by a registered medical practitioner duly appointed by the employer; or

(b) if no such medical practitioner is appointed or, if having regard to the nature or circumstances of the illness, the services of the medical practitioner so appointed are not obtainable within a reasonable time or distance, by any other registered medical practitioner or by a medical officer,

be entitled to paid sick leave:

(aa) where no hospitalisation is necessary, -

(i) of fourteen days in the aggregate in each calendar year if the employee has been employed for less than two years;

(ii) of eighteen days in the aggregate in each calendar year if the employee has been employed for two years or more but less than five years;

(iii) of twenty-two days in the aggregate in each calendar year if the employee has been employed for five years or more; or

(bb) of sixty days in the aggregate in each calendar year if hospitalisation is necessary, as may be certified by such registered medical practitioner or medical officer:

Provided that the total number of days of paid sick leave in a calendar year which an employee is entitled to under this section shall not exceed sixty days in the aggregate:

And provided further that if an employee is certified by such registered medical practitioner or medical officer to be ill enough to need to be hospitalised for any reason whatsoever, the employee shall be deemed to be hospitalised for the purposes of this section.

(1A) An employee shall also be entitled to paid sick leave under paragraphs (aa) and (bb) of subsection (1) after examination by a dental surgeon as defined in the Dental Act 1971.

(2) An employee who absents himself on sick leave:

(a) which is not certified by a registered medical practitioner or a medical officer as provided under subsection (1) or a dental surgeon as provided under subsection (1A); or

(b) which is certified by such registered medical practitioner or medical officer, or dental surgeon but

without informing or attempting to inform his employer of such sick leave within forty-eight hours of the commencement thereof'

shall be deemed to absent himself from work without the permission of his employer and without reasonable excuse for the days on which he is so absent from work.

(3) The employer shall pay the employee his ordinary rate of pay for every day of such sick leave, and an employee on a monthly rate of pay shall be deemed to have received his sick leave pay if he receives from his employer his monthly wages, without abatement in respect of the days on which he was on sick leave, for the month during which he was on such sick leave.

(6) No employee shall be entitled to paid sick leave for the period during which the employee is entitled to maternity allowance under Part IX, or for any period during which he is receiving any compensation for disablement under the Workmen's Compensation Act 1952, or for any periodical payments for temporary disablement under the Employees Social Security Act 1969.

[Section 60G-H omitted from the Act]

[Section 60I-J omitted herein]

SECTION 60K: EMPLOYMENT OF FOREIGN EMPLOYEES

(1) An employer who employs a foreign employee shall, within 14 days of the employment, furnish the nearest office of the Director General with the particulars of the foreign employee in such manner as may be determined by the Director General.

SECTION 60L: INQUIRIES INTO COMPLAINTS

The Director General may inquire into any complaint from a local employee that he is being discriminated against in relation to a foreign employee or from a foreign employee that he is being discriminated against in relation to a local employee by his employer in respect of the terms and conditions of his employment; and the Director General may issue to the employer such directives as may be necessary or expedient to resolve the matter.

SECTION 60M: PROHIBITION OF TERMINATION OF LOCAL EMPLOYEE

No employer shall terminate the contract of service of a local employee for the purpose of employing a foreign employee.

SECTION 60N: TERMINATION ON GROUNDS OF REDUNDANCY

Where an employer is required to reduce his workforce by reason of redundancy necessitating the retrenchment of any number of employees, the employer shall not terminate the services of a local employee unless he has first terminated the services of all foreign employees employed by him in a capacity similar to that of the local employee.

SECTION 61: REGISTERS

(1) Every employer shall prepare and keep one or more registers containing such information regarding each employee employed by him as may be prescribed by regulations made under this Act.

(2) Every such register shall be preserved for such period that every particular recorded therein shall be available for inspection for not less than six years after the recording thereof.

[Sections 62-64 omitted herein]

SECTION 65: INSPECTION

The Director General shall have power to enter without previous notice at all times any place of employment where he has reasonable grounds for believing that employees are employed and to inspect any building occupied or used for any purpose connected with such employment and to make any inquiry which he considers necessary in relation to any matter within the provisions of this Act.

[Sections 66-68 omitted herein]

SECTION 69: COMPLAINTS AND INQUIRIES

(1) The Director General may inquire into and decide any dispute between an employee and his employer in respect of wages or any other payments in cash due to such employee under:

(a) any term of the contract of service between such employee and his employer;

(b) any of the provisions of this Act or any subsidiary legislation made thereunder,

and, in pursuance of such decision, may make an order in the prescribed form for the payment by the employer of such sum of money as he deems just without limitation of the amount thereof.

(2) The powers of the Director General under subsection (1) shall include the power to hear and decide, in accordance with the procedure laid down in this Part, any claim by:

(i) an employee against any person liable under section 33;

(ii) a sub-contractor for labour against a contractor or sub-contractor for any sum which the sub-contractor for labour claims to be due to him in respect of any labour provided by him under his contract with the contractor or subcontractor; or

(iii) an employer against his employee in respect of indemnity due to such employer under section 13 (1),

and to make such consequential orders as may be necessary to give effect to his decision.

(3) In addition to the powers conferred by subsections (1) and (2), the Director General may inquire into and confirm or set aside any decision made by an employer under section 14(1) and the Director General may make such consequential orders as may be necessary to give effect to his decision:

Provided that if the decision of the employer under section 14(1)(a) is set aside, the consequential order of the Director General against such employer shall be confined to payment of indemnity in lieu of notice and other payments that the employee is entitled to as if no misconduct was committed by the employee:

Provided further that the Director General shall not set aside any decision made by an employer under section 14 (1) (c) if such decision has not resulted in any loss in wages or other payments payable to the employee under his contract of service.

And provided further that the Director General shall not exercise the power conferred by this subsection unless the employee has made a complaint to him under the provisions of this Part within sixty days from the date on which the decision under section 14 is communicated to him either orally or in writing by his employer.

Notwithstanding the provisions of this Act, the powers of the Director General under section 69 (1)(a) shall extend to employees whose wages exceed 1,500 ringgit but does not exceed 5,000 ringgit.

[Section 70 – 103 omitted herein]

Appendix

Excerpts from the Children and Young Persons (Employment) Act, 1966

1. (2) This Act shall apply only to the States of West Malaysia.

1A (1) In this Act, unless the context otherwise requires -

"child" *means any person who has not completed his fourteenth year of age or of such age as the Yang di-Pertuan Agong may by notification in the Gazette prescribe;*

"young person" *means any person who, not being a child, has not completed his sixteenth year of age.*

2. (1) No child or young person shall be, or be required or permitted to be, engaged in any employment other than those specified in this section.

(2) A child may be engaged in any of the following employments:

(a) employment involving light work suitable to his capacity in any undertaking carried on by his family;

(b) employment in any public entertainment, in accordance with the terms and conditions of a licence granted in that behalf under this Act;

(c) employment requiring him to perform work approved or sponsored by the Federal Government or the Government of any State and carried on in any school, training institution or training vessel; and

(e) employment as an apprentice under a written apprenticeship contract approved by the Director General with whom a copy of such contract has been filed.

(3) A young person may be engaged in any of the following employments:

(a) any employment mentioned in subsection (2); and in relation to paragraph (a) of that subsection any employment suitable to his capacity (whether or not the undertaking is carried on by his family);

(b) employment as a domestic servant

(c) employment in any office, shop (including hotels, bars, restaurants and stalls), godown, factory, workshop, store, boarding house, theatre, cinema, club or association;

(d) employment in an industrial undertaking suitable to his capacity; and

(e) employment on any vessel under the personal charge of his parent or guardian:

Provided that no female young person may be engaged in any employment in hotels, bars, restaurants, boarding houses or clubs unless such establishments are under the management or control of her parent or guardian:

Provided further that a female young person may be engaged in any employment in a club

not managed by her parent or guardian with the approval of the Director General.

(5) No child or young person shall be, or be required or permitted to be, engaged in any employment contrary to the provisions of the Factories and Machinery Act 1967 or the Electricity Act 1949 or in any employment requiring him to work underground.

4. No child or young person engaged in any employment shall in any period of seven consecutive days be required or permitted to work for more than six days.

5. (1) No child engaged in any employment shall be required or permitted -

(a) to work between the hours of 8 o'clock in the evening and 7 o'clock in the morning;

(b) to work for more than three consecutive hours without a period of rest of at least thirty minutes;

(c) to work for more than six hours in a day or, if the child is attending school, for a period which altogether with the time he spends attending school, exceeds seven hours; or

(d) to commence work on any day without having had a period of not less than fourteen consecutive hours free from work.

(2) Subsection (1)(a) shall not apply to any child engaged in employment in any public entertainment.

6. (1) No young person engaged in any employment shall be required or permitted -

(a) to work between the hours of 8 o'clock in the evening and 6 o'clock in the morning;

(b) to work for more than four consecutive hours without a period of rest of at least thirty minutes;

(c) to work for more than seven hours in any one day or, if the young person is attending school, for a period which together with the time he spends attending school, exceeds eight hours:

Provided that if the young person is an apprentice under section 2 (2)(d), the period of work in any one day shall not exceed eight hours; or

(d) to commence work on any day without having had a period of not less than twelve consecutive hours free from work.

7. Public Entertainment

(1) No child or young person shall take part or be required or permitted to take part in any public entertainment unless there has been issued by the Director General of Labour or by other such Director General as may be authorised in writing in that behalf by the Director General of Labour to the person employing such child or young person a licence in that behalf; and the Director General may, in addition to such conditions or restrictions as may be prescribed from time to time under section 15, impose in respect of such licence (whether at the time the licence is issued or thereafter from time to time) such conditions as he deems fit.

(2) No licence under subsection (1) shall be granted by the Director General to any person where he is of the opinion that the employment is dangerous to the life, limb, health or morals of the child or young person aforesaid.

8. Inquiry into Wages

(1) If representation is made to the Minister that the wages of children or young persons in any class of work in any area are not reasonable having regard to the nature of the work and conditions of employment

obtaining in such class of work, the Minister may, if he considers it expedient, direct an inquiry.

(2) For the purpose of such an inquiry, the Minister shall appoint a Board consisting of an independent member who shall be chairman and an equal number of representatives of employers and workers.

(3) The Board shall, after holding the inquiry, report to the Minister its findings and recommendations; and the Minister may, after considering the report of the Board, make an order prescribing the minimum rates of wages to be paid to children or young persons or to both, employed in the class of work in the area aforesaid.

13 Notwithstanding anything to the contrary contained in the Contracts Act 1950 or the provisions of any other written law, any child or young person shall be competent to enter into a contract of service under this Act otherwise than as an employer, and may sue as plaintiff without his next friend or defend any action without a guardian ad litem:

Provided that no damages and no indemnity under section 13 of the Employment Act 1955, shall be recoverable from a child or young person for a breach of any contract of service.

Glossary

Arbitration: A process of settling worker-management disputes by having an impartial third party (the Industrial Court) make a decision which is binding on both parties.

Award: A decision of the Industrial Court which is binding on the parties involved.

Check-off: Deduction of union subscriptions from the pay of union members by the employer, who transmits these funds to the union.

Closed-shop: An agreement between an employer and a union that, as a condition of employment, all employees must belong to the union before being hired. This practice is illegal in Malaysia.

Collective agreement: A written agreement between an employer and a union setting out the terms and conditions of employment, e.g., wages, hours of work and other benefits.

Common law: The body of legal principles laid down by judges over several hundred years.

Conciliation: A process in which the Department of Industrial Relations in the Ministry of Human Resources acts as a neutral mediator to help the parties to a dispute find a settlement.

Collective bargaining: A method of setting terms and conditions of employment by negotiation between representatives of the employer and a union.

Constructive dismissal: An employee is forced to leave his employment as a result of the employer breaching the employment contract. The employee treats himself as having been dismissed.

Contract for services: A contract whereby one party, the contractor, agrees to provide certain services to another party for agreed remuneration. The party providing the services is not considered an employee.

Contract of Service: An employment contract between an employer and an employee, also known as a contract of employment.

Cooling-off period: A required period of delay (fixed by law) before a strike or other industrial action can begin.

Deadlock: A breakdown in the process of collective bargaining where the two parties are unable to reach an agreeable compromise over the terms to be included in a collective agreement.

Domestic inquiry: An internal hearing held by an employer to determine whether an employee is guilty of charges of misconduct which have been laid against him.

Employer: A person, company, partnership, association, club or any other body which employs persons.

Ex parte: Literally, "in the absence of". A domestic inquiry may be held in the absence of the accused employee.

General strike: A coordinated and simultaneous work stoppage by workers in different industries and different organisations for the attainment of common political demands.

Lockout: A refusal by an employer to permit workers to work when a trade dispute exists between the two parties.

Mandate: Authority given to a negotiating team by those they represent, i.e. the employer or the union members.

Picket: A gathering of workers outside their workplace with placards and banners expressing workers' grievances and demands for people to see, thus generating public sympathy and support.

Recognition: A formal acknowledgement by an employer that a particular union has the right to represent his workers.

Reinstatement: The re-employment of an employee by his employer subsequent to a dismissal. The worker is given the same job as prior to his dismissal and he gets the same wages and benefits.

Retrenchment: The termination of an employee's services by the employer because the worker is redundant, i.e., he is surplus to the requirements of the organisation.

Sit-in strike: Employees strike, but remain at their work stations in the factory or office,and thus prevent other workers taking over their jobs. Such strikes can be

considered illegal on the grounds they constitute invasion of property or trespass. Employees have the right to strike, but they must physically withdraw from the employer"s premises.

Sympathy strike: A strike conducted by union members or other workers who are not involved in a trade dispute with their employer but who go on strike to show their support for a group of workers who are legally on strike. Sympathy strikes are illegal in Malaysia.

Termination simpliciter: When an employer terminates an employee's contract of service without assigning any reason for the termination.

Terms and conditions of service: The details of the work-wages agreement agreed between an employer and an employee.

Wildcat strike: Unauthorised work stoppages not approved by union leadership. They are initiated without following the required procedure of a secret ballot and without waiting for the seven day "cooling off" period.

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www.dosh.gov.my

The Employees Provident Fund:
www.kwsp.gov.my

The International Labour Organisation:
www.ilo.org

The Malayan Law Journal:
www.mlj.com.my

The Malaysian Employers Federation:
www.mef.org.my

The Malaysian Trades Union Congress:
www.mtuc.org.my

The Ministry of Human Resources, Malaysia:
www.jaring.my/KSM

The National Institute of Occupational Safety and Health:
www.jaring.my/niosh

The Malaysian Society for Occupational Safety and Health
www.msosh.org.my

Other sites:
www.workbin.com.my
www.lawyerment.com.my
www.aboutsafety.com

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