

Security of Tenure vs Management Prerogative to Discharge Surplus Labour

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Introduction

Security of tenure in employment or job security is recognised by the courts in Malaysia to the extent that it has been equated to “property right”. Further, in the middle of 1990’s the courts had given a liberal interpretation to the word “right to life” in Article 5(1) of the Federal Constitution to include a person’s fundamental “right to livelihood”. In other words, a person’s right to livelihood is protected in the Federal Constitution, Article 5(1). This right of the employee however, has to be balanced with the just requirement of the employer who should be given the opportunity, under certain circumstances, to retrench workers from employment arising from genuine business reasons such as decrease in business activities, perceived advantages of greater mechanisation and technological change, deployment of capital resources in different ways, reorganisation of business operations with a view to enhancing profitability, and reducing losses either generally or in selected areas, among others.

In the above circumstances, the law cannot give an answer which can satisfy both parties. Both would have to come to terms with facing harsh realities during time of uncertainty or change. If the employer carries on business and sustains losses, this may lead to insolvency, bankruptcy or winding up. The other option is to sacrifice some workers, thereby preserving the viability of business and the employment of the remaining workers. Therefore, it would not be inaccurate to state that retrenchment is a difficult area of labour law because a balance has to be struck between the two competing interests, the employee’s interest of retaining his security of tenure against the protection of the employer’s business interest and the overriding interest would be preserving the viability of the employer’s business and the employment of the remaining workers. Having said the above, this article will discuss workers security of tenure in employment as opposed to the employer’s prerogative of retrenching workers under certain circumstances.

Security of Tenure in Employment

In Malaysia, the courts have equated a worker’s security of tenure in employment on the same footing as “property right”. For example, in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & Anor*,¹ Gopal Sri Ram JCA observed:

The legislature has willed that the relationship of employer and workman as resting on a mere consensual basis that is capable of termination by the employer at will with the meagre consequence of paying the hapless workman a *paltry sum* as damages should be altered in favour of the workman. It has accordingly provided for security of tenure and equated the right to be engaged in gainful employment to a *proprietary right* which may not be forfeited save, and except, for just cause or excuse.

Further, the Malaysian courts have recognised a person’s right to employment (right to livelihood) as a fundamental right under the Federal Constitution, Article 5(1). In *R Rama Chandran v The Industrial Court of Malaysia and Anor*,² Eusoff Chin CJ (as his Lordship then was) stated:

¹ [1996] 1 MLJ 481 at 509-510, CA. A similar view was also expressed in *Ang Beng Teik v Pan Global Textile Bhd, Penang* [1996] 4 CLJ 313 at 323, CA; *Malayan Banking Bhd v Mohd Bahari bin Mohd Jamli @ Mohd Jamal* (unreported) (OM No R1-25-134-94 (High Court, Kuala Lumpur) (Abdul Kadir Sulaiman J); *The New Straits Times Press (Malaysia) Bhd v Chong Lee Fah* [2003] 2 ILR 239.

² [1997] 1 MLJ 145 at 190, FC.

Part II of the Federal Constitution deals with the fundamental liberties guaranteed by the Federal Constitution. And, as was correctly pointed out by Sri Ram JCA when speaking for the Court of Appeal in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996] 1 MLJ 481 at 501: “Quite apart from being a proprietary right, the right to livelihood is one of the fundamental liberties guaranteed under Part II of the Federal Constitution.

The courts arrived at this conclusion by adopting the dictum of the Indian courts. In *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan and Anor*,³ Gopal Sri Ram JCA (as his Lordship then was) drew inspiration in interpreting Article 5(1) of the Federal Constitution from the decisions of the Indian Supreme Court.⁴ For example, in *Francis Coralie v Union of India*,⁵ the Supreme Court gave a luminous guideline in the interpretation of “right to life” in Article 21 of their Constitution (in *pari materia* with Article 5(1) of the Malaysian Constitution), Bhagwati J stated that:

The fundamental right to life which is the most precious human right and which forms the arc of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person ... the right to live with human dignity and all that goes along with it namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing in diverse forms, free moving about and mixing and co-mingling with fellow human beings.⁶

It is worthwhile noting that the courts in India have given a broad and liberal interpretation to the term “right to life”. The above term is not restricted to the right to livelihood alone, but has been extended to all other rights associated with right to life. For example, right to health and medical care,⁷ opportunities to eliminate sickness and physical disability of the workman,⁸ the right to receive wages for minimum subsistence⁹ which is regarded as a minimum requirement to enable a person to live with human dignity,¹⁰ and the right to a person’s reputation.¹¹

In the same vein, the Malaysian courts have adopted a similar view to the term “right to life” in Article 5(1) of the Federal Constitution – the highest “positive law”.¹² It was stated that the Federal Constitution, being a “living piece of legislation”,¹³ did not spell out each and every aspect of the fundamental liberties of a citizen. Judicial creativity in implementing “the true brooding spirit of the framers of the Federal Constitution”¹⁴ is therefore, “necessary and timely”.¹⁵ The contemplation is not only of what has been, but also of what may be.¹⁶

³ [1996] 2 CLJ 771, CA. See also *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996] 1 MLJ 481; *Harris Solid State (M) Sdn Bhd & Anor v Bruno Gentil Pereira & Ors* [1996] 4 CLJ 747, CA; *Faber Hotel Holdings Sdn Bhd v Menteri Sumber Manusia Malaysia & Ors* [2010] 8 CLJ 462; *Mejar Fadzil Arshad lwn Majlis Angkatan Tentera, Malaysia & Satu Lagi* [2010] 1 LNS 1215.

⁴ See *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180 at 193; *Delhi Transport Corporation v DTC Mazdoor Congress & Ors* [1991] Supp 1 SCC 600 at 717.

⁵ 1981 AIR 746 SC.

⁶ *Ibid*, p 753.

⁷ See *Consumer Education and Research Centre v Union of India* AIR 1995 922 SC; *Lambodar Panigrahi v Civil Judge, Athagarh* (1996) Lab IC 2790 (Orissa HC); *Suzana Md Aris v DSP Ishak Hussain & Ors* [2011] 1 CLJ 226.

⁸ See *Kirloskar Brothers Ltd v Employees’ State Insurance Corp* [1996] Lab IC 1718 at 1721 (SC).

⁹ See *Radhey Shyam v District Judge, Moradabad* (1997) Lab IC 743 (Allahabad, HC); *V Sattamma v Maize Breeder and Head Agricultural Research Station* (1996) Lab IC 1492 (Andhra Pradesh, HC).

¹⁰ See *Charles Sobraj v Supdt Central Jail Tihar* AIR 1978 1514 SC.

¹¹ See *Sowmithri Vishnu v Union of India* AIR 1985 1618 SC at 1621-1622.

¹² Article 5(1) sets out the general notion that no person shall be deprived of his or her life, liberty and property without due process of law.

¹³ Per *Raja Azlan Shah Ag LP in Dato Menteri Osman bin Baginda and Anor v Dato’ Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29.

¹⁴ See *Utra Badi a/l K Perumal v Lembaga Tatatertib Perkhidmatan Awam* [1998] 3 MLJ 676 at 691 (HC).

¹⁵ Per *Kang Hwee Gee J in Krishnan Kutty a/l Sanguni Nair v Telekom Malaysia Kawasan Utara* [1999] 4 MLJ 393 at 408.

Therefore, the “right to life” in Article 5(1) is not merely confined to physical existence by declaring that it is unlawful to extinguish or take away another’s life except by due process of law, but includes the right to quality of life which necessarily includes right to “livelihood”. The above was further extended to the right to a “reputation”.¹⁷

As from the above, Article 5(1) of the Federal Constitution provides a substantive right or fundamental right not to dismiss a worker from employment save for just cause and excuse. The above Article of the Federal Constitution stresses the importance of right to livelihood, a priceless possession which should not be made a mockery at the whims and fancies of the employer. In other words, a worker’s right to security of tenure in employment is a fundamental right and to deprive him of such a right without justifiable reasons would not be in tandem with the Federal Constitution.

In *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan*,¹⁸ however, the Federal Court, by a unanimous decision, gave a restricted interpretation to the “right to life” in Article 5(1) of the Federal Constitution. In the above case, the Federal Court disagreed with the Court of Appeal¹⁹ which had held that the words “personal liberty” in Article 5(1) of the Federal Constitution should be generously interpreted to include all those facts that are an integral part of life itself and those matters which go to form the quality of life. The Federal Court in *Sugumar Balakrishnan’s* case had in fact reverted to the decision of the former Federal Court in *Government of Malaysia and Ors v Loh Wai Kong*.²⁰

In *Loh Wai Kong’s* case, the former Federal Court comprising of five judges²¹ had adopted a literal and narrow interpretation to the right to life where it was stated that Article 5(1) speaks of personal liberty, not of liberty simplicitor. In particular, Suffian LP stated that the above Article only guarantees a person, citizen or otherwise, except any enemy alien, freedom from being “unlawfully detained; the right, if he is arrested, to be informed as soon as may be of the grounds of his arrest and to consult and be defended by his own lawyer; the right to be released without undue delay and in any case within 24 hours to be produced before a magistrate; and the right not to be further detained in custody without the magistrate’s authority”.

Be that as it may, what the courts have insisted on by adopting the concept of “property right” in employment and further, by stating that workers’ “right to livelihood” is guaranteed in the Federal Constitution, is that a worker has an interest proprietary in nature in the continuation of his employment.²² The notion of property is not the thing itself but the right in or over the thing or object in question. Therefore, “property right” has to be translated into a practical assurance that no employer can dismiss, or even contractually terminate the services of his employee, save with just cause or excuse. Thus, where dismissal is contemplated, the employer must adhere to the strict requirement of substantive justification and procedural fairness.

International Labour Organisation’s Instruments On Security Of Tenure

(i) Recommendation No 119 of 1963

In 1963, the International Labour Conference adopted the “Recommendation Concerning the Termination of Employment at the Initiative of the Employer, No. 119”.²³ The above recommendation has contributed significantly towards the promotion of employment security. It gave international recognition to the principle that an employee should have security of tenure in employment. It provided, inter alia, that an impending termination from employment must be substantively justified; for example, connected with the capacity or conduct of the worker or based on the operational requirement of the undertaking, establishment or service.

¹⁶ See *Weems v United States* 54 L Fd 793 at 801 (1909) (SC US).

¹⁷ See *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang and Anor v Utra Badi K Perumal* [2000] 3 CLJ 224 at 239 (CA).

¹⁸ [2002] 4 CLJ 105 (FC).

¹⁹ [1998] 3 CLJ 85 (CA).

²⁰ [1979] 2 MLJ 33, 34.

²¹ Suffian LP, Raja Azlan Shah, Wan Suleiman, Chang Min Tat, Syed Othman FJJ.

²² P Davies and M Freedland (eds), *Labour Law: Text and Material*, 2nd edn (London: Weidenfield and Nicolson, 1981), p 428.

²³ The International Labour Conference adopted this Recommendation on June 26, 1963.

Dismissal of workers on the following grounds is prohibited, namely:

- (a) union activity,
- (b) filing in good faith, a complaint against the employer, or
- (c) participating in proceedings against an employer involving the alleged violation of laws or regulations.

Again, an employer is prevented from discharging workers on grounds of race, colour, sex, marital status, religion, political opinion, national extraction or social origin. Apart from the substantive justification, an impending dismissal must be procedurally fair.

An employee who is unjustifiably dismissed is entitled to appeal to an independent body created by a collective agreement, or to an arbitrator or a court. If the independent body finds that the termination was unjustified, this body is empowered to order that unless the worker is reinstated, with lost wages, he should be paid adequate compensation.

The Recommendation further provides that an employee terminated with a valid reason is entitled to reasonable notice or pay in lieu thereof. He or she would be entitled to a certificate of employment, which should indicate his period of employment and contain information not unfavourable. Termination by reason of redundancy has been allowed and the factors which determine redundancy are based on grounds such as: the need for an efficient operation of the undertaking, the ability, experience, skill and occupational qualifications of individual workers, length of service, age and family situation. If the termination is because of redundancy, the terminated employees should be given priority of re-employment whenever the opportunity arises.

(ii) Convention No. 158 of 1982²⁴

On June 22, 1982, the International Labour Conference adopted the Termination of Employment Convention No. 158²⁵ and its associated Recommendation No. 166. Convention No. 158 is an expansion of Recommendation No. 119 of 1963, and Recommendation No. 166 is a supplement to Convention No. 158. Generally the content of Convention No. 158 and Recommendation No. 166 are the same with only a few additional clauses in the Recommendation.

Article 3 of the Convention, as does Recommendation No. 119, makes it clear that the termination that is discussed here is termination at the initiative of the employer.²⁶ Part I of the Convention deals with persons governed by the Convention,²⁷ Part II requires justification for a worker's termination from employment. It provides that an employee cannot be terminated unless there is a valid reason for such termination, which is connected to the capacity,²⁸ conduct of the worker, or based on the operational requirement of the undertaking, establishment or service.

²⁴ The International Labour Organisation's Convention No. 158 was adopted in the 68th Session held in Geneva from June 2-23, 1982 with 356 votes in favour, 9 against and 54 abstentions. The Recommendation was adopted by 375 in favour, none against, and 16 abstentions. See The 68th Session of the International Labour Conference, June 1982 (1982) 121 International Labour Review 635 at 639.

²⁵ International Labour Conventions and Recommendations 1977-1995, vol III (Geneva: International Labour Office, 1996), p 164. The Convention and Recommendation of 1982 supersede the 1963 Recommendation.

²⁶ Article 3 provides, "For the purpose of this Convention the terms termination and termination of employment mean termination of employment at the initiative of the employer".

²⁷ Article 2(2) of the Convention provides that "A member may exclude the following categories of employed persons from all or some of the provisions of this Convention; (a) workers engaged under a contract of employment for a specified period of time or a specified task; (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration; (c) workers engaged on a casual basis for a short period". Article 2(3) qualified Article 2(2)(a) which stated that "Adequate safeguard shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention".

²⁸ Article 4 provides that "The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service".

The circumstances which do not constitute valid grounds for termination of a worker are provided in Article 5 of the Convention. The said Article provides:

The following, inter alia, shall not constitute valid reasons for termination:

- (a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;
- (b) seeking office as, or acting or having acted in the capacity of, a workers' representative;
- (c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
- (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- (e) absence from work during maternity leave.

Article 6 separately provides that temporary absence from work due to illness or injury shall not constitute a valid reason for termination. Article 7 stresses the employee's right to be heard in the event of termination for reasons related to his conduct or performance, so that he may defend himself against the allegations made.²⁹ The burden of proof to show the existence of a valid termination is on the employer, and not for the employee to prove that there was no cause for dismissal.³⁰

Further, Articles 8-10 deal with the employee's right to appeal to an impartial body such as a court, labour tribunal or arbitration committee and it also specifies that the workers have to do so within a reasonable period of time after the termination.³¹ If the body finds that the termination is unjustifiable, it may make an order for the payment of compensation in the absence of any power either to invalidate the termination or to recommend reinstatement. Article 11 deals with reasonable notice or payment in lieu of notice unless the worker has been guilty of serious misconduct.³² In the event of termination of employment by reasons of redundancy, severance allowance is payable which shall increase with the length of service and level of wages.³³

Meanwhile, Articles 13 and 14 of the Convention deal with consultation with workers' representatives and notification to competent authorities of any impending termination by reasons of redundancy. Article 13(1) provides that when the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:

- (a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;
- (b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.

²⁹ Article 7 provides: "The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity."

³⁰ See Article 9 of the Convention.

³¹ See Article 8(3).

³² Article 11 provides: "A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period."

³³ Article 12(1) provides: "A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to: (a) a severance allowance or other separation benefits, the amount of which shall be based, inter alia, on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contribution; or (b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or (c) a combination of such allowance and benefits."

Paragraph (2) further provides that the applicability of paragraph 1 of this Article may be limited by the methods of implementation referred to in Article 1 of this Convention to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

Article 14(1) provides that when the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he shall notify, in accordance with national law and practice, the competent authority thereof as early as possible, giving relevant information, including a written statement of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out. Paragraph (2) provides that the National laws or regulations may limit the applicability of paragraph 1 of this Article to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce. Paragraph (3) states that the employer shall notify the competent authority of the terminations referred to in paragraph 1 of this Article a minimum period of time before carrying out the terminations, such period to be specified by national laws or regulations.

(iii) ILO Recommendation No. 166 of 1982³⁴

For the purpose of this Recommendation, clause 4 states that the terms “termination” and “termination of employment” mean termination of employment at the initiative of the employer. Further, clause 2(1) provides that this Recommendation applies to all branches of economic activity and to all employed persons. Clause 2(2) provides that a Member may exclude the following categories of employed persons from all or some of the provisions of this Recommendation:

- (a) workers engaged under a contract of employment for a specified period of time or a specified task;
- (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;
- (c) workers engaged on a casual basis for a short period.

Clause 3(1) provides that adequate safeguards should be provided against recourse to contracts of employment for a specified period of time the aim of which is not to deprive the the workers of the protection as provided in the Termination of Employment Convention 1982, and this Recommendation. Clause 3(2) further provides that provision may be made for one or more of the following:

- (a) limiting recourse to contracts for a specified period of time to cases in which, owing either to the nature of the work to be effected or to the circumstances under which it is to be effected or to the interests of the worker, the employment relationship cannot be of indeterminate duration;
- (b) deeming contracts for a specified period of time, other than in the cases referred to in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration;
- (c) deeming contracts for a specified period of time, when renewed on one or more occasions, other than in the cases mentioned in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration.

Clause 5 states that in addition to the grounds referred to in Article 5 of the Termination of Employment Convention 1982, the following should not constitute valid reasons for termination:

- (a) age, subject to national law and practice regarding retirement;
- (b) absence from work due to compulsory military service or other civic obligations, in accordance with national law and practice.

Further clause 6(1) states that temporary absence from work because of illness or injury should not constitute a valid reason for termination. Clause 6(2) further states that the definition of what constitutes temporary absence from work, the extent to which medical certification should be required and possible limitations to the application of subparagraph (1) of this Paragraph should be determined in accordance with the methods of implementation referred to in Paragraph 1 of this Recommendation.

³⁴ Date of adoption – June 22, 1982.

The procedure prior to or at the time of termination is provided in clause 7 where it provides that the employment of a worker should not be terminated for misconduct of a kind that under national law or practice would justify termination only if repeated on one or more occasions, unless the employer has given the worker appropriate written warning. Further, clause 8 provides that the employment of a worker should not be terminated for unsatisfactory performance, unless the employer has given the worker appropriate instructions and written warning and the worker continues to perform his duties unsatisfactorily after a reasonable period of time for improvement has elapsed.

Clause 9 provides that a worker should be entitled to be assisted by another person when defending himself, in accordance with Article 7 of the Termination of Employment Convention 1982, against allegations regarding his conduct or performance liable to result in the termination of his employment; this right may be specified by the methods of implementation referred to in Paragraph 1 of this Recommendation. Clause 10 further provides that the employer should be deemed to have waived his right to terminate the employment of a worker for misconduct if he has failed to do so within a reasonable period of time after he has knowledge of the misconduct.

Clause 11 states that the employer may consult workers' representatives before a final decision is taken on individual cases of termination of employment. Clause 12 provides that the employer should notify a worker in writing of a decision to terminate his employment. Clause 13(1) provides that a worker who has been notified of termination of employment or whose employment has been terminated should be entitled to receive, on request, a written statement from his employer of the reason or reasons for the termination. Clause 3(2) further states that the subparagraph (1) of this paragraph need not be applied in the case of collective termination for the reasons referred to in Articles 13 and 14 of the Termination of Employment Convention 1982, if the procedure provided for therein is followed.

The procedure of appeal against termination is provided in clauses 14 and 15. Clause 14 provides that the provision may be made for recourse to a procedure of conciliation before or during appeal proceedings against termination of employment. And clause 15 states that efforts should be made by public authorities, workers' representatives and organisations of workers to ensure that workers are fully informed of the possibilities of appeal at their disposal. Clause 16 deals with the time off from work during the period of notice. The above clause provides that during the period of notice referred to in Article 11 of the Termination of Employment Convention 1982, the worker should, for the purpose of seeking other employment, be entitled to a reasonable amount of time off without loss of pay, taken at times that are convenient to both parties.

Clause 17 which deals with certificate of employment states that a worker whose employment has been terminated should be entitled to receive, on request, a certificate from the employer specifying only the dates of his engagement and termination of his employment and the type or types of work in which he was employed; nevertheless, and at the request of the worker, an evaluation of his conduct and performance may be given in this certificate or in a separate certificate. Clause 18 deals with severance allowance and other income protection. Clause 18(1) provides that a worker whose employment has been terminated should be entitled, in accordance with national law and practice, to –

- (a) a severance allowance or other separation benefits, the amount of which should be based, inter alia, on length of service and the level of wages, and paid directly by the employer or by a fund constituted by the employers' contributions; or
- (b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or
- (c) a combination of such allowance and benefits.

Clause 18(2) further provides that a worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in subparagraph (1)(a) of this paragraph solely because he is not receiving an unemployment benefit under subparagraph (1)(b). Clause 18(3) provides that provision may be made by the methods of implementation referred to in Paragraph 1 of this Recommendation for loss of entitlement to the allowance or benefits referred to in subparagraph (1)(a) of this Paragraph in the event of termination for serious misconduct.

Clause 19(1) states that all parties concerned should seek to avert or minimise as far as possible termination of employment for reasons of an economic, technological, structural or similar nature,

without prejudice to the efficient operation of the undertaking, establishment or service, and to mitigate the adverse effects of any termination of employment for these reasons on the worker or workers concerned. Clause 19(2) further states that where appropriate, the competent authority should assist the parties in seeking solutions to the problems raised by the terminations contemplated.

Clause 20 deals with the requirement of consultation on major changes in the undertaking. Clause 20(1) provides that when the employer contemplates the introduction of major changes in production, programme, organisation, structure or technology that are likely to entail terminations, the employer should consult the workers' representatives concerned as early as possible on, inter alia, the introduction of such changes, the effects they are likely to have and the measures for averting or mitigating the adverse effects of such changes. Clause 20(2) further provides that to enable the workers' representatives concerned to participate effectively in the consultations referred to in subparagraph (1) of this paragraph, the employer should supply them in good time with all relevant information on the major changes contemplated and the effects they are likely to have.

Clause 21 deals with measures to avert or minimise termination. The aforesaid clause states that, the measures which should be considered with a view to averting or minimising terminations of employment for reasons of an economic, technological, structural or similar nature might include, inter alia, restriction of hiring, spreading the workforce reduction over a certain period of time to permit natural reduction of the workforce, internal transfers, training and retraining, voluntary early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work. Clause 22 provides that where it is considered that a temporary reduction of normal hours of work would be likely to avert or minimise terminations of employment due to temporary economic difficulties, consideration should be given to partial compensation for loss of wages for the normal hours not worked, financed by methods appropriate under national law and practice.

Clause 23 is concerning the criteria of selection for termination. Clause 23(1) states that the selection by the employer of workers whose employment is to be terminated for reasons of an economic, technological, structural or similar nature should be made according to criteria, established wherever possible in advance, which give due weight both to the interests of the undertaking, establishment or service and to the interests of the workers. Clause 23(2) further states that these criteria, their order of priority and their relative weight, should be determined by the methods of implementation referred to in Paragraph 1 of this Recommendation.

Clause 24 provides for priority of rehiring. Clause 24(1) states that where workers whose employment has been terminated for reasons of economic, technological, structural or similar nature, should be given a certain priority of rehiring if the employer again hires workers with comparable qualifications, subject to their having, within a given period from the time of their leaving, expressed a desire to be rehired. Clause 24(2) provides that such priority of rehiring may be limited to a specified period of time. Clause 24(3) further states that the criteria for the priority of rehiring, the question of retention of rights – particularly seniority rights – in the event of rehiring, as well as the terms governing the wages of rehired workers, should be determined according to the methods of implementation referred to in Paragraph 1 of this Recommendation.

Clause 25 is concerning mitigating the effects of termination. Clause 25(1) provides that in the event of termination of employment for reasons of economic, technological, structural or similar nature, the placement of the workers affected in suitable alternative employment as soon as possible, with training or retraining where appropriate, should be promoted by measures suitable to national circumstances, to be taken by the competent authority, where possible with the collaboration of the employer and the workers' representatives concerned. Clause 25(2) provides that where possible, the employer should assist the workers affected in the search for suitable alternative employment, for example through direct contacts with other employers. Clause 25(3) provides that in assisting the workers affected in obtaining suitable alternative employment or training or retraining, regard may be had to the Human Resources Development Convention and Recommendation, 1975.

Finally, clause 26(1) states that with a view to mitigating the adverse effects of termination of employment for reasons of economic, technological, structural or similar nature, consideration should be given to providing income protection during any course of training or retraining and partial or total reimbursement of expenses connected with training or retraining and with finding and taking up employment which requires a change of residence. Clause 26(2) provides that the competent authority should consider providing financial resources to support in full or in part the measures referred to in subparagraph (1) of this Paragraph, in accordance with national law and practice.

The Application of the Ilo's Guidelines in Malaysia

Article 15 of the ILO Convention No. 158 requires that the formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration. Meanwhile Article 16(1) states that this Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General. Paragraph (2) further provides that it shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General. Paragraph (3) states that thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

However, like many Member States, Malaysia did not ratify ILO Convention No. 158 of 1982. Nevertheless, many of the provisions of the Convention have been adopted and enforced in Malaysia. The existing labour legislation in Malaysia was enacted to elevate the status of the employees by regulating working conditions, providing various benefits to the workers apart from discouraging arbitrary dismissal from employment.

The Industrial Relations Act 1967 (IRA), for example, is intended to regulate the relationship between employers, workman and union and seeks further to prevent and settle any differences or disputes arising out of these relationships. It is aimed at striking a balance between the need to create a climate for economic growth as far as industrial relations are concerned on the one hand and social justice on the other. The principle feature of this Act is compulsory adjudication, which provides an avenue for redress of all grievances whether brought by industrial workmen or by organised labour union. Section 20 of the IRA provides that a workman cannot be dismissed save with just cause or excuse. It thus requires substantive justification and procedural fairness for a valid dismissal. In *Hong Leong Equipment Sdn Bhd v Lieu Fook Chuan & Anor*,³⁵ Gopal Sri Ram JCA noted that:

It cannot be gainsaid that Parliament intended to elevate the status of a workman as defined in the Act from the weak and subordinate position assigned to him by the common law to a much stronger position.

Employer's Prerogative to Make Commercial Decisions

Having considered workers' security of tenure in employment, a balance has to be made against the employer's prerogative of ensuring the smooth running of their businesses. The employer is allowed to make commercial decisions in order to improve the viability or effectiveness of their business by introducing, for example, automation, or abandonment of unprofitable activities, reorganisation or undertaking other cost saving measures, among others.³⁶ The strength of the workforce in an organisation and the need for labour to carry out the day-to-day management of the company is the employer's prerogative. Where necessary for efficiency of the undertaking, the employer is empowered to discharge its own surplus. In *TWI Training and Certification (SE Asia) Sdn Bhd v Jose A Sebastian*,³⁷ it was stated that "as long as it is a genuine commercial and economic consideration that a company undertakes a restructure exercise, it is within managerial prerogative to decide in the best interest of its business arrangements to identify its own area of weaknesses, and then proceed to discharge its own surplus".

In *East Asiatic Company (M) Bhd v Valen Noel Yap*,³⁸ the Industrial Court succinctly stated the approach in dealing with retrenchment exercises as follows:

It is the right and privilege of every employer to reorganise his business in any manner he thinks for the purpose of economy or even convenience; and if by implementing a reorganising scheme for genuine reasons ... the employer is entitled to discharge such excess. But this right of the employer is limited by the rule that he must act *bona fide* and not capriciously or with motives of victimisation or unfair labour practice. Nor does this right for instance entitle an employer under the cover of reorganisation, to rid himself of employees who have offended him in some way or to promote the interest of some favoured employees to the detriment of others.

³⁵ [1996] 1 MLJ 481 at 509, CA.

³⁶ See *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & 2 Ors* [1996] 4 MLJ 747. See also *Malaysia Shipyard and Engineering Sdn Bhd v Mukhtiar Singh & 16 Ors* [1991] 1 ILR 626.

³⁷ [1998] 2 ILR 879 at 882,.

³⁸ [1987] ILR 363.

Again, in *Kumpulan Akitek, Kumpulan Dua (M) Sdn Bhd, KA Sdn Bhd v Mustapha bin Haron & Kamarul Bahrin bin Md Amin*,³⁹ it was stated that:

It is the right of an employer to reorganize his business in the way he likes for the purpose of economy or convenience provided he acts *bona fide*. An employer has a right to determine the number of his employees consistent with his business or organisation and if by the implementation of such reorganisation scheme adopted for reasons of economy and the better management of his business the services of some of the employees are found to be in excess of the requirement of his business the employer is entitled to discharge such excess. In such a case an arbitration Court will not interfere.

The emphasis herein is that the employer must ensure that any retrenchment exercise in an organisation is carried out in a fair and justifiable manner and was not done capriciously or with motives of victimisation or unfair labour practice. This is to ensure the overall reasonableness of the employer's action.⁴⁰ Fairness in the retrenchment exercise would include, inter alia, consulting or pre-warning the affected workers of the impending retrenchment,⁴¹ the selection of workers to be declared redundant⁴² and possibility of re-deployment of workers in the organisation, among others. All this will establish one point, that is that the employer has acted *bona fide* (good faith) and not otherwise.

The managerial discretion to retrench workers is however, subject to judicial scrutiny. As long as the managerial power was exercised *bona fide*, the decision of the employer to retrench the worker is immune from examination even by the Industrial Court. However, the court may intervene and set aside the employer's discretion of retrenching the affected workers when it can be established that the decision was capricious or without reason or was *mala fide* or was actuated by victimisation or unfair labour practice, among others.⁴³ In *Ong Lean Phaik v CF Sharp & Co (M) Sdn Bhd*,⁴⁴ the court stated:

It is the right of every employer to reorganize his business in any manner for the purpose of economy or convenience provided he acts *bona fide*. He should not carry out the reorganization for the purpose of victimizing any of his employees and getting rid of his services. Victimization in this context means punishment by way of dismissal of an innocent workman who has in some way incurred the displeasure of his employer ... In other words, if the employer goes through the exercise of reorganization only for the purpose of providing himself with an excuse to get rid of services of an innocent workman who had incurred his displeasure, he would be acting *mala fide*. But the employer has a right to determine the volume of his labour force consistent with his business and organization and if the implementation of a reorganizing scheme adopted for reasons of economy and better management of the business, the service of some of the employees becomes excess of the requirement of the business, the employer is entitled to discharge each excess.

³⁹ [1987] 2 ILR 80.

⁴⁰ See *Credit Corporation (M) Bhd v Choo Kam Sing & Anor* [1998] 8 CLJ 86.

⁴¹ In *Tuan Syed Hashim bin Juan Long v Esso Production Malaysia Inc* [1998] 5 MLJ 535, Abdul Kadir Sulaiman J (as he then was) stated: "The company after all was not obliged to make any offer for any alternative employment on account of the exercise properly carried out. Further, it was not *mala fide* on the part of the respondent not to consult or discuss with the applicant its determination to reorganise its company."

⁴² In selecting employees for retrenchment, an employer should resort to the "last come, first go" rule which is based on the concept of fairness, however it is subject to certain restrictions. The said rule would have no application in the case of retrenchment of the only employee in a particular category of workmen: see *Kelab Sukan Pulau Pinang & Anor v Vijayapal Singh Hira Singh & Anor & Another Appeal* [1998] 1 CLJ 415, CA; *National Union of Cinema & Amusement Workers v Shaw Computer Management Services Sdn Bhd* (Award No. 27 of 1978) and *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 2 CLJ 11.

⁴³ See *Firex Sdn Bhd v Ng Shoo Waa* [1990] 1 ILR 226 (Award No. 69 of 1990); *Hooi Sow Chun & Ors v Pabw Sdn Bhd* [2011] 2 LNS 0126 (Award No. 126 of 2011).

⁴⁴ [1980] 1 ILR 284 at 227 (Award No. 121/80).

Again, in *William Jack & Co (M) Sdn Bhd v Balasingam*,⁴⁵ it was stated, inter alia, that the Industrial Court is empowered, and in fact is duty bound to investigate the facts and circumstances of the case to determine whether the exercise of power was bona fide. Whether the retrenchment exercise in a particular case is bona fide or otherwise is a question of fact and of degree depending for its resolution upon the peculiar facts and circumstances of each case.⁴⁶

It would be worthwhile to note the Industrial Court's function in relation to a reference under s 20 of the IRA. The Federal Court, in *Goon Kwee Phoy v J & P Coats (M) Sdn Bhd*,⁴⁷ succinctly explained the function of the Industrial Court in a reference under the abovementioned section. In particular, his Lordship Raja Azlan Shah, CJ (Malaya) (as his Highness then was) stated:

Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

Therefore, if the matter is referred to the Industrial Court, the court would inquire:

- (a) whether the retrenchment was justified in the circumstances of the case;
- (b) whether the grounds given by the employer are true; and
- (c) whether the order of retrenchment was motivated by bad faith and a desire to victimise or harass the workman who for some ulterior reasons the employer wanted to discharge or dismiss.

The burden is on the employer to establish to the satisfaction of the court that there was a redundancy situation in the company and that the requirement of the job functions of the employee had ceased or greatly diminished to the extent that the job no longer existed.⁴⁸ The Industrial Court in *Food Specialities (M) Sdn Bhd v Esa bin Haji Mohamad*,⁴⁹ stated:

The company must come to the Court with concrete proof of redundancy, for the burden is on it to prove there was actual redundancy on which the dismissal was justifiably grounded. Were it not so, any employer could use the exercise of reorganisation and purported redundancy to dismiss particular workman with impunity.

Conclusion

Unlike at common law, where the employer could terminate the contract of employment by serving appropriate notice with no obligation to reveal his reason for the dismissal, not even to justify it, under statutory law, a worker is accorded job security. The protective legislation against unfair or unjustified dismissals was initiated by the ILO with the adoption of Recommendation No. 119 in 1963. In 1982, Convention No. 158 and the associated Recommendation No. 166 were adopted, which in fact, were an expansion of the 1963 Recommendation. The above international instruments significantly influenced legislatures of the Member States to adopt, inter alia, that the termination should be with valid justification.

Today, there are many countries in the world offering statutory protection against unjustified or unfair dismissal in one form or the other. In England, the term used is "unfair dismissal", in New Zealand "unjustifiable dismissal", in Malaysia "dismissal without just cause or excuse", in Canada "unjust dismissal" and in Australia, "harsh, unjust and unreasonable dismissal".

⁴⁵ [1997] 3 CLJ 235.

⁴⁶ See *Looi Kim Hoe v Yhi (M) Sdn Bhd* [2011] 2 LNS 0001 (Award No. 1 of 2011)

⁴⁷ [1981] 2 MLJ 129 at 136.

⁴⁸ See *Bayer (M) Sdn Bhd v Ng Hong Pau* [1999] 4 CLJ 155; *Sistem Televisyen Malaysia Bhd & Anor v Suzana Zakaria* [2005] 1 ILR 853 (Award No. 416 of 2005)

⁴⁹ [1989] 1 ILR 502 (Award No. 74 of 1989).

The term “unfair” denotes an action correct in strict legal interpretation, complying with the letter of the law, but morally discreditable. A cause of action is unjustified when that which is done cannot be shown to be in accordance with justice or fairness. In other words, a workman cannot be dismissed save with just cause or excuse. It thus requires substantive justification and procedural fairness for a valid dismissal.

It follows that an impending dismissal must be substantively justified and procedurally fair. The employer must establish a substantive justification for the dismissal on the balance of probabilities. All that an employer is required to do is to act fairly in considering the interests of the business and the employee’s interest in retaining the employment. Further, before dismissing an employee, the employer must furnish him with the full particulars of the allegations that have been made against him. He should then be given the opportunity to present his own version of the facts and events that have occurred.

The employer is under an obligation to conduct an enquiry into the allegation that has been made and must also listen to the explanation put forward by his employee, so that he can then form a balanced opinion on the matter at hand. This is subject to the condition that in doing so, the employer must be impartial and observe the rules of natural justice. If the employer finds that the employee in question has been at fault, then he can only impose a penalty which is fair and appropriate, having regard to the circumstances surrounding the case, failing which such punishment might be quashed on the grounds of harshness or undue severity.

Further, given the importance of security of tenure among employees in the private sector, the courts in Malaysia have even equated a person’s right in employment on the same footing as “property right”. Apart from the above, the courts in Malaysia had, in the middle of the 1990’s, stated that a worker’s right to gainful employment is a fundamental right and to deprive him of such right without just cause or excuse would be contrary to the Federal Constitution, Article 5(1). In other words, Article 5(1) stresses on the importance of right to livelihood, which is a priceless possession that cannot be made a mockery at the whims and fancy of the employer.

By equating a worker’s right to employment with “property right” and by further stating that the Federal Constitution, Article 5(1) protects a person’s right to livelihood, it goes to show that the courts are leaning in favour of protecting a worker’s security of tenure where he should not be deprived of his “property right” save and except for just cause or excuse. Thus, a worker has an interest proprietary in nature in the continuation of his employment. The words “property right” in employment has to be translated into the practical assurance that no employer can dismiss, or even contractually terminate the services of his employee, save and except for just cause or excuse. Thus, where dismissal is contemplated, the employer must adhere to the strict requirement of substantive justification and procedural fairness.

While security of tenure is recognised, the employer’s prerogative to reorganise its business for reasons of better economy or better management and to retrench any personnel found to be redundant is equally recognised. During an economic recession, for example, the employer may have no choice but to resort to reducing the workforce as a cost reduction measure in light of the unfavourable economic conditions. When the company reorganises its business operation, the company is entitled to economise its operation including reducing its labour cost. It is the company’s right and privilege to structure its operation in the manner best fitting its requirements. In the aforesaid circumstances, the law recognises the employer’s right to deprive a certain number of workers of their jobs, the justification being the survival of the employer’s enterprise as an economic entity by cutting costs.

What is emphasised here is that in the absence of a genuine redundancy situation or grounds justifying dismissal, workers have a reasonable expectation of continuity in the employment of the same employer for as long as he is able to work or up to the normal retirement age in his category.