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Discretion of the Minister: to exercise or otherwise – examining the power of the Minister under Section 20 Industrial Relations Act 1967

Introduction

A workman[1] who is dismissed may seek recourse at the Industrial Court against the employer. The power to refer the workman's claim to the Industrial Court lies with the Minister of Human Resources of Malaysia ("Minister"). Recently, the newly appointed Minister had announced that all unfair dismissal claims brought before him shall automatically be referred to the Industrial Court[2].

Minister's powers under the Industrial Relations Act 1967

According to section 20 of the **Industrial Relations Act 1967** ("IRA 1967"), a workman who has been dismissed may write to the Director General of Labour ("Director General") within 60 days from the date of dismissal to be reinstated[3]. The Director General would then take steps to amicably resolve the dispute.

Typically, the Director General of Labour will schedule a conciliatory meeting between the workman and the employer in order to achieve an amicable settlement. Where the conciliatory meeting succeeds, the matter ends. On the other hand, where the conciliatory meeting does not achieve its intended target, the Director General of Labour is duty bound to refer the dispute to the Minister[4].

The Minister will then have to properly examine all the facts and documents placed before him and screen each case to decide whether the particular dispute warrants a reference to the Industrial Court[5].

Automatic referrals

The main proponents of automatic referrals would be the workmen. In the past, it is not uncommon for the Minister to refuse to refer an unfair dismissal claim to the Industrial Court. This would leave a workman with limited access to further recourse. In that scenario, a workman may:

i. File an action for wrongful dismissal in the civil courts; or
ii. File an application for judicial review[6] against the decision of the Minister.

Typically, a workman would not opt for a claim of wrongful dismissal in the civil courts. The rewards for such a challenge is meagre as it is only limited to the last drawn salary for the notice period. The courts may further reduce the compensation by taking into account gainful employment immediately or during the notice period[7].

A workman would, on most occasions, file an application for Judicial Review in the High Court. An application for Judicial Review is made to quash the Minister's decision and to compel the Minister to refer the matter to the Industrial Court.

However, a workman may find it costly to commence a Judicial Review application. Moreover, a typical Judicial Review application may take an extensive amount of time. It may take anywhere between the range of one to two years before a decision is handed down. Even then, the decision may not be in favour of the workman. The process is simply too slow.

With that in mind, the announcement for automatic referrals is a welcome one. No one should be denied the opportunity to seek recourse. The proposal for automatic referrals would address this concern.

Is the Minister exercising his powers properly?

According to the Minister, all section 20 claims are now automatically referred to the Industrial Court. However, is the Minister currently exercising his powers properly? What about claims which are evidently frivolous?

Based on the existing laws, the Minister is still under a legal duty to review each case and to decline to refer cases which are evidently frivolous.

In **Hong Leong Equipment Sdn Bhd v Liew Fook Chuan**[8], the Court of Appeal held that the Minister must consider each case by its merits and, where a case is evidently frivolous, it is justified to refuse reference:

> "*The second question that the Minister must ask himself is whether, objectively speaking, the representations made under s 20(1) are frivolous or vexatious. If they are, then he may well be justified in refusing a reference. Whether they are or are not depends upon the facts of each case. But there are some pretty obvious cases where a reference may be properly denied.*"

This principle is long standing. In the recent case of **Sivasesan Muthusamy v Yang Berhormat Menteri Sumber Manusia, Malaysia**[9], the High Court reiterated the principle in **Hong Leong Equipment**:

> "*49. It is also trite that the 1st Respondent was not bound to refer all disputes to the IC for adjudication. Under the law, he has a duty to sieve through all matters referred to him by addressing his mind to the facts that were placed before him objectively. He was not to act merely as a rubber stamp*."

Further, in **Michael Lee Fook Wah v Minister of Human Resources Malaysia**[10], the Court of Appeal described the role of the Minister as follows:

> "*The law does not require the first respondent to do this, otherwise the position of the first respondent vis-a-vis the Act would be that of an intermediary or a mere postman. It is not a mechanical exercise for the first respondent in every case to refer to the Industrial Court*."

As the Minister no longer "*screens*" disputes brought before him, the Minister's current practice of automatic referrals may be open to challenge by employers by way of a judicial review application on the grounds of an improper exercise of discretion. The Court of Appeal in **Hong Leong Equipment** stated the position of the law:

> "*I pause to emphasize that the Minister's decision, one way or the other, upon the question whether representations made under s 20(1) are frivolous or vexatious, is neither final nor conclusive, and may be reopened in judicial review proceedings*."

Conclusion

Whilst the intention of the Minister to do away with the screening process for unfair dismissal claims is appreciated, the law as it is today still requires the Minister to objectively assess each case before deciding whether to refer to the Industrial Court or otherwise.

To do otherwise may open the Minister to challenge by way of judicial review.

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[1] "*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.
[2] Please read https://www.thestar.com.my/news/nation/2018/06/06/minister-will-no-longer-screen-industrial-courts-cases/.
[3] Section 20 (1), IRA 1967.
[4] Section 20 (2), IRA 1967.
[5] "*Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the Court for an award.*"
[6] Order 55 of the Rules of Court 2012.
[7] See the Federal Court in **Fung Keong Rubber Manufacturing (M) Sdn Bhd V Lee Eng Kiat** [1981] 1 MLJ 238.
[8] [1996] 1 MLJ 481
[9] [2015] 1 LNS 1451
[10] [1998] 1 MLJ 305