Dismissal Disputes Processing: A Critical Review | by Lim Heng Seng

Industrial relations dispute processing and resolution is a complex exercise of sensibly and sensitively balancing the often competing interests of employers and employees and their respective unions. An efficacious system for processing industrial disputes ensures that the paramount national interests of shaping a vibrant and robust economy while safeguarding social and economic justice for the citizen workforce is achieved in an environment of industrial peace and harmony. Of the industrial disputes which constitute the case load of the Industrial Relations Department (“the IRD”), the Minister of Human Resources (“the Minister”) and the Industrial Courts, the bulk of them consist of representations of unjust dismissals made by workmen. These dismissal disputes are the focus of this article directed at reviewing the system as part of reform initiatives.

The Industrial Relations Act 1967 (“the IRA”) has devised a system of prevention and settlement of industrial disputes¹ between employers and/or their associations on the one part, and employees through their trade unions on the other in the pursuit of

¹ A general term used to describe the range of matters affecting the relations of employers and employees and their unions set out in the IRA, inter alia, trade disputes (the most common of which consist of the failure of unions and employers to arrive at a mutually agreed collective agreement) under ss 18 and 26; recognition claims under s 9; requests of any party bound an award or collective agreement for interpretation under s 33; complaints alleging non-compliance with approved agreements or past awards under s 56; complaints of contravention of the protective rights of trade union and their members and of employers’ correlative duties and responsibilities under s 8.
industrial peace and harmony. When efforts towards the resolution and settlement of industrial disputes involving negotiations and conciliation by the Director General of Industrial Relations ("the Director General") fail, a notification is made and a report furnished to the Minister. He may then refer the matter to the Industrial Court. The statutory system represents the legislative authority's prescription of the tri-partite mode of industrial dispute resolution processing as the preferred alternative to disruptive industrial action.

Section 20 claims of dismissal without just cause or excuse
Section 20 of the IRA provides the means by which a workman who considers himself to have been dismissed without just cause or excuse can seek the remedy of reinstatement.

Historically, unjust dismissal claims came to the IRD as trade disputes that can only be espoused by a trade union. As a trade dispute the matter is taken through the full range of processes prescribed in the IRA with a view to resolving and settling them expeditiously so that industrial peace and harmony is maintained.

A trade dispute is defined by s 2 of the Act as "any dispute between an employer and his workmen which is connected with the employment or non-employment or the terms of employment or the condition of work of any such workmen". It is plain that a trade dispute is a collective dispute between workmen and their employer. It is not an individual dispute between a workman and his employer which is the case where a workman contends that his dismissal by his employer was without just cause or excuse.

The statutory scheme of settlement and resolution of trade disputes of a collective nature between a union of workmen and employers was soon extended to dismissal disputes between individual employees and their employers. In 1971, s 16A was introduced which empowered the Minister to grant relief to an aggrieved non-union workman. The availability of relief to non-union workmen was extended vide s 17A in 1975 which provided for a mechanism substantially along the lines of the present s 20, the only distinction being that the former section only applied to non-union workmen whilst the latter was universally applicable to all workmen, unionised or otherwise.

Dismissal disputes which are of an individual nature founded on unjust dismissal of a workman are hence processed in the same way as trade disputes which are of a collective nature espoused by a union of workmen. The workman in a dismissal dispute may not directly invoke the jurisdiction of the Industrial Court to adjudicate upon his claim. In the same way as a trade dispute, he has to lodge a complaint that he had been dismissed without just cause or excuse and make a representation to the Director General that he be reinstated to his former employment. At the IRD, conciliatory efforts are made by officers of the department. If such efforts succeed and a settlement is arrived at the matter is disposed of. If they fail, the matter is escalated to the Minister. The Minister is then required to determine the fitness for reference of the representation of unjust dismissal to the Industrial Court for an award.

Director General's power and role
The Director General's role under s 20 is twofold: firstly, conciliation and secondly, putting up a report of the case.

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2 The definition of "workman" and "contract of employment" states in a circular fashion rather unhelpfully that a workman is someone who is employed as a workman! This formulation of the definition from the words of the statute itself clearly leads nowhere, for it begs the question of who is a workman. This had been judicially distilled into a single proposition that a workman is someone who is employed under a contract of service rather than a contract for services. There is widespread and sustained concern that this construction has made the industrial adjudicatory process open to persons engaged as working directors, inter alia, executive directors, managing directors and chief executive officers who have a contract of service and that such is contrary to the spirit and the object and the purpose of the IRA clearly spelt out in the preamble of the legislation. The wide construction given to the term has also contributed to the increase in the volume of unjust dismissal claims and compounded the problem of a burgeoning case load and backlog of cases in the IRD, the Minister's office and the Industrial Court.

3 "Director General" here includes his subordinates under the IRA who act on his behalf (see s 2 of the IRA)
for the Minister to exercise his referral function. At the conciliation meetings, his industrial relations officers gather information on the facts and circumstances of the dismissal from both the dismissed workman and his employer. He ascertains their respective positions and their willingness to resolve the matter amicably whether by reinstatement or the payment of compensation. If a settlement is reached, he will require the parties to sign a memorandum of agreement stating the terms of the settlement and he will attest the same. Should conciliation fail, he sends a failure notification and a report of the dismissal dispute for the Minister.

This reporting function of the Director General is most significant. The imperative that the Minister acts on the information and materials presented to the Director General and the need for the parties to set out the cases that they had presented to the Director General has been an inherent and a vital part of the s 20 process. It is referred to in several judgments of the courts at various levels of the hierarchy where the Minister’s decision has been challenged in judicial review proceedings in the High Court.4

Minister’s power and role

The statutory discretion to refer disputes to the Industrial Court is vested in the Minister. Unlike conciliation by the Director General where both parties are represented, the Minister does not hear the parties. He acts on the report made to him by the Director General.

The Minister has to ask himself the key question whether the representation made by a workman is fit to be referred to the Industrial Court for adjudication. With regard to the substance of the workman’s complaint that he had been dismissed without just cause or excuse, the test to be applied is whether there are serious issues of law or fact to be tried. Stated alternatively, is his complaint frivolous or vexatious?5

Is the process in trade disputes resolution warranted in dismissal disputes?

Individual dismissal disputes are no longer espoused and brought to the Industrial Court as collective trade disputes. These disputes, however, are still processed in the same way as if they are collective trade disputes. Dismissal disputes between employee and employer are not collective trade disputes in any sense of that term. Parliament has retained the statutory scheme of settlement of collective trade disputes for individual dismissal disputes. Should the same graduated steps carefully designed for resolving fractious, sensitive and difficult collective disputes which can potentially cause a breach of industrial harmony from representations to and conciliation by the Director General, notification and report to the Minister and adjudication by the Industrial Court be adopted in toto for such disputes? Indeed, while the Minister’s engagement in collective trade disputes is called for, does this extend to individual dismissal disputes which are a matter of concern principally between an individual employee and his employer? The rationale and the need to do so ought to be reviewed and evaluated.

Resources and time diverted to individual disputed dismissal claims instead of collective trade disputes

The lengthy and involved steps which are imperative for the resolution of trade disputes of a collective nature are quite inappropriate where they are applied in general to dismissal disputes of an individual nature between an employee and his employer.

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4 Michael Lee Fook Wah v Minister of Human Resources [1998] 1 MLJ 305 (CA); Chan Soon Lee v YB Menteri Sumber Manusia Malaysia & Anor [1998] CLJ 133 (HC) and Exxon Chemical (Malaysia) Sdn Bhd v Menteri Sumber Manusia Malaysia & Ors [2007] 2 CLJ 97 (FC)
5 Minister of Labour, Malaysia v Liew Seng Fatt [1990] 2 MLJ 9 (SC) and Hong Leong Equipment Sdn Bhd v Liew Fook Chuan [1996] 1 MLJ 481 (CA)
Individual dismissal disputes processing take up the lion’s share of the resources inclusive of administrative and ministerial time allocated under the statutory scheme originally intended to deal with collective trade disputes. It behoves the policymakers and Parliament to revisit the rationale, or rather the lack of it, for the prescription and the full application of the entire mechanism of trade dispute resolution for the processing of individual claims pertaining to dismissals.

Direct recourse to Industrial Court

Dismissal disputes in general have little bearing upon industrial peace and harmony such as to call for the involvement and intervention of the Director General and a Minister of the Cabinet. They do not call for the adoption of a system that involves recourse to the full range of statutory processes prescribed for collective trade disputes. As in other jurisdictions, a workman who complains of unfair dismissal ought to have a right to have his case presented directly to the Industrial Court. Specific legislation on protection of employment and the remedies available is imperative so that this type of cases is no longer inappropriately and clumsily bundled together with collective trade disputes.

Expediting disposal of unjust dismissal claims in Industrial Court

Steps should also be taken to expedite the disposals of dismissal cases. A first step will be to introduce clarity and certainty in the scope and application of s 20 and to carefully lay down the rules, principles and guidelines to be applied to the different categories of workmen and the several grounds on which a termination of employment is effected.

Procedures for processing of cases in the Industrial Court to the end that there may be expeditious disposal of claims will need to be reviewed. The Industrial Court Rules 1967 can provide for disposal of cases by way of striking out or an order for a summary award. Careful consideration should be given to the proposal to put in place a procedure for putting a party at risk for costs of the other party where the claim or defence is prima facie unsustainable.

There is also the need for alternative dispute resolution within the Industrial Court itself. It has been found that mediation by experienced staff of the Industrial Court is an effective means of settling and clearing cases. The Industrial Court has introduced voluntary mediation by chairmen of the court prior to the hearing of a case which has shown promise.

In the area of remedies, of which monetary awards are the most often awarded relief to a workman, there is a lack of coherence as to the object, the measure and assessment of the award of the two heads consisting of backwages and compensation in lieu of reinstatement. What are the types of damage, harm, loss or injury (for the sake of brevity, referred to as “injurious consequences”) that have been caused to or suffered by the unjustly dismissed employee? Which one of these several items is compensable? What are the objects and purposes to be served in making such an award? What is the measure and what are the principles to be applied in the assessment thereof in the award of monetary compensation for the injurious consequences of unjust dismissal? What are the factors which may go toward enhancing or diminishing such basic quantum of compensation? What is the significance and implication of the fact that after the workman’s dismissal, he had or could have earned an income which had or

6 This observation does not apply to dismissals and other retaliatory actions or victimisation of workmen on account of their trade union activities, which might constitute indirect or constructive dismissal. These kinds of industrial disputes are more in the nature of trade disputes as they affect the union as a collective entity. They are violations of ss 4 and 5 of the IRA, and the process for their resolution are set out in s 8, where the whole range of dispute resolution mechanisms which apply to trade disputes is prescribed.

7 See the article, “Two Proposals for Industrial Tribunals” in Civil Justice Quarterly 1989, Vol 8
could have diminished or completely extinguished his pecuniary loss? How do these principles apply to various categories of workmen where an award directs them to be reinstated, and in the alternative case where he is not reinstated? Is there an imperative for the prescription of a minimum award and an upper cap imposed on awards for the various categories of injurious consequences for which compensation can be awarded?

Clarity and coherence achieved by identifying and stipulating the key elements and principles that make up the system of compensation for the injurious consequences of an unjust dismissal is an imperative in realising the desirable objective of consistency and predictability of monetary awards handed down by the Industrial Court. Legal advisers to both employers and employees will be guided by this set of key elements and principles and this will inevitably make the task of advising on settlement of dismissal disputes less problematical. This will go a long way towards the prevention and settlement of differences and disputes between employers and their workmen in line with the purpose of the IRA as set out in its preamble.

Reallocation of resources in view of Industrial Court’s expanded role
Will the above proposals cause a sudden deluge of cases in the Industrial Court? The adoption of the proposals above is bound to have a significant impact on the workload of the Industrial Court, resulting in an even more serious backlog of cases. This would be a direct consequence of channelling unjust dismissal claims directly to the Industrial Court instead of through the existing system. This will call for the reallocation of resources which have been hitherto channelled to the IRD and the Minister’s office to perform their respective roles in the processing of unjust dismissal claims to the Industrial Court, which will now be the only institution dealing with dismissal disputes.

Conclusion
The concerns of industry and trade unions and other stakeholders with regard to the efficacy, coherence and soundness of the system for the processing of individual dismissal disputes must be addressed decisively. The heightened demands and pressures upon the industrial processing and adjudicatory services under the IRA must be met by a strategic review directed at a long-due reform of the system.

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Privacy Matters: Employee Conduct In and Outside the Workplace

by Fara Nadia binti Hashim

Conduct of employees on company premises during work hours is not entirely private as it may be subject to rules governing the workplace.

Outside company premises or work hours, however, the employee is not constrained unless his actions affect the company’s reputation or business.

Conduct during work hours
A company should be allowed to determine the rules to be applied to employees when they are at work. These rules may include policies on the use of company property, protecting the company’s business, and prohibition against drug and alcohol use.

(Mis)using company property
Company property provided to employees must not be abused. In investigating whether an employee had misused such property, the company can take steps such as placing a mark in the employee’s laptop provided by the company to determine if he was the sender of abusive and offensive emails to other employees of the company.¹ The act of sending, forwarding or preparing materials containing profanity and/or unwarranted allegations against another employee or others using the computer supplied by the company would be an abuse of the company property.²

A company may also prohibit employees from uploading documents belonging to their previous employers into the computers supplied by the company. This is to minimise the risks of the company being sued by the previous employer for possession of confidential documents. It does not matter if the previous employer had not taken action against the company. If an employee uploads files belonging to third parties into the company’s computer, the company is entitled to impose disciplinary sanction against the employee for breach of the terms of the employment contract.³ The Industrial Court took cognisance that “one cannot lose sight of the fact that he had uploaded these documents into a laptop belonging to the company”.⁴

The act of uploading documents belonging to previous employers may be for personal use or reference only. However, a company has valid grounds to take disciplinary action against the employee for putting it in potential risk and real danger of a legal action by the previous employer.⁵

These cases suggest that an employee does not have absolute privacy during work hours if it concerns the use of company property.

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¹ Bax Global Imports (Malaysia) Sdn Bhd v Saravanan Rajagopal [2007] 3 ILR 434
² Ibid, para 23
³ Chua Tuck Choy v MEMC Ipoh Sdn Bhd [2012] 4 ILR 469
⁴ Ibid, para 67
⁵ Para 67
Protecting company’s business

In many instances, employees work under constant surveillance of closed-circuit television cameras (CCTV). A security assistant working at the airport, a toll-teller at a toll booth or a security guard in a guardhouse will enjoy less privacy at work. Under these circumstances, the issue of privacy should not arise as the surveillance is installed with a view to protecting the company’s business.

However, CCTVs should not be installed at certain company premises. For example, a doctor’s room should be kept free from surveillance because the nature of his duties involves examining his patients in confidence. Information on the patients, being sensitive personal data, is protected under the Personal Data Protection Act 2010 (“the PDPA”). Therefore, there should not be any processing of sensitive personal data without the patient’s knowledge and consent. A company may be vicariously liable if the doctor takes photographs of his patient without his consent.

Monitoring employees’ performance

Some companies may consider installing CCTV at the employee’s work station to monitor his performance. However, as stated in a proposal paper issued following the incorporation of the PDPA, CCTVs cannot be misused, such as for staff monitoring. The guide also suggests that the primary purpose of using CCTV at the workplace is for crime detection and prevention. This suggests that companies should, to a certain extent, respect the employees’ privacy while at work.

It is difficult to see how a company can effectively achieve the productivity level expected of its employees through constant monitoring. On the contrary, constant surveillance of its employees may be counter-productive.

Safety of employees at work

A company can also conduct drug or urine tests as part of employees’ continuing employment to ensure the safety and health of the employees and the workplace, or to ensure that productivity levels are met. This is in line with the purpose of the Occupational and Safety Health Act 1994 (“OSHA”), which was enacted to ensure the safety, health and welfare of persons at work, and to protect others against risks to safety or health in connection with the activities of persons at work.

The nature of a company’s business may justify the need for a random drug or urine test. For example, a company engaged in maritime transportation with employees working on board a ship can require the crew members to undergo the test to ensure the safety of other crew members on board the vessel.

Suspicion of an act of misconduct can also be another ground for conducting random tests. For example, an employee who takes excessive medical leave can be subject to a further medical examination and relevant tests. If he tests positive for drugs, he is liable to disciplinary action because a “company cannot be expected to retain an employee who is a drug user and who is frequently absent from work”.

However, companies are advised to put in place policies setting out the right to subject employees to random drug or urine tests before carrying them out. A company should also ensure that it complies with the steps and procedures set out in its policies; otherwise, it risks being found in breach of its own procedures.

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6 Mohd Fikri Hakim v Malaysia Airport Holding Berhad [2015] 2 LNS 0346
7 Mohamad Adeli Sanusi v Projek Lebuhraya Utara-Selatan Bhd [2007] 2 ILR 140; Norhia Ishak v Projek Lebuhraya Utara-Selatan Berhad (PLUS) [2011] 2 LNS 1565
8 Munusamy M Nadesan & Ors v Mahkota Technologies Sdn Bhd [2009] 3 ILR 117
9 [Act 709]
10 Recording is considered “processing” of personal data defined under the PDPA 2010
11 PDPA 2010, s 40
12 Lee Ewe Poh v Dr Lim Teik Man & Anor [2011] 1 MLJ 835 (HC)
13 “Guide on the Management of CCTV under Personal Data Protection Act 2010”
14 Munugaya Arumugam v Northport (Malaysia) Bhd [2012] 3 ILR 592
15 [Act 514]
16 Zulhilmi Fauzi v MISC Berhad [2014] 1 ILR 240
17 Samson Anuar Haron v Malaysia Airline System Bhd [2003] 3 ILR 1407
18 Munugaya Arumugam, supra n 14 para 25
Conduct outside work hours

The official work hours stipulated in an employment contract define the period where an employee is subject to the company’s rules, and the period when the employee is free from the company’s watch. In other words, the employee’s time belongs to the company while he is on the job, but the company does not purchase his leisure time and does not have jurisdiction or control over the use of it.19

Employee’s morally wrong conduct

The general position is that an employee’s private conduct should not affect his employment with the company. It can be said that the company is not the general custodian of the morals of its employees.

However, a company can discipline an employee for his private conduct if it is of exceptional gravity or is capable of damaging the company’s business.20 An employee’s private conduct which does not ruin the company’s image or affect its business cannot be used as grounds for dismissal.21

Factors that may be taken into account in deciding how a company’s reputation is affected include the nature of the offence, the place of incident and the consequences to the company’s business.

Direct consequences to the company’s business as a result of an employee’s private conduct are a legitimate ground for dismissal. So, a male employee who invited his female colleague to have sexual relations with him when his wife was away can be said to have tarnished the company’s image, because not only did the incident take place at 4.30am, it was also known to the public including the government departments and agencies around a small town.22 The male employee’s conduct had directly resulted in difficulties for the company to recruit female workers as parents would not permit their daughters to work for the company after this incident.23

In other instances, the court accepted the likelihood of damage to the company’s business or reputation as a valid ground of dismissal. Therefore, if the employee’s private conduct known to the company’s clients or those accustomed to dealing with the company would have the effect of damaging the company’s business, the employee’s dismissal would also be justified.24

In some cases, sexual immorality may be a relevant misconduct affecting the company’s reputation. For example:

“A married university professor who seduces one of his female students, or a school principal who seduces a native girl, as a result of which she bears an illegitimate child, is guilty of misconduct. In the instant case, the claimant took another female worker from the company to his house and had an affair with her for the night. They were caught by a party during the night and during the inquiry, the claimant admitted his action. This, in our view, is misconduct, as the claimant’s action has undoubtedly tarnished the company’s reputation and is bound to affect the company adversely, especially in a small town like Bandar Al Muktifi Billah Shah.”25

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19 Law of Victimization of Employees by Chakravarty, quoted in Award Nos 32 of 1975 and 41 of 1974
20 Cassidy v H C Goodman Ltd [1975] IRLR 86; Re Shawingian Chemicals Ltd 1958 Revenue Legale 467, Quebec Arbitration
22 Permint Plywood Sdn Bhd, Kuala Terenggannu v Kesatuan Pekerja-pekerja Perkayuan Semenanjung Malaysia [1993] 1 ILR 253
23 Ibid, at 254
24 Bank Musamat Malaysia Bhd v Mahkamah Perusahaan Malaysia & Aziz Yaakob [2011] 1 LNS 1067 (HC)
25 Permint Plywood, supra n 22
Criminal misconduct

Companies often adopt policies reserving the right to consider an employee’s conviction of a criminal offence as a major misconduct. It is suggested that such conviction must, however, be relevant to the nature of the employee’s job.26

Therefore, a company can dismiss a driver if he is convicted of an offence related to driving.27 Likewise, a chief stewardess who was issued a caution letter by the authorities in the UK for attempting to fraudulently evade paying duty chargeable on cigarettes carried in by her, while on duty wearing the company’s cabin crew uniform, was liable to be dismissed.28 It makes no difference if the employee was convicted or cautioned out of the country.29 However, an employee’s criminal record for offences committed well before his employment with the current company cannot be used as a ground to terminate employment, especially if the company is aware of such record.30

Conclusion

Privacy does matter in an employment relationship and employers and employees alike should give heed to the fact that while there is no absolute privacy in the workplace, there are clear no-go areas when it concerns an employee’s conduct outside the workplace.

An employee’s private conduct should remain private and should not be the company’s business, except in the following circumstances:

- The employee’s private conduct occurs during work hours;
- The employee’s private conduct occurs on company premises;
- The employee’s private conduct occurs outside work premises and work hours, but affects the company’s reputation or business.

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26 Kontena Nasional Berhad, Johor Bahru v Zakaria Yusak [1997] 3 ILR 203
27 Ibid
28 Tamil Selvi Letchumanan v Malaysia Airline System Berhad [2015] 3 ILR 595
29 Adrine Verghese Jacob v Malaysian Airlines Systems Berhad [2015] 1 ILR 457; Kontena Nasional Berhad, Johor Bahru, supra n 26; Tamil Selvi Letchumanan supra n 28
30 Khamis Che Rose v Malaysian Resources Corporation Berhad [2007] 4 ILR 372
Termination of Employment in Workforce Reorganisation

by Tan Hooi Ping

Employment law in Malaysia recognises security of tenure and therefore an employee’s services cannot be terminated without just cause or excuse. On occasion, a company needs to reorganise for business efficiency or to reduce expenses which may result in some employees being considered redundant or surplus to requirements. The law recognises a company’s prerogative to organise its business in the manner it considers best as long as it is exercised bona fide.

There are four modalities which a company may use to terminate the service of an individual employee or a group of employees who are no longer needed: retrenchment, voluntary separation scheme, mutual separation and resignation on terms.

Retrenchment
Retrenchment means the discharge of surplus labour or staff by a company for any reason whatsoever other than as a punishment inflicted by way of disciplinary action. The notice of termination to the employee must be given in a genuine exercise of managerial power.

Termination benefits
An employee who falls under the Employment Act 1955 (“the Act”) is entitled to receive termination benefits under the Employment (Termination and Lay-Off Benefits) Regulations 1980 (the “1980 Regulations”) based on the following scale:

<table>
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<tr>
<th>Period of continuous employment</th>
<th>Wages for each year of employment</th>
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<tr>
<td>Less than 12 months</td>
<td>Nil</td>
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<tr>
<td>At least 12 months but less than two years</td>
<td>10 days</td>
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<tr>
<td>At least two but less than five years</td>
<td>15 days</td>
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<td>At least five years</td>
<td>20 days</td>
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The statutory benefits must be paid within seven days from the last day of employment. Any additional termination benefits payable to an employee under any collective

1 Dr A Dutt v Assunta Hospital [1981] 1 MLJ 304 (FC) at 312B-D
2 A “company” in this article refers to an “employer”
3 Stephen Bong v FCB (M) Sdn Bhd & Anor [1999] 3 MLJ 411 (HC) at 416B; Ng Tai Lai v F & N Coca-Cola (Malaysia) Sdn Bhd [2008] 2 LNS 1120 (Industrial Court) at 3
5 William Jacks, supra n 4, at 241b-c
6 Ibid
7 [Act 265]. All references hereafter are to the Employment Act 1955 unless otherwise stated. It applies only to employees who fall within the definition of an “employee” in s 2 read with the First Schedule.

Section 2
“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;

First Schedule:
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 two thousand 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 …;
   (2) he is engaged in the operation or maintenance of any mechanically propelled vehicle …;
   (3) he supervises or oversees other employees engaged in manual labour …;
   (4) he is engaged in any capacity in any vessel registered in Malaysia …;
   (5) he is engaged as a domestic servant.
8 PU(A) 338/83 [wef 15 September 1983]. It was made under s 60J of the Act.
9 1980 Regulations, reg 6
10 Ibid, reg 3, which provides that a continuous contract of service for a period of at least 12 months includes two or more periods of employment which in total are not less than 12 months, and any intervening period or periods between one period of employment and another must not exceed 30 days in total.
11 Regulation 6(2) of the 1980 Regulations defines “wages” to have the same meaning under s 2(1) of the Act and provides the computation of “a day’s wages” so as to give the employee his average true day’s wages calculated over a period of 12 completed months’ services immediately preceding the relevant date.
12 The amount of termination benefits payable is prorated as respect an incomplete year, calculated to the nearest month (1980 Regulations, reg 8(1)).
13 1980 Regulations, reg 11, failure to do so is an offence under the law. If found liable, on conviction, the company could be fined not more than RM10,000 for the offence under s 99A of the Act.
agreements or company policies may be paid in such manner as may be agreed.

An employee who does not fall under the Act will not be entitled to receive statutory benefits. However, it is good practice for a company to pay the employee compensation for loss of employment¹⁴ being one of the principles in the Agreed Practices annexed to the Code of Conduct for Industrial Harmony ("the Code of Conduct").¹⁵

Mandatory reporting obligation

Pursuant to the Employment Retrenchment Notification 2004,¹⁶ a company must give 30 days’ advance notice of any retrenchment¹⁷ to the nearest Labour Department, together with a form setting out the contact details of the company and employee.¹⁸ The company must also follow up with an update on the particulars of benefits paid¹⁹ and whether the employee has found new employment²⁰ within 14 and 30 days, respectively, after the retrenchment. These obligations are regardless of whether the employee falls under the Act or not.²¹

Unjust dismissal²²

Given the employee has security of tenure under Malaysian law, the company bears the burden of proving that the termination was pursuant to a genuine redundancy and not intended to victimise the employee.²³ The company must also show that the selection process for the redundancy was fair and complies with accepted standards and procedures.²⁴ The Code of Conduct sets out agreed practices which a company may observe where redundancy is likely:

1. pre-retrenchment steps to avert or minimise reduction of workforce;²⁵
2. pre-retrenchment consultation with the employees or their trade union representatives;²⁶
3. criteria for selection of employees for retrenchment,²⁷ such as the "last in — first out" (LIFO) principle;²⁸
4. measures for implementing retrenchment.²⁹

While the Code of Conduct is a mere guideline and cannot be enforced as if it is binding law,³⁰ it sets out good industrial practices for redundancy and retrenchment situations.³¹ The Industrial Court is statutorily authorised to take the Code of Conduct into consideration when deciding an unjust dismissal claim.³² Some of these practices are deeply entrenched principles which have been adopted by the Industrial Court and may be departed from only in limited circumstances.

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¹⁴ Code of Conduct for Industrial Harmony, para (22)(a)(ii)
¹⁵ Hereafter referred to as the "Code of Conduct". It is an agreement entered into on 9 February 1975 between the Ministry of Human Resources Malaysia, the Malaysian Employers Federation and the Malaysian Trades Union Congress.
¹⁶ PU(B) 430/2004 [wef 11 November 2004]; hereafter, the "2004 Notification".
¹⁷ 2004 Notification, para 4(3)(a)-(e), or also known as Parts I, II, IIIA, III and IV of the "PK Form".
¹⁸ Borang Pemberhentian (Senarai Pekerja), which the author loosely translates as Retrenchment Form (List of Employees)
¹⁹ 2004 Notification, para 4(3)(f), also known as Part V of the "PK Form"
²⁰ ibid, para 4(3)(g), also known as Part VI of the "PK Form"
²¹ Failure to give notice is an offence under s 83 read with s 97 of the Act. If found liable, on conviction, the company could be fined not more than RM10,000 for the offence under s 99A of the Act.
²² In other words, a dismissal without just cause or excuse
²³ Bayer (M) Sdn Bhd v Ng Hong Pau [1999] 4 CLJ 155 (CA) at p. 160d; Harris Solid State, supra n 4, at 760d; East Asiatic Company (M) Bhd v Valen Noel Yap [1987] 1 ILR Rep 497 (Industrial Court) at 499h
²⁵ Code of Conduct, para (20)(a)-(f)
²⁶ ibid, para (21)
²⁷ id para (22)(b)
²⁸ The LIFO principle refers to the termination of services of the most recent employee who joined the company, other things being equal. This principle may only be departed from if justified. See Dynacraft Industries Sdn Bhd v Kamaruddin Kana Mohd Sharif & Ora [2012] 9 CLJ 21 (FC) at para 13-14 and Chang How Weng, supra n 4, at para 19.
²⁹ Code of Conduct, para (22)(a)
³⁰ Equant Integration Services Sdn Bhd (In Liquidation) v Wong Wai Hung [2012] 1 LNS 1296 (CA) at paras 9 and 12; Credit Corporation (M) Bhd v Choo Kam Sing & Anor [1999] 8 CLJ 88 (HC) at 92e-f
³¹ Code of Conduct, paras (20) to (24)
³² Industrial Relations Act 1967 [Act 177], s 30(5A)
Voluntary separation scheme

A voluntary separation scheme, or VSS, is an invitation by a company to its employees, as part of a workforce reduction exercise, to apply for termination of their contract of employment on terms offered by the company. The company initiates the exercise with a general announcement of the scheme to one or more groups of employees together with terms applicable according to category or position in the company. Any eligible employee may make an offer to the company to be considered for the scheme. If the company rejects the employee’s offer, the employee will continue in his employment with the company.

Termination benefits

The termination benefits under a VSS will almost invariably be better than the statutory benefits in order for the VSS to be more attractive to the employees. Since it is offered to a category or group of employees, the termination benefits offered in a VSS would be non-negotiable once accepted. The termination benefits may be paid as spelled out in the scheme.

Mandatory reporting obligation

Since the rationale of a VSS is similar to a retrenchment, the same obligations on a company to give advance notice and follow up with updates on the retrenchment to the nearest Labour Department apply.

Unjust dismissal

A VSS is a voluntary mutual termination of employment and the employee accepts the benefits pursuant to a scheme and signs an agreement as full and final settlement of his rights and obligations under the contract of employment. Therefore, the employee has no grounds for claiming unjust dismissal unless he has grounds to invalidate the agreement under the VSS, for example:

1. the employee was forced into accepting the VSS;
2. the company planted the fear of retrenchment in the mind of the employee;
3. the employee had no choice in the matter but either to accept the VSS or being made redundant and lose the benefits offered; or
4. the employee was not allowed to leave the room and not given time to think about the VSS.

Mutual separation

A mutual separation is a termination of a contract of employment of a specific individual employee on terms negotiated and agreed between the company and the employee. The terms of a mutual separation may be recorded in a formal agreement or in a letter issued by the company.

33 Sometimes also referred to as “voluntary redundancy programme” or “mutual separation scheme”
34 “The scheme operates on the premise that employees are invited to participate in a plan on a voluntary basis. In consideration for opting out, the employee will be given an attractive severance package.” — Thavalingam C Thavarajah & Raymond T C Low, Employment and Industrial Relations Law Malaysia [CCH (Malaysia), 2014] at 239
35 Zainon Ahmad & Ors v Padiberas Nasional Bhd [2012] 4 ILR 225 (FC) at para 18
36 Rosli Ibrahim & Anor v TIME dotCom Berhad [2013] 2 LNS 1978 (Industrial Court) at 17
37 “It is pertinent to note that the company is not obliged to retrench all the employees who opt for voluntary retrenchment. … the company may also require the services of a particular individual and may decline to accept the individual’s offer to opt for VSS.” — Thavarajah & Low, supra n 34
38 Zainon Ahmad, supra n 35, at paras 16 and 18
39 Rosli Ibrahim, supra n 36, at 17; Ahmad Fauzan Aziz & Ors v DynaCraft Industries Sdn Bhd [2010] 2 LNS 0055 (Industrial Court) at 3
40 Rosli Ibrahim, supra n 36, at 17
41 Ahmad Fauzan Aziz, supra n 39, at 9-10
42 Mariama Hassan v British American Tobacco (Malaysia) Berhad [2008] 2 LNS 0781 (Industrial Court) at p 6
43 Ibid at 4-5
Termination benefits

Since a mutual separation is pursuant to mutual agreement, the termination benefits negotiated will likely exceed the statutory benefits and parties will determine the terms of payment.

Mandatory reporting obligation

Unless redundancy is stated as the reason for the mutual separation, a company does not have to give any notice applicable to a retrenchment and VSS to the Labour Department.

Unjust dismissal

The burden is on the employee to prove that he did not voluntarily enter into the mutual separation agreement.44

Resignation on terms

A resignation on terms is a termination of the contract of employment by an employee based on an understanding that the company will respond with some form of consideration. The understanding is formalized in the form of an exchange of letter of resignation and an acceptance of the resignation with an undertaking to pay.

Termination benefits

As the employee is voluntarily resigning from his service and terminating the contract of employment on his own accord, termination benefits are not payable.45 Any payment agreed by the company will be enforced in a contract or by an undertaking.

Mandatory reporting obligation

Resignation by an employee is not a termination. Hence the question of notice to the Labour Department which applies to a retrenchment and VSS is irrelevant.

Unjust dismissal

A resignation on terms is valid unless the employee establishes grounds showing that he was forced to resign.46

Pros and cons of each modality

Retrenchment

A company may choose to retrench where there are compelling financial reasons and the company cannot afford the luxury of a VSS which is flexibility in selection. If a company chooses to retrench, besides statutory benefits and mandatory reporting obligations, the company must also comply with the requirement of giving notice of termination or salary in lieu of notice47 as well as restrictions under the Act pertaining to termination of a female employee who is on maternity leave48 or a local employee.49

Some employees may prefer to arrange a mutual separation or resignation on terms to avoid the stigma of being retrenched.

VSS

A VSS is more flexible as the company will have full discretion of selection. It is a recommended measure under the Code of Conduct in the event retrenchment becomes necessary.50 However, it requires generous incentives as an inducement for the employee to volunteer

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44 Timber Master Trading (M) Sdn Bhd v Jane Wang Sing Fang [1994] 2 ILR 1293 (Industrial Court) at 1296a–c; Encik Nik Adnan bin Nik Mohd Salleh v People-Johnson Controls (M) Sdn Bhd [2007] 2 LNS 1401 (Industrial Court) at 33-35
45 For employees who fall under the Act, statutory benefits are not payable pursuant to reg 4(1)(c) of the 1980 Regulations
46 Omron Electronics Sales and Services Sdn Bhd v Phoon Wai Kit & Anor [2010] 7 CLJ 372 (HC) at paras 26, 27 and 30; Mohamed Ali Mohamed Ariffin v Commercial Marketers and Distributors Sdn Bhd [2016] 1 ILR 376 (Industrial Court) at paras 28-30 and 33-36
47 Either pursuant to ss 12(3) and 13 of the Act or contract of employment
48 Section 37(4) and its proviso and section 42 of the Act; failure to comply is an offence and the company shall be liable, on conviction, to a fine not exceeding RM10,000 under s 99A of the Act
49 Section 60N of the Act provides that a company shall first terminate the services of its foreign employees, other things being equal, before terminating the services of the local employee. This is also known as the “foreign workers — first out” (FWFO) rule. A company which contravenes this section shall be liable, on conviction, to a fine not exceeding RM10,000. See also paragraph (22)(b)(iii) of the Code of Conduct.
50 Code of Conduct, para (22)(a)(ii); Silverstone Bhd v Ahmad Azizi Abdul Aziz & Ors & Other Cases [2004] 3 ILR 99 (Industrial Court) at 113c-d
Para 15 of Schedule 6 of the Income Tax Act 1967 provides tax exemption only in respect of such sums which do not exceed an amount ascertained by multiplying the sum of RM10,000 by the number of completed years of service. Also see Public Ruling No 1/2012 on Compensation for Loss of Employment.

Mutual separation
This modality is suited for small-scale reorganisation involving fewer and specific redundant positions. It is a strategic reduction as opposed to a general reduction in numbers. Parties are also free to negotiate and set the terms of the mutual separation, such as:

1. when the termination of employment would take effect;
2. waiver of notice period;
3. early release;
4. the amount of termination benefits;
5. the terms of payment; and/or
6. confidentiality of the negotiations.

An employee will leave his employment with a clean employment record, adequate termination benefits and on attractive terms.

Resignation on terms
This is a solution to a delicate situation where both parties are reluctant to face full confrontation. The employee has the opportunity to leave with a clean employment record and on good terms.

However, the employee may not be entitled to tax exemption, with respect to the consideration he receives, under the Income Tax Act 1967 which is available to termination benefits or compensation for loss of employment paid pursuant to a retrenchment, VSS or mutual separation.

Moving forward
There is no hard and fast rule when choosing or implementing the modality for termination of employment as long as the company observes the relevant laws and good industrial relations practices. Ultimately, a company should arrive at a modality that would best suit its needs and interest.

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Decoding the Law on Fixed-Term Contracts

Security of tenure
An employee in Malaysia has security of tenure. He cannot be dismissed without just cause or excuse. If he considers himself to have been so dismissed, he has a statutory right to make representations in writing to the Director General of Industrial Relations to be reinstated. The Director General will then take such steps as he may consider necessary or expedient for an expeditious settlement. Where the Director General is satisfied that there is no likelihood of the representations being settled, he will notify the Minister, who may, if he thinks fit, refer the representations to the Industrial Court for an award.1 The employer may find himself liable to substantial monetary compensation should the Industrial Court find in favour of the employee.

The principle of security of tenure guarantees an employee’s legitimate expectation to continue in his employment and to earn his livelihood unless his employer has just cause or excuse to terminate his services.2 The right to be engaged in gainful employment is a proprietary right which may not be forfeited unless there is just cause or excuse.3

The only exception to the principle of security of tenure is an employee engaged on a fixed-term contract. An employee engaged on a fixed-term contract enjoys security of tenure only for the duration stipulated in his employment contract. A fixed-term contract of service, unless a termination occurs earlier, ceases upon the expiry of the agreed term. There is a possibility of an employer evading the statutory guarantee of security of tenure by using a series of fixed-term contracts.4

An employer has the flexibility to arrange his contractual employment relationships in the best interests of his business including structuring contracts for the employment of their personnel on fixed terms where the need for an employee’s services is for a certain fixed duration. This, however, would need to be balanced against an employee’s right to security of tenure.5

The task of the Industrial Court is, therefore:

“... to determine whether the contract between the parties was intended to be only for a fixed duration which comes to an end when the purpose of the employment for a definite duration has ceased to exist or one, though specified to be for a fixed number of years, is an ordinary contract which was intended to continue unless some just cause or excuse arises for a termination or non-renewal”.6

1 Industrial Relations Act 1967 [Act 177], s 20
2 Malaysia Airlines Bhd v Michael Ng Liang Kok [2000] 3 ILR 179 at 186E
3 Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481 (CA) at 510
4 Han Chiang High School v National Union of Teachers in Independent Schools, West Malaysia [1988] 2 ILR 611 at para 9
5 Malaysia Airlines, supra n 2, at 186C
6 Ibid, at 182C
If necessary, the Industrial Court will go behind the text of the employment contract. Employees have to be protected against the deprivation of their rights through ordinary employments dressed up in the form of temporary fixed-term contracts.7

When an employee on a fixed-term contract does not have his contract renewed or extended, he may assert that the non-renewal is tantamount to a dismissal, thereby invoking the mechanism provided under s 20 of the Industrial Relations Act 1967 on unfair dismissals.

**Fixed-term contract**
For a fixed-term contract to be accepted as authentic, it must be based on a genuine operational requirement. The Industrial Court will undertake an inquiry into the question whether an employer had a genuine need for the services of an employee for a fixed duration:

“... it would be an obvious loophole if any employer could evade the statutory protection by making a series of contracts of finite duration with his workmen.

“The Court, however, is aware that on the other hand there are genuine fixed term contracts, where both parties recognise there is no understanding that the contract will be renewed on expiry. The Court realises that such genuine fixed-term contracts for temporary, one-off jobs are an important part of the range of employment relationships. Some such jobs are found in seasonal work, work to fill gaps caused by temporary absence of permanent staff, training, and the performance of specific tasks such as research projects funded from outside the employer’s undertaking.”8

**Employer’s prerogative**
An employer can also hire retired employees on a contractual basis in order to tap into their experience and cut back on training costs. The categories of work for which employees can be suitably engaged under fixed-term contracts are, of course, not closed.

**Renewal of contract**
In *Sime UEP*,9 a clerk was employed for four years on a contract that was renewed annually. During his four years there, the employee was involved in various projects. The Industrial Court held that an employee cannot be considered to be employed for a temporary or one-off job if he was not employed for a particular project and he had been involved in various projects during his tenure.10

In *Malaysia Airlines*, the employee was engaged on a fixed-term contract of two years as second officer in the Rural Air Service. He was confirmed in his position as second officer two months later. Eight months into his employment, he was promoted as a commander and was confirmed in that position after serving a probationary period of six months. His fixed-term contract was subsequently renewed twice, each time for three years. When the employee wrote to the company on the forthcoming expiry of his third fixed-term contract, he was given a three-month contract by the company. The Industrial Court, in finding that the employee’s employment had been permanent, considered that the Rural Air Service was not a temporary operation and that it did not have a definite duration beyond which the cessation of the business is inevitable.11

**Purpose of engagement**
Factors that determine the true character of a fixed-term contract include the nature of the employer’s business and the nature of the work which an employee is engaged

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7 Terry v East Sussex Country Council [1976] ICR 536 at 571G
8 Han Chiang High School, supra n 4, at paragraphs 9 and 10
9 Sime UEP Development Sdn Bhd v Chuah Poi [1996] 1 ILR 256
10 Ibid, at 262C
11 Malaysia Airlines, supra n 2, at 187F
to perform. For example, a mediator who carried out the company’s core functions and objectives, and who had been an integral part of the company’s main functions was held to be in permanent employment and not on a fixed-term contract. The case, however, may have been decided differently had the company remunerated the mediator on a case-to-case basis rather than a monthly salary to demonstrate her engagement on a limited basis.

Where it is plain that an employee’s services are required on an ongoing basis rather than for a definite term, he ought to be engaged in the ordinary way instead of a contract for a fixed term which automatically expires at the end of the term.

Terms of employment
The terms and conditions stipulated in a fixed-term contract must be consistent with the nature of the engagement. Additional care should also be taken by employers in drafting the fixed-term employment contract to mitigate the risk of the same being seen as a permanent contract. For example, clauses that are commonly seen in permanent employment contracts would be indicative that the fixed-term contract is in fact a permanent contract. These would include clauses subjecting an employee to a probationary period, providing for a yearly increment and bonus, retirement age, long service awards and benefits that are contingent on the years of service with the employer such as annual leave and medical leave.

Employers should also ensure that the fixed-term contract does not provide entitlement to benefits that are only available to permanent employees. Fixed-term contracts should also not include automatic renewal provisions.

Conduct of parties
A genuine fixed-term contract may be construed as a permanent contract due to the conduct of the parties in the performance of the contract of employment. An employee who is retained on a series of fixed-term contracts may be considered by the Industrial Court to be a permanent employee. The total duration or length of service with an employer is also a factor that would be taken into account.

In Holiday Villages, a resort employed both seasonal and permanent employees. Seasonal employees had a fixed term in their contracts which would range from three to six months or for a season. The resort was not open for the whole year and would be closed during the monsoon season which falls between November and January of each year. The employee had begun employment on a fixed-term contract for one season. He was subsequently employed for six consecutive seasons. The Industrial Court acknowledged that the resort was only open for

13 Malaysia Airlines, supra n 2, at 186E
14 Ibid, at 188F. See also Audrey Yeoh, supra n 12, at para 25
15 Han Chiang High School, supra n 4 at para 13. See also Sime UEP, supra n 9 at 262C and Inoprise Corporation Sdn Bhd, Sabah v Sukumaran Vanugopal[1993] 1 ILR 373B at 377G
16 Han Chiang High School, supra n 4, at para 13
17 Holiday Villages of Malaysia Sdn Bhd v Mohd Zaizam Mustafa [2006] 2 LNS 0812
nine to ten months in a year and that there was a genuine need for fixed-term contracts as it was inconceivable to expect the resort to pay salaries when it was closed. Notwithstanding the genuine need for fixed-term contracts, the Industrial Court found that the employee was, by the last fixed-term contract in the series of fixed-term contracts, a permanent employee of the resort as:

(a) he was employed even during the off-season as a laundry supervisor;

(b) he was given a new contract without the need to reapply; and

(c) he was able to continue in employment even after the alleged expiry of his penultimate fixed-term contract without an extension. 18

In Han Chiang High School, the school had employed teachers on fixed-term contracts of two years. A number of teachers who had joined the Union of Teachers in Independent Schools were informed that their employment would cease upon expiry of the fixed-term contract. The union applied to the High Court for an interlocutory injunction restraining the school from terminating the services of the teachers.

The High Court granted the injunction but the then Supreme Court subsequently set aside the injunction. After the injunction was set aside, the school proceeded to inform the teachers that their services were no longer required. The Industrial Court held that although there might have been a genuine need for fixed-term contracts when the school was first inaugurated, there did not appear to be such a need when it had been successfully established as some of the teachers had taught for more than 20 years and had their contracts renewed unfailingly during those years. 19 In holding that the fixed-term contracts were not genuine, the Industrial Court stated that the system of fixed-term contracts in the school was employed not out of genuine necessity, but as a means of control and subjugation of its teaching employees. 20

In Telekom Malaysia, 21 five employees were migrated to fixed-term contracts in 2003 as part of a transformation plan to improve the performance of government-linked companies (“GLCs”). One such GLC, Telekom Malaysia Berhad, had offered all senior management officers the option of either remaining under current terms as permanent employment or to accept fixed-term contracts. Employees would have to resign from their permanent employment before accepting the fixed-term contracts. In consideration thereof, such employees would be paid higher salaries and receive increased benefits and allowances. The dispute arose when five of those officers did not have their fixed-term contracts renewed. They lodged a complaint under s 20 of the Industrial Relations Act 1967, but the Minister declined to refer the matter to the Industrial Court. The employees applied for judicial review of the Minister’s decision. At the High Court, the decision of the Minister was upheld. Three of the five employees appealed to the Court of Appeal, which allowed the appeal and referred the matter to the Industrial Court.

18 Ibid, at 31
19 Han Chiang High School, supra n 4, at para 13
20 Ibid, at para 15
21 Osman bin Muhamad & Ors v Menteri Sumber Manusia & Anor Judicial Review No R2-25-434-2007, taken on appeal to the Court of Appeal in Hasni Hassan & Ors v Menteri Sumber Manusia & Anor [2013] 3 ILR 239
While holding that it is for the Industrial Court to deliberate on the genuineness of the fixed-term contract, the Court of Appeal stated that the GLC had genuine intentions when they offered the fixed-term contracts to their senior management as their intention was to increase performance and productivity and, in return, the senior management would be able to earn higher incomes. The Court of Appeal went on to state that this was part of a business plan and there was no ulterior or sinister motive on the part of the GLC when they offered the fixed-term contracts and the fixed term was not a guise to shorten the employment of the employees previously on permanent contracts.22

In allowing the appeal, the Court of Appeal was of the opinion that since an assessment of performance was a key ingredient for the renewal of the fixed term, a failure to hold or carry out an assessment is a question of law for the Industrial Court to decide. The Court of Appeal went on to state that the contract was termed in a manner to imply that the GLC was obliged to consider an extension based on the outcome of the assessment.23

Other considerations and factors that have been taken into account by the Industrial Court when finding that a fixed-term contract was, in fact, a permanent contract are:

(a) promoting an employee on a fixed-term contract during the fixed term;24

(b) providing bonus to an employee on a fixed-term contract as enjoyed by every other employee of the company;25 and

(c) providing a pay increase each time the fixed-term contract is renewed.26

To avoid providing permanency to the employee under a fixed-term contract, employers should ensure that employees are aware that any subsequent extension of the fixed-term contract or offer of a new fixed-term contract is subject to a review of the employer’s business and operational needs27 or other factors such as targets and performance reviews.

Minimum retirement age
Effective 1 July 2013, the minimum retirement age of an employee in the private sector shall be upon him or her attaining the age of 60 years.28 Retirement is defined as termination of a contract of service of an employee on the ground of age.29

The Minimum Retirement Age Act 2012 ("MRAA 2012") does not apply to nine categories of employees which, among others, include a person employed on a fixed-term contract of service, inclusive of any extension, of not more than 24 months.30

An employee’s fixed-term contract is not caught by the MRAA 2012 if the contract of employment is a one-off, fixed-term contract for 24 months or less. In other words, the minimum retirement age would not apply.

When an employee is employed on a fixed-term contract, it is unlikely that he will be retired during the course of his employment as doing so would lead to a breach of contract. If there is a clause on retirement in the fixed-term contract, it would be inconsistent with the character of a fixed-term contract. At this juncture, however, it is uncertain how the MRAA 2012 would affect employees employed on fixed-term contract.

22 Hasni Hassan, supra n 21, at 247G
23 Ibid, at 290C
24 Malaysia Airlines, supra n 2, at 188F
25 Ibid
26 Id at 188F. See also Sime UEP, supra n 9 at 262C; and Audrey Yeoh, supra n 12 at para 25
27 Royal Selangor International Sdn Bhd v Peter Francis De Souza [2006] 3 ILR 2146, at para 25
28 Minimum Retirement Age Act 2012 (Act 753), s 4(1)
29 Ibid, s 3
30 Id, exception (h) of paragraph 1 of the Schedule
If there is an employee on a fixed-term contract, inclusive of any extensions where it exceeds 24 months, it would by operation of law bring the employee within the scope of the MRAA 2012. The employee therefore may, in the event of non-renewal of his fixed-term contract, contend that the non-renewal was on the basis of his age and in violation of the MRAA 2012.

**Conclusion**

Employers with a genuine operational need to employ employees on fixed terms must ensure that the terms of the contract are consistent with the character of fixed-term contracts and are not that of permanent employment. Employers must also be aware that their subsequent conduct during the course of employment may be relevant in determining whether an employee will be held to be employed under a fixed-term or permanent contract of employment.

While the law does not interfere with the employer’s rights to utilise fixed-term employment contracts, it would require the employer to be able to justify their use of a fixed-term contract to prevent exploitation of workers by circumvention of the statutory protection of security of tenure using the device of such contracts.

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A front runner in the field of employment, Dato’ Thava has earned tremendous praise from peers for his extensive knowledge. He has been involved in some of the more significant, high-profile employment disputes in recent Malaysian history. He is a highly visible figure in the market, has authored several publications and has been rightfully acknowledged by Euromoney as a “leading labour lawyer” in the country. Clients appreciate his ability to give comprehensive advice even in challenging situations.

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