



# TOPIC 6

● **Law of Employment**

# OUTLINE

- Overview
- Contract of Service
- Contract for Service
- Redundancy
- Unfair Dismissal
- Remedies of employee




# OVERVIEW

- Employment law applies in governing relationship between employer and employees.
- Self-employed persons are not workers, are not protected by employment laws.
- In Malaysia, the employer –employee relationship is regulated by Employment Act 1955 and Industrial Relations Act 1967.
- EA uses the ‘contact of service’ while IRA uses the term ‘contract of employment’.



# CONTRACT OF SERVICE

- There are 2 types of contract which govern the relations between an employer and those who work for him.
  - An employee is one who has a contract of service.
  - A contract of service can be in the form of a letter of appointment/employment. The employer cannot change the terms and conditions of employment unless the employee agrees to it.
  - Any terms and conditions of employment, in a contract of service, that is less favorable than the relevant provision under the Employment Act is illegal, null and void.
  - The provision in the Act will take precedence over a particular contractual term that is less favorable.
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- The EA defines the contract of service' as :

*'any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee, and includes an apprentices contract'.*

- 'employer' as:

*'any person who has entered into a contract of service to employ any other person as an employee...'*

- 'employee' as:

*'any person or class of persons- included in any category in the First Schedule to the extent specified therein...'*



# EMPLOYEE AS IN THE FIRST SCHEDULE

- Irrespective of his occupation, who has entered into a contract of service, wages do not exceed 2000 ringgit a month.
- Irrespective of the amount of wages, has entered into a contract of service and who engaged in manual labour or engaged in the operation or maintenance of any mechanically propelled vehicle operated for the transport of passengers or goods or for reward or for commercial purposes.



- He supervises or oversees other employees engaged in manual labour employed by the same employer in and throughout the performance of their work.
- He is engaged in any capacity in any locally registered vessel but is not a certified officer.
- He is engaged as a domestic servant.



- The IRA defines the ‘contract of employment’ as :

*‘any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as a workman and that other agrees to serve his employers as workman’.*

- ‘employer’ as:

*‘any person or body of persons, whether corporate or unincorporate, who employs a workman under a contract of employment, and includes the government and any statutory authority unless otherwise expressly stated in this Act.*





○ 'workman' as:

*'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'.*



# CONTRACT FOR SERVICE

- In a contract for service, there is no employer and employee relationship.
- The person is usually self-employed or may provide his/her services on a freelance basis at a fee. He/she is not an employee within the definition in the Employment Act.



# DIFFERENCE BETWEEN A CONTRACT OF SERVICE AND A CONTRACT FOR SERVICE

- A contract of service is an agreement whereby one person agrees to employ another as an employee and the other agrees to serve his employer as an employee.
- The employer would need to contribute EPF and comply with relevant statutory benefits such as annual leave, sick leave and etc for its employees engaged under a contract of service.
- On the other hand, a contract for service is an agreement whereby a person is engaged as an independent contractor, such as a self-employed person or vendor engaged for a fee to carry out an assignment or a project for the company.
- Under such a work arrangement, there is no employer-employee relationship, and the employee is not covered by the Employment Act.



- There is no single conclusive test to distinguish a contract of service from a contract for service. Some of the factors to be considered in identifying a contract of service include;
  - Control Test
  - Independence Test
  - Integration Test
  - Economic Reality Test



## ○ **Control Test**

- How much control is being exercised over the worker by the employer.
- The more control that is being exercised, the more likely it is that the worker is an employee regardless of what the contract says.
- However, in more recent days, because people are becoming more specialized, employees will often know more about the subject area they are working in than their employers.

## ○ **Independence Test**

- Does the worker have independence in deciding how his work is to be done or can he decide his own work hours, subcontract out work, and etc.



## ○ **Integration Test**

- Is the work being performed under the contract integral to the operation of the business structure as a whole, or is it only works on the side of the main business?
- One feature which seems to run through the instances is that under a contract of service, a person is employed as part of the business and his work is done as an integral part of the business whereas under a contract for service, his work, although done for the business, is not integrated into it but is only an accessory to it.
- **Economic Reality Test**
- Is the worker dependent upon the job for economic survival.



# REDUNDANCY

- Means superfluity or abundance.
- In the context of labour law it means a surplus of labour and due to this superfluity, the workers need to be removed or retrenched.
- This means a redundancy will lead to retrenchment.
- Retrenchment means to lose a job, due to no fault on part of the worker.
- The Ministry of Human Resources, Malaysia defined retrenchment as termination of contract of service of the employees in a redundancy situation which arise from several factors, such as closure of business, restructuring, reduction in production, mergers, technological changes, take over, economic downturn and others.

- No statutory definition of redundancy or its reasons in Malaysia.
- Sec 139 (1) ERA 1996 U.K- specified definition and reasons of redundancy.
- That section is in pari materia with Sec 12 (3) EA, Malaysia (notice provision).
- The employers is shutting down the business entirely. (Business disappears- Sec 12 (3) (a)).
- The employer is shutting down the business in the place where the employee works. (Place of work disappears- Sec 12 (3) (b)).





- The employer eliminates the work the employee does, either generally or in the particular place of work. (The job disappears in its entirety- Sec 12 (3) (c)).
- The number of people doing that job is to be reduced but not eliminated. (Fewer people are required in the job – Sec 12 (3) (d)).



# CAUSES OF REDUNDANCY

- Global Economic Turndown
- Recession
- Losses
- Declining profits
- Loss of market share
- Restructuring
- Take over and mergers
- Management buys-out
- Automation



# RESULTS OF REDUNDANCY

- Reshuffling of employees
- Bumping of staff
- Retrenchment



# REDUNDANCY COMPENSATION

- Redundancy is an act of removing workers from an organisation due to certain circumstances and the workers involved will be compensated for loss of employment.
- In Malaysia, the Employment (Termination and Lay-off benefits) Regulations 1980 deals with termination benefits.
- Employees who have been in continuous employee is entitled to is provide by regulation 6:



Years of Service	Entitlement
If employed less than 2 years	10 days wages for each year of service
Employed more than 2 but less than 5 years	15 days wages for each year of service
Employed more than 5 years	20 days wages for each year of service



# UNFAIR DISMISSAL

- The term of 'unfair' means an action made in according to the law, but morally discreditable. The term 'unjust' also carries the same meaning as 'unfair'.
- Unlike wrongful dismissal, exists under the common law, means the dismissal is made not according to the law, for instance, occurs when the employee is dismissed without or with inadequate notice, irrespective whether the dismissal is fair, just or with excuse.



## WHAT CONSTITUTES A DISMISSAL WITHOUT ‘JUST CAUSE AND EXCUSE’?

- In order to determine whether such dismissal valid or not, the test is very subjective.
- In the FC’s case of *Goon Kwee Phoy v J & P Coats (M)* [1981], Raja Azlan Shah CJ stated that;
- “...Section 20 (1), in our view deliberately, couched in subjective terms. Where a non-union workman considers that his dismissal is without just cause or excuses, he may make representations for his reinstatement. It is not whether he had been dismissed without just cause or excuses, but it is how he considers he had been treated by his employer that constitutes the test for his action.”

- In the case of *Dr. Dutt v Assunta Hospital [1981]*, Federal Court of Malaya stated that there is no difference between termination of contract of services with notice or without notice.
- If the employees thinks that he/ she had been terminated wrongfully or without good cause, therefore he/she can used Section 20 (1) IRA to file an action against the employers.





# ARTICLE 135 OF FEDERAL CONSTITUTION

- No member of public service shall be dismissed or reduced in rank except:
- (a) only by an authority that appointed him in the first place; and
- (b) after being given a reasonable opportunity of being heard.



# REASONABLE NOTICE

- At Common Law, contract of service may be determined by serving appropriate notice express in the contract or implied reasonable notice.
- Factors considered:
  - (a) Age of the worker
  - (b) Length of loyal service
  - (c) Nature and character of employment
  - (d) Manner of dismissal from employment
- Other factors: position held by the employee, the size of the workers salary, what the worker had given up to come to be employed with the employer, and economic crisis or recession.



## AGE OF THE WORKER

- Permanent employment does not imply a contractual right to a freehold tenure of the post or employment for life.
- In the absence of grounds justifying early termination of the contract of employment, the employee is subject to a compulsory retirement age that ranges between 55 and 65 years.
- Senior employees who have been dismissed may face difficulties in finding alternative employment. (due to general view that the productivity among aged employee declines over years).



## LENGTH OF LOYAL SERVICE

- Long-term employment carries weight in the assessment of the notice period. An employee who has devoted a large part of his working life to a particular position of employment, working his way up through the ranks, developing expertise and knowledge in the affairs of his employer and enjoying the rewards of his efforts, would have difficulties in finding other jobs.
- Thus, along-term employees would require a longer period of notice when they are discharged from employment.



# NATURE AND CHARACTER OF EMPLOYMENT

- An employee whose expertise is gained through experience and his knowledge is highly specialized may find it extremely difficult to obtain other suitable employment.
- Thus, manual workers generally receive a shorter notice period than one who is in the managerial or professional category.



# MANNER OF DISMISSAL FROM EMPLOYMENT

- Manner of dismissal was only recognized recently as a factor in computing reasonable notice as in the Canadian case, *Wallace v United Grain Growers Ltd.*
- The employer's prerogative of hire and fire must be qualified and they should refrain from engaging in conduct that is unfair or is bad faith being, for example, untruthful, misleading or unduly insensitive.

