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1. *Complying with 60 Days' Time-Frame Under Section 20(1) of the Industrial Relations Act during COVID-19 [2020] 3 MLJ xxv*

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COMPLYING WITH 60 DAYS' TIME-FRAME UNDER SECTION 20(1) OF INDUSTRIAL RELATIONS ACT 1967 DURING COVID-19

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INTRODUCTION

An employee alleging dismissal without just cause or excuse will have to comply with certain statutory requirements before his claim may be referred to and adjudicated in the Industrial Court. This includes, inter alia, the sixty days statutory limitation period in s 20(1) of the Industrial Relations Act 1967 ('the IRA'). The dismissal date would be obvious in a direct dismissal as the dismissal is initiated by the employer either with or without notice. However, in a constructive dismissal the date of the dismissal is subjective[1] Generally, it would begin from the moment the employee resigns or quits employment due to the fact that the employer had breached the fundamental term of the employment contract. In either case, the employee must ensure that his representations under s 20(1) of the IRA is lodged at the Industrial Relations Department nearest to his place of residence within the statutory 60 days period. Failure to do so would jeopardise the dismissed worker's claim for reinstatement under the IRA.

However, the complication arises when a dismissed employee is deprived or prevented from filing the representations under s 20(1) of the IRA due to circumstances beyond his control such as during the recently enforced Movement Control Order ('MCO') from 18 March to 12 May 2020 and thereafter, the conditional Movement Control Order (CMCO) until 9 June 2020. This situation was encountered by S Tanabalan, the former supervisor of a security firm, who was dismissed from employment on 5 March and the last date to lodge his representations under s 20(1) of the IRA was on 3 May, during the MCO period wherein all government and private premises, except essential services, were closed, a preventive measure to contain the spread of Covid-19 infection. He only made attempt to file the representation during the CMCO namely, on 19 May. Unfortunately, however, his representation was declined by the Selangor Industrial Relations Department as it was way outside the 60 days deadline.[2] In light of the above, this article discusses the mandatory 60 days limitation requirement under the IRA with reference to the enlargement or extension of the period under the exceptional circumstances. It is worthwhile noting that the lodging of the representations under s 20(1) of the IRA with the Director General of the Department must be made in writing. The dismissed worker is required to lodge the representation with the department either personally or through his authorised agent. The electronic filing or e-filing services as in the civil courts and the Industrial Court[3] is currently not available at the department.

DISMISSAL WITHOUT JUST CAUSE OR EXCUSE: THE 60 DAYS LIMITATION PERIOD

The IRA requires that a workman who considers that his dismissal had been without just cause or excuse must file his representations in writing at the Industrial Relations Department nearest to the place where the workman is residing.[4] It has to be done not later than 60 days from the moment he considers himself to have been dismissed without just cause or excuse.[5] Section 20 of the IRA is reproduced below:

> (1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.
>
> (1A) The Director General shall not entertain any representations under subsection (1) unless such representations are filed within sixty days of the dismissal:
>
> Provided that where a workman is dismissed with notice he may file a representation at any time during the period of such notice but not later than sixty days from the expiry thereof.

The sample representation Form is available at Industrial Relations Department official webpage[6] where the information required therein, inter alia, are his name, address, last position held and last drawn salary before termination, the employer's name and address and the reasons of the dismissal, if known to the claimant. The term 'in writing' or 'written' under s 20(1) above is defined in s 3 of the Interpretation Acts 1948 and 1967 as 'typewriting, printing, lithography, photography, electronic storage or transmission or any other method of recording information or fixing information in a form capable of being preserved'. As from the above, the representation has to be either handwritten or typewritten.

Where the dismissal was with notice, the workman may file the representation at any time during the period of such notice but not later than 60 days from the expiry thereof.[7] As mentioned earlier, in a direct dismissal, the dismissal is initiated by the employer whose managerial prerogative is recognised and this include dismissing workers on valid basis such as unsatisfactory or poor work performance, incompetency, absenteeism, insubordination, stealing, assault, bullying, drunkenness, serious violation of employer's policies and practices, damaging employer's property and using employer's property for personal business, among others. In the aforesaid circumstances, the date of the dismissal would normally be made known or specified and thus, the 60 days limitation begun from the date of the dismissal.

However, in a constructive dismissal the 60 days limitation period is subjective, namely, from the moment the employee considers himself as having been dismissed due to a significant breach of the employment contract by the employer. The term 'constructive dismissal' denotes that the employer has breached a significant term of the contract of employment going to the root of the contract, whether the breach is an essential term of the employment contract or some conduct of the employer, such as making working life of the worker intolerable, the demotion or a transfer order being tainted with bad faith, among others. The wrongful conduct of the employer would enable the worker to claim that the employer had evinced an intention no longer to be bound by the contract of employment and hence, the claimant regards himself as having been dismissed, resign from employment without serving notice and thereafter alleging dismissal without just cause or excuse.

In *Malaysian Airline System Bhd v Abdul Kader bin Mohamed Zulman Kajang*,[8] the court cited with approval the following English cases namely, *Brindle v HW Smith (Cabinets) Ltd*,[9] and *Lees v Arthur Greaves (Lees) Ltd*,[10] which held, inter alia, that where a dismissal is by way of notice, the date of dismissal is the date on which the notice expires. Again, in *Mohamed Shah Shahbudin v Hotel Grand Paragon Sdn Bhd*,[11] the last date of claimant's service with the company was 16 February 2018 and hence, the termination could only take effect on 16 February 2018. Likewise, in *Naga Eshwary Nadarajah v AIG Shared Services (M) Sdn Bhd & Anor*,[12] the letter of termination stated that 'your employment with the company shall end on 14th May 2016'. It was held that the termination letter made plain and clear that the notice period expires on 14 May 2016. Hence, the above phrase needs to be given its effect and there is no necessity to import any other interpretation.

In *Naga Eshwary Nadarajah*'s case, the trial judge referred to the following passage from the English Court of Appeal's case in *TBA Industrial Products Ltd v Morland*:[13]

> The Employment Appeal Tribunal and the Industrial Tribunal had correctly concluded that the effective date of termination of the respondent employee's employment was the date on which the employers' notice of dismissal to him expired, notwithstanding that the employee had left before that date with payment in lieu after filling in a form provided by the employers stating that he wished to terminate his employment and to leave early. The present case was one where notice was given by the employer, but the employee was allowed to leave early receiving pay as if he had worked out his notice. Nothing happened to alter the original notice and the EAT and the Industrial Tribunal, therefore, correctly found that the respondent's unfair dismissal complaint was made within the requisite three-month period from the effective date of termination.

60 DAYS LIMITATION PERIOD: THE RATIONALE

The underlying rationale of the 60 days limitation period is twofold; firstly, to bring the impending application to the attention of the employer so that the dispute could be resolved expeditiously, and secondly, to allow the workman to obtain a cheap and speedy remedy to be reinstated into his former position as if no dismissal had taken place. If there was no time-frame to make the representations under s 20(1) of the IRA, it would certainly place the employer in a difficult position if claims for reinstatement could be made months or even years after the dismissal. The above was succinctly noted by Raja Azlan Shah CJ (Malaya) in *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors*.[14] In particular, His Lordship stated:

> In our view the whole purpose of this part of the legislation is to provide workmen with a cheap and speedy remedy to obtain reinstatement. Quite clearly it would be extraordinarily difficult for employers to keep industry going if claims for reinstatement on the ground of wrongful dismissal could be made many months or years, instead of the statutory period of one month, after dismissal had taken place. Under s 20(1) of the Act, a workman who claims reinstatement for wrongful dismissal is bound to comply with a very strict time limit. He must present his claim within one month of the dismissal. There is no similar escape clause as is provided by para 21(4) of Schedule 1 to the (UK) Trade Union and Labour Relations Act, 1974, on the ground that it is 'not practicable' to present a claim within the statutory period: see, for instance, *Wall's Meat Co Ltd v Khan* [1979] ICR 52. It is for that special reason that the time-limit clause with no escape clause is inserted in the section. It is so strict that it goes to the jurisdiction of the industrial court to hear the complaint. By that we mean that, if the claim is presented just one day late, the court has no jurisdiction to consider it

FAILURE TO LODGE REPRESENTATION WITHIN 60 SIXTY DAYS LIMITATION PERIOD

Where a workman fails to refer his representations to the Industrial Relations Department within the aforesaid period, it goes to the power of the Director General to entertain the complaint. Section 20(1A) of the IRA states that

> the Director General shall not entertain any representations … unless such representations are filed within sixty days of the dismissal.

It follows that s 20(1A) is a mandatory provision.[15] Even if the delay is just by one day, the Director General shall cease to have the power to entertain the representation. It does not matter whether the employer consents for the dispute to be submitted after the expiry of the aforesaid period.

The failure to lodge the representation within the aforesaid period would also affect the threshold jurisdiction of the Industrial Court to entertain the representation. Where the representation has been referred to the Industrial Court for an award, the Court is empowered to entertain, pursuant to ss 29(fa) and 29(g) of the IRA, the employer's preliminary objection as to whether the claimant's representation had been filed outside the statutory 60 days period. In *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd*,[16] Gopal Sri Ram JCA stated:

> It follows that in all cases where a party to a trade dispute intends to question the threshold jurisdiction of the Industrial Court to make an adjudication, save upon the limited ground that the representations under 20(1) were made out of time, he must do so by seeking to quash, by certiorari, the Minister's reference and, in the same proceedings, seek an order of prohibition against the Industrial Court from entertaining the dispute upon the ground that the latter has no jurisdiction to make an adjudication. Where a challenge is not thus taken, the Industrial Court must be permitted to decide the dispute to conclusion and in the process to deal with the jurisdictional question, e.g. whether the particular claimant is or is not a workman or whether the matter involves the exercise of extra-territorial jurisdiction. On no account ought such matters to be taken or dealt with as preliminary objections. Any other course would, as we have earlier observed, obstruct a speedy disposal of a trade dispute and thereby cut across the spirit and intendment of the Act.

In *Chandran a/l Mariamuthu v United Vehicles Industries Sdn Bhd*,[17] as the claimant was dismissed on 17 March 2018 he should have lodge his representation with the Industrial Relations Department on or before 16 May 2018. Unfortunately, however, his representation was only lodged with the department on 22 June 2018, a delay of 37 days. The Industrial Court held inter alia, that the statutory time limit prescribed under s 20(1A) is a mandatory provision and the failure to comply with the same is fatal to an employee's claim.

It is noteworthy that s 30(5) of the IRA provides that the Industrial Court must act according to equity, good conscience and the substantial merits of the case without regard to technical rules such as estoppel, limitation, lathes and acquiescence. Such technical rules have no place in industrial adjudication and thus, should not be allowed to be invoked to defeat claims which are just and proper.[18] The 60 days limitation period however is statutorily imposed and thus, necessarily a fitting case where equity has to follow the law and not to replace or violate the law. Therefore, neither the Director General nor the Industrial Court could ignore or disregard the strict 60 days limitation provision.

FAILURE TO COMPLY WITH 60 DAYS LIMITATION DUE TO MCO

Reverting back to the plight of S Tanabalan, his representation under s 20(1) of the IRA was refused by the Selangor Industrial Relations Department as he had failed to lodge the same within the 60 days period. As stated earlier, he was dismissed on 5 March and the 60 days expires on 5 May. He was prevented from lodging the representation within the aforesaid period due to the MCO from 18 March–12 May, and thereafter, the CMCO till 9 June.[19] During the MCO, all business sectors and government departments, except for the essential services, was ordered to be closed.[20] The move was primarily aimed at flattening the infection curve of the coronavirus pandemic (COVID-19) which the World Health Organization ('WHO') had declared the outbreak as a Public Health Emergency of International Concern.

It is noteworthy that while the Federal Constitution guarantees individual right to move freely throughout the Federation and to reside in any part thereof, art 9(3) however empowers the Parliament to enact law which imposes restrictions in respect of movement and residence on grounds, inter alia, related to public health. Hence, the enactment of the Prevention and Control of Infectious Diseases Act 1988 and by virtue of s 11(2) of the Act, the Prevention and Control of Infectious Diseases (Measures Within The Infected Local Areas) Regulations 2020 was passed through which the MCO and the CMCO was enforced. Pursuant to reg 3(1) of the 2020 Regulations, anyone who flout the MCO would be deemed to have committed an offence and if convicted, a maximum fine of RM1,000 would be imposed. The MCO violators can also be charged under s 24 of the 1988 Act which carries a jail sentence of not more than two years or a fine or both. For subsequent offences, violators can be imprisoned for not more than five years or fined or both.

As stated earlier, the MCO had made it impossible for S Tanabalan to lodge his representations at the department within the 60 days period, namely, before 5 May 2020. It was during the CMCO, beginning 12 May, when the government began easing the partial lockdown, that he had attempted lodging the representation namely, on 19 May. Unfortunately, the Department refused to accept his representation as it was way beyond the 60 days deadline. Since the filing of representation under s 20(1) of the IRA is done manually, as the electronic filing service or e-filing is not made available at the department, the issue arises namely, whether the department was justified in refusing S Tanabalan's representation on 19 May 2020, during the CMCO?

It is humbly submitted that it is grossly unfair to refuse the representation of S Tanabalan since his failure to lodge it within the 60 days limitation period was not due to his own carelessness or negligence but was because of the circumstances beyond his control. As noted earlier, he was prevented from filing the representation within the 60 days period due to the strict enforcement of the MCO, where its violation would entail imprisonment or fine. Hence, this case should be considered as exceptional where the Department should have entertained his representation thought filed outside the 60 days limitation period. It is reiterated that S Tanabalan is not blameworthy, the strict enforcement of MCO had made it impossible for him from lodging the representation within the aforesaid period.

It is also worth noting s 54(1) of the Interpretation Acts 1948 and 1967 which deals with the computation of time. The above section is reproduced below:

> In computing time for the purposes of any written law —
>
> (a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;
>
> (b) if the last day of the period is a weekly holiday or a public holiday (referred to in this subsection as excluded days) the period shall include the next following day which is not an excluded day;
>
> (c) where any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next following day which is not an excluded day; and
>
> (d) where any act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

It is submitted that period when the MCO was enforced namely, from 18 March to 12 May 2020, should be considered as the 'excluded day' within meaning of the above s 54(1)(c). The said period should be excluded for purposes of the computation of the limitation period under s 20(1) of the IRA. In this regard, S Tanabalan's representation under s 20(1) which he had attempted to lodge on 19 May 2020 was well within the 60 days limitation period. Pursuant to the above section:

> the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next following day which is not an excluded day.

It is also worthwhile adding, that unlike in other jurisdictions such as in the United Kingdom, the IRA does not have provision to enlarge or extend the limitation period or to present grievance outside the limitation period by invoking the exceptional circumstances. The UK Employment Rights Act 1996, s 111(2) allows the enlargement of the limitation period in exceptional circumstances. The said section provides, inter alia, that an unfair dismissal grievance should be presented to the Industrial Tribunal before the end of a period of three months beginning with the effective date of termination. Cases outside the time frame may still be referred to the Tribunal, provided that the affected employee is able to establish to the satisfaction of the Tribunal, that it was 'not reasonably practicable' for the employee to present the grievance to the Tribunal before the end of the limitation period.[21]

Although the recently passed Industrial Relations (Amendment) Act 2019 had made some significant amendment to s 20 of the principle Act, the Industrial Relations Act 1967, it had nevertheless failed to consider including an exceptional circumstances clause into s 20(1A) of the IRA. The amendments to s 20 deals inter alia, with the shifting of the referral power of unfair dismissal representations to the Industrial Court from the Minister to the Director General of Industrial Relations, widening the scope of representation for conciliation and the provision enabling a guardian to represent a mentally disabled workman at conciliation meeting. Section 12 of the Industrial Relations (Amendment) Act 2019, which deals with the amendment to s 20 of the IRA, is reproduced below:

Section 20 of the principal Act is amended —

(a) in subsection (2), by deleting the words '; where the Director General is satisfied that there is no likelihood of the representations being settled, he shall notify the Minister accordingly';

(b) by substituting for subsection (3) the following subsection: '(3) Where the Director General is satisfied that there is no likelihood of the representations being settled under subsection (2), the Director General shall refer the representations to the Court for an award.';

(c) in subparagraph (6)(a)(ii), by deleting the word 'or';

(d) in subparagraph (6)(a)(iii), by substituting for the word 'and' the word 'or';

(e) by inserting after subparagraph (6)(a)(iii) the following subparagraph: '(iv) be represented by any other person except an advocate and solicitor, duly authorized by the employer in writing and subject to the permission of the Director General; and';

(f) in subparagraph (6)(b)(ii), by deleting the word 'or';

(g) in subparagraph (6)(b)(iii), by substituting for the full stop the words '; or;

(h) by inserting after subparagraph (6)(b)(iii) the following subparagraph: '(iv) be represented by any other person except an advocate and solicitor, duly authorized by the workman in writing and subject to the permission of the Director General.';

(i) by inserting after subsection 20(6) the following subsection: '(6a) In any proceedings under this section, where a workman being under a mental disability and not having a guardian ad litem, a next-of-kin of the workman may apply to the High Court for an order to appoint a guardian ad litem for the workman.'; and

(j) in subsection (7), by deleting the words ', adviser, consultant or by any other person whatsoever'.

As the legislature had 'overlooked' the need to include an 'exceptional circumstances clause' into s 20(1A), this omission has left the Director General or the Industrial Court with no jurisdiction to handle the representation referred to it beyond the 60 days limitation period. Hence, in all fairness and justice, it is pertinent to amend s 20(1A) by incorporating the exceptional circumstance clause thereby empowering the Director General or the Industrial Court to entertain representation lodged beyond the 60 days limitation period under exceptional circumstances grounds such as the Covid-19 situation, a national health emergency. The other circumstances that could be considered as exceptional are the civil unrest, natural disasters or suffering from a chronic or terminal illness. The inclusion of the 'exceptional circumstances' clause is not to suggest an inclusion of leniency into this provision, but more importantly to give the workman a chance to explain why his representations under s 20(1) of the IRA was not brought within the 60 days period.

CONCLUSION

The 60 days limitation period under s 20(1) of the IRA is a mandatory provision which a dismissed employee must adhere to strictly. It follows that where the dismissed employee fails to lodge his representation at the Department within the aforesaid period, the Director General shall cease to have the power to entertain the representation. The limitation period also concerns with the Industrial Court's threshold jurisdiction to entertain the said representation. Sections 29(fa) and 29(g) of the IRA empowers the Industrial Court to entertain the employer's preliminary objection on the issue whether the Claimant's representation under s 20(1) of the IRA had been filed outside the statutory 60 days period.

Unlike s 111(2) of the UK Employment Rights Act 1996 which confers power on the Industrial Tribunal to enlarge the limitation period under exceptional circumstances, the IRA does not have similar provision to enlarge or extend the limitation period or to present grievance outside the limitation period. The classic example is the case of S

Tanabalan who was dismissed on 5 March 2020 but was prevented from lodging his representation within the 60 days limitation which ended on 5 May 2020 due to the MCO. His attempt to file the representations on 19 May, during the CMCO, was refused by the Selangor Industrial Relations Department as it was beyond the 60 days period. The default could not be attributed to his carelessness or negligence but because of the circumstances outside of his control. Hence, it is high time for s 20(1A) to be revised by conferring power on the Director General of the Department or the Industrial Court to entertain representations under s 20(1) which may have surpassed the 60 days limitation period under exceptional or compelling circumstances as stated above.

[1] The doctrine of constructive dismissal was expounded in *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92; [1988] 1 CLJ 45. In this case, the Supreme Court had to consider an important question of law, namely, whether the doctrine of constructive dismissal comes within the ambit of s 20 of the Industrial Relations Act 1967. In answering the above question in affirmative, the court stated that it would be a dismissal if an employer is guilty of a breach, which goes to the root of the contract, or if the employer has evinced an intention no longer to be bound by it. The test propounded in relation to constructive dismissal was the contract test. In applying this test, the proper question to ask was whether the conduct of the employer was such that they were guilty of a breach going to the root of the contract or whether they have evinced an intention no longer to be bound by the contract. If the answer to the above question was in the affirmative, then the employer was said to have repudiated the contract of employment and the employee would be entitled to regard himself as having been constructively dismissed.

[2] 'Sacked supervisor unable to file complaint within 60 days due to MCO' 24 May 2020 at https://www.freemalaysiatoday.com/.

[3] With effect from 1 January 2019, it is mandatory for parties to use the eFiling and eService services in the Industrial Court. The eFiling and eService portal will enable parties to file and receive documents anytime and anywhere.

[4] In *Southern Bank Bhd v Ng Keng Lian & Anor* [2002] 5 MLJ 553; [2002] 2 CLJ 514, Justice Faiza Tamby Chik, following the decision in *Ang Beng Teik v Pan Global Textile Bhd, Penang* [1996] 3 MLJ 137; [1996] 4 CLJ 313 held, inter alia, that s 20 of the IRA applies both to cases of outright dismissals and constructive dismissals.

[5] In *Tengku Mohd Hasmadi Tengku Hashim v Konsortium Transnasional Berhad (KTB)* [2019] 2 LNS 1509, the Industrial Court noted that the claimant's representations were duly entertained by the Director General as it was formally and regularly filed well within the 60 day period allowed under s 20 (1A) of the IRA.

[6] See http://jpp.mohr.gov.my/.

[7] The employer may terminate the contract of employment by serving on the employee the appropriate notice, for example, as in s 12 of the Employment Act 1955 or expressed in the contract or by the implied reasonable notice.

[8] [1984] 2 ILR 562.

[9] [1973] 1 All ER 230.

[10] [1974] 2 All ER 393.

[11] [2019] 2 LNS 2770.

[12] [2019] 1 LNS 1314.

[13] [1982] IRLR 331.

[14] [1981] 1 MLJ 238 (FC).

[15] In *Chandran a/l Mariamuthu v United Vehicles Industries Sdn Bhd* [2019] ILJU 275; [2019] 2 LNS 2105, the Industrial Court noted that the statutory time limit prescribed under s 20(1A) of the Industrial Relations Act 1967 is a mandatory provision and failure to comply with the same is fatal to an employee's claim.

[16] [1997] 2 MLJ 685; [1997] 3 CLJ 777.

[17] [2019] ILJU 275; [2019] 2 LNS 2105.

[18] See *Nadarajah & Anor v Golf Resort (M) Bhd* [1992] 1 MLJ 506; [1991] 1 ILR 704.

[19] The MCO covers, inter alia, the general prohibition of mass movements and gatherings nationwide, travel ban on Malaysians as well as restrictions on tourists entering the country. The CMCO however, had allowed free movement within any 'infected local area' which is limited to only within 10km of a person's house when purchasing food, medicine, dietary supplements, daily necessities or other goods from essential services providers or to seek healthcare or medical services. It also allowed movements beyond 10km to the nearest place if such items or services were not available within 10km of their home.

[20] The term 'essential services' is defined in the First Schedule to the Industrial Relations Act 1967.

[21] Section 111(2) of the Employment Rights Act 1996 provides:

Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal —

(a) before the end of the period of three months beginning with the effective date of termination; or

(b)within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.