



Employment Rights during the COVID-19 Pandemic: A Legal Analysis

Employment Rights

Hak Pekerja Semasa Pandemik COVID-19: Satu Analisis Perundangan

29

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Submitted: 09 March 2021
Revised: 22 April 2021
Accepted: 28 April 2021
E-Published: 30 April 2021

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ABSTRACT

COVID-19 has created chaos in most parts of the world. Actions taken to curb the spread of the COVID-19 in the community such as movement restriction order by the government have given a negative impact to the nation's economy. In order to survive this pandemic, employers have taken various measures to sustain the business and unfortunately employees are deeply affected by these measures. As a consequence, employees are deprived of their rights at the workplace. This paper examines rights of employees under the Employment Act 1955 which involves discussion on issues such as deduction of wages, leave utilisation, and retrenchment of employee in Malaysia during the COVID-19 pandemic period. This is a qualitative research where analysis is made through secondary sources such as article journals, books, government directives, websites and government statutes. Besides that, court cases studies are employed to reach the objective of this research. Finally, this article provides suggestions to improve the mechanism in protecting the employment rights at the workplace in order to maintain a harmonious relationship between employers and employees despite going through difficult times.

Keywords: Sick Leave, Employment Law, COVID-19, Retrenchment, Wages





ABSTRAK

Pandemik COVID-19 telah menyebabkan keadaan tidak terkawal di kebanyakan negara. Tindakan yang diambil oleh kerajaan bagi mencegah penyebaran COVID-19 di dalam komuniti telah memberikan impak negatif kepada ekonomi negara. Majikan terpaksa mengambil langkah-langkah yang diperlukan bagi memastikan kelestarian perniagaan untuk menghadapi cabaran pandemik ini. Walaubagaimanapun, golongan pekerja terkesan dengan tindakan yang diambil oleh majikan dan hak-hak mereka di tempat kerja telah diabaikan. Kajian ini meneliti hak-hak pekerja di bawah Akta Kerja 1955 yang melibatkan perbincangan isu seperti pemotongan gaji, penggunaan cuti tahunan dan pembuangan kerja di Malaysia semasa pandemik COVID-19. Kajian ini menggunakan kaedah kualitatif dengan pengumpulan data daripada sumber sekunder seperti artikel jurnal, buku, arahan pentadbiran, laman web dan akta kerajaan. Selain daripada itu, bagi mencapai objektif kajian, kajian kes-kes mahkamah yang berkaitan telah dilakukan. Akhir sekali, artikel ini memberi cadangan penambahbaikan mekanisme bagi melindungi hak pekerja di tempat kerja untuk memastikan hubungan industri yang harmoni di antara majikan dan pekerja walaupun sedang melalui waktu yang mencabar.

Kata Kunci: Cuti Sakit, Undang-Undang Pekerjaan, COVID-19, Pembuangan Kerja, Gaji

INTRODUCTION

The COVID-19 pandemic has spread at alarming speed globally and caused a public health crisis. It has also severely affected the long-term livelihoods and well-being of millions are threatened by economic and social disruption. In order to reduce the spread of the disease, the government has enforced movement control order and ordered people to stay at home as recommended by many public health agencies (WHO, 2021). Staying home is important as it will reduce the spread of disease to co-workers, customers and clients (Hsuan et al., 2017). The implementation of movement control order (MCO) which includes the restriction on economic activities has caused negative impact towards to the business owners. It is reported that 67.8% of companies and business firms in Malaysia claimed that there is no sales or revenue during the MCO period in the year 2020 (Department of Statistics, 2020). In order to survive with the economic impact of COVID-19 pandemic, the report shows that 68.9% of business owners used their own savings as the main source to accommodate operating cost or working capital during the MCO period (Department of Statistics, 2020). The main challenges for business owners are, firstly on the salary payment of their employees, second on the absence of customers in making purchase and third is on the inability to pay their premise rental fees as a consequence of profit decline in their business (Department of Statistics, 2020). As a result, in order to cope with this situation, employers have taken various measures to reduce the losses and this involves managing the workforce of the organisation. A study shows that in Malaysia, employers tend to reduce working hours of employees, give unpaid leave to employees and also terminate employees during the period of MCO. Furthermore, Malaysian Employers



Federation reported that almost 50% of Malaysian self-employed employees have lost their employment due to the MCO, while 28% of employers have lost more than 90% of their incomes (Bedi, 2020). According to the International Labour Organization, the most affected employees are the one with low-paid and low-skilled jobs employees as they became part of the mitigation exercise of the employers (International Labour Organization, 2020).

This article will analyse the legal issues on employment rights arising at the workplace during the COVID-19 pandemic in Malaysia with reference to the Employment Act 1955 (EA 1955). The first part of this article will explain on the scope of workers' protection under the EA 1955 and the second will discuss legal issues regarding reduction of wages, unpaid leave, retrenchment and constructive dismissal of the employees. Apart from that, this article will provide suggestions to improve protection of employees' rights at the workplace during the COVID-19 pandemic period.

Scope of Protection under the Employment Act 1955

It is pertinent to describe the scope of employees' protection under the current legal framework before examining the relevant issues. In Malaysia, the EA 1955 oversees the employment matters such as the rights of both employers and employees, as well as the obligations and responsibilities of the parties. The EA 1955 is important for security of tenure of employees at the workplace and is designed to protect the workers in private sectors where minimum rights of the employees are protected in the statute (D Cruz et al, 2008). Furthermore, standard protection is provided to the employees under the EA 1955. Among the protections are wages, rest day and annual leave, minimum hours of work, maternity benefits, termination, lay off and retirement benefits and others.

In general, the EA 1955 does not apply to all employees, however the protection is only applicable to employees which fall under the definition of Section 2 of the EA 1955. The term 'employee' according to Section 2 and First Schedule of the EA 1955, is defined as any person who enters into a contract of service with wages do not exceed RM2000 a month irrespective of his occupation; any person who enter into a contract of service with an employer irrespective of his amount of wages a month but engages in manual labour, engages in the operation or maintenance of any mechanically propelled vehicle, supervises or oversees other employees engaged in manual labour, engages in any capacity on a vessel registered in Malaysia and engages as a domestic servant. It should be noted that the above-mentioned categories of the employees should be considered separately based on their job designation and descriptions as per written in their employment contract or contract of service.

Deduction of Wages

In common law, it is a duty of the employers to pay employees' wages as specified in the employment contract. Section 2 of the EA 1955 defines 'wages' as any basic wages or payment payable to an employee for work completed according to contract of service. It should be noted that payment of wages does not include any contribution



(such as pension fund, provident fund, superannuation and retirement or retrenchment scheme), accommodation, lodging, travelling allowance, food, medical benefits, annual bonus, and other gratuity payment. Besides, employers are entitled to make the payment of wages to the employees not later than seventh day after the last day of wages period (not exceed one month). It is the duty of the employers to make payment to the employees accordingly without any deductions once the employees finished their tasks or performed in accordance to the employment contract (Nadzri, 2012).

Employers are required to pay employees' salaries and relevant fixed allowances even if the businesses are closed down due to the MCO (Ministry of Human Resource, 2020). However, as the businesses have been badly affected by the COVID-19 situation, some employers resorted to deduct their employees' wages. The question arises as to whether employers are allowed to deduct employees' wages on the ground of financial difficulties of the organisation? This issue is particularly relevant to the case where employers have to pay full wages to their employees during the MCO period even though there are no business operations and no work done by the employees. The general rule is that employer is not allowed to deduct any amount from employee's wages. Under Malaysian industrial or employment law, the employer's obligation to pay wages is premised upon the contractual term in the employment contract. However, in exceptional situations, deduction of employee's wages is allowed where it should only be made under certain conditions. According to the EA 1955, lawful deductions can be done for the purpose of overpayment of wages (Mohamad et al, 2017), deduction for the indemnity, deductions for the recovery of advances of wages and any deductions authorized by any other written law (Section 24 (2) of the EA 1955). Deductions in respect of the payments to a registered trade union or cooperative can be done if it is made by the request of the employee (Section 24(3) of the EA 1955) and the law requires permission of the Director General if the situations falls under the exceptions (Section 24 (4) of the EA 1955). Clearly from the said provisions, deduction of wages for the reason of cost-saving measures of the company by the employer does not fall within the exceptions under Section 24(3) and Section 24(4) of the EA 1955. However, if the employer made the application to deduct employee wages on the reason of shutting down of business or insufficient funds under Section 24(7) of the EA 1955, subject to the approval of Director General of Labour and conditions imposed by him, then the action to deduct employee's wages for the said reason might become lawful.

Additionally, an employer is not permitted to deduct employee's wages without agreement of the employee for whatever reason stated. In the case of *North Malaysia Distributors Sdn Bhd v. Ang Cheng Poh* [2001] ILJU 43, the Industrial Court decided that the wage deduction conducted by the employer was against the law as it was a unilateral decision of the employer without considering the objection of the employee. It is pertinent to take into consideration on the judgment made by the court in the case of *Syarikat Permodalan Kebangsaan Bhd. v Mohamed Johari Abdul Rahman* [2004] 2 ILR 803 where the court stated that:



Salary is the nub of an employee's relationship with the employer. If alteration be made on this, anything the purpose might be, it will be totally breaks the bond. The employer should not be permitted to justify decreasing his employee's pay on the ground that he has inadequate resources. The change in pay promises a new friendship. One which the employee can freely accept or reject. No excuse to impose the same on his workman is that an employer suffers from financial hardship.

The court had emphasised that in reducing wages of employees, it should be made with an appropriate and adequate justification. Failure to accord to the procedure and with proper justification may lead to willful breach of employment contract by the employer. In *Lim Ban Leong v. Gold Bridge Engineering & Construction Bhd* [2017] 2 LNS 0370 the court stated that employers action to deduct employees' wages can be justified in certain condition such as in the case where the businesses are faced with economic losses and as part of employers prevention from retrenching their employees. Therefore, it can be implied that deduction of wages is lawful in situation to prevent retrenchment of employees in the company. Employers can inform employees on their plan for retrenchment and as part of prevention, the employers can offer solution to the employees by reducing their wages instead of being retrenched. It is also important to ensure that the salary deductions of the employees must be done in good faith (*Penas Realty Sdn Bhd v. Chee Yew Kong* [2002] 3 ILR 13). The Court has decided in previous case that an employee is entitled to payment of full wages even if there is no work is done provided that this term is provided in the employment contract or collective agreement (*Viking Askim Sdn Bhd v. National Union of Employees in Companies Manufacturing Rubber Products* [1991] 2 MLJ 115). Therefore, applying this principle to the employees' rights during the period of MCO, any deduction from wages for periods of shutdown of company would be illegal if in the employment contract or collective agreement clearly mentioned on the right of employees to payment of wages during the MCO period or equivalent.

It is observed that the imposition of wage cuts of the employees during COVID-19 should only be the last option for the employer in his cost-saving measure of the company and should only be exercised in order to avoid termination or retrenchment of employees. In order for the action to be lawful, the employer is recommended to explain the company's financial situation to the employees other than getting employees' agreement before proceeding to deduct employees' wages. In case if there is a collective agreement between the employer and the trade union of the employees, the employer has to conduct negotiation with the trade union that represents the said employees and inform the decision to deduct employees' wages.

Leave Utilisation during the COVID-19 Pandemic

One of the effective ways to prevent the spread of COVID-19 disease is to conduct social distancing and restrict the movement of people. Therefore, MCO which has been imposed by the government is necessary in ensuring the people to stay at home to reduce contact with person infected with COVID-19. In the Prevention and Control



of Infectious Diseases Act 1988 (Act 342), people's movement is restricted except for special purposes or essential activities where only essential sectors are allowed to operate with strict requirements while non-essential businesses must be closed for operations. The employers in the non-essential businesses will have no choice but to order the employees to be at home or if the nature of work permits, the employees can be ordered to work from home. However, in some cases, employees claim that employers forced them to take annual leave or unpaid leave during the MCO period. The question arises as to whether employers have the power to order employees to apply annual leave during the period of MCO and whether employees can be ordered to stay at home with unpaid leave.

Generally, leave entitlement of employees under the EA 1955 depends on their period of service with the employer. Employees will be entitled to more leave if they work in a longer period with the employer. According to the Section 60 (E)(1) of Employment Act 1955, employees are entitled to paid annual leave of eight days for every twelve months of continuous service with the same employer if he has been employed by that employer for a period of less than two years, twelve days for every twelve months of continuous service with the same employer if he has been employed by that employer for a period of two years or more but less than five years, and sixteen days for every twelve months of continuous service with the same employer if he has been employed by that employer for a period of five years or more. Before an employee can use his annual leave, he must inform the employer of his intention to take leave and get the employer's permission. Additionally, the employer also does not have the right to force employees to use their annual leave in any circumstances. For example, in the case of *Kesatuan Pekerja-pekerja Continental Tyre PJ Malaysia Sdn Bhd v. Continental Tyre PJ Malaysia* (Award No: 727 of 2015) the employer forced the employees to take the annual leave during the period of a plant shut down but failed to pay their wages. The court decided that the employer did not have the right to force employees to take their annual leave.

Similarly, if an employee is prohibited to work at office and been ordered to stay at home due to MCO by the government or been ordered to do isolation due to direct contact with person with COVID-19, employer is not allowed forced the employees to use their annual leave. During the said period, the wages should be paid as mentioned in the contract of employment. However, according to the guideline provided by the Ministry of Human Resource, the decision on the status of leave of employee during the period of MCO is up to the agreement between the employer and the employee. Subject to the agreement of the employee, the employer may declare that the employee use his or her annual leave or employer can offer employee to take half pay leave or unpaid leave (Ministry of Human Resource, 2020). Again, if the employee is given the isolation order due to COVID-19 suspected cases, the employer must not force the employee to use his or her annual leave unless the employee agrees. Instead, the employee can be asked to work from home and the wages is paid accordingly to the contract or if with the consent of the employee, it can be declared that the period of isolation will be regarded as unpaid leave. It must be noted that the usage of annual leave is the right of the employee and should not be interfered by the employer. The



employer must prove that he had taken all possible actions before asking the employees to use their annual leave for instance, instructing the employees to work from home. But if working from home is impossible because of the nature of work of the employee, therefore, employee can take the option to make it as half day leave or as a last resort asking permission from the employee to make it as unpaid leave. The employer is advised to inform employees on the company's current situation and the reason for taking such measure. In relation to the employee who is positive for COVID-19 and admitted to the hospital, with the certification from the medical practitioners, the employees can apply for sick leave and hospitalisation leave according to the entitlement in his employment contract.

Retrenchment of Employees due to COVID-19 Pandemic

As the spread of COVID-19 has been rapidly increasing day by day, many companies are facing revenue losses and establish the need to retrench their workers. The question arises on whether employers have the right to terminate the employees by retrenchment and what are the grounds and procedure for retrenchment. Retrenchment refers to termination of the contract of service of employees in a situation of redundancy arising from a variety of causes, such as restructuring, reduction of production, surplus of staff after a merger due to the completion of identical tasks by staff from each organization and the company experiencing financial difficulties. It is the prerogative right of the employer to determine the volume of his labour force and if he thinks that retrenchment is necessary to survive economically and for better management of the business, the employer is entitled to discharge the employees (*William Jacks & Co (M) Bhd v. S. Balasingam* [1997] 3 CLJ 235). Section 12(3) of the EA 1955 provides the list of situations where the employer can terminate the contract of service of employee by way of retrenchment as the following:

- (a) the employer has ceased, or intends to cease to carry on the business for the purposes of which the employee was employed;
- (b) the employer has ceased or intends to cease to carry on the business in the place at which the employee was contracted to work;
- (c) the requirements of that business for the employee to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish;
- (d) the requirements of that business for the employee to carry out work of a particular kind in the place at which he was contracted to work have ceased or diminished or are expected to cease or diminish;
- (e) the employee has refused to accept his transfer to any other place of employment, unless his contract of service requires him to accept such transfer; or
- (f) a change has occurred in the ownership of the business for the purpose of which an employee is employed or of a part of such business, regardless of whether the change occurs by virtue of a sale or other disposition or by operation of law.



The employer must prove that the reason for retrenchment of employees is genuine and acted with good faith (*Guinness Anchor Berhad v. Rosli Ithnin & 3 Ors* (2008) 2 LNS 0077). In the recent case of *Mohd Zakir Yusoff v Telarix (M) Sdn Bhd* [2020] 2 LNS 0829, the employer resorted to retrenchment exercise of its employees on the reason of financial difficulties of the company. However, it was found that the employer had advertised offering for three positions which is similar to the position of the employee after just few months after the retrenchment was made. The court decided that the retrenchment was unlawful as the employer failed to prove that genuine redundancy exists. Therefore, in the context of COVID-19 situation, the employer have to demonstrate that there has been a genuine financial impact on the business of the company due to COVID-19 in order to retrench the employees. In *Maybank Discount Bhd v. Nooraini bte Mohd Ishak* [1994] 2 ILR 822, the court stated that the employer had exercised bona fide its prerogative with evidence detailing their losses of approximately RM11m in a span of two years and closing down company one of its branches (Rajadurai, 2013).

Apart from that, employers have to refer to Code of Conduct for Industrial Harmony (CCIH) for best practices of retrenchment. CCIH is an acceptable industrial relations practice and is also recognized by law as a factor to be considered in determining whether retrenchment is done in a genuine and reasonable manner. This Code is given statutory recognition based on Section 30 (5A) of the IRA 1967 which provides that the Industrial Court may make an award, taking into account any agreement or code of explanation on employment practices between the employer and the employee. The agreement or code has been approved by the Minister of Human Resource however, it has no legal force or sanctions and is therefore not legally binding as law. Positive measures must be taken by the employers in preventing the reduction of manpower in the organisation. For example, limiting recruitment of new employees, restrict overtime works, restrict workers from working during rest day, reduction in the number of shifts or working days each week, reducing of the number of working hours and the retraining and/or transfer employees to another department or branches during the MCO period. Employer's action in reducing working hours to minimize the chances of retrenchment of employees can be seen in the case of *Allan Jones v. Live Events Australia Pty Ltd* [2020] FWC 3469 where the employee working hours of 80 hours per fortnight had their hours reduced to 40 hours per fortnight in order to cope with their business situation that has been affected badly during the COVID-19 pandemic.

Additionally, the employer must be fair in the selection of employees to be retrenched. According to the principles of CCIH, the services of the foreign employees should be terminated first. The Last In First Out (LIFO) principle stated that employees with least number of years of service should be selected for retrenched first. This principle can guarantee the senior workers in the organisation to be compensated for their dedication and long service. However, the LIFO principle can only be applicable to the employees of the same category of job or position in the company (*Alam Arena Management Sdn Bhd v. Norfadzilah Surip & Anor* (2011) 1 ILR 590). The employer can choose to depart from the LIFO principle if he is of the opinion that the junior employees are needed to be retained rather than the senior employees. In certain situations, the



employer prefers to retain the junior employees as they have better technology skills, qualification or experience that the company needed. The court will not determine the criteria for selection as the employer is given the discretion to decide the best for his business. However, the burden to proof falls on the employer and so the employer must provide justifiable ground on choosing to depart from the LIFO principle (*First Allied Corporations Bhd v. Lum Siak Kee* [1996] 2 ILR 1628).

A proper retrenchment exercise can be seen in the case of *Tharmabalan Suppiah Velliah v. MSL Travel Sdn Bhd* (Award No. 3081 of 2019) where the employer has demonstrated appropriate action had been taken to minimise company losses before the retrenchment is carried out. For instance, moving to the new premises, not replacing the resigned employees with new employees and reducing the overhead cost. The employer have proved to the court that he had undergone two payouts himself. The evidence also revealed that all employees, including Tharmabalan Suppiah, were aware of the decline of profits in the company. The employees were also aware of the retrenchment exercise followed the LIFO principle. Therefore, the court found that the employer had taken all reasonable measures to remain in business and that the employer was fair in the selection of employees for retrenchment. The retrenched employees are entitled for benefits under the Section 60J of the EA 1955. The term 'retrenchment benefits' known as a payment for the loss of employment arising from genuine redundancy situations in the company, and 'termination benefit' known as a statutory phrase which includes retrenchment benefits and compulsory payments made to employees on closure of business or liquidation (Bidin et al., 2012). It should be noted that the said benefits should not be considered as an additional earning from employment, but it is known as a compensation payable for the loss of employment, as well to protect the industrial relations of employers and employees. It is pertinent to highlight that employees covered under the EA 1955 are entitled for termination benefits under the Employment (Termination and Lay-Off Benefits) Regulations 1980, while employees who are not covered under EA 1955 are entitled for retrenchment benefits based on the discretion of the employer (Bidin et al., 2012).

Additionally, it is important to take note that in the absence of employees' agreements, the employer who compels the employees to take annual leave or forces the employees to go on unpaid leave or deducts the employees' wages are regarded as breaching the terms of employment contract and can be considered as constructive dismissal. Constructive dismissal is defined by the court as the right of an employee to terminate his contract and therefore to consider himself as discharged from further obligations if the employer is guilty of such a breach as affects the foundation of the contract (*Wong Chee Hong v. Cathay Organisation Sdn Bhd* [1988] 1 MLJ 92). To prove constructive dismissal, it will be necessary for the employee to establish four elements. Firstly, the employer had by his conduct breached the employment contract, secondly, that the terms which had been breached go to the foundation of the contract, thirdly, the employee has informed and given the employer an opportunity to remedy the breach and lastly, the employee had left the workplace at an appropriate time soon after the breach complained of. Consequently, if an employee has been retrenched by the employer due the MCO without valid justification of the action, the employee



may lodge a complaint to the Director General of Industrial Relations against the employer for unfair dismissal.

RECOMMENDATION

The COVID-19 pandemic is a challenging period for both employers and employees. The employees are faced with job insecurities throughout this pandemic period due to the economic downturn. Although the Ministry of Human Resources have come up with guidelines to address the employment related issues during the COVID-19 period, the reality of such situation is that some employers are unable to sustain their businesses and this directly affected the welfare of their employees. However, the guideline given by the Ministry is only in form of directives and is not legally binding on the employers as it is only a guideline issued to the public for purpose of clarifying uncertainties in the law (*Tenaga Nasional Berhad v. Manfield Development Sdn Bhd & Anor* [2010] MLJU 909). The situation lies with the government to enact urgent laws to address the situation in striking a balance between the rights of employers and employees amidst the COVID-19 pandemic.

It is recommended that a comprehensive paid sick leave policies to be developed in Malaysia to cater with the current situation. The COVID-19 pandemic is likely to stay for 12–24 months and a range of countries have temporarily strengthened paid sick leave policies in respond to the situation. For example, the government in El Salvador has provided 30 days of paid sick leave for workers who are required to quarantine themselves because a higher risk of infection. Chile recently extended paid leave for all workers who must remain at home due to the COVID-19 crisis and are not able to work remotely. Saudi Arabia instituted special paid sick leave for quarantined workers that entered the country from abroad. Trinidad and Tobago recently introduced a pandemic leave that is available to government workers that are ineligible for sick leave including fixed-term contract employees, short term contract employees, and workers in on-the-job training. Still others have increased benefit levels. For example, Uzbekistan increased the wage replacement rate for paid sick leave from 60-80% to 100% for the full duration of the quarantine while Russia increased the minimum benefit level for sick leave pay to the national minimum wage until the end of 2020. Other responses include waiving waiting periods (e.g. Canada, Finland, and Portugal) (Heymann et al., 2020). Finally, an amicable solution between the employers and the employees is important to cope with the current situation. The employers must be transparent by communicating with their employees on the financial difficulties faced by the company. Every measure that will alter the contractual rights of the employees must be made with the consent of the employees.

CONCLUSION

The pandemic of COVID-19 clearly shows its catastrophic effect on employment issues globally and has compelled employers to take necessary action to curb the economic downturn. Nevertheless, employers must be cautious in exercising their prerogative powers in their management and in complying with the rules provided under the EA



1955. The above discussion clearly denotes that the harmonious relationship between employers and employees could be upheld when each of the parties protects the rights and benefits accordingly, as well as maintaining the employment duties and responsibilities at workplace.

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