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**MEDIATING EMPLOYMENT CONFLICTS:
PRESERVING, NURTURING AND HARNESSING
HUMAN CAPITAL IN ORGANISATIONS**

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MEDIATING EMPLOYMENT CONFLICTS: PRESERVING, NURTURING AND HARNESSING HUMAN CAPITAL IN ORGANISATIONS

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The Human Capital is not just workforce or labour. Human Capital is the most valuable resource to any organisation as it is the stock of skills, competence, talent and knowledge to perform work and to produce economic value. All these attributes are the result of education, training and experience. It is therefore in the best interest of any organisation to harness, preserve and nurture these resources. To harness, nurture and preserve these resources, a relationship has to be formed between the workers and the management.

Industrial Relations is about the relationship between capital and labour, between management and workers, between the employer and the employees in an organisation. Good Industrial Relations ensures continued uninterrupted production and continued employment and this contributes to the overall well being of the State. This relationship covers aspect of the industry such as trade union, collective agreements, trade disputes, interpretation of labour laws, discipline and conduct.

It is in the best interest of the employer and the employee that all resources be fully utilized and production be kept at the maximum. Therefore it is of utmost importance that a harmonious relationship be maintained at all times.

Any dispute arising in the said relationship is a failure in the relationship. Conflicts and disputes must be addressed and reduced. This raises the need for a forum where conflicts and dispute can be resolved.

In Malaysia, the Industrial Relations Act 1967 was enacted to be an Act to promote and maintain industrial harmony and to provide for regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom.

The Industrial Court in Malaysia is an arbitration tribunal established pursuant to Part VII of the Industrial Relations Act 1967 to deal with disputes between employers and employees in the private sector and to resolve it expeditiously and harmoniously.

The Federal Court in the case of *Hotel Malaya Sdn Bhd & Anor v. National Union of Hotel, Bar and Restaurant Workers (1982) CLJ 460* describes the Industrial Court as having a quasi-judicial function. Its functions comprise an investigation into the facts, an analysis of the facts, finding of facts, and lastly, the application of the law to those findings.

In the case of *Tanjong Jara Beach Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers Peninsular Malaysia reported in (2004) 4 CLJ 657* it is stated:

“The Industrial Court has to bear in mind the underlying objectives and purposes of the Act itself, that it is a piece of legislation designed to ensure social justice to both employers and employees and maintain cordial relationship between the parties; to eradicate unfair labour practices; to protect workmen against victimisation by employers and to ensure termination of industrial disputes in a peaceful manner. Clearly therefore, the *raison d’etre* of the Industrial Court is to endeavour to resolve the competing claims of employees and employers by finding a solution which is just and fair to both parties with the object of establishing harmony between capital and labour and fostering good relationship.”

Section 30(5) of the Industrial Relations Act 1967 provides that the court shall act according to equity, good conscience and substantial merits of the case without having regard to technicalities and legal form. Abdul Hamid Mohammad JCA in the case of *Telekom Kawasan Utara v Krishnan Kutty Sanguni Nair & Anor (2002) 3 CLJ 314*, concluded after referring to previous cases on Section 30(5) by saying:

“From all these, it is clear to us that the Industrial Court should not be burdened with the technicalities regarding the standard of proof, rules of evidence and procedure that are applied in a court of law. The Industrial Court should be allowed to conduct its proceedings as a “court of arbitration”, and be more flexible in arriving at its decision, so long as it gives special regard to substantial merits and decide in accordance with equity and good conscience.”

From the above, it can be seen that the nature of the Industrial Court is unique in the sense that its objective is to ensure social justice and establish harmony in the relationship between employees and employers by finding a solution that is fair to both parties in resolving conflicts. The Industrial Court is also not subject to the rigid rules of evidence and procedure but flexible in it’s approach.

Towards this end, the aim of the mediation process is parallel to the objective of the Industrial Court as the mediation process itself has similar purpose and that is, to resolve conflicts by problem solving, compromising and taking into account the interest and needs of the parties to the conflict, preserving their relationship at the same time. Because of this similarity, mediation is suitable as an alternative to litigation of cases before the Industrial Court. Hopefully through the mediation process a win-win solution for the parties will be achieved instead of a win-lose situation after a trial.

To maintain a harmonious relationship between the employer and employee, conflicts must be resolved with the objective of re-establishing trust and respect and prevent further damage. Any method or process that is conducive towards this objective must be encouraged.

The Industrial Court realises this and so too the Ministry of Human Resources. Way back in 2004, the Honourable Minister of Human Resources then, Datuk Dr. Fong Chan Onn made an announcement that the mediation system is to be introduced in the Industrial Courts where the Chairmen of the Industrial Courts themselves would be the mediators. If the mediation failed, then the case would be heard by way of a trial.

Following this announcement, the Industrial Court offered mediation as an alternative to the disputing parties. Only when mediation failed will the Court be convened to hear the case in a full trial. In the case of *Dovechem Terminals Sdn Bhd v Mohd Irfam Ejam Award No. 1728 of 2006*, the then Chairman Dato Tan Yeak Hui recorded in the award as follows:

“Upon reference by the Honourable Minister for Human Resources on 1.8.2005 the Industrial Court is tasked with finding a solution for the alleged unfair dismissal of Mohd Irfan bin Ejam (hereinafter referred to as the Claimant) by his employer Dovechem Terminals Sdn Bhd (hereinafter referred to as the Company) on the 16.4.2004.

The case was called for mention on the 22.11.2005. Pleadings were directed to be filed. The parties were then reminded that the Industrial Court is a court for social justice. Litigation has been the normal process in which disputes of parties were resolved but in recent times parties have been reminded that litigation is only one of the available processes and should only be used as a last resort. Negotiations, conciliations and mediations should be used wherever possible. Although a hearing date has been fixed the disputants and their respective representatives were encouraged and directed to explore a settlement they could live with.

When the Court assembled on 25.9.2006 to commence hearing of the disputes, counsel for the Claimant Mr. Makham Singh stood up to inform the Court that negotiations between the parties had been fruitful. An amicable settlement had been reached. This was confirmed by the Company’s H.R. Manager Ms. Kong Siew Toon and the Company’s counsel Mr. Rajoo.”

For the purpose of mediation at the Industrial Court, the chairmen of the Industrial Courts, who themselves are to be the mediators need to be trained. The first training for the chairmen to be mediators was conducted by Professor Dale Bagshaw Ph.D from the University of South Australia on 29.7.2004 to 3.8.2004.

A Second training workshop was held from 14.7.2010 to 16.7.2010 conducted by Professor Richard Bales from the NKU Chase College of Law, Highland Heights Kentucky, USA.

As already stated, the Industrial Court is unlike other courts in that it is a court of social justice acting according to equity, good conscience and substantial merits of the case without having regard to technicalities and legal form. But even though the rules of evidence and procedure are not strictly applied, the rules are still used as guidance in the presentation of evidence under our adversarial system. This includes filling of pleadings in the form of statement of case and statement in reply and bundles of documents in court. Witnesses are called and evidences adduced in examination-in-chief and cross-examinations are recorded by the court. There will be challenges to evidences presented and arguments adduced. At the end of the day, the parties still have to persuade the judge to make a decision in their favour and the decision will be made based on the evidence presented and the submissions made.

This means that a trial will take a long time to conclude. On top of this, the court has to accommodate the free dates of the court, the counsel and sometimes, the witnesses. This situation causes delaying the hearing of cases in the Industrial Courts.

The process of a full trial is time consuming and should be reserved for cases which involves truly contentious issues. Other methods of resolving the dispute are needed and mediation is one of the most suitable method used.

Mediation has several advantages as an alternative to traditional litigation. The process of mediation is flexible and informal. It is a faster and speedier way of resolving the dispute as opposed to the lengthy and time consuming traditional

litigations. The parties are in control of the outcome and this gives them the opportunity to find a creative solution to the conflict. It preserves relationships as resolutions are based on the choice and compromises between the parties. A decision that is imposed by the courts often leaves deep scars between the parties as one party will feel that they have lost the contest and the other side wins.

The mediation process is also less expensive compared to litigation. This is important in respect of a worker who has been dismissed from their jobs. With no source of income it will be hard to engage the services of a counsel for the purposes of a full trial before the court.

Mediation is also confidential in nature. The issues discussed are kept strictly personal between the parties. This reduces the likelihood of the conflict between the disputing parties from spilling over and becoming a bigger issue than it should. This helps in containing and preventing further damage.

In the employment context, mediation helps to find solutions to fulfil the interest of both parties. For the worker it is not just an issue of employment and livelihood but the opportunity to express and develop his skills, knowledge and experience which are valuable resources to the organisation that employs him. It is in the best interest of the organisation to utilise these resources. Highlighting on common interest helps to reduce the differences between the parties to the dispute.

With the advantages of mediation over traditional litigation and the suitability of mediation in resolving disputes between employers and employees, the Industrial Court will continue to offer the services of mediation and the mediators to mediate between the parties. Mediation is not a way to replace adjudication but an alternative to help parties find an amicable solutions to the disputes. In some cases involving complex or contentious issues or when mediation failed, the case then will go for full hearing before the Court. Cases are brought before the Industrial Court either by reference from the Honourable Minister of Human Resources or by direct application to the Industrial Court. Types of cases referred to the Court by the Honourable Minister are;

1. Dismissal cases under Section 20(3) of the Industrial Relations Act 1967
2. Trade Disputes under Section 26(1) or Section 26(2) of the Industrial Relations Act 1967
3. Complaint of Victimisation under Section 8(2A) of the Industrial Relations Act 1967

Cases referred to the Industrial Court by direct applications are;

1. Non Compliance of Award/Collective Agreement under Section 56(1) of the Industrial Relations Act 1967
2. Interpretation of Award/Collective Agreement under Section 33(1) of the Industrial Relations Act 1967
3. Variation of Award/Collective Agreement under Section 33(2) of the Industrial Relations Act 1967
4. Application to refer Points of Law to the High Court under section 33A of the Industrial Relations Act 1967.

Of all the types of cases brought to the Industrial Courts, claims of unfair or wrongful dismissal form the most number of cases. Out of 1,437 cases referred to the Industrial Court in the year 2010, 1179 are dismissal cases.

It is true that for dismissal cases, the parties have to go through a conciliation meeting at the Industrial Relations Department of the Ministry of Human Resources. Only when a settlement cannot be reached that the case will be referred to the Industrial Court for adjudication. But this does not mean that the efforts at mediation at the Industrial Court is superfluous.

Conciliation and mediation are two different processes. In conciliation, a neutral third party merely guides and assist the parties in a negotiation and to arrive at an amicable settlement through an orderly and rational discussion. Mediation is the continuation of conciliation with the mediator playing a more active role in encouraging negotiations between the parties by making proposals and recommendations based on identified issues with the aim of achieving an amicable settlement.

Mediation should be viewed as a continuation of the conciliation process which begins at the Ministry level and may end up at the Industrial Court stage. Moreover, at the Industrial Court when the pleadings have been filed and exchanged, the issues are clearer and identifiable. The parties may have a different perspective towards their case and this may open some doors towards compromise and amicable settlements.

In the year 2010, 39 cases has undergone mediation and of out the 39, 18 were settled and 14 failed while the rest are still undergoing the process. The number of cases that has gone through mediation can be regarded as small compared to the total number of cases referred to the Industrial Court. This could be due to a number of factors but it cannot be discounted that the level of awareness among the public and practitioners of the advantages of mediation, may have contributed to the low numbers.

In 2010, one case relating to a trade dispute referred to the Industrial Court in Penang was settled after mediation. That case was between the union of workers of *Fujikura Federal Cables Sdn Bhd and Fujikara Federal Cables Sdn Bhd* which was referred to the Industrial Court under Section 26(2) of the Industrial Relations Act 1967 by the Honourable Minister of Human Resources. After a mediation process at the Industrial Court, the dispute was settled and an agreement was concluded between the parties concerning issues such as confirmation of temporary workers, working under a contract after retirement and overtime pay. This case is a good example of preserving relationship and maintaining harmony between the company and the workers in resolving a dispute through the mediation process.

The Industrial Court in 2010, has also introduced a process known as “early evaluation of the case” at the pre-hearing stage for cases referred to under Section 20(3) of the Industrial Relations Act 1967. The main feature of this process is the evaluation of the merits of the case based on the pleadings and documents and the parties and representatives will be advised of the probable outcome of the case and the remedy. This process is voluntary and the evaluating chairman will be different from the chairman who will hear the case in the even the case was not settled.

To date the mediation process has not been made compulsory. There is no provision in the Industrial Relations Act 1967 that requires disputants to go through a mediation

process before the case can be tried. Some may argue that under the provisions of Section 29(g) of the Industrial Courts Act 1967, where the court may, in any proceedings before it direct and do all such things as are necessary or expedient for the expeditious determination of a matter before it, the court is empowered to order or direct the parties to go for mediation. But there may be others who are of the opinion that this Section was not intend to go as far as to cover mediation. The issue is an open one. In the meantime, the court will continue to encourage mediation, but on a voluntary basis.

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Reference:

1. Industrial Court website: www.mp.gov.my
2. Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314.
3. Dovechem Terminals Sdn Bhd v Mohd Irfam Ejam [2006] 2 LNS 1728.
4. Industrial Court – Past, Present and Future by Y.A. Puan Susila Sithamparam – President of Industrial Court.
5. Industrial Court Case – Kesatuan Pekerja-Pekerja Fujikura Federal Cables Sdn Bhd v. Fujikura Federal Cables Sdn Bhd Case No: 18/3-234/10.
6. Industrial Relations Act 1967 (Act 177), Rules & Regulations.
7. Mediation in Malaysia: The Law and Practice by Mohammad Naqib Ishan Jan Ashgar Ali Ali Mohamed.
8. Mediation Theory & Practice by Dale Bagshaw, Ph.D University of South Australia.