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Unfair Dismissal under the Industrial Relations (Amendment) Act 2020: A Legal Review

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Abstract
Purpose: This paper aims to examine the distinctions between the key changes under the Industrial Relations (Amendment) Act 2020 to the Industrial Relations Act 1967 with regards to unfair dismissal.
Design/methodology/approach: This is qualitative research where analysis is made through secondary sources such as articles, journals, books, government directives, websites, and government statutes.
Findings: There are a number of key changes made to the Industrial Relations Act 1967 relating to unfair dismissal involving sections 20 (3), 20 (6), section 20 (6A), section 29 (da), section 29 (ea), section 52, section 22 (5), section 23 (4), and section 30 (6A).
Research limitations/implications: Since the Industrial Relations (Amendment) Act 2020 is still new, the efficacy of each amended provision cannot be reviewed thoroughly.
Practical implications: Some comments and suggestions were made to the legislators.
Originality/value: This paper brings to light recent amendments to the Industrial Relations Act 1967.
Paper type: Conceptual paper

Keywords: Industrial Relations Act 1967, Industrial Relations (Amendment) Act 2020, Industrial relations

Introduction

Employers occasionally find it necessary to terminate employees while exercising their management prerogatives for a variety of reasons (Hassan et al., 2016). In Malaysia's employment context, any termination of employment initiated by the employer may be viewed as dismissals. Dismissal is usually the result of a worker's wrongdoing (Muniapan, 2010). In some instances, employment contracts have been terminated arbitrarily and employees have been dismissed without reason or justification (Abdul Rahman, 2019) which will lead to unfair dismissal. Employer should remember that an employee is entitled not to be fired unless there is just cause (Raja Aziz et al., 2020).

Unfair dismissal can be defined as the act of terminating an employment contract for unjust or illegitimate reasons. Unfair dismissal can occur for a variety of reasons, including

discrimination, which involves inappropriate or unfair treatment of an employee based on his or her race, gender, religious beliefs, disability, or sexual orientation (Ismail, 2018). An employee who believes he or she has been unfairly terminated by his or her employer without reasonable cause or explanation may file a written representation of dismissal. Dismissal representation is the process by which an employee seeks reinstatement in the same company under the "Industrial Relations Act 1967" ("the IRA 1967") (Lee & Dhillon, 2019).

The IRA 1967 plays a critical role in regulating claims of unfair dismissal. The IRA 1967 is an act which regulates industrial relations or the interaction of a company with its employees whether they are Malaysian or foreign workers (Fazilah et al., 2019). The IRA 1967 applies to a broader class of workers than the Employment Act 1955 ("the EA 1955"). The IRA 1967 does not impose a wage ceiling on determining whether an individual is a "workman." Furthermore, in contrast to the EA 1955, which only applies to employees of the private sector, the IRA 1967 also applies to public sector workers (Bhatt, 2016).

In 2018, an online consultation has been held by the "Ministry of Human Resources" ("the MOHR") to get response on the proposed amendments to the IRA (MOHR, 2018). The amendments aim, first, to seek, to strengthen and expand worker protection and welfare. Second, the current dispute resolution system will be improved to make it more efficient and faster. Third, to ensure that the country's labour laws are comparable to international standards established by International Labour Organisation (ILO) (JPP, 2021). "The Bill" was introduced for first reading in the Malaysian Parliament on October 7th, 2019 (MEF, 2019) then successfully passed by the Dewan Rakyat on October 9th, 2019 (Lai, 2019). The "Malaysian Industrial Relations (Amendment) Act 2020" ("the Amendment Act 2020") amended the "Industrial Relations Act 1967" and came into force on January 1, 2021 (JPP, 2021).

The recent amendment to the IRA 1967 included a number of significant improvements, one of it is related to unfair dismissal claims. To get a better understanding of the new or changed parts of the Amendment Act 2020, this paper aims to examine and emphasise the distinctions between the former IRA and the present IRA.

Changes relating to unfair dismissal under the Amendment Act 2020

Representations of Unfair Dismissals - Section 20 of the IRA 1967

Section 20 of the IRA 1967, which went into effect on February 10, 1989 (Malaysian Bar, 2006), was enacted to protect workers who were fired without justification and/or reasonable cause. This section gives workers the right to file a claim for reinstatement to their original job. The Amendment Act 2020 makes a few changes to the law under Section 20 of the IRA 1967, as shown in Table 1 below:

Table 1: Recent Amendments under Section 20 of the Amendment Act 2020

Section	Contents
Section 20 (3)	Automatic referral of unfair dismissal claims to Industrial Courts
Section 20 (6)	Representation on unfair dismissal claims
Section 20 (6A)	Guardian appointment ("*guardian ad litem"*) for unfair dismissal claims

i. Automatic referral of unfair dismissal claims to Industrial Courts

Previously, if a terminated employee feels he was fired without reason, he may write to the Director General for Industrial Relations (DGIR) and ask to be reinstated. No representation

shall be given beyond sixty (60) days. The DGIR must evaluate the disagreement and take action to encourage a quick resolution. Once the DGIR receives the terminated employee's representation, a two-sided discussion generally occurs. If the conciliation process between the parties to the dispute fails, any side may report to the DGIR, who then notifies the "Minister of Human Resources" ("the Minister"). The Minister has a discretionary power to refer the case to the Industrial Court ("the Court") for process of adjudication (the "referral level") (Dhillon & Juet, 2018).

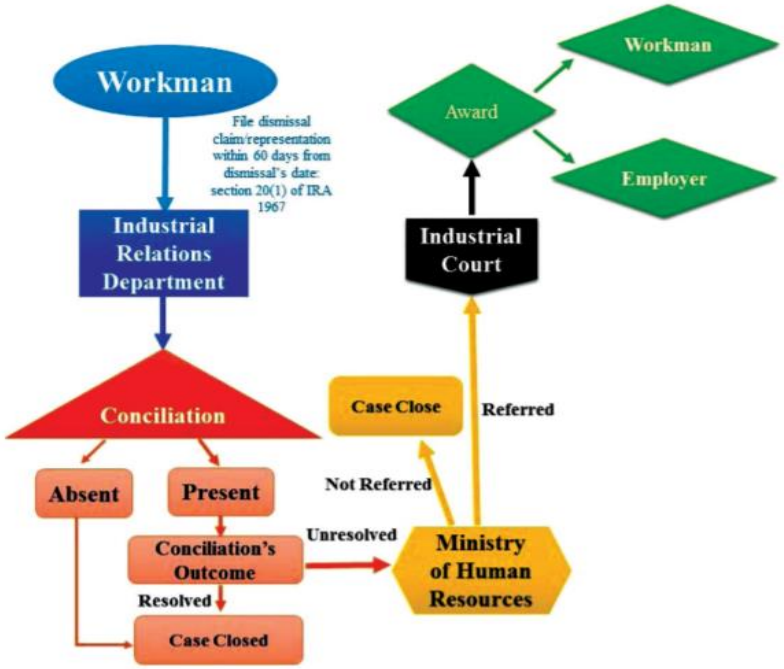

Figure 1: Process for Unfair Dismissal under the IRA 1967 (Ling & Dhillon, 2018)

The referral level can be said to be a filter mechanism owned by the Minister to weed out frivolous and vexatious claims with the intention to avoid a backlog of cases from piling up before the Court. However, Section 20 (3) of the Amendment Act 2020 states that, "*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*." Based on the amended section, the Minister no longer has the filter authority; instead, the complaint will be automatically referred to the court if no settlement is reached at the Industrial Relations Department stage without the need for a filter process.

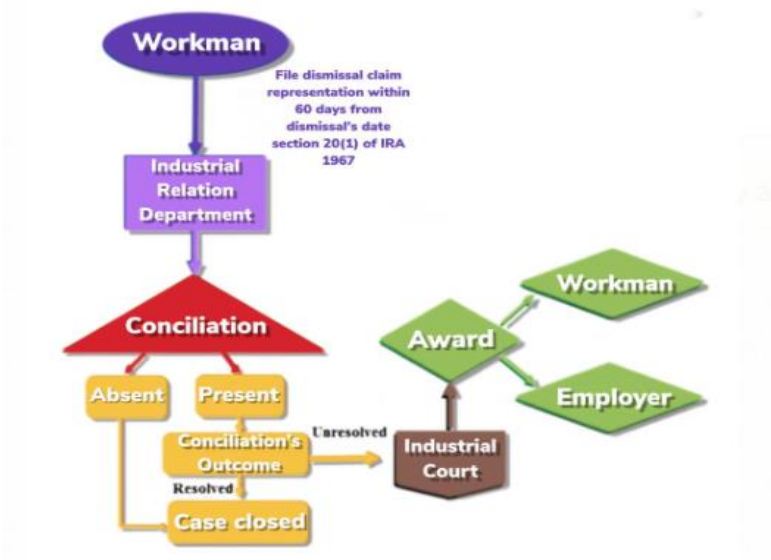

Figure 2: Process of for Unfair Dismissal under the Amendment Act 2020

With the elimination of the Minister's authority, the DGIR now has the responsibility to investigate allegations of wrongful dismissal and if he believes the cases are acceptable, then he may directly refer the cases to the Court. Section 8 (2) of the Amendment Act 2020 provides, "*The Director General upon receiving any complaint under subsection (1) may take such steps or make such enquiries as he considers necessary or expedient to resolve the complaint; where the complaint is not resolved the Director General may if he thinks fit, refer the complaint to the Court for hear*ing".

Human Resources Minister explained the modification is intended to guarantee all issues brought before the Industrial Relations Department are heard and handled in a timely manner. If the worker and employer cannot reach to an agreement, the issue should be heard in the Industrial Court as soon as possible (Thesundaily, 2018). With the absence of the ministry's power to define all unjust dismissals claims, the goal of speeding up cases looks to be attained. However, one issue to be concerned is whether, in the absence of the Minister's filtration process, the Industrial Court will be flooded with frivolous cases.

ii. Representation on unfair dismissal claims

Under the IRA 1967, after filing an unfair dismissal claim, a conciliation meeting will be called by the Department of Industrial Relations. An employer may be represented by its employee or by an officer or employee of a trade union of employers, i.e. Malaysian Employers Federation (MEF) or by a registered organisation of employers. Meanwhile, the employee may represent himself or, if he is a member of a trade union, by an officer or employee of the trade union, i.e., Malaysian Trade Union Congress (MTUC) or an official of any other registered organisation of workmen. Lawyers, legal advisors and/or negotiator are not permitted to represent either party (Teoh, 2018). Conciliation is the process in order to settle disputes between employers and employees. The conciliator is not empowered to carry out an inquiry or use any technical rules. The purpose of conciliation is to obtain an amicable settlement of a dispute with the help of a mediator (Ismail, 2018).

However, according to the Amendment Act 2020, nowadays, an employer or a worker may be represented by whomever they want (excluding attorneys) during a conciliation procedure at the Industrial Relations Department with the approval of the Director General. This is pursuant to Section 20 (6) (a) (iv) and Section 20 (6) (b) (iv) of the Amendment Act 2020 which provides

that, "*an employer or a workman may be represented by any other person except an advocate and solicitor, duly authorised by the employer in writing and subject to the permission of the Director General*."

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iii. Guardian appointment ("*guardian ad litem"*)

The Amendment Act 2020 introduces a new section under Section 20 (6A) which provides, "*In any proceeding 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*." Previously, there is no provision as regard to appointment of guardian ad litem in the IRA 1967. However, under the Amendment Act 2020, the new section gives a right to a next-of-kin of a worker who have mental impairment/disorder to protect his/her right by filing a petition to the High Court to appoint a "*guardian ad litem*" i.e. court appointed guardian. The guardian will act for the worker throughout the conciliation process and/or proceedings before the Industrial Court.

Power of the Industrial Court Relating to Representations on Unfair Dismissal - Section 29 of the Amendment Act 2020

There are two new subsections that have been inserted under section 29 of the Amendment Act 2020 as mentioned in Table 2 below:

Table: Recent Amendments under Section 29 of the Amendment Act 2020

Section	Contents
Section 29 (da)	Court's power to determine the date of termination
Section 29 (ea)	Continuation of proceedings in the event of claimant's death

i. Court's power to determine the date of termination

Previously, the Industrial Court was not permitted to alter or determine the date of dismissal, the dismissal's date was set to coincide with the date specified in the Ministerial Reference. However, under section 29 (da) of the Amendment Act, "*The court may, in any proceedings before it hear and determine the matter before it notwithstanding the fact that the date of dismissal stated in the Director General's reference under subsection 20 (3) is (i) disputed by any party to the proceedings; or (ii) incorrect, wherein the Court shall be vested with the power to determine the date of dismissal when hearing and determining the matter before it*." According to the Amendment Act 2020, the Industrial Court has the authority to establish the exact date of dismissal of the worker. This gives the Industrial Court the authority to determine any party's contested or erroneous dismissal date.

ii. Continuation of proceedings in the event of claimant's death

Previously, an unfair dismissal claim was deemed a personal action and would be dismissed upon the death of the Claimant. Nevertheless, under section 29 (ea) of the Amendment Act 2020, "*The court may, in any proceedings before it continues to conduct its proceedings notwithstanding the death of the workman who made the representations under subsection 20 (1).*" Following the change to the IRA, the Industrial Court is authorised to continue an unfair dismissal proceeding even after a claimant's death. Thus, the Court is able to accept any replacement or representation of the deceased worker by any other person or party.

The Amendment Act 2020, on the other hand, is silent on the remedies available if the deceased person's representative is successful in his or her lawsuit. This is because, if the Claimant's

claim is successful, the Court will grant reinstatement as an award under Section 20 (1) of the IRA.

According to Thein Thang Sang v. United States Army Medical Research Unit [1983] 2 MLJ 49, neither the IRA nor the Industrial Court Rules 1967 addressed the matter because the Court cannot reinstate a deceased worker and cannot recognise a person who is not a worker, the question of reinstatement is no longer relevant. It is founded on a legal maxim, "*actio personalis moritur cum persona*" i.e. "the action dies with the claimant" (Mohamed, 2004). Thus, the implementation of the new section 29 (ea) of the Amendment Act will be scrutinised in future court proceedings.

Application of Representations on Unfair Dismissal to Statutory Body Employees – Section 52 of the Amendment Act 2020

Previously, no representation for unfair dismissal could be filed to the Industrial Court by a worker employed by any government entity. However, Section 52 (3) of the Amendment Act 2020 provides, "*Notwithstanding subsection (1), Part VI shall apply to any service of or to any workman employed by, a statutory authority in which the Minister, after consultation with such statutory authority, by order published in the Gazette prescribe the name of the statutory authority*." With the amended section, a worker employed by a statutory authority may file a representation for wrongful dismissal under Section 20 (1) of the IRA. But, before filing any submission, the Minister must first confer with the statutory body in question and, by order published in the Gazette, specify the name of the statutory authority.

Constitution/divisions of the Industrial Court for Unfair Dismissal Cases – Section 22 (5) and 23 (4) of the Amendment Act 2020

Prior to the change, complaints for non-compliance under section 20 of the IRA were to be heard by a three-person panel consisting of the President (or a chairman), a member of the panel of employers, and a member of the panel of workers. However, section 22 (5) and 23 (4) of the Amendment Act 2020 provides, "*Notwithstanding the foregoing subsections, for the purpose of dealing with any reference to the Court under subsection 20 (3) or any complaint of non-compliance of award for a reference made under subsection 20 (3), the Court/Division may be constituted by the President/Chairman sitting alone*." Based on the amended sections, complaints about non-compliance with an award for representations on dismissals can now be heard by the President or a Chairman sitting alone.

Awards for Representation on Unfair Dismissals – Section 30 (6A) of the Amendment Act 2020

The Industrial Court is constrained by the restrictions set out in the Second Schedule when issuing an award in a matter of representation on dismissals under section 20 of the IRA. The restrictions are; i. In the event that backwages are to be given, such backwages shall not exceed twenty-four months' backwages from the date of dismissal based on the last-drawn salary of the person who has been dismissed without just cause or excuse; ii. In the case of a probationer who has been dismissed without just cause or excuse, any backwages given shall not exceed twelve months' backwages from the date of dismissal based on his last-drawn salary; iii. Where there are post-dismissal earnings, a percentage of such earnings, to be decided by the Court, shall be deducted from the backwages given; iv. Any relief given shall not include any compensation for loss of future earnings v. Any relief given shall take into account contributory misconduct of the workman.

However, section 30 (6A) of the Amendment Act provides "*Notwithstanding subsection (6), the Court, in making an award in relation to a reference under subsection 20 (3) shall take into*

consideration the factors specified in the second schedule; provided that this subsection is not applicable to a dismissal that relates to section 4, 5 or 7 of this Act." Thus, with the recent amendment to the Act, dismissal that relates to or as a result of the trade union activities under Section 4, 5 or 7 of the Act are no longer subject to the Second Schedule of the Act. In these instances, the Industrial Court is no longer limited to 24 months in its award for backwages.

Discussion and Conclusion

It was reported that employers fired a total of 142,336 workers between 2014 and 2017. Based on that figure, there were 21,821 (15%) cases were lodged under Section 20 of the IRA 1967 (Razak & Wan Setapa, n.d.). The biggest number of cases of unfair dismissal indicate that many employers are still unaware of their employees' rights to be terminated with only just cause and excuse. This incident demonstrates that employers underestimate the significance of employee and labour legislation (Ismail et al., 2019).

One of the goals of the latest IRA amendment was to expedite employee dismissal claims. Besides the government effort to ensure very unfair dismissal cases to be resolved as soon as possible, the government must also educate employers on the importance of adhering the law before terminating their employees. Employer should be aware that every dismissal must be according to the law and with just excuse.

The changes described in the previous section demonstrate that the government has made its best efforts to enhance our dispute settlement system speed and efficiency. However, it takes time to realise its effectiveness in some changes. For instance, many concerns on the removal of the Minister's power to filter frivolous cases. Yeoh and Jun Wen (2021) reported that employers may worry that the Amendment Act 2020 may promote the filing of frivolous complaints during this Pandemic Covid-19. The worries maybe due to the highest number of workers lost their job during this period. Human Resources Minister Datuk revealed that nearly 100,000 Malaysians have lost jobs since start of Movement Control Order (MCO) (Tan, 2020). The unemployment rate in May 2020 reached 5.3% (Raj Pragasam, 2021).

Those who have been terminated or dismissed by their employers may try their luck by filing claims for unfair dismissal against their employer. Moreover, there is no costs to be paid if a matter is referred to the Industrial Court, thus it becomes a concern whether in the absence of a ministerial filter system, the Industrial Court will be flooded with frivolous complaints.

In addition, the Amendment Act 2020 has widened its scope by allowing the appointment of guardian ad-litem for mental and continuation of proceedings in the event of claimant's death. However, the issue concerned is on when workers' who have mental impairment/disorder and workers who were death are the primary witness. This is because, in most unfair dismissal proceedings, the worker/claimant will be the primary witness to his claim since he will be the only one who is aware of the events leading up to his dismissal. Continuing the process in the absence of the claimant would essentially imply that the hearing is taking on without the claimant's testimony.

Besides, for every case of unfair dismissal, the claimant has to plead for reinstatement to the Director General of Industrial Relations. Section 20(1) of the Amendment Act 2020 provides, "*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 his former employment*."

As noted above, the section only mentioned "reinstatement" as the remedy with no provision for an alternative remedy of monetary compensation. The section remained unchanged from the previous IRA; no adjustments were made. It is proposed that the legislator should also broaden the scope of the remedy to be pleaded by the claimant. The proposed amendment not

only clarifies the process of unfair dismissal claims in cases where the claimants have mental impairment or disorder, but it also allows claimants who do not want to return to their former jobs to directly plead for other remedies.

According to Sanbos (Malaysia) Sdn Bhd v Gan Soon Huat [2021] MLJU 498, the Court held that the plea of reinstatement is only material at the stage of making a representation to the Director General of Industrial Relations. The Court may still have jurisdiction to determine a complaint of unfair dismissal if the employee does not plead reinstatement or pursue it at the hearing (Cheah & Lim, 2021). As we can see, the requirement to plead for reinstatement at the stage during making a representation to the Director General of Industrial relations and during the court proceeding seems to be different. Therefore, it is best for the legislator to make section 20 (1) of the Amendment Act clearer by widen the scope of the remedy. With that, it also makes it easier for guardian ad-litem or representative for the deceased worker to make a plead-on behalf of the claimant.

In conclusion, there are a number of key changes made to the Industrial Relations Act 1967 relating to unfair dismissal. First, the elimination of the Minister of Human Resources' discretion in determining whether to refer unfair dismissal cases to the Industrial Court or not. Second, during conciliation meetings, employers or workers may now be represented by anybody they want. Third, if a worker has a mental impairment, his family can petition the High Court to appoint *guardian ad litem*. Fourth, The Industrial Court has the jurisdiction to determine the exact date of the worker's dismissal. Fifth, even after a claimant's death, the Industrial Court has the authority to continue an unfair dismissal action. Sixth, a worker employed by a statutory authority may file a wrongful dismissal complaint. Seventh, complaints about non-compliance with an award for representations on dismissals can now be heard by the President or a Chairman sitting alone. Eighth, dismissal that relates to or as a result of the trade union activities under Section 4, 5 or 7 of the Act are no longer subject to the Second Schedule of the Act.

With these extensive amendments to the Act, the courts will continue to play an essential role in interpreting the new provisions under the Amendment Act 2020. It is hoped that with the new amendment to the IRA 1967, the process of settlement of disputes will be smoother and all the government’s objective in having the amendment will be achieved.

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