

New amendment of the employment act law employment essay

[Law](#)



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Introduction

New Amendment of the Employment Act

The Employment Act 1955 (hereinafter known as 'the Act') was first implemented in Malaysia on 1st June 1957. Along the years, there have been amendments made to improve the Act. The most recent amendments were made on 1st April 2012 under the Employment (Amendment) Act 1955 gazetted on 9th February 2012.

Amendments Made

Section 57 governs domestic servants. This section asserts that in order to terminate a contract, the employer or employee must be given a notice of termination fourteen days before ending the service or pay an indemnity which equals to fourteen days' wage. However, if there is a breach on the terms and conditions of the contract by either party, there is no need for prior notice or indemnity. Two subsections were added, Section 57A and Section 57B, after the amendment. Section 57A imposed the duty for the employer to report to the Labour Department within 30 days after the employment of a foreign domestic servant. Failure to comply, the employer may be penalised with a maximum fine of RM10, 000. On the other hand, section 57B regulates the responsibility of an employer to notify the Director-General of the Labour Department within 30 days should there be a termination of contract with the foreign domestic servant. Termination could take place in one of the following scenario, by 1) the employer, 2) the employee themselves, 3) the expiration of work permit, or 4) the repatriation

or deportation of the foreign domestic servant. Failure to notify would render the employer guilty of an offence and a fine not exceeding RM 10, 000 may be imposed. An amendment was also made to Section 60D. Section 60D (1) (a) stipulated the total number of paid holidays had been increased to a minimum of 11 days including Malaysia Day which falls on September 16. Furthermore, it was also ruled that if an employee's paid holiday falls during his or her normal holiday, the employer must still recompense the paid holiday. The amendments had also incorporated a new subsection known as subsection 3 under Section 60K. This subsection 3 require the employer make a report to the Director-General if there is a termination of contract of the foreign domestic servant including those servants who have absconded. Prior to the amendment, section 69B (1) allows the Director-General to inquire on complaints in cases where employees' salary falls between RM 1, 500 and RM5, 000 but in the last amendment the minimum wage limit to allow inquiry had been revised to RM 2, 000 and above. The amendment had also added a new part to the Act. Part XVA addressed the matter on sexual harassment in workplaces and consists of seven sections, from Section 81A to Section 81G. Sexual harassment may be said to happen between 1) an employee towards an employee, 2) an employee towards an employer or 3) an employer towards an employee. The methods of investigation into sexual harassments shall be made in accordance with the recommendation of the Minister. The convict may then be punished with a dismissal, degradation or a lesser reprimand deem fit following the result of the investigation. Additionally, Section 90A also indicated that all labour officers who are required to uphold the law in this Act is to be protected from any legal

actions against them. Lastly, section 101B was amended to take into account offences made by body corporate, partnership, society or trade union. This section allows the victim to charge the director, the manager, the partner or even the society jointly or severally in one same proceeding. The new Employment Act contains various amendments to further protect the welfare of the employees. It also improves the rights of female employees as compared to the past (before the amendment). As for pregnant ladies, confinement is now considered as parturition after at least twenty-two weeks instead of the previous twenty-eight weeks. This amendment has given effect to female employees to begin their maternity leave with benefits at an earlier date as compared to the past. It is because section 37 of the new Act provides that a female employee has the right to commence her maternity leave within 30 days immediately preceding her confinement and a day immediately after the confinement. The period of maternity leave has been prolonged to no less than sixty consecutive days from the previous 45 days thus enabling them to have a longer post-natal rest. The above benefits are not entitled for foreign employees due to the fact that they do not work under a contract of service with the company but through a contractor for labour. Interpretation of contractor for labour under section 2(1) of the new Employment Act is a person who contracts with a principal, contractor or subcontractor to supply labour for the execution of work. The definition of sub-contractor for labour under the old Employment Act is removed. Besides that, foreign domestic servant is interpreted as a domestic servant who is not a Malaysian citizen or a permanent resident.[1]The First Schedule includes part-time employee as a person whose average work hours is above

30% but below 70% of a full time employee's normal working hours in the same company with a similar capacity. For instance, Company A's designer works for 48 hours in a week, the work hours for the part-time employee in one week should not exceed 33.6 hours a week (70%) and below 14.4 hours a week (30%), if Company A is looking for part-time employees. If, however, it exceeds 33.6 hours a week, the employee will then be known as a full-time employee. If it does not exceed 14.4 hours a week, the employee should then just be appointed as a casual worker. The new Employment Act introduced new provisions on sexual harassment.[2]The Act has defined "sexual harassment" as," any unwanted conduct of a sexual nature, whether verbal, non-verbal, visual, gestural or physical, which is offensive or humiliating or a threat to his well-being, arising out of and in the course of employment". Based on the wording of the law, the definition of sexual harassment is equally applicable to both male and female employee and employer and not necessarily to female employees/employers only as both genders are opened to such harassment. A victim of sexual harassment can now seek to bring justice against the perpetrator by lodging a complaint with their employer who is duty bound to enquire into it unless the complaint of sexual harassment has previously been inquired into and no sexual harassment has been proven or the employer is of the opinion that the complaint of sexual harassment is frivolous, vexatious or mala fide. If, after that enquiry, the employer is satisfied that sexual harassment is proven, the employer may take the appropriate action against the perpetrator either by dismissing, downgrade and impose other lesser punishment on offender where the perpetrator is also an employee. It should be noted that the

employer only has power to impose such punishments if the perpetrator is also his employee but not otherwise. Employers are now allowed to pay wages for work done on rest days, paid public holidays and overtime not later than the last day of the next wage period. This is a significant change under section 19. Previously, employers are obligated to pay wages to their employees not later than the seventh day after the last day of any wage period. The definition of 'wage' now includes overtime and there are difficulties that arise in making overtime calculations in order to meet the 7th day requirement. However, under the new amendments under section 19(2) employers need not pay overtime wages by the seventh day after the last day of any wage period, instead, may do so by the last day of the next wage period. This has the effect of allowing the employer to pay his employees their wages for the month in two payments, namely, wages for the month by the 7th of the following month and overtime wages to be paid together with the following month's wages. In addition to the original purposes provided by the old Act as to instances when employers are allowed to give advances to employees, the new Employment Act added 4 more instances under section 22 in which advances of more than a month's wage may be given by employers to employees. These are to

- Enable them to purchase a computer[3]
- Pay for medical expenses for himself and immediate family members[4]
- Pay for educational expenses for himself or immediate family members[5]
- Pay his daily expenses pending receipt of any periodical temporary disablement benefits under the SOCSO Act 1969[6]

"Immediate family members" is defined as the employees' parents, children, siblings or any other person under the employee's guardianship. In view of the fact that

computers are a necessity nowadays and the cost of medical expenses has escalated to a very high level this new addition will be of much help to employees. Section 25, 25A(1) and 25A(2) provides that the employers shall pay employees' wages through an account at a bank, finance company or other financial institution licensed or established under Banking and Financial Institutions Act 1989, instead of by cash. An exception to this is where the employee himself had made a written request to the employer for his wages to be paid by cash or cheque.[7]Special protection is given to domestic servants with regards to payment of their wages. An employer of a domestic servant may only pay his domestic servant's wages by cash or cheque if the domestic servant had requested for it and the employer has obtained prior approval of the Director General of Labour to do so.[8]Section 33A is a new provision introduced in the new Act requiring a contractor for labour to register within 14 days with the Director General of Labour before supplying labour. The contractor is duty bound to maintain a register containing information on each and every employee supplied by him. Failure to do so is an offence, and shall, on conviction, be liable to a fine of not more than RM10, 000. Employers are prohibited under section 37(4) of the new Act from terminating a female employee for whatever reasons during the period they are entitled to maternity leave except on the grounds of closure of the employer's business. The maternity provisions under the old Act were applicable only to female employees who came under the scope of the act that is those earning RM1, 500 and below. However, maternity provisions are now applicable to all female employees, even a female chief executive officer earning RM30, 000, 000 or any amount, is now also entitled to

protection from being terminated during her maternity leave. As the old Act limited eligibility was only applicable to employees earning monthly wages of not more than RM1, 500. 00, female employees earning monthly wages more than that were not entitled to maternity allowance. The new Act removed this limitation altogether and by providing that every female employee employed under a contract of service irrespective of her wages, is entitled to maternity allowance.[9]With this amendment, female employees holding high positions, irrespective of their wages, are now section 44A of the new Act provides that every female employee who is employed under a contract of service irrespective of her wages is entitled to maternity allowance able to enjoy such benefit.

Problems due to amendments

Whatever good intention the legislature may have in amending the Employment Act, problems are likely to arise in respect of some of the new amendments. The interpretation of " contractor for labour" under Section 2 of the new Employment Act in place of the word " sub-contractor for labour" makes it seem as if the amendments were meant to endorse outsourcing of jobs, thus, reducing permanent jobs. When such labour is taken in by companies to carry out their work, the companies will only be liable to pay directly to the contractor for work done. By so doing, such companies will avoid paying contributions to the Employees Provident Fund (EPF) as well as to the Social Security Organization (SOCSO). Since such labour are not employees of the companies working under a contract of service, all the protection accorded to employees under a contract of service in the Act will not be applicable to them. Such workers' welfare is thus, inevitably,

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undermined. By increasing the instances whereby employers may advance to employees and their immediate family members under Section 22 of the new Act may be a noble step by the legislature. However, the tendency for employees to make full use of such advances unnecessarily not only for themselves but also for their immediate family members may lead to a very heavy burden on such employees. This may in turn lead to restriction in movement of labour. Employees who still owe their employers large sums of money due to such advances will obviously be tied down to their employers and unable to look for a better job or change to a new job. Their right to freedom of movement of labour will thus be restricted. The requirement under Section 25 of the new Act for wages to be paid to employees through their bank account only and not by cash or cheque unless the employee himself requested in writing, has made it safer on the part of the employer especially so on days when wages in large sums of cash need to be withdrawn from the bank to pay to the employees. With this provision it is more than likely that employers will not give any option to their employees but to pay their wages through their bank account. It should be noted that quite a large number of employees' wages are small amounts with many still below the poverty level. Instead of making so many of such employees making trips to the bank it would be more time saving for the companies' human resource officer to just make one trip to the bank to withdraw their wages and pay to them in cash.

Amendments needed for other Sections

Even with all the amendment made, there are still many areas that have not been addressed by the government. Take for example, Part XVA has been

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added into the Employment Act 1955 to cover issues regarding sexual harassment, but there is no section that includes any indication that compensation will be given to the victim of harassment. Generally, the aim of an Act is to fight injustice for the society. Hence, a victim of an offence is legally entitled to some reimbursement in order to ensure that the victim is put in place to a situation before the offence. However, Part XVA Employment Act has missed this important point. Secondly, S. 12(2)(f) of the Act states that an employer must give prior notice of termination for change of ownership as such change amounts to termination of service of employee. [10]Prima facie it means that it does not cover automatic continuation of employment with new owner business.[11]Therefore, this section can be further improved by recognising the automatic continuation of employment. For instance, if the old owner does not give notice of termination to the employees, automatically there is no termination of employees. Thus, the employee would secure their employment with their new business owner.

Comparative Study – Other legislation

The Employment Rights Act 1996 (Chapter 16) is a United Kingdom law that regulates labour law matters. There are various provisions in this statute on the matter of employment, however, due to different socio-background; this act may differ from Malaysia's Employment Act 1955 in terms of coverage, jurisdiction, implementation and interpretation. A comparative study to compare the Employment Rights Act 1996 and Malaysia's Employment Act 1955 was duly made public in this paper in order to identify the efficiency of Malaysia's Employment Act and thus of its potential pitfalls.

United Kingdom

Under the amended Act, confinement which is now considered as parturition after at least twenty-two weeks instead of the previous twenty-eight weeks had given the effect in which female employees may begin their maternity leave earlier than previously as stipulated under section 37. Under the United Kingdom Employment Rights Act, it was stipulated under section 70 (1) an employee may request for maternity leave after she satisfied the conditions prescribed to a normal maternity leave. An ordinary maternity leave in the United Kingdom would entitle female employees to leave of 26 weeks. Another added benefit applicable under this Act was provided under section 73 (1) which allow additional maternity leave provided certain prescribed conditions is satisfied. This, of course gave more benefit to the pregnant employees in the United Kingdom compare to that in Malaysia. Under section 55 of the Act, an extra benefit had been allocated for the pregnant employees in that she may have the benefit of time-off for ante-natal care in order to attend appointment made with registered medical practitioner for the purpose of ante-natal care. The Act further gave more family-care benefit under section 76 which entitled parents to a parental leave for the purpose of caring for a child. This section along with the many sections stipulated under this Act shows the great importance United Kingdom had put towards the quality time to care for employees' families. This is further proven by looking at section 80 of the Act which gave male employees to the rights of paternity leaves to allow their absent from work for the purpose of caring of a child or to support the expecting mother. These are the few mentioned section that gave an extra benefit to families in the

United Kingdom. Malaysia can of course look into these matters and take steps to improve benefits for family care in our country. Malaysia's Employment Act further made amendment under its First Schedule to include part-time workers as one whose average works is above 30% but below 70% to that of a full time worker. Under the Employment Rights Act, no stipulations were made on regards to a part-time employee but it was stipulated under section 80F that an employee may request for contract variation in the sense that employee may made changes to the hours he is required to works for the purpose of care for his children. In effect this is not on par with that as define under Malaysia's Employment Act but such section show that an employee may request their employment contract to change their working hour to suit with their commitment towards families. A part-time worker is however protected under The Part Time Workers (Prevention of Less Favourable Treatment) Regulations[12]which promotes equal hourly rates with that of a full time worker, or in a bigger sense to protect a part time worker from discrimination than a full time worker just because they are not a full time employee of one organization or employer. Section 19 of Malaysia's Employment Act had been amended to allow employer to pay wages for work done on rest days, paid public holidays and overtime not later than the last day of the next wages period. Such detailed wages for rest days, public holidays and overtime was not stipulated under the Employment Rights Act but under section 221, it was provided that employees will received their wages on a weekly basis. That is to say, wages in the United Kingdom is distributed every week as compare to Malaysia which wages was paid on a monthly basis. In addition to that, it was made known at an

amendment to section 22 of Malaysia's Employment Act was made in which advances of more than a month's wage may be made to employees to enable them to purchase computers[13], payment of medical expenses[14], educational purpose[15] and daily expenses pending receipt of any periodical temporary disablement benefits under the SOSCO Act 1969[16]. Under the Employment Rights Act, it was provided under section 13 that deductions may be made by the employer but it can only be made after getting their employees authority or agreement to do so. Deduction in this case would apply to overdue by the employees to the employer and having said that, this may include advance wages as well. And advance wages made by the employees may later be paid to the employer partially through deduction from employees' weekly wages. The prohibition under section 37 (4)[17] from terminating female employee who are entitled to maternity leave on any ground except for business closure can be made into comparison with that of section 72 (5) (a) and (b)[18] which states that any employers who failed to allowed employees to compulsory maternity leave shall be guilty of an offence and liable to summary conviction to a fine not exceeding level 2 of the standard scale. On the issue of sexual harassment as stated under Section 81A - 81G of Malaysia Employment Act, none of such provision is stipulated under the Employment Rights Act, but it was stated under different statute called ' The Employment Equality (Sex Discrimination)[19]' which defined sexual harassment. Section 5 of the regulation provides that sexual harassment happens when a person subjected a woman on the ground of her sex, to violating her dignity or creating offensive and intimidating environment to her. Alike the provision under section

81A[20]which definition of sexual harassment is equally applicable to both genders, section 5 is also applicable to male employees as stipulated under subsection (6) in that harassment of woman shall be treated equally as harassing a man.

Addressing problems of Malaysia EA

Although it cannot be denied that the amendments have brought a new light to Malaysia's labour law, some of the amendments made have not been able to solve the several issues prior to the amendment. This paper will also attempt to address problems arising caused by the amendment made by making a critical comparative study with the United Kingdom Employment Rights Act 1996 with the objective of filling in the gap of and thus improving our Malaysia's Employment Act 1955. This paper, in order to achieve its objective will make reference to few others law regulating labour in the United Kingdom for wider expectation. It was submitted in this paper that one of the key issue was on the amendment made to section 2 for the interpretation of 'contractor for labour' which replaces the word 'sub-contractor for labour'. The main issue behind the amendment was the fact that the amendment had now endorsed outsourcing of jobs, thus in turn reducing permanents jobs. To address this issue, we must firstly look into the bigger picture on how the amendment could affect workers and the industry as a whole. It was submitted that the amendment had destroyed the principle of direct two-party relationship between employees and the employer. The law must therefore be qualify and all workers must be employee of the business owner and not that of third party labour supplier called contractor for labour or by any other name. Therefore, it is suggested

in this paper that this amendment should be amended or worded in a way that could justify all parties especially to the employees. In this sense, tripartite and social dialogue between the government, employers and employees must convene so that decision can be achieved to address this matter. Another key issue that needs addressing in this paper was the amendment made to section 22 which allow advance wages in several restrictive conditions as stipulated under the sections. Although the amendment bring positive impact to the employees, but the impact of advance wages must be taken into account as well. Should the employees had requested for an advance wages and later were not able to repay the advances, this may lead to restriction in movement of labour in the sense that the employer will not be able to change to other job until the advances is repaid. The Employment Rights Act 1996 may have the solution by referring to section 18 which limits the amount of deductions. It was stipulated under subsection (1) that deduction from employees' wages should not exceed one-tenth of the gross amount of wages that particular employees receive on daily basis. Malaysia should have adapted to this practices as well. The amount of deduction may differ considering the fact that Malaysia and United Kingdom has a vast different in terms of economic, social and background. The key-importance to addressing this issue is by looking at the socio-economy of the employees itself. Question such as the employee ability to repay the advance should be taken into account so that the employee would not be burdened and thus lead to more problem to the employee itself. On the third key issue to the latest amendment, it was submitted in this paper that the requirement under section 25 which

required employer to pay wages only via their bank account unless requested to be in cash may bring about other problem especially to employees living far from a bank or even low paid employee who may find it difficult to travel all the way just to retrieve their salary. The practice in the United Kingdom is different from Malaysia in this aspect in that there was no statutory provision requiring employer to pay wages only through one method of payment. Instead, their contract of employment will define the method in which the wages will be paid. In other words, their prior agreement before the employees commencing their employment is that an agreed method of payment had already been decided beforehand. That is to say, an employee may have the choice to have their pay through cash, bank transfer or by cheques. As of not to reduce the possibility of payment method, through both parties agreement, the wages could be paid in any way or method agreed by both parties. Malaysia position in this was that the payment method shall be statutorily governed unlike that of United Kingdom. Of course, there are relevancy to this policy but options is always open to the employees as they may opt for cash payment instead of bank transfer provided an request letter were made by the respective employee themselves. On another different note, there are few key-issues in which the amendment to the Employment Act 1955 had failed to address as submitted in the earlier part of this paper. One of the instances is the fact that under the issue of sexual harassment, the Act particularly under Part XVA did not provide any indication that compensation will be given to the victim of harassment. In the United Kingdom, the law provides under the Equality Act 2010[21] that sex (gender)[22] is one of the characteristic protected by the

Act. The heading to the Act further explained on the purpose of the Act as follows: "... to reform and harmonise equality law and restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics..." Furthermore, under the Employment Rights Act 1996, an employee who had worked for an employer for at least one year may also claim, in addition to the claim of sexual harassment, the employee may claim for constructive dismissal[23] in the event that the employee had resign or considering to resign out of the result of such harassment. Of course, the law did not state the remedy to the harassment itself but the practice in the United Kingdom was that the matter if brought to the Employment Tribunal[24], a remedy to the harassment will then be decided in the tribunal and damages payable before the tribunal is unlimited[25], thus on judges discretionary. The key element in the awards can be made by referring to financial losses suffered and likely suffered by the aggrieved party but there is no limit to the amount of remedy that can be awarded. In addition to the compensation, aggrieved party may also claim for injury to feeling caused by the harassment and compensation is assessed as follow:(i) \$ 600 to \$ 6, 000 for low level harassment (isolated incidents)(ii) \$ 6, 000 to \$ 18, 000 for more serious cases (continuous incidents)(iii) \$18, 000 to \$ 30, 000 for the most serious cases[26]Therefore based on the above finding, it is clear that employees in the United Kingdom have more option compare to employees in Malaysia in relation to sexual harassment. Perhaps, the government may look into this matter and make a proper adjustment where needed.

Indian Employment Law

Conclusion