CHAPTER II

The Employment Relationship*

A INTRODUCTION

We have defined *Industrial Relations* as *the study of the regulation of the relations between employers, employees and their trade unions*. It would be logical, therefore, to begin our outline of the framework governing Malaysian industrial relations by defining what 'employer', 'employee', and 'trade union' mean in Malaysia: that is, by looking at the definitions of these terms in the two laws governing industrial relations here, namely, the Employment Act 1955 (EA) and the Industrial Relations Act 1967 (IRA)[1]. Now, without *employers* and *employees*, there cannot be any *trade unions*. So, in this chapter, we shall concentrate on the first two elements and on the relationship between them, and leave the third element for the next chapter.

Both the EA and the IRA define 'employer' and 'employee'; and both Acts see the employer-employee *relationship* as being essentially *contractual* in nature. But they do not define 'employer' or 'employee' in exactly the same way; nor do they refer to the particular *contract* involved by the same name: the EA calls this contract the 'contract of service', while the IRA calls it the 'contract of employment'.

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* By the 'employment relationship' we mean the relationship between the *employer* and the *employee*. As this relationship is a *contractual* one in Malaysia, the 'employment relationship' would include the particular *contract* between the employer and the employee. This contract is a type of *employment contract*.

1 While there are *employers* and *employees* everywhere in the world and *trade unions* in most countries, the legal definition of these terms is likely to vary from country to country. The definition may vary even from law to law in the same country, depending on the object of the law concerned.

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1 *The Employment Act 1955 (EA)*

The EA defines the 'contract of service' as:–

> any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee, and includes an apprenticeship contract;

'employer' as:–

> any person who has entered into a contract of service to employ any other person as an employee, and includes the agent, manager, or factor of the first mentioned person;

and 'employee' as:–

> any person or class of persons –
>
> (a) included in any category in the First Schedule to the extent specified therein; or
> (b) in respect of whom the Minister of Human Resources makes an order under section 2(3) or section 2A.

There are two classes of persons in the *First Schedule* to the Act, one based on *wage* and the other based on *occupation*, namely:–

(i) any person, irrespective of his occupation, who has entered into a contract of service with an employer and whose wages do not exceed RM1,500 a month, excluding commission, subsistence allowance and overtime payment; and
(ii) any person, irrespective of the amount of his monthly wages, who has entered into a contract of service with an employer and who:

- is engaged in manual labour; or
- is engaged in supervising or overseeing other employees engaged in manual labour; or
- is engaged in the operation or maintenance of any vehicle used for the transport of passengers or goods, or for reward or for commercial purposes; or
- is engaged in any capacity in any locally registered vessel but is not a certified officer; or
- is engaged as a domestic servant.

Sections 2(3) and 2A of the Act effectively give the Minister of Human Resources the power to 'make' employees. He may 'by

order' *either* declare the provisions of the EA to be applicable to any person or class of persons[2], *or* prohibit the employment of any person or class of persons except under a contract of service[3], and upon the order coming into force, that person or class of persons 'shall be deemed to be an employee or employees'. Similarly, *section 2B* effectively gives him the power to 'unmake' employees. It reads:–

> The Minister may by order exempt or exclude, subject to such conditions as he may deem fit to impose, any person or class of persons from all or any of the provisions of this Act.

But as the Minister has not to date exercised his powers under sections 2(3) or 2A, nor his powers under section 2B, these sections may, for the time being, safely be ignored.

Furthermore, the EA makes it obvious that the term 'employee' is broad enough to include *part-time employees* as well as *full-time ones*. It defines a 'part-time employee' as:–

> a person included in the First Schedule whose average hours of work as agreed between him and his employer do not exceed 70% of the normal hours of work of a full-time employee employed in a similar capacity in the same enterprise, whether the normal hours of work are calculated with reference to a day, a week or any other period as may be specified by regulations.

The Act also permits the Minister to make regulations 'prescribing the manner in which the hours of work of an employee are to be computed for the purpose of determining whether that employee falls within the definition of a part-time employee'. And it permits the Minister to make regulations governing the terms and conditions of employment of part-time employees.

The term 'employee' is obviously also broad enough to embrace *foreign employees*, for the EA regulates the employment of such employees – see Part XIIB thereof; but it makes it clear that *permanent residents* are not considered foreign employees. The Act defines a 'foreign employee' simply as 'an employee who is not a citizen', and a 'permanent resident' as:–

2 Employment Act 1955 section 2(3).
3 Employment Act 1955 section 2A.

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> a person, not being a citizen, who is permitted to reside in Malaysia without any limit of time imposed under any law relating to immigration, or who is certified by the federal government to be treated as such in Malaysia.

Finally, the EA affords some protection to employees (including part-time employees and foreign employees) 'whose wages exceed RM1500 but do not exceed RM5000' a month – see *Appendix A*: The 'Labour Court'.

2 *The Industrial Relations Act 1967 (IRA)*

The IRA defines the 'contract of employment' as:–

> any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as a workman and that other agrees to serve his employer as a workman;

'employer' as:–

> any person or body of persons, whether corporate or unincorporate, who employs a workman under a contract of employment, and includes the government and any statutory authority unless otherwise expressly stated in this Act;

'government' as:–

> the federal government or a state government;

'statutory authority' as:–

> an authority or body established, appointed or constituted by any written law [federal or state] and includes a local authority;

and 'workman' as:–

> any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and, for the purposes of any proceedings in relation to a trade dispute, includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute, or whose dismissal, discharge or retrenchment has led to that dispute.

The Industrial Court clarified what 'statutory authority' means in *Projek Kilang Air Batu (NEKMAT) v Food Manufacturing Industry Employees Union* (Award 601 of 1996):–

> The court must therefore determine whether the *Persatuan Nelayan Kebangsaan* (National Fishermens Association) is a statutory authority. The IRA defines a 'statutory authority' as 'an authority or body established, appointed or constituted by any written law, and includes a local authority'. Is the *Persatuan* established etc by a written law, that is, a statute? The Fishermens Associations Act 1971 is a statute. However, the question is: is the *Persatuan* established by this Act? The operative word is 'by'...Looking at the provisions of the 1971 Act, the court is of the opinion that the *Persatuan* is established not *by* the Act but *under* it. The Act is an enabling one in that it enables fishermen to form area associations, which may federate to form state associations which, in turn, may confederate to form a national association. The position is similar to cooperatives established under the Cooperative Societies Act. It would be wrong to say that because cooperatives and their confederation (*ANGKASA*) are established under this Act that they are statutory authorities. Similarly, the Companies Act enables persons to form companies, which are then incorporated under the Act. It does not follow that companies are statutory authorities. The position is different in the case of statutory authorities like the *Lembaga Kemajuan Ikan*, the *Majlis Amanah Rakyat* etc which are established by their respective Acts. In these cases, those Acts establish these authorities...The court therefore is of the opinion that the *Persatuan* is not a statutory authority.

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A 'local authority' is a statutory authority, which is confined to a particular locality, *eg* a municipality. Statutory and local authorities may be federal or state authorities, depending on the statute by which they are established, whether a federal statute or a state statute.

3 *The Employment Act and the Industrial Relations Act*

It will be noted that:–

(a) In both the EA and the IRA:

- the 'contract of service'/'contract of employment';
- the 'employer' (in each Act); and
- the 'employee'/'workman';

are each defined in terms of the other two.

As one writer has rightly pointed out: 'The definitions take us in a circle'. This unusual way of defining these three terms has been

adopted by both Acts for basically the same reason: to make it clear in each case that *there is really only one entity consisting of three parts, each of which exists not in isolation by itself but only as a part of that entity.* It is this entity consisting of three parts which constitutes the context for each Act, *ie* the universe within which that Act applies. In other words, *unless there is an 'employer', an 'employee' or 'workman', and a 'contract of service' or 'contract of employment' as defined in the Act concerned, that Act will not apply.*

(b) While there is no basic difference between the 'contract of employment' as defined in the IRA and the 'contract of service' as defined in the EA, both 'employer' and 'workman' are defined more broadly in the IRA than 'employer' and 'employee' are defined in the EA.

Thus, *while the 'contract of employment' is apparently identical in nature to the 'contract of service', the scope of the 'contract of employment' is clearly wider than the scope of the 'contract of service'.*

B THE RELATIONSHIP

Besides positing the *employer-employee relationship* as being essentially a *contractual* one, the EA and the IRA say nothing about the *implications* incidental to such a relationship. However, the Industrial Court has held that inasmuch as the employment relationship is fundamentally contractual in nature, the important terms of the employment contract, especially those affecting the security of tenure of the employee, must be spelt out clearly and expressly and preferably in writing, and must also be communicated to the employee to be at all binding on him. It has added that, where his security of tenure is at stake, the court will examine this relationship as it is outlined by the contract equitably, in order to determine whether in good conscience the employee ought to be held to the terms he has agreed to be bound by. As follows.

In *ERMS Management Sdn Bhd v Gilbert Ang* (Award 20 of 1994):–

> The employment relationship is fundamentally contractual in nature. Some form of employment contract is necessary if not mandatory for the court to find out the terms the workman has agreed to be bound by. Within the framework of statute-guaranteed security of employment and the right to work, when a dispute pertaining to the termination of a workman or the tenure of his employment arises, an arbitrator will invariably look to the terms of the contract for guidance. It is therefore of paramount importance that the fundamental terms be clearly spelt out in the contract, and that they be communicated to the workman in the first instance to be binding on him. A term that affects a workman's continued employment is a fundamental term and ought to be in writing. In its absence, it is inequitable and against good conscience to allow the employer to use legalistic refinements to circumvent a defective situation.

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And in *Primason Sdn Bhd v Chin Ooi Leng* (Award 593 of 1996):–

> It is difficult to follow the argument that the company 'reserves the right to alter, vary or add to the terms of the contract of service'. A term that affects a workman's continued employment is a fundamental term, and a party can be bound only by such terms as he has agreed to. It is of paramount importance that the fundamental terms of the contract are clearly spelt out when the workman is first employed, and these terms must be communicated to the workman in the first instance to be binding upon him. It is true that the employer-employee relationship is fundamentally contractual in nature, but in industrial law this relationship is examined equitably. The Industrial Court invariably applies to the employment contract special rules which are not applicable to other types of contract. It is for this reason that an employer cannot effectively terminate such a contract even if the contract contains terms providing for its termination and those terms had been observed. The terms of an employment contract can be changed or varied only by the mutual consent of the parties. The company cannot do what it likes to the contract of the claimant, or be permitted to run amok without fear of the consequences on a workman's right to work.

Then, in *Tractors Malaysia Sdn Bhd v National Union of Commercial Workers Sabah* (Award 176 of 1985):–

> It is important that the fundamental terms are spelt out clearly in the contract. These terms must be communicated to the employee to be binding on him. Fundamental terms cannot be implied into the contract ... There is no doubt that not all terms need be put into the contract. But a term which goes to the root of the contract, *eg* the period of employment or the circumstances of its termination, must be clearly spelt out ...We are of the view that

the company's condition that the claimants' services would be terminated if they failed their examination will not be binding on them. The company has no right to imply into the contract such a fundamental term. We cannot agree with the company's submission that since the claimants had signed the contract, they are bound by it and cannot now raise any objection ... In *Schroeder Music Publishing Co Ltd v Macaulay* (1974) 3 All ER 616 it was held that:

> A distinction has to be made between 'standard form' contracts made freely between parties bargaining on equal terms, and 'standard form' contracts which had not been the subject of negotiation between the parties to it, or approved by any organisation representing the interests of the weaker party, but had been dictated by the party which enjoyed superior bargaining power. Contracts of the former kind raise a strong presumption that their terms are fair and reasonable. When the contract is of the latter kind, however, no such presumption applies, and the court has to consider all its provisions to see whether the bargain made was fair, *ie* whether the restrictions were both reasonably necessary for the protection of the legitimate interests of the promisee and commensurate with the benefits secured to the promisor under the contract.

Applying the same test, we are unable to hold the view that it is reasonable or justifiable on the part of the company to impose a new condition, namely, that the claimants' services would be terminated if they fail their examination.

And in *Agri-Bio Corp Sdn Bhd v All Malayan Estates Staff Union* (Award 46 of 1983):–

In industrial law, it is worthwhile remembering that the relationship between the employer and the employee as it is outlined by the contract should be examined equitably to find out if the employee is bound by the terms that he has undertaken. As held by Lord Denning in *Clifford Davis v WEA Records* (1975) 1 All ER 237 (following Lord Diplock's view in *Schroeder Music Publishing Co Ltd v Macaulay* (1974) 3 All ER 616):

> If one party uses his superior bargaining power so as to 'exact promises that were unfairly onerous', or 'to drive an unconscionable bargain', then the courts will relieve the other party of his legal duty to fulfil it. Lord Diplock gave this pertinent example. A strong concern prepares a new 'standard form' contract containing terms which are most unfair, and dictates to the customer: 'Take it or leave it.' The customer is in a weak position. He has no real option but to accept. The court may decline to enforce the contract or, at any rate, may decline to enforce any term which is unfair to the customer, such as an exemption clause.

We find as a fact that the company secured the signatures of the claimants on the documents by exercising undue influence. The claimants had no choice in the matter, as one of them said that he signed it because he feared that otherwise he would lose his job. It was unconscionable of the company to have so acted. We cannot give due regard to the terms and conditions of the service contracts.

C THE CONTRACT

The *employment relationship* comprises not only the *employer* and the *employee*, but also the particular *employment contract* between them. There are, however, two major types of employment contract, one denoting the *employer-employee* relationship and the other the *principal-contractor* relationship. *What we mean by the 'employment contract' is the type denoting the employer-employee relationship. It is this type which the EA calls the 'contract of service' and the IRA calls the 'contract of employment'.* This type of employment contract constitutes the *foundation* for Malaysian industrial relations. Without it, there would be no 'employer' or 'employee', and without them there cannot be any 'trade union'. *The other type of employment contract, the type denoting the principal-contractor relationship, is called the 'contract for services'.*

As mentioned earlier in this chapter, both the EA and the IRA see the employment relationship as being essentially contractual in nature. But, unlike the IRA, *the EA does not stop there – it goes on to regulate the employment contract* in the following ways.

First, the Act prohibits any employment contract from restricting in any way the exercise by an employee of his 'trade union' rights.

> Nothing in any contract of service shall in any manner restrict the right of any employee who is a party to such contract:
>
> (a) to join a registered trade union;
> (b) to participate in the activities of a registered trade union...; or

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(c) to associate with any other persons for the purpose of organising a trade union in accordance with the Trade Unions Act 1959[4].

Second, the Act requires some employment contracts (specifically, 'fixed term' contracts exceeding one month) to be in writing, and all written employment contracts to specify the ways by which they can be terminated by either party to the contract.

> A contract of service for a specified period of time exceeding one month, or for the performance of a specified piece of work where the time reasonably required for the completion of the work exceeds or may exceed one month, shall be in writing[5].

> In every written contract of service a clause shall be included setting out the manner in which such contract may be terminated by either party in accordance with this Act[6].

(The EA also describes how the employment contract can be terminated by either party to the contract. For the specific ways by which the contract can be terminated under the Act, see Chapter VII 'The Managerial Prerogatives', under 'Termination and Dismissal')

Third, the Act compels all employment contracts to accept the terms and conditions it legislates as the *basic* and the *minimum* terms and conditions of employment. How it does this is interesting.

Initially, the Act declares that the employment contract cannot stipulate terms and conditions which are *less favourable to the employee* than the terms and conditions legislated by it.

> Subject to section 7A, any term or condition in the contract of service which is less favourable to the employee than a term or condition prescribed by this Act or by any subsidiary legislation ... shall be void and of no effect to that extent, and the more favourable provisions of this Act or any subsidiary legislation ... shall be substituted therefor[7].

4 Employment Act 1955 section 8.
5 Employment Act 1955 section 10(1).
6 Employment Act 1955 section 10(2).
7 Employment Act 1955 section 7.

Then, the Act declares that the employment contract can stipulate terms and conditions which are *more favourable to the employee* than the terms and conditions legislated by it.

> Subject to any express prohibition under this Act or under any subsidiary legislation...nothing in section 7 shall be construed as preventing an employer and an employee from agreeing [in the contract of service] to any term or condition...which is more favourable to the employee than the provisions of this Act or any subsidiary legislation[8].

Finally, the Act declares that the employment contract can stipulate terms and conditions *other than* the terms and conditions legislated by it.

> For the removal of doubt, it is hereby declared that if no provision is made in respect of any matter under this Act or under any subsidiary legislation ... or if no subsidiary legislation has been made on any matter in respect of which such legislation may be made under this Act, this shall not be construed as preventing such matter from being provided for in the contract of service, or from being negotiated upon between an employer and an employee[9].

While both the EA and the IRA see the employer-employee relationship as being essentially contractual in nature, and the former, unlike the latter, even regulates the employment contract, neither Act provides the answers to some basic questions concerning this contract. As noted earlier in this chapter, *the employment contract which denotes the employer-employee relationship is called the 'contract of service' by the EA but the 'contract of employment' by the IRA. But is there really any difference between these two contracts? And, if so, what is the difference between them?* Again: *What is the difference between the employment contract which denotes the employer-employee relationship* and *the employment contract which denotes the principal-contractor relationship? Specifically: what distinguishes the 'contract of service'/ 'contract of employment' from the 'contract for services'?* The answers to these questions cannot be found in the EA or the IRA. The Industrial Court, however, has supplied them.

8 Employment Act 1955 section 7A.
9 Employment Act 1955 section 7B.

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To start with, the Industrial Court has declared that while there are different types of employment contract catering for the various forms of employment, this court has jurisdiction over only *one* type, namely, the *contract of service/contract of employment*, the type catering for the *employer-employee* form. In *Nova Charm Bhd v Ooi Hock Huat* (Award 220 of 2002):–

> In the course of operating a business or other undertaking, all kinds of arrangements for the performance of work or the rendition of services are entered into between the various parties. These may include the employment of staff in regular employment, engaging independent contractors, and hiring temporary staff, casual workers and other personnel on fixed terms. The arrangements depend on the kind of work or services required to be done or rendered and the duration of the same. The parties of course negotiate the nature and the terms of such arrangements according to to their own needs and interests. Business entities and other undertakings have the freedom to structure arrangements for the performance of work or the supply of services in the manner consistent with their needs and according to their limitations. They should not be forced *ex post facto* into employment relationships when the attendant facts and circumstances clearly show that in contracting for such work or services it was never intended that they were employing staff to be in their regular employment.
>
> The IRA protects the security of tenure of a *workman* engaged under a *contract of service*. The principle of security of tenure guarantees an employee's legitimate expectation to continue in his employment and to earn his livelihood unless his employer has just cause or excuse to terminate his services. It is enforceable by recourse to statutory remedies under the Act. It would be clear that not all persons performing work or rendering services for another become a 'workman' within the meaning of the Act. The statutory right to security of tenure is guaranteed only to a 'workman' who comes within the Act, and not to any other person performing work or rendering services in some capacity other than as a 'workman' employed under a contract of service. The issue in this case simply stated is whether the claimant was employed under a 'contract of service': see *Hoh Kiang Ngan v Industrial Court* (1995) 3 MLJ 369 (Federal Court).
>
> In examining arrangements for the performance of work or the rendition of services to determine their character (*ie* whether there is a 'contract of service') the court must take into consideration *inter alia* the nature of the employer's business and the type of work or services which an employee is engaged to perform or render, together with the conduct of the parties in the course of the execution of the work or services ... The conduct of the parties here points to an arrangement for the rendition of services by the claimant on an *ad hoc* and casual basis, rather than one where there was a contract of service between an employer and an employee...The claimant has failed to discharge the burden of proving that he was a 'workman' within the meaning of the IRA ... The court accordingly strikes out the claimant's reference, as his claim against the company does not lie within the court's jurisdiction.

The Industrial Court has acknowledged that the *contract of service* is identical in *nature* to the *contract of employment*, although there is a difference in the *scope* of the two contracts. But it has also held that the *contract of service* is different in *nature* from the *contract for services*, and has spelt out the *test* that is applied to distinguish the first type from the second type of employment contract. As follows.

In *American International Assurance v Dato Lam Peng Chong & Others* (Award 275 of 1988):–

> The issue before the court is whether there was a contract of employment/contract of service *or* a contract for services, which is a question of mixed law and fact...It would be for this court to decide, after perusing all the evidence, whether the eight claimants were 'workmen', or whether they were employed under a contract which does not recognise them as 'workmen'. It is clear that Parliament intended to restrict the meaning of 'employee' in the EA, but deliberately left out any restriction in the definition of 'workman' in the IRA. *As Parliament did not restrict the meaning of 'workman', this term acquires a much wider meaning and connotation than the term 'employee'...*
>
> The question whether the eight claimants were 'workmen' depends on whether they were employed by the company on contracts of employment/contracts of service *or* on contracts for services...*Is there really any difference between 'contract of employment' and 'contract of service'?* It will be noted that although there is no definition of 'contract of service' in the IRA, section 41 of it suddenly talks about 'contract of service'...Does 'contract of service' in section 41 have a different meaning or connotation from 'contract of employment' as defined in the Act? I must conclude that there is *no distinction* between the two.
>
> To answer the question whether the eight claimants were 'workmen' or not, one has to look at the facts and the various tests

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with effect from 22 December 1987. That being the case, there can be no noncompliance regarding the payment of *annual increments* for the years 1988 and 1989. But in respect of the *bonus* for the year 1987, although the agreement was effectively terminated on 22 December 1987, a claim for payment of the 1987 bonus had accrued and is payable under the agreement, and such a claim is not barred merely because the agreement had been terminated: see *General Ceramics Manufacturers Bhd v Non-metallic Mineral Products Manufacturing Employees Union* [1988] 3 MLJ 474 (Federal Court). The company therefore is hereby ordered to pay the 1987 bonus.

D CONTRACT AND AGREEMENT

Sections 17(2) and 33(2) of the IRA do not only draw a *distinction* between the collective agreement/award in lieu and the employment contract. They also describe the *relationship* between the two, where they co-exist. The subsections make it clear that the collective agreement/ award in lieu is *not* the employment contract. But they also make it clear that, where the two co-exist, the collective agreement/award in lieu *supersedes* the employment contract but does not *extinguish* it. Indeed, the collective agreement/award in lieu *cannot* extinguish the employment contract, although *vide* sections 17(2) and 33(2), it not only can but does supersede it...

Section 17 deals with the 'Effect of a Collective Agreement', and section 32 with the 'Effect of an Award'.

TABLE 5.1
COLLECTIVE AGREEMENTS AND AWARDS IN LIEU: 1999 & 2000

	1999	2000
Collective Agreements	268*	324*
Awards in Lieu	26	42
Total	294	366

* The figures refer to collective agreements concluded by the parties thereto and given cognisance by the Industrial Court. In each year, the manufacturing sector accounted for about 50% of the collective agreements.

Source: Industrial Court Secretariat

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CHAPTER VI

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CHAPTER VI

Dispute Resolution – Techniques and Agencies

A INTRODUCTION

It was contended in the previous chapter that *collective bargaining and the collective agreement* together constitute the most significant feature of the discipline of Industrial Relations because they are the key means of *promoting* harmonious industrial relations. If that is true, then *the resolution of disputes between employers, employees and their trade unions by peaceful means* must be its second most significant feature, because this is the key means of *maintaining* harmonious industrial relations. Both contentions are borne out by the preamble to the Industrial Relations Act 1967 (IRA), which declares that the two principal objectives of the Act are:-

(a) the regulation of the relations between employers, employees and their trade unions; and
(b) the prevention and settlement of any differences or disputes arising from their relationship.

Now, having in its earlier parts provided for the *first* objective by making *collective bargaining* and the *collective agreement* possible, the IRA goes on in its later parts to provide for the *second* one by making available *a number of ways* to resolve what it terms 'trade disputes' peacefully, such as negotiation, fact-finding, conciliation, and arbitration. The Act also acknowledges that industrial action is one way of resolving 'trade disputes', but it carefully regulates the use of this rather confrontational (if still peaceful) way. Besides making available a number of ways to resolve 'trade disputes' peacefully, the IRA also identifies *the techniques or the agencies* involved in the use of these ways, such as the grievance machinery, the strike and lockout, the Department of Industrial Relations, and the Industrial Court (see *Table 6.1*).

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In this chapter, we shall deal first with *trade disputes*, and then with the *ways* of resolving such disputes made available by the IRA, together with the *techniques or agencies* which the Act identifies as being involved in the use of these ways. However, we shall not consider *fact-finding* because this way does not by itself resolve disputes (although it may make their resolution easier). Perhaps this is why fact-finding has never been resorted to since the IRA was enacted in 1967. Furthermore, we must bear in mind that *conciliation* is not available to the public sector *vide* section 52(1), and that *arbitration* is available to this sector only conditionally *vide* section 26(2). (In practice, trade disputes in the public sector are not referred to the Industrial Court for arbitration) Curiously, however, industrial action is freely available under the Act to the public sector! Finally, it must be emphasised that, with the notable exception of *industrial action*, none of the other ways mentioned (namely: negotiation, fact-finding, conciliation, and arbitration) is unique to Industrial Relations. In other words, these ways may be used to resolve *any kind of dispute*, not only disputes between employers, employees and their trade unions.

B TRADE DISPUTES

The IRA defines a 'trade dispute' as 'any dispute between an employer and his workmen which is connected with the employment or the non-employment or the terms of employment or the conditions of work of any such workmen'. Hence, a *trade dispute* is a dispute:-

(a) between an employer and any number of his employees; and
(b) over the employment or the non-employment or the terms of employment or the conditions of work of any such employees.

However, the Act also declares that the term 'party, with reference to a trade dispute,' means 'an employee union acting for all or any number of its members in the trade dispute, or an employer acting for himself in the trade dispute, or an employer union acting for all or any number of its members in the trade dispute'. Thus, insofar as a 'trade dispute' is concerned, the *parties* to it can only be:-

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(a) on the one side, the *employer* involved in the dispute, or an *employer union* acting for all or any number of its members involved in the dispute; and
(b) on the other, an *employee union* acting for all or any number of its members involved in the dispute, but not the *employee(s)* involved in the dispute.

This explains why the Industrial Court has insisted that a trade dispute and an employee union go together, *ie* that there cannot be the one without the presence of the other. Indeed, the law courts had decided long ago during the tenure of the Industrial Arbitration Tribunal that *an employee union is indispensable in a trade dispute*: see *Cargo Handling Corp v Cargo Handling Corp Staff Union* [1966] 2 MLJ 278 (High Court); and the Industrial Court has adhered to this principle ever since: see, for instance, *Dynamic Management Sdn Bhd v Association of Plantation Executives WM* (Award 214 of 1998).

The Industrial Court has noted that the term 'trade dispute' is defined very broadly in the IRA. In *Hagemeyer Industries Sdn Bhd v National Union of Commercial Workers* (Award 75 of 1983):-

> A 'trade dispute' is defined in the IRA as 'any dispute between an employer and his workmen which is connected with the employment or the non-employment or the terms of employment or the conditions of work of any such workmen'. This definition is worded in very wide terms, and the words 'employment' and 'non-employment' are words of the widest amplitude which have been placed in juxtaposition to make the definition comprehensive enough to include disputes of every nature connected with the employment or the non-employment of workmen by their employer. The definition, in our view, covers every dispute between an employer and his workmen which is connected with the service of the workmen, or with the benefits and privileges incidental to that service.

And in *Teluk Anson Agricultural Enterprise Sdn Bhd (Arcadia Estate) v National Union of Plantation Workers* (Award 139 of 1984):-

> The term 'non-employment' is not defined in the IRA. It is the negative of 'employment', and will come into being in various forms. It will arise when the employer dismisses an employee, or declines to employ him, or contemplates turning him out who is already in employment, or refuses to give work to an employee who is entitled to work, or suspends him; it includes constructive dismissal.

The Industrial Court has held that once a trade dispute is referred to it by the Minister of Human Resources, the court is immediately cloaked with the jurisdiction to hear and dispose of it (unless, of course, the reference itself is set aside by the law courts). However, the court has added that it has the jurisdiction to arbitrate a trade dispute only if it is referred to the court under *section 26* of the IRA (which deals with the reference by the Minister of *trade disputes* to the court for arbitration); it does not have the jurisdiction to arbitrate a trade dispute under *section 33* (which deals with the *interpretation* by the court of approved agreements or past awards) or *section 56* (which deals with the *enforcement* by the court of approved agreements or past awards) or indeed any other section of the Act. As follows.

In *Kumpulan Ladang Terengganu Bhd v Kesatuan Pekerja KLT* (Award 135 of 1982):-

> We disagree with the estate's submission that there was no 'trade dispute' in existence between the estate and the union. The very fact that there was disagreement between them over the union's proposals on the wages and terms and conditions of service of the employees employed in the estate is itself a 'trade dispute' within the meaning of this term in the IRA. We need not go further than to establish the existence of a 'trade dispute'. We also disagree with the estate's contention that this court has no jurisdiction to determine this trade dispute ...We are of the view that once a 'trade dispute' is referred by the Minister to the Industrial Court for adjudication, the court is immediately cloaked with the jurisdiction to dispose of it.

And in *Goh & Dom Enterprise Bhd v Port Ancillary Services Suppliers Employees Union* (Award 120 of 1987):-

> A 'trade dispute' can be referred to this court only under *section 26*. A dispute may sometimes fall under both section 26 and section 56. If that ever happens, parties must realise that the dispute can come to this court only if the Minister decides to refer the matter here under section 26. If we proceed to hear the dispute under section 56, we would be encroaching upon the functions of the Director General for Industrial Relations and usurping the powers of the Minister. If the union tries to have two bites at the cherry, the employer must not allow it to do so. The employer should raise a preliminary objection before the union starts its submission; the court would then make a ruling on the preliminary objection. We find that the matter before us is a 'trade dispute', and we strike out this application made under section 56. It is now for the Minister to refer the matter to this court for hearing under *section 26* if he considers that there are merits in the case.

The Industrial Court has also held that it has the jurisdiction to arbitrate a trade dispute only if *an employee union has espoused the dispute*, and that an employee union can espouse a trade dispute only if *the employees involved in it were members of the union* not only at the time the dispute arose but also at the time the dispute was referred to and heard by the court. But the High Court has held that once a union has espoused a trade dispute but cannot for any reason pursue the cause of the employees involved in it, then the Industrial Court has the power to *substitute the employees for the union*, and such substitution does not alter *the nature of the dispute* - it remains a trade dispute. As follows.

In *Autofilter Industries v Transport Equipment & Allied Industries Employees Union* (Award 204 of 1990):-

> A reference under *section 26* of the IRA is not synonymous with a reference under *section 20* of the Act. A reference under *section 26* is one where the dispute involves an employee union as a body on the one hand, and an employer or employer union on the other, although the subject matter may involve matters relating to a particular member of the employee union. The criterion is that the matter must involve a member of the union. A reference under *section 20*, on the other hand, involves a dispute between a workman (irrespective of whether he is a member of a union or otherwise) and his employer over his dismissal. It need not involve an employee union at all. If the dismissed workman is a member of a union, the union comes into the picture only to represent the workman in conciliation proceedings before the Director General for Industrial Relations under section 20. The dispute remains one between the workman and his employer.
>
> The jurisdiction of the court in this case is conferred by the reference made by the Minister under *section 26*. One of the things that this court must be satisfied on is that the workman concerned was a member of the union. If it is not satisfied that this is so, the court cannot proceed to hear the case and hand down an award as if the reference was made by the Minister under *section 20*. To do so would amount to the court exceeding its jurisdiction (although it be satisfied that the workman concerned is a 'workman' within the meaning of this term in the IRA). On the evidence presented to the court, we are not satisfied that the workman concerned was

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a member of the union at the material period, despite the existence of the union there at that time. So, if the dispute is over the dismissal of the workman by the employer, it is not one which is within the ambit of section 26 but *section 20*, and the reference by the Minister should have been made under section 20 and not under section 26. What concerns the court now is whether, on the evidence before it, it has the jurisdiction to look into this reference made under *section 26*. It will have jurisdiction if the workman was a member of the union on the date of his dismissal. If he was not, then it will have no jurisdiction to hand down an award pursuant to this reference. On the evidence, the court is not satisfied that the workman was a member of the union then. In the circumstances, we lack jurisdiction, and we therefore dismiss this action by the union.

Section 20 deals with representations made by workmen alleging 'unjustified dismissal' by employers, and seeking reinstatement in their former employment.

However in *A Anthonyamah & 2 Others v Socfin Co Bhd* [1992] 1 ILR 297 (High Court):-

In *Socfin Co Bhd (Sungai Tinggi Estate) v National Union of Plantation Workers* (Award 219 of 1988) the Industrial Court considered three of its past awards and one High Court decision on the issue of whether the workmen involved in a trade dispute could be substituted as a 'party' in the place of the union. It first said:

When this case came up for hearing, all three claimants were absent and unrepresented. The union, however, which had previously written to the court that it was withdrawing itself as a party to the dispute, was represented by its Director of Industrial Relations, who confirmed in court that the union could not represent the claimants in proceedings before the court because they were not its members any more. He further stated that the union had no objection to its being substituted as a party by the individual workmen. The gist of the arguments on the issue of whether the workmen involved in a trade dispute can be substituted in the place of the union is based on the following cases:

(a) *Plastics Sdn Bhd v Chemical Workers Union* (Award 57 of 1979);
(b) *Consolidated Plantations Ltd v National Union of Plantation Workers* (Award 135 of 1979);
(c) *Len Omnibus Co Ltd v Transport Workers Union* (Award 4 of 1972); and

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(d) *Kuppusamy v Malaysian Airline System* (High Court OM No. A14 of 1980).

In respect of the *first three cases*, wherein this court previously allowed substitution to some extent to accommodate workmen who for one reason or another could not be represented by the union under whose umbrella they came in, it is noted that all three cases were heard before the definition of 'party, with reference to a trade dispute,' in the IRA was amended... Whereas the previous definition could accommodate the substitution of the individual workman in the place of a union, the present definition cannot. For these reasons, this court is of the view that all three cases are irrelevant...The *fourth case* was also decided pre-amendment...It remains for the court to add that [in the case now before the court] from the membership register of the union, it was clearly established that two of the three claimants were not 'members in benefit' at the material date of the 'non-employment', and were therefore non-members of the union for this reason when their purported 'non-employment' arose. Be that as it may, this court's considered view is that with the withdrawal of the union as a party in this trade dispute for lack of *locus standi*, the court ceased to have before it such trade dispute to adjudicate. The reference of 'non-employment' by the Minister was made under *section 26* of the IRA (which deals with the reference of *trade disputes*), and this court cannot in law convert it into one under *section 20* of the Act (which is confined to the reference of *unjustified dismissals*). The two types of reference are based on different criteria subsisting in the Minister's mind, and are not subject to interchangeability in this court.

The Industrial Court then held that it had no jurisdiction to adjudicate on the reference. With respect, I think the Industrial Court had not properly considered the *ratio decidendi* in the fourth case, where Hashim Yeop Sani J stated:

What was the dispute? The dispute concerned the dismissal of the workman. This had not changed on 14 April 1979, when the Airline Employees Union was deregistered. The dispute on the dismissal in fact remained unresolved on 17 October 1979, when the workman applied to be substituted as a 'party' in the place of the defunct union. Therefore, it surely is not right to say that the substitution altered *the character of the dispute* from a reference under section 26 to a reference under section 20. It cannot also be true to say that the Industrial Court has no jurisdiction to *substitute an individual workman in the place of a*

> *union* under section 29(a). In my opinion, the order of the Minister referring the dispute to the Industrial Court under section 26 is merely a vehicle to carry the dispute into the Industrial Court. Once the reference is made and is not challenged, the Industrial Court is seised with the jurisdiction to hear the dispute. It is also my opinion that the procedural provisions of section 29 may be invoked by the Industrial Court at any time at all after the reference is made as the situation may warrant, provided that the order of reference itself is not challenged and remains valid.
>
> The Industrial Court's finding was that if it allowed the substitution of the aggrieved workmen as a party in the place of the union, it would amount to the court converting a reference under *section 26* to a reference under *section 20* of the IRA. I do not think so. The çause of action or dispute is the same, that is, the dismissal or the non-employment of the workmen by the employer. The word 'party' in section 29(a) of the Act should be interpreted to mean any party to the proceedings before the Industrial Court. I say so because, notwithstanding that the word 'party' has been defined by section 2 of the IRA, the opening words of section 2 itself state:
>
> > 'In this Act, unless the context otherwise requires – 'party', with reference to a trade dispute, etc.'
>
> And section 29 of the IRA reads:
>
> > 'The Industrial Court may in any proceedings before it –
> >
> > (a) order that any party be joined, substituted or struck off'.

This decision, which was delivered in 1990, was upheld by the Federal Court in 1992.

While a 'trade dispute' is defined broadly in the IRA, it is still restricted by the Act to *a dispute between an employer and his employees which is espoused by their union*. This leaves many disputes outside the ambit of a 'trade dispute', for example, a dispute between an employer and an employee union over *recognition* or over *checkoff*. To cater for disputes such as these, the term 'industrial dispute' has been coined. An 'industrial dispute' embraces any dispute between an employer *or* employer union on the one hand, and any number of employees *or* an employee union on the other. Hence, it would include – but would not be confined to – a 'trade dispute' as conceived by the IRA.

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C DISPUTE RESOLUTION

As indicated earlier, the IRA recognises, either explicitly or implicitly, *a number of ways which can be used to resolve trade disputes peacefully* (namely: negotiation, fact-finding, conciliation, arbitration, and industrial action), and it also identifies *the techniques or the agencies which are involved in the use of these ways* (such as: the grievance machinery, the strike and lockout, the Department of Industrial Relations, and the Industrial Court). We shall now take a closer look at the ways available to resolve trade disputes, and at the techniques or agencies involved in the use of these ways. (But for reasons already noted, we will not be looking at fact-finding nor at the agencies involved in the use of this way)

1 *Negotiation*

Negotiation is easily 'the one best way' of resolving any dispute, trade disputes included. It is quick, cheap, saves 'face', and very effective (for a settlement arrived at by the parties themselves is likely to be more enduring than one suggested by a conciliator or imposed by an arbitrator). But it is also the natural 'first resort' of the parties involved in any dispute. Consequently, aware that the parties involved in a trade dispute would in any case turn first to it to settle the dispute between them, the IRA has little to say about negotiation *per se*. But it does have something to say about *formal negotiating machinery* like *collective bargaining* and the *grievance procedure*. As we have seen, the Act devotes a whole part to the former, namely: Part IV 'Collective Bargaining and Collective Agreements'. As for the latter, the Act makes it clear that the parties to a trade dispute should resort to conciliation or to arbitration only *after* they had first resorted to the grievance machinery established by them (if any), unless that machinery is either not likely to settle the dispute if resorted to, or has already been resorted to without success: see section 18(4) and section 26(3), respectively.

Knowing that negotiation between the parties thereto is the best way of resolving trade disputes, the Industrial Court also has done all it can to foster collective bargaining and the grievance procedure. As for *collective bargaining*, see for instance *Congress of Unions of Employees in the Public and Civil Services (CUEPACS) v Union of Employees in Trade Unions* (Award 130 of 1980) in

Chapter V 'Collective Bargaining and Collective Agreements'. As for the *grievance procedure*, in *Kejuruteraan Awam Cang Ceng Bhd v Muling Sanai & 3 Others* (Award 25 of 1996):-

> The court does not think that the claimants' role in writing the letter of complaint about grievances pertaining to the performance of their work-related duties is a misconduct. The fact that the employees of the company were not unionised makes no difference to the court's view in this regard. It must be legitimate for any employee, whether on his own behalf or on behalf of his colleagues, in the absence of a mutually agreed grievance procedure, to take such legitimate steps as may be necessary to set out and to bring to the attention of management the grievances of employees at the workplace with a view to seeking redress for the same. It cannot be gainsaid that the provision of adequate avenues for the ventilation and the redress of employees' grievances is a prerequisite to good and harmonious industrial relations. It is for this reason that employers in association with their employees or their unions are encouraged by the *Code of Conduct for Industrial Harmony 1975* to establish procedures which will ensure the speedy and complete investigation and resolution of the grievances of employees. Such procedures are essential to good human resource management in any organisation which is concerned for and committed to the well-being of its employees and the maintenance of industrial peace and harmony.

And in *Ladang Segaria Sdn Bhd (Sabah) v Napsie Ngalit* (Award 459 of 1995):-

> On the facts of this case, the court does not consider that it is an act of misconduct for the claimant, whether in the capacity of a co-employee or that of a union official, to approach the management on behalf of another employee concerning a grievance of the latter...In the absence of any clearly established grievance procedure which all the employees of the estate are obliged to follow, the court fails to see how the estate can complain that the claimant had failed to follow such procedure or that he had misconducted himself by disregarding it...
>
> The recognition of a registered union under Part III of the IRA confers upon the union the right to require an employer to enter into negotiations for a collective agreement. This does not mean that, pending such recognition, the union or any of its officials is prohibited from engaging in any legitimate activities altogether... Article 27 of the 'Agreed Industrial Relations Practices', annexed to the *Code of Conduct for Industrial Harmony 1975*, specifically enjoins an employer to be prepared to consider receiving representations on grievances from a union on behalf of its members notwithstanding that the latter has not secured recognition. It reads:
>
> > Where a trade union has not secured recognition from the employer for negotiating rights, the employer should nevertheless be prepared to consider receiving representations from the union on behalf of its members about grievances or other matters which can be settled on an individual basis.
>
> The court might also add that due recognition of a union representing the employees in an establishment would be conducive to the process by which employees' grievances can be harmoniously resolved by the route of a mutually agreed grievance procedure. The failure to follow such procedure might then be construed as a misconduct which, if committed in flagrant and contumacious disregard of the agreed terms of amicable dispute resolution, might amount to a misconduct which warrants the dismissal of the errant employee, in particular if he was a union official.

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2 *Conciliation*

The IRA identifies only one agency for the conciliation of trade disputes – the *Department of Industrial Relations* in the Ministry of Human Resources. Under the Act, a trade dispute which has not been resolved through *negotiation* may be referred to the Director General for Industrial Relations for conciliation by an employer who is a party to it (or by a union representing him) *or* by an employee union which is a party to it. He may also initiate the conciliation of a trade dispute which has not been referred to him if, in his opinion, the dispute is not likely to be settled through *negotiation* by the parties thereto, and the public interest demands such a course of action. (Thus, the parties to a trade dispute can *voluntarily* resort to conciliation, *or* they can be *compelled* to resort to it) However, the Director General cannot initiate conciliation proceedings if there exists any machinery for settling disputes (such as the *grievance procedure*) available to the parties to the dispute, unless the dispute has already been referred to this machinery without success, or unless it is unlikely (in his opinion) that the dispute will be settled promptly through the use of this machinery.

Before initiating conciliation proceedings, the Director General may require the parties to the dispute to furnish him with all the

necessary information relating to it, together with (where possible) an 'agreed statement' setting out the issues on which they have already reached agreement, and the issues on which there is still disagreement. He may also direct any person engaged in or connected with the dispute to attend a 'conciliation conference' at such time and place as he specifies. But if, despite all efforts, he is satisfied that there is no likelihood of the trade dispute being settled by conciliation, the Director General is required to notify the Minister accordingly, who will usually then refer the dispute to the Industrial Court for *arbitration*. It should be noted, however, that the parties to conciliation proceedings cannot be represented 'by an advocate, advisor, consultant or by any other person whatsoever' at those proceedings.

3 *Arbitration*

The IRA identifies only one agency for the arbitration of trade disputes – the *Industrial Court*. We shall look first at what the Act says about this court, and then at what the Industrial Court has said about itself.

(a) Statutory Provisions

What the IRA has to say about Industrial Court may be related under the following headings.

(i) *Composition*

The Industrial Court is composed of a president and a number of chairmen (all appointed by the *Yang di-Pertuan Agong*) and of two panels, one representing employers and the other representing employees, whose members are appointed by the Minister of Human Resources. Normally, the court is constituted by the president or a chairman, and two panel members, one from each panel; in some specified cases, by the president or a chairman sitting alone.

(ii) *Jurisdiction*

The Industrial Court has jurisdiction over *trade disputes* referred to it for arbitration by the Minister. He may, after conciliation has

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failed to resolve such a dispute, refer it to the court *either* on his own motion if he is satisfied that it is expedient so to do, *or* on the joint request of the employer and employee union who are parties to the dispute. (Hence arbitration, like conciliation, can be *voluntary* or *compulsory*) However, the Minister cannot refer a trade dispute in the *public sector* to the court for arbitration, without the consent of the *Yang di-Pertuan Agong* or the state authority concerned (as the case may be) to the reference. Nor can he refer a trade dispute to the court for arbitration if there is any machinery for settling disputes (such as the *grievance procedure*) available to the parties to the dispute, unless the dispute has already been referred to this machinery without success, or unless it is unlikely (in his opinion) that the dispute will be settled expeditiously through this machinery. The court also has jurisdiction over complaints alleging *unfair labour practice* made by employers, employees or their unions, and over representations alleging *unjustified dismissal* made by unionised or non-unionised employees against their employers, but only if such complaints or representations are referred to it for arbitration by the Minister. And the court has jurisdiction over all *collective agreements* concluded by employers and unions; it can approve or reject them, require their amendment or amend them itself; it can also interpret approved collective agreements or its own past awards; and it can enforce such agreements or awards.

(iii) *Powers*

The Industrial Court has the power to summon, join, substitute or strike off parties, take evidence on oath or affirmation, compel the production before it of books, papers, documents and things, conduct its proceedings in private, call in the aid of experts, and 'generally direct and do all such things as are necessary or expedient for the expeditious determination of the matter before it'. The court also has the power to make awards.

(iv) *Awards*

The Industrial Court is required to make its awards without delay and, if possible, within 30 days of the date a dispute is referred to

it. In making an award, the court is required '[to] act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal form'. The court is also required to consider the public interest, the financial implications and the effect of the award on the national economy and on the industry concerned, and the probable effect of the award on similar or related industries. And the court may specify the period for which an award is to be effective. Awards of the Industrial Court 'shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court'. An award is binding on *inter alia* all the parties to the proceedings before the court and all those who are made parties to those proceedings, *and* on their successors, assignees or transferees. It also supersedes the employment contracts between the employers and the employees bound by it.

(v) Limitations

The Industrial Court is not, however, a court of law. If *a question of law* arose in the course of any proceedings before it, the determination of which affected its award, the court may refer that question to the High Court, which 'shall hear and determine the question referred to it *as if the reference were an appeal to the High Court* against the award of the Industrial Court, and may consequently confirm, vary, substitute or quash the award'. The decision of the High Court is 'final and conclusive'.

The Industrial Court is also subject to the *supervisory jurisdiction* exercised by the law courts through the *prerogative writs* over subordinate courts and tribunals. This jurisdiction, which enables the law courts to review the awards of the Industrial Court, may be invoked initially at the High Court, from whose decision appeal lies to the Court of Appeal and ultimately to the Federal Court, the highest court in the land.

(vi) Representation

Parties to proceedings before the Industrial Court may be represented, with the permission of the president or a chairman (as the case may be) by an advocate (*ie* a lawyer).

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(b) Court Decisions

The Industrial Court has commented on *inter alia* its *jurisdiction* and *powers*. To begin with, the court has acknowledged that it is only 'a creature of statute' and merely 'a court of arbitration'; but it has added that what it is really is 'a court of social justice', and has elaborated on what this means. As follows.

In *Lasenco Pro Consortium Bhd v Yip Meow Lian & Another* (Award 21 of 1989):-

> Hashim Yeop Sani FJ in *Lee Wah Bank v National Union of Bank Employees* [1981] 1 MLJ 170 (Federal Court) said: 'Since the Industrial Court is a creature of the IRA, its powers must be discovered only from the four corners of the Act, expressly or by necessary implication'. Earlier in the same case, referring to the Industrial Court, he said: 'It is not a *civil court*. It has no *inherent jurisdiction*'.
>
> Incidentally, he emphasised this point in *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304 (Federal Court) where he said: 'In my view, the Industrial Court, while obliged and empowered to proceed according to equity and good conscience, is not a *court of equity* in the technical sense. It cannot therefore usurp or duplicate the functions of the *common law courts* established under the Federal Constitution and the Courts of Judicature Act 1964'. Earlier in *Dr Dutt's case*, he said: 'It must not be forgotten that the Industrial Court is essentially a *court of arbitration*'.

And in *Patco Malaysia Bhd v Sarip bin Hamid* (Award 89 of 1992):-

> In any adjudication of a ministerial reference under the IRA, the Industrial Court is enjoined by section 30(5) of the Act '(to) act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal form'. It is clear therefore that this court is not strictly confined to the administration of justice in accordance with the law, [but is] an instrument for the dispensation of social justice according to equity and good conscience. Now, *social justice* and *legal justice* are two different concepts, although their common object is to ensure that justice is done. It is to free workmen from contracts and obligations that were unfair and inequitable that the concept of social justice has been evolved.
>
> In *Non-metallic Mineral Products Manufacturing Employees Union & Others v South East Asia Fire Bricks Sdn Bhd* [1976] 2 MLJ 67, Raja Azlan Shah CJ speaking for the Federal Court said:

> An employer should be very slow to dismiss upon the ground that the employee is incapable of performing the work which he is employed to do, without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground, and giving him the opportunity to improve his performance... But those employed in senior management positions may by the nature of their jobs be fully aware of what is required of them, and fully capable of judging for themselves whether they are achieving that requirement. In such circumstances, the need for warning and an opportunity for improvement are much less apparent... Again, cases can arise in which the inadequacy of performance is so extreme that there must be presumed an 'irredeemable incapability'. In such circumstances, exceptional though they no doubt are, a warning and an opportunity for improvement are of no benefit to the employee, and may constitute an unfair burden on the business.

And in *Sun Mix Concrete Sdn Bhd v S Karunanyzi* (Award 279 of 1992):-

> In *Taylor v Alidair Ltd* [1978] IRLR 82, the industrial tribunal stated as follows:
>
>> There are some occupations, such as the pilot of an aircraft, where the public safety is entrusted to a single individual. It is of the first importance that a person so engaged should be competent and capable. If it appears that he is no longer competent or capable, then the employer can very properly say, 'I am afraid we cannot entrust you with these serious duties any longer, and we must dismiss you'. It is not necessary that he be given a further chance or further training or the like before he is dismissed.

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CHAPTER IX

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CHAPTER IX

Terms and Conditions of Employment*

A INTRODUCTION

As noted in Chapter I, besides regulating the *employment contract* (specifically, the 'contract of service') the Employment Act 1955 (EA) legislates various *terms and conditions of employment*. Every employer (local or foreign) is legally obliged to comply with these provisions, and every employee (unionised or not) is legally entitled to their benefit. Among the terms and conditions legislated by the Act are the following ones:-

(a) the hours of work (including overtime work);
(b) wages (the truck system, not wage rates);
(c) a weekly rest day;
(d) public holidays;
(e) annual leave, sick leave and maternity leave; and
(f) termination, layoff and maternity benefits.

Furthermore, as noted in Chapter II, the Act establishes these terms and conditions as the *basic* and the *minimum* terms and conditions of employment. This becomes manifest when the EA is read together with the Industrial Relations Act 1967 (IRA). When so read, it is clear that neither the employment contract nor a collective agreement or award in lieu can stipulate terms or

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* This chapter considers principally those terms and conditions legislated by the *Employment Act 1955*. It will be recalled that the EA applies only (i) to those who fall within the definitions of 'employer' and 'employee' in the Act (ii) in the private sector and (iii) in Peninsular Malaysia. The Employment Act is enforced by the *Labour Department Peninsular Malaysia*, one of the departments in the Ministry of Human Resources. This department is headed by the *Director General for Labour.*

conditions *less favourable to employees* than those legislated by the EA (EA section 7; IRA section 14). But the contract or an agreement/award can stipulate terms or conditions *more favourable to employees* than those legislated by the EA (EA section 7A). And the contract or an agreement/award can stipulate terms or conditions *other than* those legislated by the EA (EA section 7B). Finally, as an agreement/award supersedes the contract, the terms and conditions stipulated in the agreement/award *prevail over* those stipulated in the contract (IRA sections 17 and 32). Consequently, *in order to determine what the terms and conditions of employment are in a particular instance, it is necessary to examine the employment contract itself, the relevant collective agreement or award in lieu (if any), as well as the EA (where appropriate),* as pointed out by the Industrial Court in *Palmex Industries Bhd v S Poobalan (Award 215 of 1984)*:-

> Section 17 of the IRA is a mandatory section. It follows that if any term in an employment contract is inconsistent with the terms of the collective agreement, the terms of the collective agreement will prevail. However, the terms of a collective agreement will not prevail if they are less favourable to the employee than the terms prescribed by the EA. Again, if the collective agreement is silent in respect of certain terms, then the provisions of the EA will prevail. What all this means is that the terms and conditions of employment of an employee are not limited only to the collective agreement. Such terms and conditions can be a combination of:
>
> (a) the individual employment contract;
> (b) the collective agreement; and
> (c) the Employment Act 1955.

The court has also acknowledged that the terms and conditions legislated by the EA constitute the *basic* and the *minimum* terms and conditions of employment, *and* that the employment contract or a collective agreement or award in lieu can stipulate terms or conditions which are *better* than those legislated by the Act *or* which are *not* legislated by the Act, *ie* on which it is silent. In *Casuarina Beach Hotel v National Union of Hotel, Bar & Restaurant Workers* (Award 127 of 1981):-

> The EA prescribes the *minimum* terms and conditions of employment. Section 7A of the Act, however, provides that the parties may agree to terms which are *more favourable* to the employees. Bearing in mind that new terms should not ordinarily be less favourable than existing terms, the court in *Award 76 of 1981* did stipulate terms more favourable to the employees than the provisions of the EA. Such enhanced terms are clearly valid under section 7A of the Act. We are of the view that the function of the Industrial Court is to arbitrate. The definition of 'trade dispute' in the IRA is so wide that we are often called upon to arbitrate on many matters which are *not included* in the EA or specified in the IRA itself.

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The Industrial Court has noted that the phrase 'terms and conditions of employment' is of very wide import, and that practically any matter can be a term or condition of employment. In *Rothmans of Pall Mall Bhd v Rothmans Employees Union* (Award 43 of 1990):-

> The phrase 'terms and conditions of employment' is not defined in the IRA. But suffice it to say that 'terms of employment' refer to all matters encompassed by the employment contract. In *British Broadcasting Corporation v Heam & Others* [1978] 1 AER 116, Lord Denning said:
>
> > The terms and conditions of employment may include not only the contractual terms and conditions but those terms and conditions which are understood and applied by the parties in practice, or habitually, or by common consent, without ever being incorporated into the contract.
>
> Basically, 'terms of employment' include bonus, wage rates (in all forms, including allowances), hours of work, overtime, paid holidays, leave benefits, superannuation benefits, grading and promotion, and dismissal and retrenchment procedures. But 'conditions of employment' appears to mean something different from 'terms of employment'. In *Brenda Dunne Ltd v Fitzpatrick* [1958] IR 29 (an Irish case) 'conditions of employment' were described as:
>
> > The physical conditions under which a workman works, such as appertain to matters of safety, health and physical comfort.
>
> This interpretation appears to be comprehensive enough to include the safety, health and comfort of employees, and all forms of welfare, like sports clubs and dramatic societies, as well as lockers, seats, showers and cabinets, creches, colour schemes, lighting, heating, airconditioning, ventilation, overcrowding, rest periods *etc.*
>
> Thus, the phrase 'terms and conditions of employment' is of very wide import.

Furthermore, the Industrial Court has indicated that the terms and conditions of employment are likely to vary by sector, by industry, by establishment, and even within the establishment by employee category. As follows.

> When the college was a statutory authority, it had to grant the quantum of sick leave required to be granted by such bodies. But as it is now in the private sector, it has, because of the change in its status, to follow the prevailing practice in this sector. If this is not done, the employees will enjoy the best terms and conditions of employment of both worlds, *ie* the public and the private sectors. We do not think any organisation in the private sector can afford this, be it regarding sick leave or other terms and conditions: *Kolej Tuanku Abdul Rahman v KTAR Academic Staff Union* (Award 275 of 1991).
>
> The banking industry, the petroleum industry, and the plantation industry each have their own peculiar needs and requirements, and one cannot just pick the best terms and conditions of the banking industry or the petroleum industry and plant them in the plantation industry. Nor can we select some of the terms and conditions in say the hotel industry, and incorporate them in the plantation industry, or *vice versa*. If we were to do that, the plantation industry would lose it uniqueness, and the terms and conditions of employment in the industry would be but a conglomeration of the terms and conditions of service of various industries. And the resultant financial impact on the plantation industry would be tremendous: *Malayan Agricultural Producers Association v All Malayan Estates Staff Union* (Award 62 of 1982).
>
> If the union has been leaning heavily on the *Collie Agreement* in its claims for better terms and conditions of service for its members, it must also be prepared to concede the other terms and conditions in that collective agreement which are less favourable. Otherwise, a situation will be created where only the best will be selected from comparable establishments. This, in our view, is not a healthy process, and will not be fair and just to the employer concerned... We, however, agree with the union's contention that, within the same industry, the terms and conditions of service should as far as possible be similar, as otherwise there will be discontent amongst those employees who receive less favourable terms and conditions: *Mohamed Ismail Printing Ink Sdn Bhd v Chemical Workers Union* (Award 147 of 1982).
>
> The union proposed that employees be given all the gazetted public holidays... The association, however, contended that although a few large establishments might be in a position to do so, it would not be possible for all its members to give their employees all the gazetted public holidays, as most of its members' establishments are small ones and cannot afford to give more than the statutory minimum. We agree with the association's submission as, in our view, the small establishments are not in a position, financially or otherwise, at present to grant their employees terms and conditions of employment which are in excess of the statutory provisions. And we have a duty to ensure that small establishments are able to survive economically. We therefore follow the provisions of section 60D of the EA: *Taiping Firewood & Charcoal Trade Association v Perak Firewood Workers Union* (Award 268 of 1984).
>
> It is true that the executive staff were paid a bonus for the year 1991 and the medical staff were not. The executive staff are outside the scope of union representation and the scope of the collective agreement. They have their own terms and conditions of employment, and these may differ materially from those of the medical staff. The two are in different groups – the executive staff are in the 'non-bargainable group' [*ie* are white-collar employees] and the medical staff are in the 'bargainable group' [*ie* are blue-collar employees]. What the non-bargainable group has as its terms and conditions, the bargainable group may not have, and *vice versa*. It therefore cannot be argued that what the non-bargainable group has, the bargainable group also should have: *Bal Plantations Bhd v Sabah Plantation Industry Employees Union* (Award 300 of 1993).

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The court has also indicated that the terms and conditions of employment are likely to vary over time, because a subsequent collective agreement or award in lieu (both of which supersede the employment contract) will ordinarily stipulate better terms and conditions than those stipulated in the preceding agreement or award. In *Security Printers Sdn Bhd v Printing Industry Employees Union* (Award 367 of 1991):-

> In any new collective agreement, the employees are expected to have, in the ordinary course of events, their terms and conditions of employment if not *improved* at least *retained*. Of course, this does not mean that the terms and conditions cannot be *reduced* if 'special circumstances' exist as, for instance, when the employer is in bad shape financially: see *Kuala Lumpur Glass Manufacturers Sdn Bhd v Non-metallic Mineral Products Manufacturing Employees Union* (Award 189 of 1988). But in this case, no 'special circumstances' exist, and the company is not pleading financial incapacity to pay. Hence, we reject the company's proposal...

Finally, the Industrial Court has reminded employers that they are required under the EA to notify their employees in writing of their terms and conditions of employment, in particular those terms and conditions regulated by the Act, and of any subsequent changes thereto. In *Genting Berhad v Genting Employees Union* (Award 160 of 1983):-

> The origin of Article 4(b) of the award in lieu can be found in the Employment Regulations 1957 (made under the EA) which provide in regulation 8 as follows:
>
> '(1) Every employer shall furnish to every employee employed by him on or before the date of his commencing employment, and subsequently on any change in the terms and conditions of employment resulting in any change in his wages, a certified copy of the particulars specified in regulation 5(b).
>
> (2) When a collective agreement is currently in force and applicable to an employee in the place of employment, the employer shall furnish him with a copy of the collective agreement, or display permanently at a conspicuous place accessible to the employee in the place of employment a copy of the collective agreement.'
>
> And regulation 5(b) provides as follows:
>
> 'Details of terms and conditions of employment:
>
> (1) name of employee and NRIC number;
> (2) occupation or appointment;
> (3) wage rates (excluding other allowances);
> (4) other allowances payable and rates;
> (5) rates for overtime work;
> (6) other benefits (including any approved amenity or approved service);
> (7) agreed normal hours of work per day;
> (8) agreed period of notice for termination of employment or wages in lieu;
> (9) number of days entitlement to public holidays and annual leave with pay;
> (10) duration of the wage period.'
>
> The object of these regulations is to ensure that every employee knows what he is entitled to for the work he does. We are of the view that Article 4(b) of the award in lieu is only a reminder that this requirement of the law be observed.

The terms and conditions of employment may be pecuniary or non-pecuniary in character. Among the *pecuniary terms and conditions* are the following:-

(a) wages and salaries;
(b) allowances;
(c) bonus and *ex gratia* payments; and
(d) pecuniary benefits.

Of these, only wages and salaries, and termination, layoff and maternity benefits are legislated by or under the EA.

And among the *non-pecuniary terms and conditions* are the following:-

(a) the hours of work;
(b) the weekly rest day;
(c) public holidays; and
(d) leave benefits.

Of these, the hours of work, rest day, public holidays, as well as annual leave, sick leave and maternity leave are legislated by the EA, while union leave is legislated by the IRA.

In this chapter, *we will consider principally those terms and conditions of employment legislated by the EA,* bearing in mind that these are just the *basic* and the *minimum* terms and conditions, and that the employment contract or a collective agreement/award in lieu can stipulate *better* as well as *other* terms and conditions than those legislated by the Act. Before doing so, however, we should take note of the following provisions in the EA, all of which may be found in Part XII thereof:-

(1) The 'hours of work' means *the time during which an employee is at the disposal of the employer and is not free to dispose of his own time and movements*[1].
(2) The 'normal hours of work' means the number of hours of work as agreed between an employer and an employee in the contract of service to be *the usual hours of work per day,* but such number shall not exceed the limits prescribed in section 60A(1)[2].

1 The Employment Act 1955 s 60A(9).
2 The Employment Act 1955 s 60A(3)(c).

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(3) 'Overtime' means *the number of hours of work carried out in excess of the normal hours of work per day*: provided that if any work is carried out after the 'spreadover period of ten hours', the whole period beginning from the time the spreadover period ends up to the time that the employee ceases work for the day shall be deemed to be overtime[3].

(a) However, any work carried out on a *rest day*, or on any of the ten *public holidays* or any paid holiday substituted therefor, shall not be construed as overtime work[4].

(b) No employer shall require nor permit an employee to work overtime exceeding such limit as may be prescribed by the Minister of Human Resources by regulations made under this Act[5].

(c) For any overtime work carried out in excess of the normal hours of work, the employee shall be paid at *a rate not less than 1.5 times his hourly rate of pay*, irrespective of the basis on which his rate of pay is fixed[6].

(d) The Minister may also make regulations for the purpose of calculating the payment due for overtime to an employee employed on piece rates[7].

(4) Except in the circumstances described in section 60A(2), no employer shall under any circumstances require an employee to work *more than 12 hours* in any one day[8].

(5) The 'ordinary rate of pay' means *the 'wages' as defined in section 2* (whether calculated by the month, the week, the day, the hour, or by piece rate, or otherwise) *which an employee is entitled to receive under the terms of his contract of service for the normal hours of work for one day*, but does not include any payment made under any approved incentive payment scheme *or* any payment for work done on a rest day *or* on any gazetted public holiday granted by the employer or any day substituted for that holiday. And the 'hourly rate of pay' means *the ordinary rate of pay divided by the normal hours of work*[9].

3 The Employment Act 1955 s 60A(3)(b).
4 The Employment Act 1955 s 60A(4)(a), proviso.
5 The Employment Act 1955 s 60A(4)(a).
6 The Employment Act 1955 s 60A(3)(a).
7 The Employment Act 1955 s 60A(6).
8 The Employment Act 1955 s 60A(7).

(6) (a) where an employee is employed on *a monthly rate of pay*, the ordinary rate of pay shall be calculated according to the following formula:

$$\frac{\text{monthly rate of pay;}}{26}$$

(b) where an employee is employed on *a weekly rate of pay*, the ordinary rate of pay shall be calculated according to the following formula:

$$\frac{\text{weekly rate of pay;}}{6} \text{ and}$$

(c) where an employee is employed on *a daily rate of pay* or on *piece rates*, the ordinary rate of pay shall be calculated by dividing the total wages earned by the employee during the preceding wage period (excluding any payment made under an approved incentive payment scheme *or* for work done on any rest day *or* on any gazetted public holiday granted by the employer or any day substituted for that holiday) by the actual number of days the employee had worked during that wage period (excluding any rest day, *and* any gazetted public holiday or any paid holiday substituted for that holiday)[10].

(7) Notwithstanding section 60I (1A) (1B) and (1C) [item 6 above], an employer may adopt *any other method or formula for calculating the ordinary rate of pay which results in a rate not less than the rates prescribed* in those subsections[11].

(8) Nothing contained in Part XII shall prevent an employer from agreeing with an employee that the wages of the employee shall be paid at an agreed rate in accordance with the *task* (ie the specific *amount* of work to be performed) and not by the day or by the piece[12].

9 The Employment Act 1955 s 60I(1)(a) and (b).
10 The Employment Act 1955 s 60I(1A), (1B) and (1C).
11 The Employment Act 1955 s 60I(2).
12 The Employment Act 1955 s 60B.

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Note:-

(1) The EA defines 'spreadover period of ten hours' to mean 'a period of *ten consecutive hours* to be reckoned from the time the employee commences work for the day, inclusive of any period or periods of leisure, rest or break within such period of ten consecutive hours'.

(2) The current limit on overtime work prescribed by the Minister of Human Resources is a maximum of *104 overtime hours* in any calendar month (*ie* 4 overtime hours for each of the 26 working days in the 30-day calendar month).

The Industrial Court has explained why, in order to calculate the *monthly* and the *weekly* rates of pay [see item (6) above], the denominators used are 26 and 6, respectively, rather than 30 and 7. In *Eng Giap Motor Service Co Ltd v Ong Yew Yen* (Award 68 of 1982):-

> The 26 denominator in the EA is an exception to the general rule that a month has 30 days. It is an extension of the concept of 'no work, no pay', resulting in the creation of the *daily-rated employee* who, although entitled to a rest day each week, is not paid for that day unless he works. With 4 rest days a month, the 26 denominator is used to reflect the number of days he actually works. But this formula is used only for specific purposes as required by law, *eg* to compute overtime pay, rest day pay, holiday pay and maternity benefits. It does not apply to the computation of [say] retirement benefits, either under the law or by implication. *Monthly-rated employees* are in fact paid for their rest days, even though they do not work on such days.

B HOURS OF WORK[13]

1 *Statutory Provisions*

As aforementioned, according to the EA, *'hours of work'* refers to 'the time during which an employee is at the disposal of his employer and is not free to dispose of his own time and movements', and *'overtime'* means 'the number of hours of work carried out in excess of the normal hours of work per day'.

13 The Employment Act 1955 s 60A.

Furthermore, the *'normal hours of work'*, *ie* the number of hours of work agreed upon by an employer and an employee to be 'the usual hours of work per day', cannot exceed the limits prescribed by *section 60A(1)*. This subsection declares that an employer cannot require an employee to work:-

(a) more than *five consecutive hours* without a period of leisure of not less than 30 minutes' duration;

However, an employee who is engaged in work which must be carried on continuously and which requires his continual attendance may be required to work for eight consecutive hours, inclusive of a period or periods of not less than 45 minutes in the aggregate during which he shall have the opportunity to have a meal[14].

(b) more than *eight hours* in one day;

However, where the number of hours of work on one or more days of the week is less than eight, the limit of eight hours may be exceeded on the remaining days of the week, but so that no employee shall be required to work more than nine hours in one day *or* 48 hours in one week[15].

(c) in excess of *a spreadover period of ten hours* in one day;

'spreadover period of ten hours' means 'a period of ten consecutive hours to be reckoned from the time the employee commences work for the day, inclusive of any period or periods of leisure, rest or break within such period of ten consecutive hours'[16].

(d) more than *48 hours* in one week.

However, an employee who is engaged in *shift work* may be required by his employer to work more than eight hours in any one day *or* in excess of a spreadover period of ten hours in one day *or* more than 48 hours in any one week, but the average number of hours worked over any period of three weeks (or over any period exceeding three weeks as may be approved by the Director General) cannot exceed 48 per week[17].

14 The Employment Act 1955 s 60A(1) second proviso.
15 The Employment Act 1955 s 60A(1) third proviso.
16 The Employment Act 1955 s 2.
17 The Employment Act 1955 s 60C(1).

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The Director General for Labour may permit an employer to enter into employment contracts with his employees requiring them to work in excess of the limits prescribed in (a), (b), (c) and (d), but only 'if he is satisfied that there are special circumstances pertaining to the business or the undertaking of the employer which render it necessary or expedient to grant such permission'[18].

However, *section 60A(2)* declares that an employee may be required by his employer to exceed the limits prescribed in (a), (b), (c) and (d) above in case of:-

(a) accident, actual or threatened, at his place of work; or
(b) work essential to the life of the community; or
(c) work essential for the defence or security of Malaysia; or
(d) urgent work to be done to machinery or plant; or
(e) an interruption of work impossible to foresee; or
(f) work in any industrial undertaking essential to the economy of Malaysia or in any 'essential service' as defined in the IRA.

But the Director General can inquire into and decide whether or not the employer is justified in calling upon the employee to work in the circumstances specified in (a) to (f).

As also aforementioned, *section 60A(7)* declares that:-

> Except in the circumstances described in section 60A(2), no employer shall under any circumstances require an employee to work *more than 12 hours* in any one day.

Finally, *section 60A(8)* declares that:-

> Section 60A shall not apply to employees engaged in work which by its nature involves long hours of *inactive* or *stand-by* employment.

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2 Court Decisions

The Industrial Court has commented on the *hours of work* as they are regulated by the EA. As follows.

In *Sun Mix Concrete Bhd v Non-metallic Mineral Products Manufacturing Employees Union* (Award 115 of 1987):-

18 The Employment Act 1955 s 60A(1A).

> For the record, we would note in passing that although the court agrees with the company that, in the absence of a specific provision in the employment contract or a collective agreement, it is the employer's prerogative to fix or to alter working hours, the employer is always limited to judicially defined standards of reasonableness, and must also take into account the customary practice existing in the place of work. In this case, by suddenly and unprecedentally changing the shift schedule without consultation, the company failed to abide by these two precepts.

And in *Norsechem Bhd v National Union of Petroleum & Chemical Industry Workers* (Award 28 of 1985):-

> Some collective agreements are worded such that a change in working hours is the prerogative of the employer, with only the requirement of notice to the employees; others make it necessary for the union to be consulted. In the absence of such stipulation, the court is of the view that a change in working hours is subject to consultation with the union. Working hours affect the welfare of employees, and the least that the employer can do is to consult the union, even if he does not finally agree with its views.

Then, in *Art Printing Works Sdn Bhd v Printing Industry Employees Union* (Award 154 of 1987):-

> The company proposed that the daily working hours not be fixed as this gave it great flexibility in arranging its working hours; in other words, it can at short notice require its employees to start work at any time it liked, as long as the limit on the total number of working hours per week is not exceeded. We do not think that this is fair to the employees. If their working hours are not fixed, they cannot regulate their own affairs. And they may have difficulties in computing their overtime work. To avoid all this, we are of the view that it is best to specify their daily working hours in the award, and we do so without changing the existing daily working hours for the normal day employees. As for the shift employees, the company said that, although the regular shift hours are from 7am to 3pm for the first shift, and from 3pm to 11pm for the second shift, some of the shift employees work from 8am to 4pm for the first shift, and from 2pm to 10pm for the second shift. As these shift hours are specified, we do not propose to interfere with them.

And in *Consolidated Plantations (Atherton Estate) v Mindar Singh* (Award 57 of 1986):-