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Employer's Managerial Prerogative Right: An Evaluation of its Relevancy to the Employer-Employee Relationship

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ABSTRACT

The contract of employment is the main instrument governing an employment relationship, with explicit deliberations on the rights and duties of parties to the contract, namely the employer and the employee. In a collective bargaining process, trade unions will scrutinise the terms and conditions of a contract of employment to seek possibilities of engaging and expanding the employer's managerial prerogative right in the bargaining process to maintain industrial harmony. Section 13 of the Industrial Relations Act 1967 has limited trade unions from encroaching on the employer's managerial prerogative rights in a collective bargaining process. Thus, employers are vested with vast discretionary power in the exercise of their day-to-day management duties. This particular section has triggered the query as to whether managerial prerogative right is absolute and unchallengeable by employees. The purpose of this article is to investigate the relevancy of managerial prerogative on the employer-employee relationship. As an initial study into the concept of managerial prerogative right, the methods used are the doctrinal analysis of statutory provisions, judicial decisions and relevant government policies.

Keywords: Contract of employment, employer and employee relationship, employer's managerial prerogative, Industrial Relations Act 1967

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INTRODUCTION

Malaysia has succeeded in promoting itself as a lucrative business hub by providing business and regulatory frameworks that attract foreign investors. Major policy changes have been made to ensure the

sustainability of this success. For instance, Vision 2020 was introduced by the fourth Prime Minister, Tun Dr Mahathir Muhammad, in 1991 as a national agenda with the ultimate aim of transforming Malaysia into the most developed nation in Asia. Vision 2020 envisaged that by the year 2020, Malaysia would be a fully developed nation in control of its own robust and dynamic economy and a confident Malaysian society with strong ethical and moral values. In order to achieve this vision, Tun Dr Mahathir stressed on the need to overcome nine challenges that required the whole nation to work in unity and tolerance (Mohamad, 1991).

In furthering Vision 2020, the current Prime Minister of Malaysia, Datuk Sri Najib Tun Razak has introduced the 1-Malaysia policy as a mechanism to promote national integration. The 1-Malaysia policy emphasises involvement and participation of all citizens towards realising the country's national agenda. From the perspective of industrial relations, to achieve Vision 2020 target via the I-Malaysia policy, employers and their employees need to play a significant. Both parties have to maintain industrial harmony in their employment relationship to ensure the realisation of these two national agenda.

In the employment relationship, the governing law regulating disputes between parties takes the perspective of employment law. Nonetheless, English common law recognises that relationships between an employer and its employees are contractual in nature and thus premised by judicial authority similar to common contractual relationships. This principle was upheld in Nethermere (St Neots) Ltd v. Gardiner and Another [1984] via the dicta of Kerr LJ:

> *The determination of the statutory issue whether the applicant home workers were employees under section 54(1) of the Employment Protection Act 1978 involves a two-stage process. The first stage requires the determination of the question whether there was a contractually binding nexus between the alleged employees and alleged employer in relation to the employment in question. The second stage is if some binding contract exists as a matter of law; is then to clarify or to define the nature of a contractual relation.*

The above case reveals that the law regards the relationship between an employer and his employee as contractual in nature, where both parties are free to negotiate terms and conditions to be incorporated in the contract of employment. Kamal and Mir 2013) commented that due to the strong economic position and high bargaining power of employers, there are many instances where a contract of employment tends to be favourable to the employer, leaning towards exploitation of the employee, and does not depict a true contractual bargain between the parties involved (Parasuraman, 2014). Such exploitation may cause an employee to resign and seek other opportunities (Kamal & Mir, 2013). Besides terms and conditions that relate to specified details and tasks to be carried out by the employee, employers also include such terms and conditions

relating to their managerial rights, which allow employers to decide and implement decisions taken for the benefit of their organisation. This particular practice has raised queries on whether an employer may utilise managerial prerogative powers to the extent of disregarding the rights of an employee and disrespecting the employee's dignity in order to ensure the efficiency of his business.

This paper is divided into three parts. The first part will discuss briefly the concept of managerial prerogative in Malaysian industrial relations. The second part explains the impact of managerial prerogative rights on the employer-employee relationship and the final section evaluates the relevancy of managerial prerogative rights via the lens of the principle of mutual trust and confidence as embedded in the implied terms of the contract of employment as well as according to current government policy.

THE CONCEPT OF MANAGERIAL PREROGATIVE AND INDUSTRIAL RELATION ACT 1967

The term 'managerial prerogative' is used interchangeably with such phrases as 'management rights' and 'management function' (Storey, 1976). Quoting Storey (1983), the term 'managerial prerogative' refers to:

> *... the name for the remaining portion of management's original authority and is therefore the name for the residue of discretionary powers left at any moment in the hands of managers. Every act which a manager of his subordinates can lawfully do, and without the consent of workers' organisation is done by virtue of this prerogative.*

The above definition indicates that in business context, managerial prerogative is traditionally viewed as legitimate rights that empower managers to organise and direct employees, machinery, materials and money in order "to achieve the business's aims" (Young, 1963; Storey, 1976). Darrow-Kleinhaus (2001) suggests that the definition of managerial prerogative can be viewed as when the employer is 'exercising all the rights necessary to effectively and efficiently run the business. Bergen (1940) added that within the sphere of employment matters, these rights include:

> *The absolute right of management to select, transfer, promote, demote, lay off, reemploy, and discharge employees on whatever basis it desires; to establish rates of pay; to determine work standards, duties, and responsibilities; and to demand the cooperation of employees in whatever plans of operation undertaken.*

The Malaysian Government has included Bergen's interpretation of managerial prerogative rights in the Malaysian labour laws framework to interest foreign investors in the postcolonial period (Galenson, 1992). The same interpretation is also used in the Malaysian Industrial Relation Act 1967 as a legal safeguard for foreign investors (Ayadurai, 1997; Suhanah, 2002).

Section 13 of the Industrial Relations Act 1967 provides that:

No trade union of workmen may include in its proposal for collective agreement a proposal in relation to any of the following matters, that is say-

a. The promotion by employer of any workman
b. The transfer by employer of any workman
c. The employment by an employer of any person
d. The termination by an employer of the services of any workman
e. The dismissal and reinstatement of a workman by an employer
f. The assignment or allocation by an employer of duties or specific task to a workman.

The principle of managerial prerogative rights is recognised by Malaysian courts as evidenced in *Elya Designs Sdn Bhd v Mahkamah Perusahaan Malaysia & Anor* (2001). In this case, The High Court of Ipoh ruled that:

> *The court should be mindful of the fact that every business strives to keep afloat during these times when prevailing economic situations turn such endeavour into a near struggle. With as much latitude as our laws would allow, the court has always respected a company's exercise of its prerogative to devise means to improve its operations. Thus, courts have held that management is free to regulate, according to its own discretion and judgment, all aspects of employment, including hiring, work assignments, working methods, time, place and manner of work, processes to be followed, supervision of workers, working regulations, transfer of employees, work supervision, lay off of prerogative, whenever exigencies of the service so require, to change the working hours of its employees.*

Thus, the purpose of managerial prerogative rights under the Industrial Relations Act 1967 is to provide legal space for employers to use their discretionary powers in management of their organisations or businesses as they think fit, tailoring these rights according to the current situation that is best suited for the need of their business.

In the next section, we will analyse the impact of managerial prerogative rights on employer-employee relationship in Malaysia.

THE IMPACT OF MANAGERIAL PREROGATIVE RIGHTS ON THE EMPLOYER-EMPLOYEE RELATIONSHIP IN MALAYSIA

The inclusion of managerial prerogative rights and their implementation in Malaysian industrial relations has ignited a debate among industrial relations scholars and legal experts in Malaysia. Many have claimed that such implementation has triggered another issue i.e. the denial of an employee's rights in his or her working place.

Sharma (1989) suggested that by virtue of Section 13 of the Industrial Act the sphere of collective bargaining in

Malaysia within the private sector has been limited as matters regarding hiring, transfer, promotion and the like are within the purview of employers' managerial prerogative right. The wording of Section 13 of the Industrial Relations Act 1967 clearly prohibits unions from discussing or negotiating issues such as hiring, firing, redundancy, promotion, transfer and the allocation of duties in the collective bargaining process (Suhanah, 2002).

Parasuraman (2014) in his research on employees' participation in the manufacturing, automobile and service industry in Malaysia found that managerial prerogative (Section 13 of IRA 1967) has limited the power of trade unions in negotiating and bargaining related to issues such as promotion and transfer. For instance, Parasuraman (2014) reported that some employees in a research he conducted were reallocated to other branches due to restructuring without their having a say in the matter. This indirectly affected their circumstances in terms of having to find new accommodation, making changes in their children's education and their cost of living.

Managerial prerogative rights have a significant impact on the role of trade unions. Parasuraman's research (2014) reported that as a direct result of implementing managerial prerogative right, a trade union's power in negotiating and bargaining with an employer is curbed and limited. In his case study, upon merger of a company with another, managerial prerogative rights were exercised quite extensively by the employer. Issues such as promotion, demotion and relocation of employees to other branches of the company were carried out by the employer without negotiation with the respective employees. One of the key findings from Parasuraman's study was that the exercise of managerial prerogative rights directly affected employees' job performance and satisfaction.

Based on the evidence and arguments above, it can be said that the management or employer utilises 'managerial prerogative' as a management tool to control and limit employees' and unions' involvement in the workplace decision-making process. The implementation of such managerial prerogative also has to a certain extent created a feeling of exploitation and victimisation on part of employees who feel they have no right to discuss or question the fairness of the management's decision.

Empirical evidence seems to suggest that the relevancy of managerial prerogative has never been directly questioned by employees even though its implementation might not be favourable to employees.

The following section proceeds to evaluate the relevancy of managerial prerogative through the principle of implied terms in the contract of employment and the policy of the Malaysian government on employment-related matters.

CONTRACT OF EMPLOYMENT

Essentially, the relationship between the employer and employee and their respective rights and obligations can be classified into two scenarios: whether the employment agreement is a contract of service or a contract for service.

The distinction between these two forms of contract is not so obvious and in cases of dispute the courts will determine the nature of the employment relationship between the parties based on the facts and circumstances of each case. The importance of distinguishing between a contract of service and a contract for service lies in the redress and protection afforded to different forms of contractual relationship. Employees under a contract of service are afforded statutory rights and relief as enumerated under the Malaysian Employment Act 1955 in contrast to employees under a contract for service (Aminuddin, 2013).

Section 2 of the Malaysian Employment Act 1955 defines a contract of service as an agreement of employment between an employer and employee, as well as apprenticeship contract, which can either be in the form of an oral or written contract or by way of implied agreement between the parties. Under a contract of service, the employer is required to provide all the statutory benefits and protection accorded to an employee under a contract of service such as annual leave, sick leave and maternity leave.

Contract for service, on the other hand, refers to an agreement between an employer and an independent contractor who is hired to complete a specified assignment or project for the employer for an agreed sum as payment. Under this type of contract, an independent contractor is not statutorily protected under the provisions of the Malaysian Employment Act 1955, and employers are not vicariously liable for any acts of independent contractors. Thus, there is no employer-employee relationship under this category of contractual relationship (Mir & Kamal, 2013).

There are several tests used by the court to determine the existence of a contract of employment, among which are control test and organisational test. A control test was applied by the court in the case of *Yewens v Noked* (1880), where the court found that the employee was subject to the command of his master as to the manner in which he exercised his duty. According to this test, if an employee is under control of his employer as regards to the work that he is employed for, then he is in a contract of service. The organisational test was introduced later to redress the lacuna (loophole) in the control test as many employees nowadays can work independently in their workplace without much supervision. This organisational test considers the degree of integration of an employee into the workplace organisation before it can be decided whether he is under a contract of service.

However, the diversity and complexity of employment relationship nowadays require a more comprehensive test and should not rely on a single test. Consequently, the court now adopts multiple tests to determine if employment is by contract for service or contract of service. In the use of multiple tests, the court's approach is to consider the criteria of the control test in conjunction with

the integration test. Thus, the court will not look into only the employer's power to control the employee with respect to means and methods but will also consider the underlying economic realities of the relationship (*Short v Handerson*, 1946).

A contract of employment consists of terms that constitute the gist of the contract. These terms can be classified as express and implied terms. An express term refers to all terms expressly stated in the contract of employment as agreed upon by the employer and employee. Usually, terms such as job description, duties and salary are explicitly mentioned in a contract of employment. Unlike an express term, an implied term is not expressly mentioned in the contract of employment. It exists through interpretation by the court and intention of the parties.

The implied term in a contract of employment was well explained by Lord Brown as an overriding obligation added to the literal term of the contract (*Wood v. WM Car Services (Petersborough) Ltd*, 1981). The significance of implied terms and conditions in the contract of employment has been described as central in the law of contract of employment (Brodie, 2001) and is a substance of the legal formation for the contract of employment (Freedland, 2003).

The importance of implied terms and conditions in employment contacts has been highlighted by Lord Browne-Wilkinson in the case of *Woods v WM Car Services (Peterborough) Ltd* (1981) as follows: "… the employer not to conduct himself in manner calculated of likely to destroy or cause serious damage the relationship of confidence and trust between the employer and employee". He further stated that:

> *in our view, an employer who persistently attempts to vary an employee's conditions of service (whether contractual or not) with a view to getting rid of the employee or varying the employee's terms of service does act in a manner calculated or likely to destroy the relationship of confidence and trust between employer and employee. Such employer has therefore breached the implied term.*

The principle laid down by Lord Brown has shown that implied terms play a significant role in the employment contract so as to maintain the contractual relationship between the parties in order to ensure smooth and harmonious business efficiency. Hence, in *Courtalds Northern Textiles Ltd v Andrew* (1979), a breach of implied terms in the employment contract was regarded as a fundamental breach as it affected the root of the contract.

Common law has categorised implied terms and conditions in employment contracts into two, namely, implied terms and conditions pertaining to joint duties and obligations of parties to employment contracts; the other is relating to the employer-employee duties. With regards to joint duties, both parties in the contract of employment are expected to exercise such duties mutually. Among the joint duties recognised by the court is the wage-work bargain implied duty of reasonable care and mutual trust and confidence (Vanitha

Sundra-Karean, 2012). The principle of implied mutual trust and confidence requires both contractual parties respectively i.e. employer and employee to conduct themselves in a manner within the spirit of mutual benefit and respect for the other's rights.

The duty of mutual trust and confidence has been judicially initiated as an implied term in employment contracts by Lord Styen in *Mahmud & Malik v Bank of Credit and Commerce International SA* (1973). He described mutual trust and confidence as inclusive of an employer's obligation not to destroy or seriously damage the relationship of confidence and trust between an employer and his employee without reasonable reason and proper cause. This was subsequently followed in Courthaulds Northern Textiles Ltd v. Andrew 1979: "It was an implied term of the contract that the employers would not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the confidence and trust between the parties."

The mutual trust and confidence principle has created a significant impact on the relationship between the employer and his employees, wherein both parties are under obligation to be bound by their bargain as stated in the employment contract and the need to protect their dignity in the workplace. By applying the principle of implied term of mutual trust and confidence, a more comprehensive application of employer-employee duties is provided for that includes unreasonableness and unacceptable conduct by parties that are not detailed in employment contracts (Vanitha Sundra-Karen, 2012). For example in a Visa International case in 2004, the court regarded the failure of the employer to inform the employee of a vacancy in a suitable post for the said employee as a breach of the implied duty related to mutual trust and confidence. A similar remedy, however, could not be read into other implied duties such as the implied duty of reasonable care.

Another example of the application of the duty of mutual trust and confidence is seen in the case of *Steven Horkulak v Cantor Fitzgerald International* (2003) where the court held that the employer had breached mutual trust and confidence when he frequently used abusive and rough language as well as acted dismissively towards his employee.

The significant role of implied terms of mutual trust and confidence has also been emphasised by Lord Styen in the Malik case as a formula to cover the diversity of situations in the work place, as well as a mechanism to balance employer's interest in managing the business and the employee's rights of not being unfairly and improperly exploited. Under implied terms of mutual trust and confidence, employers are required to exercise their power in good faith. In addition, employers are also responsible for ensuring that they will refrain from conducting themselves in a manner calculated or likely to destroy the relationship of confidence and trust

between the parties. Nevertheless, the type of behaviour, which might breach the implied term, is a question of fact where the court has to decide according to the peculiarity of each case (Mohamed, 2005). Hence, the existence of the implied term of mutual trust and confidence in a contract of employment commands greater responsibility than in a normal contract. Any act conducted by employers in exercising their managerial prerogative right must not go against the duty of the implied term of mutual trust and confidence.

An evaluation of the relevancy of the employer's managerial prerogative right to the current national agenda is also a pertinent issue to be considered here. As mentioned earlier, the principle of unity has been emphasised in both national agenda i.e. Vision 2020 and 1-Malaysia.

At the launch of the 'National Seminar Towards a Developed and Industrialised Society: Understanding of the Concepts, Implications and Challenges of Vision 2020' in 1993, former Deputy Prime Minister, Tun Ghafar Baba, stressed on the concept of unity:

> *Malaysia should be developed economically, as well as in other key dimensions including the political, social, spiritual, psychological and cultural areas. Also important is that Malaysia should also endeavour to create a united, confident, socially just and politically stable society in which everybody has a place and takes pride in being a Malaysian.*

Significantly, unity among peoples in Malaysia has been identified as one of the greater challenges in achieving this vision.

The principle of unity in the national agenda is continued in the 1-Malaysia concept, which upholds the role of participation and togetherness in the nation. Under this social partnership, people are encouraged to be actively involved in the decision-making process by contributing their opinion. This is in line with its slogan and tagline, "1Malaysia. People First, Performance Now". The policy clearly motivates each and every individual in the public and private sector to work as a team to achieve Vision 2020 (Ab Rahman, 2011). Thus, in the perspective of industrial relations, as main players, both parties i.e. employer and employee, need to adopt this unity principle in their employment relationship as a pre-condition for their own sustainability and contribution towards Malaysia's economic and social development.

In promoting the concept of unity to maintain industrial harmony it is ideal for the policies to be supported by a strong legal framework. The existence of a legal framework ensures legal rights for employers' participation in management on various issues concerning them at their work place, particularly on the issues of managerial prerogative. Markey (2004) stressed on the importance of a legal framework in the work place and argued that:

> *...without legislation, work councils may not be secure from managerial or union encroachments upon their*

independence ...legislation would ensure that all work councils have the same opportunities and constraints, and the neutrality of participative structures, free from the impositions of whichever party is favoured by the balance of industrial power.

Accordingly, the managerial prerogative principle needs to be re-defined in order to give some space for employees to be actively involved in the decision-making process in line with the current national agenda, which encourages participation from the employer and employee and relevant representative such as trade union. In conclusion, this article argues that exercise of managerial prerogative on matters as listed in Section 13 of the Industrial Relations Act 1967 needs to be re-defined, as currently it seems to be a major bone of contention in employee and trade union negotiations, which raise issues that need improvement for better working conditions and working life for employees (Parasuraman, 2014).

CONCLUSION

Managerial prerogative right is a concept inherited from pre-independence days as part of the labour package framework to protect the interest of foreign investors. However, to retain the concept in its outmoded interpretation, without reflecting on the current need and changes in social as well as employment law would not be doing justice to the development of human rights and government policies to unite citizens in the journey towards realising Vision 2020. Therefore, the managerial prerogative right as enshrined in Section 13 of the Industrial Relation Act 1967 should be amended to provide legal space for employees to be included and involved in the decision-making process in the interest of the business, whilst at the same time retaining certain privileges accorded to the employer in their capacity as management of a business entity.

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