

# 9. INDUSTRIAL COURT (IC)

(Maimunah Aminuddin)

## Introduction

- Structure and proceedings of the Court
- Awards of the Court
- Unfair dismissal claims
- Trade disputes
- Interpretation of collective agreement or awards
- Complaints of non-compliance
- Cognisance of collective agreement



# STRUCTURE AND PROCEEDINGS OF THE COURT

## Structure

- President appointed by YDP Agong, and a number of chairmen to assist
- IRA 1967 stipulates President must have a minimum of 7 years experience as a lawyer, or be a member of the judicial service.
- Union involved cases heard by the President or one of the chairmen and a two-member panel: one an employer's representative and the other representing the union.
- Before 1988, the panel consisted of 3 individuals, one employer's representative, one union representative, and an independent person, which was removed by an amendment of the IRA.
- Panel members are appointed by the President, after consultation with bodies like the MTUC and the MEF, which submit lists of names of individuals considered qualified to serve.
- President makes a selection from these lists, and the panel members serve according to roster to attend Court hearings.
- In the case of a complaint of unfair dismissal, the President or Chairman can conduct the hearing alone without the panel.

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## **Proceedings of the IC**

These are simplified versions of any court of law proceedings. The disputing parties may be represented at each hearing as follows:

- Employer may select one of his officers to make the case presentation. For a member of a trade union of employers, the representation may comprise of a union officer or employee, or can be an officer from the MEF.
- Representation for presenting the case for union may be an appointer officer or employee of the union or an MTUC official.
- Representation for an employee may be an MTUC or union official or employee, or he may represent himself.
- Only when the IC grants permission are lawyers allowed to represent the disputing parties. Normally, permission is given for legal representation.

<b><i>Employer</i></b>	<b><i>Trade Union</i></b>	<b><i>Employee</i></b>
1. Company officer	1. Union officer/ employee, or	1. Himself
2. Employers association officer	2. MTUC official/ employee	2. MTUC or union official
3. MEF official/ employee	3. Lawyer	3. Lawyer
4. Lawyer		

## *continuation*

The IC is empowered to call for witnesses and ask for documents as required. Normally, the disputing parties are required to lodge the written summary of their arguments, referred to as “pleadings”, prior to each hearing. When the hearing is in session, each party has to orally present its case on the events leading to the dispute, to bring forth witnesses, and to forward documents in support of their arguments. The President or Chairman may intermittently question the witnesses or the officer making the presentation. Each party is given opportunity to cross-examine witnesses from the other party. Upon completion of all arguments, the IC adjourns to make its decision, which is written up and considered as an award of the Court.

From time to time, a hearing may be conducted when one party to the dispute does not appear in Court. When the Court is certain that the absented party is aware of the date of the Court hearing, the case will be heard without the presence of the absent party. At times when the employers side elects not to be present in Court, the chances are that the employee or union will win the case, without the employer being able to respond to the evidence presented.

# AWARDS OF THE COURT

The awards refer to the decisions of the IC. The front page of an award document gives certain information as follows:

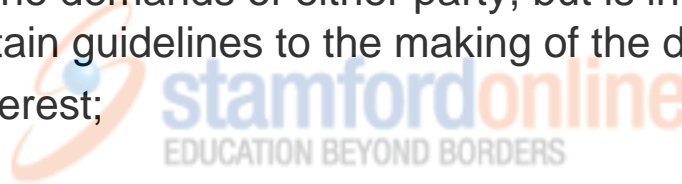
1. The disputing parties – in a trade dispute, they are an employer and a trade union;  
- in claims of dismissal, they are an employer and an employee or employees.
2. The award number – commencing consecutively from the first case of each year.
3. Decision making persons.
4. Venue – can be Kuala Lumpur, the headquarters, or Sabah, Sarawak, Johor, Penang and Ipoh.
5. Date of reference – trade disputes are referred to the IC by the MHR following failed actions of conciliation by officials of the Industrial Relations Department.
6. Dates of hearing – with cases covering more evidence for presentation, more hearing dates are required.
7. Representation

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The IC awards are binding to both parties. According to Section 56 of the IRA, any party not fulfilling the terms of an award is guilty of an offence, which incurs a fine or jail sentence upon conviction. The IC is not empowered to prosecute offenders. Action can be taken by the Court Registrar to submit the award to the High Court or the Sessions Court for enforcement.

The IC need not agree with the demands of either party, but is independent in making its decisions. There are certain guidelines to the making of the decisions, like:

- regard for the public interest;
- financial implications;
- effect of the award on the national economy and the industry;
- probable effect to related or similar industries (Section 30.4, IRA);
- consideration of agreements or code of employment practices (Code of Conduct for Industrial Harmony).



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Section 33 of the IRA indicates that awards of the IC “shall be final and conclusive, and no such decision shall be challenged, appealed against, reviewed, quashed or called in question in any other court or before any other authority, judicial or otherwise, whatsoever”.

However, at the discretion, questions of law in an award can be referred to the High Court, but this action is uncommon. A dissatisfied party to a trade dispute, after an IC award, may refer to the High Court, in turn to the Court of Appeals, and to the Federal Court.



The majority of IC awards are consent awards, which means the disputing parties resolve their differences out of Court. Under these circumstances, the IC accepts the terms agreed by the parties and make records of them. Such practice is common in cases of dismissal. The parties may also agree to settle their dispute by withdrawing their case. In this situation, if the settlement terms are not recorded with the IC, and either party defaults in the agreement implementation, the injured party has no avenue to seek for recourse.

# UNFAIR DISMISSAL CLAIMS

The majority of IC cases involve the dismissal of employees, who claim for reinstatement under Section 20 of the IRA. On the average, about four-fifths of trade dispute claims are resolved through conciliation at the IRO level. Those that cannot be settled at this level are notified to the MHR who may refer the case to the IC. If the injured party is not covered under the definition of a “workman”, the IC is not empowered to hear his claim. A workman covered under the IRA must satisfy the following:

- the traditional control test; the organisation or integration test; the mixed or multiple test.

Additional factors are also studied, like:

1. The employer’s right to control.
2. The employee as an integral part of the operation.
3. Whether the person has the opportunity for profit or incur a loss.
4. Whether the work instruments or equipment belong to the employee.
5. The entitlement to exclusive service.
6. Payment of a fixed remuneration for a designated period.
7. The power of selection and appointment.
8. The employer has the power to suspend the employee and dismiss him.
9. The power to fix the place, working time, and times to take holidays.
10. When there is doubt or ambiguity in the employment relationship.



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## Dismissal with just cause or excuse

- Reinstatement – given job back with all privileges at time of dismissal  
pay back wages
- Reinstatement is often a rare occurrence
  - likelihood of worker having found another job
  - through the dispute process, the relationship between the employee and his superiors become untenable for effective work to be performed
  - employee's position may be filled by somebody else, since the time between an employee's dismissal to the Court's decision may take up to 2 years.
- Under such circumstances, the employee is given compensation in lieu of reinstatement and back wages
- Delay caused by reasons like
  - many claims of this nature
  - employees are more aware of their rights and tend not to act on their dismissals passively
  - Industrial Relations Department very short of conciliators from the late 1990s
  - parties involved may apply for postponement of hearings because their lawyers are busy
  - the IC has inadequate staff, especially chairmen
- Employers face problems because of delay due to difficulty in getting witnesses to Court, like witnesses may have left the company. In addition, over time, memories of the incidences associated with the case would have dimmed.

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Claims relating to retrenchment

- this type of problem is more frequent in times of recession and financial downturn

Specific causes of retrenchment include

- company closure
- sale of company
- relocation to another country
- relocation within the country
- raised production cost
- fall in demand
- company reorganised



Retrenchment falls within the management prerogative category, and this an un-bargainable matter. However, it can cause a trade dispute between a union and an employer, or a claim for unfair dismissal under Section 20 of the IRA. Terms of payment of termination benefits comes under the EA 1955. It is recorded that many collective agreements have an item covering a retrenchment benefit, failing which an employee can claim for non-adherence to the collective agreement.

During the retrenchment exercise, did the employer apply the principle, “last in, first out”? Does FOF supersede LIFO? Was sufficient notice of retrenchment given? Was the retrenched employee’s position replaced within a short period of time?

# TRADE DISPUTES

Arbitration by the IC on trade disputes covers

- an employee with a grievance and is represented by his union; or
- a union, covering employees in a company, undertakes a dispute with the employer over employment terms and conditions.

The majority of cases are due to breakdown in collective bargaining between the union and the employer. The issues can involve

- Scope of a collective agreement – covering the inclusion of temporary and casual employees;
- Payment of bonus – contractual as against non-contractual;
- Salary increases – one of the issues raised most often

Award No 266 of 1992 by the IC cover factors like:

- a) wages and salaries in comparable establishments;
- b) any evidence of increase in cost of living since the last wages and salaries revision;
- c) employer's ability to pay;
- d) employer's legitimate desire to achieve a reasonable profit.

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In Award No. 211 of 2004, the IC gave support “ ... to replace the annual increments with a system of paying incentives which is linked to the Company’s performance and productivity ...”.

- Managerial prerogatives or rights – which fall outside the scope of a collective agreement, and covered under Section 13 (3) of the IRA;
- Reduction of existing benefits – Award No. 42 of 1988, states “ ... with justification and reasons, .. No rule to say these terms cannot be reduced ...”.

### **INTERPRETATION OF COLLECTIVE AGREEMENTS OR AWARDS**

The IC takes responsibility to interpret the sense and essence of any section of a collective agreement or Court award which may cause disputes by the interested parties. During the initial stage of drawing up the clauses or sections of the collective agreement, both parties may be in agreement, but may disagree during the implementation stage. The Court decides on a particular clause or section’s interpretation and how it should be implemented.

# COMPLAINTS OF NON-COMPLIANCE

The complaints cover non-adherence to a collective agreement or a Court award, and forms the last area of jurisdiction of the Court. Such complaints tend to increase during a financial crisis in the country, leading to many employers unable to pay bonuses and wages and salaries increments. As indicated in Award No. 156 of 1987, the IC had been reluctant to permit variations due to inadequate grounds, but would give consideration when the survival of the company is at stake. In 1999, complaints of non-compliance formed approximately 23% of the annual awards made.

## **COGNISANCE OF COLLECTIVE AGREEMENT**

According to the IRA, to deposit and the cognisance of a collective agreement, the following conditions must be satisfied:

- (i) A collective agreement shall be in writing and signed by both parties.
- (ii) A signed copy of the collective agreement should be jointly lodged by the parties to the Registrar of the IC, within one month of entering into agreement. The registrar shall bring the document to the IC for its cognisance.
- (iii) Before taking cognisance, the IC ensures that the document complies with Section 14 of the IRA. If amendments are necessary, the parties may be asked to make the amendments, and if the parties failed to take action after reasonable time, the Court itself amends the agreement.
- (iv) If the IC is of the opinion that the collective agreement does not conform to the requirements of Section 14, the Court may refuse to take cognisance of the collective agreement.

# REVIEW

## Structure and proceedings of the Court

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