EMPLOYMENT & INDUSTRIAL RELATIONS

MALAYSIA'S COVID-19 ACT: EMPLOYMENT PERSPECTIVE – TOO LITTLE, TOO LATE?

The long-awaited Act in light of the Covid-19 pandemic, the **Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 (the "Covid-19 Act")** has been gazetted on 23 October 2020 and came into force on the same day. This article explores the three relevant provisions from an employment law perspective.

(1) CONTRACTUAL PROTECTION

Section 7 of the Covid-19 Act has the effect of **statutory *force majeure*** on certain categories of contracts to protect the interest of the defaulting party/parties due to their inability to perform contractual obligation(s) as a result of the measures implemented by the Government to curb the spread of Covid-19.

The categories of contracts include, amongst others, contracts related to **the supply of workers in a construction contract and professional services contract** (such as independent contractors).

As such, parties that were unable to perform their contractual obligation(s) as a result of the movement control measures prescribed by the government are protected from any action commenced by their opposing party arising from the contract.

VALIDITY Crucially, this protection is only valid from 18 March 2020 until 31 December 2020.

EXCLUSION This contractual protection does not apply to any terminated contract, forfeited deposit or performance bond, damages received, legal proceedings or arbitration/mediation commenced, any judgement/award granted, or execution carried out before the commencement of the Covid-19 Act, i.e. the period from 18 March 2020 until 23 October 2020. Thus, contracts that have been terminated especially during the early period of the pandemic would not be afforded this contractual protection.

(2) MODIFICATIONS TO THE INDUSTRIAL RELATIONS ACT 1967

Section 40 of the Covid-19 Act provides that the period from 18 March 2020 to 9 June 2020 shall be **excluded** from the calculation of the time period stated in the following circumstances under the Industrial Relations Act 1967 ("IRA"):

(i) Obligation of an employer or trade union of employers under Section 9(3) IRA
Where a claim for recognition (i.e. a formal recognition that a particular trade union has the right to represent the employees) has been served on an employer or trade union of employers, the employer or trade union of employers must either accord recognition to the claim, or notify the trade union of workmen the grounds in writing for not according recognition, within **21 days** after the service of the claim.

(ii) Obligation of a trade union of workmen under Section 9(4) IRA
Where the trade union of workmen concerned receives a notification that recognition is not accorded, or where the employer or trade union of employers concerned fails to comply with item (i) above, the trade union may report the matter in writing to the Director General within **14 days** of the receipt of the notification or after the 21-day period has lapsed as the case may be.

(iii) Filing of representations under Section 20(1A) IRA
The Director General shall not entertain any representations (to be reinstated on grounds of dismissal without just cause and excuse) unless such representations are filed within **60 days** of the dismissal.

DO THE PROVISIONS ABOVE HAVE ANY IMPACT? For example, if X was dismissed with effect from 15 April 2020, he would have to file his representation in the Industrial Relations Department by 14 June 2020 (60 days) at the very latest. Under the exclusion of time provided by the Covid-19 Act, X has an extended time period until 9 August 2020 to file his claim (60 days calculated from 10 June 2020). However, the limitation period would have lapsed by 9 August 2020, before the Covid-19 Act had come into force (i.e. 23 October 2020). Thus, this provision does not effectively protect employees who wish to claim unfair dismissal during the Movement Control Order ("MCO") and early Conditional Movement Control Order ("CMCO") period as the extension of time granted under the Covid-19 Act would have expired upon the coming into force of the Covid-19 Act.

(3) MODIFICATION TO THE PRIVATE EMPLOYMENT AGENCIES ACT 1981

The period from 18 March 2020 to 9 June 2020 shall be excluded from the calculation of the period for an application to renew a licence under Section 11(1) of the Private Employment Agencies Act 1981, i.e. **at least 60 days** before the expiry date.

CONCLUSION It is recognised that the implementation of the Covid-19 Act undoubtedly aims to mitigate the financial hardship suffered by employers and to protect the interest of employees during this period. However, these reliefs appear to be of little impact, given that seven months have passed since the implementation of the MCO. The contractual protection does not extend to contracts that have already been terminated before the Covid-19 Act came into force, and the limitation period to claim unfair dismissal during the MCO and early CMCO period has already expired.

Although some may argue that the worst has passed and that the economy has regained some semblance of normalcy with limited government intervention, the Covid-19 Act does present some level of certainty as a legal compass to navigate these circumstances.

We can take comfort in that the Covid-19 Act extends protection to newly terminated contracts after it has come into force, which means businesses and contractual parties may rest a little easier knowing that further limbos if any, are alleviated. However, we hope that there would be more feasible reliefs to be implemented so that greater groups of individuals may benefit from them.

For more information, kindly contact the following:

Authors

Wong Keat Ching
keat_ching@zulrafique.com.my

Loh Qiao Wen
qiaowen.loh@zulrafique.com.my

Wong Yen Ni
yenni.wong@zulrafique.com.my

Zul Rafique & Partners
3 November 2020