

**AN ANALYSIS OF DECISION-MAKING
ARBITRATION AND SETTLEMENT ON
EMPLOYEE-TRANSFER COURT CASES**

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ASIA e UNIVERSITY

2024

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A Thesis Submitted to Asia e University in
Fulfilment of the Requirements for the
Degree of Doctor of Philosophy

May 2024

ABSTRACT

The commercial enterprises have grown with branches in districts and states, national, regionally and internationally to accommodate ever-growing demands for quality products, services and consultancies, with affordable or reasonable costs. Deployment of capital and labour is the main key to supporting production operations and sustaining logistics-supply chain for all industries; one without the other cannot survive, develop and grow organization business profitability specifically and country economic wealth and people welfare in general. Invariably, Associations representing the employers and Trade Unions representing the workers are confronted with labour-relations issues that propel each of them to protect the welfare or negotiate the disputed interests of their respective members. In this context, as the dispute-negotiation process is disrupted or has reached a stalemate, for one reason or another, the so-called Industrial Disputes and the aggrieved parties can continue to seek redress beyond the decision-arbitration intervention of the Industrial Relations Department of the Industrial Court, into the ambit of review-settlement decisions by the High Court, Appeal Court and Federal Court in pursuit of a justifiable claim for judgmental decision on reasonable compensation. In this thesis, Industrial Disputes arising from disputed employee-transfer cases are analysed, employing the legal bases for mainly Malaysian cases and the Commonwealth cases as references for judgmental decision-making, arbitration and settlement for contractual disputes involving diverse issues surrounding employee-transfer involving bona fide and mala fide transfers representing a widespread of grievances, grouses or complaints from mostly aggrieved and disrupted workmen. The 14 selected cases, based on a set of 7 pair-cause similar premise-issue such as transfer demotion, insubordination, change of ownership, change of job functions, departmental transfer, different legal entity, and no transfer clause in Appointment Letter are analysed and resolved legally. The expected output of this case-study based on the ex post facto method of review-analysis, in the form of judgement-resolution decisions, provide the retrospective insight into and critique of how, and to what extent, the impact of the decisions-outcome has affected the employer (organizations), employee (workmen and Associations), legal arbitrators (courts) in terms of labour relations and its statutory provisions (the Acts), policy governance (Ministry of Human Resource) and overall productivity of national economic wealth and citizenry welfare. The conclusion provides a directional indicator of future redress-award solutions beyond the applications of conventional arbitration and settlement models into the advocacy of water-tight contract-specific terms and conditions of employment into the digital era of industrial ventures and commercial enterprises, during and post-COVID19 pandemic era. The fourteen cases selected produce the final desired employer-employee output-outcome of the wisdom of judicial judgmental decisions.

Keywords: Employee transfer, legal, industrial relations, arbitration, settlements

APPROVAL

This is to certify that this thesis conforms to acceptable standards of scholarly presentation and is fully adequate, in quality and scope, for the fulfilment of the requirements for the degree of Doctor of Philosophy

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DECLARATION

I hereby declare that the thesis submitted in fulfilment of the PhD degree is my own work and that all contributions from any other persons or sources are properly and duly cited. I further declare that the material has not been submitted either in whole or in part, for a degree at this or any other university. In making this declaration, I understand and acknowledge any breaches in this declaration constitute academic misconduct, which may result in my expulsion from the programme and/or exclusion from the award of the degree.

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ACKNOWLEDGEMENTS

I am glad that I decided to continue my academic journey after layoff for two years due to my work commitment beyond the shores of West Malaysia, making it trying for me to concentrate on my thesis writing in East Malaysia. However, I am very grateful to my supervisor who never go up on me despite my breakaway with few occasional phone contact. And, as proven, upon my request for revival of my candidature since January 2021, under his tutelage and attentive guidance, I've now successfully completed five chapters for Viva Voce –in May 2024, and re-submitted the complete post-Viva Voce amended thesis for the final approval and endorsement of the Senate of Asia e University. My heartfelt “THANK YOU” to Associate Professor Dr OO Yu Hock, for his untiring motivation and support that have enabled me to earn my Doctor of Philosophy degree for the 2024 graduation and convocation.

As I express my gratitude to my supervisor for his friendship too, I am grateful to my wife who has stood by my ambition to complete my PhD journey. Until this stage, I also acknowledge the contributions of my circle of friends and associates who have assisted, one way or another, in providing input data or information as necessary. And I am also thankful to be co-authoring a SCORPUS publication in 2021, as part of an international e-conference I attended and presented the said publication in June 26-27, 2021.

Govindasamy Munusamy

6/6/2024

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CHAPTER 1

INTRODUCTION

1.0 Overview

A worker in Malaysia unfairly transferred can claim constructive dismissal. The Malaysian Industrial Relations Act 1967 has provisions for the claim of reinstatement to his/ her former job without loss of salary and benefits. Under Section 20 of the Industrial Relations Act 1967, an employee who feels that he or she has been unfairly dismissed, without just cause or excuse by the employer, may lodge a representation to the Director General of Industrial Relations within 60 days from the date of termination. By lodging this representation, the employee is seeking for reinstatement to his/ her former employment with the employer. This recourse includes the situation where an employee believes that he/ she was constructively dismissed by the employer. Briefly, “constructive dismissal” means a situation where the employee is left with no choice but to tender his/her resignation due to the actions, decisions or policies imposed by the employer on the employee, resulting in a major breach of contract of employment by the employer although there is no direct termination by the employer. The law on transfer is settled in Malaysia by various authorities such as the Industrial court, High Court, Appeal Court and the Federal Court.

1.1 Background of the Study

In Malaysia and also worldwide, private enterprises are growing rapidly by forming branches in all parts of the country and globally. This vigorous growth has resulted in major movement of human capital, money, equipment and machineries. The movement of employees or workforce has limitations bounded by contract of

employment, labour laws, Industrial Relations law and Trade union laws to protect the employees from exploitation.

During the period of post dismissal, the employees lose their income and the employers lose the services of a trained employee and need to spend more money to train new employees. In the event the employer loses the case, it has to pay compensation of back wages for a minimum of twenty four months and a further compensation of one month's salary per year of service if no re-instatement is ordered by the court. If the employee loses the case, he or she will carry a negative stigma for life, in addition to the monetary loss. The chances of securing a similar or better job will be slim or remote.

There are more than eleven million workmen in Malaysia employed in various industries and they face transfer orders quite regularly within the organization or with associated organizations, locally or internationally. The current laws governing transfers need to be carefully studied for correct implementation. There are more than twenty-five Industrial Courts in Malaysia to deal with mainly concerning the employee dismissal cases, direct or indirect dismissal, constructive dismissal cases and other non-compliance matters arising from collective agreements and employment contracts.

1.2 Justification of the Study

This study is justified because it attempts to provide some insightful analysis of a significant aspect of organizational productivity and work-life relations between the employers and the employees. In this way, it provides a platform to remedy the presence of a lackadaisical attitude among the general public (regardless of whatever reasons) on issues and problems related employer-employee disputed relations that normally ended in arbitrated settlement according to prevalent Labour or Employment

statutory documentations and institutional settlements. to Also, the research gap- particularly an absence or lack of general knowledge and specifics of legality in employer-employee dispute, particularly employee-transfer issues in organizations or productive workplaces that add and create values to economic development – can be addressed. Moreover, in view of the huge amount of money and manpower wasted due to the non-compliance of the transfer laws by workmen and employers which leads to lengthy negotiation, effort and time involved case decision-making arbitration or settlement, interested parties or researchers can use this study to help the government and private sector authorities find more viable solutions to employer-employee disputes particularly on bona fide employee- transfer cases.

1.3 Problem Statement

The power of Labour courts and Industrial Courts or Tribunals to interfere with employee transfer is very limited unless it is a colored exercise and/ or there are strong reasons to believe that the action by the employer is mala fide practices or victimization or unfair labour practice or due to some other ulterior motives not related with the employer's trade or business or in the interest of the organization.

The workman or employee normally challenges the organization for mala fide practices of the employer but the onus of proving the mala fide is on the employee concerned. On the one hand, ironically, when an employee's union has become large and powerful, the organizational executives or the office bearers tend to overlook the welfare of employees whose membership they represent. In this way, their own interests take precedent over the employee's interest. Hence, this compounds the issue of processing expeditiously victimization or unfair labour practice. On the other hand, the employer's unions, usually comprehending the dilemma confronting employees in

its union including internal politics, consciously or unintentionally take advantage of the said employee victimization issue.

Furthermore, in numerous cases of transfer of workman reviewed in the interest of both employee and employer by the Industrial Relations Department, delay due to various reasons at the Department level and if unresolved goes to the Minister of Human Resources for reference to the Industrial Court is a common feature and a growing public grouse about inefficiencies and negligence by both organizations and authorities involved.

The problem remains that there are pending cases up to 5 to 10 years starting from the Ministry of Human Resource up to the various courts. Sometimes delayed cases, due to cases being transferred from Industrial Court (point of origin) to High Court or vice versa and or to Appeal or Federal Court. This process of inter- legal transfers may involve more than one party. Therefore, delay, complaint, postponements, leave the grieving employees in a lurch, without due process delay of the law left neglected over time.

Those employees on lower rank have the financial issues to engage lawyers to represent them in the Industrial Court and or higher courts. Also, they face the stigma of dismissed employee and will find hard to secure employment elsewhere. They too face the isolation from co-workers and friends due the stigma of dismissal or termination.

1.4 Research Questions

- a) How to resolve the delays in addressing employee complaints by employee unions, employer unions and the Industrial Relations Department?
- b) What is meant by bona fide (Good Faith) mala fide (Bad Faith) cases of employee transfer?

- c) What are the common grievances of employee transfer cases?
- d) What are the recommended actions to expedite delayed and concluded case judgements in the shortest period possible?
- e) What are the solutions to redress the negative impact incurred by the employers, employees and the country?

1.5 Objective of the Study

- a) To determine how to resolve the delays in addressing employee complaints by employee unions, employer unions and the Industrial Relations Department.
- b) To discuss what is meant by *bona fide* (Good Faith) *mala fide* (Bad Faith) cases of employee transfer.
- c) To ascertain what are the common grievances of employee transfer cases.
- d) To recommend what are the actions to expedite delayed and concluded case judgements in the shortest period possible.
- e) To propose what are the solutions to redress the negative impact incurred by the employers, employees and the country.

1.6 Scope and Limitation of the Study

This study only refers to court cases related “transfer of employees” in most of the private sector industries but not all. The selected cases were from Industrial Court, High Court, Appeal Court and Federal Court of Malaysia. The references and authorities quoted were from Court Judgments delivered in Common Wealth countries especially from United Kingdom and India.

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authorities quoted were from Court Judgments delivered in Common Wealth countries especially from United Kingdom and India.

In this study, the various cases of transfer of workman will be studied for the benefit of both parties and of course the Industrial Relation Department. The awards and judgment of the Industrial Court, High Court, Appeal Court and Federal Court will be an eye opener for all those involved in the practice Industrial Relations in Malaysia.

This study is limited by the source of the selected cases for analysis and discussion. They comprise court cases, after reviewing the literature in the Resource Centre of the Legal Fraternity, are confined to Law Journals, books and documentations in the electronic media. For example, about 60 to 70 cases were collected from Industrial Court Library. All the cases involves employees transfer from one place to another, one section to another, one location to another, one organization to another , West Malaysia to East Malaysia and vice versa. Ad verbatim citations are quoted or paraphrased as needed. However, another limitation is the selected publications on theories, models and researches on the concepts of decision making, arbitration and settlement generally.

1.7 Significance of the Study

The results of the case study analysis can provide a better insight into, and understanding of, this human-driven processes in resolving disputed employer-employee relationships whose final output tends to affect programmed organizational productivity, usually producing more negative than positive outcome for organizations, society at large and the nation. The organizational (corporate) image, disrupted human relations such as mistrust and widespread ill-feelings, community or

societal goodwill is questioned, and the economic productivity capacity and wealth-creating opportunities through goodwill and committed labour are challenged.

This study therefore is significant because the cases reviewed fulfill and the questions asked the study objective can provide answers that useful guidelines to employee and employer Unions, the Industrial Relations Department, the Ministry of Human Resources, Government Policy Makers to avoid delays that can compromise national efforts to settle employee- employer disputes thus saving money, time and manpower.

1.8 Methodology

The theory underlying this study is employer- employee relations, particularly dispute arbitration and settlement of mala fide cases. The method used is case study, particularly reviewing and analyzing Awards from Industrial Court of Malaysia, High Court, Appeal Court and Federal Court cases. All the cases focus on employee-transfer and the decision-making or judgment of the cases which are subsequently analyzed based on the awards given in favor of both parties as per the findings of the courts.

1.9 Terminology

- **Contract of Employment**

Any form of employment that lasts for more than one month must be formalized by a written contract agreement. This contract should specify the key terms of the employment relationship, including work location, scope, wage rates, wage period, holidays, benefits and health and safety issues.

In Malaysia, all labour contracts are governed by the Employment Act 1955, which stipulates that the right of employees to participate or join trade unions that cannot be restricted.

- **Workman/Workmen**

Although the definition in the contract of employment it is expressly provided that the employer must agree to employ the person as a workman and that person must also agree to serve the employer as his workman. To determine the meaning of as a workman one has to go back again to definition of work man in the various Acts and not construe it in the ordinary sense. In the absence of any restrictions or limitations, how does one draw the line or the cutoff point as to when a person is or is not a workman?

It is clear that the Malaysia Parliament intended to restrict the meaning of employees in the Employment Act 1955, but deliberately left out any restriction in the definition of workman in the Industrial Relations Act 1967; it did not restrict the meaning of 'workmen'. This word appears to acquire a much wider meaning and connotation than the word 'employee'. In fact, the Parliament intended to cover all kinds of employees for the purposes of trade disputes and unfair dismissals.

- **Employer**

Generally, an employer is the authority which employs and pays employees for their labor. It may be an individual person or it may be an organization or company representing many people. Within the relationship between employers and their employees, the employer is the party which will typically define the terms of employment and write the contract of service. They are then obligated to provide the agreed-upon compensation to workers for any labor they perform that is contained within the terms of their contract of employment or collective agreement. An employer is the

party legally liable for work conditions, maintaining labor laws and handling any legal action an employee may pursue.

- **Employment Act. 1955**

Employment law in Malaysia is generally governed by the Employment Act 1955. The Employment Act only applies to the categories of employees, whose monthly salary does not exceed RM2000. Employees who are engaged in manual labour, regardless of salary.

- **Trade Union Act. 1959**

Labour unions or trade unions are organizations formed by workers from related fields that work for the common interest of its members. They help workers in issues like fairness of pay, good working environment, hours of work and benefits.

- **Industrial Relations Act. 1967**

The aim of this act is to promote and maintain industrial harmony and to provide for the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising.

- **Transfer of Employee/Employee-Transfer**

One of the internal mobility of the employee is transfer. It is lateral movement of employee in an organization by the employee. "A transfer involves the shifting of an employee from one job to another without changing the responsibilities or compensation".

Transfers of employees are quite common in all organizations. This can also be defined as a change in job within the organization where the

new job is substantially equal to the old in terms of pay, status and responsibilities. Transfers of employees can possible from one department to another from one plant to another. Transfer may be initiated by the organization or by the employees with the approval of the organization. It can be also due to changes in organizational structure or change in volume of work, it is also necessary due to variety of reasons. But broadly can be done either to suit the conveniences of organization and to suit the convenience of employees.

- **Transfer**

Transfer in this study means the act of moving someone (an employee of any rank or status) from one position in the same organization or a lower position in another location (of the same company's subsidiary or associate partner organization), not tantamount to an employment dismissal. In this context of employment relations, a transfer generally refers to a movement of an employee from one job to another without any loss of seniority, classification or benefits, but the cases differ as to whether, in employment law, a promotion is a transfer with the said loss or, in other words, a demotion that culminates in the loss of original rank and status including salary and benefits as well.

- **Insubordination**

Insubordination in the workplace refers to an employee's intentional refusal to obey an employer's lawful and reasonable orders. Such a refusal would undermine a supervisor's level of respect and ability to manage and, therefore, is often a reason for disciplinary action, up to and including termination. Examples of insubordination include: Refusal to obey

commands of a supervisor. Disrespect shown to higher-ups in the form of vulgar or mocking language.

- **Ownership**

Ownership in legal terms is about the exclusive rights and control over property such as a business entity, a formal organization or the nature-form of an institution, or it may refer to any asset including a land or real estate, a tangible object such as an antique or physical office-space or building, and various forms of intellectual property. In this study, a change of ownership occurs when a title is transferred from one person or entity to another, whereby the ownership of a company is transferred by having the owner sign a deed sale or otherwise in exchange for money and / or other considerations. It results in a change in the legal right to the ownership and possession of the organization. In other words, in the context of business operations, this means “business has changed hands” suggesting that a change in the ownership of the company has taken place due to numerous reasons including the founding company owner/owners would have decided to sell the company. The change in ownership brings other changes to the organization as well that affect employees, vendors and customers.

- **Change of Job Functions**

A career development job change is defined as a promotion or demotion move to a different job code and title (job specification and description) in the same or lower grade respectively. This change is lateral (lateral lemniscus) when the move to the same job code and title outside of the current department to another department (or in similar project teamwork situations) within the same organization, sometimes outside the parent

organization. But it is proximal when such a move – downward in the vertical hierarchy of the same organization or sideways into a lower ranking of relocation in an external subsidiary of the same organization.

- **Departmental Transfer**

This is characterized by participation or cooperation of two or more departments within the same organization involving lateral or proximal moves, without loss of employment benefits in job-status quo promotion or entailing loss of employment benefits in job- change demotion circumstances. Such moves are often made by management for various reasons including deployment of employees to fill upturn business demands (often with organizational expansion or diversification) or retrenchment of staff during business downturn situations (usually with organizational contraction or downsizing).

- **Different Legal Entity**

A separate legal entity is a person or an organization that is recognized by law - a "legal person" or "legal entity" having its own separate legal existence. In the case of a business entity, the term is represented by "incorporated" thus making the company or institution a separate legal entity. This means that a company really exists; it can sue or be sued in its own name, holding its own property and is liable of the any debt it incurs. However, this concept allows limited liability to shareholders because the any debt incurred is attached to the company and not the shareholders in the company. This is attested by the Salomon And Co Ltd [1897] Ac 22. Section 9 of the Indian Companies Act, 2013 which, cited on 26 August 2020 below*), has an effect of making the association a legal entity - a

separate entity from its shareholders or/and members. The company decides its name and seal. The assets of the company held by the company are separate from the assets of its members with limited liability differences.

- **No Transfer Clause in Appointment Letter**

An Appointment Letter is a compulsory official document of mutual contractual agreement that confirms that an organization has appointed a person for a given job position. It details

, in the form of “Terms and Conditions” (with main and supplementary ‘clauses’) what is required of the new employee and the role he or she will perform and cooperate in the company including the job title, job specifications and description, terms and conditions of employment and other contractual obligations mutually agreed upon, signed and sealed.

Thus, the ‘No Transfer Clause in Appointment Letter’ in this study means there is an absence of any mention on ‘transfer’ and its related matters in the terms and conditions of employment contract signed, that is, there was no specific term or condition represented by a ‘clause’ or any statement thereafter on ‘transfer’ and related matters under employee- transfer dispute negotiation and settlement.

Table 1.1: Top 5 reasons for dismissals under section 26 of industrial relations act.1967. 2014-2017

No	Description	No of Dismissals	Remarks
1.	Retrenchment	13882	
2.	Misconducts	11948	
3.	Termination Simplicitor	6605	
4.	Constructive Dismissal	2725	Mainly due to transfer.