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Professional Employees: Are They Not Vulnerable?

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Abstract

Employment law is widely defined as a set of laws that regulates employer-employee relationship. Most importantly, the laws offer protection to a contractual party who is at a weaker economic position in a free labour market system. Since workers are commonly the affected party, the employment law places extra attention on securing their rights. The major concern is however, the employment laws may not be extensive to protect all kind of employees particularly professionals. Even if they do, the protection is relatively incomprehensive. Therefore, this paper aims at identifying the legal position of professionals within the scope of employment law and further evaluate the extent employment rights of the professional workers is secured by the existing laws. Finally, it establishes that professionals are sought an equal or similar legal protection to other categories of employees. This paper is a pure doctrinal legal research as it mainly concerns with analysis of the legal principles and how they have been developed and applied.

Keywords

Employment law, professionals, professional employees, employment protection

Introduction

Generally, there are several categories of employees in Malaysia. Malaysian Department of Statistics (2019) identifies three major categories of employed persons namely, skilled, semi-skilled and low-skilled. Malaysian Department of Statistics applies the ILO International Standard Classification of Occupation (ISCO) in classifying and defining employed persons (ILO, 2012). Professionals are classified in the family of skilled employed persons and compose of 12.6% of the total employed persons in 2018. This figure increases by 0.3% in the first quarter of 2019 and represents 1.935 millions of employed persons (Malaysian Department of Statistics, 2019). The number is potentially in upward trend considering the direction of the country to achieve a developed nation in few years ahead. Furthermore, the wave of the Industrial Revolution 4.0 which widely affects changes to the nature of work strikes more demand of employees who use brain than physical i.e. professionals. Unfortunately, the employment law in general and the employment

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related legislations do not comprehensively protect and address the needs of this category of employed persons. Malaysians are looking forward to the recent effort of Human Resource Ministry in proposing changes to the 64 year-old Employment Act 1955 to incorporate all classes of employees including professional employees within its protective umbrella.

Recently, the Minister of Human Resources strongly conveys his Ministry's goal to ensure that the employment legal regimes are no longer discriminates any classes of employees (Kulasegaran, 2019). The employment statutes should be able to treat every employee equally regardless of their amount of salaries or their types of work, whereby the existing law enforces. Considering the economic perspective, generally, employed persons are well established at a weaker economic position than their employers. In highly competitive labor market, it is questionable on the extent professional employees are able to negotiate to their advantage in their employment contracts. Employment laws in Malaysia seem behind in time in addressing the issue of protection for skilled professional employees presuming that professional employees are able to protect their rights themselves through contractual bargaining process. Besides, it is well established that professionals' employees are better off as compare to the unskilled workforce. However, cases of underpaid, denial or lack of fridge benefits, even the basic entitlement rights to annual leaves, paid sick leaves, illegal escapism of statutory contribution to social security schemes i.e Employees' Provident Fund are actually encountered by professionals even though are not widely covered or reported comparing to non-professional employees cases. Therefore, the objectives of this paper are mainly to identify the position of professional employees in the context of existing employment laws, to evaluate the extent the laws protect them and finally propose the necessary approaches (not limited to merely by legislative intervention) to improve the current position.

Methodology

This paper adopted pure doctrinal legal research in analysing the existing employment laws governing the employees and businesses focusing on the issue relating to professional employees. Exploration and commentary using doctrinal analysis to provide statements of the meaning and scope of application for the issue discuss in this paper (Salter & Mason, 2007). This paper employed content analysis method in exploring the lacuna of employment laws in the context of professional employees.

Descriptive approach is used to describe the relevant employment laws governing the employer and employees relationship. Further, descriptive approach is supported by the explanatory approach in providing further explanation on the issue. Using analysis and critical approaches, this paper analyses the existing laws in the context of employment relations and positioning professionals employees within the existing legal framework. Apart from that, comparative analysis is slightly engaged in providing a quick exploration of the lacuna to the existing employment law. Thus, relevant legal approaches adopted by UK and Australia employment law in addressing the similar issues are referred to for such purpose.

The objective of this paper is to provide insight of the lacuna in employment laws that are unable the address the professional employees rights in their employment contract which lead to manipulation by the employers whose have the leverage in their organisations and positions in employment market.

Scope of the Paper

The term *'professional'* is widely defined as '*a person who has the type of job that needs a high level of education and training*' (Online Cambridge Dictionary). Moreover, professionals are further referred as people formally certified by professional bodies of belonging to specific professions (businessdictionary.com) for instance Bar Council, Malaysian Institute of Accountants and Malaysian Medical Council. However, in the context of this article, professionals are referred to class of workforce whereby their work involve increasing the existing knowledge, apply scientific or artistic concepts and theories, teach about concepts and theories in a systematic manner or engage in any combination of these activities (MASCO, 2013). Occupations in the category of professionals are classified into sub major groups such as science and engineering professionals, health professionals, teaching professionals, business and administration professionals, information and communications technology professionals and legal, social and cultural professionals (ILO, 2012). Additionally, professionals for the purpose of this paper are restricted to *'employees'*. An *'employee'* is defined in most of the employment statutes as a person who enters into a contract of employment with his employer. Therefore, the terms *'professionals'* and *'professional employees'* are used interchangeably throughout this article. The paper also limits its coverage to only professionals in private sectors particularly in Peninsular Malaysia. Finally, the recommendations proposed afterwards are not comprehensive and seek further research works.

Employment laws in Malaysia

Employment laws in Malaysia mostly in the form of written laws i.e legislations. Several statutes deal either directly or indirectly with employment relationship for example Employment Act 1955 (Act 265), Industrial Relations Act 1967 (Act 177), Occupational Safety and Health Act 1994 (Act 514), Employees Provident Fund Act 1991 (Act 452), Employees' Social Security 1969 (Act 4), Workmen's Compensation Act 1952 (Act 273), Trade Unions Act 1959 and other related statutes. These Acts have long been classified as social legislations as to balance unequal bargaining power between contractual parties in an employment relationship (Ahmad Mir & Kamal, 2006).

Other than the statutes, case laws particularly derived from the Industrial and Appeal Courts are of significant important. In addition, for employees who are members of employees' union, collective agreements form part of sources of rules. In relation to the disputes resolution, the law offers special platform in settling employment related disputes i.e Labour Court and Industrial Courts. Nevertheless, both of these are referred as tribunals instead of normal civil courts.

Employment Act 1955

The Employment Act 1955 (Act 265) (the EA 1955) is the fundamental legislation of all labour statutes recently enforceable in Malaysia. However its limitation is applicable to Peninsular Malaysia (section 1 (2) of the EA 1955) and Federal Territory of Labuan since 1st November 2000 (Federal Territory of Labuan (Extension and Modification of Employment Act) Order 2000 (P.U. (A) 400/2000). The legislation lists down the minimum rights that employees shall entitle within the employment relationship with employers and any provisions in an employment contract that intends to offer less favourable benefits that those outline in the EA 1955 shall be void and replaced with minimum benefits in the EA 1955 (see section 7, 7A and 7B of the EA1955). In short, every employee is legally entitled at the very least to the terms and conditions legislated by the Act from his employer. The terms and conditions legislated by the Employment Act are the hours of work; overtime work; a weekly rest day; public holidays; annual leave, sick leave and maternity leave; and maternity, layoff and termination benefits. It also obliges a minimum termination notice to be implied into a contract of employment. The right of an employee to form, to join and to participate in the activities of a trade union are also secured by the EA 1955 (section 8).

Unfortunately, instead of the public understanding that the EA 1955 was designed to all employees, the set of law actually restricts its application to only certain group of employees. The First Schedule of the EA 1955 defines *'employee'* as 'employee whose monthly salary does not exceed RM2,000 and any employees who earn more than RM2000 a month but who are engaged in manual labour, engaged in the operation or maintenance of mechanically propelled vehicle, supervise or oversees other employees engaged in manual labour, engaged in any capacity on a vessel (subject to certain other conditions) or domestic servants'. Secondly, the EA 1955 requires the existence of contract of service between employer and employee to fall within its purview. Section 2 (1) of the EA 1955 further states that an *'employer'* is any person who enters into a contract of service to employ any other person as an employee (includes the agent, manager or factor of such person) (Ahmad & Kamal, 2006). Obviously, professionals are not *'employees'* within the scope of the EA 1955 considering the wage level earned are usually higher than (whose average monthly wages were RM3807 (Jasphal, 2015) the threshold set whose and definitely does not meet any of the occupation as outlined by the EA 1955.

Industrial Relations Act 1967

The Industrial Relations Act 1967 (the IRA 1967) governs the relations between employers and workmen and their trade unions, and provides for the prevention or the settlement of differences or disputes arising between them (See the long title of the IRA 1967). The IRA 1967 outlines the principles underlying Malaysian industrial relations, namely the right of employees to form unions, the right to join unions, and the right to participate in the activities of unions. Secondly, the rule that employee unions must be recognized by employers before they may represent workmen, whether individually or collectively. In addition, the right to negotiate the terms and conditions of employment and the work of employee through collective bargaining between employee unions and employers and conclude a binding and enforceable written agreements incorporating the terms and conditions agreed upon. Finally, it promotes a compromise settlement in respect of disputes

arise between employers, workmen and their unions (Muniapan et al., 2018). If possible, disputes should be prevented through a grievance machinery or collective bargaining, and if not, should be settled through conciliation or arbitration, rather than industrial action (i.e. strikes, lockouts etc.).

More importantly, for an individual employee section 20 (1) of the IRA 1967 is the most relevant provision as it gives right to take action against his employer who allegedly unfairly dismiss him/her. The employee must make a representation seeking reinstatement of his former employment to the Industrial Relations Department within 60 days of the dismissal (See *Fung Keong Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 238; *V. Sinnathamboo v Minister of Labour and Manpower* [1981] 1 MLJ 251). The Department may then attempt to resolve the dispute, including by way of conciliation (section 20 (2) of the IRA 1967). If the settlement is not reached, the Department will report the matter to the Minister, who may refer the matter to the Industrial Court (section 20 (3) of the IRA 1967). The Industrial Court may award either reinstatement or compensation. The crucial provision of section 20 and the remaining content of the IRA 1967 which provide legislative framework for the wider system of industrial relations confer an equal important of this Act with the EA 1955.

Professionals and employment rights

An employment engagement of a professional employee is mainly defined by the contractual terms individually agreed between him and his/her employer (Kamal, 1995; Sharifah, 2012). Therefore most of professional employee's rights are derived from the contractual agreement. However, it is pertinent to note that for an employee who is not covered by the EA 1955 may seek the redress from the Labour department if their monthly pay are more than RM2000. Section 69B of the EA 1955 secures the powers of the Director General's inquiry to employees whose wages per month exceed RM2000 but does not exceed RM5000. Consequently, professionals who earn not exceeding RM5000 per month may utilize the 'Labor Court' to settle disputes pertaining to wages or the payment of any other sum of money.

Furthermore, women employees who are employed in a contract of services are entitled to statutory pregnancy and maternity rights (Part IX of the EA 1955) regardless they are professionals who earned more than amount of wages set by the EA 1955. Equally for provisions in respect of sexual harassment (Part XVA to the EA 1955).

The IRA 1967 regards *'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 (section 2). Therefore, professionals are well covered within this definition and entitled to resort to section 20 of the IRA 1967 and other relevant provisions of this law.

The Minimum Retirement Age Act 2012 (Act 753) (the MRA 2012) that sets a national statutory minimum retirement age for private sector employees is also extensive to cover professionals. This statutory retirement age is applicable to the private sector employee who has entered into a contract of service irrespective of wages (section 2 of the MRA 2012) but does not

include nine categories of employees (See Schedule of the MRA 2012). The Act makes unlawful to retire an employee before the employee attains the age of 60 (section 5 (1) of the MRA 2012). Failure on the part of employer to comply with the minimum retirement age may cause him to be convicted of an offence punishable with a fine not exceeding RM10,000 (section 5 (2) of the MRA 2012), he may have to reinstate or compensate an employee who has been prematurely retired (section 8 (5) of the MRA 2012).

In respect of social security protection which traditionally means a social insurance program providing social protection, or protection against socially recognised conditions, including poverty, old age, disability and others, professionals are captured (Rohaizat et. al, 2012)). The major types of security protection that are particularly offered to the private sectors employees in Malaysia including the employees provident fund, employees' social security insurance for local workers and insurance protection for foreign workers. The relevant statutes that purposely enacted to regulate the social security schemes are the Employees Provident Fund Act 1991 (the EPF Act 1991) and the Employees' Social Security Act 1969 (the ESSA 1969). The EPF Act 1991 statutorily formed the Employees Provident Fund as a social security institution and is responsible to manage the EPF members savings. The EPF Act 1991 provides retirement benefits for its members who are mainly private and non-pensionable public sector employees. While the EPF Act 1991 caters the retirement benefits for employees, the ESSA 1969 provides through Social Security Organisation (SOCSO) social security to employees and their dependants in the event of injury or death arising in the course of employment under two main insurance schemes mainly the employment injury scheme and the invalidity pension scheme. Basically, it is apparent that the EPF Act 1991 and the ESSA 1969 extends the protection to professional employees as long as they are employed persons under contract of service.

Legal issues

The key requirement of most statutory employment rights is contract of service. This major issue drives an endless discussion and debate among the experts in employment law and human resources discipline. The difficulty encountered in determining an employee status among professionals has long been recognised. The common law control test is realised as not appropriate to identify the employment relationship for professionals (Sharifah, 2012; Kamal: 2015; Ahmad & Kamal, 2006; *Mat Jusoh bin Daud v Syarikat Jaya Seberang Takir Sdn Bhd* [1982] 2 MLJ 71; *Stevenson, Jordan & Harrison v MacDonald & Evans* [1952] 1 TLR 101, 111) which prompted to the introduction of more modern tests i.e integrational test, multiple test and mutuality of obligation test (See Ahmad & Kamal, 2012). Many jurisdictions have explicitly recognised additional categories of employed persons to be part of statutory protection other than 'employee' per se. For example, many of United Kingdom employment statutes have introduced 'worker' to enjoy at least some of the major rights as enjoyed by an employee (Employment Relations Act 1996, sections 13 and 230 (3): National Minimum Wage Act 1998, section 54 (3); Working Time Regulations 1998, section 2; Employment Relations Act 1999, sections 10-13). Whilst, Australian employment laws have been actively struggling to ensure casual workers enjoying appropriate statutory employment rights (See Fair Work Act 2009, section 67 on the right to apply paternity leave, Fair Work Act 2009, section 65 (2) on the right to apply flexible working arrangement and

Fair Work Act 2009, section 382 dan section 383 on the access for unfair dismissal claim). The dependence of 'contract of service' in accessing most of the employment statutory rights seriously affects some atypical engagements between employer and employee for instance part time basis, casual, agency relationship and fixed term contractual basis.

The employment laws provide the basic minimum for the protection of employees. However, in many instances, the professional employees are not even have the protection of the basic minimum, simply because they are not governed under the EA 1955. The lacuna of the laws in providing protection for the professionals, hence resulted the not just the normal employees but the professional employees too are subject to exploitation by the rich resources and powerful organisations, whose as employers. In order to survive in the competitive employment market with the surplus of many professionals, even the professionals are subject to unfair practices of the employers. Employers with the sole aim of maximizing their profit and interest, often set unfair contractual terms in their standard form employment contract (Kickul, 2001). The employees not just have to accept such unfair terms but to endure the employers' high performance index demand by working outside their jobs scope. Immense organisation that are capable of exploiting their professionals employees often receive negative response from the professional employees resulted in high turnover of professional workforce (Kickul, 2001). This negative response would inevitably cause the negative impact in the employment market and stemmed to harm the economy of the country in a larger picture. Besides, the social welfare of the professionals' employees would also be affected because of lack of protection by the EA 1955. Therefore, government intervention in adopting the paternalism approach is much needed to address the imbalance power of organization and the professional employees (Aycan, 2006).

Another crucial issue among professional employees is that their paid is not equate to their wide scope of works and high standard of professional responsibilities. Too much emphasis on the principle of freedom of contract regards in employer and professional employees relationship ends up the latter are left inadequately protected. Generally, the EA 1955 does not cover professionals on the basis that this group of employees are competent to bargain employment terms so that they are sufficiently in favour of them. This view is doubtful in reality (Kamal, 2015). Recently, there is a proposal to revise our wage setting practice according to living wage system instead of current practice of minimum wage system. A living wage is an income level needed for a household to afford a minimum acceptable living standard which includes the ability to participate in society, the opportunity for personal and family development and freedom from severe financial stress (Eilyn & Farina, 2018). Consider low wage earners seek for such system, it is fair to claim that professionals would want a better wage setting system i.e an inspirational income (amount of income that could fulfil a desired lifestyle beyond the socially acceptable minimum, including spending on the latest gadgets and travel abroad) (Eilyn & Farina, 2018).

In addition to it, employers tend to overuse of freedom of contract principle to meet their operation needs rather than carefully considering employees interest and welfare. This is evidenced with engagement of professional employees on fixed-term contractual basis to generally save the operational cost. It is common that employees hired on fixed term arrangement do not enjoy the same benefits as equally similar positions who are hired on permanent basis. There is also an issue of lack of security of tenure.

Moving forward

The most needed provision of the EA 1955 to be amended is the existing definition of '*employee*'in the First Schedule. The Ministry of Human Resources proposed the term '*employee*' to be replaced with 'any person, irrespective of the amount of wages he earns, has entered into a contract of service with an employer' (MOHR, 2018). If this proposal passes through a parliamentary legislative process, it will create a new landscape of Malaysian employment law since a larger pool of employees including professionals could potentially be entitled to its protection. Additionally, express recognition of non-standard employees equally similar to UK and Australia legislative framework will be much needful to ease any hassle raised due to the key requirement of contract of service. This seems of very timely as there is an emerging trend that professionals prefer to work independently and flexibly through part time basis or on demand (casual) arrangement especially among women.

Besides, job security remains as one of concerns by many professionals. Employment security is much of concern especially for professionals engaged on fixed terms contractual basis. Fixed-term contract of service seems increasingly popular in the employment of expatriates and also in the construction industry where employees are commonly engaged on a project basis (Teh et al., 2017). Clearer guidelines in deciding a status and treatment of an employee who is hired through series of fixed term contract regards as very much of important. A comprehensive rules regulating the same that can be a reliable reference is the UK Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

Appropriate wage setting is highly welcomed by any employed persons regardless of their positions. Wages are perceived beyond income but extend to represent status in society, means to meet needs and life styles. This is evidenced when salary is defined as 'a payment for services rendered under some contract or appointment, computed by time and payable at fixed intervals' (Zoe, 2019). Zoe (2019) distinguishes wage from salary viewing that salary was never seen as a price that was dictated by the market but was seen as an unconditional payment set by reference to the employee's skill and status and what was needed to sustain it. Practically, professionals are paid through salary system than wage system. Zoe (2019) further described 'salary' as individualized payment which unfortunately causes underpaid among professionals as it is not one based on the prevailing or 'going' rate. Therefore, as adequate salary or pay pursues high productivity, full motivation and happiness and satisfaction, a careful attention is sought in addressing the issue.

Work-life balance benefits ranked as the top three most needed employment package (Tim, 2018). Enjoying a flexible working arrangement is one of the employment package that is looked forward by many of professionals as their nature of work demands mobility and screen based work. Again, the proposed amendment of the existing EA 1955 incorporated a new part which addresses the issue of flexible working arrangement (Part XIIC) which are relatively similar to the provisions in the UK Employment Rights Act 1996 (See Part 8A). Entitlement of paternity leave, equal

maternity leaves as per public sectors are among the most demanded benefits for many employees in private organisations.

Professional development is also reported as one of three most in demand employee benefits in 2018 (Tim, 2018). Self-development takes priority than earnings among professionals. Therefore, adequate opportunity to get trainings as needed by professionals to improve and upgrade themselves are much needed benefits to be considered by employers. Employers who offered appropriate package of niche trainings will highly considered by professionals job hunters. Integrating the adequate and attractive trainings will be wise for an organization to retain and boost the employees productivity and efficiency.

Conclusions

Professional employees are among others the most valuable human resources contributing to the economics growth of the country. In the situation that the professional employees are not even protected and satisfied in their needs to achieve social, economic and professional growth, needless to say that the laws would be able to provide any protection to the low-income workforce. This phenomenon has caused great lost to the country resulting the large migration of professionals and valuable think tank to overseas. The government initiatives in returning expert programme would not be able to provide vindication to the situation, if the core issue of the employment laws were not adequately addressed. The lack of protection by the employment laws in Malaysia, which caused the imbalance of bargaining position between the organisation and the professional employees have many impacts on social, economics and politics of the country.

Therefore, it is high tide that the existing lacuna in employment laws to be revisited and revised to address the arising issues. The progressiveness and dynamic of employment laws should serve as a shield in mitigating the challenges faced by the changing environment. Changes in nature of work, advancement of technology, politics and social require realignment of existing laws to achieve distributive justice among the economic players and the contributors. In most developing countries, states are in dilemma as to balance between those at weak position or confer with the economic forces to stimulate the economic growth of our country. This paper seek to provide some insight of the issues relating to professionals employees in the employment laws, which serve to gain awareness from the various stakeholders.

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