Introduction

The Malaysian industrial relations system has been ranked 13th best in the world, with the Industrial Court central to the system. The Industrial Court is a government agency under the Ministry of Human Resources and Manpower with its headquarters in Kuala Lumpur and four other divisions around the country. Unlike an ordinary court of law, whose functions are purely declaratory of the laws enacted by Parliament or upholding the doctrine of freedom of contract, the Industrial Court is an inferior specialist tribunal adjudicating trade disputes involving workers in the private sector. Generally, the Court is a quasi-judicial tribunal and is unfettered by any traditional judicial processes. Furthermore, the Court is not subject to technical and legal considerations as in the civil courts. Its primary objective is to provide speedy, fair and just resolutions to differences between parties to contracts of employment.

Recently, the Minister of Human Resources, Dato Dr. Fong Chan Onn was reported as saying that the Industrial Court system will be revamped where it will see the claims being decided by judges of the High Court. He said "we want the Industrial Court to be presided by a High Court judge and industrial cases be heard by judges instead of chairmen". The reason given for this move is because the judges "will have security of tenure and it will help resolve the issue of backlog of cases and awards undelivered".

He added that with a better system of case management, members of the public could expect to have their cases heard faster in the Industrial Court. Furthermore, the appeal process will be shorter because appeal cases can now go directly to the Court of Appeal and if necessary to the Federal Court, instead of the current system, where it has to go first to the High Court and only then to the Court of Appeal and Federal Court. The Minister also ruled out on the plan of making the Industrial Court part of the judiciary.

Earlier, the Malaysian Trade Union Congress (MTUC) had submitted a memorandum to the Prime Minister, Datuk
Seri Abdullah Ahmad Badawi, expressing among others, their dissatisfaction of the existing process of adjudication in the Industrial Court where there is considerable delay in the disposal of cases referred to the Court mainly due to the backlog of cases n3.

This article will therefore, discuss firstly, the viability of the above suggestion and secondly, to analyse whether appeals against the awards of the Industrial Court should be heard in the specialist Industrial Appeal Court or generalist superior civil courts.

Industrial Courts: Its establishment

Prior to 1940, labour disputes in both the Straits Settlements and the Malay States were negotiated by the parties either directly or through mediation by the Controller of Labour or the Protector of the Chinese n4. In fact, during this period there was no specific court to deal with their disputes, partly because western entrepreneurs subscribed to the doctrine of laissez-faire, which empowered them with the prerogative to hire and fire workers 'at-will', and partly because of the socio-cultural factors of the immigrant labourers n5.

However, with the setting in of serious industrial unrest in the late nineteen thirties, the British administrators took the initiative to establish an Industrial Court to adjudicate industrial disputes. The Court was introduced pursuant to the Federated Malay States Industrial Courts Enactment, 1940 n6; Straits Settlements Industrial Courts Ordinance, 1940 n7 and the Industrial Courts Enactment, 1360 of Kedah n8. Unfortunately, its establishment did not materialise because of the outbreak of World War II when these states came under Japanese occupation.

With the end of the War and the return of the British administration to Malaya, they established the Federation of Malaya. The above three pieces of legislation were repealed and replaced by the Federation of Malaya Industrial Courts Ordinance 1948 n9, which was modelled in line with the United Kingdom legislation. This Ordinance promoted among others, a peaceful and voluntary settlement of trade disputes n10 through conciliation by a third party, or through the voluntary reference of a dispute to the Industrial Court for arbitration n11.

Even with the introduction of the 1948 Ordinance, a permanent Industrial Court was however, not set up because individual requests could be made by the disputing parties to have their matter heard before the Court after undertaking that they would abide by the awards or decisions of the Court n12. Between 1949 and 1955 labour disputes were referred to the Arbitration Board for an award. Furthermore, the Trade Unions Ordinance, 1946 n13 encouraged employers and their trade unions to regulate their collective relationships and settle any dispute arising therefrom through their own efforts, and through mutually agreed procedures with minimal state intervention.

From 1964 to 1967, the newly formed Malaysia was preoccupied by the Indonesian 'konfrantasi', and coupled with communist terrorism, it faced a national threat. The communist terrorists were closely associated with communist domination of many trade unions. In light of their potential to disrupt economic activities or threaten internal security and/or industrial unrest, the Essential (Prohibition of Strikes and Proscribed Industrial Actions) Regulations 1965 n14, and the Essential (Arbitration in the Essential Services) Regulations 1965 n15 were enacted by the Yang di-Pertuan Agong by the powers conferred upon him by s.2 of the Emergency (Essential Powers) Act, 1964 n16. It introduced among others, prohibition of industrial actions in the public services and essential services as provided in the regulations, and required a compulsory adjudication of disputes by the newly established Industrial Arbitration Tribunal.

In addition, the above regulations empowered the Minister of Labour to intervene on his own volition, and if necessary, to refer the dispute to the Industrial Arbitration Tribunal for settlement. Where the Minister had intervened, a strike or lock-out could not be declared, or if it had been declared, it ought not to continue. An award of the Tribunal was to be deemed final and legally binding on the parties to the dispute, which could not be challenged, appealed against, reviewed, quashed or called into question in a court of law.
Finally, on the 7th of August 1967, the Industrial Relations Act \(^n17\) (hereinafter referred to as 'the IRA') was enacted to regulate industrial relations in Malaysia. The IRA, which has been amended from time to time, overrides all the previously mentioned legislations. Generally, the Act is a piece of social legislation primarily intended for the settlement of any differences or disputes between employer and workmen, and their trade union. Furthermore, it provides for the settlement of disputes in an expeditious manner primarily to ensure industrial peace and harmony in the country \(^n18\). In order to provide a speedy, fair and just resolution of differences between parties to contracts of employment, Part VII of the IRA established the Industrial Court.

As noted earlier, the Court is a government agency under the Ministry of Human Resources and Manpower with its headquarters in Kuala Lumpur and four other divisions around the country \(^n19\). The Court is a quasi-judicial tribunal adjudicating "trade disputes" \(^n20\) involving workers in the private sector \(^n21\). The underlying objective of its establishment was aptly noted by the promoter of the Industrial Relations Bill, the then Minister of Labour, the late Tuan V. Manickavasagam when he stated in the Dewan Rakyat, that it "is to expedite the settlement of disputes with considerations of equity and good conscience" \(^n22\).

During the first two years of its existence, since 1967, the Court made 35 awards and established many principles of general application that grew to become precedents for the guidance of the parties who were later to be involved in similar disputes. The figure increased to 143 awards in 1977, to 371 awards in 1987 \(^n23\). Since then, the Court has adjudicated thousands of applications.

Table A below provides the statistics of the number of cases referred to the Industrial Court for the period from 1996 to 2003. It contains among others cases referred to the Court in the current year, cases carried forward, the number of cases heard or award given and the total number of cases pending in the Court.

**TABLE A**

Number of cases reported to Industrial Court (1996-2003)

(Source: Industrial Court, Malaysia)

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Cases</td>
<td>717</td>
<td>655</td>
<td>731</td>
<td>1122</td>
<td>1442</td>
<td>1778</td>
<td>1881</td>
<td>2015</td>
</tr>
<tr>
<td>Carried Forward</td>
<td>548</td>
<td>692</td>
<td>905</td>
<td>1027</td>
<td>1050</td>
<td>1056</td>
<td>1092</td>
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<tr>
<td>Referred</td>
<td>610</td>
<td>616</td>
<td>664</td>
<td>707</td>
<td>704</td>
<td>963</td>
<td>958</td>
<td>888</td>
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<tr>
<td>Heard/ Given</td>
<td>655</td>
<td>731</td>
<td>972</td>
<td>1442</td>
<td>1788</td>
<td>1881</td>
<td>2015</td>
<td>2212</td>
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<tr>
<td>Award Pending</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The main body of the Court’s adjudication workload consists of cases of dismissal without just cause or excuse which the Industrial Court has been handling professionally, by efficiently applying the concept of industrial jurisprudence.

The composition of the Industrial Court
The adjudicatory functions of the Industrial Court has been vested with the President and Chairmen, either sitting alone, or with equal panels representing employers and workmen. The President is the head of the organisation, and he is responsible for all the functions and activities of the Court. He hears and determines disputes relating to the interpretation, variation and non-compliance of awards or collective agreements or cases relating to references to the High Court on questions of law, and cases relating to writ of certiorari. The Registrar, who is also the Chief Administrator of the Court, assists the President.

Apart from the President, there are currently 20 Chairmen in several divisions of the court. They are entrusted among others, to adjudicate dismissal cases and cases of industrial disputes on terms and conditions of employment under section 26 of the IRA or such other cases as the President may direct.

The President and the Chairmen of the Industrial Court are appointed by his Majesty, the Yang di-Pertuan Agong. A person is qualified for appointment as President under section 21(a), and as Chairman under section 23(2) of the IRA if, for the seven years preceding his appointment, he has been an advocate and solicitor within the meaning of the Legal Profession Act 1976, or a member of the Judicial and Legal Service of the Federation or State.

The President and 7 of the Industrial Court Chairmen are appointed on a fixed-term contract for two years, renewable at the discretion of the Minister, subject to the maximum age of 65. The remaining 13 Chairmen occupy cadre positions whose appointments are also on a contract basis for two years. The cadre chairman is occasionally on secondment from the Judicial and Legal Service, subject to be recalled or transferred at short notice. Many experienced lawyers, opting for full-time employment, would think twice to an offer of appointment as an Industrial Court chairman for a two-year contract, renewable only at the discretion of the Minister.

In a press statement, Abu Hashim Abu Bakar, a Chairman of the Industrial Court, noted that "the judges feel humiliated as their plight has never been looked into although they work just as hard as the other judges. They are suffering in silence as they do not want to put down the judiciary." He added that the struggle to get the terms and conditions of their appointment gazetted under the Industrial Relations Act 1967, has been going on for 30 years and he appealed to the Government, including the Prime Minister, to look into their plight.

As the President and the Chairmen occupy a central position in the compulsory adjudication system, holding great responsibility with considerable judicial authority, their integrity and independence should be beyond question. There should not arise in the minds of a reasonable person, any suspicion of undue influence and pressure by the Minister in the decisions or awards of a Chairman. As aptly stated by Dr. Rais Yatim, the former Minister in the Prime Ministers Department "the Court is an institution, its independence ought not to be subject to doubts and suspicion of undue influence or pressure of the Minister.

Therefore, vesting the Minister with the discretion to decide on their re-appointment undermines the integrity and independence. In light of the above, there should be a review of the policy on the appointment of the adjudicatory officers of the Industrial Court. It is suggested that the President and Chairmen of the Industrial Court should be appointed on a permanent basis in the same way as judicial officers of the civil courts. They should hold office until they attain the age of sixty-five and should not be removed from office, except on the grounds of misconduct or infirmity of body or mind, or other causes that could obstruct him from properly discharging the functions of his office.

Despite the many calls for reform of security of tenure of chairmen, backlog of cases, establishment of industrial appeal court, among others, the Minister of Human Resources, in a recent press statement, has responded by proposing that High Court judges would preside over the system and with the believe that with a better system of case management, the cases in the Industrial Court would be heard faster. It was also reported that the MTUC has welcomed the above suggestion as it would help clear cases faster and judgments would be delivered on time. It is submitted that the adjudicatory officer of the Industrial Court must be on permanent establishment rather than secondment from the High Court on a contract basis.
Proceedings in the Industrial Court

As noted earlier, the Industrial Court is an informal quasi-judicial body, specialising in industrial jurisprudence, and is central to the Malaysian industrial relations regime. Its main function is to resolve labour disputes expeditiously and arrive at a decision after sound and in depth analysis of the facts and circumstances of each case.

Unlike an ordinary court of law which is bound by contractual rights, duties or obligations with no authority to transform, alter or even create rights when justice of the matter demands, the Industrial Court is not purely judicial - it is not confined to the administration of justice in accordance with law n32. Its scope of enquiry is not only restricted to the law, but also has a broader aspect of equity and good conscience with the view of promoting social justice n33. In the interest of industrial peace, the prevention of unfair labour practices or victimisation, the Court may confer rights and privileges on either party, which it considers reasonable or proper, irrespective of whether it is within the express agreement between the parties n34.

Furthermore, the Court may free parties from any unfair terms of their contracts entered into by reasons of the inequality. It may override contracts incompatible with justice or create rights which exist independently from the contract. The Court in exercising its powers is to dispense social justice mainly to ensure peace and harmony in industrial relations. Section 30(5) of the IRA provides for the proceedings in this court to be conducted with as little formality, technicality, and form as the circumstances of the case permits, and meeting justice expeditiously and correctly. In other words, the proceedings in the Court should be less formal and not subject to the shackles of legal technicalities and defects common in an ordinary court of law. The Court is not bound by the strict rules of evidence, but rather it is entitled to act on any material which is logically probative, even though it is not evidence in a court of law n35. Thus, the technical rules such as estoppel, laches, limitations, acquiesces or other pleas have no place in industrial adjudication, and cannot be invoked to defeat claims that are just and proper n36. Similarly, the Court is not bound by precedents to guide them in the settlement of disputes by way of an award, because awards are given in circumstances peculiar to each dispute n37. In practice, however, the Court does take cognisance of the principles underlying the provision found in the Evidence Act n38 and is subject to the rule of res judicata n39.

In awarding appropriate remedy for dismissal without just cause or excuse, section 30(6) of the IRA provides that the Court is not obliged to limit the remedies specified in the contract of employment, but may award any remedy suitable depending on the facts and the circumstances of the case before it. The only limitation imposed on the Court is that it shall have regard to public interest and the macro-economic aspects affecting both the industry and the country n40. Finally, section 33B(1) of the IRA provides that an award, decision or order of the Court is final and conclusive, and cannot be challenged, appealed against, reviewed, quashed or called in to question in any court.

Industrial Court: Shifting from equity oriented to technical oriented

Despite the above, in recent years the Industrial Court has become comparable to the court of law of general jurisdiction. One often hears complaints that it is overly legalistic, the presentations of trials are adversarial in character, and cases are decided judicially and are often time consuming. Besides this, there is formality in the proceedings, and procedural rules and evidence with which lawyers are accustomed to, are freely used in the Industrial Court.

The law on procedure and evidence commonly used in civil trials that are freely followed in the Industrial Court, are such as subjecting parties to pleadings, requiring parties to submit bundles of documents, examination of witnesses and submission of the case, among others. For example, in R. Ramachandran v The Industrial Court of Malaysia and Anor n41, the Federal Court set the rule that there should be strict procedural rectitude regarding pleadings. In particular, Eusoff Chin CJ noted that the "Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion".
Raising preliminary objections on the threshold jurisdiction of the Industrial Court is another example where the Court is joggled with technicalities. Raising such technical points are altogether perfect in a strict legal forum, but raising them in the Industrial Court is surely inconsistent with the intention of the legislature for a speedy disposal of industrial disputes. In light of the above, the MTUC has called upon the Industrial Court to be less technical and should not, for example, overly insist on technical documents forming part of evidence, as it merely strengthens employers' position and subjugates workers. Its president, Senator Zainal Rampah, stated that "this gradual transformation of the Industrial Court into yet another court of law will make industrial adjudication more expensive and protracted" n42. It is noted that legal representatives who are freely allowed to represent the parties largely contribute to the legalism in the Industrial Court. One cannot deny the fact that parties represented by a qualified lawyer will have an advantage over the other in that the lawyer will assist them to win their case. As a matter of interest, legal representation before the Industrial Court, unlike that in a civil court, is only a privilege and not a right n43. It follows that a party to any proceedings before the Industrial Court, who wishes to be legally represented, must first obtain the permission of the President, or the Chairman of the Court under section 27 of the IRA. The permission is granted upon due submission by the applicant of a warrant of authority in favour of the legal representative in form B, and the application proper in form A in due compliance with rule 3 and 4 of the Industrial Court Rules 1967. However, the civil court has stated that the right to legal representation in dismissal cases on the grounds of criminal misconduct is a sine qua non, because lawyers are trained in the skill of cross-examination n44.

Furthermore, with the recent liberalisation of judicial review n45, the Industrial Court is obliged to exercise the adjudication function reasonably. It must hear and determine matters in accordance with the law and cannot ignore altogether agreements or existing obligations for any reason whatsoever, nor can it ignore the fundamental principles of law, such as natural justice or exceed its jurisdiction. The Court is bound to give a full reasoned judgment in the nature of an award n46. Apart from the above, where the Court commits an error of law, this prima facie, enables the party affected by the award to seek remedy by way of a prerogative writ of certiorari to quash the Industrial Court's award resulting from an error of law. The power to review an award of the Industrial Court has been conferred on the High Court by virtue of Paragraph 1 of the Schedule to the Court of Judicature Act 1964 and the Rules of the High Court 1980, Order 53.

Having explained the role of the Industrial Court and discussing the on going debate of its becoming too legalistic, the writer wishes to address that the proposal to have High Court judges preside over the Industrial Court proceedings is hoped to dispose off cases expeditiously besides ensuring shorter appeal process, where appeals may be referred directly to the Court of Appeal and Federal Court. Furthermore, the adjudicators of the Industrial Court will have security of tenure. As rightly pointed out by the Minister, Dato' Dr. Fong Chan Onn "the reason why we want to have judges instead of chairmen is because they will have security of tenure and it will help resolve the issue of backlog of cases and awards undelivered" n47. However, the fear is that judges of the High Court presiding over an Industrial Court function may, in the process, divert the proceedings from equity-oriented system to that of a technicality-oriented one. This would in turn immensely affect workers, who may be required to engage the services of lawyers and incur high professional legal fees.

The writer submits that the Industrial Court should be truly a low level informal body and that the proceeding in the Court is to be as little technicality as possible and any non-compliance with procedural rules, as common in the ordinary courts, ought not to hinder the Court from dealing with the substance of the matter. Hence, it is submitted that judges presiding over an Industrial Court system must canvass a case based on industrial law and should not transform the Industrial Court into yet another ordinary court of law, as such a move will only make industrial adjudication more expensive and protracted. Apart from the above, the industrial matters referred to the Court must be settled speedily which is considered as an essential prerequisite to industrial peace and harmony. Therefore, it is suggested that the appointment of the adjudicators of the Industrial Court must be on a permanent establishment. Unfortunately, what the Minister has in mind, is to have the judges of the High Court seconded to the Industrial Court.
As the Minister pointed out: "the new system would be similar to the one when the late Tan Sri Harun Hashim was seconded from the High Court to the Industrial Court in 1980" n48.

The writer is of the view that the appointment of judges of the Industrial Court should be from the members of the Industrial Court who have been performing their adjudicatory functions all this while and must be on permanent establishment. It is further suggested that the qualifications to be a judge of the Industrial Court must be the same as that of a Sessions Court judge. The reason for this is partly to ensure that cases in the Court are heard and settled expeditiously due to the fact that these judges will be specializing only in Industrial cases and partly to propose that an appeal against the decision or award of the Court is heard in the proposed Industrial Appeal Court, which will be discussed further below.

Mediation to be introduced to combat backlog of cases in the Industrial Court

A serious problem is facing the administration of justice in the Industrial Courts, namely, the backlog of cases, which are due to the accumulation of the old cases which is in turn, creating new backlog. In a bid to overcome the backlog of cases, which is hindering justice for workers and employers, the Ministry had proposed fostering disputants to use the mediation process as a means of resolving their disputes. This process would be wedded into the court system, where all cases would go to mediation before they could be listed for trial in the courts. This proposal was made with the hope of further ensuring effective and speedy settlement of disputes.

The writer is of the view that while mediation does not guarantee a settlement, it is a very positive method of resolving disputes without the need to use a more formal process. Mediation can assist parties to re-establish trust and respect, and it can help to prevent damage to an ongoing relationship. In light of the above, the writer proposes that in order to ensure the effectiveness of the mediation process, the conciliation proceedings, before the Industrial Relations Department should be absorbed into the Industrial Court system. Any settlement arrived at before the mediation proceeding should be registered in the Industrial Court, and upon registration, it should be deemed as a consent award of the Industrial Court. Thereafter the parties may enforce the award in the same way as the award of the Court. In the writers view, it would be a waste of precious time to have a two step informal process, firstly, conciliation before the Industrial Relations Department and secondly, mediation before the Industrial Court, before the case is heard in the Industrial Court.

Appeal against the award or decision of the Industrial Court

With High Court judges presiding over an Industrial Court adjudication, the appeal process against the award or decision of the Court would be shortened, as appeal cases would be referred directly to the Court of Appeal and Federal Court instead of the current system, where it goes first to the High Court, then to the Court of Appeal and Federal Court.

Earlier, many writers, academics, practitioners of industrial law and judges, have suggested for the establishment of an industrial appeal court to hear and adjudicate appeals of the awards or decisions of the Industrial Court. Among them were C.P. Mill n49, V.T. Nathan n50, Lim Heng Seng n51, K.P.Gengadharan n52, Mr. S. Narayanan n53, B. Lobo n54, Dato Gopal Sri Ram n55, and Senator Zainal Rampak n56, among others. In response to this, the Minister, at that material time, was quoted as saying that his Ministry was considering the establishment of an industrial appeal court and that it had reached the discussion stage with the Attorney General's Department n57.

However, at present, it has been reported that the Minister is proposing that appeals against the award of the Industrial Court would be referred to the superior civil courts following the proposal of having industrial cases heard by High Court judges. More recently, the Minister was quoted as saying that as for long-term action plans, there were plans to establish the court as a distinct legal system under the Federal Constitution and widen the functions of the court to include Appeals from decisions made under Section 69 of the Employment Act 1955 (Labour court) and Appeals from Social Security Organisation decisions. There are also plans to provide chairman security of tenure up to 65 years, review their designation from chairman to that of Industrial Court Judge and Industrial Court to be changed to
Employment Court. He further said that there were also plans to create an Appellate Court.

Having said that, one question that requires due consideration is whether the existing mechanism of challenging awards of the Industrial Court should be done by a generalist civil court or by a specialist industrial appeal court?

Generally, it is for the parties to decide whether to challenge the award of the Court either wholly or in part. One will apply for review of the award to remedy any defect in the original trial and not so much to give the unsuccessful party a second chance to get it right. Sometimes the parties may be so exhausted and dispirited by the trial itself that they may not wish to bother contesting the award of the court knowing that they will have to pay the cost and will certainly have to live with the consequence although it is true that a successful party can expect an order for costs to be made in his favour.

Sometimes the parties feel very strongly and may want to appeal even if the chances of success are negligible and this is normally the case with employers who are financially stable. This is because if the employer loose the case and does not appeal, it will show that he is the one who has wronged the worker and this can be taxing on them, somewhat like a stigma. The other employees in the same organisation will soon realise that they can at any point of time bring suits against their employer.

Thus, in most cases it is the employer who will challenge the award of the Industrial Court. They can afford to hire a legal practitioner. If the lawyer sees that it is likely that a defect has occurred in the proceedings of the Industrial Court, he often makes a strong recommendation that an application be made to review although the final choice of whether to proceed with such an application is with the employer.

(a) Inordinate delay in the final disposal of the cases

The writer is of the opinion that having an award of the Industrial Court in dismissal cases referred to the civil courts is not keeping in tandem with the spirit of theIRA to have a speedy disposal of trade disputes. This is largely because there are serious problems facing the administration of justice in the civil courts, namely the backlog of cases and the practical difficulty of getting them disposed off as soon as possible.

The former Minister in the Prime Ministers Department in charge of legal affairs, Dato' M.Kayveas stated that the backlog of cases in the civil courts had reached a critical level and there was an urgent need for solutions.

The statistics available in the Central Registry in Kuala Lumpur, shows that there are thousands of cases in the civil courts pending adjudication and thus justice will be more delayed with the additional bulk of the Industrial Court coming in. Table B below provides the statistic of the number of cases pending adjudication in the superior civil courts, as of 1st July, 2004.

**TABLE B**

<table>
<thead>
<tr>
<th>Court</th>
<th>Pending as at</th>
<th>Registered from</th>
<th>Disposed Off</th>
<th>Pending as at</th>
</tr>
</thead>
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<tr>
<td></td>
<td>1.4.2003</td>
<td>1.4.2003 to</td>
<td>from 1.4.2003</td>
<td>1.7.2004</td>
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<tr>
<td></td>
<td></td>
<td>30.6.2004</td>
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<td></td>
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<tr>
<td>High Courts</td>
<td>48,587</td>
<td>69,474</td>
<td>60,471</td>
<td>57,590</td>
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<tr>
<td>Court of Appeal</td>
<td>6,897</td>
<td>2,753</td>
<td>2,995</td>
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<tr>
<td>Federal Court</td>
<td>313</td>
<td>284</td>
<td>310</td>
<td>287</td>
</tr>
</tbody>
</table>

Lengthy and convoluted court procedures have been identified as the main reasons for the delay in the disposal of cases in the civil courts n60. Responding to the backlog of cases, the former Deputy Minister in the Prime Minister's Department, Datuk Tenku Adnan Tenku Mansor stated that it is "unrealistic to expect the Government to continuously make a bigger and bigger allocation for the courts with the hope of reducing the backlog of cases and improving the machinery of justice” n61.

Many steps have been taken to ensure faster and more efficient disposal of cases so as to reduce the backlog of cases, including the recent setting up of two types of courts - the 'Fast Track' and the 'Normal Track' n62. The steps taken are certainly hoped to reduce the backlog of cases but at the same time, it does not promise speedy hearing of cases, in particular, reviewing of the awards of the Industrial Court, that they are doing at present.

The writer submits that in the new proposed system, delay in the adjudication of review by the Court of Appeal and Federal Court will be inevitable due to the already existing backlog of cases and will cause a further delay, which is likely to aggravate the existing delay.

The following are examples, from the decided cases, where there had been an inordinate and unwarranted delay in disposing off appeals by way of judicial review. In American International Assurance Co. Ltd. v Dato Lam Peng Chong and Ors n63 the claimant, who was constructively dismissed in early 1985, had his representation referred to the Industrial Court in November of the same year. It took almost three years before the Industrial Court ruled on a preliminary objection on whether the claimant was a workman.

Dissatisfied with the ruling of the Industrial Court, an application was made to the High Court for an order of certiorari to quash the award of the Industrial Court and the case was further contested in the Court of Appeal. In April 1994 - approximately 9 years later - the Court of Appeal ruled on the same initial preliminary objection that the claimant was indeed a workman. The case was then remitted back to the Industrial Court to consider the main issue namely, the actual trial of whether the representation was a dismissal and whether the dismissal was for just cause or excuse. Thus, the inordinate delay goes against the main aim of speedy settlement of disputes in the Industrial Court.

In Dr. James Alfred (Sabah) v Koperasi Serbaguna Sanya Bhd. n64, the appellant who was dismissed in June 1986, had his case finally disposed off by the Industrial Court in 1995. The Court awarded him among others, arrears of back wages from 1st June 1986 right up to October 1995 (the last day of the hearing). Aggrieved by the award of the back wages, the respondent applied to quash the award of the Industrial Court. However, their application was rejected by the High Court and on appeal, the Court of Appeal allowed the appeal in part. The Court held that in assessing back wages the Industrial Court should have taken into account the fact that the appellant had found employment elsewhere after his dismissal.

The appellant appealed to the Federal Court against this decision and on June 2001, the Federal Court delivered its judgment. In dismissing the appeal, the Court upheld the decision of the Court of Appeal and remitted the case to the Industrial Court for reassessment of the back wages. This case best explains inordinate delay in the disposal of a dismissal case if the cases are handled by the ordinary superior courts and not by a specialised Industrial Appeal Court that will only handle industrial relations cases.

In R. Ramachandran v The Industrial Court of Malaysia and Anor. n65, it took almost seven years, which is at least better than the two cases above, before the claimant could enforce the award of the Industrial Court. Due to the fact that there was already an inordinate delay, the Federal Court in an unprecedented move, instead of remitting the case back to the Industrial Court, went further and by itself found that the claimant was dismissed without just cause or excuse and proceeded to issue consequential relief that disposed of the matter. To remit the case back to the Industrial Court, according to Eusoff Chin CJ (as he then was) "will certainly involve continued and prolonged litigation which will do great harm and injustice to the claimant, and were he to die, his claim will abate...and this will result in his family suffering grave injustice” n66.
In Harris Solid State (M) Sdn. Bhd. v Bruno Gentil Pereira n67, the Court of Appeal ordered the appellant to reinstate the claimant into his former position despite the fact that the claimant had been dismissed from employment for more than six years. The Court observed "if we were to affirm the remission of the case to the Industrial Court, it may take another six years or more for the matter to reach us, with a possible further appeal to the Federal Court. Such a consequence would produce the diametrically opposite result to that intended by Parliament, namely the speedy adjudication and settlement of trade disputes...".

In Kathiravelu Ganesan v Kojasa Holding Bhd. n68, the claimant - a Sri Lankan, who was hired as consultant - was subsequently transferred to the respondent's establishment in Singapore. His service was however, terminated in early 1989. His representation to be reinstated into his former position under section 20(1) of the IRA was referred by the Minister to the Industrial Court in September of the same year. A preliminary objection was raised on the threshold jurisdiction of the Industrial Court, namely, whether the Court had extra-territorial jurisdiction. After six years, the Court of Appeal ruled that the Industrial Court has jurisdiction to adjudicate the representation and remitted the case back to the Court to deal with the representation for dismissal. In Amanah Butler (M) Sdn. Bhd. v Yike Chee Wah n69 - a case on constructive dismissal - the respondent's income was unilaterally reduced on the pretext of unsatisfactory work performance. He left the employment in August 1991 and his representation under section 20(1) of the IRA was referred to the Industrial Court. The Court however, found in favour of the appellant on the grounds that they had not breached the contract.

Dissatisfied with the award, the respondent applied to have the award of the Industrial Court quashed in certiorari proceedings. The High Court allowed the application because the award of the Industrial Court was unreasonable, as it had failed to consider material evidence, namely correspondence with Bank Negara, which among others, compelled the appellant to stop sharing profit with their employees.

Against the High Court's finding, the appellant appealed to the Court of Appeal, an appeal that was eventually dismissed. On finding that the respondent had been unfairly dismissed from employment, the Court went on to deal with the consequential relief. Since reinstatement was not an appropriate remedy and because the Court had no benefit of argument on the quantum of compensation to be awarded to the respondent, the case was remitted back to the Industrial Court to deal with the assessment of compensation. To remit the case to the Industrial Court to deal with the matter afresh, according to the Court, will only occasion further delay.

The above are examples of the delay in the final disposal of dismissal cases. When cases take a long time to be heard, the award of the Industrial Court may be stayed pending disposal of the review application, this in turn may affect an aggrieved worker because of the further delay in the enforcement of the award. The writer therefore submits that by having a separate industrial appeal court, it is suggested that this delay would be reduced immensely as it would not add on to the list of backlog cases in the civil courts.

(b) The high cost of legal battle in the civil courts

Apart from delay in the adjudication, the application for judicial review of an award of the Industrial Court is not only tedious with cumbersome procedures, but more importantly it is an unequal legal battle. Employers generally, want to win the case and they have greater resources behind them and are able to seek recourse to appeal by way of judicial review. They may adopt delaying tactics to deny a workman the remedy awarded by the Industrial Court and are able to engage lawyers to represent them in the proceedings. The lawyers, who are accustomed to the rules of proceedings, may make things difficult by confusing the issues by way of raising legal technicalities. When a workman is confronted with lengthy and complicated documents filled with legal jargon or using linguistic formulae in documents, to mention but a few, it would certainly require professional legal advice. This causes sheer pressure on workers and worries them as it involves not only delay in the execution of the award of the Industrial Court but also the cost of litigation which is immense where they have to incur substantial payout to legal representatives, although it is true that the cost of an appeal may be awarded to the party succeeding in the appeal.
The imbalance would become more paramount when the worker happens to be an unemployed. It must be noted that legal aid is not available in judicial review applications. This state of affairs was aptly noted by Eusoff Chin CJ in R. Ramachandran, "employers can certainly afford to employ a number of lawyers and prolong litigation and thereby tiring the workers. The poor workman can ill afford a lawyer or prolong litigation because this will lead to immense hardship, suffering and exorbitant expenses".

The Supreme Court of India in Bharat Singh v New Delhi Tuberculosis Centre also made a similar observation, when it stated:

"...Instances are legion where workmen have been dragged by the employers in endless litigation with preliminary objections and other technical pleas to tire them out. A fight between a workman and his employer is often times an unequal fight. The legislature was thus aware that because of the long pendency of disputes in tribunals and courts, an account of the dilatory tactics adopted by the employer, workmen had suffered...".

This reinforces the view of an ordinary person that "the law and our legal system are slow, expensive and unsatisfactory". Therefore, it is the writers suggestion that with an industrial appeal court system, expenses will be incurred but it would not be as much as that incurred in the civil appeal system because a workman can choose to be represented by a union officer or by MTUC, knowing fully well that in an industrial appeal system, technicality and legal form will not be the basis of the decision but instead it will be based on social justice, equity and good conscience.

(c) The infusion of common law principles into industrial jurisprudence

Industrial law is a highly specialised subject and the exclusive jurisdiction to adjudicate industrial disputes have been conferred on the Industrial Court - a specialist tribunal. According Abu Hashim Abu Bakar, the Industrial Court "has to maintain a balance between the differing or conflicting interests, and be able to reconcile the variables, in order to maintain industrial peace and harmony". In other words, in industrial jurisprudence, the Court is required to strike a sensitive yet sensible balance between workers security of tenure on the one hand, and employer's prerogative of business efficacy and optimal workforce, on the other.

As stated earlier, the Industrial Court adjudicates dismissal cases based on equity and good conscience and the substantial merits of the case without regard to technicality and legal form. The scope of its inquiry is not confined to the law as in a civil suit in the High Court but to broader aspects of equity and social justice. Furthermore, in making an award, the Court will have regard to public interest and macro-economic aspects affecting both the industry and the country. Based on the above, the writer submits that it is not appropriate having cases referred to the civil courts because the civil courts administer legal justice based on very stringent technical form which is of no necessity in an Industrial Court system.

Apart from subjecting parties to the procedures peculiar to the civil courts, there has been infusion of the common law master and servant principles into the industrial law. As rightly noted by Gopal Sri Ram JCA "to stop the injection of medieval common law concepts into industrial law what is required is the introduction of an appellate tier within the adjudicatory system". His Lordship has noted some of these instances that have seeped into the industrial jurisprudence. They are as follows:

(i) Determining probationer's status in employment

The former Federal Court in K.C. Mathews v Kumpulan Guthrie Sdn. Bhd. accepted the position of a probationer as set out by the Indian Supreme Court in Express Newspaper Ltd. v Labour Court and Anor. That at the end of the probationary period, the employer can either confirm the probationer or terminate his services and "if no action is taken by the employer either by way of confirmation or by way of termination, the employee continues to be in service as a probationer". As from the above, the superior civil court has in fact enforced the common law master and servant principle that a probationer's status is at the will of the employer who may hire and fire him from employment,
with or without reasons.

This, however, is not the case in industrial law where a workman, irrespective whether he is on a probationary period or otherwise, is accorded security of tenure in employment. It was only quite recently that the courts began to accord probationer the same status as a confirmed or permanent employee n78 and further stated that a probationer has legitimate expectation to be confirmed in the organisation n79.

(ii) The adoption of condonation in industrial jurisprudence

Justice Gopal Sri Ram noted that although the principle on condonation originated from the common law, it is perfectly suitable in the sphere of industrial law. However, it cannot be made compulsory on the Industrial Court to enforce the common law principles of condonation because the Court is required to act in accordance with equity and good conscience under section 30(5) of the IRA. Earlier, in Sungai Wangi Estate v Uni n80 Abdoolcader J. held that failure on the part of the Industrial Court in applying the common law rule governing condonation constitutes an error of law.

(iii) The use of contract test in constructive dismissal

Similarly, the reviewing courts have been invoking the common law principles in determining the scope and meaning of the term 'dismissal'. It is interesting to note that while section 20 of the IRA is silent on constructive dismissal, Salleh Abbas LP in Wong Chee Hong v Cathay Organisation (M) Sdn. Bhd. n81, noted that the gap in the Act can be filled by common law principles. In particular, His Lordship stated that "the common law has always recognised the right of the employee to terminate his contract of service and therefore to consider himself as discharged from further obligations, if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer". The employee must inform the employer by word or conduct that he was accepting the repudiation and treating the contract of employment as having been terminated by the employer n82.

The courts have infused the common law governing principle on breach of contract by repudiatory conduct into industrial jurisprudence. The test to determine constructive dismissal is 'whether the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer to be bound by the contract' n83.

Earlier, the Court of Appeal suggested the proper approach to determine constructive dismissal in industrial law, namely, "whether what happened to the workman was just and equitable. If, at the end of the day, it finds that the conduct of the workman in all the circumstances of the case was such that he deserved what he got, then, cadit quaestio. But, if it finds that it is the act or omission on the part of the employer that deprived the workman of his proprietary right to earn a living to have been without just cause or excuse, then it will, and must, interfere".

Unfortunately, that approach was not favoured by the Federal Court in Pan Global Textiles Bhd Pulau Pinang v Aag Bang Teak n84, where Ahmad Fairus FCJ delivering the judgment of the Federal Court, stated that there is nothing wrong in applying common law principles to a dismissal under the IRA.

(iv) Domestic Inquiry under section 14 of the Employment Act, 1955

The Federal Court in Said Dharmalingam Abdullah v Malayan Breweries (Malaya) Sdn. Bhd. n85, stated that the failure to have a due inquiry before dismissing a workman as provided in s.14 of the Employment Act, 1955 is curable on the ground that the workman suffered no prejudice n86. This decision is in fact defying the legislative intend which imposes the requirement to hold a pre-dismissal inquiry before the employer may resort to the measure of dismissal under the Employment Act, 1955. The non-compliance with the statutory provision should render the dismissal a
nullity. B. Lobo, went further by saying that the pre-dismissal inquiry is a constitutional right of all employees. The above are some examples where the civil courts have fused the common law master and servant principles into the industrial jurisprudence. The civil courts as noted earlier are accustomed to the common law master and servant principles which in fact is based on legal justice, while the industrial adjudication is based on social justice, equity and good conscience.

The writer is of the view that as long as the common law master and servant principles are inconformity with equity and good conscience it can be adopted and enforced in the industrial law, for example, employee's duty to mitigate loss by seeking employment in the interim period.

Suggestion for the establishment of an Industrial Appeal Court

Based on the foregoing discussion, the writer submits that there should be a review of the existing process of challenging the awards of the Industrial Court because the existing process is not favourable to workers for the reasons noted above. Therefore, an Industrial Appeal Court (hereinafter referred to as the "IAC") should be established in Malaysia to adjudicate appeals against an award of the Industrial Court. The system exists in many parts of common law jurisdictions, for example in England, Australia and New Zealand. The writer will first discuss the existing industrial appeal process in England, Australia and New Zealand, and then go on to explain the working of the proposed Industrial Appeal Court of Malaysia.

The industrial appeal process in England

An aggrieved party who is dissatisfied with the decision of the Employment Tribunal may appeal to the Employment Appeal Tribunal (EAT). The EAT was created by the Employment Protection Act, 1975. This tribunal has been accorded powers of the High Court pursuant to the Employment Tribunals Act 1996, Part II. Its procedures are contained in the Employment Appeal Tribunal Rules and Practice Direction. The EAT is presided over by a President who is a High Court Judge appointed for 3 years by the Lord Chancellor and he sits full time at the Employment Appeal Tribunal. A Panel of High Court Judges appointed by the Lord Chancellor assist him. The hearing of an appeal in the EAT is before a Judge with two or more, usually, four lay members giving equal representation to both sides of the industry.

Legal aid is available to parties for the appeal in the EAT, subject to their financial circumstances, to cover all or part of the proceeding. The EAT will deliver a reasoned judgment and an appeal from the judgment of this Tribunal will go to the Court of Appeal. Final appeal may lie to the House of Lords with the leave of the House but should be confined to point of law only.

The industrial appeal process in the Commonwealth of Australia

An aggrieved worker alleging harsh, unjust or unreasonable dismissal may, pursuant to section 170CE of the Workplace Relations Act, 1996 refer the grievance to the Commission within 21 days after the dismissal or within such extended period as the Commission deem just. There will be conciliation and in the event the conciliation is unsuccessful in arriving at an amicable settlement, it may then be referred to an arbitrator pursuant to section 170CFA(1). The Commission will then proceed to arbitrate the matter and the remedies that may be awarded at the conclusion of the hearing and these are specified in section 170CH. An appeal may lie against the decision of the Commission to the Full Bench of the Commission with the leave of the Full Bench. Upon hearing of the appeal, the Full Bench may do any one or more of the following: (a) confirm, quash or vary the decision or act concerned; (b) make an award, order or decision dealing with the subject matter of the decision or act concerned; or (c) direct the Commission whose decision or act is under appeal or another member of the Commission, to take a further action to deal with the subject matter of the decision or act in accordance with the direction of the Full Bench.
The industrial appeal process in New Zealand

In New Zealand, a personal grievance will be referred at first instance to the Employment Relations Authority established pursuant to the Employment Relations Act 2000, section 156. The role of the Authority is prescribed in section 157 of the Act namely, as an investigating body, and has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities. It is designed to observe the principles of natural justice and act in a manner that is reasonable having regard to its investigative role and its judicial proceeding role.

Except on the ground of lack of jurisdiction, no determination, order or proceedings of the Authority are removable to any court by way of certiorari or otherwise, or are liable to be challenged, appealed against, reviewed, quashed or called in question in any court. A party aggrieved with the decision of the Authority may within 28 days after the date of determination of the Authority, elect to have the matter heard by the Employment Court.

The Employment Court - a second tier in the industrial adjudication - is constituted pursuant to section 186 of the Act and it has all powers inherent in a court of record. The Court determines the matter before it in such manner and to make such decision or orders based on equity and good conscience. The Court consists of one Judge, called Chief Judge of the Employment Court and at least two other Judges called Employment Court Judges and they have immunity of the High Court Judges.

A party to the proceedings dissatisfied with the decision or order of the Employment Court as being erroneous on a point of law, may within 28 days after the date of the issue of the decision or within such further time as the ordinary Court of Appeal may allow, appeal to ordinary Court of Appeal against its decision. The ordinary Court of Appeal may grant leave, if in its opinion, the question of law is one that by reason of its general or public importance or for any other reason ought to be submitted to the ordinary Court of Appeal for decision.

Further, section 214(5) provides that in the determination of an appeal, the ordinary Court of Appeal may confirm, modify, or reverse the decision appealed against or any part of the decision. Section 215 provides that the ordinary Court of Appeal may refer the appeal back to the Employment Court for a reconsideration and in doing so the Court will state the reasons for doing so, giving the Employment Court such direction as it thinks fit as to the rehearing or reconsideration or otherwise of the whole or any part of the matter that it referred back for reconsideration.

Alternatively, the aggrieved party may apply to review the decision or the award of the Employment Court seeking a writ or order in the nature of mandamus, prohibition, certiorari, declaration or an injunction. The application must be made or brought to the ordinary Court of Appeal. The ordinary Court of Appeal may at any time and after hearing of such person, if any, as it thinks fit, give such directions prescribing the procedure to be followed in any particular case having regard to the exigencies of the case and the interest of justice and the object of the Act. The decision of the ordinary Court of Appeal on any such matter shall be final and conclusive. It is also interesting to note that an appeal either against the decision of the Authority or Employment Court does not operate as stay of execution unless the court of first instance or the appeal court, so orders.

Proposed Industrial Appeal Court in Malaysia

In light of the existing appeal systems in other jurisdiction as noted above, the writer proposes for the establishment of an appeal tier within the industrial adjudicatory system in Malaysia. The Bar Council Industrial Court Practice Committee in an "Industrial Adjudication Reforms" workshop held at the Bar Council Auditorium on 11th May 2002, has suggested that a few modules of the Industrial appeal system be established in Malaysia. Module One suggested for the establishment of an Industrial Appeal Court to consist of three judges to form the quorum, who should have requisite experience in industrial law or industrial adjudication. An appeal to its decision may lay to the Federal Court. Module Two proposed that an appeal against the award of the Industrial Court shall lie to the High Court as of right and to be treated in the same manner as civil appeal to the High Court and with further right to appeal to the Court of Appeal.
and Federal Court or only to either of the two superior courts. Module Three was basically adopting the existing industrial appeal system in England, as noted earlier.

The preferred Module, inclusive of that of the writer, is Module One. An attempt will therefore be made to discuss the workings of this Module and propose the necessary clauses to be incorporated into the IRA to achieve this purpose.

(i) The mechanism of the Industrial Appeal Court:

The Industrial Appeal Court (hereinafter referred to as the IAC) should be equal in status and ranking as the civil High Court. The IAC may be composed of judges appointed by Yang di Pertuan Agong after consulting the Prime Minister. These judges should be among those who have the requisite expertise in industrial law and they should hold office until they attain the age of 65 and shall not be removed from office except on the ground of inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office.

An appeal shall lie to the IAC as of right from the decision of the Industrial Court and the appeal shall be by way of re-hearing. In the view of the writer, an appeal involving dismissal from employment without just cause or excuse should be heard and disposed by a single Judge because the judge is qualified in making a decision without seeking the opinion of lay members representing the employer and the employee. However, in other trade disputes, it can be heard and disposed by a Judge with two or more lay members giving equal representation to both sides of the industry.

The Chief Judge should be vested with the power to direct in relation to any proceedings, that the Court shall sit as a full Court composing of (a) the presiding officer, the Chief Judge or a Judge nominated by him; and (b) two other judges nominated by the Chief Judge. Proceedings shall be decided in accordance with the opinion of the majority of the Judges composing the full Court.

At the hearing of the appeal, fresh evidence shall not be admitted unless the judge is satisfied that - (a) at the hearing before the Industrial Court the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and (b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the Industrial Court. At the end of the hearing of the appeal, the IAC may either confirm, reverse or vary the decision of the Industrial Court, or may order retrial or may remit the matter with the opinion of the Court thereon to the Industrial Court, or may make such other order in the matter that may seem just.

To disengage from the previous system of the Industrial Courts decision to the High Court by way of judicial review, a provision should be inserted into the Courts of Judicature Act, 1964 to curtail the powers of the High Court to entertain an application by way of judicial review. As suggested by Bar Council Industrial Court Practice Committee, this will be by way of inserting into Para 1 of the first schedule of the Act, a proviso "provided that the power to issue a direction, order or writ of mandamus, prohibition or certiorari does not extend to an award of the Industrial Court or the Industrial Appeal Court". Further appeals against the decision of the IAC may lie to the Court of Appeal with the leave of the Court of Appeal and it should be confined to question of law only. Gopal Sri Ram JCA suggested that the final appeal from the decision of the IAC should lie to the Federal Court instead of the Court of Appeal, which according to His Lordship is usually overburdened with appeals from the courts below it. Taking into consideration that it is an appeal from the decision of the IAC, the presiding judges either in the Court of Appeal or the Federal Court, as the case may be, must decide the matter based on industrial jurisprudence in Malaysia and their decision shall be final and conclusive.

(ii) Proposed clauses to be incorporated into the IRA for the establishment of IAC

1. Appeals against an award or decision of the Industrial Court

(a) Any party to any proceedings before the Industrial Court, who is dissatisfied with any award or decision of the
Court in the proceedings, may appeal to the Industrial Appeal Court against that award or decision.

(b) Every such appeal to the Industrial Appeal Court shall be made in the prescribed manner within 14 days after the award of the Court.

2. Industrial Appeal Court

There is hereby established a court of industrial law, to be called the Industrial Appeal Court, which shall have all powers inherent in a High Court.

3. Jurisdiction of the Industrial Appeal Court -

(1) The Industrial Appeal Court shall have jurisdiction on the following:

(a) To hear and determine appeals from adjudication of the Industrial Court under this Act (the IRA) conferring jurisdiction on the Industrial Court;

(b) To hear and determine question of law referred to it by the Industrial Court;

(c) To order compliance with the award or decision of the Industrial Court pursuant to the Act.

(2) No decision or order of the Industrial Appeal Court, and no proceedings before it, shall be held bad for want of form, or be void or in any way violate by reason of any informality or error of form.

(3) Except on the ground of lack of jurisdiction, or on appeal to the Court of Appeal/Federal Court on question of law as provided in clause (9) below, no decision, order, or proceedings of the Industrial Appeal Court shall be liable to be challenged, appealed against, or otherwise be liable to be challenged, appealed against, reviewed, quashed or called in question in any court of law.

4. Constitution of the Industrial Appeal Court

The Court shall consist of -

(a) One Judge who shall be called the Chief Judge of the Industrial Appeal Court; and

(b) At least 2 other Judges who shall be called Judges of the Industrial Appeal Court.

5. Appointment, Qualifications and Tenure of Office of a Judge

(a) The Judges of the Industrial Appeal Court shall be appointed from time to time by the Yang di-Pertuan Agong on the advise of the Prime Minister, who in turn shall consult the Chief Judge of the Industrial Appeal Court.

(b) A person is qualified to be a judge of the Industrial Appeal Court if - (i) he is a citizen; and (ii) for ten years preceding his appointment, he has been a chairman of the Industrial Court or an advocate and solicitor or a member of the judicial and legal service of the Federation or State, or sometimes one and sometimes another.

(c) A judge of the Industrial Appeal Court shall hold office until he attains the age of 65 and shall not be removed from office except on grounds of misconduct or inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office.

6. Hearing of appeals

(a) The jurisdiction of the Industrial Appeal Court in dismissal cases shall be exercised by a Judge sitting alone;
(b) The jurisdiction of the Industrial Appeal Court in cases other than dismissal, shall be exercised by a Judge with two or more, usually, four lay members giving equal representation to both sides of the industry.

Provided always the Chief Judge may direct in relation to any proceedings that the Court shall sit as a full Court for the hearing of those proceedings. The full Court shall comprise - (a) the presiding member, the Chief Judge or a Judge nominated by the Chief Judge; (b) two other Judges nominated by the Chief Judge. The decision of a majority of the Judges present at the sitting of the Court shall be the decision of the Court.

7. Appearance of parties

Any party to any proceedings before the Industrial Appeal Court may -

(a) Appear personally; or

(b) Be represented by an officer of the Union; or

(c) Be represented by an Advocate and Solicitor.

8. Rehearing

(1) The Industrial Appeal Court shall in every proceeding, have the power to order a rehearing upon such terms as the Court thinks reasonable.

(2) The application shall not operate as a stay of proceedings unless the Industrial Appeal Court so orders.

9. Appeals to the Court of Appeal/Federal Court on question of law

(1) Where any party to any proceeding is dissatisfied with any decision of the Industrial Appeal Court as being erroneous on a point of law, that party may appeal to the Court of Appeal/Federal Court against the decision; and relevant sections of the Courts of Judicature Act, 1964, shall apply to any such appeal.

(2) Every such appeal shall be made by giving notice of appeal within 14 days after the date of the issue of the decision to which the appeal relates.

(3) In its determination of any appeal, the Court of Appeal/Federal Court may confirm, modify, or reverse the decision appealed against or any part of that decision;

(4) Notice of appeal shall not operate as a stay of proceedings in respect of the decision to which the appeal relates unless the Industrial Appeal Court or the Court of Appeal/Federal Court so orders;

(5) The determination of the Court of Appeal/Federal Court on any appeal under this clause shall be final and conclusive.

10. Court of Appeal/Federal Court may refer appeals back for reconsideration

Notwithstanding anything in the preceding clause, the Court of Appeal/Federal Court may in any case, instead of determining any appeal under clause 9, direct the Industrial Appeal Court to reconsider, either generally or in respect of any specified matters, the whole or any specified part of the matter to which the appeal relates;

In giving any direction under this clause, the Court of Appeal/Federal Court shall -

(a) Advice the Industrial Appeal Court of its reasons for so doing; and

(b) Give the Industrial Appeal Court such directions as it thinks just as to the rehearing or reconsideration or
otherwise of the whole or any part of the matter that is referred back for reconsideration.

11. The Court of Appeal/Federal Court to have regard to the objective of the IRA

In determining any appeal, the Court of Appeal/Federal Court shall have regard to the objective of the IRA.

Conclusion

The recent proposal by the Minister to engage High Court judges to preside the Industrial Court adjudication is a move intended to provide security of tenure to the adjudicators of the Court, apart from shortening the appeal process where appeal against the decision of the Industrial Court may be referred directly to the Court of Appeal and/or Federal Court instead of the current process where the matter must be referred to High Court at first instance before it may be taken on further appeal to the above mentioned courts. However, the drawback of the above proposal are; (a) delay in the disposal of the industrial matter because of the already existing serious backlog of cases in the civil courts, (b) that the Industrial Court may be transformed into yet another court of law and it will make the industrial adjudication more expensive and (c) the injection of the medieval common law concepts into industrial law.

In this article, the writer has suggested among others, that judges of the Industrial Court must be engaged on a permanent and not on a contract basis and that their qualification and status must be at par with Sessions Court judges. Further, the writer has proposed that the Legislature should seriously consider the establishment of an Industrial Appeal Court to deal exclusively with industrial appeal cases and has suggested some of the proposed clauses to be entrenched into the IRA. If these suggestions are to be considered, it is hoped that all problems associated with appeals, as noted in this article, will be solved. Apart from speeding up settlement of industrial disputes, in light of the spirit and objective of the IRA, the appeals would be heard and determined in light of the ethos of the industrial jurisprudence of the country. Lastly, it would ensure certainty and uniformity in the application of the principles of industrial jurisprudence. The rest is left to the Legislature to act promptly to bring about necessary reform having in mind that the call for the reform of the Industrial Court system has existed for a long time.

As a matter of interest, it would be interesting to note that in India, the principle adjudicatory bodies that were envisaged under the Industrial Disputes Act, 1947, to settle industrial disputes are the Labour Court, Industrial Tribunal and National Tribunal whose jurisdictions are envisaged in the Act. The Labour Courts and Industrial Tribunals are institutional devices with adjudicatory functions, and, structurally have been placed under the administrative control of the labour department - whether of the central or state government. The National Tribunals, however, are exclusively in the domain of the central government. The decisions or awards of the of Labour Courts and Tribunals are subject to the writ jurisdiction of the High Court under Article 226 of the Constitution. The Courts and Tribunals are also subject to the supervisory jurisdiction of the High Court under Article 227 of the Constitution. Further, Article 136 of the Constitution vests the Supreme Court with discretion to entertain appeals against the orders of the tribunals by granting special leave.

Prior to this, all appeals from the awards and determinations of the Industrial Tribunals and Labour Courts made under the Industrial Disputes Act, 1947, lay to the Labour Appellate Tribunal constituted under the Industrial Disputes (Appellate Tribunal) Act, 1950 (48 of 1950) and further appeals would be referred to the Supreme Court under Article 136 of the Constitution.

However, recently, the 1950 Act was repealed, abolishing the Labour Appellate Tribunal and referring all appeals to the civil courts as mentioned above. It is further noted that Pakistan also followed the same as its Indian counterpart by abolishing their Labour Appellate Tribunal. This move however, had been subject to criticism. For example, SM Yaqoob, Labour law consultant, rightly said "the Labour Appellate Tribunal is being abolished and then the appeal will go to the High Courts...the previous mistake is being again repeated and it seems that we are not prepared to learn from our past mistakes n101. 
Further, according to Ali Amjad "the logic of this policy is difficult to understand". He added "why burden the High court with labour appeals is a pertinent question unless the intention is to send the Labour Appeals in cold storage and reduce the right of appeal to a more appearance outside the reach of ordinary workers and trade unions...Constitution petitions of ten years are still pending in the preliminary stage. How soon then one can expect the Labour Appeals to be disposed of" n102

FOOTNOTES:

n1 Lokman Mansor, "High Marks for Our Industrial Relations" Business Times, 2000, 24 April, quoted from the "World Competitiveness Yearbook 2000" prepared by the Switzerland based International Institute for Management Development.

n2 "Industrial Court to be overhauled" New Straits Times, 2004, 7 April, at p. 4.

n3 A memorandum containing the resolutions was handed to Prime Minister Datuk Seri Abdullah Ahmad Badawi in Putrajaya on Jan 19, 2004. See also New Straits Times, 2004, 10 January.

n4 See Charles Gamba, Labour Law in Malaya (Singapore: Donald Moore, 1955) at p. 25.

n5 During the British occupation of the Malay peninsular, they brought in many foreign labourers from the colonial states as indentured labourers to work in mining, and in the agricultural sector, such as rubber, sugar-cane, coffee and tea estates. The Chinese labourers, who were known for being hardworking, were engaged in the colony of the Straits Settlements since 1820's. They were not considered cheap labour, as they were constantly involved in bargaining for higher wages, and were actively engaged in secret societies which staged demonstrations, including strikes, in opposition of British decrees. (See, Ooi Jin-Bee, Land, People and Economy in Malaya (London: Longman, Green and Co., 1964) 113). This led the British to bring in Indian labourers who were generally peaceable and an easily governed race. They were relatively subservient in status, were divided by caste, village, regional or linguistic origin. They lived in the labour lines provided by their masters carved out of the jungle formed into estates with no contact with outside influence, including unions. See Charles Gamba, Labour Law in Malaya (Singapore: Sonal and Moore, 1955) 4; and Michael Stenson, Class, Race and Colonialism in West Malaysia: The Indian Case (Queensland: University of Queensland Press, 1980) 19.

n6 Enactment No. 12 of 1940.

n7 Ordinance No. 4 of 1940.

n8 Enactment No. 9 of 1360.

n9 Ordinance No. 37 of 1948.

n10 The phrase "voluntary settlement" means that the parties must freely consent to have their trade dispute referred to the court for settlement.


n12 Between 1948 to 1964 only four trade disputes were heard in this Court. See M.Abraham, Ibid.
n13 Ordinance No 12 of 1946. The above Ordinance which came into force in the Malayan Union on the
1st July 1946, repealed the former Trade Unions Ordinance 1940 (Ordinance No. 3 of 1940) of the Straits
Settlements and the Trade Unions Enactment 1940 (Enactment No. 11 of 1940) of the Federated Malay States.
n14 Legislative Supplement No. 25 L.N. 195 of 1965.
n15 Legislative Supplement No. 26 L.N. 198 of 1965.
n16 Act 30/1964.
n17 Act 177.
n18 See for example Dunlop Estate Bhd. v All Malayan Estates Staff Union [1980] 1 MLJ 243.
n19 There are several divisions of the Industrial Court throughout the country namely, Northern Region
(Penang); Central Region (Ipoh, Perak); Southern Region (Johor Bharu) and East Malaysia (Sabah/Sarawak). It
is the policy of the government to establish divisions for the convenience of the parties. Therefore, a case has to
be instituted in the fair and appropriate venue. To have a case transferred from one division of the Court to
another, the Court will consider the financial capacities of the parties by asking the following question; "who
will be better able to absorb the financial hardship from the hearing being held in their non-preferred venue".
n20 For the definition of "trade dispute", see s.2 of the Industrial Relations Act, 1967.
n21 This article will not include employees in the public sector whose application will be referred to the
High Court for a declaration to nullify the dismissal. Nor will it include the unlawful termination under the
Employment Act 1955, which is heard before the Director-General of Labour or his subordinate officers.
n22 National Assembly Malaysia, 1967 Debate on Industrial Relations Bill, Penyata Resmi Dewan Rakyat
26 June 1967, 672 at p. 700.
n23 Wu Min Aun, The Industrial Relations Law in Malaysia 2nd ed. (Petaling Jaya: Longman (M) Sdn.
n24 The Registrar's responsibility includes matters relating to administration, services, personnel and
finance. He is also in charge of confirming cases for mention and hearing. The Deputy Registrar and five
Assistant Registrars assist the Registrar.
n25 Recently, the High Court held that the appointment of the Industrial Court chairman, N. Rajasegaran -
formerly with Taiko Plantation Group - as null and void because he does not meet the minimum qualification of
at least seven years of active practice as an advocate and solicitor as required under Section 23A of the Industrial
Relations Act (IRA) 1967.

n26 This was noted by the Bar Council Industrial Court Practice Committee in a workshop on "Industrial
Adjudication Reforms" held at the Bar Council Auditorium, Kuala Lumpur on the 11th May 2002.
n27 New Straits Times, 2002, 4 April, at p. 7.
n28 The Industrial Court is set up on the principles of equity and good conscience, its adjudication
function is unfettered by traditional judicial procedures. The IRA has conferred upon the Court quasi-legislative
powers. It may create new obligations or modify contracts in the interest of industrial peace, to protect the
legitimate trade union activities and to prevent unfair practices or victimization. This part is discussed further
below.

n30 "Industrial Court to be overhauled" Supra. at n.2.

n31 This part is discussed further, below.

n32 See for example South East Asia Fire Bricks Sdb. Bhd. v Non-Metallic Mineral Products Manufacturers Employees Union and Ors. [1980] 2 MLJ 165 (PC).


n35 See the English case of R v Deputy Industrial Inquiries Commissioner ex. p Moore [1965] 1 QB 456, at p. 488 where Diplock LJ stated: "The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future events the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue".

n36 See for example Kamunting Corp Bhd. and Fadzil bin Ahmand [1991] 1 ILR 704; See also Exxon Chemical (Malaysia) Sdn. Bhd. v Menteri Sumber Manusia, Malaysia and Others. [2004] 2 MLJ 447 (CA).


n38 See for example Sitt Tatt Bhd. v Flora Gnanaprasagam [2002] 1 ILR 98 where s.114(g) of the Evidence Act 1950 was applied by the Industrial Court. See also Harpers Trading (M) Sdn. Bhd. v National Union of Commercial Workers [1991] 1 MLJ 417, 419.

n39 See for example National Union of Hotel, Bar and Restaurant Workers v Casuarina Beach Hotel [1986] 2 MLJ 16.

n40 See s.30(4) of the IRA.


n42 New Straits Times, 2002, 29th November.


n44 See for example Esso Production Malaysia Inc. v Aladdin bin Mohd Hashim [2000] 3 MLJ 275 (CA).

n45 In R.Ramachandran v Industrial Court of Malaysia [1997] 1 MLJ 145 (FC) it was stated that where the award of the Industrial Court is attacked in public law proceedings for 'illegality' and 'irrationality', the reviewing court might scrutinise the substance of the impugned decision and may thereafter enquire whether the
dismissal was with or without just cause or excuse.

n46 The non-writing of awards has been identified as the main reason for the backlog of cases in the Industrial Court. To overcome this, the Minister of Human Resources has suggested that hearing of cases in the Industrial Court should be confined to four day and the remaining day-and-a-half in a week, for writing awards. See The Star, "Hearing time to be reduced", 2004, 24 April, at p. 13.

n47 Supra. at note 2.

n48 Supra. at note 2. The late Tan Sri Harun was seconded from the High Court to be the President of the Court for a term of two years, which was extended by another two years.


n50 V.T. Nathan "Role of the Industrial Court Present and Future" a paper presented in the Seminar "Trends in Employment Law" jointly organised by Bar Council Malaysia, Industrial Court Rules and Practice Committee and Industrial Court Malaysia on 3rd and 4th April 1998.

n51 Lim Heng Seng, "Role of Industrial Court, Present and Future" paper presented in a seminar jointly organised by Bar Council Industrial Court Rules and Practice Committee and Industrial Court Malaysia at Kuala Lumpur on the 3rd and 4th April 1998.

n52 K.P. Gengadharan, "Role of the Industrial Court Present and Future" a paper presented in the Seminar "Trends in Employment Law" jointly organised by Bar Council Malaysia, Industrial Court Rules and Practice Committee and Industrial Court Malaysia on 3rd and 4th April 1998.

n53 Mr. S. Narayanan, "The Employer-Worker Relationship in a Developing Country" a paper presented in the Fifth Malaysian Law Conference Kuala Lumpur on October 25 - 27, 1979.


n57 See New Straits Times, 2002, 7 November, at p.4.

n58 See New Straits Times, 2004, 19 November.


n60 Ibid.


n62 The 'Fast Track' court will deal with all legal applications involving affidavit evidence, whereas the 'Normal Track' court will deal with all legal applications involving oral hearings. See New Straits Times, 2002, 14 September, at p. 1.

n63 [1999] 2 MLJ 553 (CA).
n64  [2001] 1 MLJ 529 (FC).

n65  [1997] 1 MLJ 145, 184 (FC).

n66  Ibid. at p. 183.

n67  [1996] 3 MLJ 489 (CA).

n68  [1997] 2 MLJ 685.

n69  [1997] 1 MLJ 750 (CA).

n70  Civil cases in connection with which legal aid may be given are prescribed in the Third Schedule of the Legal Aid Act 1971. From the enumerated list, it does not include judicial review applications.


n73  Abu Hashim Abu Bakar, "The Philosophy and concept of Industrial Relations in Malaysia and the Acts relevant to it" [2002] 3 ILR i, at p. v.

n74  Dato Gopal Sri Ram JCA, Supra. at note 55, at p. xi.

n75  Ibid..

n76  [1981] 2 MLJ 320.

n77  [1964] AIR (SC) 806.


n79  See for example Abdul Majid Hj Nazardin and Ors. v Paari Perumal [ 2002] 2 MLJ 640(CA); [2000] 6 MLJ 602 (HC).


n81  [1988] 1 MLJ 92 (SC).

n82  See for example Southern Bank Bhd. v Ng Keng Lian and Anor[2002] 5 MLJ 553 (HC).

n83  See Wong Chee Hong v Cathay Organisation (M) Sdn. Bhd, Supra at note 81.

n84  [2002] 1 ILR xiii, xxiii (FC).

n85  [1997] 1 MLJ 352 (FC).

n86  The central issue before the Federal Court was the legal effect of the partial denial of 'due inquiry' on the employee - he was denied the opportunity to make a plea in mitigation before the domestic inquiry. While acknowledging that an employee is entitled to the elementary safeguard of the right to have a hearing at the domestic proceedings, by reason of s.14(1) of the Employment Act, the Court stated: "The misconduct proved against the Employee, was very grave indeed, involving the element of dishonesty and a high degree of premeditation and preparation. The Employee must have been aware, that in the event of an adverse finding on the issue of liability, dismissal would be a mandatory sequel. Indeed, no other punishment was possible, given
the circumstances of the case. It follows, that it would have been a useless formality to have accorded the Employee the right to make a plea in mitigation as the penalty would have been the same even if that right had been exercised


n88 See Nestle Food Storage (Sabah) Sdn. Bhd. v Terrence Tan Nyang Yin [2002] 1 ILR 280, 294 where the Industrial Court stated that the duty of mitigation of loss has the "basis in equity, good conscience and certainly in justice and common sense". Its objective is primarily to ensure that the claimant does not take double advantage and make excessive gains relying on the wrongful act of the employers. See also Dr. James Alfred, Sabah v Koperasi Serbaguna Sanya, Bhd., Sabah and Anor. [2001] 3 MLJ 529 (FC).

n89 A point of law is concerns with the interpretation of the legislation and its application to the facts of the case.

n90 Section 30 of the Workplace Relations Act 1996 (Comm.) provides that the Commission may be constituted by (a) a single member, or two or more members, of the Commission; or (b) a Full Bench which consist of at least three members of the Commission, including at least two Presidential Members, established by the President as a Full Bench. Further, s. 31 of the same Act provides that a function or powers of the Commission may be performed or exercised by a single member of the Commission.

n91 Ibid., section 45.

n92 Ibid., section 45(7).

n93 The term "personal grievance" includes unjustifiable dismissal. See Employment Relations Act 2000, section 103.

n94 Ibid., section 184(1).

n95 Ibid., section 179.

n96 Ibid., section 214.

n97 Ibid., section 213.

n98 Ibid., section 180.

n99 Ibid., section 214(6).

n100 Gopal Sri Ram, supra at note 55. See also Table B.


n102 Ali Amjad, "Selling the new labour policy" (http://dawn.com/2002/10/13/ebr15.htm)