MCO 2020[1] and Wages: To Pay or Not to Pay

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The Movement Control Order ("**MCO**") has been in force since 18.3.2020. Its purpose is to contain or to slow down the surge of COVID-19 cases which otherwise would explode exponentially. It is to "flatten the curve"[2] as they say. The whole nation has been ordered to stay at home and to restrict and confine their movement outdoors only to the bare essentials. Non-Essential Services, businesses and/or premises have been ordered to remain closed throughout the MCO period from 18.3.2020 to 31.3.2020. At the time of writing[3] there has been news circulating that this MCO period may even have to be extended beyond 31.3.2020[4]. For how long no one knows as yet.

While work, for many, has come to a complete halt, life still goes on. For the individuals who are employees, food needs to be put on the table, bills need to be paid and other financial commitments need to be met. For the employers, if you are not an essential service, the MCO has paralysed your business temporarily, operations have been brought to a complete halt and unless you have adequate reserves you will be wondering whether your business will be able to weather this storm.

Several questions on the treatment of wages and leave have arisen as a result. One perennial question which has gone around is whether employers are under a duty to continue to pay wages and whether employees are entitled to receive wages during the MCO period. The other question is whether the employer can put its employees on "forced" or "compulsory" unpaid leave during this period. This note will attempt to answer both questions with reference to the law currently in force.

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[1] Prevention And Control of Infectious Diseases (Measures Within The Infected Local Areas) Regulations 2020 made under The Prevention And Control of Infectious Diseases Act 1998
[2] See e.g. https://www.theguardian.com/world/2020/mar/22/flatten-the-curve-why-predicting-coronavirus-infections-and-deaths-is-so-tricky
[3] Written on 24th March 2020
[4] See e.g. https://www.nst.com.my/news/nation/2020/03/577295/pm-mco-may-be-extended

But first there is a need to distinguish employees who come within the scope and protection of the Employment Act 1955 ("**the EA 1955**") and those who do not.

The distinction between EA Employees and Non-EA Employees

In brief, the EA 1955 covers the following employees[5]:-

(a) Employees who earn RM 2,000 and below; and

(b) Regardless of how much they earn:-

- those who are engaged in, supervises or oversees manual labour (including an artisan or apprentice)
- those who are engaged in the operation or maintenance of any mechanically propelled vehicle operated for the transport of passengers or goods or for reward or for commercial purposes (e.g. bus operators, forklift operators, etc)
- those who are engaged on a vessel registered in Malaysia; and
- domestic servants.

Notwithstanding the limited classes of employees which the EA 1955 covers, the EA 1955 is commonly seen as the minimum standard for terms and conditions of employment which can be offered to all employees. In reality most employers adopt the terms and conditions prescribed in the EA as their "base" terms and conditions of employment. These are normally incorporated through their contracts of employment and their internal staff handbooks or manuals. As an illustration, in the case of an EA Employee, if there is a term and condition of employment which is less favourable than that provided for in the EA 1955 then that less

[5] See Schedule 1 of the Employment Act 1955

favourable term and condition will be rendered void to that extent and the more favourable one under the EA 1955 will prevail[6].

The difference is that EA Employees are statutorily protected under law while Non-EA Employees are protected contractually under their respective contracts of employment and the terms contained therein. A breach of an EA Employee's contract of employment or any provision in the EA 1955 will entitle the employee to lodge a complaint[7] with the Director General of Labour[8] who may then take whatever necessary action under the EA 1955 to sanction the employer concerned. On the other hand, a breach of a Non-EA Employee's contract of employment will usually entitle the employee[9] to initiate a civil claim for breach of contract or a claim for constructive dismissal under Industrial Relations Act 1967.

The Definition of Wages

The term "wages" are defined in S.2 of the EA 1955 as "basic wages and all other payments in cash payable to an employee **for work done in respect of his contract of service** but does not include –

(a) the value of any house accommodation or the supply of any food, fuel, light or water or medical attendance, or of any approved amenity or approved service;
(b) any contribution paid by the employer on **his own account** to any pension fund, provident fund, superannuation scheme, retrenchment, termination, lay-off or retirement scheme or any other fund or scheme established for the benefit or welfare of the employee;
(c) any travelling allowance or the value of any travelling concession;

[6] Employment Act 1955, S.7 and 7A
[7] Employment Act 1955, Part XV, S. 69, 69A and 69B
[8] In practical terms, the complaints are made to the Jabatan Tenaga Kerja under the Minister of Human Resources
[9] Unless the employee's salary is between RM 2,000 and RM 5,000, there are additional powers given to the Director General to inquire into claims for wages or other payments in case due under the contract of service.

(d) any sum payable to the employee to defray special expenses entailed on him by the nature of his employment;
(e) any gratuity payable on discharge or retirement; or
(f) any annual bonus or any part of any annual bonus"

Some argue that wages are only paid for "work done" and if there is no work done (as in during the MCO period) then no wages need to be paid. With respect that argument is misconceived. In the case of **Lee Fatt Seng v Harper Gilfillan [1980] Sdn. Bhd.,** it was held by a majority of the Supreme Court (as it then was) that:

> "In the definition of "wages" in the Employment Act of Malaysia, the words "work done" are not expressly used with reference to any particular time or period. There is no indication anywhere that they are intended to be used with reference to any particular time or period. Therefore in my opinion it is not correct to say that "wages" are only in respect of days on which work is actually done. The concept of monthly pay is that the wages or salary for a particular month is of the same amount as that for every other month. So the salary for January which has 31 days is of the same amount as the salary for February which may have only 29 or 28 days. The wages or salary is of the same amount irrespective of whether there are the same number of working days in January as in any other month. In other words the number of working days in the month is not relevant. For every purpose the concept that for monthly pay the number of working days in the month is irrelevant should be adopted unless it is clear from the provisions of the law that for a particular purpose it is intended that a different treatment should be given. In conformity with this concept the average daily wages in a particular month should be arrived at by dividing the amount of the monthly wages with the total number of days in that month. This method seems to be consistent with the term "average true day's wages" contained in Reg. 6(2)."[10]

Therefore unless the employees concerned are daily rated, casual workers or part time workers (who work on a no work no pay basis), wages will still have to be paid for days during the wage period where no work is done (e.g. rest days and weekends).

Having set out the context, now to return to the questions.

1. Do employees have to be paid wages during the MCO period?

[10] Lee Fatt Seng v Harper Gilfillan [1980] Sdn. Bhd. [1988] 1 MLJ 245, at pp. 247-248

EA Employees

S.18 of the EA 1955 states that the a "wage period" is one month and in the absence of any provision in the contract of service specifying the wage period it will be deemed to be one month.

S.19 of the EA 1955 states that:-

> "(1) Subject to subsection (2), every employer shall pay to each of his employees not later than the seventh day after the last day of any wage period the wages, less lawful deductions earned by such employee during the wage period;
>
> (2) Wages for work done on a rest day, gazetted public holiday referred to in paragraphs 60D(1)(a) and (b) and overtime referred to in section 60A shall be paid no later than the last day of the next wage period;
>
> (3) Notwithstanding the subsections (1) and (2), **if the Director General is satisfied that payment within such time is not reasonably practicable**, he may, on the application of the employer, extend the time of payment by such number of days as he deems fit".

The only recognized exception to the payment of wages, currently, is in S.23 of the EA 1955 which states that wages will not be due by an employer or recoverable by an employee if the employee is absent from work because he is imprisoned or attends court for whatever reason other than as a witness on behalf of his employer.

Therein lies the employers duty to pay wages in the EA 1955 for employees who are covered by it. According to S.19(3), an employer may apply to the Director General to defer the payment of wages and this may only be possible if the Director General is "satisfied" that it is not "reasonably practicable" for the wages to be paid within the usual time. The law does not

provide for any exemptions for the suspension or non-payment of wages in a situation like we find ourselves in today.

Non-EA Employees

For Non-EA Employees, the primary document which governs the employment relationship is the contract of employment itself. The contract of employment may include other ancillary documents such as staff handbooks, employment manuals, company procedures and policies etc.

In most cases, the contract of employment (or letter of appointment) will state the monthly salary payable to the employee together with the basic terms and conditions of employment applicable e.g. position, benefits, leave etc. These are usually expanded upon through ancillary documents which are usually expressed to be part and parcel of the terms and conditions of employment.

The contract of employment itself contracts the employer to pay wages to the employee for the position and the job responsibilities undertaken therein. The obligation to pay wages is contained in the contract itself. That obligation continues until and unless the contract is terminated or the employee is dismissed from service. **As long as the employee remains employed, the employer is under a contractual duty to pay his wages**.

Any attempt not to pay wages during the MCO period is akin to suspending the contract of employment for the duration the MCO remains in force. Effectively the intention is to put the employee on “no pay leave” or “unpaid leave”. This cannot be done without the employee’s consent. One thing, however, needs to be made clear. If the employee, out of his own concern or sympathy for his employer’s situation or even for his own personal reasons, voluntarily agrees or requests to take unpaid leave for a fixed duration then this is perfectly permissible as there is mutual consent to vary the terms of the contract or to suspend the contract for a specified time. A clear example of this is when an employee opts to take a sabbatical.

However, the employer cannot "force" the employee to be on "unpaid leave" or place him on forced leave unilaterally. If the employer attempts to do this then what occurs is a unilateral variation of the contract of employment which the law has accepted to be a fundamental breach of the contract.[11] This then entitles the employee to sue for breach of contract or lodge a constructive dismissal claim against the employer.

The legal concepts of "force majeure" and frustration have been bandied around in the hope of escaping the obligation to pay wages during the MCO period. While it is beyond doubt that the COVID 19 pandemic will most likely qualify as a "force majeure" event, whether or not the employer can rely on the concept of "force majeure" depends on whether the contract of employment contains a "force majeure" clause or not. For "force majeure" to apply, there must be an express "force majeure" clause in the contract which specifies the events which will constitute "force majeure" and the consequences such events will have on the performance of each parties obligations under the contract. Will it serve to discharge the contract altogether or merely extend time or delay performance of the obligations? These have to be spelt out in the "force majeure" clause itself and cannot be implied.

However, in reality, "force majeure" clauses are commonly found in commercial contracts but not in contracts of employment. When there is no express "force majeure" clause, the fallback position is then on the doctrine of frustration which does not need an express clause in the contract. A contract is said to be frustrated if an intervening event renders the performance of the obligations under the contract **impossible to perform**. The difference between the doctrine of frustration and "force majeure" is that when a contract is said to be frustrated both parties are completely discharged from performing their obligations completely. In other words, the contract is terminated completely with neither party having to compensate the other. The contract comes to an abrupt end.

Can it then be said that the MCO frustrates the contract of employment to an extent where the contract of employment has to come to an end? Obviously not. The MCO is not a

[11] Cekal Teguh Sdn. Bhd. v Mahkamah Perusahaan Malaysia [2019] 1 LNS 279 (HC); Dr. Rayanold Pereira v Minister of Labour, Malaysia & Anor [1997] 5 MLJ 366

frustrating event (at least not for the time being) because it is, currently, for a period of 2 weeks and it does not render the contract of employment impossible to perform. If all things go well, things are expected to resume on the 1st April 2020 and the contract of employment is expected to survive the event. Hence it would be premature, at this stage, to even consider the issue of frustration of contract.

Therefore, unless there is mutual agreement between the employer and the employee to suspend the operation of the contract of employment, wages will have to be paid to Non-EA employees throughout the MCO period.

2. <u>Can employees be forced to take "unpaid leave" or be forced to take annual leave for the duration of the MCO period?</u>

The answer is no unless the employee consents or voluntarily applies for unpaid leave.

Generally, an employee is entitled to 3 types of leave i.e. Annual Leave, Sick/Medical Leave and Maternity Leave[12].

Certain employers may grant their employees other kinds of leave like compassionate leave, emergency leave or even paternity leave. These are usually either provided for in the contract of employment or in an internal staff handbook or policy but these are irrelevant for the purposes of this discussion. What is relevant are the Annual Leave and Sick Leave entitlements.

Sick leave entitles the employee to be absent from work on medical grounds and be paid despite his absence. Hence if an employee is to quarantine himself or if he is taken ill then he would be entitled to sick leave and to be paid for that period. If he is hospitalized because he has been infected by COVID 19 then he is also entitled to be paid for the period of hospitalization. Sick Leave is usually supported by documentation such as a medical certificate or any other document proving the employee's medical condition. Untaken Sick leave is not compensated.

[12] S.60E and S.60F of Employment Act 1955

Annual leave entitles to the employee to absent from work, on application and with the approval of the employer and be paid during his absence. The leave of absence is the employee's entitlement and he may avail himself to it **as and when he so wishes**. The employer may, however, reject the application but the employer has to compensate the employee with payment in *lieu* of such annual leave or allow the untaken leave to be carried forward. The employer is not in any position to "force" or insist that the employee takes his annual leave during the MCO period. However, if the employee wishes to apply for such annual leave then he is free to do so and employers are encouraged to allow such applications.

The consequences of forcing an employee to take "unpaid leave" have been discussed above. It amounts to a suspension of the contract of employment which can only be done if there is mutual consent to do so from the employer and the employee. This cannot be done unilaterally.

3. The Guidelines issued by the Ministry of Resources

Thus far there have been 2 sets of guidelines issued by the Ministry of Human Resources both in the form of Frequently Asked Questions (FAQ)[13].

Both confirm that wages have to be paid in full to employees throughout the MCO period except for travelling allowances. Both set of guidelines also confirm that employers are not allowed to put employees on unpaid leave or make deductions to the employee's Annual Leave entitlements during the MCO period.

There are some quarters arguing that these guidelines are merely guidelines and that they have no force in law and are therefore not legally binding. Whilst legally this may be true,

[13] https://mohr.gov.my/images/perintah_kawalan.pdf and https://mohr.gov.my/images/perintah_kawalan_bil2.pdf

employers must take note that they will be risking non-compliance at their own peril. The guidelines clarify the position of the law as it currently stands. It does not make or set out "new law".

As explained earlier employers risk facing claims from their employees for unpaid wages either in the Labour Department, claims for breach of contract in the Civil Courts and/ or constructive dismissal claims in the Industrial Court in the event they choose to defy the guidelines.

4. The Employee Retention Plan : The only exception

On 16.3.2020 the Prime Minister announced that immediate financial assistance of RM 600 per month will be given to employees who are put on unpaid leave as a consequence of the COVID 19 pandemic. This scheme is known as the Employee Retention Program (ERP) under the Employee Insurance Scheme (EIS) under PERKESO. This scheme may be the only exception where putting employees on unpaid leave is allowed.

Generally the scheme is open to:-

- All private sector employees including temporary employees who have registered and are contributing to the Employee Insurance Scheme (EIS)
- Limited to employees with a monthly salary of RM 4,000 and below and have been issued with a "no-pay leave notice" for a minimum period of 30 days to a maximum of 6 months beginning 1.3.2020.

Applications may be made by filling up the prescribed form online and submitting it together with the required documents. Upon the application being approved the employees affected will be given financial assistance of RM 600 per month. This sum will be remitted to the

employer who will then be obligated to remit the sum to the employees. Any employer who fails to remit the financial assistance to the affected employees will commit an offence.

More information on the ERP may be accessed through PERKESO's website[14].

5. Conclusion

We are in uncharted waters. The situation is fluid and is developing day by day.

There are genuine concerns on both divides as to whether employer and employee resources are sufficient to survive this pandemic. The law, at present and in our opinion, is inadequate in balancing the interests of both the employer and the employee and in gearing the economy to overcome the aftershocks of this pandemic.

Nevertheless it remains the current state of the law and compliance thereof would be imperative and expected.

Our lawyers are working remotely during the MCO period and will continue to provide our services as usual. If you have any queries or require any legal advice please contact the following persons. Consultation over video conferencing may be arranged.

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[14] https://www.perkeso.gov.my/index.php/en/kenyataan-media