New Procedure to Challenge an Industrial Court Award: Does it matter?

Effective 1 January 2021, some amendments[1] to the Industrial Relations Act 1967 ("IRA") will come into force. The amendments, amongst others, introduce a new section 33C to provide for an appeal against the Industrial Court award to the High Court. In this article, we explain the procedure to challenge an Industrial Court award under the new section 33C.

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Appeal against an Industrial Court Award

The new section 33C reads:

> ***33C. Appeal against an award to the High Court***
>
> *(1) If any person is dissatisfied with an award of the Court made under section 30 such person may appeal to the High Court within fourteen days from the date of receipt of the award.*
>
> *(2) The procedure in an appeal to the High Court shall be the procedure in the Rules of Court 2012[2] for an appeal from a Sessions Court with such modifications as the circumstances may require.*
>
> *(3) In dealing with such appeals, the High Court shall have like powers as if the appeal is from the Sessions Court.*

Prior to the amendments, the IRA does not contain any mode of challenging the Industrial Court award. To the contrary, the ouster clause in section 33B(1) of the IRA provides that an award shall not be challenged, appealed against, reviewed, quashed or called in question in any court.[3]

Despite section 33B, historically, the Malaysian Courts have consistently held that that the award of the Industrial Court, which is a public authority exercising quasi-judicial functions, cannot escape judicial interference and supervision of the High Court by way of judicial review.[4]

[1] The Industrial Relations (Amendment) Act 2020 will be enforced on 1 January 2021, except sections 4, subsections 5(c), (d), (e), (f) and 8(b), section 10, subsections 11(a), (b) and (c), and sections 18, 33 and 34.
[2] Order 55 of the Rules of Court 2012.
[3] Section 33B(1) has been deleted under the Industrial Relations (Amendment) Act 2020.
[4] *Sabah Banking Employees' Union v Sabah Commercial Banks' Association* [1989] 2 MLJ 284; *Sabah Forest Industries Sdn Bhd v Industrial Court Malaysia & Anor* [2013] 2 ILJ 299.

Moving forward, the proper procedure to challenge the Industrial Court award made after 1 January 2021 is by way of appeal to the High Court in accordance with the new section 33C[5]. In this regard, employers should also note that the effect of the amended section 33B, where the section states that no Industrial Court award for the reinstatement or reemployment of a workman shall be subject to any stay of proceedings by any court.

Judicial Review vs Appeal

Following the introduction of the new section 33C, there are material changes to the challenge of an Industrial Court award on the principles and procedures aspects. The significant differences between a judicial review application and an appeal are discussed below:

(a) Principles of intervention by the High Court

The High Court has wider jurisdiction and power in an appeal to hear the matter on its merits by way of rehearing, as opposed to a judicial review application. In the latter, the High Court only plays a supervisory role with limited jurisdiction to review the substance of the Industrial Court's decision; it cannot review the evidence and substitute the finding of the Industrial Court with its own view.

However, the High Court exercising appellate jurisdiction may reassess the evidence and make its own analysis. It follows that the High Court will be more inclined to interfere with the Industrial Court's findings of fact based on inferences drawn from the other proved facts; or where there is no question of the credibility or reliability of any witness.

There are wider scope and grounds to challenge an Industrial Court award in an appeal. In a judicial review application, the High Court may quash the award only if the Industrial Court commits an error of law on any of the four grounds - illegality, irrationality, proportionality and procedural impropriety. However, when sitting as an appellate court, the High Court is not confined to limited grounds of error of law. Rather, the High Court may reverse an award of the Industrial Court if its decision is plainly wrong due to the lack of or insufficient judicial appreciation of evidence by the Industrial Court, giving rise to an error of law and fact.

[5] The Supreme Court in *Government of Malaysia* v *Jagdis Singh* [1987] 2 MLJ 185 held that where there is an appeal provision available, *certiorari* should not be issued unless there is a clear lack of jurisdiction or blatant failure to perform some statutory duty or serious breach of principles of natural justice.

(b) Fresh evidence at the hearing of the appeal

Unlike a judicial review application, the High Court hearing an appeal may admit fresh evidence, if the Judge is satisfied that –

(i) at the hearing in the Industrial Court, the evidence was not available to the party seeking to use it or that reasonable diligence would not have made it so available; and
(ii) the fresh evidence, if true, would have had or would have been likely to have a determining influence upon the decision of the Industrial Court.

(c) Leave of Court not required

Previously, a party who wishes to challenge an Industrial Court award is required to obtain leave of Court prior to making the judicial review application.

The leave requirement is not required for an appeal to the High Court against the Industrial Court award. The dissatisfied party only needs to file a notice of appeal within 14 days from the date of receipt of the Industrial Court award. The other party may file a notice of cross appeal within 14 days from the date of service on him of the record of appeal.

However, leave from the Court of Appeal is required for an appeal against the High Court's decision if the amount or value of the subject matter of claim (exclusive of interest) is less than RM250,000.00. The onus is on the applicant to demonstrate:

(i) a prima facie case of error, or
(ii) the question is one of general principle decided for the first time, or
(iii) the question is of importance upon which further argument and a decision of the court would be to the public advantage.

(d) Court of Appeal is now the highest appellate Court for Industrial Court matters

Previously, any challenge against the High Court's decision in a judicial review application may be, with leave of court, escalated to the Federal Court.

Under the new section 33C, the Industrial Court award will be regarded as a decision from the Sessions Court for the purposes of the appeal. Hence, the Court of Appeal becomes the highest forum to challenge an Industrial Court award.

In time to come, it might give rise to an interesting question as to whether the Court of Appeal, being the final appellate court on matters originating from the Industrial Court, can refuse to be bound by a previous decision of the Federal Court. In *Ibrahim bin Ismail* v *Hasnah bte Puteh Imat*[6] and *Noraini bte Omar* v *Rohani bin Said*[7], the Court of Appeal held that it is at liberty to depart from the decision of the Federal Court if the decision is wrong, because it stands at the apex in respect of claims solely within the jurisdiction of the subordinate courts. It is likely that, based on these decisions, the Court of Appeal may also depart from the decision of the Federal Court when hearing an appeal originating from the Industrial Court, which is akin to an appeal from the Sessions Court.

Given that the number of challenges of the Industrial Court award is reduced from three to two, the entire industrial relations adjudication process would become more expedient and cost-saving.

(e) Shorter duration to file an appeal

In the past, a party who wishes to challenge any Industrial Court award is given three months from the date of receipt of the Industrial Court award to decide on whether there are merits to judicially review the Industrial Court award. With the new section 33C, any appeal must be filed within 14 days from the date of receipt of the Industrial Court award. Thus, the party would have a shorter duration to decide on whether to file an appeal against the Industrial Court award.

Conclusion

As a whole, the new appeal process introduced to the IRA is most welcomed because, generally speaking, parties are allowed greater latitude to challenge the decision of the Industrial Court award and, better yet, in an expeditious manner.

Be that as it may, it remains unchanged that the Industrial Court is a forum in which a case is decided in accordance with equity and good conscience without being burdened with technicalities that are applied in the court of law. On this footing, it would be interesting to see whether the principles on appellate intervention may be applied differently to the decisions of Industrial Court.

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[6] [2004] 1 MLJ 525
[7] [2006] 3 MLJ 150