

Malaysia

Introduction

Trade unions in Malaysia first emerged in the 1920s when the Communist Party of Malaya encouraged unskilled workers to unionise. There was no legislation then relating to trade unions in Malaysia. In 1940, a Trade Unions Enactment was passed in the Federated Malay States, which was extended throughout the Federation in 1946. The enactment made it necessary for all trade unions to be registered.

The current legislative instruments regulating trade unions and trade union activities in Malaysia are the Trade Unions Act 1959 (TUA) and the Industrial Relations Act 1967 (IRA). The TUA regulates trade union activities; the IRA regulates employer-union relations.

Registration Of Trade Unions

All trade unions are required to register with the Director General of Trade Unions (DGTU) within one month of formation. Registration is not automatic, and the DGTU can refuse to register a trade union if it does not meet the requirements of the TUA.

Both employers and employees have the right to form unions based on the same rules, but trade unions can only be unions of employees or unions of employers and not a combination of both. The same rules apply to federations of trade unions.

Types Of Unions

Trade unions in Malaysia can be divided into three broad categories:

1. In-house trade unions;
2. “National” trade unions; and,
3. Federations of trade unions.

An in-house trade union is set up in a particular establishment to look after the interests of members in that establishment only. “National” trade unions are grouped according to industry, trade, or occupation, and their membership is not restricted to a particular establishment but geographically (i.e., a national trade union can draw its members only from Peninsular Malaysia, or Sabah, or Sarawak).

A federation of trade unions is a combination of trade unions from similar industries, trades, or occupations. Where in doubt, the DGTU has the right to decide what are similar industries, trades, or occupations. Unlike trade unions, a union federation is not restricted geographically; it can be pan-Malaysian.

A major difference in the rules governing a union federation and a trade union lies in the taking of decisions by secret ballot. The provisions of the TUA relating to this apply to a federation of trade unions as if the individual members of the trade unions comprised in the federation were the members of that federation and not the unions, except in the matter of the election of officers, who shall be elected by secret ballot of the delegates representing the component unions.

Trade Unions

The General Role Of The Trade Union

A trade union is defined by the TUA as “any association or combination of workmen or employers ... within any particular establishment, trade, occupation, or industry or within any similar trades, occupations, or industries ... having among its objects one or more of the following:

1. The regulation of relations between workmen and employers, for the purposes of promoting good industrial relations between workmen and employers, improving the working conditions of workmen or enhancing their economic and social status, or increasing productivity;
2. The regulation of relations between workmen and workmen, or between employers and employers;
3. The representation of either workmen or employers in trade disputes;
4. The conducting of, or dealing with, trade disputes and matters related thereto; or,
5. The promotion or organisation or financing of strikes or lock-outs in any trade or industry or the provision of pay or other benefits for its members during a strike or lock-out.”

This definition gives a trade union the power to assume a social role (regulating relations among its members), as well as an economic role (regulating relations

between employers and employees) through collective bargaining, and that of protector of members' rights (grievance processing and the conducting of trade disputes). It is also important to note that a trade union need not include the word "union" in its name. Some unions, in particular those whose members are professionals, call themselves associations.

Constitution Of The Trade Union

The constitution of a trade union is prescribed by Part V of the TUA. While the rules concern matters covering the administration of the union and its funds and the processes of decision-making, they do restrict the activities of trade unions. The TUA requires trade union to make provision in its rules for the following:

1. The name of the trade union and its place of meeting;
2. The objects of the trade union, the purposes for which its funds shall be applicable, the conditions under which any member may be entitled to any benefit, and the penalties to be imposed on any member;
3. The manner of making, altering, amending, and rescinding rules;
4. The election, nomination, appointment, or removal of officers and of trustees, secretaries, treasurers, and employees, and the prohibition of the employment of all officers and employees of the trade union by any other trade union. (An officer or employee of a trade union must be a citizen of Malaysia. Office-bearers and employees of a political party are not eligible for election as executives of a trade union or to be employed by a trade union. The rules of a trade union shall provide for the appointment or election of trustees and for the filling of the vacancies so that there shall always be three trustees);
5. Custody and investment of the funds of the trade union, the designation of the persons responsible for managing funds, and the audit of its accounts;
6. The inspection of the books and membership list by any person having an interest in the funds of the trade union;
7. The manner of the dissolution of the trade union and the disposal of the funds available at the time of such dissolution;
8. The manner of establishing and dissolving any branch of the trade union and the manner in which any such branch and the accounts shall be managed;

9. Taking decisions by secret ballot on: (i) the election of delegates to meetings or to a federation of trade unions; (ii) the election of officers other than trustees; (iii) all matters relating to strikes or lock-outs; (iv) the imposition of a levy; (v) dissolution of the trade union or federation of trade unions; (vi) amendment of the rules where such amendment results in increasing the liability of the members to contribute or in decreasing the benefits to which they are entitled; and (vii) amalgamation with another trade union or transference of engagements to another trade union (amalgamation of trade unions can be implemented only if at least one-half of the voting members of each union vote on the issue and at least 60% of the votes are in favour);
10. The procedure for holding ballots, securing of the secrecy of secret ballots, and preserving ballot papers;
11. The manner in which disputes shall be decided; and,
12. Cessation of membership if members commence, participate, or act in furtherance of any strike in contravention of the TUA.

Membership Of A Trade Union

The membership of a trade union is open to employees above the age of 16. However, if the employee is also a student, he or she must be over the age of 18 to qualify for membership. Members below the age of 18 are not entitled to vote on certain matters, such as those relating to strikes and lockouts, imposition of a levy, and dissolution of the trade union.

Civil servants and employees of local authorities and statutory bodies, except those engaged in a confidential or security capacity or holding managerial or professional positions (who are prohibited from joining trade unions) may only join unions confined to the public service (by department or ministry) or a particular local authority or statutory body, respectively.

Scope Of Trade Union Rights In Businesses

Registration of a union gives it the legal right to exist, but recognition by an employer gives it the right to represent the employees. The IRA gives a union the right to submit a claim for recognition to an employer. An employer can duly accord such recognition. If recognition is not accorded, the employer is to notify the trade union in writing the grounds for not according recognition. In the latter instance,

or where the employer fails to respond to a claim of recognition by the trade union, the trade union may report the matter to the Director General of Industrial Relations (DGIR), who shall then notify the Minister of the findings. Where the Minister decides that recognition is to be accorded, such recognition shall be deemed to be accorded by the employer. The decision by the Minister shall be final and shall not be questioned in any court. It is common practice for the Minister to order recognition if at least 50% of the workers in the relevant establishment are members of the union. However, this is not a prerequisite or a legal right to recognition.

In regulating the recognition process, Section 10 of the IRA prohibits an employer from declaring a lockout while recognition is being processed. Unions also have a responsibility to avoid going on strike during the process. If the claim for recognition is not successful, the union cannot make another claim in respect of the same employees for a period of six months. If the claim is successful, no other trade union may make a claim for recognition in respect of the same category of employees for a period of three years. Unlike recognition, there is, however, no process for de-recognition. In Korea Development Corporation and Construction Workers Union (Award 173 of 1983), the Industrial Court commented that, “once recognition has been accorded, the recognition stands for so long as the union exists, even though only one employee of the company is left as a member of the union.”

In addition to rights granted under the IRA, the TUA grants several rights and privileges to trade unions, including:

1. Immunity from suits for acts done in furtherance of a trade dispute where the basis of such suits is that the acts induced a person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person;
2. Immunity from liability for any tortious act alleged to have been committed by or on behalf of a trade union except one arising substantially out of the use of any specific property of a trade union unless such act was committed in furtherance of a trade dispute;
3. The privilege of having objects that are in restraint of trade deemed to be not unlawful; and,
4. The right to sue and be sued in its registered name.

Works Councils

There is no provision in Malaysian law for Works Councils. Any group of workers set up with one or more of the objects stated in the TUA will be considered to be a trade union and must therefore register itself as a trade union and conform to all legislative requirements of trade unions. Some larger unions are well-structured organisations with a system of branches and representative committees set up according to their rules.

Collective Bargaining

Collective agreements are an important means of determining wages, terms of service, and working conditions in the private sector, and the process of collective bargaining is provided for in Part IV of the IRA.

Bargaining Process

The bargaining process begins when a trade union submits a proposal for a collective agreement to an employer and invites the latter to commence collective bargaining. The employer has 14 days in which to reply to the invitation. If the employer accepts the invitation, collective bargaining must begin within 30 days. If the employer refuses to negotiate, or fails to reply, a trade dispute is deemed to exist and the union may notify the DGIR, who will take steps toward conciliation.

If there is a deadlock in the negotiations, either party can request the DGIR to conciliate. If the parties are still unable to agree on terms, the Minister of Human Resources may refer their dispute to the Industrial Court for arbitration.

The Collective Agreement

A collective agreement must be deposited, within one month of signing, with the DGIR for recognition by the Industrial Court. Section 14 of the IRA requires that an agreement include, *inter alia*, the procedure for its modification and termination, and the procedure for the settlement of disputes arising from the implementation or interpretation of the agreement.

A collective agreement cannot contain any term or condition of employment that is less favourable than, or in contravention of, any workmen's laws in Malaysia, and it must not include matters that are considered managerial prerogatives, such as

promotions, transfers, appointments, terminations for redundancy, dismissals, and assignment of duties. However, questions of a general nature relating to the procedures for promotion of workmen may be discussed.

Once taken cognisance of by the Industrial Court, the agreement becomes binding on all parties to the agreement and all employees employed in the undertaking, regardless of whether or not they are union members

Trade Union Employee Protection Rights

The right of workers in Malaysia to form and join trade unions is protected in Section 5 of the IRA. The Act states that no employer shall:

1. Impose any condition in a contract of employment seeking to restrain the employee from joining a trade union or discontinue his or her membership in a trade union;
2. Refuse to employ a worker on the ground that he or she is a member of a trade union;
3. Discriminate against an employee in regard to employment, promotion, or working conditions on the ground that he or she is a member of a trade union;
4. Dismiss or threaten to dismiss, injure, or intimidate an employee in his or her employment or position to dissuade the employee from participating in a trade union; or,
5. Induce a person to refrain from becoming or cease to be a member of a trade union by conferring or offering any advantage.

Workers also have the right not to be forced to join trade unions. A “closed shop” concept is not practised in Malaysia.