FAQ: Limitation period for unfair dismissal claims during MCO

for LexisNexis Resource Hub – COVID-19

The Ministry of Human Resources in their FAQ No 3 stated that the movement control order ('**MCO**') period will not be taken into account when calculating the limitation period for employees to file a complaint of unfair dismissal under section 20 of the Industrial Relations Act 1967 ('**Act**'). However, there are news reports claiming that the Industrial Relations Department ('**IRD**') had refused to accept an unfair dismissal complaint which was filed outside the limitation period. The complaint was eventually accepted, but this situation highlights that there is still some uncertainty about how to calculate the limitation period during the MCO.

What is the limitation period for unfair dismissal claims?
Under section 20(1A) of the Act, an employee who considers themselves to be dismissed without just cause and excuse must file their representation of unfair dismissal within 60 days from the effective date of dismissal.

Is the Ministry of Human Resources' FAQ No 3 legal and enforceable?
Arguably, the Ministry of Human Resources does not have the legal power or authority to extend a statutory limitation period via FAQ.

The Federal Court in *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 238, [1980] 1 LNS 1 held that the stipulated timeframe under section 20 of the Act must be adhered to strictly, even stating that 'if the claim is presented just one day late, the [Industrial] Court has no jurisdiction to consider it'. The Federal Court held that unlike other jurisdictions such as the UK, the Act does not provide for an 'escape clause' to extend the statutory limitation period where it is not practicable for an employee to present his claim within the stipulated time frame. As such, the Federal Court interpreted Parliament's intention in drafting the Act to mean that there should be no extension of the limitation period.

Are there other case laws which deals with the limitation period for unfair dismissal complaints?
The strict interpretation of the timeframes under the Act was followed in numerous subsequent cases such as in *Sim Kooi Soon v Malaysia Airline System* [2005] 4 MLJ 609 and *Q-PLex Communication Sdn Bhd v Wan Hafiz Wan Hussin* [2006] 2 LNS 0153. In short, the Industrial Court has no jurisdiction to consider unfair dismissal claims that are filed outside the 60-day window. The reasons for the delay are irrelevant as the limitation period is fixed and set by statute.

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Amendments to the Act were recently passed. Do any of the amendments address this issue?
The amendments to the Act have been passed and gazetted but have not yet come into force at the time of writing of this article. However, these amendments do not revise the limitation period under section 20 of the Act, nor do they seek to include any escape clause to allow an extension of time or an alternative computation of time.

What happens if the IRD accepts an unfair dismissal complaint out of time, in reliance on the Ministry of Human Resources' FAQ No 3?
If the complaint is accepted and ultimately referred to the Industrial Court for adjudication, the Minister's referral may be susceptible to challenge by way of judicial review, since the complaint may have been accepted and referred ultra vires the provisions of the Act.

What should employees do should that happen?
It is advisable for employees to err on the side of caution. Unfair dismissal complaints should still be filed within the 60-day time period, regardless of the period of the MCO or the conditional movement control order ('**CMCO**'). This is especially if no proper regulations, directives or amendments to the Act are made to extend the limitation period.

In light of the constantly changing circumstances, this is a general overview and should not be treated as legal advice. The information presented is correct to the date of its publication.

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