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LEGAL ISSUES IN WORKING FROM HOME AMID COVID-19 PANDEMIC IN MALAYSIA

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ABSTRACT

Flexible work arrangements are common during the COVID-19 pandemic as a result of the movement restriction and the closure of the economic sector. Among the flexibility practices is the implementation of remote working, in particular, working from home (WFH) where employees are physically working outside and remote from their organisations. The mandated WFH has changed the working scenario without confirming whether employers and employees are prepared for this new norm. However, the WFH arrangement requires legal

consideration as its arrangement needed a legal predicament. The concern over WFH must be addressed on the grounds of managerial rights and boundaries besides determining the rights of employees while working remotely. From the legal viewpoint, there is a question of whether the existing labour law in Malaysia is accommodating to the WFH practice. Hence, this paper aims to examine the employment-related matters concerning WFH practice in Malaysia on employment terms like wages and leaves, matters on safety and health, social security, and confidentiality and security of information. This study applied a doctrinal approach using authoritative legal texts in solving the legal problems that arise from WFH. The analysis of legal provisions and case studies were employed to present the benefits of the employment relationship and industrial relations in the changing employment landscape and work culture linked to WFH.

Keywords: Working from home, flexible work, employment, remote working, legal.

INTRODUCTION

The global outbreak of COVID-19 poses a major threat and unprecedented challenges to the economies and societies around the world. In the working world, flexibility at the workplace can be seen primarily during the pandemic as a result of the implementation of movement/restriction order and closure of some economic sectors by the government. The COVID-19 has changed the employment landscape. One of the common flexibility practices is remote working or the practice of working from home. Generally, working from home (WFH) refers to the practice of employees who are physically working outside and remote from the workplace. Unlike most developed countries where remote working is common, it is almost unfamiliar in Malaysia until COVID-19 and the government instigated the Movement Control Order (MCO) in controlling the spread of the virus. Therefore, WFH is a vital facet of the nation during the COVID-19 pandemic. It is not just an alternative working arrangement but also seen as vital that requires shared responsibility and commitment by both employers and employees to ensure business continuity. MCO is the government's restriction of movement, whereas WFH is an alternative for the traditional working system that requires the

presence of staff at the workplace. The WFH system as a new norm allows employees to complete their duties and obligations from home. One could be overstating to devalue the practice until the COVID-19 diminished, hence suggesting COVID-19 as a significant change to the work culture and employment landscape.

In some parts of the world, Europe for example, the prevalence of WFH arrangements can be seen and increased since the past decades due to the advancement of information and communication technologies. The WFH system gives employees autonomy in scheduling and organising their work (Rupietta & Beckmann, 2016). From the legal viewpoint, the concern over WFH practice is not just about the duties and obligations towards the employers but also the rights of employees while working remotely. The same should also be addressed to the employers as to what extent WFH can determine or justify their managerial rights and boundaries. Initially, WFH is not the norm and therefore should be subject to the employer's approval. Unless stipulated in the employment contract or mutually agreed between parties, employers should identify who can qualify for the WFH arrangements and how things should go (Christopher & Lee, 2020). Among the key concerns are the contractual terms, duty, obligations and liability, matters relating to safety and health, social security, confidentiality of information, and security of the documents. Whether working from home or in the office, employers should ensure the safety of the work area so that their employees are healthy, safe, and fit for work; this is extended to those affected by working at home (Yogarajah, 2020). In response to this health crisis, employers can make reasonable requests, such as prohibiting employees from coming to the workplace and recommending that certain employees perform self-quarantine in their homes in cases when they are sick or have travelled to a high-risk area (Akin, 2020). In imposing WFH, employers faced the dilemma of whether to forbid employees from working at locations other than home or permit employees to stay at any location as long as they do the work. With fewer face-to-face interactions between superiors and subordinates, will there be any issue in assessing the performance of WFH employees? There is a significant mismatch between the explosion of new-norm work and the legal framework that should protect the rights of employees. All these concerns need to be addressed from the legal point of view. As Jun (2020) remarks, WFH "is not as simple as bringing the laptop home and not turning up at the workplace the next day."

Therefore, the question is whether the existing labour law in Malaysia is accommodating to the WFH practice? Hence, this paper intends to examine the roused legal issues in the employment area concerning WFH practices in Malaysia. The paper is structured as follows. First, the concept of WFH is explored by presenting the definition and roles of WFH. The next section examines and discusses the legal issues regarding the terms in employment contracts, safety and health, social security, and matters on confidentiality arising from WFH. The paper subsequently provides some recommendations to benefit the industrial relations, in particular, both employers and employees who applied WFH as an alternative to flexible work arrangements, and the final part wraps up a conclusion.

THE CONCEPT OF WORKING FROM HOME

The prevalence of working from home has increased due to the advancements in information and communication technologies (ICT) (Shamir & Salomon 1985; Baruch 2000). Previously, the practice of remote working is more familiar with the term *telecommuting* (Teh et al., 2013) in viewing the exploitation of ICT. There are also other terms used to signify remote working or WFH, such as teleworking, telecommuting, homeworking, and working at home (Hassan & Nuruddin, 2011). Although the use of terms such as *teleworking* or *telecommuting* are more familiar in the last decades, the term *working from home* (WFH) becomes common in the COVID-19 era to refer to the situation and necessity of working at home and remotely from the workplace. The terminologies may have slight differences depending on the arrangement whether temporary or long-term. The terms are interchangeably used to refer to the evolving models of working outside the workplace with the medium of ICT. WFH is defined as a working arrangement in which employees fulfil the essential responsibilities of their job while remaining at home using ICT (International Labour Organisation, 2020). According to Savić (2020), there are four elements of WFH: first, the person is employed as an employee of the organisation; second, there is an actual work engagement with a company or an organisation on a specific task; third, the work is performed outside the company's physical premise; and fourth, telecommunication is the platform to perform work from home. Two main indications are rendered in the definitions: work is done at home and using ICT or telecommunications as a tool.

While WFH seems to be home-based telework (Eurofound and the International Labour Office, 2017), teleworking itself may include various locations away from the primary worksite or the employer's premises, such as mobile working (Messenger, 2019). According to Sayers and Monin (2005), WFH is defined by the working days spent in the home environment. There is evidence suggesting that teleworking, WFH, or telecommuting have been acknowledged by Malaysian companies and workers (Asaari & Karia, 2001; Karia & Asaari, 2006) since the early millennium. At the initial stage, academic discussions on the adoption of telecommuting practices are more connected with environmental factors when they are seen as the emerging trend for sustainable growth and green concerns to cut traffic congestion and improve air quality (Saludin et al., 2013). Assari and Karia (2001) further suggest the variables for adopting the WFH concept as follows: (1) savings and environment; (2) decision making and productivity; (3) job flexibility and satisfaction; (4) working condition; and (5) family and personal matter.

The advancement of communication technology has given the avenue for employees to work outside their working space while observing their duties and responsibilities of the organisation. Today, WFH is part of the Gen-Y paradigm in the information economy (Smith, 2010). With the characteristic of desiring work and career flexibility, they associate themselves more with the type of work that they perform rather than the organisation they are associated with, emphasising work-life balance and being interested in WFH (Sharma, 2012). This statement is supported by Reshma et al. (2015) who propose *working from home* as an online office backup system in organisations to support online education sparked from the development in ICT. In the COVID-19 pandemic, WFH is significant as employees can continue working and receiving wages, and employers can continue their operation of the business while limiting the risk of spreading the infection in the workplace. WFH can be done according to the employer's instruction to provide work flexibility in controlling the spread of the infection or following the quarantine order by the government. WFH is also a piece of evidence that supports the work-life balance policy as employees can spend quality time with their family and manage their personal matters while observing duties and responsibilities of work at the comfort of their home (Mallow, 2018; Quoquab et al., 2013) thus leading to the improvements in health and well-being (Reshma et al., 2015).

METHODOLOGY

This paper has applied the qualitative method, in particular, legal analysis of secondary sources such as article journals, statutes, books, and case law. These formal sources of information, which are considered authoritative texts, are utilised to understand the law aiming at solving the legal problem by the analysis of concepts concerning the issues of WFH (Langbroek et al., 2017). This study used the legal analysis of relevant provisions in the Employment Act 1955, the Occupational Safety and Health Act 1994, and the Employees' Social Security Act 1969 to discuss the issues on employment contract, safety and health, and workplace accident and compensation for WFH. Additionally, ten court cases have been selected and discussed in this study. The court cases were chosen based on the facts and judgments of the court that are related to the issues on employment contract, safety and health, confidentially and security of information, and workplace accident and compensation.

LEGAL ISSUES IN WORKING FROM HOME PRACTICE

The phrase WFH has indicated certain legal concepts. Instead of signifying it as other forms of remote-working and flexible work arrangements, the term intends to restrict the place and location of work. Its literal purpose is to only allow the alternative of WFH, which indicates the location of the employee's "home" and not anywhere else so that the spread of the COVID-19 virus can be halted. Daniel (2020) describes the concept of *remote working* in the European Union as the allowance for employees to freely choose their place of work; an order from employers to assign employees to temporarily work from another location; or a specific form of teleworking, which is a pre-existing form of employment. In the context of COVID-19, WFH is not mere teleworking but the government's intent that employees are staying safe at home. The mandated WFH has changed the scenario without confirming whether employers and employees are prepared for this new norm (Meenu et al., 2020).

Despite its necessity for health reasons, WFH practice requires legal consideration as its arrangement cannot be without a legal predicament (Yogarajah, 2020; Nelson, 2020). Christopher and Lee

(2020) suggest that employers may be facing labour disputes on issues such as termination because of poor performance, retrenchment, and misconduct regarding WFH arrangements. In the subsequent part, the author deliberates on the rights and duties of parties, issues in employment terms, and questions about safety and health.

Employment Contract

The relationship between employer and employee is a contractual one where one of the parties will have control over the other (Wilson, 2012). In Malaysia, the relationship is generally regulated under the Employment Act 1955 ('EA 1955'). The EA 1955 provides the minimum benefit for an employee who enters into a contract of service with an employer and falls under the definition of employee under the said act. The employment contract will be null and void in a situation where the employer provides lesser benefit than what the EA 1955 has stipulated or fails to insert in the benefits as determined by the EA 1955 in their employment contract. The non-EA employees would be regulated only by the terms of their employment contract. The controlling power of the employer, whether expressly or impliedly, creates the inherent requirement of obedience. It is generally understood that employees must obey all lawful and reasonable orders as long as they fall within the scope of the employment contract; its refusal is a breach of contract. The Federal Court in *Ngeow Von Yean v. Sungei Wang Plaza Sdn. Bhd./Landmarks Holding Bhd.* [2006] 5 MLJ 113 held that an employee has a duty of obedience to comply with all lawful and reasonable orders given by his or her employer, concerning the performance of such functions within the scope of his or her employment. In the case of COVID-19, although WFH is not expressly stipulated in the contract, the circumstances that require such arrangement indicates the obligation on the employee to follow the office instruction even though the employee would probably argue that his or her home is inconvenient for WFH. Simultaneously, the orders that may expose employees to a genuine risk of injury or work safety will be unlawful to the employer as ruled in *Ottoman Bank v Chakarian* [1930] AC 277 (PC). For the employees, it warrants a reasonable refusal that is considered lawful.

WFH has also brought a question of the employment contract terms such as the matter of wages, hours of work, and rest days. The issue

of payment of wages could be complicated if one quantifies the wages with the working days, working hours, or work done especially when the employer is reluctant to allow WFH despite MCO, or both employers and employees are prevented from working due to MCO that circuitously forced the employer to halt the business operation. The subsequent outcome would be the refusal of the employer to pay the salary. This issue has led to a hotter debate when some argue the issue of "…wages... for the work done…" (Mark, 2020), and some dispute the extent of the government's directive (Joo, 2020). Under Section 2 of the Employment Act 1955, wages are interpreted as "basic wages and all other payments in cash payable to an employee for work done…"

The directives by the Ministry of Human Resources (MOHR) under the frequently ask questions (FAQs) stated that employers are obligated to pay full salary; for daily-paid employees, employers have to pay according to the agreed rate of salary as stated in their offer letter/contract of service/latest salary increment letter, while employees with non-fixed wages shall be paid the minimum wage rate as in Minimum Wages Order 2020 (Ministry of Human Resources, 2020). The obligation is further reiterated that employers must pay full salary and allowance during the extended MCO. The case has evidence that even during a business downturn where the employee has no work to do, the employer is still obliged to pay. This can be seen in the case *Kesatuan Kebangsaan Pekerja-pekerja Pewterdan Kraftangan Semenanjung Malaysia v. Royal Selangor International Sdn. Bhd*. [2011] 4 ILJ 90. However, the situation of MCO is different, which is deemed unfair to employers if they need to pay and bear all the consequences which were not their fault (*Browning and Others v. Crumlin Valley Collieries Limited* [1926] 1 KB 522). Although MOHR can issue the directives, Joo (2020) suggests that they have no power to regulate the salary payment by employers when both are prevented from working. The EA 1955 does not have any provision or any rule for such unprecedented occasions. Under section 52 of the Contracts Act 1950, when a contract consists of reciprocal promises to be simultaneously performed, no promisor needs to perform his or her promise unless the promisee is ready and willing to perform his or her reciprocal promise. Therefore, the reciprocal promises that were supposed to be simultaneously performed seemed to be hardly fulfilled as far as MCO is concerned. Mark (2020) stated that the

obligation to pay salary is not dependent on the work being provided by the employer or work being done unless there is a specific clause in the contract of service. This situation can be understood from the case of *Lee Fatt Seng v Harper Gilfillan Sdn. Bhd.* [1988] 1 CLJ 270 when the court viewed the remuneration to be paid for the work done should be given due to the contract of service itself with no reference to a particular time or period. In the words of Wan Hamzah SCJ, "the number of working days in the month is not relevant" (1 CLJ 270, at 273) as the same amount of salary is expected for each month regardless of the differences in the number of days in a month. Instead of referring to the actual work, the salary is associated with the employment contract. Based on these authorities, which is constructed in the directives, the obligation of the employer to pay full salary should be applied for a monthly salaried employee whereas the daily payment is not covered.

Currently, the provision under the EA 1955 is silent on the status of employees' rights and benefit during the WFH period. Therefore, all the benefits for WFH are secured like traditional workers. For the payment of annual leave, despite working remotely from home and not physically present at the employer's office during working hours, the employee is not required to apply for annual leave. Employers cannot force an employee to apply for annual leave or assume it as an unpaid leave as an employee is not considered as absent from work, but instead perform his or her work outside and remote from the organisation. This statement is in line with the directive and statement that has been issued by the MOHR Malaysia during the MCO in March 2020. During the WFH arrangement, employees must be sincere to apply for leave if they are unfit or unable to perform the duty although they are at home. As commonly being practised in the workplace, he or she can use the paid annual leave and other types of leave such as sick leave and emergency leave after getting the approval of the employer.

In the case of hours of work, the normal working hours should apply to the employee under the WFH period. Employees are expected to perform their obligations from home following the hours given in their employment contract. Therefore, employees are expected to be available for contact during these hours through their phone, email, or any medium of telecommunication available. Despite WFH,

employers are expected to adhere to the maximum working hours as stated in the EA 1955, which is eight hours per day and 12 hours for overtime. The problem that may arise is how to ensure the adherence of employees to these working hours and how to monitor them. It is difficult to know whether the remote employees are working because the employer would not be able to access and oversee the conduct and workflow of all employees while WFH. The practical connotation of "hours of work" is available in section 60A (9) when it means "the time during which an employee is at the disposal of the employer and is not free to dispose of his own time and movements". Hence, according to Chakravarty (Award No. 32 of 1975), the employee's time belongs to the company while he is on the job where the work hours stipulated in an employment contract defines the period within which an employee is subject to the company's rules (Hashim, 2016). Hours of work during WFH shall not be an issue if both employer and employees are aware and appreciate this meaning.

The employer must determine the WFH rules that apply to employees, for example, to require them to share the location or to prepare a report on the task and assignment on each day of WFH. For a more advanced company, employee monitoring software and apps could be supportive. There are many kinds of remote monitoring tools available in terms of time-tracking, workforce productivity, remote clock-in and out, and even simple Google forms and sheets. While these are technical measures in managing human resources, the legal approach and understanding can be referred to *Azahari Shahrom & Anor v. Associated Pan Malaysia Cement Sdn. Bhd.* [2010] 1 ILR 423 (Award No. 101 of 2010) when the court views that (at page 436):

> It is trite that the association between employer and employee out of necessity is fiduciary in nature. There has to be mutual trust and confidence that one would deal with the other in all fairness and rectitude over the rights and obligations flowing between the parties under the employment agreement. If one does an act or commits an omission which is inconsistent with that fiduciary relationship, then that act or omission will be *mala fides*. This principle has equal application as against the employer and the employee in their respective positions viz. the employment relationship between them.

Therefore, as long as both parties understand the duty and responsibility towards each other, there should not be an issue of observation and surveillance of employees who work at home. Also, employers may request their employees to work overtime and with the agreement of the said employee, the employee must be paid for overtime pay according to the provision stated under the EA 1955.

Safety and Health

Occupational Safety and Health Act 1994 (OSHA) is regulated to ensure the safety of employees at the workplace. In Section 15, the employer owes a duty to ensure as so far as practicable, the safety, health and welfare at work of all his employees. Furthermore, the Occupational Safety and Health (Safety and Health Committee) Regulations 1996 stipulates that employers must conduct suitable and sufficient risk assessments of all work activities carried out by their employees, identify hazards, and recommend remedial measures. The main question is whether this duty is extended to cover the employees under WFH. The general understanding is that the aspect of safety and health should be related to the working environment where it should be applied even during WFH. In the context of WFH arrangements, employers should consider measures that are suitable to be put into practice (Christopher & Lee, 2020) and encourage employees to review their work area to ensure that it is free from recognised hazards that are likely to cause harm (Akin, 2020). These measures should also be applied to those affected when working at home (Yogarajah, 2020).

Therefore, it can be inferred that an employee who suffered an injury during WFH can file a civil suit against the employer for failing to provide a safe work environment. Workplace injuries can happen in the workplace such as falling from chairs or tripping or slipping and straining injuries due to repetitive work. However, an investigation should be done to determine if the injury happened “within the course of and arising out of” their employment. If the injury happened in a home office and during work hours, then the employee can claim compensation from the employer. If the injury happened when the employee is driving (not in the home office), then the claim might fail. Hence, the employee must prove that the injury was suffered during working hours whether it is at home or in his or her workstation.

In the case of *Jabatan Kesihatan Dan Keselamatan Pekerjaan v Sri Kamusan Sdn Bhd* [2013] MLJU 1549, the court views that the

employer has to rebut the duty imposed under Section 60 of OSHA on the balance of probabilities. It shall be for the employer to prove that it was not practicable to do more than what was done to satisfy the duty or requirement, or there was no better practicable means than what was used to satisfy the duty or requirement. Thus, the term "practicable" can refer to the following: (a) the severity of the hazard or risk in question; (b) the state of knowledge about the hazard or risk and any way of removing or mitigating the hazard or risk; (c) the availability and suitability of ways to remove or mitigate the hazard or risk; and (d) the costs of removing or mitigating the hazard or risk. The employer will be discharged from the offence of Section 15 if he or she can demonstrate that due diligence or reasonable precaution has been exercised. In the context of WFH, the employer has to ensure that his or her employee is working in a safe environment at home.

The employer has to care for the employees as it is reasonably practicable to assess, control, and mitigate risks in locations other than the employer's workplace (ILO, 2020); in this context, the employee's home during the WFH period. According to the ILO guidelines of WFH, the employer must remind the employees of their duties in relation to health and safety while performing the work at home and check on the following:

(a) the required work is safe to be performed from home;
(b) adjustments are made to the tasks, if needed, to ensure that they are safely doable;
(c) employees have the right equipment and tools to work safely at home, including the required protective or safety equipment, where applicable;
(d) arrangements are made to ensure that the company's equipment, if taken home to facilitate WFH, is accounted for and returned in the condition it was provided;
(e) employees have relevant information, instruction, supervision, and training, including measures to deal with emergencies;
(f) reasonable accommodations are made for employees with disabilities in relation to the work they are required to perform from home;
(g) arrangements are made for employees' physical and mental welfare.

Employers must formulate a safety and health policy on WFH and revise the policy suitable for the situation. Employees must

be informed of the policy and its review. This duty is in line with the statutory duty as stated under Section 16 OSHA. Besides that, employers should be aware of any occupational stress that arises from the WFH environment as not all employees have a convenient place to work at home. A study revealed that WFH was negatively related to work-life balance as family-related duties at home tend to overlap with work commitments during the WFH period (Palumbo, 2020). It is encouraged that employers manage the fatigue levels of the WFH employees as practised by the Australian government in its WFH policy (Williamson et al., 2020). Therefore, it is important to ensure that the safety and health of employees are appropriately addressed in the WFH environment.

The complexity of work arrangements and the increasing debate on the new world of work nowadays have resulted in the issue of whether social security protection adapts to the current changes. Besides safety and health, social security protection is another relevant issue in WFH. Generally, private sector employees are covered and protected by the Employees' Social Security Act 1969 ('ESSA') in the case of eventualities such as accidental injuries and death in the course of employment. The contributions are paid by both employers and employees. Depending on the length of service and types of injuries or illnesses, the employee-contributor will get benefits in different forms such as medical benefit, rehabilitation benefit, temporary disablement benefit, permanent disablement benefit, and constant-attendance allowance. Section 2(6) ESSA defines employment injury as a personal injury to an employee caused by an accident or an occupational disease arising out of and in the course of his or her employment. According to Section 24, the employee will have the right to claim compensation if the accidents occurred when he or she travels to and from work or on a journey for any reason directly related to the work. In the case of WFH, the possible question is whether the employee can claim for the medical treatment or be eligible for any scheme benefit in the event of an accident while working at home. Even though the provision does not explicitly mention the compensation for accidents at home, the words "in the course of his employment" under Section 23, is deemed to be inclusive of WFH particularly when the employee abides by the directive of the employer and on consent.

The assumption is that the employee must be located at home while performing his or her work. Besides that, the work is done during the working hours so that when the injury occurred during the performance

of the work, he or she could be eligible for the compensation. This is understood from the case of *Ketua Pengarah Pertubuhan Keselamatan Sosial, Kuala Lumpur v Philip Bin Felix @ Philip Bin Sintik* [2004] 5 MLJ 251 when the court views that the employee's injury which happened outside the workplace is said to have arisen out of and in the course of employment during the incident. In the words of Linton Albert JC, "I do not think a restrictive and literal interpretation of section 2(6) is consistent with the purpose of the Act which is to provide Social Security." Therefore, the employee who suffered injuries during WFH can claim compensation as WFH is considered under the definition of "out of and in the course of employment". As long as the WFH is done under the instruction of the employer, there should be no issue.

Confidentiality and Security of Information

Working from home may risk the company's data security and information confidentiality. The possibility of the private information of the employer being discussed at home can increase the risk of the data security breach. Safe WFH is essential, especially if employees are using personal devices and laptops to perform official duties and connect to the company's network (ILO, 2020). Also, employees might leave an important file in a shared household, print documents using a home printer, and use insecure Wi-Fi networks. The situation is unlike working in the office because employers can exercise control through overseeing employees and controlling documents, domains, files, and electronic devices (Halpern & Scrom, 2021). While an online meeting may risk the company when members are discussing any information that is supposed to be confidential whilst physical meetings are conducted in the employer's office and discussed within the four walls. A recent case of *Smash Franchise Partners, LLC v. Kanda Holdings, Inc.* (2020) Case No. 2020-0302, 2020 Del. Ch. LEXIS 263 highlights how a failure to take reasonable security measures during the virtual meetings can destroy a claim for trade secret misappropriation. In this case, the issue of confidential and trade secret information was discussed over a Zoom meeting with potential franchisees. The court found that the company failed to take reasonable steps when it failed to utilise any of Zoom's protective features. The Zoom meetings were too open, and the company freely gave out their Zoom information, used the same meeting ID for every meeting, did not require passcode

access, did not utilise the host control or waiting room functions, and failed to conduct roll call at their meetings as per their company procedure. This case highlights the importance of maintaining work privacy, confidentiality procedures, and reasonable efforts on the company's part in the new normal of teleworking. The lessons to be learned are relevant to the many businesses that have come to rely on virtual meetings (Marsh, 2021).

On the employee's part, they must maintain confidentiality and not disclose information that is peculiar to their employer or the activities of their employer (Marcellinus et al., 2019). Maintaining confidentiality is associated with the duty of fidelity of an employee. The duty of confidentiality as a branch of the duty of fidelity requires an employee to attend to the employer's interests. In *Sitt Tatt Industrial Gases Sdn. Bhd. v. Puvananderan Ganasamoorthy* [2003] 2 ILR 485 (Award No. 396 of 2003), the learned chairman held that the employer-employee relationship carries with it the duty of fidelity on the part of the employees and also a relationship of trust and confidence; dishonesty on the part of the employees is an attack on the trust and confidence of the employees. At this point, WFH is a threat to the employer as the owner of the information; employees could be liable for the loss or damage suffered by the employer. Therefore, the employer needs to be very careful when disseminating the information or providing the company's device and implements a proper policy regarding WFH. Furthermore, employees need to take necessary precautions during confidential conversations to avoid leaking private information and documentation. At the same time, employees should have a suitable workspace and workstation during WFH. In *Schmidt Scientific Sdn. Bhd. v. Ong Han Suan & Ors* [1998] 1 CLJ 685, the High Court observes the duty of fidelity where there is also an implied duty that prohibits employees from using any confidential information obtained during their employment without the employer's consent for themselves or someone else's use after the employment contract ends.

Infrastructure, Equipment, and Related Expenses

WFH involves logistic and infrastructure issues. The ILO (2020) imposes the employers to provide employees with specific tools, equipment, and devices, including their related expenses. All these WFH-related matters should depend on the business and work

involved such as laptops, computer monitors, software, access to the Internet, and headset. When all these needs are provided by employers, any issues regarding the work tools shall be consulted and reported to the employers. Employers have to bear the cost of tools that need to be repaired. On some occasions, employees have to set up a proper workstation at home and ensure enough tools and equipment for their work. Some employees encounter technical problems such as internet accessibility and poor connectivity. When all tools and equipment are with the employees, the issue is whether employers should reimburse the expenses incurred during the WFH period. Traditionally, this issue seems to be trivial and remote; but in the current pandemic situation when WFH becomes necessary where workers incur related expenses, a revisit to the practice is required. It is therefore suggested that employers should reimburse employees for their reasonable and necessary home office expenses in performing the required tasks (ILO, 2020).

In employment, it is a common legal understanding that employers have to reimburse the employees for their reasonable and necessary expenses in performing their duties at home. This is important to prevent employers from passing their operating expenses to their employees. Although the law in Malaysia is silent on the duty of employers, the same is still applied and imposed through the common law. To avoid dispute, the least that employers can do is to have a negotiation and clear policy on this matter. The list of items or expenses that are claimable during the WFH period can be specifically mentioned to employees. The ILO (2020) suggests mobile phone or landline costs, internet costs, personal computer/laptop/tablet, and teleconferencing software/hardware. The list can be expanded depending on the business and needs of the task.

DISCUSSION AND RECOMMENDATION

The global ramification of pandemic COVID-19 has changed the employment landscape from the conventional practice of employees to be present at the workplace to a new norm of performing WFH. Subsequently, the term WFH becomes widespread. While flexible work arrangements should extend in different forms, such as teleworking, telecommuting, homeworking, or remote-working, WFH seems to

limit its application in the government's effort to avoid the COVID-19 virus. The implication is not just to the arrangement of the workforce and management of the human resources but has also triggered some legal repercussions. Hence, the concern over WFH encompasses the rights of employees while working remotely, the duties of employers, and the boundary of their managerial rights.

One clear understanding is that WFH is not the norm; instead, it is an alternative to the conventional mode of working. Hence, WFH should be subjected to the employer's approval. Unless expressly stipulated in the employment contract or mutually agreed between the parties, employers should identify the WFH arrangements. The temporary WFH arrangements do not require any permanent adjustment to the terms and conditions of employment. The arrangements can change depending on the needs of the company. Since WFH is a new norm during the pandemic, appropriate moves and proper planning should be made foreseeable. The matters relating to contractual terms such as working hours, leave, wages, and performance must be determined. Issues of duty, liability, matters on safety and health, employment benefits and compensation, confidentiality of information, and security of documents must be properly observed as they can instigate legal implications to both parties. The location for WFH could also be the issue, and fewer face-to-face interactions can create disputes in the performance assessment of WFH employees. The substantial mismatch of the new-norm work and the legal framework must be addressed to protect the rights of both parties, thus suggesting that the labour law in Malaysia is yet to accommodate the upsurge of WFH practice.

Considering the devastating impact and threat of COVID-19 and believing that the virus will not disappear but will stay with us (WHO, 2021), we believe that although a large number of employees are back at work, many are still working remotely. Lackey (2020) reported that a poll by Gartner revealed that 42 percent of respondents expected that between 10 percent and 20 percent of their employees would become permanent remote workers. Hence, the authors recommended that employers should develop a clear company policy to provide clear guidance on implementing WFH arrangements so that they can be administered and function smoothly besides mitigating disputes. Murphy (2022) defines the WFH policy as "an agreement between

employer and employee that clearly defines the expectations and responsibilities for employees who work from home". The policy should also include those who are eligible for WFH, the process for requesting WFH, and the approval. In the light of COVID-19, the WFH policy statement requires the following (Heinz, 2021):

(a) establish a clear purpose of the policy;
(b) define the scope – this includes types of workers eligible for WFH (e.g., an infected worker, a close-contact with COVID-19 positive patient);
(c) outline the process – for example, obtaining prior approval, using a specific form, adducing proof or evidence for WFH;
(d) set the admissible days of WFH – for example, two out of five working days in a week;
(e) outline clear expectations – matters regarding attendance, dress code, work reporting, security standard, medium of communication – including virtual meetings, and other work-related matters;
(f) set technology support and requirements.

The ILO (2020) suggests employers establish a system for reporting and investigating injuries, illness, or other accidents that happened because of work activities, as well as to be aware of any health and safety risks, including psychosocial hazards due to WFH during the COVID-19 pandemic. Additionally, Halpern and Scrom (2021) propose the following:

(a) updating employee handbook to reflect the current practice of WFH;
(b) providing training on the best practice regarding the security and procedural aspects;
(c) ensuring all devices possess necessary security protection;
(d) establishing security measures;
(e) creating well-documented procedures for handling and protecting confidential and sensitive information;
(f) choosing a safe, secure video-conferencing application to conduct virtual meetings and enabling all potential security features;
(g) restricting employees from using insecure programmes and applications as the communication medium or uploading information;

(h) establishing a secure printing arrangement and preparing the disposal procedures;
(i) creating a reporting procedure.

The WFH arrangements can be occasional, temporary, or permanent. Thus, a schedule can be initiated with the possibility of WFH on a full-time basis for certain days or every day. With a clear policy imposed in the workplace, the WFH practice can be more manageable and systematically operated in mitigating legal predicaments. The employer or management must communicate the policy effectively to all workers. Subsequently, another expectation is for the respected employee to be at home during the WFH period. Under the Malaysian government's Short-Term Economy Plan, SOCSO's Employment Injury Scheme has extended the coverage for employees involved in accidents while working at home under the scheme (Radhi et al., 2020). Fixed working hours, meals, and rest periods must be spelt out in the policy for the safety of the employee working at home. This action is necessary for clarity for cases of accident or injury while working at home. Atypical features of work arrangements have caused challenges to the social security systems (Schoukens et al., 2017). It is hoped that with the new norm of WFH, the term of accidents while working can be identified for WFH.

It is expected that employers should provide a clear policy to safeguard the rights and obligations of both employers and employees. For this purpose, the directives from the Ministries, Human Resources, and Health could be used as a guide. Besides that, the International Labour Organisation's (2020) recommendations for the government to take initiatives in legislating law relating to WFH aspects should not be overlooked.

CONCLUSION

Flexible work arrangements in the form of teleworking, telecommuting, remote-working, or home-working are prevalent due to the development in ICT. Unlike the western and European countries that mostly employ ICT in their employment system for decades, Malaysia is just beginning to practise it within the decade.

The COVID-19 pandemic has changed the employment landscape from the conventional practice of being present at the workplace to the new norm of performing WFH. Well-matched with its practice, the term "WFH" becomes pervasive and largely indispensable owing to the government's implementation of movement restriction in battling the COVID-19. Although flexible work arrangements should extend in different forms, WFH seems to be the only alternative that limits its potential. There are many implications of WFH and it is not restricted to the social arrangement and management of the workforce that triggered some legal repercussions as discussed earlier. It involves the rights of employees while working remotely, the duties of employers, and the boundary of managerial rights. To avoid further disputes between the parties, quick actions from employers can initiate a clear policy that addresses the legal issues. At some point, both employers and employees should lead the way and hold a mutual understanding to confront all challenges linked to COVID-19.

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