Workplace Dispute Resolution in Malaysia: Investigating Conciliation Claims for Reinstatement

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ABSTRACT

Workplace disputes are best resolved in-house and this principle underlies dispute resolution regulations and legislation in countries such as the UK, Australia and New Zealand. Only after a failure to resolve a matter at workplace level do disputants have the option of referring their conflict to conciliation at an external tribunal in these countries. In turn, conciliation settlement rates are high, leaving only a residual need for arbitration services. Whilst Malaysia has a similar dispute resolution system to these countries, which share the same heritage of British law, its workplace dispute resolution system is fraught with problems. This thesis presents the first large scale study of workplace and tribunal level dispute resolution of claims for reinstatement in Malaysia. It addresses the key issues of why workplace disputes fail to be resolved in-house and then, why they fail to resolve at conciliation. The thesis probes into the reasons why there is a high rate of referral of claims for reinstatement which progress to arbitration, creating a severe case backlog for the Industrial Court.

The processes of conciliation, mediation and arbitration form part of the techniques of Alternative Dispute Resolution which have become increasingly popular as alternatives to litigation. They are used in Malaysia to resolve employment dispute including claims for reinstatement. Conciliation is performed by Conciliators employed by the Department of Industrial Relations Malaysia who assist the workplace parties to resolve their dispute by supervising their negotiations. They have no authority to make recommendations or determinations of the dispute. Arbitration is quasi-judicial process performed by the Industrial Court with power to impose an outcome. Access to arbitration is not automatic as it is subject to referral from the Minister of Human Resources based on the merits of the case. Unlike the situation in the UK, Australia and New Zealand, the settlement rate of conciliation has been low for many years. This has meant that a correspondingly high level of cases are referred to the Industrial Court, creating heavy judicial workloads and delays in hearing the vast backlog of cases. Despite the problems created for the court and tribunal there has been little research to date. This phenomenon has not been explored in Malaysia and very little is known about the workability of in-house dispute resolution or tribunal conciliation in resolving

dismissal disputes. Hence, this thesis fills an important gap and through the lens of the theory of organisational justice, provides crucial insights into dispute resolution of claims for reinstatement in Malaysia.

This research thesis deployed a predominantly qualitative approach using a combination of surveys and interviews in addition to an extensive international literature, publicly available reports and documents on dispute resolution. Specifically, the thesis contributes four sources of original empirical evidence through a survey of Conciliators and Employers and a set of interviews with Conciliators from the Department of Industrial Relations and with Arbitrators from the Industrial Courts in Malaysia.

The thesis found that disputes over workplace dismissals are commonly referred to conciliation rather than being resolved in-house because of a general lack of knowledge and skills to use workplace dispute mechanisms, defects in delivering workplace justice and the increasing growth of a compensation culture. Once at conciliation a large percentage of disputes fail to settle. While settlement rates in countries such as the UK, Australia and New Zealand are between about 75 to 80 percent successful, in Malaysia they vary between about 50 to 60 percent. Thus, a large number of disputes progress to arbitration. The thesis found that disputes fail to settle at conciliation for reasons such as the inability of the Conciliator to make a determination and because of the determination of the parties (particularly employees) to progress to arbitration. The thesis found that disputants seek certainty of outcome which can be offered at arbitration through the arbitrated award. The Ministerial process designed to filter cases has not deterred disputants' determination to proceed to arbitration.

The thesis also analysed the laws and precedents operating in Malaysia which may contribute to the large number of disputes which progress to arbitration. Of these, the High Court precedent known as the 'curable principle' plays a significant role. Essentially, the doctrine provides that should there be a defect in the delivery of justice at the workplace, it empowers the Industrial Court to rectify that defect by conducting its own inquiry 'de novo’. The effect of the precedent is to reduce the need for employers to observe procedural fairness at the workplace.

The thesis makes a contribution to understanding the operation of justice theories as they apply to the settlement of workplace disputes. Specifically, the thesis found that a denial of procedural justice at the level of the workplace is the most important factor when predicting whether a case will fail to settle. The bulk of cases progressing to conciliation in Malaysia were those where employees had been denied procedural justice which means that employers had not followed a fair process or provided them with an opportunity to defend themselves. In contrast, the cases which failed to settle at conciliation were those which failed to provide distributive justice (the outcome of a dispute). Here, the thesis found that because Conciliators are not authorised to make a determination or even recommendations to end a particular dispute, disputants generally fail to make a compromise and file for arbitration.

These findings have some practical ramifications and through the interviews conducted with conciliators and arbitrators the thesis identifies measures that need to be addressed to enhance the system. Specifically it highlights strategies to encourage disputes to be resolved at the workplace by implementing changes to laws and regulations and improving the quality of workplace dispute resolution. A good workplace mechanism strengthened by a workable and effective legislation will reduce the stress on the arbitration system at the IC making only deserving disputes progress beyond the conciliation stage. The thesis also recommends that the hearing procedures and process at the Industrial Court should be made more efficient through more effective use of human resources, scheduling and postponement of cases as well as ensuring disputants are fully prepared prior to hearing. The power to order certain cases back to conciliation was another key strategy put forward in the thesis. In addition, it was found that recruitment, training and placement strategies be put in place for Conciliators and Arbitrators so they are equipped with greater experience, knowledge and professionalism. The thesis also found that the role of the Department of Industrial Relations Malaysia in resolving dismissal disputes should be strengthened to make it a single point of reference to handle dismissal disputes and be empowered with the authority to filter disputes and to provide early intervention. These strategies would free the Industrial Court of much of its backlog and help in preventing recurrence. The results of this study add to the knowledge of resolving employment disputes in Malaysia

and contribute to an understanding of justice theories, particularly distributive, procedural and interactional justice and how they operate in a workplace and tribunal dispute resolution settings in Malaysia.

DECLARATION

" I, Dzulzalani Eden, declare that the PhD thesis entitled Workplace Dispute Resolution in Malaysia: Investigating Conciliation Claims for Reinstatement is no more than 100,000 words in length including quotes and exclusive of tables, figures, appendices, bibliography, references and footnotes. This thesis contains no material that has been submitted previously, in whole or in part, for the award of any other academic degree or diploma. Except where otherwise indicated, this thesis is my own work."

Signature_____ Date

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LIST OF PUBLICATIONS

The following is the list of publications that have arisen from the research undertaken as part of this thesis.

- Eden, D. Van Gramberg B. and Gough, R. (2011): Malaysian Industrial Relations: An analysis of workplace dispute resolution mechanisms. *Proceedings of the Twenty Fourth Conference of the Association of Industrial Relations Academics of Australia and New Zealand (AIRAANZ)*.

- Eden, D. and Van Gramberg B. (2009): Investigating Conciliation Claims for Reinstatement in Malaysia: A Research Strategy (2009). *Proceedings of the Twenty Third Conference of the Association of Industrial Relations Academics of Australia and New Zealand (AIRAANZ)*.

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GLOSSARY OF TERMS

ACAS	Advisory Conciliation and Arbitration Service
ADR	Alternative Dispute Resolution
AFPC	Australian Fair Pay Commission
AIRC	Australian Industrial Relations Commission
AUD	Australian Dollar
AWAs	Australian Workplace Agreements
CEO	Chief Executive Officer
CIR	Commission on Industrial Relations
DGIR	Director General of Industrial Relations Malaysia
DI	Domestic Inquiry
DIRM	Department of Industrial Relations Malaysia
DTUA	Department of Trade Union Affairs Malaysia
EA	Employment Act
EAT	Employment Appeal Tribunal
EC	Employment Court New Zealand
ERA	Employment Relations Authority
ET	Employment Tribunal
FWA	Fair Work Australia
IR	Industrial Relations
IC	Industrial Court Malaysia
ID	Identification Document
ILO	International Labour Organization
JCC	Joint Consultative Council

KPI	Key Performance Indicator
LC	Labour Court Malaysia
LIFO	Last In First Out
MEF	Malaysian Employers Federation
MMC	Malaysian Mediation Centre
MoHR	Ministry of Human Resources Malaysia
MTUC	Malaysian Trade Union Congres
NADRAC	National Alternative Dispute Resolution Advisory Council
NWCC	National Wages Consultative Council
OECD	Organisation for Economic Co-operation and Development
PCC	Pre-Claim Conciliation
SDPPs	Statutory Dismissal and Disciplinary Procedures
TU	Trade Union
UK	United Kingdom
WC	Wages Council

CHAPTER 1-INTRODUCTION TO THESIS

1.0 Introduction

Workplace disputes are inevitable and their negative impact on organizational effectiveness makes it paramount to manage them well (Dix & Oxenbridge 2004). Whilst workplace dispute resolution procedures represent the first step in managing workplace conflict, the use of tribunal methods incorporating alternative dispute resolution (ADR) such as conciliation, mediation and arbitration provide greater certainty in determining the reasons behind conflicts with an aim of reaching settlement (Tia Schneider & Danenberg 1994). Conciliation is used by tribunals in many countries including Australia and the United Kingdom (UK) and is also a feature of tribunal dispute resolution in Malaysia as an important alternative to the use of the legal system (Thavarajah 2008; Patail 2005; Rashid 2000). In Malaysia, conciliation functions are performed by the Department of Industrial Relations Malaysia (DIRM) under the auspices of the Ministry of Human Resources (MoHR).

Settlement rates for ADR are high in most countries with industrial tribunals. In the UK, the settlement rate for conciliation by the Advisory Conciliation and Arbitration Service (ACAS) was reported at 78 percent in the period 1975 – 1980 (Jones & Dickens 1983). By 2007, successful conciliation of collective disputes by ACAS had risen to 90 percent (ACAS 2006-2007). In New Zealand, the settlement rate of mediation by the Employment Tribunal was 59 percent in 1996-97 (Chapman, Gibson & Hardy 2003). In the year to June 2008, the Department of Labour, New Zealand had completed almost 9000 requests for mediation with a settlement rate of 76 percent (Department of Labour New Zealand 2007/08). Similarly, in Australia the settlement rate for conciliation of termination of employment disputes conducted by the Australian Industrial Relation Commission (AIRC) which is the predecessor to Fair Work Australia (FWA) has been above 70 percent since 1999 and of the applications for relief in respect of termination of employment that were conciliated in the second half of 2009, 76 per cent were settled at conciliation (AIRC 2010). The settlement rate of conciliation at FWA (which officially took over AIRC's role on 1st Jan 2010) for the reporting period of 1st July

2009 – 30th June 2010 was 81 percent (including AIRC half year performance in 2009). In contrast to these nations, the settlement rate for conciliation of individual disputes (mostly claims for reinstatement) in Malaysia has been low, ranging from 33 to 57 percent in the years 2002-08. The settlement of collective disputes was somewhat higher at 67 to 81 percent in the same period (Department of Industrial Relations Malaysia 2009). Whilst the settlement rate for conciliation of individual disputes increased to 71 percent in 2009 partly due to direct intervention by MoHR, it went down again in 2010 to 36.9 percent. The settlement of collective disputes has also reduced slightly to 68.2 percent in 2009 and 67.9 percent in 2010 (Department of Industrial Relations Malaysia 2010). In Malaysia, unsettled disputes are generally referred to arbitration which is a quasi-judicial function performed by the Industrial Court (IC) rather than the tribunal as is the case in Australia. The lack of settlement at conciliation has meant a correspondingly high number of cases are referred to the IC creating heavy judicial workloads and delays in hearing the vast backlog of cases. Despite this, little research has been conducted to investigate the problem or its potential solutions. Hence, the current research attempts to fill this gap and provide an insight into workplace dispute resolution and tribunal dispute resolution of claims for reinstatement in Malaysia in light of the justice theories.

1.1 Background to the research

In Malaysia conciliation is enshrined in various employment statutes including *The Employment Act 1955 (EA 1955),* The *Trade Union Act 1959 (TU Act 1959)* and *The Industrial Relations Act 1967* (*IR Act 1967*). Briefly, the *IR Act 1967* and *TU Act 1959* cover all employees regardless of their wage. However, the *EA 1955* more specifically covers all manual workers regardless of their wage and non-manual workers earning less than RM1,500 (AUD500) per month. The implementation of these pieces of legislation is under the purview of the MoHR and is enforced by three departments: the Department of Labour, the Department of Trade Union Affairs (DTUA) and the DIRM. It is the *IR Act 1967* that forms the basis for Malaysian industrial relations (Gengadharan 1991).

The *IR Act 1967* distinguishes between conciliation of trade disputes (collective disputes) and individual disputes. Trade disputes are dealt with under *Section 18* and the latter under *Section 20*. Trade disputes are defined under *Section 2* of the *IR Act 1967* as: 'any dispute between an employer and his (her) workers which are connected with the employment or non-employment or the terms of employment or the conditions of work of any such workmen'. Although not specifically defined in the *IR Act 1967*, there are two types of individual disputes. The first comprise complaints from employees about interference by an employer in their union membership and second, complaints in respect of claims for reinstatement (Aminuddin 1990). The latter represents the majority of referrals to conciliation at the DIRM in Malaysia.

In many countries including Malaysia, individual conflicts typify employment disputes. For example, in Australia applications for relief in respect of termination of employment constitute a significant proportion of the AIRC/FWA workload. From 2002-2006, claims for termination of employment constituted nearly half of the tribunal's workload running second to extension, variation and termination of agreements. The number of unfair dismissal claims received by the AIRC in 2006-2007 still constituted more than half of its workload despite legislation prohibiting employees from firms employing less than 100 to lodge a claim (AIRC 2006-2007). When FWA commenced in 2010 the prohibition in respect of employees in the category of less than 100 was removed, and the number of cases increased 30 percent (Department of Education, Employment and Workplace Relations 2010).

In Malaysia, when conciliation by the DIRM fails to resolve disputes, the next step in the process is reference to arbitration at the IC under *Section 21* of the *IR Act 1967*. The arbitrated decision binds all disputants and cannot be appealed in any court except on a point of law. The reference of a dispute to arbitration is not automatic as it must go through several administrative steps. Most importantly, the *IR Act 1967* prohibits direct reference to the IC by the disputants themselves. Instead the law empowers the Minister of Human Resources to decide whether the case will progress to the IC on the basis of merit (under *Sub-Section 3* of *Section 20*), in respect of claims for reinstatement and under *Section 26* for trade disputes.

Whilst conciliation and arbitration are considered the primary formal employment dispute resolution mechanisms in Malaysia under the *IR Act 1967*, parties are encouraged to resolve disputes at the workplace level through negotiations and grievance procedures. These are provided for under the Code of Conduct for Industrial Harmony 1975 (the Code) which whilst not a law, provides for a tripartite understanding between employers, employees and the government with the aim to achieve greater industrial harmony in the workplace (Parasuraman 2005). However, the high reference of disputes from workplaces and years of low settlement rates in the tribunal have led to a large backlog of cases for arbitration before the IC. This chapter outlines the research strategy used to investigate the reasons behind the low rate of settlement in conciliation for reinstatement claims and considers the problem in the context of justice theories and the international literature on ADR. The chapter considers the importance of filling the research gap and the contribution and significance of the thesis before moving to consider the research questions and methodology of this work.

1.2 The research gap: workplace dispute resolution in Malaysia

Research on ADR in employment dispute resolution is increasing in countries including the UK, New Zealand and Australia, contributing not only to building knowledge in this area but also helping governments to formulate laws and regulations. For example, in the UK research has been undertaken to investigate the role of workplace disciplinary and grievance procedures and its influence on employment tribunal claims for unfair dismissal (see for example, Earnshaw, Marchington & Goodman 2000) and employment dispute resolution (see for example, Gibbons 2007). In New Zealand however, research on the use of ADR in employment dispute resolution has particularly focused on mediation (see for example, McAndrew 2001; McAndrew 2000; Baylis 1999), while in Australia research into various methods of ADR have also taken place at both workplace and tribunal levels (see for example, Southey 2010; Van Gramberg 2006; Hagglund & Provis 2005).

In contrast, research on workplace dispute resolution, particularly pertaining to disputes over termination of employment in Malaysia, is very limited. Some Malaysian researchers have studied the Malaysian dispute resolution system by analysing the statutes, IC decisions and precedents of appeal cases of the High Court (see for example, Ali Mohamed & Sardar Baig 2009; Muniapan & Parasuraman 2007; Ali Mohamed 2004; Anantaraman 2004; Syed Ahmad & George 2002; Yaqin 1999). Most recently, Daud et al. (2010) investigated grievance handling styles among 302 heads of the departments from 12 branches of a telecommunication company in East Malaysia. Many others have focused on grievance management at the workplace looking at the perspectives of the employees or their unions as well as employers (including their representatives) (Daud et al. 2010; Tumin 2005). Given the low conciliation settlement rates in Malaysia for workplace disputes, the high rates of referral to arbitration and the opportunity to learn from successful international experience in workplace dispute resolution, this thesis addresses the research gap and offers a way forward in theory and practice for workplace dispute resolution and tribunal conciliation in Malaysia. Hence, in order to fill this gap this research examines dispute resolution in the workplace and the DIRM from the perspective of the third parties (Conciliators and Arbitrators) as well as employers whose decisions to dismiss have been disputed by their employees.

1.3 Contribution to knowledge & statement of significance

The findings of this research will be important to researchers, legal practitioners, and policy makers because it provides new perspectives in relation to workplace dispute resolution by the DIRM with regard to its conciliation functions and its mission to maintain industrial harmony in the workplace. Specifically the study makes a significant contribution to knowledge in terms of:

- being the first large scale study of tribunal conciliation in Malaysia which contributes to a better understanding of employment dispute resolution processes in Malaysia;
- identifying reasons for high reference of claims for reinstatement from the workplace and the low tribunal settlement rates;

- contributing to the theory of organisational justice and conciliation in tribunal settings in Malaysia; and
- contributing to the international literature on workplace dispute resolution.

Because of its applied nature, this study will make several practical contributions which will focus on the operation of tribunal conciliation through a better understanding of how to improve settlement rates. Specifically this research will be beneficial in its contribution as follows:

- It will generate recommendations and models to reduce the backlog of cases before the IC;
- It will benefit the business community in Malaysia because it will assist in streamlining cases through the conciliation process and contribute to a greater understanding of how disputes may be better handled by the parties themselves; and
- It will utilise a novel methodology which will enable stakeholder input at all levels of the industrial dispute resolution process. This will enable an understanding of different viewpoints and contribute to a wide range of recommendations and insights.

1.4 Purpose and research questions

The aim of this research is to investigate the reasons behind the low settlement rate of conciliation and the high rate of reference to arbitration. Specifically, the research questions are:

1. What are the key factors behind the referral of claims for reinstatement from the workplace to tribunal conciliation?
2. What are the key reasons for the low settlement rate of tribunal conciliation for reinstatement claims and subsequent high rates of referral to arbitration?
3. What are the strategies to encourage claims for reinstatement to be resolved at the workplace?
4. What are the strategies to reduce the backlog of claims for reinstatement before the IC.

1.5 Overview of research methodology

As further detailed in Chapter 4, this research utilises a predominantly qualitative approach based on surveys and interviews as well as a wide range of international literature and a search of internal DIRM documents in order to investigate dispute resolution from the workplace to conciliation at the DIRM, and subsequently at arbitration in the IC. Four empirical sources are used to contribute to the knowledge on dispute resolution, in the Malaysian context. First, a survey was deployed in the months of July and August 2009 to collect information from the Conciliators of DIRM. The questionnaires were distributed to 82 available Conciliators from a total of 88, with 42 returned (51.2 percent return rate).

The second empirical source of data was from an exit survey conducted with employers who attended conciliation at the DIRM and arbitration at the IC in the months of July and August 2009. This survey was conducted at five branches of DIRM and four branches of the IC in five of the 14 states in Malaysia identified to have the highest number of disputes over dismissal. A total of 142 questionnaires were received with 82 usable for analysis.

The third empirical source was a set of in-depth interviews with Conciliators of DIRM in the months of July and August 2009. These Conciliators were selected based on their availability during visits made at five DIRM offices. They were contacted using telephone and email prior to the visit in order to schedule interview times. A total of 23 Conciliators were interviewed and all were digitally recorded.

The fourth empirical source was a set of in-depth interviews with Arbitrators of the IC. They are responsible for resolving disputes which have failed to be resolved through conciliation at the DIRM. Eight Arbitrators were interviewed. Descriptive analysis of the surveys was produced using SPSS software, while open ended responses were analysed using Microsoft Excel to identify common themes. Transcriptions of all the 29 interviews were done using Sony Digital Voice Editor 2, and analysed using NVivo 8. Themes were developed using two methods, inductive coding (based on the framework of the research) and emerging themes from interview transcripts.

1.6 Limitation of the research and scope

Although this thesis was able to uncover many aspects of the employment dispute resolution system in Malaysia particularly on disputes over termination of employment, like all research it has several limitations. First, the scope of this research was focussed on individual disputes pertaining to dismissal of employees in the private sector. It did not cover employees employed in the public sector as they do not come under the coverage of the main legislation, the *IR Act 1967* and *EA 1955*. Although the public sector employees may form a union under the *TU Act 1959*, their terms and condition of employment as well as dispute resolution processes are governed by the 'Government General Orders'. Hence, findings of this research do not in any way reflect the system or practice of public sector employers.

Second, as discussed in Section 4.5 this research covers five of the 14 states in Malaysia. The justification for selecting these five states were because they have the highest numbers of dismissal disputes of all Malaysia's states so to some extent they represent a convenience sample. Additionally, other states were not included because of the researcher's time constraints due to the geographical distances of the DIRM offices. Thus the findings may not reflect the dispute resolution process of the other nine states.

Third, although the researcher distributed surveys to employers as they exited their conciliation hearings at the DIRM and arbitration at the IC, he did not provide surveys to employees or their representatives as they exited the hearing. This was because of limited resources such as translation services. Surveys could not be sent to these dismissed employees following their hearing because they had left their employment and records of their forwarding addresses were not publicly available. Further, the research did not include interviewing employers, again because of the time and resource constraints of the researcher. As a result, the findings of this thesis are limited to the views provided by employers (via the survey) balanced by the views of Conciliators and Arbitrators. Future research could consider surveying employees using the exit survey.

1.7 Overview of the thesis

This thesis is divided into nine chapters. Chapter 1 has introduced the key issues around the use of the ADR processes of conciliation and arbitration in settling disputes over termination of employment in Malaysia including the lower success rate of conciliation and the high referral to arbitration. This chapter has also briefly explained the background of the research, its contributions and significance, its purpose, an overview of the methodology used and its limitations.

Chapter 2 and 3 present the literature review for the thesis. Chapter 2 discusses the literature on employment dispute resolution systems. This chapter starts a discussion of the development of the UK employment disputes resolution system (in which Malaysia's system has its roots), followed by the Australian and New Zealand systems (having a similar UK origin) and finally the Malaysian system. While these three countries have evolved their employment dispute resolution systems quite significantly, the Malaysian system has not changed much in tandem with changes in employment relationship, particularly the rise in individual disputes.

Chapter 3 discusses the concept of organisational justice and dispute resolution processes. The three forms of justice: distributive, procedural and interactional justice are considered in relations to resolving employment disputes in the Malaysian workplaces, as well as in conciliation at the DIRM.

Chapter 4 explains the predominantly qualitative approach to methodology adopted in this research. This chapter details the method used in collecting data using surveys and interviews. It explains the justification of conducting Employer's Survey and another of Conciliators from the DIRM. It also explains process of interviews conducted with the Conciliator and Arbitrators of the IC in order to gather information pertaining to employment dispute resolution in Malaysia. Finally, the chapter details the analysis of survey and interview data using SPSS and NVivo 8.

Chapter 5 reports the findings of the first research question: What are the key factors behind the referral of claims for reinstatement from the workplace to tribunal conciliation? These findings are based on the two surveys and the interviews mentioned above. The findings suggest that the effect of laws and regulations and search for justice are the key factors driving the referral of claims for reinstatement. The chapter finds that only large workplaces have the knowledge and capabilities as well as the determination to resolve disputes at the workplace while employees from small and medium workplaces dominate referrals to tribunal conciliation. The chapter argues that the lack of a hurdle in the industrial relations system has resulted in many employees easily filing their claims for reinstatement at the DIRM even when they are not genuinely seeking reinstatement. The chapter also describes the emergence of a compensation culture in which employees are driven to conciliation in the hope of getting higher compensation. Finally, the chapter finds that many employers have not provided sufficient procedural justice to their employees at the workplace, resulting in them seeking justice for unfair dismissal at the DIRM.

Chapter 6 reports the findings of second research question outlined in Section1.4 above. In answering the second research question of this thesis relating to the key reasons for low settlement rate of tribunal conciliation for reinstatement claims and subsequent high rates of referral to arbitration, three factors were uncovered: the effect of Ministerial recommendations; the chilling effect of arbitration; and the effect of justice during the conciliation process at the DIRM.

Chapter 7 reports the findings of the third research question on the strategies to encourage claims for reinstatement to be resolved at the workplace findings five specific areas to be addressed. These are: introducing a pre-emptive process at the DIRM; making in-house mechanism compulsory; setting up an independent panel at the workplace; giving recognition and reward to encourage good practices at the workplace; and providing Conciliators with some form of authority to screen out vexatious and frivolous claims. This Chapter also outlines the findings of the fourth research question on the strategies to reduce the backlog of claims for reinstatement before the IC finding five key areas to be implemented. These are: addressing the shortcoming of the laws

and regulations; enhancing the effectiveness of conciliation mechanism; better management of human resources; case management; and improving the disputes resolution process.

Chapter 8 discusses the findings in relation to the literature provided in Chapters 2 and 3, and particularly in relation to the dispute resolution systems and justice theories related to the process of resolution of disputes over claims for reinstatement at the workplace and tribunal conciliation.

Chapter 9 concludes the thesis with an emphasis on the need to ensure that workplace dispute resolution be improved in Malaysia particularly in relation to disputants being able to utilise dispute resolution mechanisms at their workplaces rather than relying on the external mechanisms of conciliation and arbitration. It also highlights the lessons learned from the disputes resolution systems of countries discussed in this thesis that have evolved significantly compared to Malaysia.

1.8 Chapter summary

This Chapter has set the foundations of the thesis. The use of ADR processes particularly conciliation and arbitration in resolving employment disputes in Malaysia was discussed. The success rate of these processes in the UK, Australia and New Zealand highlight the need for research on more effectively resolving employment disputes in Malaysia. The chapter provided the overview of the research methodology, its limitations and overview of the whole thesis.

The next chapter discusses the employment dispute resolution systems of the UK, Australia and New Zealand which share similar histories to Malaysia. Chapter 2 focuses on the development of employment dispute resolution systems, the institutions and the respective legislations found in these countries before discussing the development of workplace dispute resolution in Malaysia.

CHAPTER 2-EMPLOYMENT DISPUTE RESOLUTION SYSTEMS

2.0 Introduction

The previous chapter outlined the aims and objectives of this thesis. The background to this thesis lies in the operation of the Malaysian industrial relations system. This system has its roots in the British system and has since evolved through adapting innovations from other nations. This chapter commences with an overview of ADR in employment dispute resolution particularly in the use of conciliation and arbitration under statutes, with emphasis on the evolution found in the industrial relations systems of the UK, Australia and New Zealand. The chapter then moves to a discussion of the Malaysian system and introduces the growing pattern of individual disputes which form the subject of this thesis. Finally, the chapter considers the various Malaysian laws pertaining to termination of employment.

2.1 Resolution of employment disputes using Alternative Dispute Resolution processes.

Alternative dispute resolution refers to a range of processes and techniques used in resolving disputes without the need for litigation in court. ADR processes have been increasingly used in resolving employment disputes, particularly in non-union workplaces (Colvin, Klaas & Mahony 2006). In many countries such as the UK, Australia and New Zealand, ADR has been applied successfully as the first step to resolve disputes, and helped to delay or avoid disputants resorting to formal court or tribunal systems (Van Gramberg 2006a). In many of these processes, representatives such as unions and employer representatives are highly involved in the process of resolving the disputes.

ADR processes which are commonly used in Malaysia include mediation, conciliation, adjudication and arbitration in the field of employment relations (Abraham 2006). However, ADR and its processes are not defined in Malaysian employment legislation. For example, although the *IR Act 1967* provides for conciliation and arbitration in

resolving employment disputes (including disputes on termination of employment), it provides no definition for these processes. Since this thesis is concerned with the ADR methods of mediation, conciliation and arbitration in resolving employment disputes, they must be defined for the purpose of this thesis before discussing the resolution of employment disputes in the UK, Australia, New Zealand as well as Malaysia.

In Australia a central institution known as the National Alternative Dispute Resolution Advisory Council (NADRAC) has been established to coordinate and provide consistent policy advice to the Federal Attorney-General on the use of ADR (NADRAC 1997). NADRAC categorises dispute resolution processes into three components: facilitative, advisory and determinative (NADRAC 2011d). Briefly, mediation falls into the facilitative category, conciliation falls into the advisory category and arbitration falls into the determinative category. In Malaysia, although employment dispute resolution processes are not categorised in this way, the processes of mediation, conciliation and arbitration are performed in a way similar to the procedures outlined by NADRAC (2011a) in terms of the degree of intervention of third parties involved. The thesis adopts this set of definitions for the processes and the next section discusses mediation, conciliation and arbitration in light of the NADRAC definitions and other relevant research literature.

2.1.1 Mediation

Earlier researchers such as Folberg & Taylor (1984) defined mediation as a process in which disputants with the help of a neutral third party systematically isolate issues in disputes to find options that could lead to a settlement of such disputes. Mediation has also been combined with other methods of ADR such as arbitration to lead to a hybrid known as Med-arb (Kovach 1994). In Australia however, mediation refers to a third party (mediator) without a determinative role but who may advise parties on the process (NADRAC 2011c) As this definition reflects similar process of mediation used in Malaysia, it has been adopted to guide the thesis. NADRAC (2011c) defined mediation as:

> Mediation is usually considered to be a process in which the participants, with the assistance of the dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator is usually regarded as having a facilitative role and will not provide advice on the matters in dispute. The mediator may have no particular experience or expertise in the subject area of the dispute but should be expected to be experienced and have expertise in the mediation process itself (NADRAC 2011c).

In Malaysia the use of mediation is more prominent in commercial disputes such as insurance claims. Specifically, the establishment of the Malaysian Mediation Centre (MMC) on 5 November 1999 by the Bar Council of Malaysia uses mediation as alternative to litigation by the court (Patail 2005). Nonetheless, suggestions for mediation to be used in resolving disputes in Malaysia have come from various parties including the Attorney General of Malaysia and the Minister of Human Resources (Menon 2010; Ali Mohamed & Sardar Baig 2009; Hui & Ali Mohamed 2006). However, this has not yet materialised and has remained a voluntarily mechanism which can be conducted by the Chairman of the IC with the consent of disputants to resolve disputes prior to arbitration (Menon 2010; Ali Mohamed & Sardar Baig 2009). As a result, disputants continue to prefer to resolve disputes through arbitration (Ali Mohamed & Sardar Baig 2009).

2.1.2 Conciliation

Noone (1996) stated that conciliation is a process that reflects the intervention of governments or tribunals working under given statutes and legal authorities into employment disputes. The usage of this term can be seen in the employment legislation of many countries including the *IR Act 1967* (Malaysia), *Fair Work Act 2009* (Australia) and *Employment Act 2002 and Employment Rights (Dispute Resolution) Act 1998* (UK). In these contexts conciliation signifies the authority given to government officials known as Conciliators to conduct conciliation between parties in dispute. In many publicly funded institutions such as tribunals conciliation is a practice where a

third party conciliator acts as neutral in order to intervene into a dispute between people. In Malaysia the authority for the DIRM to use conciliation is provided in *Section 18* (trade dispute) and *Section 20* (claims for reinstatement) of the *IR Act 1967*.

Conciliation and mediation are often labelled as similar concepts where each occupies different ends of the same spectrum of third party activity from passive (mediation) through to active (conciliation) (Van Gramberg 2006a). This thesis adopts the NADRAC definition to guide the direction of the research. NADRAC (2011b) defined conciliation as a process where:

> Conciliation is usually considered to be a process in which the participants to a dispute, with the assistance of a third person (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator has an advisory role, but not a determinative one. The conciliator is often legally qualified or has experience with, or professional or technical qualifications in, the subject area of the dispute that they are conciliating. The conciliator may suggest and/or give expert advice on possible options for resolving the issues in dispute and may actively encourage the participants to reach an agreement (NADRAC 2011b)

2.1.3 Arbitration

In Malaysia the use of arbitration in resolving disputes is not new. The first piece of arbitration legislation was the *Arbitration Ordinance XIII of 1809* enacted based on the British legal system to resolve disputes in trade and commerce (Abraham 2008). The Ordinance was replaced with the *Arbitration Act 1952* which follows the UK *Arbitration Act 1952* used in resolving commercial disputes (Bukhari 2003). This Act was repealed with the enactment of the *Arbitration Act 2005* modelled along the English *Arbitration Act 1996* and the *New Zealand Arbitration Act 1969* (Abraham & Baskaran 2008). Most recently the Act was amended with the introduction of *Arbitration (Amendment) Act 2011* which came in force on 1st July 2011. Its application remains

applicable to disputes over trade and business, not employment disputes (Kuala Lumpur Regional Centre for Arbitration 2011). Similarly, the Kuala Lumpur Regional Centre for Arbitration (established in 1978 as a non-profit and non-governmental organization), which provides arbitration services in Malaysia only deals with disputes pertaining to trade, commerce and investment and not employment disputes (Kuala Lumpur Regional Centre for Arbitration 2011).

Whilst disputes relating to trade, commerce and investment are handled under the above Act, arbitration of all types of employment disputes is covered under the *IR Act 1967*, to be performed by the Chairmen of the IC (Ali Mohamed & Sardar Baig 2009). This court is established under the Act and is empowered to arbitrate trade disputes and claims for reinstatement (Aminuddin 2009). Because the *IR Act 1967* and the *Arbitration Act 2005* have no definition for 'arbitration', this thesis has adopted the definition provided by NADRAC Australia due to similarity in terms of its usage in Malaysia. In Australia arbitration is categorised by NADRAC (2011) under the determinative category, which involves third parties deciding the outcome of disputes. These third parties can also conduct formal hearings and make determinations, which may be enforceable. The NADRAC (2011a) definition for arbitration is:

> Arbitration is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination. Arbitration is particularly useful where the subject matter of the dispute is highly technical, or the rigours of court-like procedure are desired with greater confidentiality. In such circumstances, a person who has expertise in the field may act as arbitrator (NADRAC 2011a).

The processes of mediation, conciliation and arbitration are commonly used as the key tribunal mechanisms to resolve employment disputes in the UK, Australia and New Zealand. The next section discusses employment dispute resolution in these countries.

2.2 Industrial Dispute Resolution in the United Kingdom

The genesis of modern industrial dispute resolution in the UK emerged in the period from 1880 to 1900 marked by a set of important developments in British industrial relations. These included a greater acceptance of collective bargaining, an increase in legal regulation of employment conditions and greater recourse to the courts (Brodie 2003). The enactment of the *Conciliation Act 1896* marked the government of the day's involvement in employment relations which then laid the foundation for the modern conciliation and arbitration system in UK (The National Archives 2008a; Singh 1995). The *Conciliation Act 1896* itself was a response to the recommendations of a Royal Commission established in 1891 to improve industrial relations by introducing voluntary tribunal conciliation (Brodie 2003). The *Conciliation Act 1896* survived until it was repealed in 1911.

Between 1900 until the 1930s, the industrial climate in Britain began to change with issues of compromise and conflict arising from the emergence of the mass trade union movement (Brodie 2003). This, in turn contributed to a situation of an overtly conflictual phase of industrial relations especially during the period between 1910 to 1926 which, together with the outbreak of the First World War, drew a greater government intervention into industrial disputes (McIvor 2003). The enactment of the *Trade Union and Trade Disputes Act 1927* was a notable and controversial piece of legislation which provided the power for the government to intervene in the event of strikes which had negative impacts on the community. This Act was repealed by the Labor Government in 1945. Hence, by the late 1940s and early 1950s once again a voluntary system prevailed in the UK with minimum legal regulation compared to other countries (Mizon 2007). This period witnessed harmonious industrial relations as a result of comprehensive dispute resolution procedures established at the industry level (Kessler & Palmer 1996).

From the 1960s, a further increase in industrial regulation took place in UK (Mizon 2007). This in part was triggered by the increasing number of unofficial and unconstitutional strikes in the major industries of vehicle, shipbuilding, docks and

engineering (Kessler & Palmer 1996). Industrial action, often in reaction to dismissal of employees, was reportedly taken as a first rather the last resort (Kilpatrick 2003). The number of these unofficial disputes increased to such an extent that by the mid-1960s they comprised 95 percent of all disputes (Maguire 1996). In 1965 the government established the 'Donovan Commission' to review the industrial relations system (Kessler & Palmer 1996). The Commission completed its report in 1968 with several recommendations which included a greater use of collective bargaining in wage setting and conditions of employment with minimum legal intervention (Esplin 2007; Kessler & Palmer 1996). The incumbent labour government adopted many of the Donovan Commission's recommendations through proposed legislation, which was labelled as coercive and hence, faced much criticism from the trade unions (Hyman 2003). When the new conservative government took power in 1971, it adopted an even more interventionist approach, including the enactment of the *Industrial Relations Act 1971* (*IR Act 1971)*, which established the Industrial Tribunal to provide an easily accessible, speedy, informal and inexpensive dispute resolution mechanisms, including disputes on claims for unfair dismissal (Esplin 2007). Although the *IR Act 1971* emphasized the collective bargaining and the role of trade unions, it was argued to considerably limit unions by restricting strike immunities and imposing heavy penalties on unfair industrial practices (Hyman 2003). The Donovan Commission's recommendation also brought about the establishment of a permanent Commission on Industrial Relations (CIR) to support and accelerate the development of systematic negotiation and disputes resolutions procedures (Hyman 2003; Kessler & Palmer 1996). After almost five years, the CIR was dissolved in 1974 leaving a significant history of promoting collective bargaining and good industrial relations on a voluntary basis (Wood 2000; Kessler & Palmer 1996).

In 1974 the Labour government repealed the *IR Act 1971* and introduced the *Trade Union and Labour Relations Act 1974 (TULR Act 1974)* and a year later the *Employment Protection Act 1975 (EP Act 1975)* was enacted (Hyman 2003; Wooden & Sloan 1998). The *TULR Act 1974* introduced three Codes of Practice, two of which were related to collective bargaining and union activities, while the third Code outlined disciplinary and dismissal procedures (Hawes 2000). The *EP Act 1975* was significant

as it provided various employment rights to employees as well as statutory provisions for union recognition, which, in the event of any dispute, could be referred to conciliation provided by ACAS, (then) a government institution established under the same Act (Dickens 2000; Wood 2000).

The Thatcher Government reforms made even further changes to workplace dispute resolution in the UK (Wooden & Sloan 1998). Her government introduced the *Employment Act 1980 (EA 1980*), which neutralised the issue of reasonableness in unfair dismissal cases and increased the qualifying period for employees to two years employment (Miller & Mairi 1993). These reforms transformed the industrial relations system by: decentralising the pay system; growing bargaining at plant/factory level; as well as increasing individual employment arrangements (Wooden & Sloan 1998). This liberalisation policy was to reduce the burden to businesses in order to achieve a more competitive economy (Miller & Mairi 1993). There was also no provision for collective bargaining as an enforceable mechanism nor any provision for dispute resolution procedures (Mizon 2007). It was argued that the Thatcher government's legislation considerably weakened the unions' role in the country (Undy 1999). This was evident with a decline in union density where the number of unionised employees reduced from 13 million in 1979 to 7.8 million in 1998 (Kilpatrick 2003). Although the incidence of the industrial action reduced, it was gradually replaced by a growing pattern of individual disputes pertaining to statutory rights such as equal pay, sex discrimination and unfair dismissal claims. In 1996 the *Employment Rights Act 1996* (*ERA 1996*) was introduced to codify all matters pertaining individual rights including unfair dismissals in the UK (Catherine 2004). This, coupled with the changes in dispute resolution, has helped entrench the role of industrial tribunals such as the Employment Tribunal (ET), Employment Appeal Tribunal (EAT) and ACAS (Singh 1995).

The Blair government introduced various legislative reforms including the enactment of the *Employment Relations Act 1999 (ERA 1999), Employment Act 2002 (EA 2002)* and the *Employment Relations Act 2004 (ERA 2004)* coupled with some 80 other statutory instruments (Smith & Morton 2009). The *ERA 1999* introduced many changes to individual rights including the rights for employees to be accompanied in disciplinary

and grievance hearings. The *ERA 2004* was enacted following the review of the *ERA 1999* and mainly deals with the issue of trade union recognition. The *EA 2002* on the other hand, was significant in that it reformed the ET and introduced cost orders. It provided the power to ET to award costs against either party and against a party's representatives for conducting any proceeding in an unreasonable manner, with an exception given to representatives from non-profit organizations such as trade union officers. The *EA 2002* also established the *Employment Act 2002 (Dispute Resolution) Regulations 2004*, which outlined two important mechanisms of dispute resolutions known as: Statutory Dismissal and Disciplinary Procedures (SDDPs) and Statutory Grievance Procedures (SGPs).

These two frameworks were established to promote the resolution of employment disputes in the workplace and were applicable to all employers including those employing less than 20 employees. Employees, including those who have been dismissed from the workplace, were also obliged to use the procedures. The Blair government also varied the qualifying period for unfair dismissal from two years to one year (see The Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 1999). As noted by Pollert (2005), the justification of this new hurdle was to avoid employees making unnecessary and vexatious claims to the ET. Although the lesser qualifying period provides more employees protection from unfair dismissal and could lead to increase claims at the tribunal, the new system however, is being accompanied by the requirement of in-house mechanism to avoid disputants from easily filing their claim through the tribunal system (Hepple & Morris 2002; Jonathan 1999). *The EA 2002* provision on the minimum procedure to be followed imposes a requirement on employers and employees to apply such procedure in resolving dismissal disputes (Hepple & Morris 2002). The *EA 2002* presumed that, with the existence of effective disciplinary and grievances procedures, there would be fewer employment disputes (Sanders 2009). Dispute resolution procedures were also put in place in response to a 1998 survey, which found that that 64 percent of ET applications came from employees who had not attempted to resolve the problem at the workplace.

In 2007 another reform took place in response to an independent review report on employment dispute resolution in Great Britain, led by Michael Gibbons. Gibbons recommended that the role of mediation be increased as a way of resolving employment disputes in the future (Gibbons 2007). Other key recommendations included: to ensure that the ET, at its discretion, take into account reasonableness of behaviour and procedure, when making awards and cost orders; introduce a new simple process to settle monetary disputes without the need for tribunal hearings; increase the quality of advice to potential claimants and respondents through an adequately resourced helpline and the internet; and offer a free early dispute resolution service, including, where appropriate, mediation. Prior to the reform of the prevailing disputes resolution mechanism, the government published a consultation document with the following aims: raising productivity through improved workplace relations; access to justice is ensured for employees and employers; the cost of resolving disputes is reduced for all parties; and disputes are resolved swiftly before they escalate (Department for Business Enterprise & Regulatory Reform 2007). This reform occurred with the enactment of the dispute resolution procedures of the *Employment Act 2008 (EA 2008)* (Sanders 2009). The *Act* repealed the *Employment Act 2002 (Dispute Resolution) Regulations 2004*, which were argued to be lengthy and to have generated a complex body of case law (Sanders 2009). The new ACAS Code replaced the SDDPs in April 2009 as a measure to remove overemphasis on procedures and strike the balance between the procedure and merit of cases (Sanders 2009). The government's policy in making these reforms was to ensure that emphasis be made on resolving individual grievances at the workplace and not through legal enforcement (Pollert 2005). Most recently the government had increased the qualifying period for unfair dismissal to two years (see The Unfair Dismissal and Statement of Reasons for Dismissal to take effect on 6 April 2012 (Variation of Qualifying Period) Order 2012). The continuous series of reforms to the UK industrial relations system and, in particular the mechanisms for the resolution of workplace disputes has been dynamic, political and ideological. Nevertheless, the preceding section highlights the appetite for change in the country for legislative change in employment relations – something which has not been a feature of Malaysian industrial relations which is discussed later in this chapter. This section now turns to consider the development of tribunal dispute resolution in the UK, which has arguably

been a key influence on the development of dispute resolution in Australia, New Zealand and Malaysia.

2.2.1 The origin of tribunal conciliation services and the establishment of the Advisory, Conciliation and Arbitration Services.

As discussed above, the tribunal conciliation service in the UK can be traced back to 1896 when it was the function of the Commercial, Labour and Statistics Department of the Board of Trade to investigate industrial disputes and promote voluntary conciliation under the *Conciliation Act 1896* (The National Archives 2008a). This also marked the beginning of public funding of employment dispute resolution services, where conciliation was provided as a voluntary mechanism made available for the parties in disputes. This was used in the absence of mandated internal workplace mechanisms (Mizon 2007). From 1911 until 1917 the service was exercised by a newly created department called the Chief Industrial Commissioner's Department. When the Ministry of Labour was created in January 1917, it took over the function under the Division's Wages and Arbitration Department. In 1921, the Wages and Arbitration Department was renamed the Industrial Relations Department. In 1968 when the Ministry of Labour was renamed the Department of Employment and Productivity, the Industrial Relations Department was incorporated into a division known as the Industrial Relations Division (The National Archives 2008a).

During the period of the 1960s and early 1970s there was great criticism of the conciliation service in the UK (Mizon 2007). Consequently, following a recommendation from a meeting of the Confederation of British Industry and the Trades Union Congress in May 1972, the Conciliation and Arbitration Service was established in September 1974. The service was later separated from the government in 1974 and in January 1975 it was renamed the Advisory, Conciliation and Arbitration Service (ACAS). With effect from January 1976, ACAS was made a statutory body under the *Employment Protection Act 1975* (The National Archives 2008b). In 1992 it was constituted under the *Trade Union and Labour Relations (Consolidation) Act 1992* as an independent institution free from government intervention. Indeed, Part VI, *Section*

247 (3) of the said Act stated that it is not subject to any directions of any kind from any Minister as to the manner in which it is to exercise its functions under any enactment. ACAS itself notes that it has managed to keep its reputation as being neutral, impartial, reliable and reputable among those who have used the service (ACAS 2009)

ACAS is governed by an independent council headed by a chairperson and eleven employer, trade union and independent members. Its administrative activities, however, are managed by a Management Board headed by a Chief Executive with several national and regional directors. With its headquarters in London, it has 11 main regional centres across England, Scotland and Wales and employs over 800 staff. The main stated objective of ACAS is to improve organisations and working life through better employment relations, and prevention of disputes (ACAS 2008). This is implemented through the issuance of code of practice, advice, inquiry and the use of ADR as a method of disputes resolution (ACAS 2006). ADR services include conciliation, mediation and individual arbitration schemes. While conciliation is mainly conducted for cases referred by the ET, fee for service mediation is also provided to resolve disputes between employees and employers or between individual colleagues or groups of colleagues, whose disputes do not involve an ET claim. ACAS sees itself as an affordable alternative to the ET through its individual arbitration scheme and had arbitrated 61 such cases by 2007, in which the remedies for unfair dismissal cases were consistent with the relevant ET award (ACAS 2006-2007). By 2009 ACAS conciliated 74,777 individual disputes from the ET. The number of unfair dismissal cases was 31,534 constituting 42 percent of the cases conciliated. Out these cases 51.6 percent were settled, 25.8 percent withdrawn and 21.6 percent were referred back to ET for hearing (Table 2.1). Due to changes in ACAS annual report in the reporting year 2009/10, statistics on unfair dismissal cases have changed where conciliations cleared are categorised into three 'tracks': fast, standard and open (ACAS Annual Report & Accounts, 09/10 page 47). With conciliation of unfair dismissal grouped under the standard track, ACAS reported that it has managed to settle 17,993 (48.8 per cent) cases through conciliation and saved potential hearing days by 74.3 percent. Overall ACAS reported a conciliation resolution rate of 70.8 percent (excluding cases struck out by the Tribunal, since these are generally not susceptible to conciliation).

Table 2.1 Individual disputes cleared by ACAS 2005/06 – 2008/09

Year (1st April – 31st March)	2005/06	2006/07	2007/08	2008/09
Conciliation unfair dismissal cases cleared (gross)	30,089	33,568	30,458	31,534
Settled through conciliation	11,989 *(39.8 %)*	13,320 *(39.7 %)*	13,187 (43.3 %)	16,282 (51.6 %)
Withdrawn	10,631 *(35.3 %)*	11,510 *(34.3 %)*	10,590 *(34.8 %)*	8,131 *(25.8 %)*
Employment Tribunal Hearing	7,469 *(24.8 %)*	8,738 *(26.0 %)*	6,681 *(21.9 %)*	7,121 *(22.6 %)*
Other cases cleared (through conciliation, withdrawn and reference to ET)	42,439	37,455	37,510	43,243
Total cases cleared	72,528	71,023	67,968	74,777

Source: ACAS Annual report & accounts 2008/09 (page 41)
ACAS Annual report & accounts 2007/08 (page 61)

Note 1: Statistics are based on gross cases cleared by ACAS to be consistent with the year preceding 2008/09.

Note 2: Other disputes include wages act, breach of contract, redundancy pay, sex discrimination, disability discrimination, working time, equal pay, national minimum wage, age discrimination and others.

From April 2009 ACAS has also been offering a new conciliation service called Pre-Claim Conciliation (PCC), which is a proactive measure to conciliate disputes which have a potential of going to the ET, but have not been lodged. It is a free service given to employers and employees, who have not been able to resolve disputes on their own. PCC has provided the means for a disputes resolution mechanism to small firms, which often lack of human resources expertise. The PCC pilot project done in 2008 had attracted 903 cases and 60 percent were conciliated with half settled within 3 weeks (ACAS 2006-2007). Latreille, Latreille & Knight (2007) noted that ACAS has been judged to effectively perform its functions, particularly its conciliation services. It was also revealed that ACAS had saved the UK economy £800 million a year in which £154 million was contributed by its individual disputes activity. It has also managed to reduce employers' potential costs by £223 million a year (Meadows 2007). In 2008/09 it has saved the taxpayer from potentially funding 76 percent of Tribunal Hearing Days (ACAS 2009). More recently, in the reporting period of 2009/10, ACAS received 6,293

unfair dismissal cases for PCC with 26.8 percent settled directly by ACAS conciliation efforts, resulting in a reduction of ET claims of 69.4 percent (Acas Annual Report & Accounts, 09/10).

2.2.2 The Employment Tribunal

The Employment Tribunal (ET) (then known as the Industrial Tribunal) was first created by the *Industrial Training Act in 1964*, whose main function then was to hear appeals against Industrial Training levies. As a result of the Donovan Commission's report in 1968 and subsequent enactment of the *Industrial Relations Act 1971* (*Statutory unfair dismissal protection 1971*) it changed to its present name with a much wider scope to include hearings of unfair dismissal cases (ACAS 2006; Employment Tribunal Service 2006). Since its inception it has been placed under various institutions: The Ministry of Labour, Department of Employment, Department of Education and Employment, Department for Trade and Industry and Department for Constitutional Affairs (Employment Tribunal Service 2006). When the role of the Department for Constitutional Affairs was transferred to the newly created Ministry of Justice in May 2007, the ET was placed under its jurisdiction until the present. It is a specialist court chaired by a legally qualified Chairman with two lay members: one from the employees or trade unions and another from the employers (ACAS 2006).

The ET accepted a total of 151,000 claims in 2008/09 that fell under its jurisdiction such as equal pay, breach of contract, unfair dismissal and so forth. Although there has been an overall decrease in the number of claims received compared to 2007/8, the number of unfair dismissal cases had risen by 29 percent (Employmnet Tribunals 2009). The total number of unfair dismissal cases heard in 2008/09 was 9,319 as compared to 8,312 in 2007/08 representing an increase of 12 percent and a total of 25.6 percent increase from that of 2005/06. The number of unfair dismissal cases upheld was between 42.2 to 46.1 percent between from 2005 to 2008 with compensation as the most popular remedy. More recently in the 2009/10 reporting period the ET handled 10,899 unfair dismissal cases with 5,199 cases (47.7 percent) upheld and 26.6 percent of the cases being awarded compensation (Table 2.2).

Table 2.2 All unfair dismissal cases disposed of at hearing 2005/06 – 2009/10

Year (1st April – 31st March)	2005/06	2006/07	2007/08	2008/09	2009/10
Cases dismissed :					
At preliminary hearing (classified as out of scope in 2006/07 & 2005/06)	896 *(12.1 %)*	978 *(11.6 %)*	1,180 *(14.2 %)*	1,012 *(10.9 %)*	1,200 *(11.0 %)*
Unsuccessful at hearing (classified as other reasons 2006/07 & 2005/06)	3,098 *(41.8 %)*	3,567 *(42.4 %)*	3,341 (*40.2 %)*	4,372 *(46.9 %)*	4,500 (*41.3 %)*
All cases dismissed	3,994	4,545	4,521	5,384	5,700
Cases Upheld :					
Reinstatement or reengagement	8 *(0.1 %)*	23 (0.3 %)	8 (0.1 %)	7 (0.1 %)	6 *(0.1 %)*
Remedy left to parties	255 *(3.4 %)*	256 *(3.0 %)*	141 *(1.7 %)*	132 *(1.4 %)*	93 *(0.9 %)*
Compensation	2,410 *(32.5 %)*	3,309 *(39.3 %)*	2,552 (*30.7 %)*	2,488 (*26.7 %)*	2,900 (*26.6 %)*
No award made	752 *(10.1 %)*	282 (3.4 %)	1,090 (*13.1 %)*	1,308 (*14.0 %)*	2,200 *(20.1 %)*
All cases upheld	3,425	3,870	3,791	3,935	5,199
All cases proceeding to hearing	7,419	8,415	8, 312	9,319	10,899

Source: Employment Tribunal and EAT Statistics (GB) 2006/07; 2007/08; 2008/09; 2009/10
Employment Tribunal Service, Annual Report and Accounts 2005-06

Although its aim is to provide claimants with an avenue to bring their cases in a non-adversarial setting, the service has been criticised as being costly to employers and has created a compensation culture (Trevor 2004; Dickens 2002). Despite this, it has been argued that employees' access to this justice system has been slowly eroded (ACAS 2006). Nonetheless, despite the flaws (which ACAS claims are continuously being improved), ACAS (2006) sees the ET system in Britain offering a preferable alternative for disputes settlement compared to the more legalistic approach found in Europe such as in Germany and France (ACAS 2006). The decisions of ET bind all parties in disputes and can be appealed on the points of law to the Employment Appeal Tribunal (EAT).

This section reviewed the development of ACAS and the ET in the UK finding that ACAS has evolved into an independent body providing employers and employees a range of dispute resolution services based on mediation, conciliation and arbitration. Its innovative introduction of a new advisory service, Pre-Claim Conciliation is beginning to make a positive impact by reducing the number of claims reaching the ET. The ET itself, has had an increasing demand for resolution of unfair dismissal cases and increasingly compensation is being provided as the remedy with reinstatement remaining at very low levels. The next section moves to a discussion of the evolution of the Australian industrial relations system and in particular, its workplace dispute resolution system.

2.3 The Australian industrial relations and dispute resolution system

Four years after the creation of federation of Australian states the *Conciliation and Arbitration Act 1904* was enacted in response to rising levels of industrial disputes and unrest (Hawke & Wooden 1998). Although it was not considered a piece of legislation to regulate the industrial relations system in general (as it pertained largely to interstate industrial disputes), the Act marked the beginning of government intervention in dispute resolution in Australia (Harbridge, Fraser & Walsh 2006). The Act established a Commonwealth Court of Conciliation and Arbitration. It was the first federal industrial relations tribunal in dispute resolution empowered to make a binding award. In 1956 however, the High Court of Australia ruled that it was unconstitutional for the court to exercise both arbitral and judicial power, which led to the replacement of the Court by two separate bodies. The Commonwealth Conciliation and Arbitration Commission was established to conciliate and arbitrate industrial disputes while the Commonwealth Industrial Court took up the role in the interpretation and enforcement of decisions of the Commission (Stewart 2009)**.** In 1977 the functions of the Industrial Court were taken over by the Federal Court of Australia. Arising from the report of the committee of review in 1985 into the Australian industrial law and system (Hancock Report), the *Industrial Relations Act 1988 (IR Act 1988)* was enacted which replaced the *Conciliation and Arbitration Act of 1904* (Parliamentray Library 2008). The *IR Act 1988* for the first time introduced mandatory dispute resolution procedures for all

consent awards and collective agreements (Van Gramberg 2006a). It heralded a trend in encouraging dispute resolution at the level of the workplace without tribunal interference.

In 1993 the *IR Act 1988* was amended by the *IR Reform Act 1993*. The main contribution of the Reform Act was to introduce enterprise bargaining which sparked the decentralisation of industrial relations in Australia from tribunals where wages and conditions had been traditionally set, to workplaces where employers, unions and employees would bargain towards an agreement which would be certified in the federal tribunal. At this time, it was seen as important that tribunals exercised conciliation rather than arbitration and those workplaces managed their dispute resolution to a greater extent (Van Gramberg 2006a). In 1996, the enactment of the *Workplace Relations Act 1996 (WRA 1996)* along with the *Workplace Relations Regulations 1996*, provided for non-union individual contracts between employers and workers known as *Australian Workplace Agreements (AWAs)*. The legislative package completed the decentralisation process with the abolition of compulsory arbitration by the AIRC. The *WRA 1996* also provided a dispute resolution mechanism as spelled out in Division 2 of Part 13. Here it became a default procedure when the workplace agreement did not specify any procedure for resolving dispute at the workplace (Stewart 2009). Subsequent change to the *WRA 1996* was *made* in 2001 with the introduction of the *Workplace Relations Amendment (Termination of Employment) Act 2001*. In 2005 the *WRA 1996* was replaced by the *Workplace Relations Amendment Act 2005* or *WorkChoice* as it was more commonly known. It established the Australian Fair Pay Commission as the vehicle for minimum wage rises and it utilised the Australian Constitution's Corporations' Power (s21) to extend coverage of individual workplace agreements to registered corporations which effectively overrode State legislation dealing with workplace relations within corporations. *WorkChoices* was considered the most radical and dramatic reshaping of the employment and industrial relations landscape in Australia with a move towards a single national system. Importantly, *Workchoice* provided small and medium businesses employing less than 100 employees with the total exemption from unfair dismissal claims, as well as any companies that had exercised genuine redundancies (Stewart 2009).

The changes by the Labour Government in 2009 once again reshaped the industrial relations system of Australia through the enactment of the *Fair Work Act 2009 (FWA 2009).* The new industrial relations system, which took effect on 1st January 2010, came with a motto of *forward with fairness* that is said to relieve the harshest remaining aspect of the *WorkChoice Act* (Gillard 2008). While emphasis is still placed on resolving disputes at the workplace, *FWA 2009* introduced a simple model of dispute resolution under Schedule 6.01 of the *Fair Work Regulations 2009* (*FWR 2009*). Although not so prescriptive as the *WRA 1996*, it outlined the way workplace disputes are to be handled (Stewart 2009). Here, parties must first attempt to resolve the dispute at the workplace level, failing which either party may refer the disputes to FWA, a successor to AIRC. The FWA also provides provisions for any independent third party other than FWA to resolve disputes, including arbitration subject to the parties' consent (see *Section 740 of FWA 2009*). The *FWA 2009* also made significant changes to unfair dismissal laws by removing most of the previous exclusions (Stewart 2009). This means that all national system employees apart from non-award and non-agreement employees above a high earning threshold, are entitled to claim unfair dismissal, provided they have met with the minimum of six months service (15 or more employees) and twelve months (15 or less employees). The Act also protects employees against 'adverse action' including discrimination, victimization or dismissal for asserting their rights at the workplace (Howe, Yazbek & Cooney 2011).

Despite the Federal Government's stand that the new system is to provide a balanced framework between maintaining economic prosperity and social justice through productive workplace, Bray, Waring and Cooper (2010) argued that the *FWA 2009* has reduced the free operation of market forces and limited managerial prerogatives. But whilst arguably slowing down the move towards neo-liberalism in Australia, there has been a continuing reliance on exerting individual rights. As reported by the Australian Bureau of Statistics, unfair dismissal cases reported to FWA have increased by 30 percent within the first six months of its introduction. The primary jurisdiction of unfair dismissal cases is FWA to which this discussion now turns.

2.3.1 The Tribunal

The power of the Australian federal government to prevent and settle industrial disputes is vested in Section 51 (xxxv) of the Constitution through the establishment of a tribunal which has authority beyond the limits of any one State (Romeyn 1986). State level tribunals have also been a feature of Australian industrial relations and these operate under separate State legislation. The history of the federal industrial tribunal can be traced back to 1904 with the enactment of the *Conciliation and Arbitration Act 1904* (Frazer 2002). Since then, Australia has witnessed five national industrial relations tribunals: the Commonwealth Court of Conciliation and Arbitration (1904 to 1956); the Commonwealth Conciliation and Arbitration Commission (1956 to 1973); the Australian Conciliation and Arbitration Commission (1973-1988); the AIRC (1988 to 2009) and; the FWA (2009 until present) (Acton 2011). Although these tribunals shared almost similar functions, procedures, personnel and litigants in some ways or another, they each have changed concurrent with the evolution in the industrial relations system in Australia (Rathmell 2011). The next section discusses the earlier tribunals particularly in terms of their role of resolving industrial disputes before moving to consider the role of FWA.

The Commonwealth Court of Conciliation and Arbitration (1904 to 1956) was the first federal tribunal created under the Australian Constitution with the function to make and vary industrial awards (Acton 2011). The appointment of the tribunal's members was initially from those with legal qualifications to reflect its authority and prestige as a court and only in 1956 did it include those with experience in industrial matters as a result of the significant High Court decision which saw the separation of the judicial and tribunal functions of the inaugural Conciliation and Arbitration Court, and in line with the evolution of its framework and functions (Rathmell 2011). This separation of the judicial and arbitration power created a new Commonwealth Conciliation and Arbitration Commission to reflect a more independent tribunal which could perform its function in an expeditious manner using both conciliation and arbitration (Oxnam 1957). Then in 1988 the AIRC was created to replace the Commonwealth Conciliation and Arbitration Commission subsequent to the enactment of the *IR Act 1988* and

continued its predecessor' functions of using conciliation and arbitration to settle industrial disputes (Forbes-Mewett, Griffin & McKenzie 2003). As shown in Table 2.3, more than 90 percent of the tribunal's workload over time concerned handling dispute notifications and award variations within the period of 1956 to 1992. Only from 1994 did matters on the termination of employment start to constitute a higher proportion of the tribunal's workload.

Table 2.3 Nature of most of the substantive applications made to the national industrial institution from 1956 to 2009/10

Nature of the application	1956-92	1994-95	2004/5	2007/8	2009/10
Dispute notification and award variation	90 +%	35%	17%	11%	
Termination of employment		39%	35%	62%	49%
Collective agreement approval, etc.		15%	34%		29%
Right-based dispute			4%	13%	7%
Protected industrial action ballot order				6%	4%
Bargaining dispute					2%
Total number of substantive applications		19,280	19,419	9837	26,703

Source: Adopted from Acton (2011)

During its existence as the main industrial tribunal (prior to the establishment of the FWA) the AIRC underwent extensive changes to its roles and functions in tandem with the changes in the laws and the industrial relation system of the country. For example, in 1996, its conciliation and arbitration function were reviewed under the *WRA 1996* with its power and role in resolving disputes through arbitration and its award making powers significantly reduced (Forsyth 2006). Later in 2006 the AIRC's role was substantially redefined under the *WorkChoices* with its wage setting powers largely transferred to the Australian Fair Pay Commission (AFPC) while its task of processing most of the individual Australian Workplace Agreement (AWAs) transferred to the Office of the Employment Advocate (Stewart 2011). Despite the diminishing powers of the AIRC, it remained an effective institution in resolving disputes through its interventionist role via the methods of conciliation conferences and increased focus on

mediation (Forbes-Mewett et al. 2005; Forbes-Mewett, Griffin & McKenzie 2003). As noted by Van Gramberg (2006b), although the AIRC's role was being sidelined, it retained powers in dispute settlement as nearly 98 percent of workplaces with a federal enterprise agreement had listed the AIRC as the final arbiter in 2006. In terms of resolving unfair dismissal disputes the AIRC had performed these functions since the introduction of the *IR Act 1993* subsequent to the Australian government ratification of the International Labour Organization (ILO) Convention No 158 of 1982, Concerning Termination of Employment at the Initiatives of the Employer (Teicher & Van Gramberg 2003) (see also Section 2.5.12).

Table 2.4 shows the outcomes of termination of employment finalised by the AIRC from July 2005 until December 2009. The term 'outcomes' is used to represent the nature of cases resolved. Due to changes in the report format detailed descriptions of the cases were not available in 2005/2006 and 2009 reports. The application for relief in disputes over termination of employment has consistently dominated the tribunal's workload with 7,994 claims lodged between July 2008 and June 2009. Of these, 3234 (41 percent) of applications alleged that termination was harsh, unjust or unreasonable (unfair), 1,687 (21 percent) alleged the termination was unlawful and 3,073 (38 percent) alleged it to be both unfair and unlawful. In its final six months of office, the AIRC had completed 1,621 cases of termination of employment (Table 2.4).

Table 2.4 Summary of outcomes of termination of employment matters finalised by the AIRC during 2005/06– 2008/09

Year (1st July – 30th June)	2005/06	2006/07	2007/08	2008/09	2009 (1/7 – 31/12)
Unfair dismissal only	N/A	2,225 *(42.2 %)*	2,352 (38.8 %)	3,234 (40.5 %)	N/A
Unlawful termination only	N/A	1,050 (19.9 %)	1,338 (22.0 %)	1,687 (21.1 %)	N/A
Unlawful termination and unfair dismissal	N/A	1,998 (37.9%)	2,377 (39.2 %)	3,073 (38.4 %)	N/A
Total	5,758	5,273	6,067	7,994	1,621

Source: Annual report of the President of the AIRC, 2005/06; 2006/07; 2007/08 & 2008/09.

The State of Victoria recorded the highest number of cases at 2,638, followed by New South Wales (2,428) and Queensland (1,319), with 1,609 originating from other states and territories (AIRC 2009) (Table 2.5).

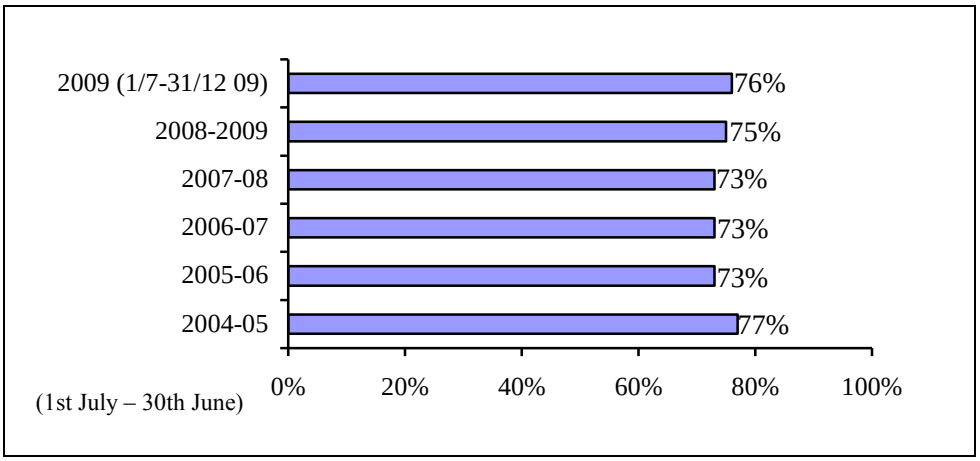
Table 2.5 Termination of employment lodged at States and Territories 2005/06 to 2008/09

Year (1st July – 30th June)	2005/06	2006/07	2007/08	2008/09	2009 (1/7 – 31/12)
Victoria	3,224	2,019	2,275	2,638	N/A
NSW	1,296	1,511	1,712	2,428	N/A
QLD	420	737	944	1,319	N/A
WA	317	394	422	762	N/A
SA	159	307	416	499	N/A
TAS	83	75	111	151	N/A
ACT	136	75	100	104	N/A
NT	123	55	87	93	N/A
Total	5,758	5,173	6,117	7,994	N/A

Source: Annual report of the President of the AIRC, 2005/06; 2006/07; 2007/08 & 2008/09.

Out of the cases conciliated in 2008-09, 75 percent were settled at conciliation. As shown in Figure 2.1, this high rate of settlement by the AIRC has been maintained at above 70 percent since the period 2004-09 (Figure 2.1).

Figure 2.1 Conciliations settlement rate of termination of employment matters of the AIRC 2004/05 to 2009.



Source: Annual report of the President of the President of AIRC, 2008/09,
Annual report of the President of the President of AIRC 1st July – 31st December 2009

In 2009 the FWA was established under a new workplace relation system introduced by the incumbent Labour government with the implementation of the *FWA 2009* (Stewart 2011). FWA has its headquarters in Melbourne with eight subsidiary offices in each of the states and territories of Australia (Fair Work Australia 2010a). Its members are appointed from the fields of industrial relations, law and economics who are mostly reappointed from the AIRC (Stewart 2011; Fair Work Australia 2010b). Unlike ACAS in the UK, FWA is a government-operated national institution with a range of responsibilities relating to employment relations, including provision of dispute resolution through mediation, conciliation, expression of opinions or recommendations and binding arbitration decisions (see *Section 595* of the *FWA 2009).* However, the FWA can only exercise these powers if they are outlined in an organisation's dispute resolution procedure or otherwise agreed upon by the parties involved (FWA 2010). FWA operates as an independent tribunal via the provision of the *FWA 2009* with hearings conducted by a single member sitting alone, or three or more members comprising a Full Bench which mostly made up of appeals and award modernization matters (Acton 2011; Fair Work Australia 2011b).

FWA continue to perform almost all of the AIRC's more traditional functions (before the *WorkChoices* regime) including the setting and adjustment of minimum wage rates;

reviewing and varying awards; policing both the new good faith bargaining requirements and industrial action; scrutinizing and approving enterprise agreement; resolving unfair dismissal complaints; and resolving disputes (Stewart 2011; AIRC 2009). In addition, it also assumed the function of the Australian Industrial Registry and the Australian Fair Pay Commission (established in 2005) and some of the functions of the Workplace Authority (established in 2007) (Fair Work Australia 2011a). FWA is also vested with a new function in dealing with individual workplace rights including pertaining to handling of unfair dismissal and 'adverse action' complaints under the new 'general protection' provisions of the *FWA 2009* (MacDermott & Riley 2011). This refinement of FWA as the new national industrial institution is in tandem with the evolution of Australia's industrial relations in the internationalised economy (Acton 2011).

Under the *FW Act 2009* the category exempting organizations with 100 or less employees from unfair dismissal claims was removed. Hence, 4.3 million more Australian now have access to protection, as evident in the increase of 30 percent (5,208 cases) of unfair dismissal claims within the first six months of its implementation (Department of Education Employment and Workplace Relations 2010). During 2010 – 11 period there were 14,897 termination of employment applications lodged at FWA and as shown in Table 2.6, 14,342 cases were finalised (Fair Work Australia 2011c).

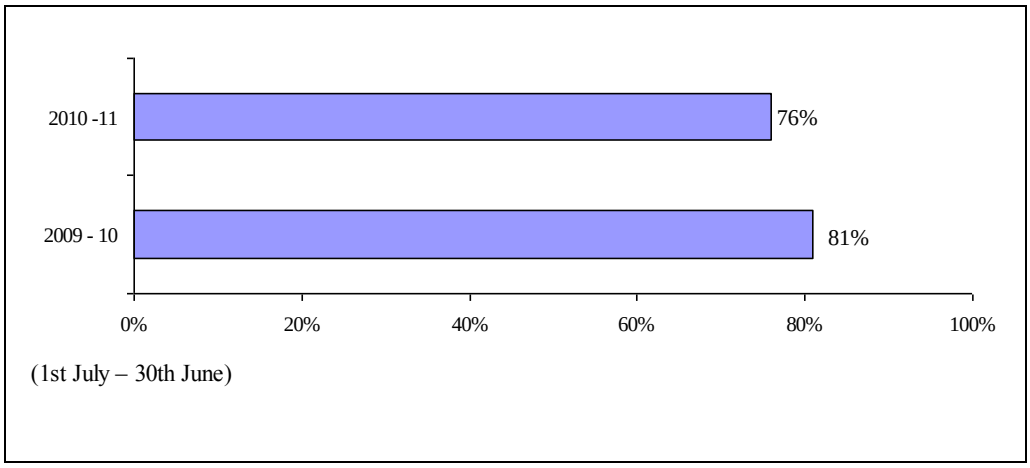
Table 2.6 Applications in relation to termination of employment finalised by FWA (1 July 2010 - 30 June 2011)

Matter type	Finalised at or prior to conciliation		Finalised without requiring a decision		Finalised by a decision		Total finalised	
Matter type	**09/10**	**10/11**	**09/10**	**10/11**	**09/10**	**10/11**	**09/10**	**10/11**
S.643 - WRA	1,750	80	395	7	55	10	2,200	97
S. 394 - FW Act	8,897	9,869	385	1,915	87	517	9,369	12,301
ss. 365 & 773-FW Act	1,176	1,944	-	-	-	-	1,176	1,944
Total	11,823	11, 893	780	1,992	142	527	12,745	14,342

Source: Annual Report Fair Work Australia 1 July 2009 - 30 June 2010 & 1 July 2010 - 30 June 2011

In the first six months of FWA taking on its tribunal function, the rate of settlement in conciliation was 81 percent and slightly reduced to 76 percent in 2010 -11 (Figure 2.2).

Figure 2.2 Conciliations settlement rate of termination of employment matters of the FWA, 2009/10 to 2010/11.



Source: Annual report Fair Work Australia 1 July 2010 - 30 June 2011

2.4 The New Zealand industrial relations and dispute resolution system

The process of resolving disputes in New Zealand has been influenced by the UK system which shares a similar legal environment and system of individual statutory employment rights (Corby 2000). Hence, as noted by Kaufman (2006) it also shares characteristics of the Australian system, which inherited the British system along with other Commonwealth countries. He further argued that similarities in economic orientation, immigration history of people from the UK, and close regional location have also contributed to their similarities. For example, the *Industrial Conciliation and Arbitration Act 1894 (ICA Act 1894)* which came into effect in January 1895, is a piece of legislation that had similarities to early Australian legislation (Dell & Franks 2008). It marked the beginning of a regulated industrial relations system and introduced compulsory conciliation and arbitration after a history of using a voluntary mechanism (Hince & Vranken 1991).

The shift towards resolving disputes through a compulsory system was brought about by economic depression and increased industrial conflict in 1890 (Lansbury, Wailes & Yazbeck 2007). At this time, arbitration was used as means of resolving industrial disputes, making and interpreting awards and setting minimum standards of employment, through the establishment of the Court of Arbitration under the *ICA Act 1894* (Ministry of Justice 2010c). As a result of long delays in the arbitration system, Dell and Franks (2008) noted that conciliation was used to encourage voluntary settlement of disputes. This was performed by a state funded Conciliations Council, which was established with the amendment of the *ICA Act 1894* in 1908. At this time, disputes were first referred to the council for conciliation, and when settlement failed, to the Court of Arbitration for a binding decision (Dell & Franks 2008; Kaufman 2006). This third party intervention through conciliation had avoided parties bringing disputes straight to the court and hence, relieved its workload. As noted by Brosnan, Smith and Walsh (1990) this intervention assisted in addressing the industrial conflicts, which had caused adverse reaction from the public.

Although the compulsory arbitration of disputes was removed in 1932, when the *ICA Act 1894* was amended, it was restored in 1936 due to employers taking the attitude of 'take it or leave it' at conciliation (Deeks, Parker & Ryan 1994; Brosnan, Smith & Walsh 1990). The *ICA Act 1894* which had regulated the way disputes were being resolved for almost 80 years was finally repealed with the introduction of the *Industrial Relations Act 1973 (IR Act 1973).* This Act introduced changes to dispute resolution procedures by distinguishing between interest and rights disputes, each having its own sets of procedures (Deeks, Parker & Ryan 1994). This meant that the Court of Arbitration was abolished and its role divided to two institutions, the first was the Industrial Commission to deal with disputes of interest, and the second was the Industrial Court to deal with disputes of rights (Hansen 1973-1975). Disputes of interest involved any intent of securing a collective agreement or award relating to the terms and conditions of employment, while disputes of rights were on the interpretation, application or operation of these agreements and awards in addition to any personal grievances of employees in the workplaces (Seidman 1974). Hence, the *IR Act 1973* required that all awards and agreements contain a personal grievances procedure,

including unjustified dismissal or any action that disadvantaged an employee in the workplace (Corby 2000; Seidman 1974). The *IR Act 1973* also had 17 series of amendment Acts, a number of which marked significant changes to the industrial relations system as well as dispute resolutions. For example, the *Industrial Relations Amendment Act 1977* was introduced with the aim of encouraging greater interaction between the public and private sectors (Ministry of Justice 2010b). This Act also abolished the Industrial Commission and the Industrial Court, and combined their jurisdictions with the establishment of another arbitration court called the Arbitration Court (Ministry of Justice 2010c)

The system changed again with the enactment of the *Industrial Relations Amendment Act 1984*, which once again abolished compulsory arbitration and replaced it with a voluntary system to encourage parties to resolve disputes without third party intervention (Wooden & Sloan 1998; Brosnan, Smith & Walsh 1990). This marked a significant development towards the principles of self-reliance in the employment relationship, eliminating or at least minimising direct intervention from the government in dispute resolution (Hince & Vranken 1991). Another change to the system occurred with the introduction of the *Labour Relations Act 1987* which established the Labour Court to deal with rights disputes, which include personal grievances and demarcation disputes, while the Arbitration Court continued to handle interest disputes.

A significant change in disputes resolution procedure took place when the *Employment Contract Act 1991 (ECA 1991)* was introduced to repeal the *Labour Relations Act 1987*. For example, it abolished the difference between interest and rights disputes (Hince & Vranken 1991). It also required that all employment contracts include effective procedures to settle personal grievances and disputes in the workplace and, if such mechanism was not available, the statutory model procedure as in the First Schedule of the Act would apply (Deeks, Parker & Ryan 1994; Hince & Vranken 1991). The emphasis on procedural fairness, as recognized by the Act including unfair dismissal cases resulted in employers being more cautious about their actions at that time (Rasmussen & Lamm 2000). They were required to utilize these internal procedures to resolve disputes, before resorting to either one of the following specialist institutions

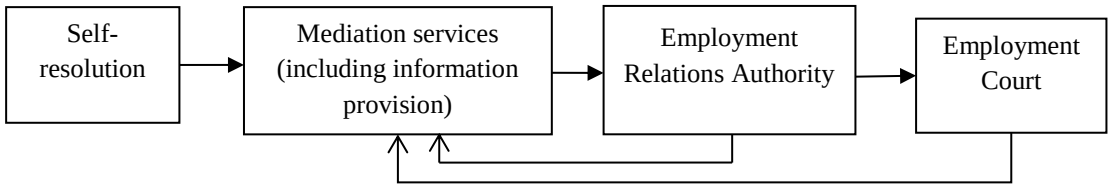
established under the Act: the Employment Tribunal; and the Employment Court (EC) as a successor to the Labour Court (Harbridge, Fraser & Walsh 2006; Deeks, Parker & Ryan 1994).

The role of the Employment Tribunal was to facilitate the resolution of disputes through mediation or adjudication (with some disputes, such as application for harsh and oppressive contract, able to be directly referred to the Court bypassing the Employment Tribunal), which was subject to appeal to the EC (Deeks, Parker & Ryan 1994). The establishment of this low level ET was to assist parties in resolving disputes, on the condition that they must first attempt the workplace procedure (Hince & Vranken 1991). This emphasis on resolving disputes at the workplace level was not only applied to unionised employees, but also to employees employed under the individual agreements (Deeks & Rasmussen 2002; Rasmussen & Lamm 2000). For the first time employees, who were not employed under an award (whom prior to this Act were only able to rely on the common law) were given access to bring their grievances to the Employment Tribunal (Rasmussen & Lamm 2000). This Act, however, was argued to have swept away the remnants of the arbitration system (Franks 2003; Rasmussen & Lamm 2000) and, as noted by Martin (1996), it marked the departure of state interventions in industrial relations of the previous 100 years. For instance, the compulsory union membership for workers below the managerial level emplaced since 1936 was abolished (Corby 2000). As noted by Dell & Franks (2008) the *ECA 1991* marked a significant movement from a highly centralised system towards a decentralised system resulting in reduced union effectiveness and involvement in the workplace. The effect was an increase in employers' power and destruction of the national award system (Geare 1998).

The introduction of the *Employment Relations Act 2000 (ER Act 2000)*, which remains enforceable at the time this thesis was written, replaced the much controversial *ECA 1991* (Franks 2003). This new *Act* worked on the principle of 'good faith' by encouraging mutual and fair dealing employment relationships. It provides dispute resolution mechanisms under Part 9, outlining the procedures for resolving disputes and personal grievances (including unjustified dismissal) through tribunal third party

intervention. These three stage process of dispute resolution are: (1) reference to mediation by the Department of Labour (2) adjudication by the Employment Relations Authority (ERA); and (3) appeal to the EC. Despite these, parties are encouraged to resolve their disputes at the workplace, before referring it to the department (Department of Labour New Zealand 2007/08). Hence, the Act continues with emphasis on the workplace dispute mechanism (as in the *ECA 1991)* to be given priority, before referring to the mediation service. In the case of unjustified dismissal an employee must raise his or her grievance to the employer within 90 days before resorting to tribunal intervention (see *ERA 2000).* Section 143 of the *ER Act 2000* recognises that employment relationships are more likely to be successful, if problems are solved by the parties themselves. Hence, as noted by Franks (2003) expert problem solving support needs to be promptly available. As shown in Figure 2.3, although parties can make an application to the ERA when mediation fails, they may be directed back to mediation at any point of the intervention processes either by the ERA or the EC. The next steps available to parties who are not satisfied with the decision of the EC are making an appeal on the question of law to the Court of Appeal, whose decision may also be further appeal to the Supreme Court (Department of Labour New Zealand 2010b). These Courts will deliver their judgement and may also direct the matter back to the EC to deal with lower level/factual issues.

Figure 2.3 Employment relationship problem resolution system in New Zealand



Adopted from: Discussion document for the review of Part 9 of the Employment Relations Act 2000: Personal grievances.

Further amendments that were made to *ER Act 2000* under the *Employment Relations Amendment Act 2004* to strengthen the tribunal dispute resolution system included: (1) ensuring that settlements are paid directly to the parties rather than to their representatives (2) allowing mediators to talk to parties without their representatives

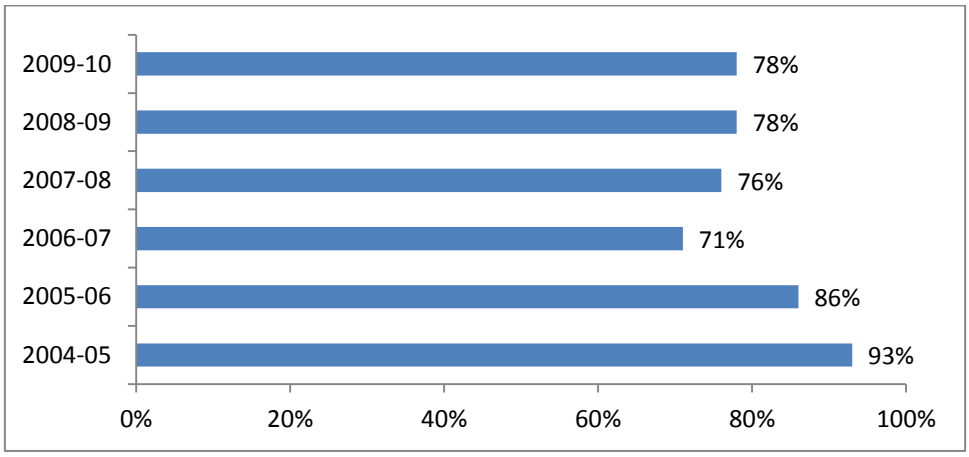
being present, and expressing their views on the substance of a claim or process being followed; and (3) providing access to dispute resolution services for parties who are in work-related relationships that are not employment relationships such as contractors (Minister of Labour 2008). More recently changes to the *ER Act 2000* have been made via the *Employment Relations Amendment Act 2010*, which came into effect on 1st April 2011. Among the key changes are: (1) expanding the trial employment period of 90 days to cover all workplaces regardless of the number of employees (2) retaining reinstatement, as remedy but removing it as a primary remedy (only retained when practicable and reasonable) (3) allowing disputants to take up an option for early problem resolution before a more formal mediation (4) promoting greater use of mediation; and (5) providing new power to mediators of the Department of Labour and the ERA to make written recommendation to resolve disputes at the request of the parties (Department of Labour New Zealand 2011) .

2.4.1 The Department of Labour New Zealand

The Department of Labour New Zealand was initially established as a Bureau of Industries in 1891 and a year later in 1892 changed to its present name (Department of Labour New Zealand 2005). It was one of the early pioneers internationally to tackle the labour problem during the long period of depression in the late 19th century (Department of Labour New Zealand 2005). It administers more than 20 statutes including the *ER Act 2000* and 80 sets of regulations (Ministry of Justice 2010a). The department assists parties in disputes by providing dispute resolution through mediation. In providing a mediation service, the department's priority is to prevent employment problems from occurring in the first instance by offering preventive mediation technique, followed by an early intervention and mediation, if disputes continue to occur (Department of Labour New Zealand 2010a; Minister of Labour 2008). A range of mediation services are provided, including face to face communication, phone, internet, fax and any other means necessary including publishing pamphlets, brochures, booklets or Codes to resolve disputes promptly (see *Section 145* of *ERA 2000*). As noted by Takitimu and Freeman-Greene (2009) the Department of Labour will provide mediation within one to six weeks from the request made by the parties to ensure that problems are solved

promptly. Once both parties have reached a settlement, they can request the mediators to sign an agreement, which will be enforceable at the ERA or EC (Minister of Labour 2008). The department receives around 9,000 request for mediation yearly and has been able to perform its mediation services effectively (Minister of Labour 2008). In 2008/09 the settlement rate was 78 percent (Figure 2.4). In 2009/10 the department had completed 6,158 mediation cases with a 78 percent settlement rate (Department of Labour, New Zealand annual report 2009/10).

Figure 2.4 Percentage of mediation request settled before or at mediation 2004/05 to 2009/10 (year ended 30th June)



Source: Department of Labour , New Zealand annual report 2004/5 ; 2005/6; 2006/07; 2007/08; 2008/09;2009/10

The success of mediation, as reflected in the above statistics, was as a result of an effective use of mediation, which as noted by Franks (2003), has been one of the most important developments in the use of ADR in resolving employment disputes, since the enactment of *ER Act 2000*. Mediation as a primary means of resolving disputes has been successful as a result of its proactive nature in New Zealand, where mediators also provide views on the strength of the case (advisory mediation), make recommendations and even provide a med/arb function where parties agree to abide by the mediator's decision (Corby 2000). These techniques demonstrate that mediation in New Zealand is more flexible than the model for mediation outlined by NADRAC (2011). Although disputes which have failed to be resolved through mediation, are referred to the ERA for

determination, Gibbons (2007) noted that the free mediation services in New Zeeland have resulted in a 50 percent fall in referrals to the ERA compared to the equivalent jurisdiction of the UK Employment Tribunal.

2.4.2 Employment Relations Authority

The ERA is an independent body established under the *ER Act 2000* to resolve disputes that cannot be resolved through mediation (Employment Relations Authority 2010). As noted by Dell and Franks (2008) the history of tribunal's functions in New Zealand began in 1908 with the establishment of the Conciliation Council noted above. The Council was made up of equal representation from unions and employers, and chaired by state officials known as Conciliators to relieve delays in the arbitration function performed by the Court of Arbitration (Dell & Franks 2008). In 1970 an Industrial Mediation Service, modelled along the United States system, was introduced to focus on rights disputes and personal grievances (Dell & Franks 2008; Corby 2000). The council co-existed with the Court of Arbitration (then known as Labour Court) until both were abolished in 1991. As mentioned previously, under the *Employment Contract Act 1991* the Employment Tribunal was established to provide both a mediation and an arbitration service and the EC (successor of Labour Court) heard appeals from the tribunal (Corby 2000). Hence, during this period the Employment Tribunal had performed med/arb functions in dispute resolution and, as noted by Dell and Franks (2008), its workload was mostly personal grievances and rights disputes. The authors found that the increased workload of the tribunal caused a huge backlog with a waiting time of three months for mediation and six months for arbitration at the main centre, with 8-16 months for mediation and 11-12 months for arbitration at other centres. This increase was brought about by the changes in the legislation which further individualised the employment relationship and lessened the role for unions in the workplace (Lansbury, Wailes & Yazbeck 2007).

When the *Employment Relations Act 2000* was implemented the mediation services were taken over by the Department of Labour, while the new Authority performs the arbitration function and this division of work strengthens the distinction between the

functions of mediation and arbitration (Dell & Franks 2008). The Authority is a specialist tribunal that uses arbitration to resolve employment relationship problems, including unjustified dismissal, after mediation by the Department of Labour has failed (Mackinnon 2009). Its decisions can be appeal at the EC (Ministry of Justice 2010c).

2.4.3. The Employment Court

The EC has had a long history since the enactment of the Industrial Conciliation and Arbitration Act 1894. It was known as the Court of Arbitration (1894-1973), the Industrial Court (1974-1978), Arbitration Court (1978-1987), and Labour Court (1987-1991). With many of its personnel drawn from the Labour Court, it was re-established in 1991 as the EC under the *ECA 1991* and continued under the *ER Act 2000* (Ministry of Justice 2010c), which is still the case at the time of writing. The jurisdiction of the EC apart from hearings on matters determined by the Authority includes imposing penalties for breaches of the *ER 2000 Act*, determining the questions of law referred by the Authority, compliance orders and any other matter specified under the *ER Act 2000.* It has been argued that many of its decisions have been controversial with emphasis on procedural correctness in unjustified dismissal cases (Evans, Grimes & Wilkinson 1996).

This section has overviewed the workplace dispute resolution systems in the UK, Australia and New Zealand. In each of these countries, development of the laws relating to the settlement of workplace disputes has evolved around turbulent industrial relations climates in the past 100 years and has also been influenced by the government of the day. Another feature of the changes in dispute resolution has been the shift from collective to individual disputes, which now make up the bulk of disputes to each of the tribunals in those countries. These tribunals have in the main, dealt with this shift effectively and all demonstrate high settlement rates in conciliation and mediation. The next section turns to an examination of the Malaysian industrial relations system, with a focus on dispute settlement. Malaysia, colonised by the British, has evolved a similar legal infrastructure to those in the three countries featured above and has also experienced a shift towards individual dispute resolution. However, unlike the other

nations examined above, conciliation rates are lower and referrals to arbitration, higher. The section begins with an overview of the relevant laws in Malaysia before moving to the voluntary Code of Industrial Harmony 1975 and the operation of conciliation conducted by the DIRM and arbitration as part of the IC.

2.5 The Malaysian industrial and labour relations

The main institution responsible for the administration and implementation of industrial relation and labour matters in Malaysia is MoHR, headed by a Secretary General, who directly reports to the Minister. With its office based in Putrajaya, MoHR has nine departments, two statutory bodies and two companies under its administration. Its main responsibilities are policy development and planning of human resources in the country.

2.5.1 History of Malaysian industrial relations

The industrial relations system in Malaysia has its roots in the colonial laws of the British system, which remains the basis of present practice (Kaur 2004). This developed under a voluntary system with the implementation of three major pieces of legislation, the *Trade Unions Enactment 1940* (now known as *Trade Union Act 1959*), the *Industrial Courts Ordinance 1948*, and the *Trade Dispute Ordinance 1949*. From the period from 1940 until 1965 self-government and autonomy was the key to industrial harmony with the settlement of disputes being left to both parties with minimum state intervention. The government's role was only advisory in nature, with conciliation and arbitration being undertaken on request (Department of Industrial Relations Malaysia 2008c). During the period 1964-65, when a confrontation emerged between Malaysia and Indonesia over the enlargement of the Federation of Malaysia to cover Sarawak, Sabah and Singapore, the industrial unrest beginning in 1962 increased tremendously (Anantaraman 1997). As a result, in September 1965 the government introduced the *Essential (Trade Disputes in Essential Services) Regulation 1965*, marking a departure from the voluntary system of industrial relations to become a compulsory system. This regulation, along with the establishment of an Industrial Arbitration Tribunal, provided power to the Minister of Human Resources (then known as Minister of Labour) to

intervene through conciliation of disputes and compulsory reference of unresolved disputes for binding arbitration. Realising the effect of industrial unrest on the economy, coupled with the industrialisation policy and positive effects of compulsory arbitration, on 7th of August 1967 the government introduced the *IR Act 1967* to replace the *Trade Dispute Ordinance 1949* and the Essential (*Trade Disputes in Essential Services) Regulation 1965*. This Act has been enforced until today as the principal legislation in conjunction with the *TU Act 1959* and *EA 1955* to regulate employment, industrial relations and disputes (Department of Industrial Relations Malaysia 2008a; Anantaraman 1997). The implementation of this legislation is supported by their respective subsidiary regulations and orders.

2.5.2. The Industrial Relations Act 1967

The *IR Act 1967* is the principal piece of legislation that regulates the industrial relations system in Malaysia, in particular the relation between employers and employees and their trade unions which include mechanisms for dispute resolution (Department of Industrial Relations Malaysia 2008b; Ayadurai 1993; Gengadharan 1991). This is expressly stated in its long title:

> '*An Act to provide for the regulation of the relations between employers and workmen and their trade unions, and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom'.*

The *IR Act 1967* has undergone a series of amendments, the latest being in 2008. The most important amendment was the inclusion of the Second Schedule, consisting of factors that must be considered by the Industrial Court of Malaysia (IC) in making an award in relation to claims for reinstatement as follows:

> *'(1) In the event that backwages are to be given, such backwages shall not exceed twenty-four months' backwages from the date of dismissal based on the last-drawn salary of the person who has been dismissed without just cause or excuse;*

(2) In the case of a probationer who has been dismissed without just cause or excuse, any backwages given shall not exceed twelve months' backwages from the date of dismissal based on his last-drawn salary;

(3)Where there is post-dismissal earnings, a percentage of such earnings, to be decided by the Court, shall be deducted from the backwages given;

(4) Any relief given shall not include any compensation for loss of future earnings; and

(5) Any relief given shall take into account contributory misconduct of the workman.'

The Act, which is enforceable throughout Malaysia, consists of ten parts. Each part sets out its specific purpose, but the application of certain provisions are however, interrelated and have to be read concurrently with provisions in some other parts. These include the definitions and issues pertaining to protection and rights of unions and their members, recognition of unions, collective bargaining and collective agreements, conciliation, representation on dismissal, trade disputes, strike and lock out. The *IR Act 1967* is said to function by providing social justice on the basis of collective bargaining and arbitration (Gengadharan 1990).

Of particular interest to this study are the provisions on dispute resolution through the use of conciliation under *Section 18* in respect of trade disputes and *Section 20* for claims for reinstatement (unfair dismissal). Trade disputes can be referred by: the employer or their trade union; or the trade union of employees which is a party to the dispute; or by the Director General of Industrial Relations Malaysia (DGIR) in public interest, when the dispute is not likely to be settled by negotiation. In addition, the Minister of Human Resources is empowered to refer any dispute for adjudication by the IC. These two administrative powers signify the element of compulsory adjudication of disputes provided by the *IR Act 1967* (Gengadharan 1991). However, for disputes over dismissal, it is the claimant who would normally institute his/her claims for reinstatement under *Section 20(1)* of the *IR Act 1967.* The section states that:

> *'Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed'.*

However, this section, unlike the *EA 1955* has no provision for the requirement of due inquiry to be conducted in the workplace prior to termination of employment on grounds of misconduct. It works on the premise of providing the right for employees to challenge their dismissals which were made without just cause or excuse. They must, however, as provided under *Section 20 (1A),* file their claims within 60 days of the dismissal. As this section clearly states, claimants must also apply for reinstatement to avoid jeopardising their cases. For example, in *Holiday Inn, Kuching v. Lee Chai Siok Elizabeth,* the High Court ruled that the IC had no jurisdiction to hear the case, as the claimant had changed her plea from reinstatement to compensation. However, in a later decision between *The Borneo Post Sdn. Bhd v. Margeret Wong Kee Sieng* under similar facts the High Court adopted the opposite view and decided otherwise. Regardless of the newer decisions, the IC and High Court have remained undecided on this issue (Ali Mohamed 2004). The latest amendment of the *IR Act 1967* with the inclusion of the *Second Schedule,* which outlines factors to be considered in awarding compensation, has indirectly marked a shift towards acknowledging compensation as a remedy. In addition, most of the IC decisions, even before the inclusion of this *Second Schedule,* were indeed settled by way of compensation rather than reinstatement, the traditional remedy. At the DIRM however, it is paramount that claimants must seek reinstatement. Failure to maintain a plea for reinstatement may affect the conciliation process, as the employer may question the employee's real motives. Compensation is restricted to those cases where employees have been dismissed without notice and seek the assistance of the Labour Court (LC) for compensation in lieu of notice.

In the provisions of both *Section 18* and *Section 20,* the functions of conciliation are performed by the Conciliators of the DIRM. The allocation of a Conciliator to a particular case is determined by the DIRM through an administrative process, and parties have no decision on which Conciliator will handle their cases. In the conciliation of collective disputes, workers can be represented by either their own union official or an official from an organisation of workmen registered in Malaysia such as the Malaysian Trade Union Congress (MTUC). In attending either the conciliation of a collective dispute or a claim for reinstatement, an employer may choose to be represented by (a) him or herself, or (b) an authorised employee, (c) an official from his/her trade union or (d) an organisation of employers registered in Malaysia such as The Malaysian Employers Federation (MEF). An employee, who files a claim for reinstatement, may either represent himself/herself or be represented by an official of his/her trade union or the organisation of workmen registered in Malaysia. However, it is clearly stated under Sections *19 (B)(2) and 20(7)* that neither employers nor employees are allowed to be represented by an advocate, adviser and consultant in the conciliation of trade disputes or in a claim for reinstatement.

Apart from the resolution of disputes through conciliation, which is the most extensively used mechanism, the *IR Act 1967* also provides other ways of resolving disputes including negotiation between both parties, fact finding procedures, arbitration, industrial actions, and executive decisions by the Minister (Ayadurai 1993). These options are presented in Table 2.7 below.

Table 2.7 Methods of resolving labour-management disputes recognised by the *IR Act 1967*

Methods of resolving disputes	Agencies involved in using these methods	Types of disputes in which methods may be used	Purpose for which these method may be used
Negotiation	The parties to the dispute	Any dispute	Prevention or settlement
Fact-Finding	A Board of Inquiry or a Committee of Investigation	Trade dispute	Prevention or settlement
Conciliation	The Department of Industrial Relation	Trade dispute /Claim for Reinstatement	Prevention or settlement
Arbitration	The Industrial Court	Trade Disputes/Claim for Reinstatement	Settlement
Industrial Action	The parties to the dispute	Trade Disputes	Settlement
Executive Decision	The Minister of Human Resources	Recognition disputes	Settlement

Source: Adopted from Ayadurai (1993), Labour Law and Industrial Relations in Asia, Eight Country Studies, Labour Law and Industrial Relations in Asia.

2.5.3 Code of Conduct for Industrial Harmony 1975

The Code of Conduct for Industrial Harmony 1975 was introduced as a tripartite initiative between the government, the Malaysian Council of Employers' Organisation (now known as MEF) and MTUC. As stated in the Code the aim is 'to lay down principles and guidelines to employers and workers on the practice of industrial relations for achieving greater industrial harmony' (see page 3 of the Code). Although not enforceable as a law this specifies responsibilities and procedures in relation to employment policies with regard to dispute resolution, collective bargaining, communication and consultation. Hence, it acts as a complement to the implementation of the above mentioned legislation.

In relation to disputes concerning termination of employment, the Code outlines several procedures to be followed by employers before making the decision to terminate their employees. This is to avoid the dismissal being disputed as unfair or unjustified by their employees. For example, in matters pertaining to redundancy and retrenchment clauses 20 to 24 outline the procedure to be followed by employers including providing early warning to employees, offering a voluntary retrenchment and retirement scheme and selection of employees to be retrenched based on the Last In First Out principle (LIFO). This principle which suggests the selection of employees to be retrenched is made based on seniority, is a common method used in Malaysia and has been acknowledged and referred to by the IC (Marsono & Jusoff 2008).

In terms of the procedure for resolving individual grievances, Clauses 38 to 40 of the Code specify several procedures to be followed by employers. Whilst Clause 41 of the Code explains measures to be taken in respect of disciplinary action, clause 42 states the principles of natural justice that should be followed by employers when taking this action and these are as follows:

'(a) Provide for the employee to be informed in writing, of the misconduct;

(a) Specify who has the authority to take what forms of disciplinary action;

(b) Provide for full and speedy consideration by employer of all the relevant facts;

(c) Give the worker opportunity to state his case and right to be represented by his workers' representative or trade union official;

(d) In the case of less serious offences, provide, in the first instances, for warning by the employees' immediate superior

(e) In the case of more serious offences, provide a formal written warning in writing, setting out the circumstances and the disciplinary action to which an employee will be liable if he commits a further offence and require a copy of this record to be given to the employee and if so wishes to his employees' representative or trade union official;

(f) Provide for right of appeal against disciplinary action to a higher level of management not previously involved.'

The Code however, has not always been effectively implemented by employers. This is evidenced by Parasuraman (2005) who found that unions, employers and the government seem to have competing interests in implementing the Code, which causes incompatibilities. He argued that employers in Malaysia continue to exercise high managerial prerogative in the workplace, which deters workers' participation schemes and involvement in decision making.

Despite the Code outlining the procedure for natural justice, failure of employers to abide by these guidelines does not affect the case they present in court. In other words, they are not obliged to comply with the Code's guidelines. This stems from the precedents of High Court in two landmark cases, '*Dreamland'* and *'Hong Leong Assurance'*, following the principle that procedural defect (including not giving reasons before termination *simpliciter*) and non-provision of domestic inquiry can be rectified and augmented in full trial before the Industrial Court. Hence, as argued by Anantaraman (2003) the current norm governing employers' action is 'Fire first; give reasons later' either in termination *simpliciter* or misconduct cases. Nonetheless, this does not imply that the Code should be disregarded. In fact, the Industrial Court has acknowledged that, although the Code is voluntary in nature it has often been referred to by the Court in making its award as provided under *Section 30(5A)* of the *IR Act 1967*. This provision states that:

> *'In making its award, the Court may take into consideration any agreement or Code relating to employment practices between organizations representative of employers and workmen respectively where such agreement or Code has been approved by the Minister.'*

In the above cited sentence, '*Code relating to employment'* refers to the Code of Conduct for Industrial Harmony 1975. For example, in 1997 landmark case between *Mamut Copper Mining Sdn. Bhd v. Chau Fook Kong@Leonard and 17 Others*, the IC makes reference to the Code, in respect of the guidelines to be followed prior to retrenchment, in its decision to make the award stating as follow:

> *While the Agreed Practices annexed to the Code is not a legally enforceable document, the Court is expressly required to have regard to its contents in making its decision on matters referred to it by the Minister. As with other principles contained in the provisions of the Agreed Practices, the Court is constrained not to apply the principle that a retrenched employee ought to be compensated by way of payment of retrenchment benefits precipitately or inflexibly. Undue hardships and burdens should not be imposed upon employers* (quoted from full judgement at para 'Redundancy and Retirement Benefits')

In a 2009 decision of the IC in *Murni Binti Murad v. Federal Furniture* (M) Sdn. Bhd, it was emphasized that the Code must always be considered, based on the fact of each case. The IC court judge at para 2, p. 14 stated as follows:

> *From what has been said above by the Federal Court, one cannot say that the Code is an unimportant piece of record of the agreed practices which parties in dispute can readily ignored. Its importance is indeed endorsed. However, compliance of the Code is still discretionary. As section 30(5A) IR Act 1967 gives the Industrial Court the discretion to take into consideration the Code, it is then for the Court to decide whether such agreed practices in the Code is to be considered in the circumstances of each case.*

The above precedents show examples where the Code has been referred by the IC and the High Court, when making their decisions. However, Anantaraman (2004), in his analysis of the IC awards between 1986 to 2001 found that while many of the awards have been consistent in making reference to the LIFO principle, when evaluating the fairness of the employers' decisions to retrench their employees, these were mostly in addition to them finding a more basic ground to rule that the retrenchment was unjustified. Hence, the IC would not simply decide employers' decisions to retrench their employees as being unjustified on the ground of employers' failure to abide to the LIFO principle alone. Anantaraman (2004) noted

that in some cases the IC itself had shown little concern to the LIFO principle by agreeing to the employers' departure from it based on clause 22(b) of the Code. For example, he noted in the IC case between *Supreme Corporation Sdn Bhd. v. Puan Doreen Daniel A/P Victor Daniel and Ong Kheng Liat* 1987, the IC Chairman on para 6 (3) held:

> *It must be noted, however, that LIFO is not a mandatory rule (it is not a statutory provision) which cannot be departed from by the employer when retrenching staff. That the employer is not denied the freedom to depart from the LIFO procedure is made obvious by the clause 22(b) of the Code of Conduct for Industrial Harmony.*

Clause 22(b), as mentioned above, provides that employers should select employees to be retrenched in accordance with objective criteria. Anantaraman (2004) however, noted that when employers have made selections of employees to be retrenched based on these objective criteria (such as for the interest of business efficiency and the need for keeping certain employees based on skills, ability or experience) the IC would accept employers' departure from the LIFO principle. Furthermore, he noted that the IC has not shown any concern for employers' failure to adhere to any of the other guidelines of the Code unless it is an obligation under their collective agreement. This again shows a conflicting interest in the implementation of the Code, which may affect employers' adherence to it. Furthermore, a review of available literature on the Code failed to identify cases other than retrenchment (for example dismissal on the ground of misconduct) where the IC have made references to it, even though clause 39 and 40 of the Code set out a procedure to procedure for resolving individual grievances which is central to ensuring industrial harmony being maintained at the workplace. Inconsistencies in its implementation may deny justice to the employees concerned, as the Code is the only documented procedure that guides disputants in the Malaysian workplace. For example, on average more than 70 percent of disputes handled by the DIRM relate to claims for reinstatement involving dismissal due to misconduct, termination simpliciter (termination with no reasons) and retrenchment (Table 2.8). It seems intuitive though, that adherence to the Code in the first instance at the

workplace would ensure justice is accorded to employees and this could reduce the incidence of employees seeking justice beyond the workplace, DIRM and the IC.

Table 2.8 Claim of Reinstatement by Nature of Dismissal 2005 – 2010

Nature of dismissal (year ended 31st December)	2005	2006	2007	2008	2009	2010
Misconduct	2,212	1,707	1,535	1,216	1,519	1287
Termination Simpliciter	1,359	1,124	1,064	450	556	459
Retrenchment	845	1,280	918	1,136	1123	512
Constructive Dismissal	318	827	291	232	395	255
Probationer	206	146	180	118	203	147
Forced Resignation	209	112	190	179	195	176
Breach of Section 15(2) Employment Act 1955	48	343	50	10	13	10
Victimization	43	30	55	17	43	22
Fixed Term Contract	38	7	72	56	151	46
Voluntary Resignation	10	31	55	14	26	16
Frustration of Contract	12	16	35	45	116	18
Medical Grounds	4	15	29	30	28	22
Retirement	7	7	22	17	22	15
Others	563	566	350	754	500	486
Total	5,874	6,211	4,846	4,274	4,890	3,471

Source: DIRM Statistic Book Year 2009, DIRM 2010.

2.5.4 The Department of Industrial Relations Malaysia

The main institution that administers and enforces the *IR Act 1967* and the Code of Conduct for Industrial Harmony 1975 is the DIRM. It commenced operations in 1912 under the Ministry of Labour (now known as MoHR) and in West Malaysia became a separate department under MoHR in 1973 (Ministry of Human Resources Malaysia 2007). The state of Sabah and Sarawak, however, continued the tribunal function within

the Department of Labour until 7th of December 2004. Although the establishment of the DIRM tribunal is not expressly stated under the *IR Act 1967* its functions are regulated by the Act. The DIRM is directly administered under MoHR which has headquarters in Putrajaya and is supported by 13 offices throughout the country. It is headed by the Director General of Industrial Relations, who is directly responsible to the Minister of MoHR through the Secretary General. With its mission *'to create, promote and maintain harmonious IR conducive for national development and to enhance the quality of life as a whole',* DIRM is staffed by 115 officers and 84 supporting staff. To achieve this mission it has set the following objective:

> *To ensure the existence of a positive and harmonious relationship between employers and employees and between their respective trade unions aimed at creating a peaceful and cordial industrial relations climate in the country* (http://jpp.mohr.gov.my).

The main services provided by the DIRM include processing claims for recognition of trade unions; facilitating collective bargaining; conciliation of trade disputes and claims for reinstatement; promoting the Code of Conduct for Industrial Harmony 1975; and advisory services. The DIRM mainly uses conciliation in which its authority covers any employees (as defined by the *IR Act 1967)* employed under the contract of employment regardless of their wages. In performing its conciliation function DIRM Conciliators have no adjudicating power and their role is limited to facilitating an amicable settlement between parties, where appropriate pointing out to either or both parties the strengths and weaknesses of their case but not for the purpose of making decision and refraining from making suggestions (Pathmanathan, Kanagasabai & Alagaratnan 2003).

The types of disputes that are normally handled by the DIRM include: (a) recognition of a trade union by an employer; (b) rights of workmen and employees and their trade unions; (c) collective agreements on terms and conditions of employment; (d) dismissals/termination of service and retrenchments; (e) transfer, promotion, assignment and allocation of duties; and (f) interpretation and non-

compliance of awards of the IC or Collective Agreement (Gengadharan 1991). However, the bulk of the disputes handled by the DIRM relate to claims for reinstatement, the central concern of this thesis. As shown in Table 2.9 the number of dismissal disputes (claim for reinstatement) resolved by the DIRM has been very low since 2005 and only in 2009 it has increased significantly to due to direct intervention from the higher authority at the Ministry of Human Resources Malaysia (see Section 1.0). A range of other disputes handled by DIRM is also noted here (Table 2.10).

Table 2.9 Number of Claim for Reinstatement (unfair dismissal) Handled by DIRM 2005 -2010 (year ended 31st December)

Total Number of Claim for Reinstatement conciliated	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**
Resolved at conciliation						
Compensated	*1,337*	*1,213*	*1,065*	*1,183*	*1,235*	*864*
Reinstated	*439*	*1,178*	*215*	*255*	*476*	*160*
Others (withdrawn, claimant absent, closed transferred to other department)	*975*	*781*	*691*	*939*	*1,943*	*645*
Total resolved up to conciliation	2,751 *(41.4 %)*	3,172 *(40.6 %)*	1,971 *(41.9 %)*	2,377 *(56.2 %)*	3,654 *(71.0 %)*	1,669 *(36.9 %)*
Decision By the Minister						
Reference to IC	3,108 *(46.8 %)*	2,954 *(37.8 %)*	1,842 *(39.2 %)*	1,233 *(29.1 %)*	1,219 *(23.7 %)*	1,671 *(37.0 %)*
Not Merit for Reference to IC	779 *(11.7 %)*	1,691 *(21.6 %)*	886 *(18.9 %)*	623 *(14.7 %)*	271 *(5.3 %)*	1,182 *(26.1 %)*
Total Number of Cases	**6,638**	**7,817**	**4,699**	**4,233**	**5,144**	**4,522**

Source: Labour and Human Resource Statistics 2009 and 2010, Ministry of Human Resources Malaysia, Statistic Book Year 2009 and 2010, DIRM.

Table 2.10 Other Disputes Handled by DIRM 2005 -2010

Other disputes handled (other than claims for reinstatement) (year ended 31st December)	2005	2006	2007	2008	2009	2010
Trade Dispute:						
Resolved through conciliation	*276 (67.4 %)*	*542 (80.2 %)*	*248 (72.9 %)*	*177 (75.6 %)*	*219 (68.2 %)*	*233 (67.9 %)*
Referred to the Industrial Court	*105*	*110*	*66*	*34*	*72*	*80*
Not referred to Industrial Court	*28*	*24*	*26*	*23*	*30*	*30*
Total trade dispute handled	**409**	**676**	**340**	**234**	**321**	**343**
Claims for Recognition:						
Recognition accorded voluntarily	*23*	*13*	*13*	*10*	*9*	*7*
Recognition accorded by decision of the Minister	*35*	*27*	*32*	*26*	*28*	*30*
Decision of the Minister Not to Recognize	*26*	*42*	*22*	*9*	*23*	*32*
Rejected/Withdrawn//Union not eligible/fault	*27*	*41*	*40*	*36*	*37*	*33*
Total claims for recognition handled	**111**	**123**	**107**	**81**	**97**	**102**
Other complaints handled:	**220**	**266**	**147**	**109**	**151**	**80**
Total disputes handled (other than claims for reinstatement)	**740**	**1,065**	**594**	**424**	**569**	**525**

Source: Statistic Book Year 2009 and 2010, DIRM.

In Malaysia, the occurrences of disputes including claims for reinstatement over the past five years, is much greater in the state of Selangor and the Federal Territory of Kuala Lumpur than other regions (Table 2.11). The next largest set of dispute incidents occurs in Penang and Johor. Sarawak, which is a state located in East Malaysia, also demonstrates high numbers of disputes pertaining to claims for reinstatement from 2005 to 2008 but the figures somewhat reduced in 2009 and 2010.

This was a result of the amendment to the *LO Sarawak Chapter 73*, which provided a similar tribunal (the Labour Court) to that of the *EA 1955* in handling disputes over termination, where the remedy sought by the claimants involved claims for compensation in lieu of notice or payment of termination and layoff benefits under the said Ordinance.

Table 2.11 Claims for Reinstatement Reported by State 2005 -2010

State (year ended 31st December)	2005	2006	2007	2008	2009	2010
Selangor	1,367	1,792	1,631	1,405	1,697	1197
Federal Territory of Kuala Lumpur	1,308	977	909	836	1,227	954
Penang	402	935	639	510	610	334
Johore	534	559	375	382	333	199
Perak	433	229	279	222	330	195
Sarawak	488	271	275	190	126	106
Negeri Sembilan	267	183	206	119	128	88
Kedah/Perlis	216	246	155	343	105	142
Sabah	333	174	127	96	141	79
Pahang	73	210	123	50	76	58
Melaka	117	162	73	53	66	55
Terangganu	101	384	36	36	31	35
Kelantan	55	89	18	32	20	29
Total	**5,874**	**6,211**	**4,846**	**4,274**	**4,890**	**3,471**

Source: Statistic Book Year 2009 and 2010, DIRM.

2.5.5 The Industrial Court

The IC was established in 1940 under the *Industrial Court of Inquiry Rules*, but was not able to function due to the Japanese occupation of Malaysia from 1941 to 1942 (Industrial Court of Malaysia 2010). This was corrected, when the *Industrial Court Ordinance 1948* was enacted, and the IC was able to operate as a voluntary arbitration panel. This voluntary mechanism was unsuccessful, however, as despite the huge number of disputes between 1948 and 1964, only four were heard as disputants were not eager to refer their cases to arbitration (Industrial Court of Malaysia 2010; Anantaraman 1997). As a result of this industrial unrest, in 1965 another Arbitration panel called the Industrial Arbitration Tribunal was established and was empowered to decide on disputes in essential services. These two arbitration panels continued to exist concurrently until the enactment of *IR Act 1967*, when the present IC was constituted and the two arbitration panels were dissolved. The IC embodies both the principles of voluntary and compulsory arbitration, acting as an important institution in the compulsory adjudication system of the country (Ali Mohamed 2004; Anantaraman 1997). Nevertheless, this has been seen by the union leaders as shifting collective bargaining to compulsory arbitration (Parasuraman 2004). The IC, which operates as an industrial tribunal (see *Section 63 proviso (b)* of the *IR Act 1967),* is headed by a president, with four branches in West Malaysia and one each in the states of Sabah and Sarawak (East Malaysia). For collective disputes, the court is presided over by a Chairman sitting with two other representatives (employers and the employees). The Chairman presides over claims for reinstatement (pertaining to unfair dismissal). The hearing at the IC is an adversarial and lengthy process taking many days due to the frequent objections from both parties on the documents. The ensuing backlog of cases at the IC became so serious that the Minister took action in 2004 by introducing mediation at the IC (Sithamparam 2010). However, the lack of a common guide on how to execute mediation it has been left to the discretion of individual IC Chairmen to conduct mediation or not and hence, there is a lack of uniformity in its implementation (Oxford Business Group 2011). Therefore, beginning in March 2010 the IC has embarked on a new initiative called 'early evaluation of cases' to expedite the disposal of cases (Practice Note no 3 of 2010). As yet there is no evaluation of the success of this new measure and this is considered in the Discussion chapter of this thesis.

The IC conducts arbitration of unfair labour practices *(Section 8*), claims for reinstatement (*Section 20*), and trade disputes (*Section 26*). The power of the IC to hear disputes including claims for reinstatement is subject to reference by the Minister. Parties in disputes are barred from referring their disputes directly to IC and it would be considered as going beyond its jurisdictional powers, if it was to hear such cases. Because of this Anantaraman (1997) has argued that the Ministerial reference has become merely procedural in nature due to the stringent requirements of the Act. Nonetheless, as these requirements are legally prescribed, they become pre-requisites in which failure to adhere to their processes may result in dispute cases being struck off or considered null and void. The only occasions, where the IC can hear cases without Ministerial reference are in relation to interpretation of awards or collective agreements *(Section 30(1)*, variation of terms of the award on grounds of ambiguity or uncertainty *(Section 33(2)*, non-compliance of an award *Section 56(1)*, and application to the IC for reference to the High Court on any questions of law arising of an award (*Section 33A*). The decision of the IC is known as an award and as stated under section 33B (1) of the *IR Act 1967* shall be final and conclusive:

> Subject to this Act and the provisions of Section 33 A, an award, decisions or order of the Court [IC] under this Act (including the decision of the Court whether to grant or not to grant an application under section 33 A (1) shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court.

The analysis of Industrial Court awards from 2005 – 2010 in respect of claims for reinstatement showed cases concerning misconduct dominated (Table 2.12). For example, in 2009 the number of awards relating to misconduct cases constituted 51.3 percent of the cases, while retrenchment and constructive dismissal represented 9.5 percent and 11.7 percent respectively. The remaining 27.5 percent of cases was for a variety of other reasons such as forced resignation and termination simpliciter (termination of employment based simply on the clause of the contract). As shown in Table 2.12 the number of misconduct cases dealt by the IC has been the highest number of cases consistent with the number of misconduct cases received by the DIRM with

both showing a downward trend from 2005 to 2010 relative to the total number of cases dealt (see also Table 2.8). Hence, this explains the striking change in the rates of dismissal for misconduct dealt by the Industrial Court Malaysia from 2005 - 2010 as shown in Table 2.12. In addition, there was also a serious backlog in 2004 at the Industrial Court Malaysia resulting in the intervention by the Ministry to speed up the process as discussed earlier.

Table 2.12 Analysis of Industrial Court Awards of Dismissal Cases (2005 - 2010)

Types of dismissal (year ended 31st December)	2005	2006	2007	2008	2009	2010
Misconduct	2144	2051	1200	878	613	608
Retrenchment	16	32	422	155	114	67
Constructive	22	42	97	126	140	135
Others	-	-	402	573	328	479
TOTAL	2182	2125	2121	1732	1195	1289

Source: Industrial Court 2010

An analysis of the IC awards from 2005 to 2010 showed almost equal percentage between decisions in favour of employers and employees. For instance, in 2009, 48.9 percent of the decisions were in favour of employers while 51.1 percent were in favour of the employees. In 2010, however, the decisions which favoured the employers had increased slightly to 50.7 percent, with 44.7 percent in favour of the employees (Table 2.13).

Table 2.13 Industrial Court Award (Decisions) on claims for reinstatement (unfair dismissal) 2005 - 2010 (year ended 31st December)

Award	2005	2006	2007	2008	2009	2010
In favour of employers	162 *(40 %)*	483 *(55.2 %)*	1,077 *(50.8 %)*	822 *(46.6)*	578 *(48.9 %)*	647 *(50.7 %)*
In favour of employees/unions	242 *(59 %)*	392 *(44.8%)*	1,041 *(49.2 %)*	941 *(53.4 %)*	604 *(51.1 %)*	571 *(44.7 %)*
Favouring both	-	-	-	-	-	39 *(3.1 %)*
Not in favour of both	-	-	-	-	-	19 *(1.5 %)*
Total awards	404	875	2118	1763	1182	1276
Compensation awarded (RM)	23,895,905	32,068,930	31,441,719	31,901,563	27,534,111	33,301,615

Source: Industrial Court 2010

2.5.6 The Trade Union Act 1959 and the Department of Trade Unions Affairs

The *TU Act 1959* and its subsidiary regulations govern the formation and registration of unions, and are applicable throughout Malaysia. The main body which administers and enforces this Act, which relates to the formation of trade unions, is known as the DTUA (formerly known as the Registry of Trade Unions). This Department was established in July 1946 (Department of Trade Unions Affairs Malaysia 2009). The formation of trade unions is regulated and subject to various conditions such as membership of trade unions being confined to West Malaysia region, Sabah or Sarawak (*Section 2* of the *Act).* In addition, since unions that are general in nature are not allowed, their membership is mainly limited to specific trades, occupations or industries.

In Malaysia the density of unions is roughly seven percent, comprising employees from the private sector, government and statutory agencies (Table 2.14 and 2.15). In 2009 with a working population of 10.9 million, only 806,860 were unionised, which

represent a density of 7.4 percent (Department of Trade Unions Affairs Malaysia 2010; Department of Statistics Malaysia 2010b). Similar trends from 2006 to 2009 showed the density remained around seven percent, even though the labour force had increased (Table 2.14). Hence, unions in Malaysia remain weak, despite increases in employment. As noted by Ramasamy and Rowley (2008) an increase in Malaysian union membership between 1995 and 2005 did not keep pace with the increase in employment. In addition, about 20 percent of unions in Malaysia are public sector unions, which are not governed under the *IR Act 1967* and *EA 1955* (Labour Ordinances for the States of Sabah and Sarawak). The trend of diminishing union density is not uncommon in other countries too but as Aminuddin (2008) noted in Malaysia the density is low even when compared to developed countries such as United States (13 percent), Korea (14 percent), Singapore (18 percent), Japan (21 percent), United Kingdom (29 percent), and Denmark (80 percent). According to the statistics issued by the Organisation for Economic Co-operation and Development (OECD) the trade union density in 2010 for New Zealand stood at 20.8 percent while in Australia and the UK the percentage was 18 percent and 26.5 percent respectively.

Table 2.14 Number of Workforce, Trade Unions and Employees Covered, Malaysia 2005 -2010 (year ended 31st December)

Workforce , Unions and employees' covered	2005	2006	2007	2008	2009	2010
Total number of labour force employed ('000)	10,043.7	10,275.4	10,538.1	10,659.6	10,897.3	11,668.2
Number trade unions	621	631	642	659	680	676
Number of employees covered	761,160	801,585	803,212	805,565	806,860	802,616
Unions density	7.5 %	7.8 %	7.6 %	7.6%	7.4 %	6.9 %

Source: Department of Statistics Malaysia
Department of Trade Unions Affairs, Malaysia

Table 2.15 Number of Trade Unions By Sector in Malaysia 2005 -2010

Sectors	2005	2006	2007	2008	2009	2010
Private sector employees	390	396	407	421	436	439
Government employees	127	130	130	132	137	139
Statutory Body and Local authority employees	91	92	92	92	93	98
Employers Trade Unions	13	13	13	14	14	14

Source : Labour and Human Resource Statistics 2009 and 2010, Ministry of Human Resources Malaysia.

In Malaysia, many employees choose not to become union members to avoid paying subscriptions, even though they recognise the benefits of union negotiation of collective agreements on their behalf (Gengadharan 1990). The growth of unions is also hindered by the presence of compulsory arbitration and the underdeveloped role of collective agreements in Malaysia (Gengadharan 1991). The unions are also generally seen to be weak, divided and practicing confrontational politics (Ramasamy 2008). Instances of leadership problems in some unions have hindered their effectiveness to serve the wider interests of their members. In addition, they have many potential members who are employed only on short term basis and hence are not likely to take up membership (Ramasamy 2008). Such employees include foreign workers employed on a contractual basis and also seasonal employees working in the construction sectors. Ramasamy and Rowley (2008) note that the situation is further exacerbated by the 'free rider' problem, which arises from the collective agreement being binding on all workers in the organisation, regardless of whether they are members or not. Unions are also not allowed to apply intimidation or force to gain membership, even though it is argued that a high union density will provide union with the legitimacy, influence, strength and confidence in bargaining (Ramasamy & Rowley 2008). Low union density may affect employees' voice and power at the workplace, particularly in the resolution of disputes.

2.5.7 The Employment Act 1955 and the Department of Labour

The *EA 1955* regulates the employment relationship, as well as the conditions of employment under the contract of employment between employer and employee (Ayadurai 1993). The objective of the *EA 1955* is to provide for minimum statutory provisions for employment. This objective is expressly stated in its preamble which states that it is '*an act relating to employment*'. These include working hours and overtime, weekly rest days, public holidays, annual and sick leave, maternity benefits, termination and lay off benefits. Although the Act covers all manual workers irrespective of their monthly wage, it only covers non-manual workers earning RM 1500 (AUD 517) and below per month. For the States of Sabah and Sarawak, however, their own *Labour Ordinance Sabah Chapter 67 (LO Sabah)* and *Labour Ordinance Sarawak Chapter 76 (LO Sarawak)* are enforced with a higher ceiling at RM2,500 per month. All other provisions of the Act and Ordinances are similar, except for those pertaining to the employment of foreign workers, guaranteed weeks, and employment of children and young persons. The *EA 1955* and the ordinances provide a 'basic floor of rights', they nonetheless aim to protect the employment security of the people they cover (Syed Ahmad 2002). In particular, specific subsections of the Act and Ordinances, which require employers to abide by the conditions of statutory notice prior to terminating services of employees, are of interest to the present study. *Section 12(2)* of the Act/Ordinances provides minimum notice in the absence of a written contract between an employer and employee. In this case notice given must not be less than four to eight weeks, depending on the length of employment. In the case of redundancies, ceased operation or change of ownership, *Section 12(3)* provides that similar length of notice be given upon termination of contract. As provided under *Section 13*, this requirement of notice can be substituted with either party paying the other indemnity of a sum equal to the amount of wages that an employee would have earned during the term of such notice or during the unexpired term of such notice. In addition, for cases of misconduct *Section 14* give the right to employers after due inquiry, to dismiss without notice, downgrade the position, or impose a lesser punishment to employees.

Under the *EA 1955 (Section 69)* and the two Ordinances for the state of Sabah and Sarawak, a tribunal known as the Labour Court (LC) has also been established with the power to inquire into and decide any dispute between an employee and his/her employer. This covers disputes in respect of wages or other payments in cash due to an employee under: (a) any term of the contract of service between such employee and his employer; (b) any of the provisions of *EA 1955/Ordinances* or any subsidiary legislation made under the acts; and (c) the provisions of any Minimum Wage Order (including those that is still valid under the repealed *Wages Council Act 1947)* and any new minimum wage order yet to be made under the recently introduced *National Wages Consultative Council Act 2011*.

The LC uses the conciliation (during first hearing) and arbitration (full hearing) in resolving disputes and hence has greater power than the DIRM, which only uses conciliation as method of dispute resolution. As opposed to DIRM, the functions of conciliation and arbitration in the LC are performed by the same person. Further, the arbitrated decisions of LC are enforceable as a judgement of a Magistrate Court or a Session Court. Nonetheless, *Section 77* of the *EA 1955* provides that any parties, who are affected financially by the decision, can appeal to the High Court. The LC, however, cannot inquire into, hear, decide or make any order in respect of any dispute including a claim for reinstatement, which has been referred to the DIRM or IC. However, the LC is an alternative mechanism, and as provided under *Section 86* of the *EA 1955,* it does not prevent any employer or employee from enforcing his/her civil rights and remedies for any breach or non-performance of contract of service in the ordinary court of law. This is on the condition that no proceedings have been instituted in the LC or if instituted have been withdrawn.

2.5.8 Other labour legislation and institutions

Apart from the above main pieces of legislation that regulate employment in Malaysia, there are a number of supplementary Acts, which regulate employment relations. For example, the *Wages Council Act 1947 (Revised 1977) (WC Act 1947)* which has provided employees working in hotels and catering industry; plantations; shop assisting;

and stevedoring with a minimum wage. The most recent minimum wage order made under this Act was for the private security guard which came into force in February 2011 in Peninsular Malaysia (*Wages Councils (Wages Regulation Order) (Statutory Minimum Remuneration of Private Security Guard in Peninsular Malaysia) Order* 2011) and August 2011 in the state of Sabah and Sarawak (*Wages Councils (Wages Regulation Order) (Statutory Minimum Remuneration of Private Security Guard in Sarawak and Sabah) Order* 2011). These were the last minimum wage orders made under the *WC Act 1947 before it was* repealed with the introduction of the *National Wages Consultative Council Act 2011* (*NWCC Act 2011*) which came into force with effect from 23 September 2011 (*National Wages Consultative Council Act 2011*). Whilst all the Wages Councils established under the repealed Act were dissolved with the implementation of the new Act, the Wages Councils Order made by these Councils, however continued to be in force until revoked or replaced by the Minimum Wage Order to be made under the new Act (see *Section 58* of *NWCC Act 2011).* Six other Acts that are currently enforced in Malaysia are: *Weekly Holidays Act 1950; Workmen Compensation Act 1952;* the *Employment Information Act 1953; Children and Young Person (Employment) Act 1966* (not applicable in East Malaysia)*; Private Employment Agencies License 1981; Workers' Minimum Standards of Housing and Amenities Act 1990* (not applicable in East Malaysia).

Four departments under MoHR which also regulate matters of employment include the: Department of Occupational Safety and Health; the Manpower Department; the Development of Skills Department; and the National Institute of Human Resources. Statutory bodies under MoHR include the Social Security Organisation and the Human Resources Development Board, as well as two companies known as the National Institute of Occupational Safety and the Health and Skills Development Fund Corporations.

2.5.9 Collective bargaining and collective agreement

In Malaysia, apart from the minimum provision of employment as prescribed by the *EA 1955* and the respective ordinances (for the state of Sabah and Sarawak), the use of collective bargaining and collective agreements are still two important mechanisms used

in wage setting and conditions of employment in the private sector. However, these do not apply to the public sector, which is also not governed by any of the legislation discussed earlier, including the *IR Act 1967*. As argued by Parasuraman (2004) there are currently two separate sub-systems in setting wages and conditions of employment in Malaysia, where in the public sector it is unilaterally decided by the government while in the private sector it is the outcome of collective bargaining. These mechanisms govern relations between employers and employees in wage setting and terms of employment in Malaysia (Ayadurai 1993).

Collective bargaining and its product the collective agreement have been argued to comprise the best method of regulating the terms and conditions of employment (Shatsari & Hassan 2006). Collective bargaining is regulated under *Section 13* of the *IR Act 1967*, which stipulates that an employee's union, whose recognition has been accorded by the employer, may invite the employer to engage in collective bargaining. Such proposals may include provision for the training of employees, the annual review of wages and a performance based pay system. This proposal must not include issues pertaining to the following: promotion, transfer, the appointment and termination as a result of redundancy or reorganisation, assignment of duties and dismissal and reinstatement of employee (which are considered to be employers' prerogative under Section 13, subsection 3 of the *IR Act 1967*). Collective agreements are governed under *Section 14* of the *IR Act 1967* and must be made in writing. In order for the collective agreement to be binding, it must be given recognition by the IC in the form of an award. It then becomes an implied term of the contract between the workmen and employers bound by the agreement.

In many developing countries including Malaysia, the development of collective bargaining and collective agreements is still weak due to the absence of strong and effective unions. Shatsari & Hassan (2006) argue that in this situation, the use of compulsory adjudication for resolving disputes affects the institution of collective bargaining. For example, in 2008, there were only 270 collective agreements covering 86,355 employees in Malaysia (Table 2.16). This is a very small percentage given the total number of unionised employees was 805,565 in a workforce of 10.7 million.

Table 2.16 Number of Collective Agreements and employees covered 2005 -2010 (year ended 31st December)

Collective agreement	2005	2006	2007	2008	2009	2010
Number of Collective Agreements	263	273	216	270	276	330
Number of employees covered	93,730	141,132	187,148	86,355	75,356	141,411

Source: Labour and Human Resource Statistics 2009 and 2010, Ministry of Human Resources Malaysia, DIRM 2010.

2.5.10 Ministerial power

In the Malaysian industrial relations system, the Minister of Human Resources has an important role in ensuring that industrial harmony is maintained as conferred by statute (Yaqin 1999). For example, under the *EA 1955, LO Sabah, LO Sarawak, IR Act 1967,* and *TU Act 1959,* the Minister has the power to make subsequent rules, regulations and orders to ensure the smooth implementation of these Acts and Ordinances. Under the *IR Act 1967*, the Minister's powers in relation to dispute resolution are as follows:

(1) to refer to the IC or not a hearing of any complaint about the contravention of Sections 4, 5 or 7 which relate to issues relating to the formation and activities of unions (Section 8(2A);

(2) to decide on whether any workman or workmen are employed in a managerial, executive, confidential or security capacity in respect of claim for recognition of union *(Section 9(1D));*

(3) to act as a final arbiter in a dispute relating to a recognition of a trade union *(Section 9(5));*

(4) to conciliate any dispute at any time if it is deemed necessary or expedient to do so *(Section 19A*);

(5) to refer or not claim for reinstatement to the IC depending on the merits of each case *(Section 20(3));* and

(6) to refer any trade dispute to IC on a joint request from the parties or on his/her own accord *(Section 26).*

The process of referring only cases with merit to the IC through the Minister's recommendation has filtered out many frivolous and vexatious cases. For example, the percentage of cases not having merit referred to the IC from 2005 to 2009 ranged from 18 percent to 36 percent, while in 2010 just slightly under half of the cases were decided to have no merit (Table 2.17). While this Ministerial process may help to avoid an influx of vexatious cases going to the IC, it has also been argued that it denies the rights of adjudication to employees, who have been unfairly dismissed by their employers. For example, in early research on this matter Dunkley (1982) found that of 2000 or more cases that came before the Minister each year prior to 1976, the largest proportion of these were rejected with no reasons provided for this rejection. Similarly, Yaqin (1999) noted that the Ministerial process restricts the benefit of the '*curable principle'* only to cases referred to the IC. Therefore, employees who have not been given due inquiry or had a defective one, do not have the possibility of their cases being reviewed by the IC, as the power conferred to the Minister by the *IR Act 1967* is final and cannot be challenged (unless such an employee made an application for judicial review at the civil court). Hassan (2007) also believes that the Ministerial process may affect the right for adjudication among employees, whose cases are not referred to the IC because the decisions are made administratively and they are not given the right to be heard. Statistics from the DIRM from 2005 until 2010 show that the Minster has referred more than half the cases to the IC for arbitration (Table 2.17).

Table 2.17 Decision of the Minister 2005 -2010

Year	2005	2006	2007	2008	2009	2010
Reference to Industrial Court	3,108 *(80.0 %)*	2,954 *(63.6 %)*	1,842 *(67.5 %)*	1,233 *(66.4 %)*	1,219 *(81.8 %)*	1,671 *(58.5 %)*
Not Merit for reference to Industrial Court	779 *(20.0 %)*	1,691 *(36.4 %)*	886 *(32.5 %)*	623 *(33.6 %)*	271 *(18.2 %)*	1,182 (41.4 %)
Total cases	3,887	4,645	2,728	1,856	1,490	2,853

Source: DIRM 2010.

Although reasons for Ministerial rejections (non-referral of cases to the IC) are not publicly available as these decisions are made administratively, this may not necessarily mean that cases are rejected without basis. The decision of the Minister not to refer any dispute to the IC is based on the merit of each case. For example, a case considered to be vexatious and frivolous will be rejected. As noted by Ali Mohamed & Sardar Baig (2009) the decision of the Minister not to refer any case to the IC would not necessarily mean that the Minister had exceeded his jurisdiction or had acted ultra vires of the *IR Act 1967*. This has been confirmed in an appeal case between *Michael Lee Fook Wah v. Minister of Human Resources Malaysia* in which the Court of Appeal judge on page 234 held:

> *We hold that, the very fact that the Minister did not refer per se any particular trade dispute, does not necessarily mean that the Minister has abused his discretion. It is for him to be satisfied that it is fit and proper case to refer to the Industrial Court. An exercise of discretion does not always mean that it should be exercised only in a positive manner. A negative act, as in the present case, is equally an exercise of discretion, provided the Minister had considered every aspect of the case. On the facts and circumstances of the present case, we are satisfied that the Minister had exercised its [his] discretion in a manner in accord with the scheme and intention of the Act, and as such the Court should not interfere.*

The Minister has been empowered with a duty not to refer cases which are considered to be frivolous or vexatious and this decision cannot be questioned unless the Minister's decision involved errors in fact or law (Ali Mohamed & Sardar Baig 2009). For example, the Minister should not deal with the issue of whether the claimants who disputed his or her dismissal are employees under the *IR Act 1967*. If such questions of fact or law are used by the Minister to refuse reference to the IC, any party who is not satisfied with the decision can appeal under judicial review to quash the decision. Despite the number of cases rejected by the Minister, the problem caused by the case backlog to the IC remains problematic (see Section 2.5.5).

2.5.11 The judicial review and the Civil Court.

In Malaysia, the intention of industrial dispute resolution is that disputes should be settled in a cheap and quick manner through conciliation by the DIRM rather than resorting to the court. Nonetheless, the establishment of LC and IC has been for the purpose of providing specialist tribunals for handling disputes in a speedy and cost effective manner. In addition, the Ministerial process (assisted by Conciliators at the headquarters of DIRM) acts as a mechanism to filter frivolous and vexatious disputes. Theoretically the *IR Act 1967* legitimates decisions of the IC and Minister through the provision which states that these decisions are final and conclusive. In practice, however, these decisions can be successfully challenged in the High Court (Ali Mohamed & Sardar Baig 2009). This may be done through application for judicial review (*writ of certiorari*) at the civil court (Syed Ahmad & George 2002). Such actions are provided for under *article 5(1)* of the *Malaysian Federal Constitution* as right for a person to have any decision by an administrative or a legislative body reviewed by a superior authority (Ali Mohamed & Sardar Baig 2009). It provides an avenue to any party aggrieved with the Minister or tribunals' decisions to file motion for judicial review in the High Court. The High Court will review these decisions, based on the manner they were made (process), rather than the outcome of the decisions.

Syed Ahmad and George (2002) observed that the Malaysian judiciary have adopted a pro-active and interventionist approach to judicial review in employment disputes. Similarly, Hassan (2006b) noted that judicial reviews, especially those relating to applications for *certiorari,* have been actively sought by aggrieved parties. The writ of certiorari is normally sought in matters of employment to ensure that jurisdiction of the inferior tribunal is properly exercised and does not contain any jurisdictional errors or violate any rules of natural justice (Anantaraman 1994). The writ of certiorari is also sought by disputants, who, while having their disputes heard by the IC, apply for *'granted of stay'* and file a motion in the High Court regarding questions of law such as: issues about the date of termination: questions of whether the claimant is an employee under the *IR Act 1967*; and arguments on accessing witness. When a writ of certiorari has been filed at the High Court, the hearing at the IC will be pending until the decision

of the High Court is received. The statistics from 2005 -2010 show that between 42 to 118 cases were pending at the IC because disputants had applied for certiorari, while between 21 to 44 awards of the IC were challenged under judicial review. The number of Minister's decisions appealed under judicial review from 2005 to 2010 was between 18 to 37 (Table 2.18).

Table: 2.18 Proceeding under *certiorari* 2005 - 2010

Year	2005	2006	2007	2008	2009	2010
Number of cases pending at IC due to disputants making an appeal under *certiorari at the High Court**	118	183	80	84	60	42
Number of decisions of IC being appeal to the High Court**	21	22	33	31	38	44
Number of Minister's decision appealed under judicial review	18	52	95	62	39	37

Source: Industrial Court 2010, Malaysia, DIRM 2010

* Statistics of cases pending (prior to decisions or interim decisions) which have been granted of stay for judicial review at the High Court) include issue such as on date of termination, question of employee, production of witness e.tc. Based on telephone interview with Registrar of the IC on 16/6/2011 at 12:03)

** This statistic only includes the number of decisions of the IC being appealed to the High Court (as reported by disputant to the IC) and does not include those which were not reported. There is no current requirement for disputants to report to the IC or Minister that they made an appeal to the High Court.

2.5.12 Specific provisions of the Malaysian employment laws in regulating unfair dismissal and unlawful dismissal and remedy under common law.

Section 2.5.2 discussed the specific provisions of employees' rights to file claims for reinstatement under the *IR Act 1967*, while Section 2.5.7 introduced the rights for due inquiry under the *EA 1955* (respective Ordinances for the state of Sabah and Sarawak). This section elaborates further on the development of these provisions in protecting employees in Malaysia against unfair and unlawful dismissals.

In many countries laws and regulations on termination of employment have been enacted as a result of the ILO Convention No. 158 of 1982 (replacing the Termination of Employment Recommendation No. 119 of 1963) and its accompanying Recommendation No. 166 of 1982 (International Labour Organization 2001). These laws are consistent with the standard of the Convention (Wheeler, Klaas & Mahony 2004). For example, the Australian unfair dismissals and unlawful dismissals provisions were enacted based on this convention (Creighton & Stewart 2005). Although Malaysia has been a member of the ILO since 1957, it is not a signatory to this Convention. Nonetheless, the *IR Act 1967* and the *EA 1955* both contained provisions on termination of employment, as well as provision on protection against dismissal without just cause and excuse. However, the Acts do not clarify the rights of employers and employees in relation to termination of employment in detail as found in many countries having similar provisions (Aminuddin 2009). Furthermore, unlike other countries such as the UK, there are no differences between unfair dismissal and wrongful dismissal and they are used interchangeably (Thavarajah 2008). As this thesis concern disputes over dismissals it is important to discuss the development of the right to file against dismissal without just cause and excuse under the *IR Act 1967*, due inquiry under the *EA 1955* as well as the available remedy for wrongful dismissal under the common law.

Prior to 1967 various laws and regulations governed the resolution of disputes over dismissal (dealt under a trade dispute), which is only available to unionised employees (see Section 2.5.1). When the *IR Act 1967* was first enacted, the protection against dismissal in Malaysia (treated as a dispute between employers and employees) was also only available to unionised employees and was dealt with by the Minister who could refer it to the IC (Thavarajah 2008). This provision was found in *Section 16* of *Part V* of the then *IR Act 1967 (See Act No 35 of 1967).* However, in 1971 the *IR Act 1967* was amended to include *Section 16A* which provided non-unionised employees with the right to file a representation against dismissal without just cause and excuse to the Minister within one month from the date of dismissal (see *Act A92 Industrial Relations (Amendment) Act 1971*). This provision for the first time provided non-unionised employees in Malaysia who prior to this relied on the harsh and outdated common law with protection against unfair dismissal. In *Hong Leong Equipment Sdn. Bhd. v. Liew*

Fook Chuan and Others (1996), the Court of Appeal Judge on page 702 para f noted:

> When the Act [*IR Act 1967*] was first passed in 1967, it did not carry any provision akin to the present [section] 20. The Minister's power to refer trade disputes to the Industrial Court was confined to disputes between a trade union and an employer. Non-union workmen were left to the harsh consequences of a common law founded upon outdated concepts. Parliament saw and recognised the injustices meted to non-union workmen. It acted.

In 1975, *Section 16A* was, however, repealed via the amendment to the *IR Act 1967* (see *Act A299 Industrial Relations (Amendment) Act 1975*) and a new *Section 17A* (under a new Part VA) was inserted to provide employees, who were not members of trade unions with the right to file for the representation against dismissal without just cause and excuse, with the Director General of Industrial Relations, instead of directly to the Minister. This must be done within one month from the date of the dismissal. In 1976 the *IR Act 1967* was revised (see *Act 177*) pursuant to *Section 10 (1)* of the *Revision of Laws Act, 1968*. In this newly revised Act, while complaints relating to trade disputes (which include disputes over dismissal of unionised employees) were placed under *section 18 in Part V* of the Act, protection against dismissal without just cause and excuse for employees, who are not members of any trade union, was placed under *Section 20 of Part VI*. Under *Section 20 (1)* of the then revised *IR Act 1967*, any employee who is not a member of trade union and who was dismissed without just cause and excuse, can file a representation to the Director General of Industrial Relations within one month from the date of dismissal. Further, in 1980, this one month period was adjusted to 30 days (see *Act A484 Industrial Relations* (Amendment*) Act 1980)*. In 1989 *Section 20* was further amended to include all employees (regardless whether they are unionised or not) resulting in them no longer being able to file their dismissal dispute, as trade dispute under *Section 18* of the revised *IR Act 1967*. The minimum period for employees to file their representation was also increased to 60 days (see *Act 718 Industrial Relations (Amendment) Act 1989)*. Table 2.19 summarise the amendments made to the *IR Act 1967* relating to provision for the right to file a representation against dismissal without just cause and excuse in Malaysia.

Table 2.19 Changes to provision against dismissal without just cause and excuse under *IR Act 1967*

Year	Amending Authority	Amendment	In force from
1967	*IR Act 1967 (Act No 35 of 1967)*	Dispute (including dismissal) can be filed to the Minister under Sec 16 by trade union of employee or by the employer or its trade union.	1967
1971	*Act A92 IR (Amendment) Act 1971*	Inclusion of Section 16A to provide non-unionised employees the right to file a representation against dismissal without just cause and excuse to the Minister within one month from the date of dismissal.	1.10.1971
1975	*Act A299 IR (Amendment) Act 1975*	Repealed of Section 16A and inclusion of new Section 17A under a new Part VA to provide non-unionised employees the right to file a representation against dismissal without just cause and excuse to the Director General of Industrial Relations within one month from the date of dismissal.	1.8.1975
1976	*Act 177 IR Act 1967*	Revision of the *IR Act 1967*. This moved Section 17 A to Section 20 in Part VI of the newly revised act. Section 16 which provided reference of trade disputes to the Minister was moved to Section 18 in Part V of the newly revised act.	1.9.1976
1980	Act 484 *IR (Amendment) Act 1980*	The period to file representation against dismissal without just cause and excuse was changed from one month to 30 days	30.5.1980
1989	Act A718 *IR (Amendment) Act 1989*	Section 20 was amended to include both dismissals of unionised and unionised employees. Provided for a new provision under Section 18 (2) that stated for any dispute relating to dismissal to be dealt under Section 20 instead of Section 18.	10.2.1989

Source: Lawnet.com.my

As discussed above *Section 20* of the *IR Act 1967* provided the right for employees in Malaysia to file claims for reinstatement if they consider the dismissal to be without just cause and excuse (see also Section 2.5.2). However, this phrase is not defined by the *IR Act 1967* making it subject to various interpretations, and hence is also not well understood by disputants. In addition, the *IR Act 1967* does not enunciate the grounds or circumstances where a dismissal is considered to be without just cause or excuse. Hence, its interpretation lies with the Court based on precedents when needed (Aminuddin 2009). These precedents been developed by the IC over the years to clarify many aspects of the dismissal cases in Malaysia (Menon 2010). For example, the IC in

Tip Top Motorcade Sdn. Bhd. v. Johnny Chong Choong Keong (1994) on page 315 ruled that:

> *It is a well established principle of law that there is no material difference between termination of employment and a dismissal. The term employed in the act of bringing a workman's employment to an end is inconsequential; it is the court's duty to determine whether the act, whatever the label attached to it, was for a just cause or excuse*.

This principle, which clarifies the meaning of dismissal to include termination of employment for any reasons including retrenchment, was based on the decision of an appeal case between *Goon Kwee Phoy and J & P Coats (M) Sdn. Bhd. (1981)* at the Federal Court of Malaysia (Anantaraman 2004). The Federal Court judge on page 136 ruled:

> *We do not see any material difference between a termination of the contract of employment by due notice and a unilateral dismissal of a summary nature. The effect is the same and the result must be the same. Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.*

While the right to file for a dismissal 'without just cause and excuse' under the *IR Act 1967* has provided employees in Malaysia a level of security of employment, the *EA 1955* sets guidelines on the notice period to be given, when either party wish to terminate the employment contract, the amount to be paid to employees for termination

and layoff benefits and the requirement of due inquiry prior to dismissal of employees who commit misconduct (See Section 2.5.7).

Section 12 of the *EA 1955* provides that any party, who wishes to terminate an employment contract must provide a notice prior to termination. The period of notice required is normally stated in writing by the contract of employment, which in such absence will follow the minimum period stipulated by the *Act*. Failure of employers to provide notice of termination will entitle an employee to claim indemnity in lieu of notice equivalent to the period of notice, which would have been required. Employees, who wish to claim for retrenchment and layoff benefits are also subject to a maximum amount as provided by the *EA 1955*. In both claims for compensation in lieu of notice and retrenchment and layoff benefits, employees must file their case with the LC operated by the Department of Labour.

When the Act was first implemented in 1955 (formerly known as *Employment Ordinance 1955),* it had no provision for due inquiry prior to dismissal (see *Section 14*, *Employment Ordinance 1955*, *Federation [of] Malaya*, *Ordinance 38 of 1955*). The *EA 1955* was amended in 1971 with the insertion of the provision for a due inquiry in *Section 14* of the Act to be conducted before dismissal on reasons of misconduct (Yaqin 1999). Under the 1971 amendments employers are also allowed to downgrade their employees or impose a lesser punishment, such as suspension without wages (see *Act A91 Employment (Amendment) Act 1971*). Since then *Section 14* of the *EA 1955* has been amended with the latest being in 1989 (see Table 2.20). However, these amendments only involved minor changes to *Section 14* and there have not been any major changes to this provision and no inclusion of any provision to define and clarify the term misconduct. At the time of writing this thesis *Section 14* provides:

> *Section 14* Termination of contract for special reasons
>
> (1) An employer may, on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service, after due inquiry-
>
> (a) dismiss without notice the employee;

(b) downgrade the employee; or

(c) impose any other lesser punishment as he deems just and fit, and where a punishment of suspension without wages is imposed, it shall not exceed a period of two weeks.

(2) For the purpose of an inquiry under subsection (1), the employer may suspend the employee from work for a period not exceeding two weeks but shall pay him not less than half his wages for such period:

Provided that if the inquiry does not disclose any misconduct on the part of the employee the employee shall forthwith restore to the employee the full amount of wages so withheld.

(3) An employee may terminate his contract of service with his employer without notice where he or his dependents are immediately threatened by danger to the person by violence or disease such as employee did not by his contract of service undertake to run.

Table 2.20 Changes to provision on due inquiry under Section 14 of the *EA 1955*

Year	Act/Amending Authority	Amendment	In force from
1955	*Employment Ordinance 1955, Federation [of] Malaya, Ordinance 38 of 1955*	Implementation of the Act	1955
1971	*Act A91 Employment (Amendment) Act 1971*	Insertion of due inquiry before dismissal under section 14	1.10.1971
1976	*Act A360 Employment (Amendment) Act 1976*	Minor amendment to rephrase section 14 (1)	1.1.1977
1980	*Act A497Employment (Amendment) Act 1980*	Substituting one week suspension period to two weeks in section 14 (2).	1.10.1980
1989	*Act A716 Employment (Amendment Act) 1989*	Minor amendment to rephrase section 14 (1) (c)	10.2.1989

Source: Lawnet.com.my

As discussed in Section 2.5.7, the *EA 1955* only applies to private sector employees whose salaries are below RM1,500 a month (RM2,500 for the State of Sabah and Sarawak). It does not cover private sector employees earning above than this wage celling and does not provide for employees of government or statutory bodies. While employees from government and statutory bodies have their own *Government General Order*, other employees who are beyond the coverage of *EA 1955* (and the respective Ordinances for the State of Sabah and Sarawak) have to rely on their own terms and conditions of employment (if any) or will have no choice but to file claim for reinstatement under the *IR Act 1967*.

Despite the above laws providing employees in Malaysia with the right to file claims for reinstatement to the DIRM, employees may still choose to exercise their right for wrongful dismissal under the common law (Ali Mohamed & Sardar Baig 2009). However, if their cases have been decided by the IC, they are not allowed to institute similar claims at common law. This provision is found in *Section 20 Subsection 4* of the *IR Act 1967* which states:

> Where an award has been made under subsection (3) the award shall operate as a bar to any action for damages by the workman in any court in respect of wrongful dismissal.

Hassan (2007), however, noted that a claim for wrongful dismissal at common law is not often sought by employees in Malaysia, due to the minimal remedy available. He asserted that at common law the remedy for wrongful dismissal is limited to the amount of wages owed by the employer or indemnity in lieu of notice, with no possibility of getting reinstatement, back wages or other types of compensation. In *Fung Keong Rubber Manufacturing (M) Sdn. Bhd v. Lee Eng Kiat & ORS (1981)* the Federal Court on para 7 (quoted from the full judgement) recognised the right of employees in Malaysia to file a wrongful dismissal under the common law noting that:

> *In the case of a claim for wrongful dismissal, a workman may bring an action for damages at common law. This is the usual remedy for breach of contract, e.g., a summary dismissal where the workman has not*

> *committed misconduct. The rewards, however, are rather meagre because in practice the damages are limited to the pay which would have been earned by the workman had the proper period of notice been given. He may even get less than the wages for the period of notice if it can be proved that he could obtain similar job immediately or during the notice period with some other employer. He cannot sue for wounded feelings or loss of reputation caused by a summary dismissal, where for instance he was dismissed on a groundless charge of dishonesty. At common law it is not possible for a wrongfully dismissed workman to obtain an order for reinstatement because the common law knew only one remedy, viz., an award of damages.*

As discussed above, the scope of the *IR Act 1967* and *EA 1955* differ in relation to the types of remedy sought by the dismissed employees. The *EA 1955* covers employees, who seek the remedy of compensation in lieu of notice or the minimum retrenchment and layoff benefits as a result of their termination. The *IR Act 1967* provides the right to file a claim against dismissal without just cause and excuse. These provisions are commonly known as statutory unfair or unjustifiable dismissals in other countries such as Australia and the UK, which provide better protection of tenure of employment than the common law (Ali Mohamed & Sardar Baig 2009). Although some have argued that reinstatement guarantees job security for employees, whose employment is terminated, Eden (1994) found that it is not an effective remedy, particularly when the employees are not unionised. His arguments were that union's presence provides support and monitoring of the compliance of the reinstatement order by the employer at the workplace. Nonetheless, as *Section 20* of the *IR Act 1967* provides reinstatement as the only remedy for unfair dismissal cases, employees are not allowed to make their claim for compensation (see Section 2.5.2). It is up to the court (during the hearing) to determine and decide whether reinstatement is unsuitable and the hence award compensation to the employees in lieu of reinstatement. Tribunal conciliation (through DIRM) is the first level to resolve the dismissal dispute but as noted earlier, Conciliators have no authority to either make a decision on the merit of the case or order reinstatement. It is up to both parties: the employers and the dismissed employees to decide.

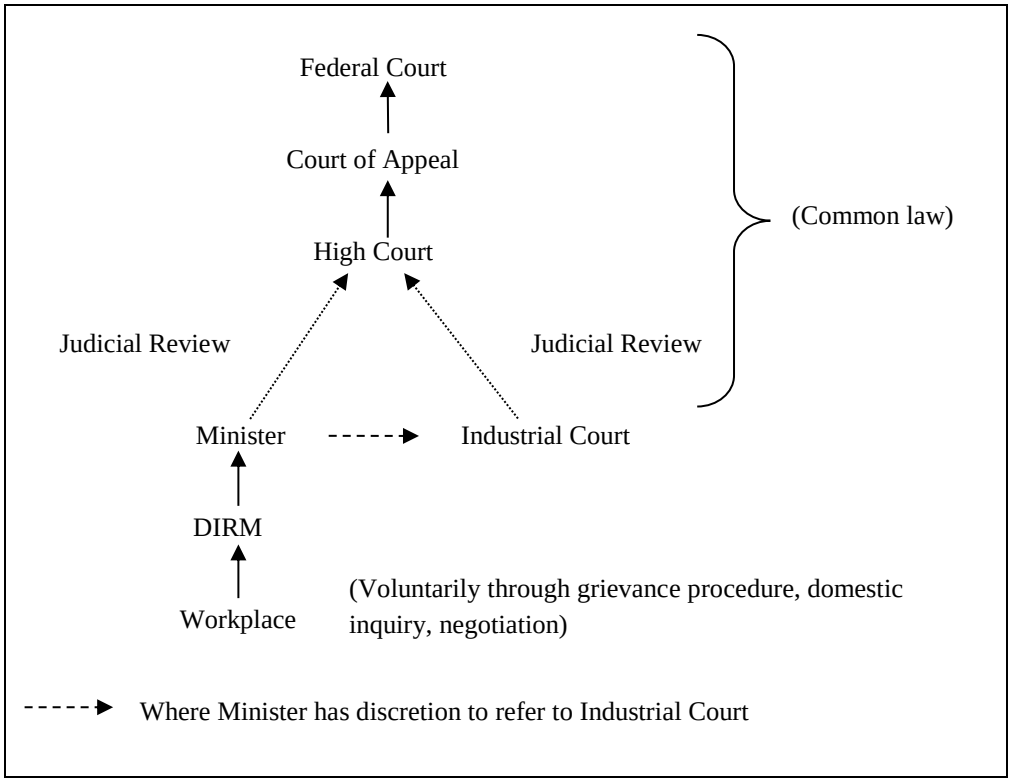
2.6 The current debate on the Malaysian conciliation and arbitration system

The system of conciliation and arbitration of employment disputes in Malaysia has the advantage of learning from the British system from which it was derived and from adopted lessons learnt from Australia and New Zealand, who share a similar origin. For example, Malaysia, which initially operated under a voluntary system of arbitration, changed to a compulsory conciliation and arbitration with the introduction of the *IR Act 1967* (see Section 2.5.1). This change came about after many industrial disputes which were detrimental to the economy, causing the government to intervene through legislation to regulate dispute resolutions in the country. This was a similar to the approach taken by the British government, when it moved away from the non-interventionist philosophy of the nineteenth century with the introduction of the *Conciliation Act 1896* which marked the beginning of a modern conciliation and arbitration system in managing employment disputes. Through the years, the British system has evolved significantly and changed the way disputes are resolved, placing emphasis on workplace dispute mechanisms and the use of conciliation and mediation to minimise the need for arbitration. Similarly, in New Zealand and Australia, conciliation has been used as the first move to resolve dispute, with arbitration only as a last resort.

Although Malaysia has a sound system of employment dispute resolution it has been subjected to continuous debates with regards to its implementation. These debates come from scholars and industrial relation practitioners within and outside the country (see for example, Aminuddin 2009; Anantaraman 2004; Wheeler, Klaas & Mahony 2004; Todd & Peetz 2001; Anantaraman 1997; and Dunkley 1982). Although workplace based mechanisms for resolving disputes are encouraged through negotiation and grievance procedures under the Code of Conduct for Industrial Harmony 1975, it is largely left to the workplace parties to implement them. In addition, there are no provisions in the *IR Act 1967* that can be used to filter vexatious or frivolous cases from being referred to conciliation. Furthermore, conciliation at the DIRM has achieved little success compared to similar institutions in the UK as well as with Australia and New Zealand, which have recorded higher settlement rates of conciliation and mediation. In

Malaysia, when a dispute (including disputes over claims for reinstatement) fails to be resolved through conciliation at the DIRM, it has to undergo a long series of processes, before it can finally be resolved at the IC. While many disputes end at this point, some had to be reviewed by the higher courts due to disputants' disagreement on the outcomes (Figure 2.5).

Figure 2.5 The route of dispute resolutions in Malaysia.



Source: Modified from (Syed Ahmad & George 2002)

These processes may result in such a dispute taking several years to be resolved. Statistics from the DIRM shows that on average, half of the disputes over dismissal (claims for reinstatement) failed to be resolved at conciliation and had to be decided by the Minister, who determines whether it has merit for arbitration at the IC (see Table 2.7 in Section 2.5.4). This not only prolongs the resolution of a dispute, but is also a burden on government resources. The Ministerial process (which ensures that only genuine disputes reach arbitration) has not discouraged disputants' determination to proceed to the IC. As noted by Aminuddin (2009) the IC has been inundated with claims of

reinstatement which will take two years on average (with some cases taking five to six years) before hearings can be conducted. On the other hand, many disputes have also been withdrawn by claimants themselves either at the DIRM or IC. As found by Aminuddin (2009), within the period of 1999 and 2003 an average of 40 percent of cases were either withdrawn by claimants, before the IC could conduct its hearing or struck off by the IC itself, when they failed to attend the hearings. One possible reason for this was that employees in Malaysia had simply used the provisions to try their luck or the lengthy delays in the system may have acted as a deterrent to continue with their claims. In addition, the current system does not require employees to pay any fee (when filing their claims at the DIRM or IC) or to pay costs, when they lose their case at the IC. There is also no requirement for them to complete a minimum period of employment (as found in other countries) before being entitled to file unfair dismissal claims. Hence, with the lack of a hurdle in the process, employees in Malaysia only need to sacrifice their time with the hope that they will get compensation from their ex-employer, either at the conciliation or arbitration (Aminuddin 2009).

While it was noted above that many employees in Malaysia have abused the system, some researchers have also criticised employers for using escape clauses and loopholes to circumvent the system. As highlighted by Dunkley (1982), these clauses and loopholes are opened to misinterpretation and are used by employers to strengthen their prerogatives. Similarly, Anantaraman (2004) argued that the current system is tilted more in favour of employers rather than employees particularly in respect of retrenchment issues. He suggested this imbalance in the system can be rectified if the IC is to perform its function in a true spirit as a 'court of equity', rather than a reflection of the common law. The IC has been argued to be overly legalistic with strict formality of proceedings and followed the practice commonly used in the civil courts (Ali Mohamed & Sardar Baig 2009).

Debates among industrial relations scholars, practitioners, employers, employees and their unions about the system has brought about more negative criticisms than positive one (see for example, Ali Mohamed & Sardar Baig 2009; Aminuddin 2009; Anbalagan 2008; Malaysian Trade Union Congress 2004; and Lobo 1986). These were mostly

made based on observation without empirical data to support them. Hence, this research aims to investigate this phenomenon and to suggest ways to improve the system.

2.7 The rise of individual dispute resolution

Whilst dispute resolution systems for collective labour disputes have had a long history in many nations, in more recent times there has been a trend towards individual dispute resolution. These changes have been reflected with a move away from a high degree of government based intervention towards a stronger presence of voluntary mechanisms whereby disputes can be settled by workplace mechanisms such as ADR and grievance procedures (Van Gramberg 2006a). At the same time legislation in many countries has installed mediation and conciliation as the primary dispute resolution techniques of industrial tribunals. For instance, in New Zealand the compulsory arbitration system was abolished by the enactment of the *IR Amendment Act 1984*, which introduced a system of tribunal based mediation. Australian changes were similar and accompanied by a move towards workplace mechanisms, where parties must prove that an effort was made to settle a dispute at the workplace before referring to industrial tribunal intervention. As found by Dix, Forth and Sisson (2008), in the UK there has been a significant increase in the ET claims in respect of individual disputes between 1986 to 2005. This growth had brought about the need for an effective use of voluntary conciliation, as a cost saving measure with the establishment of the ACAS in 1974 (Dickens 2000). The rise in individual problems continued where within the period of 2003-2004 witnessed an increase from 34 to 55 percent of employees requiring the ACAS helpline (Pollert 2005).

A similar trend was also found in Australia and Malaysia, where the incidence of individual disputes is greater than collective disputes, driven mainly by the demand for resolution of unfair dismissal claims. In Australia application for relief in respect of termination of employment constituted a significant proportion of (then) AIRC workload. From 2002-2006 claims for termination of employment in Australia comprised nearly half of the tribunal's workload running second to extension, variation and termination of agreements (AIRC 2006-2007). This increased to more than half the workload in 2006-2007, despite legislation prohibiting employees from firms

employing less than 100 from lodging a claim. In Malaysia, the majority of individual disputes received by the DIRM relate to claims for reinstatement, constituting nearly 90 percent of all disputes in 2009. Reinstatement is a primary remedy provided under Section 20 of the *IR Act 1967* and failure to plead for reinstatement may jeopardise the claimant's case. Only the IC has the authority to award compensation in lieu of reinstatement (see Section 2.5.2). Reinstatement guarantees tenured employment for employees and this has even been equated to being on the same footing as a 'property right' by courts in Malaysia (Ali Mohamed & Sardar Baig 2009). However, the reality is that in Malaysia and many other countries including the UK, Australia and New Zealand the outcomes of unfair dismissal disputes have been dominated by compensation instead of reinstatement or reengagement although it is envisaged under their legislations too (Wheller, Klass & Mahony 2004).

The phenomenon of compensation as a common outcome of dispute settlement in dismissal disputes has been associated with various reasons. As noted by Ali Mohamed (1998) the common outcomes of arbitration at the IC in Malaysia is compensation instead of reinstatement on the argument that it would be impractical to revive the employment contract. This is often due to deterioration of personal relationships and loss of trust between disputants. Ali Mohamed (1998) also noted that the time delays between dismissal and the determination of the grievance made it unlikely for the IC to award reinstatement. Reinstatement in fact has become a 'lost remedy' in many countries with many dismissal disputes resulting in monetary compensation as a settlement (Wheller, Klass & Mahony 2004). For example, Dickens et al. (1981) also noted that although the law in UK clearly provided reinstatement as the primary remedy, the most common outcome to this type of dispute has been compensation comprising at least 80 percent of all outcomes. They noted that this is due to the ET itself being less enthusiastic to promote reemployment as well as a result of time lapse between dismissal and the outcomes being decided making it impractical to reinstall the worker back in the workplace (see also Section 2.2.2). Lewis (1981) observed that since the law on unfair dismissal was first introduced in 1972 in the UK, it has failed to provide job security due to the insignificant number of dismissal disputes being resolved with reinstatement or reengagement because compensation was becoming

widely accepted as the main outcome despite changes made in the Employment Protection Act favouring reinstatement. Similarly, early studies in Australia by Sherman (1989) found that delays in delivering awards by the tribunal and the apparent unwillingness of adjudicators to invoke their authority to award reinstatement were the reasons for claimants not being awarded re-employment. Lewis (1981) also found that although at the application stage dismissed employees sought re-employment they often preferred compensation and this contributes to a low proportion of reinstatement. The continuing and wide acceptance of compensation as an outcomes of dismissal disputes could lead to what is known as 'compensation culture' commonly associated in litigation involving personal injury and negligence particularly in the United States of America and the UK (Tingle 2011; Paul 2006).

The growing compensation culture including in employment disputes has been debated by many scholars. Frank (1999) suggested that a compensation culture has not only been found to have occurred in personal injury claims but has shown it presence in quasi-judicial claims, arbitration and administrative tribunals. Morris (2007) however, noted that the notion of growing compensation culture is one that is not straightforwardly identified and is open to more than one interpretation. Despite acknowledging that the propensity of accident victims to claim through the legal system has increased in the UK since 1970, it is difficult to argue that a compensation culture exists. Similarly, Hand (2010) argued that that a compensation culture did not exist in the UK and may be an urban myth propagated by the media. He argued that despite an increase in ET claims in the UK from 1985 to 2003, it could not be attributed to a compensation culture but rather to the development in legislation on statutory rights designed to protect workers. On the other hand, Hall (2001) observed that in addition to increased employee rights in the UK, unfair dismissal claims have been fanned by solicitors who practice a 'no win no fee' policy providing a conducive environment for individual disputes for compensation. In addition, Drinkwater et al. (2010) noted that the growing trend of individualism in the workplace has given rise in claims at the ET in the UK. Similarly in Malaysia, as the current Section 20 of the *IR Act 1967* regards any dismissal disputes as individual rather than trade disputes suggests a development in individual disputes dominated by claims for reinstatement which may be attributed to a growing compensation culture (see Section 2.5.4). This is explored in this thesis.

Given the increase in individual disputes, and in particular claims for reinstatement in Malaysia, this thesis provides, for the first time a comprehensive approach to investigating the key factors behind the referral of claims for reinstatement from the workplace to tribunal conciliation; the reasons for the low settlement rate of tribunal conciliation for reinstatement claims and subsequent high rates of referral to arbitration; the possible strategies to encourage claims for reinstatement to be resolved at the workplace; and the possible strategies to reduce the backlog of claims for reinstatement before the IC.

2.8 Chapter Summary

The industrial relations systems and in particular dispute resolution mechanisms in the UK, Australia and New Zealand have evolved significantly since the 1800s. However, the main features of the dispute resolution mechanisms emerging recently in each of these countries has been on the greater use of voluntary conciliation, mediation and arbitration. All these countries have put in place legislation, which requires parties to resolve disputes at the workplace level in an attempt to make conciliation by the tribunal a last resort, when disputants fail to reach settlement in the workplace.

The three main Acts that regulate the industrial relations system in Malaysia are: *TU Act 1959*, *The EA 1955* (Labour Ordinances in respect of the state of Sabah and Sarawak) and *The IR Act 1967*. These Acts are enforced along with their subsidiary regulations to promote a climate of harmonious employment and industrial relations in the country, including provision of mechanisms for dispute settlements. There is also a Code of Conduct for Industrial Harmony 1975, which although not enforceable, provides a framework for workplaces that includes areas for cooperation, responsibilities and procedures in relation to employment policy covering disputes resolution, collective bargaining and communications. In addition, another piece of employment legislation that indirectly governs the conduct of employers and employees is the *WC Act 1947* (now replaced by *NWCC Act 2011*) under which the minimum wage is set in respect of certain employment sectors.

Under the Malaysian system the main body in charge of the industrial relations matters is the MoHR, which oversees various institutions, each with specific responsibilities and tasks. Among important institutions are the LC, DIRM and the IC, which are charged with matters pertaining to disputes resolution. The LC, however, is a labour tribunal specifically in charge of disputes in respect of monetary claims under the *EA 1955, WC Act 1947* (now replaced by *NWCC 2011*) and contracts of employment between the employers and employees.

DIRM on the other hand operates the industrial tribunal, which acts as a third party dispute resolution provider for matters pertaining to disputes which may include: recognition of trade unions by employers; rights of the workmen, employers and their trade unions; and dismissal. The LC uses both conciliation and arbitration and its decisions may be appealed to the High Court. The DIRM only uses conciliation to solve disputes but does not have the power to arbitrate. Hence, any dispute that has failed to be resolved at the DIRM will go through several stages including Ministerial approval, before it can be referred to the IC.

The principles that govern industrial jurisprudence in Malaysia are 'equity, good conscience and substantial merit of case without regard to technicality and legal form'. In this manner, the IC has to ensure that justice is accorded to all parties, when implementing its arbitration role. Hence, feelings of injustice can be minimised by providing disputants access to the tribunal. This compulsory arbitration has resulted in little effort being made to resolve disputes at the workplace. The availability of conciliation and arbitration by the tribunals is also to avoid other unwanted actions, such as street protest and other industrial action. In addition, protection from unfair dismissal in Malaysia has provided employees with an avenue to retain tenure of employment without the need to resort to common law.

The rise of individual disputes has resulted in fewer collective disputes occurring in many countries as discussed above. Malaysia is not immune from this development, and has seen a large rise in the number of individual disputes (particularly claims for reinstatement). The dispute resolution mechanisms in Malaysia governed by the *IR Act*

1967, *EA 1955* and the Code of Conduct for Industrial Harmony have not kept pace with the rising levels of individual claims. The Code for example has not been amended since its inception in 1975, while the openness of the *IR Act 1967* has not encouraged disputes to be resolved at the workplace. In addition, loopholes, escape clauses, lack of hurdle in the system and precedents have been misinterpreted or used by disputants to circumvent the system. In short, the Malaysian system remains largely unchanged from what it inherited from the British system in the 1960s and has not adapted to the current situation. This has resulted in a higher failure of settlement by conciliation compared to other British based systems.

The next Chapter turns to the discussion of the theories of justice encompassing distributive, procedural and interactional justice and how these operate in relation to workplace dispute resolution in Malaysia.

CHAPTER 3 - ORGANISATIONAL JUSTICE AND DISPUTE RESOLUTION PROCESS

3.0 Introduction

Chapter 2 presented the literature relating to the industrial relations and dispute resolution systems in the UK, Australia and New Zealand with special reference to their industrial tribunals. The chapter then introduced the Malaysian system of employment relations and its workplace dispute resolution system. A key finding from the literature review was the lower rate of settlement at conciliation in Malaysia and the higher rate of referral to arbitration compared with the other countries investigated. It was postulated that Malaysian disputants are dissatisfied with dispute resolution outcomes at workplace and conciliation levels and this may relate to their conception of justice (see Section 2.6). This chapter explores the concept of justice and its application in organisational settings with emphasis placed on internal workplace dispute resolution procedures and the process used in industrial tribunals. The chapter commences with a discussion of justice and its application in organizational settings comprising three components: distributive, procedural and interactional justice before moving to consider how justice has been framed in court and tribunal decisions in Malaysia.

3.1 History of Justice

There is a long history of the scholarship of justice which from the earliest times has been associated with the balance of reciprocity between people and the creation of frameworks for social relations. Plato's teaching in his work 'Republic' was the first attempt to criticise reciprocity on the basis that society is made up of hierarchies and the notion of justice is based on obedience of those lower in the hierarchy to those in higher positions (Johnston 2011). Aristotle's work on justice largely returned the debate back to ideas of reciprocity in his Book V of the 'Nicomachean Ethics' as he focused on the principles of what constitutes the good of humanity. Aristotle described two types of justice which pertain to individuals. First, he argued that the distribution of rewards in a given society should be in proportion to the contribution of individuals to that society.

This notion has been described as a universal concept of justice which covers the virtues and concerns of political constitutions and judicial decisions (Fleischacker 2004). Distributive justice, in Aristotle's view is thus associated with how rights, positions, powers, burdens, and benefits should be apportioned to ensure equality. This principle in its modern interpretation suggests that individuals should be treated the same, unless they differ in ways that are relevant to the situation in which they are involved.

The second form of justice considered by Aristotle was termed 'corrective' and represents the principle of just transactions based on equal exchanges between members of a society (Johnston 2011). For example, a builder exchanging a house for a pair of shoes would be considered unjust. Equally, when someone is punished for wrongdoings the punishment should consider only the relevant criteria such as the seriousness of the crime rather than other irrelevant criteria such as the race of the accused. Similarly, when one is a victim of a wrongdoing one should be compensated equally regardless of merit.

Whilst it is beyond the scope of this thesis to describe in detail the complex history of thought relating to the development of theories of justice, it is pertinent to note that modern concepts of justice stem from John Rawl's research of the 1950s and early 1970s and particularly his influential thesis: A Theory of Justice (1971). Rawl's perception of justice is that people should be accorded justice through some form of assistance solely on their right as human beings, independent of any regard for merit. Rawls differs in his interpretation of justice to the utilitarian philosophers before him such as Bentham (Johnston 2011) by emphasising the importance of the individual. In Theory of Justice he offers two principles of justice which became the foundation of the later scholars of justice (Rawls 1971).

This thesis focuses on justice in the context of organisations rather than its applications in society and political systems *per se*. The next section introduces the concept of justice in organisational settings and builds on the work of Rawls and others.

3.2 Organisational justice

Workplace decision making is a key source of justice for employees. In many organisations, decision making is guided through the use of formal and informal procedures. As argued by Lind and Tyler (1988), people face decision-making procedures far more frequently in their work than in any other area of their lives. In the workplace these decisions include for example the distribution of work, awarding of promotions, deciding who is to be laid off, resolution of conflicts and many other key outcomes. People use their internal sense of justice to evaluate the fairness of a decision and its outcomes as well as evaluate the overall fairness of the organisation to which they belong. Rawls (1971) noted that these feelings of justice or injustice can be experienced by anyone, whether in relation to the implementation of laws, institutional and social systems or decision making, judgements and imputations. He argued that society is structured according to three principles of justice which he labelled: 'equal liberty' and two 'difference principles'. In his seminal work, Rawls defined 'Equal liberty' as the condition where everyone has an equal right to the freedom to pursue individual goals, while 'difference principles' suggests a distribution of wealth arranged in a way that provides the greatest benefit to the least advantaged people (which can also be seen as a way of addressing needs); or distributed via an equality principle where the distribution is based on each member getting the same outcome. These principles have contributed to the field of organisational justice and they represent the justice of the outcome of a particular decision (Greenberg 1990). People are not only concerned about just outcomes however. They are also vitally concerned with the process used to come to that particular outcome. In theory, justice is administered through interaction of three components: procedural, distributive and interactional justice (Deutsch 1985). Whilst procedural justice (or natural justice) is defined as the fairness of the process used to resolve the dispute, distributive justice relates to fairness of the outcome (Rawls 1971). Interactional justice concerns the interpersonal treatment that one receives in the implementation of a procedure or process at the workplace and can also be classified as a component of justice (Bies & Moag 1986). These three justice dimensions will now be discussed.

3.2.1 Distributive justice

Distributive justice refers to the fairness of the consequences arising from a particular judgement or decision. In effect distributive justice is about the perceived fairness of the outcome of the dispute. Rawls (1971) argued that the idea of social justice refers to the assessment of the distributive aspects of the basic structure of society. His description of distributive justice is based on the three criteria of equity, equality and need. In a workplace setting, equity refers to decisions made based on the merit of contributions by particular employees. It might take the form of a performance bonus as recognition for a level of work far above other employees. The rule of equality is when the decision maker considers everyone as having an equal chance of getting the same outcome regardless of differences in their characteristics. The rule of need assesses the plight of an individual in the decision making process.

According to Cook & Hegtvedt (1983) the choice of distribution rules between equity, equality and need is influenced by various factors. These include (a) characteristics of the relationships among group members; (b) cognitive mediating factors; (c) number of relevant inputs; and (d) other personal and situational factors. Rousseau & Anton (1991) also argued that various factors affect perception of distributive justice. For example, they found that past performance and employability had no effect on managers' judgement regarding termination fairness. However, they found that time on the job (seniority) had an effect on managers' perception of fairness of termination but when the performance of the dismissed employees at the time of termination was considered to be sub-standard it did not have an effect on the perception of termination fairness. In a workplace setting distributive justice relates to the evaluation of specific outcomes by individuals affected by the decision (Folger & Konovsky 1989). Hence, it has a great impact on an organisation as it affects the cognitive and affective - or thinking and feeling - sense of individuals (Cohen-Charash & Spector 2001). In other words, an organisational outcome which is met by a sense of injustice will have ramifications for how employees continue to think about the organisation and how they behave in that organisation. Aggrieved employees may withhold their labour, withdraw discretionary effort or disengage from work (Bies & Tripp 2001). Low level hostility can grow into

larger, negative manifestations. Folger & Konovsky (1989) however, have argued that distributive injustice has a greater effect on employees' satisfaction of personal outcomes rather than of institutions or the authorities delivering that decision. Similarly, Barling and Phillips (1993) found that distributive injustice had no significant effect on trust in managers, affective commitment to the organisation or withdrawal behaviour. Nevertheless, when outcomes are allocated in tandem with a personal expectation of a desired outcome, one will perceive that distributive justice has been afforded (Johnson, Holladay & Quinones 2009).

3.2.2 Procedural justice

Procedural justice relates to the fairness in the process of decision making and in contrast distributive justice denotes the fairness of the outcome of the decision either in terms of distribution of rights or resources or fairness of punishment as in retributive justice (Fleischacker 2004; Thibaut & Walker 1975). Procedural justice is independent from the fairness of outcome and this distinction makes it possible for an individual in a dispute process to perceive the procedure used to settle the matter as being fair even though the outcome (decision) may not perceived as fair (Brown et al. 2010).

Procedural justice relates to the perception that the processes used to arrive at a decision were fair. The degree to which a procedure or policies were adhered to or were violated has been found to have an impact on employee trust in the system or institution of those affected by the decision. Adhering to set processes ensures that decisions made in workplaces on similar matters in dispute will be consistent. Procedural justice has been linked to participation in the decision making process (for instance presenting one's case) and participation in the formulation of the outcome of the dispute. Decisions which are consistent while at the same time providing the affected person with a voice in and influence over such decisions, will increase the perception of procedural justice being afforded (Johnson, Holladay & Quinones 2009).

In the absence of a unified theory on procedural justice, Lind and Tyler (1988) proposed two models: 'self-interest' and 'group value'. These models explained (respectively)

how people reacted to procedural justice in two different situations where they either intended to maximise their personal outcome; or where they were more concerned with maintaining an existing relationship. The self-interest model suggests that people seek control over decisions due to their concern for outcomes that affect them. This model focuses on outcomes as a primary determinant of justice judgements (Conlon 1993). For example, the self-interest model implies that employees who believe they have been unfairly dismissed would be more concerned with their own self-interest than an interest in the work group because they do not have the feeling of belonging to the group (workplace) anymore. On the other hand, the group value model holds that an individual is more likely to put aside his or her own self-interest and act in a way that helps all members of the group. According to this latter model people are more concerned over the long term outcome and would be willing to forgo their self-interest in the short term because they value their relationship or interaction with the group members (Conlon 1993). While the self-interest model confirms Thibaut and Walker's (1975) argument that individual perceptions will be enhanced through control of outcomes the second model affirms Greenberg (1990) and Shapiro (1993) which sees that people will forgo their short term interest for a better outcome in the future. For example, disputants who are involved in a negotiation process such as conciliation would be more concerned with a self-interest outcome should they believe that they do not have a long term relationship with the third party conducting the conciliation. Hence, they would be likely to be concerned on their short term gain.

Muchinsky (2006) offers a different perspective in which he proposes that procedural justice consists of 'involvement' and 'structural' components. Involvement relates to the degree of participation and influence by the affected person in the decision making process including the opportunities to speak out or to provide input into decision making processes. The structural component refers to the extent to which procedures are satisfied or violated in the process of decision-making. Similarly, Collins (1992) analysed procedural justice in employment dismissal cases using respect for dignity, democratic participation and efficiency as measures. In his study, respect for dignity meant taking into consideration the interests of persons in an unbiased manner and giving them an opportunity to validate their stand. Democratic participation related to

the adoption of consultation and expression of different opinions before decisions were reached. His third measure of efficiency stressed that decisions must be based on all reasonable and relevant information available, shunning irrelevant facts and arguments. His theory predicts that employees who are able to participate in the dispute decision making are more likely to accept the outcome.

Most researchers of procedural justice have acknowledged the vast body of research and practice built through the legal system. For instance, Geare (2003) noted that procedural justice is closely related to the concept of natural justice used in common law. He pointed out that whilst much research literature focuses on procedural justice, natural justice is more commonly cited in British common law legal rulings. For example, Lord Hodson's ruling of unfair dismissal cases in *Ridge v Baldwin (1963)* referred to two specific legal principles of natural justice: (a) no man shall be a judge in his own cause; and (b) no man shall be condemned unheard. These principles have also been used by the IC in Malaysia (Muniapan & Parasuraman 2007). The first principle requires that a person must be judged by a fair panel free from any elements of bias. The second principle suggests for example, employees accused of misconduct should be given an opportunity to answer the charge made against them. Over time, most common law jurisdictions have developed several accepted 'rules' of procedural justice which are considered to be individual rights in situations where a person is charged with having transgressed a law. First, the person charged has the right to be presented with the charges against him or her and the proposed penalty in writing (McDermott & Berkeley 1996). The fact that the charge must be detailed and documented gives rise to the requirement to conduct some form of investigation into the matter and to obtain sufficient evidence to make the charge (Miller 1996). The second rule is the right to present a defence. This may be in writing or in person and the person must be given a suitable time to prepare and attend (Barrett 1999). Being represented by a knowledgeable person is an important feature of due process. Third, due process requires that the hearing be conducted before an impartial person or panel. Fourth, the impartial person or panel must provide reasons for the decision made (Jameson 1999). Finally, the charged person should be given a right of appeal. This is an important part of a dispute resolution process, as it allows people to challenge decisions that are

perceived as wrong, unlawful or detrimental to their interests (Beugre 1998). The final requirement of due process is that the steps of the dispute resolution process should be conducted in a timely manner in order to provide justice to the disputants.

Applying these basic requirements of natural justice to employees at the workplace means they would need to be treated in the same way as in a legal setting. Posthuma (2003) has argued that procedural justice, like due proces, in a legal setting should be applied in workplace settings. This includes for example, the right to discover documents from other parties, such as employers, and the right to be represented. As pointed out by Folger and Bies (1989), there are several key managerial responsibilities in applying the concept of procedural justice in a workplace setting based on the legal principles outlined above. These are: (a) giving adequate consideration to employees' viewpoints regarding the dispute; (b) suppressing biases; (c) consistency in decision making for employees across the organisation; (d) giving timely feedback after the decision; (e) providing justification for the decision; (f) being truthful in communication; and (g) treating employees with courtesy and civility. These seven points raise the issues of both the importance of following a set procedure when resolving a dispute, and also the treatment of employees by managers during the dispute resolution process. This interpersonal treatment has been referred to as interactional justice and is considered next.

3.2.3 Interactional justice

Interactional justice relates to disputants' perceptions of whether they have been treated with dignity and respect during the dispute process (Bies & Moag 1986). It can be described as the quality of interpersonal treatment that is accorded to an individual during the decision making process or procedure in an organisation. Bies and Moag (1986) postulated four elements that affect perceptions of fairness as a result of the treatment of an individual during dispute resolution. These are truthfulness, respect, propriety of questions, and justification. Truthfulness refers to decision makers being honest and not deceitful while respect requires one to avoid rudeness, attacking or discourtesy in dealing with people. Propriety refers to avoiding asking or raising issues

unrelated to matters at hand. For example, Bies and Moag (1986) argued that recruiters should not ask unrelated questions (such as on race, age, sex) which can lead to prospective employees being subjected to possible discrimination and hence, not get the job. Justification on the other hand refers to the requirement that decisions must be provided with adequate reasons. Lack of any of these four elements of interactional justice may lead to withdrawal behaviour, distrust in managers, and lack of affective commitment (Barling & Phillips 1993).

Muchinsky (2006) identified two components of interactional justice: informational justice and interpersonal justice. First, informational justice ensures that people are provided explanations and information used in making a decision. In this way, decision makers are considered to make an effort to concern themselves about affected disputants' awareness. Second, interpersonal justice is about concern for people; treating them with dignity, trust and respect. This has the effect of ensuring that disputants are satisfied with the quality of interpersonal treatment that is accorded to them during the process of decision making or implementation of procedures at their workplace (Bies & Moag 1986). Hence, by displaying politeness and respect, decision makers help to ensure disputants leave with a perception of fairness.

This section has outlined the three major components of justice theory: procedural, distributive and interactional. Clearly there are important links between them and it is important to understand how their interaction affects individual perceptions of justice. This is described in the following section.

3.2.4 Relationships between procedural, distributive and interactional justice.

In practice, justice is administered through interactions amongst three components: procedural, distributive and interactional justice (Deutsch 1985). An early attempt to investigate employee perceptions of justice in dispute resolution was conducted by Thibaut and Walker (1975) who noted that perceptions of fairness are related to 'process control' and 'decision control' by employees. Process control is the amount of control that disputants have while undertaking the grievance procedure while decision

control refers to the degree of their influence over the outcome (Greenberg 1990). Similarly, Budd and Colvin (2008) argued that distributive and procedural justice influence the perception of dispute resolution procedures. In other words, justice perceptions are positively affected by being directly involved in both procedural and distributive justice.

But procedural and distributive elements of justice are not equally weighted by disputants and research has endeavoured to find which is dominant. By affording disputants with procedural justice they are more likely to agree with the final outcome of the case and thus be more likely to feel that distributive justice was afforded (Tyler 1988, 1991). This means that procedural justice is a predictor of acceptance of the outcome of the dispute. More recently this was confirmed by Nurse and Devonish (2007) who analysed relationships between workplace grievance management and its link to workplace justice, noting that positive perceptions of procedural justice had a positive impact over employees' willingness to settle the dispute. Lind & Tyler (1988) observed that fair procedures led to greater compliance with rules and decisions. Similarly, Van Gramberg (2006a) observed that when disputants perceived a high degree of procedural justice, they were more likely to agree with the outcome of dispute settlement, even when that outcome was not favourable to them. It follows then that when procedural justice is not afforded overall perceptions of fairness are negatively affected. Skarlicki & Folger (1997) suggest that when the perception of procedural justice is low, it will negatively affect the perception of both distributive and interactional justice. Again, this confirms the notion that it is the process that really matters and not the decision itself (Van Gramberg 2006a).

Youngblood, Trevino & Favia (1992) found that distributive justice was not the major concern for those who filed claims for unjust dismissal. They found that claimants' for unjust dismissal to the Labour Management Agency (LMS) in South Carolina mostly gave reasons pertaining to procedural justice for justifying their claims. These included reasons that they were not provided with warning before dismissal, they did not have the opportunity to voice their views and had not being given a right of appeal within the organisation. In addition, disputants stated that the employer did not follow the

workplace procedure, a breach of due process. The authors also found that claimants' reactions to third party intervention (conciliation) in terms of its process and outcome were also influenced by elements of procedural justice. In their interviewees with 63 complainants who filed unjust dismissal claims to the LMS, 73 percent indicated that they were not happy with the process of conciliation. However, this is not to downplay the importance of distributive justice. As argued by Cropanzano, Bowen & Gilliland (2007) the effect of injustice can be minimised if at least one of these three justice components (procedural, interactional and distributive) is maintained. Early work by Thiabaut and Walker (1975) however, suggests that both procedural and distributive justice were necessary to lead to perceived fair outcomes. The work on interactional justice, provides a different way forward on the issue. Interactional justice appears to be so important in creating the perception of justice that Skarlicki & Folger (1997) suggested that procedural and interactional justice can function as substitutes for each other. This means that interactional justice alone can be a predictor of acceptance of the outcome. It powerfully represents the importance of treating individuals with respect and dignity during a dispute resolution process.

This section canvassed the importance of justice perceptions in determining the fairness of the dispute outcome. Procedural and interactional justice have been described in the research literature as being the primary predictors of satisfaction with dispute outcomes. Distributive justice (the outcome of the dispute) has been described as influencing disputant perceptions of fairness particularly when disputants have participated in the process of decision making. The area of workplace justice is complex as most of its principles stem from legal practice and in particular from the common law. The next section considers justice in Malaysian workplace dispute resolution through the Code of Conduct for Industrial Harmony 1975 and the relevant court decisions in that country which have shaped judicial, tribunal and workplace understanding of what constitutes organisational justice.

3.3 Justice in the Malaysian system of workplace dispute resolution

As discussed in Section 2.5.3 workplace dispute resolution practices in Malaysia particularly those dealing with disciplinary action, grievances procedures and retrenchment are left to the parties to implement. These are mainly outlined in the Code of Industrial Harmony 1975 with no compulsory mechanism in place. The *IR Act 1967* encourages disputants to use negotiation to resolve their disputes at the workplace but this mainly concerns matters pertaining to collective bargaining for the purpose of establishing collective agreement. Negotiation between parties is also encouraged to be used in resolving collective disputes. When negotiation fails any party (employers, employers' union or employees union) can voluntarily refer it for conciliation by DIRM under Section 18(1) of the *IR Act 1967*. However, there are no similar provisions in any of the Acts or Code that either encourage disputants to resolve individual disputes (such as on disputes over dismissal) at the workplace or for voluntarily referring their disputes to the tribunal. The current practice in respect of disputes over dismissals is for employees to file their claims with the DIRM without any requirement for them to firstly seek resolution in the workplace. Only after claims are received by the DIRM will both parties be called for conciliation to resolve the dispute. This section considers the possible defects in procedural and distributive justice in the dispute resolution system in Malaysia as it operates from the workplace through to the DIRM and IC.

In Malaysia there are two mitigating factors in relation to the implementation of justice of workplace dispute resolution: the Code of Conduct for Industrial Harmony 1975 and the state of employment law on the issue of workplace due process. Whilst the Code provides guidelines to employers for resolving disputes in-house in a procedurally fair way, it is voluntary and may not be used at all by some employers. Anantaraman (2003) identified that key areas of procedural justice may therefore not be complied with at the workplace including issues of representation or social justice outcomes (areas covered by the Code). He observed that the most common reason given by employers for not enforcing a fully-fledged workplace investigation of a particular dispute (as part of the in-house dispute resolution process) was due to the inability of (particularly) small-scale employers to conduct such inquiry.

Parasuraman (2005) claimed that unions, employers and the government seem to have competing interests around the Code which makes its implementation fraught with difficulties. For instance Parasuraman noted that Malaysian employers continue to exercise high managerial prerogative in the workplace which has deterred worker participation schemes and involvement in decision making. As the Code calls for a participative approach to dispute resolution, it may be incompatible with employer expectations of how decisions should be made in a workplace. Similarly, Kaur (2004) observed that the industrial relations environment in Southeast Asian countries including Malaysia is strongly influenced by culture and the need to foster industrial harmony and consensual outcomes. Hence, national and group interests often overshadow individual interests in achieving behavioural control. This often means that employees may resort to expressing disagreement through covert and unofficial behaviours such as work slows, unavailability for overtime, increased medical leave and even vandalism. Todd & Peetz (2001) explained that in some co-operative, low conflict labour relations environments environment such as Malaysia, employees subordinate themselves to their management's decision-making power. In other words, they postulate that a strong management culture can act to suppress employee uprising. In Malaysia the importance of managerial prerogative may explain why employers are less motivated to use the Code and in turn, this may have the effect of encouraging employees to seek justice through the court system rather than through in-house grievance processes or even though the conciliation process conducted by the industrial tribunal. The absence of the Code as a baseline standard may be a contributing factor to the lack of workability of many workplace dispute procedures. Further, it is possible that the lack of procedural justice arising from poorly constructed workplace dispute procedures is a reason behind the subsequent referral of disputes to the tribunal.

Another challenge to the issue of procedural justice in Malaysian workplaces is the '*curable principle'* created in the Supreme Court in *Dreamland Corp. (M) Sdn. Bhd v. Choong Chin Sooi & Industrial Court of Malaysia* (*1988*) (*Dreamland*) which has since shaped many of the IC decisions as far as procedural justice in the workplace is concerned. The 'curable principle' applies when an employer fails to hold a domestic enquiry before dismissing the employee. Such a failure may result in a loss of

procedural justice for the disputants. But whilst justice may not be provided in the workplace, the curable principle is said to operate when the matter goes to a tribunal or court as these bodies must cure the previous lack of workplace procedural justice (Anantaraman 1997). The decision has the effect of absolving an employer from the duty to provide an investigation or a fair dispute resolution process prior to dismissal, vesting the duty with the relevant court or tribunal. In *Dreamland* the Supreme Court judge on para h, p. 44 held that:

> *The short answer to Mr Lobo's argument is that right to a hearing or as it is sometimes called the observance of procedural safeguards are only applicable in respect of a hearing before an administrative tribunal and similar quasi-judicial tribunals performing judicial functions but do not apply to simple master-servant proceedings, such as the present one.*

A later Supreme Court (now known as Federal Court) in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn. Bhd.* (1995) (*Hong Leong)* not only confirmed the curable concept in *Dreamland* but widened its application to all workers including those covered under the *EA 1955*. The decision of the Supreme Court has received some critical comment. For instance, Anantaraman (1997) wrote that enforcement of the domestic enquiry through for instance, an investigation as part of the internal dispute resolution process would facilitate speedy disposal of dismissal cases in the long run by reducing the number of arbitrary dismissals by employers. As a consequence, only deserving cases would need to be referred to IC. As argued above the issue of pre dismissal domestic inquiry has been scrutinised under judicial review by the superior court which has since overruled decisions by IC which do not conform to the 'curable principle' (Lobo 2000). Nonetheless, it has been a subject of continuous debate and discussion by many industrial relations practitioners and industrial adjudication in Malaysia including the IC itself (See, for example, Anantaraman 2003; Lobo 2000; Yaqin 1999; Anantaraman 1997; Lobo 1986).

Since then, Dato' Gopal Sri Ram, Judge, Court of Appeal Malaysia Kuala Lumpur during his Industrial Adjudication Reforms Keynote Address held in Kuala Lumpur on 11th May 2002 put forward two opposing views facing industrial adjudication on

procedural fairness matters. One view is that lack of a fair domestic enquiry is fatal which means that failure to conduct domestic inquiry or alternatively, producing a defective inquiry may entitle the worker to a relief. That view would hold an employer responsible for ensuring procedural justice in workplace dispute resolution. The other view is the retention of the curable principle. In his reasoning, His Honour stated that the common law has come down in favour of the 'curable principle' even suggesting that a failure to conduct domestic enquiry by statute can be curable on the ground that the worker suffers no prejudice as the matter can be cured by a court. Similarly, Hassan (2001) in analysing the trends of IC decisions between the years 1995-2001 found the court continued to grapple with this issue, and although the majority of judgements adhered to the 'curable principle' a number of other cases in lower courts followed the opposite principle laid down in *Said Dharmalingam Abdullah v. Malayan Breweries (Malaya) Sdn. Bhd.* This newer judgment dealt with employees covered under the *EA 1955* which provides for due inquiry before dismissal. In this case the Supreme Court Judge on para 1 p. 647 provided the following judgment:

> *Generally speaking where the relationship is that of master and servant, the applicable law is that of common law of contract, and the principles of administrative law, which must include the fundamental rule of natural justice expressed in the maxim audi alteram partem, would not apply. However, where the employment is in the public sector, or where statutory or other protection is conferred, procedural safeguards will have to be observed. Thus, whilst this was a case of master and servant relationship, the crucial question to ask is whether a statutory or other requirement provides or can be interpreted as providing the elementary safeguard of the right to a hearing.*

Further on para 4 p.647 the judge held that:

> *When, as here, a claimant is an employee within the meaning of the Act, he has by s.14 (1) thereof, a statutory right to due inquiry by his employer. This being the case, the approach of the Industrial Court or for that matter High Court, in considering the question whether the claimant had been dismissed*

without just cause or excuse, would be to examine the decision not just for substance but for process as well.

The above decision although being considered as *obiter*, delivered an important message about the requirement of due inquiry particularly if it is provided by statute. Nonetheless, the 'curable principle' in *Dreamland* and *Hong Leong* still holds as precedent as evidenced by many of the later decisions of the IR court, for example the 2008 case between *Rachel Mathews & Anor v. Basf (Malaysia) Sdn. Bhd.* (2008). In addition, Hassan (2011) recently found that in comparison to their counterparts in the public sector, the right of employees to be heard in the private sector is compromised by the precedent as it applies to the private sector.

There remains no guarantee of procedural justice for employees pursuing dispute resolution at the level of the workplace with the possible exception of those covered by the *EA 1955*. It can be argued that the 'curable principle' delivered a significant message to many employers about their role in providing for procedural fairness. This has meant that workplace dispute resolution does not have to abide by the stricter rules of procedure that exist in tribunals and courts. It may contribute to an environment where in the absence of procedural justice, employees are less likely to accept the outcome of a workplace dispute and are more inclined to take their disputes to the tribunal. Added to this is the fact that the Code is not enforceable. Together these obstacles provide little incentive for employers to put into place mechanisms to resolve disputes internally.

Employees' perceptions on the lack of procedural and distributive justice are further reinforced when employers' decisions to dismiss them on the grounds of misconduct are based on wrong procedures as shown in many cases both at tribunals and courts. For example, in a 2009 case between *Richard Felin Jinivon v. Sabah Forest Industries Sdn. Bhd.* it was found that as the company had failed to abide by their own procedure of domestic inquiry it was a breach of natural justice. This is because the domestic inquiry had been defective due to the notes of inquiry being incomplete and inaccurate. On para 25 p.153 the IC Chairman in this case ruling said;

> *In my view the failure of the company to provide the said I.D. [identification documents] which gathered from further investigation and upon which charges were framed were critical and pertinent documents and they ought to have been made available to the claimant readily even before the D.I. [Domestic Inquiry] was conducted. This [,] the company had failed to do. This in my view is a gross breach of natural justice and as such the D.I. [Domestic Inquiry] is defective.*

Further on para 27 p. 153 the Chairman said:

> *In the light of the decision in Hong Leong Equipment and the findings of this court under items (a) and (b) mentioned above I am of the view that the probative value of the D.I [Domestic Inquiry] is highly questionable and unreliable and as such the court therefore rules that the D.I. [Domestic Inquiry] is grossly defective and therefore invalid and accordingly the notes of the D.I [Domestic Inquiry] are also incomplete and inaccurate. This court will therefore only consider the evidence adduced at the trial of this matter to determine as to whether the claimant was dismissed with just cause or excuse.*

It was further found on para I p. 176 that the employers had made an afterthought and mere fabrication of argument against the claimant as follows:

> *.... In my view the issue of leniency was just an afterthought and mere fabrication by COW2 and COW6 to lend credence to company's case.*

The above example of an employer's decisions made with ulterior motives against their employee by fabricating evidence and arguments reflects the reality of imbalance of power between employees and their employers. However, in this case the employee won the case after seeking justice at the tribunal strengthening the importance of applying fair and just procedural processes at the workplaces. As argued by Posthuma (2003) the underlying rationale behind the application of procedural process in the legal realm is similar to procedural justice concepts in the workplace. Hence, he argued further that some aspects of procedural justice may be useful if they are appropriately

adopted at the workplace, for example the right to discovery which means employees would be given the opportunity to obtain copies of documents in the possession of the employers to defend their case. This will ensure that managers take the responsibility for ensuring that decision making in their workplaces does not create a sense of injustice to employees (Folger & Konovsky 1989).

Another factor relating to justice in dispute settlement in Malaysia is the general lack of employee representation in courts and tribunals. Given there is increasing evidence that employee representation in the dispute resolution process enhances justice by providing employee voice, this is potentially a key element in the provision of justice. Wheeler, Klaas & Mahony (2004) who conducted studies among seven different types of decision makers of employment disputes in the US with some reference to practice by judges and arbitrators in Malaysia, Australia, UK and several other European countries (in judging the merits of terminations), found that employees with union representation are more likely to get a favourable result when attending dispute resolution such as in arbitration. Similarly, Genn (1993) who conducted a study in the UK argued that when disputants are represented by a skilled representative there is a higher probability that they win their case. He posited that the presence of a representative in the process influences the substantive outcome of the hearings. As noted by Youngblood, Trevino and Favia (1992) when researching reactions to unjust dismissal and third-party dispute resolution in the US, lack of voice and participation in conciliation can have a negative effect on the perception of procedural justice by the claimants.

Such a factor may well operate in Malaysia reflected in the lower rate of settlement for reinstatement claims. Employees may not be able to adequately represent themselves in front of their employer. By contrast with Australia and to a certain extent in the UK which is known to have both employer and employee represented, in Malaysia it is the employer who would usually have competent representation and the employee who generally does not (Wheeler, Klaas & Mahony 2004). Adding to this disadvantage, the conciliation process (in Malaysia) is governed by a complex set of rules which is unlikely to be understood by many unrepresented employees. These rules effectively form barriers to justice for many employees. For instance, Genn (1993) in a study of

tribunals in the UK noted the complexity of industrial law for disputants in a set of interviews with Industrial Tribunal members:

> *Industrial law is so complex now. Joe Bloggs is not going to distinguish between whether we think he nicked something and whether we are looking at the employer acting reasonably. People just don't appreciate these distinctions. The law has become silted up. We have unhappily got ourselves into a situation of high technicality [Industrial Tribunal Chair]*.

Genn (1993) argued that even in an informal tribunal setting it is important for all parties to be able to 'make their case' and those without representation or with an unskilled representative will be at a disadvantage. Although the *IR Act 1967* provides for union representation in tribunal conciliation of individual disputes, the vast majority of employees are not unionised and do not bring a representative. Indeed, union density in Malaysia is very low compared to other countries including Australia (Section 2.5.6). When disputants are not represented before the tribunal they may be at a disadvantage as a result of imbalance of power (Genn 1993). Genn and Yvette (1989) observed that although informality in surroundings and procedural flexibility are important features of most tribunals these are not reasons for denying representation as representatives contribute to more accurate decision making and to the fairness of the process by which outcomes are reached.

The main problem associated with defects in justice afforded at workplace and conciliation levels is that disputants tend to seek it in other forums. In Malaysia, this has created a pressure on the IC as disputants appeal to the Minister for Human Resources to have their cases heard at arbitration. The operation of the 'curable principle' assists their claim for a court hearing to correct the breach in justice and to deliver a fair outcome. In Malaysia, arbitration is a judgment ruling, through a hearing at the IC under *Section 21* of the *IR Act 1967*. The arbitrated decision binds all disputants and cannot be appealed in any court except on point of law. In particular, arbitration provides unrepresented employees with the guarantee of a fair settlement, something that may not be afforded to them at the workplace or even conciliation (particularly if they are unable to represent themselves effectively). Such a phenomenon was observed some

years ago by Gengadharan (1991) who argued the presence of compulsory arbitration in Malaysia had a negative impact on the implementation of workplace disputes including the Code. In other words, the availability of arbitration may exert a 'chilling effect' over conciliation. Similarly, Yaqin (1999) observed that a lack of due process arising from employers failing to conduct a domestic inquiry is rectified by the IC through its arbitration power which will provide an alternative forum for employees to be heard and belatedly satisfy the need for natural justice.

Since the notion of the chilling effect of arbitration was first introduced by Stevens (1966) it has been linked to conventional arbitration systems where arbitrators are free to determine the outcome of disputes as opposed to arbitration systems in which the arbitrators are only permitted to cast a deciding vote (Treble 1989). Stevens (1996) argued that the availability of compulsory arbitration can be used by either party in negotiation as a strategy to influence a better outcome for themselves. This in turn has been said to discourage disputants to enter into a serious negotiation or bargaining process (Treble 1989). The chilling effect has also been argued to operate in the Australian conciliation and arbitration system where it was linked with the previously low settlement rates in conciliation for many years (Niland 1976; 1978; Hancock & Rawson 1993).

The chilling effect could very well operate in the Malaysian arbitration system because of the nature of the conciliation process itself. As noted by Muniapan & Parasuraman (2009) Conciliators are not empowered to provide any legal force and hence, parties are not legally bound to abide by the settlement at conciliation whereas they are required to do so in arbitration at the IC. Further, because the IC is not subject to any traditional judicial process yet can still deliver a legally binding decision, it becomes the most sought after forum for dispute resolution in Malaysia particularly among employees (Ali Mohamed & Sardar Baig 2009; Yaqin 1999). A similar effect was noted by Notz & Starke (1987) who suggested that the chilling effect of arbitration arises due to disputants' expectation of equality of decisions (for instance through precedents applied at arbitration) leading them to become less motivated to resolve their dispute via negotiation. In relation to dismissal disputes dealt with under the *IR Act 1967* the

chilling effect of arbitration on disputants, particularly employees could arise as a result of their expectation of a better outcome such as higher compensation (Bloom 2008).

Disputant's reliance on compulsory arbitration may also lead them to become too reliant on the system and dependent on it to resolve future disputes. This has been commonly associated as 'narcotic effect' of arbitration (Wheeler 2008; McQuarrie 2007; Champlin et al. 2003). While the chilling effect or arbitration relates to disputants determination to use arbitration because of their expectation of a better outcome than they would gain through negotiation, the narcotic effect operates when disputants' reliance on arbitration is as a result of their past positive experience of arbitration (Anderson 2008). In Malaysia, it could be argued that narcotic effect may not be as significant since disputes over dismissal are handled as individual disputes under Section 20 rather than collective disputes under Section 18 the *IR Act 1967* (see Section 2.5.12). Dismissed employees can only be represented by themselves or unions officials and with only seven percent of the Malaysian workforce is unionised (see Section 2.5.6) very few employees would have a chance to be represented by representative who would have had previous experience with arbitration.

Further, arbitration offers a final determination which is not possible in conciliation, which relies on a negotiated settlement. DIRM's Conciliators are not permitted to provide advice or recommendations. The outcome of conciliation must be by agreement between the disputants themselves. Thus, arbitration offers disputants finality to their dispute if there has been no settlement at conciliation. The low conciliation settlement rates and the large number of cases referred to arbitration in the IC have not gone without some comment in Malaysia. For instance, Lobo (1986) argued that the DIRM should cease the role as an intermediary between disputants and arbitration as it denies individual constitutional and common law rights to seek redress directly to the court. This is particularly so as the DIRM cannot cure any procedural defect such as failure to conduct a domestic enquiry in the workplace. The 'curable principle' enunciated in *Dreamland* is the responsibility of the IC alone.

Over time, various measures have proposed to the MoHR to improve the conciliation process because of the delays and backlogged cases in the IC. For instance, in 2004 there were some 6000 pending cases as far as back as 1998 (Malaysian Trade Union Congress 2004). The matter has also been raised in the popular media. Anbalagan (2008) in *The New Sunday Times* argued that the serious case backlog in the IC can be directly attributed to the increasing number of cases unresolved at conciliation and added that: 'A protracted court battle between employer and employee could take up to 10 years'. Similarly, Aminuddin (2009) noted that as the IC is being inundated with claims for reinstatement it holds hearings on an average two years after the dismissal date, with some cases taking five to six years to be decided. The extent of the backlog of cases to arbitration has other ramifications. More serious has been the tendency of parties to seek judicial review in the High Court (the final arbiter) to review the decisions of the IC, and this causes further delay and unnecessary expenses to all parties (Abdul Hamid 2008). As noted by Lobo (2000) employment cases have constituted the greatest component of all those referred to judicial review.

3.4 Chapter summary

Organisational justice plays an important role in any business and determines how people react to decisions and actions that affect them. The lack of justice creates not only a motivation to resolve the dispute elsewhere (such as in a tribunal or court) but also leads to negative workplace behaviours. This chapter outlined three main principles of justice: distributive, procedural and interactional justice. Distributive justice refers to the fairness of the outcome while procedural justice relates to the fairness of the process. Interactional justice concerns people's perception of fairness related to their treatment in the dispute resolution process and the extent to which the decision was explained to them. These three justice principles have been found to have strong linkages where each complements the other as to how justice has is perceived to be delivered.

This Chapter argued that the dispute resolution process in Malaysia is greatly influenced by two mitigating factors: the implementation of the Code of Conduct for Industrial Harmony 1975 and the effect of precedent known as the 'curable principle'. The Code

has not been effectively used by employers in resolving their disputes at the workplace which has meant the dispute resolution procedures are not widely in place. The ‘curable principle’, which sees courts and tribunals as being the bodies charged with the duty to deliver justice, may have also deterred the implementation of due process at the workplace. As a result, many employees seek justice beyond the workplace by filing their claims to the DIRM and IC. The high level of managerial prerogative was also discussed in this chapter as it may play a role in denying justice to employees because it means that workers are not usually involved in developing dispute resolution procedures in the workplace and because it has led to a high level of dismissals in the absence of evidence based decision making on the part of employers.

The low level of unionisation in Malaysia was also considered in this chapter because the subsequent lack of representation of employees both in the workplace and in the tribunal may mean a defect of procedural justice in these forums. Unions provide employees with both knowledge of the procedures and the ability to effectively voice their case (two elements of procedural justice). Without effective representation it is likely that Malaysian employees have driven the demand for arbitration at the IC in search of a fair outcome. The next Chapter details the research methods used in this thesis.

CHAPTER 4-RESEARCH METHODOLOGY

4.0 Introduction

The preceding two chapters canvassed the international literature on the employment dispute resolution systems of UK, Australia, New Zealand and Malaysia and introduced the concept and theories of organisational justice. It was found that unlike other countries with industrial tribunal systems based on the British industrial relations system, the Malaysian system of tribunal dispute resolution exhibits considerably lower rates of settlement at conciliation. This thesis sets out to explore workplace and tribunal conciliation in Malaysia in this context. As explained in Section 1.3, this thesis aims to investigate the reasons behind the low rate of settlement of conciliation and high rates of referral to arbitration by answering four research questions:

1. What are the key factors behind the referral of claims for reinstatement from the workplace to tribunal conciliation?

2. What are the key reasons for the low settlement rate of tribunal conciliation for reinstatement claims and subsequent high rates of referral to arbitration?

3. What are the strategies to encourage claims for reinstatement to be resolved at the workplace?

4. What are the strategies to reduce the backlog of claims for reinstatement before the Industrial Court.

This chapter explains the use of predominantly qualitative research as the tool to investigate the research questions. In doing so, the chapter considers some of the methods used in researching conciliation from the international literature. Following this discussion, the Chapter moves to explain how each research question will be answered and provides the conceptual framework which underpins this study. Finally, a

detailed description of the methodology used in this thesis is provided along with its limitations.

4.1 Justification for the research

While there exists a large body of research on tribunal conciliation internationally, and particularly in countries such as the US, UK, Australia and New Zealand, in contrast, research on industrial relations and dispute resolution in Malaysia is very limited (see for example, Parasuraman 2007; Ali Mohamed 2004). Much of the Malaysian research has been PhD and Master Degree studies conducted by analysing employment statutes, court decisions and employment codes (see for example, Hassan 2006; Sulong 1997; Abd Murad 1994). There has never been an overarching study of workplace dispute resolution, conciliation and arbitration in Malaysia despite the on-going debate and critique about the quality of dispute resolution in the country (see for example, Aminuddin 2009; Anantaraman 2003). This thesis fills this gap by investigating the reasons behind the low rate of conciliation and the factors leading to disputants' determination to seek arbitration in resolving their disputes over dismissal.

4.2 Methods used in past research on tribunal conciliation and the implications for the research methodology of this thesis

In deciding how best to fill the research gap in the area of Malaysian workplace dispute resolution, a review of the methodologies commonly used in the field was conducted and the main techniques used in qualitative and quantitative methodologies are presented in this section along with the implications for the present study. As discussed above a range of research utilising qualitative techniques to investigate dispute resolution has been found including interviews, surveys, analyses of court documentation, case studies and direct observations. We now review these methodologies as a way to guide the direction of the present study.

4.2.1 Interviews

In general, interviews are the most prominent method used in qualitative research, and particularly in dispute resolution research (see for example, Punch 1998; Patton 2002; Silverman 2006). Open ended interviews allow researchers to ask similar questions to all participants while at the same time providing them with freedom to explain different aspects of issues being investigated (Saunders, Thornhill & Lewis 2007; Maxwell 2005; Patton 2002). It is also an effective way to acquire larger and more detailed amount of data (Patton 2002; King 1994). Interviews are also commonly used as a follow up from the administration of a questionnaire in order to provide for greater clarity of issues identified in the survey (Whipp 1998). Interviews have been used by many researchers of ADR and unfair dismissal in previous study (see for example, Van Gramberg 2006; Meredith 2001; Youngblood, Trevino & Favia 1992). Despite the wealth of information which can be gleaned from interviews in the area of dispute resolution there is little use of this technique in the Malaysian research with exceptions such as Parasuraman (2007) on his work with judges.

4.2.2 Caseload information

Caseload information is used by analysing legal statutes as well as documentation (for instance, decisions and reports) produced by tribunals and courts. Whilst useful as secondary research, this information often lacks details such as the behaviours, events and processes of decision making which transpire during the conciliation or arbitration processes. In the UK, Earnshaw, Marchington & Goodman (2000) used caseload information by analysing 165 employment tribunal decisions to reveal information about the operation of employers' disciplinary procedures and the part these played in any finding of unfair dismissal. However, using this method the authors were not able to find why shortcomings occurred. This led them to conduct subsequent case studies which were used to identify reasons for non-use or misuse of procedures.

Researching conciliation through documentation reviews alone is limited by the nature of the process. Conciliation is a private process and generally not recorded. In Malaysia,

whilst Conciliators write reports on the conciliation process, these are confidential documents to be used only within the DIRM and the Ministry to make decisions either to refer a case to the IC or not. Researchers in Malaysia who have analysed legal statutes and courts decisions include Muniapan and Parasuraman (2007); Ali Mohamed and Sardar Baig (2009); and Anantaraman (2004). In this thesis, it was decided that interviews were the best means of obtaining perceptions and explanations which would assist in a detailed examination of the intricacies of justice in the workplace and in the DIRM and court.

4.2.3 Case studies

Case studies are another method commonly used in researching dispute resolution (see for example, Van Gramberg 2006; Goodman et al. 1998). Earnshaw, Marchington and Goodman (2000) used case studies (in addition to analysing tribunal decisions) in 33 selected organisations to investigate the operation of employers' disciplinary procedures in unfair dismissal hearings. The key advantage of case studies is in being able to interview a range of participants in the dispute resolution process (see for instance, Van Gramberg 2006). In Malaysia case study methodologies have been used in researching industrial relations such as employees' participation at the workplace (see for example, Parasuraman 2007). In this research the objective was to investigate workplace behaviour in an on-going environment and case study was a suitable methods. However, when examining dismissal claims in many cases the employees raising the claim have left the organisation making well rounded case studies difficult and less accurate. In the present study, most of the claimants had left their organisations and could not be contacted. For this reason it was decided that a case study approach was not achievable for the present thesis.

4.2.4 Observation

The use of observation as a qualitative research technique is commonly deployed as it provides subtle nuances often not obtainable through interviews or surveys (Yin 2004). However, it has also been argued to be unreliable, as different observers may record

different observations (Silverman 2000). In investigating workplace or tribunal dispute resolution it is also limited as it requires researchers to be present during the dispute resolution processes. The private nature of conciliation and lengthy process of these dispute resolution processes meant that observation was not a practical technique to adopt here.

4.2.5. Surveys

Surveys are a method of data collection commonly used in quantitative and qualitative research. Quantitative techniques in this field have been used to test theories and predict behaviour. For example, Shulruf et al. (2009) used a quantitative approach to investigate the costs and benefits of employment disputes based on results from a survey of employers. This method has also been frequently used by US researchers interested in investigating behavioural traits of disputants (see for example, Greenberg 1994).

Using surveys as part of qualitative investigation is useful when researching a number of issues involving several 'key' informants which can quickly be gathered on masses (Carson et al. 2001). Surveys have also been used in some research which is predominantly qualitative in nature (see for example, Van Gramberg 2006), particularly where analysis is based on descriptive statistics and as an adjunct to more traditional qualitative techniques such as interviews and case studies. This thesis also adopted surveys of employers and Conciliators.

In considering the types of methodologies frequently used in researching dispute resolution, the decision was made that the most suitable techniques to answer the four research questions for this thesis would be qualitative methods. The use of a predominantly qualitative methodology has been argued to be most appropriate where a study involves investigating issues such as culture, power and change processes in employment relationships (Whipp 1998). Qualitative methods have also been said to provide the means of identifying a broader range of issues and a richer picture of actual behaviour than quantitative methods (Whitfield & Strauss 1998). It is most suitable for research exploring peoples' everyday behaviour (Silverman 2000). As this thesis deals

with individual perceptions of justice, arguably it is more suited to qualitative techniques. In doing this, a qualitative research design was adopted to provide real life experiences from the perspectives of the third parties such as Conciliators and Arbitrators and contrast these detailed perceptions with the responses of employers from a survey questionnaire. Research on dispute resolution in workplaces and tribunals has used all of the above qualitative methods either as single methods or in combination with each other. For instance Dickens et al. (1985) used a combination of questionnaires (employees and employers), questionnaires with tribunal chairpersons and lay members, structured interviews with ACAS officials and local trade union officials, observations of tribunal hearings, and monitoring of decisions. Van Gramberg (2006) used a similar set of mixed approaches in investigating mediation at the workplace, surveying employers and ADR practitioners and interviewing members of the AIRC, employer associations and trade unions. Meredith (2001) investigated the conciliation of unfair dismissal disputes in South Australia using a qualitative approach by interviewing employees, advocates and solicitors as well as Conciliators from the South Australian Industrial Relations Commission. In the UK, qualitative approaches are also popular ways to investigate dispute resolutions (see for example, Gibbons 2007; Mizon 2007).

4.3 Operationalising the research questions

This section provides the research questions for the thesis along with an explanation of how the researcher set about answering each research question. The way the research questions were operationalised was influenced by the findings of past research into workplace and tribunal dispute resolution described briefly in the previous section. The methodological techniques used in this study (surveys and interviews) are then described in more detail in section 4.6 Data Gathering.

RESEARCH QUESTION 1:

What are the key factors behind the referral of claims for reinstatement from the workplace to tribunal conciliation?

In order to answer this question it was decided to draw on the knowledge of employers and Conciliators as these are the parties with the most experience and knowledge in why some disputes are referred to conciliation at the DIRM. The findings for this Research Question are presented in Chapter 5. In addition to the findings of an international literature review, this research question was answered using three investigative techniques:

(i) A survey of Conciliators was conducted to gather their opinions in relation to workplace disputes resolution and tribunal conciliation in Malaysia;

(ii) A survey of employers who attended Conciliation at the DIRM and arbitration at the IC between the month of July and August 2009; and

(iii) A series of semi structured interviews was conducted with Conciliators from the DIRM and Arbitrators from the IC.

RESEARCH QUESTION 2

What are the key reasons for the low settlement rate of tribunal conciliation for reinstatement claims and subsequent high rates of referral to arbitration?

Again, to answer this Research Question, the researcher drew on employers and Conciliators. The findings for this Research Question are presented in Chapter 6. The research question was answered using three investigative techniques:

(i) A survey of Conciliators was conducted to gather their opinions in relation to workplace disputes resolution and tribunal conciliation in Malaysia;

(ii) A survey of employers who attended Conciliation at the DIRM and arbitration at the IC between the month of July and August 2009; and

(iii) A series of semi structured interviews conducted with Conciliators from the DIRM and Arbitrators from the IC.

RESEARCH QUESTION 3:

What are the strategies to encourage claims for reinstatement to be resolved at the workplace?

In order to answer this Research Question the researcher relied on the knowledge of Conciliators and Arbitrators. The findings for this Research Question are presented in Chapter 7. The research question was answered using:

(i) A series of semi structured interviews conducted with Conciliators from the DIRM and Arbitrators from the IC.

RESEARCH QUESTION 4:

What are the strategies to reduce the backlog of claims for reinstatement before the IC.

Again, this Research Question was best answered by Conciliators and Arbitrators who deal with the backlog of claims on a regular basis. The findings for this Research Question are presented in Chapter 7. The research question was answered using:

(i) A series of semi structured interviews conducted with Conciliators from the DIRM and Arbitrators from the IC.

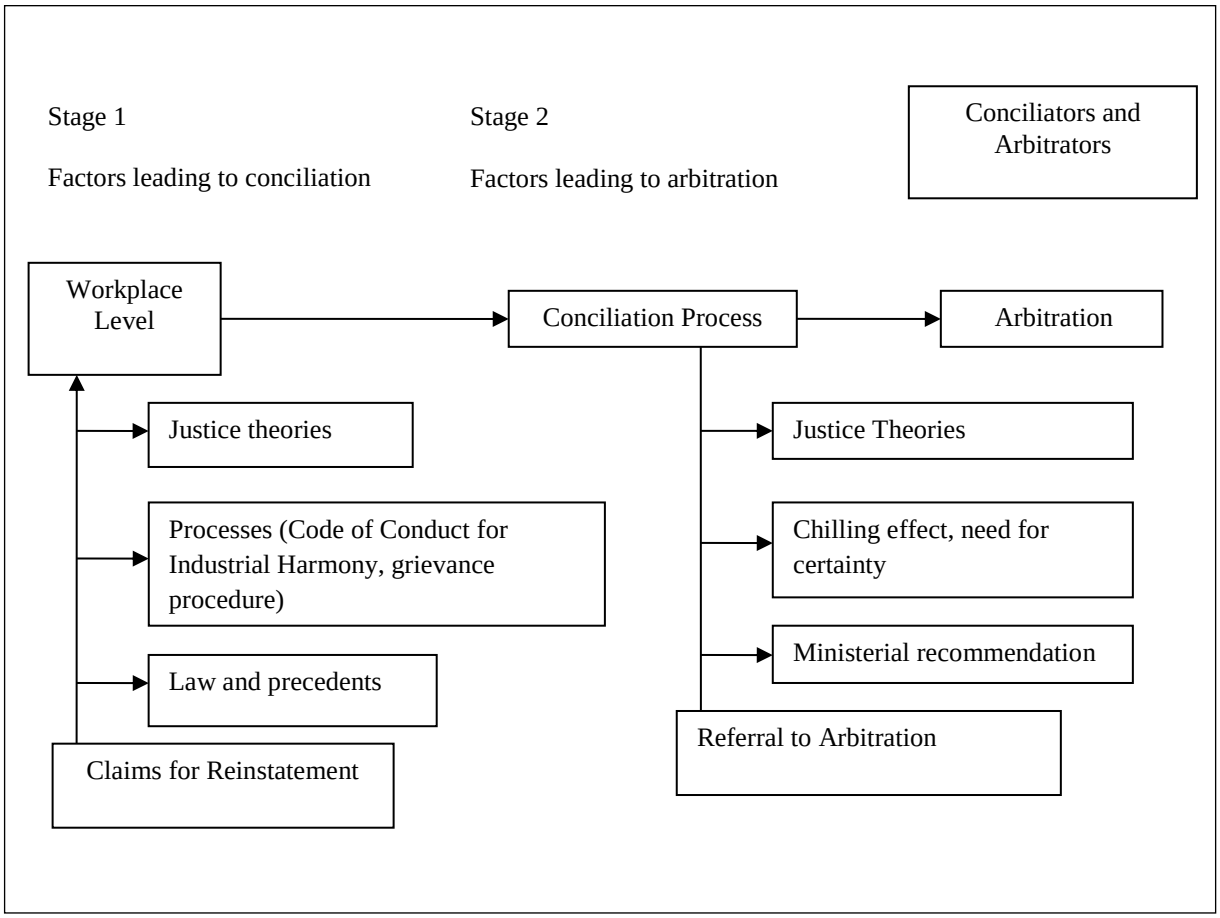
4.4 Conceptual framework

Figure 4.1 depicts the conceptual framework for this study. It is based on the premise that claims for reinstatement, like other workplace disputes have the potential to be resolved at the workplace. Arguably, these cases would have been resolved if domestic inquiry was held or Code of Conduct for Industrial Harmony 1975 was observed prior to the employee's dismissal (see Section 2.5.3). Similarly, a grievance procedure may have been able to filter employees' grievances. Hence, the first stage of the study investigated the factors leading to claims for reinstatement which could not be resolved in the workplace. This stage examined employers' views on why disputes were referred

to conciliation. The thesis examined this stage through the lens of justice theories, research on internal dispute resolution procedures and the effect of laws and precedents. Views from the perspective of the Conciliators and Arbitrators were also sought at this stage.

The second stage of the study investigated the factors contributing to the referral of unsettled conciliation of reinstatement cases to arbitration through a consideration of justice theories as they apply to the DIRM (procedural, distributive and interactional justice). Referral to arbitration was also examined by considering whether arbitration itself exerts a chilling effect on conciliation (see Section 2.6) and the relative ease or otherwise of Ministerial referrals to arbitration.

Figure 4.1 Conceptual framework



4.5 Human research ethics approval

The Human Research Ethics Committee of Victoria University granted the project ethics clearance in April 2009 (Ethics approval reference HRETH 09/89 dated 01/07/2009) (Appendix A). In accordance with the ethics requirement of Victoria University which required the following procedures to be adhered to before and during the interview process:

- Addressing issues of confidentiality and anonymity (Appendix B and Appendix C);
- Obtaining Informed consent from the interviewees (Appendix D and E);
- Giving the interviewees reassurance of voluntary participation; and
- From the interviewer perspective the maintenance of neutrality and professionalism throughout.

4.6 Data gathering

In addition to an international literature review and a search of internal DIRM and IC documents, the study utilised a predominantly qualitative approach to investigate dispute resolution from the workplace to conciliation at the DIRM and subsequently to arbitration at the IC. Surveys of employers and Conciliators of the DIRM were conducted in the months of July and August 2009. These were followed by interviews with a sub set of respondent Conciliators and Arbitrators. The DIRM has a total of 13 branches in Malaysia. These branches provide conciliation services five days a week at their respective offices located in the state capitals and the five of these offices were covered in this study. The IC has seven branches in Malaysia with a total of 26 courts. Of these, four IC branches (four states) were covered in this study.

This research focussed its data collection in respect of claims for reinstatement as these are the majority of disputes handled by the DIRM in Malaysia (see Section 2.5.4). Written permission to conduct the study was received from the President of the IC as well as the Director General of Industrial Relations before the study was conducted (see Appendix F and G).

The researcher spent an average of one week in each state to distribute the questionnaires to employers and Conciliators as well as meeting and interviewing the Conciliators and Arbitrators at their respective offices. A second round of visits was also made to these locations to collect any outstanding questionnaires. The questionnaire distribution and collection process was completed with the assistance of the staff of the five DIRM branches and the Registrar and staff of the four branches of the IC. A special courtesy visit was also made by the researcher to the Director General of DIRM and Deputy General of DIRM in Putrajaya as well as the President and Registrar of the IC in the Federal Territory to thank them for granting permission to conduct the study and to inform them of the scheduled visits to their respective branches. The visits also enabled the researcher to collect information in the form of statistical reports and publications from these offices. Both the Director General of DIRM and President of the IC reiterated their strong support for the study to be conducted and permission for the researcher to visit their respective branches.

4.6.1. Survey of Conciliators

A survey of Conciliators was conducted between July and August 2009. Conciliators were sourced from the list of Conciliators in the MoHR Staff Directory System (See Appendix H) which is publicly available on its website (http://www.mohr.gov.my). The data collected by the survey included information on the processes and techniques used in the conciliation process, the reasons for referral to arbitration, and recommendations for change or improvement (A copy of the survey instrument is provided in Appendix I). The questionnaires were distributed to 82 available Conciliators from a total of 88 who were employed by the DIRM as at July 2009. The remaining six Conciliators could not be reached as they were on leave or otherwise away from duty. The questionnaires were distributed personally to them or through their respective departmental head during the researcher's visits made to the DIRM headquarters in Putrajaya and five branches mentioned above.

The conciliators from eight other branches not visited by the researcher included Kedah/Perlis, Perak, Melaka, Negeri Sembilan, Sabah, Pahang, Terengganu and Kelantan. In these cases, the survey forms were distributed with the assistance of one

Conciliator from Sarawak. A second trip to the DIRM headquarters and the five branches selected was made to collect the remaining questionnaires which were not returned by the Conciliators during the first visit. Of the 82 questionnaires distributed, 42 were returned representing 51.2 percent return rate. The survey of Conciliators was followed by semi-structured interviews to get their views on workplace dispute resolution, conciliation and arbitration in Malaysia (see Section 4.6.3).

4.6.2 Survey of employers

The employers were chosen from the five regions: the Federal Territory of Kuala Lumpur, Selangor, Penang, Johor and Sarawak because these are the regions with the most number of dismissal disputes handled by the DIRM and the IC.

The second set of survey instruments was targeted at employers who had attended conciliation and arbitration at the DIRM and IC in the months of July and August 2009 and the responses were received immediately after their hearing and continued to be received via mail until October 2009. The data collection was focussed on getting employers' opinions on workplace dispute resolution, conciliation at the DIRM and arbitration at the IC in Malaysia as set out in the Research Questions for this study (A copy of the Employers Questionnaire is provided in Appendix J). Due to the private nature and confidentiality of the conciliation no records of disputants are available to enable questionnaires to be sent to them directly. Similarly the arbitration court lists do not provide sufficient details of disputants. It was logistically too difficult to provide employees with survey. But clearly future studies should conduct such an exit survey. Hence, it was decided to conduct exit surveys of employers as they left their hearing. Employers were issued with the survey form as they exited the conciliation process at the DIRM and following arbitration at the IC. The survey of employers was conducted using exit surveys and they were invited from those who had attended conciliation at the DIRM and arbitration at the IC. This was to ensure that only employers who had disputes pertaining to dismissal were considered in this study so as to minimise any non-response bias. The questionnaires were distributed by the researcher with assistance from the staff of the DIRM and IC. The questionnaires were collected immediately following completion by the employers after their hearing at the DIRM and IC

branches. The responses from employers who had chosen not to complete the questionnaires during the exit survey, as well as those distributed by the Conciliators of DIRM and Registrar of the IC continued to be received via mail until October 2009 via a return address envelopes provided earlier to each of the DIRM and IC branches visited.

Of a total 142 questionnaires collected 59 were discarded as they were not fully completed. Of these 59 rejected questionnaires six were incomplete while 54 had not had any recent termination case dealt by the DIRM although they completed Section 1 (organisational profile); Section 2 (Workplace dispute resolution mechanism/grievance procedure); and Section 3 (Termination of employment) of the questionnaire. As a result of discarding these questionnaires 83 were able to be analysed. The decision to discard the incomplete questionnaires ensured that only employers who had attended a recent conciliation and arbitration at the DIRM for a termination of employment matter were included in the analysis. This removed employers who only came to the DIRM for advice or other administrative matter from the analysis. The majority of employers who responded to the surveys constituted those from mostly non-unionised workplaces (62.7 %) consistent with the low union density in Malaysia of around 7 % (see Section 2.5.6)

4.6.3 The Interviews with Conciliators

The Conciliators were chosen from five regions: Federal Territory of Kuala Lumpur, Selangor, Penang, Johor and Sarawak because these regions have been identified as having the most number of dismissal disputes. As discussed in Section 4.6.1 there were 88 Conciliators employed by the DIRM whose names were sourced from the MoHR Directory System. Of these 88 Conciliators only those from the five selected locations were included to be in the pool of participants for interviews. As discussed above, the reasoning behind this selection was that these five locations represented the greatest number of termination disputes handled by the DIRM and hence, the Conciliators would have a great deal of experience in handling these matters and were judged as being most capable in providing resourceful and comprehensive responses to the interview

questions. It was also considered that these Conciliators would also be able to share examples and incidences of termination disputes.

All Conciliators from the five target branches were contacted by telephone or email prior to interviews to find out whether they were available during the proposed visits by the researcher. Those who indicated their availability were selected for interviews and were given the list of questions and Ethics Consent Forms including permission for digital recording before the interviews were conducted (see Section 4.5).

A total of 23 Conciliators were interviewed at their own offices or workstations with each interview lasting between one to one and half hours. All the interviews were digitally recorded with permission from the participants to minimise the need for note taking and enabling the researcher to concentrate on the conversation.

The semi-structured questionnaire was given to the Conciliators ahead of time to guide them on the sequence of questions and issues raised during the interview (A copy of the Semi-Structured Questionnaire is provided in Appendix K). The questions were designed to be open ended to provide for in-depth illustrations and a variety of responses from the interviewees. To assist in the smooth running of the interview process a guide was also developed for the use of researcher himself in conducting the interview (See Appendix L). This was developed based on the literature discuss in Chapter 2 and Chapter 3.

4.6.4 The Interview with Arbitrators

The Arbitrators of the IC were chosen from four regions: Federal Territory of Kuala Lumpur, Penang, Johor and Sarawak because these are the Courts that are located in the five states covered in the study. The IC has a total of seven branches (one had ceased to operate at the time of data collection) in Malaysia with a total number of 29 courts. Of these, 21 courts are in the Federal Territory of Kuala Lumpur, two each in Penang and Johore and one in Sarawak. Each court has its own Chairman (Arbitrators) except for three courts in the Federal Territory which were vacant at the time of the research.

The information on the name and contact number of these Chairmen is publicly listed in the MoHR Directory System in its website (http:www.mohr.gov.my) (Appendix M).

Appointments with the Chairmen (Arbitrators) were made through their respective Registrar or Secretary who provided a suitable time for the interview. The selection of Chairmen to be interviewed was made based on their availability during the researcher's visits to the five states covered in this study. The Arbitrators were provided with a copy of the Semi-Structured Questionnaire (Appendix N) as a guide and were allowed to answer these questions freely and to share their experiences in the course of their role as Arbitrators. These questions were developed based on the framework shown in Figure 4.1 and literature discussed in Chapter 2 and 3. A guide was also developed for the use of researcher himself in conducting the interview (Appendix O).

A total of eight arbitrators were interviewed with five interviewed on the first visit and three on the second visit. All of them had given permission to be interviewed and the process followed the procedure prescribed in the ethics process as discussed in Section 4.5 above. The interviews ranged between one to one and a half hours and were all conducted in the Arbitrators own Chambers and were digitally recorded with their prior permission except for two Arbitrators who preferred not to be digitally recorded and asked instead that the researcher take written notes. One arbitrator provided a written response to the interview questions.

4.7 Transcribing the interviews

The transcription of all the 29 digitally recorded interviews was done entirely by the researcher using a Sony Digital Voice Editor 2 which is user-friendly software equipped with digital pitch controller and transcription keys. The process took four months beginning October 2009 until January 2010. All the transcriptions were done verbatim to ensure the richness of information was kept at a maximum (Yin 2004). The words used by the interviewees and the way they responded to the questions reflected their enthusiasm and concern on the range of matters covered and these were captured during the transcription process. These transcriptions as well as the notes of interviews in respect of the two remaining interviews not digitally recorded were labelled according to the interviewees' roles but numbered randomly to maintain their anonymity (Appendix P).

4.8 Data analysis

The interviews were analysed using QSR NVivo 8 which enables the coding of data to be easily done. The codes and themes were developed using two methods. The first is an inductive method coding which is derived from the theoretical framework and literature review. The second method was by using emerging themes arising from the analysis of the interview transcripts. These were guided by themes taken from Bazeley (2007) as shown in Table 4.1. The coding process using NVivo offers an effective way of organising and managing the interviews transcripts and note taking and made them easily assessable to the researcher (Maxwell 2005; Miles and Huberman 1994)

The process of developing the coding system started with identifying ideas as they emerged in the transcripts using Free nodes followed by sorting and connecting both existing and new nodes into Tree nodes to reflect the structure of the data (Bazeley 2007). The Tree nodes used in this coding process consisted of themes proposed by Bazeley as shown in Table 4.1 in addition to those which were developed based on the framework of this research.

Table 4.1 List of themes used in the coding process

Tree Node	Description
Players	This node refers to the individual or institution involved in disputes resolution for example, Conciliator.
Events	This node captures texts which refers to activities that occur at one point of time for example, dismissal and retrenchment.
Attitudes	This refers to attitude of all the parties in the dispute resolution process such as determination to take the dispute to arbitration.
Issues	This captures matters that have some debate among respondents or public such as arguments on the ‘curable principle’
Strategies	This refers to any text that refers to the strategies put forward by respondents.
Narratives	This is a node which codes all the narratives or text which are considered good to be used as quotes in the thesis.

4.9 Reliability and validity

Many leading qualitative researchers have argued that reliability and validity only pertained to quantitative inquiries (Altheide & Johnson, 1998; Leininger 1994). Yin (1994) however argued that it is crucial for researchers to address the validity of their qualitative research such as in designing the case study and survey measures to ensure that they accurately reflect the subject under investigation. Thus, various approaches have been suggested to determine reliability and validity and ensure rigor in qualitative research (Rubin & Rubin 1995; Leininger 1994; Lincoln & Guba 1985). For example, Lincoln and Guba (1985) stated that reliability and validity refers to 'trustworthiness' consisting of four aspects: credibility, transferability, dependability and conformability. Maxwell (2005) termed validity a form of correctness and credibility of a description, conclusion, explanation, interpretation, or other sort of account. He suggested some of the most important strategies to address validity threats include triangulation, quasi-statistics and respondent validation. The following outline the steps taken in this study to ensure adherence to the principles of reliability and validity.

4.9.1 Data triangulation and methodological triangulation

The use of triangulation of data collection from a diverse range of individuals and settings reduces the risk of biases in the results because it enable the researcher to gain broader and more secured understanding of issues being investigated (Maxwell 2005). In this study varieties of techniques have been utilised including extensive literature review on industrial relations and ADR, survey of employers, survey of Conciliators as well as in-depth interviews with Conciliators of DIRM and Arbitrators of the IC. At each level of inquiry in this thesis triangulation techniques have been used to ensure the reliability and validity of the data. For example, results from the survey of Conciliators were triangulated with interviews of the Conciliators and Arbitrators. The results of the employers' survey were also triangulated with the interviews of the Conciliators and Arbitrators.

4.9.2 Quasi-statistics

Quasi-statistics involved the use of simple numerical results allowing researchers to test and support claims that are inherently quantitative. In the present study this was done by counting the number of times interviewees mentioned themes discussed in the analysis. In this research this method was made easier with NVivo 8 which can generate reports including the frequency or number of times each interviewee mentioned issues and themes discussed in the analysis.

4.9.3 Construct, internal and external validity

Construct validity ensures that the study design accurately reflects the subject under investigation (Yin 1994, Kirk and Miller 1986). The use of multiple source of evidence adopted in this research ensures the validly of data which converge towards the same line of inquiry (Van Gramberg 2006). The instruments used in this research were developed from those used by previous researchers in similar studies relating to ADR and justice. These include combinations of instruments used by researchers such as Van Gramberg (2006); Rawls (1971); and Deutsch (1985). The ability to check interviews with survey responses presented the internal validity of the design sought to eliminate other factors not studied that could have been causal but were ignored in the study. The soundness of the research design lies by taking the perspectives from the actual and major players in the conciliation processes and disputes over claims for reinstatement: the employers, Conciliators and Arbitrators.

4.10 Limitation of research methodology

Several limitations have been identified in this study which could become guidance in similar research in future. By understanding this limitation they can be well informed of when conducting surveys or interviews. These are grouped into three main aspects. First, this study confined its analysis to the perspectives of employers and members of the Malaysian tribunals (Conciliators and Arbitrators). The perspectives of the employees and their unions were not analysed due to time constraints and possible bias effect as they were the subject matter of the study and the ones who initiated their

termination disputes to DIRM. However, future research particularly in Malaysia could explore further into the perspectives of employees or their representatives (unions) and should consider ways to address the bias element.

The confidentiality of information and records created before and during the conciliation processes makes it almost impossible to identify employers and employees who had attended conciliation at DIRM. Thus, this study used an exit survey to distribute questionnaires to employers. Some of the employers who were given the questionnaires to complete (either by the researcher himself or Conciliators) were not interested to participate while some preferred to complete it in their own time at their respective offices. Thus, this resulted in only 83 completed questionnaires returned for analysis. Future research can increase the number of responses by using on-line survey that could be linked to the DIRM website. This however would require prior permission from the DIRM office.

Finally due to time and logistical constraints only 23 of 88 Conciliators were interviewed and were confined to those serving in five main DIRM branches (see Section 4.6.3). Although other branches not covered in this study had fewer disputes, they could provide different and useful perspectives to the findings of the research. Due to the busy schedules of Arbitrators as well as the researcher's own time constraints, only eight Arbitrators were interviewed. With greater resources and time this could be overcome in future research.

4.11 Chapter summary

This Chapter provides the rationale for the choice of methodology of this study. It began with the justification of predominantly qualitative technique and provided several examples of previous research in similar areas. The Chapter continued with the explanation on the data analysis which used NVivo software to organise and analyse the interview transcriptions. Finally, the issue of reliability and validity was addressed outlining the strategies used by the study. The next Chapter reports the findings of the first research question of the study which is to determine the key factors behind the referral of claims for reinstatement from the workplace to tribunal conciliation.

CHAPTER 5 - KEY FACTORS BEHIND THE REFERRAL OF CLAIMS FOR REINSTATEMENT FROM THE WORKPLACE LEVEL TO CONCILIATION

5.0 Introduction

The preceding chapter described the methodology used in this research. This chapter presents the findings of the surveys and interviews to explore the implementation of workplace dispute mechanisms and the growing pattern of disputes over dismissal at the DIRM. In doing so, this chapter answers Research Question 1: What are the key factors behind the referral of claims for reinstatement from the workplace to tribunal conciliation?

The chapter commences by presenting the demographic findings of the Conciliators' Survey and Employers' Survey. The chapter then moves to consider the views of employers, Conciliators and Arbitrators on the reasons why so many workplace disputes are referred to conciliation. In doing so, a set of process factors are identified comprising: the parties' determination to use a dispute resolution procedure; the lack of hurdle requirements which might otherwise have prevented a flow of disputes to conciliation; and the emergence of a compensation culture which has the potential to fuel increasing numbers of claims to conciliation. Next, the chapter considers the viewpoints of the survey and interview respondents regarding the effectiveness of laws and precedents and their role in moderating the flow of referrals to conciliation. Finally, the chapter describes the respondents' perceptions of the extent to which justice has been afforded to employees and employers in workplaces as they deal with claims for reinstatement.

5.1 Conciliators' Survey

There were a total of 88 Conciliators employed by the DIRM as at June 2009 and all available Conciliators (82) were surveyed between July and August 2009. The remaining six Conciliators could not be reached as they were on leave or otherwise

away from duty. Conciliators covered in this study were appointed as permanent civil servants from a range of educational backgrounds. To be appointed as a Conciliator, individuals must have minimum degree qualifications and once appointed are required to attend a series of professional development courses (as are other civil servants). Conciliators must undertake an intensive course on the labour and industrial relations laws of Malaysia. Apart from those who might be appointed directly from new graduates, many Conciliators have been transferred to DIRM from other public sector departments and in particular, the Department of Labour. In addition, Conciliators themselves are subject to inter-departmental transfer within the MoHR either as a result of promotion or periodical restructuring. As Conciliators are civil servants, permission was sought and granted by the Director General of Industrial Relations before the survey forms were distributed. The forms were sent directly to the Conciliators themselves or through the Heads of Departments. A total of 42 surveys were returned representing a 51.2 percent return rate (see Section 4.5.1). The next section outlines the demographics of the Conciliators' Survey.

5.1.1 Distribution of Conciliators by gender and age

From Table 5.1 it can be seen that 21 (50 percent) of the Conciliators were between the ages of 31 and 40 years and 13 (31 percent) Conciliators were aged between 41 and 50. There were only four (9.5 percent) Conciliators in the age groups of less than 30 or above 50 years. Hence, most of the Conciliators surveyed were between 31 and 50 years of age (81 percent).

Table 5.1 Distribution of Conciliators by gender and age

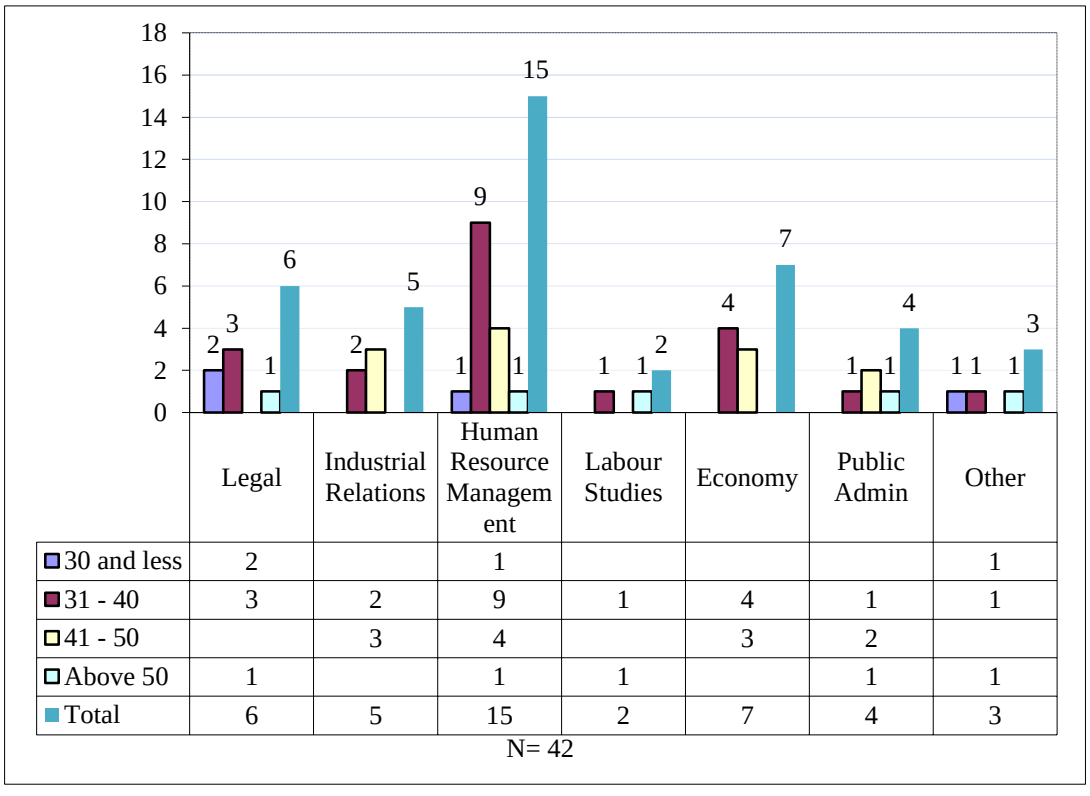
Gender/Age	Less than 30	31 to 40	41 to 50	above 50	Total
Male	2 *(4.8 %)*	8 *(19.0 %)*	7 *(16.7 %)*	3 *(7.1 %)*	20 *(47.6 %)*
Female	2 *(4.8 %)*	13 *(30.9 %)*	6 *(14.3 %)*	1 *(2.4 %)*	22 *(52.4 %)*
Total (N=42)	4 *(9.5 %)*	21 *(50.0%)*	13 (*31.0 %)*	4 *(9.5 %)*	42 *(100 %)*

Source: Survey of Conciliators

5.1.2 Distribution of Conciliators by age and professional background

Most commonly, Conciliators came from management related backgrounds. As shown in Figure 5.1, there were 15 (35.7 percent) Conciliators who had a human resource management background while seven (16.7 percent) Conciliators had either an industrial relations or labour studies background. Another seven (16.7 percent) had an economic background and a further six (14.3 percent) Conciliators came from a legal background. Another four (9.5 percent) Conciliators had public administration backgrounds. Other, less common professional backgrounds include one each from banking and finance, management and another Conciliator who only indicated having two years experience at the Department of Labour. In general, the distribution and type of professional background found across the 42 respondent Conciliators responding to the survey indicates a group which is strong in experience and training in workplace matters.

Figure 5.1 Distribution of Conciliators by age and professional background



	Legal	Industrial Relations	Human Resource Management	Labour Studies	Economy	Public Admin	Other
30 and less	2		1				1
31 - 40	3	2	9	1	4	1	1
41 - 50		3	4		3	2	
Above 50	1		1	1		1	1
Total	6	5	15	2	7	4	3

N= 42

Source: Survey of Conciliators

5.1.3 Distribution of Conciliators by years of experience

Table 5.2 shows that 22 (52.4 percent) Conciliators had 3 to 5 years work experience as a Conciliator and 14 (33.3 percent) had more than 5 years of service. Hence, the vast majority of Conciliators (85.7 percent) had over three years experience in their role and it can be inferred from this that Conciliators would be sufficiently well informed to answer the research questions in this thesis.

Table 5.2 Distribution of Conciliators by years of experience

Length of service	Number of Conciliators	Percent
Less than 1 year	2	4.8 %
1 - 2 years	4	9.5 %
3 - 5 years	22	52.4 %
Above 5 years	14	33.3 %
Total (N=42)	42	100 %

Source: Survey of Conciliators

This section described the demographics of the Conciliators who answered the survey. The respondents represented a relatively even balance of male and female Conciliators, most of whom have qualifications and experience in work related areas and most with over three years of experience in their positions. The next section describes the survey sent to employers.

5.2 Employers' Survey

The second set of surveys was aimed at employers and was also conducted in the months of July and August 2009 although responses continued to be received by mail until October 2009. This survey was conducted in five main locations: Federal Territory of Kuala Lumpur, Selangor, Penang, Johore and Sarawak. These locations were chosen

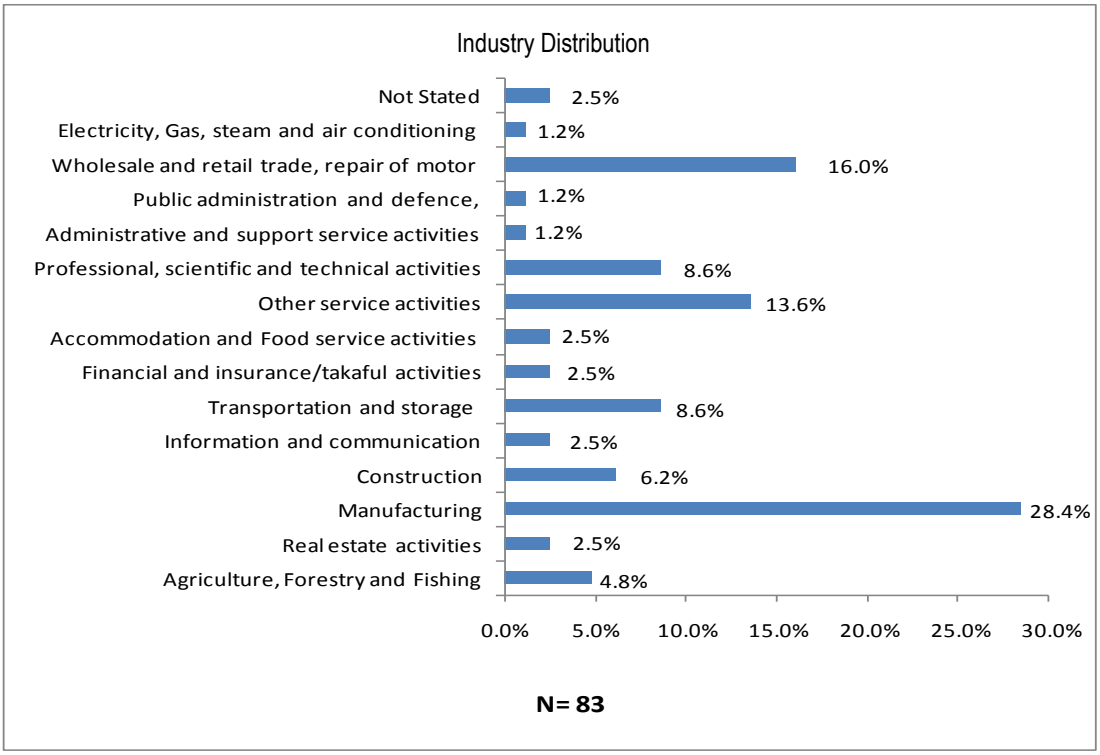
as the dispute resolution statistics held by the DIRM showed that these were the states which make up the bulk of claims for reinstatement handled (see Section 2.5.4). As conciliation is a private meeting, the questionnaires on Conciliation were handed to employers with their consent as they exited their conciliation at the DIRM. Questionnaires were also handed to employers after their hearings at the IC in four locations of the Federal Territory of Kuala Lumpur, Penang, Johore and Sarawak. Selangor has no IC and all the cases are heard at the Federal Territory of Kuala Lumpur. The distribution of survey forms was assisted by DIRM and IC staff including Heads of Offices and by some Conciliators who volunteered to help with survey distribution. These surveys were collected by hand by these volunteers and staff members at the five locations. Some employers who preferred to fill the form later at their own convenience were advised to return their questionnaires to the DIRM and IC. A return address envelope was provided for this purpose. A total of 142 employer questionnaires were distributed and out of these 59 were subsequently discarded as the questionnaires were not fully completed. The following analysis of the demographic profile of the employer questionnaires thus refers to the 83 complete questionnaires.

5.2.1 Distribution of employers by industry

From Figure 5.2, the majority of employers came from the manufacturing sector (28.4 percent) followed by wholesale and retail trade, repair of motor vehicles (16 percent) and service industries which include professional services (8.6 percent), transportation and storage (8.6 percent); and other service industry (13.6 percent). This distribution follows the pattern of employment in Malaysia. The Department of Statistics Malaysia reports that the manufacturing sector constituted the highest participation of workforce in Malaysia. In 2001 it represented 23.3 percent of total employment and whilst it reduced to 16.6 percent in 2009 it is still remained the largest employment sector. Similarly, wholesale and retail trade constitutes 16.8 percent of total employment (Department of Statistics Malaysia 2010a) which also fits the distribution of surveyed employers in this study. A small number of employer also came from industries such as agriculture, forestry & fishing, real estate activities, construction, information & communication, accommodation & food service activities, administration & support

service activities, public administration & defence, electricity, gas, steam & air conditioning as well as financial, insurance & takaful activities. Takaful activities refer to the Islamic insurance concept and are popularly practised in Malaysia along with the conventional insurance activities and are treated as a similar industry to conventional insurance. The industry code used in the survey follows the standard industry coding adopted in Malaysia.

Figure 5.2 Employers distribution by industry



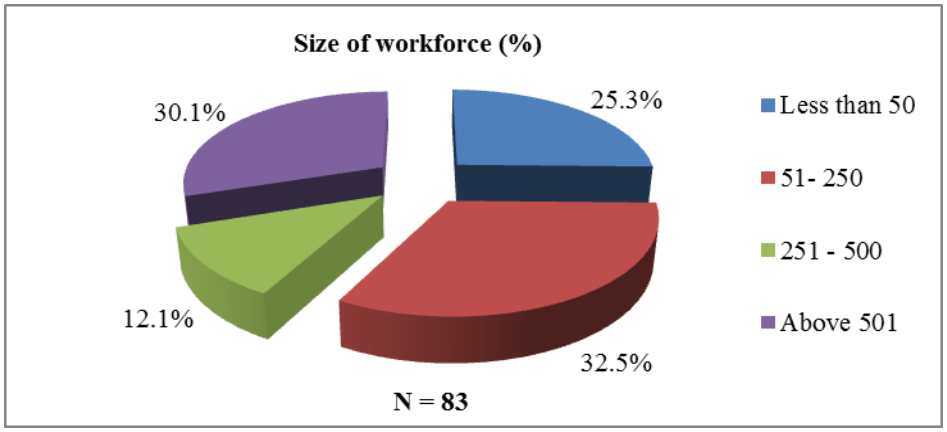
Source: Survey of Employers

5.2.2 Distribution of employers by size of workforce

The survey asked employers to indicate the size of their workplaces by the number of employees hired. Small workplaces were classified as those with less than 50 employees. Medium workplaces were classified as having between 51 and 250 employees, large workplaces were classified as employing between 251-500 employees and very large firms were those employing over 500. The distribution of employers by size of their workforce demonstrated that the sample of employers attending

conciliation hearings contained slightly more employers from large and very large workplaces (42.2 percent) than other types of employers. As shown in Figure 5.3, 25.3 percent of employers were from small firms and 32.5 percent were from medium sized firms.

Figure 5.3 Employers distribution by size of workforce

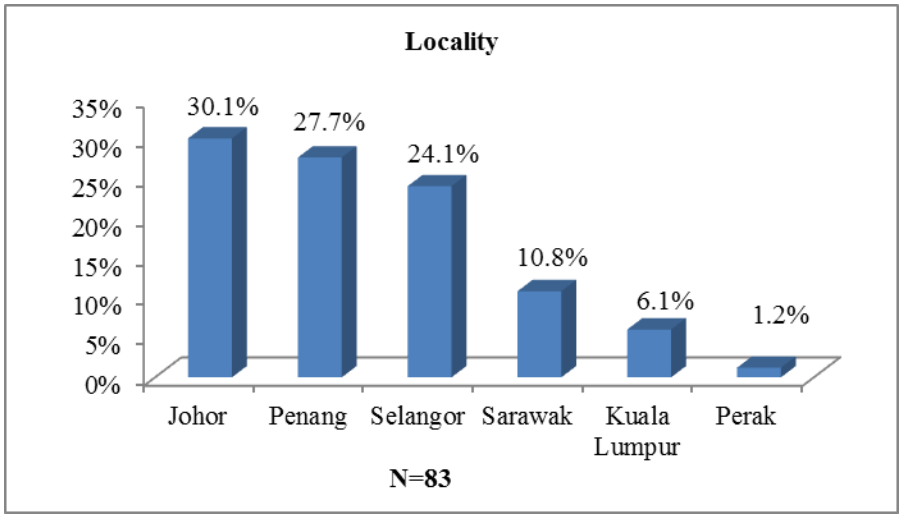


Source: Survey of Employers

5.2.3 Distribution of employers by locality

From Figure 5.4 it can be seen that the majority of employers were from Johor (30.1 percent) followed by Penang (27.7 percent) and Selangor (24.1 percent). The remaining employers were from Sarawak (10.8 percent) and Kuala Lumpur (6.1 percent). These five areas were selected for the Employer' Survey on the basis that they generate the largest tribunal workload in claims for reinstatement. The distribution found here reflects the settling of disputes in regions with large scale industries with the highest response rate found in Johor, Penang and Selangor. These three states house nine of the eleven Free-Trade Zones in Malaysia (four in Penang, three in Selangor and two in Johor) with seven of these zones being devoted to electronics industry (World Technology Evaluation Centre 1997). Penang is the state where large scale industries of electrical and electronics are located (Socio-Economic and Environmental Research Institute 2007) while the state of Johor housed the electrical and electronics, petro and oleo chemical as well as food and agro processing industries (Iskandar Regional Development Authority 2009).

Figure 5.4 Employers distribution by locality

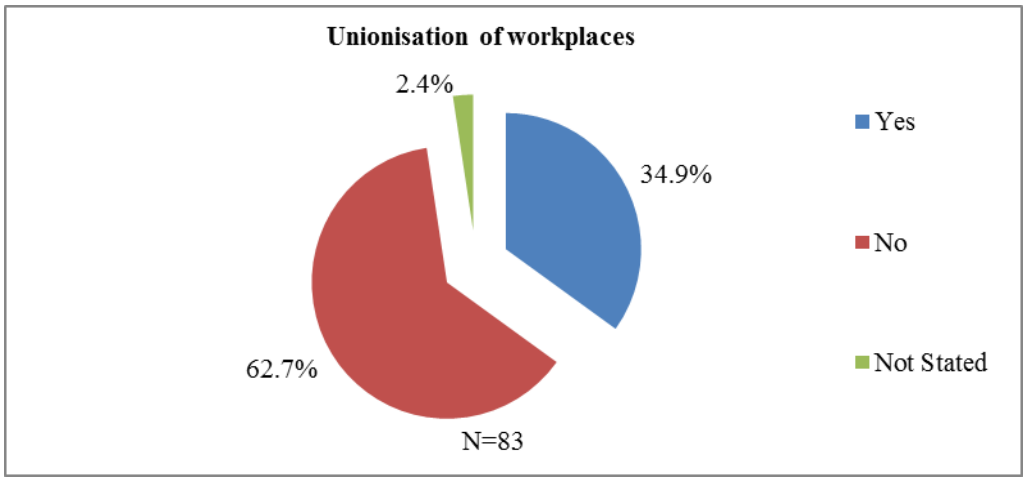


Source: Survey of Employers

5.2.4 Distribution of employers according to percentage of unionisation.

Figure 5.5 demonstrates that 62.7 percent of the employers surveyed have no union at the workplace compared with 34.9 percent unionised workplaces. As discussed in Chapter 2 Section 2.5.6 union density in Malaysia was only 7.3 percent in 2009 with a total number of 806,860 employees unionised.

Figure 5.5 Distribution of employers according to percentage of union



Source: Survey of Employers

This section of the chapter described the demographics of the survey provided to 83 employers as they exited their conciliation hearing at the DIRM as well as those exiting arbitration at the IC. Employers tended to be from manufacturing and wholesale, retail and repair of motor vehicles which reflects the concentration of employment in Malaysia more generally and the industry intensive States of Johor, Penang and Selangor. The next section describes the interviews with Conciliators and Arbitrators.

5.3 Interviews with Conciliators and Arbitrators

The third set of empirical work conducted for this thesis involved interviews with Conciliators. Interviews were conducted in the month of July 2009 with Conciliators in five selected locations of the Federal Territory of Kuala Lumpur, Selangor, Penang, Johor and Sarawak which, as reported above were selected because they have the highest number of claims for reinstatement reported to tribunal conciliation at the DIRM (see Section 2.5.4). Hence, their selection is based on purposive sampling representing those who have dealt with the most number of disputes and hence conducted the most number of conciliations.

The fourth empirical source was the interviews held with Arbitrators (Chairman) of the IC in four of the five locations which have the highest number of cases handled. These are Federal Territory of Kuala Lumpur, Penang, Johor and Sarawak. The State of Selangor however, has no Industrial Court because all their cases are handled by the IC in the Federal Territory of Kuala Lumpur. It was decided to interview Arbitrators as well as Conciliators because unresolved conciliation cases are often referred to Arbitration by the Minister and given the relatively low rate of conciliation settlement it was believed that Arbitrators are likely to have pertinent views with regard to the conduct of conciliation as well as suggestions to improve the service (see Section 2.6). Two separate semi structured interview instruments were used for each group of interviewees (see Section 4.6.3 and 4.6.4).

5.3.1 Interviewees' distribution according to localities and institutions

A total of 31 interviews were conducted involving 23 Conciliators and 8 Arbitrators (Table 5.3). The distribution of Conciliators interviewed comprised: seven from the Federal Territory of Kuala Lumpur, five from Selangor, five from Penang, four from Johor and two from Sarawak (Table 5.3). Each of these Conciliators had earlier responded to the Conciliator survey and represent 26.1 percent of the total pool of 88 Conciliators in an effort to obtain a representative sample (see Section 4.6.1).

The eight Arbitrators interviewed were also selected on a purposive sampling basis from the four IC in the Federal Territory of Kuala Lumpur, Penang, Johor and Sarawak which have recorded the highest number of disputes over reinstatement in the past five years (See Section 2.5.4). These Arbitrators were chosen of the total 25 Arbitrators employed by the MoHR in July 2009 on the basis of their availability at the time of interview. Arbitrators are appointed from the Judicial Services (Department of Justice, Malaysia) and can only perform the work as Arbitrators after the Minister has approved their appointment. The eight Arbitrators interviewed in this study comprised three (3) from the Federal Territory of Kuala Lumpur, two (2) each from Penang and Johor and one (1) from Sarawak (Table 5.3). The following section outlines the demographic details of the 31 interviewees.

Table 5.3 Interviewees' distribution according to localities and Institutions

Locality	DIRM (Conciliators)	IC (Arbitrators)	Total
Kuala Lumpur	7	3	10
Selangor	5	-	5
Penang	5	2	7
Johor	4	2	6
Sarawak	2	1	3
Total (N=31)	23	8	31

Source: Interviews with Conciliators and Arbitrators

5.3.2 Interviewees' distribution according to age and gender

The Conciliators who were interviewed were mostly from the age group of 31 to 50 years of age while all eight Arbitrators were older than 50 years (Table 5.4).

Table 5.4 Interviewees' distribution according to age and gender

Age	Conciliators		Arbitrators		Total
	Male	Female	Male	Female	
Less than 30	3	4	-	-	7
31 - 40	3	5	-	-	8
41 - 50	6	1	-	-	7
Above 50	1	-	5	3	9
Total (N =31)	13	10	5	3	31

Source: Interviews with Conciliators and Arbitrators

5.3.3 Interviewee's distribution according to years of service

From Table 5.5, it can be seen that the majority of the interviewees had over 10 years of service (10 Conciliators and all 8 Arbitrators). One recently appointed Conciliator had less than one year of service and the remaining 12 Conciliators had between one and 10 years experience.

Table 5.5 Participants distribution according to years of service

Age	Conciliators		Arbitrators		Total
	Male	Female	Male	Female	
Less than 1 year	1	-	-	-	1
1 – 5 years	3	5	-	-	8
6- 10 years	1	3	-	-	4
Above 10 years	8	2	5	3	18
Total (N =31)	13	10	5	3	31

Source: Interviews with Conciliators and Arbitrators

This section described the demographic details of the 31 interviewees for this study finding that Conciliators were younger and had fewer years of experience compared with Arbitrators. The next section moves to analyse the findings of the survey on workplace dispute resolution in Malaysia from the point of view of the respondent employers. The survey sought to canvass the extent to which employers utilised a dispute resolution procedure in their workplaces, who they involved in the operation of the procedure, how they developed their procedure and where the procedure is found in workplace policy and practice.

5.4 Workplace dispute resolution in Malaysia

Responses from the Employers' Survey

The Employers' Survey revealed that 76.5 percent (62) of the 81 employers who answered this question have written procedures to handle workplace disputes while 23.5 percent (19) do not. Of these, around three quarters of respondents (78.3 percent or 47) have steps in handling disputes pertaining to termination of employment and 73.3 percent (44) have steps in handling individual grievances while about half (51.7 percent or 31) have steps in handling collective disputes. Two employers responded with 'other' with one stating his or her workplace has a 'disciplinary procedure' and the other was 'unsure' (Table 5.6).

Table 5.6 Workplace dispute resolution procedure in Malaysia

Workplace dispute resolution procedure in Malaysia	Yes	No	Total
Does your organisation have written procedure to handle workplace dispute? (N= 81)	62 *(76.5 %)*	19 *(23.5 %)*	81 *(100 %)*
Does the procedures contain the following (N-60)			
Steps in handling termination of employment disputes	47 *(78.3 %)*	13 *(21.7 %)*	60 *(100 %)*
Steps in handling individual disputes (grievance procedure)	44 *(73.3 %)*	16 *(26.7 %)*	60 *(100 %)*
Steps in handling collective disputes	31 *(51.7 %)*	29 *(48.3 %)*	60 *(100 %)*
Other (N=2)	2 (100 %)	-	2 (100 %)

Source: Survey of Employers

The Employers' Survey also showed that of the 62 employers responding to this question, the majority (71 percent or 44 employers) indicated that dispute resolution procedures in their workplaces were designed without the involvement of the employees or their unions. Hence, only 24.2 percent or 15 of the employers who have dispute resolution procedures at their workplaces stated that the employees or their unions were involved in formulating the procedures. Two of the employers were unsure while one stated 'other' with no further explanation (Table 5.7).

Table 5.7 Employees' involvement in establishing workplace procedure

How were these procedure established?	Number of responses
By the management	44 *(71.0 %)*
By the management and employees/employees' union	15 *(24.2 %)*
Not sure	2 *(3.2 %)*
Other	1 *(1.6 %)*
Total (N=62)	62 *(100 %)*

Source: Survey of Employers

Surveyed employers were also asked to explain the points of reference used when establishing their workplace procedures. The study showed that of 62 employers who claimed to have workplace procedures in place, the majority (85.5 percent or 53 employers) referred to the *EA 1955* or *Labour Ordinance* (for the State of Sabah and Sarawak) when establishing such procedures. More than three quarters (77.4 percent or 48 employers) also referred to the *IR Act 1967* when establishing their workplace procedures but only a little more than a quarter (33.9 percent or 21 employers) referred to the Code of Conduct for Industrial Harmony 1975. Less than half of the surveyed employers stated that they referred to information provided by the Department of Labour (42 percent or 26) and 33.9 percent or 21 employers referred to the DIRM. Only ten employers (16.1 percent) referred to information provided by the MoHR when establishing their procedure. This lower percentage of employers using MoHR information is surprising because the MoHR would, in theory be a vital source of

information given that it houses some of the Conciliators. However, it could be due to the fact that MoHR is perceived as a conduit between the DIRM and IC in dispute resolution via Ministerial recommendation that employers do not consider it a source of workplace or in-house information.

Of workplaces that are unionised, less than half of the employers surveyed (44.8 percent or 13 employers) involved the employees' unions when establishing the workplace dispute procedures. Surprisingly, of employers who are members of employers' unions or associations, only 11 employers (28.9 percent) involved such associations when establishing their procedures. Two of the employers' respondents were unsure of this. (Table 5.8)

Table 5.8 Point of reference made by employers when establishing their workplace procedures.

Did you refer to the following when you established the procedure?	Number of responses			
	Yes	No	Not Sure	Total
Act (Ordinances) and Code				
Employment Act 1955/Labour Ordinance	53 *(85.5 %)*	7 *(11.3 %)*	2 *(3.2 %)*	62 *(100 %)*
Industrial Relations Act 1967	48 *(77.4 %)*	12 *(19.4 %)*	2 *(3.2 %)*	62 *(100 %)*
Code of Conduct for Industrial Harmony 1975	21 *(33.9 %)*	39 *(62.9 %)*	2 *(3.2 %)*	62 *(100 %)*
Tribunal and MoHR				
Department of Labour Malaysia	26 *(42.0 %)*	34 *(54.8 %)*	2 *(3.2 %)*	62 *(100 %)*
Department of Industrial Relations Malaysia	21 *(33.9 %)*	39 *(62.9 %)*	2 *(3.2 %)*	62 *(100 %)*
Ministry of Human Resources	10 *(16.1 %)*	50 *(80.7 %)*	2 *(3.2 %)*	62 *(100 %)*
Employees' unions and employers' association				
Employees' Union	13 *(44.8 %)*	16 *(55.2 %)*	-	29 *(100 %)*
Employers' Association	11 *(28.9 %)*	27*(71.1 %)*	-	38 *(100 %)*

Source: Survey of Employers

As illustrated in Table 5.9 half (50 percent or 32) of the 64 employers responding to this question indicated that workplace dispute procedures are located in employees' or organisational handbooks while 21.9 percent or 14 employers stated that they are encompassed in employees' contracts of employment. Another 21.9 percent indicated that dispute procedures were contained in collective agreements. Four employers (6.2 percent) who responded 'other' indicated in their statements that the procedures are written as part of workplaces guidelines, policy, terms and condition of employment or standard operating procedures.

Table 5.9 Location of workplace disputes procedures

Are these procedure written in: (N=64)	Number of responses
Employees'/organisational handbook	32 *(50.0 %)*
Contract of employment	14 *(21.9 %)*
Collective agreement	14 *(21.9 %)*
Other	4 *(6.2 %)*
Total	64 *(100 %)*

Source: Survey of Employers

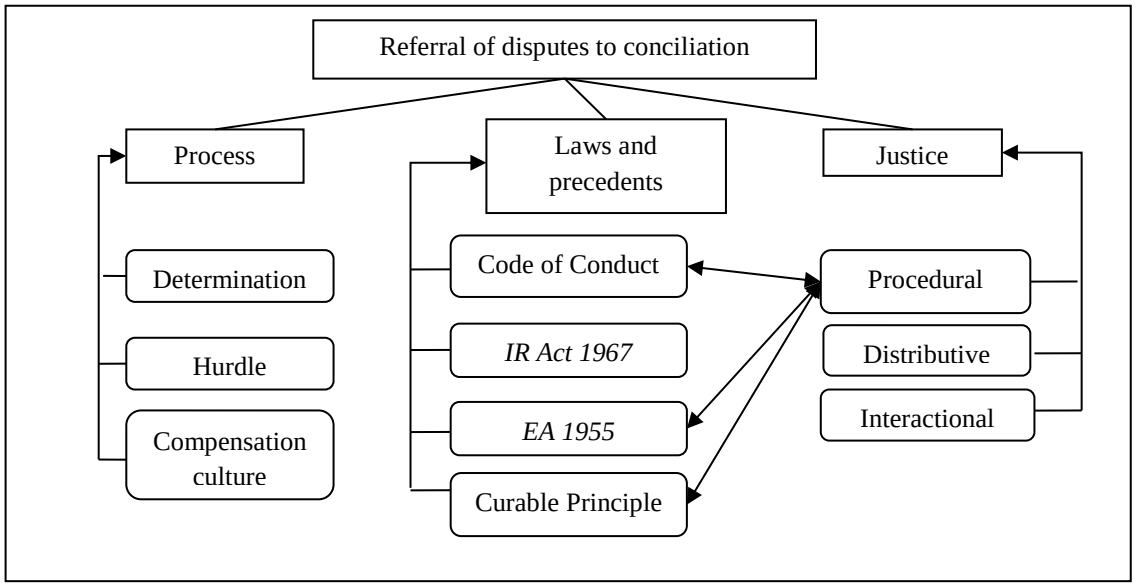
This section provided the findings on how workplace dispute resolution procedures are established and the degree of employee and union involvement in establishing them in Malaysian workplaces. Even though many of the surveyed employers had written procedures at their workplaces including steps for handling termination of employment, many of these have been written with little employee or union involvement. The *EA 1955* is the most common point of reference in establishing dispute procedures followed by the *IR Act 1967*. Despite the Government's intention that the Code of Conduct for Industrial Harmony 1975 is the main source of information when establishing these procedures, it is rarely referred to by employers. The Department of Labour Malaysia was referred more frequent than the DIRM possibly due to the fact that the *EA 1955* is under its purview. The majority of employers surveyed did not involve either unions or employer associations in establishing their dispute procedures.

The chapter now moves to investigate the findings of research question 1: What are the key factors behind the referral of claims for reinstatement from the workplace to tribunal conciliation?

5.5 Key factors behind the referral of claims for reinstatement from the workplace to conciliation.

The first research question of this thesis is to investigate the key factors behind the referral of claims for reinstatement from the workplace to conciliation based on the framework discussed in Chapter 4 and the literature described in Chapters 2 and 3. It was found in Section 2.5.4 and Section 3.2 that claims for reinstatement tend to progress rapidly to conciliation rather than being resolved in-house. The framework developed in this thesis to examine this phenomenon is categorised into three components: (1) process; (2) laws and precedent; and (3) justice (Figure 5.6). These three components were identified from the research literature presented in Chapter 2 as being the antecedents to a claim for reinstatement being referred to conciliation and they are revisited in light of the surveys and interviews in the next section.

Figure 5.6 Antecedents to the reference of claims for reinstatement from the workplace to conciliation



5.6 Process

The first component of the framework is the process used in the workplace to resolve the dispute. It is regarded an antecedent for referral to the DIRM because if it fails, there is little choice but to request a referral to conciliation. The process component involves three elements: firstly, the extent to which parties are determined to resolve their dispute at the workplace which might include the use of a dispute resolution mechanism as an indication of the intention of parties to settle early. Secondly, the absence of a hurdle requirement in the process of seeking conciliation would mean workplace disputes would more easily be referred to conciliation. Hurdle requirements such as those implemented in the tribunals of other countries including the UK and Australia, act as an incentive to resolve dispute at the workplace and seek to prevent disputes from being referred to tribunals in the absence of some effort to resolve them at the workplace (see Section 2.2, Section 2.3 and Section 2.4). Thirdly, the emergence of a compensation culture has meant that some parties use the DIRM and IC as a means of gaining compensation from the dismissal (see Section 2.6). This behaviour deviates from the main objective of DIRM conciliation as well as from the *IR Act 1967* in Malaysia which promote reinstatement as a remedy. The following section elaborates on these issues using the findings of the two surveys and interviews.

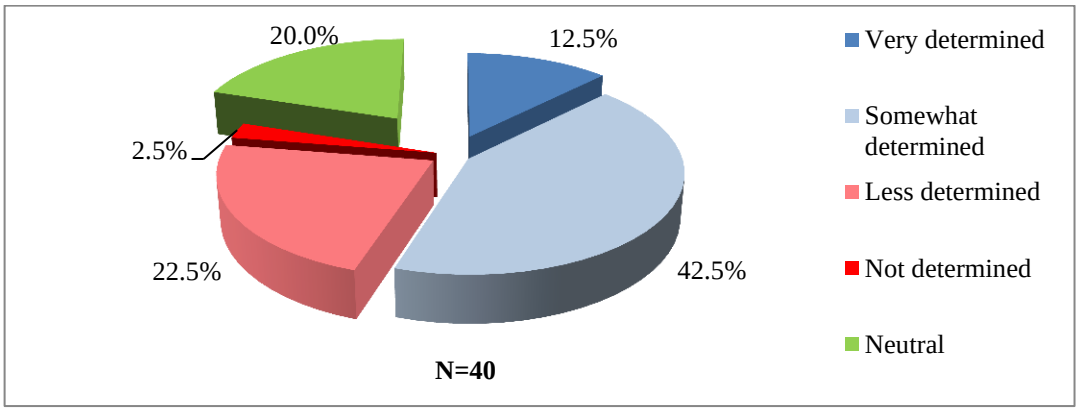
5.6.1 Parties determination to resolve disputes at the workplace

Responses from the Conciliators' Survey

Despite the large number of disputes being referred to the DIRM, the survey conducted with the Conciliators found that there had been some effort made by the disputants in Malaysia to resolve their disputes at the workplace. In other words workplace disputes were not being referred to conciliation in the absence of an attempt to settle at the workplace. Conciliators were asked to gauge the extent to which they believed the disputants were determined to settle their dispute in the workplace. Of the 40 Conciliators who responded to this question, 12.5 percent (5 Conciliators) indicated that parties were very determined while 42.5 percent (17 Conciliators) stated that parties were somewhat determined to resolve disputes at the workplaces. A total of 25 percent

(10 Conciliators) were of the opinion that parties lacked such determination and 20 percent (8 Conciliators) remained neutral (Figure 5.7).

Figure 5.7 Surveys of Conciliators on parties' determination to resolve disputes at their workplaces.



Source: Survey of Conciliators

There were 24 Conciliators who provided reasons for their responses in the open ended section of the questionnaires and a total of 27 responses received as some Conciliators provided more than one comment. The comments were themed and these are presented in Table 5.10. Whilst only five comments were given in relation to why parties were determined to settle in the workplace 22 comments were received on why parties lack determination to resolve their dispute at the workplace. Of this latter group, eight comments focused on lack of knowledge and being unaware of how to administer a dispute process procedure as the reasons. For example, one respondent commented that: '*Parties have little knowledge about dispute resolution mechanisms and refuse to resolve at their workplaces'* and another respondent wrote: *'Some companies are not aware of this mechanism and some of them do have proper procedures but then fail to adhere to them because of pressure from certain parties [top management]'*.

Another six comments highlighted that mostly large and established companies implement dispute procedures and four further comments suggest that failure to settle at the workplace is due to managerial prerogative (Table 5.10). For example, one respondent wrote: '*most established company would follow grievances procedures, unless interfere by some top management personnel, usually due to personal reason'.*

Another respondent noted: '*established and big companies normally have good and proper workplace mechanism but not for small companies'.* The five comments received indicated that parties were indeed determined to settle at the workplace focused on workplaces increasingly using internal mechanisms to resolved disputes and using domestic inquiry processes.

Table 5.10 Conciliators' reasons on parties' level of determination to resolve dispute at the workplace.

Group	Reasons	No of comments
Reasons given by Conciliators who believe that that parties were determined to settle at the workplace		
	Increasing initiatives of using internal mechanism and appeal processes	3
	Through the use of domestic inquiry process	2
Reasons given by Conciliators who believe that that parties were not determined to settle at the workplace		
	Lack of knowledge/ unaware of how to resolve the dispute	8
	Mostly large and established companies are able to apply the procedures	6
	Insistence on managerial prerogative	4
	The matter in dispute was too subjective to be resolved in the workplace	1
	Parties were seeking a third party	1
	Employers wanted to save cost and time by referring to DIRM	1
	Employers had a pre-determined reason to terminate the workplace process	1
Total responses with, N=24		27

Source: Survey of Conciliators

The Interviewees' Responses

As shown in the above Figure 5.7, the majority of Conciliators who were surveyed agreed that parties are determined to resolve disputes at the workplace. However, a large minority of 25 percent felt that parties lack the determination and 20 percent of respondents were neutral on the matter. When we investigated this issue through the interviews with the 23 Conciliators and 8 Arbitrators, three main themes emerged in relation to the factors that affect parties' determination to resolve dispute at the

workplace. These were: (1) employers' knowledge of dispute resolution procedures; (2) the size of the businesses; and (3) the capabilities of the management in handling workplace dispute procedures. The themes and number of times they were raised by interviewees are shown in Table 5.11.

Table 5.11 Themes related to the resolution of disputes at the workplace from the interviews with Conciliators and Arbitrators

Issues raised by interviewees	No. of interviewees mentioning the issues	No. of times these issues were raised
Depending on the size of employers' businesses	13	24
Employers' lack of knowledge and awareness of dispute resolution procedures	13	19
Management capabilities	10	13
Total No. of times these issues were raised by interviewees		56

Source: Interviews with Conciliators and Arbitrators

Firstly, employers' determination to implement workplace dispute mechanism depends on their size of establishment. Here, 13 interviewees shared this belief as shown in the above Table 5.11. The general consensus among these interviewees was that it was mostly employers in large firms who have the determination to resolve dispute at the workplace whilst small and medium employers often do not have dispute procedures and are not aware of the existing recommended procedure as in the Code of Conduct for Industrial Harmony 1975. Some employers were also said to be ignorant of the need to conduct domestic inquiry at the workplace, investigate the dispute and are unaware of the principles of natural justice. For example, two of the interviewees who shared this same thought said:

> *Like I told you earlier MNC [Multinational National Companies] or unionised companies do follow the procedure. The natural justice is there but when it comes to SMEs [Small Medium Enterprise] companies, they are not aware about the DI [Domestic Inquiry], and what is natural justice. Their way of thought is once you [employees] commit misconduct they will say, 'I will terminate you, you are not suitable for this position'* (Conciliator 3).

> *As I said, again, for the big companies, blue chip companies, no problem. Usually they hold the DI. It is the small companies, they do not hold it* (Arbitrator 2).

Secondly, consistent with the survey findings, the implementation of dispute resolution mechanisms at the workplace is dampened by employers' lack of knowledge. As shown in Table 5.11, 13 interviewees shared the opinion that parties' determination to resolve their dispute at the workplace was diluted because employers do not possess the skill of implementing dispute resolution at the workplace and are ignorant of the laws and regulations:

> *A lot of employers come here without knowing the law, without knowing the regulation. So who is to blame in this case? We are sitting here in the department trying to help everyone out there. We know the law but how much can we help? To what extent can we go? We can help those who come and seek our advice but how about those who do not come here? Those who are out there, who do not have the opportunity to come over and seek advice, how can we help?* (Conciliator 2).

Here the interviewees (mostly Conciliators) said that employers were lacking in their knowledge of dispute resolution. They discovered this through their encounters with employers during conciliation meetings and during promotional visits to the employers' premises or when receiving phone calls from employers who seek advice when they want to dismiss their employees: *'Before they proceed with the termination, they will call the department to ask what the proper way is'* (Conciliator 1). Another interviewee commented: '*When I do promotional visits to employers they themselves don't know what industrial relations is. Therefore there is a need to do aggressive promotion*' (Conciliator 10).

The third and related theme emerging from the analysis of the interviews suggests that capability of the management is another factor that hinders the implementation of workplace dispute mechanisms. This was raised by 10 interviewees (Table 5.11). The lack of management capability includes the absence of human resource personnel in the

organisation and the absence of personnel with knowledge of industrial relations laws and practices: '*Especially when it involves small employers or medium scale employers, they don't have enough people to do all this'* (Conciliator 21). Another interviewee suggested that some employers are not willing to pay the higher salaries for such qualified industrial relations practitioners and hence would normally employ young and inexperienced employees to handle industrial matters including termination of employment in the organization:

> *I think employers employed a very young people for a lower salary and hence just simply employ anybody. I think if a company employ these kinds of people to handle HR it will make the company in difficult position when come to termination* (Conciliator 15).

Although more than half the Conciliators surveyed were of the opinion that some effort to use workplace dispute mechanisms is undertaken by the parties, their written comments along with the interviewees' comments suggest that this only occurred in the larger firms. Hence, employees in the smaller and medium firms who comprise the majority of employees in the country (See Section 5.2.2) have no (or limited) access to internal mechanisms such as appeal processes when they are terminated from their employment. The issue of lack of knowledge among disputants (especially employers) remained one of the issues found in both the Conciliators' Surveys and interviews particularly lack of knowledge of the principles of natural justice at the workplace. The interviewees also claimed that employers relied on managerial prerogatives in justifying their actions. Hence this attitude coupled with a lack of management capabilities and lack of dedicated human resources at the workplaces contributed to the barrier to parties' determination in resolving disputes at the workplace.

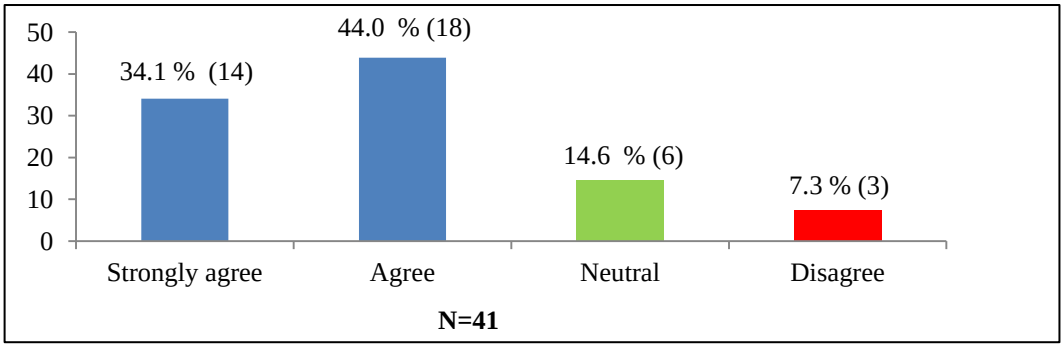
5.6.2 Lack of a systemic hurdle in making a tribunal claim.

Responses from the Conciliators' Survey

The second process theme (see Figure 5.6) investigated in this thesis through the Conciliators' Survey and interviews is the lack of a hurdle requirement at the workplace level which could be a cause of the large number of disputes being referred to conciliation. The Conciliators' Survey sought to explore whether the high volume of

disputes referred to the DIRM could have resulted from the lack of systemic hurdles which would otherwise have compelled some form of attempted settlement at the workplace, as is mandated in some other countries (see Section 2.6). From the 41 Conciliators who answered this question, 34.1 percent (14) strongly agreed and 44 percent agreed (18) whilst only 7.3 percent (3) disagreed. A large group of 14.6 percent (6) of the Conciliators remained neutral (Figure 5.8). Such a requirement can act as a hurdle to avoid parties simply referring any dispute to the DIRM particularly those which are vexatious, trivial or those where workplace parties would ordinarily have had the skills to have deal with in-house. Clearly the agreement by the vast majority of Conciliators on this matter indicates a hurdle requirement is something that might be useful in the Malaysian industrial relations system.

Figure 5.8 Should parties be required to prove that they have made an attempt to resolve dispute at the workplace prior to referring to the tribunal conciliation.



Source: Survey of Conciliators

The Interviewees' Responses

The interviews with the 23 Conciliators and eight Arbitrators found that many claims for reinstatement including non-genuine cases were routinely referred for conciliation to the DIRM without encountering any hurdle. As discussed in Section 2.6, there are no conditions in the *IR Act 1967* which can filter cases before they can be referred for tribunal conciliation. Some interviewees, particularly the Conciliators, stated that they do not have the power to stop claimants who they believed abused the system. Some for instance were said to file their claims simply to try their luck for extra compensation even though they have been paid the necessary benefits by their employers prior to

dismissal. For example four interviewees offered their views:

> *… but there is also some situation where the person personally came to our office and we advised them that you have no case and so on and so forth, but then he [or she] still say; 'No! I still want to file the case'. They insist as our Act has no restriction or provisions that we can filter the case, so we have to accept it* (Conciliator 3).

> *Our Act [IR Act 1967] does not stop anybody from making a representation so everybody can make a representation. We have no power to stop them or tell them 'you have no case' even though we know that the case is genuinely showed that the claimant had committed the misconduct* (Conciliator 6).

> *The employees feel that probationer also want to come in [to file a claim for reinstatement] but we thought we should cut out probationers for simple reason. A probationer is normally dismissed or the probation is not extended because number one, poor performance, two [because of] misconduct. I don't see any other basis for them to go [be dismissed]. It's normally one of those two. If the company thought you were not performing, to put you back there, what are the chances that they are going to find you performing? Come on! You know, what I mean, let's face it. If your conduct was not good and they had problems with your conduct, you think that if you go back there as a probationer, they will not be bias. Because whatever it is, as I said, I would only reinstate them as a probationer. So, in the circumstances, probationers as a rule only want money. They are all about money. Sometimes they take as little as one month* (Arbitrator 4).

These opinions reflect the extent to which parties can freely demand conciliation because of the openness of the *IR Act 1967*. The final comment, provided by an Arbitrator, presents the other side to the dilemma: that of the increasing search by parties, particularly employees for a greater monetary settlement rather than reinstatement. We turn now to explore this issue of a growing compensation culture.

5.6.3 Compensation culture

The third process theme investigated in this thesis (see Figure 5.6) is the development of a compensation culture which could be one reason why claims for reinstatement have been rising steadily for conciliation at the DIRM. As discussed in Section 2.5.2 the main remedy for a claim of unfair dismissal under the *IR Act 1967* is reinstatement, yet the

majority of settlements at conciliation were in the form of compensation with only a small number of employees reinstated in the last few years to 2010 (see Section 2.5.4).

The Interviewees' Responses

The analysis of interviews with the Conciliators and Arbitrators found that that there has been an increasing pattern of claimants seeking compensation and not seriously wanting to be returned to their former employment. This attitude seems part of a growing compensation culture and is not only prevalent among employees but is perhaps also evident in lawyers and consultants who (though not allowed to represent employees at conciliation) can exert their influence when employees seek advice outside the conciliation meetings or at their offices. Some union officials can also influence claimants either through their advice or as representatives at the conciliation. From the analysis of the interview transcripts, the emergence of a compensation culture was suggested by interviewees as being the result of four main drivers depicted in Table 5.12. These are: (1) claimant driven; (2) third party driven such as unions, lawyers and consultants; (3) system driven; and (4) publicity driven such as from media or word of mouth. Table 5.12 tracks the number of times the 31 interviewees mentioned that claimants were seeking greater monetary settlement rather than reinstatement even though under the circumstances, reinstatement would have been suitable in their opinion.

Table 5.12 Issues emerging from lure of compensation

Issues of compensation raised by interviewees	No. of interviewees mentioning the issues	No. of times these issues were raised
Claimant driven	16	21
Third party driven such as unions, lawyers and consultants	12	16
System driven	9	10
Publicity driven such as from media or word of mouth	4	4
Total reference made on the lure of compensation (as becoming a culture)		**51**

Source: Interviews with Conciliators and Arbitrators

5.6.3.1 Claimant driven reasons for the developing compensation culture

A compensation culture is driven by the attitude of the claimants who file their disputes over dismissal to the DIRM in an attempt to gain compensation instead of genuinely seeking to be reinstated back to their former job. Hence, even if the job is being offered back to them by their employer, some employees are not willing to accept the offer and instead, demand compensation. The interviews with the 23 Conciliators and eight Arbitrators found that some employees think that by referring their cases to the conciliation, they will always get some compensation. As shown in Table 5.12, compensation claims driven by the claimants themselves were raised by 16 interviewees, both Conciliators and Arbitrators and two typical comments are as follows:

> *But as I said earlier lot of cases where they actually don't want reinstatement but actually they just want the compensation. For example, one of my cases last week where the employer offered him reinstatement but he refused, and only interested in compensation. This afternoon also I have one case where the employer is also willing to offer reinstatement but the claimant refused* (Conciliator 15).

> *The second reason which I find common, I am saying in general, the claimant, I think is human nature, even though they have a bad case, they demand too high. Too high expectation, they demand too high in terms of settlement sum for example, when a company of its own accord wanted to settle, they [the claimants] want 24 months, more than that, they are greedy, even though we do know. I already know the case from experience, but I cannot tell them it's a very bad case but you know, they demand. And probably also, this is a bit sensitive* (Arbitrator 2).

5.6.3.2 Third party driven reasons for the developing compensation culture

The involvement of external third parties such as unions, lawyers and consultants in these disputes has elicited growing concern over the emergence of a compensation culture among claimants: '*When they come here, they want compensation and not*

reinstatement. This happens when the employee get the advice from different people, from consultants or lawyers' (Conciliator 7). Here 12 interviewees (Table 5.12) shared a similar thought that the influence of a third party had driven employees to gain compensation and one interviewee even stated that nearly 75 percent of claimants who filed their cases to the DIRM are not genuinely seeking reinstatement and came to the DIRM because of the so called 'runner' including lawyers, ex-claimant and even some union officials acting as a motivator to the claimant:

> *Another reason is to get compensation. I can say that nearly 75 percent of the claimant does not genuinely want reinstatement. They come here under the influence of the union, for example their union or [name of the association of employees' union]. It could be from what we call a runner who is a third party such as lawyers or ex-claimant or union leaders. We can know their intention during or before the conciliation* (Conciliator 22).

Another interviewee shared an experience where claimants who during the conciliation have openly said that they were not interested in reinstatement (a statement which would normally disqualify them from pursuing their case) have been persuaded to change their mind by third parties with a promise of huge compensation.

> *Normally when the workers are represented by the union or representative from the [name of the association of employees' union] and although they are not interested to be reinstated the representative will say, 'you keep quiet, let me talk on behalf of you in the conciliation process'* (Conciliator 20).

In another situation, claimants who use some representatives or advisors either directly at the conciliation meeting (as in the case of union's officials) or at their respective offices have had to pay certain fees although it has never been recognised by the *IR Act 1967*: '*It is silent, but I heard they have to pay [RM] 250 for conciliation. It is very unfair. The employee suffered losing their job, go to [name of the association of employees' union] and pay [RM]250'* (Conciliator 20). This could indicate a service fee for compensation is also emerging in the country led by some unscrupulous third parties.

5.6.3.3 System driven reasons for the developing compensation culture

The system and structure of resolving disputes over termination of employment have also cultivated the emergence of compensation culture. As discussed in Section 2.5.4 and Section 2.5.7 there are two tribunals that handle matters pertaining to termination of employment in Malaysia. These are: the DIRM (when the claimants seek the remedy of reinstatement); and the Department of Labour (when the claimants only seek a remedy of compensation in lieu of notice or termination benefits under the *EA 1955* or two Ordinances for the State of Sabah and Sarawak). The existence of the two tribunals, DIRM and the Department of Labour may result in confusing situations. The division of work between the two tribunals is clear in theory but difficult in implementation. As shown in the Table 5.12 above, nine interviewees spoke about how the system of handling matters pertaining to termination has brought about the emergence of compensation culture. For example one interviewee stated that some claimants are only interested in claiming compensation and because they are not eligible to file their case at the Department of Labour due to the condition that their wage must not exceed RM 1,500 a month, they will often try their luck at the DIRM. Here, they will be advised that they can only seek reinstatement if they want to proceed with the case.

> *There are some who only want compensation and we normally send them to the Labor Department [Department of Labour] provided that they are within the Act [Employment Act 1955]. But for those whose wage exceeds [RM] 1,500.00 a month they will try their luck here but we explain to them that they cannot claim compensation and must only seek for reinstatement* (Conciliator 13).

Another interviewee shared an experience where the claimant expressly stated that he could not file a claim with the Department of Labour and had to file it with the DIRM although the claimant was genuinely not interested in reinstatement but because of his monthly wages exceeding RM1,500 (AUD 500) a month the only option available was a DIRM hearing. An interviewee (Conciliator 15) who had served with the Department of Labour prior to joining DIRM stated that employees who have problem at the workplace and came to the Department of Labour would often be advised to file their case at the DIRM if they want higher compensation. The following are taken from the two interviewees:

> *I noticed that before I came here, I was at the Labor Department. These workers when they have problem at the workplace, would normally be advised that they you should go to IR department [DIRM] if they want to get more money in the form of compensation* (Conciliator 15).

> *We should know that when claimant refers their case to the department, it is a claim for reinstatement and majority of the claimant, off the records would say 'Madam, nobody would want to go back to work but because of the fact that my wages is more than [RM] 1,500. I cannot file a claim to the Labor Department'* (Conciliator 19).

Another example of how the system has influenced the emergence of a compensation culture among claimants, union officials, lawyers and consultants is linked to the practice of the DIRM and the IC themselves. Here, although in theory (as provided by the *IR Act 1967*) reinstatement must be sought as the remedy, on implementation very few cases are resolved with reinstatement either at conciliation or arbitration and the majority are settled by awarding compensation (see Section 2.5.4 and Section 2.5.5). Hence, the DIRM and IC have been avenues to gain compensation with IC associated with providing a much higher compensation of the two. For example, two interviewees observed this;

> *At the end of the day, I think the Industrial Court should stick only to reinstatement. That's the remedy, that's equitable remedy but if you talked about compensation, 'you are partly to be blamed 30 percent, you are partly to be blamed 70 percent for this issue, so now let apportion and pay the compensation'. That's civil already, that's accident matters already. Two parties there claiming, so I think we are moving away from the equity* (Conciliator 8).

> *The claimant in particular is not satisfied with the amount of settlement offered during the conciliation. They [claimants] believed that they can get a better deal at the arbitration if they win the case. I was informed on this during the discussion at the pre-hearing stages* (Arbitrator 6).

5.6.3.4 Publicity driven reasons for the developing compensation culture

The findings of the interviews also revealed that publicity from the media and through word of mouth has also played a role in creating a compensation culture. For example, more often than not unfair dismissal cases which have won compensation have been published by many of the major newspapers around the country. In addition, news about winning cases is also being spread through word of mouth among interested parties including union officials, lawyers, consultants as well as employees. This again has motivated claimants to refer their dismissal disputes to the DIRM or IC in a hope to also win their cases with huge compensation. As shown in Table 5.12 four interviewees spoke about this matter and highlight the effect of the mass media in generating a compensation culture:

> *They read in the paper saying that wrongful dismissal case [being] awarded compensation of hundred thousand. So they feel 'Ok oh this department may be able to get me more money', misunderstanding of facts. They come and asked us what are the reasons to qualify oneself to file for a case of reinstatement when there was no actual intention to claim but they have to tell the officer that they want to claim for reinstatement in order to qualify under this procedure. Once such person filed [the case], his [or her] intention is to get as much money* (Conciliator 12).

> *Well ahh! The newspapers, they reported cases with huge compensations by way of back wages or compensation in lieu of reinstatement. I have delivered a decision where it was the total sum of 1.3 million. Such cases always attract a lot of publicity by the media. They will tend to highlight the very successful cases with huge compensation, but they seldom or never report the cases where the claimant did not succeed* (Arbitrator 1).

This section presented the findings of the Conciliator Survey and interviews with Conciliators and Arbitrators on the theme of Process (Figure 5.6). The process theme examined the sorts of behaviours which may encourage increasing numbers of disputes to be referred to conciliation. Three elements of this theme were explored comprising: the extent to which parties are determined to resolve their dispute in the workplace, the

hurdles (or their absence) which may exist to limit disputes being referred to conciliation and the possibility of a compensation culture which may result in disputes being referred to conciliation. The section found that that parties' determination to settle a dispute at the workplace depends largely on whether employers have sufficient knowledge of dispute resolution procedures and have management capabilities or human resources such as industrial relations or human resource managers. The findings also indicate that determination to settle a dispute in-house is also linked to larger workplaces which tend to have dispute resolution procedures in place.

The section also canvassed survey and interview responses to whether there may be a hurdle requirement which acts to make it more difficult for disputes to be referred to conciliation. In fact the parties interviewed and surveyed stressed that no such procedural hurdles exist and further, that Conciliators are powerless to prevent vexatious, trivial and non-genuine disputes from being referred to conciliation.

The final element in the process theme identified was the emergence of a compensation culture which is driven by claimants themselves either because they do not wish to be reinstated or because they wish for a monetary award. It is also being driven by third parties who act as advocates for claimants and who directly promote or promise a compensation outcome to the dispute. Additionally, there is some evidence from the interviews that some third parties may be charging for this type of advocacy. The dispute resolution system itself also contributes to the development of a compensation culture. There is confusion amongst workplace parties between the DIRM and the Department of Labour. Further, the wage limits set for those seeking compensation through the Department of Labour are relatively low which forces those parties to the DIRM. The DIRM itself, whilst it espouses a reinstatement remedy is increasingly providing a compensation remedy. Together with the IC compensation is now a readily available and growing form of remedy to unfair dismissal in Malaysia.

The next section moves to the second part of the study (see Figure 5.6) which examines the effect of laws and precedents on referral of disputes to conciliation.

5.7 Laws, regulations and precedents

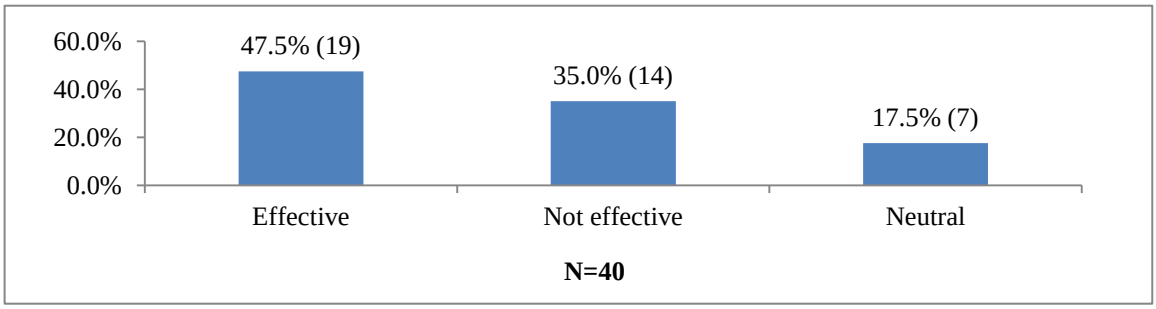
The second element regarding whether parties are likely to refer their disputes over dismissal to conciliation is the effect of laws, regulation and precedents in Malaysia. This section considers the relative contribution of the implementation of the Code of Conduct for Industrial Harmony 1975 (see Section 2.5.3), *IR Act 1967* (see Section 2.5.2), *EA 1955* (see Section 2.5.7), and the effect of the '*curable principle'* (see Section 3.3) in being effective barriers to the increasing number of disputes referred to conciliation. This section relies on the findings of the Conciliators' Survey and the interviews with Conciliators and Arbitrators.

5.7.1 The implementation of the Code of Conduct for Industrial Harmony 1975

Responses from the Conciliators' Survey

The survey of Conciliators revealed that 47.5 percent (19 Conciliators) of 40 Conciliators answering this question, were of the opinion that the Code of Conduct for Industrial Harmony 1975 has been effective while 35 percent (14 Conciliators) said it has not been effective and 17.5 percent (7 Conciliators) remained neutral (Figure 5.9).

Figure 5.9 Effective Implementation of the Code of Conduct for Industrial Harmony 1975



Source: Survey of Conciliators

There were 29 respondents who provided written comments in respect of this issue as shown in Table 5.13. There were 12 comments which indicated that there is a lack of awareness of the Code. For example, one respondent wrote: '*There are many companies*

who are still unaware of the Code of Conduct of Industrial Harmony 1975'. The open ended responses given by six Conciliators in the survey further indicates opinions that mostly large companies more effectively implement the Code rather than the smaller sized companies. For example, one Conciliator wrote: '*Only large companies implement the Code of Conduct for Industrial Harmony 1975, while the medium and small businesses do not. Some do not even know the existence of the Code'.*

Table 5.13 Conciliators' comments on the open ended survey's questions on the implementation of the Code of Conduct for Industrial Harmony 1975

Issues	No of comments
Lack awareness of the Code	12
Mostly used by the bigger employers	6
Not a legal document	5
Out-dated	5
Poorly promoted	3
Total responses with N= 29	**31**

Source: Survey of Conciliators

As discussed in Section 2.5.3, the Code is not a legal document and hence, there is no legal requirement for compliance with its principles. The survey of Conciliators confirmed this with five written comments: '*Even if they are aware, they refused to comply to it because it is only a Code and not a law'.* Further the findings of the Conciliators' Survey also suggest that the Code is considered to be out-dated and five respondents indicated this in their survey forms. The Code was indeed developed and introduced 35 years ago in 1975 through a tripartite spirit between the three parties: the Minister of Labour and Manpower (now known as Minister of Human Resources), Malaysian Trades Union Congress and The Malaysian Employers Federation and has never been amended since its inception (see Section 2.5.3). One Conciliator noting this wrote: '*Being the only Code of conduct for industrial harmony, it is the only guideline that has ever been created with a tripartism spirit. However, the Code needs to be*

revamped and amended to make it more relevant in the current situation/scenario'. Similarly, another Conciliators stated that: '*The Code of Conduct for Industrial Harmony is too old. There has been no amendment since 1975 and most employers, unions and employees have forgotten about the existence of this Code'.*

There were also three written comments which indicated that the Code has been poorly publicised. For instance, one Conciliator wrote '*The Code is not being promoted widely especially in non-unionised environment'.* Again, as discussed in Section 2.5.3 the Code is the only mechanism that has been developed by MoHR for workplace dispute resolution and hence, without effective promotion many employers would not know of its existence. However, in the Conciliators' interviews some Conciliators indicated that they had been informed that a new reprinted version of the (unamended) Code has been distributed by MoHR indicating an effort of re-promoting the Code.

As discussed earlier in Section 5.4, of the 62 employers who had a workplace dispute resolution procedure at their workplaces 62.9 percent employers (39) had not referred to this Code.

The Interviewees' Responses

The interviews conducted with Conciliators and Arbitrators also found similar results to the Survey which can be elaborated into five themes which are: (1) the Code is commonly being referred in workplace retrenchments; (2) it is mostly used by larger, established and unionised workplaces; (3) that the employers lack knowledge about the Code; (4) it is not legally binding; and (5) it is old, out-dated and poorly promoted (Table 5.14).

Table 5.14: Interviews' responses on the issue pertaining to the Code of Conduct for Industrial Harmony 1975

Emerging theme about the Code	No. of interviewees mentioning the issues	No. of times these issues were raised
Commonly being referred in workplace retrenchments	13	20
Mostly used by the larger, established and unionised workplaces	13	15
Lack of awareness of the Code	8	8
Not legally binding	6	6
Old, out-dated and poorly promoted	5	5
Total		**54**

Source: Interviews with Conciliators and Arbitrators

Firstly, 13 interviewees stated that the Code is commonly referred to by employers or employees when the dispute over the termination of employment is as a result of retrenchment (see Table 5.14). For example, one interviewee said that employers do follow the provisions in the Code which allow for the adoption of the LIFO principle prior to retrenchment. However, the provision of due notice is not strictly followed by employers. Further, none of the interviewees spoke about the use of the Code in relation to other types of dismissal including misconduct or non-performance. Provisions on resolving individual grievances and procedures for disciplinary action are unpopular among employers and employees at the workplace (see Section 2.5.3). The findings of the interviews suggest that although the provisions for retrenchment contained in the Code have been useful and are being used, these other provisions seem to be ignored or forgotten. For instance, typical comments included:

> *We have a provision in this Code especially in cases involving retrenchment, sometimes there are employers who abide by the Code. However, many employers do not follow the Code in total (*Conciliator 13).

> *In term of retrenchment and VSS [voluntary separation scheme], most are done properly. They [employers] follow the Code of Conduct of Industrial Harmony* (Conciliator 15).

> *I think LIFO they are following but by and large I have not seen a case that they are not following. The employee can complain that so and so is not retrenched,' why me' and they forget that categorization. So if you are the only person there how can you compare with one that does a different job? So by and large, we are always able to distinguish LIFO is being followed. But this question of giving notice and giving them due notice of impending retrenchment, I think that is not strictly followed because there is a fear that there will be a lot of unrest if it is made known early. So normally a salary is given in lieu. They don't really give them the notice* (Arbitrator 4).

Secondly, consistent with the findings of the Conciliators' Survey, the interviewees found the Code to be mostly used by larger and unionised workplaces. This was expressed by 13 interviewees as shown in the above Table 5.14. Some interviewees argued that large firms often have the capabilities to implement the procedures outlined by the Code. Three interviewees who offered typical views on this issue elaborated on this:

> *In my opinion employers do follow the Code but it depend on the size of the companies, if they have adequate manpower they can follow the Code. The employer said ' we try to follow the Code but we are short of manpower where everything is done by the same person, so we overlooked on this and what is to be followed' This is the situation. Some employers do follow but some don't* (Conciliator 16).

> *I think they don't follow at all. You see, I would say that an enlightened employer of a company or management would practice IR. If you believe in the dignity of labor, if you believe in treating people right with respect, you will practice it. But somehow this feeling is not there, I think everything is done in the name of business adequacy. But some established companies, [which] I have never seen in the Industrial Court. I believed it is because they have practices Human Resource and IR. Because if I am an enlightened employer I will see a good worker will enhance my business. Nobody mentioned about it, it is like almost forgotten. I think they have to. The Ministry faces an important part especially with regard to main issue. You have to see the need of an employee* (Arbitrator 1).

> *As I said, the big companies, they observed because they are knowledgeable but not the small companies, they are ignorant* (Arbitrator 2).

Thirdly, and in keeping with the sorts of comments many Conciliators wrote in their open ended responses of the survey, the interviewees also suggested that employers' lack of knowledge and their unawareness of the Code has dampened its wider implementation in the country. This was mentioned by eight interviewees as shown in the above Table 5.14. One interviewee noted that when employers are unaware or have no knowledge of the provisions contained in the Code it is difficult to convince them of its importance but once they understood it; they are more willing to follow the Code:

> *When I go for a visit to the companies I found that not many of them know what Code of Conduct for Industrial Harmony is. Even some don't know what IR department is. So I explained to them and later our rapport become very good and they communicate to me, you know! like how to go about this, 'my employee do like this', so only when they are aware they will follow the procedure* (Conciliator 3).

> *Sometimes they are employers who don't know about this Code and even there are some who don't know what this department [DIRM] is all about or what is this department doing and sometime they asked the objective of this department (*Conciliator 13).

The fourth issue concerning the lack of use of the Code is its non-legal status and this was raised by six interviewees (Table 5.14). These interviewees noted that as the Code is not compulsory it is not an effective mechanism to encourage parties to resolve disputes at the workplace. Again, this confirms the findings of the Conciliators' survey which found that the Code is only practiced on a voluntary basis. There is little incentive for employers to follow this Code as it is only based on a mutual agreement between the employers and employees. Two interviewees typified the comments in this regard:

> *As you know, it is not legally binding. That is the whole problem. So I would say as long as the Code is not legally binding, you cannot see something effective coming out of it. That's my opinion. You have somehow or rather to make it legally binding* (Conciliator 2).

> *Some employer who knows about it, they choose to ignore because they say it is not a legally binding document. The Court advocates it but still they say it is not legally binding on us* (Conciliator 12).

Another issue raised by interviewees which confirmed the open-ended responses of the survey was the fact that the Code is old and not adequately promoted. There were five interviewees who pointed out this issue as shown in Table 5.14 and one interviewee even stated that that some disputants do not know of its existence:

> '*No, they don't know. We are not promoting. Usually we talk direct to the issue, not the Code of Conduct. Only recently, the HQ [Headquarters] is reprinting the Code. But the Code is not applicable in today's market. It was introduced in 1975* (Conciliator 1).

Despite the interviewees who noted that there has been some effort to re-promote the Code through reprinting it for distribution most remained sceptical about its implementation: '*I think there is a written document on this Code. It is an old one in A5 size and I have seen it before'* (Conciliator 19)

5.7.2 The Employment Act 1955

The Interviewees' Responses

As discussed in Section 2.5.7, the *EA 1955* stipulates the minimum provisions of terms of employment in Malaysia. The analysis of interviews uncovered several issues regarding the relevance of the *EA 1955* in the implementation of workplace dispute resolution including disputes over termination of employment. These issues of coverage, termination and layoff benefits as well as the provision of due inquiry all act to downplay the importance of the Act (Table 5.15) as will be illustrated below.

Table 5.15 Interviewees' comments on the *EA 1955*

Emerging theme	No. of interviewees mentioning the issues	No. of times these issues were raised
Coverage	12	20
Quantum of the termination and layoff benefits	8	14
Due inquiry	5	5
Total		39

Source: Interviews with Conciliators and Arbitrators

Firstly, as the *EA 1955* only covers employees with a maximum salary of RM1,500 (AUD500) many are unable to seek a remedy for compensation in lieu of notice or make a claim for retrenchment benefits when they are terminated under these two situations: '*This is also due to the fact that they cannot go to Labour Department as they are not covered under the Employment Act'* (Conciliator 16). Employees in the two States of East Malaysia have a greater advantage as the ceiling is much higher at RM 2,500 per month in their respective ordinances and hence, many claimants are able to seek remedy at the Department of Labour there (see Section 2.5.7). One interviewee was of the opinion that the wage ceiling, especially in West Malaysia, is very low as many employees particularly in larger towns earned salaries much higher than this:

> *The other issue is Labour Law [EA 1955] protects those with [RM] 1,500 and below. I doubt anyone, especially in KL [Kuala Lumpur] earning less than [RM] 1,500. Then who are they [Department of Labour] covering? Why don't they raise the coverage to [RM] 5,000? So you cover more people and provide the benefits. They don't have to come to IR department [DIRM]* (Conciliator 4).

The second theme from the analysis of the *EA 1955* in the interviews is the quantum of the termination and layoff benefits (see Table 5.15 above). As discussed in Section 2.5.7, the *EA 1955* stipulates the minimum amount of termination and layoff benefits to be paid to employees who are retrenched or laid off on a genuine basis. Employees who

are not satisfied with the amount paid cannot claim beyond what is stipulated under *EA 1955* at the Department of Labour. Those who are not covered by the *EA 1955* cannot even file their claims at the Department of Labour. Hence, as described in the previous section, very often these two categories of employees will often file their cases with the DIRM under the premise of making a claim for reinstatement despite not genuinely seeking such remedy. The amount of compensation awarded in many retrenchment cases by the IC is often higher than specified in the *EA 1955* and this creates a particular incentive to bring their disputes under the unfair dismissal at DIRM. Clearly this issue is also related to the discussion on the effect of system and structures that has driven the emergence of compensation culture (Section 5.6.3.3 above). For example, as stated by one interviewee, instead of the minimum 20 days wages for each year of service the IC sometimes awarded one month for every one year of service (see Section 2.5.12). Some of the interviewees who provided comments along this line said:

> *The highest compensation at Labour [Department of Labour] is 20 days wages for each year of service. In comparison to Industrial Court decision, 1 year is equivalent to 1 month, a difference of 10 days. 10 years would mean 100 days difference of over 3 months* (Conciliator 5).

> *Even though the employers have paid the necessary benefits these claimants are just trying their luck. I think this reflect greedy attitude and they have actually spend the money that the employers paid them earlier* (Conciliator 15).

Thirdly, five interviewees also spoke about the relevance of due inquiry under the *EA 1955* in resolving disputes over dismissals at the workplace (see Table 5.15 above). This provision of due inquiry should be used by employers before dismissing employees on disciplinary matters (see Section 2.5.12). One interviewee argued that there is no definition under the *Act* on what due inquiry means resulting in many people misunderstanding its meaning. There is also an on-going argument (including among the Conciliators and Arbitrators themselves) on whether the due inquiry section of the *EA 1955* is compulsory (see Section 3.3). The interviewees reflected this in their comments and two typical responses included:

...Then I refer to the Employment Act [EA 1955]. This is my opinion. Employer may bla, bla, after inquiry. What does it mean by due [inquiry]? No definition in the Act [EA 1955]. There are a lot of misunderstandings on this issue (Conciliator 14).

I advised him that that it would be better if he file the case at the Labour department [Department of Labour] for compensation because when DI [domestic inquiry]is not done so employer terminated under section 12 [failure to give notice of termination] so he may claim the benefits (Conciliator 18).

5.7.3 The Industrial Relations Act 1967

The final piece of legislation influencing workplace dispute resolution and in particular, claims over unfair dismissal is the *IR Act 1967*.

The Interviewees' Responses

As discussed in Section 2.5.2 and 2.5.12, *Section 20* of the *IR Act 1967* provides for the reference of disputes over termination '*without just cause and excuse'* to DIRM. The interviewees suggest that there has been a lot of misunderstanding among employers and employees about this Section. The analysis of the interviews found two main themes: (1) confusion over the meaning of '*just cause and excuse';* and (2) an argument on the absence of procedural requirements in the *IR Act 1967* (Table 5.16)

Table 5.16 Interviews' comments on the *Industrial Relations Act 1967*

Emerging theme	No. of interviewees mentioning the issues	No. of times these issues were raised
Confusion over the 'just cause and excuse' principle	9	13
Absence of procedural requirements	6	7
Total		20

Source: Interviews with Conciliators and Arbitrators

Firstly, although *Section 20* of the *IR Act 1967* specifies that dismissal considered being without '*just cause and excuse'* can be referred to DIRM, very often employers argue about its existence or meaning. Many employers think that they have the prerogative to terminate their employees under the terms and condition of employment. The analysis of the interviews found that many employers grapple with the term '*just cause and excuse'* as noted by nine interviewees. For example two typical responses focused on employers' either misunderstanding the level of their prerogative or simply not knowing of the existence of *Section 20*:

> *When they come here, when we talked to them, they are stunned. They say: 'Is there such a thing. Should I do this for non-performance? I thought the moment the employee is not fit for my organisation, and then I can just give them the notice and take him out'. I said, 'of course, can, but it has to be justified'. So who is to be blamed here?* (Conciliator 2).

> *Some of employers don't even know the existence of Section 20 of the Industrial Relations Act [IR Act 1967]. They terminate following saying 'our agreement here saying that one month notice, so we just follow that and that's nothing wrong'. Like the case I had this morning the employer say both parties already agree as what is stated in the agreement. There are companies who do not realised about this Section 20 of the Act* (Conciliator 18).

Secondly, many interviewees believed that the absence of a procedural requirement in *IR Act 1967* compelling employers to provide workplace fairness in dismissing employees is a matter of concern with six interviewees speaking specifically about this issue as shown in Table 5.16. Here, interviewees' comments centred on the argument that the Act does not contain any specific procedural requirement in relation to providing fairness in dismissal. This requirement is only outlined in the Code of Conduct for Industrial Harmony 1975 which as discussed earlier is not legally binding on parties.

Some interviewees also expressed their concern about the plight of employees who may have been victimised at the workplace and who have no means to defend their rights as there is no such provision or procedure in the Act on this matter. Hence, some try to use the provision of *Section 20* by filing their case under constructive dismissal. The comments which reflect this line of arguments were:

> *At present, we don't have so many things under the IR Act [IR Act 1967]. It's not like the Employment Act [EA 1955]. IR Act is like most of it is on the decisions and the principles* (Conciliator 2).

> *I have had cases like employees being represented by the [Name of Employees' Organisation] officers, not knowing it is not constructive dismissal case. It doesn't fit to fall under CD [constructive dismissal], so we have people like that* (Conciliator 2)

> *So this means when DI [domestic inquiry] is not done it is not wrong on the part of the employer because under Section 20 it is simple where it say whether employer have cause and excuse to terminate the employee. It doesn't say whether the procedure has been followed or not* (Conciliator19).

5.7.4 Curable principle

The curable principle (see Section 3.3) is a High Court precedent which ensures that any defect in being afforded due process in the workplace as a result of a faulty dispute resolution would be 'cured' in subsequent court proceedings. To many this has been interpreted as absolving employers from having to provide a fair process when dismissing an employee.

Responses from the Conciliators' Survey

There were 18 comments on the matter (Table 5.17).

Table 5.17 Conciliators' surveys responses on the Curable Principle

Issues (effect of curable principle to the implementation of domestic inquiry)	No of comments
Affect employers willingness to implement of domestic inquiry	9
Curable principle has no effect to domestic inquiry	5
Provide parties a second chance of resolving the dispute	2
Workplace mechanism only suitable for big companies	2
Total responses (N=18)	**18**

Source: Survey of Conciliators

The majority of Conciliators were of the opinion that the 'curable principle' has a negative impact towards employers' willingness to conduct domestic inquiry at the workplace. Nine Conciliators justified their opinion by stating that despite the 'curable principle,' employers should have a workplace dispute mechanism such as domestic inquiry to ensure justice are accorded to employees, for example, as one Conciliator wrote: '*Although there is a curable principle, an employer must have a workplace dispute mechanism at his workplace, only then can justice be done'.* On the other hand, five Conciliators were of the opinion that 'curable principle' has no effect to employer's willingness to conduct domestic inquiry. For example, one Conciliator stated that even if an employer does not conduct domestic inquiry it would not automatically be considered as unfair as they will still rely on the reasons for the dismissal: '*Curable principle is relevant, even when the employer doesn't comply with the trial internally before dismissal, cases should be seen on the point of reasonable reasons of dismissal'.*

The Interviewees' Responses

The interviews conducted with Conciliators and Arbitrators allowed a deeper probe into this issue. The analysis of transcripts was able to categorise interviewee responses into two categories: those who support the principle and those who are opposed. As shown in Table 5.18 there were seven interviewees whose opinion seems to support the principle and 11 who, whilst they did not seem to agree with the principle, acknowledged the supremacy of the principle which was decided by the Supreme Court in *Dreamland Corp. (M) Sdn. Bhd v. Choong Chin Sooi & Industrial Court of Malaysia (1988)*.

Table 5.18 Interviewees' view on the 'curable principle'

Interviewees' view on the 'curable principle'	No. of interviewees mentioning the issues	No. of times these issues were raised
Supportive of the principle	7	10
Disagree with the principle	11	15
Total		25

Source: Interviews with Conciliators and Arbitrators

Interviewees who were supportive of the principles provided several reasons for their opinions. For example, one interviewee said that the 'curable principle' provided a second chance for a person to obtain a fair process or an opportunity to be heard which he or she may not have had at the workplace. In addition, it was seen by some as providing a forum for a neutral party to look into the matter where an employee may not have been given an opportunity to defend himself or herself at the workplace. One interviewee noted:

> *In reality, domestic inquiry is necessary and I agree that the court [IC] should conduct another inquiry. We talked about fairness to both parties because maybe the employee was not given an opportunity to defend in total, but when the case go to court [IC] the case have a chance to be re-examined by the court [IC]* (Conciliator 16).

There were 11 interviewees who disagreed with the 'curable principle' and eight provided reasons that it deters employers to conduct domestic inquiry at the workplace. For example, one interviewee stated that it discourages employers to conduct an in-house dispute mechanism while another interviewee said that employers may lower the standard or procedure adopted in holding a domestic inquiry. In other words, reliance on employers providing due process in employee disputes may be compromised by either their ability to provide such a mechanism or their need to make such a process efficient. Another interviewee stated that 'curable principle' affects both employers and employees when the matter has to be inquired into after a lapse of time rather than as if it had just occurred. This is because hearing at the Industrial Court (where 'curable principle' will be implemented) may only be done several months or years after the dismissal due to several processes which the case have to go through including reference by the Minister (see Section 2.5.10 and Section 2.6). This may make the matters difficult to handle such as in finding witnesses who may have left the company. Typical comments included:

> *Some employers said what is the point of having DI [domestic inquiry] if is to be redo at the court* [IC] (Conciliator 10).

> *It is not only affecting on the employers but also the employees. Everything has to start all over again and as if the matter is just occurred. But what can we do that the decision of the Industrial Court. So I think not only employers are affected but employees as well* (Conciliator 15).

> *One of the (unintended) results of Dreamland [curable principle] is that because of failure to have a good domestic inquiry will not be fatal to the employer's case, the employer may be tempted to lower the standard adopted at the Domestic Inquiry level in the belief that if there is any injustice committed at that level, it can always be corrected by the Industrial Court which would act as a second domestic inquiry* (Arbitrator 5).

This section canvassed Conciliator and Arbitrator perceptions of the effects of the laws and precedents which pertain to dispute resolution through the Conciliators' Survey and interviews. The section discussed the operation of the Code of Industrial Harmony 1975, the *IR Act 1967*, the *EA 1955* and the 'curable principle'. The findings suggest that

none of these instruments has been entirely successful in creating a legal and industrial framework which allows workplaces to settle their disputes in-house. Instead, there is a level of confusion and lack of knowledge as the predominant obstacles to good workplace dispute resolution. First, the Code is not compulsory or legally binding and this is seen as lowering its importance to employers except for a few narrow areas where it pertains to processes for retrenchment which is mostly the prevail of larger employers. It has not been updated and is seen as old and irrelevant. The *EA 1955* restricts its operation to employees earning less than RM1, 500 but is more generous in two States of East Malaysia. Even when employees satisfy the wage limitations, the compensation for retrenchment is low and this has created a demand for the DIRM. There is confusion over the *EA 1955* requirement of due enquiry by employers and there is no definition for due enquiry. Similarly, the *IR Act 1967* has caused confusion among employers particularly in relation to *Section 20* which pertains to an employer's responsibility to facilitate 'just cause and excuse'. The Act is also silent on the fairness of dismissals. Finally, the 'curable principle' as espoused by the courts has also had a negative impact on employers' willingness to conduct a domestic inquiry. Whilst conciliators were divided on the merit of the 'curable principle', it has led to some extent, to employers believing that they do not have to provide due process in the resolution of a workplace dispute because that will be rectified by the courts.

The final area of investigation for this thesis is that of Justice (see Figure 5.6). A lack of justice can be a major cause for disputants to seek higher levels of dispute resolution in order to gain a fair outcome for themselves. The following section reports on the Conciliators' Survey, Employers' Survey and interview responses as they pertain to justice in the dispute resolution process.

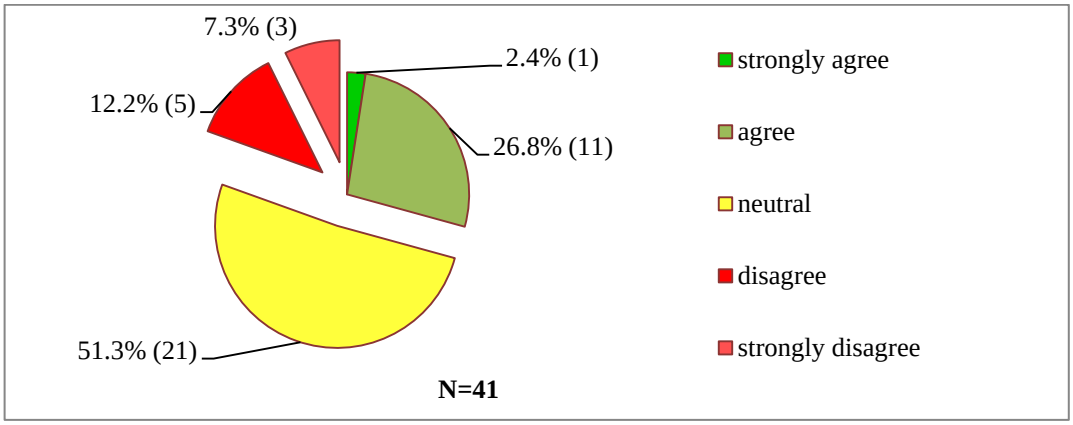
5.8 Justice

Responses from the Conciliators' Survey

The third component of the antecedents to claims for reinstatement being referred to the tribunal is the effect of justice in parties' determination to refer their disputes to conciliation. When asked about whether claimants want their cases heard at conciliation because of a lack of justice in handling the dispute in the workplace, the results of the

Conciliators' Survey show that 29.2 percent (12 Conciliators) of the 41 Conciliators who answered this question agree, with 19.5 percent (8 Conciliators) disagreeing but with a large group of 51.3 percent (21 Conciliators) neutral on the matter (Figure 5.10). Considering the high proportion of respondents who decided to withhold their opinion this required a further probing through interviews to determine further why they decided to be neutral in their responses. This is taken up in the interviews reported later in the chapter which explained further the opinions of Conciliators on this issue.

Figure 5.10 Conciliators' opinions on whether claimants who refer their case to conciliation have not been given natural justice in the workplaces.



Source: Survey of Conciliators

The survey of Conciliators also asked respondents to provide the possible reasons employees refer their disputes over dismissal to conciliation. Conciliators were provided with a set of choices divided into procedural justice elements, distributive justice elements and interactional justice elements. They were also invited to provide other elements which might pertain to the issue. The findings suggest that the elements of procedural justice were the main reasons for employees filing their claims for unfair dismissal. As shown in Table 5.19, these elements constitute a total of 54 percent (47 responses) of all the reasons given by the 42 Conciliators. The main categories into which their reasons fell as shown in Table 5.19 are: (1) the failure of employers to follow proper procedures before dismissal (26.4 percent); (2) failure of employers to explain the reasons for the termination (15.1 percent); and (3) employees were not given an opportunity to be heard (12.6 percent).

In terms of interactional justice (Bies & Moag 1986) the surveys analysed the extent to which employees had been afforded respect and dignity in the process leading to their dismissal and the extent to which this was a reason for referring their case to conciliation. The survey of Conciliators found that only 9.2 percent of Conciliators believe that claimants filed their claims because the decision of the employer was made without respect or concern for their dignity (Table 5.19). A number of other reasons were also provided by Conciliators for the dispute failing to be settled in the workplace and these included 15 Conciliators who nominated the right of employees to refer their claims to conciliation and two who believed employees were doing it as retributive action.

Table 5.19: Reasons given by claimants to Conciliators when referring their cases to conciliation

Reasons	Number of responses	Percentage
Procedural justice		
Employer had not followed the proper procedure before dismissal	23	26.4 %
Employer did not explain about the reasons before termination	13	15.1 %
Employee(s) were not given an opportunity to be heard	11	12.6 %
Interactional justice		
The employer did not treat employee/s with respect and dignity	8	9.2 %
Distributive justice		
Employers' decision (determine outcome) was unfair.	12	13.8 %
Other reasons		
Exercising rights as an employee	15	17.2 %
Retribution	2	2.3 %
Other reasons	3	3.4 %
Total number of responses (Question with multiple answers, N=42)	**87**	**100%**

Source: Survey of Conciliators

5.8.1 Procedural justice

Responses from the Conciliators' Survey

The Conciliators' Survey also asked respondents to provide their opinions on the most recent cases which they handled and provide reasons for these cases to be referred to arbitration. Of the 40 responses received, 67.5 percent (27 Conciliators) indicated that the most recent cases handled had merit to be referred to arbitration while 32.5 percent (13 Conciliators) said there was no merit (Table 5.20).

Table 5.20 Number of cases having merit to be referred to arbitration

Merit	Frequency	Percentage
Number of cases merit to be referred to arbitration	27	67.5 %
Number of cases have no merit to be referred to arbitration	13	32.5 %
Total, N=40	**40**	**100%**

Source: Survey of Conciliators

Again, elements of procedural justice in the form of an unfair workplace processes were the main reason why Conciliators considered these cases had merit to be referred to arbitration. As shown in Table 5.21 these elements include: (1) employers being unfair in dealing with non-performance (31.7 percent); (2) failure of employers to conduct a domestic inquiry (19.6 percent); (3) defective domestic inquiry (14.6 percent); and (3) the failure of employers to observe a proper retrenchment procedures (14.6 percent).

Table 5.21 Reasons for merit of reference to arbitration

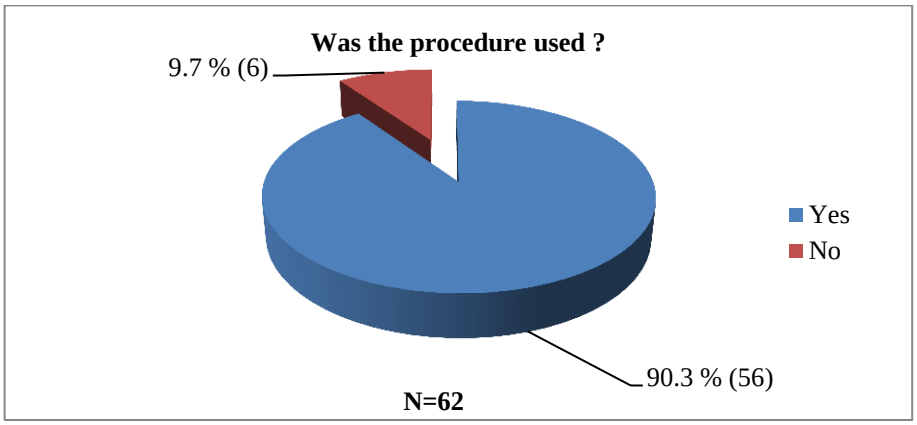
Reason for merit of reference to arbitration	No. of responses	Percentage
Employer was unfair in dealing with non-performance	13	31.7 %
Employer failed to conduct a domestic inquiry	8	19.6 %
The domestic inquiry was defective	6	14.6 %
Employer failed to observe proper retrenchment procedures	6	14.6 %
Elements of breach of contract which may lead to constructive dismissal	6	14.6 %
Other	2	4.9 %
Total number of responses (Questions with multiple answers, N =42)	41	100%

Source: Survey of Conciliators

Responses from the Employers' Survey

The Employers' Survey also attempted to identify whether they believed that they provided procedural justice to their employees on the most recent cases for which they have attended conciliation at the DIRM. Of 83 employers who responded to the survey (see Section 5.2), only 62 employers answered this question. The findings indicated that of those who responded, 90.3 percent (56 employers) had used the procedure while only 9.7 percent of the employers had not (Figure 5.11).

Figure 5.11 Percentage of employers using the procedure before termination



Source: Survey of Employers

The survey also asked employers about the elements of procedural justice they accorded to their employees by providing them with five reasons for which the employees may have been terminated: misconduct, poor performance, expiry of fixed term contract, retrenchment and constructive dismissal. A sixth category of 'other' attracted three responses from employers indicating that their disputes involved voluntary separation; termination simpliciter; and health reasons. In respect of misconduct cases, 86.8 percent (33 employers) had given written notices while 13.2 percent (5 employers) summarily dismissed their employees. The majority of employers who dismissed their employees due to poor performance (85.7 percent) also gave written notice to their employees and all employers who terminated their employees due to the expiry of a fixed term contract or retrenchment provided prior written notices (Table 5.22).

Table 5.22 Types of notice given by employers before termination (based on the most recent case at the tribunal)

Notice given	Reasons for Termination (N=74)					
	Misconduct	**Poor Performance**	**Fixed term contract**	**Retrenchment**	**Constructive dismissal**	**Others**
	N=38	**N=21**	**N=4**	**N=5**	**N=3**	**N=3**
Writing	33 *(86.8 %)*	18 *(85.7 %)*	4 *(100 %)*	5 *(100 %)*	-	*2 (66.7 %)*
Verbal	-	1 *(4.8 %)*	-	-	-	-
Summary dismissal	5 *(13.2 %)*	2 *(9.5 %)*	-	-	1 *(33.3 %)*	-

Source: Survey of Employers

Employers were also asked to indicate steps (procedural elements) that they had taken prior to their decision to dismiss employees including warnings; domestic inquiry; counselling; suspension from work; and retrenchment procedure. Here, employers were allowed to indicate more than one option and the results were cross tabulated with the types of dismissal as shown in Table 5.23. In respect of misconduct cases (N=38) (which were the majority of cases for which employers had attended conciliation) less

than half (42.1 percent) provided warnings, although most had conducted domestic inquiry (81.6 percent) and half (50 percent) suspended their employees. In cases of poor performance, the opposite situation was found where 30.4 percent of employers conducted domestic inquiry while more than half gave warnings.

Table 5.23 Steps taken by employer before terminating (based on the most recent case at the tribunal)

Steps	Types of Termination (N =77)					
	Misconduct	**Poor Performance**	**Fixed term contract**	**Retrenchment**	**Constructive**	**Others**
	(N=38)	**(N=23)**	**(N=5)**	**(N=5)**	**(N=3)**	**(N=3)**
Warning letter	16 *(42.1%)*	13 *(56.5 %)*	5 *(100 %)*	1 *(20 %)*	1 *(33.3 %)*	2 *(66.6 %)*
Domestic inquiry	31 *(81.6%)*	7 *(30.4 %)*	-	1 *(20 %)*	-	1 *(33.3 %)*
Counselling	8 *(21.1 %)*	7 *(30.4 %)*	1 *(20 %)*	1 *(20 %)*	1 *(33.3 %)*	-
Suspension from work	19 *(50 %)*	9 *(39.1 %)*	-	1 *(20 %)*	-	-
Retrenchment procedure	-	-	-	4 *(80 %)*	-	-
Unsure	-	1 *(4.3 %)*	-	-	-	-
Others	-	-	-	-	-	-

Source: Survey of Employers

When the employers were asked whether they provided an appeal process to employees who were dismissed, of the 77 employers who answered this question, 85.7 percent (66 employers) indicated 'Yes' while 14.3 percent stated 'No' (Table 5.24). The employers who indicated 'Yes' were also asked to explain how the appeal process was provided while those who indicated 'No' were asked to indicate why it was not provided, and their responses were themed as shown in Table 5.24.

Many employers who indicated that they had provided an appeal process, stated that this

was done during the domestic inquiry process (12 employers). In this category of responses, one employer wrote '*the hearings before the management to decide'* while another stated *'[this is] given during domestic inquiry for them [employees] to file their defence'*. There were also 12 employers who stated that the employees can write to their management for appeal. For example, one employer indicated '*they can appeal to the management'* and another wrote '*they are given 30 days after the termination or dismissal letter being issued [to write]'.* The Employers' Survey showed that only three employers actually provided appeals through an Appeal Board. Other methods of how employers provided appeals to their employees included through grievance procedures, negotiation and consultation, and by providing employees the option to answer to the show cause letter (Table 5.24). These results reflect employers' inability to understand how an appeal process should be provided to their employees given many equated it with providing them with the ability to respond to their charge in the domestic inquiry process.

Of those who responded that they did not provide an appeal process (Table 5.24), five employers stated that the termination was nevertheless valid. One employer wrote '*the reasons of finality and closure. Further, there would already have been counselling session'* while another stated '*termination followed the procedures in accordance to the requirement of the Employment Act [1955], consultation was made and after the inquiry.* Other reasons include not able to contact employee, the termination was made as last resort and employees can appeal at the DIRM.

Table 5.24 Percentage of employers providing appeal process

Appeal	No. of responses	Percentage
Do you provide employees with appeal process? (N=77)		
Yes	66	85.7 %
No	11	14.3 %
Total	77	100 %
How was it provided? (N=47)		
Through Domestic Inquiry	12	25.5 %
To write to the top management	12	25.5 %
Grievance procedure	6	12. 9 %
Negotiation and consultation	5	10.6 %
Show cause and termination letter	5	10.6 %
Board of appeal	3	6.4 %
Others	4	8.5 %
Total	47	100 %
Why it is not provided? (N=10)		
Termination was done accordingly and warning provided	5	50.0 %
Unable to contact employee	1	10.0 %
Termination was the last resort	1	10.0 %
Appeal to DIRM	1	10.0 %
Others	2	20.0 %
Total	10	100 %

Source: Survey of Employers

The Interviewees' Responses

As discussed in Section 2.5.3, misconduct constituted the greatest number of claims for dismissal being referred to conciliation in the past five years since 2009. The interviews with Conciliators and Arbitrators found that dismissals relating to misconduct were the most frequently mentioned dismissal type by interviewees and every time it was mentioned the issue of procedural justice was also raised. Table 5.25 depicts the analysis of themes raised in the interviews with the 20 interviewees who raised dismissal over misconduct with a total frequency of 36 times. Other types of dismissal raised related to non-performance, retrenchment, termination simpliciter and constructive dismissal (Table 5.25).

Table 5.25 Interviewees who spoke about the types of dismissal.

Reasons for the dismissal	No. of interviewees mentioning the issues	No. of times these issues were raised
Misconduct	20	36
Non- Performance	12	16
Retrenchment	10	16
Termination simpliciter	8	8
Constructive dismissal	5	7
Total No. of times these issues were raised by interviewees		83

Source: Interviews with Conciliators and Arbitrators

The interviews also indicated that elements of procedural justice were the most frequent topic raised by the interviewees each time they spoke about these types of dismissal. The interviewees provided their views on how procedural justice was being practised in the workplace in relation to cases involving misconduct, non-performance and retrenchment. These views were based on their experiences conducting visits to employers' premises or during the process of conciliation (as in the case of Conciliators) and when conducting arbitration at the IC (for Arbitrators). Their views

have been classified into the six elements of procedural justice (Van Gramberg 2006a) shown in Table 5.26. These comprised the right to be heard; providing reasons for the decision; the right to present a defence; a right to be heard by an impartial third party; the right to appeal; and the right to timely resolution of the dispute. Views on the right to be heard at the workplace received the most attention from interviewees and eleven spoke on this issue. Although five of the 11 interviewees who spoke about this issue acknowledged that some employers do provide this right, it was often not followed consistently and some considered this defective. For example, two interviewees stated:

> *We go base on the concept that we don't deny the workers right to explain, right to be heard. Based on this natural justice carried out or not, on a balance of probabilities the employers have done their part. But to say that every step of a very structured procedure in the law complied totally, no they don't. But employers have taken the initiative. That's about 30 percent of the employers* (Conciliator 12).

> *Most of the cases where I have heard, I applied that little case by Rauls and fortunately I am backed up and I find that most of the domestic inquiry are quite defective* (Arbitrator 1).

Table 5.26 Elements of procedural justice

Reasons for the dismissal	No. of interviewees mentioning the issues	No. of times these issues were raised
Right to be heard	11	13
Providing reasons for the decision	7	9
Right to present defence	8	9
Impartiality	8	12
Right of appeal	8	12
Timely	5	8
Total		63

Source: Interviews with Conciliators and Arbitrators

Eleven interviewees suggested that whilst not all the elements of procedural justice are being followed, some employers do provide some form of a right to be heard (see Table 5.26 above). In general, these interviewees believed that procedural justice should be practised at the workplace although acknowledging that it is not compulsory. They justified their opinions stating that the reasons of the dismissal are more paramount and not so much of the complete process. One interviewee however suggested that that when employees had already admitted misconduct there is no need for the domestic inquiry to be conducted. Examples of comments along this line are:

> *.... but what is important according to Datuk Wong Chee Wee [IC Chairman] is that the person has been given the right to defend himself, not so much the complete procedural facility. Next is to call the party for an investigation, to give him room to defend himself, that sort of thing without the necessity for him to appear before a panel which may only be possible if the case is in a big organization (Conciliator 21).*

> *To me, as long as the documentary evidence is there and then the direct evident is there, it is no problem bearing Section 35 of the Industrial Relation Act [IR Act 1967]. It is more on the merits of the case, rather than on technicalities. Good conscience and equity coming in* (Arbitrator 2).

According to eight of the interviewees, the right to make a defence (including allowing employee representation at the inquiry) is often not followed (see Table 5.26 above). The impartiality of the process was also in question as well as the absence and effectiveness of the internal appeal process. For example, one interviewee said only big companies provide appeal procedures at the workplace. Another interviewee stated that even if the appeal process is provided not many employees would be willing to take it when they know that they can appeal at the DIRM and in addition, the time taken before the whole process is completed may be long. The delay at the workplace waiting for an internal process could jeopardise their chance to appeal at DIRM which, as provided by the *IR Act 1967*, imposes a time limit for claimants to refer their case. Here as discussed in Section 2.5.2, the employees must file their claims for reinstatement at the DIRM within 60 days of the date of dismissal. Therefore should the internal appeal process

goes beyond this time frame, they may be time barred from filing their case to the DIRM. Typical interviewee comments included the following:

> *When it comes to termination I would say not many workers are interested to highlight it at the appeal process when they know it can be in the form of a case [to the tribunal]. Then there is also the restriction of 60 days for reinstatement. If they were to waste so much time internally this might jeopardize their case* (Conciliator 12).

> *Most of the time we have people [employees] disputing the inquiry [domestic inquiry] itself and this relates to the trust issues because they [employees] says when you are denied in the process an opportunity [to be heard], can you expect the employer to act fairly if I were to appeal this decision or raise it again or negotiate it further* (Conciliator 12)

> *Only a few employers when they make decision provide an opportunity of appeal to their employees. Normally big companies like [name of a company], [name of another company] normally provide an opportunity to appeal, meaning for example after the termination letter was issued you [employees] are given two weeks to appeal* (Conciliator 19).

> *Very rare employers provide appeal, even though they [employees] appeal, the company still refuse the appeal* (Conciliator 20).

In respect of interactional justice leading to the referral of claims for reinstatement from the workplace to conciliation, the analysis of interviews with Conciliators and Arbitrators was able to identify three themes. These are: (1) lack of respect; (2) loss of trust; and (3) communication barriers (Table 5.27).

Table 5.27 Interviewees' comments on interactional justice

Comments on interactional justice	No. of interviewees mentioning the issues	No. of times these issues were raised
Lack of respect	11	13
Loss of trust	6	6
Communication barriers	6	6
Total		**25**

Source: Interviews with Conciliators and Arbitrators

At least 11 interviewees raised the issue that some employers demonstrate a lack of respect when communicating their decision to terminate their employees. As one interviewee stated when an employer has decided to terminate an employee there will be a breakdown of relationship between them. Thus, the employer would ask the employee to leave the premises immediately and surrender all the company's belongings and this can be done without any show of respect or concern to the employee. Another interviewee stated that there are also instances where the employers simply terminate employees verbally particularly in small and medium size companies. The comments which reflect this behaviour are as follows:

> *I see, personally, the moment there is termination, the relationship is somewhat soured between them. The employer may not want to see the worker anymore, there are usually instructions like 'please return all the company belongings and return all the company belongings and leave immediately'* (Conciliator 12).

> *I have one case involving a multinational company where the dismissal was just done through the phone* (Conciliator 15).

> *Like big company, they have HR department, HR manager, they will follow the procedure, and they will show their respect. In small and medium companies, sometimes they verbally ask the worker to get out from the office or premises* (Conciliator 20).

The second most raised issue of interactional justice is that of trust which was noted by six interviewees. These interviewees believe that trust plays an important role in the employment relationship and when employers feel that they have lost trust in their employees they will react negatively towards them. One interviewee noted that dismissed employees are often escorted from the workplace because they cannot be trusted not to retaliate. When employers have lost trust in their employees it deters their willingness to reconsider their decision to terminate and they steadfastly maintain their stand to dismiss these employees. Some of the examples of this issue being raised by interviewees were as follows:

> *People with high positions sometimes handle sensitive matters, which can be detrimental to the company. Here, they [employers] will rather say, 'you are dismissed, please leave now and we will escort you out and take your personal belongings'* (Conciliator 8).

> *I mean, the employer and the employee [relationship] usually based on trust issues; they have reached a stage where the employee is no longer able to be trusted* (Conciliator 12).

Finally, six interviewees raised the problem of communication barriers as a form of interactional justice which exists between both parties when dismissal has taken place and where there is often no room for the parties to negotiate with each other:

> *From the feedback that I received from the employees, they have difficulties of communication with the employer. They said that nobody is going to listen to them* (Conciliator 15).

> *This is not a contract of buying car, but dealing with human being. When you deal with human being its emotion, where the relationship has broken down* (Arbitrator 3).

5.8.2 Distributive justice

Responses from the Conciliators' Survey

The fairness of employers' decisions was put to respondents of the Conciliators' Survey. Of the 87 responses received (multiple responses) only 12 responses (13.8

percent) indicated that employees filed their claims to the DIRM with a motive to determine the fairness of their employers' decisions (see Table 5.19 in Section 5.8 above).

Responses from the Employers' Survey

In an attempt to investigate the extent to which distributive justice, or the fairness of the outcome, is provided at the workplace, the Employers' Survey provided an open ended question to gauge the employers' or their representatives' opinions. Respondents were asked to reflect on the conciliation case they had just experienced regarding termination of employment and the reasons why they thought their actions were fair. It should be noted that there is an extensive psychological literature on the way that fairness perceptions tend to be biased in favour of oneself or ones in-group and it is likely this concept is operating here (see for example, Ham & Van Den Bos 2008; Greenberg 1983). As would be expected, of 59 employers who answered this question, 57 stated that their decisions had been fair and only two stated they had been unfair (Table 5.28). Their reasons in justifying the fairness of their decisions were grouped into seven themes as shown in Table 5.28. A total of 13 responses suggested that the decision to terminate was fair as domestic inquiry had been conducted. Another 11 responses indicated that employers equated the fairness of the decisions with reasons that the misconduct had been proven. A further 11 responses indicated that employers justified the fairness of their decisions on the grounds that their employees had been given ample opportunity to change their behaviours and nine responses indicated that employers thought their decision was fair because of the seriousness of the misconduct committed by the employees in question (Table 5.28).

Other reasons given by employers in thinking that their decisions were fair include that the employee's performance was poor (6 responses), that the employee concerned was a habitual offender (4 responses) and that it was due to a genuine retrenchment exercise (3 responses). There were also five responses which simply stated that the decision was fair with no reasons provided (Table 5.28)

Table 5.28 Employers opinion of the fairness of the decisions and their reasons

Employers opinion of the fairness of the decisions		**No. of responses**
No of employers who stated the decision was fair		57
No of employers who stated the decision was unfair		2
Reason given for the fairness of the decision	**No. of responses**	**Percentage**
Domestic Inquiry was conducted	13	20.3%
The misconduct was proven	11	17.2%
Ample opportunity given	11	17.2%
Gross Misconduct	9	14.0%
Poor performance	6	9.4%
Habitual offender	4	6.3%
Genuine retrenchment	3	4.7%
Yes, it's fair	5	7.8%
Not fair	2	3.1%
Total number of responses	**64**	**100.0%**
(Open ended questions with multiple answers recorded, N = 59)		

Source: Survey of Employers

As distributive justice concerns itself with the fairness of the outcome of the dispute (Rawls 1971) the survey endeavoured to find out under what sort of circumstances an employer might change his or her decision to dismiss an employee. Employers were asked whether they would consider reversing their decisions on the basis of their employee's age, seniority, previous positive contribution, or the ability of the employee to find job elsewhere. Extra columns were also provided for them in the questionnaire to add other factors which they thought might reverse their decision to terminate the employee. There were 75 employers who answered this question as shown in Table 5.29. Of these 80

percent stated that they would not reverse their decision when employees were terminated as result of misconduct regardless of age, seniority, previous positive contribution, or the ability of the employee to find job elsewhere.

In the case of employees dismissed for poor performance, more than 70 percent of the employers also indicated they were not willing to reverse their decision on the grounds of seniority or the perceived ability of the employee to find job elsewhere. Slightly fewer employers (68 percent) would not change their minds on the ground of an employee's age and 62.7 percent do not consider previous positive contribution of the employee as important for them to reverse their decision in cases where the employees were terminated as they had performed poorly.

In respect of employees who had been terminated as a result of retrenchment more than 70 percent of the employers would not consider reversing their decision despite a previous positive contribution or the ability of the employee to find job elsewhere. In addition, 66.7 percent would not factor in employees' age while 65.3 percent stated that the seniority of the employees would not make them change their decisions in cases of retrenchment (Table 5.29).

Table 5.29 Factors that might reverse the employers' decision

Factors	Types of Termination					
	Misconduct (N=75)		Poor Performance (N=75)		Retrenchment (N=75)	
	Yes	No	Yes	No	Yes	No
Age	*14.7%*	*85.3%*	*32.0%*	*68.0%*	*33.3%*	*66.7%*
Seniority	*14.7%*	*85.3%*	*29.3%*	*70.7%*	*34.7%*	*65.3%*
Previous positive contribution	*20.0%*	*80.0%*	*37.3%*	*62.7%*	*24.0%*	*76.0%*
Ability to find job elsewhere	*12.0%*	*88.0%*	*29.3%*	*70.7%*	*23.0%*	*77.0%*

Source: Survey of Employers

The Interviewees' Responses

The interviews with Conciliators and Arbitrators probed their views on distributive justice in relation to the employers' decisions to terminate employment. As shown in Table 5.26 this issue was raised 47 times by interviewees during the interview process. The comments received were analysed and grouped into four themes. These are: (1) the decision was harsh; (2) the decision was made based on the need of business adequacy; (3) decisions were not fair and (4) that the decisions were commensurate with the severity of the misconduct (Table 5.30).

Table 5.30 Interviewees' comments on distributive justice

Comments on distributive justice	No. of interviewees mentioning the issues	No. of times these issues were raised
Dismissal was considered too harsh	12	21
Business decision (need)	9	11
Decisions were not fair	8	8
Severity of misconduct	5	7
Total		47

Source: Interviews with Conciliators and Arbitrators

First at least 12 of the 31 interviewees believed that some employers are too harsh in their decisions and do not consider the concept of equity, or the proportionality of the punishment to the offence. This made up the bulk of comments received. One Conciliator in this group noted that employers do not practice the concept of justice and often punish employees much more severely than the misconduct committed. Another Conciliator stated that some employers do not treat their employees fairly and provided an example of fighting at the workplace between two employees where the employee who had previous problems with the employer or had committed a previous misconduct would be the one terminated from the job. Some Conciliators in this group also argued that employers failed to look into the contribution of their employees such as their

length of service or the positive contribution of such employee. Three other interviewees who spoke about the harshness of employers' decisions said:

> *..For example, the employer found that the employee is problematic which normally only minor such as being late but the employer doesn't like the employee. Then the employer never gives him [or her] any written warning and just keeping quite [act of condoning]. At certain point when the employee commits a heavier misconduct for example, fighting with other employees, the employer would target the one [employee] who had previous minor misconduct or the one [employee] that they [employers] don't like. So when the employers conducted a DI [domestic inquiry] supposedly both were punished but sometime employer only takes action to one party only. Although there are not many cases like this but there are* (Conciliator 10).

> *Yes, I believe [the] majority of employees who file their claims to our department were not happy with the decisions. What I mean is the employers do not practise the concept of justice where employees feel that the punishment were heavier than it is supposed to be* (Conciliator 16).

> *..Now! in the case of the [name of a company] where the man, the employee, his misconduct was not complying with the company's order to surrender the company's quarters which has nothing to do with his employment. His employment record, his boss has recommended him for good service and he said, 'one day on a blackout in KL', this employee worked beyond normal hours to restore power. His work is tremendous and a lot of positive contribution from the employee. A lot of good things said about him. It's just that he failed to comply with the directive. So the court [IC] said the punishment of dismissal is very harsh under this circumstances and he can be punished in other ways (*Arbitrator 3).

Secondly, nine interviewees stated that in some cases employers' decisions were made based on a needs principle which includes maintaining the survival of the company. As one interviewee stated, companies which have invested great deal of money in their company tend to downsize when the economy is bad. Other interviewees in this group pointed out that in some cases companies simply exercise their right to downsize despite

being profitable and this is done on the reason of business adequacy. Another interviewee indicated that nearly 60 percent of employers' decisions to terminate could be classified as unfair dismissal and these employers would not reconsider their decisions to reinstate the employee because the directive was generally from senior management. Three typical comments from this group included:

> *Well, if there is retrenchment, put it this way. Is reinstatement the right remedy? The company is already downsizing, they [companies] have put up all their money. Do you think they [companies] like to do that? They need to implement downsizing. They retrenchment 20 to 30 workers and those 20 to 30 workers now want to be reinstated back to their job* (Conciliator 8).

> *Through my experience, 60 percent is considered unfair dismissal. Even though we appeal to the employers to reinstate the worker, they still stand with their decision. Normally they say 'that it is their boss's decision, we are just the company's representative and we have no mandate'* (Conciliator 20).

> *But now we are having another category of businesses which fall under downsizing, reorganization for the purpose of business adequacy so they want to merge, they may want to share some shared services in other companies. They may want to outsource. The business is actually viable and profitable but they have to right sized or reorganization. It is a concept known as redundancy* (Arbitrator 1).

The third emerging theme from the interviews on distributive justice related to the employers' decision to terminate is the fairness of the decision to dismiss the employees. Eight interviewees believed that the decision to terminate in their latest case was unfair (see Table 5.26 above). They felt that employers had not considered the fairness of their decisions and hence did not abide by the concept of fairness. Employers were also said to be unfair in their decision when selecting which employees to retrench. Some interviewees in this group believed the decision could be made without any justification. The reasons for the selection of certain employees were often unclear and hence not accepted by the employees in question. One interviewee also stated that there are instances where employers act in ways where employees have had to resign

due to the pressure placed on them. As one interviewee noted, employers sometimes accuse employees of insubordination even though they might have genuinely voiced a criticism about a company's process. Interviewees whose comments indicate views about the fairness of the employer's decision included the following comments:

> *Normally they are not satisfied with the employers' action where there has been unfairness on the part of employees for example, force resignation or constructive dismissal* (Conciliator 19).

> *You see the employer must be fair to the employee and the employee must be fair to the employer. Fairness is fair play. If you accuse an employee of insubordination, let's look at it, whether you have been fair to the employee. Is he [or she] voicing criticism about the company process, is it a genuine expression of the company's process and just because you are offended, is it fair? Why shouldn't the employee criticise the process? Through criticism, a positive criticism, you have to look at it [positively],if positive criticism is given without any ulterior motive, what's the problem?*(Arbitrator 3).

> *You see, you have got to do equity to both sides. You can't just lean towards the poor claimant. But I think, when it comes to industrial relation, the workman maybe as always got a 10 or 20 percent advantage because the notion is always there that the company being the masters, sort to speak, are in a position to lord over them and could perhaps have taken advantage in handling them as workers* (Arbitrator 7).

> *Some employers are unfair in determining and making the selection of employees to be retrenched. Their decision to decide whom to be retrenched is not clear and very subjective. They have their own requirement but these may not be accepted by the employees* (Arbitrator 8).

Finally, there were five interviewees who spoke about the decision to terminate as being commensurate with the severity of the misconduct committed by the employees (see Table 5.26 above). Each of these interviewees referred to cases which the employee had been accused of gross misconduct. An interesting comment from one interviewee about this issue was how employers define seriousness of misconduct. In the absence of a statutory definition, it is a very subjective issue and one which can be argued from

different perspectives for example, the nature of business. This interviewee provided as an example of a case involving an employee smoking at the workplace where the offense could be considered as serious misconduct if it occurred in a factory but may not be considered that serious if it occurred in an office. Another example provided by an interviewee occurred in the banking industry where the mistake in an accounting figure was considered as serious misconduct whereas this might not have been the case in a different industry. The interviewees who talked about fairness in terms of the equitability of the decisions included:

> *For me it depends on the case. Not all the case, I mean what is fair. I give you an example of a claimant who always drunk has missed his flight in Vietnam. When he came back here, the company terminates him. I think that is fair because that is not the first time, a few times* (Conciliator 1).

> *But if you look at the Industrial Court awards, you also cannot say that the wrongdoing is not severe. For example, clocking the punch card of other employee, the Industrial Court is clear on this. To us it might be a minor issue but to the company it is not. In the banking industry, a figure changed might mean the integrity of the person. The nature of the business is as such trust is important. Most of the dismissal cases have their own basis. The worker might perceive it to be a minor issue. The perception of the worker and the company is different, for example, tampering with medical certificate. A lot of things that the employee thinks are minor misconduct but to the employers it is otherwise* (Conciliator 5).

> *Now, I had a case of one guy who worked at the palm oil mill and he was smoking and that is a very serious offence. Whereas, a guy who is in a hotel is caught smoking, alright, now, it is an offence to smoke in the workplace? But is the penalty going to justify the misconduct? Now, for the refinery [palm oil mill], it was a serious misconduct, whereas a hotel employee, it was a minor misconduct* (Conciliator 8).

This section presented the findings on justice as third antecedent to the referral of claims for reinstatement to conciliation. The thesis considered three forms of organisational justice: procedural, distributive and interactional justice. Many Conciliators remained neutral when asked whether Claimants refer their case to the DIRM because of lack of

justice. However, when asked to provide reasons they reported that a lack of procedural justice was the most common reason for employees pursuing their claims at the DIRM. The interviews conducted with the Conciliators and Arbitrators were used to probe further into the issue of organisational justice in the implementation of in-house mechanisms to resolve disputes. It was discovered the elements of procedural justice which dominated claimant's cases were the right to be heard by the employer at the workplace and the questionable impartiality of the in-house mechanism. Whilst the appeal process for employees who were dismissed was only accorded by big companies, many employees preferred to refer their disputes to the DIRM to avoid exceeding the specified time limit of sixty days under the *IR Act 1967*. In terms of interactional justice, Conciliators and Arbitrators pointed to the manner in which employers inform employees of their decision to terminate. This included conveying a lack of respect, loss of trust and displaying communication barriers. All these forms of interactional justice have in some ways resulted in claimants feeling that their employers have treated them unfairly, leading them to take their frustration to the DIRM.

Many employers reported that they used the internal dispute procedure and stated that they had provided notice in writing before the dismissal and conducted a domestic inquiry and an appeal process. The findings on the appeal process however, showed that employers generally equated it with providing employees with the opportunity to respond to the charge against them.

5.9 Chapter summary

This chapter presented the findings for Research Question 1. It found that although more than three quarters of employers surveyed have written procedures for handling disputes, the majority of these procedures were written without the involvement of their employees or unions. Only about half of employers surveyed refer to two main pieces of legislation in Malaysia: the *EA 1955* and *IR Act 1967* when establishing these procedures while only about one third refer to the Code of Conduct for Industrial Harmony 1975.

The key factors behind the referral of claims for reinstatement to conciliation were problems associated with dispute processes, adherence to laws and precedents and administration of justice as it applies at the workplace. Process factors identified in this chapter include parties' determination to resolve disputes at their workplaces using their dispute procedure, lack of hurdle requirements and the emergence of compensation culture. Although Conciliators reported that some efforts were made by disputants to resolve disputes at their workplaces, these were mostly in larger organisations and by those with the knowledge to handle workplace disputes procedures. Hence, this study found three important factors that predict greater use of workplace disputes: the size of companies, knowledge of dispute procedures, and human resource capabilities. Lack of hurdles in the system have resulted in many cases including non-genuine cases being referred to conciliation which have become a major concern for Conciliators who believe that there should be requirements in place to ensure that disputants make efforts to resolve disputes at their workplaces before referring them to the DIRM. The lack of hurdles also has contributed to a growing compensation culture.

The study found that confusing and conflicting issues related to laws and precedents in Malaysia have also became key factors behind the referral of claims for reinstatement being referred to conciliation. These include ignorance or lack of adherence to the Code of Conduct for Industrial Harmony; loopholes and confusing provisions in the *EA 1955* and *IR Act 1967* as well as the 'curable principle' precedent which have added to the problems and caused disputants to become dependent on the DIRM handle their disputes.

The study found that justice is often not adhered to at the workplace and in particular, many employers do not reliably provide procedural justice. According to the interviewees employers equate the appeals process with domestic inquiry. The impartiality of the domestic inquiries was also questionable and many employees do not have the opportunity to be represented in the process. In terms of distributive justice interviewees were of the opinion that employers often made harsh decisions which could be unfair in the sense that they were not commensurate with the level of

misconduct committed by their employees. Employers were said to place a great deal of emphasis on the needs of their businesses when deciding on retrenchments.

From the perspective of the Employers they believe they are fair in their decisions and generally would not consider changing their mind on equitable grounds such as taking into account an employee's age, seniority, previous positive contribution or their ability to find a job elsewhere. It is likely that given the comments of the Conciliators and Arbitrators, employers overestimate their opinions on how fair they have been to employees. This is complicated by the fact that by the time an employer has dismissed an employee their relationship has often broken down. This was reflected in the findings on interactional justice from the interviewees who noted that a lack of respect when communicating dismissal decisions to employees which can translate to employees as a lack of interactional justice leading them to challenge the dismissal through referral to conciliation.

The next chapter discusses the findings of the thesis in terms of the reasons for the low the low rate of settlement at conciliation.

CHAPTER 6- THE LOW RATE OF SETTLEMENT AT CONCILIATION

6.0 Introduction

The preceding chapter described the findings of the surveys and interviews which answered the first research question on the determinants of referral of claims for reinstatement from the workplace to tribunal conciliation. This Chapter aims at answering the second research question: what are the key reasons for the low settlement rate of tribunal conciliation for reinstatement claims and subsequent high rates of referral to arbitration? In doing so, this chapter discusses the three factors contributing to the low settlement rate of conciliation: the Ministerial process, the possible chilling effect of arbitration and the quality of justice at the DIRM as they are applied at conciliation.

6.1. Reasons for the low settlement rate of conciliation of claims for reinstatement and subsequent high rates of referral to arbitration

This section considers the second research question. Conciliation conducted by the DIRM is the first level of third party dispute resolution aimed at assisting disputants resolve their disputes through supervised negotiation and at avoiding the need for arbitration by the IC. However, as discussed in Chapter 2, the settlement of claims for reinstatement at conciliation is very low compared to other countries with similar tribunal systems such as the UK, New Zealand and Australia. Although the DIRM's performance improved in 2008 as a result of a DIRM headquarters intervention through the initiative of providing second level conciliation, achieving a settlement rate of 71 percent and subsequently reducing the referrals to arbitration to 24 percent, the number of cases pending at the Ministerial level (awaiting permission to progress to arbitration) was still escalating. In 2010 the settlement rate at conciliation had gone down again to 36.9 percent resulting in referral to the IC at 37 percent (see Table 2.9 in Section 2.5.4).
In Section 4.4, the reasons for the high rates of referral of workplace disputes over claims for reinstatement to the DIRM were discussed. These reasons, sourced from the

extant literature formed the investigative framework developed for this thesis. These factors were categorised into three components:

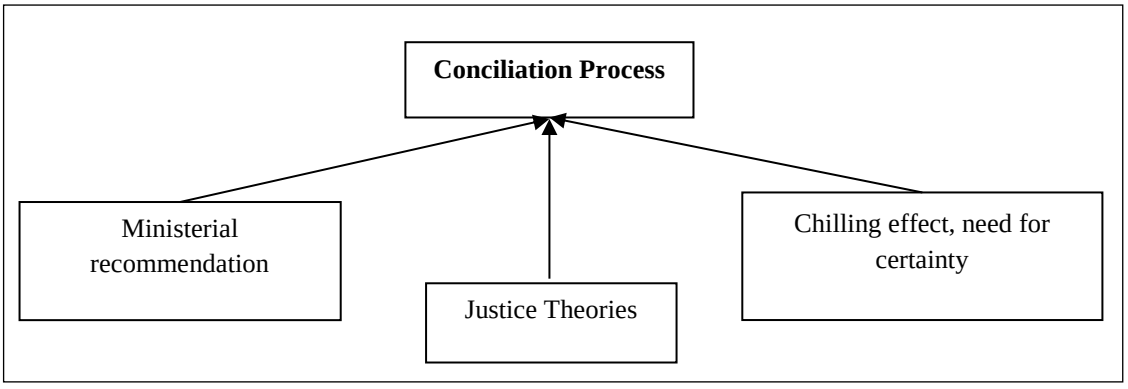
(1) Ministerial recommendations (which are relatively easy to achieve and result in greater numbers of disputes reaching arbitration);

(2) A chilling effect on conciliation, which can be seen as part of the need for certainty (where arbitration can be said to be a significant lure for disputants both in terms of their need for achieving certainty of the outcome of the dispute and the subsequent lack of enthusiasm to settle at conciliation);

(3) The quality of justice as applied at the conciliation (whether disputants feel they would receive better quality justice in the court rather than the DIRM); and

The framework depicting the operation of these hypothesised factors on tribunal conciliation is provided in Figure 6.1.

Figure 6.1 Hypothesised reasons for the low settlement rates of conciliation at the DIRM



The hypothesised reasons behind the high rates of failure of conciliation and the subsequent high rate of referral to arbitration were investigated through two surveys – one to Conciliators from the DIRM and one to employers as they exited a conciliation meeting and arbitration hearing (see Chapter 4 Methodology) as well as interviews with Conciliators and Arbitrators. This section draws on the surveys and the interviews. The section commences with the responses of the Conciliators' Survey before considering

the responses from the Employer's Survey. The final part of this section deals with the interviewee's responses to this issue.

6.1.1 Ministerial recommendation

In Section 2.5.10 the process of Ministerial recommendation prior to referring disputes to arbitration was discussed. Although all unresolved cases at conciliation are reported by Conciliators to the Minister, disputants (particularly claimants) are not guaranteed that their disputes will be referred to arbitration. The Minister has the final and conclusive power in making the decision to refer the dispute to the IC and this can only be challenged through common law under judicial review. Because of the decision making power of the Minister it could be argued that the referral process to arbitration would act to discourage disputants to aim for arbitration as they have no certainty the Minister will recommend such a move. Hence, it would seem logical that disputants would be more willing to resolve their disputes using conciliation.

Responses from the Conciliators' Survey

The survey of Conciliators found that only 26.2 percent (11 Conciliators) believed that the requirement of Ministerial recommendation discourages disputants to proceed to arbitration and 73.8 percent (31 Conciliators) stated that it would not deter parties' determination to arbitration (Table 6.1). So, whilst the decision to progress to arbitration is technically out of the hands of the disputants, Conciliators confirm that disputants demonstrate a confidence in having their case heard at arbitration which enhances their confidence in pursuing arbitration.

Table 6.1 Ministers' requirement to refer case to the arbitration.

Do you think that the current process of referring cases by merit through Minister's recommendation discourages parties' determination to go to arbitration?	Number of Conciliators	Percentage
Yes	11	26.2 %
No	31	73.8 %
Total (N=42)	42	100 %

Source: Survey of Conciliators

Conciliators were asked to indicate in the survey why they believe many disputants were still determined to have their dispute heard at arbitration despite having to go to through the process of Minister's recommendation. Of the 42 Conciliators who responded to the survey, 33 Conciliators provided a written response. As Conciliators were able to provide multiple responses, a total of 47 comments were received. These were categorised into eight themes as shown in Table 6.2. Of these, 25.5 percent (12 responses) indicated that despite having to go through the Ministerial recommendation process, disputants are determined to proceed to arbitration as they believe arbitration will provide them with greater justice while 19.1 percent (9 responses) suggested it was due to the need for certainty in resolving their disputes. Another 15 percent (7 responses) focused on the determination of disputants holding on to their principle of not being willing to resolve at conciliation while 10.6 percent (7 responses) suggested it was due to the influence of a third party and another 10.6 percent (7 responses) centred on disputants wanting to exercise their rights under the *IR Act 1967*. Other reasons given by Conciliators in explaining disputants' determination to proceed to arbitration despite the uncertainty of getting a Ministerial recommendation included: to get higher compensation (4 responses), to seek a second chance in settling a dispute (3 responses) and to prove their point (2 responses).

Table 6.2 Reasons for parties' determination to go to arbitration despite having no control over the Minister's recommendation.

Reasons for parties determination to proceed to arbitration	Number of responses	Percentage
Greater justice	12	25.5%
Need for certainty	9	19.1%
Matter of Principle	7	15.0%
Influence of third party	5	10.6%
Exercising rights	5	10.6%
To get higher compensation	4	8.5%
Provide a second chance to settle dispute	3	6.4%
To prove their points	2	4.3%
Total (Open ended questions, N=33)	47	100 %

Source: Survey of Conciliators

The most frequent response of the surveyed Conciliators regarding the determination of parties to have their matter heard at arbitration despite having to rely on the Minister's recommendation were for a more just outcome. Of the 25.5 percent (12 responses) suggesting that the perception of greater justice at arbitration drives parties' determination to proceed to arbitration (Table 6.2), one Conciliator, who typified responses in this category, stated in his or her open ended response that claimants and employers believed that greater justice is associated with cases being examined in detail by the Arbitrator, something not available to the limited role of Conciliators:

> *The claimant and the employer feel that they will get better justice in the Court because the Chairman [Arbitrator] will look into the case in detail by examining the fact of the case compare to Conciliator who will just conciliate the matter with limited resources.*

Another similar opinion was that claimants prefer arbitration as they associate justice with getting higher compensation: *'They hope to get good award/high compensation and they feel that Industrial Court can give more [better] justice'*. Similarly: *'Because they think at the Industrial Court they have another chance to bring the case and the judge can give [a] fair hearing'.*

The second key reason provided by Conciliators was that disputants are driven to arbitration because they seek certainty in the outcome of the dispute resolution process. In other words, whilst conciliation might provide a negotiated settlement from gaining the agreement of the parties, the Conciliators believe that disputants prefer the finality of a decision made by a court. Of 19.1 percent (9 responses) in this theme (Table 6.2), one Conciliator wrote that disputants believe it is the authority of an Arbitrator to make a final decision which is the most important aspect of arbitration: '*The Chairman [Arbitrator] has authority to decide on the case. This gives the image of more powerful, just and more authoritative in making decision'.* Two other Conciliators shared a similar opinion on this issue with both arguing that arbitration is able to provide a definite outcome for the disputes as opposed to conciliation. One Conciliator added that adherence to dispute outcomes is actually enhanced when the decision is imposed on the disputants: '*to get a definite decision and [disputant] mostly accept the decision'.*

Another Conciliator believed that the acceptance of the imposed outcome by disputants is due to Arbitrators having the authority to decide matters or issues in disputes which disputant could not get from Conciliators: '*Because Industrial Court has [the] power to make a decision rather than the officer from the Department of Industrial Relations [Conciliator]'.*

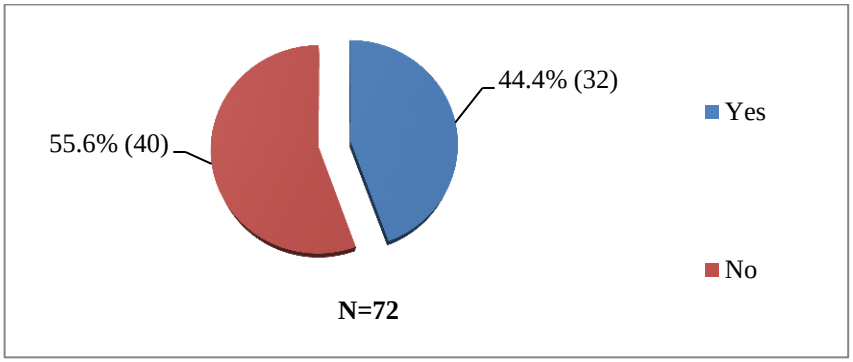
The third key reason behind the determination to progress to arbitration according to Conciliators is because disputants see it as a matter of principle. As shown in Table 6.2, 15 percent (7 responses) suggested that parties are determined to proceed to arbitration as a matter of principle. One response which typified this category suggested that big companies are the most adamant: *'Big companies tend to stand by rigid principle and refuse to negotiate due to the Claimants' bad behaviour'.* Another response stressed that employers and claimants refused to resolve their disputes at conciliation as a matter of principle and hence would stand by their decision. This Conciliator also believes that disputants' principles are often influenced by third parties providing advice: *'The employer and employee still stick to their decisions based on the principle of third party'.* The role played by third party was listed as the fourth reason for disputants' determination to proceed to arbitration with 10.6 percent (5 responses). In this category all of the Conciliators believed that disputants are influenced by third parties such as union officials, lawyers and labour consultants to proceed to arbitration. The fifth reason given by Conciliators as to why parties are determined to proceed to arbitration is that claimants wish to exercise their rights under the law. This argument was shared by 8.5 percent (4 responses) with one Conciliator: '*there is no other option available other than Section 20 [right to file claim for reinstatement] of the Act [IR Act 1967]'*.

Responses from the Employers' Survey

The determination to proceed to arbitration despite the requirement for a Ministerial recommendation was also raised in the Employers' Survey to obtain their perspective. Of the 83 employers who completed the survey as they exited their conciliation meeting or arbitration hearing 72 responded to the question: 'Do you prefer your case to be decided through arbitration at the Industrial Court?' Of these, 44.4 percent (32 employers) indicated that they prefer arbitration and the majority, 55.6 percent (40

employers) indicated that they do not prefer arbitration to resolve the disputes (Figure 6.2). Whilst the finding is at odds with the rising number of cases progressing to arbitration, it nevertheless is in line with Conciliators' perceptions that employers come to conciliation with a determination to settle at that stage suggesting it is mostly employees seeking arbitration (see Section 6.1.2).

Figure 6.2 Employers' preference for arbitration



Source: Survey of Employers

Of 32 employers who prefer arbitration, 53.2 percent (25 employers) indicated that it provides greater justice while 23.4 percent (11 employers) indicated that it provides certainty of settlement and 21.3 percent (10 employers) said it provides a greater chance of settlement (Table 6.3). There was only one employer who provided an open ended comment indicating that arbitration provided a means for both parties to express their views. The said employer wrote: *'so that both parties can view [present] their points'*. These reasons are consistent with the findings of the Conciliators' Survey as discussed earlier.

Table 6.3 Reasons given by employers who prefer arbitration

Reasons given by employers who prefer arbitration	Number of responses	Percent
It provides greater justice	25	53.2%
It provides a certainty of settlement	11	23.4%
It provides greater chance of settlement	10	21.3%
Others	1	2.1%
Total (Questions with multiple answers, N = 32)	**47**	**100 %**

Source: Survey of Employers

Employers who stated that they do not prefer arbitration were also asked to provide their reasons. As shown in Table 6.4, of the 40 employers who do not prefer to resolve their dispute through arbitration 52.7 percent (29 employers) indicated that it is time consuming and 36.4 percent (20 employers) said it is costly. The remaining 10.9 percent (6 employers) provided open ended comments including: arbitration tarnishes the image of the company and the difficulty of providing witnesses.

Table 6.4 Reasons given by employers who do not prefer to arbitration

Reasons given by employers who do not prefer to arbitration	Number of responses	Percent
Time consuming	29	52.7 %
Costly	20	36.4 %
Others	6	10.9 %
Total (Questions with multiple answers, N=40)	**55**	**100 %**

Source: Survey of Employers

The Interviewees' Responses

The interviews conducted with Conciliators and Arbitrators attempted to explore this matter further. A total of 31 interviews were conducted and the responses were themed and analysed using NVivo 8 as described in Chapter 4 (Methodology). As shown in Table 6.5 two main issues emerged from the interviewees when questioned on the issue of the Ministerial recommendation and its effect (if any) on disputants' desire to have their case heard at arbitration. The first theme centred on the role of the Ministerial recommendation acting as a filter between the conciliation and arbitration phases. The second theme however, envisaged the Ministerial recommendation more negatively, seeing it as a cause of delay in the process of achieving a just outcome.

Table 6.5 The effect of Ministerial recommendation

Issues raised by interviewees	No. of interviewees mentioning the issues	No. of times these issues were raised
Filtering of cases	7	7
Delays dispute resolution	5	5
Total		12

Source: Interviews with Conciliators and Arbitrators

Firstly, seven interviewees believed that the function of the Ministerial recommendation acts as a filtering process to avoid all disputes to progressing to arbitration. One Conciliator, who typified the responses in this theme, was of the opinion that the Ministerial process is essential as it determines that only the cases with merit will proceed to arbitration:

> *To me Ministerial recommendation is good as sometimes when the employees have no case or clear cut case, it would be unfair to the employer. We must have this mechanism. We conduct the meeting [conciliation] first, we have a clear picture, and then we propose to the Minister. It is a burden to the employer if all cases are referred. If there is a good case only then we should refer to the Industrial Court. If there is no case, like fix term contract it should not be referred* (Conciliator 20*).*

An Arbitrator who also shared a similar opinion suggested that without the Ministerial process the floodgates would be opened for cases going to arbitration: '*Of course when a case doesn't go to Minister there will be cascade of cases coming up. Suddenly when you get 1000 cases, definitely there is going to be increase in volume'* (Arbitrator 3).
A Conciliator, who was interviewed, although acknowledging that the final decision lies with the Minister, believed that in some situations, claimants may be wrong but should be given a second chance which will only be possible if the case is referred to arbitration.

> *I feel that some of my cases although the employees were wrong but they deserve a second chance. But my boss has a different view. The final decision is the Minister; we can only recommend* (Conciliator 15).

Similarly another Conciliator also argued that the system of Ministerial recommendation has worked in the past but the problem arises when people perceive it as a hindrance to pursue natural justice due to the delay as the total volume of cases increases.

> *The fact that there is a Minister's decision level means that it not automatically referred. The moment that the case is filed and is not settled during conciliation, it doesn't mean that the case will automatically be referred. People are still aware that there is a possibility that their case might not be referred at the Minister's level based on the merits of the case. That is why the system has worked in the past [filtering cases by merit]. The problem now is due to the total volume of cases. They are now blaming the Minister as a hindrance to pursue natural justice* (Conciliator 12).

A second theme that emerged from the interviews is that the Ministerial process has resulted in delays in resolving disputes over claims for reinstatement. This may cause further injustice especially to claimants who had been genuinely unfairly dismissed by their employers at the workplace. One Conciliator noted that delays due to the Minister's decision making process are often caused by the length of time necessary to look into the details of the cases with his officers at the DIRM headquarters to satisfy him of the merit of the case before making the decision to refer the case to arbitration:

> *At the Minister's level, the cases are delayed because the Minister is busy and needs to question the officers [DIRM headquarters] on the details. That is why the report has to be detailed. If the case [decision of the Minister] is challenged in court [under judicial review] and the details of the report is not there, it is a problem* (Conciliator 22).

Similarly, another Conciliator, who also acknowledged the delays in the system, noted that the process used by the Minister in consultation with a panel of DIRM officers was vital to ensure that only meritorious cases were sent to the IC:

> *The purpose of that panel of assessor is to ascertain the strength of a case, to look at all the documents, to submit proper grounds to facilitate Minister making his decision. He is assisted by four or five*

> *senior officers who will sit down with him [Minister] to go through the cases. So he will question very thoroughly those cases and until he is satisfied that there are sufficient records, sufficient evidence to prove that the case merits either reference or non-reference before he signs the paper* (Conciliator 21).

An Arbitrator from the IC who also spoke about the delays in the process of dispute resolution believed that it could only be avoided if all cases are referred directly to the IC bypassing the Ministerial process as this would ensure speedier disposal of disputes as:

> *My main concern is the system. It's better for the reference to come direct to the court because that is faster. Generally, if there is a dispute, for example in the month of January itself, he [Minister] refers to the IC provided the IR department [DIRM] can hear it in January itself, straight away. That's why [previously] the IR Act provides for three months because it has got to be fresh; the job vacancy is still there. Most of the time, we can't order reinstatement because the case comes up and we hear it after two years. Employer cannot wait. So it frustrates the IR Act [1967] itself because the process delays it* (Arbitrator 3).

This section discussed the effect of Ministerial recommendation on parties' determination to seek arbitration as a way to resolve their disputes. Despite this requirement which supposedly should encourage greater efforts from the parties to resolve at the lower level via conciliation, the Conciliators who were surveyed reported that it has little effect because they (disputants) did not see the step as an obstacle and were of the opinion that arbitration provides them with greater justice than conciliation. Whilst conciliation cannot guarantee a certainty of settlement, arbitration is seen by employers of being able to resolve their dispute with finality of settlement. The interviewees saw the process of Ministerial recommendation is important to ensure that only cases with merit are referred to arbitration and was a filtering mechanism.

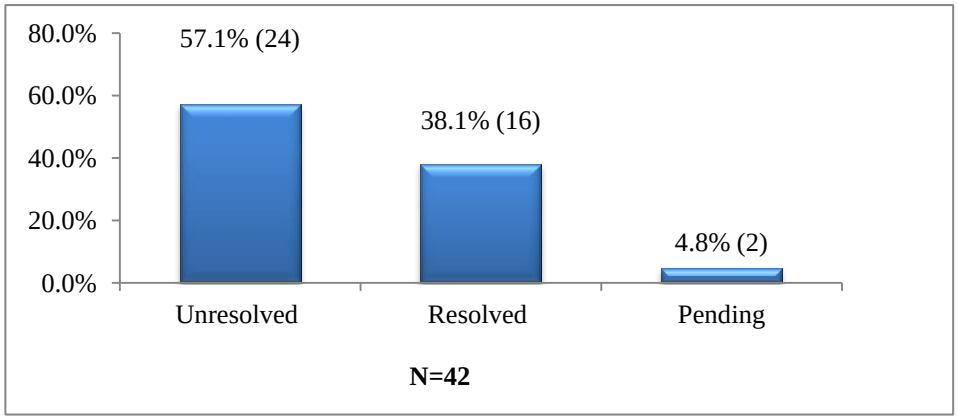
6.1.2 Chilling effect of arbitration on settlement at conciliation

It was hypothesised in Section 2.6 that arbitration can exert a chilling effect on settling a dispute at conciliation because disputants do not feel under pressure to settle when they know they might have their dispute heard more formally and decisively (Ali Mohamed & Sardar Baig 2009).

Responses from the Conciliators' Survey

To investigate whether there might be such a chilling effect on conciliation in the Malaysian industrial relations system, the surveyed Conciliators were asked to reflect on the most recent case that they had handled and provide reasons if that case failed to be resolved through conciliation. Of 42 Conciliators who were surveyed, 57.1 percent (24 Conciliators) indicated that their most recent case was not resolved at conciliation; 38.1 percent (16 Conciliators) stated that the case was resolved and 4.8 percent (2 Conciliators) indicated that their case was still pending (Figure 6.3)

Figure 6.3 Outcome of conciliation in the most recent cases handled by Conciliator



Source: Survey of Conciliators

As shown in Table 6.6, 26 Conciliators provided explanations for the factors which may have contributed to the failure to settle at conciliation (24 Conciliators whose cases failed to be resolved through conciliation and two Conciliators whose cases were still pending at the time of the survey). As they were allowed to answer more than once, the number of responses received was 49 comments. Of these, 34.7 percent (17 responses)

focused on the claimant's unrealistic expectation as a factor contributing to the failure of settlement at conciliation while 24.5 percent (12 responses) indicated that the failure of conciliation was due to claimants' determination to proceed to arbitration. The lack of the employer representative's authority to negotiate contributed to the failure of settlement at conciliation was noted in 16.3 percent (8 responses) while 14.3 percent (7 responses) indicated that it was due to the employer's determination to proceed to arbitration. In addition, 6.1 percent (3 responses) noted that employees' lack of knowledge or skills to negotiate contributed to the failure of settlement at conciliation. There were two Conciliators who provided additional written comments. One wrote that the conciliation had failed due to the claimant's refusal to resolve the dispute at conciliation although the employer had agreed to settle: *'The management agree to resolve the matter at the conciliation level i.e. reinstatement but claimant refused'.* Another stated that the: '*Employer believed that they have done the right thing and there is no need for them to consider the claimant's claim'.*

Table 6.6 Factors that contribute to the failure of settlement at conciliation

Did any of the following contribute to the failure of settlement at conciliation?	Number of responses	Percentage
Claimant's unrealistic expectation	17	34.7%
Claimant's determination to proceed to arbitration	12	24.5%
Employer representative's lack of authority to negotiate	8	16.3%
Employer's determination to proceed to arbitration	7	14.3%
Claimant's lack of knowledge/ skills to negotiate	3	6.1%
Others	2	4.1%
Total (Questions with multiple answers, N=26)	**49**	**100 %**

Source: Survey of Conciliators

Responses from the Employers' Survey

The issue of the chilling effect of arbitration on settlement at conciliation was also put to the employers on their exit from their hearing. There were a total of 73 employers

who indicated the status of their recent case for which they had attended conciliation at the DIRM. Of these, 42.5 percent (31 employers) had their cases settled at the conciliation, 49.3 percent (36 employers) stated that their cases were not settled and 8.2 percent (6 employers) had their cases pending (Table 6.7).

Table 6.7 Employers response on the outcome of the most recent conciliation

Outcome of the most recent conciliation	Number of employers	Percent
Not settled	36	49.3 %
Settled	31	42.5 %
Pending	6	8.2 %
Total (N= 73)	**73**	**100 %**

Source: Survey of Employers

As shown in Table 6.8, there were 39 employers who provided reasons for why their disputes were not resolved at conciliation. Of these, the majority, 56.4 percent (22 employers) indicated that the claimants had refused to settle and preferred to proceed to arbitration. Another 23.1 percent (9 employers) however, indicated that they themselves or their more senior management preferred to proceed to arbitration. Finally, 20.5 percent (8 employers) provided other reasons including that employees had withdrawn the case; that there was no case against the company; the company had proven the misconduct; and that the claimant demanded RM50,000 compensation.

Table 6.8 Employers' reasons for the failure of the case to be settle at conciliation

Reasons for the failure of the case to be settle at conciliation	Number of employers	Percent
Employees refused to settle and preferred to proceed to the IC.	22	56.4 %
I (The Management) preferred to go to the arbitration at the IC	9	23.1 %
Other	8	20.5 %
Total (N=39)	**39**	**100 %**

Source: Survey of Employers

The Interviewees' Responses

The interviews conducted with Conciliators and Arbitrators provided another opportunity to investigate the possible chilling effect of arbitration on conciliation settlement. There were three main themes emerging from the interviews. The first theme centred on the power and authority of Arbitrators to be able to ensure the certainty of dispute settlement. There were 11 interviewees who spoke about this theme as shown in Table 6.9. For example, One Conciliator focused on the reduced authority of Conciliators compared with Arbitrators: '*We have lack of authority. That is the main reason. If we are given the authority, let me tell you, just check our settlement rate* (Conciliator 2)*'.* Another Conciliator who had a similar opinion and had more than 20 years of experience with the DIRM said that having authority will make it easier to get parties to a settlement rather than simply relying on persuasive power as a Conciliator:

> *The same thing is being done in the Industrial Court. They will promote a settlement first. They will use all means to discourage a trial. They will encourage a settlement. They will tell the lawyers,' please settle, you settle, settle, you settle, you settle'. [It's the] same thing here. Our way is different. Our way is we don't have authority. We only use the persuasive power. The courts have the authority. When the courts say 'you settle it, I want you to go back and think about it and make a proposal and settle the matter'. Now, with authority, when you say that there will be a settlement. Now if you give us that authority, 'ok, you don't settle, then ok, we go on a trail and I make a decision'. Very simple* (Conciliator 8).

Table 6.9 Chilling effect of arbitration

Issues raised by interviewees	No. of interviewees mentioning the issues	No. of times these issues were raised
Authority	11	19
Greater compensation	10	12
Matter of principle	11	21
Total		52

Source: Interviews with Conciliators and Arbitrators

It would appear that the lack of power is not simply one of the weaknesses of conciliation over arbitration. In fact many Arbitrators utilise either mediation or conciliation to resolve the disputes before them as shown in Table 6.10. For example, of the 85 who requested for mediation in 2008, 45 cases were resolved without full hearing which represents a 52.9 percent settlement rate (Industrial Court of Malaysia 2011). This function is however, voluntary and subject to consent from parties in disputes (see Section 2.1.1).

Table 6.10 Mediation by the Industrial Court

Mediation at the IC	2005	2006	2007	2008	2009	2010
Number of cases requested for mediation *	186	107	109	85	11	42
Number of cases resolved	93	31	52	45	5	20
Percentage of cases resolved	50.0 %	28.9 %	47.7 %	52.9 %	45.5 %	47.6%

* Note: Mediation will only be conducted with consent from parties in disputes.
Source: Industrial Court, 2011

Another Conciliator, also with more than 20 years work experience, argued that because the role is limited to facilitation, Conciliators are at a disadvantage when they try to bring parties to settlement:

> *It is common sense that when we speak about Conciliator, despite his [her] skill to get the parties to come to their senses to resolve their problems but if the person knew that the Conciliator is just there to facilitate his settlement without empowered or very limited power to interrogate, to inquire and the representation of documents, I think it makes the job quite difficult. So when we speak of conciliation, there must be certain degree of the power to demand the production of certain papers, document and what not* (Conciliator 21).

The importance of authority in bringing about a settlement at conciliation is not only accepted among Conciliators but also Arbitrators. One Arbitrator stated that the reduced authority of Conciliators influences the settlement behaviour of disputants:

> *It could be because sometimes the claimant or the company [employer] is willing to hear it from the Chairman [Arbitrator], not an officer [Conciliator]. I might be in a position to better influence and have the power, so as to speak, over a company's representative, or a lawyer or a claimant for that matter that come before me. What I say seem to have an effect and impact in them as opposed to the Industrial Relation Officer [Conciliator]. I sit in the capacity of adjudicator* (Arbitrator 7).

Another Arbitrator noted that if Conciliators had sufficient authority, fewer cases would progress to the courts:

> *I believe that Conciliators must have power and authority. It is difficult to just rely on cooperation between parties. There must be authority! There must be authority to get the employers and employees cooperation at the department [DIRM] level. Only cases in which there is fifty percent chance should be referred to court (Arbitrator 8).*

The second theme identified from the interviews with Conciliators and Arbitrators regarding the chilling effect of arbitration on settlement rates at conciliation is greater compensation. Despite the emphasis of *Section 20* on reinstatement as a remedy for unfair dismissal, the trend in the IC has been to award compensation (Hassan 2007; Ali Mohamed 1998). Ten interviewees noted that compensation was a key factor driving the lack of settlement at conciliation (Table 6.9). Arbitrators have the authority to award compensation in lieu of reinstatement when they are satisfied that it would not be harmonious for both parties to be reconciled. One Conciliator, said that there are times the difference in compensation asked by claimant and the amount which the employer is willing to pay is very large and there is little chance the matter could be settled at conciliation:

> *Sometimes the margin of their proposal is very wide, very far apart. So the chances are, there are going to be no settlement. If an employee turns up and say, 'I need 24 months as compensation if you don't reinstate me back', I think no employer is going to pay that because at the end of the*

> *day, if it goes to the court and that is what the award is going to be. At least he [the employer] will have the chance of fighting over there, rather than here, paying him [employee] off that amount* (Conciliator 8).

Another Conciliator who shared the same opinion noted the changed industrial laws which now allow for back payment of wages as a motivating factor for claimants: '*Before last year [2008] there was no limitation of back wages and hence there is a big quantum of money waiting. They [claimants] only see the quantum of compensation'* (Conciliator 20).

The third factor which might indicate a chilling effect of arbitration on the settlement rates of conciliation identified by the interviewees is where employers see it as matter of principle not to settle at the conciliation (Table 6.9). Eleven interviewees raised issues around principles that employers see as important. For example, one Conciliator noted that employers may resist settling at conciliation because it might be seen as a weakness by employees:

> *They [employers] don't want to pay [compensation] because of their principle. 'We don't want to pay because other employees will look it as if our company is giving in'. As IR Officer [Conciliator] we try our best. If you ask outsiders they have different views of our department where they say that we take an easy approach meaning we take an easy way by reporting the case [to the Minister via DIRM headquarters] rather than pursue a settlement* (Conciliator 15).

Another Conciliator said that there are employers who feel that all disputes should go to arbitration. The Conciliator also stated that some employers attended conciliation only to satisfy the requirement of the *IR Act 1967* with no intention to resolve the dispute:

> *Another factor is a matter of principle where employers feel that all dispute should go to court. In essence they say that conciliation is just to satisfy the need of the Act. Although they know that they have made a mistake, still they want to the court to decide on the dispute* (Conciliator 16)

This section examined the possibility that arbitration exerts a chilling effect on settlement at conciliation. The findings of the Conciliator and Employer Survey and the interviews with Conciliators and Arbitrators revealed a range of factors which have varying degrees of influence on the parties to press for arbitration rather than settle at conciliation. These include the unrealistic expectations of parties which cannot be resolved through negotiation; a determination and preference by employers or employees to proceed to arbitration; the lack of Conciliator authority; employees' lack of knowledge and skills in negotiation; the lure of greater compensation at arbitration; and employer principles.

6.1.3 Justice at the conciliation

This section aims to explore how disputants view the fairness of the conciliation process and the extent to which arbitration is sought as an avenue to seek justice. This does not imply that conciliation does not provide an avenue for justice to both parties, but given that Conciliators lack the same power and authority as Arbitrators the survey and interviews sought to determine how this might affect the intentions of the parties in their search for justice. Our discussion of justice in as far as it applies in the conciliation process includes distributive justice (fairness of the decision), the procedural justice including the issue of representation and interactional justice. While in theory the procedural and interactional justice have been frequently discussed as two distinct concepts (Bies & Moag 1986), in practice the understanding of these two elements of justice is much more organic and merged. This research has found that the practical experience of the respondents did not reflect clear boundaries between the two components of justice as will be seen below.

6.1.3.1. Distributive justice at Conciliation

As discussed in Chapter 3, distributive justice is the fairness of the outcome of the dispute. In the conciliation process at the DIRM the outcome is not determined by the Conciliators, but the parties themselves must make an attempt to decide whether they wish to resolve the dispute. The limitation of Conciliators participating in shaping the outcome was explored in the survey and interviews.

Responses from the Conciliators' Survey

The Conciliators were asked to indicate the form of settlement taken in their most recent case and as shown in Table 6.11, of 16 disputes settled at the conciliation, 14 were resolved through payment of compensation to the employee while only two cases resulted in the employees being reinstated. Whilst two cases remained pending at the time of survey, 24 cases were declared unresolved.

Table 6.11 Forms of settlement of the Conciliators' most recent conciliation

Outcome		Frequency
Resolved		16
Compensation	*14*	
Reinstatement	*2*	
Unresolved		24
Pending		2
Total (N=42)		42

Source: Survey of Conciliators

As discussed in Section 6.1.2, the main reason for unsettled cases was due to claimants' high expectations of their outcome (see also Table 6.6 in Section 6.12). Of the 26 unsettled and two pending cases at conciliation, more than a quarter (17 cases) were not settled because of claimants' high expectations while 12 cases did not settle because of claimants' determination to proceed to arbitration and 7 cases because of employers' determination to proceed to arbitration.

Responses from the Employers' Survey

As discussed in Section 6.1.2 (see Table 6.7), of 73 employers who reported the outcome of their most recent conciliation at the DIRM, 49.3 percent (36 cases) were not resolved while 42.5 percent (31 cases) had their disputes settled via conciliation. Table 6.12 shows that of the 31 cases resolved at conciliation, more than half of (64.5 percent) were settled through compensation while nine cases (29.0 percent) resulted in reinstatement. Two cases were resolved with other mode of settlements including one case where the employee was given a discharge letter and a good testimonial and another case where employee was given a small amount of cash as settlement. Whilst 8.2 percent (six cases) was still pending, 49.3 percent (36 cases) were unresolved.

Table 6.12 Forms of settlement of Employers' most recent Conciliation

Number of cases and mode of settlement	Number of responses/ percentage
Number of cases resolved	31 *(42.5 %)*
Compensation	*20 (64.5%)*
Reinstatement	*9 (29.0 %)*
Other	*2 (6.5 %)*
Number of cases still pending	6 *(8.2 %)*
Number of cases unresolved at conciliation	36 *(49.3 %)*
Total	*73 (100 %)*

Source: Survey of Employers

Of the 36 employers whose cases were unresolved at conciliation, 15 employers provided reasons and these were grouped into two categories: employer driven outcomes and employee driven outcomes (Table 6.13). The reasons associated with employer driven outcome include '*the settlement still under review of management'* and another stated '*waiting for the management to decide'.* Other reasons considered to be under this category related to employers' determination to proceed to arbitration (see Section 6.12) with one employer who wrote: '*cases to be referred to the Minister'* while another employer wrote: '*the management prefer to go to court'*

The reasons for unresolved cases at conciliation which relate to employee driven outcomes include a: '*failure of employee and [name of the association of employees' union] to attend'.* Another reason considered to be related to the employees' outcome was where an employer was unwilling to accept employee's demand for a much higher amount than what was offered: '*the company proposed to pay 1 month salary but the worker wants 24 month*s' while another employer wrote: *[the employee] wanted MONEY, He wanted RM50,000'.* Another employee related reason for non-settlement was when employers were not able to accept the proposed reinstatement because the decision to dismiss was equitable with one employer stating that: '*Reinstatement claim by employee not possible, fair decision by manager'* and another employer wrote: *'Reinstatement proposed by employee was not an option'.*

Table 6.13 Categories of reasons for failure of settlement at conciliation

Categories of reasons for failure of settlement at conciliation	Number of responses/ percentage
Employer's driven outcome	8
Employees' driven outcome	7
Total	15

Source: Survey of Employers

The Interviewees' Responses

As mentioned earlier, the decision or outcome of conciliation depends on the willingness of the disputants to agree. All of the interviewees were aware of this fact and many even stated clearly that decisions lay with the parties and the Conciliator's presence at the conciliation process is merely to facilitate the process by ensuring that the negotiation process is equitable to both parties: *In IR [Department of Industrial Relations] we don't decide, but we can give our opinion but not to the extent of making it difficult for everybody. We try to be fair* (Conciliator 7). Table 6.14 shows the number of interviewees who spoke about the reasons why disputants were not able to accept the proposed settlement at conciliation. These are categorised into three themes: not being able to agree on the quantum of settlement; the impracticality of reinstatement; and deservedness of the outcome.

Table 6.14 Interviewees' opinion on distributive fairness of the outcome of conciliation

Issues raised by interviewees	No. of interviewees mentioning the issues	No. of times these issues were raised
Unable to agree on the quantum of compensation	11	15
Impracticality of reinstatement as settlement	7	8
Deservingness	4	5
Total No. of times these issues were raised by interviewees		28

Source: Interviews with Conciliators and Arbitrators

As shown in Table 6.14 above, 11 interviewees spoke about the difficulty of getting disputants to agree on the quantum of compensation as an alternative settlement to reinstatement. For example, one Conciliator noted that employees were not happy when the difference between their expected settlement and what the employers were willing to offer was often considerable:

> *Even if the employer is willing to pay, it would not be that high. Some employer would offer six months and the employee want 24 months wages and [he or she] have no intention to negotiate to reduce the amount* (Conciliator 7).

Another Conciliator who also spoke on the quantum of settlement stated that it was difficult to get disputants to agree because there are no standard guidelines or benchmarks: '*Sometimes it is more about the quantum of compensation, That's why now the compensation for permanent employees [confirmed in the service] is capped for 24 months while [those on] probation is 12 month* (Conciliator 20). This capping of compensation however, has not changed the attitude of claimants seeking compensation (see Section 2.5.2).

The second theme which interviewees believed had affected the willingness of disputants to accept the outcome of the conciliation is the impracticality of reinstatement as a mode of settlement. This was spoken by seven interviewees as shown in Table 6.14. One interviewee spoke about the possibility of the employees being mistreated when they returned back to work because of the broken relationship leading to the dismissal:

> *Now, the worker has to go back to work, and he [she] knows that the employer will ill-treat or find ways to get back to him [her] when he [she] goes back [to work]. The employer had terminated him [her] and now you said reinstatement, ok, you go back, [and] there is always a question mark on the relationship itself* (Conciliator 12).

Another interviewee believed that in some cases employees were not willing to accept reinstatement because they were already being employed by another employer: '*Some employer wants to reinstate but the employee has got another job' (Conciliator 15).* On

the other hand, employers may also not be able to accept a reinstatement outcome because the position may have been filled by someone else as noted by another interviewee: '*Remember! you reinstate employee to his former positions, there is already somebody there. It doesn't work that way either'* (Arbitrator 7). Employers may also find it difficult to re-employ a dismissed employee because the company itself may not be financially stable: '*In times of recession employers are also unable to reinstate back the complainants'* (Conciliator 18).

The third theme that interviewees believe had affected the acceptance of outcomes among claimants relates to whether the settlement is commensurate with the loss of income as a result of being unemployed. As shown in Table 6.14 above, four interviewees have this similar line of thought. One interviewee stated that claimants who were still not able to find another job would weigh the outcomes (usually compensation) against the prospect of getting another job in the future because the settlement amount may not be enough to cover the period of which they would be unemployed.

> *First, they [employees] are not happy with their employers' action and secondly they feel that the settlement does not guarantee them [of their livelihood] as they have lost the employment. If they accept the money, it would be gone in a short time* (Conciliator 13).

Similarly, another interviewee was of the opinion that the outcome of conciliation may not be acceptable to employees because it does not meet their expectations, particularly when employees are of an older age and who may find it difficult to get another job or a job with a similar wage:

> *It [settlement] has an effect on the employees for example, those that have almost at the retirement age where their salary are high enough, so they are unsure whether they can get the job of such income or whether they can find another job or not. We are afraid that the employees will become a victim* (Conciliator 19).

This section has highlighted issues pertaining to distributive fairness of the outcome of the conciliation. The findings from the Conciliators' Survey suggest that disputants are concerned whether the settlement is fair and equitable to them. One major concern of

disputants is about the amount of compensation. Whilst findings from the Conciliators' Survey were that employees expect higher compensation, the Employers' Survey found that they would rather proceed to arbitration than agree on the employees' demands. The interviewees also found that the outcome must be seen to be distributively fair for it to be accepted by either party. The themes that relate to the distributive justice emerging from the interviews include the inability of disputants to agree on the quantum of compensation, the impracticality of reinstatement as settlement and whether the settlement is commensurate with the loss of job.

6.1.3.2 Procedural justice (fairness of the process) and Interactional justice

As discussed in Section 3.12 disputants will perceive a greater sense of procedural justice when the process allows them greater voice and influence over the final decision (Johnson, Holladay & Quinones 2009). Hence, parties need to be able to adequately present their case to ensure that they are able to voice their issues during the conciliation process (Wheeler, Klaas & Mahony 2004; Genn & Yvette 1989). One way which assists parties to adequately voice their concerns and present their case is to be adequately represented, by a union or other qualified representative (Peetz & Todd 2001). The literature also indicates that when employees are represented by a union there is a greater chance of them getting a favourable outcome (Genn 1993).

Responses from the Conciliators' Survey

The issue of representation was put to the Conciliators in their survey. Table 6.15 indicates that 44 percent (18 Conciliators) disagreed and a further 14.6 percent (6 Conciliators) strongly disagreed that when claimants are represented by union there is a greater chance of settlement at conciliation. A large group of 34.1 percent (14 Conciliators) remained neutral on this issue while only 7.3 percent (3 Conciliators) agreed. On the other hand, more than half of Conciliators agreed that when claimants had the ability to negotiate, prepare and advocate their own cases at conciliation there is a greater chance of settlement as shown by 58.5 percent (24 Conciliators) who agreed and 12.2 percent (5 Conciliators) strongly agreed. Whilst 7.3 percent (3 Conciliators) disagreed on this matter, 22 percent (9 Conciliators) remained neutral (Table 6.15).

Table 6.15 Conciliators' opinions on representation and ability of claimant to advocate their cases at conciliation.

Representation and ability of claimants at conciliation	Percentage/Number of responses				
	Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree
When claimants are represented by a union, there is a greater chance of settlement achieved at conciliation (N=41).	-	3 *(7.3%)*	14 *(34.1%)*	18 *(44.0 %)*	6 *(14.6 %)*
When claimants have the ability to negotiate/advocate their cases at conciliation, there is a greater chance of settlement (N=41)	5 *(12.2 %)*	24 *(58.5 %)*	9 *(22.0 %)*	3 *(7.3 %)*	-

Source: Survey of Conciliators

When Conciliators were asked about the effect of employers' representation (such as by their HR) at conciliation, the survey found that if employers or their representatives had the ability to negotiate at the conciliation there was a greater chance of settlement as indicated by 68.3 percent (28 Conciliators) who strongly agreed and agreed with this statement while only 4.9 percent (2 Conciliators) disagreed and 26.8 percent (11 Conciliators) remained neutral. Further, when the employer or the employer's representative had the power to make a settlement in conciliation there is a very strong chance that the matter will be settled as 78.6 percent (33 Conciliators) strongly agreed and agreed while only 2.4 percent (1 Conciliator) disagreed with 19 percent (8 Conciliators) remained neutral (Table 6.16). These findings under pin the importance of having the right decision makers at the table during conciliation negotiations.

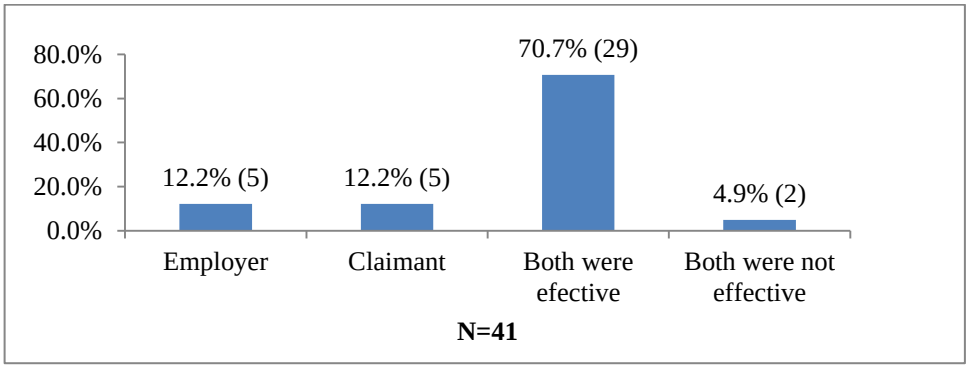
Table 6.16 Conciliators' opinions on employers' ability and authority at conciliation

Employers ability and authority at conciliation	Percentage/Number of responses				
	Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree
When the employer or his/her official has the ability to negotiate at the conciliation, there is a greater chance of settlement (N=41)	8 *(19.5 %)*	20 *(48.8 %)*	11 *(26.8 %)*	2 *(4.9 %)*	-
When the employer or his/her official has authority to make a decision at the conciliation, there is a greater chance of settlement (N=42)	16 *(38.1 %)*	17 *(40.5 %)*	8 *(19 %)*	-	1 *(2.4 %)*

Source: Survey of Conciliators

The survey of Conciliators also attempted to find out how Conciliators dealt with imbalance of power during the conciliation process based on the most recent case which they had handled. Conciliators were asked which of the parties (employees or employers) was more effective in presenting their case and how they handled the weaker party. It was found that 70.7 percent (29 Conciliators) believed that both parties were effective in presenting their cases at conciliation while only 12.2 percent (5 Conciliators) thought that employers were more effective. Another 12.2 percent believed that claimants (employees) were more effective and 4.9 percent (2 Conciliators) stated that both parties were not effective (Figure 6.4).

Figure 6.4 Conciliators' opinion on which of the parties was more effective during the most recent conciliation.



Source: Survey of Conciliators

Despite the overwhelming belief by Conciliators that the parties before them had equal ability to present their case, 21 Conciliators provided 24 open ended responses on how they would handle a weaker party during the conciliation (Table 6.17). Nearly one third (7 responses) indicated that Conciliators will guide the weaker party during the conciliation. For instance one Conciliator wrote that he or she would '*Guide the party to present their case, suggest the documents the party should bring to making the conciliation more effective'.* Another 25 percent (6 responses) stated that a split meeting with the weaker party would be held. For example, one Conciliator stated that he or she would *'separate the meeting and guide the weaker party so do not obviously show the other party*'.

Six responses indicated that Conciliators would use a fact-finding approach with one Conciliator described this as using '*a fact-finding approach by actively asking questions to the parties*' and a further 20.8 percent (5 responses) nominated use of Conciliator influence to help the weaker party (Table 6.17).

Table 6.17 Conciliators' method in handling the weaker party during conciliation

Method of handling the weaker party during conciliation	Number of responses	Percentage
Guide the weaker party	7	29.2 %
Conduct a split conciliation meeting to give chance for the party to talk	6	25.0 %
Actively ask question (fact finding)	6	25.0 %
Use influence	5	20.8 %
Total (N=21)	**24**	**100 %**

Source: Survey of Conciliators

As discussed in Section 3.1.1 interactional justice refers to the disputants being treated with respect and dignity (Bies & Moag 1986). From the survey of Conciliators, by far

the greater majority of 85.7 percent (36 Conciliators) both strongly agreed and agreed that when parties are treated with dignity and respect at the conciliation, there is a greater chance of settlement while only 7.2 percent (3 Conciliators) disagreed and another 7.1 percent (3 Conciliators) remained neutral (Table 6.18).

Table 6.18 Conciliators' opinions on interactional justice at conciliation

Interactional justice at conciliation	Percentage/Number of responses				
	Strongly Agree	**Agree**	**Neutral**	**Disagree**	**Strongly Disagree**
When both parties are treated with dignity and respect at the conciliation, there is a greater chance of settlement (N =42).	20 *(47.6 %)*	16 *(38.1 %)*	3 *(7.1 %)*	2 *(4.8 %)*	1 *(2.4 %)*

Source: Survey of Conciliators

Responses from the Employers' Survey

The survey of employers also provides insights into their opinions on justice in the conciliation process. As presented in Table 6.19 there were 46 employers who responded to the open ended question about the process of conciliation conducted by the DIRM and a total of 51 responses were received as some employers provided more than one response.

Table 6.19 Employers' Opinions on the process of conciliation

Employers' Opinions on the process of conciliation	Number of responses	Percentage
Positive opinions		
Conducted in a professional manner	25	49.0 %
Fair and Impartial	4	7.8 %
Quick and save the employers time	3	5.8 %
Conciliation provide knowledge about good workplace practice	2	3.9 %
Benefiting both parties	2	3.9 %
Useful	1	2.0 %
Interesting	1	2.0 %
Total positive opinions	**(38)**	
Negative opinions		
Should have been more effective	7	13.7 %
Bias towards employee	3	5.9 %
Time consuming	1	2.0 %
Difficult to reach settlement	1	2.0 %
Conciliators push for a settlement	1	2.0 %
Total negative opinions	**(13)**	
Total (Open ended responses N=46)	**51**	**100 %**

Source: Survey of Employers

Of 51 responses about the fairness of the conciliation process received, 38 were positive comments and 13 were negative comments. Among those who provided positive comments, nearly half (49 percent) indicated that the conciliation process was conducted in a professional manner while 7.8 percent (4 comments) noted that it was a fair and impartial process but at the same time provided suggestions for improvement. For example, one employer stated '*Quick fair and neutral, [the Conciliator] listens to*

both sides problem and understands the case well. I would suggest that the department advise employer and employee in a way on how to settle the problem'. Another wrote *'generally very fair and transparent to both parties. Most of the time [the] explanation given by officer [Conciliator] is easy to understand and [is] clear'*. More positive comments were that the conciliation process provides a speedy method of dispute settlement and that it saves the employers' time, providing knowledge about good workplace practice, benefiting both parties, and is useful and interesting.

Of those who gave negative comments, 13.7 percent (7 comments) were of the opinion that the process could have been more effective. For example, one employer wrote *'It would have been more effective if the process includes recommendation and alternative[s]/options of settlement'*. Another employer noted that the Conciliator was not very knowledgeable on the law *'[the process is] poor, officers [Conciliators] handling [the cases] are not well versed in IR [Industrial Relations] matters.[Conciliator] merely there to be witness of the process'* while another employer wrote *'Not properly conducted as the Industrial Relations Department [Conciliator's] conduct was decided by top management'*. Whilst some employers noted the conciliation process that they attended were fair and impartial (as stated above), 3.9 percent (3 comments) wrote that it favours the employee more than them. For example, one employer wrote '*sometimes [it] will be a bit biased toward employee as their purpose is to settle case but not really concern about the fairness'* while another employer wrote '*I believe that the conciliation process would be very beneficial to both parties if the officer [Conciliator] of the [Department of Industrial Relations] could conduct the process in a fair and objective manner'.* Similarly, another employer noted:

> *'It is a good process when a third party looks at the case. However, the department [Conciliator] should consider the employer's mitigating factors too. Many times the employers' input is shut-down even though the process and manner of the cases are handled well'.*

Other negative comments received about the conciliation process indicated that the process was too time consuming; that Conciliators push too hard for a settlement; and there is difficultly in reaching settlement (Table 6.19). An example of when a

Conciliator might push for a settlement was illustrated by one employer, who wrote '*The IR department [Conciliator] tried to push for settlement even though the company has valid reason for termination. The KPI [Key Performance Indicator] at IR Department [DIRM] may affect the judgement of the Conciliation officer'.* An employer who felt it was not easy to reach settlement via conciliation wrote *'Difficult to reach settlement using this mean'.* This latter comment reflects the difficulty of conducting conciliations where Conciliators are not permitted to provide recommendations or alternatives to settlement.

With regards to interactional justice employers who were surveyed were mostly happy with how Conciliators treated them during the conciliation meeting which they had attended. As shown in Table 6.20, a total of 55.6 percent employers were very satisfied and satisfied with the way the Conciliators outlined laws and regulation to them during the conciliation meeting. In addition, a total of 62.5 percent employers were satisfied with the way Conciliators explained the conciliation process and procedures to them while 51.5 percent were satisfied with the way Conciliators passed them the messages, proposal and offers received from claimants. Table 6.20 also shows employers who were satisfied with how the Conciliators have helped them to understand the strength and weaknesses of their cases (50.8 percent) as well as with how Conciliators have helped them to think of the available options (53.1 percent were satisfied). In addition, 51.6 percent employers were also satisfied with how Conciliators helped them to consider the pros and cons of not going to the Industrial Court.

Table 6.20 Employers' opinions on how Conciliators treat them during the Conciliation process

Responses	N	Percentage				
		Very satisfied	Satisfied	Neutral	Dissatisfied	Strongly dissatisfied
Outlining laws/regulation	63	*12.7*	*42.9*	*27*	*6.3*	*11.1*
Explaining the conciliation process/procedure	64	*14.1*	*48.4*	*23.4*	*9.4*	*4.7*
Passing messages, proposals and offers from the claimants	64	*15.6*	*35.9*	*31.3*	*14.1*	*3.1*
Helping you understand strengths and weaknesses of the case	63	*15.9*	*34.9*	*25.4*	*17.5*	*6.3*
Helping you think through your options.	64	*10.9*	*42.2*	*23.4*	*15.6*	*7.8*
Helping you consider pros and cons without going to the Industrial Court	64	*12.5*	*39.1*	*23.4*	*14.1*	*10.9*

Source: Survey of Employers

The Interviewees' Responses

The issue of procedural justice at conciliation was also brought to the attention of the interviewees. As shown in Table 6.21 two elements of procedural justice noted by the Conciliators relate to (1) Conciliation must be conducted in timely manner and; (2) Conciliators must be impartial (Table 6.21).

Table 6.21 Interviewees' opinion on procedural justice at conciliation

Issues raised by interviewees	No. of interviewees mentioning the issues	No. of times these issues were raised
Conciliation must be conducted in timely manner	**7**	**9**
Conciliators must be impartial.	**5**	**8**
Total No. of times these issues were raised by interviewees		**17**

Source: Interviews with Conciliators and Arbitrators

First, seven Conciliators were of the opinion that when conciliation is conducted promptly the rate of success will be greater. One Conciliator said: '*Conducting conciliation process timely plays a very important role, in settling an issue'* (Conciliator 2). Another Conciliator was also of the opinion that conciliation should be conducted as soon as the dispute arise: '*In my opinion the moment the dispute arises at the workplace that is the time we should receive the complaint then only we are able to settle it immediately*' (Conciliator 23). The immediate handling of dispute is an important factor that contributes to the settlement and this was also of concern by another Conciliator noting that allowing employees 60 days period from the date of dismissal (see Section 2.5.2) to file in their case to the DIRM is also not practical because conciliation cannot be organised soon after the dismissal have taken place. This delay affected the process and is not in line with the spirit of getting disputes resolved promptly:

> '*The 60 days period is also a concern. By right, there is no need for 60 days, 30 days would be sufficient. Because of this [name of the association of employees' union], they take advantage to file the case at the last minute. Sometimes they will file of the 56th day and the process of conciliation will take one month. That will add up to three months. Then at the first meeting, the party will ask for postponement and we normally allow it. Why do you need 60 days to file a case? By right they should file as soon as possible' (Conciliator 22).*

Second, five interviewees believed that Conciliators who conducted the conciliation must be impartial although it may be difficult due to the active role of Conciliators in assisting disputants to negotiate on settlement particularly when it involved compensation. The Conciliator who shared one of his cases stated that he avoided becoming too persuasive towards the employee to avoid being considered as bias:

> *'I have one case where the employee is from UK, a lady, work in Malaysia as Director of R&D department. The employer representative came all the way from the UK. On the first conciliation the employer insists of not willing to settle but on the second meeting they are willing to settle with 100,000 UK sterling. After that the employee do not want to settle and at that time it would be RM 700,000 but the employee insisted 200,000 UK sterling. I was worried that if I persuade her to much then she would think differently on me' (Conciliator 10).*

Another Conciliator also believed that in the process of facilitating disputants, Conciliators may need to use some investigative techniques to discover the issues behind the disputes but in doing so he or she must not be seen as being impartial or taking side on either party:

> *During the conciliation, ya, we have, the Conciliator must be able to say things without siding any parties. That's very important and the Conciliator must be very inquisitive. The conciliator mustn't play a role of a normal person, listening to both sides. The Conciliator must be a bit more advanced as proactive as I told you to look into the depth of the issue' (Conciliator 2).*

Another aspect of procedural justice at conciliation relates to the need (or not) for representation at conciliation. This issue was also brought up during interviews with 23 Conciliators and eight Arbitrators and there were mixed reactions among them on its relevancy. As shown in Table 6.22 there were 12 interviewees who think that there is no need for representation at conciliation while eight think it is necessary. Five interviewees remain neutral while six decided not to provide their opinions on this issue. With the low unionisation rates in Malaysia, representation remains a politically sensitive issue.

Table 6.22 Interviewees' opinion on the representation at conciliation

Issues raised by interviewees	No. of interviewees mentioning the issues	No. of times these issues were raised
Representation do not help in the settlement	12	20
Representation is necessary	8	13
Neutral opinions	5	6
No comment	6	-
Total No. of times these issues were raised by interviewees		39

Source: Interviews with Conciliators and Arbitrators

Table 6.22 shows that 12 interviewees were of the opinion that representation does not contribute to the settlement conciliation. Most commented that it often makes settlement difficult to be achieved because the third party may not be willing to open up for settlement to protect their interest as representative. One interviewee stated that it was much easier to resolve the dispute if she communicated directly with the parties rather than through their representatives. This is because the representative may not provide the right information or assessment of the case hence, making the disputes more difficult to be resolved.

> *If I can talk directly to the worker or management concerned, easier. I can tell them directly regarding the law. If you go through party they might mentioned the wrong thing. Like [name of the association of employers], they are going to tell the management that they have a good case, and there is no need to settle. But sometimes [I think] the case is borderline, why not [they] settle. Why don't they settle for three or four months wages* (Conciliator 1*)?*

Another interviewee who had a similar line of thinking commented that representation does not necessarily contribute to getting the case resolved at conciliation particularly when the representative is not sincere in assisting the disputants and is more concern of their own interest:

> *When we talk about representation in some cases, yes it helps. But mostly it doesn't help because this representative has a personal interest. Sometimes the case could have been settled but were not when the representative is present. In respect of the employer, not all of them are knowledgeable about the law so I prefer the presence of [name of the association of employers], representing them. The employer might know his work but not on negotiation. The issue of representation has been going on for some time even during the time I was at the Labour Department [Department of Labour]. So, the Ministry [of Human Resources] has issued an instruction on who are allowed to represent employees at the conciliation. There are only some people in [name of the association of employees' union] who can represent [employees at conciliation]* (Conciliator 15).

The issue of the insincere representative was also highlighted by another Arbitrator. He was very serious when pointing out the fact that some representatives take advantage of the employees' plight by asking them to pay a significant amounts of money as a service charge:

> *This is a real fact. Sometime, the Trade Union, [when] they represented [the employee], they will have a cut, and they get twenty per cent. So they, not all to be fair, they are the stumbling block* (Arbitrator 2).

Despite many interviewees who do not believed that representation at conciliation was useful, eight interviewees were of the opinion that it is necessary (Table 6.22). These interviewees have a common belief that it is needed particularly when disputants are not able to communicate and understand the formal language used during the conciliation which is a bit different to the spoken language (because some disputants may have their own native language):

> '*It is not really problematic except for those who have difficulty in the national language [Bahasa Malaysia] or English. Sometimes they bring their friend if the employer allowed on discretionary, to become the translator. I think it is important for these employees to have translator* (Conciliator 10).

Another Conciliator was of the opinion that employees who are not highly educated may be disadvantaged during the conciliation process because they cannot comprehend the technical or legal terms that may transpire in the conciliation meeting:

> *In my opinion for those who have good education or knowledge they may not need to be represented but for those who are non-educated or having lack of knowledge, they may not be able to represent themself especially when dealing with certain terms such as concept and legal terms. So, during conciliation when employers for example, talk about the provision of the law, the employees may not understand and say: 'what is this?' [and] in the end he or she would just keeping silent and don't know what to say, and [hence] give up* (Conciliator 16).

Whilst sharing her opinion on the necessity of representation at conciliation, another interviewee emphasised that it be undertaken by someone with good legal knowledge to enable him or her giving the correct advice to the disputants. She however, added that

some representatives such as union officials or lawyers are too occupied with other obligations and may not be able attend conciliation when required thus, prolonging the resolution of the disputes further:

> *There is a pro and con of representation. It will help if the person is represented by someone who knows the laws but it may affect the working time of his [her] colleague. For example, [name of the association of employees' union] representatives who are subject to the availability just like lawyer they would say: 'I cannot make it at this time'* (Conciliator 19).

Another Arbitrator noted that representation is beneficial because employees who are uneducated may end up with an unfavourable outcome at the conciliation. She shared her previous experience of acting as legal representative during the time when it was allowed at conciliation in the past. She commented that in the case of employees who are uneducated, the presence of representative during the conciliation meeting can contribute to a fair and equitable outcome because he or she can negotiate a better deal on their behalf:

> *It all depends on the personalities. If you have someone from the HR department, who probably know something or on how to conduct [conciliation]. What if you are one of those factory workers with hardly much education, you expect them to sit there. And it's very sad. And the chances are they may not get what they actually deserved. And when I started industrial law practices, I was a lawyer before I came here. In my early day when I handled the industrial law cases, they used to have representations at the IR department. So I have been around there sitting with claimants of companies, even at the Labour Court as well the Industrial Relations [DIRM] and negotiating so to speak and I thought it was good because at least the claimant would have been able through us as lawyers to have his peace said* (Arbitrator 7).

As discussed in Section 3.2, the culture of the Malaysian workplaces emphasises the superiority and prerogative of employers, and hence, employees may not be brave enough to stand up for their rights. This culture may be carried over into the conciliation meeting and as one interviewee noted disputants especially employees must be able to negotiate on the same footing to secure a fair outcome: *'union representation can*

balance this imbalance' (Arbitrator 3). The presence of a representative could reduce inequality that exists during the process

> *You see ah! When you, [attend] before a forum such as conciliation you have to approach the negotiating table at an arm's length. There has got to be an arm's length. In anything, negotiating or bargaining for everybody has to have an arm's length; the bargaining position must be very equal. When you are up against a HR [Human Resource] who represents a big company and you a poor manual worker, where is the arm's length that we speak of? Where is the principle to a fair bargaining? He [she] may not be able to have his say* (Arbitrator 7).

Regardless of the two opposing views on the need of representation, five interviewees were neutral and one interviewee suggested that representation may not be necessary if the Conciliator is someone who is capable of performing his or her role to help both disputants to reconcile with each other: '*It all depends on the Conciliator. If the Conciliator is effective, you can make sure that the worker is convinced of what we [Conciliators] can help'* (Conciliator 11). Another neutral opinion was that Conciliator involvement is sufficient to help disputants to come to an agreement by managing the process effectively such as by conducting split meetings. In this manner the Conciliator can clarify certain issues when one of the parties may not want his or her side of the story heard by the other party:

> *If both the employer and the employee are aware, there are situations where it might be easy to handle. They are situations where both don't want to settle, so the mediator in such situation must take an active role. But for workers who don't know how to elaborate the facts, we have separate meeting [between disputants] for the details (Conciliator 7).*

Similarly, another interviewee asserted that disputants who seek for professional service to analyse their cases may not get the right assessment of their cases because the person whom they choose may not be equipped with the right knowledge on the legal provisions pertaining to dismissal disputes:

> *The point here is when you pay money to get advice, you find that to be more reliable. When you get free advice, you don't have confidence. This*

> *is the mind-set. For example, he [she] might see [name of a prominent lawyer] and pay [RM]500 for one hour [advice], he [she] says that [it is] the best advice. But [name of a prominent lawyer] do not know anything about industrial law. Sometimes it's their feeling that the case will win* (Conciliator 4).

As highlighted earlier, the interviewees did not clearly separate interactional from procedural justice. Thus, each time they spoke about the process they would touch also on the elements of interactional justice. These were grouped under six themes including trust with the Conciliator, willingness to listen, respect, kindness, truthfulness and sincere (Table 6.23).

Table 6.23 Interviewees' opinion on the interactional justice at conciliation

Issues raised by interviewees	No. of interviewees mentioning the issues	No. of times these issues were raised
Trust	8	12
Respect	5	6
Truthfulness and sincere	3	5
Total No. of times these issues were raised by interviewees		23

Source: Interviews with Conciliators and Arbitrators

First, eight interviewees raised the issue that Conciliators must be able to get the trust of the parties during the conciliation process so that they are more willing to participate in the process (Table 6.23). For example, one interviewee stated that disputants may lose trust in the Conciliators if they are seen to be too persuasive in their tactic to resolve the dispute during the conciliation process:

> *Although we can tell them about the weaknesses of the case but they might misconstrued it. The employees may have no case but really because he or she is really stubborn they refuse to listen. If we keep on explaining to them they might accuse us of forcing them to withdraw their case* (Conciliator 23).

Another interviewee of the same opinion stated that Conciliators' behaviour and conduct during the conciliation should be geared towards securing confidence among disputants to reflect their sincerity in resolving the dispute:

> *When they are not receptive to our explanation or they themselves don't know what the procedure for termination is, okay I have followed the contract of employment and the entire requirement, it hard to resolve the disputes. The employer is more concern on what they have done at the workplace but here they don't see whether the action was fair or not. Hence, creating the intimacy and trust among employers and employees towards the conciliators is very important. Here trust is very important although we may not be able to look at this but we can derive it from their behaviour (Conciliator 13).*

Another interviewee stressed that Conciliators must be able to convince disputants that they are genuinely trying to resolve the disputes with no other motives apart from achieving for both parties what they deserve. He believed that once Conciliators are able to gain the trust from disputants it would easier to gain their acceptance towards the proposed solution:

> *I think we must make them aware that and realised that this department try its best to settle claim for reinstatement. There are three ways of settlement with full cooperation from both parties. If the claimant knows that he [she] has no case for example, similarly employer should consider alternative settlement. So it is more on instilling the awareness and this depend on the Conciliators' credibility where if parties trust on us they might agree to the proposal. But if they are not sure or not confident on the Conciliators then they may prefer to proceed to court* (Conciliator 16).

One interviewee stated the Conciliator must ensure that parties have faith in them genuinely trying to deal with both parties regardless of their status by treating them with pride, making them willing to accept the proposed settlement.

> *It can be either officers putting not enough effort or it can be employer seeing your position, he [she] will respect you, and he will be influenced by you. If you respect him [her], he [she] will respect you, something like that. And he [she] believes in you* (Conciliator 11).

Interactional justice requires that disputants be treated with respect during the negotiation process (Van Gramberg 2006a). One Arbitrator stated that apart from having good negotiation skills, Conciliators must treat disputants with respect during the conciliation process so that they are more willing to come to an agreement.

> *'The negotiation skill is important and that when we say people must be willing to follow and listen. Others are one's appearance, the office environment, personality and respect for people* (Arbitrator 8)'**.**

The third theme concerning interactional justice was grouped under truthfulness and sincerity. As shown in Table 6.23 three interviewees spoke on the matter. Conciliators must be seen as being truthful and sincere by disputants for them to be able to resolve the disputes at conciliation. For example:

> *In reality we can be sincere to the party and explain to them about the strength of the case and in this case normally we may have to conduct several conciliation meetings. This is to get the disputants believing in us so that so that they will want to settle* (Conciliator 16).

Another Conciliator stated that Conciliators might be sincere in trying to resolve the disputes although stressing that the success of conciliation would still depend on the disputants:

> *We must be fair and be a good listener. They must put themselves in a powerless position, more of a facilitator to convince parties to resolve the dispute. As a conciliation officer, the intention is sincere but it also depends on the parties. The Conciliator will try his best to help both parties (Conciliator 22).*

This section canvassed the issue of procedural and interactional justice at conciliation. Procedural justice in the form of representation was the main concern among Conciliators. The results of Conciliators' Survey showed that whilst many think that representation of employees by their unions did not help in achieving settlement at conciliation, many agreed that when claimants have the ability to negotiate and advocate their case at conciliation, there is a greater chance of settlement. The

interviews with Conciliators and Arbitrators found a mixed response on representation with many believing it does not. Employers' views on the fairness of the conciliation process also found mix responses.

Despite many employers' perceptions of conciliation as being procedurally fair some believed that it should be more effective and a few perceived it as being biased towards employees. With regards to interactional justice, the Conciliators' Survey shows that it contributes to a greater chance of settlement at conciliation. The interviews found three themes emerge on interactional justice: trust, respect and being sincere and truthful. The Employers' Survey indicated that employers believed they had been accorded interactional justice during their most recent conciliation at the DIRM.

6.2. Chapter Summary

This Chapter discussed the findings of the second research question on the reasons for the low rate of settlement of claims for reinstatement and subsequent high rate of referral to arbitration.

The thesis found that the low rate of settlement at conciliation is generally attributed to three factors. These are the effect of the Ministerial recommendation; the chilling effect of arbitration on parties' determination to settle at conciliation and; justice as it applies to conciliation. Ministerial recommendations act as a filtering mechanism to avoid unmerited cases proceeding to arbitration. However at the same time it is was considered a hindrance to justice because it delays the process due to the time taken for the Minister to make a decision.

Second the thesis finds that the low rate of conciliation is influenced by the chilling effect of arbitration. Several factors were identified to influence disputants to press for arbitration including their unrealistic expectations; their determination and preference for arbitration; lack of Conciliators' authority; employees' lack of knowledge and skills in negotiation; the lure of greater compensation at arbitration; and employers keeping to their principles. Because Arbitrators have the authority to make a binding decision to resolve the dispute and Conciliators do not, it is more preferred by disputants. The

interviews also found that whilst the expectation of greater compensation lured disputants (claimants) to proceed to arbitration, employers who prefer to proceed to arbitration on the basis of standing up for their principles on the decision to terminate the employees.

The perception of justice or lack of justice encompasses the extent to which distributive, procedural and interactional justice was provided at conciliation. The thesis found that the equitability of compensation received as settlement at conciliation was a motivating factor for employees to accept the outcome while the employers on the other hand, considered demands for compensation it a hindrance to settlement. Further the thesis found that distributive justice problems comprised disputants not being not being able to agree on the quantum of settlement; their belief about impracticality of reinstatement and; whether the outcome was one that they felt was deserved.

In terms of procedural justice the thesis found that union representation at conciliation is a vexed issue. Many interviewees believed it does not assist in resolving disputes although they acknowledged that more cases would be resolved if employees were better prepared to present their case. Interactional justice was found to be interchangeable with procedural justice in the interviews and survey. Employers indicated that they have been accorded interactional justice during their most recent conciliation at the DIRM. The elements of trust, respect and sincerity and truthfulness were found to be the key interactional justice factors related to getting settlement at conciliation according to the interviewees.

The next Chapter presents the findings for Research Questions three and four relating to strategies to encourage early resolution of claims for reinstatement at the workplace and at conciliation.

CHAPTER 7 - THE CASE FOR CHANGE-MECHANISMS FOR IMPROVING DISPUTE RESOLUTION

7.0 Introduction

The review of literature presented in Section 2.6 revealed that the conciliation settlement rates are lower in Malaysia for workplace disputes than in many other countries including Australia, New Zealand and the UK. The previous chapters answered research questions one and two:

RQ1: What are the key factors behind the referral of claims for reinstatement from the workplace to tribunal conciliation?

RQ2: What are the key reasons for the low settlement rate of tribunal conciliation for reinstatement claims and subsequent high rates of referral to arbitration?

This chapter answers the final two research questions for the thesis

RQ3: What are the strategies to encourage claims for reinstatement to be resolved at the workplace?

RQ3: What are the strategies to reduce the backlog of claims for reinstatement before the IC.

The chapter is based on the interviews with Conciliators and Arbitrators and arranged according to the themes emerging from their answers.

7.1 Strategies to encourage claims for reinstatement to be resolved at the workplace

The Interviewees' Responses

The third research question of this study is to find out what strategies might encourage claims for reinstatement to be resolved at the workplace to avoid them from progressing to conciliation. A total of 31 interviews were conducted with 23 Conciliators and 8

Arbitrators. The interviewees suggested five main strategies to encourage workplace settlement and these are summarised in Table 7.1 and comprise: (1) Pre-emptive dispute resolution through an early advisory program; (2) Imposing compulsory regulations for workplace dispute mechanisms; (3) Setting up an independent panel or strengthening the development of Joint Consultative Councils (JCC); (4) Giving Conciliators the authority to filter disputes and; (5) giving recognition to workplaces that implement good workplace dispute mechanisms. Table 7.1 also canvasses the sorts of problems envisaged to arise in implementing these strategies such as bias, attitudes and incentives. These will now be discussed.

Table 7.1 Interviewees suggestions on strategies to encourage claims for reinstatement to be resolved at the workplace and the problems associated with such strategies.

Strategies and issues	No. of interviewees mentioning this strategies/issues
Pre-emptive strategy through educational and advisory services	11
Imposing compulsory regulations in setting up workplace mechanism (such as making domestic inquiry mandatory)	9
Set up of internal mechanism comprising of independent panel (such as Joint Consultative body at the workplace)	6
Authority to filter disputes or claims	8
Recognition to workplace that implement good workplace mechanism	6
Issues	
Neutrality and bias	10
Attitude of the employers	5
Absence of incentive	7

Source: Interviews with Conciliators and Arbitrators

7.1.1 Pre-emptive strategies through educational and advisory services.

The first strategy proposed by the interviewees is to implement a pre-emptive measure consisting of educational and advisory services. There were 11 references to this strategy in the interviews (Table 7.1). The interviewees who nominated this suggestion

believe that parties in dispute can be assisted to resolve the matter at the point where it arises (workplace) or before it escalates to conciliation. For example, one Conciliator said that disputants should, in the first attempt at resolution, be given the opportunity to make contact with the DIRM to consult on how best to resolve their dispute. This could be done by providing consultation or advisory services in assisting parties (particularly employers) before making a decision on the disciplinary actions to be taken against employees:

> *Maybe, they [disputants] should let the department get involved there itself before coming to the IR department [DIRM]. Maybe they should consult the department [DIRM] earlier before they [employers] carried out the punishment (*Conciliator 2).

Another Conciliator who suggested a similar pre-emptive strategy shared her past experience in assisting employees before they file their claims to the DIRM. In this case the Conciliator noted an instance when, by speaking frankly to an employee about the charge against him was able to assist the employee in resolving the problem in the workplace:

> *Maybe he [employees] doesn't believe your [employers] statement because you are the employer when you say something they don't want to believe it. They rather believe a third party, So there are some cases where I talked to the employee personally before he file a case and then he is able to reach to settlement and there are able to resolve the matter at the workplace itself* (Conciliator 3).

7.1.2 Imposing a compulsory regulations of setting up a workplace dispute resolution mechanism.

The Interviewees also suggested that there should be compulsory regulations mandating workplace dispute resolution mechanisms with nine suggestions in this vein (Table 7.1). As discussed in 2 Section 2.6, the implementation of workplace dispute resolution mechanisms in Malaysia is something left to the parties to implement and they are encouraged to refer to the Code of Conduct for Industrial Harmony 1975 (which has no legal enforcement). One Conciliator noted that making the in-house process mandatory could lead to greater workplace level dispute resolution:

> *Maybe we make it a must for all companies to have grievance procedure at the workplace. As I said in order for to ensure that all these companies have grievance procedure at the workplace we have to put it as a law or regulation* (Conciliator 17).

Another Conciliator indicated the difficulty of encouraging employers to follow procedural justice steps when there is no mandatory in-house dispute process:

> *Procedure is important to give justice because when you terminate someone you must provide reasons. We can only advise employer that the best is to follow the procedure but we cannot say that employers are wrong when they don't conduct DI [Domestic Inquiry] unless we make it compulsory for the employer to conduct DI [Domestic Inquiry] and I think it will help [Conciliator 19]*.

Although this strategy may help to encourage parties resolve their disputes at the workplace, not all Conciliators were confident it would work effectively. This is because they believe the attitudes of the parties (for instance employers' sincerity and willingness to implement such procedures) was lacking. For example one interviewee stated that parties may not be mature enough to implement a good workplace dispute resolution mechanism due to the culture which emphasises managerial prerogative where it is not acceptable for an employee to complain about his superior. This was discussed in Section 3.2 and relates to the culture of hierarchy and paternalism which has influenced the nature of workplace norms in Malaysia. One Conciliator observed from his past experience, an employee who complains about his superior in the first place is the one who will get in trouble in the end:

> *We are all human, when we accuse our boss, we can expect the repercussion, so grievance procedures are, I still don't find that we [employers and employees] matured enough to do that. To the employers: you can't complain about my boss to the director because it is my boss who should be complaining to the director, not me [employee]. I have seen cases where people [employee] have bought up this issue. At the end of the day, they are the one who actually chop [get fired]* (Conciliator 8).

Similarly, as noted by two Conciliators, some employers would see a workplace dispute resolution mechanism as being too costly to maintain:

> *Employers sometime would say apart from the profit they will look after the employees' welfare but the fact is that employer's objective is to gain profit. To look after the employees' benefit and interest will have an impact of operating cost to employers. Sometime it [workplace mechanism] may be ok for the first few years but in the end the company goes bankrupt* (Conciliator 10).

> *To me we can also talk about economic factor where if the economy is really bad normally employers would try to reduce cost and the first thing they do is to get rid of some of their employees in order to maintain profitability or avoid losses. So their mindset is already geared towards reducing employees and when for example a dispute occurs in the workplace, they would use this opportunity to terminate the employee (Conciliator 16).*

Another interviewee stated that even if there was a law on resolving disputes at the workplace it may not work as he has witnessed the resistance particularly from employers in implementing such mechanisms at the workplace:

> *We at all times encourage them to have a harmonious and conducive environment at work. In all our visits and dialogues, we also touched on Code of Conduct. We also promote JCC [Joint Consultative Council] and to resolve dispute at workplace, but there is a lot of resistant. There is no law on that and I don't think a law on this will work (Conciliator 22).*

7.1.3 Setting up of internal mechanism comprising of independent panel

The third strategy put forward by interviewees is the setting up of an independent panel at the workplace to handle workplace disputes (Table 7.1). For example, one Conciliator suggested that in the absence of an independent panel of neutral individuals representing both parties to handle disputes at the workplace a Joint Consultative Committee may prove a good solution for dispute resolution:

> *In my opinion there should be an independent body comprising of neutral people who have got no vested interest. However, we don't have any*

> *funds to accommodate this panel [government sponsored panel] so the best would be JCC [Joint Consultative Council], which is a joint consultative body at the workplace. This consultative body would comprise of management representative, workers representative and they review the decision or look at the decision and make recommendations [to the management] (*Conciliator 12*).*

While six Conciliators supported the notion of a JCC program as a good platform for workplace mechanism, others noted it has not been accepted by employers:

> *Most companies that do not wish to have union are those who would not be interested in JCC because they say from JCC it will end up to become a union. So we have to explain to them that JCC has its advantage* (Conciliator 10).

> *Based on the results of our harmonious visit [at the workplace], some employers said they have an open door policy, and they say they don't need JCC and anyone who has a problem can come up to the top management, even the MD [Managing Director]is willing to see this people and say 'ok what is your problem'. This JCC is one of the mechanisms that can be used to resolve the matters at the workplace. We feel that this is an effective mechanism at the workplace for some employer* (Conciliator 12).

As shown in the above Table 7.1 each time interviewees spoke about JCCs at the workplace six of them also mentioned the issue of neutrality and bias in the implementation of a workplace dispute resolution mechanism. For instance, one Conciliator noted that there are employers who have already had a predetermined outcome in mind and this is where the neutrality of the internal mechanism is in question:

> *On the question of internal mechanism, I am not sure whether the employers are really using the internal mechanism before they take action against the employee. Basically big or established companies yes they may have used the mechanism, but again the other side of it, some human resources officer or certain employer have already in their mindset of what action to take against the employee concerned . They know that they want to take action against the employee* (Conciliator 11).

7.1.4 Authority to filter disputes or claims for reinstatement

The fourth strategy recommended by the interviewees is for the Conciliators to be given authority to filter cases at the point of receiving the claims (Table 7.1). This strategy was thought to help in ensuring that claimants do not simply refer their disputes to conciliation even though they know that they are at fault. For example, one Conciliator stated that Conciliators should be able to reject cases on the basis of having no merit.

> *If we can reject some of the representation, it would be good because we think that they have no case. We cannot tell them that they have no case but we can only advise but we cannot make decision* (Conciliator 6).

Similarly, another Conciliator stated that there are cases where the employment has not yet commenced but claims are nevertheless made under *Section 20* of the *IR Act 1967* which does not provide rules on eligibility to file claims:

> *They are even cases where not even started working. They don't have a case actually but they do file. It is outside the scope. The contract has not started yet* (Conciliator 11).

7.1.5 Recognition to workplaces that implement good workplace mechanisms.

The fifth strategy which six interviewees suggest as a move to encourage employers to implement workplace dispute resolution mechanisms is to give recognition to workplaces which have been able to use their internal workplace mechanisms to resolve disputes in house (Table 7.1). For instance, one noted: '*I think we can do for example award to employer who had shown that they have a good workplace procedure and use it to resolve disputes at their workplace. I believe they should be given some sort of recognition* (Conciliator 10)'. Another Conciliator who shared this idea noted the success of a different recognition scheme currently in place by the DIRM for employers:

> *We have recognition program for example, PLWS (Productivity Link Wage System) where we award and give certificate to employers. I*

> *think it not impossible if we also introduce recognition for best workplace mechanism as part of an incentive program to encourage parties to resolve dispute at the workplace* (Conciliator 16).

This section described the strategies to encourage claims for reinstatement to be resolved at the workplace from the perspective of the interviewees (Conciliators and Arbitrators). Five strategies put forward by the interviewees which are Pre-emptive strategy through educational and advisory services, imposing compulsory regulations in setting up workplace mechanism, setting up internal mechanism comprising of independent panel, empowering Conciliators with authority to filter claims and giving recognition to workplaces that implement good workplace mechanism. The next section describes the findings of the thesis with regard to Research Question four: the strategies to handle backlog of claims for reinstatement before the IC.

7.2 Strategies to handle backlog of claims for reinstatement before the Industrial Court

As discussed in Section 3.3 the backlog of disputes, particularly in claims for reinstatement has been growing at the Industrial Court. As noted by one interviewee the backlog became very serious in 2004 to the extent of becoming a debated issue at the political assembly resulting in the Minister of Human Resources to take drastic measures to rectify the situation:

> '*In 2004, it [backlog] was quite bad and the Minister was questioned in parliament. Since I came in 2002, it was very controversial. In 2004 they give an action plan and I think that is the signal to take action'* (Arbitrator 1*).*

Although in 2008 there was no public concern about the backlog, a response from another interviewee indicated that this issue was still a problem within the Ministry and of major concern to the newly appointed Minister of Human Resources who was not happy with the number of unsettled cases. The new Minister then came up with a vigorous solution by putting greater effort on use of conciliation to resolve disputes, particularly claims for reinstatement:

> '*Since the new Minister [effective 2008] came on board, I would say he has started a very aggressive conciliation effort. During our first meeting that he had with us, we went through the statistics and he was concerned of a lot of backlog'* (Arbitrator 4).

The direct influence that the new Minister had in ensuring a concerted use of conciliation at the DIRM has resulted in lesser number of cases referred to the IC from 39 to 46 percent in 2005, 2006 and 2007 to 29 percent in 2008 and 24 percent in 2009 (see Table 2.7 in Section 2.5.4) Another interviewee however, was of the opinion that setting goals on the number of cases to be settled by Conciliators would not be a long-lasting measure because it is not sustainable: '*The Minister has set the target to reduce the number of cases to be referred [to the IC], so we have to follow. I would not be surprised if the backlog of cases would happen again* (Conciliator 5)'.

The next section reports the findings of research question 4: To determine strategies to reduce the backlog of claims for reinstatement before the IC.

The Interviewees' Responses

The interviews attempted to uncover strategies to reduce the backlog at the IC and avoid further build up in the future. When these suggestion and opinions were analysed using NVivo, they were grouped into five themes. These are: (1) addressing shortcomings of current laws and regulations; (2) enhancing the effectiveness of conciliation; (3) better management of human resources; (4) case management and; (5) improving the dispute resolution process (Table 7.2).

Table 7.2 Interviewees' suggestions on how to reduce the backlog of cases before the IC

Themes	No. of interviewees mentioning the issues	No. of times these issues were raised
Addressing shortcomings of current laws and regulations		
Imposing charges and costs	7	8
Empowering Conciliators with an arbitration function	5	8
Introducing mediation or conciliation at the court level	4	9
Imposing qualifying rules or capping the compensation	4	7
Total	20	32
enhancing the effectiveness of conciliation		
Improving the conciliation process	9	18
Adopting second level conciliation	5	7
Total	14	25
Better management of human resources		
Increasing the number of Conciliators and Arbitrators	*5*	*6*
Effective appointment and placement of Conciliators and Arbitrators	*5*	*5*
Enhancing the status of Conciliator	*3*	*3*
Total	13	14
Case management		
Scheduling of cases	6	9
Managing postponement of hearings	4	4
Parties preparation prior to hearings	2	3
Total	12	16
Improving the dispute resolution process		
Effective workplace mechanisms	4	4
Direct reference of disputes to the court	4	6
Streamlining functions involved in dispute resolution	2	3
Total	10	13

Source: Interviews with Conciliators and Arbitrators

7.2.1 Addressing shortcomings in current laws and regulations

As discussed in Section 2.5.2 and Section 2.5.6 the laws and regulations pertaining to dispute resolution in Malaysia have not keep up with the changes found in countries like the UK, New Zealand and Australia with similar conciliation and arbitration systems. As shown in Table 7.2 above, 20 interviewees suggested different strategies in relation to addressing the shortcomings of current laws and regulations pertaining to dispute resolution in Malaysia. These include: (1) imposing charges and cost to parties; (2) empowering Conciliators with arbitration function; (3) introducing mediation or conciliation at the IC level and; (4) imposing qualifying rules or capping the compensation.

7.2.1.1 Imposing charges and costs to parties

Seven interviewees suggested that fees should be imposed on disputants payable when they first file their case at conciliation, and another set of fees to cover all costs should they lose their case at the IC. For example, one interviewee pointed out that implementing some form of payment for filing a claim at the DIRM would make employees to be more responsible and not make unnecessary claims: '*I think it is good at the initial stage when claimants file their case [that] they are required to pay certain fees. I mean minimum charges so that they will think whether it is worth or not for them to file the case'* (Conciliator 17). It was a common belief among seven interviewees that imposing fees and charges will deter employees from abusing the system. For example, another interviewee stated that there are instances where employees simply file their cases following the actions taken by other employees (who have filed their case to DIRM) or when they were influenced by external parties although they may not have genuine cases:

> *I personally think that they should be charged because we have cases where I mean they are filing just like 'ok everybody is filing then I am filing the case' you know so when you have certain charges 'you need to pay this', maybe they will be reluctant a bit because the first thing, they actually have no case but they are filing because their friend ask*

> *them to file la, the [name of the association of employees' union] say they have a good case la, so I think they should be charged. At least they know that they are responsible for it. I mean you cannot simply file a case. You know! something like that as every year we do have those [employees] who make frivolous claim* (Conciliator 3).

Another interviewee gave an example of where the free service of the DIRM and IC being taken advantage by employees who managed to get their way around the system and became serial claimants. Each time their motive was none other than to get money out their employer, recklessly behaving as though they have nothing to lose because they do not have to pay either fees or costs when they lose their case:

> *I think the government should impose some kind of fees or whatever, like civil cases. That is the whole thing and that is why I say that. For example, four or five of them have been filing six, seven cases in this Court, I mean the same claimant filing up a few cases because of this [no fees]. It is abuse of the system and it is immoral downright. They abuse the system, what to do?* (Arbitrator 2).

7.2.1.2 Empowering Conciliators with arbitration powers

Secondly, five interviewees proposed that Conciliators be given arbitration power to enable them to make decisions in dispute resolution (Table 7.2). As mentioned by one interviewee, some authority in decision making which is similar in nature to the Labour Officer in the Labour tribunal (Labour Court under the Department of Labour) should be given to Conciliators. This authority could assist in disputes being resolved speedily through conciliation at the DIRM, and if any back wages are to be paid they would be for a shorter period of one or two months instead of up to 24 months at the IC. This is because delays in resolving disputes are eliminated. This way, claimants or their unions will think twice when filing their cases with the DIRM for conciliation without firstly attempting to utilise internal workplace mechanisms. The small amount of back wages they may receive at the DIRM when disputes are resolved quickly, would encourage them to resolve their disputes within the workplace:

> *I have proposed to the top management, why not, if Labour Officer has the right under Section 69 [EA 1955] to hear the case and to make decision. Why not we amend the law [IR Act 1967] and give the same power to arbitrate the case [to Conciliator]. It can reduce the period of the delay and avoid having to award 24 months back wages and at the end of the day, the workers or the union no more interested to file the case to the department [DIRM] as they will only get one or two months* (Conciliator 20).

Another interviewee who has many years of experience in labour and industrial matters shared a similar thought that Conciliators should be given the same power as the Labour Officers at the Labour Court to decide on disputes pertaining to termination of employment. In this manner the process of dispute resolution would be shorter and more affordable with disputes being resolved without the need of going through all unnecessary processes including the Minister's decision to the Court. This interviewee also believed that because Conciliators have extensive knowledge as a result of working for many years in labour and industrial matters, they are capable of performing arbitration function:

> *To me, I will suggest. The process to go to the Industrial Court is long. Long in the sense that time consuming and very frustrating for both parties. It has got to wait for the Minister, then the case is there and with the backlog there and all that, it is not a fast remedy. It is not a cheap remedy to go to the Industrial Court. To me, I would rather suggest that we take up the reconciliation process as the Australians do it. You do the conciliation, try to resolve the matter and if can't resolved it, you come back, come. Let go on like the Labour Court do it where somebody trial and we make a decision. And our decision, you ask me on experience, we are more experienced than any other authority to make decision. We know, we have worked, 30 years of experience. I can make a decision. I have made decision with the Labour Department running to millions of dollars, well, the employer complied* (Conciliator 8).

7.2.1.3 Introducing provision on of mediation or conciliation at the IC level

As discussed in Section 2.5.5 there is no provision under the *IR Act 1967* that empowers the Chairman (Arbitrator) of the IC to perform conciliation or mediation. Hence, the

third strategy which comes under the category of addressing shortcomings in the current laws and regulations is to introduce conciliation or mediation at the IC level as suggested by four interviewees (Table 7.2). At least three of these four interviewees (Arbitrators) indicated that they had performed this function on their own initiative and use their influence to get parties to settle amicably without having to conduct trial at the IC. One Arbitrator acknowledged that because there is no provision under the *IR Act 1967* to empower them to conduct conciliation or mediation prior to a hearing, they can only rely on giving suggestions to parties to resolve the dispute without being able to assess the substance of the case:

> *You see, we do not have powers under the IR Act [1967] for the Chairman to do conciliation. Whatever we do is on an informal basis, so when the parties come, we will say 'why don't you try to settle', but we can't get to the merits of the case because we are also adjudicators, you know! so we can just suggest the employer 'why don't you think of settlement' very indirect* (Arbitrator 1).

Another Arbitrator offer a different view stating that the merit of the case can still be discuss during conciliation or mediation at the IC (unlike DIRM) without being prejudice because if the case is unresolved and need to be arbitrated it will not be performed by the same person. He noted the absence of such provision in the *IR Act 1967* results in mediation at the IC not being done consistently:

> *Although there is no mechanism as such [conciliation or mediation] in the Industrial Court, we can still play a double role that is the first Chairman or the Registrar can look at the matter and they do what is known as conciliation but a different type of conciliation [from the DIRM]. Here they can go into the merit of the case and tell the parties, 'eh! I have looked at your case and it seems that you have no case, if you trial this case you will lose' and because of this, A, B, C, D and so forth, whatever, they looked at the pleading, they talked to the claimant, they talked to the employer, you know! asking for details, you know! sort of first glance la, first glance they can do that [conciliation], but they cannot hear the matter. Assuming at the end of the day the party still say ah 'no! no! I don't want to settle'. they can't do anything. They then transfer the case to another Chairman, for arbitration, compulsory arbitration, that means it goes to court, full hearing before a Chairman, that is not bias, never heard*

> *anything. That can be done although the structure is not there la, but right now, we are not doing it, we are not doing that exactly now* (Arbitrator 3).

7.7.1.4 Imposing qualifying rules or capping the compensation

As discussed in Section 2.5.2 the *IR Act 1967* was amended in 2008 to limit back wages payable to a maximum of 24 months (12 months in respect of probationary). This is the maximum number of months of back wages (not including compensation in lieu of reinstatement) which could be awarded to the claimants should they win their case more than two years after the date of dismissal. This amendment however, did not set any ceiling on the sum of back wages to be awarded. In addition, the amendment also did not specify any threshold with regards to the higher income employees making them eligible to claim at the DIRM and secure huge compensation (see Section 2.6). Despite noting the positive effect of the amendment in 2008 in eliminating abuse of the system, four interviewees suggested further changes to be made to the *IR Act 1967* by introducing some form of clarifying rules of eligibility to file claims for reinstatement and to limit the amount of compensation (Table 7.2). For example, one interview proposed a revision to the definition of employees under the *IR Act 1967* to clarify categories of employees who are entitled to file their claims for reinstatement at the DIRM. This will make the conciliation at the DIRM much easier because higher income claimants would normally expect to get higher compensation and hence, would not likely to be resolved at that level. He provided a real scenario of a Director of a company with a very high income but still prefer to file claim for reinstatement with at DIRM although they could afford other avenue (such as at the civil court):

> *Why not we detail out who are workmen under the Act [IR Act 1967] as under EA [EA 1955] we have first schedule that mention who are employees or maybe we can put a cap. I have a case, CEO [Chief Executive Officer], with a salary of [RM] 50,000, how to settle the case? This is the issue. CEO meaning the Director [claiming] and we don't have power at least to investigate* (Conciliator 14).

As the *IR Act 1967* is too generous one interviewee noted that the DIRM have been faced by many high profile cases involving higher income employees at the expense of the less fortunate employees (such as those with low or middle income): '*its high profile case, not only high profile, in most cases the complainant are management and high level, even CEO* [Chief Executive Officer] (Conciliator 11). Thus, this point is shared by another interviewee who suggested the back wages to be restricted to a certain maximum amount or ceiling. This will act as deterrent to higher income employees who see the free service of the DIRM as an avenue to make civil claim against the employer for breaching their employment contract:

> *The claimant is just taking the opportunity because of the way we administered our law as well as because of cost factor [found in civil claim]. Here we are dealing with industrial law not common law or law of contract. There should be a cap to limit the compensation that can be awarded* (Conciliator 14).

Another interviewee shared similar thoughts on limiting the service to only deserving group of employees instead of high paying executives who are often working closely with the Board of Directors. She believes the real objective of the *IR Act 1967* is to provide justice to categories of blue collar employees:

> *I think there should look at a cap. Because you see there are many schools of thought. When you hold, when you are a high paying executive, you work very closely with the management and at that level ah, different kind of situations applied. You know! If they want you to leave for whatever reasons, you may have to leave, if you are the CEO and MD have to work with the existing Board of Directors, shareholders change in the process, the Board will want to have their own CEO. So this IR [Act 1967], because it is a social legislation, it is really to look at a low level* (Arbitrator 1).

Another related suggestion on the issue of qualifying rules came from an interviewee who suggested that there should be a guideline on the amount of compensation to be paid as an alternative settlement. This interviewee provided an example of the common practice used in some of the IC' decisions: *'It must be like a principle that is normally used by the court where for every one year of service you get one month of*

compensation. I think that principle is good enough, I think it is reasonable' (Conciliator 3). As discussed in Section 5.6.3.3 and Section 5.7.2 these decisions have mostly involved disputes over termination of employment as a result of retrenchment or layoff, which in many cases has also been handled by the Labour Court depending on the remedy sought by the employees. In other words, the introduction of these guidelines could be used as a standard to settle disputes by way of compensation, either at conciliation or at the workplace. This in turn would reduce the need to refer disputes to the IC

As discussed in Section 2.5.12, in countries like the UK, New Zealand and Australia employees are required to complete minimum years of service before they could be entitle to file claim for unfair dismissal. As there is no such rule in Malaysia, it has resulted in employees who have only been employed for short period of time to be able to file claim at the DIRM making it difficult to resolve. Hence, it was suggested that qualifying criteria to provide for a minimum period of employment be introduced in the *IR Act 1967: 'You see there are cases where the worker started work for a few days and then terminated. I think it is good that to put a capping for example according to length of employment'* (Conciliator 11).

7.2.2 Enhancing the effectiveness of conciliation mechanism

In Section 6.1 this thesis found factors which contributed to the low rate of settlement at conciliation to include the effect of ministerial recommendation, lure of arbitration and justice at conciliation. Arbitration by the IC is seen to provide greater justice than Conciliation at the DIRM because it cannot provide them with the outcome that they desire. These unresolved disputes would add to the backlog in the future unless conciliation service at the DIRM is continuously enhanced. In this section we analysed strategies proposed by the interviewees on how conciliation can be further improved to effectively resolve disputes. Thus, fewer disputes would need to be referred to the Minister and subsequently to the IC for arbitration. The analysis of 31 interviewees' transcript found 14 of them proposed some improvement to be made to the conciliation

service at the DIRM and these were group into two themes shown in table 7.2. They are: (1) enhancing the effectiveness of the conciliation process and; (2) adopting second level conciliation across all DIRM branches.

7.2.2.1 Improving the conciliation process

Nine interviewees believe that there is a need for the conciliation process at the DIRM to be upgraded to boost trust among disputants to settle their disputes. For instance, one interviewee suggested Conciliation process to be free from any external influence and conducted by skilful personnel:

> *The conciliation machinery must be effective enough so that people will have more confidence in the system and to do that I think the system that is in place must be one that is not only equipped with trained Conciliators, but must be one which is transparent and known to everybody and they must be ah, the system itself must be facilitative and be able to resolve cases* (Conciliator 21).

The suggestion for conciliation not to be burdened with external forces to maintain its privacy was also shared by another interviewee who said *'It should be like this; I believe! I believe! if you want to have conciliation you should let the Conciliator be as free as possible*' (Conciliator 2). Her reasons for proposing this change was because Conciliators at the DIRM are required to submit details of unresolved cases to their head office for reference to the Minister. This results in the conciliation to be regarded as not being totally independent:

> *You know if it is a conciliation system, then it has to be very confidential, very private. It should be free. Look at all this [interviewee showing a pile of files containing reports on the conciliation] Why? If it is supposed to be confidential, why should we first of all write reports? Why is there a bureaucracy whereby state's officers conduct conciliation? We have to send the report to HQ [Head Quarters]. HQ decide, Minister refers. Why must there be such a thing?* (Conciliator 2).

A drawback in the current process was also noted by another interviewee who said that when disputants are not sensible or unable to come to an agreement the process will be halted because Conciliator cannot decide on the dispute:

> *That is one of the reasons why the process [conciliation] itself is weak. When there are two competing parties and you can't pronounce judgment then it weakens the procedure because what you are trying to do is to settle the matter outside the ambit of the dispute, unless the parties are very reasonable, very reasonable, and the parties have a very strong case (*Arbitrator 3).

7.2.2.2 Adopting second level conciliation across all DIRM branches

As a result of backlog at the IC, the DIRM has been instructed to conduct second level conciliation (done by a higher grade Conciliators) as a move to encourage greater use of conciliation. However, it was found during the interviews that despite its benefits in getting more cases resolved, this were not a permanent measure due to several constraints such as difficulty in finding suitable time for another Conciliator to arrange the second level conciliation:

> *I do not deny that there are settlements at the second layer conciliation but not all offices [DIRM branches] can do that. There are offices that do not implement second level conciliation. Before we used to practise second level conciliation when it was first introduced but now due to certain constraints such as administrative, workload and time factors, it cannot be done. We cannot get the time for officers [Conciliators] to meet and conduct the second level conciliation* (Conciliator 5).

Another Conciliator shared a similar thought that second level conciliation is a good mechanism particularly for employees who may not be able to undergo arbitration which is more technical and legalistic. He pointed out second level conciliation by higher grade Conciliators would help in getting more cases resolved:

> *We have such things as recourse to second level conciliation at the headquarters or the state director's level and then a panel of*

assessors at the headquarters. The way I see it, if most cases can be resolved at the direct negotiation level or at least at the conciliation level, we are saying that management and the parties themselves have come to their senses. They have realised that it is more productive to resolve cases at that level without having to engage in the rigorous processes at the Industrial Court which are at times, time consuming and very costly to the parties concerned, not to the benefit of a poor and simple minded person (Conciliator 21).

7.2.3 Better management of human resources

The third strategy to avoid backlog at the IC relates to better management of human resources (Conciliators and Arbitrators) which were suggested by 13 interviewees as shown in the above Table 7.2. These are: (1) increasing the number of Conciliators and Arbitrators; (2) effective appointment and placement of Conciliators and Arbitrators and; (3) enhancing the status of Conciliators.

7.2.3.1 Increasing the number of Conciliators and Arbitrators

Firstly, at least five interviewees suggested increasing the number of Conciliators and Arbitrators to cope with the high volume of disputes handled. For example, one interviewee suggested that more Chairmen (Arbitrator) and Conciliators be employed to handle extra volume of cases of dismissal: '*To avoid backlog of cases, there is a need to increase the number of Chairmen [Arbitrator] and the number of IR officers [Conciliator]'* (Conciliator 5). Similarly, another interviewee holding a senior position as an Arbitrator stated by making sure that all Arbitrators vacancies are utilised their individual workload can be reduced hence, avoiding the recurrence of backlog:

'So the Minister correctly concluded that 'look! if the number of cases coming in, and the number of cases being disposed of by the court is almost even, it means that the only way that we are going to get rid of this backlog which is there is by number one: increasing the number of Chairmen [Arbitrator], which is not going to happen. At the moment, we have six positions which are task force, meaning temporary positions. The rest are permanent positions. Even so, not all positions

> *are filled. We have three vacancies. At the moment we have 26 Chairmen. It was even difficult to get the task force positions'* (Arbitrator 4).

7.2.3.2 Effective appointment and placement of Conciliators

The second option in addressing the issue of better management of human resources is by adopting a strategic appointment and placement of Conciliators and Arbitrators in their respective positions as suggested by five interviewees (Table 7.2). As discussed in Section 5.1, Conciliators are generally appointed among the officers from MoHR in Grade 41 and 44, and once they are promoted to grade 48 they would often be transferred to become a unit or departmental head in various departments within MoHR. Hence, they no longer or actively perform the conciliation function. This was rightly noted by one interviewee who proposes MoHR to retain capable and skilled Conciliators at the DIRM although they have been promoted to a higher grade. Here, this interviewee believes that effective placement of Conciliators is vital and suggested for the Ministry to reform the system of promoting them:

> *The problem now is once you [Conciliator] are promoted, you leave the Department [DIRM], you no longer do conciliation. The talent is wasted. There is a problem with the present system. In time, this is the thing that needs to be thought through* (Conciliator 5).

Similarly, another interviewee believes the engagement of Conciliators and Arbitrators should be from among those who meet certain standard of qualification as well as being well equipped with specialised ability: '*you [the Department] must have the right kind (skilled, experienced and having the right aptitude) of conciliation and arbitration officers at all levels. Fresh graduates would seldom meet these criteria'* (Arbitrator 5). The last comment from Arbitrator 5 was also shared by another interviewee who said '*I think for fresh graduate, they are not suitable because they lack the maturity [and] the working experience'* (Arbitrator 2).

7.2.3.3 Enhancing the status of Conciliators

Finally, three interviewees noted that enhancing the status of Conciliators is vital to ensure that disputants accord greater respect towards them. For example, one interviewee said that there are instances where senior human resources have lack respect towards Conciliators due to their immaturity in service and lack of knowledge: '*It cannot be denied that the HR [Human Resources] from big companies, when they see junior officers, they have the perception that the officer does not know much'* (Conciliator 7). An interviewee who is heading one of the DIRM branches stated that the status of the Conciliator also plays a role in getting parties to be more open to settlement. This interviewee believes disputants will have more respect for and confidence in a Conciliator holding a senior position:

> *Whether the second layer [conciliation] is successful or not, is because officers down there [DIRM branches] are not doing enough or because of [their] status. I came across one case involving a senior manager. I can get an employer easily settling the case even to the maximum of the complainant's claim, so they are convinced I know the law very well or because I am the Director* (Conciliator 11).

7.2.4 Case management

The fourth strategy in tackling the backlog at the IC from the point of view of interviewees is Case management. As shown in Table 6.25 above 12 of 31 interviewees highlighted the need to manage disputes both at the conciliation and arbitration level in three specific areas. These are (1) scheduling of cases for conciliation or arbitration; (2) managing postponement of hearing; and (3) ensuring that parties are fully prepared prior to hearing.

7.2.4.1 Scheduling of cases for conciliation or hearing.

One area of concern by six interviewees in terms of how a backlog of cases can be avoided is the scheduling of cases either at the conciliation or arbitration level (Table

7.2). For example, one interviewee proposed effective scheduling of conciliation meetings between the existing cases and those that just being referred to the DIRM: '*Now, we set targets and that help in reducing backlog. We have to implement good strategy to avoid backlog by managing how we set our conciliation meetings between the new cases received and pending cases'* (Conciliator 22). Another interviewee also shared a similar opinion where she provided an example of similar approach taken by the judges at the High Court which had taking initiative to clear their own backlog by rearranging their cases resulting in representative such as lawyers and union officials not being able to attend hearing at the IC although these cases were scheduled earlier:

> *Right now the issue is on the scheduling of cases because our legal representatives [or] trade union representatives will have to attend court hearings [in other courts]. At the moment, it is because the High Court has started its own actions to clear the backlog. They appointed more judges and they are also practising their case management now, more proactive so as a result, they are scheduling their cases, 2 week, 3 weeks [before hearing].We schedule our case one year in advance. There's a clash of date because we, you know! we have been giving way. But how long can we give way*? (Arbitrator 1).

Another interviewee believes that if conciliation is allowed to be extended longer such as one year instead of meeting the current target (unsettled cases to be reported within three months from the date of dismissal) there may be a good chance of disputants being willing to resolve their dispute because they may have been able to put away their resentment towards each other. However, because Conciliators have to meet the key performance indicators (KPI) they would rush into getting the case removed from their workload by quickly reporting it as being unsettled:

> *When you give it a time frame, sometimes a month or two months, we call the parties again, there is a cooling off period and now we are looking at least one year or one and half year if conciliation fails and you have to go for arbitration. Do you want to wait that long? At that stage, after the cooling period the employer is able to think, reconsider. Sometimes that plays a role, but we don't have the luxury of time because we have the KPI to meet* (Conciliator 12).

Similarly as stressed further by Arbitrator 1, better management of cases is far more important than simply meeting the KPI. This is to safeguard the interest of the parties while at the same time to be fair to the Conciliators and Arbitrators:

> *Yes, I keep my KPI, [but] have I done justice. These are the problems we are now facing, no buts, KPI is important and now, all our stats are being computerised, all are being compared so 'this person's percentage is higher, yours is low'. Presume you are not working. How would the Chairman feel? Similarly, how will the IR officers feel? Isn't it? Is it quality? Because justice means humanity, compassion, so, I think we would have to remove the KPI* (Arbitrator 1)

7.2.4.2 Managing postponement of hearings.

The second suggestion grouped under case management as proposed by the interviewees is to effectively control application from disputants to reschedule hearings at the IC. As shown in Table 7.2 this was brought up by four interviewees. For example, one interviewee suggests reasons why rescheduling is necessary to ensure parties are able to be represented by the right people:

> *Secondly is managing requests for postponement as some of the lawyers are busy. So we have to allow this request to avoid complain from lawyers. This is because the hearing cannot proceed without the present of the lawyer. The term used is 'willing able' where employees or employers only want to use the lawyers of their choice. It is important that lawyers be specialised in IR matters (Arbitrator 8).*

The need to manage postponement of cases not only has to be addressed at the IC level but also at the conciliation particularly in some cases where employers' representative who have other matters to handle such as attending to court hearings:

> *The next problem is even if you have already fixed your case a lot of these parties request for postponement. In some cases, the employer is represented by the legal officer of the company who may have to attend court hearings, so we need to decide whether to allow for postponement* (Conciliator 11).

7.2.4.3 Parties preparation prior to hearing.

The next strategy placed under case management to handle backlog at the IC as shown in Table 6.25 relates to how well parties are prepared before attending arbitration. Here two interviewees indicated that disputants must have the capability to manage and present their case properly when attending hearings at the IC. For example, one interviewee stated that the disputants must be well prepared and ensure that they have the appropriate and necessary documents when attending arbitration to enable the Arbitrators to concentrate on resolving the disputes:

> *My opinion is there should be an effective case management. The parties must cooperate and follow the process right. For example, some of the parties submit incomplete documents even though they have actually gone through the process at the DIRM. It is important that the parties prepare pleading to identify issues and the smooth running of the hearing. This will narrow down the issues so that we can focus on the disputed issues only* (Arbitrator 8).

Another interviewee also supported the view that hearings can be delayed because some employers bombarded the court with huge documentations which can be more difficult to handle and hence must be properly administered:

> *The law is there, if you say more difficult to handle, not in the sense of the nature of the cases, but in the sense of the facts of the case, documents are so thick, especially employers like banks, financial institutions, big companies, not from the legal stand point view, more on the documentation, documentary evidence and facts of the case. We have to go through [these] because, why? If you don't address the issue in your award or your judgment, they [superior courts] can quash your award for error on the facts of the record or whatever and so forth (Arbitrator 2).*

7.2.5 Improving the dispute resolution process

The fifth group of strategies themed under improving the dispute resolution process was proposed by nine interviewees as shown in the above Table 7.2. These strategies include (1) effective workplace mechanism; (2) direct reference of dispute to the court; and (3) streamlining functions involved in dispute resolution.

7.2.5.1 Effective workplace mechanism

Four interviewees suggested that if an effective workplace mechanism is in place, there will be fewer cases referred to the tribunal conciliation as well as the arbitration. As one interviewee noted, the number of cases at the IC can be minimised if employers practise good internal mechanisms to resolve their dispute with their employees: *'The employer must have very good workplace procedure in termination cases so that fewer cases need to be brought up to the Industrial Court'* (Arbitrator 5). This view is shared by another interviewee who believes that employers must ensure sound industrial relations are practised at the workplace to avoid any grievances or disputes occurring. This interviewee believes that if employers manage their employees with respect and provide them with the opportunity to voice their concern, any grievances and dispute can be easily settled at the workplace. In this manner, employees would not have to go the DIRM or the IC to have the matters resolved for them:

> *If everything, IR practices, good practices were implemented you would never have a trade dispute. A lot of it is because an employee wants to come to court to tell a story. They are real frustrations at the workplace. So you have to treat people right and tell the employee why they are not performing. Every year you must communicate, not let it face up to 20 years. You know you must nip the problem in the bud. So IR practices are important and you must call your employee every year and say 'this is what is happening, you are performing, not performing', then people will know where they stand* (Arbitrator 1).

7.2.5.2 Direct reference of dispute to the IC

As discussed in Chapter 2 Section 2.5.10, all disputes must be first reported to the Minister for his decision whether to be referred to arbitration or not (except for those concerning interpretation, variation, noncompliance of awards and application for reference to the High Court on any questions of law of an award). This is a lengthy process including some administrative steps which have to be followed at the DIRM

branches, headquarters and finally the Minister's office. From the perspective of four interviewees all disputes should be referred to the IC directly without the need for Ministerial process. This will expedite and shorten the process and hence could avoid any backlog: '*There is a view for [that] all cases to be referred to the Industrial Court for their decision'* (Conciliator 5).

7.2.5.3 Streamlining functions involved in dispute resolution

As discussed in Chapter 3 Section 3.4, disputes concerning termination of employment can be handled by two separate tribunals depending on the remedy being sought by employees. If their remedy is for reinstatement the function would be handled by the DIRM but if it is for compensation (either in lieu of notice or layoff or retrenchment benefits) it will be under the Labour Court (see also Chapter 5 Section 5.6.5.3). Thus, one interviewee proposed that there is a need to streamline these two tribunals in terms of handling dispute pertaining to termination of employment suggesting that disputes on termination of employment under *Section 69* of the *EA 1955* should be undertaken by the DIRM:

> *I feel that Section 69 [EA 1955] should be transferred to the Industrial Relation Department [DIRM] and let the Industrial Court hear Section 18 [IR Act 1955] or appeal cases. It could be faster. This could work and the officers are aware of the procedures, and can look at the merits of the case. You can imagine. Officers of Grade 27 [at the Department of Labour] can do Labour Court and it works out. Now it might not be suitable but that is something to think about for the future* (Conciliator 5).

Another interviewee also shared her thoughts of the need to streamline between the function of conciliation and arbitration which are now operated by two separate departments but she remains sceptical on this due to constraints placed under the *IR Act 1967:*

> *We learn about so many systems. We go for training and so on. Unfortunately we cannot implement certain systems here. I don't understand why but maybe one of the reason because of the Act [IR Act 1967] itself (Conciliator 2).*

The preceding section has discussed strategies from the interviewees points of view to address backlog at the IC. These include addressing shortcoming of the current law in particular the *IR Act 1967*, enhancing the conciliation mechanism, better management of human resources and case management. These strategies address three levels of dispute resolution system (from the workplace to arbitration) which falls under the mainstream of industrial relations. This is to ensure that as much as possible disputes are resolved at the lowest level through sound industrial relations practice and prudent management of resolving disputes at the DIRM conciliation and arbitration stages.

7.3 Chapter Summary

This Chapter discussed the strategies proposed by interviewees on how to encourage disputes to be resolved at the workplace and the strategies to handle the backlog of claims for reinstatement before the IC. The thesis found that in order to encourage disputants to resolve disputes at the workplace several measures need to be implemented by the government. These include changed laws and regulations to allow for taking pre-emptive action through educational and advisory before disputes escalate to conciliation; making the use of workplace dispute mechanisms compulsory; encouraging employers to set up internal independent decision making bodies; providing Conciliators with the authority to filter vexatious cases and; introducing programmes to recognise employers who have implemented good workplace mechanisms. To avoid future backlog at the IC the thesis found several recommendations including: addressing the shortcomings of the current laws and regulations in Malaysia; enhancing the effectiveness of conciliation; improving the management of human resources; introducing case management and; improving the dispute resolution process.

The next Chapter discusses the findings of the thesis in relation to the literature provided in Chapters 2 and 3, and particularly the Malaysian dispute resolution system and the justice theories.

CHAPTER-8 DISCUSSION

8.0 Introduction

Chapter 5 presented the findings regarding the key factors behind the referral of claims for reinstatement to conciliation, while Chapter 6 identified the reasons for the low rates of settlement at conciliation. Chapter 7 presented the perspectives of the interviewees in relation to strategies for encouraging disputes to be resolved at the workplace, reducing backlogs at the IC and improving the conciliation process. The present chapter brings these findings together and draws on the literature provided in Chapters 2 and 3, particularly in relation to the Malaysian dispute resolution system and the justice theories. In doing so, this chapter answers the four research questions for the thesis:

1. What are the key factors behind the referral of claims for reinstatement from the workplace to tribunal conciliation?

2. What are the key reasons for the low settlement rate of tribunal conciliation for reinstatement claims and subsequent high rates of referral to arbitration?

3. What are the strategies to encourage claims for reinstatement to be resolved at the workplace?

4. What are the strategies to reduce the backlog of claims for reinstatement before the IC.

8.1 Antecedents to the referral of claims for reinstatement from the workplace to conciliation.

The first research question sought to determine the key factors behind the referral of claims for reinstatement to conciliation. It was revealed in Chapter 5 that three main factors appear to be the antecedents for referrals of claims for reinstatement to conciliation. These are: the quality and use of in-house dispute resolution processes; the adherence to laws and precedents by workplace parties; and the quality of justice at the

workplace. These three factors were found to drive disputants to rely on the tribunal conciliation at the DIRM to resolve their disputes of unfair dismissal rather than settle them at the workplace. The next section provides a discussion of these findings with reference to similar findings in the international literature.

8.1.1 Challenges in the process of implementing workplace dispute resolution

This thesis identified the process of implementing workplace dispute resolution procedures as being a key reason behind the referral of disputes to conciliation. It was identified in Chapter 5 that there are three challenges in implementing workplace dispute procedures. These include the degree of parties' determination to implement or use workplace mechanisms; the lack of hurdles in the Malaysian dispute resolution system; and the emergence of a compensation culture. The survey of Conciliators found that despite the large number of disputes over claims for reinstatement being referred to the DIRM some effort was, nevertheless being made by the disputants to resolve their disputes at the workplace. The quality of that effort is however questionable given that justice, and particularly procedural justice has not generally been adhered to at the workplace (see Section 5.9). This thesis has found that dispute procedures are generally implemented only in larger organisations; many employers lack the knowledge to implement such procedures or carry them out; and that a combination of low union density and strong managerial prerogative bodes against the use of workplace dispute resolution procedures.

Conciliators revealed that workplace dispute resolution is mostly implemented in larger workplaces with human resource capabilities and knowledge of dispute resolution. Similar findings were found in the UK by Earnshaw, Marchington & Goodman (2000) who discovered that an obvious reason why procedures may not be followed in small companies is the lack of specialist knowledge of employment law and the absence of a personnel advisors or HR managers. In Malaysia, like in other countries, larger workplaces are the ones that are mostly equipped with dedicated HR staff who have knowledge of dispute resolution, while many smaller and medium workplaces do not. Employees in these smaller workplaces have little access to internal mechanisms

including appeal procedures when their employment is terminated by employers, and, in the absence of this, they are more likely to turn to the DIRM and IC to have their appeals heard through conciliation and subsequent arbitration.

Apart from workplace size, many employees lack knowledge of their own rights under unfair dismissal provisions of the law, and in Malaysia, are subject to the authority of their employers who rely on their own prerogatives to justify their actions (Muniapan & Parasuraman 2007; Anantaraman 1997). It means they are more likely to seek resolution of their disputes outside the workplace. As noted by Omar, Chan and Joned (2009) employees who are aware of their unfair dismissal rights are in a better position to resolve their disputes and conflicts with employers at their workplaces. In the Omar et al's (2009) study of the banking industry in Malaysia, despite that sector having the strongest union presence at the workplace employees were found to lack knowledge pertaining to termination and dismissal of employment, and many were subject to unjust dismissal by their employers. The situation is likely to be worse in smaller workplaces that have no union presence, and given the low union density in Malaysia, it is likely to be a widespread phenomenon (see Section 2.5.6).

Low union density has also led to a situation where employees have very little influence and power at the workplace. Lack of employees' involvement in the workplace helps to explain why the formulation of rules and procedures for dispute resolution are often determined by employers. Ideally this should make employers more aware of the importance of utilising such procedures but this thesis has found that although employers are aware of dispute resolution procedures it may not necessarily mean that they would implement such procedures effectively. The findings are not confined to Malaysia. Indeed Voll (2005) in a study of six Australian unfair dismissal cases, proper disciplinary and dismissal procedures were not followed by employers despite being written into their workplace procedures.

As discussed in Chapter 3 the strong tradition of managerial prerogative in Malaysia may also help to explain why employees and unions prefer to use the DIRM conciliation and court system rather than in-house grievance procedures. The strong culture of

hierarchy and paternalism at the workplace means that employees are often locked out of decision making processes (Parasuraman 2005; Frenkel & Peetz 1998; Kuruvilla 1995; Murugavell 1994;). Indeed, the non-involvement of employees in determining workplace procedures is so well accepted in Malaysia, it has been used as an argument to justify employees' rights to challenge decisions made by their employers at the workplace (Murugavell 1994). These beliefs increase employees' determination to have their cases heard by the DIRM and IC.

The inconsistent use of workplace dispute procedures together with the exercise of employer prerogative, poor dispute resolution skills, low union density and the belief that employees have a right to pursue conciliation of their disputes have contributed to a pattern of referral of termination disputes to conciliation. This thesis identified the lack of hurdle requirements in the Malaysian dispute resolution system as a contributing factor to the growing numbers of cases before the DIRM and IC. The view was shared by Conciliators and Arbitrators interviewed in this thesis who expressed a belief that parties should be required to prove that they have made an effort to resolve their disputes at the workplace prior to referral to the DIRM (see Section 5.6.2). Many of the interviewees explained that there were instances when employees insisted on filing their claims because there was no restriction on doing so, even when they did not genuinely want to be reinstated. The interviewees pointed to instances where claimants who had already received retrenchment benefits or who were on probation when they were terminated from their employment had, nevertheless, filed their cases (see Section 5.6.2).

Unlike other countries such as the UK, Australia and New Zealand, there are no hurdles or incentives in place that would encourage a greater use of workplace dispute mechanisms to avoid overuse of the conciliation system. For example, as discussed in Chapter 2, the introduction of statutory model dispute procedures in New Zealand; the use of ADR through ACAS in the UK; and the latest model dispute resolution in the Australian *Fair Work Act 2009* (*Schedule 6.01* in the *Fair Work Act 2009*) all provide for workplace based dispute resolution. In the UK and New Zealand, attempting pre-

court resolution of disputes is an official prerequisite before one can lodge a complaint with a court or tribunal. In Australia the court or tribunal will consider the parties' pre-court negotiations when making a decision on unfair dismissal cases (Venn 2009). None of these requirements are in place in any of current legislation or regulations in Malaysia. Such hurdle requirements (together with training and skills development) may act to increase dispute settlement outcomes at the workplace and lower the referral rate of disputes to conciliation. The presence of systemic hurdles such as those found in countries such as the UK, New Zealand and Australia could thus act to avoid unnecessary use of the tribunal system in Malaysia.

The third factor fuelling the growth in conciliation claims found in Chapter 5 was that the growing expectation of compensation among employees which seems to be leading a compensation culture. This phenomenon is driven by four elements: the claimant; third parties (such as unions, lawyers and consultants); the system (particularly confusion over the technicalities of the tribunal process) and growing publicity and media coverage of compensation awards which acts as an incentive to others to submit their own claims.

In interviewing a range of Conciliators and Arbitrators in Malaysia, the compensation culture was found in this thesis to be linked to the frequent awards of compensation by the DIRM and IC, despite the prime objectives of the *IR Act 1967* placing emphasis on reinstatement as the remedy (see Section 2.5.2). The move towards awarding compensation was also noted by Aminuddin (2009) who argued that although the *IR Act 1967* envisaged reinstatement as the prime remedy for dismissal without just cause and excuse, it had become an almost 'lost' remedy in Malaysia. Similarly, Anantaraman (2004) asserted that compensation has become the rule and reinstatement the exception in the IC in decision making process for unjust retrenchment.

The phenomenon of a compensation culture linked to monetary claims over workplace disputation has been the subject of considerable debate among scholars, economists and politicians resulting in changes to legislation and tribunal operations in other countries. Some early commentators have suggested that tribunals themselves began awarding

compensation over reinstatement as the appropriate remedy for unfair dismissal cases. For instance, Dickens et al. (1981) noted that in the UK the reasons for claimants not requesting reinstatement or reengagement as remedies for their dismissals was due to the unenthusiastic attitudes of the tribunals (ET and ACAS) in promoting such remedies themselves. In a study of six unfair dismissal cases before the New South Wales Industrial Relations Tribunal, Voll (2005) noted that none were resolved with reinstatement, despite this being the major objective of the claims. In one case he noted a Commissioner indicated to the parties that reinstatement was not a suitable remedy as the relationship between them had been broken.

Similarly, this thesis has found that the practice of tribunals in Malaysia to award compensation as a remedy has become the dominant form of remedy and this is likely to have contributed to claimants seeking redress via conciliation at the DIRM even though they do not genuinely want to be reinstated. In Malaysia many employees are ineligible to make claims for unjust dismissal at the Labour Court as their wage exceeds the statutory limit. The thesis found that many of those claiming compensation in lieu of termination or compensation as a result of retrenchment had used the DIRM as a platform for a monetary award under the pretext of claims for reinstatement

In their UK study of unfair dismissal, Dickens et al. (1981) explained that many claimants believed that if they used reinstatement as the starting point for negotiations with their employer, refusal to reinstate normally led to higher awards of compensation. In other words, claimants had learned to maximise their monetary benefits resulting from a claim of unfair dismissal by using reinstatement as a negotiating device.

In a study of cases handled by the ERA in New Zealand, Shulruf et al. (2009) noted that the media often reported the most extreme cases creating a perception of high compensation awards was the norm. This thesis confirmed that media reporting of successful cases was an important factor behind employees' tendency to submit their claims. Additionally, the thesis revealed that publicity through the word of mouth of third parties such as unions and consultants is highly influential on employees' decisions to lodge their claims at the DIRM. Employees, including those who were not

union members, were found to rely heavily on the information and advice provided by union officials. This phenomenon has been observed elsewhere. For instance, in their report on the estimates of the costs of dismissal in the small-and medium-sized Australian enterprises conducted in 2004, Freyens & Oslington (2007) suggested that the higher claim rates to tribunals by unionised employees could be due to unions inducing their members to lodge claims rather than settle in the workplace.

8.1.2 The effect of laws and precedent on dispute resolution

The two key implications for workplace dispute resolution arising from the effects of laws and precedents are the failure of workplaces to implement the Code and the effect of the operation of the Curable Principle. These are discussed in light of the findings of the thesis next.

8.1.2.1 Implications for the non-use of the Code of Conduct for Industrial Harmony 1975.

The industrial relations system in Malaysia is mainly regulated and guided by the *IR Act 1967*, *EA 1955* and the Code of Conduct for Industrial Harmony 1975. As discussed in Chapter 3 these two Acts and the Code are remnants of the British legislation which shaped the present system (Amante 2004; Kaur 2004). As discussed in Chapter 3 (Section 3.2), although the Code was developed to guide parties to resolve disputes at the workplace, it has not yet been applied successfully in the workplace (Parasuraman 2005). Further, because the laws covering industrial relations are silent on dispute processes, the Code is the only mechanism guiding employers and employees on the implementation of workplace dispute resolution in Malaysia as it includes procedures for dispute resolution, collective bargaining, communication and consultation.

In this thesis Conciliators' responses to the open ended questions revealed that there is in fact a problem with implementing the Code because it is widely seen to have no legal status; it is out-dated having never been amended since its inception in 1975; and it is poorly promoted. This thesis found that apart from larger organisations, the Code has

generally been ignored by small and medium businesses. This finding is confirmed elsewhere in the sparse research on the topic. In an interview with a Malaysian Employers Federation (MEF) official, in September 2003 Parasuraman (2005) recorded:

> *Basically I don't think any companies constantly use the Code, I mean to be frank with you….I don't think any companies will use the Code to say that, look this is part of a guideline for employee participation and you want to implement this. You can have workers participate as a result of other things rather than the Code itself.*

Through the interviews with Conciliators and Arbitrators it was found that some employers are only aware of the retrenchment procedure in the Code, and many do not know of the procedures for handling grievances and disciplinary matters at the workplace. Some do not even know of the existence of the Code. As claims for reinstatement represent the majority of individual disputes in Malaysian workplaces, it could be argued that these would be best dealt with using the procedure outlined in the Code. For example, the Code provides employees with an appeal process at their workplace, which may provide a salient mechanism for resolving the dispute at workplace level.

Whilst the Code is generally ignored by workplaces because it is not considered to be a legal document, there are instances where provisions in the law are also ignored. For instance, the thesis revealed that the provision for due inquiry in the workplace contained in the *EA 1955*, is still often ignored and questioned by employers. Furthermore, in this thesis it was found that employers argue that the provision of dismissal 'without just cause and excuse' in *Section 20* of the *IR Act 1967* takes away their managerial prerogative to summarily dismiss an employee. Some were clearly confused about the meaning of this phrase while others did not even know of its existence. The interviewed Conciliators and Arbitrators indicated that the failure of employers to adhere to the procedural requirements in the Acts may subject employees to victimization at the workplace, and this then drives them to DIRM and IC for help. Therefore, the existence of provisions to provide due inquiry and to explain the reasons

for the dismissal to the employee (whether by law or not) cannot guarantee that implementation will be fully adhered to. The implications of this finding are that a greater emphasis on training and awareness of the legal provisions related to workplace dispute resolution for employers would likely assist in achieving lower rates of referral of cases to the DIRM and courts.

8.1.2.2 Implications of the Curable Principle

Another issue arising from the requirement for due inquiry is that of its relationship with the Curable Principle enunciated in the Dreamland case (see Section 3.3). Muniapan & Parasuraman (2007) noted that employers in Malaysia tend to question *Section 14* of the *EA 1955* on whether or not they should implement it, and if they do what standards or rules they should follow. Furthermore, the courts have grappled with two opposing views on this matter: one stating that an employer's failure to conduct a domestic inquiry will negatively affects the employers' case because of the potential denial of justice to the employee; and the other insisting that the failure of such inquiry can be rectified by a fresh inquiry at the IC. This controversy brings the discussion to the effect that court precedents have in the implementation of workplace mechanisms, particularly in regard to the 'curable principle'.

It was described in Chapter 3 Section 3.2 that because the 'curable principle' ensures that any defect in procedural justice experienced in the workplace will be rectified in the court, the responsibility for providing procedural justice lies with the court and not with the employer. In other words it means that there is no guarantee of procedural justice for employees pursuing dispute resolution at the workplace level with the possible exception of those covered by the *EA 1955*. It was found from the survey of Conciliators that they themselves were also divided in their opinions, with many believing that the 'curable principle' negatively affects employers' willingness to conduct domestic inquiry at the workplace. The interviewees expressed the view that although many were not in support of the principle, they acknowledged its superiority. Nonetheless, it can be argued that the 'curable principle' delivers a significant message to many employers about their minimal role in providing for procedural fairness.

Employers believe they have the right to discipline employees at the workplace, ignoring the fact that proper domestic inquiry would provide them with the opportunity to defend their case before the IC should the workplace dispute process fail.

With evidence of domestic inquiry, the DIRM or IC can focus on the case in terms of the fairness of managerial decisions, instead of arguing about procedural defects, thus ensuring that equity and fairness is accorded to both parties. This has also been observed in other jurisdictions. For instance, as noted by Earnshaw, Marchington & Goodman (2000), in their study on discipline and dismissal in small establishment in the UK, employers who won their cases before the employment tribunal were able to successfully defend their cases because there were no challenges made by employees to the procedures used in the dismissal. Clearly, the complexity and confusion in interpreting fairness including in the current Malaysian legislations, Code and legal precedents have caused disputants to simply rely on the DRM and IC to resolve their disputes and seek for answers beyond the workplace. This situation of loopholes in the system has not changed much from was noted by Dunkley (1982) who found that although various IC decisions have established a set of guidelines on due inquiry the concept itself is ill defined. One implication of this finding is that employers who do provide their employees with due inquiry and, in particular, with procedural justice are more likely to be able to successfully defend their case before a tribunal or court. It is arguable then, that the business case for adopting procedural justice as part of workplace dispute resolution is to save time and money which would otherwise be spent on referral to the DIRM by employees who feel they have been treated unfairly. The issue of justice was another key finding in this thesis and the next section moves to consider the implications of the findings related to justice.

8.1.3 Justice in the workplace

This study found that the antecedents to claims for reinstatement were largely comprised of employees' quests for justice and in particular for procedural and distributive justice. Similar findings have been reported by other researchers in a range

of other jurisdictions. As noted by Anantaraman (2003) in Malaysia, key areas of procedural justice including issues of representation or social justice outcomes may not be complied with at the workplace. He observed that the most common reason given by employers for not enforcing fully-fledged workplace investigations of particular disputes (as part of in-house dispute resolution processes) was due to the inability of small-scale employers to conduct such inquiries and this was confirmed in the thesis (see Chapter 5).

Earnshaw, Marchington & Goodman (2000) in their study in the UK explained that it might be difficult for small firms to meet the standards of reasonableness demanded by employment tribunals because they often lack skills or experience. Similarly, Goodman et al. (1998) in their study of three industrial sectors (hotels and catering, road transport and engineering) in the UK found that an impartial appeal mechanism in workplace dispute resolution is virtually impossible for small companies to meet mainly because they lack the personnel to manage this role such as human resource managers. In Australia, Chapman (2009) noted that in recognising the limited capabilities of small businesses to provide fair process, the leniency given to them with the introduction of the Small Business Fair Dismissal Code in Australia negatively affected the protection of employees, and did not guarantee that dignity and respect would be accorded to them. Nevertheless, it has long been understood that the likelihood of employees filing their claims to an industrial tribunal can be reduced if formal disciplinary procedures at the workplace are applied and effectively used (Goodman et al. 1998).

8.1.3.1 Procedural justice at the workplace

The lack of implementation of proper workplace dispute resolution procedures in Malaysian workplaces has affected the perception of justice among employees and employers in the workplace. The thesis found that many employees turn to the DIRM in their quest to seek justice resulting from unfair terminations. Conciliators reported that 54 percent of employees filing claims for conciliation did so because of lack of procedural fairness at the time of termination. It is well established in the literature that

denial of procedural justice is likely to lead to a referral to a court or tribunal. For instance Muniapan & Parasuraman (2007) noted that failure of employers to adhere to natural justice at the workplace resulted in employees filing for unfair dismissal under *Section 20* of the *IR Act 1967*. Similar findings have been observed in the US where Lind et al. (2000) found that employees' determination to claim wrongful-termination to a higher authority was greatly influenced by the unfair treatment they had received at the time of termination. In other words denial of procedural justice is a key motivator to take further action on the issue.

Interactional justice is linked to procedural justice as it relates to how an employer treats an employee in the course of dispute resolution. As such, even though a dispute process is followed and the steps of procedural justice are provided a denial of interactional justice can result in employees filing unfair dismissal cases. In this thesis, interviews with the Conciliators and Arbitrators provided some perspectives on common elements of interactional justice that occur at the time of termination. These include, for example, lack of respect by employers when communicating their decisions to dismiss employees. One interviewee provided an example of a case where the decision was given on the phone. Another element was communication barriers between both parties where employers were not willing to listen to employees they had come to dislike, and immediately dismissed them without concern.

The implication of denying employees procedural or interactional justice for Malaysian industrial relations is that the high incidence of cases referred to the DIRM could be minimised if employers were better able to provide these aspects of justice in their workplaces, particularly before deciding on the course of action to be taken against their employees. Given the lack of adherence to the Code, a clear recommendation arising from this thesis is that training in dispute resolution practices and communication skills would assist both employers and employees in coming to a resolution in the workplace and help to lower the rate of referral of cases to the DIRM.

On the other hand, employers believed they had treated their employees in a procedurally fair way. In fact employers reported a lack of fairness during the in-house

dispute settlement process by employees asking for unrealistic claims for compensation and from those who were determined not to settle at workplace level.

8.1.3.2 Distributive Justice at the workplace

Distributive justice refers to fairness of decisions and in this thesis it concerns the fairness of employers' decisions to dismiss their employees and the extent to which employees were given reasons for the employer's decision to terminate. Youngblood, Trevino & Favia (1992) have argued that distributive justice is not the major concern for those who file claims for unjust dismissal. However, this thesis found that the fairness of employers' decisions at the workplace with regard to termination of employment was the trigger for employees filing for conciliation, and subsequently arbitration at the IC. Nonetheless, surveyed employers believed that they had been fair in making their decisions for several reasons, including that they had conducted domestic inquiries; their employees had committed gross acts of misconduct; and their retrenchment decisions were genuine.

Given the relatively high rate of employee success in their claims against employers at the DIRM, it appears that Malaysian employers may be too harshly applying termination. The thesis investigated the extent to which employers may be amenable to consider a set of equitable factors which might make them reconsider the decision to terminate. The thesis found that many employers had no sympathy with their employees and, in making their decision to terminate, and did not consider any mitigating factors such as age, seniority, ability of employees to find new jobs or positive past contributions. More than 70 percent of employers would not consider reversing their decisions even if their employees had positively contributed to the organization; were senior in service; or could not find a job elsewhere. These findings were similar in all three types of dismissals investigated including misconduct, poor performance and retrenchment.

There is a body of work which has examined the effect of factors such as age, seniority and performance of employees on decision makers' handling of dismissal cases. The

cases serve as a reminder that consideration of human factors play an important part in coming to a fair decision in resolving workplace conflict. In their study of factors which mitigate employment termination decisions in the US, Rousseau & Anton (1991) found that past performance and employability had no effect on judgement regarding termination fairness. However, they did find that time on the job (seniority) affects of the decision to terminate when the performance of the dismissed employees at the time of termination is sub-standard. In contrast, Wheeler, Klaas & Mahony (2004) found that long tenure of employment has a powerful effect on decision makers such as labour arbitrators, peer review panellists, jurors, human resources managers and labour court judges who have ruled highly in favour of employees with long service records. They further argued that although this might occur in practice, it has been neglected in industrial relations literature. Tribunals have also been found to use other personal factors such as the economic situation of the employee in determining the fairness of a decision. For example, in a landmark decision between *Paul L Quinlivan vs. Norske Skog Paper Mills (Australia) Ltd* 2010 the Vice President of Fair Work Australia ruled that although the employee's dismissal was considered as just and reasonable and that the procedure used by the employer was fair (for breach of safety rules at the workplace), the decision to terminate him was too harsh. In this case, factors including low educational profile and financial hardship of the employee were taken into account:

> *From the perspective of the personal and economic situation of the applicant, the dismissal was a disaster for the applicant. For a man of the applicant's age and poor educational profile, it is unsurprising that he has not been able to find another job despite great efforts to do so. Realistically, the applicant faces the prospect of long term unemployment or underemployment. His family faces severe financial hardship. There is a real risk that he will lose his house. His marriage will suffer increased stresses. His wife's depression could well be exacerbated. All these circumstances are likely to impact adversely on his young daughters.*

The analysis of interviews conducted with the Conciliators and Arbitrators suggested that some employers had been too harsh with their decisions at the workplace. Here 12 of the 21 interviewees were of the opinion that employers were not equitable in making a decision, for example imposing heavier punishments than the severity of the misconduct merited or unfairness in deciding who is to be retrenched when reorganizing

their businesses. Thus, there is a case for considering a range of other factors when making a decision such as terminating an employment contract. The thesis found that many Malaysian employers consider themselves as acting fairly when dismissing their employees even though Conciliators and Arbitrators consider employer decisions often too harsh and even though employees are able to wage successful unfair dismissal claims against them. The key implication of this finding is that the operation of the strong sense of managerial prerogative in Malaysia acts to convince employers they have a right to summarily dismiss their employees and makes them less likely to reverse that decision even when there might be mitigating factors which could be considered. Managerial prerogative as a pervasive management culture in the country was discussed in Chapter 2 in light of the power distance in the employment relationship. The high rate of contested dismissal cases referred to the DIRM by employees however indicates that employers need to question their decisions and consider the reasons why their employees win their cases. It is also an issue that Malaysian employer associations should consider in terms of reducing the business costs associated with tribunal and court cases stemming from managerial decision making.

This section discussed the antecedents to the referral of claims for reinstatement from the workplace to conciliation in light with the literature presented in Chapter 2 and Chapter 3 of the thesis. The referral of these disputes to the DIRM has been largely the result of three factors. These are: ineffective implementation of in-house dispute mechanisms coupled with a strong sense of managerial prerogative which locks employees out of the process for designing effective dispute resolution systems; lack of compliance with laws and precedents, particularly with the Code of Conduct and this is exacerbated by the effect of the curable principle which downgrades employers' responsibility to provide procedural justice in the workplace; and finally, the questionable quality of justice provided at the workplace

8.2 Low rates of settlement at conciliation and determination to arbitration.

The second research question was in relation to the key reasons for the low settlement rate of tribunal conciliation for reinstatement claims. The thesis identified two main

reasons for the low settlement rates which were: the effect of Ministerial intervention and the need for certainty. These are discussed below.

8.2.1 The need for Ministerial recommendation.

As discussed in Chapter 2 Section 2.5.4, DIRM is a government body that acts as a neutral third party in resolving any differences or disputes between employers and employees (including their trade unions) in Malaysia. It handles various types of disputes that fail to be resolved at the workplace, the majority of which pertain to claims for reinstatement. Conciliation meetings are conducted by Conciliators who facilitate the process by determining the relevant facts of the case in addition to working with the parties to find solutions in settling the dispute (Ali Mohamed & Sardar Baig 2009). If the parties fail to reach a settlement the Conciliator will refer the dispute to headquarters at the Ministry. It is then referred to the Minister for a decision on whether it should be arbitrated by the IC or not (See Section 20(3) of the *IR Act 1967*). The purpose of this Ministerial process is to ensure that only disputes that have merit are referred to the IC, hence, stopping any possibility of frivolous or vexatious claims (Ali Mohamed & Sardar Baig 2009). These processes should encourage disputants to be more inclined to resolve their disputes through conciliation, knowing that there are no guarantees that their disputes will be referred to the IC. Importantly, parties cannot themselves refer a failed conciliation case to arbitration so they are dependent on the Ministers' decision to enable a hearing at the IC.

The findings from the Conciliators' survey (as indicated by 73 per cent of Conciliators) showed that the majority of disputants (particularly employees) had made up their mind to pursue arbitration even before conciliation had commenced. This determination was despite the fact they knew they had to go through a Ministerial process with its lengthy waiting period and no guarantee of reference to the IC. The thesis identified that this expectation negatively affected the rates of settlement at conciliation, as parties were not serious about resolving their disputes at the conciliation. Instead, their determination to proceed to arbitration was driven by either their search for justice or the need to get certainty or finality over the resolution of the dispute. Similar findings were noted by

Van Gramberg (2006a) that some parties preferred the more directive nature of arbitration rather than the participative decision making process offered by alternative dispute resolution because it provided a clear endpoint to the dispute. This could explain why some disputants in Malaysia prefer the IC to resolve their disputes. The thesis found that disputants believed that arbitration will not only provide them with better justice and certainty of settlement, but will also give them a second chance to prove their points and resolve their dispute. In addition, the thesis established that some disputants justify their determination to proceed to arbitration on the basis of a belief that it is their right. The Conciliators' survey also suggested a range of third parties influence claimants to seek arbitration as an avenue to secure a much higher compensation (This will be discussed further in a later section of the chapter). The thesis also found that the determination to proceed to arbitration is driven by employee claims rather than from employers. Indeed, the survey of employers found that slightly more than half (55.6 percent) indicated they do not prefer arbitration as it is considered time consuming and costly.

As discussed in Chapter 2 Section 2.5.10, despite the Ministerial filtering process, between 18 percent to 36 percent of disputes referred to the IC were found to have no merit in the period of 2006 to 2010. Whilst this represents a relatively large group of cases with no merit, arguably this number could have been higher if there had been no Ministerial process. This study found that while the Ministerial process may have helped to filter vexatious cases it has not helped in getting disputants to be more willing to use conciliation. In fact the Ministerial process delays dispute resolution as the volume of cases has increased, and hence, places further burden on the Minister. Clearly, a recommendation from these findings in light of the large numbers of disputes which fail to settle at conciliation is the possibility of the Minister ordering some cases back to conciliation and this is discussed later in the chapter.

8.2.2 The need for certainty

As discussed above some disputants prefer to proceed to arbitration because they require certainty of settlement in the form of a legally binding directive from an

Arbitrator. Certainty can only be possible at conciliation if the parties can agree on a solution but in many cases, their settlement positions are far apart. The thesis described the phenomenon of the lure of arbitration as the chilling effect of arbitration on conciliation. Clearly, this behaviour negatively affects the success rate of conciliation. Over half (57.1 percent) of the interviewed Conciliators noted that their most recent case failed to be resolved because at least one of the parties was relying on arbitration to resolve the matter. For employees, the chilling effect reduced their participation in conciliation as they believed they would receive greater compensation in arbitration. The thesis also confirmed through the Employers' Survey that more than half (56.4 percent) of the surveyed employers reported the failure of conciliation was due to employees' refusal to settle at conciliation, preferring arbitration.

Some of the failures to settle at conciliation were also due to employers' determination to proceed to arbitration in search of greater certainty of outcome, but to a lesser degree than their employees. Employers, in general were more willing to settle at conciliation. However, a small proportion of employers pursued arbitration where they believed claimants' demands were too high. Similar findings have been noted elsewhere. For instance, in the UK Urwin et al. (2010) found that employers were much more positive than employees in resolving their disputes through mediation provided by the Employment Tribunal. They further noted that employers were more satisfied with outcomes than claimants. The present study found that the chilling effect of arbitration on conciliation was also much stronger among employees than employers. Given their generally lower bargaining power than employers, it is not surprising that employees would seek an adjudicated outcome from an Arbitrator charged with administering justice. Further, given the operation of the curable principle, employees can rely on any defect in justice being corrected at arbitration.

As discussed earlier, in Malaysia arbitration by the IC represents the final avenue for the resolution and settlement of disputes over unfair dismissal. Being a court of equity it provides an alternative to the more expensive and legalistic avenue of the common law, particularly among claimants in seeking justice as a result of dismissal. As discussed in Chapter 2 Section 2.6 the IC is a free service with no possibility of the losing parties

having to pay costs. The adjudication process gives the authority to Arbitrators to make comments about the merit of the cases, examine evidence and impose settlements. This greatly influences the disputants' willingness to settle their disputes. In contrast, the lack of authority among Conciliators in resolving employment disputes was noted in this thesis as a major drawback of the conciliation process and another reason why employees in particular seek arbitration. The lure of arbitration was partly due to the fact that only an Arbitrator can make an order of compensation which is often higher than it would have been if they had resolved their cases voluntarily at conciliation. Very often claimants demand large amounts of compensation at conciliation in the knowledge that employers will not settle and the case would have a chance of being referred to conciliation. The effect of the lack of authority in Conciliators and Mediators has also been noted elsewhere. For instance, in the UK (Urwin et al. 2010) observed that employees feel they may have more influence in an arbitral setting than in a negotiation setting.

The chilling effect of arbitration on conciliation places stresses on the system, as reflected in the low rates of settlement at conciliation and high rates of reference to arbitration. Another factor related to the desire for certainty identified in this thesis is that disputants seek arbitration as a matter of principle and they want to see their principle upheld by the IC. This fact was discovered from interviews with the Conciliators and Arbitrators who suggested that there were cases in which disputants particularly employers strongly believed that they were right in terminating their employees. Similarly, most employees carried a belief that their employers had been wrong in their decisions and that this would be better able to be rectified in arbitration. Hence, disputants were willing to go all the way to prove their cases before the Arbitrator rather than give in at conciliation. Partly, this is a matter of seeking justice for themselves and it is pertinent now to turn to the issue of justice at the DIRM.

8.2.3 Justice at the tribunals

As discussed above, disputants felt the lure to resolve their disputes at arbitration as they believed it provides greater certainty and delivers justice. As noted by Tyler (1999)

the key elements of justice to ensure the fairness of a dispute resolution process lies in the disputants being given opportunities to participate in the process; having control over the process; and being treated with respect in the process. Hence, this thesis investigated how the three elements of justice (procedural, distributive and interactional) are perceived by Conciliators, Arbitrators and Employers. At this point it is important to state that a limitation of the thesis was in its inability to capture the perspectives of employees as they had already been dismissed from their workplaces and their names and addresses were not available. However, it is recommended that future research on the perception of justice at workplace, DIRM and IC investigate employee perceptions of justice. In general the international literature has shown that disputants' perception of justice when resolving a workplace dispute is enhanced when they perceive the process affords them the elements of procedural justice outlined in Chapter 4.

This thesis found that Conciliators were positive in their views of the extent to which the conciliation process provided procedural justice. For instance, the majority of Conciliators (29 of the 42 surveyed) reported that in the most recent cases both employers and employees were able to present their cases effectively. Clearly, this implies that from the point of view of Conciliators disputants were afforded procedural justice, and in the event of any party being weak in presenting his or her cases were normally assisted by Conciliators who provided guidance. This guidance was described by Conciliators as actively asking questions (fact finding) and the strategic use of individual sessions so that disputants can voice their opinions regarding the fairness of the process. This was a technique used widely to counter the imbalance of power between unrepresented employees and their employers. Unrepresented employees have been found, in the wider literature, to be at a relative disadvantage in dispute settlement situations. For instance, in a study by (Hagglund & Provis 2005) unionised workers were found to have a better chance of securing reinstatement if their union negotiated directly with the employer before the matter reached the conciliation stage. Allowing a person a voice is vital in ensuring an outcome which is perceived as fair.

The thesis found that of 46 employers who provided open ended comments on the fairness of the conciliation process conducted by DIRM, 51 responses were received indicating that Conciliators were professional and fair in their handling of the case. A minority of 13 responses (25.5 percent), however, indicated their case should have been conducted more effectively and this issue will be further discussed in the later section of this chapter.

Whilst Conciliators and the majority of employers were satisfied that procedural justice had been provided, the findings for distributive justice (the outcome of the dispute) were more mixed. Given that so many disputes fail to settle at conciliation the finding is not surprising. In conciliation, the decision lies with the parties themselves and Conciliators have no control over this. The majority of Conciliators (57.1 percent) reported that their most recent dispute was unresolved at the conciliation session mainly as a result of claimants' unrealistic expectations of their potential settlement outcome as described in section 7.2.2 above.). Similarly, 49 percent of surveyed employers reported that their most recent case was not settled and 56.4 percent stated that it was due to the claimants' refusal to accept the outcome. The thesis canvassed the problems associated with conciliation which might contribute to the failure to achieve distributive justice and found that the lack of authority of Conciliators to more actively recommend workable solutions to the parties to end the dispute; the lack of union representation of employees rendering them less able to negotiate with their employer; the lure of arbitration which influences disputant's decisions not to settle at conciliation; and the determination of employers not to reverse or otherwise amend their decision have been described in this thesis as the key obstacles to settlement at conciliation. In short these factors contribute to a lack of incentive to properly participate and settle at conciliation rather than pointing to a defect in the conciliation process itself. The implication from this finding is that without a process to enhance the esteem of the conciliation process itself (for instance, through Ministerial or IC directives to return the matter to conciliation or by increasing Conciliators' powers to be more active and interventionist in the conciliation process) the passage of the majority of disputes from the DIRM to the IC will continue.

8.3 Mandating the use of workplace dispute resolution mechanisms.

The third research question of this thesis is to identify strategies to encourage claims for reinstatement to be resolved at the workplace. Chapter 7 reported a number of strategies proposed by Conciliators and Arbitrators to encourage greater use of the in-house dispute resolution mechanism to resolve disputes. This thesis found five key areas that need to be taken into account for this to be achieved. These are: embarking on pre-emptive efforts; introducing compulsory regulation; setting up of an independent panel within the workplace; giving recognition to workplaces that implement good in-house mechanisms; and providing the necessary authority to Conciliators to filter disputes. Some of these strategies have been implemented in the UK, Australia and New Zealand as discussed in Chapter 2 of this thesis. This section considers the implications of each of these five strategies for the Malaysian industrial relations system.

The rise in individual disputes and particularly claims for unfair dismissal has become a trend in many countries including Malaysia (see Section 2.7). Unlike collective disputes which mostly involve unions who would have experience handling disputes at the workplace, individual disputes pertaining to dismissal mostly involve individuals or small groups of employees and in Malaysia these disputes cannot be taken under collective disputes (see Section 2.5.12). Thus, employees who have been dismissed by their employers would normally have to deal with disputes on their own with their employers. As found in Chapter 5 many employers particularly in the small and medium firms demonstrate little determination to resolve disputes at the workplaces due to their lack of knowledge and capabilities. It seems then, there is a need to review the way individual disputes are handled in Malaysia as these disputes now dominate referrals to the DIRM.

The first strategy nominated by Conciliators and Arbitrators at interview was that pre-emptive efforts by Conciliators would help to resolve disputes. The implication of this finding would mean that Conciliators in Malaysia would act beyond their conciliation function. Importantly, they would provide services (particularly in the form of dispute screening, advice and early evaluation) to disputants even before claims are being made to the DIRM. Such a move has been proven to be successful in the UK by ACAS

through its early dispute resolution efforts known as Pre-Claim Conciliation to disputants before they refer their claims to the ET. This results in saving disputants' time and cost as well as preserving their relationship (Dix & Davey 2011). Such a change in the function of Conciliators would necessitate changes in the operation of DIRM and requisite training of Conciliators.

The second strategy nominated by interviewees was to increase the determination of the workplace parties to use their in-house dispute resolution mechanism. The interviewees went so far as to suggest that it should be compulsory for disputants to use the in-house mechanism before they are permitted to have their disputes referred to the DIRM. This strategy would necessitate changes to the current laws and regulations in Malaysia. For instance, the Code of Conduct for Industrial Harmony has no legal status and is often not observed by the workplace parties as was reported in Chapter 5 (Section 5.7.3). Similar legislative change has been successful elsewhere. As noted by Pollert (2005) the introduction of the *Employment Act 2002 (Dispute Resolution) Regulations 2004* (see Section 2.2) provided hurdle requirements for workplaces prior to a hearing at the tribunal and it encouraged greater use of in-house dispute resolution mechanisms in the UK. Specifically, the amended UK Act required disputants (including dismissed employees) to use their internal procedures before referring their cases to the ET.

The strategy of compelling the use of the in-house dispute resolution mechanisms would also affect the current court precedents on workplace justice. As discussed in Chapter 3 (Section 3.2) disputants' determination to use their in-house dispute resolution mechanism is affected by the 'curable principle', a court determination which ruled that any procedural defect at the workplace can be cured at the Industrial Court when conducting its own enquiry at arbitration. Hence, the IC is regarded by disputants as providing greater justice and fairness because of its independence and its mandate to ‘cure’ any injustice that occurred at the workplace.

The third strategy identified by Conciliators and Arbitrators was that an independent panel should be established at each workplace charged with the responsibility of hearing the dispute. The interviewees suggested that a panel or joint consultative committee

may be well placed to hear disputes over dismissals, misconduct, non-performance and retrenchment because employees would be highly involved in the decision making. Such a structure has been used in Malaysia. Parasuraman & Jones (2006) in their single case study of a Malaysian company, the establishment of a joint consultative committee was found to provide some degree of successful employee participation in decision making, although not as a conflict resolution body. The implication of this finding for Malaysian workplaces is one of constituting panels in such a way that neutrality and impartiality in resolving disputes is preserved. As discussed in Chapter 3 Section 3.2 Malaysian employers are used to exerting a high level of managerial prerogative and are resistant to moves to share their power. Nevertheless, it is arguable that these panels may well assist in reducing the number of cases going to the DIRM and IC which arguably, provides the business case for their establishment. Trevor's (2004) study in the UK found that employees with fewer opportunities to influence the disciplinary rules applying to them at the workplace were more likely to turn to the Employment Tribunal to resolve their grievances. The over-reliance on the tribunal system in Malaysia has become the norm and apart from the heavy workload pressures this places on the DIRM and IC it is also costly to businesses in terms of time, resources and money.

The fourth strategy proposed by the interviewees was that recognition should be given to workplaces which have implemented effective in-house dispute resolution mechanisms and can demonstrate to the DIRM that an attempt had been taken to resolve the matter prior to its referral. This strategy would require no changes to laws or regulations, but would place more need for awareness of workplaces on the Code and how to implement it. The implication of this finding is the challenge of shifting the attitudes of workplace disputants towards taking greater responsibility to use their in-house mechanism. This strategy would only reduce the number of claims referred to the DIRM if the Code was publicised more effectively and accompanied by skills training in dispute resolution. The type of recognition was not made clear by the interviewees either. The DIRM is limited in its ability to provide such recognition currently and so this strategy may require consultation and consideration by the DIRM and Ministry if it is to be trialled.

The fifth strategy suggested by the interviewees was to provide Conciliators with greater powers. As discussed in Chapter 5 (Section 5.6.2) the lack of hurdles in the Malaysian industrial relations system has been taken advantage by claimants who use it as a means to seek compensation instead of genuinely seeking reinstatement. Conciliators of the DIRM are powerless to prevent disputants from using the DIRM as an avenue to win a greater award than would be been possible at the workplace. The fact that Conciliators cannot reject vexatious and frivolous claims means that they must undertake the conciliation process with every dispute referred to them. The strategy to provide Conciliators with greater powers would mean they would play a more interventionist role by examining the authenticity of cases referred to them and deciding whether to hear the matter or not. This power is not uncommon in tribunals. For instance, Acton (2010) noted the active role of Conciliators from Fair Work Australia in being able to stop vexatious cases from progressing by using 'reality testing' when handling dismissal cases. Here, for example, Conciliators will cite previous case law to inform an employee about the weakness of their case (for instance because of their contributory conduct). Similarly, in New Zealand, mediators from the Department of Labour are empowered with a role to advise disputants on the strengths and weaknesses of their cases and can make recommendations as well as providing med-arb to resolve their disputes (Corby 2000).

The authority to decide on the merit of cases in Malaysia is only given to the Minister of Human Resources (see Section 2.5.10) who makes a decision based on information provided by Conciliators in their report (when cases are failed to be resolved through conciliation). Furthermore at the DIRM headquarters Conciliators directly assist in the Minister's decision making process. The interviewees for this thesis recommended that Conciliators should be empowered to filter cases in the first instance, in a role similar to the function of the Minister. If the Minister's role could be delegated to the Conciliators to advise disputants of the value of their cases prior to going further it is likely that the caseload of DIRM Conciliators will decline substantially. The implication of this strategy for the Malaysian industrial relations system would mean a suite of changes in DIRM regulations and functions to accommodate the new Conciliator roles. Thus, such a strategy would need to be considered politically as well as legally in the country.

This section answers the third research question on the strategies to encourage disputes over dismissal to be resolved at the workplace. The strategies canvassed in this section included: implementing a pre-emptive measure to resolve disputes at an early stage; introducing compulsory regulation; setting up of independent panel; giving recognition to workplaces with good in-house mechanisms; and providing authority to Conciliators to filter disputes. In order to implement these strategies a number of changes including improving the quality of workplace dispute resolution and changing laws and regulations may need to be undertaken. Nevertheless, these strategies have been implemented in other countries with similar tribunal systems to Malaysia and they have helped improve workplace and tribunal dispute resolution in those countries.

8.4 Avoiding backlog at Arbitration

As a result of the large number of employment disputes which are not resolved at conciliation in the DIRM there is a high level of referral of these disputes to arbitration where they are heard *de novo*. The problems this creates in terms of the backlog of cases waiting to be heard at the IC, the heavy workloads for Arbitrators and the time and costs to the parties, warranted some exploration in this thesis. This section discusses the fourth research question: the strategies to reduce the backlog of claims for reinstatement before the IC. A range of strategies put forward by the interviewees were presented in Chapter 7. They can be grouped into five areas. These are: addressing shortcomings of current laws and regulations; enhancing the effectiveness of conciliation; better management of human resources; case management; and improving the dispute resolution process. This section discusses these strategies in light of the literature discussed in Chapter 2 and Chapter 3 of this thesis.

First, in order to control the backlog at the IC, many interviewees noted shortcomings in the laws and regulations pertaining to the handling of workplace disputes. Strategies proposed under this category are: imposing charges and costs; imposing qualifying rules or capping the amount of payable compensation; empowering Conciliators with arbitral powers; and introducing mediation or conciliation at the IC. The first two strategies of imposing costs and charges to parties in dispute as well as introducing qualifying rules and capping the compensation payable relate to creating some form of filtering

mechanism in the system as is commonly implemented in other countries including the UK, New Zealand and Australia. For example, employees in Australia seeking redress for unfair dismissal are required to meet a minimum employment period of 6 months (employers with 15 or less employees) and 12 months (employers with 15 or more employees) to be eligible to file claims for unfair dismissal while employees earning above the high income threshold are excluded from unfair dismissal claims (see Section 2.3 for further discussion). In addition, a claim fee of AUD $62.40 is also required to be paid by the employee when filing their claim to the FWA, although this may be waived in case of hardship. Furthermore, any employer, employee (including their lawyer, paid agent or representative) found to have initiated a claim for unfair dismissal which is considered to be frivolous, vexatious or with no reasonable prospect of success, could be asked to pay the costs of the other party (see *Section 401, Part 3-2* of *FW Act 2008*). Similarly in the ET in the UK can award costs against either party or their representative for conducting any proceeding in unreasonable manner while employees who wish to claim unfair dismissal must complete at least a continuous period of employment of one year (two years for those whose continuous employment begin 6 April 2012) of employment (see Section 2.2).

Although in the Malaysian system there are some hurdles including a time limit of 60 days from the date of dismissal to file a claim with the DIRM and limit of compensation (introduced in 2009) payable to a maximum of 24 months pay (12 months for probationary employees), high income earners and newly engaged employees are still able to file claim for unfair dismissal. There is also no fee to be paid by employees when submitting claims at the DIRM. Implementing further hurdles mechanism in the Malaysian system could mean fewer cases to be arbitrated at the IC. As discussed in the previous section, claims that are frivolous and with very little prospect of winning could be filtered at conciliation. As discussed in Chapter 2 Section 2.5.5 given that at least half of the dismissal cases decided at the IC were against the claimants, a filtering process might be effective in further lowering this rate.

As discussed in Sections 2.5.4 and Section 2.5.5 the legislation in Malaysia distinguishes between the roles of the DIRM (conciliation) and IC (arbitration) although each has a similar objective of resolving disputes without the need of recourse to legal

proceedings. The interviewees noted that these roles could be streamlined to avoid the backlog of cases before the IC in two ways: first, by allowing Conciliators to offer arbitration when conciliation fails and second, by making conciliation or mediation at the IC a standard process instead of moving directly to the formal arbitration process (see Section 2.1.1). Most recently in March 2010 the IC introduced a new initiative called 'early evaluation of cases' for the purpose of expediting the resolution of disputes by encouraging parties to settle without the need for arbitration (see Section 2.5.5). Despite the potential to use these techniques to resolve disputes more quickly than formal arbitration, the fact that the interviewees still called for Arbitrators to have conciliation powers suggests that early evaluation and mediation have not been successful.

These sorts of practices are not uncommon in the UK, New Zealand and Australia. In Australia both conciliation and arbitration are provided by one institution. The FWA will first conduct a 'private conference' as an initial measure to resolve the disputes and can also make decisions through arbitration although parties are and not guaranteed a hearing (MacDermott & Riley 2011). Here under *Section 399* of the FWA 2009 the FWA member after holding a conference can decide whether a hearing is appropriate to resolve the dispute. This decision is to be made after taking into account views of the parties as well as with the opinion that arbitration would be the best way to resolve the matter. In addition, FWA can also decide on threshold jurisdictional questions without the need of holding any conference (MacDermott & Riley 2011).

The New Zealand model sets the two functions of mediation and arbitration to be performed by two different bodies (see Section 2.4.2). However, the flexibility of the New Zealand model is that arbitrators may refer cases back to mediation if they believe that matters are best settled through negotiation processes. The New Zealand model could thus be considered in Malaysia, particularly given the high success rate of settlement of unfair dismissal claims there. This model could empower the IC to push back cases that may have the prospect to be settled using conciliation to the DIRM. In addition, the Mediators of the Department of Labour in New Zealand also have the authority to make recommendations and decisions (at the request of the parties) which

then becomes legally binding on both parties (see *Section Section 149* of New Zealand *Employment Relations Act 2000,* New Zealand).

The interviewees also suggested that the backlog at the IC could be reduced if the conciliation services at the DIRM were enhanced. The thesis found two strategies for this to be achieved: improving the conciliation process; and adopting a second level conciliation meeting. The interviewees stated that the current practice of taking records and making reports about the conciliation does not reflect the privacy and confidentiality of the conciliation process. *Section 20 (2)* of the *IR Act 1967* in fact does not specify that the unsettled disputes to the Minister be made in the form of any report. Instead, it is sufficient for the DIRM to notify the Minister that there has been no likelihood of settlement. This was also emphasised in the ruling of the Federal Court of Malaysia in a judicial review case between the *Minister of Labour and Manpower & Anor v. Wix Corporation Sea Sdn. Bhd. (1980)*. In the judgment the Federal Judge noted:

> In notifying the Minister, sec. *20(2)* of the Act [IR Act 1967] does not appear to require him [Director General of DIRM] to do so in the form of a report on circumstances leading to there being no settlement. He is merely to notify the Minister that there has been no likelihood of settlement.

ADR processes like mediation and conciliation are generally believed to be successful partly because the privacy of the process is maintained (Provis 1997). Because of its private nature (and thus no public record), it is important for the conciliation to be as confidential as possible to encourage disputants to resolve their disputes without fearing that the documents presented or facts discussed at the conciliation might be used against them in court. This was rightly noted by the judge in the High Court of Malaysia in another judicial review case between *Takaful Nasional Berhad v. Nooraizan Bte Mohd Tahir and Industrial Court Malaysia (2010)* who ruled that:

> I agree with the learned Chairman that the aim of ensuring confidentiality of conciliation proceedings is to assure the parties that they are free to make concessions, admissions and offers to settle a case without being worried that the other side may use it to their detriment during trial. In other words section 54 [*IR Act 1967*] is aimed at promoting conciliation proceedings. In the instant case, however, the said letter only contains the version of the 1st respondent in respect of events that led to her dismissal. It has nothing to do with the events that transpired in the failed conciliation proceedings.

Similarly, in countries that have successfully used conciliation to resolve employment disputes, Conciliators are not subjected to any external influences in performing their roles. For example, in the UK ever since ACAS was instituted as a private body, it has been able to perform conciliation role independently (Gennard 2010). In Malaysia however, Conciliators might be rushed into getting their cases reported instead of promoting settlement because it may affect their performance evaluation. This is because DIRM Conciliators are evaluated based on the number of disputes that they dispose of either through conciliation or report submission (JPP Selangor 2011).

This thesis also found that the conciliation service at the DIRM can be further enhanced by adopting a second level conciliation process across its branches throughout the country. This technique may be useful because another Conciliator may be able to resolve the dispute using a different approach based on his or her different educational background and experience in handling previous cases, or perhaps just a fresh set of eyes on the problem. Differences in the professional backgrounds, styles and tactics of Conciliators have been found to influence the way the conciliation process is conducted as well as its outcome (2005). Whilst there is merit in the suggestion of a second level hearing, it may have the affect of creating a backlog at the DIRM without affecting the rate of final settlement. This is particularly true in light of the fact that the parties tend to seek arbitration because they want finality for their dispute rather than another opportunity to negotiate.

Third, this thesis also found that interviewees called for better management of human resources (Conciliators and Arbitrators) as a strategy to avoid the backlog of cases at the IC. The key points raised by the interviewees included: increasing the number of Conciliators and Arbitrators; effective appointment and placement of Conciliators and Arbitrators; and enhancing the status of Conciliators. First, it was suggested by the interviewees that the number of Arbitrators should be increased in line with the rising number of cases referred to the IC. The President of the IC (who was also one of the interviewees in this thesis) had in 2010 suggested a review on how Arbitrators are appointed. She argued that the current practice in appointing Arbitrators is too difficult and subject to various rules and conditions and subsequently Arbitrators have no tenure in their positions (Sithamparam 2010). Arbitrators can only be appointed from the judicial services after completing a minimum of seven years experience as solicitors or legal advocates and because they are are subjected to transfer to other legal and judicial services such as the High Court, their appointments as Arbitrators of the IC may be very short. In addition, some Arbitrators are only appointed on a two year (renewable) contract (unless either party decides otherwise).

The study also found that the method of appointment and placement of Conciliators at the DIRM should be reviewed to make them more effective in performing their roles. Because Conciliators are appointed from officers of the MoHR they are subject to transfer to other departments within the Ministry (either on promotion or for personal reasons). Similar findings were noted by Mohamed (2004) who found that in order to make conciliation at the DIRM more effective there is a need to ensure that Conciliators have the necessary knowledge and skills to handle disputes and this can only be achieved by making their positions at the DIRM permanent so they gain experience and skills over time. In addition, it was found that because some Conciliators are appointed directly from fresh graduates, even with training they may not have enough experience to conduct conciliations effectively. This is not a practice in countries including the UK, New Zealand and Australia which have high success rates of conciliation. In these countries Conciliators are appointed based on their specialised skills in handling dispute and their diverse professional backgrounds ensure they have vast experience, often at high levels, in workplace matters and industrial relations. For example, in Australia the

Conciliators of the FWA are appointed based on their appropriate knowledge or experience in relevant fields such as workplace relations, law, business, industry and commerce (Fair Work Australia 2010b). Good knowledge and experience in industrial relations will enhance the status and credibility of Conciliators in performing their roles given that they have to deal with managers or directors of companies appearing before them. It is important for Conciliators to have experience with, or professional or technical qualifications in the subject area of the dispute that they are conciliating (NADRAC 2001b)

The third strategy found in this thesis to address backlog at the IC is case management. Here, three suggestions were proposed by the interviewees including: scheduling of cases; managing postponement of hearings; and parties' preparation prior to hearing. The study found that many of the backlogged cases at the IC were due to requests for postponement by lawyers or union representatives. Although representation by lawyers is not compulsory at the IC it has become a norm that disputants are represented due to the increasingly adversarial nature of the process itself. The behaviour of lawyers in the process also adds to the formality. For instance, in Australia Douglas (2008) noted that because of the traditional mindset of lawyers they tend to act adversarially even in ADR processes and hence, can become a stumbling block to a settlement. In Malaysia, this phenomenon was also noted by Syed Ahmad and George (2002) who found that lawyers can often complicate and delay court proceeding with their frequent request for postponements and other technical demands. Similarly, the Chairman of the IC in one of his decisions *Coshare Sdn Bhd v Wan Masnizam Wan Mahmud* on page 40 observed that:

> 'The Industrial Court as far back as 1994 has had a backlog of cases. In order to resolve this problem, the government has now increased the number of Industrial Court Chairman to clear the backlog but unfortunately the practice of some counsels in asking for an adjournment at the 11th hour and in not following the proper procedure set out has invariably placed the court in a difficult position and has caused precious judicial time to be wasted. They have become an obstacle to the speedy disposal of cases….'

In Australia the issue of the unreasonable representative has also resulted in changes to the process of conciliation and arbitration at the FWA. When the FWA Act was drafted it envisaged that conciliation of dismissal disputes would be conducted in a speedy and informal manner which could be achieved without the role of legal representation or paid agent (Forsyth 2012; Lucef 2009).

Fourth, this thesis found that the backlog at the IC could be avoided through more effective management of cases including scheduling of cases for hearing, managing postponement of hearings and making sure that parties are prepared before the hearings. Generally, these three suggestions boil down to making sure that cases to be heard by the IC be dealt with speedily. As discussed earlier, the adversarial nature of the arbitration at the IC often forces disputants to seek legal representation. One suggestion emerging from the interviewees is that requests for postponement from lawyers and union officials should be minimised. Another matter regarding advocates is that not all representatives have the same effect on the proceedings. Whilst attendance by legal representatives has been associated with delays in the settlement of disputes in arbitration, union representatives may provide disputants with a more favourable result (see Section 3.4). It was found from the thesis that the ability of disputants to prepare their cases and present them at the hearing assists Arbitrators to conduct the process more efficiently and this is enhanced by union representation.

Finally it was found that in order to decrease the backlog of cases at the IC the dispute resolution process needs improvement. Here three proposals were put forward by the interviewees including: creating an effective workplace mechanism; directly referering disputes to the IC; and streamlining functions involved in dispute resolution. The first strategy relates to the finding in Section 8.3 concerning the need to put in place a regulation, such as an enhanced or enforceable Code that make the in-house dispute resolution mechanism compulsory. An effective in-house mechanism will directly contribute to more cases being resolved at the workplace and perhaps then only deserving cases would be channelled to the DIRM or IC.

The second strategy relates to streamlining dispute resolution functions. This thesis has noted that there is often confusion amongst disputants over which dispute process to use and which tribunal to use. The mechanism of dispute resolution at the DIRM needs to

be more clearly defined to avoid any confusion among disputants. The interviewees for this thesis recommended that all disputes pertaining to dismissal (regardless of the remedy sought) should be handled by the DIRM instead of the current practice of dividing the work between the two separate bodies: DIRM (for remedy of reinstatement) and the Department of Labour (for compensation in lieu of notice and termination and layoff benefits). Theoretically, this may create further stress to the DIRM but practically if implemented along with the other strategies noted above being put in place (such as a better workplace dispute resolution mechanism and a filtering process) should lead to a more effective and efficient system of dispute resolution in the country.

8.5 Chapter Summary

This Chapter discussed the findings of the thesis in light of the literature presented in Chapter 2 and Chapter 3 of the thesis. There are four research questions which this thesis has set to answer and each has been discussed based on the findings of the two surveys of Conciliators and Employers as well as interviews with Conciliators and Arbitrators.

The key factors behind the referral of claims for reinstatement to conciliation were discussed to answer the first research question of the thesis. The thesis found three antecedents. First, the quality and use of in-house dispute resolution procedures is the key starting point to an effective dispute resolution system. Currently, the lack of enforcement and awareness of the Code and the lack of training in dispute resolution have acted to prevent effective in-house dispute resolution. Second, the adherence to laws and precedents, particularly the curable principle, by the workplace parties has encouraged disputes to travel beyond the workplace into the DIRM and IC. Third, the quality of justice at the workplace is problematic. It was found in this thesis that the dominant nature of employers' prerogative in Malaysian workplaces together with the lack of use of the Code of Conduct for Industrial Harmony to guide them in making decisions concerning employees' dismissal at the workplace has negatively affected the quality of justice that should be accorded to employees and particularly those whose

dismissals were mostly as a result of disciplinary action or retrenchment taken by their employers.

This Chapter also discussed the reasons for the low rate of settlement at conciliation and the parties' determination to take their matter to arbitration. The second research question was answered by noting that the contribution of the Ministerial recommendation, which is designed to filter cases going to arbitration has failed to work effectively. In fact, the process has contributed to delaying the dispute resolution process as the volume of cases referred to the IC has increased over time. Second, the need for certainty is another factor which contributes to workplace disputants seeking arbitration. The thesis identified that a major weakness in conciliation at the DIRM is that unlike Arbitrators, Conciliators cannot make recommendations or suggestions and therefore cannot guarantee disputants a level of certainty in the outcome of their disputes. In addition, on the perspective of dismissed employees their determination to seek compensation as a result of their dismissal could be associated with their quest for distributive justice. However, this may have led to what is commonly known as compensation culture in some other areas of litigation. This thesis has found that claimants may have been driven by the possibility of getting monetary compensation as a result of their dismissal. Finally, the thesis found that workplace disputants in Malaysia believe that arbitration provides them with better justice than conciliation. Consequently, disputants' quest for justice through determination at arbitration not only adds to the IC case load but it also negatively affects the rate of settlement at conciliation.

This Chapter then discussed the strategies to encourage claims for reinstatement to be resolved at the workplace in Research Question 3 and this thesis has found five strategies suggested by the interviewees. First, it was suggested that introducing pre-emptive strategies such as through educational and advisory services will bring about an early dispute resolution. Second, by introducing a compulsory workplace dispute resolution mechanism in the form of an enacting provision in the industrial relations laws and regulations would encourage parties to focus dispute resolution at the workplace. Third the interviewees suggested that workplaces could set up an

independent panel to take charge of matters pertaining to resolving disputes including dismissal of employees. The fourth strategy proposed was to recognise and reward workplaces that have shown good practice of resolving disputes at their workplaces. The final strategy which could be used to encourage more disputes to be resolved at the workplace is to provide Conciliators of the DIRM to screen out disputes that are vexatious and frivolous or those that have the potential of being resolved at the workplace. This will require providing Conciliators with authority not available in the *IR act 1967*.

Finally this Chapter discussed the fourth research question which aimed to identify strategies to reduce backlog at the IC. Five key strategies were formulated. These comprise: addressing the shortcoming of the current laws; making conciliation more effective; better management of human resources in the DIRM and IC; case management and improving the dispute resolution process at both the DIRM and IC. It was found that the current laws and regulation of handling disputes in Malaysia need to be improved to keep up with the increase in the demand for resolving individual disputes particularly claims for reinstatement. Here a hurdle to avoid easy access to arbitration similar to in the hurdles in place in Australia and in the UK was recommended. The thesis recommended that providing Conciliators with some form of authority to offer advice, recommendations, suggestions or even arbitration as an alternative to conciliation would increase their status while simultaneously providing disputants with certainty and finality of their disputes. The thesis also considers expanding the IC's early intervention role with mediation or by enabling them to refer the case back to the DIRM for further conciliation. This proposed model could provide a better alternative to disputants because whilst the IC remains the final arbiter of disputes in cases that are more complicated and involved question of law, the DIRM could provide disputants with some form of certainty in the majority of the cases. By making the conciliation process more effective through greater Conciliators powers could provide some relief to the backlog at the IC. Finally, the thesis considered the interviewees' recommendation that the conciliation process should be kept private and off the record to ensure greater confidentiality which arguably, may make conciliation more acceptable to disputants.

The thesis also considered the management of human resources of the IC and DIRM. The backlog of cases at the IC has been ongoing issue in Malaysia and the thesis considered this backlog can be reduced if the appointment and placement of Conciliators and Arbitrators is more efficient and effective. Due to the high standard of knowledge and experience required of Conciliators and Arbitrators the thesis has recommended that their appointments should be selective and for long periods, if not tenured as they are in many other jurisdictions. This has been the practice in the UK, Australia and New Zealand where Conciliators and Arbitrators are regarded as professionals recruited from many fields and hold permanent, tenured positions and not subject to transfer.

Better management of cases at the IC was also identified as a way in which the backlog of cases can be reduced. The thesis considered more effective scheduling of cases; managing postponement; ensuring disputants or their representatives are well prepared before attending arbitration; and improving the dispute resolution process to make it more effective. The thesis made two proposals to deal with this issue. First, the need to put in place regulations that make in-house dispute resolution mechanisms compulsory for workplace parties will assist in focusing dispute resolution efforts at their source. Second, the thesis recommended that the formal tribunal and court dispute resolution process needs to be clarified and streamlined to avoid the confusion currently seen in the system where disputants approach DIRM and the Department of Labour, often without understanding that they have strict rules regarding the sorts of remedies which can be sought. Disappointed disputants then do not settle and the matter is often subsequently referred to the IC.

This Chapter concludes the discussion of the four research questions from the thesis. The next chapter draws together the main findings arising from this study, summarising the key points from each of the main sources of empirical evidence presented in this thesis and suggests ways in which it may inform more efficient dispute resolution in the Malaysian industrial relations system.

CHAPTER 9 - CONCLUSION AND RECOMMENDATIONS

9.0 Introduction

This thesis commenced with a literature review on the Malaysian industrial relations and dispute resolution with reference to the use of the ADR processes of conciliation and arbitration under statute. Chapter 2 discussed the evolution of industrial relations and disputes resolution in the UK, Australia and New Zealand which have similar histories to Malaysia and Chapter 3 presented the concept of justice in organisational settings emphasising its application in the internal workplace dispute resolution procedures and in industrial tribunals. The key issue arising from the literature review was that despite the similar historical and legislative backgrounds, conciliation of workplace disputes in Malaysia has been much less successful than in these other nations. The thesis set as its objectives, four research questions to investigate the phenomenon of lower settlement rates in Malaysia and to determine some strategies to improve the situation. To answer the questions, and because of the dearth of extant research in this area, a set of four empirical sources of evidence were investigated, making this the first large scale study of workplace and tribunal dispute resolution in Malaysia. Chapter 4 outlined the research methodology which comprised of surveys of 42 available Conciliators from the DIRM and 83 employers as they exited their conciliation hearing or arbitration hearing at the IC. Following this, interviews were held with 23 Conciliators and 8 Arbitrators. The findings were presented in Chapter 5, Chapter 6 and Chapter 7 and were discussed in Chapter 8.

This Chapter provides the summary of the research findings and provides an overview of the conclusions of the thesis which were described in more detail in the previous chapter. The contribution of this research for the process of workplace dispute resolution in Malaysia is then addressed and finally, this chapter presents the limitations of this research and suggestions for future researchers.

9.1. Workplace dispute resolution in Malaysia.

The mechanism for resolving employment disputes in Malaysia through government intervention was first formulated with the introduction of the *Essential (Trade Disputes in Essential Services Regulation 1965)* which established an Industrial Arbitration Tribunal to resolve industrial disputes. It marked the departure from a voluntary to a compulsory system of industrial relations in the country. This Act was replaced with the *IR Act 1967* and along with the *EA 1955* (respective Ordinances for the Eastern State of Sabah and Sarawak), *TU Act 1959* and the Code of Conduct for Industrial Harmony regulate the employment relations in Malaysia including providing mechanism of resolving dispute. Apart from the laws and the Code, precedents of the IC and the civil courts have also been used in interpreting and clarifying provisions and issues in the laws to guide similar future decisions.

In Malaysia individual disputes particularly disputes over claims for reinstatement (unfair dismissal) have dominated the number of disputes referred to the DIRM and the IC. Whilst the DIRM deal with disputes by conciliation, the IC mainly use its quasi-judicial authority to arbitrate disputes which fail to be resolved at the DIRM subject to reference by the Minister of Human Resources. Disputants however, are nevertheless encouraged to resolve disputes at the workplace as envisaged by the Code of Conduct for Industrial Harmony.

However, many disputes, particularly claims for reinstatement are referred to the DIRM. A significant number of cases also fail to be resolved through conciliation and have to be arbitrated by the IC. With limited research on dispute resolution in Malaysia this thesis has addressed the gap through an international review of the literature, surveys of Conciliators and employers as well as interviews with Conciliators and Arbitrators.

The four research questions using data from the surveys and interviews were:

RQ 1: What are the key factors behind the referral of claims for reinstatement from the workplace to tribunal conciliation?

RQ 2: What are the key reasons for the low settlement rate of tribunal conciliation for reinstatement claims and subsequent high rates of referral to arbitration?

RQ 3: What are the strategies to encourage claims for reinstatement to be resolved at the workplace?

RQ 4: What are the strategies to reduce the backlog of claims for reinstatement before the IC.

9.2 Referral of disputes to tribunal conciliation

The thesis found that the referral of dismissal disputes to conciliation at the DIRM has three antecedents or triggers. These are the poor quality and lack of use of in-house dispute resolution procedures; lack of adherence to laws and the effect of precedents; and the poor quality of justice at the workplace. The poor quality of in-house mechanisms has led workplace disputants to depend on the DIRM to resolve their disputes and this has become a norm in Malaysia. Despite Conciliators suggesting that disputants do try to resolve their matters in the workplace, the interviews presented a picture where only larger organisations with the capacity and knowledge to implement in-house resolution Despite a process allowing for Ministerial recommendations to conciliation, in fact it does not represent an effective hurdle requirement and has acted to create easy access to the conciliation.

This thesis found that the lack of adherence to laws and regulations as well as the precedent created by the 'curable principle' has fuelled the referral of disputes to conciliation. Whilst the Code of Conduct for Industrial Harmony has been generally ignored by disputants, the loopholes and escape clauses in the *IR Act 1967* and the *EA 1955* have been used to circumvent in-house dispute resolution. The provision in the *EA 1955* for a workplace inquiry to be undertaken in cases of misconduct has not generally been adhered to and the precedent created by the 'curable principle' has acted to excuse the use of employer prerogative in dismissing employees and it absolves them from the responsibility to provide workplace justice. It was also found that some employees who were not covered under the *EA 1955* or who were not satisfied with the amount of

termination and lay off benefits prescribed under the Act have also referred their case to conciliation on the pretext of claiming reinstatement despite not genuinely wishing to be reinstated.

The study also found that the quality of justice in the Malaysian workplaces, and particularly procedural justice, is problematic. A history of strong employer prerogative and the low level of unionisation in Malaysia has meant that there are no effective voice mechanisms for employees to seek organisational justice at workplace level. Employees are not generally consulted when establishing workplace dispute procedures and participate unrepresented in the dispute resolution process at the workplace and even beyond, at conciliation and arbitration. The lack of voice and procedural justice were found in this thesis to be a key cause behind the employees' requests for conciliation and arbitration of their disputes. The thesis found that employers are often harsh in their decision to dismiss employees and will not consider mitigating factors such as age, seniority, performance or ability to find another job elsewhere. Conciliators pointed to employers' decisions often being out of proportion to the offense committed. Thus, employees have sometimes had no option but to take the matter to the DIRM or IC.

The evolution of laws and regulations to deal with these dilemmas has been slow in Malaysia compared to countries like the UK, Australia and New Zealand. Part of the problem has been the lack of evidence and research in this field. The laws in the UK, Australia and New Zealand have changed over time reflecting the greater use of workplace level dispute resolution and methods of Tribunal and private ADR in response to the growing phenomenon of individual workplace disputes. In addition, the dominant nature of managerial prerogative in this highly hierarchical society has not kept pace with more participative workplace culture in other nations. These factors are summarised in Table 9.1 which provides an overview of the findings of the thesis and the implications for the Malaysian industrial relations system.

Table 9.1 Summary on the findings of the study and its implications.

Research questions	Results and conclusion	Implications
What are the key factors behind the referral of claims for reinstatement from the workplace to tribunal conciliation?	• the poor quality and lack of use of in-house dispute resolution procedures; • lack of adherence to laws and the effect of precedents; and • the quality of justice (particularly procedural) at the workplace is problematic.	• The evolution of laws and regulations pertaining to disputes resolution in Malaysia has been slow compared to similar systems in other countries. • A need for a reformation of the Malaysian dispute resolution system in line with the individualisation of employment relationship, reducing union presence at the workplace and growing number of individual disputes.
What are the key reasons for the low settlement rate of tribunal conciliation for reinstatement claims and subsequent high rates of referral to arbitration?	• the failure of the Ministerial process to encourage greater use of conciliation. • disputants' quest for certainty which they believe can only be achieved through arbitration. • justice (particularly distributive) at conciliation was a major concern over the acceptance of outcomes.	• Providing the Minister with an authority to push back disputes to conciliation instead of rejecting disputes for arbitration. • providing disputants a second chance of negotiated settlement via conciliation. • allowing Conciliators to use a hybrid process such as med-arb or con-arb.
What are the strategies to encourage claims for reinstatement to be resolved at the workplace?	• introducing a pre-emptive process at the DIRM, • making in-house mechanism compulsory; • setting up an independent panel at the workplace; • giving recognition and reward to encourage good practices at the workplace; and • providing Conciliators with some form of authority to screen out vexatious and frivolous claims.	• reassessing the mechanisms to encourage greater use of in-house mechanisms. • removing loopholes and confusion in the current laws. • transforming the Code of Conduct for Industrial Harmony into law or generating more awareness of it. • Reviewing the role of the Conciliator with a view to increasing powers and scope of function
What are the strategies to reduce the backlog of claims for reinstatement before the IC.	• addressing the shortcoming of current laws, • making conciliation more effective; • improving the process of recruiting and placement of Conciliators and Arbitrators; • case management at the IC; and • to streamline the process of dispute resolution at the DIRM and IC to avoid confusion among disputants.	• changing the way the tribunal at DIRM operates including allowing Arbitrators to send cases back to Conciliation • reviewing the method of appointment and tenure of both Conciliators and Arbitrators and Industrial Court returns to its spirit of a 'court of equity'

9.3 Settlement rates for Conciliation.

The lower settlement rate for resolving dismissal disputes in Malaysia by conciliation relative to other countries was seen as an important area for investigation in this thesis

because it contributes to the heavy backlog of cases before the IC. The thesis found that this was caused by three factors: the inability of the Ministerial process to filter disputes, disputants' need for certainty and justice at conciliation.

The Ministerial process should act as a filter or hurdle for vexatious or frivolous disputes and those disputes with little merit but it has not been able to discourage disputants' determination to seek arbitration The thesis found a range of issues around the quest for justice drives parties' determination (particularly employees) to arbitration. Arbitration has been hypothesised as having a chilling effect on conciliation. The inability of conciliation to guarantee settlement together with the relative ease of having a dispute referred to arbitration by the Minister has made workplace disputants less willing to resolve their disputes through negotiation. Arbitration offers not only a certainty of outcome but also that Arbitrators are able to correct any procedural defect of the employers' decisions to dismiss under the curable principle.

Because conciliation fails in its ability to secure an agreed outcome, the thesis finds that it cannot guarantee disputants distributive justice and this has been associated with the growing compensation culture amongst employees in Malaysia. The impracticality of reinstatement as a remedy, particularly as the dismissal of the employee may have happened months before the arbitration hearing, has added to claimants' determination to proceed to arbitration for compensation.

The implications of these findings on the settlement rate at conciliation suggests a reconsideration of the role of Conciliators in line with those in countries such as the UK and Australia. Conciliators are unable to ensure distributive justice because they are restricted to facilitating discussions and cannot even make suggestions or recommendations. The thesis raises the dilemma that the low conciliation settlement rate in the current system may lie in the limited role of Conciliators.

9.4 Making the case for a better dispute resolution process

The thesis found that the workplace dispute resolution in Malaysia needs some modifications to encourage greater settlement of disputes at the level of the workplace.

The thesis uncovered five strategies to achieve this. First by introducing a pre-emptive process at the DIRM allowing for quick resolution of disputes through early interventions at the workplace, advisory services and consultation with disputants in line with what has been done in the Department of Labour New Zealand, Malaysia may benefit from the lessons learned in these more creative and cost efficient solutions. Mediation in New Zealand takes many forms including face to face communication, phone, internet and fax as well as any other necessary means including publishing pamphlets, brochures, booklets or Codes to resolve disputes promptly. Second the thesis found that in-house dispute mechanisms should be made compulsory rather than being voluntary and should be supported with training and an advisory service (as just noted) to bring about a greater emphasis on direct negotiation between the parties in dispute. Without a strengthened dispute mechanism for in-house dispute resolution, disputants would not seriously consider using it. For instance in New Zealand, employees are required to refer their grievances to their employers within 90 days from the date of their dismissal before resorting to tribunal intervention in an effort to ensure that settlement occurs at workplace level. This thesis has also recommended that Conciliators be allowed to direct disputants to attempt their in-house mechanism if they believe insufficient effort has been made at workplace level. This may be a useful way to reduce the number of disputes progressing to conciliation.

Third the thesis found that an independent panel such as Joint Consultative Council be given task to handle disputes internally. This suggestion is in line with one of the elements of natural justice: 'no man shall be a judge in his own cause'. This principle among others requires that dispute decision making to be done by fair panel free from any bias, trained in impartial decision making and selected from a combination of managerial and employee representatives. Fourth the thesis found that workplaces with good practices should be given recognition as role models to others. This could be in the form of certification and be made public to be more effective. Finally this thesis found providing Conciliators with some form of authority to screen vexatious claims and with broader powers including the possibility of more interventionist techniques including making recommendations or providing advice may encourage more disputants to settle at conciliation.

The implications of these findings suggest there is a need to reassess the form and function of in-house dispute resolution mechanisms in Malaysia. This may include changing laws and regulation pertaining to workplace dispute resolution in line with the changes in employment relationship and the emergence of higher individual disputes. It is also recommended that the Act needs to be reviewed to remove the loopholes and confusion currently around the Labour Court and the DIRM and the form of compensation available. The Code of Conduct for Industrial Harmony which has been proven ineffective and obsolete should also be reviewed with provisions relating to justice at the workplace. Affording employees procedural justice in the workplace should not be seen as encroaching on the precedent of the curable principle. Indeed, it should make the work of the IC more straightforward if workplaces were responsible for ensuring proper procedure in the first place. Curing defects in justice would hopefully become the exception rather than the rule.

9.5 Making arbitration a sustainable process

The study found that the backlog at the IC can be avoided by implementing several key measures including: addressing the shortcoming of the current laws; enhancing the effectiveness of conciliation; better appointment and placement of Conciliators and Arbitrators; case management; and improving the dispute resolution process (Table 9.1).

As discussed above the thesis found that the current legislation regulating dispute resolution needs to be given a new lease of life consistent with the evolution of similar legislation in other countries. The thesis recommends that the *IR Act 1967* needs to be reformed emphasising arbitration as the last resort of resolving disputes and measures should be introduced to control compensation as an award. To become more sustainable and manage its case load the arbitration system may need hurdles such as introducing a minimum period of employment before employees are entitled to file claims for reinstatement. Application fees and costs were recommended by interviewees to control and regulate access to arbitration allowing only deserving cases to proceed. Restructuring conciliation so that Arbitrators can refer matters back to conciliation and empowering Conciliators with some authority to perform a med-arb like functions are

possibilities which keep disputes in conciliation rather than arbitration. This will enhance the conciliation process and reputation which is another major finding of this thesis. Further the process could also allow for more senior Conciliators to take up a second conciliation meeting allowing for the opportunity to relook on the possibility of the case being settled. The implication of these findings is for changes to be made in the way the tribunal operates.

Third the thesis found that the backlog at the IC can be controlled through better recruitment and placement of Conciliators and Arbitrators. Recruiting senior public officers rather than new graduates as Conciliators is one way of enhancing the service as well as the standing and reputation of Conciliators as professionals. Further the thesis recommends that Conciliators' appointments be made permanent rather than subject to transfer to other departments in the public sector. The implication of these findings is that the method of appointment of both Conciliators and Arbitrators is reviewed with regard to training, tenure, opportunities for promotion and professional career paths in the field.

Fourth the study found that the backlog at the IC can be handled by making sure that the Industrial Court manages its disputes effectively including proper scheduling of cases; managing postponements; and ensuring disputants are fully prepared at the hearing. The implications of these findings suggest that the Industrial Court returns to its spirit of a 'court of equity' by reducing the use overly legalistic and strict formality of proceedings a feature found in the civil courts.

Finally this thesis found that backlog at the IC can be addressed by improving the dispute resolution process overall. Many of these suggestions have been reviewed in this chapter and include: creating an effective workplace mechanisms; giving the IC the power to refer cases back to conciliation; and streamlining the functions of the DIRM and the IC. The thesis found that all matters pertaining to dismissals should be handled by the DIRM and along with more effective recruitment and training of Conciliators and an enhanced conciliation service the DIRM can be viewed as a one stop agency to resolve workplace disputes rather than as conduit to compensation at the IC.

9.6 Contributions to body of knowledge

This thesis has contributed to building new knowledge in the operation of the Malaysian dispute resolution system and particularly in relation to understanding how disputes over dismissal are resolved. This thesis provided evidence that organisational justice plays an important role in workplace decision making. In this thesis defects in procedural justice at the workplace have been found to be the key reason for many of the claims referred to the DIRM. The thesis has uncovered the difficulty in delivering procedural justice in Malaysian workplaces which is problematic given confusion over tribunals and laws, loopholes in the laws and the effect of the curable principle on disputants' determination to resolve dispute at the workplace. It has identified the lack of procedural justice in the workplace as the main trigger for employees referring their cases to the DIRM. Hence, the DIRM and IC have become avenues for them to seek for justice. The thesis supports Tyler (1999,1988) who observed that procedural justice is the predictor of the acceptance of the outcome. People are more receptive to an outcome, even one which is not favourable to them when they perceived high degree of procedural justice (Van Gramberg 2006a).

The study has made significant contribution to the distributive justice theory proposed by Adams (1965). With regard to unfair dismissal disputes, distributive justice refers to fairness in the outcome of the dispute in so far as that outcome is commensurate with the merits of the case and taking into account the individual situation of the employee in question (Greenberg 1987; Deutsch 1985).

This thesis has highlighted the importance of distributive justice in tribunal processes such as conciliation where decision making is not determined by the Conciliator. According to Rawls (1971) one assesses distributive fairness of a decision based on of three components of equity, equality and need. It was found from the interviews with Conciliators and Arbitrator that three important reasons for non-acceptance of the conciliation outcome relate these elements: These are the perceived equitability of compensation received as settlement, whether reinstatement is a practical remedy and the deservingness of the decision. Here disputants particularly claimant weigh the

outcome they expect to get at conciliation with the loss suffered as a result of the dismissal. The thesis found that the lack of distributive justice afforded at conciliation is the principle cause of disputes being referred to the IC. The thesis has made recommendations which may reverse this trend by allowing Conciliators to have greater powers to assist in the delivery of distributive justice.

In terms of ADR theory and its processes including conciliation and arbitration this thesis has contributed to new knowledge particularly their use in the tribunal and court settings in Malaysia and the effect that one has on the other. This thesis has raised the need for a review of dispute resolution in Malaysia based on a better understanding of the interaction between procedural and distributive justice and the effect of a defect in either on the determination of disputants to proceed to court for a final determination.

9.7 Contributions to practice

In terms of practice the thesis contributes recommendations to the Malaysian human resource practitioners and policy makers in the field of dispute resolution and in the DIRM and court system. It provides evidence for the implementation of a clearer focus on workplace dispute resolution in Malaysia and has highlighted strategies for improvement. Due to the lack of research on dispute resolution in Malaysia this thesis has provided evidence based on the primary data through surveys and series of interviews. The results of the study provide evidence from the perspectives of the actual players in dispute resolution that can be used for the purpose of planning and improving the system.

Second this study provide comparative evidence on the practice of other countries having similar origins to Malaysia including the UK, New Zealand and Australia and mapped the gap between Malaysia and these countries in terms of the development of legislations pertaining to dispute resolution. This thesis provides evidence on the changes made in these countries to strengthen their system and has identified those which will enhance the system in Malaysia. The thesis has presented several strategies that will assist policy makers in reforms to laws and regulations pertaining to dispute

resolution which will lead to an improvement in the settlement rate at conciliation and reduce the backlog at the IC.

9.8 Limitations of the study and suggestion for future research

The key limitation of this study relates to the participants in the empirical research. As noted in the methodology chapter, the employees who filed their claims at the DIRM were not included in the study because it was not possible to trace them as they had already left their employment. In addition, their names and addresses were not available for the survey forms to be sent to them. It was also not possible to conduct exit surveys of employees because of the limited time and resources such as translation services that would have been required. In addition, it would be difficult for the single researcher to manage two exit surveys concurrently. Interviews to gather the perspective of employees were also not conducted for the same reasons. Future research should consider the employees' views using exit survey or interviews and it is recommended that they be conducted in the local language or with translation services. Because the employees may have been emotionally and to a certain extent financially affected as a result of their dismissal, the exit surveys or interviews must also take into consideration the possibility of getting extreme responses. It was also not possible to interview unions' officials and officials from the employers' association due to limited time available at each location and the general lack of union representation. It would require the researcher to spend longer time at each location, hence incurring more cost in terms of hotels and transportation expenses. However, it is recommended that future research consider interviewing them to acquire their perspective. In addition, given the findings of this research that union representation may have some impact on settlement of unfair dismissal disputes, future research should also consider exploring their role in the process.

Second the study covers only nine of the 14 states in Malaysia where the DIRM offices are located. These states are not included due to the time constraints and logistic issues but also because they do not represent the key employment zones in Malaysia.

Furthermore, it was established that these states have had very few disputes pertaining to dismissal with many of them recorded less than 100 cases a year as discussed in Section 2.5.4. Because this thesis did not cover the views of employers in these states the findings may not reflect the situation in these locations. Future research could consider researching these states for comparative purposes and to reveal other issues not present here.

Third this study only covers dispute resolution in the private sector and not the public sector. This is because the three mechanisms discussed in this study namely the *IR Act 1967*, *EA 1955* and the Code of Conduct for Industrial Harmony do not apply to employees in the public sector. The employment of public sector employees is regulated under the 'General Orders' and dismissal claims are handled by the Public Service Commission instead of the DIRM. Future research may consider looking into the procedures used in the public sector using interviews because it would be difficult to trace the names and addresses of the dismissed employee for the survey form to be sent to them.

9.9 Final remarks

The study has made several key findings corresponding to the four research questions it set to investigate. First the referral of dismissal disputes to conciliation is triggered by the lack of quality and use of dispute resolution procedures; lack of adherence to laws, regulations and precedents; and the poor quality of justice at the workplace. Second the settlement rate at conciliation has been influenced by the failure of the Ministerial process to encourage greater use of conciliation; a quest for certainty of settlement; and a search for justice at conciliation particularly distributive justice. Third the thesis identified several strategies to encourage disputes to be resolve at the workplace including introducing a pre-emptive process at the DIRM; making in-house mechanisms compulsory; setting up an independent panel at the workplace; giving recognition and reward to encourage good practices at the workplace; and providing Conciliators with some form of authority to screen out vexatious and frivolous claims.

Finally the study found several strategies to reduce the backlog at the IC and prevent it from recurring. These are: addressing the shortcoming of current laws; making conciliation more effective; improving the process of recruiting and placement of Conciliators and Arbitrators; case management at the IC; and to streamline the process of dispute resolution at the DIRM and IC to avoid confusion among disputants. The implications of these finding suggest a review and reform of the dispute resolution system to make it more efficient and consistent with the changes in the employment relationship and standards used in other countries having similar systems.

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APPENDICES

Appendix A : Ethics Approval

VICTORIA UNIVERSITY | A NEW SCHOOL OF THOUGHT

MEMO

TO A/Prof. Bernadine VanGramberg
School of Management and Information Systems
Footscray Park Campus

DATE 01/07/2009

FROM Prof. Michael Muetzelfeldt
Chair
Faculty of Business and Law Human Research Ethics Committee

SUBJECT Ethics Application – HRETH 09/89

Dear A/Prof. VanGramberg,

Thank you for resubmitting this application for ethical approval of the project:

HRETH 09/89 Workplace Dispute Resolution in Malaysia: Investigating Conciliation Claims for Reinstatement

The proposed research project has been accepted and deemed to meet the requirements of the National Health and Medical Research Council (NHMRC) 'National Statement on Ethical Conduct in Human Research (2007)', by the Chair, Faculty of Business & Law Human Research Ethics Committee. Approval has been granted from 01/07/2009 to 31/08/2010.

Continued approval of this research project by the Victoria University Human Research Ethics Committee (VUHREC) is conditional upon the provision of a report within 12 months of the above approval date (by 01/07/2010) or upon the completion of the project (if earlier). A report proforma may be downloaded from the VUHREC web site at: http://research.vu.edu.au/hrec.php

Please note that the Human Research Ethics Committee must be informed of the following: any changes to the approved research protocol, project timelines, any serious events or adverse and/or unforeseen events that may affect continued ethical acceptability of the project. In these unlikely events, researchers must immediately cease all data collection until the Committee has approved the changes. Researchers are also reminded of the need to notify the approving HREC of changes to personnel in research projects via a request for a minor amendment.

If you have any queries, please do not hesitate to contact me at Michael.Muetzelfeldt@vu.edu.au.

On behalf of the Committee, I wish you all the best for the conduct of the project.

Prof. Michael Muetzelfeldt
Chair
Faculty of Business & Law Human Research Ethics Committee

Appendix B : Information to Participants Involved In Research (Survey)

VICTORIA UNIVERSITY | A NEW SCHOOL OF THOUGHT

INFORMATION TO PARTICIPANTS INVOLVED IN RESEARCH

You are invited to participate

You are invited to participate in a research project entitled '."Workplace Dispute Resolution in Malaysia: Investigating Conciliation Claims for Reinstatement"

This project is being conducted by a student researcher Mr Dzulzalani Eden as part of a PhD study at Victoria University under the supervision of, Associate Professor Bernadine Van Gramberg and Mr Richard Gough from the School of Management and Information System in the Faculty of Business and Law, Victoria University, Australia.

Project explanation

Tribunal dispute resolution in Malaysia is the prevalent method for resolving workplace disputes and individual claims for reinstatement comprise the greatest proportion of cases before the Malaysian Industrial Relations Tribunal (IRD). However, years of low settlement rates in the tribunal have led to a large backlog of cases for arbitration before the Industrial Court (IRC). Despite the problems created for the court and tribunal there has been little research to date. The research considers some possible root causes of the problem including the place of procedural fairness in workplace dispute procedures, legal precedents in the area and access to the tribunal and court. The research is to investigate the reasons behind the low rate of settlement in conciliation for reinstatement claims and considers the problem in terms of justice theories and the international literature on alternative dispute resolution (ADR).

What will I be asked to do?

You are invited to participate in answering a questionnaire which will take about 30 minutes to complete. The purpose is to gain your opinion in relation to workplace disputes resolution and tribunal conciliation in Malaysia.

What will I gain from participating?

The research will be used to improve the workplace dispute resolution and tribunal conciliation system in Malaysia.

How will the information I give be used?

Your information provided in the survey will be treated confidentially. You will remain anonymous. Data will be aggregated in such a way that you would not be identified.

What are the potential risks of participating in this project?

Minimum risks have been identified from participating in this project. Throughout the exercise, if you feel uncomfortable or require some form of explanation; please feel free to raise the issue with the researcher. As indicated, you are free not to reveal any information that you think is too confidential or to withdraw at any time. However, you will not be identified as the source or author of any statement. Also, statements or comments will not be used in a way which will enable you to be identified.

How will this project be conducted?

Data collection will occur through questionnaire administration, interviews, documentation review and through the international literature. An endorsement to conduct the study has been received both from the President of the IC and the Director General of Industrial Relations in Putra Jaya.

Who is conducting the study?

The study is being conducted under the supervision of Associate Professor Bernadine Van Gramberg (Phone: 613 99194489 or email bernadine.vangramberg@vu.edu.au and Mr Richard Gough (Phone: 613 9919 4640 or email richard.gough@vu.edu.au).

The research is being undertaken by Dzulzalani Eden,

School of Management and Information System
Faculty of Business and Law
Level 14, City Flinders Campus
300 Flinders Street,
8001 Melbourne, Australia
Mobile: +61430306664

Any queries about your participation in this project may be directed to the Principal Researcher listed above.
If you have any queries or complaints about the way you have been treated, you may contact the Secretary, Victoria University Human Research Ethics Committee, Victoria University, PO Box 14428, Melbourne, VIC, 8001 phone (03) 9919 4781

Appendix C : Information To Participants Involved In Research (Interview)

VICTORIA UNIVERSITY | A NEW SCHOOL OF THOUGHT

INFORMATION TO PARTICIPANTS INVOLVED IN RESEARCH

You are invited to participate

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What will I be asked to do?

You are invited to participate in a structured interview. The interview session will take about one and a half hours. The purpose is to gain your opinion in relation to workplace disputes resolution and tribunal conciliation in Malaysia.

What will I gain from participating?

The research will be used to improve the workplace dispute resolution and tribunal conciliation system in Malaysia.

How will the information I give be used?

Your information provided in the interview will be treated confidentially. You will remain anonymous. Your statements or comments may be republished, but not in such a way that you would be identified.

What are the potential risks of participating in this project?

Minimum risks have been identified from participating in this project. Throughout the exercise, if you feel uncomfortable or require some form of explanation; please feel free to raise the issue with the researcher. As indicated, you are free not to reveal any information that you think is too confidential to your company or to withdraw at any time. However, you will not be identified as the source or author of any statement. Also, statements or comments will not be used in a way which will enable you to be identified.

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Appendix D : Consent Form For Participants Involved In Research (Survey)

CONSENT FORM
FOR PARTICIPANTS
INVOLVED IN RESEARCH

VICTORIA UNIVERSITY | A NEW SCHOOL OF THOUGHT

INFORMATION TO PARTICIPANTS:

We would like to invite you to be a part of a PhD study into industrial relations, titled: "Workplace Dispute Resolution in Malaysia: Investigating Conciliation Claims for Reinstatement". This field of study has received considerable interest from industrial relations consultants, practitioners and academics alike in other parts of the world. However, in Malaysia this will be the first larger scale study to investigate workplace dispute resolution and factors leading to referral of unfair dismissal dispute to tribunal conciliation and to improve the success rate of the processes.

The aims of this research are;

1. What are the key factors behind the referral of claims for reinstatement from the workplace to tribunal conciliation?
2. What are the key reasons for the low settlement rate of tribunal conciliation for reinstatement claims and subsequent high rates of referral to arbitration?
3. What are the strategies to encourage claims for reinstatement to be resolved at the workplace?
4. What are the strategies to reduce the backlog of claims for reinstatement before the IC.

Your participation in this research is voluntary. This research is a PhD study being undertaken by a student researcher: Dzulzalani Eden. If you have any questions about the research please contact: Assoc.Prof. Bernadine Van Gramberg, on 0399194489 or Dzulzalani Eden on 019-8452011.

CERTIFICATION BY SUBJECT

I, _____ (insert your name here)
of _____ (insert your suburb of residence here)

certify that I am at least 18 years old* and that I am voluntarily giving my consent to participate in the study: Workplace Dispute Resolution in Malaysia: Investigating Conciliation Claims for Reinstatement', being conducted at Victoria University by: Associate Professor Bernadine Van Gramberg, Mr Richard Gough and Mr Dzulzalani Eden.

I certify that the objectives of the study, together with any risks and safeguards associated with the procedures listed hereunder to be carried out in the research, have been fully explained to me by:

Mr. Dzulzalani Eden

and that I freely consent to participation involving a survey into the workplace dispute resolution and conciliation

I certify that I have had the opportunity to have any questions answered and that I understand that I can withdraw from this study at any time and that this withdrawal will not jeopardise me in any way.

I have been informed that the information I provide will be kept confidential.

Signed:

Date:

Any queries about your participation in this project may be directed to the researcher Assoc.Prof. Bernadine Van Gramberg (Phone: 0399194489 ,Email: Bernadine.VanGramberg@vu.edu.au)If you have any queries or complaints about the way you have been treated, you may contact the Secretary, Victoria University Human Research Ethics Committee, Victoria University, PO Box 14428, Melbourne, VIC, 8001 phone (03) 9919 4781

Appendix E : Consent Form For Participants Involved In Research (Interview)

CONSENT FORM FOR PARTICIPANTS INVOLVED IN RESEARCH

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3. What are the strategies to encourage claims for reinstatement to be resolved at the workplace?
4. What are the strategies to reduce the backlog of claims for reinstatement before the IC.

Your participation in this research is voluntary. This research is a PhD study being undertaken by a student researcher: Dzulzalani Eden. If you have any questions about the research please contact: Assoc.Prof. Bernadine Van Gramberg, on 0399194489 or Dzulzalani Eden on 019-8452011.

CERTIFICATION BY SUBJECT

I, _____ (insert your name here)
of _____ (insert your suburb of residence here)

certify that I am at least 18 years old* and that I am voluntarily giving my consent to participate in the study: Workplace Dispute Resolution in Malaysia: Investigating Conciliation Claims for Reinstatement', being conducted at Victoria University by: Associate Professor Bernadine Van Gramberg, Mr Richard Gough and Mr Dzulzalani Eden.

I certify that the objectives of the study, together with any risks and safeguards associated with the procedures listed hereunder to be carried out in the research, have been fully explained to me by:

Mr. Dzulzalani Eden

and that I freely consent to be interviewed by telephone or in person.
I consent to the interview being recorded on audio tape. ☐ Yes ☐ No

I certify that I have had the opportunity to have any questions answered and that I understand that I can withdraw from this study at any time and that this withdrawal will not jeopardise me in any way.

I have been informed that the information I provide will be kept confidential.

Signed:

Date:

Any queries about your participation in this project may be directed to the researcher Associate Professor Bernadine Van Gramberg ,(Phone: 0399194489 ,Email: Bernadine.VanGramberg@vu.edu.au) If you have any queries or complaints about the way you have been treated, you may contact the Secretary, Victoria University Human Research Ethics Committee, Victoria University, PO Box 14428, Melbourne, VIC, 8001 phone (03) 9919 4781

Appendix F: Approval letter from Director General of Industrial Relations

JABATAN PERHUBUNGAN PERUSAHAAN
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PUSAT PENTADBIRAN KERAJAAN PERSEKUTUAN
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MALAYSIA

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Kawat : MINLAB
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E-mail : jppm@mohr.gov.my
Website : http://jpp.mohr.gov.my

Ruj. Tuan :

Ruj. kami : *JPPM.PENT.100/6/7 (16)*

Tarikh : 26 August 2008

Mr. Dzulzalani Eden (Student ID : 3768967)
Victoria University,
Level 14, City Flinders Campus,
300 Flinders Street, Melbourne,
Victoria 8001, Australia

Dear Sir,

PERMISSION TO CONDUCT RESEARCH ON CONCILIATION OF WORKPLACE DISPUTE

Your letter dated 23rd July 2008 on above subject refers.

2. The department of Industrial Relations Malaysia welcomes and support your initiative to study the conciliation process in our department. I believe that such research is not only beneficial to the department and your goodself but also contribute towards part fulfillment for your thesis. The department also feels that a research in conciliation management is crucial in resolving workplace dispute and perhaps the analysis from the study could contribute to the betterment of the conciliation system as a whole.

3. Hence the department endorses the research to be carried out and will give its full cooperation to make the research a success.

Thank you.

Yours sincerely,

[redacted]

(HJ. MD. YUNUS BIN RAZZALY)
Director General

adlyza

JABATAN PERHUBUNGAN PERUSAHAAN
27 AUG 2008
DIHANTAR
MALAYSIA

Appendix G: Approval letter from the President of the President of Industrial Court

MP. 135/34/1 Jld: 11 (2)

1 Ogos 2008

Encik Dzulzalani Eden
PhD Candidate
Victoria University
PO Box 14428, Melbourne
Victoria, 8001, Australia

Tuan,

RE: PERMISSION TO CONDUCT RESEARCH ON CONCILIATION/ ARBITRATION OF WORKPLACE DISPUTES

Saya dengan hormatnya merujuk kepada surat tuan bertarikh 23 Julai 2008 mengenai perkara tersebut di atas.

2. Dengan sukacitanya saya memberi kebenaran kepada pihak tuan untuk membuat penyelidikan berkenaan dengan rundingan damai/penimbangtaraan. Harap maklumkan kepada pihak saya bilakah tuan ingin membuat penyelidikan itu dan di Mahkamah manakah pihak tuan ingin membuat penyelidikan itu.

Sekian, dimaklumkan.

" BERKHIDMAT UNTUK NEGARA "
" Pekerja Inovatif Negara Kompetitif "

Saya yang menurut perintah,

[redacted]

(DATO' UMI KALTHUM BT ABDUL MAJID)
Yang Di Pertua
Mahkamah Perusahaan Malaysia

s.k.: Pendaftar
Mahkamah Perusahaan
Kuala Lumpur

--Translation--

MP. 135/34/1 Jld: 11 (2)

1st August 2008

Encik Dzulzalani Eden
PhD Candidate
Victoria University
PO Box 14428, Melbourne
Victoria, 8001, Australia

Sir,

RE: PERMISSION TO CONDUCT RESEARCH ON CONCILIATION/ ARBITRATION OF WORKPLACE DISPUTES

I wish to refer to your letter dated 23rd July 2008 in respect of the above subject.

I am happy to inform that approval has been given for you to undertake the research with regards to conciliation and arbitration. Kindly inform us when you wish to undertake the research and at which court.

Thank you.

" SERVING THE COUNTRY "

" Innovative Employee Competitive Nation "

Your obedient servant,

Sgd.

(DATO' UMI KALTHUM BT ABDUL MAJID)
Chairman
Industrial Court, Malaysia

c.c..: Registrar
Industrial Court
Kuala Lumpur

Appendix H :MoHR Staff Directory System: Department of Industrial Relations

Carian Melalui/Search By :

1. Nama/Name Search Reset

2. Bahagian/Division Jabatan Perhubungan Perusahaan Search

3. Abjad/alphabet

A| B| C| D| E| F| G| H| I| J| K| L| M| N| O| P| Q| R| S| T| U| V| W| X| Y| Z

Maklumat Pegawai Kementerian Sumber Manusia

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Appendix I: Conciliators' Survey

VICTORIA UNIVERSITY | A NEW SCHOOL OF THOUGHT

Workplace Dispute Resolution in Malaysia: Investigating Conciliation Claims for Reinstatement***The Research Group, School Of Management and Information System, Victoria University, Melbourne, Australia***

QUESTIONNAIRE INSTRUCTIONS (CONCILIATORS' QUESTIONAIRE)

The questionnaire is organised under six key headings: Respondent's Profiles; Justice at the Workplace; Justice at the Conciliation; Arbitration; Knowledge/Capacity as a Conciliator and About the Present Case. At the beginning of each section an explanations is provided.

Confidentiality is assured at ALL times.
Participation in this research is voluntary.

SECTION 1: RESPONDENT'S PROFILES (Please tick √)

Q1. How long have you performed the task of conciliation within the Industrial Relations Department?

_____years _____ months

Q2. Gender ☐ Male ☐ female Q3. Age _____ years old

Q4. Office locality ☐ Selangor ☐ Penang ☐ Johor
☐ Kuala Lumpur ☐ Sarawak ☐ Other (Please specify)_____

Q5. Please state your highest qualification?

☐ MCE /SPM ☐ HSC/Diploma ☐ Degree
☐ PhD ☐ Master ☐ Other (Please specify) _____

Q6. Which of the following best describes your qualification background?

☐ Legal ☐ Industrial relations ☐ Other (please specify)
☐ Human resource management ☐ Labour studies _____

SECTION 2: JUSTICE AT THE WORKPLACE

The following questions are aimed at seeking your opinion in terms of whether justice has been accorded at the workplace and whether parties have made enough effort to resolving their dispute at the workplace.

Q7. What is your opinion on parties' determination in resolving their dispute through workplace mechanisms such as grievance procedures, domestic inquiries or retrenchment procedures at the workplace prior to referring their case to conciliation?

☐ Very determined ☐ Somewhat determined ☐ Neutral
☐ Less determined ☐ Not determined

Q8. What are the reasons for your response above?

_____

_____

1

Q9. What is your opinion on the effective implementation of the Code of Conduct for Industrial Harmony 1975 at the employees' workplaces?

☐ Very effective ☐ Somewhat effective ☐ Neutral

☐ Less effective ☐ Not effective

Q10. What are the reasons for your above response?

_____

_____

_____

Q11. Do you think that disputants should be required to prove that they have made an attempt to resolve their dispute at the workplace before referring their case to conciliation?

☐ Strongly Agree ☐ Agree ☐ Neutral

☐ Disagree ☐ Strongly Disagree

Q12. Based on your experience, do you agree that the claimant who referred their case to conciliation has not been given natural justice at the workplace?

☐ Strongly Agree ☐ Agree ☐ Neutral

☐ Disagree ☐ Strongly Disagree

Q13. Please give your opinion of the effective implementation of a workplace dispute resolution mechanism at the workplace in relation to the "curable principle"?

_____

_____

_____

SECTION 3: JUSTICE AT THE CONCILIATION

The following questions are aimed at seeking your opinion about the parties' position at the conciliation process. Please give your response based on the following scale.

1 = Strongly Agree **2** = Agree **3** = Neutral **4** = Disagree **5** = Strongly Disagree

		1	2	3	4	5
Q14.	When claimants are represented by a union, there is a greater chance of settlement achieved at conciliation.	☐	☐	☐	☐	☐
Q15.	When claimants have the ability to negotiate/prepare/advocate their own case at conciliation, there is a greater chance of settlement.	☐	☐	☐	☐	☐
Q16.	When the employer or his/her official has the ability to negotiate at the conciliation, there is a greater chance of settlement.	☐	☐	☐	☐	☐

1 = Strongly Agree **2 =** Agree **3 =** Neutral **4 =** Disagree **5 =** Strongly Disagree

		1	2	3	4	5
Q17.	When the employer or his/her official has authority to make a decision at the conciliation, there is a greater chance of settlement.	☐	☐	☐	☐	☐
Q18.	When either party has experience in attending previous conciliation, there is a greater chance of settlement being achieved.	☐	☐	☐	☐	☐
Q19.	When both parties treat each other with dignity and respect at the conciliation, there is a greater chance of settlement.	☐	☐	☐	☐	☐

SECTION 4: ARBITRATION

The following questions ask your opinion on why parties decide to seek arbitration in resolving their disputes.

Q20. Do you think that the current process of referring cases by merit through Minister's recommendation discourages parties' determination to go to arbitration?

☐ Yes ☐ No

Q21 Why do you think parties who failed to resolve their case at conciliation preferred their case to be referred to arbitration at the Industrial Court?

_____

_____

SECTION 5: KNOWLEDGE/CAPACITY AS A CONCILIATOR

The following questions are aimed at getting your response about the skills/qualities required in conciliation.

Q22. Do you agree that the skills in handling different types of cases such as misconduct or retrenchment can contribute in settlement of cases at conciliation?

☐ Yes ☐ No ☐ Unsure

Q23. Please provide reasons or suggestions for the above response.

_____

_____

Q24. What qualifications do you think a conciliator should have in order to be more effective?

☐ Legal qualifications

☐ No qualifications necessary but significant experience in conciliations expected

☐ Industrial relations qualifications

☐ Other (please specify)_____

_____

Q25. Do you think that you have adequate training/skills to be an effective conciliator?

☐ Yes ☐ No

Q26. If NO, what sort of training/skills would you like to acquire to perform better as a conciliator?

_____

_____

Q27. Please list the conciliation skills training workshops you have attended in the past two years:

_____

_____

Q28. Can you rate your ability in handling disputes at conciliation in terms of the following skills?

1 = Not Adequate 2 = Less Adequate 3 = neutral 4 = Adequate 5 = Very Adequate

	1	2	3	4	5
Experience in handling conciliation process	☐	☐	☐	☐	☐
Understanding of underlying problems in disputes	☐	☐	☐	☐	☐
Understanding of issues in disputes	☐	☐	☐	☐	☐
Ability to be trusted with confidential information or strategy	☐	☐	☐	☐	☐
Acceptability as being neutral in the conciliation	☐	☐	☐	☐	☐
Other (please specify) _____	☐	☐	☐	☐	☐

_____

SECTION 6: ABOUT THE PRESENT CASE

The following questions will be based on the <u>most recent reinstatement case</u> which you have conciliated.

Q29. What was/were the claimant's/s' occupation before termination?

_____

Q30. Please state the reason/s for the termination? (You may tick more than one box)

☐ Misconduct
☐ Retrenchment
☐ Termination Simpliciter
☐ Others (Please specify)_____
☐ Poor Performance
☐ Expiry of a fixed term contract
☐ Constructive dismissal
☐ Unsure

Q31. Who represented the claimant/s during conciliation?

☐ Self represented
☐ Employees' Association (for e.g. the Malaysian Trade Union Congress
☐ Employees' Union
☐ Other (Please specify)
_____

Q32. Who represented the employer during conciliation?

☐ Owner ☐ Director ☐ Human resource manager ☐ Other (Specify)_____

Q33. Which among the parties was more effective in presenting the cases throughout the conciliation process?

☐ Employer ☐ Claimant/s ☐ Both were equally effective

Q34. If either party was less effective, how did you handle the position of the weaker party during the conciliation?

_____

_____

Q35. What reasons given by the claimant/s in referring their case to conciliation? (You may tick more than one box)

☐ Employer did not explain about the reasons before termination.

☐ Employer had not followed the proper procedure before dismissal

☐ Employee(s) were not given an opportunity to be heard

☐ To determine fairness of the employer's action.

☐ Exercising rights as an employee.

☐ Retribution (to change employer's behaviour) so that other employees would not be treated similarly

☐ The employer did not treat employee/s with respect and dignity.

☐ Other (please specify)_____

_____

Q36. Was the case settled at conciliation?

☐ Yes **(please proceed to Question 39)** ☐ No **(please proceed to the next question)**

Q37. Did any of the following contribute to the failure of settlement at conciliation? (You may tick more than one box)

☐ Employer's determination to proceed to arbitration

☐ Claimant's determination to proceed to arbitration

☐ Employer representative's lack of authority to negotiate

☐ Claimant's lack of knowledge/ skills to negotiate

☐ Claimant's unrealistic expectation

☐ Other (please specify)_____

_____

Q 38. What was the proposed settlement (if any) _____

Q.39 What was the settlement?

☐ Reinstatement ☐ Compensation ☐ Other (please specify)

_____

Q40. Please rank the following in terms of importance in resolving the dispute based on the following scale.

1 = Most Important 2 = Important 3 = neutral 4 =Less Important 5 = Not Important

	1	2	3	4	5
Gaining the trust and confidence of parties	☐	☐	☐	☐	☐
Identifying underlying obstacles to a settlement	☐	☐	☐	☐	☐
Controlling hostility between parties	☐	☐	☐	☐	☐
Educating/explaining to parties about the conciliation process	☐	☐	☐	☐	☐
Making substantive suggestions for compromise between the parties	☐	☐	☐	☐	☐
Trying to change expectations of one or both of the parties	☐	☐	☐	☐	☐
Helping parties save face	☐	☐	☐	☐	☐
Encouraging compromise	☐	☐	☐	☐	☐
Other (please specify)_____	☐	☐	☐	☐	☐

Q41. Do you think the above mentioned most recent case has merit to be referred to arbitration? (You may also give your opinion even though the case was settled at conciliation)

☐ Yes ☐ No

Q42. Is your opinion based on any of the following reasons? (You may tick more than one box).

☐ Employer failed to conduct a domestic inquiry
☐ The domestic inquiry was defective
☐ Employer failed to observe proper retrenchment procedures
☐ Employer was unfair in dealing with non performance
☐ There has been an element of breach of contract which may lead to constructive dismissal
☐ Other (please specify)

_____
_____

Q.43 What is your suggestion to improve the conciliation service?

_____

_____

We thank you for your participation,

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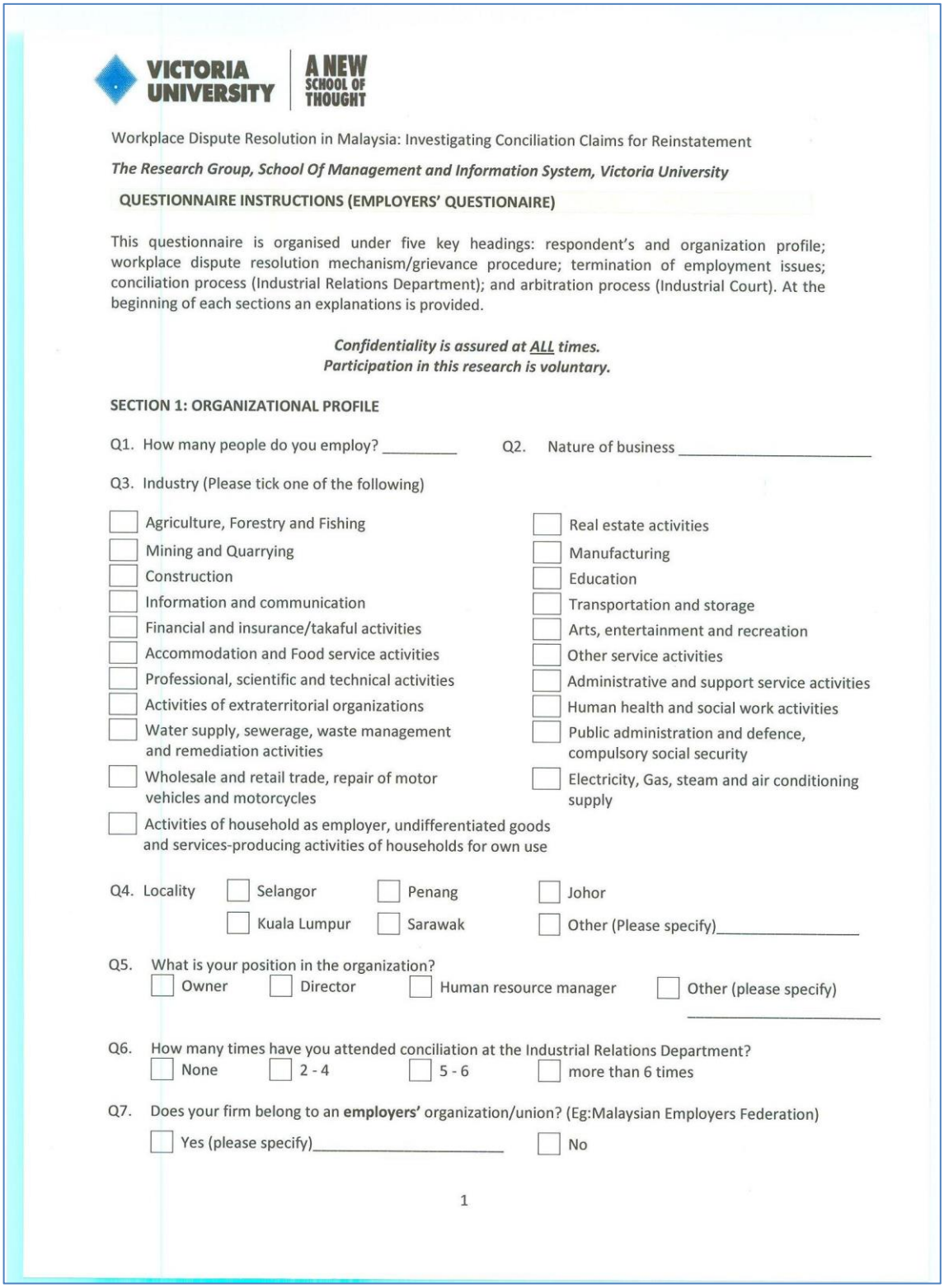
Appendix J: Employers' Survey



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Workplace Dispute Resolution in Malaysia: Investigating Conciliation Claims for Reinstatement

The Research Group, School Of Management and Information System, Victoria University

QUESTIONNAIRE INSTRUCTIONS (EMPLOYERS' QUESTIONAIRE)

This questionnaire is organised under five key headings: respondent's and organization profile; workplace dispute resolution mechanism/grievance procedure; termination of employment issues; conciliation process (Industrial Relations Department); and arbitration process (Industrial Court). At the beginning of each sections an explanations is provided.

Confidentiality is assured at ALL times.
Participation in this research is voluntary.

SECTION 1: ORGANIZATIONAL PROFILE

Q1. How many people do you employ? _____ Q2. Nature of business _____

Q3. Industry (Please tick one of the following)

- ☐ Agriculture, Forestry and Fishing
- ☐ Mining and Quarrying
- ☐ Construction
- ☐ Information and communication
- ☐ Financial and insurance/takaful activities
- ☐ Accommodation and Food service activities
- ☐ Professional, scientific and technical activities
- ☐ Activities of extraterritorial organizations
- ☐ Water supply, sewerage, waste management and remediation activities
- ☐ Wholesale and retail trade, repair of motor vehicles and motorcycles
- ☐ Activities of household as employer, undifferentiated goods and services-producing activities of households for own use
- ☐ Real estate activities
- ☐ Manufacturing
- ☐ Education
- ☐ Transportation and storage
- ☐ Arts, entertainment and recreation
- ☐ Other service activities
- ☐ Administrative and support service activities
- ☐ Human health and social work activities
- ☐ Public administration and defence, compulsory social security
- ☐ Electricity, Gas, steam and air conditioning supply

Q4. Locality ☐ Selangor ☐ Penang ☐ Johor ☐ Kuala Lumpur ☐ Sarawak ☐ Other (Please specify)_____

Q5. What is your position in the organization?
☐ Owner ☐ Director ☐ Human resource manager ☐ Other (please specify) _____

Q6. How many times have you attended conciliation at the Industrial Relations Department?
☐ None ☐ 2 - 4 ☐ 5 - 6 ☐ more than 6 times

Q7. Does your firm belong to an **employers'** organization/union? (Eg:Malaysian Employers Federation)
☐ Yes (please specify)_____ ☐ No

1

Q8. Do any of your employees belong to an in-house or industrial union?

☐ Yes (continue to the next questions.) ☐ No (proceed to **Question 12 in Section 2**).

Q9. What percentage of your workforce belongs to a union? _____ %

Q10. Has the union been given recognition? ☐ Yes ☐ No

Q11 Do you have a collective agreement with the union? ☐ Yes ☐ No

SECTION 2: WORKPLACE DISPUTE RESOLUTION MECHANISM/GRIEVANCE PROCEDURE

In this section we ask you whether you have a workplace dispute mechanism in your workplace and if yes, how has it been developed and implemented.

Q12. Does your organization have written procedures to handle workplace disputes?

☐ Yes (continue to the next questions.) ☐ No (proceed to **Question 18 in Section 3**).

Q13. Do these procedures contain the following? (You may tick more than one box)

☐ Steps to handle collective disputes
☐ Steps to handle termination of employment
☐ Steps to handle individual disputes (grievance procedure)
☐ Other (please _____

Q14. Are these procedures written in your:

☐ Collective agreement
☐ Employees'/organizational handbook
☐ Contract of employment
☐ Other (please specify)_____

Q15. How long have these procedures been established?

☐ Less than 1 year ☐ 1 - 2 years ☐ 3 - 5 years
☐ 6 - 10 years ☐ More than 10 years ☐ Not sure

Q16. How were these procedures established?

☐ By the management
☐ By the management and employees' union
☐ Not sure
☐ Other (Please specify) _____
_____

Q17. Did you refer to the following when you established the procedure?(You may tick more than once)

☐ Industrial Relations Act 1967
☐ Ministry of Human Resources
☐ Employment Act/Labour Ordinance
☐ Department of Industrial Relations
☐ Code of Conduct for Industrial Harmony 1975
☐ Department of Labour
☐ Employers' Association
☐ Employees' Union
☐ Not sure
☐ Other (Please specify) _____
_____

SECTION 3: TERMINATION OF EMPLOYMENT

The following questions are based on how you deal with terminations of employment in your organization.

Q18. Do you give reasons to employees when you terminate their employment?

☐ Yes (continue to the next questions.) ☐ No (proceed to **Question 20**).

Q19. How was the reason(s) given? ☐ Verbal ☐ In writing

Q20. Is your organization required to provide reason for terminations of employment under the followings (You may tick more than one box).

☐ Workplace dispute procedures ☐ Contract of employment ☐ Other (Please specify) _____

☐ Employees' handbook ☐ Collective agreement ☐ Not sure

Q21. Do you think employees should be given reasons or explanation when their employments are terminated and why?

☐ Yes _____

☐ No _____

Q22. Do you provide your employees with opportunities to appeal or challenge the decision to terminate their service in your organization?

☐ Yes How is it provided? _____

☐ No Why? _____

Q23. How effective is your workplace procedure in resolving termination of employment dispute and explain why?

_____

_____

Q24. Please tick the factors that might reverse your decision to terminate an employee in the following situations. (You may tick more than one box)

	Types for termination			
Factors	Misconduct	Poor performance	Retrenchment	Other types of termination (please specify) _____
(a) Age	☐	☐	☐	☐
(b) Seniority	☐	☐	☐	☐
(c) Previous positive contribution of the employees to the organization	☐	☐	☐	☐
(d) The ability of the employee to find job elsewhere	☐	☐	☐	☐
(e) Other factor (Specify) _____	☐	☐	☐	☐
_____	☐	☐	☐	☐
_____	☐	☐	☐	☐

SECTION 4: CONCILIATION PROCESS (INDUSTRIAL RELATIONS DEPARTMENT)

The following questions are based on the most recent case you have dealt with through conciliation at the Industrial Relations Department.

Q25. Have you recently had a case of termination of employment dealt with by the Industrial Relations Department?

☐ Yes (continue to the next questions.) ☐ No (proceed to Question 43).

Q26. What was/were the employee's/s' occupation before the termination of employment.

_____

Q27. How long had the employee/s worked prior to the termination of employment.

☐ Less than 1 year ☐ 1 - 2 years ☐ 3 - 5 years

☐ 5 – 10 years ☐ 10 – 20 years ☐ Unsure

Q28. How was the notice of termination given to the employee/s?

☐ In writing ☐ Verbal ☐ Instance dismissal (no notice given)

Q29. How much notice was given? _____Days _____ Months

Q30. What was the reason/s for the termination? (You may tick more than one box)

☐ Misconduct ☐ Poor Performance ☐ Expiry of a fixed term contract

☐ Retrenchment ☐ Termination Simpliciter .* ☐ Constructive dismissal.**

☐ Health reasons ☐ Unsure ☐ Others(Please specify _____

_____

* Refers to when an employee resigns/left the company and then claims he was dismissed.

**Refers to when the termination is simply based on provisions provided by the contract/agreement.

Q31. Were any of the following steps taken prior to the termination?(You may tick more than one box)

☐ Warning Letter ☐ Internal Investigation ☐ Domestic Inquiry

☐ Retrenchment procedure ☐ Suspension from work ☐ Counselling

☐ Unsure ☐ Others (Please specify_____

Q32. Are the above steps written into your organizational procedure?

☐ Yes (continue to the next questions.) ☐ No (proceed to Question 34).

Q33. Did you use your written procedure to terminate the employment? ☐ Yes ☐ No

Q34. Do you think that the decision to terminate the employment was fair and why?

_____

_____

Q35. What other actions were taken before you terminated the employment?

- ☐ Employees were given opportunities to appeal the decision
- ☐ Employees were given explanation and justification of the decision
- ☐ Consultation with employees or union
- ☐ Other (Please specify)_____

Q36. Are any of the following given to the employee/s before termination of employment? (You may tick more than one box)

- ☐ Compensation in lieu of notice
- ☐ Transfer to a different branch
- ☐ Ex-gratia payments
- ☐ Reemployment in a different job
- ☐ Retrenchment benefits
- ☐ Other (Please specify) _____

Q37. For this particular case, how many conciliation meeting have you attended?

☐ One ☐ Two ☐ Three ☐ More than three

Q38. Who represented the employee/s during conciliation?

- ☐ Self represented
- ☐ Employees' Union
- ☐ Employees' Association (for e.g. the Malaysian Trade Union Congress
- ☐ Other (Please specify) _____

Q39. Did you settle this case at the conciliation?

☐ Yes (proceed to question 42) ☐ No (continue to the next questions).

Q40. Why was the case not resolved at the conciliation?

- ☐ I (The Management)prefered to go to the arbitration at the Industrial Court.
- ☐ Employees refused to settle and prefered to proceed to the Industrial Court
- ☐ Other reason/s (please specify) _____

Q41. What was the settlement (if any) _____

Q.42 What was the settlement?

☐ Reinstatement ☐ Compensation ☐ Other (please specify) _____

Q43. What is your opinion of the conciliation process conducted by the Industrial Relations Department?

_____

_____

_____

Q44. How would you rate the conciliator in terms of the followings? (Please tick (V) in the appropriate box)

1 = very satisfied **2 = satisfied** **3 = neutral** **4 = dissatisfied** **5 = strongly dissatisfied**

	1	2	3	4	5
Outlining the laws/regulations.	☐	☐	☐	☐	☐
Explaining the conciliation process/procedure.	☐	☐	☐	☐	☐
Passing messages, proposals and offers from the claimants.	☐	☐	☐	☐	☐
Helping you understand strengths and weaknesses of the case	☐	☐	☐	☐	☐
Helping you think through your options.	☐	☐	☐	☐	☐
Helping you consider pros and cons without going to the Industrial Court.	☐	☐	☐	☐	☐
Other (please specify)_____	☐	☐	☐	☐	☐

Q45. What are your suggestions to improve the conciliation services at the Industrial Relations Department?

_____

_____

SECTION 5: ARBITRATION PROCESS (INDUSTRIAL COURT)

This section is to seek your response in respect to the arbitration process at the Industrial Court. You may still provide your views even though you have not yet had or do not intend to have your case heard at the Industrial Court.

Q46. Have you recently had a case of termination of employment dealt with by the Industrial Court?

☐ Yes ☐ No

Q47. Do you prefer your case to be decided through arbitration at the Industrial Court?

☐ Yes (continue to the next questions.) ☐ No (proceed to Question 49).

Q48. Why do you prefer your case to be decided at the Industrial Court? (You may tick more than once)

☐ It provides a certainty of settlement ☐ It provides greater justice

☐ It provide a greater chance of settlement ☐ Other (please specify) _____

Q49. Why do you **not** prefer your case to be decided at the Industrial Court? (You may tick more than one box)

☐ It is too time consuming ☐ It is costly to the management

☐ Unsure ☐ Other (Please specify)_____

Q50. Can you express your opinion of the arbitration process at the Industrial Court?

_____

_____

Thank you for your participation

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Appendix K: Conciliators' Interview

VICTORIA UNIVERSITY | A NEW SCHOOL OF THOUGHT

SCHOOL OF MANAGEMENT AND INFORMATION SYSTEM

FACULTY OF BUSINESS AND LAW

Workplace Dispute Resolution in Malaysia: Investigating Conciliation Claims for Reinstatement

Interview Questions (Conciliators)

Interview Date: _____

Interviewed by: _____

Respondent position: _____

This study will not attribute any comments to you personally or to your organization, as responses are confidential. The information gathered from this interview will be used for academic purposes only.

1

1. What are the key factors behind the referral of claim for reinstatement from the workplace level to conciliation?

2. What do you think are the key reasons for the low rate of settlement at conciliation for claims of reinstatement?

3. What are the strategies to encourage claims for reinstatement to be resolved at the workplace?

4. What are your suggestions for strategies to improve conciliation services? What is it that you think will improve the settlement rate of conciliation?

5. What about strategies to reduce backlog of claims for reinstatement before the Industrial Court?

Thank you for your participation

Appendix L : Interview guide (Conciliator)

Questions 1: What are the key factors behind the referral of claim for reinstatement from the workplace level to conciliation?

(i) Distributive justice
- fairness of the decision by the management to terminate the employees
- Equity, Equality and/or Needs principles must apply, for example
  - Perceived fairness of a positive outcome by disputant.
  - Perceived fairness of a negative outcome by disputant.

(ii) Procedural justice
- fairness of the procedure in dismissal
  - Employee to be presented with the charge explained in
  - Opportunity to present a defence to the charge
  - Process must allow for a neutral decision maker
  - A clear, rational explanation must be provided for the decision
  - Right of appeal
  - Process must be time-efficient

(iii) Interactional justice
- Disputant is afforded respect and dignity
- Disputant perception that decision maker was neutral and trustworthy
- Explanation and justification for outcome

(iv) Code of conduct for industrial harmony 1975
- Do employers use it
- Has been fully implemented

(v) Employers' skills to resolve the dispute at the workplace

(vi) Other factors which Conciliators' think that have led to so many cases not being resolved at the workplace?

Question 2: What are the reasons for the low rate of settlement at conciliation?

(i) Procedural justice
- The principles of natural justice during the conciliation process
- Representation at conciliation

(ii) Affect of the precedent in the 'dreamland case' relating to due process at the workplace

(iii) Why employees and employers are not happy with the proposed outcome or resolution of the conciliation

(iv) Nature of claims and its affect to the rate of settlement.

(v) The effect of lure of arbitration

(vi) The effect of the requirement of Ministers' power in deciding reference of disputes to arbitration

Question 3. What are the strategies to encourage claims for reinstatement to be resolved at the workplace?

(i) Should the parties be imposed to prove that they have made an effort to resolve dispute at the workplace?

(ii) What about the laws and precedents around workplace resolution? Are they adequate?

(iii) Should there be incentives introduced to encourage parties to resolve their disputes at the workplace?

Question 4. What are the strategies to improve conciliation services?

(i) Is it the education background, knowledge, skill and experience of conciliators

(ii) Training of conciliators

(iii) What about tactics of conciliators, or

(iv) Should the process of conciliation be improved?

Question 5. What are the strategies to reduce backlog of claims for reinstatement before the industrial court?

(i) Should conciliators plays a more interventionist role in the conciliation, or

(ii) Should they be allowed to arbitrate the dispute?

(iii) What about imposing cost on the losing parties?

Appendix M: MoHR Staff Directory System - Industrial Court

Carian Melalui/Search By :

1. Nama/Name Search Reset

2. Bahagian/Division Mahkamah Perusahaan Search

3. Abjad/alphabet

A| B| C| D| E| F| G| H| I| J| K| L| M| N| O| P| Q| R| S| T| U| V| W| X| Y| Z

Maklumat Pegawai Kementerian Sumber Manusia

BAHAGIAN : Mahkamah Perusahaan (Industrial Court)

Bil	Nama/ *Name*	Jawatan / *Position*	No. Tel & Emel / *Tel Num.& e-mail*
1	Hapipah binti Monel	PENGERUSI-JUSA C	hapipah@mohr.gov.my
2	Y. A. Ahmad Terirudin bin Mohd Saleh	PENGERUSI-JUSA C	terirudin@mohr.gov.my
3	Y.A Dato' Mary Shakila Azariah	PENGERUSI-JUSA C	mary@mohr.gov.my
4	Y.A Dato' Tan Yeak Hui	PENGERUSI-JUSA C	yhtan@mohr.gov.my
5	Y.A Puan Amelia Tee Hong Geok	PENGERUSI-JUSA C	03-26937492 amelia@mohr.gov.my
6	Y.A Puan Choong Siew Khim	PENGERUSI-JUSA C	05-2437591 skchoong@mohr.gov.my
7	Y.A Puan Mariah@Maliah binti Ahmad	PENGERUSI-JUSA C	mariah.a@mohr.gov.my

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16	Y.A Tuan Franklin Goonting	PENGERUSI-JUSA C	03-26912313 franklin@mohr.gov.my
17	Y.A Tuan Fredrick Indran X.A Nicholas	PENGERUSI-JUSA C	03-26939311 fredrick@mohr.gov.my
18	Y.A Tuan Hj Sauffee Afandi Bin Mohamad	PENGERUSI-JUSA C	03-26947499 sauffee@mohr.gov.my
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35	Amutha a/p Subramaniam	PENOLONG PENDAFTAR-S 41	amutha@mohr.gov.my
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37	Muhammad Khairil Amran bin Abu Bakar	PENOLONG PENDAFTAR-S 41	amranbakar@mohr.gov.my
38	Noramirah bt Ali	PENOLONG PENDAFTAR-S 41	noramirah@mohr.gov.my
39	Raja Khairul Azahar bin Raja Ahmad	PENOLONG PENDAFTAR-S 41	rk_azahar@mohr.gov.my
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43	Shairul Shahrizan bin Ishak@Isah	PENOLONG PEGAWAI TEKNOLOGI MAKLUMAT-F 29	03-88862371 shairul@mohr.gov.my
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47	Bashah Ahmad	PEMBANTU TADBIR(P/O)-N 22	bashah_a@mohr.gov.my

48	Chempaka Atan	PEMBANTU TADBIR(P/O)-N 22	chempaka@mohr.gov.my
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52	Hasnah Bt Abdul Malik	PEMBANTU TADBIR(P/O)-N 22	hasnah@mohr.gov.my
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56	Maznah Abdul Hamid	PEMBANTU TADBIR(P/O)-N 22	maznah_ah@mohr.gov.my
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60	Rosnani Ahmad	PEMBANTU TADBIR(P/O)-N 22	rosnani@mohr.gov.my
61	Rukiah Mohamed Salleh	PEMBANTU TADBIR(P/O)-N 22	rukiah@mohr.gov.my
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65	Safiah binti Abd Aziz	PEMBANTU TADBIR(P/O)-N 22	safiah@mohr.gov.my
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Appendix N: Arbitrators' interview

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FACULTY OF BUSINESS AND LAW

Workplace Dispute Resolution in Malaysia: Investigating Conciliation Claims for Reinstatement

Interview Questions (Arbitrators)

Interview Date: _____

Interviewed by: _____

Respondent position: _____

This study will not attribute any comments to you personally or to your organization, as responses are confidential. The information gathered from this interview will be used for academic purposes only.

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Appendix O: Interview guide (Arbitrator)

Question 1. What would Your Honour think are the key reasons for the low settlement rate of conciliation which have subsequently resulted in a high rate of arbitration?

(i) Procedural justice
- Opportunity to talk during the conciliation process
- Representation

(ii) Distributive justice
- Fairness of the proposed outcome or resolution of the conciliation

(iii) Interactional justice
- Any evidence that it is the way parties are being treated at the conciliation.

(iv) Nature of claim

Question 2. What is your opinion on the lure of arbitration to party's determination to resolve dispute at the conciliation?

- Do you think that parties do not resolve their case at the conciliation as they know that it will be resolved for them at arbitration?

Question 3 What is your opinion on the precedence of the Supreme Court in the "Dreamland case"?

- Based on your experience of handling claims for reinstatement cases, what do you think of the influence of this precedence to disputants at the workplace and conciliation?

Question 4. What are the strategies to reduce backlog of claims for reinstatement before the Industrial Court?

- Should conciliators plays a more interventionist role in the conciliation
- Or should they be allowed to arbitrate the dispute?
- What about imposing cost on the losing parties?
- What about training at the workplace?

Question 5. What is your opinion of conciliators performing a more interventionist role in the conciliation process?

- Initiate settlement
- Discussing the merit of the case

Question 6. What do you think are the strategies to improve the conciliation services?

- Is it the education background, knowledge, skill and experience of conciliators, or
- Training of conciliators
- What about tactics of conciliators, or

Should the process of conciliation be improved?

Appendix P : List of Interviewees according to role

Interviewee's role and random number	Gender	Age Range	Years of service (in MoHR)
Arbitrator 1	Female	Above 50	Above 10 years
Arbitrator 2	Male	Above 50	Above 10 years
Arbitrator 3	Male	Above 50	Above 10 years
Arbitrator 4	Female	Above 50	Above 10 years
Arbitrator 5	Male	Above 50	Above 10 years
Arbitrator 6	Male	Above 50	Above 10 years
Arbitrator 7	Female	Above 50	Above 10 years
Arbitrator 8	Male	Above 50	Above 10 years
Conciliator 1	Female	Less than 30	1 - 5 years
Conciliator 2	Female	Less than 30	1 - 5 years
Conciliator 3	Female	Less than 30	1 - 5 years
Conciliator 4	Male	31 - 40	Above 10 years
Conciliator 5	Male	41 - 50	Above 10 years
Conciliator 6	Female	31 - 40	1 - 5 years
Conciliator 7	Male	Less than 30	Less than 1 year
Conciliator 8	Male	Above 50	Above 10 years
Conciliator 9	Female	Less than 30	1 - 5 years
Conciliator 10	Male	Less than 30	1 - 5 years
Conciliator 11	Male	41 - 50	Above 10 years
Conciliator 12	Female	31 - 40	6 - 10 years
Conciliator 13	Male	31 - 40	1 - 5 years
Conciliator 14	Male	Less than 30	1 - 5 years
Conciliator 15	Female	31 - 40	6 - 10 years
Conciliator 16	Male	41 - 50	Above 10 years
Conciliator 17	Female	31 - 40	Above 10 years
Conciliator 18	Male	41 - 50	Above 10 years
Conciliator 19	Female	31 - 40	6 - 10 years
Conciliator 20	Male	31 - 40	6 - 10 years
Conciliator 21	Male	41 - 50	Above 10 years
Conciliator 22	Male	41 - 50	Above 10 years
Conciliator 23	Female	41 - 50	Above 10 years