International Business Management 9 (4): 508-513, 2015
ISSN: 1993-5250

The Protection of Employment Relationship in Indonesia

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Abstract: Fundamentally, an employment relationship is an economic relationship. Nevertheless, due to the weaker position of worker than employers, thus, many parties note the importance of government intervention to protect workers in the form of regulation-making in order that the employment relationship can be fair. Therefore, this study specifically analyzes how the Indonesian labor law regulates the employment relationship to ensure that workers are protected from solely economic interests and at the same time workers can function well in the company's business operations. By using statute approach, the analysis conclude that the Indonesian labor law has set minimum and maximum requirements in the making of employment contract and substantive and procedural requirements in the dismissal exercise. For instance, the dismissal exercise must be accompanied by a fair reason. This principle is in line with the slogan 'labor is not a commodity' that is embodied in the ILO Declaration of Philadelphia 1944 and the principle of 'just cause dismissal' in the ILO Convention No. 158.

Key words: Protection, employment relationship, Indonesian labor law, dismissal exercise, ILO

INTRODUCTION

Most people depend on job as a source of income. In a labor law perspective, people get jobs to ensure their economic and social welfare (Conaghan *et al*., 2005). Working must generate enough revenue to fulfill the need of workers and their dependents not only for the daily life but also for a lifetime. In addition to meeting the daily needs working also gives meaning to the lives of workers. Through, working, the workers get personal satisfaction. Through participation in the workplace, workers gain access to social community. Working can be tiring, boring and dangerous but without it, a lot of people can not fulfill their daily needs and their dependents.

However, working can bind to the economic system which tends to treat workers as commodities as one of the factors in the production ways. To make a worker persistently work that was admired by Adam Smith that occur in the efficiency of the production process, at the same time does not seem to be able to restrict exploitation (Werhane, 1991). Workers are forced by economic interests to meet production systems which tend to treat workers as commodities not in a system that recognizes the dignity and humanity of workers. This paradoxical situation clearly requires the existence of law that regulates the employment relationship to ensure workers can function well in the business operations and at the same time to protect workers against the logic of economic in treating workers (Collins, 2003).

In the context of Indonesian labor law as a country that uses the concept of welfare state, Indonesia considers that the difference in social class between the workers and employers causes the need for state intervention to protect workers in an employment relationship with the employers. Based on the background earlier by using statute approach, this study specifically analyze how the Indonesian labor law regulates the employment relationship to ensure workers are protected from purely economic interests and at the same time workers can function well in the company's business operations.

EMPLOYMENT PROTECTION IN LIGHT OF THE CONSTITUTION OF INDONESIA

Basedon the Constitution of Indonesia, economic activity is developed dynamically as a fair market or called as social market. Inside, there is a free mechanism but it must be accompanied by an affirmative policy. Affirmative policy in the labor scope is expressed under Article 27 (2) and 28 D (2) the Constitution, namely:

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- Everyone has the right to work and to live in human dignity
- Everyone has the right to work to earn wages and to get fair treatment in employment relationships. By admitting the citizens' right to obtain a job, it means that actually Indonesia has been determined and decided to eliminate unemployment. The Government is obliged to eradicate unemployment and to try that every citizen gets job with a decent wage for their livelihood

Without having a job, someone may not be able to meet his basic needs, even the other necessities of life. Due to the importance of working so that the fulfillment guarantee of these rights become obligations that must be carried out by the state. It is clear that the provisions of the Constitution which guarantees the right of every citizen to obtain a job and a decent living for humanity is a provision that symbolizes the country's commitment to its people to sustain lives by giving a guarantee to get a job. Therefore, the state is obliged to expand employment through economic growth.

Everyone has the right to work to earn wages and to get just treatment in employment relationships. This provision carries the notion that the right to work is a fundamental right of everyone. Therefore, this provision is categorized appropriately in the provisions governing the human rights aspect. By categorizing the right to work as a human right in the Constitution is in line with Article 23 the Universal Declaration of Human Rights which includes subject of the right to work:

- Everyone has the right to work to free choice of employment to just and favorable conditions of work and to protection against unemployment
- Everyone without any discrimination has the right to equal pay for equal work
- Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity and supplemented if necessary by other means of social protection
- Everyone has the right to form and to join trade unions for the protection of his interests

The principles in Article 27 (2) and 28 D (2) the Constitution above can only be realized if government creates and implements labor issues policies based on such principles. The provisions of the both articles are the highest legal principles for the government to make and implement labor policies (Sakumoto, 1999).

Based on labor principles in the constitution earlier, Indonesia has set the broader rights of workers if it is compared to some developed countries and many developing countries. This right includes for example, the right to form unions, the right to bargain and the right to strike. Indonesian law guarantees minimum labor standards including: the minimum wage; dispute settlement system of the formal industrial relations; limit on working time; 30 min rest period for every 4 h of work; annual leave with wages during the period of 12 days; maternity leave; overtime pay; prohibition of discrimination based on sex in wages; absolute prohibition for employers to terminate workers because of participating in union activities and so on (ILO, 1999). In addition, Indonesia has ratified several important ILO Conventions, so that Indonesia became the 1st country in Asia to ratify all 8 ILO fundamental Conventions.

It is clear that the Constitution acknowledges the principle of job security. The Constitution requires that the state does not only providing and fulfilling the right of every citizen to obtain a job but also ensuring and protecting every worker to be entitled to just treatment in employment relationships, including balancing the position of employers and workers in the making of employment contract and protecting the workers so their job is not dismissed arbitrarily by the employers. This principle is in line with the slogan 'labor is not a commodity' that is embodied in the ILO Declaration of Philadelphia 1944 and the principle of 'just cause dismissal' in the ILO Convention No. 158. Therefore, the labor legislation should contain the principle of job security.

However, in practice, the protection of the rights of workers over job security, especially for the protection of not to be unfairly dismissed has not run well. There is still a very wide gap between legislation and reality. For example, there were many cases of workers strikes aimed at prosecuting the rights of workers but the strikes were actually answered with firing by the employers. Another example, a worker who demands payment of the minimum wage was precisely fired by the employer. Also in the Employment report in Indonesia in 2010 made by the World Bank noted that many companies do not meet the requirements of separation benefits when deciding to terminate the employment relationship. From 14.6% of the total number of workers who meet the criteria to be eligible to receive payment of separation benefits, 65.6% reported that workers do not receive payment of separation benefits from the employers.

THE FREEDOM OF CONTRACT IS SUBJECT TO LIMITATIONS

Employment relationship is very important in a company. Nevertheless, employers should state clearly the terms and conditions of employment to the workers and do not violate the applicable legislation. This issue is very important to prevent employment disputes. Employment relationship that is suitable with law and fair is the foundation of harmonious relations between a sustainable industry and economic stability of the country. Therefore in the context of job security, government intervention in the setting of the employment contract is necessary. Nevertheless, it should be done carefully and thoroughly in order to be just for both parties.

Employment contract can be regarded as a fundamental legal institution of labor law. Employment contract is one of the most vital things of the labor law because the employment contract will lead to the formation of contractual relationship between employers and workers. In the employment contract, the rights and obligations of both parties will be set out. Once employers and workers are entering the employment contract, the laws relating to the employment valid to control the contractual relationship. Some of the laws that govern the employment relationship between employers and workers in Indonesia are: The Trade Dispute Resolution Act No. 2 Year 2004; the Manpower Act No. 13 Year 2003; the Trade Union Act No. 21 Year 2000; the Manpower Social Security Act No. 3 Year 1992 and the Occupational Safety Act No. 1 Year 1970. The entire acts contain minimum or maximum provisions that need to be obeyed by employers and workers, also give rights to workers in certain circumstances. Further, three laws, namely the Manpower Act, the Trade Dispute Resolution Act and the Trade Union Act have formed the core of Indonesian labor law.

The discussion on the employment relationship formed from employment contract can be found in Article 1 number 15 juncto Article 50 the Manpower Act that state employment relationship is the relationship between employers and workers under employment contract that have the elements of work, wage and command. Work element refers to what must be done. It is generally indicated by the presence of the contracted position. Wage element is indicated by how much wage is received and when the wages will be paid each period. While the command element is normally indicated by the job description made by employers, workers' obligation is to obey the order of the company and the right of employer is to impose disciplinary action to the workers. This understanding is principally similar to what is applied in Europe. In most countries in Europe, an employment contract is known to enclose 3 essential elements, namely: work, wage and command. This means that the employment contract is an agreement by which workers attach themselves to work under the orders of employers by accepting payment of wages.

Compared with contract in general, there is essentially no difference between the employment contract and the general contracts on the terms of its formation. In the employment contract, agreement is must also be made by both parties, both parties must be competent to make the contract, there is the contracted object (a job) and the agreed object does not violate the law, public interest and morality. The absence of any of these conditions will not allow the existing of the employment relationship. Like the other contracts, employment contract is a contract between employers on the one hand and workers on the other hand to execute or not to execute something. Both parties are bound to the terms and conditions approved. Denial of any terms and conditions provides for either party to terminate the employment relationship and get compensation.

However, there are circumstances which distinguish between employment contract and the general contracts. The most obvious difference in the employment contract which can be seen from the principle of the balance on both parties position in the formation of contract is no subordination of workers to employers. Employers as parties that generally have higher socioeconomic status than labor gave orders to workers who generally have lower socioeconomic status. The position of "subordination" brings to the position of workers who always agrees with the employers' command. The difference in this position then becomes the justification of employment contract regulated under employment law in Indonesia.

The existence of workers' subordination to employers needs to be restricted by law. Related parties in the employment contract are not only bound by the agreed terms and conditions. When the parties in the employment contract agree to certain provisions, the parties are bound by these conditions. However, the related parties cannot arbitrarily and freely assign any provision. There are laws that limit. Under Article 54 (2) the Manpower Act, the provisions of employment contract must not oppose applicable legislation, company rules or collective agreement.

The Manpower Act has arranged that making the employment contract must not oppose the established law. Provisions to be set by employers and workers must consider all legal regulations. Employers and workers no longer can set their own terms and conditions at will. In

the General Explanation of the Manpower Act, it is implicitly stated that the reduced meaning of freedom of contract principally in the establishment of the terms and conditions of employment contract through legislation is a form of government intervention to protect the basic rights of workers with regard to the implications for the country's economic growth. The intervention is necessary for the purpose of justice and protection (Hepple, 1986).

With the government intervention, the freedom of contract between employers and workers in forming the employment contract is no longer pure. Freedom of employers and workers in forming the employment contract is limited. Therefore, if in general contracts the principle of freedom of contract is still relatively pure, then in the formation of employment contract, the meaning of freedom of contract has been reduced. In comparison in Malaysia, freedom of contract was forcefully reduced because the contractual relationship between employers and workers has implications in terms of social, economic, political and so on. In order to realize the contractual relationship and harmonious working atmosphere, the Malaysian government thinks that freedom of contract primarily in setting the terms and conditions of employment should be limited. Therefore, the Malaysian labor law sets various minimum working conditions, such as the amount of leave, the amount of overtime pay, how to terminate the employment relationship and so on.

There are rules of minimum and maximum requirements which should not be violated in the formation of the contract. Indonesian labor law provides guidelines regarding the terms and conditions of employment contract and directly limit freedom of contract between the employers and the workers. This limitation is especially made to protect the rights of workers over job security. Job security is clearly expressed in terms of the formation of a specified time employment contract. Although, the term of employment contract can be made either for a specified time or an unspecified time, the Manpower Act establishes barriers to the formation of a specified time employment contract. Not all types of jobs can be created within a specified time employment contract. Specified time employment contract should only be made for a specific job which is according to the type and nature of the work or activity to be completed within a certain time, inter alia: a onetime finished job or the temporary work; work which is expected to finish within a period of 3 years; seasonal work or work related to new products, new activities or additional products that are still on probation. Therefore, under Article 59 the Manpower Act, specified time employment contract shall not be made for a permanent job. Obviously, this article is made to protect workers by gaining job security.

One example of cases about the establishment of the specified time employment contract that is not adhered to by employer was the case of CV Disan (employer) vs. Susianto and friends (workers) in 2005 (Putusan Mahkamah Agung Republik Indonesia No. 431K/PHI/2007). The workers suggested petition to the court so that the employer did not dismiss them. The workers argued that specified time employment contract between the workers and the employer had violated the regulation because the work given to the workers was actually a permanent job. According to the workers, the employment contract should have been turned into an unspecified time employment contract. The court granted the petition by stating that the employment relationship between workers and employer never ends because the specified time employment contract made by the 2 parties has violated Article 59 (2) the Manpower Act, therefore, the employer must re-employ the workers.

One more regulation that limits the formation of employment contract is a provision that does not justify the employment contract containing terms and conditions that harm workers. The employment contract must not use any term or conditions that are less favorable for the worker than the stipulated provisions of employment legislation, company regulations or collective agreements. This relates to the balance of the parties position in forming an employment contract which the position of workers has always been on the weaker side. In forming employment contract, the vulnerable position of workers can result in the enactment of advantages for employers. Workers often accept a job offer because of economic necessity. Workers accept any job offer without 1st negotiating the terms and conditions specified in the employment contract made. Therefore, to ensure workers' rights that the vulnerable position of workers is not detrimental to workers when making employment contract, Article 54 (2) the Manpower Act establishes the rights or the minimum requirements that must be obeyed by the employers to the workers such as minimum wage and off time. This provision is a form of protection over job security provided by the government in terms of legislations.

REQUIRING A JUST CAUSE FOR DISMISSAL

Just like in other countries which use civil law, the right to get protection of employment relationship in Indonesia is seen as an essential component of human rights. The right on not to be unjustly dismissed seen as part of the human rights to work and job security (ILO, 2000). Therefore, although employers have the right to dismiss the employment relationship but this right is limited. Under Article 153 the Manpower Act, there are

some circumstances that may not be used by the employers as reasons to terminate the workers such as the reasons related to health issues, obligations as citizens, religion, marital or family relationship, reproduction, freedom of association, race, gender and politics. Dismissal made on one of these reasons is not valid and the employers must re-employ the workers.

Clearly, any form of dismissal made by the employers, the law requires the dismissal was made up under just causes. Legitimate dismissal by the employers depend on whether the dismissal is made under fair causes. Legitimate dismissal means that the dismissal made is lawful and has strong reasons in addition to fulfill the requirements of the procedure. Employers must prove a legitimate reason to dismiss the workers. Dismissal reasons should be free from the element of discrimination, revenge or any element of bad intention. Those reasons can be divided into reasons connected with the conduct of the worker, reasons connected with the capacity of the worker and reasons connected with the economic.

Reasons connected with the misconduct of the worker: Misconduct is intended as an act opposing to the compliance with the terms of employment for example, careless work, malingering, disobeying the employer, being absent, fighting at work or performing criminal acts. Some articles in the Manpower Act clearly recognize deeds relating to worker misconduct as reasons that can be put forward by the employer to terminate the worker. For example, under Article 168, a worker who is absent due to work for 5 days or more in a row without any written statement and legitimate evidence and has been properly called by the employer as much as two times and in writing form can be terminated due to the worker is considered resigning or breach of contract.

One example of cases on the provisions earlier was Relawendi (worker) vs. PT PINDAD (employer) in 2010 (Putusan Mahkamah Agung Republik Indonesia No. 546 K/Pdt.Sus/2012). The worker was dismissed due to absent from work for >5 working days in a row. However, the worker did not agree to be considered resigning because he did not get any previous call. Yet, the worker was willing to accept this dismissal but it must be accompanied by payment of separation benefits due to that the employment relationship is difficult to return to its original state. The court decided that the dismissal was valid but not for reason that worker was considered to have resigned but for reason of misconduct of the worker. Therefore, the worker must be given separation of benefits as much as 106 million rupiah.

Another reason for employer to terminate worker is when the worker perform criminal acts. However, employer cannot exercise the dismissal directly based on the reason. The criminal action must 1st be proven through due process of law in independent and impartial court. Therefore, the employer can only dismiss after the judgment made by assessing the worker has been proven to carry criminal action (Putusan Mahkamah Konstitusi Republik Indonesia No. 012/ PUU-I/ 2003).

Nevertheless, some misconduct can be considered, as a minor misconduct and terminating the employment may not be an appropriate action. Among others, it includes do not clean working equipment do not keep away working tools, dirt the working area, come late to work, go home earlier than the stipulated time, joke while working and do not comply with safety regulations. Under Article 161 the Manpower Act, minor misconduct like this can be a serious misconduct if done repeatedly after being given a warning by the employer and may cause to terminate the worker.

Surprisingly, employer must provide separation benefits based on of misconduct reason. However, the level of separation benefits of repeated small misconduct is different from the level of separation benefits based on reasons that worker perform criminal acts. For misconduct dismissal on repeated minor reasons, employer must provide paid separation benefits under Article 156 (2) (3) (4) the Manpower Act, namely: severance payment; gratuity and compensation that should be accepted while for dismissal based on criminal acts, employer must provide paid separation benefits under Article 156 (3) (4).

Reasons connected with the capacity of the worker: The Manpower Act does not mention clearly that the capacity of the worker can be used, as a reason by employer to terminate the employment. However, every employment relationship surely implies that worker chosen can demonstrate their ability in performing the work. Therefore, Article 161 (1) the Manpower Act implicitly allows the employer to dismiss the worker who is incapable to implement the work as long, as the provisions provided has been set in the employment contract or collective agreement.

However, employer cannot dismiss directly based on that worker is incapable to carry out the work. Employer must first give notice to the worker so that worker improves their working ability. If the worker is still incapable in carrying out the work, then the employer may dismiss the employment. For this incapacity dismissal reason, employer must provide paid separation benefits under Article 156 (2) (3) (4).

Reasons connected with the economic reasons: The Manpower Act regulates economic circumstances that can be used as reasons by employer to terminate the employment relationship, among them: a merger,

consolidation or change of company ownership; closed down of company and corporate bankruptcy. These provision reasonably views employment contractual relationship which is an economic relationship depends on the state of the company's business operations. Employer also has the prerogative management to achieve corporate efficiency. In this situation, an economic approach on the law appears to keep and to increase the efficiency. However, the prerogative must be run fairly both in terms of procedure and substance.

For dismissal by the reason of merger, consolidation or company ownership changing, the employer must provide separation benefits under Article 156 (2) (3) (4). For dismissal on bankruptcy or closed down because the company suffered losses during 2 consecutive years or closed down due to force major, the employer must provide separation benefits under Section 156 (2) (3) (4).

Meanwhile, if the closed down is because the company runs efficiency, the employer must provide separation benefits under Section 156 (2) (3) (4).

CONCLUSION

The Constitution of Indonesia recognizes the job security principle in employment relationship which guarantees and protects every worker to be entitled to just treatment in the relationship, including balancing the position of employers and workers in the formation of employment contract and protect workers, so that their work is not dismissed subjectively by the employers. Therefore, Indonesia has made regulations that aim to protect workers in the employment relationship by establishing the minimum and maximum requirements in the formation of the employment contract and the substantive and procedural requirements in a dismissal exercise, including the establishment of the principle of just cause dismissal. This principle is in line with the principle of right to work in the Universal Declaration of Human Rights, the slogan labor is not a commodity is embodied in the ILO Declaration of Philadelphia 1944 and the principle of just cause dismissal in the ILO Convention No. 158.

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