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Personal data protection in employment: New legal challenges for Malaysia

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ABSTRACT

The purpose of this article is to discuss and apply data protection principles in the context of employment. The Personal Data Protection Act (PDPA), passed by the Malaysian Parliament in 2010, has affected many aspects of life in Malaysia, including employment. Storage of data by employers is rampant. Management, as the data user, is duty bound to safeguard the employees' data according to the PDPA. Likewise, the employees, as data subjects, enjoy some rights under the PDPA. The author also examines issues of privacy law: whether such law exists in Malaysia and, if so, whether it can be reconciled with the PDPA's principles. The author adopts legal methodology anchored in exploratory analysis, with the legislative text as the main reference point.

1. Introduction

Employee data are kept by employers, either for human resource management or to fulfil legal requirements of employment or social security legislation. Previously, the processing of this data is performed without much legal guidance or authorisation. However, with the introduction of the PDPA in 2010, data storage and processes are now more regulated. Principally, all employee data belongs to the data subjects. All employers are data controllers. Management staff must be familiar with the Act, as they are at the same time data subjects and data controllers. The increases and advances in technology have improved data processes as almost all information can now be stored electronically. Under the Malaysian Employment Act 1955 (s. 61), an employer is required to prepare and keep one or more registers containing information about each of his employees. Section 62 requires the employer to make available particulars relating to wages to the authority upon request. Under section 63, it is the employer's duty to submit returns containing particulars of each employee to the Director General of Labour. Foreign workers are also covered by the statute; section 60 K (1) requires the employer of a foreign employee to furnish the nearest office of the Director General with the particulars of the foreign employee. All of this recordkeeping of employee information and particulars is mandatory under the employment legislation. Furthermore, most employment records are protected under the PDPA 2010. The following records fall under the data protection realm, such as: application forms and work references; payroll and tax information; social benefits information; sickness records; leave records; annual appraisal/assessment records; records relating to promotion/transfer/disciplinary matters and records relating to accidents at work. These records are considered as 'sensitive data,' which are protected under the new PDPA Act 2010, discussed below.

2. Contract of employment and personal data

The theoretical framework of personal data protection can be developed from the performance duty of parties under contracts of employment. A contract of employment contains terms and conditions, and obligations which parties must perform based on the principles of good faith, fidelity and loyalty (Deakin and Morris, 1998). A violation of those terms, conditions and obligations will result in a breach of contract

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and consequently a suit filed by the aggrieved party in the civil courts. Thus, courts' decisions can form the basis of developing a theoretical framework of the duty to protect the employees' personal data. It is unusual for an employment contract entered into between an employer and an employee to address privacy rights or the protection of the employees' personal data. Most contracts do not contain such specific clauses. To the contrary, it is the employee who has a duty not to disclose the employer's confidential information (*Robb v Green, (1895)2 QB 315*). Under the common law, an employee may not disclose confidential information that qualifies as a trade secret belonging to the employer (*Printer v Holloway (1965)1 WLR 1*). However, a former employee may use the confidential information if the information was developed by the employee through his own knowledge or skills (*Faccenda Chicken v Fowler,* [1986]1 All ER 617). During his employment, an employee has a duty to act in good faith towards his employer; this duty is sometimes called the duty of fidelity. Some employment contracts contain express terms that prevent employees from suing employers who disclose the employees' personal data, and courts are willing to enforce those contract provisions under current law. However, an employee has an alternate avenue in that he may sue the employer for breach of the duty of mutual trust and confidence, a term implied in every contract under Malaysian law. This duty has been developed and used by courts to cover other implied obligations of employers that are considered new terms not envisaged by the parties when they entered into their contracts.

Analysing cases on 'mutual trust and confidence' is relevant here as this principle can be easily applied into the subject matter under discussion: the duty to protect personal data. A breach of the implied term of 'mutual trust and confidence' can be a ground for recourse by an employee against his employer for breach of confidentiality (see discussion below). Common law cases such as *Scally* and *Malik Mahmud* contributed to the birth of the implied obligation of mutual trust and confidence. In *Scally v Southern Health and Social Services Board* [1992] 1 AC 294, the first case to recognise this duty, the plaintiff, Scally, sued his employer for breach of contract for failing to adequately inform him of the availability of a contingent right, introduced by a statute, which allowed him to purchase additional years of pensionable service at advantageous rates. The Court held that it was 'merely reasonable, but necessary, in the circumstances postulated, to imply an obligation on the employer to take reasonable steps to bring the term of the contract in question to the employee's attention, so that he may be in a position to enjoy its benefits'. In another landmark case, *Malik v BCCI* [1998] AC 20, Malik and Mahmud worked for the BCCI. The BCCI became insolvent due to massive fraud, connections with terrorists, money-laundering, extortion and a raft of other criminal activity on a global scale. Malik and Mahmud both lost their jobs. They tried to seek employment elsewhere but failed. They sued the company for their loss of job prospects, alleging that their inability to secure new jobs was due to the reputational damage they had suffered from working for the BCCI and that no one wanted to hire people from such a massively fraudulent operation. The case raised the question of what duty the company owed to its employees that had been broken. Although there were no express terms in their contracts on the subject, Malik and Mahmud argued that such a duty was implied. The House of Lords unanimously held that a duty of mutual trust and confidence was implied as a necessary incident of the employment relationship. In this context, an employer must not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The same principles can be applied when an employer divulges information about employees in a manner that is detrimental to the employees.

These two cases are relevant and important as it give rise to the principle of mutual trust and confidence which can form the basis of the employers' duty to protect the personal data of the employees. Simply put, the employer is under a duty not to disclose or manage the employees' personal data to the detriment of the employees. These cases show that besides statutory recognition of employees' personal data such as the PDPA 2010, employment contract law has long acknowledged such recognition in the form of implied terms of contracts. Unlike the PPDA which will not provide a civil cause of action to the employees, the employment contract law allows the employee to take civil action against his employer and seek for appropriate remedy.

3. Right to privacy under Malaysian law

Can the right to privacy be reconciled with personal data protection law? Privacy law in Malaysia is in a state of uncertainty. For many years, privacy law has been unclear in Malaysia, to the extent that some quarters are of the opinion that there is no such law in this country. Case law shows that judges are divided as to whether privacy law exists in Malaysia. What is clear is that there is no legislation in Malaysia on privacy law. Courts have attempted to create privacy law under the law of tort, which is generally unwritten law, and of late have been quite successful in doing so, as discussed below. The meaning of privacy is broader than data protection; personal data protection covers only stored personal information about an individual, whereas privacy law covers all potential invasions of an individual's privacy. However, to a certain extent, privacy law can be reconciled with personal data protection law because personal data are also a private matter; thus, it is a matter of privacy.

Data protection law has already been widely enforced in developed economies (Schwartz, 1995; Cate, 1995). In some countries, data protection law is called privacy law (Azmi, 2002). Many definitions of 'privacy' have been put forward, but none has been very clear, leading the Calcutt Committee in the UK to say, "no where have we found a wholly satisfactory statutory definition of privacy" (Munir and Yasin, 2002). However, the Committee defines privacy as "the right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information". The common law and the international human rights documents recognise an individual right to privacy. This right has even been expressed as a fundamental human right. Article 12 of the