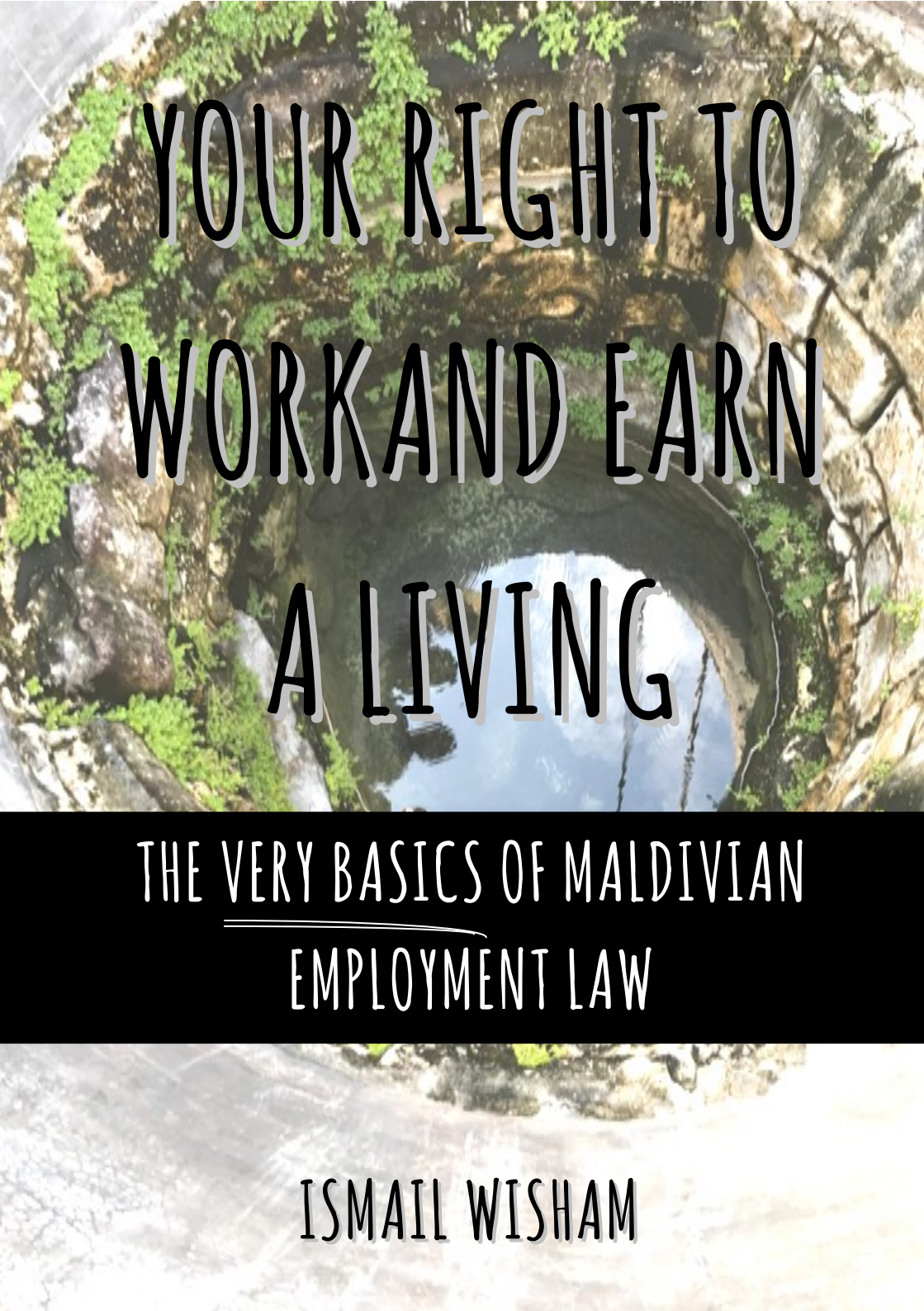

YOUR RIGHT TO WORKAND EARN A LIVING

THE VERY BASICS OF MALDIVIAN EMPLOYMENT LAW

ISMAIL WISHAM

Information in this booklet relates to a subject that is subject to constant change and development. If legal advice or expert assistance is required; the services of a competent professional should be sought. This Handbook is not an official publication of Maldivian Government, or the Supreme Court of Maldives, and is published *pro bono* by Wisham & Co. LLP, under the *Knowledge on Law Initiative* (KoLI). Special thanks to our colleagues Uz. Hassan Falah and Uza. Aishath Sheeza for their invaluable contributions for this compilation.

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To The Single Most Important Person in the Whole Wide World

HANA

PREFACE

Wisham & Co. LLP., in collaboration with Waheed, Hussain LLP is pleased to bring you this Handbook on Employment Law, intending it to be an effective way of assisting the young culture in academia and guided practice in the Maldives. Since 2008, employment law has become one of arguably the most developed and settled disciplines prevalent in the Maldivian legal system, with modern industrial thought and practice in perfect harmony with cultural peculiarities. Our intention through this Handbook is to assess all applicable regulatory structures and apply relevant authorities to sum up a sound understanding of the legal norms that govern the employer-employee relationship. The issue of this relationship has become more and more important because of the increasingly widespread awareness that is present in our country on matters of employment. The national step when the Parliament enacted the Employment Act 2008 (Act 2/2008), was one taken in an important direction, creating a regulatory framework, independent watchdogs and statutory dispute forums unprecedented in the country. Next year in 2018, we will be celebrating the tenth-year anniversary for the piece of legislation and the avenues it opened.

This Handbook seeks to explore all these provisions of the legislation and assess its application in decided cases; and wherever appropriate, provide sound comparative approaches from the '*developed*' western world. It is by no means exhaustive and is intended only as a guide which will show anyone who is interested with at least, where to start the search. We at the firm felt its best reaches will be if the booklet is made if we compiled and published it free and in electronic format, allowing the widest distribution possible with almost minimal cost. We earnestly hope that the tabulation of information within will certainly prove useful for the professional and the student alike and hope that this encourages, motivates and invokes further research and effort by others into the area of law.

FOREWORD

I am delighted by this pro bono effort powered by the law firms involved in the *Knowledge on Law Initiative* and further welcome their decision to publish a free *ebook* accessible to everyone on this subject matter.

This publication will no doubt be a good companion for anyone involved in human resource or corporate management and compliance, not to mention the academic value it holds for any promising student or researcher. It will also be a helpful guide to practitioners and attorneys. Key precedents and landmark judgments on the broader spectrum of employment law have been well tabulated herein.

Later this month, this year, we mark the tenth anniversary of the enactment of the Employment Act 2008, recording a decade of its application and development.

Over the years it is very interesting to see how the regime had developed organically. We can only imagine what the future holds for us. I pray to Almighty Allah to grant us the endurance and wisdom necessary to keep moving forward.

May 1, 2018.

Hon. Justice (Rtd) Uz Ahmed Faiz Hussain,
Former Chief Justice of Maldives.

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INTRODUCTION

Our work has always been a dominant factor in defining who we are, both as individual human beings and also as members of a given society. It gives us a sense of identity and purpose. It puts a roof over our heads, clothes us and feeds our children. Take a person's work away and you take away arguably the biggest part of his life. It is only natural that we associate a strong personal attachment to it. It is only natural that we are protective of it.

The employer-employee relation is largely subject to both public law as well as private law. In recent years, there have been a number of changes to the employment laws, with a shift towards increasing awareness of employment rights and obligations. This employer-employee relationship exists when a person performs work or services under certain conditions in return for remuneration. It is through the employment relationship, however defined, that reciprocal rights and obligations are created between the employee and the employer. This relationship serves as the main mean through which employees gain access to the rights and benefits associated with employment in the areas of labor law and social security.

Historically, there have been absolutely no legislations or regulations enacted on employment prior to 2008 with the exception of the 1994 Regulations. The function was administered by the President's Office directly and over the years, proclamations and policies were established and announced by the Public Service Division of the President's Office.

For the first time in 1994, the President's Office compiled and published all such policies and proclamations in one volume, slightly resembling the nature of a code. In 1994, these 'Regulations' became the fundamental cornerstone for the employer-employee relationship. This document required for a contract of service to be signed between the parties and included

provisions on hiring, terminating, promoting etc., although with main and direct focus on government or public service appointments. Regulations specific for the private sector were also enacted then under the direct authority of the President as proclamations of the President under the Constitution in force then, carried with it the force of law. These new regulations provided for an employment agreement as well, in addition to minimum standards on minimum age, working hours, training, medical treatment and injuries sustained at work. (Human Rights Commission of Maldives, 2009)

In 2008, the Maldives ratified its new Constitution wherein under Article 37 (fundamental rights Chapter) the Constitution recognized every person's right to engage in any employment or occupation of his or her own choice. Unprecedented at the time, the Constitution ushered in requirements upon the legislature to enact modernized legislations to govern this constitutional right to work.

The Maldives now is a party to all core International Labor Organization (ILO) conventions on fundamental labor rights. We became the 183rd member state of the ILO on 15 May 2009. By January 2013, our Government had ratified the eight fundamental ILO Conventions dealing with four categories of fundamental principles and rights at work. This includes the *Forced Labor Convention*, 1930 (No. 29); the *Abolition of Forced Labor Convention*, 1957 (No. 105); the *Freedom of Association and Protection of the Right to Organize Convention*, 1948 (No. 87); the *Right to Organize and Collective Bargaining Convention*, 1949 (No. 98); the *Equal Remuneration Convention,* 1951 (No. 100); the *Discrimination (Employment and Occupation) Convention*, 1958 (No. 111); the *Minimum Age Convention*, 1973 (No. 138); and the *Worst Forms of Child Labor Convention*, 1999 (No. 182).

Conventions and international instruments are of great legal value under the Maldivian legal system. It is a secondary source of law in the Maldives. Article 68 of the Maldivian Constitution requires

these Conventions be referred to in the interpretation of the fundamental rights. This ideally means that in the interpretation of the fundamental right to work and earn an income, provisions of the aforementioned should be of persuasive value at least. Over the past nine years, the Courts have readily referred to provisions of ILO instruments in the interpretation of the rights and processes under the Employment Act 2008.

The Employment Act 2008 outlines the provisions of public application and obligation while individual relationships are also reliant on provisions under specific employment contracts, whenever a matter is left silent under the legislation. It would not be a mistake to claim that the legislation does not hinder generally the freedom between the parties to agree on the terms of the employment, but at the same time, legislative minimums, thresholds and processes have been prescribed under the Act which no provision of private law may derail.

The Act sets a minimum standard for the key or basic terms and conditions of a given employment contract. Therefore, the terms of an employee's contract of service must be at least equal to, or more favorable than, the provisions in the Act, with less favorable terms rendered unlawful, null and void to the extent that it is so less favorable. Please note that the following guide is a summary for general information, aimed at aiding understanding of Maldivian employment law as at the date of writing. It is not exhaustive or comprehensive and reading this memorandum is not a substitute for reading the text of the various statutes to fully understand the extent of the obligations owed.

OVERVIEW OF THE ACT

The Employment Act was enacted in a time of change for our country. Between the years 2003 to 2008 the Maldives was a nation in transition. Convening of the *Special Majilis* (constitutional assembly recognized prior to 2008) and the ratification of the new Constitution ushered in a lot of change for the Maldives almost overnight. The Employment Act, the Civil Service Act, the Police Act and the Maldives National Defense Force Act were all passed between 2007 and 2008 prior to the ratification of the Constitution but in line with the general reform movement that was in motion then. For the first time the country recognized a person's right to work and earn an honest income as a matter of constitutional right.

In its function, it is important to remember that the Act allows other legislations to override its provisions provided there is explicit mention of such operation. Section 2(a), of the Act carries a pre-cursor that the provisions are applicable, *"unless otherwise provided for specifically under any other authority written law for the time being in force*". Examples here would be the earlier mentioned Police Act as well as the Maldives National Defense Force Act. The members of the local police service and military forces and their '*employment'* will be regulated by the provisions under their respective legislations.

The Act, unprecedented for its time, established the Labor Relations Authority as regulator or administrator of the Employment Act 2008, atop the dispute resolution forum the Employment Tribunal.

The Labor Relations Authority (LRA) was established under Article 77 of the Employment Act. The functions of the LRA are: to observe compliance with the Act and its regulations and to implement all necessary *'administrative measures'* required to secure compliance, to facilitate creation of awareness of the Act and its regulations and to provide technical information and advice to

employers and employees, to inform the Minister of issues that arise that are not covered by the Act and its regulations and any resultant unfair advantage, and to issue regulations governing employer and employee relations (Transparency, 2015)

Under Chapter III of the Act, we allow the employment of minors below eighteen setting the minimum age limit at sixteen unless the work is related to his family business or line of work. Under the same Chapter, several provisions on the protection of minors are in place such as mandatory registration, guardian's approval, health checks and hours of work etc.

Chapter II of the Act details out the fundamental principles mentioned under section 1. Section 3(a) prohibits any form of forced labor or employment. This section reflects the provisions under Article 25 of the Constitution which says that *"No one shall be held in slavery or servitude, or be required to perform forced labor".* What this means essentially is that no one may be forced to work without his consent, coerced, using influence, or under threat of an ulterior (or otherwise) consequence. This interpretation is provided for under Section 3(b) of the Act with the exceptions are provided under the same provision. The exceptions to this rule according to the Act include service ordered by a Court of law or mandatory service in times of emergency, the latter of which is also provided for under Article 25(b) of the Constitution.

Employees are granted several avenues for redress under the Act, most notable of which would be the notice to rectify issued by the employee to the employer. Section 26 gives the option to the employee to notify the employer of any practices within the workplace which is seen as in contravention to the provisions of the Act. This comes as a form of notice and failure to rectify issues raised in such notices gives the option to the employee to resign. Such resignation according to the section is deemed as dismissal without reasonable cause i.e., constructive dismissal triggering the right of the employee for compensation under Section 25(b).

According to section 29 of the Act, in view of a complaint, the Employment Tribunal has the power to issue orders requiring re-instatement of the employee in the same post and that the dismissal of the employee be struck off the record, or re-instating the employee in a post similar and orders requiring compensation.

The Employment Tribunal has full powers to review and deliberate as it deems appropriate on matters determined by the Act or any other law. The objective of the Employment Tribunal is to examine and adjudicate legal matters arising in the work environment between the employer and employee and any matters ascribed to the Employment Tribunal pursuant to the Employment Act or any other Act or regulation or under any agreement, in an expeditious and simple manner.

The Tribunal jurisdiction lies in order to facilitate examination of any matter determined by the employment Act or any other Act or regulation subjected for review by the tribunal without contravention to the Employment Act. Among others, the Tribunal hears complaints submitted alleging; breach of the fundamental principles laid out in chapter 2 of the Employment Act, dismissal without showing appropriate cause, denial of minimum wage entitlements to the employee, contravention of employment agreement, contravention of agreements made to retain an employee for the purpose of giving training or any agreements for training, disciplinary measures imposed on him for failure to conform to work ethics are unreasonable, appeal against the actions/orders of the Minister and Labor Relations Authority.

Based on the merits of the case, the Tribunal has the jurisdiction under section 5(c) to grant Orders mandating compliance with the basic principles under the Act, including, Orders for the performance or cessation an act, re-instating a dismissed employee, restoration of benefits denied or compensation. The tribunal also has jurisdiction to hear matter concerning complaints

of unreasonable disciplinary measures being faced by an employee under section 19(d).

Under section 86, an appeal can be made of a decision of the Employment Tribunal to the High Court of Maldives. These decisions fall outside the jurisdiction of the lower Courts even in case of judicial review. At first under the section a limitation period of sixty days was prescribed for an appeal to be lodged at the High Court from the date of the Decision.

However, under their Ruling No.: 01/SC-RU/2015, the Supreme Court had annulled section 86(b) of the Act and replaced it with the stipulations prescribed under Supreme Court Circular No.: 06/SC/2015 that states that all judgments of the lower Courts and all decisions of the Tribunals of first instance are to be appealed to the High Court of Maldives, within ten (working) days from the date of judgment or decision.

JURISDICTION

It is important to recognize the ambit and limits of the Act in terms of its application because essentially a single Act cannot protect all classifications of employees all the time. According to section 90 of the Act, an employee under the Act is defined rather simply, as an '*employee or person seeking employment*'. The widest definition possible. Preferably this means that people who apply for vacant positions are also protected in certain aspects such as discrimination. You do not necessarily need to be actually employed for you to attain the benefit under the Employment Act 2008.

A person who is under a '*contract for services*' would not be an employee under the definition of the Act. What this means essentially is that independent contractors or persons working under service contracts such as professional engagements, cannot claim to be an employee in the traditional sense and hence has to find recourse under breach of contract with its proper forum being the Courts system.

Ideally anyone in any form of employment under a contract of service will qualify to be protected under the Act. Section 2 of the Act stipulates that "*with the exception of those areas and persons exempted by any other statute, this Act shall apply to all employment by the State or the private sector and to all persons employed by the State or by the private sector."* As if the part about "*the exception of those areas and persons exempted by any other statute"* wasn't clear enough, as exemptions from the ambit of the Statute, the same section elaborates further that the Police Service and the Military will be subject only their own individual legislations on questions concerning employment rights*."*

The question on the difference between a contract of service and a contract for services is an important one, because essentially that will help classify whether the arrangement dictates the person to

be an employee, thus affording the protection under the Act, or an independent contractor, whom have to rely on contractual provisions or specialized administrative procedures for protection of their employment. Once again, the legal consequence of this distinction is that an employee can find refuge in under the Employment Act and its comparative framework, while independent contractors would be reduced to find recourse elsewhere.

The Act does not define what a contract of service or an employment contract is, but provides a prescriptive inclusionary definition of may amount to one. The types and peculiarities of the agreements will be discussed later in this Handbook. For our purposes, we are still seeking the distinction between an employee and an independent contractor or service provider. English law since the 1920s had been using a '*control test*' to determine the answer to this question i.e., does the '*employer'* or '*client'* have penultimate control over how the employee performs his duties. See for instance the case of *Performing Right Society Ltd v Mitchell and. Booker (Palais de Danse) Ltd* [1924] 1 KB 762.

As the industrial revolution grew, it became less and less necessary for managers and employers to employ close control of an employee's function and thus the need to modernize the approach arose in England. Lord Denning's readily cited '*integration test'* overtook the control test n 1952 in this decision in *Stevenson, Jordan & Harrison Ltd v MacDonald & Evans* [1952] 1 TLR 101, where the Lord is cited to have said, *"the distinction between a contract for services and a contract of service can be summarized in this way: In the one case the master can order or require what is to be done, while in the other case he can not only order or require what is to be done but how it shall be done."*

More recently however, English Courts have developed the now used '*multiple test*' prescribed in the 1969 decision in *Market Investigations Ltd v Minister for Social Security* [1969] 2 QB 173,

where Cooke J is reported to *"suggest that the fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?'. If the answer is 'Yes', then the contract is a contract for services. If the answer is 'No', then the contract is a contract of service".* Commonly referred to this approach has become known as the '*businessman approach'*.

Back to our statue, while Chapter IV of the Act carries with it the most significant group of rights and benefits enjoyed by employees, creating several duties upon the employer in matters such as dismissal, disciplinary action etc., it is important to note here that Section 34 of the Act deem that the following employees cannot claim the protection therein. These groups of employees do not enjoy the rights, benefits and protections afforded pursuant to Chapter IV of the Act. This essentially means that issues such as working hours, overtime, holidays, dismissal without cause etc. are not within the legislative purview of protection afforded to the following groups of employees.

- Employees working in emergency response services;
- Employees serving as crew of marine vessels or aircrafts;
- Persons in the senior most management posts (the test here could be that the employee be amongst the senior most, designated and appointed by the Board of Directors);
- Employees working as Imams or such staff at mosques (See for instance *Ibrahim Hussein v Civil Service Commission* (214/HC-A/2104) wherein the High Court reiterated that Imams working at mosques cannot claim the benefits and rights attached to such measures as working hours, overtime, holidays etc as they are protections afforded under Chapter IV of the Act); and
- Employees serving on-call duty during the hours of duty,

It has to be mentioned that the above-mentioned groups of persons may still be allowed to insist on the protection they have

agreed to contractually. Nevertheless, the redress for them lies under their administrative or bilateral arrangements to which they belong to.

In cases of section 34(a)(v) *'persons in the senior most management posts'* the High Court has decided that even persons under section 34 may still be protected within the wider ambit of general employment law. The Court recognized that even under the ILO *Convention on Termination of Employment 1982* (158) and the *Recommendations on Termination of Employment 1982*(166), classifications of certain groups of employees as exceptions are allowed. According to the Court *"classification of exceptions does not mean that those classified as exemptions do not enjoy the protection afforded under the previously mentioned international instruments…but special arrangements can be made under the law to cover issues related to those classified, either in the form of specialized legislations, regulations or even mutually agreed contract."*

To sum it up, all employees working on *shift-duty basis,* Mosque staff, persons working in emergency response, seamen or crew of a marine vessel and all persons working in senior management posts, in a claim as to dismissal, termination, working hours, overtime, holiday, leave etc., has to seek the avenue available through the Courts system. They can still file suit at the Civil Court of Maldives for breach of contract. Their recourse however, under protections afforded under comparative employment law are limited, although they can still file suit at the Employment Tribunal over issues such as discrimination, employment of minors, expatriate employment, employment agency complaints, training, occupational safety etc.

All military personnel or Officers of the Maldives Police Service also cannot file complaint at the Employment Tribunal but needs to find recourse for employment issues from the Civil Court of Maldives. Although for them, recourse under administrative law i.e., under their individual legislations would be a promising remedy.

Although there is no protection given under the Employment Act 2008 for the Police Service, an elaborate framework is provided for under the Police Act (Act No.: 5/2008) and its various subsidiary legislations such as the '*Police Regulations', 'Code of Conduct or Ethics',* and the *'Administrative and Disciplinary Offences and Punishment Regulations*' etc., not to mention the public law domain of constitutional protections afforded in the Maldives. For instance, in *Hussain Risheef Thoha v State* 27 SCA 2012, the Supreme Court upheld a police officer's constitutional right to privacy in disallowing recordings of his phone calls which lead to his dismissal, and was subsequently upheld at the Civil Court but was later overturned by the High Court. Agreeing with the High Court, the Supreme Court also warned the Maldives Police Service in dismissing officers based on flimsy evidence which may otherwise end in the contravention of the officer's constitutional right to his dignity enshrined under Article 33 of the Constitution. See also *State v Ali Nasheed* 243 HCA 2011, and *State v Husham Hameed* 201 HCA 2011.

Conversely consider *State v Mirfath Faiz* 103 HCA 2013, wherein the High Court pointed out that investigations carried out by the Police (now National) Integrity Commission can also be used in disciplinary proceedings against police officers despite section 40 of the Police Act 2008 stipulating that the evidence submitted in any complaint lodged at the Commission may not be used for any other purposes. Whistle blowers are afforded special protection under section 15(g) of the Police Act, something we do not see yet, at least explicitly, under the Employment Act 2008.

In case of the military, the picture is the same. Principles of *'natural justice'* was upheld in the case of *Naushad Ali v Ministry of Defense and National Security* 777 CVC 2015 where a military officer was dismissed pursuant to a disciplinary proceeding. The Armed Forces failed to take the officer's word with regard to the accusations and afforded him no right to defend himself. The Civil Court reinstated

the officer on grounds that even the military, cannot be excused from basic fundamental principles of justice such as the right to be heard.

Understandably the military will be subject only to the Armed Forces Act 2008 and its subsidiary frame work inclusive of regulations such as '*Armed Forces Regulations*' and '*Offences and Punishment for Armed Forces*' etc. Understandably again, peculiar notions of employment and its rights and liberties apply. For instance, under the Regulation 37 of the Armed Forces Regulation prohibits, unless with the permission of the Chief of Defense, the marriage of two officers of the armed forces if one of the officers had previously married and divorced an officer of the Armed Forces in active duty. The idea there possibly would be to preserve the unity amongst the ranks and to avoid potentially combustible relationships. If ever unity and brotherhood is important to an organization, it would have to be the military. Restrictions on matrimony may not be readily tolerated constraint under normal employment law recourse but in circumstances of the armed forces, it is deemed as reasonable. This was precisely what was decided in the case of *Abdu'Rafiu Hussain v State* 124 HCA 2009.

DISCRIMINATION

Any claims over discrimination has its proper forum at the Employment Tribunal of Maldives who are under a statutorily imposed duty to dispose of the matter expeditiously without depriving either side of their right to rebut the claims of the other. For the Police and the Military, the exceptions to the statute, recourse under the constitutional prohibition in Article 25(b) would be available. All other 'employees' will have to seek recourse to the Employment Tribunal.

Section 4(a) of the Act bars any form of discrimination when hiring, terminating, determining salaries and wages, awarding training and teaching, determining the terms of contract and employment and in other such matters i.e., on grounds of race, color, religion, sex, marital status, political affiliation, social standing or status, familial ties.

The provision also prohibits discrimination based on age and disability although to the extent allowed under the Act (for example matters such as the retirement age are not considered as discrimination based on age). This also does not mean that employers are not at liberty to determine employment based on a candidate's educational qualification, professional merit, experience and any other such reasonable grounds. What is important to note here is that what constitutes as *reasonable grounds* remains to be judicially tested and the burden lies with the employer to justify any claims of discrimination, a point to be noted by employers.

Interestingly, under section 4(b), the Act bars any claim that preference on Maldivians over foreigners or any sort of affirmative action aimed towards the disadvantaged is discrimination. Conversely under the Regulations on Expatriate Employees' Employment in Maldives, it has been established that foreigners may be given privileges over those afforded to Maldivians.

In the matter of *Maldivian Air Taxi v Mohamed Naif & Ors* (158/HC-A/2010), the local employees at the appellant sea plane company contended, inter alia, that the employer had afforded free accommodation for its expatriate employees, namely foreign pilots, while local pilots were denied this treatment. The local employees contended that this was a breach of section 5(c) of the Act and the Employment Tribunal agreed. However, upon appeal to the High Court, the Judges overturned the decision stating that principles have been accepted and established over the dealings of expatriate employment under the United Nation's international human rights conventions and international labor law and while the Constitution of the International Labor Organization (ILO) implores its member states to respect the aforementioned principles, the Maldives as a member state, is required to respect this position.

The Court noted that it is a responsibility of employers to ensure appropriate food and accommodation is afforded to expatriate employees under Regulation 16(a)(iv) of the *Regulations on Expatriate Employees' Employment in Maldives* and that expatriate employees, unlike local employees, seek accommodation in the country exclusively because of their employment in the country. The Court was not satisfied that such affordance to expatriate employees was in breach of local employee's rights under Article 37 of the Constitution or section 4 of the Act primarily because expatriate employees and local employees *"cannot be seen to have equal standing as provided for under the Act"*.

Consider also the case of *Maldivian Airports Company Ltd. v Sham'eel Rasheed* (34/HC-A/2013) where were that the Employment Tribunal upheld complainant employee's contention that the employer had discriminated within the meaning of section 4(a) of the Act, when the employer awarded promotions to his peers excluding him, in violation of the in-house promotion policy, and based on considerations of political affiliations and loyalty. On appeal the High Court noted that even the employer concedes that

the complainant employee was an exemplary staff with commendable attendance and performance and also noted Article 37(b) of the Constitution which reads as that *"every person has the right to work in a safe environment, be paid fair wages for his or her work, be evaluated for his or her performance, be considered for promotions, and generally be dealt with equality"*.

The Court emphasized that pursuant to section 4(d) of the employer had failed to discharge the duty upon the company to disprove any discrimination (burden of proof) when faced with a complaint pursuant to subsection (a) and upheld the employee's claim for discrimination, mainly because the employer failed to discharge the burden placed upon him under section 4(d) of the Act.

EXPATRIATES

Claims of discrimination and the debates that surround the treatment of expatriate workers against the treatment of locals have already been discussed in the preceding chapter. The exploration herein would be limited to the nature of expatriate employment, the legal hurdles and matters of repatriation or deportation.

WHO estimated that in 2008, as far as forty five percentage of the country's work force was expatriate or foreign (WHO, 2008). In 2013, the total population of foreigners working in the Maldives reached a staggering one third of the total population of the country (Immigration, 2013). In 2015 it was reported that *"it is common knowledge that the official statistics under-report the real number of foreign migrant workers in the country"* (Transparency, 2015). This is a cause for concern even simply based on the fact that this means that, according to official figures, something close to half a billion dollars goes out of the country in terms of salaries (Independent, 2016). As a temporary solution late in August 2016, the Parliament enacted a new Bill imposing a newly introduced a three percent *'Remittance Tax'*. This was specifically targeted towards remittances sent abroad by the Maldives' expatriate labor force. The amendment to the Employment Act makes it mandatory for employers to deposit salaries of expatriate workers with local banks. A tax of three percent will be collected on any money wired abroad.

According to Article 17 of the Constitution of the Maldives, *"everyone is entitled to rights and freedoms without discrimination of any kind including race, national origin, color, sex, age, mental or physical disability, political or other opinion, property, birth or other status, or native land."* The word '*everyone*' here denotes the application to be alike to both locals as well as foreigners as well. This ideally means that mistreatment of any kind of migrant workers is downright unconstitutional to say the least. The

situation with migrant workers in the Maldives and the reportedly callous treatment they undergo in the Maldives is certainly a matter of concern, if not horribly in need of redress, but for our discussion herein we digress.

Article 63 of the Employment Act 2008 requires the concerned Minister to enact and publish regulations to govern the employment of foreigners in the Maldives, carrying out of employment by foreigners, employment and dismissal of foreigners and other related matters. The *Regulation on Employment of Foreign Workers in the Maldives* (Regulation No.: 2011/ R-22) was published in the Official Government Gazette on 26 May 2011. To date, four amendments have been brought to the Act. Of these amendments, the Third and Fourth amendments are directly relevant to foreign migrant workers in the Maldives.

The Third Amendment was passed by the Parliament in December 2013 and it requires an *Employment Approval* for expatriate workers to be issued prior to arrival in the Maldives. The amendment also makes is mandatory for a deposit to be placed for each expatriate being brought in to the Maldives, to be paid by the employer. The Fourth Amendment passed in 2015 made it optional for employers to provide Ramadan bonus to Muslim expatriate employees.

For expatriate employment, the starting point of our discussion stems from the legislation that legitimizes expatriate employment and their extended stay in the Maldives i.e., the Immigration Act 2007 (Act No.: 1/2007) wherein under section 15, creates the possibility of a *Work Visa* to permit the expatriate to remain in the Maldives for the duration of a work permit granted to a foreign national visiting the Maldives for the purpose of working. Foreigners working in the Maldives without this valid work visa is illegal in the Maldives, save for the slight exception of *Business Visa* holders who are categorically short termed employees or investors. In 2010, the Department of Immigration and Emigration Gazetted

the *Work Visa Regulation* (Regulation No.: 2010/R-7) under the Immigration Act 2007 that stipulates the due procedure by which a foreigner (or rather his employer) may apply for a Work Visa.

Aside from the immigration requirements there are very little theoretical differences between locals and expatriates in terms of employment. We have already seen in the chapter on discrimination that despite the statutory affirmative stance on Maldivians receiving preferential treatment, foreigners are established to be rightfully deserving of extra ordinary treatment such as living accommodation etc., which is a basic requirement to employing foreigners in the Maldives pursuant to the *Regulation on Employment of Foreign Workers in the Maldives.*

On issue of expulsion or deportation, it is the sovereign prerogative of states to regulate the presence of foreigners on their territory. This power is not unlimited and international human rights law places some restrictions on when and how to exercise this power. With regard to expulsions, three types of protection are available, namely substantive protection against return to face grave violations of human rights (torture), procedural safeguards during deportation procedures, and protection with regard to the methods of expulsions.

Much like locals, expatriates or '*aliens*' have an unalienable inherent right to life, protected by law, and may not be arbitrarily deprived of life. They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment; nor may they be held in slavery or servitude. Expatriates have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Ideally there should be no discrimination between expatriates and citizens in the application of the rights set out in ICCPR. These rights of expatriates may be qualified only by such limitations as may be lawfully imposed under the Covenant.

Under Article 13 of the International Covenant on Political and Social Rights an expatriate lawfully in the territory of a State Party to the Convention may be expelled only in pursuance of a "*decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion"* and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

The particular rights of Article 13 only protect those foreigners who are lawfully in the territory of a State party. This means that national law concerning the requirements for entry and stay must be taken into account in determining the scope of that protection, and that illegal entrants and foreigners who have stayed longer than the law or their permits allow, in particular, are not covered by its provisions. However, if the legality of an foreigner's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13. It is for the competent authorities of the State party, in good faith and in the exercise of their powers, to apply and interpret the domestic law, observing, however, such requirements under the Covenant as equality before the law. Procedural guarantees do not protect expatriates from expulsion as such, but they help to ensure that substantive protection and due process against expulsion is provided and that no arbitrary expulsion decisions are taken.

A general prohibition on collective expulsions follows from the procedural safeguards against arbitrary expulsions: if each alien is entitled to an individual decision on his or her expulsion, mass or collective expulsions should be prohibited. Moreover, mass expulsions would prevent the proper identification of people entitled to special protection such as asylum seekers, people who might be subject to torture if expelled, victims of trafficking, and so on. The European Court of Human Rights has defined collective expulsions as *"any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a*

reasonable and objective examination of the particular case of each individual alien of the group" (*Čonka v. Belgium* (Application no. 51564/99)).

Any contract, regulation, policy or rule whether private or executive in contravention to the Act will be deemed to be voidable to the extent of such inconsistency Section 2(c), Ibid, which reads as *"any provision of any regulation, policy or employment agreement that impedes the rights or benefits conferred by this Act on an employee shall be void".*

However, see *Ahmat Aidaneez Maldives Private Limited v Hussain Shareef* (363/HCA/2013) wherein a severance agreement was signed between the employee and the employer, conditioning that the employee waives his right to recourse at the Employment Tribunal. The High Court in the present case decided that if the severance was signed and the employee awarded his compensation thereby, he may not retain any more rights of recourse. An exception to the general rule that an employee's right to recourse may never be curbed.

There is no bar on any employment contract housing provisions in furtherance, complimentary or in addition to the Act so long as the rights and responsibilities enshrined in the Act are not compromised or overridden as per section 2(b).

In the case of *Fenaka Corporation Limited v Shinan Mohamed* a company policy of the employer that allowed conditional resignation of employees who wish to stand general elections. Condition here was that if the employee was unsuccessful, he ought to be reinstated by the company. The respondent employee was refused reinstatement when after conditionally resigning he applied for reinstatement when he subsequently was unsuccessful in his endeavors. The employer relied on the contention that there was no such duty upon the employer under the Act. The High Court upheld the complaint by the employee and ordered reinstatement deeming that provisions under the Act are bare minimums and that

employers and employees are free to agree to stipulations in addition to the provisions of the Act.

See also *Riyaz Rasheed v Hotels & Resorts Construction Pvt. Ltd*., (87/HC-A/2015) where the High Court dismissed the appeal by the employer against the decision of the Employment Tribunal that awarded the employer two years of accrued annual leave, a stipulation that was agreed under the employment contract between the parties, deeming that the employee should be granted whatever that was agreed between the parties, in addition or furtherance to the stipulations made under sections 39 and 41 of the Act, implying that the provisions only established a minimum standard.

Under section 13(d) of the Act, employment agreements of a definite term, indefinite term; and employment agreements specific to certain types of work (project based) are allowed, although contracts for a definite period of service may not exceed two years. For employment contracts of a definite period, and which do not exceed totally two years of continuous service may be allowed to lapse and the employer is under no obligation to issue any notice to the employee. At the expiry of the period the employee will be considered as terminated by way contractual completion. Fixed term contracts allow employers to side step the complexities of terminating an employee upon the expiry of the contract period and Judgments awarded in favor of fixed term employees for unfair dismissal can never amount to restoration of the employment or reinstatement as per section 29(a)(2) of the Act.

In the case of *Ahmed Nasir Mohamed v Maldives Airports Company Ltd.* (291/HC-A/2014) the High Court did mention that the intention of the employer is also important in determining whether a contract was for a definite period. However, the Court in the present case, upon assessment of the facts decided that the claimant was provided a contract for a definite period, and not one

exceeding two years of continuous service and accordingly upheld the Employment Tribunal's decision in favor of the employer, against the claimant's contention that despite the fixed term contract, he should have been given notice.

Conversely consider the case of *Villa Air Pvt. Ltd. v Hussein Azhad* (387/HC-A/2013) where the employee was not provided an employment contract although out the respondent's one and half year service, and the company terminated the services of the employee, within or before the expiry of two years of his service, contending inter alia that the employee was under a fixed term contract, when the employee was arrested by the Police on accusations of possession of narcotics. The High Court decided that the non-existence of a contract has to be interpreted in favor of the employee rather than the employer and adjudged that the employee cannot be seen to have been employed under a fixed term contract. The Judges (at page 8), are of the view that; *"when (the employee) spends a year and a half in employment, the fact that (the employer) had failed to compile and communicate an agreement for (the employee) to sign should be interpreted in favor of the employee rather than the employer".*

The High Court had decided that any contract or contractual circumstance wherein an employee's contract has a definite period exceeding two years is considered as branding the employee as a permanent staff. Extension or renewal of agreements of a definite term either express or implied changes the nature of the agreement to one of indefinite terms. Employment agreements of a definite term or specific to certain projects are deemed as employment agreements of an indefinite term, provided that the objective or effect of the employment agreement is such that the employee is required to continue carrying out employment of a kind which is usually carried out at the place of work on an enduring basis.

Seasonal service contracts which are triggered on a cyclic or recurrent basis are also agreements which are recognized under the Act. Chapter IV is of much significance, outlining the conditions necessary to observe in relation to the employment contract, which is an agreement made exclusively between the employer and employee. Transfer of the agreement to another person without the consent of the employee is disallowed under section 17 of the Act. Where a business is sold, leased or transferred, etc., the rights and obligations are transferred to the new owners, and it will not be seen as a break in the period of service. Section 13(b) imposes a statutory prescription for any contract to include relevant details and conditions of the staff's employment, such as the name of the employee, permanent address, current address, identity card number or passport number, date of birth, nationality, emergency contact person's name, address and phone number; whether employment is permanent or temporary, date of commencement of employment agreement, salary and other benefits, method and guidelines for calculation of salary, pay day, days on which leave may be granted, principles pursuant to which disciplinary measures may be taken against the employee due to his conduct, staff appraisal, and manner of dismissal from employment.

Unless and where the normal weekly working hours are less than a total of sixteen hours; or where the employment term runs for six weeks, the law requires the employers to furnish the employees with a job description within one month of appointment. Employers who fail to do so may be fined by the Labor Relations Authority and employees may still enforce any benefit that maybe constructively seen in the terms agreed either verbal or otherwise. Details to be included in the Job Description include the name of the employer, address, nationality, and type of work; the name of the employee, permanent address, current address, identity card number, date of birth, and nationality; date of commencement of employment agreement; method and guidelines for calculation of salary; durations at which salary shall be paid; job title and job description; place of employment; normal working hours; leave

provisions; and principles pursuant to which disciplinary measures may be taken against employee due to his conduct.

PROBATION

According to section 14 of the Act, the law allows a maximum time of three Months as a probation period, during the duration of which, either party may terminate the employment without giving any sort of notice. For all intents and purposes though, the probation period will be counted within the period of employment under section 16(a). Originally the legislation spoke of a six-month probation period. However, the First Amendment to the Employment Act (Act No.: 14/2008) amended the period to just three months.

In the High Court decision of *Ibrahim Solih v Blue Lagoon Investments Pvt. Ltd* (258/HC-A/2014) the High Court reiterated section 14 of the Act, upholding the decision of the Employment Tribunal, and deemed that the employer (or reciprocally even the employee) may terminate the contract without having to show any cause whatsoever, making it a matter of absolute right for both parties. In this case, the appellant employee tried to contend that despite the legislative provision on probation, his contract contained procedures to be followed in making a decision after the expiry of the probation period, procedures which the employer failed to honor when terminating the employee's services. In this previous case, the employee relied on the argument that the statute imposed only a minimum standard and if the employer had pledged certain procedures to be followed at the expiry of probation to consider continuation of employment, the employee has to be given the benefit of the doubt. The High Court however, implicitly, affirmed that the employer may terminate the contract within the probation period, without having to show cause. This is an important window for the employer to address the issue of continuing with the services of the particular employee, without any possible liabilities on his part.

WORKING HOURS & LEAVES

Under section 32(a) the Act, no employee may be required to work more than forty- eight hours a week without affording the employee the right to overtime pay.

Outlining the employee's working hours is one of the requirements to be stated in the Job Description as well under section 15(c) of the Act unless such hours do not exceed 16 hours per week. No employee may be required to work more than six consecutive days a week with the exception of persons employed at tourist resorts, tourist vessels or uninhabited islands designated for industrial projects.

This essentially means that companies and offices that work for 8 hours a day for five hours i.e. with no work on weekends bring their total work hours up to 40 hours only. This also allows the companies to ignore a further 8 hours of overtime worked by the employees before they are legally required to pay for their overtime. The exception to the 48-hour maximum work hours' rule includes persons working in emergency situations, crew of sea going vessels or aircraft, persons in senior management posts, imams and other employees at mosques, and persons on on-call duty during the hours of duty under section 34.

The same provisions prohibit subjecting any employee to seven consecutive days of work under subsection (b). Under the provision, six consecutive days of work has to be followed by 24 consecutive hours of leave, albeit the exception is granted for tourist resorts, tourist vessels or uninhabited islands designated for industrial projects provided that such employees have an agreement signed with the employers which allow them to accumulate such leave days.

Employees may be fined for absenteeism from work during official working hours. Such fines can be deducted from the employee's

pay proportionate to the time absent from work. No other form of deduction is permitted from an employee's pay for absenteeism Employees may also make deductions for acts or omissions on part of an employee done knowingly, which resulted in a loss to the employer's company or business. This may include advances or loans taken from the company, if defaulted.

Under section 39 of the Act, employees are entitled to 30 days of paid annual leave per every one year of service they complete. Employees are also entitled to 30 days paid sick leave. On the same note, female employees are allowed a period of 60 days on grounds of paid maternity leave, and they are also allowed an additional 28 days of extended maternity leave should the circumstances require it. They are also granted the excuse of a 30-minute break daily upon their return to work for the next one year from date of their delivery.

Whenever there are any unused leave entitlements for which the employee has not been paid in lieu of by the employer, the employer will have to pay such amounts to the employee prior to the employee's dismissal or termination from employment. All payments due from the employer to the employee has to be necessarily settled within a week of the termination or dismissal from service of the employee.

In the High Court decision in the case of *ADK Company Pvt. Ltd. v Ali Mahir* (122/HC-A/2010), the Court declined to uphold the contention of the employer that employees who resigned do not retain their rights to settlement compared to employees that are terminated or dismissed, relying on the literal wordings of the section which was silent on employees that resign. The Judges deemed that under section 41(c) of the Act as well as Article 37 of the Constitution (fundamental right of every person to earn income), employers have a duty to settle, regardless of whether an employee resigned or was dismissed.

Conversely, in the case of *Riyaz Rasheed v Hotels & Resorts Construction Pvt. Ltd.* (87/HC-A/2015), the High Court even went further in awarding payment for accrued unused leave. In this matter the appellant employer appealed against the decision of the Employment Tribunal that awarded the employer two years of accrued annual leave, a stipulation that was agreed under the employment contract between the parties. The High Court was of the opinion that the employee should be granted whatever that was agreed between the parties, in addition or furtherance to the stipulations made under sections 39 and 41 of the Act.

Then there is the question on how someone computes the due compensation for unused leaves. annual leave is an employee's entitlement under section 39 of the Employment Act 2008. However, it is important to note that annual leave is by its statutory nature a paid leave. Computation of how much an employee is entitled to as payment during the period of leave is under section 41(b) of the Employment Act. According to this provision, paid annual leave gives right to an entitlement of pay during such period based on the proportionate amount calculable per in relation to the employee's salary or 'musaara'.

Under the Employment Act 2008, both salary (*'musaara'*) and wages (*'ujoora'*) are references used throughout the legislation. Some sections refer to a salary while other sections talk of wage. For our purposes, the relevant provisions refer to salary or *musaara* rather than wages or *ujoora*. It would be right to assume that salary (*'musaara'*) is not defined under section 89. On the other hand, wages (*'ujoora'*) has been defined to mean inclusive of salary (*'musaara'*), other benefits (*'ithuru manfaa'*), allowances, other monetary gain (*'ehenihen maalee manfaa'*). It should be therefore be implicit that the word salary under the Employment Act does not include allowances, benefits and any other monetary benefit.

According to section 41(d); computation of all monies due under section 41 is with reference to the salary ('musaara') the employee

was being paid no wages. Nowhere under this provision is there any reference to the concept of wages or more simply take home pay. This ideally means that computation of the monetary entitlement for any unused leave is to be based on a person's salary and not a person's wages. Salary herein is connotative of a person's basic salary especially for purpose under section 41 of the Act.

Under the Employment Tribunal decision dated March 2011 in *Ikleel Shareef v ADK Hospitals* (260/VTR/2010) the Tribunal had considered the meaning under section 41(d) when it talks of salary or *musaara* wherein the sitting Members noted that "*We have to determine that 'salary' under section 41(d) of the Act 2/2008 (Employment Act) denotes an employee's basic salary*". This view was upheld and endorsed by the High Court in their decision in the same case (92/HCA/2011).

TERMINATION & DISMISSAL

Sections 21 to 23 of the Act talks of dismissal or termination of employment. The notion attached to the term *'dismissal'* according to employment law carries different connotations to the word *'termination'*. A dismissal usually carries implications of a dishonorable discharge from service resulting from usually a breach of work ethics or contract.

Dismissal without notice is only allowed only "when an employee's work ethic is deemed unacceptable and further continuation of employment is on reasonable grounds seen by the employer as unworkable". See section 23 of the Act. Subsection 21(b) creates grounds whereby no employee maybe dismissed within the meaning of subsection (a) i.e. those which are hardly recognized as failure to maintain work ethics. They include the employee's race, color, nationality, social standing, religion, political opinion and affiliations with any political party, sex, marital status etc. This is in line with the no discrimination policy outlined under section 4 of the Act.

Dismissal and termination are not ideally one and the same thing. However, this distinction is not too clear in the Maldivian employment law regime. Employees that are dishonorably discharged notwithstanding the notice period or term of contract are those that are dismissed. Ideally an employee may be terminated with notice or an employee may be terminated at the expiry of his definite term contract where such employment did not result in more than two continuous years in employment. Ideally again, this situation will not require an employer to seek an 'appropriate cause' in determining not to continue the employment.

Section 25 grants the employer the right to terminate any employment after due pay is offered proportionate to the notice period, in lieu of the notice. This is so notwithstanding the

provisions under section 22, governing the notice period afforded to contracts of indefinite terms, under which two weeks' notice has to be afforded to any person in employment from six months to one year. The period is extended to one month's notice for any person in employment for more than one year but less than five years and an additional month for any person in employment for more than five years.

Under the Act, no employee can be dismissed from employment without showing *"appropriate cause as to failure to maintain work ethics, inability to carry out employment duties and responsibilities related to the proper functioning of his place of work"* and imposes a strict prerequisite that measures be taken to discipline the employee. Unlike countries such as South Africa, the local legislation does not specifically speak of substantive and procedural fairness explicitly. For instance, see the Labor Relations Act (Act 66 of 1995) South Africa, Schedule 8, Section 2 which reads as; *"a dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment."*

Of course, the burden on establishing a cause for fair dismissal rests solely on the employer. Where the employer is unable to prove that dismissal of the employee was for just cause, it shall be deemed that dismissal was without *appropriate cause* under section 27. This means that if required, the employer has to necessarily show that; there were reasonable concerns that the employee had been detrimental to the company, the employee was given the chance to explain himself and to propose remedial actions on his own part to rectify the issue and that the decision was made finally based on all tangible evidence and the decision does not seem excessive. Simple under performance will not be enough and in such cases, employers have to show remedial steps taken to increase employee performance.

If an employer wishes to dismiss a staff with payment *in lieu* of notice, there are certain thresholds you have to fulfill. In *Reethi Rah Resort v Ali Muaz* (24/HC-A/2010) the High Court decided, possibly for the first time in the Maldives, that an employee should follow the requirements in Section 23 of the Act (dismissal without notice) when dismissing a staff with payment in lieu of notice, and that in cases of dismissal, the employer need necessarily substantiate that *substantive* and *proceduraljustice* had been established in the grounds and manner of the dismissal. This means the substantive grounds for dismissal as well as the way or procedure in which the employee was dismissed is important and needs to be proved to be fair and just.

In *Reethi Rah* the facts were that on 13 April 2009, nine employees working at the employer's tourist resort were dismissed on accusation that the employees were involved in physically and grievously assaulting the general manager on April 11, two days prior, at the employer's tourist resort. The employees were arrested on the day of the incident by the Maldives Police Service. Among those dismissed was the respondent employee who complained at the Employment Tribunal that his dismissal was against the provisions of section 23. The Tribunal agreed and ordered the employee re-instated and compensated for loss of income. The decision, of course, was appealed by the employer to the High Court on grounds that the police criminal investigation was still pending against the aggrieved employees, and that in cases of employment the employer need not wait for a Court's decision beyond reasonable doubt to establish guilt. The Court noted;

> *"…In addition to the right to earn and to be engaged in an employment of his choice being a constitutional right under Article 37 of the Constitution, without a doubt the effects of unfair termination is felt not only by the employee but also his family as well as the whole society. For this purpose, safeguards have been placed as provided*

for under the laws followed by civilized open democratic states on procedures and grounds in dismissal of an employee from employment. Even though section 23 of the Employment Act allows dismissal of an employee without notice provided the employer deems detriment to him or the place of employment if the employment is continued, the provision does not allow dismissal just because the employer sees it fit. The grounds provided by the employer needs to be assessed on whether such grounds amount to being reasonable in standard. It has to be ascertained whether the dismissal of employees so terminated on such allegations was necessarily just, and whether the employer followed certain measures substantially and procedurally. Reasonable assessments need to be made before such an action is imposed upon an employee, following procedural fairness or due process."

The High Court noted that the termination letter issued to the employee talks only of the basis that the employee was placed in police custody on charge that he had allegedly partaken in the assault upon a senior staff member. The Court also noted that the employee was not remanded in custody, released before the expiry of the constitutional twenty-four hours, and meanwhile, the employer before termination, had even failed to ascertain from the Police on the findings of the investigation conducted that implicated the employee's involvement in the incident. The Court emphasized that the employer had failed to duly determine the respondent employee's involvement, if any, in an incident that involved a large number of people, and that the employer had failed to allow any recourse to defend himself to the employee, when he was dismissed two days later to the incident, based solely on the consideration that he was among the employees that were arrested. The Judges endorsed the decision of the Tribunal and dismissed the appeal.

In the case of *Maldive Gas Pvt. Ltd. v Umar Waheed* (166/HC-A/2013) the High Court pointed out that comparative perspectives to what may amount to substantive and procedural fairness may be derived from;

> *"laws applied in open democratic states such as the United Kingdom, Australia and New Zealand, as well as international treaties such as the International Labor Organization (ILO) Convention on Termination of Employment 1982 (No.: 152) and the ILO Recommendations on the Termination of Employment 1982 (No.: 166)"*.

Comparatively, substantive and procedural fairness as prerequisites to termination or dismissal has been established as a rule statutorily in, for instance, the United Kingdom since 1996 under their Employment Rights Act (1996 c. 18. The legislation complimented the old common law standards of wrongful termination), which necessitates fair and just treatment of employees when they are terminated or dismissed by their employers. Similarly, to the threshold followed in the Maldives, this protection is afforded to employees who has completed two continuous years of service *(The Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012)*. In the UK, the standard of reasonableness is measured by considering if *"no reasonable employer would have handled it the same or the dismissal was not based on an honest and genuine decision"* as established by *St Anne's Board Mill Co Ltd v Brien*([1973] ICR 444. See also *Orr v Milton Keynes Council* [2011] EWCA Civ 62, where it was said that reasonable means asking what a "*hypothetical reasonable employer*" would do).

In the case of the *Dhiraagu PLC v Ahmed Yoosuf* (77/HC-A/2013), the local High Court, provided an illustration of what amounted to *substantive justice* in dismissal. The facts of the case were that the employee was accused of breaching the leave policy, using foul

language addressing colleagues, dishonesty and failure to duly follow instructions. This High Court was of the opinion that breaches of the leave policy without due excuse or justification or prior notification amounts to gross misconduct under the purview of section 23 of the Act. The employee made no attempts to justify his extra days of leave even upon return and when questioned, turned hostile and used foul language defensively. While the Employment Tribunal deemed that the employer failed to ensure that substantive fairness was established, the High Court disagreed and overturned the decision awarded in favor of the employee. The High Court felt that when reasons for dismissal were so blatant and clear-cut the employer is justified in resorting to dismissal substantially. Procedurally, the employer in this case established that the employer was given ample opportunity to respond to which the employee seemed to have conducted himself unscrupulously.

What we've seen is that a dismissal is only advised if continuation of the employment poses as detrimental to the company or its business. The accusation against such employee needs to be serious. This is ever more applicable in cases of dismissal without notice pursuant to section 23(a) and (b) of the Act, which stipulates that dismissal without notice can only be resorted to in instances where continuation of employment is regarded ill-advised, atop of inept discipline justifying dismissal. These two concepts need to be conjunctively satisfied. Continuation of employment is ill advised when such continuation is regarded as detrimental to the employer or place of business, or in instances where the employee had committed breach of trust against the employer as provided for under section 23(b)(i) and (ii). The fact that this needs to be established on *reasonable grounds* was also established prior by the High Court in the earlier mentioned case of *Reethi Rah Resort.* Note that employees dismissed may still re-apply for the position and retain the right to fair consideration for employment provided the reason for dismissal, subjectively, is reasonably sufficient to

disregard the application. On this note see also *Abdul Jaleel Ismail v Civil Service Commission* (290/HC-A/2014).

To illustrate further on *procedural fairness*, consider the case of *Blue Lagoon Investments Pvt. Ltd. v Iyaz Naseer* (146/HC-A/2014). The facts were that the employee, the Food and Beverage Manager at the employer company's tourist resort was terminated without notice for failing to comply with instructions, when the employee was placed under suspension and subjected disciplinary measures. The employee was asked to remove himself from the resort pending investigation to which the employee failed to comply. The company proceeded to terminate the employment and the employee complained at the Employment Tribunal and won on grounds that the employer had failed to substantiate the termination on subjective fairness and procedural fairness.

On appeal though the High Court disagreed noting that the employee had failed to comply with directions issued to him by the employer pursuant to section 20.1 of the employment agreement made between employer Blue Lagoon Investments and employee Iyaz Naseer, alongside other considerations such as purpose behind the contractual provision, the employees designation, place of work and function at the company, the events that happened at the resort running up to the dismissal and the nature of the allegations made against the employee all contribute to show that the employee's conduct was of unacceptable discipline and as such, the employer may determine that continuation of the employment in that circumstance would prove detrimental to the employer or place of employment. The employment agreement made between employer and employee stipulated that the employer may place the employee on suspension pending investigation of any allegation and that the employer may ask the employee to leave the resort premises for that duration. The Judges noted that;

> *"If the contractual provision is not enforced against the (employee) it may open the door for the employee to*

disrupt the investigation of the allegation made against him by the company and disallow reasonable circumstances for employers to conduct due investigations for allegations made against employees. Furthermore, if such contractual provisions are not enforced against an employee of such standing, employees may be indiscriminately encouraged to disregard contractual obligations, increasing instances of breach of contract by employees. Such causes will create an uneasy work environment and disharmony between the employer and employees, and this will in turn allow employees to unduly influence the company in many ways, eventually hurting the business of the employer."

The High Court noted that both substantial fairness and procedural fairness was in fact established in this case, in favor of the employer. The Judges noted that the employer in this case was not bound to hear the employee's rebuttals to the allegations in this situation and despite which, the employer had satisfied procedural fairness as the employer had in writing warned the employee that 'legal action' may be taken should the employee fail to comply with the instructions. This case serves as the exception to the general rule that every employee should be afforded reasonable opportunity to defend themselves against any claim or allegation made against them on a disciplinary measure. The Court noted that it *"was not compulsory upon the employer"* to do so, if the actions complained of amount to the prescribed notions under section 23. Of course the conditions surrounding the incident, the employee's conduct at the face of company measures and all such facts circumstantial will be taken to light, before the exception can come into play. On this note see also *Blue Lagoon Investment Pvt. Ltd. v Abdulla Rilwan* (147/HC-A/2014); *Blue Lagoon Investment Pvt. Ltd. v Abdulla Salih* (148/HC-A/2014); and *Blue Lagoon Investment Pvt. Ltd. v Arshard Rasheed Hussein* (149/HC-A/2014).

In cases of dismissal, procedure employed by the employee subsequent to the dismissal is also an important factor in the debate. We've seen before how principles of natural justice are upheld even in cases involving the military as illustrated by *Naushad Ali v Ministry of Defense and National Security* 777 CVC 2015 where a military officer was dismissed pursuant to a disciplinary proceeding. The Civil Court reinstated the officer on grounds that even the military, cannot be excused from basic fundamental principles of justice such as the right to be heard.

In *State v Mohamed Hameed* 29 HCA 2014 the state appealed the decision of the Civil Court in awarding a dismissed high ranking police officer on grounds reinstatement on basis of the argument that doing otherwise would amount to double jeopardy. It was the Civil Court's contention that dismissal of an officer on grounds which may amount to a criminal prosecution or charge amounts to double jeopardy under Article 51 of the Constitution, relying on *Ahmed Fahmy Hassan v State* 35 SCA 2012. The High Court overturned the decision and deemed that the cited Supreme Court decision talks of a high ranking public officer of an constitutionally independent institution that was appointed by the Parliament, differing the facts of the case.

What is interesting to note in this decision is that, factually the complainant officer declined to give a statement to the Police, his employer, when questioned and afforded his right to defend himself. Mohamed Hameed exercised his constitutional right against self-incrimination, possibly facing criminal prosecution to the offence he was accused of. The High Court felt that doing so, although a constitutional right, gave *"substantially relevant circumstantial evidence that infers and implies that the complainant affirms the many accusations being made against him".* The Court felt that the officer's seniority of rank warranted that he speak up and defend himself and doing anything otherwise would *"deprive the complainant of any legitimacy in his claim to keep his employment"*. An instance where exercising your right to

silence in an employment proceeding that may cause adverse inferences.

Interestingly moreover, performance of the employee in periodical performance reviews or assessments have very little bearing in an issue relating to dismissal without cause. In *Ismail Rimah v Maldives Customs Service* 03 SCA 2013, the Supreme Court decided that the mere fact that the employee had been assessed to have been performing well in the precedent periodical performance reviews does not operate by itself to nullify claims that he or she may have acted in a manner that may be seen by the reasonable employer as proving potentially detrimental to him or the place of work. In this case it was decided that subsequent to the good performance reviews, the complainant employee was issued admonitions once before on the same issue, before the Civil Service Commission terminated his employment. The Supreme Court held that the existence of previous good performance reviews does not operate over and beyond these considerations.

In April 2017, another interesting development took place at the Employment Tribunal when the Members decided an award that established that the Maldives is alien to 'At Will' contracts that are predominantly found in the west. Traditionally since 2008, it was thought that employees who are not permanent (employees for a fixed term of employment not amounting to a continuous two years) may be terminated from employment by providing the necessary notice period as allowed by law. More simply, this group of employees may be terminated even without the aforementioned 'appropriate cause' ground. In *Ahzam Adil & Ors v Ministry of Islamic Affairs* (27/VTR/2017) the Government tried to argue the same where the complainant employees were not the group that was protected under the Employment Act, i.e. the group which consists of permanent staff and those who have completed more than two continuous years of service. The Tribunal did not entertain this view and established precedent that all employees across the board, notwithstanding their contractual term or

duration of service may be dismissed from employment unless the employer is able to show the infamous 'appropriate cause'. It remains to be seen how the appellate Courts deal with this line of reasoning. But what is clear now is that by case law, there are no avenues in the Maldives for *at will* contracts or employment contracts with special termination provisions for temporary staff.

REDUNDANCY

Much like severance agreements, termination of employees on basis of redundancy is also not explicitly regulated under the Act. On matters of redundancy, reliance can only be made on whether such termination on grounds of redundancy was *'with sufficient basis'* as required by section 21. However, since 2011, the High Court has allowed employers to let employees go on grounds of redundancy, basically provided the criterion set by case law is fulfilled.

We start our discussion here in the 2011 decision of the High Court in case of *Maldives Airports Company PLC v Ali Adam Manik* (89/HC-A/2011)where the employer sought to reduce the number of employees at the company (by way of redundancy) in a bid to *'strengthen the financial management of the company'* in 2010. The employer announced in a company-wide circular prior that all personnel will be evaluated and that the lowest scoring four employees would be let go. The complainant employee sought recourse at the Employment Tribunal when he unfortunately got selected amongst the previously mentioned four employees and was let go with notice despite the fact that the employee was offered a redundancy severance package which he accepted on his own volition. In the first instance, the Tribunal decided that the termination was against the provisions under section 21 of the Act. On appeal, the High Court, overturning the decision, noted the following;

> *"… Companies run with aim to attain business profit will be faced with situations where employees are terminated for purposes of company restructuring or strengthening the management of the company, with view to increase profit (instances of redundancy). If employers are not afforded this opportunity, it will affect the businesses of such employers, with profits taking a turn for the worst. Despite the fact that the Employment Act or any of its subsidiary*

regulations do not enumerate provisions on redundancy, it can be sufficient basis when employees are terminated by companies towards strengthening the financial management of the company, with view to increase profit. However even is such instances it has to be ascertained whether; [1] such a need for the company had in fact arisen, [2] there is good faith on part of the employer, [3] the move by the company is not carried out for purposes of targeting a specific employee or a group of employees, and whether [4] substantive fairness and procedural fairness was established by the employer in the process"

In the earlier mentioned case of *Umar Waheed*, the Court made reference to the case of *Maldives Transport and Contracting Company PLC v Ahmed Mohamed* (134/HC-A/2011) when it explained that *"substantive fairness is established when the grounds or basis of termination is proven to be just and fair and procedural fairness is established when the procedure used prior to the termination of an employee is just and fair"*. The Judges went on to resolve that substantive fairness will be established when the company can satisfy that the decision to restructure the company and terminate employees on redundancy was made, in good faith, with view of economic or financial reasons.

In the same case, the High Court also determined what may amount to procedural fairness in principle in cases of redundancy i.e., when employees are given prior notice of company restructuring and possible redundancy, based on a process that was notified to all employees that may be potentially made redundant, with notice or payment in lieu of provided, and where all employees that may be potentially made redundant have been notified prior of any redundancy packages or severance packages that may be offered to them.

The employer in this case furnished to Court a resolution of the company's Board of Directors which resolved to; restructure with

view to strengthen the financial management of the company, make the employee's position in the company, and create a new parallel position with stricter eligibility criterion. They justified the decision saying that the company had undergone the restructuring to bring the company abreast with modern developments, on basis of the worldwide economic downturn. The Court determined that the employer had successfully discharged the burden of proving that the redundancy was substantially fair, but at the same time determined that procedural fairness was not established as the employee was not informed prior of the possible redundancy. The High Court established that where only procedural fairness is not established in redundancy matters but substantive fairness had been, the employee cannot be required to be reinstated, but rather, where only procedural fairness is not established, a fair compensation is to be awarded.

To determine further what factually may amount to substantive and procedural fairness we see the 2013 decision of the High Court in case of *Maldives National University v Aminath Shafia* (166/HC-A/2013)where the employee was terminated on basis of redundancy while she was studying on an employer approved no-pay leave pursuant to a scholarship. The High Court agreed on point that an employee on an extended no-pay leave may be terminated on basis of redundancy as allowed under Regulation 178(h) of the Civil Service Regulations but did go on qualify that even in such instances, the employer has to show a basic necessity to do so, if redundancy is the basis on which the employee is being terminated. The Court in this case reiterated the principle that *"in cases of redundancy, substantive fairness is established by showing that the basis for termination is both just and reasonable, and procedural fairness is established by showing that the procedure followed in declaring the employee as terminated on grounds of redundancy was equitable."*

The Employer declared that the annual budget as approved by the Ministry of Finance required them to terminate four employees on

no-pay, owing to the great number of employees released by the employer on such basis. Deciding the matter though the High Court determined, *inter alia*, that the employer had failed to establish both substantial and procedural fairness in failing to satisfy both the actual basis and the procedure for selecting the specific employee to terminate on redundancy followed by the employer. Accordingly, the Employment Tribunal's decision to compel the employer to reinstate the employee was upheld.

In the case of *Donna Andrea v Reethi Rah Resort Pvt. Ltd.* (256/HC-A/2013)once again the employee was terminated on basis of redundancy. The facts of this case were that the employee was working as a clinic nurse at the employer's tourist resort. At the Employment Tribunal the employer established that they had reviewed the changes in the incoming clientele structure of the resort, at the same time, conducted a review of the resort clinic and its functions. Accordingly, the employer had decided that the post of clinic nurse need to abolished and consequently, to terminate the employee, on basis of redundancy pursuant to such assessments.

What is important to note in this decision is that the employer had successfully established that the redundancy was substantially fair, while failing to establish that the procedure used was just. It was noted that the employee was not informed prior of her termination on grounds of redundancy, nor was she given an opportunity to transfer or seek alternatives. The High Court reiterated the principle established in 2011 that where only procedural fairness is not established in redundancy matters but substantive fairness had been, the employee cannot be required to be reinstated, but rather, a fair compensation is to be awarded.

Comparatively in redundancy under English law, employers have to necessarily prove that there exists reasonable basis for redundancy and a mere reshuffling or business reorganization would not amount to sufficient basis (*Aylward v Glamorgan Holiday Hotel*

[2003] All ER (D) 249). English law is a bit developed in terms of case law and statute, also requiring proper warnings to employees before the ultimate termination is effected (*Tower Hamlets Health Authority v Anthony* [1989] ICR 656), details of the allegation to be comprehensive (*Coxon v Rank Xerox* (UK) Ltd [2003] ICR 628) and provided at dismissal proceedings (Section 10, *Employment Rights Act 1999*), and that investigations must result in notes being kept and given to the employee (*Vauxhall Motors Ltd v Ghafoor* [1993] ICR 376) etc.

SEVERANCE AGREEMENTS

The Act is silent on provisions governing severance agreements, its legality and operation. Our current regime on severance agreements is derived solely off of case law, i.e., one specific Judgement.

In *Ahmat Aidaneez Maldives Pvt. Ltd. v Hussein Shareef* (363/HC-A/2013) a severance agreement was signed between the employee and the employer, conditioning that the employee waive his right to recourse at the Employment Tribunal. The High Court decided that if the severance was signed and the employee awarded his compensation thereby, he may not retain any more rights of recourse. An exception to the general rule that an employee's right to recourse may never be curbed.

> *"The Employment Act does not explicitly disallow waiver of an employee's rights incases of termination… and (in such cases) mostly or often an agreement may bemade between the employer and the employee detailing their rights andresponsibilities (Severance Agreement). Such agreements should be madewhenever the employee knowingly and intentionally waives a right bestowed uponhim and to make sure of this consideration, Courts and Tribunals are to necessarilyascertain the following… whether;*
>
> a. *The language of the agreement is clear comprehensible by the employee with regard to his education and experience,*
> b. *In having the employee sign the agreement, the employer is cleared of any coercion, undue influence or fraud,*
> c. *The employee was given the opportunity to read the agreement and whether the employee was given ample time to consider the option of signing*

it with regard to numerous waivers of rights enumerated therein,

d. *The employee was afforded ample opportunity to consult a legal*
e. *representative or any other person of his choice with regard to the content,*
f. *The employee was afforded ample opportunity to discuss with the employer with regards to the contents and to suggest amendments of his choice,*
g. *The agreement enumerated any consideration for the benefit of the employee in return for his waiver of rights, especially rights such as that of legal recourse…"*

The High Court dismissed the complaint of the employee in this instance on consideration that all the above criterion has been fully met by the Employment Tribunal and saw no need to change the Tribunal's decision that decided not to hear the complaint of the employee on basis that the severance agreement signed between the parties specifically excluded or relieved the employee of his right to recourse to the Tribunal over.

OCCUPATIONAL SAFETY

The National Employment Act refers only to notification of work-related injuries requiring medical attention. However, there is no provision for punitive action for non-compliance. In their *Occupational Health Profile* report in 2008 the World Health Organization the global watchdog reported that awareness of occupational health as an issue in the Maldives was dangerously low. There was very little regard placed on exposure or contact hazards, avoiding accidents or precautions against harmful effects of a line of trade. The Organization identified that construction workers, boat builders, diving, agriculture, fishing and fish processing as the most hazardous lines of work in the Maldives.

Under the International Labor Organization's *Safe-work Report*, 2005 it was estimated that in 2002, there were 13 work-related fatal accidents, 9100 non-fatal accidents, 41 deaths due to work related diseases and 11 deaths due to exposure to dangerous substances. The ILO Constitution sets forth the principle that workers should be protected from sickness, disease and injury arising from their employment. The ILO has adopted more than forty standards specifically dealing with occupational safety and health, as well as over forty Codes of Practice. The IL*O Occupational Safety and Health Convention* of 1981 provides for the adoption of a coherent national occupational safety and health policy.

Under the Employment Act 2008, the employer is under an obligation to implement measures for the safety and protection of employees at the work place under section 73 of the Act. These include implementation of a safe work place and procedures, provision of safe materials to work with including protective equipment and safety equipment. In Addition to this, there is a duty to recognize hazards arising out of the work and provide education and training to employees on the use of protective gear and safety equipment, and disseminate to employee's information on all issues of related concern.

This is carried even further when the statute imposes the duty to conduct regular health checks albeit for employees engaged in work involving chemical or biological materials. In addition, employers have to arrange appropriate medical care for employees injured in line of duty. Under section 75, the employee has the right to abstain from work if he believes that reasonable grounds exist of serious hazard to health or life.

The reciprocal and proportionate duty is also imposed upon employees under section 74. They are duty bound to maintain safe work practices at work to avoid danger to the safety and wellbeing of co-workers, assist the employer and co-workers in the same, use safety equipment and protective gear as instructed in accordance with the training and education and inform the employer immediately of the occurrence of any incident which the employee believes may cause danger or any accidents suffered at work or related to work.

However, the reality of the situation is that despite these statutory guidelines on safety, there are no national standards for such measures and hence it is largely left to the discretion of the employers. Often, some employers will be forced employ substantive and efficient safety protocols in their line of business but this would almost invariably be because of their compulsion in supplying to the European or American markets, ideally only because they enforce safety standards on products and services being rendered to their jurisdiction (HRCM, 2005).

RETIREMENT PENSION

Traditionally prior to 2008, '*pension'* was given only to Government employees who complete twenty and forty years of service. If an employee completes twenty years of service, the old policy dictates that such employees will be awarded half of their basic salary at the time of the award as 'pension'. For those lucky few who complete forty years of service will be granted their full basic salary at the date of the award. Towards the end of 2006, the Maldives Government also setup the *Employee Provident Fund* for Government employees.

With the enactment of the 2008 Constitution the Parliament enacted the Maldives Pension Act 2009 to modernize and align national framework to the newly enacted Employment Act 2008 and the Civil Service Act 2008. Under the Act the prior function of the Public Service Division under the President's Office was transferred to an independent institution, namely the *'Maldives Pension Administration Office'*. Administration of national pension schemes became the prerogative of this independent institution. Under MPAO the *'Retirement Pension Scheme'* is managed wherein the institution has been given statutory authority to invest pension contributions. All profits and losses are to be apportioned to the employees. Investments are guided by the Investment Committee of the MPAO Board and is supervised by the Capital Market Development Authority established under the Securities Act 2008. All investments are required to be insured under section 17 of the Act.

It is obligatory on both the employee and the employer to partake and contribute to this scheme. Section 11 of the Maldives Pension Act (Act No.: 8/2009) ('Pension Act') deems every employee who attains the age of sixty-five have reached the age of retirement and accordingly, employers may choose to retire such person from service. Any employee in service whose age is under this threshold has to mandatorily be registered by the employer with the

Maldives Pension Administration Office. All such employees' contracts are to necessarily house provisions on retirement deductions and contributions and the Pension Act establishes a minimum deduction of seven percent of an employee's pay and a minimum contribution of seven percent of the employee's pay by the employer, both to be paid to the Pension Office, the trustee. The Act does not bar the employer from making the whole fourteen percent contribution by the employer. Self-employed persons have a choice over to participate and contribute.

Certain benefits are attainable if the employee had reached at least fifty-five years of age. Upon his or her demise, heirs or beneficiaries of employees can claim the monies accrued by way of probate. Most recently by way of the Fifth Amendment (Act No.: 7/2016) to the Pension Act 2009, employees whom wish to acquire social housing schemes can resort to their pension contributions.

Monthly pension contributions to those employees who reach sixty-five years of age by dividing the balance accumulated in the employee's Retirement Savings Account (RSA) with the life expectancy at the time of calculation. At present the World Health Organization assumes life expectancy in the Maldives to be seventy-nine years. Expatriate employees are exempt under the Pension Act under the Second Amendment to the legislation passed in 2009.

SERVICE BONDS

Service bonds are permissible in the Maldives, although is it not explicitly sanctioned and regulated under a detailed competent framework. Forcing bonded service in return for training or education is generally permissible under Maldivian law based on the fact that such contractual arrangements.

The idea here is that the employer incurs heavy expenditure and cost in training individuals to a certain function, both in terms of professional training and educational qualifications and this cost needs to be paid back by the employee to the employer. This payment back is rendered by the employee in terms of his service to the employer and bonded service creates a situation where the employee will not be allowed to leave his or her employment before due returns in terms of service is made. It is a precarious area of law where at the same time, the investment of the employer cannot be ignored, nor could the implications of forced labor upon the employee be disregarded.

To start off let us consider section 3(a) of the Employment Act 2008 prohibits any form of forced labor or employment. This section mirrors the provisions under Article 25 of the Constitution which says that *"no one shall be held in slavery or servitude, or be required to perform forced labor".* What this means essentially is that no one may be forced to work without his consent, coerced, using influence, or under threat of an ulterior (or otherwise) consequence. This interpretation is provided for under Section 3(b) of the Act with the exceptions provided, which include service ordered by a Court of law or mandatory service in times of emergency, the latter of which is also provided for under Article 25(b) of the Constitution.

Under the Civil Service Act 2007 section 71, all employees of the Government whom were serving a bond under the *Government Service Bond for Publicly Funded Students Act 1976* (Act No.: 29/76) were incorporated into the Civil Service and their bonds transferred unto this newly established statutory cadre of public service. Section 54 of the same Act stipulates that employees under a

Service Bond may not resign until such time as their service bonds are completed.

The Civil Court in the case of *State (Auditor General's Office) v Shiuna Ibrahim Nasir* (846/CvC/2012) upheld the claim of the state for the recovery of the money spent by the Auditor General's Office in the training offered to Shiuna on account of her failure to complete the scholarship according to its terms, based on the *Iqrar* that was signed by Shiuna prior to embarking on the scholarship, citing the provisions of the Contract Act 1991. For the Court, the *Iqrar* that was signed between the parties constituted a valid and binding contract.

In 2005 the High Court case of *Zeeshan Abdurahim v ADK Enterprises Pvt. Ltd.* (122/HCA/2005) the claimant was under a contract with her employer ADK Hospitals signed in 2002 which provided explicit mention that any failure to complete the service bond will trigger the reimbursement of the training expenses. The Civil Court upheld the terms of the contract and ordered Zeeshan to pay the amount back to her employer. Zeeshan appealed to the High Court on grounds that her employer had breached the terms of the agreement beforehand which required ADK Hospital to compensate her previous employer the Maldives Monetary Authority (MMA) *in lieu of* her service bond owed to the organization, forcing her to breach the terms of the agreement herself and return back to service at MMA. Zeeshan also contested the Civil Court's observation that her letter to ADK Hospitals requesting her service be transferred to one of part time nature and to arrange an easy payment scheme for the Hospital was an affirmation on her part that she is required to pay back. Her challenge was on ground that the affirmation to pay back was based on her request for part time employment which never materialized on account of the Hospital's actions.

In their Judgment the High Court noted that ADK Hospitals was in fact obligated to compensate Zeeshan's previous employer for the bond she owed them.

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