INDUSTRIAL COURT OF MALAYSIA

CASE NO : 15/4-864/02

BETWEEN

MALAYSIAN WETLANDS FOUNDATION

AND

DEVENDIRAN S.T. MANI

AWARD NO : 917 OF 2005

Before	**:**	**N. RAJASEGARAN - Chairman** (Sitting Alone)
Venue	**:**	Industrial Court Malaysia, Kuala Lumpur.
Date of Reference	**:**	29.7.2002.
Dates of Mention	**:**	29.10.2002, 2.12.2002, 29.1.2003, 19.3.2003, 5.5.2003, 5.6.2003, 8.1.2004 and 20.8.2004.
Date of Hearing	**:**	16.9.2004.

Company's written submission received: 13.10.2004.

Claimant's written submission received : -

Representation	**:**	Ms. Jennifer Chandran from Messrs Vasan, Chan & Chandran, Counsel for the Company. Mr. A. Sivananthan from Malaysian Trade Union Congress (MTUC) representing the Claimant.

Reference :

This is a reference made under Section 20(3) of the Industrial Relations Act, 1967 arising out of the dismissal of **Devendiran S. T. Mani** (hereinafter referred to as "the Claimant") by **Malaysian Wetlands Foundation** (hereinafter referred to as "the Company").

AWARD

Reference

1. Devendiran S. T. Mani ('the Claimant') was offered by Malaysian Wetlands Foundation, a company incorporated and registered in Malaysia ('the Company') and he accepted a contract of employment carrying the title 'fixed term contract' for a duration of twelve months commencing from 1.10.1998 which contract the Company terminated by way of a letter dated 9.4.1999 which letter served upon the Claimant one month's contractual notice of termination of employment which termination was effected on 9.5.1999 and being aggrieved by the Company's action, the Claimant made representation under section 20 of the Industrial Relations Act, 1967 ('the Act') resulting in the Honourable Minister of Human Resources, taking a decision on 29.7.2002 pursuant to subsection (3) of that same section of the Act, to refer that representation of the Claimant to the Industrial Court which reference found its way into Industrial Court 15 ('the Court') on 12.9.2002 upon which the reference wound its way through eight mentions spanning a period of two years occasioned by reasons contributed either by the parties or their representatives or the Court itself to finally being heard and concluded on one day's hearing on 16.9.2004 following which the Court's instruction to the Company for a written submission before 7.10.2004 bore fruition on 13.10.2004 but not so to date the directive given to the Claimant to submit the same on or before 27.10.2004.

Court's Jurisdiction

2. The Company in its pleading averred that the Claimant being an independent contractor was not a workman within the meaning of the Act thereby depriving the Court of its jurisdiction to preside and decide upon the reference.

3. The Court at the outset of the hearing opined that ***Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd. (1997) 3 CLJ 777*** is clear authority for the proposition that a party questioning the threshold jurisdiction of the Industrial Court must do so by seeking to quash by *certiorari* the Minister's reference and in that same action seek prohibition of the Industrial Court from proceeding and that if no such challenge is taken, it is incumbent upon the Industrial Court to decide the reference to conclusion and in that process deal with the jurisdictional question of whether the Claimant is a workman within the meaning of the Act.

4. Ms. Jennifer Chandran, learned counsel for the Claimant, consented to this proposition of law and graciously agreed to withdraw from her position on the preliminary issue regarding the jurisdiction of the Court and instead to take the course of raising in submission at the close of hearing that the Claimant was not a workman as envisaged under the Act. That thankfully resolved the issue on the Court's jurisdiction to proceed with the reference.

Is the Claimant a Workman?

5. The Company in its submission, after quoting elaborately from ***Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor (1996) 4 CLJ 687,*** a decision of the Federal Court, postulates that the Claimant is not a workman for the five reasons that follow :

a). First, that the written contract between the Claimant and the Company, described as a 'fixed term contract' is for a duration of twelve months and for this reason, it was the stand of the Company that the Claimant did not enjoy

security of tenure which *facet* is a basic *tenet* of a contract of service.

b. Secondly, that the Claimant was appointed for a special project to be completed in twelve months. As to how this would relate to the status of the Claimant, the Company gave no indication.

c. Thirdly, that the Claimant reported to the chief executive officer of the Company. And here again the Court was left to decipher the relevance of this information in determining whether the Claimant was a workman.

d. Fourthly, the Company maintained that on the basis of the Claimant's testimony that he need not report his presence at work, the Company did not exercise control on the whereabouts of the Claimant. Though the Company did not elaborate on the relation of this supposition to the issue in question, the Court filled this gap by assuming that it was the Company's intention to relate this supposition to that test commonly called 'the control test', sometimes applied to determine whether a contract of service exists.

e. Fifth and finally, the Company submits that the contract between the parties allows either party to terminate the same and this being so, that contract may be terminated at any time. On how this assists the Company on its preferred stand that the Claimant is not a workman, the Court, with respect, is unable to comprehend.

6. In the determination of what is a workman within the meaning of section 2 and by extension section 20 of the Act, I find it a compulsory starting point to refer to the landmark decision of Gopal Sri Ram JCA, sitting in the Federal Court in the case of ***Hoh Kiang Ngan (supra)*** where his Lordship espoused that which is now accepted as the correct test to be applied in determining whether a claimant is a workman. With this decision, the Federal Court reasserted the test applied in ***Dr. A. Dutt v. Assunta Hospital (1981) 1 MLJ 304*** which, to put it simply, is that to be a workman under the Act a claimant should be employed under a contract **of** service as opposed to a contract **for** service.

7. I next apply this test to the first reasoning of the Company, that is that the contractual relationship in the nature of a fixed term contract, precludes the Claimant from being a workman.

8. A contract of service could be any one of three major categories as follows:

a. First, it could be a regular contract of employment which determines upon a given occurrence, for example, resignation, retirement, frustration, termination of contract through notice, summary dismissal, *et cetera*.

b. Second, a contract of employment could be what is commonly called a 'fixed term contract' or a 'temporary contract'. Such a contract is for a fixed duration of time or for the performance of a specified piece of work.

c. And thirdly, a casual contract of employment. **C.P. Mills' *Industrial Disputes Law, 2nd Edn.,*** at page 179 succinctly describes the nature of such a contract as follows :

> *" A casual worker is properly defined as one who works under a series of separate contracts, usually from day to day. If he works regularly with the one employer, the position is probably best analysed as one where the worker is making a standing offer, or a series of offers on each day that he attends for engagement, to perform a day's work at the agreed wage, and any such offer can be accepted or rejected on each day in respect of which the offer is made. "*

9. Made issue in the instant case is whether a person appointed under a fixed term contract is employed under a contract of service and following therefrom is a workman under the Act. A plethora of cases involving employees on fixed term contracts have knocked, entered and successfully moved through the Industrial Court. They not only involved references under section 20 but also section 26 of the Act. On such references under section 20 of the Act, suffice it for me to refer to the oft quoted case of ***Han Chiang High School/Penang Han Chiang Associated Chinese Schools Association v. National Union of Teachers in Independent Schools, W. M'sia (1988) 2 ILR 611,*** a decision of the Industrial Court born from the wisdom of Y.A. Dato Wong Chin Wee which found support in the then apex Supreme Court.

10. Not going into the realm of whether the Claimant falls within the purview of the Employment Act, 1955, the Court notes that section 11 of that Act recognizes that a contract of service may be for a specified period of time or for a specified piece of work. The definition of 'contract of service' in the Employment Act, 1955 is in *pari materia* to that of 'contract of employment' in the Act.

11. **O.P. Malhotra's *The Law of Industrial Disputes, Vol. 1, 6th Edn.*** at page 675 describing the definition of the word 'workman' in the Industrial Disputes Act, 1947 of India, reads :

> " ***The definition does not state that a person, in order to be a workman, should have been employed in a substantive capacity or on a temporary basis*** *in the first instance, or after he is found suitable for the job, after a period of probation. In other words* ***every person employed in an industry, irrespective of his status – be it temporary, permanent or of a probationer – would be a workman*** [see ***Hutchian v. Karnataka State Road Transport Corpn (1983) 1 LLJ 30, 37 (Kant) (DB), per Rama Jois J.***]. " (emphasis added).

So too does the definition of 'workman' in the Act in Malaysia not state that to be a workman a person should have been employed in a substantive capacity.

12. ***Michael Clifford v. Goh Ban Huat Bhd. (1991) 1 ILR 596*** saw a decision springing from Mustapha Hussain J. It involved an expatriate who was offered and accepted a fixed term contract for a duration of two years and who upon termination of his contract of employment, initially made representation under section 20 of the Act, but later withdrew that representation and moved for remedy by way of originating motion in the High Court. Speaking on the various options open to an employee on a fixed term contract, his Lordship spoke thus :

> *" Looking at the Industrial Relations Act, 1967, there is provision for making representations under s.20(1). "*

13. In the result, with respect, I find the first reasoning of the Company devoid of any merit.

14. On the second, third and fifth reasoning of the Company, I have already commented. Now for the fourth reasoning of the Company that the Company had not much control on the whereabouts of the Claimant during working hours. This reasoning I had earlier presumed was tied up with the application of what is known as 'the control test' to determine whether there existed a contract of service between the parties.

Should the reasoning of the Company be accepted, then a multitude of employees employed in various disciplines should perforce fail the control test and become not employed under contracts of service. Amongst others this will include marketing personnel, drivers and any other class of employees who work outside the perimeters of the employer's premises. The application of the control test is not merely restricted to control on the whereabouts of an employee during his working hours. The true application of the control test involves a variety of *facets* including the nature, degree and extent of control exercised over an employee, specially over the way in which the person carries out the work [see ***Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance (1968) 2 QB 497, (1968) 1 All ER 433***].

15. The nature of modern employment requirements and practices, specialization skills, responsibility levels and varied work locations are such that the application of the control test as a sole criteria to determine the existence of a contract of service has become blunt. And on this ***Halsbury's Law of Malaysia Vol. 7, 2000 Edn.*** reads at page 8:

> *" The test that used to be considered sufficient, that is to say the control test, can no longer be considered sufficient, specially in the case of highly skilled individuals, and it is now only one of the particular factors which may assist a court or tribunal in deciding the point. "*

16. Still on that same point, it is noteworthy that Ms. Jennifer Chandran herself in her submission highlighted that part of ***Hoh Kiang Ngan (supra)*** where Gopal Sri Ram JCA had said :

> *" In all cases where it becomes necessary to determine whether a contract is one of service or for services, the degree of control which an employer exercises over a Claimant is an important factor,* ***although it may not be the sole criterion.*** *"* (emphasis added).

17. More to the point, in ***Mat Jusoh bin Daud v. Syarikat Jaya Seberang Takir Sdn. Bhd. (1982) 2 MLJ 71***), Salleh Abas FJ spoke :

> *" The notion of control as a test to determine the existence of relationship of master and servant has lost a good deal of its importance because under modern conditions no control as to how work is to be done can be directed to such professionally trained employees as engineers, architects, lawyers, managers, doctors and many others.* ***Morren v. Swington & Pendlebury B.C.*** *This notion is also becoming unrealistic because the majority of employers today are corporate entities who have to act through human agencies. Thus the absence of control is no longer conclusive as to the existence or otherwise of the relationship of master and servant. "*

In evidence and supported by the Company's submission is that the Claimant was highly skilled and held an important appointment. In these circumstances the control test by itself cannot be held to be entirely satisfactory in determining whether the Claimant worked under a contract of service.

18. The Claimant's contract with the Company is found in Exhibit AB which is an agreed bundle of documents. The contract carries the title "Fixed Term Contract" and amongst others provides that the duration of employment is for twelve months; states the designation and grade of the Claimant; provides that the Claimant will be paid a basic salary of RM6,750.00 per month in addition to a travelling allowance of RM400.00 per month plus reimbursement of telephone bills up to a maximum of RM130.00 per month; reserves the Company's right to transfer the Claimant; makes provision for EPF contributions and the granting of public holidays and annual leave; provides free out-patient medical treatment to the Claimant; and reimbursement of medical bills incurred by the Claimant's spouse and children.

19. Having perused the terms of the fixed term contract between the Claimant and the Company, the Claimant's attendance records maintained by the Company, the nature of the Claimant's duties and control thereof, the relationship between the Company and the Claimant is more consistent with that of a contract of service and I find the Company's submission that the Claimant was not employed under a contract of service to be somewhat outrageous under the circumstances.

20. It is therefore my inevitable finding of fact and in law that the Claimant was employed under a contract of service and flowing therefrom he was a workman within the meaning of the Act.

Court's Duties In A Dismissal Case

21. Ms. Jennifer Chandran submits on the authority of ***Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. & Anor (1995) 3 CLJ 344*** that the Industrial Court's *mandatum* on receiving a reference under s.20(3) of the Act is to embark on a two fold process of (a) to determine whether the misconduct complained of by the employer has been established and (b) whether the proven misconduct constitutes just cause for dismissal. With this authority I agree and am guided accordingly.

Company's Reason For The Dismissal

22. The Company brought about the dismissal of the Claimant by serving upon him a letter dated 9.4.1999 which letter gave one month's contractual notice of termination. The letter gave no reason for the dismissal. The dismissal was effected on 9.5.1999.

23. That there is no material difference between a termination of contract of employment by due notice and a unilateral dismissal of a summary nature and that in either case it is incumbent upon the Industrial Court to determine whether the termination or dismissal is with or without just cause or excuse has been unshakably established by the high authority of Raja Azlan Shah CJ (Malaya) (as HRH then was) speaking in the Federal Court case of ***Goon Kwee Phoy v. J & P Coats (M) Bhd. (1981) 2 MLJ 129***.

24. The Company's submission is that the reason for the Claimant's dismissal is *"the misconduct committed by the Claimant in being absent from work without lawful permission."* This in substance appears in the Company's pleadings. It is relevant here to repeat that which the

Claimant stated in cross-examination on what transpired at a meeting he attended on 9.4.1999 with the Company's Chief Executive Officer in the presence of Nor Hisham bin Ismail ("COW1") the then Manager, Natural Resources :

> *" Q:* ***Put.*** *When you were told by the CEO you were not performing your work, it was in respect of your absence from work?*
>
> *A: Yes I agree. "*

Based on this evidence the Court accepts that which is submitted by the Company to be the true reason for the dismissal.

25. The Court is able to identify the period of absence which led to the dismissal, from the evidence of COW1. In his witness statement, COW1 gave the reason for the dismissal as being the Claimant's absence from work without giving any valid reason for the whole of the months of February, March and early April 1999. This he reasserts under cross-examination when he said : *"Starting from February 1999 until middle of April 1999, Claimant did not come to work. That was the reason for termination of his contract. "*

Has The Company Made Out The Reason For The Dismissal

26. To reiterate, the Company's reason for the dismissal is that the Claimant had been absent from employment from 1.2.1999 up to 9.4.1999 which is the date of the dismissal letter.

27. In support thereof, the Company exhibited the attendance records of the Claimant for the months of February, March and April 1999. The

attendance record for February 1999 shows that the Claimant was continuously marked absent from 5.2.1999 to 26.2.1999 save that there were seven intermittent days when he was marked as either being on public holiday (2 days) or on rest day (5 days). In all he was marked absent on fifteen days. In March 1999 the Claimant was not marked absent on any one day. He was marked as either being on public holiday (2 days), rest day (6 days) or on medical leave (23 days).

For the period 1.4.1999 to 9.4.1999 the attendance record again does not show the Claimant as being marked as absent on any day. Instead it records him as being on rest day for two days with the remaining as being on medical leave.

28. The Court accepts the veracity of the attendance records for the reasons that they are the Company's exhibits, *ex facie* the records have been verified by COW1, the exhibits have been included in an agreed bundle of documents and the Claimant had not at any time challenged the truth of the contents of the exhibits.

29. An analysis of the attendance records show that from 1.2.1999 to 9.4.1999 the Claimant did not attend work on any one day. His absence from employment arise either as a result of him being on rest day or on public holiday or on medical leave or being absent *per se.*

30. When an employee does not report for work, he is *prima facie* 'absent'. But if his absence is occasioned by statutory or contractual leave of absence or with the prior consent of the employer, the status of that day ceases to be 'absent'. Instead the day of absence takes on the character of the cause of absence, for example, rest day, public holiday, annual leave, medical leave, maternity leave, compassionate leave,

SOCSO leave, *et cetera*. The employee commits no misconduct and where eligible is even paid for such days of absence.

But if the employee's absence from work is not occasioned by a statutory/contractual right or with the prior consent of the employer, the status of such a day of absence remains as 'absent'. In which event he has committed a misconduct for which an employer may legitimately impose sanction.

31. Given the foregoing exposition on absence from work, the Company's justification to dismiss the Claimant can only turn around those fifteen days in February 1999 on which dates the Claimant was marked 'absent'.

Claimant's 15 days of Absence

32. The Claimant admits that he did not report for work on those fifteen days. He however maintains that he had a valid excuse in that he was on medical leave and that he had informed the Company's head office accordingly. If this be true, then the status of the fifteen days should convert from 'absent' to 'medical leave'.

Not so says the Company. It is the Company's position that the Claimant was absent without valid excuse in that he was not on medical leave. It is also the Company's submission and correctly so, that the burden is upon the Claimant to prove that his absence was occasioned by valid excuse, that is, that it arose from the Claimant being on medical leave. And in support thereof Ms. Jennifer Chandran referred the Court to the Industrial Court's decision in ***Malaysian Airline System Bhd. v. Samson Anuar Haron (2003) 3 ILR 1407.*** That decision, the Court

finds to be in consonant with the requirement of section 101 of the Evidence Act, 1950.

33. The Claimant has lamentably failed to come up with any evidence to support his contention that he was on medical leave on those fifteen days. In cross-examination the Claimant answered that the medical certificate for those dates was in the form of a letter from his medical doctor. He could have, but did not, attempt to produce the medical doctor from whom he had received treatment to vouch his being on medical leave. This failure brings the Claimant squarely within the parameters of adverse presumption imposed by section 114(g) of the Evidence Act, 1950. In the upshot I find that the Claimant has failed to discharge his evidential burden to show that he had a valid excuse for his absence. He had therefore committed misconduct and it was open to the Company to punish him.

Condonation

34. Punish the Claimant the Company did. The right to punish the Claimant on 9.4.1999, the Company lost. That is the finding of the Court and my reasons follow.

35. The Company punished the Claimant through service of the dismissal letter on 9.4.1999, which is six weeks after the last date of absence on 26.2.1999. This delay, aggravated by the Company's act in paying the Claimant the salary in respect of the days of absence without question and failure to warn the Claimant or to reserve right of action are conduct which raise the spectre of condonation or waiver by the Company.

36. ***Halsbury's Laws of Malaysia, Vol. 7, 2000 Edn. at page 123*** on the subject of condonation reads:

> *" Condonation arises when an employer with full knowledge of a servant's misconduct, elects to continue him in service. Where misconduct has been condoned, it may not be relied on by the employer to dismiss a workman unless there are subsequent acts of misconduct. "*

37. In ***Azman bin Abdullah v. Ketua Polis Negara (1997) 1 MLJ 263,*** Abdul Malek Ahmad JCA (as his Lordship then was) allowed the appeal of a sub-inspector who was demoted, based on the doctrine of condonation. Reference was made in that case to ***District Council, Amraoti v. Vithal Vinayak AIR 1941 Nagpur 125*** where the court said :

> *" Once a master has condoned any misconduct which would have justified dismissal or a fine, he cannot after such condonation go back upon his election to condone and claim a right to dismiss his (the servant) or impose a fine or any other punishment in respect of the offence which has been condoned. "*

38. That the doctrine of condonation will waive the right of an employer to punish an employee has been lucidly expressed by Haidar Mohd Noor JCA (as his Lordship then was) in ***National Union of Plantation Workers v. Kumpulan Jerai Sdn. Bhd., Rengam (2000) 2 AMR 1387*** where at page 1396 his Lordship after having first said :

> *" The doctrine of condonation has long been established in India, Malaysia, New Zealand, Canada, South Africa, Australia and Hong Kong. "*

continued on that same page :

> *" We agree to the principle of condonation as a waiver of the employer's right to punish for misconduct. "*

39. And I have in arriving at my decision earlier stated, applied the doctrine of condonation based on the guidance given by Alauddin J. (as his Lordship then was) in ***Mui Bank Bhd. Johor v. Tee Puat Kuay (1993) 3 MLJ 239*** where his Lordship at page 246 spoke :

> *" There is no such thing as a law of condonation. It is essentially a question of fact depending on the circumstances of the matter. "*

I need to emphasize that COW1's testimony that sometime in February 1999 he had telephoned the Claimant and requested him to come to work had not escaped me. COW1 gave no further information on this purported telephone conversation. To this the Claimant responded with a flat denial of any such telephone call or conversation. A*ffirmanti non reganti incumbit probatio* – the burden of proof is on him who affirms, not on him who denies.

40. And now to another important issue tied to this subject of condonation. Pleadings. I had in my deliberations directed my mind to this all important subject. In this connection I had hearken to that oft quoted passage of Eusoff Chin CJ in ***R. Ramachandran v. Industrial Court of Malaysia & Anor (1997) 1 CLJ 149*** where his Lordship held that though the Industrial Court is not bound by all the technicalities of a civil court by virtue of section 30 of the Act, pleadings cannot be ignored and treated as pedantry.

41. The facts associated with my finding of condonation by the Company were all pleaded, led in evidence and subject to cross-examination. The legal result of condonation need not be specifically pleaded if there are sufficient facts pleaded to support such a result. For this proposition of law I rely on the authority of Gopal Sri Ram JCA speaking in ***Quah Swee Khoon v. Sime Darby Bhd. (2000) 2 MLJ 600.***

42. On all fours with this same issue is the Court of Appeal's decision in ***National Union of Plantation Workers v. Kumpulan Jerai Sdn. Bhd., Rengam (supra)***. In that case the four claimants' dismissal was held by the Industrial Court to be without just cause and excuse based on several reasons, one of which was that the company had waived or condoned the misconduct of the claimants. The claimants there were absent from 8.10.1988 up to their dismissal on 16.10.1988 effected by a letter of even date. In the Court of Appeal, the company contended five jurisdictional errors of law by the Industrial Court one which was the purported waiver or condonation by the company. The Court of Appeal ruled that this issue alone would determine the appeal. Upon invitation to submit, it was the company's position that the Court of Appeal could not consider this since the claimants had not raised this in their statement of case in the Industrial Court. And this is how Haidar Mohd. Noor JCA (as his Lordship then was) responded :

> *" Before the Industrial Court, NUPW by way of paragraph 4 of the statement of case pleaded that the dismissal was without any just cause or excuse. The detailed facts may not have been pleaded but it is a matter of presenting the evidence to support the ground to be relied on by the party. "*

In the instant case, no different. The Claimant by way of paragraph 10 of the statement of case had pleaded that the dismissal is without any just

cause or excuse and the relevant evidence had been presented in the Court.

43. That the Claimant was dismissed without just cause and excuse can be the only reasonable and inescapable conclusion. And so do I find accordingly.

Remedy

44. The Claimant was employed on a fixed term contract for a duration of twelve months commencing on 1.10.1998 which contract should have terminated on 30.9.1999. He was however untimely plucked out of employment on 9.5.1999 by the Company.

45. The Claimant in his pleadings sought the remedy of reinstatement without loss in salary, seniority and other benefits.

46. That the instant case is not as in the landmark decision of ***Han Chiang High School (supra),*** a case involving a succession of fixed term contracts, cannot but be underscored. In the instant case the Claimant's is but one single fixed term contract of employment terminated before term. In such a singular fixed term contract of employment the *lien* which a workman holds on his employment is for the duration of that contract alone. To hold otherwise would not only offend the very concept of a fixed term contract but would also go against the declared intention of the parties at the time of contract. For the avoidance of doubt, I hasten to add that a workman on a fixed term contract enjoys security of tenure for the duration of the contract and such a contract may only be terminated by the employer for good cause or excuse. To this extent I find myself having to disagree with the Company's submission that the

Claimant having been employed under a fixed term contract enjoyed no security of tenure.

47. The Claimant's fixed term contract of employment has long gone passed its time of life. It would be inequitable to resurrect the said contract through reinstatement. Reinstatement is not an appropriate remedy. In the result compensation in lieu of reinstatement is *non sequitur*. The question of backwages which is corollary to reinstatement or compensation in lieu cannot also arise.

48. Paying heed to the Federal Court's decision in ***Hotel Jaya Puri v. National Union of Hotel Bar & Restaurant Workers (1980) 1 MLJ 105*** that if there was a legal basis for paying compensation, the question of amount is very much at the discretion of the Court to fix under section 30 of the Act and further not losing sight of the requirement of section 30(5) of the Act to act according to equity, good conscience and the substantial merits of the case, the Court orders that a fixed compensation be paid by the Company to the Claimant.

49. The Court holds that the remuneration that the Claimant would have received for the estranged period, that is the period from the date of actual termination of employment to the date of termination of the fixed term contract, would be an appropriate compensation.

50. Contractually the Claimant was paid a monthly basic salary of RM6,750.00 plus a fixed travelling allowance of RM400.00 per month, giving a total remuneration of RM7,150.00 per month. For the period 9.5.1999 to 31.5.1999 his remuneration will calculate RM5,074.19 (RM7,150.00 divided by 31 days multiplied by 22 days). And for the four months commencing 1.6.1999 and ending on 30.9.1999 he would have

been remunerated a sum of RM28,600.00 (RM7,150.00 multiplied by 4 months). This totals RM33,674.19.

Scale Down

51. Ms. Jennifer Chandran submitted that if the Court should find for the Claimant then it is incumbent upon the Court to scale down on any payments by reason of contributory misconduct of the Claimant on the authority of ***Wong Yuen Hock (supra)*** and on the authority of ***Dr. James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd. (Sabah) & Anor (2001) 3 CLJ 541*** for the reason that the Claimant had been gainfully employed after his dismissal.

52. The Court's finding as earlier stated, is that the Claimant had committed misconduct by being absent on fifteen days in the month of February 1999 and that it was open to the Company to punish him. It was though application of the doctrine of condonation that the Court has found the dismissal of the Claimant to be without just cause and excuse. Contributed towards his predicament, the Claimant definitely has.

53. Contributed towards its own predicament, the Company also has. Towards this end the Company had failed to adopt the principles of natural justice in confronting the Claimant with his alleged misconduct, sought his clarification and demanded proof in support of any such clarification. Had this been done, it is probable that this dispute may not have arisen in the first instance.

54. In the circumstances the Court decides that a token scaling down will suffice and for this reason the compensation of RM33,674.19 is reduced by 10% thus giving a sum of RM30,306.77.

55. The Court is bound by the principle of law declared by the Federal Court in ***Dr. James Alfred (Sabah) (supra)*** in relation to scaling down where a Claimant is gainfully employed. The Court had analysed the application of this principle in ***Ike Video Distributor Sdn. Bhd. v. Chan Chee Bin (2004) 2 ILR 687*** and will adhere to the same here.

56. It follows to reason that the application of the principle in ***Dr. James Alfred (Sabah) (supra)*** in the instant case should be restricted to the period from the date of the Claimant's termination of employment to the date of cessation of the fixed term contract. This period is from 9.5.1999 to 30.9.1999.

57. It is the evidence before the Court that the Claimant after termination of his employment on 9.5.1999 was unemployed until July 1999 when he commenced employment with another employer at a salary of RM2,500.00 per month. In February 2002 he commenced employment with ICN Design International at a salary of RM6,500.00. His employment with ICN Design International which commenced long after the expiry of his fixed term contract with the Company is irrelevant.

58. Considering the fact that the Claimant was unemployed from 9.5.1999 to July 1999 and that thereafter his remuneration was reduced to 35% of what he had earned in the Company, on application of the ***Dr. James Alfred (Sabah) (supra)*** principle as I understand it as espoused in ***Ike Video Distributor Sdn. Bhd. (supra)*** , the Court decides not to scale down under this head of gainful employment.

Order

59. The Court orders that the Company pays the Claimant through his representative on record the sum of RM30,306.77 less statutory deductions if any, not later than 45 days from the date of this Award.

HANDED DOWN AND DATED THIS 5TH MAY, 2005.

(N. RAJASEGARAN)
CHAIRMAN
INDUSTRIAL COURT