INDUSTRIAL COURT OF MALAYSIA

CASE NO : 15/4-1021/02

BETWEEN

IKE VIDEO DISTRIBUTOR SDN. BHD.

AND

CHAN CHEE BIN

AWARD NO : 636 OF 2004

Before	:	**N. RAJASEGARAN - Chairman** (Sitting Alone)
Venue:	:	Industrial Court Malaysia, Kuala Lumpur.
Date of Reference	:	23.10.2002.
Dates of Mention	:	23.12.2002, 6.2.2003, 6.3.2003, 16.6.2003, 27.1.2004, 27.2.2004 and 23.3.2004.
Date of Hearing	:	23.4.2004.
Representation	:	Company absent and unrepresented for part of mentions and hearing. Encik Abdul Muiz bin Samsuri from M/s Khalek, Awang & Associates Counsel for the Claimant.

Reference :

This is a reference made under Section 20(3) of the Industrial Relations Act, 1967 arising out of the dismissal of **Chan Chee Bin** (hereinafter referred to as "the Claimant") by **Ike Video Distributor Sdn. Bhd.** (hereinafter referred to as "the Company").

AWARD

BACKGROUND

1. This is a reference under section 20(3) of the Industrial Relations Act, 1967 ('the Act') decided by the Minister of Human Resources on 23.10.2002 in connection with the termination of employment of Chan Chee Bin ('the Claimant') by Ike Video Distributor Sdn. Bhd. ('the Company') effected on 19.9.2000 and which reference found its way into Industrial Court 15 ('the Court') on 11.11.2002.

2. At the hearing of the reference on 23.4.2004, the Court proceeded *ex parte* in the absence of the Company. The need therefore to elaborate on the events leading to that hearing is appropriate and now follows.

3. On record the Company was represented by Messrs Tan Kok Kwang & Co. ('the Company's counsel'). Of a total of 6 mentions, preceded by effectively served notices, the Company's counsel only attended the first. In respect of all other mentions, Company's counsel wrote to the Court seeking to be excused citing appearance in other civil and criminal courts as reason.

4. The Assistant Registrar's directions to file pleadings, exhibits and witness statements were complied with by the Claimant through his Counsel on record ('the Claimant's counsel'). Not so the Company's counsel, who in spite of having sought extension of one month to file the Company's pleading, failed to do so forever.

5. After the 6th mention, Company's counsel extinguished. The Court's correspondences were returned undelivered, telephonic contact failed and efforts to trace them through the Bar Council came to naught.

6. In the circumstances, hearing first fixed for 26 and 27.1.2004 and again fixed for 23.3.2004 had to be forcibly vacated.

7. On 23.3.2004, the Claimant and his counsel being present, the Company unrepresented, hearing was adjourned to 23.4.2004. The Court further directed a search with the Companies Commission of Malaysia and thereafter to serve individual notices of hearing on the Company, its manager and director. The fruits of the search ended in notice of hearing being successfully served *via* A.R. Register upon the manager and 2 directors of the Company.

8. On 23.4.2004, the date set down for hearing, Claimant and his counsel were present. So too did one Lim Say Wee, an advocate and solicitor from Messrs Lim Seng Wee & Kwan appear, and by permission addressed the Court. He intimated that though he was not on record representing the Company, he had been requested by the Company's directors "to find out the current position of the case". He further informed the Court that the Company had since ceased business and will not contest the action in the Court.

***EX-PARTE* APPLICATION**

9. Whereupon Claimant's counsel made an application to commence and proceed hearing *ex-parte*.

10. Section 29(d) of the Act enables the Court to hear and determine the matter before it notwithstanding the absence of any party to the proceeding who has been served with a notice or summons to appear.

11. After weighing the cumulative effect of the numerous notices served upon the Company, the persistent refusal of the Company and/or

its counsel on record to respond to such notices and the final act of failing to attend hearing but instead to send an emissary, the Court formed the opinion that in accordance to equity, good conscience and the substantial merits of what had transpired thus far, it would be in the interest of justice that the application for an *ex-parte* hearing should be granted and so ordered accordingly.

Ex-parte Hearing

12. Having decided to proceed *ex-parte* I examine the role of the Court in an *ex-parte* hearing.

13. O.P. Malhotra in his text ***The Law Of Industrial Disputes, Vol. 1, 3rd Edn. at page 716*** writes:

> " *A rule empowering the tribunal to proceed ex-parte if a party is absent and sufficient cause is not shown for his absence, would not enable it either to do away with the inquiry or to straightaway pass an award without giving a finding on the merits of the dispute. In other words, the absence of a party does not entail the consequence that an award will straightaway be made against him."* ***[Dawood Khan v. Labour Court (1969) 11 L.L.J. 611 (AP) per Chinnappa Reddi J.]. "***

And the learned author continues **at page 717**:

> *" 'ex-parte' only means in the absence of the other party. It creates a fiction which enables a tribunal to presume that all parties are present before it. A fortiori, an adjudicator may*

imagine that the absentee is present, and having done so, it may give full effect to its imagination and carry it to its logical conclusion. "

14. Having framed my mind on the need to carry out a full enquiry, albeit in the absence of the Company, I take heed of the guidance given by Richard Malanjum J.C. (as His Lordship then was) in ***Liew Geok Lan (f) v. John Loh, (1993) 3 CLJ 158*** where His Lordship in deciding to hear *ex-parte* stated:

" *In considering this particular case in view of the absence of the defendant I bear in mind the following principles of law, namely, that the plaintiff is required to prove her claim* ***as far as the burden of proof lies on her.*** *The proof will be limited to the allegations in the claim, in this case as contained in the originating summons and the supporting affidavits [see* ***Barker v. Furlong (1891) 2 Ch. 172 @ pg. 179****]. "* (emphasis added).

The Court's Function

15. The Court's function upon receiving a reference from the Minister is twofold viz (a) first, to determine whether the misconduct complained of by the employer has been established, and (b) secondly whether the proven misconduct constitute just cause or excuse for the dismissal. This duty of the Court made mandatory by Mohamed FCJ's enunciations in the two Federal Court cases of ***Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. & anor (1995) 2 MLJ 753*** and ***Milan Auto Sdn. Bhd. v. Wong Seh Yen (1995) 3 MLJ 537,*** have been cited

so often and approved so often, that the need for the Court to refer to it in terms is superfluous.

Evidence, Evaluation and Findings

16. The Claimant's case as contained in his pleadings and his witness statement duly affirmed and tendered in Court unfolds as narrated below.

17. The Claimant avers that he commenced employment with the Company on 21.5.99 in the position of General Manager. That this was so, lay on the Claimant to prove (see ***section 101, Evidence Act, 1950***). Towards this end the Claimant did not produce either a letter of employment nor a written contract of employment. He however tendered as exhibits: (a) a copy of an application form bearing the Company's name, stating the position applied for as 'general manager' which form he had used in seeking employment with the Company, (b) a business card of the Company bearing the name and designation of the Claimant, (c) salary payment vouchers issued by the Company for the duration of his employment and (d) two correspondences from the Company addressed to him on matters associated with his employment. In the circumstances, and in view of section 2 of the Act which describes a contract of employment to be "*any agreement, whether oral or in writing and whether expressed or implied*", I hold that which the Claimant avers to be true.

18. It is the contention of the Claimant that Lee King Lai, the Company's director had on several occasions sought the resignation of the Claimant without assigning any reason therefore. In support, the Claimant exhibited a copy of a letter dated 19.9.2000 written by him addressed to the Company stating the same. The burden being on the

Claimant and in the absence of a rebuttal, I find the said letter corroborative of the Claimant's contention.

19. It is the Claimant's case that his employment was terminated by the Company on 15.9.2000. The burden is upon the Claimant to prove dismissal. [See ***Nikmat Jasa Piling Sdn. Bhd. v. Teng Tong Kee (1998) 3 CLJ 367*** and ***Weltec Knitwear Industries Sdn. Bhd. v. Law Kar Toy & Anor (1998) 1 LNS 258***]. The Claimant discharged this evidential burden through tendering as exhibit a letter dated 15.9.2000 from the Company addressed to him terminating his services with effect from even date, thus enabling me to hold that what he claims. The letter of dismissal ('the dismissed letter') being pertinent to other issues to be addressed in this Award, is repeated below:

> " TO: MR. CHAN CHEE BIN
> 6-2-12, BLOCK 6,
> JALAN 6/127A,
> TAMAN GEMBIRA,
> **58200 KUALA LUMPUR.**
>
> DATE: 15th September 2000
>
> Dear Mr. Chan Chee Bin
>
> **Termination Of Service**
>
> In view of your incompetence, IKE Video Distributor Sdn Bhd have decided to terminate your service as the General Manager of IKE Video Distributor Sdn Bhd with effective from 15/09/2000.

You have accepted our term of our compensation and additional one month salary as the total termination benefit.

Both parties IKE Video Distributor Sdn Bhd and yourself (Mr.Chan Chee Bin I/C No: 520219-07-5373) have both agreed that the above arrangement as the final settlement of the above termination service issue.

Thank you.

Yours faithfully

sgd.

....

Kamal Regendran Bin Abdullah Chan Chee Bin

Executive Director. "

20. The Claimant denies as untrue that part of the letter which says:

> "You have accepted our term of our compensation and additional one month salary as the total termination benefit."

I believe him on two grounds. The first, for the reason that he has not signed on the space provided above his name at the bottom of the dismissal letter; for had he done so, it could be argued as construing verification of the disputed sentence. And secondly, he had in his earlier mentioned letter dated 19.9.2000 addressed to the Company, stated that he did not agree with the contents of the dismissal letter.

21. Be that as it may, the disputed sentence even if true, cannot *estop* the Claimant from pursuing his action in the Court for section 30(5) of the Act enjoins the Court to disregard technicalities and legal form. In

applying his rule I hearken to the advice of Gopal Sri Ram JCA in ***Swedish Motor Assemblies Sdn. Bhd. v. Haji Moh Ison bin Baba, (1998) 2 MLJ 372*** where His Lordship, at page 380 said:

> " *That the Industrial Court should adjudicate upon the representations referred to it without hearkening to technical rules such as estoppels, waiver, acquiescence, etc. is a principle settled beyond dispute. The decision of Eusoff Chin J (now CJ) in* ***Nadarajah & Anor v. Golf Resorts (M) Sdn. Bhd. (1992) 1 MLJ 506*** *and that of Mohd. Yusof J in* ***Tamil Nesan (M) Sdn. Bhd. v. K. Ganesan*** *(unreported) which are authorities for the proposition I stated a moment ago were upheld be the Federal Court in* ***Kumpulan Perangsang Selangor Bhd. v. Zaid bin Hj. Mohd. Noh (1997) 1 MLJ 789.*** "

22. It is now settled by the binding authority of ***Goon Kwee Phoy v. J & P Coats (M) Bhd., (1981) 2 MLJ 129*** that the Court is restricted in its inquiry into the veracity of the reason chosen by the employer for the dismissal. Raja Azlan Shah CJ (Malaya) (as HRH then was) speaking for the Federal Court ruled at page 136:

> " W*here representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the*

termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it. "

23. The reason expounded by the Company, in its letter of dismissal, for the Claimant's termination of employment is "incompetence". The Court's mandate on the authority of ***Goon Kwee Phoy (supra)*** is to enquire whether the Company has made out the reason of incompetence.

24. "Incompetency" is described by Dunston Ayadurai in his text ***Industrial Relations In Malaysia, 1998 Edn. @ page 167*** as:

" Incompetency – sometimes referred to as incapability or inefficiency or more mundanely, unsatisfactory performance, poor performance, etc. – is suggestive of some shortfall or shortcoming in the employee vis-a-vis his job, i.e. the duties or tasks assigned or allocated him by his employer. "

25. Donaldson J in ***James v. Waltham Holy Cross UDC, (1973) IRLR 202*** held:

" An employer should be very slow to dismiss upon the ground that the employee is incapable of performing the work which he is employed to do, without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground, and giving him an opportunity of improving his performance. "

26. The Industrial Court's stand on the prerequisites of an employer before effecting dismissal for incompetency is no different from that quoted above in ***James v. Waltham Holy Cross UDC (supra)***. The Industrial Court has further held that the burden of proving that these prerequisites have been complied with lay on the employer. In this connection from a plethora of cases, suffice it for me to refer to the oft quoted cases of ***Rooftech Sdn. Bhd. v. Holiday Inn Penang (1986) 2 ILR 818; IE Project Sdn. Bhd. v. Tan Lee Seng (1987) 1 ILR 165*** and ***Puncak Niaga (M) Sdn. Bhd. v. Mohd Sulaiman Mohd Yahaya (2001) 2 ILR 1.***

27. The inevitable consequence of the Company's failure to file its pleading and to be present at the hearing is that the Company has failed to establish the presence of the necessary prerequisites to justify a dismissal on the grounds of incompetency.

The Claimant in his evidence stated at various stages the following:

"21. Q: Did you ever receive warning letter from the Company that the company was unhappy with your job performance or your incompetency prior to the termination?

A: No. I work very hard for the company and I never receive any warning letter from the company prior to the termination.

22. Q: Were there any complain against you pertaining to your incompetency and your job performance as a General Manager either orally or in writing by the company?

A: No.

24. Q: Prior to the issuance of your termination letter, were

there any discussions held that your service will be terminated?

A: No. ”

I particularly take note of the fact, as gleamed from the salary payment vouchers in exhibit, that not long before the Claimant's dismissal on 15.9.2000, the Claimant had been granted a salary increment of RM500 with effect from April 2000, an increase of 20% from his earlier drawn salary. Surely such reward cannot be for incompetency!

28. In the circumstances I find the Company not having proved its reason to effect the dismissal i.e. incompetency. And on the authority of ***Goon Kwee Phoy (supra)*** such a finding leads to the inevitable conclusion that the Claimant's dismissal is without just cause or excuse.

29. The Claimant led evidence on an **undated** letter from the Company addressed to the Claimant, entitled 'show cause letter' where several allegations had been made against him. The Claimant further tendered as exhibit a pos laju slip no. 600665656, which slip shows that it is in relation to a letter mailed by the Company to the Claimant on 26.9.2000 and received by the Claimant on 27.9.2000. I have no reason to doubt the Claimant when he says that the pos laju slip refers to the show cause letter. The Court disregards this letter for the reason that it relates to a matter which is after the fact of dismissal effected on 15.9.2000. Further the evidential burden is upon the Company to prove the allegations in the show cause letter and this has not been made out.

REMEDY

30. Lim Sey Wee intimated to the Court that the Company had ceased business. For this reason reinstatement of the Claimant to his former position will not be an appropriate remedy.

31. The Federal Court in ***Dr. A. Dutt v. Assunta Hospital (1981) 1 MLJ 304*** held that the Industrial Court is authorised to award monetary compensation if of the view that reinstatement is not appropriate. Compensation constitutes two elements *viz* (a) backwages and (b) compensation in lieu of reinstatement. [See also the Court of Appeal in ***Koperasi Serbaguna Bhd. Sabah v. James Alfred, Sabah & Anor, (2000) 3 AMR 3493***].

32. And in ***Hotel Jaya Puri v. National Union of Hotel Bar & Restaurant Workers, (1980) 1 MLJ 105*** the Federal Court held that if there was a legal basis for paying compensation, the question of amout is very much at the discretion of the Court to fix under section 30 of the Act.

33. In exercising the Court's discretion I bear in mind the cautionary words of the learned author, O.M. Malhotra in his work***, Law of Industrial Disputes, Vol. 2, 4th Ed. at page 961***:

> " *The tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to rules of reason and*

justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular. "

So too I bear in mind the requirements of section 30(5) of the Act to act according to equity, good conscience and the substantial merits of the case.

Having cautioned myself on the exercise of the Court's discretion I now approach the two heads of compensation, decide on the quantum and state my reasons therefore.

COMPENSATION IN LIEU OF REINSTATEMENT

34. Dunston Ayadurai in his textbook ***Industrial Relations In Malaysia , 1998 Edn., at page 135*** observes:

" *with regard to compensation in lieu of reinstatement, the amount usually awarded to the employee is one month's wages for each completed years of service. "*

The prevalence of compensation in lieu of reinstatement based on the multiplicant of one month's salary is so wide spread in Industrial Court decisions that the need to quote precedence is superfluous. I see no justification in departing from this precedence and follow the same.

35. The multiplicand in the instant case is RM3000.00 per month.

36. I next broach the subject of the multiplier. In this, Industrial Court precedence offer two choices (a) first, the number of years from the date of commencement of employment to the date of dismissal or (b)

second, the number of years from the date of commencement of employment to the date of completion of hearing.

37. The Court in its decision on the multiplier takes note that compensation is being awarded in place of reinstatement. Had the Claimant been reinstated, his service would be treated as continuous without abatement of the interregnum between dismissal and reinstatement. Therefore it must as a necessary corollary follow that when compensation is awarded in lieu of reinstatement the interregnum should not also be lost.

38. The Court will therefore use as the multiplier, the period from the date of commencement of work up to the last date of hearing which in the instant case is from 21.5.1999 to 23.4.2004, thus giving a multiplier of 4.9.

39. The Court is mindful that this decision on the multiplier is not at odds with the decision of Gopal Sri Ram JCA in ***Koperasi Serbaguna Bhd. Sabah (supra)*** for though His Lordship had particularly mentioned "*the disadvantaged position in which the respondent must have found himself in consequence of the dismissal*", a careful reading of His Lordship's dicta will show that this was not the only reason why he did not disturb the payment of the additional sum in respect of the interregnum between dismissal and date of award. That reason stated above by His Lordship was but an example of one of the vicissitudes that he had referred to earlier when His Lordship had said that "*I now turn to the award for compensation in lieu of an order of reinstatement. Now, there are many imponderables that influence the making of such an award. They are too numerous for me to mention.*".

40. I further find confidence in arriving at this multiplier by the decision of Eusoff Chin, Chief Justice (Malaya) in ***R. Rama Chandran v. The Industrial Court of Malaysia (1997) 1 MLJ 145*** where His Lordship used a similar multiplier in arriving at the quantum of compensation for loss of employment.

41. In the result the Court orders a sum of RM14,700.00 as compensation in lieu of reinstatement, the sum being arrived at as follows: RM3,000.00 x 4.9.

BACKWAGES

42. Practice Note No. 1 of 1987 issued by the Industrial Court, in a paragraph relating to backwages speaks of full backwages from the date of dismissal to the date of conclusion of hearing subject to a maximum of 24 months. The application of the said practice note in the Industrial Court is best described in the words of the Learned Chairman, Steve L.K. Shim (as His Lordship then was) in ***Edaran Otomobil National Sdn. Bhd. v. Neoh Hock Lye, Quah Poh Huat, Lee Chew Liam Award No. 44 of 1990:***

> " *It might be that the practice note was issued for the purpose of creating some kind of uniformity and consistency. But it must be stated that it is merely a guideline and as such is not meant to stifle the legitimate discretion of the Court in appropriate cases.* "

43. And in keeping with this principle the Industrial Court had disregarded the said practice note's limitation of 24 months backwages in several cases including one case which eventually ended in the Federal Court under the title ***Dr. James Alfred v. Koperasi Serbaguna Sanya***

Bhd. & Anor, (2001) 3 MLJ 529. In that case, the Federal Court made no adverse comments on the Industrial Court's non-adherence to the limitation stated in the said practice note.

44. Hashim Yeop A. Sani J. (as His Lordship then was) in ***Dr. A. Dutt v. Assunta Hospital (supra)*** speaking in the High Court held that "*a reinstatement order carries with it a prima facie right to an order for the recovery of wages since the date of dismissal. Such an order is ancilliary to the order of reinstatment.".*

And Learned President, Tam Kam Weng in ***Rank Xerox Ltd. v. Choong Sin Sing @ Chong Lian Hwa, (1990) 1 ILR 455*** held that where reinstatement is ordered, full backwages up to the date of reinstatement should be paid save for cogent reasons.

45. Based on the Court's earlier proffered argument on the interregnum between dismissal and reinstatement of the workman in relation to the computation of compensation in lieu of reinstatement, the logical proposition that follows is that the Claimant should not be denied backwages for the interregnum.

46. Abdul Kadir Sulaiman J. (as His Lordship then was) in ***Thilagavathy Alagan Muthiah v. Meng Sing Glass Sdn. Bhd. & Anor, (1997) 4 CLJ Supp 368,*** a case discussing backwages payable to the workman in respect of whom reinstatement was not ordered by the Industrial Court, ordered full backwages from the time of dismissal up to the date the Industrial Court handed down its award. And in doing so, His Lordship said:

> " *Thus there would have to be cogent reasons before the dismissed workman in the circumstances to be denied his full*

backwages or that the quantum of backwages be scaled down. "

47. On the foregoing grounds, the Court decides to order backwages for the interregnum between the date of dismissal and the date of conclusion of hearing i.e. from 15.9.2000 to 23.4.2004, a period of 43 months, giving a total of RM129,000.00 which sum was derived at through multipying RM3,000.00 by 43.

SCALE DOWN

48. Mindful of the cautions to be applied by the Court in its deliberations in the exercise of discretion and giving effect to section 30(5) of the Act, the Court is of the opinion that equity demands the total compensation under both heads mentioned before, which in the instant case amout to RM143,700.00 (RM14,700.00 plus RM129,000.00), should be scaled down under several heads. These are now analysed.

Delay Factor

49. Faiza Tamby Chik J. in ***Vadiveloo Munusamy v. General Tyre Retreaders Sdn. Bhd., (1999) 7 CLJ 596*** having said:

" *As a court equity and conscience, I have to take into account the following factors and in consequence scale down the calculation of the backwages and compensation in lieu of reinstatement. "*

proceeded to scale down both the backwages and compensation in lieu of reinstatement on account of what be referred to as the "delay factor".

50. Delays from the date of dismissal to the date of completion of hearing of the case may be occasioned either on account of the conduct of the parties or as a result of delays occasioned by the Ministry of Human Resources or the Industrial Court.

51. On delays occasioned by a Claimant, Faiza Tamby Chik J in ***Vadiveloo Munusamy (supra)*** had this to say:

> *" It is observed that from the time Claimant was dismissed till hearing before Industrial Court on 26 March 1999 = 5 years 3 months. It must be remembered that the monetary award in lieu of reinstatement is meant only to compensate the Claimant and not to inflict the maximum financial punishment on the respondent (employer)."*

52. In the circumstances the Court is prepared to consider as appropriate under the circumstances of each case, to scale down on the total compensation awarded, up to a maximum of 30% for delays occasioned by a claimant. In the instant case the Claimant failed to attend the first 3 mentions called but had good cause in that notices of mention were returned undelivered. The Claimant is not blameworthy of any delay and for this reason no scaling down is effected by the Court under this head.

53. An employer guilty of delays compensates the dismissed workman backwages and compensation in lieu of reinstatement calculated up to and until the last date of hearing as is the decision of the Court. To shoulder him with a penalty would be unconscionable.

54. After having arrived at this decision on scaling down for delays, the Court hopes that delays caused by parties arising say, from non-

attendance, request for adjournments, state of non-preparedness and the raising of frivolous preliminary objections, naming but a few fiends of delay, would turn for the better. Such delays clog the Court's arteries, strangulating the system, asphyxiating the Court through backlog.

55. Delay factor could also be attributed to no fault of any party but to that caused by the Ministry of Human Resources or that contributed by the Industrial Court. In this connection the learned author C.P. Mills in his work ***Industrial Disputes Law In Malaysia. 2nd Edn. at page 131*** writes:

> " *The Industrial Court has evolved another principle which operates further to reduce the amount of arrears of wages which the workman can recover on reinstatement: where there has been considerable lapse of time between the dismissal and the reinstatement order, the employer will not be required to bear the whole burden of paying wages in full for the time elapsed: see* ***Selangor Omnibus Co. Ltd. v. Transport Workers' Union (I.A.T. Award No. 11, 24 June 1966) noted [1967] 2 MLJ lii [1965-67] Mal. LLR 31; Lim Seng Seng Bus Co. Ltd. v. Transport Workers' Union (Award No. 10/68, 29 March 1968) [1968-69] Mal. LLR 95.*** *It is unfair to require the employer to meet the full amount of the loss where circumstances over which neither party had any control have made it impossible for the Court to dispose of the case in a reasonable time:* ***Malayan Tiles Manufacturers Ltd. v. Non Metallic Mineral Products Manufacturing Employees' Union (Award No.11/68, 2 April 1968) [1968-69] Mal. LLR 106.*** *In the Lim Seng Case, of the 14 months which had elapsed since the dismissals five*

months were deducted in respect of the delay in disposing of the case. "

56. Although such delays are not the doing of a claimant it is inequitable and against good conscience to shoulder the total penalty of full compensation under both heads upon the employer for he contributes no blame too. For this reason the Court is prepared to consider as appropriate under all the circumstances of a case to scale down up to a maximum of 30% for delays occasioned under this sub-head.

57. In the instant case the Claimant's appeal under section 20 of the Act was on 14.11.2000. The Court received the Minister's reference on 11.11.2002, almost two years later. A further consideration is that the Court was without a substantive Chairman for almost a year from 1.2.2003 to 15.1.2004. In the circumstances the Court scales down the total compensation by 30% under this sub-head.

Gainful Employment

58. This principle of law, set by the Court of Appeal in ***Koperasi Serbaguna Sanya Bhd. Sabah (supra),*** was further clarified by the Federal Court on appeal in ***Dr. James Alfred v. Koperasi Serbaguna Sanya Bhd. Sabah (supra).***

59. The question posed to the Federal Court related to backwages alone. For this reason scaling down by the Court, if any, under this principle should be restricted to backwages alone and should not involve compensation in lieu of reinstatement. In this connection, Steve Shim CJ (Sabah and Sarawak) speaking on behalf of the Federal Court ruled that the Industrial Court in assessing quantum of backwages should

take into account the fact that a workman has been gainfully employed elsewhere after his dismissal.

60. On first reading, this decision similarly arrived in both the Court of Appeal and the Federal Court posed a dilemma to the Court. Both Courts were influenced in arriving at this decision by the writings of Malhotra in his ***Law of Industrial Disputes (supra)*** where the learned author having first said "... *the adjudicator has to counter-balance the claim of the employer that the workman was gainfully employed elsewhere during the period of unemployment with him, with the claim of the workman that he was not employed anywhere at all*", argued that a workman who has been usefully employed in the interregnum between dismissal and reinstatement should not be entitled to backwages during that period for to allow him to do so would result in double advantage and excessive gains.

61. The vexed question that lay before the Court was whether a diligent dismissed employee who strived to seek work, not uncommonly at a lower income, should be worse off in the final analysis than from a dismissed employee who made no effort to be productive and earn an income. And the fact that the Court is enjoined to discount the need for a dismissed workman to mitigate his loss by diligently seeking employment elsewhere compounded this dilemma [see High Court in ***Thilagavathy Alagan Muthiah (supra)*** and in ***Great Eastern Mills Bhd. v. Ng Yuen Ching (1998) 6 MLJ 214*** and Industrial Court in ***Boots Co. (Far East) Pte Bhd, Singapore v. Kenneth Toh Lee Soo Teong (1981) MLLR 681***]. This same concern of disparity in treatment between a diligent and non conscientious dismissed workman through the application of the principle enunciated by the learned author Malhotra was commented upon by the Learned Chairman, Lim Heng Seng at page 294 in ***Nestle Food Storage (Sabah) Sdn. Bhd. v.***

Terrence Tan Nyang Yin, (2002) 1 ILR 280. Unfortunately Yang Arif did not direct his mind towards a solution.

62. It is my considered opinion that the solution to this illusory dilemma can be found in the speeches of both Gopal Sri Ram JCA and Steve Shim CJ in the **Dr. James Alfred case**. From their speeches, one is able to discern the true application of the principle enunciated.

63. Steve Shim CJ in the Federal Court clarified that the Industrial Court "***should take into account all relevant matters*** *including the fact, where it exists, that the workman has been gainfully employed elsewhere after his dismissal*" (emphasis added).

64. The Court finds particular guidance from that part of Steve Shim CJ's speech at page 533 where His Lordship after quoting Gopal Sri Ram JCA's decision in the Court of Appeal:

> " *It is common ground that in August 1988, the respondent found himself other employment in Peninsular Malaysia. Yet, the Industrial Court did not take into account when awarding the respondent the backwages.* ***It proceeded as though the respondent had not been employed elsewhere during the whole of the period in question.*** " (emphasis added),

His Lordship continued to say:

> " *In our view, this was a material fact which* ***should have been taken into consideration*** *by the Industrial Court in exercising its discretion as to the quantum of backwages to be*

awarded to the appellant. ***This was clearly not done in this case.*** " (emphasis added).

And it should be observed that His Lordship had taken pain, in his speech earlier, to clarify that "*taking into account*" does "*not necessarily mean that the Industrial Court has to conduct a mathematical exercise in deduction.*"

65. Based on the totality of the various speeches, I am respectfully of the opinion that the main quarrel of their Lordship is that the Industrial Court had ignored the fact that the dismissed workman had been gainfully employed in the interregnum. Upon dissection and analysis of the various speeches, I humbly opine that their Lordships' intention in connection with the assessment of the quantum of backwages is that the Industrial Court should actively bear in mind the fact of gainful employment if any, during the interregnum. The Court should then include this fact to all other relevant factors and based on this totality, first, exercise its discretion whether to scale down or not. And secondly, if a decision to scale down is taken, then the quantum of scaling down need not be based on a mathematical exercise.

66. The wisdom of their Lordship did not definitely give rise to the dilemma of inequitable disparity between a diligent and a non-diligent dismissed workman. It is possible therefore, upon consideration of all the circumstances of a case, for the Industrial Court not to scale down on the backwages even if the dismissed workman is gainfully employed in the interregnum provided always that the Industrial Court had taken the fact of gainful employment into consideration in its deliberations.

67. I find need to address one last issue under this head. Does "gainfully employed" entail employment under a contract of service? My

answer is in the negative. I believe that it is sufficient that the workman is in receipt of an income through work. There need not be a contract of service. In support of this I rely on ***A.L. Kalva v. Project and Equipment Corporation of India, AIR SC1361***:

> " *Where an employee had procured an alternative employment during the period of dismissal but subsequently his removal was held illegal, he is not entitled to salary for such period. Under the normal circumstances where an employee was removed from services and later on this removal was held illegal, he was entitled to salary during such period provided he had not engaged in any* ***trade, business or employment.***" (emphasis added).

I am propped further by the Indian Supreme Court case of ***Om Parkash Goel v. Himachal Pradesh Tourism Development Corporation, (1991) 3 SCC 291*** where in awarding backwages to a dismissed workman the Court held that an income of Rs15,550 earned by the workman as a practising lawyer should be deducted as proceeds from gainful employment.

68. The Claimant had under the Court's questioning testified that after his dismissal he had searched for but was unable to obtain regular employment on account of his age. He further stated that since May 2003 he had been on a part-time basis selling insurance policies earning him an average income of RM700.00 per month. Prior to that from January 2002 to September 2002 he had been a salesman selling wall-paper averaging an income of RM500.00 per month.

69. At the time of his dismissal, the Claimant then aged 48 years, worked as a General Manager at a salary of RM3000.00 per month. He

had attempted to seek employment, failed and to eek out a living and goes without saying, to maintain his self respect as a productive individual, fell to working as a part-time salesman for 9 months selling wall-paper and thereafter for 12 months preceding the last date of hearing, selling insurance. For this venture he earned a total of RM12,900.00 which averaged RM300.00 per month for the 43 months of unemployment, barely 10% of his former earnings.

70. On the totality of the circumstances and with regard to the loss sustained by the Claimant, I find this not a suitable case to scale down, and under the circumstances effect no scaling down of the Claimant's backwages under this head, i.e. 'gainful employment'.

Contributory Conduct

71. The second of the two-fold function of the Industrial Court upon receiving a reference from the Minister is to determine whether the proven misconduct constitute just cause or excuse for the punishment of dismissal. [see ***Wong Yuen Hock (supra)*** and ***Milan Auto Sdn. Bhd. (supra)***].

72. In cases where the Industrial Court determines that the punishment of dismissal is too grievous for the proven misconduct or in cases where the Industrial Court finds the workman to have contributed by his conduct to his predicament, the Industrial Court has scaled down the total compensation awarded for the reason of contributory conduct. In this connection ***Halsbury's Laws of Malaysia, Vol. 7, 2000 Edn. at paragraph 120.103 entitled 'Reinstatement and Compensation'*** reads:

> " *In awarding compensation, the Industrial Court may consider the contributory conduct of the employee in reducing the compensatory award [see* ***Standard Chartered Bank v. Wong Foot Kin (1994) 2 ILR 591; George Kent (M) Bhd. v. Steven Koh Hon Seng, Award No. 368 of 1995****] but any reduction must be based on facts which have been found. [see* ***M. Natonasabapathy v. United Asian Bank Bhd. (1994) 2 CLJ 534****]. It may also take into account subsequently discovered misconduct by an employee to justify a reduction in compensation. [see* ***W. Devis & Sons Ltd. v. Atkins (1977) ICR 662; George Kent (M) Bhd. v. Steven Koh Hon Seng (supra)****]. "*

73. The Industrial Court had effected scaling down the total compensation for contributory conduct by the Claimant in ***Kuala Selangor Omnibus Company Bhd. v. Mohd Isnin Saleh, (2003) 3 ILR 1267*** by 30%; in ***Fatty Chemical (M) Sdn. Bhd. v. Muniandy Muthusamy; (2004) 1 ILR 363*** by 30%; in ***Johor Port Bhd. v. Zainal Mohd. Nahu, (2003) 3 ILR 721*** by 40%; and in ***Unilever (M) Holdings Sdn. Bhd. v. Yang Kang Loong, (2003) 3 ILR 639*** by 50%.

74. Based on the aforesaid principles and precedence the Court is amenable, after considering all the circumstances of a case, to scale down up to a maximum of 50% from the total compensation payable, for the reason of contributory conduct by a claimant.

75. In the instant case there being displayed no evidence of any contributory conduct by the Claimant, the Court finds no reason to scaling down under this head.

CONCLUSION

76. Consistency and predictability in law play a central part in our judicial system. Amongst others, it facilitates settlement of cases without the need to proceed into litigation. Unless directed otherwise by higher authority or persuaded by any party before the Court, the Court will be prone to the application of the principles stated hereinbefore in connection with 'remedies'.

77. In conclusion, the Industrial Court being a court of equity, the vicissitudes of employment and economic requirements being in a continuous state of evolution and hearkening Gopal Sri Ram JCA's words that the imponderables that influence the making of an award being numerous, the Court concedes that the heads of compensation and the heads which enable scaling down on the compensation can never be closed.

FINAL ORDER

78. The Court orders that the Company pays to the Claimant through his solicitors on record, the sum of RM100,590.00 (RM143,700.00 scaled down by 30%) less statutory deductions, not later than 45 days from the date of this Award.

HANDED DOWN AND DATED THIS 8TH JUNE, 2004.

(N. RAJASEGARAN)
CHAIRMAN
INDUSTRIAL COURT.