INDUSTRIAL COURT OF MALAYSIA
CASE NO : 15(22)(15)/4-867/02

BETWEEN

LILLY INDUSTRIES (MALAYSIA) SDN. BHD.

AND

BILLY WAYNE SELSOR

AWARD NO : 1191 OF 2006

Before : **N. RAJASEGARAN** - **Chairman** (Sitting Alone)

Venue: : Industrial Court Malaysia, Kuala Lumpur.

Date of Reference : 29.7.2002.

Dates of Mention : 29.10.2002, 9.7.2003, 17.2.2004, 1.3.2004, 14.5.2004, 3.6.2004, 17.12.2004 and 5.5.2005.

Dates of Hearing : 14.6.2004, 15.6.2004, 25.10.2004, 2.3.2005 (before Court No.22), 12.7.2005, 14.7.2005 and 28.7.2005.

Company's written submission received on : 15.9.2005.

Claimant's written Submission received on : 7.2.2006.

Company's rejoinder received on : 7.4.2006.

Representation : Mr. Vijayan Venugopal (Ms. Summan Nair with him) of Messrs Shearn Delamore & Co., appearing for the Company.

Mr. S. Shanker of Messrs S. Shanker & Associates appearing 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 **Billy Wayne Selsor** by **Lilly Industries (Malaysia) Sdn. Bhd.**

AWARD

Reference

1. Before me for resolution is a reference made by the Minister of Human Resources pursuant to section 20(3) of the Industrial Relations Act, 1967. The reference was made on 29.7.2002. It involves the dismissal of Billy Wayne Selsor, the Claimant to this action. The reference puts the dismissal to have occurred on 30.11.2000. The dismissal was from his employment with Lilly Industries (Malaysia) Sdn. Bhd., the Company.

The Narrative

2. There is Lilly Industries Inc., situated in the United States of America and incorporated in that country, popularly known as the USA. I will call it Lilly USA for short. Lilly USA had operations in various countries. What is relevant to the matter before me, are its operations in Canada, Taiwan, Korea and Malaysia. At the time of the dismissal of the Claimant, the Company constituted Lilly USA's operations in Malaysia.

3. The Claimant was and continues to be a citizen of the USA. The Claimant's employment in the Company was made possible by the issuance of employment pass under the Immigration Regulations 1963. The Claimant held such employment pass for the duration of his employment in the Company. His employment in Malaysia was thus made legal.

4. The Claimant was based in Lilly USA's operations in Korea from 1998 to the year 1999. In August 1999, the Claimant was moved from Korea to the Company, situated in Malaysia. With that, he became an employee of the Company. The Claimant was moved to Malaysia for the purpose of helping to set up the management and to turn around the

business of the Company. He became the senior-most manager in the Company and remained so until the advent of Alan Archie Robertson, from now onwards referred to as Robertson. Robertson was sent by Lilly USA. He became an employee of the Company in September 1997, designated as Far East Managing Director and took over as head of the Company. He remained so until his retirement from the services of the Company sometime in January 2004.

5. Back to the Claimant. From the year 1991 up to 1995 the Claimant was designated as Marketing Manager, ASEAN. In addition to marketing, the Claimant was charged with the responsibility of the day to day administration of the Company. Later, from 1995 onwards the Claimant performed the functions of an operations manager. The Claimant's stand that he was designated as Operations Manager is supported by Lilly USA's company directory. From the time Robertson took over the helm of the Company in September 1999 up to and including September 1999, the Claimant performed a sales function. Exhibit CLE9, a human resources payroll record, designated him as Marketing Manager, Malaysia. On 1.10.1999 the Claimant was designated and started performing the functions of Wood Pro Manager, Far East. It was from this position that he was ultimately dismissed from employment. Recall, that was on 30.11.2000, just a year and two months later.

6. To step side, for a brief account of other employment in the Company which will have a bearing on this decision. Sometime in late 1997 the Company employed another foreign citizen by the name of Jerry Furr. He was designated as Operations Director but performed the functions of an operations manager. His employment in the Company arose from his transfer from the USA where he was working. At about 1998 or 1999 the Company employed a Malaysian, Peggy Hoh, carrying the designation of Operations Controller. She later became Operations

Manager. After the Claimant's dismissal, the exact date not known, but sometime in late 2001 or early 2002, Bill Ceaze, a foreign citizen, was employed by the Company in the designated position of Far East Operations Director.

7. Appropriate at this juncture, to elaborate on how the Claimant came about being appointed to the position of Wood Pro Manager, Far East. At that material point in time a new range of products to be used for furniture repair, called wood pro, had been launched in the USA by Lilly USA. To launch the same in Malaysia, Lilly USA caused to be established in the Company a new division called wood pro division. It was done in order to manufacture the product locally. At the same time Lilly USA arranged to be imported into Malaysia, wood pro products to a value of USD45,000.00 which products were to be sold by the Company. The Company decided that the Claimant's previous work experience made him the best person to head this new division. So it served Lilly USA and the Company to appoint him to the newly created position of Wood Pro Manager, Far East. Unfortunately the wood pro division did not live up to its expectations. In Robertson's words, it was viewed by the Company as a failure because it was unable to meet any of the objectives for which it was set up for. And the Company found it not economically viable to maintain that division. The result, the Company terminated the services of the Claimant through service of a memorandum dated 8.11.2000 written on the letter-head of Lilly USA, signed by Robertson on 15.11.2000 and, handed by Robertson to the Claimant on the date of signing. That memorandum fixed the effective date of the Claimant's termination of service as 30.11.2000. Robertson testified that there was no pre-discussion with the Claimant on his impending dismissal and that the decision to terminate the services of the Claimant was final and not open to discussion. Along with the dismissal letter, the Company offered the Claimant a severance package. It came in the form of a settlement called 'Separation Agreement And

Release of Claims'. The main attraction of that severance package was the payment to the Claimant of a lump sum amounting to RM16,003.20 in return for which the Claimant had to release the Company from various liabilities. The Claimant found the main attraction to be no attraction. He refused to accept that severance package. He then ceased employment as directed in the dismissal letter. Subsequently, by a letter dated 30.3.2001, Low Sheau Wei, the Claimant's secretary had her employment terminated on that very day. Besides the Claimant, she was the only other employee who served in the wood pro division. The reason given for the termination of her employment, in substance, echoed that of the Claimant's. One final aspect of the ill-fated wood pro project. After the Claimant ceased employment, Robertson took over the Claimant's job function relating to the wood pro division. That largely involved the selling off of the inventory of wood pro products that remained.

8. Save for maintaining that the wood pro division ceased operation for being economically unviable, the Company did not labour the position that the Company was financially in dire straits. Had it done so, the evidence before the Court would have put the lie on such a contention. The Company's audited financial statements show profit after taxation at RM4,901,035.00 for the year ended 30.11.1999 and RM2,393,876.00 for the subsequent year ending 30.11.2000. Staff strength too increased from seventy three to ninety three between the period November 1999 and the year 2000. This was because the Company acquired a new factory. Later, in the year 2001 the Company purchased the business of a company called Coates Bros Sdn. Bhd. The Claimant put the purchase price at RM3.2 million. Robertson was unable to set a price.

9. Before I depart the narrative, I find it timely to lay down the first paragraph of the Claimant's dismissal letter. This paragraph enumerates the Company's reason for the dismissal. It goes like this:

> *“ Today I am communicating actions that are part of an overall plan to streamline Far East operations. Cost reduction actions have already been taken at all U.S. and Canadian locations as a part of the Company’s overall plan to reduce operational costs. Throughout this process to reduce operational costs, the Company has selected those employees whose responsibilities could be eliminated or combined with others in promoting organizational efficiency. As a result of this decision your employment will be terminated due to a reduction in forces. You are being released from your job duties effective today. However because of your Expat Status, the effective date of your termination will be November 30,2000. This has been reviewed by management and is final. ”*

The Submissions

10. Both Mr. V. Vijayan and Mr. S. Shanker, learned counsel appearing for the Company and the Claimant respectively, spared no efforts in putting across their respective positions interspaced with their authorities in support thereof. I am grateful for their assistance.

11. Mr. S. Shanker’s submission took a two-pronged approach. He identified two main issues for decision. First, whether the Claimant’s dismissal was with just cause or excuse. Second, to determine the remuneration package of the Claimant at the time of his dismissal. I too find that a convenient approach to adopt and will do so.

12. On the first issue, Mr. S. Shanker’s challenge of the Claimant’s dismissal had at its forefront the burden imposed upon the Company to justify the dismissal. Using this front, he fashioned the argument that it was incumbent upon the Company to produce in the Court as a witness,

Huges Cates of Lilly USA. It was Huges Cates who took the decision to dismiss the Claimant. This the Company failed to do. That failure, he submitted, was fatal to the Company's case. For such a proposition, he relied on the Industrial Court's decisions in ***Cygal Bhd. v. Issam Abdul Rahman (1998) 3 ILR 44*** and ***Sunmugam Subramaniam v. JG Containers (M) Sdn. Bhd. & Anor (2000) 6 CLJ 521***. Unfortunately the charger that he mounted did not carry home his attack. With respect, I found him not to have driven home the point on how this failure of the Company to call Huges Cates as a witness supported the first issue on the Claimant's dismissal. Particularly so, when Robertson could testify authoritively on details pertaining to the Claimant's dismissal. On that same issue, learned Counsel mounted yet another horse. This horse, he led through a field of arguments supporting his stance that the Claimant was not redundant to the needs of the Company. I find it sufficient to gallop through his arguments at speed. He maintained that the Claimant was versatile, capable of performing functions which the Company had assigned to other expatriate employees junior in length of service to the Claimant and, that the function performed by the Claimant had not diminished after his retrenchment for being performed by Robertson *ex eventu*. His next salvo, he directed at the financial status of the Company. He shot through the Company's accounts, the acquired new investments and, the increase in the number of employees both local and foreign, to show that the Company was sound financially. Riding this bullet, he argued that the Company's reason for the Claimant's retrenchment as stated in the dismissal letter was unfounded and an afterthought.

13. Continuing on the first issue, Mr. S. Shanker unleashed yet another shot, quoting elaborately from a decision of the Industrial Court in another case involving the Company reported as ***Lilly Industries (Malaysia) Sdn. Bhd. v. Hum Foo Weng (2004) 3 ILR 204***. Valiant though, it failed to find a mark on me for the reason of factual

incompatibility and variance in the decision making approach. Mr. S. Shanker then culminated his charge on the first issue by relating to the manner in which the Claimant's dismissal was effected by the Company. He particularly referred to the Code Of Conduct For Industrial Harmony and in relation to this, the case of ***Bayer (M) Sdn. Bhd. v. Ng Hong Pau*** first heard in the Industrial Court and reported at ***(1997) 3 ILR 334***, next heard in the Court of Appeal, reported under the same title in ***(1994) 4 MLJ 361***. Along the way, Mr. S. Shanker also found reason to let off a quote from that brilliant judge, Edgar Joseph Jr. (FCJ) speaking in ***Said Dharmalingam Abdullah v. Malayan Breweries (M) Sdn. Bhd. (1997) 1 MLJ 352***. That particular quote, more relevant to pre-dismissal enquiries, I found to be inappropriately fired where the Claimant's dismissal was concerned.

14. On the second issue, relating to the remuneration package of the Claimant. It will become relevant only if I find the Claimant's dismissal to be without just cause or excuse. That makes it premature to discuss it now.

15. Turning now, to Mr. V. Vijayan's defence. Actually attack, for he submitted first. To me, it appeared very reminiscent of the Company's pleadings. At the very outset, he dug into a trench which I must admit, I found to give the Company considerable safety should the battle in the Court perchance against it. The back-up which he installed was that the Claimant not being a Malaysian and his employment by the Company being dependent on a valid employment pass, the Claimant should not, in the event of the Court finding in favour of the Claimant, be accorded the remedy of reinstatement.

16. Mr. V. Vijayan then proceeded to fortify the Company's justification of the Claimant's retrenchment. He constructed it on a turret built up of several planks. The first and most important plank that he fastened

involved the right of a company to organize its business in the manner it considers best. His research was excellent. Actually he need not have gone to such great lengths. I found that he could have driven home the point with that quote alone of Gopal Sri Ram JCA, speaking for the Court of Appeal in ***Harris Solid State (M) Sdn. Bhd. & Ors v. Bruno Gentil Pereira & Ors (1996) 4 CLJ 747***.

17. For his next plank, Mr. V. Vijayan relied on the steps that the 'Lilly group of companies' as he called it, undertook to reduce its operational costs. He particularly referred to the operations in the USA and Canada. Here, I must admit I fell off the plank. I knew not what drove the Lilly group of companies to do this cost reduction exercise. To enable an employer to retrench workmen on the grounds of reducing operational costs and without more, would indeed be an alarming proposition. Such a proposition would effectively sound the death knell to the very concept of security of tenure of employment. Further, what I find of interest is not that which transpired in the USA or Canada but instead what befell the Company in Malaysia. Save for the non-viability of the wood pro division, there lie nothing before me to show the need for such a cost reduction exercise nor whether such an exercise was indeed carried out within the Company.

18. The next plank that Mr. V. Vijayan attached to his platform; this was that the Claimant was responsible for the failure of the wood pro project. It failed for the Claimant's poor performance. To give credit to Mr. V. Vijayan, at no time did he veer off the course of redundancy and attribute the Claimant's dismissal for the reason of poor performance. For had he done so, he would have failed. The reason is that the Company's battle plan throughout the hearing was not in the direction of establishing those prerequisites necessary to support a case of dismissal for non-performance. What these prerequisites are, I find not the need to repeat here. And then, there is the unshakable authority of Raja Azlan

Shah CJ (as His Royal Highness then was) in ***Goon Kwee Phoy v. J & P Coats (M) Bhd. (1981) 2 MLJ 129*** which effectively nails the Company to that reason given in the Claimant's dismissal letter, earlier reproduced. Neither did Mr. S. Shanker attempt to adduce *mala fides* in the Company's decision to retrench the Claimant by taking the route that the retrenchment was a colourable exercise of power used as a cloak to dismiss the Claimant for purported non-performance of his duties. I trust with all these, I have put aside what evidence and submissions there exist on the Claimant's performance as Wood Pro Manager, behind me.

19. Yet another plank affixed by Mr. V. Vijayan. This was that the Company need not suffer financial loss to find an employee to be redundant. I agree with him. So I find the need to quote all those authorities that he did to support this proposition, to be by itself redundant.

20. Mr. V. Vijayan's next plank. He skilfully tied it up with the Claimant's ability to perform other functions within the Company and the application of the principle of last-in-first-out or LIFO as it is commonly known. On the Claimant's ability to perform functions other than as Wood Pro Manager, he espoused the Company's stand that the Claimant was out-dated. In short, the message prevailed upon me was that the Claimant had become a dinosaur, put out of place after closure of the wood pro division. There was no Jurasic Park within the Company to contain him. On the application of the principle of LIFO, Mr. V. Vijayan submitted that the Claimant being the only employee of his category in the wood pro division, that principle had no place. As is customary of him, he gave a slew of authorities in support. He quoted the decisions in ***First Allied Corporation Bhd. v. Lum Siak Kee (1996) 2 ILR 1628, Maybank Discount Bhd. v. Nooraini bte Mohd Ishak***

(1994) 2 ILR 822 and ***Aluminium Company of Malaysia v. Jaspal Singh (1978) 2 ILR 558***.

21. The final plank with which learned Counsel erected his turret concerned the procedure leading to the Claimant's retrenchment. He took the Code Of Conduct For Industrial Harmony. He threw it off from his turret with the cry that it imposed no obligation in law. Support for such a proposition, he claimed to find in the High Court decisions in the case of ***Penang & Seberang Prai Textile & Garment Industry Employees Union v. Dragon & Phoenix Bhd. Penang & Anor (1989) 1 MLJ 481*** and in the case of ***Malaysia Shipyard & Engineering Sdn. Bhd. v. Kesatuan Pekerja-Pekerja Shipyard & Engineering Sdn. Bhd., OM No. R1-25-31-98,*** a copy of which decision he made available to the Court.

22. Mr. V. Vijayan also spent much time on the remuneration package of the Claimant. Understandably so. For tied up with his entrenched position that the Claimant if successful in this Court, could not be afforded the remedy of reinstatement, was the position he took that remedy if any, should be restricted to award of salary for the remaining period of the Claimant's contract of employment. Such a proposition could be extracted he submitted, from the Industrial Court's decisions in ***Microsoft Malaysia Sdn. Bhd. v. Michael Brian Davis (2002) 2 ILR 455*** and ***Stamford College v. Leslie Dolores Swanson (1997) 1 ILR 152***. Both these cases involved workmen who were non citizens employed under employment passes. For reason adumbrated earlier, I find no reason to discourse on these matters without determining the first issue, that is, whether the Claimant's dismissal was with just cause or excuse.

23. So much for the submissions. If I had missed out naming any of the authorities leaned upon for support by either learned Counsel, it is

not by neglect. More that they were either reasserting a principle established by an authority already quoted by either of them or, I had discovered my own, more relevant to the point under consideration.

The Law And Its Application

24. I will refrain from repeating that oft quoted passage of Gopal Sri Ram JCA in ***William Jacks & Co. (M) Sdn. Bhd. v. S. Balasingam (1997) 3 CLJ 235*** on what retrenchment means and that other passage by the learned author Dunston Ayadurai in his work entitled **Industrial Relations in Malaysia – Law and Practice**, where he wrote on when redundancy of employees arise. I guess that in the event of any review inspirations by either party of this decision, this will establish that I had borne in mind these two authorities in my deliberations.

25. An analysis of Industrial Court decisions and those springing out of the revered bosoms of higher courts of record list those mentioned under as the issues central to a dismissal arising out of redundancy.

26. Firstly, there must be redundancy. Secondly, the dismissed workman must have been correctly selected for retrenchment. And thirdly, the employer should have adopted a fair procedure before carrying out the retrenchment. These form the three pillars upon which an employer sets the stage from which he puts forth an arguable case to justify the dismissal of a workman for the reason of redundancy. There is one common beam that connects these three pillars. That is, the unshakable proposition of law which imposes the burden upon the employer to prove the existence of these prerequisites and thus establish the correctness of the dismissal.

27. Proceeding now, to apply these principles to the instant case of the dismissal of the Claimant. I will confine myself to the peculiarities and circumstances of the case. This enables me to avoid generalities.

28. On that first issue, whether there existed redundancy within the Company at the time of the dismissal of the Claimant. More specifically, whether the position held by the Claimant had become redundant. Here, I have to tie to this pillar the element of *mala fides*, if any, on the part of the Company. It is appropriate at this point to remind myself of the words of Gopal Sri Ram JCA on the inherent right of the Company to organize its business as it found best. Actually, what the learned Judge said is well known. But for impact I will repeat it. Speaking for the Court of Appeal in ***Harris Solid State (M) Sdn. Bhd. & Ors v. Bruno Gentil Pereira & Ors (1996) 4 CLJ 747***, his Lordship said :

> *" An employer may re-organise his commercial undertaking for any legitimate reason, such as promoting better economic viability. But he must not do so for a collateral purpose, for example, to victimise his workmen for their legitimate participation in Union activities. Whether the particular exercise of management power was exercised bona fide or for collateral reasons is a question of fact that necessarily falls to be decided upon the peculiar circumstances of each case. "*

29. On the element of *mala fides,* Gopal Sri Ram JCA again. This time, in ***William Jacks & Co. (M) Sdn. Bhd. v. S. Balasingam (supra)***. Although his Lordship spoke on *bona fide* exercise of business organization, what he said suits my purpose. And this is it :

> *" So long as that management power is exercised bona fide, the decision is immune from examination even by the Industrial Court. However, the Industrial Court is empowered,*

and indeed duty-bound, to investigate the facts and circumstances of a particular case to determine whether that exercise of power was in fact bona fide. "

30. It is in substance, the Company's case that redundancy came about as a result of business reorganisation. This arose due to the closure of the wood pro division. All I need to examine is whether there was a genuine closure of the wood pro division and if so, whether the closure was prompted by *mala fides*. That the division was shut down and remained so thereafter is an open fact. The need for me to go into evidence in support would be outrageously superfluous. What remained of wood pro products unsold, had to be disposed of by Robertson. Retaining the position of Wood Pro Manager to sell these products, besides serving the purpose of delaying the closure of the division, would have served no more.

31. To now turn to that part on whether the Company was moved by intentions considered *mala fides*. Mr. S. Shanker spent much time during trial and in submission showing that the Company as a whole was not in financial dire straits so as to embark on a cost reduction operation. I had concluded earlier that a company need not necessarily be in financial troubled waters to effect a reorganisation that brings about redundancy. Recall, I have already discounted that part on the purported non performance of the Claimant in his appointment as wood pro manager. No other matter was raised by the Claimant to show *mala fides* on the Company's decision to close the wood pro division. My inescapable conclusion is that the Company's closure of the wood pro division was real and *bona fide*.

32. The contagion effect of that closure was the obliteration of the position of Wood Pro Manager which the Claimant held at that point of time. In the event, I hold that the position held by the Claimant had

indeed become redundant. With this, I find the Company to have successfully constructed the first pillar needed to establish a case for redundancy.

33. Moving onn, to the second pillar. Recall, this involves the Company's selection of the Claimant for retrenchment. On this subject, what immediately springs to mind is that principle of selection known as LIFO, an abbreviation for 'first in, last out'. Recall again, Mr. V. Vijayan submitted that the LIFO principle operated within the same category of workmen and as such did not apply where there was only one employee within that category. With that proposition I have no quarrel. But such a proposition regarding the application of the LIFO principle cannot be applied in isolation. And I must say that I found it inapplicable to the facts surrounding the Claimant's dismissal.

34. The LIFO principle in its rudimentary sense means that in the matter of retrenchment, the employer should commence with the latest recruit and progressively retrench workmen higher up in the list of seniority. The principle has long evolved out of its primordial origin. Its application in its original state, based on length of service, is now relevant only within the narrow band where all other factors are equal. Its application can now be tempered and influenced by a variety of criterion. Seniority in service can be juxtaposed with designation, work categorisation, job scope, qualifications, work experience, suitability, capability, disciplinary history and many, many more. Indeed, that comment by Gopal Sri Ram JCA in ***Fawziah Holdings Sdn. Bhd. v. Metromac Corporation Sdn. Bhd. & Anor Appeal (2006) 1 CLJ 996*** that – "*Not all the ingenuity in the world can pour wine out of an empty bottle*" is rendered impotent where usage of the LIFO principle is concerned. In skilful hands, the ingenuity of employers and their lawyers can shape the principle of LIFO such as to either include or

exclude within its parameters, workmen selected for retrenchment. This is one bottle which is far from empty.

35. Although Mr. S. Shanker allocated no space in his submission in answer to the position taken by Mr. V. Vijayan on the application of the LIFO principle, he did sort of flirt at the periphery by enticing my attention to certain aspects of the evidence which centred the Claimant's ability to perform functions other than that of wood pro manager. His argument that the Claimant could have been moved to perform one of these functions which still existed in the Company, I found to fall more within the precinct of that third pillar concerning the employer adopting a fair procedure before retrenchment.

36. Timely now, I find, to depart momentarily from this second pillar of selection and to foray into that third pillar of fair procedure. I do so for the approach I intend to take. On fair procedure, it is common place to find Industrial Court decisions making reference to the Code Of Conduct For Industrial Harmony, easier referred to as the Code. In particular those parts of the Code referring to pre-retrenchment discussion, the adoption of the LIFO principle, the offering of alternative employment, the giving of adequate notice and, the granting of a severance package.

37. I had stated earlier that Mr. V. Vijayan submitted that the Code has no legal force and that failure to observe it could bring forth no sanction. I am quick to say that I agree. Before voicing my thoughts further, I will examine learned Counsel's authorities on this proposition.

38. First, the High Court's decision in the Penang and S. Prai Textile & Garment Industry Employee's Union case. That case, up for judicial review from an award of the Industrial Court, involved a claim of check-off which the union applied to be included in a collective agreement. The Industrial Court had decided to disallow it. Mohamed Yusoff J,

upheld the Industrial Court's decision firstly because the Federal Court had in the case of ***Non-Metallic Mineral Products Manufacturing Employees Union v. Malaya Glass Factory Bhd. (1985) 1 MLJ 129*** held that allowing check-off amounted to acting out of jurisdiction by the Industrial Court for the reason that check-off did not constitute a trade dispute within the meaning of the Industrial Relations Act, 1967. The second reason revolved the application of section 30(5A) *ibid*. In brief, that sub-section enables the Industrial Court to take into consideration whilst arriving at a decision, agreements on a footing similar to the Code. Paragraph 35 of the Code allows collective agreements to cover matters concerning check-off. The learned Judge's comment that "*there is no legal force or sanction for failing to accept such Code of Conduct ...* " was one that he made in resolving the central issue of check-off. That the comment has to be read in the context of check-off becomes apparent from the three-grounded approach that the learned Judge took in arriving at his decision. These involved the Code's lack of legal clout, the need for written consent before effecting check-off and, the fact that check-off did not constitute a trade dispute. The principle to be distilled from that decision I feel, is more consistent with the proposition that section 30(5A) *ibid* does not seize the Industrial Court of jurisdiction to decide on what is not a trade dispute and that the Code, which has no legal effect, cannot alter this position.

39. Turning now, to Mr. V. Vijayan's other authority on the same subject on the effectiveness of the Code. This involved a decision by K.C. Vohrah J (as his Lordship then was) in the Kesatuan Pekerja-Pekerja Shipyard & Engineering Sdn. Bhd. case. Various issues were put before the learned Judge. The only one relevant here is that on the application of the LIFO principle. The Industrial Court had taken umbrage with the employer for having failed to comply with the LIFO principle, although compliance thereof was not provided for in the collective agreement between the parties but because it appeared in the

Code. To this, the learned Judge pointed out that in an earlier decision involving the same parties, the Industrial Court had already decided that the Company was not obliged to follow the LIFO principle. To later turn around and make such an imposition upon the Company, the learned Judge found to be a jurisdictional error. It was in this context that the learned Judge referred to Mohamed Yusoff J's dicta from the Penang & S. Prai Textile & Garment Industry Employees Union case, relating to the Code lacking legal force.

40. Agreeably the Code is couched in words that give parties discretion on its implementation. Agreed too, the Code has by itself no legal effect. But seen in the context of section 30(5) *ibid* which enjoins the Industrial Court to make decisions based on equity, the Code becomes an effective guideline to the Industrial Court and all others on equitable practices. Section 30(5A) *ibid* is in consonant with such a proposition. It reads :

> *"(5A) In making its award, the Court may take into consideration any agreement or code relating to employment practices between organisations representative of employers and workmen respectively where such agreement or code has been approved by the Minister."*

Edgar Joseph Jr. FCJ, speaking for the Federal Court in the case of ***Said Dharmalingam Abdullah (supra)*** brought into focus the application of section 30(5A) *ibid* :

> *" It is noteworthy that s.30(5A) of the Industrial Relations Act, 1967, authorises the Industrial Court, in making an award, to take into consideration, the requirements of the Code."*

41. Try as I would, I could not find the two High Court decisions relied on upon by Mr. V. Vijayan to give carte blanche to an employer to avoid the Code. The signatories to the Code are the then Minister of Labour and Manpower, the Malaysian Council of Employer's Organisation and the Malaysian Trade Union Congress. It is a salutary agreement designed to bring about industrial harmony and peace through the implementation of fair labour practices. It is therefore my believe that the sanctity of the Code should be maintained and its agreed terms adopted unless the employer has cogent and convincing grounds to depart from it. A blatant disregard of the terms agreed in the Code would tantamount to the perpetration of unfair labour practice or even extend to connote *mala fides*.

42. I had earlier, found that the Company had established the first pillar of there being redundancy, particularly of the position of Wood Pro Manager which was held by the Claimant. I now proceed to the other two pillars of selection and of fair procedure. The approach that I take is to combine both and apply the principles involving each to the facts surrounding the Claimant's dismissal. In the process I cannot avoid repeating matters already stated earlier.

43. The circumstances under which the wood pro division was created and finally disbanded, I have earlier narrated. The Claimant had no control over either. So too did he not have control over his selection for appointment to the position of wood pro manager. The creation of the division and the appointment of the Claimant to that position were to suit the purposes of the Company. To put the Claimant out of job without further effort by the Company would be manifestly inequitable. Here, I could perhaps draw an analogy to the case of ***Suraj Prakash Bhandari v. Union of India 1986 Lab IC 671, 672 (SC)***. It involved a welder who subsequent to a management induced reorganisation was redesignated as senior welder. A year and a half later, through

application of the LIFO principle, he was declared surplus. The Supreme Court of India observed that justifying such an action would tantamount to arming employers with a new weapon to promote a workman after creating a new post, abolish it after some time and relieve him of his duties on the plea of surplusage. The court discountenanced this procedure and observed that the easiest course for a reasonable management to adopt in such cases would have been to revert him to the position wherefrom he was promoted.

44. Amongst others, the Claimant had performed duties both in operations and in marketing and sales whilst in the employ of the Company and immediately before his move to wood pro division. He had held senior positions in both fields. Subsequent to the Claimant's move, the Company employed Jerry Furr and Peggy Hoh to perform duties relating to operations. They continued to perform these functions at the time of and after the Claimant's retrenchment. Not only that, sometime after the Claimant ceased employment, the Company employed yet an additional person, Bill Cease, to perform duties in operations. Save for Peggy Hoh the other two were foreign citizens or expatriates as they are commonly referred to.

45. In the circumstances, the Company could have fitted the Claimant into the position to which Bill Cease was subsequently employed. Or the Company could have chosen to apply the LIFO principle with variations as necessary, on those performing duties in operations. The Company chose neither. Instead, without any discussion or fore-warning to the Claimant, it made a decision final in nature, to terminate the services of the Claimant. And this it did stating the same in the dismissal letter. Robertson's explanation in re-examination that the Claimant's experience as operations manager from 1995 to 1997 would be irrelevant in the year 2000 because the position had become more complex stood as a mere statement. The Company's submission that the Claimant's experience as

operation manager as well as marketing manager had become out-dated, in the absence of any support, I found to be lame, incapable of upright posture independently.

46. Mr. V. Vijayan drew my attention to the Company's offer of RM16,003.20 to the Claimant as severance payment. This, he submitted was an indication of the retrenchment having been carried out fairly. Considering the claimant's service of more than nine years with the Company and his monthly remuneration package which I will immediately after this discuss, I find the Company's offer of RM16,003.20 to be somewhat outrageous. Though the Company was not in law nor I presume *ex contractu*, required to make a severance payment to the Claimant, the parley sum offered to him in the face of his real remuneration package, appears not to settle favourably as an index of fairness.

47. I find much merit in Mr. V. Vijayan's submission, in his own words, that so long as the retrenchment was carried out fairly, the decision of the Company to retrench the Claimant should be upheld. But then, my discussion thus far compels me to conclude that the selection of the Claimant for retrenchment and the manner in which it was carried out was unfairly done. Further, by not adhering without good cause to the advice given in the Code in relation to retrenchment, the Company had opened itself to criticism as having fallen below the standards of a reasonable employer. The contagion is to render the dismissal of the Claimant to be without just cause or excuse. And so, it befalls the Claimant to trumpet the call of victory in the Court.

The Claimant's Remuneration Package

48. That leads me to my second task, that is, to determine the Claimant's remuneration package. Parties are on common ground that

at the time of the Claimant's dismissal, his remuneration package included a salary, accommodation whose rental was paid for by the Company, payment towards the education of his daughter in the form of school fees and, the usage of a Company car.

49 First, I will deal with the benefits-in-kind that constituted the Claimant's remuneration package. There is no dispute here. It is Robertson's evidence that the Claimant was housed by the Company in a condominium whose rent was RM8,000.00 per month which rent was paid for by the Company. It is also Robertson's testimony that the Company paid the Claimant's daughter's school fees which amounted to USD9,130.00 per year. Finally, on the motorcar, Robertson said that the Claimant was provided with a model of the make called toyota camrey. Neither party attached a value to the benefit of the car. For want of any other criteria, I have taken judicial notice of our own income tax regulations which *vide* Inland Revenue Board Public Ruling No. 2 of 2004 dated 8.11.2004, attaches a value of RM5,000.00 per year as the annual prescribed benefit when an employee is provided with a company car purchased at a cost ranging from between RM100.000.00 to RM150,000.00.

50. Now, to deal with the more contentions part, that is, the salary earned by the Claimant. Three aspects arise in relation to the Claimant's salary. First the quantum, next the geographical locations at which it was paid and finally, the Company's liability if any, on that portion that was paid outside Malaysia. It is the Claimant's version that his salary was USD8,800.00. Of this sum he was paid RM3,630.00 in Malaysia and the balance was paid into his bank account in the USA. The Company's position in submission is restricted to that the Claimant was paid a salary of RM3,630.00 by the Company and that its liability stopped there. That part of the Claimant's salary which was paid into his bank account in the USA was made by Lilly USA, the Company said.

Unfortunately, I must admit, I did not find this submission to be of much help. Neither could I obtain any assistance from the case of ***Steven Ferenc Palos v. Ogilvy One Worldwide Sdn. Bhd./Ogilvy & Mather, Award No. 2316 of 2005*** which Mr. V. Vijayan referred me to. In that case, the workman in addition to his salary paid in Malaysia, was paid a sum of RM5,000.00 in Hong Kong. The learned Chairman excluded the RM5,000.00 from the computation of backwages, which he awarded to the workman. Save for stating that there was "*no clear evidence to substantiate his claim that this payment was made by the company*," the learned chairman said no more. That, with respect, paralysed my ability to discern his reasoning and examine its application to the circumstances of the instant case.

51. Exhibits CLE22 and CLE9 dated 10.1.1994 and 1.1.1998 respectively, both Company generated documents, were of no help in determining what the salary of the Claimant was at the time of his dismissal on 30.11.2000. For both stated the salary earned by the Claimant on their respective dates which were well before the date of dismissal. Help instead, I found in Robertson's testimony when in cross-examination he confirmed that the Claimant was paid a salary of USD8,800.00 per month. That sum tallies with the Claimant's version and I therefore accept it as a fact.

52. On the aspect of location of payment, it is undisputed that the Claimant was paid RM3,630.00 in Malaysia and the balance in the USA.

53. Now, for that final aspect of liability of the Company on the balance of the Claimant's salary which was paid in the USA. Mr. S. Shanker referred me to the decision in ***Malaysian Tobacco Co. Bhd. v. National Union of Tobacco Workers (1990) 2 ILR 210*** where learned President Tam Kam Weng referred to salary as the price paid to someone for his labour. That, I found to be most appropriately put. What concerns a

workman is what his employer had agreed to pay him for his labour. In this case what also concerned the Claimant, is his arrangement with his employer on the proportion and location of payment. Who then satisfied this arrangement does not really concern the workman. He only becomes concerned when there is a failure in the arrangement. Inextricably linked with this is the group concept of Lilly Industries. That the various companies within the group are interrelated and capable of acting on behalf of each other is seen from the dismissal letter of the Claimant given on the letter head of Lilly USA and signed by Robertson, an employee of the Company; the Claimant's severance package agreement to which Lilly USA is a party; the dismissal letter served on the Claimant's secretary, Lou Sheau Wei, contained in the letter head of Lilly Industries Far East Ltd. and signed by Peggy Hoh another Company employee; Exhibit CLE9 which is a human resources payroll record from Lilly USA breaking down the location of the Claimant's salary to be paid in Malaysia and in the USA and signed by Robertson; and Exhibit CLE 22 addressed to the Claimant and signed by John Million, the General Manager of Lilly Industries Far East Ltd. again showing details on the various locations of payment of the Claimant's salary. Adding weight to all this is Robertson's evidence that all expatiate staff of the Company including the Claimant, were paid part in Malaysia and part overseas. And on the salary breakdown stated in exhibit CLE9, Robertson did not deny that it was paid in respect of the Claimant's duties which he performed in the Company. Finally, there exist no evidence before me that the Claimant performed any duties for any others within the group other than the Company. Consequently it stands to reason that the payment he received in the USA was remuneration for the labour he put in for the Company.

54. ***Cable & Wireless plc (appellants) v. MUSCAT (respondent) (2006) IRLR 354*** is a decision of the Court of Appeal, England. It involved the identification of the employer of an employee who worked for

one company but was pursuant to an arrangement paid his salary through an employment agency. The court held the company to be the employer. Facts material to that case and the decision arising therefrom are totally alien to the instant case before me. But what attracted me is an analogy drawn by Lady Justice Smith speaking for the court. It goes like this :

> *" Mrs A employs a domestic cleaner W for several years during her marriage to Mr A and always pays W herself. There is no doubt that Mrs A is W's employer in a contract of employment. Following the divorce of Mr and Mrs A, W continues to work for Mrs A but, as part of the maintenance arrangements between Mr and Mrs A, Mr A agrees with Mrs A that he will pay W's wages. Mr. A then agrees with W that, for as long as she continues to clean Mrs A's house, he will pay her wages. Mrs A continues to control the way in which the work is done. Can it really be said that there is now no longer a contract of employment between Mrs A and W just because it is Mr A who pays the wages, by arrangement with Mrs A? We find the suggestion surprising. The position would be the same if, when Mrs A took W on as a cleaner, she arranged that the wages would be paid by the trustees of a family trust or by the company that she worked for.* ***It seems to us that it cannot make any difference how the wages are paid. In any of the arrangements we have envisaged, Mrs A, who had the benefit of the work done, would remain liable to pay the wages if the arrangement broke down.*** " (emphasis added).

55. Mention was made of an offer of employment dated 1.10.1999 appointing the Claimant as Wood Pro Manager. The offer, contained in a letter bearing the Company's letterhead, showed the Claimant's acceptance of the same. In that offer the Claimant's monthly salary is

stated as RM3,630.00. I am not unduly perturbed by this letter. I attach no importance to it. I will explain why. Robertson thought that the purpose of this letter was to facilitate the application of an employment pass for the Claimant. On this, a decision by Raus Sharif J. in the case of ***Tyco Engineering & Construction (M) Sdn. Bhd. v. James Francis Trimble & Anor (2005) 7 CLJ 236*** is on point. In that case, the expatriate workman was given a written contract of employment which did not reflect his true designation and remuneration. The employer admitted that the written contract was for Immigration purposes. The learned Judge upheld the learned Industrial Court Chairman's decision that the contract was merely drawn up to facilitate the application of the expatriate workman's work permit and for no other purpose.

56. Against such a background, I cannot but be compelled to reject the Company's claim of non-responsibility on that part of the Claimant's salary that was paid in the USA. In the event I find the Claimant's salary to be USD8,800.00 per month.

Remedy

57. The Claimant's employment in the Company was made possible and given legal status by the issuance of periodic employment passes by the Malaysian Immigration authorities. As Wood Pro Manager, he was given an employment pass for the period 2.2.2000 up to 19.1.2002. His employment beyond the date of 19.1.2002 was unassured and depended on the Immigration authorities issuing him further employment passes. As to whether he would be issued any is a matter of speculation. Also, the mysteries of the workings of the Immigration authorities remain unknown to me. The Claimant is therefore put in a position no different from that of a workman employed under a fixed term contract of employment. And that fixed term employment was for the duration of his employment pass.

58. I have had in the past, occasion to examine the remedy that should accrue to a workman employed under a fixed term contract whose dismissal is found to be without just cause or excuse. I have said that reinstatement or compensation in lieu of reinstatement and consequential backwages is not an appropriate remedy. What is, is a fixed sum of money that will equate to the total sum of what the workman would have received as remuneration had his contract of employment not been prematurely terminated [see ***Malaysian Wetlands Foundation v. Devendiran S.T. Mani (2005) 2 ILR*** and ***Malaysian Airline System Bhd. v. Karthigesu a/l V. Chinnasamy, Award 2230 of 2005***]. I have not since found reason to depart from this view. Thankfully, the position adopted by the Company on remedy bears the same result. It is therefore in keeping for me to order that the Claimant be paid the remuneration that he would have received during the interregnum between the date of his dismissal and the date of expiry of the employment pass that he was originally granted, that is, from 1.12.2000 up to 19.1.2002. There being no component of backwages, the need to take into account post dismissal income earned by the Claimant, as postulated in ***Dr. James Alfred v. Koperasi Serbaguna Sanya Bhd & Anor (2001) 3 MLJ 529***, does not arise.

59. That the remuneration package of the Claimant included a salary and benefits-in-kind as recorded earlier is not in dispute. The question confronting me is whether the lump sum that I order should include the value of the benefits-in-kind. Mr. S. Shanker took the position that the Claimant's remuneration should be his salary plus value of benefits-in-kind extended to him. As to why, he offered no reasons nor did he quote any precedence. Mr. V. Vijayan, *in adverso* took no position save for that stated earlier. After anxious consideration, I am driven to say that the question must be answered in favour of the position adopted by the Claimant. My explanation follows.

60. Employment practices have evolved to treat a workman's remuneration as a holistic package. The package, besides the basic salary may include other monetary and non-monetary benefits including benefits-in-kind. It is not uncommon for a workman to accept a lower basic salary in a remuneration package which includes generous benefits. To therefore deny such a workman the value of the benefits that he receives in the computation of his true remuneration would be inequitable. In the upshot, I find it incumbent to include the value of the benefits-in-kind which the Claimant received, in my computations. This will truly put the Claimant in that position which he would have been had his services not been terminated by the Company. In so deciding, I am comforted by a decision of Mustapha bin Hussain J. reported as ***Michael Clifford v. Goh Ban Huat Bhd. (1991) I ILR 596.*** In that case, the expatriate workman employed by means of a two-year employment pass, had his employment terminated after six months from the date of commencement. Upon termination of employment, the employer ceased to pay the workman his salary, sought the return of the company-car assigned to him, ordered the workman to vacate his company-paid residential premises and, requested the refund of the deposit paid by the employer in respect of the workman's childrens' schooling. This led the workman to apply to move the High Court for an injunction to order his employer to continue to pay him his salary, monthly house rental, education allowance for his children and provide him with a car and telephone for the remaining period of eighteen months of his contract of employment. The learned Judge allowed the application.

61. It is Mr. S. Shanker's estimation that the Claimant's remuneration package consisting of his salary, house rental and school fees totalled RM44,327.00 per month. I do not agree. The Claimant's salary of USD8,800.00, at the prevailing exchange rate of RM3.69 to the USD, equals RM32,472.00 per month. The benefit of house rental was

RM8,000.00 per month. To this I add the benefit of the school fees of USD9,130.00 per annum which works out at USD760.83 per month or RM2,807.46. And the value of the benefit of the usage of the Company's car proportions at RM416.66 per month. I am able to add the value of the benefit of car usage for the reason that the Claimant's prayer in his pleadings is wide enough to include the same. The Claimant's true remuneration package was therefore RM43,696.12 per month. The Claimant's contract of employment, after termination on 30.11.2000 had a balance of 13.6 months on it. The fixed sum payable to the Claimant should therefore be RM594,267.23.

Illegality

62. I find myself restrained from leaving this case without commenting on one disquieting aspect. It arises from the maxim *ex dolo malo non oritur actio*; meaning, no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. I will now proceed to relate my concern.

63. In order to found a claim for unfair dismissal, a workman must show that he was employed under a contract of employment which is enforceable. A contract of employment tainted with illegality is incapable of enforcement. No action can therefore be brought in the Court based on such a contract. In this connection, contracts of employment are not exempt from the provisions of sec. 24 of the Contracts Act 1950. To explain these provisions I can do no better than to rely on the words as repeated under, of Hashim Yeop A. Sani CJ (Malaya) speaking in ***Chung Khiaw Bank Ltd. v. Hotel Rasa Sayang Sdn. Bhd. & Anor (1990) 1 MLJ 365*** :

“ The provisions of s 24 of our Contracts Act 1950 referred to earlier are explicit statutory injunctions. The statute provides expressly that the considerations or objects referred to in paras (a), (b) and (e) of s24 shall be unlawful and the agreement which ensues shall be unlawful and void. Paragraph (a) deals with what is forbidden or prohibited by law; para (b) deals with what could defeat the object of any law; and para (e) deals with public policy. ”

Draw attention, to those provisions relating to defeating the object of any law and to that on opposing public policy.

64. My research came to nought on the application of the doctrine of illegality in our industrial relations jurisprudence. Cases however abound in England where the law has been horned to a level of clarity. By way of introduction I will relate a few.

65. ***Newland v. Simons & Willer (Hairdressers) Ltd. (1981) IRLR 359***, is a case in which the Employment Appeal Tribunal (EAT) expressed the view that where both employer and employee knowingly commit an illegality by way of a fraud on the Revenue authorities in the payment and receipt of the employee’s remuneration under a contract of employment, the contract turned into one prohibited by statute or common law and the employee was precluded from enforcing any employment rights which he might otherwise have against the employer.

66. In ***Salvesen v. Simons (1994) IRLR 52,*** the EAT had to consider whether, pursuant to an arrangement between employer and employee, the payment of part of the employee’s salary without deduction of tax and NIC, rendered the contract of employment illegal and unenforceable with the result that the employee could not pursue a claim for

constructive dismissal. The EAT held that the contract of employment was unenforceable.

67. ***Leighton v. Michael (1996) IRLR 67*** is yet another case of failure by the employer, with the knowledge of the employee, to make tax and NIC deductions from the salary of the employee. By a majority, the EAT held that where the employee's claims are directly founded upon a contract knowingly tainted with illegality, they will be treated as unenforceable on the grounds of public policy.

68. The law in this area saw some modification in its application by making specific requirements on the conduct and knowledge of the employee before the contract of employment became infected with illegality. ***Coral Leisure Group Ltd. v. Barnett (1981) IRLR 204,*** a decision of the EAT and ***Hewcastle Catering Ltd v. Ahmad (1991) IRLR 437,*** a decision of Court of Appeal are informative in this regard. The law as now modified is adequately concised in the words of Peter Gibson LJ speaking for the Court of Appeal in ***Hall v. Woolston Hall Leisure Ltd. (2000) IRLR 578*** thus :

> *" With all respect to the judge, his view of the unfair dismissal cases is an oversimplified one. In cases where the contract of employment is neither entered into for an illegal purpose nor prohibited by statute, the illegal performance of the contract will not render the contract unenforceable unless in addition to knowledge of the facts which make the performance illegal the employee actively participates in the illegal performance. It is a question of fact in each case whether there has been a sufficient degree of participation by the employee. "*

69. It is a basic principle of administration of justice that the Court should not lend itself to enforcing a contract involving a scheme designed to defeat the object of our tax laws. Also, the prevention of tax evasion is a legitimate objective which is in the public interest. Now, two facts in the instant case come to sharp focus. The first, is that the Company's letter of offer of employment dated 1.10.1999 to be used for purposes associated with the Immigration authorities does not state the Claimant's true salary. The second, a major part of the Claimant's salary was paid outside Malaysia. These raise sticky questions of why and who exactly. Left unanswered, they cannot but excite the curiosity of the Court

70. Whether a contract of employment, *per se* or in performance is tainted by illegality is a matter of law and fact. The law is clear. The facts being insufficient, are unclear. Neither party explored the question of illegality of contract. The reason could presumably be attributed to there being no pleadings by either on this area. The paucity of relevant evidence led in the Court prevented me from applying the principle of law distilled from the earlier mentioned cases to the instant case. It was indeed impossible to arrive at any considered conclusion of fact in the given circumstances.

71. Should I have erred in language or lacked succinctness in writing on this issue, I attribute that to the untimely demise of my beloved son-in-law, Anand, a junior partner in the legal firm of Cheah, Teh & Su, whom my family and I lost on 28.6.2006. I had penned this subject on illegality during our bereavement.

Order

72. The Court orders the Company to pay to the Claimant, through his solicitors on record, the sum of RM594,267.23, less statutory deductions if any, not later than forty-five days from the date of this award.

HANDED DOWN AND DATED THIS 4TH JULY, 2006

(N. RAJASEGARAN)
CHAIRMAN
INDUSTRAIL COURT.