

INDUSTRIAL COURT OF MALAYSIA

CASE NO. : 1/1-2663/18

BETWEEN

LOH VOON CHUN

AND

SUPERB IMPRESSION CREATIONZ SDN. BHD.

AWARD NO. : 3130 OF 2018

CORAM : YA TUAN EDDIE YEO SOON CHYE - PRESIDENT
EN. MOHD. EFFENDY BIN ABDUL GHANI - EMPLOYEES' PANEL
PN. HEZLINA BINTI HASHIM - EMPLOYERS' PANEL

VENUE : Industrial Court Malaysia, Kuala Lumpur.

FILING OF FORM S : 05.09.2018

DATE OF MENTION : 10.10.2018.

DATE OF HEARING : 29.11.2018.

REPRESENTATION : Subitra Dali of Messrs Surend Mokhzani & Partners;
Counsel for the Complainant.

Complainant present.

Esther Ong Hui Chuen of Messrs Esther Ong Tengku Saiful
& Sree;
Counsel for the Respondent.

Respondent's representative absent.

A W A R D

[1] This is a complainant of non-compliance filed in Form S pursuant to s. 56 (1) of the Industrial Relations Act 1967 & Rule 24 A of the Industrial Court Rules 1967 on 30 January 2018 in the matter of Industrial Court **Case No. 28(3)/4-895/16** (Award No. 1666 of 2018) dated 18 July 2018 between **Loh Voon Chun** and **Superb Impression Creationz Sdn. Bhd.**

[2] A complaint is hereby lodged by the Complainant that the following provisions of the said Award have not been complied with by the Respondent in respect of the Award as follows:

"13. The Company shall pay the said sum of **RM373,320.00** to the Claimant's solicitors Messrs Surend Mokhzani & Partners within 14 days from the date hereof for release to the Claimant after income tax clearance."

Complainant's submissions

[3] The Statement of Case was filed on 25 October 2018 (Encl. 2) and the Rejoinder on 29 November 2018 (Encl. 4). The dispute is over the non-compliance of the said Award No. 1666 of 2018 wherein the Respondent failed to forward the award sum to the Complainant's solicitors until to date.

[4] As the award is a monetary award, the Respondent has no valid reason in law or in fact to withhold the award sum. The Respondent's action in effect is *mala fide* and constitutes a miscarriage of justice as the Complainant is unable to enjoy the fruits of his litigation. The Complainant's counsel further argued that the Respondent has no grounds not to comply with the terms of the said Award.

[5] The Complainant's counsel referred to an application (Encl. SIC 2) filed by the Company in Industrial Court of Malaysia Case No. 28/5-2581/18 between **Superb Impression Creationz Sdn. Bhd. v. Loh Voon Chun** (Award No. 2964 of 2018) where the Court on 19 November 2018 dismissed the Company's application to refer question of law to the High Court under section 33A of the Industrial Relations Act 1967. In furtherance to this, the Company has not obtained any stay order nor any fresh application for stay was filed in the High Court.

[6] The Complainant prays for an order of compliance against the Respondent under section 56 (2) (a) (i) IRA. The Complainant's counsel submits that the Respondent has no grounds not to comply with the terms of the Award. The Respondent had failed to give cogent reasons as to why it had failed to comply with the said Award. In the Rejoinder, the Complainant states that he reserves his right to take all necessary action including winding up proceedings as the Respondent is unable to pay its debt.

Respondent's submissions.

[7] The Respondent's counsel filed the Statement in Reply on 8 November 2018. The Respondent filed an application for leave to file Judicial Review at the Kuala Lumpur High Court Civil Suit BA-25-53-08/2018. (Encl. SIC 1). The first application for a stay order of the said Award (SIC 3) was struck off by the High Court on 26 November 2018. The fresh application filed on 23 November 2018 (Encl. 6) for stay order of the Industrial Court Award will be heard on 7 December 2018.

[8] The Respondent, therefore, pray that this application for non-compliance by the Complainant is frivolous and unfair to the Respondent and ought to be dismissed. The submissions forwarded by the Respondent's counsel that there was a serious doubt

regarding the Complainant's capacity to repay the award sum of RM373,320.00 in the event that the Respondent has paid the award sum to the Complainant before the Judicial Review and stay order being heard is devoid of any merits. Any evidence in respect of the Complainant's income ought to have been elicited out of the Complainant by the Respondent during the dismissal hearing. The Respondent, therefore, pray that this application for non-compliance by the Complainant is frivolous and unfair to the Respondent and ought to be dismissed.

The Law

[9] The Industrial Court in the case of **Kesatuan Pekerja-pekerja Perkilangan Perusahaan Makanan v. Gold Coin Specialities Sdn. Bhd.** [2017] 2 ILR 260 at p. 262 referred the case of **Holiday Inn, Kuala Lumpur v. National Union of Hotel, Bar and Restaurant Workers** [1988] 1 CLJ 133 in relation the application of section 56 of the Industrial Relations Act 1967, where the Supreme Court decided as follows:

"Now, section 56 is concerned with the enforcement in a summary manner of an award made by the Industrial Court or of a collective agreement which has been taken cognisance of by the court under section 17 after a complaint has been lodged as to its non-compliance. The non-compliance of a term of the award or collective agreement must exist as an antecedent fact before the Industrial Court can exercise its power contained in subsection (2) thereof. It is therefore, a condition precedent to the exercise of those powers that there should be in existence a breach or non-observance of a term of the award or collective agreement. There must be satisfactorily established by the complainant."

[10] The Supreme Court in the case of **Dragon & Phoenix Berhad v. Kesatuan Pekerja-pekerja Perusahaan Membuat Tekstil & Pakaian Pulau Pinang & Anor.** [1990] 2 ILR 515 at p. 616, decided as follows:

"In a complaint of non-compliance with any term of a collective agreement or award under section 56 of the Industrial Court should, as a general rule, look at the terms of the contract by confining itself to within the four walls of the

collective agreement or award and decide whether the term has or has not been complied with. It is purely enforcement function.”

Decision

[11] The filing of the application for judicial review in the High Court shall not by itself operate as a stay of execution. In the instant case, the stay order has yet to be granted by the High Court. The Federal Court in the case of **Kosma Palm Oil Mill Sdn. Bhd. & Ors. v. Koperasi Serbausaha Makmur Bhd.** [2003] 1 MLRA 536 at p. 540, 544 held as follows:

“The general rule is that an appeal shall not operate as a stay of execution unless the Court so orders. Accordingly, as Brown J said in *Serangoon Garden Estate Ltd. v. Ang Keng* [1953] MLRH 690, [1953] MLJ 116 while commenting on the discretion to grant a stay:

But it is a clear principle that the Court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it.”

What then, constitute special circumstances? It was said in *Mohamed Mustafa v. Kandasami* (No. 2) [1979] 1 MLRA, [1979] 2 MLJ 126, at p. 127, that:

“One of the determining factors that calls for consideration is whether by notmaking an order of stay of the execution it would make the appeal if successful, nugatory in that it would deprive an appellant of the results of the appeal. How pertinent that factor would be may vary according to the circumstances of each particular case.”

[12] In the case of **Sabah Forest Industries Sdn. Bhd. v. Industrial Court Malaysia & Anor.** [2013] 1 MELR 74, the Court of Appeal deals with the issue of whether party aggrieved by award or decision of Industrial Court may apply for Judicial Review under O. 53 Rules of the High Court and the circumstances when the decision of the

Industrial Court is open to challenge by Judicial Review and whether in the light of section 33A of the Industrial Relations Act 1967 could challenge the Industrial Court's award by way of Judicial Review. This Court finds that this case is not relevant to the instant application for non-compliance of the Industrial Court Award.

[13] In respect of "***Non-compliance with award***" section 56 of the IRA reads as follows:

"(1) Any complaint that any term of any award ... by the Court has not been complied with may be lodged with the Court in writing by ... any person bound by such award..

(2) The Court may, upon receipt of the complaint,-

(a) make an order directing any party -

(i) to comply with any term of the award ..."

[14] The Court is of the unanimous view that the terms of the Award handed down on has not been complied and without reasonable grounds failed to pay the Complainant the award sum.

[15] Based on the reasons adumbrated above and upon hearing submissions from both counsels for the Complainant and the Respondent, the Court unanimously makes an order pursuant to s. 56 (2) (a) (i) of the Industrial Relations Act 1967 directing the Respondent to pay the Complainant the sum of **RM373,320.00** less statutory deductions forthwith through his solicitors Messrs Surend Mokhzani & Partners.

HANDED DOWN AND DATED THIS 5TH DAY OF DECEMBER 2018

~signed~

**(EDDIE YEO SOON CHYE)
PRESIDENT
INDUSTRIAL COURT MALAYSIA**