COURSE ON INDUSTRIAL AND LABOUR TRIBUNAL IN MALAYSIA PERFECTIVE FOR SRI LANKAN PRESIDENTS OF LABOUR TRIBUNAL
18 APRIL 2017 – 21 APRIL 2017

CERTIORARI

By
ANNA NG FUI CHOO
CHAIRMAN OF INDUSTRIAL COURT, MALAYSIA

Finality of the Industrial Court Award

- Section 33B(1) IRA 1967

33B. Award, decision or order of the Court to be final and conclusive

(1) Subject to this Act and the provisions of section 33A, an award, decision or order of the Court under this Act (including the decision of the Court whether to grant or not to grant an application under section 33A(1)) shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court.

(2) Subject to the provisions of section 33A, no award of the Court for the reinstatement or re-employment of a workman shall be subject to any stay of proceedings by any court.

Judicial Review Procedure

There are two (2) stages involved in an application for judicial review under O. 53of the Rules of Court (ROC) 2012. The initial stage is the application for leave. Thereafter, only when leave to apply for the reliefs prayed for is granted can the Applicant proceed to apply for the reliefs (specified under Paragraph 1 of the Schedule to the Courts of Judicature Act (CJA).

O. 53, rules 2(2) and (3) ROC 2012 collectively provide that whilst the applicant may seek any of the said reliefs in Paragraph 1, the High Court is not confined to only providing the relief claimed in the application but may make any other order that is deemed to be suitable in the circumstances of the case and may even go on to dismiss the application.

Grounds for Judicial Review of Industrial Court Awards

"... one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality'; the second "irrationality" and the third "procedural impropriety."

Booi Kim Lee v Menteri Sumber Manusia & Anor [1999] 4 CLJ 121 / citing Lord Diplock Council of Civil Service Unions & Ors v Minister for the Civil Service [1985] AC 374

Procedural Impropriety

"... Procedural impropriety susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred even when such failure does not involve any natural justice."

Booi Kim Lee v Menteri Sumber Manusia & Anor [1999] 4 CLJ 121 / citing Lord Diplock Council of Civil Service Unions & Ors v Minister for the Civil Service [1985] AC 374

Illegality

- ☑ "... the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it; whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."
- ☑ Illegality refers to "the multitude of administrative excesses such as mala fides, improper purpose, failing to take relevant matters into consideration and taking irrelevant matters into consideration."

Booi Kim Lee v Menteri Sumber Manusia & Anor [1999] 4 CLJ 121 / citing Lord Diplock Council of Civil Service Unions & Ors v Minister for the Civil Service [1985] AC 374

Irrationality

“By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”

Booi Kim Lee v Menteri Sumber Manusia & Anor [1999] 4 CLJ 121 / citing Lord Diplock Council of Civil Service Unions & Ors v Minister for the Civil Service [1985] AC 374

Example 1: Just dismissal and not fair dismissal

- ☑ The duty of the Industrial Court is firstly, to determine whether the misconduct complained of by the employer has been established (first question), and secondly, to determine whether the proven misconduct constitutes just cause or excuse for the dismissal (**second question**).
- ☑ Failure to determine these issues on the merits would be a jurisdictional error which would merit interference by certiorari by the High Court.
- ☑ Industrial Court cannot hold that dismissal is without just cause or excuse solely on grounds that there was a breach of natural justice.

Milan Auto Sdn. Bhd. v. Wong Seh Yen [1995] 3 MLJ 537

Example 2: Failure to critically scrutinize all evidence

- ☑ "... my view is that the grounds relied upon by the chairman for making his award appeared to be one sided; he readily accepted the evidence of the claimant without testing it against other evidence and was content to rely on the 'I believe him' formula. **The chairman did not come to grips with the issues raised in the pleadings and the distinct impression that one gets is that the chairman had lost himself in a thicket of irrelevant issues and evidence, loose and uncritical analysis of evidence** …

Example 2: Failure to critically scrutinize all evidence (continued)

☑ … and one has to bear in mind the case of *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; 1 MLJ 145 which reiterates a long line of principles decided earlier that the Industrial Court cannot consider or admit evidence which is irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion; the court must address its mind on fundamental issues."

OMX Agro Produce Malaysia Sdn. Bhd. v. Chairman, Industrial Court, Malaysia & Anor [1999] 5 MLJ 636

Example 3: Failure to consider opposite party's case held to be procedural defect

- ☑ "[44] In our judgment there was a serious breach of procedural fairness in this case. Not a word was mentioned in the award as to the merits or otherwise of the appellant company's case. The Industrial Court never considered the appellant company's case. In our view, the findings of the Industrial Court cannot stand having regard to the letters of resignation tendered in evidence."

Jebsen & Jebsen Engineering (M) Sdn. Bhd. v. David a/l Sandasamy & Anor [2010] 5 MLJ 628 (Court of Appeal)

Example 4: Multiple errors

- ☑ Failed to take into account the reasons given by the Company for the transfer
- ☑ Failed to properly evaluate flimsy evidence of the Employee (bare assertion of victimization; Company's witness during cross-examination)
- ☑ Took into account irrelevant consideration that Employee was still appealing to the Company to reconsider the transfer
- ☑ Also allegation of demotion (which was not mentioned in the Employee's appeal to the Company)

OMX Agro Produce Malaysia Sdn. Bhd. v. Chairman, Industrial Court, Malaysia & Anor [1999] 5 MLJ 636

Example 5: Multiple errors

- ☑ Finding that the retrenchment was without just cause and excuse is incongruous with findings that the retrenchment was pursuant to a genuine and bona fide exercise and that the selection process was proper, hence falling into error
- ☑ Error in ruling that failure to adhere to Code of Conduct for Industrial Harmony is fatal to a proper/bona fide/genuine retrenchment exercise because it is a mere guideline with no force of law
- ☑ Failure to take into account the relevant question or failed to ask the right question of how the failure to apply the Code would make a difference to a redundant position when he insisted on the application of the Code

Continued …

- ☑ Award of unjustifiable amount of compensation notwithstanding insufficiency of compensation was not pleaded and not submitted on by parties
- ☑ Failed to take into consideration that besides the exit package, there was other ex-gratia compensation given by the Company to the Employee when deciding on the amount of compensation
- ☑ Committed procedural impropriety and the compensation granted was devoid of justification which no sensible and reasonable man appraised of the fact would have arrived at

Equant Integration Services Sdn. Bhd. (In Liquidation) v. Wong Wai Hung [2012] 1 LNS 1296 CA

Erroneous inference from admitted or proved facts

- ☑ On the other hand, we accept, of course, that it is **entirely competent for the High Court in certiorari proceedings to disagree with the Industrial Court on the conclusion or the inferences drawn by the latter from the proved or admitted** evidence on the ground that no reasonable tribunal similarly circumstanced would have arrived at such conclusion or drawn such an inference. **An erroneous inference from proved or admitted facts is an error of law**.

Airspace Management Services SB v. Col (b) Harbans Singh Chinggar Singh [2004] CLJ 77

Federal Court pronounces on scope of review of facts

- ☑ Court of Appeal has in a number of cases held that where finding of facts by the Industrial Court are based on the credibility of witnesses, those findings should not be reviewed.
- ☑ Exceptions to this restrictive principle where:

  (a) reliance upon an erroneous factual conclusion may itself offend against the principle of legality and rationality, or

  (b) there is no evidence to support the conclusion reached.

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn. Bhd. [2010] 8 CLJ 629

Continued …

- ☑ Decided cases cited above have also clearly established that where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to take relevant matters into consideration, such findings are always amenable to judicial review.

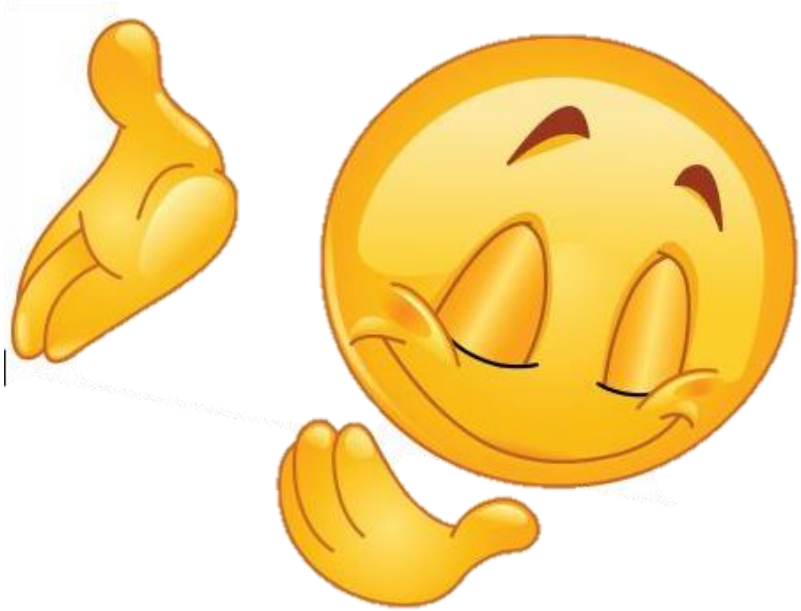
Erroneous inference can also come within irrationality ground

- ☑ On the other hand, we accept, of course, that it is **entirely competent for the High Court in certiorari proceedings to disagree with the Industrial Court on the conclusion or the inferences drawn by the latter from the proved or admitted** evidence on the ground that no reasonable tribunal similarly circumstanced would have arrived at such conclusion or drawn such an inference. **An erroneous inference from proved or admitted facts is an error of law**.

Airspace Management Services SB v. Col (b) Harbans Singh Chinggar Singh [2004] CLJ 77

Relief

- ☑ Quashes the award and remits the case to the Industrial Court for rehearing *vide* order of mandamus
- ☑ Quashes the award and the High Court makes order for remedies
- ☑ Confirms the award



THANK YOU!

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CONSTRUCTIVE DISMISSAL

By
ANNA NG FUI CHOO
CHAIRMAN OF INDUSTRIAL COURT , MALAYSIA

The principle underlying the doctrine of '**constructive dismissal**' was expressed by His Lordship Tun Salleh Abas LP in the **case of Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.** [1988] 1 CLJ (Rep) 298 as:

> "The common law has always recognized the right of an employee to terminate his contract and therefore to consider himself as discharged from further obligations if the employer is guilty of such a breach as affects the foundation of the contract, or if the employer has evinced an intention not to be bound by it any longer.".

In **Colgate Palmolive Sdn. Bhd. v. Yap Kok Foong** [1998] 2 ILR 965 (Award No. 368 of 1998) it was held as follows:

"In a section 20 reference, a workman's complaint consists of two (2) elements: firstly, that he has been dismissed, and secondly that such dismissal was without just cause or excuse. It is upon these two elements being established that the workman can claim his relief, to wit, an order for reinstatement, which may be granted or not at the discretion of the Industrial Court. As to the first element, industrial jurisprudence as developed in the course of industrial adjudication readily recognizes that any act which has the effect of bringing the employment contract to an end is a 'dismissal' within the meaning of section 20. The terminology used and the means resorted to by an employer are of little significance; thus, contractual terminations, constructive dismissals, non-renewals of contract, forced resignation, retrenchments and retirements are all species of the same genus, which is 'dismissal'.".

What is CD?

Lord Denning MR in the landmark English case of **Western Excavating (ECC) Ltd v. Sharp** [1978] 1 QB 761:

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates his contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover he must make up his mind soon after the conduct of which he complains for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.".

What is CD (Continued)

The Supreme Court in the case of **Wong Chee Hong v. Cathay Organisation (Malaysia) Sdn Bhd** [1988] 1 CLJ (Rep) 298 when Salleh Abas LP referred to the case of ***Western [E.C.G] Ltd. v. Sharp*** [1978] IRLR 27 and said:

> "According to the Court of Appeal in *Western Excavating (E.C.G.) Ltd. v. Sharp* [1978] IRLR 27, it means no more than the common law right of an employee to repudiate his contract of service where the conduct of his employer is such that the latter is guilty of a breach going to the root of the contract or where he has evinced an intention no longer to be bound by the contract. In such situation the employee is entitled to regard himself as being dismissed and walk out of his employment.".

What is CD (Continued)

The Court of Appeal in **Ang Beng Teik v. Panglobal Textiles Bhd. Penang** [1996 4 CLJ 313:

> "It has to do with the expression 'constructive dismissal'. It is a mere label. It tied up the judge in knots. We will later show how this happened. For the present, we must try and make the position clear.

What is CD (Continued)

As we have said, in order for s 20(1) to bite, a workman must consider himself to have been dismissed without just cause or excuse. As demonstrated, he may treat some conduct on the part of his employer towards him – conduct that falls short of actual dismissal or termination – as amounting to a dismissal. It may, as in the illustration earlier given, be an order of demotion. Or it may be an order of transfer. The workman in question may consider his demotion or transfer as being the same as a dismissal. In the words of the Act, he 'considers that he has been dismissed'. But there has been no formal dismissal or termination. Yet the workman may have recourse to s20. If it were not so, an employer can make a workman's life so intolerable so as to force him to resign and then boldly say that there was no dismissal. Even the common law recognizes that a dismissal may be disguised as a resignation: see **Stanley Ng Peng Hon v. AAF Pte Ltd** [1979] 1 MLJ 57.

What is CD (Continued)

Where there is no formal order of dismissal, but there is conduct on the part of an employer which makes a workman consider that he has been dismissed without just cause or excuse, lawyers term such conduct as ‘constructive dismissal’. There is no magic in the expression. It is only a convenient label to describe the kind of conduct we have referred to. It could be an order of transfer or demotion. Or, it could be that the workman has been made redundant by the employer. Or, it may be a case where the workman is asked to retire. The categories are not, we emphasize, closed.”.

What is CD (Continued)

In the case of **Quah Swee Khoon v. Sime Darby Bhd** [2000] 1 CLJ 9 at page 20 his Lordship Gopal Sri Ram JCA explained the duty of the Industrial Court in constructive dismissal cases:

> "In the normal case, an employer either dismisses the servant for cause or terminates the employment under a contractual provision that provides for notice of termination. As a matter of law, the Industrial Court is unconcerned with labels. It does not matter that the parties refer to the particular severance of the relationship as a termination or a dismissal. It is for the Industrial Court to make the determination. Having found that there was in fact a dismissal or the *bona fide* exercise of the contractual power to terminate, the Industrial Court must, in the former case, decide whether the dismissal was for just cause or excuse. If, on the other hand, it comes to the conclusion that there was a *bona fide* termination, then *cadit quaestio*...

Continued …

The task is no different where a case of constructive dismissal is alleged. The Industrial Court must in such a case also determine firstly whether there was a dismissal. And secondly, whether that dismissal was with just cause or excuse. That is a statutory formula employed by S.20(1) of the Act...

Constructive dismissal can take place, as we have attempted to demonstrate, in a number of cases. Since human ingenuity is boundless, the categories in which constructive dismissal can occur are not closed. Accordingly, a single act or acts may, according to particular and peculiar circumstances of the given case, amount to a constructive dismissal. There are cases which fall as illustrations at either end of the spectrum …

Whether one would describe the conduct complained of as amounting to constructive dismissal or the breach of the implied term governing mutual trust and confidence is really a matter of semantics. Nothing turns upon it. At the end of the day, the question simply is whether the appellant was driven out of employment or left it voluntarily.”.

What to prove?

Burden is on the Claimant, on the standard required which is on a balance of probabilities, to prove that he had been constructively dismissed and the following need to be established:

(a) that the Company had by its conduct breached the contract in respect of one or more of the obligations owed to the Claimant; the obligations breached may be in respect of either express terms or implied terms, or of both;

(b) that the terms which had been breached go to the foundation of the contract; or, stated in other words, the Company had breached one or more of the essential terms of the contract;

Continued …

(c) that the Claimant, pursuant to and by reason of the aforesaid breach, had left the employment of the Company; that is, that he had elected to treat the contract as terminated; and

(d) that the Claimant had left at an appropriate time soon after the breach complained of; that is, that he did not stay on in such circumstances as to amount to an affirmation of the contract, notwithstanding the breach of the same by the employer.

In the case of **Lewis v Motorword Garages Ltd** [1985] IRLR 465 it was stated that the breach of the implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, even though each individual incident may not do so. The 'last straw' need not itself be a breach of contract by the employer, but it must contribute, however slightly, to the sustained breach of the implied term of trust and respect.

The Contract Test

Embarrassment and humiliation are not grounds to warrant a claim of constructive dismissal. In the case of **Bayer (M) Sdn. Bhd. v. Anwar bin Abd Rahim** [1996] 2 CLJ 49, the High Court in quashing the Industrial Court's Award found, as follows:

> "The Industrial Court, in making the impugned award, has erred in law failing to apply the proper legal test governing a case based on constructive dismissal. The Industrial Court's finding that the conduct of the applicant was "not justifiable", "not bona fide" and so constitutes "embarrassment" clearly shows that it had erroneously applied "the test of reasonableness" and not "the contract test", and so has acted in excess of jurisdiction constituting an error of law.".

In **Talasco Insurance Sdn. Bhd. v. Industrial Court of Malaysia & Anor** [1997] 4 CLJ 94, the High Court in dismissing an employee's claim for constructive dismissal, held that loss of pride alone would not constitute a dismissal of an employee.

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Course On Industrial And Labour Tribunal In Malaysia Perfective For Sri Lankan Presidents Of Labour Tribunal
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DEPOSIT & COGNIZANCE OF CAs

by
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Chairman Of Industrial Court, Malaysia

Definition of collective agreement

Section 2 of the IRA:

"**Collective agreement** means an agreement in writing concluded between an employer or a trade union of employers on the one hand and a trade union of workmen on the other relating to the terms and conditions of employment and work of workmen or concerning relations between such parties."

16. Deposit of collective agreements

(1) A signed copy of the collective agreement shall be jointly deposited by the parties with the Registrar within one month from the date on which the agreement has been entered into and the Registrar shall thereupon bring it to the notice of the Court for its cognizance.

(2) The Court may in its discretion –

(a) refuse to take cognizance of the collective agreement deposited under subsection (1) if it is of the opinion that the agreement does not comply with section 14; or

(b) before taking cognizance of the collective agreement deposited under subsection (1), require that such part thereof as does not comply with section 14 shall be amended in such manner as the Court may direct.

16. Deposit of collective agreements (continued) ...

(3) If any party to the collective agreement fails to carry out such direction the Court may, notwithstanding any other power exercisable under this Act, amend the copy of the collective agreement in the manner directed after giving the parties a reasonable opportunity of being heard and the agreement so amended shall be deemed to be the collective agreement between the parties.

(4) (Omitted).

(5) Except in the case provided under subsection (2) or (3), the powers of the Court under this section may be exercised by the President sitting alone or, in the case of a Division, by the Chairman sitting alone.

Conditions in section 14(1), (2) and (3), IRA

- ☑ In writing
- ☑ Signed by parties to the agreement
- ☑ Name of parties
- ☑ Duration of collective agreement - minimum of three (3) years
- ☑ Procedure for modification and termination
- ☑ Machinery for settlement of disputes
- ☑ Should not contravene any written law

Procedure

1. The Assistant Registrar will vet articles in a collective agreement to ascertain whether section 14, IRA has been complied with.

2. Form D will be issued if the President directs, paragraph 7, Industrial Court Rules 1967.

3. If the parties do not agree to amend the collective agreement, Form E may be issued - paragraph 7, Industrial Court Rules 1967.

4. The hearing will be before the President or Chairman – Section 16(5), IRA.

17. Effect of collective agreement

(1) A collective agreement which has been taken cognizance of by the Court shall be deemed to be an award and shall be binding on –

(a) the parties to the agreement including in any case where a party is a trade union of employers, all members of the trade union to whom the agreement relates and their successors, assignees or transferees; and

(b) all workmen who are employed or subsequently employed in the undertaking or part of the undertaking to which the agreement relates.

The High Court in the case of **Malaysian Agricultural Producers Association and Mahkamah Perusahaan Malaysia**, Originating Motion R1-25-164-95 stated as follows:

> "*It would appear from the provisions of section 16 that once a collective agreement is jointly deposited with the Industrial Court, it becomes the duty of the Court to give cognizance to it so as to give effect under section 17 as an award handed down by the Court is binding the parties to the agreement. With no recognition given by the Court that agreement remains such and will not be binding.".*

Further, it stated:

The Federal Court in **Non-Metallic Mineral Products Manufacturing Employees Union & Ors v. South East Asia Fire Bricks Sdn. Bhd.** [1983] 1 ILR 71 in explaining the nature of collective agreement as opposed to individual contracts stated as follows:

> "*There is a manifest distinction between a collective agreement and a contract of service. A workman cannot, but an employer can be a party to a collective agreement. The individual workman has no bargaining power in industrial relations. He can never enter into collective agreement, nor can any number of workmen who do not form an association. It follows that a trade union of workmen when bargaining collectively, acts always and exclusively as a principal and not as an agent for its members, and this has consequence both as regards the effect of the agreement on the contract of service, and in connection with the law governing trade disputes and trade sanctions. The obligations a union undertake and the rights it acquires are collective by nature; they cannot be performed by an individual workman.".*

17. Effect of collective agreement (continued) …

(2) As from such date and for such period as may be specified in the collective agreement it shall be an implied term of the contract between the workmen and employers bound by the agreement that the rates of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with the agreement unless varied by a subsequent agreement or a decision of the Court.

Once a collective agreement has been signed and taken cognizance by the Court, then the terms and conditions of employment agreed must be strictly observed by the parties to the agreement. In the event any term is not complied with, a complaint may be lodged with the Industrial Court under section 26(1) of the Act.

56. Non-compliance with award or collective agreement

(1) Any complaint that any term of any award or of any collective agreement which has been taken cognizance of by the Court has not been complied with may be lodged with the Court in writing by any trade union or person bound by such award or agreement.

(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 or collective agreement; or

(ii) to cease or desist from doing any act in contravention of any term of the award or collective agreement;

56. Non-compliance with award or collective agreement (continued)

(b) make such order as it deems fit to make proper rectification or restitution for any contravention of any term of such award or collective agreement; or

(c) make such order as it considers desirable to vary or set aside upon special circumstances any term of the award or collective agreement.

(2A) Notwithstanding the provisions of subsection 33(1), the Court shall, upon making the order under subsection (2), have the power to interpret any matter relating to the complaint made.

56. Non-compliance with award or collective agreement (continued)

Once a collective agreement has been signed and taken cognizance by the Industrial Court then the terms and conditions of employment agreed must be strictly observed by the parties to the agreement. In the event any term is not observed a complaint may be lodged by the trade union or person bound by the agreement. In the case of ***Holiday Inn Kuala Lumpur v National Union of Hotel, Bar and Restaurant Workers [1988] 1 CLJ 133*** the Supreme Court outlined the principle and the operation of section 56 as follows:-

> "*Now s.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 cognizance by the Court under s.16 after a complaint has been lodged as to its non-compliance fact. The non-compliance of term of the award or collective agreement must exist as an antecedent fact before the Industrial Court can exercise its powers 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 .This must be satisfactorily established by the complainant.".*

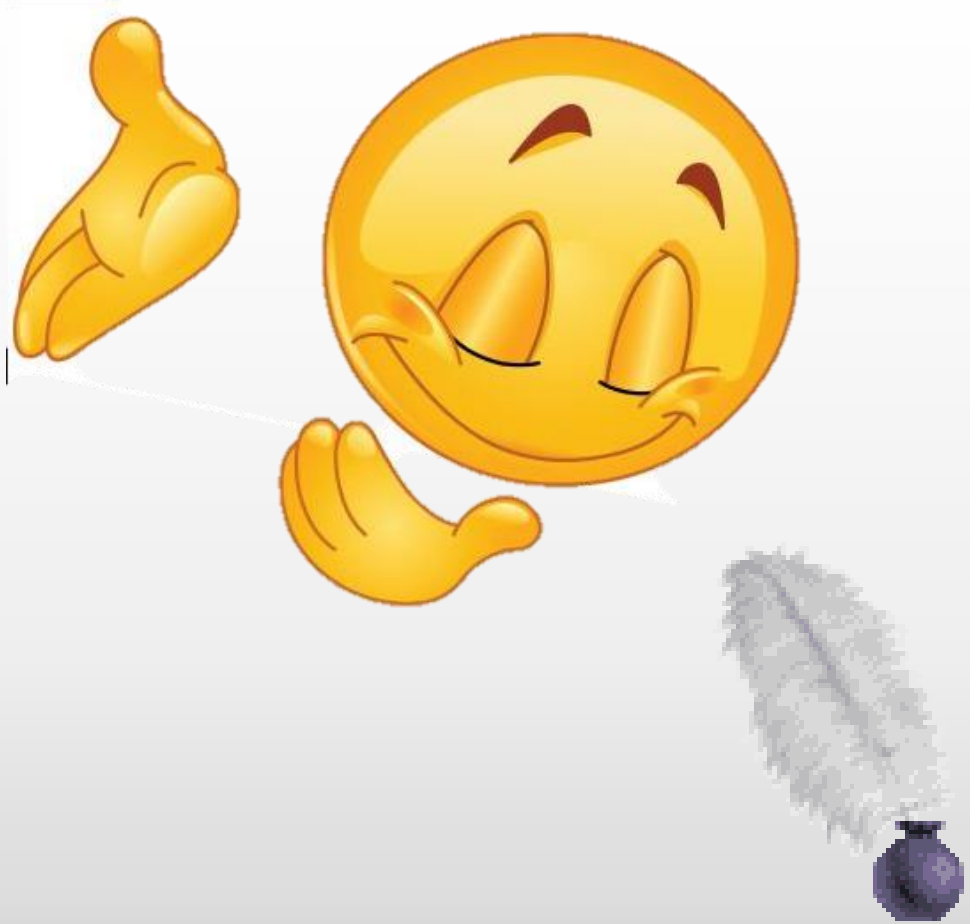
56. Non-compliance with award or collective agreement (continued)

In ***HSBC v Association of Hong Kong Bank Officers [1991] 1 ILR 543*** the Industrial Court held in a complaint of non –compliance that if facts are in dispute then the matter would be a trade dispute. The complaint was on non-payment of allowances and the bank was not in a position to verify the claim and questioned the veracity of the claims.

56. Non-compliance with award or collective agreement (continued)

The issue whether an employer can seek variation was dealt by the High Court in the case of ***Civil Appeal No. R2-25-96-1999 Prestige Ceramics Sdn Bhd v Kesatuan Pekerja-Pekerja Pembuatan Barang Bukan Logam & Mahkamah Perusahaan Malaysia.*** At the hearing before the Industrial Court, the Company pleaded that due to rapid decline in business, it was not in a position to pay annual increment or bonuses to its employees as provided in the CA.

When the Union sought an order of compliance, the Company sought protection under section 56(2) but the Industrial Court declined to accord the protection on the ground that financial difficulties cannot constitute 'special circumstances' as it would lead to a flood of similar claims.



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INTERPRETATION AND VARIATION OF AWARD

By
ANNA NG FUI CHOO
CHAIRMAN OF INDUSTRIAL COURT , MALAYSIA

Section 33(1) and (2) of the IRA has conferred power on the Industrial Court to interpret its own award, and to make such variation to the award for the sole purpose of removing ambiguity or uncertainty (if any) in the award. Section 33(1) provides:

> "If any question arises as to the interpretation of any award or collective agreement taken cognizance of the Court, the Minister may refer the question, or any party bound by the award or agreement may apply, to the Court for a decision on the question.".

Subsection (2) further provides:

> "The Court may, upon the application of any party, by order vary any of the terms of an award, if it considers it desirable so to do for the purpose solely of removing ambiguity or uncertainty.".

In **Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union**, [1995] 2 MLJ 317 VC George JCA stated:

> "Parliament had enacted the two ss 33(1) and (2) each to cover different situations, s 33(1) in respect of the need for an interpretation of some term or provision either in an award or in a collective agreement and s 33(2) when seeking, not an interpretation, but a variation which however can only be sought for the purpose of removing some uncertainty or ambiguity in an award or in a collective agreement.".

It is trite law that in an application for interpretation made under section 33(1) of the Act, the facts which give rise to the application must not be disputed. It was reiterated by his Lordship Harun Hashim SCJ in the Supreme Court decision in ***Malayan Agricultural Producers Association v. National Union of Plantation Workers*** ([1992] 1 CLJ Rep. 207

> "A s. 33(1) reference on the other hand has to be precise so that on its face, the Industrial Court will know exactly the question it has to answer. The facts which give rise to the question have to be stated but must not be disputed. In the process of answering the question, the Industrial Court will have the benefit of hearing the respective views of the parties bound by the award or collective agreement: s. 33(3). The Industrial Court should decline to exercise jurisdiction under this section if it is made to determine disputed questions of fact, so as to ensure that trade disputes are not short-circuited to it in the guise of interpretation questions."(emphasis added)

REFERENCE TO THE HIGH COURT ON A QUESTION OF LAW – SECTION 33A

- ☑ Where an award has been made under section 30(1) of the Industrial Relations Act 1967, the aggrieved party may, pursuant to section 33A of the said Act, apply to the Industrial Court to refer certain questions of law to the High Court. The Court may at its discretion, and upon fulfilment of certain conditions, refer the question of law to the High Court.

Reference to the High Court on a Question of Law – Section 33A

(continued)

- ☑ The application under section 33A of the IRA is only in relation to an award under section 30(1) of the IRA, namely, an award in relation to a trade dispute referred to the court under section 26 of the IRA, or in relation to a reference for dismissal without just cause or excuse, under section 20(3) of the IRA.
- ☑ The application, however, does not extend to a reference of question of law to the High Court under section 33 or section 56 of the IRA.

Reference to the High Court on a Question of Law – Section 33A

(continued)

- ☑ Further, section 33A of the IRA does not extend to a ruling made by the Industrial Court in a preliminary objection raised by either party in the course of its proceedings. This is so because the ruling given in a preliminary objection is not a final award made on the issue referred to the court within the meaning of section 30(1) of the IRA.

Reference to the High Court on a Question of Law – Section 33A

(continued)

- ☑ The remedy under section 33A of the IRA is not an 'as of right' remedy, but rather a discretionary remedy. The discretion, however, is not unfettered because section 33A(1) imposes certain conditions to be satisfied before the Court determines whether or not such reference could be made to the High Court.

- ☑ In an application under section 33A, the Industrial Court would have to first determine whether there is a question of law involved and, if so, whether the question of law satisfies all the conditions enumerated in the aforesaid section. In other words, the exercise of discretionary power by the Industrial Court must be done judiciously and in accordance with established principles of law.

Reference to the High Court on a Question of Law – Section 33A

(continued)

The conditions which the Industrial Court has to consider and determine are provided in section 33A(1) namely:

- ☑ whether a question of law arose in the course of the proceedings;
- ☑ whether the determination of the question of law by the Industrial Court has affected the award;
- ☑ whether, in the opinion of the court, the question of law is of sufficient importance to merit such reference to the High Court; and
- ☑ whether the determination of the question of law by the Industrial Court, in its opinion, raises sufficient doubt to merit such reference.

Reference to the High Court on a Question of Law – Section 33A

(continued)

In **Cheek Hong Leng v KYM Industries (M) Sdn. Bhd.** [1999] 7 CLJ 317, Nik Hashim J stated that the question to be referred to the High Court must be a question of law which arose in the course of the proceedings in the first award. In other words, the question of law to be referred was raised and argued before the Industrial Court and a decision was made by the court. Further, the said question must be of sufficient importance, the determination of which will affect the award and raise sufficient doubt to merit the reference to the High Court.

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18 APRIL 2017 – 21 APRIL 2017

NON-COMPLIANCE OF INDUSTRIAL COURT AWARDS

By
ANNA NG FUI CHOO
CHAIRMAN OF INDUSTRIAL COURT , MALAYSIA

The complaint of non-compliance of the Industrial Court award or a term of collective agreement may be lodged with the Industrial Court under section 56(1) of the IRA which states:

> "Any complaint that any term of any award or of any collective agreement which has been taken cognizance by the Court had not been complied with may be lodged with the Court in writing by any trade union or person bound by such award or agreement.".

Therefore, it is a condition precedent to the exercise of those powers that there is in existence a breach or non-observance of a term of the award or collective agreement.

Seah SCJ in the Supreme Court case of **Holiday Inn Kuala Lumpur v. National Union of Hotel, Bar and Restaurant Workers** [1988] 1 CLJ 133, outlined the principles and the operation of section 56 as follows:

> "Now, s. 56 is concerned with enforcement in a summary manner of an award made by the Industrial Court or of a collective agreement which has been taken cognizance by the Court under s. 16 after a complaint has been lodged as to its non-compliance fact. The non-compliance of term of the award or collective agreement must exist as an antecedent fact before the Industrial Court can exercise its powers contained in existence a breach or non-observance of a term of the award or collective agreement. This must be satisfactorily established by the complainant.".

As a general rule, the Industrial Court in a complaint of non-compliance, looks at the terms of the award by confining itself within the four walls of the award, and determine whether the terms of the award have or have not been complied with. Where the Court is satisfied that there has been a non compliance of the award by the employer, and where the employer has no special circumstances warranting the variation or setting aside of the award under section 56(2) of the IRA, the Court will make an order that the employer should comply with the said award within the period stipulated from the date of service of the Court's order for compliance.

- ☑ Complaint of non-compliance will be heard and determined by the Chairman of the Industrial Court who shall sit with two panel members.
- ☑ Incumbent on the employer to show special circumstances to enable the Court to vary or set aside the award.
- ☑ What constitutes special circumstances is not defined in the IRA. Instances of special circumstances must be a situation that is exceptional in nature and this would depend on the facts of each case, and the category of special circumstances is not exhaustive.

Can a director be made personally liable in non-compliance proceedings?

- ☑ The House of Lords' case of **Solomon v. Solomon & Co. Ltd** [1987] AC 22 established the concept of the separate legal personality of company. The House of Lords pointed out that the company was a lawful creature of statute and that even though the business had been run by Solomon, the majority shareholder, in law, he and the company had been separate legal persons. This is the principle of corporate personality.

- ☑ Lifting of the veil of incorporation only done in certain exceptional cases e.g. fraud.

Can a director be made personally liable in non-compliance proceedings? (continued)

- An Application for Joinder to make a director personally liable can be made under s.29 of the Industrial Relations Act 1967 which reads as follows:

> **"29. Power of Court**
>
> **the Court may, in any proceedings before it:**
>
> **(a) order that any party be joined, substituted or struck off.".**

- S.56 of the Act does not empower the Industrial Court, on the application by the Claimant, to make a director personally liable for the debts of the Company. Parliament has not given such power to the Industrial Court. As such, the Industrial Court being a creature of statute i.e. the Act, can only exercise such powers as provided under it.

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REMEDIES

By
ANNA NG FUI CHOO
CHAIRMAN OF INDUSTRIAL COURT, MALAYSIA

His Lordship Steve Shim CJ (Sabah & Sarawak) said in the case of **Tanjong Jara Beach Hotel Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers Peninsular Malaysia** [2004] 4 CLJ 657 at page 671,

"At the outset, it is we think, necessary to reflect on the extraordinary powers conferred upon the Industrial Court in resolving industrial disputes. They are all encompassing. This is s. 30(5) of the Industrial Relations Act 1967 (the Act) which stipulated:

The Court shall act according to equity good conscience and the substantial merits of the case without regard to technicalities and legal form.

Continued …

“It has been said, quite rightly, that industrial jurisprudence and industrial justice have a prior obligation and adherence to social justice as distinguished from legal justice and therefore have far wider powers than ordinary civil courts in the prescription, recognition and creation of rights, duties and obligations so as to achieve industrial harmony thereby enhancing the economic well-being of the nation: (see Insaf Vol. XXI no. 3 – The philosophy and concept, of industrial relations in Malaysia – by Abu Hashim bin Hj. Abu Bakar, Chairman, Industrial Court). In applying the powers under s. 30(5) above, the Industrial Court has to bear in mind the underlying objectives and purposes of the Act itself ie, that it is a piece of legislation designed to ensure social justice to both employers and employees and to advance the progress of industry by bringing about harmony and cordial relationship between the parties; to eradicate unfair labour practices; to protect workmen against victimization by employers and to ensure termination of industrial disputes in a peaceful manner. Clearly therefore, the raison d'etre of the Industrial Court is to endeavour to resolve the competing claims of employers and employees by finding a solution which is just and fair to both parties with the object of establishing harmony between capital and labour and fostering good relationship.”.

SECOND SCHEDULE OF THE IRA 1967
[Am. Act A1322]

SECOND SCHEDULE
FACTORS FOR CONSIDERATION IN MAKING AN AWARD IN RELATION TO A REFERENCE UNDER SUBSECTION 20 (3)
[Subsection 30 (6A)]

1. In the event that backwages are to be given, such backwages shall not exceed twenty-four months' backwages from the date of dismissal based on the last-drawn salary of the person who has been dismissed without just cause or excuse;

2. In the case of a probationer who has been dismissed without just cause or excuse, any backwages given shall not exceed twelve months' backwages from the date of dismissal based on his last-drawn salary;

SECOND SCHEDULE OF THE IRA 1967
[Am. Act A1322]

SECOND SCHEDULE
FACTORS FOR CONSIDERATION IN MAKING AN AWARD IN RELATION TO A REFERENCE UNDER SUBSECTION 20 (3)
[Subsection 30 (6A)]

Continued …

3. Where there is post-dismissal earnings, a percentage of such earnings, to be decided by the Court, shall be deducted from the backwages given;

4. Any relief given shall not include any compensation for loss of future earnings; and

5. Any relief given shall take into account contributory misconduct of the workman.

In **Dr. James Alfred (Sabah) v Koperasi Serbaguna Sanya Bhd. (Sabah) and another** [2001] 3 CLJ 541, the Federal Court held that in assessing the quantum of backwages, the Industrial Court should take into consideration if there was evidence that the workman had been gainfully employed elsewhere after his dismissal. However, it doesn't mean the Industrial Court has to conduct a mathematical exercise in the deduction.

PROBATIONER

The principles in ***Nada Pakar Sdn Bhd v. Radja Aritonang*** [2001] 3ILR 58 (Award No. 662 of 2001) which referred to the case of ***Hotel Jaya Puri Bhd v. National Union Of Hotel, Bar & Restaurant Workers (NUHBRW)*** [1980] 1 MLJ and ***Koperasi Serbaguna Sanya Bhd (Sabah) v. Dr. James Alfred (Sabah) & Anor*** [2000] 3 CLJ.

In **Nada Pakar's** case at pg 68:

> "*The probationer whose service has been terminated without the benefit of being given a fair opportunity to prove himself and/or the benefit of a fair process of assessment has lost the opportunity to establish himself in permanent employment with the employer or another employer elsewhere. He had as it were squandered his time with the employer who had not given him a fair bash at proving himself at the position and setting him off on his chosen career path. This, in the absence of other factors (some of which have been set out hereinbefore), which might constitute an exception to the general proposition , is the loss for which the probationer ought to be compensated. As adverted to previously, the practice of awarding compensation under the usual heads of backwages and compensation in lieu of reinstatement which is relevant to the confirmed employee on permanent employment can have no logical basis in the case of a probationer where no exceptional circumstances exist to justify the court dealing with this matter on the basis that he is a confirmed employee."*

MONETARY COMPENSATION

In ***Hotel Jaya Puri Bhd v NUHBRW*** **(supra), Salleh Abas J** (as he then was) held:

> *"… If there is a legal basis for paying the compensation, the question of the amount of course is very much a matter of discretion which the Industrial Court is fully empowered under s. 30 of the Industrial Relations Act to fix*.".

In **Dr. Dutt v. Assunta Hospital** [1981] 1 MLJ 308 at p.313, the Federal Court stated as follows:

"With all respect, this interpretation clearly flies in the teeth of the plain provisions of subsection (1), (5) and (6). It ignores the jurisdiction given to the court to make an award 'relating to all or any of the issues in dispute'. The right to compensation must be in issue in representations for reinstatement and necessarily arises where the court would not order reinstatement. And this is apart from the duty of the court to act accordingly to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.' 'The court shall not be restricted to the specific relief claimed' must, in the case of representation for reinstatement under section 20(1), which we have observed is the logical claim to be made by the workman, mean an award not only in addition in the order for reinstatement, but also in compensation for the reinstatement can be found in the subsequent words 'may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the reference to it under section 20(3)'. We cannot understand how in a reference under section 20(3) an 'award' that orders neither reinstatement nor compensation where the dismissal is without just cause or excuse, can be said to be in accordance with the guidelines in subsections (1), (5) and (6) or settle the reference.".

WHERE THE CLAIMANT CANNOT BE REINSTATED

What is the position with regard to compensation in lieu of reinstatement where the Court finds that the claimant cannot be reinstated as at the date of the award, he has reached or passed the retirement age?

(a) Sabah Forest Industries Sdn Bhd v Industrial Court Malaysia & Anor [2014] 4 ILR 258

The COA held that since the claimant could not be reinstated due to the fact that at the date of award he had reached or passed the retirement age, the remedy of compensation in lieu of reinstatement did not arise.

Continued …

(b) Unilever (M) Holdings Sdn. Bhd. v So Lai & Anor [2015] 2 ILR 265, FC held:

"From the phrase '**compensation in lieu of reinstatement**', the element of compensation will only arise when the employee is in a position or situation to be **reinstated**. It is a condition precedent to such compensation. This was fortified by the clear provision of s. 20(1) of the IRA where the primary remedy of such a representation is for the workman 'to be reinstated in his former employment'. If a workman cannot be reinstated because his age has exceeded his retirement age, the issue of compensation cannot arise and hence it cannot be in lieu of his reinstatement. Reinstatement is a statutorily recognised form of specific performance and as such it could only be ordered in a situation where the legal basis for such performance exists.

Continued ...

"The court had no reason to disagree with the legal pronouncement by the Court of Appeal in Sabah Forest Industries Sdn Bhd v. Industrial Court Malaysia that the Industrial Court 'fell into error when it awarded compensation in lieu of reinstatement when clearly the second respondent cannot be reinstated beyond his retirement age. The Industrial Court had no legal basis to award ... compensation in lieu of reinstatement.

The **Practice Note** is in reality an internal administrative circular meant to be a guideline in calculating compensation. Such circular does not have the force of law. The Practice Note cannot be construed as a statement of legal principle and it will be erroneous to do so. A careful reading of the Practice Note will reveal that it is silent on the issue of whether the worker is still eligible to be reinstated at the material time when the award is made. The Practice Note cannot be taken to be a concept stipulating that it is a carte blanche for compensation to be awarded (in all cases) in lieu of reinstatement.".

EXEMPLARY OR PUNITIVE COMPENSATION

The Industrial Court has awarded punitive compensation against the employer based on the facts and circumstances of the case where extreme bad faith has been shown by the employer towards the claimant.

EMPLOYEE ON A FIXED TERM CONTRACT

The issue of the Claimant's reinstatement does not arise as the Claimant's contract could be terminated with effluxion of time. Hence, it is only for compensation to be awarded since the Claimant was terminated before the fixed term contract ended: **Thangasamy Brown DN Gnanayutham v. Pelabuhan Tanjung Pelepas Sdn Bhd & Anor** [2009] 6 CLJ 144.