INDUSTRIAL COURT OF MALAYSIA

CASE NO : 15/4-170/02

BETWEEN

SEMANGAT RAKYAT SDN. BHD.

AND

JESUMARAN ANTHONY A/L J. MARIADASS @ MUHAMAD ADAM JESU ABDULLAH

AWARD NO : 766 OF 2004

Before	:	**N. RAJASEGARAN - Chairman** (Sitting Alone)
Venue:	:	Industrial Court Malaysia, Kuala Lumpur.
Date of Reference	:	11.2.2002.
Dates of Mention	:	2.5.2002, 3.6.2002, 26.6.2002, 29.7.2002, 10.3.2003, 15.12.2003, 12.1.2004, 27.2.2004, 30.3.2004 dan 7.5.2004.
Date of Hearing	:	20.5.2004.
Representation	:	Company absent and unrepresented throughout proceedings. Mr. David Abraham Samson Paul from M/s Syed, Paul & Co., Counsel for the Claimant.

Reference :

This is a reference made under Section 20(3) of the Industrial Relations Act, 1967 arising out of the dismissal of **Jesumaran Anthony a/l J. Mariadass @ Muhamad Adam Jesu Abdullah** (hereinafter referred to as “the Claimant”) by **Semangat Rakyat Sdn. Bhd.** (hereinafter referred to as “the Company”).

AWARD

BACKGROUND

1. Jesumaran Anthony a/l J. Mariadass @ Muhamad Adam Jesu Abdullah ('the Claimant') had his employment terminated by Semangat Rakyat Sdn. Bhd. ('the Company') on 8.1.2001 and the Claimant being dissatisfied with Company's action appealed under section 20 of the Industrial Relations Act, 1967 ('the Act') consequent upon which the Minister of Human Resources acting under that same action of the Act decided on 11.2.2002 to refer the dismissal to the Industrial Court and which reference wound its way into Industrial Court 15 ('the Court') on 27.3.2002.

2. After various mentions, ten to be exact, and two separate occasions when dates were set for hearing only to be vacated, hearing of the reference finally materialised on the third occasion on 20.5.2004. This state of affairs was brought about through failure to secure the presence of the Company at each one of the mentions and aborted hearings.

EX-PARTE APPLICATION

3. Notice of hearing set down for 20.5.2004 via the Court's letter dated 31.3.2004 by A.R. Register was served on the Company and proof of service was ascertained by return of the reply card duly endorsed. The Company not being represented and being absent on the date of hearing, learned counsel for the Claimant, David Abraham Samson Paul ('Claimant's Counsel') applied to the Court to proceed *exparte* and this the Court after weighing the cumulative effect of the numerous notices served upon the Company and the refusal of the Company to respond to

such notices and the final act of failing to attend hearing, the Court formed the opinion that in accordance to equity, good conscience and the substantial merits of what had transpired thus far, it would be in the interest of justice that the application for an *ex-parte* hearing should be granted and so ordered accordingly by the powers vested under section 29(d) of the Act.

Ex-parte Hearing

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

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

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

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

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

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

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

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

The Court's Function

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

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

Evidence, Evaluation and Findings

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

9. The Claimant avers that he commencement employment with the Company on 1.6.2000 in the position of General Manager. That this were so, lay on the Claimant to prove (see ***section 101, Evidence Act, 1950***). Towards this end the Claimant exhibited a letter of appointment dated 1.6.2000 addressed to him by the Company, issued by the Managing Director confirming the Claimant's appointment as General Manager with effect from 1.6.2000 at a salary of RM2500.00 per month and in addition, entitlement to 6 service points per month. His appointment was further subject to a six months' probationary period which period expired on 30.11.2000. I therefore hold that which the Claimant avers to be true.

10. It is the Claimant's case that his employment was terminated by the Company on 8.1.2001. The burden is upon the Claimant to prove dismissal. [See ***Nikmat Jasa Piling Sdn. Bhd. v. Teng Tong Kee (1998) 3 CLJ 367*** and ***Weltec Knitwear Industries Sdn. Bhd. v. Law Kar Toy & Anor (1998) 1 LNS 258***]. The Claimant discharged this evidential burden through tendering as exhibit a letter dated 8.1.2001 from the Company addressed to him terminating his services with effect from even date, thus enabling me to hold that what he claims. The letter of dismissal ('the dismissal letter') being pertinent to other issues to be addressed in this Award, is repeated below:

“ 8/1/01

Attn: MR Jesu Adam Abdullah

Re: Termination of service

With reference to the above, effective 24 hours from the date above, you are relieved of your duty as General Manager at the white room. Please hand over all necessary collaterals such as keys, documents, etc. pertaining the white room.

Thank You

Regards,

sgd.
....
Qayum Khan
Managing Director ”

11. Upon receipt of the dismissal letter the Claimant first appealed by letter dated 12.1.2001 to the Pengarah Perhubungan Perusahaan under section 20 of the Act for reinstatement and next wrote a letter dated 15.1.2001 to the Company, the material parts of which contain notification of his appeal, protest on his termination of service, a claim that he had not been paid his December 2000 salary and that the Company had failed to make statutory contributions to the EPF Board and SOCSO. Both letters were exhibited in the Court.

12. Also tendered and marked as exhibit was the Company’s response via a letter dated 18.1.2001 addressed to the Claimant, written by Messrs Thena & Company, a legal firm acting for the Company. That letter, after stating that the Claimant’s employment had been terminated on 24 hours notice on 8.1.2001 for the reason of “wilful breach of

condition of employment contract under section 13(2) of the Employment Act 1955," proceeds to list the events quoted below as having led to the Claimant's termination of employment:

" a) You were responsible for the inventory of beverages at the White Room during your employment. Our client has established that 17 bottles of Jack Daniels and 7 bottles of Black Label were unaccounted for the month of July 2000 and 29 bottles of Jack Daniels were unaccounted for the month of August 2000. Our client has strong reason to believe that the bottles were taken out of their premises without prior permission.

b) Our client has been informed that you had approach Grey Advertising and requested them to make payment in your favour instead of our client. We believe you are aware that this action tantamount to breach of trust.

c) Our client has observed that money from the petty cash has not been declared and the sum amounting to Ringgit Malaysia Two Thousand Seven Hundred Fifty (RM2,750.00) only is unaccounted. Further, the float sum of Ringgit Malaysia Two Thousand (RM2,000.00) only is unaccounted for as well.

d) It is within out client's knowledge that you had claimed money amounting to Ringgit Malaysia Two Hundred Forty Two (RM242.00) only from the petty cash on 24th December 2000 for food that was paid by a third party.

e) Our client is aware that you had sold beverages on happy hour prices all night without the prior approval from the Managing Director and that payment was made by the purchasers directly to you the following day. ”

13. The Court observes that the Claimant earning a salary of RM2,500.00 and working in the capacity of General Manager is not one within the First Schedule of the Employment Act, 1955 and is therefore without the purview of that Act.

14. The Court further observes that the dismissal letter states no reason for the termination of the Claimant's services. On its face it led to what is commonly called a 'termination simplicitor' by notice. The Industrial Court has long-gone maintained that in such cases, upon receiving a reference from the Minister, the Industrial Court will proceed to hear the case as a dismissal (See ***Cheryan v. Sime Darby Plantation Bhd., Award No. 64/75; Siti Norbaya v. Johnson & Johnson Sdn. Bhd., Award No. 43/77;*** and ***Alliah v. Chartered Bank, Award No. 93/81***). That this indeed was the correct position was confirmed by Raja Azlan Shah (CJ Malaya) (as HRH then was) in ***Goon Kwee Phoy v. J&P Coats (M) Bhd., (1981) 2 MLJ 129*** when His Lordship said that "*we do not see any material difference between a termination of the contract by due notice and the unilateral dismissal of a summary nature*.".

And before that Chang Min Tat FCJ delivering the judgment of the Federal Court in ***Dr. A Dutt v. Assunta Hospital (1981) 1 MLJ 304*** had said:

> " *It further follows that on a proper interpretation of the relevant section of the Act, there is no material distinction between dismissal and termination. Either must be with just*

> *cause or excuse to be justifiable; otherwise the Industrial Court may make an award.* ”

So much for the termination simplicitor.

15. The Company solicitor's letter of 18.1.2001, referred to earlier, details the reasons relied upon by the Company for the dismissal of the Claimant. Though this letter succeeds the act of dismissal effected through the dismissal letter, I give weight to it for the fact that it was written soon after the dismissal was effected on 8.1.2001 and in response to the letter dated 15.1.2001, earlier referred, from the Claimant to the Company. I therefore accept the five allegations mentioned in the said letter to be the Company's reason for terminating the services of the Claimant.

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

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

and that court or the High Court cannot go into another reason not relied on by the employer or find one for it. "

17. The Court's mandate on the authority of ***Goon Kwee Phoy (supra)*** is to enquire whether the Company has made out the reasons proffered as the cause for the dismissal.

18. The Claimant denied each and every allegation and in this connection testified as follows:

"18. Q: Are the allegations true?

A: No, the allegation are all false and without basis for the following reasons:

i) the daily bar inventory was always been done by the barman;

ii) following the inventory, the accounting personnel will carry out monthly compilation;

iii) it took 6 months for the Company to raise the allegations;

iv) there was no proof of bottles taken out from the premises by me;

v) Furthermore, video cameras were located at the entrance and exit of the White Room which monitored all movements at the White Room.

vi) the documentation on the proof of payments for any promotional campaign on certain beverages would be shown in the Company's bank statements;

vii) the Company has records of "Payment" and "Petty Cash" vouchers for any monies paid out or any monies given to any staff purchases and receipt would be

attached to "Petty Cash" voucher made for any purchase;

viii) as the General Manager of White Room, the day to day operation decisions are within my discretion (as the Managing Director is not around at night most of the time).

ix) 'happy hour' prices or discounts of liquor bottles for regular clientele were at my discretion as General Manager.

x) Two of the White Room patrons Mr. Lim Chee Ho (Botak) and Dr. Santiago have confirmed in writing vide a letter dated 1/2/2001 that I did not receive any personal payments for beverages sold at happy hours prices. *(EXHIBIT –JA-6)* "

19. The burden of proving that the Claimant had indeed committed the misconducts alleged lies with the Company, so submitted Claimant's Counsel quoting the case of ***Institut Senilukis Malaysia v. Chung Yi, (2003) 3 ILR 579*** where the Learned Chairman, Yeoh Wee Siam held that "*in a reference under s.20(3) of the Industrial Relations Act 1967, it is trite law that the burden of proof is on the employer to prove that the Claimant is guilty of the alleged misconduct thereby justifying the dismissal*" and Yang Arif went on to quote ***Koperasi Pekerja-Pekerja Stevedoring Pelabuhan Bhd. v. Ebnusama Ali & 11 Ors., (1996) 1 ILR 165*** and ***Stamford Executive Centre v. Dharsini Ganeson, (1986) 1 ILR 101*** in support thereof. With this authority I agree.

20. The inevitable consequence of the Company's recalcitrance in filing its pleading and to defend this action at the hearing is that the Company has failed to discharge its evidential burden of proving the alleged misconducts committed by the Claimant.

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

REMEDY

22. The Claimant testified that the Company now is "inactive". This being so, reinstatement of the Claimant to his former position will not be an appropriate remedy.

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

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

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

> *" The tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular. "*

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

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

PRINCIPLES APPLICABLE

26. The Court had in the case of ***Ike Video Distributor Sdn. Bhd. v. Chan Chee Bin, Award No. 636 of 2004*** analysed in detail relevant factors and has set out the principles by which the Court will be governed in the award of remedies. The Court's decision was that remedy in cases where no reinstatement is ordered, will be under two heads *viz* (a) compensation in lieu of reinstatement and (b) backwages.

27. Thereafter from this total sum the Court will scale down, if appropriate based on the circumstances of the case, under the three heads of (a) delay factor, (b) gainful employment and (c) contributory conduct.

28. The arguments and rationale of the Court in having arrived upon the above mentioned decision on remedy is discussed in detail in the ***Ike Video Distributor Sdn. Bhd. case*** and will not be repeated here.

COMPENSATION IN LIEU OF REINSTATEMENT

29. Compensation in lieu of reinstatement is one month's salary per year of service; the multiplicand being the salary and the multiplier being the period from the date of commencement of employment up to the last date of hearing.

30. It is the evidence before the Court that the Claimant, at the time of his dismissal, earned a monthly salary of RM2,500.00. The evidence is further that he was entitled to 6 service points per month. It is the unrebutted testimony of the Claimant that each service point equals RM250.00 thus earning him RM1500.00 per month in service points. The multiplicand in the instant case adds up to RM4,000.00.

31. With the Claimant having commenced work on 1.6.2000 and the last date of hearing being 20.5.2004, the multiplier in the instant case is 3.9.

32. In the result a sum of RM15,600.00 is due as compensation in lieu of reinstatement which sum is what is obtained through multiplying RM4000.00 by 3.9.

BACKWAGES

33. Backwages is for the period between the date of dismissal and the date of conclusion of hearing which in the instant case is 8.1.2001 to 20.5.2004.

34. In the instant case the multiplicand being RM4,000.00, with a multiplier of 36.3, backwages amounts to RM145,200.00.

SCALE DOWN

Delay Factor

35. The Court is amenable to scale down on the total compensation under two sub-heads in connection with delay factor *viz* (a) delays occasioned by the Claimant subject to a maximum scaling down of 30% and (b) delays attributable to the Ministry of Human Resources or the Industrial Court subject to a further maximum scaling down of 30%.

36. In the instant case the Claimant was represented at every one of the mentions and hearing dates set by the Court. He further complied with all directions on the filing of pleadings, documents and witness statement. He therefore made no contribution towards delay and the Court accordingly effects no scaling under this sub-head.

37. The Claimant's appeal under section 20 of the Act was received by the Minister of Human Resources on 15.1.2001. On 11.2.2002 the Minister decided to exercise his discretion to refer the matter to the Industrial Court and the matter was assigned to the Court on 27.3.2002, almost 1.25 years later. That the Court from 1.2.2003 to 15.1.2004 was without a substantive Chairman, a period of almost 1 year, aggravated the delay.

38. Although such delays are not the doing of a claimant it is inequitable and against good conscience to shoulder the total penalty of full compensation under both heads upon the employer for he

contributes no blame too. In the circumstances the Court scales down the total compensation by 22% under this sub-head.

Gainful Employment

39. This principle of law, set by the Court of Appeal in ***Koperasi Serbaguna Sanya Bhd. Sabah (supra),*** was further clarified by the Federal Court on appeal in ***Dr. James Alfred v. Koperasi Serbaguna Sanya Bhd. Sabah & Anor, (2001) 3 MLJ 529.***

40. The Court had analysed the application of this principle in the ***Ike Video Distributor Sdn. Bhd. case*** and will adhere to the same here.

41. The Claimant under examination by the Court testified that from the date of his dismissal on 8.1.2001 up to 30.9.2002 he was engaged in various part-time jobs but he was unable to quantify his earning whilst performing the same. However since 1.10.2002 up to the last date of hearing he had been engaged in his own entertainment business which gave him an average income of RM7,000.00 nett per month.

42. Based on the persuasive authority of ***A.L. Kalva v. Project and Equipment Corporation of India AIR SC 1361*** and ***Om Parkash Goel v. Himachal Pradesh Tourism Development Corporation, (1991) 3 SCC 291*** the Court had in the ***Ike Video Distributor Sdn. Bhd. case*** held that income not only earned under a contract of employment but also that derived from trade and business should be taken into account under this head of scaling down.

43. In the instant case the Claimant seem to have done better in his earning capacity since 1.10.2002 having increased his income by 75% of his last earnings with the Company. No evidence of hardship during this

period by the Claimant is evident before the Court. In the circumstances the Court in keeping with section 30(5) of the Act scales down the backwages due for the whole of the period 1.10.2002 to 20.5.2004. There being no evidence before the Court on the Claimant's income from the date of dismissal on 8.1.2001 up to 30.9.2002, the Court leaves undisturbed the backwages due for this period which amounts to RM84,000.00.

Contributory Conduct

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

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

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

DECEMBER 2000 SALARY

46. At paragraph 15 of the Claimant's pleading the prayer includes a request amongst others, for restitution of loss of salary and service points. This forms part of the prayer and should not be discarded as pedantry. I should give life to this part of the pleading too. It is the uncontrovoted evidence before the Court that the Claimant had not been paid his December 2000 salary and salary points. The Court therefore holds that the Claimant's December 2000 earning of RM4000.00 should be paid by the Company.

SUMMARY OF ORDERS

47. The Court orders that the Company pays the Claimant through his solicitors, the sum of money mentioned below, less statutory deductions if any, not later than 45 days from the date of this Award:

(a) Salary and salary points in respect of December 2000 amounting to RM4,000.00; and

(b) Compensation in lieu of reinstatement amounting to RM15,600.00 plus backwages amounting to RM84,000.00 from which total of RM99,600.00 a scaling down of 22% is effected for delay factor thus making the sum payable to be RM77,688.00.

HANDED DOWN AND DATED THIS 2ND JULY, 2004.

(N. RAJASEGARAN)
CHAIRMAN
INDUSTRIAL COURT.