INDUSTRIAL COURT OF MALAYSIA

CASE NO : 15/4-158/02

BETWEEN

RICWIL (MALAYSIA) SDN. BHD.

AND

THAM CHAI WAN

AWARD NO : 1309 OF 2004

Before	:	**N. RAJASEGARAN - Chairman** (Sitting Alone)
Venue	:	Industrial Court Malaysia, Kuala Lumpur.
Date of Reference	:	21.2.2002.
Dates of Mention	:	13.5.2002, 5.3.2003, 19.11.2003 and 12.7.2004.
Date of Hearing	:	26.7.2004.

Claimant's written submission received : 23.8.2004.

Company's written submission received: -

Representation	:	Ms. Jennifer Chandran from Messrs Vasan, Chan & Chandran, Counsel for the Company. Ms. Reena Enbasegaram from Messrs Murugavell Arumugam & 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 **Tham Chai Wan** (hereinafter referred to as "the Claimant") by **Ricwil (Malaysia) Sdn. Bhd.** (hereinafter referred to as "the Company").

AWARD

1. Ms. Tham Chai Wan ('the Claimant') being dissatisfied with the action of her employer, Ricwil (Malaysia) Sdn. Bhd. ('the Company') in terminating her employment on 10.8.1999, made a representation under section 20 of the Industrial Relations Act, 1967 ('the Act') in consequence of which the Honourable Minister of Human Resources on 21.2.2002 exercised his discretion to refer her representation to the Industrial Court. Industrial Court 15 ('the Court') on 27.3.2002 received the reference which is now before me for resolution.

THE FACTS

2. The Company is a small organisation. Including Mr. Low Chok Yin the Managing Director (COW1) and the Claimant there were six employees in all working in the office with another eight employed in the factory. The Claimant was based in the office. The Company's business involved contracting activities. At the material time the Company held contracts involving Sarawak General Hospital and KLIA.

3. The Claimant commenced employment with the Company on 1.5.1994 in the capacity of Technical Assistant at a monthly salary of RM2,000.00. At the time of her cessation of employment on 10.8.1999 her designation was Operations Manager and she earned a monthly salary of RM2,520.00.

4. It is common ground that the Claimant on 28.7.1999 travelled to Sarawak on a work related matter in the company of a technician, Mr. Wong; that COW1 had instructed the Claimant to prepare on an urgent basis copies of the Company's profile; and that the Claimant was

instructed by COW1 to issue a letter to Kris Heavy Engineering in connection with the KLIA project.

5. In agreement both parties are, to the fact that on the morning of 10.8.1999 COW1 and the Claimant altercated. On what words were said during this altercation both parties differ. That it ended in the summary dismissal of the Claimant, both parties agree.

6. In dispute is the role that the Claimant played on her trip to Sarawak. To baby-sit Mr. Wong says the Company. To do a proactive role says the Claimant. Next in issue is the date on which the Claimant returned from Sarawak to the office. The Claimant states that she returned to work on 6.8.1999 whilst COW1 maintains the date to be 3.8.1999. On the preparation of the Company's profile the Claimant's version is that the instruction by COW1 was given on 6.8.1999 and the number of copies requested was twenty. The Company's stand is that the instruction was conveyed to the Claimant on 3.8.1999 and the number of copies requested was ten. In dispute too was the procedure of extraction of details pertaining to, the manner of printing and the binding of the copies of the Company's profile. Much time was devoted by learned counsel for the Claimant in leading evidence on these matters and drawing attention to the same in submission. Learned counsel for the Company waded into that evidence with equal gusto. But both in vain, I regret. All this I would have considered if it was the Claimant's position that stress and pressure of work accounted for or contributed towards what had transpired during the altercation. That she did not prompts me to speak no more of it save to express the pious hope that in future all most learned counsel would endeavour to identify issues and restrict evidence towards establishing the same instead of going on a frolic and swamping the court in a quagmire of evidence, lost in direction.

THE LAW, EVIDENCE AND EVALUATION

7. I am first required to decide whether there was a dismissal. This is easy for both parties agree that the Claimant was dismissed. At page 5 of CLB1 is the termination letter. For reasons which will become obvious later in this discussion, a reproduction of the letter is necessary. This is what it says :

> " 10 August, 1999
>
> THAM CHAI WAN
> Operation Manager
>
> With immediate effect your services had been terminated for insubordination in challenging the management in terminating her services for job outstanding which the Managing Director had instructed to execute.
>
> Kindly, hand over all keys to office, hand phone and car to Judy Kong.
>
> Yours faithfully,
> RICWIL (MALAYSIA) SDN BHD
>
> signed
> .....
> Jeffery Low
> Managing Director "

8. The *locus classicus* on what next is required of me is ***Milan Auto Sdn. Bhd. v. Wong Seh Yen (1995) 3 MLJ 537.*** And this is to

determine whether the misconduct complained of by the Company has been established.

9. But before that I must make mention of ***Ghoon Kwee Phoy v. J & P Coats (M) Sdn. Bhd. (1981) 2 MLJ 129,*** the authority binding upon me to restrict my inquiry only to the reason advanced by the employer for the dismissal and nothing else. And this too has been made easy for me for the dismissal letter states the crux of the reason as "insubordination in challenging the management in terminating her services.". Confirming this is COW1's testimony under cross-examination that "I believe insubordination means challenging the management. Disrespect to management**. I agree dismissal was purely for the insubordination**."

10. What is this insubordination that the Company complains of against the Claimant? In COW1's words "I asked her on the status of the 10 company profile that I needed. She told me it was not ready. Thereafter she accused me of being inefficient in work distribution and challenged me to sack her when I questioned her about the allegation." And this transpired during the altercation between the two on the morning of 10.8.1999.

The Claimant's response to this is denial of both, that is, accusing COW1 of being inefficient in work distribution and challenging COW1 to "sack her." Though both parties differ in what exactly transpired during the altercation, a dissection of the evidence which emerged after cross and re-examination show a common thread that bind both parties. What this is, will emerge as my discussion progresses.

11. I now conjoin the versions of both parties, sieve through the same, identify issues *conjuncta* and *disjuncta* before arriving at my conclusion as to what transpired based on a balance of probabilities.

12. That COW1 and the Claimant had a disagreement on the morning of 10.8.1999 is admitted by both. Miss Tee Geok Tin (COW2) an accounts executive in the Company confirms this too. COW1 in his witness statement says that he on meeting the Claimant requested for the copies of the Company's profile. The Claimant's version is that COW1 first questioned her on the letter to Kris Heaving Engineering. And the Claimant's version I do not doubt, for in cross-examination COW1 stated that it is possible that he would have done this, but then his priority was the Company's profile.

13. That the Claimant at that point had not completed the requisite number of copies of the Company's profile and that COW1 had asked for them is not in dispute. But what is, is the response of the Claimant to this request. COW1's story is that the Claimant retorted that he did not know how to distribute work whilst the Claimant's story is that she informed COW1 that she was in the midst of preparing the Kris Heavy Engineering letter to which COW1 accused her of not having any priority (of work). Again I find the Claimant's version to be true for in cross-examination COW1 on being challenged that: "Claimant told you she was still preparing the letter to Kris and you accused her of not having priority", he answered: "I believe I mentioned that."

14. What next happened according to COW1 is that the Claimant in the presence of other staff, his office being an open-office concept, first told him that he did not know how to distribute work and then on his asking her to explain further, told him: "sack me." The Claimant after denying having said that part on work distribution gives her version

which is that she explained the delay in preparing copies of the Company's profile to which COW1 stated: "As far as I am concerned, I don't care whether you work or not, you can leave as the door is always open."

Of relevance to me on this issue are the following:

(a) The testimony of COW1 in cross-examination as follows:

" Q: (Put) After you dismissed Claimant's explanation as to why she had not completed her letter to Kris Engineering, you told Claimant that as far as you were concerned you did not care whether she worked or not and she could leave as the door is always open?

A: I might have said that. But I did not ask her to leave. Only when she start to challenge me asking me to sack her, then I terminated her. When she says 'sack me'. "

(b) The Claimant's response to a challenge under cross-examination as follows:

" Q: (Put). You challenged the MD to sack you?

A: When I was told by MD to leave the Company I responded by saying 'I am not leaving unless you give me a letter'

And that part of the Claimant's witness statement which reads:

" 41. What else did you inform Mr. Low Chok Yin? (COW1)

I also informed him that I was not going anywhere and that if he wanted me out of the Company, then the onus was on him to issue me a termination letter. "

(c) Viewed in its entirety, that there was an invitation for the Claimant to depart from the Company, I am satisfied. It is common ground that COW1 had told the Claimant words to the effect that it mattered not to him whether she worked or not and that she could leave. It is interesting to note from the Claimant's evidence aforesaid that she took this not as an invitation but as a directive from COW1 to leave the Company. And it is probably in this frame of mind she told him that she would not leave unless COW1 gave him a letter. A comedy or errors, I would have called it had it not been for the dire consequences which sprung from it - the Claimant dismissed, and the Company hauled before the Court.

(d) That the Claimant had told COW1 that he did not know how to distribute work is the provocation that led to further discourse claims COW1. The burden is upon COW1 to prove this (see section 101, Evidence Act, 1950) and against the denial of the Claimant, save for his word there is nothing more. He receives no corroboration from COW2 in this connection. In the absence of COW1 being able to discharge his evidential burden I am unable to accept this averment of his.

(e) COW1 says that it was the Claimant's challenge to sack her that prompted him to immediately prepare the dismissal letter which dismissed the Claimant. The Claimant denies using the phrase "sack me". In this COW1 finds support from the testimony of COW2, who in spite of her timidity gave no cause to suspect her truthfulness, confirms an argument between COW1 and the Claimant and that she heard COW1 use the word "profile" and the Claimant say the

words "sack me". That she did not hear the context in which the words were spoken does not in any way negative the fact that the words "sack me" were uttered by the Claimant.

After careful consideration of the totality of the evidence adduced before me, I hold that the facts and circumstances are more consistent with the Claimant having uttered the words "sack me". And in the tempestuous situation in which these words were uttered, I cannot default COW1 for treating it as a challenge.

15. My finding that the Claimant had challenged COW1 to 'sack her' does not by itself complete my function under the first limb ennunciated in ***Milan Auto Sdn. Bhd. (supra)*** case. I have now to determine whether a challenge directed by an employee to his employer to sack him amounts to insubordination, particularly when the challenge arose in response to a query on work instructions. And this I must do for it is the Company's position that the Claimant was dismissed for this action of hers which the Company treated as insubordination.

16. In this connection ***B.R. Ghaiye, in Misconduct in Employment, 2nd End.*** writes at page 571 as follows:

> *" When an employee challenges the authority of the superior it amounts to giving formal notice to the officer that the employee will no longer act in the subordinate capacity and will not receive any orders or instructions from the superior officer. Challenging the authority is, therefore, contrary to the basic character of the employer and employee relationship. This will therefore, constitute insubordination. "*

I am in agreement with the learned author and I find that a challenge to the authority of a superior is behaviour incompatible with the propriety of the relationship between an employer and employee. Such a challenge is therefore misconduct actionable by an employer.

17. In the circumstances I find that the Company has succeeded in establishing that a misconduct had been committed by the Claimant and this misconduct is as stated in the dismissal letter. The Company has succeeded in satisfying the earlier stated requirements of ***Ghoon Kwee Phoy (supra)*** and the first limb of ***Milan Auto Sdn. Bhd. (supra).***

18. As is required of me, I now turn to consider the second limb of ***Milan Auto Sdn. Bhd. (supra)*** which is, whether the misconduct committed by the Claimant constitute just cause or excuse for her dismissal. And in this connection I start by tempering my earlier ruling that a challenge to management is an actionable misconduct, with the *caveat* that the factors leading to the challenge, the environment under which it is executed and the nature of the challenge itself should be considered in its totality in evaluating the reasonableness of the response of the employer.

19. In evaluating the response of the employer I seek guidance from the authorities that follow.

Mummery LJ sitting in the Court of Appeal in the cases of ***Post Office v. Foley*** and ***HSBC Bank plc (formerly Midland Bank plc) v. Madden (2000) IRLR 827 at page 828*** said:

> *" **Iceland Frozen Foods** also made clear that the members of a tribunal must not simply consider whether they personally think that the dismissal was fair and must not*

substitute their decision as to what was the right course to adopt for that of the employer. ***The proper function is to determine whether the decision to dismiss the employee fell within the band of reasonable responses 'which a reasonable employer might have adopted'.*** *Although it is true that if application of that approach leads the members of the tribunal to conclude that the dismissal was unfair, they are in effect substituting their judgment for that of the employer,* ***that process must always be conducted by reference to the objective standards of the hypothetical reasonable employer*** *which are imported by the statutory references to 'reasonably or unreasonably', and not by reference to their own subjective views of what they in fact would have done as an employer in the same circumstances. " (emphasis added)*

Per Donaldson LJ sitting in the Court of Appeal in ***Union of Construction and Allied Trades and Technicians v. Brain (1981) IRLR 224***:

" Whether someone acted reasonably is always a pure question of fact, so long as the tribunal deciding the issue correctly directs itself on matters which should and should not be taken in account. But ***where Parliament has directed a tribunal to have regard to equity, which means common fairness, the tribunal's duty is very plain. It has to look at the question in the round and without regard to a lawyer's technicalities. It has to look at it in an employment and industrial relations context.*** *It should, therefore, be very rare for any decision of an employment*

tribunal under this section to give rise to any question of law, and where Parliament has given to the tribunals so wide a discretion, appellate courts should be very slow to find that the tribunal has erred in law. " (emphasis added)

20. I am mindful that I must not substitute my views for that of the employer in regard to the punishment imposed. In this I am reminded of the mantra *"the tribunal must not substitute their own decision for that of the employer"* oft quoted in English decisions. There is no magic in this mantra. It is simply another way of saying that the tribunal must apply the reasonableness test by going somewhat further than merely asking what the tribunal would have done in the instant case before it. It must take into account the reasons and all other factors and circumstances known to the employer and ask whether for that reason and in those circumstances, having regard to equity and substantial merits of the case, the employer acted reasonably in treating it as sufficient reason for dismissing the workman.

21. In deciding whether the dismissal effected upon the Claimant falls within the band of reasonable responses expected from the Company the Court is conscious of the facts that the Company is a small organisation; COW1 is a Malaysian Chinese who are generally sensitive to loss of face; COW1 is the managing partner of the Company; and the Claimant had thrown the challenge in the open office possibly within ear-shot of the other employees. In the circumstances, that COW1 was provoked and incensed by the Claimant's conduct is not impossible. But then, companies in arriving at a management decision have to exercise objectivity. And the essential rule of management of having to be ruled by the head and not by the heart, equally applies to a management decision involving dismissal. In this connection I find support from ***B.R. Ghaiye's Law And Procedure Of Departmental Inquiries In Private***

And Public Sectors, Vol. 2, 3rd Edn., at pages 1138 and 1139 where in discussing imposition of dismissal as a punishment, the learned author writes:

> *" The seriousness of a conduct is viewed not from any moral or social point of view but from the point of view of its effect, actual or likely, on the business itself. "*

And I am also cautioned by the words of Faiza Thamby Chik J. in ***Shanmugam Subramaniam v. JG Containers (M) Sdn. Bhd. & Anor, (2000) 6 CLJ 521,*** where his Lordship spoke :

> *" A perusal of the award would reveal that the Industrial Court in this instant case had totally failed to perform its main duty in the second limb of its twofold function as set out in* ***Milan Auto.*** *In other words, the Industrial Court failed to address its mind as regards the harshness or severity of punishment. The Industrial Court had committed a jurisdictional error of law. "*

22. And of relevance to me too in forming a decision is the fact that the retort of "sack me" by the Claimant sprang after the invitation to leave by COW1. In this connection it is appropriate to quote the writing at ***page 355, 1969 Edn. of Alfred Avins' Employees' Misconduct*** where the learned author says:

> *" A single disrespectful retort by an employee which has been provoked or called forth by an unbecoming remark on the part of the employer is not a ground for dismissal. (see* ***Williams v. Hammond, (1906) 1b Man. R. 369, 374, 4 W.L.R. 206)*** *"*

23. Finally I take into account the fact that at the time of the incident, the Claimant had worked for a period of more that five years, rose in ranks from Technical Assistant to Operations Manager, with no evidence of adverse performance or work attitudes and the fact that in the words of COW1, her "performance is as usual. She was fine."

24. I am only able to consider the question of fairness of the Company's response in the context of the reason found for the dismissal, which in the instant case is the Claimant's retort to COW1 to "sack her". A punishment of dismissal for an act of insubordination as in the instant case arising under the circumstances described will be totally out of proportion to the gravermen of the offence. And in this connection I am aided by ***OP Malhotra's The Law of Industrial Dispute, Vol 2, 6th Edn.,*** at pages 1294 and 1295 where the learned author writes :

> *" In order to avoid the charge of vindictiveness, justice, equity and fair play demand that the punishment must always be commensurate with the gravity of the offence charged. " [* see ***Rama Kant Misra v. State of Uttar Pradesh 1982 Lab IC 1790, 1792 (SC)****].*

Based on the discussion thus far the reasonable and inescapable conclusion cannot be other than that the Company had no just cause or excuse for the dismissal of the Claimant. That being so, I find the Claimant's dismissal by the Company to be wrong.

REMEDY

25. Considering the size of the Company and the circumstances under which she was dismissed, it would not be in the interest of industrial harmony to reinstate the Claimant.

26. 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***].

27. 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.

28. 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, 6th Edn. at page 1400*** :

> " *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.

Scire feci 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

29. The Court had in the case of ***Ike Video Distributor Sdn. Bhd. v. Chan Chee Bin (2004) 2 ILR 687*** 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.

30. 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) gainful employment, (b) contributory conduct and (c) delay factor.

31. The arguments and rationale of the Court in having arrived upon the above mentioned decisions on remedy is discussed in detail in ***Ike Video Distributor Sdn. Bhd. (supra)*** and will not be repeated here.

COMPENSATION IN LIEU OF REINSTATEMENT

32. 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.

33. The Claimant earned a monthly salary of RM2,520.00 at the time of her dismissal thus giving that figure as the multiplicand.

34. With the Claimant having commenced work on 1.5.1994 and the last date of hearing being on 26.7.2004, the multiplier in the instant case is 10.1.

35. In the result, a sum of RM25,452.00 is due as compensation in lieu of reinstatement which sum is obtained through multiplying RM2,520.00 by 10.1.

BACKWAGES

36. Backwages is for the period between the date of dismissal and the date of conclusion of hearing which in the instant case is from 10.8.1999 to 26.7.2004, a period of 59 months.

37. The multiplicand being RM2,520.00, with a multiplier of 59, backwages amount to RM148,680.00.

SCALE DOWN

Gainful Employment

38. 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.***

39. The Court had analysed the application of this principle in ***Ike Video Distributor Sdn. Bhd. (supra)*** and will adhere to the same here.

40. The Claimant under examination by the Court testified that since her dismissal she worked from January 2001 to May 2001 with Alphine

Gains (M) Sdn. Bhd. during which period she earned not less than RM2,500.00 per month. Then from June 2001 to December 2001 she worked with Araprop Development Sdn. Bhd. earning approximately RM6,250.00 per month. And from January 2002 to June 2004 she worked with Zuellig Pharma (M) Sdn. Bhd. during which period she earned not less than RM5,800.00 per month. Finally after working from January 2004 to mid-June 2004 earning a salary of RM5,900.00 per month she has since been unemployed.

41. Save for being a rolling stone for reasons best known to her, the Claimant had been virtually in continuous employment from January 2001 right up to June 2004. Except for the period January 2001 to May 2001 when she earned similar salary to that which she earned with the Company before her dismissal, the Claimant's remuneration during other periods of employment have been much better than what she earned with the Company. For the Court to disregard this fact would be inequitable and tantamount to the Court allowing her to take double advantage and make excessive gains relying on the wrongful act of the Company. The Court further notes that no evidence of hardship suffered by the Claimant during this period is evident before the Court. In the circumstances, the Court in keeping with section 30(5) of the Act scales down the backwages for the whole of the period of June 2001 to May 2004, a period of 36 months. The Court in considering the fact that in the period June 2001 to mid-June 2004 the Claimant had in between jobs been unemployed for periods of less than one month and the endeavours that she had taken in keeping herself employed, leaves undisturbed her backwages due for the period from the date of dismissal to May 2001 which amounts to RM57,960.00 (RM2,520.00 x 23). Backwages is therefore scaled down to this sum.

42. Learned counsel for the Claimant submitted that the fact that the Claimant, subsequent to the dismissal, was gainfully employed at a higher salary should not invite the Court to treat the Claimant's losses as ended. In support she referred me to the head notes in the reported decision of the English Court of Appeal in ***Dench v. Flynn & Partners, (1998) IRLR 653.*** In that appeal the workman after dismissal by the respondent employer sought and obtained subsequent employment with a second employer which employment too was terminated after two months. The question before the court was whether the respondent employer's liability automatically ceases forever with the workman obtaining subsequent employment or whether it ceases on completion of the trial. Interwoven with this was the question of whether the workman's loss incurred during the interregnum between termination of the second employment and the trial should be bourne by the second employer or the respondent employer. Commingled with this was the issue of whether the second employment was "permanent employment".

The principle on which the Court has decided backwages does not envisage a permanent cessation of the employer's liability on backwages the moment the dismissed workman secures gainful employment. The Court in determining backwages takes into account the whole of the interregnum period between dismissal and the date of completion of hearing. And during this interregnum there will be periods when the workman is both unemployed and gainfully employed. This principle adopted by the Court is not in any way violated by the case of ***Dench v. Flynn & Partners (supra).***

Contributory Conduct

43. The second of the two-fold function of the Industrial Court upon receiving a reference from the Minister is to determine whether the

proven misconduct constitute just cause or excuse for the punishment of dismissal. [see ***Milan Auto Sdn. Bhd. (supra)***].

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. That the Claimant contributed to the chain of events that led to that fateful dismissal letter cannot be denied. True that her repartee was a result of COW1 showing her the door. But employees who work in commercial firms ought to accept without being overtly sensitive, to forceful language designed to stimulate their efforts. It will not serve equity and good conscience to allow the Claimant not to be penalised for

her contributory conduct and the Court therefore scales down by 10% under this head, thus arriving at the figure of RM75,071.00 (10% of the sum of RM25,452.00 and RM57,960.00).

Delay Factor

46. 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%. The Court adds that scaling down if any under this head should equitably be done as the last exercise after having determined the final sum payable to a Claimant.

47. In the instant case the Claimant was represented without absence at every one of the mentions and hearing dates set by the Court. She further complied with all directions on the filing of pleadings, documents and witness statement. She therefore made no contribution towards delay and the Court accordingly effects no scaling under this sub-head.

48. The Claimant's appeal under section 20 of the Act was received by the Minister of Human Resources on 15.9.1999. On 21.2.2002 the Minister decided to exercise his discretion to refer the matter to the Industrial Court and the matter was assigned to the Court on 20.3.2002 more than 2.5 years later. And on being assigned to the Court, hearing of the matter was further delayed for the reason that the Court was without a substantive Chairman from 1.2.2003 to 15.1.2004, a period of almost one year. There was therefore a delay of a total of 3.5 years under this sub-head.

49. 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 at the rate of 5% per year of delay. Scaling down under this sub-head will therefore be 17.5%, thus giving a figure of RM61,933.00 from the original sum of RM75,071.00.

ORDER

50. The Court orders that the Company pays the Claimant through her solicitors, the sum of RM61,933.00 less statutory deductions if any, not later than 45 days from the date of this Award.

HANDED DOWN AND DATED THIS 5TH OCTOBER, 2004.

(N. RAJASEGARAN)
CHAIRMAN
INDUSTRIAL COURT.