INDUSTRIAL COURT OF MALAYSIA

CASE NO : 15/4-584/01

BETWEEN

SK COATINGS SDN. BHD.

AND

WOO WAI SEONG

AWARD NO : 831 OF 2005

Before	**:**	**N. RAJASEGARAN - Chairman** (Sitting Alone)
Venue:	**:**	Industrial Court Malaysia, Kuala Lumpur.
Date of Reference	**:**	24.4.2002.
Dates of Mention	**:**	19.7.2001, 8.4.2002, 20.10.2003 and 9.6.2004.
Dates of Hearing	**:**	23.6.2004, 24.6.2004 and 12.7.2004.
Representation	**:**	Tuan Haji Zainol Che Tak from Malaysian Employers Federation representing the Company. Mrs. Reena Enbasegaram from M/s Murugavell Arumugam & Co., Counsel for the Claimant.

Claimant's written submission received on : 10.8.2004.

Company's written submission received on : 21.9.2004.

Claimant's rejoinder received on : 30.9.2004.

Reference :

This is a reference made under Section 20(3) of the Industrial Relations Act, 1967 arising out of the dismissal of **Woo Wai Seong** (hereinafter referred to as "the Claimant") by **SK Coatings Sdn. Bhd.** (hereinafter referred to as "the Company").

AWARD

1. Before me for resolution is the dismissal of Woo Wai Seong ('the Claimant') by his employer SK Coatings Sdn. Bhd. ('the Company') effected on 9.1.1999. The matter came before me *via* a reference dated 24.4.2001 made by the Hon. Minister of Human Resources pursuant to his powers under section 20(3) of the Industrial Relations Act, 1967 ('the Act').

CRONOLOGY OF EVENTS

2. The Claimant commenced employment with a company called SK Kaken (M) Sdn. Bhd. ('SKK') with effect from 3.6.96 in the position of Quantity Surveyor. At the time the Claimant commenced employment, SKK's business involved the securing and performance of contracts to paint commercial and Japanese owned companies. It also dealt with the trading and marketing of building-coating materials. SKK's head office is situated in Japan. The Managing Director was then Gunichi Takeyama ('COW 1').

3. SK Coatings Sdn. Bhd. ('the Company') was incorporated in Malaysia on 24.8.96 as a subsidiary of SKK. The Company was set up in response to the Construction Industry Development Board's regulation which affected SKK's profitability in undertaking the type of contracts that it did. With the establishment of the Company, that part of SKK's business involving the securing and performance of contracts to paint

commercial and Japanese factory buildings was diverted to the Company. It is not in dispute that at the material time there existed work originally contracted by SKK which continued to be performed by SKK even after the establishment of the Company.

4. At the request of SKK, the Claimant resigned from his employment with SKK and thereafter by a letter entitled 'Transfer of Employment', dated 30.12.97, received by the Claimant on 5.1.98, the Claimant's services was continued with the Company without changes to his designation and to his terms and conditions of employment. All those employees employed by SKK in the capacity of site supervisors through a similar *modus operandi* became employees of the Company.

5. The parties agree that there was an *"economic downturn"* in the late 1990s which affected the building industry. The nature of the Company's business involved the building industry.

6. On 26.10.98 there was a meeting between the Claimant and COW1. It is common ground that one of the matters discussed at that meeting was the financial situation of the Company. All else that transpired during the meeting is in dispute. The Claimant's version of what had occurred at that meeting is detailed in his letter to COW1 found at page 18 of AB1, an agreed bundle of documents. In that letter, the Claimant referring to the meeting of 26.10.94 wrote that COW1 had at that meeting instructed the Claimant to tender his resignation for the reason that due to the prevailing "*economic turmoil*" the Company was unable to secure new projects and wished to cease operations, that the Company was unable to maintain him and that the position held by him was of "*non-importance to the company*." He further requested the Company to consider options other than COW1's proposal to terminate his employment.

7. A further meeting between the two was held on 2.11.98. Again what transpired is disputed. That the Claimant followed this meeting with a letter dated 7.11.98 to the Company found at page 20 of AB1, is mutually agreed, but not what is stated therein. In summary, the Claimant in that letter wrote that he was threatened by COW1 during the meeting to resign. He reiterated his earlier request for the Company to seek other options.

8. To these two letters by the Claimant, the Company replied in the form of a letter dated 30.11.98 which letter was received by the Claimant on that same date. This letter can be seen at page 22 of AB1. Paraphrased, the Company denied the Claimant's allegations contained in his letters and stated, that the two meetings were held to convey to the Claimant the Company's decision to retrench him; the inability of the Company to secure new contracts; that the position of quantity surveyor was no longer needed; and that compensation amounting to 1½ months' salary would be paid to the Claimant. To this letter the Claimant responded with his own, addressed to the Company and dated 3.12.98 in which letter he registered his disagreement to the reasons extended by the Company for his termination of employment and stating his assumption that his last date of employment would be 31.12.98.

9. Finally by a letter dated 9.12.98 entitled "Notice of Retrenchment", received by the Claimant on even date, the Company served one month's notice of termination upon the Claimant which notice also fixed his last date of employment on 8.1.99. That letter, found at page 24 of AB1, bases the retrenchment on there being insufficient work to justify the continued employment of a quantity surveyor for the reasons stated therein. Thereafter the Claimant ceased employment on that date

directed by the Company. In all, the Claimant chalked as his service, 2.6 years. For this he received a month and a half's salary as compensation.

THE CLAIMANT'S CASE

10. I choose to state the Claimant's case first, though it was the Company who began at the trial. The Claimant through his pleadings, direction of evidence and submission mounts his case on the platform that follows.

11. The first plank of the Claimant's platform is that his services was not redundant. He contends that the duties that he had performed for the Company and SKK had not, at the material time, diminished such as to make his services redundant. In support the Claimant avers, that SKK had continuing projects which required his services; that the Company was still seeking and obtaining contracts; that even after his retrenchment his ex-colleagues contacted him on work related matters; and that the Company had subsequent to his retrenchment employed one Ryan Wong to carry out the functions hitherto performed by him.

12. The second plank upon which the Claimant launched his attack is based on the insufficiency of the actions taken by the Company to avert his retrenchment. He founds this attack on what he calls the miniscule effects of the cost cutting measures adopted by the Company involving the capping of hand phone bills of employees to RM30.00 per employee per month; limiting claims on business telephone calls to RM150.00 per month; and abolishing claims on the usage of pagers. He disagrees with the Company's submission on cost-cutting in the form of a freeze on annual increment of employee's salary in 1999 and the non-payment of dividends to the Company's shareholders as being irrelevant for the reason that the freeze on increments was after his retrenchment and the

non-payment of shareholders' dividends is attributable to the Company having started its business, according to the Claimant's submission, only in January 1998.

To this plank, the Claimant has tied several actions by the Company which he maintains were imprudent. In this connection he referred to the Company's move in 1998 to a bigger premises from Petaling Jaya to Shah Alam; the fact that he was transferred from SKK to the Company on enhanced terms and conditions of employment; that the Company had paid its employees annual increment of salary in March 1998; and that the Company did not reduce his earnings as a cost saving device.

To this same plank, the Claimant conjoins the Company's failure to reduce working hours, overtime and work days. He further complains that the Company could have issued 350,000 more shares to raise funds but did not do so. These actions he submits, would have averted his redundancy.

13. As his third plank, the Claimant contends that the Company had not conformed to the Code Of Conduct For Industrial Harmony in that the Company had failed to give him appropriate advance warning of the impending retrenchment. The Claimant further complains of there being no voluntary separation scheme offered to him and finally that his retrenchment was prompted by *mala fide*, arising from his refusal to resign as allegedly requested by COW1 during the meeting held on 26.10.98.

THE COMPANY'S CASE

14. The Company's case is what follows next.

15. The Company's short reply is that having been affected by the adverse economic situation prevailing then, it was unable to secure new projects thus leading to a diminution of the work of quantity surveyor performed by the Claimant. This led to the Claimant's retrenchment.

16. The Company avers that it had embarked upon cost cutting measures by having taken action as those commented earlier in relation to the Claimant's case. It is the Company's submission that being a small company with only four employees existing within a Group employing thirty-three employees working in three separate companies, the cost cutting measures available were restricted. The Company explains that the freeze on annual increments imposed in 1999 was in respect of the increment due for the year 1998 and the annual increment that was granted in March 1998 was in respect of the year 1997 when the Company had made a profit of RM154,959.00. And in relation to the relevancy of the non-payment of share-holders dividends, the Company counters the Claimant's argument by stating that after having been established on 24.8.96, the Company had commenced business at the end of 1996 and not in January 1998 as contented by the Claimant.

17. On the Claimant's submission of imprudent management decisions, the Company has this to say. The move to a bigger premises in Shah Alam was planned earlier and a bigger premises was needed to accommodate the three companies within the Group. And on reduction of overtime, working hours and work-days the Company submits that the nature of its business, which is the undertaking of contracts at various locations, did not permit such actions. It is also the Company's stand that a paid up capital of RM150,000.00 from an authorized capital of RM500,000.00 is justified after taking into account the small size of the Company, thus the need to issue more shares did not arise.

18. On the matter relating to the need for advance warning of impending retrenchment as envisaged in the Code Of Conduct For Industrial Harmony, the Company submits that there is no legal nor contractual obligation for it to do the same. It is further the case of the Company that the Claimant was informed during the meeting of 26.10.98 of the retrenchment which date precedes the date of notice of retrenchment by a month and a half. On the issue pertaining to the failure of offer of a voluntary separation scheme, COW1 maintains that he did make a retrenchment proposal to the Claimant during his meetings with the Claimant. And on the Claimant's case of *mala fide* being evident through COW1 seeking the resignation of the Claimant during the meeting of 26.10.98, the Company's response is a flat denial of having sought the Claimant's resignation.

THE COURT'S FUNCTION

19. So much for the facts and submissions by the contending parties. In discussing the role of the Court, let me next refer to three aspects of the law which are not contentious but which need to be understood as part of the overall context of this case.

Reason For Dismissal

20. I am first bound by the authority of Raja Azlan Shah CJ (as HRH then was) in ***Goon Kwee Phoy v. J & P Coats (M) Bhd., (1981) 2 MLJ 129*** where the Federal Court limited the inquiry of the Industrial Court in a case of dismissal, to enquire whether the reason advanced by an employer for the dismissal of the workman has been made out. In this quest I am prevented from going into any reason not relied on upon by the employer. The Company *vide* its letter dated 9.12.98, referred to earlier, brought about the termination of employment of the Claimant by

way of retrenchment. And it is in the direction of the factors ancillary to retrenchment that my analysis of the instant case should flow.

Retrenchment

21. The *locus classicus* on what constitutes retrenchment is that part of the Court of Appeal decision in ***William Jacks & Co. (M) Sdn. Bhd. v. S. Balasingam (1997) 3 CLJ 235*** where Gopal Sri Ram JCA spoke :

> *" Retrenchment means: 'the discharge of surplus labour or staff by the employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action' (per S.K. Das J in Hariprasad v. Divelkar, AIR (1957) SC 121 at p. 132). "*

22. The condition precedent for retrenchment to occur is the existence of surplus labour. Succinctly is this explained by the learned author Dunston Ayadurai in his work, ***Industrial Relations In Malaysia 1998 Edn. at page 121*** :

> *" Redundancy refers to a surplus of labour and is normally the result of a reorganisation of the business of an employer; and its usual consequence is retrenchment, i.e. the termination by the employer of those employees found to be surplus to his requirements after the reorganisation. Thus, there must first be redundancy or surplus of labour before there can be retrenchment or termination of the surplus. "*

Court's Role

23. Soonavala in his text, ***The Supreme Court On Industrial Law, Vol. II, 2nd Edn. at page 424*** elaborates on the Court's role in a matter involving retrenchment as follows :

> *" ... when a company gives notice of retrenchment to its workmen and the dispute arising therefrom is referred for adjudication to a Tribunal, the only questions for its decision are (a) whether the retrenchment was justified by the circumstances of the case, (b) whether the grounds for the retrenchment given by the employer are true .... and (c) whether the order of retrenchment was motivated by bad faith and a desire to victimise or harass the workman whom for some ulterior reasons the employer wanted to discharge or dismiss. "*

24. I find Soonavala to be methodical in his approach and propose to follow the same. And in so doing, I take heed of the guidance offered by Gopal Sri Ram JCA in ***William Jacks & Co. (M) Sdn. Bhd. (supra)*** where his Lordship speaking on that part of an employer's right to organise his business said :

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

But with the *cavet* :

> *However, the Industrial Court is empowered, and indeed duty-bound, to investigate the facts and circumstances of a particular case to determine whether the exercise of power was in fact bona fide. "*

And on how to assess *bona fides*, his Lordship in that same passage advised :

> *" Whether the retrenchment exercise in a particular case is bona fide or otherwise, is a question of fact and of degree depending for its resolution upon the peculiar facts and circumstances of each case. "*

EVIDENCE, EVALUATION AND FINDINGS

Was there a diminution of the Claimant's job?

25. Diminution means diminishing work requirements. Surplus of labour is a corollary to such diminution. And it is this reason that the Company has advanced for finding the Claimant redundant and consequently terminating his services. It is appropriate at this stage to recall what is stated in the Company's notice of retrenchment : -

> *" ... due to the current economic turmoil, the Company is currently unable to secure new projects. As such the Company has decided that the position of a Quantity Surveyor is no longer needed, as there is not enough work to justify the continuing employment of a Quantity Surveyor in the Company, due to the shortage of projects."*

26. In analysing whether there was a diminution of the Claimant's job warranting his retrenchment, I adopt a two-stage process of fact finding, namely (1) had the requirements of the Company's business for the Claimant to carry out the work of Quantity Surveyor ceased or diminished? If so, (2) was the dismissal of the Claimant by reason solely of the state of affairs identified at stage (1)? Support for such an

approach I find in the words of Lord Irvine LC at page 564 in the House of Lords decision in ***Murray v. Foyle Meats (1999) IRLR 562***.

27. A starting point of the first of the two-stage process would be to determine the job function of the Claimant. Under cross-examination the Claimant testified that 70% of his job involved work as a quantity surveyor whilst the balance 30% was to assist the Director to follow up on new projects. And COW1 explained that the quantity surveyor's function was *"calculating the quantity and preparing claims, invoices and site measurements."* It also included assisting in the preparation and submission of tenders and handling project accounts. COW1 further explained that the small size of the Company led to overlapping of duties and the Claimant did perform other duties. Unfortunately what these other duties entailed was not elaborated except that part involving coordination and supervision of work process by sub-contractors. It is also of relevance to note COW1's evidence that up to early 1999 there existed outstanding projects of SKK which the Claimant, after his transfer to the Company, still performed.

28. And now to relate the Claimant's job function to the needs of the Company at the material time, which is, from October of the year 1998, when in COW1's words the decision to terminate the services of the Claimant was taken, up to the date of the Claimant's termination of employment on 19.1.99. It is COW1's stand that a *"quantity surveyor was required when economy was good"* and *"with no new projects or contracts forthcoming, there was no merit to retain a quantity surveyor."* That the Malaysian economy was not then in a desirable mode is common ground between both parties. But when challenged in cross-examination that notwithstanding, the Company still continued to acquire projects though not of as high a value as previously, COW1

concurred. He further confirmed that at the end of 1998 and in early 1999, the Company still had pending projects as well as ongoing projects whose accounts were not closed as yet. And on SKK undertaking new projects even after the Company was set up, COW1's response is – *"Maybe yes. I don't have record with me."* The Court upon study of the Company's audited accounts for the year ending 31.12.88, found at pages 4 to 17 of AB1, observes that the Balance Sheet shows that contract work in progress for that year made up of 12 months, was RM448,529.00. And this compares with RM350,640.00 for the earlier period of 16 months from 24.8.96 to 31.12.97. The Court further notes that the Profit and Loss Accounts show the turnover for the 12 months of that year was RM1,258,757.00 which compares with RM1,364,595.00 for the earlier extended period of 16 months. On a financial year basis these figures do not show the year 1998 to be worse off than 1997. What of concern to me in as far as the matter in hand is involved, is not the state of the economy or the financial position of the Company which incidentally with retained profits brought forward was not then in the red, but the actual state of the Company's and SKK's projects at the material time. For this should determine whether the job function performed by the Claimant had diminished to such an extent that that position could be dispensed with. In this connection the Company cannot be viewed in isolation from SKK for the Claimant's job function involved work for both companies.

29. Of relevance to me too is that part of COW1's evidence that the quantity surveyor's function subsequent to the Claimant's retrenchment was taken over by COW1 jointly with Shazali and after Shazali's resignation in March or April 1999, jointly with the newly employed Ryan Wong both of whom were employed either as Project Manager or Assistant Project Manager. That it needed COW1 and another to perform the job function carried out by the Claimant cannot be lost on the Court.

30. After anxiously considering the entire evidence adduced, I hold that the facts and circumstances are more consistent with a finding that the requirements of the Company's business for the Claimant to carry out the work that he had been engaged to perform had not ceased or for that matter substantially diminished at the material time, that is from October 1998 up to the date of his termination of employment on 9.1.99. And there lie no evidence before me as to whether the requirements would have been any dissimilar during the period after 9.1.99.

31. Having arrived at this decision on the first stage of my enquiry, the need for me to embark upon an enquiry into the second stage does not arise.

Was the Claimant's retrenchment justified under the circumstances of the case?

32. On the right of the Company to organize its business in the manner it considers best and the constraints imposed thereupon, I hearken and am guided in my analysis by the words of Gopal Sri Ram JCA in ***William Jacks & Co., (M) Bhd. (supra)***. What his Lordship spoke, I have already mentioned earlier.

33. The Company referred in submission, to the speech by Nik Hashim J (as his Lordship then was) in ***Stephen Bong v. FCB (M) Sdn. Bhd. (1999) 3 MLJ 411*** where his Lordship said that *" ... it is not the law that redundancy means the job or work no longer exists. Redundancy situation arise where the business requires fewer employees of whatever kind ('Harvey on Industrial Disputes')."* But that case involved an executive director who was retrenched as a result of the loss of sizeable accounts (clients) that already existed with the company. The executive

director was retrenched with 25 other employees. And the work that the executive director performed was found not to have been taken over by another employee as alleged by the dismissed executive director. The speech of his Lordship made in the circumstances of that case does not correlate to the circumstances of the instant case and with respect, I am unable to apply it here.

34. It is my finding of fact that the job performed by the Claimant at the material time existed after his termination of employment. And this job continued to exist, to be performed by COW1 and the project manger/assistant manager. In the case of ***Limton Parts Manufacturer Sdn. Bhd. v. Chandramalar Nagarajah (2001) 1 ILR 798*** the Industrial Court found the workman's termination of employment not to arise from redundancy for the reason that the kind of work performed by the said workman had not ceased or diminished. ***Aluminium Company Malaysia Berhad v. Mustapha Talip (1987) 1 ILR 553; Trident Malaysia Sdn. Bhd. v. National Union of Commercial Workers (1987) 2 ILR 190;*** and ***H.V.D. Film Production (M) Sdn. Bhd. v. Loh Shuey Ling, Annie (1994) 2 ILR 753*** are all instances where the Industrial Court for similar reason arrived at like decision.

35. For the reasons adumbrated, I find the retrenchment of the Claimant to be unjustified under the circumstances of this case.

Have the grounds given by the Company for the retrenchment been proved?

36. The Company's notice of termination states the reason for the retrenchment. The relevant passage has been repeated earlier. That reason that there was insufficient work to justify the continued employment of a quantity surveyor has been found to be factually

baseless. I therefore find the answer to this aspect of my enquiry in the negative.

37. I am further mindful of the application of the principle in ***Goon Kwee Phoy (supra)*** that if the reason given by the employer for the termination of employment is found not to have been made out, then the inevitable conclusion must be that the termination of employment is without just cause or excuse.

Was the retrenchment motivated by bad faith?

38. That reason referred to earlier given by the Company in its notice of termination of employment has been found to be untrue. The dismissal carried out on a falsity cannot be *bona fide* in exercise. And this leads me to an answer in the affirmative to the title-question.

Was the dismissal for just cause or excuse?

39. Having adopted the methodology before mentioned, as advocated by Soonavala, I find that the Company had failed in each one of the three questions that I need to address my enquiry. To dispel any future discourse, I must add that I view the three questions of enquiry to be disjunctive and not cumulative and conjunctive. Failure in any one of the questions posed would have led the Company to grief.

40. The reasonable and inescapable finding of this Court can only be that the Claimant was dismissed without just cause and excuse.

41. In the light of this finding, the need to dwell upon the various other issues raised, including that relating to the Code of Conduct For Industrial Harmony, I find not to be necessary.

REMEDY

42. Considering the size of the Company, the tone of the correspondences between the Claimant and the Company immediately preceding his dismissal and the fact that the position of quantity surveyor requires the absolute confidence of the Company, equity and good conscience will not be served if the Claimant is reinstated. That the Claimant is now gainfully employed elsewhere also contributes to this decision of mine.

43. 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***].

44. 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.

45. 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

46. 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.

47. 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.

48. 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

49. 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.

50. The Claimant earned a basic monthly salary of RM3,998.00 at the time of his dismissal thus giving that figure as the multiplicand.

51. With the Claimant having commenced work on 3.6.1996 and the last date of hearing being on 12.7.2004, the multiplier in the instant case is 8.

52. In the result, a sum of RM31,984.00 is due as compensation in lieu of reinstatement which sum is obtained through multiplying RM3,998.00 by 8. The Claimant was paid 1½ months salary as compensation at the time of his dismissal. This should amount to RM5,997.00 which figure should be offset against the compensation in lieu of reinstatement thus adjusting the sum payable under this head to RM25,987.00.

BACKWAGES

53. Backwages is for the period between the date of dismissal and the date of conclusion of hearing which in the instant case is from 9.1.1999 to 12.7.2004, a period of 66 months.

54. In addition to his basic salary of RM3,998.00 the Claimant was paid an allowance of RM400.00 called in his contract of employment as "special relief allowance" but during the trial called as "car maintenance allowance". From the evidence deduced I conclude that this sum of RM400.00 is not a reimbursement of expenses but is instead a fixed allowance paid, unsupported by any evidence of expenditure. The RM400.00 is part of wages and I therefore treat the multiplicand in the computation of backwages as RM4,398.00 (RM3,998 plus RM400).

55. On what should be the amount of backwages that is payable, my discussion follows.

SCALE DOWN

Gainful Employment

56. 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.***

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

58. The Claimant held no regular employment from the date of his dismissal on 9.1.99 up to March 2000, a period of 14 months. For this period, the Court orders full backwages which amounts to RM61,572.00 which sum is obtained through multiplying RM4,398.00 by 14, these being the appropriate multiplicand and multiplier respectively.

59. For the period April 2000 up to the last date of hearing the Claimant was gainfully employed, first from April 2000 to June 2001 with Stone Empire Sdn. Bhd. at a salary of RM3,500.00 per month and thereafter with Freudenberg Bausysteme KG at a monthly salary of RM3,200.00. His monthly earnings during this period approximated 75% of that which he would have earned in the Company. On a joint application of the principle expounded in ***Dr. James Alfred (supra)*** and the requirements of section 30(5) of the Act, I hold that the backwages payable to the Claimant for the period April 2000 up to the last date of hearing, that is 12.7.2004, should be scaled down by 50%. In arriving at this percentage I take into consideration possible increments of salary that the Claimant could have earned had he been retained by the Company. The sum due as backwages for this period is therefore RM114,348.00 (RM4,398.00 multiplied by 52 months, less 50%).

Contributory conduct

60. The Court finds the Claimant not to have contributed in any way towards his dismissal and for this reason no scaling down is effected under this head.

Delay Factor

61. 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 and (b) delays attributable to the Ministry of Human Resources or the Industrial Court. 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.

62. In the instant case the Claimant was represented without absence 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.

63. The Claimant's appeal under section 20 of the Act was received by the Minister of Human Resources on 12.1.1999. On 24.4.2001 the Minister decided to exercise his discretion to refer the matter to the Industrial Court and the matter was assigned to the Court on 25.6.2001 more than 2.4 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 3.4 years under this sub-head.

64. 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, calculated up to the last date of hearing, upon the employer for he contributes no blame too. In the circumstances the Court scales down the backwages at the rate of 5% per year of delay. In arriving at this percentage the Court has discounted the fact that a reasonable time should be allocated for the Claimant's appeal under section 20 of the Act to be referred to the Court. Scaling down under this sub-head will therefore be 17%.

65. The Court has ordered a sum of RM25,987.00 as compensation in lieu of reinstatement and a sum of RM175,920.00 as backwages, thus giving a total of RM201,907.00. From this total the Court, as decided, scales down 17% for delay, thus making the amount payable to the Claimant as being RM167,583.00.

ORDER

66. The Court orders that the Company pays the Claimant through his solicitors, the sum of RM167,583.00 less statutory deductions if any, not later than 45 days from the date of this Award.

HANDED DOWN AND DATED THIS 27TH APRIL, 2005.

(N. RAJASEGARAN)
CHAIRMAN
INDUSTRIAL COURT