**INDUSTRIAL COURT OF MALAYSIA**

**CASE NO : 15/4-1046/02**

**BETWEEN**

**METROD (MALAYSIA) BHD.**

**AND**

**SURADI BIN MD RUSDI**

**AWARD NO : 1299 OF 2005**

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| **Before** | : | **N. RAJASEGARAN - Chairman** (Sitting Alone) |
| **Venue** | : | Industrial Court Malaysia, Kuala Lumpur. |
| **Date of Reference** | : | 23.10.2002. |
| **Dates of Mention** | : | 13.1.2003, 15.9.2003, 30.10.2003, 12.7.2004, 19.7.2004, 20.8.2004, 7.10.2004, 19.10.2004, 12.1.2005, 21.3.2005, 13.4.2005 and 28.4.2005. |
| **Dates of Hearing** | : | 1.6.2005 and 3.6.2005. |

**Company's written submission received:** 10.6.2005.

**Claimant's written submission received :** 10.6.2005.

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| **Representation** | : | Ms. Prema Kesavan from Malaysian Employers Federation (MEF) for the Company.<br><br>Mr. Peter Kandiah from Malaysian Trade Union Congress (MTUC) 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 **Suradi bin Md Rusdi** (hereinafter referred to as "the Claimant") by **Metrod (Malaysia) Bhd.** (hereinafter referred to as "the Company").

**AWARD**

***THE JOURNEY TO TRIAL***

1. Metrod Malaysia Bhd. ('the Company') had in its employ Suradi bin Md Rusdi ('the Claimant'). The Company dismissed the Claimant from its employment on 6.8.1999. The Claimant was aggrieved. He made representations on 18.8.1999 under section 20 of the Industrial Relations Act, 1967 ('the Act'). The Honourable Minister of Human Resources exercised his powers under the Act. He referred the dismissal ('the Reference') to the Industrial Court. Industrial Court 15 ('the Court') received the Reference on 18.11.2002. The trial of the Reference was conducted over two days on 1st and 3rd June 2005. The parties addressed the Court in submission on 10.6.2005. It took 6.8 years for the dismissal to go on trial. Several contributed to this. The Reference took 3.25 years to arrive at the Court. The Court was without a substantive Chairman for almost one year from 1.2.2003 to 15.1.2004. This made up for the loss of 4.25 years.

2. The Claimant filed his pleadings ten months late. He was absent and unrepresented at four of the mentions that were called. Hearing fixed for two days commencing on 19.7.2004 had to be aborted when on the first day of hearing the learned representative of the Claimant, Mr. Peter Kandiah applied as his third application for the day, to discharge

himself from representing the Claimant. The Court granted this application. Before that, his first application was for the Reference to be transferred to another Division of the Industrial Court. That application was rejected. His second application was for the Chairman of the Court to discharge himself from hearing the case. This too was denied. The reason expounded by Mr. Peter Kandiah for both the first and second applications was the same. That quoted verbatim is, "*Reason being Yang Arif is in breach of section 23(1) of the Industrial Relations Act.*" I now give my reasons for having then rejected the two applications. The Court had occasion to rule on a somewhat similar application in ***Capetronic (Malaysia) Corporation Sdn. Bhd. v. Alan Ng Li Hong (2004) 2 ILR 149.*** The Court's arguments there from pages 153 to 157 under the various headings save for that entitled 'High Court application" can be applied to the first two applications made here by Mr. Peter Kandiah. I find it unnecessary to regurgitate what was there said.

3. After all that, Mr. Peter Kandiah was back in the saddle as the Claimant's representative by an application made during the mention of 20.8.2004 which the Court granted.

***THE TRIAL***

**Court's Jurisdiction**

4. I first wish to dispose of one crucial matter that arose during examination-in-chief of the Claimant. This involved the Court's jurisdiction to proceed with the Reference. This is what transpired:

> " *Q: You ambil kes ini mohon balik kerja?*
> *A: Kalau saya tawarkan kerja di Company saya tidak mahu.*

*Q: You mohon tidak salah dan minta kerja balik?*

*A: Ya. "*

5. This point received no attention from either party. That does not absolve me from addressing the same. On what this implied , I first refer to ***para 120.13 of Halsbury's Laws of Malaysia, Vol. 7, 2000 Edn.*** where it is stated :

> *" A workman making representation under the Industrial Relations Act 1967 must be ready to be reinstated. Once reinstatement is no longer applied for, the Industrial Court ceases to have jurisdiction* [see ***Holiday Inn Kuching v. Lee Chai Siok Elizabeth (1992) 1 MLJ 230.***] "

6. This area of the law has been the subject of divergence of opinion. The need for me to dwell thereon does not arise for it is my finding that the Claimant had not deserted his claim for reinstatement for the reasons that at paragraph 24 of the Statement of Case the Claimant's prayer is for reinstatement and further the Claimant had reaffirmed his prayer upon the question being repeated as seen from his testimony which I have repeated earlier.

**Facts Mutually Agreed**

7. At the outset of the trial, with the assistance of the Court, both parties identified and agreed mutually on various facts. On what these are, the Court's notes of evidence read :

> *" 1. The Claimant commenced employment with the Company as a machine operator with effect from 3.3.1983.*

2. *The Claimant was given a show cause letter by the Company as at page 1 of AB1.*
3. *The Claimant replied the show cause letter as found from pages 3 to 5 of AB1.*
4. *The Claimant was served a charge letter by the Company as found at page 6 of AB1.*
5. *The Domestic Inquiry was held on 2.8.1999 and those who participated in the Domestic Inquiry are as per the record at page 26 of AB1.*
6. *The notes of the Domestic Inquiry are as found from pages 8 to 43 of AB1.*
7. *The Claimant was dismissed by the Company on 6.8.1999 by service of the letter found at page 44 of AB1.*
8. *The Claimant was dismissed for the 3 reasons stated in the letter found at page 44 of AB1 and for no other reason.*
9. *The Claimant's salary at the time of dismissal was RM1,500.00 per month.*
10. *The Claimant received all those warnings found from pages 46 to 47, from the Company. "*

8. Before that both parties agreed to treat the Company's bundle of documents as an Agreed Bundle and this was marked as exhibit AB1.

**Domestic Inquiry Notes**

9. I move next to dispose of one other matter. Simple but important in determining what path I should adopt in my fact finding. It involves the domestic inquiry that preceded the Claimant's dismissal. As stated earlier, the parties are in agreement that a domestic inquiry was held on

2.8.1999 and that the notes of the inquiry are as reflected from pages 8 to 43 of AB1. Pages 8 to 25 constitute the original handwritten script. That from page 26 to 43 are the typed transcript.

10. In the course of leading evidence for the Company through Lionel George ('COW2'), learned counsel for the Company, Ms. Prema Kesavan referred him to pages 38 and 39 of AB1. She sought his confirmation that his testimony during the domestic inquiry was as found in those two pages. The two pages are typed transcripts whose original handwritten script appears at page 18 of AB1. The Court had occasion at that point to compare both and noted that the typed transcript was not consistent with the original handwritten script. In fact the difference was substantial. Ms. Prema Kesavan was unable to clarify the difference.

11. The veracity of the typed transcript being suspect, I am unable to rely on it. The original handwritten script being hardly decipherable, I am unable to refer to it. In the circumstances I am prevented from doing that which is exhorted by Raus Sharif J in ***Bumiputra Commerce Bank Bhd. v. Mahkamah Perusahaan Malaysian & Anor (2004) 7 CLJ 77.*** In that case his Lordship after having first referred to a decision by Low Hop Bing J. in ***Metroplex Sdn. Bhd v. Mohamed Elias (1998) 5 CLJ 467,*** held :

> " *In the instant case, the Industrial Court did not address the issue whether a proper domestic enquiry had been held and whether the conclusion reached by the inquiry panel was perverse. Thus, clearly the Industrial Court has misinterpreted the decision in* ***Wong Yuen Hock*** *and* ***Milan Auto*** *and erroneously decided that the matter should be considered de novo. To me, the two cases are cases where a domestic enquiry was not held, and therefore, distinguishable.*

*Furthermore, neither of the said cases has the proposition laid down which would be inevitable for the Industrial Court to ignore the fact that a valid inquiry had been carried out and thus, simply proceed to hear the matter de novo.*

*Thus, I am of the view that in cases of this nature, the Industrial Court should first consider whether or not the domestic inquiry was valid and whether the inquiry notes are accurate. In the absence of such consideration and a finding on the validity of the domestic enquiry and accuracy of the inquiry notes, the Industrial Court's action in proceeding to decide the matter without any regard to the notes of inquiry cannot be described as anything more than an error of law. "*

12. Thus disabled, I fall back upon the binding authorities of ***Dreamland Corp (M) Sdn. Bhd. v. Choong Chin Sooi & Anor (1988) 1 CLJ 1, (1988) 1 CLJ (Rep) 39 SC*** and ***Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. & Anor (1995) 3 CLJ 344*** to consider afresh whether the Company had sufficient evidence to find the Claimant guilty of each of the three charges that it did.

**Reasons For Dismissal**

13. At page 6 of AB1 are found the charges that the Company preferred against the Claimant during the domestic inquiry. They number seven in all. The domestic inquiry found him guilty of three. The dismissal letter at page 44 of AB1 lists the three. That letter shorn of its formalities reads :

*" Siasatan Dalaman (Domestic Inquiry) yang telah dijalankan pada 2hb. Ogos, 1999 telah mendapati anda bersalah dalam tiga (3) tuduhan yang dikenakan terhadap anda iaitu :*

1. *Tuduhan Pertama – pada 14hb Julai 1999, jam 12.20 pagi anda dengan sengaja tidak mengikut arahan penyelia anda En. R Chindorai semasa beliau mengarahkan anda untuk menjalankan mesin M3011 di bahagian Wire Drawing di Metrod (Malaysia) Berhad.*

2. *Tuduhan Keenam - anda telah berkelakuan biadap terhadap penyelia anda En K Seniasamy dengan cuba memukul beliau semasa beliau memberitahukan tanggungjawab anda untuk menjalankan mesin di bahagian Rolling Mill di Metrod (Malaysia) Berhad*

3. *Tuduhan Ketujuh – and telah menggunakan perkataan biadap kepada penyelia anda En. K Seniasamy di bahagian Maintenance Workshop di Metrod (Malaysia) Berhad jam antara 7.30 malam hingga 9.00 malam, 18/7/1999.*

*Pehak Syarikat telah mendapati kesalahan tersebut adalah satu kesalahan yang amat serius dan dengan ini perkhidmatan anda ditamatkan dengan serta merta. "*

14. I am bound by the authority of Raja Azlan Shah CJ (as His Royal Highness then was) in ***Goon Kwee Phoy v. J & P Coats (M) Bhd. (1981) 2 MLJ 129*** to limit my inquiry into the three charges relied upon by the Company to dismiss the Claimant. And nothing more. It is timely to be reminded at this point that one agreed fact between both parties is that

the Claimant, save for the three reasons stated in the dismissal letter, was dismissed for no other.

**Charge No. 1**

15. It is the first charge of the Company that the Claimant had on 14.7.1999 at 12.20 *ante meridiem* deliberately failed to carry out the instruction of his supervisor R. Chindorai, to operate a machine called M30II in the Wire Drawing section.

16. In substance, the charge against the Claimant is for the misconduct of insubordination. Ms. Prema Kesavan referred to a decision of the Industrial Court in ***Malaysian Airline Bhd. v. Paramasevan Karupiah (1998)3 ILR 567*** where the learned Chairman, Siti Saleha Sheikh Abu Bakar referred to that part of ***Alfred Avin's Employees' Misconduct*** where the learned author wrote at page 125 :

> *" In an earlier case the Calcutta Court of Small Causes remarked : Disobedience to lawful commands is a most noxious offence and the most dangerous in its nature for it goes at once to the annihilation of authority. "*

With those sentiments on insubordination, I agree.

17. The Court views insubordination as a serious offence which if left unchecked will not only spawn indiscipline within an organization but which is also behaviour inconsistent with the maintenance of the relationship of employer and employee. The ingredients of the misconduct of insubordination are first, the order should have been communicated by the employer to the employee; secondly the order should be lawful; and thirdly the employee should have refused to carry

out the order. The employer shoulders the burden of proving these three ingredients. A strong defence to a charge of insubordination would be that the employee had a reasonable excuse for refusing to carry out the order. The burden then shifts upon the employee to prove reasonable excuse.

18. The Company relied on the sole testimony of K. Seniasamy ('COW1') in relation to the first charge. Through him the Company tendered as exhibit COE1, a sketch of the lay-out of the Company's factory. Of relevance to this charge is that block marked 'Roll Mill' and that other block marked 'Wire Drawing'. Two separate blocks, set apart diagonally.

19. I now turn to consider the first ingredient, that is the communication of the instruction by the Company to the Claimant. To recapitulate, the charge states the instruction to be to operate a machine called M30II in Wire Drawing. That this instruction was indeed communicated to the Claimant by R. Chindorai is admitted by the Claimant himself thus satisfying this first ingredient.

20. Next, I will quickly dispose of that ingredient pertaining to the failure of the Claimant to carry out the instruction by merely referring to that part of the Claimant's evidence in cross-examination where in answer to the question *"Adakah kamu mengikut arahan ini?",* he replied *"tidak".*

21. That brings me to examine the question of lawfulness of the instruction; in this case *vis-a-vis* the Claimant's job function. I find this a pivotal question in the instant case. It is a question of fact to be determined based purely on the relevant evidence placed before the Court. But before that, on the importance of the order being lawful, I

am reminded of the words of Raja Azlan Shah J. (as His Royal Highness then was) in ***Menon v. Brooklands Rubber Co. Ltd. (1968) 1 MLJ 15*** :

> *" It is well established that wilful **disobedience of a lawful and reasonable order** of the employer will justify summary dismissal. "(emphasis added).*

In examination-in-chief K. Seniasamy testified that the Claimant during his fifteen years service worked in Roll Mill; that the duties and function of the Claimant is to roll coils in Roll Mill; and that when not doing this he is *"assigned different jobs like cleaning machines, packing coils, whatever jobs we have in that Department"*. In cross-examination he admitted that M30II is in a different section from Roll Mill. The charge itself says so, that is, M30II is found at Wire Drawing. Lamentably no evidence was elicited on the Company's mandate if any, to require the Claimant to work in Wire Drawing.

It is the Company's submission that the Claimant was able to operate M30II. In this regard reference was made to an answer the Claimant gave in cross-examination that in his fifteen years service in the Company, he worked amongst others at Wire Drawing. With respect, this answer cannot be seen in isolation. Its true import has to be gauged from the totality of the questions asked and the answers given by the Claimant on this subject. This repeated here, puts to question the Company's submission earlier mentioned :

> "*Q: (Refers to COE1). Selama 15 tahun kamu kerja, di bahagian mana kamu pernah kerja?*
>
> *A: Casting Plant, Wire Drawing, Rolling Mill & M30I.*
>
> *Q: Kamu kata kamu tidak tahu jalan mesin M30II?*

*A: Betul.*

*Q: Pada DI semasa anda ditanya jika kamu tahu jalan M30II?*

*A: Saya jawab saya tidak tahu menjalankan mesin M30II."*

I find the Company not having succeeded in establishing that the Claimant's job function included the operation of M30II. In so not doing, the Company has failed to buttress its instruction to the Claimant with that essential ingredient of lawfulness.

22. To this is tied the reason extended by the Claimant for having failed to carry out the instruction. His answer in cross-examination is that he told R. Chindorai he did not know how to operate machine M30II. He was only familiar with operating machine M30I found at Roll Mill. He continued :

*"Q: Apa perbezaan diantara M30I dan M30II?*

*A: Lain mesin. Keadaan mesin tidak sama.*

*Q: Apa maksud keadaan berbeza?*

*A: Namanya pun lain. Dan bentuk mesin pun lain.*

*Q: Ada perbezaan lain? Cara operasi?*

*A: Ada. M30II memakai rak yang besar ataupun drum yang besar. Sistem M30II lain daripada M30I. "*

The evidence before the Court being that the reason for the Claimant's failure to abide by the instruction was that he did not know how to operate machine M30II, my finding cannot be any other than that the Claimant had a reasonable excuse for his inaction.

23. In the upshot I find the Company to have been wrong in finding the Claimant guilty of the first charge.

**Charge No. 7**

24. I find it convenient to address charge 7 before that appearing as charge 6. To recall, charge 7 is that the Claimant had used insolent words upon his supervisor, K. Seniasamy at the Maintenance Workshop on 18.7.1999 between the hours of 7.30 p.m. and 9.00 p.m. The charge failed to be specific in what insolent words were uttered and indeed applied an unwarrantedly extended period of time as to when the offence was allegedly committed. Employers are not necessarily legally qualified or trained. The need to conform to the strict requirements of a charge preferred in a court of law does not arise for purposes of initiating a domestic inquiry. They are however expected to frame charges to a degree of certainty in identifying the specific offence and the time of commission so as to enable a reasonable defence to be put forward.

25. First, to determine what these insolent words were. The Company's pleadings gave no clue. Nor was K. Seniasamy, against whom the words were directed, of any help when in his testimony he merely said: *"Then Claimant was putting some vulgar words on me regarding my mother."* Lionel George ('COW2'), a company witness, was of no assistance too maintaining that he did not hear what was spoken between the Claimant and K. Seniasamy. But I received timely assistance from the evidence of the Claimant himself when he testified under cross-examination continued under refreshed oath on a Friday afternoon after a long break for lunch and Muslim prayers, that: *"Saya jawab perkataan dia . Dia yang memulakan dahulu dengan bahasa Tamil - "pundek". Dan saya jawab "pundek lu punya mak."* That these words are not just insolent but truly vulgar, I harbour no doubts.

26. I am tempted to accept that which the Claimant had testified to be true. This temptation arises for the reason that the Claimant's retort appears to be a natural progression of that remark purported to be made by K. Seniasamy and the probability that a Malay would not normally use a Tamil obscenity spontaneously unless if led upon. Otherwise it would have been more likely that the Claimant would have used the Malay equivalent.

27. But to such temptation I cannot yield. The Claimant's testimony that he did use the offensive words put paid to that burden that lay upon the Company. The burden of proving that the Claimant was provoked into uttering those words strictly lies with him and this he failed to satisfy. Of equal importance is the fact that the alleged obscenity by K. Seniasamy was not pleaded by the Claimant nor was K. Seniasamy when on the stand, confronted with that allegation which incidentally was raised by the Claimant for the first time in his evidence after the Company had closed its case.

28. In the upshot I find the Company not to have erred in its decision that the Claimant was guilty of charge 7.

**Charge No. 6**

29. Charge 6 which the Company found the Claimant guilty of has at its core that the Claimant had attempted to assault his supervisor K. Seniasamy on that same occasion when charge 7 occurred. For reasons that will become obvious later, I will repeat what I had stated earlier that K. Seniasamy testified. But this time I have underscored an important word. This, K. Seniasamy testified after he had informed the Court of the physical incident that occurred between him and the Claimant around which charge 6 circulates. And this is what he said: *"**Then** Claimant*

*was putting some vulgar words on me regarding my mother."* I raise this now so as to dispel the use of the vulgarity by the Claimant as a cause for any provocation that may have visited K. Seniasamy to induce the physical incident which incident I will now proceed to examine.

30. That there was indeed a physical altercation between the Claimant and K. Seniasamy on that occasion is so obvious from the evidence before me that it would offend common sense to delve upon it further. As to what it was, I am able to determine from the evidence. But as to who provoked it, I am at a loss from the quality of the evidence laid before me.

31. It is common ground that at the time of the incident the Claimant was seated on a chair at a table outside the maintenance office situated in the Maintenance Workshop. As to what time the incident occurred, the Company offered no evidence through either one of its witnesses. It is the Claimant's evidence that the incident occurred at 9.00 p.m. and that this was within his rest hour which on that day arose between 8.35 p.m. and 9.15 p.m. In support thereof he relied upon a document entitled *"Metrod (M) Daily Production Report"* which he tendered without objection from Ms. Prema Kesavan and which was marked exhibit CLE3. CLE3 records the Claimant's *"lunch time"* for that day to be from 8.35 p.m. to 9.15 p.m. In the absence of any rebuttal I accept the Claimant's evidence. Acceptance of the fact that the incident occurred during the Claimant's rest period will bear reference to other decisions that follow.

32. K. Seniasamy in examination-in-chief described the *actus* of the incident as: *"He quickly grabbed my shirt and pushed me towards the wall. I am about to fall down, so with no choice I grabbed his T-shirt"* and in cross-examination: *"He did not assault me, just pushed me to the*

*wall."* And of that same incident, Lionel George repeated in evidence what he wrote in a report dated 20.7.1999 addressed to the Company on that same incident: *"I heard them raising their voices and followed by Encik Suradi pushing Mr. Samy against the wall, upon which I tried to calm them down."* This report is exhibited as exhibit COE2. Lionel George further testified that: *"I saw Claimant's hand on COW1's neck. I saw Claimant holding COW1 by the neck and pushing him towards the wall. At that time COW1 was holding Claimant. COW1 was holding Claimant with one hand on the shoulder."* The Claimant not much different on describing the *actus,* after having said: *"Dia yang menggoncang saya. Dia menarik baju saya hingga koyak"* continued: *"Semasa menarik baju saya, saya duduk di kerusi. Selepas itu saya bangun untuk melepaskan tangan dia di baju saya. Selepas itu keadaan menjadi tegang."* The T-shirt, torn at the neck, was tendered and marked exhibit CLE2. Mohd. Zaharin bin Sarmin a witness of the Claimant testified: *"Lepas itu pada pukul 9.00, 10.00 saya nampak baju CLW1 (Claimant) koyak."*

33. On the totality of the evidence before me, I am satisfied that the *actus* complained of involved K. Seniasamy grabbing the Claimant by the shirt and the Claimant doing likewise to K. Seniasamy. In short they were grappling. As to who began the affray, each blames the other. This fact will determine the guilt or otherwise of the Claimant in relation to charge 6.

34. That the utterance of the vulgarity by the Claimant did not precipitate the *actus* has been determined earlier by K. Seniasamy's evidence. This is consistent with that which the Claimant said in cross-examination that the vulgar words were uttered after the *actus.*

35. It is common ground between both parties that immediately prior to the *actus,* K. Seniasamy gave a work instruction to the Claimant; that the instruction was to operate a machine in Roll Mill; and this transpired outside the maintenance office whilst the Claimant was seated on a chair. I have already earlier found the *actus* to have occurred during the rest hour of the Claimant.

36. On what transpired the Claimant has this to say :

> *" Saya duduk di kerusi. Tidak lama kemudian penyelia saya, Seniasamy, menyuruh saya menjalankan mesin rolling mill dengan keadaan yang tinggi suara. Kemudian saya beri tahu, sekejap lagi, masa rehat saya belum tamat. Dan dia mengemukakan berbagai soalan, seperti 'Kamu rehat berapa jam.' 'Tadi kamu ke mana?' Dan berbagai-bagai. Saya kurang ingat. Di situlah bermula pertengkaran di antara saya dan Seniasamy. Dan keadaan tidak terkawal dengan kata-kata yang besar. Saya tidak ingat perkataan yang kesat itu. Dan dia meluru kepada saya. Memegang baju T saya hingga koyak. Dan saya pun tidak terkawal juga, menepis tangan dia. Kedua-duanya hampir terjatuh. Lepas itu adalah kata yang kesat daripada Seniasamy dengan bahasa Tamil. "*

37. As for K. Seniasamy's version, it runs like this :

> *" Then he came out from the office. There was a table and chair outside the office. I asked Claimant to sit on the chair. And I asked him why Mill was not operated and the coils were not rolled. He told me that he knows his job. I further asked him, he said he will punch me. Then I told him back –*

*'we are 15 years friends, like brothers. How can you say you want to punch me.' He quickly grabbed my shirt and pushed me towards the wall. I am about to fall down, so with no choice I grabbed his T-shirt. Then Mr. Lionel came to the Maintenance Workshop and departed us. Then Claimant was putting some vulgar words on me regarding my mother. "*

38. That Lionel George arrived only after the *actus* commenced made him of no use in determining who started the affray. But his evidence led by Ms. Prema Kesavan is relevant to show that an argument between the Claimant and K. Seniasamy did indeed precede the *actus :*

*" Q: Was there any exchange of words between COW1 and the Claimant on that night?*

*A: Loud noise. They were arguing something I did not hear. "*

39. For one to react by holding another's collar when his own is held by that other is but a spontaneous reaction. To substantiate its finding in relation to charge 6, it is for the Company to satisfy the Court that it was the Claimant who started the affray. Save for the testimony of K. Seniasamy the Company has produced little else. In circumstances such as these the benefit of the doubt goes to he who stands accused and in this case it is the Claimant who stands accused and he so reaps the benefit. I must also say that considering the fact that the incident occurred during the rest hour of the Claimant; that there was an argument between him and K. Seniasamy on him not performing work at that point of time; and that the Claimant was then seated; all appear to make the Claimant's version more probable on a balance.

40. For the reasons adumbrated I find the Company to not have substantiated its decision of finding the Claimant guilty of charge 6.

**Punishment**

41. The conclusion of the Court's inquiry is that save for charge 7, the Claimant is not guilty of the other two charges. Can the punishment of dismissal imposed upon the Claimant for an offence as stated in charge 7 alone stand?

42. It is incumbent upon me to address my mind as regards the harshness or severity of punishment. Failure to do so would result in a jurisdictional error of law (per Faiza Tamby Chik J. in ***Shanmugam Subramaniam v. JG Containers (M) Sdn. Bhd. & Anor (2000) 6 CLJ 521***).

43. Mindful am I too that I must not substitute my views for that of the employer in regard to the punishment imposed. The proper function of the Court is to determine whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted [per Mummery LJ at page 828 in ***Post Office v. Foley*** and ***HSBC Bank plc (formerly Midland Bank plc) v. Madden (2000) IRLR 827***]. In deciding whether the dismissal effected upon the Claimant falls within such a band of reasonable responses expected from the Company, the Court balances the prevailing environment which led to the Claimant uttering the offensive words and the fact that the Claimant immediately thereafter complied with K. Seniasamy's instruction and went back to work, against the severity of the offence *vis-a-vis* the Claimant's service of more than 16 years with the Company. I find that a dismissal is inappropriate and harsh under

the circumstances. In the event I find the dismissal of the Claimant to be without just cause and excuse.

***REMEDY***

**Reinstatement**

44. The Claimant sought reinstatement in his former employment. Considering that the position held by the Claimant was that of a machine operator, an appointment normally capable of accommodating several employees and being non-supervisory in nature, reinstatement of the Claimant will not unduly disrupt the Company's operations. The Claimant had returned to work as instructed by K. Seniasamy after the altercation that occurred on 18.7.1999. There is also no evidence that the relationship between the Company and the Claimant had deteriorated such as to make reinstatement disharmonious. After weighing these considerations the Court finds it fit to reinstate the Claimant in his former employment.

**Backwages**

45. 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 backwages. The same is applied here, that is, that backwages will be from the date of dismissal to the date of conclusion of hearing subject to scaling down if appropriate under the three heads of (a) contributory conduct, (b) gainful employment and (c) delay factor.

46. The Claimant was dismissed from employment on 6.8.1999. The last date of hearing was 3.6.2005. Backwages of seventy months is

therefore due to the Claimant. The salary which he drew at the time of dismissal was RM1,500.00.

47. The multiplicand of RM1,500.00 into the multiplier of 70 months equals RM105,000.00 as backwages. On what should the amount of backwages payable be, my discussion follows.

**Scale Down**

***Contributory Conduct***

48. The Industrial Court may scale down any payment ordered in favour of a Claimant for the reason of contributory conduct (see ***Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. & Anor (1995) 3 CLJ 344***).

49. The Company found the Claimant guilty of three misconducts for which it imposed the punishment of dismissal. The Court found the Claimant guilty of one and exonerated him of the other two. This one misconduct which the Court found the Claimant guilty of also contributed towards his dismissal. The Claimant was indeed blameworthy. For this reason the Court decides to scale down the backwages payable by 15% under the head of contributory conduct. The RM105,000.00 backwages is therefore reduced to RM89,250.00.

***Gainful Employment***

50. The Court is bound by the principle of law expounded by the Federal Court in ***Dr. James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd. (Sabah) & Anor (2001) 3 CLJ 541*** regarding a claimant who is gainfully employed during the interregnum between dismissal and

reinstatement. The Court had in ***Ike Video Sdn. Bhd. (supra)*** held that a dismissed workman is gainfully employed when he is in receipt of an income.

51. It is the Claimant's evidence that save for two or three months immediately after his dismissal, he had been earning an income of between RM800.00 to RM1,200.00 per month. Taking the mid-figure of RM1,000.00 per month, the Claimant's income averaged 67% of that which he last earned in the Company. To this I conjoin the non-monetary benefits and monetary benefits including EPF and SOCSO benefits as well as annual increments of salary which the Claimant could have received had he been in continuous employment with the Company. On this basis the Court decides that it would be equitable to scale down backwages by 20% under this head of gainful employment. RM89,250.00 less 20% is RM71,400.00.

***Delay Factor***

52. The Court had not restricted backwages to twenty-four months (see ***Industrial Court Practice Note No. 1 of 1987***) and instead had assessed backwages for the whole of the period from the date of dismissal to the date of conclusion of hearing, a period of seventy months. To disregard delays occasioned not through the doings of the Company and order backwages for the full period of seventy months would be inequitable. The delays attributable to the Claimant, the Ministry of Human Resources and the Industrial Court had been mentioned earlier.

53. The High Court in ***Valiveloo Munusamy v. General Tyre Retreaders Sdn. Bhd. (1999) 7 CLJ 596*** reasoned that equity and good

conscience required the scaling down of backwages and compensation in lieu of reinstatement on account of what is called the 'delay factor'. ***CP Mill's Industrial Disputes Law In Malaysia, 2nd Edn. at page 131*** gives a discourse on scaling down for delays and in the process quote several precedence from the Industrial Court. This Court commencing from ***Ike Video Distributor Sdn. Bhd. (supra)*** had adopted the same in a multitude of awards.

54. After taking into account the delays peculiar to the instant case, the Court is of the opinion that scaling down under this head should be 20%. As a consequence backwages is reduced to RM57,120.00.

***ORDERS***

55. The Company is ordered to reinstate the Claimant as a machine operator in Roll Mill with effect from 1.8.2005 at a basic salary and on terms that he should be receiving on that date had he not been terminated from employment on 6.8.1999. And his service will be treated as being continuous from that date he commenced employment with the Company, that is, 3.3.1983. Should the Claimant fail to report for duty with the Company on the designated date of 1.8.2005, this reinstatement order will lapse and he will thereafter lose this benefit of reinstatement.

56. The Court further orders, independent of the order on reinstatement, that the Company pays the Claimant backwages to the sum of RM57,120.00 less statutory deductions if any, not later than 45 days from the date of this award.

**HANDED DOWN AND DATED THIS 4TH JULY, 2005.**

**( N. RAJASEGARAN)**
**CHAIRMAN**
**INDUSTRIAL COURT.**