

INDUSTRIAL COURT OF MALAYSIA

CASE NO : 15/4-1270/04

BETWEEN

Y.S MOTOR (M) SDN. BHD.

AND

NORISHMAH BINTI ANI

AWARD NO : 1690 OF 2005

Before : **N. RAJASEGARAN** - **Chairman**
(Sitting Alone)

Venue : Industrial Court Malaysia, Kuala Lumpur.

Date of Reference : 1.6.2004.

Dates of Mention : 9.9.2004, 15.10.2004 and 15.4.2005.

Date of Hearing : 22.7.2005.

Representation : Company absent and unrepresented for
all mentions and hearing.

Claimant appeared herself.

Reference :

This is a reference made under section 20(3) of the Industrial Relations Act, 1967 arising out of the dismissal of **Norismah binti Ani** (hereinafter referred to as "the Claimant") by **Y.S Motor (M) Sdn. Bhd.** (hereinafter referred to as "the Company").

AWARD

Reference

1. Norismah binti Ani ('the Claimant') had her employment with Y.S Motor (M) Sdn. Bhd. ('the Company') terminated on 18.1.2000. Considering that she had been dismissed without just cause or excuse she made representations under section 20(1) of the Industrial Relations Act, 1967 ('the Act'). This culminated in the Honourable Minister of Human Resources, referring the dismissal pursuant to section 20(3) of the Act to the Industrial Court ('the Court') which reference was received by the Court on 29.6.2004.

***Ex Parte* Hearing**

2. Hearing on 22.7.2005 proceeded *ex parte*. The need therefore to elaborate on the events leading to that hearing is necessary. But before that, section 29(d) of the Act enables the Court to hear and determine the matter before it notwithstanding the absence of any party to the proceedings who has been served with a notice of summons to appear (see also ***Ike Video Distributor Sdn. Bhd. v. Chan Chee Bin (2004) 2 ILR 687***).

3. The case was for the first time called for mention on 9.9.2004. The Claimant attended but not so the Company who had been served the necessary notice. At the subsequent mention on 15.10.2004 with attendance as before, the court gave directions on the filing of pleadings and fixed hearing for 28.1.2005. The Claimant complied with the direction on the filing of her pleadings, but not so the Company who had been duly served with the necessary Form J under the Court rules. This resulted in the hearing fixed for 28.1.2005 to be forcibly vacated. At a

further mention called on 15.4.2005, Claimant attended but not so the company notwithstanding duly served notice. At that mention hearing was fixed for 22.7.2005 and notice of hearing in the prescribed Form G was duly served upon the Company; but to no avail to secure its attendance at the hearing on 22.7.2005.

4. After weighing the cumulative effect of the absence of the Company at every one of the mentions called by the Court, the failure of the Company to file pleadings and its refusal to attend the Court on the date of hearing, the Court formed the opinion that in accordance to equity, good conscience and the substantial merits of what had transpired thus far, it would be in the interest of justice that the hearing proceed *ex-parte*.

The Court's Function

5. How the Court should proceed in an *ex-parte* hearing is succinctly described in **O.P. Malhotra's The Law of Industrial Disputes, Vol 1, 3rd Edn.** at page 717.

“ ex-parte only means in the absence of the other party. It creates a fiction which enables a tribunal to presume that all parties are present before it. A fortiori, an adjudicator may imagine that the absentee is present, and having done so, he may give full effect to its imagination and carry it to its logical conclusion. ”

6. And the Court's twofold function upon receiving a reference under section 20(3) of the Act is first to determine whether the misconduct complained of by the employer has been established and secondly whether the proven misconduct constitute just cause or excuse for the

dismissal (See ***Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. & Anor (1995) 2 MLJ 753***).

Evidence, Evaluation And Findings

7. The Claimant's testimony in Court was consistent with her pleadings. Shortly stated, it ran as what follows.

8. She commenced employment with the Company on 3.3.1999. She was given an appointment letter which she had placed in her office drawer to which she was denied access after her dismissal. She however tendered in evidence her dismissal letter on the Company's letter head, signed by a director. At the time of her dismissal on 18.1.2000 she worked as an insurance claims clerk drawing a monthly basic salary of RM1,400.00. The Company was bound by regulation 9 of the Employment Regulations 1957 made pursuant to the Employment Act, 1955 to furnish its employees who fall within the purview of the Act, a separate statement on wages earned for each wage period. The Claimant was such an employee. But the Company never complied with the regulation and instead made her sign a voucher each time she was paid her salary in cash. Thus the Claimant was unable to produce a wage slip or any other form of salary statement.

9. The Claimant was entitled to annual leave as a term of her employment. However in contravention of section 60E of the Employment Act, 1955 she was not paid a salary in respect of such leave. The *modus* of leave application was verbal, addressed to her manager, one Mr. Bobby, a Chinese male.

10. The Claimant's version is that she applied for annual leave to celebrate Hari Raya Puasa. The leave was for the period 7.1.2000 to

17.1.2000. It was approved, as was the practice, verbally by that Mr. Bobby. On her return to work, another manager, a Chinese male whose name she does not recall, served upon her the letter dated 18.1.2000 which brought about her dismissal for the reason stated therein, that is for failing to report to work from 11.1.2000 up to 18.1.2000 and on the application of section 15(2) of the Employment Act, 1955. The Claimant's explanation to that manager fell on deaf ears.

11. The inevitable consequence of the Company's failure to file its pleadings and to be present at the hearing is that the Company failed to rebut any of the Claimant's contentions, thus being made unable to establish that the dismissal of the Claimant was for good cause and excuse. In the upshot I find the dismissal of the Claimant to be without just cause and excuse.

Remedy

12. The attitude conveyed by the Company in not attending any of the Court's proceedings does not augur well for the Claimant to be reinstated. Compensation in lieu of reinstatement would be more appropriate.

13. Compensation in lieu of reinstatement uses the multiplicand of one month's salary which in the instant case is RM1,400.00. The multiplier which is the period from the day the Claimant commenced work up to the last date of hearing, works out in the instant case to 6.3 years. The amount due as compensation in lieu of reinstatement is therefore RM8,820.00.

14. The Court further orders that the Claimant be paid twenty-four months backwages (per Industrial Court Practice Note 1 of 1987) amounting to RM33,600.00.

Order

15. The Court orders the Company to pay the Claimant the total sum of RM42,420.00, less statutory deductions, not later than 45 days from the date of this Award.

HANDED DOWN AND DATED THIS 1ST SEPTEMBER, 2005.

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