INDUSTRIAL COURT OF MALAYSIA

CASE NO : 15(9)/4-449/04

BETWEEN

STEEL RECON INDUSTRIES MARKETING SDN. BHD.

AND

YAP CHENG HONG

AWARD NO : 140 OF 2006

Before	:	**N. RAJASEGARAN - Chairman** (Sitting Alone)
Venue:	:	Industrial Court Malaysia, Kuala Lumpur.
Date of Reference	:	8.4.2004.
Dates of Mention	:	(25.6.2004 and 22.7.2004 in Industrial Court 9, Penang), 5.10.2004, 8.11.2004 and 15.7.2004.
Dates of Hearing	:	19.9.2005 and 20.9.2005.
Submissions	:	5.10.2005
Representation	:	Mr. P.D. Anthony (Mr. K.M. Lim with him) of M/s K.M. Lim & Tan, for the Company. Mr. V. Jeevaretnam (Mr. K. Sugumaran with him) of M/s Jeevaretnam & Co., 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 **Yap Cheng Hong** (hereinafter referred to as "the Claimant") by **Steel Recon Industries Marketing Sdn. Bhd.** (hereinafter referred to as "the Company").

AWARD

The Reference

1. Steel Recon Industries Marketing Sdn. Bhd. ('the Company') terminated from its employ, Yap Cheng Hong ('the Claimant'). The Claimant being unhappy with this turn of events turned to the Honourable Minister of Human Resources. The Honourable Minister in turn, turned it over to the Industrial Court for resolution. He acted pursuant to section 20(3) of the Industrial Relations Act, 1967 ('the Act'). This was done on 8.4.2004, five years after the dismissal was effected on 10.5.1999.

2. The reference was first assigned to Industrial Court 9 situated in Penang. At the second mention called on 22.7.2004 in that court, the Claimant successfully applied to that court to transfer hearing of the reference to the Industrial Court housed in Kuala Lumpur. And that was how the reference found its way before me on 5.10.2004 in Industrial Court 15 ('the Court'). The parties filed their pleadings subsequently and hearing fixed for two days on 19th and 20th September 2005 proceeded as scheduled. The parties were then heard in verbal submission on 5.10.2005. So much for the passage of the reference from the date of dismissal to conclusion.

The Issues And The Law Thereto

3. I found this case to be somewhat straightforward. But it scarce maintained that character. Unfortunately so. The foundation for this misfortune was laid in the manner in which pleadings were crafted. Superstructured upon that was an onslaught of evidence, much that could have been well avoided. All this would not have arisen if the *factum probandum* of dismissal had been identified in the pleadings and

documentation relevant to the issue had been knowledgably and coherently produced in evidence. Fortunately the Court was able to sieve through, unravel and apply the documentation as appropriate.

The Law

4. First, for the principles of law applicable in relation to the circumstances of this case. There is nothing new. But I find it appropriate to restate it so as to facilitate focus on the precise track to embark in relation to the issues relevant. Brevity, I hope, will be the reward. The law shortly stated, begins with the function of the Court and then moves on to state the burden of proof.

5. The Court's function in a reference involving dismissal is twofold. Firstly, 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; the need to proceed to the second arising only upon satisfaction of the first. ***[See Wong Yuen Hock v. Sykt. Hong Leong Assurance & Anor Appeal (1995) 3 CLJ 344 and Milan Auto Sdn. Bhd. v. Wong Seh Yen (1995) 4 CLJ 449]***. But before embarking on that twofold function it is imperative to first pay heed to that exposition of law in ***Goon Kwee Phoy v. J & P Coats (M) Bhd. (1981) 2 MLJ FC*** that if an employer chooses to give a reason for the dismissal, the inquiry of the Court should be restricted to the reason given by the employer and the Court cannot go into another reason not relied upon by the employer.

6. On the burden of proof, it is sufficient for me to say that it is an approbated principle of law that the onus is on an employer to adduce cogent and convincing evidence to show that the workman committed the

misconduct that he is alleged to have done so. It is not bestowed upon the workman to prove otherwise.

7. I find it convenient to apply the law as stated by embarking upon a three-step procedure in my decision making process. I begin by identifying the specific reason relied on by the Company to dismiss the Claimant. Next, to determine whether the Company had led sufficient evidence to make out, on a balance of probabilities, that reason. And finally to determine whether that reason constituted just cause or excuse for the dismissal.

The Circumstances

8. Now to narrate the circumstances to which to apply the three-step procedure. The Claimant commenced work with the Company on 11.5.1998. She was appointed as a Sales Coordinator and remained in that position until her dismissal. The undisputed part of her duties involved receiving inquiries from potential customers, preparation of the Company's quotations, receipt of customers' purchase orders, preparation of the Company's delivery orders and to liase with the production department to effect delivery of goods to customers. The disputed part of her role is in relation to the collection of payment for goods delivered. More detail on this when the occasion demands.

The First Sale

9. There was a customer of the Company called Siemens Power Generation Asia Pacific Sdn. Bhd. ('Siemens'). The Claimant concluded a sale with Siemens sometime in mid-March 1999. The quotation for this sale, dated 15.3.1999, is exhibited at pages 1 and 2 of COE3. That exhibit shows the quotation to be prepared by the Claimant and

approved by both the Company's Sales Manager and the General Manager. Then came a purchase order issued by Siemens. It is dated 17.3.1999, addressed to the Company, sought the supply of several goods valued at RM24,128.00, stated the date of delivery as 18.3.1999 and detailed the terms of payment as being nine working days after invoicing. That the goods as detailed in the purchase order for the value stated therein was supplied to Siemens has not been made to be the subject of issue. The Company's resultant invoice in respect of the sale is found at pages 1 and 2 of COE2. That Siemens did not at any time make good payment in satisfaction is not also in issue. For convenience I will from now refer to this transaction as the first sale.

The Second Sale

10. Then came the transaction of another sale between the Company and Siemens in late March 1999. This I will call the second sale. This sale was also closed by the Claimant. The quotation issued by the Company is found at page 1 of AB2, an agreed bundle. It is dated 24.3.1999, prepared by the Claimant and approved in the appropriate column by the Company's Sales Executive as well as the General Manager, both of whom are the Claimant's superiors. Siemens on its part issued the purchase order dated 24.3.1999 for the supply of goods, the total value of which was RM73,752.00. This purchase order is found at page 2 of AB2. The Company's delivery orders and quotations in respect of this transaction, broken into three, are found from pages 5 to 10 of AB2. The delivery orders are signed by the Claimant after verification by her superior. The invoices after verification by the Company's General Manager were approved by the Managing Director. Each delivery order and associated invoice bear the same date.

The Reason For Dismissal

11. The Company was not precise in its reason for the dismissal of the Claimant. The Company's letter of 10.5.1999 which brought about the dismissal of the Claimant stops with stating that the domestic inquiry was satisfied that the charge against her had been proven and in view of the seriousness of the misconduct she was to be summarily dismissed. As to what precisely was the charge of misconduct complained against the Claimant is not stated. That made me backtrack to the notice of domestic inquiry dated 28.4.1999 which led to the domestic inquiry. Here again the misconduct committed by the Claimant or the charge preferred against her is not explicitly stated. Instead the notice refers to the Claimant's reply to a letter from the Company which letter was dated 21.4.1999 and carried the title "Allegation of Misconduct". Still on my journey of discovery, I voyaged back in time to that letter. And lo and behold! I found it – or so I thought. It was complex. One complaint conflated upon another and yet another upon that other. I will allow it to speak for itself. It read :

> *" It is alleged that on 31st March 1999, through your negligence and refusal to follow instructions, you went ahead to arrange delivery for the second 'Siemens' order. This has resulted loss to the Company. "*

12. The Company's main witness was Catherine Wong (COW1), the Managing Director's secretary, who was the chairperson of a domestic inquiry whose findings led to the dismissal of the Claimant. She was perhaps the best person to reveal what was this misconduct committed by the Claimant that brought forth the wrath of dismissal upon her. And on this, I found COW's evidence given in her witness statement straightforward and up to the point. I will repeat that part :

" 29. What was the charge against the Claimant?

- *The charge was misconduct on the Claimant's part for allowing the delivery of a second order without receiving payment for the earlier order despite company policies and instructions given by her superior against delivering any subsequent order without payment for the first order. "*

13. Now that I have caught the charge by its horns, I will proceed to identify its ingredients and the party upon whom lies the burden to prove the existence of each ingredient. The ingredients that constitute the charge I find to be :

a. That the Claimant had allowed delivery of a second order without receiving payment for an earlier order.
b. The existence of a Company policy against delivering a subsequent order without payment for the first order.
c. That instructions were given to the Claimant by the Claimant's superior to abide by this policy.

The charge of course relates to that first and second sales involving Siemens. The Company shoulders the burden of proving each one of the three ingredients contained in the charge.

Other Issues

14. I need now to step aside for a moment and deal with several matters that arose and issues that had to be decided during the trial. They really do not bear serious consequences on my final decision. But without mention of them I may lay open my decision making process to

question. I will deal with them as briefly as possible without risk to clarity and understanding.

15. The first matter relates to the delivery of the Company's goods pursuant to the first and second sales. Both deliveries arising from the first and second sales became the subject matter of police investigations for the perpetration of fraud. Ninety percent of the goods lost through both transactions were recovered by the police but continue to be in police custody as submitted by Mr. P.D. Anthony, learned Counsel for the Company. I find all these not to be on point in relation to the charge identified by COW1 and will therefore refrain from further remarks on the same.

16. The next matter relates to the disputed part of the Claimant's job function in relation to the collection of payment for goods delivered. It is not a specific complaint of the Company that the Claimant had failed to collect payment on the first sale. In the circumstances I found it unnecessary to dwell further upon this matter.

17. Then came that issue on the tendering as evidence in the Court, the notes of the domestic inquiry conducted by COW1. The Company made no attempt to tender the notes as evidence through any one of its witnesses and before close of the Company's case. Instead Mr. P.D. Anthony, attempted to tender the notes as evidence whilst cross-examining the Claimant. This move earned the objection of Mr. V. Jeevaretnam, learned Counsel for the Claimant, and correctly so. The result, Mr. P.D. Anthony withdrew. The Claimant's case was closed after her sole testimony. At this stage Mr. P.D. Anthony made an application to recall COW1 as a witness for the purpose of tendering the notes of the domestic inquiry as evidence. In support thereof he argued that the notes could be decisive on the outcome of the case; COW1 is the maker

of the notes; recalling her would not cause delay and there would arise no prejudice to the Claimant; and the document he sought to tender is actually an extension of page 11 of the Company's bundle of documents. He further referred the Court to the High Court in ***Yah Binti Aji v. Fatimah Binti Haji Mohamed Ariffin & Ors (1969) 2 MLJ 186*** where the court in deciding upon an application by the defendant to call further evidence after close of the case for the defendant, referred to the principle enunciated by Denning LJ in ***Ladd v. Marshall (1954) 1 WLR 1489*** as follows :

> *" To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible. "*

18. Mr. V. Jeevaretnam resisted the application submitting that the notes of the domestic inquiry were not fresh evidence; that the notes were in the possession of the Company since the date of the domestic inquiry; that the Company had failed to include the notes in its bundle of documents though he had requested from the Company copies of the notes as far back as 18.11.2004 and although the Claimant had challenged the domestic inquiry in her pleadings; and that ***Yah Binti Aji (supra)*** is authority for disallowing evidence unless it could not have been obtained with reasonable diligence during the trial.

19. To prevent further prolongation of trial and anguish to both parties, the Court's ruling on the issue was read out at that same hearing. It went like this :

> *" Court's Ruling*
>
> *1. The Company's application today is to recall COW1 in order to tender in evidence the notes of the Domestic Inquiry. The Court finds that what the Company seeks to tender is not an extension of page 11 of the Company's Bundle of Documents. Page 11 is a report or findings of the Domestic Inquiry. It stands alone.*
>
> *2. The law on the recall of witnesses in civil cases is succinctly stated by Arulandam J in* ***Ong Yoke Eng.*** *It is at the discretion of the Court to recall a witness after a party has closed its case. In ordinary circumstances it may not be permissible to allow a witness once examined and released. But unforeseen circumstances may develop or there may be inadvertent omissions. In such a case the Court may allow a witness to be recalled, but surprise or prejudice to the other party should be guarded against.*
>
> *3. On unforeseen circumstances, I obtain guidance from the Company's submitted case of* ***Yah Binti Aji*** *where his Lordship Chang Min Tat J. referred to a situation claimed by the defendant that "he had unearthed certain evidence". His Lordship quoting* ***Ladd v. Marshall*** *spoke particularly of evidence that could not be obtained earlier with reasonable diligence. In the instant case, the Company having had the notes at all time, cannot rely on this point.*

4. *On the question of inadvertent omissions. The Company has been represented by two able counsel. They had at the onset of the hearing on 19.9.2005 provided Claimant's counsel with a transcript of the notes of Domestic Inquiry. Yet they had on that same day when COW1 was on the stand failed to admit that evidence. An inadvertent omission I cannot find under the circumstances.*

5. *I find there is no new issue here in as far as the Domestic Inquiry is concerned. That a Domestic Inquiry was held, what the charge was, that it was attended by the Claimant, that the Claimant understood her rights during the conduct of the Domestic Inquiry and what was the outcome of the Domestic Inquiry are all not in dispute.*

6. *I take particular note of Mr. P.D. Anthony's reply to Mr. V. Jeevaretnam's submission and I quote Mr. P.D. Anthony's exact words :*

> *"No implication should be made as the case in Court today is proved by the facts and evidence before this Court today and not by prior events."*

By this I take him to mean that the Court should decide on the outcome of the Reference based on what evidence had been led in this Court and not what had transpired during the Domestic Inquiry. This appears to be inconsonant with that urged by the two Supreme Court decisions of ***Dreamland Corporation*** *and* ***Milan Auto Sdn. Bhd.*** *which authoritatively lays down the duties of the Industrial Court vis-a-vis a Domestic Inquiry held or not held by an employer prior to the dismissal of a workman.*

7. *I further bear in mind that recalling COW1 may not merely cease with her examination but could lead to further evidence being led by CLW1 and whatever other witnesses she may wish to call. In this I agree with Mr. V. Jeevaretnam that the possibility of a prolonged trial could arise. It may not, but it still could. The effect of this would be to reopen the trial. Surely this would be prejudicial to all concerned.*

8. *In the circumstances the application by the Company is not granted. "*

Rough edges if any to language is occasioned by the ruling having been written in open Court immediately after both Counsels' submissions.

20. Long after this ruling, but whilst writing the instant award, my readings perchanced me upon a decision of the High Court handed down by Abdul Kadir Sulaiman J. (now FCJ) in the case of ***Asiatic Development Bhd. v. Kanesan a/l Manayah & Anor, Kuala Lumpur High Court Originating Motion No. R-1-25-63 of 1997.*** I believe it is unreported but I stand to be corrected on this. That Judge, displaying wisdom not unlike Solomon, said :

> *" The Industrial Court when carrying out its duty in hearing the reference by the Minister ought not to be influenced by the fact that a domestic inquiry was held by an employer before dismissing his workman. Were it otherwise, the guilt or innocence of a workman upon a charge of misconduct would be decided not by the Industrial Court, but by the employer himself. That, with all respect, is not the purpose for which Parliament went through the process of legislating the Act and setting up a special machinery for the vindication of the rights of workmen. "*

I am comforted by this decision when now looking at the ruling in retrospect.

Findings

21. With that I turn to deal with the ingredients of the complaint that the Company levelled against the Claimant. Now, for the first ingredient of the charge against the Claimant, that is, whether the Claimant had allowed delivery of the second sale without receiving payment for the first sale. I commence by disposing that part on there being no payment received by the Company in respect of the first sale by simply stating that both parties are on common ground here. That brings me to the disputed part of this ingredient. The pivotal word here is "allowed". The documents before me do not support the contention that the Claimant was individually responsible to have "allowed" the delivery of the goods associated with the second sale. How could she, when delivery of the second sale was occasioned by the approval of the Claimant's superiors in the persons of the Sales Executive and the General Manager. The three delivery orders were verified by the Claimant's superior and the related invoices were approved by the Managing Director. If at all, *ex facie* the documents, it was the Claimant's superiors who shouldered the chain of responsibility which set into motion and allowed the delivery of the goods involved in the second sale.

22. One other glaring phenomenon that impaled the Company on the horns of disaster. Parties were directed by the Court's Assistant Registrar during the mention called on 8.11.2004 to file their respective witness statements by 15.7.2005. When the case came for management before me on 15.7.2005 I found that the Claimant had filed her witness statement on 12.7.2005. I must add that the Company had not done so then and it was only after COW1 had taken the stand that her witness

statement was produced for the first time. What is relevant here is that the Claimant in her witness statement in answer to questions 8 and 15 had maintained that her superior that is, the Sales Supervisor, was in the know and had also countersigned and authorized the second sale. The Company therefore had good reason to produce this important witness who could have shed critical light either in support of or against what the Claimant maintained. Not only did the Company fail to do this, but it also did not advance any evidence to explain this failure. Neither did the Company produce the General Manager nor the Managing Director, both also crucial witness as the exhibits showed. In the circumstances I find justification in Mr. V. Jeevaretnam's submission that the adverse presumption provided under section 114(g) of the Evidence Act, 1950 should be brought to bear upon the Company. Mr. P.D. Anthony's submission in his reply that all these people were no longer employees of the Company is of no help to the Company. Submission does not equal to evidence. With respect, I find the proverbial phrase of closing the stable door after the horse had bolted to be aptly appropriate.

23. The overwhelming evidence before me is that the Claimant had transacted the second sale with consequent delivery of the goods purchased with the tacit if not express approval of her superiors.

24. In the absence of the first ingredient to the charge against the Claimant, I need not necessarily proceed to inquire into the existence of the other two ingredients of there being a Company policy or of instructions having been given to the Claimant against making a second delivery upon there being no payment received in respect of the first. However for the sake of completeness I will briefly deal with the same.

25. The burden is upon the Company to show the existence of such a policy contained in a "System in operation Manual" or SOP as testified by COW1. The Company produced no such written SOP as evidence. Instead it first relied on the evidence of COW1 who upon being asked of any document to the effect of the purported policy answered that it is to be found in the letter of allegation earlier referred to, which was sent to the Claimant. She then tried to rely on paragraph 3 of page 6 of the Company's bundle of document. That page is part of the minutes of a sales meeting attended amongst others, by the Claimant. I find that neither the letter of allegation nor paragraph 3 of the minutes of the sales meeting to constitute the SOP referred to by COW1. Next the Company put on stand its second witness, one Andrew Tham Chee Hoong (COW2), an Executive Director incharge of human resources and administration. He commenced employment on 1.7.2000, well after the Claimant's dismissal effected more than a year earlier and could not speak authoritatively on the Company's policies at the material time. Save for saying that there was in existence such a policy he could say or show no more. In the circumstances I find the Company to have failed to discharge its burden to show that the Claimant was bound by such a policy or for that matter, that such a policy even existed at the material time. The Claimant on the other hand rebutted the existence of such a policy by leading evidence that two companies by the names of Mark Jaya Sdn. Bhd. and SPK had subsequent consignment delivered notwithstanding non-receipt of payment for earlier consignments. This was not challenged by the Company. Instead the Company maintained the position that these two companies were companies associated to the Company. This I find to connote that the Company did not strictly adhere to such a purported policy.

26. On that part whether the Claimant was instructed not to make delivery of the second sale without having received payment for the first sale. COW1 maintained that this was so. But her knowledge is not personal. It is hearsay from what she heard of witnesses during the domestic inquiry. Paragraph 1 of COE4 is part of the minutes of a sales meeting held on 15.12.1998. It reads - "Sales staff to be more firm and ensure that their customer does not exceed their credit limit." This is translated by Mr. P.D. Anthony in his submission to convey the desired instruction to the Claimant. With respect, I am unable to read it similarly. As against this the Claimant's evidence is that she had the permission of her superiors to effect the second sale and make delivery. The exhibits referred to earlier favour her contention. The inescapable conclusion is that no such instruction as averred by the Company was given to the Claimant.

27. The upshot of all this is that the Company had failed to make out the reason for which it had dismissed the Claimant. The consequence of such a finding is that the dismissal of the Claimant by the Company is without just cause or excuse [see ***Goon Kwee Phoy (supra)***]. The ensuing result is that I am compelled to find in favour of the Claimant.

REMEDY

Reinstatement

28. It is the Claimant's prayer that she be reinstated in her former employment. I find myself unable to grant this prayer. The reason being the circumstances peculiar to this case and also the fact that more than six years have passed by since her last date of employment in the Company. Instead I find an order of compensation in lieu of reinstatement to be more appropriate. Such compensation is calculated

by multiplying the last drawn salary by the length of period commencing from the date the Claimant was employed up to the day of the last date of hearing, that is 20.9.2005 (for reason see ***Ike Video Distributor Sdn. Bhd. v. Chan Chee Bin (2004) 2 ILR 687***). The multiplier being RM1,810.00 and the multiplicand being 7.3, the compensation in lieu of reinstatement amounts to RM13,213.00.

Backwages

29. The Claimant is in addition entitled to backwages. But backwages are subject to scaling down under various heads. The Court had discoursed on this subject in ***Ike Video Distributor Sdn. Bhd. (supra)*** and will refrain from regurgitating what was there said.

30. Backwages is due from the date of dismissal up to the last date of hearing (per Gopal Sri Ram JCA at para 10, page 3029 in ***Airspace Management Services Sdn. Bhd. v. Col.(B) Harbans Singh a/l Chingar Singh (2000) 3 AMR 3009***). That, in this case spreads over a period of 76 months. Backwages adds up to RM137,560.00. But the Court will not order this sum for it is subject to scaling down under various heads. I now proceed to examine these.

31. First, under the head of contributory conduct. The Claimant I find, not to have indulged in improper conduct and thus not to have contributed towards her dismissal. In the event there can be no scaling down under this head.

32. Next the application of the principle enunciated by the apex Court in ***Dr. James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd. (Sabah) & Anor (2001) 3 CLJ 541*** The principle behoves the Court to take into consideration income earned by the Claimant during the

interregnum between dismissal and date of completion of hearing. I now do this. A good starting point would be to summarize what the Claimant testified in this connection. She remained unemployed up to March 2000. From April 2000 up to July 2001 she was employed by Alps Electric Sdn. Bhd. at a monthly salary of RM1,400.00. She then worked for Takamichi Electric Sdn. Bhd. at a salary of RM2,800.00 per month. This employment ended in August 2003 when she began employment with Earntrade Industries Sdn. Bhd. where she remained till March 2005 earning a salary of RM3,000.00 per month. She left that company to join Sun Resources Sdn. Bhd. and continues to be employed there at a salary of RM3,000.00 per month. Over the years she had gathered no moss.

33. Applying the principle espoused in ***Dr. James Alfred (supra)*** to section 30(5) of the Act and after taking into account her actual income as against a reasonable progression of her earnings had she remained in the employ of the Company, I make the following decisions :

(a) To pay full backwages for the period of ten months that the Claimant was unemployed. This amounts to RM18,100.00;

(b) To scale down the backwages for the remaining period of 66 months amounting to RM119,460.00 by 50%. This reduces the backwages for the period to RM59,730.00.

Backwages at this stage totals RM77,830.00.

34. Now, to consider scaling down if any, under the final head of delay. The Claimant is innocent of any delay occasioned during trial. So must I say of the Company. It took five years for the Claimant's dismissal to be referred to the Court. The Company did not contribute to this state of affairs and hence it would be inequitable to make the Company to bear the brunt of the consequences of this delay. I too take into consideration

that I have not found the instant case appropriate of application of the twenty four months limitation on backwages as per Industrial Court Practice Note 1 of 1987. (See the Court's decision in ***Metrod (Malaysia) Bhd. v. Suradi bin Md. Rusdi (2005) 3 ILR 176***). I find a scaling down of 20% of the backwages of RM77,830.00 to be fair. This percentage I arrived at after discounting a one year period as being a reasonably expected time for the dismissal to be referred to the Court. Backwages will now amount to RM62,264.00.

Loss of Future Earnings

35. I now turn to examine Mr. V. Jeevaretnam's submission to the effect that should the Court be unmindful of ordering reinstatement of the Claimant, she should *inter alia* be compensated loss of future earnings. By this I understand Mr. V. Jeevaretnam to say that the Claimant should be paid the sum total of earnings which she would have received from the date of completion of trial up to the date that she would have ceased employment upon reaching the age of retirement.

36. The Federal Court in ***R. Rama Chandran v. The Industrial Court of Malaysia & Anor (1997) 1 MLJ 145*** is on point to this issue. In that case the apex Court after ruling the workman to be dismissed without just cause or excuse found reinstatement to be an inappropriate remedy. Instead the apex Court ordered that the workman should be paid loss of future earnings calculated from the date of completion of trial up to the date of the workman's retirement. The legitimacy of payment under the head of 'loss of future earnings' mandated by the apex Court is binding upon me. I willingly succumb to its authority.

37. But Mr. V. Jeevaretnam did not stop there. He advanced the argument that the Claimant should be paid compensation in lieu of

reinstatement; such payment to be in addition to payment for loss of future earnings. In support of this proposition he relied on the case of ***Telecom Malaysia Bhd. v. Ramli Akim (2005) 6 CLJ 487*** where the High Court was moved by the employer for *certiorari* to quash an award of the Industrial Court situated in Kota Kinabalu. With respect, I do not find the High Court's decision supportive of such a proposition. The learned Judge on the point of future loss of earnings stopped with stating that such an award is permissible. No argument on the suitability of the payment of loss of future earnings in addition to compensation in lieu of reinstatement was considered or addressed by the learned Judge in his decision.

38. This being the position, I find myself unfettered by any constraints in the examining Mr. V. Jeevaretnam's proposition *res nova.* In this quest I am not beleaguered by any uncertainty. I find the horizon clear, my vision unobstructed by any haze of doubt. I attempt to put the matter at its simplest by the approach that I now take. A workman who is reinstated in his employment receives the benefit of the ability to earn remuneration until his service is terminated for good cause, one of which is retirement upon reaching the contractual age of retirement. That a workman who is reinstated cannot be awarded compensation in lieu of reinstatement is axiomatic. As to why, the very name 'compensation in lieu of reinstatement' speaks for itself. The name is definitive of the purpose. How then can a workman who is placed in exactly the same position as a reinstated workman in that he is to be paid remuneration calculated up to the date of retirement, be put in a capacity to be also paid compensation in lieu of reinstatement. To ask an employer to top up compensation in lieu of reinstatement with compensation for loss of future earnings is I find, to be manifestly excessive and tantamount to be unjust enrichment to the dismissed workman. In this connection I find it noteworthy that the Federal Court in ***R. Rama Chandran (supra)***

limited itself to the order of backwages and loss of future earnings. The apex Court did not in addition order compensation in lieu of reinstatement.

39. I find it relevant to state at this juncture that the statutory remedy that a workman seeks under section 20(1) of the Act is for reinstatement in his former employment. And it is this remedy that is incumbent upon the Court to grant to a workman found to be dismissed without just cause or excuse, unless it has sound reason to do so otherwise. To quote Abdul Kadir Sulaimant J (now FCJ) in ***Malayan Banking Bhd. v. Mohd Bahari Bin Mohd Jamli, High Court (Kuala Lumpur) O.M. No. R-1-25-134 of 1994*** :

> *" If dismissal is without just cause or excuse, the law recognises that the workman must be put back into the employment with the employer unless for reasons or circumstances that permit compensation in lieu to be awarded. "*

It is only upon a decision not to grant reinstatement that the Court would go further to examine whether to grant either compensation in lieu of reinstatement or compensation for loss in future earnings.

40. Approaching the issue in this way, I am unable to order payment of loss in future earnings to the Claimant for the reason that I have already ordered compensation in lieu of reinstatement.

Orders

41. The Court orders the Company to pay the Claimant the sum of RM75,477.00, less statutory deductions if any, not later than 45 days from the date of this award.

HANDED DOWN AND DATED THIS 27TH JANUARY, 2006

(N. RAJASEGARAN)
CHAIRMAN
INDUSTRIAL COURT