



The Irregularity of Monetary Compensation Remedies for Unfair Dismissal in Malaysia

Industrial Relations Law

Ketidakseragaman Remedi Pampasan Kewangan untuk Pemecatan Tidak Adil di Malaysia

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SITI FAZILAH ABDUL SHUKOR
(Corresponding Author)
Faculty of Business and Finance,
Universiti Tunku Abdul Rahman
Kampar Perak
sitifazilah@utar.edu.my

FARAH DILAH GHAZALI
Faculty of Fisheries and Food Science,
Universiti Malaysia Terengganu, Terengganu
farahdilah.g@umt.edu.my

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ABSTRACT

The law of employment dictates that the remedy of monetary compensation should be awarded to compensate an innocent employee for the loss of employment. The assessment of monetary compensation is duly under the judge's discretion made based on the provided facts and evidence. The court may award the remedy of monetary compensation by taking into account of circumstances of the cases. The court applies certain principles (such as the duty to mitigate loss) in both remedies of monetary compensation (in lieu of reinstatement) and back wages. This type of compensation is provided to accommodate the future earnings of the employee who suffered from unfair dismissal. This paper investigated the irregularity of award evaluation in Malaysian unfair dismissal cases with the goal of suggesting a methodical assessment guideline for such cases. This study used a black letter approach which is ideal for examining theoretical, doctrinal, or pure legal review requiring library information search. All relevant legislative provisions and wrongful dismissal decisions resolved by the Industrial Court were extensively explored in this paper.

Keywords: Monetary compensation, back wages, employees, unfair dismissal





ABSTRAK

Undang-undang pekerjaan menetapkan bahawa remedi pampasan kewangan harus diberikan untuk membayar pampasan kepada pekerja yang tidak bersalah atas kehilangan pekerjaan. Penilaian pampasan kewangan adalah di bawah budi bicara hakim yang dibuat berdasarkan fakta dan bukti yang diberikan. Mahkamah boleh memberikan remedi pampasan kewangan dengan mengambil kira keadaan kes. Mahkamah menggunakan prinsip tertentu (seperti kewajipan untuk mengurangkan kerugian) dalam kedua-dua remedi pampasan kewangan (sebagai ganti pengembalian semula) dan gaji belakang. Pampasan jenis ini disediakan untuk menampung pendapatan masa depan pekerja yang mengalami pemecatan yang tidak adil. Makalah ini mengkaji ketidakteraturan penilaian anugerah dalam kes pemecatan yang tidak adil di Malaysia dengan matlamat mencadangkan garis panduan penilaian berkaedah bagi kes sedemikian. Kajian ini menggunakan pendekatan doktrinal yang sesuai untuk mengkaji kajian teori, doktrin atau undang-undang tulen yang memerlukan carian maklumat perpustakaan. Semua peruntukan perundangan yang berkaitan dan keputusan pemecatan salah yang diselesaikan oleh Mahkamah Perusahaan juga dibincangkan dengan terperinci di dalam makalah ini.

Kata Kunci: Pampasan kewangan, gaji belakang, pekerja, pemecatan yang tidak adil

INTRODUCTION

Dismissal is often initiated by an employer to terminate the services of an employee. In a situation, such an employee commits misconduct or fails to deliver his given task to a reasonable standard (Rahman, 2019). Apart from that, an employee may be terminated for a variety of reasons, including economic hardship and workplace discrimination, which is the employer's prerogative right to terminate such employment (Mohamed, 2014). The post-dismissal phase is frequently the most difficult for these affected employees since this issue will affect employees' income and future career prospects (Shukor, 2022). Since each individual has a basic right to work and it is tough to make a living without a job. According to Article 5 (1) of the Federal Constitution, no individual shall be deprived of his life or personal liberty unless in conformity with the law. Gopal Sri Ram JCA, in the case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 viewed the expression 'life' in Article 5(1) as, "... Of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members...". Although the courts have ruled that the right of employees to a living is guaranteed by the Federal Constitution, this protection does not entail that the employer cannot terminate his employment. Nevertheless, the law suggests that the employer or a company to terminate his employees in a fair and reasonable manner.

Dismissal for legitimate reason occurs through a legal procedure, whereas dismissal without just cause occurs when an employer unlawfully dismisses an employee. It is necessary to prove that the termination was caused by the employee's misconduct. As



a result, the employer bears the burden of proving that the employee engaged in a wrongful act that cause a breach of contract of employment (Ayudarai, 2004). The existence of industrial law has limited the absolute power of the employer in hiring and terminating employees under common law (Anantaraman, 1997). The statutory law gives better rights to both parties as compared to the common law. The Industrial Relations Act 1967 (IRA 1967) is legislation that regulates the law of unfair dismissal. The IRA 1967 focuses solely on providing a harmonious relationship; however, it does not provide a sufficient reason for an employer to dismiss an employee, nor does it outline any procedures for the employer to undertake before a dismissal (Aminuddin, 2009). Section 20(1) of IRA reads as *"Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director-General to be reinstated in his former employment; the representations may be filed at the office of the Director-General nearest to the place of employment from which the workman was dismissed."*

The IRA 1967 upholds the concept of natural justice and allows the Industrial Court to decide the cases based on their merits. The Industrial Court is given discretionary power such as the power of the court during proceedings, and the award made by the court is final and binding under Part VII of the Act. According to Ghani et al. (2021), the recent IRA amendments reflected the government's commitment to expediting employee dismissal claims. On top of that, the government must also educate employers on the necessity of following the law before terminating their employees in which every dismissal must be done legally and with fair cause. On the other hand, the master-servant relationship is built on mutual trust and confidence under common law. However, when it comes to the arbitrary termination of an employee, the protection by common law is insufficient whereby there are no prescribed processes for terminating an employee (Ayudarai 2004). In common law, wrongful dismissal includes the termination of employment without the notice of termination agreed upon by both parties in the employment contract. Summary dismissal is also permitted where the termination occurs without reasonable notice (Anantaraman, 2006).

As termination occurred, it is critical to determine the validity of such dismissal. In case of termination without just cause, it may compel the employer to reinstate the employee and pay salaries from the date of dismissal to the date of reinstatement. Alternatively, the court may rule that, instead of reinstating the employee, the employer must provide the employee with fair financial compensation for damages (Alharbi, 2020). In which reinstatement is not possible, monetary compensation and back wages should be allowed, which back wages are prior salaries and benefits to which a person was entitled during his service. Furthermore, the amount of back earnings to be paid is calculated by multiplying the employee's monthly compensation from the date of dismissal to the last hearing, and the wages are subject to income tax, employee provident fund (EPF), and other deductions (Charles, 2009). However, Shukor et al. (2019) stated that there is no standard guideline for calculating or assessing monetary compensation in Malaysia. The assessment of monetary compensation is duly under the discretion of the Industrial Court Chairman as stated in the IRA 1967 with reference to



Practice Direction and the Second Schedule. The measurement of a monetary award should be based on substantial merit and not burden the employer (Mohamed, 2014). It should be distributed fairly and adequately to employees of unfair dismissal. Hence, there is no provision stated in Section 20(1) regarding alternative remedies for employees. The former President of the Industrial Court, Justice Harun Hashim, awarded the alternative remedy of monetary compensation after considering the remedy applicable in common law which was deemed unfair in certain circumstances. Subsequently, Justice Harun Hashim introduced Practice Direction No.1 in 1987, as an assessment guideline of a monetary compensation award.

The Practice Direction is known as the internal administrative circular which has been introduced as a guideline in calculating monetary compensation. It is pertinent to be noted that this Practice Direction does not have the force of law and could not be construed as a statement of legal principle. Thus, the Practice Direction acts as a guideline where the Chairman refers to it while delivering the awards. The majority of the Chairmen opined that it is not mandatory to apply the Practice Direction to determine the amount of monetary compensation awarded in unfair dismissal cases (Shukor, 2022). Even though the Practice Direction lays down some calculations in it, it seems too general and some amendments are needed. The IRA 1967 has no specific provision regarding monetary compensation since reinstatement is deemed as the sole remedy. In 2008, the IRA 1967 was amended, and the Second Schedule was introduced. The Second Schedule outlined the factors considered by the Chairman of the Industrial Court during the delivery of monetary compensation, indirectly acknowledging it as one of the remedies for unfair dismissal.

Against the background of recent legal provisions for unfair dismissal, this paper research examined the inconsistency of award assessment in unfair dismissal cases in Malaysia with the view to recommending a methodical assessment guideline for unfair dismissal cases. To achieve the objective, this study adopted a black letter approach through a traditional legal method, which is suitable for studying theoretical, doctrinal or pure legal review involving library information search. In this paper, all relevant legal provisions and unfair dismissal cases that were decided by the Industrial Court were thoroughly examined.

Remedy of Monetary Compensation in Lieu of Reinstatement

A reinstatement is a minimal form of award given by the court to the employee for unfair dismissal cases (Shukor, 2022). Although the court has discretionary power to decide, the merit of each case must be accounted for. Most employees and employers are not interested in reinstatement due to the loss of confidence between both parties and a strained relationship affecting the work environment (Shukor, 2022). In these situations, the court will order monetary compensation in lieu of reinstatement to protect the liabilities of both parties. In awarding reinstatement, the court must balance between the security of employment and protection against wrongful termination, and maintaining industrial peace and harmony as per (Shukor, 2022).



The award must be genuine on the part of employers and employees by considering facts and the situation. The Industrial Court may award monetary compensation to the employee when it is possible to reinstate the employee due to the violation of the employees' security tenure (Kanagasabai, 2006). Thus, monetary compensation in lieu of reinstatement is deemed as an alternative for the reinstatement remedy in unfair dismissal cases. However, no provision was outlined in the IRA 1967 regarding the calculation for monetary compensation in lieu of reinstatement until after the amendment in 2008 with the inclusion of the Second Schedule. The court then employs the formula laid down in the Practice Direction to calculate monetary compensation. The calculation will be based on the employee's last salary before dismissal against the number of year(s) he/she worked in the company. Each tenure year will be multiplied by the one-month salary. The formula is as follows:

$$\text{Last earned salary} \times \text{length of service rendered (1 year = 1 month)} = \text{RM XXX}$$

The court uses the above formula in cases where reinstatement is inappropriate. The claimant is awarded compensation based on employment years in the company. In the case of *Encik Poobalan A/L Suppiah v Cessun Sdn. Bhd.* (Award 63 of 2009), the court awarded monetary compensation in lieu of reinstatement of RM18,540 (RM2,060 X 9 months), as he had worked for 9 years and the company failed to prove on the balance of probabilities that the claimant had failed to achieve his sales target. In the case of *Solahudin bin Mohamed v Ruane-Tati Sdn. Bhd.* (Award No: 169 of 2010), the court awarded 9 months of salary (RM 8,000 X 9 months = RM 72,000) as a monetary award because the claimant was not in a capacity to be reinstated as he had started his own business and there was a six-year gap from the date of dismissal and hearing. In *Lim Ee Hai v Swichtec Power Systems Sdn. Bhd.* (Award No: 264 of 2010), the court awarded 20 months of salary (RM 8,480 X 20 = RM 169,600) for the claimant's 20 years of service to the company and he was not eligible to be reinstated as he had been gainfully employed after 7 months of unfair dismissal. In *Kamal bin Abg Abu Bakar v Bank Pertanian Malaysia Berhad* (Award No: 210 of 2018), the court ordered monetary compensation in lieu of reinstatement of 27 months (RM8,516.93 x 27 = RM229,957.11) because the claimant had worked in the company for almost 27 years and reinstatement was inappropriate as he had joined his friend's company as HR manager.

In *Lini Feinita binti Mohd Feisol v Indah Water Konsortium Sdn. Bhd.* (Award No: 3205 of 2018), The claimant was awarded monetary compensation in lieu of reinstatement due to a soured relationship between the employer and employee, and she was awarded RM103,506 (RM7,962 x 13) for a service of 13 years. In *Tan Sew Yek v Yoncen Trading* (Award No: 1339 of 2016), the court awarded RM40,500 (RM2,700 X 15) as monetary compensation in lieu of reinstatement for 15 years of employment service. In *Hamdan bin Mohd Noor v Perusahaan Otomobil Nasional Sdn. Bhd.* (Award No: 710 of 2016), the court ordered monetary compensation in lieu of reinstatement because the claimant had gained another job after dismissal and the award amount was RM211,176 (RM17,598 X 12). In *Raja Azmil bin Raja Hussein v CIMB Bank Berhad* (Award No: 903 of 2017), the court viewed that reinstatement was inappropriate as the claimant had left the bank for more than 5 years and many changes had taken place in the banking



industry and the bank, thus the compensation was appropriate for the 26 years of employment at the bank. He was awarded RM208,858 (RM8,033 X 26). Workers under a probation period are not entitled to reinstatement and compensation in lieu of reinstatement does not exist in the frame, and they are only entitled to back wages under the remaining period of probation for unfair dismissal.

The award of monetary compensation in lieu of reinstatement was awarded because reinstatement is inappropriate. The claimant managed to gain employment or started a business after the unfair dismissal, and they were not in the capacity to be reinstated. Besides, in certain cases, reinstatement becomes inappropriate as a sour relationship exists between the claimant and the employer. It would be appropriate to avoid any further complications between the parties, and the court considered monetary compensation as the best for the parties. The court also considers the gap and changes implemented in the industry after the dismissal period. Those reasons are crucial as they will affect the operation of existing systems in the industry, as well it also considers be inappropriate to be reinstated to a lower position. Therefore, the court evades unnecessary issues and takes into consideration the aspect of both parties in delivering the award. In this situation, monetary compensation would be suitable to be awarded for the service rendered by the employee as compensation for dismissal.

The Protection under Industrial Relations Act 1967 For Workers Attained Retirement Age

Retirement age is the age where an employee is required to cease working and may receive certain benefits. In Malaysia, according to Section 4 (1) of the Minimum Retirement Age Act 2012 (MRAA 2012), the retirement age of employees is set at 60. Jaspal Kaur (2015) mentioned that the retirement age set out in the MRAA 2012 is 60 years old for private sector workers. The Ministry of Human Resources posits that a longer life span actually supports 'that the issue of the protection and the disincentives for aged workers to work, has become an issue for the State and employers, particularly from a social justice approach' (Jaspal Kaur, 2015). Aged workers are not entitled to protection from unfair dismissal such as remedy of monetary compensation and are also not entitled to reinstatement because of their mandatory retirement as stipulated in the MRAA 2012. However, in view of social justice, monetary compensation in lieu of reinstatement can be granted as compensation for aged workers to uphold justice for them.

Recently, the Federal Court delivered a new ruling for unfair dismissal cases to reject monetary compensation in lieu of reinstatement for retirement age workers. The ruling was expounded in *Unilever (M) Holdings Sdn. Bhd. v So Lai & Anor* [2015] 3 CLJ 900, where the Federal Court judge rejected the remedy of monetary compensation in lieu of reinstatement for the employee who passed the retirement age. The decision in the Unilever case referred to the judgment made by the Court of Appeal in *Sabah Forest Industries Sdn. Bhd. v Industrial Court Malaysia & Anor* [2014] 8 CLJ 876. In *Sabah Forest's* case, the award was granted after the employee passed his compulsory retirement age of 55. Retirement is defined as an act of leaving from the said job due to the age factor prescribed in the statute or the employment contract. The learned judge viewed



that the Industrial Court had made an error in awarding monetary compensation in lieu of reinstatement for the workmen who passed the retirement age.

The judgment made by the president of the Federal Court in the *Unilever* case overruled the award made by the Chairman of the Industrial Court. The judge held that Practice Direction does not cover the assessment of monetary compensation for retired workers. Furthermore, the judge viewed the Practice Direction as an internal guideline introduced to facilitate the court in making a decision. The decision was made by the Chairman of the Industrial Court who referred to the Practice Direction as the IRA 1967 does not state a specific provision regarding monetary compensation in lieu of reinstatement. The monetary compensation assessment is considered as a simple arithmetical calculation and the remedy cannot be awarded to the claimant who had passed the retirement age.

The Federal Court judge also delivered the award based on the following reasons: the compensation is known as the substitute for reinstatement; the reinstatement is a primary remedy; there is no legal basis based on Section 30(5), and the Practice Note is not a statement of legal principles (Mohamed, 2015). In *Dr. Dutt's* case, the Federal Court concluded by interpreting the word 'compensation in lieu of reinstatement as an alternative remedy for reinstatement. Furthermore, Section 20(1) of the IRA 1967 states that reinstatement is known as the primary remedy in unfair dismissal cases and the basis for reinstatement depends on the age of the employee, and those who have attained retirement age are not eligible to be reinstated.

The court would not pay compensation as an award for employees who are at retirement age either at the time of dismissal or during the hearing period. The employee is also not entitled to reinstatement because of the standard age requirement unless there is a separate agreement between the employee and the company which allows the retirement-aged worker to continue the job. The learned judge, *R. Rama Chandran*, opined that the prolonged delay of arbitration causes injustice, as well as injury to the claimant and his family. Therefore, the judge awarded the remedy of monetary compensation in lieu of reinstatement. However, in the case of *Unilever*, the delay was a lengthy 15 years, thus the claimant was not entitled to monetary compensation in lieu of reinstatement since the employee had reached retirement age (Jaspal Kaur, 2015). A prolonged delay is something that should be considered by the Industrial Court and the Chairman when they order no reinstatement or remedy of monetary compensation in lieu of reinstatement in cases of employees who have reached or passed the retirement age.

In *Oon Inn Soo v Ng Corporation Sdn. Bhd.* (Award No: 659 of 2017), the Chairman instructed that the claimant could not be reinstated to his former job because he had already passed the mandatory retirement age set by the MRAA 2012; he was aged 71 years old at the time. Thus, the court awarded back wages as a remedy for unfair dismissal. Furthermore, the Chairman viewed that remedy of monetary compensation in lieu of reinstatement should only be given when the workmen are in a position or situation to be reinstated to their former job. The Chairman of the Industrial Court did



not grant reinstatement or monetary compensation in lieu of reinstatement in the case of *Ganeson A/L Muniandy v Linde Malaysia Sdn. Bhd* (Award No: 1052 of 2016) too. The employee was awarded back wages as a remedy for unfair dismissal instead. There are cases also where the claimant was not entitled to be reinstated nor to monetary compensation in lieu of reinstatement because of having attained the age of retirement.

Nevertheless, there are a few cases where aged workers were allowed to continue their employment, subject to a separate agreement or clause in the offer letter between the employee and the company. In the case of *Amir bin Osman dan 2 Perayu Yang Lain v Meor Hamzah (M) Sdn. Bhd.* (Award No: 119 of 2016), the Chairman of the Industrial Court ruled that the second claimant was entitled to be reinstated to his former employment or to receive the remedy of monetary compensation in lieu of the reinstatement when the court refused to award reinstatement as a remedy. This decision was in reference to the evidence showing that the employer had resumed the employment period even though the employee had attained the age of retirement (60 years old) as stated in MRAA 2012, citing that the aged workers did not have any protection from unfair dismissal. Therefore, a separate agreement for employment between aged workers and employers after the mandatory retirement age is required although it may not seem to provide any protection to aged workers in the case of unfair dismissal.

Consequently, the retired claimant is also ineligible to claim monetary compensation in lieu of reinstatement as compensation cannot be paid in place of reinstatement which does not exist since the claimant has reached retirement age. The Practice Direction does not formulate a clear and concise calculation on the payment of monetary compensation by acting as a guideline that does not address the issue of retirement age. In the case of retired workers, the protection given for unfair dismissal is inadequate. Thus, in most cases, employees who attain retirement age lose their rights to receive monetary compensation because of the prolonged delay in the court proceedings. The delay should not cause injury to the claimant who attains retirement age since delays cannot be avoided by the claimant or the court. The researcher humbly requests that the relevant authority ought to give fair protection to the claimant who has attained retirement age due to prolonged delays at the court. This study proposes a provision for employees who have attained retirement age to be entitled to monetary compensation of five to ten years back pay in lieu of reinstatement based on the service rendered during their employment.

The Status of Deceased Claimant or Workers

Deceased employees are not entitled to continue their proceedings in court, and no one is allowed to act on their behalf. In some cases, the delay is prolonged until the death of the employee, causing their claim to be abated. The claim for unfair dismissal issue is then automatically terminated and no justice was given to them. The Ministry has recently taken some initiatives to provide protection and justice to the deceased employee in unfair dismissal cases. The Industrial Relations (Amendment) Act 2020 was



introduced to amend the IRA 1967 included in Section 29 (ea) for the proceeding of the deceased employee to be continued by appointing a representative as stated in Subsection 20 (1). To be precise, the amendment was made with the intention to provide justice to deceased employees who suddenly passed away during the court proceedings. In most cases, the deceased employee's claim was terminated at the court because the employee passed away. The Act also allows the payment of remedy in the form of monetary compensation to the next of kin of the deceased employee as mentioned in Section 30 (6B). The inclusion of these subsections is intended to give protection to the deceased's family who might suffer losses from death. Indirectly, the inclusion of both sections aims to provide fair and just treatment to the deceased employee.

The Position of Fixed-term Contract Worker

The general principle of hiring fixed-term contract workers is stipulated in Section 11 of the Employment Act 1955, which states that the contract worker is hired on a specified term basis by the employer where the contract may be ended by either party upon completion of the project or contract, and the expiration date of contract does not constitute as dismissal nor resignation. The fixed-term contract does not impose any obligation for renewal of contract or be categorised as unfair dismissal when the employer does not renew the contract. When the issue of unfair dismissal does not arise in the fixed-term contract, the primary nor the alternative remedy (compensation in lieu of reinstatement) does not exist. In the case of *Han Chiang School, Penang Han Chiang Associated Chinese Schools Association v. National Union of Teachers in Independent Schools, W. Malaysia* [1988] 2 ILR 611, the Industrial Court held that in the case of a conventional fixed term contract,

"the workman may have a grievance that he has not been hired by his employer under a fresh contract, but ordinarily an employer is not under any obligation in law to enter into a contract. At common law, therefore, there is simply no remedy."

Therefore, the decision of the case was applied in most of the cases to affirm the general principle of law. The court also looks into relevant factors before deciding the fixed-term contract as a genuine contract; a) the intention of the parties, b) the employer's conduct during the course of employment, and c) the nature of the employer's business and nature of the job scope the employee was engaged to perform (*Ahmad Zahri bin Mirza Abdul Hamid v Aims Cyberjaya Sdn. Bhd.* [2020] 1 LNS 494). These are intended to protect the employee's security of tenure and to ensure there is no element of sham or intricate manoeuvres in the fixed-term employment contract. The Chairman awarded back wages as a remedy for unfair dismissal cases and viewed that monetary compensation in lieu of reinstatement was inappropriate in the case of *Robert Scully v Persatuan Bola Sepak Pulau Pinang* (Award No: 589 of 2017). In the case of *Ahmad Zaini bin Omar v Bella Vista Waterfront Resort & Spa / Langkawi Aman Sdn. Bhd.* (Award No: 540 of 2017), the Chairman of the Industrial Court opined that the primary remedy of reinstatement does not exist, and alternative remedies, such



as monetary compensation in lieu of reinstatement, cannot be awarded to permanent contractual workers. In some cases, the employer has the rights to renew the contract for a certain period under specific conditions. In *Nasha'at Muhy Mahmoud v Malaysian Airlines System Bhd.* [2014] 1 ILJ 458, the employer has declined to renew the contract on the basis that priority should be given to local staff members, rather than foreigners. The learned judge opined that the decision made by the employer was genuine and there was no unfair dismissal in the case. Furthermore, in *Aims Cyberjaya Sdn. Bhd. v Ahmad Zahri bin Mirza Abdul Hamid* [2018] MLJU 1975, the learned judge decided that the employment contract was ended fairly and genuinely by the employer, and set aside the decision made by the Industrial Court and High Court.

The Chairman of the Industrial Court opined that as a fixed-term contract worker, the employee should not assume that they will be reinstated to former employment while fixed-term contract workers should be treated differently from permanent workers. Malaysian employers may hire fixed-term contract workers and there is no unfair dismissal if the contract expired genuinely. Therefore, this allowance calls for a clear understanding that permanent workmen and fixed-term contract workers should be handled differently in employment matters by providing separate standard guidelines for these workers to protect their interests as well as to uphold justice for permanent workmen and fixed-term contract workers.

The Assessment of Back Wages Remedy for Unfair Dismissal Cases

In common law, most claimants preferred to apply for monetary compensation as a remedy for breach of contract. Subsequently, a common remedy is to compensate innocent parties through remedies such as arrears of wages (back wages). The remedy of back wages is normally awarded by the court to compensate for the losses suffered during the unfair dismissal period. However, there are certain factors that need to be considered by the Chairman of the Industrial Court before awarding this remedy according to the monetary compensation guideline stipulated in the Second Schedule of the IRA 1967. Factors that need to be satisfied include the last drawn salary, the length of service, any misconduct committed by the employee, any future earnings, the duration of dismissal date up till the date of the judgment and any other benefits received by the employee during unfair dismissal.

The inconsistency of monetary compensation calculation arises because there is no standard assessment in calculating monetary compensation for unfair dismissal cases. The calculation of back wages is restricted to a maximum claim of 24 months for permanent workers and 12 months for probation workers. The last drawn salary of workers is to be multiplied by the months of unemployment prior to dismissal. The rationale for awarding back wages is to compensate employees' financial losses during the unlawful dismissal period. The formulas are:

Permanent worker: Last drawn salary X maximum 24 months = RM XXX Probationary worker: Last drawn salary X maximum 12 months = RM XXX

The abovementioned formulas have been applied widely since the introduction of the Second Schedule in 2008, and the Chairman seems to award back wages within the maximum time frame. Even though the facts of cases vary, the Chairman has upheld justice and acted in good conscience while awarding back wages with the purpose of balancing the rights and interest of the employer and employee. The assessment of back wages varies according to the circumstances of cases and the Chairman discretionary power. There are cases where the Chairman has awarded a maximum of 24 months of back wages despite a longer duration. However, there also awards which were less than 24 months, even when the duration exceeded the maximum capping or when the dismissal period is longer than the award conferred. The deduction for contributory conduct and post dismissal earning is calculated after totaling the amount of back wages. Thus, the deduction does not affect the number of months for back wages. There are no standard rules in deciding the calculation and award.

In *Mohamad Azhar bin Abdul Halim and Naza Motor Trading Sdn. Bhd.* (Award No: 101 of 2017), the employee was awarded a maximum of 24 months as a remedy of back wages when the duration between dismissal and court award was 26 months and the company had failed to prove that the claimant had committed misconduct by sending threatening messages. In *Navinathan A/L Doraisamy and Bekaert Southern Wire Sdn. Bhd.* (Award No: 453 of 2017), the court awarded a maximum of 24 months despite the duration exceeding the maximum period of back wages, and it was proven that the company's action of dismissal was male fide and the increment of salary showed that the claimant's job was exceptional. Furthermore, in *Chan Shy Yean and Marcus Evans (M) Sdn. Bhd.* (Award No: 34 of 2016), the employee received a maximum of 24 months of back wages as a remedy because the company failed to establish its case for genuine retrenchment of the claimant. The logical conclusion based on the evidence and facts was that the claimant's position was in fact not redundant. Similarly, in *Ng Bee Yoong and Capital Development Sdn. Bhd.* (Award No: 186 of 2016), the employee was entitled to a maximum of 24 months of back wages because the claimant was driven out of her employment through the company's conduct of transferring her to another separate entity and a different scope of work and industry with the intention of demotion.

Nevertheless, in *Liew Wing Fai @ Lew Wing Fai and Dry Cut Sdn. Bhd.* (Award No: 214 of 2017), the Industrial Court awarded 21 months of back wages for the time between the date of dismissal and date of hearing and dismissal (24/06/2014 till 24/03/2016). In *Mohamad Rafie bin Mohd Razi and Hume Concrete Sdn. Bhd.* (Award No: 285 of 2017), the duration of employee dismissal and the hearing date was 24 months, but the number of months awarded by the court as back wages was 15 months because he was unemployed for the said duration after dismissal and the court viewed it as appropriate to award the said duration. Furthermore, in *Razali bin Ab Rahman and Divaforce Sdn. Bhd.* (Award No: 182 of 2016), the duration of dismissal was 16 months, but the employee was only awarded 11 months of back wages for the remaining unexpired probation period. In the above cases, the court has limited the number of months for back wages, despite the employee duration of dismissal which exceeded the maximum capping. The reason for limiting the back wages was the duration of the



probation period, fixed-term contract and dismissal date to the hearing date, but a detailed calculation was not stated. However, the assessment of months seems to be more on the fact of cases and subject to the Chairman's discretionary power. It should be noted that the Second Schedule is a mere guideline for a standard monetary compensation assessment. Therefore, it does not outline a detailed assessment nor the reason for awarding back wages.

Even though the award is given for a maximum 24 months, if there is any contributory conduct, the Chairman has to make the deduction accordingly, while in some cases back wages were restricted and deduction also made. In *Harun bin Yaakub v RHB Bank Berhad* (Award No: 307 of 2017), the employee was awarded 12 months of back wages even though he had been dismissed for 32 months. Furthermore, in *Ameranthiran A/L Munisamy v Lap Engineering Sdn. Bhd.* (Award No: 247 of 2016), the court awarded 12 months of back wages even when the employee duration of dismissal exceeded the maximum cap of back wages. These two cases proved that the employee contributed to the dismissal as there is a deduction from the total amount awarded for their misconduct. Therefore, the rationale of limiting the employee back wages to 12 months, and the reason behind this decision is questionable as the court has deducted its contributory conduct percentages from the 12 months of back wages. A detailed assessment was not mentioned in the cases as the reason for limiting the back wages, as well as for the deduction of contributory conduct cases. Therefore, this has led to some disparity in months of back wage awards, as well as a lack of reason for the restriction of months and deduction for contributory conduct. Undeniably, the Chairman was exercising his power under Section 30 (4), (5) and (6) accordingly with the intent to uphold justice for the disputing parties, but then a valid reason should be detailed in the assessment to justify and clarify the reason for the award as well as for the calculation.

Non-monetary damages should be determined based on the aspect of the unemployment period following an unfair dismissal, which causes employees emotional pain and sadness. Furthermore, throughout the unemployed term, the employees' emotional suffering should be considered while determining monetary compensation (Shukor et al, 2019). According to Shukor (2022), the IRA 1967 was designed to protect the disputing parties nevertheless, the guidelines provided in this Act seem vague and need to be amended according to the development of the industrial sectors in Malaysia with a new model for assessing monetary compensation in an unfair dismissal claim. Through this model, it can provide a better understanding and the calculation of monetary compensation and improve the system's legal certainty since the existing guidelines provide wide discretionary power to the Chairman of the Industrial Court (Shukor, 2022).

CONCLUSION

The law governing the dismissal of employees is constructed based on the notion of fairness which the employer-employee relationships in Malaysia are governed by the Employment Act 1955 and the Industrial Relations Act 1967. Considering the intricacies



of disciplinary standards and actions, it is difficult to explain the prevalence of challenged unfair dismissal claims across companies and organisations. In Malaysia's context, the existing employment law makes it clear that employers must have "good cause and reason" before terminating the employee. Employers must guarantee that the employee is terminated in a fair and equitable way, whereby a 'due inquiry' or 'domestic inquiry' is one of the procedures that must be carried out before dismissal for misconduct may be justified under section 14(1)(a) of the Employment Act 1955. Despite that, the Industrial Court nonetheless hears huge numbers of unfair dismissal claims each year. Against the background of current unfair dismissal legislation, this paper examined the inconsistency of award assessment in unfair dismissal cases in Malaysia with the view to recommending a methodical assessment guideline for unfair dismissal cases.

Several remedies can be awarded to compensate the innocent party for breach of contract. Under employment law, the remedies applicable are reinstatement and monetary compensation. Reinstatement is a primary remedy for unfair dismissal cases. However, reinstatement is not a preferable remedy in Malaysian unfair dismissal cases as employees prefer monetary compensation remedy for unreasonable termination. Nevertheless, the Malaysian Act does not recognise monetary compensation as one of the remedies claimable for unfair dismissal. While the practise of granting monetary compensation as an alternative remedy to reinstatement is permitted under common law, the inclusion of the Second Schedule establishes fundamental rules in awarding monetary compensation as an alternative remedy to reinstatement. Monetary compensation in lieu of reinstatement and back wages are payable to the innocent party to compensate the losses suffered for breach of the employment contract. The remedy of compensation in lieu of reinstatement will be awarded to the employee when the court thinks that reinstatement is unsuitable. In contrast, the remedy of back wages is to compensate for the loss of earnings between the dismissal period and the hearing period.

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