LABOUR RELATIONS IN MALAYSIA: AN EVALUATION

by

Prof. V Anantaraman

Prof. V Anantaraman, MA, PhD., (Wisconsin) Cert ITP (Harvard), Specialist in Industrial Relations, Faculty of Management, MULTIMEDIA UNIVERSITY, Cyberjaya, Selangor, Malaysia

Also found at [2003] 2 xxxvii
LABOUR & EMPLOYMENT
Malaysia

The focus of this paper is the Industrial Relations Act 1967 ('IRA'). Among the Labour Laws in Malaysia, this legislation is of primary importance for it deals not only with collective bargaining relationship between union and management but equally importantly governs termination of the employee's contract of employment for reasons of dismissal due to misconduct, retrenchment and constructive dismissal. Furthermore, this legislation marks a watershed in the history of Malaysian labour-management relations because it replaced the then prevailing voluntary system of industrial relations with a compulsory system providing for conciliation and adjudication at the discretion of the Minister for Labour. It is in this context this evaluation is concerned with the needed changes in the law: (a) to ensure procedural fairness in dismissal proceedings; (b) to ensure speedy disposal of industrial disputes; and (c) to ensure social justice to workmen.

I

Procedural Fairness

Procedural fairness in dismissal or termination is an important domain of the IRA calling for reform. The concept of procedural fairness has several dimensions and in one way or the other, it is concerned with the workman knowing the employer's reason or reasons for dismissal before he is dismissed or why his representation for reinstatement is not referred to the Industrial Court by the Minister. Ensuring procedural fairness in dismissal proceedings is, therefore, discussed with reference to: (a) giving reasons for termination simplicitor; (b) giving reasons to the employee before dismissing him for misconduct; (c) giving reasons as part of pre-dismissal inquiry proceedings; and (d) giving reasons for the exercise of Minister's discretion.

"Fire first; give reasons later" is the current norm governing employer's action either in the case of termination simplicitor or dismissal due to misconduct. In other words, the employer can dismiss an employee (a) without giving reasons for his dismissal.
and (b) without conducting a domestic enquiry before he is dismissed.

These procedural defects (not giving reasons before termination simplicitor) as also in cases of non-provision of a domestic enquiry or a defective inquiry are not in themselves fatal to the employer's case - it is now settled that these shortcomings in relation to natural justice are rectified and augmented by a provision of a full trial in which the issues are opened up all over again in Industrial Court proceedings …

This state of the law is due to the controversial ruling by the Federal Court in the case of *Hong Leong Assurance*. The ruling in that case is disconcerting in that pre-dismissal inquiries have been made redundant not only under the IRA but also under s. 14(1) of the Employment Act 1955 ('EA') injuring the interest of all workmen earning less than RM1,500 per month as well as those earning more than RM1,500 per month. Furthermore, pre-dismissal inquiries are redundant even when it is a requirement under the collective agreement or the contract of employment. It is significant that Abdul Malik Ishak J commenting on the effect of the Federal Court ruling in *Hong Leong Assurance* stated:

> The effect can be disastrous. The employer can simply dismiss unwanted employees without stating any reasons and only state the reasons which may include manufactured ones to strengthen his case when the case is referred to the Industrial Court.

In fact the learned judge was echoing the ruling of the House of Lords in *Atkin's case* which held that:

> The employer was not entitled to rely on evidence acquired after dismissal and fairness must be judged in the light of the facts known to the employer at the time of dismissal.

It was not surprising, therefore, that the House of Lords in *Polkey's case* overruled the British Labour Pump Principle (Curable Principle) on the ground of possible abuse by the employer in not giving reasons to the employee at the time of his dismissal but manufacturing them subsequently.

Finally, it was Lord Mackay in the *Polkey's case* who equated procedurally wrongful dismissal with substantively wrongful dismissal when he stated:

> it is not correct in law to draw a distinction between the reason for dismissal and the manner of dismissal as if they were mutually exclusive with the industrial tribunal limited only to considering the reason for dismissal.

The invalidation of the curable principle by the House of Lords and the justification provided by Lord Mackay to restore procedural rectitude in dismissals coupled with the fears of Abdul Malik Ishak J of continued misuse of this principle by the employers for not giving reasons for dismissal point to the urgent need to resurrect pre-dismissal inquiry in some form or the other.

This reasoning obviously reverts our interest in the Industrial Court devised rule in *Sykt Great Eastern Life Assurance Bhd v. Kesatuan Sekerja Kebangsaan Pekerja-Pekerja Perdagangan* (Award No. 21 of 1969):

> The accused must be given sufficient opportunity not only to know the case against him
but also to answer it.

When one traces the history of procedural fairness in dismissal proceedings in Malaysia, the starting point is the aforementioned rule by the Industrial Court since s. 20 IRA is silent on the requirement of due inquiry before dismissal.

However, this rule devised by the Industrial Court as early as 1969 was not enforced until 1983 as it failed to reach a consensus on the exact form and content of domestic enquiry. Finally, the court seems to have reconciled to a standard of "reasonable investigation" in the loose sense of the term. This loose standard of affording a reasonable opportunity of being heard to the workman in his own defense amounted to no more than what may be equated with a preliminary investigation in the elaborate Indian disciplinary procedure without the hearing that necessarily follows when the explanation given by the employee to the show cause letter is not satisfactory.

The Industrial Court in Aliah bte Yasin v. Chartered Bank (Award No. 93 of 1981) operationalised the expected standard as:

If the workman has been informed of the specific accusation and he submitted his written explanation, that is sufficient opportunity of being heard; an oral hearing is not essential.

There are several arguments against the feasibility of enforcing a full-fledged domestic inquiry in Malaysia. The foremost among them is the inability of small-scale employers to conduct domestic enquiry and the inadvisability of annoying their big brothers with this requirement in the context of Malaysian dependence on them for economic development.

Another formidable argument against it is the recent decision of the Federal Court in Perumal's case. As a hospital attendant Perumal was a civil servant. Civil servants are governed by art. 135(2) of the Federal Constitution of Malaysia, and they cannot be dismissed or demoted before being heard. Federal Court judge Abdul Malek Ahmad ruled that in the case of civil servants also:

The right to be heard did not require the person concerned to be given an oral hearing.7

Obviously, this is a lukewarm standard of procedural fairness under the Malaysian law. The next question to be answered is how to make this lukewarm standard of pre-dismissal investigation translated into law in the context of the Federal Court ruling in Hong Leong Assurance case.8 See also the Supreme Court in Dreamland's case on the concept of procedural fairness. Nevertheless in the author's opinion the concept of procedural fairness will be addressed soon.

The great jurist Tun Suffian observed in his address to the Bar conference recently:

In our judicial system, which is modelled along the English system, if a Magistrate makes an error of judgment, the High Court would correct it, and if the High Court makes an error of judgment, the Federal Court would correct it, and if the Federal Court makes such an error, the errors then become the laws of the land, and the danger of such twisted judgment is that it will become precedent in later cases ... the last few years saw some perverse written judgments.10

mhtml:file://H:\MASTER (G)\DCE 5634 Sem 2 2008-2009\Articles\Labor relations in M... 12/28/2009
It is not implied that the Federal Court's ruling in *Hong Leong* falls within the ambit of this criticism. It is only to emphasise that, notwithstanding Tun Suffian's lament, the Federal Court's ruling is not absolute for all time to come for it can be overruled. For example, the former Chief Justice Mohamed Dzaiddin ruled that the Federal Court can review its own decision to prevent injustice:

> Rule 137 of the Rules of the Federal Court gives us the inherent powers to hear any application or to make an order as may be necessary to prevent injustice.\textsuperscript{11}

There are two very significant indicators that this is the most propitious moment to make such an application to set right the injustice of denying pre-dismissal inquiry to workers. The first one is the bold step forward taken by the Supreme Court judge Edgar Joseph Jr. in going against the *Hong Leong Assurance* ruling and declaring in no uncertain terms that due inquiry is a statutory obligation on the part of the employer under s. 14(1) EA:

> When, as here, a claimant is an employee within the meaning of the Act, he has by s. 14(1) thereof a statutory right to due inquiry by his employer, and so, the approach of the Industrial Court or, for that matter, the High Court - in considering the question whether the claimant had been dismissed without just cause or excuse would be to examine the decision not just for substance but for process as well.\textsuperscript{12}

Though the above quoted *dicta* may be viewed as an *obiter*,\textsuperscript{12a} it is such a persuasive one to form the basis for a binding precedent in the future to ensure procedural fairness in dismissals proceedings not only for workmen coming under s. 14(1) EA but also for those coming within the meaning of s. 20(1) IRA. The tenor of his verdict is unmistakably inclined towards this end.\textsuperscript{13}

Secondly, the attempt by the Industrial Court (approved by the High Court later on) to enforce pre-dismissal inquiry by modifying the relation back doctrine and ordering payment of backwages from the date of dismissal to the final date of hearing of the case in the Industrial Court proved to be a misadventure.\textsuperscript{14} The strategy suggested by the author to get pre-dismissal inquiry accepted by the apex court will entail the Industrial Court to set aside a dismissal of an employee solely on procedural grounds by invoking sub-ss. 5, 5A and 6 of s. 30 IRA.\textsuperscript{15}

Specifically apart from equity and good conscience, taking into account cl. 42 of the Code of Conduct for Industrial Harmony, in enforcing due inquiry, it would prove to be a formidable challenge to our apex courts to quash it by *certiorari*. Furthermore, pursuant to Gopal Sri Ram's prescription\textsuperscript{16} of the limits of the power of the Industrial Court to create new rights and obligations under s. 30(6) IRA, it is not difficult to establish a rational nexus between the dispute (absence of domestic inquiry) and the relief (setting aside the dismissal) in order to apply s. 30(6), and compel the employer to conduct domestic enquiry.

Finally, Mohd Azmi FCJ applied the literal rule of statutory interpretation in contrast to the purposive approach supported by the Industrial Court.\textsuperscript{17} Now when a case confronting the issue of procedural rectitude in dismissal proceedings goes to the Federal Court, in the author's opinion, the probability of it being affirmed in the process of statutory construction seems to be promising.
This belief is strengthened by the very recent observation by Gopal Sri Ram in a Court of Appeal case where he said at p. 662:

Now it is true that a literal interpretation of s. 30(1)(c) would produce the meaning contended for by the appellant. But if you look at the decisions of our courts over the past few years, you will notice that we no longer resort to the literal rule when interpreting statutes. We will not use it when it will produce an absurd result. 18

As the author has voiced his views on the Malaysian law governing unfair dismissal in his articles in the Malayan Law Journal, he desists from repeating his arguments against the Federal Court judgment in Hong Leong Assurance case.

Ambit Of Ministerial Discretion

The final dimension of procedural fairness arises during the exercise of discretion by the Minister not to refer the representation of the workman under s. 20(3) IRA. The Supreme Court in Sanjiv Oberoi's case clearly held that neither is the Minister under any statutory duty to give reasons nor can he be directed or compelled to give reasons when the exercise of his discretion is challenged. However, the Court of Appeal in Hong Leong Equipment case equating the fundamental right to life guaranteed in the Federal Constitution of Malaysia to right to livelihood, decreed that the Minister is expected to give reasons when he exercises his discretion in dismissal cases under s. 20(3) IRA. Furthermore, in underscoring the importance of this aspect of procedural fairness, the Court of Appeal stressed that consideration of feasibility, public interest or national security did not apply to exclude procedural fairness where a fundamental right conferred by the Federal Constitution is involved.

However the Court of Appeal in Joseph Puspam v. Mentri Sumber Manusia, Malaysia & Anor [2000] 4 CLJ 252 viewed the ruling in Hong Leong Equipment case as not binding because in its view the dicta of the Federal Court in Sanjiv Oberoi still held good. In other words, the Minister is only expected to give reasons, not obliged to do so for refusing to refer the dispute to the Industrial Court. Incidentally, under the Indian Industrial Disputes Act 1947, the Minister is subject to such a statutory duty.

It is appropriate to conclude this section by citing a case in which two of the four procedural defects listed at the beginning of the section occurred. Specifically, in this case (The Hon. Minister For Human Resources v. Thong Chin Yoong & Another Appeal [1999] 4 CLJ 161 CA), while the employer alleged that the claimant had committed some serious misconduct and suspended him suddenly, he did not give any specific reasons for his action. When his constructive dismissal claim went to the Minister, the Minister also did not give any reason for refusing to refer the dispute to the Industrial Court. Be that as it may, the Court of Appeal ruled that the Minister was wrong in not referring the matter to the Industrial Court for a totally different reason:

Whether or not an employee was constructively dismissed is a question of law which is not the province of the Minister to decide and we feel that the Minister is not competent to decide and the Industrial Court is the best avenue to decide the question.

II
Speedy Disposal Of Industrial Disputes

Gopal Sri Ram has repeatedly emphasised that, "the legislators' paramount concern in passing the Act (IRA) is to ensure speedy disposal of Industrial Disputes". In this section all possible ways by which delay in settling industrial disputes could be reduced are considered within the following framework:

1. reducing delay on account of the three-cornered approach to industrial relations;

2. reducing delay by excluding legal representation to the parties in adjudication proceedings in the Industrial Court;

3. reducing delay on account of the employers' tendency to pursue to the end the judicial review process;

4. reducing delay through voluntary arbitration of industrial disputes subject to appeal; and

5. reducing delay through revising threshold jurisdiction challenge.

Delay Due To Three-cornered Approach

The well-known cliché "justice delayed is justice denied" epitomises the significance of reducing or minimising delay in the settlement of industrial disputes in the interest of social justice to the workers. In the three-cornered approach to industrial relations, when conciliation steps in after negotiation and adjudication follows conciliation, settlement of industrial disputes is cumulatively delayed.

There will always be some lapse of time in reporting the dispute to the Director General of Industrial Relations and the conciliation process that follows will necessarily take further time. The delay due to bargaining and conciliation is difficult to be reduced unless the government efforts to speed up the process by relying on greater number of conciliators with greater expertise in the conciliation process materialises. Normally it takes three to four months and the Human Resource Minister is trying to reduce it to one month.22

The discretion the IRA confers on the Minister to refer or not to refer the dispute to the Industrial Court further adds to the delay in processing the dispute for reference to the Industrial Court. The dicta of the Court of Appeal in Hong Leong Equipment case23 requiring the Minister to give reasons for exercising his discretion calls for a more careful scrutiny of each case and obviously adds another dimension of delay in the referral process. Nevertheless the Minister's role as a conduit between the parties to the dispute and the Industrial Court is deemed necessary to weed out frivolous and vexatious cases lest they clog the Industrial Court. Furthermore, the Minister's refusal to refer the dispute may compel the parties to seek a negotiated settlement when they are not seeking a solution through industrial action.

Thirdly, apart from the time taken for negotiation, conciliation and referral of the industrial dispute for adjudication, a further delay of three to six months seems
unavoidable in setting cases down for hearing in the Industrial Court.

Fourthly, once the trade dispute comes within the jurisdiction of the Industrial Court - that is when there is no threshold jurisdiction challenge either in the Industrial Court or in the High Court, s. 30(3) IRA supposes that ordinarily the dispute can be disposed of within a period of 30 days. However, that has usually proved to be too optimistic an expectation due to the delay attributable to one or the other party, occasionally to both; sometimes to the unavailability of the representatives of the party, especially busy lawyers and sometimes a member of the panel. Thus the scope for reducing the delay in the dispute settlement process from the time the dispute is reported to the Director-General of Industrial Relations to the date of the award by the Industrial Court is only very limited and if at all there is some improvement, it would only be marginal.

Excluding Legal Representation

This brings us to consider the MTUC mooted suggestion to speed up the disposal of disputes by excluding lawyers from appearing for the parties. Not only legal assistance is expensive but much of the delay in disposing of Industrial Court cases is caused by lawyers requesting postponement as they are busy attending other cases. In Kandiah v. Golden Hope Plantation Ltd, the court allowed adjournments, which stretched a 15-day hearing over a period of nearly 18 months (Award No. 134 of 1977).

The suggestion to keep lawyers away from the Industrial Court does not call for any amendment to the IRA because, unlike in other countries, lawyers appear in the Industrial Court cases only with the permission of the President/Chairman of the Court under s. 27(1) IRA.

While the suggestion to abolish legal representation was not disapproved by all those concerned, they seem to opt for a qualified, not a total exclusion of lawyers in the Industrial Court cases. Specifically, they argue that disputes relating to dismissal of employees especially non-unionised employees and cases involving interpretation of collective agreements and application on points of law to the High Court under s. 33 (A) require the services of the lawyers.

Finally the reason for their belief that parties can do without legal assistance in cases involving negotiation disputes is that this is only an extension of negotiation and conciliation which the parties deal with without legal assistance. Furthermore, a system of informal interaction between the parties and the panel members of the industrial arbitration court in Singapore seems to settle negotiation disputes expeditiously and effectively (infra 38n p. 141-42).

Delay Due To Judicial Review

The tendency on the part of the employers to challenge the decisions of the Industrial Courts in the High Court and then in other superior courts is another major cause of delay in settlement of industrial disputes. This has favoured the employers who have the financial capacity to persist in the pursuit of exhausting all avenues open to them to win their cause or defeat the cause of labour. Currently a worker spends between
RM1,000 to RM5,000 each in legal fees and may have to spend close to RM10,000 if the case is sent to the High Court or the other superior courts. Most of our financially weak trade unions also cannot afford to incur this expenditure even if they are keen on espousing the workers' cause.

However, a method to neutralise the legal and financial advantage the employer enjoys in taking cases for review and appeal is the suggestion, wholeheartedly supported by the Malaysian Trade Union Congress, to set up the Industrial Appellate Court. A study on the feasibility of such an appeal had been undertaken by the Ministry of Human Resources, the Malaysian Trade Union Congress and the Malaysian Employers Federation. Though its outcome has not been made public, it is learnt that the setting up of the appellate court will become a reality very soon.

Nevertheless, if the Industrial Appellate Court is going to be a creature of the IRA, its success in reducing the delay in settlement of industrial disputes entirely depends upon the ways to make the decisions of the appellate court final and conclusive. However, it is quite unlikely that any statutory provision, however strongly worded, could shield its decisions from judicial review for jurisdictional errors, and even errors of law within its jurisdiction.

Voluntary Arbitration

While the legal minds in Malaysia explore ways and means to make the ruling of the appellate court final and conclusive, it is worthwhile to stress the usefulness of the institution of the Industrial Appellate Court to implement the innovative suggestion made by the Prime Minister in 1996 (New Straits Times, 10 January 1996). It was:

"the idea of arbitration by a third party with provisions for affected parties to appeal to a higher authority, if they were dissatisfied with the initial arbitration". Though the idea is rather radical" he pleaded, "let us not completely shut our hearts to the idea".

It is suggested that the jurisdiction of the Industrial Appellate Court is open to appeals over the voluntary arbitration decisions of industrial disputes. This may provide a powerful incentive to the parties to resort to voluntary arbitration initially to settle interpretation and implementation disputes and to extend its scope later.

This does not call for any amendment to the IRA. There is an enabling provision under s. 14(2)(d) IRA for the parties to prescribe in the collective agreement voluntary arbitration as a means of settling interpretation and implementation disputes. All that needs to be developed is a cadre of reliable arbitrators well versed in industrial law. The Industrial Appellate Court is the competent court to hear appeals over arbitration decisions since it also administers exclusively industrial law. If the Industrial Appellate Court is going to be instrumental in establishing voluntary arbitration on a firm footing in Malaysian Industrial Relations it should be welcomed.

Threshold Jurisdictional Challenge

According to Salleh Abas LP in the Inchcape Holdings (M) Bhd's case the Industrial Court's threshold jurisdiction challenge should be raised in the form of a "preliminary objection" before the Industrial Court. On the other hand, the Federal Court in
Assuntha Hospital's case as well as the Supreme Court in Kojasa Holdings (M) Bhd's case argued that the Industrial Court is seized of its threshold jurisdiction following the Minister's reference of the case to the Industrial Court, and threshold jurisdiction of the Industrial Court has to be challenged by challenging the Minister's reference in the High Court, and at the same time the party challenging the Minister's reference should apply to the High Court for a writ of prohibition to stop the Industrial Court from proceeding any further.

Thus there are two sides to this question of threshold jurisdiction of the Industrial Court and both the sides reached their conclusions through statutory construction in the absence of any definite statutory provision in the Act. It is needless to say that the basic function of the court in statutory construction is to ascertain the intention of the parliament on this issue. Gopal Sri Ram argued that "having regard to the general scheme of the Act, Parliament did not intend a threshold jurisdiction challenge before the Industrial Court by way of preliminary objection. On the other hand, Salleh Abas LP argued that the right to examine the preliminary issue of jurisdiction need not have to be expressly conferred in the statute. The right to examine its own jurisdiction is purely a matter of statutory interpretation." It is incongruous that in construing the statute both the parties have ascertained the intention of the Parliament on this issue totally differently.

Be that as it may, Gopal Sri Ram's rationale for reverting to Assuntha Hospital's ruling is on the ground that "the legislature's paramount concern in passing the Act was to ensure speedy disposal of industrial dispute; and permitting "preliminary objection to the threshold jurisdiction being taken will only delay industrial adjudication." He cites the American International Assurance's case where threshold jurisdiction was sought to be resolved through preliminary objection:

Here is a case where the the Minister made a reference in 1985; now after a passage of almost 14 years, all we have is a finding that the respondent was a workman. The other critical issues whether the respondents were dismissed and whether their dismissal was for a just cause are yet to be decided. Most surely, this cuts across the very purpose for which Parliament passed the Act.

It is indeed a very persuasive argument but it appears to be so only on the surface. Of the fourteen years, three years were taken up by the Industrial Court and the rest by the higher courts. Any possible delay in resolving preliminary objection would now be minimised in view of the doubling of the number of presiding officers of the Industrial Court (from 9 to 18) and appeal over any preliminary objection decision being finally settled by the proposed Industrial Appellate Court.

In fact the setting up of the Industrial Appellate Court resolves the conflict over the two routes to settle Industrial Court's threshold jurisdiction. Either you may follow the preliminary objection route or challenge the Minister's reference direct in the Industrial Appellate Court. The saving in cost and time in both the cases will be substantial.

The justification for the Industrial Court to consider its threshold jurisdiction is due to the fact that the Industrial Court as a court of arbitration has a better understanding
of its jurisdiction than the High Court. The same reasoning applies to the Industrial Appellate Tribunal since it will also administer the Industrial Law. The High Court or our superior courts are likely to take a legalistic view towards this issue. It was due to such legalistic attitude that the reviewing courts denied the privilege of check-off of union dues which, in progressive democracies, is considered a routine matter and is included in the collective agreement without any protest. In Malaysia employers object to even trivial matters like a place for a "union notice board," in the company's premises. In the matter of check-off, they went all the way to the highest court\textsuperscript{29} to get the decision they wanted, and the courts also seemed to have obliged them though taking a strictly legalistic view of the matter.\textsuperscript{30} However, it is quite revealing that while our superior courts in interpreting or construing the statute did not hesitate to give the employer his new right to order payment of compensation \textit{in lieu} of reinstatement, they were unconcerned to create a new obligation for the employer to allow check off of union dues.

Finally, it is an undeniable fact that preliminary objections have seldom been or not at all raised questioning the jurisdiction of the Industrial Court in trade disputes. Since almost all such cases are on the issue of who is a workman under s. 20(1) IRA, a simple and clear definition of workman would even eliminate the necessity for any party to choose between the two routes to challenge the Industrial Court's jurisdiction. The issue of revising the statutory definition of workman is considered in the next section.

\section*{III}

\textbf{Role Of The Act In Ensuring Social Justice}

The efficacy of the IRA in ensuring social justice is discussed in relation to the following issues:

1. Relief for unfair \textit{dismissal};

2. Union recognition & non-compliance disputes;

3. Revision of the definition of workman;

4. Need for a statutory definition of misconduct; and

5. Comprehensive revision of the law governing dismissals.

\textbf{Relief For Unfair Dismissal}

The saddest chapter in the history of Malaysian Industrial Relations is the one that deals with the inequities heaped on the hapless workman unfairly dismissed.

The first inequity was the result of the role of the Industrial Court in making reinstatement a lost remedy for unfair \textit{dismissal}. When Parliament deliberately removed payment of compensation from the statute in 1980, hardly a year later the Federal Court in \textit{Assuntha Hospital's case}\textsuperscript{31} restored it even though the Industrial Court's power to order payment of compensation was no where to be found in the
IRA.

This privilege was fully exploited by the employers since the Industrial Courts are too easily taken in by the pleas of employers’ inability to reinstate the unfairly dismissed employees on the ground that harmonious relations cannot be restored. This strained relationship doctrine has been responsible for the progressive loss of reinstatement as a remedy for unfair dismissal. The table below confirms this conclusion that reinstatement has become more or less a "lost remedy."

<table>
<thead>
<tr>
<th>Year</th>
<th>Reinstatement ordered</th>
<th>Compensation ordered</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>17</td>
<td>145</td>
</tr>
<tr>
<td>1993</td>
<td>13</td>
<td>182</td>
</tr>
<tr>
<td>1994</td>
<td>12</td>
<td>288</td>
</tr>
<tr>
<td>1995</td>
<td>13</td>
<td>300</td>
</tr>
<tr>
<td>1996</td>
<td>23</td>
<td>225</td>
</tr>
<tr>
<td>1997</td>
<td>34</td>
<td>308</td>
</tr>
<tr>
<td>1998</td>
<td>41</td>
<td>246</td>
</tr>
</tbody>
</table>

Source: Industrial Court: Ministry of Human Resources

The second inequity was the principle on which the Industrial Court determined the quantum of compensation to be paid to the unfairly dismissed workman. Payment of compensation in lieu of reinstatement is intended to compensate the dismissed workman for the loss of his future earnings on the job from which he has been dismissed. However it has never been a norm on the part of the Industrial Court to order loss of future earnings. On the other hand, Malaysian Industrial Courts seem to consider it proper to assess the compensation payment as in the case of ordinary retrenchment and to order payment at the rate of one month’s salary for each completed year of service. It is needless to say that it is improper to limit the compensation payment to the compensation payable in the case of lawful retrenchment because unfair dismissal should not be equated with lawful retrenchment.

The third glaring inequity relates to payment of back wages on reinstatement. Reinstatement is to restore to the workman who has been unfairly dismissed his former position and status as if he has not been dismissed. In other words, upon reinstatement, he is entitled to all back pay, allowances and benefits from the date of his dismissal to the date of the Industrial Court award.

However, the prima facie right of the workman to recover wages lost since the time of his dismissal has been curtailed by the Industrial Court’s ruling based on the common law principle of mitigation of damages. Out of the backwages owed to the unfairly dismissed workman, the Industrial court ordered deduction of his actual
earnings on his alternative job if he has found one after his **dismissal**. Secondly, if he had neglected to obtain another employment in the interim period, a remission of an amount equivalent to his earnings on his job before **dismissal** was given. Thirdly, if his conduct before **dismissal** was not altogether blameless and so some disciplinary action short of outright **dismissal** was merited, some remission say 40% of backwages would be given on account of contributory cause. Fourthly, the employer, not the employee, would get some remission of the amount, if he showed that there had been substantial delay in reaching finality, a delay for which he was not held responsible. Finally, a further remission might be given when the employer succeeded in showing that payment of full amount would impose a financial strain on his business. On top of it all, the Industrial Court on the balance of convenience limited the arrears of backwages to a maximum period of 24 months. It should be noted that all these remissions were given on this 24-month wages even if the worker's eligibility would have been much more than two years since the date of his **dismissal**. The mitigation rule obviously, operated harshly against the employee and gave an unfair advantage to the employer who had unfairly dismissed him in the first place. To add insult to injury, many an industrial court gave the deductions on account of the foregoing grounds as a percentage, not of the 24-month backwages alone but added the quantum of compensation payment to this backwages and offered the deductions as a percentage of the combined amount. From the workers' point of view one wonders whether the Industrial Courts in awarding these remissions in the quantum of backwages and compensation were aware of s. 30(5) IRA under which it is mandatory for them to "act according to equity and good conscience."

Forgetting that the aim of the industrial law is to minimise the harshness of the common law governing employer-employee relations, the industrial courts might have continued to traverse unfettered on this unjust path as it had done during the past two decades if not for the High Court ruling in 1987 in *Taylor's College* case that "the doctrine of mitigation of damages does not apply in industrial law cases".

However, this ruling of the High Court does not appear to have removed the discretion of the Industrial Court to grant some of these remissions. It is indeed an irony that the Industrial Court invoked the principle of "equity and good conscience" under s. 30(5) to grant these remissions. For example, the Industrial Court in *Kama Moris* case stated that "the extent of income earned by the workman in an alternative employment following his **dismissal** should be one of the relevant factors to be taken into account in calculating the quantum of compensation to be paid, though the workman was under no legal duty to mitigate the damage".

The following two cases are illustrative of the continued inequity of the Industrial Court action:

(a) In *Intrakota Kompost Sdn Bhd & Ors v. Mohd Bahar* (New Straits Times 30 July 2001) the Industrial Court ordered a deduction of RM260,250 of the worker's post-**dismissal** salary out of his total compensation package of RM308,000 and paid him only RM47,750. The deduction was an astounding 85%.
(b) Secondly, in Moza Precision Plastic Industrial (Kedah) Bhd v. WR Jamarulan (New Straits Times 20 April 2001) a deduction of RM128,640 or 30% of a total package of RM428,000 was ordered by the Industrial Court for contributory cause.

Be that as it may, following the lead given by the Court of Appeal in Koperasi Serbaguna Sanya Bhd v. Dr James Alfred (Sabah) & Anor [2000] 3 CLJ 758 where Gopal Sri Ram JCA stated that in awarding backwages, adjustments should be made "taking into account" the fact that the respondent had found other employment. But when this case went on appeal to the Federal Court, the Chief Justice went a step further and ruled that "in assessing the quantum of backwages, not only the Industrial Court should take into account the fact that the workman had been gainfully employed elsewhere after his dismissal but more importantly "a failure to do so amounts to a jurisdictional error of law and certiorari will lie to correct it" (Dr James Alfred v. Koperasi Serba Guna Sanya Bhd [2001] 3 CLJ 541).

It is unfortunate that in the absence of any statutory law on the subject, the Federal Court should choose to restrict the exercise of discretion of the Industrial Court governing mitigation. In view of this harsh ruling the Industrial Court would be well advised to desist from limiting the arrears of backwages to a maximum of 24 months. It is pertinent to note at this juncture that the Federal Court in Ramachandran's case, while extending the scope of judicial review claimed the right not only to substitute its decision to that of the Industrial Court but also to mould the relief for unjust dismissal. Pursuing this extension, the Federal Court, unlike the practice of the Industrial Court to limit backwages to a maximum period of 24 months, ordered backwages calculated from the date of dismissal to the date of the judgment and this was for a period of 88 months.

Payment of compensation in lieu of reinstatement is not governed by statutory law but by the dicta of the Federal Court in Assuntha Hospital's case. The suggested reform is, therefore, not to abolish this alternative remedy but to incorporate it into the statutory law through an amendment to the statute governing dismissal. Secondly, regulations under s. 62(2) IRA should be formulated to govern granting of both the reliefs on sound principles of social justice. Thirdly, limiting the payment of backwages to a maximum of 24 months and equating dismissal with retrenchment for payment of compensation should be dispensed with in the suggested regulations governing the statutory provision on unfair dismissal. If at all some deductions have to be made on any reasonable ground of equity or good conscience, it should be subject to a ceiling in terms of a reasonable percentage of the income earned on the alternative employment during the period between the date of dismissal and the final date of hearing.

Finally the regulations governing determination of the quantum of compensation should be formulated bearing in mind that a relatively small compensation package is no real incentive for employers to prefer reinstatement to payment of compensation. It is further suggested that these regulations could incorporate at least some of the criteria spelt out by the Ceylonese Supreme Court for payment of compensation:

In quantifying compensation payment, account should be taken of such circumstances as the nature of the employer's business, and his capacity to pay, the employee's age, the nature of his employment, length of service, seniority, present salary, future prospects,
opportunity for obtaining similar alternative employment, his past conduct, the circumstances and manner of the **dismissal** including the nature of the charge levelled against the workman, the extent to which the employer's actions were blameworthy, and the effect of the **dismissal** on future pension and any other relevant considerations.

**Union Recognition**

Our restrictive labour legislation not only puts a severe strain on new unions seeking registration but also makes the recognition process troublesome and cumbersome. It is cumbersome because the recognition process involves both the Director General of Industrial Relations and Director General of Trade Unions whose powers are spelt out in two different Acts, the IRA and the Trade Unions Act 1959. There could be arguments for and against for bringing both registration procedures and recognition proceedings under any one of the Acts. If one views the important role played by the Director General of Trade Unions in the union recognition proceedings, bringing s. 9 governing recognition from the IRA to the Trade Unions Act appears to be reasonable. However, since the IRA regulates relationship between the trade union and the employer in many respects and union recognition is the first step in this regulatory process, its rightful place is the IRA, not the Trade Unions Act. It is better to leave the issue to be resolved to the Government, which is contemplating a comprehensive review of Malaysian Labour Laws.

Recognition of union gives a union the right of appearance before the employer for the purpose of collective bargaining. Under the current recognition proceedings, when the union overcomes all the hurdles and hassles placed on its way to seek recognition, the Minister orders the employer to recognise the union as the representative union. Any delay in reaching finality in the recognition proceedings delays the process of rendering social justice to labour because it postpones the commencement of the bilateral process of determining the terms and conditions of employment. Unilateral determination by the management of the terms and conditions of employment runs counter to the principle of social justice and the very philosophy of pluralism in industrial relations.

The Secretary-General of MTUC (28 February 2000 New Straits Times) complained that one hundred trade unions nationwide had yet to be recognised by their employers. He blamed both the employer and the Ministry for delaying the recognition process. Some times, the delay is due to the companies not submitting their employee's names to the Ministry; and sometimes, the delay is due to the Ministry itself. Torn between its pro-management stance and the notion of social justice to the workman, the Ministry seemed to have procrastinated on the issue.

The issue plaguing 3000 workers of Hualon Corporation in getting their union recognised is an example. The issue is that the management did not recognise the 59.9% votes gained by the Hualon Workers to form a union in October 1999. The company wanted the inclusion of the workers in its Nilai subsidiary in the secret ballot. Hualon at first did not include the workers in Nilai and therefore, they should have recognised the union notwithstanding the new claim to have its subsidiary included. This matter should be resolved by the Human Resources Ministry, but the Ministry is hesitant perhaps because Hualon is a multi-national. It is very sad that the Ministry was warned to risk a picket near the factory premises if it failed to resolve this issue. (New Straits Times 28 February 2000)
The government should be aware that these same multi-nationals have agreed to live with unions in other developing countries. They should stop considering freedom from unionisation as an additional incentive for them to invest in Malaysia. Freedom of association and the right to collective bargaining are the core labour standards of the International Labour Organization. The Government cannot afford to be ambivalent on this issue of union recognition.

Sometime back, the government contemplated an amendment to provide for automatic recognition once it has been determined that the right union is represented by 50% of eligible employees plus another employee (New Straits Times 10 November 1993). There would be no need for employer's recognition of the union. This proposal is worth reviving in the interest of Malaysia meeting the ILO core labour standards aimed at rendering social justice to organisations of workmen.

Non-Compliance Issue

One of the crucial areas demanding reform is non-compliance by the employer with the awards of the Industrial Court. It is a truism that a law gets discredited when it is not enforced, and it is no exaggeration to say that non-compliance with the awards is a singularly significant draw back the IRA could not so far rectify.

The penal provisions under this law for non-compliance with the award are really stringent in that under s. 56 IRA failure to comply with the order of the Industrial Court elicits a fine not exceeding RM2,000 or imprisonment for a term not exceeding one year, or both, and a further fine of RM500 every day during which such offence continues. But all these punishments for non-compliance follow only after conviction which entails an involved legal procedure for prosecution.

However, to ensure employer's compliance with the award of the Industrial Court, the Act was amended in 1989 to allow the claimants to register the Industrial Court awards as judgments of the High Court or the Sessions Court (s. 56(4) IRA). Nevertheless, Zainal Rampak, the MTUC President felt that it would be better to give punitive powers to the Industrial Court by way of fines and prison terms to make people comply, rather than take it to the Sessions Court or the High Court. That means the aggrieved party has to find the financial and legal means to get justice done. (New Straits Times, 15 December 1987).

It is to be noted that Zainal's proposal is based on Singapore's practice where the Industrial Arbitration Court has the same power to punish, as contempt of court, a failure to comply with an order of the court as possessed by the High Court. The fines and penalties for contempt of court are much heavier than those provided for other offences under the IRA.38

It is suggested that if the government has any qualms about bestowing this punitive power on the Industrial Court, it could consider conferring it on the Industrial Appellate Tribunal when it is set up.

Definition Of Workmen

The Federal Court in Hoh Kiang Ngan case39 overruling the Inchcape test40 to
determine who is a workman under the IRA, reverted to the contract of service test in Assuntha Hospital's case with a difference; no more is the determination of whether an employee is on a contract of service or contract for services solely dependent on the control test but on a multi-factorial test. Control test is very specific, but not the multi-factorial test. One view is that workers paid on a commission basis are self-employed and another says not necessarily so. One will say that no contribution to EPF or SOCSO is an indication that he is not under contract of service and another will say not necessarily so.41

In the case of Great Eastern Mills Bhd v. Ng Yuen Ching & Ors HC [1998] 3 CLJ 847, the first set of reasoning by the court makes you believe that the lorry drivers of the company are on a contract for services; but the second set of reasoning states that they are in fact, on a contract of service. This High Court ruling leaves much room for doubt.

It is worthwhile to recall at this juncture what Teng Kam Wah said on the criteria to decide who is an employee under our law:

The dividing line between a contract of service and contract for services is often very fine. What is the standard to apply to distinguish between the two contracts? It is an elusive question. Despite a plethora of authorities, the courts have not been able to devise a single test that will conclusively point to the distinction in all cases.42

In the author's view the issue of who is a workman under the law went under the clouds because of the well-intentioned idea of bringing non-union workers of the bargaining unit within the scope of s. 20(1) IRA:

When a workman, irrespective of whether he is a member of the trade union of workmen or otherwise ... .

The vagueness of the aforementioned "otherwise" category was the source of all trouble in rendering social justice to the really deserving members of the working class.

In Malaysia people are not familiar with the concept of bargaining unit. The trade union recognised by the employer as the sole bargaining agent is indeed the sole agent of the bargaining unit. A union so recognised by the employer is called the representative union.

Who are the members of the bargaining unit? They are those who are eligible to vote in secret ballot to determine the strength of a union's following. Some are actual members of the union and others are workers eligible to vote but not members of the union. Thus, a bargaining unit consists of actual union members and potential union-members. The "otherwise" category refers to this group of potential union-members, not the prohibited category of managers or executives at any level in the organisation. But our reviewing courts have included under this "otherwise" category not only employees like the lower level managers but also the higher level managers and professional employees like doctors, lawyers and even General Managers.

Industrial law is meant to replace the harshness of the common law treatment of workers, and as such the IRA is meant to protect them. It is imperative, to clarify the
"otherwise" category of workers by a statutory definition of workman to include within its meaning only the potential union members of the bargaining unit. Others like managers may be called "employees" and brought under a separate definition to remove the anomaly of calling them workmen. While there will not be any need to challenge the Minister's reference of the dismissal of "workman" under the new definition of workman, threshold jurisdiction of the Industrial Court to hear the dismissal of "employees" may be challenged in the Industrial Appellate Court by joining the Minister as a party.

**Statutory Definition Of Misconduct**

A majority of cases referred to the Industrial Court under s. 20(1) IRA relates to dismissals due to misconduct. However, there is no definition of misconduct anywhere in the IRA.

The definition of misconduct under s. 14(1) EA is couched in contractual language in that it refers to "any conduct inconsistent with the fulfillment of the express or implied conditions of service".

The Industrial Court instead of adopting this statutory definition for misconduct, defined misconduct as "any improper behaviour that violates the rules of the organisation. It should not be trifling in nature, must be intentional, and the employee must be aware of the harm he is causing". Unlike in India where the organisational rules on misconduct are formulated by the management in consultation with the trade unions, in Malaysia the said rules are unilaterally formulated by the management subject to the aforementioned Industrial Court guidelines.

Nevertheless, pursuing its definition of misconduct as any improper behaviour, the Industrial Court in *Kannan v. National Land Finance Co-operative Society Ltd* (Award No 95 of 1977) adopting Malhotra's classification of misconduct, established that misconduct in industrial employment can broadly be dealt with under the following three headings, namely (a) misconduct relating to duty; (b) misconduct relating to discipline; and (c) misconduct relating to morality.43

Be that as it may, CP Mills expressed his misgivings about accommodating "misconduct relating to morality" within the meaning of the definition of misconduct under s. 14(1) EA. He argued that misconduct becomes relevant to the contract of employment only if a breach of the duty owed by the workman to his employer is under the contract of service. To distinguish "misconduct relating to morality from misconduct relating to duty suggests that immoral conduct per se will justify summary dismissal and that is not so."44

However, following Malhotra's classification of misconduct in cases involving sexual immorality by employees, though they come under private conduct, the Industrial Court considered them as grounds for misconduct deserving dismissal. Moral turpitude or an act of depravity, for example, is a violation of an employee's moral duty not to tarnish the image of the organisation in which he is employed, and as such it could, in fact, come under the implied condition of service.

In conclusion it is suggested that in reviewing the law governing dismissals there
must be a provision clearly defining what is misconduct and such a definition under s. 2 IRA should permit inclusion of all of Malhotra's classification of misconduct currently followed by our Industrial Courts.

Finally in order to make the definition of misconduct under s. 14(1) EA congruent with that under the IRA, a regulation governing this section (s. 14(1)) should stipulate that implied conditions of service also include misconduct relating to morality.

**Revision Of the Law Governing Dismissal**

Essentially there are four obvious gaps in the Malaysian Industrial Law governing dismissals which our apex courts sought to fill through the judicial process of statutory interpretation and construction:

(a) absence of a provision for cause of action under s. 20 IRA;

(b) absence of a provision for payment of compensation *in lieu* of reinstatement as a statutory remedy for unfair dismissal;

(c) absence of a provision to make it mandatory for the employer to conduct a pre-dismissal investigation before dismissing a workman or an employee; and

(d) absence of a definitive provision for constructive dismissal.

**Cause Of Action**

The cause of action in the UK Employment Protection (Consolidation) Act 1978 is found in s. 54(1) therein which stipulates that "in every employment to which this section applies … every employee shall have the right not to be unfairly dismissed by the employer". It was Lobo who pointed out that s. 20(1) IRA, unlike its counterpart in the UK labour legislation, does not create a cause of action but provides a remedy for a pre-existent cause of action, namely, the workman's right not to be unfairly dismissed. Since we cannot find the cause of action in the common law or in the statutory law, we sought to overcome this *lacuna* through an involved interpretation of the Federal Constitution of Malaysia. Gopal Sri Ram in *Hong Leong Equipment* case clearly established that such a right not to be unfairly dismissed is enshrined in art. 5(1) of the Federal Constitution of Malaysia.

**Payment Of Compensation**

The issue of payment of compensation *in lieu* of reinstatement has been settled once and for all by the Federal Court in *Assuntha Hospital*. Payment of compensation should always be considered along with payment of backwages. As suggested earlier, the payment of compensation should be incorporated into the statutory law governing unfair dismissal with regulations governing both payment of backwages and compensation on sound principles of social justice.

**Pre-dismissal Inquiry**
Thirdly our analysis of the need for pre-dismissal inquiry seems to indicate that we should be reconciled to include in the statutory provision or regulation, only a loose standard of pre-dismissal investigation as articulated by the Industrial Court in *Aliah v. Chartered Bank*. If the workman has been informed of the specific accusation and he submitted his written explanation, that is sufficient opportunity of being heard; an oral hearing is not essential.\(^49\)

However feeble may be this provision to ensure procedural fairness in dismissals, it may solve several problems. Firstly, it is not burdensome even for a small-scale employer and therefore he would accept that the Industrial Court is justified in setting aside the dismissals when he fails to observe even this minimum standard of procedural fairness. Secondly, not only does it compel the employer to give reasons to the worker before dismissing him but it also precludes the employer from relying on reasons other than those known to him at the time of dismissal. Furthermore, it will safeguard the interest of the employee from dismissals without just cause or excuse by requiring the employer to prove the case on a stricter standard of proof (on balance of probabilities) before the Industrial Court, since his preliminary investigation would not amount to establishing a *prima facie* case as a full-fledged domestic enquiry would.

**Constructive Dismissal**

The confusion that currently prevails concerning the mode of determining constructive dismissals is largely due to the rather irrational attempts by all concerned to force an entry into s. 20(1) IRA to accommodate constructive dismissals within its ambit. The Federal Court's decision in *Bayer (M) Sdn Bhd*\(^50\) appears to prefer Salleh Abas' contract test in *Cathy Organization*\(^51\) to that of Gopal Sri Ram's novel suggestion that it should be accommodated within the meaning of s. 20(1) IRA.\(^52\)

The law on constructive dismissals premised on the contract test has been well developed in the United Kingdom due to the efforts of Lord Denning in *Western Excavation*'s case,\(^53\) Lord Browne Wilkinson in *Wood*'s case,\(^54\) and the Court of Appeal in *Lewis*' case.\(^55\) As a result, the criteria for determining constructive dismissals include not only breach of the express terms of the contract of employment by the employer but also breach of the implied terms of the contract. The application of the two criteria, breach of the express terms and breach of the implied terms of the contract has been further liberalised by the Court of Appeal decision in the *Lewis*' case.\(^56\)

Since all these criteria are applied by our Industrial Court in determining constructive dismissals, a brief listing of them is in order.

1. The criteria to determine constructive dismissals include:
   
   (a) the actual and the anticipatory breaches of the express terms of the contract of employment by the employer; and
   
   (b) the requirement that the employee's response to this employer's conduct must be made within a reasonable time.
2. "Although a single act by the employer may not tantamount to a fundamental breach, a series of acts which by themselves may not be fundamental breaches can tantamount to a fundamental breach, if looked at cumulatively."

(Court of Appeal (UK) in Lewis v. Motorworld Garrages Ltd [1985] 1 IRLR 465.)

3. "Breach of the implied term of the contract occurs when the employer conducts himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee … it is to be emphasised that this implied term is an overriding obligation independent of and in addition to, the literal terms of the contract." This implied term is regarded as one of great importance in good industrial relations and "any breach of that implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract."\(^{57}\)

4. In liberalising further the application of this principle of implied term, the Court of Appeal stated that:

The breach of this implied obligation of trust and confidence may consist of a series of acts or incidents, some of them quite trivial, which cumulatively amount to a repudiatory breach of the implied term of the contract.\(^{58}\)

Since the Federal Court prefers the contract test to any other test to determine constructive dismissal, in the suggested revision of the law governing unfair dismissal, a definitive statutory provision should be included. The following provision found in the UK Law governing constructive dismissal should be used as a benchmark:

An employee shall be treated as dismissed by his employer, if the employee terminates his contract with or without notice in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct.\(^{59}\)

In the context of the Federal Court ruling in Bayer (M) Bhd, the criterion that has to be applied by our Industrial Courts should have to be the contract test with all its ramifications mentioned above.

Furthermore, it should be noted that the enlargement of the scope of the contract test to include the implied term of the contract would more than adequately cover any unreasonable behaviour on the part of the employer in determining constructive dismissal.

Currently as the law stands today, in adjudicating constructive dismissal claims by employees, the Industrial Court generally has to undertake a two-staged process, ie, after deciding that there is constructive dismissal, the court should then proceed to
determine whether or not the employer has just cause or excuse for bringing about constructive dismissal. In other words, a finding of constructive dismissal must necessarily involve a conclusion that the dismissal is without just cause or excuse. Furthermore, the onus of proving constructive dismissal is on the employee whereas the burden of proving that the dismissal was with just cause or excuse squarely lies with the employer.

Since the suggested revision of the law governing constructive dismissal will make the two-staged process redundant, the onus of proving constructive dismissal will solely lie on the employee. In most cases it will not present an insurmountable task but in cases like sexual harassment it may turn out to be a herculean task. In such cases, it is suggested that the regulations under the new statutory provision governing constructive dismissal should adopt the Singapore law governing the burden of proof when the employee alleges victimisation. The Singapore law sought to distribute the burden between the two parties without seriously jeopardising the interest of either party. If such law is adopted, the employee who alleges sexual harassment as a ground for constructive dismissal need only prove the facts and circumstances of the offence, leaving the employer the onus of proving that the reason for his action is not sexual harassment.

Conclusion

Since the IRA is a social welfare legislation, it is appropriate that this concluding section should be devoted to the concept of social justice. The concept of social justice according to Shabbir suffers from surfeit of meaning and as a result it lends itself to be used as a convenient term to serve the vested interest of the parties to sound radical but at the same time help realise their private agenda. However, as he asserts, a discerning eye can search for truth.

He argues that unless we understand justice we cannot understand one segment of it, namely, social justice. Justice to start with was legal justice characterised by equality before law. Soon it became evident that absolute equality may run counter to some moral principles. Hence, emerged the concept of egalitarian justice. This is justice of inequality - justice for those suffering from social and economic inequalities.

The egalitarian view of justice or social justice is need-based, and therefore, it led to the emergence of distributive justice and the use of law - both constitutional and civil law, as an instrument to ensure just distribution, not equal distribution of resources - social, economic and political. Social justice means that justice is not limited to providing justice to the "haves" but equally to the "have nots". In fact, it weighs in favour of the disadvantaged segments of the society.

The concept of social justice and the need for the use of the law to ensure equity to the disadvantaged or exploited segment of the society like labour, form the bedrock of industrial law to reduce the harshness of the common law.

The Industrial Court, for example, should recognise the employer's right to dismiss an employee for he has the right to manage his own affairs in the best way he chooses. While this right is recognised, it has to be controlled if social justice requires such regulation. Social justice cannot countenance any capricious action of
the employer in denying the worker's right to job security.

Gopal Sri Ram in admonishing the lackadaisical attitude of the Industrial Court to this aspect of social justice underscored its compelling duty to render social justice to the employee in no uncertain terms when he said:

Section 30(5) of the Act imposes a duty upon the Industrial Court to have regard to the substantial merits of the case rather than to technicalities. It also requires the Industrial Court to decide a case in accordance with equity and good conscience. Parliament has imposed this solemn duties upon the Industrial Court in order to give effect to the policy of a democratically elected government to dispense social justice to the nation's workforce. It is therefore, our bounden duty to ensure that the Industrial Court applies the Act in a manner that best suits the declared policy of the elected government. Whereas, as in the present case, there has been an obvious failure to do so, it is for us, the judicial arbiters, to set matters right.

Among the players in Malaysian Industrial Relations - the government, the employer, the trade unions, the Malaysian Employers Federation, the Malaysian Trade Union Congress and the reviewing courts, the initiating role of the Industrial Court in rendering social justice to the workers is pivotal. In fact, it is in recognition of its instrumental role that the Parliament has conferred on it the mandatory duty to act in accordance with equity and good conscience without regard to technicalities and legal form. Therefore, it is fervently hoped that the Industrial Court in discharging this onerous responsibility will not act contrary to the spirit of this commandment.

Note:


In this case the UK Employment Appeal Tribunal held:

Where an employer has not followed a proper procedure, the right approach is for the industrial tribunal to ask two questions. First, have the employers shown on the balance of probabilities that they would have taken the same course had they held an inquiry, and had they received the same information which that inquiry would have produced. Secondly, have the employers shown that in the light of the information which they would have had, had they gone through the proper procedure, they would have been behaving reasonably in still deciding to dismiss?

This ruling by the Employment Appeal Tribunal is based on the so-called curable principle upon the premise that failure of natural justice in the trial body can be cured by a sufficiency of natural justice in an appellate body.


8. Supra n.1.


In this verdict Edgar Joseph Jr. FJ talked supportively of the Code of Conduct provision favouring predismissal inquiry: "The resemblance between the requirements of art. 42 and the requirements of natural justice is striking" (p. 361).


15. While sub-s. (5) required the Industrial Court to act according to equity and good conscience ... Sub section (5A) allowed the Industrial Court to take into account the code guidelines in making its award. Sub-section (6) enabled the industrial court as a court of arbitration to include in its award any matter which it thinks necessary or expedient for the purpose of settling the dispute.


In my judgement the limits imposed by s. 30(6) will not be exceeded so long as there is a rational nexus between the relief and the dispute it seeks to resolve, bearing in mind that a flexibility of approach is called for when considering the relief that is to be granted by the court in a particular case. This then is the true extent of the court's powers under s. 30(6) of the Act.


25. Assuntha Hospital v. Dr A Dutt [1980] MLJ 96 HC


27. Ibid. n.17.


It should be noted that check-off of union dues comes within the meaning of the statutory definition of collective agreement; when it becomes a "deadlocked demand" in negotiation, it becomes a dispute. When this dispute is referred to the Industrial Court, the court cannot have jurisdiction to decide on this dispute and impose it in the collective agreement through its award. One may argue that "what is capable of being included in the collective agreement should also be capable of inclusion in an award".

30. (Contd)

But it is trite law that the Industrial Court will have jurisdiction to decide on a dispute only when the dispute that has been referred for adjudication is a "trade dispute" under the meaning of the Act. In other words, check-off is not a dispute between the employer and his workman which is connected with employment or non-employment or the terms of employment or conditions of work of any such workman.

31. Dr A Dutt v. Assuntha Hospital [1981] 1 MLJ 304 FC.


33. Taylor's College Sdn Bhd v. Lim Pang Ooi (Award No. 231 of 1985).


It is regrettably noted that The Federal Court in Dr. James Alfred (Sabah v. Koperasi Serbaguna Sanya Bhd. (Sabah) & Anor FC [2001] 3 CLJ 541) made such deduction a law, and any violation of it a jurisdictional error.
Although the assessment of backwages is a matter well within the discretion of the Industrial Court that discretion is not one which is unfettered; it has to be exercised according to law and equity as conceived by s. 30(5) of the Industrial Relations Act 1967. The discretion is in the nature of decision making process and is therefore, open to judicial review. In line with equity and good conscience the Industrial Court should, in assessing the quantum of backwages, take into account the fact, if established by evidence or admitted, that the workman has been gainfully employed elsewhere after his dismissal. A failure to do so amounts to a jurisdictional error of law and certiorari will lie to correct it.

35. *R. Ramachandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 FC.

Unlike the practice of the Industrial Court to limit backwages to a maximum of 24 months, the Federal Court in this case ordered backwages for a period of 88 months without any deductions. Secondly, instead of calculating payment of compensation on the retrenchment principle, ordered loss of future earnings for a period of 39 months till the employee reached the age of 55.

36. *Supra* n. 22.


40. *Supra* n.15.

The Inchcape Test: "When a person is the very brain of the company or the directing mind determining and formulating the company policy he cannot be a workman under s. 2 of the Act."

(*Asia Motors Co Sdn Bhd v. Cho Mai Sum* (Award No. 198 of 1986.)

41. Teng Kam Wah, "*Who is an Employee?*" [1997] 2 MLJ ci.

42. Teng Kam Wah, "*Who is an Employee?*" [1997] 2 MLJ ci.

43. Malhotra and Malhotra follow their own classification of misconduct in Industrial employment under the following headings:

a. misconduct relating to duty includes acts of misconduct like non-observance of duty, non-performance of work, negligence of duty, engaging in work similar to that of the employer, absence without leave, late attendance and illegal industrial action;

b. misconduct relating to discipline includes acts subversive of discipline such as abusing a superior officer by using vulgar and filthy language, sleeping in the office while on duty, rowdy conduct during working hours etc.; other acts of misconduct relating to discipline are insubordination or disobedience, riotous and disorderly behaviour and
damage to employer's property and reputation;

c. misconduct relating to morality (morality meaning good and upright behaviour) include theft, dishonesty and fraud, disloyalty, corruption and moral turpitude implying depravity and wickedness of character or immoral acts; and

d. arrests and convictions for criminal offences, including all offences under criminal law.

43. (Contd)


44. Mills C.P. "Industrial Disputes Law in Malaysia" Malayan Law Journal Sdn Bhd. 1984, p. 68


47. Dr A.Dutt v. Assuntha Hospital [1981] 1 MLJ 304 FC.

48. Supra, s. III p. 16.


52. The way he defined constructive dismissal makes it possible: Constructive dismissal describes a situation "where there is no formal dismissal, but there is conduct on the part of an employer which makes a workman "consider that he has been dismissed" without just cause or excuse".


56. Ibid.


59. Supra n. 53.


61. Section 84(1) of the Industrial Relations Act Singapore stipulates:

if all the facts and circumstances constituting the offence, other than the reason for defendant's action, are proved, the onus shall be on the defendant to prove that he was not actuated by the reason of the alleged charge.
