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Guidelines Governing Awards in Dismissal Cases

On 1 November 2019, the President of the Industrial Court of Malaysia issued Practice Note No 3 of 2019 (**PN 3/2019**) on “Guidelines Governing Awards in Dismissal Cases”.^[1] PN 3/2019 replaces Practice Note No 1 of 1987 on “Guide Lines on Dismissal Cases”.

PN 3/2019, like its predecessor, provides guidelines to the Industrial Court in determining the relief to be awarded to a successful workman in his representation made under s 20 of the Industrial Relations Act 1967^[2] that he was dismissed without just cause or excuse.

PN 3/2019 reaffirms that the following orders may be made by the Industrial Court if the dismissal is found to be without just cause or excuse:

(a) Where reinstatement is a suitable remedy:

- (i) Reinstatement to the workman’s former employment; and
- (ii) An amount, usually referred to as backwages or backpay, which is equivalent to the wages that the workman would have earned had he not been dismissed.

(b) Where reinstatement is not a suitable remedy:

- (i) An amount of wages as compensation in lieu of reinstatement based on one month’s salary for each year of completed service; and
- (ii) Backwages.

(c) Deductions to backwages after taking into consideration any post-dismissal earnings and/or any contributory misconduct of the workman.

(d) Such contractual bonus, payment in lieu of leave not taken and other contractual benefits.

There are also several pertinent changes introduced in PN 3/2019, as set out in the table below:

What's new	What's not retained
<p>(a) A distinction is made between backwages to be awarded to a confirmed workman and a probationer, i.e. that backwages shall be subject to a maximum of 24 months for a confirmed workman and 12 months for a probationer.</p> <p>(b) Compensation in lieu of reinstatement shall not be awarded if the workman is incapable of being reinstated (e.g. statutory age of retirement).</p> <p>(c) Compensation in lieu of reinstatement shall not be computed in respect of an uncompleted year of service.</p> <p>(d) An award shall not include any compensation for loss of future earnings.</p>	<p>(a) The 24-month cap on the amount of compensation in lieu of reinstatement.</p> <p>(b) The cap on the amount of deductions which may be made to the backwages after taking into consideration any post-dismissal earnings and/or contributory misconduct.</p>

No specific reference is made to the Second Schedule of the IRA, which provides for factors the Industrial Court must consider when making an award in a s 20 dismissal dispute. That said, all such factors are now reflected in PN 3/2019.

While the Industrial Court may be mindful of PN 3/2019 when making an award, unlike the Second Schedule, PN 3/2019 would have no force of law^[3] and cannot tie the hands of the Industrial Court when the justice of the case warrants not to do so.^[4]

In any event, the Industrial Court is required to act according to equity, good conscience and the substantial merits of the case and may include in the award any matter or thing which it thinks necessary or expedient,^[5] subject, however, to the factors stipulated in the Second Schedule. As such, the possible financial exposure of employers would have to be analysed and advised on a case-by-case basis.

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[1] <http://www.mp.gov.my/practice_note/PN3_2019_Guidelines_Governing_Awards_in_Dismissal_Cases.pdf>

[2] [Act 177]. Hereafter referred to as the "IRA".

[3] *Unilever (M) Holdings Sdn Bhd v So Lai & Anor* [2015] 2 ILR 265 (FC)

[4] *Josephine Banun Pako v Hong Leong Bank Bhd* [2008] 7 CLJ 699 (HC)

[5] IRA, s 30