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Nothing Owed, Nothing Due: Limited Damages For Dismissal Claims In Civil Courts

In Malaysia, employers may dismiss employees on various grounds, such as misconduct, poor performance, or redundancy. Employees may also find themselves (i) constructively dismissed when a fundamental term of their contract is breached, or (ii) victims of forced resignation. Such employees typically seek recourse at the Industrial Court - a specialised tribunal established under the Industrial Relations Act 1967 to adjudicate unjust dismissal claims. The Industrial Court is empowered to award specific performance in the form of reinstatement, or monetary compensation in lieu thereof, and backwages of up to 24 months for confirmed employees. Alternatively, employees may turn to the civil courts (i.e., the Magistrates', Sessions, or High Court) for relief.

The existence of two forums in which unjust dismissal disputes may be resolved, naturally leads to the question of whether there are material differences, or financial advantages, in initiating a claim in the civil courts over the Industrial Court and vice versa.

The Fung Keong Principle

In *Fung Keong*,¹ the Federal Court established that should an employee file a dismissal claim at the civil courts, damages will be limited to the employee's notice period. This may be further reduced if it can be proven that the employee could have, but failed to secure, a similar job immediately or during the notice period. An employee can neither sue for wounded feelings or loss of reputation, nor be reinstated.

Muddying the Waters?

Over the years, certain decisions have demonstrated a departure from the principles espoused in *Fung Keong*. In *Alan Thomas Bohlsen*,² the employee claimed that he was constructively dismissed. After finding in favour of the employee, the High Court awarded damages equivalent to the balance of the employee's fixed-term employment contract instead of the 4 months' notice period. A similar departure was seen in *Jon Paul Dante*³ where the High Court awarded damages amounting to the remainder of the employee's fixed-term contract.

A Return to Fung Keong

Recently, in the case of *7-Eleven Malaysia Sdn Bhd v Ashvine A/P Hari Krishnan* (Civil Appeal No. W-02(IM)(NCVC)-629-04/2022), the issue before the Court of Appeal was whether the employee was entitled to pursue a claim for constructive dismissal in the High Court, where she sought an eye-watering sum of RM96 million in damages.

The employee was a Senior Manager of the Human Resources department, who tendered her resignation owing to purported unfair treatment, as well as bullying and harassment. She sought damages for alleged wrongful dismissal, intentionally causing emotional distress, harassment, bullying, and negligence.

¹ *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 238

² *Alan Thomas Bohlsen v Draftworldwide Sdn Bhd* [2009] 8 MLJ 461

³ *Jon Paul Dante v Malaysian Philharmonic Orchestra* [2012] 1 LNS 1091

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The employer's appeal to have the matter struck out was allowed. In doing so, the Court of Appeal reiterated the principle espoused in *Fung Keong*, which held that damages for dismissal claims filed at the civil courts would be limited to the pay in which the employee would have earned had the proper notice period been given.

In this case, the Court of Appeal allowed the matter to be struck out since the employee had served her notice period. As such, there were no outstanding sums which could have been awarded by the court. The claim was therefore found to be an abuse of process. The Court of Appeal also described the tort of harassment, bullying, emotional distress, etc. as mere "building blocks" for a complaint of constructive dismissal. Since the Industrial Relations Act 1967 was enacted to provide a remedy for unjust dismissal, it was wholly incumbent upon the employee to invoke the aforesaid statutory remedy instead of filing a civil action.

The Court of Appeal judgement can be read [here](#).

Conclusion

This decision puts paid to the matter that whilst employees may institute claims in the civil courts for dismissal claims, there is a firm cap on the damages to which they are entitled. Likewise, it clarifies that the Industrial Court is the appropriate avenue for employees seeking recourse for unjust dismissal claims.

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