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SPECIAL ALERT

Employment & Industrial Relations



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Industrial Court Remedies: Reliefs in a Claim for Unfair Dismissal

*Ng Teck Fay v Syarikat Takaful Malaysia Berhad
& Anor*

(Kuala Lumpur High Court Application for Judicial
Review No.: WA-25-97-02/2019)

The primary remedies available in a claim for unlawful dismissal at the Industrial Court are reinstatement or compensation in lieu of reinstatement and backwages. That being said, the issue arises when unfairly dismissed employees pray for punitive compensation or contractual benefits such as contributions to the Employee Provident Fund (“**EPF**”) on backwages, encashment of annual leave, dividends from a stock incentive plan, and reimbursement of any insurance membership without ever raising the same in their pleadings. In such circumstances, the Industrial Court must determine whether those claims can be entertained, since they were never pleaded nor substantiated.

Punitive Compensation

The assessment of compensation in lieu of reinstatement is in fact expressly provided in the Practice Note 3 of 2019 (“**Practice Note**”) namely, at the rate of one month’s salary for each completed year of service. As such, the courts have always conscientiously observed this method of calculation, save for exceptional circumstances. Unlike compensation in lieu of reinstatement which is aimed at compensating unfairly dismissed employees, punitive compensation is aimed at punishing employers.

Although the Industrial Court is conferred with the power to award compensation in lieu of reinstatement in excess of the ordinary rate provided under the Practice Note, such power is only invoked in exceptional circumstances which aims to act as a deterrent and/or punishment to any form of malice or deviousness on the part of the employer.

Backwages

In a successful unfair dismissal claim, the unjustly dismissed employee, irrespective of whether he is awarded reinstatement or compensation in lieu of reinstatement, will be awarded backwages, which is aimed at compensating him for the period that he has been unemployed because of the unjustifiable act of the dismissal. Significantly, it is also settled industrial jurisprudence that the amount of backwages shall be computed based solely on an employee’s last drawn basic salary and fixed allowance.

In awarding backwages, the Industrial Court must comply with the Second Schedule of the Industrial Relations Act 1967, which provides for a statutory maximum of 24 months for backwages and the mandatory requirement for a percentage of post-dismissal earnings to be deducted from any backwages.

EPF Contributions on Backwages

It is trite that any backwages awarded by the Industrial Court do not attract the liability of the employer under the Employees Provident Fund Act 1991 (“EPFA”) to pay Employee Provident Fund (“EPF”) contributions. In deciding whether arrears of wages, i.e., backwages paid for retrospective wages attract EPF contributions, Tan Sri Dato’ Harun Mahmud Hashim J (as he then was) in the oft-quoted High Court case of **ASSOCIATION OF BANK OFFICERS, MALAYSIA v OVERSEA-CHINESE BANKING CORPORATION LTD [1994] 3 CLJ 169** referred to the EPFA and held as follows:

“From the above provisions, it will be seen that the employer is liable to pay contributions monthly, that is to say, he must pay every month the amount (or rate) of contribution based on the actual wages due to the employee at the time of payment. The liability to pay is only in respect of a current month and if he does not pay, he is liable to prosecution under s. 16A. The several provisions referred to above clearly indicate the present and does not relate to the past. The argument that the word “otherwise” in the definition of wages to mean arrears of salary or wages other than payable monthly, weekly or daily is without merit. Applying the ejusdem generis rule the word otherwise means hourly or twice monthly or yearly.

For these reasons, I hold that EPF contributions are not payable on arrears of salary.”

The purpose of making a monetary award is compensatory, which cannot fall under the definition of “wages” due to a workman for work done under a

contract of service. The award sum, although computed based on an employee's last drawn salary, is not wages per se as defined in the EPFA. Therefore, it is patently clear that the award of backwages as a form of monetary compensation does not and cannot attract EPF contribution in any way.

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The instant matter was remitted to the Industrial Court by the Court of Appeal for an assessment of the appropriate remedy to be awarded to the Claimant. Vide Award No.: 1958 of 2022 dated 1st September 2022 (“**Award**”), the Industrial Court held among others, as follows:

***“[11] The Claimant is not entitled to 16% Employee Provident Fund contributions of the backwages amount since it is not wages by itself. In respect of encashment of annual leave, stock incentive plan and reimbursement of chartered insurance institute membership fee, those claims were not substantiated.*”**

[12] The final award shall be:

1. Backwages of 2 months:

***RM18,150 x 2 months = RM36,300.00
less 20% (period the Claimant was
gainfully employed on 15.07.2014)
= RM7,260.00
= RM29,040.00***

***2. Compensation in lieu of reinstatement
of one month's pay for each year of
completed service:***

RM18,150 x 6 months salary = RM108,900

Total = RM137,940

[13] The award amount after deducting the necessary statutory deduction is to be paid by the Company directly to the Claimant through his solicitors on record, not later than 30 days from the date of this Award.”

Dissatisfied with the Industrial Court’s Award, the Claimant filed a Judicial Review application in the Kuala Lumpur High Court to among others, vary the backwages awarded to him by the Industrial Court and quash paragraph 11 of the said Industrial Court Award. In dismissing the Judicial Review Application, the High Court broadly held among others, as follows:

- (a) In relation to exemplary & punitive damages prayed for by the Claimant, the same was never pleaded in his Statement of Case filed before in the Industrial Court and thus, based on trite principles of law, the failure by the Industrial Court to consider the said damages did not arise;
- (b) In relation to backwages, the case of **LECHMY SUPRAMANIAM v DHL GLOBAL FORWARDING (M) SDN BHD [2015] 2 LNS 1142** (where the Industrial Court awarded the unfairly dismissed employee 3 months’ backwages for the period that she was unemployed and 21 months’ backwages less 20% for the period that she was gainfully employed) relied on by the Claimant can be distinguished from the instant case;
- (c) This is because, in this case, the Claimant was never ordered to be reinstated and hence, there was no basis for his

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employment to be treated as being continuous for him to be entitled to backwages for the period that he was already employed in his new employment, 1.5 months after he was dismissed; and

- (d) In relation to EPF contributions, encashment of annual leave, stock incentive plan dividend, and reimbursement of an insurance membership, there were no evidence produced by the Claimant to substantiate his claim that he was entitled to the same.

Given that the Industrial Court takes into consideration the preservation of industrial harmony in awarding remedies, the remedy of reinstatement, despite being a primary remedy is uncommon, especially where there has been a loss of trust and confidence in the employer-employee relationship. Thus, the High Court herein has reaffirmed the trite industrial relations jurisprudence that while the absence of a specific plea for reinstatement cannot oust the jurisdiction of the Industrial Court to determine an unfair dismissal claim, employees must specifically plead and substantiate claims for punitive damages and contractual benefits in order to be entitled to them.

The employer was successfully represented in the High Court by Partner, Shariffullah Majeed, and Senior Associate, Arissa Ahrom of Lee Hishammuddin Allen & Gledhill. The Industrial Court Award can be found [here](#).

If you have any queries, please contact Senior Associate, **Arissa Ahrom** (aa@lh-ag.com), or her team Partner, **Shariffullah Majeed** (sha@lh-ag.com).