Introduction

Section 20 of the Industrial Relations Act 1967 (‘the IRA’) provides that a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, if dismissed without just cause or excuse by his employer, may make representations in writing to the Director General of the Industrial Relations Department to be reinstated in his former employment. The aggrieved workman ‘may make representations in writing to the Director General to be reinstated in his former employment’. As from the above, the representation for dismissal without just cause or excuse must be for reinstatement into his former employment.

Reinstatement has been defined as ‘putting the specified person back, in law and in fact, in the same position as he occupied in the undertaking before the employer terminates his employment’ n1. The aggrieved workman ‘may make representations in writing to the Director General to be reinstated in his former employment’. As from the above, the representation for dismissal without just cause or excuse must be for reinstatement into his former employment.

Reinstatement has been defined as ‘putting the specified person back, in law and in fact, in the same position as he occupied in the undertaking before the employer terminates his employment’ n2. The award is intended to restore the status quo ante of the dismissal where the employer will be compelled to restore the claimant to his former or original position n3. It carries with it a prima facie right to recover all benefits the claimant might reasonably have expected to receive during his period of dismissal. In practice, reinstatement need not necessarily be confined to the original position and status but may include re-engagement to an equivalent or other suitable position comparable to that from which the worker was dismissed. However, the re-engagement order must be as favourable as an order of reinstatement, so far as reasonably practicable n4.

In this article, the writer will consider the following pertinent procedural questions, frequently raised in Industrial Court, namely: (i) whether the Industrial Court’s jurisdiction to adjudicate the grievance ceases when the claimant, in his representations, does not desire reinstatement or where he initially desired reinstatement but subsequently changes his plea to monetary compensation; (ii) whether the action under s 20(3) of the IRA abates with the death of the claimant; and (iii) whether the heirs or legal representatives may continue the proceedings on behalf of the deceased claimant.
All the above questions have been subject to differing opinions of the courts and thus, require urgent redress. These questions are inter-related, in that, if reinstatement is the only remedy for dismissal without just cause or excuse, were the claimant dies whilst the case is pending adjudication, the action shall abate and cannot be continued by the deceased's personal representatives since reinstatement is personal to the claimant. On the other hand, if the claimant is entitled to plead for monetary compensation, the action shall not abate with the death of the claimant and thus it may be continued by the deceased claimant's estate.

When The Claimant Abandons A Claim For Reinstatement: Whether Industrial Court Ceases To Have Jurisdiction To Adjudicate The Grievance?

A preliminary question frequently raised in the Industrial Court is whether the court shall cease to have jurisdiction to adjudicate the grievance when the claimant, in his representation, does not desire reinstatement or where he had initially desired reinstatement but subsequently changed his plea to monetary compensation. On this question, both the civil courts and the Industrial Court have expressed differing opinion. It has been observed that in some cases, the courts have held that where reinstatement is not pleaded or desired, the Industrial Court ceases to have any jurisdiction to determine the representation. While in some other cases, the Court have held that the omission of the claimant to ask for reinstatement does not preclude the Industrial Court from hearing and determining the case.

For example, in Holiday Inn, Kuching v Lee Chai Siok Elizabeth n5, the High Court stated that the remedy of an aggrieved workman under the IRA is reinstatement, therefore, once reinstatement is no longer sought, the Court ceases to have any jurisdiction to make an award. This approach had been enforced by the Industrial Court in the following cases, namely, Selaco Aluminium Bhd v Razali Mohamed and Ors n6; Kewangan Usaha Bersatu Bhd v Mohammad Hatta Rosli n7; Syarikat Sanyo Sales and Services Sdn Bhd v Foo Lee Jin n8; Sungai Pedu Estate v Shaban Ramli n9; Mara Shipyard and Engineering (Terengganu) Sdn Bhd v Hussain Ab Rahman n10; Institut Seni Lukis Sabah v Lee Nee Ping n11; and Cornelder Metal Malaysia (CMM) v Liew Teck Yong n12.

However, in The Borneo Post Sdn Bhd v Margaret Wong Kee Sieng n13, the High Court differed from Holiday Inn, Kuching. In The Borneo Post Sdn Bhd, it was held that whether or not reinstatement must be expressly pleaded in the statement of case is only a point of procedure. In other words, the omission to plead reinstatement as a specific relief does not affect the jurisdiction of the Industrial Court to hear and determine the case on the merits. This approach had been adopted by the Industrial Court in the following cases, namely, Sibu Steel (Sarawak) Sdn Bhd v Ahmad Termizie Bujang n14; Stamford College v Leslie Dolores Swanson n15; Academia Sdn Bhd v Devarajan VSD Panicker n16; SKB Shutters Manufacturing Sdn Bhd v Chan Kok Leong n17; and Chandra Sekaran Murugesu v Mentakab Veneer & Playwood Sdn Bhd n18.

The Court of Appeal in Malayan Banking Bhd v Mohd Bahari bin Mohd Jamli @ Mohd Jamal n19, had the opportunity to express its opinion on the above issue, however, it has merely distinguished the facts of the present case from Holiday Inn, Kuching. In Mohd Bahari's case, the court had to consider whether the respondent's claim for reinstatement under s 20(1) of the IRA could be entertained by the Industrial Court given the fact that s 56 of the Banking and Financial Institutions Act 1989 (Act 372) prohibited the appellant from employing a bankrupt. The Court, in affirming the decision of the High Court -- where Holiday Inn, Kuching's case was distinguished from the present -- stated that in Holiday Inn, Kuching, the prayer for reinstatement was abandoned leaving only a claim for damages. However in this case reinstatement still subsisted, although the Industrial Court could only award compensation, if successful. The court further stated; 'We would however like to make it clear that we do not in this appeal give any view whether Holiday Inn, Kuching was rightly decided or not’ n20.

The question whether the claimant must at all time plead reinstatement before the Industrial Court may adjudicate the grievance remains unsolved and the courts, as noted above, have been expressing two diverging opinions as seen above. In a previous article, the writer had suggested an appropriate approach to this issue and had called for legislative intervention to overcome the injustice to the claimant n21.
Death Of The Claimant: Whether The Cause Of Action Survives?

Yet another important procedural question frequently raised in the Industrial Court is whether the action under s 20 of the IRA abates with the death of the claimant? Whether the heirs or legal representative may continue the proceedings on behalf of the deceased claimant? Again, this question has given rise to differing opinions of the courts and the problem too requires urgent redress. It may be noted that unlike the Rules of the High Court 1980 or the Subordinate Courts Rules 1980, where there is an express provision which provides that the action does not abate on the death of the plaintiff and it can be continued by the legal representatives of the deceased's estate, in the sphere of industrial law, it is uncertain because neither the IRA nor the Industrial Court Rules 1967, has made any specific reference on this issue.

The Common Law Approach

At common law, where a party to any action dies, the action does not abate and thus, it can be continued by the legal representative of the deceased's estate. In Thein Tham Sang v United States Army Medical Research Unit & Anor n22, Hashim Yeop A. Sani J stated that s 20(4) of the IRA 'does not operate as a bar to any action for damages in any court in respect of the alleged wrongful dismissal. It seems clear on the authorities that the right to sue for money or the equivalent of money due to a deceased workman whilst the case was pending before the Labour Court continues with the heirs, successors and legal representative and they can take action by way of a suit in a civil court'.

Again, in Kumpulan Gutherie Sdn Bhd v Sukamari Amma N Menon n23, the learned Chairman, Tuan KA Menon stated: 'The general principle at Common Law is that the death of the servant puts an end to the contract of service, but any right of action vested in the deceased during his life-time survives for the benefit of the deceased's personal representatives -- subject to the provisions of the Limitation Ordinance. For example the deceased servant's personal representatives can sue for and recover any arrears of wages due to the deceased-servant from his employer'.

The estate of the deceased -- the executor or administrator of the deceased plaintiff -- may obtain an order of the court to carry on the proceedings for damages for wrongful dismissal under O 15 r 7(2) of the Rules of the High Court 1980 or O 8 r 7(2) of the Subordinate Courts Rules 1980. For example, O 15 r 7(1) of the Rules of the High Court 1980 provides; 'Where a party to an action dies or becomes bankrupt but the cause of action survives, the action shall not abate by reason of the death or bankruptcy'. Further, O 15 r 9(1) provides that if the plaintiff's personal representative does not apply for an order making them parties, the defendant may apply for an order that unless the action is proceeded within such time as may be specified in the order, the action be struck off.

May it be noted that at common law, a worker is not conferred security of tenure in employment. They are employed at the will of the employer who retains the prerogative to terminate the employment relationship by serving on its workers an appropriate notice, either expressed in the contract of employment or implied reasonable notice. Once the notice of termination is served, the employment relationship shall come to an end at the expiry of the notice period. It may be further noted that the employer is neither bound to warn the employee nor is he bound to give any reason for the termination of the contract. Further, the employer is not bound to adhere to the rule of fairness. The burden of proof is on the employee to establish, on the balance of probabilities, that the dismissal was wrongful.

Where the dismissal is held to be wrongful, the remedy of the aggrieved worker is a right for action for damages representing the notice period. As aptly stated by Gopal Sri Ram JCA in Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & Anor n24, at common law, 'the relationship of employer and workman as resting on a mere consensual basis that is capable of termination by the employer at will with the meagre consequence of paying the hapless workman a paltry sum as damages'. Having said that, it would be worthwhile to consider the following question namely, whether all the trouble and efforts taken, money spent and time wasted for the sake of obtaining the redress, pursuant to the common law, is it really worth at the end n25.
The statutory unfair dismissal approach

As stated earlier, the recourse under s 20(1) of the IRA is only in respect of reinstatement. In other words, the primary remedy for dismissal without just cause or excuse is reinstatement. Therefore, if the claimant dies during the pending period of such an application, the primary consideration of reinstatement is extinguished. The issue herein is whether the maxim *actio personalis moritur cum persona* -- the action abates with the death of the claimant -- applies in unfair dismissal claims. Can the legal representative or administrator of the estate of the deceased workman apply to continue the proceedings on behalf of the deceased workman? On this issue, the IRA, as mentioned earlier, is silent and therefore, one has to turn to judicial decisions for guidance.

In *Thein Tham Sang v United States Army Medical Research Unit & Anor* n26, the deceased -- Mrs Elizabeth Thein Nee Lee Geak Choo -- was employed by the United States Army Medical Research Unit as a Supply Supervisor. On 14 February 1980, the employer summarily terminated her services. She considered herself as having been dismissed without just cause or excuse and made representations in writing, within the prescribed time, to the Director-General of the Industrial Relations to be reinstated to her former employment. Since there was no settlement, the Minister, in the exercise of his discretion, referred the representation to the Industrial Court for an award under s 20(3) of the IRA.

However, on 7 January 1981, Mrs Elizabeth Thein died and this was before the reference could be heard in the Industrial Court. Her widower and personal representative, Thein Tham Sang, attempted to continue the proceedings in the Industrial Court and applied that he be substituted in place of the deceased. This was opposed by the counsel for the employer who argued, *inter alia*, that the proceedings in the Industrial Court had abated upon the death of Mrs Elizabeth Thein. The Industrial Court agreed with his submission and struck off the case n27. The Court noted that an employee's claim to reinstatement expires upon his death and thus, it no longer remained a dispute capable of settlement or adjudication.

Before the High Court, in an application for judicial review, Thein Tham Sang appeared in his capacity as legal representative and administrator of the estate of the deceased and prayed for an order of *mandamus*, but the application was dismissed. Hashim Yeop Sani J stated; 'Section 20 of our Industrial Relations Act 1967 must be construed within the four corners of our own Statute. Section 20 of the Act ... is a provision especially incorporated into our Act to provide relief to workmen who are not members of any union who consider themselves to have been dismissed without just cause or excuse. The section clearly says a claim under s 20 is a claim for reinstatement. It is a claim personal to the claimant. The Industrial Court cannot reinstate a dead workman. Any other relief's the Industrial Court may give are merely incidental or ancillary to the main relief asked for. Thus, the main claim under s 20 is personal in nature and the action abates with the death of the claimant’ n28.

The appellant appealed to the Federal Court. The appellant contended that notwithstanding the death of the claimant, the reference under s 20(3) of the IRA must be adjudicated upon by the Industrial Court after he has been substituted as a party in place of the deceased under s 29(a) of the IRA. Section 29(a) provides, 'The Court may, in any proceedings before it -- (a) order that any party be joined, substituted or struck off'. The respondent however, argued that the Industrial Court has no power to order a legal representative or administrator of the estate of the deceased workman to be substituted. It was further argued that the power under sub-para (a) of s 29 be given a restrictive construction.

The application was however, dismissed with costs. Seah FJ (delivering the judgement of the court) affirmed the decision by Hashim Yeop Sani J. His Lordship also referred to the UK Employment Protection (Consolidation) Act 1978, where express provisions exist, authorising the legal representatives of the deceased to continue the proceedings in the tribunal, in the event the employee dies while the case is pending in court. Reference was made to rule 2 of Schedule 12 of the 1978 Act which provides that 'where an employee or employer has died, tribunal proceedings under any of the relevant provisions may be instituted or continued by a personal representative of the deceased employee or;
as the case may be, defended by a personal representative of the deceased employer’. The Federal Court noted that there was no equivalent provision either in the IRA or in the Industrial Court Rules 1967.

Further, the Court referred to the word ‘party’ in s 29(a) of the IRA and stated that the said word does not include the legal representative or administrator of the estate of the deceased workman. Reference was also made to s 27 (i)(c) and (d) of the IRA which reads as follows: ‘In any proceeding before the Court a party may -- (c) where the party is a workman (in proceedings under s 20(3)), appear himself personally or where he is a member of the trade union of workmen, be represented by an officer or employee of the trade union; (d) where the party is a trade union, or an employer, or a workman (in proceedings under s 20(3)), be represented with the permission of the President or the Chairman, by an advocate, or, notwithstanding anything to the contrary contained in any written law relating to the registration of trade unions, by any official of an organisation (not being a trade union) of employers or of workmen, as the case may be, registered in Malaysia’.

His Lordship then stated, ‘If the legal representative or administrator of the estate of the deceased workman were allowed to appear at the Industrial Court in proceedings under s 20(3) of the Act express provision would be provided for it in the Act. But none was so provided either in the Act or in the Industrial Court Rules 1967. Having regard to the abovementioned facts, we agree with the learned Judge that proceedings under s 20(3) of the Act are a claim personal to the non-union workman and that it abates on his death. In short, the maxim actio personalis moritur cum persona applies to the facts of this case’.

Based on the above authority, in the absence of a specific provision under the IRA, the Industrial Court is in no position to accept any substitution or representation of a deceased party. In R Rama Chandran v Industrial Court of Malaysian & Anor n30, the Federal Court cited with the approval the rationale in Thien Tham Sang’s case. Eusoff Chin CJ stated; ‘the claimant is 51 years old and has been jobless for the last seven years. Owing to his unemployment he and his family with school going children are suffering immense hardship. Should we remit this case back to the Industrial Court? To do this will certainly involve continued and prolonged litigation which will do great harm and injustice to the claimant, and were he to die, his claim will abate as was held in Thien Tham Sang v. United States Army Medical Research Unit [1983] 1 MLJ 97 and this will result in his family suffering grave injustice’.

In many cases, the Industrial Court had followed the rationale in Thien Tham Sang’s case and thereby struck off the action. For example, in Kee Huat Industries Bhd v Panjalinggam Munusamy n31, the court stated; ‘From the reading of s 20(1) it would appear that the primary award for the court to consider in a proceeding under s 20 is reinstatement. If the workman is not capable of being reinstated or that reinstatement is not part of the remedy he is seeking for there is then no scope of giving relief under s 20 of the Act to the workman. On the death of the claimant, it follows that the primary consideration for reinstatement is extinguished and no longer available. It no longer remains a dispute capable of being redressed to its status quo ante as envisaged by the said s 20 of the Act. Equally it no longer remains a dispute capable of settlement or adjudication. The workman’s claim under s 20 of the Act expires along with his death on account that it is a claim personal to the workman’.

Again, in People’s Mirror, Bre Sdn Bhd v Chew Hock Guan n32, while the case was pending hearing in the Court, the claimant died and his widow, Doreen Ong Phek Choo, applied to the State Probate Officer for Letters of Administration to be granted to her to enable her to pursue this case. In relation to this, the learned counsel for the deceased claimant requested the court to substitute the name of Doreen Ong Phek Choo in place of the deceased claimant as that was the last wish of the deceased husband that she be appointed as the administratrix of his estate and to carry on with this action. However, the counsel for the employer objected to the application by the administratrix to substitute her in place of the deceased claimant and asked the Court to invoke s 29(a) of the IRA and to strike off the claimant’s claim as the action was abated with the death of the claimant.

The court agreed with the submission by the counsel for the employer by invoking the rationale of Thein Tham Sang’s case. In particular, the Chairman of the Court stated; ‘I am left with no alternative but to hold that the main claim by the deceased claimant under s 20 of the Act is personal in nature and the action abates with the death of the claimant
on the 26 January 1990. The objection by the employer of the application to substitute Doreen Ong Phek Choo as a party is upheld and the matter of the reference is hereby struck off because of the death of the claimant.

Again, in Tamura Electronics (M) Sdn Bhd v Jaya Kumar Jaya Raman n33, the Industrial Court struck off the claim under s 20(3) of the IRA which was fixed for hearing on 24 August 2004 because the claimant had passed away sometime in June 2004. In Kim Hua Used Car Trading Co v Kali Veeramuthu n34, the Industrial Court noted that the court's considered opinion that the present case is within the principles of the above Federal Court's decision (Thein Tham Sang's case) and thus bound by the principles applied. Accordingly this court handed down an award of striking off the claimant's claim. In Linatex Rubber Products Sdn Bhd v Paranthaman Moothasamy, n35 the representative of the claimant informed the court that the claimant had passed away on 15 April 1996. A copy of the death certificate was tendered in court. On the authority of the decision of the Federal Court in Thien Tham Sang's case, the Industrial Court ordered the claimant's claim to be struck off.

In Plaat (M) Sdn Bhd v Gohbalan s/o P Tharmalingam n36, it was stated that although s 29(a) had empowered the Industrial Court in any proceedings before it to order that any party be joined to a trade dispute, the Federal Court had held in Thein Tham Seng's case that the word 'party' in s 29(a) of the IRA did not include the legal representative or administrator of the estate of the deceased workman. The Court sympathises with the deceased workman and his family but on the authority of the Federal Court's decision above, the Court held that the claimant's claim under s 20(3) of the IRA abates with his death. In Vanto Organisation Sdn Bhd v Rajendran a/l Arumugam n37, when this case came up for hearing on 23 October 1993, the counsel for the claimant informed the court that the claimant had since died and this was confirmed by the counsel for the employer. Following the decision in Thein Tham Sang's case, the Industrial Court ordered the claimant's claim to be struck off.

In Sistem Penerbangan Malaysia v Rozila Omar n38, at the commencement of the hearing on 14 September 1992, the Industrial Court was informed that Puan Rozila bte Omar had since died on 8 January 1992. On the authority of the Federal Court's decision, the court stated that her claim under s 20(3) of the IRA has abated with her death although the court expressed sympathy to the deceased workman and her family. In Syarikat Kendaraan Melayu Kelantan Bhd, Kota Bharu v Transport Workers' Union n39, the dispute was between the company and the union over the dismissal of one Sidek bin Jaafar (the claimant), an employee of the company and a member of the union. On the date of hearing on 11 June 1990, the Union informed the Court that the claimant had died and that he was withdrawing the case. His application was allowed and the case was struck out accordingly.

**Hotel Istana v Nor Azam Baharin: A Review**

Recently, however, the Industrial Court in Hotel Istana v Nor Azam Baharin n40, argued that the representation under s 20 of the IRA does not abate with the death of the claimant and thus, it can be continued by the legal representative of the deceased's estate. The correctness of the rationale in Thien Tham Sang's case was questioned. As aptly noted by the learned Chairman, Dato' Tan Yeak Hui; 'It is the humble opinion of this court that the judges in the Superior Courts may have misread or misconstrued the intention of Parliament. It is hoped the time has come for the social activists, reformers and all concerned parties to prompt Parliament to debate further this matter so that the true intention of Parliament can be ascertained and if appropriate, review and amend the law accordingly. Further it is hoped that the application of the principles of natural justice be encouraged to roam more freely in the Industrial Court and to assert itself in the manner envisaged by the creator of the Industrial Relations Act 1967 n41.

In the Hotel Istana case, the alleged representation for dismissal without just cause or excuse of the claimant, Nor Azam bin Baharin, by Hotel Istana, was referred to the Industrial Court vide the Ministerial reference dated 1 June 2004. However, the Court was informed that the claimant had passed away on 4 July 2003. The deceased's claimant's estate wished to pursue the claim by applying for letters of administration and substituting the administrators for the deceased claimant. The defendant submitted that reference under s 20(3) of the IRA is personal in nature and is a claim for reinstatement and pursuant to the Federal Court's decision in Thein Tham Sang's case, the action abates on the death of the claimant and the maxim actio personalis moratur cum persona was cited. The defendant further contended that
although the Industrial Court has the power to award compensation in lieu of reinstatement, this may only be considered when the remedy of reinstatement is not appropriate under the circumstances of the case.

After perusing the arguments of the defendant, the Industrial Court had to consider the following questions; (a) whether the death of the original complainant abated the reference altogether; and (b) whether the Industrial Court should proceed to hear the merits of the dispute which gave rise to the reference. The Court referred to the case of Kumpulan Gutherie Sdn Bhd v Sukamari Anma N Menon [n42], where Tuan KA Menon -- the Chairman -- in allowing the substitution of the deceased worker by his widow in the claim against the employer, stated:

The general principle at Common Law is that the death of the servant puts an end to the contract of service, but any right of action vested in the deceased during his life-time survives for the benefit of the deceased's personal representatives-subject to the provisions of the Limitation Ordinance. For example the deceased servant's personal representatives can sue for and recover any arrears of wages due to the deceased-servant from his employer. In the present case, the primary issue on the pleadings for the court's determination was whether the deceased was dismissed for good and just cause. Therefore as soon as the court was informed of the deceased's death it had to bear in mind the possibility that the facts of the dispute might lead to the conclusion that the company did not have good cause to dismiss the deceased. If that was so, then the question of an award for compensation would arise, since re-instatement was no longer a remedy. By analogy to the position under the Common Law, the deceased's personal representative would be entitled to the benefit of an award and that right therefore had to be safeguarded. Mr Gomez informed the court that he had been instructed that the deceased had left a will under which his widow was appointed executive. However, there is no requirement in the Industrial Relations Act or Rules on Regulation as a pre-condition to substitution and in pursuance of s 29(a) of the Act the court directed that the name of the deceased's widow (being the most obvious and suitable person for the purpose) be substituted in place of her late husband in the title thereto so that the merits of the dispute could be examined.

Further, the Court referred to the High Court's decision in the Thein Tham Sang case, where Hashim Yeop Sani J stated; 'a claim under s 20 is a claim 'personal' to the claimant. The Industrial Court cannot re-instate a dead workman. Any other relief the Industrial Court may give is merely incidental or ancillary to the main relief asked for. Thus the main claim under s 20 is personal in nature and the action abates with the death of the claimant'. The Federal Court, on appeal, affirmed the above observation. Justice George Seah FJ referred to the UK Employment Protection (Consolidation) Act 1978, in particular, r 2 of Schedule 12 of the said Act and stated that there is no parallel or similar provision in the IRA. Therefore, according to His Lordship, the deceased worker's estate cannot proceed or continue with its claim on behalf of the deceased worker.

In relation to the above, the Industrial Court had analysed the decision of Thein Tham Sang's case, and thereafter expressed its observation and opinion on the following issues:

(a) Claim of reinstatement under s 20 of the IRA is 'personal in nature': The correct construction

The claim under s 20 is personal to the workman. As such the claimant may proceed in his own personal capacity as opposed to by a union (in which he is a member). The learned Chairman stated; 'It is the humble opinion of this court that since the dispute under a s 20 reference is one involving the personal capacity of the workman as distinct from his
status or capacity as a member of a union the deceased workman should all the more be allowed to continue with his claim through his personal representatives upon his death. The fact that the deceased workman is not in court to give evidence to support his allegation or contention of his alleged unfair dismissal, is no good reason why the company need not be present in court to prove their case that the dismissal was fair and with just cause. In a s 20 reference other than a claim for constructive dismissal it has been the practice and the procedure has been for the company to justify its action in court that the dismissal was fair and with just cause’ n43.

(b) Reference under s 20 is for reinstatement and that all other relief’s are merely incidental or ancillary

It is the intention of the legislature that the recourse under s. 20(1) of the IRA is only in respect of reinstatement. However, according to the learned Chairman, the reality in the current economic situation is that over 90% of all claims although pleaded for reinstatement end up in monetary consideration. In other words, reinstatement is no longer the norm and the general remedy regularly granted by the court n44. The learned Chairman stated: 'This court humbly disagrees with his Lordship's contention (in Thein Tham Sang's case) that the claimant's claim abates upon death. This court whilst agreeing that the Industrial Court cannot re-instate a dead man even if the evidence can be produced to find that the dismissal was without just cause and excuse, hold the view that the court can still mitigate the hardship (in appropriate cases) by awarding monetary compensation in lieu of re-instatement. Applying the reality test in a majority of cases the claimant's remedy can be satisfied (if the alleged dismissal without just cause and excuse can be proven) with monetary compensation' (Emphasis added.) n45.

c) Common law approach: The analogical deduction

Right to sue for money or equivalent of money due to a deceased workman whilst the case was pending before the Labour Court survives to the heirs, successors and legal representatives and they can take action by way of a suit in a civil court. According to the learned Chairman, 'if the personal representatives heirs or successors of the deceased workman are not barred from pursuing the deceased worker's claim in the other courts it would appear illogical to an average workman why his estate would be barred from or denied the right to claim for monetary or its equivalent in lieu of re-instatement in the Industrial Court just because he is no longer around to prove his case. The Industrial Court is specially created by Parliament to regulate the relationships between the employer and the employee and it would be incomprehensible for an average workman to be referred to another civil court to make his monetary claim in lieu of re-instatement just because of technicalities' n46.

d) The word 'party' in s 29(a) of the IRA does not 'exclude' the legal representative or administrator of the deceased worker's estate

The learned Chairman observed; 'Since Parliament did not specifically 'exclude' the deceased workman's legal representative or administrator then it is submitted that since the 1967 Act is a piece of legislation proclaiming to advance social justice and to provide a more level playing field to the workers of this country the 'contra proferentem' rule should be applied in reverse. Hence in a situation such as this where there is an ambiguity or uncertainty in a document the most appropriate and just interpretation would be to construe it in favour of the party in which Parliament had in mind to assist in the uneven playing field prevailing before the creation of this enactment... The draftsman of s 27(i) may or may not have the mathematical precision and acumen with the usage of words as in the league or in the craftsmanship style of the late Lord Denning. The meaning of s 27(i) may appear to be a bit ambiguous from the choice of words used to express Parliament's intended goal. But if the provision of s 27(i) is read in its entirety with the whole of the 1967 Act, the crystal clear intention of Parliament with its declared goal of providing social justice to the workers of this country would surface’ n47.

e) The maxim actio personalis monitor cum persona: Its application in the industrial jurisprudence

The learned Chairman stated; 'It is arguable whether our legislators had intended the maxim to apply in the relationship governing the workers and employers in this country. If this court were to hazard a guess it is of the view
that Parliament would not have adopted this maxim because as in the words of the late Hashim Yeop Sani J, 'the right to sue for money or equivalent of money due to a deceased workman whilst the case is pending before the Labour Court survives to the heirs, successors and legal representatives and they can take action by way of a suit in the civil court'. It is humbly submitted that if a personal representative heir or successor of a deceased workman can have the right to actions in the civil court, any obstructions preventing the deceased worker's personal representative heirs or successors from pursuing its claim in the Industrial Court would in the opinion of this court be the last thing Parliament would have intended it to be n48.

Having stated his opinion of the correct approach to the issue, the learned Chairman nevertheless had to enforce the rationale in Thein Tham Sang’s case. 'Mindful and with respect to the doctrine of stare decisis this court is unable to assist the father of the deceased son to make a claim over the alleged unfair dismissal. This court stands bound by the decision of the Federal Court in Thein Tham Sang v The United States Army Medical Research Unit & Anor and with much reluctance struck off the claimant's case as requested by the company's counsel’ n49.

In response to the above decision, the Malaysian Trade Union Congress (MTUC) argued that the dismissal cases pending adjudication in the Industrial Court should not abate with the death of the claimant. This is because, apart from reinstatement, the court has the power to award monetary compensation. It was further stated that there is nothing in the Industrial Relations Act stating that the entitlement should not be applicable if the claimant dies n50.

The writer of this article is strongly supportive of the opinion expressed by the learned Chairman in Hotel Istana’s case. This is largely because there are inconsiderable delays in the administration of justice in the Industrial Relations Department and in the Industrial Court due to the backlog of cases and the practical difficulties of getting them disposed of as soon as possible. In fact, in the early 2004, the MTUC had submitted a memorandum to the Prime Minister, Datuk Seri Abdullah Ahmad Badawi, expressing among others, their dissatisfaction over the existing process of adjudication in the Industrial Court. There is inordinate delay in the disposal of cases referred to the court mainly due to the backlog of cases n51. This is certainly not keeping in tandem with the spirit of the IRA, namely, speedy settlement of the dispute referred to the court, and where practicable, within thirty days from the date of reference to it n52.

The table below provides the statistics of the number of cases referred to the Industrial Court for the period between 2000 to 2005. It contains among others, cases referred to the court in the current year, cases carried forward, the number of cases heard or awards given and the total number of cases pending in the court.

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<td></td>
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<tr>
<td>Total Cases</td>
<td>1050</td>
</tr>
<tr>
<td>Referred</td>
<td></td>
</tr>
<tr>
<td>Total Cases</td>
<td>704</td>
</tr>
<tr>
<td>Heard / Given</td>
<td></td>
</tr>
<tr>
<td>Award</td>
<td></td>
</tr>
<tr>
<td>Total Cases</td>
<td>1788</td>
</tr>
</tbody>
</table>

(Source: Ministry of Human Resources and Manpower, http://mp.mohr.gov.my)
As noted from the above table, the backlog of cases in the Industrial Court is increasing and thus, there is undue delay in the settlement of disputes. This is further acknowledged by the Federal Court in *R Ramachandran*’s case, where the Court, in an unprecedented move, instead of remitting the case back to the Industrial Court, went further and by itself found that the claimant was dismissed without just cause or excuse and went on to issue consequential relief that disposed of the matter. To remit the case back to the Industrial Court, according to Eusoff Chin CJ (as he then was) ‘will certainly involve continued and prolonged litigation which will do great harm and injustice to the claimant, and were he to die, his claim will abate...and this will result in his family suffering grave injustice’ \(^n53\).

In *Harris Solid State (M) Sdn Bhd v Bruno Gentil Pereira* \(^n54\), the Court of Appeal ordered the appellant to reinstate the claimant into his former position despite the fact that the claimant had been dismissed from employment for more than six years. The Court observed; ‘if we were to affirm the remission of the case to the Industrial Court, it may take another six years or more for the matter to reach us, with a possible further appeal to the Federal Court. Such a consequence would produce the diametrically opposite result to that intended by Parliament, namely the speedy adjudication and settlement of trade disputes’.

In *Hasbullah Mohamad v Persatuan Otomobil Malaysia (AAM)* \(^n55\), the Industrial Court noted that this case took four years ten months from the date of dismissal for the case to be heard. ‘The delay was caused partly by the conciliation process and the busy court schedule’. In *Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar dan Restoran Semenanjung Malaysia v MTB Reality Sdn Bhd/Renaisance Melaka Hotel* \(^n56\), there was a delay of almost two years in the Industrial Court in hearing of the representation after the Minister’s reference and a further delay of almost 14 months in handing down the award.

The table of cases below further elucidate the inordinate delay in the settlement of disputes under s 20(3) of the IRA. It contains the selected list of dismissal cases, where the remedy of reinstatement was awarded. The table also contains the date the claimant was dismissed; the date the award was handed down by the court and the lapse of time.

<table>
<thead>
<tr>
<th>No</th>
<th>Cases</th>
<th>Dismissal date</th>
<th>Last date of the hearing</th>
<th>Lapse of time (Months)</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td>Kasinathan Vellasamy v President of the</td>
<td>1 November 2000</td>
<td>30 September 2002</td>
<td>23</td>
</tr>
<tr>
<td>Case Title</td>
<td>Date of Filing</td>
<td>Date of Judgment</td>
<td>Volume</td>
<td></td>
</tr>
<tr>
<td>---------------------------------------------------------------------------</td>
<td>----------------------</td>
<td>-------------------</td>
<td>--------</td>
<td></td>
</tr>
<tr>
<td>Committee of the Hindu Devalaya Paripalana Sabah [2002] 3 ILR 252</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>MBF Unit Trust Management Sdn Bhd v Hamzah Mohamad [2000] 2 ILR 596</td>
<td>6 October 1996</td>
<td>29 September 2000</td>
<td>46</td>
<td></td>
</tr>
<tr>
<td>Trichy Flour Mill Sdn Bhd v Thewarajan Velayuthan [1999] 1 ILR 197</td>
<td>3 July 1997</td>
<td>8 February 1999</td>
<td>18</td>
<td></td>
</tr>
<tr>
<td>Malaysian Tobacco Co Bhd v Zainuddin Abd Rani &amp; Ors [1993] 3 ILR 206</td>
<td>29 July 1997</td>
<td>1 December 1999</td>
<td>28</td>
<td></td>
</tr>
<tr>
<td>Edtra Sdn Bhd v Lee</td>
<td>17 March 1997</td>
<td>16 October 1999</td>
<td>30</td>
<td></td>
</tr>
</tbody>
</table>
What is apparent from the above table is that it takes many months before the Industrial Court makes an appropriate award in favour of the unfairly dismissed workman. Given the fact that there is inordinate and inexcusable delay in the settlement of the disputes under s 20(3) of the IRA, it is suggested that, God forbid, should the claimant die before its full settlement, the deceased workers personal representatives ought to be allowed to continue the proceedings.

It is therefore submitted that express provision should be made or incorporated into the IRA or the Rules made thereunder to allow the legal representative of the deceased estate to continue the proceedings, as the same is the practice in many common law jurisdictions. One can therefore, look to the 'mother' of all common law jurisdictions i.e. the United Kingdom for legislative examples. The English Employment Rights Act 1996, s 206 expressly provides that the proceeding under this Act, which includes proceedings for unfair dismissal, may be instituted or continued by a personal representative of the deceased employee. In particular, sub-s (3) of s 206 provides; 'Where an employee has died, any tribunal proceedings arising under any of the provisions of this Act to which this section applies may be

<table>
<thead>
<tr>
<th>Case</th>
<th>Decision</th>
<th>Date of Fact</th>
<th>Date of Award</th>
<th>Years</th>
</tr>
</thead>
</table>
instituted or continued by a personal representative of the deceased employee'. Subsection (4) further provides; 'If there is no personal representative of a deceased employee, any tribunal proceedings arising under any of the provisions of this Act to which this section applies may be instituted or continued on behalf of the estate of the deceased employee by any appropriate person appointed by the employment tribunal'.

Subsection (5) provides that 'In subsection (4) 'appropriate person' means a person who is -- (a) authorised by the employee before his death to act in connection with the proceedings, or (b) the widow or widower, child, parent or brother or sister of the deceased employee'. Subsection (6) states that 'In a case where proceedings are instituted or continued by virtue of subsection (4), any award made by the employment tribunal shall be (a) made in such terms, and (b) enforceable in such manner, as the Secretary of State may by regulations provide'.

Subsection (7) provides, 'Any reference in the provisions of this Act to which this section applies to the doing of anything by or in relation to an employer or employee includes a reference to the doing of the thing by or in relation to a personal representative of the deceased employer or employee'. Finally, sub-s (8) states, 'Any reference in the provisions of this Act to which this section applies to a thing required or authorised to be done by or in relation to an employer or employee includes a reference to a thing required or authorised to be done by or in relation to a personal representative of the deceased employer or employee'. Where the Employment Tribunal holds in favour of the deceased claimant, reinstatement or re-engagement provisions obviously cannot apply, but the Tribunal can nonetheless consider the question of monetary compensation.

**Conclusion**

The Federal Court had, in *Thein Thang Seng*’s case, stated that a claim for reinstatement under s 20 of the IRA is personal to the claimant and therefore, an employee's claim for reinstatement expires along with his death. The maxim *actio personalis moritur cum persona* (a personal action dies with the person) applies. It was further stated that if the legal representative or administrator of the estate of the deceased workman were allowed to appear at the Industrial Court in proceedings under s 20(3) of the IRA express provision would be provided for it in the Act. But none is so provided either in the Act or in the Industrial Court Rules 1967.

However, the Industrial Court in the *Hotel Istana*’s case holds otherwise. The learned Chairman stated; 'The demise of the deceased worker should not provide the company an unfair procedural advantage to deny the deceased worker's estate of their just and lawful claim for the alleged unfair dismissal of the deceased. The deceased worker's estate should be allowed to bring forth whatever evidence they may have in support of their claim despite the absence of the deceased worker's presence as a witness in court. By this act of striking out the claim without the benefit of hearing fully the deceased worker's personal representative's evidence, this court has to live with the conscience that justice may have been denied to the deceased worker because of a possible misconstruction of a provision in a statute'.

In this article, the writer had, once again, proposed the legislative intervention to resolve this issue. It is humbly submitted that the IRA or the Industrial Court Rules must have an express provision on this matter, in that, where the claimant has died, a proceeding arising under s 20(3) of the IRA may be continued by a personal representative of the deceased. It may be by emulating the practice of the civil courts as provided in the Rules of the High Court 1980 or the Subordinate Courts Rules 1980 or the practice of the UK Employment Tribunal as provided in s 206 of the Employment Rights Act 1996. Further, being a court of equity and good conscience, the Industrial Court must be allowed to have regard to the substantial merits of the case and not technicalities and legal form. Section 30(5) of the IRA has conferred upon the Industrial Court an inherent right to use its wisdom and to apply equitable principles wherever applicable. This is primarily to enable the court to dispense justice without being subject to any legal form or technicality and further, without fear or favour.
FOOTNOTES:

n1 It was in 1989, when s 20 of the IRA was amended to extend the application of the above section to all workmen 'irrespective of whether they are union members or not'. Prior to that, to have a case adjudicated in the Industrial Court, a person must be a member of the trade union.

n2 Per Tucker J in *Hodge v Ultra Electric Ltd* [1943] 1 KB 462, p 466.

n3 See, for example, *Kumpulan Jerai Sdn Bhd Rengam v National Union of Plantation Workers & Anor* [1996] 3 MLJ 221, p 238 (HC).

n4 See *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil Pereira & Ors* [1996] 3 MLJ 489 (CA); *Clara Tai Saw Lan v Kurnia Insurance (M) Bhd* [2001] 1 MLJ 497 (CA).


n6 [1999] 1 ILR 375 (IC).

n7 [1994] 1 ILR 170 (IC).

n8 [1995] 1 ILR 293 (IC).

n9 [2001] 1 ILR 704 (IC).

n10 [2003] 3 ILR 177 (IC).


n12 [2004] 3 ILR 950 (IC).

n13 [2001] 8 CLJ 758 (HC).

n14 [1996] 2 ILR 885 (IC).

n15 [1997] 1 ILR 152, at p 162 (IC).

n16 [2003] 3 ILR 279.

n17 [2004] 1 ILR 1284 (IC).

n18 [2004] 3 ILR 355 (IC).

n19 [2003] 4 MLJ 432 (CA).

n20 Ibid, at p 439.

n21 See Ashgar Ali Ali Mohamed, 'Pleading reinstatement: Is it vital for Industrial Court adjudication in dismissal without just cause or excuse?' [2004] 2 ILR i.


n23 Award No 33/73.

n24 [1996] 1 MLJ 481.

n26  [1983] 2 MLJ 49 (FC).

n27  See Elizabeth Thein Nee Lee Geok Choo v United States Army Medical Research Unit (Ruling on Preliminary) [1981] MLLR 257.


n29  See footnote 26 above, at p 51.

n30  [1997] 1 CLJ 147 (FC).

n31  [2004] 3 ILR 529.


n33  [2004] 3 ILR 556.

n34  [2003] 2 ILR 213.


n37  [1993] 2 ILR 428.


n39  [1990] 2 ILR 16.

n40  [2005] 4 CLJ 241 (IC).

n41  Ibid, at p 256.

n42  Award No 33/73.

n43  See footnote 40 above, at p 249.

n44  See Nestle Food Storage (Sabah) Sdn Bhd v Terrence Tan Nyang Yin [2002] 1 ILR 280, p 283.

n45  See footnote 40 above, at p 250.

n46  Ibid, at p 250.


n48  Ibid, at p 256.

n49  Ibid, at p 256.

n50  See 'MTUC: Disputes should not end with death' New Straits Times, Friday, 11 November 2005, p 20 (National).
n51 A memorandum containing the resolutions was handed to the Prime Minister Datuk Seri Abdullah Ahmad Badawi in Putrajaya on 19 January 2004. See also *New Straits Times*, 10 January 2004.

n52 Section 30(3) of the IRA provides 'The Court shall make its award without delay and where practicable within thirty days from the date of reference to it of the trade dispute or of a reference to it under s 20(3)'.

n53 See footnote 30 above, at p 183.

n54 [1996] 4 CLJ 747 (CA).

n55 [2004] 2 ILR 199.

n56 [2003] 6 MLJ 420.