Abstract

This article traces how a simple statutory provision governing redress for unfair dismissal has been allowed to develop into a hydra-headed monster by reason of the rather indefensible common law traditions, case law precedents, administrative directions besides the predilections and idiosyncrasies of some of the Presiding Officers of the Industrial Court. As such, it is postulated that the remedy for unjust dismissal works to the great disadvantage of the workman under the law and practice of Industrial Relations in Malaysia. In the course of this discourse, the presentation highlights the irony that the Industrial Court set up under the industrial law on employer-employee relations had itself initiated action, sometimes without jurisdiction, which worked to the great disadvantage of the unjustly dismissed workman. Therefore it is suggested that the Industrial Court could itself initiate action, since it has the necessary powers, to set right the inequitable situation governing unjust dismissals in the larger and the long term interest of industrial harmony and social justice.

This article is about how a simple statutory provision governing redress for unfair dismissal has been complicated to develop into a hydra-headed monster by reason of the indefensible common law traditions, case law determination, administrative directions besides the predilections and idiosyncrasies of some of the Chairmen of the Industrial Court.

The starting point to understanding the issues discussed in this presentation is section 20 of the Industrial Relation Act 1967 n1. The Industrial Law in Malaysia, under this section, stipulated reinstatement as the only remedy for unfair dismissals. However, legislation preceding this section in the Act did recognize payment of compensation as an alternative remedy for unjust dismissal. Specifically, when in 1980 Parliament replaced earlier provisions of the Act with section 20, it retained reinstatement as the only relief for the unfairly dismiss workman after deliberately removing from the statute the alternative remedy of payment of compensation.
In providing for reinstatement as the only remedy for unfair dismissal, Malaysian Industrial Law seemed to have recognized, by implication, the workman's right to security of tenure. However, the right to security of tenure was somewhat diluted by the Federal Court in Dr A Dutt's case legitimizing payment of compensation as an alternative remedy for unjust dismissal n2.

When the Federal Court conferred on the Industrial Court the power to order this alternative remedy it was expected that the Industrial Court would exercise this power in deserving cases only in the interest of industrial peace and harmony. However, strained relationship doctrine, loss of trust and confidence excuse and other kindred rationale such as the vacancy had been filled or the job had been out sourced were frequently invoked by the employers to resist reinstatement and seek payment of compensation instead as the remedy for unjust dismissal. C P Mills provoked by the response of the Industrial Court to this plea observed that "Industrial Court is easily taken in by the employers' plea against reinstatement". As a result payment of compensation had become the rule, reinstatement, the exception n3.

Mitigation of damages

Under the common law, the unlawfully dismissed employee can sue the employer for damages, and mitigation of damages, in the context of common law, refers to grounds on which the burden of the damages on the employer is sought to be lightened or lessened.

Neither the industrial court is a common law court nor its predecessor the Industrial Arbitration Tribunal was one, and yet for many years they adopted the principle of mitigation of damages in making their awards under the industrial law n4. C P Mills in reviewing the application of the common law principle of mitigation of damages in Malaysian cases observed that "throughout the cases, it has been stated as a general proposition that a reinstatement order carries with it a prima facie right for the workman to recover wages lost since the time of dismissal, But very early, the decisions showed a tendency to cut back this entitlement. The workman may lose some part of the arrears on account of his income earned in the alternative employment after his dismissal or if he has neglected to obtain other employment in the interim period [failure to mitigate his loss] or if his conduct before the dismissal was not altogether blameless and so some disciplinary action short of outright dismissal is merited. On the other hand, the employer will obtain some remission of the amount he would otherwise be ordered to pay if he shows that there has been a substantial delay in reaching finality, a delay for which he was not responsible, or if he shows that payment of the full amount of back wages will impose some financial strain on his business n5. in the cases decided by the industrial court, the principle was usually stated by way of introducing some grounds as stated above for cutting back the workman's prima facie entitlement n6.

Mills himself was aware that not all of the reasoning which has thus modified the worker's entitlement to full back wages is entirely convincing. Referring to the remission given to the employer by reason of the delay in reaching finality, mills argued that where the cause of the delay lies elsewhere, either in the tactics of the employer or in the process of the court itself, then it is inequitable to say that the workman should bear part of the losses resulting from the employer's wrong doing n7.

Though the Industrial Court succumbed to applying the common law principle of damages to curtail the workman's entitlement to full back wages, when in some long drawn cases the total monetary compensation package turned out to be a very large amount, the Court seemed to have preferred, under the direction of its President Justice Harun Hashim to rely on alternative devices to limit the financial burden on the employer, instead of solely depending on the questionable method of reducing his burden on the common law principle in industrial law cases. Reference here is to the Practice Note No I, which contained not only the norm of limiting back wages to a maximum of 24 months but also the guideline on payment of compensation in lieu of reinstatement on the basis of retrenchment principle at the rate of one month of workman's last drawn salary for every completed year of service with the employer.

It is well known that this Practice Direction was issued soon after the Federal Court confirmation of the Industrial Court award to Dr Dutt in the Assunta Hospital case n8. In this case the Industrial Court Chairman K Sumasundaram...
ordered payment of back wages for 40 months and compensation for 18 months when Dr Dutt had served only for 12 years. Obviously the Chairman awarded full back wages without any limitation and payment of compensation not on retrenchment principle. The total monetary package granted to Dr Dutt was a large sum of more than half a million Ringgits.

The need to regulate though not control the Court's awards of monetary payment to the unjustly dismissed workman also became imperative since Salleh Abas FCJ in his ruling in the Hotel Jaya Puri case in 1979 conferred on the Industrial Court a near total discretion to determine the quantum of compensation. He stated that, "if there is a legal basis for paying the compensation, the question of amount, of course, is very much a matter of the discretion which the Industrial Court is fully empowered under section 30(5) of the Industrial Relation Act to fix n9 ".

The Hotel Jaya Puri ruling, in fact, did not confer on the Industrial Court a carte blanche discretion but quite surprisingly even Justice Harun as the President of the Industrial Court seemed to have presumed it to be so when he said in Wearne Brothers case n10 that "the court could have fixed an arbitrary amount as compensation without explaining how the figure is arrived at". The presumption of unfettered discretion might have been the reason for the issue of the Practice Directions to regulate the quantum of monetary compensation awarded by the Industrial Court.

**Limitation on back wages**

Was there any justification for limiting the back wages to a maximum of 24 months? We have only very limited authentic information on this issue. For example late Kuppusamy's [Counsel for workman] application to the Industrial Court on a point of law to know the reasons for this limitation elicited the response from the High Court that it was to offset separate deductions on three counts viz to mitigate damages to the employer when there was delay in reaching finality of decision by the Industrial Court for no fault of the employer, when the employee has himself contributed to the dismissal by his blameworthy conduct besides when the employee was earning on his alternative employment after his dismissal n11 .

While the Industrial Court adhered to the rationale provided by the High Court in a few cases, there were many cases in which the Industrial Court deducted from back wages on all the grounds mentioned after limiting the back wages to a maximum of 24 months. For example, in H M Shah Enterprise case n12 the Court held the dismissal too harsh a penalty for the Asst Bell Captain for smoking while on duty in violation of house rules. In ordering payment of compensation in lieu for the poor workman with a gross monthly salary of 455 Ringgits, the Court not only limited back wages to 24 months but ordered a reduction of 50 per cent out of the combined total of back wages and payment of compensation for contributory conduct. Secondly in Kejuruteraan case n13 the Industrial Court ruled that retrenchment of the workman was unjust and ordered payment of compensation. Five years had elapsed between the date of retrenchment and the last date of hearing but the Industrial Court not only limited the back wages to 24 months but also ordered 25 per cent deduction out of the combined total of monetary reward by way of mitigation of loss since the claimant was gainfully employed after his dismissal.

Furthermore, B Lobo, Counsel for workman made two formal attempts to elicit from the Industrial Court the rationale for this limitation both in the Utusan Melayu and the Associated Motor Industries cases n14 . When the Industrial Court in both the cases enforced this limitation, Lobo sought to vary the award through an application to the Industrial Court under section 33 (2) of the Industrial Relations Act 1967. In both the cases the application was dismissed because, in the opinion of the Court, there was no ambiguity or uncertainty in the award limiting payment of back wages to a maximum of 24 months. It is needless to say that section 33(2) of the Act stipulated that the Court could "vary the terms of the award for the purpose solely of removing ambiguity or uncertainty."

After these two futile attempts to question this limitation, lawyers have realized that they are not going to succeed through attempting to vary the award under section 33(2) of the Act. The right course of judicial action is to have recourse to certiorari proceedings to quash the award of the Industrial Court on the ground that limiting back wages to a maximum of 24 months is a jurisdictional error n15 .
Notwithstanding the foregoing attempts, it should be noted that none of them explained or justified the number of months for which limitation was prescribed. May be the recommendation of the Royal Commission on Labour and Employers’ Associations (UK) n16 to limit payment of compensation to a maximum period of 2 years and its subsequent incorporation into the law in England inspired Justice Harun to adopt this mantra of 24 months as a maximum not only for payment of back wages but also for payment of compensation in lieu.

Not only this limitation had no statutory sanction but also no case law confirmation. It is understandable, therefore, that when in Casurina Beach Hotel case n17 way back in 1981 the Industrial Court limited the back wages to 24 months, the learned author C P Mills made the following observation: "if we are to take this as indicating that the Court has set itself some arbitrary, undisclosed guideline for its decision, then it is denying itself the exercise of its statutory duty under section 30 (5) of the Industrial Relations Act 1967 to act according to equity and good conscience and the substantial merits of the case, and this would be an error of jurisdiction n18 ".

Payment of Compensation in Lieu

Payment of compensation in lieu of reinstatement is intended, in other jurisdictions, to compensate the unjustly dismissed workman for the loss of his future earnings on the job from which he has been unjustly dismissed. However in Malaysia, it had never been a norm on the part of the Industrial court to order loss of future earnings n19 . On the other hand, Malaysian Industrial Courts seem to consider it proper to assess the compensatory payment as in the case of ordinary retrenchment and to order payment of compensation at the rate of one month of workman’s last drawn salary for every completed year of his service with his employer.

It is needless to say that the underlying rationale for equating retrenchment with unfair dismissal is incorrect. Of course in both the cases the contract of employment stands terminated. The similarity between these two concepts ends there. On the other hand, in retrenchment the termination is lawful by reason of redundancy or reorganization, whereas in the latter case it is unlawful by reason of it being without just cause or excuse. Secondly, the retrenchment benefit for the workman is a sort of a solatium for premature termination of employment for no fault of his whereas payment of compensation is his entitlement because the employer had illegally deprived him of his security of tenure.

The conclusion is, therefore, inescapable that the unique Malaysian practice of paying compensation on retrenchment principle is not only improper but also unfair n20 .

On the other hand, if this payment of compensation were to cover the future loss of earning of the unfairly dismissed workman, several factors have to be taken into account in determining the quantum of such compensation. In fact there are many imponderables in determining the future loss of earnings of an unjustly dismissed employee. For example, the real problem of finding an alternative employment despite carrying the stigma of dismissal, the relative difficulty in getting the same type of job from which he had been dismissed, his age besides the drawback that the workman if and when he finds alternative employment may have to start from a lower rung are some of them n21 . Understandably no definite yardstick for measuring the quantum of compensation is available. However the Royal Commission (UK), earlier mentioned, observed, "we think it is desirable for practical reasons to fix a ceiling for the amount of compensation which can be awarded. It would, in our view, be reasonable to provide that the maximum should be an amount equal to the employee’s wages or salary for two years n22 . Incidentally, since the award of payment of compensation in lieu of reinstatement in Ramachandran case n23 covered the employee’s future earnings, it may be inferred that the apex court in Malaysia recognized the correct principle on which the payment of compensation should be determined.

In the context of the foregoing analysis, the industrial adjudicators in Malaysia should strive hard to determine the quantum of payment of compensation to cover the loss of future earnings of the unjustly dismissed employee taking into consideration all the relevant factors specific to each case and allow payment of compensation for a period not exceeding, as far as possible, to a maximum of 2 years [UK model] depending upon the facts and circumstances of each
case. If the total compensation package consequent on adding to the back wages this compensation payment on the suggested principles (widely followed in other jurisdictions) is perceived by the employers as excessive, it will at least act as a catalyst to promote reinstatement in preference to payment of compensation in lieu as a desirable remedy for unjust dismissal and pave the way for the much needed change in the mind set of the employers in Malaysia.

**Challenge to mitigation of damages**

While in the past the industrial court often invoked the common law principle of mitigation of damages in computing back wages, the High Court, for the first time, made a serious dent in the power of the Court to do so when it held in *Taylor’s College* case that the doctrine of mitigation of damages does not apply in industrial law cases.\(^{24}\)

It is heartening to note that in *Unirub Malaysia* case\(^{25}\) the Industrial Court in complying with the ruling of the High Court stated that the claimant did not have a legal duty to mitigate his damages and allowed the claim of RM 4000 a month for 19 months without any deductions! Furthermore, it is learnt from the award of the Industrial Court in *Edaran Otomobil* case\(^{26}\) that subsequent to the ruling of the High Court in Taylor’s College case, the Industrial Court in the overwhelming majority of awards in 1988 and 1989 had not considered the principle of damages. Indeed in a fair number of instances, the Court had instead adopted the guideline in Practice Note No I of 1987, limiting computation of back wages to a maximum of 24 months.

However this respite was short-lived because the ruling of the High Court in *Taylor’s* case did not appear to have removed the discretion of the Industrial Court to order remission to the quantum of compensation amount on the ground that the workman was gainfully employed after his dismissal. Specificity, the Industrial Court in *Kama Morris* case\(^{27}\) stated that “the extent of income earned by the workman in 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”.

How the Industrial Court was able to side step the High Court ruling in *Taylor’s* college is clearly evident in Chairman steve Shim’s reasoning in the same *Kama Morris* case: “in my view, the industrial court is bound by the ratio decidendi in that case. Nevertheless, this Court is empowered under s 30(5) of the Industrial relations Act 1967 to act in accordance with equity and good conscience In this context, therefore, without invoking the mitigation principle but generally on the basis that the claimant was able to obtain a well paid job about 18 months after his dismissal, I will make a deduction of 30% from the amount of back wages”.

Thus, it has come to pass that whilst, on the one hand, the Court is bound by the *ratio decidendi* in *Taylor’s College* case, it has, on the other, steadfastly continued to invoke the provision of s 30(5) of the Act and grant remissions, presumably acting in accordance with equity and good conscience.\(^{28}\)

In sum development of law governing redress for unfair dismissal at this stage outlawed the doctrine of mitigation of damages but retained the principle of mitigation against loss by the workman. Currently, when reinstatement is ordered, the employee is entitled to all wages from the date of dismissal to the date of reinstatement. The sum awarded, however, may be reduced on the ground that the dismissed employee is expected to mitigate his loss and it may further be reduced if he had, in any way, contributed to his dismissal. In other words, the Industrial Court allows deduction from back wages on these two counts: mitigation of loss and contributory cause.

**Deduction for Contributory conduct**

Sometimes the unsatisfactory conduct of the employee upon which his employer's decision to dismiss him was based might not have been sufficient to warrant his dismissal. In other words, it would have fallen short of the required standard of proof to establish just cause or excuse. In this circumstance the Industrial Court would decide that the penalty of dismissal for his conduct was harsh and therefore the dismissal was unjust. Following this decision the Court may award reinstatement or payment of compensation in lieu. However, to make the employee responsible for his
conduct that initially led the employer to dismiss him, the Industrial Court in such cases deducts a percentage of the back wages he is entitled to on account of, what is called, his "contributory conduct."

The Malaysian Industrial Court owes to the British industrial law and practice, its practice of taking into account the contributory conduct of the unfairly dismissed workman in determining the quantum of monetary compensation. In particular, the House of Lords in Devis & Sons case n29 stated that unfair dismissal would only be decided on what was known to the employer at the time of dismissal and, therefore, subsequently discovered misconduct of the employee is irrelevant. However, it accepted that the tribunal is entitled to take into account evidence of misconduct which came to light after dismissal in determining reinstatement or compensation and also in assessing the quantum of compensation to be awarded to the claimant. If such a misconduct is sufficiently serious the tribunal could also reduce the compensation [which would otherwise have been awarded] to a nominal or nil amount.

It is interesting to note that the decision of the House of Lords in Davis & Sons case was applied by the Industrial Court way back in 1981 in its award in Hotel Merlin case n30. In Nam Lee's case n31 the Industrial court cited Devis case with approval. Finally, the Federal Court in Hong Leong Assurance case, n32 firmly established in 1990 the principle of law that the Industrial Court may effect deductions in the compensation awarded to a workman on account of his contributory misconduct.

In Malaysia there are many cases in which the Industrial Court has applied the Devis & Sons principle of law in deducting for contributory cause from the quantum of compensation awarded to the unjustly dismissed workman and it is noteworthy that the percentage of such deductions ranged from zero% to a maximum of 75 per cent.

A significant application of the House of Lords decision on Devis & Sons case for a near total deduction for a contributory conduct is the Industrial Court award by Chairman Lim Heng Seng in UMW Toyota case n33. In this case, the Industrial Court found that there was potential for nepotism since the claimant's brother was employed in the same establishment and his brother-in-law was employed in its branch company. They were likely to be benefited by the claimant's decisions since he was in a top management position in the company. The failure of the claimant to keep the company informed of his relationship with these persons or his failure to seek clarification on whether it would amount to conflict of interests was viewed as misconduct. He was dismissed. However the Court found that it was definitely a contributory cause to his dismissal though not sufficient enough to justify dismissal. Nevertheless, the Court considered this contributory conduct serious enough to deserve a nil award or a nominal award of monetary compensation but decided against it for the reason that a nil award would tantamount to concluding that the contributory conduct was serious enough to warrant a dismissal. Therefore, the Court ordered 75 per cent reduction on the combined package of monetary compensation after limiting the back wages to 24 months n34.

At the other end of the continuum is an uncommon case n35 in which the contributory conduct was recognized but was not taken into account by the Industrial Court in ordering relief. It not only ordered reinstatement but awarded no deduction for anything including the contributory cause. In this case the claimant shouted vulgar words at his supervisor and subsequently apologized for his behavior and his supervisor accepted his apology. But the company took action and after domestic inquiry dismissed him. The Industrial Court decided that since the claimant tendered an apology and it was accepted by his supervisor (besides he had a clean record of service for 14 years), the claimant deserved only a warning letter, not dismissal. Reinstatement was ordered without any deduction for contributory conduct. The nil or zero deduction is indeed at one end of the continuum for deduction for contributory conduct.

Misuse of Discretion

Hotel Jaya Puri ruling had conferred on Industrial Court discretion to award monetary compensation. However, the Industrial Courts either do not pay need to the requirement of exercising it in accordance with section 30(5) of the Act or operate on their own view of what is equitable which, in many cases, turned out to be inequitable from the worker's point of view. For example, deduction for mitigation of loss as well as for contributory conduct should be from back wages. What happens, quite often, is that both the deductions take the form of percentages but from the combined total
of back wages and payment of compensation. However, this form of deduction, often times, proves to be inequitable from the employee’s point of view and may tantamount to misuse of discretion by the Industrial Court. It is because the quantum of compensation paid in lieu of reinstatement is, on principle, to cover future loss of earnings and therefore it cannot be touched either for mitigating the loss or for deducting for contributory cause. It is unfortunate the Industrial Court continues this practice even today, n36.

Furthermore, even under the Practice Direction [No 2 of 1981] the amount of back wages may be reduced by the actual amount earned by the workmen in his alternative employment subject to a maximum deduction of 50 percent. This stipulation is also abused since many Industrial Court awards require this deduction directly from the back wages, not a deduction from his back wages of a percentage of the earnings of the employee in his alternative employment. Not infrequently, as noted earlier, the deduction is an arbitrary percentage of the combined total of back wages and payment of compensation with or without limiting the back wages to a maximum of 24 months.

Limitation of space compels the author to restrict the number of illustrations to only a few cases: In S J Printing case n37 out of the three allegations against the claimant only one was proved. Therefore, the Court considered the dismissal harsh and hence unjustified. The Court in ordering reinstatement limited the back wages to 24 months [whereas the interim period was 51 months] and ordered 30% deduction for contributory conduct. In this award it is surprising that the limitation of back wages to 24 months was not deemed sufficient to offset the penalty for contributory cause.

Secondly in the Straits Times case n38, the claimant was provoked into writing a reply to his supervisor using rude and disrespectful language. This conduct was not sufficiently serious to deserve dismissal and the Court ordered payment of compensation in lieu of reinstatement. Though the interim period was 34 months, it was scaled down to 24 months and 50% deduction for contributory conduct was made on the combined total of back wages and payment of compensation.

In Pelangi Enterprises n39 the claim of constructive dismissal was upheld. Though the duration of the interim period was 44 months, the Industrial Court ordered full back wages without limiting it to 24 months. Since he was gainfully employed a deduction of 30% of back wages was awarded by way of mitigation of loss. This is a commendable award since the Industrial Court exercised discretion not to limit the payment of back wages to 24 months. However instead of calculating the earnings of the employee on his alternative employment and deducing a percentage of it [not exceeding 50% of the earning] it considered 30% deduction directly out of back wages as reasonable.

In NST Management Services case n40 the Chief Editor of New Straits Times was dismissed for breach of company policy. The Court decided that his dismissal was harsh and hence it was unjust. This case is interesting in that the back wages were limited to 24 months whereas the duration of the interim period was 48 months. Furthermore the remission of 15 per cent for blameworthy conduct was given out of the total compensation after scaling down the back wages.

Intrakota Komposit Sdn Bhd n41 is a case of a Senior Executive unjustly dismissed on the ground of disobedience and insubordination. The duration of the interim period was 55 months and his last drawn salary was RM 5500. The entire earnings on his alternative employment were deducted from his back wages. The redeeming feature was that the back wages were not limited to 24 months but the deduction for gainful employment did not follow the norm of not more than 50 per cent of the earnings on the alternative employment.

**Current Law Governing Mitigation of Loss**

The current law governing mitigation of loss is the result of the Federal Court ruling in James Alfred's case n42. This ruling added teeth to the decision of the Court of Appeal in the same case n43. Both the reviewing courts were, perhaps, provoked by the Industrial Court award in the case n44. In this case the Industrial Court awarded payment of compensation in lieu of reinstatement. Pursuant to this award, the Court ordered payment of full back wages for a
period of 8 years and 4 months from the date of dismissal [1 June 1986] to the last date of hearing [11 Oct 1995] and payment of compensation at the rate of one month salary for every completed year of service for 11 years [from 1st November 1984 to the last date of hearing of the case by the Industrial Court]. His monthly salary was RM 8000 per month. The total relief was, therefore, a staggering amount of RM 888,000. The important point to note is that the Industrial Court totally ignored to take into account the fact that the workman was gainfully employed after his dismissal.

In reviewing the Industrial Court decision both the Court of Appeal and the Federal Court cited approvingly Malhotra's reasoning that "the unjustly, dismissed employee cannot be allowed to take double advantage and make excessive gains relying on the wrongful act of the employer n45 ". While the Court of Appeal ruled that it was a flawed decision, the Federal Court went one step further and ruled that not taking into account the post dismissal earnings of the unjustly dismissed workman in assessing the quantum of back wages is a jurisdictional error of law.

Since the ruling of the Federal Court in James Alfred case is the prevailing law on mitigation of loss, it is relevant to consider the salient features of its ruling. The foremost is the Federal Court's reasoning in support of its ruling. While the quantum of back wages is a matter very much within the discretion of the Industrial Court, its discretion is not unfettered in that it has to be exercised in accordance with law, that is, in accordance with section 30(5) of the Industrial Relations Act 1947, with equity and good conscience. Equity not only does not favour double portions but also requires the Court to balance the interests of the employer and the unjustly dismissed employee n46 .

Secondly, as explained by the Court of Appeal Judge Gopal Sri Ram, the phrase "taken into account" in the Federal Court ruling was not intended to mean "deduct earnings." In fact the Industrial Court may not deduct any amount at all from back wages or may not deduct the entire earnings on alternative employment n47 . The Federal Court, in fact, observed that "taking into account of such employment after dismissal does not necessarily mean that the Industrial Court has to conduct a mathematical exercise in deduction n48 . Actually, the Federal Court required that the Industrial Court should take into account all factors including the fact, where exists, that the workman had been gainfully employed elsewhere after his dismissal.

Thirdly, the Federal Court is very clear that the fact that the employee was gainfully employed after his dismissal must be established by evidence or admission by the workman. It follows, therefore, that in the absence of proof or admission of the fact that the workman had indeed been gainfully employed; such a workman may be entitled to his full back wages n49 .

Finally, the Federal Court stated that the discretion exercised by the Industrial Court is in the nature of a decision making process, and therefore, the exercise of the discretion is subject to judicial review on the grounds of jurisdictional errors.

In other words, in reviewing, the Reviewing Courts would have to rely on jurisdictional errors of law as innunciated by Lord Reid in Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 n50 . This is an enabling provision since any inequity perceived by the aggrieved employee or the employer by the exercise of discretion by the Industrial Court can seek review of its discretion for the purpose of quashing it in certiorari proceedings.

Conclusion

Our analysis in this article clearly reveals that consistency is conspicuous by its absence in the awards of the Industrial Court on migration of loss. In fact, one wonders whether the wide-ranging variations in the quantum of monetary compensation awarded by our Courts could ever be justified even under the Federal Court dispensation that the quantum is very much a matter of discretion which the industrial court is fully empowered to fix under s 30 (5) of the Industrial Relations Act 1996 n51 . On the other hand, it is not surprising because, in the author's opinion, it may be attributed to the industrial adjudicators' predilections and idiosyncrasies. In pursuing this proposition the author would like to highlight the irony that the Industrial Court set up under the industrial law on employer-employee relations had
itself initiated action, sometimes without jurisdiction, which worked out to the great disadvantage of the workman in Malaysia.

For example, it was the Industrial Court in Dr A Dutt v Assunta Hospital case n52 that ordered payment of compensation in lieu of reinstatement when the power to award this alternative remedy was nowhere found within the four corners of the Industrial Relations Act 1967. This transgression was subsequently legitimized by the Federal Court n53

Secondly it was the Industrial Court administering industrial law that initiated deduction from the employer’s entitlement to full back wages on the common law principle of mitigation of damages n54. Even the operationalisation of the principle of mitigation of loss as expressed by the Industrial Court in Sykt Eastern Smelting case n55 bears ample testimony to the harshness of the common law application under the industrial law. It may be recalled that when the unjustly dismissed employee, during the interim period, had not made all the reasonable effort to search for a gainful employment or had unreasonably refused employment offered, then it would be assumed that other reasonable employment would have yielded earnings equal to the earnings of the employee in the job from which he was dismissed and that assumed amount would be deducted from the back wages on account of mitigation of loss.

Thirdly when the High Court in Taylor’s College case n56 outlawed the application of the principle of mitigation of damages in industrial law cases, once again it was the Industrial Court in Kama Morris case n57 that restored mitigation of loss through the backdoor under the guise of equity and good conscience.

Fourthly when the power of the Industrial Court to mitigate damages was clipped by the High Court ruling and the Industrial Court did not find any legal avenue to minimize the financial burden on the employer, it had recourse to administrative direction to limit the payment of back wages to a maximum of 24 months.

Fifthly violating its own Practice Direction some Industrial Courts instead of limiting the deduction to not more than 50% of the earnings of the unjustly dismissed employee on his alternative employment, took to the easy way of reducing the back wages by 50 per cent avoiding the trouble of calculating his earnings. Often times the Industrial Court first limited the back wages to 24 months and then deducted from the balance a percentage of it for mitigation of loss. The same method was followed in limiting the back wages to 24 months and then deducting a percentage out of it for contributory cause or sometimes all deductions were made not on back wages alone but on the combined total of back wages limited to 24 months and payment of compensation on the retrenchment principle.

Thus there has been an endless stream of inequities heaped on the workman who has been unjustly dismissed by the employer in the first place. Be that as it may, we conclude this article with a few suggestions to set right the situation.

While Chairman Lim Heng Seng in Tanjung Manis case n58 talks enthusiastically about the prophylactic effect of awarding reinstatement instead of payment of compensation to mitigate the inequities experienced by the unfairly dismissed workman, the author is of the view that it should be considered in conjunction with a proposal to provide an incentive for the employers to prefer reinstatement to payment of compensation. Such a proposal should include elimination of both the limitation of 24 months on back wages and payment of compensation on retrenchment principle either by law or by litigation. Alternatively, since it was the Industrial Court that initiated deductions on these two counts, it is up to the Presiding officers of the Court to plan a strategic withdrawal of their Practice Directions. The crowning glory of such constructive efforts should be the introduction of a fair and effective pre-dismissal inquiry as a necessary pre-condition for dismissal of a workman. This will help the employer to weed out weak dismissal cases and will pave the way for effective conciliation by the Industrial Relations Department, contribute toward meaningful Ministerial reference to the Court and expedite the adjudication process in the Industrial Court. It should be underscored that it is within the jurisdiction of the Industrial Court to initiate action to implement this aforementioned suggestion also. n59
Finally it is generally agreed that the tendency on the part of the employer to relentlessly pursue the process of judicial review of the Court's awards to its limits needs to be discouraged. It is needless to say that the establishment of the proposed Industrial Appellate Court with dedicated Judges applying industrial law in administering justice to the parties to the disputes would substantially serve the purpose.

Return to Text

FOOTNOTES:

n1 Section 20 Representations on dismissals:
(1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.
(1A) The Director General shall not entertain any representations under subsection (1) unless such representations are filed within sixty days of the dismissal:

Provided that were a workman is dismissed with notice he may file a representation at any time during the period of such notice but not later than sixty days from the expiry thereof.
(2) Upon receipt of the representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at; where the Director General is satisfied that there is no likelihood of the representations being settled, he shall notify the Minister accordingly.
(3) Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the Court for an award.
(4) Where an award has been made under subsection (3), the award shall operate as a bar to any action for damages by the workman in any court in respect of wrongful dismissal.

n2 Dr A Dutt v Assunta Hospital [1981] I MLJ 304.

n3 Even the Industrial Court Chairman Lim Heng Seng candidly admitted in his award in Nestle Food Storage [Sabah] Sdn Bhd v Terrence Tan Nyang Yin [2001] 2 ILR 302; [Award No 390 of 2001] that in Malaysia, "reinstatement in Industrial Adjudication is no longer the normal or the usual or the general remedy regularly granted by the court". In fact statistics furnished by the Ministry of Human Resources confirm that between 1992 and 1998 reinstatement was awarded in less than 9 percent of the total 1964 dismissal cases decided in favour the workmen, and in 1994 and 1995 this percentage figure dipped to as low as 4 and 4.3 respectively [12 out of 288 and 13 out of 300]. Reinstatement is fast becoming a lost remedy in Malaysia.


n5 Mills, CP, Industrial Dispute Law in Malaysia, Malayan Law Journal Sdn Bhd Kuala Lumpur 1984, at
n6 Ibid, at p 132.

n7 Mills, CP, Supra n 17 p 132.

n8 Supra n 2.

n9 Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers [1979] I LNS 32.


n11 Ter Ah Chai v The Times Packaging Co Sdn Bhd & Anor [1998] 4 CLJ 923; HC.


n14 Utusan Melayu case Supra n 35 and Associated Motor Industries (M) Sdn Bhd and v Chan Hock Liong[1997] I ILR 986; [Award No 185 of 1997].

n15 It is Interesting that this suggestion has come from the Industrial Court Chairman in Chan Hock Liong v Associated Motor Industries (M) Sdn Bhd HC [1998] 3 CLJ Supp 104 at p 114;

"If indeed the Industrial Court had no jurisdiction to limit the backwages to 2 years, the proper action, in my view, is an application for certiorari to quash the award, not an application under S 33(2) of the Act [to vary the award] per at p 114".


n17 Casurina Beach Hotel v National Union of Hotel, Bar and Restaurant Workers [1982] 1LR230 [Award No 74 of 1981].


Only in RRamachandran v The Industrial Court of Malaysia[1997] 1 MLJ 145, the Federal Court, for the first time, ordered payment of wages for 39 months to compensate the claimant for the loss of his income till his age of retirement.


Industrial Tribunals in India consider it improper to limit the compensation payment in lieu of reinstatement to the compensation payable in the case of lawful retrenchment because dismissal cannot be equated with lawful retrenchment. Malhotra says that "termination of service as a punishment inflicted by way of disciplinary action has been specifically excluded from the definition of retrenchment. There is, therefore, no scope for allowing retrenchment compensation in such cases."
n21 Factors gathered from both *Malhotra*, *supra* n 20 at p 940 and *Koperasi Serbaguna Sanya Bhd, [Sabha] v Dr James Alfred [Sabha] and Anor* CA[2000] 3 CLJ 758, at p 767.

n22 *Supra*, n 16, at p 943.

n23 *Supra*, n 19

n24 *Taylor’s College [MS] Associates Sdn Bhd v Puan Yong Show Foi & 2 Ors* HC Civil appeal no R-8-16-11 of 1987 [ Unreported].


n27 *Kama Morris Sdn Bhd v Lee Chwee Say*[1990] 1 ILR 435 ; [Award no 116 of 1990].

n28 Two other cases in which the Industrial Court followed *Kama Morris* rationale are the following:

(a) In *Ireka Construction Bhd v Chantiravathan* [1995] 2 ILR, the Chairman of the Court concucluded that "since the employee obtained employment soon after his dismissal with similar if not better earnings, I think it is fair and reasonable to deduct 20% from the amount under back wages"; but he left the compensation amount untouched.

(b) In *Autoserve Sdn Bhd v Lim Beng Cheng*[1991] 1 LR 411 [Award No 120 of 1991] the Chairman stated that "as the claimant was able to secure employment at a reasonable salary soon after his dismissal, I would think it fair and reasonable to make a deduction of 30% from the amount under back wages". In this award though payment of compensation was ordered no deductions were made in that amount.

n29 *Devis & Sons v Atkins* [1977] ACT 931.


n31 *Syarikat Nam Lee Sdn Bhd, Kelang v Kok Kiow* [1985] 1 ILR 827.

n32 *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd*[1995] 3 CLJ 344.

n33 *UMW Toyota Motor Sdn Bhd v Chong Phui Lim @ Anthony Chong* [1996] 2 ILR 750; [Award No. 380 of 1996].

n34 Back wages RM 4000 x 24 = RM 96,000

Compensation RM 4000 x 13 = RM 52,000

Total monetary compensation = RM 148,000

Less 75 per cent = RM 111,000

To be paid to claimant = RM 37,000 [Vide Supra, n 34].

n35 *Kesatuan Pekerja - Pekerja Perkayuan v Malayan Veneer Bhd Klung, Johor* [Award No. 36 of 1981].

n36 (a) *Bumimedic [Malaysia] Sdn Bhd v Mohamed Pakri Osman* [2004] 2 ILR 997; [Award No 739 of
In this case, the Court limited the back wages to 24 months when the duration of the interim period exceeded 8 years, and ordered a deduction of 50 percent out of the combined total of back wages and payment of compensation on account of the claimant's contributory conduct.

(b) *Kiwi Brands [Malaysia] Sdn Bnd v Ng Peng Soon* [2004] 1 ILR 927; [Award No 938 of 2003].

In this case the Court limited the back wages to 24 months when the duration of the interim period far exceeded 5 years [actually 70 months] and ordered a deduction of 30 percent of the back wages, not of the earnings of the claimant on his alternative employment on account of mitigation of loss.


n38 *New Straits Times Sdn Bhd v Bun Sri Na Nagara* [1993] 1 ILR 350; [Award No 148 of 1993].

n39 *Pelangi Enterprises Sdn Bhd v Oh Swee Choo* [2001] I ILR 492; [Award No 115 of 2001].

n40 *NST Management Services Sdn Bhd v Eddy Lok Aun Kheng* [2002] 3 ILR 1209; [Award No 1064 of 2002].


Monetary Compensation was calculated as under

Back wages RM 5500 x 55 Months = RM 302,500

Entire post-dismissal earnings = RM 260,250

Balance of back wages after deduction = RM 42,250

Compensation RM 5500 x 1 Month = RM 5,500

Total payment = RM 47,750

n42 *Dr James Alfred [Sabah] v Koperasi Serbaguna Sanya Bhd [Sabah] & Anor* [2001] 3 CLJ 541 FC.

n43 *Koperasi Serbaguna Sanya Bhd [Sabah] v Dr James Alfred [Sabah] & Anor* [2000] 3 CLJ 758, CA.

n44 *Koperasi Serbaguna Sanya Bhd v Dr James Alfred* [Award No 376 of 1996].


n46 *Talasco Insurance case Supra n 4, at pp 174 -76.*

In this case the Industrial Court in reviewing the practice of granting monetary compensation in other jurisdictions [in India, Sri Lanka, Australia and United Kingdom] stated that an award on the quantum of compensation ought to be made in a spirit of fairness following rules of justice and reason and a proper balance has to be maintained between the conflicting claims of the employer and employee without jeopardizing the larger interest of industrial peace and progress and the requirements of social justice" [Chairman Sachithanandhan].

"When there is no proof or admission of the fact that a workman had indeed been gainfully employed elasewhere, such a workman may be entitled to his full backwages."

In this case Lord Reid's speech reads as follows:

It has sometimes been said that it is only where a Tribunal acts without jurisdiction that its decision is a nullity. But there are many cases where, although the Tribunal has jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it has no power to make. It may have failed in the course of the inquiry to comply with the requirement of natural justice. ... It may have refused to take into account something which it was required to take into account or it may have based its decision on some mater which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.