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POWER OF INDUSTRIAL COURT TO AWARD COSTS IN CLAIMS FOR DISMISSAL WITHOUT JUST CAUSE OR EXCUSE

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Introduction

A worker in the private sector is accorded job security pursuant to section 20 of the Industrial Relations Act 1967 ("IRA") where his 'property right' should not be deprived of save for just cause or excuse. The employer's prerogative to dismiss an employee on grounds of misconduct or due to redundancy in the organisation is equally recognised. However, where dismissal is contemplated the requirement of substantive justification and procedural fairness must be strictly adhered to by the employer. An employee who alleges unfair dismissal from employment may have his grievance litigated in the Industrial Court. The burden is on the employer to prove that he has just cause or excuse for taking the decision to impose the disciplinary measure of dismissal upon the employee. Adequate evidence must be produced to substantiate the allegation against the employee such as misconduct, negligence or poor performance, among others.

It is undeniable that the aggrieved employee would incur costs to bring a claim in the Industrial Court against the employer for dismissal without just cause or excuse. The employer would also incur costs to defend themselves from the employee's claim that the dismissal was without just cause or excuse. Hence, the issue that forms the basis of this article is whether the costs incurred by either party in bringing or defending their claims for unfair dismissal would be recoverable. In plain English, 'costs' would mean fees, charges, disbursements, expenses and remuneration.¹ In the context of legal proceedings, 'costs' would generally mean the charges which a solicitor is entitled to make and recover as remuneration for his professional services,

including the provision of legal advice, attendance in court, the drafting and copying of documents and conducting legal proceedings, among others. It too means the expenses which a successful litigant would be entitled to recover from the other side by reason of his being a party to legal proceedings. Such expenses include the court fees and the reasonable and proper charges and fees of the solicitor, if the party had been represented by a solicitor.

The awarding of costs is at the discretion of the court and the amount to be awarded must be reasonable which generally would depend on the nature and extent of any disputed issues. It cannot be denied that litigating a dispute in the court is an expensive affair and in some cases it might even involve the litigant's life savings as the vast majority of people are in the lower and middle income bracket.² Hence, the expenses incurred by the succeeding party to establish his claim in the courts must be recoverable from the unsuccessful party. In certain circumstances, the courts have even made the solicitors liable to bear the costs of litigation especially when it was disclosed that it was the solicitor who instigated the filing or defending of the unmeritorious application. In *Dato' Ting Cheek Sii v Mohamad Tufail bin Mahmud & Ors*,³ Hamid Sultan Abu Backer JC stated: 'Any solicitor who takes unmeritorious procedural objections must be made liable to pay costs personally. Such an order will arrest procedural skirmishes in limine and pave way for cases to be heard on merits and this will also be a good step to reduce backlog of cases, as it will act as a deterrent to file unmeritorious application or raise objections.'

Dismissal without just cause or excuse: Adjudication in the Industrial Court

A claim for dismissal without just cause or excuse pursuant to section 20(1) of the IRA will pass

2 In *R Rama Chandran v Industrial Court of Malaysia and Anor* [1997] 1 MLJ 145, Eusoff Chin CJ stated: 'Employers can certainly afford to employ a number of lawyers and prolong litigation and thereby tiring out the workers. The poor workman can ill afford a lawyer or prolong litigation because this will lead to immense hardship, suffering and exorbitant expenses.'

3 [2007] 5 MLJ 339. See also *Sabu Development Sdn Bhd v Kelik Anak Bayel* [2007] 8 MLJ 264.

1 Order 59 rule 1(1) of the Rules of the Court 2012.

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different levels, namely, the conciliatory level (where the Director General of the Industrial Relations Department seeks to conciliate over the dispute), reporting level (where the Director General reports to the Honourable Minister after finding the dispute irreconcilable), referral level (where the Honourable Minister decides whether or not to refer the dispute to the Industrial Court), and the adjudicatory level at the Industrial Court.⁴ Where the representation has been referred to the Industrial Court, the court shall before setting the matter down for trial, hold a case management involving the disputants and their counsel, which serves to prepare the parties for trial by identifying inter alia, the essential issues.

At this stage, the chairman assigned to hear the matter would issue the following possible directives: (i) directing the parties to mediate their dispute or offering mediation services to the parties with a view of speedy disposal of the dispute;⁵ (ii) directing the parties to furnish particulars of their claim and/or the filing of pleadings; (iii) requiring the parties to formulate and settle the principal issues to be determined at the trial;⁶ (iv) ordering the parties to deliver their respective list of documents that may be used at the trial of the action; (v) directing the parties to furnish to the court and to exchange between themselves a bundle containing each of their respective documents;⁷ (vi) directing the parties to exchange and file a statement of agreed facts; (vii) limiting the number of witnesses that each party to the action may call at the trial; (viii) ordering the administration of interrogatories;⁸ (ix) fixing a date for the hearing of the action; (x) directing the parties to file the witness statements, for example,

when there is difficulty in tracing the witnesses;⁹ and (xii) dealing with all the applications for amendments to the pleadings,¹⁰ among others.

Within fourteen days of the date fixed for hearing, the parties will be required to submit an agreed bundle of documents relating to the case and an agreed statement of facts if any, which shall form part of the documentary evidence.¹¹ Furthermore, the chairman may, if he thinks fit, permit any party to state the evidence of its witness by way of affidavit and/or affidavit-in-reply at least one month before the date of hearing. If such a course is taken, the chairman shall, on an application to be made by the opposite party within fourteen days of service of the affidavit, require the deponent of such affidavit to be present and be examined orally at the hearing.¹² Such affidavit and examination arising therefrom shall form part of the record and proceedings of the Court.¹³

The taking of 'witness statements' is also encouraged which is mainly to expedite the hearing of a case. The court may also, if it appears desirable in the interests of justice and upon an application being made, order by way of summons any party: (a) to state on oath orally or by affidavit about documents he has or he has had in his possession or power relating to the matters in question; and (b) to produce any documents in his possession or power.¹⁴

At the trial of the matter, the President or the Chairman, as the case may be, shall call upon such party, as he may think fit, to state his case and to adduce evidence, if any, in support thereof. The opposite party shall thereafter state his case and adduce evidence, if any, in support thereof. The first party shall then be at liberty to reply to the matters raised by the opposite party and thereafter the opposite party shall be at liberty to reply to the matters raised by the first party in his reply.¹⁵

4 See Ashgar Ali Ali Mohamed, Dismissal from Employment and the Remedies, Second Edition (2014, LexisNexis (M) Sdn Bhd. Petaling Jaya).

5 See *WRP Asia Pacific Sdn Bhd v Norsa'ida Abdul Ghani* [2005] 3 ILR 268j.

6 See *Tecomax (M) Sdn Bhd v Lee Choon Keong* [2005] 2 ILR 725.

7 See *Carling Air Compressor Sdn Bhd v Leong Chee Kuen* [2005] 2 ILR 128.

8 See *Yano Electronics (M) Sdn Bhd v Fazila Bahadin* [2006] 3 ILR 1570. In this case, the Industrial Court in allowing the company to administer interrogatories to the claimant, states: 'any steps that are taken "to reduce the issues or the length of trial and the saving of time and cost" should always be encouraged. This stand or spirit must be allowed to supersede any technicalities or legal form that may be found to be restrictive or prohibitive in any statutory form or guise.'

9 See *Southern Bank Berhad v Johnny Phun Chye Jin* [2008] 1 ILR 323.

10 See *Dectra Sdn Bhd v Cynthia Geraldine De Castro* [2005] 3 ILR 261. See *Abdul Malik Ishak*, 'Summons for Directions and Other Related Issues Together With Case Management: A Synopsis' [2004] 3 MLJ lxxxiii.

11 See Industrial Court Rules 1967, rule 21A(1).

12 *ibid*, rule 21A(2).

13 *ibid*, rule 21A(3).

14 *ibid*, rule 21B(1).

15 *ibid*, rule 22.



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In relation to the examination of witnesses, the Industrial Court relies on section 137 of the Evidence Act 1950 which deals with examination of witness. This is because there are no specific provisions in either the IRA or in the Industrial Court Rules 1967 on the production and examination of witnesses. Section 137 provides that the examination of a witness by the party who calls him would be called an examination-in-chief. The examination of a witness by the adverse party shall be called a cross-examination and where a witness has been cross-examined and is then examined by the party who called him, such examination would be called a re-examination.

It is worth noting that the employer bears the burden to demonstrate the reason for the employee's dismissal. Whether or not the dismissal was with or without just cause or excuse depends entirely on the reasons shown by the employer at the time of the employee's dismissal and the employer is at liberty to call on any witnesses or adduce any documents.¹⁶ If the employer has alleged that the claimant had resigned voluntarily from the company or had abandoned the job, the employer then has to prove that the claimant had abandoned his job.¹⁷ Again, if the employer provides redundancy as the reason for the termination, it is incumbent upon the employer to prove that there was indeed redundancy in the organisation that led to the retrenchment exercise and that the consequential retrenchment was made in compliance with accepted standards of procedure.¹⁸

If the grounds for dismissal was misconduct, it is incumbent upon the employer to prove that the claimant had committed acts of misconduct, for example, intentionally falsified the attendance,¹⁹ medical record,²⁰ company's accounting record²¹ or committed thefts of its properties,²² among others. Where the reason for the dismissal was on grounds of alleged sexual harassment, the company must adduce convincing evidence to establish the alleged acts of sexual harassment.

However, in certain circumstances the burden of proving the dismissal lies on the claimant. In cases of indirect or constructive dismissal, the burden is on the claimant to establish, on a balance of probabilities that the employer has committed the breach. For example, the transfer or demotion order was proven to be tainted with mala fide. Again, if the claimant alleges that he was coerced to sign a resignation letter or that he had signed a document which later turns out to be a resignation letter, the burden is on him to establish that the resignation was not voluntary but forced upon him by the employer.²³

The court shall, upon hearing all concerned parties and the evidence presented, make a decision based on the evidence collected.²⁴ The court will also ascertain whether the employer has acted reasonably or unreasonably in treating the reasons as sufficient to warrant the dismissal. If the

16 This is in line with article 9(2) of the ILO's Convention Concerning Termination of Employment at the Initiative of the Employer (Convention No. 158 of 1982) which provides: 'in order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities: (a) the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer; (b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice.'

17 See *Pempena Sdn Bhd v Ahmad Zubaidee Yusof Omar* [2007] 1 ILR 320.

18 See *Transnorm System Sdn Bhd v Mollyza Abdul Majid* [2003] 3 ILR 1400; *Heap Loong Poultry Farm Sdn Bhd v Tan Ah Bah* [2005] 3 ILR 558.

19 See *Sony Electronics (M) Sdn Bhd v Zarina Abdul Latif* [2007] 2 ILR 228.

20 See *Sime Bank Bhd v Mohd Shaib Md Yusof* [2003] 2 ILR 530. In *Ibrahim Abdul Hamid v Malaysia Airline Systems Bhd (MAS)* [2013] 2 LNS 1650, the claimant's dismissal for allegedly submitting forged medical certificate was held as reasonable. The Industrial Court noted that, 'it was only proper and right that the employer terminated his services. It is not wrong for the Company to require a degree of integrity and honesty that the Claimant as a Security Officer for some years was expected to show and discharge. That trust has been displaced when the Claimant commits such an act. It matters less whether he knew that the medical certificate was false or not.'

21 See *Maybank, Johor v Mohd Najib Salim* [1997] 3 ILR 435.

22 See *Press Metal Berhad v Mustafa Ngamil & Anor* [2007] 3 ILR 251.

23 See *Food Specialities (M) Sdn Bhd v M Halim Manap @ Abd Manaf* [1992] 2 ILR 311; *Hotel Grand Continental Johor Bahru v Sim Chee Kheong* [2006] 2 ILJU 111.

24 *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129.



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employer fails to discharge the burden, the court would then declare that the claimant's dismissal was without just cause or excuse. Likewise, if the employee failed to establish his alleged constructive dismissal, the court will hold his dismissal to be with just cause or excuse. Furthermore, any party who are unhappy or dissatisfied with the decision of the Industrial Court may file a judicial review application against the said decision in the High Court.

It is obvious from the above that the proceeding before the Industrial Court is adversarial in nature. The course of the trial is controlled by the parties through their advocates and parts of the litigation proceedings would include investigating and preparing for the court proceedings. During the trial, the parties may decide on the evidence that would be introduced to support their case or claim. Parties who engage a lawyer to bring or defend an unfair dismissal claim in court will incur expenses which would include the fees for engaging a lawyer, court filing and processing fees, experts, consultants and witness fees, process servers fee and miscellaneous expenses such as travel expenses, photocopying, postage and telephone charges among others.²⁵ The question however is whether such expenses are recoverable.

At this juncture, it would be worthwhile to note the distinction between professional legal fees and the court awarded costs. The former is what a person would have to pay for his lawyer to carry out the work for him, while the latter is what the court would usually award when a person succeeds with his claim or defence. Basically, the court awarded costs are intended to reimburse the successful party for the expenses incurred in having to claim or defend his case in court and the amount given would be assessed and determined by the judge based on several factors such as the complexity of the case, the skill and the specialised knowledge of the counsel among others.²⁶

Costs for bringing or defending unfair dismissal claims

In the civil courts, awarding costs is at the discretion of the court and the general principle is that costs are to follow the event. The successful party is entitled to be paid costs unless there are special

grounds to order otherwise. Item 15 of the Schedule in the Courts of Judicature Act 1964 conferred power on the High Court to award costs. The procedure on awarding costs and the scale of costs are contained in Order 59 of the Rules of Court 2012 and Appendix 1 to the Order, respectively. The general rule in awarding costs is set out in Order 59 rule 3: "If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other Order should be made as to the whole or any part of the costs." This means that unless there are express and specific reasons why an order for costs should not be made, the successful party should receive the costs.

In *Re Elgindata Ltd (No 2)*,²⁷ Nourse LJ stated: "Costs are in the discretion of the court. They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs."

In exercising its discretion, the court would normally take into account factors such as any offer of settlement, the conduct of the parties including conduct before and during the proceedings, the conduct of the parties in relation to any attempts at resolving the cause or matter by mediation or any other means of dispute resolution and in particular, the extent to which the parties have followed any relevant pre-action protocol or practise direction for the time being issued by the Registrar.²⁸ In certain circumstances however the court may decide that there would be no order as to costs and this would mean that each party will end up paying its own costs of the proceedings.

However, the power of the Industrial Court to award costs is discussed below with reference to claims under section 20 of the IRA. It is common for a party to Industrial Court proceedings to ask whether or not they would be able to recover their costs from the opponent should they succeed in their claim. Where the unfair dismissal claim

²⁵ See Order 59 rule 1 of the Rules of Court 2012.

²⁶ See Fahri Azzat, 'The Distinction between Legal Fees and Court Costs' at http://www.malaysianbar.org.my/members_opinions_and_comments/the_distinction_between_legal_fees_and_court_costs.html

²⁷ [1993] 1 All ER 232, at p 237.

²⁸ Order 59 Rule 8 of the Rules of Court 2012.



is frivolous, unreasonable or groundless it would certainly involve time and money to defend. It is noteworthy that the Industrial court is clogged with backlog of dismissal cases and this has contributed to the delays in the dispensation of justice. Failure to observe the time schedule or the hearing dates,²⁹ unnecessary requests for adjournment,³⁰ postponement of cases,³¹ transfer of judge,³² and failure to effect service of process,³³ among others are some of the common factors that have contributed to the delay. The request for postponement or adjournment may be due to some genuine reasons such as illness of a party, family member or witness, unavailability of a key witness,

29 In *Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v Awang Soh bin Mamat & Ors* [2009] 4 MLJ 610, CA, James Foong FCJ observed: 'Waste of judicial time and resources undermines the efforts of the Judiciary to eradicate the backlog of cases faced by the courts'.

30 In *Anne Lim Keng See v Malayan Banking Berhad* [2009] 9 MLJ 502, Harmindar Singh Dhaliwal JC stated that: 'A case that is adjourned will have to be reallocated fresh trial dates which will affect other cases. The parties and the witnesses may become disillusioned after having taken time off and incurring expenses to be then told that the case is adjourned. As a consequence, public trust and confidence in the judicial system may be seriously impaired and undermined. For these reasons, it is imperative that once a case is set down for hearing, unless there are good and satisfactory reasons, there should be no adjournments. The reasons which are advanced for the purpose of seeking an adjournment must also emanate from circumstances beyond the control of the parties'.

31 In *Public Prosecutor v Foo Kim Lai* [2009] 1 MLJ 211, the High Court proceeded with the appeal notwithstanding the absence of the respondent. To postpone the case to a later date according to the Court, would only add to the backlog of cases for the court to dispose of.

32 In *Pembinaan Majujaya & 2 Ors v Lau Tiong IK Construction Sdn Bhd* [2008] 1 MLJU 17, Hamid Sultan Bin Abu Backer JC stated: '...courts are often inundated with much backlog of cases and more often than not, adjudicators are moved from one place to another with short notice and/or reach retirement age without making sure that the grounds of judgment are delivered before retirement and/or transfer'.

33 In *Castle Inn Sdn Bhd v Bumiputra-Commerce Bank Bhd* [2009] 1 MLJ 542, CA it was stated that, 'failure on the part of the plaintiff to effect expeditious service thereof would result in the Court being inundated with unserved writs, thereby contributing to the infamous backlog of cases'.

inability to locate the witness or document or that the parties are negotiating for settlement. A fair and timely access to justice may be significantly impaired when the request for postponement comes days before a hearing, on the day of the hearing itself or during the hearing which would undoubtedly burden the other party financially and such losses must be recoverable.

Power of Industrial Court to award costs

Section 62 of the IRA conferred power to the Minister to make regulations on matters enumerated therein and this includes the awarding of costs of proceedings before the Court.³⁴ Regulation 5 of the Industrial Relations Regulations 1967 has conferred the power to the President of the Industrial Court to make orders with respect to costs and expenses, including expenses of witnesses of proceedings before the Court. In practice, however, the awarding of costs by the Industrial Court seems to be the exception rather than the rule.³⁵ Generally, each party will bear their own costs even if the claimant is successful in bringing a claim against the respondent or the respondent, in defending their contention that the claimant's dismissal was with just cause or excuse. In *Standard Chartered Bank (Malaysia) Bhd v Standard Chartered Bank Officers Association*,³⁶ Yussof Ahmad, Chairman of the Industrial Court, stated: "It is indeed an established practice that the court does not order costs. Regulation 5 has not been implemented and it is not a mandatory regulation. The court while welcoming amicable settlement does not see anything wrong for a party to have its dispute adjudicated by the court. It should not punish a party for this.

34 Section 62(b) of the IRA provides: 'The Minister may make regulations for the purpose of carrying out or giving effect to this Act and in particular without prejudice to the generality of the foregoing, the regulations may:- (b) authorise the making of orders with respect to the costs and expenses including the expenses of witnesses of proceedings before the Court or Board.'

35 See *Shell Malaysia Trading Sdn Bhd / Shell Malaysia Limited v John Christopher Johns* [2007] 2 ILR 566; *Pernas International Holdings Bhd & Anor v National Union of Hotel, Bar & Restaurant Workers Peninsular Malaysia* [2003] 2 ILR 427 and *Standard Chartered Bank (Malaysia) Bhd v Standard Chartered Bank Officers Association* [2000] 3 ILR 316; *Sun Media Group Sdn Bhd v Ganesh Sahathevan* [2006] 2 ILR 1057.

36 [2000] 3 ILR 316.



It is noteworthy in cases such as where there was an application to struck off the lawsuit,³⁷ an amendment to the pleadings,³⁸ joinder of parties,³⁹ substitution of respondent⁴⁰ and variation of award,⁴¹ each of the parties had to bear their own costs. However, when recording the terms of consent award, the parties may agree on the payment of costs by the other⁴² or that each party would bear their own costs.⁴³ For example, in *Khairielnizan Othman v Wekajaya Sdn Bhd*,⁴⁴ respondent raised a preliminary objection requesting the court to strike out the claimant's representation

allegedly because the claimant had failed to comply with the mandatory time limit prescribed under section 20(1A) of the IRA. The application was however dismissed with no order as to costs. Again, in *Hanafi Salleh v Malaysia International Shipping Corporation Berhad*,⁴⁵ the claimant's request for postponement of the trial due to the death of a family member was allowed by the Court. However, the respondent's request for costs to offset their financial losses due to the abrupt postponement of the trial was declined as the claimant had genuine reasons to request for the postponement.

The Industrial Court has allowed the order as to costs in exceptional circumstances. However, there is no rule of thumb as to what amounts to exceptional circumstances as every case has to be assessed based upon its own particular circumstances. In *Teo Bee Hung v LJS Resources Sdn Bhd*,⁴⁶ the Industrial Court in dismissing the application for variation of the Award No. 1408 of 2007 ordered the applicant/respondent to pay costs to the claimant for the expenses borne by her to travel from Kapit to Sibu to attend the hearing of this application. Again, in *Sudirman Wan Mansor v Kelab Golf Sarawak*,⁴⁷ the Industrial Court invoked its power under regulation 5 and ordered the club to pay the claimant's costs and expenses for the air ticket and hotel accommodation in attending the reference in Kuching, Sarawak.

In fact, in several cases the chairman of the Industrial Court had proposed the awarding of costs to the respondent for defending an unmeritorious claim. In *Sama World Asia Sdn Bhd v Teh Soo Seng*,⁴⁸ Tan Yeak Hui, the chairman of the Industrial Court, stated: 'As there are no costs to be awarded against the losing employee there is no deterrent against the employee in pursuing claims that are weak and often after a few case management sessions found to be almost unsustainable. The reluctance by the higher paid employees to withdraw their claims against their former employers even though their cases may look weak is obvious. The question of costs has for years been a very sensitive issue and if left unresolved may also contribute towards clogging up the system thereby leading to more delays.' Again, in *Yano Electronics (M) Sdn Bhd v Fazila Bahadin*,⁴⁹

37 In *Chee Tan Bee Chin v Palmgold Corporation Sdn Bhd* [2018] 2 LNS 0710, the company applied to struck off the claimant's claim for dismissal without just cause or excuse the ground that wrong company was being brought by the Claimant to the Industrial Court. It was argued that the holding company, that is, Palmgold Corporation Sdn Bhd, is the right party to be brought to this Court. The Court disallows the company's application to strike off this case with no order as to costs.

38 In *Rudra Prasad Adhikari v Kentus Industry Sdn Bhd* [2018] 2 LNS 0854, the respondent application for an order to amend the Statement of Reply was allowed but there was no order as to costs.

39 In *Joo Chooi Me v Sampro Distribution Sdn Bhd* [2019] 2 LNS 0335, the claimant had applied for *inter alia* an order to join the company's holding company namely, Samchem Holdings Berhad as co-respondent to this action. The Industrial Court however, dismissed the claimant's application with no order as to costs.

40 In *Kong Ping Huz v Tan Sri Dato' Khoo Chai Kaa* [2018] 2 LNS 1505, the claimant's application for an order that Tan Sri Dato' Khoo Chai Kaa be substituted as the respondent in this case in place of the Federation of Hokkien Associations of Malaysia was allowed with no order as to costs.

41 In *Azilan Shhruddin v Shangri-La (KL) Sdn Bhd* [2014] 4 ILJ 338, the applicant applied for a variation of Award No. 635 of 2010 to include the seventh collective agreement which was not brought to the attention of the court when the application for non-compliance was heard. The respondent who had no objection to this application had prayed that costs of RM2,000.00 be awarded in favour of the respondent. While approving the application for variation, the court did not award any costs.

42 In *Jeffrey Tan Lai Hock v Chevron Malaysia Limited* [2014] 2 LNS 1365, the parties amicably resolved their case and among the terms of the consent award was that the company agreed to pay the sum RM25,000.00 as legal costs to the claimant.

43 See *Paul Si Poh Lim v Tribune Press Sdn Bhd* [2013] 2 LNS 1491.

44 [2007] 1 ILR 49.

45 [2012] 2 LNS 0257.

46 [2008] 1 ILR 411.

47 [2007] 4 ILR 501.

48 [2008] 1 ILR 112, at p 124; See also *Mother's Nursing Home v Pakiam Veerappan* [2000] 2 ILR 580.

49 [2008] 1 ILR 317.



the Industrial Court stated that litigants should not have the uncontrolled use of a trial judge's time. 'This court would have failed in its duty if it does not jealously guard the usage of judicial time and resources especially in the Industrial Court where no cost is imposed upon litigants pursuing at times glaringly frivolous issues without merits.'

In light of the above, it is submitted that the Industrial Court should award costs which flow with the result of litigation or costs which follow the event. The awarding of costs is necessary since the claimant, in enforcing his job security or the respondent, in defending their claim that the claimant's dismissal was with just cause would definitely incur costs, it is only fair that the succeeding party is awarded the party-to-party costs.⁵⁰

It may be added that a party aggrieved with the award of the Industrial Court may question the award in the High Court by way of judicial review.⁵¹ The award of the Industrial Court may successfully be challenged for excess or lack of jurisdiction, error of law on the face of the record, breach of the rules of natural justice or where the determination was procured by fraud, collusion or perjury, and as noted earlier, the High Court has the discretion to award costs to the successful party.⁵²

50 Party to party costs are intended to reimburse the successful party for legal costs which they have paid or owe to their solicitor: <http://www.olsc.nsw.gov.au/Documents/Fact%20Sheet%203%20Types%20of%20costs%20July2015%20AC.pdf>

51 The judicial review power of the High Court is contained in section 25, read together with paragraph 1 of the Schedule of the Courts of Judicature Act 1964. The procedure involved in judicial review application is governed by the Specific Relief Act 1950 and Order 53 of the Rules of the Court 2012.

52 See *Chan Hock Liong v Associated Motor Industries (M) Sdn Bhd* [2008] 1 ILR 249, CA; *Marulee (M) Sdn Bhd v Menteri Sumber Manusia & Anor* [2008] 1 ILR 260; *Mohd Baharin Hj Abu v Perbadanan Perwira Harta Malaysia & Anor* [2008] 1 ILR 277; *Telekom Malaysia Bhd v Ramli Akim* [2008] 1 ILR 288; *Josephine Banun Pako v Hong Leong Bank Bhd* [2008] 7 CLJ 699; *Abu Samah Othman v Oriental Assemblers Sdn Bhd* [2007] 3 ILR 1; *Dr David Vanniasingham Ramanathan v Subang Jaya Medical Centre Sdn Bhd* [2007] 1 MLJ 713; *Exxon Chemical (Malaysia) Sdn Bhd v Menteri Sumber Manusia, Malaysia & Ors* [2007] 3 MLJ 1; *K A Sanduran Nehru Ratnam v I-Berhad* [2007] 2 MLJ 430; *Menteri Sumber Manusia v John Hancock Life Insurance (Malaysia) Bhd & Another Appeal* [2007] 1 ILR 274.

Awarding costs to successful litigant: The practice in other jurisdictions

The practise of awarding costs to succeeding litigants for bringing or defending the unfair dismissal claim in other jurisdictions is discussed below.

(i) United Kingdom

In the United Kingdom, the Employment Tribunal is empowered to award costs to party succeeding in bringing or defending a claim involving unfair dismissal. Regulation 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides that the Tribunal may award costs in the following circumstances: (i) a party, or their representative, has acted vexatiously, abusively, disruptively, or otherwise unreasonably in the bringing or conducting of the proceedings, (ii) a claim or defence to a claim made in the proceedings had no reasonable prospect of success, (iii) a party was in breach of any order or practise direction given by the Tribunal, or (iv) a hearing was postponed or adjourned on the application of a party.⁵³

Further, the procedure to apply for costs is contained in regulation 77. It provides: 'A party may

53 Regulation 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides: "(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that - (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or (b) any claim or response had no reasonable prospect of success.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if - (a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and (b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.



apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.’ While the amount of a costs order is contained in regulation 78. It provides:

‘(1) A costs order may –

- (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;
- (b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993(23), or by an Employment Judge applying the same principles;
- (c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;
- (d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or
- (e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.’

(ii) Canada

In Canada, if the complainant is successful, the adjudicator has the power to order the employer to pay some or all of the complainant’s costs. This power is derived pursuant to section 242(4)(c) of the Canadian Labour Code which provides: ‘Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to - (a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person; (b) reinstate the person in his employ; and (c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.’

In *Banca Nazionale Del Lavoro of Canada Ltd v Lee-Shanok*,⁵⁴ the applicant contended, inter alia, that an adjudicator had no authority to award costs in an unfair dismissal proceeding under the Canada Labour Code. In rejecting that argument, Stone J stated:

‘I will not repeat what I have already said on the construction of paragraph (c). I have difficulty in reading it, with its broad reference to granting relief that is “equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal”, as including the power to award costs. The difficulty I have is in viewing an award of compensation, gained at some considerable expense to a complainant in terms of legal costs, as to have the effect of making him whole. Legal costs incurred would effectively reduce compensation for lost remuneration, while their allowance would appear to remedy or, at least, to counteract a consequence of the dismissal. I am not persuaded by the Applicant’s contention that paragraph (c) does not permit an award of costs because the only pecuniary award contemplated by Parliament is compensation as provided for in paragraph (a). I understand paragraph (c) as extending the range of possible remedies somewhat beyond those already specified in paragraphs (a) and (b). While we are not called upon here to define its true breadth, I am satisfied that it does surely embrace the awarding of costs to a successful complainant in appropriate circumstances.’

⁵⁴ (1988) 87 NR 178.



Hence, when making the closing arguments the complainant may ask the adjudicator for costs in the event the dismissal is found to have been unjust.

(iii) New Zealand

In New Zealand, the successful party would receive an award of costs against the other party. The power of the Employment Relations Authority to order any party to pay the costs of any other party is set out in clause 15 of the second schedule to the Employment Relations Act 2000. This power will be exercised if the parties are unable to agree on the issue of costs between themselves. Clause 15 of the second schedule provides: '(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable. (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable'.

Further, the Practice Note No 2 entitled: 'Costs in the Employment Relations Authority' provides: 'Parties to proceedings in the Authority ought always to remember in evaluating their proceedings that if they are unsuccessful, they will almost always face the prospect of having to make a contribution to the costs of the successful party, as well as meeting their own costs... Generally, the presiding Member will discuss the costs regime at the case management conference if the issue appears to warrant such discussion, and Members will be ready to explain to parties, if requested, the principles that are used to apportion costs at the conclusion of an Authority investigation.'⁵⁵

(iv) Australia

In Australia, the disputants shall bear their own legal costs in a matter before the Fair Work Commission (FWC). However, the Fair Work Act 2009 empowers the Commission to order against a party to a matter for costs incurred by the other party to the matter if the FWC is satisfied that the first party caused those costs to be incurred because of an unreasonable act or omission of the first party in connection with the conduct or continuation of the matter.⁵⁶ The FWC may also order one party to an unfair dismissal matter to pay the other party's legal

or representational costs when the Commission is satisfied that the matter commenced or responded was vexatious or without reasonable cause, or with no reasonable prospect of success. In particular, section 401(1A) provides: "The FWC may make an order for costs against the representative for costs incurred by the other party to the matter if the FWC is satisfied that the representative caused those costs to be incurred because: (a) the representative encouraged the person to start, continue or respond to the matter and it should have been reasonably apparent that the person had no reasonable prospect of success in the matter; or (b) of an unreasonable act or omission of the representative in connection with the conduct or continuation of the matter."

The general provision on costs is also contained in section 611 where the above section provides:

"(1) A person must bear the person's own costs in relation to a matter before the Fair Work Commission.

(2) However, the Fair Work Commission may order a person (the first person) to bear some or all of the costs of another person in relation to an application to the Fair Work Commission if:

- (a) the Fair Work Commission is satisfied that the first person made the application, or the first person responded to the application, vexatiously or without reasonable cause; or
- (b) the Fair Work Commission is satisfied that it should have been reasonably apparent to the first person that the first person's application, or the first person's response to the application, had no reasonable prospect of success."

Further, the Fair Work Regulations 2009 includes a 'schedule of costs' which provides the Commission with guidance when exercising its jurisdiction to make an order for costs.

Conclusion

A party who brings or defends an unfair dismissal claim would undoubtedly incur expenses and as noted earlier, in some jurisdictions the unsuccessful party may have to face the prospect of having to make a contribution to the costs of the successful party and this is aside from meeting their own costs. In Malaysia however, although the Industrial Court has the power to award costs and expenses of witnesses appearing at the trial, it is seldom

⁵⁵ See Practice Note 2 at <https://www.era.govt.nz/assets/Uploads/ERA/ERA-Costs-Practice-Note-0616.pdf>

⁵⁶ Section 400A, Fair Work Act 2009.



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ordered. The practice however is that each party will bear their own legal fees whether they win or lose.

It is submitted that the awarding of costs by the Industrial Court should be made the rule rather than the exception, especially when either party had acted unreasonably in bringing or defending the claim or where the claim was vexatious or without reasonable cause, or with no reasonable prospect of success. It is further submitted that by awarding costs based on the outcome of the trial, the parties and their representatives would be more committed in finding an amicable solution to the dispute at the early neutral evaluation process carried out by the Settlement Chairman or an Assistant Registrar of the Industrial Court.⁵⁷

It should be noted that an early evaluation or assessment would be done based on the pleadings and other documents filed by the parties in the court, including the evidence and the legal arguments that may be raised by either parties at the early evaluation stage. All the documents and other matters raised will be critically reviewed and thereafter, the evaluator will provide an unbiased evaluation of the merits of each party's case. He would also give the parties some indication as to where they stand, and provide guidance on the most possible outcome if the case goes to trial. In other words, the parties will receive an assessment of the likeliest outcome of the case if it was heard by the court alongside the costs of that

57 See 'Early Neutral Evaluation' (www.buildingdisputestribunal.co.nz).

process.⁵⁸ It must be added that awarding costs should not be considered as a punishment or as an expression of disapproval of the unsuccessful party's conduct but rather to recompense the successful party for the expenses it had incurred either in enforcing his statutory rights or defending the stand taken.

As a final remark it would be worthwhile to heed the observation by YA Tan Yeak Hui, Chairman of the Industrial Court, in *Hotel Grand Continental Johor Bahru v Sim Chee Kheong*.⁵⁹

'Those who wish to take a gamble must be prepared to pay a premium. It would be most unfair and inequitable to allow or encourage a Claimant to indiscriminately drag his employer to Court without him fully appreciating the inconvenience and cost incurred by the employer. The fact that Claimants are not penalized with costs in the event of failure to prove their case should not be abused. There must be a balanced and level playing field in the arena of industrial adjudication. It is most essential that if confidence is to be maintained in the Industrial Court, the power balance between the parties must be closely guarded and maintained, in order that social justice be allowed to flourish.'

58 Mark A Myers 'What is an Early Evaluation of Case?' (www.resolutionsadr.com/id32.html).

59 [2006] 2 LNS 0530.