IN THE COURT OF APPEAL OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO. W-01(A)-83-02/2022

BETWEEN

ACE HOLDINGS BHD. [Co. No. 199201001872 (233376-H) ... APPELLANT

AND

1. NORAHAYU BT. RAHMAD (NRIC NO. 810624-04-5202)

2. INDUSTRIAL COURT, MALAYSIA ... RESPONDENTS

[In the High Court of Malaya at Kuala Lumpur
(Appellate and Special Powers Division)
Judicial Review No. WA-25-84-03/2021

Between

NORAHAYU BT. RAHMAD (NRIC NO. 810624-04-5202) ... APPLICANT

And

1. INDUSTRIAL COURT MALAYSIA
2. ACE HOLDINGS BHD.
   [Co. No. 199201001872 (233376-H) ... RESPONDENTS]

CORAM:

S. NANTHA BALAN, JCA

MARIANA BINTI YAHYA, JCA

WONG KIAN KHEONG, JCA

GROUNDS OF JUDGMENT

A. Background

1. The first respondent (**1st Respondent**) claimed that she had been appointed in 2018 by the appellant company (**Appellant**) to be the Appellant's Vice President. The Appellant however claimed that the 1st Respondent was not its employee but was instead an "*independent agent*" who had agreed to refer "*high net worth*" individuals to invest in its products and services in return for commission.

2. By way of a letter dated 1.4.2019, the Appellant terminated the 1st Respondent's appointment with effect from 28.3.2019 (**1st Respondent's Dismissal**).

3. The 1st Respondent filed Kuala Lumpur High Court Civil Suit No. WA-22NCvC-586-08/2019 on 20.8.2019 against, among others, the Appellant (**Civil Suit**). In the Civil Suit, the 1st Respondent had claimed for "*renewal commission fees*" amounting to RM1,149,680.00.

4. On 11.4.2019, the 1st Respondent made a written representation to the Director General for Industrial Relations (**DG**) pursuant to s 20(1) of the Industrial Relations Act 1967 (**IRA**) to be reinstated in her former employment with the Appellant (**1st Respondent's Representation**).

5. By way of a letter dated 29.8.2019, the DG informed the President of the Industrial Court (**IC**) that the Minister of Human Resources

(**Minister**) had decided to refer the 1st Respondent's Representation to IC for an award (**Minister's Reference**).

6. In IC, the 1st Respondent's Statement of Case (**SOC**) only applied for, among others, "*full wages and benefits*" from the date of the 1st Respondent's Dismissal. The SOC did not pray for a reinstatement of the 1st Respondent's former employment with the Appellant (**Reinstatement Remedy**).

7. On 13.12.2019, the Civil Suit was struck out by the High Court without any liberty for the 1st Respondent to file a fresh suit [**High Court's Striking Out Order (Civil Suit)**]. The 1st Respondent did not appeal to the Court of Appeal against the High Court's Striking Out Order (Civil Suit).

8. In IC -

   (1) the Appellant raised two preliminary objections (**2 POs**) before the learned Chairlady, namely -

      (a) the SOC was not properly e-filed and consequently, the proceedings in IC were defective (**1st PO**); and

      (b) the SOC only prayed for monetary relief and did not apply for a Reinstatement Remedy. Hence, IC had no jurisdiction to hear the 1st Respondent's claim (**2nd PO**); and

   (2) with regard to the 2 POs, the learned Chairlady directed the parties to file and serve -

      (a) affidavits; and

(b) written submissions; and

(3) the IC -

(a) dismissed the 1st PO; and

(b) accepted the 2nd PO. Hence, the 1st Respondent's claim in the IC was dismissed for want of jurisdiction (**IC's Award**).

B. Proceedings in High Court

9. On 18.5.2021, the 1st Respondent obtained leave of High Court to apply for a Judicial Review of IC's Award (**1st Respondent's Judicial Review Application**).

10. The High Court allowed the 1st Respondent's Judicial Review Application on 20.1.2022 with the following orders:

(1) an order of *certiorari* was issued to quash IC's Award;

(2) a declaration is granted that IC's Award is invalid, null and void;

(3) a *mandamus* order was granted to direct another learned Chairperson of IC to hear the 1st Respondent's claim on the merits; and

(4) the Appellant shall bear costs of the 1st Respondent's Judicial Review Application

(**High Court's Decision**).

11. According to the High Court's Decision, among others:

(1) the learned Chairlady committed an error of law in deciding that IC's "*threshold jurisdiction*" ceased to exist when the 1st Respondent failed to pray for a Reinstatement Remedy in the SOC. In this regard, the learned High Court Judge has followed the Court of Appeal's decision in **Sanbos (M) Sdn Bhd v Gan Soon Huat** [2021] 4 MLJ 924;

(2) the Appellant could not rely on the Federal Court case of **Unilever (M) Holdings Sdn Bhd v So Lai & Anor** [2015] 4 MLJ 326 because the facts of **Unilever** could be distinguished from the facts of this case;

(3) the IC is a creature of IRA. Consequently, the learned Chairlady could not decline jurisdiction to hear the 1st Respondent's claim which had been referred by the Minister to IC under s 20(3) IRA;

(4) the 1st Respondent's failure to apply for a Reinstatement Remedy in the SOC was not fatal because the IC had a discretion to grant a Reinstatement Remedy or otherwise;

(5) the learned Chairlady was under a duty to determine the 1st Respondent's claim on the merits and should not have dismissed the 1st Respondent's claim by way of a PO; and

(6) by dismissing the 1st Respondent's claim by way of a PO (without any hearing of the merits of the 1st Respondent's claim), the learned Chairlady was unable to determine whether

to grant a Reinstatement Remedy or monetary relief to the 1st Respondent.

12. The Appellant appealed to the Court of Appeal against the High Court's Decision (**This Appeal**).

13. On 19.5.2022, the Appellant obtained a stay of execution of the High Court's Decision pending the disposal of This Appeal [**Stay Order (High Court's Decision)**]

C. Issues

14. The main question in This Appeal [**Main Issue (This Appeal)**] is - if the Minister has referred a representation of a "*workman*" (defined in s 2 IRA) to IC, can IC dismiss the workman's claim without hearing the claim merely on the ground that IC has no jurisdiction to decide the claim because the workman's SOC has not applied for a Reinstatement Remedy? The determination of the Main Issue (This Appeal) involves a resolution of the following questions:

    (1) has the Federal Court in **Unilever** decided the Main Issue (This Appeal) in favour of the Appellant and if so -

        (a) whether the subsequent Court of Appeal's judgment in **Sanbos** is *per incuriam* the Federal Court's *ratio decidendi* in **Unilever** [***Ratio Decidendi* (Unilever)**]; and

        (b) is the *Ratio Decidendi* (Unilever) binding on the Court of Appeal with regard to This Appeal?;

    (2) if the *Ratio Decidendi* (Unilever) does not apply in This Appeal -

(a) whether a Minister's reference can only be quashed be way of a court order of *certiorari* and cannot be rendered redundant by a workman's abandonment of a Reinstatement Remedy in SOC;

(b) can a Minister's reference be rendered ineffectual by a public policy consideration that IC may be flooded by pure monetary claims of workmen (who do not apply for Reinstatement Remedies in SOCs); and

(c) as a matter of *stare decisis*, is the Court of Appeal in This Appeal and other appeals bound by the *ratio decidendi* of the Court of Appeal's judgment in **Sanbos** [***Ratio Decidendi* (Sanbos)**]?; and

(3) when the Minister has referred a workman's claim to IC, in the absence of a court's *certiorari* order to quash the Minister's reference, if a PO is raised in the IC in respect of -

(a) IC's jurisdiction and/or powers to decide on a workman's claim; and/or

(b) any matter for which the IC may dismiss the claim

should the IC -

(i) first decide merits of the PO before proceeding with the hearing of the claim; or

(ii) proceed expeditiously to hear and decide together in one award the merits of both the PO and the claim?

Our Decision

D. Main Issue (This Appeal)

15. We reproduce below s 20(1) and (3) IRA:

> "*s 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 [DG] to be reinstated in his former employment****; the representations may be filed at the office of the [DG] nearest to the place of employment from which the workman was dismissed.*
>
> ...
>
> *(3)* ***Upon receiving the notification of the [DG] under subsection (2), the Minister may, if he thinks fit, refer the representations to the [IC] for an award.***"
>
> (emphasis added).

16. In support of This Appeal, Mr. Wong Kah Hui, the Appellant's learned counsel, has submitted that, among others, in **Unilever** the Federal Court has decided the Main Issue (This Appeal) in favour of the Appellant. Consequently, according to Mr. Wong, this court is bound by **Unilever** and should not follow **Sanbos**.

D(1). What is *Ratio Decidendi* (Unilever)?

17. The above submission by Mr. Wong requires this court to extract the *Ratio Decidendi* (Unilever). If the *Ratio Decidendi* (Unilever) concerns the Main Issue (This Appeal), from the view point of the doctrine of *stare decisis* -

    (1) the subsequent Court of Appeal's decision in **Sanbos** is given *per incuriam* the *Ratio Decidendi* (Unilever); and

    (2) the Court of Appeal in This Appeal and all other cases is bound to follow the *Ratio Decidendi* (Unilever).

18. With regard to the *ratio decidendi* of a judgment of a superior court, the High Court has decided as follows in **Syahin Hafiy Danial Bin Soh Ahmad Luptepi Amin v Mansur Bin Yunus & Anor** [2021] 8 MLJ 297, at [14] and [15] -

> "*[14]* ***I am not able to accept the reference by the Defendant's learned counsel to Other Cases except if written judgments have been delivered in the Other Cases. This is because from the view point of the stare decisis doctrine, only the ratio decidendi ascertained from a written judgment of a superior court, has binding or persuasive effect. I refer to the judgment of Raja Azlan Shah FJ (as his Majesty then was) in the Federal Court case of Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud [1979] 2 MLJ 29, at 32 as follows*** -
>
> > ***"However, I would once again emphasize what has so often been said before, that precedents are not to be***

slavishly followed; a case may be followed only for its strict ratio decidendi."

(emphasis added).

Without a written judgment of a previous case, the court cannot ascertain the ratio decidendi of the previous case by considering the following three matters (3 Matters) -

(1) ***the material facts of the case which give rise to the issue to be decided by the court;***

(2) ***the rule of law which has been applied by the court to resolve the issue; and***

(3) ***the reasoning of the court in applying the rule of law to decide the issue in question.***

[15] ***In Datuk Haji Harun bin Haji Idris v Public Prosecutor [1977] 2 MLJ 155, the appellant's learned counsel referred to a digest, summary or extract of a previous decision, Heah Chin Kim. Suffian LP held as follows in the Federal Court in Datuk Haji Harun****, at p. 170 -*

> "***The full judgment in Heah Chin Kim [1954] MLJ xxxiii is not available and it is impossible for us to determine its ratio decidendi.***"
>
> *(emphasis added).*

Based on Datuk Haji Harun, no reliance can be placed on a digest, summary or extract of a previous decision because the court cannot extract the ratio decidendi of the previous case by considering the 3 Matters."

(emphasis added).

19. In **Unilever**, at [1] to [3], [15], [20], [23], [24] and [27], Mohamed Apandi Ali FCJ has delivered the following judgment of the Federal Court:

> "***LEAVE QUESTION***
>
> *[1]* ***This court had, on 6 January 2014, granted leave to the appellant to appeal on a single question of law, which reads***:
>
> > ***Whether compensation in lieu of reinstatement can be awarded to a person who cannot be reinstated and/or whether the issue of reinstatement even arises as he had already attained the age of retirement at the time of the filing of his claim (under s 20 of the [IRA])***.
>
> *[2]* ***The salient facts of this case which are not disputed are as follows. So Lai @ Soo Boon Lai ('the first respondent') had been in the employment of the appellant company for 17 years when he was dismissed on 14 March 2001. He was then a redistribution stockist operation supervisor and his dismissal was consequential to a domestic enquiry conducted by the appellant company, based on allegations of receiving unauthorised payments from a complainant, one Tey Hup Heng Trading Sdn Bhd. At the time of his dismissal, the first respondent was, according to his terms and conditions of service, only 14 months away from his mandatory retirement age of 55 years***. ...
>
> *[3]* ***The first respondent challenged his dismissal by filing a complaint to the [IC] ('the second respondent') pursuant to s 20 [IRA]. The [IC] decided in favour of the first respondent and proceeded to award compensation in lieu of reinstatement, calculated based on the first respondent years of service and in addition awarded backwages for 24 months***.

...

*[15] **At the outset, it must be acknowledged that under the [IRA], the [IC] has the power to make an order for reinstatement or an award of compensation in lieu of reinstatement. The core issue at hand, is whether an award of compensation can be given when reinstatement cannot be ordered.***

...

*[20] **From the phrase 'compensation in lieu of reinstatement'. it is our judgment that the element of compensation will only arise when the employee is in a position or situation to be reinstated. It is a condition precedent to such compensation. Our view is fortified by the clear provision of s 20(1) [IRA], where the primary remedy of such a representation to the [DG] is for the workman 'to be reinstated in his former employment'. If a workman cannot be reinstated because his age has exceeded his retirement age, the issue of compensation cannot arise. Corollary to that logic, it cannot be in lieu of his reinstatement. After all, reinstatement is a statutorily recognised form of specific performance. On that premise, such specific performance can only be ordered in a situation where the legal basis for such performance does exist. One cannot substitute when the one to be substituted does not or cannot exist. This can be seen in the legal maxim: lex non cogit ad impossiblia, ie the law does not compel the impossible.***

...

*[23] **The above analysis formed the rationale of the Court of Appeal's decision in Sabah Forest Industries Sdn Bhd v Industrial Court Malaysia & Anor [2013] 2 MLJ 410; [2014] 8 CLJ 876, Raus Sharif PCA concluded that the [IC] 'fell into error when it awarded compensation in lieu of reinstatement when clearly the second respondent cannot be reinstated beyond his retirement age. The [IC] had no legal basis to award ... compensation in lieu of reinstatement'.***

[24] ***For reasons explained above, we see no reason to disagree with that particular legal pronouncement.***

...

[27] ***For the above reasons, we will answer the leave question in the negative. In the result, we allow the appeal and set aside the orders made by the courts below, in respect of compensation in lieu of reinstatement of the first respondent. Consequentially, we order the first respondent to return to the appellant, the sum paid by the appellant as compensation in lieu of reinstatement.*** *...*"

(emphasis added).

20. We are of the following view regarding **Unilever**:

(1) when the first respondent (workman) was dismissed by the appellant (employer), the first respondent was 14 months away from his mandatory retirement age of 55 years;

(2) there was no PO raised by the appellant in **Unilever**;

(3) IC completed the hearing of the first respondent's claim and made the following award -

(a) the dismissal of the first respondent was without just cause or excuse; and

(b) the following monetary remedies were awarded to the first respondent -

(i) compensation in lieu of reinstatement [**Award (Compensation in lieu of Reinstatement)**]; and

(ii) 24 months "*backwages*" (**Backwages Award**);

(4) the sole question that arose in **Unilever** was whether the IC could lawfully make the Award (Compensation in lieu of Reinstatement) in favour of the first respondent who could not be reinstated by the appellant because he had already attained the age of retirement at the time of the filing of his claim [**Sole Question (Unilever)**];

(5) the Federal Court decided the Sole Question (Unilever) in the appellant's favour. Hence, the *Ratio Decidendi* (Unilever) is as follows - IC cannot award compensation in lieu of reinstatement to a claimant/workman who cannot be reinstated because the claimant has attained retirement age at the time the claim is filed in IC;

(6) in view of the *Ratio Decidendi* (Unilever), the Federal Court -

(a) allowed the appeal and set aside the Award (Compensation in lieu of Reinstatement); and

(b) ordered the first respondent to return to the appellant compensation in lieu of reinstatement.

It is to be noted that the Sole Question (Unilever) did not concern Backwages Award and the Backwages Award was paid by the appellant to the first respondent; and

(7) the Main Issue (This Appeal) did not arise in **Unilever**.

21. As explained in the above paragraph 20, the *Ratio Decidendi* (Unilever) cannot bind the Court of Appeal in **Sanbos**. Consequently, the proposition by the Appellant's learned counsel that the Court of Appeal's decision in **Sanbos** was *per incuriam* the *Ratio Decidendi* (Unilever) is untenable. It is also our view that the *Ratio Decidendi* (Unilever) does not bind the Court of Appeal in This Appeal. Furthermore, the material facts in **Unilever** (the first respondent had already retired at the time of the filing of his claim in IC) can be easily distinguished from the material facts which emanate from This Appeal (the 1st Respondent had not prayed for a Reinstatement Remedy in her SOC).

D(2). <u>What is *Ratio Decidendi* (Sanbos)?</u>

22. Ravinthran JCA has decided as follows in **Sanbos**, at [1], [10], [15] and [17] to [31]:

> *"[1]* ***This is an appeal against the decision of the High Court that allowed a judicial review application in favour of an employee who failed get relief before the [IC]. Before us, only two main issues were argued, ie whether the [IC] had substantive jurisdiction in view of the fact that reinstatement was not pleaded*** *and whether the employee was constructively dismissed.*
>
> ...
>
> *[10]* ***As we said earlier, the learned chairman of the [IC] held that notwithstanding the reference of the representation of the respondent to the [IC] by the Minister, she ceased to have jurisdiction to hear the matter****. ...*
>
> ...
>
> *[15]* ***In Assunta Hospital v Dr A Dutt*** *[1981] 1 MLJ 115* ***that was cited in the above mentioned passage, the issue of lack of***

jurisdiction arose in this way. It was emphasised by the counsel for the employer that the employee is a non-citizen. Chang Min Tat FJ dismissed the argument and said that whether the employee can extend his work permit or not is not a factor that 'can influence the court in the proper exercise of the jurisdiction conferred on it by the Minister's reference'. His Lordship continued as follows:

> ***Once the Minister decides to make the reference and his order is not set aside, the [IC] is seized with jurisdiction to hear the case and it is implicit in [IRA] that the [IC] must exercise that jurisdiction. Failure to do so may well result in an order for mandamus. Section 29 [IRA] spelling out the powers of the [IC] is expressed in discretionary terms. The [IC] may take any of the steps set out in the section, and generally 'direct and do all such things as are necessary or expedient for the expeditious determination of the trade dispute or the reference under s 20(3)'. But there can be, on a proper construction of this section, no doubt whatsoever that it would be a dereliction of duty to renounce the jurisdiction to hear the reference.***
>
> ...

[17] ***The learned High Court judge also said as follows:***

> *[14]* ***In determining this issue, firstly, it must be remembered that the paramount objective of [IRA] is to protect the interest of the employees. In addition, the IRA is a piece of social legislation and the Industrial Court must act in accordance with equity, good conscience and substantial merit of the case without regard to technicalities and legal form as provided under s 30(5) [IRA].***

[15] ***The objective of [IRA] and the provision of s 30(5) will be meaningless if the [IC] cease to have jurisdiction when no claim for reinstatement is made. The employees right to have their claims heard before the [IC] should not be hindered just because the employee did not want to be reinstated for myriads of reasons. One acceptable reason is that there is no longer trust and confidence between the employee and the employer. Further, for the reason of industrial harmony, reinstatement may not be an appropriate option.***

[18] ***On our part, we wholly agree with the decision of the learned High Court judge that the [IC] was seized with jurisdiction to hear the dispute between the employer and employee in this case once the Minister had duly made a reference under s 20(3) [IRA]. As stated by Denis Ong J in The Borneo Post Sdn Bhd v Margaret Wong and Chang Min Tat FJ in Assunta Hospital v Dr A Dutt, the [IC] is invested with jurisdiction because of the Ministerial reference.***

[19] ***Counsel for the appellant did not dispute that the [IC] had jurisdiction at the 'threshold' stage because of the Ministerial reference. However, he argued that there must be a distinction drawn between 'threshold' and 'substantive' jurisdiction. He said that [IC] was not relieved of the duty to ask whether it continued to be seized with 'substantive' jurisdiction because reinstatement was not pleaded and asked for at the hearing.***

[20] *...* ***As we understand the meaning of threshold jurisdiction, it is the jurisdiction to enter into an inquiry. This was lucidly explained in Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd*** *[1997] 2 MLJ 685; [1997] 3 CLJ 777* ***by Gopal Sri***

Ram JCA (as he then was) who sat as a Federal Court judge. The matter involved Industrial Law. The relevant excerpts from the judgment reads as follows:

> ***At the heart of this appeal lies the important difference between the class of cases where there is lack of authority on the part of a public decision-maker to enter upon an inquiry and the class of cases where there is such authority, but the decision-maker exceeds the bounds of his decision-making power because of something he does or fails to do in the course of the inquiry. The former is termed 'threshold jurisdiction' in recognition of a public decision maker's inability to cross the threshold, as it were, and enter upon the inquiry in question. It is jurisdiction in the narrow sense.***
>
> ***... The [IC] is therefore empowered to take cognisance of a trade dispute and adjudicate upon it only when the Minister makes a reference. In other words, it is the reference that constitutes threshold jurisdiction.***

[21] ***There can be no dispute that the [IC] was seized with 'threshold jurisdiction' in the instant case to commence hearing. However, counsel for the appellant submitted that once the inquiry commenced, [IC] ceased to have 'substantive' jurisdiction because the remedy of reinstatement was not sought. In Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd, the Federal Court drew a distinction between the threshold jurisdiction which was called the 'narrow jurisdiction' and the jurisdiction in the wider sense which is called 'Anisminic jurisdiction' (name after well-known House of Lords case of Anisminic Ltd v Foreign Compensation Commission*** *[1969] 2 AC 147). ...*

[22] ***As for 'substantive jurisdiction', it is not mentioned in [IRA]. In Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd , the following passage of the judgment of the Federal Court appears to deal with jurisdiction other than the 'threshold' jurisdiction:***

> ***Once it is seised of the dispute in the threshold sense, the [IC], unlike the authorities at the preceding three levels, is empowered to determine whether it has the wider jurisdiction to entertain the workman's claim. Thus, for example, it has jurisdiction to decide whether the particular claimant is a workman or whether a dispute is extra-territorial in nature. This is sometimes referred to as 'the jurisdiction to decide whether there is jurisdiction'.***

[23] ***But it must be noted that 'substantive jurisdiction' is not discussed or mentioned specifically. Be that as it may, for the purpose of our discussion, we take the 'substantive' jurisdiction argument of counsel for the appellant to mean that the [IC] ceased to have jurisdiction because it has no power under the [IRA] to adjudicate when the remedy of reinstatement is not pleaded or prayed for. With respect to counsel for the appellant, we are of the view that the [IC] did not cease to have 'substantive' jurisdiction merely because the remedy of reinstatement was not pleaded or asked for at the hearing. In addition to the reasons given by Denis Ong J in The Borneo Post Sdn Bhd v Margaret Wong and the learned High Court judge in the instant case, our other reasons are as follows.***

[24] ***Now, as has been acknowledged in numerous cases, the [IRA] is a beneficent social legislation meant to provide better remedies for employees than that granted under common***

law. At common law, an employee cannot avail the remedy of reinstatement and may only obtain 'meagre' compensation. In Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors** [1981] 1 MLJ 238**, Raja Azlan Shah CJ (Malaya) (as HRH then was) observed as follows:

> ***In the case of a claim for wrongful dismissal, a workman may bring an action for damages at common law. This is the usual remedy for breach of contract, eg, a summary dismissal where the workman has not committed misconduct. The rewards, however, are rather meagre because in practice the damages are limited to the pay which would have been earned by the workman had the proper period of notice been given. He may even get less than the wages for the period of notice if it can be proved that he could obtain similar job immediately or during the notice period with some other employer.***

[25] ***In respect of the remedies that an employee may obtain at the [IC], His Lordship said as follows:***

> ***Reinstatement, a statutorily recognized form of specific performance, has become a normal remedy and this coupled with a full refund of his wages could certainly far exceed the meagre damages normally granted at common law.***

[26] ***Thus, it must be noted that 'reinstatement' is not the only reason for a dismissed employee to make representation to the [DG] under s 20(1) [IRA] with a view of having his case referred to the [IC]. He may avail more generous damages in the form of compensation and back wages from the [IC] as compared to what he can get under common law.***

[27] ***However, at the point of making representation to the [DG] under s 20(1), an employee who considers himself dismissed without just cause or excuse is obliged to seek 'to be reinstated in his former employment'. This is the only reference in the [IRA] to the remedy of reinstatement insofar as the prosecution of the claim of the employee is concerned. The other reference to the remedy of reinstatement is in respect of the power of the [IC] to grant the said remedy when making the award under s 30. Therefore, it follows that once the case is referred to the [IC] by the Minister, there is no longer a specific requirement in the [IRA] for the employee to plead the remedy of reinstatement. The Industrial Court Rules 1967 which governs the procedure of the [IC] does not impose the obligation to plead the remedy of reinstatement in the statement of case either. Rule 9 stipulates that the statement of case shall contain the following:***

(a) a statement of all relevant facts and arguments;

(b) particulars of decisions prayed for;

(c) an endorsement of the name of the first party and of his address for service; and

(d) as an appendix or attachment, a bundle of all relevant documents relating to the case.

[28] ***In the premises, the requirement to plead reinstatement as a remedy is only material at the stage of making a representation to the [DG]. In our view, the real issue that arises from the 'substantive jurisdiction' argument canvassed by counsel for the appellant is whether the [IC] would exceed its statutory powers in granting monetary relief when reinstatement is not pleaded or asked for at the [IC] hearing. In our view, this***

question must be answered in the negative. In respect of the powers of the Industrial Court in giving relief, s 30(6) [IRA] gives the court very wide discretion. The provision reads as follows:

...

[29] ***As we said earlier, the only relief envisaged in s 20(1) at the inceptive representation stage is the remedy of reinstatement. But s 30(6) empowers the [IC] to include in the award 'any matter or thing which it thinks necessary or expedient'. Hence, even if reinstatement was pleaded and asked for, the [IC] is not restricted to the said relief. As we pointed out, there is no statutory obligation to plead or ask for reinstatement before the [IC]. In the premises, the [IC] cannot be said to commit an error of law if it grants monetary relief when reinstatement was not pleaded or asked for. Therefore, the question of the [IC] ceasing to possess 'substantive' jurisdiction cannot arise.***

[30] ***In concluding this part of the judgment, we find it necessary to repeat what was said about the function of the [IC] in the past. Generally speaking, it is two-fold as succinctly stated in the following passage by the Federal Court in Harianto Effendy Zakaria & Ors v Mahkamah Perusahaan Malaysia & Anor [2014] 4 ILR 241:***

> *[33]* ***It is trite law that the function of the [IC] under s 20 [IRA] is twofold, first, to determine whether the alleged misconduct has been established, and secondly whether the proven misconduct constitutes just cause or excuse for dismissal. Failure to determine these issues on its merits would be a jurisdictional error which would merit interference by certiorari by the High Court (see Milan Auto Sdn Bhd v Wong Seh Yen*** *[1995] 3 MLJ 537; [1995] 4 CLJ 449).*

[31] ***Therefore, it is not the function of the [IC] to question its own jurisdiction simply because the remedy of reinstatement is not pleaded or sought. In the light of the occasional conflict of views in the [ICs] on the issue of jurisdiction if reinstatement is not pleaded or claimed, we state here that the decision in The Borneo Post Sdn Bhd v Margaret Wong on this point is correct. The [IC] does not cease to have jurisdiction once a reference is duly made under s 20(1) [IRA] even if the remedy of reinstatement is not pleaded or pursued at the hearing.***"

(emphasis added).

23. It is clear that the Main Issue (This Appeal) arose in **Sanbos** and had been authoritatively decided by the Court of Appeal in the workman's favour. According to the *Ratio Decidendi* (Sanbos), if the Minister has referred a workman's representation to IC, the IC cannot dismiss the workman's claim without hearing the claim on the sole ground that the IC ceases to have jurisdiction to decide the claim merely because the workman's SOC has not applied for a Reinstatement Remedy.

D(3). Can Minister's reference to IC be rendered ineffective by workman's abandonment of Reinstatement Remedy in SOC?

24. We are of the considered view that the *Ratio Decidendi* (Sanbos) can be further supported by the following reason:

    (1) when a workman makes a written representation to the DG for a Reinstatement Remedy, the Minister has two options as follows -

(a) the Minister may refuse to refer the workman's claim to IC (**1st Option**); **or**

(b) the Minister may refer the workman's claim to IC (**2nd Option**);

(2) if the 1st Option is exercised by the Minister, the workman may apply to the High Court for -

(a) a *certiorari* order to quash the Minister's refusal to refer the workman's claim to IC; and

(b) an order of *mandamus* to compel the Minister to refer the workman's claim to IC.

In the Court of Appeal case of **Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal** [1997] 1 CLJ 665, the workman had successfully applied for a *certiorari* order and *mandamus* order as explained in the above sub-paragraphs (a) and (b) with regard to the 1st Option which had been exercised by the Minister in that case;

(3) if the Minister chooses the 2nd Option, the employer in question may apply to the High Court for -

(a) an order of *certiorari* to quash the Minister's reference of the workman's claim to IC; or

(b) an order of prohibition to prohibit the IC from hearing the workman's claim (**Prohibition Order**). In the Federal Court case of **Assunta Hospital v Dr A Dutt** [1981] 1 MLJ 115,

Chang Min Tat FJ had dismissed an appeal by an employer for a Prohibition Order on the merits of that appeal;

(4) if an employer has not obtained a court order of *certiorari* to quash the Minister's reference of a workman's claim to IC, by virtue of s 114(e) of the Evidence Act 1950 (**EA**), there is a rebuttable presumption that the Minister has exercised his discretion "*regularly*" when the Minister decided to refer the workman's claim to IC. We reproduce below s 114(e) EA -

> "***Court may presume existence of certain fact***
>
> *114.* ***The court may presume the existence of any fact which it thinks likely to have happened, regard being had to*** *the common course of natural events, human conduct, and* ***public*** *and private* ***business, in their relation to the facts of the particular case****.*
>
> ***ILLUSTRATIONS***
>
> ...
>
> *(e) that judicial and* ***official acts have been regularly performed****;*"

(emphasis added); and

(5) in the absence of a *certiorari* order to quash the Minister's reference of the workman's claim to IC, if we allow the IC to decide that the IC ceases to have jurisdiction to hear a workman's claim solely because the workman has abandoned a Reinstatement Remedy in SOC -

(a) this will render redundant the Minister's reference; and

(b) this will defeat the purpose of a rebuttable presumption provided in s 114(e) EA.

D(4). Whether *Ratio Decidendi* (Sanbos) is contrary to public policy

25. Mr. Wong has advanced a far-reaching contention in support of This Appeal. According to Mr. Wong, if the Main Issue (This Appeal) is resolved in favour of the 1st Respondent, IC may be flooded by pure monetary claims of workmen who have not applied for Reinstatement Remedies in SOCs (**Floodgates Argument**).

26. We are unable to accept the Floodgates Argument. Our reasons are as follows:

(1) the Floodgates Argument cannot prevail over Parliament's clear intention in providing for the Minister's discretion to refer workmen's disputes to IC under s 20(3) IRA;

(2) IRA a piece of beneficent social legislation with, among others, the objective of providing more effective remedies to employees [**Social Objective (IRA)**] - please refer to the judgment of Gopal Sri Ram JCA (as he then was) in **Hong Leong Equipment**, at p. 704. An acceptance of the Floodgates Argument will defeat the Social Objective (IRA);

(3) as decided in **Hong Leong Equipment**, at p. 705 to 706 -

(a) pursuant to Article 5(1) of the Federal Constitution, an employee has a constitutional right to livelihood in respect

of his or her employment (**Constitutional Right to Livelihood**); and

(b) IRA has provided for an employee's security of tenure by conferring a limited proprietary right on an employee to be engaged in gainful employment which can only be terminated if there exists a just cause or excuse (**Limited Proprietary Right**).

If this court were to accede to the Floodgates Argument, then an employee's Constitutional Right to Livelihood and Limited Proprietary Right will be undermined;

(4) by way of IRA, IC has been specifically established by our legislature to be a specialised tribunal to decide on, among others, workmen's claims for unlawful dismissal. In fact, Parliament has now provided for a right of appeal to the High Court against an award of IC - please refer to s 33C IRA which has been introduced by Industrial Relations (Amendment) Act 2020 (Act A1615). In other words, even if employees have abandoned their Reinstatement Remedy, the employees should be allowed to proceed with their pure monetary claims against their employers (**Employees' Pure Monetary Claims**) in IC which has been specially constituted by our legislature in IRA; and

(5) if there is an increase in IC cases due to Employees' Pure Monetary Claims, this means that our courts do not have to hear the Employees' Pure Monetary Claims. This will directly reduce the courts' heavy workload. Consequently, it is in the

public interest for the Employees' Pure Monetary Claims to be decided in IC and not in our courts.

E. The binding effect of *Ratio Decidendi* (Sanbos)

27. In the Federal court case of **Dalip Bhagwan Singh v Public Prosecutor** [1998] 1 MLJ 1, at 12 to 13, Peh Swee Chin FCJ has decided as follows:

> "***The doctrine of stare decisis or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal***.
>
> ***The said exceptions are as decided in Young v Bristol Aeroplane Co Ltd*** *[1944] KB 718.* ***The part of the decision in Young v Bristol Aeroplane in regard to the said exceptions to the rule of judicial precedent ought to be accepted by us as part of the common law applicable by virtue of Civil Law Act 1956 vide its s 3.***
>
> ***To recap, the relevant ratio decidendi in Young v Bristol Aeroplane is that there are three exceptions to the general rule that the Court of Appeal is bound by its own decisions or by decision of courts of co-ordinate jurisdiction such as the Court of Exchequer Chamber. The three exceptions are first, a decision of Court of Appeal given per incuriam need not be followed; secondly, when faced with a conflict of past decisions of Court of Appeal, or a court of co-ordinate jurisdiction, it may choose which to follow irrespective of whether either of the conflicting decisions is an earlier case or a later one; thirdly it ought not to follow its own previous decision when it is***

expressly or by necessary implication, overruled by the House of Lords, or it cannot stand with a decision of the House of Lords. There are of course further possible exceptions in addition to the three exceptions in Young v Bristol Aeroplane when there may be cases the circumstances of which cry out for such new exceptions so long as they are not inconsistent with the three exceptions in Young v Bristol Aeroplane."

(emphasis added)

28. Premised on **Dalip Bhagwan Singh**, an earlier *ratio decidendi* of a Court of Appeal's judgment binds subsequent Court of Appeal unless any one of the three exceptions stated by Lord Greene MR in United Kingdom's Court of Appeal case of **Young v Bristol Aeroplane Co Ltd** [1944] 2 All ER 293, at 300 [**3 Exceptions (Young's Case)**], applies to exclude the binding effect of the earlier Court of Appeal's *ratio decidendi*.

29. Firstly, we are satisfied that the 3 Exceptions (Young's Case) do not apply in This Appeal so as to justify a departure from the *Ratio Decidendi* (Sanbos). In fact, in the above Part D(3), we find further support for the invocation of the *Ratio Decidendi* (Sanbos) in This Appeal.

30. Secondly, we take this opportunity to state that any previous High Court decision or IC award which is contrary to the *Ratio Decidendi* (Sanbos), is now overruled by the *Ratio Decidendi* (Sanbos).

F. IC should hear POs and workmen's claims together

31. When the Minister has referred a workman's claim to IC and in the absence of a court's *certiorari* order to quash the Minister's reference, if a PO is raised in the IC in respect of -

    (1) IC's jurisdiction and/or powers to decide a workman's claim; and/or

    (2) any matter for which the IC may dismiss the claim

    the question that arises is whether the IC should -

    (a) first decide the merits of the PO before hearing the merits of the claim (**Staggered Hearing Approach**); **or**

    (b) proceed expeditiously to hear and decide together in one award the merits of both the PO and claim [**Joint Hearing (PO and Claim) Approach**]?

32. We have no hesitation to -

    (1) endorse a Joint Hearing (PO and Claim) Approach; and

    (2) disapprove a Staggered Hearing Approach.

    The following reasons support a Joint Hearing (PO and Claim) Approach and not a Staggered Hearing Approach -

    (a) if IC adopts a Staggered Hearing Approach, this will unduly delay the disposal of a workman's claim. A good example is this case -

(i) the IC upheld the 2nd PO without hearing the merits of the Respondent's claim;

(ii) the Respondent successfully obtained a *certiorari* order from the High Court to quash IC's Award;

(iii) the Appellant obtained a Stay Order (High Court's Decision) pending the disposal of This Appeal;

(iv) when This Appeal was dismissed [**Court of Appeal's Decision (This Appeal)**], the Appellant had filed an application for leave of the Federal Court to appeal against the Court of Appeal's Decision (This Appeal) (**Appellant's Federal Court Leave Application**). The Appellant has a right to apply for a stay of the Court of Appeal's Decision (This Appeal) pending the disposal of the Appellant's Federal Court Leave Application;

(v) if the Appellant's Federal Court Leave Application is allowed, the Appellant may then apply for a stay of the Court of Appeal's Decision (This Appeal) pending the disposal of the Appellant's appeal to the Federal Court against the Court of Appeal's Decision (This Appeal) [**Appellant's Appeal (Federal Court)**]; and

(vi) the disposal of the Appellant's Appeal (Federal Court) may take some time. Until the resolution of Appellant's Appeal (Federal Court), the Respondent's claim languishes in the IC.

In this case, the Minister's Reference was made on 29.8.2019. Until the date of this written judgment, for a period of more than 3 years and 9 months, the hearing of the 1st Respondent's claim in IC has yet to commence!;

(b) the inordinate delay caused by a Staggered Hearing Approach [as explained in the above sub-paragraph (a)] is anathema to -

(i) the Social Objective (IRA); and

(ii) an employee's Constitutional Right to Livelihood and Limited Proprietary Right with regard to his or her employment; and

(c) when IC applies a Staggered Hearing Approach, employees and their learned counsel have to expend extra legal expense, time and effort to resist POs first and then to prosecute their claims in IC;

(d) the adoption of a Joint Hearing (PO and Claim) Approach will save time, effort and legal expense of employers. It is good commercial practice for employers to complete expeditiously all claims in IC by their former employees so as to bring a closure to such disputes in IC. It is to be noted that the IC in this case had directed both the Appellant and Respondent to expend time, effort and legal expense to file affidavits and written submissions with regard to the 2 POs; and

(e) the undue delay caused by an application of a Staggered Hearing Approach may cause irreparable prejudice to employees as follows -

(i) employees may pass on before the final disposal of their claims in IC and subsequent court proceedings;

(ii) employees may exhaust their limited financial resources (especially if they have not secured fresh employment) and are therefore constrained to discontinue their claims in IC or courts;

(iii) employees may face "*litigation fatigue*" [adverse consequences to the employees' health (mental and/or physical) and/or emotional well-being] due to long-drawn-out legal battles in IC and courts. Litigation fatigue may constitute a reason for employees to discontinue their claims in IC or courts; and

(iv) employers may become insolvent before the final disposal of employees' claims in IC or courts. In such an event, employees only have the sole satisfaction of paper IC awards and/or court orders.

G. Conclusion

33. Premised on the above evidence and reasons, This Appeal is dismissed with costs of RM10,000.00 (subject to allocatur fee).

DATE: 6 JUNE 2023

WONG KIAN KHEONG
Judge
Court of Appeal

Counsel for Appellant: *Mr. Wong Kah Hui (Messrs KH Wong & Co.)*

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