FATIMAH NOORDIN

v.

CARSEM (M) SDN BHD & ANOR

Court of Appeal, Putrajaya
Lee Swee Seng, Wong Kian Kheong, Azhahari Kamal Ramli JJCA
[Civil Appeal No: A-01(A)-535-09-2021]
22 April 2025

Administrative Law: *Judicial review — Certiorari and mandamus — Application by appellant seeking order of certiorari to quash Industrial Court/2nd respondent's award dismissing her claim for wrongful dismissal — Whether consideration and assessment of further evidence not adduced in Industrial Court and High Court — Whether Industrial Court's award irrational or unreasonable based on the further evidence — Whether appellant entitled to monetary compensation*

The appellant herein, a Section Manager of the 1st respondent's HR Department, alleged that she was summarily dismissed in bad faith by the 1st respondent, and her representation was referred to the Industrial Court ("IC"), the 2nd respondent. The 1st respondent filed a Statement in Reply to the Industrial Court, which averred, among others, that the appellant had entered into a Mutual Separation Agreement ("MSA") with the 1st respondent without any coercion, pressure, or influence by the 1st respondent. Hence, the appellant was not dismissed by the 1st respondent, and the Industrial Court had no jurisdiction to hear the appellant's claim for wrongful dismissal. It was further alleged that after the execution of the MSA, the 1st respondent discovered that the appellant had committed fraud with her accomplices with regard to the recruitment of foreign workers for the 1st respondent. The Industrial Court dismissed the appellant's claim ("IC's Award") and the appellant filed a Judicial Review Application ("JRA") seeking, *inter alia*, an order of *certiorari* to quash the IC's Award and a *mandamus* order to direct the Industrial Court to hear and decide the appropriate remedy to be granted to the appellant. The High Court dismissed the JRA, resulting in the present appeal, where the main issue was whether there was any ground to set aside the High Court's refusal to issue an order of *certiorari* to quash the IC's Award. To decide the main issue, the following questions had to be determined: (i) whether the Court of Appeal could consider "further evidence," adduced by the appellant consisting of witness testimony adduced in separate civil proceedings for this appeal when the further evidence was not adduced before the Industrial Court and the High Court ("1st Question"); (ii) if the answer to the 1st Question was in the affirmative, how should the Court of Appeal assess the further evidence? In this regard, should the Court of Appeal consider the further evidence as an appellate Court reviewing the High Court's exercise of discretion in refusing to issue a *certiorari* order in the JRA? ("2nd Question"); (iii) if the

2nd Question was answered in the affirmative, whether an objective assessment of — (a) the further evidence; and (b) the evidence adduced at the hearing in the 2nd respondent — would show that the IC's Award was irrational or unreasonable; and (iv) if the IC's Award was irrational, and this appeal was allowed with a *certiorari* order to quash the IC's Award, whether the appellant was entitled to monetary compensation.

Held (allowing the appellant's appeal):

(1) The relevance of the evidence of Puan Nur, a senior Human Resources ("HR") personnel in the Hong Leong Manufacturing Group (which included the 1st respondent), was, on the facts, as follows: (1) the reason why the 1st respondent offered the MSA to the appellant was because — (a) there were a lot of performance issues concerning the appellant in the 1st respondent; and (b) the 1st respondent was very unhappy with the appellant and wanted the appellant to leave; (2) the 1st respondent did not give any prior notice of the MSA to the appellant because the 1st respondent wanted the appellant to leave no matter what; (3) the 1st respondent did not give the appellant time to consider the contents of the MSA; and (4) even though the MSA stated that the appellant's last day at the 1st respondent's premises was 21 April 2017, the appellant was asked to leave the 1st respondent's premises on 20 April 2017, the very day the appellant signed the MSA. (para 32)

(2) The Court in this appeal was constrained to attach weight to Puan Nur's evidence because she was a senior HR personnel and her evidence was given during cross-examination by the appellant's Counsel and was not corrected by the 1st respondent's Counsel during the re-examination. Puan Nur's evidence during cross-examination was accepted without any qualification by the 1st respondent. Notwithstanding the fact that her evidence was not adduced before the Industrial Court and the High Court, the Court could and should consider her evidence for this appeal for, *inter alia*, the following reasons: (1) her evidence was clearly relevant for this appeal; (2) this Court attached weight to her evidence; and (3) her evidence had been suppressed by the 1st respondent during the hearing of — (a) the appellant's claim in the Industrial Court; and (b) the appellant's JRA in the High Court. If Puan Nur's evidence was not considered, this would unjustly allow the 1st respondent to benefit unlawfully from its suppression of her evidence by dismissing the appellant without just cause or excuse under the guise of the MSA. (paras 33-34)

(3) The Court was not persuaded that the appellant had signed the MSA voluntarily due to these reasons: (a) the existence and implementation of a premeditated plan by the 1st respondent to dismiss the appellant; (b) the 1st respondent did not give the appellant an opportunity to negotiate; (c) the MSA was a sham contract; (d) the circumstances regarding the appellant made it highly improbable for the appellant to have agreed to the MSA voluntarily; and (e) the reprehensible conduct of the 1st respondent in suppressing evidence and acting in bad faith by concealing its unlawful dismissal of the appellant by way of the MSA. Although the 1st respondent's Counsel relied on the doctrine of

equitable estoppel to contend that the appellant was estopped from denying that she had executed the MSA voluntarily, this submission was unacceptable because the 1st respondent's inequitable conduct, in itself, disentitled it to rely on that doctrine. It was clear that it was not an act of condoning an employee's fraud, secret profits, misconduct, and/or disciplinary infraction. If there was an alleged fraud, secret profits, misconduct, or disciplinary offence by an employee ('X'), an employer ('Y') might pursue the matter by conducting a due inquiry against X. However, Y could not unlawfully dismiss X under the guise of an MSA. (paras 41-43)

(4) In view of the 1st respondent's unlawful dismissal of the appellant, the following consequences would ensue: (1) the Industrial Court had jurisdiction to hear the appellant's claim; (2) if the Industrial Court had the benefit of Puan Nur's evidence, it would have allowed the appellant's claim; and (3) in view of Puan Nur's evidence, the IC's Award was irrational in the sense that no reasonable Industrial Court Chairperson would have made the IC's Award. On this ground alone, this appeal should be allowed, and a *certiorari* order should be issued to quash the IC's Award. (para 45)

(5) In view of the 1st respondent's unlawful dismissal of the applicant, in the interest of justice, the following order of monetary compensation was made: the 1st respondent should pay to the appellant a sum of RM177,600.00 as compensation for backwages (RM7,400.00 X 24 months). This was because when the 1st respondent unlawfully dismissed the appellant on 20 April 2017, the appellant had about two more years to serve in the 1st respondent's employment (before her retirement at the age of 60 years). (para 50)

Case(s) referred to:

Ace Holdings Bhd v. Norahayu Rahmad & Anor [2023] 3 MELR 207; [2023] 5 MLRA 96 (refd)

B Braun Medical Industries Sdn Bhd v. Mugunthan Vadiveloo [2024] 6 MLRA 186 (refd)

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1996] 1 MELR 142; [1996] 2 MLRA 212 (refd)

Matrix Global Education Sdn Bhd v. Felix Lee Eng Boon [2023] 2 MLRA 40 (refd)

Ranjit Kaur S. Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 5 MLRA 696 (refd)

R Rama Chandran v. Industrial Court Of Malaysia & Anor [1996] 1 MELR 71; [1996] 1 MLRA 725 (folld)

Unilever (M) Holdings Sdn Bhd v. So Lai & Anor [2015] 2 MELR 511; [2015] 3 MLRA 507 (folld)

Legislation referred to:

Courts of Judicature Act 1964, ss 25(2), 69(1), (3), (4), Schedule, para 1

Evidence Act 1950, ss 8(2), 91, 92(a), 101(1), (2), 102

Federal Constitution, art 5(1)

Industrial Relations Act 1967, ss 20(1), 30(5)

Rules of Court 2012, O 53 rr 2(3), 3(2), O 92 r 4

Rules of the Court of Appeal 1994, r 7(1), (3), (3A), (4)

Rules of the High Court 1980, O 92 r 4

Counsel:

For the appellant: Raam Kumar (Norleena Jamal with him); M/s K B Tan Kumar & Partners

For the 1st respondent: Thavalingam C Thavarjah (Tan Yang Qian with him); M/s T Thavalingam & Co

For the 2nd respondent: Not present

JUDGMENT

Wong Kian Kheong JCA:

A. Background

[1] We shall refer to the parties as they were in the High Court.

[2] On 5 August 2002, the applicant (Applicant) commenced employment as a "Section Head" in the Human Resources (HR) Department of the 1st respondent company (1st Respondent).

[3] The 1st Respondent appointed the Applicant to be a "Section Manager of its HR Department on 23 December 2013.

[4] As a Section Manager of the 1st Respondent's HR Department, the Applicant was responsible for, among others, the recruitment of foreign workers for the 1st Respondent [1st Respondent's Recruitment (Foreign Workers)].

[5] On 20 April 2017-

(1) the Applicant returned to work after spending her two weeks of annual leave;

(2) the 1st Respondent's then HR Head, Mr J. Chandrasegaran (COW-1) met the Applicant and gave her a letter dated 20 April 2017 [1st Respondent's Letter (20 April 2017)]. According to the 1st Respondent's Letter (20 April 2017), among others-

(a) the title of the 1st Respondent's Letter (20 April 2017) was "Mutual Separation Agreement" (MSA);

(b) the opening sentence stated that "With reference to the above, we [the 1st Respondent] are writing to confirm the details of the mutually agreed separation of [the Applicant's] employment with [the 1st Respondent]" {Opening Sentence [1st Respondent's Letter (20 April 2017)]};

(c) clause 1 stated that "Your [the Applicant] physical last day of service with the [1st Respondent] is 21 April 2017" {Clause 1 [1st Respondent's Letter (20 April 2017)]};

(d) according to cl 2, "In consideration of your [the Applicant] voluntary cessation or separation from employment with the [1st Respondent], the [1st Respondent] will pay you, the sum of [RM50,000.00] only as compensation" {Clause 2 [1st Respondent's Letter (20 April 2017)]};

(e) clause 3 provided that the payment of RM50,000.00 "will be divided into two payments where the 1st payment of RM25,000.00 will be made payable to your [the Applicant's] account on or before 30 May 2017 and the 2nd payment of RM25,000.00 will be made payable to your account on or before 30 June 2017' {Clause 3 [1st Respondent's Letter (20 April 2017)]};

(f) clause 7 stated that "You [the Applicant] will, as soon as practicable, and in any event not later than your last day of service in the office, return to the [1st Respondent] all of the [1st Respondent's] property in your possession, correspondence, documents and other property belonging to the [1st Respondent] and/or any Group Company which is currently in your possession, custody or power" {Clause 7 [1st Respondent's Letter (20 April 2017)]}; and

(g) the Applicant signed at the end of the 1st Respondent's Letter (20 April 2017) below this paragraph {Applicant's Signature Paragraph [1st Respondent's Letter(20 April 2017)]}-

"**RELEASE**

...

I [Applicant] have read, understood and agreed to the terms set out in this letter. I further confirm that there is no outstanding agreement or *[sic]* arrangement relating to any of my assignments with the [1st Respondent] under which the [1st Respondent] has or could have any obligation or liability to use...."

[Emphasis Added]; and

(3) the Applicant's monthly salary then was RM7,456.00.

[6] The 1st Respondent did not pay to the Applicant RM50,000.00 in accordance with the MSA. Hence, on 13 June 2017, the Applicant made a representation to the Director General of Industrial Relations under s 20(1) of the Industrial Relations Act 1967 (IRA) that she had been dismissed by the 1st Respondent without just cause or excuse (Applicant's Representation).

[7] On 10 November 2017, the Applicant's Representation was referred to the Industrial Court, the 2nd respondent (2nd Respondent).

[8] While the Applicant's claim against the 1st Respondent was pending in the IC, on 18 April 2018, the 1st Respondent filed a civil suit in the Sessions Court against the Applicant (Civil Suit).

B. Proceedings In The 2nd Respondent

[9] The Applicant's "Statement of Case" in the 1C [SOC (1C)] alleged that the Applicant was summarily dismissed in bad faith by the 1st Respondent on 20 April 2017 because prior to her dismissal-

(1) no disciplinary proceedings had ever been instituted by the 1st Respondent against her. In other words, she had an unblemished work record with the 1st Respondent;

(2) she had not been given any warning by the 1st Respondent regarding any alleged misconduct;

(3) she was not asked by the 1st Respondent to show cause to any alleged misconduct;

(4) no charge of alleged misconduct had been made against her; and

(5) the 1st Respondent did not conduct any domestic inquiry against her.

[10] The 1st Respondent filed a "Statement in Reply' in the 2nd Respondent which averred as follows:

(1) the Applicant had entered into the MSA with the 1st Respondent without any coercion, pressure or influence by the 1st Respondent. Hence, the Applicant was not dismissed by the 1st Respondent and the 2nd Respondent had no jurisdiction to hear the Applicant's claim for wrongful dismissal by the 1st Respondent;

(2) after the execution of the MSA, the 1st Respondent discovered that fraud had been committed by the Applicant and her "accomplices" with regard to the 1st Respondent's Recruitment (Foreign Workers) [Alleged Fraud (Applicant)]; and

(3) the 1st Respondent had conducted an audit investigation which "concluded" that the Alleged Fraud (Applicant) had been committed against the 1st Respondent. Consequently-

(a) the 1st Respondent lodged a police report against the Applicant on 23 May 2017 (1st Respondent's Police Report);

(b) the Applicant was arrested by the police on 24 May 2017 [Applicant's Arrest (24 May 2017)]; and

(c) the 1st Respondent had the "necessary justification" for not honouring the MSA and not paying the sum of RM50,000.00 to the Applicant.

[11] At the hearing in the 2nd Respondent, the Applicant testified on her behalf while COW-1 was the sole witness for the 1st Respondent.

[12] The learned Chairperson of the 2nd Respondent dismissed the Applicant's claim without any order as to costs (IC's Award). The grounds for the IC's Award were as follows, among others:

(1) the learned Chairperson found as a fact that the Applicant had read, understood and agreed to the terms set out in the MSA. This was because the Applicant held a "very senior position" as a Section Manager in the 1st Respondent's HR Department and had 15 years of experience in the HR Department;

(2) there was no evidence to show that the Applicant had protested against her execution of the MSA under duress or coercion;

(3) the Applicant's claim was filed only because the 1st Respondent did not pay her the sum of RM50,000.00 as stipulated in the MSA; and

(4) in view of the MSA, the 1st Respondent did not dismiss the Applicant, let alone dismiss her without just cause or excuse.

C. Applicant's Judicial Review Application In The High Court (JRA)

[13] Dissatisfied with the IC's Award, the JRA was filed by the Applicant for the following relief, among others:

(1) an order of *certiorari* to quash the IC's Award; and

(2) a *mandamus* order to direct the 2nd Respondent to hear and decide the appropriate remedy to be granted to the Applicant.

[14] The learned High Court Judge dismissed the JRA with costs of RM3,500.00 to be paid by the Applicant to the 1st Respondent (High Court's Decision).

[15] According to the High Court's written judgment, among others-

(1) the learned High Court Judge agreed with the IC's Award that the Applicant had voluntarily signed the MSA because-

(a) the fact that the MSA was prepared and/or signed within a short period of time alone cannot negate her voluntariness to execute the MSA; and

(b) the Applicant did not send any letter or email to the 1st Respondent regarding the alleged compulsion by COW-1;

(2) there was no evidence to support the Applicant's claim that she was escorted out from the 1st Respondent's premises after she had signed the MSA (Alleged Escorting Out Incident). The Applicant did not serve a notice on the 1st Respondent to produce the 1st Respondent's "CCTV" recording regarding the Alleged Escorting Out Incident; and

(3) the Applicant failed to discharge the legal burden to prove on a balance of probabilities that she had signed the MSA under coercion or duress by the 1st Respondent.

[16] The Applicant filed this appeal to the Court of Appeal against the High Court's Decision (This Appeal).

D. Proceedings In The Civil Suit

[17] In the Civil Suit, the 1st Respondent's Statement of Claim [1st Respondent's Original Action (Civil Suit)] pleaded as follows, among others:

(1) the Applicant breached her employment contract with the 1st Respondent when the Applicant made secret profits from the 1st Respondent's Recruitment (Foreign Workers) [Alleged Secret Profits (Applicant)];

(2) fraud was committed by the Applicant against the 1st Respondent and this had caused loss to the 1st Respondent; and

(3) the 1st Respondent prayed for the following relief from the Applicant-

(a) compensatory damages to be assessed by the Sessions Court and shall be paid by the Applicant to the 1st Respondent;

(b) the Applicant shall pay aggravated damages to the 1st Respondent; and

(c) the Sessions Court shall conduct an account of all the secret profits made by the Applicant and upon the conclusion of such an account, the Applicant shall pay the secret profits to the 1st Respondent.

[18] The Applicant denied the 1st Respondent's Original Action (Civil Suit) and filed a counterclaim against the 1st Respondent [Applicant's Counterclaim (Civil Suit)]. The Applicant's Counterclaim (Civil Suit) prayed for the following relief, among others:

(1) a declaration that the Applicant had not committed any fraud against the 1st Respondent and had not obtained any secret profit in the course of her employment with the 1st Respondent;

(2) a declaration that the 1st Respondent's Police Report was false and had been made *mala fide;*

(3) the 1st Respondent shall pay exemplary damages and aggravated damages to the Applicant for-

(a) the false 1st Respondent's Police Report; and

(b) the 1st Respondent's malicious prosecution of the Applicant;

(4) alternatively, a declaration that the 1st Respondent had deceived the Applicant to sign the MSA and had dismissed the Applicant from the 1st Respondent's employment in a *mala fide* manner;

(5) a declaration that the 1st Respondent had failed to pay RM50,000.00 to the Applicant pursuant to the MSA; and

(6) an order for the 1st Respondent to pay RM50,000.00 to the Applicant according to the MSA.

[19] At the trial in the Sessions Court-

(1) three witnesses testified for the 1st Respondent, namely-

(a) Mr Marco Lee Kah Kit (Mr Marco Lee), an Internal Audit Manager at HLMG Management Co Sdn Bhd. Mr Marco Lee had been appointed by the 1st Respondent to conduct a forensic and audit investigation against the Applicant with regard to the Alleged Fraud (Applicant) and Alleged Secret Profits (Applicant);

(b) Puan Nur Atikah Lalitha bt Abdullah (Puan Nur), the HR Manager with Hong Leong Manufacturing Group (the 1st Respondent is one of the companies in this group). Puan Nur testified regarding, among others, the MSA; and

(c) Encik Mohd liman Rao bin Abdullah; and

(2) the Applicant elected not to give evidence.

[20] On 22 March 2023, the Sessions Court delivered the following judgment in the Civil Suit, among others:

(1) the 1st Respondent's Original Action (Civil Suit) was allowed with the following orders-

(a) the Applicant shall pay to the 1st Respondent a sum of RM249,802.01 as general damages; and

(b) an amount of RM50,000.00 shall be paid by the Applicant to the 1st Respondent as exemplary damages; and

(2) the Applicant's Counterclaim (Civil Suit) was dismissed

[Sessions Court's Judgment (Civil Suit)].

[21] The Applicant had filed an appeal to the High Court against the Sessions Court's Judgment (Civil Suit) [Applicant's Appeal (Civil Suit)]. At the time of our decision on This Appeal, the Applicant's Appeal (Civil Suit) was still pending.

E. Applicant's Application To Adduce Further Evidence In Support Of This Appeal (Enclosure No 19)

[22] In Encl No 19, the Applicant applied for leave of the Court of Appeal to adduce the evidence of Mr Marco Lee and Puan Nur given in the Civil Suit (collectively referred to in this judgment as "Further Evidence") for the hearing of This Appeal.

[23] The 1st Respondent had opposed Encl No 19 but to no avail. On 13 January 2023, the Court of Appeal unanimously allowed Encl No 19 with costs in the cause [Court of Appeal's Order (Further Evidence)]. Consequently, the Applicant filed a Supplemental Record of Appeal (Encl No 39) in This Appeal, which contained the Further Evidence.

F. Issues

[24] The main question in This Appeal (Main Issue) is whether there is any ground for the Court of Appeal to set aside the High Court's Decision (the High Court's refusal to issue an order of *certiorari* to quash the IC's Award). To decide the Main Issue, the following questions have to be determined:

(1) whether the Court of Appeal can consider the Further Evidence for the purpose of This Appeal when the Further Evidence was not adduced in-

(a) the 2nd Respondent; and

(b) the JRA (in the High Court)

(1st Question).

The 1st Question discusses the effect of the following provisions of written law-

(i) section 69(3) and (4) of the Courts of Judicature Act 1964 (CJA);

(ii) rule 7(3), (3A) and (4) of the Rules of the Court of Appeal 1994 (RCA); and

(iii) section 30(5) IRA;

(2) if the answer to the 1st Question is in the affirmative, how should the Court of Appeal assess the Further Evidence? In this regard, should the Court of Appeal consider the Further Evidence as an appellate court which is deciding on the High Court's exercise of discretion to refuse to issue a *certiorari* order in a JRA (2nd Question);

(3) if the answer to the 2nd Question is "yes", whether an objective assessment of-

(a) the Further Evidence; and

(b) the evidence which had been adduced at the hearing in the 2nd Respondent [Evidence (IC)]

- would show that the IC's Award was "irrational' or unreasonable in the sense that no reasonable Industrial Court Chairperson would have made the IC's Award?; and

(4) if-

(a) the IC's Award is irrational; and

(b) This Appeal is allowed with a *certiorari* order to quash the IC's Award

- in view of the pending Applicant's Appeal (Civil Suit), whether the Applicant is entitled to monetary compensation pursuant to-

(i) section 69(1) and (4) CJA;

(ii) section 25(2) read with para 1 of the Schedule to the CJA (Paragraph 1);

(iii) rule 7(1) and (4) RCA; and

(iv) Order 53 r 2(3) of the Rules of Court 2012 (RC)?

[25] We are unable to find any previous case which has decided the 1st and 2nd Questions.

G. The 1st Question

[26] We reproduce below-

(1) section 69(3) and (4) CJA;

(2) rule 7(3), (3A) and (4) RCA; and

(3) section 30(5) IRA

"section 69 CJA **Hearing of appeals**

...

(3) **Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal.**

(4) **The Court of Appeal may draw Inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.**

rule 7 RCA **Power of Court** to amend, **admit further evidence,** or draw inferences of fact

...

(3) **Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, such further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court.**

(3A) **At the hearing of the appeal further evidence shall not be admitted unless the Court is satisfied that -**

(a) **at the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and**

(b) **the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court or the subordinate court, as the case may be.**

(4) **The Court may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.**

section 30 IRA **Awards**

...

(5) **The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.**"

[Emphasis Added]

[27] Firstly, we have to consider whether the Further Evidence is relevant to-

(1) the Applicant's claim in the IC;

(2) the Applicant's JRA in the High Court; and

(3) This Appeal.

[28] It was clear from the SOC (IC), the Applicant's claim was confined to the question of whether the Applicant had succeeded to discharge the legal burden to prove on a balance of probabilities that the Applicant did not sign the MSA voluntarily and hence, the Applicant had been wrongfully dismissed by the 1st Respondent [Issue (IC)].

[29] In the JRA in the High Court, para (e) of the Statement [required by O 53 r 3(2) RC] [Statement (JRA)] relied on the ground that the Applicant had been forced and rushed to sign the MSA (Pemohon telah dipaksa menandatangani MSA dalam keadaan yang terburu-buru). It is clear that the Statement (JRA) concerned the Issue (IC).

[30] This Appeal concerns the Main Issue, namely, whether there is any ground for the Court of Appeal to set aside the High Court's refusal to issue an order of *certiorari* to quash the IC's Award. The Main Issue clearly concerns the Issue (1C).

[31] Puan Nur gave the following evidence in the Civil Suit during cross-examination by the Applicant's learned counsel [Puan Nur's Evidence (Civil Suit)]:

Raam (Applicant's learned counsel):	In relation to your question and answer 33 ya you said you suggested to Chandra jCOW-1] for the payment to Fatimah [Applicant] pursuant to the MSA to be held pending the outcome of the investigation, Chandra agreed, now this matter has gone to court at that time when you gave this suggestion was it before it went to court or while it was in court or after it went to court
Saksi (Puan Nur):	Before
Raam:	Before, very good so when a matter before it goes to court it become a very important matter it is a matter of legality you agree you did not put in writing your suggestion
Saksi:	No I did not
Raam:	Would you be able to explain why
Saksi:	It was a conversation that I had with Chandra and was outcome of the investigation so I told him that we should not be paying the MSA we should wait for the outcome of the investigation
Raam:	Why was MSA given to her

Saksi:	Because there was a lot of issues on performance unfortunately not documented so the best way was to part with amicably
Raam:	In another word to get rid of this employee you have to give her MSA you agree
Saksi:	To part with amicably yes
Raam:	Part with get rid of her doesn't matter it is matter of terminology to ensure that Puan Fatimah leave your company she has to sign the MSA you agree
Saksi:	Yes
Raam:	And after signing the MSA only she was informed she would not be paid you agree
Saksi:	Yes
Raam:	And she had no choice but to sign the MSA because the company wanted her out you agree
Saksi:	No
Raam:	Can you show to the court that she had a choice or rather to sign the MSA or not to sign
Saksi:	No I can't
Raam:	Because the company at that point of time was very unhappy with her and wanted her to leave you agree
Saksi:	Agree
Raam:	Did the company prior giving her the MSA give her notice to say that she .....
Saksi:	No
Raam:	Would you agree good industrial practice would require an employee to be given ample notice before MSA or MSS or VSS given to the
Saksi:	Yes
Raam:	And it was not given in this case
Saksi:	No
Raam:	Why
Saksi:	Because I believe they wanted to move ahead with this
Raam:	Another word they wanted her to leave no matter what you agree
Saksi:	Yes I agree

Raam:	And the MSA was only given to Puan Fatimah the day she entered she came back from her annual leave you agree the moment she entered the company
Saksi:	Not after she came back from annual leave because after she came back from annual leave she went for training
Raam:	The company sent her for training
Saksi:	Yes then she came back to the office then there was a findings [sic]
Raam:	She was on annual leave the immediately she asked to go to training then she came back to her work and she was handed the MSA you agree
Saksi:	Agree
Raam:	And she was not given a time to consider you agree
Saksi:	Agree
Raam:	Like I said you are experienced Human Resource person and you are on oath in court do you think that it is equitable to treat her this way by giving her MSA without any notice and thereafter making her leave on the same day
Saksi:	I think given the circumstances of what was going on and I am going very harsh saying this
Raam:	No you have the right
Saksi:	Yes
Raam:	So in your mind the fact that she was given the MSA she was made to sign the same day and although her last day employment is the next day she was asked to leave on the same day you agree that was what happened
Saksi:	Yes

[32] The relevance of Puan Nur's Evidence (Civil Suit) to the Issue (IC) in the IC, JRA and This Appeal is as follows:

(1) the reason why the 1st Respondent offered the MSA to the Applicant was because-

(a) "there was a lot of issues on performance" of the Applicant in the 1st Respondent; and

(b) the 1st Respondent was "very unhappy with [the Applicant] and wanted [the Applicant] to leave"]

(2) the 1st Respondent did not give any prior notice of the MSA to the Applicant because the 1st Respondent "wanted [the Applicant] to leave no matter what;

(3) the 1st Respondent did not give the Applicant time to consider the contents of the MSA; and

(4) even though the MSA stated that the Applicant's last day in the 1st Respondent's premises was 21 April 2017, the Applicant was asked to leave the 1st Respondent's premises on 20 April 2017, the very day the Applicant had signed the MSA.

[33] We are constrained to attach weight to Puan Nur's Evidence (Civil Suit) because-

(1) Puan Nur is a senior HR personnel in the Hong Leong Manufacturing Group (which includes the 1st Respondent); and

(2) Puan Nur's Evidence (Civil Suit) was given during cross-examination by the Applicant's learned counsel and was not corrected by the 1st Respondent's learned counsel during the re-examination of Puan Nur. In other words, Puan Nur's Evidence (Civil Suit) during cross-examination was accepted without any qualification by the 1st Respondent.

[34] We are of the view that notwithstanding the fact that Puan Nur's Evidence (Civil Suit) was not adduced in the IC and JRA (in the High Court), the Court of Appeal can and should consider Puan Nur's Evidence (Civil Suit) for the purpose of This Appeal. Our reasons are as follows:

(1) as explained in the above para 32, Puan Nur's Evidence (Civil Suit) was clearly relevant for This Appeal;

(2) we attach weight to Puan Nur's Evidence (Civil Suit) — please refer to the above para 33;

(3) Puan Nur's Evidence (Civil Suit) had been suppressed by the 1st Respondent during the hearing of-

(a) the Applicant's claim in the IC; and

(b) the Applicant's JRA in the High Court

[1st Respondent's Suppression (Puan Nur's Evidence)].

If Puan Nur's Evidence (Civil Suit) is not considered in This Appeal, this would unjustly allow the 1st Respondent to benefit unlawfully from the 1st Respondent's Suppression (Puan Nur's Evidence) by dismissing the Applicant without just cause or excuse under the guise of the MSA;

(4) by reason of the Court of Appeal's Order (Further Evidence), the Applicant had succeeded to satisfy the high threshold under s 69(3) CJA, r 7(3) and (3A) RCA to admit Puan Nur's Evidence (Civil Suit) in This Appeal. If we do not take into account Puan Nur's Evidence (Civil Suit) in deciding This Appeal, this will render nugatory the Court of Appeal's Order (Further Evidence);

(5) section 69(3) CJA and r 7(4) RCA empower the Court of Appeal to consider Puan Nur's Evidence (Civil Suit) in This Appeal and "draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires";

(6) by reason of s 30(5) IRA, the court "shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form". It is to be noted that Parliament has employed a mandatory term "shall" in s 30(5) IRA; and

(7) This Appeal concerns a claim by an employee against an employer under the IRA. In this regard-

(a) the IRA is 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 the Court of Appeal in *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1996] 1 MELR 142; [1996] 2 MLRA 212, at pp 229-230;

(b) as an employee of the 1st Respondent, the Applicant has a constitutional right to livelihood (Employee's Constitutional Right to Livelihood) pursuant to art 5(1) in Part II of the Federal Constitution (FC); and

(c) the 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 (Employee's Limited Proprietary Right) — please refer to the Court of Appeal's judgment in *Ace Holdings Bhd v. Norahayu Rahmad & Anor* [2023] 3 MELR 207; [2023] 5 MLRA 96, at p 113

If Puan Nur's Evidence (Civil Suit) is not considered in This Appeal-

(i) this will be contrary to the Social Objective (IRA); and

(ii) this will render illusory the Employee's Constitutional Right to Livelihood and Employee's Limited Proprietary Right.

H. The 2nd Question

[35] There was no appeal by the Applicant to the High Court against the IC's Award. The Industrial Relations (Amendment) Act 2020, which came into force on 1 January 2021, provided an appeal to the High Court from an IC's award. Until then, any challenge made against an award of the IC was by way of a JRA. Hence, in this case, the JRA was filed in the High Court by the Applicant for a *certiorari* order to quash the IC's Award. This Appeal emanated from the High Court's dismissal of the Applicant's JRA. Hence, with regard to the 2nd Question, we can only decide This Appeal on the following three grounds of Judicial Review, namely-

(1) whether the IC's Award was illegal;

(2) was there any procedural impropriety regarding the IC's Award?; and

(3) whether the IC's Award was "irrational".

- please refer to the Federal Court's judgment delivered by Raus Sharif FCJ (as he then was) in *Ranjit Kaur S. Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 5 MLRA 696, at para [15].

[36] In this case, the IC's Award was not illegal. Nor was there any procedural impropriety regarding the IC's Award. The only ground for a Judicial Review of the IC's Award was whether the IC's Award was irrational based on Puan Nur's Evidence (Civil Suit) and Evidence (IC). Before discussing this issue, we shall decide the following two matters:

(1) in this case, with regard to the MSA, who had the legal and evidential burden of proof [Burden (Legal and Evidential)] under ss 101(1), (2) and 102 of the Evidence Act 1950 (EA)?; and

(2) whether the Applicant could rely on extrinsic evidence, such as Puan Nur's Evidence (Civil Suit) and Evidence (IC), to invalidate the MSA pursuant to proviso (a) to s 92 EA {Proviso (a) [Section 92 EA]} and s 30(5) IRA.

I. Who Had The Burden (Legal And Evidential)?

[37] It is not disputed that the Applicant had the Burden (Legal and Evidential) to prove on a balance of probabilities that the Applicant had not signed the MSA voluntarily — please refer to the judgment of the Court of Appeal delivered by Lee Swee Seng JCA in case of *Matrix Global Education Sdn Bhd v. Felix Lee Eng Boon* [2023] 2 MLRA 40, at para [67]. The 1st Respondent had no Burden (Legal and Evidential) to prove that the Applicant had voluntarily signed the MSA.

J. Effect Of Proviso (a) [Section 92 EA] and Section 30(5) IRA

[38] We reproduce below the relevant parts of ss 91 and 92 EA:

> "section 91. **Evidence of terms of contracts**, grants and other, dispositions of property **reduced to form of document**
>
> **When the terms of a contract** or of a grant or of any other disposition of property **have been reduced by or by consent of the parties to the form of a document**, and in all cases in which any matter is required by law to be reduced to the form of a document, **no evidence shall be given in proof of the terms of the contract**, grant or other disposition of property or of the matter **except the document itself**, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.
>
> section 92. **Exclusion of evidence of oral agreement**
>
> **When the terms of any such contract**, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, **have been proved according to s 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms**:
>
> **Provided that -**
>
> (a) **any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto,** such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;..."
>
> [Emphasis Added]

[39] By reason of Proviso (a) [s 92 EA] (any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto), the Applicant could rely on Puan Nur's Evidence (Civil Suit) and Evidence (IC) to invalidate the MSA — please refer to the Court of Appeal's decision in *B Braun Medical Industries Sdn Bhd v. Mugunthan Vadiveloo* [2024] 6 MLRA 186, at [36(2)(b)]. Furthermore, according to s 30(5) IRA, the court "shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form". Accordingly, in an employee's claim for dismissal without just cause or excuse, the court is not shackled by ss 91 and 92 EA.

K. Whether The Applicant Had Succeeded In Discharging The Burden (Legal And Evidential) To Prove That She Had Not Signed MSA Voluntarily

[40] We have perused Puan Nur's Evidence (Civil Suit) and Evidence (IC). This court is satisfied that the Applicant had discharged the Burden (Legal and Evidential) to prove on a balance of probabilities that the Applicant had not

signed the MSA voluntarily. The following evidence and reasons support our decision:

(1) according to Puan Nur's Evidence (Civil Suit), before 20 April 2017 (before the Applicant returned to work and signed the MSA), the 1st Respondent had already decided to dismiss the Applicant because the 1st Respondent was "very unhappy" with the Applicant's work performance and the 1st Respondent "wanted [the Applicant] to leave no matter what (1st Respondent's Premeditated Plan);

(2) the 1st Respondent's Premeditated Plan was put into effect as follows-

(a) the MSA was prepared by the 1st Respondent without any prior notice to the Applicant — please refer to Puan Nur's Evidence (Civil Suit). It is to be emphasised that if the 1st Respondent had wanted in good faith to give prior notice to the Applicant regarding the MSA, before 20 April 2017, the 1st Respondent could have easily-

(i) emailed a draft MSA to the Applicant;

(ii) sent a WhatsApp message to the Applicant to the Applicant with a draft MSA; and/or

(iii) called the Applicant's mobile phone and informed her about the draft MSA;

(b) on 20 April 2017, when the MSA was given to the Applicant for the very first time, the Applicant was not given a period of reasonable time to-

(i) consider the contents of the MSA;

(ii) get legal advice regarding the effect of the MSA; and/or

(iii) discuss the contents of the MSA with her spouse, immediate family members, close colleagues and close friends;

(c) it is to be noted that on 20 April 2017, the Applicant had just returned to work from her two weeks of annual leave. Any reasonable employee in the Applicant's circumstances on 20 April 2017, i.e., presented with the MSA by the 1st Respondent (her employer) after she had spent two weeks of annual leave, would not be in the right state of mind to decide there and then to accept the MSA or otherwise.

It was not coincidental for the 1st Respondent to present the MSA to the Applicant on 20 April 2017. The 1st Respondent had

deliberately chosen 20 April 2017 as part of its "shock and awe" strategy to force the Applicant to sign the MSA on that very day; and

(d) after the Applicant signed the MSA on 20 April 2017, the Applicant was asked to leave the 1st Respondent's premises on the same day. The 1st Respondent did not comply with cl 1 [1st Respondent's Letter (20 April 2017)] (prepared by the 1st Respondent itself) which stated that the Applicant's "physical last day of service with [the 1st Respondent] is 21 April 2017. Furthermore, cl 7 [1st Respondent's Letter (20 April 2017)] stated that the Applicant could return all of the 1st Respondent's property "not later than your [the Applicant's] last day of service in the office".

The above conduct by the 1st Respondent is relevant under s 8(2) EA which states as follows-

> **"The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto."**
>
> [Emphasis Added]

If the MSA had been offered in good faith to the Applicant, the 1st Respondent would have complied with cls 1 and 7 [1st Respondent's Letter (20 April 2017)] by allowing the Applicant to-

(i) stay and work in the 1st Respondent's premises on 20 April 2017; and

(ii) come to work on 21 April 2017 for the last time;

(3) the fact that there was-

(a) no prior notice of a draft MSA by the 1st Respondent to the Applicant — please refer to the above sub-paras (2)(a)(i) to (iii); and

(b) no reasonable time was given by the 1st Respondent to consider the MSA as well as to consult lawyers and certain persons as stated in the above sub-para (2)(b)(iii)

- had deprived the Applicant of her "opportunity' to negotiate in good faith with the 1st Respondent regarding the terms and conditions of the MSA [Opportunity (Negotiations)].

If the Applicant had been afforded an Opportunity (Negotiations) by the 1st Respondent, it would be difficult, if not impossible, for the Applicant to discharge the Burden (Legal and Evidential) to prove on a balance of probabilities that she had not signed the MSA voluntarily. The importance of an Opportunity (Negotiations) has been explained by the Court of Appeal in *Matrix Global Education*, at [11] to [17], [66], [71] to [73], [93] and [94], as follows-

> "[11] Meanwhile the appellant company received information that the respondent was involved in certain irregularities during his tenure as CEO of MGS. This placed further concerns in respect of the respondent's suitability of employment within the company.

[12] In the light of the aforesaid, the appellant, through Tuan Hj Mohammad Nor, had immediately on 13 February 2018 notified the respondent via WhatsApp message of the withdrawal of the offer letter dated 6 February 2018. The respondent was also advised to resign and was informed that he would be given six months' salary *in lieu* of the notice.

[13] The respondent entered into a negotiation with the appellant to achieve a better severance package for his resignation. The respondent then issued another email dated 28 February 2018 wherein he boldly requested for 12 months' salary *in lieu* and for the appellant's car ownership scheme ('COS') to be deemed fully executed.

[14] Soon after that, a meeting was held on 2 March 2018 between Tuan Hj Mohammad Nor and the respondent wherein the former informed the respondent that in the event the respondent opted to resign, he would be paid six months' salary *in lieu*.

[15] The respondent wrote an email dated 2 March 2018 to the appellant wherein he tendered his resignation as CEO of the appellant and in language both warm and cordial, he also further thanked the appellant for the opportunity to work with them and expressed his Intentions to assist MGS, if need be in the future. It was what one would reasonably expect in a voluntary parting of ways where courtesy and commendation would be the sweet aroma of separation.

[16] The appellant company by its letter of 5 March 2018 accepted the respondent's resignation and informed him that his last date of employment was on 3 March 2018. The appellant committed itself in writing as negotiated that as a result of his resignation, the respondent would be granted the following:

(a) six months' salary *in lieu* of notice;

(b) full waiver of his child's tuition fees with MIS until completion of the remaining academic term; and

(c) restructuring of the COS in order to allow the respondent an additional three months to repay the car loan under the COS.

[17] The appellant company honoured what had been agreed. The six months' salary *in lieu* of notice was paid by the appellant to the respondent.

The respondent received the benefit of a full waiver of his child's tuition fees with MIS until the remaining of the academic term and the repayment of the car loan was restructured.

...

[66] What is more pertinent and indeed pivotal in this case is whether both the High Court and the Industrial Court had failed to consider the relevant fact that the respondent, prior to his resignation, had entered into negotiations with the appellant to discuss a better severance package.

...

[71] What is not disputed here is that there was a suggestion from the appellant company that the respondent should consider resigning in the light of the numerous complaints by parents on the quality of teaching and education and the company having to refund the fees paid to the parents to the tune of more than RM1 million for that academic year. It cannot be denied as it had become *fait accompli* that, upon the suggestion of resignation being raised, the respondent had entered into negotiations with the appellant for a better severance package....

...

[72] The conduct of the respondent in entertaining and entering into negotiations for settlement on terms does not sit snugly and indeed cannot support what he later asserted in the statement of case and at the Industrial Court that he had been constructively dismissed.

[73] The respondent cannot have the best of both worlds; negotiating and accepting the terms of a separation and then at the same time claiming that he had been constructively dismissed. He cannot have the cake and eat it; entering into a negotiated settlement without reservation of rights and then launching a claim for more on account of being constructively dismissed.

...

[93] It cannot be over emphasised that a resignation made pursuant to a series of negotiations completely negates the allegations of forced resignation as upheld by the Employment Appeal Tribunal in the case of *Sheffield v. Oxford Controls Co Ltd* [1979] ICR 396 as follows:

> **In cases such as that which we have just hypothesised, and those reported, the causation is the threat. It is the existence of the threat which causes the employee to be willing to sign, and to sign, a resignation later or to be willing to give, and to give, the oral resignation. But where that willingness is brought about by other considerations and the actual causation of the resignation is no longer the threat which has been made but is the state of mind of the resigning employee, that he is willing and content to resign on the terms which he has negotiated and which are satisfactory to him, then we think there is no room for the principle to be derived from the decided cases. In such a case he resigns because he is willing to resign as the result of**

being offered terms which are to him satisfactory terms on which to resign. He is no longer impelled or compelled by the threat of dismissal to resign, but a new matter has come into the history, namely that he has been brought into a condition of mind in which the threat is no longer the operative factor of his decision; It has been replaced by the emergence of terms which are satisfactory. Therefore, we think that the finding that Mr Sheffield had agreed to terms upon which he was prepared to agree to terminate his employment with the company — terms which were satisfactory to him — means that there is no room for the principle and that it is impossible to upset the conclusion of the Tribunal that he was not dismissed.

[94] The Employment Appeal Tribunal went on to dismiss the employee's claim as the employee therein had resigned voluntarily after he had agreed to satisfactory terms/offer of financial benefits. There it was held in the headnotes as follows:

Held: dismissing the appeal, that where an employee was threatened that if he did not resign he would be dismissed and the threat caused the resignation, that amounted to a dismissal in law; but where the resignation was brought about not by the threat of dismissal but by other factors such as the offer of financial benefits, there was no dismissal; that accordingly, since the employee had agreed satisfactory terms upon which he was prepared to resign so that the threat of dismissal was not in fact the cause of his resignation, he had not been dismissed and the industrial tribunal's decision was correct."

[Emphasis Added];

(4) the Opening Sentence [1st Respondent's Letter (20 April 2017)] stated that "With reference to the above, we [the 1st Respondent] are writing to confirm the details of the mutually agreed separation of your [the Applicant] employment with [the 1st Respondent]. The Opening Sentence [1st Respondent's Letter (20 April 2017)] was not true because how could the 1st Respondent write "to confirm the details of the mutually agreed separation of [the Applicant's] employment with [1st Respondent] when the MSA was thrust upon the Applicant for the very first time in the morning on 20 April 2017 (after the Applicant had just returned to work from two weeks of annual leave). More importantly, the 1st Respondent did not give an Opportunity (Negotiations) to the Applicant — please refer to the above sub-paragraph (3).

The fact that the Opening Sentence [1st Respondent's Letter (20 April 2017)] was false, supports the above decision that the MSA was indeed a sham contract to cloak an unlawful dismissal of the Applicant by the 1st Respondent [1st Respondent's Unlawful Dismissal (Applicant)];

(5) before 20 April 2017-

(a) the Applicant's monthly salary was RM7,456.00;

(b) the Applicant had worked in the 1st Respondent for a period of nearly 14 years 2 months (from 5 August 2002 to 20 April 2017);

(c) the 1st Respondent had not issued any "show cause letter to the Applicant regarding her work performance;

(d) the 1st Respondent had not initiated any charge against the Applicant with regard to misconduct or disciplinary offence allegedly committed by her [Alleged Misconduct/ Disciplinary Offence];

(e) no domestic inquiry had been convened and conducted by the 1st Respondent against the Applicant in respect of any Alleged Misconduct/Disciplinary Offence;

(f) the Applicant had not been found guilty by the 1st Respondent of any misconduct or disciplinary offence; and

(g) the Applicant's age was more than 56 years 10 months. She had about two years and one month to retire from her employment with the 1st Respondent at the age of 60 years old. It was neither logical nor reasonable for the Applicant to have accepted the MSA voluntarily.

In view of the above evidence and reasons, it was highly improbable for the Applicant to have signed the MSA voluntarily on 20 April 2017. On the contrary, it was probable for the 1st Respondent to have coerced the Applicant to sign the MSA on 20 April 2017;

(6) after the Applicant had signed the MSA, the 1st Respondent did not give a copy of the MSA to her. Such a conduct by the 1st Respondent was consistent with the inference that the 1st Respondent intended to conceal the 1st Respondent's Unlawful Dismissal (Applicant); and

(7) even if the Alleged Fraud (Applicant) and Alleged Secret Profits (Applicant) were true, any *bona fide* employer in the 1st Respondent's circumstances, would have informed the Applicant in writing the reasons why the 1st Respondent refused to pay to the Applicant the sum of RM50,000.00 as stipulated in cls 2 and 3 [the 1st Respondent's Letter (20 April 2017)]. However, the 1st Respondent did not inform the Applicant why the 1st Respondent refused to pay the amount of RM50,000.00 to the Applicant. Once again, such a conduct by the 1st Respondent fortified our decision that the MSA was indeed a sham contract to cloak the 1st Respondent's Unlawful Dismissal (Applicant).

[41] We are mindful of the following evidence:

(1) the Applicant's Signature Paragraph [1st Respondent's Letter (20 April 2017)] stated that the Applicant had "read, understood and agreed to the terms set out in" the MSA;

(2) the Applicant did not register any objection or protest after signing the MSA by way of email and/or letter; and

(3) before executing the MSA, the Applicant occupied a senior position in the 1st Respondent's HR Department and had vast experience in HR matters. We have considered the above evidence as submitted by the 1st Respondent's learned counsel. This court is however not persuaded that the Applicant had signed the MSA voluntarily because-

(a) the existence and implementation of the 1st Respondent's Premeditated Plan — please refer to the above sub-paragraphs 40(1) and (2);

(b) as explained in the above sub-paragraph 40(3), the 1st Respondent did not give an Opportunity (Negotiations) to the Applicant;

(c) the Opening Sentence [1st Respondent's Letter (20 April 2017)] was not true and showed that the MSA was a sham contract — please see the above sub-para 40(4);

(d) the circumstances regarding the Applicant as explained in the above sub-para 40(5) made it highly improbable for the Applicant to have agreed to the MSA voluntarily; and

(e) the following reprehensible conduct of the 1st Respondent-

(i) the 1st Respondent's Suppression (Puan Nur's Evidence) — please refer to the above sub-paragraph 34(3); and

(ii) the conduct of the 1st Respondent as described the above sub-paragraphs 40(2)(a), (b), (d), (3), (6) and (7)

- proved on a balance of probabilities that the 1st Respondent had acted in bad faith in this case by concealing the 1st Respondent's Unlawful Dismissal (Applicant) by way of the MSA.

[42] The 1st Respondent's learned counsel relied on the doctrine of equitable estoppel to contend that the Applicant was estopped in this case from denying that she had executed the MSA voluntarily. We are unable to accede to this submission because the 1st Respondent's inequitable conduct (please refer to the above para 41), in itself, disentitles the 1st Respondent from relying on the equitable estoppel doctrine in this case.

[43] We must make it clear that we are not condoning an employee's fraud, secret profits, misconduct and/or disciplinary infraction (Alleged Fraud/ Secret Profits/Misconduct/Disciplinary Offence). If there is an Alleged Fraud/Secret Profits/Misconduct/Disciplinary Offence by an employee (X), an employer (Y) may pursue the Alleged Fraud/Secret Profits/Misconduct/ Disciplinary Offence by conducting a "due inquiry" against X. Y however cannot unlawfully dismiss X under the guise of a MSA.

[44] All the cases cited by the 1st Respondent's learned counsel can be easily distinguished from the particular facts of this case — please refer to the above paras 40 and 41.

L. Effect Of The 1st Respondent's Unlawful Dismissal (Applicant)

[45] In view of the 1st Respondent's Unlawful Dismissal (Applicant), the following consequences shall ensue-

(1) the 2nd Respondent had jurisdiction to hear the Applicant's claim in this case;

(2) if the 2nd Respondent had the benefit of Puan Nur's Evidence (Civil Suit), the 2nd Respondent would have allowed the Applicant's claim in this case; and

(3) in view of Puan Nur's Evidence (Civil Suit), the IC's Award was irrational in the sense that no reasonable Industrial Court Chairperson would have made the IC's Award. On this ground alone, This Appeal should be allowed and a *certiorari* order should be issued to quash the IC's Award.

M. Can The Applicant Claim For Reinstatement To Her Former Job Or Compensation *In Lieu* Of Reinstatement?

[46] As the Applicant has attained retirement age, premised on the Federal Court's judgment delivered by Mohamed Apandi Ali FCJ in *Unilever (M) Holdings Sdn Bhd v. So Lai & Anor* [2015] 2 MELR 511; [2015] 3 MLRA 507, at [1], [20], [23], [24] and [27], she is not entitled to the following remedies:

(1) an order of *mandamus* to direct the 1st Respondent to reinstate the Applicant to her former employment in the 1st Respondent; and

(2) monetary compensation *in lieu* of the remedy of reinstatement to be paid by the 1st Respondent to the Applicant.

N. Whether The Applicant Is Entitled To Monetary Compensation In View Of The Pending Applicant's Appeal (Civil Suit)

[47] Reproduced below is ss 25(2), 69(1), para 1 CJA, r 7(1) RCA and O 53 r 2(3) RC:

"CJA

section 25**Powers of the High Court**

...

(2) **Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule: Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.**

section 69(1) **Appeals to the Court of Appeal shall be by way of rehearing, and in relation to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court**, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.

Paragraph 1 **Prerogative writs**

Power to issue to any person or authority directions, **orders** or writs, including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* **or any others, for the enforcement of the rights conferred by Part II [FC], or any of them, or for any purpose.**

RCA

rule 7(1)**The Court shall have all the powers and duties, as to amendment or otherwise, of the appropriate High Court**, together with full discretionary power to receive further evidence by oral examination in Court, by affidavit, or by deposition taken before an examiner or Commissioner.

RC

Order 53 r 2(3)

Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or **monetary compensation**:

> Provided that the power to grant an injunction shall be exercised in accordance with the provisions of s 29 of the Government Proceedings Act 1956 and s 54 of the Specific Relief Act 1950."

[Emphasis Added]

[48] It is clear from the majority judgment of the Federal Court (by Eusoff Chin CJM and Edgar Joseph Jr FCJ) in *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1996] 1 MELR 71; [1996] 1 MLRA 725, that in a JRA, when the court quashes a decision of the Industrial Court by way of a *certiorari* order, the court has the power under para 1 and O 92 r 4 of the then Rules of the High Court 1980 (which is in *pari materia* with the present O 92 r 4 RC) to grant monetary compensation in the interest of justice.

[49] The court's power to grant monetary compensation in a JRA is now clear from the following provisions of written law:

(1) section 25(2) CJA {the High Court shall have the additional powers set out in the Schedule) read with para 1 {Power to issue to any person..., orders..., including, or any others, for the enforcement of the rights conferred by Part II [FC], or any of them, or for any purpose). It is to be noted that an employee's claim for unlawful dismissal is an enforcement of the Employee's Constitutional Right to Livelihood under Part II FC;

(2) section 69(1) CJA {the Court of Appeal shall have all the powers and duties... of the High Court)]

(3) section 69(4) CJA (The Court of Appeal may... give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires)]

(4) rule7(1) RCA {[the Court of Appeal] shall have all the powers and duties... of the appropriate High Court};

(5) rule 7(4) RCA {[the Court of Appeal] may... give any judgment; and make any order which ought to have been given or made, and make such further or other orders as the case requires); and

(6) Order 53 r 2(3) RC (Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may... make any orders, including an order of... monetary compensation).

[50] Premised on *Rama Chandran* and the provisions of written law as stated in the above para 49, in view of the 1st Respondent's Unlawful Dismissal (Applicant), in the interest of justice, we make the following order of monetary compensation:

(1) the 1st Respondent shall pay to the Applicant a sum of RM177,600.00 as compensation for backwages (RM7,400.00 X 24 months). This is because when the 1st Respondent unlawfully dismissed the Applicant on 20 April 2017, the Applicant had about two more years to serve in the 1st Respondent's employment (before her retirement at the age of 60 years); and

(2) if the Applicant is successful in the Applicant's Appeal (Civil Suit) in the High Court or Court of Appeal (whichever the case may be) with regard to the 1st Respondent's Unlawful Dismissal (Applicant), the Applicant shall not be entitled to a double recovery regarding the 1st Respondent's Unlawful Dismissal (Applicant). This is to avoid any unjust enrichment of the Applicant at the expense of the 1st Respondent.

O. Outcome Of This Appeal

[51] Premised on the above evidence and reasons-

(1) This Appeal is allowed;

(2) the High Court's Decision is set aside;

(3) the JRA is allowed and an order of *certiorari* is issued to quash the IC's Award;

(4) the 1st Respondent shall pay to the Applicant a sum of RM178,944.00 as compensation for backwages (RM7,456.00 X 24 months). If the Applicant is ultimately successful in the Applicant's Appeal (Civil Suit) with regard to the 1st Respondent's Unlawful Dismissal (Applicant), the Applicant shall not be entitled to a double recovery in respect of the 1st Respondent's Unlawful Dismissal (Applicant); and

(5) a sum of RM20,000.00 shall be paid by the 1st Respondent to the Applicant as costs for the proceedings in the Court of Appeal and High Court (subject to allocatur fee).

[52] In closing, employers should avoid unlawful dismissal of their employees under the guise of "mutual separation agreements/arrangements/schemes", "downsizing schemes", "employee restructuring schemes" or any other euphemism.