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JUDGMENT Express

ACEXIDE TECHNOLOGY SDN BHD & ANOR

v.

CHANG HENG KEONG & ANOTHER APPEAL

Federal Court, Putrajaya
Vazeer Alam Mydin Meera, Ahmad Terrirudin Mohd Salleh, Mohd Nazlan Mohd Ghazali FCJJ
[Civil Appeal Nos: 01(f)-8-03-2025(W) & 08(f)-9-12-2025(W)]
24 June 2026

Labour Law: *Employment — Workman — Industrial Relations Act 1967 — Company directors who were also promoters and shareholders removed as directors by EGM resolution pursuant to s 206(1)(a) Companies Act 2016 — References filed under s 20 Industrial Relations Act 1967 ("IRA") alleging unlawful dismissal as workmen — Appeals to Federal Court on 11 questions of law — Whether a company director could simultaneously be a workman within s 2 IRA — Whether absence of written employment contract and alleged absence of superior-subordinate relationship precluded directors in whose favour EPF and SOCSO contributions and income tax deductions were made from being workmen under s 2 IRA — Whether removal of a director under s 206(1)(a) Companies Act 2016 amounted to dismissal justiciable by Industrial Court under s 20(3) IRA — Whether Court of Appeal empowered to award compensation and back-wages pursuant to Practice Note No. 3 of 2019 of the Industrial Court without remitting matter to Industrial Court for merits hearing*

The appellant company, Acexide Technology Sdn Bhd, was incorporated in 1996 with three promoters, Lim BH ("Mr Lim"), Woon Kim Choy ("Mr Woon") and Chang Heng Keong ("Mr Chang"), each of whom became a shareholder and Director upon incorporation. At the material time, Mr Lim and his son held 54% of the shares, Mr Woon 10%, and Mr Chang 36%. Company documents designated Mr Lim as Managing Director, Mr Woon as Technical Director, and Mr Chang as Project Director. On 6 November 2019, an Extraordinary General Meeting ("EGM") was convened at the behest of Mr Lim, whereat resolutions were passed pursuant to s 206(1)(a) of the Companies Act 2016 to remove Mr Woon and Mr Chang as Directors. Jovin Lim was appointed as a new Director on the same day. The respondents did not challenge their removal as Directors. They thereafter filed separate references with the Director General of Industrial Relations under s 20 of the Industrial Relations Act 1967 ("IRA") alleging that they had been unlawfully dismissed as workmen by the appellant company. The Industrial Court dismissed their claims, holding that, as individuals who constituted the directing mind and will of the company, they did not qualify as employees or workmen within s 2 of the IRA. The respondents' respective applications for judicial review to the High Court were also unsuccessful, the High Court agreeing that the company records did not sufficiently establish that the respondents were employees. The

Court of Appeal however overturned the decisions of the lower courts, finding that the respondents were workmen within the IRA, relying on indicia of employment including EPF and SOCSO contributions under the Employees Provident Fund Act 1991 and the Employees' Social Security Act 1969, EA Forms, income tax deductions under the Income Tax Act 1967, the company's register of employees, salary records, and the annual financial reports in which the respondents were categorised as employees. The Court of Appeal made consequential orders for compensation *in lieu* of reinstatement and back-wages pursuant to Practice Note No. 3 of 2019 of the Industrial Court. The appellant company appealed to the Federal Court, which granted leave on 11 questions of law. The two appeals were heard together. The issues before the Federal Court were (i) whether a statement filed pursuant to O 53 r 3(2) of the Rules of Court 2012 in support of a judicial review application must categorise the errors of law relied upon under one or more of the recognised heads of judicial review, namely procedural impropriety, irrationality, illegality, and/or proportionality; (ii) whether an individual who was concurrently a promoter, shareholder, and Director of the appellant company, and who held functional positions and was paid remuneration described as salary subject to EPF, SOCSO, and income tax deductions under the respective statutes, could also be a workman within s 2 of the IRA read with ss 20(1) and 20(3), notwithstanding the absence of a written employment contract and the appellant company's contention that no superior-subordinate relationship existed; and (iii) whether the Court of Appeal was empowered to make consequential orders for compensation in lieu of reinstatement and back-wages pursuant to Practice Note No. 3 of 2019 of the Industrial Court without remitting the matter to the Industrial Court for a merits hearing on whether the respondents had been dismissed without just cause or excuse under s 20(3) of the IRA, and without affording the appellant company an opportunity to address deductions for post-dismissal earnings and contributory misconduct under the Second Schedule of the IRA.

Held (dismissing both the appeals):

(1) A statement filed pursuant to O 53 r 3(2) of the Rules of Court 2012 was required to categorise the errors of law relied upon under one or more of the recognised heads of judicial review, this was especially so in cases such as the present, where the Courts undertook a merits review or examined the substance of the case on grounds of illegality or irrationality. However, the respondents' O 53 statements were found to be compliant, as they did in fact irrefutably allude to their complaints being grounded on the judicial review heads of illegality and irrationality even if these specific words were not stated therein; sufficiency of pleadings must be read with proper emphasis on both substance and form. (paras 50, 52, 53, 75 & 215)

(2) Non-compliance with O 53 r 3(2) did not quite amount to a lack of jurisdiction on the part of the Courts, and even if there were defects, the judicial review application would not fail on the ground of lack of jurisdiction. Further, since the appellant had raised the objection for the first time before the Federal Court and had not pleaded it below, this ground of appeal could be dismissed on that basis alone. In any event, the court retained the discretionary power to address any errors, either where the decision of the lower tribunal was tainted with illegality or the findings of the Courts below in dealing with such impugned decisions and their reasoning were themselves erroneous, such that the Court of Appeal was entirely justified in hearing the appeal and conducting the merits review in the manner that it did. (paras 59, 61, 65, 73, 74, 75 & 215)

(3) Being a company Director did not preclude a person from concurrently being an employee of the company. A critical distinction was drawn between the position and the person holding it. The position of a Director was not and could not be equated with that of an employee, but an individual could hold and perform these two distinct roles at the same time, with the status as an employee or workman originating and deriving from the contract of service, not from the position of Directorship. (paras 79, 82, 83, 92, 93, 94, 95, 96, 108, 109 & 215)

(4) The appellant's contention that there was an absence of a master-servant or superior-subordinate relationship was rejected. There could never be an absence of a supervising or controlling authority. As Directors, the respondents reported to the board as a whole, and as employees/Executive Directors, they equally had to answer to the board as a whole, such that the superior-subordinate relationship therefore existed in both situations, either as an employee or as a Director. The control test was not obsolete, though for very senior employees, control and clocking-in were replaced by mutual accountability and accountability to the Board of Directors, and the existence of an employment relationship must be assessed holistically and in substance, and that no single factor was conclusive. (paras 135, 139, 140, 143, 144, 145, 146, 147, 148, 164, 168 & 215)

(5) The absence of a written employment contract was not fatal, since s 2 of the IRA defined a contract of employment as including any agreement which could be oral or in writing and whether express or implied. The oral nature of the arrangement was further fortified by the conduct of the parties. The conduct of the appellant company on the matter, such as describing each of the two respondents as an employee in the register of employees, according them functional titles, paying remuneration labelled as salary or Directors' fees, and making statutory contributions or deductions under the EPF Act 1991, SOCSO Act 1969, and the Income Tax Act 1967 was on the whole sufficient to clothe the two respondents with the status of a workman under s 2 of the IRA. The appellant could not, by making those contributions and deductions, represent to the relevant statutory authorities that the respondents were its employees, but now conveniently denied the same for the purpose of the IRA. (paras 156, 159, 163, 165, 173, 174, 215, 216 & 217)

(6) The removal of the respondents as Directors under s 206(1)(a) of the Companies Act 2016 was held, without more, to be distinct from and to have no nexus with an unfair dismissal under s 20(3) of the IRA. However, in these appeals, the EGM minutes recorded that the respondents were discharged from all their duties and that the company would no longer be paying salaries to them, unmistakably demonstrating that they had been dismissed simultaneously as employees. Their termination as employees was without just cause and excuse. (paras 186, 188, 189, 190, 191,192, 215, 216, 217 & 218)

(7) The appellant's contention that the Court of Appeal should not have awarded reliefs without granting a merits hearing before the Industrial Court was unjustified, since the merits hearing had in fact taken place at the Industrial Court. To remit the matter would unfairly afford the company a second bite at the cherry, particularly when it had chosen to defend the claim on the basis that the Industrial Court lacked jurisdiction by asserting that Woon and Chang were not workmen. There were no errors in the Court of Appeal's application of Practice Note No. 3 of 2019 of the Industrial Court of Malaysia. (paras 195, 196, 197, 198, 199, 200, 203, 215, 216, 217 & 218)

(8) On back-wages, the Court of Appeal was held to have been entirely correct not to have applied deductions, since it was for the employer to show that the employee had not mitigated, and no evidence was adduced in the Industrial Court to such effect. The respondents' evidence that they remained unemployed went unrebutted. The provision on contributory misconduct equally had no application to the two respondents, as no evidence was led to show any transgression of their fiduciary duty at all. (paras 205, 208, 209, 210, 211, 212, 215, 216, 217, 218 & 219)

Case(s) referred to:

Actacorp Holdings Bhd v. Helen Tang Chiew Yien [2005] 2 MELR 240 (refd)

Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor [2020] 1 MLRA 683 (refd)

Beh Keang Yu v. Fairtrio Marketing Sdn Bhd [2006] 2 MELR 590 (refd)

Chong Kim Sang v. Metatrade Sdn Bhd [2004] 1 MELR 4; [2004] 1 MLRA 241 (folld)

Continental Tyre & Rubber Co (Great Britain) Ltd v. Daimler Co Ltd [1915] 1 KB 893 (refd)

Dato Ahmad Johari Tun Abdul Razak v. A Santamil Selvi Alau Malay @ Anna Malay & Ors And Other Appeals [2020] 4 MLRA 565 (refd)

Dataran Rentas Sdn Bhd v. BMC Construction Sdn Bhd [2009] 1 MLRA 163 (refd)

DKLS Sunshine Sdn Bhd v. Kerajaan Negeri Pulau Pinang & Anor [2019] 2 MLRA 471 (refd)

Dr A Dutt v. Assunta Hospital [1981] 1 MLRA 472 (folld)

Gopala Krishnan Chettiar Muthu v. Sealand Marine Inspection And Testing (M) Sdn Bhd [2022] MLRAU 303 (folld)

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1995] 1 MELR 1; [1995] 2 MLRA 435 (folld)

Inchcape (M) Holdings Bhd v. Rb Gray & Anor [1985] 1 MELR 1 (not folld)

Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd [1997] 1 MELR 10; [1997] 1 MLRA 372 (refd)

Lennard's Carrying Company v. Asiatic Petroleum Co Ltd [1915] AC 705 (refd)

National Union Of Hotel Bar & Restaurant Workers Peninsular Malaysia v. Muhammad Zailani Mat Zin & Anor [2023] 1 MELR 21 (refd)

Perbadanan Pengurusan Sunrise Garden Kondominium v. Sunway City (Penang) Sdn Bhd & Ors And Another Appeal [2023] 3 MLRA 44 (folld)

Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2003] 1 MELR 21; [2003] 2 MLRA 114 (refd)

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

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

Sam Maark Verak v. Dato' Zainal Abidin Ahmad & Ors [2022] 4 MLRA 404 (folld)

Southern Foundries (1926) Ltd v. Shirlaw [1940] 1 AC 701 (refd)

Sunway University College v. Mahkamah Perusahaan Malaysia & Anor [2019] MLRAU 80 (distd)

Tan Heng Chew & Ors v. Tan Kim Hor & Ors [2006] 1 MLRA 786 (refd)

Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Berhad & Another Case [2018] 1 MLRA 263 (refd)

V Paul Raj Chelladurai v. Jabatan Telekom Malaysia Bhd & Ors [2000] 1 MLRA 726 (folld)

Legislation referred to:

Companies Act 2016, ss 2, 206(1)(a), 210, 211(1), 212, 230(1), (2), Third Schedule

Courts of Judicature Act 1964, ss 25(2), 96(a), First Schedule, para 1

Federal Constitution, arts 4, 121(1)

Industrial Relations Act 1967, ss 2, 20(1), (3), 30(6A), Second Schedule

Rules of Court 2012, O 53 rr 1, 3(2), 7

Rules of the High Court 1980, O 53 r 3

Counsel:

For the appellants: Steven Thiru (Khoo Wai Tuck, Janice Anne Leo, Adrienne Sena, Athanasia Yolanda Bartolome & Ameer Imran with him); M/s Hariati & Khoo

For the respondent: Gavin Jay Anand Jayapal (Merissa Ann Augustin, Sivanandini Sreegantham, Goh Yee Huey, Fang Huey Yiing & Parveena Karu Baldeb Singh with him); M/s Gavin Jayapal

[For the Court of Appeal judgment, please refer to *Woon Kim Choy v. Acexide Technology Sdn Bhd & Anor And Another Appeal* [2025] 1 MLRA 495]

JUDGMENT

Mohd Nazlan Mohd Ghazali FCJ:

Introduction

[1] In the two related appeals heard together before us, we dealt with the recurring question of whether an individual who is a company Director could be an employee of the company at the same time. We affirmed that the answer is in the positive, which is a position that is already well-settled.

[2] This judgment examined the key issue raised in these appeals — the applicability of the employer-employee or superior-subordinate relationship to the context of a Directorship, especially for individuals performing such dual roles.

[3] In the final analysis, we unanimously found no errors in the judgment of the Court of Appeal, which, in overturning the decisions of the lower courts, had determined that the two respondents who were company Directors of the appellant company were also its employees and that as employees, they had been unlawfully dismissed. For the reasons hereinunder contained, we affirmed the decision of the Court of Appeal and dismissed the appeals.

Key Background Facts

[4] The two appeals were heard together, as they were in the courts below, since both concerned the same issues. Appeal 198 was filed by the respondent herein, Woon Kim Choy ("Mr Woon"), and Appeal 199, the other respondent, Chang Heng Keong ("Mr Chang"), both of whom, together with Lim BH ("Mr Lim"), were the three promoters of the appellant company, Acexide Technology Sdn Bhd. The 2nd Appellant on record in these appeals is the Industrial Court, which is a nominal party and takes no part in these proceedings. References to the appellant or the appellant company in these grounds of judgment therefore concern Acexide Technology Sdn Bhd.

[5] Primarily involved in the business of installation and maintenance of fire fighting systems, trenchless technology and transportation, on the appellant company's incorporation in 1996, each of the three promoters, not untypically, became shareholders as well as Directors of the company. At the material time, and presently, Mr Lim, together with his son, Jovin, are the majority shareholders of the company, owning 54% of the entire share capital of the company. Mr Woon holds 10% and Mr Chang, 36%. Importantly, company documents also referred to Mr Lim, Mr Woon and Mr Chang as the Managing Director, the Technical Director and the Project Director of the appellant company, respectively.

[6] At the behest of Mr Lim, an Extraordinary General Meeting (EGM) of the appellant company was convened on 6 November 2019, whereat Mr Lim, by virtue of his simple majority shareholding held with his son, secured the passing of resolutions to remove the two respondents — Mr Woon and Mr Chang — as Directors of the appellant company. In their place, his son, Jovin Lim, was, on the same day, appointed as a new Director to the Board of Directors of the appellant.

[7] We should state that there can be no quarrel about their removal as Directors at the EGM, which was a manifestation of majority control in modern company law and a reflection of the exercise of unbridled discretion of the majority shareholders to remove company Directors in accordance with the provisions of the governing statute and the appellant company's constitution. The respondents therefore did not challenge the Directors' removal process at the EGM.

[8] But the respondents first moved to initiate a minority oppression action against Mr Lim and his son. Here again, we should emphasise that the respondents were perfectly entitled to pursue, as their complaint in the oppression action was in respect of their status as shareholders of the appellant company, particularly their minority status which they alleged were oppressed or discriminated against by the majority owners by their exclusion from the management of the appellant company by the latter. In other words, their removal as Directors was alleged to have harmed the interests of the respondents in their capacity as members or shareholders of the appellant company.

[9] Crucially, and more relevantly for these appeals, the respondents had also filed a reference with the Director General of Industrial Relations under s 20 of the Industrial Relations Act 1967 ("the IRA 1967") alleging unlawful dismissal as "workmen" by the appellant company.

The Verdicts In The Courts

[10] The Industrial Court initially rejected the appellant company's attempt to strike out the claims of the respondents on the basis of the appellant's argument that they did not fall within the definition of a "workman" under the IRA 1967. But subsequently, after hearing evidence, the Industrial Court did rule that the respondents were not "workmen". It held that individuals who are the directing mind and will of a company, such as Directors, of which they both were, do not qualify as employees or "workmen" of the company.

[11] The two respondents were found to have worked independently and with no supporting evidence to demonstrate that they were even answerable to the Board of Directors. Given the finding of the absence of any employment, their alleged dismissal as employees became irrelevant. The claims of the respondents were as such dismissed by the Industrial Court.

[12] The respondents' judicial review applications to the High Court too were not successful.

[13] The High Court agreed with the finding of the Industrial Court that the company records and documents highlighted by the respondents did not sufficiently prove they were employees or "workmen" of the appellant company. This was despite contributions by the company to the Employees Provident Fund (EPF) and Social Security Organization (SOCSO) and notwithstanding the monthly deduction of income tax (PCB) to the Inland Revenue Board (LHDN), all in favour of the respondents, and notwithstanding the fact that their names were listed under the company's Register of Employees.

[14] The Court of Appeal however overturned the decisions of the lower courts. In essence, the Court of Appeal affirmed that Directors can simultaneously be workmen of the same company.

[15] In addition, the Court identified several factors as evidence or indicia of an employment relationship, including the above mentioned contributions pursuant to the Employees Provident Fund Act 1991 and the Employees' Social Security Act 1969, the issuance of EA Forms summarizing annual income, allowances, and monthly tax deductions (PCB), as well as the company's own records, which included especially its Register of Employees and the annual financial reports, where they categorized the relevant Directors — the two respondents — as employees.

[16] The Court of Appeal then made an order for compensation *in lieu* of reinstatement in favour of the two respondents based on Practice Note No: 3 of 2019 of the Industrial Court as follows. For Mr Chang-

(1) Compensation *in lieu* of reinstatement

RM18,500.00 per month plus RM6,000.00 monthly allowance x 23 months (years of service) = RM563,500.00

(2) Back-wages

RM18,500.00 per month plus RM6,000.00 monthly allowance x 24 months= RM588,000.00

[17] And in respect of Mr Woon-

(1) Compensation *in lieu* of reinstatement

RM14,500.00 per month plus RM4,500.00 monthly allowance x 23 months (years of service) = RM437,000.00

(2) Back-wages

RM14,500.00 per month plus RM4,500.00 monthly allowance x 24 months = RM456,000.00

The Questions Of Law & The Key Issues In These Appeals

[18] Dissatisfied with the judgment of the Court of Appeal, the appellant company appealed to the Federal Court, after its leave questions to this Court

— 11 in total — had been allowed. These questions read — verbatim — as follows:

Question 1

Whether the Statement pursuant to O 53 r 3(2) of the Rules of Court 2012 in support of a judicial review application (under O 53 r 1 of the Rules of Court 2012) must categorize and/or identify the errors of law relied on (by the applicant for judicial review) under one or more of the recognised heads of judicial review, *viz*, procedural impropriety, irrationality, illegality and/or proportionality?

Question 2

Whether a promoter and/or shareholder and/or Director of a private company limited by shares incorporated under the Companies Act 1965 and/or 2016, who acts independently and/or who does not report (directly or indirectly) to any person or persons, and/or who is not subject to any supervising and/or directing and/or controlling authority, is a "workman" of the said company under s 2 of the Industrial Relations Act 1967 ("the said Act"), read with ss 20(1) and 20(3), of the said Act?

Question 3

Whether a Director of a private company limited by shares incorporated under the Companies Act 1965 and/or 2016, who is an equal and/or peer of the other Directors, and/or who is not a subordinate and/or inferior to the other Directors, and/or who is not subject to the supervision and/or control of the other Directors and/or who participates in the decision making of the Directors as a co-equal Director and in decision making of Directors based on the mutual understanding of all the Directors, is a "workman" of the said company for the purposes of s 2, read with ss 20(1) and 20(3), of the said Act?

Question 4

Whether a "contract of employment", as defined in s 2 of the said Act, requires the basic legal elements of a superior employing authority ("one person"), a subordinate employee ("workman"), and an employing entity ("employer"), for the purposes of determining whether a person is a "workman" under s 2, read with ss 20(1) and 20(3), of the said Act?

Question 5

Whether the absence of factors such as any employment contract (written or oral) and/or any control and/or direction in the discharge of job duties, functions and responsibilities and/or defined or specific job description and/or scope and/or fixed working hours and/or provision for annual leave and/or approval for annual leave and/ or attendance records, is inimical or obverse to the existence of a "contract of employment", as defined in s 2 of the said Act?

Question 6

Whether the inclusion of a promoter and/or a shareholder and/ or Director of a private limited company incorporated under the Companies Act 1965 and/or 2016 in the "Register of Employees", and who are given functional positions (as Technical Directors and Project Director) and who is paid remuneration and/or benefits described as "Directors salaries" and "Directors fees" which are subject to voluntary contributions under the Employees Provident Fund Act 1991 (EPF Act 1991) and the Employees' Social Security Act 1969 (SOCSO Act 1969) and further subject to mandatory deductions under the Income Tax Act 1967 (ITA 1967) — but sans a superior and/or reporting and/or supervising and/or controlling and/or directing authority — renders a person a "workman" of the said company under s 2, read with ss 20(1) and 20(3), of the said Act?

Question 7

Whether the test to decide whether a person is a "workman" under s 2 of the said Act, formulated in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1995] 1 MELR 1; [1995] 2 MLRA 435, is applicable to cases that do not involve the determination of whether a contract is a contract for services or a contract of service?

Question 8

Whether the removal of a Director of a private limited company incorporated under the Companies Act 1965 and/or 2016, qua Director of the said company, by the shareholders of the company in an extraordinary general meeting of the company (pursuant to s 206(1)(a) of the Companies Act 2016) — without any allegations by the said company of "just cause or excuse" and/or any misconduct in employment by the Director *qua* employee of the said company — is justiciable by the Industrial Court under s 20(3) of the said Act as an unfair dismissal?

Question 9

Whether the removal of a Director of a private limited company incorporated under the Companies Act 1965 and/or 2016, *qua* Director of the said company, by the shareholders of the company in an extraordinary general meeting of the company (pursuant to s 206(1)(a) of the Companies Act 2016) — without any allegations by the said company of "just cause or excuse" and/or any misconduct in employment by the Director *qua* employee of the said company — attracts the application of the principles in *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1996] 1 MELR 71; [1996] 1 MLRA 725, as set out in paras [66] to [72] of the judgment of the Court of Appeal?

Question 10

Whether the Court of Appeal can make consequential orders for back-wages to a workman (pursuant to Practice Note No: 3 of 2019 of the Industrial Court) without granting the employer a merits hearing before the Industrial Court for the determination by the Industrial Court whether the workman was dismissed without "just cause or excuse" pursuant to s 20(3) of the said Act?

Question 11

Whether the Court of Appeal can make consequential orders for back-wages to a workman (pursuant to Practice Note No: 3 of 2019 of the Industrial Court) without giving the employer the opportunity to be heard on whether the award of back-wages should be subject to deductions for post-dismissal earnings by the workman and for contributory misconduct on the part of the workman, per the Second Schedule of the said Act?

[19] In our view, the two appeals presently before us essentially give rise to three principal issues, as reflected in these 11 questions. The first in Question 1 revolves around the adequacy of the statements made under O 53 of the Rules of Court 2012 ("the RC 2012"). The second — in what we consider as the core of these appeals, as it was in the Courts below — relates to the question whether the two respondents are "workmen" under the IRA 1967, and these are contained in Questions 2 to 9. The third issue — in Questions 10 and 11 — is on the validity of the consequential order for compensation and back-wages made by the Court of Appeal.

[20] These three principal issues, each of which raises a number of questions, will now be examined in turn.

First Key Issue — The Adequacy Of The Order 53 Statement & Issue Of Jurisdiction

[21] The first key ground of appeal advanced by the appellant was one which its learned counsel, with his usual candour, disclosed had not been raised in the Courts below, including the Court of Appeal. He described it as a jurisdictional point.

[22] It was argued that the respondents' pleaded grounds for judicial review contained in their respective statements pursuant to O 53 r 3(2) of the RC 2012 did not justify the case instituted against the decision of the Industrial Court, such that absent proper grounds for judicial review, the Court will have no jurisdiction to hear the judicial review.

[23] This concerns the appellant's first question of law before us. We again state the same:

> Question 1
>
> Whether the Statement pursuant to O 53 r 3(2) of the Rules of Court 2012 in support of a judicial review application (under O 53 r 1 of the Rules of Court 2012) must categorize and/or identify the errors of law relied on (by the applicant for judicial review) under one or more of the recognised heads of judicial review, *viz*, procedural impropriety, irrationality, illegality and/or proportionality?

[24] The appellant emphasised that it is settled law that an applicant for judicial review is bound by the grounds stated in the O 53 statement. It is also trite that judicial review will lie for errors of law on the grounds only of procedural impropriety, irrationality or Wednesbury unreasonableness, illegality and proportionality. This was clearly enunciated by the Federal Court in the landmark decision in *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1996] 1 MELR 71; [1996] 1 MLRA 725.

[25] Counsel for the appellant strenuously contended that whilst a judicial review will lie where there are errors of law by the decision maker (in this case, the Industrial Court), the said errors of law must in the O 53 statement be categorized under one or more of these four heads of review.

[26] It is further posited by the appellant that whilst judicial review is principally concerned with the decision-making process and is not a full-blown appeal on the merits of the decision, there can however be a merits review or scrutiny of the substance of the decision if the errors of law relied on by the applicant are under the heads of irrationality or illegality, by making reference to the decision of the Federal Court in *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 1 MELR 21; [2003] 2 MLRA 114 which had held as follows:

> "18. Quite clearly, the Industrial Court had found the respondent to be impatient. A reviewing judge might not have come to the same conclusion from the established facts, but he should exercise restraint. He should not disturb such finding unless it could be shown to be based on grounds of illegality or plainly irrational."

[27] As such, should the case of an applicant for judicial review involve a scrutiny of the substance or the merits of the decision sought to be impugned, which according to the appellant might require reassessment of evidence and substitution of findings of fact, the applicant must therefore plead the applicable heads of judicial review and further plead the relevant errors of law under these heads. Failure to do so means that the Court will not have the requisite jurisdiction to undertake the merits review.

[28] And it is the key complaint of the appellant that the Court of Appeal had erroneously conducted a merits review by reversing the findings of fact of the Industrial Court and substituted its own findings, in the absence of a specific pleading of the heads of judicial review. The O 53 statements of the two respondents in this case, according to the appellant, contain only generic averments of errors of law but without any reference to one or more of the four heads of judicial review.

[29] The appellant made reference to the following passages in the judgment of the Court of Appeal in *Sunway University College v. Mahkamah Perusahaan Malaysia & Anor* [2019] MLRAU 80 to stress the point that merely general averments would be insufficient. Tengku Maimun JCA (later Chief Justice), delivering the judgment of the Court, said:

> "[33] In the instant case, the claimant has not shown how the findings of the Industrial Court were based on grounds of illegality. Neither has it been shown that the award was plainly irrational. In fact, the statement filed by the claimant pursuant to O 53 r 3(2) of the Rules of Court 2012 did not specifically plead the two limited grounds of illegality and plain irrationality to allow the High Court to review the decision of the Industrial Court on the merits. The claimant had only made the following general averments:
>
> > 4.1 Pemohon mengatakan bahawa Mahkamah telah terkhilaf di sisi undang-undang dan/atau fakta dan/atau bertindak melebihi/ tanpa bidang kuasa apabila Responden Pertama berpendapat bahawa penurunan gred Pemohon daripada pangkat korporat dan gred, 'Head of Centre for Partnership and Collaboration (EG4) kepada 'senior lecturer' gred EO dan pemindahannya daripada Bahagian Pentadbiran kepada bahagian Akademik serta perubahan dalam terma dan faedah oleh syarikat bukanlah suatu pelanggaran terma asas kontrak pekerjaannya.
> >
> > (i) Responden Pertama *(sic)* telah membuat keputusan buruk dan salah dan tanpa justifikasi munasabah dimana tiada orang munasabah atau tribunal yang munasabah dalam keadaan yang sama boleh memutuskan begitu.
>
> [34] It is a cardinal requirement that the claimant must set out her grounds clearly in the statement supported by sufficient details and comprehensive particulars of the facts and matters which the claimant sought to rely on (see *Ong See Teong & Anor v. Tenaga Nasional Bhd* [2007] 4 MLRH 421). The above general averments were not supported by any particulars and thus were insufficient to warrant a review on the merits by the High Court."

[30] One other decision of the Court of Appeal referred to by the appellant is *Gopala Krishnan Chettiar Muthu v. Sealand Marine Inspection and Testing (M) Sdn Bhd* [2022] MLRAU 303 where, on the issue of the O 53 statement, it was stated as follows:

"[54] The company relied upon the following grounds per the statement pursuant to O 53 r 3(2) of the Rules of Court 2012 ('O 53 statement') which read as follows:

(a) the Industrial Court took irrelevant matters into consideration;

(b) the Industrial Court failed to take relevant matters into consideration;

(c) the Industrial Court arrived at conclusions without taking into consideration and/or taking heed of the relevant documents and evidence which were tendered at the hearing;

(d) the Industrial Court misconstrued or failed to consider the applicable law in the circumstances of the case;

(e) the Industrial Court arrived at a decision which was perverse and unjustified, such that no reasonable tribunal, similarly circumstanced, could have arrived at such a decision; and

(f) the Industrial Court had exceeded and/or acted without jurisdiction in arriving at its conclusion and the award.

[55] Clearly, there was no specific or particularised ground in the O 53 statement. The O 53 statement merely stated general and generic grounds without identifying with particularity the manner in which the Industrial Court had allegedly committed error(s) of law which vitiated the award. Be that as it may, we may now examine the High Court's grounds of judgment."

[31] The appellant therefore argued that based on these authorities, the answer to the first question ought to be in the affirmative.

[32] In turn, the net result that is pursued by the appellant is that the decision of the Court of Appeal is untenable, for it did not have the jurisdiction for the merits review given the respondents' non-compliance with the pleadings requirements in respect of their respective O 53 statements.

[33] The respondents, on the other hand, objected to the appellant raising this ground of appeal. They maintained that all relevant particulars had been disclosed in their O 53 statements. They also alleged, which we find unsurprising, that the appellant was being disingenuous, since the appellant had never raised any objection to the O 53 statements in any of the Courts below. This issue was in fact only raised for the first time in their appeals to this Court.

[34] We are nonetheless constrained to allow this ground to be argued before us because it was asserted to be a matter of jurisdiction. It is undoubtedly trite that a jurisdictional challenge can be raised at any stage of the proceedings. The appellant was thus correct to refer to the case of *Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor* [2020] 1 MLRA 683 as an authority for this proposition.

[35] In that case, the Federal Court in a majority decision held that pursuant to the Courts of Judicature Act 1964, the decision of the High Court in an amendment application (in respect of the pleadings) made in the course of trial does not finally dispose of the rights of parties and is not appealable to the Court of Appeal. It is, as such, a matter of the jurisdiction of the Court of Appeal as to whether it could hear such an appeal.

[36] Relevant for present purposes, Azahar Mohamed (Chief Judge of Malaya), delivering one of the two judgments for the majority in that case, said this:

> "[71] It is against the above background, we have to decide on this fundamental question: whether the High Court's decision on an amendment application was appealable to the Court of Appeal. The issue of whether a decision is appealable is a jurisdictional matter. It concerns the jurisdiction of the Court of Appeal, and a question of jurisdiction can be raised at any time. The Federal Court in *Chan Yock Cher v. Chan Teong Peng* [2005] 2 MLRA 25 accepted that a jurisdiction error would arise where a court pronounces upon a lower court decision that was not appealable. The decision of the Federal Court in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 1 MLRA 183 established the proposition of law that courts have the inherent jurisdiction to set aside orders or judgments that are null and void on the grounds of want of jurisdiction whether at appellate stage or otherwise".

[37] Any question of jurisdiction can therefore be raised at any stage of proceedings, including on appeal, like presently, precisely because a Court without jurisdiction cannot validly adjudicate on a matter. When raised, it ought to be dealt with first by the Court, for absent the requisite jurisdiction, any judgment issued ought to be set aside.

1) Whether Defective Pleading In O 53 Statement Divests Jurisdiction Of The Court From Hearing Judicial Review

[38] What exactly, then, is this jurisdiction issue as raised by the appellant?

[39] As stated in the first question of law, it pertains to O 53 r 3(2) of the RC 2012 which reads as follows:

> Leave (O 53, r 3)
>
> 3.(1) An application under this Order shall not be made unless leave therefor has been granted in accordance with this rule.
>
> (2) An application for leave must be made *ex parte* to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.

[40] Whilst the provenance of the Courts' jurisdiction in judicial review may be said to be enshrined in the Federal Constitution — specifically arts 4 and 121(1), and statutorily enacted in s 25(2) read with para 1 of the Schedule to the Courts of Judicature Act 1964, O 53 of the RC 2012 — which is the concern of the first question of law before us — provides for the procedural provisions that must be adhered to in such judicial review proceedings.

[41] In accordance with O 53, a judicial review application involves a two-stage process. First, the leave stage, which is the essence of O 53 r 3, and secondly, the substantive stage. We are more concerned with the leave stage. It is plain in O 53 r 3(2) that this stage requires the applicant to prepare first, a notice of application for judicial review (in accordance with Form 109); secondly, the requisite statement; and thirdly, an affidavit in support.

[42] In the said statement, the applicant must set out the relief sought and the grounds for the same, as well as the reasons for the challenge. The former Federal Court in *Dr A Dutt v. Assunta Hospital* [1981] 1 MLRA 472 emphasised that no grounds should be relied upon or any relief sought except the grounds and relief set out in the O 53 statement under the equivalent provisions of the former Rules of the High Court 1980. Grounds which are not in the statement cannot be relied upon at the hearing, or at the appellate stage. In that case, incidentally, the Federal Court held that the Industrial Court was not wrong in holding that a consultant radiologist was a workman within the IRA 1967. The pleaded grounds of judicial review thus bind the case of the applicant, who is not allowed to traverse beyond them. The affidavit however should only verify the facts in the application, and must not be a substitute for the O 53 statement.

[43] Now, reverting to the crux of the first question of law raised by the appellant, it will be recalled that the appellant's principal complaint about the deficiencies in the two respondents' O 53 statements are twofold. First, the lack of pleading in respect of the grounds on the type of error, and secondly, on the particularisations of such error.

[44] Is this challenge by the appellant justified?

2) The O 53 statements of the respondents contained the requisite pleadings and particulars

[45] In the six-page O 53 statement of each of the respondents (the contents of both are substantially similar), its para 2, after the introductory para 1, lists out the reliefs sought, which are principally *certiorari,* declaration and compensation, whilst para 3 summarises the grounds for the application for such reliefs in a number of sub-paragraphs. These are described as the errors in law committed by the Industrial Court in reaching its findings.

[46] These included its failure to consider that there was no domestic inquiry held before the dismissal of the respondents, that they were denied due process, and that they were determined not to be "workmen" under the IRA 1967 despite evidence that showed they were in fact employees of the appellant company. Paragraph 4 characterised these erroneous findings of the Industrial Court as unfair and unreasonable. As pointed out by counsel for the respondents, the BM version of the O 53 statements had these words as "tidak adil/tidak munasabah" respectively.

[47] In our view, the respondents could thus not be said to have failed to plead the grounds of judicial review relied on in their respective O 53 statements.

[48] We cannot emphasise enough that the essence of the pleading rule, which is fundamental and foundational in civil litigation, including for judicial review proceedings is to ensure that the issues in dispute are well stated by providing fair notice of the material facts relied upon by the parties so that parties are not taken by surprise at trial.

[49] But there was no absence of such notice here. In fact, the affidavit in reply of the appellant also averred that the decision of the Industrial Court was "munasabah, rasional dan tidak melampau". The appellant clearly responded by attempting to refute the case of the respondents. No absence of notice, and no surprises. It cannot thus be said that the appellant had in any meaningful manner misunderstood or been confused about what was the crux of the case of the respondents. And for completeness, neither can the pleadings here be described as merely containing general averments like those found by the Court of Appeal in the aforementioned cases of both *Sunway University College* and *Gopala Krishnan Chettiar Muthu*.

[50] As such, we cannot disagree with the respondents that the O 53 statements of the respondents did in fact irrefutably allude to their complaints being grounded on the judicial review heads of illegality and irrationality, even if these specific words were not stated therein, since mentions were in fact made of the expressions error in law and unreasonableness, in paras 3 and 4, respectively.

[51] Furthermore, in paras 6 to 11 of both of the O 53 statements, the respondents had pleaded, in verbatim, as follows:

> 6. In deciding that the Applicant does not fall within the definition of a workman, the Chairman of the Industrial Court is deemed to have erred as evidence is clear that Applicant is in fact an employee. In this regard:
>
> a. Throughout the tenure of the Applicant's employment, the Applicant had received a monthly salary together with allowances;
>
> b. The Company had also made all relevant statutory contributions on behalf of the Applicant namely EPF, SOCSO and PCB;
>
> c. The monthly salary of the Applicant is stated in the Register of Employees.

7. Premised on the above, as it is undisputed that the Company had made all relevant statutory contributions on behalf of the Applicant, it is crystal clear that the Applicant is in fact an employee of the Company.

8. Although receiving salary and making contributions and deductions are not the sole criteria in deciding whether the Applicant was an employee of the Company, it is the most telling one and this was not appreciated by the Chairman of the Industrial Court in coming to his finding.

9. Further, from a perusal of the Company's Financial Report, it is also pertinent to note that the Directors have been classified as employees.

10. The Company had not provided any proof that a resolution was passed at a general meeting with regard to the remuneration of Directors as per art 76 of the Company's Articles of Association.

11. From the lack of evidence on such general meetings being held and any resolutions passed pertaining to the subject of the Director's remuneration, this enforces the fact that the Applicant was in fact, receiving a salary instead of a remuneration.

[52] It cannot therefore be validly said that in this case, as argued by the appellant, the reviewing court has no jurisdiction to embark on what would otherwise be an impermissible merits review. Whilst the parties in a judicial review application are bound by their O 53 statements, in this case before us, it is not true to say that there was an absence of categorisation of the errors of law under any of the recognised heads of judicial review (procedural impropriety, irrationality or Wednesbury unreasonableness, illegality or proportionality), or any other requisite particularisations which deprived the High Court (and Court of Appeal) of jurisdiction to intervene.

[53] In our view, on the whole and for all intents and purposes, and when proper emphasis is given to both the substance and the form of disclosure in the O 53 statements, all requisite particulars have been provided by the respondents in their respective O 53 statements.

[54] We are, as such, also inclined to agree with the submission of the respondents that the appellant's grievance in this regard borders on an exercise in pedantry which runs counter to the advancement of public interest litigation in judicial review applications in modern administrative law in this country.

[55] We note in any event that the appellant did not submit on any authorities which hold that non-compliance with O 53 r 3(2) — which is what the appellant company is really alleging here — means that the Court has no jurisdiction to undertake a merits review in an application for judicial review.

[56] Accordingly, we find that the respondents did not fail to plead either the reliefs sought, the grounds for which they were sought, or the reasons or other particularisations for the same in their respective O 53 statements. Consequently, the contention that the Court of Appeal did not have the jurisdiction to undertake the merit review is patently without merit, as the issue simply did not arise.

3) Objections against adequacy of O 53 statements should also be pleaded

[57] Now, whilst it has been determined that there is no deficiency in the O 53 statements and there is no lack of jurisdiction on the part of the Courts to have examined the substance of the case in the judicial review applications of the respondents, there is one other reason why we think the challenge made by the appellant against the decision of the Court of Appeal cannot succeed.

[58] It should be stated that whilst the principle that a party is bound by his own pleadings indisputably applies, the Court of Appeal in *V Paul Raj Chelladurai v. Jabatan Telekom Malaysia Bhd & Ors* [2000] 1 MLRA 726 held that the failure to plead objections against the adequacy of the O 53 statement which objections were only raised on appeal (which is also the case now before us, since the objection was only raised in these appeals before the Federal Court, never earlier) meant that the appeal was unmeritorious. Siti Norma Yaakob JCA (as she then was) said this:

> "Clearly from the aforesaid grounds, the appellant never raised as issues his objections to the use of the phraseology dan lain-lain maklumat yang berkaitan' and the loss of the opportunity to plead in mitigation. These two objections were only raised for the first time before us as in the court below the appellant was more content to submit on other issues. Order 53 r 3(1) of the RHC emphasizes the principle that a party is bound by his own pleadings and since that order and rule is mandatory in nature, the omission to plead in the statement the two objections raised before us is sufficient reason for us to hold that this appeal lacks merits and on that conclusion we dismiss it with costs, confirm the order of the High Court and order that the deposit be paid out to the respondents to account of their taxed costs".

[59] In these appeals before us, the objection raised by the appellant was also not pleaded. For this reason alone, this ground of appeal could be dismissed. In any event, we are not persuaded that the alleged error or deficiency in the O 53 statements in the judicial review applications by the two respondents could properly be characterised as fundamentally a jurisdictional matter in the first place. This may be contrasted with the issue of, say, whether an applicant is a "workman" under the IRA 1967. Because if he is not, the Industrial Court plainly has no jurisdiction to hear his complaint against any alleged dismissal. In that situation, the matter of whether the applicant is a "workman" is indisputably jurisdictional for the Industrial Court. That is not the situation in the case before us.

[60] And it should also be appreciated that under O 53 r 7 of the RC 2012, the Court may allow the statement to be amended, where notice of this intention and of the proposed amendment of the statement must be immediately given to every other party.

4) Issues on illegality may still be considered even if not pleaded

[61] Not only that. We must also add that even if the appellant company was correct in contending that the O 53 statements of the respondents were defective — which we already determined not to be the case — this Court has already decided that the Court has the power to consider issues of contraventions of law which were previously not raised but which are relevant to deciding the matter before the Court.

[62] The case of *Perbadanan Pengurusan Sunrise Garden Kondominium v. Sunway City (Penang) Sdn Bhd & Ors And Another Appeal* [2023] 3 MLRA 44 concerned a judicial review against the decision of the Penang State Planning Appeal Board, which had set aside the granting of a planning permission by Majlis Bandaraya Pulau Pinang. One key issue that fell for determination was which was the valid and lawful framework under the provisions of the Town and Country Planning Act 1976 ("the TCPA 1976") — the administrative guidelines on a zoning implementation plan ('Pelan Dasar') or the 1996 Interim Zoning Plan under the repealed legislation.

[63] It was argued that the status or applicability of the Pelan Dasar had not been raised in the applicant's statement filed pursuant to O 53 of the RC 2012, but no issue was taken on this matter in the Courts below. The case of *DKLS Sunshine Sdn Bhd v. Kerajaan Negeri Pulau Pinang & Anor* [2019] 2 MLRA 471 was referred to in support of the rule that the judicial review statement serves as pleadings and that the Court ought not to look beyond issues raised therein. In *DKLS Sunshine,* the relief in fact went beyond the scope of the pleaded case in the relevant O 53 statement, with the result that the judicial review application was refused for that reason, which was a decision upheld by the Court of Appeal.

[64] The Federal Court in *Perbadanan Pengurusan Sunrise v. Sunway City,* however, held as follows:

> "[68] With respect, this case is irrelevant to the issue at hand. *DKLS Sunshine* is not authority for the argument that the court is precluded from considering instances of illegality that were not raised by parties or in the courts below or, alternatively put, to condone contraventions of the law once the court is appraised of such. It is well within the confines of the present appeal for this court to consider contraventions of the law that were not previously raised by parties or addressed by the courts below. If the courts below embarked on reasoning that erred in law, or if the local authority's decision was tainted with illegality, it is within the province of this court to address that error. In the interests of ensuring justice in each case, the court has the power and hence

> discretion to consider issues which were previously not raised but which are relevant to deciding the matter before the court."

[65] This decision proffers a clear authority that the Court is not powerless or prevented from examining issues of illegality or contraventions of law which are relevant to the determination of the question before the Court, even if these issues were not raised earlier in the proceedings in the lower Courts.

[66] This therefore provides yet another complete answer to the appellant's assertion that the pleadings in the respondents' O 53 statements were lacking in requisite particularisation, not unlike the situation in *Perbadanan Pengurusan Sunrise v. Sunway City*.

[67] We emphasise that this is because even if this contention was true — which we have shown not to be the case — and even if there had been no objections raised against such shortcomings in the proceedings in the Industrial Court, the High Court and the Court of Appeal (just like in the instant case before us), this Court still retains the discretionary power to address any errors — either where the decision of the lower tribunal is tainted with illegality or the findings of the Courts below in dealing with such impugned decisions and their reasonings are themselves erroneous.

[68] We should further add that neither was the argument on the deficiency in the O 53 statement in *Perbadanan Pengurusan Sunrise v. Sunway City* framed or ventilated in terms germane to the issue of jurisdiction, like that taken by the appellant before us.

5) The former but not the present O 53 r 3 specifically prohibited reliance on any un-pleaded grounds

[69] We must add one other point. It is this. The abovementioned case of *V Paul Raj Chelladurai* was decided by the Court of Appeal in reliance on the former O 53 r 3 of the Rules of the High Court 1980 prior to the amendments in 2000. Significantly for present purposes, the said former O 53 r 3(1) then read as follows:

> 3.(1) Copies of the statement and of the affidavits in support of the application for leave under r 1 must be served with the notice of motion or summons under r 2 and, subject to para (2), **no grounds shall be relied upon or any relief sought at the hearing of the motion or summons except the grounds and relief set out in the said statement**.
>
> [Emphasis Added]

[70] It is therefore plain that the former O 53 r 3 specifically prohibited reliance on any grounds which were not set out in the O 53 statement. But significantly, this definitive restriction is absent from the current provision in O 53 r 3 of the RC 2012.

[71] This very point was addressed by the Court of Appeal in the case of *Sam Maark Verak v. Dato' Zainal Abidin Ahmad & Ors* [2022] 4 MLRA 404 where in that case, the ground of judicial review of proportionality of the sentence meted out against the public servant appellant by the Public Services Commission was found to have been an afterthought since it was not an issue that had been raised in the appellant's O 53 statement, not unlike the finding made in *V Paul Raj Chelladurai* as mentioned above.

[72] Relevantly, on the point about the different wordings in the former O 53 of the Rules of the High Court 1980 pre-2000 amendments, Darryl Goon JCA observed as follows:

> "[63] This expressed restriction however no longer appears in the current O 53 of the Rules of Court 2012. This does not mean that it is no longer vital to set out the grounds relied upon in the statement to be delivered pursuant to O 53 r 3(2). What in our view it does mean is that the stringency of the former rule no longer exists but similar to the principles relating to pleadings, a valid objection may still be raised, in appropriate cases, against reliance on grounds not set out in the statement."

[73] We fully subscribe to this observation and we further say that this further fortifies our view that compliance with O 53 r 3(2) is not strictly a matter of jurisdiction for the Court in undertaking a merit review or examining the substance of the case in a judicial review application. In other words, we say that its non-compliance does not quite amount to a lack of jurisdiction on the part of the Courts. It does however mean that there is a failure by the applicant to comply with a mandatory requirement of O 53 r 3, with the result that in accordance with the usual judicial process, any decision of the Court allowing such judicial review application (notwithstanding the defects) and any relief granted as a result could potentially (but not necessarily, in light of cases such as *V Paul Raj Chelladurai* and especially *Perbadanan Pengurusan Sunrise v. Sunway City* referred to above) be held to have been made in error, and as such liable to be set aside.

[74] But this is not the same as saying that such failure or defect is a jurisdictional issue — which assertion could then be used to justify any objection against such alleged breach to be raised only much later, for instance only at the appellate stage — like presently before us at the Federal Court — on the pretext that such breach concerns a jurisdictional point, taking advantage of the principle that a jurisdictional challenge may be raised at any stage of the proceedings.

[75] As such, the answer to the first question of law — as to whether the O 53 statement must categorize or identify the errors of law under one or more of the recognised heads of judicial review is clearly in the affirmative. We add that this is especially true in cases, like presently, where the Courts undertake a merits review or examine the substance of the case on grounds of illegality or irrationality. There is, however, no failure in this respect in the O 53 statements of the two respondents, which sufficiency of pleadings must be read with proper emphasis on both substance and form. Even if there were defects, the judicial review application would not fail on the ground of lack of jurisdiction. The Court of Appeal was thus entirely justified in hearing the appeal and conducting the merit review in the manner that it did.

Second Key Issue — Whether The Two Respondents Are "Workmen" Under The IRA 1967

[76] Questions 2 to 9 concern the pivotal issue of whether the two respondents could be held to be "workmen" under the IRA 1967, which in turn raises a number of other issues raised by learned counsel for the appellant company, which as reflected in these questions, include the following:

(a) Whether a Director who does not report to any controlling party or answer to any superior could be a "workman".

(b) Whether a co-equal Director who is not subject to any supervision could be a "workman".

(c) Whether a contract of employment in the context of a "workman" requires the presence of a superior employing authority and a subordinate employee.

(d) Whether the absence of an employment contract, specific job description or factors such as control on working hours, leave and attendance records negates the existence of a contract of employment under the IRA 1967.

(e) Whether a Director who is given functional positions and whose name is included in the company's Register of Employees, who are paid remuneration described as Director salaries and fees, subject to voluntary statutory contributions for employees' provident fund and employees' social security as well as mandatory income tax deductions, all in the absence of a superior authority to whom he reports makes the Director a "workman".

(f) Whether the test to decide whether a person is a "workman" formulated in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1995] 1 MELR 1; [1995] 2 MLRA 435, is applicable to cases that do not involve the determination of whether a contract is a contract for services or a contract of service.

(g) Whether the removal of a Director of a private limited company in his position as Director of the said company by the shareholders of the company without any allegations by the said company of "just cause or excuse" and/or any misconduct in employment by the Director qua employee of the said company — is justiciable by the Industrial Court under s 20(3) of the IRA 1967 as an unfair dismissal.

(h) Whether such removal of the said Director attracts the application of the principles in *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1996] 1 MELR 71; [1996] 1 MLRA 725.

1) Whether An Individual Can Be Both A Director And Employee — Affirmative

[77] But first, we consider it imperative that the more foundational question be examined — whether an individual can be both a company Director and an employee of the same company at the same time. This analysis should helpfully provide the necessary background context to many of the abovementioned issues raised by the appellant in its 11 questions.

[78] We need only state at the start that cases such as the decision of the Court of Appeal in *Gopala Krishnan Chettiar Muthu v. Sealand Marine Inspection And Testing (M) Sdn Bhd* [2022] MLRAU 303 affirms the principle which we now say to be settled law, in that being a company Director does not preclude a person from concurrently being an employee of the company.

[79] We would reiterate that a person can wear two hats — one as a Director, in the sense of being a member of the company's Board of Directors, and another, as an employee of the same company, at the same time. As such, it follows that the removal of that person as a Director does not necessarily terminate his employment — unless due process is followed under the IRA 1967.

[80] This key ruling in *Gopala Krishnan* is consonant with the decision of the Federal Court in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1995] 1 MELR 1; [1995] 2 MLRA 435 which established that an employer-employee relationship exists where the company exercises control and pays wages for the service rendered.

[81] This departed from the earlier position that Directors could not be employees in the same company, as decided by the Supreme Court in *Inchcape (M) Holdings Bhd v. RB Gray & Anor* [1985] 1 MELR 1. The Court in *Inchcape* determined that since Directors are the directing mind and will of the company, they cannot at the same time fall within the definition of "workman" in the IRA 1967. George Seah SCJ had stated this:

> "If a company Director is to be regarded as representing the mind and will of the company and may not be treated as a servant of the company it would be strangely out of date (to borrow a phrase of Viscount Simon LC in *National Association of Local Government Officers v. Bolton Corporation* [1942] 2 All ER 425 @ p 435) nowadays to urge the Industrial Court to construe a company Director, in the more complex conditions of modern companies, to include a "workman". Such a construction would place the company Director in conflict with his duties and loyalty towards his employer and the company whom he represents. The proposition has only to be stated in order to make one realise how untenable it is. I am unable to accept it. In short, the simple test appears to be this: If a person or a company Director can be regarded

either expressly or by necessary implication, as representing the company in the course of the trading activities of the company, he ought not to be treated as a workman under the Act."

[82] The previous view that Directors would be automatically excluded from the definition of "workman" under the IRA 1967, which is attributed to *Inchcape,* is thus generally considered no longer good law.

[83] We should nevertheless point out that the authority of the decision in *Inchcape* was in fact abrogated by a subsequent decision of the Supreme Court in *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* [1997] 1 MELR 10; [1997] 1 MLRA 372. In this latter case, the issue for determination was not entirely the same, where the Supreme Court held that the High Court had erred in finding that the Industrial Court lacked jurisdiction to hear a dispute referred by the Minister. Specifically, the High Court wrongly held that because a workman engaged locally was required to work abroad, his subsequent dismissal was extra-territorial in nature.

[84] However, the case of *Inchcape* was also referred to in support of the decision of the High Court. Gopal Sri Ram JCA (as he then was), writing for the Supreme Court, had this to say:

> "We now turn to the relatively easier task of dealing with the second authority relied upon by Mr Sivabalah. It is the rather controversial decision of the precursor of this Court in *Inchcape (supra)*. That decision was reviewed at some length by this Court in *Hoh Kiang Ngan (supra)*. No useful purpose will be served by a regurgitation of the criticism levelled against it. It is a decision that was plainly wrong, even upon its own facts. It also failed to properly appreciate the judgment of Mohamed Azmi J and of the former Federal Court in *Assunta Hospital No. (1)*. In our judgment, the time has come for this Court to recognise that *Inchcape* was wrongly decided and is no longer good law. All that is required is to formally overrule it and that we now do."

[85] That modern company law has considerably moved away from the *Inchcape* position can be seen in another aspect, which is this. Section 2 of the Companies Act 2016 defines a "Director" as:

> "Director" includes any person occupying the position of Director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the majority of Directors of a corporation are accustomed to act and an alternate or substitute Director...

[86] However, s 210 of the same Act specifically states that for the purposes of Subdivision 3 of the Act — which concerns Directors' duties and responsibilities — in certain provisions therein, in addition to the definition of "Director" in s 2, a "Director" also includes Chief Executive Officer, Chief Financial Officer, Chief Operating Officer or any other person primarily responsible for the management of the company.

[87] These sections are in respect of the duties and responsibilities of Directors, the business judgment rule, reliance on information provided by others, responsibility for actions of delegate, responsibility of a nominee Director, prohibition against improper use of property, position, etc, as well as the requirement for approval of company for disposal of company's undertaking or property and concerning transactions with Directors, substantial shareholders or connected persons.

[88] The effect of this provision is simply that certain statutory duties imposed by the Companies Act 2016 are also made binding on those holding these senior management positions.

[89] As such, *albeit* limited only to certain provisions in the Companies Act 2016, this s 210 gives a degree of statutory recognition to certain key management positions in a company, such as a Chief Executive Officer, in that the holder of such senior position is by operation of law deemed to also be a Director of the company, even without formal appointment as one under the same Act.

[90] Now, reverting to *Inchcape*, we must add however that based on a careful reading of the analyses made in *Inchcape*, in relation to the specific issue of the status of a company Director *vis-à-vis* the definition of a workman under the IRA 1967, such as expressed in the above-mentioned passage attributed to George Seah SCJ, it is in our view fair to conclude that the Supreme Court was not entirely wrong. Salleh Abas LP had, consistent with the aforesaid observation made by George Seah SCJ, also stated:

> "Under the law, as a Director, the respondent is the very brain of the companies or their directing mind determining and formulating the companies' policy. Thus, I cannot see how in the circumstances of this case, the respondent could be held to be a workman."

[91] These are strictly not incorrect statements in law. In fact, they are quite accurate. The nature, status, and capacity of a company Director are different from those of an employee or workman, and *vice versa*. These two distinct positions are established by way of separate legal processes. The former is pursuant to the Companies Act 2016 and the latter is under a contract of employment. In this sense, a Director cannot be an employee of the same company. The converse is equally true.

[92] It is therefore absolutely critical for the proper appreciation of the true legal position that a distinction in this context must be made between the position and the person holding it. Thus, the position of a Director is not and cannot be equated with that of an employee. However — and this is very crucial — an individual may hold and perform these two distinct roles at the same time. This, in our view, was what was meant by the Supreme Court in *Inchcape*. *Inchcape,* however, did not consider double-hatting and in any case, the issue appeared not to have been raised.

[93] In other words, the position may, in our view, be stated with greater precision as follows. Legally, a Director is not an employee, and *vice versa*. A company Director, as a member of the Board of Directors of the company, is not a "workman" under s 2 of the IRA 1967. In the same vein, a company employee or the definition of a "workman" does not extend to the company Director. As such, viewed in this fashion, these two legal concepts — Director and employee/workman are mutually exclusive. A closer scrutiny of the case of *Inchcape* appears to suggest that this was intended to be the true focus of the decision of the Supreme Court on this issue.

[94] Nonetheless — and this is especially critical — there is no prohibition in law for an individual to simultaneously be both a company Director and an employee of the same company, as the performance of the two different roles, as well as the rights and obligations arising therefrom are subject to different sets of laws and regulations.

[95] As such there is presently no legal impediment to an arrangement where a person is validly appointed as a company Director in adherence to the provisions of the Companies Act 2016 but who is also a party to a contract of employment with the company in satisfaction of the definition of a workman under the IRA 1967. Separate laws and processes govern the appointments for these two positions.

[96] Therefore, even though a Director can also be an employee of the company, that is legally possible only in the sense that his employment status arises from his contract of employment with the company. Not pursuant to his Directorship. This further means that an employee can also be a company Director, where his role as a Director is established under his appointment as a Director, and strictly, this has nothing to do with the employment contract.

[97] In corporate law jurisprudence, Directors are generally identified as the directing mind and will of the incorporated entity. They are the governing organs of a company. They make and execute decisions on behalf of the company. They are responsible for providing oversight and contributing to the development and formulation of company strategy and budgetary requirements. Under s 2 of the Companies Act 2016, however, the definition of a Director, as stated above, makes no distinction between executive and non-executive or between independent and non-independent Directors.

[98] It is common ground that in Malaysia, most companies — including especially public listed companies have Directors who also hold executive positions under a contract of employment. These are often the senior management of the company, typically in the positions of a Managing Director, a Chief Executive Officer, a Chief Financial Officer, or the Chief Operating Officer. Non-Executive Directors, on the other hand, do not participate in the day-to-day management of the company. They clearly are not workmen under the IRA 1967 unless there is a specific employment contract in place, which is very rarely the case.

[99] Independent non-Executive Directors are non-Executive Directors who do not have any affiliation or connection with the shareholders or management of the company. This category of independent Directors which clearly cannot be employees of the company must, as stipulated in the listing requirements and applicable regulatory guidelines, be appointed to the boards of listed companies and of companies in certain regulated industries such as in the financial services industry.

[100] We might add that for these non-executive or independent Directors they may also be expected to attend board committee meetings, which are a common feature in larger companies and in fact a mandatory requirement for listed companies and companies regulated in the financial services industry.

[101] Executive Directors would typically sign a contract of service with the company such that the law will consider them as employees (and as "workmen" under the IRA 1967) and their relationship with the company in this context is governed by the employment and industrial relations laws. It is also possible that the constitution of a company may specifically provide for the appointment of Executive Directors, but this is not the case presently.

[102] The contract of employment would commonly include key terms on areas of responsibility, milestones on performance targets, as well as on salary and other remuneration items and benefits. These would be agreed with the board of the company, of which the relevant Executive Directors are part. Tax payments and statutory deductions would be necessary items as well.

[103] This also means that given this contract of service and as it has been found by the Court of Appeal to render the respondents in this case as falling within the definition of a "workman" under the IRA 1967, they could and did avail themselves of s 20(1) of the IRA 1967 which permits workmen to file a representation for reinstatement to the Director General if they believe they were dismissed without just cause or excuse.

[104] This, it ought to be reiterated, is distinct from their relationship with the company as Directors which is principally subject to the Companies Act 2016, whereby in respect of their remuneration, which is in the form of fees, must be approved for payment in accordance with the provisions of s 230 of the Act, the relevant parts of which read as follows:

> Approvals for fees of Directors
>
> 230(1) The fees of the Directors, and any benefits payable to the Directors including any compensation for loss of employment of a Director or former Director-
>
> (a) of a public company; or
>
> (b) of a listed company and its subsidiaries,
>
> shall be approved at a general meeting.

(2) In the case of a private company, the Board may, subject to the constitution approve the fees of the Directors and any benefits payable to the Directors including any compensation for loss of employment of a Director or former Director.

[105] As such, in these appeals, as the appellant is a private company, the Director fees for the respondents needed only to be approved by the board of the appellant company, of which the two respondents are members, without having to be approved at a general meeting of the company. However, s 230(2) plainly qualifies such a rule should the matter of remuneration be already governed by the company's articles of association. Which is the case here before us. Article 76 of the Articles of Association of the appellant company provides that "the remuneration of the Directors shall be such sum or sums as may be voted by the Company in a general meeting."

[106] Further, company Directors can only be removed in accordance with the Companies Act 2016, whereby in respect of a private company like the appellant company, s 206(1) states that a Director may be removed before the expiration of the Director's period of office by ordinary resolution, subject to the constitution of the company.

[107] Given the fundamental distinction between a Director and a workman and the ability of an individual to perform these two distinct roles concurrently, we would approvingly associate ourselves with the following observations made by the Court of Appeal in this case on the key differences of these different roles:

> "[62] The fact that these roles coalesce in a person does not warrant a conflation of what must remain conceptually and functionally distinct and separate, within a corporate structure where the person may be one and at the same time a Director, shareholder and employee of the company. This principle is traceable back to the landmark case of *Salomon v. A Salomon & Co Ltd* [1897] AC 22, which established that a company is a separate legal entity, distinct from its Directors, shareholders, employees and agents. Consequently, the dismissal or cessation of one role, such as an individual's Directorship, does not automatically affect or extinguish the rights and responsibilities attached to his other roles, such as that of a shareholder or employee. Maintaining this distinction ensures that the corporate veil remains intact, preserving the integrity of the company as an independent legal person. The roles of the appellants as employees have not been subsumed into or superseded by their roles as Directors of the Company and they remain separate and distinct in their capacity as employees of the Company.
>
> [63] Essentially there is nothing strange or extraordinary for a Director of a company to be also an employee of the company; much depends on whether he is expected to play an executive role in the company as a working Director answerable to the Board of Directors of the company or as a non-Executive Director where his duty is of an intermittent character where quarterly or more regular meetings of the Board of Directors are concerned with attendance also at AGM and EGMs of the company."

[108] In light of the above analysis, it is therefore strictly incorrect to state that a Director can hold a "dual capacity" or wear "two hats" — in the sense of acting as a Director under company law while at the same time being an employee (workman) under a contract of service. It is in our view more accurate as well as helpful if focus is made on the individual concerned, who can be described as wearing two hats when he is both a company Director and also an employee of the company at the same time. It is the individual — not the position of Director — who can double-hat and perform both roles. It cannot be emphasised enough that a distinction must be drawn and properly understood between the position and the person holding it. This is key.

[109] In other words, the inherent status of a Directorship does not admit that of an employee (or workman), and *vice versa*. The two do not mix. Nevertheless, again we say that an individual can under the law be both, but the performance of the two roles we reiterate is subject to different sets of legal considerations. As a Director, the individual is subject primarily to the Companies Act 2016 and the common law *fiduciary* duty whilst as an employee, he is bound by the contract of service and the employment and industrial relations laws.

[110] The position of an Executive Director is a perfect and classic example of this mutual exclusivity and distinction of the two roles in action. By definition, it can be said that an Executive Director means that the individual holding this position is a company Director appointed under the Companies Act 2016 who is also an executive or employee of the company pursuant to a contract of employment. We stress that it may be possible that the constitution of the company also provides for specific provisions on the appointment of Executive Directors, but this is not the case presently.

[111] When it is said that a Director can also be an employee if a genuine contract of service exists, it must mean that an individual who is appointed as a Director can also be an employee under an employment contract. The status as an employee or workman originates and is derived from the contract of service, not from the position of Directorship, and *vice versa*. When he is double-hatting, the two roles are combined or coalesce in one individual, but they remain conceptually separate, functionally distinct and unmistakably mutually exclusive.

[112] For exactly this same reason, it is also inaccurate to contend that the two roles are mutually exclusive only if the individual is purely a non-Executive Director who does not have a contract of service to perform day-to-day tasks for the company. This is because, at the risk of repetition, even for an Executive Director, the two concepts and roles are always mutually exclusive, and do not mix as they are patently governed by different laws.

[113] Now, as the law allows for double hatting, each case must be evaluated on its own particular facts to determine whether a genuine employment contract is in place in order to make a finding whether the termination of the relationship should only comply with corporate rules in the Companies Act 2016 or also additionally with the applicable labour laws.

[114] The decision of the Court of Appeal aptly illustrates the dual capacity in which individuals can simultaneously serve as both Directors and employees of a company. It underscores the important point that removal as a Director, which must necessarily be under the provisions of the Companies Act 2016, does not also mean the termination of the employment unless due process is followed under the IRA 1967.

[115] Assessment ought to be made whether the individual, being a company Director, was not merely required to perform the functions as a Director, but that he was also required to manage the company on a day-to-day basis, and in performing the same, he was under the control of the company via the Board of Directors. Evaluation should also extend to whether he was entitled to remuneration other than in the form of directors' fees. An affirmative answer to these questions would likely render the company Director also being an employee of the company.

[116] The abovementioned case of *Hoh Kiang Ngan* also held that as for determining whether a person is an employee, regard must be had to the nature, degree and extent of control of his duties and functions, which are not limited to the terms of a written contract, and extend to the conduct of the parties at the material time.

[117] In light of our analysis above, we again state that the removal of a Director from the board does not mean the termination of his employment contract, if he has one. Likewise, dismissing an employee does not necessarily result in him vacating office as a Director, if he is one. It is fundamental to appreciate that these two processes are distinct. However, in this case, the respondents claimed that the appellant had removed them not only from their position as company Directors but also as employees of the appellant, as will be further discussed below.

[118] Regard in this context may also be had to the decision of the House of Lords in *Southern Foundries (1926) Ltd v. Shirlaw* [1940] 1 AC 701. In that case, Shirlaw, who served as the Managing Director of Southern Foundries, was removed as Director following changes made to the articles of association of the company prior to the expiry of his ten-year service contract with the company.

[119] His claim for damages for breach of contract succeeded. This decision underscores the important principle that removal of Directors pursuant to provisions of articles or statute does not absolve the company of breach claims under separate service contracts. The Lords resoundingly dismissed the company's argument that the articles superseded the personal service agreement, holding that Articles of Association could not unilaterally override an existing contractual right.

[120] It cannot therefore be emphasised enough that whilst a person can be both, distinguishing the two roles is essential to determine not only the rights of the person involved, precisely because it is from this relationship that rights and duties flow — including not only on whether remuneration, taxation and remission of statutory deductions would be required, but also which Court has the jurisdiction over a legal claim in the event of a dispute.

[121] If the person who wears the two hats is pursuing a claim concerning his rights as a company Director, then he must seek relief in the civil court. But if it is about his employment with the company, as an employee who falls under the definition of a workman under the IRA 1967, he must turn to the Industrial Court.

2) Whether A Director Who Does Not Report To Any Supervising Authority Can Be A Workman Under The IRA 1967

[122] The crux of this issue is whether a shareholder Director whom, the appellant company argued, does not report to anyone, can be a workman under s 2 of the IRA 1967.

[123] Properly understood, this issue concerns the status of three different roles — shareholder, Director and employee, each of whom, in terms of their respective accountability, is differently governed under the law.

[124] Simply put, a shareholder, as the owner of the shares in a company, is generally subject to shareholder majority rule. And although shareholders have oversight over the Directors in terms of the latter's appointment, election, and removal, as well as other powers usually exercisable at general meetings, including the approval of Director remuneration or large property transactions, shareholders do not manage and run the company.

[125] The division of powers between the board and the general meeting of members is trite and often prescribed in the company's constitution. And in s 211(1) of the Companies Act 2016, it is stated that the business and affairs of a company shall be managed by or under the direction of the Board of Directors. The power of management is thus specifically vested in the Board. The law imposes that duty on the Directors. This has also been affirmed by the Federal Court in the case of *Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Berhad & Another Case* [2018] 1 MLRA 263.

[126] Whilst a company is a legal entity, it is also a legal fiction in the sense that it is created by law and can only cease to exist by the process of the law. In an English case of *Continental Tyre & Rubber Co (Great Britain) Ltd v. Daimler Co Ltd* [1915] 1 KB 893, Buckley LJ had this to say of this legal fiction in that a company has:

> "....neither body, parts or passions. Apart from its incorporation, it can have neither thoughts, wishes, or intentions, for it has no other mind than the minds of the corporators".

[127] Thus, as a company which is a legal fiction, it requires natural persons in the form of usually Directors or other agents, in effect, to be the directing mind and will of the company.

[128] Viscount Haldane LC in *Lennard's Carrying Company v. Asiatic Petroleum Co Ltd* [1915] AC 705 had said this:

> "My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the Board of Directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the Board of Directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company."

[129] A company employee, on the other hand, reports to his or her employer — which legally is the company but, for all intents and purposes, is represented in the employment contract by the Board of Directors, as they manage the company. The Board, in turn, delegates this authority to execute the agreement to one of the Directors, such as its Managing Director, or an Executive Director, or any senior management executive.

[130] With a delegated authority framework in place, the reporting structure in a relatively sizeable company would likely see a fresh graduate entrant reporting to an assistant manager or manager heading the unit he is assigned to, within a larger department. At the other end of the spectrum, a very senior executive would have a reporting line to the chief executive and, in turn, the Chief Executive himself or herself reports to the Board of Directors.

[131] In all cases, there is no absence of a reporting relationship.

[132] However, the premise of the appellant company's questions 2 to 5 and 7 is the absence of a master-servant or superior-subordinate relationship. They queried whether a promoter, shareholder and/or Director of a private company, such as both of the respondents, who, according to the appellant company, are also equal decision makers, can be regarded as a "workman" under the IRA 1967 when there is no superior-subordinate relationship.

[133] In other words, the appellant company submitted that read together, ss 2 and 20(1) of the IRA 1967 make it clear that the statutory concept of a "workman" is predicated upon a contract of employment in which the employee is answerable to a superior employing authority. A person who is not subject to such supervision or control falls outside the definition of "workman". A valid contract of employment must necessarily involve the agency of a human superior who has the authority to employ, supervise, control and, if necessary, dismiss a subordinate.

[134] As we understand it, the essence of this primary contention of the appellant company is that since each of Mr Lim and the two respondents, being a promoter, a shareholder, and a Director of the appellant company, is an equal decision maker, they are not subject to any supervision and there is no master-servant or superior-subordinate relationship.

[135] We disagree. In light of our earlier analysis on the legal recognition of an individual holding the position of a company Director and employee in the same company at the same time — or double hatting — and the importance of distinguishing the two, we are constrained to hold that this line of argument posited by the appellant to be devoid of merit.

[136] The premise of these questions is twofold. Both are untenable. First, each of Mr Lim and the two respondents is a Director whom the appellant contends is an equal decision maker and does not report to a higher authority. Secondly, implicit in the questions is the assumption that, given their status as decision makers, the respondents could not also be workmen because there is no higher authority, such as a master or employer that they could report to.

[137] This premise is clearly flawed. For one, it totally disregards the true nature of the double-hatting arrangement, as discussed above. Whilst the appellant contended that as shareholders and Directors the respondents had no higher authority to report to, this is so precisely because the appellant is focusing merely on the respondents' role as Directors of the company.

[138] It is indisputably rudimentary that an employee under a contract of service has a reporting line to the employer/master. But the appellant chose not to address this other status of the respondents as employees, other than concluding that they could not have been company employees since, in effect, they themselves (in their positions as Directors and shareholders) were their own "employers".

[139] Had the appellant considered this important aspect, it would have immediately become clear that as high-ranking employees of the appellant company with the functional titles of project and Technical Directors, each of the two respondents, in the positions of the project and Technical Directors, must have reported to either the Managing Director (Mr Lim) or the Board of Directors as a whole. Given evidence that most key decisions were made through mutual understanding and agreement amongst the three of them, it is more likely that each of the two must have reported to the Board of Directors of the appellant company. The fact that they themselves are members of the board is entirely irrelevant. At any rate in either case, the respondents, as company employees, had to answer to "a higher authority". The employer-employee or superior-subordinate relationship existed. Here, the respondents reported to the board as a whole.

[140] The second fallacy in the argument of the appellant is to contend that, as a company Director, each of the respondents is their own boss and has no superior authority to answer to. Clearly, this is false. As individual board members appointed under the Companies Act 2016, they each report to the entire board. We must stress that as company Directors, the respondents report to the board as a whole, not to any individual Director such as Mr Lim singly. Similarly, as stated earlier, as employees in the position of Executive Directors, each of the respondents also had to answer to the Board of Directors as a whole. The superior-subordinate relationship therefore exists in both situations, either as an employee or as a Director.

[141] It is inconsequential (and this is not even a point raised by the appellant) that, as Directors on the Board, they would have an interest when issues concerning their roles as employees/Executive Directors come before the Board. This is because even if they must abstain from any deliberation or decision-making on matters affecting them, the Board could still operate, by virtue of the presence or participation of other members of the board (either at a physically convened board meeting or by way of circular resolution, as may be usually provided in the constitution of a company), to discuss and decide on any such matter concerning any individual employee/Executive Director or any company Director. As mentioned earlier, the three constituted the Board of Directors since incorporation until the two were removed at the EGM, and Mr Lim's son was appointed to become a new Director. Indeed, pursuant to art 95 of the Articles of Association of the appellant company, a resolution in writing signed by a majority of Directors (not less than two) shall be as valid and effectual as if it had been passed by a meeting of the Directors duly called and constituted.

[142] We do not therefore agree with the contention of the appellant that the Court of Appeal had failed to appreciate that the superior-subordinate dynamic is the hallmark of a contract of employment (whether oral or written) within the meaning of s 2 of the IRA 1967 or that the Court of Appeal had also erred in finding that the degree of control test is archaic, and that it has been replaced by the concept of mutual accountability.

[143] Therefore, we do not think the Court of Appeal erred in any way when it stated the following, despite the appellant company's assertion to the contrary:

> "[34] The degree of control test is rather archaic where professionals and technical staff are concerned especially when they are very senior and high-ranking in the company like in the capacity of Chief Executive Officer ("CEO") or Chief Operating Officer ("COO"). The more senior and responsible a position one occupies as being part of the senior management of the company, the less control one would expect from the company in terms of the day-to-day running of the company. In place of control would be targets to achieve, quality assurance to maintain, risk to manage and strategies to adopt with the focus on the overall performance of the company. Control

and clocking-in is replaced by mutual accountability and accountability to the Board of Directors in its overall objective of growing the company.

[35] Even if there is no formal system of applying for leave that is no longer significant for the focus is not on control but on sustaining and growing the business. **The Executive Directors are answerable to the Board of Directors of the company as a whole and there is nothing incompatible with the fact that these high-ranking employees may also be a member of the Board** or even have some shareholding in the company by virtue of their long service reward under some employees' share option scheme or that they may be investors in the company itself."

[Emphasis Added]

[144] In our view, whilst it is quite clear from the above passages of the judgment of the Court of Appeal that there could now be much lesser degree of control, such as clocking in — especially over the more senior and high ranking employees of a company, focus on matters which the Court of Appeal described as replacing the test of control such as on items on targets to achieve (we should add for example in terms of revenue growth and costs reduction), quality assurance to maintain, risk to manage and future plans to strategise, are for all intents and purposes deliverables that these employees are expected to meet and against which their performance is measured by the employer.

[145] But we would not go as far as stating the control test is obsolete, precisely because these items also translate into features or forms of control over these employees. And it also cannot be said that these high-ranking employees — including Executive Directors — are entirely exempt from complying with the company's disciplinary regime as typically documented in the standard employment terms and conditions or the employees' code of conduct.

[146] In our view, more accurately, these items on performance targets and deliverables unmistakably demonstrate the accountability of these employees to the employer — in this case, as the two respondents are Executive Directors, to the Board of Directors. The Court of Appeal from the said passages has, in fact, said exactly this. That there is accountability to the Board of Directors, and that the Executive Directors are answerable to the board as a whole.

[147] From the above, we wish to reiterate two key points. First, there is no lack of master-servant or employer-employee or superior-subordinate relationships in situations where an individual, such as each of the two respondents who was a company Director, was also a company employee. It is irrefutable that not only are individual ordinary company Director answerable and accountable to the entire Board of Directors of the company, but that so too are high-ranking employees such as Executive Directors of the company.

[148] Secondly, there is absolutely no legal incoherence or incompatibility in the fact that these Executive Directors (just like any individual ordinary Director) are individually and separately answerable and report to the board as a whole, of which they are by definition also members. The stance of the appellant to the contrary on these two points, which constitute the foundation of its challenge in the two appeals before us, is as such misconceived and not tenable.

[149] The appellant next argued that here, there was no evidence to show that the respondents were accountable to the Board of Directors or that they reported to the board on a periodic basis. However, the appellant agreed, and it is the case of the appellant that the respondents and Mr Lim were the founding members/promoters, Directors and shareholders of the appellant company, where all decisions regarding the appellant company were made through mutual understanding and agreement amongst the respondents and Mr Lim, and that no unilateral decisions concerning the appellant had been made without prior consultation between the three.

[150] It could be argued, therefore, that in that situation the respondents and Mr Lim collectively constituted the directing mind and will of the appellant company. The absence of the minutes of meetings cannot be said to show a lack of reporting to the Board of Directors by the two respondents.

[151] After all, s 212 of the Companies Act 2016 states that, subject to the company's constitution, the provisions set out in the Third Schedule shall govern the proceedings of the board. And in art 95 of the appellant company's Articles of Association, as stated earlier, it is provided, as is commonly found in the constitution of many companies, that a resolution in writing signed by a majority of the Directors, not being less than two, shall be as valid and effective as if it had been passed by a meeting of the Directors duly called and constituted.

[152] From the above, even if there is no direct evidence of the respondents being accountable to the board in terms of documents such as meeting minutes, given the structure of the appellant as a private limited company, and evidence of governance process that the three could generally be described as the directing mind and will of the appellant company, in that all decisions regarding the appellant company were made through mutual understanding and agreement amongst the three, there would be no difficulty in our finding that the respondents as employees/Executive Directors (as well as ordinary company Director) did, individually report to the board as a whole, since the three were at the material time also the members of the Board.

[153] Even if it were true that the Court of Appeal had overlooked the point about the superior-subordinate dynamic, we find that to be inconsequential. Because of two reasons. First, in the first place, the appellant did not even plead this argument about the necessity for a superior-subordinate relationship and only raised the same in the appeals before us. Secondly, the essence of the judgment of the Court of Appeal is, in any event, entirely consistent with our analysis and finding that such a relationship was not absent in the factual matrix of the case involving the two respondents *vis-à-vis* the appellant company.

[154] In short, as the respondents, in addition to being Directors of the appellant company (which necessarily report to the whole board) were also its employees as Executive Directors, the respondents were therefore subject to the superior-subordinate/employer-employee relationship, by each of them also being answerable to the Board of Directors as a whole, fulfilling the definition of a workman under s 2 of the IRA 1967.

3) Whether The Absence Of Specific Job Description Despite Presence Of Functional Positions, Payments Of Remuneration As Well As Voluntary Statutory Contributions For Employees' Provident Fund And Employees' Social Security And Mandatory Income Tax Deductions Negate Any Contract Of Employment

[155] We agree that as Executive Directors who are workmen under the IRA 1967, there must be a "contract of employment" pursuant to s 2 of the IRA 1967. The appellant argued that in this case, there is, however, the absence of indicia such as a written or oral employment contract, a defined job scope, working hours, leave entitlements, and attendance requirements, which makes it fundamentally inconsistent with the existence of a contract of employment.

[156] Section 2 of the IRA 1967, we reiterate, defines a "workman" as any person employed under a contract of employment, be it written, oral, express, or implied.

[157] Whilst the existence of a contract of service or contract of employment and the degree of control possessed are paramount, other considerations would include whether the contract was terminated when the employee was made a Director, and whether the individual was treated as an employee; and especially in this respect, whether the individual receives wages or other benefits typically reserved only for employees, and whether the company makes statutory contributions or deductions such as EPF, SOCSO, and income tax for the individual as if they were an employee.

[158] In these appeals, we are in agreement with the analysis performed by the Court of Appeal in respect of the question whether the respondents were employees of the company, and we readily share its conclusion that, given the totality of documentary records, the respondents were treated as wage earners, not as independent contractors or passive Directors.

[159] We note that, factually, there is, without any dispute, no written contract of employment to which the respondents were parties as employees or Executive Directors. But this does not mean that an oral contract of employment cannot subsist between the appellant company and each of the respondents. Indeed, we reiterate that s 2 of the IRA 1967 defines the "contract of employment" as, among others, any agreement, which can be oral or in writing and whether express or implied. In this case, the oral nature of the agreement is further fortified by the conduct of the parties. We stress further that the abovementioned case of *Hoh Kiang Ngan* had held that to ascertain whether a person is an employee, regard must be had not only to the nature, degree and extent of control of his duties and functions, which are not limited to the terms of a written contract, but also significantly encompasses the conduct of the parties at the material time.

[160] Here, the evidence crucially included what would usually be construed as key indicators of an employment relationship, and these are — in no particular order of significance — first, the company made EPF and SOCSO contributions on behalf of the respondents; secondly, the respondents' monthly salary and allowance statements indicated regular wage payments; thirdly, the respondents were listed in the appellant company's Register of Employees; fourthly, the relevant EA tax forms classified the respondents under the label "SG" (salary) rather than "OG" (business income); and fifthly, the relevant payroll slips recorded that the respondents were paid a salary instead of Director's fees.

[161] The appellant company had always listed the three of them in its Register of Employees in its employment record — with the respondents being referred to as a Technical Director and a Project Director, respectively. The same references were also made in various contract documents with customers and also in the submission of EA Forms, as well as even in the forms filed with the Industrial Relations Department for the referral under s 20 of the IRA 1967 for unlawful dismissal, which now led to these appeals.

[162] The appellant company's accounting and other documents referred to payments of salaries instead of fees to them, the latter term typically being the remuneration for non-Executive Directors and certainly not for employees of companies. Thus in the financial statements, no less, in those for financial years ended 2013 and 2016, for example, references were made to Directors' "salaries" under the heading of "Staff Costs" and "Directors' fees" and "Directors' salaries" under the heading of "Employee Benefits". This goes a long way towards advancing the argument that the appellant company viewed the respondents as employees of the company.

[163] We, as such, agree with the following conclusion made by the Court of Appeal:

> "[38] The documentary evidence of the Company consistently refer to both Woon and Chang as an employee of the Company. The fact that they are also Directors of the Company does not disqualify them from being an employee and hence a "workman" within the meaning of the IRA. Their removal as a Director, does not in the circumstances of this case, amount to their dismissal as an employee of the Company. The appellants as a "workman" is entitled to seek the remedy of reinstatement or compensation *in lieu* of reinstatement as the Industrial Court has jurisdiction to hear the dispute...".

[164] We, at the same time, therefore find no real departure from the test of control as laid down by the Federal Court in *Hoh Kiang Ngan (supra)*, despite the argument of the appellant to the contrary.

[165] In this case, for emphasis, we are satisfied that the conduct of the appellant company on the matter — such as describing each of the two respondents as an "employee" in the Register of Employees, according them functional titles, paying remuneration labelled as salary or Directors' fees, and making statutory contributions or deductions under the EPF Act 1991, SOCSO Act 1969, and the Income Tax Act 1967 is on the whole sufficient to clothe the two respondents with the status of a "workman" under s 2 of the IRA 1967.

[166] The law requires less emphasis on titles and managerial status. Instead, the focus ought to be on whether a person serves under a contract of service. And for this, the examination ought to be on whether the company exercises a degree of control and supervision over the work of that person. Needless to say, the exact determination of one's degree of control in any particular case is a question of fact.

[167] As we have earlier concluded, it is not correct on the part of the appellant to contend that the superior-subordinate relationship is absent in this case. The other point is that, also as stated above, we cannot disagree with the finding of the Court of Appeal that, based on the facts of the case, the respondents satisfied the definition of a workman under the IRA 1967. As such, we find that the Court of Appeal was certainly not wrong in having concluded as follows:

> "[51] We cannot ignore these three statutory documents, which are strong indicia confirming the appellants were employed by the company under a contract of employment as an employee and such a fact has not been rebutted by the company on its flimsy excuse of conferring additional benefits to its Directors. The fact that Woon and Chang are also Directors of the company is not, in the circumstances of this case, in conflict with their roles as employees of the company. They are no less an employee of the company and thus qualify as "workman" under the IRA while at the same time discharging their statutory duties as Directors who are answerable to the Board."

[168] The above, in our view, is entirely in keeping with the trite law that the existence of an employment relationship must be assessed holistically and in substance, and that no single factor is conclusive.

[169] We must also state that we have no quarrel with the appellant's submission that case authorities, *albeit* Industrial Court decisions, appear to hold that statutory contributions, designations, or payroll entries cannot by themselves establish a contract of employment in the absence of a superior-subordinate relationship. Cases such as *Actacorp Holdings Bhd v. Helen Tang Chiew Yien* [2005] 2 MELR 240; *Beh Keang Yu v. Fairtrio Marketing Sdn Bhd* [2006] 2 MELR 590, *National Union Of Hotel Bar & Restaurant Workers Peninsular Malaysia v. Muhammad Zailani Mat Zin & Anor* [2023] 1 MELR 21 were referred to in support.

[170] However, we need not address this any further since we have, at the risk of repetition, already found that the respondents were "workmen" in their position as Executive Directors and employees, and that the Court of Appeal is also correct in its finding precisely because the appellant's principal premise that there was no superior-subordinate or master-servant relationship in this case is totally without merit.

[171] At the same time, we are also of the view that the fact of contributions to EPF under the Employees Provident Fund Act 1991 and SOCSO under the Employees' Social Security Act 1969, and the filing of deduction of monthly income tax on salaries are proper indicia of a contract of employment — which in this case was not rebutted by the appellant company.

[172] For instance, both the employer (the appellant) and the employees (the respondents) here contributed their respective portions to the EPF under the EPF Act 1991. It cannot be denied that this is exactly the arrangement mandated under the EPF Act 1991 in an employer-employee relationship. And the form prescribed for SOCSO contribution declares the company to be the employer of the respondents whose contributions are included.

[173] The appellant's argument that the respondents are not employees and that such contributions were made as benefits for their Directorships could not hold water as it violates the scheme of the EPF Act 1991 which differentiates business owners and employees, offends the SOCSO Act 1969 which coverage is only for insured employees who are engaged under a contract of service with the employer company, as well as being contrary to the scheme of the ITA 1967 as there is a monthly deduction of income tax (PCB) for the respondents, as recorded in the EA Forms submitted to the LHDN.

[174] We agree with the Court of Appeal that the appellant company cannot, by making those contributions and deductions, represent to the relevant statutory authorities that the respondents are its employees, but now conveniently denies the same for the purpose of the IRA 1967.

[175] We find the following passages from the judgment of the Court of Appeal in *Chong Kim Sang v. Metatrade Sdn Bhd* [2004] 1 MELR 4; [2004] 1 MLRA 241 especially helpful in explaining this vital point of distinction:

> "29. The relationship of employer and employee exists where a worker is employed under a contract of employment, ie. a contract of service. According to *The Concise Oxford Dictionary* (9th Edn), an 'employee' is 'a person employed for wages or salary'. A person who is appointed Director of a company does not become an employee of the company. Whether he is entitled to receive remuneration as Director would depend on the articles of association and that would normally have to be determined by the company in general meeting. An employee of a company can of course be appointed Director of that company. He remains an employee of the company as long as his contract of employment has not been terminated and would still be entitled to receive wages or salary. As Director, he would further be entitled to any remuneration as determined by the company in general meeting if that is what is provided for and allowed by the articles of association of that company....".

[176] On the contention that the relevant individuals are not employees and that EPF contributions ascribed to them had merely been made voluntarily, the Court of Appeal in *Chong Kim Sang v. Metatrade Sdn Bhd* had this to say:

> "28. The appellant claimed that the respondent had to contribute the equivalent of 13% of his basic salary towards the Employment Provident Fund. This claim was not disputed. Section 2 of the Employees Provident Fund Act 1991 ('EPF Act') provides 'wages' means, *inter alia*, all remuneration in money due to an employee under his contract of service and includes any bonus. Section 43(1) of the EPF Act provides every employee and every employer of a person who is an employee within the meaning of this Act shall be liable to pay monthly contributions on the amount of wages for the month. **We cannot find any reason why the respondent would take it upon its goodself to make contributions towards the said fund on the appellant's wages if the appellant was not its employee**".
>
> [Emphasis Added]

[177] There is one other reason why the appellant's position of conferring additional benefits to its Directors by making these statutory contributions and deductions is untenable and untrue. It is this.

[178] The giving of benefits to Directors, just like payment of fees, must be duly approved in accordance with the applicable requirements in the Companies Act 2016 or the constitution of the company. The key provision is s 230 of the CA 2016, as referred to above. It clearly provides that payment of benefits to Directors of a private limited company — which the appellant company is — instead of being approved at a general meeting, may be approved by its Board of Directors in which case such approval by the board must be recorded in the minutes of the Directors' meeting and the board shall notify the shareholders of the approval of the fees or such benefits within 14 days of the approval. The relevant parts of this provision read as follows:

> Approvals for fees of Directors
>
> 230.(1) The fees of the Directors, and any benefits payable to the Directors including any compensation for loss of employment of a Director or former Director-
>
> (a) of a public company; or
>
> (b) of a listed company and its subsidiaries,
>
> shall be approved at a general meeting.
>
> (2) In the case of a private company, the Board may, subject to the constitution approve the fees of the Directors and any benefits payable to the Directors including any compensation for loss of employment of a Director or former Director.

(3) Any approval made under subsection (2) shall be recorded in the minutes of the Directors' meeting and the Board shall notify the shareholders of the approval of the fees within fourteen days from the date of the approval.

[179] We cannot in this case overlook the fact that there is no suggestion, let alone evidence, by the appellant company that the various statutory contributions and deductions which the appellant contended were additional benefits made in the respondents' favour had been duly approved in accordance with s 230 of the CA 2016. Neither is there anything in the constitution of the appellant company that could assist it in this regard. In any event, the appellant's contention that these contributions were paid on a voluntary basis as benefits to the respondents as company Directors is not even substantiated in any internal documents to record such an arrangement. This reeks of an afterthought.

[180] All these considerations demonstrated the presence of the requisite degree of control which more than sufficiently established the existence of a contract of employment between each of the two respondents and the appellant company, respectively, within the scope of s 2 of the IRA 1967.

4) Whether the removal of a company Director in a general meeting without any allegations of any misconduct in employment by that Director as employee is justiciable by the Industrial Court under s 20(3) of the said Act as an unfair dismissal and attracts the application of the principles in *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1996] 1 MELR 71; [1996] 1 MLRA 725.

[181] It must be highlighted that in terms of Board membership and shareholding structure during the material period, Mr Lim, together with his son, are the majority shareholders of the appellant company, holding 54% of its total shares, with the respondent in Appeal 198 — Mr Woon — holding 10% and the respondent in Appeal 199 — Mr Chang — 36%. Their majority shareholding enabled them to secure the removal of the respondents as Directors of the company at the EGM. Immediately thereafter, the majority shareholders on the same day appointed Mr Lim's son, Jovin Lim, as a new Director of the company.

[182] The problem, however, is that at that same meeting and in that same resolution to remove the respondents, the respondents maintained that the appellant company, through its majority shareholders, sought to and did remove the respondents as employees of the company in their respective capacities of Technical Director and Project Director as well.

[183] The appellant correctly maintained that the respondents' removal was made by way of shareholders' resolution pursuant to s 206(1)(a) of the Companies Act 2016, which is expressly concerned with the tenure of Directors *qua* Directors.

[184] The appellant further contended that such removal, qua Director, does not constitute dismissal under s 20(3) of the IRA 1967 unless there is an independent act terminating a subsisting contract of employment. This is also correct and suggests that the appellant does recognise that a person can be both a company Director and an employee at the same time. Yet the appellant also contended that pursuant to the exercise of such statutory provision, it was unnecessary for any show cause, domestic inquiry, or letter of dismissal to be issued to the respondents from their functional positions as Technical Director and Project Director.

[185] The appellant asserted that the Court of Appeal erred in treating the respondents' removal *qua* Directors for breaches of *fiduciary* duty as equivalent to dismissal *qua* employees for misconduct, and that for this reason, Question 8 must be answered in the affirmative — the removal of a Director under s 206(1)(a) of the CA 2016 does not amount to unfair dismissal within s 20(3) of the IRA 1967, and that the Industrial Court lacks the jurisdiction to adjudicate such removal as a dismissal.

[186] We agree with the proposition that a removal of a Director under s 206(1)(a) of the CA 2016 is, without more, distinct from and has no nexus with an unfair dismissal under s 20(3) of the IRA 1967, or any dismissal of an employee for that matter. This is so, even if the person is double-hatting, performing both the roles of a Director and an employee at the same time. As such, the removal of the respondents as Directors by a majority vote at the EGM does not automatically mean that they have been dismissed as employees of the company. As the Court of Appeal correctly pointed out, for that dismissal, it must be for a just cause and excuse, which is understood to mean that it must be because of misconduct that justifies a dismissal.

[187] But the real issue here, which appears to be conveniently overlooked by the appellant, is that the appellant company sought to and did dismiss the respondents in both of their capacities — as an ordinary Director as well as an employee/Executive Director. The Court of Appeal had determined that the respondents were workmen but found that no evidence was adduced to prove their alleged misconduct, which therefore meant that their dismissal was without just cause or excuse. However, the appellant challenged this, arguing that there was no evidence of their dismissal as employees.

[188] This, in our assessment, is incorrect, since the minutes of the said EGM that recorded that both the respondents were removed as Directors also stated that they were relieved of all their duties and that the appellant company would no longer pay "salaries" to the two respondents, unmistakably underscoring the fact that the company had also treated them as its employees (in addition to as Directors). The minutes of the meeting at para 5 were recorded verbatim as follows:

> "5. WWF asked Chairman when should CHK and WKC stop their duties as Directors and are there any compensation for the loss of office.

> Chairman informed that the removal of Directorship will take immediate effect and CHK and WKC will be discharged of all their duties in the Company. The Company will no longer be paying salaries to CHK and WKC. Chairman further added that they only have the right to receive dividend in the future. WWF questioned who will replace the duty of the removed Director.
>
> LBH informed that he will source for correct candidate for replacement."

[189] In light of the above, and given the facts and circumstances of this case, in our view, the absence of any letter of termination of services of the respondents as employees in this case is immaterial. In our view, the removal of the respondents had clearly been stated and understood as having the effect of the termination and discharge of all their duties to the appellant company, and this must mean responsibilities both as company Directors and as company employees (*vis-à-vis* their respective positions as Technical Director and Project Director).

[190] The above minutes were also unmistakable in stating that the status of the two respondents as shareholders of the appellant company would remain and not be affected by their removal as Directors, as confirmed by the chairman himself pronouncing that the respondents, following their removal, only have the right to receive dividends.

[191] The foundational premise of these two questions 8 and 9, is therefore erroneous as it suggests that the removal of the two respondents was only an exercise undertaken pursuant to the Companies Act 2016, and nothing more. Given our affirmation of the finding of the Court of Appeal that the respondents were individuals who were double-hatting — both as a Director as well as an employee (Executive Director), it is wrong to assume that the dismissal could only have affected their Directorship status.

[192] Whilst it is true that a dismissal of a company Director *qua* Director cannot under the law attract the application of s 20 of the IRA 1967 or the case of *Rama Chandran*, in these appeals we have determined that the respondents had also at the same time (as their removal as Directors) been removed from their positions as employees of the appellant company, which therefore must mean that the IRA 1967 and *Rama Chandran* became relevant.

Third Key Issue — Validity Of The Consequential Orders On Compensation & Back Wages

1) Whether The Court Of Appeal Can Make Consequential Orders For Back-Wages To A Workman (Pursuant To Practice Note No 3 Of 2019 Of The Industrial Court) Without Granting The Employer A Merits Hearing Before The Industrial Court For The Determination Whether The Workman Was Dismissed Without "Just Cause Or Excuse" & Whether The Award Of Back-Wages Should Be Subject To Deductions For Post-Dismissal Earnings By The Workman And For Contributory Misconduct On The Part Of The Workman

[193] As stated much earlier, the Court of Appeal had granted compensation *in lieu* of reinstatement for 23 completed years of service and back-wages for 24 months in favour of each of the two respondents.

[194] The crux of the appellant's complaint is that the Industrial Court should be the proper forum to determine the merits of the respondents' reference, such that the Court of Appeal had acted in excess of its jurisdiction to grant such reliefs without a merits determination by the Industrial Court.

[195] We find no issues at all with the findings made by the Court of Appeal relevant to these two questions 10 and 11. We can do no better than reproduce the following relevant passages from its judgment, which are self-explanatory and clearly address the points in contention:

> "[65] The company had pleaded in such a way that it stood or fell based on the defence that the appellants were not a "workman" within the meaning of the IRA and had not adduced evidence in the Industrial Court with respect to misconduct on the part of the appellants.
>
> [66] This court is of the view that this was not a fit and proper case to be remitted back to the Industrial Court for a rehearing. The company, in its statement of reply (see Woon's appeal record, Encl 6, p 292), pleaded that Woon and Chang had breached their fiduciary duties, yet no evidence was led to substantiate this allegation. To remit the matter back to the Industrial Court would unfairly afford the company a second bite at the cherry, particularly when it had chosen to defend the claim on the basis that the Industrial Court lacked jurisdiction by asserting that Woon and Chang were not 'workmen'.
>
> [67] Having found that the appellants, Woon and Chang, qualify as 'workmen' and that the Industrial Court has jurisdiction, and further that no evidence was adduced to prove their alleged misconduct, it follows that their dismissal was without just cause or excuse. This court can proceed to award damages or compensation *in lieu* of reinstatement, consistent with the reliefs commonly sought before the Industrial Court. If authority is needed, one may refer to the majority decision of Edgar Joseph Jr FCJ in the Federal Court's case of *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1996] 1 MELR 71; [1996] 1 MLRA 725 (CLJ); p 227 (MLJ)...

> [68] In any event, O 53 r 5 of the Rules of Court 2012 allows the court upon hearing a judicial review application to award damages in a case properly pleaded and where it is justified.
>
> [69] For the reasons given above, this court allowed the two appeals and quashed the dismissal of the claims by the Industrial Court. We set aside the order of the High Court and made an order for compensation *in lieu* of reinstatement based on the Practice Note No 3 of 2019 of the Industrial Court. This practice note specifies that the compensation is calculated at the rate of one month's salary for each year of completed service."

[196] We need only to emphasise that it is unjustified for the appellant to contend, as reflected in these two final questions 10 and 11, that the Court of Appeal should not have awarded such reliefs without granting the employer a merits hearing before the Industrial Court for the determination by the Industrial Court. This is because the merits hearing had, in fact, taken place at the Industrial Court.

[197] It would not, in our view, be correct in law and in principle for the issues on whether the respondents were dismissed without "just cause or excuse" pursuant to s 20(3) of the IRA 1967 and whether the award of back-wages should be subject to deductions for post-dismissal earnings by the respondents and for contributory misconduct on their part to be remitted by the Court of Appeal to the Industrial Court.

[198] As has been adequately explained by the Court of Appeal, the exact foundation of the case of the appellant company was that neither of the two respondents was a "workman" within the meaning ascribed to it in s 2 of the IRA 1967. However, given the determination by the Court of Appeal that they were "workmen" — a finding with which we are in full agreement — it follows that the appellant company, as the employer, bears the burden of proving that their dismissal was with "just cause and excuse".

[199] But no evidence of misconduct was adduced at the Industrial Court. There were unquestionably therefore no good reasons under the law for the case to be remitted to the Industrial Court which would have otherwise unfairly accorded the appellant with a second bite at the proverbial cherry, almost like a retrial where the appellant could fundamentally change its position by having to now defend a claim that the two were "workmen" (when that was never the stance of the appellant) and that they had committed misconduct and breached their fiduciary duties as employees (evidence of which, if any, the appellant never bothered to provide at the Industrial Court).

[200] Reliance by the Court of Appeal on *Rama Chandran,* where the Federal Court had held that it is clothed with the power to make a finding that an employee was dismissed without just cause and excuse and thereafter to order compensation, was therefore not wrong.

[201] This is not to mention that remitting would also potentially offend the rule against conducting litigation by instalments. Reference to the following self-explanatory passage from the judgment of the Court of Appeal decision in *Dato Ahmad Johari Tun Abdul Razak v. A Santamil Selvi Alau Malay @ Anna Malay & Ors And Other Appeals* [2020] 4 MLRA 565 is not out of place:

> "[50] On the factual matrix of this case, we are of the view, that the 2nd present Suit is in fact no more than a repetition, in thinly veiled new guise of the cause of action of the 1st or earlier suit and the 2nd/present Suit was filed with the intention to re-litigate and re-open the earlier suit which was struck out and dismissed by the 1st Court. This is so since the parties, the facts of the case, the causes of action and the reliefs sought by the Plaintiffs are identical, if not one and the same. Even if the "continuing tort" as averred to in the 2nd/present Suit could be said to be a different cause of action, which we are of the view it is not; **that cause of action was already present or in existence when the 1st Suit was filed on 9 June 2014 and no reasons or explanations were proffered by the Plaintiffs as to why it was not pleaded and brought or filed together with the 1st Suit. In light of the principle expounded by *Henderson v. Henderson (supra)*, that a party should bring forward once and for all every points which properly belonged to the subject of litigation and not to litigate by way of instalments, the 2nd/present Suit ought to be dismissed on the ground that it is *res judicata* in its extended or broader sense and an abuse of the process of court. The Learned HCJ's finding to the contrary is thus unsustainable."**
>
> [Emphasis Added]

[202] In other words, here, the appellant company could have raised the defence that even if the respondents were construed as "workmen," they had been dismissed with just cause and excuse, and adduced evidence to such effect at the Industrial Court. But the appellant company absolutely did not do that.

[203] The appellant's challenge to the award of back wages by the Court of Appeal is also devoid of merit. We find no errors in the Court of Appeal's application of Practice Note No: 3 of 2019 of the Industrial Court of Malaysia.

[204] This Practice Note contains guidelines for the calculation of compensation *in lieu* of reinstatement for unfairly dismissed employees. It provides that compensation ought to be at one month's salary for each completed year of service, with no compensation for uncompleted years, while also providing for back-wages and mitigation.

[205] Here, as is plain from the passages from its grounds of judgment set out above, the Court of Appeal applied this Practice Note and awarded compensation based on the stated formula. Pertinently, the Court of Appeal also allowed back-wages and, in accordance with the Practice Note, also awarded them from the dismissal date based on the last drawn salary, subject to a maximum of 24 months.

[206] The appellant submitted that the Court of Appeal had failed to take into account the factors as stipulated in the Second Schedule of IRA 1967 in making the orders. This is fallacious since the two — the said Second Schedule and the Practice Note — are generally consistent in their respective requirements. The Second Schedule is in reference to s 30(6A) of the IRA 1967, which sets out the factors for consideration in making an award in relation to a reference under s 20(3). Whilst the Second Schedule statutorily sets out the factors that ought to be adhered to when the Industrial Court makes an award, the Practice Note: 3/2019 — entitled Guidelines Governing Awards in Dismissal Cases — provides the clarifying administrative guidance.

[207] For example, the Second Schedule mandates a maximum of 24 months of back-wages for confirmed employees and this is affirmed in the Practice Note as the key guideline for calculating arrears from the date of dismissal. And whilst the Second Schedule requires the Court to deduct a percentage of post-dismissal earnings from the back-wages awarded, the Practice Note makes it abundantly clear that it is for the employer to prove any failure by the employee to mitigate, and that in any event such deductions apply only to back-wages.

[208] As for the specific objection of the appellant company that the Court of Appeal did not apply any deduction in relation to the back-wages despite the provision in the Practice Notes, we take the view that the Court of Appeal was entirely correct not to have done so. We are mindful that the Second Schedule of the IRA 1967 requires that any award of back-wages must account for post-dismissal earnings and any contributory misconduct on the part of the workman. We take cognisance of the fact that these provisions are designed to ensure fairness to the employer and to prevent unjust enrichment.

[209] However, whilst para 4 of the Practice Note states that for a back-wages claim, the employee must mitigate against loss, it also states — in no uncertain terms — that it is for the employer to show that the employee has not done so. In these appeals before us, no evidence was adduced in the Industrial Court to such effect.

[210] Further, paragraph 4.3.1 states that there shall be no deduction if the employee has not secured new employment since dismissal. In this case, evidence had been led that neither of the respondents had been newly employed. Both the respondents had led evidence that they were still unemployed. This went unrebutted.

[211] And as for para 4.4, which provides that any relief should take into account any contributory misconduct on the part of the employee, this too had no application to the two respondents because despite the case of the appellant company being that the two were guilty of misconduct which justified their removal (as Director), no evidence was led to show any transgression of their fiduciary duty at all. This was precisely the reason that led the Court of Appeal to rule that the dismissal of the two respondents as employees/Executive Directors was without just cause and excuse.

[212] In light of such circumstances and factual matrix, it would be flatly unwarranted for the appellant to assert that they had no opportunity to address such matters as the extent of the respondents' actual efforts on mitigation of losses, on post-dismissal earnings, or in respect of any contributory misconduct.

This Court's Answers To The Questions Of Law

[213] Whilst we are mindful of the very tenuous nexus, if at all, between the appellant's questions of law and the pleadings and submissions raised before the Industrial Court, the High Court and even the Court of Appeal, where the questions are entirely new issues being ventilated for the first time, and never canvassed at the Courts below, and despite the trite law that a party is bound by its pleadings (see the Federal Court decision in *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 5 MLRA 696), we will nevertheless attempt to answer these questions in light of the analysis and findings stated above.

[214] At the same time we are also fully cognisant of the rule that leave having been granted is no bar to the panel hearing the substantive appeal refusing to answer the questions posed, such as when the questions are not properly framed under s 96(a) of the Courts of Judicature Act 1964 (see the decisions of the Federal Court in *Dataran Rentas Sdn Bhd v. BMC Construction Sdn Bhd* [2009] 1 MLRA 163 and in *Tan Heng Chew & Ors v. Tan Kim Hor & Ors* [2006] 1 MLRA 786).

[215] In light of the foregoing analysis and findings, we now turn to the questions of law before us.

> Question 1: Whether the Statement pursuant to O 53 r 3(2) of the Rules of Court 2012 in support of a judicial review application (under O 53 r 1 of the Rules of Court 2012) must categorize and/or identify the errors of law relied on (by the applicant for judicial review) under one or more of the recognised heads of judicial review, *viz*, procedural impropriety, irrationality, illegality and/or proportionality?
>
> Answer: Affirmative. However there was no non-compliance by the two respondents with the said requirements in their respective O 53 statements where sufficiency of pleadings must be read with proper emphasis on both substance and form. Even if there were defects, the judicial review application would not fail on the ground of lack of jurisdiction.
>
> Question 2: Whether a promoter and/or shareholder and/or Director of a private company limited by shares incorporated under the Companies Act 1965 and/or 2016, who acts independently and/or who does not report (directly or indirectly) to any person or persons, and/or who is not subject to any supervising and/or directing and/

or controlling authority, is a "workman" of the said company under s 2 of the Industrial Relations Act 1967 ("the said Act"), read with ss 20(1) and 20(3), of the said Act?

Answer: The premise of this question is incorrect and unfounded. There can never be an absence of a supervising or controlling authority. In any event, a mere promoter, shareholder or Director is not a "workman" in the absence of a contract of employment under the IRA 1967. In these appeals however, the respondents, despite being Directors of the appellant company were also at the same material time "workmen" of the appellant company under the IRA 1967.

Question 3: Whether a Director of a private company limited by shares incorporated under the Companies Act 1965 and/or 2016, who is an equal and/or peer of the other Directors, and/or who is not a subordinate and/or inferior to the other Directors, and/or who is not subject to the supervision and/or control of the other Directors and/or who participates in the decision making of the Directors as a co-equal Director and in decision making of Directors based on the mutual understanding of all the Directors, is a "workman" of the said company for the purposes of s 2, read with ss 20(1) and 20(3), of the said Act?

Answer: Just like question 2, the premise of this question is also incorrect and unfounded. There can never be an absence of a supervising or controlling authority. A Director is answerable to the Board of Directors. An Executive Director under a contract of employment also reports to the entire board. Without any contract of employment with the company, such a Director cannot be a "workman". In these appeals, the two respondents were "workmen" because the existence of contracts of employment, primarily inferred from the conduct of parties and the factual matrix of this case, had been established.

Question 4: Whether a "contract of employment", as defined in s 2 of the said Act, requires the basic legal elements of a superior employing authority ("one person"), a subordinate employee ("workman"), and an employing entity ("employer"), for the purposes of determining whether a person is a "workman" under s 2, read with ss 20(1) and 20(3), of the said Act?

Answer: We answer this in the affirmative. These basic employer-employee or superior-subordinate relationships existed in the contracts of employment of the two respondents with the appellant company which rendered them "workmen" under s 2 of the IRA 1967, despite also being Directors of the appellant company at the same time.

Question 5: Whether the absence of factors such as any employment contract (written or oral) and/or any control and/or direction in the discharge of job duties, functions and responsibilities and/or defined or specific job description and/or scope and/or fixed working hours and/or provision for annual leave and/or approval for annual leave and/or attendance records, is inimical or obverse to the existence of a "contract of employment", as defined in s 2 of the said Act?

Answer: We refuse to answer this question as it is equivocal. The absence of a contract of employment will certainly mean there is no relationship involving an employee or a "workman" under the IRA 1967. As plainly stated in s 2, an employment contract could either be written or oral. The absence of a specific job description or fixed working hours or approval for annual leave does not necessarily mean there can be no contract of employment under the IRA 1967. In these appeals, the Court of Appeal was correct in finding the existence of a contract of employment in respect of both of the respondents based on the facts of the case.

Question 6: Whether the inclusion of a promoter and/or a shareholder and/or Director of a private limited company incorporated under the Companies Act 1965 and/or 2016 in the "Register of Employees", and who are given functional positions (as Technical Directors and Project Director) and who are paid remuneration and/or benefits described as "Directors salaries" and "Directors fees" which are subject to voluntary contributions under the Employees Provident Fund Act 1991 (EPF Act 1991) and the Employees' Social Security Act 1969 (SOCSO Act 1969) and further subject to mandatory deductions under the Income Tax Act 1967 (ITA 1967) — but sans a superior and/or reporting and/or supervising and/or controlling and/or directing authority — renders a person a "workman" of the said company under s 2, read with ss 20(1) and 20(3), of the said Act?

Answer: This question is also based on a wrong premise because there was no absence of a superior — subordinate relationship in this case. A Director appointed under the companies legislation can never be said to be sans a supervising or directing authority since he would be accountable to the Board of Directors of the company, just like the two respondents in these appeals. The fact that their names were included in the company's Register of Employees, that they were given functional titles, paid remuneration and benefits as well as subject to contributions under the EPF Act 1991 and the SOCSO Act 1969 and deductions under the ITA 1967 are all considerations that go towards fortifying the finding that they were also employees or workmen of the appellant company as well. As employees/Executive Directors they also reported to the entire Board of Directors.

Question 7: Whether the test to decide whether a person is a "workman" under s 2 of the said Act, formulated in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1995] 1 MELR 1; [1995] 2 MLRA 435, is applicable to cases that do not involve the determination of whether a contract is a contract for services or a contract of service?

Answer: It is well settled that the requisite test formulated in *Hoh Kiang Ngan* applies to the determination whether or not there exists a contract of employment or service. This was also the situation in these appeals. There is no necessity for us to answer this question on whether the test applies in other situations because that issue simply did not arise here.

Question 8: Whether the removal of a Director of a private limited company incorporated under the Companies Act 1965 and/or 2016, *qua* Director of the said company, by the shareholders of the company in an extraordinary general meeting of the company (pursuant to s 206(1)(a) of the Companies Act 2016) — without any allegations by the said company of "just cause or excuse" and/or any misconduct in employment by the Director qua employee of the said company — is justiciable by the Industrial Court under s 20(3) of the said Act as an unfair dismissal?

Answer: We shall answer this in the negative, since a removal of a company Director qua Director in his position as a Director is a matter which is clearly outside the jurisdiction of the Industrial Court to determine whether such a removal was an unfair dismissal. However in these appeals, we have agreed with the finding of the Court of Appeal that the two respondents had also been dismissed, unfairly, as employees of the appellant company.

Question 9: Whether the removal of a Director of a private limited company incorporated under the Companies Act 1965 and/or 2016, qua Director of the said company, by the shareholders of the company in an extraordinary general meeting of the company (pursuant to s 206(1)(a) of the Companies Act 2016) — without any allegations by the said company of "just cause or excuse" and/or any misconduct in employment by the Director qua employee of the said company — attracts the application of the principles in *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1996] 1 MELR 71; [1996] 1 MLRA 725, as set out in paras [66] to [72] of the judgment of the Court of Appeal?

Answer: We shall also answer this in the negative, for the same reason that a removal of a company Director qua Director in his position as a Director is a matter which is clearly outside the jurisdiction of the Industrial Court. Nevertheless, in this case the two respondents had also been found to be employees of the appellant company, and they were not only removed as Directors but also terminated as employees at the same time. Their termination as employees which had been found to be without just cause and excuse had rightfully attracted the principles enunciated in the *Rama Chandran* case, as applied by the Court of Appeal.

Question 10: Whether the Court of Appeal can make consequential orders for back-wages to a workman (pursuant to Practice Note No: 3 of 2019 of the Industrial Court) without granting the employer a merits hearing before the Industrial Court for the determination by the Industrial Court whether the workman was dismissed without "just cause or excuse" pursuant to s 20(3) of the said Act?

Answer: We shall not answer this question because it is based on an incorrect premise. In these appeals we had determined that the merits hearing had taken place at the Industrial Court in the action for unlawful dismissal instituted by the two respondents against the appellant company.

Question 11: Whether the Court of Appeal can make consequential orders for back-wages to a workman (pursuant to Practice Note No: 3 of 2019 of the Industrial Court) without giving the employer the opportunity to be heard on whether the award of back-wages should be subject to deductions for post-dismissal earnings by the workman and for contributory misconduct on the part of the workman, per the Second Schedule of the said Act?

Answer: Similar to our response to question 10, it had been correctly determined by the Court of Appeal that a merits hearing had taken place at the Industrial Court, and following its finding that the two had been unlawfully dismissed, it was entirely proper for the Court of Appeal to have made the consequential orders for back-wages to the two respondents, in line with the principles enunciated in *Rama Chandran*.

Conclusions

[216] In view of the foregoing, we conclude that these appeals have no merit. There were no defects in the O 53 statements of the two respondents and there was no basis to contend that the Court of Appeal had no jurisdiction to have decided the appeals in the manner it did.

[217] In any event, the Court of Appeal had correctly found that despite being company Directors, the two respondents were also at the material time employees of the appellant company falling within the definition of "workmen" under the IRA 1967.

[218] The Court of Appeal was also correct in its finding that as "workmen", their dismissal by the appellant was without just cause and excuse, and the Court of Appeal was entirely empowered to order the reliefs of compensation and back wages following therefrom.

[219] As such, we are of the unanimous view that any appellate intervention into the decision of the Court of Appeal is wholly unwarranted. These appeals are accordingly dismissed, with costs to the two respondents, subject to payment of allocatur.