

**INDUSTRIAL COURT OF MALAYSIA
[CASE NO: 1/1-2078/19]**

BETWEEN

ETHRAJ MURUGAN

AND

TECHMERIT ENGINEERING SDN. BHD.

AWARD NO. 190 OF 2020

**CORAM : YA TUAN EDDIE YEO SOON CHYE - PRESIDENT
EN. ALFRED A/L IRUTHIARAJOO - EMPLOYEES' PANEL
PN. ANITA SELVI A/P L. SELVARAJU - EMPLOYERS' PANEL**

VENUE : Industrial Court Malaysia, Kuala Lumpur.

FILING OF FORM S : 22.10.2019.

DATE OF MENTION : 27.11.2019.

DATE OF HEARING : 15.01.2020.

**REPRESENTATION : *For the complainant - Vinu
Kamalanathan; Lee Yoong-Uei; M/s
Vinu & Lopez***

Complainant present

*For the respondent - Jeff Sia Chong
Seng; M/s Adrian, Shuhada, Sia &
Associates*

AWARD

[1] This is a complaint of non-compliance pursuant to Form S filed under s. 56 (1) of the Industrial Relations Act 1967 & Rule 24A of the Industrial Court Rules 1967 on 22 October 2019 in the matter of Industrial Court **Case No.**

23(21)/4-2333/18 (Award No. 1108 of 2019) dated **2 April 2019** between *Ethraj a/l Murugan v. Techmerit Engineering Sdn. Bhd.*

[2] A complaint is hereby lodged by the Claimant that the provisions of the abovementioned Award have not been complied with in respect of paragraph 7 where the Court orders the Company to pay to the Claimant the sum of **RM135,800.00** through his solicitors Messrs Vinu & Lopez within 30 days from the date of this Award.

Statement of Case

[3] The Complainant in the Statement of Case filed on 11 November 2019 avers that the Respondent has failed, neglected and/or refused to pay the award sum of RM135,800.00. The Respondent filed an application for Judicial Review in KL High Court Judicial Review Application No. **WA-25-240-05/2019**. The High Court granted leave for Judicial Review and stay on the execution of the award pending the disposal of the Judicial Review application on 2 July 2019. The High Court dismissed the Judicial Review Application with costs of RM5,000.00 on 7 October 2019. The Respondent now filed an appeal to the Court of Appeal. On 11 July 2019, the Complainant's solicitors withdrew the 1st non-compliance application with liberty to refile in **Award No. 2056 of 2019** dated 16 July 2019. The Complainant prays that this Court grants an order directing the Respondent to comply with the terms of the Award.

Statement in Reply

[3] The Respondent filed the Statement in Reply on 5 December 2019. By letter dated 3 May 2019 the Respondent's solicitors enquired the Complainant's solicitors whether the Complainant had been discharged as a bankrupt since 20 December 2017 at the Shah Alam High Court Case No. BA-29NCC-11394-11/2016. As the Complainant is an undischarged bankrupt, the Respondent could not remit any payment directly to the Complainant and its solicitors under section 38 (1) (ba) of the Insolvency Act 1967 which is punishable under section 109 of the same Act. The Respondent ought to remit any payment directly to the Jabatan Insolvensi Malaysia. The Respondent had filed a Notice

of Appeal to the Court of Appeal on 4 November 2019 and the matter is fixed for Case Management on 9 April 2020.

Rejoinder

[4] The Rejoinder was filed on 3 January 2020. The Respondent contends that the remedy of reinstatement pursuant to section 20 (3) of the Industrial Relations Act 1967 is a personal claim and is not ‘property’ that vests with the Insolvency Department or caught under section 38 of the Insolvency Act 1967.

Issues

[5] The issues to be determined and decided by this Court pursuant to this complaint under s. 56 of the Industrial Relations Act 1967 are as follows:

- a) was there an award by this Court in favour of the Complainant;
- b) did the Respondent comply with the award granted by this Court.

Submissions of parties

[6] The Complainant’s counsel submits that there was no stay order obtained by the Respondent in this case. An appeal by way of an application for Judicial Review in the High Court does not operate as a stay of execution. The Federal Court in the case of *Kosma Palm Oil Mill Sdn. Bhd. v. Serbausaha Makmur Bhd.* [2004] 1 MLJ 257 at p. 263 decided that an appeal shall not operate as a stay of execution unless the court so orders. The stay of execution on the Award has now lapsed and hence the the award sum of RM135,800.00 is now due and payable by the Respondent to the Complainant.

[7] The Respondent’s counsel referred to the case of *Hock Peng Realty Sendirian Berhad v. Ting Sieh Chun @ Ting Sie Chung* [2015] MLJU 200 in respect the law pertaining to a stay of execution which was set out by the Federal Court in the case of *Kosma Palm Oil (supra)* whereby the applicant is required to show special circumstances.

The status of the Complainant as a bankrupt

[8] The Respondent's counsel submitted that any payment to be made ought to be paid to the Insolvency Department. In this respect when the Court prompted the proof of the Complainant's status as a bankrupt, there was none and neither was a search of the same was conducted by the Respondent. The Complainant's counsel in the written submissions in paragraph 21 that the Respondent (see paragraph 3 of the Statement in Reply) could not remit any payment directly to the Insolvency Department was flawed and a mere attempt to deny the Complainant the fruits of his litigation. Reference was made to the relevant provisions of the Insolvency Act 1967 (Act 380) and by virtue of sections 8 (1) (b) & 38 (1) (a) the underlying rationale for sanction is that the property and assets of a bankrupt vest in the Director General of Insolvency (DGI) as follows:

8. Effect of bankruptcy order

s. 8 (1) (b) states that "advisable among his creditors and shall vest in the Director General of Insolvency and the Director General of Insolvency shall be the receiver, manager, administrator and trustee of all properties of the bankrupt."

Undischarged Bankrupt

38. Duties and disabilities of bankrupt

s. 38 (1) (a) states that "where a bankrupt has not obtained his discharge, the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency."

[9] The Complainant submits that the **remedy of reinstatement** pursuant to section 20 (3) of the Industrial Relations Act 1967 is a personal claim and the Award is therefore not "property" that vests with the Insolvency Department or caught under section 38 of the Insolvency Act 1967. The Federal Court in the case of *Akira Sales & Services (M) Sdn. Bhd. v. Nadiah Zee Abdullah & Another Appeal* [2018] 1 ILR 433 at p. 462 decided as follows:

“[31] In *Grady v. Prison Service* [2003] EWCA Civ. 527, the employment tribunal acceded to the submissions that Grady did not have standing to bring the relevant proceedings and that the tribunal had no jurisdiction to hear it. But on further appeal to the Court of Appeal, it was held by Sedley L.J. giving the judgment of the court, that a claim for unfair dismissal is personal not proprietary, and not a thing in action of the kind which forms part of the estate of a bankrupt.

[34] A proceeding under s. 20 (3) of the IRA, a personal claim (see *Thein Tham Seng v. The United States Army Medical Research & Anor* [1983] 1 CLJ 240; [1983] CLJ (Rep) 417), does not require the previous sanction of the DGI.

A proceeding under s. 20 (3) of the IRA does not require sanction. Since judicial review of an award under s. 20 (3) of the IRA and consequential appeals are also in continuation of the challenge to the award, they should not require the previous sanction of the DGI.’

[10] Based on the current legal landscape in respect of undischarged bankrupts, it is clear that a claim for unfair dismissal is a personal claim that does not require the previous sanction of the DGI. This sanction is not required as the remedy of reinstatement is not a property that would vest upon the DGI. The Industrial Court in the case of *Mashkon Hj. Samuri v. Orang Kampung Holdings (M) Sdn. Bhd.* [2013] 3 ILR 574 at p. 604 decided as follows:

“[65] Having now found for the claimant should the payment of backwages for the loss of his employment and compensation awarded *in lieu* of reinstatement be paid to the DGI or can the court order that it be paid to the claimant directly and/or his solicitors as it usual to do so.

It is a known fact that an undischarged bankrupt can continue in employment and operate a bank account. It is the court’s view that the award of backwages for loss of employment and compensation in lieu of reinstatement could be received by the bankrupt as it is given for loss of his employment and compensation awarded is *in lieu* of reinstatement. The remedy of reinstatement that is otherwise awarded is personal to the

claimant and of no interest to the DGI as it is not a right which can be exercised beneficially for his creditors.’

Conclusion

[11] In conclusion, the Court in handing down the Award is unanimous in its decision having taken into account the totality of the submissions by both parties. In arriving at this decision, the Court has acted with equity and good conscience and the substantial merits of the case without regard to the technicalities and legal form as stated under section 30 (5) of the Industrial Relations Act 1967. It is crystal clear that there is no stay of execution on the Award No. 1108 of 2019. The Court is of the considered view that since the Judicial Review of an award under s. 20 (3) of the IRA and consequential appeals (in this case the Court of Appeal) are also in continuation of the challenge to the award, they should not require the previous sanction of the Director General of Insolvency.

Decision

[12] The order of compliance is hereby allowed. The Court **unanimously** orders the Respondent to pay the Complainant through Messrs Messrs Vinu & Lopez the sum of **RM135,800.00** forthwith.

HANDED DOWN AND DATED THIS 21ST DAY OF JANUARY 2020

(EDDIE YEO SOON CHYE)
PRESIDENT
INDUSTRIAL COURT MALAYSIA

Case(s) referred to:

Kosma Palm Oil Mill Sdn. Bhd. v. Serbausaha Makmur Bhd. [2004] 1 MLJ 257

Hock Peng Realty Sendirian Berhad v. Ting Sieh Chun @ Ting Sie Chung
[2015] MLJU 200

Akira Sales & Services (M) Sdn. Bhd. v. Nadiah Zee Abdullah & Another Appeal
[2018] 1 ILR 433

Mashkon Hj. Samuri v. Orang Kampung Holdings (M) Sdn. Bhd. [2013] 3 ILR
574

Legislation referred to:

Industrial Relations Act 1967, ss. 20 (3), 30 (5), 38 (1) (ba), 56 (1), 109