

## **CHAPTER FIVE**

### **THE STRUCTURE OF INDUSTRIAL LAW REPORTS**

#### **5.0 Introduction**

This chapter proceeds to describe the structure of the Industrial Law Report (ILR) to determine the moves that make up the genre. Bhatia's four-move structure will be used as a guide in analyzing the ILR. Before looking at the structure of the ILR, this chapter will first identify and discuss the communicative purposes of the ILR. In analyzing the structural organization of the ILR, this chapter will also state the obligatory and optional moves found in the ILR.

#### **5.1 The Communicative Purposes of the Industrial Law Reports**

Legal reports are key texts in the legal community. They are referred to by people who are involved in this field as a source of reference, legal reasoning, precedents, and decisions of the court. Bhatia (1993) identifies four communicative purposes of the legal cases. The purpose of legal cases are to serve as:

- (a) authentic records of past judgments
- (b) precedent for subsequent cases
- (c) reminders to legal experts
- (d) illustrations of certain points of law

The ILR are also key texts in the industrial relations/human resource management community. They are a source of information which are referred to by professionals be they managers, lawyers, trade union leaders and officers and executives in human resource and industrial relations departments as awards and decisions of all trade disputes cases are reported in this journal. The ILR is the only journal written for matters related to industrial relations in Malaysia. This information found in the ILR helps to update and inform these people of the latest cases, trends and processes in industrial relations.

The ILR is also a source of reference as they are referred to when management decides to proceed with a case. The ILR provides the readers with the information they need before they decide to take any course of action. Management, lawyers, union and even the workers can know whether the case they have at hand is worth pursuing and what are their chances for the case they take up to the Industrial Court. In cases of similar nature, management or lawyers can quote and cite previous cases to build up their new case. Even though no two cases are alike, the legal materials of the case can recur and this generally means the cases are judged along the same manner.

The third communicative purpose of the ILR is that cases reported in the ILR are used as a reference to certain points of law. Several ILR cases, for example, in the case of poor performance, illustrates the need to refer to *Ireka and Rooftech* principles before deciding to dismiss an employee. The Ireka's and Rooftech's cases are cases of poor performance where in dismissing an employee of poor performance, the employer must ensure the three conditions are met before dismissing the workers. These three conditions are:

- (i) that the workman was warned about his poor performance;
- (ii) that the workman was accorded sufficient opportunity to improve; and
- (iii) that notwithstanding the above, the workman failed to sufficiently improve his performance.

Procedures and conditions stated in *Ireka and Rooftech* that are not complied with normally deem the dismissals unjustified. Previous precedence and award given in the ILR can be used as evidence for or against a particular line of reasoning or decision.

The ILR also serves as a good guide for the management in writing the charges of dismissal. Actual legal terms and words are used to denote the charge/s to make it more conclusive. The ILR also provides ways for management to mete out punishment after a domestic inquiry. These guides help the management from getting into unnecessary court action for administering reasonable punishment with accordance to the misconduct.

The ILR is a source of knowledge for newcomers, students and teachers in the field of industrial relations. As reading is an integral part of law, the ILR can be used as a resource for these people to know more about ILR cases, whether the judgment is justified or unjustified, how the judgment/decisions are derived, what merits a dismissal, what is compensation of backwages and so on. As a source of knowledge, the ILR is an indispensable tool to these new members of the discourse community.

All the five communicative purposes of the ILR justify the role of the ILR in its legal community. The need and reliance on the ILR indicate the importance of the ILR in disseminating information, providing reference, imparting knowledge and guidance towards the effectiveness of the industrial relations practice. These findings are supported by the specialist informant on the importance of the ILR to its discourse community.

In summary, the communicative purposes of the ILR are to serve as a:

1. source of information on matters related to industrial relations
2. source of reference for proceeding with a case
3. reference to certain points of law
4. guide in writing up the charges of the dismissal
5. source of knowledge

## **5.2 The Generic Structure of Industrial Law Reports**

Despite the importance of this genre as a vehicle of information in the field of management and industrial relations, there are currently no specific studies on the genre structure of the ILR. Neither have there been any studies carried out on the language of ILR. Studies of ILR have mainly been related to areas in industrial relations. There have however been studies on legal cases and law reports such as Bhatia's (1993), Maley's (1994), Bowles' (1995) and Badger's (2003) (refer to Chapter Three). These studies examine the structure of legal cases and law reports.

In this study, twenty dismissal cases was examined to identify the overall structure of the dismissal cases in the ILR. The following structure was found to be inherent in all the twenty cases. The structure of the dismissal cases in the ILR in general consists of the following elements:

Move 1 Identifying the case

Move 2 Summary of the case

Move 3 Pronouncing judgment

Move 4 Giving of award

Step 1 Introducing the claimant and his employment history/ Introducing the case

Step 2 Stating the issue of the dispute/Allegation(s) of dismissal

Step 2a Claimant's version/Company's version

Step 2b Company's version/Claimant's version

Step 3 Providing the evidence to support or dispute the allegation

Step 3a Reference to previous cases and laws to support the chairman's argument

Step 3b Deriving ratio-decidenti

Step 4 Pronouncing judgment/Giving of award

To further illustrate the rhetorical structure of the ILR, an example is given below:

**Move 1:**

**SOUTHERN REALTY (MALAYA) SDN. BHD. & ANOR**

**v.**

**CHEAH CHENG TEIK**

INDUSTRIAL COURT, KUALA LUMPUR

TAN KIM SIONG

AWARD NO. 126 OF 2000 [CASE NO: 4/4-61/98]

3 MARCH 2000

**DISMISSAL:** *Dishonesty – False invoices – Monetary loss to company – Whether substantiated (HEADNOTES)*

## **Move 2**

[The dispute concerned certain repairs carried out on behalf of the company by a customer. The claimant was employed as a mill engineer.] *Employee history*

[The company claimed, *inter alia*, the claimant had, issued fictitious invoices, had not complied with the company's standing instruction to only approve invoice values of not more than RM2,000, and that he had instructed his subordinate to sign a delivery order issued by the customer knowing no work had been carried out. Therefore committing an act of dishonesty alone or with the company's customer to cause monetary loss to the company.] *Company's claim*

[The claimant argues that the company had not been billed immediately by the customer who carried out the repairs but later, i.e. repairs took place in September 1993 whereas they sent the invoice in September 1994. When the claimant received the bill he did not approve it and had told the customer to explain it to his boss, for the payment. Further, he claimed that he had not been told that he was not to incur expenses above RM2,000.]

*Claimant's claim*

## **Move 3**

### **Held:**

- [1] The offence against the claimant was serious and tainted with elements of criminality involving moral turpitude. The company had accused the claimant of cheating, falsification and collaboration, which requires a higher degree of proof.
- [2] On the evidence and facts before this court, the company has failed to substantiate its allegations. The claimant was dismissed without just cause or excuse.

*[Unjust dismissal.]*

*For the claimant – Ajit Singh Jessy; M/s. Jessy & Assocs.  
For the company – Satvinder Singh; M/s. Muker & Assocs.*

## Move 4

### AWARD

[The claimant was employed as a mill engineer since 1 June 1989 by the estate. He was dismissed by the estate on 8 April 1995. The claimant was found guilty by the domestic inquiry on five charges and at the time of dismissal his salary was RM4,600 per month.] *Move 4 Step 1 Employment history and introduction to the case*

The company alleged that the claimant had issued fictitious invoice, instructed his subordinate to sign a delivery order issued by a customer knowing no work was carried out and committed act of dishonesty with a company's customer to cause a RM16,200 loss to the company.

[The dispute concerned the repairs of the company's Demag crane by Sami Brothers Letrik later known as Pusaka Letrik (M) Sdn. Bhd. and the invoice and payment arising out of the repairs. The actual date of the repairs became the company's focal point of contention. The two dates hotly contested were September 1993 and September 1994.] *Move 4 Step 2 Stating the issue of the dispute/Allegation(s) of dismissal*

[On 28 February 1995 the company issued a show cause letter containing five charges. They were as follows:

- (a) That you had approved an invoice no. 0574 issued by Pusaka Letrik (M) Sdn. Bhd. amounting to RM16,200 for repairing work on our overhead creane at Fermanagh Palm Oil Mill which was found to be fictitious and did not take place on 16 September 1994 as claimed;
- (b) That you did not comply to the company's sending instruction to only approve invoice value of not more than RM2,000 by approving invoice no. 0574 amounting RM16,200 without seeking consent from the company.
- (c) That you instructed your subordinate Encik Sallehudin Bin Yusoh to countersign on delivery order no. 0650 issued by Pusaka Letrik (M) Sdn. Bhd. knowingly that such repairing work had not been carried out on 16 September 1994 as claimed;

- (d) That you did not report to the company of the irregularities of invoice no. 0574 and delivery order no. 0650 issued by Pusaka Letrik (M) Sdn. Bhd. and had failed to perform the duty as mill manager/engineer; and
- (e) That the company will suffer financial loss of RM16,200 if payment for invoice no. 0574 is made as a result of your own fraudulent intention or in collaboration with Pustaka Letrik (M) Sdn. Bhd.

Later the company preferred two additional charges:

- (a) That you were found to be negligent in your duty by sending one year later the purchase order no. 10200 in connection with invoice no. 0574 during December 1994 which claimed the work was done somewhere in September 1993.
- (b) That you have committed a serious act of dishonesty either through your own fraudulent intention or in collaboration with Pusaka Letrik (M) Sdn. Bhd. to cause a RM6,200 financial loss to the company.] *Move 4 Step 2a Company's version*

Although the claimant had given an explanation to the company and denied the allegations, the company was not convinced and proceeded to hold a domestic inquiry *ex parte*. The claimant's request of adjournment of the inquiry was refused.

At the proceeding before this court, the company had called several witnesses to testify and to establish its allegations. It is the company's contention that the claimant was guilty of the charges alleged against him and the company had proved its case with cogent evidence of serious act of dishonesty with fraudulent intention.

[The claimant in his evidence testified that repairs were carried out on the broken down crane by Sami Brothers but the company was not billed immediately after the repairs. Sami Brothers took the damaged parts of the crane to their workshop for repairs and these parts are still with them. The claimant stated that he called Sami Brothers many times to send in their bill but they only took action in September 1994. When the claimant received the bill he did not approve it. He issued a work order and told Sami Brothers to



explain to his boss for payment. The claimant averred it was not a false bill or a false claim.

The claimant testified he had never been told that Sami Brothers were blacklisted by the company or he was not to incur expenses above RM2,000. It is also an undisputed fact that there were three Demag cranes in the company and at any given time only two were in use. One crane was used as spare and parts were utilized from the spare crane for use in the other cranes in the event of breakdown. The damaged parts of the broken down crane were transported from the mill by the company's van and Sami Brothers' own transport. The store requisition notes recorded the date September 1993 where various parts pertaining to Demag crane were issued to Sami Brothers. Similarly, the gate pass clearly recorded items for use of crane no. 3 were sent to Sami Brothers in July and August 1993. The fact that work was carried out was confirmed by letter from Sami Brothers and the evidence of company's witness no. 3, when he said:

*After I signed the Delivery Order, I went to the hospital to confirm with Encik Kassim, who confirmed that Sami Brothers did the work. He did not give me the details.]*  
**Move 4 Step 2b Claimant's version**

The company's witnesses, COW2, COW5 told the court there was a Tadano crane which was brought in by Cheap Fong Engineering. The store keeper testified that the spare parts were sent to Pustaka Letrik in 1993 and in 1994 no spare parts were sent out for the repair of Demag crane.

[It is the claimant's submission the company has failed to establish that repairs were not carried out in 1993. Sami Brothers' testimony would have clarified whether repairs were carried out in September 1993 but they were not called as witnesses. The company has failed to produce convincing evidence that the claimant committed the misconduct he was alleged to have committed

The offence against the claimant for his dismissal was serious and tainted with element of criminality involving moral turpitude. The company had accused the claimant of cheating, falsification and collaboration which require a higher degree of proof. On the evidence and facts before this court the company has failed to substantiate its allegations.] **Move 4 Step 3 Providing the evidence to support or dispute the allegation** [The finding of this court is that the claimant was dismissed without just cause or excuse.]

Looking at the circumstances of the dispute this court does not think that reinstatement is a proper remedy. Taking everything into account [the court is of the view a sum of RM50,000 is sufficient to compensate the claimant for the loss of employment. This sum shall be paid by the company to the claimant through his solicitors within one month from date of this award, subject to statutory contributions and deductions, if any.] *Move 4 Step 4 Pronouncing judgment and giving of award*

The dismissal cases display this typical four-move structure in all the twenty cases. Two moves have been identified and labeled as “Summary of the case” and “Giving of Award”. These two moves are similar to Bhatia’s original moves of “Establishing facts of the case” and “Arguing the case”. Move 2 is called “summary of the case” because it is a brief, summarized version of the case that includes the nature of the dismissal charge(s) and the history of the case. It is not much different from Bhatia’s original structure of Move 2, “Establishing facts of the case” except that in the ILR, this move is summarized for the purpose of brevity, time and relevance. The ‘Giving of Award’ move, which is the heart or the gist of any dismissal case, contains a detailed description of the case. The history, facts, evidence and findings of the case are again found in this move before the judgment is made/award is given. All four moves and their sub-moves will be discussed below.

### **5.3 The Moves**

The standard four move structure which has been found in legal cases is also found in the structural organization of the ILR. These four moves appear in the order of Move 1, Move 2, Move 4 and Move 3 are inherent throughout the twenty cases analyzed in the study. Unlike the structure of legal cases, the ILR has Move 4 Pronouncing judgment (Giving of award) first, before Move 3 which is ‘Arguing of the case’. This

is a common structure found in the ILR which serves to inform the readers the decisions of the Court and the relevance of the case to them. If the case is relevant to the readers, they will then proceed to Move 4 ‘Giving of award’ to find out more about the detailed description of the case. Below is a detailed description of each move found in the ILR.

### **5.3.1 Move 1 – Identifying the case**

All the twenty dismissal cases have Move 1 which is “Identifying the case”. This move has a typical formulaic realization and is standardized throughout the twenty cases. All cases begin with the identification of the two parties to the disputes which is written in capital letters. The letter *v.* (versus) appears between the two disputing parties and this is followed by the name of the court and the venue the case was tried, the name of the President or Chairman of the case, the award number and the date the case was heard. Examples of this move are given below:

1. **SEE HUA DAILY NEWS SDN. BHD.**  
**v.**  
**BASAR JEE**  
INDUSTRIAL COURT, KUCHING  
LIM HENG SENG  
AWARD NO. 414 OF 2000 [CASE NO. 8/4-521/99]  
4 AUGUST 2000
  
2. **TSURITANI (MALAYSIA) SDN. BHD. MELAKA**  
**v.**  
**SHA'ARI SAHAT & ORS**  
LABOUR DEPARTMENT, MELAKA  
AWARD NO. 717 OF 2000  
[CASES NO: 1/4-509/95, 1/4-510/95,  
1 /4-511 /95 & 1 /4-333/951  
20 DECEMBER 2000

3. **SRI ANDAMAN SDN. BHD.**  
v.  
**RAHMAH BIDIN**  
INDUSTRIAL COURT, KUALA LUMPUR  
SITI SALEHA SHEIKH ABU BAKAR  
AWARD NO.56 OF 2001 [CASE NO: 6/4-876/99]  
31 JANUARY 2001
4. **ASSUNTA HOSPITAL, PETALING JAYA**  
v.  
**ROZZANA MOHAMED SAZALI**  
INDUSTRIAL COURT, KUALA LUMPUR  
ABU HASHIM ABU BAKAR  
AWARD NO 296 OF 2001  
2 MAY 2001
5. **PENAS REALTY SDN BHD**  
v.  
**CHEE YEW KONG**  
INDUSTRIAL COURT, PULAU PINANG  
SYED AHMAD RADZI SYED OMAR  
AWARD NO. 580 OF 2001 [CASE NO: 9/4-251/99]  
31 JULY 2001

In Industrial Court cases, the case number is not used when citing the case as a reference of law or ratio-decidenti. Each case is given an award number, thus **AWARD NO. 414 OF 2000** is award number four hundred and fourteen of the year 2000. Cases are quoted based on the award number and the names of the involved parties. For example, in the dispute between Intrakota Consolidated Bhd. and Suhed bin Salleh (1998), a reference to a case was made in the following manner,

“Now taking into consideration all the available evidence it falls upon the Court to inquire into all aspects of the fight. In Steelform Industries Malaysia Sdn. Bhd v. Foo Fook Ban (Award No. 126 of 1991) the learned Chairman observed....”

(Industrial Court, Malaysia, 1998)

It is clear from the example that the reference was made to Award No. 126 of 1991 between Steelform Industries Malaysia Sdn. Bhd. And Foo Fook Ban. In recent cases of ILR from the year 2000 onwards, this reference is made even easier as not only the name but also the volume of the journal and page number are given. For example, in the case of Rahmah Bidin and Sri Andaman Sdn. Bhd (Award no. 56 of 2001), a reference to a case is made in the following manner,

“In the later case of I.E. Project Sdn. Bhd. v. Tan Lee Seng [1987]  
1 ILR 165 the learned chairman had this to say...”

(ILR, Vol.2, 2001, p. 264)

where 1 ILR is an abbreviation for Volume 1 of the ILR of 1987 and 165 is the page number of the journal of reference. This finding shows how important it is for the reader to refer to a particular case and this is made easier and quicker by providing all the necessary details. Citations to other awards in the ILR are found in sixteen of the cases studied. Another interesting finding from the analysis is the way the title is written. In the original copy of the Court proceedings, the word **BETWEEN** and **AND** is used and not the letter **v.** (versus) for the two disputing parties as shown below:

**INDUSTRIAL COURT OF MALAYSIA**  
**CASE NO. 8/4 – 521/99**  
**BETWEEN**  
**SEE HUA DAILY NEWS SDN. BHD**  
**AND**  
**BASAR BIN JEE**

This shows that the way the title of the case is written is also similar to legal cases.

This seems to indicate that in terms of structure and wording ILR should belong to the legal genre.

The ‘Identifying the Case’ move is found in all twenty cases making it an obligatory move in the structure of the ILR. The table below describes the occurrence of Move 1 Identifying the Case as found in the study:

**Table 13: Occurrence of Move 1 Identifying the Case**

Cases	Move 1
Case 1: Forest Vision v. Mutalip Bohari	/
Case 2: Shin Yang v. Uning Gunter	/
Case 3: Cicso (M) v. Wan Azizan	/
Case 4: See Hua Daily v. Basar Jee	/
Case 5: Azmi & Company v. Firdaus Musa	/
Case 6: Mother’s Nursing Home v. Pakiam Veerappan	/
Case 7: The Shaper Image v. Wong Kt Peng	/
Case 8: Tsuritani (Malaysia) Sdn. Bhd. Melaka v. Sha’ari Sahat & Ors	/
Case 9: Kok Hoon Sdn. Bhd. v. Raja Kumaran Suppiah	/
Case 10: Siri Andaman Sdn. Bhd. v. Rahmah Bidin	/
Case 11: Nam Heng Industries Sdn. Bhd. v. Nishtar Shahul Hamed	/
Case 12: Assunta Hospital, Petaling Jaya v. Rozzana Mohamed Sazali	/
Case 13: Technobond Group Sdn. Bhd. v. Chong Kien Kee	/
Case 14: NT Computers Sdn. Bhd. v. Ng Ah Siew	/
Case 15: Penas Realty Sdn. Bhd. v. Chee Yew Kong	/
Case 16: Alpha Sigma Sdn. Bhd. v. Renujeet Kaur	/
Case 17: Andalas Medical Centre v. Anthony Selvaraj M. Asirvathan	/
Case 18: G-Two Management Services Sdn. Bhd. v. Chin Siew Ping	/
Case 19: Hamay Glass Sdn. Bhd. v. Loganathan Vadamalai	/
Case 20: Indah Water Operation Bhd. v. Vijaragavan Manicam & Anor	/

### 5.3.2 Move 2 – Summary of the case

Immediately below the date is a string of words and phrases. Also known as the headnote (Badger,1995), this string of words and phrases provide a brief account of the dismissal charge(s) and the nature of the dismissal. Even though the headnote has no legal authority in official law reports and students are discouraged from reading it (Badger, 1995), this is an exception in the ILR. The headnote is important in the ILR as this is where readers of the case will be able to know whether the case is relevant to them by the brief information given in the phrases and that they need to read further on it, or that it is of no relevance to them. This finding is confirmed by the specialist informant who stressed that the summary of the case provides a quick reference whether the case they are referring to have any relevant. The headnote basically sums up what the whole case/dispute is about. Examples of the headnotes are as follows:

1. DISMISSAL: Insubordination – Leaving office before cessation of printing operations – Allegation of – Whether permission to do so obtained from superior officer – Whether printing operations had ceased at relevant time

DISMISSAL: Absenteeism – Whether proven

2. DISMISSAL: Absenteeism - Absent from work for two consecutive days - Whether tantamount to a breach under s. 15 of Industrial Relations Act 1967 - Whether employees must be absent from work three working days for s. 15 to apply Condonation - Existence of - Whether proven

DISMISSAL: Strike - Whether illegal - Whether employees' action fell within definition of s. 2 of Industrial Relations Act 1967

INDUSTRIAL COURT: Procedure - Trials - Whether court could decide on reason not relied upon in dismissing employees Exception - Industrial Relations Act 1967, s. 30(5)

3. DISMISSAL: Performance – Unsatisfactory work performance and late coming – Whether allegations substantiated – Whether warnings given beforehand – Whether dismissal with just cause and excuse
  
4. DISMISSAL: Probationer - Performance - Poor performance – Allegation of - Whether substantiated - Whether warnings accorded prior to dismissal- Whether reasonable to hold claimant solely responsible for short-comings- Whether claimant accorded reasonable time to carry out duties – Whether dismissal with just cause and excuse
  
5. DISMISSAL: Resignation – Letter of retirement – Whether signed voluntarily – Whether there was forced resignation

The charge(s) is/are written in brief or as main key words consisting of single words and phrases. The charge(s) for each case ranges from one to two allegations in many of the cases. Out of the twenty cases, 17 cases have only one allegation and 3 cases have two allegations of dismissals. For example, in 1 above, it can be seen that the employee was dismissed on two allegations: insubordination and absenteeism. Example 2 is more unusual compared to all the other cases in this study. Beside the two charges: absenteeism and strike, the Industrial Court has taken upon itself to include another charge that was not included in the pleadings. The Court viewed the illegal strike that was staged out by the employees as detrimental not only to the Company but to the nation as well. In carrying out its role, the Court has decided to include this charge of taking part in the illegal strike for the purpose of ‘equity, good conscience and the substantial merits of the case’ (s. 30(5) Industrial Relations Act 1967). In example 3, the dismissal was due to unsatisfactory work performance and late-coming and in example 4, the dismissal was also for poor performance but, in this case, the worker is a probationer. The last example, Example 5, is a simple case of



forced resignation. The issue in this case was whether there was force coercion in signing the letter or it was signed voluntarily.

These simple, straightforward charges/allegations given in brief against the employee are easy to read and understand. Out of 20 cases analyzed in this study, 9 dismissal cases were for poor performance, 3 for termination of service, 3 for insubordination and absenteeism/strike, 2 for misconduct and one each for breach of trust, medical leave and resignation.

In the ILR, the headnote is of paramount importance to the readers. Professional people are busy and would normally be expected to rely on headnote as a summary or a reference to the case before proceeding to the next sections of the report. This is further validated by the specialist informant as the headnote is necessary reading to know first of all what the case is all about.

The headnote or the brief write-up about the case is followed by a summary of the facts of the case where both sides to the dispute are presented. The material/information here plays a crucial role in the decision that is eventually made. It is therefore important that the information given here is presented clearly. Examples of the facts of the case are as follows:

1. The claimant, a newspaper printer, was dismissed on two allegations. It was the company's policy that all printers could return home after all works are completed regardless of which machines they are manning. The first charge against the claimant was that on 11 August, he had left the office without assisting the other lino newspaper printers to complete the printing. The company proceeded to give him a warning letter. He was also charged of being absent without

authorization from 4-6 September. When the claimant went to work on 7 September, he was told that another worker had been employed to replace him. The claimant alleged that the company had unjustly dismissed him.

2. The claimants consisted of the production or administrative staff in the company. On 4 and 5 May 1995, they did not turn up for work. Their refusal was found to be based upon not being paid the proper rate for overtime work and an allegation that the company was discriminating against the Malay employees and the dismissal of their assistant manager. The claimants submitted that on 6 May, they were initially prevented from entering the company premises for the first half of the day. After being allowed in, they had a meeting with the industrial relations director. They were given their punch cards and they punched out at the end of the morning shift. They even claimed that they were paid for that day. The claimants contended that by doing so, the company had condoned any misconduct alleged of. This, the company denied.

The company submitted that on 6 May the claimants not only continued to be absent for the first half of the day but participated in an illegal strike in front of the company's main gate. It is because of this continued absence, i.e. since 4 May, that the company contended that the claimants have terminated their employment under s. 15(2) of the Employment Act. However the company, in submitting to this court that the workers had participated in a strike on the third day, had not pleaded that they were dismissed for taking part in an illegal strike.

3. The claimant, a junior stenographer, alleged that her dismissal which was based upon contentions of unsatisfactory work performance and late-coming to work was baseless and unjustified. She added that she was not given enough warnings regarding her work performance beforehand.

The company, in submitting their case, also raised the issue of estoppel claiming the claimant had accepted a sum of money given to her in the labour court in exchange for agreeing not to pursue any further claims against it.

4. The claimant commenced employment with the company as a probationary finance manager. She alleged that her superior persuaded her to become a credit control manager due to her satisfactory work performance, that she would no longer be on probation and would be confirmed in the latter post in a redesignation exercise. Two months from the said exercise, the company dismissed her on the ground of unsatisfactory work performance. The claimant disputed the allegation that she was an under-achiever.

The company contended that the claimant continued to be on probation despite being re-designated as credit control manager and that it had given her the necessary notice, warning, counseling and sufficient opportunity to improve herself when her work performance was below its expectation. In forwarding the claim of inefficiency, the company's finance director submitted that this included firstly her inability to locate missing patients' slips; secondly, non-billing of corporate clients; thirdly, unsatisfactory submission of a fixed asset management procedure; fourthly, discrepancies in provision for bad debts; and fifthly, unsatisfactory evaluation of corporate clients in relation to credit facility. Therefore, it was submitted that the claimant's dismissal was exercised pursuant to its employment rules.

5. The claimant claimed that he was forced to a retirement letter. He further contended that he was in fact dismissed because he refused to sign a consent letter for a salary reduction of 25%. The company however claimed that the claimant had voluntarily signed the option letter to retire and was paid an *ex-gratia* payment of RM17,600. The claimant alleged that the company's action tantamount to an unjust dismissal.

This summary which I have earlier identified as the “summary of the facts” move is found in all twenty cases and is necessary reading for lawyers, union officials, human resource managers, employers and industrial relations officers who are usually busy people. The need to justify each and every case they have to deal with requires them to be up to date, and in the know of relevant or related cases. The nature of cases and decisions made are important information to them. Thus the summaries of cases should

inform them if the cases are relevant to them. The award which is found in Move 4 is where the reader will be able to get a full, detailed account of what actually happens in the case.

The relevance of a case is determined by the similarities of the facts of the case. No two cases are alike. However, if the facts of the case they are dealing with have some similarities to previous cases with awards given, these cases can be used as a guide in their line of reasoning and in deciding on the case since the rule of *ratio-decidendi* is usually followed. By referring to other similar cases, management and union officials can also know where they stand and whether a case can be settled amicably at their level without resorting to the Industrial Court or whether a case should be brought to the Industrial Court .

All twenty cases in the data have Move 2 in the reports. This move enables the readers to immediately zero in on the claims and facts of the case which are given in a simple and straightforward manner. Readers of the dismissal cases should not have any problem in identifying the facts of the case here as the facts of the case are already established by summarizing the legally-material facts of the case from both sides of the disputing parties. The legal-material facts of the case are facts of the case that are considered legally material for a particular decision. The examples below show the legally-material facts of the case:

1. The claimant, a newspaper printer, was dismissed on two allegations. [It was the company's policy that all printers could return home after all works are completed regardless of which machines they are manning.] The first charge against the claimant was that [on 11 August, he had left the office without assisting the other lino newspaper printers to complete the printing. ] [The company proceeded to give him a warning letter.] [ He was also charged of being absent without authorization from 4-6 September.] {When the claimant went to work on 7 September, he was told that another worker had been employed to replace him.} The claimant alleged that the company had unjustly dismissed him.
  
2. The claimants consisted of the production or administrative staff in the company. On 4 and 5 May 1995, they did not turn up for work. Their refusal was found to be based upon not being paid the proper rate for overtime work and an allegation that the company was discriminating against the Malay employees and the dismissal of their assistant manager. {The claimants submitted that on 6 May, they were initially prevented from entering the company premises for the first half of the day. After being allowed in, they had a meeting with the industrial relations director. They were given their punch cards and they punched out at the end of the morning shift. They even claimed that they were paid for that day. The claimants contended that by doing so, the company had condoned any misconduct alleged of.} This, the company denied.

[The company submitted that on 6 May the claimants not only continued to be absent for the first half of the day but participated in an illegal strike in front of the company's main gate. It is because of this continued absence, i.e. since 4 May, that the company contended that the claimants have terminated their employment under s. 15(2) of the Employment Act.] However the company, in submitting to this court that the workers had participated in a strike on the third day, had not pleaded that they were dismissed for taking part in an illegal strike{The claimant claimed that he was forced to a retirement letter.} {He further contended that he was in fact dismissed because he refused to sign a consent letter for a salary reduction of 25%.} [The company however claimed that the claimant had voluntarily signed the option letter to retire and was paid an *ex-gratia* payment of RM17,600. ] The claimant alleged that the company's action tantamount to an unjust dismissal.

3. {The claimant, a junior stenographer, alleged that her dismissal which was based upon contentions of unsatisfactory work performance and late-coming to work was baseless and unjustified.} {She added that she was not given enough warnings regarding her work performance before -hand.} [The company, in submitting their case, also raised the issue of estoppel claiming the claimant had accepted a sum of money given to her in the labour court in exchange for agreeing not to pursue any further claims against it.]
4. The claimant commenced employment with the company as a probationary finance manager. {She alleged that her superior persuaded her to become a credit control manager due to her satisfactory work performance, that she would no longer be on probation and would be confirmed in the latter post in a redesignation exercise.} {Two months from the said exercise, the company dismissed her on the ground of unsatisfactory work performance.} {The claimant disputed the allegation that she was an under-achiever.}

[The company contended that the claimant continued to be on probation despite being re-designated as credit control manager and that it had given her the necessary notice, warning, counselling and sufficient opportunity to improve herself when her work performance was below its expectation.] [In forwarding the claim of inefficiency, the company's finance director submitted that this included firstly her inability to locate missing patients' slips; secondly, non-billing of corporate clients; thirdly, unsatisfactory submission of a fixed asset management procedure; fourthly, discrepancies in provision for bad debts; and fifthly, unsatisfactory evaluation of corporate clients in relation to credit facility.] [Therefore, it was submitted that the claimant's dismissal was exercised pursuant to its employment rules.]

5. {The claimant claimed that he was forced to a retirement letter.} He further contended that {he was in fact dismissed because he refused to sign a consent letter for a salary reduction of 25%.} [The company however claimed that the claimant had voluntarily signed the option letter to retire and was paid an *ex-gratia* payment of RM17,600.] The claimant alleged that {the company's action tantamount to an unjust dismissal.}

The symbols, { } – for the claimant and [ ] – for the employer, indicate the legally-material facts of the case as established by both parties. In example 1, we can see that it is legally material for the claimant to claim the employer had unjustly dismissed him by replacing him with another worker when he went back to work on September 7. The employer, on the other hand, claimed that the dismissal was justified because according to the facts of the case, the claimant was aware of: 1) the company's policy 2) he had been given a warning and 3) his absence is without authorization. Although these facts are summarized, they are significantly important legal material as they have establish the reasons that the disputes had arisen in the first place.

Example 2 which has been mentioned earlier establishes the facts of the case whereby the claimants claim that the company had denied them from entering the work premises. After a discussion with the management, the workers were allowed in, given their punch card and even paid for their work for that period of time. The management therefore cannot claims they are against the employees because by allowing them in and letting them work, the management has condoned the workers' for the alleged misconduct. However, from the management's point of view, the legal facts for the case are that the workers have been absent since 4 May. When they staked out a strike for the first half day of 6 May, they had been continuously absent for three complete working days. It is based on this continued absence that the company terminated the workers' employment under s. 15(2) of the Employment Act.

In example 3, the facts of the case are also clearly established, as according to the claimant, she had not been given enough warnings for her unsatisfactory work performance. To the claimant, her dismissal was unjustified although her employer had claimed that it was agreed by the claimant that she will not pursue the case after accepting a sum of money. These facts are legally significant in this case.

Example 4 is also a case of poor performance. However in this case, the claimant was asked to take up a higher position as her supervisor was very satisfied with her previous work and she was promised to be confirmed if she agreed to it. However, after two months, she was deemed as an under achiever. The legal facts of the case were challenged by the claimant who denied that she was incompetent. The management on the other hand responded that it had acted on the dismissal pursuant to the employment's rules.

In the last example, Case 5, the legal facts of the case are that the claimant had claimed that he had been forced to sign a resignation letter. This was different from the company's version which was that, the claimant had signed the letter voluntarily. Again the facts of the case are legally material because if the claimant had indeed been forced to sign, his dismissal would have been unjustified but if on the other hand, he had signed the letter voluntarily, the company would not be at fault. Thus, by establishing the facts of the case, both the employee and employer have the right to pursue the case to ensure that a fair judgment is given.



The five examples above show that the dismissal cases in ILR establish the facts of the case by providing only the legally significant facts by both parties in Move 2. All twenty cases have the facts of the cases written between one to two paragraphs long and three cases have three paragraph summaries. The summaries range from three to twelve sentences. Only one case (Case 1) is different in the sense that it has a word and a clause written in colloquial Malay language, '**pulang**'(to go back) and '**lu boleh pulang**'(you can go back) which are material facts to the case. Code-mixing and code switching are common in the Malaysian context because of the multiracial composition of the community. This form of code mixing and code-switching is quite common when neither parties are proficient in English to be able to explain well or in this case to instruct the workers to go back or not to return to work anymore. Although code-switching and code mixing are used by a Malaysian in general, in the ILR examples of code-switching and code-mixing are normally found when illiterate or uneducated workers especially those in the rural areas who work for the logging companies are involved.

In Move 2, nineteen cases begin this move with an introductory statement of the claimant's position in the company and/or the nature of the claimant's dismissal. For example:

1. The claimant, a newspaper printer, was dismissed on two allegations.
2. The claimants consisted of the production or administrative staff in the company.
3. The claimant, a junior stenographer, alleged that her dismissal which was based upon contentions of unsatisfactory work performance and late coming to work was baseless and unjustified.

4. The claimant commenced employment with the company as a probationary finance manager.
5. The claimant claimed that he was forced to a retirement letter.

One of the cases begins with the introduction of the company's position,

The company was financially distressed during the 1998 economic crisis

This is followed by a summary of the details of the case that leads to the dispute as claimed by the claimant and the company. Since the ILR is used as a reference, the summarized description of the facts can help the readers to quickly understand the nature of the case. If the case is relevant to the readers, they can proceed to the other sections of the reports to understand the case better.

All twenty cases have this move, thus indicating that it appears to be an obligatory move in the structure of the ILR. Table 14 below shows the occurrence of Move 2 in the ILR:

**Table 14: Occurrence of Move 2 Summary of the Case**

Cases	Move 2	Claimant's Version	Company's Version
Case 1: Forest Vision v. Mutalip Bohari	/	/	/
Case 2: Shin Yang v. Uning Gunter	/	/	/
Case 3: Cicso (M) v. Wan Azizan	/	/	/
Case 4: See Hua Daily v. Basar Jee	/	/	/
Case 5: Azmi & Company v. Firdaus Musa	/	/	/
Case 6: Mother's Nursing Home v. Pakiam Veerappan	/	/	Ex parte
Case 7: The Shaper Image v. Wong Kt Peng	/	/	/
Case 8: Tsuritani (Malaysia) Sdn. Bhd. Melaka v. Sha'ari Sahat & Ors	/	/	/
Case 9: Kok Hoon Sdn. Bhd. v. Raja Kumaran Suppiah	/	/	/
Case 10: Siri Andaman Sdn. Bhd. v. Rahmah Bidin	/	/	/
Case 11: Nam Heng Industries Sdn. Bhd. v. Nishtar Shahul Hamed	/	/	/
Case 12: Assunta Hospital, Petaling Jaya v. Rozzana Mohamed Sazali	/	/	/
Case 13: Technobond Group Sdn. Bhd. v. Chong Kien Kee	/	/	Company's director did not cross examine claimant
Case 14: NT Computers Sdn. Bhd. v. Ng Ah Siew	/	/	/
Case 15: Penas Realty Sdn. Bhd. v. Chee Yew Kong	/	/	/
Case 16: Alpha Sigma Sdn. Bhd. v. Renujeet Kaur	/	/	/
Case 17: Andalas Medical Centre v. Anthony Selvaraj M. Asirvathan	/	/	Ex parte
Case 18: G-Two Management Services Sdn. Bhd. v. Chin Siew Ping	/	/	Ex parte (company no longer in business)
Case 19: Hamay Glass Sdn. Bhd. v. Loganathan Vadamalai	/	/	/
Case 20: Indah Water Operation Bhd. v. Vijaragavan Manicam & Anor	/	/	/

### 5.3.3 Move 3 – Pronouncing Judgment

Move 3 ‘Pronouncing Judgment’ is an important part of any legal case as it is in this move that the decision/judgment made by the Chairman/Industrial Court is given. No case will be complete without the judgment being delivered. Sharing similar features to other legal cases, this move is also signaled by the word ‘Held’ in all the twenty cases of the ILR. It is then followed by the argument of the President/ Chairman of the Court on the case and at the end of the argument, the verdict/decision of *[Just Dismissal.]* or *[Unjust Dismissal.]* is given. Also stated at the bottom of the verdict or judgment is the reference to the award and cases referred to in the case, the representation of the two disputing parties and sometimes the legislation referred to. This can be seen in the following example:

*[Unjust dismissal.] --- Verdict(1)*

**Award(s) referred to: ---- Reference to Award (2)**

*Rooftech Sdn. Bhd. v. Holiday Inn Penang 1986] 2 ILR 818*

*I.E. Project Sdn. Bhd. v. Tan Lee Seng [1978] 1 ILR 165*

*Nadarajah & Anor v. Golf Resort (M) Sdn. Bhd. [1999] 1 ILR 704*

**Case(s) referred to: ---- Reference to Cases (3)**

*Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd. [1988] 1 CLJ 45*

*Milan Auto Sdn. Bhd. v. Wong She Yen [1995] 4 CLJ 449*

*Koperasi Serbaguna Sanya Bhd. (Sabah) v. Dr. James Alfred (Sabah) & Anor [2000] 3 CLJ 758*

**Legislation referred to: -----(4)**

*Industrial Relations Act 1967, ss. 20(3), 30(5)*

**Representation of the parties(5)**

*For the claimant – S. Muhendaran; M/s Sri & Company ---*

*For the company – Gan Ching Lim*

In this example, the decision/judgment of the case is 'Unjust Dismissal' (1). In deciding on the case, the Court has referred to three awards and three cases to support the arguments and decisions for the case (2 & 3). The legislation referred to is also shown by indicating the particular section of the Industrial Relations Act 1967 (4) and finally this move ends with the names of the representatives for the disputing parties(5).

Examples of this Move 3 are given below:

**Example 1: See Hua Daily News Sdn. Bhd. V. Basar Jee**

**Held:**

[1] Regarding the first offence, even if it had been proven, the company had dealt with it by issuing a warning letter to the claimant. There was no evidence that the claimant had repeated his offence or failed to take heed of the company's warning thereafter.

[2] The claimant's punch card showed that his clocking-in and out times were remarkably regular. It also indicated that the claimant had given the company not only the daily measure of working hours expected of an employee but beyond the same.

[3] The one occasion he had left before 3 a.m. was with the knowledge of his supervisor and when printing operations had ceased. Furthermore, the said supervisor did not submit any evidence to the contrary.

[3a] On the second charge, the company had not produced the claimant's punch card. The testimonies of its witnesses had been tainted with inconsistencies and contradictions, when matched against the documentary evidence availed at the trial. The company had failed to prove that the claimant had been absent for two days as alleged.

[4] As the company had already engaged another worker to replace the claimant, the company's action clearly tantamount to a dismissal. Accordingly, his punch card would have been removed.

[5] Due consideration was given to the claimant's own contributory misconduct in the admitted absence for one day without leave of the company. Even if he had a good reason for the same, it was nevertheless incumbent upon him to inform the management of his absence but he is failed to do so. Such an absence does not justify a dismissal but some other form of disciplinary action within the range of punishments available to an employer. Thus, a 30% deduction was made from the usual award of backwages.

[6] It was pointed out that s. 105 of the Sarawak Labour Ordinance provides that no worker shall be required to work for more than eight hours a day and that if he does so, he shall be paid overtime for such extra work according to the prescribed statutory rates.

[6a] Employers are reminded that employment legislation which lay down minimum conditions for workers' remuneration ought to be scrupulously followed by employers. Wilful of the obligation pertaining to the payment of overtime wages might well tantamount to repudiatory breach of contract which might justify a plea of constructive dismissal by a workman.

*[Unjust Dismissal]*

**Legislation referred to:**

Sarawak Labour Ordinance, s. 105

*For the claimant – In person*

*For the company – William Kong Sing Yii; M/s William Kong & Company*

**Example 2: Tsuritani (Malaysia) Sdn. Bhd. Melaka v. Sha'ari Sahat & Ors**

**Held:**

[1] For s. 15 of the Employment Act 1955 to apply, there has to be absence for three complete working days. The company had contributed towards the claimants' absence for the first part on 6 May by closing the main gate (although the side gate was open) and not letting the claimants to punch their cards. Thus, the company cannot succeed under s. 15(2) of the Employment Act as

the claimants had not been absent for more than two consecutive working days. They had only been absent for two days.

[2] The conduct of the claimants by being absent for the first two days itself amounted to an illegal strike as defined by s. 2 of the Act. Their absence on the first two days of the episode was a "cessation of work by a body of workmen". On the evidence of one of the workers, Haliza, they acted in combination. It was a decision by all of them as a result of the instigation of a few of them. It was intended to result in cessation in the performance of their duties and it did. This evidence was not challenged by the claimants.

[3] One of the reasons the claimants withdrew their service in combination on the first two days related to the dismissal of the assistant manager. Such a reason fell within such matters which would render the strike illegal. Therefore, it was decided that the claimants had gone on an illegal strike for two days. For those who took part in illegal strikes the appropriate punishment must be dismissal.

[4] The claimants had done almost irreparable harm to the company by going on the illegal strike. The company had been generous to allow them to come back provided they sign a pledge in which they would apologise for the absence without leave and promise not to repeat the offence. They refused to sign the pledge. In the case of one of the claimants, Anita, although she agreed to sign the pledge the company did not take her back because she was instrumental in the strike by instigating the others to do so.

[5] Although the company did not plead that the claimants were dismissed for taking part in an illegal strike, the court acting under s. 30(5) of the Act holds that it is contrary to equity and good conscience and the substantial merits of the case to order the reinstatement of the claimants.

[6] The company could not be said to have condoned the claimants' actions by merely allowing them into the company's compound on the third day for negotiation purposes.

***[Just dismissals.]***

**Award(s) referred to:**

*United Seino Transportation (M) Sdn. Bhd. v. Ahmad Khodziri Hj Mohd Zain & Ors*[1994]12 ILR 1117  
*National Union Of Hotel, Bar & Restaurant Workers v. Palm Beach Hotel Sdn. Bhd. Penang -Award No. 49/1974*  
*Securicor (M) Sdn. Bhd. v. Kesatuan Pekerja pekerja Securicor (M) Sdn. Bhd.* [1985]1 ILR 577

**Case(s) referred to:**

*R. Rama Chandran v. Industrial Court of Malaysia & A nor* [1997] 1 CLJ 147  
*Wong Mook v. Wong Yin & Ors* [1948] 14 MLJ 41  
*National Union Of Hotel, Bar & Restaurant Workers v. Hotel Malaya Sdn. Bhd.* [1987] 2 MLJ 350

**Legislation referred to:**

Employment Act 1955, s. 15(2)  
Industrial Relations Act 1967, s. 2, 13(3)(e), 20(3), 30(5), 44(e), 45

*For the claimants - Ravindran Muthiah; M/s. Ravi Muthiah & Co.*  
*For the company - P. Sekar (S. Ganandran with him); M/s. Sault &Co.*

**Example 3: Sri Andaman Sdn Bhd v. Rahmah Bidin**

**Held:**

[1] In order to justify a workman's dismissal on poor performance, the employer has to establish that the workman was warned about his poor performance; that the workman was accorded sufficient opportunity to improve; and notwithstanding the above the workman failed to sufficiently improve his performance.

[2] The claimant had not been given any written or verbal warnings regarding her poor performance nor was there any convincing evidence, oral or documentary, concerning her late-coming to work.

[3] It is trite law that estoppel does not apply in industrial adjudication. The claimant's claim in the labour court was different and separate to her claim for reinstatement before this court.

***[Unjust dismissal.]***



**Award(s) referred to:**

*Rooftech Sdn. Bhd. v. Holiday Inn Penang 1986] 2 ILR 818*

*I.E. Project Sdn. Bhd. v. Tan Lee Seng [1978] 1 ILR 165*

*Nadarajah & Anor v. Golf Resort (M) Sdn. Bhd. [1999] 1 ILR 704*

**Case(s) referred to:**

*Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd. [1988] 1 CLJ 45*

*Milan Auto Sdn. Bhd. v. Wong She Yen [1995] 4 CLJ 449*

*Koperasi Serbaguna Sanya Bhd. (Sabah) v. Dr. James Alfred (Sabah) & Anor [2000] 3 CLJ 758*

**Legislation referred to:**

Industrial Relations Act 1967, ss. 20(3), 30(5)

*For the claimant – S. Muhendaran; M/s Sri & Company*

*For the company – Gan Ching Lim*

**Example 4: Assunta Hospital, Petaling Jaya v. Rozzana Mohamed Sazali**

**Held:**

[1] In order to justify the dismissal of the workman on this ground the employer has to establish that the workman was warned about his poor performance; that the workman was accorded sufficient opportunity to improve; and that notwithstanding the above the workman failed to sufficiently improve his performance.

[2] As to the form of the warning, it would appear that a written warning by the employer is essential before the workman can be dismissed.

[3] There may have been discussions, comments or dissatisfaction expressed by the claimant's superior, the finance director, but they are not sufficient to specifically and finally warn the claimant to the effect that if she failed to improve within a specified or given period, she will have to go. It is a graduated process to come to this penultimate step, before the final action to dismiss an employee can take place. This is missing in all the evidence of the company in the instant case.

[4] The period involved in the entire process from the time the worker is alerted on the unsatisfactory work performance, the respects to which the defects are shown or pointed out, until the time or the period given for the worker to improve, must be realistic.

[5] In the present case, the time span given to the claimant to achieve the objectives was unrealistic and not consonant with the *Ireka* or *Rooftech* principles.

[6] The evidence is glaringly absent about any warnings or counseling for the previous four months when the claimant discharged her responsibilities as the finance manager - no evidence of her shortcomings then, but suddenly the criticisms of poor work performance emerges for that short duration after assumption of her new duties. Her claim that she had done very well during her stint as the finance manager remained uncontroverted.

[7] There was insufficient evidence to prove that the claimant was solely responsible for the missing patients' slips.

[8] The non-billing of the prescription slips of corporate clients, were all carried forward from past years and this clearly showed the company's own past neglect, or problems that were too massive and not cleared during those years. The claimant was merely trying her best to clear the backlog which resulted from the company's own neglect.

[9] Regarding the fixed asset management report, the company's assets were of such magnitude, that it was beyond the claimant alone to try and identify and put in place a comprehensive report, without the top management themselves involved in the input. The initial draft did not denote her inefficiency or incompetence, but was seen as a positive effort for trying her level best to engage in this massive exercise. The company had unjustly pursued to discredit the claimant.

[10] The claimant could not be held solely responsible for the complaints from its corporate clients in relation to credit facilities.

[11] The former human resource manager provided evidence that the finance director had promised the claimant confirmation in persuading her to accept the re-designation based on several positive factors. He also informed the court that the medical superintendent had instructed him to terminate the claimant's services.

[12] The claimant was indeed confirmed but dismissed due to bad faith and victimisation on some ulterior motives of the company. Unfortunately, or fortunately for Assunta, there was no allegation or evidence of discrimination based on racial or gender bias or prejudice against the claimant, because if that was proven, Assunta will have been in deep trouble.

*[Unjust dismissal.]*

**Award(s) referred to:**

*Stamford Executive Centre v. Puan Dharsini Ganesan [1986] 1 ILR 101*

*Rooftech Sdn. Bhd. v. Holiday Inn, Penang [1986] 2 ILR 818*

*I.E. Project Sdn. Bhd. v. Tan Lee Seng [1987] 1 ILR 165*

*Ireka Construction Berhad v. Chantiravathan Subramaniam James [1995] 2 ILR 11*

*For the claimant - Gengadharan; M/s Genga Maha Wong & Co*

*For the company - Lewis; M/s Lee Hishamuddin*

**Example 5: Penas Realty Sdn. Bhd v. Chee Yew Kong**

**Held:**

[1] Evidence showed that the claimant had a steady and strong character. It was improbable that he could have been forced to sign his resignation letter.

[2] Regarding the pay reduction, the company had proved that they were in fact financially distressed and that the option of reducing staff wages instead of its staff was a way of reducing its overhead costs. The claimant was the only staff in his department to refuse the said reduction. There was no evidence of *mala fide* on the company's part.

***[Just Dismissal.]***

**Award(s) referred to:**

*VP Nathan & Partners v. Subramaniam [2000] 2 ILR 350*

*Food Specialities (M) Sdn Bhd v. M Halim Bin Manap [1992] 2 ILR 311*

**Case(s) referred to:**

*Weltex Knitwear Industries Sdn Bhd v. Law Kar Toy & Ors [1998] 7 MLJ 359*

*TaTa Robinson Fraser Co Ltd v. Labour Court [1989] 11 LLJ 443*

*Harris Solid State (M) Sdn Bhd v. Bruno Gentil Perera & Ors [1996] 4 CLJ 747*

*For the claimant – Ajit Singh Jessy, M/s Jessy & Assocs*

*For the company – William Joseph, Malaysian Employers Federation*

Again, in this move, the argument is written in point form. From the above examples, we can see that the decision against the dismissal charge/allegation(s) is given at the end of the argument summarized as ***[Just Dismissal.]*** or ***[Unjust Dismissal.]***. This verdict lays out the decision of the Chairman (Judge)/Court based on the argument he put forward. The argument which is summarized in point form is derived from the dismissal charge/allegation(s) against the claimant. For example, in 1 above, which refers to Case no.4, the claimant was dismissed on two charges: insubordination and absenteeism. The chairman/president begins his argument by taking up the first charge which is; insubordination. He argues in points no. 1-3 that this offence had been dealt with by the company by issuing a warning letter and that the claimant would not be repeating the offence again. The fact that the claimant's working hours were regular and his leaving early on one occasion was with the knowledge of his supervisor further substantiated his claim of unjust dismissal. The Chairman's argument for the claimant's second charge which is absenteeism was that there was no proof,

inconsistencies and contradictions in the witnesses' testimonies and the company engagement of another worker to replace the claimant. All this indicated the company's intention of dismissing the worker. The Chairman was also fair in considering that the claimant was at fault when he was absent for a day without informing the company. However, the Chairman argued that the worker's action did not warrant a dismissal but some other forms of disciplinary action, thus the 30% reduction on the award of backwages is justified. After dealing with the two charges, the chairman highlighted s. 105 of the Sarawak Law Ordinance Law in which a worker who had worked for more than eight hours shall be paid overtime wages and non-compliance with such law could result in breaching the contract and might as well justify a workman's plea of constructive dismissal.

The argument concludes with the verdict of "Unjust Dismissal".

In example 2, decisions 1 and 2, the Court refers to the rule of the law which can be found in s. 15 of the Employment Act 1955 and s. 15(2) of the Act in arguing for the first charge that is absenteeism for three complete working days. The workers cannot be charged for absenteeism because the company contributed to this by not allowing the workers into the premises. Thus, the workers had only been absent for two complete working days and cannot be charged for absenteeism as claimed by the company. Even though the workers went on strike on the third day, this conduct was viewed as "cessation of work by a body of workmen" as it was a result of instigation from other workers and cannot be construed as an illegal strike. However, in decision [4], it is brought to the Court's attention that one of the reasons the workers did not work was because they had reacted to a related dismissal of the assistant manager. This act is

interpreted as an illegal strike and therefore those who took part can be dismissed. In arguing further for the case, the Court is of the view that the act of the workers had done more harm to the company and the work industry and the workers had not been grateful towards the company generosity by refusing to sign the pledge promising not to repeat the offence and apologizing for being absent. Even though the company had only pleaded for the dismissal of the workers based on absenteeism and taking part in the strike, the Court has taken upon itself to act under s. 30(s) of the Act that the workers cannot be reinstated as it is contrary to 'equity and good conscience and the substantial merits of the case'. The Court ends its argument by concluding that the company action of allowing the workers into the premises was not a sign of condoning the strike. Thus, a judgment of 'Just Dismissal' is accorded to the case.

In example 3, before delivering his judgment, the Chairman begins this move by referring to the charge of the dismissal. The employer's failure in establishing that the workman was given sufficient opportunity to improve and no written or verbal warnings were given to the employee regarding her poor performance and late-coming were not enough to justify a dismissal. On the issue of estoppel as raised by the company, the Chairman argued that the claimant's claim in the labour court is different and separate from her claim in this court. Thus, the verdict of "Unjust Dismissal".

Example 4 contains a lengthy portion on the decision of poor performance. This is because the claimant is a probationer and there was an element of bad faith and victimization by the company. The company's main allegation towards the claimant was inefficiency, poor work performance and incompetence. It is usually very hard to prove cases of poor performance because there are many conditions to substantiate.

For the company to claim that a worker has given poor performance, it has first to justify two conditions: Firstly, that the workman was warned about his poor performance and secondly, that the workman was accorded sufficient opportunity to improve. In decisions 1- 4, the Court discusses these conditions which has to be fulfilled by the company. These conditions are emphasized because a workman can only be dismissed after the Chairman/Court finds the evidence convincing enough. However, this is lacking on the part of the Company in this case as mentioned by the Court in decisions 5-6. In fact, the time given for the claimant to improve was not in line with the principles set in the *Ireka* or *Rooftech* cases (conditions for dismissals on poor performance). Even all the evidence concerning poor work performance was not proven by the company and the Court deems it ethically wrong to hold the claimant responsible for the company's flaws as mentioned in decisions 7-10. The Court decides in favour of the claimant without convincing evident from the company. In fact, the claimant's witness substantiate the claimant's claim that she was not incompetence and her dismissal was unjust.

Example 5 further confirms the same rhetorical structure for this move. Again, the Chairman begins this move by referring to the charge of the dismissal, that is in this case, forced resignation. Based on the claimant's character, the Chairman found that it was highly improbable that he was forced to sign the resignation letter. The fact that the company had proven it was in financial distress and its option of reducing staff wages instead of its staff indicated there was no bad intention on the part of the company. The claimant was the only staff who refused to accept the pay cut. The Chairman concludes his argument by delivering the verdict of "Just Dismissal".

All the five examples above show that pronouncing of judgment was arrived at only after providing the argument against each charge/allegation for the dismissal. The fact that the argument and judgment are given in abbreviated form indicates the need to be fast, efficient and accurate in disseminating the information to the readers. In this move, the argument in supporting the Court's decisions are not considered as sub-moves or steps as they are given as a summarized version of the decisions. From the examples given, it is clear that ILR cases' must be easily understood by the readers and especially people in industrial relations so that time can be managed wisely. The format of simplicity and brevity helps to speed up the decision making of either the management, the union or the worker on whether to pursue the case or to settle it amicably among themselves. This can further alleviate unnecessary tension and ill-feelings among the employer and employees.

All five examples are also similar in their rhetorical moves. Table 15 below shows the occurrence of this move as found in all the twenty cases:



**Table 15: Occurrence of Move 3 Pronouncing Judgment**

<b>Cases</b>	<b>Move 3</b>	<b>Decision</b>	<b>Award</b>
Case 1: Forest Vision v. Mutalip Bohari	/	Unjust Dismissal	Compensation of backwages
Case 2: Shin Yang v. Uning Gunter	/	Unjust Dismissal	Compensation of backwages
Case 3: Cicso (M) v. Wan Azizan	/	Just dismissal	
Case 4: See Hua Daily v. Basar Jee	/	Unjust Dismissal	Compensation of backwages
Case 5: Azmi & Company v. Firdaus Musa	/	Just dismissal	
Case 6: Mother's Nursing Home v. Pakiam Veerappan	/	Unjust Dismissal	Compensation of backwages
Case 7: The Shaper Image v. Wong Kt Peng	/	Unjust Dismissal	Compensation of backwages
Case 8: Tsuritani (Malaysia) Sdn. Bhd. Melaka v. Sha'ari Sahat & Ors	/	Just dismissal	
Case 9: Kok Hoon Sdn. Bhd. v. Raja Kumaran Suppiah	/	Unjust Dismissal	Compensation of backwages
Case 10: Siri Andaman Sdn. Bhd. v. Rahmah Bidin	/	Unjust Dismissal	Compensation of backwages
Case 11: Nam Heng Industries Sdn. Bhd. v. Nishtar Shahul Hamed	/	Unjust Dismissal	Compensation of backwages
Case 12: Assunta Hospital, Petaling Jaya v. Rozzana Mohamed Sazali	/	Unjust Dismissal	Reinstatement & Compensation of backwages
Case 13: Technobond Group Sdn. Bhd. v. Chong Kien Kee	/	Unjust Dismissal	Compensation of backwages
Case 14: NT Computers Sdn. Bhd. v. Ng Ah Siew	/	Just dismissal	
Case 15: Penas Realty Sdn. Bhd. v. Chee Yew Kong	/	Just dismissal	
Case 16: Alpha Sigma Sdn. Bhd. v. Renujeet Kaur	/	Just dismissal	
Case 17: Andalas Medical Centre v. Anthony Selvaraj M. Asirvathan	/	Unjust Dismissal	Compensation of backwages
Case 18: G-Two Management Services Sdn. Bhd. v. Chin Siew Ping	/	Unjust Dismissal	Compensation of backwages
Case 19: Hamay Glass Sdn. Bhd. v. Loganathan Vadamalai	/	Just dismissal	
Case 20: Indah Water Operation Bhd. v. Vijaragavan Manicam & Anor	/	Unjust Dismissal	Compensation of backwages

Table 15 shows that all twenty cases have this move, with seven cases of justified dismissal and thirteen cases of unjust dismissal. As this move is found in all twenty cases, this makes it an obligatory move in the structure of the ILR. The positioning of this move which comes before *'Move 4 – Giving of Award'* further indicates and supports the purpose of the ILR cases' as a source of reference.

### **5.3.4 Move 4 – Giving of Award**

This is the final move in all the dismissal cases. Referred to as the **Award**, it is the most important part of the dismissal case. The specialist informant finds this particular move informative as well as the most complex. The details of the case, the dismissal charges, the evidence, the findings and the decisions are contained in the 'Award'. This move consists of additional moves and the recycling of some earlier moves. The following are the moves that are found in this section of the case:

#### Move 4 Giving of Award

Step 1 Introducing the claimant and his employment history/ Introducing the case

Step 2 Stating the issue of the dispute/Allegation(s) of dismissal

Step 2a Claimant's version/Company's version

Step 2b Company's version/Claimant's version

Step 3 Providing the evidence to support or dispute the allegation

Step 3a Reference to previous cases and laws to support the chairman's argument

Step 3b Deriving ratio-decidenti

Step 4 Pronouncing judgment/Giving of award

Depending upon the nature of the case, this move can either be very brief or very lengthy. In cases of ex parte hearing where one of the disputing parties does not turn up, the hearing of the case is usually brief as there is no one to refute or rebut the claims. The same applies in cases of amicable settlement. Usually the hearing and reports of these cases are very brief and straight-forward in nature.

Unlike legal cases, Move 4 does not begin with the name of the judge delivering the judgment. It usually starts with an introduction to the disputing parties, facts of the case, arguing the case and finally the award/judgment. This move is the most important move in reading and understanding the case. In this move, the allegations and claims presented by both the employer and employee are dealt with. Evidence, testimonies as well as witnesses are called in to support the case. After hearing from both sides of the parties, the Court will make a decision and hand down the award. If the case is an unjustified dismissal, the employee will be awarded compensation. This compensation is normally in terms of backwages up to a maximum of 24 months or reinstatement of the employee with backwages. If on the other hand, the dismissal is a justified one, the Court will uphold the decision of the dismissal and the employee will not gain anything.

#### **5.3.4.1 The Format of the Award**

There are several different formats in the award move. It is interesting to note that some formats of the ILR are reader friendly in the way they are written. Some of the awards are divided into several sections like 'The Introduction, The Issues, The Evidence and The Findings' making it easy for the readers to quickly identify and relate

to the case. And there are some cases which just have the whole award written in one text with no divisions at all and there are some with only ‘The Introduction’ and “The Conclusion/Findings’. Examples of the format of the award in this study are listed below:

**Table 16: Formats of Award**

FORMAT 1

Introduction
Conclusion and Award

Six cases are written in this way with just the whole section of the award in one long paragraph or they are divided into two sections where the last section is the conclusion and the award given.

Another common format is where the Award is divided into four or five divisions. This format is easier to read compared to the one above:

FORMAT 2

1. INTRODUCTION
2. EVIDENCE
3. CLAIMANT
4. THE LAW
5. DECISION

### FORMAT 3

1. INTRODUCTION
2. THE LAW
3. THE ISSUES
4. THE EVIDENCE
5. THE SUBMISSIONS
6. EVALUATION AND FINDINGS
7. THE REMEDY

Out of twenty cases, eight cases belong to format 1, six cases to format 2 and six to format 3. Even though the format of the awards differ in these ways, we can basically sum them up into four main sections of the award. The first section is the Introduction, the second section provides the Summary of the case, the third section contains the Argument of the case and the fourth section is the Decision or Judgment. These four sections can further be broken up into smaller sections for clear demarcation such as the issues, the law, the claimant, the evidence, the submissions, the findings and so on. The ILR is made clearer and easier to follow with the various sub-headings that are found. For a non-legal person, the ability to distinguish legal material from that which is legally immaterial is important. Thus, breaking up the award into smaller sections helps them understand the case, the arguments and the decisions better. These facts will help them see how the whole case was interpreted, judged and decided.

#### **5.3.4.2 The Award Move**

As mentioned earlier, the award is the most important section of the ILR. The ability to read through the award and understand every move and decision of the court will enable the readers as well as the person involved in industrial relations to understand the case. This will help them in their dealings with similar cases if they are in the field

of legal or industrial relations. This will also help the layperson understand how cases are interpreted and decisions on awards or nonawards made.

#### **5.3.4.3 Move 4 - Step 1 Introducing the claimant and his employment history / Introducing the Case**

This move usually starts with either a brief introduction to the disputing parties or a history of the claimant's employment or both. Examples of the introduction are as follows:

##### **Example 1**

The claimant was employed as a newspaper printer by the company on 24 June 1998.

##### **Example 2**

The honourable minister of human resources had referred to this court under illegal strike s. 20(3) of the Industrial Relations Act 1967 ("the Act") the alleged dismissals of a number of employees by a Japanese company in Melaka called Tsuritani (Malaysia) Sdn. Bhd. ("the company").

##### **Example 3**

The dispute is over the dismissal of Rahmah Bidin (hereinafter referred to as "the Claimant") by Sri Andaman Sdn Bhd (hereinafter referred to as "the Company".)

The claimant was employed by the company *vide* letter of appointment (exh. C1) as a junior secretary with effect from 16 May 1977 and was confirmed in her appointment on 16 August 1977 (exh. C2).

#### **Example 4**

The claimant commenced employment with the company as a probationary finance manager. She alleged that her superior persuaded her to become a credit control manager due to her satisfactory work performance, that she would no longer be on probation and would be confirmed in the latter post in a redesignation exercise.

#### **Example 5**

The dispute in this matter is between Penas Realty Sdn. Bhd. ('the company') and Chee Yew Kong ('the claimant').

Except for case 2 in the above example (Tsuritani (Malaysia) Sdn. Bhd. Melaka v. Sha'ari Sahat & Ors), sixteen out of twenty cases begin with this introduction in the award move. The other four cases begin with a history of the case: one was referred to by the minister since the case involved a strike (Case 2), two cases were an ex-parte hearing (Mother's Nursing Home v. Pakiam Veerappan and G-Two Management Services Sdn Bhd v. Chin Siew Ping) since the cases had been postponed several times and one case (Andalas Medical Centre v. Anthony Selvaraj M Asirvathan) had to proceed without the company's main witness. These four cases begin with the history of the case with the dates and events that led to the final hearing so that readers are able to understand the case better before the facts of the case are given in the following section of the award. This introduction of the history of the case is common in ex parte hearings. The following table summarizes Move 4 Step 1 as found in the data:

**Table 17: Occurrence of Move 4 Step 1**

Cases	Move 4 Step 1	Introduction to the disputing parties	History of Claimant's Employment/History of the case	Referred by the Minister
Case 1	/		/	
Case 2	/		/	
Case 3	/		/	
Case 4	/		/	
Case 5	/		/	/
Case 6	/			/
Case 7	/	/	/	
Case 8	/	/	/	/
Case 9	/		/	
Case 10	/		/	
Case 11	/		/	
Case 12	/		/	
Case 13	/		/	
Case 14	/	/	/	
Case 15	/	/	/	
Case 16	/	/		
Case 17	/		/	
Case 18	/		/	
Case 19	/		/	
Case 20	/		/	

**5.3.4.4 Move 4 - Step 2 Stating the Issues of the Dispute/ Allegation of Dismissal**

Since dismissal cases that are brought to the court are cases that cannot be settled through negotiation, the reasons as to how the dispute arises are mentioned in all the reports. This constitutes Step 2 of Move 4 stating the Issues of the dispute/Allegations of Dismissal where a history of how the dispute started will be revealed to the readers of the award. Both the employer and the employee will give their version of the case which is found in Step2a Claimant's Version/Company's version and this marks the end of the introduction section of the report. Examples of the issues of the dispute/allegations are as follows:



### **Example 1**

The claimant was employed as a newspaper printer by the company on 24 June 1998. His working hours as stated in the company's rules (COB9) starts from 6.00 p.m. Nothing however is mentioned about how long these hours are or when his working hours end. On 7 September 1998 the claimant turned up for work and was told that his services were no longer needed as the company had found a replacement worker. The claimant alleges that he had been dismissed and that such dismissal was without just cause or excuse.

The company contends the termination of the claimant's employment was lawful and with just cause or excuse as the claimant was guilty of misconduct inconsistent with the terms and conditions of his employment agreement and the rules of the company. Firstly, the company alleges that the claimant was guilty of willful disobedience of the lawful decisions or orders given by the company in returning early after he has finished work on his printing press but before work on both the company's printing presses were completed. Secondly, the company alleges that the claimant was absent for two consecutive days, i.e. on 5 September 1998 and 6 September 1998

### **Example 2**

In their original statements of claims they either alleged dismissals without just cause or unjust or wrongful termination amounting to constructive dismissal and prayed for reinstatement. By their amended statements of case they dropped the allegation of constructive dismissal and only alleged simple dismissal. They also alleged in the alternative that if they had committed acts of misconduct such misconduct had been condoned by the company.

The company in its amended statement in reply denied terminating the employment of the claimants and pleaded that it was the claimants' themselves who had terminated their employment under s. 15(2) of the Employment Act 1955. The company also denied the allegation of condonation. The company also pleaded that the claimants after being absent for two consecutive days "participated with others in an illegal strike on the third day". However the company had not pleaded that they were dismissed for taking part in an illegal strike. They relied mainly on s. 15(2) of the Employment Act 1955.

### **Example 3**

On 11 September 1998 the claimant received a letter terminating her employment with effect from 10 October 1998 (exh. C3)

The claimant's last drawn salary was RM 1,300 per month.

The claimant contends that she has been dismissed without just cause and excuse and filed a representation to the director general of industrial relations.

Pursuant to s. 20(3) of the Industrial Relations Act 1967, the minister then referred this matter to the Industrial Court for an award.

### **Example 4**

The dispute arising out of this particular reference is the dismissal of the claimant on 9 December 1996 as the company's credit control manager, which she claims was effected without just cause and excuse. In addition, the claimant claims that the decision to dismiss her was *mala fide* which tantamounts to an act of victimisation by the hospital against her, infringing the rules of natural justice.

The company's pleadings and evidence is that the claimant continued to be a probationer despite being redesignated to the position of credit control manager. So she was at all material times a probationer until her termination.

The company avers that prior to her appointment, the claimant had been briefed her duties and responsibilities and also the employer's expectations of her. After her appointment, she was briefed, counseled and warned with regard to her performance. Despite the briefings, counseling and warnings given to the claimant, she had failed and/or was unable to perform and discharge her duties and obligations to the satisfaction of the management as expected of her. The hospital specifically pleaded in their pleadings that the claimant was given sufficient or adequate opportunities to prove herself to the satisfaction of the employer, and to improve during her probationary period, but had failed to do so. She was therefore not confirmed and asked to leave in those circumstances, exercising their right under the Assunta Hospital Employment Rules, cls. 3(15) & (24) in respect of inefficiency, and failure to

meet established standard of performance or standard of output required by the employer.

### **Example 5**

This dispute arises when the claimant claimed that his resignation letter was signed under threat or duress. The claimant further contended that he was in fact dismissed because he refused to sign a consent letter for a salary reduction of 25%. The company however claimed that the claimant had voluntarily signed the option letter to retire and was paid an *ex gratia* payment of RM 17,600.

The five examples above show how the dispute had started as seen by both disputing parties. In example 1, the claimant claimed he was dismissed without just cause or excuse whereas the company contended that his dismissal was lawful as he was guilty of a misconduct and breaching the company's rules and regulations. Example 2 shows the claimants alleged dismissal by the company that had in a way condoned the misconduct. The company on the other hand, contended that they did not dismiss the workers. The workers had dismissed themselves by being absent for two consecutive days and by taking part in an illegal strike on the third working day.

In example 3 it is noted that we only get to know the history of the case from the claimant. She contended that her dismissal was unlawful and reported the matter to the director general of industrial relations. There was no contention from the company at all. The claimant received a letter terminating her employment with effect from 10 October 1998. Thus, she filed a claim against her dismissal by the company.

In Example 4, the main issue of allegation was that the company viewed the claimant as incompetent, inefficient and had performed poorly. The claimant claimed her dismissal was due to bad faith and victimization. The company however, stated that the claimant had been provided sufficient opportunity to improve but she still failed to do so.

If in example 3, we see the claimant getting her termination letter, in example 5 the dispute is concerned with the signing of a resignation letter. Example 5 shows the dispute was a result of forced resignation whereas according to the company the employee had willingly signed his retirement letter.

Issues of the dispute established in move 2 in summarized points are reestablished again in Step 2 of Move 4 but with further details and information. Move 4 Step 2b Company's Version is optional because not all the cases have this move as illustrated in the table below:

**Table 18: Occurrence of Move 4 Step 2**

<b>Cases</b>	<b>Move 4 Step 2</b>	<b>Claimant's Version Step 2a</b>	<b>Company's Version Step 2b</b>
Case 1	/	/	/
Case 2	/	/	/
Case 3	/	/	
Case 4	/	/	/
Case 5	/	/	/
Case 6	/	/	
Case 7	/	/	/
Case 8	/	/	/
Case 9	/	/	
Case 10	/	/	
Case 11	/	/	
Case 12	/	/	/
Case 13	/	/	
Case 14	/	/	/
Case 15	/	/	/
Case 16	/	/	/
Case 17	/	/	
Case 18	/	/	/
Case 19	/		/
Case 20	/	/	

In summary, Move 4 Step 2 is an obligatory move as it is found in all twenty cases. Stating the issues of the disputes or allegations of the dismissal is central to understanding why the dispute arose in the first place.

#### **5.3.4.5 Move 4 - Step 3 Providing the Evidence to Support or Dispute the Allegation**

In Move 4 Step 3, the Court/Chairman/President presents his argument after hearing from both sides of the disputing parties. In arguing the case, the Chairman usually follows some strategies before deciding on the case. The strategies consist of references to previous cases, awards and laws to support the Chairman's argument. In example 1, the Chairman's/President's argument is presented by referring to the two

acts of misconduct, insubordination and absenteeism by the claimant. The Chairman/ President agrees that the proof of a just dismissal is upon the company to prove it and this had been done by the company in a written warning to the claimant,

In respect of the first alleged act of misconduct, the court holds of that the same, even if proven had been dealt with by the company with a written argument.

(ILR, Vol.2 , 2000, p. 430)

The Chairman went on to argue that the claimant had taken heed of the warning since no offence had been committed ever since. However, to further support his argument upon which his decision is made, the Chairman applies Section 105 of the Sarawak Labour ordinance that states,

no worker shall be required to work for more than eight hours a day and that if he does so he shall be paid overtime for such extra work according to the prescribed statutory rates

(ILR, Vol.2, 2000, p. 430)

This is move 4 Step 3a where a reference to a law is being made to support the Court argument. Looking at the claimant's attendance, the chairman found that the claimant had not only given his fair share of the eight hours of work but on several occasions had worked from half an hour to an hour and a half more for the company. Further elaborating on his arguments, the chairman states that it is the court's duty to highlight this employment legislation which should be scrupulously followed by the employer. Turning the table against the employer, the chairman argues that in this particular case

the payment of overtime wages might well justify a plea of constructive dismissal by the claimant to the company. This marks the end of his first argument.

Moving on to the second act of misconduct, which in this case is absenteeism, the Chairman/Court thought it is ridiculous that the claimant's punch card had been conveniently lost. The fact that the company had reengaged another worker on 7 September clearly indicates its intention of dismissing the claimant. However to be fair to the company, the Chairman/Court had allowed oral evidence to support the case. The oral evidence further contradicts the documentary evidence produced by the company thus resulting in the Court finding that the company had failed to prove that the claimant had been absent for two days as alleged by the company and three days as alleged by company witness 1. This marks the end of the chairman's second argument.

To deliver the verdict, the chairman wraps up his judgment based on both arguments he had given,

The company has failed to establish the misconduct alleged against the claimant which it had advanced as the just cause or excuse for dismissing the latter. Accordingly the court holds that the claimant's dismissal was without just cause and excuse.

(ILR, Vol.2, 2000, p. 432)

The Chairman/Court concludes that the company had failed to establish the misconduct of the claimant. The chairman therefore awards the claimant with monetary compensation but not without taking into consideration the claimant misconduct of being absent for a day without the company's approval which results into a 30%

reduction of the usual award of backwages. The chairman, once again, supports his argument by giving the reason that,

Such absence does not warrant a dismissal but some form of disciplinary action within the range of punishments available to an employer.

(ILR, Vol.2, 2000, p. 432)

Completing his argument, the Chairman/Court orders the company to pay the claimant within 30 days from the date of the award. This marks the end of the award section.

Example 2 is a unique example as in this case, the Court has acted beyond what was pleaded for in the dispute. The issue before the court is whether the claimants had been absent for two consecutive days based on s. 15 (2) of the Employment Act and whether the action taken by the workers in the strike falls within s. 2 of Industrial Relations Act 1967.

Regarding the first allegation, the Court, after hearing from both parties, finds that the workers did hold a demonstration and the claim that the main gate was closed and the punch cards were not at their usual place were also true. However, as the workers were allowed into the premises on the third day, the company cannot contend that the workers were absent for three consecutive days; in fact, they were absent for only two and a half days. The court also finds that the company played a role towards the claimants' absence by closing the main gate and not allowing the workers to have their punch cards. Based on this evidence, the Court finds that the company cannot hold the



claimants against s.15 (2) of the Employment Act as the claimants had not been absent for more than two consecutive working days.

For the second allegation, the company had pleaded that the claimants' absence was aggravated by them taking part in an illegal strike. This piece of evidence was scrutinized closely by the Court which then decided the action of the claimants for the first two days amounted to an illegal strike. To further support the Court's argument, a definition of strike is given as mentioned in s. 2 of the Industrial Relations Act 1967 as:

the cessation of work by a body of workman acting in combination or a concerted refusal or a refusal under common understanding of a number of workmen to continue to work or to accept employment, and includes any act or omission by a body of workmen acting in combination or under a common understanding, which is intended to or does result in any limitation, restriction, reduction or cessation of or dilatoriness in the performance or execution of the whole or any part of the duties connected with their employment.

(ILR, Vol.1, 2001, p.116)

The Court finds that the action taken by the workers on 4 and 5 May was a "cessation of work by a body of workmen" and it was a planned action as stated by the evidence of one of the claimants. Holding onto this evidence, the Court takes on the second charge which is whether the strike was illegal. Quoting s. 44(e) of the Act, which forbids the workmen to go on strike related to any matters covered under s. 13 (3) which amongst others is 'the dismissal and reinstatement of a workman by an employer'.

To support its argument that the claimants were wrong, the Court drew the attention to

‘s. 45 of the Act that a strike shall be deemed to be illegal if:

- (a) it is declared or commenced or continued in contravention of section 43 or section 44 or of any provision of any other written law; or
- (b) it has any other object than the furtherance of a trade dispute -
  - (i) between the workmen on strike and their employer; or
  - (ii) between the employer who declared the lock-out and his workmen.’

(ILR, Vol.1, 2001, p.117)

The fact that the strike was staged because of the dismissal of the assistant manager; deemed the strike illegal as seen by the Court. The Court therefore finds that the claimants had gone on an illegal strike for two days. This reference to the Act justify the Court’s decision to render the strike staged by the workers as illegal. Again, we can see that reference to a law was made in this Move 4 Step3a.

Case 2 should end here based on the charges as alleged by the claimants. However, as can be seen in this case, the Court’s findings revealed that the company’s contention against the claimants was dissimilar to the Court’s views. The strike held by the claimants was viewed as too serious by the Court that to ignore it was “contrary to equity and good conscience and the substantial merits of the case.” The Court then takes another stand to argue for its coming decision which was not pleaded by both the claimants and the company. Citing a decision in an earlier case between the *Federal Court in R. Rama Chandran v. Industrial Court of Malaysia & Anor* [ 1997] 1 CLJ 147 at p. ] 62 which *inter alia* held:

It is trite law that a party is bound by its pleadings. The Industrial Court must scrutinize the pleadings and identify the issues and finally pronounce its judgement having strict regards to the issues. The Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism because if it does so it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion.

(ILR,Vol.1, 2001, p. 117)

The Court has acted upon the pleadings as submitted by both disputing parties but at the same time the court is bound by s. 30(5) of the Act which provides:

the Court shall act according to equity, good conscience and the merits of the case without regard to technicalities and legal form.

(ILR,Vol.1, 2001, p.117)

Even though the Court had acted accordingly to the pleadings, the Court cannot ignore the fact that the claimants had gone on an illegal strike and referred to several cases to support its decision to mete out the punishment of dismissal for taking part in the illegal strike,

There are enough authorities to support the proposition that for those who took part in illegal strikes the appropriate punishment must be dismissal. In *United Seino Transportation (M) Sdn. Bhd. v. Ahmad Khodziri Hj Mohd Zain & Ors* [1994] 2 ILR 1117 the learned chairman upheld the claimants' dismissals for going on an illegal strike. She also considered other cases involving illegal strike. They are *National Union Of Hotel, Bar & Restaurant Workers v. Palm Beach Hotel Sdn. Bhd. Penang* - Award No. 49/1974, *Securicor (M) Sdn. Bhd. v. Kesatuan Pekerja pekerja Securicor (M) Sdn. Bhd.* - Award No. 156 of 1985. *Wong Mook v. Wong Yin & Ors* [1948] 14 IVILJ 41 is a High Court decision holding the same view. *National Union Of Hotel, Bar & Restaurant Workers v. Hotel Malaya Sdn. Bhd.* [1987] 2 MLJ 350 is also a decision of the High Court on this issue.

(ILR,Vol.1, 2001, p. 118)

Applying the rule of ratio-decidenti, the Court holds that in accordance with s. 30(5) of the Act, the company's decision is not contrary to equity and good conscience and the substantial merits of the case and that the dismissals were with just cause. This marks the end of the Court's decision where Step 3b is applied in deriving the decision for the case.

Example 3 differs from the above. Unlike the case in example 1, this case applies a number of laws to its arguments. It begins by stating the function of the Industrial Court in dealing with dismissal cases. Applying s. 20 of the Industrial Relations Act, 1967, the chairman begins his arguments by referring to two cases,

*In Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1998]

1 CLJ 45 p.49, the then Supreme Court held as follows:

When the Industrial Court is dealing with a reference under s.20 the first thing that the Court will have to do is to ask itself a question of whether there was a dismissal, and if so, whether it was with or without just cause or excuse.

(ILR, Vol.1, 2001, p. 260)

The chairman, further quotes another case to support his point,

*In the more recent case of Milan Auto Sdn. Bhd. v. Wong She Yen*

[1995] 4 CLJ 449 at pp. 454-455 Mohd Azmi succinctly stated:

.....As pointed out by this Court recently in *Wong Yuen Hock v. Hong Leong Assurance* [1995] 2 MLJ 753, the function of the Industrial Court in dismissal cases on a reference under s. 20 is twofold, first to determine whether the misconduct complained by the employer has been established and secondly whether the proven misconduct constitutes just cause or excuse for the dismissal.

(ILR, Vol.1, 2001, p. 262)

It is the duty of the Court to find out whether in any of the dismissal cases there was a dismissal in the first place and if there was a dismissal, was it carried out with just cause and excuse. In example 3, the issue here is of unsatisfactory work performance and late-coming. To dismiss a worker based on unsatisfactory work performance, the employer must warn the employee of his/her work performance and accorded him/her with sufficient opportunity to improve before dismissing him/her. Quoting the case of *Rooftech Sdn. Bhd v. Holiday Inn Penang* [1986] 2 ILR 818, the Chairman points out:

Inefficiency which discloses a course of negative conduct no doubt is a sufficient ground for termination but there must necessarily be sufficient proof that a procedure has been followed. Ordinarily there must be sufficient written communication to the claimant in order to establish inefficiency or poor performance before the company can rely on it to justify dismissal. The company has failed to do so.

(ILR, Vol.1, 2001, p. 264)

To support his point further, the chairman quotes another case in *I.E. Project Sdn. Bhd v. Tan Lee Seng* [1987] 1 ILR 165,

Dismissal for unsatisfactory work or incompetency should almost invariably have been protected by warnings. In the event of poor performance being the reason for the dismissal one should endeavour to show that the work complained of was performed subsequent to warnings.

(ILR, Vol.1, 2001, p. 264)

The two cases above illustrate that written warnings and sufficient opportunity must be given to the employee first before the employer can dismiss his/her workers. Using these two cases as a basis for his argument, the Court finds that the company had not given any written warnings to the employee for the first allegation of unsatisfactory work performance. On the second allegation of late-coming, the Court also finds that the company has failed to produce any documentary evidence. Stressing the fact that it is “a principle of industrial jurisprudence that in a dismissal case the employer must produce cogent and convincing evidence that the workman committed the offence or offences he is alleged to have committed for which he has been dismissed,” the Court finds that,

“there had been no written or verbal warnings to the claimant concerning her poor performance nor is there any convincing evidence oral or documentary concerning her late-coming to work. In all the circumstances of the case the evidence points to the irresistible conclusion that the claimant’s dismissal was without just cause and excuse and in violation of natural justice.”

(ILR, Vol.1 , 2001, p. 265)

Accordingly, the Court therefore finds itself in favour of the claimant. This marks the end of the argument for the two issues relating to the case.

On the issue of estoppel, the Court made another reference to a case, Nadarajah & Anor v. Golf Resort (M) Sdn. Bhd. [1991] 1 ILR 704 to support his arguments,

“In view of the provisions of s.30 (5) of the Act pursuant to which the Industrial Court must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms, it is clear that technical rules such as estoppel, limitation, laches, acquiescence and other pleas unless otherwise provided for in the Act have no place in industrial adjudication and should not be included to defeat claims which are just and proper.

(ILR, Vol.1, 2001, p. 265)

This Act is applied to the present case for a decision in favour of the claimant.

In awarding the award for this case, the Court once again applied s.30(5) of the Act to support its decision of the award,

“In the case of Koperasi Serbaguna Sanya Bhd. (Sabah) v. Dr. James Alfred (Sabah) and Anor [2000] 3 CLJ 758, Gopal Sri Ram JCA held, inter alia that an adjustment to an award of backwages should be made where the workman has found other employment. The Court is further mindful of the provisions of s. 30(5) of the Industrial Relations Act that it should act in accordance with equity and good conscience. Approaching the case at hand within this context the court concludes that it is fair and reasonable to deduct 40% from the amount under backwages.”

(ILR, Vol.1, 2001, p. 266)

The award is thus based on a principle of law derived from a previous case. Move 4 Step 3a is also applied here.

Case 4 is similar to Case 3 in that it is also related to poor work performance except in this case, the claimant, is still a probationer. As mentioned before, cases of poor performance are hard to justify. The Court has to be satisfied that in cases of poor work performance, there are convincing and compelling evidence that the workman had committed the offence for which he/she has been dismissed. In arguing this case, the Court starts by stating that in cases of poor work performance, the burden of proof is on the employer to prove it. Quoting a case, *Stamford Executive Centre v. Puan Darshini Ganesan* [1986] 1 ILR 1001, the Court has to establish whether the company has accorded the claimant the conditions of poor performance: she has been warned, she was accorded sufficient opportunity to improve and in spite of all that she failed to improve her performance. Further, to support his argument, the Court cites another case of *Rooftech Sdn. Bhd v. Holliday Inn, Penang* [1996] 2 ILR 818, on a written warning which is essential in dismissing an employee. In cases where the workers is of low ranking position, a written warning is very crucial as this is further illustrated by the Chairman's reference to two other cases, *I.E Project Sdn. Bhd. v. Tan Lee Seng* [1987], 1 ILR 165, where the Chairman stated,

Dismissal for unsatisfactory work or incompetency should almost invariably have been preceded by warnings. In the event of poor performance being the reason for the dismissal one should always endeavour to show that the work complained of was performed subsequent to warnings.

(ILR, Vol.2, 2001, p. 55)



The Chairman further added,

An employer should be very slow to dismiss on the ground that the employee is found to be unsatisfactory in his performance or incapable of performing the work which he is employed to do without first telling the employee of the respect in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground and giving an opportunity of improving his performance. It is for the employer to find out from the employee why he is performing unsatisfactorily, to warn him that if he persists in doing so he may have to go. There is no record of such warnings.

(ILR, Vol.2 , 2001, p. 55)

Further reference was also indicated by referring to *Ireka Construction Berhad v. Chantiravathan Subramaniam James* [1995] 2 ILR 11.

The Court further argues that even though it find there are steps taken to discuss and comments on the claimant's performance by her superior, they are not sufficient to the conditions specified in dismissing workers of poor performance. This first part of the case applies Step 3a in arguing for the case. The Court further finds discrepancy in the allegations of the employer. Relying on the principle laid out by *Ireka or Rooftech* cases, the Court finds the period of two months given to the worker was unrealistic. The Court finds that the company has failed to satisfy the court based on *Ireka or Rooftech* even though the documents presented to substantiate the allegations of poor performance, incompetence and inefficient were considerable. On the issue of probation, the Court finds the claimant had been confirmed but was dismissed. The claimant's witness and the company's human resource manager's contradicting statements further justify that the claimant was dismissed due to victimization and bad faith. In concluding the arguments, the Court argues that it has no reservation in

holding the claimant was indeed confirmed and her dismissal was unjust. This marks the end of the arguments which were largely based on the *Ireka and Rooftech* principles.

In this case, since the claimant is jobless, the Court awarded that the claimant be reinstated back into her old position or an equivalent without any loss or benefit and be paid the full backwages from her date of dismissal to the date she resumes work at the company.

Example 5 is a case of forced resignation. It is a lengthy case with plenty of details and explanations. This move begins with an introduction to the disputing parties and the history of the dispute. It is followed by evidence from the company and the claimant. In arguing for the case, the Court made several references to previous cases of a similar nature. Cases are quoted to highlight that there should not have been forced resignation since this makes the dismissal null and void. In the case of *VP Nathan & Partners v. Subramaniam* [2000] 2 ILR 350, it is stated:

A resignation under compulsion is no resignation in law and amounts to a dismissal being forced upon as was held by the High Court of Singapore in *Stanley Ng Peng Hon v. AAF Pte. Ltd.* [1979] 1 MLJ 57. In *Jeflo Sdn. Bhd. v. Tunku Azizah Tunku Nong Jiwa* [1999] 2 ILR 48 the Industrial Court referred to a decision of the Industrial Relations Court of Australia in *Steward v. Pullin* [1994] 58 IR 322 which held that “for there to be resignation on the part of the employee it must be apparent that there was a real choice on the part of the employee to be exercised.

(ILR, Vol.3 , 2001, p.17)

The Court has to determine whether in this case (*Penas Realty v. Chew*), the claimant had voluntarily resigned or was forced to resign. It has to look at the conduct of the Company, its representatives, the claimant as well as the verbal communication that took place prior to the dismissal. This is illustrated by a reference to the case of *Ang Beng Teik v. Pan Global [1996] 3 MLJ 137*:

The Court of Appeal held in that case that a workman may of actual dismissal or termination, as amounting to a dismissal. To determine this the Court will have to look at the whole chain of events as forming one continuous story to find out whether what happened to the workman was just and equitable.

(ILR, Vol.3, 2001, p. 18)

The Court has to look at the whole story to decide whether the dismissal was just and equitable. The issue of forced resignation is also for the claimant or employee to prove it as further illustrated by these cases:

1. “In *Food Specialities (M) Sdn Bhd v. M. Halim bin Manap @ Abd. Manaf [1992] 2 ILR 311* the court held that the burden in a case where there is resignation rests on the employee to prove that he was forced into resigning and not a voluntarily act. Mere allegations, vague suggestions and insinuations are not enough.
2. In the High Court case between *Weltex Knitwear Industries Sdn Bhd v. Law Kar Toy & Ors [1998] 7 MLJ 359*, YA Dato’ Abdul Kadir Sulaiman held that “where the fact of dismissal is in dispute, it is for the workman to establish that he was dismissed by his employer. If he fails there is no onus whatsoever on the employer to establish anything for in such a situation no dismissal has taken place and the question of it being with just cause and excuse would not arise.”

(ILR, Vol.3, 2001, p. 18)

Looking at the context of the whole situation, the Court is made aware of the facts of the case. The economic situation and the viability of the company to operate during the economic turmoil were taken into consideration. In presenting its first argument, the Court has to consider the allegation of pressure and stress as claimed by the claimant at the time of signing the letter. Was the claimant under pressure and stress at the time of signing the letter? Quoting a passage from *TaTa Robinson Fraser Co Ltd v. Labour Court* [1989] 11 LLJ 443, the chairman argues,

To make out a case that his resignation was not voluntary and his resignation was obtained under undue influence, misrepresentation, fraud or the like, the employee has to establish that he was not allowed time to think over the matter, not allowed to come out of the office but was physically restrained and he had signed under protest.

(ILR, Vol 3, 2001, p. 20)

The claimant only signed the letter after he came back from lunch. He was not physically restrained from leaving the room. The issue of pressure and stress does not arise here. On the second issue of pay reduction, the Court quoted another case (*Harris Solid State (M) Sdn Bhd v. Bruno Gentil Perera & Ors*[1996]) to support its argument,

“An employer may reorganize his commercial undertaking for any legitimate reason, such as promoting better economic viability, but he must not do so for collateral purpose, for example, to victimize his workman for their legitimate participation in union activities whether the particular exercise of managerial power was exercised *bona fide* for collateral reasons is a question of fact that necessarily falls to be decided upon the peculiar circumstances of each case.”

(ILR, Vol 3, 2001, p. 20-21)

The context in which this case took place is important. In 1997, the country experienced a downturn in the economic situation. Even government servants had agreed to a pay deduction to help cushion the impact on the country's economy. The salary deductions by the Company was to ensure that the Company can still survive during the economic downturn. The Court does not find any element of *mala fide* on the part of the company. On the issues of the retirement age and the voluntary separation scheme as put forward by the claimant, the Court found the company's explanations justifiable. Again, referring to the case above, the Company's action during this particular time was legitimate and appropriate. Based on the two cases quoted above, the Court decided that since the claimant had signed the retirement letter voluntarily there was thus no claim to justify that he had been dismissed without justifiable reasons. This marks the end of the Court's argument. Again, we find Move 4 Step 3a applied in this case.

All twenty cases in the ILR show that the Chairman/President/Court has argued the case based on the charges/allegations of the dismissal. Each charge/allegation is dealt with before delivering the judgment. The Chairman/President/Court normally resorts to sub-moves a and b which are 'reference to a case/law' and 'deriving *ratio-decidenti*' in arguing the case. Sub-move 'history of the case' is hardly applied to dismissal cases since dismissal cases that are brought to the Court are not appeal cases. Almost all cases analyzed in this study have references to other cases of a similar nature, thus, in deciding on the cases, the Chairman/President /Court normally refers to these cases and awards as a basis for his/her arguments. Cases No.1 and No.2 for example were case of dismissal based on ambiguous words. Reference to a case of a similar nature, *General Containers v. Yip Siew Ling*(Award No. 418 of 1994) was used as a basis by

the Court in presenting its arguments. The *ratio-decidenti* set by this case is applied to the two cases which could also become future references for other cases. Case No. 3 is another interesting example of poor performance. As was mentioned earlier, cases of poor performance must be accorded with written warnings and sufficient opportunities to improve before a dismissal can take place. The Industrial Court must ensure that these requirements are fulfilled by the Company before terminating its employees. In this particular case, the claimant was in a senior position where the need for warnings or opportunities to improve was less as cited by the Court in *United Oriental Assurance Sdn. Bhd. v. Kamala Rangithan Selladuray*(1992, 2 ILR 280) citing *James v. Waltham Holy Cross*(1973, 1 CR 378) which stated as follows,

Those employed in senior management level may by the very nature of their jobs be fully aware of what is required of them and are fully capable of judging for themselves whether they are achieving that requirement. In such circumstances the need for warning and an opportunity for improvement are less apparent.

(ILR, Vol.1, 2000, p. 812)

Sufficient warnings and opportunities were accorded to this claimant, thus his claims of unjust dismissal were dismissed.

Although dismissal cases are by nature straightforward, the need to keep up to date is reflected in this other case of poor performance. Case No.5 illustrates that a written warning is not essential and a legal burden imposed by law on the employer as long as the claimant's shortcomings, inefficiencies and instances of unsatisfactory and poor performance are made known to him. Citing the case of *Ginder Singh Transport Co. Sdn. Bhd. v. Bijir Singh Juala Singh*[1995], it was held:

A formal written letter of warning provides an employer with the evidence to rebut his employees claim that he had not been sufficiently made aware of any deterioration in his work and of the prospect of the employer terminating his services should he fail to improve upon his performance. It does not, however, mean that an employer must in all cases issue such a letter.

(ILR, Vol.2, 2000, p. 516)

To the Court, the issuance of a written warning is only a procedure to ensure that an employer had communicated to the employee on his poor performance but to make a requirement of the said rule is inappropriate. Although the claimant had been given three extensions, he had still failed to improve. The company's dismissal of him is therefore justified.

In cases of poor performance, it is the Court prerogative to decide whether the written warning is essential towards the decision of the case as we can see in Case no. 5, Case no. 6, Case no.9, Case no. 10 and Case. No 17. As mentioned earlier, cases of poor performance are very hard to prove and even if the slightest conditions that were set out in the *Ireka and Rooftech* principles were not complied with, the case will most probably be in favour of the claimant.

Further reference to the ILR is also required as shown in Case No. 9. No employee whether confirmed or on probation should be discriminated. As long as the employee is employed under a contract of service, he/she should be accorded the rights against unfair dismissals. Quoting the landmark case of *R. Rama Chandran v. Industrial Court of Malaysia and Anor* ( [1997], 1 CLJ 147), the Court comes to the conclusion that the dismissal of the claimant is unjustified as he was not accorded with sufficient time and

warnings to improve his performance during probation. Any new legal officer or even new union leader needs to know this as it is normally assumed that probationers are not accorded the same rights as confirmed workers.

Also the need to be present in court on the day of hearing is important in fighting for the case as shown in Cases no. 6, no. 17 and no.18 which are ex-parte hearing. An ex-parte hearing is where one of the parties concerned does not turn up for court. Hearing normally proceeds if the Court is satisfied that the party concerned was aware of the date of the court hearing. In case no.6, the Court is aware that the party concerned had on both occasions been served with a notice to attend court. Invoking its power under Section 29(d) of the Industrial Relation Act 1967, the Court proceeded with the hearing. Since it is an ex-parte hearing, the history of the case is given at the beginning of the move to highlight when the case first came up for hearing. Normally, in ex-parte cases, the favour is always on the party who attends the hearing as there is no rebuttal to the claims or evidence presented as shown in these cases.

Reference to a case or law was also almost evident in the cases studied. The Court normally refers to a rule of law to justify its arguments and decision as illustrated by all the cases except case no. 19. Case no. 19 between *Hamay Glass Sdn. Bhd. v. Loganathan Vadamalai* is a clear case of misconduct. The claimant had contradictory statements on the case in Court and previously during a domestic inquiry. The Court had no problems deciding on this case as a 'Just Dismissal' because the evidence produced by the company was compelling. The rule of ratio-decidenti was also applied in this study. Out of twenty cases, the Court applied this rule of ratio-decidenti to five cases in this study.



The Awards handed down by the Court are always referred to by other cases. Examples of Cases no. 7, no.12, no.13 and no. 20 for example show how the amount of backwages is calculated if the claimant is reinstated back to her job or if the claimant has been gainfully employed elsewhere, the calculation will be based from the date of the dismissal to the date of the hearing. Table 19 below indicates the occurrence of Move 4 Step 3 and the strategies used by the Court to arrive at the decision of the case:

**Table 19: Occurrence of Move 4 Step 3 and Strategies Used to Arrive at Decision**

<b>Cases</b>	<b>Move 4 Step 3</b>	<b>Reference to previous cases/ laws Step 3a</b>	<b>Deriving ratio-decidenti Step 3b</b>
Case 1	/	/	
Case 2	/	/	
Case 3	/	/	/
Case 4	/	/	
Case 5	/	/	
Case 6	/	/	
Case 7	/	/	
Case 8	/	/	/
Case 9	/	/	/
Case 10	/	/	
Case 11	/	/	
Case 12	/	/	
Case 13	/	/	
Case 14	/	/	/
Case 15	/	/	/
Case 16	/	/	
Case 17	/	/	
Case 18	/	/	
Case 19	/		
Case 20	/	/	

The cases analyzed in this study showed almost all ILR have the material facts of the case similar to previous cases or previous judgments. The facts that these legally facts material recur suggest that the cases are generally decided the same way and therefore it is very important to keep abreast and to note down the similarities of previous cases.

Thus, the purpose of the ILR as a source of reference remains most important among the other communicative purposes of the ILR.

#### **5.3.4.6 Move 4 - Step 4 Pronouncing Judgment/Giving of Award**

This is the last step in Move 4 or the Award move. Like law cases, no dismissal cases can be complete without the pronouncement of judgment. Earlier in Move 3, the judgment is signaled by the word ‘Held’ and given in point form. In this move, the judgment is delivered at the end of the hearing after summing up all the evidence and arguments against the charges of dismissal. It is formulaic and highly standardized as illustrated in all twenty cases. In cases of justified dismissals, the judgment is normally signaled by the word ‘Accordingly’ or ‘holds’ as given in the examples below:

1. “Accordingly his claim is hereby dismissed.
2. Accordingly, this court finds that the company’s dismissal of the claimant was justified and orders that the claimant’s claim be dismissed.
3. The court holds that the dismissals were with just cause.
4. ...this court holds that the claimant’s dismissal was properly done and as such her claim that she was dismissed without just cause or excuse is therefore dismissed.
5. ...the court holds.....the claimant’s case is therefore dismissed.
6. ....the court holds.....and her claim is hereby dismissed.”

This marks the end of the case and also the move.

In cases of unjustified dismissals, the pronouncement of judgment is also signaled by the word 'holds'. Examples of the judgment of unjustified dismissals are as follows:

1. "The court holds.....Such dismissal was without just cause and excuse.
2. The court holds..... dismissal without just cause and excuse.
3. Accordingly the court holds..... dismissal without just cause and excuse.
4. In this circumstances this court holds..... dismissal without just cause and excuse."

Beside the common word 'holds', other phrases such as 'this court finds....without just cause and excuse' and 'the court comes to the conclusion' are also used to signal the decision/judgment of the court. This judgment is then followed by the award. The claimant is awarded for his/her unjustified dismissals. In awarding the claimant, the court can order the company to pay compensation of backwages or reinstatement into the job. The latter seldom occurs as normally by the time the case is brought to court, the relationship is so strenuous that reinstatement is not the best solution to both parties. However, in case number 12, the Court not only awards monetary compensation but also reinstatement as the claimant could not get a job elsewhere. In awarding the claimant, the court also refers to previous dismissal cases that had been awarded. The rule of '*ratio-decidendi*' is also applied here as can be seen in cases where compensation of backwages is ordered. The Industrial Court normally follows the ruling as set by the Court of Appeal in '*Koperasi Serbaguna Sanya Sdn. Bhd. (Sabah) v. Dr. James Alfred (Sabah) & Anor [(2000), 3 CLJ 758]*' as a basis in awarding monetary compensation or reinstatement. If the claimant is already employed

elsewhere, the award should be adjusted and not calculated from the date of dismissal to the last date of hearing,

In the case of 'Koperasi Serbaguna Sanya Sdn. Bhd. (Sabah) v. Dr. James Alfred (Sabah) & Anor( [2000], 3 CLJ 758, Gopal Sri Ram JCA held, inter alia that an adjustment to an award of backwages should be made where the workman has found other employment.

(ILR, Vol. 2, 2001, p. 266)

This also applies if the claimant is reinstated back into his/her job. The rule of ratio-decidenti in awarding the monetary compensation is found in Cases no. 6, 7, 10, 13 and 18. The award orders by the court also marks the end of the award move in unjustified dismissal cases. Table 20 below displays the decision of the Court as analyzed in this study:

**Table 20: Occurrence of Move 4 Step 4 Pronouncing Judgment/Giving of Award**

<b>Cases</b>	<b>Move 4 Step 4</b>	<b>Decision</b>	<b>Award</b>
Case 1	/	Unjust Dismissal	Compensation of backwages
Case 2	/	Unjust Dismissal	Compensation of backwages
Case 3	/	Just dismissal	
Case 4	/	Unjust Dismissal	Compensation of backwages
Case 5	/	Just dismissal	
Case 6	/	Unjust Dismissal	Compensation of backwages
Case 7	/	Unjust Dismissal	Compensation of backwages
Case 8	/	Just dismissal	
Case 9	/	Unjust Dismissal	Compensation of backwages
Case 10	/	Unjust Dismissal	Compensation of backwages
Case 11	/	Unjust Dismissal	Compensation of backwages
Case 12	/	Unjust Dismissal	Reinstatement & Compensation of backwages
Case 13	/	Unjust Dismissal	Compensation of backwages
Case 14	/	Just dismissal	
Case 15	/	Just dismissal	
Case 16	/	Just dismissal	
Case 17	/	Unjust Dismissal	Compensation of backwages
Case 18	/	Unjust Dismissal	Compensation of backwages
Case 19	/	Just dismissal	
Case 20	/	Unjust Dismissal	Compensation of backwages

## 5.4 Conclusion

Based on the discussion of moves above it can be observed that, the ILR displays a similar structure of rhetorical patterns of legal case. Although the labeling and the position of the moves are different from the ones proposed by Bhatia, the information found in each move are similar in content. The following table summarizes the findings of the moves in this study.

**Table 21: Occurrence of Moves in ILR**

Cases	MV 1	MV 2	MV 3	MV 4	MV 4 S1	MV 4 S2	MV 4 S2a	MV 4 S2b	MV 4 S3	MV 4 S3a	MV 4 S3b	MV 4 S4
C1	/	/	/	/	/	/	/	/	/	/		/
C2	/	/	/	/	/	/	/	/	/	/		/
C3	/	/	/	/	/	/	/		/	/	/	/
C4	/	/	/	/	/	/	/	/	/	/		/
C5	/	/	/	/	/	/	/	/	/	/		/
C6	/	/	/	/	/	/	/		/	/		/
C7	/	/	/	/	/	/	/	/	/	/		/
C8	/	/	/	/	/	/	/	/	/	/	/	/
C9	/	/	/	/	/	/	/		/	/	/	/
C10	/	/	/	/	/	/	/		/	/		/
C11	/	/	/	/	/	/	/		/	/		/
C12	/	/	/	/	/	/	/	/	/	/		/
C13	/	/	/	/	/	/	/		/	/		/
C14	/	/	/	/	/	/	/	/	/	/	/	/
C15	/	/	/	/	/	/	/	/	/	/	/	/
C16	/	/	/	/	/	/	/	/	/	/		/
C17	/	/	/	/	/	/	/		/	/		/
C18	/	/	/	/	/	/	/	/	/	/		/
C19	/	/	/	/	/	/		/	/			/
C20	/	/	/	/	/	/	/		/	/		/

In conclusion, a model for the generic structure of the ILR is proposed as follows:

Move 1 Identifying the case

Move 2 Summary of the case

Move 3 Pronouncing judgment

Move 4 Giving of award

Step 1 Introducing the claimant and his employment history/ Introducing the case

Step 2 Stating the issue of the dispute/Allegation(s) of dismissal

Step 2a Claimant's version/Company's version

Step 2b Company's version/Claimant's version

Step 3 Providing the evidence to support or dispute the allegation

Step 3a Reference to previous cases and laws to support the chairman's argument

Step 3b Deriving ratio-decidenti

Step 4 Pronouncing Judgment/Giving of Award

All the four moves can be said to be obligatory. However, the amount of information for each move differs from one case to another depending on how much essential information is needed. The positioning of the moves are on the whole standardised with possible variation in the steps found in Move 4. Knowledge of these moves will benefit those involved in the writing and reading of the ILR. This is indeed beneficial with the increase in popularity in alternative dispute mechanisms that can be seen in the country today.

This chapter has focused on the generic structure of the ILR, a genre that has been neglected in legal discourse. The linguistic realizations in each of the moves would also be useful to writers and readers of the genre. This will be discussed in the next chapter.