

**INDUSTRIAL COURT OF MALAYSIA
AT IPOH, PERAK
[CASE NO: 10/4-1010/23]**

BETWEEN

BALAKRISHNAN KARUPPIAH

... The Claimant

AND

**IREKA ENGINEERING & CONSTRUCTION
SDN. BHD.**

... The Company

**AWARD NO. 167 OF 2024
(Enclosure 18)**

Before : **Y.A. TUAN ZULHELMY BIN HASAN –
CHAIRMAN**

Venue : Industrial Court of Malaysia, Perak Branch

Date of Reference : 29/05/2023

Date of Mention : 14/07/2023, 04/08/2023, 23/08/2023,
05/10/2023 & 07/11/2023

Date of Application : 27/10/2023
(Enclosure 18)

Representation : *For the claimant - Nur Farah Farhana Effendy
Onn; M/s Lily Chua & Associates*

*For The company - Absent (Unrepresented –
Voluntarily Wound Up on 27/03/2023)*

Reference:

This is a reference by the Director General of Industrial Relations
Department of Malaysia dated 29/05/2023 pursuant to **Section 20(3) of the**

Industrial Relations Act 1967 which was received by the Industrial Court of Malaysia on 01/06/2023 arising out of the alleged dismissal of **BALAKRISHNAN A/L KARUPPIAH** (hereinafter referred to as “the Claimant”) by **IREKA ENGINEERING & CONSTRUCTION SDN. BHD.** (hereinafter referred to as “the Company”) on 30/11/2022.

INTERIM AWARD

(Notice of Application – Enclosure 18: Substitution of Party)

Brief Fact of The Claimant’s Notice of Application (Enclosure 18):

- [1]** On 11/08/2016, the Claimant signed a contract for service as Senior Manager for Health and Safety with the Company with starting monthly salary at RM15,600.00 and monthly transport allowance of RM2,300.00. On 13/05/2019, the Claimant’s monthly salary was adjusted to RM16,070.00 and his monthly transport allowance is retained at the same rate.
- [2]** The Company is a subsidiary of Ireka Corporation Berhad (thereafter herein referred as “ICB”) with business address at Level 18, Wisma Mont’ Kiara, No.1, Jalan Kiara, Mont’ Kiara, 50480 Kuala Lumpur, and has been voluntarily wound up on 27/03/2023 whereby a liquidator has been appointed. On 08/08/2022, the Company was placed under judicial management vide Kuala Lumpur High Court OS No. WA-28JM-13-07/2022.
- [3]** Notwithstanding the Company was purportedly insolvent at that juncture, the Company had still continued to ask the Claimant to continue to carry out works on behalf of the Company whilst assuring the Claimant that they will continue to pay the Claimant’s outstanding salary, and everything is business as usual. The Claimant had continued to work with the Company ever since until the Company failed to pay his outstanding monthly salary and allowance.
- [4]** The Claimant contends that he was not remunerated his monthly salary and allowance since July 2022 for the work that he had carried out

while continuing to work with the Company. The pay slip for the Claimant was still issued up to September 2022 but the Claimant did not receive any monies from the Company since July 2022. At various town hall attended by the Claimant, representatives of ICB was present during the said town hall and assurances were given that the Claimant's position is secured.

- [5] Nevertheless, the Company has been operating in an increasingly challenging environment and it is facing serious financial difficulties. The Company was only able to fully settle September 2022 salaries in the month of November 2022 and was unable to pay any salaries for October 2022 and does not have the requisite funds to pay for November 2022 salaries. Salaries for October and November 2022 are still outstanding due to insufficient funds to make payment towards salaries with regards to the Company's financial position.
- [6] As a result, the Company is also not in a position to continue the projects for which it was appointed for and also not in a position to sustain any manpower. Due to financial distress the Company ceased the Claimant's position as redundant and terminated the Claimant's employment on 30/11/2022 on the ground of redundancy.
- [7] The Claimant's further contends that during the judicial application by the Company, the Directors and Shareholders of the Company had affirmed in their affidavits to the effect stating that the purpose of the judicial management was made to preserve the jobs of their employees.
- [8] On 30/11/2022, the Company vide its judicial manager had held a town hall on even date and terminated the Claimant with no further notice. The Claimant avers that before the judicial management order was terminated by the Court, the Company has terminated the Claimant's employment with immediate effect. Notwithstanding the Claimant was not remunerated of his salary, he still asked to carry out works for the Company which ultimately benefited ICB as the parent holding company of the Company.

- [9] The Claimant pleads that the act of the Company tantamount to a constructive dismissal as ICB had carried out the judicial management proceedings and its judicial manager terminated the Claimant for the ultimate benefit of ICB and to detriment towards the Claimant. The Claimant further avers that at the time of termination of his service, the Company had yet the Claimant of the sum of RM140,060.00 for monthly salary from July 2022 to November 2022, transport allowance of RM91,850.00 from July 2022 to November 2022 and a payment in lieu of short notice by three (3) months amounting to RM48,210.00.
- [10] Hence, the Claimant further pleads that the termination by the Company amounts to a dismissal without just cause or excuse, unlawful and unfair labour practice. The termination was done without notice and not according to the employment agreement.
- [11] The Claimant further contends that whatever the Company takes direction and action are with a view to benefit ICB and/or the shareholders of ICB. At all material times, ICB was the directing minds of the Company in order to benefit the ICB and/or the shareholders of ICB. The placement of the Company under judicial management was directed by ICB which was subsequently announced by ICB at Bursa Malaysia. Even the lawyers and the judicial managers were ultimately paid by ICB and not by the Company.
- [12] As such, the Claimant submits that there is a legal nexus between the Company and ICB as the former is a subsidiary company for the later and therefore takes instructions from the latter, which makes the latter responsible for the former. It is well within the Court's jurisdiction to substitute any party of the proceedings with another party and this power can be exercised in any proceedings of this Court.
- [13] The Claimant further submits that ICB is not a separate legal entity as there is sufficient legal nexus between the ICB and the Company and therefore has a right to be substituted in the place of the Company as before the Claimant was wrongfully terminated, he has a genuine claim against the Company before it was voluntarily wound up on

27/03/2023 whereby the liquidator has been appointed.

[14] Based on the reasons above, on 07/11/2023, the Claimant filed a Notice of Application (Enclosure 18) supported with an Affidavit in Support affirmed by the Claimant himself to have Ireka Engineering & Construction Sdn. Bhd. (the Company) be substituted with Ireka Corporation Berhad (ICB) due to the fact that the Company is a subsidiary of ICB. In the same application, the Claimant also prays to amend his Statement of Case in the event if this present application is granted by the Court. The application to substitute was made pursuant to **Section 29(a) and (g) of the Industrial Relations 1967**.

[15] Further to the above, the cause papers of this application (Enclosure 18) has also at all times, been served on the Company and ICB, but there is no reply from them till to date. Hence, the Claimant further submits that this Court should recognize that ICB and the Company were afforded the opportunity to file any objection (if any) to this proceeding despite they have failed to do so in a timely manner.

The Law on Joining or Substitution of New Parties:

[16] The powers of the Industrial Court to join or substitution of any party to the proceedings are found in the relevant provisions for consideration are **Section 29(a)** and **Section 32(1)(a)** of the **Industrial Relations Act 1967** which provide as follows:

“Section 29

The Court may, in any proceedings before it: -

(a) order that any party be joined, substituted or struck off:

Section 32

(1) Any award made by the court under this Act shall be binding on:

(a) all parties to the dispute or the reference to the court under subsection 20(3) appearing or represented before the court and

all parties joined or substituted or summoned to appear or be represented before the court as parties to the dispute or the reference to the court under subsection 20(3). ”

[17] The general principles for joining or substitution a new party to the proceedings were succinctly laid down by the Court of Appeal in *Asnah v. Mahkamah Perusahaan Malaysia & Ors* [2015] 3 CLJ 1053 as follows:

- “(i) *That IRA 1967 is a social legislation;*
- (ii) *That third parties can be made liable to pay the award notwithstanding that they were not the employer;*
- (iii) *That third parties cannot resist joinder or deny liability on the grounds there is no privity or is a separate legal entity, etc. when there is sufficient nexus between the party to be joined and the party named in the reference;*
- (iv) *That the threshold test to be employed at the joinder stage appears to be whether the employee can demonstrate by way of prima facie evidence that the party who are requested to be joined have directly and/or indirectly and/or otherwise assumed liability or can be made liable partly or wholly for the payment of the award or for that matter purported award in cases where award has not been delivered. In essence, the threshold to satisfy the Industrial Court is low based on the above sections as well as supportive case laws in this area of jurisprudence. As long as the complaint of the employee is not frivolous, vexatious and/or abuse of process of court, there should be no hindrance in permitting the joinder if nexus is shown; and*
- (v) *That the issue of liability can only be dealt with after the joinder and hearing on merits. The parties joined should not at joinder stage be allowed to submit of the merits. Their presence at the joinder stage is only to verify the complaint of the employee to ensure that the facts relied on by the employee are credible. ”*

- [18] Prior to *Asnah's* case, the test for joinder of parties which was often being referred to by our courts was the test extracted from the dictum of Gajendragadkar CJ in *Hochtief Gammon v. Industrial Tribunal Orisa* AIR [1964] SC 1746, where his lordship stated as follows:

*“If it appears to the Tribunal that a party to the industrial dispute named in the order of reference does not completely or adequately represent the interest either on the side of the employer, or on the side of the employee, it may direct that other persons should be joined who would be necessary to represent such interest. If the employer named in a reference does not fully represent the interests of the employer as such, other person who are interested in the undertaking of the employer may be joined. Similarly, if the unions specified in the reference do not represent all the employees of the undertaking, it may be open to the Tribunal to add such other unions as it may deem necessary. **The test always must be, is the addition of the party necessary to make adjudication itself effective and enforceable? In other words, the test may well be, would the non-joinder of the party make the arbitration proceedings ineffective and unenforceable? it is in the light of this test that the implied power of the Tribunal to add parties must be held to be limited.**”*

[Emphasis added]

- [19] The aforesaid test propounded by the Indian Supreme Court has been adopted and applied by our Courts in many cases in deciding application for joinder or dis-joinder of parties including the Court of Appeal in *Harris Solid State (M) Sdn. Bhd. & Ors v. Bruno Gentil Pereira & Ors* [1996] 4 CLJ 747; [1996] 2 MLJ 489 whereby his lordship, Gopal Sri Ram J (as he then was) applied the test with approval.
- [20] However, the Court of Appeal in *Asnah's* case has criticized the application of the aforesaid test in the Malaysian context. Unlike the Indian's position, our IRA 1967 has express powers which are much wider than the Indian's provision. As such, the Court of Appeal in *Asnah's* case held that the more appropriate test to be applied in the

Malaysian context was the “*reasonable factual or legal nexus*” test, propounded by Justice *Gopal Sri Ram* in *Co-Operative Central Bank Ltd. & Ors v. Rashid Cruz Abdullah & Ors And Other Appeals* [2004] 1 CLJ 849, a wider net to facilitate all maladies of third parties to answer to the Industrial Court for their involvement in the dispute and if appropriate be liable under the award upon hearing the merits.

[21] Both in *Asnah’s case* and *Co-Operative Central Bank’s case*, the Courts were dealing with the issue of the nature of relationship between the employee-employer and whether the party in question adequately represent the interest of the employer or employee. The second limb of the test in *Hochtief Gammon*, in that it must also be shown that the addition of the party is necessary to make adjudication itself effective and enforceable was never canvassed or considered by the courts as the companies or employers in these two cases had ceased to exist at the time of the joinder application.

[22] Another observation in the decision of *Transocean Drilling Sdn. Bhd. v. Industrial Court of Malaysia & Anor* [2016] CLJU 1077; [2016] MLJU 502 whereby the learned judge, *Azizul Azmi Adnan* echoed a similar view, in that the Court of Appeal in *Asnah’s case* did not exclude the application of the second limb of the test in *Hochtief Gammon*. Accordingly, the Court stated as follows:

“Pulling these threads together, it is my considered view that the applicable test for the joinder of parties in an industrial dispute is as follows. Where it appears to the Industrial Court that a joinder may be necessary for an award in an industrial dispute to be effective or enforceable, the court may join any person as a party to the dispute if the court is satisfied that the person has a reasonable factual or legal nexus with an existing party in dispute, and that would be just and equitable to do so.”

Evaluation of the Application & Findings:

[23] At this stage, it is appropriate to state the test for the joinder or

substitution of a party under **Section 29(a) of the IRA**. I begin with the law established by the Court of Appeal in *Asnah Ahmad v. Mahkamah Perusahaan Malaysia & Ors* [2015] 3 CLJ 1053. There it was stated that our **Section 29(a) and (b) of the IRA** is much wider than the statement of law made by the Supreme Court of India in *Hochtief Gammon v. Industrial Tribunal Bhubaneshwar, Orissa And Ors* [1964] AIR 1746 which was followed in *Harris Solid State (M) Sdn. Bhd. & Ors v. Bruno Gentil Pereira & Ors* [1996] 4 CLJ 747. In *Asnah Ahmad* it was established that in our IRA there was no requirement that to enable joinder or substitution of a party, such party to be joined or substituted in place of another party must be the employer. The Court of appeal stated the test as follows:

“The more appropriate test to be applied in the Malaysian context was propounded by Justice Gopal Sri Ram in Co-Operative Central Bank Ltd. & Ors v. Rashid Cruz Abdullah & Ors And Other Appeals [2004] 1 CLJ 849. The test is ‘reasonable factual or legal nexus’ test a ‘wide net’ to facilitate all maladies of third parties to answer to the Industrial Court for their involvement in the dispute and if appropriate be liable under the award upon hearing the merits.”

[24] Notwithstanding that, the employee must satisfy the Court that the party to be joined or substituted has a reasonable factual or legal nexus and how such power is to be exercised by the Industrial Court was eloquently stated in *Transocean Drilling Sdn. Bhd. v. Industrial Court of Malaysia & Anor* [2016] 1 LNS 1077 in the following words:

*“Of course, any exercise of any power of joinder by the Industrial Court must be carried out in accordance with the requirements of **Section 30(5) of the Industrial Relations Act 1967**, which requires the court to act in accordance with equity, good conscience and the substantial merits of a case. Accordingly, the power of the Industrial Court to order a joinder or substitution pursuant to **Section 29(a)** must be read subject to a limitation that the joinder or substitution must be just and equitable in the circumstances.”*

[25] Thus, the joinder or substitution must be just and equitable in the circumstances. In this regard, the burden of proof is on the employee and such burden is discharged by merely having to prove an arguable case for joinder or substitution. To prove an arguable case, the employee is required to show is that there exists some sort of a relationship or nexus between the entity named in the reference and the proposed party.

[26] Any issue of separate legal entities is devoid of merit. It was held in *Asnah Ahmad* that third parties cannot resist joinder or deny liability on the grounds there is no privity or is a separate legal entity when there is sufficient legal nexus between the party to be joined and the party named in the reference, as in this case the reference made by the Director General of Industrial Relations Department of Malaysia dated 29/05/2023. The test is not separate legal entity but reasonable factual or legal nexus between the said parties.

[27] Therefore, in view that the Company has voluntarily wound up on 27/03/2023, this application was necessary to ensure the entire proceedings are enforceable as there was a reasonable factual and legal nexus between the applicant, the Company as well as ICB. Due to the

interest of justice and/or to disregard the doctrine of corporate personality as the Claimant would have no avenue to make claim against the Company at all, this application would be just and equitable.

- [28] For the above reasons the application for substitution (Enclosure 18) is hereby allowed with no order as to costs. The Applicant is also allowed to amend and file his Amended Statement of Case within 14 days from the service of this Interim Awards, as well as for the Proposed Substituted Company (ICB) to file its Statement of Reply. In addition, Form L of the Schedule in the Industrial Court Rules 1967 be issued to the Proposed Substituted Company (ICB) as the party substituted the Company.
- [29] The trial dates which were fixed on 22nd and 23rd of February 2024 are hereby retained.

HANDED DOWN AND DATED THIS 24 JANUARY 2024

(ZULHELMY HASAN)

CHAIRMAN

INDUSTRIAL COURT OF MALAYSIA

PERAK BRANCH