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Punitive Damages in Unfair Dismissal Cases: Lessons from Malaysia and New Zealand

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ABSTRACT

Employers tend to dismiss employees without proper grounds, in bad faith or fail to follow procedure prescribed under law. An employee that has been dismissed unfairly can bring an action against the employer for unfair dismissal. Damage is the most sought remedy of the employee for unfair dismissal claims. Punitive damage is a form of monetary remedy awarded by the court in addition to the actual damage to the aggrieved party. Punitive damage is awarded as a punishment to the wrongdoer. Punitive damage has become the remedy in both Malaysia and New Zealand. The objective of this study is to analyse the punitive damage awarded by the Malaysian Industrial Court and New Zealand Court in unfair dismissal cases. This study employed a qualitative method with reference to journal articles, relevant statutory laws and case laws on unfair dismissal cases with punitive damage as an award. The findings show that punitive damages in unfair dismissal cases have been awarded by the Malaysian industrial court and New Zealand court against employers on the grounds that the dismissals were made under bad faith. This study is significant as it expands the application of punitive damage in unfair dismissal cases and improve the system's legal certainty.

Keywords: Punitive Damage, Unfair Dismissal, Employment Law, Industrial Relations, Remedy.

Introduction

Dismissal is the act of terminating an employment contract unilaterally (Ayadurai, 1998). There are two categories of dismissal: firstly, dismissal with a just cause and secondly, dismissal without a just cause or also known as unfair dismissal. All forms of dismissal can either be fair or unfair and should be distinguished based on evidence. Dismissal with a just cause occurs when the dismissal is done according to due process while dismissal without a just cause or excuse is when an employer dismisses an employee without following proper procedure or the dismissal is done without reasonable grounds. The burden of proving fair dismissal lies on the employer. The employer must establish that the termination is caused

by the employee's wrongful act during their employment period and the dismissal is done according to prescribed procedures under the Employment Act 1955 and company's policy on dismissal procedure. An employee that has been dismissed unfairly can bring an action against the employer for unfair dismissal. The remedy for unfair dismissal can be in the form of reinstatement and damages. According to the Malaysian Department of Industrial Relations, the number of cases heard for unfair dismissal was high in 2017 with 1,170 cases, in 2018 with 1,116 cases, in 2019 with 1,141 cases and in 2020 with 1,096 cases. According to the Malaysian Department of Labour, in the year 2021, the total amount awarded as compensation in unfair dismissal cases was RM2,516,002.02. This trend shows that there are employers that fail to adhere to procedure in dismissing their employees and these employees are seeking damages as a form of remedy. Commonly, damages are preferred by the employee when seeking remedy for unfair dismissal instead of reinstatement. One form of damages is punitive compensation which is mostly given by the court for breach of contract and tort cases. Recently, the Industrial Court has awarded punitive compensation in industrial disputes as a means of remedy for the aggrieved employee. The objective of this study is to analyse the punitive compensation awarded by the Industrial Court in unfair dismissal cases in Malaysia and New Zealand. The first part of this article will explain the remedy of punitive compensation and punitive compensation from the common law perspective. This is followed by a discussion on the approaches of punitive compensation in Malaysia and New Zealand for unfair dismissal cases.

Literature Review

Remedy of Punitive Compensation

Remedy for damages is defined as compensation awarded for the losses suffered by the aggrieved party due to the wrongful action of the wrongdoer. There are several objectives of using remedy (Fong, 2004). The first objective is to provide specific reliefs that are applicable in specific performance (an order of the court to the defendant for the breach) and injunction (an order of the court to refrain the defendant from any wrongful act). The second objective is to provide relief for damages in the form of monetary compensation to recompense the losses of the injured party (plaintiff). The third form of remedy is restitution, where the court will order the defendant to return the received benefits (any types of profits or advantage or payment received) to the plaintiff. Covell, W. et al. (2012) posited that remedies are treated as "addenda" to the "substantive" subjects of contract, tort and equity. The law of remedies is applicable in breach of contract, torts and equity where a defendant had acted unlawfully towards the plaintiff and violated their rights according to law. The fundamental purpose of awarding remedies in civil, contract and tort cases are not to punish the wrongdoer but has the aim of putting the innocent party in the position before the breach.

Awarding monetary compensation has been widely practised since the 1900s to solve industrial disputes. This solution was based on the practice of common law to award damages as a traditional remedy. It is important to note that the method of remedy claimable under common law differs from the method of remedy claimable under statutory law (Industrial Relations Act 1967). Punitive compensation is a form of remedy awarded to the aggrieved party. According to Black's Law Dictionary, punitive compensations are "damages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit" and "damages assessed by way of penalising the wrongdoer or making an example to others". Punitive compensations are awarded in most tort cases as a compensatory action for injury suffered due to the negligence of the wrongdoer. Punitive compensation is normally not

awarded in the context of contract law. Currently, it is observed that there is no consensus among countries on the award of punitive compensation. Punitive compensation is not available in civil law countries, particularly in private cases, but it is practised in common law countries (John, 2003). In civil law countries, punitive compensation is awarded in a criminal proceeding as a penal sanction, and limitations or prohibitions are considered as a fundamental public policy (McGregor, 1988). Punitive compensation has been applied in common law countries for more than 200 years, and this compensation is allowed and applied widely in such countries as Australia, New Zealand, England, Canada and the United States.

Punitive Compensation from Common Law Perspective

In common law countries, there is no uniform practice in awarding punitive compensation based on the case facts such as purpose of award, factors and action which constitute the reason for awarding compensation, and the amount of compensation to be awarded. Punitive compensation appeared in common law around the eighteenth century in two trespass cases: Wilkes v. Wood, 95 Eng. Rep. 766 and Huckle v. Money, 95 Eng. Rep.768. The punitive compensation was awarded based on the jury's verdict, and the award was given with the purpose of compensating the plaintiff for ethereal injury such as hurt feelings, humiliation, mental anguish and embarrassment. However, it has been argued that the legal rationale for punitive compensation has ceased to exist, as well as no longer necessary nor justifiable (James, 1984). In the 20th century, English Law began to separate compensation under the doctrine of aggravated damages and punishment as punitive compensation (Bailey, 1989). Punitive compensation is applicable in common law, even though it is absent in the statutes. In 1964, the judge in Rookes v. Barnard All England Report 367, 407 (1964) ruled that punitive compensation is permissible in three instances: 1) where there are oppressive, arbitrary or unconstitutional actions, 2) where the conduct of defendant was calculated to make a profit for himself which exceeds the payable compensation for plaintiff, and 3) actions where punitive compensation is authorised. The ruling in Rookes v Barnard has been limited to tortious action in a few cases such as Cassell & Co., Ltd. v. Broome, [1972] 1 All E.R. 801 (H.L.). However, in Kuddus v Chief Constable of Leicestershire Constabulary [2002] 2 A.C. 122, the House of Lords rejected the limitation on the grounds that "such a rigid rule seems to me to limit the future development of the law even within the restrictive categories adopted by Lord Devlin [in Rookes] in a way which is contrary to the normal practice of the courts" (John, 2003). The Kuddus case has broadened the types of action and damages that could be claimed and awarded under punitive compensation. With that, the availability of punitive compensation in England has been confined by six limitations: 1) if, but only if test, where compensatory damages are inadequate to punish the defendant or wrongdoer; 2) plaintiff is the victim of defendant's punishable behaviour; 3) punitive compensation inappropriate when the defendant has been punished for the wrongful conduct; 4) the existence of multiple plaintiffs will limit the availability of punitive compensation; 5) if the action of defendant is in good faith, punitive compensation is not available; and 6) if the plaintiff has contributed or is the cause of action, punitive compensation is not applicable (Kuddus v Chief Constable of Leicestershire Constabulary [2002] 2 A.C. 122). With respect to the quantum of punitive compensation, the court has to consider various factors to determine the damages awarded to the plaintiff. In common law, dismissal cases will be referred to the civil court, where "the courts tend to uphold summary dismissal for what was often a relatively trivial act of misconduct on the part of the workman" (Anantaraman, 1997). The court also often "adopted

a standard code of conduct that prioritises demanding employers, rather than standards that are more closely fitted to the theoretical rule".

Moreover, other common law countries such as Australia, New Zealand, Canada and the United States have declined to restrict punitive compensation based on the categories in Rookes v. Barnard. In Australia, the award of punitive compensation must not be proportional to the amount of compensatory damages, as long as the award is delivered with reasonableness and justice, while the damages must not be too great nor too little for the wrongful conduct of the defendant and the punishment should be deserving. In New Zealand, punitive compensation is available in most areas and as a general rule, the punitive compensation is awarded when it is necessary to teach the wrongdoer for the action. The award of punitive compensation must be proportionate to the amount of misconduct or wrongful action committed by the wrongdoer (Ellison v. L, [1998] 1 N.Z.L.R. 416). The court determines the size of punitive compensation to be awarded based on six factors: 1) the gravity of the defendant's misconduct, (2) the principle in awarding the awards within the scope, (3) the windfall to the plaintiff, (4) the defendant's resources, (5) the injury or loss to the plaintiff, and (6) any prior punishment on the defendant. Yet, punitive compensation (damages) is not applicable in breach of contract cases. Therefore, in the United Kingdom, New Zealand and Australia, the statute or Parliament is largely silent in awarding punitive compensation in employment law. Punitive compensation becomes an exceptional remedy awarded for pure breach of contract law in common law (Conrad, 2018). For more than 30 years, punitive compensation has been prevented from being awarded in pure breach of contract law cases. In the case of Vorvis v Insurance Corporation of British Columbia [1989] 1 S.C.R 1085, the court established an important precedent by recognising punitive compensation via two conditions, which are actionable wrong and as a punishment for harsh, vindictive, reprehensible and malicious nature. This decision was criticised due to the confusion between actionable tort and actionable wrong standard that was not clearly expressed by the learned judge.

Moreover, in Whiten v. Pilot Insurance Co. [2002] SCC 18, [2002] 1 SCR 595, the Supreme Court of Canada awarded punitive compensation by reaffirming the decision made in Vorvis that actionable wrong should be extended from tort law for any breach of contract cases. The Whiten case induced the idea of breach of duty and breach of contractual obligations, by transforming the infrastructure of the law of punitive compensation from a tort discipline into a general civil doctrine (Yehuda, 2005). In Bhasin v Hyrnew [2014] SCC 71, [2014] SCR 494, the learned judged established the following principles in reaffirming the award of punitive compensation for pure breach of contract: recognising new common law duties such as the principle of good faith, and duty of honest performance in contractual obligation (Shanon, 2015). The above discussion denotes that punitive compensation is applicable in breach of contract law as a deterrence for wrongdoers. It also reaffirms that actionable wrong in contract law should be treated separately from actionable tort standard. The breaches of good faith and honesty in complying with a contract are also allowed as one of the actionable wrongs to award punitive compensation in the breach of contract law.

Research Method

This study employed a qualitative research method with reference to journal articles, statutory provisions such as the Employment Act 1955, Industrial Relations Act 1967 and the Employment Relations Act 2000. Content analysis is adopted to reach the research objectives

of this study by analysing the relevant provisions and case law. Unfair dismissal cases in Malaysia and New Zealand for comparative purpose.

Punitive Compensation for Unfair Dismissal Cases in Malaysia

Punitive compensation has been awarded in some cases of Malaysian industrial disputes. The rationale for awarding compensation was made clear by the learned judges. In most cases, there was a mala fide reason in dismissing the workman. Therefore, awarding punitive compensations is allowed in industrial disputes cases, and subject to logical reasons such as mala fide on the part of the employer. The decision of the Chairman in KFC Technical Services Sdn Bhd v. The Industrial Court of Malaysia & Anor [1992] 2 CLJ 634 confirmed a ruling decision for punitive compensations and became a landmark case in industrial relation disputes. On the decision of the Industrial Court in Sivabalan a/l Poobalasingam v. Kuwait Finance House (Malaysia) Berhad [2016] 1 ILR 542 the learned Chairman viewed:

"It is a trite principle of law on redundancy which amounts to retrenchment of an employee, that the company has the right to reorganise their business in any manner the company considers best. However, this right is limited by the rule that the company must act bona fide and not capriciously or with motives of victimisation or unfair labour practice. Neither does this right entitles the company, under the cover of reorganisation, to rid itself of an employee in order to replace him with another person seemingly more favourable to the company. From the whole of the evidence adduced before this court, the court finds that the company has failed to abide by these important principles of law. The reasons given for the alleged redundancy by the company is without good faith, indubitably unwarranted and was not the real and main reason for the dismissal. The claim of "redundancy" was merely a convenient and ingenious means to terminate the claimant. In view of that, after taking into account the totality of the evidence adduced by the parties and bearing in mind subsection 30(5) of the Industrial Relations Act 1967 "which requires the court to act according to equity, good conscience and the substantial merits of the case without regard for technicalities and legal form, the court finds that the company has failed to prove the position of the claimant as redundant on a balance of probabilities; and thus the claimant's dismissal is without just cause or excuse."

Retrenchment is one type of dismissal which can fall under fair or unfair dismissal. Retrenchment is an approach to reduce redundancy of positions and usually happens during times of economic downturn, technological change, business relocation or stagnancy. Unlawful dismissal takes place when a dismissal occurs because of discriminatory reasons and without the issuance of any notice or legal reason. The above decision denotes that reorganisation of a company is allowed and the retrenchment of the employee should be done accordingly with a valid reason. Punitive compensation may be granted at the Court's discretion.thi case, the Court granted 2 month's salary for every year of completed service in lieu of reinstatement, having regard to the circumstances that showed that the company had acted in bad faith.In the case of Sivabalan, the company failed to provide a valid reason for the retrenchment and was unable to prove the redundancy was in good faith. It was revealed that the company intended to rid the employee under redundancy. The company had acted in mala fide and breached good faith as well as honesty in performance. This case also indirectly reaffirms the ruling precedent in the Vorvis case which is actionable wrong and punishment for a harsh and vindictive action committed by the company. With the above-arrived decision, the court viewed that the company was liable to pay two months of salary for every year of service for the mala fide redundancy. The court has power to award punitive

compensations under Section 30(5) of the Industrial Relations Act. The award was delivered as a deterrence to the harsh action of the company. The decision was made with reference to Hotel Jaya Puri Bhd v. National Union of Hotel Bar & Restaurant Workers & Anor [1980] 1 MLJ 109, where the Federal Court stated:

"If there is a legal basis for paying the compensation, the question of amount of course is very much a matter of the discretion which the Industrial Court is fully empowered under section 30 of the Industrial Relations Act to fix…"

In Hotel Jaya, the Federal Court found that the decision of the Industrial Court to award two months' salary as a punitive compensation did not have any legal basis as an award for an unfair dismissal case. Yet, the award was given as an exercise of discretionary power under Section 30 of the Industrial Relations Act 1967. In contrast, in Sivabalan, the Industrial Court found that the dismissal was without cause and the court was entitled to award punitive compensation as a deterrence for mala fide dismissal. Similarly, in the decision of the Industrial Court in Zakaria Ahmad v. Airasia Bhd [2014] 3 ILR 201, the court viewed:

"The issues are (a) whether the court has the power to grant exemplary or punitive compensation in appropriate cases and (b) if the answer to issue (a) is in the affirmative then what is the quantum that should be awarded in the instant case. As far as issue (a) is concerned, the court's power to grant exemplary or punitive compensation is not prohibited by the Industrial Relations Act 1967. In fact, the granting of exemplary or punitive compensation is a matter of discretion of the court (see Warren J Carey v. Coca-Cola Far East Limited (Malaysian Branch) & Anor (High Court Judicial Review) No. R3 (2)-25-339-2006 [2010] 1 LNS 1474."

In the case of KFC Technical Services Sdn Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Perdagangan [1989] 1 ILR 535 (Award no. 83 of 1989) and Soon Bao Corporation Sdn Bhd & Ors v. Kesatuan Pekerja-Pekerja Perusahaan Logam [2000] 1 ILR 413 (Award no. 153 of 2000), punitive compensation was awarded in the sum of two months' salary for each year of service. The court held that

"After analysing all the factors, firstly, I am fully in agreement with the submission of the claimant's counsel that awarding of exemplary or punitive compensation in a particular case is a question of discretion to be exercised by the court depending on the facts of each particular case. Secondly, based on the facts mentioned above pertaining to the irresponsible manner by which the claimant's case had been dealt by the company, I am fully in agreement with the submission of counsel for the claimant that this is indeed a fitting and proper case for punitive compensation to be awarded. I am of the view that awarding two months' salary as punitive compensation (damages) for each year of completed service of his employment in lieu of reinstatement is fair and reasonable in addition to back wages."

The judge's decision was cited in the Sivabalan case and shares a similar point in the case of a deterrence for mala fide action of the company towards the employee. Furthermore, in KFC Technical Services Sdn Bhd v. The Industrial Court of Malaysia & Anor [1992] 2 CLJ 634, the High Court held that:

"I find that the Industrial Court had correctly made the order of payment of compensation to the dismissed employees and having regard to the reasons and circumstances leading to the dismissal of the employees, I think the amount of compensation of two months' salary for each year of service, which the Industrial Court described as punitive compensation, is justified..."

The above precedent of cases clarifies that, in accordance with Section 30(5) of the Industrial Relations Act 1967, the court can act according to equity and on a legal basis to deliver the award for the claimant. Furthermore, the court should exercise its discretionary power to

uphold justice in the case of unfair dismissal by considering the merits of the case, and the treatment meted out by the company whether it was bona fide or mala fide. The termination of the workman should be exercised in a proper manner without causing any harm to the workman or the company. A punitive compensation is awarded as a means to punish the breached party and compensate the innocent party for emotional suffering, such as mental distress or loss of reputation. Due to unfair dismissal, the employee may suffer economic losses, as well as non-pecuniary losses such as trauma or tarnished reputation (Mohamed, 2016).

The rationale for awarding punitive compensation in the abovementioned cases is to prevent the defendant from avoiding liability and deprive the rights and interest of an individual. This is to prevent the defendant from gaining any illicit benefit from the plaintiff in a malicious way. The concept of deterrence is known as an act of discouraging an unlawful behaviour with the purpose of instilling fear of punishment, whereas the concept of punishment is known as sanction for a wrongful action committed. In awarding punitive compensation, the court should distinguish the differences between the objectives of deterrence and punishment, so the measure of punitive compensation award is in line with upholding justice and balances the interest of employer and employee.

Punitive Compensation for Unfair Dismissal Cases in New Zealand

The employment law practised in foreign countries can be relevant and is based on the virtue of Section 3 of the Civil Law Act 1956 alongside the unwritten law of judicial precedent. The employment law in New Zealand offers insights into the practicability and function of the Malaysian labour system. New Zealand has a similar legal, political and industrial relations environment to Malaysia. Furthermore, New Zealand possesses strong employment rights on accessibility and specialisation of the employment institution. Corby (2000) indicated that the employment law in New Zealand has been effective in upholding justice for both employers and employees as its existing legal provision was designed to uphold a harmonious relationship. Thus, it will be an advantage to adopt the system of New Zealand as a benchmark in improvising the existing legal provision in Malaysia. The term used by the Employment Tribunal in New Zealand is compensation or compensatory award for monetary remedy. Report shows that the number of active cases in employment court increasing since 2017 until now (Employment Court of New Zealand, 2023).

In New Zealand, according to Section 123(c)(i) of the Employment Relations Act 2000, the Employment Tribunal is allowed to award compensation to the worker for humiliation, loss of dignity, injury to the employee's feelings, and for loss of any benefit in additional to the reimbursement of wages and compensatory awards. In the case of Jane v Roberts NZ Limited [2023] NZERA 256, the court awarded compensation for humiliation, loss of dignity and injury to feelings for the worker's personal grievance due to unfair dismissal. Jane was employed by Roberts NZ Limited as a carpenter until his dismissal by way of redundancy.

Conclusion and Recommendation

From the analysis above, it can be observed that punitive compensation is awarded both in the Industrial Court of Malaysia and New Zealand. In Malaysia, the court has discretion to award punitive compensation in unfair dismissal cases. the Industrial Court has the power to award punitive compensation under Section 30(5) of the Industrial Relations Act 1967 which provides that:

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

However, in New Zealand, punitive compensation is clearly stated under Section 123 of the Employment Relations Act 2000.

"Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

(c) the payment to the employee of compensation by the employee's employer, including compensation for—

humiliation, loss of dignity, and injury to the feelings of the employee;"

Section 123 (c) (i) is a good model to improve the punitive compensation as a form of remedy for unfair dismissal in Malaysia. It is recommended to insert a specific provision in the Malaysian Industrial Relations Act on the punitive compensation as currently punitive compensation for unfair dismissal in Malaysia is awarded at court's discretion.

The purpose of the law is not to punish an individual but, to prevent them from performing any wrongful act where individual adherence is an obligation, rather than an option. The law denotes the availability of legal punishment or penalty imposed on individuals for infringing the law, to prevent violation based on the consequences of an individual's act. The award of punitive compensation should be served as a reminder to employers that termination of employees should fall under grounds of good faith. The employer should be aware that termination of employees with mala fide action or without any evidence will result in severe consequences. Although employers have a right to reorganise or restructure their business and terminate employees in the best interests of the business, an employer who acted in bad faith during employee termination, has to deal with punishment in the form of punitive compensation.

The findings of this study contribute theoretically to the area of employment law where it extends the type of damages that can be claimed by employees under the unfair dismissal. The award of punitive damages in unfair dismissal serve a lesson for employer to be just and fair in dismissing employee.

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