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# Balancing Ideals and Reality: Exploring the Dilemma of Legal Remedies in Unjust Dismissal

## *Mengimbangi Ideal dan Realiti: Penerokaan Dilema Remedi Undang -Undang dalam Pemecatan yang Tidak Adil*

FATHAL SYAZALLY MOHD SHAFFEE, NUR KHALIDAH DAHLAN* &
JADY@ZAIDI HASSIM

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ABSTRACT

*The primary quandary in legal theory pertains to whether the law ought to mirror the current state of circumstances or aspire to an ideal standard. This study has the potential to be applied to a variety of legal domains, including employment law, with a particular emphasis on the concept of remedies for cases involving terminating employees unfairly. Reinstatement is the principal type of remedy that can be utilised in situations involving unfair termination. These kinds of claims are granted by the Industrial Court only infrequently because of specific justifications. The objective of this article is to provide a comprehensive explanation of the fundamental concepts that underpin Western jurisprudence within the context of legal theory. Through a variety of approaches, including legislative interpretations, case studies, and practical applications, the essay demonstrates the enduring impact and adaptability of legal principles in the context of seeking remedies in the form of monetary compensation. The disparity between legislative restrictions and the remedies available to employees becomes clearer through a critical analysis of key legal concepts articulated by notable scholars. By examining their interpretations, one can uncover the underlying tensions between statutory limitations and judicial remedies, revealing whether the law truly serves its protective purpose or merely imposes procedural hurdles.*

*Keywords: Reinstatement; legal theory; unjust dismissal; western jurisprudence; financial compensation*

ABSTRAK

*Perkara yang menjadi persoalan utama dalam teori perundangan adalah sama ada suatu undang-undang tersebut perlu mencerminkan keadaan semasa atau berusaha kepada mencapai suatu piawaian yang ideal. Kajian ini berpotensi diaplikasikan dalam pelbagai bidang perundangan, termasuk undang-undang pekerjaan yang memberikan tumpuan secara khusus kepada konsep remedi bagi kes-kes pemecatan pekerjaan secara tidak adil. Pemulihan kerja merupakan remedi utama yang boleh digunakan dalam situasi yang melibatkan pemecatan kerja yang tidak adil terhadap pekerja. Walau bagaimanapun, tuntutan sebegini adalah jarang diberikan oleh pihak Mahkamah Perusahaan atas sebab-sebab justifikasi tertentu.Objektif artikel ini adalah bertujuan untuk memberikan penjelasan mengenai konsep-konsep asas yang mendasari ilmu jurispruden Barat didalam konteks teori undang-undang dan juga berkaitan dengan remedy pemulihan kerja. Melalui pendekatan seperti kaedah tafsiran perundangan, kajian kes, serta aplikasi praktikal, penulisan ini menunjukkan kesan serta keanjalan prinsip-prinsip perundangan dalam konteks tuntutan remedi berbentuk pampasan kewangan.Ketidakseimbangan antara sekatan perundangan dengan remedi yang tersedia kepada pekerja menjadi lebih jelas melalui analisis kritikal terhadap konsep perundangan utama berhubung pemecatan tidak adil dan pandangan yang diutarakan oleh para sarjana terkenal. Dengan meneliti tafsiran mereka, ianya dapat mengenal pasti punca ketegangan asas antara batasan statutori dengan remedi kehakiman. Seterusnya perkara ini akan memberikan gambaran bahawa sama ada undang-undang benar-benar berfungsi seperti yang diperuntukkan atau sekadar mewujudkan halangan prosedur semata-mata.*

*Kata Kunci: pemulihan kerja; teori undang-undang; pemecatan tidak adil; jurispruden barat; pampasan kewangan*

## INTRODUCTION

The contrast between "law as it is" (legal positivism) and "law as it ought to be" (natural law theory) is fundamental to comprehending the theoretical and practical aspects of the reinstatement remedy in employment law. "Law as it is" advocated by thinkers such as John Austin (Austin, 1970) and H.L.A. Hart (Hart, 1994) that underscores the implementation of codified regulations in their literal form devoid of moral or social considerations. Conversely "law as it ought to be" as proposed by natural law theorists such as St. Thomas Aquinas (D'Entreves, 1970) and Lon L. Fuller (Fuller, 1969) emphasises justice, equity, and the ethical aims of the law.

Legal positivism influences employment law in both beneficial and detrimental ways since it dictates the formulation, interpretation, and enforcement of regulations governing employer-employee relationships. This philosophical perspective on law underscores the significance of codified statutes and recognised legal standards, frequently favouring the literal interpretation of the law over notions of fairness or morality. Thus, legal positivism influences the formulation and implementation of employment legislation, affecting employee rights and protections.

Legal positivism prioritises "law as it is" over "law as it ought to be" asserting that the validity of legal laws stems from their formal enactment rather than moral or ethical considerations. It also has numerous practical advantages such as clear legal framework and enforcement of worker's rights such as wrongful termination in employment law especially in domains where explicit regulations and enforceable mechanisms are essential for safeguarding workers' rights and governing company conduct.

## METHODOLOGY

This study adopts a doctrinal legal research approach, focusing on primary and secondary legal sources to analyze the remedy of reinstatement in the UK and Malaysia. The research is qualitative in nature and follows a comparative legal framework to assess the influence of Western jurisprudence on reinstatement remedies in Malaysia. The acquired data is examined through the content analysis method throughout the purification phase. (Syariah et al., 2020) The findings will provide a comparative perspective on the application of reinstatement in UK and Malaysia, evaluating its alignment with Western jurisprudence and the effectiveness of reinstatement as a legal remedy.

## REINSTATEMENT FROM THE JURISPRUDENCE PERSPECTIVE

These jurists contributed to legal theory in ways pertinent to labour law in Malaysia, shaping the interpretation, application, and comprehension of legislation governing employer-employee relationships.

Malaysian labour law integrates components from positivist, realist, and principle-based legal systems. It embodies Austin's command theory inside statutory frameworks, Hart's rule-based legal system, Dworkin's rights-oriented perspective in judicial interpretations, Kelsen's hierarchical structure, and the pragmatism and social issues emphasised by Holmes and Llewellyn in industrial relations.

## JOHN AUSTIN

John Austin's point of view is firmly anchored in "law as it is." (Sumargi et al., 2023) As a prominent proponent of legal positivism, Austin underscores the necessity of examining law descriptively and empirically, independent of moral or ethical implications. He emphasises comprehending law as it manifests within a specific society predicated on its origins and enforcement mechanisms, rather than its moral ideal.

Based on John Austin's Command Theory of Law, reinstatement can be understood as law as a command where the remedy reflects the sovereign authority's command to the employers to restore employees to their former positions when dismissal is found to be without cause or excuse. Failure of the employer to comply with the reinstatement order could result in legal consequences such as sanctions for disobedience. (Fanani & Zulkarnain, 2022)

Although John Austin's legal positivism is not entirely implemented in Malaysia, aspects of governmental authority, adherence to statutes, and enforcement via punishments correspond with his theory. Malaysian labour law encompasses collective bargaining, judicial discretion, social justice, and industrial relations concepts, extending the legal framework beyond Austin's inflexible command paradigm. Austin's theory is predominantly utilised to comprehend the framework of legislative authority and legal enforcement mechanisms in employment and industrial relations, rather than to inform judicial decision-making or the resolution of industrial disputes.

## HERBERT LIONEL ADOLPHUS HART

H.L.A. Hart's perspective is fundamentally based on "law as it is," aligning with the principles of legal positivism. His perspective however is more nuanced and adaptable than that of early positivists such as John Austin.(Dyzenhaus, 2011) Hart emphasises the description and analysis of law as a social construct distinct from morality. However, he concedes that moral considerations may impact legal systems and judicial interpretation.(Kaplan, 2021)

H.L.A Hart focuses on the distinction between primary and secondary rules, and reinstatement can be seen as a primary rule that imposes a duty on employers to restore the employee to the former position when the dismissal is unjust. According to Hart, the secondary rules can be seen as a rule of adjudication where the court determines whether a dismissal is unjust and warrants a reinstatement.(Halim & Amni, 2023)

Hart's approach is relevant in Malaysia, particularly in industrial relations and labour legislation. Some elements are not entirely followed in job decisions because of the impact of morality, social justice, and financial concerns. The legal positivism of H.L.A. Hart is very pertinent in Malaysia's labour law system because of the rule of recognition (legal validity of statutes), the difference between primary and secondary rules (structured lawmaking and execution), the function of the court and the interpretation in resolving uncertainty. It does not, however, apply entirely since political discretion shapes dispute settlement while morality and social justice impact labour legislation. Industry practices and customs shape employment relationships. Though, in practice factors of morality, discretion, and real-world economic conditions limit its rigorous application, Hart's theory is a useful analytical tool for understanding how labour laws function in Malaysia.

RONALD DWORKIN

In Taking Rights Seriously,(Douglas, n.d.) Dworkin mainly argues that legal rights ought to be seen as moral rights. He argued the prevailing "positivist" perspective, which holds that laws are merely guidelines social institutions establish. Against this, he contends that law comprises procedural due process, justice, and fairness. In "hard cases", Dworkin argues that judges must go beyond following current legal guidelines and consider fundamental moral rights.(Santillán, 2022) Under his "rights as trumps" concept, rights restrict the capacity of majorities to enforce their opinions via laws.(Weinrib, 2017)

According to him, rights create "duties of principle" that must be honoured even in conflicting policy objectives. Dworkin contends that judges should decide on complex matters via an "integrity" strategy. This implies reading the law in a way that fits legal judgements into a logical moral narrative, thereby enabling the best possible interpretation of the law.(Goździ-Roszkowski, 2023) According to him, integrity produces "right answers" in difficult situations rather than only being a matter of personal inclination. However, Dworkin's idea needed to draw criticism as well.

Some claimed he undervalued the part discretion plays in court decision-making and exaggerated the coherence of law. Others asked whether moral rights limit legal interpretation in the manner he proposes. Taking Rights Seriously seeks to create a liberal philosophy of law based on the importance of individual rights and the necessity of judges to interpret and implement those rights morally. Though elements of Dworkin's theory remain debatable, his arguments for "rights as trumps" and the judicial virtue of "integrity" were fresh and startling.(Spaak, 2008)

Within the framework of the reinstatement remedy, Dworkin's point of view provides a prism through which one may view how courts strike a balance between legal rules (statutory provisions on reinstatement) and ideas of justice, equality, and fairness. This method helps to balance the conflict between strict legislative rules and the complex reality of workplace conflicts.

Dworkin's idea of "law as integrity" calls for courts to view the law as a coherent story in which every ruling fits society's ideals and earlier court rulings. In employment law, this implies seeing reinstatement as a remedy reflecting values of justice, decency, and fairness rather than only a legislative right.

According to Dworkin, court rulings should be guided by values rather than laws.(Muñiz, 1997) Reinstatement cases are governed by principles such as corrective justice (restoring employees to their rightful position after wrongful dismissal), equality (ensuring that employees are treated fairly regardless of power imbalances) and judicial discretion must be informed by practicality which is the consideration of operational reality to prevent undue hardship on employers in addition to statutory rules.

Dworkin's viewpoint is not entirely represented by the notion of "law ought to be" in an abstract context. He does not entirely reject the idea of “law as it is” and believes it cannot be fully understood without engaging “law as it ought to be”.(Kovalenko, 2023) He perceives the law as a synthesis of norms and principles wherein the process of legal interpretation necessarily incorporates moral reasoning to ascertain the most coherent and equitable interpretation of the law. Dworkin reconciles "law as it is" with "law as it ought to be" by emphasising the incorporation of morality into the interpretation of current legal frameworks rather than establishing a wholly normative ideal.

Dworkin's theory is pertinent to Malaysian labour law because of its focus on workers' rights, equity, and judicial discretion in industrial conflicts. Dworkin's legal theory profoundly impacts Malaysian labour law, especially advocating for equity, justice, and judicial discretion in

industrial conflicts. The Industrial Court embraces concepts consistent with his theory, safeguarding workers' rights by legislation and judicial precedents. Nonetheless, its comprehensive implementation is obstructed by governmental interference, economic strategies, and the emphasis on communal rights over individual rights. These limits can restrict judicial discretion and justice-oriented reasoning underscoring the conflict between theoretical legal ideals and practical industrial relations. Dworkin's theory offers a robust basis for justice, although extrinsic socio-political circumstances hinder its full implementation.

## HANS KELSEN

Hans Kelsen's pure theory of law significantly contributes to legal theory. Kelsen's theory emphasises the law's autonomy and self-contained nature separate from morality and other social considerations.(Hadi & Michael, 2022) According to Kelsen, law should be understood as a system of norms created and enforced by a hierarchical structure of legal norms.(Fanani & Zulkarnain, 2022).This hierarchical structure is based on the idea of a "basic norm," which serves as the foundation for all other legal norms.(Fillafer, 2021) Kelsen's pure theory of law rejects the idea that law is based on natural or moral principles. Instead, he argues that law is a purely formal system that can be analysed and understood through its internal logic and structure.(Paulson, 2018)

This approach allows for a scientific and objective study of law free from subjective interpretations or moral judgments.(Małecka, 2016) One of the key concepts in Kelsen's theory is the concept of normative imputation. Normative imputation refers to attributing legal norms to individuals or groups.(Langford & Bryan, 2013) This concept reflects Kelsen's attempt to bridge the gap between constructing a legal theory of positive law and establishing a cosmopolitan international order based on international law.(Langford & Bryan, 2013)

Kelsen's theory also addresses the issue of sovereignty. He criticises John Austin's conception of law as sanction-backed sovereign command and argues for a different understanding of sovereignty.(Vinx, 2011) Kelsen's conception of sovereignty is based on the idea that legal norms derive their validity from a higher norm rather than a sovereign's will.(Vinx, 2011) This perspective challenges traditional notions of sovereignty and highlights the importance of legal norms in determining the legitimacy of a legal system. Overall, Kelsen's pure theory of law provides a systematic and rigorous framework for understanding the nature and structure of law.(Hadi & Michael, 2022) It emphasises the autonomy of law and the importance of analysing legal norms in their terms, separate from moral or political considerations.(Fanani & Zulkarnain, 2022) Kelsen's theory has significantly impacted legal philosophy and is influential in contemporary legal scholarship.

Hans Kelsen's "Pure Theory of Law" underscores the distinction between law and morality, politics, and other social sciences. His approach emphasises the hierarchical arrangement of legal norms, with each norm's validity originating from a superior norm, ultimately leading to the Grundnorm (basic norm).(Griffo et al., 2020) Kelsen posited that law constitutes a set of standards that should be implemented, irrespective of moral or social factors.

Hans Kelsen's viewpoint does not pertain to "law ought to be" in a moral or normative context. His Pure Theory of Law examines law as a set of standards distinct from morality or other external factors. His employment of the term "ought" pertains to legal obligations inside the legal framework rather than moral imperatives. Although his theory offers clarity and analytical precision, it faces criticism for being excessively formalistic and disconnected from the practical realities of law, especially its moral and social aspects.

Kelsen's theory is particularly relevant in Malaysia for comprehending the legal system's structure, statutory hierarchy, and the supremacy of the Federal Constitution. Kelsen's theory is fundamental to Malaysian labour law, with the Federal Constitution serving as the Grundnorm, establishing a structured legal hierarchy in which statutes and regulations are rigorously implemented. Nonetheless, its implementation is influenced by pragmatic factors. In contrast to Kelsen's strictly logical methodology, Malaysian labour law integrates social justice and equity principles. Furthermore, legislative and ministerial discretion affects industrial relations, and judicial interpretations tend to be adaptable rather than rigidly hierarchical. These discrepancies underscore that although Kelsen's theory offers a legal foundation, Malaysia's labour law reconciles legal formality with pragmatic and justice-oriented factors.

## OLIVER WENDELL HOLMES AND KARL LIEWELYN

Legal realism questions the formalist idea that laws are fixed and derived from abstract ideas.(*Oliver Wendell Holmes, "The Path of the Law," 10 Harvard Law Review 457 (1897)*, 2007). It highlights the "law in action"—how laws are carried out and understood in actual events. Scholars like Karl Llewellyn and Oliver Wendell Holmes Jr. contend that social conventions, pragmatic reality, and the setting of legal conflicts all shape court rulings. Within the framework of reinstatement remedies, realism emphasises how courts and tribunals balance elements such as workplace dynamics, employer-employee relationships, and societal developments in their decisions, often in direct contrast to strict legal norms.

Oliver Wendell Holmes Jr.'s viewpoint does not focus on "law as it should be" in a moral or normative context.(Kellogg, 2006) His legal realism prioritises "law as it is," concentrating on the pragmatic application of law and the conduct of legal practitioners.(Sery, 2022) He recognises the necessity for law to adapt pragmatically to society's demands, although his methodology is grounded on realism and pragmatism rather than moral or ethical idealism.(Swaminathan, 2021) Consequently, Holmes' perspective signifies a divergence from normative legal theories, such as natural law, and is more congruent with the pragmatic reality of legal systems.

Karl Llewellyn's approach does not concern "law as it ought to be" in a moral or idealistic context. His legal realism prioritises the pragmatic implementation of the law, concentrating on its societal function and adaptability to evolving circumstances.(Sery, 2022) His instrumental and pragmatic perspective on law focuses on outcomes that meet society's demands, grounded not on moral imperatives but in a functional approach to legal systems.(Do & Schertzer, 2023) Consequently, Llewellyn's viewpoint is more accurately interpreted as "law as it functions" rather than "law as it should be."

Legal Realism is particularly relevant to Malaysia's labour law and industrial relations framework, notably in how labour courts interpret employment legislation in light of social realities. Legal realism profoundly influences Malaysian labour law by prioritising pragmatic workplace conditions, collective bargaining, and the dynamic evolution of employment legislation. The Industrial Court considers practical considerations in addition to rigid legal texts based on the conceptions of Holmes and Llewellyn. Nonetheless, its comprehensive implementation is constrained by the pre-eminence of labour legislation, political and ministerial discretion, and employer-centric economic policies. These limits occasionally compromise judicial independence and the flexible, pragmatic methodology endorsed by legal realism. Although legal realism influences decision-making, legal formalism and economic factors hinder its full implementation within Malaysia's labour structure.

The concept and implementation of reinstatement focus on restoring an employee to their former position following an unjust termination. Reinstatement is commonly viewed as a primary remedy in labour law to safeguard workers' rights and foster equity in workplace relations. Its execution, however, differs by jurisdiction and is contingent upon jurisprudential definition, the legislative framework, practical factors, and judicial discretion.

The remedy of reinstatement brings to light the tension between these two points of view, mainly in situations where the courts must strike a balance between the codified principles of employment law and more prominent concerns of justice, equity, and practicality.

Numerous governments have implemented unfair dismissal laws to safeguard employees against arbitrary or unfair dismissal. According to Beebeejaun, the laws and regulations have been implemented to incorporate procedural protections that aim to prevent unjust termination of employees.(Beebeejaun, 2018) Additionally, these laws offer remedies, such as financial compensation, for unfair dismissal. Acting rules and regulations that include procedural safeguards against wrongful termination of employees exemplify a legal positivist and social welfare-focused perspective in Western jurisprudence.

Unfair dismissal laws aim to mitigate the power asymmetry between employers and employees while safeguarding employees' exclusive entitlements to their positions and preserving their dignity and autonomy.(Adikaram & Kailasapathy, 2022) These legislations acknowledge the significance of safeguarding employees against unjust treatment and establish a legal structure to guarantee that employers comply with equitable protocols when terminating an employee's agreement.

Reinstatement in employment law refers to the statutory remedy of restoring an employee to their previous position or job after they have been wrongfully terminated or dismissed. It is one of the potential remedies available to employees subjected to unlawful employment practices. Reinstatement rights protect employees from unjust dismissals and ensure their job security.(Aman-Ullah et al., 2021) When an employee is wrongfully terminated, reinstatement allows them to return to their previous position, providing stability and continuity in their career. This remedy not only restores the employee's income and benefits but also helps to preserve their professional reputation and self-esteem. Moreover, reinstatement rights can act as a deterrent for employers, discouraging them from engaging in unfair employment practices. The fear of potential reinstatement can incentivise employers to comply with labour laws and treat their employees fairly.(Sunaryo et al., 2024) This in turn, promotes a more equitable and respectful work environment.

While reinstatement is essential for protecting employees their implementation can present challenges. The right to reinstatement as a remedy for unjust termination primarily derives from law as it is (Legal Positivism) rather than law as it ought to be (Natural Law or moral reasoning). However, elements of social justice-oriented perspectives can influence its justification and implementation. One challenge is the reluctance of employers to reinstate employees due to concerns about workplace dynamics or strained relationships. Employers may argue that reinstatement is not feasible or would disrupt the organisation's functioning. These challenges highlight the need for effective dispute-resolution mechanisms and clear guidelines for reinstatement procedures. Another challenge is the variation in reinstatement laws and regulations across different jurisdictions. The inconsistency in reinstatement rights throughout jurisdictions raises substantial concerns about the equitable treatment of employees. Employees frequently feel more comfortable in their jobs in nations like South Africa and India where reinstatement is mandatory because they know they have legal options in case they are fired unfairly.(Eneh et al.,

2024) This legislative structure establishes a safeguard for employees and cultivates a culture of trust and dedication within organisations. Management that demonstrate honesty and self-awareness can cultivate a robust organisational culture and enhance trust within their employees. Moreover, it is essential for companies to encourage the discovery of meaning and interpersonalconnections among individuals by cultivating a heightened sense of self-awareness.(Raflis & Omar, 2024)

Reinstatement as a remedy in employment law represents a form of statutory justice functioning as a legally established corrective action aimed at restoring equity following an unlawful termination of an employee. It is not solely based on moral or philosophical justice but is a mechanism of legal justice established by statutes and enforced through tribunals or courts. Statutory justice seeks to rectify an inequity resulting from an illegal action. Reinstatement reverses the unjust termination, guaranteeing that the employee is restored to the position they would have occupied had the company not breached the law.

Research suggests that when employees believe their rights are safeguarded, they are more inclined to interact positively with their work environment, resulting in improved organisational citizenship behaviours and job satisfaction.(Matta et al., 2020) In nations where reinstatement is discretionary or unavailable, such as the United States and the United Kingdom, employees may face more uncertainty concerning their job status.(Autor et al., 2002) The absence of security can foster a culture of fear and obedience, wherein employees may feel compelled to adhere to organisational expectations without expressing concerns over inequitable practices. Research indicates that uncertainty regarding job security might intensify adverse perceptions of fairness, resulting in diminished organisational commitment and heightened employee stress levels.(Reychav & Sharkie, 2010) Securing new employment frequently presents people with an additional formidable challenge workplace fatigue, a widespread concern in numerous nations fuelled by increasing demands for employee performance. Excessive job demands and burdensome workloads often deplete employees' vitality and productivity. Supportive workplace resources, such as organisational frameworks, favourable physical settings, strong social networks, and increased motivation, are essential in alleviating fatigue, enabling employees to maintain their performance, resilience, and general well-being.(Kerja et al., 2023)

The extent of reinstatement rights can differ significantly from country to country, making it essential to have comprehensive and consistent legislation to ensure fair treatment for employees. For example, recent changes in labour laws in Germany and Italy have limited the scope of reinstatement rights.(Hastings & Heyes, 2016) These changes have placed restrictions on the forced reinstatement of workers making it more difficult for employees to regain their positions.

According to Donohue and Siegelman, reinstatement is one of the remedies available to plaintiffs in employment discrimination cases.(Donohue & Siegelman, 2005) However their research suggested that plaintiffs are less likely to seek and secure reinstatement than monetary settlements or awards. This indicates that while reinstatement is an option it may not be the most commonly pursued remedy in employment discrimination cases. Trudeau discussed reinstatement as a form of protection for at-will employees in Quebec.(Trudeau, 1991). The study examines the post-reinstatement experience of rehired employees and highlights both the drawbacks and merits of reinstatement as a form of protection for non-union employees. This suggests that reinstatement can provide certain benefits to employees, but challenges may also be associated with its implementation. Eguchi analyzes the difference between two remedies for unjust dismissals: damages and reinstatement.(Eguchi, 2008). The study uses a simple employment contract model

and considers workers' bargaining power in different economic conditions. The findings suggested that the effectiveness of reinstatement as a remedy may vary depending on the economic context. In severe recessions, reinstatement may strengthen workers' bargaining power, while in moderately severe recessions, damages may be more favourable for employees.

TABLE 1. Reinstatement: Jurisprudential Analysis

| Theorist | Key Focus | Analysis of Reinstatement |
|---|---|---|
| **John Austin** | The command theory of law views law as commands issued by a sovereign authority, enforced through sanctions. | Reinstatement is valid if it is a directive from a sovereign authority (e.g., through legislation or judicial order). The aspects of moral or social justice regarding reinstatement are irrelevant; only the command of the sovereign matters. |
| **H.L.A Hart** | The rule of recognition defines law as a system composed of primary rules (which impose duties) and secondary rules (which govern the primary rules). | Reinstatement is examined through the framework of secondary rules, which are the rules that govern legal procedures and judicial decisions. If the legal system recognizes the rule for reinstatement, it is considered valid. Hart emphasizes the importance of procedural fairness, the coherence of the legal system, and the adherence to legal rules, prioritizing these elements over moral considerations. |
| **Ronald Dworkin** | Law should be viewed as a system of integrity, prioritizing principles over specific rules. | Reinstatement is in line with principles of fairness and justice, but it demands clear judicial reasoning to balance rights and practical considerations. Courts should prioritize reinstatement unless there are justified deviations based on principled grounds. |
| **Hans Kelsen** | The pure theory of law: a normative hierarchy. | Reinstatement is recognized as a secondary norm under the Industrial Relations Act 1967. Poor enforcement has weakened the authority and coherence of this norm. |
| **Oliver Wendell Holmes** | Legal realism emphasizes the importance of practical consequences. | Reinstatement should be assessed based on its practical application and outcomes. The courts' preference for compensation over reinstatement reflects a pragmatic approach to resolving labor disputes. |
| **Karl Llewellyn** | Legal realism and sociological jurisprudence | Reinstatement should be evaluated based on its effectiveness in society. The remedy must be flexible and adaptable to real-world challenges, such as workplace hostility and employer resistance. |

Labour law governs the relationships of employers, employees, and trade unions, ensuring equitable employment practices, workplace rights, industrial harmony, and adherence to statutory and contractual responsibilities. Labour law seeks to equilibrate the power dynamics between employers and employees, guaranteeing equitable treatment, job security, and industrial harmony, while concurrently advancing economic and corporate interests. It is shaped by legislative requirements, judicial precedents, and international labour standards established by the

International Labour Organisation (ILO). In certain jurisdictions, governmental action and socio-economic policies influence its implementation.

Labour law assists companies and employees in comprehending their rights and responsibilities, fostering secure and equitable work environments. Work, fundamentally, is an activity characterised by voluntary engagement, adherence to directives, coercion, and a predetermined schedule. Moreover, it generally signifies executing an action to secure a predetermined reward. compensation, remuneration, outcomes, or executed tasks The demands of labour encompass the psychological, economic, and sociological aspects of humans, achieved via persistent effort until success is attained.(Rosniza Aznie Che Rose, Nur hanis Misrin, 2020) In the realm of employment, employees assess justice by contemplating the work ethics implemented in the workplace, concerning the allocation of tasks, rewards, and penalties. Consequently, workplace ethics significantly contribute to establishing mutual trust and confidence between the employer and the employee. This implied obligation of reciprocal trust and confidence pertains to the expectations of both the employer and employee, as evidenced by workplace ethics.( et al., 2022)

## EMPLOYMENT LAW IN UNITED KINGDOM

By the Employment Rights Act 1996 (ERA 1996) in the United Kingdom where an Employment Tribunal determines that a dismissal is unfair it has the authority to propose either the reinstatement or re-engagement of the employee or to grant a monetary compensation. In the case of The British Council v Sellers, the Employment Tribunal has the authority to refrain from mandating the remedy of reinstatement or re-engagement. This is contingent upon the factors contributing to the erosion of trust and confidence.The employee's initial application, in which he claims unjust dismissal, includes a question about his preferred remedy if the tribunal concludes that his termination was unfair.

The alternatives proposed for evaluation are reinstatement, re-engagement, or remuneration. Upon recognising the perceived inequity of the termination, the Employment Tribunal must inform the employee of the option to request reinstatement or re-engagement, while delineating the specific conditions under which such orders may be issued. Furthermore, it is essential to ascertain the employee's desire for reinstatement or re-engagement.

If the employee does not seek reinstatement or re-engagement, the Employment Tribunal must consider the issue of compensation. Monetary compensation typically represents lost wages and can serve as a substantial remedy for employees abruptly stripped of their means of income due to what an industrial tribunal considers an unjust termination.(“1Labour Appeal Court: Case of National Union of Metalworkers of South Africa (Numsa) and Others v Afgri Animal Feeds (Pty), Judgement of June 17, 2022,” 2023)

The Act explicitly states that the principal remedy within the remedies framework is an order for reinstatement or re-engagement. The preliminary phase of the industrial tribunal involves assessing the feasibility of reinstatement.(Roux, 2022)

An order for reinstatement puts the employee in the same position he would have enjoyed had he not been dismissed. In deciding whether it will make an order for reinstatement, the Employment Tribunal must consider three key factors: first, whether the employee wants to be reinstated; second, whether it is feasible for the employer to comply with a reinstatement order and third, whether reinstatement would be fair, especially in cases where the employee contributed to their dismissal. In the case of the University of Huddersfield v Duxbury, the Respondent refused

to comply with an order to restore the claimant (employee), which resulted in the entitlement to an extra award being triggered. It was determined that the Claimant had been arbitrarily terminated from his position.

When evaluating the feasibility of reinstatement, the Employment Tribunal must disregard the fact that the employer has hired a permanent replacement for the dismissed employee. However, this is contingent upon the employer providing evidence to support their considerations regarding the reinstatement process that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement or that he engaged the replacement after the lapse of a reasonable period, without having heard from the dismissed employee that he wished to be reinstated or re-engaged, and that when the employer engaged the replacement it was no longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement.

Reinstatement is frequently impracticable owing to the erosion of trust and workplace relations. In Stapp v Shaftesbury Society, The court acknowledged that reinstatement is rendered impracticable if the trust and confidence between employer and employee are irrevocably compromised. Furthermore, workplace dynamics are essential, as reinstatement may interrupt operations and impact relationships with other employees. Although reinstatement is a legal remedy for unlawful dismissal, practical concerns sometimes diminish its feasibility, rendering compensation or alternative remedies more appropriate in several instances.

The employment protection legislation in the UK is primarily "law as it is" (Legal Positivism) because it is based on codified statutes and tribunal decisions. However, in terms of unjust dismissal cases, it reflects some elements of "law as it ought to be" by acknowledging social justice principles, particularly through the availability of reinstatement.(Harwood, 2016)

## EMPLOYMENT LAW IN MALAYSIA

The jurisprudential principles established in United Kingdom law similarly apply to Malaysia's legal requirements under the provision of the Industrial Relation Act 1967 (Act 177). Reinstatement is the primary remedy for employees who have been unjustly terminated under Malaysia's Industrial Relations Act 1967. This legislative framework demonstrates a dedication to safeguarding labour rights and shielding workers from unfair dismissal as reinstatement is perceived as a method to return the employee to their prior position and preserve the continuity of their employment connection.(Kumar et al., 2012)

There have been numerous Industrial Court awards regarding compensation, reinstatement, and retroactive pay. Upon their combined reading, they establish that the court will typically order reinstatement and backpay in the event of a wrongful termination or unjust dismissal. In cases where reinstatement is not feasible or prudent, the court will order compensation in lieu of reinstatement and back pay.

The Industrial Court has the authority to determine whether to impose reinstatement or compensation as a substitute. It also has the authority to determine the amount of back pay and compensation in lieu of reinstatement. The Industrial Court is permitted to conduct its proceedings as a court of arbitration, allowing for greater flexibility in reaching decisions. It also focuses on the substantial merits of each case and strives to make decisions based on equity and good conscience. (Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Ors, 2002) Nevertheless the court applies specific principles to both compensation in lieu of reinstatement

and backpay such as the employee's obligation to mitigate their loss by pursuing alternative employment. This typically leads to a substantial if not substantial reduction in the amount awarded.

A sequence of Industrial Court rulings on reinstatement and back pay have been recorded. (Industrial Court Website, n.d.) These sources show that the court usually orders the affected person to be reinstated with the payment of back wages in circumstances where a termination is judged improper or a dismissal is deemed unreasonable. Should reinstatement be neither practical nor advised, the court will instead mandate compensation as a replacement for reinstatement in addition to back earnings. The court has discretionary power to decide whether to order alternative compensation or reinstatement. The organisation in issue has the right to use discretion in deciding the retroactive pay amount and the degree of compensation provided as a substitute for reinstatement. The court follows particular guidelines in compensation circumstances in lieu of reinstatement and backpay, including the employee's obligation to actively seek other employment to help mitigate their loss. This usually results in a clear sometimes significant decrease in the authorised sum.

The Industrial Court in Malaysia has clarified what reinstatement means and how re-employment differs from reinstatement. In the case of Han Chiang High School & Another and National Union of Teachers in Independent School. it stated reinstatement obligates the employer to treat the employee as if they were never been dismissed, ensuring the restoration of all pension, holiday and seniority rights along with payment of any outstanding wages. The purpose of an award for reinstatement is to nullify the wrongful dismissal of a worker to their previous position and status and treat the employment contract as if it had remained in effect continuously.

Then, in Rank Xerox Ltd and Chong siw Sing (Award 119 of 1990):

> *The general rule in industrial adjudication is that when a workman is reinstated then, in the absence of cogent reasons, the workman should be entitled to the full wages or remuneration which he would have received had he continued in service. The effect of reinstatement is that the workman is restored to his former position insofar as his capacity, status, and emoluments are concerned. The workman is restored to his former position and status, setting aside his discharge or dismissal as if it never had occurred, and he gets all the benefits of continuity of service.'*

In deciding whether to order reinstatement or only compensation in lieu thereof, the Industrial Court adopts a pragmatic approach. In Holiday Inn and National Union of Hotel, Bar & Restaurant Workers (Award 90 of 1987) it observed:

> *where a workman's dismissal was found without just case or excuse, he must be deemed never to have been dismissed at all an so continues in service and it is, therefore, reasonable to hold that the normal relief is reinstatement*.

Nonetheless, the principle that reinstatement is the standard remedy for unjust and unlawful termination is neither inflexible or universally applicable. The pragmatic approach has modified the rules to indicate that in atypical or extraordinary circumstances where it is inappropriate or impractical to provide standard relief or reinstatement, compensation in lieu would serve the interests of justice as the challenges faced in industrial adjudication must advance its dual objectives namely job security and safeguards against unjust termination and dismissal contrasted with industrial tranquilly.

TABLE 2. Reinstatement Remedies in Employment Law: United Kingdom vs Malaysia

| Aspect | United Kingdom (UK) | Malaysia |
|---|---|---|
| **Legal Framework** | Employment Rights Act 1996 | Industrial Relations Act 1967 |
| **Legal Basis for Reinstatement** | Discretionary; rarely granted by tribunals, with compensation typically favoured | Statutory right; primarily remedy emphasised, but compensation is prevalent |
| **Judicial Attitude** | Pragmatic, emphasising practical practicality; reinstatement seen as unique. | Pro-employee stance, strong presumption favouring reinstatement |
| **Criteria for Awarding Reinstatement** | Considerations of practicality, employer-employee trust, and workplace harmony | Employee entitlement persists unless compelling evidence demonstrates impracticality or disharmony. |
| **The Law as It Is vs. Ought to Be** | The positivist perspective underscores present market conditions, while the normative perspective advocates for enhanced employment protection. | The positivist perspective emphasises employee protection, while the normative perspective advocates for a more equitable framework addressing employers' practical considerations. |

## JURISPRUDENTIAL ANALYSIS UNDER THE INDUSTRIAL RELATION ACT 1967 (ACT 177)

RONALD DWORKIN

The main remedy for unfair dismissal under Malaysia's Industrial Relations Act 1967 is reinstatement. Courts however do often stray from this guideline and choose compensation instead of reinstatement when workplace dynamics make reinstatement unworkable. A Dworkinian perspective defends such aberrations as a conformity with more general standards of justice and fairness.

In the case of Holiday Inn Kuching v Lee Chai Siok Elizabeth The court acknowledged that while reinstatement is the statutory remedy practical considerations like workplace animosity may render it unfeasible. A Dworkinian perspective would argue that this decision reflects the principle of practicability ensuring that remedies align with the moral fabric of workplace justice.

Dworkin's approach corresponds with the principle of corrective justice wherein reinstatement aims to rectify the harm inflicted by unfair dismissal. The idea guarantees that personnel be reinstated to their appropriate roles safeguarding their dignity and financial stability.

Reinstatement embodies the principle of equality by acknowledging the intrinsic power disparity in employer-employee dynamics. Dworkin's emphasis on fairness underscores the notion that employees terminated without reasonable cause are entitled to a remedy that reinstates equilibrium and honours their rights.

The courts' authority to replace reinstatement with compensation illustrates the law as a cohesive story. Decisions that take into account workplace hostility or practical realities exemplify a principled interpretation of reinstatement consistent with statutory meaning and larger community objectives.

HANS KELSEN

Kelsen's theory offers a framework for examining the statutory requirements related to reinstatement such as the Industrial Relations Act 1967 (IRA 1967) in Malaysia and the systematic application of these principles by courts and tribunals. Within Kelsen's paradigm the reinstatement remedy obtains its legitimacy from the Grundnorm of the legal system, which is the Constitution of Malaysia. Section 20(3) of the IRA 1967 serves as a subordinate norm within the legal hierarchy, stipulating reinstatement as the principal remedy for unfair dismissal.

Kelsen's view asserts that the reinstatement remedy should be implemented exclusively according to statutory provisions disregarding moral considerations of fairness or justice. Kelsen contends that the law ought to prioritise its procedural implementation over subjective or extraneous elements such as workplace hostility or pragmatic challenges.

Courts and tribunals when implementing the restoration remedy function within the legal hierarchy. Their authority to grant compensation instead of reinstatement arises from statutory provisions that permit deviation from the primary remedy when deemed necessary.

In Malaysia, Section 20(3) of the IRA 1967 mandates reinstatement as the primary remedy for employees dismissed without reasonable cause. A Kelsenian viewpoint would emphasise that this standard is directly drawn from the IRA which is subservient to the Federal Constitution. In Dreamland Corporation (M) Sdn Bhd v Choong Chin Sooi, the Industrial Court underscored that reinstatement is the principal remedy until deemed impossible. Kelsen posits that the court's rationale precisely follows the legislative norm while permitting the use of subordinate norms (judicial discretion) to evaluate feasibility.

Kelsen's view recognises that judicial discretion must function within the limits of the statutory framework. When courts deny reinstatement on the grounds of impracticality they exercise discretion permitted under subordinate regulations. This guarantees the preservation of the legal hierarchy. From a Kelsenian perspective, decisions regarding reinstatement should disregard moral or social norms, concentrating exclusively on statutory criteria. Considerations such as workplace antagonism or the employer's operational difficulties should only be relevant if expressly permitted by the statute.

OLIVER WENDELL HOLMES AND KARL LIEWELYN

Reinstatement as intended under employment legislation such as Malaysia's Industrial Relations Act 1967 is based on the restorative justice principle restoring workers dismissed without reasonable cause to their prior jobs. Legal realism, especially in light of strained workplace relationships or changed operational reality challenges whether this theoretical ideal is realistic in practice nonetheless.

In Malaysia reinstatement is the principal remedy under to Section 20(3) of the IRA 1967. Industrial Courts frequently replace reinstatement with monetary compensation demonstrating a pragmatic approach to the implementation of law. In Dreamland Corporation (M) Sdn Bhd v Choong Chin Sooi, the court determined that compensation was preferable to reinstatement due to the impracticality of re-establishing the job relationship. This decision embodies realism by acknowledging that reinstatement may be impractical if mutual confidence between the parties has eroded.

The assertion that reinstatement is not the primary remedy contradicts the conventional interpretation of labour legislation, notably Malaysia's Industrial Relations Act 1967, which has historically prioritised reinstatement as the primary remedial action for unjust terminations.

Nonetheless legal interpretations, practical realities and shifting jurisprudence indicate that reinstatement may no longer be the predominant remedy in all instances. Rather, it is progressively regarded as one of multiple possible solutions, frequently eclipsed by compensation owing to numerous limitations.

## CONCLUSION

The reinstatement remedy in employment law illustrates the conflict between "law as it exists" and "law as it should be." Although statutory rules prioritise reinstatement as the preferred remedy pragmatic factors frequently compel courts to choose alternate methods based on equity and justice. This dynamic illustrates the interaction between legal positivism and natural law as courts endeavour to reconcile the predictability of legislative regulations with the moral obligations of just results.

By integrating these viewpoints, employment law can more effectively tackle the intricacies of contemporary labour relations, ensuring that reinstatement fulfils its objective of equity and restorative justice while maintaining practicality and fairness in its implementation. This balanced approach highlights the dynamic nature of employment law as it addresses the requirements of both theoretical and practical reality.

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## CONFLICT OF INTEREST

The authors declares that there is no conflict of interest.

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Fathal Syazally Mohd Shaffee
Faculty of Law
Universiti Kebangsaan Malaysia, Malaysia
Email: msyazly@gmail.com

Nur Khalidah Dahlan (Corresponding author)
Faculty of Law
Universiti Kebangsaan Malaysia, Malaysia
Email: nurkhalidahdahlan@ukm.edu.my

Jady@Zaidi Hassim
Faculty of Law
Universiti Kebangsaan Malaysia, Malaysia
Email: jady@ukm.edu.my