DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

DALAM NEGERI WILAYAH PERSEKUTUAN KUALA LUMPUR

[PERMOHONAN SEMAKAN KEHAKIMAN NO: WA-25-223-08/2017]

Dalam perkara permohonan Tore Nedregaard untuk suatu perintah *certiorari*;

Dan

Dalam perkara mengenai Awad No: 781 Tahun 2017 bertarikh 30.5.2017 oleh Mahkamah Perusahaan Malaysia di Kuala Lumpur dalam Kes No. 18(12)/4-492/14;

Dan

Dalam perkara mengenai Akta Perhubungan Perusahaan 1967;

Dan

Dalam Perkara Aturan 53 Kaedah-Kaedah Mahkamah, 2012

ANTARA

TORE NEDREGAARD ... PEMOHON

DAN

1. MAHKAMAH PERUSAHAAN MALAYSIA

2. PETROFAC (MALAYSIA – PM304) LIMITED

... RESPONDEN-RESPONDEN

Abstract: The date of constructive dismissal is a finding of fact by the Industrial Court and does not go to the issue of jurisdiction; the Industrial Court retained its jurisdiction to inquire into a claim of constructive dismissal following its finding that the date of constructive dismissal was different from that in the Minister's reference.

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Error of law - Industrial Court dismissed applicant's claim on issue of jurisdiction and without making a finding on substantive complaint - Whether Industrial Court has jurisdiction to adjudicate complaint due to different date of dismissal in Minister's reference - Whether findings of fact ought to have been on substantive complaint - Whether substance of Minister's reference was on constructive dismissal - Whether it was for Industrial Court to ascertain date of constructive dismissal after hearing all the evidence*

[Application allowed with costs.]

Case(s) referred to:

Booi Kim Lee v. YB Menteri Sumber Manusia, Malaysia & Anor [1999] 4 CLJ 121 HC ***(refd)***

Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Dreamland Corporation (M) Sdn Bhd v. Choong Chin Sooi & Anor [1981] 1 MLJ 112 ***(dist)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 CA ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

Shafie Abd Rahman v. Petroliam Nasional Berhad & Anor [2010] 1 LNS 1296 HC ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, ss. 20(3), 33A

Grounds of Decision

Application

[1] The Applicant is seeking to quash the award of the Industrial Court No. 781 of 2017 dated 30.5.2017.

[2] At the end of the trial, the Chairman made a finding on the preliminary issue raised by the 2nd Respondent that the date of the alleged constructive dismissal is on 28.11.2013, which is at variance with the date stipulated in the Ministerial reference that is 21.10.2013.

[3] Therefore, the Chairman then held that the Industrial Court lacked the threshold jurisdiction to inquire into the Applicant's complaint of constructive dismissal, which the Industrial Court found to be on 28.11.2013, as the said date is not the subject matter of the Ministerial reference that the alleged dismissal was on 21.10.2013 (based on the Applicant's complaint). The Industrial Court dismissed the Applicant's claim on the issue of jurisdiction, without making a finding on the substantive complaint, the issue on constructive dismissal.

[4] Having considered the application and the submission of the parties, this Court has allowed the application, quash the Award

and remit it back to the Industrial Court to consider the issue of constructive dismissal.

The Salient Facts

[5] The 2nd Respondent ("**Company**") is incorporated in England, United Kingdom and has a branch office in Kuala Lumpur. The Company's primary business is petroleum exploration and production.

[6] The Applicant was employed as an Asset Manager PM 304 and Asset Operations by the Company on 14.5.2012.

[7] The Applicant's primary duties were to undertake control and oversee the operation of PM304, an oilfield. PM304 is an area/block offshore Peninsular Malaysia over which the Company and its co-ventures were granted rights by Petronas to explore and exploit petroleum resources via a Production Sharing Contract dated 23.2.1998.

[8] The Applicant reported directly to the Company's Country Manager, Keith Collins up until July 2013. In July 2013, the Company was headed by a new Country Manager, Glyn Robert Jones ("**Glyn**"). The Company then embarked on a remapping process to address performance issues within the Company.

[9] The remapping process was to address the complaint by Petronas dated 28.6.2013 on the significant delays and cost overruns experienced by PM304. The Company decided that change was needed and proceeded with the remapping process. All Management Team ("**MT**") members, including the Applicant were appraised on the reorganization exercise and selection process.

[10] During the Functional MT meeting on 6.8.2013, the MT members agreed to the *"PML Organizational Philosophy"*. Under this Philosophy, a selection process will be commenced to select the best person for the job. Following the reorganization, the role of PM304 Asset Manager no longer exists, and a more senior post of General Asset Manager, PM304 was created.

[11] On 11.10. 2013, the Applicant was summoned to Glyn's office and was informed that Glyn had been observing his performance in the Company for the past few months. According to Glyn, the Applicant's performance at work was sub-standard and he lacked leadership skills.

[12] The Applicant was further informed that he would not be offered the newly created position of General Asset Manager PM304. Rather, he was redesignated and was given a new job description of Manager of Business Strategy, Planning and Systems.

[13] On 14.10.2013, the Applicant emailed Glyn declining the role of Manager of Business Strategy, Planning and System and requested for alternatives, including positions in other countries.

[14] On 21.10.2013, the Applicant had a meeting with the Company's Director of Human Resources ("**HR**") requesting for a position with similar job description (i.e. Asset Manager) in other countries but was told there was none available at that point in time.

[15] On the same day (21.10.2013), the Applicant informed HR via email stating that he felt subjected to constructive dismissal and to confirm that parties have agreed that he would leave the office with no further requirements to come to the office since there was no meaningful tasks for him to attend to anymore.

[16] On 21.11. 2013, the Applicant received a letter from HR which stated amongst others, that he was still an employee of the Company and he was reminded to respond to the offer contained in the separation agreement by 28.11.2013, failing which, the Applicant was deemed to have terminated his employment with the Company at his own accord.

[17] On 28.11.2013, the Applicant had, vide his solicitor, replied HR's letter which reiterated his earlier position that he had been constructively dismissed by the Company in view of his relegation by the Company to a position of lesser responsibilities to which he had no experience whatsoever.

[18] The Company contends that the Applicant's allegation of constructive dismissal was misplaced. Accordingly, the Company issued a letter dated 9.12.2013 to the Applicant stating that the Company did not terminate his employment and that the Applicant had left the Company on his own volition.

[19] The Applicant then filed a representation under Section 20 of the Industrial Relations Act 1967 to the Industrial Relations Department and the representation was referred to the Industrial Court for an adjudication by the Minister under section 20(3) of the Industrial Relations Act 1967.

The Findings of the Court

[20] The Federal Court in *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629 has set out the function of the Court in an application for Judicial Review and the correct test to be applied in reviewing findings of fact made by the Industrial Court, to be as follows:

"[15] …… Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. Rama Chandran is the mother of all those cases. ***The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of "illegality", "irrationality" and possibly "proportionality" which permits the courts to scrutinize the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds****.*

[16] The Rama Chandran decision has been regarded or interpreted as giving the reviewing court a license to review without restrain decisions for substance even when the said decision is based on finding of facts. However, post Rama Chandran cases have applied some brakes to the courts' liberal approach in Rama Chandran. The Federal Court in the case of Kumpulan Peransang Selangor Bhd v. Zaid Mohd Noh [1997] 2 CLJ 11 after affirming the Rama Chandran decision held that there may be cases in which for reason of public policy, national interest, public safety or national security the principle in Rama Chandran may be wholly inappropriate.

[17] The Federal Court, in Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2003] 4 CLJ 625, again held that the reviewing court may scrutinize a decision on its merits but only in the most appropriate of cases and not every case is amenable to the Rama Chandran approach. Further, ***it was***

held that a reviewing judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or plain irrationality, even where the reviewing judge might not have come to the same conclusion.

[18] The Court of Appeal has in a number of cases held that where finding of facts by the Industrial Court are based on the credibility of witnesses, those findings should not be reviewed (see William Jacks & Co (M) Sdn Bhd v. S Balasingam [1997] 3 CLJ 235, National Union of Plantation Workers v. Kumpulan Jerai Sdn Bhd (Rengam) [2001] 1 CLJ 681, Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9, Colgate Palmolive (M) Sdn Bhd v. Yap Kok Foong & Another [2001] 3 CLJ 9. However, there are exceptions to this restrictive principle where:

(a) reliance upon an erroneous factual conclusion may itself offend against the principle of legality and rationality, or

(b) there is no evidence to support the conclusion reached.

(See Swedish Motor Assemblies Sdn Bhd v. Hj. Md Ison Baba [1998] 3 CLJ 288).

[19] It is clear from the above authorities that the scope and ambit of Rama Chandran had been clearly explained and clarified. Decided cases cited above have also clearly established that ***where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider relevant matters into consideration,***

such findings are always amendable to judicial review." (emphasis added)

[21] In *Booi Kim Lee v. YB Menteri Sumber Manusia, Malaysia & Anor* [1999] 3 MLJ 515, Justice KC Vohrah adopted Lord Diplock's classification of grounds of judicial review in the House of Lords case of *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374. The three (3) grounds described by Lord Diplock are:

(i) illegality;

(ii) irrationality; and

(iii) procedural impropriety.

[22] By illegality as a ground for judicial review, it means *"that the decision-maker must correctly understand the law that regulates his decision-making power and must give effect to it"* and that *"... the authority concerned has been guilty of an error of law in its action as for example, purporting to exercise a power which in law it does not possess."*

[23] By irrationality it means 'Wednesbury unreasonableness' and *"applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided upon could have arrived at it".*

[24] By procedural impropriety, it includes *'failure by an administrative tribunal to observe procedural rules that are expressly laid out.."* and *"duty to act fairly*".

[25] In the present case, the main issue is whether the Industrial Court has committed an error of law in the Award when the

Chairman held that the Industrial Court does not have the jurisdiction to inquire into the Applicant's complaint of constructive dismissal, due to the variation of the purported date of dismissal by the Industrial Court's finding, from that of the Minister's reference. In the Award, the Industrial Court made the following finding:

> *"**Conclusion***
>
> *As the threshold jurisdiction of this Court rests on the Minister's reference, and in view of the fact that the dismissal date of 21 October 2013 appearing in the Minister's reference is different from the actual date of dismissal date, i.e. 28 October 2013 and on this ground alone, the Court is the view that the Claimant is uncertain as to when he was actually allegedly dismissed. In the circumstances the Court upholds the preliminary issue as raised by the company and on this ground alone, the Claimant's claim is hereby dismissed and the issue as to whether the dismissal was with just cause or excuse does not arise for determination.*
>
> *The claim is hereby dismissed."*

[26] Based on the evidence presented before it, the Industrial Court has made a finding of fact that the Applicant's allegation of constructive dismissal was on 28.10.2013. This is different from the date in the Minister's reference, which is 21.10.2013.

[27] Since the Industrial Court's finding on the date of dismissal is different from the Minister's reference, then premised on the case *Dreamland Corporation (M) Sdn Bhd v. Choong Chin Sooi & Anor* [1981] 1 MLJ 112, the Industrial Court held that it has no jurisdiction to adjudicate on the complaint which is not the

subject matter of the Minister's reference under section 20(3) of the IRA 1967. The relevant part of Dreamland Corporation case that was relied by the Company and the Industrial Court reads as follows:

> *"Accordingly, we hold that the workman was lawfully dismissed as was held by the Industrial Court. However, neither that Court nor the High Court were correct in amending the date of dismissal and in awarding compensation as a consequence of such amended date, both matters outside their jurisdiction in an enquiry under s. 20(3) of the Industrial Relations Act."*

[28] However the issue in Dreamland Corporation case is different from the present case. In **Dreamland Corporation**, the Industrial Court has heard the witnesses and handed down the following award:

> *"1. I find that there is evidence that the Claimant had talked about the low salaries and low increment to the staff in the Company, and this to my mind brings about a bad effect among the staff concerned, so I uphold the dismissal of the Claimant by the Company.*
>
> *2. The Claimant had committed a misconduct and before such dismissal took effect the Company did not hold any inquiry at all. Though I uphold the order of dismissal of the Claimant* ***the effective date of such dismissal takes effect on the last date of the hearing****; therefore the Claimant is entitled to back wages from the date of dismissal 23 February 1984 till 28 April 1986, i.e., 26 months and 4 days at the rate of RM2,400 a month... RM62,720.*

3. The Company is to pay this sum within one (1) month from the date of this Award after tax clearance." (emphasis added)

[29] This above award was referred under s. 33A of the Industrial Relations Act 1967 to the High Court on the following questions of law:

(i) does the Industrial Court have jurisdiction to award compensation to a workman whose dismissal has been upheld by the Court; and

(ii) does the Industrial Court have jurisdiction to amend the date of dismissal of the workman so that the workman is deemed to be in employment until the date of the award and thereby become entitled to back wages?

[30] It is in relation to the 2nd question of law that the Supreme Court held that the Industrial Court (and the High Court which affirmed the decision of the Industrial Court) has no jurisdiction to amend the date of dismissal (of the employee by the employer on 23.2.1984) to the last date of the hearing in the Industrial Court, i.e. 28.4.1986. The actual date of dismissal cannot be amended to any other date in order to grant the employee back wages.

[31] Therefore, the Industrial Court had failed to appreciate the judgment in **Dreamland Corporation** when it stated at page 30 of the Award that in the **Dreamland Corporation** case, the Supreme Court *"**held that the scope of inquiry of the Industrial Court is limited to the date of dismissal as stated in the ministerial reference**"*. There is no such issue in respect of the date of dismissal in the Minister's reference in **Dreamland Corporation** case. There is no issue that the date of dismissal in

the Minister's reference is different from the actual date of dismissal found by the Industrial Court in **Dreamland Corporation** case.

[32] The issue on the date is in the 2nd question of law referred to the High Court, that is whether the Industrial Court can change the actual date of dismissal to another date, and in that case, to the last date of hearing before the Industrial Court. The Supreme Court held that both the Industrial Court and the High Court have no jurisdiction to change the date of dismissal, and thereafter deemed that the employee is still in the employment during the extended period.

[33] I am of the considered opinion that the relevant case to consider is the decision of Justice Aziah Ali in *Shafie bin Abd Rahman v. Petroliam Nasional Berhad* [2010] MLJU 1290. In this case, Justice Aziah Ali held as follows:

> *"[8] It is the Ministerial reference and not the Statement of Case that determines the Industrial Court's jurisdiction. In the present case, what is the dispute referred by the Minister to the Industrial Court?* ***The subject matter of reference as reflected in the Award is the dismissal of the Applicant by the 1st Respondent. That is the dispute referred to the Industrial Court for adjudication and it is clearly within the scope of the Industrial Court's jurisdiction****. The date of dismissal is a matter for determination by the Industrial Court.*
>
> *[9] The Applicant herein claims constructive dismissal. Hence the issues before the Industrial Court are amongst others –*

a. whether there was constructive dismissal; and

b. if there was constructive dismissal, whether the date of dismissal is 29.9.2005 as stated in the Ministerial reference or 30.9.2005 as stated in the Statement of Case."

[34] I am therefore of the considered opinion that the Minister's reference to the Industrial Court is on the issue of constructive dismissal, whether the Applicant was constructively dismissed by the Company. That is the substance of the Minister's reference.

[35] On the issue of the date of the constructive dismissal, the same does not go to the issue jurisdiction as it is a finding of fact by the Industrial Court as to whether the constructive dismissal took place on 21.10.2013 or 28.11.2013. The Applicant has asserted his position that he was constructively dismissed on 21.10.2018. He then made his complaint to the Minister, and the Minister referred his complaint to the Industrial Court for adjudication. It is not for the Minister to ascertain the *'**correct**'* or *'**actual**'* date of dismissal in order to state the *'**correct date**'* in his ministerial reference. In *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665, the Court of Appeal held as follows:

> *"To summarise, when a question arises as to whether the Minister has correctly exercised his discretion under s. 20(3) of the Act, it is the solemn duty of a Court to undertake a meticulous examination of the facts that were made available to the Minister.* ***If the examination reveals that the representations made under s. 20(1) are neither perverse, frivolous nor vexatious, a decision not to refer is liable to be quashed by an order of certiorari****.*

.....

It follows from these decisions that the Minister must bear in the forefront of his mind that the Act has established a special tribunal to adjudicate upon a dispute arising from representations made under s. 20(1) of the Act and that it is therefore no part of his function to arrive at a concluded view upon the merits of the dispute. ***His role is limited to ascertaining whether, on the facts and materials placed before him, the representations raised serious questions of fact or of law calling for adjudication****. And, as I have already said, his determination upon the question one way or the other is not conclusive."* (emphasis added)

[36] Thereafter, it is for the Industrial Court to ascertain the date of the constructive dismissal after hearing all the evidence. But once the Industrial Court finds that the Applicant was dismissed on a different date, other than the date in the Minister's reference, it does not mean that the Industrial Court no longer has the jurisdiction, because the Industrial Court is already seized with the jurisdiction from the Minister's reference itself. The reference is on the Applicant's complaint, that is on his constructive dismissal. It is clearly irrational if the Industrial Court suddenly finds itself lacking in jurisdiction after combing through the evidence and makes a finding that the date of constructive dismissal is different from the date in the ministerial reference.

[37] Therefore, I am of the considered opinion that the Industrial Court has made an error in law when it decided that it has no jurisdiction to inquire into the Applicant's claim of constructive dismissal premised on its finding that the date of constructive dismissal is different from that in the Minister's reference.

[38] I am also of the considered opinion that the Industrial Court has made an error in law when the learned Chairman failed to make a finding as to whether there was constructive dismissal as claimed by the Applicant. Bearing in mind that the Minister's reference for adjudication is the Applicant's complaint on constructive dismissal, the Industrial Court should have decided on the substantive complaint.

[39] In the premise, I find that there is merit in the application and the same is allowed with cost. I also make an order that the matter be remitted back to the Industrial Court on the issue of whether the Applicant had been constructively dismissed by the Company before another Chairman.

(AZIZAH HAJI NAWAWI)
Judge
High Court Malaya
(Appellate And Special Powers Division 2)
Kuala Lumpur

Dated: 23 NOVEMBER 2018

COUNSEL:

For the applicant - Hariharan Tara Singh & Fakhrul Redha; M/s Scivetti & Associates Kuala Lumpur

For the respondent 2 - R Ravindra Kumar; M/s Raja, Darryl & Loh Kuala Lumpur