MALAYSIAN AIRLINE SYSTEM BHD v ISMAIL NASARUDDIN BIN ABDUL WAHAB

CaseAnalysis
| **[2021] MLJU 565**

Malaysian Airline System Bhd v Ismail Nasaruddin bin Abdul Wahab [2021] MLJU 565

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COURT OF APPEAL (PUTRAJAYA)

HANIPAH FARIKULLAH, LEE HENG CHEONG AND GUNALAN MUNIANDY JJCA

CIVIL APPEAL NO W-01(A)-568-10 OF 2019

14 April 2021

N Sivabalah (Jamie Goh Moon Hoong with him) (Shearn Delamore & Co) for the appellants.
Lim Wei Jiet (Sreenevasan) for the respondent.

Hanipah Farikullah JCA:

GROUNDS OF JUDGMENTINTRODUCTION

[1]The Appellant, Malaysian Airline System Berhad (MASB) appeals against the decision of the High Court dated 4.9.2019. This appeal stems from an application at the High Court which allowed the judicial review filed by the Respondent, Ismail Nasaruddin bin Abdul Wahab against the Industrial Court's decision dated 14.2.2019.

[2]A notable feature of the present proceedings is that the Respondent claims that he was dismissed without just cause and execute by his employer pursuant to *section 20(1)* of *Industrial Relation Act 1967*.

[3]Following the respondent's dismissal, he applied to the Industrial Court under *section 20(1)* of *IRA 1967* for a declaration that he was dismissed without just cause an exercise because he exercised his right as the President of NUFAM by making a press statement to voice concerns over the plight of 3,500 cabin crew of MAS and that his dismissal was, therefore, contrary to *section 4* and *5(1)* of *IRA 1967*.

[4]The Industrial Court dismissed the Respondent's application for unlawful dismissal. Aggrieved by the decision of the Industrial Court, the Respondent filed a Judicial Review application. Thus, the issues in the present appeal arise from a decision by the Appellant, to dismiss the Respondent.

[5]At the material time, the Appellant was a company responsible for the operation of airline transportation service. The Respondent was an employee of the Appellant and also the President of the National Union of Flight Attendants Malaysia (NUFAM). NUFAM is registered as a trade union under *section 12* of the *Trade Union Act (TUA) 1959*.

[6]The primary question advanced by the Respondent was that his dismissal of the Respondent was an action taken for a reason which is prohibited by *sections 4* and *5* of *IRA 1967*.

[7]It is the Appellant's position that the Respondent was dismissed because he had breached the terms and conditions of employment. The Appellant argued that the relevant provisions of IRA 1967 require that such a proceeding should not be resolved in favour of the Respondent unless the evidence in the proceeding established that the employer's reasons for dismissing were associated with any of the reasons prohibited by *sections 4* and *5(1)* of *IRA 1967*.

[8]The task of a court in a proceeding alleging a contravention of *sections 4* and *5(1)* of *IRA 1967* is to determine why the employer took adverse action against the employee and to ask whether it was for prohibited reason or reasons. This appeal was concerned with identifying the correct approach to that task.

The Background Facts

[9]In order to appreciate the background of the impugned dismissal, it would be relevant to mention some material facts. The facts of the present case are not disputed by the parties. On 8.11.2013, it was brought to the Appellant's attention that The Sun newspaper was carrying an article on the National Union of Flight Attendants Malaysia ("NUFAM") call for the resignation of the Appellant's Chief Executive Officer. The article published in The Sun newspaper on 8.11.2013 referred to an interview of the Respondent conducted with Sunbiz; whereby the said article also made reference to a press statement issued by the Respondent. The said article raised various other allegations against the Appellant.

[10]At the material time, the Applicant was the President of NUFAM and a member of its Executive Committee.

[11]The starting point of the applicant is dismissal was a show cause letter issued on 12.11.2013 by the Appellant purporting to call upon the Respondent to show cause why he should not be dismissed from office for various reasons mentioned therein. The show cause letter contained the following allegations:

> "**Allegation 1**
>
> The Sun, in a report appearing on 8.11.2013, *inter alia* stated:
>
> > 'The National Union of Flight Attendants Malaysia (NUFAM), which represents 3,500 cabin crew at Malaysia Airlines (MAS), has called on the national carrier's CEO Ahmad Jauhari Yahya to resign saying he had failed to resolve their plight since he took over the helm in September 2011, in a statement yesterday, NUFAM Secretariat said it is calling on the Prime Minister to review Jauhari's contract and remove him as the CEO of MAS, which is a government appointed position, unhappy that there has been no changes in resolving the cabin crew's problems and they have become demoralized. 'Three years is long enough to observe how a CEO of a GLC (government-linked company) takes seriousness and consideration into the cabin crew's issues, it said. The management have cut costs drastically on the cabin crew and did not bother to review their allowances and salaries,' it further claimed". [sic]
>
> Although you may be the President of NUFAM, you are first and foremost an employee of the Company and owe a duty and responsibility to the Company as such. The Company holds you responsible for the foregoing statement/press released by NUFAM, of which you are its President. The contents of the foregoing statement/press release are baseless, insolent and publicly damaging and your conduct in allowing the release of the said statement – calling for, among others, the resignation of the Company's Chief Executive Officer and further making reference to employees' allowance and salaries which are strictly internal and confidential matters – to be tantamount to a serious act of misconduct.
>
> **Allegation 2**
>
> You had, vide the same report appearing in The Sun on 8.11.2013, been quoted following your interview with SunBiz, as *inter alia* stating:
>
> > 'They (MAS management) said they had discussed with Maseu before putting these changes into a CA, but the discussions are behind Nufam's back' … 'it was not done in fairness and is a form of discrimination against employees. This is also the first time

they are picking on this (weight control) issue', in relation to various terms and conditions which had been agreed to by all relevant parties and subsequently incorporated into the Collective Agreement Cognizance No. 001/2013, thereby creating disharmony amongst the cabin crew fraternity which would have had access to the aforesaid newspaper report.'

'The crew are overworked and Nufam has raised these concerns with MAS. These are fatigue issues concerning the safety and welfare of employees … we request that the DCA monitor the work schedules of cabin crew', in relation to the cabin crew work schedules which had been discussed by the Company with the Department of Civil Aviation (DCA) and approved by the DCA; thereby creating disharmony amongst the cabin crew fraternity and concerns on safety amongst the public, which would have had access to the aforesaid newspaper report'.

'NUFAM wants the airline to straighten out its policies. All policies concerning cabin crew must be regulated. The welfare and safety of the cabin crew must be looked into by the government', giving rise to the inference in the view of the public – which would have had access to the aforesaid newspaper report – that the Company neglects and compromises the welfare and well-being of its employees.

The company deems the foregoing conduct serious acts of misconduct. Your foregoing actions are tantamount to a breach of your implied term of employment/fiduciary duty to serve the Company with good faith and fidelity and further a breach of your express terms of employment as stated in Clause 12, Appendix 1 of the MAS Book of Discipline as well as the procedures governing grievance procedures pursuant to the Collective Agreement (Cognizance No. 001/2013)."

[12]The Respondent answered the show cause letter by a letter dated 16.11.2013. In his response, the Respondent, among others, states that the Press Statement was made in his capacity as the President of NUFAM and not as an employee of the Appellant.

[13]Dissatisfied with the Respondent's explanation, the Appellant dismissed the Respondent from employment by a letter dated 29.1.2013 with immediate effect. The Respondent's appeal against the said dismissal by a letter dated 5.1.2014 was rejected by the Appellant by a letter dated 5.2.2014.

[14]With this brief overview, let us turn, first to recount the decision of the Industrial Court and the High Court.

Decision Of The Industrial Court

[15]In order to deal with the issues in this case, it is necessary to understand the nature of the proceedings before the Industrial Court and the statutory provisions relating to jurisdiction being exercised pursuant to reference under *section 20(1)* of *IRA 1967*.

[16]It is trite law that the function of the Industrial Court under *section 20(1)* of *IRA 1967* is twofold, first, to determine whether the alleged misconduct has been established, and secondly whether the proven misconduct constitutes just cause or excuse for dismissal. Failure to determine these issues on their merits would be a jurisdictional error which would merit interference by certiorari by the High Court (see *Milan Auto Sdn Bhd v Wong Seh Yen* *[1995] 3 MLJ 537*). (*Harianto Effendy bin Zakaria & Ors v Mahkamah Perusahaan Malaysia & Anor* *[2014] 6 MLJ 305*)

[17]The Industrial Court held that *sections 4(1)* and *5(1)* of *IRA 1967* are inapplicable in this case as the Respondent was found guilty of the allegations of misconduct levelled against him. Related thereto, the Industrial Court held that even if there was any breach of *section 4(1)* or *section 5(1)* of *IRA 1967*, the avenue to redress such breaches was by way of *section 8* of *IRA 1967* and that it was not open to the Respondent in a reference under *section 20(1)* of *IRA 1967* to consider *sections 4* and *5(1)* of *IRA 1967*.

The Decision of The High Court

[18]The High Court took a different view. The learned High Court Judge essentially found in favour of the Respondent and held that the Respondent was unfairly dismissed because the Appellant had dismissed him for participating in trade union activities.

[19]The learned High Court Judge's grounds of judgment were well summarised by learned counsel for the Appellant as follows:

(i) *Sections 4*, *5* and *59* of *IRA 1967*, as well as *section 8* of the Employment Act provide wide protection for members of a trade union for participating in trade union activities;

(ii) Pursuant to the Court of Appeal case of *Harris Solid State (M) Sdn. Bhd. v Kesatuan Pekerja-Pekerja RCA Sdn. Bhd.* [1996] 2 ILR 480, an employer may reorganize his commercial undertaking for legitimate reasons but must not do so for a collateral purpose, such as victimising his workmen for participating in trade union activities. A workman's dismissal for participating in trade union activities tantamount to victimization or unfair labour practice actuated by *mala fide*;

(iii) The question of whether an employer has exercised such managerial power bona fide or for collateral reasons is a question of fact that must be decided based on the peculiar circumstances of each case;

(iv) Being a trade union member per se does not mean one is shielded from any misconduct. This must be viewed based on the facts of each case;

(v) The respondent's press statements relate to the objective of NUFAM as a trade union and are undoubtedly trade union activities to ensure the good working conditions of its members;

(vi) The issues raised in the press statements have been prolonged for some time and the respondent's efforts to resolve the issue amicably has not been successful; and

(vii) The appellant failed to produce any cogent evidence that the Respondent's press statements have caused reputation damage.

[20]The High Court proceeded to quash the decision of the Industrial Court and remitted the matter for assessment of compensation.

[21]We would wish to emphasize that it was the right and the duty of the industrial tribunal to find the facts as they have done so. The concern of the High Court and our concern in this appeal is only with the application of the law to the facts of the case.

[22]At the end of the hearing of this appeal, we allowed the appeal.

[23]In this judgment, we have referred to various authorities which were not cited to us. We have done so in order to satisfy ourselves that we have not overlooked any relevant legal point which arises in this appeal.

ISSUES

[24]The central issues before us can be summarized as follows:

(a) Whether the Claimant's dismissal was a violation of *sections 4* and *5(1)(d)(ii)* of *IRA 1967*.

(b) Whether the dismissal of the Respondent was lawful.

(c) Whether the membership in the union immunized the Respondent from dismissal pursuant to *section 22(1)* of *TUA 1959*.

(d) Whether there was a trade dispute between NUFAM and the appellant.

[25]Issues (a) and (b) are interrelated, hence we will address them together.

The Status Of The Respondent

[26]Before we consider each of these issues, it is necessary to start by considering the status of the Respondent and what is his relationship with the Appellant. Perhaps the most important factor in this connection is that the Respondent as the President of NUFAM is not appointed by the trade union. He is chosen by election or otherwise, and it is his duty to represent the union.

[27]NUFAM is a trade union registered under *section 12* of *TUA 1959*. *Section 2* of *TUA 1959* provides that "A trade union shall not enjoy any of the rights, immunities or privileges of a registered trade union unless it is registered". The rights and liabilities of a trade union are set out in Part V of TUA 1959 (see sections 21-25A). For our present purpose, the relevant provision is *section 22* of *TUA 1959*. Further analysis of this section will be undertaken in a later part of this judgment.

[28]As President of NUFAM, the Respondent is a representative of his workgroup, that is, his fellow-workers in the Appellant. He is one of them. He works alongside them. He is employed by the same employer as they are. He is their leader. He speaks for them. If any of them has a grievance with the management, he takes it up. He negotiates on their behalf with the Appellant on any point. (*Heatons Transport (St. Helens) Ltd v Transport and General Workers Union [1973] AC 15*)

[29]However, it is worthy to note that the Respondent is not paid by NUFAM. He is not an "officer" of the NUFAM. "He is only an official". He is paid by his employer. The Respondent is the servant of his employer, but they allow him to spend part of his time on his NUFAM duties. Therefore, the President of NUFAM has a dual role.

[30]Generally, an employee enters a trade union in order to better negotiate terms and conditions of employment, aside from preventing potential abuse by the employer due to unfair bargaining power. Due to this inequality of bargaining power, employees have organised themselves into organisations or societies, and more specifically into unions, to defend their interests, coupled with the threat of industrial action if their demands have not been met ***(see: Lord Wedderburn, The Worker and the Law (3rd Ed, London: Sweet and Maxwell, 1986), at p. 5 and Ghosh Piyali 'The Changing Role of Trade Unions in India: A Case Study of National Thermal Power Corporation (NTCP)', UNCHAHAR Asian Academy of Management Journal Vol 14 No 1 at p. 39).***

[31]Many matters have been argued by the parties, but in the ultimate analysis it seems to us is that the question of whether the decision of the High Court in the present case should be affirmed or reversed depends upon the issue of whether the Appellant can take disciplinary action against the Respondent for issuing the Press Statement.

[32]In this regard, it is appropriate to consider whether, in the circumstances of the present case, it was a proper or lawful exercise of powers by the Appellant in dismissing the Respondent. In our view, that question must be decided on the facts of each case having regard the provisions of the Employment Act 1955, TUA 1959 and IRA 1967.

Whether The Dismissal Of The Respondent Was UnLawful

[33]The Appellant contended that the learned High Court Judge had erred in taking into account an irrelevant consideration, namely, that there is no evidence that the Appellant's reputation was tarnished; and had failed to consider that the press statements were disparaging and disrespectful of the Appellant's CEO.

[34]It was next argued on behalf of the Appellant that the learned High Court Judge erred in law when he placed undue weight on the applicability of *sections 4(1)* and *5(1)* of *IRA 1967* and failed to appreciate

that the aforesaid provisions did not apply in the present matter as the Respondent had committed acts of misconduct warranting disciplinary action being taken against him.

[35]The Appellant claimed the existence of an implied term in the contract of employment that the Respondent would not conduct himself in a manner to destroy or damage the relationship of confidence and trust between him and the Appellant.

[36]These arguments are refuted by the Respondent. The crux of the Respondent's contention is that his dismissal was a purported "union- busting" by the Appellant and that his dismissal was a violation of *sections 4* and *5(1)(c)* and *5(1)(d)(ii)* of *IRA 1967*.

[37]Learned counsel for the Respondent also submitted that the Appellant has not adduced any evidence during trial to show how its reputation had been damaged or tarnished as a result of the Respondent's Press Statement. We cannot accept the Respondent's arguments. Our reasons are as follows.

[38]It is trite that the burden of proof is on the Appellant company to prove that the Respondent has committed the alleged misconduct or wrongdoings and such misconduct or wrongdoings constitute just cause or excuse for the claimant's dismissal.

[39]It is necessary to set out some of the relevant legislation relating to the protection of rights of workmen and their trade unions which are the Employment Act 1955, IRA 1967 and TUA 1959.

[40]The starting point is *Section 8* of the *Employment Act 1955* which provides that any employment contract cannot restrict the right of employees to participate in the activities of a registered trade union:

> "Nothing in any contract of service shall in any manner restrict the right of any employee who is a party to such contract-
>
> (a) to join a registered trade union;
>
> (b) to participate in the activities of a registered trade union, whether as an officer of such union or otherwise; or
>
> (c) to associate with any other persons for the purpose of organizing a trade union in accordance with the Trade Unions Act 1959 (Act 262)."

[41]*Section 4(1)* of *IRA 1967* is the next directly relevant section. It makes it very clear that it is unlawful for any party to interfere with workman or employee's participation in trade union activities. *Section 4(1)* of *IRA 1967* reads as follows:

> ***"Rights of workmen and employers***
>
> *4.(1) No person shall interfere with, restrain or coerce a workman or an employer in the exercise of his rights to form and assist in the formation of and join a trade union and to participate in its lawful activities."*.

[42]*Section 5(1)(c) and (d)* of *IRA 1967* also provides the same, as follows:

> *"**Prohibition on employers and their trade unions in respect of certain acts***
>
> *5.*
>
> (1) *No employer or trade union of employers, and no person acting on behalf of an employer or such trade union shall—*
>
> *(c) discriminate against any person in regard to employment, promotion, any condition of employment or working conditions on the ground that he is or is not a member or officer of a trade union;*

(d) dismiss or threaten to dismiss a workman, injure or threaten to injure him in his employment or alter or threaten to alter his position to his prejudice by reason that the workman—

(i) *is or proposes to become, or seeks to persuade any other person to become, a member or officer of a trade union; or*

(ii) *participates in the promotion, formation or activities of a trade union; or … ".*

(e) induce a person to refrain from becoming or to cease to be a member or officer of a trade union by conferring or offering to confer any advantage on or by procuring or offering to procure any advantage for any person.

(2) Subsection (1) shall not be deemed to preclude an employer from-

(a) *refusing to employ a person for proper cause, or not promoting a workman for proper cause, or suspending, transferring, laying-off or discharging a workman for proper cause;*

(b) *requiring at any time that a person who is or has been appointed or promoted to a managerial, an executive or a security position shall cease to be or not become a member or officer of a trade union catering for workmen other than those in a managerial, an executive or a security position; or*

(c) *requiring that any workman employed in confidential capacity in matters relating to staff relations shall cease to be or not become a member or officer of a trade union.*

[43]On 5th June 1961, Malaysia ratified the International Labour Organization (ILO)'s Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, whereby pursuant to Article 1, Malaysia has an obligation to ensure adequate protection against anti-union discrimination including dismissal of a worker by reason of participation in union activities:

"

1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
2. Such protection shall apply more particularly in respect of acts calculated to-

(a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;

(b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours."

[44]Similar to Malaysia, the Singapore legislation also provides the basic aspects of trade union protection. For example, section 82(1) of Singapore's Industrial Relations Act (Cap 136). This provision expressly states that the employer shall not dismiss or threaten to dismiss the employee 'by reason of' the circumstances listed in subsections (a) to (g). Specifically, section 82(1)(d) bars the employer from dismissing or threatening to dismiss an employee for being a member of a trade union which is seeking to improve working conditions **(**see: *Arokiasamy Joseph v Singapore Airlines Staff Union* *[2000] 2 SLR 303*).

[45]In *Cowie Edward Bruce v Berger International Pte Ltd* [1999] 1 SLR(R) 739, the Court laid down the general approach for determining whether an employee had misconducted himself to justify the disciplinary action or dismissal, as follows:

"In each case, ***it is a matter of degree whether the act complained of is of the requisite gravity. It has been said that it must be so serious that it strikes at the root of the contract of employment, that it destroys the confidence underlying such a contract:*** *Jackson v Invicta Plastics* *[1987] BCLC 329* *at 344, per Peter Pain J.*

> *The relevancy and effect of any misdeed complained of must, it seems to me, be judged by reference to its effect on the employer-employee relationship**. It also seems to me that in judging the relevancy and effect of the acts complained of, account must be taken of the habits and attitude of the employer at the relevant time. They cannot be judged totally in a vacuum**.”*.
>
> [Emphasis Added]

[46]Some cases also implied duty of good faith into contracts of employment, thus any breach of it will amount to misconduct. In *Wong Leong Wei Edward & Anor v Acclaim Insurance Brokers Pte Ltd* [2010] SGHC 352, Steven Chong J, citing *Rickshaw Investments Ltd & Anor v Nicolai Baron von Uexkell* [2007] 1 SLR(R) 377 *and Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663, stated as follows:

> *“… the law is clear that a term will be implied into all employment relationships such that an employee owes his or her employer a duty of good faith and fidelity…”*

[47]In *Cheah Peng Hock v Luzhou Bio-Chem Technology Limited* [2013] SGHC 32, the Court held that an implied term of mutual trust and confidence, and fidelity, is implied by law into a contract of employment under Singapore law. The Court noted as follows:

> ***“The content of that implied term can thus vary greatly depending on the facts in each case; this includes but is not limited to the type of employer and employee, the business or activity of the employer, the position or nature of the appointment of the employee, the employee’s level within the hierarchy of employees, the express and other implied terms of employment and the termination provision**. These factors are obviously not exhaustive and there will be as many factors as there are types of employment contracts and individual facts and circumstances.”*.
>
> [Emphasis Added]

[48]In United Kingdom (UK), any conduct of the employee, whether at the workplace or outside of work, which is likely to damage the reputation of the employer may constitute gross misconduct and will lead to disciplinary action up to and including dismissal. UK cases have established the principle that an employer-employee relationship is similar to a master-servant position. Hence, if the servant (employee) does anything incompatible with the due or faithful discharge of his duty to his master (employer), the latter has a right to take disciplinary action or dismiss him.

[49]In the case of *Pearce v Foster* *[1886] 17 QBD 536*, Lord Esher MR stated very clearly that:

> *“The rule of law is, that **where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him**. The relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faithfully, and if by his own act he prevents himself from doing so, the master may dismiss him … But **if a servant is guilty of such a crime outside his service as to make it unsafe for a master to keep him in his employ, the servant may be dismissed by his master; and if the servant’s conduct is so grossly immoral that all reasonable men would say that he cannot be trusted, the master may dismiss him** … **If a servant conducts himself in a way inconsistent with the faithful discharge of his duty in the service, it is misconduct which justifies immediate dismissal**. That misconduct, according to my view, need not be misconduct in the carrying on of the service of the business. **It is sufficient if it is conduct which is prejudicial or is likely to be prejudicial to the interests or to the reputation of the master, and the master will be justified, not only if he discovers it at the time, but also if he discovers it afterwards, in dismissing that servant**.”*.
>
> [Emphasis Added]

[50]In *Clouston & Co v Corry* *[1906] AC 122* at p 129, Lord Hereford stated as follows:

> *"There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course, there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand,* ***misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal****."*.
>
> [Emphasis Added]

[51]Some UK cases also ruled that the employer has a right to take disciplinary action or dismiss an employee if the latter is involved in any kind of 'irregular industrial action'. In *Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen (No 2)* *[1972] 2 QB 455*, three trade unions representing railway workers pressed for increases in pay. Offers of increases by the Railways Board were refused by the Union. The executive committees of the Union instructed their members to work strictly to rule from April 17, 1972, and to ban overtime, rest day and Sunday working. The instructions were obeyed, thus causing many dislocation of services. The issue that arose was whether the relevant union members were in breach of their contract of employment.

[52]The Court of Appeal in **Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen (No 2) (supra)** held as follows:

> *"****Now I quite agree that a man is not bound positively to do more for his employer than his contract requires****. He can withdraw his goodwill if he pleases.* ***But what he must not do is wilfully to obstruct the employer as he goes about his business.*** *That is plainly the case where a man is employed singly by a single employer. Take a homely instance, which I put in the course of argument. Suppose I employ a man to drive me to the station. I know there is sufficient time, so that I do not tell him to hurry. He drives me at a slower speed than he need, with the deliberate object of making me lose the train, and I do lose it.* ***He may say that he has performed the letter of the contract; he has driven me to the station; but he has wilfully made me lose the train, and that is a breach of contract beyond all doubt. And what is more, he is not entitled to be paid for the journey. He has broken the contract in a way that goes to the very root of the consideration****; so he can recover nothing. Such a case is akin (it has been said we have had no authorities on the subject) to the many cases where there is an implied term not wilfully to prevent the carrying out of the contract****.***
>
> ***…***
>
> ***The short answer to this contention, in my judgment, is that those concerned to organise lawful concerted action must ensure that no breach of contract is involved at any point, otherwise what would be lawful concerted action becomes, in my judgment, irregular industrial action short of a strike within the definition which I have construed."***
>
> [Emphasis Added]

[53]Duty of mutual trust and confidence also applies when it comes to the employer dismissing its employee. In *Woods v W.M. Car Services (Peterborough) Ltd* *[1982] ICR 693*, the English Court of Appeal in discussing the implied term of mutual trust and confidence said, at p. 698:

> ***"It is the duty of the employer to be good and considerate to his servants. Sometimes it is formulated as an implied term not to do anything likely to destroy the relationship of confidence between them : see*** *Courtaulds Northern Textiles Ltd v Andrew* *[1979] I.R.L.R. 84*. *But I prefer to look at it this way:* ***the employer must be good and considerate to his servants. Just as a servant must be good and faithful, so an employer must be good and considerate.*** *Just as in the old days an employee could be guilty of misconduct justifying his dismissal, so in modern times an employer can be guilty of misconduct justifying the employee in leaving at once without notice.* ***In each case it depends on whether the misconduct amounted to a repudiatory breach as defined in*** *Western Excavating (E.C.C.) Ltd. v. Sharp* *[1978] I.C.R. 221*.
>
> ***The circumstances are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not. It is a question of fact for the tribunal of fact*** *… Thus, when the manager told a man: "You can't do the bloody job anyway," that would ordinarily not be sufficient to justify the man in leaving at once. It would be on a par with the trenchant criticism which goes on every day.* ***But if the manager used those words dishonestly and maliciously — with no belief in their truth — in order to get rid of him, then it might be sufficient: because it would evince an intention no longer to be bound by the contract.".***

[Emphasis Added]

[54]In India, case laws have established that the trade union is obligated to act within the four corners of the law. Any unlawful conduct would be outside the scope of the protection provided to the trade union. In *Tamil Nadu State Apex Co Operative Bank Employees v State of Tamil Nadu & Others - LNIND* 2010 MAD 3314, the Court observed as follows:

> ***"The desirability to have a truly independent and representative union of workmen to represent their cause cannot be lost sight off. A Management may think that the leadership of a particular trade union is militant, yet even such a union when it obtains a recognised status, it has to act within the four corners of law and discipline.*** *Where the number of workmen is very large, it is also in the interest of the management to have a truly representative collective bargaining agent to represent the workmen so that the Management can discuss with it the problems governing the production and industrial peace and the decisions arrived at will have to be accepted by all the workmen.*"

[55]Similarly, in *Jay Engineering Works v State of West Bengal AIR* 1968 Cal 407, it was held that illegal or violent activities would not and cannot be treated as part of trade union activities. The Court observed as follows:

> *"31. The net result of the decision set out above is that sections 17 and 18 of the Indian Trade Unions Act grant certain exemption to members of a trade union, but there is no exemption against either an agreement to commit an offence or intimidation, molestation or violence, where they amount to an offence.* ***Members of a trade union may resort to a peaceful strike, that is to say, cessation of work with the common object of enforcing their claims. Such strikes must be peaceful and not violent and there is no exemption where an offence is committed*** *Therefore, a concerted movement by workmen by gathering together either outside the industrial establishment or inside, within the working hours is permissible, when it peaceful and does not violate the provisions of law.* ***But when such a gathering is unlawful or commits an offence then the exemption is lost. Thus, where it resorts to unlawful confinement of persons criminal trespass of where it becomes violent and indulges in criminal force or criminal assault or mischief to person or property or molestation or intimidation, the exemption can no longer be claimed****."*.
>
> [Emphasis Added]

[56]In Australia, any breach of mutual trust and confidence as well as good faith obligation, which is likely to damage the reputation of the employer may constitute gross misconduct and will lead to disciplinary action up to and including dismissal. In other words, the employee can be subjected to disciplinary action or may be dismissed if he did demonstrate any element of bad faith, or act in such a way so as to seriously damage the mutual trust and confidence of the employee.

[57]The New South Wales Court of Appeal in *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* *[2008] NSWCA 217* used mutual trust and confidence as a synonym for a good faith obligation. This was a case concerning allegations of sexual abuse by a priest. The priest was summarily dismissed and the question arose as to whether this dismissal was a breach of contract. The trial judge had considered the implied duties of good faith and mutual trust and confidence separately as two implied terms. The New South Wales Court of Appeal held that, implied duties of good faith and mutual trust and confidence were part of the employee's obligation. The Court observed as follows:

> "*[30] Rothman J considered separately* ***whether there were implied terms of good faith and of not acting, without reasonable and proper cause, in a manner calculated to destroy or seriously damage the relationship of confidence and trust between employer and employee. In relation to the former, he noted that the express terms of the contract were basic in their extent and that the parties envisaged a continuing, indefinite period of employment, where the precise extent of the obligations of the employee were not fully known at the time the contract was entered into****: at [118]. His Honour continued:*
>
> *And in those circumstances,* ***the rights and/or duties reposed in either the employer or the employee would need to be exercised***

honestly and reasonably; with prudence, caution and diligence, and with 'due care to avoid or minimise adverse consequences' to the other party that are inconsistent with the agreed common purpose and expectations of the parties to the contract. But all the while, the parties have the capacity to exercise their rights in their own interests.

[31] In relation to the second implied term, ***his Honour noted that the characterisation of an employer/employee relationship as one importing duties of loyalty, honesty, confidentiality and mutual trust, was the subject of high authority****, …*

[32] Although there were said to be two implied terms, it is probably sufficient ***to identify them as a single obligation . Thus, in*** *Eastwood v Magnox Electric plc [2005] 1 AC 503, Lord Nicholls of Birkenhead stated at [11]:*

The trust and confidence implied term means, in short, that an employer must treat his employees fairly. In his conduct of his business, and in his treatment of his employees, an employer must act responsibly and in good faith. ***In principle, this obligation should apply as much when an employer exercises his right to dismiss as it does to his exercise of other powers of his which affect a subsisting employment relationship. It makes little sense, for instance, that the implied obligation to act fairly should apply when an employer is considering whether to suspend an employee but not when the employer is proposing to take the more drastic step of dismissing him.".***

[Emphasis Added]

[58]In Malaysia, reference should be made to the Federal Court judgment in *Harianto Effendy bin Zakaria [2014] 6 MLJ 305*. In this case, the Federal Court has affirmed the dismissal of members of the National Union of Bank Employee (NUBE) for picketing at the lobby and banking hall which disrupted the business and operation of the bank. The Federal Court agreed with the reasoning and observation by the Court of Appeal which states as follows:

"[22] The appellants subsequently appealed to the Court of Appeal against the decision of the High Court. The Court of Appeal unanimously dismissed the appellants' appeal with costs. On the issue of 'victimisation' the Court of Appeal held as follows:

> *The appellant's argument relating to victimisation was patently untenable premised as it was on conjecture. It is rather far-fetched to conclude that the appellants were victimised simply because they were active union members and there was breach of natural justice in the conduct of the domestic enquiry instituted to determine the charge against them.*

[23] As regards the issue of punishment imposed, whether the dismissal was too harsh and was actuated by discriminative practice, the Court of Appeal opined:

> *The final aspect of the appeal was in relation to the contention advanced on behalf of the appellants that the dismissal was too harsh and was actuated by discriminative practice. This was premised on the fact that five other employees of the second respondent were also participants in the illegal picket like the appellants but were either let off unpunished or given light punishments. In rejecting the argument that the punishment was too harsh the learned judge relied on the principle set out in Said Dharmalingam Abdullah v. Malayan Breweries Sdn Bhd* [1977] 1 CLJ 646; ; [1977] 1 MLJ 352 *and in our view rightly so. The Supreme Court had this to say at p 660 (CLJ); at p 364 (MLJ):*
>
> *We are prepared to accept, as a tenable proposition that, speaking generally,* ***where misconduct has been proven,*** *different employers might react differently. To quote Acker LJ in British Leyland UK Ltd v. Swift [1981] IRLR 91 at p 93: '****An employer might reasonably take the view, if the circumstances so justified, that his attitude must be a firm and definite one and must involve dismissal in order to deter other employees, from like conduct. Another employer might quite reasonably on compassionate grounds treat the case as special'.***
>
> ***In any event the charge proved against the appellants constituted very grave misconduct involving the core of the second respondent's existence and they must been aware that dismissal would have been the inevitable punishment.*** *The contention relating to discriminative practice was misconceived because the five other employees treated differently from the appellants were never adjudged guilty of the misconduct which was proven against the appellants.*

…

[40] We shall deal first with the appellants' contention that the second respondent was guilty of unequal treatment and double standards because five of the employees who were charged together with the appellants were not dismissed. On this issue we agree with the observation made by the Court of Appeal that there was no merit in the appellants' contention that the appellants' dismissal was actuated by discriminative practice."

[Emphasis Added]

[59]Recently, this Court in *Muhamad Sukeri bin Mahudin v Hicom Automotive Manufacturers (M) Bhd & Anor and other appeals* *[2020] MLJU 1943*, declared that the dismissal of the Appellants who were union members as valid. The facts of the case are as follows.

[60]All the appellants were employees of the 1st respondent prior to their dismissal and they were members of the National Union of Transport Equipment and Allied Industrial Workers ('the Union').

[61]As the Collective Agreement between the Union and the 1st respondent had expired on 30.6.2014, a proposal for a Collective Agreement for the period of 1.7.2014 until 30.6.2017 was sent to the 1st respondent by the Union on 1.4.2014.

[62]Several meetings were held between the Union and the 1st respondent concerning the proposed Collective Agreement but had not reached any agreement. The appellants, together with other members of the Union, were then informed that a briefing will be held on 4.12.2015 to update the Union members of the new development in the Collective Agreement negotiations.

[63]The 1st Respondent's management who heard that an assembly would be held on 4.12.2015 took steps to remind the employees not to attend the assembly as otherwise disciplinary action would be taken against who attended the said assembly.

[64]On 4.12.2015 between 5.30 p.m. and 6.30 p.m., the Union officials and its members including all the appellants, had assembled at the car park outside the 1st Respondent's premises, facing the main public road of Jalan Pekan and Kuantan, Pahang.

[65]Pursuant to the assembly attended by all the Appellants, the 1st Respondent issued show cause letters dated 6.1.2016 to all the Appellants to explain as to why disciplinary action should not be taken against them. The allegation against all the Appellants was:

"Pada 4hb Disember 2015 di antara pukul 5.30 ptg hingga 6.30 ptg, anda didapati telah mendorong atau mempengaruhi pekerja-pekerja kilang dalam anggaran 110 orang atau lebih berkumpul ramai-ramai di hadapan kawasan hadapan ICAM lama (sebelah kilang HAMM), di mana tindakan anda ini memberikan gambaran bahawa ada wujudnya ketidakhamonian perhubungan perusahaan dalam syarikat yang boleh memberikan tanggapan yang negatif kepada orang awam terhadap syarikat.

Dengan ini anda telah melanggar peraturan syarikat di bawah kesalahan berat lampiran DTT-2 (35) & (48) seperti berikut:

DTT 35: menjatuhkan imej atau nama baik syarikat melalui apa- apa cara samada secara lisan, tulisan atau perbuatan.

DTT 48: membawa atau cuba membawa apa-apa bentuk pengaruh atau tekanan luar untuk mengemukakan atau menyokong sesuatu tuntutan berhubung dengan perkhidmatan samada tuntutan itu tuntutan perseorangan atau tuntutan lain-lain kakitangan."

[66]On 22.1.2016, a domestic inquiry proceeding was held and the Appellants were found guilty of the charges levelled against them. Thereafter, by a letter dated 3.2.2016, the 1st Respondent dismissed all the Appellants with effect from 5.2.2016. Substantially, the dismissal letter reads as follows:

"Pada 4hb Disember 2015 di antara pukul 5.30 ptg hingga 6.30 ptg, anda didapati telah mendorong atau mempengaruhi pekerja-pekerja

kilang dalam anggaran 110 orang atau lebih berkumpul ramai-ramai di hadapan kawasan hadapan ICAM lama (sebelah kilang HAMM), di mana tindakan anda ini memberikan gambaran bahawa ada wujudnya ketidakharmonian perhubungan perusahaan dalam syarikat yang boleh memberikan tanggapan yang negatif kepada orang awam terhadap syarikat."

[67]All the Appellants' appeals against the dismissal order was dismissed. Aggrieved, the Appellants filed their representations for wrongful termination to the Industrial Relations Department pursuant to *section 20(1)* of *Industrial Relations Act, 1967* ("IRA 1967"). The appellants' representations were forwarded to the Minister who in turn referred that matter to the Industrial Court ("IC") for determination pursuant to *section 20(3)* of *IRA 1967*.

[68]The issue in **Muhamad Sukeri** case was whether IRA 1967 and TUA 1959 protect the Appellant from termination, the taking of disciplinary action or the discrimination against union members participating in lawful union activities. This Court rejected the appellants' challenge to their dismissal. Referring to paragraph [30] of the learned High Court Judge's Judgment, Kamardin, JCA said:

"[30] Here, the applicants' action clearly has brought disrepute to the 1st respondent's reputation and an action to obtain influence from outside to support the demand made in the proposed Collective Agreement although the 1st respondent's management has explained the financial situation of the 1st respondent."

[69]The aforesaid cases appear to have accepted the view that any conduct of the employee, irrespective of their position as a trade union member which is likely to damage the reputation of the employer may constitute gross misconduct and will lead to disciplinary action up to and including dismissal. Apart from that, some jurisdictions here also implied a duty of good faith into contracts of employment, thus, any breach of it will amount to misconduct as well.

[70]In this present case, the Appellant's witness gave evidence for his reason for taking adverse action against the Respondent. The Industrial Court accepted the Appellant's witness (COW-3)'s evidence that the Respondent had failed to appreciate that the Appellant had previously accorded him with the opportunity to improve his behaviour by issuing him with lesser punishments when he had made press statements in the past. Instead of desisting, the Respondent repeated his conduct; despite being expressly warned against making future statements to the press pertaining to the business of the Appellant. The Industrial Court also took into account that notwithstanding the above, the Respondent had acted in defiance of the Appellant's warnings and had committed misconduct of a similar nature in this instance.

[71]In addition, the Industrial Court took into account the fact that the Respondent was well aware of the Appellant's position in relation to his action of speaking to the media without the prior consent of the Appellant, which the Appellant deems as misconduct under item 12 of Appellant's 'Book of Discipline' which provides:

"Publishing or circulating any article, book, photograph or letter or giving any interview or broadcast whether online or through any other media or making statements to the press or delivering any lecture or speech on any matter which concerns the duty of business of the Company without having obtained the prior consent of the Company in writing."

[72]The rights and duties which are reposed in either the employer or the employee would need to be exercised honestly and reasonably, with prudence, caution and diligence, and with "due care to avoid or minimise adverse consequences" to the other party that are inconsistent with the agreed common purpose and expectations of the parties. (see: *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* *[2007] NSWSC 104*)

[73]It is established law that where an employee has in fact been guilty of uncondoned misconduct so

grave as to justify instant dismissal, the employer can rely on that misconduct in defence of any action for wrongful dismissal even if at the date of the dismissal the misconduct was not known to him: (*Boston Deep Sea Fishing & Ice Co v Ansell* *(1888) 39 Ch D 339*). The misconduct need not be one that is in connection with the performance of the employee's duties. It is sufficient if it is conduct prejudicial to the interests or to the reputation of his employer: (*Pearce v Foster* (1886-87) *17 QBD 536*). In each case, it is a matter of degree whether the act complained of is of the requisite gravity. It has been said that it must be so serious that it strikes at the root of the contract of employment, that it destroys the confidence underlying such a contract: (*Jackson v Invicta Plastics* *[1987] BCLC 329* at 344), per Peter Pain J. (see also *Cowie Edward Bruce v Berger International Pte Ltd* [1999] SGHC 62)

[74]It is trite that past misconduct of an employee is a relevant factor to be considered in determining whether the punishment of dismissal is harsh. (see: *Kamala Loshanee A/P Ambalavanar V Jaffnese Co-Operative Society* *[1998] 7 MLJ 61* and *Umw Equipment Sdn Bhd V Parantaman Ramasamy & Anor* *[2014] 3 MLJ 457*)

[75]Therefore, we agree with the Appellant's submission that the learned High Court Judge had erred in law in deciding that the Respondent's past record on making press statements without consent from the Appellant does not carry much weight. In so deciding, the learned High Court Judge failed to appreciate the Respondent's own admission that he cannot make any public statements without the approval of the Appellant and that the repetitive nature and the cumulative effect of similar acts of misconduct in totality warranted dismissal.

[76]The Industrial Court found that the Respondent's repeated misconduct underlines his insubordination against the Appellant and that as a long-serving employee of the Appellant, the Respondent ought to have been aware of the Appellant's policies instead of acting in contravention of the same. On this issue, the Industrial Court took into account that in the present instance, the Respondent did not deny the allegations which had been levelled against him; he merely took the position that the press statements had been made by virtue of his position as the President of NUFAM. Apart from breaching his implied duty towards the Appellant, the Industrial Court noted that the Respondent had also breached express regulations of the Appellant, namely, the procedure governing the raising of grievances and the provisions in the Appellant's Book of Discipline in relation to publications, interviews, broadcasts, etc. Based on the foregoing factors, the Industrial Court ruled as follows:

> *"[74] In view of the seriousness and nature of the Claimant's misconduct; and taking into account the fact that the Claimant remained unremorseful based on his poor disciplinary record, it is the considered view of this Court that the Company's decision to dismiss the Claimant with immediate effect was warranted and commensurate with the misconducts committed by the Claimant. Hence, the Company had just cause and excuse to dismiss the Claimant in the circumstances of this matter."*

[77]The Industrial Court also stated that commencement of disciplinary action and dismissing a workman did not tantamount to a violation of *section 5(1)* of *IRA 1967*; and that it was reinforced by *section 5(2)* of *IRA 1967*. This is what the Industrial Court said:

> "Merely commencing disciplinary action and dismissing him thereafter as he was found guilty by the panel of inquiry for the perceived wrong he did, cannot tantamount to a violation of *s. 5(1)(d)*. These are actions taken rightly or wrongly by an employer for a perceived wrong done by its workman.
>
> …
>
> The court's view to this effect is further reinforced by *s. 5(2)* of *IRA 1967* which states that subsection (1) of *s. 5* shall not be deemed to preclude an employer from refusing to employ a person for proper cause or not promoting a workman for proper cause or suspending, transferring, or laying off or discharging a workman for proper cause. Hence for reasons enumerated herein before it the court finds that the union's arguments and claim that the respondent has violated *s. 5(1)(d)* is again misconceived as it is clear that pursuant to

subsection (2) an act of discharging a workman for proper cause cannot be deemed a contravention of *s. 5(1)(d)*".

[78]We observed that the Industrial Court had arrived at a conclusion based on a thorough, reasoned and sound analysis of the evidence presented before it which includes the testimonies of the Appellant's and the Respondent's witnesses as well as an evaluation of the documentary evidence presented by both parties. Therefore, we are of the view that in this present case, it was not open to the High Court to interfere with the findings of fact by the Industrial Court and substitute its own views in place thereof.

[79]In fact, in paragraph [39] of his judgment, the learned High Court Judge acknowledged that clause 12, Appendix 1 of the Appellant's Book of Discipline requires consent in writing from the Appellant before issuing any press statement. Similarly, his Lordship also said that Article 27 of the MASEU's Collective Agreement 2011 prohibits employees from making press statements.

[80]It is trite law that the High Court is not obliged to interfere with the findings of the Industrial Court unless such findings are so unreasonable that no reasonable man could reasonably arrive at such findings. This principle of law has been laid down by Gopal Sri Ram, JCA (as he then was) in *William Jacks & Co. (M) Sdn Bhd v. S. Balasingam* [1997] 3 CLJ 235 which we reproduce below:

> "Before us, Sivabalah, with his usual meticulous care, has taken us through several passages in the testimony of the witnesses who gave evidence in the Industrial Court. He has attacked the learned Judge's refusal to issue certiorari on a number of grounds. I find it, however, unnecessary to delve into each of them. Suffice to say that the complaints made by Sivabalah amount to a criticism of the findings of fact made by the Industrial Court based upon the credibility of the witnesses it saw and heard.

It is well-settled that a Court cannot utilise certiorari proceedings as a cloak to entertain what, in truth, is an appeal against findings of fact. If authority is needed for that proposition, it may be found in the decision of the Indian Supreme Court in *Basappa v. Nagappa AIR* *[1954] SC 440* and in *Dharangadhra Chemical Works Ltd. v. State of Saurashtra & Others AIR* [1957] SC 264.

In response to this proposition, Sivabalah refers us to the decision of this Court in *Amanah Butler (M) Sdn. Bhd. v. Yike Chee Wah* [1997] 2 CLJ 79 and the decision of the Federal Court in **Rama Chandran** (supra). I am conscious of the inroad made by these decisions in the field of administrative law. The principle they establish is that when a decision of an inferior tribunal is attacked in public law proceedings for unreasonableness, the inquiry extends to the merits of the decision itself.

The question at the end of the day is whether a reasonable tribunal similarly circumstanced would have come to a like decision on the facts before it. However widely understood the proposition in **Rama Chandran** and **Amanah Butler** (supra) may be, it does not include the review, in certiorari proceedings, of findings of fact based on the credibility of witnesses.

We are, therefore, in agreement with learned Judge's refusal to enter upon a domain expressly reserved by law to the Industrial Court. The issue before that Court was whether there was a genuine retrenchment exercise vis-a-vis the respondent. Retrenchment means: "the discharge of surplus labour or staff by the employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action" (per S.K. Das J in *Hariprasad v. Divelkar AIR* [1957] SC 121 **at p. 132**).

Whether the retrenchment exercise in a particular case is bona fide or otherwise, is a question of fact and of degree depending for its resolution upon the peculiar facts and circumstances of each case. It is well-settled that an employer is entitled to organise his business in the manner he considers best. So long as that managerial power is exercised bona fide, the decision is immune from examination even by the Industrial Court. However, the Industrial Court is empowered, and indeed duty-bound, to investigate the

facts and circumstances of a particular case to determine whether that exercise of power was in fact *bona fide*.".

[81]In *Puhlhofer v Hillingdon London BC* [1986] 1 All ER 467 at 474; , 1986 AC 484 at *518* Lord Brightman said:

> *"Where the existence or non-existence of a fact is left to the judgment and discretion of a public body … it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely."*

Whether The Respondent Is Protected Under Section 22 Of TUA 1959

[82]The next question for consideration is whether section 22 of TUA 1959 applies to the dismissal of the Respondent.

[83]Learned counsel for the Appellant submitted that the learned High Court Judge erred in law when his Lordship failed to appreciate that section 22 of TUA 1959 does not apply to any acts of misconduct committed by an employee or any disciplinary action commenced in respect of such acts of misconduct.

[84]Central to the Respondent's argument in this appeal is that the Respondent's status as an officer of a trade union engaged in lawful trade union activity at the time the Appellant took adverse action against him meant that the Respondent's union position and activities were interrelated with the dismissal action and that the Respondent was therefore immune and protected under section 22 of TUA 1959.

[85]It was urged on behalf of the Respondent that the learned High Court Judge had not erred in law in applying section 22 of TUA 1959 in the context of this case. Learned counsel for the Respondent seeks to overcome this argument by relying on *Chen Ka Fatt v Maybank Bhd* [2018] 2 ILR 250 where the Industrial Court held that:

> "Berdasarkan kepada keputusan Mahkamah Rayuan tersebut, Mahkamah berpendapat pihak bank tidak mempunyai kausa tindakan untuk mengambil tindakan sivil terhadap pekerja-pekerjanya. Walaupun kes ini melibatkan tindakan disiplin dan bukannya tindakan sivil, namun berdasarkankepada fakta yang dikemukakan, pihak bank tidak boleh menamatkan perkhidmatan pihak menuntut atas perbuatan yang sama di mana undang-undang secra jelasa menghalang sebarang tindakan sivil untuk tort defamation."

[86]On this point, the learned High Court Judge held as follows:

> "[46] As to the provision of section 22 of the Trade Union Act 1959, the Court of Appeal in Nur Rashi dah's ca se has explained clearly that this provision provides immunity for union members from any civil suit in relation to tortious act arising from lawful activities of the union.
>
> [47] In this regard, the allegations against the applicant also relates to the derogatory and defamatory statement against the 1st respondent particularly when the statement demanded the Chief Executive Officer to resign. The 1st respondent's complaint also relates to tort of defamation. Here, if the law, which is section 22 protects union members from civil suit from any tortious act arising from the union activities, the member should also be protected from action of dismissal based on the same conduct. Otherwise, it will make section 22 ineffective in protecting union members. This certainly is not the intention of the Parliament in enacting section 22."

[87]It is necessary first to look at the governing legislation. Section 22(1) of TUA 1959 states that:

> "A suit against a registered trade union or against any members or officers thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union shall not be entertained by any court."

[88]*Section 22(1)* in its plain and literal reading essentially means when a tortious act committed by a registered trade union or its members, will be excluded from liability in a suit brought by the trade union or its members themselves or by officers' representation to the court. This further means that this section is of broad and general application that it does not expressly stipulate the particular type or category of the tortious act to warrant the operation of this section.

[89]Case laws which dealt with *section 22(1)* or provisions similar to it which highlight that tortious acts would include "defamatory acts" are as follows:

i. The National Union of *Plantation Workers v K Annamalai* *[1959] 1 MLJ 9*; COA **("K Annamalai")**

ii. *National Union of Plantation Workers & Ors v Abdul Hamid* *1963 1 MLJ 78*; COA **("Abdul Hamid")**;

iii. *Nur Rasidah bt Jamaludin v Malayan Banking Bhd and other appeals* [2018] 127; COA **("Nur Rasidah")**

[90]In **K Annamalai (supra)**, the issue brought before the Court of Appeal was whether the registered trade union of National Union of Plantation Workers (the Appellant) may be liable to be sued for libel by the Honorary Secretary of the Malayan Estate Workers Union (the Respondent) for the reason of being an owner and publisher of certain defamatory statements published in a magazine entitled "Sangamani" in light of section 21 of the Trade Unions Enactment 1940.

[91]Thompson CJ had elaborated at length concerning the meaning and scope of section 21 of the Trade Unions Enactment 1940 which is in *pari materia* with the current *section 22(1)* of *TUA 1959*. His Lordship held that *sections 21* through sub (1) and (2), limits the liabilities of a registered trade union while at the same breath allows certain instances and requirements for the contrary.

[92]In holding that a registered trade union in the Federation cannot be sued for libel, His Lordship (delivering the majority) held as follows:

> ***At 10:***
>
> *"The law relating to trade unions in this country is contained in the Trade Unions Enactment, 1940, which is clearly based on, though it does not follow in detail, the provisions of the United Kingdom Trade Union Acts. Section 21 of that Enactment, which corresponds to section 4 of the Trade Disputes Act, 1906, reads as follows:*
>
> ***"21(1). A suit against a registered trade union or against any members or officers thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union shall not be entertained by any Court.***
>
> *(2). Nothing in this section shall affect the liability of a trade union or any officer thereof to be sued in any Court touching or concerning the property or rights of a trade union, except in respect of any tortious act committed by or on behalf of the trade union in contemplation or in furtherance of a trade dispute."*
>
> *Before proceeding to a detailed consideration of that section it is important to observe that it does not create any liability on the part of trade unions. What it does do is to cut down and limit liabilities which arise and exist independently of it and which, but for its provisions, would be greater than they are.*
>
> *These liabilities are the same as were the liabilities of trade unions under the law of England prior to the Trade Disputes Act, 1906. After the case of The Taff Vale Railway Co v The Amalgamated Society of Railway Servants (1901) AC 426 it was settled law that a trade union was an entity known to the law and could be sued inter alia for the tortious acts of its servants or agents (see Bonsor v Musicians' Union (1956) AC 104. Moreover, in the case of any unincorporated body whose property is vested in trustees the trustees as such can be joined as defendants in any proceedings where the plaintiff is seeking a remedy against the property (see Ideal Films Ltd v Richards (1927) 1 KB 374.*

As regards libel, therefore, the position, had section 21 not been enacted, would have been that a trade union could be sued for any libel published by its servants for which it would be liable … on ordinary principles of agency" (see Citizens' Life Assurance Co Ltd v Brown (1904) AC 423 426. That is the liability which would exist were it not for section 21 and which section 21 has to some extent cut down and limited.

With great respect for the legislature I can only describe section 21 as a sort of forensic jumping jack. He starts with the liability of the trade union as it has been stated; then the section cuts it down by saying that no action in respect of any tortious act shall be entertained by any Court. Having imposed that prohibition the section then detracts from it by saying it is not to apply where the union is sued "touching or concerning" its "property or rights." Then having thus detracted from the prohibition it proceeds so to speak, to detract from the detraction by saying that the prohibition is not to be detracted from where the tortious act is committed in connection with a trade dispute.

The initial prohibition which is contained in sub-section (1) which follows the wording of section 4(1) of the Trade Disputes Act, 1906, is clear and unambiguous. Every Court is forbidden to entertain a suit against a registered trade union in respect of any tortious act committed by or on behalf of the union, and if any authority is necessary to support the proposition that this prohibition strikes at a suit based on the publication of a libel it is to be found in the case of Vacher & Sons Ltd v London Society of Compositors (1913) AC 107.

In the present case there is no question of any connection with a trade dispute and the only question therefore which arises is whether in the present proceedings the union is being sued "touching or concerning" its "property or rights". If it is being so sued, then the case falls within sub-section (2) and ***sub-section (1) does not apply; if it is not being so sued then sub-section (1) does apply and the suit is prohibited.***

At 12:

In the first place I would observe that section 21 is meaningless except on the assumption that tortious acts can be divided into two classes according as to whether or not suits based on them do or do not touch or concern the property or right of the union which is sued. ***Sub-section (1) applies to all actions for tort.*** *Sub-section (2) must apply to less than all actions for tort for otherwise it would completely cancel out sub- section (1) except in cases connected with a trade dispute. This may have been the intention of the legislature but in the first place if it was so intended then it is surprising that the legislature did not say so in terms and in the second place it is a construction which is in conflict with the view of the House of Lords in Vacher's case, supra, where their Lordships strongly disapproved the attempt to take the words "in contemplation … of a trade dispute" from sub-section (2) and read them with sub-section (1) of section 4 of the Trade Disputes Act so as to cut down the generality of the provisions contained in sub-section (1).*

If it be accepted that section 21 postulates a dichotomy among suits for tort according as to whether they do or do not touch or concern the property or rights of the union then it clearly follows that by "property or rights" is meant not the sum total of the union's property or rights of every description but individual specific rights or items of property. My reason for saying so is that every action of any sort viewed s limine touches or concerns in some way the property or rights of both litigants. If it were not so there would be no action. And in the event in every case the totality of the property and rights of each of the litigants must be to some extent increased or diminished. For example, as was said by Mathew, J., in the case of Linaker v Pilcher supra — p. 426):—

"An action that threatened the assets of the society by a claim for damages … would be an action that touched and concerned the property of the society."

Then I would observe that the word "rights" must mean patrimonial or property rights. In that sense its use may be pleonastic. Nevertheless, I think it is so used not only from its close juxtaposition with the word "property" but again because it is difficult to imagine any action that has not something to do with "rights" in the widest sense, for after all rights and liabilities are co-relative terms. And again such an interpretation would nullify the provisions of sub-section (1)."

[Emphasis added]

[93]It appears from **K Annamalai (supra)** that section 21(1) of the Trade Unions Enactment 1940 which is *in pari materia* with *section 22(1)* of *TUA 1959*, includes a defamatory act of tort as the 'tortious act' precluded from a suit. This ratio mirrors in another subsequent case.

[94]In **Abdul Hamid (supra)**, the Court of Appeal had again the opportunity to entertain similar question

with similar lines of facts as in **K Annamalai (supra)**, only that the relevant law which is the Trade Unions Enactment 1906 had been repealed and was replaced by the Trade Unions Ordinance 1959.

[95]In **Nur Rasidah (supra)** the Court of Appeal had the occasion to deal with the sole question of similar nature: whether *section 22* of *TUA 1959* afforded absolute immunity to five employees against an action for libel taken against them by the employer bank. In this case, the Court of Appeal agreed to Thompson CJ's ratio in both **K Annamalai (supra)** and **Abdul Hamid (supra),** having considered itself bound by the decisions.

[96]Harminder Dhaliwal, JCA (now FCJ) reasoned as follows:

At 134:

> *"[8] Before we deal with the respective positions taken by the parties with respect to the application of s 22* of the *TUA 1959, it is necessary to set out some background to this particular provision. The law relating to trade unions in this country was initially contained in the Trade Unions Enactment 1940 ('the 1940 Enactment'). Section 21 of that Enactment, which is relevant to the present appeals, provided as follows:*
>
> > *21(1) A suit against a registered trade union or against any members or officers thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union shall not be entertained by the Court.*
> >
> > *(2) Nothing in this section shall affect the liability of a trade union or any officer thereof to be sued in any Court touching or concerning the property or rights of a trade union, except in respect of any tortious act committed by or on behalf of the trade union in contemplation or in furtherance of a trade dispute.*
>
> *[9] In 1959, the Legislature enacted the Trade Unions Ordinance 1959 which was later revised in 1981 and is now referred to as the Trade Unions Act 1959 (Act 262) ('the TUA 1959'). Section 21* of the 1940 Enactment was replaced by *s 22* of the *TUA 1959 which contained some changes. These changes, together with the background to the law relating to trade unions in this context, were well set out in the judgment of Thompson CJ (as he then was) in National Union of Plantation Workers & Ors v Abdul Hamid [1963] 1 MLJ 78. The changes were noted by Thompson CJ as follows (at p 80):*
>
> *It will be observed that sub-s (1) is the same as the old sub-s (1) and the same as sub-s (1) of s 4 of the Trade Disputes Act 1906. But in sub-s (2) there are three changes from s 21 of the 1940 Enactment. The words 'or any trustee' have been inserted after the words 'trade union' where these words first occur; the word 'specific' has been inserted before the word 'property' where it first occurs; and the words 'or in respect of any tortious act arising substantially out of the use of any specific property of a trade union' have been inserted after the words 'trade union' the second time these words occur.*
>
> ***At 136:***
>
> *[19] Coming now to the arguments raised, the pivotal question that requires an answer at the outset is whether the tort of libel is a type of tort that is envisaged by s 22* of the *TUA 1959 and more particularly s 22(2). The jurisprudence in this respect is covered by two cases of the higher courts dealing specifically with s 22* of the *TUA 1959, namely, the cases of Annamalai and Abdul Hamid, as alluded to earlier.*
>
> *[20] The case of Annamalai was a decision of the then Court of Appeal. It was decided based on s 21 of the then 1940 Enactment. It was therefore decided prior to the amendment which appeared in s 22(2)* of the *TUA 1959. **The Court of Appeal decided that unlike actions for trespass, trover and detinue, for example, an action for libel does not touch or concern the property or rights of a trade union as required by the then s 21(2). We therefore agree that this case is authority for the proposition that s 21(1) confers general blanket immunity against any libel action against a trade union or its members/officers.***
>
> *[21] As revealed earlier, s 22(2)* of the *TUA 1959 was amended a year after the decision in Annamalai. The question of whether the amended s 22(2) applied to the tort of libel was considered soon after by the Court of Appeal in Abdul Hamid. The changes to s 22(2) were noted by Thompson CJ as set out earlier. **The Court of Appeal then, having considered the amendments to s 22(2)** of the **TUA 1959, decided that the addition of several words to the section did not change the general legal position of the section, in that a trade union or any officer of a trade union shall not be sued for the tort of defamation**. It was observed that s 22(1)* of the *TUA 1959*

conferred an absolute immunity to a trade union and its members from being sued for libel. ***The Court of Appeal also concluded that libel is not a type of tort that the falls within the ambit of the qualification introduced under*** *s 22(2)* of the *TUA 1959*.

[22] In a nutshell, Thompson CJ explained that the effect of s 22(2) was to distinguish between:

(a) *torts where liability arises from ownership of property and for which the trade union is liable to be sued; and*

(b) *torts which arise otherwise than from ownership of property and for which the trade union is not liable to be sued.*

[23] Thompson CJ went on to hold that libel is not a type of tort that arises from ownership of property. In deciding whether the qualification introduced by s 22(2) of the *TUA 1959 applied or not, Thompson CJ pronounced as follows (at p 81):*

> *So considered it is clear that the words 'arising substantially out of the use of any specific property' do not qualify the words 'tortious act' but qualify the word 'liability'. Thus the true dichotomy is between torts where the liability arises from ownership of property and for which the union is liable to be sued and torts which arise otherwise than from ownership of property and for which the union is not liable to be sued.*
>
> *Libel clearly falls within the second of these classes …*

[24] The upshot of the above two decisions is that it matters not whether there exists a 'trade dispute' between the parties as the tort of libel is not a type of tort which is covered by s 22(2) of the *TUA 1959*. ***The general immunity conferred by*** *s 22(1)* ***applies to the tort of libel and hence the defendants here cannot be held liable for the impugned documents published by the trade union. In short, trade unions and its members or officers have absolute immunity from actions that are premised upon the tort of libel pursuant to*** *s 22(1)* of the *TUA 1959* ***when the tortious acts complained of we re 'c ommi tte d by or on be ha lf of the trade union'.***

[25] We have been urged by learned counsel for the bank to depart from these decisions based on the arguments raised as set out at the outset. It was argued that the legislative intent ought to be considered and the debate speech in 1959, as alluded to earlier, was cited in support. In this respect, we agree that reference to parliamentary reports as an aid to interpretation is permissible. However, the circumstances in which such reference could be made were circumscribed by the Federal Court in Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345 where it was held (at the headnotes):

> *In construing a statute, a reference to Parliamentary reports of proceedings or Hansard, as an aid to statutory interpretation, should be permitted where the enactment is ambiguous or obscure, or which if literally construed might lead to an absurdity, provided that the statement reported in the Hansard was made by a Minister or other promoter of a Bill. However, Hansard was only an aid to interpretation and could not be determinative of the issue for that would amount to substituting the words of the Minister or promoter of the Bill for the words of the statute. In this case, the Ministerial statement reported in Hansard did not assist the court at all.*

[26] Similarly, in the instant case, we were unable to see how the speech referred to could provide any assistance in interpreting s 22 of the *TUA 1959*. ***The Court of Appeal in Abdul Hamid interpreted*** *s 22* ***after it was amended when the TUA 1959 came into force and we found no reason to disagree. In fact, we are bound by the decisions of the then Court of Appeal. It must be*** *noted that Annamalai (1959) and Abdul Hamid (1963) are both cases of the Court of Appeal that was in existence prior to the coming into force of the Courts of Judicature Act 1964 ('the CJA 1964').*

[Emphasis Added]

[97]However, in our view, the authorities that the Respondent cited in support of its contention are not on point. The cases cited above relate to defamation suits by the employer against the employee. The same cannot be said of the present case. The present action is not an action in tort (defamation). The action is an action for unlawful dismissal. The dismissal of the Respondent in the present case was pursuant to the alleged breach of the terms and conditions of employment and therefore, it is not a tortious action.

[98]The Singapore Court of Appeal case of *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and Another* [2008] SGCA 8**; 2 SLR 623** explained the "contract" – "tort" distinction in the following ways:

"[75] The law of contract, put simply, is about agreement. It is true that there can be concurrent liability in contract and in tort, but, where there is no such concurrent liability, the law of tort clearly relates to civil wrongs that occur not as a result of a contractual relationship between the party that has suffered damage and the party that committed the tort(s) in question as such but, rather, despite the fact that both have hitherto been strangers to each other. This is a simple – yet profoundly important – starting point, which is also captured by the observations of both Lord Reid and Lord Upjohn in The Heron II at 386 and 422, respectively (reproduced above at [71]).

[76] If there has, ex hypothesi, been agreement between the parties to a contract, it follows that they have already been afforded the opportunity to consider various matters thought to be relevant to their contractual relationship itself. This would, of course, include any matters relating to remedies in general and damages in particular. Indeed, the quintessential illustration of contractual provision in this regard is the liquidated damages clause, which purports to constitute a genuine pre-estimate of loss that might result from a breach of contract (see also the passage from The Heron II at 422 (per Lord Upjohn) reproduced above at [71]). In this regard, whether or not a clause which purports to be a liquidated damages clause is truly a clause of that nature or is, instead, unenforceable because it actually constitutes a penalty is not a topic that concerns us in the present appeal (but, for the classic statement of the applicable principles in this particular area of contractual remedies, see the judgment of Lord Dunedin in the House of Lords decision of *Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited* *[1915] AC 79* at 86–88)."

[99]The case of **Robertson Quay (supra)** was followed by the Singapore Court of Appeal in *PH Hidraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd and Another Appeal* *[2017] 2 SLR 129*.

[100]It is noted that in *Kumpulan Sua Betong v. Maruthan Kuppusam* [1996] 2 ICR 1594, the Industrial Court had referred to Alfred Avins, Employee's Misconduct which opined that:

"The making of a public defamatory attack on superiors is insubordination as is the use of abusive language about superiors to third persons.

A union officer who authorises the issuance of a public leaflet making a defamatory attack on supervisor is guilty of misconduct and cannot shield himself behind his union status. In one case officers of a union on strike against a bank issued a leaflet accusing management of "exploiting" the bank for their "individual interests of shareholders depositors and poor bank employees" as device to gain public sympathy. The Supreme Court of India observed that this statement makes importations about the honesty and management of the bank and in terms suggest improper use of the funds of the bank for personal purposes. It therefore concluded that the "publication can be regarded as subversive of the credit of the bank. Therefore for his direct connection with this document alone the appellate tribunal would have been justified in refusing reinstatement", (*Punjab National Bank Ltd v. All India Pun. N.B.E.F* – (1960) 1 SCR 806 AIR **[1960]**."

[101]In view of the position of the law as discussed above, we do not think that the facts of this case will be covered under *section 22* of *TUA 1959*. We are of the view that the learned High Court Judge had misdirected himself on this point.

Whether There Was A Trade Dispute Between NUFAM And The Appellant

[102]In dealing with the respondent's dismissal, it is also relevant to consider whether there was a trade dispute between NUFAM and the Appellant.

[103]On behalf of the Appellant, it was urged upon us that the High Court was in error in holding that the dismissal was unlawful because the issues raised in the press statements have been prolonged for some time and the Respondent's efforts to resolve the issue amicably have not been successful.

[104]NUFAM was established under the collective agreement. There is no dispute here. Learned counsel for the Appellant in his oral submissions argued that NUFAM had performed a step in the disputes procedure when it wrote to the Director-General of Industrial Relations by a letter dated 20.10.2013. Therefore, learned counsel for the Appellant stressed to us that it was wrong for the Respondent to issue a press statement on behalf of NUFAM on 7.11.2014 when it had referred the said dispute to the Director-

General of Industrial Relations on 11.10.2013. In fact, by a letter dated 11.11.2013, the Director-General of Industrial Relations responded to the Respondent as follows:

> "Setiausaha Agong Kesatuan Kebangsaan
>
> Anak-Anak Kapal Kabin Malaysia Level 28, No. 16A
>
> Persiaran Barat, PJ Exchange 46050 Petaling Jaya, Selangor
>
> Tuan,
>
> **PERTIKAIAN PERUSAHAAN DI ANTARA KESATUAN KEBANGSAAN ANAK-ANAK KAPAL KABIN MALAYSIA DENGAN MALAYSIAN AIRLINE SYSTEM BERHAD MENGENAI PENURUNAN STATUS DAN TANGGUNGJAWAB PEKERJAAN ANAK-ANAK KAPAL DARI PESAWAT WIDEBODY KE NARROWBODY (REALIGNMENT EXERCISE)**
>
> Saya dengan hormatnya diarah merujuk kepada surat tuan bertarikh 11.10.2013 mengenai perkara di atas.
>
> 2. Adalah dimaklumkan bahawa pertikaian perusahaan seperti di atas akan diambil tindakan oleh Jabatan Perhubungan Perusahaan, Selangor.
>
> Sekian, terima kasih.
>
> **"BERKHIDMAT UNTUK NEGARA"**
>
> **"Pekerja Pemangkin Transformasi Negara"**
>
> Saya yang menurut perintah,
>
> (**MOHD RIDWAN BIN ABD RAZAK**)
>
> b.p. Ketua Pengarah Perhubungan Perusahaan Malaysia "

[105]It has to be kept in mind that it is the Respondent's case that the press statement was issued pursuant to a trade dispute between the Respondent and the Appellant. According to the Respondent, at the material time, the Appellant had implemented the Weight Loss Exercise and Fleet Realignment Exercise which caused a lot of distress among cabin crew members. NUFAM raised the concerns faced by cabin crew members regarding the Weight Loss Exercise and Fleet Realignment Exercise to the Appellant Company through letters/emails dated 29.4.2013 and 3.6.2013. However, in his oral submission, learned counsel for the Respondent submitted that there is no evidence that the Appellant Company had responded or had addressed NUFAM's concerns.

[106]Therefore, it was contended for the Respondent that NUFAM had no other option except to issue a press statement on 7.11.2013 in respect of *inter alia* the plight of overworked and underpaid cabin crew members. As we have stated earlier, this press statement was carried in an article by The Sun Daily on 8.11.2013, which highlighted an interview the respondent had with Sun Biz wherein the respondent, amongst other things raised:

a) the plight of overworked and underpaid cabin crew members;

b) fatigue issues faced by cabin crew workers;

c) requested the Department of Civil Aviation to monitor the work schedules of cabin crew members in order to safeguard their wellbeing, health and safety;

d) the weight loss exercise which is applied across the board affecting all cabin crew members including those who have just returned from maternity leave;

e) urged the Company to straighten out its policies to ensure that the welfare and safety of cabin crew members are looked into; and

f) urged the Company's CEO to resign as a result of his inability to resolve the plight of cabin crew members since he took over in 2011.

[107]Learned counsel for the Respondent submitted that the press statement was done with a genuine intention to highlight the plight of overworked and underpaid cabin workers due to two (2) very recent exercises implemented by the Company. This is an important issue for cabin crew workers because overworking can lead to health and safety complications in the airline industry. In gist, the press statement according to the Respondent is to urge the Appellant to improve its policies to ensure the welfare and safety of cabin crew members.

[108]Learned counsel for the Respondent further submitted that the Respondent's press statement fell squarely within the scope of "trade union activities". The Respondent relied on the decision of this court in **Harris Solid State** (supra) which makes it clear that any dismissal of a workman for participating in trade union activities is unfair labour practice and tainted with *mala fide* and unreasonable.

[109]In this present case, it is not disputed by the Respondent that there exists a "trade dispute" between the union and the Appellant with regards to the terms of the working conditions of the Appellant's cabin crew.

[110]*Section 2* of *TUA 1959* defines a 'trade dispute' as follows:

> "'trade dispute' means any dispute between an employer and his workmen which is connected with the employment or non-employment or the terms of employment or the conditions of work of any such workmen."

[111]In our view, the issue between NUFAM and the appellant is certainly a "trade dispute" within the contact of *section 2* of *IRA 1967*.

[112]It would be appropriate at this juncture to set out the relevant provisions of the laws that govern a trade dispute. Where there is a trade dispute between a trade union and an employer, *sections 18*, *19* and *26* of *IRA 1967* provide the procedure for the settlement of the dispute as follows:

> "18.
>
> (1) Where a trade dispute exists or is apprehended, that dispute, if not otherwise resolved, may be reported to the Director General by—
>
> (a) an employer who is a party to the dispute or a trade union of employers representing him in the dispute; or
>
> (b) a trade union of workmen which is a party to the dispute
>
> (2) The Director General shall consider any dispute reported to him under subsection (1) and take such steps as may be necessary or expedient for promoting an expeditious settlement thereof: Provided that where the dispute relates to the dismissal of a workman, *section 20* shall apply.
>
> (3) Where a trade dispute exists or is apprehended, which in his opinion is not likely to be settled by negotiation between the parties, the Director General may, if he deems it necessary in the public interest, take such steps as may be necessary or expedient for promoting a settlement thereof whether or not the trade dispute has been reported to him.
>
> (4) The steps taken by the Director General under subsection (2) or (3) shall include reference of the dispute for settlement to any appropriate machinery which already exists by virtue of an agreement between or applicable to the parties to the dispute, unless -
>
> (a) the dispute has already been referred to such machinery and there has been a failure to reach a settlement; or
>
> (b) in his opinion it is unlikely that the dispute will be promptly settled through such machinery.

(5) Where, after having taken the steps under subsection (2) or (3), the Director General is satisfied that there is no likelihood of the trade dispute being settled, he shall notify the Minister accordingly.

19.(1) Where a trade dispute has been reported to the Director General under subsection 18(1) or where the Director General has taken steps under subsection (3) of that section, the party reporting the dispute and, if directed to do so by the Director General, the other party shall furnish to the Director General within such period as may be specified in the direction all the necessary information relating to the matters in dispute, together with, wherever possible and appropriate, an agreed statement setting out the points, if any, on which they have already reached agreement and the points on which there is still disagreement.

(2) The Director General may, if he deems it necessary or expedient, direct any person engaged in or connected directly or indirectly with the trade dispute in respect of which steps have been taken under *section 18* to attend a conference to be presided over by the Director General or such person as he may appoint at such time and place as may be specified in the direction.

26.(1) Where a trade dispute exists or is apprehended, the Minister may, if that dispute is not otherwise resolved, refer the dispute to the Court on the joint request in writing to the Minister by the trade union of workmen which is a party to the dispute and the employer who is a party to the dispute or a trade union of employers which is a party to the dispute.

(2) The Minister may of his own motion or upon receiving the notification of the Director General under subsection 18(5) refer any trade dispute to the Court if he is satisfied that it is expedient so to do:

Provided that in the case of a trade dispute in any Government service or in the service of any statutory authority, reference shall not be made except with the consent of the Yang di-Pertuan Agong or State Authority as the case may require.

(3) If there exists in any industry any arrangement for the settlement of trade disputes, made in pursuance of an agreement between an employer or a trade union of employers and a trade union of workmen, the Minister shall not refer the trade dispute to the Court in accordance with subsections (1) and (2) unless there has been a failure to obtain a settlement by means of those arrangements or in his opinion it is unlikely that the dispute will be expeditiously settled through such arrangements."

[113]In summary, where there is a trade dispute between a trade union and an employer, the following procedures are to be followed:

Procedures where there is a trade dispute between trade union and employer:

(a) Summary:

A. Stage 1

Route 1

(i) Where a trade dispute exists or is apprehended, either the employer or the trade union of workmen can make a report to the Director General ('DG'). (*s.18(1)*)

(ii) Subsequently, the party reporting the dispute and the other party (if directed to do so by the DG) shall furnish to the DG within such period as may be specified in the direction all the necessary information relating to the matters in dispute, together with, wherever possible and appropriate, an agreed statement setting out the points, if any, on which they have already reached agreement and the points on which there is still disagreement. Later, the DG may, if he deems it necessary or expedient, direct any person engaged in or connected directly or indirectly with the trade dispute in respect of which steps have been taken under *section 18* to attend a conference to be presided over by the DG or such person as he may appoint at such time and place as may be specified in the direction. (*s.19*)

(iii) The DG shall then consider such dispute and take such steps as may be necessary or expedient for promoting an expeditious settlement thereof. However, if it is related to dismissal of a workman, then *section 20* of Act 177 shall apply. The steps shall include reference of the dispute for settlement to any appropriate machinery which already exists by virtue of an agreement between or applicable to the parties to the dispute, unless the dispute has already been referred to such machinery and there has been a failure to reach a settlement, or in his opinion it is unlikely that the dispute will be promptly settled through such machinery. If the DG is satisfied that there is no likelihood of the trade dispute being settled, he shall notify the Minister accordingly. (*s.18(2), (4) & (5)*)

Route 2

(i) Where a trade dispute exists or is apprehended, it is in the DG's opinion that it is not likely to be settled by negotiation between the parties, the DG may, if he deems it necessary in the public interest, take such steps as may be necessary or expedient for promoting a settlement thereof whether or not the trade dispute has been reported to him. (*s.18(3)*)

(ii) Where the DG has taken any such steps, the party reporting the dispute and the other party (if directed to do so by the DG) shall furnish to the DG within such period as may be specified in the direction all the necessary information relating to the matters in dispute, together with, wherever possible and appropriate, an agreed statement setting out the points, if any, on which they have already reached agreement and the points on which there is still disagreement. Later, the DG may, if he deems it necessary or expedient, direct any person engaged in or connected directly or indirectly with the trade dispute in respect of which steps have been taken under *section 18* to attend a conference to be presided over by the DG or such person as he may appoint at such time and place as may be specified in the direction. (*s.19*)

(iii) The steps taken by the DG shall include reference of the dispute for settlement to any appropriate machinery which already exists by virtue of an agreement between or applicable to the parties to the dispute, unless the dispute has already been referred to such machinery and there has been a failure to reach a settlement, or in his opinion it is unlikely that the dispute will be promptly settled through such machinery. If the DG is satisfied that there is no likelihood of the trade dispute being settled, he shall notify the Minister accordingly. (*s.18(4) & (5)*)

B. Stage 2

(i) Where a trade dispute exists or is apprehended, and is not otherwise resolved, the Minister may refer the dispute to the Industrial Court on the joint request in writing to the Minister by the trade union of workmen which is a party to the dispute and the employer who is a party to the dispute. (*s.26(1)*)

(ii) Alternatively, the Minister may of his own motion or upon receiving the notification of the DG under subsection 18(5) refer any trade dispute to the Industrial Court if he is satisfied that it is expedient so to do. Provided that in the case of a trade dispute in any Government service or in the service of any statutory authority the consent of the Yang di-Pertuan Agong or State Authority as the case may require. (*s.26(2)*)

(iii) If there exists in any industry any arrangement for the settlement of trade disputes, made in pursuance of an agreement between an employer and a trade union of workmen, the Minister shall not refer the trade dispute to the Industrial Court unless there has been a failure to obtain a settlement by means of those arrangements or in his opinion it is unlikely that the dispute will be expeditiously settled through such arrangements. (*s.26(3)*)

[114]It is our considered view that it is the intention of Parliament that when there is a "trade dispute", the parties must adhere to the procedure under *sections 18*, *19* and *26*. However, the Respondent did not settle the disputes according to the provisions of the relevant laws as discussed above. Instead, the Respondent issued the press statements seeking the dismissal of the CEO.

[115]We are of the view that where the law provides for an alternative procedure for settlement of disputes arising under the collective agreement, this method must be adhered to by the parties. A party cannot unilaterally bypass the settlement procedure. In the instant case, the grievance procedure has not been exhausted by the parties when the Respondent issued the said Press Statement.

[116]In fact, the evidence shows that on 13.8.2014, the Director-General wrote to the Chairman of Industrial Court as follows:

"Yang Dipertua Mahkamah Perusahaan 50544 Kuala Lumpur

Y.A Puan,

PERTIKAIAN PERUSAHAAN DI ANTARA KESATUAN KEBANGSAAN ANAK-ANAK KAPAL KABIN SEMENANJUNG MALAYSIA DENGAN MALAYSIAN AIRLINE SYSTEM BERHAD MENGENAI TINDAKAN MAJIKAN YANG MEMAKSA ANAK-ANAK KAPAL KABIN PENERBANGAN SUPAYA MENURUNKAN BERAT BADAN MEREKA DI DALAM BEBERAPA TEMPOH YANG DIBERIKAN DAN TAMAT TEMPOH TERSEBUT ADALAH PADA 15.6.2013

Saya dengan hormatnya diarah merujuk kepada perkara di atas.

2. Dimaklumkan bahawa Y.B. Menteri Sumber Manusia melalui keputusan bertarikh **8 Ogos 2014** telah memutuskan pertikaian di antara **Kesatuan Kebangsaan Anak-Anak Kapal Kabin Semenanjung Malaysia Dengan Malaysian Airline System Berhad Mengenai Tindakan Majikan Yang Memaksa Anak-Anak Kapal Kabin Penerbangan Supaya Menurunkan Berat Badan Mereka Di Dalam Beberapa Tempoh Yang Diberikan Dan Tamat Tempoh Tersebut Adalah Pada 15.6.2013** dirujuk ke Mahkamah Perusahaan di bawah Seksyen 26(2) Akta Perhubungan Perusahaan 1967.

Sekian, terima kasih.

"BERKHIDMAT UNTUK NEGARA"

"Pekerja Berinovasi Pemacu Transformasi"

Saya yang menurut perintah

(**SULAIMAN BIN ISMAIL**)

b.p. Ketua Pengarah Perhubungan Perusahaan Malaysia "

[117]The facts clearly show that the parties' dispute procedure has not been exhausted and this prerequisite was not satisfied. During the pendency of the settlement process between the parties to the dispute, they are expected to maintain the status quo and not to take any action which would disturb industrial peace or prejudice a fair trial before the Industrial Tribunal (see: *State of Bihar v. D.N Gangly and others* *[1959] 1 MLJ 178* (S.C).

[118]In our view, the policy of IRA 1967 is to secure and preserve good relations between the employers and their workmen and to maintain industrial peace and harmony. TUA 1959 provides that one of the objects of a trade union is '*the regulation of relations between workmen and employers, for the purpose of promoting good industrial relations between workmen and employers, improving the working conditions of the workmen or enhancing their economic and social status'*.

[119]Having developed a mutually agreeable process under the collective agreement, it is not up to one party to by-pass any stage in the procedure. The IRA 1967 (part V) recognises the importance of this. Therefore, the Respondent must not issue any Press Statement if the procedure has not been exhausted. Such an action is contrary to the provisions of IRA 1967 and the intention of Parliament.

[120]In our view, even though the word used in *section 19*, is "may" the principles of Collective Agreement interpretation necessarily lead to the conclusion that the dispute settlement procedure should have been exhausted by the parties.

[121]It is also relevant to refer to the decision of the Federal Court in *Dynamic Plantations Bhd v YB Menteri Sumber Manusia & Anor and another appeal* [2011] 1 ILJ 100; FC. Sometime after the appellant left an employer's trade union known as MAPA, the second Respondent invited the appellant, pursuant to *s 13* of the *Industrial Relations Act 1967* ('IRA'), to commence collective bargaining concerning the employment of a category of the appellant's employees. The Appellant declined the invitation on the basis that it had not granted recognition to the second respondent. The second Respondent referred the matter to the first Respondent who subsequently referred the matter to the Industrial Court as a trade dispute under *section 26(2)* of *IRA 1967*. The issue for determination was whether the first respondent had acted ultra vires in referring the dispute over recognition to the Industrial Court as a trade dispute when the second respondent had neither sought nor obtained recognition from the appellant.

[122]The Federal Court dismissed the appellant's appeal and held that firstly, it is to be restated that recognition can also be granted by way of conduct of the parties and that recognition under *section 9* of *IRA 1967* is not the exclusive procedure for recognition. Secondly, by reference to *sections 18* and *26* of *IRA 1967*, it will show that the first respondent had rightly referred the dispute directly to the Industrial Court under *section 26(2)* of *IRA 1967* as a trade dispute as distinct from a dispute over recognition, due to the reason that:

> "***[24]*** *The definition of a trade dispute is very wide. If a dispute is connected with employment, it is a trade dispute. This is sensible because the objective of the IRA is to confer on the Industrial Court power to sort out issues between the employee and the employer. Therefore, based on the above provision of s18, 26 and 2 of the IRA, it is clear that the second respondent's complaint was a trade dispute. It was a trade dispute on the issue of a failure to reach a collective agreement between the parties and not on the issue of recognition. The first respondent therefore had the jurisdiction to refer the matter to the Industrial Court as such for resolution.*"

[123]Before we conclude the ultimate burden of showing that the Respondent had committed gross misconduct which would have justified a dismissal is one on the Appellant. On the facts, we think they have succeeded. In the circumstances, the dismissal of the Respondent is justified.

[124]We find that the contract of employment had implied into it, a duty of good faith. There was also an implied duty that the employee would not, without proper and reasonable cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the parties. As a matter of fact, there is no merit in the allegation that the Appellant had contravened *sections 4* and *section 5(1)* of *IRA 1967*.

CONCLUSION

[125]In view of the facts and legal position as alluded to, this appeal is allowed with costs of RM5,000.00 subject to the allocator. We dismiss the application of the Respondent against the Appellant and set aside the order of the High Court.

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