ROBIN TAN PANG HENG

v.

KETUA PENGARAH KESATUAN SEKERJA MALAYSIA & ANOR

HIGH COURT MALAYA, PENANG
RK NATHAN J
[ORIGINATING SUMMONS NO: 24-288-1995]
21 NOVEMBER 2001

LABOUR LAW: *Trade union - Registration - Application to declare registration null and void on ground that trade union represented casual workers - Whether amounted to judicial review of decision of Director General of Trade Unions - Whether applicant had shown that Director General acted unfairly or abused powers to warrant judicial interference - Whether applicant should resort to appeal procedure provided under s. 71A Trade Unions Act 1959*

ADMINISTRATIVE LAW: *Exercise of judicial functions - Judicial review - Decision of Director General of Trade Union to register trade union - Whether applicant had shown that Director General acted unfairly or abused powers to warrant judicial interference - Whether applicant should resort to appeal procedure under s. 71A Trade Unions Act 1959*

The plaintiff was the General Manager and Public Officer of the Penang Turf Club registered under the Societies Act 1966. The 1st defendant was the Director General of Trade Unions who registered the 2nd defendant as a trade union of the said Turf Club under s. 12(1) of the Trade Unions Act 1959 ('the Act'). The plaintiff refused to recognise the 2nd defendant as a trade union because he was of the view that the 2nd defendant represented casual workers who in law could not form a trade union. The plaintiff now sought to declare the said registration of the 2nd defendant null and void.

Held:

[1] Section 2(2) of the Act empowered the 1st defendant to register the 2nd defendant and by virtue of s. 71A of the Act the plaintiff, if dissatisfied with that decision could appeal to the Minister within 30 days from the date of that decision. The 1st defendant issued the registration of the 2nd defendant as a Trade Union on 22 November 1994. There was no evidence that the plaintiff had appealed to the authorities within 30 days from the date of that decision. (pp 777 h, 778 h & 779 a-b)

[2] Sub-section (4) of s. 71A clearly states that the decision of the Minister made under that section on appeal shall be final and conclusive. In other words, the door against the plaintiff's entry into any further litigation had been bolted doubly secure. The first bolt was his failure to appeal within 30 days and the 2nd bolt was that the decision of the authorities one way or the other would have been final. (p 779 b-d)

[3] The plaintiff did not submit that the 1st respondent had acted unfairly or had abused his powers to warrant judicial interference. He merely pointed out that since 1999 after the *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* case there was a shift in judicial opinion "with regard to the existence of an internal appeal notwithstanding the right of the courts to review the decision of a public authority". Whilst there clearly was such a trend, it was limited to cases where it must be shown that a party had acted unfairly or had abused its powers or that like in the said case where it was more expedient to go for judicial review than to go for appeal. (pp 779 h-i & 780 a)

[4] Other than the issue of the plaintiff that the members of the 2nd defendant were merely casual workers, there was no affidavit or other evidence or even a plea in the statement of claim that the 1st defendant had acted unfairly or had abused his powers or had acted in breach of any rules. (p 780 c)

[Preliminary objection upheld; suit dismissed.]

Case(s) referred to:

Electrical Industry Workers Union v. Registrar of Trade Unions and Anor [1976] 1 MLJ 177 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 CLJ 65 ***(refd)***

Metal Industry Employees Union v. Registrar of Trade Unions and Ors [1976] 1 MLJ 220 ***(refd)***

Legislation referred to:

Trade Unions Act 1959, ss. 2(1), (2), 12(1), 17(1), 71(A)

For the plaintiff - K Prakash; M/s Shook Lin & Bok
For the 1st defendant - Mazni Buang FC
For the 2nd defendant - P Subramaniam; M/s BC Teh & Yeoh

Reported by Usha Thiagarajah

JUDGMENT

RK Nathan J:

The Preamble

This matter which was initially commenced as an originating summons was filed on 6 April 1995 and on 10 April 1996 the same was converted to a writ action. After a long and chequered history the case finally came up for hearing on 1 October 2001. When the matter was called up counsel for the plaintiff requested for an adjournment. Counsel for the 1st defendant then informed the court that she had a preliminary objection to raise. Counsel for the plaintiff did not inform the court his reason for requesting an adjournment in spite of the court asking him why he wanted an adjournment. The matter was then stood down to enable the parties to sort out the plaintiff's solicitors request. When the case was recalled for hearing counsel for the 1st defendant took an unusual step by taking a preliminary objection before the trial commenced. I was surprised when counsel for the plaintiff raised no objections to this. I therefore assumed that notice of any preliminary objection had already been given by the 1st defendant's solicitors since the matter was for full trial. I was again surprised when counsel for the plaintiff did not object to the matter proceeding to be resolved on a preliminary issue when it was in fact set for full trial. When parties, represented by competent solicitors, agree to a mode of procedure, so long as it does not transgress any rule of law, the court hearing the case ought to accede to the views of counsel who know best the conduct of their respective cases.

The Plaintiff's Case

The plaintiff was at all material times the General Manager and Public Officer of the Penang Turf Club registered under the Societies Act 1966. The 1st defendant, the Director General of Trade Unions is the officer empowered by the Trade Unions Act 1959 (the Act) responsible in law for the registration of all Trade Unions. The 2nd defendant is a Trade Union registered under s. 12(1) of the Act.

On 23 December 1994 the 2nd defendant forwarded to the plaintiff a notice of claim for recognition together with a certificate of registration issued by the 1st defendant under the Rules of the Union. The plaintiff replied by his letter dated 13 February 1995 that the Club was unable to accord recognition to the 2nd defendant. The plaintiff who contended that the 2nd defendant was representing casual workers, refused to recognise the 2nd defendant because he was of the view that in law a trade union cannot be registered to represent casual workers, who are only hired to work on weekends or other race days. It was the plaintiff's case that these casual workers are principally involved on race days which normally fall on weekends and on public holidays. They are hired to perform casual work on race days under the following conditions:

(i) Two days of work per week (weekends);

(ii) Between five to six hours of work per day;

(iii) The workers are paid a fixed allowance for the day they actually worked ie, if they do not work, then they are not paid any allowance for that day;

(iv) Contribution to the Employees' Provident Fund (EPF) and Social Security Organisation (SOCSO) are made by the workers and the plaintiff;

(v) The workers are not entitled to any annual leave nor public holiday leave;

(vi) The workers are not given any sick leave or any medical benefit;

(vii) The wages of the workers, are, for administrative reasons, paid fortnightly.

The plaintiff further pleaded that the workers turn up for work on race days (weekends/public holidays) of their own free choice. Hence, if any worker is unable to turn up for work, then a replacement worker would be hired or assigned to the particular job. In the result, if a worker is not able to turn up for work then he/she would not be paid any wages. The plaintiff does not exercise any disciplinary rights over the workers as to their attendance or absence. The matter is left entirely to their free will as to whether they wish to work for the weekend and on race days and earn some extra income. The plaintiff further pleaded that most, if not all of these weekend-raceday-workers are regularly employed elsewhere, which is their real employment. The work done for the plaintiff is casual work over the weekend and on race days. It was the plaintiff's case that such workers who are hired to work at the Penang Turf Club, are casual workers who are paid, only if they turn up for work, in accordance with the "no work no pay" principle and that such workers are engaged on a "hired for the day" basis for each day when he/she turns up for work. The plaintiff further pleaded that by reason of the peculiar circumstances and characteristics of the work being carried out only on race days (weekends/public holidays) and there being an acceptance by all the workers who turn up for work that they work on the basis of "no work no pay", such workers are in law treated as casual workers, who do not fall within the purview of Part XII of the Employment Act 1955 and neither are these workers entitled to any benefit under any collective agreement and that as a result thereof, such workers are not entitled to organise themselves and form a trade union of workers. The plaintiff therefore prayed for:

(1) a declaration that the Registration of the 2nd defendant by the 1st defendant *vide* Certificate of Registration No. 737 dated 22 November 1994 pursuant to s. 12(1) of the Act is null and void and of no effect;

(2) a consequential Order that Certificate of Registration No. 7376 dated 22 November 1994 issued by the 1st defendant abovenamed pursuant to s. 12(1) of the Act be and is hereby revoked and cancelled;

(3) costs; and

(4) such further and/or other consequential orders or directions that may be necessary or which this Honourable Court deems fit and proper.

The Defence

The principal defence of the 1st defendent was that the 2nd defendant's registration as a Trade Union is regular and in compliance with the provisions of the Trade Unions Regulations 1959. The 1st defendant further averred that the members of the union are paid workers of the Penang Turf Club. A large number of them are working as "deputy operators" and "salesmen/saleswomen". In the premises these workers come within the definition of "employee" under s. 2(1) of the Act. The 2nd defendant pleaded that its workers invariably are retained by the plaintiff to carry out the work at the plaintiff's premises. A substantial portion of the workers have been employed by the plaintiff for over a decade in the same job by the plaintiff under the following general terms and conditions of employment:

i) The workers are required to work two days per week during all the weekends and regularly for six hours or more per day at the disposal of the plaintiff;

ii) Equipment and instruments as well as uniform and employees badges are provided by the plaintiff to the workers for their use;

iii) The workers are assigned to specific tasks and regularly positioned at the same work posts during their course of work;

iv) The workers are not required to inform the plaintiff before reporting for work on all the weekends provided they are willing and able to work on these days. All the workers who turn up are always remunerated irrespective of whether work is provided and/or is available to them on the said days;

v) The workers receive fixed payment for the days they work and also additional payment for races conducted in excess of eight races in a day and beyond the usual hours of work;

vi) Payment of wages are not made daily but fortnightly in arrears on a regular basis;

vii) Contribution to the EPF and Socso are deducted at source before balance of wages is handed over to the workers. Such contribution, commenced in the years 1986/1987 or thereabouts continues till to date;

viii) Returns of Remuneration from Employment (EA Form) are also prepared by the plaintiff for some of the workers and duly submitted to the Inland Revenue Department; and

ix) The workers are also required to attend training conducted by the plaintiff from time to time to upgrade their skills and competence.

It was the 2nd defendant's case that workers employed by the plaintiff on race days are persons regularly employed on periodic basis and are thus not casual workers and that the "no work no pay" principle does not make a worker who has a contract of employment into a casual worker and that a daily rated/paid worker who is an employee and who receives no pay on his non-working day, yet his status as a worker under a contract of employment is not affected. The 2nd defendant further pleaded that by reason that the plaintiff exercises control through its Totalisator Manager and other staff over the manner in which the workers perform their work, there is therefore in existence a contract between the plaintiff and the workers. It was also the case of the 2nd defendant that the workers are "part and parcel" of the plaintiff's organisation and thus an integral part of the plaintiff's business. The workers provide their own labour and skill to the plaintiff in their performance of the work. There is no investment of capital and the workers do not stand to profit from the commercial success of the plaintiff. They further pleaded that owing to the longstanding and regular course of dealings between the plaintiff and the second defendant's members over the years, there exists sufficient mutuality and permanency for there to be an overall employment relationship that amounts to a contract of employment. The terms of employment are also not inconsistent with there being a contract of employment. It was the 2nd defendant's case that the race day workers are entitled to organise themselves and form a trade union of workers.

Findings Of The Court

The preliminary objection raised by the 1st defendant and supported by the 2nd defendant was that the plaintiff ought not to have commenced this suit without further exhausting his remedy under s. 71 of the Act. The relevant s. 71A (which previously was s. 17(1) of the 1959 Act) reads as follows:

(1) Any person who is dissatisfied with any opinion, order, declaration, refusal, cancellation, withdrawal, direction or decision, as the case may be, given, made or effected by the Director General under any, of the following provisions:

(a) section 2(2);

(b) section 12;

(c) section 15(2)(b) or section 15(4);

(d) section 16(1);

(e) section 17(1);

(f) section 25A(4);

(g) section 28(1)(d), or section 29(2)(b);

(h) section 34(2);

(i) section 40(6) or 40(9);

(j) section 54(1);

(k) section 76A(1); or

(l) section 76C(1)

may, within thirty days from the date of the opinion, order, declaration, refusal, cancellation, withdrawal, direction or decision of the Director General, appeal against the same to the Minister, in such manner as may be prescribed by regulations.

(2) An appeal under subsection (1) shall not operate as a stay of execution of the opinion, order, declaration, refusal, cancellation, withdrawal, direction or decision, as the case may be, of the Director General unless the Minister otherwise directs, and where he so directs he may impose such terms and conditions as he deems fit.

(3) The Minister may, after considering any such appeal, give such decision thereon as he deems just and proper.

(4) A direction or decision of the Minister under this section shall be final and conclusive.

Section 2(2) of the 1959 Act reads as follows:

(2) For the purposes of the definition of 'trade union' in sub-section (1), and for the purposes of sections 72 and 74, 'similar' means similar in the opinion of the Registrar.

To my mind the plaintiff had no leg to stand on. Section 2(2) of the Act empowers the 1st defendant to register the 2nd defendant. If that decision of the 1st defendant was unsatisfactory there is ample opportunity for the plaintiff to appeal and the Act specifically spells out that the plaintiff if dissatisfied with the decision of the 2nd defendant made under s. 2(2) of the Act may within 30 days of that decision appeal against that decision, to the Minister. The 1st defendant issued the Registration of the 2nd defendant as a Trade Union on 22 November 1994. There is no evidence that the plaintiff had appealed to the authorities within 30 days from the date of that decision. In fact sub-s. (4) of s. 71A clearly states that the decision of the Minister made under that section on appeal shall be final and conclusive. In other words the door against the plaintiff's entry into any further litigation has been bolted doubly secure. The first bolt is his failure to appeal within 30 days and the 2nd bolt is that the decision of the authorities one way or the other would have been final. There are numerous Federal Court decisions to this effect. (See *Metal Industry Employees Union v. Registrar of Trade Unions and Ors.* [1976] 1 MLJ 220; *Electrical Industry Workers Union v. Registrar of Trade Unions and Anor* [1976] 1 MLJ 177.)

Mr. Prakash for the plaintiff came well prepared in spite of his earlier request for an adjournment. He relied heavily on *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65, a decision of the Federal Court which advocated that where a party sought judicial review based on distinct principles of publication on general issues of law and where the party seeking the review had clearly raised "an arguable case" that the public body had acted unfairly, had abused its powers and had raised the general question of the extent to which representations can bind public bodies, and because these grounds involve a consideration of generalised principles of public law developed by the courts to control the exercise of power by public authorities, judicial review would be more appropriate rather than to proceed by way of an appeal. I have read the case and am of the view that the Federal Court went into great pains to explain that in the circumstances of that particular case where the court was concerned with a planning case involving a housing project, the object of which was to provide homes for members of a co-operative society belonging to the less affluent section of society, a swift means of redress was indicated and judicial review was preferred rather than to proceed by way of an appeal. Unfortunately, Mr. Prakash did not demonstrate in his submission that the 1st respondent had acted unfairly or had abused his powers to warrant judicial interference. He merely pointed out that since 1999, that is after the *Majlis Perbandaran Pulau Pinang* case there is a shift in judicial opinion "with regard to the existence of an internal appeal notwithstanding the right of the courts to review the decision of a public authority". Whilst there clearly is such a

trend, but as I have said, it is limited to cases where it must be shown that a party had acted unfairly or had abused its powers or that like the *Majlis Perbandaran Pulau Pinang* case it was more expedient to go for judicial review than to go for appeal.

Even on this last ground, it is clear that the appeal to the Minister should have been done within 30 days of the decision. Surely that decision would have been more expeditiously obtained from the Minister than this present judicial review, which although filed on 6 April 1995 has taken six years and six months to conclude on a preliminary issue. In the case before me, other than the issue of the plaintiff that the members of the 2nd defendant are merely casual workers there is no affidavit or other evidence or even a plea in the statement of claim that the 1st defendant had acted unfairly or had abused his powers or had acted in breach of any rules.

Having considered the submissions I was of the view that the preliminary objection must be upheld and consequently I dismissed the suit with costs.