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KESATUAN PEKERJA-PEKERJA BUKAN EKSEKUTIF MAYBANK BHD v. KESATUAN KEBANGSAAN PEKERJA-PEKERJA BANK & ANOR

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
B SURIYADI HALIM OMAR FCJ
AZAHAR MOHAMED FCJ
ZAHARAH IBRAHIM FCJ
BALIA YUSOF WAHI JCA
[CIVIL APPEAL NO: 02-46-07-2015(W)]
C 10 MARCH 2017

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Application to challenge and quash decision of Director General of Trade Unions ('DG') in registering in-house union – Whether DG failed to afford opportunity to national*
D *union representing non-executive employees in banking industry to be heard before registering in-house union – Interpretation of s. 12 of Trade Unions Act 1959 (TUA) – Whether DG given wide discretion to allow registration – Whether DG needs to consult with existing trade union representing same industry – Whether relevant parties should be afforded fair hearing – Whether provisions of s. 12 of TUA*
E *complied with – Trade Unions Act 1959, s. 71A*

LABOUR LAW: *Trade union – Registration – Director General of Trade Unions ('DG') registered in-house union – Whether DG failed to afford opportunity to national union representing non-executive employees in banking industry to be heard before registering in-house union – Interpretation of s. 12 of Trade Unions*
F *Act 1959 (TUA) – Whether DG given wide discretion to allow registration – Whether DG needs to consult with existing trade union representing same industry – Whether relevant parties should be afforded fair hearing – Whether provisions of s. 12 of TUA complied with – Trade Unions Act 1959, s. 71A*

STATUTORY INTERPRETATION: *Construction of statutes – Interpretation of*
G *– Trade Unions Act 1959, s. 12 – Whether gives free hand to Director General of Trade Unions ('DG') in exercise of discretion in registering an in-house union – Whether DG needs to consult relevant parties – Whether a fair and reasonable decision may only be given by affording relevant parties a fair hearing*

H On 3 January 2011, the second respondent, Ketua Pengarah Kesatuan sekerja ('DG') registered the appellant, an in-house union of Malayan Banking Berhad ('MBB'), as a trade union to represent MBB's non-executive employees. By a letter dated 28 January 2011, the first respondent, a national union representing non-executive employees in the banking industry ('NUBE') filed an appeal to the DG pursuant to s. 71A of the Trade Unions
I Act 1959 ('TUA 1959') to cancel the registration of the appellant. Failing to get any response or decision on the appeal, NUBE filed an application for judicial review to challenge and quash the decision of the DG for, *inter alia*, the following reasons (i) that the DG failed to afford NUBE an opportunity

to be heard before proceeding to register the appellant as a trade union; and (ii) the DG failed to take into account the scope of the appellant's membership which overlapped and/or was identical with the scope of membership of NUBE who are employed with MBB. The High Court dismissed NUBE's application for judicial review on the grounds that s. 12(2) of TUA 1959 gave the DG a wide discretion whether or not to allow the registration and that the same provision also did not provide or require consultation before any decision to register is made. The High Court held that the DG was correct in arriving at his decision to register the appellant. Aggrieved, NUBE appealed to the Court of Appeal. In allowing NUBE's appeal, the Court of Appeal held that s. 12 of TUA 1959 should be read as a whole and that it placed an investigative role on the DG before coming to a conclusion. Dissatisfied with the decision of the Court of Appeal, the appellant then filed an application for leave to this court. Leave was granted on the following question of law: in considering an application for registration of a trade union in respect of a particular establishment, was there a statutory requirement on the part of the DG under s. 12 of the TUA 1959 to consult with any existing trade union representing workmen in that establishment, trade, occupation or industry.

Held (dismissing appeal)
Per Balia Yusuf Wahi JCA delivering the judgment of the court:

(1) Taking centre stage in this appeal was the interpretation to be accorded to s. 12 of TUA 1959, which must not be read in isolation and must be liberally interpreted by the courts. It was not a correct proposition of law to say that s. 12(1) of TUA 1959 does not require consultation before the DG can exercise his power. While the word 'shall' appeared in sub-s. (3), the use of the word 'may' in the other two subsections does not give a free hand to the DG in the exercise of discretion whether to register or not. In order to arrive at a decision whether or not to allow the registration, it must involve some weighing and consideration of various factors. Reading sub-s. (2), the DG needs to be satisfied of a certain fact before he may act. In order to be satisfied, he has to consult the relevant parties making the application or likely to be affected by his allowing or refusing the application. (paras 54, 57, 69 & 70)

(2) The power given under s. 12 of TUA 1959 to the DG involved an exercise of discretion. The exercise of such discretion was not one which may be exercised with impunity and without any check and balance. The law does not impose an onerous burden on the decision-maker to hear a party in all cases. A fair and reasonable decision under s. 12 of TUA 1959 may only be given by affording the parties a fair hearing which may take the form of consulting an interested party. A body which is entrusted by statute with a discretion, must act fairly. A fair opportunity of being heard is so fundamental to any civilised legal system and that it was only right to expect that such an opportunity be

given to NUBE as NUBE had an interest in the registration of the appellant and had a legitimate and reasonable expectation to be heard at least by being consulted on the application. NUBE had been denied that right. (paras 75, 79, 81-85)

(3) In exercising his powers and/or discretion and making a decision under s. 12 of TUA 1959, the DG must have a reason for that decision. Being in that position, it was reasonable and appropriate to imply that he ought to have given reason/s for his decision. He did not do so, for he was under the erroneous belief that he had "kuasa budi bicara yang mutlak". The circumstances as borne out from the facts of the case demonstrate the need for further deliberation and consideration by the DG in arriving at his decision. There was already an existing trade union representing and catering for the same particular industry and it ought to have dawned upon the DG that multiplicity of trade unions in respect of the same occupation would not be in the best interest of industrial harmony. The satisfaction of the DG as provided under s. 12 of the TUA 1959 in deciding whether to register another trade union in the same industry could not be achieved without there being a prior consultation with the other players in the industry. NUBE ,which was an existing trade union representing workmen in the banking industry, was not consulted. Failure to do so was fatal. The provisions of s. 12 of the TUA 1959 had not been complied with. The question posed was answered in the affirmative (paras 89-91)

***Bahasa Malaysia** Headnotes*

Pada 3 Januari 2011, responden kedua, Ketua Pengarah Kesatuan Sekerja ('DG') mendaftarkan perayu, sebuah kesatuan dalaman Malayan Banking Berhad ('MBB'), sebagai kesatuan pekerja mewakili pekerja-pekerja bukan eksekutif MBB. Melalui surat bertarikh 28 Januari 2011, responden pertama, sebuah kesatuan kebangsaan mewakili pekerja-pekerja bukan eksekutif dalam industri perbankan ('NUBE') memfailkan rayuan kepada DG di bawah s.71A Akta Kesatuan Sekerja 1959 ('AKS 1959') untuk membatalkan pendaftaran perayu. Apabila NUBE gagal memperolehi apa-apa jawapan atau keputusan berkenaan rayuan itu, NUBE memfailkan permohonan untuk semakan kehakiman bagi membantah dan membatalkan keputusan DG untuk, antara lain, alasan-alasan berikut (i) bahawa DG gagal memberikan NUBE peluang untuk didengar sebelum mendaftarkan perayu sebagai kesatuan sekerja; dan (ii) DG gagal mengambil kira skop keahlian perayu yang bertindan dan/atau adalah serbasama dengan skop keahlian NUBE yang bekerja dengan MBB. Mahkamah Tinggi menolak permohonan NUBE untuk semakan kehakiman atas alasan bahawa s. 12(2) AKS 1959 memberikan DG bidang kuasa luas sama ada untuk membenarkan pendaftaran dan bahawa peruntukan yang sama juga tidak memberikan atau menghendaki rujukan untuk perundingan sebelum apa-apa keputusan untuk membuat pendaftaran dibuat. Mahkamah Tinggi memutuskan bahawa DG betul apabila mencapai

keputusan untuk mendaftarkan perayu. Terkilan, NUBE merayu ke Mahkamah Rayuan. Dalam membenarkan rayuan NUBE, Mahkamah Rayuan memutuskan bahawa s. 12 AKS 1959 harus dibaca secara keseluruhan dan ia meletakkan peranan penyiasatan ke atas DG sebelum membuat apa-apa kesimpulan. Tidak berpuas hati dengan keputusan Mahkamah Rayuan, perayu memfailkan permohonan untuk kebenaran mahkamah ini. Kebenaran dibenarkan atas persoalan undang-undang berikut: dalam mempertimbangkan permohonan untuk pendaftaran kesatuan sekerja berkenaan dengan sesuatu pertubuhan, adakah terdapat keperluan statutori dari pihak DG di bawah s. 12 AKS 1959 untuk berunding dengan mana-mana persatuan sekerja sedia ada bagi mewakili pekerja-pekerja dalam pertubuhan, perdagangan, pekerjaan atau industri itu.

Diputuskan (menolak rayuan):
Oleh Balia Yusuf Wahi HMR menyampaikan penghakiman mahkamah:

(1) Isu utama dalam rayuan ini adalah pentafsiran yang diberikan kepada s. 12 AKS 1959, yang tidak boleh dibaca secara berasingan dan harus ditafsirkan secara liberal oleh mahkamah. Ia bukan satu cadangan undang-undang yang betul untuk menyatakan bahawa s. 12(1) AKS 1959 tidak memerlukan rujukan untuk perundingan sebelum DG dapat melaksanakan kuasanya. Sementara perkataan 'shall' muncul dalam sub-s. (3), penggunaan perkataan 'may' dalam dua subseksyen yang lain tidak memberikan kebebasan kepada DG dalam pelaksanaan budi bicaranya sama ada untuk mendaftarkan atau tidak. Untuk mencapai keputusan sama ada untuk membenarkan pendaftaran, ia harus melibatkan pertimbangan pelbagai faktor. Membaca sub-s. (2), DG harus berpuas hati dengan fakta tertentu sebelum beliau boleh bertindak. Untuk berpuas hati, beliau perlu merujuk dan berunding dengan pihak-pihak relevan yang membuat permohonan atau yang berkemungkinan terjejas oleh tindakannya untuk membenarkan atau menolak permohonan.

(2) Kuasa yang diberikan di bawah s. 12 AKS 1959 kepada DG melibatkan pelaksanaan budi bicara. Pelaksanaan budi bicara itu bukanlah satu tindakan yang boleh dilaksanakan dengan sewenang-wenangnya dan tanpa apa-apa sekatan dan imbangan. Undang-undang tidak mengenakan bebanan ke atas pembuat keputusan untuk mendengar pihak-pihak dalam semua kes. Satu keputusan yang adil dan munasabah di bawah s. 12 AKS 1959 hanya boleh dicapai dengan memberikan ruang kepada pihak-pihak untuk mendapatkan satu perbicaraan adil yang boleh dibuat dalam bentuk perundingan dengan pihak yang berkepentingan. Perbadanan yang diamanahkan oleh statut dengan budi bicara, harus bertindak dengan adil. Peluang yang adil untuk didengar adalah asas penting kepada mana-mana sistem undang-undang yang bertamadun dan

adalah wajar untuk mengharapkan peluang itu diberikan kepada NUBE kerana NUBE mempunyai kepentingan dalam pendaftaran perayu dan mempunyai jangkaan sah dan munasabah untuk didengar dengan dibawa berunding berkenaan permohonan itu. NUBE telah dinafikan hak itu.

(3) Dalam melaksanakan kuasa dan/atau budi bicaranya dan membuat keputusan di bawah s. 12 AKS 1959, DG harus mempunyai alasan untuk keputusan itu. Untuk berada dalam kedudukan itu, adalah munasabah dan sesuai untuk menganggap bahawa dia sepatutnya memberikan alasan untuk keputusannya. Beliau gagal berbuat demikian, kerana beliau di bawah kepercayaan salah bahawa beliau mempunyai kuasa budi bicara yang mutlak. Fakta kes menunjukkan keperluan untuk perbincangan dan pertimbangan lanjut oleh DG dalam mencapai keputusannya. Terdapat kesatuan sekerja yang sudah wujud yang mewakili industri yang sama dan ia harus disedari oleh DG bahawa keberbilangan kesatuan sekerja berkenaan pekerjaan yang sama tidak akan memupuk keharmonian industri. Kepuasan DG seperti diperuntukkan di bawah s. 12 AKS 1959 dalam memutuskan sama ada untuk mendaftarkan lagi satu kesatuan sekerja dalam industri yang sama tidak boleh dicapai tanpa perundingan dengan pihak-pihak lain dalam industri. NUBE, kesatuan sekerja yang sememangnya sudah wujud mewakili pekerja-pekerja dalam industri perbankan, tidak dirujuk untuk perundingan. Kegagalan berbuat demikian adalah memudaratkan. Peruntukan-peruntukan s. 12 AKS 1959 tidak dipatuhi. Persoalan yang ditimbulkan dijawab secara afirmatif.

Case(s) referred to:

Association Of Bank Officers, Peninsular Malaysia v. Ketua Pengarah Kesatuan Sekerja, Malaysia & Anor & Another Case [2004] 1 LNS 683 HC ***(refd)***

Attorney General v. Thomas D'arcy Ryan [1980] AC 718 ***(refd)***

Bar Malaysia v. Index Continent Sdn Bhd [2016] 2 CLJ 545 FC ***(refd)***

Breen v. Amalgamated Engineering Union (now Amalgamated Engineering and Foundry Workers Union) and Others [1971] 1 All ER 1148 ***(refd)***

Cooper v. Wandsworth Board of Works (1863) 14 CB NS 180 ***(refd)***

Council of Civil Service Union & Ors v. Minister for the Civil Service [1985] 1 AC 374 ***(refd)***

Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***

Doody v. Secretary of State for the Home Department and Other Appeals [1993] 3 All ER 92 ***(refd)***

Duke v. Reliance Systems Ltd [1987] 2 WLR 1225 ***(refd)***

Huddersfield Police Authority v. Watson [1947] 2 All ER 193 ***(refd)***

Kammins Ballrooms Co Ltd v. Zenith Investments (Torquay) Ltd [1971] AC 850 ***(refd)***

Kelab Lumba Kuda Perak v. Menteri Sumber Manusia, Malaysia & Anor [2005] 3 CLJ 517 CA ***(refd)***

Kesatuan Pegawai-pegawai Bumiputra-Commerce Bank Bhd (Kepak Bumi-Commerce) v. Association Of Bank Officers, Peninsular Malaysia & Another Appeal [2006] 4 CLJ 901 CA ***(refd)***

Lembaga Minyak Sawit Malaysia v. Arunamari Plantations Sdn Bhd & Ors and Another Appeal [2015] 7 CLJ 149 FC ***(refd)***
Lim Kit Siang v. United Engineers (M) Bhd & Ors [1987] 2 CLJ 195; [1987] CLJ (Rep) 170 SC ***(refd)***
Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***
MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun [2002] 3 CLJ 577 FC ***(refd)***
Morelle Ltd v. Wakeling [1955] 1 All ER 708 ***(refd)***
Nothman v. Barnett London Borough Council [1978] 1 WLR 220 ***(refd)***
O'Reilly v. Mackman And Others And Ors Cases [1982] 3 All ER 1124 ***(refd)***
Padfield & Ors v. Minister of Agriculture, Fisheries And Food And Ors [1968] AC 997 ***(refd)***
Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***
Pepper (Inspector of Taxes) v. Hart And Related Appeals [1993] 1 All ER 42 ***(refd)***
Persatuan Pegawai-pegawai Bank Semenanjung Malaysia v. Ketua Pengarah Kesatuan Sekerja, Malaysia & Ors [2012] 10 CLJ 666 HC ***(refd)***
Persatuan Pegawai-Pegawai Bank Semenanjung Malaysia v. Minister of Labour, Malaysia & Ors [1989] 1 CLJ 4; [1989] 1 CLJ (Rep) 124 SC ***(refd)***
Persatuan Pegawai-Pegawai Bank, Semenanjung Malaysia (ABOM) v. Ketua Pengarah Kesatuan Sekerja, Malaysia & Ors [2014] 5 CLJ 562 CA ***(dist)***
Rohana Ariffin & Anor v. Universiti Sains Malaysia [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 390 HC ***(refd)***
Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***
Tan Kim Chuan & Anor v. Chandu Nair Krishna Nair [1991] 1 CLJ 682; [1991] 1 CLJ (Rep) 441 SC ***(refd)***
United Hokkien Cemetries Penang v. The Board Majlis Perbandaran Pulau Pinang [1979] 1 LNS 122 FC ***(refd)***
Western India Automobile Association v. The Industrial Tribunal, Bombay AIR 1949 FC III ***(refd)***
Wiseman & Anor v. Borneman & Ors [1971] AC 297 ***(refd)***
Workmen of Diromakuchi Tea Estate v. Management of Diromakuchi Tea Estate (1958) I LLJ 500 ***(refd)***
Workmen of Indian Standards Institution v. Management of Indian Standards Institution (1976) I LLJ 33 ***(refd)***
Young v. Bristol Aeroplane Co Ltd [1994] KB 718 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 3
Interpretation Acts 1948 and 1967, s. 17A
Trade Unions Act 1959, ss. 10, 12(1), (2), (3), 71A

Other source(s) referred to:
Craiese on Legislation, 9th edn 2008, p 611

For the appellant - Porres Royan, C Sri Kumar & Jaqdesh Singh Johal; M/s Kumar Partnership
For the 1st respondent - Ambiga Sreenevasan, Alex de Silva & Gajendran Balachandran & Deepa Morgan; M/s Bodipalar Ponnudurai De Silva
For the 2nd respondent - Suzana Atan; SFC

[Editor's note: Appeal from Court of Appeal; Civil Appeal No: W-02-(IM)-2530-11-2013 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Balia Yusof Wahi JCA:

The Parties

[1] The appellant is an in-house union of Malayan Banking Berhad (MBB) which was registered by the Ketua Pengarah Kesatuan Sekerja, the second respondent, (hereinafter referred to as the DG) on 3 January 2011 pursuant to s. 12 of the Trade Unions Act 1959 (TUA 1959). The first respondent (hereinafter referred to as NUBE) is a national union representing non-executive employees in the banking industry including MBB.

Background Facts

[2] On 3 January 2011, the DG registered the appellant as a trade union to represent MBB's non-executive employees. By a letter dated 28 January 2011, NUBE filed an appeal to the DG pursuant to s. 71A of TUA 1959 to cancel the registration of the appellant. Failing to get any response or decision on the appeal, NUBE filed an application for judicial review on 8 February 2011 to challenge and quash the decision of the DG for *inter alia* the following reasons:

(i) that the DG failed to afford NUBE an opportunity to be heard before proceeding to register the appellant as a trade union; and

(ii) the DG failed to take into account the scope of the appellant's membership which overlapped and/or is identical with the scope of membership of NUBE who are employed with MBB and enjoying the terms and benefits of the 16th collective agreement entered into between NUBE and Malaysian Commercial Banks Association.

[3] On 7 November 2013 the High Court dismissed NUBE's application for judicial review on the grounds that s. 12(2) of TUA 1959 gave the DG a wide discretion whether or not to allow the registration and that the same provision also does not provide for or require consultation before any decision to register is made. The High Court held that the DG was correct in arriving at his decision to register the appellant.

Decision Of The High Court

[4] In dismissing NUBE's application for judicial review, the learned High Court Judge concluded that the issue before the court rests mainly, if not solely, on the application of s. 12(2) of TUA 1959. At paras. 18 and 19 of the judgment, the learned High Court Judge found:

> [18] Further it is also my opinion that section 12(2) of Act 262 gives upon the 1st respondent wide discretion to allow or not to allow registration of a union. The use the word "may" in the subsection is testimony to this as opposed to the word "shall" used in its subsection (3). Refer to the Court of Appeal's decision in *Ma Boon Lan v. UOB Kay Hian Pte Ltd (previously known as Kay Hian Pte Ltd) and Another Appeal* [2013] 4 MLJ 848.
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> [19] Further, Act 262 does not provide or require any consultation before the 1st respondent can exercise his power to register. There is also nothing in the Act which prohibits the 1st respondent from registering the 2nd respondent as an in-house union. In fact, I do not see any overlapping in the scope of membership of the applicant with the 2nd respondent. The 2nd respondent is merely an in-house union representing non-executive employees of MBB whereas the applicant is an industry based union representing non-executive employees of all commercial banks in Malaysia. Hence, the 2nd respondent's role is more specific and it would be able to represent its members more effectively as it focuses only on one bank and would be more familiar with issues and problems faced within its jurisdiction as compared to the applicant which has a bigger focus as it represents 26 commercial banks with more than 30,000 members.

[5] Aggrieved by the decision of the High Court, NUBE appealed to the Court of Appeal. By its decision on 17 September 2014, the Court of Appeal unanimously allowed the appeal and the decision of the DG was quashed in consequence of which the registration of the appellant was set aside.

Decision Of The Court Of Appeal

[6] In allowing NUBE's appeal, the Court of Appeal held that s. 12 of TUA 1959 must be read as a whole. Considering the purpose and intent of the legislation and adopting the purposive approach of interpretation, the Court of Appeal held that s. 12 places an investigative role on the DG before coming to a conclusion. We append below an excerpt from the judgment of the Court of Appeal:

> [17] Section 12(1) is not an administrative procedure *per se* and cannot be exercised mechanically. Section 12 places an investigative role on the 1st respondent before coming to the conclusion whether or not to register the trade union. The 1st respondent to do so must meticulously comply with sections 12(2) as well as 12(3) though it is negatively worded. Where applicable and for this purpose the 1st respondent is duty bound to give notice to all necessary and interested parties to obtain their feedback to arrive at an opinion whether or not to register. Common sense and rule of natural justice will dictate that the views of the appellants ought to have been heard before deciding to register. Failure to strictly comply with

A the statutory obligations set out in the section will make the decision or decision making process a nullity *ab initio* without the need even to consider the concept and parameters of judicial review. [See *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Berhad* [1998] 1 MLJ 393]. Support for the proposition is found in a number of cases, to name a few are as follows:

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(a) In *Attorney General v. Ryan* [1980] AC 718, the Privy Council observed:

> … the Minister was a person having legal authority to determine a question affecting the rights of individuals. This being so, it is a necessary implication that he is required to observe the principles of natural justice when exercising that authority; and if he fails to do so, his purported decision is a nullity.

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(b) In *R v. Commr. Of Racial Equality, ex p Hallingdon London Borough Council* [1984] AC 779, Lord Diplock stated:

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> Where an Act of Parliament confers upon an administrative body functions which involved its making affect to their detriment the rights of other persons or curtail their liberty to do as they please, there is a presumption that Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decisions.

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[7] Further on, the Court of Appeal held:

[22] We find merits in the appellant's submissions as there is a gross failure on the part of the 1st respondent to satisfy the requirement of section 12 of TUA 1959 and the affidavit in opposition of the respondents only confirms the gross failure.

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[23] Section 12(1) is not a passport for registration of trade union as of right, without going through the investigative procedure which we have stated above. Support for the proposition is found in the case of *Persatuan Pegawai-Pegawai Bank Semenanjung (ABOM) v. Ketua Pengarah Kesatuan Sekerja, Malaysia & Anor* [2013] 7 MLJ 265 where His Lordship Abang Iskandar J (as he then was) in dealing with section 12 of the TUA 1959 at page 269 had this to say:

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> [6] Clearly therefore there is, *ipso facto*, a desire to avoid a multiplicity of trade unions that would cater for the same particular occupation, in this case, that would be the executive officers of the commercial banks and that the DG may not register a trade union where there already exists a trade union that represents the workmen in the particular occupation. The caveat is put in a place when it is not in the interest of the workmen concerned that there be established another trade union in respect the same occupation. The words of the said section refer to the satisfaction on the part of the DG in deciding whether to register another trade union. But that satisfaction cannot be achieved without there be a prior act on the part of the DG to duly consider.

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[8] And continuing at para. 25 in the judgment, the Court of Appeal concluded:

> [25] It is our judgment that before deciding to register or not to register the new union the 1st respondent must take relevant consideration such as competing interest of trade union and its effect, etc, as adumbrated by us earlier. If that has been done according to law and established principles then there is nothing the appellant can complain of. In the instant case it was not done.

[9] Dissatisfied with the decision of the Court of Appeal, the appellant then filed an application for leave to this court and on 18 June 2015 leave was granted on the following question of law which reads:

> In considering an application for registration of a trade union in respect of a particular establishment, is there a statutory requirement on the part of the Director General under Section 12 of the Trade Unions Act, 1959 to consult with any existing trade union representing workmen in that establishment, trade, occupation or industry.

Appellant's Submission

[10] In his submission before us, learned counsel for the appellant placed much reliance on the case of *Persatuan Pegawai-Pegawai Bank, Semenanjung Malaysia (ABOM) v. Ketua Pengarah Kesatuan Sekerja, Malaysia & Ors* [2014] 5 CLJ 562 (hereinafter referred to as *ABOM 14*). The appellant relies on that case as an authority that the DG is under no obligation under s. 12 of TUA 1959 to consult NUBE before registering the appellant as a trade union, although NUBE is a national union currently representing the same category of employees sought to be represented by the appellant. In the aforesaid case, the Court of Appeal held that s. 12 of TUA 1959 imposes no obligation on the DG to hear or discuss with the appellant before making any decision under s. 12(1) of TUA 1959. Learned counsel submitted that the Court of Appeal in the instant appeal although was referred to the case, had erred in departing from its own previous decision. The doctrine of precedent had been breached as none of the exceptions to the application of that doctrine as stated in the case of *Parlan Dadeh v. PP* [2009] 1 CLJ 717; [2008] 6 MLJ 19 (FC) is applicable.

[11] Further submission of counsel touched on the issue of canons of interpretation. In interpreting s. 12 of TUA 1959, we were reminded that the court's power is limited to interpreting the words used by Parliament and it has no power to fill in any gaps. In short, learned counsel is urging this court to adopt the literal interpretation of s. 12 by just relying on the cold prints of the section. The words in s. 12 are clear and unambiguous and the court must give effect to that meaning irrespective of the consequences.

A **NUBE's Submissions**

[12] Learned counsel for NUBE submitted that the registration of a trade union by the DG under s. 12 is not a mere mechanical process and in fact the DG does not act like a rubber stamp. The case of *ABOM 14* relied upon by the appellant is not binding on the Court of Appeal as it was decided
B *per incuriam*.

[13] On the powers and the discretion of the DG under the aforesaid provision, it was submitted that the discretion is not an unfettered one. The decision of the DG in registering the appellant without consulting and hearing NUBE was in breach of the principle of natural justice namely the
C *audi alteram partem rule*.

[14] Further, in public law litigation, it is settled principle that a public decision-making body must afford reason, and the failure to give any reason for any decision made, offends the principle of natural justice. The failure of
D the DG to give any reason under the guise of exercising his absolute discretion accorded by s. 12 of TUA 1959 is, in the submissions of learned counsel, an affront to natural justice.

The DG's Submissions

[15] The learned Senior Federal Counsel, appearing for and on behalf of the
E DG, in her short submission was of the view that the clear provisions of s. 12 of TUA 1959 restrain the court from going beyond the words used in the section. Given the plain meaning of the words used and adopting the literal interpretation of the words used, the DG was not in error in not consulting NUBE before registering the appellant as a trade union.
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Our Decision

[16] At the outset, it is pertinent to note that no consultation was made by the DG in coming to his decision to register the appellant as a trade union. Learned counsel for the appellant had rightly conceded to that fact. The two
G affidavits in reply by the DG affirmed on 29 May 2013 admitted that no consultation with NUBE was made. The two affidavits in reply were filed together in answer to NUBE's affidavit in support of the application for judicial review in the High Court. On the issue of consultation, the DG in para. 13 of his affidavit stated:

H > 13. Bagi menjawab perenggan 16 affidavit pemohon, adalah diakui sememangnya tiada perundingan dilakukan di dalam mendaftarkan Responden kedua sebagai kesatuan sekerja bersama Pemohon, akan tetapi tiada peruntukan di bawah Akta Kesatuan Sekerja 1959/Akta 262 yang mewajibkan Responden Pertama berunding atau berbincang bersama
I > Pemohon sebelum mendaftarkan Responden kedua sebagai kesatuan sekerja berdaftar.

[17] It was also brought to our attention that from the facts gathered from the various affidavits filed in support of and in opposition to the judicial review applications, what has become clear is that the DG in this case had acted at an unprecedented pace. The application for registration by the appellant was received on 13 December 2010 and the *pro tem* committee of the appellant met with the representatives of the DG on 23 December 2010 to explain the justification for its registration. The registration of the appellant was made on 3 January 2011. According to NUBE learned counsel's submission, it was done within a period of six days. Taking into consideration the year-end holidays and the weekend, the period taken by the DG to register the appellant must, in the circumstances of the case, have been done in the most hurried way. On the same token, we also noted that NUBE had acted equally swift by filing the judicial review application within a matter of days after lodging an appeal against the DG's decision. That aside, we will now deal with the issues raised and submissions made by the parties.

The Decision In *ABOM 14*

[18] Heavy reliance was placed by the appellant on the decision of the Court of Appeal in the above said case. In that case, the Court of Appeal held that s. 12 of TUA 1959 imposes no obligation on the Ketua Pengarah Kesatuan Sekerja, Malaysia (the first respondent therein) to hear Persatuan Pegawai-Pegawai Bank, Semenanjung Malaysia (ABOM) (the appellant in that case) before making a decision under s. 12(1). We shall now have a closer look at *ABOM 14*.

[19] The facts in *ABOM 14* may be stated as follows:

(a) The appellant is a trade union registered under TUA 1959, whose membership is open to all workmen classified as Class II Officers and Internal Officers employed in banks which are members of the Malayan Commercial Banks' Association ("MCBA"). RHB Bank Berhad (RHB) is a member of MCBA.

(b) The second respondent, Kesatuan Eksekutif RHB Bank Berhad had applied under s. 10 of TUA 1959 to be registered as an in-house trade union covering officers in category E1 to E4 in RHB. The Pengarah Kanan, Jabatan Hal Ehwal Kesatuan Sekerja Malaysia then wrote to the appellant requesting the appellant to list out the category and grades of officers that it represented in RHB. The appellant replied stating that any application to register an in-house union in RHB ought to be rejected because the appellant claimed that its membership covered all executives at RHB. However on 27 December 2010 the first respondent registered the second respondent as a trade union under s. 12(1) of TUA 1959. The appellant thereupon filed the application for judicial review.

(c) The appellant's application seeking reliefs was premised on *Wednesbury* unreasonableness and non-compliance with the rules of natural justice by the first respondent in not affording the appellant a reasonable opportunity to be heard before registering the second

respondent. The appellant said that the first respondent had failed to consider relevant facts, had taken into consideration irrelevant facts and had acted arbitrarily and in excess of jurisdiction. The appellant alleged that the first respondent had failed to:

(i) consider s. 12(2) of TUA 1959 which allows the first respondent to refuse registration where there is already in existence a trade union representing the workmen;

(ii) consider that the appellant has members in executive capacity who are employees of RHB;

(iii) observe the rules of natural justice under s. 12(2) TUA 1959;

(iv) consider the fact of multiplicity of unions resulting from such registration.

(d) Before the learned High Court Judge, a preliminary objection was raised by the learned Senior Federal Counsel acting for the first respondent that the appellant had failed to exhaust the remedy of appeal to the Minister provided for in s. 71A of TUA 1959 against any decision of the first respondent made under s. 12 of the same.

(e) The appellant contended that there are special circumstances that do not bar the application for judicial review notwithstanding the remedy of appeal to the Minister as provided for under s. 71A of TUA 1959. It was contended that special circumstances existed in this application because the first respondent had failed to observe the rule of natural justice by not calling the appellant for any discussion before considering the registration of the second respondent.

(f) The learned High Court Judge found that under s. 12 of TUA 1959 there was no requirement for the first respondent to call for evidence whether orally or by document. There was no statutory obligation on the first respondent to discuss with any party before registering the second respondent and the court should not read what is not written in the law.

[20] On appeal to the Court of Appeal, the decision of the High Court was upheld. The Court of Appeal held that no obligation is imposed on the Ketua Pengarah Kesatuan Sekerja to discuss with the appellant before making a decision under s. 12(1) of TUA 1959. At para. 9 of its judgment, the Court of Appeal held:

> [9] It is clear that s.12 imposes no obligation on the first respondent to hear the appellant before making a decision under s. 12(1). Since under the law no obligation is imposed on the first respondent to discuss with the appellant before making a decision under s. 12(1), no discussion need be called for. In the circumstances we agree with the learned judge that there is no breach of the *audi alteram partem* principle and consequently there are no special circumstances to justify the appellant's act of disregarding the provisions of s. 71A. However we note that the first

respondent *vide* its letter dated 19 August 2010 did notify the appellant of the second respondent's request and did request for the appellant to provide it with a list of the officers in RHB that its represents.

[21] The decision in *ABOM 14* was referred to the Court of Appeal in the instant appeal and as mentioned earlier, learned counsel for the appellant submitted that the Court of Appeal had erred in departing from its own decision in the *ABOM 14* case. To date, that decision in *ABOM 14* has not been overturned by the Federal Court and as such is good law. The Court of Appeal is bound by its own previous decision.

[22] It is trite that the doctrine of *stare decisis* or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decision of the courts of a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal (per Peh Swee Chin FCJ in *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645; [1998] 1 MLJ 1)

[23] The exception referred to by His Lordship Peh Swee Chin FCJ are as per the decision of the English Court of Appeal case of *Young v. Bristol Aeroplane Co Ltd* [1994] KB 718. The *ratio decidendi* in that case is that there are three exceptions to the general rule that the Court of Appeal is bound by its own decision or by decision of courts of coordinate jurisdiction such as the Courts of Exchequer Chamber. The Federal Court in *Dalip Bhagwan Singh v. PP (supra)* ruled that the said exceptions to the rule of judicial precedent ought to be accepted as part of the common law applicable by virtue of s. 3 of the Civil Law Act 1956.

[24] The three exceptions stated in *Young v. Bristol Aeroplane Co Ltd (supra)* are firstly, a decision of the Court of Appeal given *per incuriam*; secondly when faced with a conflict of past decisions of the Court of Appeal, or a court of coordinate jurisdiction, it may choose which to follow irrespective of whether either of the conflicting decisions is an earlier case or a later one, and thirdly it ought not to follow its own previous decision when it is expressly, or by necessary implication, overruled by the House of Lords or it cannot stand with a decision of the House of Lords. The Federal Court further cautioned that there are of course further possible exceptions in addition to the three where there may be cases the circumstances of which cry out for such new exceptions so long as they are not inconsistent with the three exceptions in *Young v. Bristol Aeroplane & Co Ltd (supra)*.

[25] A similar stand on the three exceptions referred to above was again echoed in the decision of this court in *Parlan Dadeh v. PP (supra)*.

[26] In our local context, the Federal Court should be substituted for the House of Lords with regard to the matter discussed above.

[27] Learned counsel for the appellant submitted that the Court of Appeal had erred in not following *ABOM 14* as it is a binding decision. Learned counsel for NUBE however submitted that *ABOM 14* was decided *per incuriam* and the Court of Appeal in the instant appeal was at liberty not to follow it. At least one of the exceptions to the doctrine of *stare decisis* as mentioned in *Young v. Bristol Aeroplane Co Ltd (supra)* and followed in *Dalip Bhagwan Singh v. PP (supra)* applies.

[28] The Latin term '*per incuriam*' means through want of care, through inadvertence or by mistake. A decision given *per incuriam* is given 'in ignorance or forgetfulness' of an earlier relevant case or an inconsistent legislative provision. *Osborn's Concise Law Dictionary* (8th edn) says a decision of the court is not a binding precedent if given *per incuriam* ie, without the court's attention having been drawn to the relevant authority or statute.

[29] Lord Goddard CJ in delivering the judgment of the Court of Appeal in *Huddersfield Police Authority v. Watson* [1947] 2 All ER 193 said at p. 196 as follows:

> What is meant by giving a decision *per incuriam* is giving a decision when a case or a statute has not been brought to the attention of the court and they have given the decision in ignorance or forgetfulness of the existence of that case or that statute.

[30] In *Morelle Ltd v. Wakeling* [1955] 1 All ER 708, Sir Raymond Evershed MR speaking on the same subject matter had in his judgment in the Court of Appeal said the following at p. 718:

> As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided *per incuriam* must, in our judgment, consistently with the *stare decisis* rule which is an essential feature of our law, be, in the language of Lord Greene, MR, of the rarest occurrence.

[31] On the application of the doctrine, it is instructive to refer to the words of Sir John Donaldson MR in *Duke v. Reliance Systems Ltd* [1987] 2 WLR 1225 when he said at p. 1228:

> I have always understood that the doctrine of *per incuriam* only applies where another division of this court has reached a decision in the absence of knowledge of a decision binding upon it or a statute, and that in either case, it has to be shown that, had the court had this material, it must have reached a contrary decision. That is *per incuriam*, I do not understand the doctrine to extend to a case where, if different arguments had been placed before it or if different material had been placed before, it might have reached a different conclusion. That appears to me to be the position at which we have arrived today.

[32] The above quote was approved by our then Supreme Court in *Lim Kit Siang v. United Engineers (M) Bhd & Ors* [1987] 2 CLJ 195; [1987] CLJ (Rep) 170; [1988] 2 MLJ 12 and by the Federal Court in *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577; [2002] 2 MLJ 673.

Is The Decision in *ABOM 14 per incuriam*?

[33] We had perused the decision of the Court of Appeal in *ABOM 14* and we have reproduced para. 9 of the said judgment at para. 20 of this judgment which says that no obligation is imposed on the Ketua Pengarah Kesatuan Sekerja to discuss with the appellant therein in making a decision under s. 12 of TUA 1959.

[34] Prior to *ABOM 14* case, s. 12 of TUA 1959 had been dealt with by the courts in a number of cases such as follows:

(a) *Persatuan Pegawai-Pegawai Bank Semenanjung Malaysia v. Minister of Labour, Malaysia & Ors* [1989] 1 CLJ 4; [1989] 1 CLJ (Rep) 124; [1989] 1 MLJ 30 (Supreme Court).

(b) *Association of Bank Officers, Peninsular Malaysia v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor & Another Case* [2004] 1 LNS 683; [2004] 7 MLJ 109 (High Court).

(c) *Kesatuan Pegawai-Pegawai Bumiputra-Commerce Bank Bhd (Kepak Bumi Commerce) v. Association of Bank Officers, Peninsular Malaysia* [2007] 1 MLJ 37 (COA).

(c) *Persatuan Pegawai-Pegawai Bank Semenanjung Malaysia v. Ketua Pengarah Kesatuan Sekerja, Malaysia & Ors* [2012] 10 CLJ 666; [2013] 7 MLJ 265 (High Court)

[35] Our perusal of the grounds of judgment of the Court of Appeal in the instant appeal reveals that all the above-stated authorities had been referred to the court. So was *ABOM 14* case.

[36] We have examined *ABOM 14* with a fine toothcomb and we agree with the submissions of learned counsel for NUBE that none of those cases listed in para. 34 above was referred to or considered by the Court of Appeal. The decision in *ABOM 14* is therefore clearly made in ignorance or without consideration of those cases.

[37] We shall now look at those authorities, starting with the decision of the then Supreme Court in *Persatuan Pegawai-Pegawai Bank Semenanjung Malaysia v. Minister of Labour, Malaysia & Ors (supra)*. The appellant in that case is a trade union of executive officers of commercial banks in Peninsular Malaysia established in 1978. In 1980, the appellant received recognition of 12 commercial banks in Peninsular Malaysia, including the fourth respondent, Malayan Banking Bhd ('the bank'). On 8 October 1986, the second respondent, the Registrar of Trade Unions, registered the third

A respondent, the Association of Maybank Officers ('the association') as a trade union of executive officers in the employment of Malayan Banking Bhd. Subsequently, the bank gave recognition to the association (the third respondent) and withdrew its recognition to the appellant. The appellant being aggrieved by the decision of the Registrar appealed to the Minister but B the appeal was dismissed. The appellant obtained leave of the High Court to apply for an order of *certiorari* to quash the decision of the Minister in dismissing the appeal, but this was refused. The appellant appealed to the Supreme Court. The Registrar of Trade Unions had stated that he registered the association (third respondent) because he was satisfied that it is in the C interest of the officers in the fourth respondent bank to register the third respondent as a trade union.

[38] The Supreme Court in allowing the appeal held that sub-s. (2) of s. 12 of TUA 1959 requires that the interest of the workmen in the particular occupation should be considered, not just the interest of the officers in the D employment of the bank. The Registrar had failed to correctly take into account the provisions of sub-s. (2). The registration of the association was held to be a nullity.

[39] What is clear to us from the reading of the above authority on the interpretation of s. 12(2) of TUA 1959 is that it was incumbent on the part E of the Registrar in registering the association to also take into consideration the interest of the workmen in the particular occupation. This failure is a breach of s. 12(2) of TUA 1959.

[40] In our considered view, it is implicit in the said provision that the right to be heard at least by the process of consultation ought to be accorded F to the other interested party. It is not sufficient for the Registrar to consider the application without hearing and/or consulting others who may or will be affected by his decision.

[41] Next, we will consider the decision of Raus Sharif J (as he then was) G in *Association of Bank Officers, Peninsular Malaysia v. Ketua Pengarah Kesatuan Sekerja, Malaysia & Anor & Another Case* [2004] 1 LNS 683. The facts of the case may summarily be stated in the following terms:

(a) Bank Bumiputra Malaysia Bhd ('BMB') merged with Bank of Commerce Malaysia Berhad ('BOC') to become Bumiputra Commerce Malaysia H Berhad ('BCB') and Bank Muamalat Malaysia Berhad. There were already two registered unions in BOC, namely Kesatuan Kakitangan Eksekutif Bumiputra-Commerce Bank Berhad ('BOCESU'), an in-house union which represented officers in Grades 35 and 36, and Persatuan Pegawai-Pegawai Bank Semenanjung Malaysia ('ABOM'), a national union which BBMB, that represented officers in Grade 34 to 39. I

(b) Subsequently, the former employees of BBMB currently employed by BCB received acceptance by the Director-General of Trade Unions ('the first respondent') to register a new in-house union ('the second respondent') in BCB on the ground that it would be in the best interests of all parties to come under a single union.

(c) BOCESU and ABOM ('the applicants') applied separately to the court for *certiorari* to quash the decision of the first respondent on the ground that he had erroneously exercised his discretion. The second respondent contended that the applicants did not avail themselves of the remedies available to them under the Trade Unions Act 1959 and they had no *locus* to make the applications. The parties agreed that the suits would be jointly heard.

[42] The applications by BOCESU and ABOM were allowed by the learned High Court Judge on the ground that the Director General of Trade Union (the first respondent therein) had not properly exercised his statutory discretion under s. 12(2) of TUA 1959. At para. 19 of the judgment, the learned High Court Judge opined:

> [18] It is not disputed that the first respondent has wide discretion as to whether he should or should not register the second respondent. Surely, if the respondent has acted within the provisions of the Act and has acted *bona fide* and considered relevant matters without abusing his powers, then that discretion cannot be reviewed by judicial review proceedings. But this is not the situation in this case. To me, the first respondent has not properly exercised his statutory discretion under s. 12(2) of the Act. This is because the first respondent failed to consider the fact that the scope of the second respondent's membership was overlapping with the scope of membership of the applicants. This overlapping factor should have put the first respondent on guard because of s. 12(2) which states:
>
> > The Director General may refuse to register a trade union in respect of a particular establishment, trade, occupation or industry if he is satisfied that there is in existence a trade union representing the workmen in that particular establishment, trade, occupation or industry and it is not in the interest of the workmen concerned that thus be another trade union in respect thereof."

[43] The decision of the Supreme Court in *Persatuan Pegawai-Pegawai Bank Semenanjung Malaysia v. Minister of Labour, Malaysia & Ors (supra)* discussed earlier was cited and followed.

[44] Speaking on the right to be heard and consultation, the learned High Court Judge had this to say at paras. 23 and 24 of his grounds of judgment:

> [23] The first respondent in his affidavit has also stated he registered the second respondent in the interests of all parties and wanted to bring the unions under one umbrella. I am of the view that if that was the reason, then BOCESU and ABOM being the **interested parties should have been consulted and given the right to be heard** because the registration of the second respondent would have a direct impact and repercussion on the

A scope of BOCESU and ABOM. The question of whether a union should be given an opportunity be heard by the Director-General was ventilated in *Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v. Director General of Trade Union & Ors* [1990] 3 MLJ 231. In that case, whilst the recognition issue of the applicant union was pending for determination, the Director General registered the fourth defendant union. The B employers (second and third defendants) accorded the fourth defendant recognition but withdrew its recognition to the applicant union. The issue that arose was whether the applicant union should have been given an opportunity of being heard before the Director General registered the fourth defendant, Edgar Joseph Jr SCJ invoked the concept of **legitimate expectation** of being heard in favour of the applicant union when he said:

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> Applying the principle to the fact disclosed in the statement of claim, I am satisfied that it was certainly arguable that the plaintiff could invoke the concept of legitimate expectation of being afforded an opportunity of making representations before the first defendant proceeds to register the fourth defendant as a trade D union …
>
> [24] In our present case the first respondent has not given the applicants an opportunity of being heard before the registration of the second respondent. Surely, there was a **reasonable expectation that the first respondent would call BOCESU and ABOM to give their views and their** E **representations before the registration of the second respondent** which would be representing employees in Grade 34 to 36 who are within the scope of membership. A reasonable person similarly circumstance would have anticipated that trouble would brew between the unions because the registration of the second respondent would cause dissatisfaction among the employees of BDB, especially Grade 34 to 36, and the existing unions F in BCB. It is for that reason that the first respondent should have afforded BOCESU and ABOM and opportunity to be heard before the registration of the second respondent. (emphasis added)

[45] This decision of the High Court was affirmed by a unanimous decision of the Court of Appeal in *Kesatuan Pegawai-Pegawai Bumiputra-Commerce* G *Bank Bhd (Kepak Bumi-Commerce) v. Association of Bank Officers, Peninsular Malaysia & Another Appeal* [2006] 4 CLJ 901.

[46] From our scrutiny, the decision of the Court of Appeal in the *Kepak Bumi-Commerce* case was also not referred to by the Court of Appeal in *ABOM 14*. Neither was the High Court case.

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[47] For completeness sake, we are constrained to refer to a more recent High Court decision in *Persatuan Pegawai Bank Semenanjung (M) (ABOM) v. Ketua Pengarah Kesatuan Sekerja, Malaysia & Anor (supra)* referred to in the list of cases dealing with s. 12 of TUA 1959 in para. 34 above. The learned High Court Judge (as he then was) in that case in dealing with the provisions I of s. 12 of TUA 1959 spoke in a similar vein on the duty of the Director-General to consider the interest of other interested parties before registering a trade union.

[48] Given that background, it is abundantly clear that when the Court of Appeal in the *ABOM 14* case decided the matter, at least two other earlier decisions, one of the Court of Appeal and the other of the Supreme Court, were not brought to its attention and were never considered or referred to. These two authorities are binding on the Court of Appeal. As such, the decision in *ABOM 14* was clearly decided *per incuriam* as it was given in ignorance of those two earlier binding decisions. As rightly submitted by learned counsel for NUBE, the Court of Appeal in the instant case did not err in departing from the decision in *ABOM 14*. When faced with a situation where there are conflicting decisions, the Court of Appeal is free and is entitled to depart from the decision in *ABOM 14* and rely on the two earlier decisions if it so chooses. And it did. It was not in breach of the doctrine of *stare decisis* in so doing.

[49] Still on the issue of departure from the decision in *ABOM 14*, learned counsel for NUBE further submitted that *ABOM 14* can be clearly distinguished on the facts with the case before us now, a minor point though. Before registering the second respondent therein, the DG in the *ABOM 14* case *vide* a letter dated 19 August 2010 did notify the appellant of the second respondent's request for registration and did request for the appellant to provide it with a list of the officers in RHB which it represents. The appellant was therefore given an opportunity to explain and be heard. But not NUBE in the instant appeal. On that note, we find the submission of learned counsel to be tenable. A distinction may indeed be drawn between these two cases.

[50] In the upshot, we find no merits in the submissions of learned counsel for the appellant on the issue of the Court of Appeal erring in not following and in departing from the decision of *ABOM 14* on the duty of the DG to consult or to refer to parties in exercising his discretion under s. 12 of TUA 1959.

Interpretation Of s. 12 TUA 1959

[51] To start with, it would be pertinent to highlight some of the basic principles followed by the court in giving an interpretation to statutes passed by Parliament.

[52] The function of a court when construing an Act of Parliament is primarily to interpret the statute in order to ascertain what the legislative intent is. And this is primarily done by reference to the words used in the provision. *Craiese on Legislation* (9th edn, 2008) at p. 611 states:

> The cardinal rule for the construction of legislation is that it should be construed according to the intention expressed in the language used. So the function of the court is to interpret legislation "according to the intent of them that made it" and that intent is to be deduced from the language used.

[53] An observation by *Tan Kim Chuan & Anor v. Chandu Nair Krishna Nair* [1991] 1 CLJ 682; [1991] 1 CLJ (Rep) 441; [1991] 2 MLJ 42 on the different methods of interpretation adopted by the courts may serve as a good reminder:

> We hasten to add that we are conscious that there are two schools of thought relating to statutory interpretation. Lord Denning favoured a creative role for judges, taking on themselves the task of ascertaining the purpose of an Act and the ironing out of creases which may appear. Lord Denning has observed in *Seaford Court Estates Ltd v. Asher* [1949] 2 KB 2 481 at 499 that:
>
> > ... it would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears, a judge cannot simply fold his hands and blame the draftsman. He must set out to work on the constructive task of finding the intention of Parliament and he must do this not only from the language of the statute, but also from a consideration of the social conditions which give rise to it and of the mischief which it was passed to remedy and when he must supplement the written word so as to give 'force and life' to the intention of the legislature.
>
> The other school, notably Lord Simonds, did not share Lord Denning's approach and argued against such a creative role preferring to leave all aspects of the legislative function to Parliament, 'if a gap is disclosed, the remedy lies in an amending Act' (*Magor & St Mellons RDC v. Newport Corp* [1952] AC 189).
>
> In the same case, Lord Morton of Henryton remarked that:
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> > In so far as the intention of Parliament or of ministers is revealed in Acts of Parliament or Orders, either by the language used or by necessary implication, the courts should, of course, carry these intentions out; but it is not the function of any judge to fill in what he conceives to be the gaps in an Act of Parliament. If he does so, he is usurping the function of the Legislature.
>
> While we respect both schools, we do not really have to prefer any of these opinions. We also need not dwell much on various rules and aids to construction of statutes except to say in general, that we have always been inclined to follow purposive and literal constructions which mean that the literal meaning of an Act will be followed where that meaning is in accordance with the legislative purpose (see the decisions in *United Hokkien Cemetries Penang v. Majlis Perbandaraan Pulau Pinang* [1979] 2 MLJ 121; *Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35; *Vengadasalam v. Khor Soon Weng & Ors* [1985] 2 MLJ 449).

[54] Taking centre stage in this appeal is on the interpretation to be accorded to s. 12 of TUA 1959.

[55] For ease of reference it would be helpful to refer to s. 12 of TUA 1959 which reads as follows:

12. Registration

(1) The Director General may, upon receiving any application under section 10, and subject to this section, register the trade union in the prescribed manner.

(2) The Director General may refuse to register a trade union in respect of a particular establishment, trade, occupation or industry if he is satisfied that there is in existence a trade union representing the workmen in that particular establishment trade, occupation or industry and it is not in the interest of the workmen concerned that there be another trade union in respect thereof.

(3) The Director General shall refuse to register a trade union if -

(a) He is of the opinion that the trade union is likely to be used for unlawful purposes or for purposes contrary to or inconsistent with its objects and rules;

(b) Any of the objects of the trade union is unlawful;

(c) He is not satisfied that the trade union has complied with this Act and of the regulations;

(d) He is satisfied that the objects, rules, and constitution of the trade union conflict with any of the provisions of this Act or of any regulations; or

(e) The name under which the trade union is to be registered is:

(i) Identical to that of any other existing trade union, or so nearly resembles the name of such other trade union as, in the opinion of the Director General, is likely to deceive the public or the members of either trade union; or

(ii) In the opinion of the Director General, undesirable,

unless the trade union alters its name to one acceptable to the Director General.

[56] In interpreting s. 12 of TUA 1959, an interpretation which meets the purport and design of that provision ought to be considered. It is a cardinal rule of interpretation of statutes that the provisions must be read as a whole. Section 12 of TUA 1959 consists of three subsections and in our view, all the same must be read together and as a whole. To read in isolation sub-s. (1) of the same would lead to an unnatural meaning to that provision. It was contended by the appellant's learned counsel that the words of sub-s. (1) are clear and unambiguous and thus its plain natural meaning must be given effect. That in our view may be so if and only if that is the only provision in the said section. Regard must also be given to the other clauses of the provision in order to give the true purport and meaning of that section.

[57] On the interpretation to be accorded to the said provision, the Court of Appeal had stated that, the TUA 1959 is a piece of social legislation to promote, preserve and protect the employees and employee's right as well as the employer's right to create industrial harmony. The object of trade unions whether in-house or national, is to regulate the relationship between employers and employees and in particular the rights of its members. The industrial court, dealing with the matters referred to it shall act according to equity and good conscience. Section 12(2) of TUA 1959 must not be read in isolation and must be liberally interpreted by the courts.

[58] In this respect, reference must be made to the case of *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748 where the Court of Appeal had taken the approach that a judicial arbiter should not place an interpretation upon any Act of Parliament which has the effect of producing a result opposite to that intended by the collective will of the Legislature as gathered from the words of the legislation. An interpretation which would advance the object and purpose of the legislation must be the prime consideration of the arbiter, so as to give full meaning and effect to it in the achievement to its avowed social objective.

[59] Taking this approach, the court stated at p. 758 of the report:

> In my judgment, this approach when applied to the interpretation of welfare of social legislation demands that such legislation must *ex necessitae rei* receive a liberal interpretation in order to achieve the object aimed at the Parliament. There is respectable authority that supports this views.

[60] In support of such proposition, the court also referred and cited a number of authorities such as: (i) *Western India Automobile Association v. The Industrial Tribunal, Bombay* AIR 1949 FC III (ii) *Workmen of Diromakuchi Tea Estate v. Management of Diromakuchi Tea Estate* (1958) I LLJ 500 SC (iii) *Workmen of Indian Standards Institution v. Management of Indian Standards Institution* (1976) I LLJ 33. We are inclined to agree and support that proposition and hasten to add that it is trite law.

[61] When Parliament confers powers on the DG, it is expected that such powers will be used to promote the policy and objects of the TUA 1959. And this intended object and policy can only be determined by the construction of the words in the statute. This is a matter of law for the courts to decide. Whenever it appears that the effect of his decision frustrates the policy and object of the statute, the courts are entitled to intervene. (per observations by Lord Morris of Berth-y-Gest in *Padfield & Ors v. Minister of Agriculture, Fisheries And Food And Ors* [1968] AC 997 and Lord Diplock in *O'Reilly v. Mackman And Others And Ors Cases* [1982] 3 All ER 1124).

[62] We pause here to state that literal interpretation *per se* is not the only applicable rule to interpret statutes. Section 17A of the Interpretation Acts 1948 and 1967 (Act 388) for example provides that:

Regard to be had to the purpose of Act

17A. In the interpretation of provision of an Act, a construction that would promote the purpose of object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[63] This court, in *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265; [2005] 3 MLJ 97 had stated:

When construing a taxing or other statute, the sole function of the court is to discover the true intention of Parliament. In that process, the court is under a duty to adopt an approach that produces neither injustice nor absurdity: in other words, an approach that promotes the purpose or object underlying the particular statute *albeit* that such purpose or object is not expressly set out therein.

[64] The same view was again expressed by this court in *Lembaga Minyak Sawit Malaysia v. Arunamari Plantations Sdn Bhd & Ors and Another Appeal* [2015] 7 CLJ 149; [2015] 4 MLJ 701.

[65] In the most recent case of *Bar Malaysia v. Index Continent Sdn Bhd* [2016] 2 CLJ 545; [2016] 1 MLJ 445 this court had again reiterated the principles laid down in the above two cases and held that in considering the intended purpose of the statute, the courts are not confined to undertake a literal interpretation of the words therein but are permitted to construe the purpose in the context and scheme of the relevant Act as a whole.

[66] Still on literal interpretation of statutes, earlier, Chang Min Tat FJ in *United Hokkien Cemetries Penang v. The Board Majlis Perbandaran Pulau Pinang* [1979] 1 LNS 122; [1979] 2 MLJ 121 citing what Lord Diplock said in *Kammins Ballrooms Co Ltd v. Zenith Investments (Torquay) Ltd* [1971] AC 850 had stated that the literal method of construction is now completely out of date and has been replaced by a "purposive approach". His Lordship went on to say that this purposive approach is not a modern fashion. Since the 17th century, it has been the task of the Judiciary to interpret an Act "according to the intent of them that made it".

[67] Lord Denning MR in *Nothman v. Barnett London Borough Council* [1978] 1 WLR 220 at p. 228 observed:

In all cases now in the interpretation of statute, we adopt such a construction as will 'promote the general legislative purpose' underlying the provision. It is no longer necessary for judges to wring their hands and say: 'There is nothing we can do about it'. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it - by reading words in, if necessary - so as to do what Parliament would have done, had they had the situation in mind.

[68] A similar view was further echoed in the speech delivered by Lord Griffiths in *Pepper (Inspector of Taxes) v. Hart And Related Appeals* [1993] 1 All ER 42 at p. 50 that:

> The object of the Court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature ...
>
> The days have long passed when the Courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language.
>
> The Courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted.

[69] Adopting the views and approach as stated above, it is our considered view that in interpreting s. 12 of TUA 1959, to take the literal method of interpretation would certainly be misplaced. We agree with the view taken by the Court of Appeal that it is not a correct proposition of law to say that s. 12(1) of TUA 1959 does not require consultation before the DG can exercise his power.

[70] While the word "shall" appears in sub-s. (3), the use of the word "may" in the other two subsections does not give a free hand to the DG in the exercise of discretion whether to register or not. We recognise that in the exercise of his discretion by the DG there is no simple formula or rule of thumb which will readily and easily produce the proper result. But in order to arrive at a decision whether or not to allow the registration, it must involve some weighing of and consideration of various factors. Reading sub-s. (2), it only makes sense that the DG needs to be satisfied of a certain fact before he may act. In order to be so satisfied, it only again makes sense that he has to consult the relevant parties making the application or likely to be affected by his allowing or refusing the application. How does the DG satisfy himself if not by getting further information and so forth and without consulting or engaging the relevant parties?

[71] The Court of Appeal in allowing NUBE's appeal against the decision of the High Court had aptly commented that the DG is "duty bound to give notice to all necessary and interested parties to obtain their feedback to arrive at an opinion whether or not to register. Common sense and rule of natural justice will dictate that views of the appellant ought to have been heard before deciding to register." (para. 17 of the Court of Appeal judgment).

[72] Lest we forget, natural justice is a universal concept and must be observed at all levels especially when an individual or a body having power to determine questions affecting the rights of other individuals. We say not only common sense dictates that the views of NUBE ought to be considered but it is also implied that the principles of natural justice (in this case the right

to be consulted) must be observed. The position of the DG in this case may be likened to that of the Minister in *Attorney General v. Thomas D'arcy Ryan* [1980] AC 718 where the Privy Council observed:

> … the minister was a person having legal authority to determine a question affecting the rights of individuals. This being so, it is a **necessary implication** that he is required to observe the principles of natural justice when exercising that authority; and if he fails to do so, his purported decision is a nullity. (emphasis added)

[73] Authorities are in abundance to support the view that the courts will imply into the statutory provision a rule that the principles of natural justice should be applied. Lord Guest in *Wiseman & Anor v. Borneman & Ors* [1971] AC 297 (House of Lords) had reiterated that "This implication will be made upon the basis that Parliament is not to be presumed to take away parties' right without giving them an opportunity of being heard in their interest. In other words, Parliament is not to be presumed to act unfairly". In that case, the *dictum* of Byles J in *Cooper v. Wandsworth Board of Works* (1863) 14 CBNS 180 was quoted as a clear proposition to this effect and which has been followed in many subsequent cases in England.

[74] The duty to consult, which essentially is a duty to give a hearing and the need to give reasons by decision-making bodies goes hand in hand. They must go together. In *Breen v. Amalgamated Engineering Union (now Amalgamated Engineering and Foundry Workers Union) and Others* [1971] 1 All ER 1148 Lord Denning observed that where a person "has some right or interest, or some legitimate expectation of which it would not be fair to deprive him without a hearing, or reasons given, then these should be afforded him accordingly, as the case may demand". This view was earlier followed by this court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65 (FC).

[75] It is acknowledged that the power given under s. 12 of TUA 1959 to the DG involves an exercise of discretion. The exercise of such discretion is not one which may be exercised with impunity and without any check and balance. It would be most appropriate to quote the oft-quoted statement of Raja Azlan Shah CJ (as His Royal Highness then was) in *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 which goes to say:

> Every legal power must have legal limits, otherwise thee is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the

courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place", (per Danckwerts L.J. in *Bradbury v. London Borough of Enfield*).

[76] Earlier, Lord Denning in the *Breen* case also observed that:

> The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside. This established by *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] AC 997, which is a landmark decision in modern administrative law.

[77] The DG has taken the view that he has an absolute and an unfettered discretion whether or not to register the appellant. In his affidavit in reply and as submitted by the learned Senior Federal Counsel, the DG has "kuasa budi bicara yang mutlak". Quoting para. 11 of the DG's affidavit in reply it states:

> 11. Merujuk kepada perenggan 14 dan 15 Afidavit Pemohon adalah ditegaskan bahawa Responden Pertama mempunyai kuasa budi bicara yang mutlak sama ada untuk menerima atau menolak satu satu permohonan untuk memeriksa dan mendapatkan salinan sijil Pendaftaran dan kuasa tersebut adalah termaktub di bawah akta Kesatuan Sekerja 1959/Akta 262.

[78] The stand taken by the DG is in clear contradiction and goes against the very grain of the remarks made by the two eminent judges in the person of the late Raja Azlan Shah CJ (as His Royal Highness then was) and Lord Denning MR that, unfettered discretion is a contradiction in terms.

[79] The law does not impose an onerous burden on the decision-maker to hear a party in all cases. But, as Lord Denning says in the *Breen* case, it should be considered accordingly as "the case may demand" or in a "proper case". What is a "proper case" is a question of fact. In our view, in light of the discretion given to the DG as interpreted under s. 12 of TUA 1959, such an opportunity ought to have been given to NUBE.

[80] We are mindful and very certain that we are not inventing fancied ambiguities in the provisions of s. 12 of TUA 1959. Our approach in interpreting the said provision is merely to keep abreast with the development of time and the liberal approach of interpretation towards social legislations. We dismiss learned counsel's submission that we are herein filling the gaps in the legislative provision.

[81] We are further fortified by the decision of the Supreme Court in *Tanjong Jaga Sdn Bhd v. The Minister of Labour and Manpower & Anor* [1987] 2 CLJ 119; [1987] CLJ (Rep) 368; [1987] 1 MLJ 124 that where there is no

provision or requirement for due enquiry which essentially is the requirement to hear parties, then all that was necessary was a fair and reasonable decision in the exercise of the discretion under the law. A fair and reasonable decision under s. 12 of TUA 1959 in our view may only be given by affording the parties a fair hearing which may take the form of consulting an interested party, namely, NUBE, the first respondent in this appeal.

[82] This court had on an earlier occasion in *Majlis Perbadanan Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan (supra)* said that people expect fairness in their dealings with those who make decisions affecting their interests. Natural justice, it has been said, is only "fair play in action".

[83] It is well settled that a body which is entrusted by statute with a discretion, must act fairly. It matters not whether its function is described as judicial or *quasi*-judicial or administrative in nature. Still, it must act fairly. A fair opportunity of being heard is so fundamental to any civilised legal system and that it is only right to expect that such an opportunity be given to NUBE.

[84] On the duty to act fairly, Lord Roskill in the House of Lords case of *Council of Civil Service Union & Ors v. Minister for the Civil Service* [1985] AC 374 at p. 415 stated:

> The particular manifestation of the duty to act fairly which is presently involved is that part of the recent evolution of our administrative law which may enable an aggrieved party to evoke judicial review if he can show that he had "a reasonable expectation" of some occurrence or action preceding the decision complained of and that that "reasonable expectation" was not in the event fulfilled.
>
> The introduction of the phrase "reasonable expectation" into this branch of our administrative law appears to owe its origin to Lord Denning M.R. in *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149, 170 (when he used the phrase "legitimate expectation"). Its judicial evolution is traced in the opinion of the Judicial committee delivered by my noble and learned friend, Lord Fraser of Tullybelton, in *Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] 2 A.C. 629, 636-638. Though the two phrases can, I think, now safely be treated as synonymous for the reasons there given by my noble and learned friend, I prefer the use of the adjective "legitimate" in this context and use it in this speech even though in argument it was the adjective "reasonable" which was generally used. The principle may now be said to be firmly entrenched in this branch of the law. As the cases show, the principle is closely connected with "a right to be heard." Such an expectation may take many forms. One may be an expectation of prior **consultation** (emphasis added). Another may be an expectation of being allowed time to make representations especially where the aggrieved party is seeking to persuade an authority to depart from a lawfully established policy adopted in connection with the exercise of a particular power because of some suggested exceptional reasons justifying such a departure.

[85] NUBE, the first respondent in the instant appeal has an interest in the registration of the appellant and had a legitimate and reasonable expectation to be heard at least by being consulted on the application. NUBE was denied that right.

[86] It is also settled public law principle and principle of natural justice that a public decision-making body is under a duty to give reasons for its decision. Indeed, a reasoned decisions can be an additional constituent of the concept of fairness (*Rohana Ariffin v. Universiti Sains Malaysia & Another Case* [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 380; [1989] 1 MLJ 487, *Kelab Lumba Kuda Perak v. Menteri Sumber Manusia, Malaysia & Ors* [2005] 3 CLJ 517; [2005] 5 MLJ 193. The giving of reason is also one of the fundamentals of good administration.

[87] The absence of any provision in the statute requiring the decision maker to give reasons ought not to be understood or taken to mean that there is no such duty to give reason unless that very statute specifies that no reason needs be given. The absence of such a provision ought not to be regarded as a cloak under which the decision maker can hide his rationale for making the decision, privy only to himself but a mystery to the interested parties or the public at large.

[88] In a case where the decision is one that is straight forward and one that is not mired in circumstances that would invite further or deeper rationalisation, then, perhaps the need to give reason by the decision maker may not arise. The circumstances arising in the particular case may by implication, demand the imposition of the duty to give reasons. Lord Mustill in the House of Lord case of *Doody v. Secretary of State for the Home Department and Other Appeals* [1993] 3 All ER 92 said:

> I accept without hesitation … that the law does not at present recognise a general duty to give reasons for an administrative decision. **Nevertheless it is equally beyond question that such a duty may in appropriate circumstances be implied**. (emphasis added)

[89] In our view, in exercising his powers and/or discretion and making a decision under s. 12 of TUA 1959 the DG must have a reason for that decision. It is not a fanciful decision and the discretion can never be exercised willy nilly. Being in that position, it is reasonable and appropriate to imply that he ought to have given reason/s for his decision. He did not do so, for he was under the erroneous belief (as stated in his affidavit in reply) that he has "kuasa budi bicara yang mutlak". He has not.

[90] The circumstances as borne out from the facts of the case as disclosed from the affidavits in support and in opposition of the application, demonstrate the need for further deliberation and consideration by the DG in arriving at his decision. There is already an existing trade union representing and catering for the same particular industry and it ought to have dawned upon the DG that multiplicity of trade unions in respect of the same

occupation would not be in the best interest of industrial harmony. In our view, the satisfaction of the DG as provided under s. 12 of TUA 1959 in deciding whether to register another trade union in the same industry cannot be achieved without there being a prior consultation with the other players in the industry. NUBE which is an existing trade union representing workmen in the banking industry was not consulted. In the circumstances of the case, failure to do so is fatal.

[91] For the reasons above-stated, in the totality of the matter and the circumstances of the case under which the discretion was exercised by the DG in registering the appellant as a trade union, we find the provisions of s. 12 of TUA 1959 had not been complied with.

[92] We answer the question posed in the affirmative.

[93] The appeal is hereby dismissed and the decision of the Court of Appeal is affirmed.

[94] Composite costs of RM50,000 is ordered against the appellant to be paid to the first respondent only, subject to the payment of allocator. Deposit to be refunded.