A **PERSATUAN PEGAWAI-PEGAWAI BANK, SEMENANJUNG MALAYSIA (ABOM)**

v.

B **KETUA PENGARAH KESATUAN SEKERJA, MALAYSIA & ORS**

COURT OF APPEAL, PUTRAJAYA
ABU SAMAH NORDIN JCA
ALIZATUL KHAIR OSMAN JCA
C AZIAH ALI JCA
[CIVIL APPEAL NO: W-01-555-09-2011]
24 FEBRUARI 2014

D ***ADMINISTRATIVE LAW:*** *Judicial review - Certiorari - Application to quash decision of Director General of Trade Unions allowing registration of in-house trade union - Whether proper recourse - Whether appellant should have appealed to Minister - Whether special circumstances justified non-compliance with s. 71A of Trade Unions Act 1959 - Rules of the High Court 1980, O. 53*

E ***LABOUR LAW:*** *Trade union - Registration - Director General of Trade Unions (DGTU) allowing registration of in-house trade union - Whether trade union representing workmen already existed - Whether DGTU could refuse registration under s. 12(2) of Trade Unions Act 1959 - Whether registration resulted in multiplicity of union - Whether DGTU considered all relevant matters before registering trade union - Whether decision tainted with Wednesbury unreasonableness*

F

The appellant is a trade union 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 G Banks Association ('MCBA'). RHB is a member of MCBA and the second respondent had applied to be registered as an in-house trade union, under s. 10 of the Trade Unions Act 1959 ('the Act'). The Pengarah Kanan, Jabatan Hal Ehwal Kesatuan Sekerja Malaysia requested the appellant to list out the category and grades H of officers that it represented in RHB. The appellant stated 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, the first respondent registered the second respondent as a trade union under s. 12 of the Act. The I appellant applied for a judicial review under O. 53 of the Rules of the High Court 1980, *inter alia*, for an order of *certiorari* to quash the decision of the first respondent and argued that the first

respondent failed to consider (i) that s. 12(2) of the Act which allows the first respondent to refuse registration where a trade union representing the workmen had already existed; (ii) that the appellant had members of executive capacity who were employees of RHB; and (iii) the fact of multiplicity of union resulting from such registration. The first respondent raised the preliminary objection that the appellant failed to exhaust the remedy of appeal provided under s. 71A of the Act against any decision of the first respondent made under s. 12 of the Act. The appellant argued that there were special circumstances that did not bar the application for judicial review notwithstanding the remedy of appeal to the Minister because the first respondent had failed to observe the rule of natural justice by not calling the appellant for any discussion before considering registering the second respondent. The High Court dismissed the appellant's application. Hence, the present appeal.

Held (dismissing appeal with costs)
Per Aziah Ali JCA delivering the judgment of the court:

(1) Section 12 of the Act imposes no obligation on the first respondent to hear the appellant before making a decision under s. 12(1). Therefore, no discussion needed to be called for. There was no breach of the *audi alteram partem* principle and consequently, there were no special circumstances to justify the appellant's act of disregarding the provisions of s. 71A which provides that any person who is dissatisfied may appeal to the Minister against a decision of the first respondent made under s. 12 of the Act (paras 9 & 10).

(2) The appellant ought not to have been allowed to resort to judicial review as a substitute to a practical procedure laid down within the Act. The proper recourse for the appellant was by way of appeal to the Minister. The court was not properly seized of the matter until, at the least, the Minister had made his order. No reason could be relied upon, including as in this 'special circumstances' case, to justify non-compliance of s. 71A of the Act. The High Court ought to have rejected this application (para 13).

(3) The first respondent had made a finding of fact that at the time the second respondent made the application for registration, there was no trade union that represented the class of executives that the second respondent represented. The reasons given by the first respondent for the decision was

supported by all relevant considerations and the first respondent had acted properly and had taken all relevant matters into consideration in deciding to register the second respondent. The decision of the first respondent was not tainted by *Wednesbury* unreasonableness and there was no multiplicity of trade unions (para 17).

Bahasa Malaysia *Translation Of Headnotes*

Perayu merupakan kesatuan sekerja yang keahliannya terbuka kepada semua pekerja-pekerja yang diklasifikasikan sebagai Kelas II Pegawai-pegawai dan Pegawai-pegawai Dalaman yang bekerja di bank-bank yang merupakan ahli-ahli Persatuan Bank-Bank Komersil Malaysia ('PBKM'). RHB adalah salah satu daripada ahli PBKM dan responden kedua telah memohon agar didaftarkan sebagai kesatuan sekerja, di bawah s. 10 Akta Kesatuan Sekerja 1959 ('Akta'). Pengarah Kanan, Jabatan Hal Ehwal Kesatuan Sekerja Malaysia memohon perayu menyenaraikan kategori dan gred-gred pegawai-pegawai yang diwakilinya di RHB. Perayu menyatakan bahawa sebarang permohonan untuk mendaftarkan kesatuan dalam RHB sepatutnya ditolak kerana perayu menghujahkan bahawa keahliannya meliputi kesemua eksekutif di RHB. Walau bagaimanapun, responden pertama mendaftarkan responden kedua sebagai kesatuan sekerja di bawah s. 12 Akta. Perayu memohon satu semakan kehakiman di bawah A. 53 Kaedah-Kaedah Mahkamah Tinggi 1980, antara lain, bagi satu perintah *certiorari* untuk membatalkan keputusan responden pertama dan menghujahkan bahawa responden pertama gagal mempertimbangkan (i) bahawa s. 12(2) Akta membenarkan responden pertama untuk menafikan pendaftaran kesatuan sekerja yang mewakili pekerja-pekerja telah wujud; (ii) bahawa perayu mempunyai ahli-ahli berkapasiti eksekutif yang merupakan pekerja-pekerja RHB; dan (iii) fakta kepelbagaian kesatuan yang terhasil daripada pendaftaran sedemikian. Responden pertama membangkitkan bantahan awalan bahawa perayu gagal menghabiskan remedi rayuan yang diperuntukkan di bawah s. 71A Akta terhadap apa-apa keputusan responden yang dibuat di bawah s. 12 Akta. Perayu menghujahkan bahawa terdapat hal-hal keadaan khas yang tidak menghalang permohonan semakan kehakiman walau apa pun remedi rayuan kepada Menteri kerana responden pertama gagal untuk mematuhi peraturan keadilan asasi dengan tidak memanggil perayu bagi apa-apa perbicangan sebelum mempertimbangkan mendaftarkan responden kedua. Mahkamah Tinggi menolak permohonan perayu. Oleh itu, rayuan ini.

Diputuskan (menolak rayuan dengan kos)
Oleh Aziah Ali HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 12 Akta tidak mewajibkan responden pertama untuk membicarakan perayu sebelum membuat keputusan di bawah s. 12(1). Oleh itu, tiada perbincangan perlu dibuat. Tiada pelanggaran prinsip *audi alteram partem* dan dengan itu, tiada hal-hal keadaan khas yang menjustifikasikan tindakan perayu dalam tidak mengambil kira peruntukan-peruntukan s. 71A yang memperuntukkan bahawa mana-mana orang yang tidak berpuas hati boleh merayu kepada Menteri terhadap keputusan responden pertama yang dibuat di bawah s. 12 Akta.

(2) Perayu sepatutnya tidak dibenarkan mengambil jalan keluar melalui semakan kehakiman sebagai ganti kepada prosedur praktikal yang dinyatakan dalam Akta. Langkah yang sesuai untuk perayu adalah melalui rayuan kepada Menteri. Mahkamah tidak sebetulnya dirampas daripada perkara tersebut hinggalah, sekurang-kurangnya, Menteri telah membuat perintah beliau. Tiada alasan yang boleh disandarkan, termasuklah dalam kes hal-hal keadaan khas ini, untuk memberi justifikasi kepada s. 71A Akta. Mahkamah Tinggi sepatutnya menolak permohonan ini.

(3) Responden pertama telah membuat dapatan bahawa ketika responden kedua membuat permohonan bagi pendaftaran, tidak terdapat kesatuan sekerja yang mewakili kelas eksekutif yang diwakili oleh responden kedua. Alasan-alasan yang diberikan oleh responden pertama bagi keputusan tersebut disokong oleh pertimbangan-pertimbangan relevan dan responden pertama telah bertindak wajar dan telah mengambil kira perkara-perkara relevan dalam pertimbangan bagi memutuskan untuk mendaftarkan responden kedua. Keputusan responden pertama tidak tercemar dengan ketidakmunasabahan *Wednesbury* dan tidak terdapat keberbilangan kesatuan sekerja.

Case(s) referred to:
Electrical Industry Workers Union v. Registrar of Trade Unions & Anor [1975] 1 LNS 35 FC ***(refd)***
Government of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC ***(refd)***
Manggai v. Government Of Sarawak & Anor [1970] 1 LNS 80 FC ***(refd)***
Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) v. Mohd Noor Abdullah [2004] 2 CLJ 777 FC ***(refd)***
Pahang South Union Omnibus Co Bhd v. The Minister of Labour & Manpower & Anor [1981] CLJ Rep 74; [1981] CLJ 83 SC ***(refd)***
Pasmore v. The Oswaldtwistle Urban District Council [1898] AC 387 ***(refd)***

Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2010] 9 CLJ 505 FC ***(refd)***
Wilkinson v. Banking Corporation [1948] 1 KB 722 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 53
Trade Unions Act 1959, ss. 10, 12(1), (2), 71A(1), (3), (4)

For the appellant - VK Raj (R Chandra Segaran with him); M/s P Kuppusamy & Co
For the 1st respondent - Maisarah Juhari; SFC
For the 2nd respondent - Azmer Md Saad; M/s Lainah Yaacob & Zulkepli (Kesatuan Eksekutif RHB Bank Bhd)
For the 3rd respondent - M/s Zaid Ibrahim & Co (RHB Bank Bhd)

[Appeal from High Court, Kuala Lumpur; Criminal Revision No: R2-25-24-2011]

Reported by Najib Tamby

JUDGMENT

Aziah Ali JCA:

[1] The appellant had filed an application for judicial review under O. 53 of the Rules of the High Court 1980 *inter alia* for an order of *certiorari* to quash the decision of the first respondent, the Director General of Trade Unions, Malaysia dated 27 December 2010 to register the second respondent as an in-house union in RHB Bank Berhad ("RHB"). The High Court dismissed the appellant's application, hence this appeal. We heard submissions made by all parties, considered the appeal record and by a unanimous decision we dismissed the appeal with costs of RM5,000 each to the first and second respondent. We now give our reasons below.

Background Facts

[2] The appellant is a trade union registered under the Trade Unions Act 1959 ("the Act"), 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 is a member of MCBA (pp. 86-89 appeal record).

[3] The second respondent, Kesatuan Eksekutif RHB Bank Berhad had applied under s. 10 of the Act 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 claims that its membership covers 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 the Act (p. 74 appeal record). The appellant thereupon filed the application for judicial review.

[4] The appellant's application seeking reliefs are 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 says that the first respondent has 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 has failed to:

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

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

(c) observe the rules of natural justice under s. 12(2) of the Act;

(d) consider the fact of multiplicity of union resulting from such registration.

[5] Before the learned judge, a preliminary objection was raised by learned Senior Federal Counsel for the first respondent that the appellant has failed to exhaust the remedy of appeal to the Minister provided under s. 71A of the Act against any decision of the first respondent made under s. 12 of the Act. We note that this objection has also been raised in paras. 24 and 25 of the first respondent's affidavit in reply opposing the appellant's application (p. 61 appeal record). In the appellant's affidavit in reply (pp. 69-72 appeal record) the appellant has not responded to this objection.

[6] For the appellant it is submitted that there are special circumstances that does not bar the application for judicial review notwithstanding the remedy of appeal to the Minister as provided under s. 71A of the Act. It is contended that special circumstances exist in this application because the first respondent has failed to

observe the rule of natural justice by not calling the appellant for any discussion before considering registering the second respondent. Therefore it is submitted that this application falls within the exception as stated in the case of *Government of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110; [1987] 2 MLJ 185.

[7] The learned judge found that under s. 12 of the Act there is no requirement for the first respondent to call for evidence whether orally or by document. There is 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 (*Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) v. Mohd Noor Abdullah* [2004] 2 CLJ 777).

[8] Section 12 of the Act provides as follows:

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

(b) 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.

(c) 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

[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 it represents.

[10] Section 71A(1) of the Act provides that any person who is dissatisfied with a decision made by the first respondent may appeal to the Minister against a decision of the first respondent made under s. 12. Section 71A(3) empowers the Minister to make a decision on any such appeal as he deems just and proper. Section 71A(4) states that such decision made by the Minister shall be final and conclusive.

[11] The principle is that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy or any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law (per Earl of Halsbury LC in *Pasmore v. The Oswaldtwistle Urban District Council* [1898] AC 387, 394). In the case of *Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2010] 9 CLJ 505 cited by the learned Senior Federal Counsel, in the High Court the appellant had sought a declaration that the registration of the second respondent by the first respondent pursuant to s. 12(1) of the Act is null and void and for the certificate of registration issued by the first respondent to be revoked and cancelled. The High Court dismissed the application on the basis of a preliminary objection raised by learned counsel for the first respondent that the appellant was wrong in commencing the suit without first exhausting the remedy available under s. 71A of the Act. The decision of the High Court was affirmed by the Court of Appeal. One of the questions posed to the Federal Court was "whether the existence of a statutory appeal procedure/alternative remedy is a bar to judicial review; or declaratory reliefs?". Heliliah

Mohd Yusof FCJ (as she then was) in delivering the judgment of the court said *inter alia* that the mode to challenge the Registrar's decision has been provided by the Act. Her Ladyship said as follows:

> In our opinion the legislation by stipulating that the decision of the Minister is to be final is itself indicative that when there is already stipulated a second tier identified in the legislation, courts are not authorised to interfere for the statutory right that has accrued is not purely formal but mandatory. In other words the statutory right has to be exhausted.
>
> Section 71A has provided a remedial mechanism within the framework of the trade union legislation, that is a specific procedure whereby an appeal lies to the Minister. By praying for the declaratory orders the appellant is in effect appealing against the decision of the 1st respondent while a specific procedure has been laid down in the Act 262.

Her Ladyship said further:

> …. the mandatory procedure that is laid down (that) has to be resorted to for the legislation has identified the specific procedure whereby any person who is dissatisfied is to seek further recourse with the Minister if that person wishes to negate the decision of the Registrar.

[12] In *Manggai v. Government Of Sarawak & Anor* [1970] 1 LNS 80 Gill FJ speaking for the Federal Court said *inter alia* as follows:

> It is well settled law that the court will not make a declaratory judgment where an adequate alternative remedy is available.

His Lordship quoted with approval the statement of Lord Asquith in *Wilkinson v. Banking Corporation* [1948] 1 KB 722 at p. 724:

> It is undoubtedly good law that where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal, and not to others.

[13] Similarly in the present case, the appellant ought not to have been allowed to resort to judicial review as a substitute to a practical procedure laid down within the Act. The proper recourse of the appellant is by way of appeal to the Minister. The court is not properly seized of the matter until, at the least, the Minister had made his order (see the judgment of Chang Min Tat J in *Electrical Industry Workers Union v. Registrar of Trade Unions & Anor* [1975] 1 LNS 35)). Thus we are of the considered view that no

reason can be relied upon, including as in this case 'special circumstances', to justify non-compliance of s. 71A of the Act. On this ground alone we are of the view that the High Court ought to have rejected this application for judicial review. A

[14] Notwithstanding our findings above, we nevertheless proceeded to consider the appellant's contention that the appellant has members of executive capacity who are employees of RHB and therefore by virtue of s. 12(2) of the Act, the first respondent ought to have refused the second respondent's application to be registered. The appellant *vide* its affidavit in support of the application avers *inter alia* as follows: B C

(a) that the appellant has been representing executive officers employed by RHB when the first respondent registered the second respondent (para. 2.1);

(b) that the appellant had replied to the letter from Pengarah Kanan, Perundangan & Penguatkuasaan, Jabatan Hal Ehwal Kesatuan Sekerja and appealed to the first respondent to refuse any application for registration of in-house union for workers in the executive grade (para. 4.1); D E

(c) that the first respondent has failed to consider the fact that the appellant has members who are employees of RHB who are within the scope of 'executives' (para. 6(c)(ii)).

[15] The first respondent responded *vide* an affidavit in reply dated 8 June 2011 wherein the first respondent avers that the second respondent had justified its application *inter alia* on the following grounds: F

(a) at the time of application there is no trade union including the appellant that represents Grade E1-E4 Executives employed by RHB (para. 6(ii)); G

(b) the service and salary schemes of Grade E1-E4 Executives in RHB do not come within the scope of the agreement between Malaysian Commercial Banks' Association (MCBA) and the appellant (para. 6(iii)); H

(c) no Grade E1-E4 Executives in RHB are members of the appellant (para. 6(iv)).

[16] In para. 19 of the said affidavit, the first respondent states the factors that the first respondent had considered in making the decision to register the second respondent. Another affidavit in I

reply was filed by an executive of RHB, Muhammad Faizal bin Basir opposing the appellant's application wherein the deponent states that the appellant represents only Officer II or Internal Officer of RHB and no trade union represents executive officers. The appellant in its affidavit in reply did not traverse the positive averments made in these two affidavits filed by the first respondent.

[17] In the Federal Court case of *Electrical Industry Workers Union v. Registrar of Trade Unions & Anor* [1975] 1 LNS 35 Lee Hun Hoe (Borneo) CJ in his judgment that was read by Ong Hock Sim FJ said:

> Whether a person in a related or similar industry becomes a member of a particular union is squarely a matter for the decision of the Registrar of Trade Unions.

The first respondent has made a finding of fact that at the time the second respondent made the application for registration, there is no trade union that represents the class of executives that the second respondent represents. The learned judge found that the reasons given by the first respondent for the decision is supported by all relevant considerations and the first respondent has acted properly and has taken all relevant matters into consideration in deciding to register the second respondent. We agree with the learned judge that the decision of the first respondent is not tainted by *Wednesbury* unreasonableness. We agree with the learned judge that there is no multiplicity of trade unions.

[18] The court will review a decision only where it is shown that the decision is vitiated by jurisdictional error or is a nullity (*Pahang South Union Omnibus Co Bhd v. The Minister of Labour & Manpower & Anor* [1981] CLJ Rep 74; [1981] CLJ 83). In this case we do not find any ground for appellate intervention. For the reasons stated we dismissed the appeal with costs. We order the deposit to be refunded.