DALAM MAHKAMAH RAYUAN DI MALAYSIA

(BIDANGKUASA RAYUAN)

RAYUAN SIVIL NO : W-01(A)-526-08/2018

ANTARA

KESATUAN PEKERJA-PEKERJA KERETAPI
TANAH MELAYU BERHAD … PERAYU

DAN

1. **MENTERI SUMBER MANUSIA**
2. **KETUA PENGARAH PERHUBUNGAN PERUSAHAAN**
3. **KETUA PENGARAH KESATUAN SEKERJA**
4. **KESATUAN KEBANGSAAN PEMANDU-PEMANDU TREN SEMENANJUNG MALAYSIA (TDU) … RESPONDEN-RESPONDEN**

[Dalam perkara mengenai Permohonan Untuk Semakan Kehakiman No. WA-25-249-09/2017 Dalam Mahkamah Tinggi Malaya di Kuala Lumpur

Dalam perkara satu keputusan yang dibuat oleh Responden Pertama bertarikh 5.7.2017 bahawa Keretapi Tanah Melayu Berhad memberi pengiktirafan kepada Responden Keempat

Dan

Dalam perkara satu keputusan yang dibuat oleh Responden Ketiga bertarikh 18.9.2015 yang diketahui Pemohon pada 5.7.2017 dalam mendaftarkan Responden Keempat sebagai satu kesatuan sekerja

Dan

Dalam perkara Seksyen 9, 10A dan 11 Akta Perhubungan Perusahaan 1967

Dan

Dalam perkara Seksyen 12 Akta Kesatuan Sekerja 1959

Dan

Dalam perkara Aturan 53 Kaedah-Kaedah Mahkamah 2012

Dan

Dalam perkara Seksyen 25 Akta Kehakiman Mahkamah 1964 dan perenggan 1 Jadual di dalamnya

CORAM:

ABDUL KARIM BIN ABDUL JALIL, JCA

NOR BEE BINTI ARIFFIN, JCA

GUNALAN A/L MUNIANDY, JCA

JUDGMENT

INTRODUCTION

[1] This is an appeal by the Appellant against the decision of the Learned High Court Judge ["LHCJ"] given on 25.7.2018 which dismissed the Appellant's application for Judicial Review ["JR"] for an order of certiorari to quash the decision of the 1st Respondent and other reliefs.

BACKGROUND FACTS

[2] The Appellant is a trade union of employees in Keretapi Tanah Melayu Berhad ["KTMB"] established and registered under the Trade Unions Act, 1959 ["TUA1959"] on 30.1.1961.

[3] The 1st Respondent is the Minister of Human Resources who is empowered under section 9(5) of the Industrial Relations Act 1967 ["IRA 1967"] to decide whether or not a claim for recognition of a trade union ought to be accorded.

[4] The 2nd Respondent is the Director General of the Industrial Relations Department, who is empowered by the IRA 1967 to have general direction, control and supervision of all matters relating to industrial relations.

[5] The 3rd Respondent is the Director General of Trade Unions, who is empowered by the TUA 1959 to have general direction, control and supervision of all matters relating to trade unions in Malaysia.

[6] The 4th Respondent is a national trade union registered by the 3rd Respondent under the TUA 1959 on 18.9.2015. The 4th Respondent represents all non-executive train drivers in the country.

[7] Vide a letter dated 18.10.2016, the 4th Respondent sought recognition from KTMB in respect of representing the train drivers only. KTMB did not respond to the 4th Respondent's application for recognition. Therefore, vide a letter dated 11.11.2016, the 4th Respondent lodged a complaint with the 2nd Respondent that KTMB did not respond to its application for recognition.

[8] On 8.12.2016, the claim was referred by the 4th Respondent to the 2nd Respondent.

[9] On 15.5.2017 and 16.5.2017, a secret ballot was carried out and the results of the secret ballot revealed that 85.58% of the train drivers in KTMB had become members of the 4th Respondent.

[10] Vide a letter dated 12.7.2017, the 1st Respondent had accorded recognition to the 4th Respondent with effect from 18.10.2016.

[11] The Appellant filed an application for JR and sought the following reliefs:

(1) An order of certiorari to quash the 1st Respondent's decision dated 5.7.2017 that the 4th Respondent be accorded recognition ["The Impugned Decision"] to represent all train drivers except those employed in a management, executive, confidential or security capacity;

(2) A declaration that the Impugned Decision made by the 1st to 3rd Respondents are a breach of the Federal Constitution and principles of natural justice and as a result, unconstitutional and void;

(3) An order of prohibition to prevent the 1st to 3rd Respondents from making any subsequent decisions to register and/or to recognise a trade union which has a membership that is overlapping/identical with the scope of the Appellant's existing membership;

(4) In the alternative to (3), an order of prohibition to prevent the 1st to 3rd Respondents or with one or more of them from making any subsequent decisions to register and/or to recognise a trade union which has a membership that is overlapping/identical with the scope of the Appellant's existing

membership without furnishing the Appellant with the reasons and according the Appellant's a right to be heard; and

(5) Costs.

[12] On 25.7.2018, the Learned High Court Judge ["LHCJ"] dismissed the Appellant's application for JR.

FINDINGS OF THE HIGH COURT

[13] The LHCJ held that there is nothing in section 9 of the IRA 1967 that requires the 3rd Respondent to consult another union before according recognition, unlike the case of the registration of trade unions. Unlike section 12 of the TUA 1959, section 9 of the IRA 1967 makes no reference to any other trade union. This is further fortified by reference to Rule 7(1) of the Industrial Regulations 2009. As such, there is no legal requirement for the 1st to the 3rd Respondents to consult the Appellant before according recognition to the 4th Respondent.

[14] As there is no legal requirement for the 1st to the 3rd Respondents to consult the Appellant before according recognition to the 4th Respondent, then the issue of legitimate expectation does not arise. The 1st to the 3rd Respondents have not made any commitment to the Appellant to enable the Appellant to invoke the doctrine of legitimate expectation. The acts of the 1st to the 3rd Respondents pursuant to section 9 of the IRA 1967 are an exercise of statutory power, which cannot be overridden by the doctrine of legitimate expectation.

[15] Section 11 of the IRA 1967 allows for another union to apply for recognition after 3 years from the registration of first union. This is supported by section 15(2) of the TUA 1959, which provides that where there are 2 or more unions in an establishment, the 3rd Respondent may cancel the registration of a union that has lesser members. The policy consideration behind such provisions is to allow the workers to have the freedom of choice as to which Union can better represent them.

THE APPELLANT'S SUBMISSION

[16] The Appellant submitted that the Impugned Decision is in breach of the principles of natural justice. The Appellant was not consulted nor given a right to be heard before the Impugned Decision was made in breach of the principles of natural justice embedded in Articles 5 and 8 of the Federal Constitution.

[17] The recognition process under the IRA 1967 cannot be read in isolation from the provisions relating to registration under TUA 1959 as the registration of a trade union is the antecedent to the recognition of the same. The two processes are inextricably linked. The consultation process under section 12(2) of TUA 1959 is not a mere administrative process *per se* but an investigative procedure that cannot be dispensed with. Therefore, the LHCJ erred to hold that there is no legal requirement for the 1st to 3rd Respondents to consult the Appellant before according recognition to the 4th Respondent and that the right to be heard and prior consultation is limited only to matters relating to the registration of a trade union.

[18] The Appellant hence submitted that the LHCJ's decision was erroneous and flawed on the following grounds:

(1) The LHCJ erred in law and/or in fact in failing to hold that Impugned Decision is irrational as it is unreasonable and does not take into account that the 1st Respondent, in arriving at the Impugned Decision, failed to state for a fact that he had considered the interest of KTMB locomotive train drivers when he decided to accord recognition to the 4th Respondent.

(2) The LHCJ also failed to take into consideration that the 1st to 3rd Respondents had failed to disclose any material or evidence of the factors and processes employed by them before arriving at the Impugned Decision.

(3) The LHCJ erred in law and/or in fact in failing to consider that the secret ballot cannot be conclusive evidence based on the peculiarities of this case.

(4) The LHCJ failed to take into consideration that there is a real and subsisting confusion and likelihood of disharmony in having two overlapping collective agreements for KTMB locomotive drivers.

(5) The LHCJ failed to take into consideration the objects of the Appellant's establishment which goes back in history to its founding in 1961 whereby the very objective of the Appellant is to unite the fragments of unions representing workmen of various job positions in KTMB. The Impugned Decision would

result in a disruption in the Appellant's functions and objects as a trade union as part of its members would be represented by the 4th Respondent.

THE RESPONDENTS' SUBMISSION

[19] The Respondents submitted that there is nothing in section 9 of the IRA 1967 that requires the 3rd Respondent to consult the Appellant before according recognition of the 4th Respondent. Therefore, the decision discloses no error of fact and/or law that warrants an intervention of this Honourable Court.

[20] The 4th Respondent submitted that since the Appellant was not involved in the recognition process, there was no legal requirement for consultation with the Appellant before according recognition to the 4th Respondent. As such, the issue of the legitimate expectation of the Appellant does not arise.

[21] The 4th Respondent also submitted that when there is no statutory requirement for the 1st Respondent to give reasons for his decision, the Court cannot compel the 1st Respondent to give reasons for his decision.

[22] There was no evidence to prove that the Respondents had acted irrationally. The recognition was accorded pursuant to the statutory requirements and provisions under the IRA 1967.

OUR DECISION

[23] In contending that the LHCJ had erred in law and/or in fact when she dismissed the Appellant's JR Application, counsel for the Appellant drew our attention to the core issue in this Appeal which arises from the recognition and registration of TDU by the 1st to 3rd Respondents, namely, that the decisions to register and recognise TDU were made without hearing or consulting the Appellant, which is an existing union representing the same class of workmen that TDU seeks to represent. The Appellant sought *inter alia* an order of *certiorari* to quash the Impugned Decision.

[24] As correctly understood by the LHCJ, the basic contention of the Appellant on this core issue was that natural justice required the Applicant to be granted the right to be heard and be consulted before its scope of representation over the locomotive drivers stood to be extinguished by reliance on several cases, including the decision of the Federal Court in **Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor** [2017] 4 CLJ 265, where the Question before the Federal Court was as follows:

> *"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 workman in that establishment, trade, occupation or industry."*

[25] This is how the Federal Court answered the above Question:

"[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."

[26] For ease of reference, we reproduce section 12 of the TUA 1959, which governs the registration of a trade union. It read 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…"

[27] Importantly, as noted by the LHCJ, the Federal Court in the above case went on to conclude that in order to be *"satisfied that there is in existence a trade union representing the workmen in that particular establishment trade… and it is not in the interest of the workmen concerned that there be another trade union in respect thereof*" within subsection 12(2) of the TUA 1959, the DGTU must have consulted the other players in the industry, such as the existing trade union representing the workmen in the banking industry.

[28] In regard to a claim for recognition by a trade union, which is the subject of dispute in the present JR Application, the governing law is section 9 of the Industrial Relations Act, 1967 ["IRA"] of which we propose to reproduce only the provisions relevant to the dispute as follows:

"Claim for recognition shall be deemed to have been withdrawn.

9. (1) No trade union of workmen the majority of whose membership consists of workmen who are not employed in any of the following capacities that is to say-

(a) managerial capacity;
(b) executive capacity;
(c) confidential capacity; or
(d) security capacity,

may seek recognition or serve an invitation under section 13 in respect of workmen employed in any of the above mentioned capacities.

….
(4A) Upon receipt of a report under subsection (4), the Director General may take such steps or make such enquires to ascertain-

(a) the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom the recognition is sought to be accorded; and

(b) by way of secret ballot, the percentage of the workmen or class of workmen, in respect of whom recognition is being sought, who are members of the trade union of workmen making the claim.

(4B) For the purposes of carrying out his functions under subsection (1B) or (4A) the Director General-

(a) shall have the power to require the trade union of workmen, the employer, or the trade union of employers concerned to furnish such information as he may consider necessary or relevant within the period specified in the requirement;

(b) may refer to the Director General of Trade Unions for him to ascertain the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded, and the performance of duties and functions by the Director General of Trade Unions under this paragraph shall be deemed to be a performance of his duties and functions under the written law relating to the registration of trade unions; and

(4C) Upon ascertaining the matter under subsection (4A), the Director General shall notify the Minister.

(5) Upon receipt of a notification under subsection (4C) the Minister shall give his decision thereon; where the Minister decides that recognition is to be accorded, such recognition shall be deemed to be accorded by the employer or trade union of employers concerned, as the case may be, as from such date as the Minister may specify.

(6) A decision of the Minister under subsection (1D) or (5) shall be final and shall not be questioned in any court."

[29] Importantly too, the LHCJ's considered opinion that led to her eventually dismissing the JR Application was that there is nothing in section 9 of the IRA 1967 that requires the DGTU to consult another union before according recognition, unlike the case of the registration of trade unions. The three (3) parties referred to and are involved in a recognition exercise under section 9 are the union seeking recognition, the employer and the union of employers.

[30] In her view, this section, unlike s.12 of the TUA 1959, makes no reference to any other trade union which is further fortified by reference to Rule 7(1) of the Industrial Regulations, 2009.

[31] According to the Appellant, this is an erroneous view by reference, amongst others, to the recent Federal Court decision of **Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor** (supra) **('NUBE's Case')** which is a case on point. Hence, that the Impugned Decision was procedurally flawed and devoid of merits that would attract the remedy of a certiorari. It was contended that the LHCJ had erred in holding that the principle *of audi alteram partem* may be excluded by legislation based on **S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors** [1982] 1 MLJ 204, where the Federal Court held as follows:

> *"(1) Whether there is a right to a pre-acquisition hearing*
>
> ***Considering the provisions and scheme of the Act, the short answer to this point is that there is nothing in the legislation imposing any such obligation in marked contrast to the specific provisions for an inquiry and hearing in respect of the***

***quantum of compensation payable**. This very point was taken before the Privy Council in Mukta Ben & Anor v Suva City Council [1980] 1 WLR 767, 769 where it was contended inter alia that the requirements of natural justice were not observed but he Judicial Committee held (at p 779) **that acquisition could not be impugned on any ground of natural justice, since the legislation imposed no obligation to inform the appellants in that case that an application for compulsory acquisition was contemplated or to invite them to make representations to the Governor and that he had in no way acted unfairly in regard to them**. The rules of natural justice vary in content and ambit according to the circumstances and context (Pahang South Union Omnibus Co. Bhd. v Minister of Labour and Manpower & Anor [1981] CLJ (Rep) 74; [1981] 2 MLJ 199; Merdeka University Bhd. v Government of Malaysia [1981] CLJ 191 (Rep); [1981] 2 MLJ 356), and the English Court of Appeal in Regina v Raymond [1981] 3 WLR 660, 670; [1981] 2 All ER 246 (at p 670) approved the proposition that the **Courts should not fly in the face of a clearly evinced Parliamentary intention to exclude the operation of the audi alteram partem rule**.*

…..

***The legislature can by clear words exclude the principles of natural justice in the absence of specific constitutional guarantees**. In an appeal from New Zealand the Privy Council approved of the idea that natural justice could be effectively excluded by a legislative code in Furnell v Whangarei High Schools Board [1973] AC 660, 679 which concerned the disciplinary code for New Zealand government teachers. Charges against a school*

teacher were investigated by a sub-committee which reported to the high school's board. Neither the sub-committee nor the board gave the schoolteacher an opportunity of making representations but he was suspended from teaching pending consideration and decision by the teachers' disciplinary board. The majority opinion held that the legislative code was not unfair and refused a writ of prohibition, stating (at page 679) that it is not 'the function of the court to re-draft the code' and referring with approval to the decision of the High Court of Australia in Brettingham-Moore v Municipality of St Leonards (1969) 121 CLR 509, 524 which held in effect (at page 524) ***that it is not for the court to amend the statute by engrafting upon it some other provision which it might think more consonant with a complete opportunity for an aggrieved person to present his views and to support hem by evidentiary material."*** (emphasis added)

[32] At the outset, the Appellant brought to our attention that the rules of natural justice which originate from the common law have been widely recognised by our apex courts as being embedded in Articles 5 and 8 of the Federal Constitution whether in the wider sense or the formulation of "*procedural fairness*."

[33] A leading authority on this vital point is **Ong Ah Chuan v PP [1981] 1 MLJ 64 at 71B-C** where it was remarked:

"… in a constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to "law" in such contexts as "in accordance with law",

"equality before the law", "protection of the law" and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution."

[34] It would be instructive, to resolve the issue at hand that guidance be sought from the leading case of **Yusof bin Sudin v Suruhanjaya Perkhidmatan Polis & Anor [2011] 5 MLJ 465,** where **Richard Malanjum, CJSS** in no uncertain terms held:

"[3] I would add that the term 'law' in a given legislation including a written constitution has been understood to encompass both substantive law and procedure including the rules of natural justice.

…..

[5] Accordingly, observation of procedural fairness that is closely connected to a fundamental right, for instance, the right to life (article 5(1) as enshrined in our Federal Constitution is of paramount importance. Indeed right to life has been interpreted to include the right to livehood. And it has been said that 'income is the foundation of many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental' (see: Delhi Transport Corporation v D.T.C. Mazdoor Congress & Ors. [1991] Supp. 1 SCC 600) and referred to by our Court of Appeal in Tan Tek Seng & Tan Chee Meng v Suruhanjaya Perkhidmatan Pendidikan & Anor. [1996] 2 CLJ 771. Hence, failure to observe such procedural fairness would tantamount to a breach or aiding a breach of such fundamental right.

[6] It is therefore critical for a public decision maker to know that it is under a duty to act fairly including the observation of the rules of natural justice which comprised of two maxims namely, no man shall be a judge in his own cause and that no man shall be condemned unheard (see Re HK (an infant) [1967] 2 QB 617)."

[35] We are in agreement with the Appellant that, based on the established authorities that have been referred to us, it is now settled principle that a person whose rights or interests would be affected or aggrieved by the decision of a public authority must be accorded the right to he heard before the decision is made. In accordance with established principles of natural justice, he cannot in the normal course be denied that right.

[36] We now propose to examine the reasons advanced by the Appellant as to why the decision to grant recognition to the 4th Respondent ["TDU"] would seriously affect the position and statutory role of the Appellant. Notably, the Appellant is a trade union which has for decades been acknowledged by the employer, KTMB to represent all non-executive employees in KTMB - including that of locomotive train drivers.

[37] Considering the fact that the Appellant's scope of representation over a large category of its existing members would be extinguished, the crucial question before us would be simply whether the Appellant was entitled to be granted the right of hearing preceding the decision.

[38] It is the Appellants' case that the Impugned Decision is prejudicial to their interests and those of the employees of the KTMB that they represent because:

(1) In granting recognition to TDU, it has the effect of reducing the scope of representation of the Appellant – as there can only be one trade union representing the same class of workmen in an industry – either the Appellant or TDU.

(2) The Impugned Decision is in essence the 1st Respondent's choice, as admitted, that it is TDU that should represent all locomotive train drivers in KTMB and not the Appellant.

[39] Hence, it was contended that justice requires that the Appellant be granted a right to be heard and to be consulted before its scope of representation as aforesaid is extinguished permanently.

[40] Primarily, the question for our determination would be whether the LHCJ had made an erroneous finding that the 4th Respondent had not breached s 12 of the TUA 1959 for the following reasons (as summarised by the Appellant):

(1) that with regard to the process of registration under section 12 of the TUA 1959, the DGTU had complied with this provision when the Appellant had been purportedly invited to attend a meeting to discuss the registration application submitted by TDU but the Appellant failed to attend the meeting;

(2) that there was no legal requirement for the 1st to 3rd Respondents to consult the Appellant before according recognition to TDU;

(3) that the right to be heard and prior consultation apply only to matters relating to the registration of a trade union but not the recognition process.

[41] In opposing the Appellant's contention that s 12 of the TUA 1959 had in fact not been complied with, the DGTU alleged that prior to the registration of TDU, the Appellant was in fact invited for a meeting to discuss the viability of the registration of TDU but the Appellant did not attend the meeting and thus, was not consulted on the status of TDU.

[42] We are satisfied that the Appellant had correctly pointed out to us that the LHCJ had mistakenly concluded that the Appellant had been invited to a meeting with the DGTU on the proposed registration application submitted by the TDU but the former failed to attend the meeting. This conclusion was shown to us to be factually incorrect based on the exchange of correspondences between the two parties.

[43] Evidence was produced through the Appellant's secretary that based on a thorough perusal of the Appellant's correspondences over a 5 year period the purported invitation letters by the DGTU were completely untraceable. Notably, none of the purported letters exhibited by the DGTU contained an acknowledgement of receipt by the Appellant nor any proof that the letters were sent out to the Appellant.

[44] In our view, the Appellant was right to contend that, assuming that the purported letters had in fact been sent to them, the requirement for the DGTU to consult them cannot credibly be limited only to sending out letters considering that the DGTU had extensive expertise and experience in the control and supervision of all trade unions nationwide. Bearing in mind the far-reaching implications of the proposed decision, it was certainly incumbent on the DGTU to go the entire mile to obtain feedback from the Appellant whose office was freely accessible to all and sundry.

[45] On the facts brought to our attention, we would conclude on the issue at hand that the LHCJ had in failing to properly evaluate the evidence before her, wrongly held that in this instance the DGTU had complied with the requirements of s 12 of the TUA 1959 by giving to the Appellant a right to be heard before making the impugned decision when in fact the Appellant had clearly not been consulted on the matter of recognition granted to the TDU. Hence, on the evidence, there was thus, a clear breach of the principles of natural justice by the DGTU in the instant decision making process in not consulting the Appellant notwithstanding that there were likely implications to the interests of the Appellant and its huge body of members.

[46] An important fact highlighted to us was that the decision to register the TDU was not even communicated to the Appellant who inadvertently discovered the same themselves from other sources.

[47] As for the 1st Respondent, on the facts before us he should have been well aware that the Appellant was in fact not heard before he arrived at the Impugned Decision. There was no indication of any steps having been taken by him to ensure that the DGTU had consulted the Appellant

before making his decision. We agree with the Appellant that the 1st Respondent had, in his decision-making process acted unreasonably or in a manner inconsistent with any other person or body of persons entrusted with policies of industrial relations and the welfare of workmen in similar circumstances. [See **Association of Bank Officers, Peninsular Malaysia v Ketua Pengarah Kesatuan Sekerja, Malaysia & Anor [2004] 7 MLJ 109**].

[48] We also agree with the Appellant that the LHCJ was wrong in law in failing to bear in mind that the recognition process under the IRA cannot be read in insolation with the specific provisions relating to registration under TUA 1959 as the registration of a trade union is the antecedent to the recognition of the same as the two processes are indisputably inextricably linked. The consultation process under section 12(2) of TUA 1959 must not be viewed as a mere mechanical or administrative process *per se* but as an investigative procedure that is mandatory.

[49] We have duly noted the Court of Appeal judgment in **National Union of Bank Employees v Director General of Trade Unions & Anor [2015] 10 CLJ 62 (CA)** that held that the registration of a trade union is a precursor to recognition:

> *"…(ii) Objections under TUA 1959 are crucial for the Appellant. IRA is inter alia related to the employer who must be satisfied of the employees' support of the new union* ***for purpose of recognition****. If there is no support, registration may be cancelled under s 15 of TUA 1959.*
>
> *(iii)* ***TUA1959 and IRA must not be read in isolation.***

… Trade Union Act 1959

The Act must be read with the Trade Union Act 1959*. TUA 1959 covers the affairs of trade unions of both employers and employees. Trade Unions are associations formed within any particular trade or occupation or industry.* ***The object of trade union, whether in-house or national is to regulate the relationship between employer and employees and in particular, to protect the right of its members****.* ***They negotiate collective bargaining to conclude collective agreement between employers and employees.*** *They represent employees in Industrial Court in their trade dispute with their employers. As the Act deals with principle of Trade Unionism, Recognition, Collective Bargaining and resolving trade disputes,* ***the TUA 1959 must be considered in all material aspects when dealing with the related issues****.*

(emphasis ours)

[50] Our attention was also drawn to another leading case, **Robin Tan Pang Heng v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2010] 9 CLJ 505**, where the Federal Court had in no uncertain terms remarked that:

"[11]… it cannot be categorically asserted that there is no nexus between the Trade Unions Act 1958 ('Act 262') and the Industrial Relations Act 1967 (Act 177). If the object of forming a trade union, inter alia, is to regulate relations between workmen and employers, then it cannot be accepted unreservedly that Act 262 is not applicable to an employer.

[14] … The very claim for recognition has an antecedent process of the registration of a trade union. The current state of law governing the relationship of employer and workmen for the purposes of a trade union activity is therefore found in both Acts 177 and 262. There is a nexus between the two Acts."

[51] In our considered view, both the registration and the recognition processes under the TUA 1959 and the IRA 1967 respectively undeniably affect the interests of workmen in the same industry. Hence, the need to accord the right to be heard to the existing union which would apply equally to both processes. It cannot logically apply to one and not the other as it could result in a procedural vacuum inconsistent with the legislative intent of the above Acts. It could lead to consequences unintended by the Legislature.

[52] Based on submissions made to us, the stand taken by the 1st - 3rd Respondents was, in essence, that in law there was no express requirement mandating them to confer with the Appellant before granting recognition to the 4th Respondent under s 9 of the IRA 1967.

[53] Their position was that there was no provision in s 9 of the IRA 1967 requiring them to negotiate with the Appellant before granting recognition to the Appellant. As such, that principles of natural justice, particularly the right to be heard, were not applicable to the decision – making process for recognition in this case. This contention with which the LHCJ concurred, is, in our considered opinion, erroneous and misconceived as it disregards cardinal principles of natural justice wherein persons or parties affected by the decision of a person or body exercising statutory or administrative powers are entitled as of right to be heard before the decision is made. In

the present instance, the Appellant as the long established trade union representing all non-executive employees of the KTMB should logically and naturally be considered as a party likely to be aggrieved by the decision of the 1st Respondent to grant recognition to the 4th Respondent which is a splinter union intended to represent a class of railway employees.

[54] The Respondents' position, in our view, also fails to appreciate the proximate nexus between the process of registration under s 12 of the TUA 1959 and the provisions relating to recognition under s 9 of the IRA 1967. On this point, we were referred to the instructive view of the Court of Appeal in **Marulee (M) Sdn Bhd v Menteri Sumber Manusia & Anor [2007] 6 MLJ 222**, where it was held:

> *"[5] Upon receipt of an application under 9(3)(c), or a report under section 9(4) of the Act, the DGIR is under a statutory duty to attempt to resolve the matter. In attempting to resolve the dispute the DGIR is authorized 'to take such steps or make such enquiries as he may consider necessary or expedient to resolve the matter' (s 9(4A). In order to perform his functions under s 9(4A) the DGIR is empowered 'to require the trade union of workmen, the employer, or the trade union for A employers concerned, to furnish such information as he may consider necessary or relevant' [s 9(4B)(a)] and 'may refer to the Director General of Trade Unions for his decision any question on the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded' [s 9(4B)(b)]. This provision also provides that the performance of duties and functions of the Director General of Trade Union (DGTU) under this paragraph shall*

be deemed to be a performance of his duties under the written law relating to the registration of trade unions. There is accordingly a direct nexus of the power entrusted to the DGTU under the Act and that conferred upon him by the Trade Unions Act."

[55] To conclude on the issue at hand, our considered view is that the LHCJ had wrongly concluded, without giving sufficient consideration to settled principles of natural justice, that there is no legal requirement for the 3rd Respondent to consult the Appellant before according recognition to TDU on the premise that the right to be heard and prior consultation are limited only to matters relating to the registration of a trade union.

[56] We take cognisance of the fact that various provisions in the IRA 1967, including s 9, prescribe the general procedure for a trade union's claim for recognition by the employer. As pointed out to us by the Appellant, this is a peculiar case where the Appellant's rights would be adversely affected as admitted by the 1st Respondent himself.

[57] To our minds, the mere absence of a statutory right to be heard in contrast to an express exclusion, which is not the case here, would not tantamount to an applicant being denied the right to be heard where his rights are affected. A case squarely in point is **Cooper v Wandsworth Board of Works [1861-73] ALL ER Rep Ext 1554** where the Learned Judge held with precision that:

"I am of the same opinion. This is a case in which the board of works have pulled down a house and thrown the charge on the plaintiff, without any notice whatever, and they have given him no opportunity of being heard, and I am of opinion that they acted wrong, whether

they acted judicially or ministerially. ***I am of opinion that they acted judicially, and on the authority of a number of cases, though the statute has not directly provided for it, the common law will supply the deficiency and will not allow a person to be punished without being heard.*** *If they acted judicially, they have acted contrary to the whole current of cases; and if they acted ministerially, they have acted unjustly, and exceeded their powers."*

(emphasis ours)

[58] Statutory powers conferred on administrative bodies or officials must in principle be exercised fairly if the exercise of the said powers be to the detriment of the persons affected by the decision made pursuant to those powers. [See **R v Commr. of Racial Equality, ex p Hillingdon London Borough Council [1982] AC 779]**

[59] We now turn to the next important aspect of the LHCJ's decision pertaining to the invocation of the doctrine of legitimate expectation wherein the right to be heard ought to have been afforded to the Appellant under the present circumstances. On this issue, the Appellant's contention was that the LHCJ had erred in law and/or in fact in holding that the issue of legitimate expectation does not arise given that there is no legal requirement for the 1st - 3rd Respondents to consult the Appellant before according recognition to the 4th Respondent.

[60] The 4th Respondent's position on this issue was that there was no statutory requirement for the Respondents to consult the Appellant and as such, the principle of legitimate expectation does not arise. [See the case of **Federal Auto Cars Son. Bhd v Ketua Pengarah Kastam Diraja Malaysia [2019] 1 LNS 1277**]

[61] In other words, where the applicant's expectation is not recognised by law this doctrine would have no application. Reference was made to **Salemi v Mackellar (no. 2) [1977] 137 CLR 396, at page 404** where Barwick IJ observed:

> *"It is therefore necessary to examine the eloquent phrase 'legitimate expectation' derived as it is from the reasons for judgment of the Master of the Rolls in Schmidt v Secretary of State for Home Affairs. I am bound to say that I appreciate its literary quality better than I perceive its precise meaning and the perimeter of its application. But, no matter how far the phrase may have been intended to reach, as its centre is the concept of legality, that is to say, it is a lawful expectation which is in mind. I cannot attribute any other meaning in the language of a lawyer to the word 'legitimate' than a meaning which expresses the concept to entitlement or recognition by law. So understood, the expression probably adds little, if anything, to the concept of a right."*

[62] This was precisely what the LHCJ held in rejecting the Appellant's contention that the 1st - 3rd Respondents had acted in violation of its legitimate expectation in failing to afford an opportunity to make representations to the 1st Respondent and/or the 2nd Respondent in the decision-making process pertaining to the recognition of the 4th Respondent.

[63] In arriving at her decision, the LHCJ relied on the following authorities as summarised in the 4th Respondent's submission:

(i) **Darahman bin Ibrahim & Ors v Majlis Mesyuarat Kerajaan Negeri Perlis & Ors** [2008] 4 MLJ 309. (The Court of Appeal by relying on the case of ***Attorney General of Hong Kong v Ng Yuen Shiu*** *[1983] 2 AC629* held that: legitimate expectations in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis.

(ii) In **Hotel Sentral (JB) Sdn. Bhd. v Pengarah Tanah dan Galian Negeri Johor, Malaysia & Ors** [2017] 5 MLJ 116, the Court of Appeal held that; the general rule appears to be the doctrines of estoppel and legitimate expectation are not ordinarily available against the Government nor is the Government bound by any representation which may have been made expressly or by conduct which if needed to be acted upon would invoke a breach of statute**.**

(iii) In **North East Plantation Sdn. Bhd. v Pentadbir Tanah Daerah Dungun & 1 lagi** [2011] 4 CLJ 729 the Federal Court held that "whether or not the doctrine of legitimate expectation applies depends on the facts of each case, it cannot and should not override the express statutory power vested in the State Authority."

[64] It can be summarised that the reasoning of the LHCJ based on the authorities that she had relied upon was that since the Appellant was not involved in the recognition process, there was no legal requirement for consultation with the Appellant before according recognition to TDU. As such, the issue of the legitimate expectation of the Appellant does not arise.

[65] As to the purported legitimate expectation of the Appellant to be afforded a right to be heard in the recognition process, the question before us was whether the LHCJ had erred in law and/or in fact in holding that in the present case, the principle of *audi alteram partem* may be excluded by legislature when she failed to consider that there have been a spate of authorities where the highest Courts have quashed decisions by the DGTU to register a trade union when there was already an existing trade union representing the same class of workmen in that particular trade, establishment, occupation or industry without giving the latter a right to be heard or to be consulted prior to the decision.

[66] We observe that in all these cases referred to us by the Appellant, a similar contention as advanced by the DGTU in the present case was rejected wherein non-consultation of an affected party was, on the contrary, viewed as a serious jurisdictional error. Among the authorities referred to us are **National Union of Bank Employees v Director General of Trade Unions & Anor [2015] 10 CLJ 62 (CA)**; and **Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2017] 4 CLJ 265 (FC) ('NUBE's Case')**.

[67] We agree with the Appellant that the case of **S Kulasingam & Anor** (supra) ought to be distinguished from the present case on the specific issues decided by the Federal Court in that case. It concerned whether a landowner is entitled to a right to be heard before the power of compulsory acquisition of land is exercised by the relevant authority and hinged on the interpretation of Article 13 of the Federal Constitution relating to the fundamental right to property. It was the Federal Court's decision that a right to be heard prior to such power being exercised would stultify acquisition proceedings. And, thus, the decision to acquire land could not be impugned on any ground of natural justice.

[68] We are of the view that unlike **S Kulasingam** which deals with compulsory acquisition of land, section 9(1) of IRA 1967 does not confer the right of compulsory recognition but is left to the discretionary power of the 4th Respondent.

[69] We do not share the view of the LHCJ that legitimate expectation does not arise on the basis that there is no legal requirement for the 1st - 3rd Respondents to consult the Appellant before according recognition to the 4th Respondent. This is a flawed view as, from a careful reading of the authorities cited to us, the doctrine of legitimate expectation is a creature of common law and entrenched in the Federal Constitution. It does not depend on any legislative basis but would apply as a matter of course where constitutional rights are affected.

[70] It is undeniable that as the Impugned Decision would have the direct and obvious effect of adversely affecting the Appellant's right to represent all non-executive employees in KTMB, the Appellant ought to be granted a right to be heard before a decision of such a magnitude is made.

[71] We, therefore, find that the 1st Respondent had plainly acted in defiance of principles of natural justice in making the decision without prior consultation with the Appellant which the LHCJ failed to seriously consider.

[72] The impact of the decision of the 1st Respondent as an authority in the public sphere has to be borne in mind as an uppermost consideration which, as a matter of necessity, requires prior consultation with the Appellant who on record had 60 years' experience in representing and advancing the rights of all locomotive drivers of KTMB.

[73] A decision to recognise the 4th Respondent as the union to represent the same class of workmen in lieu of the Appellant would obviously have wide-ranging effects which would, in principle, require that rules of natural justice be strictly adhered to. Hence, the making of the decision thereof without consulting the Appellant would, in our view, be devoid of justification based on the flimsy reasons given by the 1st and 2nd Respondents. It is only through the process of consultation and engagement with the relevant parties could the DGTU satisfy himself as to the correctness and fairness of his decision.

[74] As impressed upon us by the Appellant, the High Court should have borne in mind the correct principles as to the interpretation of statutes which in the instant case would require that the Minister, the DGIR and the DGTU in exercising their respective functions ought to advance a purpose which is consistent with the objects and rules of the governing legislation. Effect must be given to its legislative intent. In our view, the decision to grant recognition to the 4th Respondent should not be taken as

a mechanical process without any application of mind in contrast to the registration process.

[75] In arriving at her decision, the LHCJ appears to have overlooked the spirit and objects of the IRA 1967 and the TUA 1959. Both the legislation are, indisputably, social legislation aimed at creating industrial harmony. The long title for IRA 1967 reads as follows:

> *"An Act to promote and maintain industrial harmony and to provide for the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom."*

[76] It follows that the 1st and 2nd Respondents in exercising their powers must act in accordance with the objects of these legislation as intended by Parliament. In support of this proposition, our attention was drawn to the following Court of Appeal decisions:

> **Syarikat Kenderaan Melayu Kelantan Bhd v Transport Worker Union [1995] 2 CLJ 748 (CA):**
>
> *"In my judgment, this approach when applied to the interpretation of welfare or of social legislation demands that such legislation must ex necessitae rei receive a liberal interpretation in order to achieve the object aimed at by Parliament. There is respectable authority that supports this view."*

National Union of Bank Employees v Director General of Trade Unions & Anor [2015] 10 CLJ 62 (CA):

"(i) What is essential to note is that registration under the TUA 1959 itself does not permit the second respondent to represent the employees without obtaining 'recognition' under s 9 of the Industrial Relations Act 1967 (IRA). Both of these Acts in a way must be seen to be social legislation to promote, preserve and protect the employees as well as the employers' right to create what we often term as 'industrial harmony' for successful 'Nation Building'. Industrial Jurisprudence does not just depend on the cold letters of the law per se or procedural requirement to decide on issues affecting the employer or employee unless the law as well as case laws are clear on the issues."

[77] A corollary of the promotion of industrial harmony would, as correctly suggested by the Appellant, include a prevention of multiplicity of trade unions representing the same group of employees in a trade or occupation consistent with s 12(2) of the TUA 1959 as held by the Federal Court in the NUBE case (supra) as follows:

"[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."

[78] This proposition is supported by a host of prior authorities to the effect that the interest of workmen is paramount in the exercise of statutory powers by the Minister of Human Resource/Labour in making his decision on the registration of unions. [See **Persatuan Pegawai-Pegawai Bank Semenanjung Malaysia v Minister of Labour, Malaysia & Ors [1989] 1 CLJ (Rep) 124 (SC)]**

[79] In **Kesatuan Pegawai-Pegawai Bumiputra-Commerce Bank Bhd (Kepak Bumi-Commerce) v Association of Bank Officers, Peninsular Malaysia [2007] 1 MLJ 37 (CA), per Gopal Sri Ram, JCA** (as he then was) held, inter alia, that:

> *"… [7] the Director General also failed to take into account the considerations set out in s 12(2) of the Act. It is settled law that a public decision maker who fails to take into account relevant considerations and makes a decision not in accordance with law is liable to be quashed on an application for judicial review: See Anisminic Ltd v Foreign Compensation Commission & Anor [1969] 2 AC 304."*

[80] We are convinced that section 9 of the IRA 1967 cannot be read in isolation and it is mandatory on the part of the 1st Respondent to consider the wider interests of all KTMB locomotive drivers whether or not they would be better represented by the Appellant or TDU. It is only upon recognition of the 4th Respondent under s 9 of the IRA 1967 that the registration under s 12 of the TUA 1959 would be rendered effective. Hence, the decision to accord recognition would have far-reaching implications and naturally, the Appellant ought to have been heard and consulted beforehand.

[81] It is clear to us that, in this regard, the LHCJ fell into error when she viewed the two processes in isolation and failed to appreciate the inextricable link between the same notwithstanding that each is governed by a different legislation. Logically, in line with the ratio of the Federal Court in the NUBE case, a correct decision cannot be achieved without there being a prior consultation with the other players in the industry.

[82] The Appellant contended that the LHCJ erred in law and/or in fact in failing to take into consideration that it is a settled public law principle consistent with rules/principles of natural justice that a public decision-making body is under a duty to give reasons for its decision even in the absence of a statutory duty to give reasons. Further, that the decision was procedurally flawed as the Minister had failed to communicate the same to the Appellant, and had not given the Appellant the reasons for his decision. Reliance was placed on **Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd** (supra) where the Federal Court held that "it is reasonable and appropriate to imply that he ought to have given reasons for his decision".

[83] In rejecting the Appellant's proposition, the LHCJ found support in **Pendaftar Pertubuhan v Datuk Justin Jinggut [2013] 3 MLJ 16**, where the Federal Court held that where an Act of Parliament does not provide an express statutory duty to give reasons, then the said duty does not arise:

> *"With respect, I unable to agree with the applicant. Firstly, it is an* ***established position of law that there is no general duty universally*** *imposed on all decision makers to give reasons for their decision. Secondly,* ***ss 16(1) and 13 of the Act do not require the***

***ROS to give reasons for his decision**. There is no express statutory duty imposed on the ROS to give reasons to the applicant." (emphasis added)*

[84] In submitting that the LHCJ had erred in holding as she did on this point, the Appellant relied on the Federal Court decision in the NUBE case where the circumstances were similar to the present and it was held on the statutory duty to give reasons as follows:

"[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 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)***

[85] The Respondents' position on this purported procedural flaw by the 1st – 3rd Respondents was that this ground of appeal should fail because when there is no statutory requirement for the 1st Respondent to give reasons for his decision, he thus, cannot be compelled to do so. In this case, the Respondents, it was contended, had followed the statutory process and procedure provided under s 9 of the IRA 1967, and as such, the decision of the 1st Respondent was not tainted with any infirmities that warrant an intervention of the High Court and/or the Court of Appeal.

[86] The 4th Respondent submitted that the LHCJ in her grounds of judgment had rightly referred to the cases of **Pendaftar Pertubuhan v Datuk Justin Jinggut (supra) (Federal Court) and Minister of Labour, Malaysia v Chan Meng Kuan and Another Appeal [1992] 2 MLJ 337 (Supreme Court)** which, in essence, held that there is no general duty universally imposed on all decision makers to give reasons for their decision, specifically when there is no such duty imposed by law.

[87] In the LHCJ's view, as the 1st – 3rd Respondents had adhered to the statutory procedures prescribed in s 9 of the IRA 1967, the Regulations thereunder and had considered the secret ballot which showed that a majority of KTMB train drivers (85.59%) had become members of TDU to represent them, recognition had to be accorded to TDU as a national union exclusively for train drivers. Be that as it may, it is our view, that the

cardinal principle enunciated by the Federal Court imposing a general duty on administrative decision makers to give reasons for their decision should prevail under the circumstances of this case. We are in agreement with the Appellant that this is not a case that is straight-forward and one that is not mired in circumstances that would invite further or deeper rationalisation.

[88] Lastly, the Appellant contended that the Impugned Decision is irrational as it is unreasonable and does not take into account relevant considerations. It was contended that the LHCJ had erred in law and/or in fact in failing to hold that the impugned Decision is flawed and tainted on this ground.

[89] As we have found serious procedural flaws in the decision-making process by the 1st – 3rd Respondents, which centred around a blatant disregard for established principles of natural justice that rendered the Impugned Decision by the Minister to accord recognition to the 4th Respondent open to be declared void, we do not propose to state our views on whether the decision suffers from irrationality or unreasonableness. In other words, whether the decision, on its merits, is tainted on the ground of unreasonableness.

[90] In any event, the LHCJ does not appear to have dealt with this ultimate ground of appeal except to conclude that she found no reason to interfere with the decision made by the Minister on the basis that it was not tainted with any form of irrationality, illegality, or procedural impropriety. **[Minster of Labour v Lie Seng Fatt [1990] 2 MLJ 9 SC referred to]**

CONCLUSION

[91] To sum up, we have duly considered the facts surrounding this appeal, the submissions of the respective parties through counsel, the principles of law applicable and the issues of law and fact canvassed for our determination.

[92] It is our considered view that the LHCJ had erred in principle and/or had failed to correctly apply settled principles relating to the issues at hand in dismissing the Appellant's further JR Application for an order of certiorari against the impugned decisions made by the 1st and 3rd Respondents to accord recognition to the 4th Respondent to be registered as a Trade Union.

[93] We would conclude that the Impugned Decisions were flawed in law for breach of established principles/rules of natural justice and administrative law that have been guaranteed by the Federal Constitution. We are not in agreement with the LHCJ's view that as DGTU had complied with s 12 of the TUA 1959 in regard to the 4th Respondent's application for registration as a Trade Union on 10.02.2015, there was no legal requirement under s 9 of the IRA 1967 for 1st and 3rd Respondents to consult the Appellant before according recognition to 4th Respondent. This, in our view, is a fundamental error as it is inconsistent with basic principles of natural justice which require a right to be heard to be granted to the Appellant as the sole or umbrella union vested with the right to represent non-executive employees of KTMB in service negotiations with the latter.

[94] We also agree with the Appellant's contention that the 1st and 3rd Respondents had acted in violation of the Appellant's legitimate expectation to be consulted and to be given an opportunity to make representations and/or to participate in the process of the application for recognition by the 4th Respondent before any decision is made by the 3rd Respondent that would ultimately affect the rights of the employees represented by the Appellant.

[95] For primarily these reasons, we find sufficient merits in law and fact in this appeal that would justify the LHCJ's decision dated 5.7.2017 being interfered with and set aside. We would, therefore, allow this appeal with costs and set aside the decision of the High Court and quash the Impugned Decisions of the 1st and 3rd Respondents by an order of certiorari.

Dated: 07 July 2021

- Sgd -

GUNALAN A/L MUNIANDY
Judge Court of Appeal
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