HSBC BANK MALAYSIA BHD

v.

MENTERI SUMBER MANUSIA, MALAYSIA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
MOHD ZAWAWI SALLEH J
[JUDICIAL REVIEW NO: R1-25-209-09]
15 JUNE 2012

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Bank employees - Claim for recognition by Union to represent Bank's resident managers - Decision of Minister - Minister ruling that job grade Manager Band 4, 5 and 6 not employed in managerial capacities and could be represented by Union - Whether Minister failed to consider relevant facts - Whether Minister erred in law in making decision*

LABOUR LAW: *Trade union - Recognition of members - Bank employees - Claim by Union to represent Bank's resident managers - Decision of Minister - Minister ruling that job grade Manager Band 4, 5 and 6 not employed in managerial capacities and could be represented by Union - Whether Minister failed to consider relevant facts - Whether Minister erred in law in making decision*

This was an application for an order of *certiorari* to quash a decision of the Minister ruling that certain members of the applicant Bank's managerial staff were not employed in managerial, confidential and security capacities, and therefore could be properly represented by the second respondent Union (Resident Managers Association Union). The facts were that in February 2006, the Union had filed a claim for recognition under s. 9 of the Industrial Relations Act 1967 ('the Act') seeking to represent all resident managers employed by the Bank. The Bank responded by requesting the Director General of Industrial Relations ('the DGIR') to decide on the competency of the Union's claim, and following that, the DGIR, after having interviewed the affected managers, informed the Bank by letter that the Minister of Human Resources ('the Minister') had decided that: (i) Manager Band 1, 2 and 3 were employed in the managerial, confidential or security capacities and could not be represented by the Union; and (ii) Manager Band 4, 5 and 6 were not so employed, and hence, could be properly represented by the Union. The Bank was dissatisfied with the second part of the Minister's decision, and so filed the present judicial review application to the High Court.

A Before the learned judge, the primary issue that arose was whether the Minister had erred in law or in fact in deciding the way he did.

Held (allowing *certiorari* and setting aside the impugned
B **part of the Minister's decision):**

(1) The scope of membership of the Union is confined to all resident managers save for those falling under the managerial, security and confidential capacities. This means that it cannot represent employees who are employed in the managerial,
C security or confidential capacity. (para 41)

(2) The Minister had erred in law in failing to appreciate the relevant facts and considerations, namely that under the job grade Manager Band 4, 5 and 6, there were employees
D employed in positions and job titles that carry out managerial, confidential and security functions. The constitution of the second respondent Union did not permit it to represent employees who were engaged in such capacities, and therefore, such employees of the Bank did not fall within the
E scope of representation of the Union for the purpose of the instant recognition claim. (paras 37-40)

(3) The Minister had failed to explain in his affidavit-in-reply as to how he had arrived at the decision that Manager Band 4, 5
F and 6 did not fall within the managerial, security and confidential categories, and further failed to address the Bank's averment and issues raised in the Bank's affidavit-in-support which provided why such managers were actually engaged in the said categories. (paras 59, 64)

G
(4) Although there was no duty under the Act for the Minister to disclose the reports made by the DGIR, such duty was implied since it is necessary to ensure fairness and to prevent an aberrant, unreasonable or irrational decision. The disclosure of the reports will assist the court in performing its supervisory
H functions and ascertaining whether the decision-maker, ie the Minister, had taken into account the relevant considerations or had acted properly. (*Doody v. Secretary of State for the Home Department*) (para 67)

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Case(s) referred to:

Attorney-General, Malaysia v. Chemical Workers' Union of Malaya & Anor [1970] 1 LNS 6 HC ***(refd)***

Buck v. Bavone (1976) 135 CLR 110 ***(refd)***

Colgate Palmolive (M) Sdn Bhd v. Yap Kok Foong & Another Appeal [2001] 3 CLJ 9 CA ***(refd)***

Corporation of the City of Enfield v. Development Assessment Commission (2000) 199 CLR 135 ***(refd)***

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

E v. Secretary of State for the Home Department [2004] QB 1044 ***(refd)***

Kaneka Paste Polymers Sdn Bhd v. Ketua Pengarah Perhubungan Perusahaan & 2 Ors [2005] 1 LNS 276 HC ***(refd)***

Marulee (M) Sdn Bhd v. Menteri Sumber Manusia & Anor [2007] 5 CLJ 51 CA ***(refd)***

Minister Of Labour & The Government Of Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC ***(refd)***

Montes v. Secretary of State for the Home Department [2004] EWCA Civ 404 ***(refd)***

National Union Of Hotel, Bar And Restaurant Workers v. Minister Of Labour And Manpower [1980] 1 LNS 50 FC ***(refd)***

National Union Of Plantation Workers v. Kumpulan Jerai Sdn Bhd (Rengam) [2000] 1 CLJ 681 CA ***(refd)***

Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 CA ***(refd)***

R (Assura Pharmacy Ltd) v. NHS Litigation Authority [2008] EWHC 289 ***(refd)***

R (MH) v. Bedfordshire County Council [2007] EWHC 2435 ***(refd)***

R (On the application of Prolife Alliance) v. British Broadcasting Corporation [2003] 2 All ER 977 ***(refd)***

R v. Secretary of State for Scotland [1999] SLR 74 ***(refd)***

R v. Secretary of State for the Home Department, Exp. Duggan [1994] 3 All ER 277 ***(refd)***

Ranjit Kaurs Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

Reg v. City of London, Exp Matson [1997] 1 WLR 765 ***(refd)***

Reg v. Secretary of State for the Home Department, Expt McAvoy [1998] 1 WLR 790 ***(refd)***

Shaheen v. Secretary of Home Department [2008] QB 533 ***(refd)***

Taylor's College Sdn Bhd v. Ketua Pengarah Kesatuan Sekerja Malaysia & Ors [2009] 5 CLJ 153 CA ***(refd)***

William Jack & Co (M) Sdn Bhd v. S Balasingam [1997] 3 CLJ 235 CA ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, s. 9(1)(a), (c), (d), (1A), (2), (3)(c), (4A), (4C), (5)

Rules of the High Court 1980, O. 53

Trade Unions Act 1959, ss. 2, 26(1A)

A *For the applicant - Sivabalah (Raymond Low with him); M/s Shearn Delamore & Co*
For the 1st respondent - Wan Suhaila Mohd, DPP
For the 2nd respondent - Ramesh Chandran (Revindran Pillai with him); M/s Renuka Rabindranath & Assocs

B *Reported by Baizura Abd Razak*

JUDGMENT

C **Mohd Zawawi Salleh J:**

Application

[1] Impugned in this application for review on *certiorari*, filed by HSBC Bank Malaysia Bhd ("the applicant"), is the part of the
D decision of the Minister of Human Resource, Malaysia ("the Minister") dated 4 May 2009, made under s. 9 of the Industrial Relations Act 1967 ("the Act"). The Minister determined, *inter alia*, that "Manager Band 4, Manager Band 5 and Manager Band
E 6 are employers that are not employed in the managerial, confidential or security capacity".

[2] The applicant sought to quash the part of the said decision.

[3] I have given anxious scrutiny to the submissions of counsel
F and to the documents and authorities relied upon by the parties. For the reasons that follow, I am of the view that this application is impressed with merit and should be allowed.

Facts Of The Case

G **[4]** The facts of the case, as submitted by the parties, may be stated as follows:

(a) By a letter of 13 February 2006, the union had submitted a claim for recognition under s. 9 of the Industrial Relations Act
H 1967 ("the Act"). In the Notice of Recognition in Form A dated 13 February 2006, the union filed a claim of recognition on the applicant seeking to represent all the resident manager employed by the applicant, as follows:

I

(ii) The following class or classes of workmen employed by you: A

In the same form, the Union deleted the paragraph which is reflected in the following manner:

~~All workmen employed by you, except those in managerial, executive confidential or security capacity~~. B

(b) The applicant responded by issuing a letter dated 23 February 2006 to the Director General of Industrial Relations ("the DGIR") requesting the following issues to be ascertained by the DGIR under s. 9(3)(c) of the Act: C

(i) whether or not the union is a competent union to represent all resident managers; and

(ii) whether or not the intended scope of representation of the union with reference to Form A and r. 3 of the union's constitution satisfies the requirements of s. 9(1) of the Industrial Relations Act 1967. D

(c) Arising from the applicant's letter dated 23 February 2006, the Industrial Relations Department in Putrajaya ("IRD Putrajaya") had issued a letter dated 18 August 2006 to the Industrial Relations Department in Kuala Lumpur ("IRD KL") to inform that the applicant had raised an issue on the scope of membership of union under s. 9(1A) of the Act. The letter took cognizance of the applicant's argument that there were resident managers who were engaged under the managerial, confidential and security capacity and hence, the assistance of the IRD KL was sought to conduct interview with the relevant resident managers to ascertain the matter further. The said letter was signed by one Encik Zun bin Rawi of the IRD Putrajaya. E F G

(d) The IRD KL, acting on behalf of the DGIR, then issued a letter dated 11 May 2007 to the applicant to request the applicant to provide the Industrial Relations Department with a list of the names of officers and titles in issue to enable the office to arrange for an interview session on a date to be fixed. This was in connection with the scope of representation of the union. The said letter was signed by one Hj Abdul Razak. H I

(e) The IRD KL, acting on behalf of the DGIR, further issued a letter dated 3 July 2007 to the applicant enclosing a list of the names of executives employed by the applicant. The list contained 142 names that were selected at random for the interview session. The applicant was requested to revert on the suitable time and place for the interview sessions.

(f) The interview sessions were held between 8 August 2007 and 13 December 2007.

(g) It was alleged by the applicant that although the IRD KL had conducted the interview sessions with the selected employees, the said department did not obtain the views and input from the applicant neither did the said department invite the applicant to provide any information or feedback in relation to the matter.

(h) On 21 May 2009, the applicant received a copy of the letter from the DGIR advising that the Minister had handed down a decision under s. 9(5) of the Act in respect of the scope of representation of the union. The Minister's decision, which is embodied in Form E dated 4 May 2009, stated the following:

> Maka pada menjalankan kuasa-kuasa di bawah s. 9(5), Akta Perhubungan Perusahaan 1967, saya adalah dengan ini memutuskan bahawa:
>
> (i) Pengurus Band 1, Pengurus Band 2 dan Pengurus Band 3 adalah pekerja-pekerja yang diambil kerja dalam kapasiti pengurusan, sulit atau keselamatan.
>
> (ii) Pengurus Band 4, Pengurus Band 5 dan Pengurus Band 6 adalah pekerja-pekerja yang bukan diambil kerja dalam kapasiti pengurusan, sulit atau keselamatan.

[5] The decision of the Minister is composed of the following matters:

(i) that employee employed as Manager Band 1, Manager Band 2 and Manager Band 3 are employed in the managerial, confidential or security capacity; and

(ii) that employees employed as Manager Band 4, Manager Band 5 and Manager Band 6 are not employed in the managerial, confidential or security capacity.

[6] As a result of the decision, only employees who are employed as Manager Band 4, Manager Band 5 and Manager Band 6 can be represented by the union as they are not employed in the managerial, confidential or security capacity.

Preliminary Issue

[7] At the commencement of this application, learned counsel for the second respondent has taken a preliminary objection on the ground that the applicant's application is premature because the applicant should wait for the Minister to hand down his decision on the recognition issue under s. 9(5) of the Act. The second respondent also argued that the applicant should not challenge the administrative process on the matter.

[8] In support of his submission, learned counsel for the second respondent relied upon the following cases:

(i) *Taylor's College Sdn Bhd v. Ketua Pengarah Kesatuan Sekerja Malaysia & Ors* [2009] 5 CLJ 153; and

(ii) *Kaneka Paste Polymers Sdn Bhd v. Ketua Pengarah Perhubungan Perusahaan & 2 Ors* [2005] 1 LNS 276.

[9] I respectfully disagree with the submissions of learned counsel for the second respondent.

[10] Upon bare and cursory reading of s. 9 of the Act, it is clear that there are two different and district types of the dispute that the Minister has to decide:

(i) dispute on recognition claim filed by a trade union under s. 9(2) of the Act; and

(ii) dispute on whether any workmen are employed in a managerial, executive, confidential or security capacity under s. 9(1A) of the Act.

[11] Section 9(2) of the Act states as follows:

> A trade union of workmen may serve on an employer or on a trade union of employers in writing in the prescribed form **a claim for recognition** in respect of the workmen or any class of workmen employed by such employer or by the members of such trade union of employers. (emphasis added)

[12] On the other hand, s. 9(1A) states as follow:

> Any dispute arising at any time, whether before or after recognition has been accorded, **as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity** may be referred to the Director General by a trade union of workmen or by an employer or by a trade union of employers. (emphasis added)

[13] From the provision of s. 9(1A), it is clear that the dispute on whether "any workmen are employed in a managerial, executive, confidential or security capacity" can arise "whether before or after recognition has been accorded". This shows that a dispute under s. 9(1A) can arise independent of a recognition dispute under s. 9(2) of the Act.

[14] In addition, s. 9(4A) of the Act clearly recognises these two distinct types of disputes, as follows:

> The Director General, upon receipt of a reference under **subsection (1A), or an application under paragraph (3)(c)**, or a report under subsection (4) may take such steps or make such enquires as he may consider necessary or expedient to resolve the matter. [emphasis added]

[15] In s. 9(1A) dispute, if the DGTU is unable to resolve the matter, he has to refer the matter to the Minister under s. 9(4C) of the Act.

[16] Next, the Minister would then have to hand down his decision under s. 9(5) of the Act, which provides as follows:

> 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; **a decision of the Minister under this subsection may include a decision as to who are workmen employed in a managerial, executive, confidential or security capacity**. (emphasis added)

[17] In my judgment, the present application is not premature. The Minister had made his decision relating to the s. 9(1A) dispute under s. 9(5) of the Act. This is a final decision which is capable of being challenged under O. 53 of the Rules of the High Court 1980. In fact, a failure to challenge the Minister's decision

in the present case would prejudice the applicant because it cannot wait for the recognition decision by the Minister under s. 9(5) of the Act and challenge both decisions at the same time. This is because there is a time limit of 40 days under O. 53 of the Rules of High Court 1980 challenge the present decision.

[18] With respect, the second respondent's reliance of the cases of *Taylor's College Sdn Bhd v. Ketua Pengarah Kesatuan Sekerja Malaysia (supra)* and *Kaneka Paste Polymers Sdn Bhd v. Ketua Pengarah Perhubungan Perusahaan & 2 Ors (supra)* are misplaced.

[19] In *Taylor's College*, the dispute was a recognition claim made by the union on the college. The DGTU had decided to conduct the membership check by way of verification exercise instead of secret ballot. There, the employer, without waiting for the Minister's final decision under s. 9(5) had filed an application for judicial review to challenge the decision of the DGTU on membership check for his failure to carry out a secret ballot. The Court of Appeal held that the application was premature because the employer should have waited for the final decision of the Minister under s. 9(5).

[20] Similarly, in *Kaneka Paste Polymers (supra)*, the employer had challenged the decision of the DGIR on competency (similarity in trade, business) in a recognition claim without waiting for the Minister's final decision. The High Court ruled the application was premature.

[21] The facts in the instant case do not fit into the factual matrix and profile of the facts in *Taylor's College* and *Kaneka Paste*. In the present case, the dispute is under s. 9(1A) of the Act rather than a recognition dispute. Secondly, unlike the case of *Taylor's College* and *Kaneka*, the applicant had already waited for the Minister to hand down his decision under s. 9(5) of the Act. In the instant case, the applicant is actually challenging the decision of the Minister directly. The DGIR and DGTU are not parties to the present proceedings.

Grounds Of Challenges

[22] The Minister's decision is challenged on three separate grounds.

[23] The first ground of review is that the Minister failed to consider that under Band 4, 5 and 6, there are employees who are carrying out managerial, confidential or security functions.

[24] The second ground of review is that the Minister erred in law in premising the decision based on job grade. The Minister asked the wrong questions or applied wrong test.

[25] The third ground of review is that there was a breach of natural justice.

[26] The foregoing grounds of challenge, in my opinion, boil down to the lone issue of the whether the Minister had taken into consideration the relevant facts when he made the said decision.

Principle Applicable To Judicial Review

[27] A proposition that should be unnecessary to state is that judicial review, does not strictly speaking, permit a court to consider the merit of the case. To a large extent, the court is more interested in the process of decision making rather than the actual result.

[28] Authority for this abounds in Malaysia and abroad (see *Minister Of Labour & The Government Of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195; *National Union Of Hotel, Bar And Restaurant Workers v. Minister Of Labour And Manpower* [1980] 1 LNS 50; *William Jack & Co (M) Sdn Bhd v. S Balasingam* [2007] 7 MLJ 1; [1997] 3 CLJ 235; *National Union Of Plantation Workers v. Kumpulan Jerai Sdn Bhd (Rengam)* [2000] 1 CLJ 681; *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9; *Colgate Palmolive (M) Sdn Bhd v. Yap Kok Foong & Another Appeal* [2001] 3 CLJ 9].

[29] The scope of judicial review and its relationship with evidential merits of any particular decision was summarised in *R v. Secretary of State for Scotland* [1999] SLR 74; [1999] 2 WLR 28; [1999] 1 All ER 481 in the following terms:

> Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the

> authority which it had. It may have departed from the procedures which either by statute or at common law as matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in a case of review, as distinct from ordinary appeal, the court may not set about forming its own preferred view of the evidence.

[30] It is settled law that the circumstances in which a reviewing court may examine the factual foundation of the opinion of the decision-maker are limited. The limited review permitted by the court was summarised by Raus Shariff FCJ (as he then was) in the context of the award by the Industrial Court which is also applicable to this instant case in *Ranjit Kaur S/O Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629. His Lordship held that where the facts do not support the conclusion arrived at by the Industrial Court, or where findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider the relevant matters into consideration, such findings are amenable to judicial review.

[31] Review of error of fact is now a well-established ground of English judicial review. Although English judges had traditionally been cautious about challenges based on errors of fact, the test now applied is that set down by Carnwarth LJ in the case of *E v. Secretary of State for the Home Department* [2004] QB 1044. Carnwarth LJ relied upon the principle of fairness to assert a separate ground of review for mistake of fact, and expressed the view that:

> the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve for correct result.

[32] Carnwarth LJ then established a number of requirements for a finding of unfairness based on mistake of fact:

(a) first, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter;

(b) secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable;

(c) thirdly, the appellant (or his advisers) must not been have been responsible for the mistake; and

(d) fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning.

[33] The principles in the *E* case have been approved and are applied with increasing frequency by the English courts (see *Montes v. Secretary of State for the Home Department* [2004] EWCA Civ 404, [2004] Imm AR 250, para 21; *R (Assura Pharmacy Ltd) v. NHS Litigation Authority* [2008] EWHC 289 (admin), para. 118; *R (MH) v. Bedfordshire County Council* [2007] EWHC 2435 (Admin) [2008] ELR 191, para. 51; *Shaheen v. Secretary of Home Department* [2008] QB 533, 580).

[34] In *Runa Begum v. Tower Hamlets London Borough Council* [2003] UKHL 5, Lord Bingham had held that a review decision may be quashed:

> not only ... if it is held to be vitiated by legal misdirection or procedural impropriety or unfairness or bias or irrationality or bad faith, but also if there is no evidence to support factual findings made or they are plainly untenable or ... if the decision-maker is shown to have misunderstood or been ignorant of an established and relevant fact.

[35] In the same vein, Gibbs J in *Buck v. Bavone* (1976) 135 CLR 110 had this to say at pp. 118-119:

> Whether the decision of the authority under such a stature can be effectively reviewed by the courts will often largely depend on the nature of the matters of which the authority is required to be satisfied. In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to

> consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached. In such cases the authority will be left with a very wide discretion which cannot be effectively reviewed by the courts.

[36] To summarise, the general rule, no doubt, is that findings of facts of an administrative body, which has acquired expertise in the particular field of endeavour, are accorded great weight by the reviewing court. The rule is not absolute and admits of certain well-recognised exceptions, however. Thus, when the findings of facts of the Industrial Court or the Minister of Human Resources, as in the instant case, are not supported by substantial evidence or their decision was based on a misapprehension of facts, the reviewing court may made independent evaluation of the facts of the case. The reviewing court, may look into the record of the case and re-examine the findings if it considers the same to be necessary to arrive at a just decision.

Findings Of The Court

Ground (a)

[37] Based on available evidence, (see exh. LWK21 of the applicant's first affidavit-in-support dated 25 June 2009), it is clear that the Minister had erred in law in failing to appreciate the relevant facts and consideration on the following reasons:

(a) that under the job grade Manager Band 4, 5 and 6, there are employees employed in positions and job titles that carry out managerial functions.

The full list of positions and job titles that carry out managerial functions have been summarised in paras 40(a) of the applicant's affidavit in support dated 25 June 2009 (refer - Appendix 1 of the submissions).

These employees carry out managerial functions due to the following reasons:

A (i) the employees are all managers having managerial duties and responsibilities and a team of direct reports (comprising executives and/or assistant managers); and

(ii) the employees all have responsibilities to plan, lead/manage, B direct and delegate their roles and responsibilities to their direct reports/team, apart from managing and controlling resources, budgets and expenses to be within approved limits in their respective departments.

C (b) that under the job grade Manager Band 4, 5 and 6, there are employees employed in position and job titles that carry out confidential functions, such as:

– Manager Employee Relations;
– Senior Resourcing & Development Manager;
D – Senior Employees Relations & Communications Manager;
– Senior Compensation & Benefits Manager;
– Manager, Human Resources Relationship;
– Manager, Human Resources Operations & Systems;
E – Manager, Compensation Policy;
– Human Resources Benefits & Payroll Manager;
– Assistant Manager HR Support & Systems;
– Assistant Manager HR Operations & Manpower Planning;
F – Assistant Manager, Graduate Recruitment;
– Assistant Manager, Employee Relations;
– Assistant Manager, HR Data Analysis; and
– Legal Advisors.

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The employees employed in the above positions are all attached to Human Resource Department and are primarily dealing with confidential staff matters or staff relations which include interviewing and selection/employment of executive and H managers, handling payroll matters (all levels of employees) and/or managing industrial/employee relations.

It is crucial to note that s. 9(1)(a), (c) and (d) of the Act provides that no trade union of workmen the majority of whose membership consists of workmen who are not employed I in any of the following capacities may seek recognition in respect of workmen employed in any of the said capacities, that it to say:

(i) managerial capacity;

(ii) confidential capacity;

(iii) security capacity.

(c) that under the job grade Manager Band 4, there is an employee employed in a position and job title that carries out security functions, ie, the position of Manager Security & Financial Crimes. The employee concerned is responsible in managing and overseeing all aspects of security and financial crimes, which include investigations into internal and external fraud and also managing all aspects of physical security within the head office and all other buildings and branches of the bank.

[38] There is a material error of law when the Minister failed to appreciate that in view that there are employees that are employed under job grade Manager Band 4, Manager Band 5 and Manager Band 6 that carry out managerial, confidential or security functions, these employees of the applicant do not fall within the scope of representation of the union for the purpose of the instant recognition claim.

[39] It is pertinent to note that the constitution of the second respondent ("RMA") does not permit the union to represent employee who are engaged in the managerial, confidential and security capacities.

[40] In this respect, r. 3(1) of the RMA's Constitution stipulates the following:

(1) Membership of the union shall be open to all Resident Managers who are employed by the HSBC Bank Malaysia Berhad **except those who are employed in managerial capacity, confidential capacity or security capacity** ... (emphasis added)

[41] In short, the scope of membership of RMA is confined to all resident managers save for those falling under the managerial, security and confidential capacities. This means that it cannot represent employees who are employed in the managerial, security or confidential capacity.

[42] It is an established principle of trade union law that a trade union of employees is bound by its rules of membership and is only permitted to represent employees who are within the scope of their representation.

[43] Section 2 of the Trade Unions Act defines a trade union as:

> any association or combination of workmen within any particular trade, occupation or industry or within any similar trades, occupations or industries.

[44] It is instructive to note that s. 26(1A) of the Trade Unions Act also provides that:

> No person shall join, or be a member of, or be accepted or retained as a member by, any trade union if he is not employed or engaged in any establishment, trade, occupation or industry in respect of which the trade union is registered.

[45] In *Attorney General Malaysia v. Chemical Workers' Union of Malaya & Anor* [1970] 1 LNS 6, an issue was brought before the High Court as to whether the Registrar of Trade Unions was correct in ruling that a company's industries were similar to those enumerated in the rules of the union. In the course of dealing with the said issued, the High Court held that:

> It is the duty of the Registrar of Trade Unions to register a trade union of workers employed in similar trade, occupation or industry, to approve the federation of two or more trade unions, or the affiliation of a trade union with the federation of trade unions, of similar trade, occupation or industry. For these and these purposes only could the registrar validly exercise his powers to declare similarity of trade, occupation or industry.

And later at para. F of the same page, the court proceeded to hold as follows:

> ... **it seems to me that once a trade union is registered it is bound by the rules of its constitution. It can only represent that category or class of workmen as is specified its rules**. If a trade union desires to extend its membership clause to include workmen engaged in other categories of work or industry, it should first amend its rules. In this instant case the Chemical Workers' Union of Malaya has failed to do so. (emphasis added)

[46] This was re-emphasised by the Court of Appeal in *Marulee (M) Sdn Bhd v. Menteri Sumber Manusia & Anor* [2007] 5 CLJ 51, as follows:

> A trade union of employees is bound by their constitution in respect of the scope of representation. **A union can only represent the category or class of workmen specified in their constitution**. It must be an association of workmen in similar trades, occupations or industries (See *Minister of Labour & Manpower v Paterson Candy (M) Sdn Bhd* [1980] 2 MLJ 122). (emphasis added)

[47] However, in the instant case, the Minister had decided that employees employed as Manager Band 4, Manager Band 5 and Manager Band 6 are not employed in the managerial, confidential or security capacity. The effect is that such employees falling under Bands 4, 5 and 6 can be represented by the union.

[48] In my view, in so ruling, the Minister had failed to appreciate that under job grades of Manager Band 4, Manager Band 5 and Manager Band 6, there exists approximately 347 positions and titles held by employees of the applicant as at 13 February 2006 whose job functions and responsibilities of the positions reflect that such employees carry out either managerial and/or confidential and/or security functions, in substance and in effect.

[49] Learned counsel for the second respondent argued that the Minister had stated that his decision was based on the findings forwarded to him from the investigation by the DGTU on the competency of the union and the interviews conducted by the DGIR on the scope of membership of the union. The Minister had taken into account the result of the investigation by the DGIR pertaining to the capacity of the employees under Band 4, 5 and 6 and he was satisfied that the nature of work of these employees are outside the managerial, confidential and capacity. It should be appreciated that the decision was based on the answer provided by the employees interviewed.

[50] Furthermore, the government officers from the IRD KL office are independent; they are well versed in the disputed subject matter; they are knowledgeable and intelligent enough to know what is the objective of the interview and what question to be posed to the interviewee.

[51] Based on exh. LWK-10, 11, 12 and 16, it is apparent that the DGIR had taken the right and necessary steps to determine the issue. The findings from the interview session and finding from the DGTU office was put forward to the Minister for his determination and decision.

[52] It was submitted by learned counsel for the second respondent that having regard to the context of the purpose or object underlying the Act, the findings and recommendations by DGIR and DGTU and the decision by the Minister should be given a judicial deference.

[53] With respect, I disagree. In determining whether the facts in truth exist, the court will not defer to the fact finding of the administrative decision-maker. In England, Lord Hoffman in *R (On the application for Profile Alliance) v. British Broadcasting Corporation* [2003] 2 All ER 977 rejected the doctrine of deference. His Lordship said at p.997, paras. [75]-[76]:

> [75] My Lords, although the word "deference" is now very popular in describing the relationship between the judicial and the other branch of government, I do not think its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts.
>
> [76] This means that the courts themselves often have to decide the limits of their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principles upon which decision-making powers are allocated are principles of law. The courts are the independent branch of government and the legislature and executive are, directly and indirectly respectively, the elected branches of government. Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles. The principle that the independence of the courts is necessary for a proper decision of disputed legal rights or claims of violation of human rights is a legal principle. It is reflected in art. 6 of the convention. On the other hand, the principle that majority approval is necessary for a proper decision on policy or allocation of resources is also a legal principle. Likewise, when a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law.

[54] Spigelman CJ, speaking extracurially, has added:

> Where intervention by a court is designed to ensure the institutional integrity of the decision-making process, it should be clear that "deference" is entirely inappropriate. That does not mean that a court will not give considerable weight to the conclusions on fact and usage, including jurisdictional facts, of primary decision-makers. This will, however, depend on the statutory scheme under consideration. To do more would be to abdicate the judicial function. To do less would be to blur the legality/merits distinction which, whatever the difficulties of its application, remains a rigorously policed boundary in Australian administrative law.
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> [See J Spigelman, "Jurisdiction and Integrity", The Second Lecture the 2004 National Lecture Series for the Australian Institute of Administrative Law, Adelaide, 5 August 2004, p. 11]

[55] Courts in Australia have similarly rejected any idea of judicial deference. In *Corporation of the City of Enfield v. Development Assessment Commission* (2000) 199 CLR 135, the High Court rejected the suggestion that courts should defer to administrative fact finding. A reviewing court must "determine independently for itself" whether the jurisdictional fact existed.

[56] Hence, the High Court held in that case that it was for the primary judge of the reviewing court to determine the jurisdictional fact as to whether the decision-maker had jurisdictional on the evidence before the judge, and the intermediate appealable court had erred in holding that the judge should defer "in grey areas of uncertainty to the practical judgment" of the administrative decision-maker.

[57] I turn now to the factual scenario of this case. It should be noted that based on the Industrial Relations Department letter dated 18 August 2006 to IRD KL (exh. LWK5), the IRD KL was specifically instructed to obtain a written statement from amongst the employees resident managers to the following particulars:

(a) 'Nama Kakitangan';

(b) 'Gred serta gaji sekarang';

A (c) 'Tugas serta tanggungjawab mereka di antara lain kenal pasti kuasa 'discretionary' yang ada mengenai hal-hal tatatertib, laporan atau syor atas kenaikan pangkat access' kepada perkara sulit dan sebagainya;

B **[58]** The said letter also clarified that the above areas are not exhaustive and that the IRD KL could ask additional information to ascertain on whether the said employees fall within the managerial, confidential or security capacities.

C **[59]** All these particulars were not even provided in the Minister's affidavit in reply to explain on how he had decided that the Managers Band 4, 5 and 6 do not fall within the said categories. To exacerbate the matter, the Minister had also failed to satisfactorily address the applicant's averment and issues raised in paras. 39, 40 and 41 of the applicant's affidavit-in-support dated D 25 June 2009, which in essence, provide detailed explanation on why such managers in Bands 4, 5 and 6 are actually engaged in managerial, confidential or security capacities.

Second Ground

E

[60] In premising his decision by reference to the job grade of the employees in the form of Bands, the Minister had erred in law because it had asked himself the wrong questions and/or applied the word test when in actual fact, the correct test and approach F was to examine the job titles of each category of employees. In short, the Minister had erred in law when:

(a) he had asked himself the wrong question to ascertain the issues;

G (b) he had applied the wrong test to determine whether the employees were within the scope of representation of the union;

(c) he had failed to consider relevant matters, such as that:

H

(i) job grade does not reflect the job titles, job description or scope of work done by the employees;

(ii) that job grade cannot be used as an indicia, reference point and/or yardstick to determine whether the employees were I employed in the managerial, confidential or security capacity;

(iii) the correct approach was to assess the employees by reference to their job titles and job description;

(d) he had considered irrelevant matters;

(e) arrived at a decision that is so perverse and unreasonable that no reasonable tribunal in similar circumstances would have arrived at such a decision or conclusion.

[61] Learned counsel for the second respondent submitted that the nature of work of an employee is very subjective. In most instances, it would be overlapping and it would be difficult to ascertain whether or not that employee falls within or outside the scope of membership of the union. As the union is registered to represent the resident managers of the applicant all the members are inevitably "managers" *per se*. Supervising, guiding, delegating, managing are all terms which could be related to any level of organisation and does not by itself determines one to be a managers. To hire and fire, to transfer, suspend and to promote are some of the responsibilities attributed to a manager. Similarly, it would also not be easy to differentiate which employee are employed and recognised to be doing work which are held to be confidential or work which can be classified as security based.

[62] Further, in light of the abovesaid difficulties, the interview conducted by the DGIR whereby the employee is directly interviewed would, to a great extent, remove the ambiguity. The list of titles as provided by the applicant in Appendix 1 of his submission is only true in form but not in substance. The exact nature of the work can only be established by interviewing them personally and not otherwise.

[63] With respect, I disagree. The court is of the considered opinion, had the Minister properly examined the job titles and the job description of each position, he would have come to the conclusion that there are employees of the applicant who are employed either in the managerial, confidential or security capacities. If one examines carefully the Minister's affidavit-in-reply in detail, no where did the Minister aver that either he or the officers of the DGTU/DGIR had actually considered, examined or even taken into account the job description of the affected employees. In fact, a cursory review of the list in exh. LWK21 will show that many of the positions and posts are confidential and security position, irrespective of rank.

[64] To exacerbate the seriousness of the matter, the Minister had failed to disclose in his affidavit an explanation as to how he had arrived at the conclusion that Manager Band 4, Band 5 and Band 6 are not employed in managerial, confidential or security capacity. All that the Minister had explained on this issue can be found at paras. 21 and 22:

> 21. Merujuk perenggan 34 dan 35 Afidavit Pemohon, perkara tersebut adalah dalam makluman Responden Pertama dan keputusan tersebut adalah dibuat berdasarkan fakta-fakta yang diterima daripada siasatan dan temuduga yang dibuat oleh KPPP dan JHEKS.
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> 22. Saya menafikan perenggan 36 hingga 41 Afidavit Pemohon dan saya sesungguhnya menyatakan bahawa saya telah mengambilkira hasil siasatan KPPP yang dimaklumkan kepada saya berkaitan kapasiti pekerja-pekerja yang berada di Band 4, Band 5 dan Band 6, saya telah berpuas hati bahawa mereka bukan terlibat di dalam kapasiti pengurusan, sulit atau keselamatan.

[65] The Minister had explained that he had relied on the investigations that were carried out by the Director General of Industrial Relations and Director General of Trade Unions. However, the reports of such investigations have not been disclosed neither has the DGIR or DGTU averred any affidavit to explain on their investigation processes or results. This begs the burning question - how did the DGTU, DGIR and Minister arrive at the decision that Manager Band 4, 5 and 6 are not employed in managerial, confidential or security capacity?

[66] Learned Senior Federal Counsel appearing for the Minister submitted that there is no requirement under any written law to compel the Minister to disclose the reports made by DGTU in pursuance to their duty under the Act.

[67] In my judgment, although there is no duty under the Act for the Minister to disclose the reports made by DGTU, the duty is, *inter alia*, implied since it is necessary to ensure fairness and to prevent an aberrant, unreasonable or irrational decision. The disclosure of the reports will assist the courts in performing their supervisory functions to know whether the decision-maker took into account relevant consideration or acted properly.

[68] In the leading House of Lords case of *Doody v. Secretary of State for the Home Department* [1993] 3 All ER 92, Lord Mustill referred to the term "fairness" as "an insistence on greater openness, or … "transparency" in the making of administrative decisions". The Law Lord further stated that:

> Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.

[69] The concept of fairness as outlined in *Doody* was applied in *R v. Secretary of State for the Home Department, Exp Duggan* [1994] 3 All ER 277; *Reg v. City of London, Exp Matson* [1997] 1 WLR 765 and *Reg v. Secretary of State for the Home Department, Expt McAvoy* [1998] 1 WLR 790.

Third Ground

[70] The applicant did not desire to proceed with the third ground of the application. Therefore, it is not necessary for the court to discuss the issue.

Conclusion

[71] For all these reasons, the application for a judicial review is allowed with no order as to costs. The part of the Minister's decision dated 4 May 2009 is set aside.