A **ISMAIL NASARUDDIN ABDUL WAHAB v. MALAYSIA AIRLINE SYSTEM BHD & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR
NORDIN HASSAN J
[JUDICIAL REVIEW NO: WA-25-200-05-2019]
B 4 SEPTEMBER 2019

ADMINISTRATIVE LAW: *Judicial review – Decision of Industrial Court – Dismissal of employee, President of Secretariat of the National Union of Flight Attendants Malaysia ('NUFAM'), a registered trade union – Whether unfair*
C *dismissal – Employee made press statement in relation to working condition of workmen – Whether issues highlighted related to objective of trade union – Whether statements made in capacity as President of NUFAM – Whether statements were in interest of members of trade union without involving illegal act – Whether press statements caused disrepute to image and reputation of company – Whether*
D *Industrial Court's decision tainted with error of law and irrationality – Industrial Relations Act 1967, ss. 4(1), 5(1) – Trade Unions Act 1959, s. 22*

LABOUR LAW: *Dismissal – Misconduct – Employee was President of Secretariat of the National Union of Flight Attendants Malaysia ('NUFAM'), a registered trade union – Interview in relation to working condition of workmen – Whether issues*
E *highlighted related to objective of trade union – Whether statements made in capacity as President of NUFAM and not as employee of company – Whether statements were in interest of members of trade union without involving illegal act – Whether union members immune from civil suit in relation to tortious act arising from lawful activities of union – Whether press statements caused disrepute to image*
F *and reputation of company – Whether conduct of employee could be labelled as misconduct warranting dismissal – Industrial Relations Act 1967, ss. 4(1), 5(1) – Trade Unions Act 1959, s. 22*

The applicant joined the first respondent as a trainee flight steward on 6 March 1989 and promoted as a leading steward on 14 August 1995. On
G 8 December 1997, the applicant was promoted as the chief steward, but was demoted back as leading steward for making media statements concerning the first respondent. However, on 7 June 2007, he was reinstated as the chief steward. On 7 November 2013, the Secretariat of the National Union of Flight Attendants Malaysia ('NUFAM'), a registered trade union under the
H Trade Unions Act 1959 ('TUA'), issued a press statement, among others, calling for the resignation of the first respondent's chief executive officer ('CEO'). The press statement, carried in an article by the Sun Daily on 8 November 2013, also highlighted the interview with the applicant on the following issues: (i) the plight of overworked and underpaid cabin crew
I members; (ii) fatigue issues faced by the cabin crew workers; (iii) the request for the department of civil aviation to monitor the work schedules of cabin crew members in order to safeguard their wellbeing, health and safety; and

(iv) urging the first respondent to straighten out its policies to ensure that the welfare and safety of cabin crew members were looked into. On 8 November 2013, the applicant was suspended from his service pending investigation by the first respondent concerning the applicant's press statement. Thereafter, the first respondent issued a show cause letter to the applicant. In reply to the show cause letter, the applicant stated, *inter alia*, that the press statement was made in his capacity as the President of NUFAM and not as an employee of the first respondent. Dissatisfied with the applicant's explanation, the first respondent dismissed the applicant from the employment with the first respondent with immediate effect. The applicant's appeal against the dismissal was rejected by the first respondent. The applicant thus filed a representation under sub-s. 20(1) of the Industrial Relations Act 1967 ('IRA') and the Minister referred the matter to the Industrial Court ('IC') under sub-s. 20(3). The IC found that the first respondent had proved, on the balance of probabilities, that the applicant's dismissal was with just cause and excuse. Hence, the judicial review application by the applicant. The primary issue for determination by the court was whether the applicant's conduct in making the press statement on 7 November 2013 was a misconduct that warranted a dismissal by the first respondent.

Held (allowing application with costs; remitting case to Industrial Court):

(1) At the material time, the applicant was the President of NUFAM and one of its exco member. NUFAM is a registered trade union under the TUA. Section 4(1) of the IRA, *inter alia*, prohibits any interference by any person including the employer in the employee's rights to participate in its lawful activities. Section 5(1)(d)(ii) of the IRA further prohibits an employer, among others, from dismissing an employee for participating in trade union activities. Clearly, the law endorsed the rights of union's members to participate in the union lawful activities and ss. 4(1) and 5(1) of IRA were put in place to ensure that these rights could be exercised without impediment including from the employer. This includes an action for dismissal, threaten to dismiss, injure or threaten to injure the employee in his employment or alter or threaten to alter the employee's position to his prejudice. To further protect the members of a union in carrying out its activities, the Parliament has enacted s. 22 of the TUA to protect any union or its members from civil suit in respect of any tortious act arising from the lawful activities of the union. (paras 14 & 29-31)

(2) The issues highlighted in the press statement were related to the objective of a trade union, *inter alia*, to improve the working conditions of workmen as reflected in the definition of a trade union or union under s. 2 of the TUA. The statements also contained a call for the resignation of the first respondent's CEO for failure to address the issues. Viewed in totality and the fact that the statements were made in the applicant's capacity as the President of NUFAM for the interest of its members without involving any illegal act, the applicant's conduct could not be

labelled as a misconduct which warranted his dismissal. (paras 34-36 & 40)

(3) The IC fell into error in deciding that ss. 4(1) and 5(1) were inapplicable as the applicant was found to be guilty of the allegation of misconduct levelled against him. The assessment of the applicant's misconduct must be taken in light of ss. 4(1) and 5(1). There is nothing in ss. 4(1) or 5(1) which states that the provisions are not applicable to any disciplinary proceedings. Further, the case concerned the dismissal of the applicant and as such, the provision of s. 20 is applicable. Hence, the IC had committed an error of law when it held that ss. 4(1) and 5(1) were inapplicable as well as misconceived in regard to the application of s. 8 of the IRA. (paras 41, 42 & 45)

(4) Section 22 of the TUA provides immunity for union members from any civil suit in relation to tortious acts arising from lawful activities of the union. The allegations against the applicant related to the derogatory and defamatory statement against the first respondent particularly when the statement demanded the CEO to resign. The first respondent's complaint also related to tort of defamation. If s. 22 of the TUA protects union members from civil suit from any tortious acts arising from the union activities, the member should also be protected from action of dismissal based on the same conduct. Otherwise, it will make s. 22 of the TUA ineffective in protecting union members, which certainly is not the intention of the Parliament in enacting s. 22 of the TUA. (paras 46 & 47)

(5) Further, the first respondent had failed to adduce any cogent evidence to establish that the applicant's press statements had caused disrepute to the image and reputation of the first respondent. The present press statement was made in his capacity as the President of NUFAM compared with an earlier statement when he was not the President of NUFAM. As such, the applicant's past record on this issue did not carry much weight to support the first respondent's case against the applicant. The IC's decision was tainted with errors of law and irrationality which warranted curial intervention. The applicant's application was allowed and the case was remitted to the IC before another Chairman to ascertain the appropriate remedies in accordance with the law. (paras 55-59)

Case(s) referred to:

Abdul Jamil Jalaludeen v. Maybank Bhd (Case No: 9-4-1864-12) (Unreported) ***(refd)***

Akira Sales & Services (M) Sdn Bhd v. Nadiah Zee Abdullah & Another Appeal [2018] 2 CLJ 513 FC ***(refd)***

Chen Ka Fatt lwn. Maybank Bhd [2018] 2 ILR 250 ***(refd)***

Dr Koay Cheng Boon v. Majlis Perubatan Malaysia [2012] 4 CLJ 445 FC ***(refd)***

Gula Padang Terap Bhd v. Ahmad Hj Hakim [1994] 2 lLR 933 ***(refd)***

Harianto Effendy Zakaria & Ors v. Mahkamah Perusahaan Malaysia & Anor [2014] 8 CLJ 821 FC ***(foll)***

Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors [1996] 4 CLJ 747 CA ***(refd)***
I Bhd v. K A Sandurannehru Ratnam & Anor [2004] 5 CLJ 460 HC ***(refd)***
Nur Rasidah Jamaludin v. Malayan Banking Bhd & Other Appeals [2018] 1 CLJ 330 CA ***(refd)***
PP v. Sihabduin Hj Salleh & Anor [1981] CLJ 39; [1981] CLJ (Rep) 82 FC ***(refd)***
R Rama Chandran v. The Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***
Tan Poh Thiam v. Industrial Court Of Malaysia & Anor [2015] 1 LNS 1534 CA ***(refd)***
Titular Roman Catholic Archbishop Of Kuala Lumpur v. Menteri Dalam Negeri & Ors [2014] 6 CLJ 541 FC ***(refd)***
Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 334 FC ***(refd)***

Legislation referred to:
Employment Act 1955, s. 8
Federal Constitution, art. 10
Industrial Relations Act 1967, ss. 4(1), 5(1)(c), (d)(ii), (2)(a), 8(1), (1A), 20(1), (3), 30(5)
Rules of Court 2012, O. 53 r. 3(2)
Trade Unions Act 1959, ss. 2, 22

For the applicant - Lim Wei Jiet & Joshua Wu (PDK); M/s Sreenevasan
For the 1st respondent - Sivabalah Nadarajah & Jamie Goh Moon Hoong; M/s Shearn Delamore & Co
For the 2nd respondent - Industrial Court Kuala Lumpur

Reported by S Barathi

JUDGMENT

Nordin Hassan J:

Introduction

[1] Ismail Nasaruddin bin Abdul Wahab, the applicant, has filed this application for judicial review, among others, seeking an order of *certiorari* to quash the decision of the Industrial Court dated 14 February 2019 which dismissed the applicant's claim against the first respondent for an unfair dismissal.

The Salient Facts

[2] The material facts in this application are the following:

(i) On 6 March 1989, the applicant was employed by the first respondent as a trainee flight steward and from 12 May 1989, he was appointed as a flight steward. After four months of probationary period, the first respondent confirmed his position as a flight steward.

(ii) Thereafter, on 14 August 1995, the applicant was promoted as a leading steward and was confirmed in this position on 14 November 1995.

(iii) Next, on 8 December 1997, the applicant was promoted as the chief steward but was demoted back to his earlier position as a leading steward for making media statements concerning the first respondent. However, on 7 June 2007, he was reinstated as the chief steward.

(iv) On 7 November 2013, the Secretariat of the National Union of Flight Attendants Malaysia ("NUFAM"), a registered trade union under the Trade Unions Act 1959 ("TUA 1959"), had issued a press statement, which was carried in an article by the Sun Daily, on 8 November 2013. The press statement, among others, call for the resignation of the first respondent's chief executive officer.

(v) The article in the Sun Daily also highlighted the interview with the applicant and a reporter from the Sun Daily which among others, are the following:

(a) The plight of overworked and underpaid cabin crew members;

(b) fatigue issues faced by the cabin crew workers;

(c) the request for the department of civil aviation to monitor the work schedules of cabin crew members in order to safeguard their wellbeing, health and safety; and

(d) urging the first respondent to straighten out its policies to ensure that the welfare and safety of cabin crew members are looked into.

(vi) On 8 November 2013, the applicant was suspended from his service pending investigation by the first respondent concerning the applicant's press statement.

(vii) Thereafter, the first respondent issued a show cause letter dated 12 November 2013 to the applicant with two allegations to be answered by the applicant. The allegations are the following:

Allegation 1

The Sun, in a report appearing on 8.11.2013, *inter alia* stated:

> The National Union of Flight Attendants Malaysia (NUFAM), which represents 3,500 cabin crew at Malaysia Airlines (MAS), has called on the national carrier's CEO Ahmad Jauhari Yahya to resign saying he had failed to resolve their plight since he took over the helm in September, 2011. In a statement yesterday, Nufam Secretariat said it is calling on the prime minister to review Jauhari's contract and remove him as the CEO of MAS, which is a government appointed position,

unhappy that there has been no changes in resolving the cabin crew's problems and they have become demoralised. 'Three years is long enough to observe how a CEO of a GLC (government-linked company) takes seriousness and consideration into the cabin crew's issues, it said. 'The management have cut costs drastically on the cabin crew and did not bother to review their allowances and salaries,' it further claimed. [*sic*]

Although you may be the President of NUFAM, you are first and foremost an employee of the Company and owe a duty and responsibility to the Company as such. The Company holds you responsible for the foregoing statement/press released by NUFAM, of which you are its President. The contents of the foregoing statement/press release are baseless, insolent and publicly damaging and your conduct in allowing the release of the said statement - calling for, among others, the resignation of the Company's Chief Executive Officer and further making reference to employees' allowance and salaries which are strictly internal and confidential matters - to be tantamount to a serious act of misconduct.

Allegation 2

You had, *vide* the same report appearing in The Sun on 8.11.2013, been quoted following your interview with SunBiz, as *inter alia* stating:

- 'They (MAS management) said they had discussed with Maseu before putting these changes into a CA, but the discussions are behind Nufam's back' ...' it was not done in fairness and is a form of discrimination against employees. This is also the first time they are picking on this (weight control) issue', in relation to various terms and conditions which had been agreed to by all relevant parties and subsequently incorporated into the Collective Agreement Cognizance No. 001/2013, thereby creating disharmony amongst the cabin crew fraternity which would have had access to the aforesaid newspaper report'.
- 'The crew are overworked and Nufam has raised these concerns with MAS. These are fatigue issues concerning the safety and welfare of employees ... we request that the DCA monitor the work schedules of cabin crew', in relation to the cabin crew work schedules which had been discussed by the Company with the Department of Civil Aviation (DCA) and approved by the DCA; thereby creating disharmony amongst the cabin crew fraternity and concerns on safety amongst the public, which would have had access to the aforesaid newspaper report'.
- 'NUFAM wants the airline to straighten out its policies. All policies concerning cabin crew must be regulated. The welfare are safety of the cabin crew must be looked into by the government', giving rise to the inference in the view of the

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> public - which would have had access to the aforesaid newspaper report - that the Company neglects and compromises the welfare and well-being of its employees'.
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> The company deems the foregoing conduct serious acts of misconduct.

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> Your foregoing actions are tantamount to a breach of your implied term of employment/fiduciary duty to serve the Company with good faith and fidelity and further a breach of your express terms of employment as stated in Clause 12, Appendix 1 of the MAS Book of Discipline as well as the procedures governing grievance procedures pursuant to the Collective Agreement (Cognizance No. 001/2013).

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(viii) The applicant answered the show cause letter *vide* a letter dated 16 November 2013. In his response, the applicant among others, states that the press statement was made in his capacity as the President of NUFAM and not as an employee of the first respondent.

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(ix) Dissatisfied with the applicant's explanation, the first respondent dismissed the applicant from employment with the first respondent by a letter dated 29 November 2013 with immediate effect. The applicant's appeal against the said dismissal by a letter dated 5 January 2014 was rejected by the first respondent by letter dated 5 February 2014.

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(x) The applicant then filed a representation under sub-s. 20(1) of the Industrial Relations Act 1967 ('IRA 1967') and the matter was referred to the Industrial Court by the Minister pursuant to sub-s. 20(3) of the same Act.

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(xi) Having heard evidence and submissions by both parties, the Industrial Court found that the first respondent has proved on the balance of probabilities, that the applicant's dismissal was with just cause and excuse.

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(xii) Hence, the present judicial review application by the applicant.

The Grounds For The Judicial Review Application

[3] The applicant's grounds for this judicial review which need to be scrutinised its details as stated in his statement under O. 53 r. 3(2) of the Rules of Court 2012 are as follows:

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(i) The Industrial Court erred in law and acted in excess of or without jurisdiction when:

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(a) failed to properly consider that the applicant issued the public statement in his capacity as President of NUFAM and not as an employee of the first respondent;

(b) failed to take into consideration s. 2 of the TUA 1959 that the objective of a trade union is to, *inter alia*, improve the working conditions of workmen or enhancing their economic and social status.

(c) failed to properly consider that the widest protection and freedom must be given to trade union leaders to speak up on issues relating to the welfare of union members - less the union's existence becomes redundant;

(d) failed to take into consideration s. 8 of the Employment Act 1955 which provides that nothing in any contract of service shall in any manner restricts the right of any employee who is a party to such contract to, *inter alia*, participate in the activities of a registered trade union, whether as an officer of such union or otherwise. Section 8 of the Employment Act 1955 is a statutory safeguard against any term of contract which restricts the participation of any worker in trade union activities or any matter in relation to trade union business;

(e) failed to take into consideration that the dismissal of a trade union leader for public statements the applicant has made to protect the welfare of workers is a breach of the freedom of expression and association guaranteed under art. 10 of the Federal Constitution;

(f) failed to properly consider s. 22 of the TUA 1959 as well as established case law which grants trade union officers absolute immunity from any action based on defamation of libel;

(g) failed to properly consider that the applicant's dismissal by the first respondent was a violation of s. 4 of the IRA 1967 which provides that no person shall interfere with, restrain or coerce a workman or an employee in the exercise of his rights to participate in the lawful activities of a trade union;

(h) failed to properly consider that the applicant's dismissal by the first respondent was a violation of s. 5(1)(c) of the IRA 1967 which provides that no employer shall discriminate against any person in regard to employment, promotion, any condition of employment or working conditions on the ground that he is a member or officer of a trade union;

(i) failed to properly consider that the applicant's dismissal by the first respondent was a violation of s. 5(1)(d) of the IRA 1967 which provides that no employer shall dismiss or threaten to dismiss a workman, injure or threaten to injure him in his employment or alter or threaten to alter his position to his prejudice by reason that the workman participates in the activities of a trade union;

(j) misconstrued the applicability of s. 5(2)(a) of the IRA 1967 in a manner which renders s. 5(1) of the IRA 1967 ineffective or illusory and/or which restricts trade union from speaking up on important issues affecting union members;

(k) misconstrued the scheme of the IRA 1967 when it held that it was not open to consider ss. 4 and 5 of the IRA 1967 purportedly because redress of the same was by way of s. 8 of the IRA 1967. In this respect, the Industrial Court *inter alia* failed to consider s. 8(1A) which states that where a complaint in s. 8(1) relates to the dismissal of a workman, the provision of s. 20 shall apply;

(l) failed to take into consideration s. 59(1)(d) of the IRA 1967 which states that (subject to sub-s. 5(2)) it shall be an offence to dismiss a workman or injure or threaten to injure him in his employment or alter or threaten to alter his position to his prejudice, by reason of the circumstances that the workman being a member of a trade union which is seeking to improve working conditions, is dissatisfied with such working conditions;

(m) took into account irrelevant considerations when it referred to the applicant's past conduct when the situation therein was very different in that the applicant was not the President of NUFAM at those material times;

(n) found that the statements issued by the applicant were defamatory, derogatory or disparaging. In this regard, the Industrial Court failed to take into consideration that the applicant's statements were made *bona fide* and centred primarily on:

(1) highlighting the plight of overworked cabin crew members;

(2) highlighting the issue of cabin crew members who are facing fatigue issues;

(3) requesting the department of civil aviation to monitor the work schedules of cabin crew members in order to safeguard their wellbeing & safety; and

(4) urging the first respondent to straighten out its policies to ensure that the welfare and safety of cabin crew members are looked into.

(o) failed to properly consider that the applicant's dismissal was a deliberate move to 'union bust' NUFAM by dismissing its President from employment and to send a message to NUFAM so as to not issue any criticism against the first respondent;

(p) failed to properly consider that the applicant's dismissal was an act of victimisation and done in *mala fide* against the applicant because he was president of a trade union in NUFAM;

(q) failed to properly consider that the applicant's dismissal was an act of victimisation and done in *mala fide* against him in light of the fact that MASEU union officials had also made similar statements calling for the dismissal of the first respondent's CEO but no action had been taken against any of their officers;

(r) failed to properly consider that the first respondent had failed to conduct a domestic inquiry before the dismissal;

(s) failed to take into consideration that, as a whole, the applicant had not breached the express or implied terms of his conditions of employment or the collective agreement;

(t) failed to properly consider the fact that the applicant had loyally served the company for 28 years;

(u) failed to take into consideration that the applicant's dismissal by the first respondent in the circumstances was callous, harsh, humiliating and disproportionate;

(v) failed to properly consider that, as a whole, the first respondent had dismissed the applicant without just cause or excuse; and

(w) failed to take into account s. 30(5) of the IRA 1967 which requires the Industrial Court to act according to equity and good conscience.

(ii) The Industrial Court arrived at a decision that was so perverse or devoid of plausible justification when notwithstanding all the circumstances of the case, it arrived at the decision that it did. The ultimate decision in the award is erroneous and is not in accordance with the law.

The Applicant's Submission

[4] The applicant's submission can be summarised, *inter alia*, as follows:

(i) The legal regime in Malaysia provides widest protection for trade union leader's participating in trade union activities and in the present case, the applicant's press statement issued in his capacity as the President of NUFAM is within the scope of trade union activities;

(ii) the applicant's dismissal for participation in the trade union activities not for his personal benefit, tantamounts to unfair labour practice and tainted with *mala fide* and unreasonableness;

(iii) the Industrial Court erred in law in failing to take into account the principle of law in the case of *Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors* [1996] 4 CLJ 747; [1996] 3 MLJ 489, which held that any dismissal of workmen for participation in trade union activities is an unfair labour practice and the dismissal is tainted with *mala fide* and unreasonableness;

(iv) the Industrial Court's decision suffers from error of law in failing to consider the recent development of law that accords protection for workers participating in trade union activities as illustrated in the case of *Chen Ka Fatt lwn. Maybank Bhd* [2018] 2 ILR 250 and *Abdul Jamil Jalaludeen v. Maybank Bhd* (Case No: 9-4-1864-12);

(v) the first respondent has failed to produce any evidence that the first respondent's reputation has been tarnished by the applicant's press statement;

(vi) the failure to conduct the domestic inquiry which is mandatory in nature under cl. 13 of the first respondent's book of discipline shows that the applicant's dismissal was irrational, pre-conceived and done *mala fide* with intent to muzzle the trade union, NUFAM; and

(vii) the Industrial Court has misinterpreted s. 8 of IRA 1967 and misconceived the application of s. 22 of the TUA 1959.

The First Respondent's Submission

[5] On the contrary, the first respondent submitted as follows:

(i) The Industrial Court has decided in favour of the first respondent based on its finding of facts and assessment of the witnesses' demeanour and credibility. As such, the decision should not be interfered by this court;

(ii) the applicant's press statement contravened item 12, appendix 1 of the first respondent's book of discipline and had breached the express or implied terms of his conditions of employment;

(iii) the applicant's membership in the trade union, NUFAM does not immunise the applicant from dismissal. The Federal Court case of *Harianto Effendy Zakaria & Ors v. Mahkamah Perusahaan Malaysia & Anor* [2014] 8 CLJ 821; [2014] 6 MLJ 305, was cited to support this contention;

(iv) section 22 of the TUA 1959 does not apply to disciplinary proceedings against employees and as such the Industrial Court's interpretation and application of this provision are correct;

(v) the Industrial Court also correctly ruled that ss. 4 and 5 of IRA 1967 are inapplicable in the present case;

(vi) there is no evidence of victimisation or union busting in the instant case; and

(vii) the absence of a domestic inquiry does not render the dismissal unfair or in breach of any procedure that renders the applicant's dismissal null and void.

Decision Of This Court

[6] It is trite that the decision of an Industrial Court may be reviewed by this court on the grounds of illegality, irrationality, procedural impropriety or disproportionality. This review is not confined to the decision-making process but also to the merits of the decision.

[7] In the Federal Court case, *Akira Sales & Services (M) Sdn Bhd v. Nadiah Zee Abdullah & Another Appeal* [2018] 2 CLJ 513; [2018] 2 MLJ 537, the liberal approach on judicial review in *R Rama Chandran v. The Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 has been re-emphasised at pp. 547 to 548 (CLJ); pp. 571 to 572 (MLJ) as follows:

> [45] In the same appeal, Edgar Joseph Jr FCJ (Eusoff Chin in agreement) said that an award could be reviewed for substance as well as for process:
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> > It is often said that judicial review is concerned not with the decision but the decision making process. (See eg *Chief Constable of North Wales Police v. Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in Judicial Review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.
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> > But Lord Diplock's other grounds for impugning a decision susceptible to Judicial Review make it abundantly clear that such a decision is also open a challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinise such decisions not only for process, but also for substance.
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> > In this context, it is useful to note how Lord Diplock (at pp. 410-411) defined the three grounds of review, to wit, (i) illegality, (ii) irrationality, and (iii) procedural impropriety. This is how he put it:
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> > > By 'illegality' as a ground for Judicial Review, I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
> > >
> > > By 'irrationality', I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness' (see *Associated Provincial Picture Houses Ltd v. Wednesbury Corp.* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a

A question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] AC 14, or irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review.

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

Lord Diplock also mentioned 'proportionality' as a possible fourth ground of review which called for development.

[8] Further, the meaning of error of law has also been explained in the case of *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748; [1995] 2 MLJ 317 in the following words:

> **Is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law**, for the categories of such an error are not closed. But it may be said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed *Anisminic* error) or **if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law**.
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> (emphasis added)

[9] Next, in a judicial review, the test applicable is the objective test as was held by the Federal Court in the case of *Titular Roman Catholic Archbishop Of Kuala Lumpur v. Menteri Dalam Negeri & Ors* [2014] 6 CLJ 541; [2014] 4 MLJ 765, as follows:

> (1) (per Arifin Zakaria Chief Justice) **It is trite that the test applicable in judicial review now is the objective test**. In considering whether the Court of Appeal had applied the correct test, it is pertinent to consider the whole body of the judgments of the judges of the Court of Appeal and not by merely looking at the terms used in the judgments. The courts will give great weight to the views of the Executive on matters of national

security. The Court of Appeal had applied the objective test in arriving at its decision. Had it applied the subjective test, it would not be necessary for it to consider the substance of the first respondent's decision.

(emphasis added)

[10] Reverting to the present case, the core issue here is whether the applicant's conduct in making the press statement on the 7 November 2013 is a misconduct that warrants a dismissal by the first respondent. In other words, whether there are grounds that constituted just cause or excuse for the dismissal.

[11] On the issue of misconduct, it is instructive to make reference to the Court of Appeal case of *Tan Poh Thiam v. Industrial Court of Malaysia & Anor* [2015] 1 LNS 1534 where it states as follows:

It must be strictly observed that industrial law jurisprudence does not permit all forms of unsatisfactory conduct or poor performance or negligence to be labelled as misconduct. There are a number of case laws here as well as in other recognised jurisdictions that explain what act or conduct amount to misconduct or will not satisfy the threshold.

An industrial tribunal properly appraised of the facts must not succumb to any allegation of misconduct, if the acts complained of do not qualify as misconduct, or if the circumstances leading to allegation of misconduct do not warrant dismissal on the ground of just cause or excuse, taking into consideration the proportionality principle advocated in the case laws.

Industrial law jurisprudence does not permit any form of oppressive conduct on the part of an employer having the objective of dismissing the employee on just cause or excuse' based on trivial allegations; based on matters that could have been dealt with appropriately with proper operating system or management system instead of taking drastic steps to dismiss the employee. The Industrial Court in the Malaysian context is obliged to do a balancing exercise taking into account such factors as the nature of the complaint the conduct of the employer, the operating and management system that is in place, the reason advanced by the employee as well as his conduct, and the gravity of the allegation; in order to ascertain whether the employee's act or omission qualifies as a misconduct to attract section 20 of Industrial Relations Act 1967 (IRA 1967). The proposition is fortified by section 30 of IRA 1967.

It is now well established that in exercising the jurisdiction and power under section 20 of the IRA 1967, the duty of the Industrial Court is two-fold, namely:

(i) Firstly, to determine whether the misconduct complained of by the employer has been established; and

(ii) Secondly, whether the proven misconduct constitutes just cause or excuse for the dismissal.

A Failure to determine these issues on the merits would be a jurisdictional error which merits intervention by the High Court. (See *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449; [1995] 3 MLJ 537].

The starting point and the key to decide whether the situation attracts section 20 is for the Industrial Court to determine whether the complaint
B qualifies as misconduct, taking into consideration all the circumstances and facts.

[12] In another High Court case of *I Bhd v. K A Sandurannehru Ratnam & Anor* [2004] 5 CLJ 460, where the test to determine whether the dismissal is with or without just cause or excuse is as follows:

C In deciding whether the dismissal was without just cause, what the Industrial Court had to consider was merely whether on the evidence produced before it the applicant had reasonable grounds in dismissing the first respondent. The test applied in *Ferodo Ltd v. Barnes* [1976] 1CR 39 states that:

D ... The test is not whether the employee did it but whether the employer acted reasonably in thinking the employee did it and whether the employer acted reasonably in subsequently dismissing him.

[13] Further, in the often-quoted Federal Court case of *Wong Yuen Hock v.*
E *Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344 at p. 352, it was held as follows:

On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under s. 20 of the Act (unless otherwise lawfully provided by the terms
F of the reference) is to **determine whether the misconduct or irregularities complained of by the management as the grounds of dismissal were in fact committed** by the workman, and if so, **whether such grounds constitute just cause or excuse for the dismissal**.

(emphasis added)

G

[14] In addressing the core issue mentioned above, it is not disputed that at the material time, the applicant was the President of NUFAM and one of its exco member. NUFAM is a registered trade union under the Trade Unions Act 1959.

H **[15]** At this juncture, it is pertinent to analyse the relevant statutory provisions in relation to employee involved in the trade union activities.

[16] Section 4(1) of the IRA 1967, states the following:

No person shall interfere with, restrain or **coerce a workman** or
I an employer in the exercise of his rights to form and assist in the formation of and join a trade union and to **participate in its lawful activities**.

(emphasis added)

[17] Further, s. 5(1)(c) and (d) of the IRA 1967 provide: A

(1) **No employer** or trade union of employers, and no person acting on behalf of an employer or such trade union shall:

...

(c) discriminate against any person in regard to employment, promotion, any condition of employment or working conditions on the ground that he is or is not a member or officer of a trade union; B

(d) **dismiss or threaten to dismiss a workman, injure or threaten to injure him in his employment or alter or threaten to alter his position to his prejudice by reason that the workman**: C

(i) is or proposes to become, or seeks to persuade any other person to become, a member or officer of a trade union; or

(ii) **participates in** the promotion, formation or **activities of a trade union**.

(emphasis added) D

[18] It is also an offence to dismiss a workman as a trade union member, seeking to improve working conditions as provided under s. 59(1)(d) of the IRA 1967, which is as follows:

(1) Subject to subsection 5(2), it shall **be an offence to dismiss a workman** or injure or threaten to injure him in his employment or alter or threaten to alter his position to his prejudice, by reason of the circumstances that the workman: E

...

(d) **being a member of a trade union which is seeking to improve working condition, is dissatisfied with such working conditions**; F
(emphasis added)

[19] Next, s. 8 of the Employment Act 1955 provides as follows:

Nothing in any contract of service shall in any manner restrict the right of any employee who is a party to such contract: G

(a) to join a registered trade union;

(b) **to participate in the activities of a registered trade union, whether as an officer of such union or otherwise**; or

(c) to associate with any other persons for the purpose of organising a trade union in accordance with the Trade Unions Act 1959 [Act 262]. H

(emphasis added)

[20] From the above-mentioned statutory provisions, undoubtedly, the law provides protection for member of a trade union to participate in trade union activities. I

[21] Here, the more intricate question is whether a member of a trade union is immunised from action of dismissal for misconduct by the employer. I would say, being a member of a trade union *per se*, should not be a shield to exclude liability of misconduct. Liability for misconduct by member of a trade union must be viewed based on its facts. I find support on this view in a Federal Court case of *Harianto Effendy (supra)* where the dismissal of members of the National Union of Bank Employee ('NUBE') was affirmed for picketing at the lobby and banking hall which disrupt the business and operation of the bank. Their conduct has caused disrepute to the bank. Their conduct was very grave misconduct that involved the core of the bank's business.

[22] In *Harianto Effendy*'s case, the Federal Court agreed with the reasoning and observation by the Court of Appeal which states as follows:

> [22] The appellants subsequently appealed to the Court of Appeal against the decision of the High Court. The Court of Appeal unanimously dismissed the appellants' appeal with costs. On the issue of 'victimisation' the Court of Appeal held as follows:
>
> > The appellant's argument relating to victimisation was patently untenable premised as it was on conjecture. It is rather far-fetched to conclude that the appellants were victimised simply because they were active union members and there was breach of natural justice in the conduct of the domestic enquiry instituted to determine the charge against them.
>
> [23] As regards the issue of punishment imposed, whether the dismissal was too harsh and was actuated by discriminative practice, the Court of Appeal opined:
>
> > The final aspect of the appeal was in relation to the contention advanced on behalf of the appellants that the dismissal was too harsh and was actuated by discriminative practice. This was premised on the fact that five other employees of the second respondent were also participants in the illegal picket like the appellants but were either let off unpunished or given light punishments. In rejecting the argument that the punishment was too harsh the learned judge relied on the principle set out in *Said Dharmalingam Abdullah v. Malayan Breweries Sdn Bhd* [1977] 1 CLJ 646; [1977] 1 MLJ 352 and in our view rightly so. The Supreme Court had this to say at p 660 (CLJ); at p 364 (MLJ):
>
> > > We are prepared to accept, as a tenable proposition that, speaking generally, where misconduct has been proven, different employers might react differently. To quote Acker LJ in *British Leyland UK Ltd v. Swift* [1981] IRLR 91 at p 93: 'An employer might reasonably take the view, if the circumstances so justified, that his attitude must be a firm and definite one

and must involve dismissal in order to deter other employees, from like conduct. Another employer might quite reasonably on compassionate grounds treat the case as special'.

In any event the charge proved against the appellants constituted very grave misconduct involving the core of the second respondent's existence and they must been aware that dismissal would have been the inevitable punishment. The contention relating to discriminative practice was misconceived because the five other employees treated differently from the appellants were never adjudged guilty of the misconduct which was proven against the appellants'.

[23] On the same issue, it is instructive to make reference to the Court of Appeal case of *Harris Solid State (M) Sdn Bhd* (*supra*) which held that a workman should not be dismissed for his participation in union activities as collateral purpose as this tantamounts to victimisation of an unfair labour practice actuated by *mala fide*. This to me, involves question of facts to be decided upon circumstances of each case.

[24] As pointed out in *Harris Solid State (M) Sdn Bhd* case at p. 767 (CLJ) p. 511 (MLJ):

An employer may reorganise his commercial undertaking for any legitimate reason, such as promoting better economic viability, but he must not do so for a collateral purpose, for example, to victimise his workmen for their legitimate participation in union activities. *Whether the particular exercise of managerial power was exercised bona fide or for collateral reasons is a question of fact that necessarily falls to be decided upon the peculiar circumstances of each case.*

(emphasis added)

[25] Further, the Court of Appeal explained in the following words:

The authorities in support of the view we have expressed are legion. We do not propose to go through them all in this judgment. It is sufficient, for present purposes, to quote from two leading cases decided by the Supreme Court of India in respect of the parallel Indian legislation.

The first is *Assam Oil Co Ltd v. Its Workmen* AIR [1960] SC 1264, where Gajendragadkar J, speaking for the majority, said (at p. 1267):

...

If the discharge has been ordered by the employer in *bona fide* exercise of his power, then the industrial tribunal may not interfere with it; but the words used in the order of discharge and the form which it may have taken are not conclusive in the matter and the industrial tribunal would be entitled to go behind the words and the form and decide whether the discharge is a discharge simpliciter or not. If it appears that the purported exercise of the power to terminate the services of the employee was in fact the result of the misconduct alleged against him, then the tribunal will

A be justified in dealing with the dispute on the basis that despite its appearance to the contrary, the order of discharge is in effect an order of dismissal. The exercise of the power in question to be valid must always be *bona fide*. If the *bona fide* of the said exercise of power are successfully challenged, then the industrial tribunal would be entitled to interfere with the order in question. *It is in*
B *this context that the industrial tribunal must consider whether the discharge is mala fide or whether it amounts to victimisation or an unfair labour practice*, or is so capricious or unreasonable as would lead to the inference that it has been passed for ulterior motives and not in *bona fide* exercise of the power conferred by the contract. In some
C cases, the employer may disapprove of the trade union activities of his employee and may purport to discharge his services under the terms of the contract. In such cases, it if appears that the real reason and motive for discharge is the trade union activities of the employee, that would be a case where the industrial tribunal can justly hold that the discharge is unjustified and has been made
D *mala fide*. It may also appear in some cases that though the order of discharge is couched in words which do not impute any misconduct to the employee, in substance, it is based on misconduct of which, according to the employer, the employee has been guilty; and that would make the impugned discharge a punitive dismissal. In such a case, fair play and justice require that
E the employee should be given a chance to explain the allegation weighing in the mind of the employer and that would necessitate a proper enquiry, *Whether or not the termination of services in a given case is the result of the bona fide exercise of the power conferred on the employer by the contract or whether in substance it is a punishment for alleged misconduct would always depend upon the facts and circumstances of each*
F *case*.

(emphasis added)

[26] On this issue, the provisions of s. 4(1) and s. 5(1) of IRA 1967 are plain and clear and should be given its effect without any other
G interpretation. The intention of Parliament in enacting such provisions is to provide protection to members of union who carried out the union's lawful activities.

[27] In the Federal Court case of *Dr Koay Cheng Boon v. Majlis Perubatan Malaysia* [2012] 4 CLJ 445; [2012] 3 MLJ 173, in the following words:

H [48] A statute is the written will of the Legislature. It is the fundamental rule of interpretation of a statute that should be expounded according to the intent of Parliament. Courts must use the literal rule where a clear meaning of statute will allow it, ie, interpret the statute literally, according to its ordinary plain meaning. In the event of the words of the statute being precise and unambiguous in themselves, it is only just necessary to
I expound those words in their natural and ordinary sense.

[28] Likewise in the Federal Court case of *PP v. Sihabduin Hj Salleh & Anor* [1981] CLJ 39; [1981] CLJ (Rep) 82; [1980] 2 MLJ 273, where it states:

> The words of Lord Diplock in an authority cited by my Lord President, *Duport Steels Ltd v. Sirs*, seem to me to be particularly apt, for 'the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral.

[29] Reverting to the said provisions, s. 4(1), *inter alia*, prohibits any interference by any person including the employer in the employee's rights to participate in its lawful activities. Section 5(1)(d)(ii) of the IRA 1967 further prohibits an employer, among others, from dismissing an employee for participating in a trade union activities.

[30] Clearly, the law endorsed the rights of union's members to participate in the union lawful activities and ss. 4(1) and 5(1) of IRA 1967 were put in place to ensure that this rights can be exercised without impediment including from the employer. This includes an action for dismissal, threaten to dismiss, injure or threaten to injure the employee in his employment or alter or threaten to alter the employee's position to his prejudice.

[31] To further protect the members of a union in carrying out its activities, the Parliament has enacted s. 22 of TUA 1959 as referred earlier to protect any union or its members from civil suit in respect of any tortious act arising from the lawful activities of the union.

[32] This protection has been explained in the case of *Nur Rasidah Jamaludin v. Malayan Banking Bhd & Other Appeals* [2018] 1 CLJ 330, as follows:

> The case of *Annamalai* and *Abdul Hamid* provided that it matters not whether there exists a 'trade dispute' between the parties as the tort of libel was not a type of tort which is covered by s. 22(2) of the TUA. The general immunity conferred by s. 22(1) applies to the tort of libel and hence the defendants here could not be held liable for the impugned documents published by the trade union. In short, trade unions and its members or officers had absolute immunity from actions that were premised upon the tort of libel pursuant to s. 22(1) of the TUA when the tortious acts complained of were 'committed by or on behalf of the trade union.

[33] Reverting to the instant case, the pertinent consideration is whether the applicant's conduct in making the press statement is within the NUFAM lawful activities.

[34] In this regard, the evidence in totality must be viewed. Firstly, at the risk of repetition, the contents of the press statement, among others, highlighted the following issues:

(i) The plight of overworked and underpaid cabin crew members;

(ii) fatigue issues faced by cabin crew workers;

(iii) the request for department of civil aviation to monitor the work schedules of cabin crew members in order to safeguard their wellbeing, health and safety; and

(iv) the first respondent to straighten out its policies to ensure that the welfare and safety of cabin crew members are looked into.

[35] I find these issues relate to the objective of a trade union, *inter alia* to improve the working conditions of workmen as reflected in the definition of a trade union or union under s. 2 of the TUA 1959 which is as follows:

> ... any association or combination of workmen of employers, being workmen whose place of work is in Peninsular Malaysia, Sabah or Sarawak, as the case maybe, or employers employing workmen in Peninsular Malaysia, Sabah or Sarawak, as the case may be:
>
> (a) within any particular establishment, trade, occupation or industry or within any similar trades, occupations or industries;
>
> (b) whether temporary or permanent; and
>
> (c) having among its objects one or more of the following objects:
>
> (i) the regulation of relations between workmen and employers for the purposes of promoting good and harmonious industrial relations between workmen and employers, improving the working conditions of workmen or enhancing their economic and social status, or increasing productivity;

[36] The statements also contained a call for the resignation of the first respondent's chief executive officer for failure to address the said issues.

[37] The issues complained of by the applicant has been prolonged for some time and the applicant's effort to resolve the issues amicably was not successful as can be seen in the NUFAM's letter dated 29 April 2013 and email dated 4 June 2013 to the first respondent.

[38] In the circumstances, I find, the making of the press statement by the applicant on 7 November 2013 is the lawful activities of NUFAM particularly to ensure the good working conditions of its members.

[39] I also acknowledge that, cl. 12, appendix 1 of the first respondent's book of discipline requires consent in writing from the first respondent before issuing any press statement. However, this internal requirement must be assessed together with the established law in determining whether there

was a misconduct by the applicant. Likewise art. 27 of the MASEU's collective agreement 2011 which prohibits employees from making press statement.

[40] Viewed in totality and the fact that the statements were made in the applicant's capacity as the President of NUFAM for the interest of its members without involving any illegal act, the applicant's conduct cannot be labelled as a misconduct which warrants his dismissal.

[41] In connection to this, the Industrial Court decided that ss. 4(1) and 5(1) of IRA 1967 are inapplicable as the applicant was found to be guilty of the allegation of misconduct levelled against him.

[42] This is where I find, the Chairlady of the Industrial Court fell into error. The assessment of the applicant's misconduct must be taken in light of ss. 4(1) and 5(1). This does not mean that no action of misconduct can be taken against a member of a union but it must be done in accordance with the law. In the present case, there is nothing in ss. 4(1) or 5(1) that states that the provisions are not applicable to any disciplinary proceedings.

[43] The Industrial Court also decided that any breach of ss. 4(1) and 5(1) can be redressed by way of ss. 8 and 20 of the same Act which provide:

> Section 8 Reference Of Complaint To Industrial Court
>
> (1) Any complaint of any contravention of sections 4, 5, or 7 may be lodged in writing to the Director General setting out all the facts and circumstances constituting the complaint.
>
> ...
>
> Section 20 Representations On Dismissals
>
> (2) Upon receipt of all representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at; where the Director General is satisfied that there is no likelihood of the representations being settled, he shall notify the Minister accordingly.
>
> (3) Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the Court for an award.
>
> (4) Where an award has been made under subsection (3), the award shall operate as a bar to any action for damages by the workman in any court in respect of wrongful dismissal.

[44] However, I agree with the submission by counsel for the applicant that the Industrial Court has failed to consider s. 8(1A) of the same Act which states:

> (1A) Where a complaint in subsection (1) relates to the dismissal of a workman, the provision of s. 20 shall apply to the exclusion of subsections 8(2) to 8(4).

[45] Clearly, the present case concerns the dismissal of the applicant and as such, the provision of s. 20 is applicable. Hence, the Industrial Court has committed an error of law when it held that ss. 4(1) and 5(1) are inapplicable as well as misconceived in regard to the application of s. 8 of IRA 1967.

[46] As to the provision of s. 22 of the TUA 1959, the Court of Appeal in *Nur Rasidah*'s case (*supra*) has explained clearly that this provision provides immunity for union members from any civil suit in relation to tortious act arising from lawful activities of the union.

[47] In this regard, the allegations against the applicant also relate to the derogatory and defamatory statement against the first respondent particularly when the statement demanded the chief executive officer to resign. The first respondent's complaint also relates to tort of defamation. Here, if the law, which is s. 22 protects union members from civil suit from any tortious act arising from the union activities, the members should also be protected from action of dismissal based on the same conduct. Otherwise, it will make s. 22 ineffective in protecting union members. This certainly is not the intention of the Parliament in enacting s. 22.

[48] On the same issue. I agree with the reasoning by the Chairlady of the Industrial Court in *Chen Ka Fatt lwn. Maybank Bhd* [2018] 2 ILR 250, which held that s. 22 was applicable and said this:

> Berdasarkan kepada keputusan Mahkamah Rayuan tersebut, Mahkamah berpendapat pihak bank tidak mempunyai kausa tindakan untuk mengambil tindakan sivil terhadap pekerja-pekerjanya. Walaupun kes ini melibatkan tindakan disiplin dan bukannya tindakan sivil, namun berdasarkan kepada fakta yang dikemukakan, pihak bank tidak boleh menamatkan perkhidmatan pihak menuntut atas perbuatan yang sama di mana undang-undang secara jelas menghalang sebarang tindakan sivil untuk tort (defamation).

[49] *Chen Ka Fatt*'s case (*supra*) and *Abdul Jamil Jalaludeen v. Maybank Bhd* (Case No: 9-4-1864-12) relate to the same fact where both employees are members of the National Union of Bank Employees (NUBE) and attended the International Labour Organisation Conference in Geneva, Switzerland from 30 May 2011 to 10 June 2011. Both employees of the bank then, in front of The United Nation Building hold a banner containing the words "Maybank Robs Poor Malaysian Workers".

[50] In both cases, which were tried separately before the Industrial Court for complaints of unfair dismissal, it were held that the employees' conducts were a lawful activities of NUBE and as such the dismissal of the employees were without just cause or excuse.

[51] The Industrial Court in both cases also held that ss. 4(1) and 5(1) of the IRA 1967 are applicable as well as s. 22 of the TUA 1959.

[52] Here, I find, the application of the law in these two Industrial Court cases are correct but was not considered by the Industrial Court in the present case.

[53] In an earlier Industrial Court case of *Gula Padang Terap Bhd v. Ahmad Hj Hakim* [1994] 2 ILR 933, it was held that a dismissal for making a press statement by the president of the union of the employees is without just cause or excuse.

[54] I fully agree with the reasoning by the Chairman of the Industrial Court in that case which states as follows:

> Though this Court agrees the press statements made involved the affairs of the Company, it holds that the Claimant has the right to make those statements. It is also this Court's view that Union members must be protected against being deprived of their rights. Constructive criticisms or their views must always be respected.
>
> In upholding the welfare of the employees, the Union has the duty to take whatever action including making the press statements. The collective agreement recognises the Trade Union as representing the employees. It also recognises the Trade Union as a party to negotiate on behalf of the workers. It is clear that the Claimant has not been proven guilty of any other misconduct.

[55] In addition, the first respondent has failed to adduce any cogent evidence to establish that the applicant's press statements alluded to earlier, has caused disrepute to the image and reputation of the first respondent.

[56] Further, the first respondent's contention that the applicant has committed the same offence by making a press statement without consent from the first respondent can be distinguished from the press statement in the present case. The present press statement was made in his capacity as the President of NUFAM compared with an earlier statement when he was not the President of NUFAM. As such, the applicant's past record on this issue does not carry much weight to support the first respondent's case against the applicant.

Conclusion

[57] Premised on the aforesaid reasons, I find, the Industrial Court's decision dated 14 February 2019 is tainted with error of law and irrationality which warrant curial intervention of this court.

[58] As such, the applicant's application for judicial review is allowed with costs of RM5,000. The decision of the Industrial Court is set aside.

[59] The present case is to be remitted back to the Industrial Court before another Chairman of the Industrial Court to ascertain the appropriate remedies in accordance with the law.