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KESATUAN KEBANGSAAN PEKERJA-PEKERJA PERDAGANGAN v BUMIPUTRA - COMMERCE FACTORLEASE BERHAD

INDUSTRIAL COURT (KUALA LUMPUR)
TUAN FRANKLIN GOONTING
CASE NO 3/2-666/07
22 October 2008

Mr. Chandra Segaran (Messrs Prem & Chandra);

Ms. K. Rajeswari & Ms K.C Wong (Messrs Zul Rafique & Partners)

TUAN FRANKLIN GOONTING

Reference :

This is a dispute under Section 26 (2) of the Industrial Relations Act 1967 between **Kesatuan Kebangsaan Pekerja-Pekerja Perdagangan** (hereinafter referred to as "the Union") and **Bumiputra Commerce Factorlease Berhad** (hereinafter referred to as "the Respondent").

AWARD

This trade dispute concerns the proposed terms of a Collective Agreement for the period 1st January 2003 to 31st December 2005. As named in the ministerial reference the union/applicant is Kesatuan Kebangsaan Pekerja-Pekerja Perdagangan (NUCW) while the respondent is Bumiputra Commerce Factorlease Berhad.

On 30th August 2007 NUCW filed an application to join the National Union of Bank Employees (NUBE) and CIMB Bank Berhad (CIMB) as parties to the dispute. The Court understands this to mean that NUCW wants itself to be substituted by NUBE and the respondent to be substituted by CIMB. It is an extraordinary application in that it seeks a replacement of parties on both sides of the contention i.e the contender and the defender, by outsiders. When asked by the Court whether there was any precedent for it Mr. Chandra, counsel for NUCW, candidly replied in the negative, adding that he was trying to cover new ground.

Supportive and opposing affidavits, and written submissions were filed and the Court and its panel heard further oral submissions on 30th July 2008 and it now gives its ruling. The facts wherever referred to herein are gleaned from the said affidavits.

Antecedents

The previous period, that is, 1st January 2000 to 31st December 2002 is covered by Collective Agreement Cog. 233/2001 between NUCW and Bumiputra - Commerce Factoring Berhad (hereinafter called "BCFB" (not the respondent, be it noted).

BCFB and Bumiputra - Commerce Leasing Berhad (hereinafter called "BCLB") were wholly owned subsidiaries of the then Bumiputra -Commerce Bank Berhad (BCBB, now CIMB).

BCFB had 53 staff, of whom 19 clerical and non-clerical staff were members of NUCW. Its 34 officers were not unionized. The said 19 clerical and non-clerical staff came under CA Cog. 233/2001 aforesaid.

BCLB had 38 staff i.e 26 officers and 12 clerical and non-clerical staff, all not unionized.

In early 2004 these two subsidiaries merged upon terms that BCLB would purchase the assets and liabilities of BCFB which would then become dormant. All its employees including the said 19 unionized staff accepted employment by BCLB on an employment package which was no less favourable than what they were getting from BCFB. With effect from 15 June 2004 BCLB changed its name to Bumiputra - Commerce Factorlease Berhad, that is, the respondent herein.

By a Vesting Order dated 28th September 2004 the business of BCFB was transferred to the respondent as a going concern under section 50 of the Banking and Financial Institutions Act 1989.

By letter dated 15th March 2006, all the employees of the respondent were offered direct employment by BCBB and/or its subsidiaries commencing from 1st April 2006. In response to this offer, 16 of the 19 former unionized staff of BCFB were absorbed into the service of BCBB whilst the remaining 3 staff were absorbed by two (2) of BCBB's subsidiaries, namely, Semerak Services Sdn Bhd and EPIC- 1 Sdn Bhd. The result: *There are no more members of NUCW left in the employment of BCFB or the respondent.*

The said staff of the respondent who joined BCBB then became subjected to the terms and conditions of employment contained in the Collective Agreement between Malayan Commercial Bank's Association (MCBA) and NUBE i.e CA Cog. 73/2001. It must be emphasised that the terms and conditions of CA Cog. 233/2001 were similar in almost all respects to the terms and conditions of CA Cog. 73/2001.

With effect from 7th September 2006 BCBB changed its name to CIMB.

The dispute

In October 2003 NUCW served a notice on BCFB to commence negotiations for a new collective agreement for the period 1st January 2003 to 31st December 2005 to replace the expired CA Cog. 233/2001.

In view of the said merger, BCFB did not commence negotiation with NUCW, which then referred the matter as a trade dispute to the Director of Industrial Relations. Following an initial meeting at the Industrial Relations Department NUCW submitted a proposal for the settlement of the dispute to the respondent. The respondent, however, did not respond, since NUCW had not submitted any claim to represent the employees employed by the respondent. At a second conciliation meeting the respondent notified the Director of Industrial Relations that all the former employees of BCFB had been offered continuous employment by the respondent effective from 1st September 2004 and that further, the respondent was not a party to the collective agreement between BCFB and NUCW i.e CA Cog. 233/2001; in other words, NUCW did not have the locus standi to represent the respondent's employees in bargaining for a collective agreement.

By a letter dated 12th January 2007 the Director General of Industrial Relations referred the matter as a trade dispute between NUCW and the respondent to the Industrial Court for adjudication.

Grounds for the joinder application

The main grounds put forward by NUCW are:

(a) There was an essential unity of group enterprise between BCFB, BCLB, the respondent, and CIMB; and
(b) The two joinders are necessary to make adjudication effective and enforceable.

NUCW concedes that its members were deployed from the respondent into CIMB and therefore it no longer represents these employees. It contends, however, that the justice of the case demands the joinder of NUBE which has now in its membership NUCW's former members, and of CIMB which now has in its employment the respondent's former employees. As authority for this contention Mr. Chandra cites the Indian Supreme Court case of *Hochtief Gammon v Industrial Tribunal, Orrissa and Others AIR* [1964] SC 1746 in which Chief Justice Gajendragadkar stated as follows:

> "If it appears to the tribunal that a party to the industrial dispute named in the order of reference does not completely or adequately represent the interest either on the side of the employer, or on the side of the employee, it may direct that other persons should be joined who would be necessary to represent such interest. ***If the employer named in a reference does not fully represent the interests of the employer as such, other persons who are interested in the undertaking of the employer may be joined. Similarly, if the unions specified in the reference do not represent***

> ***all the employees of the undertakings, it may be open to the Tribunal to add such other unions as it may deem necessary. The test always must be is the addition of the party necessary to make adjudication itself effective and enforceable?*** In other words, the test may well be: would the non-joinder of the party make the arbitration proceedings ineffective and unenforceable? It is in the light of this test that the implied power of the Tribunal to add parties must be held to be limited.". (Emphasis added).

Mr. Chandra submits that the ***Hochtief Gammon*** case lays down two tests to be applied i.e:

(a) Whether the joinder of the party is necessary to make adjudication effective and enforceable; and
(b) Whether the employer named in the reference fully represents the interest of the employer and, if not, then the persons who are interested in the undertaking of the employer may be joined.

Another test, Mr. Chandra submits, is that of functional unity and integration among the companies concerned. For this proposition he cites the Malaysian Court of Appeal case of *Harris Solid State (M) Sdn Bhd v. Bruno Gentil Pereira & Ors* [1996] 4 CLJ 747. He also refers to the case of *Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor* [1979] 1 LNS 32 in which Salleh Abas FJ (sitting alone as a High Court judge) spoke of the essential unity of a group enterprise.

By section 29(a) of the Industrial Relations Act 1967 the Court may, in any proceedings before it, order that any party be joined, substituted or struck off. This power, however, is a discretionary one.

At the outset two obstacles come to mind standing in the way of this unique bi-party joinder application. Firstly it would appear that the Court has no threshold jurisdiction to hear and determine the reference proper since NUCW itself concedes that it no longer represents the employees concerned. BCFB, the party to CA Cog.233/2001, is dormant. NUCW's members employed there had moved out and accepted employment in BCLB which on 15th June 2004 changed its name to Bumiputra - Commerce Factorlease Berhad, namely, the respondent named in the Minister's reference. The respondent itself is also dormant since its employees, which included NUCW's members working there had been absorbed into BCBB and its subsidiaries. To be precise 16 of the 19 former non-unionized staff were absorbed into BCBB while the remaining 3 staff were absorbed into BCBB's subsidiaries. Secondly, the trade dispute in this reference stems from the refusal of the respondent to commence collective bargaining. NUCW's reliance on the ***Hochtief Gammon*** case to justify the joinder sought is simplistic and short-sighted. If the Court were to grant the said joinder, then what? Then, to follow through the reference proper the Court would have to hear NUBE and CIMB, entities who were not parties to CA Cog. 233/2001 which was concluded between BCFB and NUCW. And taking the matter further to its logical conclusion the Court might be prevailed upon to direct CIMB and NUBE to execute a separate collective agreement covering these 16 or so employees. This would be going well beyond the scope of the trade dispute referred to the Court by the Honourable Minister under section 26 of the Act. Incidentally the Court notes that, going by the affidavit of the General Secretary of NUBE filed herein, NUBE is willing to be joined in this trade dispute. Indeed, he prays for an order in terms of the joinder application. It is clear that NUBE is seeking to intervene in the proceedings via the back door i.e without itself making a formal application to intervene.

The respondent's grounds for opposing the application are:

1. NUCW has no locus standi;
2. Neither the respondent nor CIMB were party to the trade dispute relating to the collective agreement between NUCW and BCFB; and
3. The majority of NUCW's members who were formerly employed by BCFB now fell within the scope of representation of NUBE.

Objection 1

The locus standi of NUCW

The movements of the said 19 members have been traced above. As of now CA Cog. 233/2001 has no more beneficiaries.Where there are no more employees left in the company the union will have no locus standi to represent the employees in a trade dispute. This is trite law. NUCW concedes this. (See ***Kesatuan Pekerja-Pekerja Dalam Perkhidmatan Perubatan dan Kesihatan Swasta v. Policlinic G.F Chin, Ipoh*** (Award

No. 7/78); and *Reading & Bates (M) Sdn Bhd v Sarawak Union of Land & Offshore Drilling Workers* [1987] 1 ILR 416, to name just two authorities).

Furthermore, BCFB had ceased its business and become a dormant company. For this reason, also, NUCW had no locus standi in respect of the trade dispute which concerns the collective agreement between BCFB and NUCW. (See Cooperative Central Bank Ltd, The *Allied Bank (Malaysia) Bhd - Joined as a party v. Kesatuan Kebangsaan Pekerja-Pekerja Perdagangan* [1996] 1 ILR 469, and *Aero Manufacturing Sdn Bhd Selangor v. Kesatuan Kebangsaan Pekerja-Pekerja Syarikat-Syarikat Pembuatan Keluaran Getah* [2007] 1 ILR 464).

Since NUCW has no locus standi, by the same token neither does NUBE. NUCW cannot clothe this lack of locus standi by seeking to bring in NUBE for the simple reason that NUBE is not a party to the trade dispute, and furthermore, the beneficiaries to CA Cog. 233/2001 were never under NUBE's scope of representation.

Objection 2

Neither the respondent nor CIMB were party to the trade dispute relating to the Collective Agreement between NUCW and BCFB

The trade dispute basically concerns NUCW's proposals for a new collective agreement between itself and BCFB, the previous one being CA Cog. 233/2001. The relevant letter from NUCW to BCFB is reproduced:

By this letter NUCW was in effect inviting BCFB (not the respondent, be it noted) to commence collective bargaining pursuant to section 13 of the Act. Section 13(1) states as follows:

> **"13. Collective bargaining**
>
> (1) Where a trade union of workmen has been accorded recognition by an employer or a trade union of employers-
> (a) the trade union of workmen may invite the employer or trade union of employers to commence collective bargaining; or
> (b) the employer or the trade union of employers may invite the trade union of workmen to commence collective bargaining.
>
> (2) The invitation under subsection (1) shall be in writing and shall set out the proposals for Collective Agreement.".

(Italics added).

The respondent's objection in this regard is two-fold. Firstly, it (the respondent) was not a party to the previous Collective Agreement Cog. 233/2001. Secondly, section 13(1) of the Act clearly envisages that the collective bargaining is to be between the employer and the trade union of workmen which has been accorded recognition by the employer. NUCW has not sought recognition from the respondent nor, for that matter, from CIMB. The process for recognition of a trade union should be pursued under Part III of the Act which bestows on the Minister of Human Resources the function and power to decide whether or not recognition is to be accorded to a particular trade union. Section 9(5) and (6) of the Act is reproduced:

> "(5) Upon receipt of a notification under subsection (4C) the Minister shall give his decision thereon; where the Minister decides that recognition is to be accorded, such recognition shall be deemed to be accorded by the employer of 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.
>
> (6) A decision of the Minister under subsection (5) shall be final and shall not be questioned in any Court.".

In light of these statutory provisions the Court agrees with the respondent's counsel's submission that the question of recognition should be pursued in a different forum i.e under Part III of the Act. The Court will not usurp the power of the Minister. (See *Tobacco Blenders and Manufacturers Sdn Bhd & Anor v. National Union of Tabacco Workers* [2001] 1 ILR 990).

Objection 3

The majority of NUCW members who were formally employed by BCFB now fall within the scope of the representation of NUBE

As has been explained earlier, most of the 19 beneficiaries of CA Cog. 233/2001 are now employed by CIMB whose employees are covered by the Collective Agreement between MCBA and NUBE. The said beneficiaries therefore come within the scope of representation of NUBE which represents workmen in the banking industry. CIMB, too, is in the banking industry, which is a different industry from the industry which NUCW is competent to represent. Whether an employee in a related or similar industry can be a member of a particular union is a matter for the decision of the Registrar of Trade Unions under section 12(2) of the Trade Union Act 1959. Section 12 is reproduced:

> **"12. Registration.**
>
> (1) The Director General may, upon receiving any application under section 10, and subject to this section, register the trade union in the prescribed manner.
>
> (2) The Director General may refuse to register a trade union in respect of a particular establishment, trade, occupation or industry if he is satisfied that there is in existence a trade union representing the workmen in that particular establishment trade, occupation or industry and it is not in the interest of a workmen concerned that there be another trade union in respect thereof.".

Thus it would be untenable for NUCW to contend that CIMB and NUBE (both of whom are concerned with the banking industry) should become parties in a collective agreement relating to another industry. This would be tantamount to usurping the function of the Registrar of Trade Unions. In the Federal Court case of *Electrical Industry Workers Union v. Registrar of Trade Unions and Anor* [1976] 1 MLJ 177 at page 179Lee Hun Hoe CJ (Borneo) stated:

> "Whether a person in a related or similar industry becomes a member of a particular union is squarely a matter for the decision of the Registrar of Trade Unions. If a particular union can say it is for the Union to decide whether those in another industry might be absorbed as members of the union a dangerous situation would develop whereby each and every union in the country would do the same. This could produce disastrous result for the country. It is for the Union to satisfy the Registrar of Trade Unions that the Monsanto Electronics Workers Union belong to the same or similar industry as the union. What is sought by the originating summons is a declaratory judgment as to the functions and powers of the Registrar of Trade Unions. I think the Court must decline to exercise its discretion in making any declaration which would fetter the Registrar in the exercise of his duties imposed on him by the Ordinance.".

Mr. Chandra submits that since the staff of the respondent were deployed into CIMB and all the respondent's assets and liabilities were transferred to CIMB, CIMB is now the party interested in the undertaking of the employer i.e the respondent, which is dormant and does not fully represent the interest of the employer. He further submits that BCFB, the respondent, and CIMB have a unity of group enterprise, and therefore the corporate veil of these companies ought to be lifted, and, following the ***Hochtief Gammon*** principle, the order of joinder sought by NUCW ought to be granted. Mr. Chandra also refers to a case found in the respondent's bundle of authorities i.e *Sin Poh (Star News) Amalgamated Malaysia Sdn Bhd (Sin Chew Jit Poh Malaysia) & 2 Ors v. National Union of Journalists Malaysia* [1993] 2 ILR 23 and submits that this case falls squarely on the present case. In that case the Industrial Court held that two related companies which together between themselves had taken over Sin Chew Jit Poh Malaysia as a going concern and some 85% of its work force, were successors, assignees or transferees of Sin Chew Jit Poh Malaysia and, as such, were bound by an existing collective agreement between Sin Chew Jit Poh Malaysia and National Union of Journalists Malaysia. The case pivoted on the application and interpretation of section 17 of the Act which states that a collective agreement which has been taken cognizance of by the Industrial Court is deemed to be an Award of the Court and is binding on the parties to the agreement, their successors, assignees or transferees.

The ***Sin Chew Jit Poh*** case is clearly distinguishable from the facts and issues in the present case, as that case concerned a complaint of non-compliance with a concluded collective agreement and the application and interpretation of section 17 of the Act whereas the case at hand concerns a bid for collective bargaining aimed for an intended collective agreement.

Lastly, in her closing submissions the respondent's co-counsel Ms. K.C Wong submitted that the ***Hochtief Gammon*** case cannot be applied in breach of the said statutory provisions, that is, Part III of the Act and section 12 of the Trade Unions Act 1959, and that if NUCW and NUBE side-stepped these statutory hurdles in order to gain direct access to the Industrial Court it would be tantamount to their obtaining recognition via the back door. The Court agrees.

For the above reasons the Court upholds the respondent's objections and dismisses NUWC's application.

One final matter needs to be addressed. The respondent's counsel submits that since NUCW has no locus standi in this trade dispute, the application for joinder must fail at the outset and the trade dispute itself must also be struck off. NUCW's counsel, on the other hand, submits that once a dispute has been referred by the Minister to the Industrial Court, the Court is obliged to hear the dispute and decide it one way or another. Both sides cited authorities in support of their respective positions. However, before making a decision in this regard the Court and its panel would like to hear further submissions from counsel in the light of the Court's ruling disallowing the joinder sought. A date will be fixed for this purpose.