

INDUSTRIAL COURT OF MALAYSIA

CASE NO: 22/3-733/13

BETWEEN

**KESATUAN SEKERJA INDUSTRI ELEKTRONIK WILAYAH
BARAT SEMENANJUNG MALAYSIA**

AND

RENASAS SEMICONDUCTOR KL SDN. BHD.

AWARD NO: 244 OF 2016

**CORAM: Y.A. DATO' MARY SHAKILA G. AZARIAH - CHAIRMAN
MR. ABDULALIM BIN ZAKARIA - EMPLOYERS' PANEL
MR. PREM KUMAR A/L APPUKUTTY - EMPLOYEES' PANEL**

VENUE : Industrial Court, Kuala Lumpur

**DATE OF
REFERENCE** : 18 March 2013

DATES OF MENTION : 7 May 2013, 14 June 2013,
2 September 2013, 19 November 2013,
27 January 2014, 19 March 2014,
14 April 2014, 28 April 2014,
1 October 2014, 15 October 2014,
14 November 2014, 18 March 2015
and 8 April 2015

DATES OF HEARING : 23 April 2015, 6-7 May 2015
and 9 December 2015

**DATE OF ORAL
SUBMISSIONS** : 12 January 2016

REPRESENTATION : Mr. Chandra Segaran of Messrs. Prem
& Chandra, Counsel for Union

Mr. Edward Saw and Mr. Jerry Low of
Messrs. Josephine L K Chow & Co,
Counsel for Company

REFERENCES:

This is a reference made under Section 8(2A) of the Industrial Relations Act 1967 between **Kesatuan Sekerja Industri Elektronik Wilayah Barat Semenanjung Malaysia** (hereinafter referred to as “the Union”) and **Renasas Semiconductor KL Sdn. Bhd.** (hereinafter referred to as “the Company”).

AWARD

This reference pertains to a trade dispute between Kesatuan Sekerja Industri Elektronik Wilayah Barat Semenanjung Malaysia (hereinafter referred to as “the Union”) and Renesas Semiconductor KL Sdn. Bhd. (hereinafter referred to as “the Company”).

Brief Facts

This is a reference made by the Honourable Minister of Human Resources under section 8(2A) of the Industrial Relations Act 1967. The reference arose out of a complaint of Union Busting against the Company for violations of sections 4(1), 4(2), 4(3), and 5(1)(d)(i) and (ii) of the Industrial Relations Act 1967. In May 2009 the Government of Malaysia had approved the unionisation of the workmen in the electronics industry. The Director-General of Trade Unions approved the registration of the workmen in the electronics industry into 4 regions. A pro-tem committee was formed for the registration of those workmen employed in the electronics industry and Wan Noorulazhar bin Mohd. Hanafiah, an employee of the Company, was elected as its pro-tem President.

Wan Noorulazhar contends that sometime in November 2009 he was called by the Plant Director of the Company and told that he was not to promote the establishment of a national/regional wide Union for the electronics industry and told that the Company will very soon be promoting an Union. He was told to cooperate with Zulkifly Abdul Rahman who was then the Division Manager, Human Resource General Admin Department to facilitate the establishment of the in-house union.

It is contended that Wan Noorulazhar replied that employees were free to form trade unions and that employers ought not to interfere with Union activities. It is contended that Goh Kwang Whung, the Company's Plant Director issued a veiled threat to Wan Noorulazahar to concentrate on his work to safeguard his future in the Company and to allow Zulkifly Abdul Rahman to establish the in-house union. Nevertheless the Union was established and was registered as the Kesatuan Sekerja Industri Elektronik Wilayah Barat Semenanjung Malaysia on 1 December 2009 and it submitted a claim for recognition from the Company on 18 January 2010. The Company vide its letter dated 8 February 2010 refused to grant recognition to the Union.

It is alleged that sometime in March 2010 the Company arranged for members of the Joint Consultative Committee (JCC) in the Company to be brought to Cyberview Resort & Spa to attend a seminar on the setting up of an in-house union. The said seminar was conducted by the official from the Malaysian Employers Federation.

It is alleged that sometime in May 2010 Loh Kuei Wah an officer of the Company met Wan Noorulazhar and offered him the post of President of the in-house union and to send him for a course on collective agreements and requested him to encourage other employees to join the in-house union. Wan Noorulazhar declined the said offer. It is alleged that he was told that he was at the risk of being dismissed and that the Union's claim for recognition from the Company was a futile effort. Wan Noorulazhar alleges that thereafter he was moved from his normal work and shift and placed in cold storage only to perform tasks that was below his job grade as a Chargeman and his movements were closely monitored by the Human Resource Department even by the installation of CCTV.

Sometime in July 2010 it is alleged that Romanza bin Ramli a Shop Steward in the Union and employed as a Senior Technician in the Company was approached by Loh Kuei Wah to discuss with the other shop stewards to request that the Union withdraw its claim for recognition so as to enable the in-house union to secure recognition from the Company. It was said that Romanza bin Ramli was told that Union will never get its recognition as the Company was working closely with the IR Department.

It is the Union's contention that sometime in August 2010 Mohd. Saizol bin Othman a colleague of Wan Noorulazhar was approached by the new Manager of FMD Department and told not to associate with Wan Noorulazhar and the Union and to only join the in-house union. It is averred that sometime in January and February 2011 Loh Kuei Wah again requested Wan Noorulazhar to withdraw the Union's claim for recognition. Special incentives were paid out sometime in April 2011 to certain categories of employees but not to active shop stewards of the Union and Wan Noorulazhar. Chargemen in the Company were promoted except

for Wan Noorulazhar who in fact was dismissed with effect from 26 August 2011 after a domestic inquiry for a Charge that was allegedly without basis. Pursuant to section 9 of the Industrial Relations Act 1967 a secret ballot was conducted to ascertain what percentage of workers employed by the Company were members of the Union and it was declared that 72.69% were members of the Union by the IR Department.

It is the contention of the Union that the Company had taken steps in contravention of sections 4(1), 4(2), 4(3) and 5(1)(d)(i) and (ii) of the Industrial Relations Act 1967 without proper cause. It prays that the Industrial Court finds that the Company has contravened these sections and orders the Company to pay Wan Noorulazhar the amount of wages lost from the date of dismissal to the date of Hearing of this reference or final date determined by this Honorable Court.

The Company denies that it has contravened sections 4(1), 4(2), 4(3) and 5(1)(d)(i) and (ii) of the Industrial Relations Act 1967. The Company alleges that it had no knowledge of the registration of the Union and that Wan Noorulazhar its employee had been elected as the Pro-Tem President of the said Union. It is contended that it came to know that Wan Noorulazhar was its President when a claim for recognition was signed by him in his capacity as President which was served on the Company on 18 January 2010. The Company alleges that following the announcement by the government of Malaysia approving the unionisation of the electronics industry on a regional basis the Company had formed the intention of forming an in-house union and had discussions with the Joint Consultative Committee within the Company towards that end. The Company states that at the material time the Company had no knowledge that the Union was working towards registration of its establishment and claiming recognition from the Company. It is the Company's allegations that as part of its initiative in educating employers on trade Unionism the Malaysian Employers Federation had held a briefing on 10 November 2009. It is the Company's allegation that Union's claim

for recognition vide Form A was served on the Company on 18 January 2010 and was declared null and void for non-compliance of the Industrial Relations Regulations 2009. It is its contention that a fresh claim for recognition was made by the Union on 6 September 2011. It is contended by the Company that the seminar at the Cyberview Resort & Spa was to educate members of the JCC on the Trade Union Act as a whole and not on in-house unionism. It is its contention that special incentives were paid to employees who earned it including Wan Noorulazhar. It states that it had no knowledge as to which of its employees were shop stewards of the Union and which were not. The Company denies any insinuation and allegation of victimisation against Wan Noorulazhar and states that the promotion of chargemen in the Company was dependent on whether the relevant chargemen had passed the relevant examinations and acquired the necessary qualification for promotion as a chargeman.

It is the Company's contention that Wan Noorulazhar was dismissed on 26 August 2011 after a domestic inquiry had found him guilty of a misconduct that is that he had maligned the Company publicly online through his facebook page.

Evidence, Evaluation and Findings

The Union's

The Union's first witness, UW.1 was the General-Secretary of the Electronic Industry Employee's Union - Western Region Peninsular Malaysia, which is the Union in this matter. He testified that sometime thereabout May 2009 the Government of Malaysia had approved the unionisation of the workmen of the electronics industry. He testified that thereafter the Director-General of Trade Unions approved the registration of the workmen in the electronics industry into 4 regions. He testified that a pro-tem committee for the registration of a Union of those workmen employed in the electronics industry was formed and Wan Noorulazhar bin Mohd. Hanafiah, the Company's employee, was elected as the pro-tem president.

UW.1 testified that he was informed by Wan Noorulazhar that the Company's Plant Director, Goh Kwang Whung ("Goh") questioned him sometime in early 2009 about the activities of the Union and for him to seek advise of Zulkifli Abdul Rahman when was then the Division Manager, Human Resource General Admin Department for requirements on establishing an Union. He said that Goh requested Wan Noorulazhar not to promote the establishment of a national/regional-wide Union for the electronics industry and that the Company will very soon be promoting an establishment (in-house) union and when Wan Noorulazhar refused to do so he issued a veiled threat to him to concentrate on his work to safeguard his future in the Company. He further testified that on 12 November 2009 Loh Kuei Wah ("Loh") met with Mohd. Nazri bin Jahuri another employee of the Company and prior to that meeting Loh had offered him to lead the in-house union that was being established by the Company as the Company had come to know of the establishment of the Union. He testified that Mohd. Nazri declined the said offer.

UW.1 testified that the Union was registered as Kesatuan Sekerja Industri Elektronik Wilayah Barat Semenanjung Malaysia on 1 December 2009 and was permitted to receive as members those workmen employed in the electronics industry located in the States of Selangor, Wilayah Persekutuan and Perak. It was his evidence that he was aware that the Union submitted a claim for recognition on 8 January 2010 to the Company. He testified that the Company refused to recognise the Union. He testified that the Company sometime in March 2010 arranged for the members of the Joint Consultative Committee (JCC) in the Company to attend a seminar on the setting up of an in-house union conducted by an Official from the Malaysian Federation of Employers at Cyberview Resort & Spa. It was his evidence that the JCC members who attended were advised to join the in-house union and Siti Jumiah Md. Ful and Roziah bt. Karim who attended the said seminar were encouraged by Zulkifly Abdul Rahman and Loh to lead the in-house union. He testified that under the guidance and influence of Loh and/or Zulkifly Abdul Rahman, Siti Jumiah Md. Ful, Roziah bt. Karim, Zakaria bin Deraman, Nurul Azira bt. Abd. Rahman and Julaidah bt. Pardi who were the principal pro-tem committee officials took steps to for the formation of an in-house union in the Company.

It was his evidence that he was informed by Wan Noorulazhar that sometime in May 2010 Loh met him again and offered him the post of president of the in-house union and to send him for a course on collective agreements and requested him to encourage other employees to join the in-house union. He testified that when Wan Noorulazhar refused and because he did not want to cooperate with the management he was told that his future the Company was bleak and that he was at the risk of being dismissed. It was UW.1's evidence that Wan Noorulazhar was informed by his immediate superior Sundramorgan on several occasions that he had no future in the Company including promotions as the HR Department will pressure him to resign and if those efforts fail he will be dismissed for whatever reasons. It was his testimony that Wan Noorulazhar was moved from his normal work and shift and placed in cold storage only to perform task that was below his job grade as a chargeman and his movements were closely monitored by the HR Department even by the installation of CCTV.

UW.1 further testified that in July 2010 Romanza bin Ramli who was a shop steward in the Union and employed as a Senior Technician in the Company was approached by Loh to discuss with the other shop stewards to request the Union to withdraw its claim for recognition and to replace the Union to enable the in-house union to secure recognition from the Company. He said that in exchange Romanza was offered the authority of appointing anyone in the Company to be the leadership with him in the in-house union. He testified that sometime in August 2010 Mohd. Saizol bin Othman a colleague of Wan Noorulazhar was approached by the new Manager of FMD Department and told not to associate with Wan Noorulazhar and the Union and to only join the in-house union. He said that sometime in January 2011 Wan Noorulazhar was asked by Loh again to withdraw the Union's claim for recognition and stating that it was easier for an in-house union to obtain recognition. He said that sometime in February 2011 the new Manager of FMD Department asked Wan Noorulazhar to withdraw the Union's claim for recognition and if he did so there will be no more harassment discrimination in any form or victimisation on him. He testified that Wan Noorulazhar declined the offer.

UW.1 further testified that sometime in April 2011 the Company paid out incentives to certain categories of the employees but not to the active shop stewards of the Union and 1 Exco Member. He said Wan Noorulazhar was paid 6% out of a maximum of 12%. He testified that Wan Noorulazhar was denied promotion and was dismissed from the Company on 26 August 2011 after a domestic inquiry found him guilty of misconduct that was without basis.

It was UW.1 testimony that in the light of the above mentioned actions the Company had violated sections 4(1), 4(2), 4(3) and 5(1)(d)(i) and (ii) of the Industrial Relations Act 1967 without proper cause and the fundamental rights of the Union which was seeking to improve working conditions for the workmen in the Company. It was his testimony that the Company exercised managerial powers in furtherance of unfair labour practice depriving the members of the Union of their freedom of association and their fundamental rights enshrined in the Federal Constitution. He said that despite several letters by the pro-tem committee of the in-house union the Director-General of Trade

Unions (DGTU) had refused to register the in-house union and the pro-tem committee of the in-house union initiated judicial review proceedings at the High Court against the decision of the DGTU to register the said in-house union and to the Court of Appeal as the High Court had dismissed their application. It was his evidence that the appeal was dismissed by the Court of Appeal as well.

UW.1 testified that on 6 September 2011 the Union sought recognition from the Company again and the Company declined to accord recognition. He said that the Union reported the matter to the Director-General of Industrial Relations and also complained that the Company had breached sections 4(1), 4(2), 4(3) and 5(1) (d)(i) and (ii) of the Industrial Relations Act 1967. He testified that pursuant to section 9 of the Industrial Relations Act 1967 a secret ballot was carried out and it showed that 72.69% of the workmen employed by the Company were members of the Union and that the Union had thus established the requirements to be accorded recognition. It was his testimony that the Company filed an application for judicial review at the High Court dissatisfied with the Minister of Human Resources order recognising the Union.

It was his evidence when cross-examined that he had no personal knowledge of the incidents and facts he narrated in Court and that what he testified was based on what was told to him by Wan Noorulazhar and other employees of the Company.

UW.2 the Union's second witness testified that he was the president of the Union. He testified that the Union was registered on 11 February 2009 and that its Secretary-General was UW.1. It was his evidence that vide the its letter dated 16 February 2012 the Union complained about the activities of the Company which were in violation of sections 4(1), 4(2), 4(3) and 5(1)(d)(i) and (ii) of the Industrial Relations Act 1967. He testified that in early November 2009 he was asked by Goh Kwang Whung the Company's Plant Director (Goh) about the developments of the Union and had asked him to seek advise from Zulkifly Abdul Rahman (Zulkifly). He said that he was asked by Goh to not spread news about the Union among its employees as the Company intended to set up an in-house union and asked him to work with Zulkifly in the setting up of the in-house union. He said that he told Goh that it was a worker's right to form an Union and

that he cannot be influenced by the Company. He testified that he was told by Goh then to concentrate on his work so as to preserve his position in the Company. He further testified that on 12 November 2009 the Senior Manager in the Human Resource Department, Loh telephoned Mohd. Nazri bin Jahuri offering him membership in the in-house union that the Company was intending to set up. He said that at 7.55 pm that sameday Loh met Mohd. Nazri and during this meeting he rejected Loh's offer.

UW.2 testified further that on 8 January 2010 he signed Form A on behalf of the Union seeking recognition of the Union from the Company. He testified that Loh vide his letter dated 8 February 2010 refused to accord recognition to the Union. He testified that in the middle of May 2010 the Company organised a seminar for employees who were members of the JCC at Cyberview Resort & Spa at Cyberjaya. He testified that the Company invited an official from Malaysian Federation of Employers to give a briefing to them on the formation of an in-house union. It was his evidence that Mohd. Ayob was one of the attendees at the said seminar together with Siti Jumiah bt. Md. Ful and Roziah bt.

Karim who were involved in applying for the registration of the in-house union. It was his evidence that Loh met him in may 2010 at the Factory Maintenance Department (FMD). He said that he was advised by Loh to think hard about his future in the Company and was asked to withdraw as President of the Union and to take up membership in the in-house union that was to be formed. He said that Loh offered him to be the President of the said in-house union and to send him for a course in collective agreements. He testified that he was asked to invite his friends to follow him as well. He said that he again turned down the offer and requested Loh to respect the workers' rights. UW.2 testified that he was taken a back when Loh told him that his future in the Company looked bleak and that he was at the risk of being dismissed. UW.2 further testified that Loh told him that applying for recognition of the Union was an exercise in vain and that Zulkifly was close to the officer at JPP Putrajaya.

UW.2 testified that he was often told by his immediate supervisor, Sundramogan a/l Murugan that he had no future in the Company and that he will be harassed by the Company and will be dismissed if he himself had not resigned. He testified that his promotion was frozen whilst his colleague Muhammad Suhaimi bin Dollah who was in the grade as him was given Certificate A4 and finished his course at ILSAS Bangi later than him. He testified that he was not given specific tasks as he was given prior to him being involved in the Union. He said that he was only asked to do some odd jobs and assist the other chargemen. He said that he was no longer placed on shift duties but was told to commence normal working hours by the Company. It was his evidence that the Company installed CCTV cameras just next to his office as if they wanted to monitor his movements and to scare other employees to wanted to talk to him. He said that he was informed by Sundramorgan that the CCTV cameras was to monitor him.

UW.2 testified further that Romanza bin Ramli a Technician in the Company and 1 of the shop stewards of the Union was visited by Loh who asked him to discuss with the Union to withdraw its claim for recognition and to replace it with the in-house union. He said that Loh promised him that if he and the other shop stewards agreed to his request they could determine who could lead the in-house union that was to be set up. He testified that Loh informed Romanza that their Union will never get the recognition as they were working close with the JPP and that until Loh retires the Union will never get the recognition sought. It was his evidence that because Romanza did not give Loh a reply he was transferred out. He testified that Romanza was discriminated against by the Company and his movements were monitored.

It was his evidence that in July 2010 his new Department Manager/General Manager Vijendran a/l Seevaratnam met him and discussed his future in the Company with him. He testified that he was given a choice that if he continued to be active in the Union his had no future in the Company and if he choice to be a part of the in-house union his future in the Company would be bright. He said that he was asked to think about his family if he was to be dismissed.

UW.2 testified that his colleague, Mohd. Saizol bin Othman was told by Vijendran sometime in August 2010 not to participate in the Union and to become a member of the in-house union. He said that Mohd. Saizol was told not to follow him as he had no future in the Company. It was his evidence that throughout the month of January 2011, Loh telephoned him asking him to not be active in the Union as the Union's claim for recognition will not succeed. He said that he was asked by Loh to cancel the Union's application for recognition and to give up my position in the Union and to follow the Company's decision to set up the in-house union. He said that he was ahin asked by Vijendran to cancel the Union's claim for recognition and to assist the Company set up the in-house union. It was his evidence that in April 2011 he and other shop stewards were discriminated against by the Company when special incentive payments were paid out. It was his evidence that he was paid 6% out of a maximum of 12% whist his colleagues were paid none. He said that in July 2011 he was again discriminated against when the Company denied him a promotion when the other chargemen received theirs. It was his evidence that on 1 August 2011 Sundramorgan told him that he was to be

dismissed at anytime and therefore asked him to hand over his work. It was his testimony that he was eventually dismissed on 26 August 2011.

UW.2 testified that he was dismissed for not cooperating with the Company and failing to withdraw from the Union. He said that the Company's intention was to paralyse the Union and to threaten other members of the Union so that they too would think of leaving the Union.

It was the evidence of UW.3, Technical Assistance with the Company, that on 12 November 2009 he met Loh and rejected his earlier offer to him to become a member of the in-house union that was to be set up. He said that Loh had informed him that the Company was aware of the Unions's move to obtain recognition and the Company was intending to set up an in-house union. It was his evidence that he recorded the said conversation with his handphone but could not reproduce the same as it was done some 5 years ago and that his handphone no longer functions.

UW.4, a Technical Assistant with the Company, testified that he was aware that the JCC was set up in the Company and that he was involved in it. It was his testimony that he attended the seminar that was sponsored by the Company at Cyberview Resort & Spa in 2010 together with, inter alia, Puan Siti Jumiah another member of the JCC. He testified that he informed UW.2 what was discussed at the said seminar viz that the representative from Malaysian Employers Federation and the Company's representatives present at the said seminar attempted to influence them to join the in-house union. It was his evidence that Loh and Zulkifly Abdul Rahman both from the Human Resource Department, were at the said seminar. He testified that they were told about the advantages of joining an in-house union and the disadvantages of joining the Union.

UW.5, a senior Technician with the Company at the material time, testified that he had informed UW.2 that Loh had spoken to him in 2010 asking him to ask the Union to withdraw or cancel its claim for recognition so that the in-house union could be set up. He testified that Loh had told him to treat this matter seriously

and if he did then he and his other shop steward could decide who should lead and be shop steward in the in-house union that was to be set up. He said that Loh said that if they did not compromise it will be a loss because the Union will never obtain its recognition as the officials of the JPP were working with the Company to hinder this. It was his evidence that because he did not give Loh a reply to this he was transferred out without prior discussion or his consent to another department. He said that he was not allowed to do overtime and his movements were monitored by the Company closely. He said that he felt pressured and was told by his superior that this was the Company's orders that he be monitored.

The last witness of the Union, UW.6, a Technician with the Company at the material time, testified that he had informed UW.2 that in August 2010 Vijendran his supervisor had asked him not to participate in the Union and to join the in-house union instead. He testified that Vijendran had also told him that he was to not follow UW.2 a UW.2 had no future in the Company as he refuses

to give up his activities of the Union and join the in-house union that is sponsored by the Company.

The Company's

The Company's 1st witness, COW.1, the Industrial Relations and General Administration Manager in the Human Resources and General Administration Department of the Company, testified that the Union served the Company with their claim for recognition on 6 September 2011. He testified that the accusations against the Company were baseless and denied them. He testified that the Company had good relationship with its workers and that they had in existence a JCC comprising of 6 management representative and 16 employee representative from each group of employees and shifts. It was his evidence that on 8 November 2009 he received from Siti Jumiah binti Md. Ful who was the pro-tem secretary stating the intention to establish an in-house union and asked for the Company's consent to use its address as their correspondence address. He testified that this is all he knew. He testified that he had no knowledge of the fact that Siti Jumiah challenged the DGTU's refusal to register the said in-house union and had filed

the application in Court. COW.1 testified that he was not aware that the in-house union had filed their application for registration as he was not provided with or given a copy of the in-house union's said application. It was his evidence that he did not know who the members of the pro-tem committee members were save for Siti Jumiah.

It was his testimony that he did not know when the regional Union had submitted its application for registration. He said that he only became aware of the existence of the Regional Union when a claim for recognition was served on the Company on 18 January 2010 and that UW.2 had become its President. He testified that this claim by the Union for recognition was declared null and void by the Industrial Relations Department as it did not comply with the then newly introduced Industrial Relations Regulations 2009. It was his evidence that the Regional Union subsequently made another claim for recognition on 6 September 2011.

He denied that he met Mohd. Nazri bin Jahuri and that the Company did not establish the in-house union. It was his evidence that the Seminar arranged by the Company Cyberview was to educate the JCC members on the relevant laws on Trade Unionism and not on the formation of in-house union. He testified that the accusations against him that he met Wan Noorulazhar in May 2010 offering him the post of president of the in-house union was false as the post had been taken up by Zakaria bin Deraman. He denied that he made any threats to Wan Noorulazhar as regards his future in the Company. He further denied that he met Romanza in July 2010 and asking him to request the other shop stewards to request that the Union withdrew their claim for recognition so that the in-house union could be recognised. He testified that he did not offer Romanza to lead the in-house union. He also denied that he met Wan Noorulazhar in January 2011 asking him to withdraw the Union's claim for recognition as there was no pending claim for recognition in the first place. He testified that active shop stewards and Wan Noorulazhar were not discriminated against when incentive payments were paid out by the Company. It was his testimony that Wan Noorulazhar was in

fact paid the incentive. COW.1 testified further that Wan Noorulazhar was dismissed for gross misconduct as he had made false and irresponsible statements on social media against the Company so as to incite employees to go against the Company.

When he was cross-examined COW.1 testified that efforts were made in 2010 to establish an in-house union and that the Company was aware by March 2010 that the Regional Union for electronics Workmen had been established. He agreed when the names of some of the attendees at the Seminar arranged by the Company at Cyberview were members of the Pro-tem Committee of the in-house union. He denied however when it was put to him that the said seminar was arranged for them. When it was read out from the Statement In Reply and put to him by the Union's Counsel COW.1 agreed that it was the Company's intention to form the in-house union. He agreed when it was put to him that the Company refused to recognised the Union when the claim was submitted to him and that by a secret ballot carried by the Industrial Relations Department 72.69% of eligible workers from

the Company voted in favour of the Union and the Honourable Minister directed the Company to accord recognition to it.

It was COW.1's testimony that he was seen with some of the pro-tem committee members at the Industrial Relations Department by UW.1 and agreed that he walked out quickly when he was seen. He denied leveling threats at Wan Noorulazhar or meeting him in 2010 and 2011. He denied that he told Wan Noorulazhar, Industrial Relations Officer, that he knew Kamal Pardi and that he will delay the recognition sought by the regional Union. He agreed that this Kamal Pardi was the signatory to the official letter from the Industrial Relations Department stating that the Union's claim for recognition was defective. When asked about the installation of the CCTVs in the Company he said that they were installed way before 2009 to safeguard the Company's precious metal and not to monitor Wan Noorulazhar's movements. He testified that he was not aware that Wan Noorulazhar was overlooked for promotion. He disagreed that the Company had taken steps to bust the Union in contravention of the Federal Constitution.

The Company's 2nd witness, COW.2, testified that UW.2 was given the incentive that meant that his salary was increased by 6%. He testified that some of the employees under him were not given the incentive by the Company as they were under-performers. He testified that he did not know whether these named employees were shop stewards and members of the regional Union. It was his testimony that the said incentive was given to those who performed well and had nothing to do with whether they were members or active in the Union. He testified that he did not know who the Union's shop stewards were.

It was his evidence when cross-examined that he was not involved in the incentive pay out to UW.2. When asked he said that he had no documents before the Court to show that the named individuals who did not receive the incentive were poor performers.

COW.3 the Company's 3rd witness denied that he advised UW.2 to not tell the other employees of the Company about the formation of the Union and that at anytime the Human Resources

Department could take action against him. In cross-examination he testified that he attended the seminar at the Cyberview on 16 March 2010. It was his evidence that the seminar was about understanding Industrial Relations. He denied when it was put to him that it was also about formation of an in-house union. He maintained when cross-examined by the Union's Counsel that he did not speak to UW.2 about not talking to his colleagues about Union issues.

COW.4, the General Manager cum Department Manager of the Factory Maintenance Department (FMD) at the material time testified that he did not meet UW.2 as alleged by him and gave him a choice of continuing as the President of the Union in which case he would not have a future with the Company or assist and cooperate with the Company in the formation of the in-house union and would have then a bright future. He denied that he told UW.2 that Encik Zulkifly Abdul Rahman would guarantee his future would be bright in the Company and that these were the instructions and decision of the Management. He testified that he did not tell UW.2 to think long and hard whether he wanted to

continue his employment with the Company or not and to think about his wife and children and the consequences if he lost his job. He testified that he did not tell UW.2 that he could talk this out with Encik Zulkifly Abdul Rahman. It was his evidence that he did not meet UW.2 sometime in February 2011 to discuss Union issues or having requested UW.2 to take the win situation by canceling the registration of the Union and to go with the Company on the establishment of the in-house union. He testified that he did not tell UW.2 that if he did this the victimisation and the freezing of his promotion will cease. COW.4 testified that he did not meet UW.2 in April 2011 and denied telling him that some employees and those active in the Union will not be eligible for the special incentive given by the Company asking him again to choose whether he will follow the Company and withdraw as President of the Union and if he did so he could be given up to 12% as a special incentive.

COW.4 further testified that he did not meet Mohd. Saizol bin Othman and told him not to join the Union but to join the in-house union approved by the Company. He denied that he had told him that if he followed UW.2 he too would have no future in the Company.

It was his evidence when cross-examined by the Union's Counsel that he could not remember meeting UW.2 in July 2010 but testified that he did not meet UW.2 with regards to his Union matters. It was his evidence that he did not receive any directive from COW.1 or Zulkifly to tell UW.2 and UW. 6 to remove themselves from the Union and to get involved in the in-house union. COW.4 maintained that he did not meet UW.2 in February 2011.

The Company's final witness, COW.5 testified that at the material time he was UW.2's supervisor. He denied that he had frequently told UW.2 that he had no future in the Company and the Company was victimising him so that he would made to resign on his own. He denied that he told UW.2 that if he did not deny

the Company would dismiss him on grounds of misconduct. He testified that he did not tell UW.2 that his promotions will be frozen by the Company nor did he verify that UW.2 did not get his promotion because he was the President of the Union. It was his testimony that he also did not tell UW.2 that he ought to be careful and that his movements were being watched through the CCTV and that he was not given specific work as the Company intended to kill his career in the Company. COW.5 testified that he did not meet UW.2 on 1 August 2011 or tell him that not to say anything to anyone but to be ready to be dismissed at anytime and that it was the decision of the Human Resources Department of the Company.

It was his evidence when cross-examined that he was aware that the regional Union was set up and that the Company was not happy with it operating within its premises. He admitted that he was aware that UW.2 was the President of the said regional Union. He denied when it was put to him that he told UW.2 not to be involved in the said Union.

The Court's Evaluation

The Honourable Minister has referred this dispute involving the Union and the Company as a case of “Union busting”. The term “Union busting” as we know it to be is a term used to describe a wide range of activities undertaken to disrupt or prevent the formation of a Trade Union. Union busting tactics can refer to both legal and illegal activities and can range anywhere from subtle to violent. It is trite enshrined in the Federal Constitution that the right to form or join a Union. It includes, inter alia the right to help organise, to join and to support a Union of your choosing. It includes also and is not limited to such activities as talking to other employees about the Union, passing out literature and one cannot be punished for his own Union activity. Most employers do not want their employees to be in a Union. Think about it; employers go from having to share power with workers who stand together. From their perspective organised workers will cost more money and require that they follow a legally binding contract when before they could do it however they wanted. So when employees show interest in organising a Union the Company responds with an anti-Union program. These Union-avoidance

programs serve to impede Union organising. Sometimes they are legal restrictions on specific actions. Union-busting tactics range from urging employees to try and influence others to oppose Union and tantamounts to a violation of law protecting the right to organise a Union. Often the employer may resort to threatening supporters through third party and taking of actions that adversely affect an employee's job because of Union activities. It may also consists in discriminating against Union supporters when assigning desirable work or overtime work. It is observed that a disturbing Union-busting trend is emerging whereby employers have been terminating, suspending and taking disciplinary actions against Trade Union leaders and members and workers involved in legitimate Trade Union and workers activities. Over the years we hear and see workers being terminated and/or disciplined by reason of their involvement in Union activities. Workers are compelled to attend one-on-one sessions with supervisors where workers are often harassed because of their involvement in Union campaigns.

It is said that a campaign against a Union is an assault on individuals and a war on truth. As such it is a war without honour. The only way to bust a Union is to lie, distort, manipulate, threaten and always, always attack. Employers adopt Union busting tactics that include coercion, intimidation and retaliation to discourage from joining Union.

Our laws are well-defined within the Industrial Relations Act 1967 (IR Act) and Trade Union Act 1959. **Section 5** of the IR Act places a prohibition on employers and their Trade Unions in respect of certain acts. The section inter alia protects the termination, taking of disciplinary action or discriminating against Union members. **Section 59** of the IR Act states amongst other things that an employer cannot threaten an employee's position for his involvement in a Trade Union whilst **section 4** of the IR Act which shall be discussed in greater detail hereinafter prohibits the interference by the employer of a workman's rights to form and assist in the formation of and joining of a Trade Union and to participate in its lawful activities.

The Union's complaint in this case is that the Company has by its actions contravened section 4(1) and (3) and sections 5(1)(d) (i) and (ii) of the IR Act. They complain that the Company has engaged in Union-busting actions. The burden is on the Union to prove that the Company has indeed violated section 4 and (3) and sections 5(1)(d)(i) and (ii) of the IR Act. Has it discharged its burden on a balance of probabilities?

Section 4(1)

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

It is trite that the burden is on the Union to prove there was interference, restraint, or coercion from the Company against the workmen's right to form and assist in the formation of and joining a Trade Union and participating in its lawful activities. The Union narrated through its witnesses a chronology of events that was put in place by the Company through its officers after the

establishment of the Electronic Industry Employees' Union-Western Region Peninsular Malaysia which is the Union in this matter. This was approved sometime in May 2009 by the Government of Malaysia and a pro-tem committee according to the evidence of UW.1 was set up for the registration of a Union of those workmen employed in the electronics industry and UW.2 was elected as its President on 31 July 2009. These facts are not in dispute.

It is alleged that UW.2 was asked by Goh Kwang Whung sometime in 2009 not to promote the establishment of a national/regional wide Union for the electronics industry and was told to concentrate on his work to safeguard his future in the Company. Unfortunately Goh Kwang Whung did not testify on behalf of the Company. His evidence to this extent was not rebutted by the Company. COW.1 denied the allegations that he telephoned UW.3 prior to 12 November 2009 offering him to lead the in-house union that was formed. COW.1 denied that he met UW. 4 in July 2010 as alleged requesting him and other shop stewards to call for the Union's withdrawal of its claim for

recognition so as to enable the in-house union to secure registration. COW.1 denied telling him that he could appoint anyone to be in leadership with him in the in-house union. COW.1 also denied that he met UW.2 in January 2011 where it is alleged that he requested him to withdraw the Union's claim for recognition and saying it was easier to register an in-house union. COW. 4 denied that he approached UW. 6 telling him that he was not to associate himself with UW.2 and the Union and to join the in-house union.

The Union alleged that the active shop stewards and UW.2 were not given special incentives that was given to the other workmen by the Company. This was denied by the Company. The Company adduced evidence to show that UW.1 received a special incentive of 6% raise in his salary, and that this was handled by the Human Resources Department and was based on performance as per COW.2's evidence. COW.2 also said that he did not know who the shop stewards were.

The Union further alleges that the seminar organized by the Company at Cyberview Resort and Spa in March 2010 was in essence for the leadership of the in-house union to educate them on how to set it up. This was refuted by the Company's witness during the Hearing.

Likewise the allegations that COW.3, COW.4 and COW.5 met with UW.2 at different times and had made specific requests and representations to him about his involvement in the Union and his future in the Company are denied by them. Supervisors are usually the front line troops against the Union delivering informal chats and speeches.

This then is the scenario and the difficulty that the Court faces. The chronology of events that the Union alleges took place were designed to interfere, with, restrain or coerce UW.2 and the remaining the other witnesses who testified from joining the Union and/or participating in the lawful activities of the Union. These actions if established by the Union will tantamount to a clear-cut violation of section 4(1) by the Company. Taking into

consideration the other acts of the Company which I shall deal with a little later as we consider the other complains of the Union, the Court is of the view that the Company's witnesses, all still serving in the employ of the Company, are not to be believed. To state it slightly differently the Court is satisfied with the veracity of the Union's witnesses and their evidence some of whom are still employed by the Company and have risked their jobs to testify against the Company. The Court is aware that in its Statement In Reply the Company had pleaded that after becoming aware that the unionization of the electronics industry on a regional basis had been approved by the Government of Malaysia it had formed the intention of forming an in-house union and had discussions with the JCC within the Company. The JCC was described as a body which served as the bridge between the employees and the Management. This pleaded fact does not augur well for the Company and throws open for interpretation whether from thence onwards they were going to indulge in any Union-avoidance activities and the complains of what the management did after that, leveled by the Union, perhaps is suggestive of this. UW.2 was terminated by the Company subsequently. This is manifestly

a Union-busting tactic and a violation of **section 5(I)(d) of the IR Act 1967** that protects the termination, disciplinary action or discrimination against Union members if there is no just cause for his termination. Weighing them side by side each other is enough for the Court to conclude that certain findings of fact that the Company had indulged in Union-busting tactics and has violated section 4(1) of the IR Act 1967 which prohibits the interference, restrain or coercion of any workman in participating in the lawful activities of a Trade Union. The Union's Counsel conceded that the Union's complaint was limited to this limb of section 4(I). Hence it is the Court's finding that on the evidence before it the Company has by its activities through its troopers that is COW.1, COW.3, COW.4 and COW.5 indulged in Union-avoidance tactics violating section 4(1) of the IRA 1967. The Court is satisfied based on the evidence before it that the Company embarked on a planned course of action to stop UW.2 and the other workers testifying at the Hearing from establishing a Union already in the making. This is why they refused to grant recognition to the Union when they first submitted a claim for recognition from the Company vide Form A on 18 January 2010. The timing of the

seminar that was held at Cyberview Resort and Spa in March 2010 leaves a lot to be said as to the motives of the Company in organising the same.

Section 4(3)

This section states that no employer amongst others shall support any Trade Union of workmen by financial or other means with the object of placing it under the control or influence of it. The Union complains that the Company has supported the formation of the in-house union in violation of this section. The Union witnesses testified that the Company organized a seminar at Cyberview Resort & Spa in March 2010 for the said JCC. The Union witnesses testified that this seminar was for the leadership of the in-house union to educate them on how to set up the in-house union. The Union witnesses showed that some of the attendees of this seminar were members of the pro-tem committee of the in-house union to be set up. This is too much of a coincidence I must say and coupled with their averment at paragraph 6 of their Statement In Reply in that the Company had already formed that intention of forming an in-house union

following the announcement by the Government of Malaysia approving the unionisation of electronics industry on a regional basis the only inference that the Court can draw from its actions is that the Company supported the very least the formation of the in-house union. The Union witnesses testified that these attendees at the said seminar who were the pro-tem committee members of the in-house union went on to make an application for judicial review at the High Court when the registration of the in-house union was refused by the Director-General of Trade Unions. This is the Court's findings based on the evidence before it and also being told that COW.1 was seen with the said pro-tem committee members (pro-tem committee was formed on 7 November 2009) of the in-house union at the Trade Union Office. Again it is too much of a coincidence that COW.1 is seen with these pro-tem committee members of the in-house union and his explanation that he happened to be there and was guiding them is rejected by the Court as the Court finds it to be implausible. Given the facts and evidence it would not be wrong for the Court to conclude that the COW.1 was supporting the formation of the in-house union and this is in violation of section 4(3). The word “support”

encompasses the giving of assistance, encouragement or approval to or to be actively interested in. Although their claim for recognition was rejected subsequently the circumstantial evidence surrounding the facts of this case points to the Company having supported and encouraged the formation of the in-house union. This is in gross violation of section 4(3).

Section 5(1)(d)(i) and (ii)

No employer or Trade Union of employers and no person acting on behalf of an employer or such Trade Union shall:

“(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-

- (1) is or proposes to become or seeks to become, or seeks to persuade any other person to become a member or officer of a Trade Union: or*
- (2) participates in the promotion, formation or activities of a Trade Union”.*

The Union witness, UW.2 testified that COW.1 met him in May 2010 and had told him that if he did not cooperate his future looked bleak and that he was at the risk of being dismissed. UW.2 testified that COW.5, his superior, on several occasions had intimated to him that he had no future in the Company including promotions as the HR Department of the Company will pressure him to resign and if this fail he will be dismissed by the Company. UW.2 further testified that in February 2011 he met COW.4 who requested him to cooperate with the HR Department for a win-win situation by withdrawing the claim for recognition by the Union and that there would be no more harassment or victimization against him. All these allegations were denied by them. The evidence bear out that UW.2 was by-passed for promotion as a Chargeman in his department and the special incentive paid out to him was 6% when the maximum received by other workers were 12%. His superiors testifying at the Hearing did not go on to talk about his performance as a Chargeman in the Company. In fact the Company did not lead evidence to establish him as having been a bad performer during his stay with the Company at the

material time. The Company did not adduce evidence or defend UW.2's claim against them that he was also sidelined, his shift taken away from him which shows that he was victimized since 2009 that is since his appointment as President of the said Union. This is indeed an alteration of his position as a Chargeman to his prejudice. The Company did not deny this and offered no explanation as to why they had embarked on this course of action against UW.2. The dismissal of UW.2 that followed suit thereafter has become the subject-matter of another action pending at the Industrial Court case number 12/4-83/12 where the Company carries the burden of establishing that he (UW.2) was dismissed for a just cause or excuse. I shall therefore stay clear of passing any comments on this lest I prejudice its outcome. Suffices to say that on the evidence before it is the Court's findings that the Company has violated section 5(1)(d) in that it has carried out acts to injure or threaten to injure or alter or threaten to alter UW.2 by reason that he has been active as a President and member of the Union applying for its recognition and participating in its lawful activities.

Conclusion

The Court has made its ruling in accordance with equity, good conscience and having regard to the substantial merits of the case. The Court notes that employers are lawfully bound to respect a worker's right to engage in unionism and to participate in the lawful activities of a Union. The IR Act further makes the employer morally and ethically constrained to do so. **Article 8 of the Code of Conduct for Industrial Harmony** dated 9 February 1975 unequivocally declares, inter alia, that employers agree not to support or encourage any unfair labour practises such as interfering with the affairs of a Trade Union and the right of workers to organize, discriminate, restrain, or coerce against any worker because of legitimate Trade Union activities and abuse authority in any form.

The protection of the right of the employees to unionise for their common good is stated in section 4(1) of the IR Act 1967. On the evidence, facts and its pleaded case, the Court finds that the Company has violated the sections as pleaded by the Union save for section 4(2) which the Union had withdrawn during its submissions in Court. This is the Court's final order.

HANDED DOWN AND DATED THIS 8 DAY OF MARCH 2016

Signed

**(DATO' MARY SHAKILA G. AZARIAH)
CHAIRMAN
INDUSTRIAL COURT, MALAYSIA
KUALA LUMPUR**