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High Court Clarifies Question of Chairman's Jurisdiction to Hand Down Award

Ahmad Khushairi Mohamed Nasser v Bank Kerjasama Rakyat Malaysia Berhad

(Penang High Court Application for Judicial Review No.: PA-25-80-10/2023)

Last Tuesday (26.3.2024), the High Court held that an incumbent chairman, who did not preside over a single day of trial of an industrial dispute, is nevertheless seized with jurisdiction to decide and hand down the final award for the matter.

The employee had filed a judicial review application to challenge, apart from the substantive Award itself, the jurisdiction of the new Industrial Court chairman, who replaced her predecessor. The preceding chairman had presided over the full trial of the matter but was transferred to another government agency before she could hand down the final Award.

The employee argued in the High Court that the incumbent chairman, who did not have the benefit of seeing, hearing, and observing the witnesses, would be handicapped in properly evaluating the nuances of the case before delivering her Award. It was also contended that there was a breach of natural justice by the Industrial Court in not calling upon parties to submit orally before the incumbent chairman to highlight particular issues, evidence, and/or demeanour of the witnesses, which were allegedly not evident from just the cold pages of the documents before her.

Section 23(6) IRA: A Purposive Approach

The High Court first addressed the employee's argument that, under section 23(6) of the Industrial Relations Act 1967 ("IRA")¹, the word "and"* connotes that an award should only be handed down by a chairman who had also completed the hearing of the case. In this regard, the High Court disagreed with the narrow interpretation of the section and held that completing the hearing would also entail perusing the pleadings, documents, and notes of proceedings before handing down the final award.

Pertaining the employee's contention that the Industrial Court had breached natural justice by failing to ask for consent for the Award to be handed down by a new chairman or to call parties to submit orally before the new chairman, the learned judge held that there is nothing in the IRA which mandates the Industrial Court to do so. Furthermore, there was no evidence that the incumbent chairman did not understand the facts of the case in arriving at her decision. On the contrary, she was able to appreciate the facts and evidence before her as reflected in the Award. Thus, it cannot be said that any prejudice was caused to the employee or that an error of law was committed by the chairman.

The High Court adopted the purposive approach to section 23(6), which was highlighted by Justice Hadhariah Ismail in the landmark case of ***Bax Global (Malaysia) Sdn Bhd v Sukhdev Singh Pritam Singh & Anor***². In *Bax Global*, it was highlighted that the section is intended to ensure the speedy disposal of industrial disputes, and to read it otherwise would be contrary to the intention of Parliament when enacting the IRA.

The High Court had further addressed the fact that parties were made aware at a Mention that the preceding chairman had been transferred to another government agency. However, the employee did not proceed to write to request to appear before the new chairman to present oral submissions prior to handing down of the Award.

In this regard, it was held that it cannot be said the Industrial Court had breached the principles of natural justice, as it was incumbent on the employee to apply to be heard before the new Chairman, should he wish to do so (since this is not mandated under the IRA). If he had done so, and the Industrial Court had rejected such request, then this would be a different matter altogether.

Dismissal with Just Cause - Higher Standard Expected in the Banking Industry

After addressing the preliminary issue of jurisdiction, the High Court went on to consider the employee's substantive challenge against the

¹ "During the absence of or inability to act from illness or any other cause by the Chairman, the Yang di-Pertuan Agong may appoint another person to exercise the powers or perform the functions of the Chairman and, notwithstanding that the Chairman may have resumed the duties of his office, the person so appointed may continue to exercise the powers or perform the functions for the purpose of completing the hearing of *and determining any trade dispute or matter commenced before him."

² [2011] 2 CLJ 534

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findings of the Industrial Court, having argued that the Industrial Court had committed various errors of law in arriving at the said Award.

Last year³, the Industrial Court upheld the dismissal of the employee, upon finding that he had acted in breach of the Bank's vehicle financing policies by instructing his subordinates to fabricate financing documents to conceal the breakdown of additional accessories and costs, which were not allowed to be financed, and subsequently approved the disbursements of loans based on the said fabricated documents.

The High Court, in deciding that the Award was not tainted with illegality, irrationality, or procedural impropriety, reaffirmed the findings of the Industrial Court as follows:

- a) On the employee's complaint that there were flaws in the investigation conducted against him and at the domestic inquiry, it is settled law that such flaws are curable by a hearing held *de novo* at the Industrial Court itself;
- b) The Industrial Court chairman had undertaken the exercise of evaluating the evidence before her and held that the misconducts the employee was accused of were proven based on documentary evidence and corroborating oral testimonies of his subordinates, who were viewed as credible witnesses despite the employee contending otherwise;
- c) The employee, as the Head at one of the Bank's Auto Finance Centres, would be fully aware of the ongoings there and should not be allowed to point fingers at his subordinates at a whim; and
- d) On the punishment of dismissal, it cannot be said that it was disproportionate given the high-ranking position of the employee and given the settled principle of industrial jurisprudence that employees in the banking industry are held to a higher standard of accountability and integrity.

The High Court acknowledged that the Industrial Court's Award was arrived at upon a scrutiny of the documents and, more importantly, the oral testimony of the witnesses. Based on trite principles of judicial review, such findings of fact based on the credibility of witnesses are not susceptible to review by the High Court.

The detailed written grounds of judgment of the High Court will be published in due course. The Industrial Court Award may be accessed [here](#).

If you have any queries, kindly contact Partner, [Nurul Aisyah Hassan \(nah@lh-ag.com\)](#), who successfully represented the Bank.

³ *Ahmad Khushairi Mohamed Nasser v Bank Kerjasama Rakyat Malaysia Berhad (Award No.: 1810/2023)*