

**DALAM MAHKAMAH RAYUAN DI MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO. C-01-51-2008**

Antara

Holiday Villages of Malaysia Sdn Bhd .. Perayu

Dan

- 1. Y.B. Menteri Sumber Manusia**
- 2. Kesatuan Kebangsaan Pekerja-Pekerja
Hotel, Bar dan Restoran Semenanjung
Malaysia .. Responden-Responden**

**(Dalam perkara mengenai Notis Pendengaran Permohonan Bagi
Semakan Kehakiman bertarikh 6 haribulan Oktober 2004
(No. Kandungan 11) dalam Usul Pemula No. 25-9-1998
Dalam Mahkamah Tinggi Malaya di Kuantan**

**Dalam perkara Akta-Akta Perhubungan
Perindustrian, 1967;**

Dan

**Dalam perkara Kaedah-Kaedah
Mahkamah Tinggi 1980;**

Dan

**Dalam perkara keputusan Yang
Berhormat Menteri Sumber Manusia
bertarikh 1hb. Jun 1998;**

Antara

Holiday Villages of Malaysia Sdn Bhd

.. Pemohon

Dan

- 1. Y.B. Menteri Sumber Manusia**
- 2. Kesatuan Kebangsaan Pekerja-Pekerja
Hotel, Bar dan Restoran Semenanjung
Malaysia**

Responden-Responden)

**CORAM: SURIYADI HALIM OMAR, JCA
 WAN ADNAN MUHAMAD, JCA
 RAMLY ALI, JCA**

RAMLY ALI, JCA

(DELIVERING JUDGMENT OF THE COURT)

1. This is an appeal by Holiday Villages of Malaysia Sdn Bhd (the Appellant) against the whole of the learned High Court judge's decision given on 6.3.2004 dismissing its application for judicial review and an order of certiorari to quash the 1st Respondent's decision made on 1.6.1998 to accord recognition to the 2nd Respondent to represent all of the

Appellant's employees, other than those employed in the managerial, executive, confidential and security capacity.

Factual Background

2. The relevant facts as enumerated in the learned judge's grounds of judgment can be summarised as follows:

(a) the Appellant, a company which owns and operate an integrated holiday village known as Club Mediterranean Cherating Resort Village, employed two categories of employees, namely, permanent and seasonal employees. The seasonal employees are employed for a maximum period of ten months from February to November in a year (whose employment will cease when the resort closes for business during the "monsoon period" (late November to January) affecting the east costs of West Malaysia. The seasonal employees may or may not be employed thereafter,

depending on various factors including whether the employees wish to be re-employed by the Appellant;

- (b) on 10.9.1997, the 2nd Respondent claimed recognition from the Appellant to represent all the Appellant's employees except those in the managerial, executive, confidential and security capacity with effect from 10.9.1997;
- (c) since there was no feedback from the Appellant, the 2nd Respondent on 10.10.1997, informed the Director General of Industrial Relations (DGIR) about the claim;
- (d) the DGIR by a letter dated 25.10.1997, requested the Appellant to submit a list of its employees as of 10.9.1997 and the 2nd Respondent to submit a list of employees who were members of the union as of the same date;

- (e) the 2nd Respondent by a letter dated 7.11.1997 complained that the Appellant has refused to continue the employment of 80 employees;
- (f) the 2nd Respondent by a letter dated 26.1.1998 informed the DGIR that the contract of employment of 86.5% of their members had come to an end around the period between 2.11.1997 to 8.11.1997 and only 13.5% continued their employment;
- (g) the Director-General of Trade Union (DGTU) by a letter dated 21.1.1998 informed both parties that membership verification will be conducted on 26.2.1998;
- (h) by a letter dated 12.3.1998, DGTU informed the DGIR that the membership verification shows 59.32% of employees are members of the union; and
- (i) by a letter dated 9.4.1998, the DGIR informed both parties of the result and accordingly the 1st Respondent accorded recognition to the 2nd Respondent.

3. Those facts are not in dispute as are evident from the various affidavits filed by the parties in the High Court.
4. The Appellant protested against the findings of the DGTU that there was at least 59.32% of the Appellant's employees were members of the 2nd Respondent at the relevant agreed cut off date i.e. 10.9.1997. These findings were upheld both by the 1st Respondent as well as by the High Court.
5. According to the Appellant, its investigation of the union membership showed less than 10% of the Appellant's permanent employees were members of the 2nd Respondent; and it was impossible that 50% of the Appellant's permanent and seasonal employees were members of the 2nd Respondent.
6. Dissatisfied with the 1st Respondent's decision the Appellant applied to the Kuantan High Court for judicial review and for on order of certiorari to quash the aforesaid decision by way of a Notice of Motion dated 16.7.1998.

7. On 6.3.2008 the High Court dismissed the Appellant's application. Subsequently the Appellant proceeded to file a notice of appeal to the Court of Appeal against the aforesaid High Court's decision.

The Role of Court in Judicial Review

8. It is trite principle that the Court does not act as an appeal court in cases of judicial review. Judicial review is concerned not with merits of a decision but with the manner in which the decision was made. Judicial review is entirely different from an ordinary appeal. It is made effective by the Court quashing an administrative decision without substituting its own decision and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer. (This was clearly explained by Lord Fraser of Tullybelton in the case of **Reg v. Entry Clearance Officer, Bombay, Ex. p. Amin [1983] 2 AC 818**. The same principle was also applied and followed in **Minister of Labour Malaysia v. Lie Seng Fatt [1990] 2 MLJ**

9; and **National Union of Hotel, Bar and Restaurant Workers v. Minister of Labour & Manpower [1980] 2 MLJ 189**).

9. In **Minister of Labour, Malaysia v. Lie Seng Fatt** (supra), the Supreme Court stressed that as long as the administrative authority concerned had exercised the discretion without improper motive, the exercise of discretion must not be interfered with, unless it can be shown that the particular authority had misdirected itself, had taken into irrelevant considerations or had not taken into consideration relevant matters or that the decision militates against the object of the statute.

10. According to Lord Diplock in the case of **Council of Civil Service Union & Ors. V. Minister for the Civil Service [1985] 4 All E.R 374 AC**, one can conveniently classify the grounds upon which administrative decision is subject to control by judicial review in three categories, namely: illegality, irrationality and procedural impropriety.

11. “Illegality” refers to a situation where the authority concerned has been guilty of an error of law in its action i.e. purporting to exercise a power it does not have. “Irrationality” refers to a situation where the authority exercises a power in so unreasonable manner (“wedgesbury unreasonableness”). 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. Lastly, “procedural impropriety” refers to a situation where there is a failure on the part of the authority to observe procedural rules that are expressly laid down in the legislature instruments by which its jurisdiction is conferred even where such failure does not involve any denial of natural justice.

12. In the present case, the issues of “illegality” and “irrationality” have not been established at all. There is no evidence to substantiate the two issue. The Court shall now consider whether the issue of “procedural impropriety” is applicable or not to the facts of the present case.

13. To establish “procedural impropriety” the Appellant must show that the procedural steps taken by the 1st Respondent in coming to his decision on 1.6. 1998 to accord recognition to the 2nd Respondent to represent all the Appellant’s employees, other than those employed in the managerial, executive, confidential and security capacity, were not in compliance with the legislative instruments expressly provided under the relevant laws.

14. The relevant provisions for the recognition of a trade union are provided for under **section 9 of the Industrial Relation Act 1967 [Act 177]** – (the IR Act).

15. **Section 9(2) of the IR Act** provides for the trade union to serve on the employer in writing a claim for recognition. **Under section 9(3)** an employer who has been served with such a claim may after 21 days from service of the claim:

- (a) accord recognition; or
 - (b) if recognition is not accorded notify the trade union concerned in writing the grounds for not according recognition; or
 - (c) apply in writing to the Director General of Industrial Relation (DGIR) to ascertain whether the workmen in respect of whom recognition is being sought are members of the trade union.
16. If the trade union received a notification under **section 9(3)(b)** of the **IR Act** or where the employer concerned fails to comply with **section 9(3) of the IR Act** the trade union may under **section 9(4)** report to the DGIR in writing.
17. **Section 9(4A) of the IR Act** provides that upon receiving an application under **section 9(3)** or a report under **section 9(4)** the DGIR is empowered to take steps or make inquiries to resolve the matter. In order to perform his function under

- section 9(4A) the DGIR** is vested with the powers to require the trade union, the employer or trade union of employees to furnish any information he deems necessary.
18. The DGIR is also given the discretion under **section 9(4B)** of the **IR Act** to refer to the Director – General of Trade Union (DGTU) for the DGTU's decision on any question of the competence of the trade union to represent any workmen in respect of whom recognition is sought.
 19. If the DGIR cannot resolve the matter pursuant to **section 9(4A) of the IR Act** he shall notify the Minister.
 20. The Minister is required by **section 9(5) of the IR Act** to give his decision either to accord recognition or otherwise.
 21. In a situation where a trade union has served a claim for recognition, the DGIR may request the DGTU to carry out a membership check in a manner prescribed by **Regulation 63, 64, 65 and 66 of the Trade Union Regulations 1959**

- (TU Regulations).** The purpose is to ascertain the percentage of workmen in respect of whom recognition is being sought; who are members of the union making the claim.
22. The DGTU may in writing notify the trade union making a claim for recognition that a membership check would be conducted either by membership verification or by secret ballot. A copy of such notification shall be sent to the employer (**Reg. 63 of the TU Regulations**).
23. Both the employer and the trade union are to assist the DGTU with information as he may require to enable the DGTU to conduct the membership check (**Reg. 64 of the TU Regulations**).
24. **Regulation 65 of the TU Regulations** prescribes the formula to ascertain the percentage of membership by way of membership verification based on the total number of valid members (as at the date of the claim). The DGTU shall notify

the DGIR the result of the membership check (**Reg. 66 of the TU Regulations**).

25. After going through all the relevant affidavits filed as well as the grounds of judgment of the learned judge, this Court is satisfied that the steps or process as laid down in the relevant laws (**IR Act, IR Regulations, TU Act and TU Regulations**) have been strictly followed by the DGIR, DGTU as well as the 1st Respondent before coming to the conclusion that 59.32% of the Appellant's employees were members of the 2nd Respondent as at the cut-off date 10.9.1997 and before the 1st Respondent gave his decision to accord recognition to the 2nd Respondent.

26. The crux of the Appellant's appeal is that seasonal employees should be excluded from the verification exercise. But in its own letters to the 1st Respondent (before the impugned decision) the Appellant wanted both permanent and seasonal employees to be included in the verification exercise. The learned Judge noted this and held it was

therefore a non-issue. Therefore the “main issue” was correctly held by the learned Judge to be a “non issue” based on the Appellant’s own letters to the 1st Respondent.

27. In this appeal before this Court, the learned counsel for the Appellant argued that the 1st Respondent had failed to give reasons in coming to his decision to accord recognition to the 2nd Respondent; thus the said decision is fundamentally flawed and should be quashed.

28. This Court agrees with the findings of the learned judge (in her grounds of judgment) that the 1st Respondent had sufficiently given his reasons for his decision to accord recognition to the 2nd Respondent. These reasons were found in paragraphs 6, 7, 9, 10, 13, 14 and 15 of the 1st Respondent’s affidavit and were properly cited by the learned judge at page 24 of her grounds of judgment, and read as follows:

“As to giving of reasons for his decision to accord recognition, this can be found in paragraphs 6, 7, 9, 10, 13, 14 and 15 of the 1st Respondent’s affidavit. The 1st Respondent has taken into account the letter of complaint from the 2nd Respondent that 80 employees of the applicant had their services terminated as from 6.11.1997 in violation of section 10(2) and (3) of IR Act which made it an offence for an employer to terminate the services of its employees once a claim for recognition is filed; the letter dated 16.12.1997 from the applicant informing that a majority of its seasonal employees had left from 2.11.1997 – 8.11.1997 and the applicant’s support for a membership verification exercise to be done; the Forms B and C forwarded by the applicant and 2nd Respondent listing their employees and members respectively and the result of the verification exercise and the manner in calculating the percentage by the DGTU. The 1st Respondent too has stated clearly and equivocally that he has taken

both seasonal and permanent employees into account even though a majority of them had left the applicant's service after November 1997 since these employees are as at 10.9.1997, i.e. the date recognition was sought still the employees of the applicant."

29. The learned counsel for the Appellant also argued that in coming to his decision without giving any reasons to support it, the 1st Respondent seemed to be acting mechanically and/or not directing his mind to the relevant considerations, by adopting in toto the recommendations of the DGIR and DGTU.

30. In view of the reasons given by the 1st Respondent in paragraphs 6, 7, 9, 10, 13, 14 and 15 of his affidavit and in view of the fact that this Court had agreed to the findings of the learned judge on this matter, this Court cannot accept the said argument put forward by the learned counsel for the Appellant. There is sufficient evidence for the 1st Respondent to consider and to come to his decision on 1.6.1998. The

1st Respondent decision is one which any decision maker similarly circumstanced would have made. It is not so outrageous or in defiance of logic. In other words, it is not tainted with any “wednesbury unreasonableness”. Therefore the said decision by the 1st Respondent cannot be considered as ‘irrational’.

31. The principles upon which this Court will act in reviewing the discretion exercised by the High Court are well settled. There is a presumption that the learned judge has rightly exercised her discretion. The Court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle or that there has been miscarriage of justice.

(See: **Ratnam v Gumarasamy & Anor [1965] 31 MLJ 228; Charles Osenton & Co. v. Johnston [1942] A.C. 130, and Evans v. Bartlam [1937] A.C. 473).**

32. In coming to his decision to accord recognition to the 2nd Respondent, the 1st Respondent was acting on his powers **under section 9(5) of the IR Act. Section 9(6) of the IR Act** clearly stipulates that:

“A decision of the Minister under subsections (1D) or (5) shall be final and shall not be questioned in any Court”

In view of these ouster provisions, the 1st Respondent’s decision can only be quashed on jurisdictional grounds but not on merits. Therefore in the present appeal, this Court will not interfere on the merits of the 1st Respondent’s decision.

Conclusion

33. On the above considerations, this Court is satisfied that the Appellant has failed to show that the 1st Respondent and his officers have acted outside the scope of powers conferred upon him under the **IR Act (Act 177)** and the relevant regulations. In fact the processes as laid down in section 9 of

the IR Act and the relevant regulations have been strictly followed. Therefore the 1st Respondent's decision cannot be said to be "illegal".

34. The Appellant has also failed to show that the decision of the 1st Respondent was "irrational or procedurally improper" so as to enable the High Court to exercise its discretion for judicial review. The learned judge had not exercised her discretion on a wrong principle; and that there has been no miscarriage of justice resulting in her exercise of the discretion.

35. The Appellant has failed to show any valid or cogent grounds upon which the High Court can exercise its discretionary power of judicial review and to quash the decision of the 1st Respondent. The learned High Court judge was right in dismissing the Appellant's application with costs.

36. Therefore, this Court unanimously holds that the present appeal is dismissed with costs. Deposit to the account of taxed costs. The decision of the learned High Court judge is affirmed.

Dated this 15th day of April 2009

**RAMLY ALI
JUDGE
COURT OF APPEAL MALAYSIA**

Solicitors:

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3. B. Lobo
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.. for the 2nd Respondent

Cases Referred to:

1. **Reg. v. Entry Clearance Officer, Bombay, Ex p Amin
[1983] 2 AC 818**
2. **Minister of Labour Malaysia v. Lie Seng Fatt [1990] 2 MLJ 9**
3. **National Union of Hotel, Bar and Restaurant Workers v.
Minister of Labour & Manpower [1980] 2 MLJ 189**
4. **Council of Civil Service Union & Ors. V. Minister for the
Civil Service [1985] 4 All E.R 374 AC**
5. **Ratnam v Gumarasamy & Anor [1965] 31 MLJ 228**
6. **Charles Osenton & Co. v. Johnston [1942] A.C. 130**
7. **Evans v. Bartlam [1937] A.C. 473**

Legislation Referred to:

1. **Industrial Relation Act 1967 [Act 177] : section 9 (2), (3),
(3b), (4), (4a), (4b), (5) and (6)**
2. **Trade Union Regulations 1959: Regulation 63, 64, 65 and
66**