DALAM MAHKAMAH PERSEKUTUAN MALAYSIA DI PUTRAJAYA
(BIDANGKUASA RAYUAN)
RAYUAN SIVIL NO. 02-36-2006 (W)

ANTARA

BANK PERTANIAN MALAYSIA ... PERAYU

DAN

AHMAD ZAKI BIN ISMAIL ... RESPONDEN

(Dalam perkara mengenai Rayuan Sivil No. W-02-149-1999
di Mahkamah Rayuan Malaysia

Antara

Ahmad Zaki Bin Ismail ... Perayu

Dan

Bank Pertanian Malaysia ... Responden)

Corum: Nik Hashim Bin Nik Ab. Rahman, FCJ
Abdul Aziz Bin Mohamad, FCJ
Hashim Bin Dato' Hj. Yusoff, FCJ

JUDGMENT OF THE COURT

1. Four questions were posed to this Court in this appeal, as follows:-

"(a) In general, whether a body created by statute may avail itself of the disciplinary rights and remedies provided by the common law governing an employer – employee relationship in the absence of specific disciplinary regulations or procedures formulated under the statute by which it is established.

(b) In particular, whether the Applicant was under a mandatory duty imposed by S.38A of the Bank Pertanian Act 1969 to make its disciplinary regulations, create its disciplinary offences and provide for its disciplinary punishments viz-a-viz its employees.

(c) If the answer to (b) is in the affirmative, whether in the absence of such disciplinary regulations, disciplinary offences and disciplinary punishments, the Applicant is entitled to invoke and rely on its common law rights and remedies to discipline the Respondent.

(d) If the answer to (c) above is in the affirmative, whether it was an implied term of the Respondent's employment with the Applicant that the Applicant may discipline the Respondent by issuing a warning to the Respondent."

Brief facts of the case

2. The Respondent was a loan supervising officer in the employ of the Applicant, Bank Pertanian Malaysia, which is a statutory body established under the Bank Pertanian Act 1969

(hereinafter referred to as "the Act"). By letters dated 15/03/1991 and 25/03/1991, the Respondent was suspended from work with full pay pending inquiry into charges of misconduct and negligence which were levelled against him. By a letter dated 13/06/1991, the Applicant informed the Respondent of its decision to hold a Domestic Inquiry into the charges levelled against him. On 22/10/1991 a Domestic Inquiry was conducted by a Disciplinary Committee set up under Section 10B of the Act and the Disciplinary Committee had found the Respondent guilty of the charges levelled against him but issued him a warning only.

3. The Respondent then filed a Writ of Summons in the High Court, seeking the following declaratory reliefs:-

"(i) a declaration that the suspension of the respondent pursuant to letters dated 15.3.91 and 25.3.91 were null and void and of no legal effect; and

(ii) a declaration that the decision of the disciplinary committee against the respondent was null and void and of no consequence."

4. The Respondent also prayed for consequential reliefs for damages and costs as per his statement of claim.

5. Before the learned Judge of the High Court, it was agreed between the parties that since the suit involved only questions of law, they would only file in written submissions. There was

therefore no trial of this matter and hence no oral evidence was placed before the Court.

6. After hearing and reading the submissions of both parties, the learned High Court Judge dismissed the Respondent's claim on the grounds that there was no breach of natural justice and hence it was an abuse of process of the Court for the Respondent to have sought to by-pass the Statutory provision for the procedure of domestic appeal of Section 10B (8) of the Bank Pertanian Act 1969 ("the Act"), by coming to Court to seek the declaratory reliefs. Sub-section 8 states:-

> *"(8) Any officer or employee of the Bank who is dissatisfied with the decision of the Disciplinary Committee or of any committee delegated with functions, powers or duties under subsection (6) may, within fourteen days, appeal in writing against such decision to the Board which may thereupon affirm, reverse or give such directions on the matter as it deems fit and proper."*

7. The Respondent then appealed to the Court of Appeal which allowed his appeal on the ground that since at the material time, no disciplinary regulations were made yet, the disciplinary proceedings were null and void, as it lacked jurisdiction.

8. Before us, learned counsel for the Appellant submitted that the main issue is whether, in the absence of such disciplinary regulations, the Appellant had the substantive right to discipline the Respondent based on common law. He went on to argue

that the Disciplinary Committee (DC) was properly established under section 10B (1) of the Act. By virtue of Section 10B (5) of the Act, the DC was empowered to impose such disciplinary punishment as may be provided for under any regulation that may be made under section 38A, which provides:-

> *"Section 38A (1)*
> *The Board may with the approval of the Minister, make such disciplinary regulations as it deems necessary or expedient to provide for the discipline of the officers and employees of the Bank ..."*

9. Although admitting that at the material time, there were no disciplinary regulations made yet, the learned counsel submitted that there was still the implied right for the DC to act and mete out the appropriate punishment based on common law. Reference was made to the case of ***Pearce v. Foster [1886] 17 QB 536*** where Lord Esher M.R. stated very clearly that:-

> *"The rule of law is, that where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him. The relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faithfully, and if by his own act he prevents himself from doing so, the master may dismiss him."*

10. Further, reliance was placed on the case of ***Attorney General v. The Great Eastern Railway Company [1880] 5 AC 473*** where Lord Selborne said:-

> *"I assume your Lordships will not now recede from anything that was determined in the Ashbury Railway Company v Riche. It appears to me to be important that the doctrine of ultra vires, as it was explained in that case, should be maintained. But I agree with Lord Justice James that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires."*

11. The above statement of the law has been accepted by our Courts in the case of ***Malaysian Shipyard & Engineering Sdn. Bhd. v. Bank Kerjasama Rakyat (M) Bhd. [1985] CLJ (Rep) 206***; and in ***Penang Development Corporation v. Teoh Eng Huat & Anor [1992] 3 CLJ (Rep) 204***.

12. A similar issue was dealt with by the Indian Supreme Court in the case of ***Mysore State Road Transport Corporation v. Gopinath Gundachar Char [1968] 1 SCR 767***, where it held that:-

> *"In Dundee Harbour Trustees v D & J Nicol, Viscount Haldane L.C. said: "The answer to the question whether*

a corporation created by statute has a particular power depends exclusively on whether that power has been expressly given to it by the statute regulating it, or it can be implied from the language used. The question is simply one of construction, and not of presumption". Bearing in mind this statement of law, let us consider whether the appellant had the power to appoint officers and servants and to lay down their conditions of service in the absence of regulations framed under s. 45(2)(c) of the Road Transport Corporation Act 1950. The appellant is an autonomous Corporation incorporated under the Act for the purpose of operating road transport services in the State and extended areas. For the proper discharge of its functions, it is necessary for the Corporation to appoint officers and servants. S. 14(2) expressly confers upon the Corporation the incidental power to appoint such officers and servants as it considers necessary for the efficient performance of its functions. S.19(1)(c) empowers it to provide for its employees suitable conditions of service. Section 14(3) provides that the conditions of appointment and service and the scales of pay of its officers and servants shall be such as may subject to the provisions of S. 34 be determined by regulations under the Act. S. 45(2)(c) empowers the Corporation to frame regulations with the previous sanction of the State Government prescribing the conditions of appointment, service and scales of pay of the officers and servants. If the State Government issues any directions under S. 34 relating to the recruitment and

conditions of service of the employees, the Corporation must obey those directions. The conjoint effect of ss. 14(3)(b), 34 and 45(2)(c) is the appointment of officers and servants and their conditions of service must conform to the directions, if any, given by the State Government under S. 34 and the regulations, if any, framed under S. 45(2)(c). But until such regulations are framed or directions are given, the Corporation may appoint such officers or servants as may be necessary for the efficient performance of its duties on such terms and conditions as it thinks fit. There is necessarily a time-lag between the formation of the Corporation and the framing of regulations under S. 45(2)(c). During the intervening period, the Corporation must carry on the administration of its affairs with the help of officers and servants. In the absence of clear words, it is difficult to impute to the legislature the intention that the Corporation would have no power to appoint officers and servants to fix the conditions of service unless the regulations under S. 45(2)(c) are framed."

13. The learned counsel for the Respondent in his written submission had referred to Section 38A(4) of the Act which provides:-

"The disciplinary regulations made under this section shall, in prescribing the procedure for disciplinary proceedings, provide for an opportunity for representations to be made by the person against whom

disciplinary proceedings are taken before decision is arrived at by the disciplinary authority on the disciplinary charge laid against the such person."

14. Relying on the case of ***Fadzil Bin Mohamed Noor v. Universiti Teknologi Malaysia [1981] 2 MLJ 196*** it was submitted that since the Respondent was appointed pursuant to the Act, his tenure was protected by Statute. He further argued that under section 38A, the Appellant is obliged to make, with the approval of the Minister, disciplinary regulations, and also create disciplinary officers and punishments. Since no such regulations were made at the material time, then the disciplinary proceedings were ultra vires.

15. Looking at the provisions of the Act, it cannot be denied that the DC was properly constituted under Section 10B(1). The DC under Section 10B(5) was given the power to impose such disciplinary punishment as may be provided for under any regulations that may be made under Section 38A. Section 10B(8) further provides that *"any officer or employee of the Bank who is dissatisfied with the decision of the DC ... may, within fourteen days, appeal in writing against such decision to the Board which may thereupon affirm, reverse or give such directions on the matter as it deems fit and proper."*

16. In his statement of claim, the Respondent himself admitted that he was at all material times a loan supervising officer in the employ of the Appellant. Therefore he admitted being an employee of the Appellant. As such there was an employer –

employee relationship between the Appellant and the Respondent. I am of the view that the position of employer – employee is similar to a master – servant position where, as stated by Lord Esher M.R. in the case of ***Pearce v. Foster*** (supra), that if the servant does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him.

17. It is not disputed that at the material time no regulation was made pursuant to section 38A of the Act to provide the necessary punishment to be meted out by the DC. Would the act of the DC in suspending the Respondent from work and subsequently giving him a warning, be ultra vires? The Court of Appeal in this instance, held that the DC lacked jurisdiction because of the absence of the specific regulations to be read under section 38A and thereafter the act of the DC was ultra vires. I am of the view that even if no specific regulation was made to state what punishments could have been given, as an employer, the Appellant still had the implied power to impose disciplinary punishment against the Respondent, as provided under section 10B(5), pending the making of the punishment regulations under section 38A. As stated by Viscount Haldane L.C. in ***Dundee Harbour Trustees v. D & J Nicol [1915] A.C. 550***, *"the argument to the question whether a cooperation created by a statute has a particular power depends exclusively on whether that power has been expressly given to it by the statute regulating it, or can be implied from the language used."* In this instant appeal, section 10B(5) provides:-

> *"In the exercise of its disciplinary functions, the DC shall have the power to impose such disciplinary punishment as may be provided for under any regulations that may be made under section 38A."*

18. It is pertinent to note in section 10(5) that the word "*shall*" is used, thus giving express power for the DC to impose punishment. But at the same time the word "*may*" is used twice to say what the punishment could be if it was expressly stated pursuant to section 38A. So if no regulation is made yet under section 38A, does it mean that the DC would be powerless to mete out any punishment at all? I am of the view it would not be the intention of the Legislature to give the DC the power to act yet not give it what punishment to impose. There must necessarily be a time lag between the establishment of the DC and the subsequent regulation to be made giving it the specific punishment that it can impose. It would be against the intention of the Act, that while waiting for the regulation to be made under section 38A, no punishment at all can be imposed by the DC. That power can reasonably be implied to be with the DC. Otherwise potential disciplinary offenders may just get away during the interim period.

19. In any event, the letters of the General Manager, who is also a member of the DC by virtue of section 10B(1), dated 15/03/1991 and 25/03/1991, to the Respondent clearly indicated that he was suspended on full pay from 15/01/1991 pending the full enquiry against him. Finally by letter dated 06/05/1992, the chairman of the DC informed the Respondent

that the punishment imposed on the Respondent was warning only. I cannot see how the Respondent could have asked for damages if he had been on full pay during his suspension. But that would have been for the trial court to decide. In any event I agree with the decision of the High Court that since the Respondent had not exhausted his legal remedy as provided under section 10B(8) by not appealing in writing to the DC against its decision, therefore it would amount to an abuse of the process of Court.

20. For the reasons given above, I would answer the questions posed as follows:-

> Question (a) is answered in the affirmative.
> Question (b) is answered in the negative, in that it would only be directory on the Appellant.
> Questions (c) and (d) now do not arise anymore.

21. My learned brother Nik Hashim Bin Nik Ab. Rahman, FCJ has seen my judgment in draft and has expressed his concurrence.

22. It follows, that this appeal is allowed with costs. The order of the Court of Appeal is set aside. The order of the High Court is restored. Deposit to be returned to the Appellant.

Signed.
(DATO' HASHIM BIN DATO' HJ. YUSOFF)
Judge
Federal Court of Malaysia
Putrajaya

Dated: 22nd January, 2009

Parties:

Counsel for the Appellant:	Mr. Edward Saw
Solicitor for the Appellant:	Messrs Y.H. Teh & Quek Advocates & Solicitors 6th Floor, Wisma Bandar 18, Jalan Tuanku Abdul Rahman 50100 Kuala Lumpur
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Cases Referred To:

(1) Pearce v. Foster [1886] 17 QB 536;

(2) Malaysian Shipyard & Engineering Sdn. Bhd. v. Bank Kerjasama Rakyat (M) Bhd. [1985] CLJ (Rep) 206;

(3) Penang Development Corporation v. Teoh Eng Huat & Anor [1992] 3 CLJ (Rep) 204.

(4) Mysore State Road Transport Corporation v. Gopinath Gundachar Char [1968] 1 SCR 767

(5) Fadzil Bin Mohamed Noor v. Universiti Teknologi Malaysia [1981] 2 MLJ 196

(6) Dundee Harbour Trustees v. D & J Nicol [1915] A.C. 550