DALAM MAHKAMAH RAYUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO: W-01(A)-449-11/2016

ANTARA

BANK MUAMALAT MALAYSIA BERHAD
(No. Syarikat: 6175-W) … PERAYU

DAN

1. **MENTERI SUMBER MANUSIA, MALAYSIA**
2. **KETUA PENGARAH PERHUBUNGAN PERUSAHAAN**
3. **KETUA PENGARAH KESATUAN SEKERJA**
4. **KESATUAN KEBANGSAAN PEKERJA-PEKERJA BANK**

… RESPONDEN-RESPONDEN

[Dalam Mahkamah Tinggi Malaya di Kuala Lumpur
(Bahagian Rayuan dan Kuasa-Kuasa Khas)
Permohonan Untuk Semakan Kehakiman No. 25-249-08/2015

Dalam perkara permohonan Bank Muamalat Malaysia Berhad untuk memohon untuk suatu perintah *certiorari*

Dan

Dalam perkara keputusan Yang Berhormat Menteri Sumber Manusia yang dibuat pada 18.5.2015 dan hanya dimaklumkan kepada Pemohon pada 5.6.2015

Dan

Dalam perkara seksyen 9 Akta Perhubungan Perusahaan 1967

Dan

Dalam perkara mengenai Aturan 53 Kaedah-Kaedah Mahkamah 2012

ANTARA

Bank Muamalat Malaysia Berhad … Pemohon
(No. Syarikat: 6175-W)

DAN

1. Menteri Sumber Manusia, Malaysia
2. Ketua Pengarah Perhubungan Perusahaan
3. Ketua Pengarah Kesatuan Sekerja
4. Kesatuan Kebangsaan Pekerja-Pekerja Bank … Responden-Responden]

CORAM:

TENGKU MAIMUN TUAN MAT, JCA
VERNON ONG LAM KIAT, JCA
ZALEHA YUSOF, JCA

GROUNDS OF JUDGMENT

INTRODUCTION

[1] This appeal is against the decision of the High Court given on 2.11.2016 dismissing the appellant's application for judicial review of the Minister of Human Resources' decision dated 18.5.2015 which held that the employees of the appellant known as Customer Relationship Representatives are not employed in a managerial, executive, confidential or security capacity.

SALIENT FACTS

[2] The appellant is a licensed bank under the Islamic Financial Services Act 2013 and a member of the Malayan Commercial Banks Association ("MCBA").

[3] The Minister of Human Resources, Malaysia (**Minister**), the Director General of Industrial Relations (**DGIR**) and the Director General of Trade Unions (**DGTU**) are the 1st, 2nd and 3rd respondents respectively. The 4th respondent (the National Union of Bank Employees (**NUBE**)) is a trade union of bank employees registered under the Trade Unions Act 1959. Pursuant to a Collective Agreement dated 3.11.2015 between the MCBA and NUBE, NUBE was accorded recognition by the appellant to represent its employees in the Non-Clerical, General Clerical and Special Grade Clerical Category.

[4] In 2009, the appellant created a category known as Customer Service Representatives ("**CRR**") within the Executive Grade 12, which is a junior officer grade.

[5] From 2009 until 20.8.2015, there were 2,265 employees of the appellant who consisted of eligible non-clerical, clerical and special grade clerks, teller, and Customer Service Representatives (Grades 17 and 18) who were selected to be promoted based on their performance for the position of CRR. There were about 23 successful applicants who rejected the promotion or did not want to attend the interview, and only 160 of the 2,265 employees concerned, were eventually promoted since 2009. As at the date of the appellant's application for leave to commence judicial review proceedings, there were 134 CRRs.

[6] The appellant's employees who are categorised as clerical, non-clerical and special grade are represented by NUBE. The appellant's employees who fall within the executive grades 12, 11 and 10 including the CRRs, are represented by the appellant's in-house officers' union Kesatuan Pegawai-pegawai Bank Muamalat Malaysia Berhad ("**KEPAK**").

[7] A dispute has arisen between the appellant and NUBE arising from the promotion of certain general clerical grade employees of the appellant, who were promoted and re-designated as CRRs. By a letter of complaint dated 18.12.2014, NUBE referred the dispute to the DGIR under s. 9(1A) of the Industrial Relations Act 1967 (**IRA 1967**).

[8] The DGIR conducted enquiries and interviewed the CRRs under s. 9(1B) of the IRA 1967 at the appellant's branches in Penang, Kelantan, Selangor, Kuala Lumpur and Johore. Subsequently, the DGIR notified the Minister of the dispute under s. 9(1C) of the IRA 1967.

[9] On 25.5.2015, the DGIR wrote to the appellant and NUBE enclosing the Minister's decision pursuant to s. 9(1D) of the IRA 1967 whereby it was decided that the CRRs employed by the appellant are not employed in the managerial, executive, confidential or security capacity, as follows:

> "Customer Relationship Representative adalah pekerja-pekerja yang digaji bukan dalam kapasiti pengurusan, Eksekutif, sulit atau keselamatan."

THE DISPUTE

[10] The essence of the dispute which was referred to the DGIR was NUBE's complaint that the appellant's promotion and redesignation of its clerical staff, who were members of NUBE to the post of CRR, prevented them from continuing as members of NUBE.

DECISION OF THE HIGH COURT

[11] In summary, the findings of the learned judge are as follows:

(i) The Minister was not required to limit his decision to the former employees of NUBE;

(ii) The Minister was not required to refer the complaint to the DGTU;

(iii) The Minister was not required to produce the DGIR's report;

(iv) The promotion of the appellant's employees was contrary to the collective agreement between the appellant and NUBE and contrary to the spirit of the IRA 1967; and

(v) The Minister and the DGIR had taken all necessary steps as required by the IRA 1967 and the appellant had failed to show any illegality, irrationality or procedural impropriety.

SUBMISION OF PARTIES

[12] Before us, learned counsel for the appellant advanced two principal grounds. First, the Minister had acted beyond his jurisdiction in handing down his decision as his ruling exceeded the terms of NUBE's complaint. The Minister's decision under s. 9(1A) of the IRA 1967 can only be in respect of the dispute raised by any of the parties, viz. trade union of workmen or by an employer or by a trade union of employers. NUBE's only complaint was the issue of the capacity and scope of the appellant's tellers, i.e., NUBE's former members, who had accepted the promotion to the position of CRRs, resulting in them coming out of NUBE's scope of representation. The issue was not whether or not all the CRRs came within the scope of NUBE's representation. In purporting to make a blanket ruling for the entire CRR category instead of confining itself to the issue raised in the trade dispute, the Minister had asked itself the wrong question and committed an error of law (***Ambank (M) Bhd v Menteri Sumber Manusia & Another and Another Appeal*** [2014] 1 LNS 686; ***Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union*** [1995] 2 CLJ 748; ***Minister of Home Affairs, Malaysia v Persatuan Aliran Kesedaran Negara*** [1990] 1 CLJ (Rep) 186).

[13] Second, learned counsel argued that despite the Minister's decision being challenged in a judicial review application the Minister failed to produce the DGIR report and investigation report upon which his decision was founded upon. The reviewing court must have before it all the material upon which the Minister's impugned decision had been premised upon. It is incumbent upon the Minister to justify the manner in which he came to his decision. In the absence of the same, the Minister's decision cannot

be sustained (***Hong Leong Bank Bhd v Menteri Sumber Manusia, Malaysia & 2 Ors*** (CA) Civil Appeal No. W-01-403-09/2012).

[14] In reply, learned Senior Federal Counsel appearing for the Minister, the DGIR and the DGTU argued firstly that the DGIR had conducted a thorough investigation pursuant to s. 9(1B) of the IRA 1967. The DGIR found that the CRRs were in fact performing clerical functions; the CRRs did not "(vi) Tidak membuat penilaian prestasi; (vii) Tidak mengambil tindakan disiplin; (viii) Tidak mengakses maklumat sulit seperti minit mesyuarat Pengurusan Kewangan Syarikat dan maklumat peribadi pekerja." Further, the Minister's discretion under s. 9(1D) of the IRA 1967 is wide, but not unlimited and, is based on his objective consideration of the referred dispute in the light of the DGIR's report and finding of the DGIR. Secondly, ***Hong Leong Bank*** (supra) cited by the appellant is distinguishable as in that case the DGIR did not file any affidavit in reply whereas in this case, the DGIR filed an affidavit setting out the details of investigations he conducted and the findings. It was also argued that s. 9(1D) of the IRA 1967 did not require the Minister to consider the DGIR's report.

[15] Learned counsel for NUBE advanced the following points in reply:

(i) There is nothing in s. 9(1A) of the IRA 1967 that requires the complaint made by NUBE to be limited to its former members and that the DGIR was correct to investigate and the Minister was correct to make his decision in respect of the CRRs, who were all excluded from being members of NUBE, as a class. The fact that some current CRRs were not formerly members of NUBE is irrelevant, since the question of whether or not they

are employed in an executive, management, security or confidential capacity continues to determine whether or not they can become members of NUBE and be represented by NUBE. There is no error of law as the Minister's decision pursuant to s. 9(1D) relates back to s. 9(1A) of the IRA 1967.

(ii) This case is distinguishable from ***Hong Leong Bank*** (supra) where the Court of Appeal held that the failure of the DGIR to file a separate affidavit meant that there was no material before the High Court to confirm that the DGIR had acted in a reasonable manner. In this case, however, both the Minister and the DGIR had filed separate affidavits and explained the investigations process. Further, the Minister only made his decision after an examination of the relevant reports, negotiations between the parties, results of the DGIR's investigations, the law and other relevant factors. The investigations carried out by the DGIR were also comprehensive, whereby interviews were conducted with the CRRs in the appellant's branches in five states and meetings were conducted with the appellant. The Minister's failure to produce the investigation report was not fatal as there was no requirement under the relevant provisions which compels the Minister or the DGIR to disclose investigation reports (***Radha Krishnan a/l Kandiah v Menteri Sumber Manusia Malaysia & Another*** [2010] 4 MLJ 713; ***Hasni Hassan & Ors v Menteri Sumber Manusia & Another*** **[**2013] 6 CLJ 74 (CA); ***Kesatuan Pekerja-Pekerja Syarikat-Syarikat Pembuatan Keluaran Getah lwn YB Menteri Sumber Manusia dan satu lagi*** [2012] 9 MLJ 748).

(iii) The appellant's argument that there was no relevant material before the High Court is without basis as the learned judge considered the affidavits filed by the Minister and the DGIR detailing the complaint, the meetings between the parties, the investigations conducted and the DGIR's findings. The learned judge correctly found that the Minister's decision pursuant to s. 9(1D) of the IRA 1967 had been properly and lawfully made following the Minister's consideration of the relevant issues relating to the dispute.

DECISION

[16] At the outset, it is pertinent to note that NUBE's membership is open to all employees of banks or financial institutions whose job contents consist of clerical functions, irrespective of their designation, but exclude those who are employed in a managerial, executive or confidential or security capacity ("**Excluded Capacities**"). The concept of Excluded Capacities is derived from s. 9 of the IRA 1967 which deals primarily with the recognition of trade unions by employers for the purpose of collective bargaining. As such, s. 9(1) of the IRA 1967 distinguishes between workmen employed in the Excluded Capacities and workmen employed in other capacities.

[17] A trade union, the majority of whose members are employed outside the Excluded Capacities may not seek recognition or serve an invitation to commence collective bargaining in respect of members employed in the Excluded Capacities. As a labour union, NUBE's functions are to negotiate wages and working conditions, to regulate relations between worker and employer, to take collective action to enforce the terms of

collective bargaining, to raise new demands on behalf of its members and to help settle their grievances. In order to enable NUBE to perform its responsibilities, the size of its membership is important. The effectiveness of collective bargaining and effective dispute resolution between employers and employees is dependent upon the number of members of the union. In the light of the above mentioned it can be appreciated that NUBE lodged the complaint with the DGIR over the fact that CRRs falling under the Excluded Capacities would remain as or become ineligible to become NUBE's members thereby ultimately affecting their membership enrolment in the appellant as a whole.

[18] The appellant's first complaint relates to the contention that the Minister had exceeded the scope of his authority in ruling that CRRs are not employed in the Excluded Capacities. Although there is specific reference to "jawatan juruwang" in NUBE's letter of complaint to the DGIR, we are of the view that the dispute in essence relates to the question of whether CRRs are employed in the a managerial, executive or confidential or security capacities. The fact that some current CRRs were not formerly members of NUBE is irrelevant as the question of whether they are employed in the Excluded Capacities continues to determine whether or not they can become members of NUBE. We do not think that s. 9(1A) of IRA 1967 requires a dispute to be confined to workmen who are or were previously members of the trade union that has made the reference to the DGIR. We say this because s. 9(1A) of IRA 1967 is couched such that any dispute as to "whether any workman or workmen are employed in a managerial, executive, confidential or security capacity" may be referred to the DGIR. At any rate, the job scope and functions of the CRRs are the same irrespective of whether or not the CRR was formerly a member of NUBE. This fact is consistent with the DGIR's finding that there is no

discernible difference in the job scope and functions between promoted CRRs and other CRRs; in other words, all CRRs perform and undertake the same tasks. Accordingly, we do not think that the Minister had asked himself the wrong question or committed an error of law or had exceeded his jurisdiction under s 9(1D) of the IRA 1967. The cases cited by learned counsel for the appellant are of no aid to the appellant's argument and may be distinguished on the facts. ***Ambank (M) Bhd v Menteri Sumber Manusia & Another and Another Appeal*** (supra) relates to a claim by the Association of Bank Officers under s. 9(2) of the IRA 1967 for recognition of a class of workmen specifically identified as those in "Executive Scale E". ***Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union*** (supra) was an appeal against the decision of the High Court quashing an award of the Industrial Court which turned on two issues, namely, as to the effect of ouster clauses in Acts of Parliament and secondly, as to the proper construction to be given to subsection (1) and (2) of s, 33 of the IRA 1967. ***Minister of Home Affairs, Malaysia v Persatuan Aliran Kesedaran Negara*** (supra) relates to an application for an order of *certiorari* to quash the decision of the Minister of Home Affairs, Malaysia refusing Aliran's application for a permit under s. 6(1)(a) of the Printing Presses and Publications Act 1984.

[19] The second complaint relates to the non-production of the DGIR's report and investigation report. Learned counsel for the appellant relied on ***Hong Leong Bank*** (supra) where the Court of Appeal held that the failure of the DGIR to file a separate affidavit meant that there was no material before the High Court to determine whether the DGIR had acted in a reasonable manner. Further, the Minister therein made bare averments in his affidavits and failed to refer to the relevant materials he took into consideration in coming to his decision.

[20] In the instant case, however, the Minister had stated the relevant facts which were placed before him when coming to his decision. The Minister and the DGIR have filed separate affidavits setting out the particulars of the investigative process conducted following receipt of NUBE's complaint letter. There were at least two meetings organised by the DGIR which were attended by representatives of the appellant and NUBE. On 12 occasions between 4.3.2015 to 3.4.2015, the DGIR's officers had attended the appellant's branch offices and interviewed the CRRs in Selangor, Kuala Lumpur, Johore, Kelantan and Penang. In the course of their investigations, the DGIR obtained information on the job scope of the CRRs, roles and responsibilities. The results of the investigation were submitted to the Minister who after having considered the same rendered his decision. Accordingly, it is apparent that the Minister only came about to his decision after an examination of the relevant reports, negotiations between the parties, results of the DGIR's investigations, the law and other relevant matters.

[21] In all the circumstances and as there is no requirement under s. 9 of the IRA 1967 obliging the Minister or the DGIR to disclose the investigation report we do not think that the non-production of the DGIR's report is fatal.

[22] Lastly, we observe that the Minister's decision is not impugned on the ground of procedural impropriety; rather the point raised by the appellant was that there was no evidence before the High Court. For the reasons adumbrated above, we are of the view that the appellant's contention is clearly without merit as demonstrated by the comprehensive

affidavits filed by the Minister and the DGIR. Accordingly, the appeal was dismissed with costs.

sgd

(Vernon Ong)
Judge
Court Of Appeal
Malaysia

Dated : 29 November 2018

Counsel:

For the Appellant: Sivabalah Nadarajah (Reena Enbasegaram with him)
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For the 1st – 3rd Respondents: Ruzimah Mohd Radzuan (Shahmin Amizah Abu Bakar with her)
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