DALAM MAHKAMAH RAYUAN DI MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO.W- 02(A)-789-04/2016

ANTARA

MOHD ZAMRI BIN ISMAIL …PERAYU

DAN

KOPERASI PEKEBUN KECIL GETAH NASIONAL BERHAD …RESPONDEN

[DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
PERMOHONAN BAGI SEMAKAN KEHAKIMAN No. 25-200-07/2015

Di dalam perkara Mahkamah Perusahaan kes No. 11/4-893/11 (Awad No. 383 Tahun 2015 bertarikh 7 haribulan April 2015)

Dan

Di dalam perkara suatu Permohonan di bawah Aturan 53 Kaedah-Kaedah MahkamahTinggi Untuk Semakan Kehakiman

ANTARA

KOPERASI PEKEBUN KECIL GETAH NASIONAL BERHAD …PEMOHON

DAN

MOHD ZAMRI BIN ISMAIL …RESPONDEN

CORAM:

HAMID SULTAN ABU BACKER, JCA
PRASAD SANDOSHAM ABRAHAM, JCA
ASMABI BINTI MOHAMAD, JCA

(Asmabi Binti Mohamad JCA, delivering Judgment of the Court)

JUDGMENT OF THE COURT

INTRODUCTION

[1] This is an appeal from the Kuala Lumpur High Court (Special Powers) against the decision of the learned Judge of the said High Court dated 28th March 2016 which allowed the Judicial Review Application (**"JR Application"**) filed by the Applicant, Koperasi Pekebun Kecil Getah Nasional Berhad for certiorari to be issued to quash the award of the Industrial Court vide Award No.383 of 2015 dated 7th April 2015.

[2] We heard this appeal on 1st November 2016. After having read the written submissions as well as hearing the oral arguments on the issues raised, we allowed the appeal with cost of RM5,000.00 to the Respondent.

[3] Our reason for doing so now follow.

[4] For ease of reference the parties will be referred to as there were described in the High Court.

BRIEF BACKGROUND FACTS

[5] Briefly the facts of the case are as follows:

[6] The Respondent commenced his employment with the Applicant on 1st November 1990 as a Marketing Executive. He continued to work for the Applicant for almost twenty years. His last post was General Manager of the General Business Division and his last drawn salary was RM6,699.38.

[7] On 23rd October 2009, the Respondent was issued a show cause letter with five charges having been framed against him. These five charges are as follows:

> *"(a) Bahawa kamu selaku Pengurus Besar Bahagian Perniagaan Am adalah tidak cekap di mana kamu gagal melaksanakan tugas, lalai, melambat-lambatkan dan berlengah-lengah dalam menjalankan tugas yang diamanahkan kepada kamu.*
>
> *(b) Bahawa kamu telah didapati cuai, lalai dan berlengah-lengah dalam menjalankan tugas kamu yang telah menyebabkan Syarikat menanggung kerugian yang amat tinggi apabila dikenakan penalti atau denda kualiti baja Estet Pekebun Kecil Sdn Bhd (ESPEK) kerana baja yang dibekalkan tidak mengikut spesifikasi bagi bekalan baja untuk tahun 2006.*
>
> *(c) Bahawa kamu telah dianggap telah melakukan kesalahan selaku Pengurus Besar Bahagian kerana menyembunyikan dengan niat dari pengetahuan pihak Pengurusan Syarikat dan tidak mengambil sebarang tindakan segera berhubung dengan denda kualiti baja yang dikenakan oleh pihak ESPEK bertarikh 28 Mac 2007 walaupun surat itu telah dihantar dan diakui penerimaannya oleh*

Bahagian Perniagaan Am pada 9 Januari 2008 yang lalu dan surat tersebut dijumpai oleh pihak pengurusan Syarikat di dalam posesi dan kawalan kamu.

(d) Bahawa kamu adalah tidak cekap dimana kamu telah gagal mengambil tindakan yang segera untuk berbincang serta membuat rayuan kepada pihak ESPEK berkenaan dengan denda kualiti baja yang telah dikenakan tersebut sedangkan kamu selaku kaki tangan kanan yang berpengalaman di dalam bidang ini sepatutnya mengetahui akan langkah-langkah segera yang boleh dan perlu diambil berhubung dengan denda kualiti baja yang telah dikenakan tersebut untuk mengelak pihak Syarikat daripada menanggung kerugian yang lebih besar.

(e) Bahawa kamu telah menggunakan kepentingan diri sendiri kamu melebihi kepentingan Syarikat dan tidak amanah di dalam melaksanakan tugas kamu dimana kamu telah berkelakuan dengan cara yang menimbulkan syak yang munasabah dan menimbulkan kecurigaan apabila tidak mengambil tindakan serta tidak pernah memaklumkan kepada pihak Syarikat berkaitan dengan surat ASPEK yang bertarikh 28 Disember 2007 tersebut yang telah pun diterima oleh bahagian pengurusan kamu dengan niat untuk menyembunyikan perkara tersebut daripada pengetahuan pihak pengurusan Syarikat yang mana kelakuan kamu tersebut telah menjejaskan imej dan kepercayaan terhadap perkhidmatan kamu sebagai seorang Pengurus Besar dan ekoran dari perbuatan kamu tersebut pihak Syarikat telah menanggung kerugian yang amat tinggi."

[8] On 26th November 2009 the Respondent replied to the charges proffered against him. He stated that he had overlooked the letter from ESPEK dated 28th December 2007 (see **page 14 of the Core Bundle** (**"CB"**) (**"ESPEK's Letter"**) and he had never intended to conceal the matter from the Applicant's knowledge. He further claimed that he had no intention to put off and / or delay and / or defer any work given to him

especially matters touching compensation or penalty imposed on the Applicant.

[9] The Respondent testified that he had been working for the Applicant for over 20 years and for the sake of the survival of the Applicant, he, along with other employees worked hard during the financial crisis as well as for the sake of the fertilizer business.

[10] On 25th February 2015, the Respondent was informed that a domestic inquiry that was set up to inquire into the five charges proferred against him had found him guilty of these charges. Based on this finding, the Respondent was dismissed from the employment of the Applicant with effect from the date of the letter.

[11] Aggrieved over the action, the Respondent filed a claim for reinstatement with the Industrial Relations Department alleging that his dismissal was without just cause or excuse. Pursuant to Section 20(3) of the Industrial Relations Act 1967(**"IRA"**), the Honourable Minister referred the matter to the Industrial Court (**"IC"**) for adjudication. On 7thApril 2015 the IC handed down Award No. 383/2016 dated 7th April 2015 which found that the Respondent was dismissed without just cause and excuse and that the punishment of dismissal was too harsh in the circumstances of the case. As reinstatement was not an appropriate remedy in the circumstances, the IC made an order for the Respondent to be paid compensation in the sum of RM133, 987.60 (RM6,699.38 x 20 years), in lieu of reinstatement. He was also awarded back wages in the sum of RM80,392.56 (RM6,699.38 x 12).

[12] Aggrieved by the said Award, the Applicant moved the High Court by way of the JR Application to quash the Award of the IC. On 28th April 2016, the High Court allowed the Applicant's JR Application, to quash Award No. 383/2015 with costs of RM3,000.00. A further order was made by the learned Judge for the monies paid to the Respondent to be refunded to the Applicant.

AT THE INDUSTRIAL COURT

[13] The salient facts before the IC Court were as follows:

(a) The action against the Respondent was premised on ESPEK's Letter. Vide ESPEK's Letter addressed to "Pengurus Besar Kumpulan" of the Applicant, Estet Pekebun Kecil Sdn Berhad (**"ESPEK"**) made a claim via Debit Note DN03/12/2007-ESTET from the Applicant in the sum of RM1,174.776.57 as penalty for supplying fertilizer not in accordance with the specification for year 2006.

(b) The Applicant contended, due to the Respondent's failure to act upon the said letter i.e. to appeal against the imposition of penalty in the sum RM1,174,776.57, the Applicant suffered loss in the sum of RM1,174,776.57.

(c) The IC was of the view that the Respondent was negligent in not taking action on the said letter and / or in not bringing the

said matter to the attention of the Applicant and / or in not appealing to ESPEK for the penalty imposed on the Applicant to be reduced.

(d) The IC was of the view, based in the circumstances of the case, the penalty imposed was excessive. The IC further stated that the Applicant had framed five charges based on one act of failing and / or neglecting to act upon the letter. In short there were multiple charges premised only on one single alleged misconduct (see **paragraph 17 of the Award (at page 8 of CB)**).

(e) The Applicant had framed five charges in order to make the disciplinary proceedings against the Respondent appear to be serious and/ or grave despite the fact that the alleged misconduct was based on the alleged act of the Respondent in not taking action on ESPEK's Letter.

(f) With respect to the 5th Charge where the issues of conflict of interest and untrustworthiness were raised against the Respondent, the IC found that despite the issues having been raised, no facts and / or evidence in support of those allegations were proved before the IC.

(g) Based on equity and good conscience and within the spirit of IRA, in the circumstances before the IC, the IC was of the view that the five charges framed by the Applicant based only on

one single act discussed above was merely to make it appear and or to give the impression to the IC, the Respondent was facing many charges of serious misconducts. This was intentionally done in order to influence the IC to impose heavier penalty on the Respondent.

(h) The IC was not satisfied that the Applicant had proved that it was the Respondent who was responsible to have caused the Applicant to lose RM1,174,776.57. From the facts adduced, the Respondent was not accused of causing the Applicant to suffer the penalty for failure to supply fertiliser in accordance with the specification but he was only responsible for not acting upon ESPEK's Letter.

(i) The facts before the IC disclosed that the penalty sum was only RM74,776.57. There was no evidence adduced by the Applicant that the amount of penalty paid was RM1,174.776.57.

(j) Premised on the above reasons, the IC was of the view that the penalty in the form of dismissal was too harsh and ought not to be imposed on the Respondent. Hence, the IC viewed the punishment imposed was disproportionate to the misconduct he was charged with.

(k) As a reinstatement was not appropriate, in the circumstances of the case, the Respondent ought to be paid compensation in

lieu of reinstatement. Back wages too was awarded to the Respondent as he was dismissed without just cause or excuse.

AT THE HIGH COURT

[14] The findings of the High Court were as follows:

(a) The learned Chairman of the IC erred when he decided that there was no evidence that the Applicant had paid RM1,174.776.57 to ESPEK as penalty. If the learned Chairman disbelieved the Applicant's witnesses pertaining to the payment of the sum of RM1,174.776.57 million, the learned Chairman ought to have held that the witnesses were not credible. (Note: The learned Judge made a finding of fact that there was in fact payment made based on the oral evidence of the witnesses).

(b) The IC ought to have considered the reliability and credibility of the evidence given by the witnesses. Unfortunately, this was not done. The IC had made a finding that the loss of RM1,174,776.57 million was not proved merely because there was no evidence tendered. Relying on the case of ***Norizan Bakar v Panzana Enterprise Sdn Bhd [2013] 9 CLJ 409***, the Learned Judge ruled that the IC had taken into consideration irrelevant matter. (Note: The Learned Judge interfered with the finding of the IC)

(c) The learned Judge further made a finding that the decision of the IC that the misconduct committed by the Respondent did not merit a dismissal but something lesser, was unreasonable.

(d) The Respondent was holding an important post which must come with responsibility. His failure to act upon the said letter was a serious failure especially when the Applicant had incurred substantial loss.

(e) The Respondent, with his experience and knowledge of the job, ought to have understood the consequences of his action and ought to have taken the necessary action.

(f) The Applicant no longer had confidence in him due to his lack of action. It mattered not whether the Applicant suffered any loss due to the Respondent's action. The learned Judge ruled that as long as there is potential loss to be suffered by the Respondent at the time the said letter was issued, that sufficed.

(g) In view of the aforesaid, the learned Judge was of the opinion that decision of the IC was so unreasonable that no reasonable tribunal similarly circumstanced could have arrived at such decision.

OUR DECISION

The law

[15] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance.

[16] In the course of that, we had sought guidance from the very often quoted case of ***Lee Ing Chin @ Lee Teck Seng v Gan Yook Chin [2003] 2 MLJ 97*** where the Court of Appeal held as follows:

> *"an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence."*

[17] Reference is also made to the decision of the Federal Court in ***Gan Yook Chin v Lee Ing Chin @ Lee Teck Seng [2004] 4 CLJ 309*** where the Federal Court held that the test of *"insufficient judicial appreciation of evidence"* adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

[18] We were also mindful of our role in dealing with the appeal at hand which originated by way of a judicial review application. The issue on the proper approach to deal with the appeal was ventilated by both the

respective parties. We do not propose to deal with the law pertaining to the scope of judicial review at great length as the law is trite. We were guided by a plethora of cases which ruled that judicial review is not an appeal from the decision but a review of the manner in which the decision was made and that the High Court in hearing the judicial review is not entitled to consider whether the decision itself, on the merits of the facts, was reasonable and fair.

[19] Notwithstanding the above, we were also aware that the law on judicial review had developed so as to give the power to the court hearing a judicial review matter to scrutinize such decision not only for process, but also for substance to determine the reasonableness of the decision. Therefore, the conventional concept that judicial review is concerned only with the review in the manner a decision is made is no longer the correct approach to be adopted by the Court in dealing with judicial review cases. (see ***R.Ramachandran v. The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145*** ; ***Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 8 CLJ 629; Datuk Justine Jinggut v Pendaftar Pertubuhan [2012] 3 MLJ 212 ; Ranjit Kaur S. Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629***) ***Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 2 CLJ 1***).

[20] We were also guided by cases such as ***Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd [1995] 2 MLJ 753*** ; **[1995] *3 CLJ 344 FC* ("Hong Leong")** ***; Milan Auto Sdn Bhd v Wong She Yen [1995] 4 CLJ 449 ; [1995] 3 MLJ 537*** (**"Milan Auto"**) which provide

the guidelines to the Industrial Courts in dealing with dismissal cases involving private sector employees. These two cases stated that the Industrial Courts have to, firstly determine whether the misconduct complained of by the employer has been established, and secondly whether the misconduct which was established constituted just cause or excuse for the dismissal. The Industrial Court, having decided that the misconduct had been proven, is vested with the power to consider if such a misconduct which had been proved merits the punishment of dismissal.

[21] We have also considered the principles laid down in ***Hong Leong; William Jacks & Co. (M) Sdn Bhd v S. Balasingam [1997] 3 CLJ 235*** (**"William Jacks"**) which ruled that generally the High Court is not obliged to interfere with the findings of the IC unless such findings are so unreasonable that no reasonable man could reasonably arrived at such findings. This principle is in line with the spirit and intent of the IRA that the IC must act according to equity and good conscience. Further the court in ***Vasudevan Vazhappuli Raman v T. Damodaran P.V Raman & Anor [1981] CLJ (REP) 101*** ruled that the appellate court must not reverse the judge's exercise of discretion *"on a mere "measuring cast" or on a bare balance as the mere idea of discretion involves room for choice, and for difference in opinion"*. The court too *"cannot make use of certiorari proceedings as a cloak to entertain, what in truth is, an appeal against findings of fact."* (see **William Jacks**).

[22] Upon perusal of the appeal records, the written submissions of the learned Counsels as well having heard the oral arguments of both parties and based on the facts as presented above, the question that we need

to ask is whether the IC could decide if the dismissal of the Respondent was without just cause or excuse by using the doctrine of proportionality of punishment and also decide whether the punishment of dismissal was too harsh in the circumstances when ascertaining the Award under section 20 (3) of the IRA.

[23] We need not go further as this very question had been answered in affirmative by the Federal Court in ***Norizan Bakar v Panzana Enterprise Sdn Bhd [2013] 9 CLJ 409 (FC) ("Norizan")***. The Federal Court in Norizan held as follows:

> *"[36] Thus, in reference to the questions posed to us, we are of the view that the Industrial Court has the jurisdiction to decide that the dismissal of the appellant was without just cause or excuse by using the doctrine of proportionality of punishment and also decide whether the punishment of dismissal was too harsh in the circumstances when ascertaining the award under s. 20(3) of the IRA. We are further of the view that the Industrial Court in exercising the aforesaid functions can rely on its powers under s, 30 (5) of the IRA based on the principle of equity, good conscience and substantial merit of the case.*
>
> *[37] Clearly, the reference by the Federal Court in Milan Auto's decision to the "two fold" test, especially the second fold where the Industrial Court has to decide whether the proven misconduct constitutes just cause and excuse for the dismissal is clear reference to the duty of the Industrial Court to apply the doctrine of proportionality of punishment. This is consistent to what is required of the Industrial Court under s. 30 (6) in making an award which provides:*
>
> > *(6) In making its award, the Court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in*

the course of the trade dispute or in the matter of the reference to it under section 20 (3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under section 20 (3).''

[24] The Federal Court in Norizan acknowledged that within the framework of the IRA, there is already an inbuilt mechanism under Item 5 of the Second Schedule for the Industrial Court to consider the doctrine of proportionality of punishment.

[25] Norizan is the authority which permits the Industrial Court to decide whether the misconduct proved warrants the punishment of dismissal.

[26] Our next task is to examine the Award of the IC and determine, whether based on the facts as illustrated above, the decision of the IC can be quashed for want of "proportionality".

[27] The facts from the proceedings before the IC were as follows:

(a) Although the Respondent was charged with five charges, the undisputed fact is, all these five charges stemmed from the single act in not taking action and / or in not responding to ESPEK's Letter.

(b) The IC was of the view that this was not appropriate and against the doctrine of equity and good conscience for the Applicant to magnify the alleged misconduct so as to influence

the IC that the Respondent was charged with many charges consisting of serious misconducts to justify imposition of more severe punishment on the Respondent.

(c) The Applicant had included element of conflict of interest and untrustworthiness in the 5th charge, despite no evidence and / or facts being adduced to support these allegations.

(d) The IC which conducted the *viva voce* evidence was satisfied that the Applicant had failed to tender documentary evidence to prove the Applicant had in fact paid the sum of RM1,174,776.57 to ESPEK as claimed. My comments: If it is true as claimed, the Applicant could have easily produced documentary evidence in their possession to prove payments had been made. Hence, there was no reason for the IC to consider the credibility of the witnesses as suggested by the learned Judge, when the facts showed the Applicant did not have any documentary evidence to prove the same. The issue is not credibility of the witness but non-production of documents to prove payment. Hence the learned Judge erred in disturbing the finding of the IC which had the benefit of a *viva voce* evidence.

(e) The alleged misconduct was not based on the fact, the Respondent was responsible for the penalty imposed by ESPEK on the Applicant for supplying the fertilisers not in

accordance with the specification but only for his failure to take action on ESPEK's Letter.

(f) The penalty imposed on ESPEK was RM74,776.57. The Applicant had failed to rebut, that payment of penalty was not made by the Applicant.

(g) The Respondent had served in the Applicant for about twenty years from 1st November 1990 to 25th February 2010. He had contributed his services diligently. He was awarded the "Promising Young Manager Award 1993" and "Excellent Service Award" in 1993.

(h) The Applicant had failed to rebut the Respondent's evidence that the penalty imposed by ESPEK was not paid by the Applicant.

[28] With the above facts placed before us, our next task is to ascertain if the dismissal of the Respondent was without just cause or excuse by using the doctrine of proportionality of punishment. We also have to decide if the punishment of dismissal was too harsh in the circumstances when ascertaining the award under section 20 (3) of the IRA.

[29] We are of the view, based on the facts as illustrated above and guided by the authorities we have discussed herein, the decision of the IC could not be termed as so unreasonable that no reasonable tribunal

could have arrived at such decision. In Hong Leong, the Federal Court stated as follows:

> *"In exercising judicial review, the High Court was obliged not to interfere with the findings of the Industrial Court unless they were found to be unreasonable, in the sense that no reasonable man could reasonably come to the conclusion. In this case it was perfectly justified for the Industrial to take into consideration Wong's misconduct as contributory factor towards the assessment of compensation. It was not only consistent with S. 30 (5) of the Act, which requires the Industrial Court to act according to equity and good conscience, but it would also discourage unfair trade practice by motor insurance."*

[30] Even assuming, the High Court was of the view, based on the facts before it, the High Court would have come to a different conclusion as indicated in the case of Vasudevan, the High Court must not reverse the said decision *"on a mere "measuring cast" or on a bare balance as the idea of discretion involves room for choice, and for different of opinion."*

[31] The law is trite, the High Court cannot interfere with the said decision unless if it could be shown that the IC:

(a) Had applied the wrong principle;

(b) Had taken into consideration irrelevant matters or had not taken into consideration relevant matters; and

(c) Handed down an award which is unfair.

[32] On the facts of this case, the decision of the Applicant to dismiss the Respondent was disproportionate to the misconduct the Respondent was charged with. It was too harsh and excessive. In view of this the IC was justified in substituting it with its own Award vide Award 383/2015 dated 7th April 2015. Guided by the authorities discussed above, it is within the jurisdiction of the IC to do so.

[33] Upon a close scrutiny of the facts before us, we found that the decision of the IC did not suffer from any of the infirmities mentioned above. Therefore, we found no reason for the High Court to interfere with the findings of the IC.

CONCLUSION

[34] Having examined the appeal records and perused the written submission and having heard the oral arguments, we were constrained to hold that the learned Judge failed to judicially appreciate the evidence and / or the law presented before him so as to render his decision plainly wrong and upon curial scrutiny, it merits our appellate intervention.

[35] Based on the aforesaid, we unanimously allowed this appeal with costs of RM5,000.00 to the Respondent subject to payment of allocator fees. The decision of the High Court was set aside and the decision of the Industrial Court was reinstated. The deposit refunded to the Applicant.

[36] We therefore ordered accordingly.

Dated: 27th October 2017

t.t.

(ASMABI BINTI MOHAMAD)

Judge
Court of Appeal, Malaysia

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