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Trade Unions: A Shield Against Unlawful Dismissal?

Malaysian Airline System Bhd v Ismail Nasaruddin bin Abdul Wahab

Contact Persons:

Datuk D P Naban
Senior Partner
Tax, SST & Customs Practice
☎ +603 6209 5405
✉ naban@rdslawpartners.com

Rosli Dahlan
Partner
☎ +603 6209 5420
✉ rosli@rdslawpartners.com

Tan Wei Wei
Partner
☎ +603 6209 5404
✉ weiwei@rdslawpartners.com

R Rishi
Partner
☎ +603 6209 5400
✉ rishi@rdslawpartners.com

Kenny Lam Kian Yip
Senior Associate
☎ +603 6209 5400
✉ kenny@rdslawpartners.com

On 14 April 2021, the Court Of Appeal¹ allowed Malaysian Airline System Berhad's (MAS) appeal and dismissed Ismail Nasaruddin's (Ismail) application for judicial review.

The Industrial Court had previously dismissed Ismail's application for unlawful dismissal, where he sought for a declaration that he was dismissed without just cause for making a press statement to voice concerns over the plight of 3,500 cabin crew of MAS. Aggrieved by the Industrial Court's decision, Ismail had filed an application for judicial review at the High Court, which had allowed the application.

Brief Facts

MAS was a company responsible for the operation of airline transportation service. Ismail was an employee of MAS and also the President of the National Union of Flight Attendants Malaysia (NUFAM). NUFAM is registered as a trade union under the Trade Union Act 1959 (TUA).

MAS got wind of an article that was published in the Sun newspaper calling for the resignation of the Chief Executive Officer of MAS (CEO). The article made reference to, among others, a press statement which was issued by Ismail containing several allegations against MAS.

A show cause letter was issued to Ismail. In the show cause letter, there were 2 allegations which were identified:

- Ismail, as president of NUFAM caused the press statement, calling for the Prime Minister to remove the CEO, to be released; and

¹ [2021] MLJU 565

- Ismail criticised the MAS management stating that the management created disharmony amongst the cabin crew fraternity and that MAS compromised the welfare and well-being of its employees. MAS identified Ismail's action to be tantamount to a serious act of misconduct, a breach of his express/implied duties to MAS.

The contents of the show cause letter were denied by Ismail, where he took the stand that the press statement was made in his capacity as the President of NUFAM and not as an employee of MAS. Subsequently, MAS dismissed Ismail.

Provisions Of The IRA 1967 Raised By Ismail

Ismail had applied to the Industrial Court contending that the dismissal was contrary to Sections 4(1) and 5(1) of the Industrial Relations Act 1967 (IRA) and Section 22 of the TUA.

In essence, Ismail's contention that his position as a member of a trade union conferred protection upon him *vis-à-vis* the relevant provisions.

Industrial Court Ruling

The Industrial Court ruled that as an employee of MAS, Ismail owed a duty and responsibility to MAS. Ismail's duty and responsibility to MAS takes precedence over his duties in the trade union.

The Industrial Court also considered the provisions in the IRA 1967 and decided that those provisions are inapplicable in this instance as the Ismail's dismissal by MAS was warranted. Ismail had acted against the interest of MAS. Ismail's position in NUFAM does not alleviate him of his duties and responsibilities to MAS.

High Court Ruling

Following Ismail's application for judicial review, the High Court disagreed with the Industrial Court's ruling. The High Court ruled that Ismail's press statement was within the lawful activities of NUFAM, particularly to ensure good working condition of its members. The High Court further

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ruled that the Sections 4 and 5 of IRA bestow a wide protection for members of a trade union for participating in trade union activities. Ismail's dismissal which stems from his participation in trade union activities was tantamount to victimisation or unfair labour practice. Accordingly, the High Court allowed the judicial review.

Court Of Appeal's Ruling

The Court of Appeal identified 4 issues, namely:

- (1) Whether the Ismail's dismissal was a violation of Sections 4 and 5(1)(d)(ii) of IRA
- (2) Whether the dismissal of Ismail was lawful
- (3) Whether the membership in the union immunised Ismail from dismissal pursuant to Section 22(1) of the TUA
- (4) Whether there was a trade dispute between NUFAM and MAS

In relation to issues (1) and (2):

The crux of the Court of Appeal's decision in reversing the High Court case is dependent on the issue of whether MAS can take disciplinary action against the Ismail for issuing the press statement. The Court of Appeal ruled that any conduct of the employee, irrespective of their position as a trade union member, which is likely to damage the reputation of the employer may constitute gross misconduct and will lead to disciplinary action up to and including dismissal.

The Court of Appeal acknowledged that the Industrial Court was correct in finding sufficient evidence adduced by MAS to justify its action in dismissing Ismail. There was also evidence of lesser punishment which was imposed on Ismail in the past for making similar press statements. Ismail's repeated actions was a testament to his defiance to MAS' warnings. The Court also held that the Industrial Court was correct in finding that Ismail's repeated misconduct "*underlines his insubordination*" against MAS. Accordingly,

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the commencement of disciplinary action in dismissing Ismail did not tantamount to a violation of Section 5(1) of the IRA.

In relation to issue (3):

The Court of Appeal ruled that Section 22 of the TUA does not apply to any acts of misconduct committed by an employee and to subsequent disciplinary action which flows from such acts of misconduct. The Court held that the present case was not one of a tortious nature, but one of a breach of the express/implied terms and conditions of employment. As such, it does not fall within the ambit of Section 22 of the TUA.

In relation to issue (4):

The Court of Appeal ruled that there exists a “trade dispute” between NUFAM and MAS, in respect on the working conditions to the terms of the working condition of the cabin crew. Citing the definition of “trade dispute” in the TUA which reads as “any dispute between an employer and his workmen which is connected with the employment or non-employment or the terms of employment or the conditions of work of any such workmen”, the Court of Appeal expressed the need to comply with the prerequisites in Sections 18, 19 and 26 of the IRA. These provisions set out the procedures to be taken by parties to achieve settlement of the dispute. In the present case Ismail did not settle the dispute according to the provisions of the relevant laws but proceed to issue press statements seeking the dismissal of the CEO.

As a finality, the Court of Appeal ruled that there was an implied duty of good faith in Ismail’s contract of employment. Ismail had breached that duty and accordingly there was no merit in the allegation that MAS had contravened Sections 4 and section 5(1) of IRA.

Commentary

The High Court's decision seems to support the contention that protection ought to be accorded to member of trade union in performing certain acts against their employer companies, provided such actions were done in the interest of its unions’ members.

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☎ +603 6209 5405
✉ naban@rdslawpartners.com

Rosli Dahlan
Partner
☎ +603 6209 5420
✉ rosli@rdslawpartners.com

Tan Wei Wei
Partner
☎ +603 6209 5404
✉ weiwei@rdslawpartners.com

R Rishi
Partner
☎ +603 6209 5400
✉ rishi@rdslawpartners.com

Kenny Lam Kian Yip
Senior Associate
☎ +603 6209 5400
✉ kenny@rdslawpartners.com



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However, the Court of Appeal's recent decision reaffirmed the position that although an employer has no right to interfere with an employee in exercising its rights to participate in union activities, such participation does not shield the employee from unfair dismissal claims.

Participation ought not to result in dereliction. In other words, it is necessary for an employee to exercise caution when participating in union activities to ensure that he does not neglect his fundamental duties to his employer.

Authored by Joseph Wong, an Associate with the firm's Dispute Resolution practice.

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