INDUSTRIAL COURT OF MALAYSIA

CASE NO:15/4-399/01

BETWEEN

CAPETRONIC (MALAYSIA) CORPORATION SDN. BHD.

AND

ALAN NG LI HONG

AWARD NO.: 400 OF 2004

Before	:	**N. RAJASEGARAN - Chairman (Sitting Alone)**
Venue	:	Industrial Court Malaysia, Kuala Lumpur
Date of Reference	:	22.3.2001.
Dates of Mention	:	31.5.2001, 24.2.2002, 30.7.2003 and 25.3.2004.
Date of Hearing	:	29.3.2004.
Representation	:	Mr. Eric Siow from M/s Lee, Ong & Kandiah, Counsel for the Company. Ms. Angeline Low from M/s Lobo & Associates, Counsel for the Claimant.

Reference:

This is a reference made under Section 20(3) of the Industrial Relations Act, 1967 arising out of the dismissal of **Alan Ng Li Hong** (hereinafter referred to as "the Claimant") by **Capetronic (Malaysia) Corporation Sdn. Bhd.** (hereinafter referred to as "the Company").

AWARD

Background

1. This case emanates from the termination of employment by Capetronic (Malaysia) Corporation Sdn. Bhd. ('the Company') of Alan Ng Li Hong ('the Claimant') on 3.10.1998 consequent upon which the Minister of Human Resources acting under s.20(3) of the Industrial Relations Act 1967 ('the Act') by a decision arrived at on 22.3.2001 referred the dispute to the Industrial Court for an award which reference was allocated to Industrial Court No. 15 ('the Court') on 3.5.2001.

2. The Court was without a Chairman for the period commencing on 1.2.2003 until 15.1.2004 on which date I, the current Chairman ('the Chairman'), was appointed under s.23(2) of the Act and assigned to the Court, both of which occurred on that same date.

3. Several mentions were called before the Assistant Registrar and on the 3rd occasion on 3.7.2003, hearing of the matter was fixed for 29 and 30.3.2004.

Application (Preliminary Objection)

4. At the outset of the hearing on 29.3.2004, learned counsel for the Claimant ('Ms Angeline Low') and learned counsel for the Company ('Mr. Eric Siow") both made similar applications for the Chairman to recuse and thereafter to transfer this case to another Division of the Industrial Court.

5. In substance, the application as can be gauged from learned counsels' submission, is a preliminary objection against the jurisdiction of the Court to proceed with the hearing of the case.

6. Gopal Sri Ram JCA sitting in the Supreme Court case of ***Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd. (1997) 2 MLJ 685*** held that the reference of the Minister constitutes the threshold jurisdiction and once seized of the dispute in the threshold sense the Court is empowered to determine whether it has the wider jurisdiction to entertain the workman's claim. His Lordship referred to this as *"the jurisdiction to decide whether there is jurisdiction."*

7. There being a reference of this dispute under the Act by the Minister, the Court is seized of threshold jurisdiction. Both learned counsel have not challenged this threshold jurisdiction; and correctly so since the forum for such a challenge is not in this Court. Their challenge of the Court's jurisdiction falls therefore under the wider *Anisminic* sense.

8. I rule that the Court has jurisdiction to enter and decide upon the preliminary objection taken by both learned counsel. Any decision otherwise will fly against the judgement arrived at in the Supreme Court cases of ***Enesty Sdn. Bhd. v. Transport Workers Union (1986) 1 MLJ 18*** and ***Kathiravelu Ganesan & Anor (supra)***. I am bound by the decision in these cases based on the principle of *stare decisis*.

Claimants Submission

9. Both learned counsel made individual verbal submissions which were recorded verbatim by the Court. These are now narrated to demonstrate the thrust of their respective arguments in support of their cause.

10. Ms. Angeline Low submitted as follows:

" I am making an application for Tuan to recuse from hearing the present matter and to transfer it to another Division of the Court. The reason being there is presently an application in the High Court for which leave has been granted on 10.2.2004 by High Court to challenge Tuan's appointment.

If eventually the applicants succeed in the application in the High Court to challenge the appointment, and if in the meantime the present case is heard and decided upon, the losing party in his case may then take up the matter to the High Court to quash the Award on grounds that Tuan has no jurisdiction to hear the case. As decided in the case of Federal Hotel v. National Union of Hotel Bar & Restaurant Workers where jurisdiction is absent, parties cannot confer jurisdiction by agreement, estoppels [sic] or acquiescence. Therefore even if parties were to agree at this stage not to take up the issue of jurisdiction it does not preclude that party from subsequently raising that in the High Court. And if that were the case, the case will have to be reheard. And this would defeat the purpose and policy of s.30(3) of the Industrial Relations Act which mandates the Court to make its Award without delay.

Therefore I humbly urge Tuan to recuse from hearing the case and to transfer the same to another Division.

Although the present appointment, there may be arguments it is not a jurisdictional matter. But we submit that an improperly constituted Tribunal has no jurisdiction to hear the case. And hence making it an issue of jurisdiction."

(No citation nor copy of the authority quoted was extended to the Court by Ms. Angline Low.)

11. Mr. Eric Siow then submitted :

> " Y.A. with respect I make a similar application as my learned friend. And I adopt her submission.
>
> Whether or not the issue is one of jurisdiction of the Court or proper constitution of the Court it is my submission that an Award made by an improperly constituted Court would be a nullity. Furthermore as the position of the Chairman of the Court is a statutory appointment it is my submission that parties are not at liberty to come to an agreement to waive all objections arising from this point. As parties may not by agreement put themselves beyond the reach of a statute."

Mode of Application

12. Save for the verbal submissions of both counsel, no prior notice nor affidavit were filed by either party.

13. In ***Ooi Chew Seng v. Ultratech Sdn. Bhd. & Ors. (1997) 2 MLJ 344*** Nik Hashim JC (as his Lordship then was) held that there need not be affidavit evidence in support of a preliminary objection and that prior notice of the preliminary objection is sufficient. Earlier in his speech his Lordship observed that *"the rationale behind the need for prior notice is to prevent surprise."* In the instant case the element of surprise does not arise, for both parties are uniform in raising the same objection. For this reason and the authority of the High Court decision referred to, I hold that the absence of affidavit or prior notice does not in any way vitiate

the application. In this, I further find statutory support under s.30(5) of the Act which enjoins the Court to disregard technicalities and legal form.

Evidence

14. Per Syed Agil Barakbah SCJ in ***Pembangunan Maha Murni Sdn. Bhd. v. Jururus Ladang Sdn. Bhd. (1986) 2 MLJ 30:***

> *"Now, the general rule is that all facts in issue and relevant facts must be proved by evidence. There are, however, two cases of facts which need not be proved, viz (a) facts judicially noticed and (b) facts admitted."*

The relevant fact in this case in the words of Ms. Angeline Low, adopted by Mr. Eric Siow is that "there is presently an application in the High Court for which leave has been granted on 10.2.2004 by the High Court to challenge Tuan's (the Chairman's) appointment," This fact does not fall within the exceptions stated by his Lordship.

15. ***Sarkar on Evidence, 15th Edn. Vol. 1 at pg. 57*** *reads:*

> "*In deciding a matter of fact, no judge is justified in acting on his own knowledge and belief, or public rumour, without proof of it* ***(Mithan v. Bashir, 11 MIA 213:7 WR 27)***"

16. In ***Loh Moh & Anor v. Public Prosecutor (1954) 20 MLJ 14***, Bellamy J said:

> *"It is an elementary proposition of law, too frequently overlooked with resulting confusion and possible injustice, that cases must be decided on the evidence and that the*

evidence must be such as is relevant and admissible under the Evidence Ordinance, that is, it must be either from admitted documents or the statements of witnesses or be something of which the Court can take judicial notice."

His Lordship then continued:

*"In **Harpushad v. Shoe Dyal,** their Lordships of the Privy Council said:*

> *"A Judge cannot without giving evidence as a witness import into a case his own knowledge of particular facts."*

The learned President clearly, in my view, misdirected himself in importing into the case his own knowledge of matters of which there was not a shred of evidence before him."

17. Shankar J in ***Chong Khee Sang v. Pang Ah Chee (1984) 1 MLJ 377*** ruled:

*"In this case the learned President imported into the case his own knowledge of particular facts relating to the cost of a Chinese funeral and a coffin. He could not without giving evidence himself as a witness have brought such knowledge into the case and what was done was not permissible under the law. See **Low Moh v. Public Prosecutor."***

18. And in recent times Augustine Paul J (as his Lordship then was) said in ***Public Prosecutor v. Sharma Kumari (2000)6 MLJ 254:***

"It is settled law that a judge cannot, without giving evidence as a witness, import into a case his own knowledge of

particular facts (see ***Low Moh & Anor v. PP (1954) MLJ 14; Lee Sew Kuan v. R (1940) MLJ 211****)"*

19. Where, there is no evidence to support a conclusion, there is necessarily an error of law in the decision arrived at *[See* ***Edwards v. Bairstow (1956) AC 14; Din (Taj) v. Wandsworth LBC at p664 H, per Lord Wilberface; R V Hillingon LBC, Exp Islam (Tafazzul) (1983) 1 AC 688 at p708D, per Lord Wilbeforce and at p717G, per Lord Lowry****].*

20. The brunt of the attack against the Chairman by both counsel is that there is pending in the High Court an application to challenge the appointment of the Chairman. However both did not lead any evidence whatsoever towards establishing this as a fact. On this ground alone, on the basis of the authorities stated above, their preliminary objection stands to be dismissed.

Improperly Constituted Court

21. It is the argument of both learned counsel that the Court being improperly constituted is bereft of jurisdiction.

22. In dealing with this facet of submission, the Court is mindful of the passage in **Halsbury's Laws of Malaysia, 2001 Edn. Vol.9, paragraph 160.73 entitled "Illustrations of jurisdictional defects'** which reads:

"A tribunal lacks jurisdiction if: (1) it is improperly constituted [see ***George v. Chambers (1843)11 M & W 149; R(Dobbyn) v. Belfast Justices (1917) 2 IR 297; R(Department of Agriculture) v. Londonderry City Justices, R (Meehan) v. Hardy (1917) 2 IR 283; R v. Inner London Quarter***

***Sessions, ex p D'Souza (1970) 1 All ER 481, (1970) 1 WLR 376, DC**]"*

23. So too relevant in this connection, is the caution administered by Faiza bin Tamby Chik J in ***Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v. GB Kuari Sdn. Bhd. & Anor (2003) 3 AMR 363*** where his Lordship in dealing with the composition of the Industrial Court in relation to a panel member said:

> *"The upshot of ss 21(1) and 22(2) of the IRA is that whenever the Industrial Court sits to hear a trade dispute referred to it, it is mandatory or obligatory that the constitution of the Industrial Court be in accordance with the provisions of the IRA."*

24. Having borne in mind the above authorities, I also pay heed to Low Hop Bing J (as his Lordship then was) in ***Tenaga National Bhd. v. Perwaja Steel Sdn. Bhd. (1995) 4 MLJ 676*** where he said:

> *"Under section 101(1) of the Evidence Act 1950, whoever desires the Court to give judgement as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exists."*

25. In ***Tun Dato Haji Mustapha Bin Datu Harun v. Tun Datuk Haji Mohamed Adnan Robert, Yang Di Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan (No. 2) [1986] 2 MLJ 420***, on the issue concerning the validity of the appointment of the Sabah Chief Minister, the Court ruled:

"*The evidential burden lies upon them to prove that there was no, or no valid appointment.*"

26. The evidential burden therefore lay on the applicants of the preliminary objection to prove that the Court is improperly constituted. Towards discharging this burden they made no effort. For this reason I am unable to find the Court to be improperly constituted.

Court's Jurisdiction

27. Having found the Court to be properly constituted and faced with the Minister's reference as hereinbefore stated, what then is incumbent upon the Court?

28. Suffian FJ ***in Kesatuan Pekerja-Pekerja Kenderaan Sri Jaya v. The Industrial Court & Ors. (1970) 1 MLJ 78*** stated:

> *"When the matter has been referred to the Industrial Court by the Minister in the proper exercise of his power, what is the Industrial Court to do? Can it decline to act? I do not think so."*

29. And Mohamed Azmi J (as his Lordship then was) in ***Assunta Hospital v. Dr. A. Dutt (1980) 1 MLJ 96*** said:

> "In *the present application for prohibitory order, the question therefore, arises whether the Industrial Court (in the instant case, the Chairman of the Court) can refuse to make an award in respect of a representation referred to it by the Minister for Labour. In my judgement, there is no provision in the Industrial Relations Act where the Industrial Court can*

disregard a decision made by the Minister under s.20(3) of the Act."

30. And upon acting on the Minister's reference, as the Court is enjoined to do by the above authorities, the Court's function is twofold viz (a) First to determine whether the misconduct complained of the employer has been established, and (b) Secondly whether the proven misconduct constitute just cause or excuse for the dismissal. This duty of the Court made mandatory by Mohamed Azmi FCJ's enunciations in the two Federal court cases of ***Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. & anor (1995)2 MLJ 753*** and ***Milan Auto Sdn. Bhd. v. Wong Seh Yen (1995) 3 MLJ 537***, have been cited so often and approved so often, that the need for the Court to refer to it in terms does not arise.

31. In the face of the aforesaid decisions a refusal by the Court to proceed towards making an award would by itself constitute a jurisdictional error. See ***Halsbury's Laws of Malaysia, 2001 Edn., Vol. 9 paragraph 160.078 entitled 'Declining jurisdiction'*** where it is stated as follows:

"An order of mandamus will issue to an inferior tribunal or other decision maker which wrongfully refuses to hear and determine a matter within its jurisdiction or the scope of its powers."

High Court Application

32. For purposes of completion of all issues raised, I ask myself: In the event counsel had satisfied their evidential burden regarding a pending application in the High Court challenging the appointment of the Chairman, would this fact by itself demand the Chairman to recuse and

abdicate his duty? My considered response to this poser is firmly in the negative. My reasons follow.

33. In ***Tun Datu Haji Mustapha bin Datu Harun v. Tun Datuk Haji Mohamed Adnan Robert, Yang Di Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan (1986) 2 MLJ 391***, one of the grounds canvassed by the applicant in support of his application was that the Speaker of the Legislative Assembly would be dismissed at an impending future meeting of the State Assembly. Abu Mansor J (as his Lordship then was) in rejecting the ground said:

> *"The decision that the Court is invited to take cognisance of is the decision of a meeting of the State Assembly due to meet on Monday, November 4, 1985 (hearing Thursday, October 31, 1985). Such an event is remote and may or may not take place and it borders even on it being hypothetical when as such no order should be given (See* ***Glasgow Navigation Co. v. Iron Ore Co****). The case of* ***Attorney-General v. Scott*** *may also be in point which decided that the Court cannot decide on something which depends on uncertainties or "in the air"."*

As there, so here. The Court cannot deliberate on remote events or on surmise or on conjecture of outcome of events.

34. The administration of justice and public confidence in the same would be greatly hampered if serving judicial arbitrators are prevented from carrying out their duties for the reason that a challenge has been mounted and is pending against their appointment. To allow so would make the courts atrophy and disabled from carrying out their business.

Conclusion

35. For the reasons adumbrated above the preliminary objection clothed in the form of an application for the Chairman to recuse is dismissed.

36. The application to transfer this case to another Division of the Industrial Court is a progression from the initial preliminary objection on the Court's jurisdiction. By reason of the above decision on the Court's jurisdiction, the application for transfer deserve no consideration and is therefore denied.

37. The Claimant was dismissed on 3.10.1998. Delayed this case has been. To perpetrate further delay would cause injustice to both parties. The Court will call immediate mention of this case so as to enable early dates of hearing to be fixed.

HANDED DOWN AND DATED THIS 14TH APRIL, 2004

(N. RAJASEGARAN)
CHAIRMAN
INDUSTRIAL COURT.