

Ismail Nasaruddin Bin Abdul Wahab v Malaysian Airline System Berhad – a case note

Facts

On 8 November 2013, it was brought to Malaysian Airline System Berhad's ("MAS") attention that The Sun newspaper was carrying an article on the National Union of Flight Attendants Malaysia's ("NUFAM") call for the resignation of the Chief Executive Officer of MAS.

The published article referred to an interview the claimant, Ismail Nasaruddin Bin Abdul Wahab, ("Ismail Nasaruddin"), conducted with Sunbiz where the article also made reference to a press statement issued by NUFAM. The article also raised various other allegations against MAS. At the material time, Ismail Nasaruddin was the President of NUFAM and a member of its Executive Committee.

Ismail Nasaruddin was issued a show cause letter and, in his reply, Ismail Nasaruddin did not deny the allegations levelled against him and took the position that the press statements had been made in his position as the President of NUFAM and not in his capacity as a Chief Steward of MAS. MAS then dismissed Ismail Nasaruddin.

Issues

The principal issues before the Industrial Court in determining whether Ismail Nasaruddin's dismissal was justified was whether Ismail Nasaruddin, in his capacity as the President and member of the Executive Committee of NUFAM, was immune to disciplinary action for comments made by him as an officer of NUFAM.

Ismail Nasaruddin contended that he was not in breach of express and/or implied terms and conditions of his employment under the circumstances, considering that he had acted in his capacity as an officer of a trade union. Ismail Nasaruddin further alleged that MAS discriminated against him in favour of Malaysian Airline System Employees' Union Peninsular Malaysia Union ("MASEU") officials who had also made press statements, calling for, amongst others, the removal of the Chief Executive Officer of MAS but no action was taken against those officials.

MAS's stance was that Ismail Nasaruddin's role as a member and President of NUFAM was subject and secondary to his underlying fiduciary duty to MAS as his employer. MAS took the position that although it was Ismail Nasaruddin's right to partake in union activities, he was not immune from disciplinary action when he had breached his expressed and/or implied duties to MAS as an employee.

Decision and analysis of the Industrial Court

The Industrial Court held that Ismail Nasaruddin, in participating in the interview and making the press statements, had acted against the interests of MAS which should be given top priority. The Industrial Court ruled that Ismail Nasaruddin was duty bound to place his responsibilities as an employee ahead of his duties in the trade union. The Industrial Court further held that the holding of the post in and/or membership of NUFAM did not give Ismail Nasaruddin the licence to make the comments which he made in public.

The Industrial Court also considered Ismail Nasaruddin's contention that section 22 of the **Trade Unions Act 1959** ("TUA") and sections 4 and 5 of the **Industrial Relations Act 1967** granted him immunity against any action as a member of the trade union.

Section 22 of the Trade Unions Act 1959 ("TUA")^[1]

On this point Ismail Nasaruddin sought to rely on the Court of Appeal decision in **Nur Rasidah Jamaludin v Malayan Banking Bhd**^[2] which held as follows:

"The general immunity conferred by s.22(1) applies to the tort of libel and hence the defendants here cannot be held liable for the impugned documents published by the trade union. In short, trade unions and its members or officers have absolute immunity from actions that are premised upon the tort of libel pursuant to s.22(1) of the TUA 1959 when the tortious acts complained of were 'committed by or on behalf of the trade union'."

MAS contended that Ismail Nasaruddin's interpretation of section 22 of the TUA ran counter to the established cases which have ruled that notwithstanding the fact that an employee was a member of the union, it did not provide him with immunity if his actions amount to misconduct.

The Industrial Court agreed with MAS and ruled that section 22 of the TUA does not apply to disciplinary proceedings taken against employees and only relates to conferring immunity from civil suits for tort.

Sections 4 and 5 of the Industrial Relations Act 1967 ("IRA")

Similarly, Ismail Nasaruddin argued that he was statutorily protected by sections 4(1)^[3] and 5(1)^[4] of the IRA. The Industrial Court ruled that sections 4(1) and 5(1) of the IRA were inapplicable in this case as Ismail Nasaruddin was found to be guilty of the allegations of misconduct levelled against him. The Industrial Court agreed with MAS that even if there was any breach of the aforesaid sections, the avenue to redress such breaches was by way of section 8^[5] of the IRA.

In relation to Ismail Nasaruddin's allegation that he was discriminated in his treatment by MAS by being punished with dismissal while no action was taken against the MASEU officials, the Industrial Court held that the fact that no action was taken against other employees was not relevant in determining the justness of Ismail Nasaruddin's dismissal.

The Court, citing the Federal Court decision in **Ranjit Kaur S Gopal Singh v Hotel Excelsior (M) Sdn Bhd**^[6], ruled that its role was confined to determining whether the acts committed

by Ismail Nasaruddin warranted his dismissal and not whether other employees committing similar misconduct had been previously dismissed.

The Industrial Court found that MAS's decision to dismiss Ismail Nasaruddin was warranted and commensurate with acts of misconduct committed by him. In so ruling, the Industrial Court also took into account Ismail Nasaruddin's past misconduct which was of a similar nature and held that as a long-serving employee of the company, he ought to have been aware of MAS's policies instead of acting in contravention of it.

Conclusion

The Industrial Court has reaffirmed the position that although an employee has the right to be involved in legitimate union activities, the fact that he was an officer of a trade union did not grant him immunity from disciplinary action if his conduct amounted to a breach of the express and/or implied terms of his employment.

The Court further affirmed that when engaging in union activities, the employee must ensure that he is not derelict in his fundamental duty as an employee of his employer.

[1]22. Liability in tort:

1. A suit against a registered trade union or against any members or officers thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union shall not be entertained by any court.

[2] [2018] 1 CLJ 330

[3] No person shall interfere with, restrain or coerce a workman or an employer in the exercise of his rights to form and assist in the formation of and join a trade union and to participate in its lawful activities.

[4] No employer or trade union of employers, and no person action on behalf of an employer or such trade union shall-

- a. impose any condition in a contract of employment seeking to restrain the right of a person who is a party to the contract to join a trade union, or to continue his membership in a trade union;
- b. refuse to employ any person on the ground that he is or is not a member or an officer of a trade union;
- c. discriminate against any person in regard to employment, promotion, any condition of employment or working conditions on the ground that he is or is not a member or officer of a trade union;
- d. dismiss or threaten to dismiss a workman, injure or threaten to injure him in his employment or alter or threaten to alter his position to his prejudice by reason that the workman-
 - (i) is or proposes to become, or seeks to persuade any other person to become, a member or officer of a trade union; or
 - (ii) participates in the promotion, formation or activities of a trade union; or
- e. induce a person to refrain from becoming or to cease to be a member or officer of a trade union by conferring or offering to confer any advantage on or by procuring or offering to procure any advantage for any person.

[5] Any complaint of any contravention of sections 4, 5 or 7 may be lodged in writing to the Director General setting out all the facts and circumstances constituting the complaint.

[6] [2010] 8 CLJ 629