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INTRODUCTION

The judgments of His Royal Highness Sultan Azlan Shah on labour law reflect a keen understanding of the competing legal rights of management and labour. The judgments have touched on many points relating to labour law, but it is in the field of industrial disputes that His Highness' judgments have left an indelible mark. In the short two decades since the Industrial Relations Act, 1967 (the Act) has been in existence, considerable litigation has arisen as to its scope and application. This is largely due to the fact that the Act sought to radically change the face of the master/servant relationship at common law; legitimate certain trade union activity; accord recognition to collective bargaining and collective agreements; introduce the doctrine of specific performance of employment contracts through the remedy of reinstatement; and, establish a permanent Industrial Court to adjudicate over industrial disputes.

In several judgments Sultan Azlan Shah lucidly expounded the legislative rationale behind the introduction of the Act. In *Non Metalic Mineral Products Manufacturing Employees Union & Ors* v *South East Asia Fire Bricks Sdn Bhd,*[1] Raja Azlan Shah FJ (as he then was) explained it thus:

> The Act is intended to be a self-contained one. It seeks to achieve social justice on the basis of collective bargaining, conciliation and arbitration. Awards are given in circumstances peculiar to each dispute and the Industrial Court is to a large extent free from the restrictions and technical considerations imposed on ordinary courts.[2]

In *Fung Keong Rubber Manufacturing (M) Sdn Bhd* v *Lee Eng Kiat &*

[1][1976] 2 MLJ 67 (Reversed by the Privy Council, [1980] 2 MLJ 165, on a preliminary technicality).

[2]At page 68.

Ors, [3] Raja Azlan Shah CJ (as he then was) gave an exegesis on the essential distinction in the remedies available to a dismissed worker at common law and under the Act: It has now become a classic with students and lawyers alike on the question. It deserves full reproduction:

> In the case of a claim for wrongful dismissal, a workman may bring an action for damages at common law. This is the usual remedy for breach of contract, for example, a summary dismissal where the workman has not committed misconduct. The rewards, however, are rather meagre because in practice the damages are limited to the pay which would have been earned by the workman had the proper period of notice been given... At common law it is not possible for a wrongfully dismissed workman to obtain an order for reinstatement because the common law knew only one remedy, viz, an award of damages. Further, the courts will not normally 'reinstate' a workman who has been wrongfully dismissed by granting a declaration that his dismissal was invalid: See *Vine* v *National Dock Labour Board; Francis* v *Municipal Councillors of Kuala Lumpur.* At the most it will declare that it was wrongful. However his common law right has been profoundably affected in this country by the system of industrial awards enacted in the Industrial Relations Act, 1967. The wrongfully dismissed workman can now look to the remedies provided by the arbitration system. He can now look to the authorities or his union to prosecute the employer and force the latter to reinstate him. Reinstatement, a statutorily recognized form of specific performance, has become a normal remedy and this coupled with a full refund of his wages could certainly far exceed the meagre damages normally granted at common law. The speedy and effective resolution of disputes or differences is clearly seen to be in the national interest, but it is also apparent that any attempt to impose a legal obligation without a prior exploration for a voluntary conciliation could aggravate rather than solve the problem. To this end the Director General is empowered by section 20 of the Act to offer assistance to the parties to the dispute to expedite a settlement by means of conciliatory meetings.

His Lordship then added:

> We say this because the general common law considerations applicable to contracts of employment have been modified, in the area to which industrial awards are applicable, to the advantage of the workman in relation to wrongful dismissals where he could now ask to be reinstated in his former employment.[4]

A consistent feature of the Sultan's judgments on labour law have been their expository character, particularly on those parts of the Act that had hitherto bedevilled labour lawyers. In *Goon Kwee Phoy* v *J & P Coats (M) Bhd,*[5] Raja Azlan Shah CJ (as he then was) gave quietus to the long debate whether there still existed under the new regime of the Act the distinction between contractual termination of employment and dismissal. His Lordship spoke for the Federal Court and said:

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[3] [1982] 1 MLJ 238.

[4] At page 239-240.

[5] [1981] 2 MLJ 129, 135.

> We do not see any material difference between a termination of the contract of employment by due notice and unilateral dismissal of a summary nature. The effect is the same and the result must be the same. Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer choses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse.[6]

In another case, *National Union of Hotel, Bar & Restaurant Workers* v *Minister of Labour and Manpower*,[7] Raja Azlan Shah CJ (as he then was) dealt with the equally vexed problem of the jurisdiction of the Minister of Labour to refer disputes to the Industrial Court and the extent to which that discretion is subject to judicial review by the High Court. His Lordship was not content merely to rely on the *Wednesbury*[8] principle propounded by Lord Greene MR on the discretionary power of public officials, or its later enunciation in the *Tameside*[9] case, but sought to relate the principle contextually to the discretionary power envisaged under the Act:

> He is an elected Minister and is entitled to have his opinion of industrial problems within the area of his responsibility respected. In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient.[10]

Earlier in the judgment Raja Azlan Shah CJ had, however, made it clear that the Minister did not exercise an unfetterd discretion and that his decision was open to challenge if he had misconstrued the Act or exercised his powers in a way as to defeat the policy and object of the Act.[11]

The resolution of industrial conflict through the judicial process remains one of the most controversial aspects of industrial law. Probably no other area of judicial decision-making is so open to criticsm as this. The perennial charge has been that judges as a result of their conservative or different class background hold an unconscious bias against trade unions and trade union activity.[12] Even Lord Denning, noted for his progressive views, has not escaped the wrath of trade unions.[13] A survey of Malaysian labour cases reveals that organised

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[6]At page 135.

[7][1980] 2 MLJ 189.

[8]*Associated Provincial Pictures Homes Ltd* v *Wednesbury Corpn* [1948] 1 KB 223.

[9]*Secretary of State for Education* v *Tameside MBC* [1976] 3 All ER 665.

[10]At page 191.

[11]*Ibid.*

[12]See JAG Griffith, *The Politics of the Judiciary* (1978 Fontana).

[13]Lord Denning, *The Closing Chapter* (Butterworths 1983) see Chapter 6.

labour had its best judicial spokesman in Sultan Azlan Shah. The *South East Asia Firebricks* case was hailed as a 'labour charter' by trade unions soon after its decision. But the recognition of the legitimate role and function of trade unions began well before that. In 1968, in *Re Application of Lower Perak Motor Service Co Ltd,*[14] Raja Azlan Shah J (as he then was) dealt with the question whether a disputed claim for recognition by a trade union was 'a trade dispute' and said this in the course of his judgment:

> It is an accepted fact in all democratic countries that free trade unions have as one of their primary objects the representation of the interests of workmen in trade disputes. To suggest that it means a claim by the union for recognition *simpliciter* as distinct from its representative capacity is to adopt a narrow approach to the whole problem and in my view contrary to the accepted meaning attributed to it in the context of the requirements of industrial relations.[15]

The *South East Asia Firebricks* case[16] was, however, the landmark decision for legitimate trade union activity. The Sultan put the point beyond pre-adventure that a trade union could engage in lawful strike and in consequence its members would not jeopardise their contracts of employment. His Highness took the opportunity to declare:

> Workers organisations cannot exist if workers are not free to join them, to work for them, and to remain in them. This is a fundamental right which is enshrined in our Constitution and which expresses the aspiration of workmen. It is declaratory of present day industrial relations that management should encourage workmen to join a union and to play an active part in its work, but this is restricted to the activities of a registered trade union, such as the freedom to strike. 'The right of workmen to strike is an essential element in the principle of collective bargaining' per Lord Wright in *Crofter Hand Woven Harris Tweed Co Ltd* v *Veitch & Anor* [1942] AC 435, 463. That is a truism. There can be no equilibrium in industrial relations today without the freedom to strike. If workers could not, in the last resort, collectively withhold their labour, they could not bargain collectively.[17]

His Lordship was careful to enter the caveat that his declaration of trade union rights was confined to the activities of a registered trade union only. Later in the judgment he cautioned that strike action must be for a lawful purpose.[18] It was typical of the balanced view that Sultan Azlan Shah took on the vexed problems posed by industrial conflict.

His Highness' definitive pronouncements in this regard helped to shape the growth of a proper body of industrial law under the new regime of the Act. It can thus be said of Sultan Azlan Shah what

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[14][1968] 1 MLJ 5.

[15]At page 8.

[16]*Supra.*

[17]At page 69.

[18]At page 70.

Frankfurther said Holmes when he wrote to the latter of his judgments: 'I find that if you have dealt with it — it's dealt with'.[19]

DECISIONS AND COMMENTS

CONTRACT OF EMPLOYMENT

(a) Conditions of employment contained in circular and newspaper advertisement

GB Parker & Ors
v
Central Electricity Board, Kuala Lumpur

[1967] 4 MC 86 High Court, Kuala Lumpur

Case referred to :-
(1) *Healey* v *Minister of Health* [1955] 1 QB 221.

RAJA AZLAN SHAH J: These three actions were consolidated by order of court dated March 14, 1966. The plaintiffs were recruited in Australia as qualified accountants in the service of the then Central Electricity Board (hereinafter referred to as the board). The question has arisen whether they are 'entitled officers' within the meaning of para. 4(b) of the Ministry of Commerce and Industry's circular dated August 10, 1957. It is an important matter for them because if they are 'entitled officers' they are entitled to receive special compensation in the event of Malayanisation. Under the definition provision in the Ministry's letter, an 'entitled officer' is 'one serving on a contract or agreement who, by his terms of service and considering the previous practice in that body, has a reasonable prospect of appointment to the permanent establishment'. It is perfectly plain that a certain degree of latitude is given to the board to determine the question, regard being had to each individual officer's terms and conditions of service and considering the board's own practice. In August 1957 the board classified the plaintiffs as 'non-entitled officers'. The plaintiffs asked the board to re-consider its decision. The board, after re-consideration, adhered to its earlier decision. That was in November 1957. The plaintiffs were dissatisfied with the board's decision and they now ask, among other things, for a declaration that they are and have been at all material times entitled officers within the meaning of the said circular.

Before stating the circumstances leading to the plaintiffs' appointment to the board, it is necessary to dispose of one procedural point. It was said by Mr Rawson on behalf of the board that the only declaration which the plaintiffs are entitled to ask from this court is whether or not

[19]Hirsh, *The Enigma of Felix Frankfurter* (Basic Books, New York 1981) at page 42.

the decision of the board made in November 1957 is right. He submitted that to approach the issue in the light of the plaintiffs' claim would result in two separate decisions, and if the court decides in favour of the plaintiffs there would then be two inconsistent findings, one by the board and the other by the court, and that would lead to a most undesirable state of affairs. Reliance was placed on the case of *Healey* v *Minister of Health*.[1] There is force in Mr Rawson's argument because if this court has to entertain the plaintiffs' claim for the declaration prayed for, that would mean that this court has to hear and determine a case which does not belong to it but to the board. I think *Healey's* case is on all fours. However, the difficulty arises from the nature of the pleadings. Neither has the defence pleaded want of jurisdiction. No application was made by either party to amend the pleadings. In my opinion justice would be met if I decide the case on the basis whether or not by the terms of service and considering the previous practice of the board the plaintiffs have reasonable prospects of appointment to the permanent establishment.

In 1953 a committee for the advancement of local officers was established to investigate into the future administration of the board, in particular with its Malayanisation policy. That committee put up a report and, among other things, recommended that all future new appointments of expatriate officers should be on gratuity-earning contract terms or on secondment only, with no contractual right of emplacement on the board's pensionable establishment. That report was adopted by the board on November 20, 1954.

On February 10, 1955 the board issued a circular relating to the vacancies for qualified accountants. Clause 8 thereof provides that all appointments will be on gratuity-earning contracts; clause 9 provides for the establishment of a non-contributory pension scheme for officers appointed to the permanent establishment; clauses 10 and 11 provide for leave and passages for officers who are placed on the permanent and pensionable establishment. It is significant to note that these particulars are for information only and do not in any way constitute an offer of employment.

On March 7, 1955 the board passed Financial Resolutions No 184/55, the relevant one being resolution (vi) which reads:

> In future all initial recruitment of expatriate officers will normally be on gratuity-earning contract terms only.

An advertisement by the board for qualified accountants (originated on January 31, 1955) appeared in the *Sydney Morning Herald* on March 23, 1955. The advertisement set out the qualifications required and the salaries and allowances offered, and stated that:

> Recruitment will be on a three-year gratuity-earning contract (renewable) and such officers may be considered by the board after not less than three years' satisfactory service for emplacement on its pensionable establishment under a non-contributory pension scheme.

In response to the said advertisement the plaintiffs applied for appoint-

ment and were sent a copy of the board's circular dated February 10, 1955. Recruitment in Australia were done with the assistance of Professor Cowen of the Colonial Appointments Board, and in due course the plaintiff Kennedy sent in his application which was later transmitted to the board. On April 28, 1955 the board wrote to the plaintiff Kennedy stating that his name had been placed on the list of candidates who would be considered for interview. The board also enclosed in that letter the official form of application and a paper giving brief particulars of the conditions attached to the appointment. In June the plaintiff Kennedy was interviewed in Australia by Mr Sinclair who is the Comptroller and Chief Accountant of the board, and Professor Cowen. He was successful, and on August 25, 1955 he was offered a contract by telegram. That was confirmed by letter dated August 29,1955. Two copies of the form of contract to be signed by the plaintiff were enclosed in the said letter. On August 30, 1955 the plaintiff wrote to the board, informing them that he intended selling his house and severing connections at that end and taking up permanent residence in Malaya and therefore he required some six weeks to finalise matters. The contract was duly signed by the plaintiff on September 29, 1955. The agreement sets out the usual conditions of service and the schedule which forms part of the agreement provides, so far as is material, that the appointment is on gratuity-earning contract effective from the date of taking up duty and is for a tour of three years' resident service commencing from that date which may be extended on such terms and for such period as may be mutually agreed (clauses I and II); clause 10 provides for a gratuity on satisfactory completion of service provided the officer concerned is not emplaced on the pensionable establishment. The plaintiff came to Malaya and entered the service of the board. There is no dispute that his work was satisfactory for on April 1, 1957 he was appointed to act as a senior accountant. That is briefly the history of the plaintiff Kennedy's appointment as an accountant with the board.

It is thus desirable at this stage to consider the circumstances giving rise to the present action. It began with a circular letter dated May 24, 1957 from the Senior Officers Association of the board circularising a letter from the board's management dated May 18, 1957 which sets out what it intended to do about Malayanisation. Paragraph 2 of the circular stated:

> You will be aware that for several years now the recruitment policy and training programme of the board have been directed towards early Malayanisation of Div 1 posts of the board's establishment. Thus, in accordance with this policy, since the end of 1955 when it has become necessary to recruit expatriate officers this has been done on contract terms only.
> (See page 35 of agreed bundle).

The plaintiffs became worried about their positions, and on the assumption that they were non-entitled officers they jointly wrote to the general manager on May 28, 1957 setting out the circumstances which they said gave them reasons to assume that their employment, subject to

an initial period of satisfactory service, would be permanent and pensionable. These circumstances are the advertisement, the circular dated February 10, 1955, and clause 10 of their contracts. They further complained that at no time during their interviews or in correspondence in connection with their appointments were they given any indication that their prospects were for other than permanent and pensionable employment. They also cited the case of an officer recruited in the United Kingdom at about the same time they were recruited, who had been classified as 'entitled officer' (see page 36 of agreed bundle).

On August 27, 1957 the general manager of the board replied to the plaintiffs in the following terms:

> The circumstances leading up to your recruitment to the board's services have been carefully examined and I regret to inform you that you are not considered to be within 'an entitled officer'....

However, the letter stated that it was not the intention of the board to discontinue the plaintiffs' employment after the expiration of their contracts but it was very probable that the board would wish to offer one or more further contracts to the majority of the non-entitled officers. It is fair to say that the decision was made as a result of what Mr Sinclair had written to the general manager on June 14, 1957 at the request of the board concerning the interviews he had had in Australia (*vide* page 52 of agreed bundle). In that letter he said that he gave the candidates some indication of their prospects with the board, namely, that they would be engaged on contract terms and the board could guarantee employment for three years only but they could reasonably expect renewals if their services proved satisfactory. But he did stress the point that political changes were pending in Malaya and that these changes would have an effect on their employment. He could not recall anything he had said regarding prospects of their emplacement on the pensionable establishment, but if he had said anything, the most he would have said was that engagement on contract did not rule out the possibility that the board might wish in its own interest to offer them pensionability as an alternative to contract terms; but he said he did not think he even went as far as that. He did say that before he went to Australia he had had discussions with the general manager (Mr Sharples) as to what he should and should not say to the candidates regarding prospects of their engagement and he would hardly think that what was said went beyond the board's then recently expressed intentions. Finally, he said that the above remarks did not represent a clear-cut answer to the plaintiffs' claim in the sense that he could not recall the conversations *verbatim,* but he said that it would be entirely fair for the management to take the attitude that reasonable prospects of employment on the pensionable establishment were not offered to any of the candidates. There is also a memorandum prepared by Mr Sinclair on the same matter dated March 16, 1964: *vide* pages 125-128 of agreed bundle.

Mr Peddie on behalf of the plaintiffs contended that their complaint regarding the interview was not what was said by the deputy general manager but what was left unsaid. It was submitted that the deputy

general manager had not countermanded any promises already given by the board in their advertisement and the correspondence between the board and the plaintiffs. It was for him to say that there was no such chance of pensionable employment. He did not do that. This objection is reflected in the plaintiffs' letter dated August 29, 1957 in which they indicated that the conditions of employment offered implied that they would have by their terms of service and considering the previous practice of the board a reasonable prospect of appointment to the permanent establishment, and nothing was said at the interview to indicate that this was not the position. They were not told far more than what they were told, which influenced their individual decisions to accept employment with the board when it was offered. For instance, they said they were told nothing of the recommendations of the committee for the advancement of local officers which were accepted by the board at its meeting on November 29, 1954, one of which was that all future new appointments of expatriate officers should be on gratuity-earning contract terms or on secondment only with no contractual rights of emplacement on the board's pensionable establishment. Had the board's recently expressed intentions been disclosed to them at their interviews their decisions as to whether or not to accept the offers would have been adversely influenced by them. Nevertheless they contended that expatriate officers engaged since that date had been advised that they were entitled officers. The case of a Mr JP Will was cited as an instance: see page 75 of agreed bundle.

The plaintiffs therefore asked for re-consideration of the matter. The general manager did not consider the board's decision as irrevocable and asked for further submissions to substantiate their claim. The plaintiffs wrote to Professor Cowen for clarification of what was said at the interview. Quite naturally, the Professor in due course replied that he could not recall *verbatim* the conversation that had taken place and therefore was not in a position to give a clear statement of recollection.

The board sat on November 5, 1957 to consider Board Memorandum No 118 of 1957 and resolved that the plaintiffs could not be classified as 'entitled officer': see page 60 of agreed bundle. For some unexplained reasons the board's decision was not conveyed to the plaintiffs, for on February 14, 1958 they jointly wrote to the general manager to enquire if in the event they were being classified as non-entitled officers whether the board could give any indication if any or all of them could reasonably expect to be offered one or more further renewals of their present contracts before they had to take a decision as to whether they wished for further employment with the board. On February 21, 1958 the general manager replied that their respective cases had been placed before the board but they were turned down as the board considered that they had not been given any reasonable assurance of permanent employment. The letter further indicated that in the light of the staffing position in the financial division the board might be expected to offer them not less than 6 years' further employment. On April 3, 1958 the board wrote to all non-entitled officers, setting out offers either to remain on their present contract terms until the expiration of the

current contract or to apply for further employment under a new form of contract: see page 70 of agreed bundle. Kennedy, like all the others was given 15 days to make a decision in which case, if the board approved his application, he would be deemed to enter into the new form of contract with effect from March 1, 1958. Those who did not make their applications within the said period would be deemed to wish to continue in their present form of contract unless they subsequently made application not later than September 30, 1958, in which case if the board approved, the new form of contract would become effective on the first of the month following the expiration of three months from the date of making such application. The new form of contract was in the course of drafting and any offers made under it were conditional upon the terms of the new form of contract being subsequently found to be acceptable to the officers. The terms of the new contract were no less favourable than their present contract. Under the new contract there was no prospect of pension of any kind. It was purely a gratuity contract. On April 9, 1958 Kennedy elected to take advantage of the new form of contract (page 73) and on July 25, 1958 he signed it (page 79). The new contract, entitled 'Form of Contract for Non-Entitled Officers', took effect from March 1, 1958 to December 31, 1964. It is common ground that his continued employment was on the basis of his acceptance of the conditions under the new contract. On September 15, 1958 the board credited the gratuity due to him under the old contract to his account with The Chartered Bank. It is this conduct of the plaintiffs which is said to give rise to the plea of waiver.

Kennedy continued service with the board under the new contract and it was not until some five years later when he and the other plaintiffs again felt that they could not agree with the board's decision of November 5, 1957, and accordingly on August 18, 1963 they again wrote to the board asking for their cases to be re-opened. The grounds which seem to be the basis of their new complaint are the same as that contained in their letter dated May 28, 1957, with this additional ground that they were not given full opportunity of being heard in accordance with the principles of natural justice. Mr Peddie, before me, has not pressed this argument and I can with confidence say that this latter ground can be dismissed as lacking in merit. I would have thought that on the facts every latitude had been given to them to put their case before the board, and to take this point now is, in my opinion, discreditable on their part: see page 109 of agreed bundle.

The board acknowledged their letter on August 30, 1963 and stated that it was necessary to do a considerable amount of 'research' so that their representations might be given proper consideration. The plaintiffs replied on September 3, 1963, giving possible assistance by referring to various points raised in their earlier letter of August 1, 1963. The secretary wrote to the general manager and commented on the various points raised by the plaintiffs: see pp 114-117 of the agreed bundle. There was further correspondence between the parties, and on January 29, 1964 the secretary wrote to the plaintiffs to state that the board at its meeting on January 28, 1964 had agreed to submit their claim to

arbitration by a judge of the High Court and that he would write to them regarding the terms of reference and the procedure to be adopted. Negotiations followed but they broke down owing to differences of opinion as to what the stated cases should contain. On July 15, 1964 the Board rescinded its earlier decision to re-open the claim. That was notified to the plaintiffs in a letter dated July 29, 1964. The plaintiffs filed the present writ on October 7, 1964.

No evidence has been led by either side, and it was agreed that this court should decide this case on the pleadings as they stand.

The sole question before the court is in the context of the Ministry's letter whether by the terms of service and considering the previous practice of the Board the plaintiffs have reasonable prospects of appointment to the permanent establishment. Although it is beyond doubt that the circular and the advertisement formed no part of the eventual contract they cannot be ignored in its construction. In my opinion they are merely an invitation to an offer of employment on a three-year gratuity-earning contract (renewable) with an indication that such officers may be considered for emplacement on the pensionable establishment after a minimum period of 3 years' of satisfactory service. That is all the circular and advertisement could reasonably mean. They do not give an enforceable right to permanent and pensionable employment. It may be observed that both these documents were prepared before the board's resolution of March 7, 1955 — that all future recruitment would normally be on gratuity-earning contract only. The contract in the case of Kennedy was executed on September 29, 1955. The provision 'pensionability after the minimum period of three years' satisfactory service' is not incorporated in his contract (page 27). In fact there is no provision providing for pensionable employment save the introductory sentence in clause 10 which, I consider, is ambiguous. In the last analysis it is not the circular or the advertisement or the board's resolution of March 1955 but the concluded contract between the parties which determines whether the plaintiffs were recruited with reasonable prospects of permanent and pensionable employment. In my judgment there is no ground for holding that the plaintiffs could reasonably have supposed that their terms of service would give them the legal right to permanent and pensionable employment or that the board could for one moment have contemplated such a result. It follows that the plaintiffs do not have reasonable prospects of appointment to the permanent establishment.

I now come to the question that the board took no positive steps to remove the representations held out by it to the plaintiffs that recruitment carried with it reasonable prospects of pensionable employment. Estoppel was accordingly pressed in argument. The plaintiffs contended that the board was estopped from denying that the representation had this prospect. I am of the opinion that the matter is to be resolved between what was said by Mr Sinclair and the plaintiffs regarding the interviews. Mr Sinclair was authorised on behalf of the board to interview applicants. In view of the board's resolution of March 1955 and the fact that Mr Sinclair had had discussions with the general

manager regarding the scope and extent of his authority to indicate the terms of employment, it is certain that there was an ostensible limit to his authority. He could not go beyond the board's recently expressed intention not to recruit officers beyond gratuity-earning contract terms only. In my view the three documents pertaining to the matter (see pp 52, 62 and 128 of agreed bundle) favour the inference that Mr Sinclair did not go beyond his ostensible authority. It was common knowledge then that political changes were pending in Malaya which would have effect on their employment, and the fact that Mr Sinclair did stress this point to the plaintiffs strengthens the probability that he did not offer them reasonable prospects of pensionable employment. The plaintiffs on the other hand, denied that Mr Sinclair had told them that their employment did not carry pensionability. If it is necessary to decide between the two versions, I would prefer that of Mr Sinclair.

I envisage this case will not end here. It therefore becomes necessary to consider the defence.

The defence has relied on the provisions of the Public Authorities Protection Ordinance, 1948. Under section 12 of the Electricity Ordinance, 1949, the board is empowered to appoint accountants, and under section 23(1)(b) to assign salaries or remuneration to them. The claim of the plaintiffs is not in relation to any duty under the Ordinance. What they are asking for is a declaration that they are 'entitled officers'. That is, in my opinion, a declaration of right. The real test is whether in determining the plaintiffs' category the board is doing an act in the course of exercising its public function. Certainly the board has to determine the status of expatriate officers with the advent of Malayanisation, but it cannot rationally be said that the act is 'in the direct execution of a statute, or in the discharge of its public duty or authority'. It seems to me that it may more properly be said to have been made for the benefit of individuals, i.e., expatriate officers, and not for the public benefit. I am of the view that the said Ordinance provides no defence to the present action.

I am also of the view that the defence of election or waiver must fail. It is of the essence of election that the party electing shall be confronted with a choice between two inconsistent rights. In the case before us it is said that the plaintiffs had elected to enter into the new form of contract thereby waiving their rights under the old contract. As I have determined, under the old contract they had no legal right to a permanent and pensionable employment. Their old contracts are on gratuity-earning contract terms only, which are renewable. If they had no such rights to a permanent and pensionable employment it is idle to say that they had waived these rights. What they had waived are their terms of service under the old contract. I think this defence is wholly misconceived.

The correct view is that the plaintiffs had waived their rights to take the present proceedings by appealing to the board and accepting and acting upon its decision for over six years. The writ was not filed until October 7, 1964. The cause of action accrued in February 1958, on which date the plaintiffs were informed that their applications for re-

consideration of the matter were rejected by the board. There has been considerable delay on the part of the plaintiffs in bringing these proceedings. The declaratory judgment asked for is in the discretion of the court and in my view it will be inequitable for this court to grant the plaintiffs the declaration asked for.

It was also said that time does not run during the period of negotiations. Mr Peddie therefore argued that the board had by its conduct led the plaintiffs reasonably to believe that the defence of limitation would not be insisted on. It is well-recognised that the essence of waiver is that there must be an intention to affect the legal relations between the parties. If that cannot be inferred from the conduct, there is no waiver. From the correspondence in the present case it is not possible to spell out any intention to affect the legal relations in the matter. There were only approaches with a view to settlement from which nothing concrete materialised.

The claim is dismissed with costs.

Claim dismissed.

SDK Peddie for the Plaintiffs.
GD Rawson for the Defendants.

(b) Dismissal — disobeying lawful and reasonable orders

Menon
v
The Brooklands (Selangor) Rubber Co Ltd

[1968] 1 MLJ 15 High Court, Kuala Lumpur

Cases referred to:-
(1) *Laws* v *London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285, 287, 288.
(2) *Sinclair* v *Neighbour* [1967] 2 WLR 1.
(3) *Boston Deep Sea Fishing & Ice Co* v *Ansell* (1888) 39 Ch D 339, 363, CA.
(4) *Ridge* v *Baldwin* [1963] 2 All ER 66, 71.
(5) *Savage* v *British India Steam Navigation Co Ltd* 46 TLR 294.

RAJA AZLAN SHAH J: The plaintiff claims damages against the defendants for wrongful dismissal. He contends that the dismissal without sufficient reason and without proper notice is wrongful and actionable. The ground of dismissal which is alleged against him in the pleadings is misconduct which, in the particulars enumerated in paragraph 4 thereof, consisted of wilful disobedience to the lawful and reasonable orders of the defendants in the course of employment and insolence to the defendants' assistant manager in the course of the said employment. Upon the pleadings which I have stated two material contentions were raised on behalf of the plaintiff: whether the facts justify summary dismissal; if not, was there proper notice for such dismissal.

It is well-established law that wilful disobedience of a lawful and reasonable order of the employer will justify summary dismissal. It is also axiomatic that one act of disobedience or misconduct can justify instant dismissal if it is of a nature which goes to show that the servant is repudiating the contract or one of its essential conditions: see *Laws* v *London Chronicle (Indicator Newspapers) Ltd.*[1] This point was re-stated in the recent case of *Sinclair* v *Neighbour.*[2] In that case the manager of a betting-shop, responsible for the conduct of the shop and the employees there, quite deliberately took money out of the till for his own personal purposes in circumstances which he knew quite well his employer, if asked, would not permit. He replaced the money on the following day. The employer, on hearing of what had happened, dismissed him summarily. The Court of Appeal,in reversing the decision of the trial judge, held that the facts justified summary dismissal. Davies LJ at page 5 of the judgment said:

> With the greatest respect to the judge, I think that he fell into error in attaching too much weight to the label and not enough to the facts. The facts were established. The fact that the manager took the money from his employer's till behind his back knowing that the employer would not consent was established; and it seems to me that it does not really matter very much whether that justifies the label 'dishonest' or not. The judge ought to have gone on to consider whether even if falling short of dishonesty the manager's conduct was nevertheless conduct of such a grave and weighty character as to amount to a breach of the confidential relationship between master and servant, such as would render the servant unfit for continuance in the master's employment and give the master the right to discharge him immediately.

Sachs LJ paraphrased the matter in the following way:

> It is well established law that a servant can be instantly dismissed when his conduct is such that it not only amounts to a wrongful act inconsistent with his duty towards his master but is also inconsistent with the continuance of confidence between them. That was said by Brown LJ, in his classic judgment in *Boston Deep Sea Fishing and Ice Co* v *Ansell.*[3]

The fact that the master has not heard the servant in his own defence is irrelevant: the criterion is whether facts emerging at the trial prove breach of contract. If the facts do not warrant summary dismissal, the master must pay damages: see *Ridge* v *Baldwin.*[4] The onus is on the defendants to prove that summary dismissal was justified: see *Savage* v *British India Steam Navigation Co Ltd.*[5]

Having stated the law, let me now turn to the facts of this case. The plaintiff was employed by the defendants as an estate conductor in Division II of the estate since 1960. On 5th January 1965 the assistant manager of the defendants reported to the manager of discrepancies between the lower grades net weights of latex from Division II of the estate and the weights at the main factory. Both the scales were later checked and found to be correct. The manager then wrote a letter dated 6th January, 1965 (hereinafter referred to as the 'warning letter') to the plaintiff purporting to warn him against further carelessness and

negligence in his duties. Since the case hinges on the warning letter, it is necessary to reproduce it. It reads as follows:

> You have already been verbally warned in regard to your field latex which re-coagulated at the Factory on 29th December. There was no rain on this day and no reason for this pre-coagulation other than lack of attention on your part to ensure ammoniation is being properly carried out in the field and at the reception station. There is now further cause to doubt your ability to carry out your duties in a responsible manner.
>
> The following Lower Grades Wet Weights are recorded:-

	Your signed Crop Sheet	*Check weighed at Factory*
1st Jan 1965	990 Ibs	730 Ibs
2nd Jan 1965	1,038 Ibs	820 Ibs
3rd Jan 1965	Sunday	
4th Jan 1965	826 Ibs	715 Ibs
5th Jan 1965	776 Ibs	747 Ibs
	3,630 Ibs	3,012 Ibs

> A difference of 618 Ibs in 4 days and would have been higher but for Mr Comfort (on the instructions) checking at your Reception Station and finding on 5th January that you adopt a most careless attitude in regard to weighing in of lower grades and have been failing to ensure that water in buckets is excluded.
>
> I can assure you that further gross carelessness and negligence of your duties is liable to result in your immediate dismissal.

The difference of 618 Ibs in four days was ascertained from the daily crop sheet and the factory records. These records are exhibited in court. The manager instructed his assistant manager to deliver the warning letter to the plaintiff and to ask him to sign the second copy in acknowledgment of receipt. The assistant manager testified that he handed the warning letter to the plaintiff and asked him to read it. When the plaintiff had done so, the assistant manager asked him if he understood it and the plaintiff answered in the affirmative. The plaintiff was then asked to acknowledge receipt of the warning letter on the second copy but he refused to do so. As against that, the plaintiff has told the court that he read the warning letter but did not understand its contents. He further said that he did not acknowledge receipt on the copy of the warning letter because the assistant manager did not give him a copy. He wanted to read and understand the letter and to check the figures and also to consult his friends and his union. He added that if he had signed the copy of the warning letter that would mean that he would have admitted having made a mistake. Dato' Seenivasagam on his behalf also submitted that as there was no acknowledgment clause in the said letter the plaintiff could not be expected to know that he was only required to acknowledge receipt of the warning letter. In my view, the contents of the warning letter are plain and expressed in a way that any reasonable estate conductor would be able to comprehend. I am

satisfied and so find that the plaintiff knew what was contained in that letter. To superimpose an argument that by signing a copy of the warning letter, the plaintiff, who claims to have been an estate conductor all his working life, would be admitting his mistake is, to say the least, a bit difficult for me to swallow. The result of that meeting was conveyed to the manager who instructed the assistant manager to write another letter to the plaintiff asking him to see the manager at his bungalow before 6.00 am on 7th January 1965. This second letter was duly handed to the plaintiff, but he failed to turn up as requested. His reason was that if he had gone to the bungalow the manager might have abused him. The plaintiff was again instructed by the manager to come to his office later that morning, but again he refused to comply. Later in the day, the manager asked his clerk to call the plaintiff to the office. He finally came at about 2.30 pm. What took place between the two can be gauged from their respective evidence. According to the manager, when the plaintiff turned up he took the warning letter, asked him to read, sign a copy and return it to him. The plaintiff refused. On the other hand, the plaintiff has told this court that the manager did not show him the warning letter, but when he asked him the reason for his refusal to sign the copy he replied that he could not understand the contents of the warning letter. The manager suspended the plaintiff's service on that same day. The plaintiff referred the matter to his union and at their request the union was informed by the defendants that the plaintiff was suspended for insubordination. From then onwards the plaintiff's case was placed in the hands of his solicitors. There were protracted negotiations between the solicitors and the defendants, and later between the union and the defendants. On 21st April 1965 the defendants served the plaintiff with a written notice of dismissal for insubordination with effect from 8th January 1965. The manager in his evidence said that he considered the incidents of 6th January 1965 and 7th January 1965 sufficient to render the plaintiff guilty of misconduct in his employment in that he disobeyed the lawful and reasonable orders of the defendants.

The question now is to ascertain the reasonable inference to be gathered from the incidents of 6th January 1965 and 7th January 1965. To repeat what plaintiff's counsel has speciously urged on his behalf, the only incident (which he submitted is trivial) is the refusal of the plaintiff to sign a copy of the warning letter in acknowledgment. The proposition is sound if the facts justify the inference. In such a case I will gladly accede to counsel's argument that that would be too trivial a matter to justify summary dismissal. In my view, to adopt counsel's argument would be to take the line of least resistance. With all due respect to counsel, I think he attached too much weight to the failure to sign the copy of the warning letter and not enough to the inference to be deduced from all the facts.

The plaintiff, as the estate conductor of his division, is responsible for proper estate management; some of his essential duties are to ensure that the field latex does not pre-coagulate at the factory. He is also required to show diligence in supervising the weighing of latex in the

field and to ensure that buckets are free of water. Failure to do that would result in great discrepancies between the latex weighed in the field and at the factory. The warning letter purports to be a final warning to the plaintiff not to be grossly careless and negligent in his duties. In spite of repeated attempts by the defendants, the plaintiff contumaciously refused to acknowledge the said warning, thereby giving rise to the irresistible inference that he refused to mend his ways, that he is adamant against correction, that he refused to remedy an alleged wrong. This is not just a trivial case of ignoring to acknowledge a warning letter. It goes further than that. It goes to the essential conditions of his contract of service, that is, to be a responsible estate conductor. His whole conduct during those two days, if unchecked, might not only result in the low results of latex produced, which would be detrimental to the interests of the defendants, but what is more important is that it conveys the impression that that mutual confidence which is so essential to the relationship between master and servant has been violated. In these circumstances it is idle to say that the conduct of the defendants was arbitrary.

In the light of my findings on the issue of summary dismissal it would now be supererogatory to determine the question of proper notice.

The plaintiff's case is dismissed with costs.

Claim dismissed.

Dato SP Seenivasagam for the Plaintiff.
R Khoo for the Defendants.

(c) Liability of master — acts of forgery by servant

Negara Traders Ltd
v
Pesuruhjaya Ibu Kota, Kuala Lumpur

[1969] 1 MLJ 123 High Court, Kuala Lumpur

See under Commercial Law at page 262 above.

(d) Provident Fund Scheme — employee's right of withdrawal

Reddy
v
Employees Provident Fund Board

[1967] 2 MLJ 82 High Court, Kuala Lumpur

See under Statutory Interpretation at page 975 below.

(e) Termination — probationary period

KC Mathews
v
Kumpulan Guthrie Sdn Bhd

[1981] 2 MLJ 320 Federal Court, Kuala Lumpur
Coram: Raja Azlan Shah CJ (Malaya), Wan Suleiman and Chang Min Tat FJJ

Case refered to:-
(1) *Express Newspapers Ltd* v *Labour Court & Anor* AIR (1964) SC 806.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment of the Court): At the end of the argument we dismissed the appeal from the dismissal of the plaintiff's claim for reinstatement in his employment, alternatively, for damages for wrongful termination of employment. We now give our reasons.

The facts in this case were not greatly in dispute. By letter dated April 13, 1970, the appellant was appointed a second clerk on an estate belonging to the respondent. The letter of his appointment expressly provided that the appointment was for a probationary period of six months after which period consideration would be given to confirmation, the deciding factor being whether the employer was or was not satisfied with his work. The employment commenced on April 16 and the six months' period ended on October 15, 1970. An assessment was made of the appellant's work at about this time. In all aspects of his work his rating was poor, the only ray of sunshine being his knowledge of work which was rated fair. As for his personal qualities he was either fair or poor and he was only considered good in one respect and that was in his appearance. It was indicated in that report which was dated October 20, 1970, that his shortcomings had been told to him but he had made absolutely no attempt to improve the quality of his work. There was no indication however that this letter was shown to him and there was no evidence that he was told that he would not be confirmed in his appointment. Fortunately, nothing turned on this at that time since he continued in his work. By letter of March 6, 1971 the respondent advised the appellant that it did not propose to confirm him in his appointment but offered him continuation of employment on a probationary basis until June 6, 1971, i.e. for a further three months. He accepted it as a second chance to prove himself. On June 7, 1971 the appellant received a notice that he would not be confirmed and that he was given one month's notice of termination from July 6.

The only difference between the parties appeared to be the proper assessment of the appellant's work. The appellant endeavoured to

challenge the poor opinion of his employer by requesting a test but it was apparent to the employer, as it is to us, that an excellent performance in a test is no sure indication of proper application to one's duty.

Sir Joshua Reynolds in his discourse to the students of the Royal Academy on December 11, 1969 said:

> If you have great talents, industry will improve them; if you have but moderate abilities, industry will supply that deficiency.

He did not deal with the case in which lack of industry was allied to a lack of aptitude. The point in this case was that the appellant had, in the opinion of the respondent, shown neither industry nor talent in his work. On April 22, 1971 for instance, he was given a letter in which he was told that the standard of his work was still unsatisfactory. He had taken a long time over his duties and he had committed numerous careless clerical errors in the books dealt with by him.

The hearing of the High Court was very brief. Only the plaintiff gave evidence and all he complained of was that no notice was given to him at the end of the first probationary period that he was to continue as a probationer. He was briefly cross-examined. He called no other witness and the employer elected not to call any evidence on its part.

The appellant's counsel made two points. First, he said that at the end of the first probationary period the appellant became confirmed in his appointment unless he was told that either he was not confirmed or he would have to undergo a further period of probationary service. Secondly, he said that the dismissal was bad because there had been no enquiry. The learned trial judge in his judgment did not deal with the second point and it is not quite clear from the memorandum of appeal whether the appellant continued to rely on his complaint of breaches of natural justice. In our view, however, there is absolutely no point in this part of the submission. No enquiry needed to be called for in the circumstances of the case. There was evidence which the appellant could not and did not deny that in the course of his brief employment he had been told on several occasions of the unsatisfactory nature of his work, his lack of industry and initiative. His acceptance of a further period of probationary employment must be regarded as an acceptance of the condition that he had to prove his suitability for confirmed service. Unfortunately, his willingness was never translated into action. The appellant knew at all times how dissatisfied his employer was with him and he must have known, having regard to the terms of the letter of appointment, that he was running the risk of dismissal. All he had to do was to produce the work required of him. He never did. The enquiry that he now requires would have served no useful purpose.

In so far as his claim of confirmed service was concerned, counsel for the respondent relied on the following passage from the judgment of Das Gupta J, in *Express Newspapers Ltd* v *Labour Court & Anor*[1]:

> This contention is, in our opinion, wholly unsound. There can, in our opinion, be no doubt about the position in law that an employee appointed on probation for six months continues as a probationer even after the period of six months if at the end of the period his services had

either not been terminated or he is confirmed. It appears clear to us that without anything more an appointment on probation for six months gives the employer no right to terminate the service of an employee before six months had expired, except on the ground of misconduct of other sufficient reasons in which case even the services of a permanent employee could be terminated. At the end of the six months period the employer can either confirm him or terminate his services, because his service is found unsatisfactory. If no action is taken by the employer either by way of confirmation or by way of termination, the employee continues to be in service as a probationer.

With respect, we agree.

For these reasons we dismissed the appeal with costs.

Appeal dismissed.

K Chandra for the Appellant.
W Abraham for the Respondent.

EMPLOYEES OF STATUTORY BODIES

(i) Fadzil Bin Mohamed Noor
v
Universiti Teknologi Malaysia

[1981] 2 MLJ 196 Federal Court, Kuala Lumpur
Coram: Raja Azlan Shah CJ (Malaya), Abdul Hamid FJ and Abdoolcader J

See under Administrative Law at page 174 above.

(ii) Dr Paramsothi s/o Murugasu
v
University of Malaya

[1983] 1 MLJ 289 Federal Court, Kuala Lumpur
Coram: Raja Azlan Shah LP, Abdul Razak and Abdoolcader JJ

See under Administrative Law at page 130 above.

GOVERNMENT EMPLOYEES

Rajion bin Haji Sulaiman
v
Government of State of Kelantan

[1976] 1 MLJ 118 Federal Court, Kota Bharu
Coram: Suffian LP, Raja Azlan Shah and Wan Suleiman FJJ

RAJA AZLAN SHAH FJ: I can see nothing, either in principle or authority, to warrant us in coming to a conclusion different from that of the trial judge.

The argument that Government cannot unilaterally amend the conditions of service of a person in the public service of a State by administrative rules and regulations overlooks and negatives the tenure at pleasure laid down in Art 132(2A) of the Constitution. In my view, the rules and regulations relating to the public services under the Constitution are directory, liable to be changed to suit the public policy of the State, and such variations are not amenable to directions under the schedule to section 25 of the Courts of Judicature Act, 1964.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.

A Wilson for the Appellant.
Datuk Idris bin Yusoff (State Legal Adviser) for the Respondent.

TRADE UNION
(a) Dispute between member and his trade union — election of office bearers

Muthuraku
v
Kuala Lumpur Municipality Workers Trade Union

[1972] 1 MLJ 165 High Court, Kuala Lumpur

Case referred to:-
(1) *Kolandaisamy* v *Annamalai & The Harbour Trade Union (Selangor) Port Swettenham* [1968] 1 MLJ 222 at p 223.

RAJA AZLAN SHAH J: The plaintiff is the president of the defendant union. He has filed a writ claiming for a declaration that the emergency meeting held on 18th July 1971 had no power to decide matters pertaining to the election of officers of the said union and also an injunction restraining the said union from proceeding to hold a general

meeting on 29th September 1971, or from convening or holding any other general meeting. On 28th August 1971, the plaintiff obtained an interlocutory injunction. The defendant union now applies to set aside the interlocutory injunction and all subsequent proceedings on the ground that this court has no jurisdiction to entertain the plaintiff's claim.

The trouble arose in this way at all three meetings held on 2nd and 23rd May and 13th June 1971 a majority of the union members proposed that there should be wider Malay participation in union affairs i.e., that the posts of president, assistant secretary and three executive council members should be filled in only with Malay members. An extraordinary general meeting was convened on 18th July 1971. At that meeting a secret ballot was taken to determine the proposal. By a majority of one the union resolved in favour of the proposal. At the nomination meeting which followed immediately afterwards, nominations were called for and recorded. The plaintiff's name was proposed and seconded as vice-president. He accepted the nomination but on 25th August 1971 he withdrew.

The plaintiff now says that the resolution passed on 18th July 1971 was *ultra vires* because it contravenes rule 6 of the defendant union rules which bestows equal rights to all members and rule 25 which provides for the election of officers by secret ballot in accordance with the prescribed procedure.

Part VI of the Trade Union Ordinance, 1959 (sections 44-46) prescribes the manner in which a dispute may be resolved. I need not go into detail with the relevant sections; that is reproduced in the judgment of Gill J (as he then was) in *Kolandaisamy* v *Annamalai & The Harbour Trade Union (Selangor) Port Swettenham.*[1] In other words Part VI read with rule 26 of the union rules provides two methods of resolving a dispute. One is by arbitration and the second is by referring the matter to the Registrar of Trade Unions. It is common ground that the first method is not open to the parties. With regard to the second ground the plaintiff in his affidavit sworn on 28th August 1971 said that on 3rd May 1971 he went to see the registrar and requested him:

> for a clarification on the new move that only Malay members could be nominated for the post of president. He said there is no such provision in the rules and regulations of our association.

There is no certificate or documentary evidence of the registrar's decision. The general secretary of the defendant union in his affidavit sworn on 10th September 1971 said:

> that when the nomination meeting was held again on 13.6.71 the plaintiff had not made any reference to the Registrar of Trade Unions of the dispute as to Malay participation for his decision as provided in the constitution of the said union.

From that it is plain there is nothing to show from the affidavit that reference was made to the registrar and if that is so, then this method of resolving the dispute was not pursued.

Now section 44(6) of the Trade Union Ordinance provides that where no decision is made on a dispute within 40 days after application to the union for a reference under its rules, the member or person aggrieved may apply to a sessions court and the sessions court may hear and determine the matter in dispute. Section 44 enacts that the court or registrar may at the request of either party state the case for the opinion of the High Court on any question of law. In other words where no reference is made to the registrar the parties may resort their differences to the sessions court who may in turn state the case to the High Court. The High Court will then take cognisance of the matter.

In my opinion this is clearly a dispute regarding the election of officers. Before the plaintiff can say that the resolution passed on 18th July 1971 is invalid he must come to court for a declaration that it is so. Before this court can make a declaration it must be empowered to adjudicate over the matter. That brings me to the defendant's argument that this court has no jurisdiction. Before this court can have jurisdiction over the matter, the procedure for resolving a dispute as prescribed in Part VI must be exhausted and the only way in which this court can have jurisdiction over the matter is by way of a case stated under the provisions of section 45 of the Trade Union Ordinance. In my view this case exemplifies the principle that when a statute creates an obligation and enforces the performance in a specified manner, that performance cannot be enforced in any other manner.

I would allow the application with costs. Although the application gives the defendant union their whole remedy before the action is tried, that should be so since the plaintiff has no cause of action.

Application allowed.

DP Vijandran for the Plaintiff.
Ms Naidu for the Defendant.

(b) Meaning of 'statutory authority' in section 29(3) of the Trade Union Ordinance, 1959

Kuala Lumpur, Klang & Port Swettenham Omnibus Co Berhad
v
Transport Workers' Union

[1970] 2 MLJ 148 High Court, Kuala Lumpur

Case referred to:-
(1) *Nuth* v *Tamplin* (1881) 8 QBD 247, 253.

RAJA AZLAN SHAH J: There arose a dispute between the Kuala Lumpur, Klang and Port Swettenham Omnibus Company Berhad, the applicant company in the present proceedings and the Transport Workers' Union (Federation of Malaya), the respondent union. The dispute had reached

a stage where the Industrial Court was asked to adjudicate upon the matter but the hearing was adjourned to enable the applicant company to seek a ruling from this court on the following questions:

1. Do the words 'statutory authority' include a company constituted under the Companies Act, 1965 for the purposes of section 27(3) of the Trade Unions Ordinance, 1959?
2. If so, have the employees of the Kuala Lumpur, Klang and Port Swettenham Omnibus Company Berhad ceased to be members of the respondent union?
3. If they have ceased to be members, (a) can the respondent union represent the said employees at the Industrial Court so as to cause them to be bound by any decision of the Industrial Court; and (b) is the reference by the Minister rendered void by virtue of the fact that the respondent union no longer represents the workers; and
4. In the circumstances should the Industrial Court proceed with the hearing of the case before it?

It is conceded that for the present purpose only question No 1 need be considered. It it urged on behalf of the applicant company that they are a statutory authority within the meaning of the definition 'statutory authority' as enacted in section 27(3) of the Trade Unions Ordinance, 1959. If that is the case, then they argue that their employees cannot be members of the respondent union as their membership are not confined exclusively to persons employed by the applicant company and therefore the respondent union who claim to represent the workers of the applicant company have no *locus standi.* In other words it is urged that the words 'statutory authority' are to be read literally and that I should not put a restricted meaning to it.

I will now cite the provisions of section 27 of the Trade Unions Ordinance, 1959 which came into force on June 1, 1959. Section 27 then had two subsections. Subsection (1) prohibits public officers from becoming members of trade unions. Subsection (2) gives certain exemptions whereby certain classes of public officers can become members of trade unions or that certain conditions can be imposed on those public officers who are members of trade unions.

'Public Officer' is defined in the Interpretation Act, 1967. It means a person lawfully holding, acting in or exercising the functions of a public office. 'Public office' means an office in any of the public services. 'Public services' means the public services mentioned in Article 132(1) of the Federal Constitution, that is, the armed forces, the judicial and legal service, the general public service of the Federation, the police force, the railway service, the joint public service mentioned in Article 133, and the public service of each State.

By virtue of regulation 9 of the Essential (Trade Unions) Regulations, 1969 as enacted by PU (A) 408/69, section 27 was amended by adding to it a new subsection, i.e., subsection (3). That came into force on October 9, 1969. I will reproduce subsection (3) as it is material for our present purpose.

(3) (a) No person employed by a statutory authority shall join or be a

member of, or be accepted as a member by any trade union unless the membership of that trade union is confined exclusively to persons employed by the particular statutory authority.

(b) Any trade union whose membership is confined to persons employed by a statutory authority shall not be affiliated to any other trade union or federation of trade unions whose membership is not otherwise so confined.

For the purpose of this subsection, the expression 'statutory authority' shall mean an authority or body established, appointed or constituted under a Federal or State law.

The legislature could have inserted the new subsection (3) as a separate section but they thought fit not to do so. Instead they inserted it as a subsection of section 27. The intention of the legislature can only be ascertained from the terms of the section itself. Therefore the whole of the section must be looked into, for every section of an enactment is a substantive enactment in itself. It is an elementary rule of construction of a statute that a section of a statute must be read literally unless one of two things occur; either there is some other section which cuts down its meaning or else the section itself is repugnant to the general purview of the Act: see *Nuth* v *Tamplin*[1].

In other words it is certainly a right doctrine to apply that in the consideration of all Acts of Parliament, and that includes the construction of a subsection, that, unless there is compelling reason for it, words should not be imported into an Act of Parliament either by way of limitation or extension. Is there compelling reason which restricts the meaning and operation of subsection (3)? I think there is. Subsection (1) enacts that a public officer as popularly understood is restricted from being a member of a trade union. Subsection (3) was added so as to include employees who could not be catered under the class of 'public officers' but nevertheless bear the same characteristics. In other words, section 27 as a whole prohibits public officers as popularly understood as well as employees of these public authorities which are outside the scope of 'public services' as defined in the Constitution, e.g. MARA, from becoming members of trade unions. To put a literal construction on subsection (3) will be to construe the words 'public officer' and 'person employed by a statutory authority' in a different sense. That is not the intention of the legislature as can be ascertained from the terms of the whole section itself. The marginal note too, which reads 'membership of public officers, is certainly of consequence in considering the general trend of the section as a whole.

Therefore the question in the summons must be answered by saying that the words 'statutory authority' as enacted in section 27(3) of the Trade Unions Ordonance, 1959 do not include a company incorporated under the Companies Act, 1965.

Costs to the respondent to be taxed.

Questions answered.

VC George for the Applicant.
R Ponnudurai for the Respondent.

(c) Recognition of a union: meaning of 'trade dispute' and the right to represent members

Re Application of Lower Perak Motor Service Co Ltd

[1968] 1 MLJ 5 High Court, Kuala Lumpur

Cases referred to:-
(1) *Larkin* v *Long* [1915] AC 814, 832.
(2) *National Association of Local Government Officers* v *Bolton Corporation* [1934] AC 166,189.
(3) *R* v *national Arbitration Tribunal; ex parte Keable Press Ltd* [1943] 2 All ER 633, 634, 636.
(4) *Beetham* v *Trinidad Cement Ltd* [1960] AC 132, 133, 144.
(5) *Stratford & Son Ltd* v *Lindley* [1965] AC 269, 281, 334.

RAJA AZLAN SHAH J: This is a motion by the Lower Perak Motor Service Co Ltd for an order of prohibition to prohibit the Industrial Arbitration Tribunal from adjudicating upon a dispute between the company and the Transport Workers' Union, Federation of Malaya, as to whether the company should recognise the trade union as distinct from the question of its representative capacity as the bargaining agent for the workmen employed by the company. That is the case for the company as it is pleaded in the motion.

The case was started on the basis of a letter dated 22nd April 1966 from the general secretary of the union to the managing director of the company in the following terms:

> We take the pleasure in informing you that we represent the workers employed in your company. We have been informed that your company has dismissed two employees, namely, Mohd Kassim and Veeramaney s/o Krishnasamy on 14th March 1966. We would be pleased if you will kindly inform us the reasons leading to the dismissal of these two workers. We hope the company will extend its co-operation in creating healthy employer/employee relationship.

On 12th May 1966 the company replied stating that the workmen were asked to leave because their work and conduct were unsatisfactory. The union did not accept the bare statement and asked for more detailed information. The company ignored the union's request. On 12th July 1966 the union wrote again to the company informing them that the majority of the company's workmen were union members, and again sought recognition as the sole representative body of the workers employed by the company. In the meantime the union received complaints from its members that the company had already begun to intimidate workers from joining the union. By a letter dated 21st July 1966, the general secretary reminded the company of its claim for recognition and on the subject of dismissal of the two workmen, and appealed to the company to refrain from anti-union activities in the form of victimising workers and restraining them from joining the union. On 26th July 1966 the union in its letter accused the company of

conducting large-scale transfers of workers from one job to another in order to discredit the union and frustrate the members, and instanced the case of P Munusamy, a fitter, who was transferred to the job of a driver. On the same date the company wrote to the union denying the allegation of anti-union activities but at the same time stated that their directors were considering union recognition. In its letter of 2nd August 1966 the union again urged the company to recognise the union, and it is necessary to reproduce the said letter:

> Your indirect action on the workers discouraging them from participating in union activities has also been reported to the Ministry of Labour by the workers themselves. Necessary investigations are being conducted by the Ministry of Labour in this matter. We will be pleased if you will kindly extend recognition to this union without further delay.

On that same day the Assistant Commissioner for Industrial Relations, Perak, wrote to the manager of the company appointing a date for a discussion between them in respect of the union's claim for recognition and other industrial relation matters. On 5th August 1966 the managing director of the company informed the union that he had sent a list of their employees for union membership check and as soon as the result was known the company would consider the question of recognition. On that day the company sent a list of their employees to the Commissioner for Industrial Relations at Kuala Lumpur and upon request they sent a fresh list giving details on 2nd September 1966. The check, conducted on the lines agreed upon between the Federation of Malaya Employers' Consultative Association and the Malaysian Trade Union Congress, disclosed that 52 per cent of the company's workers, excluding office staff, directors, and ticket collectors, were union members. On 14th October 1966 the union informed the company of the result and again urged for immediate recognition. The company again ignored the union's claim. On 24th November 1966 the union reported to the Minister of Labour under regulation 4 of the Essential (Trade Disputes in the Essential Services) Regulations, 1965 of the existence of a trade dispute between the company and their workmen, and I quote the said letter:

> Dispute between Lower Perak Motor Service Company Ltd and the Transport Workers' Union, Federation of Malaya.
>
> This union has been seeking recognition from the Lower Perak Motor Service Company Ltd since 22nd April 1966. The union is of the firm belief that the company is deliberately applying delaying tactics with a view of driving the members into frustration and discrediting the union. Therefore we will be pleased if you will kindly refer the dispute to the Industrial Arbitration Tribunal. Issues under dispute are: (a) recognition of the union, (b) unnecessary transfer of union members.

On 6th February 1967 the company informed the commissioner that it had made its own assessment and found that only 20 per cent of its workers were union members and in those circumstances it was not prepared to accord recognition to the union. In the affidavit of Mohamed Yaacob, managing director of the company, dated 14th May

1967, filed in support of the company's application for leave, he stated that the check was conducted by the Ministry from books belonging to the union and in the absence of any opportunity to the company to verify the veracity of those books the company was not bound by the result. On 22nd February 1967 the commissioner asked the company for its present stand before formally accepting the union's report of 24th November 1966 and commencing action under the Regulations. The company still maintained its present stand. On 16th March 1967 the secretary to the Ministry of Labour and Industrial Relations informed the company that with effect from that date the Minister had accepted the report of the union dated 24th November 1966 under regulation 4(4), of the existence of a trade dispute between the company and its employees who were represented by the union on the union's request for recognition and 'that officers of the Ministry would be contacting your company in due course'. On 8th April 1967 the Minister referred the dispute to the Industrial Arbitration Tribunal in the following terms:

> Essential (Trade Dispute in the Essential Services) Regulations, 1965.
>
> Dispute between the Lower Perak Motor Service Company Ltd and the Transport Workers' Union,Federation of Malaya.
>
> I am directed to refer to the above-mentioned dispute regarding the demand of the union that the employer should recognise the said union which according to the report of the latter was officially accepted on 16th March 1967, and therefore vide article 7 of the above regulation I am to inform that all steps taken to settle the dispute had not met with any success and the Hon'ble Minister for Labour under article 8 of the above-mentioned regulation today has referred the matter to the Industrial Arbitration Tribunal for settlement.
>
> 2. The secretary to the Industrial Arbitration Tribunal, Enche Ng Kim Seang, will communicate with you about the trial of this dispute.

The hearing before the tribunal fixed on 15th May 1967 was not heard because of the present application.

The validity of the hearing was attacked on two main grounds. First, it was said that no trade dispute existed as defined under the Trade Union Ordinance, 1959, or the Essential (Trade Disputes in the Essential Services) Regulations, 1965. Enlarging the argument, it was contended that this company-union dispute did not come within the ambit of the prescribed parties or the prescribed subject matter of a trade dispute. Therefore it was said that the Minister had acted *ultra vires* the provisions of the law relating to trade disputes when he made the reference. Secondly, the reference by the Minister, if it was valid at all, was made only after the time prescribed by regulation 7 of the Essential Trade Disputes in the Essential Services) Regulations, 1965 had expired under the notification by the secretary to the Minister of Labour. This was outside the prescribed period of twenty-one (21) days.

I will first deal with the second contention and, with a view to decide this point, it is convenient to state briefly the statutory provisions relating to trade disputes. The Essential (Trade Disputes in the Essential Services) Regulations, 1965 give a wide discretion to the Minister in a

case where a trade dispute in any essential service exists or is apprehended, to take such steps as are necessary or expedient to promote a settlement of such dispute in accordance with regulation 5 which, by no means exhaustive, includes reference to existing machinery agreed upon between the parties. He can either act on a written report of a trade union representing the workmen who are parties to the dispute [regulation 4(3)]. The regulations empower him to determine whether can be settled without delay (regulation 6)]. The report must clearly state the names of the parties and the specific matters in dispute [regulation 4 (2)]. The Minister may require additional particulars of the report, in which case the trade dispute shall be deemed to have been reported to him only after such additional particulars have been furnished to him regulation 4 (3)]. The regulations empower him to determine whether or not a trade dispute has been reported to him , and if so, as to the date on which such report has been made to him, and his decision in this respect is final and conclusive [regulation 4(4)]. When the steps taken by him prove abortive he must notify the parties of the failure to promote a settlement within 21 days from the date on which the dispute was reported to him, unless the special circumstances of the case make it necessary or desirable to postpone such notification, in which case the postponement must not exceed 7 days (regulation 7). Only then may the Minister refer the dispute to the Industrial Arbitration Tribunal (regulation 7).

In my view, for the purpose of the regulations the dispute was reported to the Minister when he formally accepted it on 16th March 1967, i.e., after he had acquainted himself with the company's stand in the dispute. His decision in that matter was final and conclusive. The notification of the failure to reach a settlement was made on 8th April 1967. Therefore, it was made 24 days after the dispute was 'reported' to him. It was said that the requirements of regulation 7 had been violated as the notification ought to have been made on 5th April 1967, i.e., within 21 days of the report. A contrary view taken by the respondents was that the Minister must be deemed to have postponed such notification which he could do as long as such postponement did not exceed 7 days. Mr Sharma then argued that there was no evidence on record to show the existence of the special circumstances.

The phrase 'unless in his opinion the special circumstances of the case make it necessary or desirable to postpone such a notification' confers an absolute discretion upon the Minister to postpone such notification for reasons which seemed to him necessary or desirable. It may well be that he did not divulge his opinion, but I do not think that is a fatal defect. In the context of the letter of 16th March 1967 'that the officers of the Ministry would be contacting your company in due course' it must be assumed that the Minister had exercised his discretion in postponing the notification in the light of the special circumstances of the case. In my opinion, the probabilities favour such an inference.

I now come to the first contention which can be divided into two parts: that the employer-union dispute is not a dispute between the

specified parties of a trade dispute and that union recognition is not 'connected with' the specified subject matter of a trade dispute. The only question for the court is whether the contention is to be sustained or negatived. I have been referred to a multiplicity of authorities, but I think for present purposes I shall be absolved from any disrespect for the argument of counsel if I only refer to a few as they already contain material excerpts of the law relating to trade disputes.

The phrase 'trade dispute' as defined in the Essential (Trade Disputes in the Essential Services) Regulations, 1965 means any dispute between employers and workmen, or between workmen and workmen connected with the employment or non-employment, or the terms of the employment or with the conditions of labour of any person. This definition reproduced identically the definition of 'trade dispute' in section 5(3) of the (UK) Trade Disputes Act, 1906 although in subsequent UK legislation dealing with trade disputes the definition is enlarged by the addition of the words 'or difference'. In any event the definition contemplates a dispute between the specified parties and must be connected with the specified subject matter. As the regulations containing the definition abrogates rights at common law it should be construed with reasonable strictness and not given a wider meaning than the words justify: *per* Lord Parker in *Larkin* v *Long*.[1]

The regulations which specifically refer to two main sets of parties to a trade dispute, that is, employers and workmen, or workmen and workmen, makes no mention of trade unions or employers' associations as parties in trade disputes. Normally they act on behalf of one side or the other or both sides. The legal position is that trade unions and employers' associations have no *locus standi* unless they represent workmen and employers who are actual parties to a trade dispute: see *National Association of Local Government Officers* v *Bolton Corporation*.[2] But that, in my judgment, does not mean that the employer-workmen dispute must precede the union's intervention. Invariably the initiative in sparring for an opening is taken by the union, and as long as its workmen members subsequently adopt or ratify the dispute either expressly or impliedly, the dispute is one between 'employers and workmen'. That proposition received the approval of the Court of Appeal in *R* v *National Arbitration Tribunal, ex parte Keable Press Ltd*[3] and was applied by the Judicial Committee of the Privy Council in *Beetham* v *Trinidad Cement Ltd*.[4] In the *Keable Press* case the suggestion that the union had gone on a frolic of its own was rejected by the Court of Appeal because the men adopted the dispute by coming out on strike. In the *Trinidad Cement* case a similar suggestion was also rejected by the Judicial Committee of the Privy Council who took the view that the claim had been brought to the attention of the branch at Claxton Bay who may fairly be assumed to have approved it.

It was said that in the present case the union's claim for recognition was never instigated or authorised or approved by the union members of the company. Pausing there for a moment, I wish to express my opinion on the meaning of 'union recognition' as used in the letter of 8th April 1967. To my mind, the expression 'union recognition' conveys

to the ordinary mind that the employer refuses to negotiate with the union, i.e., refuses to recognise the union as the bargaining agent of its member employees. It is an accepted fact in all democratic countries that free trade unions have as one of their primary objects the representation of the interests of workmen in trade disputes: see for example the definition of 'trade union' in section 2 of the Trade Union Ordinance, 1959). To suggest that it means a claim by the union for recognition *simpliciter* as distinct from its representative capacity is to adopt a narrow approach to the whole problem and in my view is contrary to the accepted meaning attributed to it in the context of the requirements of industrial relations. Lord Wright, when confronted with a similar situation in the *Bolton Corporation* case, answered it by saying that 'it would be strongly out of date to hold that a trade union cannot act on behalf of its members in a trade dispute...'. Coming back to the argument that the union was acting on a frolic of its own, I am unable to accept this argument. All the correspondence between the union and the company annexed to the affidavit of Mohamed Yaacob, dated 14th May 1967, amply bear out the fact that the union was claiming for bargaining status on behalf of its workmen members. If the union were to succeed in its claim then it would be able to promote the interests of the workmen far better than if it were unrecognised. Moreover, it can reasonably be inferred that the workmen members had approved of the union's claim. In the circumstances the union can therefore be properly considered as acting for its members and in consequence the dispute is one between 'employers and workmen'.

The subject-matter of the dispute must also be related to a contract of employment and it is well settled that the dismissal or reinstatement or suspension of union members can all be the basis of a trade dispute. The material question that arises here is whether 'union recognition' is 'connected with' the specified subject matter of a trade dispute. Mr Sharma on behalf of the company strenuously urged upon me that since 'union recognition' is not contemplated in the regulations it is not one of the specified subject matters of a trade dispute. It is, I think, sufficient for me to say that this view has been rejected by the Judicial Committee of the Privy Council in the case of *Beetham* v *Trinidad Cement Ltd.* In that case the company employed 300 to 500 men in a factory in Trinidad of whom 100 to 200 had formed themselves into a branch of the 'Federated Workers' Trade Union. The attitude of the company towards union intervention in its labour relations was hostile. Two union members employed by the company were dismissed and the union took up their case with the company but its attempt at negotiation was ignored. The union then asked the Commissioner of Labour to mediate, but that too proved abortive because of the attitude adopted by the company. The Minister of Labour unsuccessfully intervened. At this point the basis of the difference between the union and the company, initially confined to the question of limited recognition of individual grievances, was immensely widened. The union now wrote to the company claiming general recognition to bargain on behalf of the company's manual workers. A copy of that letter was sent to and

approved by the Trinidad Cement branch of the union. The union's letter was ignored. The commissioner, at the request of the union, was again asked to conciliate and again was rebuffed by the company. The commissioner thereupon reported the matter directly to the Governor who on the same day appointed a board of enquiry. The validity of the enquiry was successfully challenged in the West Indian Courts on the ground that there was at the relevant time no 'trade dispute' between the company and the union. On appeal, the Judicial Committee of the Privy Council took the view that the dispute between the company and union covered the general recognition of the union as the bargaining agent of its members employed by the company. The question whether the dispute was 'connected with' the specified subject matter of a trade dispute was not answered directly by the Judicial Committee who held simply that the recognition dispute was a 'trade dispute' which the Governor was therefore empowered to refer to a board of enquiry. In any event the observation forms part of the judgment and is as much an authoritative exposition of the law as the rest of the judgment. This view was approved *obiter* by the Court of Appeal and the House of Lords in *Stratford & Son Ltd* v *Lindley*.[5] In the Court of Appeal Lord Denning MR, who was the same learned judge who delivered the judgment of the Privy Council in the *Trinidad Cement* case, said:

> It is not necessary that there should be a dispute between any individual workman and his employer. Suffice it that the union, on behalf of all its members, desires to be able to negotiate terms of employment, and the employer refuses to recognise it. There is thereupon a dispute between employers and workmen which is connected with the terms of employment: see *Beetham* v *Trinidad Cement Ltd.*

In the House of Lords, Lord Pearce put it in the following words:

> When a union makes a genuine claim on the employers for bargaining status with a view to regulating or improving the conditions or pay of their workmen and the employers reject the claim, a trade dispute is in contemplation even though no active dispute has yet arisen: see for instance *Beetham* v *Trinidad Cement Ltd.*

It is in my judgment that there is here a trade dispute within the meaning of the regulations; in consequence the jurisdiction of the tribunal is established.

There were some minor objections which I can shortly answer. It was said that the report was made in much too vague a manner in that the reference to the parties was not clearly stated and the nature of the dispute was not specifically mentioned as required by regulation 4(2). The correct way, so it was said, was to name the parties as 'between the company and members of the union in the employment of the company', and the report should also have contained sufficient particulars of the dispute. It may be that the strict rules of pleading have not been observed, but it has been made sufficiently clear to the Ministry what the dispute was and who the parties were. It must be noted that copies of all correspondence between the union and the company from 22nd

April 1966 to 14th October 1966 were sent to both the Commissioner of Industrial Relations, Kuala Lumpur, and the Industrial Relations Officer, Perak. In the circumstances it appears to me that the conditions of regulation 4(2) have been sufficiently complied with.

It was then said that items 2, 3 and 4 of prayer 11 of the union's statement of case dealing with re-instatement, transfer and suspension respectively ought not to go before the tribunal as these items were not included in the reference. I can see the force of that argument. On the other hand, it appears to the court that these three items, including the first item, i.e., union recognition, are integral parts of the dispute. The dispute is the essence. If there is a dispute, the parties must know of it. It is not necessary to formulate them in the reference. Suffice it for these items to be formulated by the parties themselves when they go before the tribunal. That is the meaning and effect of regulation 8.

Lastly, it was said that the company was not bound by the union membership check as it had no opportunity to verify the union books. The company claimed that only 20 per cent of its workmen were union members. That, in my opinion, is begging the question of recognition. The question here is plain, and that is whether there is a trade dispute. It seems to me that there is a trade dispute. The company did not see fit to grant recognition to the union as a representative of its members and therefore a dispute exists. The dispute has been referred to the Minister by a trade union representing the workmen members and therefore the Minister has power to refer it to the tribunal.

For these reasons the motion is dismissed with costs.

Motion dismissed

N Sharma for the Applicant.
Au Ah Wah (Senior Federal Counsel) for the first respondent.
R Rajasingam for the second Respondent.

(d) The right to strike

Non-Metallic Mineral Products Manufacturing Employees Union & Ors
v
South East Asia Firebricks Sdn Bhd

[1976] 2 MLJ 67 Federal Court, Kuala Lumpur
Coram: Gill CJ (Malaya), Ong Hock Sim and Raja Azlan Shah FJJ

Cases referred to:-
(1) *Wong Mook* v *Wong Yin & Ors* [1948] MLJ 41.
(2) *Crofter Hand Woven Harris Tweed Company Limited & Ors* v *Veitch & Anor* [1942] AC 435, 463.
(3) *Conway* v *Wade* [1909] AC 506, 513.
(4) *Rookes* v *Barnard* [1964] 1 All ER 367, 381.

RAJA AZLAN SHAH FJ: This appeal is directed against the judgment of the

High Court reported in [1975] 2 MLJ 250 setting aside the award of the Industrial Court made on August 8, 1974. The parties to the dispute are the South East Asia Firebricks Sdn Bhd ('the company') and the Non-Metallic Mineral Products Manufacturing Employees Union ('the union') and its members.

The relevant facts and circumstances giving rise to the appeal are set forth in the judgment. On February 4, 1974, 73 workers of the company stopped work. The stoppage ended on February 16, 1974 when the dispute was referred to the Industrial Court on February 12, 1974. They resolved to resume work on that day, i.e., February 16, but were locked out. The apparent cause for the strike was that the management of the company had repeatedly ignored the requests for recognition and to commence negotiations for collective bargaining of terms and conditions of employment. The strike ballot was taken on February 3, 1974. On February 4 and 5 the management issued two warning notices to the strikers that the stoppage of work was a sudden wild cat strike and was illegal and a break in service and, unless they returned to work within 48 hours, their services would be deemed to have terminated.

It appears to me clear from the evidence and, indeed, it cannot seriously be disputed that there was a trade dispute. Section 13(7) of the Industrial Relations Act, 1967 reads:

> If after such steps, as aforesaid, have been taken there is still refusal to commence collective bargaining, a trade dispute shall be deemed to exist upon the matters set out in the invitation.

The Industrial Court found that the workers, by going on strike, did not terminate their contracts of service; that the company in refusing to reinstate them had declared a lock out; and that the strike was legal. It therefore made an award that the workmen were to be reinstated on the same terms and conditions of employment with effect from February 16, 1974.

The company took the matter to the High Court contending that the Industrial Court had erred in law in coming to those findings. The learned judge upheld the company's application and quashed the award. Hence this appeal by the union.

The learned judge's formulation that 'certiorari is pre eminently a special revisionary and discretionary remedy to be acted upon recognised and established principles' is an accurate distillation of the authorities. For my part I would like to express it this way. Proceedings by way of certiorari with regard to industrial disputes are not as of right; otherwise they may materially affect the fundamental basis of the decision of the Industrial Court under the Industrial Relations Act, 1967, namely, quicker solution to industrial disputes to achieve industrial peace. The Act is intended to be a self-contained one. It seeks to achieve social justice on the basis of collective bargaining, conciliation and arbitration. Awards are given in circumstances peculiar to each dispute and the Industrial Court is to a large extent free from the restrictions and technical considerations imposed on ordinary courts. The jurisdiction of the High Court to issue orders of certiorari is neither an appellate nor

a revisional jurisdiction. Also from the very nature of the power conferred under section 25 of the Courts of Judicature Act, 1964, it is clear that in exercise of this power the High Court exercises original jurisdiction. This jurisdiction stems from the prerogative jurisdiction inherited from the United Kingdom Courts and its object is mainly to enable the superior courts to keep inferior tribunals within the bounds of their authority. The supervisory character is essential, for always in the background there is the beguiling illusion that an inferior tribunal entrusted to hand down awards of a final nature may hand down awards as it likes. Therefore the jurisdiction may for convenience be described as an extraordinary original jurisdiction. The circumstances under which the High Court can interfere with the decision of the Industrial Court are limited. For instance, it has no jurisdiction under section 25 of the Courts of Judicature Act to interfere with the findings of fact reached by the Industrial Court on the ground that the decision is erroneous except where there is a clear error of law on the face of the record. It cannot arrogate the powers of a Court of Appeal by substituting its own judgment for that of the Industrial Court on questions of fact and cannot review the evidence.

Before dealing with the facts of this appeal, it is convenient to dispose of a point given a prominent place in the judgment of the High Court. The learned judge considered *Wong Mook* v *Wong Yin & Ors*[1] as not outdated and might be distinguished from the instant case. That case, in my mind, concerns the interpretation of the Labour Code, Cap 154 only, in particular, section 53(iv)(a), regarding the breach of contracts of employment of 4 rubber tappers 'along with other tappers' who of their own volition absented themselves for 3 continuous days for the purpose of a strike. Willian CJ found the element of reasonable excuse not present. He instanced illness and transport breakdown as two ready examples of reasonable excuse. My only comment is that the circumstances of that case are distinguished by one very important fact, that is, the strike was organised by an amorphous group of rubber tappers. In that context the learned Chief Justice was right when he took the view that the provisions of the Trade Union Enactment, 1940 was not affected; hence his pronouncement of section 20 of the Enactment that 'a person going on strike, even though the strike is not an illegal one, may break his contract of employment' is, with respect, quite unnecessary to the decision, and is considered *obiter*. No guidance is more misleading than an *obiter dictum*.

The learned judge rightly held in the instant case that *Wong Mook* v *Wong Yin & Ors, supra,* can be justified on the facts. Up to that point I am in complete agreement. A decided case is only an authority for the principle of law that it decides and courts are forever emphasising the individuality of each case. But the learned judge went on to say that section 66(1)(b) of the Trade Union Ordinance, 1959 operates and in the result he has to examine the effect of section 15(2) of the Employment Ordinance, 1955. I think he missed a point there. After rightly distinguishing *Wong Mook* v *Wong Yin,* he adopted the same line of reasoning as that of Willian CJ, in that case. That is not right. The law

has not been standing still since then. A new section, i.e., section 8, has been added to the Ordinance. The relevant section reads:

> 8. Nothing in any contract of service shall in any manner restrict the right of any labourer who is a party to such contract —
> (b) to participate in the activities of a registered trade union, whether as an officer of such union or otherwise.

In interpreting a statute it is necessary to consider what the law was before the statute was passed, what the mischief was for which the previous law did not provide, and the remedy provided by the statute to correct that mischief. It is here that the learned judge went wrong. He has failed to give proper consideration to the provisions of that section which, in my opinion, is a saving clause for workmen. Workers' organisations cannot exist, if workers are not free to join them, to work for them and to remain in them. This is a fundamental right which is enshrined in our Constitution and which expresses the aspirations of workmen. It is declaratory of present day industrial relations that management should encourage workmen to join a union and to play an active part in its work, but this is restricted to the activities of a registered trade union, such as the freedom to strike. 'The right of workmen to strike is an essential element in the principle of collective bargaining' *per* Lord Wright in *Crofter Hand Woven Harris Tweed Company Limited & Ors* v *Veitch & Anor.*[2] That is a truism. There can be no equilibrium in industrial relations today without the freedom to strike. If workers could not, in the last resort, collectively withhold their labour, they could not bargain collectively.

In this country the freedom to strike appears in the form of immunities from criminal prosecution and from civil action with labour relations and transforms them into privileges which are confined to acts done in contemplation or in furtherance of trade disputes: see section 21 of the Trade Union Ordinance, 1959. However, a strike can be illegal because of the purpose of the strike, e.g., better wages and conditions, recognition dispute, closed shop dispute, sympathetic strike, or because of the method used, e.g., attacks on person or property, or defamation or trespass: see sections 40 and 41 of the Industrial Relations Act, 1967). In short, what I wish to stress here is that section 8 of the Employment Ordinance, 1955 has removed the provisions of section 15(2) of the Employment Ordinance from the scene of trade disputes. We can safely overlook that provision when dealing with the activities of a registered trade union, such as a strike in contemplation or in furtherance of a trade dispute and is therefore protected.

With these considerations, I now approach this appeal which may conveniently be divided under two heads. The first and root question is to consider the Industrial Court's finding that there was a lawful strike, i.e., a concerted stoppage of work by the workmen, employed in an industry. That is a question of fact: see *Conway* v *Wade.*[3] The Industrial Court found that the workmen had in fact gone on strike, and furthermore that its manifest purpose was to further their trade dispute

in regard to union recognition and collective bargaining. That tribunal was charged with findings of fact, and, unless it can be shown that the evidence was so much one way that no reasonable tribunal could have disregarded it, it is not possible to interfere with its finding of fact. In my opinion, all the necessary ingredients of the definition of strike exist in the present case and the stoppage of work on February 4, 1974 amounted to a strike. This was not a case of an individual worker's failure to turn up for work, as was decided in *Wong Mook* v *Wong Yin*, but a concerted action on the part of a large number of workmen. The Industrial Court was not in error in regarding it as a strike that was perfectly legal. A trade union's primary object is to negotiate terms and conditions of service of its members and a dispute as to whether the management should recognise for this purpose is clearly connected with such terms. That can hardly be regarded as an unlawful purpose. Following that, was the Industrial Court right in arriving at the conclusion that the workmen, by going on strike, had not terminated their contracts of service? In my opinion, when workmen absented themselves from work because they had gone on strike with the specific object of enforcing the acceptance of their demands, they could not be deemed to have terminated their contracts of service. By going on strike they clearly indicated that they wanted to continue in their service but were only demanding collective bargaining. Such an attitude, far from evidencing termination of service, emphasises the fact that the service continued as far as they were concerned. There is a preponderance of authority in favour of this view. I need only quote a passage from the speech of Lord Evershed in *Rookes* v *Barnard:*[4]

> It has long been recognised that strike action or threats of strike action in the case of a trade dispute do not involve any wrongful action on the part of workmen, whose service contracts are not regarded as being or intended to be thereby terminated.

Apart from the apparent 'sin' of going on strike, I do not think that there is a *prima facie* case of breach of contracts of service. If there is, only then can the company resort to dismissal action. I say it for this reason. There is a manifest distinction between a collective agreement and a contract of service. A workman cannot, but an employer can, be a party to a collective agreement: see section 12 of the Industrial Relations Act, 1967. The individual workman has no bargaining power in industrial relations. He can never enter into a collective agreement, nor can any number of workmen who do not form an association. It follows that a trade union of workmen, when bargaining collectively, acts always and exclusively as a principal and not as an agent for its members, and this has consequences both as regards the effect of the agreement on the contracts of service, and in connection with the law governing trade disputes and trade sanctions. The obligations a union undertakes and the rights it acquires are collective by nature; they cannot be performed by an individual workman. The agreement itself imposes no obligations on union members, and an illegal strike is not a breach by the workmen of the agreement; it may of course be a breach by the union. Nor can an

individual member of the union derive any rights from the agreement as such, as distinguished from his contract of service the content of which has been determined by the collective agreement.

If the decision of the learned judge is correct, then it would have ominious repercussions for trade unions in regard to the freedom to strike.

finding that the company, in refusing to reinstate the workmen, had declared a lock-out. It appears to me that if the management took this action with the knowledge or reasonable expectation that the workmen would be willing to return to work on February 16, 1974 and carry out their working obligations, then its act might in certain circumstances constitute a lock-out. It is necessary to look at the situation on that day, not with the benefit of hindsight, but in the light of the situation then prevailing. On February 12, 1974 the Minister had indicated his intention to refer the trade dispute to the Industrial Court. Both the management and the union were notified of the Minister's intervention. The union on receipt of that communication had instructed its members to call off the strike and return for work on February 16, 1974. They reported for work on that day but the management refused to take them back. It therefore seems to me clear that on that day the workmen had no longer wished to withdraw their labour and wanted to go back to work. They had, in my view, clearly ceased to be on strike and the management knew it was no longer under strike pressure. The inference is that it could reasonably expect that the workmen would be ready and willing to resume work. I therefore see no ground for setting aside the Industrial Court's finding that there was a lock out; on the contrary, I would have been very much surprised if it had been the other way.

I say it again that workmen are entitled to withdraw their labour by concerted action for any lawful purpose connected with management. Workmen who down tools do not risk the loss of their employment. The contracts of service are suspended by the strike: they are not terminated, and the workmen are entitled to be put back to the *status quo* on the same terms and conditions. Much had been canvassed in the court below and before as to the two warning notices given by the company indicating that if the workmen did not return to work by a certain date, they would be deemed to have abandoned their contracts of service. In my opinion, the management could not, by imposing a new term of service, unilaterally convert the absence from work of the workmen who had gone on strike into abandonment of their contracts of service.

I would allow the appeal with costs to the appellants both here and in the court below, setting aside the order of the High Court and restoring the award of the Industrial Court.

Gill CJ (Malaya) and **Ong Hock Sim FJ** concurred.

Appeal allowed.

DP Xavier for the Appellants.
Ronald Khoo for the Respondents.

INDUSTRIAL RELATIONS

(a) Reference of dispute by Minister of Labour to Industrial Court — when reviewable by High Court

National Union of Hotel, Bar and Restaurant Workers
v
Minister of Labour and Manpower

[1980] 2 MLJ 189 Federal Court, Penang

Coram: Raja Azlan Shah CJ (Malaya), Chang Min Tat FJ and Abdoolcader J

Cases referred to:-

(1) *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948] 1 KB 223.
(2) *Padfield* v *Minister of Agriculture, Fisheries and Food* [1968] AC 997.
(3) *Duport Steels Ltd* v *Sirs* [1980] 1 WLR 142.
(4) *Secretary of State for Education and Science* v *Tameside Metropolitan Borough Council* [1976] 3 All ER 665, 682.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment of the Court): This is an appeal by the National Union of Hotel, Bar and Restaurant Workers ('the appellants') against the decision of Gunn Chit Tuan J made on January 2, 1980, refusing to grant an order of certiorari to quash the decision of the Minister of Labour and Manpower ('the Minister') to refuse to refer to the Industrial Court a trade dispute involving the dismissal of 5 hotel workers of the Casuarina Beach Hotel Penang, who are members of the appellants under section 26 subsection (2) of the Industrial Relations Act, 1967. The subsection is in these terms:

> (2) The Minister may of his own motion refer any trade dispute to the court if he is satisfied that it is expedient so to do.

On May 22, 1978 at about 10.00pm the five hotel workers together with one Raman Che Mat (a non-union member) were found gambling while on duty in the hotel premises. A domestic inquiry was held on May 29, 1978 before they were all dismissed for gambling while on duty and for neglect of duty.

Raman Che Mat being a non-union member made representations to the Director-General for Industrial Relations under section 20(1) of the Act. Three meetings were held under section 20(2). Raman Che Mat denied gambling in the hotel premises. The Minister referred his case to the Industrial Court as an industrial dispute.

The appellants on behalf of the 5 union workers reported the trade dispute to the Minister pursuant to section 18(1) of the Act, and requested that it be referred to the Industrial Court. The Director-General was directed to take the necessary steps to resolve the dispute. He in turn directed the Director of Industrial Relations, Penang, Kedah and Perlis to do so. The latter held two conciliation meetings but to no avail. During those two meetings the representatives of the appellants admitted that the five union workers were gambling while on duty in

the hotel premises, thus contravening rule 13(3) of the said Hotel Rules. The Director put up a report annexing the record of the two meetings for consideration by the Director-General who in turn put up his report to the Minister on November 30, 1978. The Minister gave due consideration to the report and the facts and circumstances relating to the dismissal of the five union workers without taking into account their status as union members. He was of the opinion that the explanations and statements made by Raman Che Mat at the conciliation proceedings particularly his denial that he participated in the gambling were different from those of the five union members. Clearly he considered the admission of gambling made by them fully justified their dismissal. Consequently he refused to refer their case to the Industrial Court, stating that the complaint was vexatious and without merit.

The appellants now contend as they did before the learned judge that the Minister failed to take into consideration the case of Raman Che Mat which was referred to the Industrial Court and which, they said, arose from similar facts and circumstances as those which were the subject-matter of the trade dispute. In so failing, the Minister had exercised his discretion wrongfully and in a manner which was not in accord with the policy and object of the Industrial Relations Act, 1967. It was said that it is plainly the intention of the Act to refer such a trade dispute as the present to the Industrial Court.

The present case no doubt centered on the interpretation of section 26(2) of the Industrial Relations Act, 1967, which provides that, where the Minister is 'satisfied' that it is expedient so to do, he may of his own motion refer any trade dispute to the Industrial Court. This subjective formulation is sufficient in our opinion to show that the Minister has a discretion to determine the desirability or otherwise of a particular course of action within the scope of the discretionary power. It is the exercise by him of the discretion vested in him, not in the courts, that we are here required to review and, when his action is challenged in the courts for alleged abuse of discretion, we are obliged to resist any temptation to convert our jurisdiction to review into a reconsideration of the merits as if on appeal. The underlying principles of judicial review have been stated in numerous cases, notably in *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation*[1] (which concerned the powers of a local authority) and *Padfield* v *Minister of Agriculture, Fisheries and Food*[2] (which concerned the powers of a Minister). Perhaps it would not be out of place to refer to a passage from the speech of Lord Diplock in the recent House of Lord's case of *Dubort Steels Ltd* v *Sirs,*[3] which provides a timely reminder that it is the exercise by those in whom discretionary power is vested, not in the courts, that we are required to review:

> A feature of the judgments (referring to the Court of Appeal) which appears to me to be less legitimate is the absence of any recognition that the task upon which the Court of Appeal was engaged was not one of exercising an original discretion of its own... but of reviewing the exercise by a High Court judge of an original discretion which was his alone which he has exercised in favour of withholding an injunction. (pages 160, 161).

The criteria adopted by the courts in the process of judicial review of administrative actions are expressed in general terms, and there is no agreed terminology. As was said by Lord Wilberforce in *Secretary of State for Education and Science* v *Tameside Metropolitan Borough Council*:[4]

> There is no universal rule as to the principles on which the exercise of a discretion may be reviewed; each statute or type of statute must be individually looked at.

Thus we must construe the Industrial Relations Act, 1967 to determine its policy and object. It cannot be gainsaid that the intention of the Act is to regulate the relations between management and labour and to prevent and settle trade disputes arising therefrom. Briefly, it provides machinery for investigating, determining and settling such disputes by arbitration, conciliation and reference to the Industrial Court, and in implementing it, policy decisions come into play. The courts call this 'discretion', meaning that the decision is one for the Minister to make, and not for the courts. It is a matter of discretion depending upon the satisfaction of the Minister with respect to the expediency of making such a reference. But if the Minister, by reason of his having misconstrued the Act or, for some other reason, so exercises his discretion in a way as to defeat the policy and object of the Act, then he has clearly exercised it wrongly. In that case the courts will interfere with the exercise of his discretion by saying that he has given no weight, or has given insufficient weight, to the considerations that ought to have weighed with him, or if he has been influenced by considerations which ought not to have weighed with him.

The Minister has given his reason for refusing to refer the trade dispute to the Industrial Court and that enables us to know the considerations which had weighed with him. We have already set out the facts and circumstances which formed the basis of his decision. He stated in his affidavit that the facts and circumstances relating to the dismissal of the five union workers were different from those relating to the dismissal of Raman Che Mat. In the case of the former, they admitted gambling in the hotel premises: in the case of the latter, he denied it. In the circumstances he said the complaint of the union workers was vexatious and without merit. We can therefore see a reason to the effect that on receipt of the complaint, the Minister had satisfied himself from information in his possession as to the merits of the complaint, and he then decided that it was not expedient to refer it to the Industrial Court, and it would in our opinion be a waste of time and money and contrary to the policy and object of the Act to do so. Looking at the factual basis upon which he invoked his discretionary power, we are satisfied that he had exercised it in a manner which is in accord with the intention of the Act. He is an elected Minister and is entitled to have his opinion of industrial problems within the area of his responsibility respected. In controversial matters such as are involved in industrial relations, there is room for differences of opinion as to what is expedient. 'The very concept of administrative discretion involves a right to choose between

more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred'. These words, taken from the speech of Lord Diplock in the *Tameside* case, (*supra,* p 695), reflect the truism that those in whom discretionary power is vested have, to a greater or lesser extent, a range of options at their disposal. As we have said earlier in this judgment, we must guard against any tendency to equate the distinct process of mere review with an unarticulated opinion that having investigated the facts we are in a better position to adjudicate upon the merits. That is not our function. It is not for us to say what shall or shall not be done in this special area of delegated jurisdiction. Our duty is only to see that the matter in hand has been determined by the Minister in accordance with the policy and object of the Act. That in our opinion he has done.

We dismissed the appeal with costs.

Appeal dismissed.

T Thomas for the Appellants.
Susila S Param (Federal Counsel) for the Respondent.

(b) Termination of Employment and Dismissal — whether distinction exists under section 20 of Industrial Relations Act 1967

Goon Kwee Phoy
v
J & P Coats (M) Bhd

[1981] 2 MLJ 129 Federal Court, Ipoh

Coram: Raja Azlan Shah CJ (Malaya), Wan Suleiman FJ and Abdoolcader J

Cases referred to:-

(1) *Langston* v *Amalgamated Union of Engineering Workers & Anor* [1974] 1 WLR 185.
(2) *Hotel Jaya Puri Berhad* v *National Union of Hotel, Bar and Restaurant Workers & Anor* [1980] 1 MLJ 109, 114.
(3) *Thompson* v *Goold & Co* [1910] AC 409, 420.
(4) *Reg* v *National Insurance Commissioner, ex parte Hudson* [1972] AC 944, 1005. 1005.
(5) *Attorney-General* v *Great Eastern Railway* (1880) 5 App Cas 473, 478.
(6) *South-East Asia Firebricks Sdn Bhd* v *Non-Metallic Mineral Products Manufacturing Employees Union & Ors* [1980] 2 MLJ 165.
(7) *P Raman* v *Chairman, Board of Governors, Sekolah Rendah Jenis Kebangsaan Gopeng & Anor* [1973] 2 MLJ 161, 162-163.
(8) *Haji Ariffin* v *Government of Pahang* [1969] 1 MLJ 6, 10, 15, 16.
(9) *Shrinivas Ganesh* v *Union of India,* AIR (1956) Bom 455.
(10) *PL Dhingra* v *Union of India* AIR (1958) SC 36, 40.
(11) *Gnanasundram* v *Public Services Commission* [1966] 1 MLJ 157, 159.
(12) *Reg* v *Industrial Injuries Commissioner, ex parte Amalgamated Engineering Union* [1966] 2 QB 31.
(13) *The Chartered Bank, Bombay* v *The Chartered Bank Employees' Union* AIR (1960) SC 919.
(14) *Anisminic Ltd* v *Foreign Compensation Commission* [1969] 2 AC 147, 171.
(15) *Dr. A Dutt* v *Assunta Hospital* [1981] 1 MLJ 304.
(16) *London Transport Executive* v *Clarke* [1980] ICR 532, 538-539.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment of the Court): We set aside the order of certiorari made by the High Court in Penang on an application by the applicant employers to quash the award given by the Industrial Court to the workman. We now give our reasons.

Mr Goon, the workman, had his employment with the respondent company terminated on the stated ground of redundancy, as clearly appeared in the letter of termination of service served on him. He was given one month's notice and an ex-gratia payment of six months' pay by way of retrenchment benefit in recognition of his past services. The month's notice was in compliance with a term of his employment. Mr Goon did not however concede that there was any redundancy in the company and he made representations on dismissal without just cause or excuse to the Director-General. On being referred to these representations by the Minister, the Industrial Court held an inquiry and on the evidence led before it, found as facts that there was no redundancy that would justify the company dismissing or terminating the employment of the workman on this score, and that the real reason for the action taken against the workman was the difference with Mr Loke, the Financial Manager, and it therefore came to the conclusion that the dismissal was without just cause or excuse. In the circumstances of the case, the Industrial Court did not think it would order reinstatement of the workman in his employment, but made an award of compensation in lieu of the reinstatement asked for.

In the statement annexed to its application for certiorari, the company attacked each and every finding of the Industrial Court as an error of jurisdiction or, the case being stated before the Privy Council delivered its judgment in the *South-East Firebricks'* case,[6] an error of law on the face of the record.

The High Court agreed entirely with the Industrial Court that there was no redundancy, but agreed with the company that the employment of the workman had been terminated in accordance with the contract of employment, and it held that in law an employer could do so without making itself liable under the Industrial Relations Act, 1967 to an order of reinstatement or compensation in lieu of reinstatement. The workman then appealed to this court.

It appears to have escaped the notice of the company's counsel both in the High Court and before us that in its statement in reply to the statement of the workman's case in the Industrial Court, the company had nowhere raised the issue of lawful termination in accordance with the contract. But the High Court was completely taken up with this one argument, and it held a person whose contract was simply terminated was not dismissed in the sense that word was used in section 20 of the Industrial Relations Act, 1967 (the Act) under which the workman had made his representations; there was therefore no evidence that the workman had been dismissed and that in coming to this finding of fact, the Industrial Court had committed a jurisdictional error.

After we had allowed the appeal from the decision of the High Court but before we had time to give our reasons, another division of this court delivered a considered judgment which dealt, *inter alia,* with this very

same point. In *Dr A Dutt* v *Assunta Hospital,*[15] this court held that the so-called 'termination *simpliciter*' i.e., a termination by contractual notice and for no reason, if ungrounded on any just cause or excuse, would still be a dismissal without just cause or excuse and, on the workman's representations, the Industrial Court may award reinstatement or compensation in lieu of reinstatement.

Under the Industrial Relations Act, 1967 what the employee can do in the case of a unilateral termination is to apply under section 20(1) of the Act. This section which reads:

> 20.(1) Where a workman who is not a member of a trade union of workmen considers that he has been dismissed without just cause or excuse by his employer he may, within thirty days of the dismissal, make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.

is, in our view deliberately, couched in subjective terms. Where a non-union workman considers that his dismissal is without just cause or excuse, he may make representations for his reinstatement. It is not whether he had been dismissed without just cause or excuse; but it is how he considers he has been treated by his employer that constitutes the test for his action.

We do not see any material difference between a termination of the contract of employment by due notice and a unilateral dismissal of a summary nature. The effect is the same and the result must be the same. Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

In the instant case, the High Court entirely agreed with the Industrial Court that there was no redundancy. Indeed, it could not do otherwise on the evidence. But even assuming for the moment that the High Court would be correct in disagreeing with the Industrial Court on what is essentially a finding of fact and disregarding the ouster provisions in the Act, we would adopt the words of May J in *London Transport Executive* v *Clarke*[16]:

> ...though we may disagree with it as a matter of fact, we do not think it can be upset on appeal by this appeal tribunal. We think it of prime importance in these cases that, unless it can be demonstrated that the industrial tribunal has gone wrong in law, this appeal tribunal should uphold the decisions of industrial tribunals who after all are there, as the

> Court of Appeal has said, to decide these very things; and the whole purpose, efficacy and informality of industrial tribunals, just as with so many other domestic tribunals that exist in modern society, would be undermined completely, if after a minute examination, as it was described in one case, the appeal tribunal was prepared to disturb decisions of industrial tribunals which otherwise did not err in law.

But on the finding that there was no redundancy as suggested by the company, the conslusion is inevitable that the termination was without the cause or excuse advanced, and therefore without just cause or excuse.

We do not think that having regard to the company's pleadings in the Industrial Court, the High Court was correct to consider the ground of termination by due notice, which had not been relied on in the Industrial Court, but assuming that it is possible for it to do so since this question was raised in the statement in support of the application for certiorari, we are of the opinion for the reasons given by this court in *Dr Dutt's* case, that termination by due notice but without just cause or excuse is a dismissal in respect of which the Industrial Court can make an order for reinstatement or an award of compensation in lieu of reinstatement.

For these reasons, the appeal was allowed with costs here and in the High Court.

Appeal allowed.

VT Nathan for the Applicant.
DP Xavier for the Respondent.

(c) Time-limit for lodgement of complaint of unfair dismissal under section 20(1) of the Industrial Relations Act, 1967 — whether mandatory

Fung Keong Rubber Manufacturing (M) Sdn Bhd
v
Lee Eng Kiat & Ors

[1981] 1 MLJ 238 Federal Court, Kuala Lumpur
Coram: Raja Azlan Shah CJ (Malaya), Syed Othman and Salleh Abas FJJ

See under Administrative Law at page 215 above.

(d) Industrial Court acting under section 33A of the Industrial Relations Act, 1967 on a application to appeal to High Court composition

Hotel Malaya Sdn Bhd & Anor
v
National Union of Hotel, Bar & Restaurant Workers & Anor

[1982] 2 MLJ 237 Federal Court, Kuala Lumpur
Coram: Raja Azlan Shah CJ (Malaya), Wan Suleiman FJ and Abdoolcader J

See under Administrative Law at page 164 above.